THE LITTLER REPORT

ANNUAL REPORT ON EEOC DEVELOPMENTS: FISCAL YEAR 2022

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

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

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

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

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

INTRODUCTION

This Annual Report on EEOC Developments—Fiscal Year 2022 (hereafter "Report"), our twelfth annual publication, is designed as a comprehensive guide to significant Equal Employment Opportunity Commission ("EEOC" or "the Commission") developments over the past fiscal year. The Report does not merely summarize case law and litigation statistics, but also analyzes the EEOC's successes, setbacks, changes, and strategies. By focusing on key developments and anticipated trends, the Report provides employers with a roadmap to where the EEOC is headed in the year to come.

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

Part One discusses the intersection of artificial intelligence (AI) and Equal Employment Opportunity laws. The EEOC has taken a heightened interest in how an employer's use of AI and machine learning tools to recruit, hire, and manage employees can both reduce decision-maker bias and run afoul of anti-discrimination statutes. While the Commission has been involved primarily in information gathering over the past few years, we anticipate the EEOC will increase its involvement in this developing area.

Part Two outlines EEOC charge activity, litigation, and settlements in FY 2022, focusing on the types and location of lawsuits filed by the Commission. More details on noteworthy consent decrees, conciliation agreements, judgments and jury verdicts are summarized in Appendix A to this Report. A discussion of cases in which the EEOC filed an amicus or appellate brief can be found in Appendix B.

Part Three focuses on the current composition of the EEOC, its regulatory activities, and other agency priorities and initiatives.

Part Four summarizes the EEOC's investigations and subpoena enforcement actions, particularly where the EEOC has made broad-based requests to conduct class-type investigations in pursuit of its goal to combat systemic discrimination. Appendix C to this Report supplements this section in summarizing subpoena enforcement actions filed by the EEOC during FY 2022.

Part Five of the Report focuses on FY 2022 litigation in which the EEOC was a party. This discussion is broken down into numerous topic areas, including: (1) pleading deficiencies raised by employers and the EEOC; (2) statutes of limitations cases involving both pattern-or-practice and other types of claims; (3) intervention and consolidation of claims with private counsel representing charging parties; (4) class issues in EEOC litigation; (5) other critical issues in EEOC litigation, including protective orders, ESI and experts; (6) general discovery issues in litigation between the parties; (7) favorable and unfavorable summary judgment rulings, which also are summarized in greater detail in Appendix D; (8) default judgments against employers; (9) trial-related issues and those tied to remedies and settlements; and (10) circumstances in which courts have awarded attorneys' fees to prevailing parties.

Appendices A-D are useful resources that should be read in tandem with the Report. Appendix A includes summaries of significant EEOC consent decrees, conciliation agreements, judgments, and jury verdicts. Appendix B highlights appellate cases where the EEOC has filed an amicus or appellant brief and decided appellate cases in FY 2022. Appendix C includes information on select subpoena enforcement actions filed by the EEOC in FY 2022. Appendix D highlights notable summary judgment decisions by claim type.

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

I. THE CHALLENGE OF ARTIFICIAL INTELLIGENCE

The use of AI in the workplace will only continue to grow in the years to come. In this opening chapter, we highlight that AI may be a potential antidote to intentional discrimination, but facially neutral employment practices, including the use of AI, may have a disparate impact on members of protected groups, unless such practices are "job related" and "consistent with business necessity." We also review the EEOC's initiatives examining this evolving area of the law, including a 2016 public hearing on big data in the workplace, an October 2021 initiative relating to the use of AI in employment decision-making, issuance of "technical guidance" tied to the ADA involving the use of AI in hiring and related decisions, and most recently, the January 21, 2023 Commission hearing focusing on the rapid increase in the use of AI in the workplace and implication under our EEO laws.

We predict one of the most significant challenges for employers and regulators in the years to come will be the use of artificial intelligence (AI) and "machine learning" in employment decision-making. To date, the EEOC's activities in this area have been focused primarily on information gathering. And, as discussed later in this Report, the ability of the agency to move forward on bold new policy initiatives in line with President Biden's agenda has been hampered by the fact that throughout his administration, the agency, while chaired by a Democrat, has had a majority of Republican commissioners. That changed recently, and the Commission now sits at two Democratic and two Republican members, but still lacks a voting majority. We expect that when the recently vacated seat is filled, and the Commission has a Democratic majority, it may move more aggressively to regulate in this space.

For employers, the development of algorithmic decision-making creates both opportunities and novel issues of concern, which generate new questions about long-time problems. This in turn potentially affects every aspect of employment decision-making for employers of all sizes in virtually every industry, from the selection and hiring process, through performance management and promotion decisions, and up to and beyond the time termination decisions are made, whether for performance reasons or as part of a reorganization.

Today, employers can access more information about their applicant pool and workforce than ever before and have an ability to correlate data gleaned from an application itself, perhaps supplemented by publicly available social media sources, to determine how long a candidate is likely to stay at a particular job. Conversely, by combing through computerized calendar entries and e-mail headers, by way of AI, tools exist that can indicate which employees are likely to leave their employment within the next 12 months. These new tools and methods that rely on algorithms and the aggregation and analysis of a massive amount of data are becoming part of the daily landscape in human resource departments.

Similarly, the use of algorithms to review résumés and perform other recruiting functions is becoming far more commonplace. Novel solutions include games-based tools that seek to measure aptitude, tools that conduct interviews and evaluate candidates, and tools that scrape publicly available social media content. The promise of AI-based recruiting tools is to eliminate possible implicit bias of decision-makers and expand the pool of potential candidates. In this way, firms can leverage big data to identify and recruit optimal candidates. Employers may also turn to predictive recruiting tools for reasons of efficiency and cost savings by automating at least part of the recruiting process and identifying quality candidates who will stay for the long term.

Equally important, AI-based tools have the potential to promote diversity, equity, and inclusion by expanding the applicant pool and focusing on candidates' abilities versus well-worn proxies for talent such as academic achievement, work history, and employee referrals, all of which are capable of perpetuating historical biases.

Deploying algorithmic tools is not risk-free, however. Artificial intelligence offers a potent antidote to intentional discrimination. Anti-discrimination laws, however, also prohibit practices that are facially neutral if they have a disparate impact on members of protected categories, unless those practices are "job-related" and consistent with "business necessity." Even then, they must be narrowly tailored to achieve their goals, presenting a distinct compliance problem for many users of AI tools.

Given the complexity of amassing and then analyzing vast quantities of information, an employer would certainly not reverse engineer the process to intentionally discriminate against a protected group. It is far more probable that the use of algorithms may be challenged because it unintentionally yields a disparate impact on one or more protected groups. More precisely, a plaintiff or class may allege that the algorithm used for hiring, promotion, or similar purpose adversely impacts one or more protected groups. Both intentional and "disparate impact" discrimination is unlawful under Title VII and other non-discrimination laws. Moreover, the use of AI raises numerous issues under the Americans with Disabilities Act (ADA) regarding access, accommodation, and a tool's ability to accurately assess a candidate with a covered disability.

The legal landscape of how courts should view these challenges, and what methods of analysis they should apply, is limited, and despite the rapid advent of AI and predictive technology, employers continue to operate in a legal environment based on rules and regulations developed in an analog world with few guideposts that readily translate to the 21st century workplace. Issues may arise in a context that makes yesterday's compliance paradigm both outdated and difficult to apply.

For example, under current federal guidance, whether a selection method that produces an adverse impact passes muster under Title VII is often decided with reference to the Uniform Guidelines on Employee Selection Procedures (UGESP), under which employers are required to "validate" certain employment tests and tools. Unfortunately, because UGESP was adopted in 1978, it fails wholly to contemplate the use of algorithmic data and its reliance on correlation rather than cause-and-effect relationships.

Algorithmic analysis means that employers can theoretically analyze every aspect of every decision without worrying about a need to rely only on a partial sample, and this data allows employers to find (or, in some cases, to disprove) correlations between characteristics and outcomes that may or may not have a seeming connection. As a result, employers need to be able to understand what the use of these tools means for reducing the risks of traditional discrimination claims without giving rise to new varieties of such claims. But there are also new implications for background checks and employee privacy, data security obligations, and new theories of liability and new defenses based on statistical correlations, to name but a few.

The challenge for the legal system is to permit those engaged in the responsible development of these methodologies in the employment sector to move forward and explore their possibilities without interference from guidelines and standards based on assumptions that no longer apply or that become obsolete the next year. It is against this backdrop that we have seen the EEOC, other federal agencies, and state and local governments begin to confront the complex, myriad issues that the regulation of AI in the workforce inevitably presents.

EEOC Activity Regarding Artificial Intelligence

As noted above, to date the EEOC's activity in this area has been largely devoted to information gathering (a commendable exercise, given the complexity of the subject and the novelty of many of the issues it raises).

In 2016, the EEOC held a public hearing on the equal employment opportunity implications of big data in the workplace. Focus areas of that hearing included potential discrimination, privacy concerns, and the possibility that disabled applicants or employees may be disadvantaged.[1]

In October 2021, the EEOC launched an initiative relating to the use of AI in employment decision-making.[2] As stated by the EEOC, the initiative is intended to examine how technology impacts the way employment decisions are made, and give applicants, employees, employers, and technology vendors guidance to ensure that these technologies are used lawfully under federal equal employment opportunity laws. In its rollout of the initiative, the EEOC indicated that the agency plans to:

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

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

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

The EEOC's initiative further underscores the interest in such systems, and that care must be taken when deploying such systems to avoid running afoul of anti-discrimination laws.[3] Based on the announcement on March 28, 2022 of its FY 2021 Performance Report and FY 2023 Budget Justification, EEOC Chair Charlotte Burrows underscored that the proposed budget would be used, in relevant part, to advance the EEOC initiative launched in 2021 "to ensure that employment-related artificial intelligence and algorithmic decision-making tools comply with federal civil rights laws."[4]

In May 2022, the agency published "technical assistance"[5] relating to compliance with Americans with Disabilities Act requirements when using AI and other software to hire and assess employees. The agency also published a short "Tips for Workers"[6] summary of this guidance. Neither of these documents has the force or effect of law, nor are they binding on employers; as the accompanying press release notes, this guidance is meant to be educational, "so that people with disabilities know their rights and employers can take action to avoid discrimination."[7] Nevertheless, we see several take-aways regarding the Commission's likely expectations and areas of focus when regulating the use of such tools in hiring or assessing employees:

- **Accessibility:** Employers should account for the fact that on-line/interactive tools may not be easily accessed or used by those with visual, auditory or other impairment.
- **Accommodation:** Barring undue hardship, employers should provide alternatives to the use or application of these tools if an individual's disability renders the use of the tool more difficult or the accuracy of the tool's assessment less reliable.
- **Accommodation II:** Beyond providing reasonable accommodations in accessing/using these tools, employers should ensure that the tools assess an individual in the context of any reasonable accommodation they are likely to be given when performing their job.
- **ADA vs. Title VII:** The EEOC stresses that disability bias requires different design and testing criteria than does Title VII discrimination, such as access considerations and the potential for inadvertent disability-related inquiries or medical examinations.
- **Promising Practices:** Noting that employers are responsible for ADA-violating outcomes even when a software tool is created or used by a third-party vendor or agent, the Commission provides examples of so-called "Promising Practices" that employers can engage in to demonstrate good-faith efforts to meet ADA requirements.

While the EEOC has not focused on litigation against employers involved in the use of AI in the workplace, it should be noted that in May 2022, the EEOC filed suit in *EEOC v. iTutorGroup, Inc.*,[8] alleging that the defendants, providers of English-language tutoring services, illegally programmed their application software to automatically reject female applicants over the age of 55 and male applicants over the age of 60, in violation of the Age Discrimination in Employment Act (ADEA). Employers should continue to closely monitor litigation by the EEOC in this area.

In the interim, the EEOC is continuing to highlight the fact that AI continues be on the agency's "radar screen" as employers consider potential reliance on AI in hiring and other employment decisions. Most recently, on January 31, 2023, the Commission held a public hearing examining the implications of artificial intelligence and machine learning in employment decisions, entitled "Navigating Employment Discrimination in AI and Automated Systems: A New Civil Rights Frontier." At that hearing the Commission heard testimony from a range of stakeholders, including academics, representatives of employers, privacy advocates and others. Notably excluded from the witness list were: (a) any actual employer using AI tools in practice; and (b) the vendors or creators of AI employment tools. This absence was noted by both of the Republican commissioners.

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

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

5 EEOC, EEOC-NVTA-2022-2, *The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees* (May 12, 2022); *see also* Jim Paretti, Niloy Ray, and Marko Mrkonich, *EEOC Issues Guidance on Artificial Intelligence and Americans with Disabilities Act Considerations*, Littler Insight (May 18, 2022).

6 EEOC, *Tips for Workers: The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence* (May 12, 2022).

7 EEOC, Press Release, *U.S. EEOC and U.S. Department of Justice Warn against Disability Discrimination* (May 12, 2022).

8 Case No. 1:22-cv-02565 (Filed: May 5, 2022, E.D.N.Y).

The meeting focused heavily on the rapid increase in the use of AI in the workplace. Both Democratic commissioners and a number of witnesses repeatedly expressed concern that, depending on the data on which an algorithmic tool is based, these tools might perpetuate existing patterns of bias in the workplace. Consumer and privacy advocates stressed their view that "without guardrails" data-driven technology is likely to cause harm in the workplace, or, as one witness claimed, "inevitably lead to disparities." Others noted that even where an algorithm is shown to be highly predictive based on correlation (for example, a tool determining that candidates who preferred a certain hobby would be more successful employees), correlation itself is insufficient, and the agency should require a showing of causation as well. A number of witnesses focused on the "structural bias" that may be contained in existing data sets (such as credit reports or arrest and conviction records) and urged the EEOC to take the position that "de-biasing" an algorithm, even where decisions to do so are based on race or other protected characteristics, is lawful under civil rights laws.

Supporters of AI tech, who were somewhat underrepresented at the hearing, stressed the value of AI in eliminating bias in subjective decision-making. Also of note, many called for requirements that the use of AI be prominently disclosed to workers and applicants, and that alternative methods of evaluation should be required where requested. Finally, there seemed significant consensus that AI tools should be subject to audit requirements to ensure they are non-biased – although few offered specifics as to what these audits might look like, or how they might practicably be conducted.[9]

The EEOC's attempt to regulate the use of AI in employment, if and when it comes, will follow a number of states and localities that have already moved ahead on proposals to limit this technology. For example, in 2020, both Illinois and Maryland adopted restrictions on the use of video evaluations using AI (including facial recognition tools) by, among other things, requiring that an employer provide notice of, and obtain consent from, applicants who will be subject to an AI tool.

In December 2021, New York City adopted the most comprehensive regulatory scheme governing the use of AI in all manner of employment decisions.[10] The law, which applies to employers and employment agencies alike, requires that any algorithmic tool that reviews, selects, ranks, or eliminates candidates for employment or promotion must be subject to a number of limitations, including a requirement that any such tool undergo an annual, independent "bias audit," with a publicly available summary; that employers provide each candidate (internal or external) with 10 business days' notice prior to being subject to the tool; that the notice list the "job qualifications and characteristics" used by the tool to make its assessment; that the sources and types of data used by the tool, as well as the applicable data-retention policy, be made available publicly (or upon written request from the candidate); and that candidates be able to opt out and request an alternative selection process or accommodation. In September 2022, the City published draft regulations, which significantly narrowed the scope of the legislation, and addressed some of the more onerous provisions of the law (*e.g.*, a 10-day notice requirement). On April 5, 2023, the City published final regulations, and will therefore begin enforcing this law on July 5, 2023.[11]

On the other side of the country, in March 2022 the California Fair Employment and Housing Council released draft revisions to the state's employment non-discrimination laws that would dramatically expand the liability exposure and obligations of employers and third-party vendors that use, sell, or administer employment-screening tools or services that embody artificial intelligence, machine learning, or other data-driven statistical processes to automate decision-making.

As proposed, the regulations would define an "automated-decision system," or ADS, in extremely broad terms: any "computational process, including one derived from machine learning, statistics, or other data processing or artificial intelligence techniques, that screens, evaluates, categorizes, recommends, or otherwise makes a decision or facilitates human decision making that impacts employees or applicants."[12] These regulations are still in draft form; in July 2022, California's Department of Fair Employment and Housing released proposed revisions, which have yet to be approved or become final, and to date the agency has declined to provide a timeline for when final regulations will be issued.

9 In the absence of regulation at the federal level, states and localities have begun to consider and adopt their own laws regulating the use of AI in employment and other contexts. Notice, alternative screening, and audit requirements are frequently part of these regulatory schemes.

10 *See* Eli Z. Freedberg, Niloy Ray, and Jim Paretti, *New York City Enacts Law that Hinders Use of Automated Tools in Hiring and Promotion Decisions*, Littler Insight (Dec. 28, 2021).

11 *See* Niloy Ray and Jim Paretti, *New York City Proposes Regulations to Clarify Requirements for Using Automated Employment Decision Tools*, Littler ASAP (Sept. 23, 2022); Jim Paretti, Niloy Ray, Eli Freedberg, and Ellie McPike, *New York City Adopts Final Regulations on Use of AI in Hiring and Promotion, Extends Enforcement Date to July 5, 2023*, Littler Insight (Apr. 13, 2023).

12 *See* Jim Paretti, Niloy Ray, Allan King, and Alice Wang, *California Fair Employment & Housing Council Proposes Sweeping Regulation of Automated Decision-making and Artificial Intelligence in Employment*, Littler ASAP (Mar. 17, 2022).

Equally important, the number of state and local proposals to regulate AI continues to grow. In 2022, more than two dozen states saw legislation introduced to regulate the use of AI, many with a focus on its use in employment decision-making. In September 2022, the Washington, D.C. City Council held a hearing on a far-ranging measure that would have strictly regulated AI use in everything from employment to health care to marketing. More recently, in January 2023, the New Jersey State Assembly Labor Committee held a hearing on Assembly Bill No. 4909, which would regulate the use of AI in employment in a manner similar to the New York City law.[13]

The use of AI in the workplace will only grow in the years to come. Whether and how legislators and policymakers will adopt regulatory frameworks around this technology has yet to be seen, but increasingly it appears that the table is being set. Given the complicated and nuanced nature of the subject, and the vast range of territory it covers, savvy employers should pay close attention to federal, state, and local regulation in this area, and consider efforts to influence such policies before they are set in stone.

13 A recorded transcript of this hearing may be found at *https://www.njleg.state.nj.us/archived-media/2022/ALA-meeting-list/media-player?committee=ALA&agendaDate=2023-01-19-10:00:00&agendaType=M&av=A*

II. OVERVIEW OF EEOC CHARGE ACTIVITY, LITIGATION AND SETTLEMENTS

A. Review of Charge Activity, Backlog and Benefits Provided

For the fourth year in a row, and what seems to be the new standard practice, the EEOC issued two separate reports providing financial and performance metrics for FY 2022.[14] On November 9, 2022, the Commission published its Agency Financial Report ("FY 2022 AFR").[15] On March 13, 2023, the EEOC issued its FY 2022 Annual Performance Report ("FY 2022 APR").[16] The same day, the EEOC issued its Office of General Counsel Annual Report for FY 2022 ("FY 2022 OCG Report"), which details the agency's litigation activities for the past fiscal year.[17]

Reversing a several-year trend, the number of charges filed with the Commission rose nearly 20% in FY 2022. During the past fiscal year, the EEOC received 73,485 new charges of discrimination, up from the 61,331 charges received in FY 2021. The EEOC reports that of these filings, more than 10,000 charges (approximately 13.6%) alleged discrimination related to COVID-19.[18] The Commission also states that in FY 2022, it initiated 29 Commissioner charges, up from three in FY 2020 and three in FY 2021.[19]

Fiscal Year	Number of Charges	% Increase/Decrease
2007	82,792	--
2008	95,402	+15.23%
2009	93,277	-2.23%
2010	99,922	+7.12%
2011	99,947	+0.03%
2012	99,412	-0.54%
2013	93,727	-5.72%
2014	88,778	-5.28%
2015	89,385	+1.01%
2016	91,503	+2.37%
2017	84,254	-7.92%
2018	76,418	-9.30%
2019	72,675	-4.90%
2020	67,448	-7.19%
2021	61,331	-9.07%
2022	73,485	+19.82%

At the same time, the EEOC indicates the merit factor rate of these charges decreased slightly from 19.2% to 18.6% from FY 2021 to FY 2022.[20] Specifically, the Agency resolved 65,087 charges and secured more than $342 million in monetary relief for charging parties during the administrative process. The Commission further highlighted the percentage of post-investigation charge resolutions in which the EEOC was able to obtain some form of targeted, equitable relief.[21] Specifically, according to the FY 2022 APR, the EEOC obtained such relief in 91.53% of conciliation agreements during the administrative process.[22]

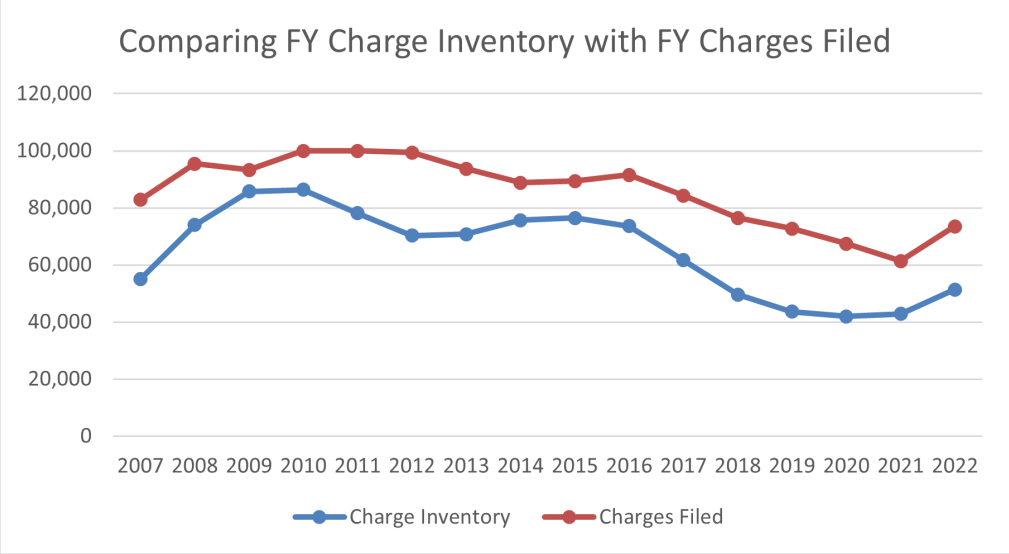
Overall, the EEOC secured more than $513.7 million for victims of discrimination in the private sector and local governments.[23] As detailed in the FY 2022 APR, approximately $342 million of this total went to more than 33,298 victims of employment

14 Prior to FY 2019, the EEOC issued one Performance and Accountability Report (PAR) in late fall.
15 EEOC, Fiscal Year 2022 Agency Financial Report, *available at* https://www.eeoc.gov/sites/default/files/2022-11/22-137%20EEOC-2022%20AFR_111522.pdf.
16 EEOC, Fiscal Year 2022 Annual Performance Report, *available at* https://www.eeoc.gov/2022-annual-performance-report-apr.
17 EEOC, Office of General Counsel Annual Report for FY 2022, *available at* https://www.eeoc.gov/office-general-counsel-fiscal-year-2022-annual-report.
18 FY 2022 APR, part B, *Strengthening the Enforcement Capacity of the Agency in the Private Sector.*
19 EEOC, Commissioner Charges and Directed Investigations | U.S. Equal Employment Opportunity Commission (eeoc.gov).
20 FY 2022 APR, part B, *Strengthening the Enforcement Capacity of the Agency in the Private Sector.* The EEOC has defined "Merit Resolutions" as charges with outcomes favorable to charging parties and/or charges with meritorious allegations. These include negotiated settlements, withdrawals with benefits, successful conciliations, and unsuccessful conciliations. *See* https://www.eeoc.gov/eeoc/statistics/enforcement/definitions.cfm.
21 The EEOC defines *targeted, equitable relief* as "any non-monetary and non-generic relief (other than the posting of notices in the workplace about the case and its resolution), which explicitly addresses the discriminatory employment practices at issue in the case and either provides remedies to the aggrieved individuals or prevents similar violations in the future. Such relief may include customized training for supervisors and employees, development of policies and practices to deter future discrimination, and external monitoring of employer actions, as appropriate." *Id.*
22 FY 2022 APR, part B, *Strengthening the Enforcement Capacity of the Agency in the Private Sector.*
23 *Id.* at part E, *Recovery for Victims of Discrimination.*

discrimination in the private sector and state and local government workplaces through mediation, conciliation, and settlements. Another $39.7 million was obtained for 1,461 individuals as a direct result of litigation resolutions, and more than $132 million was awarded to 3,362 federal employees and applicants.[24]

With respect to the backlog of charges, the surge in new charges likely led to the increased charge inventory for FY 2022. According to the FY 2022 AFR, at the end of the fiscal year there were 51,399 pending charges, a 20% increase over the prior year's backlog.

Fiscal Year	Charge Inventory	% Increase/Decrease
2007	54,970	--
2008	73,951	+34.53%
2009	85,768	+15.98%
2010	86,338	+0.66%
2011	78,136	-9.50%
2012	70,312	-10.01%
2013	70,781	+0.67%
2014	75,658	+6.89
2015	76,408	+0.99%
2016	73,559	-3.73%
2017	61,621	-16.23%
2018	49,607	-19.50%
2019	43,580	-12.15%
2020	41,951	-3.74%
2021	42,811	+2.0%
2022	51,399	+20.0%



According to the Commission, managing its charge inventory included fielding more than 475,00 calls from the public through the Agency's contact center, up from the 383,500 calls received in FY 2021. The EEOC also reportedly handled over 68,700 emails, which represents an increase of over 32% over the prior fiscal year.[25] With that said, the Agency has taken steps to address the increased demand for public contact and the increasing charge backlog by hiring more than 352 employees for positions

24 *Id.*
25 *Id., Summary of Fiscal Year 2022 Performance Highlights.*

in FY 2022.[26] The majority of the 352 new hires are front-line staff (*i.e.*, investigators, investigative support assistants, mediators, and attorneys).

With respect to staffing, the EEOC had 2,041 full-time employees (FTEs) at the end of FY 2022, representing a nearly 6% increase in headcount.[27]

Fiscal Year	Number of FTEs at End of FY	Number of FTE Increase/Decrease	Percentage Increase/Decrease
2007	2,158	---	---
2008	2,176	18	0.83%
2009	2,192	16	0.74%
2010	2,385	193	8.80%
2011	2,505	120	5.03%
2012	2,346	-159	-6.35%
2013	2,147	-199	-8.48%
2014	2,098	-49	-2.28%
2015	2,191	93	4.43%
2016	2,202	11	0.50%
2017	2,082	-120	-5.45%
2018	1,968	-114	-5.48%
2019	2,061	93	4.73%
2020	1,939	-122	-5.92%
2021	1,927	-12	-.62%
2022	2,041	114	5.92%

The Commission touted a number of outreach efforts conducted in the past fiscal year. Specifically, the EEOC prioritized "outreach and education programs to reach vulnerable workers and underserved communities, including immigrant and farmworker communities."[28] The EEOC hosted over 1,000 events for these groups and avers it reached nearly 80,000 individuals.[29] In addition, the EEOC reported its collaboration with partner organizations to extend the Agency's reach, which included 1,619 partnership events reaching 98,490 attendees.[30] The EEOC's outreach numbers exceeded last year's, with "3,302 fee-based and no cost outreach and training events and providing more than 225,906 individuals nationwide with information about employment discrimination and their rights and responsibilities."[31] Such efforts included:

- Addressing the intersection of COVID-19 and federal employment discrimination laws, including conducting 369 outreach events related to COVID-19.
- Conducting listening sessions, trainings, and meetings on the rights of LGBTQI+ individuals to be free from employment discrimination, including hosting 343 outreach events related to LGBTQI+ matters.
- Publishing new technical assistance documents to assist EEOC stakeholders.[32]

Finally, since 2020, the EEOC data modernization team has been developing an Agency Record Center (ARC), an end-to-end charge management solution for the Agency's private-sector processes and corresponding FEPA partner processes. The finalized ARC system was deployed on January 18, 2022 to 145 EEOC and FEPA offices. During its first nine months in operation, the ARC system provided intake services for over 158,000 inquiries to the EEOC, more than 49,000 of which became charges.[33]

26 *Id., A Message from the Chair.*
27 FY 2022 AFR, p. 27.
28 FY 2022 APR, *A Message from the Chair.*
29 *Id.*
30 *Id.*
31 FY 2022 APR, *Summary of Fiscal Year 2022 Performance Highlights.*
32 *Id.*
33 FY 2022 APR, part D, *Continued Use of Technology to Improve Services to the Public.*

B. Systemic Investigations and Litigation

Although most EEOC lawsuits were filed on behalf of individual charging parties, the Commission has continued to demonstrate interest in initiating systemic investigations and litigation. Discrimination is considered "systemic" if it involves a discriminatory pattern, practice or policy that has a broad impact on an industry, company or geographic area. The Commission maintains in its FY 2022 AFR that addressing systemic discrimination "is central to the mission of the EEOC."[34] In FY 2022, the EEOC filed the same number of systemic lawsuits (13) as it did in each of the prior two fiscal years, but these filings represented a slightly larger percentage of total lawsuits filed.

Year	Merits Case Filings	Systemic Filings	Percentage
2009	281	19	6.8%
2010	250	20	8%
2011	261	23	8.8%
2012	122	10	8.2%
2013	131	21	16%
2014	133	17	12.8%
2015	142	16	11.3%
2016	86	18	20.9%
2017	184	30	16.3%
2018	199	37	18.6%
2019	144	17	11.8%
2020	93	13	14%
2021	116	13	11.2%
2022	91	13	14.3%

Systemic suits are one of the priorities outlined in the EEOC's Strategic Plan. In the FY 2022 AFR the EEOC reported that among suits filed by the EEOC in FY 2022, 43 raised one or more Strategic Plan priorities.[35]

In its FY 2022 AFR, the EEOC notes that it "continued to identify and remedy systemic discrimination in all forms and on all protected bases, including unlawful harassment."[36] The Commission reports that during FY 2022 it resolved 330 systemic investigations on the merits and obtained $29.7 million in monetary benefits for victims of discrimination, an increase in over $5 million in benefits from the prior year.[37]

Fiscal Year	Systemic Lawsuits Filed	Monetary Recovery
2012	12	$36.2 million
2013	21	$40 million
2014	17	$13 million
2015	16	$33.5 million
2016	18	$20.5 million
2017	30	$38.4 million
2018	37	$30 million
2019	17	$22.8 million
2020	13	$69.9 million
2021	13	$24.4 million
2022	13	$29.7 million

34 FY 2022 AFR, p. 16.
35 FY 2022 APR, *Summary of Fiscal Year 2022 Performance Highlights*.
36 FY 2022 AFR, p. 16.
37 *Id.*

These systemic suits involved the following types of alleged systemic discrimination: failure to accommodate and discharge based on religion and disability; hiring and/or assignment claims based on race and/or national origin; hiring and/or assignment claims based on sex; hiring claims based on age; systemic harassment; and unequal pay based on sex.[38]

At the end of FY 2022, the EEOC had 177 cases on its active district court docket, of which 100 (43.5%) sought relief for individuals, 45 (25.4%) were non-systemic, multiple victim cases and 32 (18%) involved challenges to systemic discrimination.

Fiscal Year	Number of Total Pending Litigation Cases	Number of Pending Systemic Cases	% of Systemic Cases in Litigation
2012	309	62	20.0%
2013	231	54	23.4%
2014	228	57	25.0%
2015	218	48	22.0%
2016	165	47	28.5%
2017	242	60	24.8%
2018	302	71	23.5%
2019	275	59	21.5%
2020	201	59	29.3%
2021	180	29	16.0%
2022	177	32	18.0%

Meanwhile, the EEOC had resolved 96 merits lawsuits at the federal district court level, and as a result, recovered approximately $40 million on behalf of 1,461 individuals.

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

As noted above, the Commission also issued an Office of General Counsel Report for FY 2022. The FY 2022 OGC Report details the specific functions of the Agency's OGC, including its responsibility for oversight of the Commission's litigation program. The FY 2022 OGC Report notes that in early FY 2021, "the Commission instituted a process in which all district office litigation recommendations are reviewed by the EEOC Commissioners for a 5-day period to determine which recommendations require a vote by the Commission."[39]

The EEOC filed 91 "merits" lawsuits in FY 2022, of which 53 suits were filed on behalf of individuals—25 of these "multiple victim lawsuits" were non-systemic class suits (typically involving fewer than 20 individuals) and, as noted, 13 were systemic cases.[40] Additionally, of the 91 merit lawsuits filed by the Agency, 65 of those suits were authorized by the OGC and remaining 26 merit lawsuits were approved by a vote of the EEOC's Commissioners.[41]

38 *Id.* at p. 17.
39 FY 2022 OGC Report, part III.A.1., *Filing Authority.*
40 FY 2022 AFR, p. 17.
41 FY 2022 OGC Report, part III.A.1., *Filing Authority.*

Year	Individual Cases	"Multiple Victim" Cases (including systemic cases)	Percentage of Multiple Victim Lawsuits	Total Number of EEOC "Merits"[42] Lawsuits
2005	244	139	36%	381
2006	234	137	36%	371
2007	221	115	34%	336
2008	179	111	38%	270
2009	170	111	39.5%	281
2010	159	92	38%	250
2011	177	84	32%	261
2012	86	36	29%	122
2013	89	42	24%	131
2014	105	28	22%	133
2015	100	42	30%	142
2016	55	31	36%	86
2017	124	60	33%	184
2018	117	82	41%	199
2019	100	44	31%	144
2020	68	25	27%	93
2021	74	42	21.1%	116
2022	53	38	41.8%	91

The EEOC typically files scores of lawsuits the end of the fiscal year, with FY 2016 and FY 2020 being the notable exceptions. In FY 2020, the number of lawsuits filed between August 1 and September 30 was down 20% from the year prior. FY 2022 continued the usual trend that resumed in FY 2021, however. During the last two months of the fiscal year, the EEOC filed at least 58 lawsuits, over 60% of all lawsuits filed during the entire fiscal year.[43]

In addition to providing the top states where the EEOC filed lawsuits for FY 2022, the chart below maps out the state trends since 2016 and the number of cases filed in those states.[44]

	2016	2017	2018	2019	2020	2021	2022
1	N. Carolina (11)	California (20)	California (19)	Florida (13)	Texas (11)	Texas (14)	California (8)
2	Maryland (9)	Maryland (16)	Texas (14)	N. Carolina (11)	Florida (9)	Florida (10)	Texas (8)
3	Texas (8)	Texas (16)	Maryland (13)	Texas (10)	California (8)	Illinois (7)	Maryland (7)
4	Colorado (7)	Illinois (13)	Georgia (13)	Maryland (9)	New York (7)	Georgia (6)	Georgia (5)
5	California (6)	Georgia (10)	N. Carolina (11)	New York (9)	Georgia (6)	Alabama (6)	Florida (5)
6	Illinois (6)	Florida (9)	New York (10)	Georgia (7)	Michigan (6)	Colorado (6)	Washington (5)
7	Florida (4)	New York (8)	Florida (9)	Michigan (7)	Arkansas (5)	California (5)	North Carolina (5)
8	Mississippi (4)	Tennessee (7)	Michigan (9)	California (6)	Maryland (5)	New York (5)	Louisiana (4)
9	Nevada (4)	Louisiana 6	Alabama (7)	Minnesota (6)	Ohio (4)	Pennsylvania (5)	Colorado (4)
10	Alabama (3)	Michigan (6)	Illinois (7)	Louisiana (5)	-	Maryland (5)	Wisconsin (4)
11	Arizona (3)	Mississippi (6)	Pennsylvania (7)	Pennsylvania (5)	-	Mississippi (4)	Illinois (2)

42 *See* FY 2022 AFR, p. 17. The EEOC has defined "merits" suits as direct lawsuits or interventions involving alleged violations of the substantive provisions of the statutes enforced by the EEOC as well as enforcement of administrative settlements.

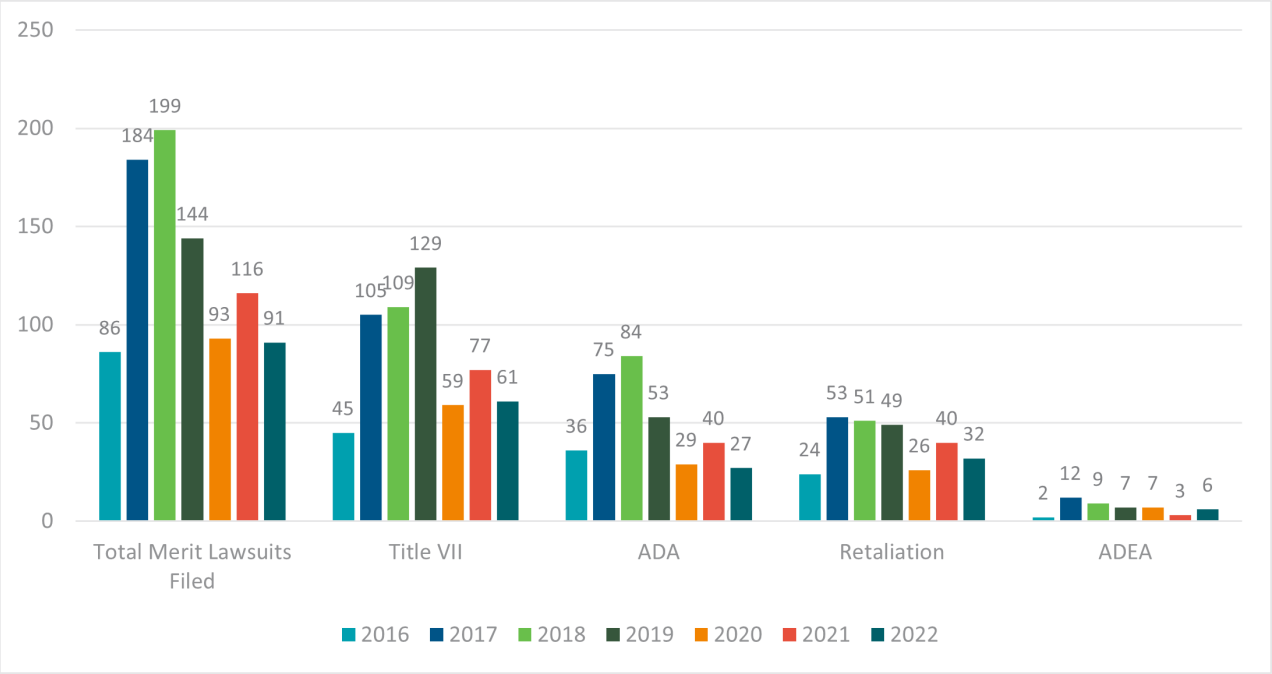
43 The EEOC notes that unlike FY 2018-2021 where its litigation budget was at or above $3.5 million for each of those years, its FY 2022 litigation funding support was well below at $2.60 million. FY 2022 OGC Report, part G.2., *Litigation Budget*.

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

	2016	2017	2018	2019	2020	2021	2022
12	Michigan (3)	-	Tennessee (7)	Washington (5)	-	N. Carolina (4)	South Carolina (2)
13	New York (3)	-	Washington (7)	Alabama (4)	-	-	Arizona (2)
14	-	-	Wisconsin (7)	Colorado (4)	-	-	Oklahoma (1)
15	-	-	-	Oklahoma (4)	-	-	Arkansas (1)
16	-	-	-	-	-	-	Kentucky (1)
17	-	-	-	-	-	-	Pennsylvania (1)
18	-	-	-	-	-	-	Nebraska (1)
19							Tennessee (1)
20	-	-	-	-	-	-	New York (1)

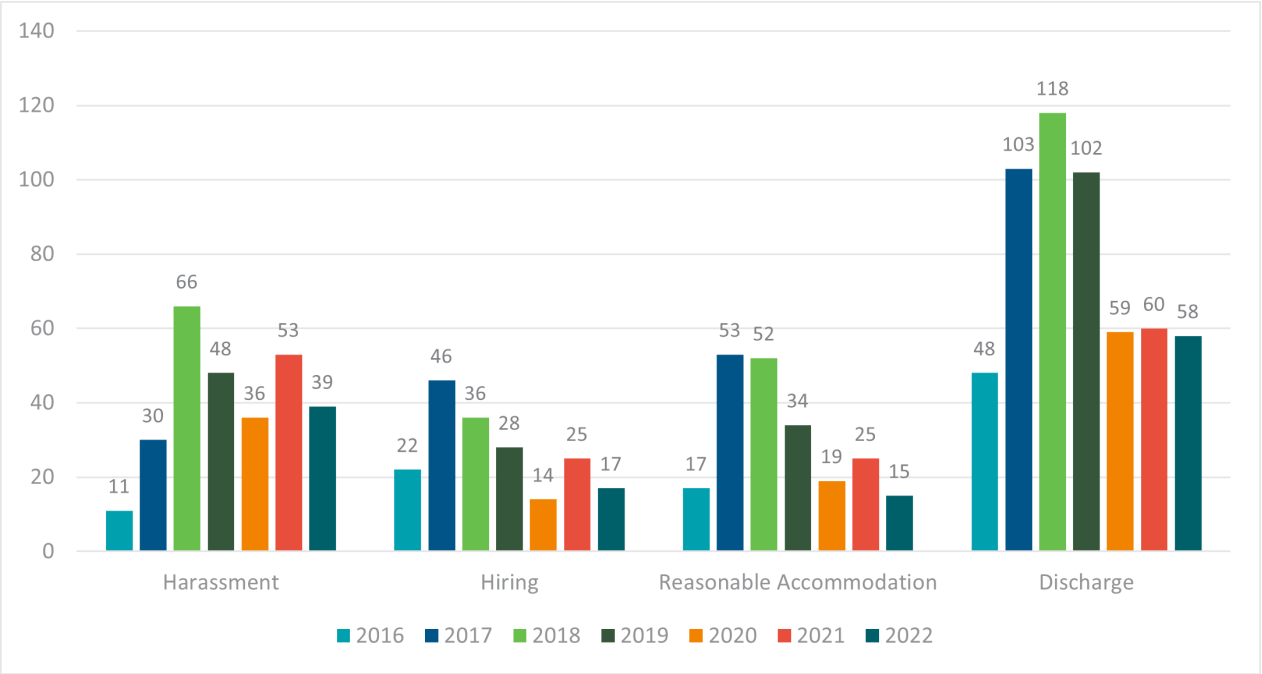
Based on these trends, the states in which the Commission appears to have consistently litigated most heavily include California, Florida, Maryland, Georgia, and Texas.

The 91 "merits" lawsuits filed in FY 2022 alleged a wide range of bases, including discrimination on the basis of disability (27), sex (45), retaliation (32), race (17), religion (3), national origin (6), and age (6).[45] Common issues raised include discharge (58), harassment (39), hiring (17), and disability accommodation.[46] The following chart shows a year-over-year comparison for the last seven years (FY 2016-2022) for the aforementioned bases of the lawsuits filed by the EEOC.



For the past seven years, the EEOC's reports also provided information on the most frequently identified issues that are the subjects of its litigation efforts.[47] Every year, these most frequently identified issues have been the same – they include harassment, hiring, reasonable accommodations for disabilities, and discharge. The chart below demonstrates the variance by issue for each fiscal year.

45 FY 2022 APR, part F, *Challenging Discrimination in Federal District Court*.
46 *Id.*
47 *Id.*



D. New Priorities for the EEOC

The EEOC was created in direct response to the call for racial justice and human rights. As such, advancing racial justice in the workplace was one of the major priorities for the EEOC in FY 2022.[48] In its FY 2022 APR, the EEOC states that it furthered this goal by conducting 468 race and color outreach events reaching 52,675 attendees, including 143 racial justice events reaching 9,064 attendees.[49] The EEOC also educated more than 225,000 individuals nationwide regarding workplace rights and discrimination.[50]

In FY 2022 the EEOC filed 20 lawsuits alleging race or national origin discrimination. This figure represents 21.9% of all merit suits filed for FY 2022.[51] The EEOC resolved 18 cases involving race or national origin in FY 2022, recovering $4.6 million for 298 individuals.[52]

The EEOC also noted an increased interest in the use of artificial intelligence and algorithmic fairness in employment decisions.[53] To address this new area of interest, the EEOC provided artificial intelligence training to enforcement teams, issued technical assistance, held listening sessions, hosted virtual roundtables, and issued an educational video.[54] In 2022, the EEOC also litigated a case dealing with artificial intelligence and technology.[55]

Of course, 2022 saw an increased focus on the effect of the COVID-19 pandemic on employment law. In fact, the EEOC saw 10,000 charges alleging discrimination related to COVID-19 and litigate two cases dealing with the same.[56] Throughout 2022, the EEOC prioritized outreach to address workplace civil rights implications of the COVID-19 pandemic by holding 369 outreach events, which reached over 26,041 individuals.[57] Lastly, the EEOC updated its written technical guidance on COVID-19 and the EEOC laws on seven different occasions in FY 2022.[58] In these updates, the EEOC added new sections addressing religious

48 FY 2022 APR, *A Message from the Chair.* Other notable priorities for the Commission for FY 2022 included preventing and remedying unlawful retaliation; enforcing pay equity; supporting diversity, equity, inclusion, and accessibility (DEIA); and addressing the use of artificial intelligence in employment decisions.
49 FY 2022 APR, *Summary of Fiscal Year 2022 Achievements in Priority Areas.*
50 FY 2022 APR, *A Message from the Chair.*
51 *Id.*
52 *Id.*
53 *Id., Summary of Fiscal Year 2022 Achievements in Priority Areas.*
54 *Id.*
55 *Id.* The case at issue is *EEOC v. iTutorGroup, Inc., Tutor Group Limited, and Shanghai Ping'An Intelligent Education Technology Co., Ltd.*, No. 1:22-cv-2565 (E.D.N.Y. May 5, 2022) ("EEOC alleged that providers of English-language tutoring services to students in China programmed their software to automatically reject female applicants over the age of 55 and male applicants over the age of 65. The EEOC alleged that the defendants failed to hire the charging party and more than 200 other qualified tutor applicants age 55 and older because of their age.")
56 FY 2022 APR, part B, *Strengthening the Enforcement Capacity of the Agency in the Private Sector.*
57 *Id.*, part II.A., *Continued Emphasis on Outreach and Education in the Private Sector.*
58 FY 2022 APR, *STRATEGIC OBJECTIVE II: Prevent Employment Discrimination and Promote Inclusive Workplaces Through Education and Outreach.*

objections to vaccinations, retaliation against workers for violations of EEO laws, and when COVID-19 can became a disability under the ADA.[59]

Throughout 2022, the EEOC demonstrated a clear interest in each of the topics above and it is likely that 2023 will see the same areas of focus.

E. Mediation Efforts

In its FY 2022 APR, the EEOC notes that it achieved 6,578 successful mediations out of the 8,690 conducted, resulting in $170.4 million in monetary benefits for complainants through its mediation program.[60] Due to the pandemic, the EEOC's mediation program has conducted only telephone and video mediations since March 2020. Overall, the EEOC reports that the vast majority of participants (98% of employers and 92% of charging parties) indicated they would be willing to participate in the mediation program again if the situation were to arise.[61]

F. Significant EEOC Settlements and Monetary Recovery

During FY 2022, the EEOC secured approximately $342 million for parties in private sector and state and local government workplaces through mediation, conciliation, and settlements. The EEOC's efforts in conciliation and pre-determination settlement alone resulted in $39.3 million for claimants during this period.[62] According to the EEOC, it successfully resolved 44% of conciliations, an increase from the 41% resolution rate in FY 2021.[63] Moreover, the EEOC reports that of these settlements, 10 were systemic lawsuits, the resolutions of which resulted in over $28 million for approximately 1,300 individuals.[64]

During the past fiscal year, the EEOC entered into at least 9 consent decrees and 2 conciliation agreements for at least $500,000, down from the prior year (11 and 3, respectively). Only six of these settlements equaled or exceeded $1 million, verses eight in FY 2021. Notably, sex discrimination and/or harassment claims were alleged in every high-dollar settlement during FY 2022. In two settlements, the EEOC also raised allegations of race discrimination, while two settlements also included allegations of pregnancy discrimination. Half of these settlements also alleged retaliation.

While nine of these settlements ranged from $500,000 to $1.75 million in monetary penalties, the two largest consent decrees included penalties of $18 million and $5 million. The $18 million settlement alleged the employer engaged in widespread sexual harassment, pregnancy discrimination, and retaliation. Under the terms of the three-year consent decree, the employer has agreed to several non-monetary relief measures, including the hiring of a third-party EEO consultant and the creation of an internal EEO position to work with the external consultant to combat sex discrimination. The employer also agreed to submit to audits of its pending and current discrimination and harassment complaints, provide semi-annual reports to the EEOC, perform climate surveys, conduct anti-harassment and anti-discrimination training that includes bystander intervention and civility training, expand mental health counseling services to employees who have experienced sexual harassment, create a tracking system for complaints, institute a toll-free complaint reporting hotline, implement a performance review system for managers, supervisors and human resources personnel that includes an EEO component, and institute recordkeeping and reporting mechanisms.

In the next-largest consent decree entered in FY 2022, the EEOC alleged the employer engaged in a nationwide pattern or practice of sex discrimination against job applications for certain positions. As part of the three-year settlement, the employer agreed to pay $5 million and appoint a Title VII coordinator to implement the company's EEO policies and procedures and oversee compliance with the decree. The company also agreed to develop a recruitment plan to encourage more women to apply for sales positions and offer positions to qualified women applicants who were initially denied positions. Specifically, one in every five new vacancies will be offered to women who are part of the settlement. The company will provide reports to the EEOC on its recruitment and hiring efforts and provide anti-discrimination training to all employees.

Appendix A of this Report includes a description of these and other notable consent decrees and conciliation agreements averaging $500,000 or more, as well as significant judgments and jury verdicts. Particularly noteworthy is an $8 million nationwide ADA settlement entered into in early FY 2023 involving ADA and pregnancy claims, which was resolved in conciliation and announced by the EEOC on November 29, 2022, following the completion of the EEOC's 2022 fiscal year. According to the

59 FY 2022 APR, *Summary of Fiscal Year 2022 Performance Highlights*.
60 *Id.*
61 *Id.*, part I, *Continued Focus on Alternative Dispute Resolution*.
62 *Id.* at p. 37.
63 *Id.*
64 FY 2022 OGC Report, part B, *Selected Systemic Resolutions*.

EEOC press release, based on multiple discrimination changes, the EEOC determined that "it had reasonable cause to believe [the employer] denied reasonable accommodations to pregnant employees and those with disabilities, subjecting them to actions such as involuntary unpaid leave, retaliation, requiring employees be 100% healed to return to work, or terminations." Based on the reported injunctive relief, the company "agreed to update its policies, as needed; appoint a coordinator to provide oversight on pregnancy-related disability policies, requests for reasonable accommodations, and maintenance of records; conduct climate surveys and exit interviews with specific attention to their accommodation process; conduct anti-discrimination training to all employees, including management; and require performance evaluation of managers include consideration of compliance with EEO laws."[65]

Under the terms of the conciliation agreement, the company will pay $8 million, which includes a class fund to provide relief to those employees impacted by the company's policies and employed between July 10, 2009 and September 26, 2022.

G. Appellate Cases

Over the past few years, the EEOC has filed fewer notices of appeal in federal circuit courts of appeals. The EEOC continues, however, to actively participate as *amicus curiae* in private lawsuits. During FY 2022, the EEOC's Office of the General Counsel filed eight briefs on appeal in Commission cases; the OGC filed *amicus curiae* in at least 21 appellate cases. At the end of FY 2022, the EEOC had nine pending cases in federal courts of appeal and was *amicus curiae* in 24 pending cases.[66] According to the FY 2022 APR, the EEOC secured over $7.7 million in monetary relief ordered in federal appellate decisions. Some notable decisions are discussed below.

1. Decisions in Favor of the EEOC

In EEOC v. Ryan's Pointe Houston, LLC,[67] the U.S. Court of Appeals for the Fifth Circuit reversed the district court's grant of summary judgment to a property management company, finding insufficient evidence of discrimination on the basis of both national origin and pregnancy. The case was unusual in having a fair amount of direct, versus circumstantial, evidence of discrimination based on the employer's expressions of animus close in time to the termination decision.[68] The court also rejected the district court's conclusion the employee was not qualified for her position because she lacked experience, reasoning that the plaintiff had been promoted to her position after having worked with the employer for several months and, therefore, the employer was aware of her experience level. The court of appeals did not address the lower court's findings that the employee misrepresented her experience, was frequently late, and was absent for hours at a time without explanation.

Direct evidence of discriminatory animus is sufficient to withstand summary judgment, without the burden-shifting analysis required by McDonnell Douglas,[69] in circumstantial evidence cases. The Fifth Circuit explained that four factors are considered in distinguishing between direct and circumstantial evidence: Whether the comments are (1) related to the plaintiff's protected characteristic; (2) proximate in time to the challenged employment decision, (3) made by an individual with authority over the challenged employment decision; and (4) related to the challenged employment decision.[70] Here, the Fifth Circuit found that "the evidence demonstrate[d] clear discriminatory motive on its face without the need for inference."[71]

In EEOC v. Cash Depot, Ltd.,[72] the Fifth Circuit again reversed summary judgment in favor of the employer on the basis that the lower court ignored the EEOC's evidence creating a triable issue of material fact whether the employee could have performed his field service technician job with an accommodation restricting lifting to less than 25 pounds. The employee's testimony he could perform the essential functions of the job without lifting 25 pounds was not speculative, contrary to the district court's conclusion, as the employee has worked as a field service technician for the employer for months prior to his leave of absence and thus knew what the job entailed, and the employer's own job description stated an essential function was lifting up to 20 (not 25) pounds. The district court failed to consider evidence that other employees had been accommodated. In addition, there was a triable issue of material fact whether an extended temporary leave of absence was a reasonable accommodation under the circumstances of this case.

65 *See* EEOC Press Release dated November 29 2022, at https://eeoc.gov.
66 FY 2022 OGC Report, part E, Appellate Activity.
67 *EEOC v. Ryan's Pointe Houston, L.L.C.*, No. 19-20656, 2022 WL 4494148 (5th Cir. Sept. 27, 2022).
68 *Id.* at **1, 5.
69 *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).
70 *Ryan's Pointe Houston, L.L.C.*, 2022 WL 4494148 at *9.
71 *Id.* at *10.
72 *EEOC v. Cash Depot, Ltd.*, No. 21-20515, 2022 WL 3644186, at *1 (5th Cir. Aug. 24, 2022).

In EEOC v. Roark-Whitten Hospitality 2, LP, the district court dismissed a race discrimination and retaliation complaint against two successor entities of a hotel on the basis the EEOC failed to allege the entities had sufficient notice of the claims to confer liability under the successor employer doctrine.[73] The court of appeals reversed this finding with respect to one of the two successors on the basis that constructive notice was sufficiently alleged due to allegations that due diligence would have revealed the existence of the lawsuit at the time of purchase and that many of the adverse employment actions happened subsequent to the sale. The panel was unanimous in striking down a default judgment against the original owner of a mere $35,000 for 11 allegedly aggrieved employees, as the lower court did not sufficiently justify the amount awarded.

2. Decisions in Favor of the Employer

The Seventh Circuit rejected the EEOC's claim the employer's light duty program discriminated against pregnant workers, ineligible for the program, under the Pregnancy Discrimination Act.[74] Applying a version of the McDonnell Douglas burden-shifting analysis modified for pregnancy discrimination cases,[75] the court of appeals affirmed summary judgment for the employer finding that the employer articulated non-discriminatory, legitimate business reasons for the light-duty program (returning to work employees injured on the job, reducing costs, and complying with the state worker's compensation regulations). The court rejected the EEOC's argument that the employer must also articulate the reasons why it excluded pregnant employees from the benefit, rather the EEOC was required (but failed) to prove the exclusion imposed such a burden on pregnant women that it would give rise to an inference of intentional discrimination.

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

73 *EEOC v. Roark-Whitten Hospitality 2, LP*, No. 20-2023 LEXIS (10th Cir. Mar. 10, 2022).
74 46 F.4th 587 (7th Cir. Aug. 16, 2022).
75 *See Young v. United Parcel Service, Inc.*, 575 U.S. 206, 135 S. Ct. 1338 (2015).

III. EEOC AGENCY AND REGULATORY-RELATED DEVELOPMENTS

A. EEOC Leadership

As we enter the third year of the Biden administration, the Equal Employment Opportunity Commission has yet to have a majority of Democratic commissioners. The Commission is presently chaired by Democratic Commissioner Charlotte A. Burrows, whose term expires in July 2023. Jocelyn Samuels, also a Democrat, serves as vice chair, with a term expiring in July 2026. With the resignation of Republican former Chair Janet Dhillon in November 2022, the five-member Commission's membership was reduced to four: Republican Commissioner Keith Sonderling, whose term expires in July 2024, and Republican Commissioner Andrea R. Lucas, whose term expires in July 2025, fill two of the remaining seats, with one seat currently vacant. In the prior Congress, President Biden nominated plaintiffs' bar attorney Kalpana Kotagal[76] to replace Commissioner Dhillon, but the Senate failed to act on her confirmation prior to adjourning. In January 2023, the White House resubmitted her nomination in this Congress.

The general counsel's position has also remained unfilled since former General Counsel Sharon Fast Gustafson was removed from the position by the White House in March 2021; career Associate General Counsel Gwendolyn Reams served as acting general counsel from March 2021 until her term in that position expired on December 30, 2021. Deputy General Counsel Christopher Lage now oversees operation of the Office of General Counsel, and in the absence of a designated acting officer, any authority vested solely within the general counsel may be exercised by the chair. In June of last year, President Biden nominated Karla Gilbride, a senior attorney at the legal advocacy non-profit firm Public Justice, to serve as general counsel, but, as with nominee Kotagal, the Senate failed to confirm her nomination. She, too, has been renominated for the position in this Congress.

The chair of the Commission exercises significant control over the administration and operations of the agency and its 53 offices around the country. The vast majority of day-to-day operations of the Commission and its field staff largely proceed apace, irrespective of which party holds the chair. The chair also has broad discretion in setting the Commission's agenda—what items the agency will consider and vote upon, and which it will not, as well as scheduling meetings of the Commission to examine issues or vote on disputed matters. Significant policy changes, however, require the approval of the full Commission. Chair Burrows has not had a Democratic majority on the Commission since assuming her position. As a practical matter, this means that the agency has been limited in its ability to revisit polices from the prior administration, or to move forward on substantive policies in line with the Biden administration's agenda. When the Commission has a Democratic majority, we expect the agency to begin to move aggressively on new policy priorities of the chair and the administration more broadly.

B. Delegation of Litigation Authority

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

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

76 Ms. Kotagal is a partner in a Washington, D.C. law firm, where she is a member of the firm's Civil Rights & Employment Practice. According to the firm's *website*, "A highly-acclaimed employment and civil rights plaintiffs' litigator, Ms. Kotagal represents women and other disenfranchised people in employment and civil rights class actions, involving often cutting-edge issues related to the Title VII, Equal Pay Act, the Americans with Disabilities Act, Family Medical Leave Act, as well as wage and hour issues."

Perhaps more notable, even where cases do not fall within the above criteria, the revised delegation provides that before filing any case, the general counsel must circulate it to all commissioners for a period of five business days. If during that period a majority of the commissioners notifies the general counsel and the other commissioners that the case should be submitted to the Commission for a vote, the litigation may not be filed without approval of the majority of the Commission.[77] This means, as a practical matter, that any bloc of three commissioners generally may effectively "veto" the filing of a case (first by requiring that it be presented for a Commission vote, then by voting to disapprove the recommendation to file suit). With Commissioner Dhillon's resignation, however, the continuation of this rule is open to serious question. Currently, Commission votes on litigation (and other matters that come before the Commission for consideration) are made publicly available on the agency's website.[78]

C. Conciliation Procedures

Where the Commission has been unable to act on prior administration policy, Congress has stepped in to fill the void. One notable example was the Commission's final regulations updating its conciliation procedures issued at the end of the Trump administration (by way of background, "conciliation" refers to the statutory requirement that, after the EEOC has found reasonable cause to believe discrimination occurs, the agency must "endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion" prior to filing suit).[79] The regulations were designed to ensure that employers were provided a minimum amount of baseline information regarding the Commission's findings and proposed conciliation offer so as to meaningfully be able to assess and respond to the Commission's proposal, and were widely well-received by employers. With Democrats controlling both chambers during the last Congress, these regulations were repealed pursuant to the Congressional Review Act in June of 2021. Having been repealed in this fashion, the Commission is now prohibited from adopting "substantially similar" regulations without explicit congressional approval.

D. EEOC and COVID-19

1. COVID-19 Technical Assistance

EEOC has, throughout the pandemic, maintained updated guidance as to employers' and employees' rights and responsibilities with respect to the pandemic and federal civil rights laws prohibiting discrimination on the basis of disability, religion, genetic information, and pregnancy.[80] In the spring of 2021, the agency updated its FAQs regarding vaccinations, making clear that an employer's merely asking for proof of vaccination is not a "medical examination" and does not implicate ADA concerns (employers should be aware, however, that asking why an employee is not vaccinated—or engaging in pre-vaccination questions where the employer or a third party with whom it contracts is vaccinating workers—likely do implicate the ADA insofar as they are questions that are likely to elicit information about a disability).

The Commission more recently updated its COVID guidance in July 2022, publishing updated FAQs regarding employer testing of employees for the COVID-19 virus.[81] Most notably, with respect to requiring employees to be tested for COVID as a condition of returning to or remaining at work, the EEOC's updated guidance makes clear that an employer's ability to require such a test is not unlimited. Rather, an employer can require such testing only where it is "job-related and consistent with business necessity" under the ADA. Specifically, the agency's updated guidance with respect to testing provides:

> A COVID-19 viral test is a medical examination within the meaning of the ADA. Therefore, if an employer implements screening protocols that include COVID-19 viral testing, the ADA requires that any mandatory medical test of employees be "job-related and consistent with business necessity." **Employer use of a COVID-19 viral test to screen employees who are or will be in the workplace will meet the "business necessity" standard when it is consistent with guidance from Centers for Disease Control and Prevention (CDC), Food and Drug Administration (FDA), and/or state/local public health authorities that is current at the time of testing.**

77 But see *EEOC v. Route 22 Sports Bar*, 2021 U.S. Dist. Lexis 115532 (N.D.W.V. June 22, 2021), in which the employer moved to dismiss the complaint because the EEOC did not obtain approval from its commissioners prior to filing a complaint alleging systemic discrimination (there was no evidence that the Commission had actually voted to approve the filing of the lawsuit). The court rejected this argument, finding that the Commission's decision to bring litigation was within its discretion and not reviewable by the court, and that the agency's internal litigation procedures did not create a substantive basis on which defendants could challenge the suit.

78 U.S. EEOC, Commission Votes, *https://www.eeoc.gov/commission-votes*.

79 EEOC, Update of *Commission's Conciliation Procedures*, 86 Fed. Reg. 2974-2986 (Jan. 14, 2021).

80 EEOC, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, last updated July 12, 2022 (EEOC COVID-19 Guidance).

81 *See* Jim Paretti and Devjani Mishra, *EEOC Updates COVID-19 Guidance, Potentially Limiting Employers' Ability to Screen Employees for COVID-19*, Littler Insight (July 14, 2022).

...

> If an employer seeks to implement screening testing for employees such testing must meet the "business necessity" standard based on relevant facts. **Possible considerations in making the "business necessity" assessment may include the level of community transmission, the vaccination status of employees, the accuracy and speed of processing for different types of COVID-19 viral tests, the degree to which breakthrough infections are possible for employees who are "up to date" on vaccinations, the ease of transmissibility of the current variant(s), the possible severity of illness from the current variant, what types of contacts employees may have with others in the workplace or elsewhere that they are required to work (e.g., working with medically vulnerable individuals), and the potential impact on operations if an employee enters the workplace with COVID-19**. In making these assessments, employers should check the latest CDC guidance (and any other relevant sources) to determine whether screening testing is appropriate for these employees.[82]

Based on this update, it appears that the EEOC plans to take the position that a COVID-19 screening test for employees entering the workplace is not per se or presumed permissible. Rather, an employer must be able to demonstrate that such a test is necessary for the safety of the workplace, and consistent with the job in question. However, the EEOC also advises employers to keep current with CDC recommendations regarding COVID exposure and infection, as well as those of state and local public health authorities.

It is not clear what, if any, immediate practical impact this updated guidance will have in light of current rates of COVID-19 community transmission, and the continued emergence of new variants. Only days after the EEOC published its guidance suggesting that testing may be limited in some circumstances, the U.S. Department of Health and Human Services (HHS) announced that it would again extend its COVID-19 declaration of public health emergency, although that declaration is set to expire on May 11, 2023. Until that time, HHS views the pandemic as still very much a public health crisis, suggesting employers that base decisions on the most up-to-date guidance from the CDC and other public health authorities will have strong arguments that their testing programs are justified as a matter of public health.

2. EEOC COVID-19 Litigation

On the litigation front, in September 2021, in the context of COVID, the EEOC brought its first case alleging that an employer violated the ADA by failing to accommodate an employee by allowing her to continue to work remotely. The agency brought suit in the Northern District of Georgia, alleging that the employer terminated the employment of a health and safety manager who requested to work remotely.[83] By way of background, from March through June 2020, the company required all employees to telework four days a week. In June 2020, when the company re-opened its worksite, the employee requested that, because of an underlying pulmonary condition that made breathing difficult and placed her at heightened risk of COVID-19, she be allowed to continue to work remotely two days each week and take breaks when working onsite. EEOC's complaint alleges that while other employees were permitted to work from home, this manager's request was denied, and her employment was terminated shortly thereafter. The parties settled in December 2022 for $47,500.[84]

While it is still not clear how far EEOC will push the envelope with respect to employees requesting telework as a reasonable accommodation in light of COVID-19 (and each case will turn on its own facts), employers should be aware that the agency has started down this road. While courts came to differing conclusions as to whether "physical attendance" was an essential requirement of some jobs prior to the pandemic, it is likely that they will be more sympathetic to employee requests for remote work, particularly where they and others were able to telework successfully during the pandemic.

Relatedly, the agency has also brought lawsuits alleging ADA violations where an employee with asthma was not permitted to wear a mask at work, and harassed for doing so, and where employees with disabilities were not permitted to return to work until a COVID-19 vaccine was developed, notwithstanding that they were ready and willing to work.[85] In the case involving the asthmatic employee, the U.S. District Court for the Western District of Texas granted summary judgment in favor of the employer on October 18, 2022, although the EEOC has filed an appeal.[86] In the second lawsuit, the parties settled for $36,250.[87]

82 EEOC COVID-19 Guidance, *supra* note 80 (emphasis added).
83 *EEOC v. ISS Facility Services, Inc.*, No. 1:21-cv-03708 (N.D. Ga.) (Filed: Sept. 7, 2021); EEOC, Press Release, *EEOC Sues ISS Facility Services for Disability Discrimination* (Sept. 7, 2021).
84 *EEOC v. ISS Facility Services, Inc.*, 1:21-cv-03708 (N.D. Ga. Dec. 19, 2022).
85 *See* EEOC, Press Release, *EEOC Files Disability Lawsuits in El Paso and Ft. Worth Based on COVID Related Discrimination* (Sept. 24, 2021).
86 *EEOC v. U.S. Drug Mart, Inc.*, 3:21-cv-00232 (W.D. Tex. Oct. 18, 2022); *appeal filed* No. Case 3:21-cv-00232-FM (5th Cir. Dec. 15, 2022).
87 *EEOC v. 151 Coffee, LLC*, No. 4:21-cv-01081 (N.D. Tex. May 9, 2022).

We have not yet seen the EEOC file a case alleging discrimination in violation of Title VII for an employer's failure to grant a COVID-related accommodation to an employee's sincerely held religious belief or practice—but we can report that employees are filing charges,[88] and we can expect that at some point in the near future, the agency will bring suit (perhaps shedding some light on how it views "sincerely held religious objections" to COVID-19 vaccination, testing, and masking, and/or what it views as "unreasonable hardship" for employers asked to accommodate these requests.

3. Civil Rights Impact of COVID-19

Although it is hoped the instances of infection will continue to decline, the impact of the pandemic on civil rights in the workplace will likely linger. To that end, the EEOC in its FY 2023 Congressional Budget Justification describes various initiatives launched in FY 2021 it plans to continue, one of which is addressing the civil rights impact COVID-19 has had on individuals. According to the agency, the pandemic "has proved to be a civil rights crisis in addition to a public health crisis and economic crisis. COVID-19 and its economic fallout have disproportionately impacted people of color, women, older workers, individuals with disabilities, and other vulnerable workers."[89] The agency held a virtual public hearing on this topic in 2021 and will continue to "provide numerous resources to assist employers and employees as they grapple with pandemic-related issues."[90]

E. New Agency Priorities

As the agency contemplates a Democratic majority, we expect activity around a number of items the new chair and administration have articulated as priorities. In addition to the Commission's focus on artificial intelligence in making employment decisions, which is discussed in greater detail in Part I of this Report, the following areas will receive increased attention:

1. Hiring Initiative to Reimagine Equity (HIRE)

A joint effort with the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP), the Hiring Initiative to Reimagine Equity (HIRE) remains a Commission priority for the coming year. HIRE is a multi-year collaboration between the two agencies that will:

- Host a series of roundtables, meetings, and public forums on promoting organizational policies and practices that enhance diversity, equity, inclusion, and accessibility as well as reimagine equity and expand opportunities in hiring;
- Identify strategies to remove unnecessary hiring barriers as well as promote effective, job-related hiring and recruitment practices to cultivate diverse pools of qualified applicants;
- Promote equity in the use of technology-based hiring systems; and
- Develop resources to promote adoption of innovative and evidence-based, recruiting and hiring practices that advance equity.[91]

In January of last year, the Commission hosted a roundtable discussion intended to bring together employer, worker and civil rights organizations "to explore how to promote recruitment and hiring practices that advance racial equity for underserved communities." In its summation of the event, the EEOC indicated that, going forward, "HIRE will engage a broad array of stakeholders in pursuit of a common goal – to help address key hiring and recruiting challenges that prevent underrepresented communities from accessing good jobs," and that the agency intends to "identify actionable strategies to promote organizational policies and practices that advance equity" and "develop materials such as guidance documents or promising practice resources" based on evidence-based research and intended to "embed equity in recruitment and hiring practices." The agency convened a second, virtual roundtable in April 2022, focusing on opportunities for workers with gaps in their employment history, which the EEOC noted are often due to caregiving responsibilities, disabilities, age, or incarceration.

2. Strengthening the Agency

The Commission intends to make it a priority to "rebuild and strengthen the agency,"[92] increasing its headcount by approximately 450 new hires, most of whom are front-line staff (investigators, mediators, attorneys, and administrative staff).

88 *See COVID-19 Labor & Employment Litigation Tracker*, Littler Insight (last updated Apr. 1, 2022).
89 *FY 2023 EEOC Congressional Budget Justification*, (FY 2023 Budget) p. 3.
90 *Id.* at pp. 3-4.
91 Available at *https://www.eeoc.gov/hiring-initiative-reimagine-equity-hire-fact-sheet* (last visited Feb. 14, 2023).
92 FY 2023 Budget, p. 4.

Chair Burrows stated, "[t]he addition of these new employees in mission-critical positions is a down payment on what I hope will be a long-term investment to ensure that the EEOC has resources commensurate with its task."[93]

3. Pay Equity

Narrowing the pay gap continues to be a key EEOC priority. In its FY 2023 Budget Justification, the EEOC claimed it would "continue to use all of the tools at its disposal, including outreach and education, enforcement and, where necessary, litigation to address pay discrimination and unjustified wage gaps."[94]

Compensation data collection appears to be one way in which the EEOC intends to help advance pay equity and combat pay discrimination. During the Obama administration, the EEOC revised its Form EEO-1 to require employers to report detailed information about employee compensation and hours worked, broken out by race, ethnicity, and gender. The Trump administration discontinued this collection (although a federal court ultimately found the suspension of the collection unlawful and ordered the agency to collect two years of pay data).

A National Academy of Sciences (NAS) panel evaluated the compensation data collected by the EEOC to determine its utility and in July published its report analyzing the EEOC's previous pay data collection effort.[95] Chair Burrows emphasized the NAS's findings that, done properly, pay data collection could assist the agency in rooting out pay discrimination. In response, Republican Commissioner Janet Dhillon highlighted a number of flaws NAS discussed in its analysis of the agency's prior effort, NAS's conclusions that the EEOC's pay data collection had used a faulty measure of pay measurement, outdated job categories, and pay bands that were overly broad and limited the collection's utility. Commissioner Keith Sonderling likewise noted the NAS's conclusions that the EEOC had used flawed methodology, failed to conduct a pilot program, and had issues with the quality of the data collected.

The EEOC had previously suspended collection of EEO-1 data in 2020 in light of the pandemic; in 2021, it collected compensation data for calendar years 2019 and 2020, and in 2022, the agency resumed its normal collection of data for the year prior. We predict it is likely that the Biden EEOC will attempt again to require employers to submit employee compensation data to the agency in a future, revised iteration of the EEO-1; whether the collection mirrors what was previously done or adopts a different approach that takes into account NAS recommendations, remains to be seen.

4. Artificial Intelligence

As discussed in the opening section of this year's Annual Report, there will be a continued focus by the EEOC on artificial intelligence (AI). We refer you to the opening section of this Report for a detailed analysis of the intersection of artificial intelligence, employment decision-making, and civil rights law, including developments at the state and local level. The EEOC also has already increased its investigation and litigation activity involving the use of AI. Specifically, in May 2022, the EEOC filed suit in *EEOC v. iTutorGroup, Inc.*,[96] alleging that the defendants, providers of English-language tutoring services, illegally programmed their application software to automatically reject female applicants over the age of 55 and male applicants over the age of 60, in violation of the Age Discrimination in Employment Act (ADEA).

5. Anti-Retaliation

Signaling the resolve of the Biden administration to enforce workers' rights collaboratively across the government (and its emphasis on unlawful retaliation), the EEOC, U.S. Department of Labor, and National Labor Relations Board announced in November 2021 that the three agencies were embarking upon a joint initiative to "raise awareness" about retaliation issues when workers exercise protected employment-law rights.[97] As indicated in the tri-agency rollout, the initiative "will include collaboration among these civil law enforcement agencies to protect workers on issues of unlawful retaliatory conduct, educate the public and engage with employers, business organizations, labor organizations and civil rights groups in the coming year." The announcement of the effort was quickly followed by a virtual dialogue with employer stakeholders regarding workplace retaliation. Whether the initiative results in any substantive change to enforcement policy or is meant more to

93 FY 2023 Budget, p. 4.
94 *Id.* at p. 3.
95 EEOC, Press Release, *EEOC Announces Independent Study Confirming Pay Data Collection is a Key Tool to Fight Discrimination* (July 28, 2022).
96 Case No. 1:22-cv-02565 (Filed: May 5, 2022, E.D.N.Y))
97 EEOC, Press Release, *U.S. Department of Labor, National Labor Relations Board, U.S. Equal Employment Opportunity Commission Align to End Retaliation, Promote Workers' Rights* (Nov. 10, 2021).

"signal" the agencies' enforcement priorities, is not yet clear, although we expect claims of retaliation to continue to outrank claims of substantive discrimination in terms of the number of charges filed.

6. Strategic Enforcement Plan

On January 10, 2023, the EEOC published a draft Strategic Enforcement Plan for 2023-2027 for public input.[98] The EEOC lists the following changes in this version of its SEP:

- "Expands the vulnerable and underserved worker priority to include additional categories of workers who may be unaware of their rights under equal employment opportunity laws, may be reluctant or unable to exercise their legally protected rights, or have historically been underserved by federal employment discrimination protections—such as people with intellectual and developmental disabilities, individuals with arrest or conviction records, LGBTQI+ individuals, temporary workers, older workers, individuals employed in low-wage jobs, and persons with limited literacy or English proficiency;
- Refines the recruitment and hiring priority to include limiting access to on-the-job training, pre-apprenticeship or apprenticeship programs, temp-to-hire positions, internships, or other job training or advancement opportunities based on protected status;
- Recognizes employers' increasing use of automated systems, including artificial intelligence or machine learning, to target job advertisements, recruit applicants, and make or assist in hiring decisions;
- Updates the emerging and developing issues priority to include employment discrimination associated with (1) the COVID-19 pandemic and other threats to public health, (2) violations of the newly enacted Pregnant Workers Fairness Act of 2022, and (3) technology-related employment discrimination; and
- Preserves access to the legal system by focusing on overly broad waivers, releases, non-disclosure agreements, or non-disparagement agreements."[99]

Although it is unclear what, if any, changes will be made to the final SEP, the above issues clearly indicate which areas will merit the EEOC's attention in the coming years.

F. The Months Ahead

The era of a restrained EEOC may soon come to an end, and as the balance of political power at the agency shifts, we likely can expect more aggressive regulation and enforcement for the balance of the Biden administration. At the same time, now that Republicans have control of the U.S. House of Representatives in the 118th Congress, the agency will be subject to increased oversight. Additionally, as the thousands of charges of discrimination arising out of the COVID-19 pandemic, vaccination mandates, and return-to-work requirements are investigated and processed administratively, we will be monitoring to see trends in litigation (both EEOC-instituted and brought by private parties), as well as how the courts now deal with the thorny legal questions raised by nearly three years of a pandemic that has reshaped much of the employment landscape.

98 EEOC, *Draft Strategic Enforcement Plan*, 88 Fed. Reg. 1379 (Jan. 10, 2023).
99 *Id.* at p. 19.

IV. SCOPE OF EEOC INVESTIGATIONS AND SUBPOENA ENFORCEMENT ACTIONS

A. EEOC Investigations

As part of the investigation process, the EEOC has statutory authority to issue subpoenas and pursue subpoena enforcement actions if an employer fails to provide requested information or data or to make requested personnel available for interview. The EEOC continues to exercise this option, particularly when dealing with systemic investigations. As discussed below, the EEOC's authority to issue subpoenas and conduct investigations is quite broad. Because the scope of EEOC investigations and related issues are critical in guiding employer conduct in dealing with the EEOC, the discussion below is not limited to court decisions over the past fiscal year.

1. EEOC Authority to Conduct Class-Type Investigations

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

The Commission enjoys expansive authority to investigate systemic discrimination stemming from its broad legislated mandate.[100] 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."[101]

Title VII also authorizes the EEOC to issue charges on its own initiative (*i.e.*, commissioner's charges),[102] based upon an aggregation of the information gathered pursuant to individual charge investigations. Under a commissioner's charge, the EEOC is entitled to investigate broader claims.

Finally, the EEOC may initiate a systemic investigation under either the Age Discrimination in Employment Act or the Equal Pay Act. Under both statutes, the Commission can initiate a "directed investigation" even in the absence of a charge of discrimination, seeking data that may include broad-based requests for information and initiating a lawsuit for violation of the applicable statute.[103]

2. Scope of EEOC's Investigative Authority

The touchstone of the EEOC's subpoena authority is the text of its originating statute. By statute, the Commission's authority to request information arises under Title VII, which permits it "at all reasonable times have access to . . . any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this subchapter and is relevant to the charge under investigation."[104] The leading case interpreting the scope of this authority is the U.S. Supreme Court decision *EEOC v. Shell Oil Co.*,[105] frequently cited for the proposition that "relevance" in this context extends "to virtually any material that might cast light on the allegations against the employer."[106] Less cited is the Court's admonition that "Congress did not eliminate the relevance requirement, and [courts] must be careful not to construe the regulation adopted by the EEOC governing what goes into a charge in a fashion that renders that requirement a nullity."[107]

What if the initial reason for the charge no longer exists? Courts of appeals for the Ninth and Seventh Circuits have already held that, even if the EEOC issues a right-to-sue letter or even if the charge is withdrawn, the EEOC's authority to investigate

100 *See* 42 U.S.C. § 2000e-5(b).

101 *EEOC v. Caterpillar, Inc.*, 409 F.3d 831, 832 (7th Cir. 2005). *But see EEOC v. Burlington Northern Santa Fe Railroad*, 669 F.3d 1154 (10th Cir. 2012) (denying enforcement of the EEOC's subpoena expanding the scope of its investigation involving two individuals); *EEOC v Royal Caribbean Cruises, Ltd.*, 771 F.3d 757 (11th Cir. 2014) (denying the EEOC's attempt to subpoena information to help support a pattern-or-practice claim, when the case at issue involved one individual only).

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

103 *See, e.g.*, 29 U.S.C. § 626(a) of the ADEA (the EEOC "shall have the power to make investigations. . . for the administration of this chapter"); 29 C.F.R. § 1626.15 ("the Commission and its authorized representatives may investigate and gather data . . . advise employers . . . with regard to their obligations under the Act . . . and institute action . . . to obtain appropriate relief").

104 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.

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

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

107 *Id.*

remains unabated.[108] But is the same true if the charging party's underlying lawsuit is dismissed on the merits? Such was the issue of first impression for the Seventh Circuit in *EEOC v. Union Pacific Railroad*.[109] There, an employer challenged the EEOC's legal authority to continue an enforcement action after issuing a right-to-sue letter and after the underlying charges of discrimination in a private lawsuit had been dismissed on the merits.[110] While the federal appellate courts have been split on this issue,[111] the Seventh Circuit treated the issue as answered by the Supreme Court's decision in *Waffle House*, where the Court held that the charging individual's agreement to arbitrate did not bar further action on the part of the EEOC.[112]

In *Waffle House*, the Court held that "[t]he statute clearly makes the EEOC the master of its case and confers on the agency the authority to evaluate the strength of the public interest at stake."[113] This established, for the *Union Pacific* court, that the EEOC's authority is not derivative.[114] And if issuing a right-to-sue letter does not end the EEOC's authority, then the court did not see how the entry of judgment in the charging individual's civil action had any more bearing. "To hold otherwise," concluded the court, "would not only undercut the EEOC's role as the master of its case under Title VII, it would render the EEOC's authority as 'merely derivative' of that of the charging individual contrary to the Supreme Court's holding in *Waffle House*."[115] The upshot is that, however disposed of, the outcome of a valid charge in the Seventh Circuit does not seem to determine or define the EEOC's authority.

The Ninth Circuit in *EEOC v. VF Jeanswear LP* reaffirmed its position that the EEOC's power to investigate instances of discrimination extend beyond the allegations of the individual charging party.[116] Citing Ninth Circuit precedent, the court emphasized, "there is no legal basis for limiting the scope of the relevance inquiry only to the parts of the charge relating to the personally-suffered harm of the charging party."[117]

a. Applicable Timelines for Challenging Subpoenas (Waiver Issue)

As part of its investigatory authority, the EEOC can and does issue subpoenas to employers seeking information or data. An employer may challenge an EEOC subpoena, but may be barred from doing so in a subpoena-enforcement action in circumstances where it fails to challenge or modify the subpoena in accordance with statutorily imposed deadlines.[118] 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.[119] This requirement is set forth in the regulations governing the EEOC's investigative authority. Namely, "any person served with a subpoena who intends not to comply shall petition" the EEOC "to seek its revocation or modification . . . within five days . . . after service of the subpoena."[120]

In recent years, the EEOC has taken an aggressive stance on this "waiver" issue when dealing with employers that have generally failed to respond to its requests for information and subpoenas. The most notable case on this issue is the

108 *Watkins Motor Lines, Inc.*, 553 F.3d 593 (7th Cir. 2009); *EEOC v. Fed. Express Corp.*, 558 F.3d 842 (9th Cir. 2009) (holding that the issuance of a right-to-sue letter does not strip the EEOC of its authority to continue its investigation).

109 *EEOC v. Union Pacific Railroad*, 867 F.3d 843 (7th Cir. 2017).

110 *Union Pacific Railroad*, 867 F.3d at 845.

111 *See EEOC v. Hearst*, 103 F.3d 462 (5th Cir. 1997) (holding that the EEOC's authority to investigate a charge ends when it issues a right-to-sue letter); *EEOC v. VF Jeanswear LP*, No. 17-16786, 769 Fed. Appx. 477 (9th Cir. May 1, 2019) ("there is no legal basis for limiting the scope of the relevance inquiry only to the parts of the charge relating to the personally-suffered harm of the charging party."); *Fed. Express Corp.*, 558 F.3d 842 (9th Cir. 2009) (holding that the issuance of a right-to-sue letter does not strip the EEOC of authority to continue to process the charge, including independent investigation of allegations of discrimination on a company-wide basis).

112 *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 291 (2002).

113 *Waffle House, Inc.*, 534 U.S. at 291.

114 *Union Pacific Railroad*, 867 F.3d at 851.

115 *Id.*

116 *EEOC v. VF Jeanswear LP*, No. 17-16786, 769 Fed. Appx. 477 (9th Cir. 2019), petition for cert. filed (U.S. Oct. 1, 2019) (No. 19-446), cert. denied (U.S. Apr. 6, 2020).

117 *VF Jeanswear LP*, 769 Fed. Appx. 477, slip op. at 3, citing *EEOC v. Fed. Express Corp.*, 558 F.3d 842, 855 (9th Cir. 2009).

118 *See, e.g.*, *EEOC v. Bashas', Inc.*, 2009 U.S. Dist. LEXIS 97736, at **9-29 (D. Ariz. 2011) (providing a thorough discussion of the case law discussing the potential "waiver" of a right to challenge administrative subpoena); *see also EEOC v. Cuzzens of GA, Inc.*, 608 F.2d 1062, 1064 (5th Cir. 1979); *EEOC v. Cnty of Hennepin*, 623 F. Supp. 29, 33 (D. Minn. 1985); *EEOC v. Roadway Express, Inc.*, 569 F. Supp. 1526, 1528 (N.D. Ind. 1983).

119 *See, e.g.*, *EEOC v. Chrome Zone LLC*, Case No. 4:13-mc-130 (S.D. Tex. Feb. 22, 2013) (EEOC motion to compel employer's compliance with subpoena arguing waiver by failure to file a Petition to Revoke or Modify Subpoena where the employer had failed to respond to charge of discrimination or EEOC's requests for information or subpoena); *EEOC v. Ayala AG Services*, 2013 U.S. Dist. LEXIS 14831, at **11-12 (E.D. Cal. Oct. 15, 2013); *EEOC v. Mountain View Medical Center*, Case No. 2:13-mc-64 (D. Ariz. July 30, 2013) (same). *But see EEOC v. Loyola Univ. Med. Ctr.*, 823 F. Supp. 2d 835 (N.D. Ill. 2011) (denying enforcement of overbroad subpoena requesting irrelevant information despite employer's failure to file a Petition to Revoke or Modify Subpoena, reasoning a procedural ruling was inappropriate given (1) the absence of established case law on the issue under the ADA, (2) the sensitive and confidential nature of the information subpoenaed, which related to employees' medical conditions, and (3) the fact that the employer had twice objected to the scope of the EEOC's inquiry before the enforcement action was filed).

120 29 C.F.R. § 1601.16(b)(1).

Seventh Circuit's 2013 decision in *EEOC v. Aerotek*,[121] in which a federal appeals court supported the EEOC's position that an employer waived the right to challenge a subpoena by failing to file a Petition to Modify or Revoke. In *Aerotek*, a staffing agency was accused of placing applicants according to the discriminatory preferences of its clients. The EEOC's subpoena sought a "broad range of demographic information, including the age, race, national origin, sex, and date of birth of all internal and contract employees dating back to January 2006," in addition to information about recruitment, selection, placement, and termination decisions by the company and its clients. Despite receiving from the company about 13,000 pages of documents in response to the subpoena, the EEOC claimed the company failed to provide additional requested information. In addition, although the staffing agency had filed objections to the EEOC's petition, the objections were filed one day beyond the statutorily required five days. The district court determined that the company's objections were waived and ordered it to comply with a broadly worded subpoena, which had been pending for more than three years, because the company filed objections with the agency six days after receipt. The Seventh Circuit agreed with this decision, finding that the defendant "has provided no excuse for this procedural failing and a search of the record does not reveal one … We cannot say whether the Commission will ultimately be able to prove the claims made in the charges here, but we conclude that EEOC may enforce its subpoena because [defendant] has waived its right to object."[122]

Since *Aerotek*, there have been examples where a court has disagreed with the EEOC's contention that an employer has waived objections to a subpoena due to its failure to timely or properly petition for revocation or modification of the subpoena. Those courts have scrutinized the justifications offered by an employer for failing to file a petition to modify or revoke within the five-day period and have applied the four-factor test articulated in *EEOC v. Lutheran Social Services*.[123]

In *Lutheran*, the U.S. Court of Appeals for the D.C. Circuit held that there is a "strong presumption that issues parties fail to present to the agency will not be heard . . ." but it also stated that the court should still consider "whether the facts and circumstances surrounding [non-compliance] are sufficiently extraordinary" to excuse non-compliance.[124] It further explained that factors that may amount to such exceptional circumstances include whether (1) the subpoena advised the recipient of the five-day petition deadline expressly or by citing the relevant law or regulation; (2) the agency investigator informed the subpoena recipient of the missed deadline; (3) the subpoena recipient repeatedly raised its objections to the agency in some form other than a revocation petition; and (4) the objections are not within the "special competence" of the EEOC.[125] The *Lutheran* court also suggested, however, that this standard would be "quite different" in the more "typical situation where a subpoena recipient's objections rest on relevance."[126] Although there were no reported decisions on the waiver issue during fiscal year 2022, employers should anticipate that the EEOC will continue to scrutinize carefully whether an employer has timely challenged any subpoenas issued by the agency.

b. Procedural Issues

It is well established that to bring and maintain an enforcement action, certain procedural requirements must be met. For example, in 2020 the Fifth Circuit addressed whether these procedural requirements were satisfied in *EEOC v. Vantage Energy Services, Inc*.[127] Specifically, the issue on appeal was whether a "later-verified intake questionnaire" was sufficient to constitute a charge under the ADA's requirement that charges be filed within 300 days.[128]

In *Vantage Energy Services*, the claimant worked on a deep-water drillship for the defendant, and suffered a heart attack while at sea.[129] The defendant subsequently placed him on short-term disability leave, and on the day he was due to return to work, the defendant fired him, citing poor work performance.[130] The claimant, through his legal counsel, submitted a letter to the EEOC asserting the defendant had violated the ADA, and included with the letter an EEOC intake questionnaire.[131] The questionnaire included the claimant's name, address, nature of the discrimination claim, and the defendant's stated reason for the termination.[132] The claimant also checked the box at the end of the questionnaire, which

121 *EEOC v. Aerotek*, 498 Fed. Appx. 645 (7th Cir. 2013).
122 *Aerotek*, 498 Fed. Appx. at 648.
123 *EEOC v. Lutheran Social Servs.*, 186 F.3d 959 (D.C. Cir. 1999).
124 *Id.* at 959.
125 *Id.* at 964-66.
126 *Id.* at 959.
127 *EEOC v. Vantage Energy Servs., Inc.*, 2020 U.S. App. LEXIS 10560 (5th Cir. Apr. 3, 2020).
128 *Id.* at **5-6.
129 *Id.* at *2.
130 *Id.*
131 *Id.*
132 *Id.*

stated that he "wanted 'to file a charge of discrimination' and 'authoriz[ed] the EEOC to look into the discrimination' claim," and included his unverified signature.[133]

After receiving the intake questionnaire from the claimant, the EEOC added a charge number to the questionnaire, handwriting it at the top of the document.[134] This number remained the same throughout the course of the matter.[135] The EEOC then sent the claimant two letters, which, respectively, acknowledged receipt of the "charge" and requested him to supplement the questionnaire with his address and phone number.[136] The defendant also received notice of the charge, but was informed no action was required pending receipt of a perfected charge.[137]

The perfected charge, belatedly received by the EEOC, was signed under the penalty of perjury and was dated more than 300 days after the claimant's job termination.[138] Upon receipt of the perfected charge, the EEOC informed the defendant and requested a position statement, which the defendant submitted.[139]

After conducting an investigation, the EEOC determined there was reasonable cause to believe that the defendant violated the ADA, and the parties submitted to conciliation, which was unsuccessful, resulting in the filing of an enforcement action.[140] The defendant moved to dismiss the EEOC's complaint, arguing that it failed to exhaust administrative remedies because the formal charge was filed more than 300 days after the employee's termination.[141] The EEOC opposed the motion, asserting that the intake questionnaire, which was filed within 300 days, satisfied the requirement to exhaust administrative remedies, and it was inconsequential that the intake questionnaire was not verified pursuant *Edelman v. Lynchburg College*.[142]

Although the district court was persuaded by the defendant and dismissed the EEOC's enforcement action with prejudice, the Fifth Circuit reversed the decision, noting that the defendant's arguments, upon which the district court relied, were "all contrary to considerable precedent."[143] The Fifth Court first explained that the Supreme Court previously ruled in *Federal Express Corp. v. Holowecki*[144] that an intake questionnaire could qualify as a charge if it satisfied the charge-filing requirements and could be construed as a request for the agency to take remedial action.[145] Because the claimant's intake questionnaire in *Vantage Energy Services* identified the parties, described the action complained of, specifically, the claimant's belief that the defendant had discriminated against him by discharging him immediately after finishing his short-term disability leave, and indicated that the claimant wanted to file a charge and authorized the EEOC to investigate the alleged conduct, the Fifth Circuit concluded that the intake questionnaire satisfied the *Holowecki* test.[146]

In reaching this conclusion, the Fifth Circuit noted that the EEOC's treatment of the questionnaire was ambiguous because it emphasized the need for the claimant to verify the intake questionnaire, but also had assigned it a charge number. Still, it determined that, while instructive, "the EEOC's characterization of the questionnaire is not dispositive. What constitutes a charge is determined by objective criteria."[147]

Relying on *Edelman*, the appeals court also ruled that the fact the intake questionnaire was not verified upon receipt or within the 300-day filing deadline did not render the charge untimely.[148] It explained that the purposes of the verification requirement was to protect employers from the expense and disruption of a claim unless it was supported by an oath subject to the liability for perjury.[149] The Fifth Circuit reiterated that, under *Edelman*, this purpose is maintained if the technical defect, such as a lack of verification, is corrected by the time an employer must respond to the charge.[150]

133 *Id.* at **2-3. "Following *Holowecki*, the EEOC revised its Intake Questionnaire to require claimants to check a box to request that the EEOC take remedial action. . . . Under the revised form, an employee who completes the Intake Questionnaire and checks Box 2 unquestionably files a charge of discrimination." *Hildebrand v. Allegheny Cty.*, 757 F.3d 99, 113 (3d Cir. 2014).
134 *Vantage Energy Servs., Inc.*, 2020 U.S. App. LEXIS 10560, at *3.
135 *Id.*
136 *Id.*
137 *Id.*
138 *Id.* at **4-5.
139 *Id.* at *4.
140 *Id.*
141 *Id.* at **4-5.
142 *Id.* at *5, citing *Edelman v. Lynchburg College*, 535 U.S. 106 (2002).
143 *Vantage Energy Servs., Inc.*, 2020 U.S. App. LEXIS 10560, at *6.
144 *Fed. Express Corp. v. Holowecki*, 552 U.S. 389 (2008).
145 *Vantage Energy Servs., Inc.*, 2020 U.S. App. LEXIS 10560, at *6.
146 *Id.* at **7-9.
147 *Id.* at **9-10.
148 *Id.* at *11.
149 *Id.*
150 *Id.*

Thus, because the claimant eventually complied with the verification requirement, it "related back" to the time the intake questionnaire was filed.[151]

Finally, the Fifth Circuit rejected the defendant's argument that its due process rights would be violated if the intake questionnaire was treated as a charge because it did not receive formal notice of the charge with 10 days of the EEOC's receipt, as required by 42 U.S.C. § 20003-5(e)(1).[152] The court rejected the argument because the defendant failed to demonstrate what prejudice it suffered by the delay, and there was no evidence of bad faith on part of the EEOC.[153]

3. Standard for Reviewing Subpoena Enforcement

The Supreme Court in FY 2017 decided what standard a court of appeals should use when reviewing a district court's decision to enforce or quash an EEOC subpoena. While almost all circuits used the deferential abuse-of-discretion standard, the Ninth Circuit had stood alone in applying the more searching *de novo* standard. Such was the state of the law until the Court's 2017 decision,[154] in which it brought the Ninth Circuit into line with her sister circuits. Rejecting the Ninth Circuit's approach, the Court held that a district court's decision to enforce an EEOC subpoena should be reviewed for abuses of discretion, not *de novo*.[155] In so holding, the Court was guided by two principles: (1) the longstanding practice of the courts of appeals in reviewing a district court's decision to enforce or quash an administrative subpoena; and (2) whether, "as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question."[156] For the Court, each favored a more deferential standard. While the Court explained that district courts need not defer to the EEOC on what is "relevant," it did emphasize *Shell Oil*'s "established rule" that the term "relevant" be understood "generously" to permit the EEOC "access to virtually any material that might cast light on the allegations against the employer."[157]

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

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

In *EEOC v. Stanley Black & Decker, Inc.*, both the EEOC's investigatory powers and alleged undue burden created by its subpoena were at issue.[158] In *Stanley*, the charging party, a former employee, filed a charge with the EEOC alleging (1) he experienced racial discrimination during his tenure with the company; (2) he was fired due to his race, and (3) upon termination, he was offered an agreement and general release providing severance if he agreed, among other things, to waive his right to file an EEOC charge.[159] The complainant alleged this waiver was retaliatory and interfered with his rights under Title VII, the ADA, Genetic Information Nondiscrimination Act (GINA), the EPA, and the ADEA.[160] In connection with this charge, the EEOC requested that the company identify other employees who had been provided similar releases, to which the company objected.[161] In response, the EEOC issued an administrative subpoena seeking this information, asserting that its authority included the ability to investigate whether there was a practice of requiring employees to waive their rights to file EEOC charges in exchange for severance pay.[162] The company continued to object, stating, among other things, the information requested was not pertinent to the complainant's individual claims and that the EEOC could expand its investigation beyond the scope of his charge once a violation had been found.[163]

151 *Id.* at **11-12.
152 *Id.* at *13.
153 *Id.*
154 *McLane Co. v EEOC*, 137 S. Ct. 1159 (2017).
155 *Id.* at 1170.
156 *Id.* at 1166-67.
157 *Id.* at 1163. On remand, in the applicable case, *McLane Co. v. EEOC*, 857 F. 3d 813 (9th Cir. 2017), the Ninth Circuit reached the same decision, even under the deferential abuse-of-discretion standard. Citing Justice Ginsburg's concurrence in the above-referenced Supreme Court decision, the court held that, by requiring an unduly heightened showing of relevance, the district court had abused its discretion. The court therefore remanded the case to the lower court, where the employer was free to renew its argument that the EEOC's pedigree information, while perhaps not irrelevant, was unduly burdensome.
158 *EEOC v. Stanley Black & Decker, Inc.*, 2021 U.S. Dist. LEXIS 93627 (D. Md. May 17, 2021).
159 *Id.* at *2.
160 *Id.*
161 *Id.*
162 *Id.* at **2-3.
163 *Id.* at *3.

Rather than continue to pursue this administrative subpoena, the EEOC issued a new charge against the company focusing on the company's compliance with the ADEA, including whether discharged employees were required to release their rights to file a charge with the EEOC.[164] In the charge, the EEOC sought information pertaining to which employees had been provided general release agreements requiring this waiver.[165] When the company failed to respond to the new charge, the EEOC issued a new subpoena seeking this information, which was the subject of the instant lawsuit.[166] In refusing to respond to this second subpoena, the company argued that it was an abuse of the EEOC's investigatory powers and that the request did not seek information pertaining to a plausible unlawful employment practice under the ADEA.[167]

Regarding the first point, the company asserted the new subpoena was an "end-run around its more limited authority to investigate [the complainant's] original individual charge."[168] The court, however, disagreed. It explained the EEOC's authority to initiate investigations into compliance with the ADEA contained no "charge-based relevancy requirement."[169] The court also concluded that, contrary to the company's contention, there was no evidence of bad faith where the EEOC had obtained evidence, in the course of its investigation into the complainant's charge, which suggested the company may have a systemic policy involving violations of the ADEA and the information at issue in the subpoena related to the claimed ADEA violations.[170]

Regarding the latter point, the court was not persuaded by the company's argument that the investigation sought records of a release which did not evidence a plausible unlawful employment practice.[171] In this regard, the court pointed out that the company's claim, that the offer of an agreement which required the waiver of the right to file an EEOC charge was not retaliatory, was not a finding that was binding on the Fourth Circuit, especially given the EEOC's authority to investigate potential ADEA violations.[172] Moreover, the court further explained that the authority relied upon by the company, *EEOC v. Nucletron Corp*., at least suggested that the alleged conduct may constitute retaliation.[173]

Finding that the subpoena was appropriately issued and sought relevant information, the *Stanley* court next addressed whether the EEOC's subpoena imposed an undue burden. In support of its claim of undue burden, the company submitted a declaration by the company's vice president for labor and employee relations detailing the type of review that needed to be conducted and the amount of staff time such a review would take.[174] Missing from the declaration, however, was a comparison of this cost against the company's normal operating costs or an explanation relating to how the company's functions would be disrupted.[175] Nevertheless, the court acknowledged that the declaration submitted indicated the total time to conduct the review—at least 2,250 hours—was significant, and thus ordered the parties to meet and confer to reach an agreement about scope of the subpoena as it related to time and geographic reach.[176] The court, however, still recognized that the EEOC may still seek further production if "justified."[177]

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

B. Conciliation Obligations Prior to Bringing Suit

Before filing a lawsuit under Title VII based on pattern-or-practice claims under Section 707 or "class" claims under Section 706, the EEOC must investigate and then try to eliminate any alleged unlawful employment practice by informal methods of conciliation.[178] Only after pursuing such conciliation attempts may the EEOC file a civil action against the employer.[179] 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.

164 *Id.* at **3-4.
165 *Id.*
166 *Id.* at *4.
167 *Id.* at *6.
168 *Id.*
169 *Id.* at **6-7.
170 *Id.* at **7-8.
171 *Id.* at *10.
172 *Id.* at *14.
173 *Id.* at **14-15.
174 *Id.* at *18.
175 *Id.*
176 *Id.* at **17, 20.
177 *Id.* at *20.
178 42 U.S.C. § 2000e-5(b).
179 42 U.S.C. § 2000e-5(f)(1).

1. Impact of Mach Mining

Over the years employers have challenged the sufficiency of the EEOC's investigation and conciliation efforts. In April 2015, the Supreme Court addressed EEOC conciliation obligations in *Mach Mining v. EEOC*.[180] In this case, the Court held that the EEOC's attempts to conciliate a discrimination charge prior to filing a lawsuit *are* judicially reviewable, but that the EEOC has broad discretion in the efforts it undertakes to conciliate.

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

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

On remand, the EEOC moved to strike part of Mach Mining's memorandum in opposition to the EEOC's motion for partial summary judgment because it contained information from confidential settlement discussions (and the EEOC wished to bar any future disclosure of "anything said or done" during conciliation).[181] The U.S. District Court for the Southern District of Illinois held that because the Supreme Court determined that "[a] court looks only to whether the EEOC attempted to confer about a charge, and not to what happened (*i.e.*, statements made or positions taken) during those discussions," it would grant the motion to strike and would bar the parties from "disclosing anything said or done during and/or as part of the informal methods of 'conference, conciliation, and persuasion.'"[182] The court also held that the defendant-employer had no right to inquire about calculations for damages during the conciliation process.[183]

2. Investigation and Conciliation Obligations Post-Mach Mining

Courts continue to apply *Mach Mining* to clarify how charges and conciliations affect the EEOC's authority to investigate and conciliate. As discussed, pursuant to *Mach Mining*, the EEOC "must try to remedy unlawful workplace practices through informal methods of conciliation" prior to filing suit.[184] In *EEOC v. Telecare Mental Health Services of Washington, Inc.*,[185] the Western District of Washington examined whether the EEOC met its conciliation obligations prior to filing its lawsuit against the defendant. In its answer to the EEOC's complaint, the defendant brought an affirmative defense alleging failure to exhaust administrative remedies, which the court presumed was based on the EEOC's failure to attempt the required "informal methods of conciliation" prior to bringing suit.[186] The defendant brought this defense because at the charge stage, it responded to the EEOC's "formal offer to conciliate" and "initial demand" with a counteroffer that was "communicated to the EEOC as an opening offer for conciliation purposes,"[187] and, instead of proceeding to conciliation, the EEOC filed a Notice of Conciliation Failure and then filed suit in federal court.[188] The EEOC brought a motion to strike the defendant's affirmative defense, arguing that under *Mach Mining*, the court lacked authority to evaluate the sufficiency of the conciliation.[189]

180 *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645 (2015).
181 *EEOC v. Mach Mining, LLC*, 161 F. Supp. 3d 632, 635-636 (S.D. Ill. 2016).
182 *Id.* at 635-636.
183 *Id.* at 635.
184 Mach Mining, 575 U.S. at 482.
185 *EEOC v. Telecare Mental Health Servs. of Washington, Inc.*, 2022 U.S. Dist. LEXIS 55657 (W.D. Wash. Mar. 28, 2022).
186 *Id.* at *4 & n.2.
187 *Id.* at *3.
188 *Id.*
189 *Id.* at **1, 6.

The Western District of Washington denied the EEOC's motion to strike, holding that "[t]he allegations before the Court do not indisputably demonstrate that EEOC met its conciliation obligations."[190] The court observed that to the contrary, "the facts show that the EEOC sent [the defendant] what amounts to a single 'take it or leave it' offer (while apparently failing to advise [the defendant] that that is what it was), did not respond to [the defendant]'s counteroffer, and unilaterally declared its conciliation efforts a failure."[191] "It is at the very least a matter of debate whether this exchange of letters can be characterized as a 'discussion.'"[192] The court reiterated that while *Mach Mining* "makes clear that the scope of judicial review of the EEOC's conciliation efforts is narrow," the scope of review still "extends as far as is necessary to determine whether a conciliation in fact took place."[193]

This case aside, there generally remains a low bar for reviewing the EEOC's "good faith" conduct in the conciliation process and sufficiency of its conciliation efforts. For example, the Ninth Circuit held in one case that the EEOC could meet its conciliation requirements *without* naming individual class members, rejecting the premise that the EEOC must identify and conciliate on behalf of each individual aggrieved employee prior to bringing suit on behalf of a class.[194] The Fifth Circuit has similarly held that the EEOC need not name specific aggrieved individuals as part of the conciliation process in a pattern-or-practice lawsuit.[195]

Apart from the issue of whether aggrieved individuals must be named, after *Mach Mining*, courts have almost uniformly taken a "hands-off" approach to evaluating whether the EEOC's investigation and/or conciliation efforts satisfy the requirements of *Mach Mining*. If there have been any efforts to conciliate at all, courts will generally deem the investigation and conciliation requirements satisfied.[196]

But the EEOC must make *some* effort to conciliation, and courts are willing to dismiss a case or otherwise rule in favor of the defendant if it finds the EEOC completely failed to investigate or conciliate a claim.[197]

190 *Id.* at *5.
191 *Id.* at **5-6.
192 *Id.* at *6 (citing *Mach Mining*, 575 U.S. at 488).
193 *Id.*
194 *Arizona ex rel. Horne v. Geo Group, Inc.*, 816 F.3d 1189 (9th Cir. 2016).
195 *EEOC v. Bass Pro Outdoor World LLC*, 826 F.3d 791, 805 (5th Cir. 2016); *see also EEOC v. New Mexico*, 2017 U.S. Dist. LEXIS 198770 (D. N.M. Dec. 4, 2017) (rejecting the state's motion for partial summary judgment as to the previously unidentified individuals, holding that the EEOC had had sufficiently described the affected class of individuals in notifying the state of the charges and had otherwise met its conciliation obligations under *Mach Mining); EEOC v. UPS*, 2017 U.S. Dist. LEXIS 34929, **26-29 (E.D.N.Y. Mar. 9, 2017), *report and recommendation adopted* in relevant part by 2017 U.S. Dist. LEXIS 101564 (E.D.N.Y. June 29, 2017) (EEOC need not name specific aggrieved individuals where it investigated and conciliated with regard to claims arising out of the same alleged course of conduct).
196 *See, e.g., EEOC v. George Wash. Univ.*, 2019 U.S. Dist. LEXIS 77605 (D.D.C. Dec. 7, 2018) (court denied the university's motion to stay proceedings pending the EEOC's fulfillment of its conciliation obligations in a case involving claims under Title VII and the Equal Pay Act, holding that the EEOC had satisfied the conciliation obligation as to its Title VII claims by merely informing the university of the "specific allegation" giving rise to those claims and that that the EPA claim was "not subject to a conciliation requirement); *EEOC v. MJC, Inc.*, 306 F. Supp. 3d 1204 (D. Haw. 2018) (EEOC had satisfied its conciliation obligations under *Mach Mining* insofar as the EEOC had sufficiently notified the defendants of the claim, invited conciliation through the determination letter, and offered to settle the charge by proposing a settlement involving the payment of monetary damages); *EEOC v. PC Iron, Inc.*, 316 F. Supp. 3d 1221, 1231-32 (S.D. Cal. 2018) (EEOC had satisfied its conciliation obligations where the employer was aware of a discrimination claim not addressed in the EEOC's determination letter, and had made an offer to resolve the matter in response to the charge); *EEOC v. MVM, Inc.*, 2018 U.S. Dist. LEXIS 66217 (D. Md. Apr. 18, 2018) (EEOC established that it had complied with both prongs of Title VII's conciliation requirement by presenting evidence that it had informed the employer of the specific allegations and attempted to engage the employer "in some form of discussion (whether written or oral), so as to give the employer an opportunity to remedy the allegedly discriminatory practice."); *EEOC v. Dimensions Healthcare Sys.*, 2016 U.S. Dist. LEXIS 70126 (D. Md. May 27, 2016) (EEOC met its conciliation obligations by submitting a declaration in which the Director of the Commission's Baltimore Field Office noted the EEOC had "engaged in communications with the [Employer] . . . including sending [the Employer] a conciliation proposal"); *EEOC v. Stone Pony Pizza, Inc.*, 2016 U.S. Dist. LEXIS 115658 (N.D. Miss. July 7, 2016) (court found that a determination letter and an invitation to engage in a face-to-face conciliation conference sufficed to satisfy the conciliation requirements); *EEOC v. East Columbus Host, LLC*, 2016 U.S. Dist. LEXIS 118993 (S.D. Ohio Sept. 2, 2016) (EEOC complied with the "bare bones" conciliation requirement by (1) informing the employer about the specific allegations, (2) trying to engage the employer in some form of discussion so as to give the employer a chance to remedy the alleged improper practices, and (3) issuing a notice of failure to conciliate); *EEOC v. Lawler Foods*, 2015 U.S. Dist. LEXIS 167178 (S.D. Tex. Dec. 4, 2015) (court rejected argument that the EEOC must present specific evidence supporting its allegations during the conciliation process, and reinforced the principle that the EEOC need only notify the employer of the alleged unlawful practices); *EEOC v. Dolgencorp*, 249 F. Supp. 3d 890 (N.D. Ill. 2017) (court held that it was bound under Mach Mining to determine only whether the EEOC had attempted to confer regarding the charge, not to weigh in on substance of conciliation discussions); *EEOC v. Western Distribution Co.*, 218 F. Supp. 3d 1231 (D. Colo. 2016) (EEOC met its conciliation obligations by providing a settlement offer, meeting in person, and exchanging letters); *EEOC v. Amsted Rail Co.*, 2016 U.S. Dist. LEXIS 6466 (S.D. Ill. Jan. 20, 2016) (EEOC satisfied its obligation to notify the employer of the disability discrimination allegations against it, even though the communications did not name the relevant disability; court declined the employer's request to review the EEOC's correspondence regarding conciliation to determine whether the agency's conciliation efforts were a "sham." In light of *Mach Mining*, the court concluded it could only look to determine whether discussion took place and it reached the conclusion that it had).
197 *See, e.g., EEOC v. CRST Van Expedited, Inc.*, 2015 U.S. Dist. LEXIS 166797 (N.D. Iowa Dec. 14, 2015).

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

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

In *EEOC v. CVS Pharmacy, Inc.*,[198] the EEOC argued that Section 707(a) of Title VII authorizes it to bring actions challenging a "pattern or practice of resistance" to the full enjoyment of Title VII rights without alleging that the employer engaged in discrimination and without following any of the pre-suit procedures contained in Section 706, including conciliation. Specifically, the EEOC argued that Section 707(a) creates an independent power of enforcement to pursue claims alleging a pattern or practice "of resistance" and that Section 707(e), by contrast, requires only that claims alleging a pattern or practice "of discrimination" comply with Section 706 procedures.[199] The Seventh Circuit rejected this argument, holding that "there is no difference between a suit challenging a 'pattern or practice of resistance' under Section 707(a) and a 'pattern or practice of discrimination' under Section 707(e)," and that "Section 707(a) does not create a broad enforcement power for the EEOC to pursue non-discriminatory employment practices that it dislikes—it simply allows the EEOC to pursue multiple violations of Title VII . . . in one consolidated proceeding."[200] Adopting the EEOC's interpretation, the court reasoned, would read the conciliation requirement out of Title VII because the EEOC could always contend that it was acting pursuant to its broad authority under Section 707(a).[201] Noting that the EEOC's interpretation would undermine both the spirit and letter of Title VII, the court held that the EEOC is required to comply with all of the pre-suit procedures contained in Section 706 when it pursues pattern-or-practice violations.[202]

4. Evidence/Documents Relating to Conciliation

Title VII expressly provides that nothing said or done during the conciliation process "may be used as evidence in a subsequent proceeding without the written consent of the persons concerned."[203] In a 2008 decision, *EEOC v. CRST Int'l, Inc.*, the Northern District of Iowa granted the EEOC's motion to strike from the record a letter containing proposed terms of conciliation.[204] In so doing, the court rejected the employer's arguments that the letter was essential to its ability to disprove one of the EEOC's allegedly undisputed facts, that the EEOC had waived the statute's confidentiality protections by initiating a dispute regarding the substance of conciliation, and that the letter was admissible under Fed. R. Evid. 408. Significantly, the court also held, citing *Mach Mining*, that sealing the letter, as opposed to striking the letter entirely, would not serve the purpose of guaranteeing the parties that their conciliation efforts would not "come back to haunt them in litigation."[205]

The Middle District of Tennessee recently provided further insight into the confines of Title VII's confidentiality protections in the absence of consent by both parties to the conciliation. Specifically, in *EEOC v. Whiting-Turner Construction Co.*,[206] the EEOC filed a motion to quash one paragraph of a subpoena issued by the defendant to a non-party job placement agency which had previously conciliated the matter with the EEOC. Paragraph 13 of the subpoena sought "any and all documents, property, and ESI which relate to any charges of discrimination filed against [the subpoenaed party] with any federal, state or local EEO agency (including the Equal Employment Opportunity Commission and the Tennessee Commission on Human Rights)," in connection with the project at issue in the case.[207] It specified that the response should include, but not be limited to, "charges and complaints, statements of position, correspondence, notes, settlement and/or conciliation agreements (including drafts), [and] responses to requests for information."[208]

The EEOC objected to Paragraph 13 of the subpoena, arguing that Title VII's confidentiality protections prevented disclosure of information regarding conciliation proceedings, and further that conciliation-related documents were not

198 *EEOC v. CVS Pharmacy, Inc.*, 809 F.3d 335 (7th Cir. 2015).
199 *Id.* at 340-41.
200 *Id.* at 341-42.
201 *Id.* at 342.
202 *Id.* at 343. *But see EEOC v. Doherty*, 126 F. Supp. 3d 1305 (S.D. Fla. 2015), in which a district court took the opposite view.
203 42 U.S.C. § 2000e-5(b).
204 *EEOC v. CRST Int'l, Inc.*, 351 F. Supp. 3d 1163, 1174 (D. Iowa 2018).
205 *Id.* at 1175 (citing *Mach Mining*, 575 U.S. at 493).
206 *EEOC v. Whiting-Turner Construction Co.*, 2022 U.S. Dist. LEXIS 140900 (M.D. Tenn. Aug. 8, 2022).
207 *Id.* at **4-5.
208 *Id.* at *5.

relevant to any claims or defenses in the action because they are inadmissible as evidence "without the written consent of the persons concerned," which the EEOC had not given.[209] In response, the defendant argued that the majority of the information it requested in Paragraph 13, including the final conciliation agreement between the subpoenaed party and the EEOC (if any) was "purely factual material" and therefore not subject to Title VII's confidentiality protections.[210]

Observing that Title VII's confidentiality protections protect materials reflecting what was "said or done" during conciliation efforts, but does not protect "purely factual information about the merits of the charge, gleaned by the [EEOC] during its conciliation endeavors," the court granted in part and denied in part the EEOC's motion to quash.[211] The court opined that although "proposals and counter-proposals of compromise made by the parties during [conciliation efforts]" fell under Title VII's confidentiality protections, any final agreement between the EEOC and the subpoenaed party, if one existed, was *not* so protected.[212] At the same time, the court expressed no opinion as to objections that the subpoenaed party might make on its own behalf.[213]

209 *Id.* at *6 (citing 42 U.S.C. § 2000e-5(b)).
210 *Id.* at **6-7.
211 *Id.* at **8-9.
212 *Id.* at **14-15 (emphasis added).
213 *Id.* at *15.

V. REVIEW OF NOTEWORTHY EEOC LITIGATION AND COURT OPINIONS

A. Pleadings

1. Motion to Dismiss/Scope of Complaint

Although the courts continue to liberally construe the EEOC's complaints in response to a motion to dismiss filing by the employer, some basic pleading requirements must still be met. While this issue has not resulted in a court opinion during the past fiscal year, in 2019, a federal district court in Florida placed some limitations on the liberal pleading standard, requiring the EEOC to plead separate counts for each of its claims.[214] In this case, the EEOC filed a complaint against the employer, alleging Title VII race discrimination. The employer moved to dismiss, and in response, the EEOC asserted that the employer misunderstood its legal theories, which included claims for both disparate impact and disparate treatment under Title VII. The court determined that the EEOC had failed to set forth its claims of disparate impact and disparate treatment separately, rejecting the EEOC's argument that it was not necessary to do so. Citing to F.R.C.P. Rule 10(b), the court explained, "[i]f doing so would promote clarity, each claim founded on a separate transaction or occurrence … must be stated in a separate count."[215] The court directed the EEOC to file an amended complaint with separate counts and facts in support of each count of discrimination.

In a unique circumstance, a district court in Texas considered a motion to dismiss filed by the EEOC alleging lack of subject matter jurisdiction. The employer brought an Administrative Procedure Act (APA) action against the EEOC, challenging the validity of an EEOC charge and seeking declaratory and injunctive relief on judicial review of the EEOC's issuance of right-to-sue letters.[216] In 2012, the employer received notice of a commissioner's charge stating that the EEOC was investigating the employer for possible ADA and GINA violations. Six years later, the EEOC concluded its investigation and issued 54 right-to-sue letters. The employer filed the APA action, and the EEOC moved to dismiss, arguing that the court lacked subject matter jurisdiction because a right-to-sue letter did not constitute a final agency action subject to judicial review. The court disagreed, finding that a right-to-sue letter satisfied both prongs of finality, because the EEOC had "ruled definitively," and the right-to-sue letter was an action from which legal consequences would flow. The court also determined that the employer sufficiently alleged a legal wrong, and was without an adequate alternative remedy to remedy that wrong. Accordingly, the court held that the issuance of a right-to-sue letter constituted a "final agency action" that was subject to judicial review and denied the EEOC's motion to dismiss.[217]

2. Key Issues in Class-Related Allegations

a. Challenges to pattern or practice claims (including Section 706/707 issues)

In *EEOC v. Qualtool, Inc.*, the EEOC claimed violations of Title VII on behalf of the charging party and an unidentified "class" of persons, alleging discrimination based on their sex.[218] During discovery, the EEOC's Rule 26 initial disclosures identified no "Class of Aggrieved Persons," and in its response to interrogatories, the EEOC identified only one additional individual as the sole purported "class" member. No further purported "class" members were identified by the EEOC until months later, when the EEOC served its first supplemental initial disclosures, asserting for the first time, three months before the discovery deadline, that it had identified 14 other purported class members. Moreover, these alleged class members were not timely added as additional "parties" pursuant to the pretrial schedule order entered in the case.

The court weighed the EEOC's mandate to pursue the expansion of claims in an existing lawsuit to include new claims determined after a reasonable investigation against the interests of the defendant, and granted the motion to strike, without prejudice to the EEOC's right to file a separate action on behalf of the 14 purported class members.

In *EEOC v. Green Jobworks, LLC*,[219] the defendant's motion to dismiss the EEOC's pattern-or-practice complaint was denied by the court. The EEOC asserted two counts of pattern-or-practice employment discrimination against female

214 *EEOC v. Jacksonville Plumbers & Pipefitters Joint Apprenticeship & Training Trust*, 2018 U.S. Dist. LEXIS 168834 (M.D. Fla. Oct. 1, 2018).
215 *Id.* at *2.
216 *BNSF Railway Co. v. EEOC*, 2018 U.S. Dist. LEXIS 226251 (N.D. Tex. Nov. 27, 2018).
217 In the *BNSF Railway* lawsuit, the employer argued that the right to sue letters were flawed because they were issued to workers who had not been aware of the charge (since it stemmed from a Commissioner's Charge) and argued that the agency violated a ban on making public the right to sue letters because the workers were not aware of the charge. On June 11, 2019, the parties jointly filed a motion for entry of an agreed final judgment bringing the matter to closure. *See BNSF Railway Company v EEOC*, Case No. 2:18-cv-00311, Docket 23 (N.D. TX, June 11 2019).
218 *EEOC v. Qualtool, Inc.*, 2022 U.S. Dist. LEXIS 156361 (M.D. Fla. Aug. 30, 2022).
219 *EEOC v. Green Jobworks, LLC*, 2022 U.S. Dist. LEXIS 74723 (D. Md. Apr. 25, 2022).

job applicants and employees: (1) Failure to hire females for demolition and laborer positions; and (2) Assigning female employees to cleaning duties instead of equipment operation and other demolition work. The defendant argued that Count I of the EEOC's complaint failed to allege facts sufficient to demonstrate more than a few isolated discriminatory acts, and that Count II failed to state any facts demonstrating discrimination in the defendant's terms and conditions of employment. The court rejected the defendant's arguments, finding that the EEOC had alleged "evidence of conduct or statements that both reflect directly the alleged discriminatory attitude and that bear directly on the contested employment decision."

The defendant further argued that the EEOC's allegations were too discrete to plausibly indicate a pattern or practice of refusing to hire females or refusing to place females in demolition and labor assignments. The court found this argument to be unavailing.

The court further rejected the defendant's argument that, to state a pattern-or-practice claim, the EEOC must meet the standard set forth in *International Board of Teamsters v. United States*,[220] which requires "more than a mere occurrence of isolated or accidental or sporadic discriminatory acts."[221] Instead, the court held "pattern or practice" is not a separate legal claim, but rather an evidentiary framework with which a plaintiff may prove discrimination. Further, the court determined that, at the motion to dismiss stage, the plaintiff need only state a plausible claim for relief under Title VII, and direct evidence of discrimination is sufficient to carry this burden.

The court also determined that the EEOC was not required to plead the existence of an express policy to state a plausible claim of a pattern-or-practice of sex discrimination in terms or conditions of employment.

b. Other Issues

When the EEOC determines there is sufficient evidence to support some, but not all, of the alleged unlawful employment practices asserted in a complainant's charge of discrimination, the EEOC is authorized to pursue relief for those claims for which it has found reasonable cause. In a 2020 decision, *EEOC v. Pediatric Health Care Alliance, P.A.*, the district court denied the defendant's motion to dismiss the EEOC's complaint where the EEOC had determined the complainant's claim of sexual harassment was not sufficiently supported, but that there was sufficient evidence to show retaliation for reporting sexual harassment.[222] In doing so, the court found that the complaint only asserted a claim of retaliation, even though the complaint contained allegations related to the claim of sexual harassment.[223] The court also determined there was no basis to strike the allegations about the alleged sexual harassment, which the EEOC argued provided relevant background for the claim of retaliation, because the court could not conclude there was no relation between these asserted facts and the retaliation claim or that they prejudiced the defendant.[224] The court found defendant's argument regarding the sexual harassment allegations required further factual development, and thus was not appropriate to consider on a motion to dismiss.[225]

3. Who is the Employer?

In FY 2022, several courts addressed the issue of joint liability for a successor, affiliated entity, or integrated businesses for claims brought by the EEOC.

In one such lawsuit, the EEOC brought a harassment claim against an automobile dealership, arguing that the dealership and the defendant management company were an integrated enterprise for Title VII liability purposes.[226] The management company provided the dealership with management services, including human resources, payroll, advertising, accounting, and information technology, as well as human resources policies and an employee handbook, and advised the dealership on personnel matters such as sick leave and other benefits, employee performance issues, and disciplinary matters.

The court cited to the Fourth Circuit's decision in *Hukill v. Auto Care, Inc*. for its determination that multiple companies may be "so interrelated that they constitute a single employer" under the integrated enterprise. The court further adopted the *Hukill* factors to use in determining whether such companies comprise an integrated enterprise, including "(1) common

220 431 U.S. 324, 97 S. Ct. 1843 (1977).
221 *Id.* at 336.
222 *EEOC v. Pediatric Health Care Alliance, P.A.*, 2020 U.S. Dist. LEXIS 205660, **2, 4 (M.D. Fla. Nov. 4, 2020
223 *Id.* at *4.
224 *Id.*
225 *Id.* at **4-5.
226 *EEOC v. Lindsay Ford LLC*, 2021 U.S. Dist. LEXIS 212371 (D. Md. Nov. 2, 2021).

management; (2) interrelation between operations; (3) centralized control of labor relations; and (4) degree of common ownership/financial control."[227]

The court began its analysis with the common ownership/financial control factor, finding that this factor weighed in favor of a finding of an integrated enterprise because the member-owners of the dealership were three brothers, each of whom has a 33.33% ownership interest. The dealership also did not have its own executive suite, and instead relied upon the management company's Chief Operating Officer, Chief Financial Officer, Chief Marketing Officer, and General Counsel.

In analyzing the interrelation between operations factor, the court considered the management company's role in providing a wide range of services to assist the dealership's operations, including advertising, marketing, accounting, information technology, and maintaining a shared website.

The companies' centralized control of labor relations also supported a finding that the entities were an integrated enterprise because the management company exercised significant control over personnel matters. Although the dealership handled its own hiring of lower-level employees, it used general job descriptions and job application forms issued by the management company rather than the dealership, and the management company established certain requirements, such as those relating to drug testing and background checks, that had to be followed in the hiring process. Moreover, the court found that the senior management's response to the plaintiff's complaint and their involvement in the subsequent investigation cut in favor of a finding of an integrated enterprise.

The court held that these factors, and others, were consistent with an integrated enterprise, and that both defendants were involved in the employment decisions at issue in the case, granting the EEOC's cross motion for partial summary judgment on this issue.

Similarly, in *EEOC v. Green Lantern Inn, Inc.*, the EEOC alleged that defendants Green Lantern Inn (d/b/a Mr. Dominic's on Main) and Pullman Associates, LLC (d/b/a Mr. Dominic's at the Lake) subjected female workers in their restaurant to sex discrimination by creating, maintaining and failing to remedy a hostile work environment based on sex. The EEOC argued that the court should find the two entities a single employer for Title VII purposes.[228] In making its determination, the court examined the *Cook* factors articulated in *Cook v. Arrowsmith Shelburne, Inc*.[229] The *Cook* factors include: (1) interrelated operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership. In examining these factors, courts note that "the second factor, centralized control of labor relations, is the central concern of the inquiry."[230]

In the *Green Lantern* case, the court found it is undisputed that the control of labor relations weighed in favor of the EEOC, because two individuals were involved with virtually all employment processes at both operations and were the final decision makers regarding the employment decisions at issue in the case. In addition, the two restaurants had shared payroll system, tax accountant, website and Facebook accounts, personnel forms, employee manuals, and other employment documents. The court found the interrelation of operations apparent, finding it difficult to tell where the business of one defendant ceased and the business of the other began.[231] As such, the court determined that although a single employer should be found only under "extraordinary circumstances,"[232] where, as here, "the facts critical [to] the determination are undisputed" and manifestly favor the EEOC on every *Cook* factor, partial summary judgment is appropriate.[233]

In *EEOC v. Roark-Whitten Hospitality 2, LP*,[234] the U.S. Court of Appeals for the Tenth Circuit address the issue of successor liability in a case filed by the EEOC. In this case, the EEOC alleged that after defendant Roark-Whitten Hospitality 2 ("Roark-Whitten") purchased and began operating a hotel, Hispanic and Black employees were subjected to racist slurs, disparate treatment, and constructive discharges. The EEOC filed amended complaints seeking to add as defendants two additional entities, Jai Hanuman, LLC ("Jai"), which purchased the hotel from Roark-Whitten in 2014, and SGI, LLC ("SGI"), which purchased the hotel from Jai in 2016.

The district court dismissed the EEOC's claims against SGI and Jai, finding that the EEOC had failed to adequately allege a basis for successor liability. In March 2022, the Tenth Circuit revived claims against SGI.

227 *Id.*
228 *EEOC v. Green Lantern Inn, Inc.*, 2022 U.S. Dist. LEXIS 41218 (W.D.N.Y. Mar. 8, 2022).
229 *Cook v. Arrowsmith Shelburne, Inc.*, 69 F.3d 1235 (2d Cir. 1995).
230 *Cook*, 69 F.3d at 1240.
231 2022 U.S. Dist. LEXIS 41218, at *114, citing *Ayala v. Your Favorite Auto Repair & Diagnostic Ctr., Inc.*, 2016 WL 5092588, at *17 (E.D.N.Y. Sept. 19, 2016).
232 *Id.*, citing *Murray v. Miner*, 74 F.3d 402, 404 (2d Cir. 1996).
233 *Id.*, citing *Niland v. Buffalo Laborers Welfare Fund*, No. 04-CV-0187F, 2007 U.S. Dist. LEXIS 77567, 2007 WL 3047099, at *6 (W.D.N.Y. Oct. 18, 2007).
234 *EEOC v. Roark-Whitten Hospitality 2, LP*, 28 F.4th 136 (10th Cir. 2022).

The appellate court cited the "longstanding common law rule" that "where one corporation sells or otherwise transfers all of its assets to another corporation, the latter is not liable for the debts and liabilities of the transferor."[235] The court further noted the "four well recognized exceptions" to this general common law rule, including: "(1) [w]here the purchaser expressly or impliedly agrees to assume such debts; (2) where the transaction amounts to a consolidation or merger of the corporations; (3) where the purchasing corporation is merely a continuation of the selling corporations; and (4) where the transaction is entered into fraudulently in order to escape liability for such debts."[236]

The appellate court upheld a lower court's decision to dismiss the suit as to Jai, finding that the EEOC had failed to properly allege constructive notice of the claims. However, the appellate court ruled that the EEOC's allegations against SGI sufficient to establish constructive notice, because it alleged that SGI reasonably should have been aware of the EEOC's 2014 lawsuit filed against Roark-Whitten if it had conducted proper due diligence before its purchase of the hotel. The Tenth Circuit remanded for further proceedings.

In an ADA failure to accommodate case, *EEOC v. American Flange & Greif, Inc*., the defendant filed a motion to dismiss the EEOC's first amended complaint for failure to exhaust administrative remedies.[237] The charging party filed an EEOC charge against American Flange, alleging that his firing violated the ADA. However, Greif was not named in the charging party's charge.

American Flange is a wholly owned subsidiary of Greif, Inc. Moreover, the EEOC's investigation revealed that (1) "both Greif and American Flange employed the employees at the American Flange facility," and (2) "all temporary employees would be paid and controlled by Greif once they obtained permanent employment." The EEOC further alleged that Greif knew or should have known that the charging party's charge concerned Greif's own conduct and employment practices, given Greif's control over American Flange's operations.

The EEOC issued a Letter of Determination finding reasonable cause that both Grief and American Flange violated the ADA and invited both entities to engage in conciliation. The EEOC informed both defendants of failure to reach an acceptable agreement, and initiated the lawsuit, to which Greif moved to dismiss on grounds of failure to exhaust administrative remedies.

The court rejected the parties' arguments regarding whether Greif and American were a "single employer," and thus Greif need not be named in a charge of discrimination, finding that the caselaw cited by the parties do not address the failure to exhaust administrative remedies, but, instead, discuss circumstances where an action may lie against a defendant's corporate affiliates.[238]

The court explained that the proper analysis involved the narrow exception to the administrative exhaustion requirement where an "unnamed party [1] has been provided with adequate notice of the charge, [2] under circumstances where the[at] party has been given the opportunity to participate in conciliation proceedings aimed at voluntary compliance" (the "*Eggleston* exception").[239]

At issue was whether the EEOC's first amended complaint sufficiently alleged the *Eggleston* exception. The EEOC asserted that Greif had (1) notice that charging party intended for his EEOC charge to include Greif, and (2) an opportunity to conciliate the EEOC claim on its own behalf. Greif claimed *Eggleston* did not apply because the EEOC "failed to provide Greif notice of a charge against it, as opposed to a charge against its subsidiary American Flange." In response, the EEOC countered that (1) it issued a determination letter finding reasonable cause to believe Greif and American Flange discriminated against the charging party, (2) it invited both defendants to participate in the conciliation process, and (3) Greif "knew or should have known" that the charge was directed at it (and not American Flange alone) given that the employment practices at issue in the charge were "initiated and carried out by Greif."

The court determined that the EEOC adequately alleged facts warranting the exception to the general rule that a party not named in an EEOC charge cannot be sued under Title VII. As such, Greif was properly before the court as a defendant in the matter.

235 *Id.* at 146, quoting *W. Tex. Ref. & Dev. Co. v. Comm'r of Internal Revenue*, 68 F.2d 77, 81 (10th Cir. 1933) (citing federal and state cases).
236 *Id.* at 147.
237 *EEOC v. American Flange & Greif, Inc.*, 2022 U.S. Dist. LEXIS 94683 (N.D. Ill. May 26, 2022).
238 *Id.* at **10-12.
239 2022 U.S. Dist. LEXIS 94683, at *7, citing *Eggleston v. Chi. Journeymen Plumbers' Loc. Union No. 130, U. A.*, 657 F.2d 890, 905 (7th Cir. 1981).

4. Challenges to Affirmative Defenses

There have been several decisions over the past few years addressing challenges to affirmative defenses. Last year in the Northern District of Indiana, for example, the district court considered the EEOC's Rule 12(f) motion to strike affirmative defenses in the defendant's answer.[240] The court found that striking defendant's affirmative defenses is appropriate when they are insufficient on the face of the pleading, and that "bare bones conclusory allegations," "insufficient facts," and "lack of plausibility" all provide grounds to strike affirmative defenses. The court opined that affirmative defenses are subject to all pleading requirements of the Federal Rules of Civil Procedure. Accordingly, to be sufficiently pled, an affirmative defense must include a short and plain statement of facts and allege the necessary elements of the defense.[241] Additionally, the court found that stating "defendant reserves the right to add or amend its affirmative defense as facts become known through discovery" is not in and of itself an affirmative defense and thus it also be stricken. Based on the foregoing, the court ultimately granted the EEOC's motion, striking seven of the twelve affirmative defenses.

In August 2021, the Western District of New York Court[242] granted the EEOC's motion to strike defendant's affirmative defenses. The defendant had pled affirmative defenses asserting that the EEOC's claims were barred by the applicable statute of limitations, the doctrine of laches, and were unconstitutional. The court struck defendant's statute of limitations defense, finding that there was no plausible basis for it, and that the defendant had not alleged sufficient facts to assert such a defense. The court also found the doctrine of laches unavailable because the EEOC is a governmental entity and it undertook to enforce a public right or to protect the public interest by bringing the action, even if it was somewhat delayed. Lastly, the court held that because the EEOC has express authority to bring the underlying suit against defendant, the affirmative defense for unconstitutionality was insufficient as a matter of law and should therefore be stricken.

In a FY 2022 decision out of the Northern District of New York, the court considered the EEOC's Rule 12(f) motion to strike affirmative defenses in defendant's answer in a suit alleging violations of the Equal Pay Act (EPA).[243] At the center of the parties' dispute was whether salary negotiations are a job-related factor other than sex under the EPA. Specifically, the EEOC sought to have the court strike defendant's fifth affirmative defense that any differential in pay was the result of a factor other than sex, the ability to negotiate a higher salary.[244] In support of its motion, the EEOC argued that the affirmative defense was legally insufficient because the fact that the charging party and her comparator each negotiated their contracts was not related to the performance of the superintendent job.[245]

The court noted that "[i]n order to prevail on a motion to strike [an affirmative defense], a plaintiff must show that: (1) there is no question of fact which might allow the defense to succeed; (2) there is no question of law which might allow the defense to succeed; and (3) the plaintiff would be prejudiced by inclusion of the defense."[246] The court denied the EEOC's motion and noted neither the Supreme Court nor the U.S. Court of Appeals for the Second Circuit had previously determined that only job-related factors could constitute a "factor other than sex."[247] Because there was a question of law as to whether the job-related requirement would apply to negotiations, the court denied the motion.[248] Thus, the court concluded that the court may resolve this issue at a later stage in the litigation, but at this point, a motion to strike was not intended to furnish "an opportunity for determination of disputed and substantial questions of law."[249]

In March 2022, the Western District of Washington denied the EEOC's motion to strike defendant's affirmative defenses on the basis a motion to strike is not an appropriate vehicle for resolving disputed and substantial factual or legal issues.[250] In this case, the EEOC sought to strike defendant's fifth affirmative defense, asserting that the EEOC failed to conciliate and, thus, failed to exhaust its administrative remedies.[251] Defendant claimed that while the EEOC represented it was open to conciliation,

240 *EEOC v. HZ OPS Holdings, Inc.*, 2021 U.S. Dist. LEXIS 108009 (N.D. Ind. June 9, 2021).
241 *Id.* at *4, citing *Heller Fin., Inc. v. Midwhey Powder Co., Inc.*, 883 F.2d 1286, 1294 (7th Cir. 1989).
242 *EEOC v. Green Lantern Inn, Inc.*, 2021 WL 4086148, at *10 (W.D.N.Y. Aug. 19, 2021), *report and recommendation adopted*, 2021 WL 4081109 (W.D.N.Y. Sept. 8, 2021).
243 *U.S. EEOC v. Hunter-Tannersville Cent. Sch. Dist.*, No. 1:21-CV-0352, 2021 U.S. 230595, at *1 (N.D.N.Y. Dec. 2, 2021).
244 *Id.* at *2.
245 *Id.* at *3.
246 *Id.* at 2 (quoting *Demirayak v. City of New York*, No 17-CV-5205, 2021 WL 1209560, at *2 (E.D.N.Y. Mar. 31, 2021); *GEOMC Co., Ltd. v. Calmare Therapeutics Inc.*, 918 F.3d 92, 96 (2d Cir. 2019)).
247 *Id.* at 4.
248 *Id.* at 5.
249 *Id.* at 8.
250 *See* generally *EEOC v. Telecare Mental Health Servs. Wash., Inc.*, No. 2:21-cv-1339-BJR, 2022 U.S. Dist. LEXIS 55657 (W.D. Wash. Mar. 28, 2022).
251 *Id.* at *4.

it was wholly unresponsive to defendant's counteroffer and, instead, unilaterally declared conciliation efforts failed.[252] The EEOC argued this defense should be stricken for several reasons, including the fact that the court's conciliation review process was limited.[253] Ultimately, the court declined to strike the affirmative defense.[254] The court reasoned that whether the few exchanges between the defendant and the EEOC could be characterized as a discussion to meet the conciliation requirement is "at the very least a matter of debate."[255]

5. Other EEOC Motions

The EEOC achieved varied success on other miscellaneous motions filed this past fiscal year, including a motion for a temporary restraining order and motion for leave to file an amended complaint.

In *EEOC v. BNSF Railway*, the district court denied the EEOC's motion for a temporary restraining order.[256] The EEOC filed the motion while defendant's motion to dismiss was pending, asking the court to restore the charging party to her position by immediately returning her to work and prohibiting the defendant from engaging in any retaliatory action against employees who cooperate with or provide information to the EEOC in support of the lawsuit.[257] The court noted a temporary restraining order (TRO) is an extraordinary remedy.[258] In denying the TRO, the court found the EEOC had not shown a likelihood of success on merits, because it had not established that the attendance issues committed by charging party (many of which she admitted) were pretext for retaliation.[259] Further, the court also found the EEOC had not shown irreparable harm to justify the imposition of a TRO.[260]

In *EEOC v. Yale New Haven Hospital, Inc.*, the district court granted the EEOC's motion seeking leave to file an amended complaint, which essentially removed the EEOC's ADA interference claim.[261] The EEOC sought dismissal of the claim without prejudice, but the defendant argued the dismissal should be with prejudice.[262] In determining whether dismissal should be without prejudice, the court considered several factors including: (1) plaintiff's diligence in bringing the motion; (2) any "undue vexatiousness" on plaintiff's part; (3) the extent to which the suit has progressed, including the defendant's effort and expense in preparation for trial; (4) the duplicative expense of re-litigation; and (5) the adequacy of plaintiff's explanation for the need to dismiss.[263] The court found these factors weighed in favor of granting the motion to amend and dismissing the ADA interference claim without prejudice.[264] The court's decision was influenced by the fact that the defendant did not demonstrate it would suffer any substantial prejudice, which was further supported by the EEOC's unequivocal assertion it did not intend to refile the ADA interference claim in another lawsuit or in the present lawsuit.[265] Further, the court recognized that even if the EEOC were to reassert the ADA interference claim in a subsequent lawsuit, much of the discovery conducted on the remaining ADEA and ADA claims would overlap and could be used in any subsequent litigation of the ADA interference claim.[266]

6. Venue

Because there is a strong presumption in favor of the plaintiff's choice of forum, a defendant seeking to transfer venue must clear a high hurdle to convince a court to exercise its discretion and transfer the case. Typically, this presumption can only be overcome if private and public interest factors clearly point towards the alternative forum. Such factors include the potential jurisdiction of the transferee district; convenience of the witnesses; convenience of the parties; and the interest of justice.[267]

This past fiscal year in the Eastern District of Louisiana,[268] the court considered defendant's motion to transfer venue from the Eastern District to the Western District of Louisiana where the defendant claimed the alleged discriminatory act occurred,

252 *Id.* at **2-3.
253 *Id.* at *5.
254 *Id.*
255 *Id.*
256 *EEOC v. BNSF Ry.*, No. 8:21-cv-369, 2022 U.S. Dist. LEXIS 77502, at *2 (Dist. Neb. Apr. 28, 2022).
257 *Id.* at **1-2.
258 *Id.* at *35.
259 *Id.* at **43-44.
260 *Id.* at 47.
261 *EEOC v. Yale New Haven Hosp., Inc.*, No. 3:20CV00187, 2021 U.S. Dist. LEXIS 217340, at *1 (Dist. Co. Nov. 10, 2021).
262 *Id.* at **1-2.
263 *Id.* at **5-6.
264 *Id.* at **6-7.
265 *Id.* at **9, 11-12.
266 *Id.* at *10.
267 *See, e.g., EEOC v. Plains Pipeline, L.P.*, 2020 U.S. District LEXIS 52863, at *2 (D.N.M. Mar. 25, 2020); *EEOC v. Hirschbach Motor Lines Inc.*, 2018 U.S. Dist. LEXIS 199243 (D. Maine Nov. 26, 2018); *EEOC v. FedEx Ground Package System, Inc.*, 2015 U.S. Dist. LEXIS 21801 (D. Md. Feb. 24, 2015).
268 *EEOC v. Am. Screening*, No. 21-1978, 2022 U.S. Dist. LEXIS 107298 (E.D. La. June 14, 2022).

where its only office was located, and where the pertinent witnesses to the case resided.[269] While the court ultimately granted defendant's motion to transfer, the court found that the Eastern District was a proper venue.[270] Specifically, the court noted because it was undisputed the alleged unlawful employment practice occurred in Louisiana, venue was proper in any district within Louisiana, including the Eastern District.[271] However, the court granted defendant's motion to transfer, finding the Western District of Louisiana was a more convenient venue given the location of documents and witnesses.[272]

B. Statutes of Limitations and Unreasonable Delay

1. Limitations Period for Pattern-or-Practice Lawsuits

Individual claims under Section 706 of Title VII are subject to certain administrative prerequisites, including that the discrimination charge is filed with the EEOC within 300 days of the alleged discriminatory act; that the EEOC investigate the charge and make a reasonable cause determination; and that the EEOC first attempt to resolve the claim through conciliation before initiating a civil action.[273] Section 707, governing pattern-or-practice actions, incorporates Section 706's procedures, raising the implication that the EEOC must bring pattern-or-practice cases within the 300-day period defined in Section 706.

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

In 2018, a district court held that alleged victims of pattern-or-practice discrimination are not bound to file timely claims within 300 days of discriminatory conduct under Title VII or the ADA, "so long as the additional discriminatory practices, or victims, have been ascertained in the course of a reasonable investigation of the charging party's complaint and the EEOC has provided adequate notice to the defendant-employer of the nature of such charges to allow resolution of the charges through conciliation."[274] The court also agreed with the EEOC's contention that ADEA actions "are indisputably not subject to the 300-day charge-filing period applicable to private actions."[275]

A handful of other district courts in recent years have similarly held that the nature of pattern-or-practice cases is inconsistent with the application of the 300-day limitations period.[276] For example, in *EEOC v. New Prime*, a district court in Missouri observed that a "few" district courts have applied the 300-day period to pattern-or-practice cases, but then held that "the very nature" of pattern-or-practice cases attacking systemic discrimination "seems to preclude" use of the 300-day period.[277] In doing so, the court followed the reasoning set forth in *EEOC v. Mitsubishi Motor Manufacturing of America, Inc.*, a 1998 Illinois district court case that held, "[a]fter careful consideration, this Court has concluded that the limitations period applicable to Section 706 actions does not apply to Section 707 cases, despite the language of Section 707(e), which mandates adherence to the other procedural requirements of Section 706."[278] The *Mitsubishi* court noted that, when the EEOC files a pattern-or-practice charge, it is usually unable to articulate any specific acts of discrimination until the investigation begins. Therefore, it would be impossible to determine at that point if the charge was timely filed within 300 days of the discriminatory conduct and it would be arbitrary to bar liability for all conduct occurring more than 300 days before the filing of the charge.[279] Acknowledging that such an interpretation would leave pattern-or-practice claims without a limitations period and "might place an impossible burden on defendants in other cases to preserve stale evidence," the *Mitsubishi* court proposed allowing the "evidence [of discrimination to] determine when the provable pattern or practice began."[280]

As another recent example in pattern-or-practice cases, a district court decision in *EEOC v. Staffing Solutions of WNY, Inc*. upheld the magistrate judge's report and recommendation in declining to limit the EEOC to seek redress for only those claims

269 *Id.* at *1.
270 *Id.* at *4.
271 *Id.*
272 *Id.* at *6.
273 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.
274 *EEOC v. Staffing Solutions of WNY, Inc.*, 2018 U.S. Dist. LEXIS 207186, at *4 (W.D.N.Y. Dec. 6, 2018), citing *EEOC v. Upstate Niagara Cooperative, Inc.*, 2018 WL 5312645, at *3 (W.D.N.Y. 2018).
275 *Staffing Solutions*, 2018 U.S. Dist. LEXIS 207186, at *5.
276 *EEOC v. New Prime*, 2014 U.S. Dist. LEXIS 112505, at *34 (W.D. Mo. Aug. 14, 2014); *see also EEOC v. Spoa, LLC*, 2013 U.S. Dist. LEXIS 148145, at **8-9, fn. 4 (D. Md. Oct. 15, 2013) (refusing to apply 300-day period to pattern-or-practice case).
277 *New Prime*, 2014 U.S. Dist. LEXIS 112505, at *34.
278 *EEOC v. Mitsubishi Motor Mfg. of America, Inc.*, 990 F. Supp. 1059, 1085 (C.D. Ill. 1998).
279 *Id.* at 1085, accord *EEOC v. LA Weight Loss*, 509 F. Supp. 2d 527, 535 (D. Md. 2007).
280 *Id.* at 1087.

that occurred within 300 days prior to the filing of the charge.[281] The *Staffing Solutions* court went further in agreeing that the EEOC is not subject to the 300-day charge-filing period for ADEA claims.[282] However, other courts have disagreed, finding that the statute's plain language controls and there is no reason why the 300-day period cannot be calculated from the filing of the EEOC's charge.[283]

If a 300-day limitations period is applied, generally, it is triggered by the filing of a charge. (The court will count back 300 days from the date of filing of the charge and require that the discriminatory act occur within that timeframe to be actionable.)[284] If the discriminatory act is a termination, the "date of the termination" is considered to be the date the employer gives the employee unequivocal notice of the termination.[285] An employer should assert the statute of limitations defense as soon as it has knowledge of facts suggesting that the discriminatory act occurred outside the 300-day window.[286] In rebutting a statute of limitations defense, the EEOC may be granted additional time to conduct discovery shedding light on which acts will be encompassed in the lawsuit.[287]

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.[288] This is helpful to employers because it shortens the period during which the EEOC can reach back to draw in additional claimants.

In *Arizona ex rel. Horne v. Geo Group, Inc.*, however, the Ninth Circuit disagreed, finding Section 706's "plain language" did not permit tethering the 300-day period to any event other than the filing of the charge.[289] The Ninth Circuit observed that the trial court's choice to instead use the date of the Reasonable Cause Determination may have been due to the initial charge's failure to provide notice to the employer of potential class claims by other aggrieved female employees, but stated, "this concern fails to distinguish the time frame in which the employee is required to file their charge of discrimination (*i.e.*, 300 days after the alleged unlawful employment practice occurred) from the EEOC's responsibility to notify the employer of the results of the EEOC's investigation."[290]

Given the district court trend to apply the 300-day limitation to pattern-or-practice cases, the EEOC is increasingly relying on creative arguments or equitable defenses. For example, in cases involving age discrimination under the ADEA, the EEOC can attempt to avoid section 706 and 707 prerequisites altogether by bringing a pattern-or-practice suit outside of Title VII. For enforcement actions by the EEOC, the ADEA does not have a 300-day limitation.[291] In such a case, the Commission claims its authority to bring a pattern-or-practice case derives from the ADEA's 29 U.S.C. § 626(b), which adopts "the powers, remedies, and procedures provided in" the Fair Labor Standards Act (FLSA).[292]

In *EEOC v. New Mexico*, the district court accepted this premise without analysis, allowing the EEOC to reach back to 2009 to include the claims of 99 additional aggrieved individuals even though some of these individuals last experienced alleged discrimination well before 300 days prior to the filing of the charge and even though their names had not been

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

282 *Id.*

283 *EEOC v. Optical Cable Corp.*, 169 F. Supp. 2d 539, 547 (W.D. Va. 2001) (while limitations period is not particularly well-adapted to pattern-or-practice cases, problems are not insurmountable); *EEOC v. Global Horizons, Inc.*, 904 F. Supp. 2d 1074, 1093 (D. Haw. Nov. 8, 2012) (court will not disregard the statute's text or ignore its plain meaning in order to accommodate policy concerns); see also *EEOC v. FAPS*, 2014 U.S. Dist. LEXIS 136006, at *69 (D.N.J. Sept. 26, 2014) ("Like the majority of the courts that have reviewed this issue, the Court is convinced that Section 706 applies to claims brought by the EEOC"); *EEOC v. United States Steel Corp.*, 2012 U.S. Dist. LEXIS 101872, at **13-16 (W.D. Pa. July 23, 2012) (noting lack of circuit court decisions on point and citing cases evidencing the split of authority in federal district courts); *EEOC v. Global Horizons, Inc.*, 904 F. Supp. 2d 1074, 1091 (D. Haw. Nov. 8, 2012) ("spate" of recent decisions applying 300-day limitations period).

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

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

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

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

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

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

290 *Id.*

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

292 29 U.S.C. § 201, *et seq.*; *EEOC v. Horizontal Well Drillers, LLC*, 2018 U.S. Dist. LEXIS 102434 (W.D. Okla. June 18, 2018), at *26 (explaining but not deciding the EEOC's argument it could pursue a pattern or practice age discrimination claim without resort to Title VII).

disclosed to the employer prior to discovery in the lawsuit, filed in 2015.[293] The court granted summary judgment to the EEOC on the employer's statute of limitations defense because the court found that Title VII's 300-day deadline did not apply to EEOC enforcement actions under the ADEA.[294]

2. Equitable Theories to Support Untimely Claims

In an effort to resurrect claims barred by the 300-day statute of limitations applicable to Sections 706 and 707, the EEOC often turns to equitable theories, such as waiver, estoppel, equitable tolling, the single-filing rule—which allows the EEOC to litigate a substantially related non-filed claim where it arises out of the same time frame and similar conduct as a timely filed claim—and the continuing violation doctrine, which allows a timely claim to be expanded to reach additional violations outside the 300-day period.[295] While there were not any reported decisions on this issue during the past fiscal year, in FY 2018, one district court conceded the application of the continuing violation doctrine in pattern-or-practices cases was a "close call" but ultimately was bound by Tenth Circuit precedent to apply the doctrine.[296] The court further found the EEOC sufficiently alleged the continuing violations theory, denying the employer's motion to dismiss untimely disability discrimination-in-hiring claims.[297]

The continuing violation doctrine only allows the enforcing party to reach back to conduct that is not "discrete."[298] Although it is sometimes difficult to draw a distinction between discrete and non-discrete actions, the guiding principle is that a discrete action is "actionable on its own" and thus alerts the charging party as to the necessity of pursuing their claim.[299] Termination, failure to promote, and denial of overtime are all examples of discrete actions that are only reachable if within the 300-day limitation, even if they occur as part of a hostile work environment.[300]

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

> Under the EEOC's proposal, the continuing violation doctrine protects those who have slept on their rights and resurrects their otherwise expired claims, whenever a subsequent employee whom the dilatory one may never know or be aware of fortuitously appears on scene, is subject to the same type of harassing conduct, and sees fit to file a timely charge. That cannot be the rule.[301]

Likewise, during FY 2021, in *EEOC v. USF Holland, LLC*, the court rejected the EEOC's continuing-violation argument and dismissed its claims on behalf of persons passed over for jobs since 1986, notwithstanding the agency's allegations of a discriminatory pattern and practice.[302] The court explained that "[f]ailure to hire is a 'discrete act' which is easy to identify and distinguished from hostile work environment claims, which the Supreme Court has found amenable to the continuing violation doctrine."[303] It therefore concluded that the EEOC "cannot evade the limitations period by invoking the 'continuing violation doctrine,' as it does not apply to failure-to-hire claims, even when a 'systemic policy' or a 'pattern and practice' are alleged."[304]

To counter the EEOC's reliance on the continuing violation doctrine to salvage untimely claims, employers may point to *Discovering Hidden Hawaii, USF Holland*, and other district court decisions holding that, even in the context of an "unlawful employment practice" claim, such as hostile work environment, the doctrine cannot be used to expand the scope of the

293 *EEOC v. New Mexico*, 2018 U.S. Dist. LEXIS 50125, at *6 (D.N.M. Mar. 27, 2018) ("pattern or practice" not specifically alleged but the EEOC brought a representative action on behalf of "aggrieved" individuals).
294 *Id.* at **14-15 (D.N.M. Mar. 27, 2018).
295 *EEOC v. Draper Development LLC*, 2018 U.S. Dist. LEXIS 115124, at **9-10 (N.D.N.Y. July 11, 2018) (adopting flexible approach and excusing charging party's failure to verify charge where employer not prejudiced); *EEOC v. East Columbus Host, LLC*, 2016 U.S. Dist. LEXIS 118993, at *26 (S.D. Ohio Sept. 2, 2016) (restaurant server's claims against the harasser's coworker permitted where another server had timely filed a charge of discrimination against the main harasser and where the EEOC had given notice that the harassing behavior was not limited to one person); *Princeton Healthcare Sys*., 2012 U.S. Dist. LEXIS 150267, at *10 (D.N.J. Oct. 18, 2012) (where the employer's conduct forms a continuing practice, an action is timely if the last act evidencing the practice falls with the limitations period and the court will deem actionable even earlier related conduct that would otherwise be time-barred); *EEOC v. Global Horizons, Inc.,* 904 F. Supp. 2d 1074, 1093, n. 5 (D. Haw. Nov. 8, 2012); *EEOC v. Evans Fruit Co*., 872 F.Supp.2d 1107, 1112 (E.D. Wash. 2012); *EEOC v. Pitre, Inc*., 908 F.Supp.2d 1165, 1175 (D.N.M. Nov. 30, 2012).
296 *EEOC v. Horizontal Well Drillers, LLC*, 2018 U.S. Dist. LEXIS 102434, at *21, following *Bruno v. W. Elec. Co.*, 829 F.2d 957, 960 (10th Cir. 1987).
297 *Horizontal Well Drillers, LLC*, 2018 U.S. Dist. LEXIS 102434, at *23; *see also, EEOC v. PMT Corp.*, 2014 U.S. Dist. LEXIS 119465, at **5-6 (D. Minn. Aug. 27, 2014) (300-day limit does not apply to pattern-or-practice cases where a "continuing violation" is alleged); *see also EEOC v. Phase 2 Inv. Inc.*, 2018 U.S. Dist. LEXIS 65719, at **50-51 (D. Md. Apr. 17, 2018) (court denied summary judgment based on timeliness in multi-plaintiff hostile work environment case where EEOC claimed continuing violations defense).
298 *EEOC v. Phase 2 Inv. Inc.*, 2018 U.S. Dist. LEXIS 65719, at *51 (D. Md. Apr. 17, 2018).
299 *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113, 115 (2002) ("each discrete discriminatory act starts a new clock for filing charges alleging that act").
300 *EEOC v. Phase 2 Inv. Inc*., 2018 U.S. Dist. LEXIS 65719, at *51.
301 *EEOC v. Discovering Hidden Hawaii Tours, Inc*., 2017 U.S. Dist. LEXIS 154576, at *5 (D. Haw. Sept. 21, 2017).
302 *EEOC v. USF Holland, LLC*, 2021 U.S. Dist. LEXIS 188211, at *5 (N.D. Miss. Oct. 4, 2021).
303 *Id.* (citing *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115 (2002)).
304 *Id.* (citing *Frank v. Xerox Corp*., 347 F.3d 130, 136 (5th Cir. 2003)).

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.[305] Where the EEOC seeks to enlarge the number of individuals entitled to recover, rather than the number of claims a single individual may bring, the employer can make the argument that the continuing violation doctrine does not apply.

Of course, the employer can also raise equitable defenses. In *EEOC v. Baltimore County*, the court found the EEOC's eight-year unreasonable delay in bringing its lawsuit barred any award of backpay or other retroactive relief.[306] In FY 2018, another district court refused to grant summary judgment to the EEOC on the employer's laches defense, finding it an issue of fact whether the EEOC's six-year delay between the filing of the charge and the lawsuit prejudiced the employer.[307]

On the other hand, in *EEOC v. LogistiCare Solutions LLC*, the United States District court for the District of Arizona refused to grant summary judgment against the EEOC on the employer's equitable defense of laches, notwithstanding the fact that the agency had waited seven years after the relevant charges of discrimination were filed before filing suit.[308] The court began by observing that, because "[p]rejudice is 'the essential element of laches,'"[309] a delay that does not result in prejudice is insufficient to establish the defense, even where the delay is both lengthy and unexcused.[310] The court also explained that assertions of prejudice "must be supported by evidence establishing specific prejudicial losses that occurred during the period of delay."[311] On considering the employer's evidence, the court found genuine factual issues remained as to whether the delay, even if "unreasonable," had resulted in actual prejudice.[312] For instance, while the employer adduced evidence that important fact witnesses had taken other employment during the delay period, the court was not satisfied that the employer had taken even "simple steps to contact the former employees, such as by using their contact information from when they were employed."[313] Similarly, the court was not persuaded by the argument that the delay may result in an increased back pay award. The court opined that back pay alone "is not enough to show prejudice" because the court may "take the EEOC's delay into account when crafting a remedy."[314]

Similarly, in *EEOC v. Stan Koch & Sons Trucking, Inc.*, the United States District Court for the District of Minnesota granted summary judgment against the employer's laches defense upon finding the employer could not adduce competent evidence of prejudice from the EEOC's six-year delay in filing suit.[315] In its complaint, the EEOC alleged the employer, a trucking company, had made employment decisions based on a physical-abilities test that had a disparate impact on female drivers.[316] Following discovery, the EEOC moved for summary judgment.[317] The employer maintained that its laches defenses should survive because there was evidence that its "policies and personnel had changed" during the delay period, "such that it no longer had the resources to successfully mount its defense."[318] The court, however, could find no such evidence. It observed that "[c]ounsel for the EEOC represented at oral argument that the EEOC deposed every person [the employer] identified as having been involved in [its] use of the [physical-abilities test], and that all voluntarily appeared for their depositions."[319] By contrast, "[e]ven when pressed at oral argument, [the employer's] counsel could not identify a specific key player or relevant

305 *EEOC v. Swissport Fueling, Inc.*, 916 F. Supp. 2d 1005, 1033-34 (D. Ariz. Jan. 7, 2013); see also *Evans Fruit Co.*, 2012 U.S. Dist. LEXIS 169006, at *8 (holding that some individual claims were barred even under the continuing violation doctrine because the alleged unlawful acts were separated by up to 6-8 years).

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

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

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

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

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

311 *Id.* at *5.

312 *Id.* at **5-6.

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

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

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

316 *Id.* at *2.

317 *Id.*

318 *Id.* at **33-34.

319 *Id.* at **34-35.

information that was no longer available."[320] The employer did cite instances in deposition testimony where the deponent could not recall certain facts, such as dates when cutoff scores for the physical-abilities test were modified.[321] However, the court found that even if the deponents could recall these details, the information "would fall far short of the evidence needed" to show that the test was job-related or used because of a business necessity.[322] Because the court found no evidence from which a reasonable factfinder could infer prejudice, it concluded that the employer's laches defense did not stand as a barrier to granting summary judgment to the EEOC on liability issues.[323]

It is worth posing one additional question before moving on to the next subsection. Setting aside whether a discrete act occurring outside the 300-day limitations period is *actionable*, may it be *considered* as relevant evidence in the context of a hostile work environment claim? In FY 2018, a district judge issued a ruling in favor of the EEOC in an enforcement action, addressing whether the court could consider discrete acts—occurring outside the 300-day limitations period—when evaluating a hostile work environment.[324] The EEOC brought suit against alleged joint employers on behalf of nine former employees and other aggrieved individuals, complaining of discrimination, retaliation, and harassment on the basis of race, sex, color, and/or national origin.[325] (Seven of the individuals joined as intervenors as well.) In their motion to dismiss, defendants argued that the Title VII claims must be limited to acts occurring on or after February 10, 2009, which marked 300 days prior to the filing of a discrimination charge by the initial claimant.[326] In response, the EEOC and intervening plaintiffs pointed out that conduct predating the 300-day period may be considered by a fact-finder as part and parcel of a hostile work environment claim, and as "'background evidence' of discriminatory intent."[327] The court noted that the U.S. Supreme Court had not expressly decided the question of "whether discrete acts of discrimination falling outside the 300-day window may be considered in conjunction with a hostile work environment claim."[328] Nonetheless, the court ultimately agreed with the plaintiffs and declined to adopt a rule "categorically barring the use of discrete acts to support a hostile work environment claim."[329] By the same reasoning, the court refused to dismiss claims based on conduct alleged in the complaint that did not include specific dates or a temporal context.[330]

C. Intervention and Consolidation

This section examines intervention and consolidation by the EEOC, as well as the more common phenomenon of intervention by private plaintiffs in litigation brought by the EEOC, and the standards courts apply to determine whether to grant motions to intervene. This section also surveys recent intervention-related issues decided by courts, including allowing intervention by individuals who have not exhausted their individual administrative remedies, allowing intervention by individuals who have previously stipulated to a dismissal of claims, the complicated issues that arise when hundreds of individuals litigate their individual claims alongside EEOC pattern-and-practice claims, and the balancing of factors used in determining whether cases are consolidated.[331]

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

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

In Title VII actions, at the court's discretion, the EEOC may intervene in private lawsuits where "the case is of general public importance."[332] Courts generally accord a great deal of deference to the EEOC's determination that a matter is of "general

320 *Id.* at *35.
321 *Id.* at **35-36.
322 *Id.* at *36.
323 *Id.* at **36-37.
324 *EEOC v. Jackson Nat'l Life Ins. Co.*, 2018 U.S. Dist. LEXIS 156258 (D. Colo. Sept. 13, 2018).
325 *Id.* at **2-15.
326 *Id.* at *16.
327 *Id.* at *18.
328 *Id.*
329 *Id.* at **22-25.
330 *Id.* at **25-27.
331 For a more in-depth discussion regarding rules applicable to intervention and case law interpreting it, please see Barry A. Hartstein, *et al., Annual Report on EEOC Developments: Fiscal Year 2013*.
332 42 U.S.C. § 2000e-5(f)(1).

public importance" and usually will not require any proof of public importance beyond the EEOC's conclusory declaration.[333] The same approach is followed in dealing with intervention in ADA actions.[334]

Federal Rule of Civil Procedure 24(b) generally addresses "permissive intervention" in civil cases, and provides that anyone may intervene who "(A) is given a conditional right to intervene by a federal statute [such as Title VII's grant of a conditional right to intervene to the EEOC]; or (B) has a claim or defense that shares with the main action a common question of law or fact."[335] Rule 24(b) instructs courts to consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights in determining whether to grant motions to intervene.[336]

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

- whether the EEOC has certified that the action is of "general importance"; and
- whether the request is timely.[337]

Courts have stated that the timeliness requirement is flexible, subject to district judge discretion. The factors to determine timeliness include: (a) the length of time the applicant knew or should have known of its interest before making the motion; (b) prejudice to existing parties resulting from the applicant's delay; (c) prejudice to the applicant if the motion is denied; and (d) the presence of unusual circumstances militating for or against a finding of timeliness.[338] With respect to the knowledge factor, in *EEOC v. Birchez Associates*,[339] a court denied intervention to two non-charging parties who attempted to intervene a year and a half after the complaint had been filed, reasoning that they knew or should have known of their interest well before they made the motion. Similarly, in *EEOC v. Danny's Restaurants, LLC*,[340] the court denied intervention to the individual owner of the defendant restaurant who sought to intervene well after the trial on damages had concluded.

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

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

Title VII and the ADA expressly permit a charging party to intervene in an action brought by the EEOC against the charging party's employer.[341] The ADEA, on the other hand, makes no mention of intervention. Thus, once the EEOC pursues a lawsuit under the ADEA, the charging party's right to intervene or commence their own lawsuit terminates.[342]

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

333 *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).

334 42 U.S.C. § 12117.

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

336 *Id.*

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

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

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

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

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

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

Rule 24(a) provides:

(a) **Intervention of Right.** On timely motion,[343] the court must[344] permit anyone to intervene who:

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

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

Given Title VII's and the ADA's language expressly permitting an aggrieved person to intervene in a lawsuit brought by the EEOC, most courts analyze a charging party's motion to intervene under Rule 24(a). While courts construe Rule 24 liberally in favor of potential intervenors, an applicant for intervention bears the burden of showing that they are entitled to intervene.[345]

A minor overlap between the impetus for the EEOC's case and a proposed intervenor's allegations are insignificant where the facts constituting the proposed intervenor's allegations and their requested relief are substantively different from the aggrieved's claims and requested relief.[346] If pendent claims are involved (*e.g.*, tort claims or claims arising out of state anti-discrimination statutes), those claims are analyzed under Rule 24(b).[347] Rule 24(b) may also apply if the movant is not aggrieved by the practices challenged in the EEOC's lawsuit[348] or the movant is a governmental entity other than the EEOC.[349] Note, however, that some courts have allowed intervention solely on the basis that a motion to intervene is uncontested,[350] but will deny intervention under a traditional Rule 24(a) analysis. For example, in *EEOC v. 1618 Concepts Inc.*,[351] the court denied intervention on the remaining claims of breach of contract and constructive discharge in violation of public policy because the plaintiff failed to show that he had an interest in the subject matter of the action.

A plaintiff-intervenor's Title VII complaint in intervention is limited to the scope of the EEOC investigation that can reasonably be expected to "grow out of the charge of discrimination."[352] An individual is not required to thoroughly describe the discriminatory practices in order to meet the requirements of Rule 24(a).[353] Courts will also permit intervention even when the individual's complaint includes claims that are legally barred, reasoning that these claims may be used to support a claim that is timely.[354]

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

Although employees must generally exhaust their administrative remedies in order to file a Title VII or ADA civil suit independently, one court allowed the intervention of 10 former or prospective employees who had not filed a charge of discrimination at all with respect to their claims. In *EEOC v. Stone Pony Pizza, Inc.*,[355] the EEOC initiated a pattern-or-practice lawsuit alleging the company discriminated against Black employees/prospective employees by failing to hire them for front-of-house positions. Eleven individuals intervened in the action, including 10 who never filed charges of discrimination. The company filed a motion for summary judgment seeking dismissal of these individuals' claims due to their failure to exhaust their administrative remedies. The intervenors argued they were entitled to intervene as a matter of right because they were "persons aggrieved" by the company's alleged unlawful employment practices under 42 U.S.C. § 2000e-5(f)(1) or, alternatively,

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

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

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

346 *Id.* at *9.

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

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

349 *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)).

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

351 2020 U.S. Dist. LEXIS 2090, at **22-22.

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

353 *Id.* at *5.

354 *Id.* at *6.

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

were entitled to permissive intervention under the "single filing rule," otherwise known as the "piggybacking rule," allowing them to exhaust their administrative remedies vicariously based on the lone charging party's exhaustion. The court allowed intervention by the 10 individuals because it found the individuals alleged "essentially the same claim" as the charging party-plaintiff—although the court declined to hold the individuals were "persons aggrieved" or entitled to application of the "single-filing rule." The court, however, dismissed the claims of intervenors that arose long before the lone charging party's claims, holding that the charging party's charge could not possibly have put the company on notice of these individuals' older claims.

One court has also applied the "single filing rule" to a charging party who failed to timely file her EEOC charge. In *EEOC v. JCFB, Inc.*,[356] the charging party filed almost a year after the statutory period for filing a charge of discrimination ended. However, in rejecting defendant's attempts to distinguishing plaintiff's claims, the court exempted the plaintiff from the administrative requirement to timely file and found that the timely filed plaintiff's claims were identical to the late-filed plaintiff's claims.

In a case heard in FY 2022, *EEOC v. N. Georgia Food Inc.*,[357] the EEOC brought claims against the defendant for sexual harassment and hostile work environment, pregnancy discrimination, and retaliation under Title VII of the Civil Rights Act of 1964.[358] Plaintiff-intervenor filed a motion under Rule 24(a)(1) of the Federal Rules of Civil Procedure to intervene 21 days after the EEOC commenced suit.[359] The EEOC did not oppose the motion and the defendant did not respond, as it had yet to make an appearance in the case.[360] The court granted the plaintiff-intervenor's motion, recognizing that Title VII authorizes her to intervene and noting that her Rule 24 motion was timely filed.[361]

In *EEOC v. Activision Blizzard Inc.*,[362] while in the midst of its own parallel state court lawsuit against the defendant, the California Department of Fair Employment and Housing (DFEH) sought to intervene in this federal case brought by the EEOC against the defendant after the parties agreed to settle, and the court's consent decree was set to be entered to that effect.[363] Concerned that the consent decree could permit relevant evidence for DFEH's state law claims to be destroyed and might release relevant state law claims, DFEH moved to intervene under Rule 24(b)(1).[364] DFEH's motion was denied, but not before the court noted DFEH's declared interest in the case, to uphold the rights of all California citizens, exceeded the bounds of Rule 24, as such interest would allow DFEH to potentially intervene in almost every employment action in California.[365] Moreover, the court denied intervention because DFEH's concern about evidence destruction, although a potentially sufficient reason to allow intervention in some situations, was found insufficient here because the concern was based on mere speculation, at best. [366]

In *EEOC v. J & R Baker Farms, LLC*,[367] the court granted a motion to amend the complaint to add 10 additional plaintiff-intervenors in the EEOC's pattern-or-practice lawsuit, even though the individuals were not eligible to participate in the lawsuit under the single-filing rule. (The court had previously ruled potential plaintiff-intervenors whose claims arose after the date any representative plaintiff filed a representative charge could not take advantage of the single-filing rule.) Yet, the court held those individuals could permissively intervene under Rule 24(b)(1)(B) because their claims shared common questions of law and fact with those in the lawsuit.

In *EEOC v. Horizontal Well Drillers, LLC*,[368] the plaintiff-intervenor alleged class claims despite stating in his charge that he brought his charge individually. However, during the course of the EEOC investigation, the EEOC had requested additional information, including the employer's hiring policies, methods for screening and recruiting, and records of everyone hired and not hired from the applicant pool. The EEOC later issued a "Notice of Expanded Investigation and Request for Additional Info." Despite the plaintiff-intervenor's failing to state that he sought to represent others in his charge, the court permitted intervention. The court was satisfied that the employer was on sufficient notice and should have reasonably expected

356 *EEOC v. JCFB, Inc.*, 2019 U.S. Dist. LEXIS 102862 (N.D. Cal. June 19, 2019).
357 *EEOC v. N. Ga. Foods Inc.*, 2022 U.S. Dist. LEXIS 68541 (W.D.N.C. Apr. 13, 2022).
358 *Id.* at *1.
359 *Id.* at ** 1-2.
360 *Id.* at *2.
361 *Id.* at **2-3.
362 *United States EEOC v. Activision Blizzard Inc.*, 2021 U.S. Dist. LEXIS 250822 (C.D. Cal. Dec. 20, 2021).
363 *Id.* at **1-4
364 *Id.* at **2-4.
365 *Id.* at **1-2, 4.
366 *Id.* at *3.
367 *EEOC v. J & R Baker Farms, LLC, 2016 U.S. Dist.* LEXIS 29167 (M.D. Ga. Mar. 8, 2016). EEOC v. Horizontal Well Drillers, LLC, 2018 U.S. Dist. LEXIS 102434 (W.D. Okla. June 18, 2018).
368 *EEOC v. Horizontal Well Drillers, LLC*, 2018 U.S. Dist. LEXIS 102434 (W.D. Okla. June 18, 2018).

class claims to grow out of the charge upon receipt of the Notice of Expanded Investigation, along with the requests for additional information.

At least one federal appellate court has held a mandatory arbitration agreement does not preempt an individual's right to intervene. In *EEOC v. PJ Utah, LLC*,[369] the Tenth Circuit reversed the district's court's denial of intervention by the allegedly aggrieved employee. The EEOC brought an enforcement action against the employer for allegedly denying a workplace accommodation to the employee and terminating his employment for requesting an accommodation. The employee sought to intervene in the EEOC's lawsuit, but the district court held the employee's claims were subject to mandatory arbitration under an agreement the employee's mother had signed on his behalf. The court of appeals overturned the district court's decision, holding that the denial of a motion to intervene is a final order subject to immediate review, and finding the arbitration agreement did not affect the employee's unconditional right to intervene under Rule 24(a). The court of appeals further held the district court's order compelling arbitration was not yet appealable because it was not a final decision—as the EEOC's claim against the employer remained.

3. Adding Pendent Claims

Courts may allow individual intervenors to assert pendent state or federal law claims in addition to the EEOC's federal claims, but are willing to entertain defendants' motions to dismiss pursuant to Rules 12(b)(6) and 24(b) as discussed below. While determining timeliness for purposes of intervention is not a fixed requirement, courts will uphold the statute of limitations for pendent state law claims.[370] In some instances, courts have permitted leave to amend the complaint to add factual detail related to pendent claims even when the plaintiff-intervenors knew most if not all of the alleged facts at the time they filed their initial complaint in intervention. In *EEOC v. JBS USA, LLC*,[371] the plaintiff-intervenors filed amended complaints adding factual detail supporting their pendent claims in response to the defendant's motion for judgment on the pleadings arguing the initial complaints did not contain sufficient factual detail. Although the initial complaints were filed almost nine years prior to the motion to amend, the court permitted amendment, reasoning the first time the plaintiff-intervenors were on notice of a potentially deficient complaint was when the defendant filed a motion for judgment on the pleadings, which occurred only two months before the plaintiff-intervenors' motion to seek leave to amend.

As explained above, Rule 24(b)(1)(B) allows the court, in its discretion, to permit intervention by a person "who has a claim or defense that shares with the main action a common question of law or fact." In exercising its discretion, the court "must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." This standard is commonly used for analyzing pendent claims. Further, courts will rely on 28 U.S.C. §1367 in asserting supplemental jurisdiction over state law discrimination claims in intervention actions.[372] In a 2020 decision, however, in *EEOC v. Norval Electric Cooperative, Inc.*,[373] the court held that in order for the court to hear an intervenor's state law claims, the intervenor must seek leave from the court to file an amended complaint that contains both her federal and state law claims, reasoning the court lacked authority to remove or consolidate a state court action to federal court. Further, the court also declined to exercise supplemental jurisdiction over the intervenor seeking judicial review of proceedings before the state Human Rights Commission, reasoning there was nothing to be gained in terms of judicial economy or avoidance of risk of conflicting decisions.[374]

In an older decision, *EEOC v. Mayflower Seafood of Goldsboro, Inc.*,[375] the court allowed the plaintiff-intervenor to assert her state law claims for assault, battery, intentional and negligent infliction of emotional distress, negligent hiring, supervision, training, and retention, and wrongful discharge because the factual bases for these claims and the Title VII gender discrimination and sexual harassment claims were closely related, and it would not require a lengthy extension of the case deadlines. Likewise, in *EEOC v. Favorite Farms*,[376] the plaintiff-intervenor survived a motion to dismiss her state law claims for assault and battery because the issue of vicarious liability was more appropriately addressed at the summary judgment stage.

369 *EEOC v. PJ Utah, LLC*, 822 F.3d 536 (10th Cir. 2016).
370 *EEOC v. OnSite Solutions, LLC*, 2016 U.S. Dist. LEXIS 158620, at **8-9 (W.D. Okla. Nov. 16, 2016).
371 *EEOC v. JBS USA, LLC*, 2021 U.S. Dist. LEXIS 24079, at **21-23 (D. Col. Feb. 8, 2021).
372 *EEOC v. PC Iron, Inc.*, 2017 U.S. Dist. LEXIS 141187, at **9-10 (S.D. Cal. Aug. 31, 2017); *EEOC v. Cappo Mgmt*. XXIX, 2021 U.S. Dist. LEXIS 64326, at **3-4 (E.D. Cal. Mar. 31, 2021) (exercising supplemental jurisdiction over California FEHA disability and common law claims under §1367).
373 *EEOC v. Norval Elec. Coop. Inc.*, 2020 U.S. Dist. LEXIS 58548, at **10-11 (D. Mont. Apr. 2, 2020).
374 *Id* at *7.
375 *EEOC v. Mayflower Seafood of Goldsboro, Inc.*, 2016 U.S. Dist. LEXIS 101154 (E.D.N.C. Aug. 2, 2016).
376 *EEOC v. Favorite Farms, Inc.*, 2018 U.S. Dist. LEXIS 1482 (M.D. Fla. Jan. 4, 2018).

In contrast, in *EEOC v. Norval Electric Cooperative, Inc.*,[377] a Montana district court held that while it could exercise pendent jurisdiction over an intervenor's state law claims that arise from the same nucleus of facts as the federal claims, in order for the court to hear those state law claims, the intervenor must ask the court for leave to file an amended complaint that contains both her federal and state law claims.

Note that in *EEOC v. LXL Learning, Inc.*,[378] the court permitted intervention even though the parties had stipulated to dismissal of a prior lawsuit with prejudice. After the dismissal and after the EEOC had initiated its own lawsuit, the plaintiff-intervenor sought to intervene on the Title VII claim (which the employer did not oppose based on the prior agreement) under a different factual theory. The intervenor also sought to add a state law claim previously not asserted. The employer opposed such additions on the basis that the stipulated dismissal barred the plaintiff-intervenor from any claims or theories in the case beyond what the EEOC had included in its complaint. However, while the court agreed that the employer did not consent to expand the case, the court conditionally permitted intervention with the understanding that the employer may further pursue its *res judicata* defense.

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

Courts have made clear that only the EEOC may pursue Section 707 pattern-or-practice claims, and individuals may not assert such claims.[379] Where individual employees or the EEOC also assert individual claims in a pattern-or-practice lawsuit initiated by the EEOC, however, managing the various individual claims becomes complicated because of the different proof schemes. While there are not any recent reported cases on this issue, *EEOC v JBS USA, LLC*[380] provides useful guidance in dealing with this issue.

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

The employer moved to dismiss the claims of several categories of employees, including those who were proceeding *pro se* and not engaging in discovery. The court granted the employer's motion to dismiss the claims of 16 *pro se* plaintiff-intervenors for failure to prosecute their cases. The employer also argued that the EEOC could not seek relief on behalf of 18 other individuals whose claims had previously been dismissed for failure to prosecute. The court agreed and held, based on *res judicata* principles, the EEOC could not assert claims on behalf of the individual plaintiff-intervenors whose claims had been dismissed. In a later proceeding, the court dismissed 13 remaining plaintiff-intervenors for failure to comply with a court order for each plaintiff-intervenor to file written notice of their current address and telephone number.[381]

The employer also moved to dismiss 36 individuals' claims due to their failure to file Title VII charges. The individuals argued their claims were saved under the single-filing rule, described above. The court declined to adopt a categorical rule that the single-filing rule only applies to class actions and noted only the Third Circuit has so held.[382] Hence, the court denied dismissal and held seven individuals' claims were subject to the single-filing rule because the employer was on notice of potential class allegations, given multiple employees filed charges alleging similar discriminatory treatment on the same day.

5. Consolidation

Under Rule 42, a court may "join for hearing or trial any or all matters at issue in the actions; consolidate the actions; or issue any other orders to avoid unnecessary cost or delay" if actions before the court involve a common question of law or fact.[383] While a plaintiff's lawsuit may involve a common question of law or fact brought in a separate lawsuit by the EEOC, courts will use a balancing test to determine whether consolidation would avoid unnecessary costs or delay. Here, too,

377 *EEOC v. Norval Elec. Coop. Inc.*, 2020 U.S. Dist. LEXIS 58548, at **10-11 (D. Mont. Apr. 2, 2020).
378 *EEOC v. LXL Learning, Inc.*, 2017 U.S. Dist. LEXIS 200184 (N.D. Cal. Dec. 4, 2017).
379 *EEOC v. JBS USA, LLC*, 2012 U.S. Dist. LEXIS 167117 (D. Neb. Nov. 26, 2012).
380 *EEOC v. JBS USA, LLC*, 2016 U.S. Dist. LEXIS 110697 (D. Neb. Aug. 19, 2016).
381 *EEOC v. JBS USA, LLC, 2017* U.S. Dist. LEXIS 63879 (D. Neb. Apr. 27, 2017).
382 *See Communications Workers of Am. v. New Jersey Dep't of Personnel*, 282 F.3d 213, 217 (3d Cir. 2002).
383 Fed. R. Civ. P. 42.

although there were not any reported decisions on this issue in FY 2022, *EEOC v. Faurecia Auto Seating, LLC*,[384] is illustrative regarding the manner in which this issue may be dealt with by the courts.

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

D. Identity of Class Members in EEOC Litigation

Courts continue to address the issue of identification of class members in EEOC-led class actions. In a recent decision, *EEOC v. Qualtool, Inc.*,[385] the EEOC initiated the instant suit on behalf of one named individual and an unidentified class of persons who had been similarly harmed.[386] No other person was identified in the complaint or in the EEOC's initial disclosures.[387] Only in its response to interrogatories did the EEOC identify one other person, forming a two-person class.[388]

Then, one year and three months after filing the complaint, the EEOC identified five more class members in its First Supplemental Initial Disclosures.[389] Another four class members were disclosed about a month later, and five more members were added the next week, totaling 14 additional members post-complaint and post-interrogatory responses.[390] Relying on the court's Case Management and Scheduling Order to support the timing of its disclosure since the discovery cutoff date had not yet expired, the EEOC defended its delay.[391] But the court did not agree.

Contesting the EEOC's argument, the court anchored its decision to strike all 14 class members based on a conjunctive reading of Rule 26(a) and Rule 26(e) of the Federal Rules of Civil Procedure. Viewed together, Rule 26(a) and Rule 26(e) impose a duty on a party to supplement its Rule 26(a) responses "in a timely manner if the party learns in some material respect the disclosure or response is incomplete or incorrect." Notably, the facts supported the contention that the EEOC had some information about the alleged class members months before submitting its first set of supplemental disclosures.

Taking into account the significant number of potential new class members and the timing of the EEOC's disclosure of same, the court ruled that allowing any one of the 14 additional members depleted defendant's chances of completing discovery and preparing its defense.[392] Finding the disclosure of the additional claimants untimely and prejudicial, the EEOC was left with its original two-person class.[393]

Following the court's order, another discovery battle ensued between the parties.[394] This time it was based on whether eight of the stricken potential plaintiffs, whom the EEOC relayed would now be used as fact witnesses, could be (a) excluded from providing deposition testimony pursuant to Rule 37(c)(1) and Rule 26(e) of the Federal Rules of Civil Procedure or (b) be compelled to testify at a deposition without ever being subpoenaed by the defendant or the plaintiff to do so.[395]

Initially, before the witnesses were stricken from being class members and while the EEOC still represented the witnesses, the EEOC had noticed their depositions, and the defendant decided against subpoenaing the witnesses' depositions testimony.[396] However, after the witnesses were stricken as class members, the defendant still did not subpoena their depositions.[397] The court found no merit in the defendant's argument to strike the eight witnesses from testifying at a deposition because while the EEOC was representing the witnesses, it complied with the requirements of Rule 26(a) and Rule 26(e) of the Federal Rules of Civil Procedure.[398] The EEOC properly disclosed the identity of the witnesses after interviewing them and amended its responses

384 *EEOC v. Faurecia Auto Seating, LLC*, 2018 U.S. Dist. LEXIS 105391 (S.D. Miss. June 25, 2018).
385 *United States EEOC v. Qualtool, Inc.*, 2022 U.S. Dist. LEXIS 156361 (M.D. Fla., Aug. 30, 2022).
386 *Id.* at *2.
387 *Id.* at **2-3.
388 *Id.* at *2.
389 *Id.* at *3.
390 *Id.*
391 *Id.* at **3-4.
392 *Id.* at **6-7.
393 *Id.* at **2, 7.
394 *United States EEOC v. Qualtool, Inc.*, 2022 U.S. Dist. LEXIS 164249 (M.D. Fla., Sept. 12, 2022).
395 *Id.* at **1-2.
396 *Id.* at **1-2.
397 *Id.* at **3-6.
398 *Id.* at **4-5.

to interrogatories to provide the name, contact information, and subject of each witnesses' testimony.[399] Because the EEOC met its requirements under Rule 26(a), Rule 26(e), and Rule 37(c), the court found an exploration into whether the exceptional circumstances under Rule 37(c), which provides pathways for admitting witnesses who should be excluded, was unwarranted because the EEOC had satisfied its duties.[400]

As the defendants had failed to subpoena the witnesses' testimony in accordance with Rule 30(a)(1) and Rule 45 of the Federal Rules of Civil Procedure, the court found it lacked any authority to compel the witnesses to appear for depositions, since neither the defendant nor the plaintiff ever subpoenaed their appearance.[401]

E. Other Critical Issues in EEOC Litigation

1. Protective Orders

Issues continue to arise concerning the scope of enforceability related to confidentiality agreements and protective orders. While not many decisions on this topic were issued in FY 2022, some decisions from the recent past are instructive.

For instance, in *EEOC v. University of Miami*,[402] which involved claims of Equal Pay Act violations, the parties entered into a confidentiality agreement stipulating specific contents of documents to be designated as confidential. During discovery, the University produced documents relating to its salary recommendations and justifications for multiple faculty members, as well as documents relating to the decision to promote the plaintiff professor and her alleged comparator.[403] The University attached redacted versions of these documents to its motion for summary judgment, and filed a motion to seal the unredacted versions.[404] Plaintiffs opposed the motion and the court agreed.[405] The court noted that since the documents were filed with a pretrial motion requiring judicial resolution on the merits, they were subject to the common law right of access.[406] Only a showing of good cause could overcome the right of access, which the court found the University failed to demonstrate.[407] The court stated the University's motion to seal, without the benefit of reviewing the unredacted documents at issue, did not show the University's interest in redacting the names of individuals involved in the promotion and tenure review process, nor did it describe the process.[408]

While a protective order commonly governs discovery in most employment law cases, protective orders may also be used to assist in settlement discussions. In one FY 2019 case,[409] a magistrate judge held a pre-discovery settlement conference with the parties in which she suggested disclosure of certain confidential financial information and documents might be beneficial for the settlement process.[410] Although discovery had not yet commenced, the parties agreed to be bound by a protective order for the limited purpose of engaging in settlement discussions with the magistrate judge.[411]

The public generally has a right to judicial records. A party seeking to limit public access to such records has the burden to show sealing is appropriate and must support its position with specific reasons. In a disability discrimination case,[412] a federal court in North Carolina granted, in part, the parties' request to seal certain personal and private medical information of a kind not ordinarily made public, holding privacy interests override the public's interest in access to such records. The court sealed personal and medical information of limited or no relevance to the case, such as claimant's medical records concerning irrelevant health conditions. The court also granted defendant's request to seal deposition transcripts and Occupational Safety and Health Administration records containing health information of employees not parties or claimants on the grounds this information was not relevant. The court declined, however, to seal information about the nature of injuries suffered by employees because it was relevant to the court's decision. The court also denied the parties' requests to seal other types of information. For example, the court disagreed the name of the claimant's prescription drug at issue in her discharge and the

399 *Id.* at *5.
400 *Id.* at **5-6.
401 *Id.* at **6-7.
402 *EEOC v. Univ. of Miami*, 2021 U.S. Dist. LEXIS 89226, at *2 (S.D. Fla. May 11, 2021).
403 *Id.*
404 *Id.*
405 *Id.* at **2-5.
406 *Id.* at *6.
407 *Id.* at *5.
408 The University filed an unopposed motion for reconsideration providing additional facts regarding the tenure review process along with a sworn declaration. The court granted the motion and allowed the University to redact the names of certain individuals involved in the promotion and tenure review process.
409 *EEOC v. Prestige Care, Inc.*, 2018 U.S. Dist. LEXIS 217857 (E.D. Cal. Dec. 27, 2018).
410 *Id.* at **1-2.
411 *Id.*
412 *EEOC v. Loflin Fabrication LLC*, 2020 U.S. Dist. LEXIS 119252 (M.D.N.C. July 8, 2020).

results of a drug test were otherwise sensitive information. The court also refused to seal information concerning dates of treatment and diagnoses because these were relevant to the court's summary judgment decision in the case. The court found a table listing prescriptions employees disclosed per company's drug disclosure policy, but which did not contain personally identifiable detail, also was not confidential.

Although the public has a general right to access judicial records, courts continue to show a willingness to protect sensitive information, especially when there is mutual agreement by the parties, and the parties establish "good cause" to protect this material disclosed during discovery. In a FY 2022 sex discrimination case,[413] a federal court in Washington State approved a stipulated protective order protecting, among other items, the confidentiality of social security and tax numbers, financial information, credit card numbers, dates of birth, immigration status, trade secrets, and even the maiden names of mothers.

2. ESI: Electronic Discovery-Related Issues

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

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

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

3. Reliance on Experts, Including Systemic Cases

Following a trend from last year, expert testimony has continued to be a frequently litigated issue in EEOC cases.

413 *EEOC v. Chief Orchards Admin. Servs.*, 2022 U.S. Dist. LEXIS 152289 (E.D. Wash. Aug. 24, 2022).
414 *EEOC v. SSC Montrose San Juan Operating Co.*, LLC, 2021 U.S. Dist. LEXIS 152539 (D. Colo. Aug. 13, 2021).
415 *Id.* at *3.
416 *Id.*
417 *Id.*
418 *Id.* at *4.
419 *EEOC v. Green Lantern Inn*, 2021 U.S. Dist. LEXIS 157379 (W.D.N.Y. Aug. 19, 2021).
420 *Id.* at **22-23
421 *Id.* at *24.
422 *Id.* at **25-26.

In a case out of the Eastern District of Wisconsin, a federal court considered the EEOC's pre-trial motion in limine to exclude the defendant's expert testimony.[423] The case concerned claims of disability discrimination brought by an individual with Down Syndrome against her former employer. The defendant's expert was a clinical and forensic psychologist whose clinical services focus on children, adolescents, and families, and forensic services include evaluations of adults, adolescents, and children.[424] The EEOC argued the expert's testimony was not relevant to any issue the jury would be asked to decide. The EEOC also asserted the expert, a child psychologist, lacked the specific qualifications and experience to offer an opinion on the intellectual functioning of persons with Down Syndrome, as well as a geriatric diagnosis of dementia for an individual with Down Syndrome.[425] The court, however, determined that based on the expert's qualifications, experience, and expertise, he was qualified to offer his expert medical opinion in this case and any disagreement regarding the expert's opinions could be challenged at cross-examination.[426]

In a federal lawsuit in the Southern District of Florida alleging unequal pay violations on the account of gender,[427] the University (which allegedly paid a female professor less than male colleagues) filed a motion in limine asking the court to preclude expert testimony of an EEOC economist. The court denied the motion. Notably, the EEOC had asked the expert to calculate back pay and in doing so to assume (1) the charging party should have earned the same as her male comparator when he was hired by the University in 2007; and (2) she would have received the same percentage pay raises per year that she actually received, which percentage pay raises would be applied to the salary assumed under (1).

These assumptions served as the basis for the University's challenge. The University argued those assumptions were faulty, the expert failed to analyze any information about the comparator professor beyond his salary, and the assumptions would inappropriately allow the charging party to "double dip" by receiving market raises twice (once to raise her salary to her comparator's, and again over the years with percent pay raises).

The expert summarized her calculations in a report and listed 19 documents she considered and noted her estimates were conservative. Expert testimony is admissible under Fed. R. Evid. 702 if (1) the expert is qualified to testify regarding the subject of the testimony; (2) the expert's methodology is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert v. Merrell Dow Pharmaceuticals, Inc*.[428]; and (3) the expert's testimony will assist the trier of fact in understanding the evidence or determining a fact at issue.

Here, the University claimed the calculations were unreliable as the assumptions underlying them were provided by counsel for the EEOC. The court, however, noted that "Florida federal courts permit expert opinion testimony on damages even though the opinions are based on assumptions if there is a factual foundation for the assumptions."[429] Thus, the inquiry is whether there is a factual basis for the assumptions underlying the expert's opinion that render it reliable. The court found there was. The record included statements referencing "gross" underpayment. Moreover, regarding the double dipping allegation, the accuracy of an expert's assumptions is not the driving factor in determining admissibility. The University's disagreements with the expert's calculations went to the weight and credibility of her opinion, which may be tested through cross-examination at trial. The court found they do not limit the admissibility of her testimony.

F. General Discovery by Employer

The EEOC takes an expansive view of its entitlement to discovery from the employer, while arguing employer requests for discovery should be limited. Courts, however, have frequently taken the position the EEOC has many of the same obligations as other plaintiffs' counsel in providing requested information.

1. Discovery of EEOC-Related Documents

The primary dispute in these discovery battles continues to focus on the scope of the EEOC's "deliberative process privilege," the attorney-client privilege, or work-product doctrine. Over the years, courts have considered how these privileges apply to the EEOC's investigative communications with employees.

423 2021 U.S. Dist. LEXIS 115941 (E.D. Wis. June 22, 2021).
424 *Id.* at *3.
425 *Id.* at *6.
426 *Id.* at **9-10.
427 *EEOC v. Univ. of Miami*, 2022 U.S. Dist. LEXIS 30027 (S.D. Fla. Feb. 18, 2022).
428 509 U.S. 579 (1993).
429 2022 U.S. Dist. LEXIS 30027, at *5, citing *McSwain v. World Fuel Servs. Corp.*, No. 1:20-CV-21203, 2021 WL 2682269, at *4 (S.D. Fla. June 30, 2021).

For example, in a case decided in 2014, a federal court in Massachusetts distinguished between pre-litigation investigative communications with employees and post-litigation communications.[430] The court held pre-litigation communications are discoverable and post-litigation communications are not because they are protected under the attorney-client privilege and work-product doctrine. Later, the employer filed Freedom of Information Act (FOIA) requests with the EEOC seeking information on the agency's prosecution of the case, and then filed a declaratory judgment action with another court alleging the EEOC failed to timely produce documents responsive to those FOIA requests.[431] The court dismissed the declaratory judgment action, holding the employer did not exhaust its administrative remedies because, before it filed the action, it should have appealed to the EEOC the agency's decision to withhold certain information requested in the FOIA requests.

Where courts have been unable to determine whether the privilege applies, they have compelled production of the agency documents for in camera review.[432] In *EEOC v. Parker Drilling Co.*,[433] for example, the employer sought an order compelling the production of three documents originally withheld by the EEOC under the "conciliation" privilege. Later, in a revised privilege log, the EEOC added the attorney-client and government deliberative process privileges as reasons for the agency's withholding the documents. The employer asserted the conciliation privilege was inapplicable and that the EEOC waived the newly asserted privileges by failing to identify them in its initial privilege log. The court ordered the *in camera* submission of the documents, and upon review, found that two of the three documents were conciliation materials privileged from discovery under § 2000e-5(b) because they consisted of "proposals" and "counter-proposals" of compromise by the parties. The court held that the remaining documents did not contain such materials, and therefore were not material to which the § 2000e-5(b) conciliation privilege applied. The court also found the EEOC waived the attorney-client and government deliberative process privileges by failing to raise the privileges when its discovery response was due. The court awarded the employer reasonable fees and costs associated with obtaining the materials because the court determined the materials were unequivocally purely factual matters.

2. Third-Party Subpoenas

Courts continue to encounter challenges to the enforceability of third-party subpoenas. As an example, in a 2015 decision in *EEOC v. Dolgencorp, LLC*,[434] the court granted the EEOC's motion for a protective order and an order to quash a subpoena to a third-party employer. The EEOC had sued, alleging the defendant created a sexually hostile work environment and constructively discharged the charging party. Based on information from charging party's deposition, the employer sent a subpoena to her prior employer, requesting "[a]ny and all records maintained in the ordinary course of business with respect to [charging party]…including but not limited to [her] personnel file, disciplinary records, and any complaint or investigation records." The EEOC moved to quash on grounds that the records sought were (1) disproportional, (2) irrelevant, and (3) intended to harass and embarrass charging party.

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

More recently, in *EEOC v. Charles W. Smith & Sons Funeral Home, Inc.*,[435] a sex discrimination lawsuit in Texas federal court, defendants served the EEOC with notice of intent to serve third-party subpoenas on three healthcare-related entities. In response, the EEOC moved to quash under Rule 45 of the Federal Rules of Civil Procedure. In moving to quash the subpoenas, the EEOC noted that the subpoenas at issue sought "any and all medical records" from three separate medical entities for a 10-year period. The EEOC argued the information sought in the third-party subpoenas was highly personal and confidential, largely irrelevant to the case, and disproportionate to the issues in the case. In its ruling, the court reiterated that generally,

430 *EEOC v. Texas Roadhouse, Inc.*, 2014 U.S. Dist. LEXIS 125865 (D. Mass. Sept. 9, 2014).
431 *Texas Roadhouse, Inc. v. EEOC*, 2015 U.S. Dist. LEXIS 25468 (W.D. Ky. Mar. 3, 2015).
432 *See* EEOC v. Dolgencorp, LLC, 2015 U.S. Dist. LEXIS 58994 (N.D. Ill. May 5, 2015) (EEOC asserted the privilege in response to a request for documents revealing the statistical analysis used to determine whether a reasonable cause determination of discrimination should be issued, but the court held that it could not conclude the legitimacy of the privilege claimed by the agency without reviewing the documents in question, and ordered *in camera* review).
433 *EEOC v. Parker Drilling Co.*, 2014 U.S. Dist. LEXIS 151053 (D. Alaska Oct. 22, 2014).
434 2019 U.S. Dist. LEXIS 220340 (Dec. 23, 2019).
435 2022 U.S. Dist. LEXIS 148238 (Aug. 18, 2022).

a plaintiff lacks standing to oppose the subpoena of a non-party on the ground that the subpoena violates the non-party's privacy rights, although the EEOC has limited standing to assert the privacy rights of the employees it represents. In this case, the court found the EEOC did not have standing to oppose the subpoenas on the basis they violate the charging party's privacy rights. The EEOC did not appear to have the requested medical records in its possession, nor did the EEOC have a personal right to the medical records. "That said, any party to the litigation has standing to move for a protective order pursuant to Rule 26(c) seeking to limit the scope of discovery, even if the party does not have standing pursuant to Rule 45(d) to bring a motion to quash a third-party subpoena. As a party to this litigation, the EEOC has standing pursuant to Rule 26(c)(1) to seek a limitation on the scope of the subpoenas."[436] Ultimately, the court allowed the modification of the third-party subpoena to cover only records related to the psychiatric treatment and drugs prescribed to treat any psychiatric illness, such as anti-depressants.

In another 2022 decision involving a Tennessee federal case[437] alleging a racially hostile work environment, the EEOC moved to quash one paragraph of a subpoena issued by the defendant to a non-party who previously conciliated the matter with the EEOC, but the lawsuit continued against the defendant seeking the subpoenaed records. In particular, as part of discovery, the subpoena sought:

> any and all documents, property, and ESI which relate to any charges of discrimination filed against [temporary employment agency] with any federal, state or local EEO agency (including the Equal Employment Opportunity Commission and the Tennessee Commission on Human Rights) in connection with the . . . Project. Your response should include, but not be limited to, charges and complaints, statements of position, correspondence, notes, settlement and/or conciliation agreements (including drafts), [and] responses to requests for information.[438]

In response, the EEOC objected on the grounds Title VII prevents disclosure of information regarding conciliation proceedings under 42 U.S.C. § 2000e-5(b). Further, the EEOC argued the requested conciliation-related documents were not relevant to any claims or defenses in this action because conciliation materials are inadmissible as evidence "without the written consent of the persons concerned,"[439] which the EEOC had not given.

In turn, the defendant argued the conciliation privilege established by § 2000e-5(b) does not apply to "purely factual material" obtained during the informal conciliation process. The defendant also asserted "the majority" of the information it requested in the aforementioned paragraph, including the final conciliation agreement between the staffing agency and the EEOC, fell in that category and was therefore not subject to the statutory conciliation privilege.

Generally, courts applying Title VII's confidentiality provision have distinguished between materials reflecting what was "said or done" during conciliation efforts and "purely factual information about the merits of a charge, gleaned by the [EEOC] during its conciliation endeavors,"[440] finding the second category of information not subject to the provision. Conciliation materials that are prohibited from disclosure include "proposals and counter-proposals of compromise made by the parties during [conciliation efforts]."[441] In this case, neither party appeared to dispute that § 2000e-5(b) applies to conciliation materials and does not apply to purely factual material. Accordingly, the court denied the EEOC's motion to quash as it applied to "purely factual information about the merits of a charge, gleaned by the [EEOC] during its conciliation endeavors."[442] However, the court limited the reach of its decision and granted the motion as it applied to things "said or done during and as part of" conciliation, including "proposals and counter-proposals of compromise made by the parties."[443]

436 *Id.* at **6-7 (internal citations omitted).
437 *EEOC v. Whiting-Turner Contr. Co.*, 2022 U.S. Dist. LEXIS 140900 (M.D. Tenn. Aug. 8, 2022).
438 *Id.* at **4-5.
439 42 U.S.C. § 2000e-5(b).
440 2022 U.S. Dist. LEXIS 140900, at **8-9.
441 *Id.* at *9, citing Branch v. Phillips Petroleum Co., 638 F.2d 873, 881 (5th Cir. 1981).
442 2022 U.S. Dist. LEXIS 140900, at *10.
443 *Id.*

3. Confidentiality/Protective Orders

Courts have applied the deliberative process privilege in depositions of EEOC personnel where the deposition intrudes upon the agency's decision-making process. While the privilege is applied to those matters relating to the EEOC's internal analysis and basis for legal conclusions, it does not apply to factual and administrative matters.[444]

A party seeking a protective order has the burden of demonstrating good cause for that order, which typically requires articulating a clearly defined and serious injury.[445] The court, in its broad discretionary power over the discovery process, weighs the countervailing interests of both parties.[446] In *EEOC v. Coughlin*,[447] which involved a class hostile work environment action, both parties moved to enter a protective order after trying, in good faith, to negotiate a stipulated protective order. The parties disputed three provisions: (1) the definition of "confidential information," (2) the scope of the protective order, including temporal scope and whether the protective order would apply to publicly filed documents, and (3) whether confidential documents would be destroyed at the conclusion of the case.[448]

The court agreed with the EEOC's more limited definition of "confidential information" as "information that constitutes or contains trade secrets pursuant to the Uniform Trade Secrets Act" or its state law counterpart.[449] The EEOC argued the defendant's proposal that confidential information be expanded to include "information a party in good faith contends constitutes or contains trade secrets or other confidential business information that could provide a competitor with a competitive advantage" was too broad, and failed to identify a clearly defined, serious injury if disclosed.[450] The court agreed the EEOC's definition was comprehensive and employable.[451]

Additionally, the *Coughlin* court agreed with the EEOC's more limited temporal scope, which provided the protections would expire at the conclusion of discovery, rather than extending beyond the conclusion of the case.[452] Given the presumption of openness and access to judicial documents, the court declined to extend the protective order to documents filed with the court.[453] For information designated as confidential and not filed, however, the court granted the defendant's proposal to extend conditions of the protective order beyond the conclusion of the action.[454]

Finally, with respect to the destruction of documents at the conclusion of the case, the defendant proposed both parties destroy or return confidential documents.[455] The EEOC opposed the defendant's position, and the court agreed, explaining, "Courts must exercise caution when issuing confidentiality orders so as not to demand that the EEOC destroy government documents, including notes and memoranda, in conflict with the EEOC's duty to obey the requirements of the [Federal Records Act]."[456]

4. Other issues

When determining whether to extend a mediation deadline and modify the court's scheduling order, the Western District of Washington reiterated the standard set forth in Fed. R. Civ. P. 16(b)(4) for modifying a case schedule.[457] The parties agreed

444 *See, e.g., EEOC v. GGNSC Holdings, LLC,* U.S. Dist. LEXIS 79819 (E.D. Wis. June 20, 2016) (court granted the employer's motion to compel the EEOC to produce representatives to testify regarding the factual bases supporting various allegations in the complaint, as well as EEOC policies regarding reasonable accommodations and the interactive process under the ADA. The EEOC objected, unsuccessfully, on the grounds that the information sought is subject to the attorney-client, work-product, and/or deliberative process privileges); *EEOC v. AZ Metro Distribs., LLC*, 2016 U.S. Dist. LEXIS 124009 (E.D.N.Y. Sept. 6, 2016) (employer permitted to depose four EEOC officials involved in the investigations and two other officials whom the EEOC represented had no personal knowledge of the investigations); *c.f. EEOC v. National Railroad Passenger Corporation, d/b/a Amtrak*, No. 15-cv-1269 (W.D. Wash. July 8, 2016) (court issued a protective order barring the Rule 30(b)(6) deposition of the EEOC noticed by the employer. Although the employer argued the deposition should be permitted because it intended to explore facts only, the court believed that given the topics listed in the notice, the employer was either seeking cumulative information that it already had, or information regarding the sufficiency of the EEOC's pre-suit investigation, which is prohibited. In reaching its conclusion, the court accepted the EEOC's representation at face value that "all factual, non-privileged information" in its investigation file had already been turned over to the employer, as well as the agency's argument that it would therefore be cumulative to have a witness sit for a deposition to merely recite information that the employer already has in its possession.)

445 *EEOC v. Coughlin*, 2022 U.S. Dist. LEXIS 89372, at *6 (D. Vt. May 18, 2022) (citing *United States v. Int'l Bus. Machines Corp.*, 67 F.R.D. 40, 46 (S.D.N.Y. 1975).

446 *Id.* (citing *Rossini v. Ogilvy & Mather, Inc.*, 798 F.2d 590, 601 (2d. Cir. 1986)).

447 2022 U.S. Dist. LEXIS 89372, at *2.

448 *Id.*

449 *Id.* at **9-11.

450 *Id.* at **10-11.

451 *Id.* at *11.

452 *Id.* at *14.

453 *Id.*

454 *Id.* at *15.

455 *Id.* at *17.

456 *EEOC v. Kronos Inc.*, 620 F.3d 287, 304 (3d Cir. 2010).

457 *EEOC v. GIPHX10*, LLC, 2022 U.S. Dist. LEXIS 95748, at *2 (W.D. Wash. May 27, 2022).

to extend the deadline for mediation and, although the defendants sought to extend the deadline for dispositive motions based on the continuance, the EEOC refused to stipulate to an amended scheduling order for lack of good cause.[458] The court considered the parties' diligence and noted that "failure to complete discovery within the time allowed does not constitute good cause" for a continuance.[459] Accordingly, the court sided with the EEOC, holding the defendants failed to provide evidence or a factual basis supporting a finding of good cause, particularly where the parties had already negotiated four continuances during two years of litigation.[460]

In *EEOC v. Scottsdale Healthcare Hospitals*,[461] the court considered several filings by the parties related to discovery for purposes of mediation, including mediator selection, pre-mediation discovery disputes, and ESI discovery protocols. The court, sitting in a position that appeared more administrative than dispositive, addressed each of the parties' disputes and ordered the parties to proceed to mediation before their mutually selected mediator, despite the EEOC's objection as to the mediator's availability.[462] Additionally, the court directed the parties to continue discovery without delay and submit a joint proposed ESI protocol consistent with the defendant's proposal, plus portions of the EEOC's proposed protocol to which the parties were in agreement.[463]

G. General Discovery by EEOC/Intervenor

1. Scope of Permitted Discovery by EEOC

a. Attorney-Client Privilege and Work-Product Doctrine

A few FY 2022 cases addressed the assertion of privilege against EEOC discovery requests. Those decisions are discussed below.

EEOC v. Red Roof Inns, Inc.[464] highlighted the boundaries of the attorney-client and work product privileges. After reviewing the defendant's privilege log, the EEOC moved to compel the production of documents, requesting *in camera* review of 43 documents which the defendant had said were shielded from discovery by attorney-client privilege, work product doctrine or both.[465] For 14 of these documents, the court gave the defendant the opportunity to provide evidence in support of its privilege assertion, and EEOC the opportunity to demonstrate substantial need and undue hardship before it decided the EEOC's motion.[466]

The court used an eight-factor test to determine whether the attorney-client privilege applied: "(1) [w]here legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) unless the protection is waived."[467] It noted that attorney communications that simply convey facts acquired from other sources are not protected by the attorney-client privilege.

Regarding the attorney-expert privilege, the court noted that communications between an attorney and a retained expert witness who may testify at trial are often privileged from disclosure.[468] For example, draft reports are not discoverable.[469] Attorney-expert communications are discoverable only to the extent they: "'(i) relate to compensation for the expert's study or testimony; (ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or (iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.'"[470]

The court next explained that the purpose of the work-product privilege is to "protect[] an attorney's trial preparation materials from discovery to preserve the integrity of the adversarial process."[471] A multi-step process applies to assess

458 *Id.* at *3.
459 *Id.* at *5.
460 *Id.*
461 2022 U.S. Dist. LEXIS 151288, at *1 (D. Ariz. Aug. 23, 2022).
462 *Id.* at *2.
463 *Id.* at **3-4.
464 *EEOC v. Red Roof Inns, Inc.*, 2022 U.S. Dist. LEXIS 54983 (S.D. Ohio 2022).
465 *Id.* at *1.
466 *Id.* at **1-2.
467 *Id.* at *2 (*quoting Reed v. Baxter*, 134 F.3d 351, 355-56 (6th Cir. 1998)).
468 *Id.* at **2-3.
469 *Id.* at *3 (*citing* Fed. R. Civ. P. 26(b)(4)(B)).
470 *Id.* at *3 (*quoting* Fed. R. Civ. P. 26(b)(4)(C)).
471 *Id.* at *3 (*quoting In re Professionals Direct Ins. Co.*, 578 F.3d 432, 438 (6th Cir. 2009)).

claims of work-product privilege.[472] The party seeking disclosure bears the initial burden of demonstrating relevance and the absence of privilege.[473] If that burden is met, then the party objecting to disclosure must demonstrate that the documents were created in anticipation of litigation.[474] A party may do that by submitting affidavits, depositions or answers to interrogatories.[475] Absent such evidence, the documents may be ordered to be disclosed.[476] If the objecting party meets its burden, then the requesting party must demonstrate substantial need and undue hardship.[477] If the requesting party meets that burden so that disclosure of materials protected by the work-product privilege is ordered, the court "must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation."[478] The court noted that applicability of this privilege often turns on whether a document was prepared in anticipation of litigation.[479] This involves consideration of "(1) whether a document was created because of a party's subjective anticipation of litigation, as contrasted with ordinary business purpose, and (2) whether that subjective anticipation of litigation was objectively reasonable."[480]

Addressing the documents at issue, the court found that emails between defendant's attorneys and experts were protected by the attorney-expert privilege because they did not relate to either the expert's compensation or the facts, data, or assumptions provided by the attorney to the expert.[481] Regarding emails between defendant's insurer and employees, no attorney was copied, but the substance of the communications was not relevant to the claims and defenses in the lawsuit, so the court denied the motion to compel.[482] With respect to emails commenting on the substance of attorney-client communications, the court found them to be both attorney-client communications and work product, and thus privileged.[483] The court denied the motion to compel with respect to employee emails that discussed scheduling a call with the defendant's attorneys, because they were not relevant to the claims and defenses in the lawsuit.[484] As to employee emails regarding information requested by defendant's attorneys, the court held the work-product privilege to apply because these communications revealed the thought processes of the defendant's attorneys.[485]

Lastly, the court considered six documents reflecting email communications between two employees regarding a position interest form submitted by the charging party. Their substance was relevant, but the basis for work-product privilege unclear, so the court allowed the defendant the opportunity to explain.[486] The court ordered the same outcome for emails seeking information related to charging party's allegations and termination of employment.[487]

Subsequently, after briefing regarding certain documents, the court issued a further decision on those documents.[488] The defendant argued these documents were protected from discovery by the work-product privilege.[489] The court again set out the standard and process for assessing claims of work-product privilege.[490] It said that the work-product privilege only will apply if "(1) … a document was created ***because of*** a party's subjective anticipation of litigation, as contrasted with ordinary business purpose, and (2) … that subjective anticipation of litigation was objectively reasonable."[491] To determine whether the first requirement is met, the court must consider the "driving force" behind the document's creation and the document's purpose.[492] The court "must examine not only the documents themselves, but the circumstances surrounding the documents' creation."[493] If the objecting party shows that documents were created in anticipation of litigation, then the requesting party must demonstrate substantial need and undue hardship.[494]

472 *Id.* at *4.
473 *Id.* (*citing Toledo Edison Co. v. GA Technologies, Inc.*, 847 F.2d 335, 339 (6th Cir. 1988)).
474 *Id.*
475 *Id.*
476 *Id.* (*citing Biegas v. Quickway Carriers, Inc.*, 573 F.3d 365, 382 (6th Cir. 2009)).
477 *Id.*
478 *Id.* (*quoting* Fed. R. Civ. P. 26(b)(3)(B)).
479 *Id.*
480 *Id.* at **4-5.
481 *Id.* at **5-6.
482 *Id.* at *6.
483 *Id.* at **6-7.
484 *Id.* at *7.
485 *Id.* at **8-9.
486 *Id.* at **9-10.
487 *Id.* at **8-10.
488 *EEOC v. Red Roof Inns, Inc.*, 2022 U.S. Dist. LEXIS 154747 (S.D. Ohio 2022).
489 *Id.* at *1.
490 *Id.* at **2-3.
491 *Id.* at *3 (*citing U.S. v. Roxworthy*, 457 F.3d 590, 594 (6th Cir. 2006) (emphasis in original)).
492 *Id.*
493 *Id.*
494 *Id.* (*citing Biegas v. Quickway Carriers, Inc.*, 573 F.3d 365, 382 (6th Cir. 2009)).

Regarding employee emails seeking information related to plaintiff's allegations, the defendant provided a copy of its Response to the EEOC Request for Information, arguing that the emails were created to prepare the Response.[495] The court agreed with defendant that the information in these documents was in the Response to EEOC, and the content and context of these documents established that their purpose was to assist with preparing the Response.[496] The court held these documents protected from discovery by the work-product privilege.[497]

With respect to employee emails discussing the charging party's position interest form, the court denied that the work-product privilege applied because "these documents were created for ordinary business purposes and not in anticipation of litigation."[498]

As to the three documents discussing setting up communications with the defendant's attorney, the court held, based on their content and context, the driving force behind their creation was anticipation of litigation, not ordinary business purposes.[499]

Finally, with respect to email communications between two of the defendant's employees regarding the termination of the charging party's employment, the court concluded that these documents were created for ordinary business purposes and not in anticipation of litigation.[500] No attorney was copied on these emails, and the defendant failed to submit any evidence to explain its claim of work-product privilege.[501]

In *EEOC v. George Washington University*, another court addressed a discovery dispute involving claims of attorney-client privilege and work-product doctrine.[502] The focus was documents created in connection with the university's internal investigation of a discrimination complaint filed with the school's equal employment opportunity office.[503] The EEOC sought to compel production of all withheld documents related to that investigation, contending that the documents did not seek, contain or reflect legal advice, nor were they created in anticipation of litigation at the direction of counsel.[504] The EEOC further argued that, even if the documents were covered by the work-product or attorney-client privileges, the university waived that privilege either by asserting a *Kolstad* defense[505] or by failing to claim or support claims of privilege on its privilege log.[506] Finally, the EEOC asserted that it had shown substantial need for the documents sufficient to overcome any work-product protection.[507]

The court provided an extensive discussion of the factual background, reviewed the applicable legal standards and ultimately concluded that the university had not waived attorney-client or work-product privileges: "In these circumstances, the university has not waived attorney-client privilege or work product protection over the internal investigation documents because it will not 'rely on privileged advice from [its] counsel to make . . . [its] defense.'"[508]

b. Aggrieved Parties and Temporal Scope of Discovery

EEOC v. Frontier Hot-Dip Galvanizing, Inc. concerned an objection to the scope of discovery.[509] The EEOC brought suit on behalf of two charging parties and similarly-situated employees, allegedly subjected to racial and national origin discrimination and a hostile work environment, and then fired after complaining to the employer and the EEOC.[510] The EEOC sought and then moved to compel discovery from 2011 to the current day, but the defendant objected to the temporal scope, saying it should be limited to employees identified as aggrieved during the EEOC investigation and who

495 *Id.* at **4-5.
496 *Id.*
497 *Id.* at *5.
498 *Id.* at **6-7.
499 *Id.*
500 *Id.* at **7-8.
501 *Id.*
502 *EEOC v. George Wash. Univ.*, 2022 U.S. Dist. LEXIS 157848 (D.D.C. 2022).
503 *Id.* at **1-2.
504 *Id.* at *2.
505 In *Kolstad v. American Dental Ass'n*, 527 U.S. 526 (1999), the Supreme Court recognized punitive damages may be awarded for a Title VII violation "if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual." An employer cannot be held vicariously liable for punitive damages for the discriminatory employment decisions of managerial agents, however, where these decisions are contrary to the employer's good-faith efforts to comply with Title VII.
506 2022 U.S. Dist. LEXIS 157848 at *2.
507 *Id.*
508 *Id.* at *73 (*quoting In re Cty. of Erie*, 546 F.3d 222, 229 (2d Cir. 2008)).
509 *Id.* at **1-2.
510 *Id.* at **1-2.

claimed discrimination between May 25, 2013 (300 days before filing the charge of discrimination) through October 22, 2015 (date of EEOC determination letter and conciliation demand).[511]

Regarding discovery of similarly situated employees, the court held the EEOC was permitted to identify new claimants, including individuals allegedly discriminated against after the EEOC's investigation ended, so long as their claims were within the scope of the claims investigated, disclosed and conciliated.[512]

As for the temporal scope of discovery, the court recognized that there is conflicting authority on whether the EEOC can recover for Title VII violations arising more than 300 days before the filing of the initial charge of discrimination against the employer.[513] Since the complaint alleged that defendant had continued to engage in racial discrimination since at least 2011 and the EEOC represented to the court that employees alleged to have engaged in discriminatory conduct were still employed with defendant, the court found the 2011 to present scope appropriate.[514] The court then examined specific interrogatories and document requests, and ordered the defendant to produce responsive documents/information.[515]

In *EEOC v. Ohio State University*, the EEOC sought a 30-day discovery extension beyond the close of discovery, plus leave to take an eleventh deposition and to reopen the deposition of the university's human resource manager in an ADEA case.[516] The court granted and denied in part the EEOC's motion.[517]

The court noted that to re-open discovery the EEOC must satisfy Federal Rule 16(b)(4), which provides that a court may modify a scheduling order for good cause.[518] Factors for determining good cause include "whether the need for additional discovery is due to the movant's neglect, and whether there exist other persuasive reasons (such as prejudice to the non-moving party) not to reopen discovery."[519] The key inquiry is whether the moving party was diligent while discovery was ongoing.[520]

The EEOC's request to reopen the deposition of the university's human resources manager, the basis was a letter which provided justification for promoting a younger employee in lieu of the charging party.[521] During her initial deposition, the manager could not recall the letter.[522] The EEOC sought the "native version" of the letter which identified the manager as the author, so the EEOC wanted to re-depose her on this issue for another two hours.[523] But a deposition is normally limited to one day of seven hours unless otherwise ordered by court and additional time is granted only if needed fairly to examine the deponent.[524] Factors to consider include: whether the additional testimony is proportional to the needs of the case, considering the importance of the issues; the amount in controversy; the parties' relative access to relevant information; the parties' resources; the importance of the discovery in resolving issues; and whether the burden or expense of the proposed discovery outweighs its likely benefit.[525] The university agreed to allow the additional deposition for 30 minutes, which the court found reasonable and allowed.[526]

Another dispute concerned an interrogatory that the EEOC propounded to which the university objected. The EEOC did not file a motion to compel or alert the court to a discovery dispute, but sought to reopen discovery.[527] The defense had offered to produce spreadsheets with responsive information, and the EEOC did try to resolve the issue with defense counsel near the end of discovery.[528] Finding the defendant's proposal sufficient, the court ordered the defendant to provide such information within seven days.[529] The EEOC was also allowed to ask the human resources manager at her

511 *Id.* at *2.
512 *Id.* at *4.
513 *Id.* at **5-6.
514 *Id.* at **7-8.
515 *Id.* at **8-16.
516 *EEOC v. Ohio State Univ.*, 2021 U.S. Dist. LEXIS 203795 (S.D. Ohio 2021).
517 *Id.* at *1.
518 *Id.* at *2.
519 *Id.* (*quoting Romans v. Ford Motor Co.*, 2021 U.S. Dist. LEXIS 73542, at *2 (S.D. Ohio Apr. 16, 2021)).
520 *Id.*
521 *Id.* at *3.
522 *Id.*
523 *Id.*
524 *Id.* at *4 (*citing* Fed. R. Civ. P. 30(d)(1)).
525 *Id.* (*quoting Cole v. Coverstone*, 2021 U.S. Dist. LEXIS 28954, at *2 (S.D. Ohio Feb. 17, 2021)).
526 *Id.* at **7-8.
527 *Id.* at *9.
528 *Id.* at **9-10.
529 *Id.* at *10.

deposition about the subject matter of the interrogatory. The court denied the request to reopen discovery, particularly since discovery had been ongoing for a year.[530]

Lastly, the EEOC sought an eleventh deposition of a labor relations consultant in the university's human resources department.[531] To take a new deposition after close of discovery, the EEOC had to meet two requirements: satisfy Rule 16(b)(4) and show good cause and proportionality (considering the importance of the issues, the parties' access to relevant information, the parties' resources, and weighing the burden against the benefit of the proposed discovery).[532] The court found that the EEOC met this burden. New evidence indicated the individual was involved in the decision-making process regarding the charging party, and the EEOC was not neglectful during discovery, discovery only recently ended, and the time sought for deposition was proportional to the needs of the case.[533]

In *EEOC v. Yale New Haven Hospital, Inc.*,[534] the defendant had adopted a policy requiring medical practitioners age 70+ to undergo neuropsychological and ophthalmological testing upon appointment or re-appointment. The EEOC sued, claiming violation of both the ADA and ADEA. The court separated the discovery in two phrases—Phase I to determine the employment status of any practitioners affected by the policy, and Phase II to address whether the policy violated the ADEA or ADA. By the time the EEOC brought its motion to compel, the parties were already proceeding in Phase II.

The EEOC claimed to have learned in Phase II that the defendant failed to disclose several practitioners it had been ordered to disclose in Phase I, so it moved for an order directing the defendant to disclose those practitioners, produce related documents, and answer a related interrogatory. The court granted in part and denied in part the EEOC's motion, ordering the defendant to disclose some but not all of the practitioners at issue, to produce certain documents related to them, and to answer the disputed interrogatory.

c. Relevance of Requested Discovery

In *EEOC v. Heart of CarDon, LLC*,[535] the court considered whether the employer had to produce financial information claimed to be pertinent to the EEOC's claim for punitive damages. The EEOC filed a motion to compel production of these documents, claiming that defendant acted with malice or reckless indifference, warranting punitive damages. The defendant objected, contending that the information was not relevant to the EEOC's claims or its defenses, and that the information was not within its possession, custody or control.[536] The defendant failed to refute that it lacked possession or control of the requested information, and the court determined this argument was meritless and a clear attempt to impede discovery. The court held that relevance is not a high bar, and when in doubt, the court would err on the side of permissive discovery.[537] It therefore found the EEOC's request relevant to the claim for punitive damages, proportionate to the needs of the case, and the information sought to be within defendant's possession and control.[538]

In another case previously discussed, *EEOC v. Red Roof Inns, Inc.*,[539] the EEOC moved to compel documents responsive to its discovery requests. The court granted the motion, ordering the defendant to produce a privilege log with respect to those documents over which it would assert privilege.

EEOC v. Werner Enterprises, Inc.[540] involved allegations that the defendant violated the ADA by not hiring two individuals because they were deaf and by requiring job applicants to answer a disability-related question. The EEOC served numerous discovery requests, seeking information about other deaf or hard-of-hearing applicants. Werner objected to the requests as overly broad, unduly burdensome and not proportional to the needs of the case. Werner advised that it received thousands of applications each week and did not maintain a list of those with hearing exemptions or who were deaf, and its database did not allow it to search for such characteristics.[541] In trying to identify responsive documents, the defendant identified 14 deaf or hard-of-hearing applicants. The parties reached a compromise where it provided names of

530 *Id.*
531 *Id.* at *11.
532 *Id.* at *12.
533 *Id.* at **14-15.
534 *EEOC v. Yale New Haven Hosp.*, Inc., 2022 U.S. Dist. LEXIS 111926 (D. Conn. June 24, 2022).
535 *EEOC v. Heart of CarDon, LLC*, 339 F.R.D. 339 (S.D. Ind. 2021).
536 *Id.* at 606-07.
537 *Id.* at 607-08.
538 *Id.* at 609.
539 *EEOC v. Red Roof Inns, Inc.*, 2022 U.S. Dist. LEXIS 38301 (S.D. Ohio Mar. 4, 2022).
540 *EEOC v. Werner Enterprises, Inc.*, 2022 U.S. Dist. LEXIS 61838, at *1 (D. Neb. Apr. 1, 2022).
541 *Id.* at *2.

686 hearing exemption holders from a FMCSA list. The parties also agreed that if a match were found, it would provide the application and documentation, and produce audit trail data.[542]

After initial compromises were reached, the EEOC requested that the court compel the defendant to respond to the plaintiffs' initial discovery requests, to include production of full application files for all applicants who are deaf, hard of hearing, use a hearing aid, and/or possess a hearing exemption—not just those applicants identified on the FMCSA list. The EEOC also requested that the court order the defendant to produce audit trail data for *all* applicants who are deaf, hard of hearing, use a hearing aid, and/or possess a hearing exemption.[543] After considering the documents produced to date, and efforts made by the defendant, the court denied the EEOC's requests because the discovery sought was (1) outside the scope of the parties' discovery compromises, (2) marginally relevant and/or (3) not proportional to the needs of the case. The court found that defense counsel was forthcoming with respect to items found and explanations regarding items produced.[544]

D. Electronically Stored Information

Another court considered the scope of the EEOC's request for electronically stored information (ESI), and whether the defendant must meet stringent requirements in producing ESI. The court denied the EEOC's motion, holding that better communication between the parties could effectively resolve the discovery issues without judicial assistance. In this case, *EEOC v. Qualtool, Inc.*,[545] the EEOC moved to compel the defendant to (1) produce responsive documents in a native, usable format and organized in the manner requested by the EEOC in the first request for production, (2) provide an affidavit listing ESI repositories such as email addresses, devices, and other online accounts, (3) cease unsupervised ESI self-collection and conduct supervised searches. The EEOC claimed the defendant's responsive documents were not labeled using bates stamps, were stripped of metadata, and were unorganized. The defendant claimed that it produced all documents that it had in native files and bates-labeled, and any documents not bates-labeled were produced in the ordinary course of business and identified by subject matter in the name.[546] The court denied the EEOC's motion to compel without prejudice because it found the defendant made a good-faith effort to comply with all of the EEOC's requests and had appropriately offered to allow the EEOC to search the computers and give additional search terms.[547]

2. Sanctions/Spoliation Issues

In *EEOC v. Citizens Bank*,[548] a district court issued a decision denying the EEOC's request for sanctions to prevent the defendant from using the report and all testimony from a Rule 35 examination. The court ruled on a Rule 35 examination, allowing a doctor to evaluate the charging party based on a stipulation that the doctor and charging party be the only two to participate with no audio or video recording with comfort breaks as needed.[549]

At the outset of the examination, the doctor explained to the charging party that a transcriptionist would in the room.[550] The doctor also needed technical assistance with his computer, which was provided by one of his assistants who entered the room for that purpose.[551] During a "comfort break" to the bathroom, the charging party called counsel for the EEOC to report that he had heard a sound, suspecting someone else was in the room.[552] The EEOC's counsel advised charging party to ask the doctor if there was another person present and that as long as the individual was not an attorney, "to just continue the exam[.]"[553]

The EEOC thereafter moved for sanctions, arguing that the entry into the room of an assistant to help the doctor with computer issues and the off-camera transcriptionist present in the room listening to the audio feed to record the answers constituted two clear violations of the court's "unambiguous" order that attendees at the examination be limited to the doctor

542 *Id.* at **3-4.
543 *Id.* at **8-9.
544 *Id.* at **11-14.
545 *EEOC v. Qualtool*, 2022 U.S. Dist. LEXIS 92289 (M.D. Fla. May 23, 2022).
546 *Id.* at **2-3.
547 *Id.* at **4-5.
548 *EEOC v. Citizens Bank*, 2022 U.S. Dist. LEXIS 125459 (D.R.I. July 15, 2022).
549 *Id.* at **2-4.
550 *Id.* at **5-6.
551 *Id.* at *6.
552 *Id.*
553 *Id.*

and charging party.[554] Citing Rule 37(b)(2)(A) and the court's inherent power, the EEOC contended this was "egregious conduct" that caused "significant prejudice[.]"[555]

Under Rule 37(b)(2)(A), a court may impose sanctions on a party for not obeying a discovery order.[556] The imposition of sanctions, however, is not mandatory. The court may impose sanctions through the exercise of its inherent power.[557] Two "conditions precedent" must exist before a court may impose sanctions: (1) a clear court order must be in effect, and (2) the order must be violated.[558] The court has "considerable leeway"[559] in imposing sanctions and looks at "the totality of the attendant circumstances."[560] This includes:

> (1) the willfulness or bad faith of the non-complying party; (2) the prejudice to the opposing party; (3) whether the procedural history indicates protracted inaction or deliberate delay; and (4) the disregard of earlier warnings of the consequences of the misconduct in question.[561]

Here, the court disagreed with the EEOC, finding that the doctor had "acted consistently with his reasonable interpretation of the [c]ourt's order, as well as with his professional opinion regarding best practice for performing" the examination.[562] The court did not find that the defendant or its counsel engaged in "any intentional misconduct or bad faith conduct (never mind a pattern of such conduct)" with regards to the examination.[563] The court also noted that "at worst" "there may have been confusion arising from the unintended ambiguity caused by the potential inconsistency between the [c]ourt's actual ruling [that charging party must be alone and no audio or video recording created] and the ambiguous phrase ("attendees at the examination are limited to" [charging party and the doctor]).[564]

The court ruled the examination was not tainted and that any confusion on the part of the charging party could be addressed at trial and that the doctor could be cross examined regarding any potential impact of the charging party's suspicion during the examination on his professional opinions.[565] The motion for sanctions therefore was denied.[566]

3. Miscellaneous

In *EEOC v. Green Lantern Inn, Inc.*, the EEOC sought sanctions against the defendant employer individually after its attorney withdrew as counsel.[567] The EEOC filed a motion for expenses when one defendant through counsel refused to waive service and offered no good cause for doing so.[568] The court ordered the defendant to pay the full cost of service, plus attorney's fees for filing the motion for expenses.[569]

The EEOC had also filed a motion for sanctions against defendants, not counsel, for intentionally failing to comply with the court's discovery order compelling production.[570] The court directed the EEOC to submit a detailed summary of hours expended in preparing the motion for sanctions.[571] The EEOC filed its application and noted that because the "EEOC is not a fee-charging institution, its attorneys do not keep precise records of time....Therefore, an award to EEOC of costs and attorneys' fees can only be based on estimated time."[572] Defendants argued that the fees were not reasonable and that the EEOC had "failed to maintain records of hours expended."[573] Defendants argued that any fees awarded against its prior counsel should be assessed against counsel.[574] Defendants also argued that any sanctions against defendants should only be assessed against the initial party defendant, Green Lantern, and not Pullman Associates because Pullman Associates was not a party at

554 *Id.* at **8-9.
555 *Id.* at *9.
556 *Id.* (citing Fed. R. Civ. P. 37(b)(2)(A)(ii)).
557 *Id.* at *10
558 *Id.* (citing *Alifax Holding SpA*, 2018 WL 11371604, *2 (quoting R.W. Int'l Corp. v. Welch Foods, Inc., 937 F.2d 11, 15 (1st Cir. 1991)).
559 *Id.* at *11 (citing *Young v. Gordon*, 330 F.3d 76, 81 (1st Cir. 2003).
560 *Id.* (citing *Torres-Vargas v. Pereira*, 431 F.3d 389, 392 (1st Cir. 2005).
561 *Id.* (citation omitted).
562 *Id.* at *12.
563 *Id.*
564 *Id.*
565 *Id.* at *13.
566 *Id.*
567 *EEOC v. Green Lantern Inn, Inc.*, 2022 U.S. Dist. LEXIS 84545 (W.D.N.Y. May 10, 2022).
568 *Id.* at *2.
569 *Id.* at **2-3.
570 *Id.* at *3.
571 *Id.*
572 *Id.* at **3-4 (internal citation omitted).
573 *Id.*
574 *Id.* at *4.

the time the discovery requests were issued.[575] In an earlier ruling, the court had found that defendants Green Lantern Inn, Inc. and Pullman Associates, LLC were a single employer.[576]

Defendants' prior counsel was also given an opportunity to respond to defendants' claim that he should be responsible for the fees and sanctions—he alleged he was not aware of subsequent filings after he was removed from the case.[577] Thereafter, the EEOC and defendants were given an opportunity to respond to prior counsel's opposition.[578] The EEOC argued that defendants should be assessed EEOC's attorneys' fees and not prior counsel.[579] The defendants alleged that defendants' principal was not aware that counsel had failed to execute the waiver form and were also not aware that counsel had failed to comply with a discovery order, having provided all of the information and documents requested by counsel.[580]

The court found that in "[c]onsidering EEOC's status as a government agency," it had provided sufficient documentation."[581] The court also acknowledged that "fees awarded as sanctions are not intended only as compensation of reimbursement of legal services, but also serve to deter abusive litigation practices."[582] The court found a rate of $300 per hour was appropriate and was also persuaded that the EEOC has provided an accurate and reasonable hours-expended calculation.[583]

The court found Pullman Associates responsible for the fees and costs related to the EEOC's motion for expenses, reminding defendants that "a litigant chooses counsel at his peril."[584] The court further found that defendants "acted as a single entity with respect to discovery[]" but also found that prior counsel "committed sanctionable conduct."[585] The court ultimately determined "that the best course of action is not to apportion liability among [d]efendants and their former counsel[.]"[586] The court ordered defendants and former counsel "to determine division of the remaining" fees.[587]

H. Summary Judgment

In FY 2022, federal courts issued decisions on roughly two dozen summary judgment motions filed by either the EEOC or the employer in agency-initiated litigation. Many of these decisions involved either alleged disability or religious discrimination, although one federal court also resolved a claim of genetic information discrimination, which historically has rarely been litigated. Summary judgment motions were often denied, but, when granted, the decisions tended to favor employers and the EEOC evenly.

A discussion of some notable summary judgment decisions during FY 2022 follows.

1. Disability Discrimination

Several cases involved disability discrimination claims. First, in *EEOC v. Charter Communications, LLC*,[588] the EEOC claimed that the employer failed to accommodate a retention representative in the employer's call center who had requested a shift that would allow him to avoid driving to or from work in the dark due to his alleged night blindness based on "early cataracts."[589] The parties filed cross-motions for summary judgment, in which the employer argued, among other things, that it was not required to accommodate the employee because he could already perform all the essential functions of his job.[590] The court granted summary judgment to the employer, concluding that even if the employee's night blindness was an ADA-covered disability, an employer has no obligation, as a matter of law, to accommodate an employee who can already perform the essential functions of the job.[591] As the employee could already perform all essential functions of the retention

575 *Id.* at **4-5.
576 *EEOC v. Green Lantern Inn, Inc.*, 2022 U.S. Dist. LEXIS 41218 (W.D.N.Y. Mar. 8, 2022).
577 *Green Lantern Inn, Inc.*, 2022 U.S. Dist. LEXIS 84545 at **8-9.
578 *Id.* at **9-10.
579 *Id.* at *9.
580 *Id.* at *10.
581 *Id.* at *14.
582 *Id.* at *17 (citing *Ceglia v. Zuckerberg*, 2012 U.S. Dist. LEXI 18438 (W.D.N.Y Feb. 14, 2012).
583 *Id.* at **15-20.
584 *Id.* at **21-22 (citing *Joint Stock Co. Channel One Russia Worldwide v. Infomir LLC*, 2019 U.S. Dist. LEXIS 166373 (S.D.N.Y. Sept. 26, 2019), aff'd, 2020 WL 1479018 (S.D.N.Y. Mar. 26, 2020) (quoting *Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp.*, 602 F.2d 1062, 1068 (2d Cir. 1979) (change in case name omitted)).
585 *Id.* at **26-27 (internal quotation and citation omitted).
586 *Id.* at *27.
587 *Id.* at *28.
588 Case No. 18-cv-1333-bhl (E.D. Wis. Dec. 17, 2021).
589 *Id.* at **3-4.
590 *Id.* at *6.
591 *Id.* at **8-10.

representative position, and the requested accommodation would merely make the employee's commute more convenient, the court concluded that the employer was not under any duty to accommodate this request.[592]

The employer also prevailed at summary judgment in *EEOC v. Rogers Behavioral Health*.[593] After a job candidate received a conditional offer of employment, she was required to complete a drug test through a third-party vendor used by the employer.[594] When that test came back positive for Alprazolam, both the Medical Review Officer (MRO) conducting the test and the employer's Employee Health and Wellness Specialist called and left voicemails for the candidate to gather an explanation for the positive result, but the candidate did not respond.[595] The employer then rescinded its job offer.[596]

After the parties filed cross-motions for summary judgment, the court denied the EEOC's motion and granted the employer's motion.[597] The court concluded that, based on the information known to the employer at the time (*i.e.*, that the candidate had tested positive for Alprazolam and failed to provide any evidence of a prescription to take it), the candidate was not protected under the ADA because she was engaged in the current illegal use of drugs.[598] Notwithstanding that Alprazolam is often used to treat anxiety, the court further concluded there was no evidence that the employer actually regarded the candidate as disabled, *i.e.*, suffering from anxiety or other mental health impairment.[599] The evidence did establish, however, that the employer consistently rescinded offers where candidates failed to explain the reasons for their positive test and reinstated offers in at least 10 other instances where candidates provided a satisfactory explanation (*e.g.*, that they had a lawful prescription) after testing positive.[600] Summary judgement was appropriate because the candidate neither identified any comparators who had behaved differently yet still had been hired, nor presented any direct evidence of discriminatory animus.[601]

By contrast, in *EEOC v. Blue Sky Vision, LLC*,[602] the court denied the employer's summary judgment motion where there were genuine issues of material fact about whether the scope of the employer's disability-related inquiry was appropriately limited.[603] The employee, an optometrist, suffers from homonymous hemianopsia, resulting in a blind spot in the periphery of his vision.[604] Based on its concerns about whether the employee could safely perform the essential functions of his job, the employer shared a questionnaire with the employee for his health care provider to complete. That questionnaire, however, was not clearly limited to the condition at issue and sought the release of medical records regardless of whether they pertained to that specific condition.[605]

2. Religious Discrimination

Religious discrimination issues – especially the scope of employers' obligation to accommodate employees' religious beliefs – were at the center of multiple cases. For example, in *EEOC v. Kroger Limited Partnership I*,[606] the court denied the parties' cross-motions for summary judgment. Two employees who were fired for dress code violations after refusing to display the company's multi-colored heart-shaped symbol on their work aprons contended that being required to display such a symbol conflicted with their belief that homosexuality is a sin and that the employer failed to accommodate those beliefs by refusing to allow them not to display it.[607] Regardless of the undisputed evidence that the company did not intend the symbol as a showing of support for the LGBTQ community, the court found it was sufficient at the summary judgment stage that the employees had an objectively reasonable belief that that was the symbol's purpose.[608] Similarly, although the employer pointed to several hardships – including, most notably, evidence of disruption among store employees, as well as customer complaints

592 *Id.* at **8-12 (citing *Brumfield v. City of Chicago*, 735 F.3d 619 (7th Cir. 2013)). The court observed, however, that the Second, Third, and Ninth Circuits have not enacted a bright line rule on this issue. *See id.* at *11 (citing *Lyons v. Legal Aid Soc.*, 68 F.3d 1512, 1517 (2d Cir. 1995); *Colwell v. Rite Aid Corp.*, 602 F.3d 495, 505 (3d Cir. 2010); and *Livingston v. Fred Meyer Stores, Inc.*, 388 F. App'x 738, 740 (9th Cir. 2010)).
593 Case No. 19-cv-935-pp (E.D. Wis. Sept. 6, 2022).
594 *Id.* at **2-3.
595 *Id.* at **8-12, 20-27.
596 *Id.* at **28-30.
597 *See id.* at **97-98.
598 *Id.* at **70-73 (citing 42 U.S.C. §§ 12114(a)).
599 *Id.* at **78-82.
600 *See id.* at **31, 85-87.
601 *Id.* at *87.
602 *EEOC v. Blue Sky Vision, LLC*, 2021 U.S. Dist. LEXIS 228020 (W.D. Mich. Nov. 1, 2021).
603 *Id.* at **17-18, 26-27.
604 *Id.* at *3.
605 *Id.* at **19-25.
606 *EEOC v. Kroger Limited Partnership I*, No. 4:20-cv-1099-LPR (E.D. Ark. June 23, 2022).
607 *Id.* at **4-5, 8-11.
608 *Id.* at **30-32.

– a rational juror could conclude from the short-lived nature of the disruption (which was resolved within an hour or two) and the lack of evidence of any lost business that such hardship was merely *de minimis*.[609]

In *EEOC v. Center One, LLC*,[610] however, the court denied the EEOC's motion for summary judgment and granted the employer's motion. The employee, an adherent of Messianic Judaism, resigned after approximately one month of employment, contending his employer failed to accommodate his religious beliefs, by assessing attendance points against him on days that he contended his religion required him to abstain from working and requesting he provide documentation from the leader of his congregation confirming his need to take those days off.[611] The court noted the employee had failed to provide any detailed information to his employer prior to his first two incidents of being assessed attendance points that he needed time off for religious observances.[612] Furthermore, the court concluded the employer's request for documentation was reasonable under the circumstances, particularly because of the employee's own uncertainty about the precise dates and times he would need off.[613] Although the employee had accrued enough attendance points under company policy to be terminated, the employer did not terminate or otherwise discipline the employee while awaiting the documentation it had requested. As the employee's terms and conditions of employment had not otherwise been affected, the court concluded that "merely assigning [attendance] points, without more, does not constitute adverse employment action within the meaning of Title VII."[614] And although the employee believed he was going to be terminated after attending a meeting to discuss his policy violations and possible corrective efforts, his decision to resign based on his subjective perception did not constitute a constructive discharge.[615]

3. Hostile Work Environment

In *EEOC v. Lindsay Ford LLC*,[616] the court denied the employer's motion for summary judgment, and permitted the EEOC's racially and sexually hostile work environment claims to go to trial. A male salesperson of South Asian descent claimed his supervisor and the general manager of the car dealership where he worked repeatedly called him a "a creepy brown person" and a "serial killer" on at least a daily basis, regularly subjected him to sexually derogatory slurs, squeezed his buttocks, played Bollywood music when he was nearby, and threw papers and a plastic water bottle at him.[617] In response to a written complaint submitted by the employee (who resigned the next day), the company's comptroller conducted an investigation.[618] The investigation corroborated many of the employee's allegations and ultimately resulted in the company reducing the general manager's pay. The comptroller who conducted the investigation, however, had no formal workplace investigation training and did not obtain written statements or keep notes from her interviews.[619] The general manager also was not retrained on the company's anti-harassment policy, and less than a year later, another salesperson raised similar harassment complaints against him.[620]

The court rejected the employer's arguments that because the general manager had also made stereotypical and derogatory comments about members of other races, the harassment toward this employee was not racial in nature.[621] The daily slurs and other incidents were sufficiently pervasive to survive summary judgment, and the fact that the alleged harasser was the employee's supervisor heightened the severity of the conduct.[622] The court further concluded the employer could not establish the *Faragher/Ellerth* affirmative defense because employees were not given copies of the anti-harassment policy and having an arguably unqualified investigator handle the investigation and offering the complainant the option of accepting a less desirable position still reporting to the same supervisor-harasser or applying competitively for another position 38 miles away were not clearly reasonable.[623]

609 *Id.* at **34-48.
610 *EEOC v. Center One, LLC*, 2022 U.S. Dist. LEXIS 148694 (W.D. Pa. Aug. 19, 2022).
611 *Id.* at **2-3.
612 *Id.* at **21-22.
613 *Id.* at **23-24.
614 *Id.* at **25-28.
615 *Id.* at **31-39.
616 *EEOC v. Lindsay Ford LLC*, No. TDC-19-2636 (D. Md. Nov. 2, 2021).
617 *Id.* at **2-5.
618 *Id.* at **6-8.
619 *Id.* at **8-9.
620 *Id.* at **9-10.
621 *See id.* at **18-20 ("[A]n employer who discriminates against both men and women based on their sex as a result of different stereotypes does not 'avoid[] Title VII exposure' but instead 'doubles it[.]'") (quoting *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1741 (2020)).
622 *Id.* at **22-25.
623 *Id.* at **26-31.

4. Genetic Information Discrimination

The Genetic Information Nondiscrimination Act (GINA) renders it an unlawful employment practice for an employer "to request, require, or purchase genetic information with respect to an employee or a family member of the employee" except when done inadvertently.[624] In *EEOC v. Dolgencorp, LLC*,[625] the EEOC alleged the employer asked job candidates whether their grandparents, parents, or children had significant medical problems. After the parties filed cross-motions for partial summary judgment, the court was faced with what it described as an issue of first impression – namely, whether GINA permits the recovery of compensatory and punitive damages.[626]

In a victory for the EEOC, the court concluded that such damages may be awarded because a viable GINA claim is necessarily based on intentional discrimination.[627] The court reasoned that GINA adopts the same remedies as Title VII, and because there is no liability either for inadvertent requests for genetic information or for disparate impact claims, only intentional requests for or requirements to disclose genetic information may be viable.[628] Plus, Supreme Court precedent "limits compensatory and punitive damages awards . . . to cases of 'intentional discrimination[,]'"[629] and other federal courts have assumed that such damages are available.[630] This outcome was further corroborated by the legislative history of GINA.[631]

Additional information on these and other summary judgment decisions issued in FY 2022 can be found in Appendix D of this Report.

I. Default Judgment

In one FY 2022 decision, discussed in greater detail in the Remedies section of this Report, after the EEOC obtained an order of default judgment against the defendant in a disability discrimination case, the court denied the EEOC's request for injunctive relief but granted leave to supplement the record.[632] The court explained, "[e]ven when liability has been established by an order of default judgment, allegations relating to the amount of damages are not established merely because a defendant failed to participate in the action."[633] However, "[t]he kinds of damages available are limited by those pleaded in the Complaint."[634]

The EEOC renewed its request for back pay, front pay, prejudgment interest, compensatory and punitive damages, as well as post-judgment interest on behalf of the charging party.[635] After discussing in great detail how it would calculate each component of damages, the court ultimately awarded the charging party $219,232.11 in backpay; $24,436.78 in prejudgment interest; $50,000 in compensatory damages (capped by the size of defendant corporation); and post-judgment interest.[636]

J. Bankruptcy

A defendant's or charging party's bankruptcy declaration will not necessarily stay an EEOC lawsuit. Although there were no applicable cases involving the EEOC and bankruptcy for the past fiscal year, prior cases can be instructive.

In a 2020 case out of the Northern District of Georgia, for example, the EEOC sued the defendant under the ADA seeking injunctive relief, back pay and front pay for defendant's former employee, compensation for pecuniary and non-pecuniary losses, punitive damages, and costs.[637] The former employee filed her own complaint against defendant, which was consolidated with the EEOC complaint and treated as an intervenor complaint. The defendant subsequently filed for Chapter 11 bankruptcy, filed a notice of the bankruptcy to obtain an automatic stay, and moved to stay proceedings not subject to an automatic stay.

The EEOC opposed the notice and motion to stay, contending that the Bankruptcy Code's automatic stay provision does not apply because the proceeding falls within the governmental unit or police and regulatory power exception under 11 U.S.C. § 362(b)

624 42 U.S.C. § 2000ff-1(b).
625 *EEOC v. Dolgencorp, LLC*, 2022 U.S. Dist. LEXIS 132466 (N.D. Ala. July 26, 2022).
626 *Id.* at **38-41.
627 *Id.* at **41-47.
628 *Id.* at **42, 45-46.
629 *Id.* at *42 (quoting *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 534 (1999) (in turn citing 42 U.S.C. § 1981a(a)(1)).
630 *See id.* at *43 & n.27 (citing *EEOC v. Grisham Farm Prods.*, Inc., 191 F. Supp. 3d 994, 998 (W.D. Mo. 2016), and collecting cases).
631 *Id.* at **46-47.
632 *EEOC v. MSDS Consultant Services*, 2021 U.S. Dist. LEXIS 244898 (D. Md. Dec. 22, 2021).
633 *Id.* at **2-3 (internal quotation and citation omitted).
634 *Id.* at *3.
635 *Id.* at *2.
636 *Id.* at **4-18.
637 *EEOC v. Krystal Co.*, 2020 U.S. Dist. LEXIS 92482 (N.D. Ga. May 21, 2020).

(4) ("Section 362(b)(4)"). The purpose of the exception is to discourage debtors from initiating bankruptcy proceedings to evade impending governmental efforts to enjoin or deter ongoing debtor conduct that would "seriously threaten the public safety."

The defendant argued that the police-power exception did not apply because: (1) any injunctive relief the EEOC seeks is likely to be moot, because the defendant intends to sell its assets to another company; and (2) the defendant is unaware of any cases applying the police-power exception in cases involving claims brought by both the EEOC and a private litigant.[638] After surveying authority from around the country, the court "agree[d] with those courts that have considered the issue and finds that the police-power exception applies to the EEOC" because "the EEOC brings claims under the ADA for injunctive and monetary relief in the course of exercising its police or regulatory powers, and it is therefore not subject to the automatic stay."[639] The court also declined to exercise its authority to stay a case pending the resolution of a related case in another forum, finding its discretionary stay authority inapplicable where a more specific stay mechanism (*i.e.*, bankruptcy stay) expressly did not apply.[640] In doing so, the court rejected the argument that a stay of the intervenor complaint required staying the EEOC lawsuit, recognizing that "while it is true that there is some overlap between the EEOC's claims and those of the intervenor, it is not unusual for litigation to proceed as to the EEOC while the claims of an intervenor are stayed."[641]

Finally, the court stated that "the fact that the claims for injunctive relief may end up being moot at the conclusion of the bankruptcy proceedings is not a sufficient reason to stay the claims now—especially when that argument is insufficient to preclude application of the police-power exception to the automatic stay."[642]

Similarly, in the Northern District of Texas, the court emphasized that the Bankruptcy Code's automatic stay does not necessarily stop an EEOC lawsuit. In this case, the EEOC sued a medical practice for alleged Title VII violations.[643] The EEOC sought injunctive relief under Title VII, back pay with prejudgment interest, compensatory damages for past and future pecuniary and non-pecuniary losses, punitive damages, and costs. The defendant subsequently filed for Chapter 7 bankruptcy. In light of the bankruptcy, the court entered an order staying and administratively closing the case pursuant to 11 U.S.C. § 362.

Upon receiving notice of the stay, the EEOC filed a motion to reopen the case and permit it to continue with its claims against the defendant notwithstanding the bankruptcy proceeding. The EEOC averred that the Bankruptcy Code's automatic stay provision does not apply because the proceeding falls within the governmental unit or police and regulatory power exception under 11 U.S.C. § 362(b)(4).

In response, the defendant countered that Section 362(b)(4) does not apply to actions seeking money judgments. The EEOC replied by clarifying that it was seeking to prove defendant's liability for the asserted discrimination claims and obtain a judgment against the defendant for damages and injunctive relief to "prevent [defendant] from 'engaging in future discriminatory conduct in violation of Title VII.'"[644]

The court applied the Fifth Circuit's "public policy test" and "pecuniary interest test," used to determine whether proceedings fall within Section 362(b)(4)'s police and regulatory power exception. The public policy test asks whether the government is effectuating public policy rather than adjudicating private rights. The pecuniary purpose test asks whether the government primarily seeks to protect a pecuniary government interest in the debtor's property, as opposed to protecting public safety and health. If the purpose of the government's action is to promote public safety and welfare or to effectuate public policy, the exception applies and the stay to the lawsuit would be lifted. If, however, the purpose of the action is to protect the government's pecuniary interest in the debtor's property or primarily to adjudicate private rights (such as seeking damages for a charging party), the exception would not apply and the stay would remain in place.

In its analysis, the court acknowledged that the issue of whether an EEOC enforcement action under Title VII falls within Section 362(b)(4)'s exception was a matter of first impression in the Fifth Circuit. As such, the court looked to and relied upon the Fourth Circuit's precedent, which held that EEOC employment discrimination lawsuits brought under Title VII satisfy the public policy test—even when brought on behalf of specific individuals—because the EEOC is acting to vindicate the public interest in preventing employment discrimination. Further, the court noted the Third and Eighth Circuits have reached the same conclusion regarding Section 362(b)(4)'s application to EEOC enforcement actions.[645]

638 *Id.* at **3-4.
639 *Id.* at *6.
640 *Id.* at *8.
641 *Id.* at *9.
642 *Id.*
643 *EEOC v. Shepherd*, 2018 U.S. Dist. LEXIS 175025 (N.D. Tex. Oct. 11, 2018).
644 *Id.* at **2-3.
645 *Id.* at *8.

Applying the Fourth Circuit's rationale, the court held that Section 362(b)(4)'s exception should apply. In its reasoning, the court emphasized that the EEOC's primary relief sought was a permanent injunction, which was not limited to the individuals named in the EEOC's pleadings. The court noted that, although the EEOC sought monetary relief on behalf of specific individuals, there was no indication that the EEOC was seeking to protect a pecuniary interest in the defendant's property. Further, the court underscored the EEOC's acknowledgment that it would not be able to use the proceeding to enforce any money judgment entered against the defendant. Accepting that the EEOC was focused on the public interest and not debt collection, Section 362(b)(4) applied and the stay to the EEOC's lawsuit was lifted.

In another case out of the Southern District of Indiana, the court determined a claimant's failure to disclose his claims in a personal bankruptcy proceeding did not preclude the EEOC from pursuing a disability discrimination lawsuit on his behalf. In this case,[646] the EEOC alleged a trucking company violated the ADA by asking disability-related questions during the job application process. Four members of the affected class of applicants, however, did not disclose their claims against the company in their personal bankruptcy proceedings. The company alleged that the EEOC should therefore be precluded from pursuing claims on their behalf.

Generally, under the Bankruptcy Code, a debtor must schedule as assets "all legal or equitable interests of the debtor in property as of the commencement of the case."[647] Causes of action that arise during the court of the bankruptcy are also deemed property of the bankruptcy estate.[648] The bankruptcy estate owns the claim, so the debtor lacks standing to pursue an undisclosed claim on the estate's behalf during the pendency of the bankruptcy. Once the bankruptcy has closed, the doctrine of judicial estoppel would normally preclude a claimant from pursuing a previously undisclosed claim. The court, however, emphasized that in this case, the EEOC—not the claimants—was the entity filing suit. The question the court had to consider, therefore, was "whether judicial estoppel applies when the EEOC sues on a claim previously undisclosed by individual charging parties in bankruptcy proceedings."[649]

The court responded in the negative, concluding that judicial estoppel did not apply in this instance "because the agency, in fulfilling its enforcement role, does not merely stand in the shoes of individual claimants; in other words, it is not the same 'party' that earlier took an inconsistent position before a court. The EEOC is not 'merely a proxy for the victims of discrimination,' . . . nor does it sue 'as the representative of the discriminated-against employee.'"[650] The ADA in particular "makes the EEOC the 'master of its own case,' and confers upon the agency independent authority to evaluate the strength of the public interests at stake in enforcing the statute."[651] The individual claimants' failure to disclose their claims in their bankruptcy proceedings therefore did not prevent the EEOC from recovering damages on their behalf. The court reasoned that because the EEOC was not a party to the bankruptcy proceedings, nor were the claimants parties to the EEOC's lawsuit, "judicial estoppel does not bar the EEOC from recovering damages predicated on harms they may have suffered."[652]

Whether an automatic stay in a defendant's bankruptcy proceeding could preclude the EEOC from enforcing a subpoena against a third party to determine whether it was a successor-in-interest was a question before the Western District of Pennsylvania in 2018.[653] The EEOC filed a motion to show cause why the third party should not be compelled to comply with the EEOC's discovery subpoena. The court granted the EEOC's motion. In response, the third party argued that the automatic stay in the defendant's bankruptcy proceeding applied to the EEOC's action to enforce its judgment against the third party, and therefore to the EEOC's ability to subpoena the third party to take discovery. The third party also averred that the stay barred the EEOC from enforcing the money judgment because the Bankruptcy Code Section 362(b)(4)'s exception did not apply to money judgments.

The EEOC countered that the automatic stay did not apply to the third party because it is not the debtor and the bankruptcy court did not extend the stay to the third party. Further, the EEOC contended that, even if the stay applied to the third party, the EEOC was still entitled to enforce the nonmonetary portion of its judgment against it and take discovery for that purpose.[654] The court agreed with the EEOC and explained that Section 362(b)(4) explicitly exempts only the enforcement of money judgments, which implies that government agencies retain the power to enforce injunctions against a debtor in bankruptcy. Given that the

646 *EEOC v. Celadon Trucking Servs.*, 2015 U.S. Dist. LEXIS 84639 (S.D. Ind. June 30, 2015).
647 *Id.* at *50, citing 11 U.S.C. § 541(a)(1).
648 *Id.*, citing 11 U.S.C. § 1306(a)(1).
649 *Id.* at *51.
650 *Id.*, citing *In re Bemis*, 279 F.3d 419, 421-422 (7th Cir. 2002) ("The EEOC's primary role is that of a law enforcement agency and it is merely a detail that it pays over any monetary relief obtained to the victims of the defendant's violation rather than pocketing the money itself.") (internal citation omitted)
651 *Id.* at *52, citing *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 122 S. Ct. 754 (2002).
652 *Id.* at *55.
653 *EEOC v. Scott Medical Health Ctr.*, P.C, 2018 U.S. Dist. LEXIS 183552 (W.D. Pa. Oct. 26, 2018).
654 *Id.* at *4.

EEOC can bring an action to enforce an injunction against a successor-in-interest to the defendant, the court reasoned that the EEOC must also have the ability to subpoena a putative successor-in-interest to determine whether that entity is a successor. The court declined to address whether an automatic stay under 11 U.S.C. § 362 would apply to an action to enforce a money judgment against the third party.[655]

K. Trial

1. Pre-Trial Motions

Few cases involved pre-trial motions in FY 2022.

In a decision out of the Southern District of Florida, defendants were denied their motion in limine to exclude the EEOC's damages expert's testimony.[656]

Expert testimony is admissible under Fed. R. Evid. 702 if:

> (1) the expert is qualified to testify regarding the subject of the testimony; (2) the expert's methodology is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert*, and (3) the expert's testimony will assist the trier of fact in understanding the evidence or determining a fact at issue.[657]

Defendant argued that the damages expert's back pay calculation should not be admitted under Rule 70 because they "parrot" the EEOC's position.[658] Specifically, defendant alleged that the damages expert's calculations were unreliable "because the assumptions underlying them were provided to [the damages expert] by counsel for the [EEOC]" along with the fact that the damages expert is an employee of the EEOC. Defendant further alleged that because the calculations "amount to little beyond simple arithmetic that a jury could be able to perform and that, as such, her testimony would be unhelpful to them."[659]

In this case, the court disagreed with defendant. Considering the standard that "Florida federal courts permit expert opinion testimony on damages even though the opinions are based on assumptions if there is a factual foundation for the assumptions[,]" the court found that there was a factual basis for the assumptions underlying the damages expert's opinion that rendered it reliable.[660] In this case, the record included statements by the defendant's own administrators as well as data from a study conducted by ad hoc committees created by defendant.[661] The damages expert had verified the "pay data and assessed it against factors such as market rates of return in noting potential different calculation outcomes."[662]

The court also held that "the purported accuracy of an expert's assumptions is not the driving factor in determining admissibility[663]…[n]or is the fact that an expert assumes a party's facts as true dispositive of the admissibility of that expert's testimony."[664] The court held that defendant's disagreement about the damage expert's calculation "go to the weight and credibility of her opinion, which may be tested through cross-examination at trial."[665] Therefore, defendant's argument did not limit the admissibility of the damage expert's testimony.[666] The court also held that the damages expert's employment with the EEOC "does not alone render her testimony unreliable under Rule 702."[667] EEOC employees, including the damages expert at issue in the case, have provided expert testimony before other courts.[668] Again, the court held that the fact that the damages expert is employed by the EEOC "goes again to the weight and credibility of her testimony, not its admissibility."[669] Given this, the court found the damages expert's testimony sufficiently reliable as to be admissible.[670]

655 *Id.* at *6.
656 *EEOC v. Univ. of Miami*, 2022 U.S. Dist. LEXIS 30027 (S.D. Fla. Feb. 18, 2022).
657 *Id.* at *4 (internal quotations and citations omitted).
658 *Id.* at **4-5
659 *Id.*
660 *Id.* at *5 (citing *McSwain v. World Fuel Servs. Corp.*, 2021 WL 2682296, at *4 (S.D. Fla. June 30, 2021).
661 *Id.* at **5-6.
662 *Id.* at *7.
663 *Id.* at **7-8 (citing *Rosenfeld v. Oceania Cruises, Inc.*, 654 F.3d 1190, 1194 (11th Cir. 2011) (admitting expert testimony characterized by the challenging party as being based on "incorrect" assumptions)).
664 *Id.* at *8 (citing *Rossi v. Darden*, 2017 WL 2129429, at **9-10 (S.D. Fla. May 17, 2017)).
665 *Id.* at 8.
666 *Id.* (citing *Bahr v. NCL (Bahamas) Ltd.*, No. 19-CV-22973, 2021, WL 4845789, at *6 (S.D. Fla. Oct. 18, 2021) ("[A]n objection based upon an expert opinion's reliance on incorrect assumptions attacks the weight and persuasiveness of the testimony, not its admissibly.")).
667 *Id.* at **8-9.
668 *Id.* at *9.
669 *Id.*
670 *Id.*

The court also found that the damages expert's testimony would be helpful for the jury to understand how to calculate the damages at issue.[671] In particular, the court found that the fact that the damages expert's "calculations are admittedly attainable through arithmetic is not dispositive[]…[h]er calculations necessarily encompass her professional assumptions and as such go beyond the nature of truly simplistic calculations that an average person could readily perform."[672] The court disagreed with defendant that the testimony "would be more prejudicial than probative."[673]

2. Post-Trial Motions

After a five-day virtual bench trial in 2020, defendants were found to be in violation of the Equal Pay Act.[674] Thereafter, the EEOC filed a bill of costs pursuant to Rule 54(d), requesting defendants reimburse the EEOC for costs related to deposition transcript and exhibit binders.[675] Defendants argued against this as the "trial issues were difficult and close such that cost-shifting would be unfair."[676] The court denied defendants' motion for reconsideration of the award of bill of costs.[677]

Pursuant to Rule 54(d)(1), costs "should be allowed to the prevailing party" after trial "unless . . . a court order provides otherwise."[678] Although "the rule creates the presumption that costs are to be awarded to the prevailing party,"[679] the court retains "discretion to deny an award of costs" so long as the non-prevailing party articulates "good reason" for the denial.[680] "Good reason" includes:

> (1) misconduct by the prevailing party; (2) the unsuccessful party's inability to pay the costs; (3) the excessiveness of the costs in a particular case; (4) the limited value of the prevailing party's victory; or (5) the closeness and difficulty of the issues decided.[681]

With regard to the closeness of a case, that is "judged not by whether one party clearly prevails over another, but by the refinement of perception required to recognize, sift through and organize relevant evidence, and by the difficulty of discerning the law of the case."[682] The court found that "[a]lthough important and interesting, the case was not especially close or difficult."[683] The court noted that the "case ran a customary course."[684] Furthermore, the court found that the facts of the case were straightforward and, while fact-intensive, not factually complex.[685] The court also held that it was appropriate for the EEOC to include costs "related to preparing exhibit binders when there is prior court approval, prior agreement between the parties, or a showing of necessity."[686] Here, the court had expressly directed the parties to supply exhibit binders.[687]

L. Remedies

1. General

The cases decided in FY 2022 contained several helpful discussions of the remedies available under the statutes administered by the EEOC.

In *EEOC v. MSDS Consultant Servs., LLC*, the court denied the EEOC's request for injunctive relief, and later awarded back pay, front pay, prejudgment interest, compensatory and punitive damages, and post-judgment interest on behalf of the employee after the court's entry of default judgment against the employer.[688] The EEOC sued the employer on behalf of the employee for disability discrimination, hostile work environment, and failure to accommodate her disabilities in violation of the

671 *Id.*
672 *Id.* at **10-11.
673 *Id.* at *11.
674 *EEOC v. Enoch Pratt Free Library*, 2022 U.S. Dist. LEXIS 159480 (D. Md. Sept. 2, 2022).
675 *Id.* at **1-2.
676 *Id.* at *2.
677 *Id.*
678 *Id.* (citing Fed. R. Civ. P. 54(d)(1)).
679 *Id.* at 2-3 (citing *Cherry v. Champion Int'l Corp.*, 186 F.3d 442, 446 (4th Cir. 1999).
680 *Id.* at 3 (citing *Ellis v. Grant Thornton LLP*, 434 Fed. App'x, 232, 253 (4th Cir. 2011).
681 *Id.* at 3 (citing Ellis, 434 F. App'x at 253 (citing *Cherry*, 186 F.3d at 446)).
682 *Id.* at 3 (citing *Grochowski v. Sci. Applications Int'l Corp.*, No. ELH-13-3771, 2017 WL 121743, at *4 (D. Md. Jan. 12, 2017) (quoting *White & White, Inc. v. Am. Hosp. Supply Corp.*, 786 F.2d 728, 732-33 (6th Cir. 1986)).
683 *Id.* at *4.
684 *Id.*
685 *Id.* at *5.
686 *Id.* (citing *U.S. District Court for the District of Maryland Guidelines for Bills of Costs*, § II.H.2.c.).
687 *Id.* at *5.
688 *EEOC v. MSDS Consultant Servs.*, LLC, 2021 U.S. Dist. LEXIS 244898, at *2 (D. Md. Dec. 22, 2021).

Americans with Disabilities Act.[689] During the course of litigation, the employer failed to secure counsel and to respond to the complaint, which led the court to grant default judgment against the employer on all three theories of liability.[690]

In deciding the amount of damages to award the employee, the court noted, "[e]ven when liability has been established by an order of default judgement, allegations 'relating to the amount of damages' are not established merely because a defendant failed to participate in the damages."[691] The kind of damages available are limited to those pleaded in the complaint.[692] The court went into detail regarding how it would calculate each component of damages.

The EEOC argued that the employee should receive back pay from the date of her termination through the date of judgment.[693] The EEOC also urged the court to adopt its calculation of a "gross monthly rate" by factoring in the employee's wages earned, including overtime and bonus payments.[694] In the employee's case, the EEOC's calculation included a 3.9% annual increase in their monthly rate.[695] The court agreed that the employee should be compensated for lost wages and fringe benefits but disagreed with the EEOC's method of calculation.[696] The court used a simpler calculation and multiplied the employee's hourly rate by hours worked for the applicable years.[697] The court declined to include overtime and medical expenses in the employee's base rate, but noted that they would be calculated separately and added to the backpay award.[698] The court also opted to adjust the hourly rate of pay upward each year to reflect the percentage increase the employee would have received for cost of living and other related increases and subtract any actual earnings for the same period to arrive at the final back pay award.[699]

With respect to the employee's medical expenses and overtime, the court adopted the EEOC's calculation of overtime which was far lower than the actual overtime hours that the employee worked in previous years.[700] The EEOC opted to estimate conservatively the amount of overtime that the employee would have worked.[701]

When calculating lost benefits, the court looked to the employer's policy on the topic.[702] The employer's policy stated that the employee would have accrued 5.67 hours of PTO per bi-monthly pay period, which if unused at the end of the employment relationship would have been paid at the employee's straight-time hourly rate.[703] The court also awarded the amount spent on out-of-pocket medical expenses and lost health insurance for years 2017-2018 because the EEOC did not amend the record to show the value of the employee's medical benefits for the time she was employed with the employer.[704]

The EEOC also requested that the court award prejudgment interest on $26,928.14 of lost wages and $2,399.85 of PTO using the EEOSTAT PayCalc commercial software.[705] The court decided to award the employee prejudgment interest on her backpay.[706] Given that the EEOC's calculation used interest rates that were either the same or lower than Maryland's statutory prejudgment interest rate of six percent per year, the court opted to adopt the EEOC's requested rate for prejudgment interest.[707] The court declined to adopt the EEOC's rate of compound interest.[708] The EEOC requested that the interest compound monthly, and the court opted for a more conservative method of compounding annually.[709]

The court declined to award front pay to the employee reasoning that the EEOC did not provide evidence to support a reasonably certain front pay award.[710] The EEOC urged the court to calculate the difference between a projected salary for 2021 had the employer continued to work with the employer at the current salary that she earns.[711] The employer went out of

689 *Id.*
690 *Id.*
691 *Id.* at **2-3.
692 *Id.* at *3.
693 *Id.* at **4-5.
694 *Id.* at *5.
695 *Id.* at **5-6.
696 *Id.* at *6.
697 *Id.*
698 *Id.*
699 *Id.*
700 *Id.* at *8.
701 *Id.*
702 *Id.* at *9.
703 *Id.*
704 *Id.*
705 *Id.* at *11.
706 *Id.* at *13.
707 *Id.*
708 *Id.*
709 *Id.*
710 *Id.* at *15.
711 *Id.* at **15-16.

business in 2019, which would have left the award for front pay up to some speculation had the employer stayed in business and been financially stable enough to employ the employee.[712] The court thus held that under those circumstances, an award for front pay was unsupported.[713]

The court decided to award compensatory damages up to the statutory cap of $50,000.[714] It found that when reviewing the totality of the record evidence, a compensatory damage award of $50,000 was supported.[715] The court found that the employee was repeatedly harassed by the employer at her home before returning to work, all with the intent of coercing her to return to work sooner.[716] The employee was also chastised for pursing her discrimination claims.[717] Also, when she did return to work, the employer engaged in a pattern of ignoring, delaying, and denying her requests to accommodate her disability.[718] As such, the employer's PTSD and Panic Disorder symptoms worsened.[719] Finally, the court found that post-judgment interest was applicable and was awarded pursuant to 28 U.S.C. 1961.[720]

In another FY 2022 case, the EEOC sued an employer alleging it subjected a female train conductor and other aggrieved individuals to a sexually hostile working environment in violation of Title VII.[721] The employer moved to dismiss for failure to state a claim on which relief can be granted.[722] While the employer's motion to dismiss was pending, the employer terminated the charging party's employment for alleged attendance issues.[723] The EEOC filed a motion for temporary restraining order pursuant to FRCP 65 asking the court to restore the status quo ante by immediately returning the former employee to work and prohibiting the employer from engaging in any retaliatory action against employees who cooperate with or provide information to the EEOC in support to the lawsuit.[724] More specifically, the EEOC requested a TRO: (1) requiring the employer to reinstate the employee under the same terms and conditions; (2) prohibiting the employer from taking or threatening discretionary employment actions against the former employee, other female employees or any employee who seeks to cooperate with or provide information to the EEOC or participate in this lawsuit as a potential aggrieved individual or witness and (3) requiring the employer to publicize the court's order to all employees at the facility to ensure they are aware of the protection granted by the order. [725]

The court used the standards of Rule 65 to evaluate the EEOC's request for a TRO.[726] The court ultimately held that the EEOC failed to show the likelihood of success on the merits of the claims and failed to show irreparable harm and emergency—*i.e.*, a monetary remedy would suffice if the claim were to succeed on the merits.[727] The EEOC's request for TRO was therefore denied.[728]

In *EEOC v SDI of Mineola Tex., LLC.*, during a charge conference, the EEOC objected to an aspect of the court's proposed instruction on compensatory damages for nonpecuniary harm.[729] The EEOC objected to the inclusion of an instruction on the reduction of damages to the extent that a claimant unreasonably failed to mitigate them.[730] The EEOC argued that in a Title VII employment discrimination case, the duty to mitigate damages does not apply to non-pecuniary harm.[731] The court rejected that argument finding that the EEOC's objection to the mitigation component of the jury instruction on compensatory damages for non-pecuniary harm was overruled.[732]

In another FY 2022 matter the EEOC sued a large retailer alleging discrimination under Title I of the Americans with Disabilities Act of 1990 and Title I of the Civil Rights Act of 1991.[733] After a four-day jury trial, the jury returned a verdict in

712 *Id.* at *16.
713 *Id.*
714 *Id.*
715 *Id.*
716 *Id.* at *17.
717 *Id.*
718 *Id.*
719 *Id.*
720 *Id.*
721 *EEOC v. BNSF Ry.*, 2022 U.S. Dist. LEXIS 77502, at *3 (D. Neb. Apr. 28, 2022).
722 *Id.* at *1.
723 *Id.*
724 *Id.* at *2.
725 *Id.* at *33.
726 *Id.* at *34.
727 *Id.* at **39-51.
728 *Id.*
729 *EEOC v. SDI of Mineola Tex.*, LLC, 2022 U.S. Dist. LEXIS 175430, at *1 (E.D. Tex. Sep. 27, 2022).
730 *Id.* at *1.
731 *Id.* at **1-2.
732 *Id.* at *9.
733 2022 U.S. Dist. LEXIS 30382, at *1 (E.D. Wis. Feb. 22, 2022).

favor of the EEOC, awarding the former employee compensatory and punitive damages.[734] The court held off on entering the judgement until it determined issues of equitable relief.[735] The EEOC requested a number of measures of equitable relief. The court ultimately rejected several measures and ordered reinstatement of the former employee, and consultation with the employee's guardian regarding any need for discipline or accommodations while employed.[736] Additionally, the employee was entitled to backpay, prejudgment interest, and a tax-component award.[737]

2. Punitive Damages

The EEOC sued the employer in *EEOC v. Heart of Cardon, LLC* alleging that the employer violated the Americans with Disabilities Act by failing to accommodate an injured employee.[738] The EEOC sought punitive damages under §1981a because of the employer's alleged failure to reasonably accommodate the former employee by refusing to place her in a receptionist position for which she was qualified.[739]

When evaluating the EEOC's request for punitive damages, the court noted that punitive damages are available under Section 1981a where an employer engages in a discriminatory practice "with malice or with reckless indifference to the federally protected rights of an aggrieved individual."[740] The court noted that the EEOC has the burden of showing (1) that the employer acted with malice or reckless indifference to the employee's federal rights; and (2) that there is a basis for imputing liability to the employer based on agency principles.[741] The employer argued that it was entitled to summary judgment on the malice requirement and the good-faith defense.[742] To prove malice or reckless indifference, "[a] plaintiff may satisfy this element by demonstrating that the relevant individuals knew of or were familiar with the anti-discrimination laws but nonetheless ignored them . . . ."[743] Additionally, punitive damages hinge on the employer's state of mind or whether it acted "in the face of a perceived risk" that its actions violate federal law.[744] To survive summary judgment, the EEOC only needed to show that on this one occasion the employer was reckless or malicious, and that it had in fact done so.[745] The court held that there were enough questions of fact remaining for a jury to determine the employer did not make a good-faith effort to accommodate the employee. As such, summary judgment was denied.[746]

M. Settlements

Four FY 2022 decisions discussed the applicable standard for approving consent decrees to settle lawsuits involving the EEOC.

The first case, *EEOC v. SFM*,[747] issued by the U.S. District Court for the District of Colorado, involved alleged disability discrimination in the hiring process. The parties agreed to settle and filed a joint motion to enter the consent decree.[748] The consent decree required, among other things, that the defendant: pay the charging parties a total of $280,000, expunge the charging parties' personnel records of any allegations of the discrimination and retaliation claims, and issue letters of apology to the charging parties.[749] In exchange, the charging parties released and waived their right to recovery for any claim of disability discrimination or retaliation under the ADA that could have been asserted against the defendant.[750]

The court began its analysis by explaining that "[a] consent decree is primarily a means by which parties settle their disputes without having to bear the financial and other costs of litigating,"[751] and that a "consent decree entered in federal court 'must be directed to protecting federal interests.'"[752] The court recognized Supreme Court precedent that a federal consent decree must (1)

734 *Id.* at *2.
735 *Id.*
736 *Id.* at *19.
737 *Id.*
738 *EEOC v. Heart of CarDon, LLC*, 2021 U.S. Dist. LEXIS 209253, at *6 (S.D. Ind. Oct. 29, 2021).
739 *Id.* at *23.
740 *Id.*
741 *Id.* at **23-24.
742 *Id.* at *24.
743 *Id.*
744 *Id.*
745 *Id.* at *12.
746 *Id.* at *28.
747 *EEOC v. SFM, 2021 U.S. Dist. LEXIS 212983*, at **2-3 (D. Colo. Oct. 14, 2021).
748 *Id.*
749 *Id.* at **3-4.
750 *Id.* at *3.
751 *Id.* at *6, quoting *Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501, 528-29 (1986).
752 *Id.* quoting *Frew ex rel. Frew v. Haskins*, 540 U.S. 431, 437 (2004).

"spring from and serve to resolve a dispute within the court's subject-matter jurisdiction"; (2) "come within the general scope of the case made by the pleadings"; and (3) "further the objectives of the law upon which the complaint was based."[753]

The court acknowledged that "[b]efore entering a consent decree, a district court 'must ensure that the agreement is not illegal, a product of collusion, or against the public interest and that the decree is fair, adequate, and reasonable.'"[754] When analyzing the parties' proposed injunction, the court recognized that Federal Rule of Civil Procedure 65(d),"requires that every order granting injunctive relief must 'state the reasons why it issued,' 'state its terms specifically,' and 'describe in reasonable detail ... the act or acts restrained or required.'"[755]

With this legal standard in mind, the court found no evidence to suggest that the parties' consent decree was illegal, a product of collusion, or against the public interest.[756] Instead, the court opined that the consent decree was directed to protecting federal interests, because it resolved a matter within the court's subject-matter jurisdiction, was within the general scope of the case made by the complaints, and furthered the objectives of the discrimination laws.[757] Therefore, the court determined that the consent decree was fair, adequate, and reasonable.[758] The court observed that the parties were both represented by experienced counsel, the parties' bargaining positions were relatively balanced, and that the negotiation process was procedurally fair.[759]

Finally, the court opined that the terms of the consent decree were also substantively fair, including the monetary and non-monetary costs imposed against defendant, because it incorporated "corrective justice and accountability" and "finally and completely" resolved the parties' respective disputes.[760] The court noted that the consent decree was reasonable; was in the public interest; and upheld the objectives of the laws pursuant to which the plaintiffs raised their claims.[761] Further, the consent decree complied with Federal Rule of Civil Procedure 65(d) because it sufficiently described the contents of, basis for, and persons bound by the consent decree.[762] The court thus concluded the consent decree was satisfactory and granted the parties' joint motion for entry of the consent decree.[763]

The second case, *EEOC v. International Association of Bridge, Structural & Ornamental Iron Workers Union*,[764] reminded the parties that compliance with Title VII of the Civil Rights Act of 1964 often takes time. There, the parties sought court approval of a consent decree to resolve allegations that the defendants engaged in discrimination, after 50 years "of work to wind down this litigation . . . endeavoring to bring Local 580 and its co-defendants into compliance with Title VII."[765]

The parties alleged that "changed factual circumstances" warranted relief from the court's existing orders, including increased Black and Hispanic representation in Local 580 and its leadership, defendants' cooperation with the EEOC, and lack of recent Title VII violations.[766] The special master opposed the entry of the decree, however, based on his contention that the evidence in support of the motion was "unacceptably conclusory."[767] The court explained that it must determine that a proposal is "fair and reasonable" before approving it.[768] The court recognized that a "fair and reasonable consent decree is basically legal, clear, reflects a resolution of the actual claims in the complaint, and is not tainted by improper collusion or corruption."[769]

The Southern District of New York delivered the difficult reminder that the "district court's role is not "merely [to] 'rubber stamp' consent decrees negotiated by government agencies"[770] because "[c]onsent decrees vary" and "a district court may need to make additional inquiry to ensure that the consent decree is fair and reasonable."[771] The court determined that it required further information regarding the alleged changed circumstances to ensure that the actual claims at issue in this case have been resolved.[772] In order to weigh the evidence properly, the court specifically requested information and documentation regarding:

753 *Id.* quoting Local No. 93, *Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501, 525 (1986).
754 *Id.* at *6, quoting *United States v. State of Colo.*, 937 F.2d 505, 509 (10th Cir. 1991).
755 *Id.* at **6-7, quoting *EEOC v. Gollnick Constr., Inc.*, No. 19-cv-02581-DDD-SKC, 2019 WL 6327715, at *1 (D. Colo. Nov. 26, 2019).
756 *Id.* at *7.
757 *Id.*
758 *Id.* at *8.
759 *Id.*
760 *Id.*
761 *Id.* at **8-9.
762 *Id.* at *9.
763 *Id.*
764 *EEOC v. Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers Union*, 2021 U.S. Dist. LEXIS 239816 (S.D.N.Y. Dec. 15, 2021).
765 *Id.* at *5.
766 *Id.* at **5-6.
767 *Id.* at *6.
768 *Id.* citing *S.E.C. v. Citigroup Glob. Mkts. Inc.*, 752 F. 3d 285, 294 (2d Cir. 2014).
769 *Id.*
770 *Id.* citing S.*E.C. v. Levine*, 881 F.2d 1165, 1181 (2d Cir. 1989).
771 *Id.* citing *S.E.C. v. Citigroup Glob. Mkts. Inc.*, 752 F. 3d 285, 295 (2d Cir. 2014).
772 *Id.*

1) the EEOC's outreach to Black and Hispanic members, including an explanation of the EEOC's methodology in selecting interviewees and conducting interviews, the overall response rate, and the results of the interviews taken, including "when the outreach interviews occurred, who was interviewed, who conducted the interviews, what questions were asked, and what the respondents said"; 2) the current employment opportunities for Black and Hispanic Members, including the underlying data regarding the EEOC's pre-settlement analysis between 2009-2018, that purportedly uncovered no evidence of discrimination by Local 580; and 3) the disparities in hours worked across race and ethnicity.[773]

Subsequently, this standard was applied in a third case, *EEOC v. International Association of Bridge of Structural & Iron Workers*[774] – which stemmed from the earlier matter. The parties filed a joint motion to approve a proposed consent decree that, if adopted, would limit relief that was made available to minorities under a prior consent decree.[775]

The court recognized that it must determine that a "proposed consent decree is 'fair and reasonable' before granting its approval."[776] The court acknowledged that a "fair and reasonable consent decree is basically legal, clear, reflects a resolution of the actual claims in the complaint, and is not tainted by improper collusion or corruption."[777]

In response to the court's prior order, the EEOC filed a supplemental memorandum and declaration by the EEOC attorney in support of the proposed consent decree.[778] Exhibits included a letter soliciting information from Black and Hispanic members related to instances of discrimination by the union; a contact form that members were invited to submit to the EEOC if they wished to be in touch regarding any such discrimination; a report by an EEOC economist regarding disparities in hiring and hours worked between union members according to race and ethnicity; and a declaration by the defendant's business manager regarding the union's efforts to achieve proportionate working hours.[779] In response, the special master filed a letter arguing that the EEOC's supplemental submissions were substantially deficient.[780]

The court was satisfied with the EEOC's answer to its question about the union's outreach to Black and Hispanic members.[781] The court, however, agreed with the special master that the EEOC's submissions did not adequately address its other requests.[782] Specifically, the court agreed the EEOC's submissions did not answer the court's inquiry regarding employment opportunities for Black and Hispanic members, which was necessary to determine whether defendant was "committed to providing equal . . . employment opportunities to Black and Hispanic individuals."[783] The court also agreed that the EEOC failed to address the court's question concerning current disparities in hours worked among union members along lines of race and ethnicity because it did not provide a detailed accounting of the parties' efforts to achieve proportionate working hours, which was necessary to address the fact that white members worked more hours than minority members.[784] The court therefore denied the joint motion to approve the proposed consent decree, without prejudice, and requested that any renewed motion would include the EEOC's data underlying its pre-settlement analysis and a "detailed accounting" of the parties' efforts to achieve proportionate working hours.[785]

Finally, in the fourth case, *EEOC v. Sherwood Food Distributors*,[786] the Northern District of Ohio, Eastern Division reviewed an emergency motion for sanctions for failure to comply with a consent decree. The court issued a difficult reminder as to compliance with consent decrees, in its determination that a defendant's failure to pay its payroll tax liabilities (as required under the consent decree) prior to the agreed date constituted civil contempt.[787]

The court began by explaining that "to establish that a defendant is in civil contempt, the movant must show by clear and convincing evidence that the defendant 'violated a definite and specific order of the court requiring it to perform' or that the defendant acted with knowledge of the court's order."[788] The court further explained that the burden then shifts to the defendant to

773 *Id.* at **7-8.
774 *Id.*
775 *Id.* at *6.
776 *Id.* quoting *S.E.C. v. Citigroup Glob. Mkts. Inc.*, 752 F.3d 285, 294 (2d Cir. 2014).
777 *Id.* citing *S.E.C. v. Citigroup Glob. Mkts. Inc.*, 752 F.3d 285, 294-295 (2d Cir. 2014).
778 *Id.* at *7.
779 *Id.*
780 *Id.* at *8.
781 *Id.*
782 *Id.*
783 *Id.*
784 *Id.* at **8-9.
785 *Id.* at *10.
786 *EEOC v. Sherwood Food Distribs.*, LLC, 2022 U.S. Dist. LEXIS 32921, at *1 (N.D. Ohio Feb. 23, 2022).
787 *Id.* at *2.
788 *Id.* at *4, quoting *Electrical Workers Pension Trust Fund of Local Union #58 v. Gary's Elec. Serv. Co.*, 340 F.3d 373, 379 (6th Cir. 2003).

show they are presently unable to comply with order through a categorical and detailed explanation of their inability to comply for reasons outside their control.[789]

There, the court considered that the decree explicitly stated that distribution of the settlement funds must be completed by December 14, 2021.[790] The EEOC provided email communications to show that the defendant was informed of its payroll tax duties in accordance with the decree and that the defendant did not timely pay.[791] The court determined this was clear and convincing evidence that the payroll tax was a definite and specific order of the court and that defendant's refusal to pay is a violation of said order.[792]

The court further found that the defendant did not satisfy its burden to demonstrate that it took all reasonable steps to comply, and failed to satisfy its burden of providing a detailed explanation as to why it could not comply with the decree and make payments.[793] In sum, the court recognized that the defendant failed to produce evidence illustrating that its non-compliance was through no fault of its own.[794] Instead, defendant blamed the EEOC for conducting its investigation too slowly.[795] The court disagreed and found that the defendant failed to prove that its then-current situation prevented it from complying with the Decree.[796]

The court found that, since the defendant failed to prove that its delay was caused by reasons outside of its control, payment of the increase in back-pay tax liability was appropriate.[797] Accordingly, the defendant was ordered to pay the full amount within 30 days of the order, and the payment of additional costs that exceed those expected in the decree.[798] The court denied the EEOC's requests for additional sanctions.[799]

N. Recovery of Attorneys' Fees by Employers

Title VII provides that "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person."[800] By its terms, this provision allows either a prevailing private plaintiff or a prevailing defendant to recover attorneys' fees. The award of attorneys' fees to a prevailing plaintiff, however, involves different considerations from an award to a prevailing defendant. The prevailing plaintiff is acting as a "private attorney general" in vindicating an important federal interest against a violator of federal law, and therefore "ordinarily is to be awarded attorney's fees in all but special circumstances."[801]

The opposite is true of a prevailing defendant. A prevailing defendant not only is not vindicating any important federal interest, according to the governing standard, but the award of attorneys' fees to prevailing defendants as a matter of course would undermine that interest by making it riskier for "private attorneys general" to bring claims.[802] Accordingly, before a prevailing defendant may be awarded fees, it must demonstrate that a plaintiff's claim was "frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so."[803] This stringent standard does not, however, require proof that the EEOC or a private plaintiff acted in bad faith.[804] A decision to award fees is committed to the discretion of the trial judge who is "on the scene" and in the best position to assess the considerations relevant to the conduct of litigation.[805]

The last significant EEOC litigation on this issue occurred in 2019 in the Eighth Circuit. In *EEOC v. CRST Van Expedited, Inc.*, the EEOC was required to pay a prevailing employer $3.3 million in attorneys' fees for pursuing a "class" sexual harassment claim after it knew or should have known the claims were frivolous.[806] In the decade-old lawsuit, the EEOC alleged that the employer engaged in a pattern or practice of discrimination against female truck drivers and driver trainees who claimed they were sexually harassed.

789 *Id.*at *6, citing *Electrical Workers Pension Trust Fund*, 340 F.3d at 373, 379 (6th Cir. 2003).
790 *Id.* at **5-6.
791 *Id.* at *6.
792 *Id.*
793 *Id.*
794 *Id.* at *8.
795 *Id.*
796 *Id.* at **8-9.
797 *Id.* at **9-10.
798 *Id.* at *10.
799 *Id.*
800 42 U.S.C. § 2000e-5(k).
801 *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 416–17 (1978).
802 *Id.* at 422.
803 *Id.*
804 *Id.* at 421.
805 *EEOC v. Propak Logistics, Inc.*, 746 F.3d 145, 151 (4th Cir. 2014) (quoting *Arnold v. Burger King Corp.*, 719 F.2d 63, 65 (4th Cir. 1983)).
806 *EEOC v. CRST Van Expedited, Inc.*, 944 F.3d 750 (8th Cir. 2019).

The employer prevailed at the district court level in 2009, but, on appeal, the Eighth Circuit held that the EEOC did not owe the company costs and fees because the EEOC's claims had not been dismissed on the merits—but rather for procedural deficiencies. The Supreme Court disagreed, finding that the EEOC can be ordered to pay costs and fees when some or all of its claims are dismissed for failure to satisfy the EEOC's pre-lawsuit requirements, and remanded the matter back to the district court.

On remand, the district court once again held that the company was entitled to attorneys' fees, expenses, and costs. Specifically, the district court applied the *Christiansburg* standard and in an exhaustive, claim-by-claim analysis, determined that the 78 claims dismissed on summary judgment were frivolous, groundless, and/or unreasonable. On appeal, the Eighth Circuit upheld the fee award, finding that the district court did not abuse its discretion in applying the *Christiansburg* standard. The Eighth Circuit agreed that the EEOC's failure to conciliate and investigate the claims was an unreasonable litigation tactic that resulted in frivolous, unreasonable, or groundless claims. In addition, the Eighth Circuit noted that the district court made particularized findings of frivolousness, unreasonableness, and groundlessness as to each individual claim dismissed on summary judgment. The Eighth Circuit also rejected the EEOC's allegation that it sought relief for the remaining women based on the pattern-or-practice burden of proof because the EEOC never actually alleged the company was engaged in "a pattern or practice" of illegal sex-based discrimination. The Eighth Circuit agreed with the district court's reasoning that, "[a]s the master of its own complaint, it was frivolous, unreasonable and/or groundless for the EEOC to fail to allege a pattern-or-practice violation and then proceed to premise the theory of its case on such a claim."[807]

In regard to company's calculation of attorneys' fees, the Eighth Circuit agreed that the company properly distinguished between costs associated with defending against frivolous, unreasonable, and/or groundless claims and those that did not meet that standard. In doing so, the Eighth Circuit held that the district court is not required "to become a green-eyeshade accountant pour[ing] over the record to calculate each individual claim. Instead the district court did rough justice by finding that the general method by which [the company] calculated the fees it now seeks was appropriate."[808]

807 *Id.* at 757.
808 *Id.* at 759 (quoting *EEOC v. CRST Van Expedited, Inc.*, 277 F. Supp. 3d 1000, 1052 (N.D. Iowa 2017) (internal quotations omitted)).

VI. APPENDICES

APPENDIX A – EEOC CONSENT DECREES, CONCILIATION AGREEMENTS AND JUDGMENTS[809]

Select EEOC Settlements in FY 2022-2023

Settlement Amount	Claim	Description	Court	EEOC Press Release
$18 million	Sex Harassment Pregnancy Discrimination Retaliation	The EEOC alleged defendants subjected female employees to sexual harassment, discrimination based on pregnancy, and retaliation. Under the terms of the three-year consent decree, the defendants agreed to hire a third-party EEO consultant and to create an internal EEO position to work with the external consultant; submit to audits of its pending and current discrimination and harassment complaints; provide semi-annual reports to the EEOC; perform climate surveys; conduct anti-harassment and anti-discrimination training that includes bystander intervention and civility training; expand mental health counseling services to employees who have experienced sexual harassment; create a tracking system for complaints; institute a toll-free complaint reporting hotline; implement a performance review system for managers, supervisors and human resources personnel that includes an EEO component; and institute recordkeeping and reporting mechanisms.	U.S. District Court for the Central District of California	*3/30/2022*
$8 million*	Disability Discrimination Pregnancy Discrimination Retaliation	The EEOC alleged a company and related entities failed to provide reasonable accommodations to employees with disabilities and those who were pregnant, and instead required them to take unpaid leave, retaliated against them, and required returning employees to be 100% healed or face termination. Under the terms of the conciliation agreement, which will be in place for four years, the company will pay $8 million, which includes a class fund to provide relief to those employees impacted by the company's policies and employed between July 10, 2009 and September 26, 2022. The company will also provide non-monetary relief, including the appointing of an EEO coordinator to provide oversight on pregnancy-related disability policies, requests for reasonable accommodations, and maintenance of records. The company will update its accommodation policies, conduct climate surveys and exit interview, and provide employees and managers with anti-discrimination training.	This settlement was reached during conciliation before the EEOC filed a lawsuit on the merits.	*11/29/2022*

809 Littler monitored EEOC press releases regarding settlements, jury verdicts, and judgments entered in EEOC-related litigation during FY 2022 and the early months of FY 2023. The significant consent decrees and conciliation agreements in Appendix A include those amounting to $500,000 or more. Notable conciliation agreements are included in the shaded boxes. FY 2023 settlements are marked with an asterisk (*). Appendix A also includes notable jury verdicts and judgments.

Settlement Amount	Claim	Description	Court	EEOC Press Release
$5 million	Sex Discrimination	The EEOC alleged that the defendant engaged in a nationwide pattern or practice of sex discrimination against female job applicants for sales positions. Under the terms of the three-year consent decree, the company agreed to appoint a Title VII coordinator to implement the company's EEO policies and procedures and oversee compliance with the decree. The company will also develop a recruitment plan for women in sales positions and provide anti-discrimination training to all employees. In addition, the company will offer positions to qualified female applicants who were denied positions. Specifically, one in every five new vacancies will be offered to women who are part of the settlement. The company will provide reports to the EEOC on its recruitment and hiring efforts.	U.S. District Court for the Northern District of Alabama	*2/2/2022*
$2 million*	Sex Harassment	The EEOC alleged a fast-food franchise owner allowed sexual harassing behavior to persist at various locations. Under the terms of the consent decree, the owner will pay $1,997,500, retain a third-party EEO monitor to conduct audits of the franchise practices in handling harassment and retaliation claims, create a tracking system for complaints, conduct climate surveys, update its EEO policies, and conduct training.	U.S. District Court for the District of Nevada	*1/6/2023*
$1.75 million	Race Discrimination National Origin Discrimination Sex Harassment Retaliation	The EEOC claimed four companies acting as joint employers engaged in systemic race discrimination, national origin discrimination, sexual harassment, and retaliation. Specifically, the EEOC alleged the companies subjected men to harassment based on race (African American), national origin (Native American, Hispanic, and Mexican), and/or sex (male). In addition, the EEOC claims the companies retaliated against those who complained or who associated with those who complained. Under the terms of the three-year consent decree, the companies will pay 16 individuals $1,750,000, review and update their anti-discrimination and retaliation policies, provide training, and report compliance measures to the EEOC.	U.S. District Court for the Western District of Texas	*8/8/2022*

Settlement Amount	Claim	Description	Court	EEOC Press Release
$1.6 million	Sex Harassment Retaliation	The EEOC alleged a restaurant franchise subjected employees to sexual harassment and retaliated against at least one who complained by revoking her disability-related reasonable accommodation, resulting in her constructive discharge. Under the terms of the five-year consent decree, the employer agreed to provide $1,475,000 in lost wages and compensatory damages to the employees who were subjected to harassment, and to the estate of the employee who filed the original charge of discrimination. In addition, the defendant franchise owner will pay $125,000 to the State of Vermont in civil penalties. Non-monetary relief includes an injunction prohibiting future discrimination, anti-harassment and anti-discrimination training, revisions to company policies, hiring an independent monitor to oversee compliance with the consent decree, reporting requirements, and prohibiting the manager who harassed the employees from entering the premises.	U.S. District Court for the District of Vermont	*6/30/2022*
$1.1 million	Race Discrimination Race Harassment	The EEOC alleged the company discriminated against Black applicants in hiring and fired a Black employee on account of his race and in retaliation for complaining about harassment. The EEOC also alleged the company favored hiring Hispanic over Black job applicants. Under the terms of the three-year consent decree, the company agreed to provide $1.1 million in damages to a class of 93 rejected job applicants and those subjected to harassment, hire job applicants who were initially rejected, make good-faith efforts to recruit and hire Black applicants, and implement anti-harassment training and policies. With respect to recruitment efforts, when the company seeks to fill general labor or skilled labor positions, it agreed to hire one individual from a list provided by the EEOC for every two individuals hired from another source. Once the EEOC's list is exhausted, the company will use its best efforts to meet hiring goals for Black applicants of 50% for general labor positions and 43% for skilled labor positions.	U.S. District Court for the Northern District of Illinois	*10/7/2021*

Settlement Amount	Claim	Description	Court	EEOC Press Release
$1 million	Sex Harassment Retaliation	The EEOC alleged the company subjected female applicants and employees to sexual harassment and created a hostile working environment. In addition, the EEOC claimed the company engaged in unlawful retaliation. As part of the three-year conciliation agreement, the company agreed to provide monetary relief to the charging party and establish a class fund to compensate applicants and employees who were subjected to sexual harassment. The company also agreed to hire an EEO consultant or employment counsel to review and potentially revise its sexual harassment and anti-retaliation policies. The new employee will also be responsible for handling internal and external complaints. The company agreed to include a provision in its performance plans for managers addressing accountability for compliance with the company's EEO policies and procedures. The company will conduct anonymous climate surveys to assess the effectiveness of its new policies.	This settlement was reached during conciliation before the EEOC filed a lawsuit on the merits.	12/20/2021
$935,000	Sex Discrimination	The EEOC alleged the employer discriminated against female job applicants by failing to hire them for sales positions and by not maintaining records. Under the terms of the conciliation agreement the employer agreed to pay $935,000 to those affected by the company's hiring practices (those who applied between January 1, 2012 and June 14, 2022). The employer also agreed to increase female representation in its workforce, hire an independent monitor, provide EEO training to all employees and management, change its hiring and recordkeeping practices, and post a notice that informs customers of its commitment to creating a workplace free of discrimination.	This settlement was reached during conciliation before the EEOC filed a lawsuit on the merits.	8/25/2022
$715,000*	Sex Discrimination	The EEOC alleged an employer failed to recruit, hire, and promote women. As part of the four-year conciliation agreement, the employer agreed to pay $715,000 into a class fund for those women who were not hired and those who were denied in-store non-management positions. The company also agreed to appoint an EEO monitor, develop a nationwide online promotion platform, revise its complaint and investigation procedures, provide training, and conduct anonymous, internal climate surveys.	This settlement was reached during conciliation before the EEOC filed a lawsuit on the merits.	2/2/2023
$700,000	Sex Harassment	The EEOC alleged a manager at defendant store sexually harassment at least three employees. Under the terms of the three-year consent decree, the defendant will pay $700,000 in monetary damages; review, revise, and distribute its anti-harassment and other policies to employees; provide annual anti-harassment training; expunge the charging parties' personnel files; provide letters of reference upon the charging parties' request; and certify it will not employ the alleged harasser at any of its facilities.	U.S. District Court for the District of Arizona	9/16/2022

Settlement Amount	Claim	Description	Court	EEOC Press Release
$690,000	Sex Harassment	The EEOC alleged that the defendant restaurant's former managing partner sexually harassed female employees. Under the terms of the 2.5-year consent decree, the defendant will pay $690,000 to those impacted by the harassment. The company also agreed to implement a new sexual harassment policy and investigation procedures nationwide, as well as provide training to certain HR and management officials on sexual harassment.	U.S. District Court for the Middle District of Florida	12/9/2021
$550,000	Race Discrimination Sex Discrimination Pregnancy Discrimination Age Discrimination Disability Discrimination Retaliation	The EEOC alleged the defendant staffing company refused to hire Black applicants or placed them in lower-paying positions and adhered to client preferences by placing employees in positions based on race and sex, and rejected pregnant applicants. The EEOC also alleged the defendant routinely rejected applicants ages 50 and older, and improperly inquired about medical conditions and rejected applicants if they were deemed disabled. The EEOC claimed an office manager who complained about the hiring practices was retaliated against and forced to resign. Under the terms of the three-year consent decree, the staffing company will pay $475,000 to a class of applicants and employees impacted by the defendant's practices, and pay an additional $75,000 to retain an independent monitor to review the company's hiring practices and ensure its compliance with EEO laws, provide training, and investigate claims of discrimination. The company agreed to send a letter to all clients about its commitment to follow anti-discrimination law, adopt a robust anti-discrimination policy, and allow the EEOC to monitor its compliance.	U.S. District Court for the Western District of New York	10/3/2022
$500,000	Sex Discrimination	The EEOC alleged the defendant company discriminated against women by using a physical abilities test in hiring, which tended to screen out women. Under the terms of the five-year consent decree, the company will pay $500,000 to the class of women whose job offers were revoked on account of the test results. The agreement also prevents the company from using the physical abilities test at issue, and if it opts to use an alternative test that has a disparate impact on women, it must first demonstrate it is job-related for the position and consistent with business necessity. The consent decree also requires the company to provide reports to the EEOC on its hiring practices.	U.S. District Court for the District of Minnesota	12/8/2021
$500,000*	Sex Harassment	The EEOC alleged the defendant subjected a class of monolingual Spanish-speaking female employees to sexual harassment. Under the terms of the 2.5-year consent decree, the company will pay $500,000 in monetary relief to members of the class, provide sexual harassment training, post a notice of the settlement, and hire an outside EEO monitor to ensure it adheres to the terms of the decree.	U.S. District Court for the District of Nevada	10/13/2022

Select EEOC Jury Awards or Judgments in FY 2022[810]

Jury or Judgment Amount	Claim	Description	Case Citation	EEOC Press Release
Costs taxed in the amount of $25,647.71 against the EEOC	Pay Discrimination	The EEOC alleged the defendant university unlawfully paid a woman $28,000 less than a male colleague who performed similar work on account of her gender. On March 11, 2022, the jury returned a verdict in favor of the employer, finding sex was not a motivating factor in any pay differential. The court subsequently entered judgment in favor of the defendants and against the plaintiffs.	*EEOC v. University of Miami*, No. 1:19-cv-23131 (S.D. Fla. Mar. 23, 2022)	n/a
$12,146.72	Disability Discrimination	The EEOC alleged the defendant discriminated against the charging party in violation of the ADA when it failed to accommodate her and terminated her employment after she requested intermittent FMLA leave to address her anxiety. The defendant initially was awarded summary judgment, but the Sixth Circuit reversed and remanded for trial, alleging the defendant regarded her as having a physical or mental impairment and failed to accommodate her. On October 25, 2022, a jury found in favor of the EEOC, awarding $6,000 in compensatory damages and $6,146.72 in back pay. The jury declined to award punitive damages.	*EEOC v. West Meade Place*, No. 3:18-cv-00101 (M.D. Tenn. Oct. 25, 2022)	11/1/2022

810 Judgments and verdicts in favor of the defendant are shaded.

APPENDIX B – FY 2022 EEOC AMICUS AND APPELLANT ACTIVITY[811]

FY 2022 – Appellate Cases Where the EEOC Filed an Amicus Brief[812]

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Stratton v Bentley University	U.S. Court of Appeals for the First Circuit No. 22-1061	7/22/2022 (amicus filed)	Title VII	Retaliation **Result:** Pending

Background: Defendant university hired Plaintiff in August 2016 as Executive Program Coordinator for its User Experience Center, a consulting unit that advises third-party clients on how to better serve their own clients. The Plaintiff alleges she experienced discriminatory treatment, specifically that her supervisors would give her inconsistent directions, fail to communicate with one another, and speak to her in "disrespectful" ways that "degraded" and "humiliated" her. Believing her gender, race, and Guatemalan origin motivated this ill treatment, Plaintiff allegedly made "repeated" but fruitless discrimination complaints to Human Resources. She testified that her mistreatment (from her supervisors) intensified soon after she complained including: (1) increased workload; (2) increased criticism of her work; (3) criticized in front of co-workers (4) received negative remarks in performance review; (5) and received a performance improvement plan. Plaintiff testified she could not take it any longer and felt forced to resign.

She then sued the university, claiming it violated Title VII by retaliating against her for opposing unlawful discrimination. The district court granted summary judgment for the university on Plaintiff's Title VII retaliation claim. Explaining that a retaliation Plaintiff "must show that her employer took some objectively and materially adverse action against her," the district court held that no reasonable jury could find the university's allegedly retaliatory actions sufficiently adverse to qualify.

Issues EEOC is Addressing as Amicus: Whether the district court should have assessed Plaintiff's Title VII retaliation claim under the *Burlington Northern* standard, which provides that an employer's allegedly retaliatory conduct is sufficiently adverse to be actionable if it could dissuade a reasonable worker from making or supporting a discrimination charge.

EEOC's Position: The EEOC claims that the district court erred in failing to apply the *Burlington Northern* standard when assessing whether a reasonable jury could find Plaintiff experienced a materially adverse action for purposes of her retaliation claim. Specifically, under Burlington Northern, allegedly retaliatory conduct can be actionable if it could have dissuaded a reasonable worker from engaging in protected activity.

Court's Decision: Pending.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Banks v General Motors, LLC	U.S. Court of Appeals for the Second Circuit No. 21-2640	2/8/2022 (amicus filed)	Title VII	Sex Race Retaliation **Result:** Pending

Background: Defendant hired Plaintiff as a manufacturing supervisor at its Lockport, New York, plant in 1996. In 1999, Delphi Automotive Systems acquired the plant from Defendant, and Defendant reacquired it in October 2009. Plaintiff remained employed at the Lockport plant throughout this time. By the time Defendant regained ownership, Plaintiff had been promoted to site safety supervisor. Plaintiff alleges that she endured a hostile work environment because of her race and gender. Focusing on the timeframe beginning in October 2009, she claims she routinely experienced hostility and insubordination unlike anything directed at her White/Caucasian colleagues. Plaintiff claims she was subjected to numerous sexist and racist comments creating a hostile work environment. Plaintiff complained of discriminatory treatment to Human Resources and a third-party reporting service Defendant provides for its employees. Defendant terminated her disability benefits one month after she filed her EEOC charge (however, she appealed and it was ultimately reinstated). When Plaintiff sought to return from disability leave, Defendant required her to get additional approval from its own psychiatrist. After she returned from leave Defendant placed her as shift safety representative supporting manufacturing operations on the second and third shifts and gave her a small raise, but the job had no supervisory responsibilities and was no longer involved in strategic planning. Defendant asked Plaintiff if she would transfer to a safety supervisor position in Cincinnati.

Plaintiff sued under Title VII. She alleged that Defendant had demoted her and subjected her to a hostile work environment because of her race and sex and had retaliated against her for complaining. The district court granted summary judgment to Defendant on all claims.

811 The information included in Appendix B, "*FY 2022–Appellate Cases Where the EEOC Filed an Amicus Brief*" and "*FY 2022–Appellate Cases Where the EEOC Filed as the Appellant*," were pulled from the EEOC's publicly available database of appellate activity *available at* http://www1.eeoc.gov/eeoc/litigation/briefs.cfm. Appendix B includes select cases from this database. The cases are arranged in order by circuit.

812 As of late March 2023, the cases listed as "pending" were still in that status.

Issues EEOC is Addressing as Amicus: (1) Could a reasonable jury find, based on the totality of the circumstances, that Plaintiff endured a hostile work environment because of her race and/or sex? (2) Could a reasonable jury find that Defendant took an adverse action for purposes of Plaintiff's discrimination and retaliation claims when it brought her back from disability leave with a small raise, but stripped her of her supervisory title and responsibilities, transferred her to an undesirable shift where she had little opportunity to engage with members of senior management, and only gave her work beneath her skill and experience level? (3) Given the Supreme Court's holding that a 37-day suspension without pay can constitute a retaliatory adverse action, could a reasonable jury assessing Plaintiff's retaliation claim find that the 61-day suspension of her disability benefits was an adverse action? (4) Could a reasonable jury find a causal connection between the plant doctor's refusal to authorize Plaintiff's return to work and Plaintiff's filing of an EEOC charge, based on the doctor's repeated, pointed references to the charge during the four-month authorization process?

EEOC's Position: A jury could find that Plaintiff endured race- and/or sex-based harassment sufficient to constitute a hostile work environment under Title VII. Here, Plaintiff has alleged widespread, long-term, and pervasive race- and sex-based hostility. Although not all the conduct was expressly discriminatory, much of it was committed by individuals who indicated possible discriminatory animus in other ways. The EEOC cites to examples like co-workers who did not use expressly racist terms but who never treated white employees the way they treated Plaintiff. A jury could find from this difference in treatment that these individuals, too, were motivated by racial animus. The district court erroneously held that Plaintiff could not establish a hostile work environment because the incidents of which she complains were frequent but not severe. When a plaintiff alleges an ongoing pattern of sexually and/or racially offensive and humiliating conduct, the severity of any single act is not dispositive. Finally, the court erred by focusing on the absence of tangible harm. A plaintiff need not show that she has been physically threatened or that the harassment interfered with her job performance.

A jury could find that Plaintiff's demotion was an adverse action for purposes of her discrimination and retaliation claims. The district court failed to apply the correct legal standards in holding that no reasonable jury could find Plaintiff's demotion to be an adverse action. The court has stated that Title VII's anti-discrimination provision prohibits actions that are more disruptive than a mere inconvenience or an alteration of job responsibilities. The anti-retaliation provision prohibits any action that well might have dissuaded a reasonable worker from making or supporting a charge of discrimination. Plaintiff's demotion satisfies both standards.

A jury could find that the two-month suspension of Plaintiff's disability benefits was an adverse action for purposes of her retaliation claim. The district court ignored Supreme Court precedent in holding that the 61-day suspension of Plaintiff's disability benefits could not constitute an adverse action for purposes of her retaliation claim. In Burlington Northern, the employer suspended Plaintiff for 37 days without pay, allegedly in retaliation for her EEOC charge. It subsequently paid her retroactively for the 37 days. The Supreme Court upheld the jury's finding that the suspension was a materially adverse action even though the employer ultimately provided backpay.

A jury could find a causal connection between the plant doctor's delay in allowing Plaintiff to return from disability leave and her filing of an EEOC charge, because the doctor repeatedly referred to the charge during the four-month authorization process.

Court's Decision: Pending.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Eisenhauer v. Culinary Institute of America	U.S. Court of Appeals for the Second Circuit 21-2919	3/10/2022 (amicus filed)	EPA	Sex **Result:** Pending

Background: The Defendant is a private cooking college in Hyde Park, New York. Plaintiff was hired as a Lecturing Instructor in Defendant's Culinary Art Department in 2002 with a starting salary of $50,000. Plaintiff testified that, although she hoped to be making at least $60,000, she was told "to take it or leave it." Throughout her tenure at Defendant, Plaintiff taught in Defendant's Culinary Arts Global Specialization department, teaching courses in Mediterranean, Asian, and American cuisine. Plaintiff's salary over the years increased steadily, pursuant to the collective bargaining agreement. She received annual percentage raises and increases for milestones like promotions and degree completion. Plaintiff also advanced in rank every few years, from Lecturing Instructor to Assistant Professor in 2005 to Associate Professor in 2008 and finally to Professor in 2013. She was also given increases for completing a bachelor's degree from SUNY Empire State College in 2009 and an MBA from Green Mountain College in 2016.

Plaintiff sued Defendant under the EPA and state law, and both parties moved for summary judgment. Plaintiff claimed another professor in Culinary Arts Global Specialization was hired as a Lecturing Instructor in 2008 with a starting salary of $70,000. The other professor specialized in teaching the same cuisine as Plaintiff and had the same job duties. Defendant maintained that the other instructor completed an associate degree from Defendant, had greater years of experience as a chef and professor, and superior performance in the cooking and teaching demonstrations during the application process, justifying his higher starting salary. Also, starting salaries generally were higher by that time. Both received pay bumps since the time they started, Plaintiff's pay was usually higher than the other professor's until 2017 when his pay was $111,032 and hers was $104,623, and in 2020 the other professor's pay increased to $121,918 and hers to $114,880.

The district court granted Defendant's motion for summary judgment, initially noting that the EPA "is a strict liability statute, and so a plaintiff need not show an employer's discriminatory intent." In setting out the analysis in an EPA case, however, the court asserted, "[o]nce an employer establishes one of the four affirmative defenses, the burden shifts back to Plaintiff to show that the stated reason was, in fact, a pretext for sex discrimination." The district court first rejected Defendant's argument that Plaintiff could not establish a *prima facie* case using only the other professor as a comparator. On the EPA's affirmative defenses, the district court concluded that Defendant's articulation and assertion of a non-discriminatory justification—the other professor's greater experience, education, and professional credentials when he was hired and the CBA's gender-neutral formula for awarding pay increases—was a factor other than sex, "which Plaintiff has not shown was pretextual."

Issues EEOC is Addressing as Amicus: (1) Whether the district court correctly held that Plaintiff established a *prima facie* case of pay discrimination by offering evidence that a single male comparator was earning more for performing substantially equal work. (2) Whether the district court erred by holding that Defendant had established an affirmative defense to liability under the EPA as a matter of law merely because it articulated nondiscriminatory reasons for the pay disparity between Plaintiff and her male colleague, and because Plaintiff failed to prove those reasons were pretextual.

EEOC's Position: (1) Plaintiff established a *prima face* case of wage discrimination under the EPA by offering evidence of a single male comparator who earned a higher salary for performing the same job. Because the central question for EPA purposes is whether men and women are paid unequal wages for equal work based on their sex, only comparators performing substantially equal work are relevant to the analysis. Several other circuits have unequivocally recognized that an EPA claimant need show only she was "paid less than one or more males" for equal work to establish a *prima facie* case of wage discrimination. (2) A defendant must prove, not merely articulate, its affirmative defense that something other than sex explains a wage disparity, and the burden of proof never reverts to Plaintiff to establish pretext. The district court's grant of summary judgment to Defendant based on Plaintiff's failure to demonstrate pretext misunderstands the appropriate burdens of proof on summary judgment in an EPA claim. Under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and its progeny, showing an employer's stated reason is a pretext can allow a trier of fact to find intentional discrimination in a Title VII case. But there is no pretext phase akin to *McDonnell Douglas* in EPA cases. The court should correct the confusion that has stemmed from a blurring of the two-proof scheme. (3) Under the EPA, once Plaintiff has made her *prima facie* showing, the burden shifts to the employer to prove one of the four statutory affirmative defenses. Where a defendant relies on the catch-all fourth exception for "a differential based on any other factor other than sex," the employer must prove that a "bona fide business-related reason" was responsible for the pay disparity as the purported factor other than sex. Regardless of which affirmative defense the employer pursues, its burden is one of persuasion, not production, and it is "a heavy one." Thus, on summary judgment, Defendant was required to identify evidence that would not simply create a genuine issue of fact for trial, but instead was so one-sided in its favor that a rational jury would be compelled to conclude that in every instance, the salary disparity between Plaintiff and the one comparator was based on a factor other than sex.

Court's Decision: Pending

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Stidhum v 161-10 Hillside Auto Ave, LLC	U.S. Court of Appeals for the Second Circuit No. 21-1653	3/3/2022 (amicus filed) 4/12/2022 (decided)	Title VII	Charge Processing **Result:** n/a – Appeal dismissed as moot

Background: Defendant hired Plaintiff as a salesperson in May 2018. Plaintiff alleges that Defendant discriminated against her based on her sex and pregnancy, including by denying her commissions and bonuses. Plaintiff filed a charge of discrimination on or about April 19, 2019. On or about July 19, 2019, the District Director for the EEOC's New York District Office responded to a request from Plaintiff by issuing a right-to-sue notice. The District Director checked the box stating that "[l]ess than 180 days have passed since the filing of this charge, but I have determined that it is unlikely that the EEOC will be able to complete its administrative processing within 180 days from the filing of this charge." The District Director also checked the box explaining the EEOC was "terminating its processing of the charge."

Plaintiff sued, and Defendant moved to dismiss on the ground that Plaintiff's right-to-sue notice was premature because the EEOC issued it less than 180 days after her charge. The district court entered an order granting Defendant's motion to dismiss, and later issued its opinion holding that Plaintiff's suit was premature because she lacked "the [right-to-sue] notice that is a statutory prerequisite to" suit. The court held that 42 U.S.C. § 2000e-5(f)(1) permits right-to-sue notices only when (1) the EEOC dismisses the charge or (2) the EEOC has not filed a civil action or entered into a conciliation agreement within 180 days of the charge. The district court recognized the split in courts as to the validity of the regulation but sided with the courts holding the regulation invalid.

Issues EEOC is Addressing as Amicus: (1) Whether this appeal may be moot. (2) Whether the notices described in 42 U.S.C. § 2000e-5(f)(1) are the only notices that create a right to sue under Title VII, barring the initiation of a Title VII suit upon receipt of a notice issued solely pursuant to 29 C.F.R. § 1601.28(a)(2). (3) If 42 U.S.C. § 2000e-5(f)(1) is ambiguous regarding the validity of notices issued pursuant to 29 C.F.R. § 1601.28(a)(2), whether 29 C.F.R. § 1601.28(a)(2) is entitled to agency deference under *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

EEOC's Position: The two questions the court posed to the EEOC concern the agency's authority under Title VII and 29 C.F.R. § 1601.28(a)(2) to issue right-to-sue notices less than 180 days after a charge is filed when the EEOC determines it is unlikely to complete the administrative processing necessary to file a lawsuit or conciliate the charge within 180 days. Before addressing those questions, however, the EEOC notes this appeal may be moot.

The court's first question suggests that right-to-sue notices issued pursuant to 29 C.F.R. § 1601.28(a)(2) are a separate category of notices untethered from 42 U.S.C. § 2000e-5(f)(1). They are not. The statute is ambiguous as to whether the right-to-sue notices Title VII explicitly authorizes—when EEOC has not sued or entered into a conciliation agreement within 180 days after a charge is filed—can be issued earlier when the EEOC determines it probably will not complete its administrative processing in that time. The text and statutory context of section 2000e-5(f)(1) support finding section 2000e-5(f)(1) ambiguous on the precise question of whether the EEOC must wait 180 days to issue a right-to-sue notice under these circumstances, a conclusion buttressed by decisions from three other courts of appeals.

Because the statute is ambiguous, the next question under *Chevron*'s two-step analysis—which is this court's second question—is whether 29 C.F.R. § 1601.28(a)(2) is entitled to deference. It is. The regulation is a procedural regulation within the EEOC's authority under Title VII, and the EEOC issued it in a notice-and-comment rulemaking. And the regulation reasonably interprets section 2000e-5(f)(1) to further Congress's interest in the prompt resolution of charges, consistent with the statutory language and context, while ensuring that charging parties may receive a right-to-sue notice only in less than 180 days when the EEOC certifies that it is unlikely to complete its administrative processing within 180 days.

Court's Decision: The Second Circuit held that it lacked appellate jurisdiction because Plaintiff's new lawsuit renders this appeal moot. The new suit — filed after the 180-day period elapsed and after the EEOC issued a new right-to-sue notice — is based on essentially the same claims in Plaintiff's original lawsuit and does not raise the same "early right-to-sue notice" issue as the original lawsuit. However, once this appeal is resolved, Plaintiff will be left in substantially the same position as she is now with the benefit of the new suit. Thus, the court stated it cannot "grant any effectual relief whatever to the prevailing party" in this appeal.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Massaro v. New York City Department of Education	U.S. Court of Appeals for the Second Circuit No. 21-266	5/28/2021 (amicus filed) 6/2/2022 (decided) 10/31/2022 (petition for *writ of certiorari* denied)	ADEA	Retaliation Harassment **Result:** Pro-Employer

Background: Plaintiff filed suit in 2011 against the Board of Education of the City School District of the City of New York (the Board), alleging age discrimination. The district court dismissed her suit in 2013, but Plaintiff alleges that the Board subjected her to continuous retaliatory conduct related to performance ratings and staffing.

Issues EEOC is Addressing as Amicus: (1) Whether the *Burlington Northern* materially-adverse-action standard applies to ADEA retaliatory harassment claims. (2) Whether the district court erred in its analysis of the timeliness of the retaliatory harassment claim.

EEOC's Position: (1) The EEOC argued that the materially-adverse-action standard applies to retaliatory harassment claims. In order for the allegedly retaliatory conduct to be actionable under Title VII or the ADEA, it must be materially adverse to Plaintiff. (2) The district court erred in analyzing the timeliness of Plaintiff's retaliatory harassment claim under the "continuing violation doctrine." Instead, the court should have defined Plaintiff's retaliatory harassment claim to include all the non-discrete acts of retaliatory harassment from 2012-2016, with any time-barred alleged retaliatory discrete acts available as background evidence on the question of liability.

Court's Decision: In a summary order, the Second Circuit affirmed the judgment of the district court. The court noted that the Plaintiff's "evidence is comprised of discrete acts that do not make up a series of violations within the meaning of the continuing violation act," and that she failed to provide any evidence supporting her contention that her employer's actions constituted a series of repeated retaliatory practices. Therefore she was subject to the ADEA's 300-day statute of limitations. Moreover, the Plaintiff failed to show temporal proximity in support of any alleged causation.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
O'Brien v. The Middle East Forum, et al.	U.S. Court of Appeals for the Third Circuit No. 21-2546	12/3/2021 (amicus filed) 1/5/2023 (decided)	Title VII	Sex Harassment **Result:** Pro-Employer

Background: Plaintiff claimed her direct supervisor sexually harassed her. The supervisor was second-in-command of the place of employment and exercised significant decision-making authority. She alleged that after she complained about his alleged conduct, she was unfairly reprimanded for purported performance deficiencies and was constructively discharged. She eventually sued, arguing on multiple occasions that the Defendant should be barred from raising the *Faragher/Ellerth* defense because the harasser qualified as the company's proxy, such that any unlawful harassment would be automatically imputed to the company. The matter went to the jury, and the court denied her jury instruction request regarding the proxy liability issue. The district court instead instructed the jury that if it found that the Plaintiff experienced unwelcome harassment that was severe or pervasive, it "must consider" the *Faragher/Ellerth* defense unless it found that the supervisor's harassment culminated in a tangible employment action, and the jury "must find for the Defendants" if it found the elements of the defense satisfied. The district court did not instruct the jury to consider whether the supervisor qualified as the company's proxy, nor did it instruct that the *Faragher/Ellerth* defense would be unavailable if he so qualified. The court submitted the case to the jury with a general verdict form, which asked only a single question related to the Plaintiff's Title VII hostile-work-environment claim: whether she had "proven by a preponderance of the evidence that she was subjected to sexual harassment by the Defendant [supervisor] and that this harassment was motivated by her gender." The jury answered this question in the negative, returning a verdict in the Defendant's favor on this claim.

Issues EEOC is Addressing as Amicus: (1) Is the employer automatically liable for actionable harassment where the individual perpetrating this unlawful harassment is not merely a supervisor but instead qualifies as the employer's proxy? (2) Whether the district court's decision not to instruct the jury regarding proxy liability was prejudicial, where the evidence suggested that the harasser qualified as the employer's proxy, given that the harasser was second-in-command as Director, Chief Operating Officer, and Secretary of the Board; answered only to the employer's president; and dictated policies for the day-to-day governance of the employer's main office?

EEOC's Position: The district court erred by refusing to instruct the jury that the *Faragher/Ellerth* defense would be unavailable if the jury found the supervisor to be the Defendant's proxy. Where the employer's proxy perpetrates unlawful harassment, it is automatically imputed to the employer and no *Faragher/Ellerth* defense is available. The evidence of the supervisor's significant authority within the company and control over the company's affairs warranted instructing the jury to determine whether he qualified as its proxy. Finally, a new trial is required because the district court's error in failing to give a proxy-liability instruction was not harmless.

Court's Decision: The court affirmed the judgment of the district court. Per the court, "The District Court held that [Plaintiff] was not entitled to a jury instruction that this defense is unavailable where the harasser functions as the alter ego or proxy of the employer. Although we agree that this affirmative defense is not available in that situation, the District Court's refusal to so instruct the jury here was harmless because the jury found that [she] was not subjected to sexual harassment. The existence of an affirmative defense was therefore irrelevant. Accordingly, we must affirm the District Court's order denying [Plaintiff's] motion for a new trial."

Case Name	Court and Case Numbe	Date of Amicus Filing and/ or Court Decision	Statutes	Basis/Issue/Result
Israelitt v Enterprise Services LLC	U.S. Court of Appeals for the Fourth Circuit No. 22-1382	7/21/2022 (amicus filed)	ADA	Retaliation **Result:** Pending

Background: Defendant hired Plaintiff in 2013 as a senior architect in its Cybersecurity Solutions Group, where he worked with information systems. Plaintiff has hallux rigiditis, which involves "degenerative changes in his right first metatarsophalangeal joint and right great toe." Plaintiff testified that the impairment can cause significant pain, to where he "can barely walk." Plaintiff could not attend a conference because his registration did not go through, which was related to his disability. He testified he asked Defendant to help him with handling the disability accommodation. Ultimately, Plaintiff did not attend the conference.

Plaintiff testified that Defendant then treated him differently. He was reassigned to a longer-term Technology Roadmap project and was told not to attend daily "scrum" meetings. Defendant also scheduled Plaintiff and other employees to attend a team-building meeting in Florida to prepare to bid on Department of Homeland Security (DHS) projects. Plaintiff testified that he asked not to be listed as an extra driver on a vehicle because of his impairment. Shortly after, a Defendant lead told Plaintiff he should not bill to the DHS account or travel to Florida. Plaintiff thus missed the Florida meeting. Shortly after that Florida meeting, Plaintiff was given a performance warning and instructed to complete the Technology Roadmap within 30 days. Plaintiff did not complete the project because, according to Plaintiff, it would typically take months for two employees to complete. Plaintiff was terminated.

Plaintiff sued, pleading several claims under the ADA, including discrimination and retaliation. Defendant moved for summary judgment on all claims. The district court began with Plaintiff's disability discrimination claim. Although Plaintiff testified that the hallux rigiditis caused significant pain, the district court held the condition did not substantially limit any major life activities and Plaintiff therefore did not have a disability under the ADA. Even had Plaintiff made such a showing, the district court held, the removals from the Defendant Protect 2013 conference, the daily "scrum" meetings, and the Florida trip were not adverse actions because they did not "result in 'some significant detrimental effect.'" The termination was an adverse action, the district court held, but it was not causally connected to Plaintiff's disability. Regarding the retaliation claim, the district court allowed only Plaintiff's retaliatory termination claim to proceed. Plaintiff had asserted several other potentially adverse actions, including withdrawal from the Defendant Protect 2013 conference, removal from the "scrum" meetings, removal from the team-building meeting in Florida, and increased workload. The district court held that only the termination was an adverse action because, the removal from the Defendant Protect 2013 conference, the daily meetings, and the Florida trip were not adverse actions

Issues EEOC is Addressing as Amicus: (1) Whether the district court erred by requiring Plaintiff to show that his physical impairment "significantly restricted" a major life activity, after Congress had rejected that standard in the ADA Amendments Act of 2008 (ADAAA). (2) Whether the district court's standard for adverse actions in retaliation claims aligns with the Supreme Court's standard in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006). (3) Whether compensatory and punitive damages are available for employment-based retaliation under § 503(a) of the ADA, 42 U.S.C. § 12203(a).

EEOC's Position: (1) An impairment need not significantly restrict a major life activity to qualify as a disability under the amended ADA. Congress did not alter the definition of disability at 42 U.S.C. § 12102(1)(A), but added two sections to the ADAAA to ensure a broader reading of disability. First, it added 42 U.S.C. § 12102(4)(A), stating that "[t]he definition of disability in this Act shall be construed in favor of broad coverage . . . ." Then Congress emphasized "[t]he term 'substantially limits' shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008." Id. § 12102(4)(B). The EEOC subsequently revised its regulation defining "substantially limits" to say that "a limitation need not 'significantly' or 'severely' restrict a major life activity." (2) *Burlington Northern*'s dissuade-a-reasonable-worker standard controls the level of harm required for a claim of retaliation. The district court held that many of the adverse actions alleged for Plaintiff's retaliation claim were insufficient because they "did not create significant detrimental effects." That "significant detrimental effects" standard, however, arose in the discrimination context before *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), and it conflicts with the dissuade-a-reasonable-worker standard the Supreme Court adopted for retaliation claims. (3) Compensatory and punitive damages are available for ADA retaliation claims. Congress linked the remedies for ADA retaliation claims involving employment to the compensatory and punitive damages available through § 1981a. Through this direct, if extended, path, Congress provided compensatory and punitive damages for ADA retaliation claims. Other courts of appeals have affirmed compensatory and punitive damages awards for ADA retaliation claims, albeit without explicitly discussing their availability under § 503.

Court's Decision: Pending.

Case Name	Court and Case Numbe	Date of Amicus Filing and/ or Court Decision	Statutes	Basis/Issue/Result
Lattinville-Pace v Intelligent Waves LLC	U.S. Court of Appeals for the Fourth Circuit No. 22-1144	5/18/2022 (amicus filed)	ADEA	Age **Result:** Pending

Background: Plaintiff (67) who was fired from her job as a Senior Vice President of Human Resources alleged Defendant began looking for her replacement months before her termination. Ultimately, Defendant hired a less-experienced replacement. Plaintiff alleged Defendant had fired two other Vice Presidents, a Senior Director, and several other employees, all over the age of 60. The district court held Plaintiff failed to show a causal connection between her age and termination and instead asserted mere conclusions and formulaic recitations.

Issues EEOC is Addressing as Amicus: Whether the district court incorrectly imposed a heightened pleading standard on the Plaintiff that exceeded the requirements established in Federal Rule of Civil Procedure 8(a)(2).

EEOC's Position: The EEOC argued that Plaintiff's First Amended Complaint sufficiently stated a plausible ADEA claim under the *Twombly/Iqbal* standard as interpreted by the U.S. Court of Appeals for the Fourth Circuit. Specifically, the EEOC argued Plaintiff described in detail her positive job performance and the ways her qualifications exceeded those of her replacement, thus giving Defendant fair notice of what the claim were and the grounds upon which it rested pursuant to Rule 8(a)(2). It argued that at such an early stage of the litigation, nothing more was required. The EEOC argued the allegations in a complaint need show only that discrimination plausibly occurred, and Plaintiff did not need to prove it conclusively.

Court's Decision: Pending

Case Name	Court and Case Number	Date of Amicus Filing and/ or Court Decision	Statutes	Basis/Issue/Result
Lyons v City of Alexandria	U.S. Court of Appeals for the Fourth Circuit No. 20-1656	9/22/2020 (amicus filed) 6/1/2022 (decided)	Title VII	Race **Result:** Pro-Employer

Background: A firefighter, who is Black, was required to participate in the Advanced Life Support Internship Program. He alleged the city employer discriminated against him based on race by assigning three white employees to participate in the program before allowing him to participate. The district court granted Defendant's motion for summary judgment, finding that when a Plaintiff's claim involves "actions short of firing, demotion, or other clearly 'ultimate' employment decisions—such as reassignments—the Fourth Circuit has held that Plaintiff must show 'some significant detrimental effect on [him].'" The district court held Plaintiff's claim failed because he had not shown a significant detrimental effect on him or his continued employment with the city.

Issues EEOC is Addressing as Amicus: Whether delaying placement in an internship program that is a prerequisite for a promotion, based on race, constitutes discrimination "with respect to * * * [the] terms, conditions, or privileges of employment" under Section 703(a)(1), 42 U.S.C. 2000e-2(a)(1), without a showing that such discrimination had a significant detrimental effect on the employee.

EEOC's Position: Delaying placement, based on race, in an internship program that is a prerequisite for a promotion is actionable under Section 703(a)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a)(1), and that no showing of a "significant detrimental effect" is required.

Court's Decision: The court affirmed the lower court's decision. The court noted, "the Fire Department explains that the first come, first served practice is *shift-specific*. [Plaintiff] offers no evidence to prove that the Fire Department's explanation—which is supported by its practice—is pretextual. So we affirm the district court's grant of summary judgment to the Fire Department."

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

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

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

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

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

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

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

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

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

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Davis v. Parish of Caddo	U.S. Court of Appeals for the Fifth Circuit No. 21-30694	1/25/2022 (amicus filed) 7/26/2022 (decided)	Title VII	Sex Harassment Retaliation **Result:** Pro-Employer

Background: Plaintiff, who worked as an office manager for a sewage district, alleged she was repeatedly harassed by the former Chairman of the Sewerage District Board and her supervisor. Plaintiff alleged she was subject to sexually offensive terms, unsolicited sexual touching, and stalking. Plaintiff asserted numerous federal and state claims against Defendants, including sexual harassment and retaliation under Title VII. Following mediation, the sewerage district and the individually named Board members settled and the Parish, the sole defendant left, proceeded to summary judgment.

The district court granted the Parish's motion for summary judgment. The district court held that the Parish could not be held liable as an "employer" under Title VII because the relationship between the Parish, through its legislative body (the Commission), established the sewerage district. And, relying on the Louisiana Constitution, state revised statutes, and state court rulings, the district court found that the Parish and the sewerage district were legally distinct entities. The district court concluded that the court's precedent precludes applying an agency theory to multiple governmental entities in Title VII cases.

Issues EEOC is Addressing as Amicus: Whether more than one governmental entity can qualify as a particular worker's "employer" under Title VII.

EEOC's Position: The EEOC argued the U.S. Court of Appeals for the Fifth Circuit should clarify that more than one governmental entity can qualify as a plaintiff's "employer" in a Title VII suit. Specifically, the EEOC argued the court has should reaffirm its precedent and apply the joint employer test to governmental entities, adopt the integrated enterprise theory to public entities or a variation of the integrated enterprise test and should apply an agency theory to public entities. The EEOC analyzed various tests and theories in various circuit courts and argued that although the law and the names of the theories may differ from circuit to circuit, the heart of the inquiry is always fact-intensive thus the court should always consider the totality of the circumstances to determine the nature of the employment relationship under Title VII in public-employer cases.

Court's Decision: In an unpublished opinion, the Fifth Circuit affirmed the decision of the district court, because the employee "failed to show that any putative agent's role encompassed employment practices on [the Parish's] behalf . . ."

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Gosby v. Apache Industrial Services, Inc.	U.S. Court of Appeals for the Fifth Circuit No. 21-40406	8/25/2021 (amicus filed) 4/8/2022 (decided)	ADA	Disability **Result:** Pro-Employee

Background: Plaintiff, who is diabetic, was hired into an unskilled position expected to last up to six months. Within her first month of employment, she injured her finger, but was allegedly discouraged from seeking medical care and was warned that if she did, her employment may be terminated. Plaintiff later experienced a diabetic episode at work and was laid off six days later, along with 11 other employees. Defendant alleged the layoffs were due to a workforce reduction, but other employees told Plaintiff that the real reason she was terminated was because of her medical incident. Plaintiff filed suit, claiming the causal connection for a *prima facie* case was established not only by the close temporal proximity between her diabetic episode and discharge, but also through warnings to avoid seeking medical attention at all costs. The district court granted defendant's motion for summary judgment, holding that Plaintiff failed to establish a *prima facie* case. In so holding, the district court noted that because Plaintiff's position was likely to last only six months, Defendant would "only be able to terminate [Plaintiff] during a small portion of her employment without being at risk of a temporal proximity argument." The court gave little weight to the temporal proximity between Plaintiff's diabetic attack and her termination. The court also rejected the warnings and statements from other employees, finding them irrelevant to a *prima facie* case because they were not made by those involved or influencing layoff decisions.

Issues EEOC is Addressing as Amicus: (1) Whether the district court erred by rejecting Plaintiff's evidence of close temporal proximity to establish the causation element of her *prima facie* case, solely because Plaintiff's job was short-term in nature; and (2) Whether the district court erred by ignoring Plaintiff's evidence of statements by her lead man that seeking medical care at the worksite could – and did – cause her to lose her job.

EEOC's Position: The EEOC argued that the district court erred in ignoring precedent that evidence of close temporal proximity at least meets the minimal initial burden to show some causal connection—a less stringent standard than the "but for" test. It argued that the operative consideration was not how long Plaintiff's job was expected to last, but rather, the length of time between the disability-related incident (six days) and discharge vis-à-vis the length of time she expected to continue work (approximately five months). The EEOC further argued that the court ignored Plaintiff's evidence that she was warned to avoid seeking medical attention and also wrongly discounted the relevance of employee statements challenging the real reason for her termination—especially where the court has previously considered such circumstantial evidence as relevant and not categorically excludable.

Court's Decision: The court reversed and remanded. The court agreed that "[e]valuating temporal proximity in the context of employment that is understood to be short-term cannot ignored," but all the court was concerned with was whether the Plaintiff "carried her light burden of showing a *prima facie* case. The evidence was that [she] was terminated immediately after an event that highlighted her ADA-protected disability. . . The proximity of her diabetic episode on the job and her termination was sufficient to constitute a *prima facie* case that she was included in the group to be terminated for ADA-violative reasons." The appellate court also found that the district court erred on the issue of pretext: "[the Plaintiff] has presented evidence sufficient to rebut [the employer's] nondiscriminatory reason for termination and show that a fact question exists as to whether that explanation is pretextual."

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Lockhart v. Republic Services, Inc.	U.S. Court of Appeals for the Fifth Circuit No. 20-50474	9/23/2020 (amicus filed) 10/25/2021 (decided)	Title VII	Discrimination Race **Result:** Pro-Employer

Background: Plaintiff worked as a waste disposal driver for Defendant and alleged that the employer discriminated against him with respect to his compensation, terms, conditions, and privileges of employment on account of his race. He alleged his employment was terminated because he complained about the pay system; the employer presented evidence of disciplinary infractions. The district court held that Plaintiff did not show an adverse employment action connected to race OR any comparators who were treated more favorably. In addition, the court held that the employer articulated a legitimate, nondiscriminatory reason for Plaintiff's discipline and termination under the company's progressive discipline policy.

Issues EEOC is Addressing as Amicus: The EEOC is asking whether the district court erred—because Plaintiff sued under Title VII and not the ADEA—it required him to offer comparator evidence as part of his *prima facie* case of discrimination. The EEOC also asks whether the lower court erred by failing to consider as circumstantial evidence of race discrimination that the decision maker and an employee who influenced the termination decision allegedly used racial slurs to refer to Plaintiff and other Black employees.

EEOC's Position: Title VII does not require evidence of comparators to establish a *prima facie* case of race discrimination. Even if the ADEA and Title VII do have different causation standards, it would not explain why the *prima facie* case standard in a Title VII case would be narrower and more difficult to meet than under the ADEA. Moreover, the decision makers' use of racial slurs to refer to Plaintiff and other Black employees is strong circumstantial evidence that race discrimination was at least partially responsible for the termination.

Court's Decision: The Fifth Circuit affirmed summary judgment dismissal of the employee's claims, finding he raised no genuine issues of material fact regarding either his claims of racial discrimination under Title VII or overtime violations and retaliation under the Fair Labor Standards Act.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Mueck v La Grange Acquisitions, L.P.	U.S. Court of Appeals for the Fifth Circuit No. 22-50064	4/18/2022 (amicus filed)	ADA	Disability **Result:** Pending

Background: Plaintiff filed a lawsuit against his employer for violating the ADA when he was fired after requesting to attend court-ordered alcohol use disorder (AUD) treatment classes during his scheduled work hours. The U.S. District Court for the Western District of Texas granted the employer's motion to dismiss, holding that Plaintiff's AUD was not a disability under the ADA. The court reasoned that the Plaintiff did not establish that his AUD permanently impaired a specific major life activity. The court also held that even if the Plaintiff's AUD was a disability under the ADA, he was not entitled to a reasonable accommodation to attend his court-ordered AUD treatment classes during his scheduled work hours because the accommodation would be to satisfy a court order instead of addressing a limitation caused by his disability.

Issues EEOC is Addressing as Amicus: Whether the district court incorrectly relied on pre-Americans with Disabilities Act Amendments Act of 2008 when interpreting the definition of "disability" under the ADA?

EEOC's Position: The EEOC argued that an individual with a disability is defined as having "a physical mental impairment that substantially limits one or more major life activities of such individual, 42 U.S.C. § 12102(1)(B). The EEOC further stated that Congress changed the inquiry into whether an impairment substantially limits that a major life activity to require a degree of functional limitation which is a lower standard prior to the 2008 amendments. The EEOC argued that alcoholism is an impairment under the ADA if it substantially limits one or more of an individual's major life activities because courts no longer require permanent, long-term, or active limitations when establishing a disability. The EEOC argued that given the episodic and chronic nature of Plaintiff's limitations, a jury could find his alcoholism rendered him substantially limited under the ADA.

Court's Decision: Pending.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Scott v. U.S. Bank National Association	U.S. Court of Appeals for the Fifth Circuit No. 21-10031	4/21/2021 (amicus filed) 11/2/2021 (decided)	Title VII	Retaliation **Result:** Pro-Employee

Background: A Black Plaintiff overheard a white manager tell Plaintiff's Black manager he intended to terminate four Black employees. In turn, Plaintiff told his fellow employees what he had overheard, prompting an employee to report concerns of race discrimination to HR. Plaintiff provided a statement in the subsequent investigation. Around a month later, Plaintiff reported to Human Resources he was experiencing various retaliatory acts, including verbal warnings and harassment, which he believed were in retaliation for providing a witness statement. A month later, Plaintiff was terminated. Plaintiff sued for retaliation under 42 U.S.C. § 1981, but the district court dismissed his complaint with prejudice for failure to state a claim. The court denied Plaintiff any opportunity to amend his complaint because Plaintiff could not demonstrate that he held a reasonable belief that the employer was engaged in unlawful employment practices.

Issues EEOC is Addressing as Amicus: Whether Plaintiff adequately pled that he engaged in protected activity because he opposed employment practices he believed to be unlawful.

EEOC's Position: The EEOC argued the district court made errors in discussing the framework to be used for evaluating whether Plaintiff's comments supported a reasonable belief of unlawful employment practices under the "opposition clause." It argued that reactive statements solicited by an employer during an internal investigation could constitute "opposition" to unlawful employment practices if Plaintiff made such statements with a reasonable belief, as assessed from the perspective of a layperson, that such practices were unlawful, even if they ultimately are not. It further argued that the district court improperly considered Plaintiff's witness statement in isolation, rather than considering his oppositional acts "as a whole," including reports of retaliation and harassment.

Court's Decision: The Fifth Circuit affirmed in part, reversed in part, and remanded for further proceedings. It affirmed the judgment of the district court as to the denial of leave to amend the complaint, reversed the judgment of the district court granting Defendant's motion to dismiss, and remanded for further proceedings. Plaintiff sufficiently alleged facts that, interpreted in the light most favorable to him, supported a reasonable belief that his employer engaged in an unlawful practice. The district court erred when it engaged in a factual analysis akin to *McDonnell Douglas* and discounted these facts.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Wallace v. Performance Contractors, Inc.	U.S. Court of Appeals for the Fifth Circuit No. 21-30482	11/5/2021 (amicus filed) 1/3/2023 (decided)	Title VII	Sex Harassment Retaliation **Result:** Pro-Employee

Background: Plaintiff, a construction site safety monitor, alleged she was subject to constant sexual harassment by her supervisors, lost core job responsibilities and was tasked with housekeeping duties because she was a woman. Plaintiff brought a Title VII sex discrimination, sexual harassment, and retaliation suit against the employer. The district court rejected her discrimination claim because it believed she needed—and failed—to show she had suffered an "ultimate" adverse employment decision. The court did not see the employer's refusal to let Plaintiff work in certain areas as a "de facto demotion" and noted the housekeeping duties fell within her job description. The district court also determined the employer was entitled to prevail on the *Faragher/Ellerth* defense.

Issues EEOC is Addressing as Amicus: (1) Whether a plaintiff's loss of opportunities could constitute actionable discrimination as a matter of law. (2) Whether the district court erred in granting summary judgment based on the *Faragher/Ellerth* defense, thus relieving Defendant from liability for actionable sexual harassment as a matter of law when Plaintiff was terminated after rejecting a supervisor's propositions, harassment was open and known to multiple layers of management, and Plaintiff made repeated complaints up her chain of command.

EEOC's Position: The EEOC argued the court's "ultimate employment decision" requirement contravenes Title VII's plain meaning. They argued even if the ultimate employment decision is required, the district court wrongly held that no reasonable jury could find one since the court has previously held that withholding professional opportunities may be actionable. Additionally, the EEOC argued a reasonable jury could conclude the harassment was connected to at least two tangible employment actions. Foreclosing the defense altogether. Finally, the EEOC argued that even if the defense was available, a reasonably jury could conclude the employer failed to satisfy the elements.

Court's Decision: The appellate court reversed and remanded. The Plaintiff argued that the district court "erred in granting summary judgment to [the employer] on all her claims. First, she argues that when [the employer] prevented her from working at elevation because she was a woman, it effectively demoted her, which amounts to an adverse employment action. Second, [she] argues that her hostile-work environment claim survives summary judgment because [the employer] knew (or should have known) about the severe or pervasive harassment, and because [it] is not entitled to the *Ellerth/Faragher* affirmative defense. Third, she argues that a reasonable jury could find that [the employer] retaliated against her for opposing conduct that she reasonably believed would violate Title VII. We agree with her on each claim."

Case Name	Court and Case Number	Date of Amicus Filing and/ or Court Decision	Statutes	Basis/Issue/Result
Garcia v Beaumont Health Royal Oak Hospital	U.S. Court of Appeals for the Sixth Circuit No. 22-1186	5/22/2022 (amicus filed)	Title VII	Sex Retaliation **Result:** Pending

Background: Plaintiff, a respiratory therapist, alleges she was inappropriately touched by a coworker during a midnight shift. Although she did not request that the coworker be terminated, she did request to not be paired with the coworker in an intensive-care unit to avoid being alone with the coworker. A few weeks later, the coworker began telling their other coworkers that Plaintiff was lying about the incident. Plaintiff complained to HR and instead the employer continued to schedule Plaintiff with the coworker. Plaintiff later resigned as a charge therapist.

Issues EEOC is Addressing as Amicus: (1) Whether a plaintiff alleging constructive discharge must show her employer deliberately created working conditions so intolerable that they would cause a reasonable person to resign. (2) Whether a plaintiff must show harassment was severe or pervasive to bring a claim of coworker retaliatory harassment under Title VII.

EEOC's Position: The EEOC argued the district court applied a superseded legal standard to Plaintiff's constructive discharge claim. The EEOC stated the Supreme Court had clarified that Title VII plaintiffs alleging constructive discharge are *not* required to demonstrate deliberateness, thus a plaintiff need only make an objective showing of circumstances so intolerable a reasonable person would resign. The EEOC also argued the district court improperly conflated the standards for retaliatory harassment—a form of retaliation—and discriminatory harassment. Specifically, the EEOC stated the district court erred when it asserted that actionable retaliatory harassment must "produce a constructive alteration in the terms or conditions of employment," and that "[o]nly harassing conduct that is severe or pervasive" will meet that standard, which is the standard for actionable discriminatory harassment, not retaliation. Finally, the EEOC argued the district court conflated the "severe or pervasive" standard used to assess claims of workplace harassment with the broader "sufficiently severe so as to dissuade a reasonable worker" standard applied to retaliation claims under Title VII.

Court's Decision: Pending.

Case Name	Court and Case Number	Date of Amicus Filing and/ or Court Decision	Statutes	Basis/Issue/Result
Pelcha v. MW Bancorp	U.S. Court of Appeals for the Sixth Circuit No. 20-3511	2/10/2021 (amicus filed)	ADEA	Age **Result:** Pro-Employer

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

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

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

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

Case Name	Court and Case Number	Date of Amicus Filing and/ or Court Decision	Statutes	Basis/Issue/Result
Connors v Merit Energy Co.	U.S. Court of Appeals for the Eighth Circuit No. 22-2080	7/18/2022 (amicus filed) 1/25/2023 (decided)	Title VII	Sex **Result:** Pro-Employee

Background: Plaintiff was a lease operator responsible for overseeing the operation of pumping operations for gas wells. When Plaintiff's former employer sold its gas assets to Defendant, Defendant announced that it planned to rehire 20 of the 29 lease operators. Because six lease operators chose to retire or transfer internally, Defendant considered the 23 remaining lease operators, including Plaintiff, for the 20 open positions. Plaintiff alleged that her interview and ride along with the hiring supervisors were very short, and that few questions were asked. Plaintiff was one of the three applicants rejected by Defendant, and all 20 operators hired were male. Defendant's notes on Plaintiff's application were favorable and contained no negative comments. In contrast, several of the men who Defendant did hire lacked the years of experience that Plaintiff had, and Defendant had noted criticisms or negative feedback on several of the men hired instead of Plaintiff.

After her rejection, Plaintiff filed an EEOC charge, and after the EEOC issued a right to sue letter, she alleged sex discrimination in violation of Title VII. Defendant moved for summary judgment. The district court granted Defendant summary judgment, finding that Defendant and provided legitimate non-discriminatory reasons for deciding not to hire Plaintiff, and that no reasonable jury could find the reasons to be pretextual. The district court rejected Plaintiff's argument that a jury could infer pretext because many of the operators hired had far less experience than she did, noting that seniority is not the sole determining factor for determining who is the most qualified candidate. The district court also rejected Plaintiff's argument that Defendant's shifting reasons for why she was not selected could be evidence of pretext. The district court found that Defendant had been consistent in at least some of the reasons that it chose not to hire Plaintiff.

Issues EEOC is Addressing as Amicus: Whether summary judgment was inappropriate because a reasonable jury could find sex discrimination based on Plaintiff's *prima facie* case and evidence casting doubt on Defendant's proffered nondiscriminatory rationales for not hiring Plaintiff.

EEOC's Position: The EEOC argued that the district court erred in granting summary judgment because under *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), "a plaintiff's *prima facie* case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." The EEOC's position was that Plaintiff had established a *prima facie* case of sex discrimination, and had supplied evidence to cast doubt on Defendant's proffered reasons for not hiring her, and that therefore, her claim should have been sent to a jury. The EEOC argued that the district court erred when it assumed that a reasonable jury would have to credit the nondiscriminatory reasons given by Defendant for its hiring decision. The EEOC noted that while the district court held that an employer may consider subjective elements in its hiring decisions, the question on summary judgment is whether the evidence would permit a jury to find that the employer did not rely on the subjective considerations it proffered and instead acted for discriminatory reasons. The EEOC contended that the evidence in this case created a fact dispute as to pretext, and therefore summary judgment was inappropriate.

Court's Decision: The court remanded. The court noted that to make a *prima facie* case of discrimination when a reduction-in-force is involved, a plaintiff must show, in addition to evidence that (1) she was a member of a protected group; (2) she applied for an available position; (3) she was qualified for the position; (4) she was not hired; and (5) similarly situated individuals, not part of the protected group, were hired instead, that there is some additional evidence that an illegal discriminatory criterion was a factor in the employer's decision. In this case, the court found that because the district court did not consider or make findings on the question of whether a bona fide reduction-in-force occurred, and the requisite *prima facie* showing differs when a RIF occurs, it remanded the case for consideration of this issue.

Case Name	Court and Case Number	Date of Amicus Filing and/ or Court Decision	Statutes	Basis/Issue/Result
Guelache v Conagra Brands	U.S. Court of Appeals for the Eighth Circuit No. 22-1950	7/1/2022 (amicus filed) 12/1/2022 (decided)	Title VII	Statute of Limitations Charge Processing **Result:** Pro-Employer

Background: Plaintiff was terminated from his job and alleged that Defendant had terminated him based upon his race and national origin. 179 days after his termination, Plaintiff emailed the EEOC, attaching a letter regarding his termination and his claim that he had suffered discrimination. The next day, the EEOC investigator emailed Plaintiff a formal charge and asked him to sign and return it. Plaintiff returned the formal charge to the EEOC three days later. After the EEOC issued a right to sue letter, Plaintiff filed suit.

The district court granted Defendant summary judgment, holding that Plaintiff had failed to exhaust his administrative remedies because Plaintiff did not file his charge within 180 days of his termination date. Plaintiff argued that his charge was timely because he initiated it before the 180 days had expired, but the district court found that a charge was not valid until it is signed under oath. Since Plaintiff did not sign his charge under oath within the 180-day filing period, the district court found that he had failed to exhaust his administrative remedies and granted summary judgment.

Issues EEOC is Addressing as Amicus: Whether the district court erred in dismissing Plaintiff's complaint where a person does not verify their charge under oath until after the statutory filing period.

EEOC's Position: The EEOC argued that the district court erred in dismissing Plaintiff's case, because there is well-established precedent that a person who fails to timely verify their charge may do so later. The EEOC stated that the charge-filing provision of Title VII does not indicate when the verification of a charge must take place. The EEOC noted that the EEOC's regulations provide that "[a] charge may be amended to cure technical defects or omissions, including failure to verify the charge . . . ." and this subsequent verification "will relate back to the date the charge was first received." 29 C.F.R. § 1601.12(b). The EEOC argued that the Supreme Court has upheld this relation back principle, as has the Eighth Circuit on numerous occasions. See E*delman v. Lynchburg Coll.*, 535 U.S. 106, 112 (2002). The EEOC therefore asked that the Eighth Circuit vacate the trial court's grant of summary judgment.

Court's Decision: The court affirmed the district court's grant of summary judgment in favor of the employer. The court agreed with the lower court's determination that the plaintiff failed to establish a *prima facie* case of discriminatory termination or failure to reinstate.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Naes v. City of St. Louis	U.S. Court of Appeals for the Eighth Circuit No. 22-2021	8/12/2022 (amicus filed)	Title VII	Sex **Result:** Pending

Background: Plaintiff, a heterosexual male, was a city police detective who alleged, among other things, that he was unfairly removed from his position and replaced with woman whom he asserted the mayor favored on account of her gender and sexual orientation. He also alleged he was later denied the ability to transfer back to his prior position. Defendants moved to dismiss, arguing Plaintiff failed to identify an adverse employment action sufficient to state a claim of discrimination. According to Defendants, Plaintiff failed to allege that he was terminated, that he received any cut in pay or benefits, or that his transfer from problem properties affected his future career prospects; he was simply transferred out of the unit. The district court had initially denied Defendants' motion to dismiss. However, while this case was pending, the Eighth Circuit issued its opinion in *Muldrow v. City of St. Louis*, 30 F.4th 680 (8th Cir. 2022), in which the appellate court affirmed a grant of summary judgment for the City of St. Louis in a Title VII action involving an alleged discriminatory transfer. The court found that Plaintiff's allegedly discriminatory involuntary job transfer was not actionable. The appellate court began its analysis in *Muldrow* by stating that "[a] n adverse employment action is a tangible change in working conditions that produces a material employment disadvantage." The court affirmed the rejection of Plaintiff's claim, as she suffered no "diminution to her title, salary, or benefits" and could not show that "she suffered a significant change in working conditions or responsibilities." The day after the Eighth Circuit issued its opinion, the city here moved for reconsideration in district court, arguing the appellate court's decision foreclosed Plaintiff's claims. The district court acknowledged *Muldrow*'s holding that "'absent proof of harm' resulting from an employee's reassignment, there is no adverse employment action." The district court therefore granted the motion for reconsideration and entered judgment for the city.

Issues EEOC is Addressing as Amicus: (1) Whether the denial or forced acceptance of a job transfer, allegedly made based on the employee's sex, may constitute discrimination "with respect to . . . compensation, terms, conditions, or privileges of employment" under Section 703(a)(1), even where there is no change in benefits or salary; (2) Whether the district court improperly conflated the standard for proving a discrimination claim under Section 703(a)(1) with the standard for proving a retaliation claim under Section 704(a).

EEOC's Position: The appellate court should reconsider its precedent and hold that all discriminatory job transfers and denials of requested transfers are actionable under Section 703(a)(1) of Title VII because they affect an employee's "terms" and "conditions" of employment. There is no more fundamental "term" or "condition" of employment than the employee's formal job position. Forcing or denying an employee's job transfer based on a protected characteristic falls within the scope of discrimination prohibited by Section 703(a)(1). Moreover, Section 703(a)(1) does not require plaintiffs to make an additional, a textual showing of "material" or "tangible" harm. The EEOC contends the district court also erred by conflating the standard for proving a discrimination claim under Section 703(a)(1) of Title VII with the standard for proving a retaliation claim under Section 704(a). The EEOC contends the district court erroneously cited *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 68 (2006), as supporting a requirement to prove a material disadvantage resulting from an allegedly discriminatory transfer. But *Burlington Northern* concerns the standard for Title VII retaliation claims, not discrimination claims under Section 703(a)(1). Under Section 703(a)(1), and absent affirmative defenses not at issue, no amount of race, sex, religion, or national origin discrimination that affects the terms, conditions, or privileges of employment is lawful.

Court's Decision: Pending.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
O'Reilly v Daugherty Systems, Inc.	U.S. Court of Appeals for the Eighth Circuit No. 21-3465	2/3/2022 (amicus filed)	EPA	Sex **Result:** Pending

Background: Plaintiff brought a claim of wage discrimination under the Equal Pay Act against her former employer. Plaintiff alleged that a single, male comparator, was paid substantially more than she was for the same work. The district court granted the Defendant's motion for summary judgment, finding that Plaintiff had failed to establish a *prima facie* case of wage discrimination. The district court noted that Plaintiff had only identified a single male comparator who was paid more than she, while the Defendant had presented evidence of six other male comparators who were paid less than Plaintiff. The district court noted a split in the Eighth Circuit regarding the number of valid compactors required to demonstrate a *prima facie* case under the Equal Pay Act, but ultimately found that the alleged comparators who did not earn as much as Plaintiff outnumbered the sole comparator that she based her claim upon, she could not establish her *prima facie* case, and granted summary judgment for Defendant.

Issues EEOC is Addressing as Amicus: Whether Plaintiff can establish a *prima facie* case under the Equal Pay Act by identifying a single male comparator who was paid more for substantially the same work.

EEOC's Position: The EEOC argued that Plaintiff could establish a *prima facie* case by identifying a single male comparator who was paid more than she. The EEOC noted that there were two lines of cases in the Eighth Circuit – the first line under *Hutchins v. Int'l Bhd. of Teamsters*, 177 F.3d 1076, 1081 (8th Cir. 1999), in which the court held that a plaintiff could establish a *prima facie* case if she could show she was paid less than at least some of her male comparators. A later line of cases under *Sowell v. Alumina Ceramics, Inc.*, 251 F.3d 678, 684 (8th Cir. 2001) held that a plaintiff fails to make out a *prima facie* case where Plaintiff made the same or more than some of her male comparators. The EEOC argued that the *Sowell* line of cases was overly strict, and that the Equal Pay Act does not require a class-wide showing of differences in pay. The EEOC argued that interpreting the *prima facie* case to require a single comparator better serves the EPA's goal of ensuring equal pay for equal work. It argued that otherwise, there would be instances where a plaintiff would be unable to challenge certain clearly discriminatory pay practices. The EEOC gave the example of an employer who paid ten women half of what it paid nine men for equal work, and noted that under *Sowell* and its progeny, the women would be unable to challenge their pay if the employer paid even a single man the same amount as the women. The EEOC also argued that applying *Hutchins* would not prevent an employer from defending itself because a single comparator does not conclusively establish liability under the Equal Pay Act, it merely establishes a *prima facie* case. Defendant would then have the opportunity to show that one of the enumerated factors in the statute was the reason for any pay disparity, and that evidence of other male comparators who were paid less could establish that the differential was based on a "factor other than sex."

Court's Decision: Pending.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Morgan v. USSF	U.S. Court of Appeals for the Ninth Circuit No. 21-55356	9/30/2021 (amicus filed) 2/24/2022 (the parties filed a joint motion to hold the case in abeyance pending settlement)	Title VII EPA	Sex **Result:** The parties settled the matter

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

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

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

Court's Decision: N/A. The parties settled the matter.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result

Sharp v S&S Activewear LLC	U.S. Court of Appeals for the Ninth Circuit No. 21-17138	6/15/2022 (amicus filed)	Title VII	Sex Harassment **Result:** Pending

Background: Plaintiffs, seven women and one man, sued their employer for sex discrimination under Title VII, arguing that the Defendant repeatedly subjected them to offensive, obscene, and misogynistic music in the workplace for two years. The district court granted Defendant's motion to dismiss, finding that Plaintiffs failed to state a claim under Title VII because: (1) both men and women were offended by the music; (2) Plaintiffs failed to alleged the conduct was discriminatory; and (3) Plaintiffs did not allege that any employee or group of employees were targeted by the conduct or subjected to treatment that others were not. In granting Defendant's motion to dismiss, the district court relied upon the Supreme Court's decision in *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998), which noted that a critical issue "is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."

Issues EEOC is Addressing as Amicus: Whether the district court erred in granting a motion to dismiss where both men and women were subjected to the same allegedly offensive conduct and both men and women were offended by it.

EEOC's Position: The EEOC argued that the district court committed error when it granted Defendant's motion to dismiss because Title VII does not require that the offensive conduct be targeted at a particular group. The EEOC contended that even if both men and women were exposed to the offensive material, that exposure could still support a claim of sex discrimination if the material is degrading towards women. The EEOC noted that several appellate courts have held that that a work environment replete with words or conduct that are degrading of women or explicit can constitute sex discrimination under Title VII, even if women were not targeted for the offensive conduct. The EEOC further argued that in these cases, it was not necessary for Plaintiffs to show that their employers' motive in tolerating or creating such an environment was rooted in discriminatory animus. The EEOC argued that a reasonable juror could conclude that the derogatory language spread throughout the workplace had the effect of exposing the female plaintiffs to "disadvantageous terms or conditions of employment" as compared to men exposed to the same material.

The EEOC also argued that the fact that a man also found the music to be offensive did not negate the female Plaintiffs' claims. The EEOC cited to the Ninth Circuit's decision in *Steiner v. Showboat Operating Co.*, 25 F.3d 1459 (9th Cir. 1994) to argue that there is a possibility that an employer may create or tolerate discriminatory working conditions as to both men and women, if both are subjected to sexually harassing conduct. Further, the EEOC contended that the district court should not have dismissed the male Plaintiff's sex discrimination claim, because taking the allegations in the light most favorable to the Plaintiff, it was plausible that the music contained lyrics that were demeaning towards men in addition to women, particularly if the music portrayed men as pimps, murderers, or rapists.

Case Decision: Pending

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Frank v Heartland Rehabilitation Hospital LLC	U.S. Court of Appeals for the Tenth Circuit No. 22-3031	5/4/2022 (amicus filed)	Title VII	Retaliation **Result:** Pending

Background: Plaintiff alleged that she was sexually harassed by a co-worker. At the same time, she was having some performance issues, which caused her supervisor to issue her a Last Chance Agreement. After receiving the Last Chance Agreement, Plaintiff decided to look for other employment, and informed her supervisor that she was applying for other jobs. Her supervisor supported her decision and allowed her to continue to work while looking for another position. Before securing a new position, Plaintiff decided to report the sexual harassment she was experiencing to human resources, and her alleged harasser resigned rather than submit to an investigation. Shortly after Plaintiff made her report, her supervisor informed her that the Defendant could no longer keep her employed while she looked for other work, and gave her two weeks to find a new job and resign or be terminated. Because of this, Plaintiff accepted the first job she was offered, even though she had hoped for a "higher level job," and was forced to miss of week of pay due to the constrained timeline. Plaintiff brought a claim of retaliation under Title VII, alleging that her former employer forced her out of her job prematurely after she made a complaint of sexual harassment. The district court granted Defendant's motion for summary judgment, finding that while Plaintiff had engaged in protected activity, she could not make out a *prima facie* case because no reasonable jury could find that Defendant's allegedly retaliatory conduct was sufficiently adverse to be actionable. The district court held that Plaintiff was required to show a "significant" change in employment status, and that changing Plaintiff's departure date from an indefinite date to a specific date did not meet this standard.

Issues EEOC is Addressing as Amicus: Whether a quit-or-be-fired ultimatum can deter a reasonable employee in Plaintiff's position from engaging in protected activity.

EEOC's Position: The EEOC argued that the district court should have applied the Supreme Court's standard in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), which held that retaliation for protected activity violates Title VII if it is "harmful to the point that [it] could well dissuade a reasonable worker from making or supporting a charge of discrimination." The EEOC's position was that that district court erred when it found that Plaintiff had not shown a "significant" change in employment status, because the court drew that language from case law that discussed the sort of adverse action that is required as an element of a discrimination claim, and not a retaliation claim. The EEOC noted that the standard is different for claims of retaliation, and, under *Burlington*, the district court should have asked only whether Defendant's actions could have deterred a reasonable employee in Plaintiff's position from making a harassment claim. The EEOC also argued that a reasonable jury could find that the quit-or-be-fired ultimatum could dissuade a reasonable employee from engaging in protected activity, because forcing a plaintiff to choose between two undesirable actions is sufficiently adverse to support a claim for retaliation.

Case Decision: Pending.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Baker v Upson Regional Medical Center	U.S. Court of Appeals for the Eleventh Circuit No. 22-11381	6/7/2022 (amicus filed)	EPA	Sex **Result:** Pending

Background: Plaintiff sued Defendant medical center under Title VII and the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (EPA), alleging sex- and race-based pay discrimination. Defendant moved for summary judgment, arguing that any pay disparities between the Plaintiff and another employee were due to their different levels of experience, not Plaintiff's race or sex; and any disparities between the other employee and the Plaintiff after Plaintiff and Defendant amended her employment contract were due to the different contract terms Plaintiff negotiated with Upson Regional medical Center. The district court granted summary judgment, finding that Plaintiff provided no affirmative evidence showing that Defendant's explanation for the pay differential was pretextual or offered as a post-event justification for her EPA claim.

Issues EEOC is Addressing as Amicus: Whether the district court erred in analyzing Plaintiff's EPA claim when it shifted the burden of proof to the Plaintiff to establish that Defendant's explanation for the pay disparity was pretextual.

EEOC's Position: The district court erred in its analysis of Plaintiff's EPA claim when it shifted the burden of proof to the Plaintiff to show that Defendant's explanation was pretextual. The EEOC contended that in an EPA suit, each party must prove—the plaintiff must establish a *prima facie* case of pay discrimination, and the defendant must establish a statutory affirmative defense to liability for the pay disparity. Yet, the EEOC alleged the district court erroneously imposed an additional burden of the Plaintiff, requiring the Plaintiff to disprove as "pretext" the Defendant's explanation for the pay disparity.

Case Decision: Pending.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Beasley v. O'Reilly Auto Parts	U.S. Court of Appeals for the Eleventh Circuit No. 21-13083	11/8/2021 (amicus filed)	ADA	Disability **Result:** Pending

Background: Plaintiff, a deaf individual who primarily communicates through American Sign Language (ASL), sued Defendant, alleging that it violated the ADA by failing to provide reasonable accommodations. Specifically, Plaintiff alleged that Defendant failed to provide an ASL interpreter for mandatory meetings, training, corporate events, and various disciplinary and performance meetings. The district court granted summary judgment for Defendant on two independent grounds. First, the district court held that Plaintiff failed "to present evidence of an 'adverse employment action' to sustain his failure-to-accommodate claim[,]" and noted to the contrary that Plaintiff consistently received positive performance reviews and merit pay increases. Second, the district court held that Plaintiff had "not shown that Defendant's failure to provide any accommodation prevented him from performing his essential job functions."

Issues EEOC is Addressing as Amicus: (1) Whether the district court erred by holding that an ADA failure-to-accommodate claim is not actionable absent proof of a separate "adverse employment action," and by defining such an action, if required, as demanding proof of a "tangible" and "serious and material" adverse effect on employment; and (2) whether the district court erred by holding that the ADA only requires reasonable accommodations necessary for the performance of essential job functions rather than those necessary for the enjoyment of equal benefits and privileges of employment.

EEOC's Position: (1) the EEOC argued it is unnecessary for a plaintiff to establish a separate "adverse employment action" when asserting a failure-to-accommodate claim. Denial of a reasonable accommodation that a disabled employee needs—whether to perform the essential functions or enjoy the equal benefits, and privileges of the workplace—itself establishes an adverse effect on that employee's "terms, conditions, and privileges of employment" by depriving that employee of equal employment opportunities. Even if denial of a reasonable accommodation cannot be said to inherently affect the "terms, conditions, and privileges of employment," the district court erred by equating this language with the Title VII standard for an "adverse employment action," requiring "tangible" and "serious and material" adverse effect on employment. (2) The EEOC argued that nothing in the ADA's text limits the accommodation requirement to the performance of essential job functions, and the EEOC's regulations, along with a considerable body of decisions from other circuits, support the proposition that ADA also requires accommodations to enable enjoyment "of equal benefits and privileges of employment as are enjoyed . . . by other similarly situated employees without disabilities." 29 C.F.R. § 1630.2(0)(1)(iii).

Case Decision: Pending.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Humphrey v Augusta, Georgia	U.S. Court of Appeals for the Eleventh Circuit No. 22-10612	5/13/2022 (amicus filed) 9/23/2022 (dismissed)	Title VII	Retaliation **Result:** n/a – the parties settled the matter and agreed to dismissal

Background: Plaintiff was hired to work at the Equal Employment Opportunity (EEO) Office of the City of Augusta, Georgia. Her job duties including investigating EEO claims raised by City employees, making factual findings, and recommending corrective action. Notably, Plaintiff investigated and substantiated an internal allegation of race discrimination in a promotional process by a City employee. Five days after the City received a copy of the Plaintiff's findings, Plaintiff was terminated. Plaintiff sued pursuant to the "opposition clause" of Title VII's anti-retaliation provision, which prohibits an employer from discriminating against any employee who "has opposed any practice" made unlawful by Title VII, 42 U.S.C. 2000e-3(a). The district court granted the City's summary judgment motion, noting that the Plaintiff did not engage in protected activity under the opposition clause. In granting the City's summary judgment motion, the district court reasoned that it had to apply the "manager rule" based on the Eleventh Circuit's decision in *Brush v. Sears Holding Corp.*, 466 F. App'x 781 (11th Cir. 2012) (unpublished), *cert. denied*, 568 U.S. 1143 (2013). The management rule "holds that when a management employee, 'in the course of her normal job performance, disagrees with or opposes the action an employer,' that disagreement does not equate to protected activity." (quoting *Brush*, 466 F. App'x at 787).

Issues EEOC is Addressing as Amicus: Whether the district court erred when it applied the "manager rule" to conclude that, because an employee's opposition to unlawful employment practices occurred during the employee's job duties, the employee was not protected from retaliation under Title VII, 42 U.S.C. 2000e-3(a).

EEOC's Position: The EEOC argued the opposition clause of Title VII's anti-retaliation provision prohibits an employer from acting "against any of his employees" when the employee has opposed an employment practice deemed unlawful by Title VII. 42 U.S.C. 2000e-3(a). The EEOC asserted that word "any" is defined broadly and has an expansive meaning. Further, the "manager rule" derived from cases decided under the Fair Labor Standards Act (FLSA), which stated that managers and other employees with EEO responsibilities have not engaged in protective activity under the FLSA's anti-retaliation provision unless they have gone beyond their job duties and have acted adverse to their employer. Regardless of the rule's validity for FLSA, the EEOC argued the "manager rule" undermines the practical considerations specific to Title VII. The EEOC also argued that the "manager rule" is inapplicable in the Title VII context, noting that the rule directly contravenes Title VII's text and precedent. The EEOC claimed the Eleventh Circuit's unpublished opinion in *Brush v. Sears Holding Corp.*, 466 F. App'x 781 (11th Cir. 2012) (unpublished), *cert. denied*, 568 U.S. 1143 (2013), failed to consider Title VII' statutory language and context. EEOC requested the Eleventh Circuit hold that the "manager rule" does not apply to claims brought under the opposition clause of Title VII's anti-retaliation provision.

Case Decision: Plaintiff and the City settled. As a condition of settlement, both the Plaintiff and the City filed a joint motion to voluntarily dismiss the appeal. The case was dismissed on September 23, 2022.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Nelson v. Health Services, Inc.	U.S. Court of Appeals for the Eleventh Circuit No. 21-11319	6/8/2021 (amicus filed) 7/26/2022 (decided)	Title VII	Retaliation **Result:** Pro-Employee

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

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

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

Case Decision: The court reversed and remanded, noting that the Eleventh Circuit "recently rejected the use of the 'manager exception' in Title VII cases, holding that the text of Title VII's 'anti-retaliation provision applies the same to all employees.' *Patterson v. Ga. Pacific, LLC*, No. 20-12733, 2022 WL 2445693, at *7 (11th Cir. July 5, 2022). Accordingly, we reverse the grant of summary judgment and remand for further proceedings consistent with our opinion in *Patterson*."

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

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

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

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

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

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

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Yelling v. St Vincent's	U.S. Court of Appeals for the Eleventh Circuit No. 21-10017	5/3/2021 (amicus filed)	Title VII	Race Harassment **Result:** Pending

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

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

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

Court's Decision: Pending

FY 2022 – Select Appellate Cases in Which the EEOC was a Party

Case Name	Court and Case Number	Date of Appellate Filing and/or Court Decision	Statutes	Basis/Issue/Result
EEOC v. Cash Depot, Ltd.	U.S. Court of Appeals for the Fifth Circuit No. 21-20515	12/13/2021 (appeal filed) 8/24/2022 (decided)	ADA	Disability **Result:** Pro-EEOC

Background: The EEOC claimed the employer failed to accommodate charging party's lifting restriction to not lift over 25 pounds, imposed after he suffered a stroke. The employer moved for summary judgment, arguing the EEOC could not meet its burden of establishing that charging party could perform his job with or without a reasonable accommodation. The employer claimed it was impossible to accommodate his lifting restriction as the essential functions of his job required him to perform daily tasks exceeding the 25-pound restriction. The EEOC contended this was speculation. The court granted summary judgment for the employer, concluding that the EEOC had failed to identify a reasonable accommodation the employer reasonably could have considered. The court also said that the EEOC's speculation that a reasonable accommodation existed and the charging party's insistence he could do his job does not overcome the employer's business judgment on how the job is done. The court also emphasized the burden to engage in the interactive process was not just on the employer but also on the charging party.

Issues on Appeal: (1) Whether the district court erred in holding that no reasonable jury could find that the employer unlawfully discriminated against the charging party based on his disability when the employer's only reason for terminating was a temporary lifting restriction, which was compatible with his job description, capable of being accommodated in multiple ways, and unknown to the employer until after it hired his replacement; and (2) whether the district court abused its discretion in curtailing the EEOC's discovery into how the employer decided to terminate the charging party without exploring possible accommodations.

EEOC's Position on Appeal: (1) The EEOC argued that a reasonable jury could find that the charging party was qualified because he performed his essential functions with no accommodation. The job description of the charging party's essential job functions required only that he be able to lift 20 pounds, and testimony from both the charging party and the employer's witnesses confirmed that the job rarely required lifting over that requirement. Alternatively, the EEOC claimed that a jury could find the charging party was qualified because the employer could reasonably accommodate his restriction through the modification of his job duties or providing unpaid leave for a few weeks until his restriction was lifted. (2) The EEOC claimed that the district court abused its discretion by not allowing the EEOC to depose individuals with firsthand knowledge of charging party's termination.

Court's Decision: The Fifth Circuit reversed and remanded, finding the district court erred in granting summary judgment for the employer because it improperly made credibility determinations and/or weighed the evidence and deferred to the employer's judgment despite contradictory evidence. Summary judgment should not have been granted, as the EEOC's argument it could reasonably prevail on its discriminatory termination claim was supported by the record. Finally, the record also supported a reasonable accommodation claim given there was evidence that an employee would have the assistance of tools or another worker during heavier jobs.

Case Name	Court and Case Number	Date of Appellate Filing and/or Court Decision	Statutes	Basis/Issue/Result
EEOC v. Ryan's Pointe Houston	U.S. Court of Appeals for the Fifth Circuit No. 19-20656	11/12/2019 (appeal filed) 9/27/2022 (decided)	Title VII	National Origin Pregnancy **Result:** Pro-EEOC

Background: Plaintiff alleged Defendant terminated her because of her national origin and pregnancy. Plaintiff alleged that a coworker told her management "really p***** off that the entire staff was Mexican." Plaintiff also alleged that the majority owner of Defendant used racial epithets in describing Defendants' tenants. Plaintiff also alleges she was told by Defendant's employees it would be in her best interest professionally to get an abortion after she announced she was pregnant. Plaintiff also alleged that shortly before her termination, the majority owner of Defendant expressed a desire to have a staff that was "very fit, tall, thin, blonde hair." The district court granted summary judgment for Defendant, holding that the EEOC could not establish a *prima facie* case because Plaintiff was not qualified for her position. Specifically, the court reasoned that Defendant hired Plaintiff only after she misrepresented her previous managerial experience. The court also noted that Defendant's knowledge of Plaintiff's Hispanic heritage when it hired her and fact that she was preceded and succeeded by a woman belies any inference of discriminatory pretext.

Issue on Appeal: (1) Did the EEOC introduce sufficient direct and circumstantial evidence of discrimination to support a jury finding that Defendant fired Plaintiff because of her national origin and/or pregnancy in violation of Title VII? (2) Did the district court erroneously conclude that Defendants could not have discriminated against Plaintiff because her predecessor and successor were both women?

EEOC's Position on Appeal: The EEOC argued that it presented direct evidence of discrimination to defeat summary judgment in management's comments about wanting to hire white employees. The EEOC also argued that management's negative comments about other Mexican employees and tenants were sufficient circumstantial evidence to find national origin discrimination. Further, the EEOC contended that the district court improperly relied on the after-acquired evidence that Plaintiff lied on her application, noting such evidence can only limit relief, not liability. Last, the EEOC argued that the same actor inference was properly refuted by the direct and circumstantial evidence discussed above and that Defendant hired other women does not prevent any inference of discrimination based on Plaintiff's pregnancy status.

Court's Decision: The Fifth Circuit reversed and remanded, finding the lower court erred in granting summary judgment to the employer. According to the appellate court, the EEOC presented sufficient evidence to demonstrate the employer's clear discriminatory motive without the need for inference because one of the new property owners made his preference for a "white" staff known on multiple occasions and was in a position to influence the employee's termination. In addition, the EEOC presented sufficient evidence to support the conclusion that the charging party's pregnancy played a role in her termination.

Case Name	Court and Case Number	Date of Appellate Filing and/or Court Decision	Statutes	Basis/Issue/Result
EEOC v. Roark-Whitten Hospitality 2, LP	U.S. Court of Appeals for the Tenth Circuit No. 20-2023	5/27/2020 (appeal filed) 3/10/2022 (decided)	Title VII	Race National Origin Retaliation **Result:** Pro-EEOC

Background: The EEOC sued the Defendant hospitality company (RW2) alleging that it engaged in unlawful employment practices against employees at a hotel the Defendant owned. After learning that the Defendant sold the hotel, the EEOC filed an amended complaint naming the successors (Jai and SGI) as Defendants. After counsel for the Defendant and successors withdrew, the court entered default judgment against the Defendant and successor on all issues of liability and set a hearing to determine damages and injunctive relief. Notwithstanding the default judgment, the successors argued that dismissal of the complaint was warranted because the EEOC failed to plead that the successor had notice of the claims in a manner sufficient to hold the successors liable under a theory of a successor liability. The court dismissed the claims against the successors, holding that the operative complaint failed to state a plausible claim of successor liability because it did not plausibly allege that the successors had notice of the charges. The district court awarded a collective $35,000 in compensatory damages for the 11 claimants.

Issues on Appeal: Whether the district court erred in dismissing Jai and SGI from the case under Rule 12(b)(6) on notice grounds, given that there is no set formula to determine successor liability and, in any event, the EEOC's complaint pled constructive notice; Whether the district court abused its discretion in awarding only a collective $35,000 in compensatory damages for 11 aggrieved individuals who attested that RW2's discrimination and retaliatory terminations caused them anxiety, stress, and humiliation, and, for some, financial strain, vomiting, homelessness, headaches, depression, and suicidal thoughts.

EEOC's Position on Appeal: The district court erred in dismissing Jai and SGI for failure to state a claim of successor liability on notice grounds. It is well established that the successor liability doctrine applies under Title VII. The EEOC plausibly pled successor liability against Jai and SGI including, if required, that each had constructive notice. The district court's sole basis for dismissing the successor liability claims against Jai and SGI was the EEOC's purported failure to adequately plead notice. That dismissal constituted reversible error for three reasons: 1) the district court improperly applied a heightened pleading standard; 2) notice is not necessarily required for successor liability, an equitable doctrine; and 3) even if it were, the EEOC plausibly pled that Jai and SGI had constructive notice of the charges and claims, which satisfies the notice factor. Finally, the district court abused its discretion in awarding only $35,000 in compensatory damages for the 11 aggrieved individuals. That minimal award was so low as to constitute an abuse of discretion.

Court's Decision: In a 2-1 split panel decision, the Tenth Circuit affirmed the lower court's decision to dismiss the complaint as to Jai (the first successor) but reversed the lower court's decision as to successor liability for SGI (the second successor). The majority held that with due diligence SGI should have been aware of the underlying lawsuit and the EEOC's claims at the time of purchase. The panel was unanimous in striking down the damages award, as the lower court did not sufficient justify the amount awarded.

Case Name	Court and Case Number	Date of Appellate Filing and/or Court Decision	Statutes	Basis/Issue/Result
EEOC v. Eberspaecher North America, Inc.	U.S. Court of Appeals for the Eleventh Circuit No. 21-13799	12/21/2021 (appeal filed)	ADA	Disability Subpoena Enforcement **Result:** Pending

Background: In 2017, the EEOC began investigating a charge of discrimination from a former employee of the Defendant who alleged that the company violated the ADA when, pursuant to Defendant's "point system" to discipline employees for absences and tardiness, fired the employee following a series of disability-related absences. The EEOC also uncovered information suggesting that the same discriminatory practice might have affected other Defendant employees across the country. Subsequently, an EEOC Commissioner filed a charge in July 2019 alleging that Defendant "has violated, . . . and continued to violate the ADAAA [ADA Amendments Act of 2008] by discriminating against employees on the basis of disability with respect to qualified leave." The charge listed a Defendant facility rather than Defendant corporate headquarters.

Pursuant to the charge, the EEOC requested nationwide information regarding Defendant employees discharged pursuant to the attendance policy. However, Defendant refused to provide such information, noting that the underlying charge was specific to only one of Defendant's facility. In response, the EEOC issued a subpoena seeking such information.

Defendant refused to comply with the subpoena, and the EEOC applied for judicial enforcement. The district court ordered Defendant to comply with the subpoena in part. The district court agreed with the Commission that the temporal and subject matter scope of the subpoena was "both relevant and reasonable in light of the Commissioner's ADAAA charge." But the court limited enforcement to the Defendant facility stating: "[T]he geographic scope of the subpoena is too broad when read in conjunction with the Commissioner's Charge and Notice." The district court further concluded that only records pertaining to the violations of the ADA at the facility were relevant and must be produced.

Issues on Appeal: (1) Whether the district court abused its discretion by limiting the EEOC's subpoena to a single facility when the Commissioner charge broadly alleged that Defendant was violating the ADA by disciplining and terminating employees for absences directly correlated to their disability; and (2) assuming *arguendo* that the Commissioner's charge was directly at only one Defendant facility, whether the district court abuse its discretion by holding that the nationwide information was irrelevant to the EEOC's investigation of potential discrimination at the facility.

EEOC's Position on Appeal: The EEOC argued that the district court abused its discretion in two ways by limiting the subpoena to the facility. (1) The district court misinterpreted the Commissioner's charge as alleging ADA violations at Defendant facility only. Read as a whole, the charge is directed at Defendant's companywide practices of disciplining and terminating employees whose disabilities caused workplace absences. The EEOC also argued that neither of the district court's reasons—the charge's failure to use the terms "companywide" or "nationwide," nor its use of the facility's address, justifiably limited the charge only to the Defendant facility. (2) Even if the charge was limited to the facility, the EEOC argued that the requested nationwide information would be relevant to the EEOC's investigation. The EEOC reasoned that the Supreme Court has repeatedly held that relevance has an expansive meaning in connection with the EEOC's administrative investigations. Further, the charge, on its face, is based on Defendant's practices and those practices are based on a written companywide attendance policy that applies to all of the Defendant facilities.

Court's Decision: Pending.

APPENDIX C – SUBPOENA ENFORCEMENT ACTIONS FILED BY EEOC IN FY 2022[813]

Filing Date	State	Court Name / Case Number / Judge	Defendant(s)	Individual Charging Party or Systemic Investigation	Result
8/29/2022	FL	U.S. District Court for the Middle District of Florida 8:22-mc-00036-MSS-CPT Hon. Mary S. Scriven	*Enterprise Leasing Co. of Florida, LLC and Enterprise Leasing Co. of Orlando, LLC*	Systemic Investigation	The parties voluntarily resolved the matter

Commentary:

On May 18, 2022, the EEOC initiated two directed investigations against Respondents to determine whether they were in compliance with the ADEA. The investigation focused broadly on Respondents' compliance with the ADEA and whether they engaged in discriminatory hiring practices in violation of the ADEA. The EEOC requested the following information:

(1) Electronic applicant data for all applicants to the Management Trainee positions from January 1, 2019 to December 31, 2021, including all fields listed on Respondent's Employment Applications and all fields that track the applicant through the application process; (2) Identify each entity that employs Respondent's Management Trainees within the state of Florida; (3) For each entity identified, provide number of employees as of December 2021; (4) State the starting salary for Respondent's Management Trainees (or range/average if not uniform); and (5) Identify whether Respondent's Management Trainee position is a full-time position and, if not, how many hours per week managers in training work (if not set, range or average).

The Respondents did not provide the information, so the EEOC issued a subpoena for the information. The Respondents objected, but counsel for the parties could not reach an agreement. According to the EEOC, the Respondents provided no valid defense for failure to comply.

On November 15, 2022, the EEOC filed a notice of resolution.

813 The summary contained in Appendix C reviews select administrative subpoena enforcement actions filed by the EEOC in FY 2022. The information is based on a review of the applicable court dockets for each of these cases. The cases illustrate that in most subpoena enforcement actions, the matters are resolved prior to the issuance of a court opinion.

APPENDIX D - FY 2022 SELECT SUMMARY JUDGMENT DECISIONS BY CLAIM TYPE(S)

Statute and Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motion and Result	General Issues
ADA Retaliation	Autozone, Inc.	U.S. District Court for the Northern District of Illinois No. 14-cv-3385	2022 U.S. Dist. LEXIS 179912 (N.D. Ill. Sept. 30, 2022)	Defendant's Motion for Summary Judgment; EEOC's Motion for Partial Summary Judgment **Result:** Mixed The court denied the EEOC's motion and granted in part and denied in party the defendant's motion.	Did the employer's points-based attendance policy violate the ADA? Did firing one of the charging parties six months after she filed a charge of discrimination with the EEOC constitute unlawful retaliation?
Commentary: This case stems from the EEOC's lawsuit on behalf of eight charging parties who claimed the defendant's points-based attendance policy violated the ADA. The EEOC filed a motion for partial summary judgment, and the defendant filed a motion for summary judgment. Under the attendance policy at issue, the company issued "occurrence points" for absences. A progressive discipline system corresponded with the number of points and was based on factors such as: (1) when the absence/tardy occurred (weekday or weekend); and (2) whether the employee provided proper notice and/or advance notice of the absence and/or tardiness. An employee who accumulated 12 points could be fired. Employees did not incur points for absences/tardiness related to (a) the company's short-term disability leave policy; (b) an approved FMLA leave/absence; (c) absences related to emergency volunteer responder responsibilities; (d) leave covered by approved vacation; (e) funeral leave; (f) military obligations; (g) jury duty; (h) hospital confinement; (i) work-related injuries, or (j) other approved leaves of absence. The defendant maintained, and the EEOC disputed, that the STD exception also applied to any known disability. The court examined each charging party's situation, and ultimately denied the EEOC's motion and granted in part and denied in part the defendant's motion. The court determined questions of material fact remained as to whether being absent enough to warrant 12 disciplinary points rendered an employee able to perform the essential functions of the job, or whether excusing points was a reasonable accommodation. The court granted the defendant's motion with respect to the allegation the defendant retaliated against one charging party by firing her after she filed an EEOC claim. The court, however, found the six-month lapse between events was too tenuous a link to be considered a retaliatory action.					
ADA	Blue Sky Vision, LLC	U.S. District Court for the Western District of Michigan No. 1:20-cv-285	2021 U.S. Dist. LEXIS 228020 W.D. Mich. Nov. 1, 2021)	Defendant's Motion for Summary Judgment **Result:** Pro-EEOC The court denied the defendant's motion.	The defendant claimed its termination of the charging party was justified, as he refused to participate in a medical examination to assess his ability to perform his essential job functions. The EEOC claimed the scope of the examination and release of medical information was not sufficiently limited in scope, so the charging party was justified in objecting to it. The question before the court was whether the scope was too broad so as to preclude the defendant's motion for summary judgment on the ADA claim.

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

Commentary:

EEOC alleged the defendant discriminated against the charging party by placing him on a leave of absence based on the perception of his having a disability, subjecting him to an unlawful medical inquiry, and then firing him.

The charging party is an optometrist who suffers from homonymous hemianopsia (blind spot in his periphery vision), which arose following a stroke. Six years later he advertised his practice for sale and signed a purchase and employment agreement with the defendant. Months later he disclosed his health condition, after which the defendant expressed concern about his ability to perform his job. He was asked to resign, which he agreed to do, provided the defendant lift its restrictive covenant, which it declined to do. It then placed the charging party on a leave of absence. It offered him the option of resigning or continuing employment but remaining on leave and undergoing a medical evaluation. The charging party ultimately agreed to the evaluation. The defendant asked the charging party which doctor he would prefer and attached to the email a questionnaire for the doctor and an authorization for the release of medical information. The questionnaire itself listed the employer's concerns, and seemingly sought the release of the charging party's medical history. Specifically, the release included:

> All pharmacy records; dental records; any and all records and documents pertaining to any treatment/consultation rendered or performed, including but not limited to: complete in-patient and outpatient hospital records, surgical records, emergency room records, rehabilitation records, therapy, lab studies, radiographic films and reports, actual office notes, patient files, narrative reports, billings, and medications prescribed and/or filled. This authorization includes alcohol, mental health and substance abuse records, including psychotherapy notes; records protected under the regulations of 42 Code of Federal Regulations, Part 2, if any; HIV and AIDS records, and all records defined by statute and MDPH Rules (Public Act 174, 1989) if any. This authorization also permits oral communications regarding the listed information between agents of [defendant] and the provider identified in paragraph 2. This authorization includes information prior to and following the date of this authorization not to exceed the expiration defined in paragraph 3.

During several follow-up exchanges, the defendant told the charging party that if it did not hear from him, it would consider him to have voluntarily resigned. The charging party noted he was seeking the advice of counsel and would be in touch. He then filed a complaint with the EEOC. The charging party said he agreed to the medical evaluation with a particular specialist, but objected to the evaluation's overreach. The doctor slated to perform the evaluation noted that the charging party should see an ophthalmologist first, and the defendant notified the doctor's office that the charging party would probably "go elsewhere." It then terminated the charging party's employment. The EEOC filed suit alleging violations of the ADA.

Generally, a plaintiff making a claim for discrimination under the ADA must prove (1) they are disabled, (2) otherwise qualified to perform the essential functions of the position, with or without an accommodation, and (3) suffered and adverse employment action because of the disability. For a regarded-as claim under the ADA, a plaintiff must prove (1) the defendant regarded the plaintiff as disabled and (2) the defendant took some adverse action against the plaintiff because of the actual or perceived physical or mental impairment. For the second element, a plaintiff may rely on direct or circumstantial evidence. When the plaintiff relies on direct evidence, the factfinder does not need to draw any inferences to conclude that the plaintiff's disability was at least a motiving factor in the defendant's decision. If the plaintiff provides circumstantial evidence, the *McDonnell Douglas* burden-shifting framework applies.

The defendant first argued that the charging party is not a qualified individual able to perform the essential functions of his job. The defendant claimed he was not qualified, in part, because of his alleged rude and unprofessional behavior regarding the request to undergo a medical examination. The court, however, declined to dismiss the claim on the basis of the defendant's assertions, as the defendant did not contest the charging party's education, experience and expertise.

Defendant claimed its requests for a medical exam were proper, and that the charging party's lack of cooperation was therefore legitimate and nondiscriminatory. An employer may make medical inquiries and may require a medical examination of an existing employee when the exam or inquiry "is shown to be job-related and consistent with business necessity." §12112(d)(4)(A). A claim brought under this statutory provision presents two questions: (1) did the employer require or conduct a medical examination or a disability inquiry and (2) was the exam or inquiry job-related and consistent with business necessity? The employer bears the burden of proof.

In the Sixth Circuit, an employer-required medical examination is job-related and consistent with a business necessity when (1) the employee requests an accommodation, (2) the employee's ability to perform the essential functions of the job is impaired, or (3) the employee poses a direct threat to himself or others.

The issue here turned on the scope of the examination. The court referred to the EEOC guidance, which was persuasive albeit nonbinding: "Any inquiries or examination, however, must be limited in scope to what is needed to make an assessment of the employee's ability to work. Usually, inquiries or examinations related to the specific medical condition for which the employee took leave will be all that is warranted. The employer may not use the employee's leave as a justification for making far-ranging disability-related inquiries or requiring an unrelated medical examination." The court concluded there remained genuine issues of material fact regarding whether the disability inquiry and medical release were properly narrow in scope. Viewing the record in light most favorable to the plaintiff, the court deemed the medical release too broad, as defendant would be "hard pressed" to identify a medical record that would not be covered by the release, as it seemed to solicit all of the charging party's entire medical history. The court also found a genuine issue of material fact about whether the charging party's alleged lack of communication with the defendant about the medical exam justified his termination.

Statute and Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motion and Result	General Issues
ADA Failure to Accommodate	Charter Communications, LLC	U.S. District Court for the Eastern District of Wisconsin No. 1:20-cv-285	2021 U.S. Dist. LEXIS 241026 (W.D. Mich. Nov. 1, 2021)	Parties' Motions for Summary Judgment **Result:** Pro-Employer The court granted the defendant's motion.	Does the ADA require an employer to accommodate an employee who can perform the job's essential functions without such an accommodation?
Commentary: The charging party, who had "early cataracts," worked as a call center operator for defendant. Full-time employees work nine-hour shifts, five days per week. Following his training period, which lasted from April 2016 through July 2016, Monday-Friday from 10:00 a.m. to 7:00 p.m., the charging party selected to work the 12:00 p.m. to 9:00 p.m. shift, as it was the only one left. Employees are expected to work their shifts for at least 6-12 months until the next shift bid. The charging party claimed that his condition made driving at night difficult, and submitted an accommodation request form. He did not seek accommodation of his actual job duties. When the employer did not accommodate him on a permanent basis, the employee filed suit. The defendant alleged in support of its motion for summary judgment that (1) the charging party did not have a disability under the ADA; (2) even if he did have a disability, the company was not required to accommodate him when he could already perform all the essential functions of his job; and (3) even if the company were required to accommodate him, the accommodation requests were unreasonable because they would have been ineffective. The EEOC, on the other hand, countered that the record proves that the company unreasonably denied the charging party an accommodation to which he was entitled under the ADA, and failed to adduce sufficient facts to support an undue hardship defense. The court, however, determined that because as a matter of law the company was not required to accommodate the charging party, it would grant the defendant's motion and deny the EEOC's. The court noted the ADA does not require an employer to accommodate an individual who can perform the essential functions of the job without an accommodation. In this case, the charging party's accommodation did not implicate the essential functions of his job. The court relied on Seventh Circuit precedent, *Brumfield v. City of Chicago*, 735 F.3d 619 (7th Cir. 2013), in which the appellate court explained, "[w]hereas the ADA's other anti-discrimination provisions protect all qualified individuals, the reasonable-accommodation requirement applies only to the known physical or mental limitations of *otherwise* qualified individuals." Thus, "an employer's accommodation duty is triggered only in situations where an individual who is qualified on paper requires an accommodation in order to be able to perform the essential functions of the job." *Id.* "It follows that an employer need not accommodate a disability that is irrelevant to an employee's ability to perform the essential functions of [his] job—not because such an accommodation might be unreasonable, but because the employee is fully qualified for the job without accommodation and therefore is not entitled to an accommodation in the first place." *Id.* In this case, nothing in the record suggests that the charging party's night blindness affects his work performance. His accommodation request related to the convenience of his commute, not to his job functions. Thus, the employer had no duty to accommodate.					
ADA Disability Discrimination Failure to Accommodate	Clarksville Health System, G.P.	U.S. District Court for the Middle District of Tennessee No. 3:19-cv-00898	2022 U.S. Dist. LEXIS 134201 (M.D. Tenn. July 28, 2022)	Defendant's Motion for Summary Judgment **Result:** Mixed The court granted the defendant's motion with respect to the discriminatory discharge claim, but denied in part and granted in part the defendant's motion with respect to the failure to accommodate claim.	Was a nurse who suffered a permanent injury qualified for her position with or without a reasonable accommodation, and therefore was unlawfully terminated under the ADA? Did the employer fail to accommodate her injury by not transferring her to alternative open positions?

Statute and Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motion and Result	General Issues
Commentary: Charging party was an emergency room nurse who suffered a knee injury. After rehabilitation, she was still restricted in her ability to work. Specifically, her injury required her to be sedentary for the majority of the workday. She was initially accommodated in desk jobs, included by assigning another nurse to work with her. When her requirements became permanent, she was told she did not meet the job requirements, and applied for alternative positions in the hospital, but was not hired for the ones she preferred, although she declined to respond to one offer that paid significantly less than her current salary. EEOC brought two claims under the ADA: one for discriminatory discharge and one for a failure to accommodate. The court granted the defendant's motion for summary judgement on the discriminatory discharge claim. The court found the plaintiff did not have direct evidence to support its claim. Statements such as the charging party "wouldn't be able to continue her job as she was doing" and that her employment would be terminated if the hospital could not find her another suitable position within 10 days was not direct evidence of discrimination. Direct evidence is that which "requires the conclusion that unlawful [discrimination] was a motivating factor in the employer's action. Specifically, direct evidence is evidence that proves the existence of a fact without requiring any inferences." A statement that merely expresses concern about the plaintiff's ability to perform job requirements is not direct evidence of disability discrimination. Moreover, the court found the EEOC failed to make a *prima facie* showing of its indirect-evidence discriminatory discharge claim. "A *prima facie* [indirect-evidence] case of disability discrimination under the ADA requires that a plaintiff show: 1) he or she is disabled; 2) otherwise qualified for the position, with or without reasonable accommodation; 3) suffered an adverse employment decision; 4) the employer knew or had reason to know of the plaintiff's disability; and 5) the position remained open while the employer sought other applicants or the disabled individual was replaced." Defendant challenged prong 2, *i.e.*, the charging party's qualifications to perform the job either with or without an accommodation. Allowing her to continue performing the triage nurse position with an assistant as an accommodation is not reasonable. As to the failure to accommodate claim, the court granted in part and denied in part the defendant's motion for summary judgment. The Sixth Circuit uses a multi-part test to evaluate reasonable accommodation claims: "(1) The plaintiff bears the burden of establishing that he or she is disabled[, and] (2) The plaintiff bears the burden of establishing that he or she is 'otherwise qualified' for the position despite his or her disability: (a) without accommodation from the employer; (b) with an alleged 'essential' job requirement eliminated; or (c) with a proposed reasonable accommodation." In this case the defendant is challenging only the EEOC's ability to prove that the charging party was qualified for the position with a proposed reasonable accommodation. The defendant argued it was not required to accommodate her by transferring her to any positions for which she expressed interest. In this case, however, the court examined the qualifications for each position, and found that a reasonable jury could find that a couple of the positions could have been a viable and reasonable accommodation.					
ADA GINA	Dolgencorp, LLC	U.S. District Court for the Northern District of Alabama No. 2:17-cv-01649-MHH	2022 U.S. Dist. LEXIS 132466 (N.D. Ala. July 26, 2022)	Defendant's Motion for Summary Judgment on ADA claim, and Parties' Cross-Motion for Summary Judgment on GINA claim **Result:** Pro-EEOC Court held EEOC and charging party established that defendant violated GINA. The court denied defendant's motion for summary judgment on the EEOC's and charging party' 42 U.S.C. §§ 12112(b)(6) and 12112(a) ADA claims. Court set the remaining ADA claims and GINA claim, with respect to damages, for trial.	Did the employer violate the ADA and Title VII by subjecting post-offer applicants to medical tests? Did the plaintiff and charging party have standing to bring a GINA claim?

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

Commentary:

EEOC filed a claim under GINA and the ADA on behalf of unsuccessful job applicants. The EEOC claimed the defendant used a post-offer medical examination that screened out some applicants based on actual or perceived disabilities. The EEOC and defendant filed cross motions for summary judgment on the employees' GINA claim, and the defendant filed a motion for summary judgment on the plaintiffs' ADA claims.

The employer used post-offer employment background checks, physical examination, and drug tests. The EEOC alleged the defendant required job applicants to undergo a post-offer medical examination, and deemed not qualified for employment in the warehouse those applicants whose corrected vision did not measure 20/50 or better in both eyes, whose blood pressure measured 160/100 or higher, and/or whose blood sugar exceeded a certain threshold. The EEOC contends that binocular vision and blood pressure below 160/100 were not job-related requirements for the general warehouse worker position, and the medical qualification standards were not consistent with business necessity.

§ 12112(b)(6) prohibits an employer from discriminating against a qualified individual on the basis of disability by: "using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity." In addition, a disabled individual may assert a claim under § 12112(b)(6) and may prove that his employer's qualification standards, employment tests, or other selection criteria screened him out. Thus, under § 12112(b)(6), claims can be brought either by an individual plaintiff or by a class of individuals. . . . [A]n ADA disparate impact claim need not present statistical evidence if he or she can show that a job qualification screens out the plaintiff on the basis of his or her disability."

For an individual to prove a *prima facie* screen-out claim under § 12112(b)(6) of the ADA, a plaintiff "must (i) identify the challenged employment practice or policy, (ii) demonstrate that the practice or policy had an adverse impact on the plaintiff with a disability, and (iii) demonstrate a causal relationship between the identified practice and the [adverse] impact." To assert a business necessity defense, the defendants must show that the allegedly discriminatory qualification requirement is (i) job-related, (ii) consistent with business necessity, and (iii) that performance cannot be accomplished with a reasonable accommodation.

Disputed questions of fact regarding the company's screen-out policy preclude judgment in the defendant's favor based on the company's job-relatedness and business necessity defenses. Job-relatedness and business necessity are "distinct pillars of the affirmative defense."

Per the court, the record is replete with evidence from which jurors reasonably may infer that the EEOC class members could safely perform the essential functions of the job, undercutting defendant's argument that screening the applicants out was a business necessity. Thus, the court denied the defendant's motion for summary judgment on the EEOC's and charging party's ADA "screen out" claim.

The court also denied defendant's motion for summary judgment on the EEOC's and charging party's genetic disparate treatment claim.

With respect to the GINA claim, this statute prohibits employers from discriminating based on genetic information and acquiring genetic information. 42 U.S.C. § 2000ff-1. An employee — or an agency, such as the EEOC, acting on behalf of an employee — may bring a GINA claim under subsection (a), "Discrimination based on genetic information;" or subsection (b), "Acquisition of genetic information." 42 U.S.C. § 2000ff-1. Here, the EEOC brought its GINA claim under subsection (b).

Under GINA, it is an unlawful employment practice for an employer to request, require, or purchase genetic in-formation with respect to an employee or a family member of the employee except (1) where an employer inadvertently requests or requires family medical history of the employee or family member of the employee." 42 U.S.C. § 2000ff-1(b). Under GINA, "genetic information" includes "(i) such individual's genetic tests, (ii) the genetic tests of family members of such individuals, and (iii) the manifestation of a disease or disorder in family members of such individual." 42 U.S.C. § 2000ff(4)(A).

In this case, the defendant does not deny it violated GINA subsection (b) by asking applicants about their relative's medical problems. Instead, the defendant focused on the EEOC's and charging party's standing to bring a claim. Specifically, defendant argues that, insofar as the EEOC and charging party request compensatory and punitive damages, there is no redressability because GINA does allow for compensatory and punitive damages for claims brought under 42 U.S.C. § 2000ff-1(b). The court considered this an issue of first impression.

In its remedies and enforcement section, GINA incorporates the remedial schemes of other statutes. 42 U.S.C. § 2000ff-6. In this case, although the defendant claimed neither the EEOC nor the charging party alleged intentional discrimination, and that the court should treat it like a disparate impact claim, the EEOC did expressly allege intentional conduct to support a damage award. Given the language and legislative history of GINA, coupled with the Supreme Court's interpretation of 42 U.S.C. § 1981a(a)(1), the court found that compensatory and punitive damages are available for claims brought under 42 U.S.C. § 2000ff-1(b). In turn, the court also found that the EEOC and the charging party have standing to bring their GINA claims, even if their request for injunctive relief is moot, and the EEOC and charging party have alleged intentional conduct to support a damages claim.

The court granted the EEOC's motion for partial summary judgment on its GINA claim as to liability. Damages under GINA are for a jury to decide.

Statute and Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motion and Result	General Issues
ADA Failure to Accommodate	Heart of CarDon, LLC	U.S. District Court for the Southern District of Indiana No. 1:20-cv-00998-JRS-MJD	2021 U.S. Dist. LEXIS 209253 (S.D. Ind. Oct. 29, 2021)	Defendant's Motion for Summary Judgment **Result:** Pro-EEOC The court denied the defendant's motion.	Did the employer fail to accommodate an injured nurse's assistant by disallowing her to apply for a desk job at an alternative location?

Commentary:

The EEOC claims the defendant should have moved the injured charging party, who worked as a nurse's aide at a long-term care facility, to a front desk position at another location as a reasonable accommodation. After injuring her arm, she went on medical leave, followed by a return to work with modified duties that did not include lifting or use of her left arm. In November 2017, the charging party's doctor concluded she had reached maximum medical improvement, and imposed a no-lifting over ten pounds restriction and no over-the-shoulder lifting with her left arm. Her employer told her she could no longer work as a CNA in a modified position, and that she had 30 days to find a viable open position in the company or face discharge. She located a receptionist position in a different location, but was told there were lifting restrictions. The EEOC filed suit, claiming the employer failed to reasonably accommodate her. The employer moved for summary judgment on liability and punitive damages.

To prove a failure to accommodate claim under § 12112 of the ADA, the EEOC must show (1) that charging party is a qualified individual with a disability; (2) that the employer was aware of her disability; and (3) failed to reasonably accommodate the disability. The defendant only contests one part of that first element: it disputes that the charging party is a qualified individual, not that she is disabled. Specifically, it argued she could not perform two essential functions with or without a reasonable accommodation: (1) regular attendance, and (2) lifting more than ten pounds.

With respect to the essential functions, while courts generally do not second-guess the employer's judgment on essential functions, whether a function is essential is a question of fact, not law. The court and jurors are permitted to consider the job's description, the consequences of not requiring the employee to perform the function, the amount of time an employee actually spends performing the function, and the experience of those who previously or currently hold the position.

As for the requirement of regular attendance, the court must consider whether there is a genuine dispute of material fact regarding whether the charging party could regularly attend work as a receptionist. To survive summary judgment, the EEOC must produce evidence sufficient to permit a jury to conclude that the charging party could attend work regularly at the time of her termination. The court found the EEOC had done so, as evidenced by her doctor's report. Although she had regularly missed work months prior to her termination, the relevant period to consider is her condition at the time at dismissal. The EEOC produced evidence of the charging party's physical therapist and a functional capacity evaluation. Moreover, the lifting restriction was not absolute.

Regarding the lifting restriction, the employer said lifting is required to accomplish three tasks: (1) sorting the USPS mail; (2) delivering packages and deliveries to residents; and (3) putting away the copy paper delivery. The EEOC showed, however, that there is a genuine dispute as to how much lifting is actually required. Since the determination of an essential function is a question of fact for the jury, and several of the factors are in dispute, there is a genuine dispute of material fact and summary judgment is improper. Moreover, there is a dispute as to whether the charging party could accomplish such tasks with a reasonable accommodation.

As for punitive damages, such an award is available under § 1981a where an employer engages in a discriminatory practice "with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a. The EEOC has the burden of showing (1) that the employer acted with malice or reckless indifference to the charging party's federal rights; and (2) that there is a basis for imputing liability to the employer based on agency principles.

If the EEOC is imputing liability through an agent working in a "managerial capacity and . . . acting in the scope of employment," then the employer can avoid punitive damages by showing "that it engaged in good-faith efforts to implement an anti-discrimination policy." *EEOC v. AutoZone, Inc.*, 707 F.3d 824, 835 (7th Cir. 2013) (citing *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 544-46, (1999). The employer claimed it is entitled to summary judgment on the malice requirement and on the good-faith defense. To prove malice or reckless indifference, "A plaintiff may satisfy this element by demonstrating that the relevant individuals knew of or were familiar with the anti-discrimination laws but nonetheless ignored them . . . ." *AutoZone*, 707 F.3d at 835 (citing *Bruso v. United Airlines, Inc.*, 239 F.3d 848, 857-58 (7th Cir. 2001)). Punitive damages hinge on the employer's state of mind or whether it acted "in the face of a perceived risk" that its actions violate federal law. *Morris v. BNSF Ry. Co.*, 969 F.3d 753, 767 (7th Cir. 2020) (citing *Kolstad*, 527 U.S. at 535-36). In this case, the court found a reasonable jury could find that at least one company decisionmaker was familiar with the ADA accommodation requirements but ignored them. To survive summary judgment, the EEOC only needs to show that on this one occasion the employer was reckless or malicious, and that it had in fact done so. In this case, enough questions of fact remained for a jury to determine the employer did not make a good-faith effort to accommodate the charging party, so summary judgment was denied.

Statute and Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motion and Result	General Issues
ADA Direct Threat	Outokumpu Stainless USA, LLC	U.S. District Court for the Southern District of Alabama No. 20-521-CG-B	2022 U.S. Dist. LEXIS 158073 (S.D. Ala. Sept. 1, 2022)	Defendant's Motion for Summary Judgment **Result:** Pro-EEOC The court denied the defendant's motion.	Was the charging party, who took Xanax, not a qualified individual with a disability, as he was not able to perform the essential functions of the position, which were safety-sensitive, without posting a direct threat?

Commentary:

Defendant had in place a reasonable accommodation policy for qualified individuals with disabilities, as well as a substance abuse policy, which required employees to report prescription medications that may interfere with their ability to safely perform their job duties.

Charging party is a certified forklift driver and Senior Crane Operator with experience using several types of cranes, plasma cutting machines, track torches, powered industrial vehicles, and other industrial power tools and equipment. His employer was aware he had a prescription for Xanax and let him work without restriction. He had worked without incident in a variety of positions involving continuous hazards. He then applied for and was offered a conditional position of dump truck driver for an on-site contractor. A nurse practitioner performed a pre-employment physical examination. Charging party disclosed his medical history and his prescriptions. The nurse determined he should not be cleared for "safety sensitive duties" or "operating heavy industrial equipment." He was then made an offer to work at the company's steel mill, contingent on a background check and pre-employment physical exam with the same nurse. The nurse noted she would request medical records from his treating physician prior to clearing. There was no Xanax in his system, nor did she know whether he took it during work hours or whether he experienced side effects. The nurse ultimately determined he was not cleared for safety-sensitive work. His job offer was rescinded.

The issue became whether the charging party's use of Xanax precluded him from safety-sensitive positions. He had stopped taking Xanax with his doctor's consent, although he was not told his job was being rescinded because of his anxiety disorder or ADHD, or that he was unable to perform the essential functions of his job.

The EEOC engaged an occupational medicine expert to opine whether it was reasonable and appropriate to disqualify the charging party from safety-sensitive duties based on his Xanax prescription. The doctor noted that manufacturer drug warnings such as "be careful when driving a motor vehicle or operating machinery" are broadly used and "do not necessarily define likely safety risks." Therefore, the expert concluded it was not reasonable or appropriate to disqualify him based on an assumption that taking this drug or having this condition rendered one unable to perform safety-sensitive work without performing due diligence in assessing fitness for duty, and that the charging party did not pose a direct threat.

The defendant argued the court should grant its motion for summary judgment because: (1) EEOC did not satisfy the administrative prerequisites; (2) charging party was not a qualified individual with a disability; (3) charging party was not subjected to any form of disability discrimination; (4) charging party was not denied a reasonable accommodation; (5) charging party posed a direct threat of harm to himself or others; (6) all actions taken by defendant were for legitimate, non-discriminatory reasons; and (7) any damages are limited by the doctrine of after acquired evidence.

With respect to the administrative prerequisites argument, the defendant claims the EEOC's charge was not timely. But evidence showed the charging party did file his initial charge within 180 days of the last discriminatory employment practice, so that argument failed.

The defendant also argued that the charging party was not a qualified individual with a disability because he could not work in a safety-sensitive position, and that he could not perform these duties without posing a direct threat and that no reasonable accommodations were available. And even if he were qualified, the offer was not rescinded because of his disability. Moreover, the defendant argued the EEOC cannot show pretext, so summary judgment was not warranted.

The court applied the *McDonnell-Douglas* framework, as there was no direct evidence of discrimination. Assuming the charging party's position was safety-sensitive, the court addressed whether he could perform those essential functions. In the Eleventh Circuit, the employee retains at all times the burden of persuading the jury either that he was not a direct threat or that reasonable accommodations were available. The court noted that there exists "a scarcity of binding legal authority discussing a direct threat defense in the context of a pre-hire medical exam." In fact, the defendant did not cite to any legal authority with a similar fact pattern in support of its argument. The charging party, however, presented facts from which a jury could reasonably conclude that he was not a direct threat, including his limited use of Xanax and that he had held safety-sensitive positions in the past. Yet both sides presented evidence regarding whether the charging party's condition and medications posed a direct threat.

Statute and Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motion and Result	General Issues
As for an individualized assessment, the court noted that in determining whether an individual would pose a direct threat, the factors to be considered include: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm. The EEOC averred that the defendant failed to adequately assess these factors. Therefore, the court denied summary judgment on the direct threat defense. Moreover, there exists a question of fact as to whether the charging party is a qualified individual. There similarly remains a question of fact as to whether disability was a motiving factor prompting the defendant's job rescission. Moreover, for the same reasons that defendant could not rely on its nurse's assessment to show that the charging party was not qualified or to show a lack of evidence that he suffered an adverse action due to his disability, it could not rely on this assessment to establish a lack of pretext. Therefore, summary judgment was not warranted.					
ADA Reasonable Accommodation	Red Roof Inns, Inc.	U.S. District Court for the Southern District of Ohio No. 3:20-cv-381	2022 U.S. Dist. LEXIS 146956 (S.D. Ohio Aug. 16, 2022)	Defendant's Motion for Summary Judgment and the EEOC's Motion for Partial Summary Judgment **Result:** Mixed The court denied both motions.x	Is the employer entitled to summary judgment on the EEOC's failure to accommodate and failure to promote claims, as the charging party did not explicitly ask for an accommodation, nor did he apply for the job to which he was not promoted? Is the EEOC entitled to partial summary judgment on the employer's undue hardship affirmative defense?
Commentary: EEOC alleged defendant failed to accommodate the charging party, who is visually impaired, in his attempt to learn more about a promotion, to compete for the promotion, and the denial of that promotion. Defendant filed a motion for summary judgment, and the EEOC filed a motion to partial summary judgment. The court denied both. During his employment, the charging party was promoted several times, and used a Jobs Access with Speech (JAWS) software, a text to speech program, to assist him in his job performance. He expressed interest in a position that would have been a promotion, but asked whether he could attend the information session about this job via Skype, as he could not drive there. The supervisor told him via email that the online systems the position would use would not be compatible with the JAWS software, and she didn't want him to waste his time applying, and further that the company wanted to "get the bugs worked out" before offering the seminar via Skype. The EEOC filed suit. The employer, in turn, filed a motion for summary judgment, arguing (1) the charging party failed to request an accommodation; (2) the EEOC "has not articulated that a reasonable accommodation exists and is 'objectively reasonable'"; (3) the EEOC "has failed to establish that a 'reasonable' accommodation is possible"; and (4) the EEOC "has not shown [charging party] was 'otherwise qualified' for the position, as required to establish a *prima facie* case and to survive summary judgment." The employer also argued that summary judgment is warranted on an alleged claim by the EEOC for failure to engage in the interactive process, the EEOC's failure to promote claim, and the EEOC's request for punitive damages. The court denied the motion, finding, for example, that in certain instances, a request for accommodation can be inferred from the context of the situation. Here, the email communications between the supervisor and the charging party can enable the jury to infer that an accommodation is desired. As to whether the charging party would have been otherwise qualified for the position with a reasonable accommodation, the court determined that genuine issues of material fact exist regarding whether implementing JAWS was a reasonable accommodation and whether the charging party was qualified for the position with that alleged reasonable accommodation. With respect to the EEOC's motion for partial summary judgment on the company's "undue hardship" affirmative defense, both sides offered expert testimony on the feasibility of using JAWS for compatibility with third-party websites. The court denied the motion, noting that reasonable jurors could side with the company and deem such efforts an undue hardship.					

Statute and Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motion and Result	General Issues
ADA	Rogers Behavioral Health	U.S. District Court for the Eastern District of Wisconsin No. 19-cv-935	2022 U.S. Dist. LEXIS 159962; 2022 WL 4080649 (E.D. Wis. Sept. 6, 2022)	Parties' Cross Motions for Summary Judgment **Result:** Pro-Employer The court granted the employer's motion for summary judgment and denied the EEOC's motion.	Did the employer discriminate against a job applicant by rescinding a job offer after she tested positive for a drug, and therefore based its decision on her legal drug use? Or did it rescind the offer, as the employer claimed, because she failed to complete all steps of her pre-employment medical screenings?

Commentary:

The employee applied for a position of "intake specialist" and received a conditional offer contingent on a physical and drug screen. As part of the physical, the charging party completed a medical history form, listing her medications, including Alprazolam (generic Xanax). She did not indicate whether she had a prescription and noted she did not have work restrictions or need for accommodation. A third party administered a drug test. The charging party tested positive for Alprazolam and failed to provide proof of a prescription for this drug. Had the employer received a prescription for the medication, it would have changed the drug screen results from "positive" to "negative." The offer was rescinded because the charging party did not complete her pre-employment requirements. The EEOC alleged she was discriminated against contrary to the ADA based on her use of a legally prescribed medication and that the employer chose not to hire her because of an actual or perceived impairment for which she was taking the medication.

The employer at issue is a healthcare facility, so some of its hiring processes are regulated by the government, including the State of Wisconsin. Among the requirements is passing a drug test overseen by an independent testing laboratory. Neither party disputes that the defendant does not control the drug-screen process. The defendant says that when a candidate tests positive, the Medical Review Officer (MRO) contacts that candidate "to determine the reason for the positive test." If there is a valid prescription for the drug at issue, the results are changed to "negative." In this case, the charging party was directed to contact the MRO, but she failed to do so.

Defendant claims that discovery showed that the EEOC was aware before it filed the lawsuit that the reason the charging party failed the pre-employment process not because she was using a prescribed medication, but because she never provided proof that she had a prescription for that medication. The defendant claimed the charging party could not meet the *prima facie* elements of discrimination, because no disability was identified, there was no evidence the charging party met the defendant's legitimate business expectation (providing a prescription), and no similarly situated applicants were treated differently. In fact, every candidate who tested positive on the drug screen and provided a valid prescription was hired. Moreover, even if a *prima facie* case could be made, the defendant had a legitimate, nondiscriminatory reason for rescinding the job offer. Finally, there is no evidence of pretext.

As for the EEOC's motion for summary judgment, the court found that its "smoking gun" argument that the defendant rescinded the charging party's job offer because she failed a drug test "is a classic case of cherry-picking evidence." The EEOC cited to various documents and emails noting the positive drug test. Reading the EEOC's evidence in its entirety, however, showed that the employer's actions were based on her failing a drug test *and* failing to provide a valid prescription for said drug. Moreover, there is no evidence on record that the defendant regarded the charging party as suffering from anxiety or being a drug user, or that she was limited in any major life activity.

The court found it has no evidence that the defendant was testing for anything other than the "illegal use of drugs," not determining an applicant's medical status or disability. Even assuming without deciding that the post-offer, pre-employment drug screen the defendant used was a "preemployment" "medical examination" under §12112(d)(2), there is no record evidence to show that the defendant conducted it to determine whether the charging party—or any other candidate—was an individual with a disability, or to determine the nature or extent of a disability.

The court therefore granted the defendant's motion for summary judgment and denied the EEOC's motion.

Statute and Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motion and Result	General Issues
ADA Disability Discrimination Direct Threat	St. Joseph's / Candler Health System, Inc.	U.S. District Court for the Southern District of Georgia No. 4:20-cv-112	2022 U.S. Dist. LEXIS 37741 (S.D. Ga. Mar. 3, 2022)	EEOC's Motion for Partial Summary Judgment and Defendant's Motion for Summary Judgment **Result:** Pro-EEOC The court denied the defendant's motion, and granted in part and denied in part the EEOC's motion for summary judgment.	Did the employer unlawfully rescind an applicant's conditional offer of employment based on concerns his HIV-positive status would present a direct threat to his coworkers? Did offering the applicant the opportunity to apply to alternative positions negate any showing of an adverse employment action?

Commentary:

The EEOC alleges the defendant unlawfully rescinded a job offer to an applicant based on his HIV-positive status. The position at issue is that of a safety officer, whose job responsibilities include patrolling grounds, providing patient assistance when required, and responding to calls for vehicle assistance, domestic or family disputes, psychiatric patient issues, and emergency room patients exhibiting violence. The charging party was given a conditional job offer pending a health screening. During the screening the charging party indicated he was HIV positive but that his viral load was almost undetectable. The manager of infection control informed the Occupational Health Services Department manager that there was a risk of HIV exposure and a lower risk of HIV transmission based on the charging party's status, and recommended that she contact a doctor to obtain more information about the party's lab work to assess the level of risk. The doctor informed the manager there was little risk of exposure for the job tasks, but wanted to see the charging party's viral load. The manager did not request additional information or lab tests, but did her own research online about viral loads and HIV transmission, and examined hospital injury logs to see how many incidents involved bodily fluid. She concluded that violent altercations did occur, and could result in bleeding and lacerations, and based on all of the above information, rescinded the job offer. She then searched for other job positions where there would be no risk of physical altercations. Some were filled and some did not meet the charging party's ability. The EEOC filed suit under the ADA.

The defendant argued the EEOC did not make a *prima facie* showing of ADA discrimination, as it could not show he was qualified to perform the position and that he did not suffer an adverse employment action. The EEOC claimed it was entitled to summary judgment on the issues of whether the charging party is disabled, whether he is a qualified individual, whether the hospital rescinded the job offer because of his disability, and whether it based its decision on "current objective medical evidence."

The court first granted the EEOC's motion on the issue of whether the charging party is disabled, as the hospital conceded this issue. As for whether he was qualified, the court noted an employer's subjective, good-faith belief that an applicant will pose a significant threat will not relieve the employer from liability. But, under precedent established by the 11th Circuit, the plaintiff "retains at all times the burden of persuading the jury . . . that he was not a direct threat." *LaChance v. Duffy's Draft House, Inc.*, 146 F.3d 832, 836 (11th Cir. 1998). The court agreed with the EEOC that the charging party is qualified for the position, but noted there is a genuine dispute of material facts regarding whether he could perform the essential functions of the position without posing a direct threat to others. To determine whether an individual would pose a direct threat, four factors must be considered: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm. 29 C.F.R. § 1630.2(r). The court determined that neither party was entitled to summary judgment on this issue, as the evidence on record is conflicting. A factual dispute also exists as to whether the employer performed an individualized assessment of the charging party's ability to safely perform the essential job functions based on the most current medical knowledge or best available objective evidence.

As to whether the charging party suffered an adverse employment action, the defendant argued because he was offered other jobs, he did not suffer an adverse action in any real and demonstrable way. The defendant did not argue the rescission wasn't an adverse employment action, but instead attempted to equate the facts of this case with that of a "lateral transfer" case. Even if this could be analogized to a lateral transfer case, however, the court noted the job tasks were not similar. Therefore, there remained an issue of material fact as to whether the charging party suffered an adverse employment action.

Finally, the court determined neither the EEOC nor the defendant was entitled to summary judgment on the issue of whether the employer took the adverse action because of the charging party's disability status. The parties disputed whether this was a direct evidence case or a circumstantial evidence case, but the court found the EEOC presented direct evidence of discrimination (*i.e.*, that it based its decision on the applicant's HIV-positive status). That said, finding that direct evidence of discrimination exists, standing alone, is normally sufficient to defeat a motion for summary judgment.

Statute and Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motion and Result	General Issues
Title VII Hostile Work Environment Constructive Discharge	Lindsay Ford LLC	U.S. District Court for the District of MarylandNo. TDC-19-2636	2021 U.S. Dist. LEXIS 212371 (D. Md. Nov. 2, 2021)	Defendant's Motion for Summary Judgment; EEOC's Cross Motion for Partial Summary Judgment **Result:** Pro-EEOC The court denied the defendant's motion and granted the EEOC's motion.	Did the defendant engage in harassment based on sex, race, and national origin that was sufficiently severe and pervasive so as to result in the charging party's constructive discharge? Did the EEOC show that the two defendant entities were an integrated enterprise subject to joint liability under Title VII?

Commentary:

The EEOC alleged that the charging party was subjected to a hostile work environment that resulted in a constructive discharge. The defendant moved for summary judgment, and the EEOC moved for partial summary judgment.

The charging party notified company officials about the harassment, including being called a "serial killer" on multiple occasions because he was a "creepy brown person," among other names, and that his supervisors threw water bottles and wads of paper at him, and grabbed his buttocks. The charging party was given two options (1) remain at the dealership but in a different division but still report to the alleged harasser; or (2) apply to work at a location 38 miles away, but was not guaranteed. The alleged harasser was issued a disciplinary action, which imposed a $10,000 pay reduction, but he refused to sign. When another employee complained about the harasser's behavior, the harasser resigned rather than be terminated.

After the EEOC filed suit, the defendant argued the EEOC could not establish facts sufficient to establish either a hostile work environment claim or a constructive discharge claim. The EEOC's cross-motion argued that the defendant dealership and the defendant management company are an integrated enterprise. Lindsay Management provides the defendant dealership (Lindsay Ford) with management services, including human resources, payroll, advertising, accounting, and information technology, including human resources policies and an employee handbook and advises it on personnel matters such as sick leave and other benefits, employee performance issues, and disciplinary matters.

With respect to the hostile work environment claim, one exists "when the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive work environment." *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 277 (4th Cir. 2015). To prove such a claim, a plaintiff must show that (1) the plaintiff experienced unwelcome conduct; (2) the conduct was based on the plaintiff's race, color, religion, national origin, age, or sex; (3) the conduct was sufficiently severe or pervasive to alter the conditions of employment and to create an abusive atmosphere; and (4) there is some basis for imposing liability on the employer. *Baqir v. Principi*, 434 F.3d 733, 745-46 (4th Cir. 2006).

In this case, the harassment was unwelcome. Regarding protected categories, the defendant claimed the harasser was unaware of the charging party's identity, the harasser's statements were not overtly racial in nature but rather merely unkind and rude, and that the harasser treated others worse. As to the first argument, there was sufficient evidence to show the comments were based, in part, on the charging party's skin color and motivated by discriminatory animus, including derogatory statements about others of South Asian or Middle Eastern descent. As for the sexual component, the court noted that the Fourth Circuit recently emphasized that same-sex sexual harassment . . . may be established based on other sex-based motivations, including "a plaintiff's failure to conform to sex stereotypes." *Roberts v. Glenn Indus. Grp., Inc.*, 998 F.3d 111, 120 (4th Cir. 2021).

As for the "equal opportunity harasser" argument, the court cites to *Bostock v. Clayton County*, 140 S. Ct. 1731, 1741 (2020), noting that an employer who discriminates against both men and women based on their sex as a result of different stereotypes does not "avoid[] Title VII exposure" but instead "doubles it." The court therefore found sufficient evidence to support a finding that the harassment was based on race, national origin, and sex.

Regarding whether the conduct was severe or pervasive enough to alter the conditions of employment, the court noted that no single factor is dispositive. In this case, a reasonable jury could find the charging party's treatment was objectively severe or pervasive.

As to whether the defendant could be held liable for the harasser's conduct, the court noted that if the harasser is a supervisor, then the employer may be either strictly or vicariously liable for the supervisor's actions. In this case, the harasser was the highest-ranking manager at the dealership, so the condition was satisfied.

Statute and Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motion and Result	General Issues
Defendants argue that they are nevertheless entitled to summary judgment because they have conclusively shown the applicability of the *Faragher/Ellerth* defense. Under this defense, an employer may not be vicariously liable for a hostile work environment created by a supervisor if (1) it exercised reasonable care to prevent and correct promptly any harassing behavior; and (2) the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. The defense is not available if the hostile work environment resulted in a "tangible employment action," consisting of "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." The EEOC argued this defense is not available here, as it resulted in constructive discharge. Even if there was no tangible employment action, however, the EEOC argued the defendants failed to establish there is no genuine issue of material fact as to both prongs of the defense. Specifically, there was no reasonable care taken to address the conduct. The court agreed that the record does not support a viable *Faragher/Ellerth* defense. In addition, the court found the EEOC put forth sufficient evidence to support a constructive discharge claim. As for the EEOC's motion on the issue of integrated enterprise, the test is whether the entities have (1) common management; (2) interrelation between operations; (3) centralized control of labor relations; and (4) degree of common ownership/financial control. In this case, the court found sufficient evidence to "reveal that all of the factors are consistent with an integrated enterprise, and that Lindsay Ford and Lindsay Management were both deeply involved in the employment decisions at issue here." Therefore, the court concluded that the two operated as an integrated enterprise.					
Title VII Joint Employment	Green Lantern Inn, Inc.	U.S. District Court for the Western District of New York No. 19-cv-06704	2022 U.S. Dist. LEXIS 41218 (W.D.N.Y. Mar. 8, 2022)	EEOC's Motion for Partial Summary Judgment **Result:** Pro-EEOC The magistrate's report and recommendations granted the EEOC's motion.	Applying the so-called "Cook factors," should the court find that the defendant, Green Lantern Inn, Inc., d/b/a Mr. Dominic's on Main and Pullman Associates, LLC d/b/a Mr. Dominic's at the Lake are a "single employer" for Title VII purposes?
Commentary: This matter stems from a sexual harassment charge at defendant restaurant. There are two restaurants at issue, both of which have common ownership and are jointly managed by two individuals. The EEOC therefore asserts they should be considered a single employer for Title VII purposes. In making its determination, the court examined the so-called *Cook* factors articulated in *Cook v. Arrowsmith Shelburne, Inc.*, 69 F.3d 1235 (2d Cir. 1995). Specifically, the factors are: (1) interrelated operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership. "To demonstrate single employer status, not every fact need be present, and no factor is controlling." *Lihli Fashions Corp. v. N.L.R.B.*, 80 F.3d 743, 747 (2d Cir. 1996). However, courts note that "the second factor, centralized control of labor relations, is the central concern of the inquiry." *Cook*, 69 F.3d at 1240. "Whether two related entities are sufficiently integrated to be treated as a single employer is generally a question of fact." *Daikin Am., Inc.*, 756 F.3d at 226. Finally, while a single employer should be found only under "extraordinary circumstances," *Murray v. Miner*, 74 F.3d 402, 404 (2d Cir. 1996), where, as here, "the facts critical [to] the determination are undisputed" and manifestly favor EEOC on every *Cook* factor, partial summary judgment is appropriate. *Niland v. Buffalo Laborers Welfare Fund*, No. 04-CV-0187F, 2007 U.S. Dist. LEXIS 77567, 2007 WL 3047099, at *6 (W.D.N.Y. Oct. 18, 2007). In this case, the court found it is undisputed that the control of labor relations weighs in favor of the EEOC, as two individuals as common managers were involved with virtually all employment processes at both operations, and were the final decision makers. The payroll system was the same, as were the tax accountant, website and Facebook accounts, personnel forms, employee manuals, etc. According to the court, the interrelation of operations was apparent. Moreover, neither party disputed common ownership. Per the court, "the appropriate conclusion is that EEOC's motion for partial summary judgment should be granted: it is 'difficult to tell where the business of' Pullman Associates ceases 'and the business of' Green Lantern begins." 2022 U.S. Dist. LEXIS 41218, at *114, citing *Ayala v. Your Favorite Auto Repair & Diagnostic Ctr., Inc.*, No. 14CV5269ARRJO, 2016 WL 5092588, at *17 (E.D.N.Y. Sept. 19, 2016).					

Statute and Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motion and Result	General Issues
Title VII Race Discrimination	DHL Express United States	U.S. District Court for the Northern District of Illinois No. 10-C-6139	2021 U.S. Dist. LEXIS 253036_ (N.D. Ill. Dec. 30, 2021)	Defendant's Motion for Summary Judgment **Result:** Pro-EEOC The court denied the defendant's motion.	Was there sufficient evidence for a reasonable jury to conclude the supervisors classified and segregated Black drivers to routes in predominantly Black, higher-crime areas or to more arduous routes, while assigning white drivers to other, more-preferable routes?

Commentary:

EEOC filed a race discrimination lawsuit on behalf of 83 truck drivers, claiming they were assigned to more dangerous or demanding routes, were segregated from white employees, and were given more strenuous dock work. Twenty-one of the drivers intervened and filed section 1981 claims. The defendant moved for summary judgment on the EEOC's and the intervenors' claims, and on the EEOC's request for punitive damages.

The EEOC's expert analyzed seven characteristics of the routes assigned: 1) Black population as a percent of the neighborhood where each stop took place; 2) percent of the neighborhood population that was below the poverty line; 3) percent of the neighborhood that was non-white; 4) rate of violent crimes in the neighborhood; 5) rate of property crimes in the neighborhood; 6) whether the neighborhood was more than 50% Black; and 7) whether the neighborhood was more than 70% Black. The expert found that Black drivers were more likely than white drivers to pick up or deliver in neighborhoods that were more non-white and crime-ridden. As for the segregated worker charge, Black drivers were the ones typically unloading freight or given less desirable or more strenuous work. Those who complained were allegedly retaliated against by being given more undesirable/strenuous work. In addition, some drivers cited to racially insensitive comments made when they pointed out the disparity.

The defendant first claimed that neither assigning a driver to a more dangerous or arduous route, nor assigning a driver to more strenuous dock work, is an adverse employment action. Essentially, the argument was delivering and picking up packages and performing dock work are tasks within the scope of a driver's duties, so a driver does not suffer a materially adverse employment action when the driver is assigned to perform one route or dock task versus another. The court disagreed: "Recognizing that job discrimination may take many forms, Congress cast the prohibition of Title VII broadly to include subtle distinctions in the terms and conditions of employment . . . ." *Collins v. State of Ill.*, 830 F.2d 692, 703 (7th Cir. 1987).

"When the summary judgment record is viewed in the light most favorable to the EEOC, there is evidence to support a reasonable inference that assigning a driver to a route in a predominantly Black, non-white, higher-crime area is a significantly negative work condition that may fairly be characterized as objectively creating a hardship." Additionally, the court found there was evidence to support a reasonable inference that being assigned to a route in a predominantly Black, higher-crime area was objectively degrading. For example, some supervisors told Black drivers that they were assigned to such routes based solely on their skin color, and that white drivers refused those routes. The EEOC also established facts sufficient issues of fact that being assigned to a route requirement significantly more arduous work constituted an adverse employment action.

The defendant alleged it had legitimate, nondiscriminatory reasons for assigning certain routes. The drivers are subject to a CBA, under which assignments are largely seniority-based. Drivers can bid for time slots and shipping centers through an annual bidding process. Routes are allocated by supervisors. The defendant claimed many of the Black drivers had sufficient seniority to bid out of one station into another, but chose not to do so. The court, however, explained that this position is based on a "fundamental misunderstanding of EEOC's claim. The EEOC is not arguing that drivers should never have had to work on certain routes, but, rather, that Black drivers should not have been assigned to routes in predominantly Black, higher-crime areas at a disproportionately high rate, when compared to their white counterparts." Moreover, there is evidence that supervisors, who assigned routes and dock work, harbored racist attitudes, from which a reasonable jury could infer that the supervisors acted with racially discriminatory intent.

The court therefore denied the defendant's motion, finding there is enough evidence for a reasonable jury to conclude the supervisors classified and segregated Black drivers to routes in predominantly Black, higher-crime areas or to more arduous routes, while assigning white drivers to other, more preferable routes.

There also existed enough questions of material fact as to whether supervisors were sufficiently trained to address racial discrimination complaints, whether management responded effectively to such complaints, and whether Black drivers felt intimidated and/or feared retaliation for filing grievances or raising complaints of race discrimination. The court therefore denied the defendant's motion for summary judgment on the EEOC's punitive damages claim.

Statute and Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motion and Result	General Issues
Title VII Religious Accommodation	Center One, LLC	U.S. District Court for the Western District of Pennsylvania No. 2:19-CV-01242	2022 U.S. Dist. LEXIS 148694 (W.D. Pa Aug. 19, 2022)	Cross-Motions for Summary Judgment **Result:** Pro-Employer The court granted the employer's motion for summary judgment.	Did the application of an employer's point-based attendance policy result in a failure to accommodate an employee's religious-based absences? Did the employee's resignation based on his belief that he would be terminated for future absences amount to a constructive discharge?

Commentary:

The EEOC and the charging party alleged that the former employer failed to accommodate the charging party's religious beliefs and constructively discharged him. The parties filed the cross-motions for summary judgment.

The charging party practices Messianic Judaism, which required him to abstain from work on certain Jewish holidays. His five weeks of employment included a probationary period and training period. The employee handbook described the attendance and disciplinary policies, which were based on a "point" system and progressive discipline. The policy notes an employee that calls out during the training period will face termination. The said, the handbook also noted in a section titled "Corrective Action and Acknowledgement" that in lieu of termination, if an employee "do[es] not meet these standards, the Company may, under appropriate circumstances, take corrective action, other than immediate termination."

During the hiring period, the charging party stated generally that he could not work during religious festivals, but did not give specific dates or ranges. He accrued one attendance point for a nonreligious-based absence and then called out two days for religious observance purposes, although it is disputed whether he provided advance notice. All told, he received three negative attendance points for those two days, making him eligible for termination. He was not fired, however, but instead was subject to a Final Warning/Employment Review Committee (ERC) meeting to discuss the attendance points he had accrued. He was asked to provide documentation about his religious-based absences, which he was unable to obtain.

The charging party ultimately resigned, aware that he had accumulated points for his absences and would likely gain more for upcoming holidays.

The lawsuit turned on whether the company unlawfully disciplined him for absences on days his religion required him to abstain from work and whether the application of the company's policies imposed conditions that were so intolerable as to force him to resign.

The court found the record was clear in that the charging party did not provide the employer with detailed information about his need for time off for religious observance until after he had accrued attendance points for his absences. Moreover, the dates and times on the calendar the charging party obtained from the internet and the congregation he was considering joining also did not necessarily match up with the dates and times the charging party's sect observed certain holidays. Given the lack of specific information provided by the charging party leading up to his absences and his own uncertainty as to the days and times he was required to abstain from working, the company sought supplemental information to ascertain the specific contours of any reasonable accommodation. The court found the company's policy to request more information was reasonable in this instance.

As for the failure to accommodate, the court noted that the viability of the charging party's claim rests on whether he suffered an adverse employment action. The court found that he could not establish this element of the religious discrimination *prima facie* case. The alleged adverse actions (accumulation of points) did not materially alter the terms, privileges, or conditions of employment. Moreover, the fact that, in light of his accrual of attendance points, the charging party was required to attend an ERC meeting does not constitute an adverse employment action.

As for the constructive discharge claim, the test in the Third Circuit is whether the employer knowingly permitted conditions of discrimination in employment so intolerable that a reasonable person subject to them would resign. Considerations relevant to evaluating a claim of constructive discharge include whether the employer (1) threatened the employee with discharge or urged or suggested that they resign or retire, (2) demoted them, (3) reduced pay or benefits, (4) involuntarily transferred them to a less desirable position, (5) altered job responsibilities, or (6) gave unsatisfactory job evaluations.

Statute and Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motion and Result	General Issues
These conditions were not met in this case. The court noted the law of constructive discharge is not concerned with subjective fears of possible future dismissal. The EEOC also asserted an "inevitable termination" theory of constructive discharge, which it contends is a "a species of intolerable working conditions"—such that a plaintiff's claim can succeed in the case where "an employer act[s] in a manner so as to communicate to a reasonable employee that he will be terminated," and the employee resigns. The EEOC cited cases in which the employee was essentially asked to choose between their job and their faith. That is not the situation in this case, the court explained. The employer did not threaten the charging party with termination or tell him he would be terminated for observing religious holidays; rather, he was merely warned about future unexcused absences. A reasonable employee in the charging party's position would have understood that directive to mean they must follow company procedure before taking future absences from work. The court granted the defendant's motions in full and denied the EEOC's motion.					
Title VII Religious Discrimination	Kroger LP I	U.S. District Court for the Eastern District of Arkansas No. 4:20-cv-1099-LPR	2022 U.S. Dist. LEXIS 111587 (E.D. Ark. June 23, 2022)	Cross Motions for Summary Judgment **Result:** Mixed The court denied both parties' motions for summary judgment, but granted the employer's motion with respect to the retaliation claim.	Did the employer discriminate against two employees who refused to wear a symbol on their work uniform because they believed it expressed support for the LGBTQ community, and such support was against their religion? Did the employer retaliate against them by firing them for noncompliance with the dress code?
Commentary: The employer instituted a dress code that included wearing an apron with a multi-colored heart symbol. The symbol somewhat resembled the rainbow flag symbolizing support for the LGBTQ community, although that was not its intended purpose. Some store employees sought accommodations not to display the heart, on the belief that homosexuality is a sin and against their religion. The employees were told the symbol did not represent the gay pride flag, and were ultimately fired for not conforming to the dress code. The EEOC brought two claims on behalf of the employees. The principal claim is a religious discrimination claim. The EEOC alleges that the employer violated Title VII when it denied the requests for religious accommodations and fired them for not complying with the dress code. The second claim is a retaliation claim. The EEOC alleges that, by firing the employees, the employer unlawfully retaliated against them for complaining about wearing the apron with the heart symbol. Both sides moved for summary judgment. The court held that neither side is entitled to summary judgment on the failure-to-accommodate claim, but that the employer is entitled to summary judgment on the retaliation claim. Regarding the failure to accommodate claim, the employer argued that the EEOC did not provide any evidence to establish the first prong of the *prima facie* case (the employee's sincerely held religious belief conflicted with the employer's workplace rule). The employer essentially conceded the other two prongs of the *prima facie* case (the employer was notified of the conflict and the employee suffered an adverse action). The employer then argued that, based on the record before the court, it is clear that accommodating the employees would have caused undue hardship on the conduct of its business. The court found the employer was wrong on both points. The employer argued there is an important distinction between (1) the employees' religious beliefs themselves, and (2) their view that the dress code (specifically the Our Promise rainbow heart symbol) conflicts with their sincerely held religious beliefs. The employer argued that this latter view is not religious in nature, and thus should not be insulated from an objective-reasonableness review. The employer further argued that an objective-reasonableness review is necessary to determine whether there is a conflict between the dress code and the beliefs about homosexuality. And, according to the employer, all the record evidence points in one direction—that it is objectively unreasonable to believe that the Our Promise symbol supports and promotes the LGBTQ community. Thus, the employer concludes, there is no conflict at all between the religious beliefs and the dress code. The court noted, however, that there is no controlling precedent that authoritatively approves of or rejects this theory of how to apply prong one of the *prima facie* case in a Title VII failure-to-accommodate action. But there is some highly persuasive precedent lined up against this point. The court invoked the Supreme Court's decision in *Burwell v. Hobby Lobby Stores, Inc*. and *Fulton v. City of Philadelphia*, concluding it was enough the employer conceded that the employees sincerely believed wearing the symbol violated their religion. In addition, a rational juror could conclude that the employees reasonably believed that wearing the multi-colored heart would communicate support for and promotion of the LGBTQ community. As to the undue hardship defense, the court noted that the Eighth Circuit has made clear that the existence of an undue hardship is a question of material fact that, when genuinely disputed, must be resolved by a jury.					

Statute and Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motion and Result	General Issues
Regarding retaliation, in the Eighth Circuit, the EEOC must show that (1) the employees engaged in a protected activity, (2) they suffered an adverse employment action, and (3) the adverse action occurred because they were engaged in the protected activity. Then the employer could rebut this showing by providing nondiscriminatory reasons for its action, and then the EEOC would have to show that that explanation was instead pretext for discrimination. In this case, the EEOC would have to show that the company fired the employees because of their whistleblowing activities. But it is undisputed that the reason for their termination was noncompliance with the dress code. Therefore, no reasonable juror could conclude that the protected activity (*i.e.*, the requests to not wear the symbol) caused their termination, so summary judgment is granted for the employer on this charge.					
Title VII Sexual Harassment	Elite Wireless Group, Inc.	U.S. District Court for the Eastern District of California No. 2:19-cv-02187	2022 U.S. Dist. LEXIS 15480 (E.D. Cal. Jan. 27, 2022)	Defendant's Motion for Summary Judgment **Result:** Pro-EEOC The court denied the defendant's motion.	Should the court grant the defendant's motion for summary judgment based on the EEOC's alleged failure to initiate discovery, or in the alternative, dismiss the EEOC's complaint based on a failure to prosecute?

Commentary:

EEOC filed suit against the defendant, alleging that it discriminated against a former employee based on sex. Specifically, the EEOC claimed that after the charging party was hired as a sales clerk, her supervisor began to make unwanted sexual comments, which the manager allegedly dismissed as "joking" and "not serious." After the supervisor allegedly sexually assaulted the charging party during a holiday party (which was reported to the police and the defendant's CEO) the supervisor continued to work at the store, while the charging party was transferred to a less desirable location with a longer commute. The defendant ultimately fired the charging party for excessive absenteeism, which the EEOC attributed to the charging party's being traumatized.

The defendant in early February 2020 indicated it would file an answer to the lawsuit, but failed to do so, resulting in the EEOC's moving for default, which was entered in March 2020. The defendant did not move to set aside the default until August 14, 2020, and answered the complaint on October 14, 2020, after the court granted its motion to set aside the default.

The EEOC initially believed that since so much time had passed, the court would issue a new Initial Pretrial Scheduling Order, but then decided that this might not necessarily occur, so it sent a letter dated March 4, 2021, which included a proposed agenda for a meet and confer meeting pursuant to Rules 16 and 26(f), as well as Local Rule 240, to address a discovery plan and protocol for procuring electronically stored information. The defendant instead filed the instant motion for summary judgment on the grounds that the EEOC has failed to initiate discovery since the defendant filed an answer to the complaint in October 2020, and therefore failed to present evidence in support of its claim. In the alternative, the defendant argued that the lawsuit should be dismissed for failure to prosecute under Rule 41(a).

Under Rule 41(b), "[if] the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it." Rule 41(b) requires that plaintiffs prosecute their claims with "reasonable diligence" to avoid dismissal. A Rule 41(b) dismissal must be supported by a showing of unreasonable delay. Only unreasonable delay will support a dismissal for lack of prosecution. "The pertinent question. . . is not simply whether there has been any, but rather whether there has been sufficient delay or prejudice to justify a dismissal of the plaintiff's case." *Nealey v. Transportacion Maritima Mexicana*, S.A., 662 F.2d 1275, 1280 (9th Cir. 1980). Moreover, to the extent that delay has been occasioned by "what appears to be a good faith error rather than any willful failure to prosecute", dismissal for delay in prosecution is not indicated. *Cox v. County of Yuba*, No. 2:09-cv-01894-MCE-JFM, 2011 U.S. Dist. LEXIS 14051, 2011 WL 590733 at * 5 (E.D. Cal. Feb. 10, 2011). Dismissal under Rule 41(b) is considered to be a harsh penalty and imposed as a sanction only in extreme circumstances. To assess this, the court must consider (1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of cases on their merits; and 5) the availability of less drastic alternatives. *Yourish v. California Amplifier*, 191 F.3d 983, 990 (9th Cir. 1999).

In this case, the court found that the defendant's motion "fails without even having to determine whether the EEOC was dilatory in proceeding with discovery." This is because a plaintiff alleging discrimination "need produce very little evidence in order to overcome an employer's motion for summary judgment." *Davis v. Team Elec. Co.*, 520 F.3d 1080, 1089 (9th Cir. 2008). The defendant claims it is entitled to summary judgment solely on grounds that the EEOC has failed to produce evidence, beyond its pleadings, that any actionable discrimination occurred. The defendant presented no evidence of its own to show the EEOC's claims are baseless, thus allowing the EEOC to overcome its motion by simply producing material facts sufficient to support a *prima facie* case of discrimination on the basis of sex; namely, that charging party was subjected to verbal or physical conduct of a sexual nature, that the conduct was unwelcome, and that the conduct was sufficiently severe or pervasive to alter the conditions of her employment and to create an abusive work environment. The court noted it was troubled that the defendant was aware of the details of the EEOC's allegations, but moved for summary judgment anyway. The court deemed the defendant's summary judgment motion "utterly without merit" and denied it.

Statute and Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motion and Result	General Issues
It found that the defendant's failure to prosecute claim fared no better. It was the defendant's failure to request that the motion for default be set aside for over five months, and it was the EEOC, not the defendant, that requested the scheduling conference to move things along. The defendant's actions caused the majority of the delay, so its request for dismissal based on failure to prosecute "is woefully inadequate." The court concluded with a harsh admonishment: "This Court having to consider this baseless motion wasted everyone's time and this district's limited judicial resources. Defense counsel is admonished that the Court will not look kindly on future motions of this sort, motions that have no basis in the law and no support in the record. Any future such filings will result in the imposition of sanctions."					
Title VII Joint Employment Sexual Harassment	SDI of Mineola, LLC	U.S. District Court for the Eastern District of Texas No. 6:21-CV-00226	2022 U.S. Dist. LEXIS 163289 (magistrate); 2022 U.S. Dist. LEXIS 163303 (accepting magistrate's report and recommendations) (E.D. Tex. Aug 17, 2022); (E.D. Tex. Sept. 9, 2022)	Defendant's Motion for Summary Judgment **Result:** Pro-EEOC The court accepted the magistrate's report and recommendation to deny the employer's motion for summary judgment.	Is the defendant entitled to a grant of summary judgment on the EEOC's claims that it created a hostile work environment resulting in the constructive discharge of two charging parties? Were the defendant operations sufficiently integrated so as to be jointly liability under Title VII?

Commentary:

EEOC alleged that the defendants discriminated against four charging parties and other aggrieved female employees by subjecting them to sexual harassment, ultimately leading to two charging parties' constructive discharge.

Defendants moved for summary judgment on the following grounds: (1) EEOC cannot establish a *prima facie* case for hostile work environment based on sexual harassment for all claimants because the alleged behavior was not severe or pervasive and the complained-of conduct was not based on sex; (2) EEOC cannot prove constructive discharge, as the parties resigned for non-harassment reasons; (3) defendants are entitled to the *Ellerth/Faragher* affirmative defense, as they maintained a reasonable and appropriate written harassment policy and each claimant failed to take advantage of any preventative or corrective opportunities provided, and neglected to report the conduct while the alleged harasser was their manager; (4) EEOC cannot prove that defendants and other entities are an integrated enterprise under Title VII, as the only thing in common is common ownership; (4) EEOC cannot prove that any charging party is entitled to recover punitive damages under Title VII, as the EEOC cannot prove defendants acted with malice or reckless indifference, as no upper-level manager or owner had knowledge of the issue; and (5) EEOC cannot prove that certain claimants suffered non-economic damages, as the charging parties did not state a specific, discernable injury regarding their emotional state that is supported by evidence and as a result of any harassment.

The EEOC, in response, claim the harassment primarily targeted women, was frequent, severe, threatening, and altered the work environment. Two charging parties resigned because they felt compelled to due to the harassment. The defendants are not entitled to the *Ellerth/Faragher* affirmative defense because there are genuine issues of material fact regarding dissemination of the employer's policy. As to the EEOC's integrated enterprise claim, EEOC claims there is a question of material fact as to whether the franchise operations were highly interrelated, centrally controlled, commonly managed, and commonly owned. Finally, the EEOC asserts that each claimant adequately alleged an injury as required to establish non-economic damages, and that defendants are not entitled to summary judgment on the EEOC's claim for punitive damages because there is a question of material fact regarding whether defendants made a good-faith effort to protect claimants' federally protected rights.

The magistrate judge agreed. It is a question for the jury to decide the pervasiveness issue. As for the constructive discharge allegation, the magistrate found the evidence presented two possible explanations for both claimants' resignations. Viewing the evidence in the light most favorable to the EEOC, whether the claimants reasonably felt compelled to quit—especially given their ages at the time—is a fact question for the jury.

Regarding the *Ellerth/Faragher* defense, assuming *arguendo* that defendants' policy was perfectly detailed and well developed, there is still a genuine question of material fact as to whether they exercised reasonable care to prevent and promptly correct any sexually harassing behavior. Moreover, the magistrate could not determine, as a matter of law, that claimants unreasonably failed to avail themselves of any of the preventative or corrective opportunities provided by defendants.

Statute and Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motion and Result	General Issues
With respect to whether the defendants are an integrated enterprise for Title VII liability purposes, courts consider: (1) interrelation of operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership or financial control. With respect to #1, evidence suggestive of interrelated operations includes (1) one entity's involvement in the other's daily decisions relating to production, distribution, marketing, and advertising; (2) shared employees, services, records, and equipment; (3) commingled bank accounts, accounts receivable, inventories, and credit lines; (4) one entity's maintenance of the other's books; (5) one entity's issuance of the other's paychecks; and (6) one entity's preparation and filing of the other's tax returns. In this case, the EEOC put forth summary judgment evidence demonstrating there is a genuine issue of material fact regarding the second, third, and fifth factors. The magistrate also analyzed the other factors: the common control of labor relations weighed against summary judgment, the common management factor was neutral in this analysis, and the parties conceded common ownership. Therefore, on balance, summary judgment was not warranted on this point. Finally, the magistrate determined that questions of fact remain regarding whether economic and noneconomic damages can be awarded, so summary judgment on these points were denied as well. The defendants did not file objections to the magistrate's report and recommendations, so the court accepted them, denying the defendants' motion for summary judgment.					

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