THE LITTLER REPORT

ANNUAL REPORT ON EEOC DEVELOPMENTS: FISCAL YEAR 2019

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

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ANNUAL REPORT ON EEOC DEVELOPMENTS: FISCAL YEAR 2019

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

INTRODUCTION

This **Annual Report on EEOC Developments—Fiscal Year 2019** (hereafter "Report"), our ninth annual publication, is designed as a comprehensive guide to significant EEOC developments over the past fiscal year. The Report does not merely summarize case law and litigation statistics, but also analyzes the EEOC's successes, setbacks, changes, and strategies. By focusing on key developments and anticipated trends, the Report provides employers with a roadmap to where the EEOC is headed in the year to come.

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

Part One examines the increased focus on pay equity. This opening chapter provides an overview of applicable law under both the federal Equal Pay Act and Title VII; discusses the patchwork of equal pay legislation at the state and local levels; summarizes recent EEOC investigation activities, litigation, and settlements involving unequal pay claims; offers an update on the status of the EEOC's compensation data collection efforts and increased efforts involving pay transparency in the U.S. and abroad; and provides practical suggestions to assist employers in reducing the risks of pay inequity litigation and/or remediating pay inequities, where appropriate. A review of recent EEOC litigation involving pay equity claims is included as Appendix A to this Report.

Part Two outlines EEOC charge activity, litigation and settlements in FY 2019, 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 B to this Report. A discussion of cases in which the EEOC filed an amicus or appellate brief can be found in Appendix C.

Part Three focuses on the changing composition of the EEOC, its regulatory activities, and other agency priorities and initiatives. This chapter includes a discussion of current and planned formal rulemaking, the status of pay data collection efforts, as well as steps the Commission has taken to streamline its informal guidance.

Part Four summarizes the EEOC's investigations and subpoena enforcement actions, particularly where the EEOC has made broad-based requests to conduct class-type investigations. Case law addressing the EEOC's authority to do so is discussed in this chapter as well. Appendix D to this Report is a companion guide, summarizing select subpoena enforcement actions undertaken by the EEOC during FY 2019.

Part Five of the Report focuses on FY 2019 litigation in which the EEOC was a party. This discussion is broken into several topic areas, including: (1) pleading deficiencies raised by employers; (2) statutes of limitations cases involving both pattern-or-practice and other types of claims; (3) the state of employer challenges based on the EEOC's alleged failure to meet its conciliation obligations prior to filing suit; (4) intervention-related issues, both when the EEOC attempts to enter a case through intervention and when third parties attempt to join as plaintiffs in EEOC-filed lawsuits; (5) class discovery issues in EEOC litigation, including the scope of discovery in class-based or pattern-or-practice cases, and the use of experts; (6) general discovery issues involving both employers and the EEOC in litigation between the parties; (7) favorable and unfavorable summary judgment rulings, which also are summarized in greater detail in Appendix E; (8) trial-related issues; and (9) circumstances in which courts have awarded attorneys' fees to prevailing parties.

Appendices A-E are useful resources that should be read in tandem with the Report. **Appendix A** includes information on EEOC case filings involving pay equity claims. **Appendix B** includes summaries of significant EEOC consent decrees, conciliation agreements, judgments, and jury awards. **Appendix C** highlights appellate cases where the EEOC has filed an amicus or appellant brief, and decided appellate cases in FY 2019. **Appendix D** includes information on select subpoena enforcement actions filed by the EEOC in FY 2019. **Appendix E** 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. PAY EQUITY: THE NEW FRONTIER[1]

While Littler's *Annual Report on EEOC Developments* generally focuses exclusively on EEOC-related developments, the issue of pay equity merits a far broader discussion.

The EEOC's Strategic Enforcement Plan (SEP) for both 2012-2016 and 2017-2021 identified pay equity as one of the EEOC's six priorities. In its most recent SEP, the EEOC stated, "EEOC will continue to focus on compensation systems and practices that discriminate based on sex under the Equal Pay Act (EPA) and Title VII. Because pay discrimination also persists based on race, ethnicity, age, and for individuals with disabilities, and other protected groups, the Commission will also focus on compensation systems and practices that discriminate based on any protected basis, including the intersection of protected bases, under any of the federal anti-discrimination statutes." However, employers today must look beyond compliance efforts tied to the EPA and Title VII based on enactment of pay equity legislation at both the state and local levels.

Based on this rapidly evolving area of the law, this opening chapter is designed as a primer on pay equity and includes: (1) an overview of applicable law under both the EPA and Title VII; (2) a review of state and local equal pay laws, which in numerous respects limit defenses that may be available under federal law, restrict inquiries on pay, and otherwise provide additional compliance challenges for employers; (3) an update on EEOC investigations and litigation involving pay discrimination; (4) an update on pay transparency, including the status of the recent requirement for employers to collect pay data based on EEO-1 reporting requirements; and (5) practical advice to assist employers in reducing the risks of pay inequity litigation and/or remediating pay inequities, where appropriate.

A. Introduction

The pay gap—or paying women and other historically marginalized groups less for the same or substantially similar work—has increasingly been in the media spotlight. Politicians have also taken note. While there have been pay discrimination laws on the books at the federal level and in most states for decades, over the past several years, state and local governments and Puerto Rico have passed numerous new laws all aimed at closing the pay gap. Since 2016, more than 200 bills addressing pay equity were introduced in nearly every state. At the time of publication, 13 states have enacted "second wave" pay equity laws; 24 states and municipalities, along with Puerto Rico, have enacted salary history inquiry bans; and 19 states have enacted wage transparency provisions. In addition, employers with 100 or more employees were required to submit EEO-1 Reports with compensation data (*i.e.*, "Component 2 data") for calendar years 2017 and 2018 by September 30, 2019, although any future required submissions remain unlikely at present.[2]

While the federal Equal Pay Act prohibits employers from paying employees less for equal work because of gender, these second-wave pay equity laws revise this standard—prohibiting unequal pay for "comparable" work as opposed to "equal" work. The newly enacted salary history inquiry bans restrict employers' ability to inquire into the salary history of applicants. Finally, wage transparency measures prohibit employers from banning pay disclosure in the workplace or from retaliating against employees who discuss their wages. Employers must comply with federal law and this growing patchwork of state and local laws.

The plaintiffs' bar has also gotten in on the action. Since 2016, over 250 pay equity cases have been filed in the United States. High-profile pay equity cases are in the news frequently—the proposed class and collective action filed in California federal court by all 28 members of the U.S. Women's soccer team is just one example. Law firms and technology companies also have been targets. Indeed, to a large extent, the cases target professional services organizations and professional positions: lawyers, engineers, professors, scientists, managers and doctors. In addition to an equal pay claim, these lawsuits frequently include claims of discrimination, sexual harassment or wrongful termination. These lawsuits have been filed in state and federal courts across the nation as both single plaintiff cases and class or collective actions.

1 Special thanks to Trish Martin, Denise Visconti and Corinn Jackson based on their Report, "Minding the Pay Gap: What Employers need to Know as Pay Equity Protections Widen," which was relied on in providing the foundation for this opening chapter.

2 *See* Jim Paretti, David Goldstein, and Lance Gibbons, *Court Orders EEOC to Collect Compensation Data by September 30, 2019,* Littler ASAP (Apr. 25, 2019).

This opening chapter provides a discussion of the nuts and bolts of the various existing pay equity laws, including:

- the elements a plaintiff must establish to prove a claim;
- the defenses available to employers;
- the damages available; and
- the procedural mechanisms that allow for these cases to be brought as class or collective actions—increasing the exposure for employers.

Next, we will turn to a review of the numerous state and local equal pay laws and distinctions from federal law, including: (1) limits on available defenses by employers; (2) restrictions on inquiries about an applicant's salary history; (3) prohibitions on reducing salaries/wages of other employees to comply with such laws; (4) self-audits as a defense; (5) wage secrecy prohibitions; and (5) other unique state law provisions, including available remedies for pay discrimination claims.

The focus then turns to EEOC investigations and related litigation involving pay equity claims. This section will review EEOC court filings, related settlements and noteworthy court opinions.

An update is then included on pay reporting requirements based on EEO-1 reports and related pay transparency efforts that may be on the horizon.

We conclude this opening chapter with some practical advice to assist employers in reducing the risks of pay equity claims and/or remediating pay inequities identified through a self-audit or otherwise.

B. The Nuts and Bolts of Pay Equity

1. Federal Law

While there has been significant attention to the expanding state and local pay equity laws and their attendant compliance challenges for and potential lawsuits against employers, state equal pay claims are frequently brought with an accompanying federal equal pay claim.

a. The Federal Equal Pay Act

The Equal Pay Act, 29 U.S.C. § 206(d), has been in effect since 1963. It prohibits wage discrimination on the basis of sex. Specifically, an employer cannot discriminate between employees within the same "establishment" on the basis of sex by "paying wages to employees at a rate less than the rate at which the employer 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."[3]

i. Elements of a Claim

An employee asserting an EPA claim has the burden of establishing a *prima facie* case of an equal pay violation. To do this, the employee must show: (1) the employer pays different wages to employees of a different sex at the same establishment and (2) the employees perform substantially equal work (3) under substantially equal working conditions.[4]

3 29 U.S.C. § 206(d)(1).

4 29 U.S.C. 206(d); *Corning Glass Works v. Brennan*, 417 U.S. 185, 195 (1974); *Price v. Northern States Power Co.*, 664 F.3d 1186, 1191 (8th Cir. 2011). In cases where whether the plaintiff and the plaintiff's comparators work in the same "establishment" is not an issue, courts sometimes articulate the elements for a prima face case differently. *See EEOC v. Maryland Ins. Admin.*, 879 F.3d 114, 120 (4th Cir. 2018) ("A plaintiff establishes a *prima facie* case of discrimination under the EPA by demonstrating that (1) the defendant-employer paid different wages to an employee of the opposite sex (2) for equal work on jobs requiring equal skill, effort, and responsibility, which jobs (3) all are performed under similar working conditions."); *Lauderdale v. Ill. Dep't of Human Servs.*, 876 F.3d 904, 907 (7th Cir. 2017) ("To establish a *prima facie* cause of action under the Act, an employee must demonstrate a difference in pay for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.") (internal quotations and citations omitted); *Riser v. QEP Energy*, 776 F.3d 1191, 1196 (10th Cir. 2015) ("To establish a *prima facie* case of pay discrimination under the Equal Pay Act, a plaintiff must demonstrate that: (1) she was performing work which was substantially equal to that of the male employees considering the skills, duties, supervision, effort and responsibilities of the jobs; (2) the conditions where the work was performed were basically the same; (3) the male employees were paid more under such circumstances."); *Steger v. General Elec. Co.*, 318 F.3d 1066, 1077-78 (11th Cir. 2003) ("An employee demonstrates a *prima facie* case of an Equal Pay Act violation by showing that the employer paid employees of opposite genders different wages for equal work for jobs which require equal skill, effort, and responsibility, and which are performed under similar working conditions.") (internal citations and quotations omitted).

An "establishment" is defined as a "distinct physical place of business instead of a business enterprise. Only in unusual circumstances may two or more distinct physical portions of a business enterprise be treated as a single establishment. Such treatment may be appropriate where a central administrative unit hires all employees, sets wages, and assigns the location of employment."[5]

An employee does not have to show that the job of their higher-paid comparator is identical in every respect, only that they are substantially equal.[6] However, "jobs that are merely alike or comparable are not 'substantially equal' for purposes of the EPA."[7] Job titles or classifications are not determinative in establishing whether the work is substantially equal. Instead, the actual job duties of the plaintiff and the plaintiff's comparators are examined to determine whether the work is substantially equal.[8] Job differences that are not significant in amount or degree will not support a wage differential. Moreover, "differences in skill, effort or responsibility do not support a finding that two jobs are not equal under the EPA where the greater skill, effort, or responsibility is required of the lower paid sex."[9] As the Fourth Circuit recently explained:

> Equality under the Act is a demanding threshold requirement. It requires a comparator to have performed work "virtually identical" (or the apparent synonym, "substantially equal") to the plaintiff's in skill, effort, and responsibility. *Wheatley v. Wicomico Cty.*, 390 F.3d 328, 332-33 (4th Cir. 2004). Similarity of work is not enough; the Act explicitly distinguishes between the work itself (which must be "equal") and the conditions of work (which need only be "similar"). 29 U.S.C. § 206(d)(1). The Act does not provide courts with a way of evaluating whether distinct work might have "comparable" value to the work the plaintiff performed. *See Wheatley*, 390 F.3d at 333; *see also Simms-Fingers v. City of Indianapolis*, 493 F.3d 768, 771 (7th Cir. 2007) (Posner, J.) (explaining that, when trying to identify "comparable" pay for unequal work, "there are 'no good answers that are within the competence of judges to give.'") Instead, the Act's inference of discrimination may arise only when the comparator's work is equal to the plaintiff's.[10]

A plaintiff in an EPA claim can meet the burden of establishing a *prima facie* case by pointing to a single comparator of a different gender who performs substantially equal work under substantially equal working conditions who is paid more.[11] Similarly, an EPA plaintiff establishes a *prima facie* case where they point to a predecessor or successor of the opposite sex who is paid more.[12] Claims under the EPA may be brought by both women and men.[13]

ii. Defenses

If the plaintiff establishes a *prima facie* case, the burden shifts to the employer to prove that a gender-neutral factor explains the discrepancy.[14] The EPA provides four affirmative defenses an employer may use to show the pay

5 *Price*, 664 F.3d at 1194 (internal citations and quotations omitted).

6 *Corning Glass Works*, 417 U.S. at 203 n.24; *Gumbs v. Del. DO*L, Case No. 17-2977, 2018 U.S. App. LEXIS 23810 (3d Cir. Aug. 23, 2018) ("To determine whether two jobs are equal for purposes of the EPA, the crucial finding . . . is whether the jobs to be compared have a common core of tasks, *i.e.*, whether a significant portion of the two jobs is identical. The inquiry then turns to whether the differing or additional tasks make the work substantially different. Equal means substantially equal and any other interpretation would destroy the remedial purposes of the EPA.") (internal quotations and citations omitted).

7 *Riser*, 776 F.3d at 1196.

8 *Santiago v. United States*, 107 Fed. Cl. 154, 161 (2012); *Riser*, 776 F.3d at 1196 ("Work is 'substantially equal' for purposes of the EPA if it requires 'equal skill, effort, and responsibility.' This determination turns on the actual content of the job – not mere job descriptions or title.") (internal citations omitted).

9 *Riser*, 776 F.3d at 1196-97.

10 *Spencer v. Virginia State Univ.*, 919 F.3d 199, 204 (4th Cir. 2019) (affirming grant of summary judgment in favor of employer on the basis that plaintiff did not perform equal work to her two selected comparators, who were also full professors at the same university on the basis that "professors are not interchangeable like widgets," where plaintiff taught classes in a different university department and taught undergraduates as opposed to graduate students).

11 *See Maryland Ins. Admin.*, 879 F.3d at 122 ("An EPA plaintiff is not required to demonstrate that males, as a class, are paid higher wages than females, as a class, but only that there is discrimination in pay against an employee with respect to one employee of the opposite sex."); *Riser*, 776 F.3d 1196 (reversing grant of summary judgment in favor of employer and explaining that there was a fact question as to whether plaintiff's work was substantially equal to the work of a higher-paid male comparator).

12 *Ackerson v. Rector and Visitors of the Univ. of Va.*, Case No. 3:17-cv-00011, 2018 U.S. Dist. LEXIS 107786, at *19 n.3 (W.D. Va. June 27, 2018).

13 *Maryland Ins. Admin.*, 879 F.3d at 120, n.5 ("The EPA is written in gender-neutral terms so that it is available to remedy discriminatory actions against both men and women.").

14 *Lauderdale*, 876 F.3d at 907; *Riser*, 776 F.3d at 1198 (explaining that for an employer to meet its burden with respect to these affirmative defenses, "an employer must submit evidence from which a reasonable factfinder could conclude not merely that the employer's proffered reasons *could* explain the wage disparity, but that the proffered reasons *do in fact* explain the wage disparity") (citations omitted; emphasis in the original).

difference is not discriminatory: (1) seniority; (2) merit; (3) quantity or quality of production; or (4) a differential based on any factor other than sex.[15]

Unlike a plaintiff pursuing a claim under Title VII, a plaintiff bringing a cause of action under the EPA does not have the burden of proving intentional discrimination.[16] Moreover, "a defendant cannot escape liability merely by articulating a legitimate non-discriminatory reason for the employment action . . . [it] must prove the pay differential was based on a factor other than sex."[17]

The employer's burden in proving an affirmative defense under the EPA is described by some courts as a "heavy one."[18]

The federal case law is not uniform with respect to the scope of the "any factor other than sex" affirmative defense. As will be discussed below, many states have passed their own pay equity laws and either have eliminated entirely, or severely restricted, the scope of this defense. In addition, many states have expressly prohibited employers from using prior salary to justify pay differentials.

The Second Circuit has imposed a requirement that the employer prove "a *bona fide* business-related reason exists for using the gender-neutral factors that results in a wage differential in order to establish the factor-other-than-sex defense."[19] The Sixth Circuit also has adopted a "legitimate business reason" requirement for the "factor-other-than-sex" defense.[20] Consequently, these courts, along with the Tenth and Eleventh Circuits, have held that employers may not rely on salary history alone to support a wage disparity.[21] As the Eleventh Circuit has explained, "[t]he question is whether other business reasons reasonably explain the utilization of prior salary."[22]

Courts recognize that permitting an employer to rely on prior salary history has the potential to perpetuate gender discrimination in wages. The Seventh and Eighth Circuits have refused to adopt a *per se* rule that would exclude past salary or salary retention as a "factor other than sex."[23] Instead of adopting a *per se* rule, the Eighth Circuit explained that courts:

> need to carefully examine the record in cases where prior salary or salary retention policies are asserted as defenses to claims of unequal pay. In particular, it is important to ensure that employers do not rely on the prohibited "market force theory" to justify lower wages for female employees simply because the market might bear such wages. In addition, it is important to ensure that reliance on past salary is not simply a means to perpetuate historically lower wages.[24]

Similarly, while holding employers may rely on prior wages to explain a pay disparity, the Seventh Circuit cautioned: "basing pay on prior wages could be discriminatory if sex discrimination led to the lower prior wages."[25]

15 *Lauderdale*, 876 F.3d at 907; *Riser,* 776 F.3d at 1198.

16 *See Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 640 (2007); *Spencer*, 919 F.3d at 207; *Maryland Ins. Admin.*, 879 F.3d at 120 (collecting cases).

17 *Price*, 664 F.3d at 1191 (quoting *Taylor v. White*, 321 F.3d 710, 716 (8th Cir. 2003)); *Maryland Ins. Admin.*, 879 F.3d at 120 ("An EPA plaintiff need not prove that the employer acted with discriminatory intent to obtain a remedy under the statute."); *Eng v. City of New York*, Case No. 17-1308, 2017 U.S. App. LEXIS 22858, at *3 (2d Cir. Nov. 14, 2017).

18 *See Maryland Ins. Admin.*, 879 F.3d at 120; *Perkins v. Rock-Tenn Servs., Inc.*, 700 Fed. Appx. 452, 2017 U.S. App. LEXIS 11772 (6th Cir. June 30, 2017); *Jamilik v. Yale Univ.*, 362 Fed. Appx. 148, 150, 2009 U.S. App. LEXIS 22144 (2d Cir. Oct. 8, 2009).

19 *Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 526 (2d Cir. 1992).

20 *EEOC v. J.C. Penney Co.*, 843 F.2d 249, 253 (6th Cir. 1988).

21 *See Riser*, 776 F.3d at 1198; Glenn v. General Motors Corp., 841 F.2d 1567, 1571 (11th Cir. 1988); *Irby v. Bittick*, 44 F.3d 949 (11th Cir. 1995); *Angove v. Williams-Sonoma*, Case No. 02-5079, 70 F. App'x 500 (10th Cir. July 8, 2003) ("Consideration of a new employee's prior salary is not forbidden under section 206(d)(iv). The EPA only precludes an employer from relying solely upon a prior salary to justify a pay disparity. However, where an employer sets a new employee's salary based upon that employee's previous salary and the qualifications and experience the new employee brings, the defendant has successfully invoked the Act's affirmative defense.") (internal citations omitted).

22 *Irby*, 44 F.3d at 955 (internal quotation and citation omitted) (affirming summary judgment in favor of employer on the basis that pay differential was justified based on prior pay and more experience.)

23 *Taylor*, 321 F.3d at 718-19; *Covington v. Southern Ill. Univ.*, 816 F.2d 317, 322-23 (7th Cir. 1987).

24 *Taylor*, 321 F.3d at 718 (internal citations omitted).

25 *Lauderdale*, 876 F.3d at 909.

In 2018, the Ninth Circuit, sitting *en banc*, overruled its prior precedent and held an employer may not rely on prior salary to set initial wages. Specifically, in *Rizo v. Yovino*, the court held that under the EPA, prior salary, either alone or in combination with other factors, cannot be used to justify a wage differential between male and female employees.[26] As the court explained:

> "any other factor other than sex" is limited to legitimate, job-related factors such as a prospective employee's experience, educational background, ability, or prior job performance. It is inconceivable that Congress, in an Act the primary purpose of which was to eliminate long-standing "endemic" sex based wage disparities, would create an exception for basing new hires' salaries on those very disparities – disparities that Congress declared are not only related to sex but caused by sex. To accept the [employer's] argument would be to perpetuate rather than eliminate the pervasive discrimination at which the Act was aimed.[27]

Rizo was vacated and remanded by the U.S. Supreme Court,[28] however, because the opinion was issued 11 days after the death of the Honorable Stephen Reinhardt, who authored it. The Supreme Court held that "federal judges are appointed for life, not eternity"; setting aside Judge Reinhardt's vote, the five remaining votes approving the opinion were not enough to constitute a majority of the *en banc* panel. In issuing its ruling, the Supreme Court did not opine on the substance of the Ninth Circuit's holding in *Rizo* with respect to the EPA's any-factor-other-than-sex defense. On February 27, 2020, however, the full Ninth Circuit reiterated its prior holding that employers cannot use salary history to justify sex-based pay disparities. The court explained:

> The express purpose of the [EPA] was to eradicate the practice of paying women less simply because they are women. Allowing employers to escape liability by relying on employees' prior pay would defeat the purpose of the Act and perpetuate the very discrimination the EPA aims to eliminate. Accordingly, we hold that an employee's prior pay cannot serve as an affirmative defense to a prima facie showing of an EPA violation.[29]

The decisions construing the EPA also are inconsistent with respect to whether having a pay disparity as the result of differences in salary negotiations constitutes a factor other than sex under the statute.[30]

The statute of limitations for an EPA claim is generally two years.[31] The statute of limitations may be increased to three years if the violation is willful.[32] Regardless of the limitations period, a court can consider evidence from before the statute of limitations period when assessing the employee's claim.[33]

iii. Damages

The potential damages for a violation of the EPA include the amount of wages the employee was underpaid, liquidated damages equal to 100% of the underpaid wages, and reasonable attorneys' fees and costs.[34] A court may decline to award liquidated damages if the employer shows its actions were in good faith and it had reasonable grounds for believing its actions did not violate the EPA.[35] An individual can pursue a claim on their own behalf and on behalf of an opt-in collective of similarly situated individuals. In addition, Congress charged the EEOC with enforcing the EPA. However, an individual does not have to first file a charge of discrimination with the EEOC prior to bringing a lawsuit against the employer.

26 *Rizo v. Yovino*, 887 F.3d 453, 456 (9th Cir. 2018) (vacated by, remanded by *Yovino v. Rizo*, 139 S. Ct. 706 (2019)).
27 *Id.* at 460.
28 *Yovino v. Rizo,* 139 S. Ct. 706 (2019).
29 *Rizo v. Yovino*, No. 16-15372, slip op. at 6 (9th Cir. Feb. 27, 2020).
30 *Compare Grigsby v. AKAL Sec., Inc.*, Case No. 5:17-cv-06048, 2018 U.S. Dist. LEXIS 104219 (W.D. Mo. June 21, 2018) (granting summary judgment in favor of employer and explaining that negotiations leading to a comparator's higher salary, or a demand for a specific salary, may establish a factor-other-than-sex defense to an EPA claim), *with Duncan v. Texas HHS Comm'n*, Cause No. AU-17-CA-00023, 2018 U.S. Dist. LEXIS 64279, at *11 n.3 (W.D. Tex. Apr. 17, 2018) (denying employer's motion for summary judgment and noting, "it is an open question whether negotiation even qualifies as a 'factor other than sex'").
31 29 U.S.C. § 255(a).
32 *Id.*
33 *Price*, 664 F.3d at 1191.
34 29 U.S.C. § 216(b).
35 29 U.S.C. § 260.

b. Title VII of the Civil Rights Act of 1964

Under Title VII, an employer cannot "discriminate against any individual with respect to [their] compensation . . . because of such individual's race, color, religion, sex, or national origin."[36]

i. Elements and Burden of Proof

The burden of proof on a plaintiff bringing a Title VII claim for a pay disparity is different from the burden of proof on a plaintiff bringing an EPA claim.[37] Unlike for an EPA claim, in a Title VII case, the plaintiff maintains the burden of proof. As a result, liability under the EPA may not always prove a Title VII violation.[38]

A plaintiff bringing a Title VII claim must establish intentional discrimination by using direct or circumstantial evidence of intentional discrimination. In the alternative, a Title VII plaintiff may use the *McDonnell Douglas* burden-shifting framework to develop an inferential case of discriminatory intent.[39]

In order to establish a *prima facie* pay disparity case under the *McDonnell Douglas* burden-shifting framework, the plaintiff must show they are paid less than a member of the opposite gender in similar jobs.[40] Under Title VII, the jobs only have to be "similar" instead of "equal." There is no bright-line rule, but courts typically look at "whether the employees (i) held the same job description, (ii) were subject to the same standards, (iii) were subordinate to the same supervisor, and (iv) had comparable experience, education, and other qualifications – provided the employer considered these latter factors in making the personnel decision."[41] Although the "similarity" requirement under Title VII is less demanding than the "equality" requirement under the EPA, it is not toothless. Instead, the plaintiff bears the burden of proving they and any appropriate comparator(s) are not only similarly situated in *some* respects, but rather, "similarly-situated *in all respects*."[42] The Seventh Circuit has explained that while the comparators do not need to be identical in "every conceivable way," the court "must conduct a common-sense examination."[43]

If the plaintiff establishes a *prima facie* case, the burden of production shifts to the employer to proffer a legitimate, nondiscriminatory explanation for the wage disparity.[44] In contrast with the EPA, the employer's burden at this stage has been called "exceedingly light."[45] The employer is not required to prove its non-gender-based reasons for the pay disparity, but merely must proffer them.[46] Title VII also incorporates the defenses available under the EPA.[47]

If the employer meets this burden of production, then the burden shifts back to the plaintiff to prove the defendant's proffered explanation is merely pretext for intentional discrimination.[48] An employee can prove pretext by showing the employer's proffered reason was "(1) factually baseless; (2) not the employer's actual motivation;

36 42 U.S.C. § 2000e-2(a)(1).
37 *Lauderdale*, 876 F.3d at 907.
38 *Id.* at 910; *Angove*, 700 F. App'x at 505 ("As noted, an EPA violation does not establish Title VII liability as Title VII still requires evidence of *intentional discrimination*.") (emphasis in original); *but see Martinez v. Davis Polk & Wardwell, LLP*, Case No. 16-3476-cv, 2017 U.S. App. LEXIS 23444 (2d Cir. Nov. 21, 2017) (explaining that a claim for unequal pay for equal work under Title VII is generally analyzed under the same standards used in an EPA claim.).
39 *Anupama Bekkem v. Wilkie*, 915 F.3d 1258, 1267 (10th Cir. 2019); *Spencer,* 919 F.3d at 207.
40 *Sprague v. Thorn Ams., Inc.*, 129 F.3d 1355, 1363 (10th Cir. 1997); *see also Spencer,* 919 F.3d at 207; *Mengistu v. Miss. Valley State Univ.*, 716 F. App'x 331, 333-34 (5th Cir. 2018) (explaining that "[i]n order to make out a *prima facie* case of pay discrimination under § 1981 or Title VII, a plaintiff must show (1) that he was a member of a protected class; (2) that he was paid less than a non-member; and (3) that his circumstances are nearly identical to those of the better-paid non-member") (internal citations and quotations omitted).
41 *Spencer*, 919 F.3d at 207 (internal quotation omitted); *Mitchell v. Mills*, 895 F.3d 365, 370-71 (5th Cir. 2018); *Lauderdale*, 876 F.3d at 910.
42 *Spencer*, 919 F.3d at 207-208 (quoting *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 583 (6th Cir. 1992)).
43 *Johnson v. Advocate Health & Hosps. Corp.*, 892 F.3d 887, 895 (7th Cir. 2018); *see also Ackerson*, 2018 U.S. Dist. LEXIS 107786, at *25 (explaining that if a plaintiff satisfies her burden of showing that jobs are "substantially equal" under the EPA, she has also satisfied Title VII's burden of showing that the jobs are similar).
44 *Spencer*, 919 F.3d at 208.
45 *Anupama Bekkem*, 915 F.3d at 1268; *see also Maryland Ins. Admin.*, 879 F.3d at 120 n.7 (comparing the burdens between EPA and Title VII claims and explaining: "In contrast, in a Title VII case, the employer need only proffer a legitimate, non-discriminatory reason for the challenged action, and is not required to establish that the cited reason *in fact* motivated the employer's decision.") (emphasis in original).
46 *Sprague*, 129 F.3d at 1363.
47 42 U.S.C § 2000e-2(h) ("It shall not be an unlawful employment practice under this title [42 USCS §§ 2000e et seq.] for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d))").
48 *Spencer*, 919 F.3d at 208.

(3) insufficient to motivate the action; or (4) otherwise pretextual."[49] As the Fifth Circuit has explained, the plaintiff is required to "put forward substantial evidence to rebut each of the nondiscriminatory reasons the employer articulates. The plaintiff may do so by showing a discriminatory motive is more likely than a nondiscriminatory one, or that her employer's explanation is unworthy of credence."[50]

In order to pursue a claim for unequal pay under Title VII, an employee must file a charge of discrimination with the EEOC within 180 or 300 days of the discriminatory pay practice.[51] The Lilly Ledbetter Fair Pay Act extends the statute of limitations on these claims by providing that "a discriminatory compensation decision . . . occurs each time compensation is paid pursuant to the [discriminatory decision]."[52]

ii. Damages

Damages available under Title VII include lost wages, front pay, compensatory damages, punitive damages, and reasonable attorneys' fees, except that back pay cannot go back more than two years prior to the charge.[53] Compensatory and punitive damages are capped on a sliding scale ranging from $50,000 to $300,000 depending on the size of the employer.

2. Procedural Distinctions Between Representative Actions Brought Under Different Pay Equity Laws

The financial exposure to employers from a pay equity claim increases dramatically if the claim is brought not only on behalf of a single aggrieved employee, but on behalf of a class or collective of similarly situated employees. In addition, the cost of defending the litigation rises significantly when a class or collective action is involved. Plaintiffs filing suit under the federal EPA may use the collective action procedures found in Section 216(b) of the Fair Labor Standards Act. Plaintiffs filing claims in federal court under Title VII or state pay equity laws may assert a class action under Rule 23 of the Federal Rules of Civil Procedure.[54] Collective actions under § 216(b) differ from class actions under Rule 23 in some important ways.

First, in a Rule 23 class action, once a class is certified, a class member must affirmatively opt out in order to avoid being part of the class. Under § 216(b), an individual must affirmatively opt in to the proceeding. The opt-in requirement of § 216(b) collective actions is advantageous to employers because typically fewer class members participate if they are required to affirmatively join the lawsuit rather than, as under Rule 23, remain part of a class merely by doing nothing.

Second, when an individual affirmatively opts in to an EPA collective action, they become a party plaintiff. As a party plaintiff, the opt-in may be required by the court to participate in discovery, and the court may dismiss opt-in plaintiffs who fail to respond to discovery that has been ordered. The amount of discovery permitted of absent Rule 23 class members typically is more limited.

Another major distinction between EPA collective actions and Rule 23 class actions asserting Title VII or state law violations is the impact of the statute of limitations. A plaintiff suing to recover for an EPA violation may recover the wage differential for the two-year period prior to the date they file their lawsuit, or three years if the employer acted willfully. The filing of a collective action complaint does not toll the statute of limitations for anyone other than the individuals who file a consent to join along with the complainant. Instead, the statute of limitations is tolled only upon an opt-in plaintiff's filing a written consent form, affirmatively joining the lawsuit. In a Rule 23 class action, on the other hand, the filing of the complaint halts the running of the statute of limitations for all individuals who ultimately are determined to be part of the class until the court decides whether to certify the case as a class action.

49 *Lauderdale*, 876 F.3d at 910 (internal quotation and citation omitted).
50 *Mengistu*, 716 F. App'x at 34.
51 42 U.S.C. § 2000e-5(e)(1).
52 42 U.S.C. §2000e-5(e)(3). The Ledbetter Act was enacted in 2009 and retroactively effective to May 28, 2007. It overturned the United States Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618 (2007), in which the Supreme Court rejected the EEOC's rule that every paycheck issued was a separate act of discrimination and thereby tightened the timeframe for employees to bring pay discrimination claims. As a result of the Ledbetter Act, the date that each new discriminatory paycheck is issued restarts the statute of limitations for filing a pay discrimination claim. The Ledbetter Act also broadened the type of occurrences that constitute an unlawful employment action. Under the Ledbetter Act, an unlawful employment practice occurs when: (1) a discriminatory compensation or other practice is adopted; (2) an individual becomes subject to the discriminatory pay decision or practice; or (3) an individual is affected by application of the discriminatory decision or practice, including each time discriminatory compensation is paid.
53 42 U.S.C. § 2000e-5(g)(1).
54 As discussed below, the EEOC has far more flexibility in seeking relief on behalf of class based on "pattern or practice" claims because it is not bound by Rule 23 of the Federal Rules of Civil Procedure in seeking relief on behalf of a class.

There also are important differences between EPA collective actions and Rule 23 Title VII or state law class actions in the standards for certification and issuance of notice to class or putative collective members. A plaintiff bringing a Rule 23 class action must satisfy all of the four requirements of Rule 23(a): numerosity, commonality, typicality, and adequacy of representation. In addition, the plaintiffs must all show that the case qualifies under one of three categories listed in Rule 23(b).

A plaintiff pursuing an EPA collective action must prove they are "similarly situated" to other potential members of the collective. Most courts have adopted a two-stage procedure for certifying collective actions. Because the statute of limitations is not tolled until an EPA plaintiff affirmatively files a consent to join the litigation, plaintiffs' counsel are incentivized to quickly move for conditional certification, the first stage of the two-stage procedure, so the court will authorize the sending of court-approved notice to the members of the putative collective. Where plaintiffs' counsel moves for conditional certification before significant discovery has occurred, courts typically apply a lenient standard for conditional certification. If more discovery has occurred, some courts will apply an intermediate standard for conditional certification. If the court grants conditional certification, the court authorizes notice to be sent to all putative class members, describing the litigation and explaining how they can join.

The second stage of the two-stage process usually occurs after the close of discovery when the employer moves for decertification. It is at the decertification stage that courts apply a rigorous analysis comparable to the commonality, typicality and predominance analysis courts apply in Rule 23 class actions.

The difference in certification standards between EPA collective actions and Rule 23 class actions is illustrated by the recent case of *Ahad v. Board of Trustees of Southern Illinois University*.[55] Plaintiff, a doctor, brought a claim on her own behalf and on behalf of other female physicians employed by the defendant, asserting that female physicians were paid lower compensation than male physicians for the same or equal work in violation of the EPA, Title VII, and Illinois state law. In 2017, the district court granted conditional certification of plaintiff's EPA claim, and notice was sent. In 2018, the court, applying the rigorous Rule 23 certification standard, denied plaintiff's Motion for Rule 23 Class Certification. In denying Rule 23 certification, the court found that, even though plaintiff presented an expert report based on a multivariable regression analysis that concluded there was a statistically significant gender pay disparity, the plaintiff had not met the commonality requirement under Rule 23. As the court explained, "the statistical evidence here does not and cannot show whether a common cause existed regardless of the statistically significant showing of pay disparities based on gender."

Even if the employer is able to have an EPA collective action decertified successfully, this ordeal is an expensive process in terms of attorneys' fees, as well as business disruption and distraction. In addition, if the EPA claim is decertified, the claims of the opt-in plaintiffs are dismissed without prejudice and they can refile individual claims. If a meaningful number of these individuals do so, the attorneys' fees of defending dozens of individual lawsuits can mount quickly. The challenges can become even more significant when faced with potential "class-type" claims initiated by the EEOC. While the focus in recent years has been on other types of class-type claims by the EEOC, the same principles most likely would apply in pay equity litigation initiated by the EEOC.

The EEOC has been armed with the power to file class-type claims since 1972 amendments to Title VII, when the EEOC was given authority based on Section 707 of Title VII to file "pattern-or-practice" discrimination lawsuits in support of class-based claims.[56] *International Brotherhood of Teamsters v. United States*[57] serves as a guidepost in dealing with the applicable burdens of proof in pattern-or-practice cases.

In 1980, the U.S. Supreme Court in *General Telephone Company v. EEOC*[58] eased the EEOC's burden in bringing class-type claims. The Court held that the requirements under Rule 23 of the Federal Rules of Civil Procedure did not apply to the EEOC, making it easier to file class-type discrimination claims against employers.[59] As significant, in *General Telephone*, which involved claims of sex discrimination on behalf of a group of female workers, the Court clarified that the EEOC could

55 *Ahad v. Bd. of Trs. of S. Ill. Univ.*, Case No. 15-cv-3308, 2018 U.S. Dist. LEXIS 155243 (C.D. Ill. Sept. 12, 2018).
56 42 U.S.C. § 2000e-6 (*i.e.*, Section 707).
57 *Int'l Brotherhood of Teamsters v. U.S.*, 431 U.S. 324 (1977).
58 *General Telephone Company v. EEOC*, 446 U.S.318 (1980).
59 Fed. R. Civ. P. 23 (a) imposes the prerequisites of numerosity, commonality, typicality, and adequacy of representation as requirements for certification of a lawsuit as a class action.

seek relief under Section 706 of Title VII on behalf of a "person or persons aggrieved."[60] In short, the EEOC is not faced with the rigors of class certification, and the only manner in which such actions typically can be challenged is based on a summary judgment motion.[61]

These early developments could not have foreshadowed the close scrutiny the Court would place on broad-based employment discrimination claims, as best evidenced by the Court's 2011 decision in *Wal-Mart Stores, Inc. v. Dukes*.[62] Such developments undoubtedly have contributed to the EEOC's increased focus on pattern-or-practice and class-type litigation based on the view that the Commission is not constrained by the procedural requirements for bringing class actions as set forth in Rule 23 of the Federal Rules of Civil Procedure.

In bringing actions under Title VII, particularly pattern-or-practice claims, additional complexity has been added to the mix because Congress empowered the EEOC to challenge alleged discriminatory practices based on two separate sections in Title VII: Section 706 and Section 707. Only Section 707 expressly refers to pattern-or-practice claims, and there are significant distinctions between these sections because jury trials and compensatory and punitive damages are available under Section 706, but not under Section 707 of the Act.[63] Notwithstanding, as highlighted in the 2016 Systemic Report, while employers have challenged the EEOC's authority to pursue pattern-or-practice suits under Section 706 of Title VII, only two appellate courts have addressed the issue,[64] and both courts have ruled in favor of the EEOC. From the EEOC's perspective, "[t]he significance of these rulings is that the agency may seek the full panoply of monetary relief for victims of a pattern or practice of discrimination."[65] These decisions avoid the anomalous result that a victim of an individual instance of discrimination would be entitled to relief greater than victims of structural discrimination."[66]

3. State Equal Pay Laws

Every state except Mississippi has some type of equal pay law. Most of these state pay discrimination laws have been on the books for decades. However, since January 1, 2016, a number of states have either enacted or significantly amended their equal pay statutes. This section discusses these "second wave" pay equity laws. State legislatures have employed several different approaches to narrow the pay gap, including:

- Expanding the scope of positions that can be considered in comparing pay, both functionally (moving from equal work to work that is substantially similar or comparable) and geographically (moving from comparing employees at the same establishment to comparing employees in the same county, city, or state);
- Narrowing the scope of the "any-factor-other-than-sex" defense to require the factor be job-related and consistent with business necessity, be applied reasonably and account for the entire difference, and disallow the defense if: (i) the plaintiff demonstrates an alternative employment practice exists that would serve the same business purpose without producing the wage differential and (ii) the employer refused to adopt such alternative practices;
- Prohibiting the use of prior salary to justify pay disparities;
- Prohibiting or limiting the ability of an employer to inquire into the salary history of job applicants;
- Imposing new requirements on employers to increase wage transparency; and
- Providing safe harbors for employers that conduct pay equity audits.

60 42 U.S.C. §2000e-5 (*i.e.*, Section 706).

61 *But see EEOC v. Port Authority of N.Y. & N.J.*, 768 F.3d 247 (2d Cir. 2014), in which a the EEOC's pay equity case involving a claim that female attorneys allegedly were paid less than male attorneys, was successfully challenged in a motion for judgment on the pleadings, which was upheld by the Second Circuit.

62 *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 131 S. Ct. 2541 (2011).

63 Based on the Civil Rights Act of 1991 (CRA), Pub. L. No. 102-166 (1991), *codified at* 42 U.S.C. § 1981 *et seq.*, jury trials and compensatory and punitive damages of up to $300,000 are limited to claims under Section 706 of Title VII. 42 U.S.C. §1981a. Section 707 merely provides for the traditional equitable remedies available under Title VII (*e.g.* back pay, front pay, attorneys' fees and injunctive relief).

64 *See EEOC Bass Pro Outdoor World, L.L.C.*, 826 F.3d 791 (5th Cir. 2016) and *Serrano & EEOC v. Cintas Corp.*, 699 F.3d 884 (6th Cir. 2013).

65 As discussed in the EEOC's 2006 Systemic Task Force Report, the Commission has also had the same authority to pursue systemic discrimination under the ADA as it does under Title VII because the ADA incorporates the powers, remedies and procedures set forth in Title VII. Similar provisions exist under § 207(a) of GINA. The Commission also has had authority to pursue class cases under the ADEA and the EPA. Under these statutes, the Commission has authority to initiate "directed investigations," even without a charge of discrimination and pursue litigation, where warranted.

66 *See* 2016 Systemic Report at 34.

a. Protected Classes of Employees

Virtually all of the second wave state statutes prohibit wage discrimination on the basis of sex or gender. Under some state laws, such as those in Massachusetts and Washington, sex or gender are the only protected categories.[67]

However, some states have included additional protected categories. For example, Maryland's Equal Pay for Equal Work statute prohibits discrimination based on sex or gender identity.[68] The California Fair Pay Act prohibits wage discrimination on the basis of sex, race or ethnicity.[69] Alabama's and Illinois' statutes prohibit wage discrimination based on sex or race.[70] New Jersey's statute goes even further and protects the following categories: race, creed, color, national origin, nationality, ancestry, age, marital status, civil union status, domestic partnership status, affectional or sexual orientation, genetic information, pregnancy, sex, gender identity or expression, disability or atypical hereditary cellular or blood trait, or military service.[71] Oregon protects race, color, religion, sex, sexual orientation, national origin, marital status, veteran status, disability or age.[72] New York just amended its statute to protect the following categories: age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, or domestic victim status.[73]

b. The Functional Scope of Positions the Can Be Compared

Many of the second wave pay equity statutes have broadened the scope of positions that are deemed comparable for purposes of establishing a violation. While under the federal EPA, the comparators must perform "substantially equal work," under the California Fair Pay Act the comparators must perform only "substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions."[74]

Similarly, under the New Jersey statute, employees are entitled to equal pay (including benefits) for "substantially similar work," which is "viewed as a composite of skill, effort and responsibility."[75]

Alabama likewise requires equal wage rates for "substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions."[76]

Massachusetts mandates equal pay for "comparable work," which is work requiring "substantially similar skill, effort and responsibility" that is "performed under similar working conditions" without regard to job titles or job descriptions.[77] Minor differences in skill, effort, or responsibility will not prevent two jobs from being considered "comparable."[78] A job is "substantially similar" with respect to the factor being considered if the factors "are alike to a great or significant extent, but are not necessarily identically or alike in all respects."[79]

Like Massachusetts, the Oregon Equal Pay Act applies to "work of comparable character."[80]

Maryland's Equal Pay for Equal Work statute requires that the work be of comparable character or work on the same operation, in the same business or of the same type.[81]

67 Wash. Rev. Code § 49.58.020(1); Mass. Gen. Laws ch. 149, § 105A.
68 Md. Code Ann., Lab. & Empl. § 3-304(b).
69 Cal. Lab. Code § 1197.5(a)-(b).
70 Clarke-Figures Equal Pay Act, 2019 Ala. Reg. Sess., Act No. 2019-519 (H.B. 225) (2019) (effective Sept. 1, 2019) [hereinafter *Clarke-Figures Equal Pay Act*]; 820 ILCS 112/10.
71 N.J. Stat. Ann. § 10:5-12(t).
72 Or. Rev. Stat. § 652.210 (5).
73 29 C.F.R. § 1620.14.
74 Cal. Lab. Code § 1197.5(a)-(b).
75 N.J. Stat. Ann. § 10:5-12(t).
76 *Clarke-Figures Equal Pay Act* § 1(a).
77 Mass. Gen. Laws ch. 149, § 105A(a).
78 Mass. Office of the Att'y Gen., *An Act to Establish Pay Equity: Overview and Frequently Asked Questions*, at 5 (Mar. 1, 2018), available here (last accessed July 29, 2019).
79 *Id.*
80 Or. Rev. Stat. §§ 652.220; 652.235.
81 Md. Code Ann., Lab. & Empl. § 3-304(b).

Under the New York Equal Pay Act, pay equity is required for "equal work on a job the performance of which requires equal skill, effort and responsibility, and which is performed under similar working conditions." Similarly, Washington's Equal Pay Opportunity Act defines individuals as "similarly employed" if the individuals: (1) work for the same employer; (2) the performance of the job requires similar skill, effort, and responsibility; and (3) the jobs are performed under similar working conditions.[82]

Under recent amendments to Illinois's Equal Pay Act, employers must compensate employees equally, without regard to sex or race, where they perform "substantially similar work," the performance of which requires "substantially equal" skill, effort and responsibility.[83]

As under federal law, under state pay equity laws, job titles alone are not determinative as to whether positions or employees are comparable.[84]

c. Geographic Limitations on Comparators

Under the federal EPA, the plaintiff must prove the comparator works in the same "establishment," which is typically a "distinct physical place of business." Several second wave state pay equity laws have expanded the geographic scope of who can be considered comparators. For example, under the California law, comparators can be state-wide.[85] In Maryland, "establishment" includes an employer's workplaces within the same county in Maryland. The New Jersey statute expressly provides that the comparison "shall be based on wage rates in all of an employer's operations or facilities" and not just limited to the location of the employee at issue.[86] Under the New York law, employees are deemed to work in the same "establishment" if they work "for the same employer at workplaces located in the same geographic region, no larger than a county, taking into account population distribution, economic activity and/or the presence of municipalities."[87]

d. What is Included in Compensation?

Several state statutes expressly define what types of compensation are included for equal pay purposes. For example, the New Jersey statute specifies that benefits are included.[88] The Oregon statute provides that compensation includes wages, salary, bonuses, benefits, fringe benefits and equity-based compensation.[89] The Washington statute defines compensation to include both discretionary and nondiscretionary wages and benefits.[90]

e. Permitted Bases for Wage Differentials

Many of the second wave statutes have narrowed the permitted bases for wage differentials as compared with federal law. While most of the second wave statutes incorporate the EPA's affirmative defenses of permitting wage differentials based on seniority, merit, or the quantity or quality of production, certain states have restricted or eliminated the "any factor other than [protected category]" defense.

For example, in California this defense has been narrowed to "a *bona fide* factor other than [protected category x], such as education, training or experience."[91] For an employer to be able to rely upon "a *bona fide* factor other than [protected category]," the employer must demonstrate the factor "is not based on or derived from a sex-based [or race-based or ethnicity-based] differential in compensation, is job related with respect to the position in question, and is consistent with business necessity."[92] "Business necessity" is "an overriding legitimate business purpose such that the factor relied upon effectively fulfills the business purpose it is supposed to serve."[93] Importantly, an employer may not rely on the *bona fide* factor other than sex defense if the employee "demonstrates that an alternative business practice exists that would serve the same business purpose without producing the wage differential."[94]

82 Wash. Rev. Code § 49.58.020 (2).
83 820 ILCS 112/10(a).
84 Wash. Rev. Code § 49.58.020 (2); Mass. Gen. Laws ch. 149, § 105A(a); Or. Rev. Stat. §§ 652.210 (12).
85 *See* Cal. Lab. Code § 1197.5.
86 N.J. Stat. Ann. § 10:5-12(t) (emphasis added).
87 N.Y. Lab. Law § 194
88 N.J. Stat. Ann. § 10:5-12(t).
89 Or. Rev. Stat. §§ 652.210 (1).
90 Wash. Rev. Code § 49.58.010 (1).
91 Cal. Lab. Code § 1197.5(a)-(b).
92 *Id.*
93 *Id.*
94 *Id.*

New Jersey similarly incorporates the *bona fide* factor defense. To rely on the legitimate *bona fide* factor exception under New Jersey law, the employer must establish all of the following elements:

1. the factors at issue are not characteristics of the protected class and do not perpetuate a differential that is based upon characteristics of the protected class;
2. each of the factors is applied reasonably;
3. one or more of the factors accounts for the *entire* wage differential; and
4. the factors are job-related with respect to the position in question and based on legitimate business necessity.

If the plaintiff demonstrates there is an alternative business practice that would serve the same business purpose without creating the pay disparity, then the legitimate business necessity prong is not satisfied.[95] The statute cites "training, education or experience" and "the quantity or quality of production" as examples of legitimate *bona fide* factors that may justify a pay disparity if the other requirements are established.[96]

Under the recently amended Illinois Equal Pay Act, pay differences may be justified by any other factor other than race or sex so long as it "(A) is not based on or derived from a differential in compensation based on sex or another protected characteristic; (B) is job-related with respect to the position and consistent with a business necessity; and (C) accounts for the differential."[97]

Likewise, New York's Equal Pay Act includes a *bona fide* factor other than sex defense, and the statute identifies education, training or experience as examples.[98] To constitute a *bona fide* factor other than sex, the factor must not "be based upon or derived from a sex-based differential in compensation" and must be "job-related with respect to the position in question and shall be consistent with business necessity."[99] A factor is consistent with business necessity if the factor "bears a manifest relationship to the employment in question."[100] In addition, an employee can avoid application of this catch-all exception if the employee shows: (1) the employer uses an employment practice that causes a disparate impact on the basis of compensation; (2) an alternative employment practice exists that would serve the same business purpose and not produce the pay differential; and (3) the employer has refused to adopt the alternative practice.[101]

Alabama also includes a *bona fide* factor other than sex or race defense and, like New York, identifies education, training or experience as examples. The Alabama statute tracks the New York statute with respect to this defense except that "business necessity" is defined as "an overriding legitimate business purpose such that the factor relied upon effectively fulfills the business purpose it is supposed to serve." The employee can avoid application of the catch-all exception if the employee "demonstrates that an alternative business practice exists that would serve the same business purpose without producing the wage differential."[102] In addition, under the Alabama statute for any affirmative defense to apply, the factor(s) relied upon must be applied reasonably and must account for the entire wage differential.[103]

Maryland also incorporates the *bona fide* factor other than sex defense, with statutory language that closely tracks California, namely the factor must not be based on or derived from a gender-based differential in compensation; must be job-related with respect to the position and consistent with a business necessity; and must account for the entire differential.[104] The Maryland statute does not incorporate the Alabama, California and New Jersey provisions that disallow the defense if the employee demonstrates an alternative practice that would have worked. Maryland's law also provides that wage differentials are permissible for jobs that require different abilities or skills; that require regular performance of different duties or services; and where the work is performed on different shifts or at different times of day[105]

95 N.J. Stat. Ann. § 10:5-12(t).
96 *Id.*
97 820 ILCS 112/10(a)(4)(i).
98 N.Y. Lab. Law § 194.
99 *Id.*
100 *Id.*
101 N.Y. Lab. Law § 194.
102 *Clarke-Figures Equal Pay Act* § 1(a)(1)(d).
103 *Id.* § 1(a)(2)-(3).
104 Md. Code Ann., Lab. & Empl. § 3-304(c).
105 *Id.*

A pay differential under Washington's Equal Pay Opportunity Act is lawful if it is based in good faith on a *bona fide* job-related factor or factors that: (i) are consistent with business necessity; (ii) are not based on or derived from a gender-based differential; and (iii) alone or in combination with other factors account for the *entire* differential.[106]

The Washington statute provides a non-exhaustive list of *bona fide* factors: (i) education, training or experience; (ii) a seniority system; (iii) a merit system; (iv) quantity or quality of production; or (v) a *bona fide* regional difference in compensation levels.[107] The employer bears the burden of proof on these defenses.[108]

Massachusetts does not incorporate the "any factor other than sex" defense. Instead, variation in wages for comparable work is permissible under the Massachusetts law only if the variation can be explained by one or more of six factors:

1. a seniority system;[109]
2. a merit system;
3. a system that measures earnings by quantity or quality of production, sales or revenue;
4. the geographic location;
5. education, training or experience to the extent such factors are reasonably related to the job in question; or
6. travel, if travel is a regular and necessary condition of the particular job.[110]

Oregon's Equal Pay Act, like Massachusetts', does not include a catch-all defense. Instead, wage disparities are not unlawful *only* if all of the difference is based on a *bona fide* factor that is related to the position in question and is based on:

i. a seniority system;
ii. a merit system;
iii. quantity or quality of production;
iv. workplace location;
v. travel, if travel is necessary and regular for the employee;
vi. training;
vii. experience; or
viii. any combination of these factors as long as they account for the *entire* pay differential.[111]

f. Burden of Proof

Similar to the federal EPA, under most second wave state laws, the burden of proof is initially on the plaintiff to demonstrate a pay disparity with a comparator outside of the protected class. The burden is then on the employer to prove that the pay differential is permissible under the state statute.[112] As with the federal EPA, an employee typically is not required to prove the employer intended to discriminate based on gender.[113]

106 Wash. Rev. Code § 49.58.010 (3).
107 *Id.*
108 *Id.*
109 Time spent on leave due to a pregnancy-related condition, and protected parental, family and medical leave, shall not reduce seniority. *See* Mass. Gen. Laws ch. 149, § 105A(b).
110 *See* Mass. Gen. Laws ch. 149, § 105A(b).
111 Or. Rev. Stat. §§ 652.220 (2).
112 *See, e.g.,* Cal. Lab. Code § 1197.5(a)-(b); *Clarke-Figures Equal Pay Act* § 1(a); N.J. Stat. Ann. § 10:5-12(t).
113 Mass. Office of the Att'y Gen., *An Act to Establish Pay Equity: Overview and Frequently Asked Questions*, at 12.

g. Prohibition Against Using Prior Salaries or Salary History to Justify Pay Differentials

Historically, employers have sought to determine a job candidate's current salary in order to consider it, along with other factors, in setting proposed starting compensation. This practice has come under fire because, even if the prospective employer does not have discriminatory intent, relying on a candidate's salary history in setting starting compensation in a new job may continue the cycle of pay inequity. As the late Ninth Circuit Judge Reinhardt explained in *Rizo*, to allow employers to rely on salary history to explain pay differentials, "would be to perpetuate rather than eliminate the pervasive discrimination at which the [Equal Pay] Act was aimed."[114]

While the courts are split regarding whether prior salaries or salary history may lawfully justify a pay disparity under federal law, many of the second wave state laws disallow this justification.[115]

There currently are 24 state and local jurisdictions that have enacted laws prohibiting employers from inquiring into or considering a job applicant's wage or salary history: Alabama;[116] California;[117] San Francisco, California;[118] Colorado;[119] Connecticut;[120] Delaware;[121] Hawaii;[122] Illinois;[123] Massachusetts;[124] Maine;[125] Kansas City, Missouri;[126] New Jersey;[127] New York;[128] New York City, New York;[129] Albany County, New York;[130] Suffolk County, New York;[131] Westchester County, New York;[132] Cincinnati, Ohio;[133] Toledo, Ohio;[134] Oregon;[135] Puerto Rico;[136] Philadelphia, Pennsylvania;[137] Vermont;[138] and Washington.[139]

Typically, employers of all sizes are subject to the restrictions. The prohibition against asking about an applicant's salary history usually is not limited by these state and local laws to questions on a job application or in an interview. Obtaining this same information through other means also may violate these laws.

Some of these salary history restrictions incorporate an exception to the general prohibition against salary history inquiries for voluntary disclosures by an applicant of their salary history. States that incorporate some version of this exception into their salary history bans include California, Connecticut, Hawaii, Illinois, Maine, Massachusetts, Oregon, and Vermont.

Moreover, California's law affirmatively requires an employer to provide the pay scale for a position to an applicant applying for employment upon the applicant's reasonable request. "Pay scale" means a salary or hourly wage range. "Reasonable request" means a request made after an applicant has completed an initial interview with the employer.[140]

On the other hand, Wisconsin and Michigan have enacted preemption provisions to prevent local jurisdictions from passing laws banning salary history inquiries.

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114 *Rizo*, 887 F.3d at 460.
115 Cal. Lab. Code § 1197.5(a)-(b); Mass. Gen. Laws ch. 149, § 105A(b); Or. Rev. Stat. §§ 652.220 (2).
116 *Clarke-Figures Equal Pay Act*.
117 Cal. Lab. Code § 432.3(a), (b), (i).
118 S.F., Cal. Police Code § 3300J.4(a), (b), (c), (f).
119 Colo. Rev. Stat. § 8-5-101 (effective Jan. 1, 2021).
120 Conn. Gen. Stat. § 31-40z(a)(5).
121 Del. Code Ann. tit. 19, § 709B.
122 Haw. Rev. Stat. § 378-2.4.
123 820 ILCS 112/10(b-5) - (b-20).
124 Mass. Gen. Laws ch. 149, § 105A(c)(2).
125 Me. Stat. tit. 5, § 4577 (effective Sept. 17, 2019).
126 Kansas City, Mo Code of Ordinances § 38-102 (effective Oct. 31, 2019).
127 Act of July 25, 2019, N.J. 218th Legis., Pub. L. No. 2019-199 (A.B. 1094) (2019) (effective Jan. 1, 2020).
128 N.Y. Lab. Law § 194-a (effective Jan. 6, 2020).
129 N.Y.C., N.Y. Admin. Code § 8-107(25); New York City Commission on Human Rights, *Employer Fact Sheet: Protections Against Inquiries Into Job Applicants' Salary History*.
130 Albany County, N.Y. Local Law No. 1 for 2000 (Omnibus Human Rights Law for Albany County), as amended by Local Law No. P for 2016 § 7(1)(i).
131 Suffolk Cty., N.Y. Code of Ordinances § 528-7(13) (effective June 30, 2019).
132 Westchester Cty., N.Y. Code of Ordinances § 700.03(9) (automatically sunset when New York's statewide law took effect Jan. 6, 2020.)
133 Cincinnati, Ohio Mun. Code § 804-03 (effective Mar. 12, 2020).
134 Toledo, Ohio Mun. Code § 768.02 (effective July 4, 2020).
135 Or. Rev. Stat. §§ 652.220, 659A.357; Oregon Bureau of Labor & Industries, *Oregon Equal Pay Law* (Sept. 2017).
136 Puerto Rico Law No. 16 (Mar. 8, 2017) art. 4(a).
137 Phila., Pa. Code § 9-1131.
138 Vt. Stat. Ann. tit. 21, § 495m(a).
139 Wash. Rev. Code § 49.58.010 (as amended by H.B. 1696, effective July 28, 2019).
140 Cal. Lab. Code § 432.3.

h. Prohibition Against Reducing the Wages of Other Employees to Comply

Several of the second wave state statutes expressly provide that if an employer discovers a wage disparity prohibited by the state equal pay law, the employer cannot reduce the wages of other employees to come into compliance. For example, under Massachusetts law, an employee cannot reduce the wages of any employee "solely in order to comply" with the statute.[141] New Jersey has a similar prohibition.[142] While the Oregon statute also contains this express prohibition,[143] the Oregon Bureau of Labor and Industries has clarified in its administrative order and rules implementing the statute that "red circling, freezing or otherwise holding an employee's compensation constant as other employees come into alignment are not considered reductions in compensation level for the employee whose compensation is being held constant."[144]

i. Self-Audits as a Defense

Two states, Massachusetts and Oregon, provide a statutory "carrot" to employers that voluntarily conduct pay equity audits. The Massachusetts Equal Pay Act provides employers with an affirmative defense if the employer can show that, within the last three years, it (1) "completed a self-evaluation of its pay practices in good faith"; and (2) "can demonstrate that reasonable progress has been made towards eliminating wage differentials based on gender for comparable work."[145] The self-audit must be reasonable in detail and scope in light of the employer's size. The Massachusetts Attorney General has issued basic guidelines for employers with respect to self-audits.[146]

An employer alleged to have violated the Oregon Equal Pay Act may file a motion to disallow an award of compensatory and punitive damages if it has conducted a self-audit satisfying certain criteria. In that event, the court *shall* grant the motion if the employer demonstrates, by a preponderance of the evidence, that the employer has: (1) completed, within three years of the date the lawsuit was filed, an equal pay analysis of the company's pay practices that was reasonable in detail and scope given the size of the employer and related to the protected class asserted by the plaintiff in the lawsuit; and (2) eliminated the wage differential for the plaintiff and made reasonable and substantial progress towards eliminating wage differentials for the protected class asserted by the plaintiff.[147]

In addition, even outside of Oregon and Massachusetts, conducting a pay equity audit may shield an employer from a "willfulness" finding, which may decrease the exposure.

j. Wage Secrecy Prohibitions

Several states have adopted express statutory wage secrecy prohibitions. For example, in Massachusetts and Washington, employers may not prohibit employees from disclosing or discussing their wages.[148] Similarly, in New York and Alabama, employers cannot prohibit employees from inquiring about, discussing, or disclosing wages.[149] However, even in states without such a statute, prohibiting employees from discussing their wages typically runs afoul of the federal National Labor Relations Act.

k. Anti-Retaliation Provisions

Six of the second wave state statutes include express anti-retaliation provisions: Alabama, California, Illinois, Massachusetts, New York and Washington.[150] The New York statute defines unlawful retaliation as any action, more than trivial, that would have the effect of dissuading a reasonable worker from engaging in conduct protected by the statute.[151] In California, employers may not discharge, discriminate or retaliate against an employee because the employee has invoked the statute or *assisted in any manner* with the enforcement of the statute.[152] Nonetheless, employees who engage

141 Mass. Gen. Laws ch. 149, § 105A(b).
142 N.J. Stat. Ann. § 10:5-12(t).
143 Or. Rev. Stat. §§ 652.220 (4).
144 Or. Admin. R. 839-008-0025.
145 Mass. Gen. Laws ch. 149, § 105A(d).
146 Mass. Office of the Att'y Gen., *An Act to Establish Pay Equity: Overview and Frequently Asked Questions.*
147 Or. Rev. Stat. § 652.23(1).
148 Mass. Gen. Laws ch. 149, § 105A(c); Wash. Rev. Code § 49.58.040; 820 ILCS 112/10(b).
149 N.Y. Lab. Law § 194; *Clarke-Figures Equal Pay Act* § 1(e)(1).
150 *Clarke-Figures Equal Pay Act* § 1(e)(1); Cal. Lab. Code § 1197.5(k); 820 ILCS 112/35(b); Mass. Gen. Laws ch. 149, § 105A; N.Y. Lab. Law § 194; Wash. Rev. Code §§ 49.58.040, 49.58.050.
151 N.Y. Lab. Law § 194.
152 Cal. Lab. Code § 1197.5(k).

in conduct protected by the pay equity statutes in states that do not include an express anti-retaliation provision are likely protected from retaliation by state whistleblower statutes and/or common law wrongful discharge causes of action.

l. Prohibitions on Providing Less Favorable Opportunities

In addition to requiring pay equity, two state statutes prohibit providing less favorable opportunities. The Maryland statute prohibits "providing less favorable employment opportunities" based on sex or gender identity.[153] Providing less favorable employment opportunities is defined to mean: (1) assigning or directing the employee to a less favorable position or less favorable career track; (2) failing to provide information about promotions or advancement in the full range of career tracks offered by the employer; or (3) limiting or depriving an employee of advancement opportunities that would be available but for the employee's sex or gender identity.[154]

The Washington law also prohibits employers from limiting or depriving an employee of "career advancement opportunities" based on gender.[155] The law does not define "career advancement opportunities." In order for a complainant to be entitled to remedies for a career advancement violation, the employer must have "committed a pattern of violations . . . as to an employee or committed a violation . . . through application of a formal or informal employer policy or practice."[156]

m. No Exhaustion of Administrative Remedies

While many state statutes provide for administrative enforcement of their pay equity statues, they also allow for the filing of civil actions by aggrieved employees without first filing a Charge of Discrimination.

For example, in California, the Division of Labor Standards Enforcement is charged with enforcement of the California Fair Pay Act. An aggrieved employee may file a complaint with the DLSE. The DLSE also is authorized to bring a civil action on behalf of the employee who filed the complaint and on behalf "of a similarly affected group of employees" to recover unpaid wages and liquidated damages and the costs of bringing suit.[157] Aggrieved employees also may file a civil action without first exhausting administrative remedies.[158]

Similarly, the Massachusetts Equal Pay Act provides for both a private right of action and for enforcement by the Massachusetts attorney general. An employee is not required to file a charge of discrimination with the Massachusetts Commission Against Discrimination before bringing a civil action for violation of the Massachusetts Equal Pay Act.[159]

In Oregon, an aggrieved employee may file a complaint with the Commission of the Bureau of Labor and Industries. In addition, an aggrieved employee may file suit under either Oregon Revised Statutes § 652.230 or § 659A.885. There is no exhaustion requirement prior to filing a civil suit.

The Washington law provides for both a private right of action and enforcement by the Washington State Department of Labor and Industries. An employee is not required to file a complaint with the Department of Labor and Industries before filing a civil lawsuit.[160]

n. Statute of Limitations

There is significant variation among the states in the applicable statute of limitations. In Alabama, Illinois and Oregon, the statute of limitations is only one year.[161] In California, the statute of limitations is two years, but increases to three years if the plaintiff demonstrates the differential was willful.[162] Massachusetts, Maryland and Washington each have a three-year statute of limitations.[163] However, in Maryland, the statute of limitations is three years from the employee's receipt of their final paycheck.[164] In Washington, while an employee must file suit within three years of the date of the alleged violation, recovery of any wages or interest owed "must be calculated from four years from the last violation prior to the date of filing

153 Md. Code Ann., Lab. & Empl. § 3-304(b).
154 *Id.*
155 Wash. Rev. Code § 49.58.030 (2).
156 Wash. Rev. Code § 49.58.030 (4).
157 Cal. Lab. Code § 1197.5(g).
158 Cal. Lab. Code § 1197.5(h).
159 Mass. Gen. Laws ch. 149, § 105A(b).
160 Wash. Rev. Code § 49.58.070.
161 *Clarke-Figures Equal Pay Act* § 1(e)(3); 820 ILCS 112/15; Or. Rev Stat. §§ 652.230 (6).
162 Cal. Lab. Code § 1197.5(i).
163 Mass. Gen. Laws ch. 149, § 105A(b); Md. Code Ann., Lab. & Empl. § 3-307; Wash. Rev. Code § 49.58.070.
164 Md. Code Ann., Lab. & Empl. § 3-307.

the civil action."[165] Under Washington law, a violation occurs when a discriminatory decision or practice is adopted and each time discriminatory compensation is paid.[166] New York and New Jersey both have six-year statutes of limitations.[167]

o. Remedies

While all of the second wave state statutes permit the recovery of unpaid wages and most permit the recovery of attorneys' fees and costs, there are significant differences in the liquidated damages or penalties available. In addition, the length of the relevant statute of limitations can have a significant impact in the damage exposure for pay equity claims.

In Alabama, the damages available to an aggrieved employee include only the wages the employee was deprived by reason of the violation, interest, and an equal amount as liquidated damages.[168]

In California, the damages available to an aggrieved employee include the wages the employee was deprived because of the violation, interest, and an equal amount of liquidated damages, as well as attorneys' fees and costs, interest, and civil penalties (including those potentially due under the California Private Attorneys General Act).[169]

In Maryland, the damages available to plaintiffs include: (1) the unpaid wages; (2) liquidated damages equal to 100% of the unpaid wages; (3) reasonable attorneys' fees and costs; and (4) prejudgment interest.[170] Effective October 1, 2019, the Commissioner of Labor and Industry or a court *must* require an employer that is found to have violated the Act to pay a civil penalty equal to 10% of the amount of damages owed by the employer. The Commission or a court *may* order additional civil penalties. Civil penalties awarded are paid to the state's general fund.[171]

The damages available to plaintiffs under Massachusetts law include: (1) the unpaid wages; (2) liquidated damages equal to 100% of the unpaid wages; and (3) reasonable attorneys' fees and costs.

The damages in New Jersey are especially significant as they include treble damages (three times the compensatory damages) and attorneys' fees.[172] When coupled with New Jersey's six-year statute of limitations, the treble damages provision has sharp teeth.

Like New Jersey, the New York penalties are noteworthy. The damages available to an employee who wins a claim brought under the New York Equal Pay Act include damages equal to the pay differential going back six years, liquidated damages equal to three times the pay differential, attorneys' fees, costs, and interest.[173]

In Oregon, a plaintiff may proceed under two different statutes that have different available remedies. Remedies available to employees under Oregon Revised Statute § 652.230 include the unpaid wages to which the employee is entitled for the one-year period of time before the commencement of the lawsuit and an additional amount of liquidated damages.[174] Courts *shall* (as in "must") award reasonable attorneys' fees to a prevailing plaintiff. If the plaintiff had "no objectively reasonable basis for asserting the claim" then the court *may* award reasonable attorneys' fees and expert witness fees incurred by a defendant.[175]

The remedies available to an employee under Oregon Revised Statutes § 659A.885 include: injunctive or equitable relief (including reinstatement), back pay for the two years immediately preceding the filing of the complaint, compensatory damages or $200, whichever is greater, and punitive damages.[176] A court may award costs and reasonable attorneys' fees to the prevailing party.[177] To be entitled to punitive damages, the plaintiff must prove "by clear and convincing evidence" that the employer "has engaged in fraud, acted with malice or active with willful and wanton misconduct" *or* the employer was adjudicated previously for a violation of the Oregon Equal Pay Act.[178]

165 Wash. Rev. Code § 49.58.070.
166 Wash. Rev. Code § 49.58.080.
167 N.J. Stat. Ann. § 10:5-12; N.Y. Lab. Law § 198.
168 *Clarke-Figures Equal Pay Act* § 1(b).
169 Cal. Lab. Code § 1197.5(c).
170 Md. Code Ann., Lab. & Empl. § 3-307.
171 Act of May 25, 2019, Equal Pay Remedies and Enforcement Act, 2019 Md. Reg. Sess. (H.B. 790) (2019) (effective Oct. 1, 2019).
172 N.J. Stat. Ann. § 10:5-13.
173 N.Y. Lab. Law § 198.
174 Or. Rev. Stat. § 652.230 (1).
175 Or. Rev. Stat. § 652.220 (2).
176 Or. Rev. Stat. § 659A.885.
177 Or. Rev. Stat. § 659A.885 (1).
178 Or. Rev. Stat. § 659A.885 (4).

In Washington, a prevailing plaintiff may recover: actual damages, statutory damages equal to actual damages or $5,000 (whichever is greater), interest of one percent per month on all compensation owed, and costs and reasonable attorneys' fees.[179] An employee must file suit within three years of the date of the alleged violation, but recovery of any wages or interest owed "must be calculated from four years from the last violation prior to the date of filing the civil action."[180] The court also may order reinstatement and injunctive relief.[181]

C. Update on EEOC Developments Involving Pay Equity Investigations and Litigation

The EEOC's updated Strategic Enforcement Plan (SEP) for 2017-2021 expressly provides pay equity claims will be one of the EEOC's six major priorities and

> EEOC will continue to focus on compensation systems and practices that discriminate based on sex under the Equal Pay Act and Title VII. Because pay discrimination also persists based on race, ethnicity, age, and for individuals with disabilities, and other protected groups, the Commission will also focus on compensation systems and practices that discriminate based on any protected basis, including the intersection of protected bases, under any of the federal anti-discrimination statutes.[182]

Based on the EPA, employers need to be mindful of the risk of an investigation being initiated by the EEOC in the absence of charge of discrimination based on the authority of the EEOC to initiate a "directed investigation" to determine whether the employer is complying with the EPA.[183] In such circumstances, the EEOC can make broad-based requests for information.[184]

A review of EEOC charge activity and settlements involving EPA claims reveals the following:[185]

EEOC CHARGES AND SETTLEMENTS – EQUAL PAY ACT / PRE-LITIGATION *(Includes concurrent charges with Title VII, ADEA and GINA)*		
Fiscal Year	# Charges	Settlements
FY 2019	1,117	$20.7 million
FY 2018	1,066	$10.5 million
FY 2017	996	$9.3 million
FY 2016	1,075	$8.1 million
FY 2015	973	$5.9 million
FY 2014	938	$6.2 million
FY 2013	1,019	$5 million

A summary of EEOC litigation involving EPA claims since 2015 is attached to this Report as "Appendix A." A review of this litigation reveals the following:

- Approximately 32 lawsuits have been filed since 2015;
- In filing these lawsuits, the EEOC typically has coupled the EPA claim with Title VII allegations;
- Most EEOC lawsuits have involved individual claims of discrimination;
- 7 "class-type" claims were filed by EEOC (one of which included differential parental leave for male and female employees);

179 Wash. Rev. Code §§ 49.58.060, 49.58.070.
180 Wash. Rev. Code § 49.58.070.
181 *Id.*
182 EEOC Strategic Enforcement Plan (SEP), 2017-2021 at 8, available at *https://www.eeoc.gov/eeoc/plan/sep-2017.cfm*.
183 Directed investigations are initiated by EEOC field office directors under the Equal Pay Act (EPA), 29 U.S.C. §206(d) (1963), under the provisions of Section 11 of the Fair Labor Standards Act, 29 U.S.C. §211.
184 As an example, in one case, the court enforced a broad-based request for nationwide data stemming from an EPA directed investigation. *See EEOC v. Performance Food Group Company LLC*, Case No. 1:09-cv-02200, Docket No. 29 (Memorandum and Order re Subpoena Enforcement) (D. Md. Feb. 18, 2010). While EPA claims are limited to alleged pay disparities at the "same establishment" (*See* 29 U.S.C. § 206(d) and 29 CFR Part 1620; *also see* 29 CFR 1620.9). The Performance Food Group investigation was coupled with a Title VII charge, which led the court to permit a more broad-based investigation across an entire division of the employer.
185 See EEOC, Enforcement and Litigation Statistics, available at https://www.eeoc.gov/eeoc/statistics/enforcement/index.cfm.

- Among the 32 lawsuits, other than the "class" claims, there are 2 "multiple victim" lawsuits (*i.e.*, on behalf of two employees), one of which included a retaliation claim based on withdrawal of an offer after a male friend was offered more than the charging party female applicant;
- While most of the pending lawsuits were filed in 2019, 2 pending lawsuits were filed in 2017 and 2 pending lawsuits were filed in 2018;
- As of the date of publication, approximately 70% (*i.e.*, 23 of 32 lawsuits) have settled based on consent decrees and/or the parties' agreement for the court to enter judgment (*i.e.*, 2 Offers of Judgment from employer/agreed to by EEOC), and among the pending lawsuits, 2 were filed in 2017, 2 were filed in 2018 and 5 were filed in 2019.[186]

In reviewing the above litigation, the rationale for coupling EPA with Title VII claims is two-fold: (1) the available damages under Title VII are far more extensive under Title VII (*i.e.*, up to $300,000 in compensatory and punitive damages under Title VII, as opposed to "liquidated damages" (*i.e.*, double back pay); and (2) the EEOC can broaden the scope of the litigation beyond the applicable "establishment" and geographically pursue a more broad-based claim, particularly when dealing with "class-type" claims.

In reviewing the EPA settlements involving recent litigation filed by the EEOC, the agency typically has coupled monetary relief with injunctive relief. The most noteworthy settlement involves the consent decree in *EEOC v. University of Denver*,[187] which involved a claim that female "Full Law Professors" were paid less than male "Full Law Professors." Aside from a settlement payment of $2,660,000, the settlement provided for injunctive relief, including retention of an independent consultant who would work with the University in updating its EEO policy and complaint procedure and making recommendations regarding objective and equitable methods and criteria in setting faculty compensation; implementation of an "informational campaign" to inform faculty of the policy and protections afforded by the policy; and retention of a labor economist jointly selected by the EEOC and the University who would conduct an annual compensation equity study.

Prior to the recent *University of Denver* settlement, the EEOC had faced some challenges in pattern-or-practice pay equity litigation whether the women were being paid less for "equal work" on jobs requiring "equal skill, effort and responsibility."[188]

On the other hand, in *EEOC v. Maryland Insurance Administration*,[189] which dealt with an EPA claim that various female fraud investigators were paid less than male workers for "equal work," the EEOC was able to establish a *prima facie* case that the employer paid different wages to employees of the opposite sex for performing "equal work on jobs requiring equal skill, effort and responsibility, which jobs all are performed under similar working conditions." The burden then shifted to the employer to show that the wage differential was justified by one of the four affirmative defenses in the statute. In denying the employer's motion for summary judgment on the EPA claim, the Fourth Circuit stated that in asserting an affirmative defense, "the burden on the employer necessarily is a heavy one." Significantly, the court underscored, "[i]n contrast, in a Title VII case, the employer need only proffer a legitimate, nondiscriminatory reason for the challenged action, and is not required to establish that the cited reason in fact motivated the employer's decision."[190]

When faced solely with an EPA claim, the court further explained the significant burden in establishing an affirmative defense:

> We agree with the Third and Tenth Circuits' explanation that this statutory language requires that an employer submit evidence from which a reasonable factfinder could conclude not simply that the employer's proffered reasons could explain the wage disparity, "but that the proferred reasons do in fact explain the wage disparity."
>
> The present record does not show, as a matter of law, that the reasons proffered by [the employer] do in fact explain the salary disparities. In particular, the record does not contain any contemporaneous evidence showing that the decisions to award [the male employees] their starting salaries were in fact made pursuant to their aforementioned qualifications.[191]

186 While beyond scope of this chapter, employers that are federal contractors also need to be mindful of the fact that the Office of Federal Contract Compliance Programs also has placed a strong focus on pay equity. A general overview of OFCCP's current approach is described in Littler's ASAP by Meredith Shoop and David Goldstein, *OFCCP Reins in Compensation Analysis By Rescinding Directive 307 and Issuing New Guidance* (Aug. 28, 2018).

187 See *EEOC v. University of Denver*, Case No. 16-cv-02471-WYD-MJW (consent decree) (D. Colo. May 18, 2018).

188 See *EEOC v. Port Authority of N.Y. & N.J.*, 768 F.3d 247 (2d Cir. 2014) (Claim that female attorneys allegedly paid less than male attorneys struck down. Appeals Court focused on EEOC's "failure to allege any facts" concerning actual job duties demonstrating attorneys performed "equal work." Judgment on pleadings for employee upheld by Second Circuit); and *EEOC v. True Oil LLC*, Case No. 15-cv-74 (D. Wyo. May 15, 2016) (Summary judgment for employer striking down EPA claim that female accounting clerks paid less for substantially similar work).

189 *EEOC v. Md. Ins. Co.*, 879 F.3d 114 (4th Cir. 2018).

190 879 F.3d at 120, note 7, citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

191 *Id.* at 123.

The Fourth Circuit further explained that it was insufficient someone to have "recommended" a higher salary due to prior experience. Rather, there needs to be evidence showing that the decision setting the salary "was actually made on that basis."[192]

In short, the Maryland Insurance Administration case demonstrates the importance of documenting pay-related decisions, and that the absence of such documentation may preclude summary judgment in EPA-related claims.[193]

D. Pay Data Reporting and Efforts Around the U.S. and Globally for Increased Pay Transparency

1. EEO-1 and Compensation Data Collection

From the perspective of many in the employer community, the most significant EEOC activity in 2019 focused on the agency's Form EEO-1, and the collection of compensation data from private sector employers.

As most employers are aware, employers with 100 or more employees, and federal contractors with 50 or more employees (and a sufficient dollar amount of federal contracts), are required to annually file an EEO-1 report, providing the EEOC with data on the number of individuals employed, their distribution by legal entity and location, and their demographic characteristics. During the Obama administration, the EEOC proposed the collection of pay data correlated to employee demographic groups. To that end, in 2016, the EEOC finalized a dramatically expanded revised Form EEO-1, which would collect data on employee compensation and hours worked (the so-called EEO-1 "Component 2").[194]

The employer community's reaction to the increased requirements for the EEO-1 report was almost uniformly negative. Businesses explained the report would be difficult to complete and would likely require substantial investments in personnel and software in order to be able to efficiently address the requirements. At the same time, there was substantial uncertainty as to whether the collected data could be effectively used by the EEOC for its stated purpose.

In February 2017, with a new presidential administration in place, business groups petitioned the Office of Management and Budget (OMB)'s Office of Information and Regulatory Affairs (OIRA), asking that it rescind its prior approval of Component 2. In August 2017, OIRA informed EEOC that it was initiating a review and immediate stay of the effectiveness of the pay data collection aspects of the EEO-1 form.[195] This effectively killed Component 2 (the "old" Component 1 of the EEO-1 was unaffected by OMB's stay). Shortly thereafter, employee advocate groups sued the EEOC and OMB in federal court, claiming that the agencies' stay of the collection of pay data was unlawful. They asked the court to overturn OMB's stay of Component 2, and reinstate the pay data collection.[196]

In March 2019, in a decision that surprised many, the district court ruled for the plaintiffs and ordered the EEOC to reinstate the collection of compensation data covering two calendar years.[197] Filers were required to file the standard EEO 2018 (*i.e.*, "Component 1") data by May 31, 2019 (the original March reporting deadline was extended because of the government shutdown). Employers with 100 or more employees were required to file the Component 2 data for calendar years 2017 and 2018 by September 30, 2019—although to date, the court has ordered that the reporting portal remain open, and that the EEOC continue to collect Component 2 data from late filers. When the court will determine that EEOC may close its Component 2 collection of 2017/2018 data is not clear—a hearing on EEOC's collection is scheduled for early 2020.

On September 12, 2019, the EEOC announced that it was proposing to not renew its authority for pay data collection such that the next three-year EEO-1 cycle would collect only Component 1 demographic data. This decision stemmed from the EEOC's finding that it had "insufficiently calculated what the burden would be to submit data," and that it had no plan to request authorization to collect such pay data moving forward until it assesses the usefulness of the initial data collected for 2017 and 2018 and to "balance" the utility of the data against the burden on employers that must collect it.[198]

192 *Id.*
193 See also *EEOC v. Enoch Pratt Free Library*, 2019 U.S. Dist. Lexis 187970 (D. Md. Oct. 30, 2019), in which an employer's summary judgment motion also was denied on similar grounds.
194 EEOC, *Agency Information Collection Activities; Notice of Submission for OMB Review, Final Comment Request: Revision of the Employer Information Report (EEO-1)*, 81 Fed. Reg. 45479 (July 14, 2016), available at https://www.federalregister.gov/documents/2016/07/14/2016-16692/agency-information-collection-activities-notice-of-submission-for-omb-review-final-comment-request.
195 Office of Information and Regulatory Affairs, Memorandum of Neomi Rao, Administrator, to Acting Chair Victoria Lipnic, EEOC (Aug. 29, 2017), available at https://www.reginfo.gov/public/jsp/Utilities/Review_and_Stay_Memo_for_EEOC.pdf.
196 *Nat'l Women's Law Ctr. v. OMB*, No. 17-cv-2458, D.D.C., filed Nov. 15, 2017.
197 *Nat'l Women's Law Ctr. v. OMB*, 358 F.Supp.3d 66 (D.D.C. 2019).
198 EEOC, Notice of Information Collection, 84 Fed. Reg. 48138, 48140-48142 (Sept. 12, 2019).

It is unclear whether this decision, too, will be subject to legal challenge. In a November 20, 2019 hearing on the proposal to discontinue Component 2, a number of Commissioners indicated that they would examine the information collected in the 2019 cycle to determine if it is useful to the agency to continue collection of pay data in some form or fashion.[199] In announcing its proposal to discontinue use of Component 2, the EEOC noted that its prior cost estimates had dramatically understated the cost to stakeholders of preparing and filing this data, suggesting that a cost-benefit analysis would not support continuing collection in this manner in the future.

More recently, in its fall regulatory agenda, the agency indicated that it would contemplate proposing a revised pay data collection tool,[200] but to date no details on whether EEOC will move forward, or what form such a revised report might look like, are forthcoming. Starting 2020, both the fate of the expired Component 2 and future efforts at pay data collection remain open questions.

2. Pressure on Employer Community for Increased Pay Transparency

Regardless of any federal mandate to report pay data, the employer community has been confronted with activist groups urging publicly traded companies to share pay data. Some employers also have taken the lead in pay transparency as part of their efforts to promote and ensure pay equity within their respective organizations.

Certainly one of the most prolific activist groups urging pay transparency is investment management firm Arjuna Capital.[201] A December 4, 2019 posting by Arjuna Capital highlighted the claim that it "has spurred nearly two dozen companies to provide gender and racial pay equity disclosure," and has been the "the sponsor of the more demanding *median* gender pay equity resolutions" at certain companies.[202] It is anticipated that such efforts by this organization and other activist groups will continue over the coming year.

Some employers also have self-initiated such efforts. In the spring of 2019, a financial services company elected to publish "unadjusted" or "raw" pay gap data for women and U.S. minorities, measuring the difference in median total compensation without adjusting for factors such as job function, level of seniority or geography in order to be "transparent" regarding its goals and challenges.[203] Similarly, Starbucks announced similar efforts in 2019, which included "publishing pay equity progress annually and using an offer standards calculator to determine starting pay range for roles."[204] As part of Starbucks' commitment to transparency, the company has committed to publishing its pay equity progress annually, and says it will rapidly address any future discrepancies that it uncovers.[205] Other companies focusing on pay transparency have gone the route of either sharing the salary ranges of roles with candidates and employees, and in one case going so far as making exact salaries of all its employees public.[206]

3. Global Efforts to Promote Pay Equity

While pay disclosure mandates remain in limbo in the United States, pay equity has become a global concern. As an example, various countries in Europe are beginning to enact legislation designed to hold employers more accountable for pay equity, as illustrated by the following:

- Effective April 6, 2017, new Gender Pay Reporting regulations went into effect in the United Kingdom. The Regulations are intended to address the pay gap between men and women by requiring large employers to calculate and publish certain gender pay information annually.[207]

199 *See* general information on EEOC hearing at EEOC, Press Release, *Experts Examine the Efficacy of EEOC's Pay Data Collection Model* (Nov. 20, 2019), available at https://www.eeoc.gov/eeoc/newsroom/release/11-20-19.cfm.

200 EEOC, *Amendments to the Regulations at 29 CFR Part 1602 to Provide for a Pay Survey*, RIN: 3046-AB15, *available at* https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201910&RIN=3046-AB15.

201 *See Gender and Minority Pay Equity, Proxy* Preview, https://www.proxypreview.org/2019/report/social-issues/decent-work/gender-and-minority-pay-equity.

202 *See* Press Release, Arjuna Capital (Dec. 4, 2019), http://arjuna-capital.com/news/press-release-battle-in-seattle-starbucks-shows-leadership-on-median-gender-racial-pay-equity-while-laggard-microsoft-fights-disclosure/.

203 *See* statement by Citi CEO Michael Corbat, *Transparency Is Integral to Reaching Equality and Shared Prosperity* (Apr. 29, 2019), https://www.citigroup.com/citi/news/executive/190429Ea.htm.

204 *See* Linda Dahlstrom, *How Starbucks is working to close global gender pay gap* (Mar. 20, 2019), https://stories.starbucks.com/stories/2019/pay-equity-around-the-globe/.

205 *See* Samantha McLaren, *Why These 3 Companies Are Sharing How Much Their Employees Make*, LinkedIn.com, (Feb. 14, 2019), https://business.linkedin.com/talent-solutions/blog/trends-and-research/2019/why-these-3-companies-are-sharing-how-much-their-employees-make.

206 *Id.*

207 *See* Raoul Parekh and Kate Potts, *UK Gender Pay Gap – Where are We Now?* Littler ASAP (May 1, 2019).

- The German Federal Government approved the Pay Transparency Act, which came into force in June 2017. The Act, which is intended to reduce the gender-based pay inequality in Germany, creates the right for employees to access information related to salaries if the employer's workforce exceeds 200 employees. The Act also imposes various review and reporting obligations on employers, intended to facilitate the adjustment of salaries. The new law will, for sure, increase the HR department's administrative workload. Whether it will be a "breakthrough for fair pay for women," as the legislator is calling it, remains to be seen.[208]
- Last year France enacted the Professional Future Act to combat the lingering pay gap between men and women. Among other provisions, the law requires companies to report on sex-based pay differentials, based on the average pay of each group and organized by age and job category. On March 1, 2020, French companies with between 50 and 250 employees must publish the results of salary data gathered from the previous 12 months. This equal pay index must also include what percentage of employees received a pay raise during the year after returning from maternity leave, and the difference in salary increases for women versus men. The indexed results of the pay and leadership gap must be published on the company's website. Failure to do so could result in penalties up to 1% of the annual payroll amount for the preceding calendar year.[209]

E. Practical Tips for Employers to Help Avoid Pay Equity Issues

Pay equity is a moral, legal and business imperative. Getting this issue wrong can have serious consequences for employers. Class action lawsuits focused on fair pay are increasing and they are expensive to defend, both in terms of legal costs, and in terms of employee morale and company culture. Moreover, the unwanted publicity from these lawsuits can have a negative impact on employee recruiting, retention, and customer relationships. It can have a lasting detrimental impact on the company's reputation. The following are strategies that companies can consider to help them avoid pay equity problems.

- Understand Your Company's Compensation Philosophy. What is your company trying to accomplish through its pay structure and what factors does your company want to drive compensation? Some companies have a clearly defined compensation philosophy that is well understood throughout the organization. If your company does not, partner with the appropriate stakeholders to get agreement on the company's compensation philosophy and the drivers of compensation. The drivers of compensation likely will vary for the different functions within the company. Examples of drivers of compensation include experience in the industry, time in the job, past performance ratings, education, financial results, scope of responsibility, location, market rate for a particular skillset, or business unit.
- Evaluate Your Company's Compensation to Ensure the Factors Impacting Compensation Comply with Applicable Law. As discussed above, many states and municipalities have passed their own pay equity laws and salary history bans that limit the permissible factors that may be used to explain pay differentials. Consider having legal counsel review your company's compensation philosophy and the factors influencing compensation with an eye toward compliance with all relevant laws for the jurisdiction(s) in which your company has employees.
- Educate the Decision Makers. Evaluate (and, if needed, take) the steps that would be helpful to ensure the managers who make compensation decisions for your organization understand your company's compensation philosophy and the permissible and impermissible factors in making compensation decisions.
- Job Leveling and Salary Bands. Consider reviewing job descriptions to confirm they accurately describe the job being performed by the incumbents holding that position. Job titles also should reflect what jobs employees actually are performing. Employees whose job duties are different typically should not be given the same job title. Consider implementing a job-leveling framework that evaluates positions in the company against a series of factors, such as job requirements and job scope, impact, value and accountability. Consider assigning salary bands to each job level or grade to keep compensation consistent.
- Decide What the Job is Worth. Since differences in pay for similar jobs must be justified, consider setting the amount a particular job or set of job duties is worth to the organization, which then will drive the job level or grade in which that role is placed and, ultimately, the compensation offered to individuals performing those job duties. To the extent similar job duties are valued differently by the organization, document the rationale before someone is hired to fill those roles.

208 *See* *New Law Promotes Equal Pay and Creates New Employer Obligations*, Litter Global Guide, Q2- 2017 (July 11, 2017).
209 *See* Edward Carlier et al., *Littler Lightbulb: Highlighting Recent Developments Across Europe*, Littler Lightbulb (Oct. 23, 2019).

- **Understand the Potential Impact of Negotiation.** New hires and those seeking to advance their careers may be tempted to negotiate with the organization for higher pay, signing bonuses or similar compensation benefits. But such negotiations can create an instant pay equity issue if those negotiations take the proposed pay outside of the range set for the position or deviate significantly from what current incumbents are making. Be prepared to explain the company's philosophy of paying what the job is worth when a potential hire tries to negotiate their pay.
- **Consider Limiting Discretion in Setting Compensation.** Consider requiring hiring managers to obtain approval if the hiring manager wants to pay an employee more or less than the midpoint of the salary band for the position at issue. The approval process should ask the manager to explain the reasons for the deviation and document the decision-making process, which may help ensure it is not discriminatory and provide a defense should issues with respect to pay equity arise. As part of this process, the company can provide hiring managers with a list of acceptable reasons for varying from the midpoint of the salary band in setting compensation.
- **Document Reasons for Pay Decisions.** As discussed above, some state pay equity laws provide extremely long statutes of limitations. For example, under the Maryland statute, the statute of limitations extends three years after the employee's final paycheck, and essentially permits the employee to litigate over compensation decisions that were made years prior to termination. New York and New Jersey both have six-year statutes of limitations. As a result, companies may need to defend pay decisions made by managers who have long since left the organization. Requiring documentation of the reasons for pay decisions can enable the company to be able to defend against these claims.
- **Consider Training Recruiters and Hiring Managers on Salary History Bans.** It is important to make sure managers are aware of the ever-changing law in this area and are not unknowingly violating state or local law. In particular, hiring managers and recruiters should understand what factors can go into setting compensation. They should also know how to recognize impermissible factors, such as prior compensation, when establishing a newly hired employee's rate of pay.
- **Have an Adequate Internal Complaint Procedure.** Your organization is much better off learning of a pay equity issue from an employee directly rather than through an attorney demand letter, charge of discrimination, or lawsuit. Having a robust system for internal complaints, a strong anti-retaliation policy and practice, and a culture of compliance can encourage employees to come forward with issues so that they can be fixed by the company, if appropriate, before they become expensive litigation and negative publicity.
- **Conduct a Pay Equity Audit.** Consider conducting a pay equity audit to determine whether there are positions or divisions in your organization that have potential pay equity issues. An audit can help your company identify pay disparities and determine whether they are statistically significant. If your organization is going to conduct an audit, it should be done correctly and the company should be committed to dealing with the results if an inequity is found.

  And, in a couple of jurisdictions, a self-audit may offer additional benefits. In Massachusetts, an employer that conducts a pay equity audit and takes reasonable steps towards correcting discrepancies has an affirmative defense to a pay equity claim brought under its laws. In Oregon, conducting a pay equity audit may allow an employer to avoid an award of compensatory and punitive damages. In most cases, it makes sense to have an audit conducted under privilege to reduce the risk of disclosure during an agency investigation or litigation. It is important to ensure the audit compares all individuals performing substantially similar work and does not just look at job titles. Personnel involved in an audit should try to think creatively about what positions and incumbent employees could be reasonably argued to be comparators. Typically, a pay equity audit will take your company's data, including the control variables your organization believes are driving compensation, and perform a multivariable regression analysis to determine whether there are gender or other protected class pay differences that cannot be explained. Pay equity audits also allow the company to determine whether its compensation philosophy actually is working as intended—are the control variables the company identified actually driving compensation or do they make pay disparities worse?

F. Practical Tips for Employers to Remediate Pay Equity Issues

If your company becomes aware of potential pay inequities, it should consider evaluating different options for remediating the issue. First, the company might explore whether there are protected classification-neutral factors supported by legitimate business reasons that explain the pay differential. If there are, the company should document those reasons so that if a question or claim arises, the rationale for any pay differentials can be explained. If there are not, the company should explore what compensation adjustments may be needed to eliminate the unlawful pay disparity. Ideally, this discussion should be conducted in a privileged setting with counsel. Recall that under many state pay equity laws, pay disparities cannot be remedied by lowering the compensation of comparator employees. As a result, remediation necessarily must include a pay increase for one or more employees. Advice on who should receive those pay increases and in what amount can be provided at the conclusion of a pay equity audit performed by legal counsel. Discussions about whether and to what extent those increases alleviate the company's risk of a claim are also helpful.

Careful consideration should be given to both the timing of any wage increases and the messaging to employees regarding why they are receiving an increase. Consider whether it is possible to make the remedial pay adjustments as part of the company's normal compensation and performance review cycle. The message communicated to an employee who affirmatively makes a complaint regarding pay equity about remediation measures likely will be different from the messaging surrounding pay equity issues identified through an employer-initiated prospective pay equity audit.

Employers should attempt to discover the source of the pay inequity so it can be addressed and prevent the problem from recurring:

- Are the issues focused in a particular business unit, department, or part of the organization, suggesting that hiring or compensation managers need training regarding the company's compensation philosophy and the permissible factors to consider in setting pay?
- Are the inequities focused on a particular type of pay, such as base pay, bonus amounts, or other types of incentive payments, such that any modification of the company's compensation structure and philosophy should be concentrated in a particular area of compensation?
- Did the inequities arise with the setting of starting compensation? If so, the employer should explore its process for setting starting compensation and consider implementing some of the measures described in Section D, above, for avoiding pay equity issues.
- Do the pay equity issues arise from a merger or acquisition in which the compensation philosophies of the two companies have not yet been integrated?

Finally, in reviewing the above concerns, the company should consider regularly conducting pay equity audits, ideally as part of the company's normal compensation and performance review cycle to ensure that pay equity issues do not recur.

II. OVERVIEW OF EEOC CHARGE ACTIVITY, LITIGATION AND SETTLEMENTS

A. Review of Charge Activity, Backlog and Benefits Provided

In years prior, the EEOC published a Performance and Accountability Report (PAR) for the prior fiscal year that detailed its charge activity, litigation statistics, financial performance, and goals for the upcoming fiscal year. For FY 2019, however, the EEOC issued a FY 2019 Agency Financial Report (FY 2019 AFR) as well as an FY 2019 Annual Performance Report (FY 2019 APR) and separate Enforcement and Litigation Statistics for FY 2019. According to the EEOC's records, the Commission received 72,675 private-sector charges during this past fiscal year.[210] This figure represents a 4.90% decrease from the number of charges filed in FY 2018. As shown by the following chart, the number of charges filed in FY 2019 continues to represent a downward trend in the number of overall private-sector charges filed with the Commission.

FISCAL YEAR	NUMBER OF CHARGES	% INCREASE/DECREASE
2007	82,792	--
2008	95,402	+15.23%
2009	93,277	-2.23%
2010	99,922	+7.12%
2011	99,947	+0.03%
2012	99,412	-0.54%
2013	93,727	-5.72%
2014	88,778	-5.28%
2015	89,385	+1.01%
2016	91,503	+2.37%
2017	84,254	-7.92%
2018	76,418	-9.30%
2019	72,675	-4.90%

In addition, the EEOC indicates the merit factor rate of these charges increased from 15.2% to 15.6% between FY 2018 and FY 2019.[211] During FY 2019, the agency secured over $486 million for victims of discrimination in the private sector and local governments, $346.6 million of which was obtained through mediation, conciliation, and settlements, and $39.1 million through litigation.[212] These amounts down from the prior year's numbers. In FY 2018, the EEOC obtained over $505 million in monetary recovery, including $354 million through mediation, conciliation, and settlements, and $53.6 million through litigation.[213]

210 EEOC, Charge Statistics FY 1997 through FY 2019, *available at* https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm.

211 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.

212 EEOC, Fiscal Year 2019 Annual Performance Report, at 38, *available at* https://www.eeoc.gov/eeoc/plan/upload/2019apr.pdf. The remaining monetary recovery was obtained on behalf of federal employees and applicants.

213 EEOC, Fiscal Year 2018 Performance and Accountability Report, at 13, *available at* https://www.eeoc.gov/eeoc/plan/upload/2018par.pdf.

In terms of the allegations set forth in the charges, data for FY 2019 indicates the following:

THEORY OF DISCRIMINATION	NUMBER OF CHARGES	PERCENT OF TOTAL CHARGES
Retaliation	39,110	53.8%
Disability	24,238	33.4%
Race	23,976	33%
Sex	23,532	32.4%
Age	15,573	21.4%
National Origin	7,009	9.6%
Color	3,415	4.7%
Religion	2,725	3.7%
Equal Pay Act	1,117	1.5%
Genetic Information	209	0.3%

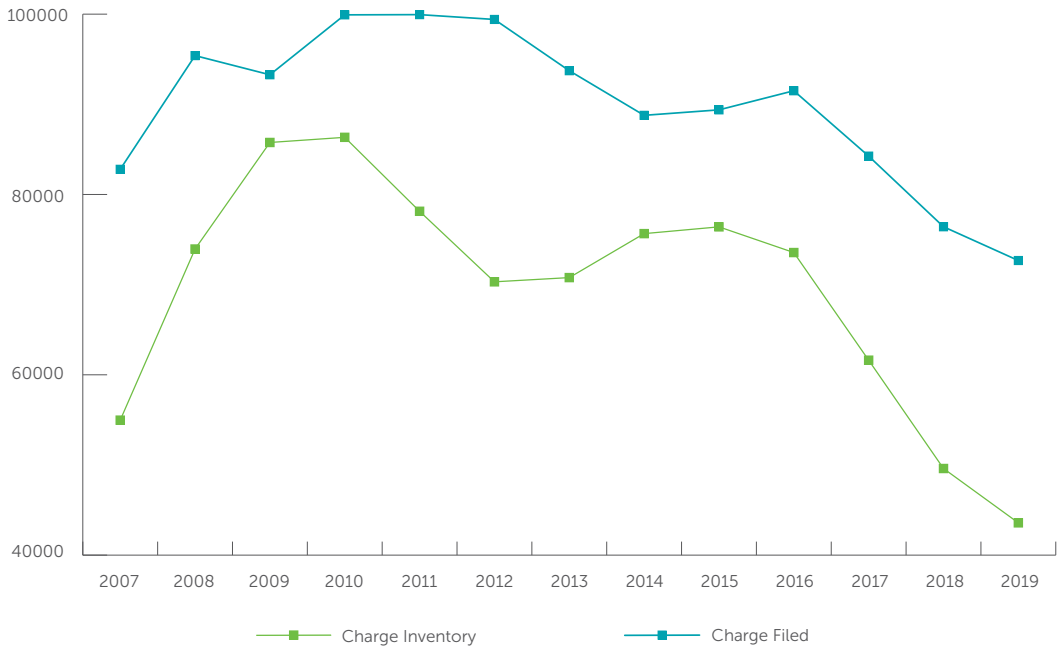
It is noteworthy that retaliation charges consistently have remained the highest percentage of total charges, but this percentage is based on the combined total of retaliation claims based on any type of protected status.[214]

With respect to the claims backlog, in the FY 2019 AFR, Chair Janet Dhillon stated that the Commission has a duty to "be responsive to employees who raise discrimination claims[,]" and as a result, the EEOC continued its efforts to make the reduction of its charge backlog a priority.[215] Chair Dhillon emphasized that due to the Commission's inventory reduction strategies, priority charge handling procedures, technological enhancements, and additional hiring of front-line staff, the EEOC's charge inventory was down 12.1% to 43,580 pending charges.[216] This is the fourth year in a row that the charge inventory has decreased.

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%

214 *See* EEOC Statistics *at* https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm.
215 EEOC, Fiscal Year 2019 Agency Financial Report, at 5, *available at* https://www.eeoc.gov/eeoc/plan/2019afr.cfm.
216 *Id.* at 12.

Comparing FY Charge Inventory with FY Charges Filed



Specifically, the Commission attributes the scaling down of its pending charges to its Public Portal, Respondent Portal, and its overall Digital Charge System (DCS).[217] In its FY 2019 APR, the EEOC provided insight into how the DCS has changed the charge landscape:

> The DCS allows potential charging parties to answer a series of questions leading to a self-screen (to determine if the EEOC is the proper agency to address their concern), as well as obtain referrals to other agencies, as appropriate, and ultimately, to allow them to schedule an initial interview prior to filing a charge. The DCS provides an accessible and customer-friendly approach and reflects the value of providing greater access for the public to speak with a member of our enforcement staff prior to filing a charge of discrimination. As a result, 123,688 Potential Charging Parties initiated inquiries through the system (up from 111,363 in fiscal year 2018). Of these, 30,759 were formalized into charges of discrimination (up from 30,565 in fiscal year 2018).[218]

The Commission also indicated that its priority charge handling procedures played a significant role in managing the charge backlog. These procedures included pre-charge counseling and pre-determination interviews. The EEOC stated that the counseling aspect involved "[e]ffective pre-charge counseling [to] ensure [that] individuals make informed decisions about whether to file a charge of discrimination."[219] On the other hand, a pre-determination interview is where the EEOC communicates "the basis for [its] decisions to the parties." Accordingly, the Commission claims that it experienced a 4.9% reduction in 2019 charge receipts because of the combination of pre-charge counseling and the elimination of paper intake questionnaires.[220]

Lastly, to Chair Dhillon's point on the Commission's efforts in increasing its staffing, the EEOC did, in fact, increase the number of Full-Time Employees (FTEs) from FY 2018 by 93 individuals.[221] This represents the EEOC's first positive gain in FTEs since FY 2016.

217 *Id.* at 20.
218 *Id.* at 28.
219 *Id.* at 21.
220 *Id.*
221 EEOC Budget and Staffing History 1980 to Present, *available at* https://www.eeoc.gov/eeoc/plan/budgetandstaffing.cfm (last visited Feb. 6, 2020).

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%

B. Systemic Investigations and Litigation

Prior PARs emphasized the agency's efforts in initiating systemic investigations and litigating cases.[222] Indeed, in FY 2018, the Commission demonstrated its continued interest in addressing systemic discrimination when it stated, "[t]ackling systemic discrimination… is central to the mission of the EEOC."[223] While systemic investigations and litigation is still listed as an enforcement priority in the Commission's National Enforcement Plan,[224] the EEOC filed fewer systemic lawsuits in FY 2019. Specifically, in FY 2019, the Commission filed 144 merits lawsuits, 17 of which (11.8%) were systemic suits involving multiple victims or discriminatory policies. The year before, the EEOC filed 199 lawsuits, 37 of which, or 18.6%, involved allegations of systemic discrimination.

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%

222 The EEOC defines "systemic discrimination" as: "where a discriminatory pattern, practice or policy has a broad impact on an industry, company or geographic area." *See* EEOC FY 2018 PAR at 37.

223 EEOC FY 2018 PAR at 37.

224 U.S. Equal Employment Opportunity Commission National Enforcement Plan, *available at* https://www.eeoc.gov/eeoc/plan/nep.cfm (last visited Feb. 6, 2020).

Moreover, within its 2018-2022 Strategic Plan, the Commission states under "Strategic Objective I" (combat employment discrimination through strategic law enforcement) that one of the Commission's four key strategies includes "us[ing] administrative means and litigation to identify and attack discriminatory policies and other instances of systemic discrimination."[225] However, unlike its prior Strategic Plan, wherein the Commission stated its goal that 22-24% of the cases in the Commission's litigation docket must be systemic cases, the 2018-2022 Strategic Plan did not outline any specific goal for FY 2019. It is likely that the Commission will continue to pursue its systemic initiative, but it is unclear under the current Commission as to the degree in which it will prioritize systemic investigations and litigation over other stated goals and performance metrics.

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

The overall percent of pending systemic cases was down slightly in FY 2019.

FISCAL YEAR	NUMBER OF TOTAL PENDING LITIGATION CASES	NUMBER OF SYSTEMIC CASES	% OF SYSTEMIC CASES IN LITIGATION
2012	309	62	20.0%
2013	231	54	23.4%
2014	228	57	25.0%
2015	218	48	22.0%
2016	165	47	28.5%
2017	242	60	24.8%
2018	302	71	23.5%
2019	275	59	21.5%

225 EEOC, Strategic Plan for Fiscal Years 2018-2022, *available at* https://www.eeoc.gov/eeoc/plan/strategic_plan_18-22.cfm#objective1 (last visited Feb. 6, 2020).

C. EEOC Litigation Statistics and Increased Focus on Workplace Harassment

As noted, in FY 2019, the EEOC filed 144 "merits" lawsuits, which included 100 suits filed on behalf of individuals, and 44 "multiple victim" lawsuits, which involved 27 non-systemic class suits (typically involving fewer than 20 individuals) and 17 systemic suits.[226]

YEAR	INDIVIDUAL CASES	"MULTIPLE VICTIM" CASES (INCLUDING SYSTEMIC CASES)	PERCENTAGE OF MULTIPLE VICTIM LAWSUITS	TOTAL NUMBER OF EEOC "MERITS"[227] 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

As in past years, the EEOC continued its trend of filing the bulk of its lawsuits during the last two months of the EEOC's fiscal year—between August 1 and September 30. In FY 2018, 60% of the EEOC's lawsuits were filed on or after August 1, 2018. Similarly, in FY 2019, the EEOC filed 71 lawsuits on or after August 1, 2019, constituting 49% of the lawsuits filed in the entire fiscal year.

226 EEOC FY 2019 AFR at 13.

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

The top 14 states for EEOC lawsuits filed over the past fiscal year are as follows:[228]

STATE	NUMBER OF LAWSUITS
Florida	13
North Carolina	11
Texas	10
Maryland	9
New York	9
Georgia	7
Michigan	7
California	6
Minnesota	6
Louisiana	5
Pennsylvania	5
Washington	5
Alabama	4
Colorado	4
Oklahoma	4

At the end of fiscal year 2019, the EEOC had 275 cases on its active district court docket, of which 59 (21.5%) were non-systemic multiple victim cases and 59 (21.5%) involved challenges to systemic discrimination.[229] Meanwhile, the EEOC had resolved 173 merits lawsuits at the federal district court level, and as a result, recovered approximately $39.1 million on behalf of 2,479 individuals.[230] The EEOC reports that it achieved "favorable results in approximately 95 percent of all district court resolutions."[231]

Looking at the bases or types of claims asserted in the 144 "merits" lawsuits filed in FY 2019, 129 lawsuits implicated Title VII claims (*i.e.*, race, sex, religion, and national origin), 53 contained ADA claims, 6 contained ADEA claims, and 48 filings included retaliation claims.

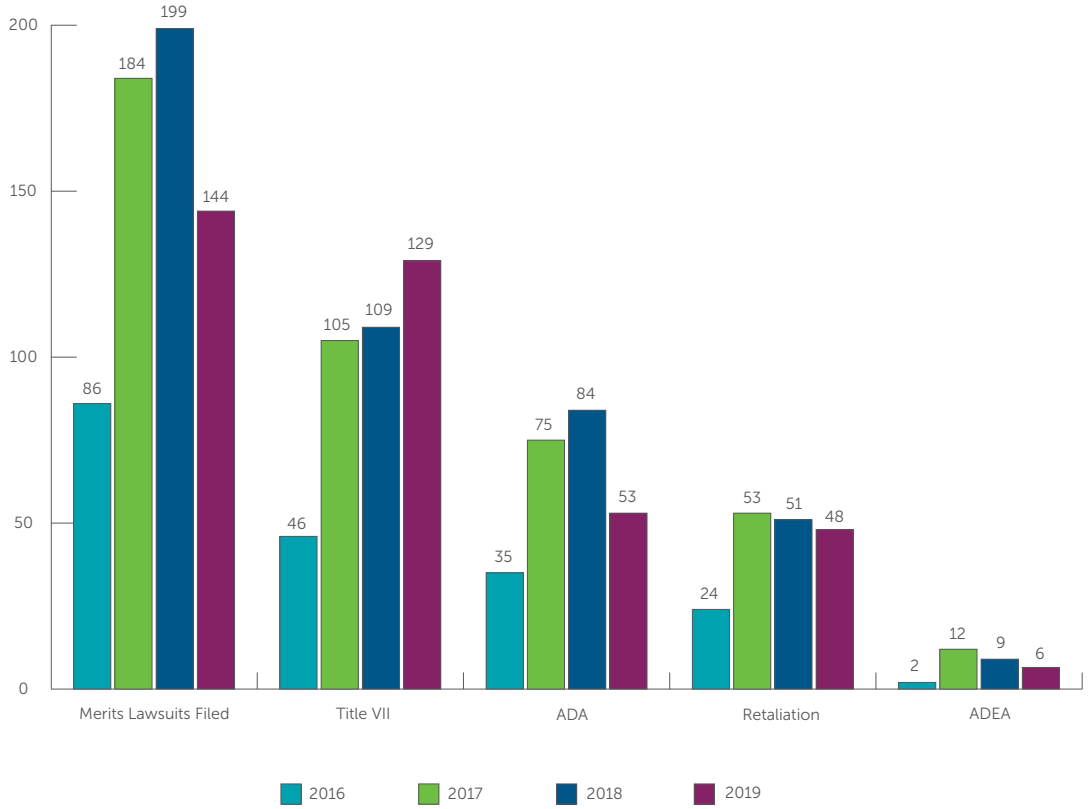
228 Littler monitored the EEOC's court filings over the past fiscal year. The state-by-state breakdown of lawsuits filed as well as the table summarizing the types of claims filed are based upon a review of federal court filings in the United States. The EEOC does not make publicly available its data showing the breakdown of lawsuits filed on a state-by-state basis, although charge activity on a state-by-state basis has been available from the Commission's website since May 2012. *See* EEOC, FY 2009 - 2019 EEOC Charge Receipts by State (includes U.S. Territories) and Basis*, *available at* http://www1.eeoc.gov/eeoc/statistics/enforcement/charges_by_state.cfm.

229 FY 2019 APR at 43.

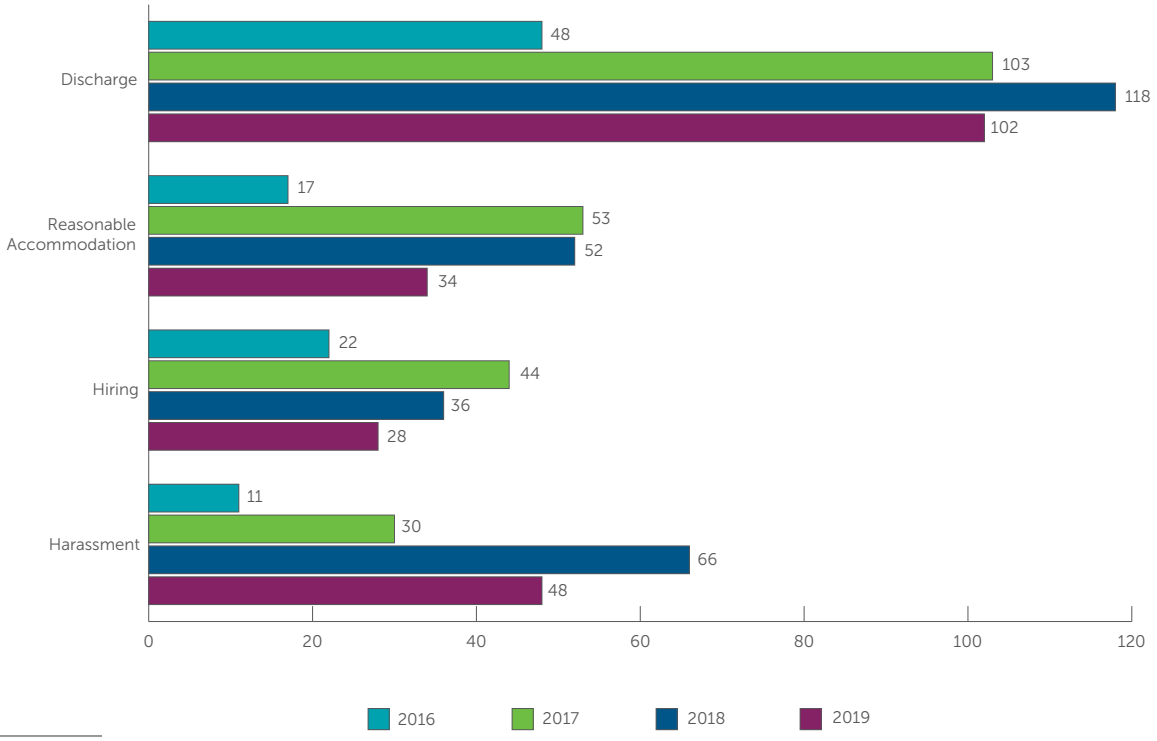
230 FY 2019 AFR at 13.

231 *Id.*

The following chart shows a year-over-year comparison for the last four years (FY 2016-2019) for the aforementioned bases of the lawsuits filed by the EEOC.



For the past four years, the EEOC's reports also provided information on the most frequently identified issues that are the subjects of its litigation efforts.[232] The chart below demonstrates the variance by issue for each fiscal year.



232 FY 2019 APR at 43.

More recently, the EEOC has made combatting workplace harassment a "top priority," especially in light of the #MeToo movement that has swept the nation in the last fiscal year.[233] In 2015, the EEOC created the Select Task Force on the Study of Harassment in the Workplace and a Co-Chairs' Report was issued in 2016 summarizing its findings.[234] Based on the increased public attention and the EEOC's Study, the Commission has ramped up its efforts on both the training and enforcement fronts.[235]

The EEOC reports it received 7,514 charges alleging sexual harassment in FY 2019, representing 10.3% of all charges, a slight (1.2%) decrease over the prior year.[236]

Of the 144 merits lawsuits filed by the EEOC in FY 2019, 48 (33%) raised claims of harassment. Thirty-four of those lawsuits specifically involve claims of sexual harassment. There were two disability harassment claims, 13 race harassment claims, one religious harassment claim, and three national origin harassment claims. Eighteen harassment lawsuits were class cases; 5 were considered systemic harassment cases.[237] According to the FY 2019 APR, the EEOC successfully resolved 48 harassment lawsuits over this period, three of which involved allegations of systemic harassment. Through its litigation efforts, the EEOC recovered approximately $10.7 million for 207 victims of harassment.[238]

D. Mediation Efforts

In its FY 2019 AFR and APR, the EEOC notes that it achieved 6,394 successful mediations in resolving charges.[239] Moreover, the Commission secured $159.6 million in monetary benefits for complainants through its mediation program.[240] The EEOC states that 96.8% of all private sector mediation participants expressed positive feedback about the EEOC's mediation program and would use the program again.[241]

In FY 2019, The EEOC attributed some of its success with its mediation program to its increased outreach efforts via marketing campaigns, but also through the use of Universal Agreements to Mediate (UAMs).[242] Specifically, UAMs are agreements between the EEOC and employers in which they agree to mediate all eligible charges before investigations or litigation are initiated. In FY 2018, the EEOC secured 108 UAMs with employers.[243]

E. Significant EEOC Settlements and Monetary Recovery

EEOC litigation in FY 2019 resulted in significantly fewer high-dollar settlements than in FY 2018. Over the course of the year, at least 19 consent decrees and conciliation agreements resulted in payments of $500,000 or more, compared to 22 in FY 2018. Of those settlements, at least eight required employers to pay over $1 million, versus 17 the prior fiscal year.

According to the EEOC's FY 2019 Agency Financial Report (AFR), the EEOC's success rate with conciliations rose from 27% in fiscal year 2010 to 40% in fiscal year 2019. In FY 2019, the success rate for conciliation of systemic charges was 56%, compared to 46% the prior fiscal year.[244] Overall, the EEOC reports that it obtained approximately $346.6 million for victims of employment discrimination in private sector and state and local government workplaces through mediation, conciliation, and settlements.[245]

One high-dollar ($6 million) settlement involved allegations a retailer's use of criminal background screening unlawfully discriminated against African-American applicants. Under the terms of the three-year consent decree, the employer agreed to hire a criminology consultant to develop a revised applicant screening process if it chooses to continue using criminal background checks. The new process would take a number of factors into consideration, including the time since conviction, the number of offenses, the nature and gravity of the offense(s), and the risk of recidivism.

233 FY 2018 PAR at 31, 35.
234 *Id.* at 31.
235 *Id.*
236 EEOC Charge Statistics, FY 1997 through FY 2019, *available at* https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm.
237 FY 2019 APR at 43.
238 *Id.*
239 FY 2019 AFR at 12; FY 2019 APR at 13.
240 *Id.*
241 *Id.*
242 FY 2018 PAR at 32
243 *Id.*
244 EEOC FY 2019 AFR, p. 23.
245 *Id.* at 12.

Employers in two FY 2019 cases—one involving race, and the other religious, discrimination—agreed to settle their lawsuits for $4.9 million. In the race discrimination matter, the EEOC alleged a firefighter's union advocated for an unlawful promotion process that had a disparate impact on African-American promotion candidates. The Commission claimed the union continued to promote this practice after receiving an EEOC commissioner's discrimination charge in February 2008, and after the city's Human Rights Commission issued a report on August 8, 2006 recommending changes to the promotion process. This lawsuit was a companion case to that filed by the U.S. Department of Justice against the City of Jacksonville, Florida alleging its promotion practices for various positions in the Jacksonville Fire and Rescue Department (JFRD) violated Title VII.

Under the terms of the consent decree, the city agreed to develop a new promotion exam for the selection of certain positions in the JFRD. In addition, the city will offer up to 40 promotion positions for qualified African Americans and will establish a $4.9 million settlement fund for eligible promotion candidates.

In the second settlement with a $4.9 million price tag, the EEOC claimed a company's appearance policy prohibiting men in supervisory or customer contact positions from wearing beards or growing their hair below collar-length discriminated on the basis of religion. Under the terms of the five-year consent decree, the company agreed to pay $4.9 million to a class of current and former applicants and employees. The company will also, among other things, amend its religious accommodation process for applicants and employees, provide nationwide training to managers, supervisors, and human resources personnel, and publicize the availability of religious accommodations on its internal and external websites.

At least three high-dollar settlements involved claims that an employer's enforcement of an inflexible leave policy was discriminatory. In one case out of the Eastern District of California, which resulted in a $1.75 million consent decree, the EEOC alleged that a company engaged in systemic disability and pregnancy discrimination by implementing and enforcing "rigid" leave policies and practices, denying disabled and pregnant employees from taking additional leave as a reasonable accommodation, and terminating their employment when leave was exhausted. The parties agreed to a three-year consent decree. In addition to the monetary payout, the company agreed to hire an EEO monitor to review and revise the company's policies, institute training on preventing disability and pregnancy-based discrimination and harassment, and develop a tracking system for employee accommodation requests and discrimination complaints.

In a disability discrimination case in Arizona, the EEOC claimed a health care entity violated the ADA by refusing to provide reasonable accommodations to employees with disabilities who had exhausted their leave under the company's 30-day medical leave policy and/or the federal Family and Medical Leave Act, and then terminating their employment. The company maintained a return-to-work policy that required employees to be 100% healed or able to work without any medical restrictions. Under the terms of this settlement, the employer agreed to pay $950,000 to 23 individuals impacted by the employer's policies and practices, and to modify its accommodation policy.

In a disability lawsuit filed in the Southern District of New York, the parties settled for $700,000. In this case, the EEOC alleged the defendant violated the ADA by maintaining a "long-standing inflexible policy and practice" of placing individuals with impairments or disabilities on involuntary leaves of absence or until the individuals were cleared to work with no restrictions from their medical providers. According to the EEOC, this policy resulted in denying qualified individuals with disabilities reasonable accommodations, as well as placing qualified individuals with disabilities on involuntary leave and/or discharging them because of disability. Among other terms of the consent decree, the employer is enjoined for two years from implementing policies or practices that would require employees to work with "no restrictions" or denying employees an interactive process to determine reasonable accommodations for their disabilities.

Relatedly, a nationwide retailer agreed to pay $3.5 to resolve the EEOC's systemic investigation of disability and pregnancy discrimination. The EEOC alleged the company denied reasonable accommodations to certain pregnant employees and those with disabilities, and made them take unpaid leaves of absence and/or terminated their employment. The company also agreed to consider a range of accommodations for those with medical restrictions, and conduct training for over 10,000 of its employees.

Overall, nine high-dollar consent decrees and conciliation agreements involved claims of disability discrimination, four involved claims of pregnancy discrimination, four included retaliation claims, three involved sexual harassment, two involved sex discrimination, two included race discrimination claims, one involved race harassment, and one included a religious discrimination charge.

Appendix B 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.

F. Appellate Cases

In recent years, the EEOC has filed fewer notices of appeal in federal circuit courts of appeals, but continues to actively participate as amicus curiae in private lawsuits. At the end of FY 2019, the EEOC was handling 17 appeals in federal court, and participating as *amicus curiae* in 28 cases.[246] Several notable appellate wins are discussed below.

1. Notable Wins for the EEOC

In *EEOC v. McLeod Health, Inc.*, the Fourth Circuit reversed summary judgment for the employer on claims of an unlawful medical exam and resulting wrongful discharge.[247] An employer cannot require a medical exam unless the employee's ability to perform an essential job function is impaired by a medical condition or the employee can perform all the essential functions of the job, but because of her medical condition, doing so will pose a "direct threat" to her own safety.[248]

In *McLeod Health*, the employee's job was to interview employees on the company's five campuses, take photos, and write articles for internal publication. The employee had performed her job for 28 years with a longstanding condition affecting her stability.[249] Frequent falls were a part of her life.[250] Although the employee had recently fallen three times, on one occasion needing stitches and on another an x-ray, the court held that a reasonable jury could find the employer lacked an objective belief the employee posed a risk to herself because she was not "severely injured" in the recent falls.[251] Critical to the court's finding was the employee's long-term history of successfully performing her job despite periodic falls. The court also based its ruling on a potential disputed issue whether traveling to the various campuses to perform the interviews and take pictures was an essential function of the position, since the job description did not identify travel and the employee testified she did not think the travel was "necessarily" part of her job.[252] Although she admitted she collected better content by attending company events and conducting in-person interviews and had been doing the job that way for 28 years, the court held the EEOC's "scintilla" of evidence that the interviews could have been conducted by telephone was all that was required to show a disputed issue on summary judgment. The district court's grant of summary judgment as to wrongful termination followed from the exam and subsequent leave of absence, and so the Fourth Circuit also reversed that judgment.

The Ninth Circuit also ruled favorably for the EEOC in reversing summary judgment for the employer in *EEOC v. Global Horizons, Inc.*, which involved joint employer status in the context of the H-2A visa program—for seasonal or temporary agricultural workers.[253] Now-insolvent Global Horizons contracted with Washington orchard growers to supply Thai workers under the H-2A visa program.[254] The growers' involvement with the Thai workers was limited to "general oversight and management, including determining the number of workers needed for each task, setting quotas for work output, and inspecting the quality of the work."[255] Global Horizons recruited the workers from Thailand, supervised their daily work, including meals and rest breaks, and paid their wages.[256] The company was also responsible for transporting, housing, and feeding the Thai workers as required by the H-2A visa program.[257] The EEOC claimed Thai employees were subjected to uninhabitable and unsanitary housing, unsafe transportation, insufficient meals, and were forced to work through meals, rest breaks, and extreme weather conditions.[258] The alleged conduct was discriminatory based on the alleged comparatively favorable treatment of Mexican workers.[259]

246 FY 2019 PAR at 45. EEOC appellate and amicus briefs can be searched on the EEOC's webpage, *available at* https://www1.eeoc.gov/eeoc/litigation/briefs.cfm.
247 914 F.3d 876 (4th Cir. 2019).
248 *Id.* at 880-81.
249 *Id.* at 877-78.
250 *Id.* at 878.
251 *Id.* at 878, 882.
252 The court did not address whether the limitation on travel would effectively prevent the falls, which could presumably occur even traveling to and from work at one location.
253 915 F.3d 631 (9th Cir. 2019).
254 *Id.* at 633-634.
255 *Id.* at 635.
256 *Id.* at 635-636, 640.
257 *Ibid.*
258 *Id.* at 636.
259 *Ibid.*

The district court granted summary judgment to the growers, finding that although they were joint employers, the growers could not be liable for non-orchard-related conduct in which they were uninvolved ("joint employer relationship does not equate to joint liability").[260] In an issue of first impression, the Ninth Circuit agreed the growers were joint employers under the common-law test ("principal guidepost" is the "element of control") and that joint employment does not necessarily dictate joint liability.[261] However, the Ninth Circuit disagreed the growers could avoid liability for non-orchard-related conduct, reasoning that the H-2A visa program itself defined employment to encompass the growers and conferred upon them the obligation to provide meals, housing, and transportation.[262] And if the growers knew or should have known about the discriminatory conduct and failed to take prompt corrective measures within their control, they would be liable for their co-employer's discriminatory conduct.[263]

Although the growers had permissibly delegated H-2A's housing, transportation, and wage obligations to Global Horizons, prompt action was still within the growers' control because they had the power to demand changes, withhold payment, or end the contract if dissatisfied with Global Horizons' services.[264] Therefore, the Ninth Circuit reversed summary judgment and, finding the EEOC sufficiently alleged one of the growers knew or should have known about the discriminatory conduct, remanded to allow the EEOC to come forward with sufficient allegations against the other.[265]

In *EEOC v. VF Jeanswear LP*, the EEOC sought information from the defendant as part of an investigation of systemic, classwide gender discrimination that stemmed from an initial charge of discrimination. Specifically, the EEOC sought information relevant to investigating whether women in specified portions of defendant's operations were deprived of opportunities to advance to higher-level positions within the company. The defendant provided only information it believed related to charging party's allegations of personal harm, including information on 13 account executives, but refused to produce information on all other employees the EEOC had requested. The EEOC modified its request and narrowed the category of employees, but the defendant still refused to produce the information requested, stating it was still overbroad and not limited to the processing of the charge and allegations of personal harm. The EEOC then issued an administrative subpoena, directing defendant to "[s]ubmit an electronic database identifying all supervisors, managers, and executive employees at [defendant's] facilities during the relevant period, January 1, 2012, to present" including personal identifying information, gender, location, etc. Defendant petitioned the Commission to revoke the subpoena, which the EEOC denied, stating that the charging party had identified classwide gender discrimination it was investigating, and required the requested information as part of its investigation.

The EEOC moved to enforce the subpoena in district court. Defendant stated that, besides being overbroad and outside the scope of the charge, it would take a full-time employee eight weeks of complete dedication, costing $10,700, to retrieve the information requested. The EEOC narrowed the scope of the subpoena; defendant said it would likely take five weeks for one employee to retrieve the same information. The district court determined that the requested information was not relevant to the charge based on its views that (1) Title VII limits the EEOC to investigating discrimination that the charging party alleges she experienced personally, and (2) charging party did not allege that defendant excluded her from, or denied her an opportunity to obtain, a top-level position.[266]

The EEOC appealed, arguing, among other things, that the court erred in believing that the EEOC's authority is limited to when the charging party alleges she experienced the same form of discriminatory harm as the class and that the allegations must satisfy a specified level of certainty before the EEOC can investigate, and that it applied the wrong standard in determining undue burden—it should have required that defendant show that the subpoena would cause serious disruption of normal business operations or imposition of undue operations costs (as compared to normal operation costs). Finally, the EEOC argued the district court further erred by opining that the value of the information the EEOC seeks is "attenuated at best."

260 *EEOC v. Global Horizons, Inc.*, 2012 U.S. Dist. LEXIS 105993, at *11 (E.D. Wash., July 27, 2012).
261 *EEOC v. Global Horizons, Inc.*, 915 F.3d at 637-638, 641.
262 *Id.* at 640.
263 *Id.* at 641.
264 *Id.*
265 *Id.* at 642.
266 *EEOC v. VF Jeanswear LP*, No. MC-16-00047, 2017 WL 2861182 (D. Ariz. July 5, 2017).

The Ninth Circuit agreed, finding that the district court abused its discretion when it held that the subpoenaed information was not relevant to the charge.[267] The court pointed out:

> 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. Indeed, we have held otherwise. EEOC subpoenas are enforceable so long as they seek information relevant to any of the allegations in a charge, not just those directly affecting the charging party.[268]

The appellate court also found the district court abused its discretion when it held that the subpoena was unduly burdensome. The company's estimated cost of complying with the subpoena as part of an investigation into systemic and unlawful discrimination does not unduly burden a company with approximately 2,500 employees, the court held.

Notably, the defendant has sought Supreme Court review of the Ninth Circuit's decision.[269]

2. Notable Wins for Employers

In *EEOC v. North Memorial Health Care*, a healthcare employer rescinded a nurse's conditional job offer when she requested Friday nights off in accordance with her religion because the collective bargaining agreement required semi-weekly weekend shifts the hospital believed would be difficult to cover.[270] The Eighth Circuit noted the EEOC could have pursued disparate treatment or failure-to-accommodate claims under Title VII (the *EEOC v. Abercrombie & Fitch Stores, Inc.* decision[271] "makes it clear that [the] applicant . . . was entitled to reasonable accommodation of her religious practice as a Seventh Day Adventist").[272] For reasons not clear from the decision, the EEOC did not pursue such theories in this case, and instead pursued only one claim alleging religious retaliation under Title VII, contending the job offer was rescinded in retaliation for the candidate's request for a religious accommodation.[273]

Under Title VII, it is unlawful for an employer to discriminate against an applicant because she has "opposed any practice made an unlawful employment practice by this subchapter."[274] However, the Eighth Circuit found that merely requesting an accommodation does not necessarily constitute opposition to an unlawful employment practice.[275] Here, the hospital had a lawful policy of reviewing religious accommodation requests on a case-by-case basis and granting them when the accommodation requested would not pose an undue hardship.[276] In consequence, the applicant's request for accommodation did not constitute opposition to an allegedly unlawful policy. The Eighth Circuit explained that denial of a request for accommodation might be retaliatory under Title VII in other circumstances, for example, if the employer has a blanket policy of refusing religious accommodation requests or refuses to hire an employee because of a belief the request is not based on a religious practice.[277] Thus, the Eighth Circuit affirmed the district court's grant of summary judgment to the hospital.[278] Justice Grasz dissented on the basis that courts have construed the same language in the ADA to include accommodation requests as protected conduct for the purposes of a retaliation claim.[279]

The Eleventh Circuit rejected the EEOC's novel approach in *EEOC v. STME, LLC*, where the Court determined that an employer's termination of a massage therapist's employment based on an unsubstantiated fear she might contract Ebola on a trip to Ghana could not form the basis for a disability discrimination suit because the therapist was neither disabled nor perceived as being disabled by the employer at the time of her termination.[280] The EEOC claimed the employer perceived

267 *EEOC v. VF Jeanswear LP*, No. 17-16786, 769 Fed. Appx. 477 (9th Cir. May 1, 2019).
268 *Id.*, slip op. at 3, citing *EEOC v. Fed. Express Corp.*, 558 F.3d 842, 855 (9th Cir. 2009).
269 *EEOC v. VF Jeanswear LP*, No. 17-16786, 769 Fed. Appx. 477 (9th Cir. May 1, 2019), *petition for cert. filed*, No. 19-446 (Sup. Ct. Oct. 1, 2019). The questions presented: (1) Whether Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253, prohibits the U.S. Equal Employment Opportunity Commission from continuing to investigate a charge of discrimination after it issues the charging party a right-to-sue notice and that party files a lawsuit raising some of the allegations in the charge; (2) Whether the court of appeals correctly held that the district court abused its discretion in declining to enforce a subpoena issued by the EEOC based on the district court's view that information requested in such a subpoena must be relevant not only to the allegations in the charge, but also to the personal harm suffered by the charging party.
270 908 F.3d 1098-1011 (8th Cir. 2018).
271 (2015) 135 S.Ct. 2028, 2033.
272 *EEOC v. North Memorial Health Care*, 908 F.3d at 1101.
273 *Id.* at 1101-02.
274 *Id.* at 1101.
275 *Id.* at 1102.
276 *Id.* at 1103.
277 *Id.*
278 *Id.* at 1104.
279 *Id.*
280 *EEOC v. STME, LLC*, 938 F.3d 1305 (11th Cir. 2019).

the massage therapist as disabled due to its belief she would contract Ebola in the future.[281] The court disagreed, finding, "[r]ather, by its terms, for an employee to qualify as 'being regarded as' disabled, the employer must have perceived the employee as having a current existing impairment at the time of the alleged discrimination."[282] The court also rejected the EEOC's association discrimination claim that the employer terminated the therapist's employment because of her association with relatives in Ghana who might have Ebola. Association discrimination requires a plausible allegation that the employer knew at the time of the adverse action that the employee had an associate with a disability, but the EEOC did not allege the employer knew the massage therapist would associate with anyone in Ghana who had Ebola.[283] Accordingly, the court affirmed the district court's grant of the employer's motion to dismiss.[284]

In Texas v. EEOC, the state of Texas successfully challenged the EEOC and achieved an injunction prohibiting enforcement of the EEOC's guidance on employers' use of criminal records in hiring.[285] In April 2012, the EEOC issued the guidance at issue.[286] The guidance "rejected across-the-board felon hiring screens" and provided a safe harbor to employers that either "establish a validated, multi-factor screening system per the Uniform Guidelines on Employee Selection Procedures standards"[287] or develop a "targeted screen but provide an opportunity for an individualized assessment for individuals excluded by the screen."[288]

The Fifth Circuit found the guidance exceeded the EEOC's limited rulemaking and enforcement power with respect to Title VII, which permits the EEOC to issue procedural but not substantive rules.[289] Because the guidance was a final agency action binding the agency to a particular legal position, it was an impermissible substantive rule. Specifically, under the guidance, EEOC staff would be compelled to refer a matter to the Attorney General for an enforcement action whenever an employer maintained an automatic general exclusion from all employment opportunities based on criminal record even when the employer could prove it had a racially balanced workforce, unless the employer could meet the safe harbor provisions.[290] The Fifth Circuit issued an injunction to prevent the EEOC and Attorney General from treating the guidance as "binding in any respect."[291] The injunction applied only to the state of Texas; therefore, it remains unsettled whether other states will bring similar lawsuits challenging the EEOC's guidance.

A would-be intervenor lost his day in court in the unpublished case of *EEOC v. JC Wings Enterprises*, involving the EEOC's age discrimination claim against an employer for allegedly refusing to hire older employees to work in "front of house" positions.[292] The party seeking to intervene was the general manager of a ribs restaurant who claimed he was fired in retaliation for refusing to discharge a 72-year-old restaurant host.[293] The EEOC issued the general manager a right-to-sue letter and did not include his retaliation allegations in the lawsuit it pursued against the employer.[294] The general manager first filed a motion to join the lawsuit, which the district court denied.[295] He then filed a motion to intervene in the lawsuit, which also was denied. He appealed the denial of both motions, but the Fifth Circuit refused to consider the denial of the first motion because it was not a final order and thus not appealable.[296] The Fifth Circuit then affirmed denial of the second—intervenor—motion because it was filed over 90 days after the issuance of the right to sue letter, leaving the general manager without a remedy.[297]

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

281 *Id.* at 1315.
282 *Id.* at 1318.
283 *Id.* at 1319.
284 *Id.* at 1323.
285 *Texas v. EEOC*. 933 F.3d 433 (5th Cir. 2019).
286 *Id.* at 437.
287 *See* 29 C.F.R. Part 1607, adopted by the EEOC in 1978. This regulation provided uniform guidance for employers about how to determine if their tests and selection procedures were lawful for purposes of Title VII disparate impact theory.
288 *Id.* at 438.
289 *Id.* at 439.
290 *Id.* at 443.
291 *Id.* at 451.
292 2019 U.S. App. LEXIS 26465; (5th Cir. Aug. 30, 2019).
293 *Id.* at *1.
294 *Id.* at *3.
295 *Id.*
296 *Id.* at *6.
297 *Id.* at *7, n.4; *8 (noting leniency generally reserved for claimants lacking in sophistication and thus not available to general manager represented by experienced employment law counsel).

III. EEOC AGENCY AND REGULATORY-RELATED DEVELOPMENTS

A. EEOC Leadership

The composition of the Commission and its leadership were among the most notable developments in 2019. The EEOC began 2019 with the loss of its quorum, when then-Commissioner Chai Feldblum (D)'s term expired in early January. That left only two sitting members—Acting Chair Victoria A. Lipnic (R) and Commissioner Charlotte Burrows (D); three sitting commissioners are required for a quorum of the five-member Commission. In December 2018, while it still had a quorum, the Commission delegated significant authority to its field offices, such that day-to-day operations of the agency were not significantly impacted in the absence of a quorum. Significant policy or litigation matters were put on hold during this time (the Commission was also among those federal agencies that were shuttered for the 35-day government shutdown).

In May 2019, the U.S. Senate confirmed Janet Dhillon as Chair of the EEOC, restoring its quorum and, for the first time in the current administration, giving the EEOC a Republican majority. Dhillon will serve a term ending July 1, 2022. Upon Dhillon's confirmation, Acting Chair Lipnic resumed her role as a commissioner with a term scheduled to end on July 1, 2020 (although, as we have seen in the past, given the Commission's holdover rules, if she is not reconfirmed she may continue to serve past the expiration of her term, potentially until early January 2021).

In August 2019, the Senate re-confirmed Democratic Commissioner Burrows for a term ending July 1, 2023. At the same time, it confirmed Sharon Fast Gustafson as the EEOC's general counsel. Gustafson is the first woman to hold the position of general counsel in the agency's 50+ year history, and the first confirmed general counsel in the current administration (for the first two and a half years of the administration, the GC role had been filled on an acting basis by a career EEOC attorney). Prior to joining the agency, Gustafson practiced employment law as a solo practitioner in Washington, D.C., Virginia, and Maryland.

As of this writing, there remain two vacant Commissioner seats—one Republican, one Democratic. In July 2019, the president nominated Keith Sonderling, who currently serves as deputy administrator of the Wage and Hour Division at the U.S. Department of Labor, to fill the Republican seat (if confirmed, his term would expire on July 1, 2024). Sonderling's nomination expired at the end of the congressional session in December 2019, and will need to be resubmitted by the White House during the 2020 session. On March 2, 2020, the White House announced its intent to nominate private-sector attorney Andrea Lucas (R) (who would succeed Commissioner Victoria A. Lipnic (R) at the expiration of her term this year) and civil rights attorney Jocelyn Samuels (D) to the Commission; their nominations are likely to be formally submitted to the Senate in the very near future. Sonderling's nomination for the open Republican seat will likely be resubmitted to the Senate at the same time.

B. EEOC's Strategic Enforcement Plan and Agency Initiatives/Priorities

The EEOC continues to operate under the Strategic Enforcement Plan (SEP) it adopted in 2016, which covers Fiscal Years 2017-2021. That SEP sets forth the agency's enforcement priorities in greater detail, and identifies core areas of interest where the agency will focus its limited resources.[298] These priorities include:

- Eliminating barriers in recruitment and hiring that discriminate against protected classes, including "exclusionary policies and practices" and "screening tools that disproportionately impact workers based on their protected status";[299]
- Protecting vulnerable workers, including immigrant and migrant workers and underserved communities, from discrimination by way of job segregation, harassment, trafficking, pay discrimination, and retaliation;
- Addressing selected emerging and developing legal issues, including ADA qualification standards and "inflexible" leave policies; accommodation of pregnancy-related limitations; protection of LGBT workers; complex or non-traditional employment relationships and the on-demand economy; and "backlash" religion or national origin discrimination against certain workers;
- Ensuring equal pay protections for all workers, not solely on the basis of sex, but on all other protected bases;
- Preserving access to the legal system via close scrutiny of "overly broad" waivers, releases, and mandatory arbitration agreements; applicant and employee data and retention policies; and "significant" retaliatory practices; and
- Preventing systemic harassment, including policies, practices, or patterns of workplace harassment.

298 EEOC, *Strategic Enforcement Plan Fiscal Years 2017 – 2021, available at* https://www.eeoc.gov/eeoc/plan/sep-2017.cfm.

299 Notably, On August 6, 2016, in Texas v. EEOC, 933 F.3d 433 (5th Cir. 2019), the U.S. Court of Appeals for the Fifth Circuit dealt the EEOC a significant setback in this area, largely affirming the district court's decision that the EEOC violated the federal Administrative Procedure Act (APA) in issuing its 2012 Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964. *See* Rod M. Fliegel and Molly Shah, *Fifth Circuit Deals a Blow to EEOC's Criminal Record Guidance*, Littler ASAP (Aug. 6, 2019).

Since restoring a quorum and securing a Republican majority earlier in 2019, the agency has yet to revisit the SEP. Chair Dhillon did, however, outline a number of her priorities and the agency's accomplishments in its Agency Financial Report (AFR) published in November 2019.

- **Inventory Reduction.** In the private sector, the EEOC has focused on inventory reduction strategies and priority charge handling procedures, including technological enhancements and the hiring of front-line staff (a process begun by former Acting Chair Lipnic). In FY 2019, the agency reduced its charge workload by 12.1% to 43,580 pending charges. It likewise focused on the reduction of its federal sector inventory.
- **Use of Data.** In 2017, the EEOC dramatically reorganized its Office of Research, Information, and Planning, creating in its stead the Office of Enterprise Data and Analytics (OEDA). The AFR reports that in FY 2019, OEDA focused on modernizing EEOC's methods of data collection, reporting, and access to provide improved services to both internal and external stakeholders. In that report Chair Dhillon indicated her support for efforts to upgrade the Commission's data capabilities to promote greater public access to its data, and augment the agency's use of modern data analytics "to drive data-driven decision making."
- **Updating Guidance.** In FY 2019, the Commission also worked to reduce obsolete guidance. The AFR reports that the EEOC has established a working group to identify guidance that is out of date or has been superseded by statute or court decisions. The working group identified guidance and technical assistance documents that are candidates for updating or rescission, and the Commission has begun the process of updating and rescinding these documents.[300] In the AFR, Dhillon indicated that one of her priorities is to, where possible, harmonize EEOC guidance with that of other federal agencies, so that employers have a clear understanding of their obligations.

C. EEO-1 and Compensation Data Collection

The most significant EEOC activity in 2019 focused on the agency's Form EEO-1, and the collection of compensation data from private sector employers.

By way of background, employers with 100 or more employees, and federal contractors with 50 or more employees (and a sufficient dollar amount in federal contracts), are required to file the EEO-1 report, providing the EEOC with data on the number of individuals employed, their distribution by legal entity and location, and their demographic characteristics. During the Obama administration, the EEOC proposed the collection of pay data correlated to employee demographic groups. To that end, in 2016, the EEOC finalized a dramatically expanded revised Form EEO-1, which would collect data on employee compensation and hours worked (the so-called EEO-1 "Component 2").[301]

The employer community's reaction to the increased requirements for the EEO-1 report was almost uniformly negative. Businesses explained the report would be difficult to complete and would likely require substantial investments in personnel and software in order to be able to efficiently address the requirements. At the same time, there was substantial uncertainty as to whether the collected data could be effectively used by the EEOC for its stated purpose.

In February 2017, with a new presidential administration in place, business groups petitioned the Office of Management and Budget (OMB)'s Office of Information and Regulatory Affairs (OIRA), asking that it rescind its prior approval of Component 2. In August 2017, OIRA informed EEOC that it was initiating a review and immediate stay of the effectiveness of the pay data collection aspects of the EEO-1 form.[302] This effectively killed Component 2 (the "old" Component 1 of the EEO-1 was unaffected by OMB's stay). Shortly thereafter, employee advocate groups sued the EEOC and OMB in federal court, claiming that the agencies' stay of the collection of pay data was unlawful.[303] They asked the court to overturn OMB's stay of Component 2, and reinstate the pay data collection.

300 The EEOC has created a dedicated webpage where it lists policy statements, technical assistance documents, informal discussion letters, and other guidance documents it has rescinded: https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_clear_guidance.cfm.

301 EEOC, *Agency Information Collection Activities; Notice of Submission for OMB Review, Final Comment Request: Revision of the Employer Information Report (EEO-1)*, 81 Fed. Reg. 45479 (July 14, 2016), *available at* https://www.federalregister.gov/documents/2016/07/14/2016-16692/agency-information-collection-activities-notice-of-submission-for-omb-review-final-comment-request.

302 Office of Information and Regulatory Affairs, Memorandum of Neomi Rao, Administrator, to Acting Chair Victoria Lipnic, EEOC (Aug. 29, 2017), available at https://www.reginfo.gov/public/jsp/Utilities/Review_and_Stay_Memo_for_EEOC.pdf.

303 *Nat'l Women's Law Ctr. v. OMB*, No. 17-cv-2458, D.D.C., filed Nov. 15, 2017.

In March 2019, in a decision that surprised many, the district court ruled for the plaintiffs and ordered the EEOC to reinstate the collection of compensation data covering two calendar years.[304] Filers were required to file 2018 Component 1 data by May 31, 2019 (the original March reporting deadline was extended because of the government shutdown). Employers with 100 or more employees were required to file Component 2 data for calendar years 2017 and 2018 by September 30, 2019—although to date, the court has ordered that the reporting portal remain open, and that EEOC continue to collect Component 2 data from late filers. When the court will determine that EEOC may close its Component 2 collection of 2017/2018 data is not clear—a hearing on EEOC's collection is scheduled for January 2020.

In September 2019, the EEOC announced that it was proposing to not renew its authority for pay data collection such that the next three-year EEO-1 cycle would collect only Component 1 demographic data.[305] It is unclear whether this decision, too, will be subject to legal challenge. In a November hearing on the proposal to discontinue Component 2, a number of commissioners indicated that they would examine the information collected in the 2019 cycle to determine if it is useful to the agency to continue collection of pay data in some form or fashion. In announcing its proposal to discontinue use of Component 2, the EEOC noted that its prior cost estimates had dramatically understated the cost to stakeholders of preparing and filing this data, suggesting that a cost-benefit analysis would not support continuing collection in this manner in the future.

Most recently, in its fall regulatory agenda, the agency indicated that it would contemplate proposing a revised pay data collection tool, but to date no details on whether EEOC will move forward, or what form such a revised report might look like, are forthcoming.[306] Heading into 2020, both the fate of the expired Component 2 and future efforts at pay data collection remain open questions.

D. Noteworthy Regulatory Activities

Over the past fiscal year the EEOC engaged in a number of notable regulatory efforts and other agency initiatives.

1. Joint Employment

In its fall 2019 regulatory agenda, the EEOC indicated that it would be publishing a proposed rule on joint-employer status under the various statutes the agency enforces.[307] While the specifics of what the EEOC's proposed rule might look like are not yet clear, given the Chair's stated purpose to harmonize EEOC guidance with that of other federal agencies, it is likely the EEOC's proposed joint-employer standard will be similar in substance to joint-employer rules promulgated by the U.S. Department of Labor (addressing joint employment under the Fair Labor Standards Act) and the National Labor Relations Board (addressing joint employment under the National Labor Relations Act).

2. EEO-1/Non-Binary Reporting

In August 2019, the EEOC released guidance in the form of Frequently Asked Questions (FAQ) to employers as to how they should report non-binary employees on Form EEO-1.[308]

Historically, the agency has required an employer to indicate an employee's gender on the EEO-1 report as male or female—with no "other" or non-binary option. In recent years, however, some employers have chosen to provide employees with other options. Moreover, some states and localities have enacted laws or ordinances that require state agencies to issue drivers' licenses, state identification cards, and birth certificates with a third, non-binary gender marker. These developments have led some employers to ask how they should report to the federal government on Form EEO-1 the gender of employees who identify as non-binary. The EEOC now appears to have answered that question. In its FAQ, the EEOC explained:

304 *Nat'l Women's Law Ctr. v. OMB*, 358 F.Supp.3d 66 (D.D.C. 2019).
305 EEOC, Notice of Information Collection, 84 Fed. Reg. 48138, 48140-48142 (Sept. 12, 2019).
306 EEOC, *Amendments to the Regulations at 29 CFR Part 1602 to Provide for a Pay Survey*, RIN: 3046-AB15, *available at* https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201910&RIN=3046-AB15.
307 EEOC, *Joint Employer Status Under the Federal Equal Employment Opportunity Statutes*, RIN: 3046-AB16, *available at* https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201910&RIN=3046-AB16.
308 EEOC, Frequently Asked Questions (FAQs), available at https://eeoccomp2.norc.org/Faq.

> Filers may report employee counts and labor hours for non-binary gender employees by job category and pay band and racial group in the comment box on the Certification Page, [sic] please preface this data with the phrase "Additional Employee Data:" For example, "Additional Employee Data: 1 non-binary gender employee working 2,040 hours in Job Category 4, Salary Pay Band 5, Race/ethnicity non-Hispanic White. 3 non-binary gender employees; combined work hours 5,775; in Job Category 5, Salary Pay Band 8; Race/ethnicity: Employee 1 – Non-Hispanic Black, Employee 2 – Hispanic, Employee 3 – Two or more races".

Although this FAQ addressed non-binary employees in the context of the expanded EEO-1 Component 2 (which collected information on employee compensation and hours worked), it is likely that these instructions will be applicable to any future Form EEO-1, irrespective of whether it includes a pay data component. Finally, note that the FAQ does not appear to require employers to collect information as to whether an employee identifies as non-binary, but merely provides instructions on how to report those who do.

Although the FAQ is thus limited in scope, it is still significant because the EEO-1 instructions generally have been interpreted as requiring employers to invite employees to identify as either male or female. To the extent that binary self-identification was a federal requirement, employers had to retain a record of every employee as either male or female in order to comply with federal law even if the employer wanted to respect broader categories of self-identification and even if state or local laws otherwise required the employer to recognize non-binary gender markers. With this FAQ, employers that operate in states with laws requiring them to recognize employees' non-binary gender markers no longer have to worry about inconsistent federal requirements. Moreover, it appears that all employers are now free to offer employees broader options for gender identification if they wish to do so.

3. Wellness Plans/Permissible Incentives

For another year, the EEOC's position as to whether and when wellness plan incentives are lawful under the Americans with Disabilities Act (ADA) and Genetic Information Nondiscrimination Act (GINA) remains unclear.

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

Where, one might ask, does EEOC fit into this picture? Well, two statutes administered by the EEOC—the ADA and GINA—are implicated by wellness plans. The ADA generally prohibits medical examinations or disability-related inquiries that are not job-related and consistent with business necessity. GINA prohibits the acquisition of genetic information from employees and their families, including certain family medical histories. Both statutes, however, provide an exception to the general prohibition where this information is requested in the context of a workplace wellness program—so long as participation in the wellness program is *voluntary*.

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

In 2016, the agency issued final regulations under GINA and the ADA setting forth the rules under which a wellness plan incentive could be considered "voluntary."[309] While these regulations bore a surface resemblance to the tri-agency regulations and HIPAA regulatory scheme, they did differ in material ways (for example, the EEOC regulations provided for a 30% cap, facially similar to HIPAA's, but calculated in a significantly different fashion. The EEOC's regulations also included a number of other limitations not found in HIPAA or the ACA). Critics in the employer and plan sponsor communities argued that the regulations unduly restricted their ability to incentivize wellness plan participation, and were inconsistent with what Congress had affirmatively allowed them to do under HIPAA and the ACA. Critics in the employee and disability advocacy communities, on the other hand, argued that the regulations allowed employers to offer incentives or penalties that were far too onerous, which could render employee participation in a wellness plan coercive and involuntary.

In the fall of 2016, the American Association of Retired Persons (AARP) sued the EEOC in federal district court to enjoin its new wellness regulations, arguing that they were insufficiently protective and allowed employers to offer wellness plan incentives that rendered participation involuntary.[310] The court declined to grant a preliminary injunction, but after briefing, granted summary judgment in AARP's favor in August 2017. Specifically, the court held that the EEOC had offered insufficient economic analysis to justify its setting a permissible rate at 30% of total premium cost. Moreover, insofar that among the EEOC's stated purposes in promulgating these regulations was to "harmonize" them with HIPAA requirements, the fact that the EEOC's regulations differed in some dramatic ways undercut the agency's argument. The court vacated those portions of the regulations setting permissible incentive limits effective January 1, 2019 (other limitations on confidentiality, participation, structure, and notice that are unrelated to the financial incentive remain in effect).

In its fall 2019 regulatory agenda, the agency indicated that it expected to propose new wellness regulations in January 2020. Now that the EEOC has a confirmed Republican majority, it is possible that these efforts will move forward. Until then, employers are once more left to wonder what level of incentive the EEOC will deem to be permissible, and/or when incentives will be so great as to render participation in a workplace wellness plan involuntary. Employers and plan sponsors will want to closely scrutinize wellness plan incentives on a holistic basis to assess "voluntariness" and not simply assume that because financial limits fall within permitted HIPAA guidelines, the EEOC will take the same position.

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

310 *See AARP v. Equal Employment Opportunity Commission*, 226 F.Supp.3d 7 (D.D.C. 2016).

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 the employer fails to provide requested information or data or to make requested personnel available for interview. The EEOC continues to exercise this option, particularly dealing with systemic investigations.[311] As will be discussed, the EEOC's authority to issue subpoenas and conduct investigations is quite broad.

1. EEOC Authority to Conduct Class-Type Investigations

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

The Commission enjoys expansive authority to investigate systemic discrimination stemming from its broad legislated mandate.[312] 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."[313]

Title VII also authorizes the EEOC to issue charges on its own initiative (*i.e.*, commissioner's charges),[314] 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.[315]

2. Scope of EEOC's Investigative Authority

The touchstone of the EEOC's subpoena authority is the text of its originating statute. By statute, the Commission's authority to request information arises under Title VII, which permits it to "at all reasonable times have access to . . . any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this subchapter and is relevant to the charge under investigation."[316] The leading case interpreting the scope of this authority is the U.S. Supreme Court decision *EEOC v. Shell Oil Co.*,[317] 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."[318] 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."[319]

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

311 *See* Appendix D to this Report, which includes information on select subpoena enforcement actions the EEOC initiated in FY 2019.
312 *See* 42 U.S.C. § 2000e-5(b).
313 *EEOC v. Caterpillar, Inc.*, 409 F.3d 831, 832 (7th Cir. 2005). *But see EEOC v. Burlington Northern Santa Fe Railroad*, 669 F.3d 1154 (10th Cir. 2012) (denying enforcement of the EEOC's subpoena expanding the scope of its investigation involving two individuals); *EEOC v Royal Caribbean Cruises, Ltd.*, 771 F.3d 757 (11th Cir. 2014) (denying the EEOC's attempt to subpoena information to help support an pattern-or-practice claim, when the case at issue involved one individual only).
314 *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").
315 *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").
316 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.
317 *EEOC v. Shell Oil Co.*, 466 U.S. 54 (1984).
318 *Id.* at 59.
319 *Id.*

remains unabated.[320] 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*.[321] 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.[322] While the federal appellate courts have been split on this issue,[323] 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.[324]

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."[325] This established, for the *Union Pacific* court, that the EEOC's authority is not derivative.[326] 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*."[327] 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.

More recently, 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.[328] 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."[329]

a. Challenges to Subpoena

Challenges to subpoenas typically turn on two related issues: (1) relevance and (2) burdensomeness. The courts have been extremely deferential to the EEOC in subpoena enforcement actions. On balance, the courts have been least deferential in the Tenth and Eleventh Circuits.[330]

In FY 2019, the EEOC filed fewer subpoena enforcement actions compared to prior years.[331] Throughout the fiscal year, the EEOC filed at least 11 applications to show cause why its subpoena against the Respondent employer should not be enforced. Of the subpoena enforcement actions that were resolved, the court either ordered the Respondent employer to comply with the subpoena in whole or in part, or the EEOC voluntarily withdrew the application to show cause after the Respondent voluntarily complied with the subpoena.

The majority of the past fiscal year's subpoena enforcement actions were filed as part of the EEOC's investigation into sex discrimination and/or harassment allegations. Three were filed against related restaurant entities stemming from charges of sex discrimination against men.[332] In this matter out of the U.S. District Court for the Southern District of Texas, the charging party alleged he was denied employment as a server at all three affiliated restaurants because of his

320 *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).

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

322 *Id.* at 845.

323 *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."); *EEOC v. Federal Express Corporation*, 558 F.3d 842 (9th Cir. 2009) (holding that the issuance of a right-to-sue letter does not strip the EEOC of authority to continue to process the charge, including independent investigation of allegations of discrimination on a company-wide basis).

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

325 *Id.* at 291.

326 *Union Pacific Railroad*, 867 F.3d at 851 (7th Cir. 2017).

327 *Id.*

328 *EEOC v. VF Jeanswear LP*, No. 17-16786, 769 Fed. Appx. 477 (9th Cir. May 1, 2019), *petition for cert. filed*, No. 19-446 (Sup. Ct. Oct. 1, 2019).

329 *Id.*, slip op. at 3, citing *EEOC v. Fed. Express Corp.*, 558 F.3d 842, 855 (9th Cir. 2009).

330 *See, e.g., EEOC v. BNSF*, 669 F.3d 1154 (10th Cir. 2012) (denying the EEOC's request for nationwide recordkeeping data, as such information is not "relevant to" charges of individual disability discrimination filed by two men who applied for the same type of job in the same state) and *EEOC v. Royal Caribbean Cruises, Ltd.*, 771 F.3d 757 (11th Cir. 2014) ("Although eradicating unlawful discrimination and protecting other as-yet undiscovered victims are laudatory goals and within the Commission's broad mandate, the EEOC must still make the necessary showing of relevancy in attempting to enforce its subpoena.").

331 As discussed in previous Annual Reports on EEOC Developments, in FY 2018, the EEOC filed 18 subpoena enforcement actions; in FY 2017, 17; in FY 2016, 28; in FY 2015, 32; in FY 2014, 34; in FY 2013, 17; in FY 2012, 33; and in FY 2011, 39.

332 Applications for an Order to Show Cause Why Subpoena Should Not be Enforced, *EEOC v. Big Catch Corp.*, 4:19mc1053 (S.D. Tex.); *EEOC v. Bart V Investment Inc.*, 4:19mc1050 (S.D. Tex.); *EEOC v. Connie Seafood, Inc.*, 4:19mc1037 (S.D. Tex.) (filed Apr. 8, 2019), *notice of appeal filed*, No. 19-20395 (5th Cir. June 5, 2019).

sex. He was purportedly told the restaurants did not hire male servers. As part of its investigation into this systemic Title VII sex discrimination claim, the EEOC sought from each of the three restaurants documents and information, including employment applications, document retention policies and procedures, identities of human resource personnel, and corporate ownership documentation. The subpoenas were issued on March 13, 2018, and made 15 separate requests for information.

The Respondents filed a petition to revoke or modify the subpoenas, which the EEOC denied. The EEOC then filed its Application to Show Cause on April 8, 2019, after the Respondents refused to comply, claiming they had provided sufficient information responsive to the EEOC's requests. Namely, they claimed to have already supplied information relating to the EEOC's requests for job applications and accompanying notes for all applicants hired as servers; applications for persons not hired as servers between January 1, 2017 and the present; practices related to how employment applications are stored or deleted and where they are kept; names, title, and dates of employment for anyone with authority to hire food servers and information relating to websites where applicants could apply and all job announcements it had used.

The district court ultimately ordered the Respondents to comply with the subpoenas in full, but that decision has been appealed to the Fifth Circuit. The appeals court on July 18, 2019, in turn, granted the Respondents' request for a stay of compliance pending the appeal and consolidated the three proceedings.

In one matter filed in Maryland, the EEOC is pursuing a systemic investigation of age discrimination regarding the company's release agreement. Notably, the subpoena was issued as part of an investigation of a directed charge of discrimination under the ADEA. The matter, however, grew out of a single charging party's claim of race discrimination and "facial retaliation" because he was presented with a severance agreement that allegedly required him to waive his right to file an EEOC charge in exchange for severance pay.

The EEOC issued a request for information, and later a subpoena, citing its authority under Title VII, the ADA, GINA, EPA and the ADEA, to obtain the following:

> (1) the identity of all employees at any of Respondent's facilities who have been provided an Agreement and General Release which contains a provision that the individual must (a) waive his or her right to file any charge or complaint before any federal, state or local administrative agency and/or (b) "agree not to in any way voluntarily assist or cooperate with any individual or entity in commencing or prosecuting any action or proceeding against [company] including, but not limited to, any charges, complaints or administrative agency claims" and
>
> (2) copies of all releases offered to and/or signed by those identified by Respondent.[333]

The Respondent petitioned the EEOC to revoke its subpoena, arguing 1) the information sought bore no relevance to the charge under investigation, as required by 42 U.S.C. § 2000e-8(a), and 2) merely presenting a severance agreement cannot be "facially retaliatory" under settled case law.[334] The EEOC did not rule on that petition, but instead moved forward with its directed investigation under the ADEA only, and issued a new subpoena, requesting the same information as the initial subpoena.

According to the Respondent, it was informed of the expanded scope of the EEOC's investigation to include the ADEA in a Notice of Charge, which read, in pertinent part:

> The Commission's investigation will specifically focus on your organization's requirement that discharged employees sign a waiver releasing their rights to file any charges with the EEOC in exchange for severance pay. This requirement is facially retaliatory and interferes with employees' rights under the ADEA.[335]

333 EEOC's Memorandum In Support Of Application For An Order To Show Cause Why An Administrative Subpoena Should Not Be Enforced, p. 2, *EEOC v. Stanley Black & Decker, Inc.*, No. 1:19-cv-02599-CCB (filed Sept. 9, 2019).

334 Respondent's Response In Opposition To EEOC's Petition For Enforcement Of Administrative Subpoena And Request For Hearing, p. 1, *EEOC v. Stanley Black & Decker, Inc.*, No. 1:19-cv-02599 (D. Md.) (filed Oct. 30, 2019).

335 *Id.*, p. 7.

ADEA investigations are covered under 29 U.S.C. § 626(a), which states that investigations are to be conducted in compliance with 15 U.S.C. § 209, "which in turn refers to 15 U.S.C. § 49, granting the power to subpoena 'documentary evidence relating to any matter under investigation.'"[336] The investigative authority is broader than that conferred under Title VII, which is the basis for the Respondent's objection that the EEOC has abused its authority in issuing the subpoena. The Respondent has also objected that requesting information as to all releases and waivers offered to or signed by employees with no geographic or timeline limitations is overly broad. It did, however, provide the "general release" severance agreement letter offered specifically to the charging party. The Respondent has also argued that the EEOC lacks the authority to investigate alleged "facial retaliation," and that the subpoena is argumentative, lacks a reasonable temporal scope, and is unduly burdensome.

At the time of publication, the court had not yet ruled on this subpoena enforcement action.

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

b. Applicable Timelines for Challenging Subpoenas (Waiver Issue)

An employer may be barred from challenging a subpoena in a subpoena-enforcement action in circumstances where it does not timely move to challenge or modify the subpoena.[337] The EEOC has recently taken an aggressive stance on the "waiver" issue when dealing with employers that have generally failed to respond to the EEOC's requests for information and subpoenas. Specifically, an employer may "waive" the right to oppose enforcement of an administrative subpoena, unless it petitions the EEOC to modify or revoke the subpoena within five days of receipt of the subpoena.[338] 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."[339]

The most notable case on this issue is the Seventh Circuit's 2013 decision in *EEOC v. Aerotek*,[340] discussed in Littler's FY 2013 Annual Report, in which a federal appeals court supported the EEOC's view that an employer waived the right to challenge a subpoena by failing to file a Petition to Modify or Revoke. In *Aerotek*, a staffing agency was ordered to comply with a broadly worded subpoena that was pending for more than three years because the company filed objections *one day* late. The staffing company was accused of placing applicants according to the discriminatory preferences of its clients. The EEOC's subpoena sought a "broad range of demographic information, including the age, race, national origin, sex, and date of birth of all internal and contract employees dating back to January 2006," in addition to information about recruitment, selection, placement, and termination decisions by the company and its clients.

Despite receiving from the company about 13,000 pages of documents in response to the subpoena, the EEOC claimed the company failed to provide additional requested information. The district court held that the defendant filed its Petition to Revoke or Modify the subpoena six days after the subpoena was issued, instead of the statutorily-required five days. The Seventh Circuit agreed, finding that 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."[341]

336 *Id.* p. 10.

337 *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).

338 *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).

339 29 C.F.R. § 1601.16(b)(1).

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

341 *Id.* at 648.

Contrary to *Aerotek*, in one decision issued in FY 2017, the court more carefully considered the justifications offered by an employer for failing to file a petition to modify or revoke within the five-day period. In a decision by the U.S. District Court for the Eastern District of Kentucky, a large retailer had, like the staffing agency *Aerotek*, filed its petition a day late.[342] Unlike the staffing agency, however, it provided excuses. Whether these excuses could overcome procedural failure turned on the application of *EEOC v. Lutheran Social Services*.[343] There, the U.S. Court of Appeals for the D.C. Circuit held that there is a "strong presumption that issues parties fail to present to the agency will not be heard . . ." but the court should still consider "whether the facts and circumstances surrounding [non-compliance] are sufficiently extraordinary" to excuse non-compliance.[344] The *Lutheran* court also suggested, however, that the standard would be "quite different" in the more "typical situation where a subpoena recipient's objections rest on relevance."[345] On that suggestion, the EEOC tried to distinguish Lutheran, but the court rejected it as *dictum*. Applying *Lutheran*, the court found several circumstances that weighed against waiver: (1) the employer raised the same objections nearly a month before the subpoena was issued, (2) the parties disputed whether the deficiency even occurred, (3) the employer cited "extraordinary" postal circumstances, (4) the delay was only a day, and (5) the employer tried to comply with the requirements.[346] The court therefore ruled in favor of the employer and permitted the employer to raise challenges to the subpoena.

More recently, a federal court in Pennsylvania disagreed with the EEOC's contention that because the defendant did not timely or properly petition for revocation or modification of a subpoena in a sex and pregnancy discrimination case, it waived its objections.[347] The EEOC had claimed that because the defendant objected to the subpoena on relevance and particularity grounds, it should have complied with the regulatory requirement to seek revocation or modification of the subpoena within five days.[348] The defendant, by contrast, took the position that *Lutheran* and its progeny stand for the proposition that "not filing a petition to revoke or modify the subpoena with the EEOC does not act as a waiver of objections."[349] The court disagreed with both positions. *Lutheran*, the court explained, provides that under normal circumstances,

> objections to an administrative subpoena on grounds within the purview of the EEOC should be raised first with the EEOC in compliance with the regulation. But whether failure to properly seek administrative remedies bars an objection to the subpoena in federal court is a fact-specific analysis that considers (1) content of the subpoena and related agency communication regarding statutory and regulatory compliance, (2) grounds of the objection, and (3) when and how the objection is raised and addressed.[350]

The court noted that in the instant case, the EEOC's subpoena to the defendant and related correspondence about the requests did not reference any statutory or regulatory obligation about petitioning the EEOC to modify or revoke within the five-day timeframe. "If the EEOC desired strict compliance with 29 C.F.R. § 1601.16(b), it would be exceptionally easy to include this regulation's text or citation in the agency's cover letter, email, or subpoena itself."[351]

As to the second factor—which the court found leaned in the EEOC's favor—relevance and particularity "are squarely within the purview of the EEOC. The EEOC is well equipped to address such objections without resort to federal court guidance, and the agency's views on this subject would warrant considerable deference."[352]

342 2016 U.S. Dist. LEXIS 41071 (E.D. Ky. Mar. 29, 2016).
343 *EEOC v. Lutheran Social Services*, 186 F.3d 959 (D.C. Cir. 1999).
344 *Id.* at 959.
345 *Id.*
346 2016 U.S. Dist. LEXIS 41071, at *7.
347 *EEOC v. Service Tire Truck Centers*, 2018 U.S. Dist. LEXIS 178025 (M.D. Pa. Oct. 17, 2018).
348 *Id.* at **7-8, *citing* 29 C.F.R. § 1601.16(b)(1).
349 *Id.* at *8.
350 *Id.*, *citing Lutheran*, 186 F.3d at 964-67.
351 *Id.* at *9.
352 *Id.* [internal citations omitted].

This factor, however, is "inextricably connected" with the third, according to the court, because the defendant is not raising these objections for the first time in court. The defendant had communicated its objections to the investigator via responses to the EEOC's subpoena *duces tecum*, even though they mostly contained "formulaic objections" on the ground of over-breadth, burdensomeness, and that they sought information "not reasonably calculated to lead to the discovery of admissible evidence." That the EEOC waited two months to file the subpoena enforcement action instead of engaging with the defendant to resolve the charge "undermines the very purpose of administrative exhaustion, which is 'to allow an administrative agency to perform functions within its special competence.'"[353]

Weighing all factors, the court determined the defendant had not waived its objections to the subpoena.

It should also be noted, however, that an employer does not have the option to file a petition to modify or revoke a subpoena when faced with subpoenas involving ADEA and EPA claims.[354]

c. Scope of Information Requested

Although the EEOC's subpoena power is relatively broad, courts will often limit the scope of the requests if they are overbroad, unduly burdensome, or seek information irrelevant to the charge. In *EEOC v. Service Tire Truck Centers*,[355] the defendant objected to the breadth of the requests for complete personnel files of the charging party's supervisor, the individual who was hired for the job the charging party sought, and several comparator employees. The defendant argued that the personnel files contain "a vast amount of sensitive information including tax documents, emergency contacts, retirement plan information, personal email addresses, family information, and medical records,"[356] much of which is irrelevant to the failure-to-promote charge on account of sex/pregnancy, according to the defendant. The EEOC did not address this argument, but instead focused on the other materials sought in the personnel files, including application materials, performance reviews, disciplinary notices, leave requests, promotion documents, pay records, and discharge paperwork. The court, therefore, agreed with the defendant that the EEOC had "not made the minimal relevance showing necessary to support its wholesale request for personnel files."[357] The court therefore narrowed the scope of the subpoena to exclude "sensitive information" from the personnel files, such as medical and healthcare information unrelated to pregnancy, retirement plan information, names and other identifying details for spouses and dependents, personal email addresses, copies of social security cards, and tax information beyond earnings and salary.

The defendant also objected to the EEOC's request for the names, social security numbers, street addresses, and telephone numbers of employees at the charging party's work location. The EEOC claimed this information was necessary to identify and interview coworkers with personal knowledge of the charging party's allegations. The court agreed with the EEOC except as to the social security numbers.

d. Confidentiality Order Regarding Information Produced to the EEOC

In this same case, the defendant sought a confidentiality order regarding its responses to a number of the EEOC's information requests. The court applied Third Circuit precedent, which held that when a party requests a confidentiality order, it bears the burden of establishing good cause by demonstrating that "disclosure will work a clearly defined and serious injury to the party seeking closure."[358]

353 *Id.* at *10, citing Lutheran, 186 F.3d at 965.

354 The EEOC may initiate a systemic investigation under either the ADEA or the EPA. Under both statutes, the Commission can initiate a "directed investigation" even in the absence of a charge of discrimination, seeking data that may include broad-based requests for information and initiating a lawsuit for violation of the applicable statute. *See, e.g.*, 29 U.S.C. § 626(a) of the ADEA (the EEOC "shall have the power to make investigations. . . for the administration of this chapter); 29 C.F.R. § 1626.15 ("the Commission and its authorized representatives may investigate and gather data . . . advise employers . . . with regard to their obligations under the Act . . . and institute action . . . to obtain appropriate relief").

355 *EEOC v. Service Tire Truck Centers*, 2018 U.S. Dist. LEXIS 178025 (M.D. Pa. Oct. 17, 2018).

356 *Id.* at *11.

357 *Id.*

358 *Id.* at *14, *citing EEOC v. Kronos Inc.*, 620 F.3d 287, 302 (3d Cir. 2010).

Specifically, the court must balance public interests against private interests by considering, among other factors, (1) whether disclosure will violate any privacy interests; (2) whether the information is being sought for a legitimate purpose or an improper purpose; (3) whether disclosure of the information will cause a party embarrassment; (4) whether confidentiality is being sought over information important to public health and safety; (5) whether the sharing of information among litigants will promote fairness and efficiency; (6) whether a party benefitting from the order of confidentiality is a public entity or official; and (7) whether the case involves issues important to the public.[359]

Weighing these factors, the court determined a confidentiality order was unwarranted. The production will be made not to a private party but to the EEOC, which is prohibited from disclosing this information to the public "on pain of fines and criminal prosecution."[360] Additionally, personnel files and related personal information are excludable from Freedom of Information Act (FOIA) requests.[361] Therefore, because the EEOC is seeking the information for a legitimate purpose and the defendant had not claimed disclosure would cause embarrassment, the court found that on balance, the above factors weigh against a confidentiality order.

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

a. Supreme Court Decisions

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,[362] in which it brought the Ninth Circuit into line with her sister circuits. Rejecting the Ninth's approach, the Court held that a district court's decision to enforce an EEOC subpoena should be reviewed for abuses of discretion, not *de novo*.[363] 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."[364] For the Court, each favored a more deferential standard. Otherwise, while the Court explained that the district courts need not defer to the EEOC on what is "relevant," it did emphasize *Shell Oil*'s "established rule" that the term "relevant" be understood "generously" to permit the EEOC "access to virtually any material that might cast light on the allegations against the employer."[365]

b. Court of Appeals Decisions

In reviewing other court decisions involving subpoena enforcement actions, several decisions, as discussed below, touched on important issues such as scope of investigative privilege, judicial review, and relevance.

In *EEOC v. VF Jeanswear LP*, the EEOC sought information from the defendant company as part of an investigation of systemic, classwide gender discrimination that stemmed from an initial charge of discrimination. The EEOC's subpoena sought an order directing the defendant to "[s]ubmit an electronic database identifying all supervisors, managers, and executive employees at [defendant's] facilities during the relevant period, January 1, 2012, to present" including personal identifying information, gender, and location. The defendant petitioned the Commission to revoke the subpoena, which the EEOC denied, stating that the charging party had identified classwide gender discrimination it was investigating and required the information it had requested as part of its investigation.

359 *Id.*
360 *Id.* at *15, *citing* 42 U.S.C. § 2000e-8(e).
361 5 U.S.C. § 552(b)(3), (6).
362 *McLane Co. v EEOC*, 137 S. Ct. 1159 (2017).
363 *Id.* at 1170.
364 *Id.* at 1166-67.
365 *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.

The company declined to produce all requested information, so the EEOC sought a court order to enforce the subpoena. In that proceeding the district court determined that the requested information was not relevant to the charge based on its views that, among other things, Title VII limits the EEOC to investigating discrimination that the charging party alleges she experienced personally.[366]

On appeal, however, the Ninth Circuit found that the district court abused its discretion when it held that the subpoenaed information was not relevant to the charge.[367] According to the appellate court:

> 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. Indeed, we have held otherwise. EEOC subpoenas are enforceable so long as they seek information relevant to any of the allegations in a charge, not just those directly affecting the charging party.[368]

The Ninth Circuit also found the district court abused its discretion when it held that the subpoena was unduly burdensome. The company's estimated cost (around $10,700) of complying with the subpoena as part of an investigation into systemic and unlawful discrimination does not unduly burden a company with approximately 2,500 employees, the court held.

The Tenth Circuit has taken a more restrictive approach in reviewing the EEOC's subpoena enforcement authority. In *EEOC v. Tri-Core Reference Laboratories*,[369] the Tenth Circuit affirmed the lower court's decision to deny an application to enforce a pattern-or-practice subpoena that arose out of an individual charge of discrimination. The court concluded, "[g]iven the EEOC's paltry explanation of how the . . . request was relevant, the overbreadth of the request, and the EEOC's burden of showing the subpoena's relevancy to the charge," it could not "say the district court abused its discretion."[370]

On the other hand, taking a broader review of the related principle of burdensomeness, the Sixth Circuit ruled in the EEOC's favor regarding evidence to which the EEOC is entitled.[371] At issue was how the employer stored and disclosed employees' medical information. While this was related to the charge, the EEOC sought company-wide evidence on how the information is stored and disclosed. Rejecting the employer's unduly burdensome request, the court found that, because the employer had not shown any material undue burden and had in fact admitted the information could be transmitted electronically, the EEOC was entitled to it.[372]

Regardless of an investigation's scope relative to the charge, the parties and courts also have to grapple with the evidentiary issues that may arise. In the *EEOC v. BDO U.S.A. LLP*,[373] for instance, the Fifth Circuit decided whether the district court erred when it affirmed the magistrate judge's ruling that the documents were privileged, without an *in camera* inspection and without supporting documentation supporting why the documents were privileged. In deciding the magistrate judge did so err, the court held that the "the privilege log" provided by the employer "lacked sufficient detail to ascertain whether" the withheld documents came within the privilege's scope. In the view of the court, the magistrate judge therefore erred when placing the burden on the EEOC to show that the defendant's withheld communications were not privileged.[374]

Determining whether a magistrate judge errs is no easy matter. It depends, in large part, on the district court's standard of review, which in turn depends on whether an application to enforce an administrative subpoena is a dispositive motion. A magistrate judge's findings of fact are reviewed de novo for dispositive motions, clear error for non-dispositive motions.[375] While the question has already been decided in the Third Circuit as precedent, its application is not without issue. In *EEOC v. City of Long Branch*,[376] for instance, the district court had misapplied the precedent and treated the magistrate judge's ruling as a non-dispositive motion. On appeal, therefore, the Third Circuit affirmed the circuit precedent treating an application as dispositive and remanded the case to the district court for consideration in the first instance or

366 *EEOC v. VF Jeanswear LP*, No. MC-16-00047, 2017 WL 2861182 (D. Ariz. July 5, 2017).
367 *EEOC v. VF Jeanswear LP*, No. 17-16786, 769 Fed. Appx. 477 (9th Cir. May 1, 2019), *petition for cert. filed*, No. 19-446 (Sup. Ct. Oct. 1, 2019).
368 *Id.*, slip op. at 3, citing *EEOC v. Fed. Express Corp.*, 558 F.3d 842, 855 (9th Cir. 2009).
369 *EEOC v. Tri-Core Reference Labs.*, 849 F.3d 929 (10th Cir. 2017). *See also EEOC v Royal Caribbean Cruises, Ltd.*, 771 F.3d 757 (11th Cir. 2014), in which the Eleventh Circuit limited the scope of a subpoena enforcement action.
370 *Tri-Core Reference Labs*, 849 F.3d at 942.
371 *EEOC v. UPS*, 859 F.3d 375 (6th Cir. 2017).
372 *Id.* at 380.
373 *EEOC v. BDO U.S.A. LLP*, 876 F.3d 690 (5th Cir. 2017).
374 *Id.* at **12-13.
375 28 U.S.C. § 636(b)(1)(A), (B).
376 *EEOC v. City of Long Branch*, 866 F.3d 93 (3d Cir. 2017).

reference of the motion to a magistrate judge for a report and recommendation.[377] On remand, the district court ruled in the EEOC's favor.

4. District Court Cases Involving Broad-Based Investigation by the EEOC

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

In one FY 2019 decision, the court considered the defendant's motion to quash the EEOC's subpoena on the grounds that the underlying charge was invalid and complying with the subpoena would be unduly burdensome.

In *EEOC v. Joon, LLC*,[378] the EEOC was investigating a claim that the defendant discriminates against Korean workers. The charging party is a former employee who claimed that since March 3, 2016, the defendant had a practice of employing Korean employees through an internship program that subjected them to various forms of disparate treatment, including forced overtime and different timekeeping practices, and that this discrimination is ongoing. The charging party filed a separate charge alleging he was discriminated against based on his own Korean nationality, and that this resulted in his constructive discharge on March 26, 2015.

The defendant first alleged that the EEOC had not made an initial showing that the discrimination charge itself was valid. According to the defendant, the EEOC's subpoena was not timely, as an alleged act of discrimination occurred more than 180 days prior to the filing of the charge. The court rejected that argument as premature, as disputed facts relating to timeliness are not appropriate at the subpoena enforcement stage, plus the nature of the discrimination was argued to be of a continuing nature.

The defendant next claimed that the EEOC's enforcement responsibilities had not yet been triggered because the charging party's allegations were not based on his personal knowledge. The EEOC's "enforcement responsibilities are triggered by the filing of a specific sworn charge of discrimination."[379]

The court similarly rejected this argument, as EEOC regulations specifically allow for third-party charges of discrimination. "A charge on behalf of a person claiming to be aggrieved may be made by any person, agency, or organization. The written charge need not identify by name the person on whose behalf it is made."[380]

Regarding the scope of the requests, the defendant claimed they were unduly broad and burdensome as they sought information regarding discrimination not allegedly suffered by the charging party. The court disagreed, noting, "this artificial limitation on the scope of the EEOC's investigation ignores the EEOC's power to investigate third-party charges of discrimination."[381]

The defendant's objection also lacked specificity, the court found. The defendant had argued the subpoena was burdensome because it would require the company to search "the email accounts and text messages of countless employees" and "to manually review countless files and documents." This would require the company to "reassign several employees for days or weeks to the task of searching and reviewing responsive documents."[382] Without meaningful specificity, the defendant's evidence of undue burden was only "moderately persuasive," the court found, especially when the record showed the EEOC had no reasonable alternatives to obtain information to substantiate the charge.

The magistrate judge therefore recommended that the EEOC's application to enforce the subpoena be granted, but did narrow the temporal scope of the requests. Specifically, the magistrate recommended that the various requests be limited from March 3, 2016 to the present. The magistrate also recommended that the defendant be permitted to cull its electronically stored information by using a set of defined search terms and review for production only the documents returned by this keyword search.

377 *Id. at* 101-02.
378 *EEOC v. Joon, LLC*, 2019 U.S. Dist. LEXIS 35015 (M.D. Ala. Mar. 4, 2019).
379 *Id.* at 7, *citing University of Pa. v. EEOC*, 493 U.S. 182, 190, 110 S. Ct. 577 (1990).
380 *Id.*, *citing* 29 C.F.R. § 1601.7.
381 *Id.* at *11.
382 *Id.* at *12.

More information on the EEOC's subpoena enforcement activities for FY 2019 can be found in Appendix D 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.[383] Only after such conciliation attempts may the EEOC file a civil action against the employer.[384] If the EEOC fails to conciliate in good faith prior to filing suit, the court may stay the proceedings to allow for conciliation or dismiss the case.

Employers in recent years have challenged the sufficiency of the EEOC's investigation and conciliation efforts. In April 2015, the Supreme Court addressed EEOC conciliation obligations in *Mach Mining v. EEOC*.[385] 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 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. The EEOC must try to engage the employer in discussion to give the employer a chance to remedy the allegedly discriminatory practice. Judicial review of whether these requirements are met is appropriate, but "narrow." It is just a "barebones review" of the conciliation process and a court is not to examine positions the EEOC takes during the conciliation process, since the EEOC will have "expansive discretion" to decide "how to conduct conciliation efforts" and "when to end them."

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

On remand, the EEOC moved to strike part of *Mach Mining*'s memorandum in opposition to the EEOC's motion for partial summary judgment because it contained information from confidential settlement discussions (and the EEOC wished to bar any future disclosure of "anything said or done" during conciliation).[386] 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.'"[387] The court also held that the defendant-employer had no right to inquire about calculations for damages during the conciliation process.[388]

Courts continue to clarify how charges and conciliations affect the EEOC's authority to investigate and litigate.

1. Post-*Mach Mining* Decisions

Subsequent to the Supreme Court's *Mach Mining* decision, in *Arizona ex rel. Horne v. Geo Group, Inc.*, a lawsuit in which the EEOC alleged that a purported class of 20 female employees was sexually harassed at two correctional facilities, the Ninth Circuit concluded that the EEOC could meet its conciliation and requirements *without* naming individual class members.[389] The court "reject[ed] the [] premise that the EEOC . . . must identify and conciliate on behalf of each individual aggrieved employee . . . prior to filing a lawsuit seeking recovery on behalf of a class."[390] It held that, instead, the EEOC "satisf[ies] [its] pre-suit conciliation requirements to bring a class action if [it] attempt[s] to conciliate on behalf of an identified class of individuals

383 42 U.S.C. § 2000e-5(b).
384 42 U.S.C. § 2000e-5(f)(1).
385 *Mach Mining*, LLC v. EEOC, 135 S. Ct. 1645 (2015).
386 *EEOC v. Mach Mining*, LLC, 161 F. Supp. 3d 632, 635-636 (S.D. Ill. 2016).
387 *Id.* at 635-636.
388 *Id.* at 635.
389 *Arizona ex rel. Horne v. Geo Group, Inc.*, 816 F.3d 1189 (9th Cir. 2016).
390 *Id.* at 1200.

prior to bringing suit."[391] The court reasoned that this holding was "consistent with the Supreme Court's broad interpretation of the EEOC's enforcement powers."[392] In *EEOC v. Bass Pro Outdoor World, LLC*, the Fifth Circuit similarly held, based on *Mach Mining*, that the EEOC need *not* name specific aggrieved individuals as part of the conciliation process in a pattern-or-practice lawsuit.[393]

The same rule applies in cases brought under Section 706. In *EEOC v. New Mexico*, the District of New Mexico denied the employer's motion to dismiss claims brought on behalf of previously unidentified aggrieved individuals, holding that actual pre-litigation notice of such claims is not relevant to whether a complaint states a cognizable claim.[394] Noting that it was unable to identify authority to the contrary, the court rejected the employer's request that the court evaluate whether the employer had notice of such claims "as part of the notice pleading inquiry."[395] Ultimately, the court rejected the state's motion for partial summary judgment as to the previously unidentified individuals, holding that the EEOC 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*.[396]

In *EEOC v. UPS*, the Eastern District of New York also held that the EEOC need *not* name specific aggrieved individuals where it investigated and conciliated with regard to claims arising out of the same alleged course of conduct.[397] There, the court granted the EEOC's motion to strike an affirmative defense that it had failed to conciliate with regard to each allegedly aggrieved individual in light of "the limited nature of judicial review of the scope of the EEOC's duty to conciliate."[398]

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

In *EEOC v. Dimensions Healthcare System*, the EEOC sued on behalf of a single plaintiff, alleging sex discrimination.[399] The District of Maryland held that the EEOC met its conciliation obligations by submitting a declaration in which the Director of the Commission's Baltimore Field Office noted the EEOC had "engaged in communications with the [Employer] . . . , including sending [the Employer] a conciliation proposal."[400] The district court noted that "to the extent Dimensions Healthcare requests that this Court pry into whether the EEOC negotiated in good faith, any such argument was explicitly foreclosed by *Mach Mining*, as multiple courts have recognized since the Supreme Court issued that decision."[401]

In *EEOC v. East Columbus Host, LLC*,[402] two EEOC investigators informed the employer on separate occasions that they would recommend a finding that certain of its employees (all but one went unnamed) were sexually harassed and subjected to retaliation. The employer was invited to provide additional information but did not, claiming it could not respond unless it knew the identity of the women. The EEOC issued a determination that the employer violated Title VII, and submitted its only demand letter on behalf of the women. The employer did not accept the demand. The EEOC notified the employer that conciliation efforts had failed and then filed suit. The court found that the EEOC complied with the "bare bones" conciliation requirement by (1) informing the employer about the specific allegations, (2) trying to engage the employer in some form of discussion so as to give the employer a chance to remedy the alleged improper practices, and (3) issuing a notice of failure to conciliate. The court said *Mach Mining* "prohibits a court from doing a 'deep dive' into the conciliation process," and that it must only look for "bare compliance."[403]

391 *Id.*
392 *Id.* at 1201.
393 *EEOC v. Bass Pro Outdoor World. LLC*, 826 F.3d 791, 805 (5th Cir. 2016).
394 *EEOC v. New Mexico*, 2017 U.S. Dist. LEXIS 198770 (D. N.M. Dec. 4, 2017).
395 *Id.* at *8-10.
396 *EEOC v. New Mexico*, 2017 U.S. Dist. LEXIS 198770, *12-14 (D. N.M. Dec. 4, 2017).
397 *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).
398 2017 U.S. Dist. LEXIS 34929 at *29.
399 *EEOC v. Dimensions Healthcare System*, 188 F.Supp.3d 517 (D. Md. 2016).
400 *Id.* at 519.
401 *Id.* at 523.
402 *EEOC v. East Columbus Host, LLC*, 2016 U.S. Dist. LEXIS 118993 (S.D. Ohio Sept. 2, 2016).
403 *Id.* at *33.

In *EEOC v. Amsted Rail Co.*,[404] the court found that the EEOC had satisfied its obligation to notify the employer of the disability discrimination allegations against it, even though the communications did not name the relevant disability. The court also declined the employer's request to review the EEOC's correspondence regarding conciliation to determine whether the agency's conciliation efforts were a "sham." In light of *Mach Mining*, the court concluded it could only look to determine whether discussion took place and it reached the conclusion that it had.

In *EEOC v. MJC, Inc.*, the District of Hawaii rejected the defendants' motion to stay proceedings, finding that the defendants had failed to produce credible evidence establishing the EEOC's failure to conciliate.[405] In doing so, the court analyzed the EEOC's determination letter and a series of correspondence from defendants to the EEOC, finding that they established that the EEOC had satisfied its conciliation obligations under *Mach Mining* insofar as the EEOC had sufficiently notified the defendants of the claim, invited conciliation through the determination letter, and offered to settle the charge by proposing a settlement involving the payment of monetary damages.[406]

Another court rejected an argument by an employer that the EEOC must present specific evidence supporting its allegations during the conciliation process, and reinforced the principle that the EEOC need only notify the employer of the alleged unlawful practices.[407] In *EEOC v. Stone Pony Pizza, Inc.*, the court found that a determination letter and an invitation to engage in a face-to-face conciliation conference sufficed to satisfy the conciliation requirements.[408] Some courts have accepted less. In *EEOC v. PC Iron, Inc.*, the Southern District of California struck a failure-to-conciliate affirmative defense, finding that the EEOC had satisfied its conciliation obligations where the employer was aware of a discrimination claim not addressed in the EEOC's determination letter, and had made an offer to resolve the matter in response to the charge.[409]

Accordingly, for these same reasons, the courts also have stricken references to the substance of the EEOC's conciliation efforts from motions to dismiss. In *EEOC v. Phase 2 Investments, Inc.*, for example, the District of Maryland granted a motion to strike such references based on Title VII's prohibition against the disclosure of statements made during the conciliation process absent an agreement between the parties.[410] In so doing, the court reasoned that the defendant had not asserted a failure-to-conciliate defense and, even if it had, under *Mach Mining*, doing so "would not open the door to the introduction of all things said or done during conciliation."[411]

While the burden on the EEOC to engage in conciliation efforts is light, the courts are clear that the EEOC must engage in at least *some* efforts at conciliation. Courts finding in favor of the employer generally do so only in cases where no conciliation takes place. In *EEOC v. College America of Denver, Inc.*, a case in which the court ultimately determined the EEOC failed to meet its conciliation requirement with respect to claims challenging an employer's separation agreements, the EEOC argued it attempted to conciliate separate, unrelated claims and that a case cannot be dismissed for lack of conciliation if any effort to conciliate has taken place.[412] The district court rejected that argument, reasoning that to satisfy its conciliation obligations the EEOC must give an employer "an adequate opportunity to respond to all charges and negotiate possible settlements," and in this case, the EEOC did not do that. Since there was no evidence the EEOC made *any* effort to conciliate its allegations that the separation agreements at issue violated the ADEA, the court refused to stay proceedings to permit conciliation on that claim and dismissed the EEOC's claim "for lack of jurisdiction as a result of the EEOC's failure to satisfy the jurisdictional prerequisites of notice and conciliation."[413] This ruling was upheld on a motion for reconsideration.[414]

In *EEOC v. Dolgencorp, LLC*, the Northern District of Illinois held that the EEOC met its pre-suit investigation and conciliation obligations under the *Mach Mining* standard before filing suit.[415] The EEOC claimed that the employer's use of background checks in hiring and firing discriminated against employees on the basis of race in violation of Title VII and moved for partial summary judgment.[416] The employer argued that the EEOC failed to meet its conciliation obligations under *Mach*

404 *EEOC v. Amsted Rail Co.*, 2016 U.S. Dist. LEXIS 6466 (S.D. Ill. Jan. 20, 2016).
405 *EEOC v. MJC, Inc.*, 306 F. Supp. 3d 1204 (D. Haw. 2018).
406 *Id.* at 1219.
407 *EEOC v. Lawler Foods*, 2015 U.S. Dist. LEXIS 167178 (S.D. Tex. Dec. 4, 2015).
408 *EEOC v. Stone Pony Pizza, Inc.*, 2016 U.S. Dist. LEXIS 115658 (N.D. Miss. July 7, 2016).
409 *EEOC v. PC Iron, Inc.*, 316 F. Supp. 3d 1221, 1231-32 (S.D. Cal. 2018).
410 *EEOC v. Phase 2 Investments, Inc.*, 2018 U.S. Dist. LEXIS 22546 (D. Md. Dec. Feb. 12, 2018).
411 *Id.* at *25.
412 *EEOC v. College America of Denver, Inc.*, 75 F. Supp. 3d 1294, 1302-03 (D. Colo. Dec. 2, 2014).
413 *Id.*
414 *EEOC v. College America of Denver, Inc.*, 2015 U.S. Dist. LEXIS 144302 (D. Colo. Oct. 23, 2015). However, the court allowed the EEOC's retaliation claim to stand.
415 *EEOC v. Dolgencorp*, 249 F. Supp. 3d 890 (N.D. Ill. 2017).
416 *Id.* at 891.

Mining by failing to provide adequate notice of the allegations of discrimination and failing to engage adequately in conciliation discussions.[417] With respect to the adequacy of the EEOC's notice, the court held that the EEOC had adequately identified the persons or class of persons affected by the alleged discriminatory practice in two letters of determination it sent to the employer.[418] With regard to the substance of the conciliation discussions, the court held that it was bound under *Mach Mining* to determine only whether the EEOC had attempted to confer regarding the charge, which it had.[419]

In *EEOC v. Western Distributing Co.*, the District of Colorado held that the EEOC met its pre-suit conciliation and investigation obligations.[420] Noting that the EEOC had engaged the employer in discussions regarding remedying the discriminatory practice by providing a settlement offer, meeting in person, and exchanging letters, the court held the EEOC had met its conciliation obligations.[421] The court also rejected the employer's argument that the EEOC was required to identify all aggrieved individuals to satisfy the conciliation requirement, noting that Mach Mining makes clear that the EEOC need not identify each aggrieved individual, even if doing so would have placed the employer in a better position to respond to the EEOC's settlement offer.[422]

In *EEOC v. MVM, Inc.,* the District of Maryland held that the EEOC established that it had complied with both prongs of Title VII's conciliation requirement by presenting evidence that it had informed the employer of the specific allegations and attempted to engage the employer "in some form of discussion (whether written or oral), so as to give the employer an opportunity to remedy the allegedly discriminatory practice."[423] Applying *Mach Mining*, the court held that no further inquiry was necessary and that the EEOC had acted well within its "wide latitude" over the conciliation process.[424]

Most recently, in *EEOC v. George Washington University*, the District Court for the District of Columbia 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."[425]

In *EEOC v. CRST Van Expedited, Inc.*, however, the court upheld a previous ruling dismissing the case due to a complete failure to investigate or conciliate the claims.[426] The court distinguished *Mach Mining*, noting that it addressed the level of judicial inquiry into the EEOC's conciliation process, and did not prevent the court from dismissing where no investigation or conciliation efforts took place at all. Further, the court noted that, because it found that no investigation or conciliation efforts occurred, it was not limited to *Mach Mining*'s directive that the case be stayed in order to allow the EEOC to comply with these requirements.[427]

In *EEOC v. Sensient Dehydrated Flavors Co.*, the Eastern District of California relied on *CRST* in upholding an employer's challenge to discovery demands served by the EEOC that went well beyond the scope of the allegations in the charge in issue.[428] The EEOC claimed that the court had impermissibly challenged the sufficiency of the EEOC's investigation in violation of *Mach Mining*. However, the court distinguished *Mach Mining* on the grounds that the investigation the EEOC wanted to perform was completely unrelated to the charges that would have been conciliated, and accordingly, *Mach Mining* was not implicated.[429]

2. 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.

417 *Id.* at 893.
418 *Id.* at 893-94.
419 *Id.*
420 *EEOC v. Western Distribution Co.*, 218 F. Supp. 3d 1231 (D. Colo. 2016).
421 *Id.*
422 *Id.*, *citing Mach Mining*, LLC v. EEOC, 135 S.Ct. 1645, 1654 (2015).
423 *EEOC v. MVM, Inc.*, 2018 U.S. Dist. LEXIS 66217 (D. Md. Apr. 18, 2018).
424 *Id.* at **9-13.
425 *EEOC v. George Wash. Univ.*, 2019 U.S. Dist. LEXIS 77605, at **23-26 (D.D.C. Dec. 7, 2018).
426 *EEOC v. CRST Van Expedited, Inc.*, 2015 U.S. Dist. LEXIS 166797 (N.D. Iowa Dec. 14, 2015).
427 *Id.* at *8.
428 *EEOC v. Sensient Dehydrated Flavors Co.*, 2016 U.S. Dist. LEXIS 109479 (E.D. Cal. Aug. 17, 2016).
429 *Id.* at *21.

In *EEOC v. CVS Pharmacy, Inc.*,[430] 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.[431] 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."[432] 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).[433] 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.[434]

3. Admissibility of Evidence of Substance of 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."[435] In *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.[436] 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."[437]

430 *EEOC v. CVS Pharmacy, Inc.*, 809 F.3d 335 (7th Cir. 2015).
431 *Id.* at 340-41.
432 *Id.* at 341-42.
433 *Id.* at 342.
434 *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.
435 42 U.S.C. § 2000e-5(b).
436 *EEOC v. CRST Int'l, Inc.*, 351 F. Supp. 3d 1163, 1174 (D. Iowa 2018).
437 *Id. at* 1175, *citing Mach Mining*, 135 S.Ct. at 1655.

V. REVIEW OF NOTEWORTHY EEOC LITIGATION AND COURT OPINIONS

A. Pleadings

1. Motion to Dismiss/Scope of Complaint

Although the courts have continued to be liberal in construing the EEOC's complaints where a motion to dismiss is filed, some basic pleading requirements must still be met. In FY 2019, for example, a federal district court in Florida placed some limitations on the liberal pleading standard.[438] In this case, the EEOC filed a complaint against the employer alleging Title VII race discrimination. In response to the employer's motion to dismiss, the EEOC asserted that the employer misunderstood the Commission's legal theories. The employer sought leave to file a reply in support of its motion to dismiss. In evaluating the employer's motion to file a reply, the court determined that the EEOC had failed to set forth its claims of disparate impact and disparate treatment separately which is what caused the "misunderstanding" regarding the EEOC's legal theories. The EEOC argued that it was not necessary for it to assert these claims separately, but the court found this argument unpersuasive. 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."[439] Because separating the disparate impact and disparate treatment claims would promote clarity, the court directed the EEOC to file an amended complaint with separate counts and facts in support of each count.

In a unique circumstance, a district court in Texas considered a motion to dismiss filed by the EEOC. 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.[440] 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, in 2018, 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 that is 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 this 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 for lack of subject matter jurisdiction.

2. Lack of Particularity

A case out of Washington D.C. showed that courts may impose a low particularity hurdle for pleading by the EEOC, allowing complaints to survive a motion to dismiss even when the EEOC does not plead all the elements of a *prima facie* case. In this case, the EEOC brought suit against the employer, alleging Title VII and Equal Pay Act violations.[441] The crux of the EEOC's complaint were allegations that a female employee was paid significantly less than a male counterpart for substantially similar work, and that the employer failed to provide the female employee with promotion opportunities, subjecting her to disparate terms and conditions of employment. The employer moved to dismiss for failure to state a claim. The court opined that "[a]t the motion to dismiss stage, the district court cannot throw out a complaint even if the plaintiff did not plead the elements of a *prima facie* case."[442] The court reasoned whether the job descriptions of the two employees represented substantially similar work was irrelevant, as the EEOC had pled facts sufficient to state a claim by stating that the female employee was being paid less than a male employee for substantially similar work. The court held that at the pleading stage, "[m]erely alleging that the employer's proffered reasons for the adverse employment actions is [sic] false may support an inference of discrimination sufficient to survive a motion to dismiss."[443] The EEOC had pled facts that could plausibly support a reasonable inference that the employer had violated Title VII, and therefore, the employer's motion to dismiss for failure to state a claim was denied.

438 *EEOC v. Jacksonville Plumbers & Pipefitters Joint Apprenticeship & Training Trust*, 2018 U.S. Dist. LEXIS 168834 (M.D. Fla. Oct. 1, 2018).
439 *Id.* at *2 (M.D. Fla. Oct. 1, 2018).
440 *BNSF Railway Co. v. EEOC*, 2018 U.S. Dist. LEXIS 226251 (N.D. Tex. Nov. 27, 2018).
441 *EEOC v. George Wash. Univ.*, 2018 U.S. Dist. LEXIS 77605 (D.D.C. May 8, 2019).
442 *Id.* at **13-14 (Dist. D.C. May 8, 2019).
443 *Id.* at *20 (internal citation omitted).

3. Key Issues in Class-Related Allegations

a. Disparate Impact Claims

When the EEOC brings allegations about employment practices that affect a *class* of employees, as opposed to specific employees, the EEOC must satisfy additional pleadings requirements. In the same Southern District of Florida case discussed above, a district court ordered the EEOC to amend its complaint for clarity at the motion to dismiss stage.[444] In its complaint, the EEOC alleged that an employer's employment practices discriminated on the basis of race in violation of Title VII. The complaint did not specify whether the alleged discriminatory policies had a disparate impact—meaning that a neutrally applied policy had an unintentionally disproportionate impact on a protected group—or disparate treatment, in which a policy intentionally "singles out" of members of a protected group. The EEOC argued that it was not required to assert the two claims separately, but the court disagreed. In order to promote clarity, it was necessary for the EEOC to plead its disparate impact and disparate treatment claims separately, and support each claim with separate, pertinent facts.

b. Special Issues Regarding ADEA Claims

On occasion, claims arising under the ADEA differ from EEOC enforcement actions of other federal statutes, such as Title VII. In New York, a district court addressed the question of whether the EEOC is limited by the 300-day statute of limitations period of the individual charge underlying the enforcement action in its ability to seek redress for statutory violations.[445] In this case, the employer filed a partial motion to dismiss the EEOC's complaint, arguing that the EEOC's alleged violations of Title VII, the ADA, and the ADEA occurred outside the 300-day window established by the aggrieved employee's administrative charge, and therefore were time-barred. The court ultimately denied the employer's motion, but on slightly different grounds for the Title VII and ADA claims than the alleged ADEA violations. The court determined that the EEOC's Title VII and the ADA claims were constrained by the 300-day limitations period of the individual's charge. For the ADEA, however, the court held that the EEOC's power to investigate and litigate violations of the ADEA was not dependent on the filing of an aggrieved employee's administrative charge at all, and that "ADEA actions are indisputably not subject to the 300-day charge-filing period applicable to private actions."[446]

If the aggrieved employee wishes to intervene in an ADEA action, the employee must do so within 90 days of receipt of a right-to-sue letter. In a case arising in Texas, the Fifth Circuit heard an appeal of a district court's denial of an individual's motions both to join and to intervene in an ADEA enforcement action.[447] The individual seeking to intervene in the EEOC's enforcement action against the employer was a former employee whose administrative charge of alleged ADEA violations spurred the EEOC to investigate and bring an action against the employer. The former employee had been issued a right-to-sue letter at the close of the investigation. The Fifth Circuit determined it lacked jurisdiction to review the district court's decision not to allow the employee to join the suit because the district court's consent decree was not a "final order," which would make the employee's motion appealable. On the employee's motion to intervene, the Fifth Circuit affirmed the decision of the district court, holding that the district court did not abuse its discretion in denying the employee's motion to intervene because the employee had not filed an individual lawsuit within the 90 period set forth in the right-to-sue letter.

4. Who is the Employer?

In FY 2019, courts addressed successorship as it relates to liability for claims brought by the EEOC.

In a decision out of the Western District of Pennsylvania, the EEOC sought to enforce a discovery subpoena served on a third party.[448] The EEOC subpoena sought information concerning whether the third party was a successor in interest to the defendant "for purposes of enforcing its judgment."[449] The third party argued that the subpoena was not enforceable because the defendant was subject to a bankruptcy stay and "actions against a successor in interest to the debtor in a bankruptcy proceeding are subject to the automatic stay."[450] The third party also argued that the bankruptcy stay barred the

444 *EEOC v. Jacksonville Plumbers & Pipefitters Joint Apprenticeship & Training Trust*, 2018 U.S. Dist. LEXIS 168834 (M.D. Fla. Oct. 1, 2018).
445 *EEOC v. Staffing Solutions of WNY*, 2018 U.S. Dist. LEXIS 207186 (W.D.N.Y. Dec. 6, 2018).
446 *Id.* at *5 (internal citation omitted).
447 *EEOC v. JC Wings Enterprises, LLC*, 2019 U.S. App. LEXIS 26465 (5th Cir. Aug. 30, 2019).
448 *EEOC v. Scott Med. Health Ctr., P.C.*, 2018 U.S. Dist. LEXIS 183552, at *2 (W.D. Pa. Oct. 26, 2018).
449 *Id.*
450 *Id.* at *3 (W.D. Pa. Oct. 26, 2018).

EEOC from taking any actions against it to enforce the money judgment against the defendant. The court rejected the third party's arguments, holding that the subpoena was enforceable because the underlying judgment also contained an "injunctive component" and the bankruptcy stay statute expressly applies only to money judgments.[451] Thus, the court concluded that because the EEOC—"a government agency exercising its police and regulatory power—may bring an action to enforce an injunction against a successor in interest to Defendant, [the EEOC] must have the ability to subpoena a putative successor in interest for the purpose of assessing whether that entity is a successor."[452]

In New Mexico, a district court addressed two issues related to successorship: jurisdiction and liability. The successor (more specifically, the successor to the successor) argued that the court lacked jurisdiction because the successor was not named in the original EEOC charge, and did not have notice of the charge or an opportunity to voluntarily comply with the law.[453] Relying on the Supreme Court's recent *Fort Bend* decision holding that "Title VII's charge-filing requirement is not of jurisdictional cast," the court rejected the successor's jurisdictional challenge "because it is now clear that Title VII jurisdiction does not hinge on notice."[454] Turning to the question of successor liability, the New Mexico court distilled the nine-factor *MacMillan* test for determining such liability to the following three factors: (1) whether the successor employer had prior notice of the claim against the predecessor; (2) whether the predecessor is able, or was able prior to the purchase, to provide the relief requested; and (3) whether there has been a sufficient continuity in the business operations of the predecessor and successor.[455] The court focused on the first notice factor and, assuming without deciding that constructive notice would be sufficient, held that the complaint's allegations were insufficient to establish that the successor had constructive notice of the claim.[456] In rejecting the EEOC's argument that the existence of the lawsuit combined with the successor's due diligence was sufficient to establish constructive notice, the court stated: "The notice analysis does not turn on the diligence exercised. Rather, it turns on whether there were facts and circumstances of which a party had a duty to take notice. Imposing a duty to uncover an employment dispute involving a predecessor's predecessor, with little or no knowledge of circumstances that mandate further inquiry, would turn constructive notice into needle-in-a-haystack notice."[457]

A district court in the Southern District of Florida denied a motion for final default judgment against the alleged predecessor-in-interest defendant.[458] The court concluded that, where the EEOC's "primary theory of liability is that [one co-defendant] is a successor in liability to [the other co-defendant], and all of [the EEOC's] claims have been asserted against both [of the co-defendants], . . . granting final default judgment would be inappropriate and premature before [the alleged successor's] liability is fully adjudicated."[459]

In a decision out of the Southern District of Mississippi, the court rejected an owner's attempt to appear *pro se*, recognizing that the owner's two LLCs—as opposed to the owner individually—were the defendants in the litigation.[460] The court reiterated the "well-settled" rule that "a corporation may not appear in federal court unless represented by an attorney" and stated that where a corporation fails to hire counsel to represent it, a court may strike its defenses.[461]

Courts in FY 2019 also addressed joint-employment issues. The Ninth Circuit reversed a district court decision holding that two fruit growing operations were not joint employers with a labor contractor of temporary foreign workers.[462] The growers contracted with the labor contractor to recruit temporary workers for their orchards.[463] All of the parties agreed that the growers and labor contractor were joint employers of the workers with respect to "orchard-related matters" (*i.e.*, working conditions in the orchards).[464] With respect to "non-orchard-related matters" (*i.e.*, housing, meals, transportation, and payment of wages), however, the district court held that the EEOC had not plausibly alleged that the growers were joint employers and, accordingly, dismissed all allegations against the growers as to non-orchard-related matters.[465]

451 *Id.* at **4-5.
452 *Id.* at **5-6.
453 *EEOC v. Roark Whitten Hospitality 2, LP*, 2019 U.S. Dist. LEXIS 142185, at *4 (D.N.M. Aug. 20, 2019).
454 *Id.*, *citing Fort Bend Cty. v. Davis*, 139 S. Ct. 1843, 1850-51 (2019).
455 *Id.* at **6-7.
456 *Id.* at **8-9.
457 *Id.* at *11 (internal citation omitted).
458 *EEOC v. Universal Diversified Enters.*, 2019 U.S. Dist. LEXIS 73601 (S.D. Fla. Apr. 3, 2019).
459 *Id.* at **2-3 (S.D. Fla. Apr. 3, 2019).
460 *EEOC v. Danny's Rest.*, 2018 U.S. Dist. LEXIS 172915, at *2 (S.D. Miss. Oct. 5, 2018).
461 *Id.*
462 *EEOC v. Global Horizons, Inc.*, 2019 U.S. App. LEXIS 3670 (9th Cir. Feb. 6, 2019).
463 *Id.* at *4.
464 *Id.* at *6.
465 *Id.* at **5-6.

On appeal, in a case of first impression, the Ninth Circuit adopted the common-law agency test to determine whether an entity may be held liable as a joint employer under Title VII (rejecting the economic-reality test).[466] Under this test, the court found that the element of control was determinative.[467] The court recognized that, under the applicable statute, the growers were responsible for providing housing, meals, transportation, and wages to the temporary foreign workers.[468] Thus, even though the growers had contracted with the labor contractor to provide those services, "responsibility for compliance ultimately rested on the [g]rowers' shoulders."[469] Thus, in reversing the district court decision dismissing the EEOC's claim as to non-orchard-related matters, the Ninth Circuit stated that the "power to control the manner in which housing, meals, transportation, and wages were provided to the [foreign] workers, even if never exercised, is sufficient to render the [g]rowers joint employers as to non-orchard-related matters."[470]

5. EEOC Motions, Challenges to Affirmative Defenses

When amending pleadings, care must be taken to do so expeditiously after learning of facts that warrant amendment. For example, in a case out of the Northern District of Iowa, after learning additional facts in discovery, the defendants moved to amend their answer to deny that the EEOC had satisfied all conditions precedent to bringing the action.[471] Analyzing the motion under Rule 16(b)'s good-cause standard, the court first found that the defendants had shown good cause for not bringing the motion prior to the date during discovery on which they obtained the relevant information.[472] The court nonetheless denied the motion, however, because the defendants offered no explanation for the five-month delay between the date on which they obtained the information alerting them of the need to amend, and the date on which they filed their motion to amend.[473]

At the end of 2018, two courts confirmed the well-recognized rule that courts disfavor motions to strike affirmative defenses. In New Jersey, the EEOC sought to strike the following five affirmative defenses: "(1) statute of limitations, (2) failure to mitigate damages, (3) not entitled to compensatory or punitive damages, (4) not entitled to back or front pay, and (5) failure to show an adverse employment action."[474] Noting that motions to strike are disfavored, the court denied the EEOC's motion to strike, holding that leaving the defenses will not substantially complicate discovery or the issues at trial, will not prejudice the EEOC and that the defendant "has provided sufficient notice as to what the defenses entail, shed light on the relevant law it intends to raise, and given EEOC adequate opportunity to discern the defenses' viability."[475]

Similarly, in a decision out of the Eastern District of New York, the court denied the EEOC's motion to strike eight affirmative defenses.[476] Reiterating that motions to strike are disfavored, the court also stated that, even where a defense is factually insufficient, the court should not strike the defense unless its inclusion would prejudice the plaintiff.[477] With respect to the defendant's statute of limitations and failure to exhaust administrative remedies defenses, the court found that motion to strike should be denied because there were questions of fact and law that would allow theses defenses to proceed and there was no prejudice to the EEOC.[478] As to the remaining affirmative defenses, which the EEOC contended were not proper affirmative defense but rather general denials, the court declined to strike the defenses because the EEOC failed to show any prejudice and "absent prejudice, defenses in the form of general denials need not be stricken."[479]

6. Venue

A defendant seeking to transfer venue must clear a high hurdle to convince a court to exercise its discretion and override the plaintiff's original choice of venue.

466 *Id.* at **17-21.
467 *Id.* at **23-26.
468 *Id.* at **23-25.
469 *Id.* at *25.
470 *Id.* at *26.
471 *EEOC v. CRST Int'l, Inc.*, 2018 U.S. Dist. LEXIS 206948 (N.D. Iowa Dec. 7, 2018).
472 *Id.* at **12-13.
473 *Id.* at **13-15.
474 *EEOC v. Hackensack Meridian Health, Inc.*, 2018 U.S. Dist. LEXIS 207780, at *3 (D.N.J. Dec. 10, 2018).
475 *Id.* at **3-4.
476 *EEOC v. A & F Fire Protection Co., Inc.*, 2018 U.S. Dist. LEXIS 211324 (E.D.N.Y. Dec. 13, 2018).
477 *Id.* at **5-6.
478 *Id.* at **6-15.
479 *Id.* at **15-17.

In Maine, a district court outlined and analyzed the heavy burden that a defendant seeking to transfer venue must satisfy to be successful.[480] First, the court made clear that "there is a strong presumption in favor of the plaintiff's choice of forum, which may be overcome only when the private and public interest factors clearly point towards trial in the alternative forum."[481] The court then analyzed each of the private and public interest factors in turn: (1) the potential jurisdiction of the transferee district; (2) convenience of the witnesses; (3) convenience of the parties; and (4) the interest of justice. There was no dispute that the employer could easily satisfy the first factor because the EEOC could have originally filed the suit in the Northern District of Iowa. The court then turned to the "most important factor," the convenience of the witnesses, indicating convenience of the parties was not as important of a factor. The employer argued that since more witnesses resided in Iowa than anywhere else—five out of an expected twelve—the scale of convenience tipped in favor of transferring the case to Iowa. However, the court found this argument unpersuasive, stating that because three of the five witnesses based in Iowa were former company employees who were testifying for the employer, their convenience was entitled to less weight than the non-party witnesses so that factor weighed in the EEOC's favor. The court held that the final factor, the interest of justice, came out neutral. Because the employer could not overcome the strong presumption in favor of the plaintiff's chosen forum, the employer's motion to transfer venue was denied.

7. Related Lawsuit

In a Colorado state court action, an employer sued a former employee alleging that the former employee breached her separation agreement by making disparaging comments about the employer to a former colleague.[482] In a separate case filed against the employer by the EEOC on behalf of the former employee in the District of Colorado, which alleged unlawful interference with statutory rights under § 7(f)(4) of the ADEA, the EEOC sought to preliminarily enjoin the employer "from asserting any breach of contract claim under the Separation Agreement, or from otherwise using the Separation Agreement to pursue a claim or judgment against [the former employee], including in the pending [state court] case."[483] The court denied the motion, holding that the EEOC could not establish a showing of "probable irreparable harm" because the potential harms identified were "largely speculative and fairly typical," and rejecting the EEOC's argument that allowing the state court case to proceed would have a "chilling effect" on other employees.[484]

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

Individual claims under Section 706 of Title VII are subject to certain administrative prerequisites, including that the discrimination charge is filed with the EEOC within 300 days of the alleged discriminatory act; that the EEOC investigate the charge and make a reasonable cause determination; and that the EEOC first attempt to resolve the claim through conciliation before initiating a civil action. Section 707, governing pattern-or-practice actions, incorporates Section 706's procedures, raising the implication that the EEOC must bring pattern-or-practice cases within the 300-day period defined in Section 706.[485]

There has yet to be a court of appeals decision to determine whether the EEOC may seek relief under Section 707 on behalf of individuals who were allegedly subjected to a discriminatory act more than 300 days prior to the filing of an administrative charge. 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 a FY 2019 decision the EEOC likely views as a significant win, the court held that held that alleged victims of discrimination are not bound by the view that they must file timely claims within 300 days of discriminatory conduct under Title VII, ADA or the ADEA, "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."[486] 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."[487]

480 *EEOC v. Hirschbach Motor Lines Inc.*, 2018 U.S. Dist. LEXIS 199243 (D. Maine Nov. 26, 2018).
481 *Id.* at *4 (internal citation omitted).
482 *EEOC v. CollegeAmerica Denver, Inc.*, 2018 U.S. Dist. LEXIS 72601 (D. Colo. Apr. 30, 2019).
483 *Id.* at *3.
484 *Id.* at **4-6.
485 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.
486 *EEOC v. Staffing Solutions of WNY, Inc.*, 2018 U.S. Dist. LEXIS 207186, *4 (W.D.N.Y. Dec. 6, 2018), *citing EEOC v. Upstate Niagara Cooperative, Inc.*, 2018 WL 5312645, *3 (W.D.N.Y. 2018).
487 *Staffing Solutions*, 2018 U.S. Dist. LEXIS 207186 at *5.

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 period.[488] 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.[489] In doing so, the court followed the reasoning set forth in *EEOC v. Mitsubishi Motor Manufacturing of America, Inc.*, a 1998 district court case, that held, "[a]fter careful consideration, this Court has concluded that the limitations 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."[490] 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.[491] 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."[492] 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.[493]

Generally, the 300-day limitations period is triggered by the filing of a charge (the court will count back 300 days from the date of filing and require that the discriminatory act occur within that timeframe).[494] 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.[495] 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.[496] 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.[497]

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.[498] This is helpful to employers because it shortens the time period during which the EEOC can reach back to draw in additional claimants. However, in *Arizona ex rel. Horne v. Geo Group, Inc.*, the Ninth Circuit disagreed, finding Section 706's "plain language" did not permit tethering the 300-day period to any event other than the filing of the charge.[499] The Ninth Circuit observed the trial court's choice to instead use the date of the Reasonable Cause Determination may have been due to the initial charge's failure to provide notice to the employer of potential class claims by other aggrieved female employees, but stated, "this concern fails to distinguish the time frame in which the employee is required to file their charge of discrimination (*i.e.*, 300 days after the alleged unlawful employment practice occurred) from the EEOC's responsibility to notify the employer of the results of the EEOC's investigation."[500]

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

488 *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).
489 *New Prime*, 2014 U.S. Dist. LEXIS 112505, at *34 (W.D. Mo. Aug. 14, 2014).
490 *EEOC v. Mitsubishi Motor Mfg. of America, Inc.*, 990 F.Supp. 1059, 1085 (C.D. Ill. 1998).
491 *Id. at* 1085, accord *EEOC v. LA Weight Loss*, 509 F. Supp. 2d 527, 535 (D. Md. 2007).
492 *Id.* at 1087.
493 *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).
494 *EEOC v. GMRI, Inc.*, 2014 U.S. Dist. LEXIS 106211 (D. Md. Aug. 4, 2014).
495 *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).
496 *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).
497 *EEOC v. DHD Ventures Mgmt. Co.*, 2015 U.S. Dist. LEXIS 167906 (D.S.C. Dec. 16, 2015).
498 *EEOC v. Princeton Healthcare Sys.*, 2012 U.S. Dist. LEXIS 150267, at *14 (D.N.J. Oct. 18, 2012).
499 *Arizona ex rel. Horne v. Geo Group, Inc.*, 816 F.3d 1189, 1203 (9th Cir. 2016).
500 *Id.*

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.[501] 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).[502]

In *EEOC v. New Mexico*, the court accepted this premise without analysis, allowing the EEOC to reach back to 2009 to include the claims of 99 additional aggrieved individuals even though some of these individuals last experienced alleged discrimination well before 300 days prior to the filing of the charge and even though their names had not been disclosed to the employer prior to discovery in the lawsuit, filed in 2015.[503] 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.[504]

In an effort to resurrect claims barred by the 300-day statute of limitations applicable to Sections 706 and 707, the EEOC often turns to equitable theories, such as waiver, estoppel, equitable tolling, the continuing violation doctrine—which allows a timely claim to be expanded to reach additional violations outside the 300-day period—and the single-filing rule, which allows the EEOC to litigate a substantially related non-filed claim where it arises out of the same time frame and similar conduct as a timely filed claim.[505] 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.[506] 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.[507] The continuing violation doctrine only allows the enforcing party to reach back to conduct that is not "discrete."[508] Although it is sometimes difficult to draw a distinction between discrete and non-discrete actions, the guiding principle is that a discrete action is "actionable on its own" and thus alerts the charging party as to the necessity of pursuing his or her claim.[509] 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.[510]

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.[511]

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

501 *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").

502 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).

503 *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).

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

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

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

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

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

509 *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").

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

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

unless each claimant suffered at least one act considered to be part of the unlawful employment practice, within the "300-day window."[512] Where the EEOC seeks to enlarge the number of individuals entitled to recover, rather than the number of claims a single individual may bring, the employer has a strong argument that the continuing violation doctrine does not apply.

Of course, the employer can also raise equitable defenses. In *EEOC v. Baltimore County*, the court found the EEOC's eight-year unreasonable delay in bringing its lawsuit barred any award of backpay or other retroactive relief.[513] In FY 2018, one district court refused to grant summary judgment to the EEOC on the employer's laches defense, finding it an issue of fact whether EEOC's six-year delay between the filing of the charge and the lawsuit prejudiced the employer.[514] In FY 2017, a federal district court in California held that a defendant may not bring a laches defense in an enforcement action brought by the United States unless the defendant can show affirmative misconduct on the part of the government.[515]

In a more recent decision, a district judge issued a pro-EEOC ruling in an enforcement action, addressing whether the court could consider discrete acts—occurring outside the 300-day limitations period—when evaluating a hostile work environment.[516] 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.[517] (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.[518] 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."[519] 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."[520] 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."[521] 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.[522]

Defendants also challenged claims asserted on behalf of two individuals who did not file discrimination charges with the EEOC. Defendants contended that the EEOC neglected to exhaust administrative remedies with respect to these two non-charging parties, necessitating dismissal.[523] The court rejected that theory, however, because the EEOC brought those claims through an enforcement action, which does not require administrative exhaustion.[524] And while the defendants argued in their reply brief that the EEOC had failed to satisfy other pre-suit conditions (such as notice and conciliation), the court refused to entertain that argument because it was not properly raised.[525]

Case developments in the past few years have provided employers with a strong argument that the EEOC should not be permitted to add claimants whose claims are outside the 300-day window based on the continuing violations doctrine and, before district courts at least, an even stronger argument that the statute of limitations set forth in Section 706 must be applied to Section 707 claims.

512 *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).
513 *EEOC v. Baltimore Cty.*, 202 F.Supp.3d 499, 522 (D. Md. Aug. 24, 2016).
514 *EEOC v. Wynn Las Vegas, LLC*, 2018 U.S. Dist. LEXIS 115042, **17-18 (D. Nev. July 10, 2018) (employer must show prejudice resulting from delay in order to prevail on laches defense).
515 *EEOC v. Marquez Brothers International Inc.*, 2017 U.S. Dist. LEXIS 153339, at *23 (E.D. Cal. Sept. 18, 2017).
516 *EEOC v. Jackson Nat'l Life Ins. Co.*, 2018 U.S. Dist. LEXIS 156258 (D. Colo. Sept. 13, 2018).
517 *Id.* at **2-15.
518 *Id.* at *16.
519 *Id.* at *18.
520 *Id.*
521 *Id.* at **22-25.
522 *Id.* at **25-27.
523 *Id.* at *28.
524 *Id.* at *29.
525 *Id.* at **30-31.

C. Intervention and Consolidation

This section examines intervention and consolidation by the EEOC, as well as the more common phenomenon of intervention by private plaintiffs, and the standards courts apply to determine whether to grant motions to intervene. This section also surveys recent intervention-related issues decided by courts, including allowing intervention by individuals who have not exhausted their administrative remedies, allowing intervention by individuals who have previously stipulated to dismissal of claims, allowing intervention by an individual whose claims were subject to mandatory arbitration, the complicated issues that arise when hundreds of individuals litigate their individual claims alongside EEOC pattern-and-practice claims, and the balancing of factors used in determining whether cases are consolidated.[526]

1. EEOC Permissive Intervention in Private Litigation

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

In Title VII actions, at the court's discretion, the EEOC may intervene in private lawsuits where "the case is of general public importance."[527] Courts generally accord a great deal of deference to the EEOC's determination that a matter is of "general importance" and usually will not require any proof of public importance beyond the EEOC's conclusory declaration.[528] The same approach is followed in dealing with intervention in ADA actions.[529]

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."[530] 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.[531]

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.[532]

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

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

526 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*.

527 42 U.S.C. § 2000e-5(f)(1).

528 *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).

529 42 U.S.C. § 12117.

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

531 *Id.*

532 *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).

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.[533] The ADEA, on the other hand, makes no mention of intervention. Thus, once the EEOC pursues a lawsuit under the ADEA, the charging party's right to intervene or commence his/her own lawsuit terminates.[534]

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

Rule 24(a) provides:

(a) **Intervention of Right.** On timely motion,[535] the court must[536] 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). If, however, pendent claims are involved (e.g., tort claims or claims arising out of state anti-discrimination statutes), those claims are analyzed under Rule 24(b).[537] Rule 24(b) may also apply if the movant is not aggrieved by the practices challenged in the EEOC's lawsuit[538] or the movant is a governmental entity other than the EEOC.[539]

A plaintiff-intervenor's Title VII complaint is limited to the scope of the EEOC investigation that can reasonably be expected to "grow out of the charge of discrimination."[540] An individual is not required to thoroughly describe the discriminatory practices in order to meet the requirements of Rule 24(a).[541] 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.[542]

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.*,[543] the EEOC initiated a pattern-or-practice lawsuit alleging the company discriminated against African American employees/prospective employees by failing to hire them for front-of-house positions. Eleven individuals intervened in the action, including 10 who never filed charges of discrimination. The company filed a motion for summary judgment seeking dismissal of these individuals' claims due to their failure to exhaust their administrative remedies. The intervenors argued they were entitled to intervene as a matter of right because they were "persons aggrieved" by the company's alleged unlawful employment practices under 42 U.S.C. § 2000e-5(f)(1) or, alternatively, were entitled to permissive intervention under the "single filing rule," otherwise known as the "piggybacking rule," allowing

533 *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.").

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

535 *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 ninety-day prescription period mandated by ADEA)

536 *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).

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

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

539 *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)).

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

541 *Id.* at *5.

542 *Id.* at *6.

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

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-plaintiff who failed to timely file her EEOC charge. In *United States EEOC v. JCFB, Inc.*,[544] the charging party-plaintiff filed almost a year after the statutory period for filing a charge for discrimination ended. However, in rejecting Defendant's attempts to distinguishing plaintiffs' claims, the court exempted the plaintiff from the administrative requirement to timely file and found that the timely filed plaintiff's claims were identical to the late-filed plaintiff's claims.

In *EEOC v. J & R Baker Farms, LLC*,[545] the court granted a motion to amend the complaint to add 10 additional plaintiff-intervenors in the EEOC's pattern-or-practice lawsuit, even though the individuals were not eligible to participate in the lawsuit under the single-filing rule. (The court had previously ruled that potential plaintiff-intervenors whose claims arose after the date any representative plaintiff filed a representative charge could not take advantage of the single-filing rule.) Yet, the court held those individuals could permissively intervene under Rule 24(b)(1)(B) because their claims shared common questions of law and fact with those in the lawsuit.

In *EEOC v. Horizontal Well Drillers, LLC*,[546] the plaintiff-intervenor alleged class claims despite stating in his charge that he brought his charge individually. However, during the course of the EEOC investigation, the EEOC had requested additional information, including the employer's hiring policies, methods for screening and recruiting, and records of everyone hired and not hired from the applicant pool. The EEOC later issued a "Notice of Expanded Investigation and Request for Additional Info." Despite the plaintiff-intervenor failing to state that he sought to represent others on his charge, the court permitted intervention. The court was satisfied that the employer was on sufficient notice and should have reasonably expected class claims to grow out of the charge upon receipt of the Notice of Expanded Investigation, along with the requests for additional information.

A mandatory arbitration agreement does not preempt an individual's right to intervene. In *EEOC v. PJ Utah, LLC*,[547] 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.[548]

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.[549]

544 *United States EEOC v. JCFB, Inc.*, 2019 U.S. Dist. LEXIS 102862 (N.D. Cal. Jun. 19, 2019).
545 *EEOC v. J & R Baker Farms, LLC*, 2016 U.S. Dist. LEXIS 29167 (M.D. Ga. Mar. 8, 2016).
546 *EEOC v. Horizontal Well Drillers, LLC*, 2018 U.S. Dist. LEXIS 102434 (W.D. Okla. Jun. 18, 2018).
547 *EEOC v. PJ Utah, LLC*, 822 F.3d 536 (10th Cir. 2016).
548 *EEOC v. OnSite Solutions, LLC*, 2016 U.S. Dist. LEXIS 158620, at **8-9 (W.D. Okla. Nov. 16, 2016).
549 *EEOC v. PC Iron, Inc.*, 2017 U.S. Dist. LEXIS 141187, at **9-10 (S.D. Cal. Aug. 31, 2017).

For example, in *EEOC v. Mayflower Seafood of Goldsboro, Inc.*,[550] 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*,[551] 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.

Note that in *EEOC v. LXL Learning, Inc.*,[552] 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.[553] Where individual employees or the EEOC also assert individual claims in a pattern-or-practice lawsuit initiated by the EEOC, however, managing the various individual claims becomes complicated because of the different proof schemes.

In *EEOC v. JBS USA, LLC*,[554] the EEOC sued a meatpacking company—alleging it discriminated against Somali, Muslim, and African American employees. The agency asserted several pattern-or-practice claims. At the outset of the case, the EEOC and the employer entered into a bifurcation agreement dividing discovery and trial into two phases: (1) the EEOC's pattern-or-practice claims (Phase I); and (2) individual or Section 706 claims (Phase II). More than 200 individuals intervened. At the trial of the Phase I claims, the court found in the employer's favor, and the action proceeded to Phase II. In Phase II, over 200 intervenor-plaintiffs sought relief for their individual Title VII and state law claims and the EEOC brought suit under Section 706 on behalf of 57 individuals, some of whom were also intervenor-plaintiffs.

The employer moved to dismiss the claims of several categories of employees, including those who were proceeding *pro se* and not engaging in discovery. The court granted the employer's motion to dismiss the claims of 16 *pro se* plaintiff-intervenors for failure to prosecute their cases. The employer also argued that the EEOC could not seek relief on behalf of 18 other individuals whose claims had previously been dismissed for failure to prosecute. The court agreed and held, based on *res judicata* principles, that the EEOC could not assert claims on behalf of the individual plaintiff-intervenors whose claims had been dismissed. In a later proceeding, the court dismissed 13 remaining plaintiff-intervenors for failure to comply with a court order for each plaintiff-intervenor to file written notice of their current address and telephone number.[555]

The employer also moved to dismiss 36 individuals' claims due to their failure to file Title VII charges. The individuals argued their claims were saved under the single-filing rule, described above. The court declined to adopt a categorical rule that the single-filing rule only applies to class actions and noted that only the Third Circuit has held it only applies to class actions.[556] Hence, the court denied dismissal and held seven individuals' claims were subject to the single-filing rule because the employer was on notice of potential class allegations, given that multiple employees filed charges alleging similar discriminatory treatment on the same day.

5. Consolidation

Under Rule 42, a court may "join for hearing or trial any or all matters at issue in the actions; consolidate the actions; or issue any other orders to avoid unnecessary cost or delay" if actions before the court involve a common question of law or

550 *EEOC v. Mayflower Seafood of Goldsboro, Inc.*, 2016 U.S. Dist. LEXIS 101154 (E.D.N.C. Aug. 2, 2016).
551 *EEOC v. Favorite Farms, Inc.*, 2018 U.S. Dist. LEXIS 1482 (MD. Fla. Jan. 4, 2018).
552 *EEOC v. LXL Learning, Inc.*, 2017 U.S. Dist. LEXIS 200184 (N.D. Cal. Dec. 4, 2017).
553 *EEOC v. JBS USA, LLC*, 2012 U.S. Dist. LEXIS 167117 (D. Neb. Nov. 26, 2012).
554 *EEOC v. JBS USA, LLC*, 2016 U.S. Dist. LEXIS 110697 (D. Neb. Aug. 19, 2016).
555 *EEOC v. JBS USA, LLC*, 2017 U.S. Dist. LEXIS 63879 (D. Neb. Apr. 27, 2017).
556 *See Communications Workers of Am. v. New Jersey Dep't of Personnel*, 282 F.3d 213, 217 (3d Cir. 2002).

fact.[557] While a plaintiff's lawsuit may involve a common question of law or fact brought in a separate lawsuit by the EEOC, courts will use a balancing test to determine whether consolidation would avoid unnecessary costs or delay.

In *EEOC v. Faurecia Auto Seating, LLC*,[558] two plaintiffs with separate lawsuits sought to consolidate their cases with an EEOC lawsuit filed on behalf of 15 claimants. Both plaintiffs alleged ADA discrimination by the same employer and the EEOC did not oppose consolidation. However, the court denied consolidation given that a significant amount of discovery had already been conducted, including 29 depositions. Thus, the court noted that seeking to add the additional parties would require all 29 deponents to be re-deposed and would expand the scope and extend the time of discovery. The court further noted that consolidation would also result in a significant risk of prejudice to the employer and increase litigation costs for the parties.

D. Class Issues in EEOC Litigation—Disparate Impact Litigation

In FY 2019, a district court addressed the need for the EEOC to better delineate its claims of disparate impact in its complaint.[559] In Florida, a district court directed the EEOC to separate its claims into separate counts and to incorporate the factual allegations pertinent to each. Although the EEOC disagreed whether this was necessary, the court nonetheless held that "[s]eparating its disparate impact and disparate treatment claims into separate claims would promote clarity" as described in Federal Rule of Civil Procedure 10(b).

E. Other Critical Issues in EEOC Litigation

1. Protective Orders

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,[560] the magistrate judge held a pre-discovery settlement conference with the parties during which she suggested disclosure of certain confidential financial information and documents may be beneficial for the settlement process.[561] 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.[562]

2. Reliance on Experts, Particularly in Systemic Cases

Expert testimony remains a frequent topic of law and motion in EEOC cases. In one FY 2019 case,[563] a federal court in Mississippi denied defendant's motion to exclude the testimony of a vocational expert. In that case, the defendant first challenged the relevancy and qualifications of the EEOC's vocational expert on the basis that the expert cannot provide an opinion as to plaintiff's reasonable accommodations and any undue hardship.[564] The court disagreed, finding such topics are appropriate for expert testimony.[565] The court found, however, that while expert testimony that offers a legal opinion is inadmissible, whether an accommodation is reasonable is a question of fact.[566] Likewise, whether an accommodation poses an "undue hardship" for an employer is a question of fact.[567] Finally, defendant argued the vocational expert's opinions are unreliable due to a lack of sufficient facts and reliable methodology.[568] The court, however, explained that although the expert "could have been more thorough in his research" and there were "shortcomings in his research," such challenges are a question of the weight of the testimony, not admissibility.[569] Further, the court found that vocational and occupational rehabilitation experts are not subject to "rigorous testing and review that the hard sciences are."[570] Accordingly, the court permitted expert testimony from the vocational expert and advised defendant it can attack the testimony on cross-examination.[571]

557 Fed. R. Civ. P. 42.
558 *EEOC v. Faurecia Auto Seating, LLC*, 2018 U.S. Dist. LEXIS 105391 (S.D. Miss. June 25, 2018).
559 *EEOC v. Jacksonville Plumbers & Pipefitters Joint Apprenticeship & Training Trust*, 2018 U.S. Dist. LEXIS 168834 (M.D. Fla. Oct. 1, 2018).
560 *EEOC v. Prestige Care, Inc.*, 2018 U.S. Dist. LEXIS 217857 (E.D. Cal. Dec. 27, 2018).
561 *Id.* at *1-2.
562 *Id.*
563 *EEOC v. Wesley Health Sys., LLC*, 2018 U.S. Dist. LEXIS 196451 (S.D. Miss. Nov. 19, 2018).
564 *Id.* at *4.
565 *Id.* at **4-5.
566 *Id.*
567 *Id.*
568 *Id.* at *7.
569 *Id.* at **7-8.
570 *Id.* at *8.
571 *Id.*

A month later, in the same case, the Mississippi district court granted defendant's motion in limine to exclude testimony and opinions of an expert not previously disclosed in discovery as required.[572] The court found that plaintiff did not disclose the expert's testimony and opinions on various matters as required under its disclosure obligations set forth in Fed. R .Civ. P. 26.[573]

Similarly, one particularly notable decision involving reliance on experts arose in a federal district court in Oklahoma.[574] There, the defendant moved to strike, arguing that the EEOC included in its motion for summary judgment declarations of the claimants' treating physicians, which contained expert testimony from experts not previously disclosed as required by Fed. R. Civ. P. 26 and after discovery closed.[575] The EEOC claimed it offered such statements as permissible lay testimony and not an expert opinion.[576] However, the court agreed with the defendant that some portions of the declarations contain expert testimony and further stated that the declarations contain a mix of lay and expert testimony.[577] Where, as here, the proposed testimony includes a mix of both impermissible and permissible testimony, the declarations are admissible in their entirety if the plaintiff's failure to disclose is justified or harmless under Fed. R. Civ. P. 37.[578] As a result, the court struck the declarations based on the view that such testimony includes expert testimony and a failure to disclose expert witnesses was unduly prejudicial to defendant.[579] The court indicated the EEOC cannot "proffer 'an expert in lay witness clothing' to the prejudice of Defendant without consequence."[580]

3. Management of Class Discovery

A recent federal court decision demonstrates that courts may appoint a special master to combat ongoing discovery disputes.[581] In a Colorado district court decision, the court ordered appointment of a special master after the court held four hearings to resolve discovery disputes between the parties over a five-month period in a case involving a pattern-or-practice claim under the ADA.[582] The court stayed the matter to allow the parties to pursue mediation, but after unsuccessful attempts, the court held its fifth hearing regarding a motion to quash a third-party subpoena and a motion for a protective order.[583] At the end of the hearing, the EEOC raised another discovery dispute, and the court set a sixth hearing.[584] Over the next two years, the parties sought the court's assistance concerning an additional four discovery disputes.[585]

At that point, the court issued its notice of its intent to appoint a special master to handle discovery disputes in the case moving forward.[586] In response, the EEOC objected to the appointment on four grounds.[587] First, the EEOC argued a special master was not warranted.[588] Second, the EEOC argued such appointment would cause the EEOC to violate federal procurement law.[589] Third, the EEOC argued the court insufficiently set forth the procedure for how discovery disputes would be submitted to the special master.[590] Finally, the EEOC argued the recommended special master was conflicted out due to her representation of a client before the EEOC. Defendant, however, argued for the need for an appointment special master.[591]

The court was not persuaded by the EEOC's position. Based on the court having already conducted nine hearings lasting six hours in total, reviewed hundreds of pages of briefing, spent 40 hours preparing for the disputes, and not having had any success, coupled with the heightened tension between the parties, there was a clear need for a special agent.[592] Additionally, there was no violation of procurement laws, and the EEOC admitted it would not necessarily violate such laws but instead the EEOC may need to obtain approval in advance.[593] Further, the court resolves any concerns over procedures for the special

572 *EEOC v. Wesley Health Sys., LLC*, 2018 U.S. Dist. LEXIS 209457 (S.D. Miss. Dec. 12, 2018).
573 *Id.* at **4-5.
574 *EEOC v. Brown-Thompson Gen. P'ship*, 2019 U.S. Dist. LEXIS 143688 (W.D. Okla. Aug. 23, 2019).
575 *Id.* at **1-2.
576 *Id.*
577 *Id.* at **4-5.
578 *Id.* at **5-6.
579 *Id.* at *6-7.
580 *Id.* at *7 (*citing* Fed. R. Evid. 701 advisory committee notes).
581 *EEOC v. W. Distrib. Co.,* 2019 U.S. Dist. LEXIS 86136 (D. Colo. May 22, 2019).
582 *Id.* at *2.
583 *Id.* at *3.
584 *Id.* at **3-4.
585 *Id.* at **4-8.
586 *Id.* at *8.
587 *Id.*
588 *Id.*
589 *Id.*
590 *Id.*
591 *Id.*
592 *Id.* at *12.
593 *Id.* at *14.

master to resolve disputes at the hearing and by largely adopting the EEOC's proposed order.[594] Lastly, to resolve any concerns regarding conflicts of interest, the court appointed a different special master.[595]

F. General Discovery by Employer

1. Discovery of EEOC-Related Documents

One notable FY 2019 order addressing employers' discovery efforts involved the EEOC's assertion of the "deliberative process privilege." In *EEOC v. R & L Carriers, Inc.*,[596] the defendants argued that the EEOC had improperly invoked the privilege in defense of its refusal to respond to certain interrogatories and documents requests.[597] In opposition, the EEOC submitted a declaration from its Acting Chair, Victoria A. Lipnic, averring that the materials at issue contained "predecisional opinion, analyses, and conclusions of the Commission investigatory and legal personnel" regarding the investigation of a charge filed against the defendants.[598] Acting Chair Lipnic further averred that disclosing the materials would hinder the EEOC's future enforcement efforts by deterring open communication among its employees.[599]

Before ruling, the court surveyed the case law to provide a definition for the deliberative process privilege and summarize its purpose and scope. The court explained that the privilege operates to shield from disclosure "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which government decisions and policies are formulated."[600] Its purpose is "to promote frank discussion of issues relating to the adoption of policies, or the making of specific adjudicative decisions, within a governmental agency."[601] Although the reasons cited by a governmental agency in support of its final decisions are properly matters of public record, often an agency is "required to weigh various options prior to reaching its final decision," which may involve "questioning the accuracy of the process that has preceded the point of decision."[602] If these deliberative communications were discoverable, agency staff would be understandably hesitant to exchange "honest opinions about matters which factor into the agency's final decision."[603] Courts have therefore recognized a privilege for intra-agency communications that are both "predecisional" and "deliberative."[604] The privilege does not extend to "purely factual" material, however, unless the material is "so inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the government's deliberations."[605]

After performing an *in camera* review, the court concluded that the privilege applied to the materials at issue and that the EEOC was not obligated to disclose them. The materials—which included, among other items, intra-agency e-mail correspondence and statistical analyses and reports[606]—were "predecisional" in that they were exchanged within the agency prior to its issuance of a finding of discrimination.[607] The materials were also "deliberative," as they contained the opinions and conclusions of individual investigators and analysts employed by the agency and reflected the agency's "internal decisionmaking process."[608] Finally, insofar as the material in the documents at issue was purely factual in nature, the information had either been provided to the EEOC by the defendants themselves or had already been disclosed.[609]

594 *Id.* at *15.
595 *Id.* at **15-16.
596 *EEOC v. R & L Carriers, Inc.*, 2019 U.S. Dist. LEXIS 46242 (S.D. Ohio Mar. 20, 2019).
597 *Id.* at *1.
598 *Id.* at *2.
599 *Id.*
600 *Id.* (citations and internal quotation marks omitted).
601 *Id.* (citations omitted).
602 *Id.* at **2-3 (citations omitted).
603 *Id.* at *3 (citations omitted).
604 *Id.* (citations and internal quotation marks omitted).
605 *Id.* at *4 (citations and internal quotation marks omitted).
606 *Id.* at **5-9.
607 *Id.* at *4.
608 *Id.* at *5.
609 *See id.* at *9–10.

2. Third-Party Subpoenas

In *EEOC v. Chipotle Mexican Grill, Inc.*,[610] the court refused an employer's request to hold a third party in contempt for failing to appear for deposition, notwithstanding that the individual had refused to comply with two separate subpoenas.[611] The court expressed no doubts that the nonparty had relevant information to offer.[612] In a separate lawsuit, the nonparty, a former employee of the employer, had alleged that she was harassed and retaliated against by the same general manager who allegedly harassed and retaliated against the charging party.[613] The EEOC had even named her as a witness in its initial disclosures.[614] Nevertheless, considering the "full context" of the employer's efforts to depose her, the court concluded that the nonparty had shown an "adequate excuse for her noncompliance."[615]

The court began by surveying the employer's efforts to depose the nonparty. It first observed that the nonparty had appeared for deposition in response to a subpoena from the EEOC.[616] The employer had the opportunity to question the nonparty for more than two hours at that deposition, although it maintained that it had not yet completed its questioning when the deposition adjourned.[617] The employer served its first subpoena following the EEOC's deposition.[618] At the nonparty's request, the first subpoena designated her workplace as the deposition site.[619] Yet the nonparty refused to go forward with the deposition when the employer's counsel arrived earlier on the designated date than scheduled, maintaining that the early arrival had angered her building manager and caused her to fear losing her job.[620] The employer then served a second subpoena, but the nonparty failed to appear on the designated date.[621] When asked for a reason, the nonparty explained that she was working at the time scheduled for the deposition, that she had just returned from a seven-day vacation, and that a medical condition prevented her attendance.[622] The employer successfully moved for an extension of discovery to allow additional time for the nonparty's deposition, but the employer could not secure the nonparty's attendance before the extended deadline had passed.[623] The nonparty did not move to quash the employer's subpoena or for a protective order, but she did deliver a letter to the court, along with a doctor's note, to explain that her medical issues made her absence unavoidable.[624]

Turning to its legal analysis, the court first observed that the "standard for holding a person who has failed to obey a subpoena or related order in contempt" is "whether that person has an 'adequate excuse' for her failure."[625] It further explained that a district court has "wide latitude in determining whether there has been contempt of its order."[626] Under these standards, the court concluded that the nonparty's appearance for deposition was "not possible" and declined to hold her in contempt.[627] The court found that the doctor's note submitted by the nonparty "confirms that she in fact has a medical condition requiring surgery," and it found credible the nonparty's claims that the side effects of her condition rendered her "unavailable for deposition."[628] Additionally, the court noted that the employer did have at least some opportunity to question the nonparty at the EEOC deposition, and it further noted that the employer had also deposed the nonparty in the context of her own lawsuit.[629] In concluding its order, the court clarified that the parties would be free to address "proper remedies" for the nonparty's incomplete deposition testimony "at the time of trial."[630]

610 *EEOC v. Chipotle Mexican Grill*, 2019 U.S. Dist. LEXIS 138516 (N.D. Cal. Aug. 15, 2019).
611 *See id. at* **10-12. The employer moved for two forms of relief: an order directing the nonparty to appear for deposition and an order to show cause. *See id.* at *8. The court treated the motion "as a motion pursuant to Rule 45(g) seeking to hold [the nonparty] in contempt." *Id.* at **8-9; *see* Fed. R. Civ. P. 45(g). While a contempt order ordinarily requires the issuance of an order to the contemnor to show cause why she should not be held in contempt, the court found this procedure unnecessary because the nonparty had already submitted a letter to the court requesting to be excused from deposition. *Id.* at *9.
612 *Id.* at *12.
613 *Id.* at *2.
614 *Id.* at *3.
615 *Id.* at *10.
616 *Id.* at *10.
617 *Id.* at *3.
618 *Id.*
619 *Id.* at **3-4.
620 *See id.*
621 *See id.* at *4.
622 *See id.*
623 *See id.* at *5.
624 *See id.* at *6.
625 *Id.* at *9 (quoting Fed. R. Civ. P. 45(g)).
626 *Id.* (citations and internal quotation marks omitted).
627 *Id.* at *10.
628 *Id.* at **11-12.
629 *See id.* at *12.
630 *Id.*

3. Other Issues

Issues pertaining to employer subpoenas also arose in *EEOC v. American Medical Response*.[631] There the court granted the EEOC's motion to quash three subpoenas for the production of documents served by the employer on three nonparties, including two former employers of the charging party.[632] The EEOC contended, and the court agreed, that the three subpoenas were untimely.[633]

Under the court's initial scheduling order, the parties' deadline for completing written discovery was September 28, 2018, and their deadline for completing depositions was November 12, 2018.[634] On November 5, 2018, the parties filed a joint motion to extend the "[d]eadline for completing depositions" to December 17, 2018, but they did not include a request to extend any other type of discovery.[635] During a status conference later that month, the EEOC asked the court to extend the December 17 deadline another two weeks.[636] The court granted the request and issued an amended scheduling order following the conference.[637] That order provided that the parties' deadline for completing "all discovery" would be January 17, 2019.[638]

Upon reviewing the record, the court concluded that the employer's subpoenas served after the written discovery deadline were untimely because the discovery extensions it had granted pertained only to the parties' deadlines for taking depositions.[639] The court first observed that the parties were obligated to adhere to its discovery deadlines when serving subpoenas because a "subpoena issued pursuant to Federal Rule of Civil Procedure 45 is considered to be a discovery device in the Sixth Circuit."[640] Reviewing the parties' extension requests, the court concluded that the record reflected the parties had limited the scope of their requests to deposition deadlines and had made no mention of any other type of discovery in those requests.[641] Likewise, when granting the parties' joint motion for an extension, the court had expressly stated that the parties' "deadline for *completing depositions* shall be December 17, 2018."[642] As for the language in the court's amended scheduling order purporting to extend the deadline for "all discovery," the court explained, "it is apparent from the record that the intent of the court and the parties was to extend only the deposition deadline, which was the lone remaining discovery deadline at the time."[643] The court therefore granted the motion to quash the employer's subpoenas and ordered the employer to refrain from using any documents it may have obtained from them.[644]

G. General Discovery be EEOC/Intervenor

1. Scope of Permitted Discovery by EEOC

In *EEOC v. MJC, Inc.*, the district court reversed, in part, a magistrate judge's decision denying the EEOC's request for the defendants' financial information, finding that some of the documents requested were relevant to the agency's claim for punitive damages.[645] However, to the extent the requested documents were unnecessary to determine the defendants' net worth, the court refused to order them disclosed.[646]

At issue were the EEOC's requests for documents pertaining to the defendants' "monthly revenue generated and expenses incurred" during the preceding six years, as well as documents pertaining to their "assets and liabilities" over the same period.[647] On motion, the magistrate judge determined that the requests were "overly broad," that they sought documents "outside of the relevant time period," and that the requested documents were "not relevant to the claims and defenses" of the parties.[648] The EEOC appealed the decision before the district court, arguing that the requested documents would be relevant when

631 *EEOC v. Am. Med. Response,* 2019 U.S. Dist. LEXIS 16825 (W.D. Tenn. Jan. 2, 2019).
632 *See id.* at **4-5.
633 *See id.* at *7.
634 *See id.* at *2.
635 *Id.* at **2-3.
636 *Id.* at **3-4.
637 *Id.* at *4.
638 *Id.*
639 *Id.* at **6-7.
640 *Id.* at *5 (citations and internal quotation marks omitted).
641 *Id.* at *6-7.
642 *Id.* at *6 (emphasis in original).
643 *Id.* at *7.
644 *Id.*
645 *EEOC v. MJC, Inc.*, 2019 U.S. Dist. LEXIS 102673, *1–2 (D. Haw. June 17, 2019).
646 *Id.* at *2.
647 *Id.* at **2-3.
648 *Id.* at *3.

adjudicating its punitive damages claim.[649] The district court agreed.[650] Citing several district court decisions, the court explained, "it is firmly established that a detailed inquiry into the size of defendant's business and financial worth is relevant to the determination of punitive damages."[651] Because the EEOC had sought relief in the form of punitive damages in its complaint, the court concluded that it was entitled to such discovery as would allow it to "establish an appropriate amount of punitive damages at trial."[652]

The court, however, did not order the defendants to comply with the EEOC's requests in their entirety. It explained that while evidence of the defendants' financial condition was relevant, "relevancy alone is not sufficient to obtain discovery"; the "discovery requested must also be proportional to the needs of the case."[653] The court first addressed the temporal scope of the requests. It observed that "[w]hen allowing discovery into a defendant's financial records relating to a punitive damages claim, courts generally limit the time period for production to such information to reflect the defendant's current condition or net worth."[654] The court therefore limited the scope of the necessary disclosure to the two-year period immediately preceding its decision.[655] The court then addressed the EEOC's requests for documents showing the defendants' monthly revenue and expenses.[656] Citing *Black's Law Dictionary*, the court explained that "'net worth' is calculated as the excess of total assets over liabilities."[657] In the court's view, the defendants' balance sheets would suffice to establish their assets and liabilities, and the EEOC had provided no explanation as to why it would need evidence of the defendants' monthly revenue and expenses in addition to those documents.[658] Accordingly, the court limited the required disclosures to balance sheets alone.[659]

2. Miscellaneous

Two additional FY 2019 orders involving the EEOC's discovery efforts are also worth noting. The first involves an unopposed motion to compel and request for sanctions against an employer that failed to provide initial disclosures, notwithstanding the EEOC's diligent efforts to obtain the disclosures without court intervention. The second involves certain obstacles to the EEOC's discovery efforts created by the recent federal government shutdown.

In *EEOC v. KS Aviation, Inc.*,[660] the court granted the EEOC's unopposed motion to compel the employer to propound its initial disclosures, and it granted in part the agency's unopposed motion for sanctions. At the outset of the case, the court had entered a scheduling order requiring the parties to propound their initial disclosures by October 23, 2018, and the EEOC provided its disclosures on that date.[661] On October 25, counsel for the EEOC called and left a message for the employer's counsel informing him that they had yet to receive his initial disclosures.[662] They then sent several additional communications to the employer's counsel regarding the disclosures, including a letter threatening to seek sanctions and recover attorneys' fees if he continued to be unresponsive.[663] Counsel for the EEOC finally reached the employer's counsel by phone on November 7.[664] Counsel acknowledged during that call that he had received the communications regarding his initial disclosures but asked that counsel for the EEOC call back the next day, as "he had a filing due at midnight."[665] Counsel for the EEOC was unable to reach the employer's counsel the following day, and they could not leave him a message because his voice mailbox was full.[666] Given counsel's "blatant refusal" to comply with his discovery obligations—together with his failure to file any memorandum in opposition to the EEOC's motion—the court granted the motion and ordered sanctions in the form of the attorneys' fees incurred in performing tasks related to the motion.[667]

649 *See id.* at *5.
650 *Id.*
651 *Id.* at *6 (citations and internal quotation marks omitted).
652 *Id.* at *7. Notably, the court added the caveat that the EEOC would be required at trial to make an initial showing that punitive damages are appropriate before presenting evidence to establish their amount.
653 *Id.* at *8 (citations and internal quotation marks omitted).
654 *Id.* (citations and internal quotation marks omitted).
655 *Id.* at *9.
656 *Id.*
657 *Id.* (quoting Black's Law Dictionary (11th ed. 2019)).
658 *Id.*
659 Specifically, the court limited the defendants' required disclosure to "balance sheets for the years 2017, 2018, and, to the extent available, 2019." *Id.* at *2.
660 *EEOC v. KS Aviation, Inc.*, 2018 U.S. Dist. LEXIS 205227 (E.D. Cal. Dec. 4, 2018).
661 *Id.* at **2-3.
662 *Id.* at *3.
663 *Id.* at **3-4.
664 *Id.* at *4.
665 *Id.*
666 *Id.*
667 *Id.* at **9-10. The court refused to grant the EEOC all the fees it requested, however, as it found that one of the EEOC's attorneys had spent an "excessive" amount of time on tasks related to the motion.

Also notable is an order entered in the case of *EEOC v. American Medical Response*.[668] In that order, entered January 2, 2019, the court addressed a motion from the EEOC to stay the litigation and extend discovery deadlines "due to the lapse in appropriations and government shutdown."[669] Specifically, the EEOC requested that the court extend all deadlines "for the same duration as the shutdown."[670] The employer did not oppose the EEOC's motion, although it did request that the court also quash four depositions scheduled during the weeks of December 31, 2018, and January 7, 2019, if it should decide to grant the motion.[671] The court granted the parties' requests "[f]or good cause shown" and ordered the EEOC to "promptly notify the court in writing when Congress has appropriated funding" allowing the agency's employees to resume their work.[672]

H. Summary Judgment

In FY 2019, federal courts issued at least a dozen decisions addressing the EEOC's or the defendant's motions for summary judgment. As in prior years, a significant portion (60%) of those cases involved claims of disability discrimination under the Americans with Disabilities Act. Courts considered summary judgment motions on a range of other typical claims, however, including sexual harassment, religious accommodation, race discrimination, and retaliation. In addition, the courts reviewed cases involving other interesting issues not considered in recent years, such as the scope of an EEOC complaint and investigations and termination based on an honest belief of a false charge.

In most instances, the courts either granted the EEOC's motion for summary judgment or partial summary judgment, or denied the employer's motions.

Some notable summary judgment decisions issued in FY 2019 are discussed below.

1. Disability Discrimination

When a party alleges disability discrimination under the ADA, the burden-shifting analysis differs depending on whether there is evidence of direct or indirect discrimination. If the EEOC claims there is indirect evidence of discrimination, the *McDonnell Douglas* burden-shifting analysis applies.[673] Specifically, the EEOC must show the charging party (1) has a disability, was regarded as disabled, or has a record of a disability; (2) was qualified for the job; and (3) was subjected to an adverse employment decision on account of the disability. The employer must then proffer a legitimate, nondiscriminatory reason for its actions. The EEOC then has an opportunity to rebut that contention on the grounds of pretext.

When there *direct* evidence of discrimination, the *McDonnell Douglas* analysis does not apply. Direct evidence is evidence that shows a specific link between the discriminatory animus and the adverse employment action, which is sufficient for a reasonable jury to find that an illegitimate criterion actually motivated the adverse employment action. Thus, "direct" refers to the causal strength of the proof. Employer actions or remarks that reflect a discriminatory attitude, comments that demonstrate a discriminatory animus in the decisional process, or comments made by individuals closely involved in employment decisions may all constitute direct evidence of discrimination.

In a handful of decisions involving disability discrimination considered this fiscal year, the EEOC was able to put forth direct evidence of disability discrimination to defeat the employer's motion for summary judgment.

In *EEOC v. Crain Automotive Holdings LLC*,[674] the EEOC alleged an auto dealership failed to accommodate an employee's disability and terminated her employment on account of her disability. Specifically, it alleged the defendant fired her after she experienced panic attacks and left work. Upon returning to work after an episode, the charging party met with two supervisors, one of whom told her at this meeting that "it was not working out" due to her health problems and that she needed to take care of herself. The charging party suffers from anxiety, depression, and panic attacks, although the employer alleged it was not aware of these specific conditions at the time of termination.

The dealership filed two motions for summary judgment on both claims (discrimination and failure to accommodate). The defendant claimed that the charging party is not disabled within the meaning of the ADA, and that even if she were disabled, it was unaware of this disability and therefore could not have discriminated because of it.

668 *EEOC v. Am. Med. Response*, 2019 U.S. Dist. LEXIS 16826.
669 *Id.* at **1-2.
670 *Id.*
671 *Id. at* *2.
672 *Id.*
673 *McDonnell Douglas* Corp. v. Green, 411 U.S. 792 (1973).
674 *Crain Auto. Holdings LLC*, 2019 U.S. Dist. LEXIS 62513 (E.D. Ark. Apr. 11, 2019).

Among other reasons for denying the employer's motions, the court noted that the supervisor's comments that due to the charging party's health it "wasn't going to work out" constituted direct evidence of discrimination. "If a jury found that [charging party] is disabled, and it believed these facts, it could draw the inference that an illegitimate criterion — [her] disability — actually motivated her firing."

Similarly, in *EEOC v. Wesley Health System, LLC*,[675] the court denied the employer's motion for summary judgment in an ADA case, determining that a jury could reasonably infer from a supervisor's statements that the employer never intended to accommodate or retain the charging party, a nurse who sought to return to work with restrictions following FMLA leave due to a shoulder injury. Specifically, the Director of Nursing sent an email to the Chief Nursing Officer before the charging party returned from leave, directing her to find a replacement. In the email, the Director wrote, ". . . this is a nurse [we] would rather not have back. She says she is coming back with restrictions. That's good because she can't work with restrictions, so just FYI, her FMLA will be up next week . . ."[676] Such direct evidence of disability discrimination was sufficient to preclude summary judgment per the court.

In yet another case involving direct evidence of disability discrimination, the EEOC sued a plastics manufacturer, alleging the company fired an employee because of his actual and/or perceived disability.[677] The EEOC alleged the company terminated a maintenance technician after he told the company of his 50% lung capacity breathing restriction resulting from undiagnosed childhood tuberculosis, which crystalized and became dormant because of prior exposure to asbestos.

The charging party had completed a "Post Offer Medical History Questionnaire" when first hired, which disclosed that he had a prior shoulder injury. This injury left him with an 11% impairment in his range of motion and lifting. The charging party did not disclose any additional impairments at this time.

After completing his 90-day probationary period, he was told he was making adequate progress and given a pay increase. Sometime after this period, his supervisor raised concerns about his performance, and suspected he was at times intoxicated while on the job, among other safety concerns.

The charging party eventually developed breathing problems, and it was determined he had the aforementioned lung capacity breathing restriction. He was referred to a cardiologist.

Prior to taking medical leave to undergo a heart catheterization procedure, the charging party met with an HR manager and told her about his TB, lung, heart, and esophagus conditions. She wrote about her concerns to the charging party's supervisor. After the charging party's medical procedure, he returned to work with a release from his doctor to work regular duty with no restrictions. About a month later, he experienced some short-lived breathing difficulties, but was able to return to work after about a 10-mintue period.

Shortly afterwards, the charging party was scheduled to receive his annual review, which would have given him a raise, 10 more sick days per year, and 40 hours paid vacation per year. The EEOC contends that, rather than allowing the charging party to vest in these benefits, his supervisor preemptively terminated his employment.

The charging party alleges that when firing him, the supervisor made negative disability-related comments, including ". . . hate to say this but we are going to have to let you go . . . you are riding the clock waiting until you get your disability because of your disability and our insurance . . . having all of these sick people makes our insurance liability and premiums higher . . . didn't know you had all these health problems . . . why didn't you go to the doctor before you came to us . . . was it because of our insurance?"[678]

While the court acknowledged the employer did set forth several legitimate, non-discriminatory reasons for terminating the charging party, including several performance-related and safety issues, it held the EEOC was able to provide evidence—including the email from the HR manager to the supervisor, and the comments the supervisor made upon termination—that such proffered reasons could be considered pretext for discrimination. The court therefore denied the employer's motion.

675 *EEOC v. Wesley Health Sys., LLC*, 2018 U.S. Dist. LEXIS 193960 (S.D. Miss. Nov. 14, 2018).
676 *Id.* at **11-12.
677 *EEOC v. Mid-South Extrusion, Inc.*, 2018 U.S. Dist. LEXIS 179713 (W.D. La. Oct. 18, 2018).
678 *Id.* at *6.

Another notable disability-related issue that arose in FY 2019 is whether and to what extend an employer needs to offer an employee returning from disability-related leave a position without competition as a reasonable accommodation. In *EEOC v. Manufacturers & Traders Trust Co.*,[679] the EEOC alleged the defendant bank violated the ADA when it failed to offer the charging party an open position as a reasonable accommodation after she returned from a leave of absence, and terminated her employment. The charging party, who was pregnant, had taken FMLA to obtain surgery to prevent a miscarriage. She also filed for short-term disability benefits. While on leave, the defendant advised the charging party that it would fill her position unless she was medically cleared to return to work within 10 days. After giving birth and receiving medical clearance to resume work, the charging party was required to apply for vacant positions, but was not reassigned to those positions, allegedly because she was regarded as having a disability/had a record of a disability.

The EEOC claims the defendant failed to provide a reasonable accommodation "by forcing [charging party] to compete for vacant positions for which she was qualified." The defendant countered that at the time of the charging party's employment termination she was not disabled and had no record of disability. Moreover, the defendant asserts that the ADA does not require reassignment without competition.

The court considered cross motions for summary judgment and granted the EEOC's summary judgment motion as to its failure to accommodate claim, but denied its unlawful discharge claim.

Notably, the court held that the defendant failed to accommodate the plaintiff by not reassigning her to an open position without competition. In reaching that decision, it rejected the defendant's argument that it had met its burden under the ADA by providing plaintiff with eight months of leave and allowing her to apply for open positions upon her return. The court held that the defendant's obligation to provide reasonable accommodations extended to non-competitive reassignment, and the issue turned on whether the defendant had to re-assign plaintiff even if she was not the "best qualified" candidate for the positions to which she applied.[680]

The court held that the defendant also failed to accommodate the plaintiff by requiring that she apply for vacancies rather than automatically reassigning her to a position for which she was qualified, even if she was less qualified than other applicants. Utilizing a textual reading of the ADA, the court held that re-assignment without competition was necessary to allow qualified employees with disabilities to re-enter the workforce. The court also noted that without such re-assignment, plaintiff's employment would be terminated and that such preferential treatment was required to level the playing field between qualified individuals with disabilities and all other applicants and employees.

The court declined to adopt the Seventh Circuit's *per se* rule that extended leave is not a reasonable accommodation,[681] holding that it conflicted with the Fourth Circuit's decision that a leave request will not be unreasonable on its face so long as it (1) is for a limited, finite period of time; (2) consists of accrued paid leave or unpaid leave; and (3) is shown to be likely to achieve a level of success that will enable the individual to perform the essential functions of the job in question.[682]

In denying the EEOC's unlawful discharge claim, the court rejected the EEOC's assertion that the defendant's failure to reassign the plaintiff occurred under circumstances that support an inference of intentional discrimination. The court held the defendant offered evidence of a legitimate, performance-based reason for the termination, and the circumstances offered by the EEOC considered separately or together did not support a finding of pretext.[683]

2. Scope of EEOC Complaint / Equal Pay

As noted, federal courts considered a handful of other interesting issues this past fiscal year. In *EEOC v. Denton County*,[684] the EEOC and a doctor sued the county, alleging the charging party, a woman, was paid at least $34,000 less than a male doctor performing substantially equal work. The charging party alleged the defendant discriminated against her by (1) failing or refusing to promote her to a position for which she was qualified because of her gender, (2) failing or refusing to pay her wages that were equal to male physicians performing the work of a primary care physician because of her gender, and (3) treating her less favorably than her male counterparts. She added a claim for retaliation since filing her complaint in intervention. Both the EEOC and the county filed motions for summary judgment.

679 *EEOC v. Manufacturers & Traders Trust Co.*, 2019 U.S. Dist. LEXIS 154701 (D. Md. Sept. 10, 2019).
680 *Id.* at *55
681 *Severson v. Heartland Woodcraft, Inc.*, 872 F.3d 476 (7th Cir. 2017).
682 *Wilson v. Dollar Gen. Corp.* 717 F.3d 337 (4th Cir. 2013).
683 *Manufacturers & Traders Trust Co.*, 2019 U.S. Dist. LEXIS 154701 at *69.
684 *EEOC v. Denton Cty.*, 2018 U.S. Dist. LEXIS 175794 (E.D. Tex. Oct. 12, 2018).

The defendant sought summary judgment on the Title VII claims based on retaliation and any claim the doctor was treated less favorably than male physicians aside from allegations of unequal pay, arguing she failed to exhaust her administrative remedies because they exceed the scope of the charge of discrimination.

The doctor claimed that her charge of discrimination was broad enough to encompass all of her claims and that she properly exhausted her administrative remedies. In her charge of discrimination, the plaintiff selected "sex" as the basis of her unequal pay. The EEOC's determination found that the defendant had discriminated against her based on her gender by paying her wages that were less than her male counterpart's. The EEOC determination read:

> Charging Party, a Primary Care Clinician (PCC), alleged that *she was discriminated against by the Respondent's payment of unequal wages* to her because of her sex (female). Specifically, she complains that she was *denied equal pay* because of her gender.

Thus, the EEOC investigation focused on wage disparity, which reasonably grew out of the charge of discrimination where the charging party also complained of unequal pay. The court noted that neither the charge of discrimination nor the EEOC determination even state that the charging party's employment was terminated, which is the adverse employment action alleged for both her Title VII claim for retaliation and the claim that she was treated less favorably. The court therefore found that the claims were not limited to the EEOC's investigation and did not grow from the charge of discrimination, even reading the charge liberally.[685]

The court emphasized that the administrative process and Title VII claims are separate and distinct rights. One can appeal a termination decision yet only file a Title VII claim for failure to pay equal wages.

The court therefore granted the defendant's motion for summary judgment as to its assertion that the doctor's "discrimination claim under Title VII must be limited to the single issue of alleged pay disparity between her and [her male counterpart]." With respect to the equal pay claims, the court denied both the EEOC's and the defendant's motions, as it found neither party had met its burden demonstrating that no material issue of fact remained.

3. Termination Based on Honest Belief of a False Charge

In *EEOC v. HP Pelzer Automotive Systems*,[686] the EEOC and intervening plaintiff sued defendant alleging the individual plaintiff /charging party was fired in retaliation for filing a sexual harassment complaint. In response, defendant asserts that, based on its investigation of the sexual harassment complaint, the charging party had falsified the report. Thus, defendant asserts that it terminated the charging party for making a false complaint, consistent with its harassment policy. The defendant filed a motion for summary judgment, arguing the plaintiff's claim failed as a matter of law because she was unable to show that she engaged in a protected activity or that the defendant's motivation for her termination was in retaliation for engaging in the protected activity because it "honestly believed" she falsified the report.

The court, however, found that the questions regarding the quality of defendant's investigation, and thus the reasonableness of its belief in its asserted reason for firing the charging party, were genuine disputes of material fact best left up to the jury.

Subsequently, the defendant asked the court to alter or amend its order, arguing that the court's order contained a clear error because it failed to apply the "honest belief" rule. The court denied the defendant's motion again, noting a split in the circuits in the honest belief rule: the Eleventh Circuit had found that the defendant's honest belief that the plaintiff lied during the investigation was enough to grant summary judgment on a retaliation claim,[687] while the Eighth Circuit denied summary judgment on a retaliation claim where evidence existed that the honest belief was founded solely on the statements of other employees and witnesses.[688] The court therefore denied the defendant's motion.

685 *Id.* at *15
686 *EEOC v. HP Pelzer Auto. Sys.*, 2018 U.S. Dist. LEXIS 210296 (E. D. Tenn. Dec. 13, 2018).
687 *EEOC v. Total System Serv., Inc.*, 221 F.3d 1171 (11th Cir. 2000).
688 *Gilooly v. Missouri Dept. of Health and Senior Services*, 421 F.3d 734, 740-41 (8th Cir. 2005).

4. Retaliation

A few summary judgment cases involved claims of retaliation. In *EEOC v. CRST International*,[689] for example, the EEOC alleged a company discriminated and retaliated against a driver applicant when he said he would need to ride with his emotional support dog as an accommodation for his post-traumatic stress and anxiety disorders. Specifically, the EEOC brought claims under Section 102(a) of Title I of the ADA, Section 503(a) of Title V of the ADA, and Section 503(b) of Title V of the ADA. Section 102(a) prohibits discrimination on the basis of disability, Section 503(a) prohibits retaliation against individuals who asserts their rights under the ADA, and Section 503(b) prohibits interference with an individual's exercise of their rights under the ADA. The court noted the EEOC did not sufficiently allege claims for failure to accommodate under the ADA.

The defendant argued that the charging party was not qualified to drive a commercial vehicle because he had been involuntarily civilly committed two months prior to the date he underwent a medical examination to receive clearance to drive commercially, and he failed to disclose the full extent of his mental health history, including having a history of impulsive and destructive behaviors, anxiety, and blackouts. The defendant brought evidence showing that had the medical examiner been aware of any of this information, the medical examiner would not have found plaintiff medically fit to drive commercially.

In denying summary judgment on the discrimination claim, the court found that the charging party could have been medically fit to drive when defendant denied his application for employment despite not finding employment for nearly six months. The court also denied summary judgment on the retaliation claim. The EEOC must show a causal connection between the charging party's allegedly engaging in a protected activity and the defendant's failure to hire him. Although defendant asserted that the reason the applicant was not hired was because of its "no pets" policy, a reasonable factfinder could find that the applicant was not hired because he raised his right to an accommodation under the ADA, and thus this strict application of the policy interfered with the charging party's right to be free from disability-based discrimination.

Notably, the court granted defendant's summary judgment motion to bar compensatory and punitive damages on plaintiff's retaliation and interference claims, holding that sections 1981a(a)(1) and 1981a(a)(2) of the Civil Rights Act (CRA) did not expand the remedies for retaliation and interference claims that were not expressly listed therein. In refusing to expand the remedies available under the CRA, the court noted plaintiff's retaliation and interference claims under sections 12203 and 503(b) under the ADA were *not* expressly identified as claims where compensatory and punitive damages were available, and thus plaintiff was only entitled to equitable relief.[690]

Additional information on these and other summary judgment decisions issued in FY 2019 can be found in Appendix E to this Report.

I. Default Judgment

Although uncommon, some courts have awarded the EEOC default judgments in discrimination, retaliation, and harassment cases.

One such instance in 2019 occurred in *EEOC v. NAKI Corp.*,[691] in which the EEOC sued the defendant, alleging that one of its managers sexually harassed three charging parties while they worked as former servers at the defendant's restaurant known as Daisy Dukes & Boots Saloon ("Daisy Dukes"). All three servers complained to other supervisors and were allegedly instructed by the owner to ignore the harassing manager. The three servers ultimately resigned, according to the complaint.[692]

The EEOC served the defendant with the summons and complaint on November 30, 2018.[693] After the defendant failed to file a responsive pleading, the EEOC moved for entry of default.[694] On February 26, 2019, the court clerk entered the default pursuant to Fed. R. Civ. P. 55(a), and the EEOC moved for entry of default judgment.[695]

689 *EEOC v. CRST Int'l*, 351 F. Supp. 3d 1163.
690 *Id.* at *1186.
691 *EEOC v. NAKI Corp.*, 2019 U.S. Dist. LEXIS 107610 (E.D. Va. June. 26, 2019).
692 *Id.* at *3
693 *Id.* at *1.
694 *Id.*
695 *Id.*

When a court enters a default against a defendant, the defendant admits the well-pleaded factual allegations in the complaint. As such, when reviewing a motion for default judgment under Fed. R. Civ. P. 56(b), courts accept as true the plaintiffs' well-pleaded allegations regarding liability. From there, courts must determine whether the allegations, as accepted, support the relief sought.

First, the court confirmed the EEOC's complaint established the requisite elements of a sexual harassment claim.[696] Notably, the court held that the manager's conduct could be imputed to the defendant because the manager supervised the three charging parties, and the charging parties complained to defendant's owner.[697]

The court then addressed the charging parties' relief sought. One charging party sought two months of back pay with prejudgment interest, and all three sought compensatory damages. The charging party seeking back pay submitted a declaration asserting that, based on estimates of her average monthly gratuity earnings, she would have made $1,400 per month, but for her constructive discharge. The court awarded of $3,025.16 in back pay and prejudgment interest under these facts.[698]

One charging party also sought $30,000 in compensatory damages, and the two others requested $15,000. Under Title VII, a plaintiff may recover compensatory damages of up to $50,000 if the employer has between 14 and 101 employees, as this employer was alleged to have had. Further, a plaintiff's testimony alone—without expert or lay medical testimony—can justify an award of compensatory damages. Based on the charging parties' complaint allegations accepted in the default, the court determined that their respective requests for compensatory damages were justified.[699]

J. Bankruptcy

A defendant's or charging party's bankruptcy declaration does not necessarily stay an EEOC lawsuit. For example, in one 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 *EEOC v. Celadon Trucking Services, Inc.*,[700] 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 pursing 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."[701] Causes of action that arise during the court of the bankruptcy are also deemed property of the bankruptcy estate.[702] 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."[703] 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.'"[704] 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."[705] Therefore, the individual claimants' failure to disclose their claims in their bankruptcy proceedings 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

696 *Id.* at **4-5.
697 *Id.*
698 *Id.* at *5.
699 *Id.* at **7-8.
700 *EEOC v. Celadon Trucking Servs.*, 2015 U.S. Dist. LEXIS 84639 (S.D. Ind. June 30, 2015).
701 *Id.* at *50, citing 11 U.S.C. § 541(a)(1).
702 *Id.*, citing 11 U.S.C. § 1306(a)(1).
703 *Id.* at *51.
704 *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)
705 *Id.* at *52, citing *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 122 S. Ct. 754 (2002).

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."[706]

In a more recent case, it was the *defendant* that declared bankruptcy. In *EEOC v. Shepherd*,[707] the EEOC sued a medical practice in the U.S. District Court for the Northern District of Ohio for alleged Title VII violations. 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) ("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."[708]

In response, the defendant countered that Section 362(b)(4) does not apply to actions seeking money judgments.[709] The EEOC replied by clarifying 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.'"[710]

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.[711] 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.[712] 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.[713] 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.[714]

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.[715] 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.[716] 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.

706 *Id.* at *55.
707 *EEOC v. Shepherd*, 2018 U.S. Dist. LEXIS 175025 (N.D. Tex. Oct. 11, 2018).
708 *Id.* at *4.
709 *Id.* at *2.
710 *Id.* at **2-3.
711 *Id.* at *5.
712 *Id.* at *7.
713 *Id.* at **7-8.
714 *Id.* at *8.
715 *Id.* at *9.
716 *Id.* at *9–10.

In another bankruptcy-related matter involving the EEOC, the Western District of Pennsylvania analyzed whether the EEOC could enforce a subpoena against a third party to determine whether the party was a successor-in-interest to the defendant. In *EEOC v. Scott Medical Health Ctr., P.C.*,[717] the EEOC filed a motion to show cause against Renu Medical and Weight Loss Center, PLLC ("Renu") requesting that the court order Renu to show good cause as to why it should not be compelled to comply with the EEOC's discovery subpoena. The EEOC subpoenaed Renu for information to determine whether it is a successor-in-interest to the defendant for purposes of judgment enforcement.[718]

The court granted the EEOC's motion and ordered Renu to show cause as to why it should not be compelled to comply with the subpoena.[719] In response, Renu argued that the automatic stay in the defendant's bankruptcy proceeding applied to the EEOC's action to enforce its judgment against Renu, and therefore to the EEOC's ability to subpoena Renu to take discovery. Renu also averred that the stay barred the EEOC from enforcing the money judgment because Section 362(b)(4)'s exception did not apply to money judgments. The EEOC countered that the automatic stay did not apply to Renu because it is not the debtor and the bankruptcy court did not extend the stay to Renu. Further, the EEOC contended that, even if the stay applied to Renu, the EEOC was still entitled to enforce the nonmonetary portion of its judgment against Renu and take discovery for that purpose.[720]

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.[721] Given that the 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.[722] 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 Renu.[723]

K. Pre-Trial Motions

In *EEOC v. Wesley Health System, LLC*,[724] the EEOC sued the defendant alleging that it violated the Americans with Disabilities Act by not providing a reasonable accommodation under the ADA to the charging party.[725] In addition to moving unsuccessfully for summary judgment, the defendant also filed a motion to exclude testimony of the EEOC's vocational expert.[726] The defendant argued the expert could not provide opinions as to: (1) whether the defendant failed to accommodate the charging party; (2) whether receiving assistance from coworkers was a reasonable accommodation; or (3) whether receiving assistance from coworkers would create an undue hardship on the defendant.[727] The defendant contended these were all legal questions and, since expert testimony offering a legal opinion is inadmissible, the expert's testimony on these subjects is inadmissible and irrelevant. The court disagreed, holding that those three topics also involved questions of fact and, thus, appropriate topics for expert testimony.[728] Similarly, the court rejected the defendant's argument that the vocational expert was unqualified to testify on the three topics because they were fact questions not requiring specialized knowledge to address.[729] Finally, the defendant contended the expert's opinions would be unreliable because they were not based on sufficient facts or a reliable methodology.[730] The court again disagreed with the defendant and outlined the vocational expert's underlying investigation that supported his expert report.[731] In addition, the court noted that the vocational and occupational rehabilitation fields are not subject to the same rigorous testing and review as with experts of hard sciences.[732] The court therefore held that, although the expert's methodology was simple, it was sufficient to survive the defendant's motion.[733]

717 *EEOC v. Scott Medical Health Ctr., P.C*, 2018 U.S. Dist. LEXIS 183552 (W.D. Pa. Oct. 26, 2018).
718 *Id.* at *2.
719 *Id.* at **2-3.
720 *Id.* at *4.
721 *Id.* at **4-5.
722 *Id.* at **5-6.
723 *Id.* at *6.
724 *EEOC v. Wesley Health Sys., LLC*, 2018 U.S. Dist. LEXIS 196451 (S.D. Miss. Nov. 19, 2018).
725 See *Id.* at *2.
726 *Id.* at *1.
727 *Id.* at *4.
728 *Id.* at **4-5.
729 *Id.* at *5.
730 *Id.* at **5-6.
731 *Id.* at **6-7.
732 *Id.* at *8.
733 *Id.* at **8-9.

The defendant's challenges to the expert's testimony nonetheless continued. Following the court's holding on its motion to exclude, the defendant filed a motion in limine to exclude all opinions and testimony of the vocational expert that were not disclosed during discovery.[734] The defendant anticipated that the EEOC would attempt to elicit testimony from the expert on several topics that were not disclosed in his designation, expert report, or deposition because the EEOC mentioned such topics in its response to the defendant's motion to exclude.[735] Contrary to the defendant's argument set forth in its motion in limine, the EEOC averred that the disputed testimony was disclosed during discovery.[736] After analyzing each disputed topic, the court granted the defendant's motion in limine in part and barred the vocation expert from testifying regarding topics that were not disclosed in discovery.

L. Remedies

As discussed in prior sections of this Report, Congress empowered the EEOC to challenge alleged discriminatory practices based on two separate sections in Title VII: section 706 and section 707. Different remedies are available under each. Jury trials and compensatory and punitive damages of up to $300,000 for an aggrieved individual are available under section 706, but not under section 707 of the Act. Section 707, on the other hand, merely provides for the traditional equitable remedies available under Title VII (e.g., back pay, front pay, attorneys' fees and injunctive relief).[737]

One case decided in FY 2019 dealt with the court's award of injunctive relief. In *EEOC v. UPS Ground Freight, Inc.*, the U.S. District Court for the District of Kansas was asked to modify or vacate a permanent injunction in light of changed circumstances.[738] In a prior decision, the court found that a provision in the company's collective bargaining agreement (CBA) discriminated on the basis of disability, and enjoined the company from enforcing this provision. The CBA at issue provided that the company could pay disabled drivers 90% of what nondisabled drivers earn when they temporarily move to non-driving jobs. Later, the company sought to vacate the injunction, because it was in final negotiations with the union over a new CBA that did not contain the policy previously found to be discriminatory. The company argued that these changed facts rendered the permanent injunction inequitable.

Changed factual circumstances may warrant modification when the injunction "proves to be unworkable because of unforeseen obstacles," the changed circumstances "make compliance with the [injunction] substantially more onerous," or when "enforcement of the [injunction] without modification would be detrimental to the public interest."[739] Courts, however, "should deny a party's request for modification . . . if it merely establishes that 'it is no longer convenient [for the movant] to live with the terms' of the injunction or consent decree."[740]

Here, although the company argued the permanent injunction should be eliminated entirely, the court found that a modification suggested by the EEOC was consistent with the language in the declaratory judgment, and was tailored to the changed circumstances that evolved while the company's motion was pending. To that end, the court modified the language of the injunction.

The company also moved to stay the injunction pending ratification and appeal. In evaluating this motion, the court considered four factors: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceedings; and (4) where the public interest lies.[741]

734 2018 U.S. Dist. LEXIS 209457 (S.D. Miss. Dec. 12, 2018).
735 *Id.* at **1-2.
736 *Id.* at *2.
737 It is not uncommon, however, for the EEOC to file "hybrid" actions involving sections 706 and 707. Based on this approach, the EEOC has argued that it can bring a "pattern or practice" claim under section 706 and rely on the broad-based framework established in *Int'l Brotherhood of Teamsters v. U.S.*, 431 U.S. 324, 336 (1977) (EEOC must "establish by a preponderance of the evidence that ...discrimination was the company's standard operating procedure—the regular rather than the unusual practice") as applied to section 707 claims, but also seek compensatory and punitive damages and jury trials, which are permissible only under section 706. The courts remain unsettled whether the EEOC is permitted to bring such "hybrid" class-based claims.
738 *EEOC v. UPS Ground Freight, Inc.*, 344 F. Supp. 3d 1256, 1260 (D. Kan. 2018)
739 *Id.* at 1263 (internal citations omitted).
740 *Id.*
741 *Id.* at 1265 (internal citations omitted).

After weighing such factors, the court denied the company's motion to stay the injunction.[742]

M. Settlements

Courts have taken steps to help the parties settle their disputes to avoid protracted litigation. In United States *EEOC v. Prestige Care, Inc.*, for example, at the court's suggestion, the parties entered into a stipulated protective order governing pre-discovery exchange of information (including financial information) for the limited purpose of facilitating settlement negotiations.[743]

In *EEOC v. Amy's Country Candles, LLC*, the parties filed a joint motion seeking a 30-day conditional order of dismissal allowing them time to finalize a settlement agreement.[744] The court granted this motion. One day before the close of this 30-day period, the EEOC filed a motion to enforce a settlement agreement. The EEOC argued that the parties had agreed to a full settlement of claims by way of a joint consent decree, but the defendant's counsel had allegedly not responded to the EEOC's requests to finalize the consent decree. The EEOC therefore moved to enforce the consent decree. Defendant did not oppose the motion.

The court reviewed the parties' correspondence, and determined that the defendant had accepted the terms in a previous version of the consent decree. The court therefore granted the EEOC's motion to enforce the decree, but struck a provision that had been added in a later draft, and to which there was no record of the defendant having agreed.

In considering whether to enter a proposed consent decree, courts consider a variety of factors. In *EEOC v. Absolut Facilities Management, LLC*,[745] the EEOC alleged that the company (1) failed to accommodate disabled workers; denied leave as a reasonable accommodation to employees with disabilities; (2) refused to allow disabled employees to return to work unless they could do so without medical restrictions; and (3) subjected employees to impermissible disability-related inquiries and medical examinations. The EEOC also claimed that the company fired employees on the basis of pregnancy and failed to accommodate pregnancy-related medical restrictions.

The parties jointly moved to enter a consent decree. Under the terms of the three-year proposal, the company agreed to pay $40,000 in lost wages and damages to the former employee who filed the initial discrimination charge with the EEOC, and to pay $425,000 into a class settlement fund to compensate other claimants. The defendant also agreed to revise its leave of absence, discipline and attendance policies to comply with the ADA, and to train its corporate human resources personnel and facility HR directors and administrators on their legal obligations under Title VII (as amended by the Pregnancy Discrimination Act) and the ADA. Moreover, the defendants, as well as their managers, officers, and agents are enjoined from engaging in an enumerated list of employment practices that discriminate on the basis of disability or pregnancy.

The court reviewed the proper standard for considering the decree: "Before entering a consent judgment, the district court must be certain that the decree 1) 'spring[s] from and serve[s] to resolve a dispute within the court's subject-matter jurisdiction,' 2) 'come[s] within the general scope of the case made by the pleadings,' and 3) 'further[s] the objectives of the law upon which the complaint was based.'"[746] In this case, the court agreed all three prongs were satisfied. Among other things, the court found the terms of the consent decree furthered the goals of the ADA and Title VII.

In *EEOC v. KS Aviation, Inc.*, the U.S. District Court for the Eastern District of California reminded parties that telephonic scheduling conferences with the court are not to be missed. Counsel for the defendant failed to appear for a telephonic conference regarding scheduling of a future settlement conference.[747] In addition, defense counsel did not alert the court to any scheduling conflict prior to the call, and, apparently, this was not the first time defense counsel had "caused the needless expenditure of Plaintiff's time and the Court's limited resources by failing to comply with a court order."[748] Upon motion from the EEOC, the court ordered defense counsel to show cause why it should not issue sanctions for failure to comply with the court's order and scheduled a hearing on the issue of sanctions.

742 *Id.* at 1269.
743 *EEOC v. Prestige Care, Inc.*, 2018 U.S. Dist. LEXIS 217857 (E.D. Cal. Dec. 27, 2018).
744 *EEOC v. Amy's Country Candles, LLC*, 2018 U.S. Dist. LEXIS 196716 (E.D. La. Nov. 19, 2018).
745 *EEOC v. Absolut Facilities Mgmt., LLC*, 2018 U.S. Dist. LEXIS 180900 (W.D.N.Y. Oct. 18, 2018).
746 *Id.* at *8, citing *Kozlowski v. Coughlin*, 871 F.2d 241, 244 (2d Cir. 1989) (alteration in original).
747 *EEOC v. KS Aviation, Inc.*, 2019 U.S. Dist. LEXIS 37883 (E.D. Cal. Mar. 8, 2019).
748 *Id.* at *1.

In *EEOC v. CollegeAmerica Denver, Inc.*, the U.S. District Court for the District of Colorado was asked to enjoin the proceedings of a state court breach of severance agreement action until after conclusion of the EEOC's related ADEA retaliation lawsuit.[749] Here, the defendant filed a state court action against an individual, whose interests the EEOC represented in the federal case. The employer alleged that the individual represented by the EEOC breached her separation agreement. The employer demanded the return of $7,000 paid to her under the agreement. That case was stayed upon the filing of an action by the EEOC.

Prior to trial in this case, the court dismissed the EEOC's claim for unlawful interference with statutory rights pursuant to § 7(f)(4) of the ADEA. The case proceeded to trial on the EEOC's retaliation claim, and the jury returned a verdict in favor of the defendant employer. The EEOC then filed a post-trial appeal of the dismissal of its § 7(f)(4) claim, and the Tenth Circuit reversed the dismissal based on a new legal theory that the defendant presented at trial, *i.e.*, that the former employee breached the separation agreement by reporting adverse information to the EEOC without first notifying the defendant.

The breach of separation agreement case was set for trial before the EEOC's § 7(f)(4) claim. In its statement of the case involving the breach of separation agreement, the defendant stated that the case involved the charging party's promise that she would not "intentionally with malicious intent (publicly or privately) disparage the reputation of [defendant] or any of its related entities" and that she breached this promise in statements made a former employee through the social networking site LinkedIn and in email.[750]

The EEOC requested that defendant be preliminarily enjoined from asserting any breach of contract claim under the separation agreement, or from otherwise using the separation agreement to pursue a claim or judgment against the former employee it was representing. Applying the criteria used for issuing an injunction, the court found that the EEOC failed to show that either the EEOC or the charging party would suffer irreparable harm if the defendant prevailed on its claim in the breach case before the merits of the EEOC's claim was decided. As such, the EEOC was not entitled to the extraordinary remedy of injunctive relief.

In *EEOC v. Amy's Country Candles, LLC*, the court denied defense counsel's motion to withdraw from the case following the defendant's failure to make a timely settlement payment.[751] Per a clause in the agreement, once the defendant failed to make a payment by the specified time, the entire settlement amount became due. The defendant failed to make one such payment. Counsel for the defendant then moved to withdraw, but the court denied this motion and noted, "[a]n attorney may withdraw from representation only upon leave of the court and a showing of good cause and reasonable notice to the client."[752] In this case, the court found counsel did not provide the court with any reason for the withdrawal, and the withdrawal could prejudice the plaintiff and delay resolution of the case by affecting plaintiff's ability to enforce the terms of the settlement agreement. The court found "no reason why defendant's counsel cannot remain as the counsel of record for the period of time it will take for defendant to fulfill its remaining obligation or for the Court to enforce the judgment."[753]

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."[754] 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."[755]

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 the EEOC or "private attorneys general" to bring claims.[756] Accordingly,

749 *EEOC v. CollegeAmerica Denver, Inc.*, 2019 U.S. Dist. LEXIS 72601 (D. Colo. Apr. 30, 2019).
750 *Id.* at **3-4.
751 2019 U.S. Dist. LEXIS 99259, at *1 (E.D. La. June 13, 2019).
752 *Id.* at **2-3.
753 *Id.* at **3-4.
754 42 U.S.C. § 2000e-5(k).
755 *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 416-17 (1978).
756 *Id.* at 422.

under the standard set forth in *Christianburg Garment Co. v. EEOC*,[757] 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."[758] This stringent standard does not, however, require proof that the EEOC or a private plaintiff acted in bad faith.[759] 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.[760]

In *EEOC v. PC Iron, Inc.*, the defendant sought an award of $189,353.00 in attorneys' fees arguing that, as the prevailing party under Title VII, it should be awarded fees because the EEOC's claims against it were frivolous, unreasonable, and without foundation.[761] The defendant asserted the EEOC failed to conduct a good-faith investigation, failed to conduct a thorough interview of the charging party in direct contravention of its own procedures as set forth in the EEOC's Regional Attorneys' Manual, and failed to conciliate the hostile work environment claim prior to filing suit. The defendant claimed that had the EEOC done so, it would have been evident that the charging party's hostile work environment claim was barred by the applicable statute of limitations and that a thorough investigation would have revealed the myriad defects with her claims.

Applying the *Christianburg* standard, the court found that the hostile work environment claim was indeed frivolous at the outset. The EEOC's investigation case log illustrated multiple deficiencies in its investigation, including the fact that the EEOC waited over three years before it interviewed any of the relevant witnesses. Had the EEOC conducted a proper investigation, the court explained, it would have discovered that the four interactions the charging party alleged occurred within the 300-day window preceding the filing of her charge were not discriminatory or abusive acts.

The court, however, did not find that the EEOC's discrimination claim was frivolous, unreasonable, or without foundation, notwithstanding its finding following the bench trial that the evidence did not establish an adverse employment action. The court therefore awarded the defendant $2,070.00 in attorneys' fees for work attributable exclusively to the hostile work environment claim.

Although the opinion in *EEOC v. PC Iron, Inc.* ultimately granted a portion of the fees sought by defense counsel, it is a modest total. More recently, for example, an Eighth Circuit panel upheld a $3.3 million fee award to defendant CRST Van Expedited, Inc.[762] This was the third time this matter had landed before the Eighth Circuit.

This long-running saga began in 2007 when the EEOC filed suit against trucking company CRST, claiming it violated Title VII by subjecting approximately 270 female employees to a hostile work environment. The district court granted summary judgment in favor of the defendant on the majority of claims.[763] Most of them were dismissed because of the EEOC's failure to meet its statutory pre-suit obligations to conduct a reasonable investigation and *bona fide* conciliation of these claims. The district court concluded that the EEOC "wholly abandoned its statutory duties" to investigate and conciliate before suing the employer. The district court also ruled that the EEOC's failure to satisfy its pre-suit obligations was unreasonable, therefore making an award of attorneys' fees appropriate.

The EEOC appealed the district court's dismissal of claims brought by 107 of the class members to the Eighth Circuit, arguing, in part, that the district court had abused its discretion in awarding the defendant attorneys' fees and costs. In 2012, the Eighth Circuit reversed the lower court's grant of summary judgment on the EEOC's claims as to two of the class members.[764] The court also vacated the district court's award of attorneys' fees and costs, reasoning that the defendant was not a "prevailing party" under Title VII and, therefore, was not entitled to such an award. The remainder of the case was remanded for further proceedings to determine whether individual claims were frivolous, unreasonable, or groundless.

On remand, after the EEOC had withdrawn its claim on behalf of one of the two remaining claimants, the parties settled the last claimant's claims and jointly moved for an order of dismissal. The settlement agreement specifically provided that it did not preclude the defendant from pursuing attorneys' fees and costs. After the district court granted the motion to dismiss, the defendant filed a bill of costs and moved for a fee award. The EEOC argued that the defendant was not a "prevailing party" because a majority of claims had been dismissed for non-merits reasons, including the EEOC's failure to investigate and conciliate the claims before filing suit. However, the district court rejected the EEOC's argument, holding that dismissal

757 434 U.S. 412 (1978).
758 *Id.*
759 *Id.* at 421.
760 *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)).
761 *EEOC v. PC Iron, Inc.*, 2019 U.S. Dist. LEXIS 34150 (S.D. Cal. Mar. 4, 2019).
762 *EEOC v. CRST Van Expedited, Inc.*, 2019 U.S. App. LEXIS 36511 (8th Cir. Dec. 10, 2019).
763 *EEOC v. CRST Van Expedited, Inc.*, 611 F.Supp.2d 918 (N.D. Iowa 2009).
764 *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657 (8th Cir. 2012).

of claims due to the EEOC's failure to satisfy its pre-suit obligations was, indeed, a dismissal on the merits, thus qualifying the defendant as a "prevailing party" under Title VII. Accordingly, the district court on August 1, 2013, granted the employer nearly $4.7 million in attorneys' fees, expenses, and costs.

The EEOC again appealed. It argued—and the Eighth Circuit initially agreed—that the district court erred in awarding the defendant attorneys' fees, expenses, and costs because the dismissal of claims based on deficiencies in the EEOC's pre-suit processing did not equate to a merits-based decision, a necessary prerequisite for such an award. The Eighth Circuit held, in part, that because Title VII's pre-suit requirements—namely, the EEOC's duties to investigate and conciliate—are not elements of a Title VII claim, the dismissal of claims on this ground did not constitute a ruling on the merits required to deem defendant a "prevailing party."[765]

In May 2015, the defendant petitioned the Supreme Court for review after the entire Eighth Circuit declined to revisit the appellate panel's decision to overturn the attorneys' fee award. One year later, the Supreme Court reconciled a circuit split that resulted from the Eighth Circuit's decision regarding the definition of "prevailing party." The Supreme Court held that "a defendant need not obtain a favorable judgment on the merits in order to be a 'prevailing party' under Title VII."[766] The Court noted that Congress had not intended that defendants be eligible to recover for costs and fees only when courts disposed of cases on their merits. Additionally, the Court amplified its previous decision in *Christianburg*, emphasizing that Title VII permits prevailing defendants to recover whenever the plaintiff's claim was "frivolous, unreasonable, or groundless," given that one purpose of the fee-shifting provision of Title VII is to deter plaintiffs from bringing meritless claims.

The Court declined, however, to make a determination on the EEOC's argument that a defendant must obtain a preclusive judgment in order to prevail, and remanded these issues to the Eighth Circuit. The Court also declined to reconsider whether, even if the defendant were a prevailing party, the EEOC's claims were frivolous, unreasonable, or groundless, which would thereby preclude defendant from being awarded fees and costs.

The Eighth Circuit, in turn, remanded the matter to the district court, which reaffirmed its earlier holding that "[t]he EEOC's failure to conciliate and investigate the sixty-seven claims at issue caused the resulting claims in the instant action to be frivolous, unreasonable and/or groundless under *Christiansburg*."[767] The district court then examined each of the 78 claims dismissed on summary judgment, and determined that the majority were frivolous, groundless and/or unreasonable "for a variety of reasons."[768]

In setting the award amount, the court took the prior amount awarded ($4,694,442.14) and subtracted the fees previously awarded for the EEOC's first appeal and those attributable to the EEOC's purported pattern-or-practice claim. The court then calculated the average fee amount for the claims dismissed at summary judgment ($24,937.94) and for the EEOC's failure to satisfy its presuit obligations ($20,225.34). The court also awarded $122,749.25 for the briefing and hearing on the defendant's motion to show cause based on the EEOC's presuit failures. The court then added a portion of the fees previously awarded for the pattern-or-practice claim ($53,336.16) to cover the individual claims for which the EEOC relied on its pattern-or-practice theory. These calculations resulted in a new fee award of $3,317,289.67. The EEOC appealed.

The matter was once again before the Eighth Circuit, where a three-judge panel determined that the district court did not abuse its discretion in assessing the fee award. According to the panel, "[t]he district court's finding that the EEOC's failure to conciliate and investigate the claims was an unreasonable litigation tactic that resulted in frivolous, unreasonable, or groundless claims is consistent with this court's prior observation that the EEOC 'wholly failed to satisfy its statutory presuit obligations.' The EEOC could not hold a reasonable belief that it satisfied its presuit obligations when it 'wholly failed to satisfy' them."[769]

The panel also noted that the district court "exhaustively explained" why the majority of the claims dismissed on summary judgment were frivolous, unreasonable, or groundless. "In doing so, it complied with our directive to 'make particularized findings of frivolousness, unreasonableness, or groundlessness as to each individual claim upon which it granted summary judgment on the merits to CRST.'"[770]

765 *EEOC v. CRST Van Expedited, Inc.*, 774 F.3d 1169 (8th Cir. 2014), *vacated and remanded*, 136 S. Ct. 1642 (2016).
766 *EEOC v. CRST Van Expedited, Inc.*, 136 S. Ct. 1642 (2016).
767 EEOC v. CRST Van Expedited, 277 F.Supp.3d 1000, 1017 (N.D. Iowa 2017).
768 *Id.* at 1049.
769 *CRST Van Expedited*, 2019 U.S. App. LEXIS 36511 at *11 (internal citations omitted).
770 *Id.* at **11-12, citing *EEOC v. CRST Van Expedited, Inc.*, 774 F.3d at 1183.

Finally, the panel determined the district court appropriately applied the fee-granting standard the Supreme Court established in *Fox v. Vice*.[771] In that 2011 case, the Court held that "a court may grant reasonable fees to the defendant" where "the plaintiff asserted both frivolous and non-frivolous claims," "but only for costs that the defendant would not have incurred but for the frivolous claims."[772] The trial court has "wide discretion" in applying this standard.[773] The Eighth Circuit therefore gave "substantial deference" to the lower court's determinations, particularly in light of its "superior understanding of the litigation."[774]

To date, the $3.3 million fee award is the largest monetary penalty ever assessed against the EEOC.

771 *Fox v. Vice*, 563 U.S. 826 (2011).
772 *CRST Van Expedited*, 2019 U.S. App. LEXIS 36511 at *14, citing *Fox*, 563 U.S. at 829.
773 *Fox*, 563 U.S. at 829.
774 *CRST Van Expedited*, 2019 U.S. App. LEXIS 36511 at *16, citing *Fox*, 563 U.S. at 838.

VI. APPENDICES

Appendix A: Pay Equity Case Filings for FY 2015-FY 2019[775]

Filing Date	Court Name and Case Number	Summary	EEOC Press Release
4/15/2015	U.S. District Court for the District of Maryland 1:15-cv-1091	An independent state agency that regulates Maryland's insurance industry and enforces insurance laws allegedly paid female employees lower wages than men since at least December 2009. Specifically, the agency paid three women and a class of similarly situated female investigators and enforcement officers lower wages than it paid to their male counterparts who were doing substantially equal work under similar working conditions. Court approved Consent Decree on 1/25/19 involving payment of $36,002 (equally divided between backpay and liquidated damages) to three individuals identified in Consent Decree, and injunctive relief.	4/20/2015
9/10/2015	U.S. District Court for the District of Maryland 1:15cv2681	Female employee with 30 years of experience in bookkeeping was paid less than a male employee with only 10 years of experience. Female employee resigned (constructively discharged) after pointing out disparity to employer to no avail. Male employee subsequently admitted to EEOC that he was asked to embellish his duties to "shoot down [charging party's] case." Court approved Consent Decree on 4/11/16 involving payment of $10,371 in backpay to charging party, and injunctive relief.	n/a
9/28/2015	U.S. District Court for the Eastern District of Virginia 1:15cv1246	Employer paid female employee less than male employee for the same work. Court approved Consent Decree on 12/30/15 involving payment of $45,000 (breakdown not specified) and injunctive relief.	10/2/2015
9/29/2015	U.S. District Court for the District of Maryland 8:15cv2942	Employer paid female employee less than male employee for the same work. Court approved Consent Decree on 6/1/17 involving payment of $139,633.56 (equally divided between backpay and liquidated damages) to charging party, and injunctive relief.	10/1/2015
9/29/2015	U.S. District Court for the Northern District of Ohio 5:15cv2017	Human Resources manager was paid less than her male predecessor and received fewer benefits. Court approved Consent Decree on 9/19/16 involving payment of $50,000 (equally divided between backpay and liquidated damages) and injunctive relief.	n/a
7/25/2016	U.S. District Court for the District of New Mexico 1:16cv852	Charging party was paid less than a male coworker in the same position. After the charging party complained about the pay disparity, the male coworker was promoted. Charging party was also disciplined for speaking Spanish to coworkers, in violation of defendant's English-only policy. Court approved Consent Decree on 12/30/16 involving payment of $60,000 (divided equally between backpay and alleged compensatory damages) to charging party, and injunctive relief.	7/27/2016
9/26/2016	U.S. District Court for the Southern District of California 3:16cv2410	A pharmacy chain in north San Diego County allegedly violated federal law when it paid a female pharmacy technician substantially less than a male pharmacy technician and then fired her two days after she complained about discrimination. According to the EEOC's lawsuit, both pharmacy technicians were performing the same job at the same location, but the female was paid less than her male co-worker. EEOC contends that from October 2013 until January 2016, the pharmacy paid the female employee upwards of four dollars an hour less than the male employee. EEOC also charged that within two days of the female employee's complaining of sex discrimination, she was fired. Court approved Consent Decree on 11/6/17 involving payment of $60,000 ($21,116.40 in backpay and $38,883.60 in compensatory damages) and injunctive relief.	9/26/2016

775 Shaded entries involve class-type claims.

9/30/2016	U.S. District Court for the Southern District of Mississippi 3:16cv768	A poultry processor allegedly violated federal law by paying a female plant coordinator less than a male plant coordinator doing equal work. EEOC charged that defendant continuously paid the charging party at a lower rate, while giving her a greater workload than it gave to her male counterpart, who has the same title and position. On several occasions, the charging party requested to be paid on an equal basis as her male counterpart, but her requests for pay increases and equal pay were denied. Court approved Consent Decree on 7/27/18 involving payment of $30,000 (equally divided between backpay and alleged compensatory damages) and injunctive relief.	9/30/2016
9/30/2016	U.S. District Court for the District of Colorado 1:16cv2471	A university violated federal law by paying female employees lower wages than men. Specifically, the university allegedly paid a class of female full law professors lower salaries than it paid to their male counterparts who were doing substantially equal work under similar working conditions. Court approved Consent Decree on 5/18/18 involving aggregate payment of $2,660,000 to class of aggrieved individuals and injunctive relief.	10/3/2016
11/17/2016	U.S. District Court for the Central District of California 8:16-cv-02066	Defendant allegedly discriminated against a female former employee by paying her a lower base salary and applying a different commission structure than male employees in the same position. After complaining about the commission and salary discrepancy, the agency alleges that charging party's sales goal was increased, her computer and phone were monitored and her employment was eventually terminated. Consent Decree approved by court on 11/14/17 involving payment of $105,000 ($84,000 in compensatory damages and $21,000 in backpay) and injunctive relief.	11/17/2016
6/12/2017	U.S. District Court for the District of Nebraska 4:17cv3068	The EEOC alleged that defendant illegally paid the complainant less than it paid men for doing a job with the same required skill, effort, responsibility, working conditions, and within the same establishment. Court approved Consent Motion for agreed upon judgment (*i.e.*, offer of judgment) on 7/10/17 involving payment of $30,598.90 ($15,479.45 in backpay and $15,479.45 in liquidated damages) to charging party, and injunctive relief.	6/12/2017
6/12/2017	U.S. District Court for the Eastern District of Arkansas 4:17cv387	The EEOC filed an action to correct unlawful employment practices on the basis of sex, to restrain the unlawful payment of wages to an employee of one sex at a rate less than the rate paid to an employee of the opposite sex, and to provide appropriate relief due to the charging party as a result of such unlawful practices. The EEOC alleged that defendant paid the charging party, a woman, significantly less money than her male predecessor for performing equal work in the same position. Court approved stipulated order of settlement on 7/5/18 involving payment of $38,000 ($15,000 in back pay and $23,000 in compensatory damages) to charging party and injunctive relief.	6/12/2017
8/30/2017	U.S. District Court for the Eastern District of Pennsylvania 2:17cv3897	The EEOC relied on EPA and Title VII and alleged that female employees were offered superior parental leave benefits in comparison to the parental leave benefits offered to male employees. Consent Decree entered on 7/17/18 (and supplemental decree on 11/21/18) involving payment of an aggregated sum of $1,100,000 to the aggrieved employee and a class of similarly situated male employees and injunctive relief.	8/30/2017
8/31/2017	U.S. District Court for the Eastern District of Texas 4:17cv614	The EEOC alleged that charging party, a female Primary Care Clinician employed by the county defendant, was paid less in comparison to male physicians hired for the position with equivalent employment and experience. Court approved by final Judgment on 10/24/16 based on offer of judgment involving payment of $15,000 to charging party, and injunctive relief.	8/31/2017

9/5/2017	U.S. District Court for the District of Kansas 2:17cv2513	The EEOC alleged that two friends were offered "pizza artist" positions with defendant, but the female applicant was offered a job at a pay rate of 25 cents less than the male applicant. When the female applicant called to inquire as to the pay disparity, defendant withdrew the offer for both individuals, allegedly because they discussed their pay. Court approved offer of judgment on 11/9/17 involving payment of $2,500 ($850 in backpay and $1,650 for liquidated, compensatory and punitive damages) in the aggregate to four impacted employees, and injunctive relief.	9/5/2017
9/26/2017	U.S. District Court for the District of Columbia 1:17cv1989	The EEOC alleged that charging party, who is female, was paid less than her male counterpart for the same job and work, even though she had more years of relevant experience. Consent Decree approved by court on 7/17/18 involving payment of $41,770 ($33,450 in backpay and lost benefits and $8,320 in liquidated damages) and injunctive relief.	9/27/2017
9/26/2017	U.S. District Court for the Middle District of Tennessee 3:17cv1306	The EEOC alleged that defendant hired a male employee to the same position occupied by charging party (female) at a higher salary rate than it paid charging party, and a higher rate than it initially offered to a female applicant. Charging party requested a salary review. The salary review confirmed that charging party was not being paid at the market rate, but she was told her compensation would not be adjusted. Court approved Consent Decree on 3/29/19 involving payment of $77,500 (payment of $4,000 in backpay and $73,500 in non-wage emotional distress damages) and injunctive relief.	9/27/2017
9/26/2017	U.S. District Court for the District of Columbia 1:17cv1978	The EEOC alleges that charging party was paid less than a male employee conducting equivalent work who had less experience, and was denied a promotion in favor of the male employee due to her sex. Lawsuit still pending as of 1/1/20.	n/a
9/27/2017	U.S. District Court for the District of Maryland 1:17cv2860	The EEOC alleges that charging party and a class of female librarians were paid lower wages than their male counterparts. Lawsuit still pending as of 1/1/20.	9/27/2017
9/27/2017	U.S. District Court for the Eastern District of Virginia 1:17cv1083	Charging party alleged that she was paid less than her male coworker to do the same janitor job. After charging party complained about the pay disparity, she was given extra duties and was eventually terminated from her position. Court approved Consent Decree on 1/17/18 involving payment of $36,461.60 ($23,461.60 for backpay and $13,000 for other damages) and injunctive relief.	n/a
3/22/2018	U.S. District Court for the Central District of California 2:18cv2323	The EEOC alleged that a charter school and non-profit organization violated the EPA and Title VII by paying a female math tutor at a lower hourly rate than it paid her male coworker, despite their jobs being interchangeable. Consent Decree approved by court on 2/27/19 involving payment of $8,000 to charging party, and injunctive relief.	3/22/2018
8/6/2018	U.S. District Court for the District of Kansas 2:18cv2398	EEOC alleged that a Kansas school district violated federal law by paying women and men unequally for jobs with the same required skill, effort, and responsibility. According to the EEOC, the charging party was hired to be the principal of both a middle school and elementary school in 2015. Although her male predecessor was paid a base salary of $50,000, she was paid only 90% of that, or $45,000. In 2016, after almost a year as principal, charging party complained about the unequal pay and was given a small raise to $46,500, still only 93% of what her male predecessor earned. In 2017, when she was replaced by another male whom defendant paid $50,000, she filed a complaint with the EEOC. Consent Decree approved by court on 5/16/19 involving payment of $11,250 to charging party, and injunctive relief.	8/6/2018

9/5/2018	U.S. District Court for the Middle District of Pennsylvania 1:18cv1753	The EEOC alleged that a company violated federal law by paying female sales support employees lower wages than men. According to the EEOC, the company paid two female sales support employees lower hourly wages than their male coworkers, even though the women were doing substantially equal work. One of the women trained two of her male coworkers when they were hired, yet she received lower wages, the EEOC charged. Consent Decree approved by court on 4/15/19 and payment of $50,000 in total that the two impacted employees jointly received, and injunctive relief.	9/5/2018
9/18/2018	U.S. District Court for the Northern District of Mississippi 1:18cv177	The EEOC alleges a consumer loan and finance company violated federal law when it paid a class of female branch managers less than their male colleagues for doing essentially the same work. The EEOC's lawsuit challenged the company's compensation system, which has paid female branch managers less than males performing the same job since at least 2010. These disparities involved branch managers at different company branches in different cities across Tennessee and Mississippi. In 2017, a female branch manager who worked in Mississippi brought the pay disparity issue to the company's attention. The company, however, refused to discuss the pay disparity or address her complaint. Lawsuit still pending as of 1/1/20.	9/19/2018
9/28/2018	U.S. District Court for the District of Wyoming 2:18cv161	EEOC alleged that defendant discriminated against female nurses by paying them less than a male nurse, despite performing work that was substantially equal, in violation of the Equal Pay Act and Title VII. Further, when presented with evidence of the pay disparity between male and female nurses, as well as frequent inappropriate behavior of Interim Administrator, defendant failed to take appropriate corrective action, resulting in the constructive discharge of charging party and other aggrieved female nurses. Consent Decree approved by court on 10/22/19 involving payment of $50,000 to be distributed to charging party and other aggrieved individuals as determined by EEOC, and injunctive relief.	10/1/2018
12/20/2018	U.S. District Court for the District of Minnesota 0:18cv3446	The EEOC alleged the charging party, who is a former employee of the defendant, was paid less because of her gender than the defendant paid to at least four male employees for performing the same job duties. Lawsuit still pending as of 1/1/20.	n/a
6/3/2019	U.S. District Court for the District of Maryland 1:19cv1625	EEOC alleged the defendant engaged in a pattern or practice of discrimination against a class of female security guards, in violation of Title VII and the Equal Pay Act, by paying them lower wages than that paid to their male counterparts who performed equal work under similar working conditions. Lawsuit still pending as of 1/1/20.	6/3/2019
6/3/2019	U.S. District Court for the District of Maryland 8:19cv1626	EEOC alleged that the defendant violated the EPA by paying an employee lower wages than that paid to male employees performing equal or less-demanding work under similar working conditions. Consent Decree approved by court on 11/27/09 involving payment of $16,595 to charging party, and injunctive relief.	6/3/2019
7/16/2019	U.S. District Court for the Western District of Louisiana 3:19cv914	EEOC alleged the defendant hotel paid the charging party, a female front desk supervisor, and the known and unknown members of a class of female guest service representatives, less than a male guest service representative, for equal work at the hotel. In addition, the defendant paid the male employee less in an attempt to correct the difference between what it paid him and what it paid the charging party and the known and unknown members of the class. Consent Decree approved by court on 11/27/19 involving payment of $16,595 to charging party, and injunctive relief.	7/22/2019

7/29/2019	U.S. District Court for the Southern District of Florida 1:19cv23131	The EEOC alleges the university defendant violated federal law by paying a female professor less than a male counterpart for performing equal or similar work. The EEOC's suit charged that a male political science professor was paid more than a female political science professor even though the two professors were both awarded promotion to full professor on their first attempt at promotion, at the same time, and with similar reviews by faculty. Through an inadvertently sent email, the female professor confirmed what she had before suspected—that the university was treating her less favorably than male faculty by paying her less than her male counterpart. The female professor repeatedly complained to the university, but the pay disparity continued. Lawsuit pending as of 1/1/20.	n/a
8/30/2019	U.S. District Court for the Western District of Tennessee 2:19cv2586	EEOC alleges defendant discriminated against the charging party, a former employee, by paying her significantly less money than her male counterpart for performing substantially equal work in the same position. Lawsuit pending as of 1/1/20.	n/a
9/19/2019	U.S. District Court for the Western District of Missouri 4:19cv760	EEOC alleged the company violated the Equal Pay Act by paying a female nurse less than two male nurses performing the same job. According to the EEOC, a licensed practical nurse (LPN) was hired in March 2017 at the rate of $21 per hour. Two male LPNs performing the same job were paid $25 per hour. According to the suit, the company admitted it should have paid the charging party $25 per hour. Lawsuit pending as of 1/1/20.	n/a

APPENDIX B - EEOC CONSENT DECREES, CONCILIATION AGREEMENTS AND JUDGMENTS[776]

Select EEOC Settlements in FY 2019-2020[777]

Settlement Amount	Claim	Description	Court	EEOC Press Release
$20.5 million*	Race Discrimination Sex Discrimination Retaliation	EEOC alleged the company tolerated a work environment hostile to female and African American employees, and discriminated against them on the basis of pay and career advancement. The EEOC also alleged the company retaliated against employees who filed charges of discrimination with the EEOC or otherwise opposed discrimination. In one instance, the company purportedly fired a vice president who refused to give a negative evaluation and a disciplinary warning to two African American female employees who had complained. Under the terms of the four-year consent decree, the company will pay $20,500,000 to 21 former employees, and refrain from engaging in future violations of Title VII. The company must also designate an Internal Compliance Monitor and retain an outside consultant to review its EEO policies, promotion and compensation practices and data, and future complaints of discrimination, harassment, and retaliation. The company agreed to train employees on discrimination, harassment, and retaliation, and rate its managers and supervisors on their compliance with the company's EEO policies and laws prohibiting discrimination and retaliation.	U.S. District Court for the District of Colorado	1/9/2020
$6 million	Race Discrimination	The EEOC alleged a retailer discriminated against a class of employees based on race. Specifically, the EEOC claimed the defendant denied employment of African-American applicants at a higher rate than white applicants based on the employer's use of criminal background screening. Under the terms of the three-year consent decree, the defendant will pay $6 million into a settlement fund to be distributed through a claims process to African American applicants who were not hired between 2004 and 2019. If the retailer opts to continue using criminal background screening, it must hire a criminology consultant to develop a new criminal background screening process based on several factors, including the time since conviction, the number of offenses, the nature and gravity of the offense(s), and the risk of recidivism. Until such time, the company is precluded from using criminal background screening in its hiring process. The company is also prevented from discouraging applicants with criminal records.	U.S. District Court for the Northern District of Illinois	11/18/2019

776 Littler monitored EEOC press releases regarding settlements, jury verdicts, and judgments entered in EEOC-related litigation during FY 2019 and the first half of FY 2020. The significant consent decrees and conciliation agreements in Appendix B include those amounting to $500,000 or more. Notable conciliation agreements are included in the shaded boxes. Appendix B also includes notable jury verdicts and judgments.

777 Included in this appendix are high-dollar conciliation and consent decrees entered into during FY 2019 and early FY 2020. FY 2020 settlements are marked with an asterisk (*).

Settlement Amount	Claim	Description	Court	EEOC Press Release
$4.9 million	Race Discrimination	The EEOC alleged a firefighter's union advocated for an unlawful promotion process that had a disparate impact on African-American promotion candidates. The Commission claimed the union continued to promote this practice after receiving an EEOC commissioner's discrimination charge in February 2008, and after the city's Human Rights Commission issued a report on August 8, 2006 recommending changes to the promotion process. This lawsuit was a companion case to that filed by the U.S. Department of Justice against the City of Jacksonville, Florida alleging its promotion practices for various positions in the Jacksonville Fire and Rescue Department (JFRD) violated Title VII. Under the terms of the consent decree, the city agreed to develop a new promotion exam for the selection of certain positions in the JFRD. In addition, the city will offer up to 40 settlement promotion positions for qualified African Americans and will establish a $4.9 million settlement fund for eligible promotion candidates.	U.S. District Court for the Middle District of Florida	1/14/2019
$4.9 million	Religious Discrimination	The EEOC alleged the defendant unlawfully prohibited male employees in supervisory or customer contact positions from wearing beards or growing their hair below collar length. The EEOC alleged that since at least January 1, 2005, the company failed to hire or promote individuals whose religious practices conflicted with its appearance policy and failed to provide religious accommodations to its appearance policy at facilities throughout the country. The EEOC further alleged that the company segregated employees who maintained beards or long hair in accordance with their religious beliefs into non-supervisory, back-of-the-facility positions without customer contact. Under the terms of the five-year consent decree, the company has agreed to pay $4.9 million to a class of current and former applicants and employees, amend its religious accommodation process for applicants and employees, provide nationwide training to managers, supervisors, and human resources personnel, and publicize the availability of religious accommodations on its internal and external websites. The company also agreed to provide the EEOC with periodic reports of requests for religious accommodation related to the appearance policy to enable the EEOC to monitor the effectiveness of the decree's provisions.	U.S. District Court for the Eastern District of New York	12/21/2018
$4.4 million*	Sexual Harassment Retaliation	The EEOC filed a Commissioner's Charge of sex discrimination against the company. Specifically, the EEOC alleged the company permitted a culture of sexual harassment and retaliated against those who complained. Under the terms of the conciliation agreement, the company will pay $4.4 million to individuals the EEOC determines experienced sexual harassment and/or retaliation. The company will also establish a means for identifying employees who have been the subject or more than one harassment complaint, update its policies, and continue conducting exit interviews with an eye towards harassment and retaliation issues. The company has also consented to third-party monitoring for a three-year period to ensure it adheres to the terms of the agreement.	This settlement was reached during conciliation before the EEOC filed a lawsuit on the merits.	12/18/2019

Settlement Amount	Claim	Description	Court	EEOC Press Release
$3.6 million	Sex Discrimination	The EEOC alleged that as far back as 2009, the defendant discriminated against a class of female applicants at its warehouses in Cleveland, Ohio and Detroit, Michigan by refusing to hire them for entry-level positions because of gender. The EEOC also charged that the company failed to make and preserve records related to its alleged discriminatory hiring practices. Under the terms of the five-year decree, the company will pay $3.6 million to a class of women the EEOC identified, and the company must offer jobs to at least 150 women the agency identified during the claims process. The consent decree establishes hiring goals designed to increase the percentage of women hired for entry-level warehouse positions and to maintain a higher representation of women in those positions over a period of years. The decree also requires the company to create and produce to the EEOC electronic data such as applicant flow logs, and to disclose the number of men and women who seek entry-level warehouse positions, the number of men and women hired for such positions, and the company's progress in meeting hiring goals. The EEOC will monitor these hiring practices and the company's compliance while the decree is in effect.	U.S. District Court for the Northern District of Ohio, Eastern Division	10/16/2018
$3.5 million	Disability Discrimination Pregnancy Discrimination	The EEOC alleged the defendant retailer engaged in nationwide, systemic discrimination against disabled and/or pregnant employees. Specifically, the EEOC alleged the company denied reasonable accommodations to certain pregnant employees or those with disabilities, made certain employees take unpaid leaves of absence, and/or terminated them because of their disabilities. Under the terms of the settlement, the company agreed to pay $3.5 million to employees who were fired on account of their pregnancy or disability. The company also agreed to revise its employment policies to more fully consider whether medical restrictions of its pregnant employees or those with disabilities can be reasonably accommodated, conduct companywide training for over 10,000 of its employees, and—for a three-year period—periodically report to the EEOC on its responses to employee requests for accommodation.	This settlement was reached during conciliation before the EEOC filed a lawsuit on the merits.	12/10/2018
$2.65 million*	Disability Discrimination	The EEOC alleged a company discriminated on the basis of disability by allowing employees who prepared and served food samples to customers to sit on stools for no more than 10 minutes only every two hours regardless of medical conditions or restrictions. Under the terms of the 4.5-year consent decree, the employer will pay $2.65 million to over 100 former employees, designate ADA coordinators to address requests for accommodation, revise its disability discrimination and reasonable accommodation policies, provide training, and establish a toll-free number through which employees can obtain more information about requests for accommodation.	U.S. District Court for the Southern District of Illinois	11/21/2019

Settlement Amount	Claim	Description	Court	EEOC Press Release
$2.625 million*	National Origin Discrimination	The EEOC alleged the defendant engaged in national origin discrimination by subjecting Hispanic banquet staff to a hostile work environment and retaliating against workers who opposed the English-only language policy. Under the terms of the two-year consent decree, the defendant will pay $2,625,000, post a notice of intent to comply with Title VII, provide training, and revise its language policy.	U.S. District Court for the Western District of Texas	10/31/2019
$2.25 million	Pregnancy Discrimination	Prior to 2015, the company at issue had provided accommodations in the form of light-duty assignments to employees injured on the job, those with certain driving restrictions, and those with disabilities. At the time, the offer of light-duty assignments did not apply to pregnant employees. A driver alleged that this policy violated the Pregnancy Discrimination Act, but resolved that individual charge. The EEOC continued its investigation, focusing on other pregnant employees who were denied light duty or other accommodations to allow them to continue working. The conciliation agreement with the EEOC applies to affected workers between 2012 and 2014. The company voluntarily changed its policy in 2015 to allow light duty accommodations for pregnant, unionized employees; the new agreement clarifies that the company's obligation to accommodate pregnant workers extends to both unionized and non-unionized employees. The agreement also clarifies that other types of accommodations may be appropriate, and that the company's accommodation obligation under the PDA extends to childbirth and related medical conditions. The agreement also provides for training for human resources and supervisory employees on this revised policy, notifying employees on the policy, and reporting to the EEOC on pregnancy accommodation requests and complaints. Further, the company has agreed to pay $2.25 million to those affected.	This settlement was reached during conciliation before the EEOC filed a lawsuit on the merits.	9/17/2019
$2 million	Race Discrimination	The EEOC alleged the defendant unlawfully denied applicants work based on their race, failed to keep hiring records Title VII requires, and failed to file EEO-1 reports. Specifically, the EEOC claimed the defendant preferred Hispanic job applicants in unskilled production and warehouse positions, and discouraged non-Hispanic applicants from applying for open positions, by, among other things, imposing a language requirement. Under the terms of the three-year consent decree, the company agreed to pay $2 million, and to stop engaging in race- and national origin-based hiring practices. The company agreed to hire an external monitor, implement hiring goals and measures to ensure hiring transparency and diversity, maintain a centralized discrimination complaint tracking system, and institute training. In addition, the company will preserve the necessary hiring materials and file EEO-1 reports.	U.S. District Court for the Eastern District of California	9/18/2019

Settlement Amount	Claim	Description	Court	EEOC Press Release
$1.75 million	Disability Discrimination Pregnancy Discrimination	The EEOC alleged a company engaged in systemic disability and pregnancy discrimination by implementing and enforcing "rigid" leave policies and practices, and denied reasonable accommodations to disabled and/or pregnant employees by allowing them to take additional leave, and terminating their employment when they were unable to return to work at the end of their leave. The EEOC alleges that in some instances, the company fired employees before they had exhausted their approved leave and failed to rehire them when they tried to return to work. Under the terms of the three-year consent decree, the company agreed to pay $1.75 million, hire an EEO monitor to review and revise the company's policies, institute training on preventing disability- and pregnancy-based discrimination and harassment, and develop a tracking system for employee accommodation requests and discrimination complaints. The company will also submit regular compliance reports to the EEOC.	U.S. District Court of the Eastern District of California	12/6/2018
$1.25 million*	Disability Discrimination	The EEOC claimed the company engaged in disability discrimination by using an online application process. Under the terms of the conciliation agreement, the company will pay $1.25 million to the original charging party and other aggrieved applicants who claimed they were denied employment opportunities due to the alleged discriminatory online application process. Going forward, the company will include on its applications a prominent statement regarding its willingness to provide required reasonable accommodations and directions on how to request such accommodations during the application process. The company will also retain an outside consultant to conduct a job analysis and validity study to evaluate and revise their online assessment to ensure that questions asked on the application relate to the job. In addition, the company will designate a compliance officer that will provide training and monitor its application process to ensure compliance with the ADA.	This settlement was reached during conciliation before the EEOC filed a lawsuit on the merits.	10/9/2019
$1.2 million*	Race Discrimination Race Harassment Retaliation	The EEOC alleged two oil field services companies discriminated against African-American employees by creating a hostile work environment and retaliating against those who complained about the harassment. The EEOC also claimed the company's managers intentionally assigned African-American employees to lower-paying jobs. Under the terms of the two-year consent decree, the company will pay $1,225,000 to nine African-American employees and one of their white co-workers who complained about discrimination. The company will also provide training to employees, and revise its policies regarding race discrimination, harassment, and retaliation.	U.S. District Court for the Western District of Texas	11/12/2019

Settlement Amount	Claim	Description	Court	EEOC Press Release
$950,000	Disability Discrimination Failure to Accommodate	The EEOC alleged a health care entity violated the ADA by refusing to provide reasonable accommodations to employees with disabilities who had exhausted their leave under the company's 30-day medical leave policy and/or the federal Family and Medical Leave Act, and then terminating their employment. The company also maintained a 100% healed or ability to work without any medical restrictions return-to-work policy. The company also allegedly subjected employees to a hostile work environment due to their disabilities and/or need for accommodation; retaliated against some employees because they engaged in protected activity; terminated employees who had disabilities or needed accommodations; and refused to promote one employee because of her disability and/or need for accommodation. Under the terms of the consent decree, the company will pay $950,000 to 23 individuals impacted by the company's policies and practices. In addition, the company has agreed to modify its disability and accommodation policies, designate ADA coaches to ensure that employees with disabilities are afforded reasonable accommodations, provide annual training to all employees, and hire a monitor to ensure compliance with the terms of the decree.	U.S. District Court for the District of Arizona	5/16/2019
$950,000*	National Origin Discrimination Race Discrimination	The EEOC alleged a beverage distributor offered sales employees account and territory assignments that resulted in race and/or national origin discrimination. Under the terms of the settlement, the company will pay $950,000 to those affected and take proactive steps to prevent discriminatory assignments. In addition, the company will conduct anti-discrimination training, put in place systems to further encourage diverse applicants to apply for open positions, revise its anti-discrimination policy to expressly reference that it prohibits segregating or making assignments based on race and/or national origin and distribute the revised policy to its employees, and hire a monitor to track the demographics of employees applying for and receiving offers for specified Illinois sales positions. The company also agreed, for a two-year period, to periodically report to the EEOC on the demographics of its sales force.	This settlement was reached during conciliation before the EEOC filed a lawsuit on the merits.	10/23/2019
$925,000	Sexual Harassment Disability Discrimination Retaliation	This settlement resolves claims in two lawsuits filed against the defendant. In the first lawsuit, the EEOC alleges the defendant failed to accommodate employees with disabilities and failed to engage in the interactive process. In a second lawsuit, the EEOC alleges the company failed to investigate charges of third-party harassment or take corrective actions to stop the harassment. In addition, the EEOC claims the defendant retaliated against employees who requested accommodations, were associated with someone with a disability, or who complained about harassment. Under the terms of the four-year consent decree, the company will pay $925,000 to the victims, develop a centralized tracking system for disability accommodation requests, create a process for addressing harassment complaints, and provide training.	U.S. District Court for the District of Nevada	9/23/2019

Settlement Amount	Claim	Description	Court	EEOC Press Release
$750,000*	Race Discrimination Race Harassment Retaliation	The EEOC alleged the company engaged in an ongoing pattern or practice of race discrimination against African-American job applicants. The company purportedly failed to hire African Americans for certain positions. In addition, district managers allegedly used racial slurs against an African-American supervisor. Under the terms of the 30-month consent decree, the company agreed to pay $750,000 to the supervisor and other claimants; designate an internal monitor to ensure compliance with the consent decree; implement a targeted hiring plan, including tracking the number and race of applicants, and reason(s) why they are not hired; create an anti-harassment and retaliation policy; provide training on preventing discrimination, harassment and retaliation; post a notice regarding the settlement; and report to the EEOC on how it investigates and handles any future complaints of race discrimination in hiring.	U.S. District Court for the District of Maryland	11/22/2019
$700,000	Sexual Harassment Retaliation	The EEOC alleged several restaurant franchisee owners, managers, supervisors, and co-workers subjected female employees to ongoing sexual harassment and retaliated against those who complained by reducing their hours and/or firing them. The EEOC also asserted the company had a written sexual harassment policy requiring that complaints be made to the corporate office in writing within 72 hours of the harassing incident. The Commission claims such a policy deterred victims of harassment from reporting incidents and removed the responsibility of local managers and supervisors to correct harassment that they were aware of, and emboldened the abusers. Under the terms of the five-year consent decree, the defendants will pay $700,000 to a class of female employees; eliminate the 72-hour reporting requirement; establish and maintain a human resources department; hire an outside monitor; and create performance review standards for compliance with Title VII. The company will also provide extensive training to its management officials to prevent and correct harassment and retaliation, along with civility training.	U.S. District Court for the District of Nevada	2/20/2019
$700,000	Disability Discrimination	The EEOC alleged a defendant violated the ADA by maintaining a "long-standing inflexible policy and practice" of placing individuals with impairments or disabilities on involuntary leaves of absence or until the individuals were cleared to work with no restrictions from their medical providers. According to the EEOC, this policy resulted in denying qualified individuals with disabilities reasonable accommodations, as well as placing qualified individuals with disabilities on involuntary leave and/or discharging them because of disability. Under the terms of the settlement, the defendant will pay $700,000 and be enjoined for two years from implementing policies or practices that would require employees to work with "no restrictions" or otherwise deny employees an interactive process to determine reasonable accommodations for their disabilities. The defendant must also conduct trainings on its disability discrimination policy, the ADA, the ADA's requirement of reasonable accommodation, and other statutes enforced by the EEOC.	U.S. District Court for the Southern District of New York	12/19/2018

Settlement Amount	Claim	Description	Court	EEOC Press Release
$690,000	Sex Discrimination Retaliation	The EEOC alleged a female mining employee was denied promotions in favor of male colleagues with less seniority or training. The Commission alleged that after the charging party complained, the company imposed additional training requirements on her (while not doing the same for her male counterparts) in retaliation. Under the terms of the three-year consent decree, the employer agreed to pay $690,000 to the charging party in lost wages and compensatory damages. The company also agreed to have an independent expert evaluate, develop and implement policies, procedures, and trainings to ensure equal employment and enhance accountability and oversight of managers, supervisors and trainers. The company will conduct training and report to the EEOC all complaints of sex or gender discrimination or retaliation it receives, and post a notice for employees about the consent decree and employees' rights under federal law.	U.S. District Court for the District of Alaska	6/13/2019
$650,000	Race Harassment	The EEOC alleged a company allowed employees to engage in ongoing harassment of Hispanic employees. The incidents of harassment included mocking employees' accents and using ethnic slurs. Because the company allegedly failed to address these harassment complaints, employees were constructively discharged. Under the terms of the three-year consent decree, the company will pay $650,000; hire an EEO consultant; conduct internal audits; review and revise its anti-harassment policies; create complaint procedures; develop a centralized tracking system for harassment and discrimination complaints; implement training for its human resources and hiring personnel; and submit annual reports to the EEOC verifying compliance with this decree.	U.S. District Court for the Eastern District of California	5/14/2019
$650,000	Sexual Harassment Retaliation	The EEOC alleged women employed at a staffing agency were subjected to ongoing and egregious sexual harassment since at least 2013. The alleged harassment was carried out by male managers, line supervisors and co-workers, and included unwanted touching, solicitations for sex, and crude comments about the workers' bodies. The company allegedly fired two women after they filed charges of discrimination with the EEOC. Under the four-year consent decree, the company will pay $650,000, create and/or revise policies prohibiting sex discrimination (including harassment) and retaliation and provide related training to their managers and workers. The company must also retain, track, and investigate complaints of sex harassment and provide copies of those complaints to the EEOC for the duration of the decree. The company must also hire a human resources professional who is bilingual in English and Spanish.	U.S. District Court for the District of Massachusetts	1/30/2019
$570,000	Disability Discrimination	The EEOC alleged the defendant medical center failed to make accommodations for an employee with vision loss. Following an illness that caused the vision impairment, the employee sought to return to work with accommodations. The defendant allegedly rejected the accommodations the charging party and the California Department of Rehabilitation suggested, and terminated her employment. Under the terms of the three-year consent decree, the employer agreed to pay $570,000 to the charging party in lost wages, compensatory damages, and attorneys' fees. The employer also agreed to update its policies, procedures and training, and report to the EEOC all disability complaints it receives, as well as post notice about the decree.	U.S. District Court for the Northern District of California	9/19/2019

Settlement Amount	Claim	Description	Court	EEOC Press Release
$550,000	Disability Discrimination	The EEOC alleges the defendant unlawfully enforced an inflexible maximum leave policy. Specifically, the EEOC claimed the defendant fired employees with disabilities who needed additional unpaid leave beyond the Family and Medical Leave Act's required 12 weeks, and failed to provide requested accommodations, such as reassignment to vacant positions, which would have allowed workers with disabilities to remain employed. According to the EEOC, the defendant placed employees with disabilities on FMLA leave and terminated their employment when such leave expired. Under the terms of the three-year consent decree, the defendant will pay $550,000 to five former employees, and be enjoined from violating the ADA going forward. The decree also requires the defendant to implement and disseminate a new reasonable accommodation policy to all employees, and provide training on the ADA, its reasonable accommodation policy and other federal anti-discrimination laws. The company will also post a notice regarding the settlement.	U.S. District Court for the District of Delaware	9/10/2019
$545,000	Disability Discrimination Pregnancy Discrimination	The EEOC alleged the defendant discriminated against employees with disabilities and pregnant women with pregnancy-related medical conditions. Specifically, the EEOC claimed the defendant refused to provide reasonable accommodations such as extended leave, reassignment, or assistive devices to employees with disabilities. The EEOC also alleged that the defendant maintained a strict 90-day leave policy, and that it unfairly terminated employees who exceeded this leave without first offering them a reasonable accommodation that would enable them to return to work. Under the terms of the two-year consent decree, the defendant will pay $545,000 to six individuals, as well as appoint at least one accommodation coordinator to be responsible for overseeing future requests for reasonable accommodations. The defendant will also be required to post a notice of employee's rights at its locations and provide training.	U.S. District Court for the District of Arizona	5/17/2019
$537,760	Disability Discrimination	The EEOC alleged an automobile manufacturer failed to hire applicants with disabilities. According to the EEOC's investigation, the employer screened out applicants based on criteria not proven to be job-related and consistent with business necessity, and failed to use the results of the post-offer, pre-employment medical examination. The employer did not admit liability, but agreed to resolve the matter. Under the terms of the conciliation agreement, the employer will pay $537,760, to be allocated to 12 individual charging parties, and to the EEOC to distribute to as-yet-unidentified individuals who may have been affected by the company's policies. The company will also provide written guidance and training to its employees involved in the hiring process.	This settlement was reached during conciliation before the EEOC filed a lawsuit on the merits.	10/1/2019

Select EEOC Jury Awards or Judgments in FY 2019-2020

Jury or Judgment Amount	Claim	Description	Case Citation	EEOC Press Release
$5.2 million ($200,000 compensatory damages; $5 million in punitive damages) The defendant filed a motion to reduce the damages award, but as of the time of publication, the court had not ruled	Disability Discrimination	The EEOC alleged defendant retailer discriminated against an employee with a developmental disability and is deaf and visually impaired, who performed his job with the assistance of a job coach. The EEOC claimed a new manager suspended the employee's employment and required the resubmission of medical paperwork to continue to work with the accommodation. The defendant countered that the job coach was not merely providing assistance, but instead performing the employee's job. A jury sided with the EEOC and awarded the employee $200,000 in compensatory damages and an additional $5 million in punitive damages.	l7-cv-739-jdp, U.S. District Court for the Western District of Wisconsin	10/11/2019
$3.3 million ($1.68 million compensatory damages, $1.5 million punitive damages, and $130,550 backpay) The defendants filed a motion to reduce the damages award, but as of the time of publication, the court had not ruled	Race Discrimination	This lawsuit alleged a strip club and its predecessor discriminated against African-American dancers by subjecting them to racially offensive epithets, by providing them with fewer shifts than offered to white dancers, and by forcing them to work at an affiliated club that catered to an African-American clientele, even though the dancers were not licensed to do so, and the second location offered poorer pay and working conditions. The African-American dancers that refused to work at the second club were fined and sent home. This long-running case involved two EEOC charges, three prior lawsuits and contempt proceedings and three consent decrees. The jury verdict awarded five dancers $1.68 million in compensatory, $1.5 million in punitive damages, and $130,550 in backpay.	*EEOC v. Danny's Restaurant, LLC and Danny's of Jackson, LLC f/k/a Baby O's Restaurant, Inc. d/b/a Danny's Downtown Cabaret*, Civil Action No. 3:16-cv-00769-HTW-LRA, U.S. District Court for the Southern District of Mississippi	5/16/2019
$850,000 This amount was reduced by court order to $300,000	Sexual Harassment Retaliation	This lawsuit alleged a female farmworker was raped by her supervisor, and reported the assault to the company and police. At trial, the EEOC alleged the defendant failed to properly investigate the complaint, and instead sent her home from work without pay the next work day. The EEOC alleged the defendant failed to take action against the supervisor, who had been subject to other harassment complaints, and instead retaliated against the charging party by forcing her to take a leave of absence. The Tampa jury of seven returned a unanimous verdict finding that the victim was entitled to compensatory damages of $450,000 and punitive damages in the amount of $400,000.	*EEOC v. Favorite Farms*, Civil Action No. 8:17-cv-01292-JSM-AAS, U.S. District Court for the Middle District of Florida	12/21/2018
$458,000 (compensatory damages)	Age Discrimination	The EEOC brought suit alleging a beverage distributor fired two sales employees because of their age. The jury found the defendant acted "willfully" in violating the ADEA, which the EEOC believes will merit an additional award as punitive damages. During trial, the EEOC presented evidence that a manager "wanted a younger sales force" and subsequently hired younger staff. The defendant maintained that the employees instead voluntarily resigned.	*EEOC v. AZ Metro Distributors, LLC*, Case No. 15-CV-05370, U.S. District Court for the Eastern District of New York	9/26/2019

Jury or Judgment Amount	Claim	Description	Case Citation	EEOC Press Release
$115,000	Pay Discrimination	Denton County was ordered to pay $115,000 to a female former county doctor after a federal court entered judgment in her favor in a pay discrimination lawsuit. The EEOC alleged the charging party worked as a Primary Care Clinician in the Denton County Public Health Department beginning in October 2008. Her job duties entailed providing medical treatment for county residents in county-operated clinics. In August 2015, Denton County hired a male physician to perform the same duties as the charging party. His starting salary was more than $34,000 higher than the charging party's, and the county's director of public health allegedly failed to take remedial measures in response to the complaint about the unequal pay. The final judgment and order awards the charging party $115,000 in damages, and requires the county to implement a new written policy regarding the compensation policy for all new physicians in the public health department, and provide training on equal pay.	*EEOC v. Denton County*, Civil Action No. 4:17-CV-614, U.S. District Court for the Eastern District of Texas, Sherman Division	10/24/2018
$5,500	Pregnancy Discrimination	A towing company was ordered to pay $5,500 after failing to respond to a lawsuit alleging breach of a mediation agreement regarding claims of pregnancy discrimination. The parties had entered into an agreement to settle the charging party's charge during mediation. The defendant refused, and the EEOC filed suit seeking enforcement of the agreement. The company failed to appear in court, and the EEOC moved to have the court enter a judgment by default, which was granted.	*EEOC v. TRU Towing*, Civil Action No. 2:18-cv-3874, U.S. District Court for the Eastern District of Louisiana	10/22/2018

APPENDIX C – FY 2019 EEOC AMICUS AND APPELLANT ACTIVITY[778]

FY 2019 – Appellate Cases Where the EEOC Filed an Amicus Brief

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Nieves-Borges v. El Conquistador Partnership	U.S. Court of Appeals for the First Circuit No. 18-1008	5/03/2018 (amicus filed) 8/21/2019 (decided)	Title VII	Harassment Sex **Result:** Mixed

Background: Plaintiff filed his EEOC charge in February 2015, alleging defendant's director of human resources sexually harassed him and subjected him to a hostile work environment between 2011 and 2014. Plaintiff also claimed defendant retaliated against him by terminating his employment after he filed his EEOC charge.

The district court granted summary judgment for defendant on both claims. The court held that plaintiff's sexual harassment and hostile work environment claims were untimely because there was no discriminatory anchoring event within the statute of limitations period. The court also held plaintiff failed to show that his protected activity was the "but for" cause of the alleged retaliation.

Issue EEOC is Addressing as Amicus: (1) Whether the district court erred by holding that incidents of harassment occurring prior to the charge-filing period are irrelevant unless there is an independent statutory violation occurring within the charge-filing period; and (2) Whether the district court erred in holding that plaintiff's retaliation claim failed because he could not show the defendant's proffered non-discriminatory reason was pretextual.

EEOC's Position: The EEOC argued that all incidents of harassment, regardless of whether they independently constitute a violation of Title VII, can properly "anchor" the admissibility of other incidents of harassment that occurred outside of the statute of limitations. The EEOC also contended that "but for" causation does not require a party show that the protected activity was the sole cause of the alleged retaliation. Rather, once a plaintiff has established that retaliation was a but-for cause of an adverse employment action, the defendant is liable under Title VII, and plaintiff need not show that additional asserted reasons for the defendant's actions were pretextual.

Court's Decision: While the appellate court upheld the district court's dismissal of the charging party's retaliation claims, it found that the district court "incorrectly held that alleged incidents of harassment that occurred earlier than 2014 were time-barred, an error that contributed to other flaws in its analysis." The court therefore vacated the lower court's dismissal of the sexual harassment claims based on a hostile work environment and remanded for reconsideration of those claims. Regarding the harassment claims, the appellate court determined that "[t]he district court's statute-of-limitations error necessarily impacted its assessment of the hostile work environment claim. On remand, the court should consider the admissible evidence covering the entire period of alleged harassment, while also adhering to our precedent on what it means for conduct to be 'based upon sex' and on the alternative nature of the 'severe or pervasive' element." With respect to the retaliation claim, however, the appellate court noted that it was uncontested the purported act of retaliation—the decision to transfer the charging party—was announced six weeks prior to the filing of an internal complaint. Therefore, the court held, no reasonable jury could find that the two instances were causally linked.

778 The information included in Appendix C, including the *"FY 2019 Appellate Cases Where the EEOC Filed an Amicus Brief"* and *"FY 2019– 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 C includes select cases from this database. The cases are arranged in order by circuit.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Roy v. Correct Care Solutions	U.S. Court of Appeals for the First Circuit No. 18-1313	7/17/2018 (amicus filed) 1/28/2019 (decided)	Title VII	Sex **Result:** Pro-Employee
Background: Plaintiff worked as a nurse at a state prison. Plaintiff alleged that she was subjected to a hostile work environment both because of her sex and for her whistleblowing activities. Plaintiff asserts that several male corrections officers made sexual jokes and demeaning comments to her as well as engaged in sexually suggestive behavior. Plaintiff claims that her complaints were unaddressed by defendant and that she was told to stop filing so many complaints. Plaintiff was terminated after her security clearance was revoked in response to a false complaint that she made about the response time of a corrections officer to a medical emergency. Plaintiff contends that she was fired because of her complaints about her alleged hostile work environment. The district court granted summary judgment for defendant. The court first determined that some of the alleged incidents cited by plaintiff in support of her hostile work environment and retaliation claims were not because of her sex, and thus would not be considered. The court analyzed the remaining incidents and determined that plaintiff could not establish a *prima facie* case of retaliation because she could not prove that she engaged in protected conduct under Maine law. **Issue EEOC is Addressing as Amicus:** (1) Whether the district court erred by characterizing some incidents of harassment as based on plaintiff's sex and others as based on her whistleblowing; and (2) Whether the district court erred by applying state law, rather than federal law, to plaintiff's Title VII retaliation claim. **EEOC's Position:** The EEOC argued that the district court erred in its determination that some of the incidents cited by plaintiff to support her Title VII claims were not motivated by her sex. The EEOC argued that the court should not have assigned either a sex-based or whistleblower-based motivation for each of the alleged incidents, and failed to consider that plaintiff's sex was the "but-for" cause of all of plaintiff's cited incidents. The EEOC further argued the court improperly applied Maine law, and not federal law, to the analysis of whether plaintiff engaged in protected activity. **Court's Decision:** The First Circuit reversed in part and affirmed in part. Specifically, the court found that the district court applied an erroneous legal standard and erroneously resolved disputes of fact in finding that the conduct at issue aimed at the plaintiff was not based upon her sex and that the harassment she experienced was not sufficiently severe or pervasive. In other words, the district court erred when it suggested that the plaintiff's sex must be the but-for cause or even the sole cause of each alleged harassing incident. Thus, a reasonable jury could find that plaintiff's work environment was hostile, and that an employer can be liable for a hostile work environment created by non-employees as long as the employer knew of the harassment and failed to take reasonable steps to address it.				
Daeisadeghi v. Equinox Great Neck, Inc.	U.S. Court of Appeals for the Second Circuit No. 19-506	6/5/2019 (amicus filed)	Title VII	Harassment National Origin **Result:** Pending
Background: Plaintiff alleged a hostile work environment claim alleging that his supervisors would call him "crazy Persian", "f****** crazy Persian, maniac", and made harassing comments and jokes about his accent and grammar. Plaintiff complained to human resources, but alleged that his supervisors were not disciplined. The district court granted summary judgment to defendant on the ground that the frequency and severity of the incidents were not sufficient enough to create a hostile work environment. The district court noted that many of the comments were not based on plaintiff's race or national origin and that the alleged harassers would frequently make similar comments to employees outside of plaintiff's protected class. **Issues EEOC is Addressing as Amicus:** (1) Did the district court err in holding that plaintiff could not establish a hostile work environment after he presented evidence that his supervisor ridiculed his name, accent, and grammar? **EEOC's Position:** The EEOC argued that a reasonable jury could find that the harassing comments were sufficient to create a hostile work environment claim. Specifically, the agency argued that the standard for hostile work environment claims is lower when the alleged harasser is a supervisor. The EEOC also contended that the district court erred when it did not specifically analyze each specific incident to determine whether it was sufficiently severe, nor did it provide analysis on whether the incidents as a whole were pervasive. **Court's Decision:** Pending				

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Davis-Garett v. Urban Outfitters, Inc.	U.S. Court of Appeals for the Second Circuit No. 17-3371	2/9/2018 (amicus filed) 4/8/2019 (decided)	Title VII	Retaliation **Result:** Pro-Employee

Background: Plaintiff filed an action for age-based hostile work environment and retaliation in violation of the ADEA. Plaintiff worked for defendant from September 2012 until October 2013 and claimed that during this period she was called "Mommy," denied transfer requests, told her age did not fit the store's demographic, and disciplined more harshly than her younger coworkers. Plaintiff claimed that she was retaliated against and ultimately fired after calling the company's official hotline to complain about the alleged age discrimination. The district court granted summary judgment for defendant on all claims, holding that plaintiff failed to provide sufficient evidence that she was subjected to an "adverse employment action," and that incidents that occurred outside the 300-day statute of limitations were time-barred.

Issue EEOC is Addressing as Amicus: (1) Whether the district court applied the wrong standard for determining whether plaintiff adduced sufficient evidence to support a *prima facie* case of ADEA retaliation; and (2) Whether the district court erred in refusing to consider evidence of conduct that occurred prior the charge-filing period in connection with plaintiff's hostile work environment and retaliation claims.

EEOC's Position: The EEOC argued that the district court applied the wrong legal standard in concluding that plaintiff failed to adduce sufficient evidence to support a *prima facie* case of ADEA retaliation. The EEOC argued that instead of applying the "adverse employment action" standard for substantive discrimination claims to plaintiff's claim, the district court should have required only that the challenged action "might well have dissuaded a reasonable worker from making or supporting a charge of discrimination." The EEOC further argued that the district court misconstrued Supreme Court precedent, and should have considered discrete acts that occurred outside the 300-day statute of limitations as background evidence to support an otherwise timely claim.

Court's Decision: The Second Circuit vacated the district court's decision. With respect to limiting the timeframe, the court found that the lower court "erred in ruling that it could not consider pre-February 16, 2013 events in connection with assessment of liability on the hostile work environment claim and that it could not consider such events as background for her claim of retaliation." The court further determined that the district court applied the wrong standard of harm in a retaliation case. The correct standard is that established in *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006), which requires proof only that the challenged action was materially adverse, meaning "it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Lenzi v. Systemax, Inc.	U.S. Court of Appeals for the Second Circuit No. 18-979	8/16/2018 (amicus filed) 12/6/2019 (decided)	EPA Title VII	Retaliation Sex **Result:** Pro-Employee

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

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

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

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

Court's Decision: On December 6, 2019, the court vacated and remanded the district court's judgment dismissing the plaintiff's pregnancy discrimination, Title VII retaliation, and Title VII pay discrimination claims. The court held the plaintiff presented enough evidence of temporal proximity between the plaintiff's announcing her pregnancy and the adverse employment action to support a pregnancy discrimination claim under the Pregnancy Discrimination Act With respect to the pay discrimination claim, the appellate court determined the lower court erred in requiring the plaintiff to present under Title VII and local law the same *prima facie* case she would need to make under the EPA. The court emphasized that "a Title VII plaintiff alleging a discriminatory compensation practice need not establish that she performed equal work for unequal pay. By its plain terms, Title VII makes actionable any form of sex-based compensation discrimination. 42 U.S.C. § 2000e-2(a)(1) ('It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his [or her] compensation . . . because of such individual's . . . sex . . . .')." The plaintiff was also able to set forth sufficient evidence to support her retaliation claim under Title VII.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Rasmy v. Marriott International	U.S. Court of Appeals for the Second Circuit No. 18-3260	3/12/2019 (amicus filed)	Title VII	Harassment **Result:** Pending
Background: Plaintiff asserted a claim that defendant subjected him to a hostile work environment based on his race, national origin, and religion. Plaintiff alleged that after he complained about alleged wage theft and unfair scheduling his coworkers began calling him numerous names. Plaintiff also alleged that human resources told him that his "days would be numbered" if he continued to complain at work. Plaintiff's employment was ultimately terminated after he was in a physical altercation at work. The district court dismissed the complaint, holding that many of the alleged comments were not based on plaintiff's religion or race and were instead based on personal animosity after plaintiff complained of alleged wage theft and scheduling. The district court also held that plaintiff did not establish a hostile work environment as it did not alter the conditions of his employment. **Issues EEOC is Addressing as Amicus:** (1) Did the district court err in holding that plaintiff did not demonstrate he was subject to direct harassment?; (2) Did the district court err in holding that because plaintiff had not been physically threatened and his work performance did not suffer, that the alleged harassment did not alter the conditions of his employment? **EEOC's Position:** The EEOC argued that the district court erred when it only considered comments specifically about plaintiff's race or religion, instead of all abusive comments not directly related to his protected class. The EEOC also contended that plaintiff did not need to establish that he was physically threatened or that his work suffered in order to establish a hostile work environment claim. **Court's Decision:** Pending				
Elledge v. Lowe's Home Centers LLC	U.S. Court of Appeals for the Fourth Circuit No. 19-1069	4/19/2019 (amicus filed)	ADA ADEA	Disability Age Retaliation **Result:** Pending
Background: Plaintiff worked for defendant for 22 years, climbing the ranks and culminating with his role as the market director overseeing 12 stores. In that role, plaintiff worked 50-60 hours per week, most of which was spent on his feet. After plaintiff underwent a knee replacement surgery, his physician restricted plaintiff to an eight-hour workday and four hours of walking or standing. After plaintiff's physician recommended that plaintiff's work restrictions be permanent, defendant determined it could not accommodate plaintiff's permanent restrictions as the market director. At that point, defendant advised plaintiff that he needed to find a new job at the company within 30 days but if he needed additional time to search for a job, defendant could place him on a leave of absence. Plaintiff utilized leave for several months while he searched for other positions, but he ultimately requested early retirement. Thereafter, plaintiff filed suit against defendant alleging disability discrimination, age discrimination, and retaliation for filing an EEOC charge of discrimination. The district court granted summary judgment in favor of defendant on all claims. Regarding his disability discrimination claim, the district court rejected plaintiff's contention that he was entitled to special treatment of defendant's job application and hiring policy, and instead, he was required to adhere to the policy and "compete on equal footing with other employees and outside applicants." Additionally, the court reasoned that plaintiff's requested accommodation of reassignment to another director-level position was not reasonable under the ADA because as long as the employer has a competitive hiring policy, it need not reassign disabled employees to vacant, equivalent positions. The court went on to say that plaintiff was not a qualified individual under the ADA because he rejected a reasonable accommodation offered to him (use of a motorized scooter). Further, the court rejected plaintiff's age discrimination claim, reasoning that plaintiff was not qualified for any of the director positions for which he applied. As to plaintiff's retaliation claim, the court found that such claim was "stale" because he was rejected for a position five months after he filed his charge of discrimination with the EEOC. **Issues EEOC is Addressing as Amicus:** (1) Whether an employer's competitive hiring policy complies with its obligation under the ADA regarding the reassignment duty when the employer allows an employee to apply for a vacation position in accordance with the competitive hiring policy; (2) Whether the district court erroneously determined the employer's competitive hiring policy effectively trumps the ADA duty to reassign. **EEOC's Position:** The EEOC argued that the ADA requires employees to reassign, not just permission to compete for a position, meaning that an employer is required to appoint employees to vacant positions for which they are qualified when they are no longer able to perform the essential functions of their current positions due to a disability. In support, the EEOC pointed to the statutory interpretation of the ADA itself, arguing that the statutory term "reassignment to a vacant position" does not mean "permission to compete for jobs with other employees." Additionally, the EEOC argued that an employer may be required to make exceptions to its competitive hiring policies in order to reasonably accommodate a disabled employee as necessary to achieve the ADA's goal of equal opportunity. **Court's Decision:** Pending.				

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Kinnett v. Key W + Sotera Defense Solutions	U.S. District Court for the Western District of Virginia (in the 4th Cir.) No. 5:18-cv-00110	1/30/2019 (amicus filed) 8/26/2019 (decided)	Title VII	Charge Processing **Result:** Pro-Employee

Background: Plaintiff worked for defendant, a federal contracting company, from 2016 until his job termination in April 2017. On October 3, 2017, plaintiff filed a complaint with Department of Labor's Office of Federal Contractor Compliance Programs (OFCCP), alleging religious and sexual orientation discrimination. After an investigation, OFCCP concluded that there was insufficient evidence to establish that defendant violated its nondiscrimination obligations under Executive Order 11246. On May 22, 2018, OFCCP sent plaintiff a right-to-sue notice informing him of its determination and advising him that he had 90 days in which to file a Title VII lawsuit.

On August 24, 2018, plaintiff filed this Title VII lawsuit and alleged that he exhausted his administrative remedies by timely filing his complaint of discrimination with OFCCP and receiving his May 22, 2018, right-to-sue notice.

Defendant filed a motion to dismiss for failure to state a claim. After the motion was briefed, the district court issued an order *sua sponte* questioning whether plaintiff's complaint should be dismissed for a failure to exhaust his administrative remedies because he had not filed a charge with the EEOC. The district court noted that plaintiff alleged that he had filed a complaint with OFCCP and had received a right-to-sue letter. However, the district court observed that OFCCP is part of the Department of Labor, not the EEOC. "Thus, the allegations in the complaint raise serious questions about whether Plaintiff filed a charge with the EEOC prior to initiating the present action." Accordingly, the district court ordered additional briefing on whether plaintiff exhausted his administrative remedies.

On December 12, 2018, plaintiff filed his supplemental response and stated that OFCCP told him it would be "duplicative and was not necessary" to file a charge with the EEOC. He further stated that pursuant to the 2011 memorandum of understanding (MOU) between the EEOC and OFCCP, his OFCCP complaint constitutes a charge. Finally, he recounted that he had requested that the EEOC address the exhaustion of administrative remedies issue.

On December 20, 2018, defendant filed its supplemental response arguing plaintiff's charge should be dismissed for a failure to exhaust administrative remedies.

Issues EEOC is Addressing as Amicus: Whether plaintiff's filing of his Title VII complaint of discrimination with the OFCCP satisfied Title VII's charge-filing requirement.

EEOC's Position: The EEOC contends that plaintiff exhausted his administrative remedies by filing his Title VII discrimination charge with OFCCP. Specifically, the EEOC argues that consistent with Title VII and Executive Orders, which authorize the EEOC to enter into agreements with other agencies with overlapping responsibilities to enforce anti-discrimination laws, the EEOC and OFCCP have entered into the MOU at issue in 2011. The EEOC noted that the 2011 MOU states, "OFCCP shall act as EEOC's agent for the purposes of receiving the Title VII component of all complaints/charges." It went on to state that the MOU provides that all complaints or charges "filed with OFCCP alleging a Title VII basis . . . shall be received as complaints/charges simultaneously dual-filed under Title VII," and that the applicable filing date is "the date the matter is received by OFCCP, acting as EEOC's agent[.]" The EEOC also noted that the Fourth Circuit and other courts have recognized the validity of these MOUs.

Court's Decision: In its July 19, 2019 report and recommendations, the magistrate cited to the Supreme Court's June 3, 2019 decision in *Fort Bend County, Texas v. Davis*, in which it held that "Title VII's charge-filing requirement" is a mandatory claim "processing rule . . . , not a jurisdictional prescription delineating" the federal courts' adjudicatory authority over a Title VII claim. 139 S. Ct. 1843, 1851. Thus, a court is not obligated to raise the issue on its own, and "an objection based on a mandatory claim-processing rule may be 'forfeited if the party asserting the rule waits too long to raise the point,'" *Davis*, 139 S. Ct. at 1849 (quoting *Eberhart v. United States*, 546 U.S. 12, 15 (2005)). Because the defendant company did not raise the issue in its Rule 12(b) motion, and it has not challenged the plaintiff's position that he satisfied Title VII's exhaustion requirement by filing a claim with the OFCCP, it forfeited its right to object to the plaintiff's Title VII claims on those grounds. On August 26, 2019, the court adopted the magistrate's report and recommendations in its entirety.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Parker v. Reema Consulting Services	U.S. Court of Appeals for the Fourth Circuit No. 18-1206	5/30/2018 (amicus filed) 2/8/2019 (decided)	Title VII	Charge Processing Harassment Retaliation Sex **Result:** Mixed; Pro-Employee for discrimination and retaliation claims, but pro-employer on constructive discharge claim on the grounds the employee failed to exhaust her administrative remedies.

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

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

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

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

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

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

Court's Decision: The Fourth Circuit reversed the district court's dismissal of the plaintiff's claims alleging discrimination and retaliation, but affirmed the dismissal of the discriminatory discharge claim on the grounds the plaintiff failed to exhaust her administrative remedies.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Roberts v. Glenn Industrial Group, Inc.	U.S. Court of Appeals for the Fourth Circuit No. 19-1215	5/9/2019 (amicus filed)	Title VII	Harassment Sex **Result:** Pending
Background: Plaintiff worked for defendant from July 2015 to April 2016 and sued for same-sex harassment and retaliation in violation of Title VII. He claimed that during his tenure his supervisor repeatedly ridiculed and demeaned him by calling him gay, using sexually explicit and derogatory language towards him and physically threatening him. He also claimed he was slapped, put in a headlock and pushed. Plaintiff claimed he was fired in retaliation for complaining about the alleged harassment to other supervisors. The district court rejected plaintiff's claims and granted defendant summary judgment. It stated that in *Oncale v. Sundowner Offshore Services, Inc.* "the Supreme Court identified three situations that may support a same-sex claim of harassment based on gender: (1) the plaintiff presents credible evidence that the alleged harasser is homosexual and made 'explicit or implicit proposals of sexual activity'; (2) the plaintiff shows that the harasser was motivated by general hostility to the presence of members of the same sex in the workplace; or (3) the plaintiff offers 'direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace.'" *Oncale*, 523 U.S. at 80-81. The district court concluded that none of the three *Oncale* factors had been met because the alleged harasser was a straight man and while his conduct was inappropriate and vulgar, it was not of a sexual nature. Moreover, there was no evidence he was hostile towards men in the workplace and defendant's workplace was all men, removing the possibility of comparative evidence. **Issues EEOC is Addressing as Amicus:** (1) Whether besides the *Oncale* factors there are other ways of establishing same-sex harassment; (2) Whether physical abuse that is not sexual but perpetrated by an individual who has engaged in other explicitly sex-based abuse can be sex-based; and (3) Whether an employer is entitled to the *Faragher-Ellerth* affirmative defense when plaintiff reported the alleged harassment to multiple company officials but not to the CEO. **EEOC's Position:** The EEOC argues that a plaintiff may establish same-sex harassment using other evidence besides the three *Oncale* factors. The EEOC also contends that that district court was wrong in concluding that "facially neutral" physical conduct cannot be sex-based. Finally, the EEOC argues that the defendant is not entitled to the *Faragher-Ellerth* defense because it did not exercise reasonable care to prevent and correct sexual harassment since it failed to investigate and address plaintiff's repeated complaints. **Court's Decision:** Pending.				
Johnson v. Pride Industries, Inc.	U.S. Court of Appeals for the Fifth Circuit No. 19-50173	6/17/2019 (amicus filed)	Title VII	Harassment Race **Result:** Pending
Background: Plaintiff, an African American male, sued for race discrimination and retaliation alleging that he was subjected to a hostile work environment. Plaintiff claimed that a co-worker frequently called him the Spanish language equivalent of the n-word, frequently addressing him as "boy," "pinch mayate" and "mano." The co-worker also victimized and harassed plaintiff in other ways such as hiding his work tool and the paper work for his promotion. Plaintiff claimed that the alleged harassment escalated after he complained to various company officials. The district court rejected plaintiff's claims and granted defendant summary judgment holding that the use of racial slurs alone is not sufficient to establish a *prima facie* claim for hostile work environment based on race. The district court also concluded that since plaintiff failed to show he experienced sufficiently pervasive or severe harassment, he was not subjected to a constructive discharge. **Issues EEOC is Addressing as Amicus:** (1) Whether plaintiff's complaint stated a plausible claim for a hostile work environment where he alleges that another employee frequently called him the Spanish language equivalent of the n-word, and victimized him in other ways not obviously discriminatory; and (2) Whether the court erred in concluding that it had ancillary jurisdiction over plaintiff's constructive discharge, even though he failed to file a new EEEOC charge, because the claim grew out of an administrative charge properly before the court. **EEOC's Position:** The EEOC argues that the district court erred when it determined that the sole use of slurs is insufficient to establish hostile work environment. It contends that the frequent use of racial slurs is adequately severe and pervasive to establish a claim for workplace harassment. The EEOC also claims that when the alleged harasser also engages in various forms of abuse, some of which is explicitly discriminatory and some is not, all of it constitutes a single discriminatory conduct. The EEOC argues that the district failed to consider the totality of circumstances. Finally, the EEOC contends that it is unnecessary for a plaintiff to exhaust administrative remedies prior to urging a constructive discharge claim growing out of an earlier charge. **Court's Decision:** Pending				

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
O'Daniel v. Industrial Service Solutions	U.S. Court of Appeals for the Fifth Circuit 18-30136	5/2/2018 (amicus filed) 4/19/2019 (decided)	Title VII	Retaliation **Result:** Pro-Employer

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

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

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

Court's Decision: The Fifth Circuit panel held Title VII does not prevent employers from firing heterosexual employees because of their sexuality. "Simply put, Title VII does not grant employees the right to make online rants about gender identity with impunity."

Stancu v. Hyatt Corporation/ Hyatt Regency	U.S. Court of Appeals for the Fifth Circuit No. 18-11279	3/1/2019 (amicus filed) 10/21/19 (decided)	ADEA	Discrimination Harassment Retaliation **Result:** Pro-Employer

Background: Shortly after plaintiff begin his employment with defendant as an entry-level engineer, co-workers made plaintiff aware that defendant was discriminating against them and asked for advice. In response, plaintiff provided his co-workers EEOC literature on how to file a charge of discrimination. Plaintiff alleges that he was subjected to a hostile work environment based on his age and subjected to retaliation. Specially, plaintiff claims defendant placed offensive and threatening notes on his tool cart, stole his tools, spied on him, and refused to consider him for a promotion. After defendant moved for summary judgment on all claims, the magistrate judge recommended the motion be granted and the action dismissed. The district court accepted the magistrate judge's recommendation.

Issues EEOC is Addressing as Amicus: (1) Whether the district court should have rejected the magistrate judge's conclusion that plaintiff is required to prove an "ultimate employment decision" for his retaliation claim rather than simply an action that well might have dissuaded a reasonable worker from making or supporting a charge of discrimination; (2) Whether the district court wrongly usurped the jury's fact-finding role by agreeing with the magistrate judge that the anonymous age-based notes on plaintiff's tool cart were not objectively offensive as a matter of law, and by failing to consider other evidence of an age-based hostile work environment; (3) Whether the district court should have rejected the magistrate judge's conclusion that defendant could not be liable for a hostile work environment based on anonymous notes that may have been left by coworkers.

EEOC's Position: The EEOC argued that the "ultimate employment decision" standard applies only to discrimination claims, not retaliation claims. Further, the EEOC argued that the magistrate determined the notes plaintiff found on his tool cart were not objectively offensive without describing the notes' content and failed to consider the totality of the circumstances in assessing plaintiff's hostile work environment claim. Finally, the EEOC argued that an employer may be liable for hostile work environment under the ADEA regardless of whether the alleged harassment was a member of management and regardless of whether the harasser was anonymous.

Court's Decision: The Fifth Circuit affirmed the district court's grant of summary judgment in favor of defendant on all claims. As to the standard for retaliation claims under the ADEA, the court found that the "ultimate employment decision" is an "outdated and mistaken understanding of the law," however, even under the proper standard, no material issue of fact exists on that claim. Regarding the notes left on plaintiff's tool cart, the court held that because plaintiff did not specify how many notes he reported, the contents of the notes, or frequency of receiving notes after he complained, it would be "sheer speculation" to find the employer liable.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Williams v. TH Healthcare Limited	U.S. Court of Appeals for the Fifth Circuit 19-20134	6/19/2019 (amicus filed) 11/14/2019 (decided)	Title VII ADA	Charge Processing **Result:** Pro-Employee

Background: Plaintiff began working for the defendant hospital as a registered nurse in December 2008. In July 2016, plaintiff made a written request to the hospital for accommodation of her disability, because, she stated, "the accommodation that worked all these years would no longer be granted." Plaintiff subsequently met with the hospital's HR Director and another management official, who informed plaintiff that her accommodation request had been denied. Shortly thereafter, plaintiff was "written up for several reasons" and suspended before the hospital terminated her employment on October 17, 2016.

On January 17, 2017, plaintiff filed a charge of discrimination with the EEOC. Plaintiff alleged that the hospital's conduct toward her was the result of race discrimination and retaliation because she was in "a dispute with [her] former employer regarding pay discrepancies between Black and White nurses." Plaintiff further contended that the hospital also "discriminated and retaliated" against her because of her disability. Plaintiff, proceeding pro se, filed suit in district court on Monday, October 29, 2018, using a court-provided "complaint for employment discrimination" form. Plaintiff checked the box on the form indicating that the EEOC had issued her a notice of right to sue, and she wrote July 29, 2018, as the date she had received the notice. The hospital responded with a motion to dismiss the suit as untimely filed or, in the alternative, to compel arbitration.

On January 28, 2019—after the hospital filed its motion to dismiss but before plaintiff filed a response to that motion—the district court held an "initial conference" with the parties. On that same day, the court issued a four-sentence order dismissing the suit. According to the court, because plaintiff filed her suit 92 days after she received her notice of right to sue, it lacked jurisdiction over her claims and it dismissed plaintiff's claims with prejudice.

Issues EEOC is Addressing as Amicus: The two issues the EEOC addresses are: (1) Whether the district court erred in concluding that plaintiff's complaint was not timely filed; and (2) Whether the district court erred in holding that timely filing of a complaint is a jurisdictional prerequisite under the ADA and Title VII.

EEOC's Position: The EEOC argued that under the Federal Rules of Civil Procedure, plaintiff's time period for filing her complaint ran through October 29, 2018—the date on which she filed it. And, that in any case, under the district court's settled precedent, a plaintiff's filing of her Title VII or ADA complaint beyond the 90-day statutory filing period does not deprive a court of jurisdiction over her claims. Elaborating on its position, the EEOC argued that Rule 6(a) provides that the statutory filing period excludes the day triggering it (*i.e.*, the day plaintiff received her notice of right to sue), but includes every intermediate calendar day. Fed. R. Civ. P. 6(a)(1)(A), (B). The EEOC also noted that if the last day of that filing period, so calculated, falls on a Saturday, Sunday, or legal holiday, the filing deadline is extended until the next non-holiday weekday. Fed. R. Civ. P. 6(a)(1)(C); see also Fed. R. Civ. P. 6(a)(4)-(6) (defining, for purposes of Rule 6(a), the terms "last day," "next day," and "legal holiday"). The EEOC went on to note that both the hospital and the court overlooked Rule 6(a)(1)(C), because 90 days after plaintiff received her notice of right to sue fell on Saturday, October 27, 2018, which meant her actual deadline to file her complaint was Monday, October 29, 2018. Because, as the EEOC argues, it was uncontested that plaintiff filed her complaint on October 29, 2018, the district court erred in holding that her complaint was untimely. In support of its position on the second issue, the EEOC argued that the district court's ruling constitute legal error because it contravenes the Fifth Circuit's long-settled precedent that the "ninety-day filing requirement is not a jurisdictional prerequisite, but more akin to a statute of limitations" and, accordingly, is "subject to equitable tolling."

Court's Decision: The Fifth Circuit reversed and remanded, holding that the plaintiff's lawsuit was timely and that the district court erred in dismissing it.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Wittmer v. Phillips 66	U.S. Court of Appeals for the Fifth Circuit No. 18-20251	8/6/2018 (amicus filed) 2/6/2019 (decided)	Title VII	Sex **Result:** Pro-Employer
Background: Plaintiff alleged defendant rescinded a job offer after defendant discovered she was a transgender woman. Defendant maintained that the job offer was rescinded because plaintiff represented that she was still employed by her former employer, when her job was in fact terminated. Plaintiff sued for sex discrimination under Title VII, alleging that the job offer was rescinded "because of her sex (female) by not conforming to gender stereotypes." The district court granted defendant's motion for summary judgment. The court acknowledged that Title VII would prohibit discrimination based on transgender status. However, the court determined that plaintiff failed to establish a *prima facie* case of discrimination because the record could not support an inference that the reasons for rescinding the job offer were pretextual, or that transgender discrimination was a motivating factor for the decision. **Issue EEOC is Addressing as Amicus:** Whether transgender discrimination is a form of sex discrimination prohibited by Title VII because it involves impermissible consideration of sex and because it invokes sex stereotypes about how a woman or a man should behave. **EEOC's Position:** The EEOC argued that to discriminate against transgender people in hiring decisions would violate the rule that "gender must be irrelevant to employment decisions." The EEOC contended that to discriminate against transgender people was necessarily discrimination on the basis of sex. Further, the EEOC argued transgender discrimination violates Title VII because the Supreme Court had determined that Title VII's prohibition against discrimination on the basis of sex included barring employers from taking adverse action based on an individual's failure to conform to sex stereotypes. **Court's Decision:** The Fifth Circuit held that Title VII does not prohibit employers from discriminating against employees because of sexual orientation.				
Harrison v. Soave Enterprises LLC	U.S. Court of Appeals for the Sixth Circuit No. 19-1176	4/24/2019 (amicus filed)	ADA	Disability **Result:** Pending
Background: Plaintiff worked as a manager for defendants' multiple auto parts business from December 2005 to August 2015. Her duties included patrolling the perimeter of the facility to guard against theft and spot-checking vehicles to ensure they were ready. The latter required plaintiff to kneel to look under the hood of the vehicle to ensure the catalytic converter had been removed. Around 2010 plaintiff suffered a knee injury that resulted in a torn anterior cruciate ligament (ACL). Because of the torn ACL, plaintiff could not kneel down or walk long distances and on certain terrains. Plaintiff requested that defendants purchase a mirror to aid her in inspecting the underside of the vehicles and defendants acquiesced. Her supervisor also informed her that another employee would assist with the perimeter patrols. Other than her inability to kneel and walk long distances, plaintiff had no other physical limitations that would preclude her from performing her duties. Plaintiff claims that on August 2015 her supervisor informed her that the company had terminated her employment because she could no longer perform her duties due to her torn ACL. Upon inquiring what part of her duties she had failed to perform, her supervisor informed her she had failed to patrol the facility perimeter. Plaintiff sued, alleging that defendants failed to provide her with a reasonable accommodation for her disability and terminated her employment because of her disability, in violation of the ADA. Plaintiff argued that she meets the ADA's definition of "disability" because she suffers an impairment that substantially limits a major life activity and defendants regarded her as disabled since they provided her with a mirror when she requested one. The district court rejected plaintiff's claim that her torn ACL alone constituted an impairment and granted defendants summary judgement. However, it concluded that defendants were plaintiff's employer since some companies can be so entangled that they constitute a single employer. **Issues EEOC is Addressing as Amicus:** (1) Whether the district court applied the wrong standard for determining whether plaintiff had a disability under the amended ADA; (2) Whether the ADA requires medical evidence of a disability; and (3) Whether the district court applied the correct standard for determining plaintiff's employer. **EEOC's Position:** The EEOC argues that the court applied the wrong standard for determining whether plaintiff had a disability. It argues that in 2008 Congress revised and expanded ADA coverage to include "a physical or mental impairment that substantially limits a major life activity." In doing so Congress provided that the term "substantially limits" is to be interpreted to require a lower degree of functional limitation. Thus, the district court wrongly relied on outdated, pre-ADAAA precedent in concluding that plaintiff's knee injury did not meet the threshold requirement of proving she was disabled because it certainly impedes her ability to walk and kneel. Moreover, defendants regarded plaintiff as disabled. The EEOC also argues that the amended ADA does not require medical proof of a disability. Finally, the EEOC contends that the district court applied the correct standard for determining plaintiff's employer because multiple entities can be so integrated that they constitute a single employer. **Court's Decision:** Pending.				

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Hubbell v. FedEx Smartpost, Inc.	U.S. Court of Appeals for the Sixth Circuit No. 18-1373	8/15/2018 (amicus filed) 8/5/2019 (decided)	Title VII	Retaliation **Result:** Pro-Employee

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

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

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

Court's Decision: The Sixth Circuit noted that "[a]s the EEOC points out, the district court erred in relying on our pre-2006 precedent regarding materially adverse employment actions." Citing *Rogers v. Henry Ford Health Systems*, 897 F.3d 763, 775-76 (6th Cir. 2018), the court emphasized that "the showing required for a Title VII retaliation claim 'is less burdensome than what a plaintiff must demonstrate for a Title VII discrimination claim.'" Viewed under this correct standard, "a reasonable factfinder could find that a number of the actions [charging party] testified about would be sufficient, on their own or in combination, to dissuade a reasonable worker from filing or pursuing an EEOC complaint." Moreover, the appellate court noted that the factfinder could find some or all of the employer's actions were taken in retaliation for the filing of the complaint.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Jones v. Federal Express Corp.	U.S. Court of Appeals for the Sixth Circuit No. 19-5073	6/4/2019 (amicus filed)	Title VII	Charge Processing **Result:** Pending

Background: Plaintiff, who is black, worked as a security officer at a shipping center operated by defendant. One of his duties was to watch an X-ray monitor to detect weapons in packages about to be loaded on defendant's aircraft. On August 4, 2017, plaintiff failed to detect a weapon. Twelve days later, defendant terminated his employment because he failed to detect that weapon. According to plaintiff, the consequences for failing to detect a weapon were harsher for him and another black officer than they were for certain white officers.

Plaintiff filed a charge alleging discrimination with the EEOC on April 25, 2018, 252 days after his termination. After processing his charge, the Commission issued him a notice of his right to bring suit against defendant. In explaining the basis for closing its file on the charge, the EEOC completed a standard form, and it did not place a checkmark next to the statement "Your charge was not timely filed with EEOC."

Plaintiff subsequently filed a pro se Title VII action in district court alleging race discrimination. Defendant moved to dismiss, arguing that plaintiff had not filed a discrimination complaint with the Tennessee Human Rights Commission (THRC), and thus he had only 180 days to file his charge with the EEOC. Defendant argued that his EEOC charge, filed 252 days after his termination, was therefore untimely, and the case should be dismissed.

The district court accepted defendant's argument and dismissed the case with prejudice. Relevant here, the court acknowledged that plaintiff "argues that he should have 300 days in which to file his [EEOC] charge, because the Tennessee Human Rights Commission prohibits race discrimination in employment." The court held, however, that "[t]he existence of a state agency is not enough; instead, the person aggrieved must have actually 'instituted proceedings' which [sic] said agency." The court noted that plaintiff had not "allege[d] that he filed a charge with the Tennessee Human Rights Commission, so the 300-day deadline does not apply in this case." Plaintiff moved to alter or amend the judgment, and the district court denied that motion.

Issues EEOC is Addressing as Amicus: Whether a 300-day limitation applies to the plaintiff's EEOC charge, and whether the plaintiff's charge was filed with the Commission within that 300-day period.

EEOC's Position: In support of its position that a 300-day limitation applies to plaintiff's charge, the EEOC first noted that it has a "work-sharing agreement" with the THRC. The EEOC argued that because of this relationship, when plaintiff submitted his race-discrimination charge to the EEOC 252 days after he was terminated, three things automatically happened as a result of the work-sharing agreement: (1) the EEOC, acting as the THRC's agent, instituted a THRC proceeding; (2) the THRC terminated that proceeding (pursuant to its waiver); and (3) the EEOC instituted an EEOC proceeding. Accordingly, the EEOC argued, contrary to the district court's conclusion, plaintiff did institute proceedings with the THRC because the EEOC initiated such proceedings on his behalf, and, as a result, under 42 U.S.C. § 2000e-5(e)(1), p. A-3, the 300-day limitations period governed.

Court's Decision: Pending.

Logan v. MGM Grand Detroit Casino	U.S. Court of Appeals for the Sixth Circuit No. 18-1381	8/8/2018 (amicus filed) 9/25/2019 (decided)	Title VII	Charge Processing, Limitations **Result:** Pro-Employee

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

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

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

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

Court's Decision: On this issue of first impression, the Sixth Circuit held that Title VII's limitation period "is part of an elaborate pre-suit process that must be followed before any litigation may commence. Contractual alteration of this process abrogates substantive rights and contravenes Congress's uniform nationwide legal regime for Title VII lawsuits." The appellate court therefore reversed the district court's decision.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Chaidez v. Ford Motor Company	U.S. Court of Appeals for the Seventh Circuit No. 18-2753	2/25/2019 (amicus filed) 8/28/2019 (decided)	Title VII	Charge Processing **Result:** Pro-Employee

Background: Plaintiffs filed separate charges alleging race discrimination after they were not hired. After the EEOC issued a right-to-sue letter they subsequently filed a class complaint alleging the defendant's hiring practices constituted disparate treatment and/or disparate impact discrimination against Hispanic applicants. The district court subsequently dismissed the complaint on the grounds that while the plaintiffs' charges alleged that Hispanic applicants were unable to pass the defendant's pre-employment testing, the class complaint alleges disparate impact on the grounds that Hispanic applicants were not permitted to take defendant's pre-employment testing. As a result, the district court held plaintiffs had not exhausted their administrative remedies prior to filing suit.

Issues EEOC is Addressing as Amicus: Whether the plaintiffs sufficiently exhausted their administrative remedies in their EEOC charges to support the claims in their complaint.

EEOC's Position: The EEOC argued that the claims presented in the class complaint were sufficiently similar to the allegations in plaintiffs' administrative charges to satisfy the exhaustion requirement. The EEOC contended that Title VII prescribes only minimal requirements pertaining to the form and content of charges of discrimination. Specifically, the EEOC argued that the administrative charges and complaint both alleged that defendant subjected them to race and/or national origin discrimination as a consequence of its hiring practices.

Court's Decision: The Seventh Circuit panel of judges affirmed the district court's dismissal of Count I of the complaint (and modified the judgement to be without prejudice), vacated the district court's dismissal of Count II of the complaint, and remanded the case to the district court for further proceedings consistent with the Seventh Circuit's opinion in this matter. The appellate court held that claims in Count I were not properly exhausted before the EEOC because they included new claims of pre-test discrimination that were not "like or reasonably related" to claims in the plaintiffs' EEOC charges. Count I of the complaint alleged that Hispanic and Latino applicants' contact information was destroyed or interfered with by employees at the unemployment office and that Hispanic and Latino applicants were "never allowed to begin pre-employment testing." The appellate court determined that these allegations do not describe the misconduct alleged in the plaintiffs' EEOC charges that alleged that defendant discriminated against Hispanic and Latino applicants in the post-test process. The appellate court held that because Count II describes claims that were consistent with the conduct described in the EEOC charges the claims were properly exhausted before the EEOC. The court reasoned that, like plaintiffs' EEOC charges, Count II alleges disparate impact upon Hispanic and Latino applicants caused by the skills test. The court also reasoned that, unlike Count I, Count II implicates the same individuals as the EEOC charges.

Shell v. Burlington Northern Santa Fe	U.S. Court of Appeals for the Seventh Circuit No. 19-1030	8/28/2019 (amicus filed) 10/29/19 (decided)	ADA	Disability **Result:** Pro-Employer

Background: Plaintiff worked for a third-party railyard operations company and applied for a job with defendant in 2010 when the company announced plans to take over those services. Plaintiff applied to work as an intermodal equipment operator, a job category defendant classified as safety-sensitive because it involves using heavy equipment, and defendant offered plaintiff a job contingent on his undergoing a physical. Defendant denied plaintiff the job after an exam showed he had a body mass index of 47.5, citing a policy of not letting workers with BMIs over 40 perform safety-sensitive jobs because of concerns they may develop conditions (such as sleep apnea, heart disease, and diabetes), all of which could "manifest as a sudden incapacitation" according to court documents. There was no evidence that plaintiff suffered from any of these conditions. Defendant informed plaintiff his application would be reconsidered if he lost 10% of his body weight and kept it off for six months, and provided defendant with any test results it requested (even if his BMI still exceeded 40). Plaintiff sued for alleged violation of the ADA. Defendant argued that the regarded-as provision of the ADA does not protect an individual from discrimination unless the employer perceives him to have a current (or perhaps, a prior) impairment, and because there was no evidence that defendant ever regarded plaintiff as impaired *at the time* it refused his application, it could not have violated the ADA. Defendant argued that the ADA's definition of "disability" is not met where an employer regards an applicant as not presently having a disability but is at a high risk of developing one. The lower court denied defendant's motion for summary judgment, holding that although plaintiff may not have been disabled under most courts' interpretation of the ADA, defendant may have violated the law by treating him as if he was, and that the ADA does reach discrimination based on a future impairment.

Issues EEOC is Addressing as Amicus: Whether a job applicant rejected based on an employer's concerns that he will develop a physical impairment may invoke the protections of the ADA, and if so, whether an employer may lawfully reject such an applicant based on statements by a company physician that the applicant poses a safety threat.

EEOC's Position: The district court correctly held that plaintiff is protected by the ADA because defendant regarded him as having an impairment within the meaning of the statute. Defendant acted "because of . . . perceived . . . impairment[s]" when it refused to hire plaintiff based on its fear that he would develop these impairments (sleep apnea, heart disease, and diabetes) in violation of the ADA (as amended). Denying plaintiff employment because of the risk that plaintiff may develop one of these three impairments, defendant was treating plaintiff as if he actually had those impairments. Moreover, coverage under the regarded-as provision is not limited to individuals perceived to have a current impairment because the there is no temporal limitation in the statute.

Court's Decision: The ADA's "regarded as" prong does not cover a situation where an employer views an applicant as at risk for developing a qualifying impairment in the future. The Seventh Circuit panel of judges held that the evidence showed that defendant did not believe that plaintiff had any of the feared impairments when it refused his application and that when defendant echoed this position in its statement of material facts, plaintiff's response did not identify any evidence controverting that fact. The panel explicitly said that the text plainly encompasses only current impairments, not future ones, by using the key word "having" of "regarded as having ...an impairment" because "having" means presently and continuously and "does not include something in the past that has ended or something yet to come."

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Trujillo v. Rockledge Furniture	U.S. Court of Appeals for the Seventh Circuit Nos. 18-3349 & 19-1651	5/2/2019 (amicus filed) 6/7/2019 (decided)	ADEA	Charge Processing **Result:** Pro-Employee

Background: Plaintiff worked for defendant as a store manager until his employment was terminated. Plaintiff filed a charge of discrimination with the EEOC alleging age discrimination and retaliation under the ADEA, arguing that defendant replaced older employees with younger ones to attract younger customers. In his charge, plaintiff named "Ashley Furniture HomeStore" with its location in Burbank, Illinois. The proper entity and that which employed plaintiff was "Rockledge Furniture LLC," which is registered to do business in Illinois as "Ashley Furniture HomeStore – Rockledge." The EEOC provided the Texas-based company notice of the charge by utilizing the EEOC's digital charge system, and the company responded that plaintiff was never an employee. The EEOC contacted plaintiff's attorney to request information on the proper respondent, and the attorney provided "Rockledge Furniture LLC" and a copy of plaintiff's pay stub. The EEOC dismissed the charge on the basis that plaintiff was not an employee of the Texas-based company. Subsequently, plaintiff sued defendant for age discrimination and retaliation, and defendant moved to dismiss for failure to exhaust administrative remedies. The district court granted the motion and dismissed the action. In so doing, the district court determined that plaintiff's charge did not accurately identify defendant by its registered or assumed name. As such, the employer did not receive notice as required under the ADEA.

Issues EEOC is Addressing as Amicus: Whether the district court erred in dismissing plaintiff's lawsuit for failing to satisfy the ADEA's charge-filing requirements.

EEOC's Position: The EEOC argued that plaintiff should be allowed to proceed with his lawsuit in federal court because the EEOC had sufficient information to identify the correct employer and process his charge. Plaintiff's charge, either standing alone or coupled with his attorney's follow-up correspondence with the EEOC, adequately identify plaintiff's employer. Further, the EEOC argued that the name plaintiff listed in his charge as his employer is almost identical to the employer's trade name registered in Illinois, and therefore, based on district court cases in other jurisdictions, use of a company's trade name in a charge is sufficient notice to an employer.

Court's Decision: The Seventh Circuit panel reversed the lower court's decision, finding that plaintiff sufficiently named his employer in the charge and any doubt about the employer's identify was removed when his attorney sent the EEOC plaintiff's pay stub. Further, the court found that the EEOC's error in processing the charge does not preclude plaintiff's federal lawsuit.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Garrison v. Dolgencorp	U.S. Court of Appeals for the Eighth Circuit No. 18-1066	4/10/2018 (amicus filed) 10/3/2019 (decided)	ADA	Disability **Result:** Pro-Employee

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

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

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

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

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

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

Court's Decision: The Eighth Circuit determined it is up to a jury to decide whether the employer failed to provide leave as a reasonable accommodation for the employee's conditions.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Horton v. Midwest Geriatric Management, LLC	U.S. Court of Appeals for the Eighth Circuit No. 18-1104	3/7/2018 (amicus filed)	Title VII	Sex **Result:** Pending

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

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

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

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

Court's Decision: On April 25, 2019, the Eighth Circuit agreed to hold consideration of this appeal in abeyance pending the Supreme Court's decision in *Bostock v. Clayton County, Georgia, Altitude Express Inc. v. Zarda,* and *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission.*

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Anthony v. Trax International Corp.	U.S. Court of Appeals for the Ninth Circuit No. 18-15662	7/25/2018 (amicus filed)	ADA	Disability **Result:** Pending

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

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

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

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

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

Court's Decision: Oral argument was held on November 15, 2019.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Biel v. St. James School	U.S. Court of Appeals for the Ninth Circuit No. 17-55180	9/28/17 (amicus filed) 12/18/2018 (decided)	ADA	Disability **Result:** Pro-Employee

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

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

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

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

Court's Decision: The Ninth Circuit panel reversed the lower court's decision, finding the ministerial exception does not apply to a teacher who primarily teaches secular subjects.

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

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

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

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

Court's Decision: Oral argument was held on November 5, 2019.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
McAllister v. Adecco	U.S. Court of Appeals for the Ninth Circuit No. 18-17393	8/16/2019 (amicus filed)	Title VII	Retaliation **Result:** Pending

Background: Plaintiff worked for a staffing agency, which assigned him to a temporary assignment with another company. Plaintiff complained to the staffing agency about assignments and interactions from his manager, believing they were "tricking" him and might not want to work with him because he is black. Plaintiff submitted two more e-mails to this effect. The matter was escalated to a staffing agency HR representative out of Florida. The HR representative contacted plaintiff several times to investigate his allegations and also asked if he still wanted to accept assignments from the staffing agency. He said the matter was with the EEOC. He confirmed he wished to continue to receive assignments from the staffing agency. He did not participate in the internal investigation, and he did not confirm further assignments that were communicated to him and in accordance with company policy, was placed on "inactive" status. The district court granted summary judgment in the staffing agency's favor, finding that the plaintiff would be unable to establish (1) the staffing agency's liability for client's alleged racially discriminatory, harassing, or retaliatory conduct; (2) *prima facie* cases of race-based discrimination and retaliation by the staffing agency or that the staffing agency's reasons for its actions were pretextual, (3) racially harassing conduct by the staffing agency; and (4) that the manager acted with racial animus or participated in any racially discriminatory act. Plaintiff appealed.

Issues EEOC is Addressing as Amicus: Whether Title VII prohibits retaliation for the filing of a charge regardless of the merits of the charge; whether the district court applied the wrong legal standard to determine whether the staffing agency subjected plaintiff to an adverse action for filing a charge; and whether the district court erred in finding that the staffing agency could not be held liable for alleged discriminatory conduct occurring during plaintiff's placement at the client.

EEOC's Position: The court erred as a matter of law in applying the reasonableness test to the participation clause of the anti-retaliation provision of Title VII, because no such test is required once an individual files a charge. The district court erred by not applying the more expansive, broader adverse action test available for retaliation claims (rather than the more narrow test for substantive discrimination claims), which would include a failure to investigate. The district court erred in only analyzing the facts of the case under a joint employer analysis rather than, as the facts support here, the staffing agency's negligence in allowing a third party to discriminate against plaintiff at his workplace.

Court's Decision: Pending

Valtierra v. Medtronic, Inc.	U.S. Court of Appeals for the Ninth Circuit No. 17-15282	11/13/2018 (amicus filed) 9/11/2019 (decided)	ADA	Disability **Result:** Pro-Employer

Background: Former employee who was diagnosed as morbidly obese filed suit against his former employer, alleging he was terminated for being morbidly obese and for requesting a reasonable accommodation, and that his employer interfered with his FMLA leave. As a matter of first impression, the district court granted summary judgment in favor of the employer, holding that morbid obesity is not a physical impairment under the ADA; employee's discharge did not violate ADA's "regarded as" prong; employer did not discharge employee for requesting a reasonable accommodation; and employer did not interfere with plaintiff's exercise or attempted exercise of his FMLA rights when it terminated plaintiff's employment where plaintiff was discharged for signing off on maintenance activities that he did not perform. Plaintiff appealed.

Issues EEOC is Addressing as Amicus: A genuine issue of material fact exists as to whether morbid obesity constitutes a physical impairment under the ADA. Plaintiff's morbid obesity is a physical impairment because it affects one or more body systems and neither the regulations, statute, nor guidance requires that morbid obesity be caused by another physiological condition in order to qualify as a physical impairment. A genuine issue of material fact exists as to whether plaintiff's knee condition constitutes a physical impairment and whether his morbid obesity and knee condition substantially limit a major life activity.

EEOC's Position: The EEOC's regulations and guidance do not impose a causation requirement to constitute a physical condition and instead impose other requirements that are satisfied by morbid obesity. Plaintiff's morbid obesity qualifies as an impairment under the governing regulation because it is a physiological condition or disorder that affects one or more body systems, and the trending of the law and regulations throughout the years supports this (*e.g.*, social security disability, AMA definitions, pre-ADAAA case law supporting that morbid obesity is an impairment). The conclusion that morbid obesity is an impairment only if a plaintiff establishes that it was caused by another physiological disorder is contradicted by the text of the governing regulation, which the EEOC contends does not require a plaintiff to show the cause of his disorder or condition. The EEOC further contends that the court's decision is based on another fundamental error of law — a faulty interpretation of the Commission's interpretive guidance. The EEOC argues that the district court also erroneously excluded First Circuit case law that found that a reasonable jury could find that morbid obesity is a physical impairment under the ADA and did not require the plaintiff in that case to show that her obesity was caused by a physiological condition. Finally, the plaintiff's knee condition (torn cartilage) was both aggravated by and inoperable because of his weight, and the EEOC contends that the district court failed to address whether his knee condition substantially limits a major life activity, in which case he would be an individual with a disability and entitled to the protections of the ADA.

Court's Decision: Affirmed. Assuming morbid obesity was an impairment, or that the employee had a disabling knee condition, his job termination was not caused by his obesity or knee condition. The Ninth Circuit bypassed the issue of whether morbid obesity was an impairment under the ADA (or whether the employee had a disabling knee condition), finding that even if one or both of these conditions constituted a disability under the ADA, the employee will be unable to show a causal relationship between these impairments and his job termination and there is no basis for concluding that he was terminated for any reason other than the employer's stated ground that he falsified records to show he had completed work assignments. The court further determined that, pursuant to the evidence on record, the employer did not treat the employee less favorably than similarly situated co-workers because although the employee identified two employees who admitted to also falsifying records, the evidence demonstrated that management was not informed of their actions and never discovered that others had prematurely closed tasks.

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

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

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

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

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

Court's Decision: A divided panel of the appellate court rejected the this argument. The majority held that an "adverse employment action—that is, a materially adverse decision regarding 'application procedures, hiring, advancement, discharge, compensation, training, or other terms, conditions, and privileges of employment'—is an element of all discrimination claims under the ADA." The majority then affirmed the jury's verdict, explaining that, when the County denied plaintiff's request for a reasonable accommodation, "it did not fire her or make any other changes in her employment status." The dissent would have held that "an adverse-employment action element" is not among the "requisite elements of a failure-to-accommodate claim" under the ADA, and that such a requirement only applies to disparate treatment claims under the ADA. On December 18, the Tenth Circuit granted rehearing *en banc*, which is pending.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Frappied v. Affinity Gaming Black Hawk, LLC	U.S. Court of Appeals for the Tenth Circuit No. 19-1063	6/11/2019 (amicus filed)	ADEA Title VII	Age Sex **Result:** Pending
Background: Plaintiffs, eight women and one man ages 46-74, worked at a casino that defendant purchased in 2012. Upon the purchase, defendant required all employees to reapply for their jobs and each plaintiff re-applied and was re-hired, subject to a 90-day probationary period. Before the 90-day period lapsed, defendant posted 59 job openings. Around the same time, defendant required all employees undergoes training on its service philosophy. After competition of the required training, defendant began discharging employees from its casino, including all plaintiffs, and then began replacing its laid-off employees. Plaintiffs allege sex discrimination claims against older women under Title VII, age discrimination under the ADEA, age-based disparate treatment, and disparate impact claims under the ADEA. The court granted defendant's motion to dismiss as to its sex discrimination claim, disparate impact under the ADEA, and disparate impact under Title VII. As to the gender discrimination claim, the court found that plaintiffs did not provided fair notice of their sex plus age claim, which is "effectively an attempt to have a spare bullet in plaintiffs' chamber should its standalone age discrimination claim fail." Further, the court determined that plaintiffs did not establish a *prima facie* case of age discrimination under the ADEA because defendant did not eliminate plaintiffs' positions after terminating their employment. **Issues EEOC is Addressing as Amicus:** (1) Whether the district court erred in dismissing plaintiffs' Title VII sex discrimination claim against older women because such claims are cognizable under Title VII and whether plaintiffs' complaint provided defendant "fair notice" of the nature of their Title VII disparate treatment claims; and (2) Whether the district court erred in holding that plaintiffs could not establish the fourth prong of a *prima facie* case under the ADEA where defendant admitted plaintiffs' jobs remained open after it terminated their employment. **EEOC's Position:** The EEOC argues that "sex-plus" claims under Title VII are cognizable, regardless of whether the "plus" characteristic, age, is protected by another statute that plaintiffs also invoked in a separate claim. In support of that argument, the EEOC relies on other district court opinions accepting Title VII sex-plus claims where age is the "plus" factor. In addition, the EEOC argues the complaint provided "fair notice" of plaintiffs' Title VII disparate treatment claim because the complaint details the circumstances under which plaintiffs were fired. Finally, the EEOC argues that both Supreme Court and Tenth Circuit precedent allow a flexible approach to the *prima facie* case of age discrimination under the ADEA in that plaintiffs can show their jobs were not eliminated after their employment ended or that plaintiffs were replaced by a younger comparator. **Court's Decision:** Oral argument was held on November 20, 2019.				
Tesone v. Empire Marketing Strategies	U.S. Court of Appeals for the Tenth Circuit No. 19-1026	5/13/2019 (amicus filed) 11/8/2019 (decided)	ADA	Disability **Result:** Pro-Employee
Background: Plaintiff sued alleging disability discrimination and wrongful termination in violation of the Americans with Disabilities Act. Plaintiff was a Produce Retail Sales Merchandizer and suffered from back pain and muscle weakness that limited her ability to lift. She claimed to have informed defendant of her lifting limitations when she was hired. Despite plaintiff's lifting limitation, defendant reprimanded her inability to lift, complained she was slow in performing her work duties, which required lifting, and finally terminated her employment for substandard performance. The district court rejected plaintiff's claims and granted defendant summary judgment holding that plaintiff failed to submit expert medical evidence of a substantial impairment of a major life activity. **Issue EEOC is Addressing as Amicus:** Whether the ADA ordinarily requires expert medical evidence to establish a disability. **EEOC's Position:** The EEOC argues that disabled status under the ADA does not ordinarily require medical evidence of the extent of the injury. In some rare circumstances where the impairment is unique and uncommon, such information would be necessary to establish the existence of a qualifying medical condition. However, in others, a lay jury can determine this status without detailed medical evidence. The EEOC contends that under the ADAAA, the threshold for claiming disability was reduced to the point where juries can decide these issues without expert testimony or evidence. **Court's Decision:** The Tenth Circuit affirmed the district court's denial of the plaintiff's motions to amend, but determined the district court erred in granting summary judgment in favor of the defendant, as the ADA does not always require medical experts.				

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Bratwaite v. Broward County School Board	U.S. Court of Appeals for the Eleventh Circuit No. 17-13750	12/7/2017 (amicus filed) 2/28/2019 (decided)	Title VII	Retaliation **Result:** Pro-Employer
Background: Plaintiff, who is black, worked as a secretary for the defendant school board. She filed a complaint under Title VII alleging that another employee verbally harassed and physically bullied and threatened her because of her race, and that she suffered retaliation in the form of verbal and written reprimands after she filed a charge of discrimination with the EEOC and complained of discrimination to her supervisor. The school board moved for summary judgment, arguing in relevant part that plaintiff could not establish a *prima facie* case of retaliation because she could not show that the school board disciplined her because of her protected activity rather than for legitimate, non-retaliatory reasons, and because the issuance of a reprimand allegedly could not constitute a prohibited adverse employment action. The district court granted the school board's motion for summary judgment and concluded that plaintiff's retaliation claim failed for two reasons. First, the court concluded that verbal and written reprimands "do not constitute 'adverse employment action' for Title VII purposes," because they do not effect "a serious and material change in the terms, conditions, or privileges of employment." Second, the district court held that the plaintiff's retaliation claim failed because she was unable to show a causal connection between the reprimands and any protected activity, such as filing her EEOC charge or submitting complaints to her supervisor. **Issue EEOC is Addressing as Amicus:** Whether the district court erred in holding that the anti-retaliation provision of Title VII, 42 U.S.C. 2000e-3(a), requires a plaintiff to show a "serious and material change in the terms, conditions, or privileges of employment," when controlling Supreme Court law requires only that "a reasonable employee would have found the challenged action materially adverse," such that it "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." **EEOC's Position:** The EEOC argued that the district court erroneously applied an adverse action standard derived from substantive discrimination cases, not from retaliation cases. Specifically, the EEOC contended that the district court failed to apply the appropriate standard for adverse action established in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006). The EEOC also argued that the Eleventh Circuit must disregard any case that contradicts *Burlington* because the court had already acknowledged that it was the appropriate standard to use for retaliation claims. **Court's Decision:** The appellate court affirmed the district court's finding that the plaintiff's discrimination claim fails as a matter of law. The court also found that although the plaintiff and the U.S. Department of Justice correctly argued that the district court applied the wrong standard to plaintiff's retaliation claim, the court concluded that even if the correct standard were applied, the retaliation claim still fails.				
Durham v. Rural/ Metro Corporation	U.S. Court of Appeals for the Eleventh Circuit No. 18-14687	2/11/2019 (amicus filed)	Title VII	Pregnancy **Result:** Pending
Background: Plaintiff worked as an emergency medical technician (EMT) for the defendant. Plaintiff submitted a physician's note to defendant stating she could not lift 50 pounds or more due to her pregnancy. Defendant subsequently denied plaintiff light-duty work due to its policy that only employees injured on the job may obtain light-duty work. After defendant offered unpaid leave, plaintiff subsequently claimed she was constructively discharged and filed suit for pregnancy discrimination. The district court dismissed the case on the grounds that plaintiff failed to establish that defendant intentionally treated her less favorably than non-pregnant workers, reasoning that the only employees permitted light-duty work were injured on the job. **Issues EEOC is Addressing as Amicus:** (1) Whether the district court erred in holding that plaintiff failed to establish a *prima facie* case of pregnancy discrimination where she presented evidence that defendant routinely accommodated non-pregnant employees who were similar in their inability to work; and (2) Whether the district court erred in failing to send plaintiff's case to the jury when defendant did not provide a reason for its policy of only accommodating workers who were injured on the job. **EEOC's Position:** The EEOC argued that the district court erred when it required that plaintiff show non-pregnant workers who were uninjured on the job to meet her *prima facie* burden. Specifically, the EEOC contended that evidence that non-pregnant workers received light duty was sufficient. The EEOC also argued that defendant had a burden to present a legitimate nondiscriminatory reason for its policy of only providing light duty to employees injured on the job. **Court's Decision:** Oral argument is scheduled for January 15, 2020.				

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Gogel v. Kia Motors Manufacturing Georgia, Inc.	U.S. Court of Appeals for the Eleventh Circuit No. 16-16850	8/30/2019 (amicus filed)	Title VII	Retaliation **Result:** Pending

Background: Plaintiff began working for defendant in 2008 as Team Relations Manager. In March 2009, defendant announced organizational changes and named several managers Head of Department (HOD) for their respective departments. Plaintiff observed that defendant designated all the male senior managers as HODs, and that she was the only senior manager who did not become HOD of her department. Between March 2009 and November 2010, the plaintiff complained to her supervisors that she believed defendant was treating her differently because of her sex. On November 10, 2010, plaintiff filed an EEOC charge alleging that defendant discriminatorily denied her the HOD position based on sex and national origin.

On Friday, December 3, 2010, the defendant presented the plaintiff with a document that sought her agreement to refrain from encouraging or soliciting other employees to make claims against the company. When plaintiff explained that she did not feel comfortable signing the document until her attorney reviewed it, she was asked to go home. Plaintiff signed the document the following Monday.

On January 19, the defendant fired the plaintiff because it believed she was soliciting other employees to make claims against the company.

The district court granted summary judgment to the defendant on the plaintiff's Title VII and 42 U.S.C. § 1981 retaliation claims, agreeing with the magistrate judge that (1) defendant had stated a legitimate "non-retaliatory" reason for firing plaintiff (it "lost confidence in plaintiff's abilities to perform her job duties after an investigation showed that she had solicited another employee to file a charge") and (2) plaintiff could not establish pretext because she failed to present evidence that defendant did not "honestly believe[] that plaintiff had solicited another employee."

An Eleventh Circuit panel reversed summary judgment on plaintiff's retaliation claim. *Gogel v. Kia Motors Mfg. of Ga., Inc.*, No. 16-16850, slip op. at 2 (11th Cir. Sept. 24, 2018). In contrast to the magistrate judge's report and the district court's opinion, the panel decisions centered on whether the "manner" of plaintiff's opposition was "reasonable," relying on *Rollins v. Florida Department of Law Enforcement*, 868 F.2d 397 (11th Cir. 1989). *Gogel*, slip op. at 15 (quoting *Rollins*, 868 F.2d at 401). As the majority explained, this court assesses whether the manner of opposition was reasonable by balancing "the purpose of the statute and the need to protect individuals asserting their rights [ ] against an employer's legitimate demands for loyalty, cooperation and a generally productive work environment." *Id.* (quoting *Rollins*, 868 F.2d at 401).

The majority concluded that plaintiff's assistance to another employee qualified as protected opposition. At the outset, the panel majority determined that, under a plain text reading, Title VII's antiretaliation provision does not exempt managerial or human resource employees. Id. at 17, 25 (quoting 42 U.S.C. § 2000e-3(a)). Next, applying the balancing test articulated in *Rollins*, the panel majority concluded that the manner of plaintiff's opposition was reasonable. The majority distinguished prior decisions that deemed the manner of opposition conduct unreasonable because employees "alleged[ly] . . . violated their employer's procedures for reporting complaints," including *Whatley v. Metropolitan Atlanta Rapid Transit Authority*, 632 F.2d 1325 (5th Cir. 1980), *Hamm v. Board of Regents*, 708 F.2d 647 (11th Cir. 1983), and Jones, on which the district court relied. *See Gogel*, slip op. at 15-17, 19-20, 24-25. The panel majority concluded that the balancing test favored the plaintiff, emphasizing that she did not significantly diverge from the defendant's procedures, that the plaintiff had unsuccessfully attempted to use defendant's internal procedures to address discrimination complaints, and that any apparent "conflict" between human resource employees' job duties and their "support[] [for] coworkers' oppositional conduct" was "overstated." *Id.* at 18, 20, 21-22.

Issues EEOC is Addressing as Amicus: Whether the district court erred when it granted summary judgment for defendant on plaintiff's retaliation claim, where defendant fired plaintiff after she filed an EEOC charge, and where defendant stated that it fired plaintiff because, in the company's view, she assisted another employee in filing an EEOC charge.

EEOC's Position: The EEOC agreed with the panel majority that the district court erred in granting summary judgment on plaintiff's Title VII retaliation claim. The EEOC stated that a reasonable jury could find that the defendant fired the plaintiff because of her assistance to the other employee. Here, the EEOC also argued that the panel majority correctly determined that the plaintiff's status as a human resource manager did not exempt her from Title VII's antiretaliation protections because the statutory text covers "any . . . employee[]" and "contains no exception for human resource employees." *Gogel*, slip op. at 17, 25 (quoting 42 U.S.C. § 2000e-3(a)). In support of this argument, the EEOC noted that because Title VII's anti-retaliation provision provide no basis for exempting managers or human resource personnel, "focus[ing] on an employee's job duties, rather than the oppositional nature of the employee's complaints or criticisms, is inapposite in the context of Title VII retaliation claims." *Littlejohn*, 795 F.3d at 317 n.16.

The EEOC also argued that the so-called "honest belief" doctrine does not apply in this case, where defendant's stated justification for terminating the plaintiff's employment was her protected activity, not misconduct. Here, the EEOC argued that defendant's stated reason for firing the plaintiff was not based on legitimately sanctionable misconduct independent from her protected activity, but rather precisely because of—and for no other reason than—her protected activity. Relying on prior Eleventh Circuit decisions, the EEOC stated that it is not a legitimate, non-retaliatory reason to fire an employee who has complained of discrimination because the company thinks the employee is "unhappy working for the company" given the complaint, or that it would be "awkward and counterproductive" to retain her. *Alvarez v. Royal Atl. Developers, Inc.*, 610 F.3d 1253, 1269 (11th Cir. 2010); *see also id.* at 1269-70 (adding that an employer's fear that an employee who engaged in opposition might sabotage the company is not a legitimate, non-retaliatory reason for termination, absent a "reasonable, fact-based fear of sabotage or violence").

Court's Decision: Oral argument was held on October 22, 2019.

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)	ADEA Title VII	Age Race **Result:** Pending

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

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

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

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

Court's Decision: Pending.

FY 2019 – Select Appellate Cases in Which the EEOC was a Party

Case Name	Court	Date of Appellate Filing and/or Court Decision	Statutes	Basis/Issue/Result
R.G. & G.R. Harris Funeral Homes v. EEOC	U.S. Supreme Court No. 18-107	4/22/2019 (cert. granted)	Title VII	Gender Identity Discrimination **Result:** Pending

Background: A transgender woman initially presented as a man who worked for a funeral home as an embalmer. During her employment, she notified her supervisor that she was transgender and would undergo gender-reassignment surgery to present as a woman. The funeral home also applied a very specific gender-based dress benefit through which it supplied male employees with suits and ties but rarely gave female employees any such privileges. When employee returned after surgery, defendant terminated her employment.

The EEOC filed a complaint alleging that the funeral home fired the employee because she transitioned from male to female and did not conform with the funeral home's gender-based dress policy or stereotypes and only provided a clothing benefit to men. Although the district court found that transgender status is not protected under Title VII, it found that the employee stated a claim for relief under the act based on unlawful sex-based stereotyping. Subsequently, the funeral home filed an amended answer alleging the Religious Freedom Restoration Act defense under Title VII, *i.e.*, permitting the employee to continue employment would violate closely held religious beliefs. The district court granted summary judgment to the funeral home on the basis of this defense.

The Sixth Circuit reversed the district court's grant of summary judgment. Specifically, the Sixth Circuit determined that (1) the funeral home engaged in unlawful discrimination against the ex-employee on the basis of her sex; (2) the funeral home has not established that applying Title VII's proscriptions against sex discrimination to the funeral home would substantially burden the owner's religious exercise, and therefore the funeral home is not entitled to a defense under RFRA; (3) even if the owner's religious exercise were substantially burdened, the EEOC has established that enforcing Title VII is the least restrictive means of furthering the government's compelling interest in eradicating workplace discrimination against the ex-employee; and (4) the EEOC may bring a discriminatory-clothing allowance claim in this case because such an investigation into the funeral home's clothing-allowance policy was reasonably expected to grow out of the original charge of sex discrimination that Appellant submitted to the EEOC. Importantly, the Sixth Circuit expressly held that "discrimination on the basis of transgender and transitioning status is necessarily discrimination on the basis of sex" (884 F.3d 560, 571) and "discrimination on the basis of transgender and transitioning status violates Title VII" (*Id.* at 574-575).

Issues on Appeal: (1) Whether the word "sex" in Title VII's prohibition on discrimination "because of . . . sex," 42 U.S.C. 2000e-2(a)(1), meant "gender identity" and included "transgender status" when Congress enacted Title VII in 1964; and (2) Whether *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), prohibits employers from applying sex-specific policies according to their employees' sex rather than their gender identity.

EEOC's Position on Appeal: Title VII's prohibition on discrimination "because of . . . sex" includes discrimination based on transgender status and/or transitioning as outlined in the text of Title VII and decisions of the Supreme Court that have long recognized that Title VII forbids employment decisions based on gender. The court also erred in ruling that RFRA provides the funeral home a defense to the EEOC's enforcement action in this case. Title VII permits religious organizations to prefer employees who hold the same religious beliefs, and the judicially created "ministerial exception" prohibits application of federal anti-discrimination laws to the employment relationship between a religious institution and its ministers. Neither exception applies here. RFRA does not provide a defense that exempts the funeral home from complying with Title VII's prohibition on sex discrimination based on the sincere religious beliefs of its owner. That is because the funeral home failed to meet its initial burden of showing that the EEOC's enforcement action imposed a "substantial burden" on the company's "exercise of religion."

Court's Decision: This case is pending before the U.S. Supreme Court.

Case Name	Court	Date of Appellate Filing and/or Court Decision	Statutes	Basis/Issue/Result
EEOC v. McLeod Health Inc.	U.S. Court of Appeals for the Fourth Circuit No. 17-2335	3/8/2018 (appeal filed) 1/31/2019 (decided)	ADA	Disability **Result:** Pro-EEOC

Background: On September 11, 2014, the EEOC filed a complaint alleging that defendant violated the ADA by requiring its employee to undergo two medical examinations and by discharging her due to her disability after first placing her on forced unpaid leave. Defendant moved for summary judgment, arguing that the medical examinations were appropriate in light of the employee's symptoms, and that the examinations showed the employee was no longer qualified for her position because she posed a threat to herself that could not be accommodated. On January 21, 2016, the magistrate judge issued a report and recommendation suggesting that the district court grant defendant's motion and dismiss the case. On March 31, 2016, the district court adopted the recommendation in part. It dismissed the illegal examination claim in its entirety, but rejected the magistrate judge's rationale for dismissing the wrongful termination claim and remanded the case for further consideration. Defendant moved for reconsideration, and the district court concluded, in an order dated November 18, 2016, that additional analysis of the wrongful termination claim was necessary. It instructed the magistrate judge to give "particular attention to the role of the futile gesture doctrine, as well as whether a failure to accommodate claim exists and survives summary judgment." On June 19, 2017, the magistrate judge again recommended summary judgment on the wrongful termination claim. In an opinion dated September 21, 2017, the district court adopted the recommendation and granted summary judgment in favor of the defendant on all remaining claims.

Issues on Appeal: (1) Does the record support a reasonable jury finding that defendant violated the ADA by forcing charging party to undergo two medical exams without any reasonable belief, based on objective evidence, that the employee's condition prevented her from performing essential job functions or posed a direct threat? (2) Could a reasonable jury find that, even if defendant was justified in subjecting the employee to one or more medical examinations, the examinations it gave the employee were neither job-related nor consistent with business necessity, in violation of the ADA? (3) Could a reasonable jury find that defendant discriminated against the employee in violation of the ADA by putting her on involuntary unpaid leave and subsequently terminating her employment based on the results of the improper medical examinations to which it had subjected her?

EEOC's Position on Appeal: The EEOC argued that a reasonable jury could find that defendant violated the ADA by requiring the employee to undergo two medical examinations because defendant lacked an objectively reasonable belief that the employee could not perform her essential job function or posed a direct threat. The EEOC also argued that there was a triable issue of fact that existed as to whether the medical exams were sufficiently tied to the employee's job requirements. Lastly, the EEOC also argued that a reasonable jury could find that defendant discriminatorily discharged the employee in violation of the ADA.

Court's Decision: The Fourth Circuit reversed. Among other findings, the court determined "(a) reasonable jury could conclude that when [defendant] required [the charging party] to take a medical exam, the company lacked a reasonable belief—based on objective evidence—that [the charging party's] medical condition had left her unable to navigate to and within the company's campuses without posing a direct threat to her own safety." Interpreting the record in the light most favorable to the EEOC, "it was not reasonable for [defendant] to believe that she had become a direct threat to herself on the job simply because (a) she had fallen multiple times recently and (b) her manager thought she looked groggy and out of breath." The court reversed the district court's ruling on the termination claim on the same basis.

EEOC v. Vantage Drilling Co.	U.S. Court of Appeals for the Fifth Circuit No. 19-20541	9/13/2019 (appeal filed)	ADA	Charge Processing **Result:** Pending

Background: The EEOC sued defendant alleging that it violated the Americans with Disabilities Act by terminating an employee because he had a heart attack on board one of its drilling rigs. The company purportedly fired the employee after he suffered a heart attack at work and the heart attack resulted in an impairment to the employee's cardiovascular system, which necessitated that he take short-term disability leave. Defendant discharged him immediately upon being released to return to work. The district court never reached the merits of the case because it dismissed the action as time-barred since plaintiff did not file an official EEOC charge form within 300 days of his termination. Instead, the employee's attorneys submitted an EEOC Form 283 intake questionnaire and accompanying letter outlining his complaint, and thanking the EEOC for reviewing his complaints of discrimination against defendant. The letter and questionnaire contained the same information required by the official charge.

Issue on Appeal: Whether a completed but unverified EEOC intake questionnaire constitutes a charge of discrimination under the ADEA for timely filling purposes.

EEOC's Position on Appeal: The EEOC argues that the district court erroneously concluded that plaintiff did not timely file a charge of discrimination because the Supreme Court has concluded that intake questionnaires and other documents can be charges, for timely filling purposes, if they contain the information required by the EEOC for a charge and can be reasonably interpreted as a request for the EEOC to take remedial action. Moreover, verification may occur after the filing period. Thus, the EEOC argues that it is irrelevant that plaintiff's EEOC charge was not submitted on an official EEOC charge form because his informal questionnaire and letter provided the same information required by the official form. The required information included an allegation that defendant violated the ADA by terminating the employee because he had suffered a heart attack at work. The EEOC also argues that the employee's questionnaire is evidence he intended to activate the administrative process.

Court's Decision: Pending

Case Name	Court	Date of Appellate Filing and/or Court Decision	Statutes	Basis/Issue/Result
EEOC v. CVS Pharmacy, Inc.	U.S. Court of Appeals for the Seventh Circuit No. 17-1828	9/4/2018 (appeal filed) 11/13/2018 (decided)	Title VII	Attorneys' Fees **Result:** Pro-Employer
Background: Defendant was the prevailing party in a Title VII case (the district court granted summary judgment, the Seventh Circuit affirmed, and on remand, the district court granted defendant's request for attorneys' fees, finding that the EEOC had a reasonable factual foundation to bring its suit but fees were proper because according to the district court, the Commission's position violated its own regulations requiring presuit conciliation). The district court granted defendant its attorneys' fees. A Seventh Circuit panel of three reversed the lower court's award, finding that the award was not warranted because the EEOC's position was not "foreclosed by controlling and unambiguous precedent" (which opinion was later amended and superseded) and that a finding that the EEOC failed to conciliate was legal error under the facts of the underlying case. Defendant petitioned for a rehearing by the full court, seeking an opinion *en banc*, highlighting a 1989 case that it indicates presents a new contradiction that must be reconciled in determining whether it is entitled to attorneys' fees as the prevailing party in a Title VII case. **Issues on Appeal:** Whether defendant is entitled to attorneys' fees as the prevailing party in a Title VII case. **EEOC's Position on Appeal:** The EEOC argues that Rule 11 sanctions are not fee-shifting and therefore an analysis involving such sanctions does not apply here because unlike the traditional fee-shifting statute, Rule 11 focuses on inputs rather than outputs, conduct rather than result, and that its focus is *ex ante* (what should have been done before filing) rather than *ex post* (how things turned out). The EEOC further buttresses the panel's decision that attorneys' fees were not appropriate under long-standing precedent, that the EEOC had no obligation to conciliate (and even if it did, the remedy was not attorneys' fees), and the EEOC's basis to pursue the suit against defendant was reasonable and not foreclosed by precedent. The EEOC submits that defendant's real objection, which the Seventh Circuit panel already rejected, is that the EEOC had a legal obligation to conciliate and failed to do so. **Court's Decision:** The Seventh circuit reversed and remanded, finding the EEOC must pay the defendant's costs.				
EEOC v. CRST Van Expedited, Inc.	U.S. Court of Appeals for the Eighth Circuit No. 18-1446	6/8/2018 (appeal filed) 12/10/2019 (decided)	Title VII	Attorneys' Fees Harassment Sex **Result:** Pro-Employer
Background: CRST was awarded $3.3 million in attorney's fees from the EEOC after prevailing at the district court level. CRST alleged that they were entitled to a fee award as a prevailing party. **Issues on Appeal:** Whether the district court abused its discretion in awarding $3.3 million in attorney's fees in the Title VII enforcement action. **EEOC's Position on Appeal:** The EEOC argued that simply because the defendant prevailed in the district court Title VII action does not necessarily entitle defendant to a fee award. Instead, the EEOC argued that in order to be entitled to fees, the EEOC action would needed to have been "frivolous, unreasonable, or without foundation." The EEOC asserted that it was not required to investigate each individual's claim in a class of claimants, and the investigation into the widespread practices of defendant as a whole was sufficient for the EEOC to have found that the claim was not meritless. Further, the EEOC argued that it had a non-frivolous basis to believe each of the claims asserted in the action, and thus defendant was not entitled to a fee award. **Court's Decision:** A three-judge panel of the Eighth Circuit upheld the fee award, finding the district court did not abuse its discretion in applying the standard set forth in *Christianburg Garment Co. v. EEOC*, 434 U.S. 412 (1978). According to the panel, "[t]he district court's finding that the EEOC's failure to conciliate and investigate the claims was an unreasonable litigation tactic that resulted in frivolous, unreasonable, or groundless claims is consistent with this court's prior observation that the EEOC 'wholly failed to satisfy its statutory presuit obligations.' The EEOC could not hold a reasonable belief that it satisfied its presuit obligations when it 'wholly failed to satisfy' them." *CRST Van Expedited v. EEOC*, 2019 U.S. App. LEXIS 36511 at *11 (8th Cir. Dec. 10, 2019) (internal citations omitted).			

Case Name	Court	Date of Appellate Filing and/or Court Decision	Statutes	Basis/Issue/Result
EEOC v. North Memorial Health Care	U.S. Court of Appeals for the Eighth Circuit No. 17-2926	11/8/2017 (appeal filed) 11/13/2018 (decided)	Title VII	Religion Retaliation **Result:** Pro-Employer

Background: The EEOC filed suit against defendant alleging that it violated the anti-retaliation provision of Title VII when it withdrew an offer of employment after an employee requested that she be exempt from working the Friday night shift because working that shift conflicted with her beliefs as a Seventh-day Adventist. Defendant moved for summary judgment, arguing that a request for a religious accommodation is not considered protected activity under Title VII. Defendant further argued that even if the request was considered protected activity, the employee requested to be exempt from the Friday night shift so she would not be too tired for church, not because working the shift conflicted with her religion, and, as such, the request was not reasonable. Additionally, defendant alleged that the EEOC could not establish that its justification for withdrawing the offer, even after she expressed willingness to work on Friday nights, was pretext for discrimination because it was legitimately concerned that she would not come to work on Friday nights. The district court granted defendant's motion and enter summary judgment in its favor. The EEOC appealed.

Issues on Appeal: Whether a request for a religious accommodation constitutes protected activity within the meaning of Title VII's anti-retaliation provision.

EEOC's Position on Appeal: The EEOC argued that the district court's holding that the employee did not engage in protected activity within the meaning of Title VII's anti-retaliation provision was erroneous, and conflicted with Eighth Circuit precedent and rulings from sister courts. The EEOC cited to the Eighth Circuit's decision in *Ollis v. HearthStone Homes*, 495 F.3d 570, 576 (8th Cir. 2007) to uphold a jury verdict for a plaintiff on his Title VII retaliation claim where he had asked to be excused from employer-sponsored religious sessions and was later fired. Moreover, the EEOC argued that the court should follow the extensive case law under the Americans with Disabilities Act, which recognizes requests for accommodations constitute protected activity, because the language in both anti-retaliation provisions is the same and courts use the same framework for ADA and Title VII claims. Finally, the EEOC argued that Title VII's broad statutory scheme strongly favors interpreting requests for religious accommodations as protected activity. More specifically, the EEOC contended that because Title VII required employers to reasonably accommodate the religious beliefs and practices of their employees, with limited exception, interpreting requests for religious accommodations as outside the scope of protected activity would be contrary to the purpose of the law.

Court's Decision: The Eighth Circuit affirmed the lower court's grant of summary judgment in the employer's favor, agreeing with the district court that the EEOC failed to establish a *prima facie* case of opposition-clause unlawful retaliation because "merely requesting a religious accommodation is not the same as opposing the allegedly unlawful denial of a religious accommodation," and that the charging party's initial request for a religious accommodation "simply does not 'implicitly' constitute opposition to the ultimate denial of the requested accommodation."

Case Name	Court	Date of Appellate Filing and/or Court Decision	Statutes	Basis/Issue/Result
EEOC v. Global Horizons, Inc.	U.S. Court of Appeals for the Ninth Circuit No. 16-35528	1/30/2017 (appeal filed) 2/7/2019 (decided)	Title VII	Joint Employment **Result:** Pro-EEOC

Background: The EEOC alleges that the growers, as joint employers with defendant, engaged in discrimination, harassment, and constructive discharge against a group of Thai guest workers on the basis of their national origin and retaliated against them for complaining. The district court partially dismissed the first amended complaint on July 27, 2012, holding that the growers could only be liable for "orchard-related" Title VII violations involving the workers. The district court also found that there were no facts alleged to support a plausible finding of joint employment regarding "non-orchard-related matters" which included recruitment, transportation, subsistence and housing, or "paycheck issues." The district court also dismissed the national origin discrimination claim against the growers for failure to state a claim. On May 28, 2014, the district court granted summary judgment to the growers on EEOC's remaining claims (national origin-based hostile work environment, constructive discharge, and retaliation as against on farm defendant). Default was entered against defendant on March 3, 2015 for failure to defend. The growers filed a motion for attorneys' fees on March 19, 2015, and on November 2, 2015, the district court awarded $986k against the EEOC in the growers' favor. The district court entered final judgment on April 26, 2016, after entering default judgment against defendant in favor of the EEOC in the amount of $7.7 million. The EEOC appealed.

Issues on Appeal: Whether the district court applied the wrong legal standard when it partially dismissed the First Amended Complaint as to the growers' liability for "non-orchard-related" conduct and national-origin-based disparate treatment and in denying the EEOC's related discovery motions; whether the district court erred in granting summary judgment to the growers on the EEOC's Title VII hostile work environment and constructive discharge claims; and whether the district court abused its discretion in awarding the growers attorneys' fees under *Christiansburg*.

EEOC's Position on Appeal: The EEOC adequately pled that the growers were liable as joint employers of the claimants as to "non-orchard-related" matters under this court's legal standard on joint employment in *EEOC v. Pacific Maritime Association* and *Iqbal/Twombly*. The EEOC adequately pled a plausible national-origin-based disparate treatment claim, as it set forth numerous, specific allegations regarding how the claimants were treated differently from non-Thai workers, often related to the orchards, including being given fewer breaks, harder jobs, could not leave when they wished, had to work in the rain, etc. The district court also abused its discretion in denying the EEOC's discovery motions pertaining to non-orchard-related issues because it precluded the EEOC from making any factual showing as to the growers' involvement in the non-orchard-related aspects of the case and fed directly into the court's ruling that the lawsuit was frivolous (in that the EEOC was unable to show the non-orchard-related conduct). The district court also erred in awarding summary judgment on the EEOC's hostile work environment claims because it applied the wrong standard and simply concluded – without support – that the conduct the claimants suffered was not sufficiently severe to create an abusive working environment and failed to view the evidence in the light most favorable to the EEOC. The district court thereafter erred in granting summary judgment on the constructive discharge claims based on its erroneous hostile work environment ruling. Finally, the district court erred in awarding attorneys' fees under *Christiansburg* because it (1) erred in reviewing the scope and sufficiency of EEOC's administrative investigation of the charges in the case, which are not subject to judicial review and may not form the basis of an award of fees; and (2) the court erred in ruling that the litigation itself was frivolous, unreasonable, or without foundation – including the EEOC's theory of joint liability, remedies sought, and the merits of the claims.

Court's Decision: The Ninth Circuit reversed, finding that "[a]ll parties agree that the Growers and Global Horizons were joint employers of the Thai workers with respect to orchard-related matters. Thus, the salient question before us is whether the EEOC plausibly alleged that the Growers were also joint employers with respect to non-orchard-related matters." The appellate panel held that they were, and that the complaint sets forth "a plausible basis for holding Green Acre liable for discrimination relating to non-orchard-related matters." Moreover, the panel rejected "the economic-reality test … developed in the context of the Fair Labor Standards Act (FLSA) and the Migrant and Seasonal Agricultural Worker Protection Act (AWPA)," and the "hybrid" test that combines elements of both standards.

Case Name	Court	Date of Appellate Filing and/or Court Decision	Statutes	Basis/Issue/Result
EEOC v. VF Jeanswear, LP	U.S. Court of Appeals for the Ninth Circuit 17-16786	12/11/2017 (appeal filed) 5/1/2019 (decided)	Title VII	Subpoena Enforcement **Result:** Pro-EEOC

Background: This is a subpoena enforcement action brought by the EEOC in its attempt to subpoena information from defendant in pursuit of its investigation in a potential systemic, classwide claim of gender discrimination, initially brought by a charging party. The subpoena asks defendant to produce information relevant to investigating whether women in specified portions of defendant's operations were deprived of opportunities to advance to higher-level positions within the company. Defendant employs 2,500 individuals across the country in the manufacture and sale of its jeans and other clothing for various retailers. Charging party worked out of her home in sales. She received various promotions, culminating in an Account Executive position. She worked for defendant for 20 years, eventually resigning in lieu of agreeing to a demotion. She filed a charge of discrimination after. Charging party alleged that male employees dominated executive-level positions, young men moved up through the ranks more quickly than women, and that women were denied the same or similar promotional opportunities. The charge also alleges that while working at defendant, she was harassed and demoted based on her sex and her age and was paid less than men performing the same work, in violation of Title VII, the Equal Pay Act (EPA), and the Age Discrimination in Employment Act (ADEA). Defendant's position statement requested that the charge be dismissed because, *inter alia*, charging party had filed a private lawsuit under the EPA. The EEOC sent a request for information, identifying 10 categories of information it required. Charging party requested a right-to-sue letter, and the EEOC informed the parties that it would continue its investigation of the charge nonetheless. Defendant responded to the request for information, providing only that information it believed related to charging party's allegations of personal harm, including providing information on 13 account executives, but refusing to produce information on all other employees the EEOC had requested. The EEOC modified its request and narrowed the category of employees, but defendant still refused to produce the information requested, stating it was still overbroad and not limited to the processing of the charge and allegations of personal harm. The EEOC then issued an administrative subpoena, directing defendant to "[s]ubmit an electronic database identifying all supervisors, managers, and executive employees at [defendant's] facilities during the relevant period, January 1, 2012, to present" including personal identifying information, gender, location, etc. Defendant petitioned the Commission to revoke the subpoena, which was denied, stating that charging party had identified classwide gender discrimination that it was investigating and required the information it had requested as part of its investigation.

The EEOC then moved to enforce the subpoena in district court. Defendant stated that, besides being overbroad and outside the scope of the charge, it would take a full-time employee eight weeks of complete dedication, costing $10,700, to retrieve the information requested. The EEOC narrowed the scope of the subpoena; defendant said it would likely take five weeks for one employee to retrieve the same information. The district court determined that the requested information was not relevant to the charge based on its views that (1) Title VII limits the EEOC to investigating discrimination that the charging party alleges she experienced personally, and (2) charging party did not allege that defendant excluded her from, or denied her an opportunity to obtain, a top-level position.

Issues on Appeal: Did the district court abuse its discretion and err as a matter of law both when it denied enforcement on the ground that the requested information is not relevant to charging party's allegations of personal harm and when it ruled, in the alternative, that defendant would be unduly burdened by full compliance?

EEOC's Position on Appeal: The district court erred when it ignored charging party's explicit statement that defendant never offered her anything higher than an executive sales representative position when it determined she, unlike a potential class, did not complain of failure to promote. The district court further erred in relying on her private lawsuit as modifying and limiting the EEOC's authority to investigate based on her chosen claims in the litigation. The district court also erred in believing that the EEOC's authority is limited to when the charging party alleges she experienced the same form of discriminatory harm as the class and that the allegations must satisfy a specified level of certainty before the EEOC can investigate. The district court also applied the wrong standard in determining undue burden—it should have required that defendant show that the subpoena would cause serious disruption of normal business operations or imposition of undue operations costs (as compared to normal operation costs). The district court further erred by opining that the value of the information the EEOC seeks is "attenuated at best."

Court's Decision: The court found the district court abused its discretion when it held that the subpoenaed information was not relevant to the charge. The court pointed out 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." The appellate court also found the district court abused its discretion when it held that the subpoena was unduly burdensome. The company's estimated cost of complying with the subpoena as part of an investigation into systemic and unlawful discrimination does not unduly burden a company with approximately 2,500 employees, the court held.

Case Name	Court	Date of Appellate Filing and/or Court Decision	Statutes	Basis/Issue/Result
EEOC v. Centura Health	U.S. Court of Appeals for the Tenth Circuit 18-1188	11/26/2018 (appeal filed) 6/28/2019 (decided)	ADA	Subpoena Enforcement **Result:** Pro-EEOC

Background: Between February 2011 and October 2014, 11 current or former employees of defendant filed charges with the EEOC alleging, *inter alia*, violations of the ADA at five of the company's facilities and in two of the company's programs in Colorado. At least nine of the individuals who filed charges ("the charging parties") alleged that defendant had terminated their employment—or refused to allow them to return to work after medical leave—because of their disabilities or because they requested accommodations for their disabilities.

In December 2014, the EEOC issued an administrative subpoena to obtain information that the agency had requested but that the company had refused to provide. The subpoena, which was expressly based on the 11 charges referenced above, sought, among other things, the personnel and medical files of the 11 charging parties.

The EEOC subsequently filed this subpoena-enforcement action and the district court issued an order enforcing the subpoena in part and referring the remainder to a magistrate judge for further proceedings. Defendant challenged parts of the subpoena on two grounds—(1) the information the EEOC sought was not "relevant" to the 11 charges within the meaning of 42 U.S.C. § 2000e-8(a); and (2) complying with those parts of the subpoena would impose an "undue burden" on the company. The district court determined that the information in dispute is "relevant" to the charges the EEOC is investigating, "particularly given the number of ADA charges the EEOC has received and the widespread geographic distribution of those charges." The court referred the "undue burden" question to a magistrate judge.

The magistrate judge ordered defendant to give the Commission certain information about a specified electronic database in which Defendant stored information about its employees. Using that information, the EEOC identified 880 employees of particular interest to the agency because they (1) had requested a reasonable accommodation; (2) had been identified as disabled and then were disciplined or fired; or (3) had taken medical leave and then were disciplined or fired.

The magistrate judge also granted in large part the EEOC's request for accommodation, disciplinary, and separation documents. In issuing its order, the court explained that "[h]ow [defendant] treated other employees who requested accommodations (or were identified as having a disability) at the same facilities is directly relevant to whether [defendant] discriminated against the charging parties on the basis of disability."

The district court overruled defendant's objections to the magistrate judge's decision, and it ordered defendant to comply with the magistrate judge's order within 30 days. Although the district court ordered defendant to turn over the information covered by its order within 30 days (by May 4, 2018), and although defendant did not obtain a stay of that order, the company did not provide the EEOC with the information.

Issues on Appeal: Whether the district court abused its discretion in concluding that the information pertaining to other employees identified by the company as having a disability or having requested an accommodation for a medical condition is "relevant" to the 11 charges of discrimination filed by current and former defendant employees within the meaning of 42 U.S.C. § 2000e-8(a).

EEOC's Position on Appeal: The EEOC took the position that the district court acted well within its discretion in determining that the general-practices information it ordered produced is relevant to the 11 disability-discrimination charges filed against the defendant. Here, the EEOC explained that it is well established that evidence of a pattern, practice, or policy of unlawfully discriminating against individuals on the basis of disability or some other protected characteristic can be used at trial to help prove that any given individual was subjected to such unlawful discrimination.

The EEOC also argued that the disputed information would be relevant to the 11 charges because it may allow it to identify pertinent "comparators." The EEOC also stated that comparator evidence concerning similarly situated employees who share the charging party's protected characteristic is "relevant" within the meaning of § 2000e-8(a), and that such comparator evidence is relevant regardless of whether the EEOC has also subpoenaed comparator evidence concerning similarly situated employees who do not share the charging party's protected characteristic.

Court's Decision: The Tenth Circuit panel concluded that the district court did not abuse its discretion in determining the EEOC met its burden, and therefore upheld the lower court's orders to enforce the subpoena. According to the panel, the relevance standard under § 2000e-8(a) "sweeps more broadly than it would at trial." This is because "[a]t the investigative stage, the EEOC is trying to determine only whether 'reasonable cause' exists 'to believe that the charge is true.'"

Case Name	Court	Date of Appellate Filing and/or Court Decision	Statutes	Basis/Issue/Result
EEOC v. The Doherty Group	U.S. Court of Appeals for the Eleventh Circuit No. 18-11776	8/27/2018 (appeal filed)	Title VII	Charge Processing **Result:** Order issued granting withdrawal of motion to continue oral argument

Background: From 1999 forward, defendant required all employees to sign an arbitration agreement as a condition of employment. In 2013, defendant amended its arbitration agreement, in pertinent part, as follows:

> I acknowledge that Doherty enterprises utilizes a system of alternate dispute resolution which involves binding arbitration to resolve any dispute, controversy or claim arising out of, relating to or in connection with my employment with Doherty Enterprises. As a condition of employment at Doherty Enterprises or any of its related companies, I agree to the terms of this Agreement because of the mutual benefits (such as reduced expense and increased efficiency) which private binding arbitration can provide both Doherty Enterprises and myself.
>
> I and Doherty Enterprises agree that any claim, dispute and/or controversy (including but not limited to any claims of employment discrimination, harassment, and/or retaliation under Title VII and all other applicable federal, state, or local statute, regulation or common law doctrine) which would otherwise require or allow resort to any court or other governmental dispute resolution forum between myself and Doherty Enterprises (and/or its parents, subsidiaries, affiliates, owners, directors, officers, managers, employees, agents and parties affiliated with its employee benefit and health plans) arising from, related to, or having any relationship or connection whatsoever with my seeking employment with, employment by, or other association with Doherty Enterprises, whether based on tort, contract, statutory, or equitable law, or otherwise, (with the sole exception of claims arising under the National Labor Relations Act which are brought before the National Labor Relations Board, claims for medical and disability benefits under applicable state and/or local law) shall be submitted to and determined exclusively by binding arbitration . . . .

According to plaintiff, the amended agreement interferes with the right to file a charge of discrimination with the EEOC and FEPAs and to communicate and participate in proceedings with the EEOC and FEPAs. At the district court, each party moved for summary judgment. In granting defendant's summary judgment motion, the district court determined that the agreement was intended to inform applicants and employees that all disputes would be resolved by arbitration and does not prevent individuals from filing charges with the EEOC or FEPAs.

Issues on Appeal: Whether a reasonable fact-finder could conclude that defendant engaged in a pattern or practice of resistance to the full enjoyment of its employees' and applicants' Title VII rights by implementing a mandatory arbitration agreement in 2013 that led them to believe they could not file discrimination charges or otherwise cooperate with civil rights enforcement agencies.

EEOC's Position on Appeal: The EEOC argued that the district court should have applied the reasonable person standard when interpreting the 2013 agreement, instead of its own interpretation of the terms "resolve" and "determine" in isolation. Instead, the EEOC argued, the court should have considered the language requiring all claims and disputes be submitted to arbitration, which precluded a "governmental dispute resolution forum" – excepting the NLRB, but not the EEOC.

Court's Decision: N/A. On January 29, 2019, the Eleventh Circuit granted appellant's unopposed motion to withdraw its motion to continue oral argument.

Case Name	Court	Date of Appellate Filing and/or Court Decision	Statutes	Basis/Issue/Result
EEOC v. STME dba Massage Envy	U.S. Court of Appeals for the Eleventh Circuit No. 18-12277-GG	7/27/2018 (appeal filed) 9/12/2019 (decided)	ADA	Disability **Result:** Pro-Employer

Background: In September 2014, an employee requested time off to visit her sister in Ghana and was told by her supervisor that she would be terminated if she went ahead with the trip. The employee's supervisor said he was worried she would contract the Ebola virus if she went to Ghana and would "bring it home to Tampa and infect everyone." Despite the threat, the employee went on her previously planned vacation. Upon her return, the employee was not permitted to resume working for defendant. The employee filed a charge of discrimination with the EEOC alleging she was terminated because defendant perceived her as disabled or as having the potential to become disabled, in violation of the ADA.

After conciliation efforts failed, the EEOC filed suit on April 26, 2017. Defendant moved to dismiss the first amended complaint (FAC) on the grounds that the EEOC had failed to exhaust its administrative remedies and that the FAC failed to state a cognizable claim under the ADA. The district court granted defendant's motion to dismiss, explaining that it "decline[d] to expand the regarded as disabled definition in the ADA to cover cases, such as this one, in which an employer perceives an employee to be presently healthy with only the potential to become disabled in the future due to voluntary conduct." Similarly, the court dismissed the EEOC's association-based claim because it concluded that such claims require an actual association with someone known to have a disability, rather than "a potential future association" with such a person, and rather than an association with people "who are merely regarded as disabled."

Issues on Appeal: (1) Whether an employer violates the ADA's prohibition on discrimination against individuals "regarded as" disabled when it terminates an employee's employment because it believes she will imminently contract a disabling condition; and (2) Whether an employer violates the association provision of the ADA when it terminates an employee's employment because it believes the people with whom she will imminently associate have a communicable disability.

EEOC's Position on Appeal: The EEOC argued that defendant violated the ADA when it terminated the employee based on its unfounded fear that she would contract Ebola after she refused to forego visiting her sister in Ghana. Here, the EEOC noted that if defendant wanted to exclude the employee from the workplace because it believed she posed a "direct threat" to others, it would first need to make "an individualized assessment of the individual's present ability" to safely perform her job, based on "a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence." Contrary to the district court's ruling that defendant did not violate the ADA because it fired the employee before she left for her vacation, the EEOC further argued that the ADA does not shield employers that anticipatorily terminate employees' employment to avoid their statutory obligations because the goals of the ADA and the settled means of interpreting its language make clear that such an insignificant temporal distinction cannot and should not lead to a different outcome. Lastly, the EEOC argued that the district court erred as a matter of law in requiring that the association be with someone with an actual, as opposed to a perceived, disability. Here, the EEOC explained that by requiring the existence of an actual disability, and refusing to recognize a cause of action for discrimination based on association "with people who are merely regarded as disabled," the district court read the "regarded as" portion of the definition out of the statute.

Court's Decision: The Eleventh Circuit affirmed, finding the ADA protects only those "who experience discrimination because of a current, past, or perceived disability—not because of a potential future disability that a healthy person may experience later."

APPENDIX D – SUBPOENA ENFORCEMENT ACTIONS FILED BY EEOC IN FY 2019[779]

Filing Date	State	Court Name / Case Number / Judge	Defendant(s)	Individual Charging Party or Systemic Investigation	Result
10/10/2018	CA	USDC Southern District of California 3:18CV02335 Hon. Cynthia Bashant	G4S Secure Solutions (USA) Inc.	Individual Charging Party	Respondent ordered to comply with parts 2 and 3 of the subpoena.
Commentary: The EEOC filed an application to show cause why a subpoena should not be enforced arising from an investigation of a charge alleging race and sex discrimination and retaliation on behalf of a single charging party. On June 28, 2018, the EEOC issued a subpoena seeking (1) a list of the names, positions, dates and reasons for discharge, of any individuals who were in the charging party's job classification in the San Diego area, and who were discharged at any time during the period when the charging party worked there, and whether any of these workers were disciplined beforehand and the supporting details of such discipline; (2) all documents referring to all complaints of harassment in San Diego County operations offices, including names, positions, departments, dates, and detailed descriptions of relationships between employees, the name and sex of each witness, and any disciplinary actions taken against the accused harasser; and (3) unredacted copies of all contractual agreements between Respondent G4S Secure Solutions and the office where the charging party worked. On July 13, 2018, Respondent filed a petition to revoke the subpoena, claiming that the request was overly broad, and that the contractual documents contained protected trade secrets. On July 16, 2018, the EEOC denied Respondent's Petition to Revoke as untimely. On October 10, 2018, the EEOC filed the instant application to show cause why the subpoena should not be enforced. On Nov. 29, 2018, the court ruled that the EEOC was not entitled to information concerning individuals who were discharged because the claim related to harassment and not wrongful discharge. Therefore, the Respondent did not have to provide any information about discharged individuals as requested in part 1of the subpoena. The information in part 2 of the request was granted, however, because the court found that documents related to complaints of harassment were directly relevant to charging party's claims. Thus, the court ordered that Respondent must submit documents showing any complaints of harassment in the San Diego area. The court also ordered Respondent to produce the contract documents requested in part 3 because Respondent relied on the contractual provisions as support for transferring the charging party. For this reason, the court ordered Respondent to produce unaltered contractual documents, but allowed Respondent to redact any financial data.					
1/31/2019	CA	USDC Eastern District of California 1:19at81 Hon. Barbara A. McAuliff	MG Luna Inc.	Individual Charging Party	The EEOC action was withdrawn pursuant to stipulation between parties after Respondent voluntarily agreed to produce most information requested.
Commentary: The EEOC brought this subpoena enforcement action seeking an Order to Show Cause why the EEOC's subpoena served on Respondent should not be enforced. The EEOC is investigating charges of sexual harassment, sex discrimination, and retaliation filed against Respondent under Title VII. Specifically, in October of 2017, the charging party filed a charge alleging that Respondent discriminated against the charging party on the basis of sex, allowed an employee to engage in sexual harassment and sexual assault, and retaliated against the charging party and others associated with her after the charging party reported the harassment. As part of its investigation of the charge, the EEOC requested information related to Respondent's employees from January 1, 2016 to the present; the names, titles and contact information of anyone hired during this time; all employee handbooks; all discipline and discharge policies and all complaints made and the names of those involved; as well as the personnel files of the charging party. According to the EEOC, the Respondent replied to these requests with partially relevant, but not wholly responsive, documentation. On November 14, 2018, the Commission subpoenaed the information not yet supplied from January 1, 2016 to the present including (1) Respondent's number of employees during these dates; (2) all versions of employee handbooks; (3) discipline and discharge policies for all employees; (4) all materials from complaints made, including the name of the employee lodging the complaint, their dates of hire, dates of complaints, and names of all those investigating or involved in the complaints; (5) personnel files for the charging party; (6) personnel files for her foreperson; and (7) electronic files listing all employees hired or reinstated during this period and their names, identification numbers, titles, forepersons, managers, dates of hire and terminations, reasons for terminations or separations and persons involved in recommending those actions and making final decisions on those actions, and the last known contact information for these employees. The EEOC also subpoenaed the Respondent's owner to appear for an interview. The Commission claimed that Respondent has waived all non-constitutional objections to enforcement by failing to file a petition to revoke or modify the subpoenas. Prior to Respondent submitting a response or any cause hearing, the parties agreed to a partial production of documents in the subpoena. In the stipulation, Respondent agreed to produce Ms. Luna, owner of MG Luna, for an interview; produce all information requested in parts 1, 2, 3, 5, and 6 and produce partial information from number 7 of the subpoena. The partial information from part 7 includes all names and contact information for those who worked in the same crew as the employee who was alleged to have committed sexual harassment and their assigned crew foreperson. The EEOC submitted the stipulation for production and notice of voluntary dismissal to the court on April 25, 2019, which the court granted on April 26, 2019.					

779 The summary contained in Appendix D reviews select administrative subpoena enforcement actions filed by the EEOC in FY 2019. The information is based on a review of the applicable court dockets for each of these cases. The cases illustrate that in most subpoena enforcement actions, the matters are resolved prior to the issuance of a court opinion.

Filing Date	State	Court Name / Case Number / Judge	Defendant(s)	Individual Charging Party or Systemic Investigation	Result
3/21/2019	OH	USDC Northern District of Ohio 3:19mc46 Hon. James G. Carr	Eagleview Logistics Corp.	Individual Charging Party	Voluntarily dismissed due to Respondent's compliance
Commentary: The EEOC filed an Application for an Order to Show Cause why its administrative subpoena should not be enforced. The EEOC is investigating a charge that Respondent discriminated against the charging party by denying him reasonable accommodations under the Americans with Disabilities Act. After the EEOC submitted a request for information to investigate this charge, the Respondent did not reply by the deadline and also did not petition for administrative relief. Consequently, the EEOC issued the subpoena to collect all information related to the charging party's discharge; any records regarding the medical leave, reasonable accommodation, and direct threat policies at the time of his discharge; the charging party's personnel file and last three performance reviews; all requests for accommodations and whether they were granted; and a list of all employees discharged, their positions, and the reason for their discharge from January 1, 2016 through the date of the request. On April 9, 2019, Judge Carr ordered that Respondent appear in court to show cause why it should not have to comply with the subpoena. After this order, Respondent did comply with the subpoena and the Commission voluntarily dismissed the enforcement action on May 13, 2019.					
4/8/2019	TX	USDC Southern District of Texas 4:19mc1053 Hon. Vanessa D. Gilmore	Big Catch Corp.	Systemic Investigation	Respondent granted stay of enforcement pending appeal. Pre-trial motions were filed in the 5th Circuit.
Commentary: On March 13, 2018, the EEOC issued Subpoena No. HU-A18-03 to Respondent Big Catch Corporation d/b/a Connie's Seafood Kitchen. The EEOC also issued separate but related subpoenas to Bart V Investment Inc., and Connie Seafood Inc. Big Catch Corporation d/b/a Connie's Seafood Kitchen, Connie Seafood, Inc. d/b/a Connie's Seafood and Oyster Bar, and Bart V Investment, Inc. d/b/a The Original Connie's Seafood #1 are three related corporate entities and restaurants. The EEOC claimed it needed the subpoenaed information as part of its investigation of the charging party's allegation of unlawful employment discrimination under Title VII. Specifically, the charging party alleged that upon applying for a position as a server at Connie's Seafood Kitchen, Respondent told him that the restaurants do not hire male servers. The charging party further alleged that he was not considered for a server position at all three restaurants for this reason. The subpoena sought documents and information, including employment applications, document retention policies and procedures, identities of human resource personnel, and corporate ownership documentation. Unless another time period was specified, the subpoena requested the following information from January 1, 2014 to the present: (1) PDF copies of all job applications of persons hired to be servers; (2) PDF copies of applications from all persons not hired for servers from January 1, 2017 to the present; (3) an explanation of Respondent's practice of retaining and storing applications, including the name and business address of the person holding the applications; (4) a list of all persons, titles, dates of employment with authority to hire servers; (5) all documents with policies and practices on retention or deletion of employment applications; (6) indications of electronic filing of job applications and the custodian of these files; (7) names, titles and addresses for each person(s) managing human resources and personnel; (8) the date The Big Catch acquired Connie's Seafood Kitchen and the names and titles of officers and directors each year; (9) list of all restaurants owned by The Big Catch Corp., their years in operation, and the full name of any previous owners each year; (10) identification of any websites where applicants could submit applications on the internet along with the name and titles of any employees with substantive knowledge of the Respondent's online application process; (11) PDFs of all job announcements for servers that Respondent used and for which time periods; (12) names and titles of any employees or agents of Respondent with knowledge about the business relationship between the Connie's Seafood restaurants; (13) list of payroll administrators names, titles, and business addresses; (14) indications of whether any Respondent managers or supervisors also managed part of another Connie's Seafood restaurant while employed with Big Catch and their managers, dates of employment, and job titles; and (15) indications of whether Respondent's non-supervisory employees worked at other Connie's Seafood restaurants while employed with Respondent. The deadline for compliance with the subpoena was Friday, March 30, 2018. The Respondent filed a petition to revoke or modify the subpoenas on March 20, 2018. The Commission denied the petition on November 6, 2018. After the denial, Respondent failed to comply with the Subpoena. On April 8, 2019, the EEOC filed an Application for an Order to Show Cause Why an Administrative Subpoena Should Note be Enforced. Claiming that the Commission was greatly enlarging its request for documents, Respondent requested an extension for time to respond and the court granted this extension on May 13, 2019. In its response to the Commission's Motion for Enforcement, Respondent alleged it had already complied with the requests for information from items 1-6 and 10-11 when it responded to the Commission's original request for information on January 16, 2017. Regardless of Respondent's claims, the judge ordered Respondent to comply with the subpoena on May 24, 2019. On June 3, Respondent appealed the portion of the U.S. District Court's order as to the EEOC requests nos. 7-9 and 12-15 to the U.S. Court of Appeals for the Fifth Circuit, as it claimed to have already supplied the information regarding requests 1-6 relating to job applications and accompanying notes for all applicants hired as servers; applications for persons not hired as servers between January 1, 2017 and present; practices related to how employment applications are stored or deleted and where they are kept; names, title, and dates of employment for anyone with authority to hire food servers and 10-11 relating to websites where applicants could apply and all job announcements it had used. The judge denied the motion to stay enforcement, but on June 14, 2019 granted Respondent extended time to comply with the subpoena until June 20, 2019. The U.S. Court of Appeals for the Fifth Circuit, however, granted the Respondent's request for a stay pending the appeal on July 18, 2019. The Court of Appeals also consolidated two related subpoena enforcement actions, case nos. 4:19mc1037 and 4:19mc1050, discussed below, and the appellate court is currently reviewing records from the prior proceedings.					

Filing Date	State	Court Name / Case Number / Judge	Defendant(s)	Individual Charging Party or Systemic Investigation	Result
4/8/2019	TX	USDC Southern District of Texas 4:19mc1050 Hon. Vanessa D. Gilmore	Bart V Investment Inc. d/b/a/The Original Connie's Seafood #1	Systemic Investigation	Consolidated with 4:19mc1037 and 4:19mc1053 as part of appeal to 5th Circuit.
Commentary: On March 13, 2018, the EEOC issued Subpoena No. HU-A18-04 to Respondent Bart V Investment, Inc. d/b/a The Original Connie's Seafood #1. The subpoena sought documents and information, including employment applications, document retention policies and procedures, identity of human resource personnel, and corporate ownership documentation that the Commission needed as part of its investigation of a charge of gender discrimination in hiring. The EEOC alleged various entities were related and that none would hire male servers at its restaurants. The deadline for compliance with the subpoena was March 30, 2018. The Respondent filed a petition to revoke or modify the subpoenas on March 20, 2018, but the Commission denied the petition on November 6, 2018. Respondent failed to comply, and so the Commission brought the application for an order to enforce the subpoena on April 8, 2019. Except for the business named, the facts and charges are identical to those involving claims against The Big Catch, Corp, discussed above.					
4/8/2019	TX	USDC Southern District of Texas 4:19mc1037 Hon. Vanessa D. Gilmore	Connie Seafood Inc. d/b/a Connie's Seafood Restaurant & Oyster Bar	Systemic Investigation	Consolidated with 4:19mc1050 and 4:19mc1053 as part appeal to 5th Circuit
Commentary: On March 13, 2018, the EEOC issued a subpoena to Respondent Connie Seafood, Inc. The subpoena sought documents and information, including employment applications, document retention policies and procedures, identity of human resource personnel, and corporate ownership documentation, that the EEOC claimed it needs as part of the an investigation of a charge of unlawful sex discrimination, filed against Respondent Connie Seafood, Inc. d/b/a Connie's Seafood Restaurant. The deadline for compliance with the Subpoena was March 30, 2018. Respondent filed a petition to revoke or modify the subpoenas on March 20, 2018. But on November 6, 2018, the Commission denied the petition. Since the determination was issued, Respondent has failed to comply with the Subpoena. The EEOC filled a request to enforce the subpoena on April 8, 2019. This matter has been consolidated with the subpoena enforcement actions against Bart V. Investment and Big Catch Corp., discussed above.					
11/2/2018	CA	USDC Southern District of California 3:19-cv-01653 Hon. Linda Lopez	Sleep Data Services LLC	Individual Charging Party	EEOC voluntarily withdrew application after Respondent voluntarily provided responses to the subpoena.
Commentary: On November 1, 2018, the EEOC issued a subpoena to Respondent as part of its investigation of the charging party's allegation that the Respondent subjected her to sex discrimination and retaliation in violation of Title VII. The subpoena sought a list of employees, including temporary workers, who were employed via staffing agencies from January 1, 2015 to the present, including their office locations, names, contact information, sex, date of hire, employment status, if and when employees changed status from temporary to permanent, titles, and names of supervisors. The subpoena sought the same information for any workers who had been discharged, as well as the person recommending discharge, the person making the discharge decision, and the reasons and dates for discharges. Upon bringing the instant action to enforce, the EEOC claimed that Respondent failed to fully comply with the subpoena, and has waived any objections by failing to exhaust administrative remedies. Once the court set a schedule for hearing the claim, communications between the Commission and Respondent's attorney facilitated production of responsive documents to the subpoena. Specifically, Respondent voluntarily provided employee contact information and the names of staffing agencies used to provide workers, and also performed an email search for further responsive documents relating to any records of temporary employees and related dismissals. Respondent affirmed that it did not keep any formal records regarding temporary employees, and thus the Commission found this information to be sufficient to fulfill the subpoena. Therefore, the Commission filed for voluntary dismissal on October 3, 2019 based upon compliance with the subpoena.					

Filing Date	State	Court Name / Case Number / Judge	Defendant(s)	Individual Charging Party or Systemic Investigation	Result
9/9/2019	MD	USDC for the District of Maryland 1:19-cv-02599 Hon. Catherine C. Blake	Stanley Black & Decker, Inc.	Systemic Investigation	Pending

Commentary:

The matters stems from a charging party who claimed the Respondent subjected him to race discrimination during employment, and was potentially subject to "facial retaliation" because he was presented with a severance agreement that allegedly required him to "waive [his] right to file an EEOC Charge in exchange for receipt of severance pay." The EEOC issued a request for information, and later a subpoena, seeking (1) the identity of any employees who were provided an Agreement and General Release of the person's rights to file any charge or complaint and/or agreement not to assist in any proceeding against Respondent, and (2) copies of releases offered to or signed by those identified.

The EEOC subsequently began its investigation pursuant to Section 7 of the ADEA and Section 1625.15 of the Commission's Regulations, regarding the requirement that discharged employees sign a waiver releasing their rights to file any charges with the EEOC in exchange for severance pay. In March 2019, the EEOC issued a second subpoena to the Respondent seeking the same information as sought via the request for information, but based exclusively on the ADEA.

The Respondent petitioned the EEOC to revoke its subpoena, arguing that 1) the information sought bore no relevance to the charge under investigation, as required by 42 U.S.C. § 2000e-8(a), and 2) that merely presenting a severance agreement cannot be "facially retaliatory" under settled case law. In addition, the Respondent claimed that requesting information as to all releases and waivers offered to or signed by employees with no geographic or timeline limitations was overly broad, but did supply the "general release" severance agreement letter offered specifically to charging party. Respondent's counsel indicated that her client would only be willing to provide information related to employees who either were sued for violating the release at issue or were required to agree to the terms of the release in order to obtain severance payments that were already promised or owed to all terminated employees. Because the Respondent indicated it would not be complying fully with the subpoena, the EEOC filed the instant Application to Show Cause Why the Subpoena Should Not be Enforced.

In its response filed October 30, 2019, the Respondent claimed that the EEOC's subpoena is an abuse of its ADEA authority, is unenforceable due to the EEOC's lack of authority to investigation alleged "facial retaliation," and that the subpoena is argumentative, lacks a reasonable temporal scope, and is unduly burdensome.

Filing Date	State	Court Name / Case Number / Judge	Defendant(s)	Individual Charging Party or Systemic Investigation	Result
9/17/2019	CA	USDC for the Central District of California 2:19-mc-00175 Hon. Frederick F. Mumm	Kaiser Foundation Hospitals	Systemic Investigation	The court ordered the Respondent to comply with the EEOC's request, but did limit the scope of employees for which the Respondent had to provide information. Specifically, the court ordered the Respondent to produce, within 21 days of the court's order, information requested in Subpoena Request No. 2. The court, however, limited the response to current and former employees of the pharmacy at issue who either worked during the shifts that the charging party worked or are (or were) female employees from the particular facility who submitted a claim of sexual harassment during the relevant period, *i.e.*, January 1, 2017 to the present.

Commentary:

The EEOC filed an Application for Order to Show Cause Why Its Subpoena Should Not Be Enforced stemming from an investigation of a class charge of sex discrimination and retaliation. Specifically, on October 31, 2017, the charging party filed a charge of discrimination alleging that Respondent discriminated against her and a class of female employees because of sex and retaliated against her in violation of Title VII. On April 24, 2019, the EEOC issued Subpoena No. LA-19-08 and served the subpoena on Respondent seeking documents and information Respondent had refused to otherwise provide to the EEOC during its investigation of the charge. Subpoena Request #2 sought employee contact information limited to those who worked at the relevant location and during the specified time period. The EEOC sought a list of all employees, their genders, current employment status, and contact information for those who worked at the same location as the charging party from January 1, 2017 to the time of the request. The Commission also sought the name and gender of all supervisors at the location during that period. Respondent objected to Subpoena Request #2 as irrelevant and overbroad, and refused to produce documents in response. Respondent also did not submit a Petition to Revoke or Modify the Subpoena within five days, so the Commission argued it had waived any right to object to the subpoena's enforcement. Therefore, the EEOC filed the instant action seeking to enforce the subpoena. Respondent argued it had not waived the right to make objections because it had continuously objected to the Commission via conferences and that the subpoena should not be enforced because it requested irrelevant information and was overbroad, especially as related to the class charge complaint.

On December 11, the court ordered the Respondent to provide most of the requested information. Specifically, the court ordered the Respondent to comply with Request #2 (all employee records from January 1, 2017 to present that provide information for each employee who worked at the relevant location, including names, addresses and telephone numbers, email addresses, gender, position, department, employment status, and the name and gender of their supervisor), but limited the scope to employees who worked during the same shifts the charging party worked, as well as the female employees at that location who had claimed sexual harassment.

Filing Date	State	Court Name / Case Number / Judge	Defendant(s)	Individual Charging Party or Systemic Investigation	Result
9/13/2019	MI	USDC for the Western District of Michigan, Southern Division 1:19-mc-00078 Hon. Ray Kent	General Mills Sales, Inc.	Individual Charging Parties	The EEOC withdrew its Application to Show Cause after the Respondent voluntarily complied with the subpoena.
Commentary: The EEOC is investigating charges of race discrimination filed by three African-American applicants who sought employment at the Respondent's facility in Reed City, Michigan. During the course of the investigation, the EEOC issued three substantively identical subpoenas, which seek information the EEOC needs to determine whether the workforce includes African Americans, and the contact information of such employees, if any. After considerable wrangling regarding the scope of the subpoenas, which included two petitions to revoke, the Respondent ultimately provided significant material responsive to the subpoenas. However, Respondent failed to provide information regarding the representation of African Americans in its workforce, which, the EEOC contends, has delayed and hampered the investigation of the charges. Specifically, the EEOC asked Respondent to: (Request 5) List all African American employees currently employed at the Reed City facility. For each person listed, provide his/her name, job title, date of hire, address and phone number; (Request 6) List all employees who were hired into entry level or non-supervisory positions at any time between January 1, 2013 and the present. For each person listed, provide: a. Name, b. Job title, c. Date of hire, d. Date employment was terminated (if applicable); Reason for termination (if applicable); and (Request 7) Identify all persons listed in to Response Number 6 who are African American (or believed to be African American) and provide his/her last known address, phone number and personal email. According to the EEOC, Respondent provided a response to Request No. 6, but did not provide the follow-up information for Request No. 7. The EEOC therefore applied for this instant order to show cause why the subpoena should not be enforced.					
9/24/2019	AL	USDC for the Northern District of Alabama, Northeastern Division 5:19-mc-01581 Hon. Madeline Hughes Haikala	Kelly Services, Inc.	Systemic Investigation	Pending
Commentary: The EEOC brought an action for enforcement of a subpoena for information it is seeking to support an investigation of a charge of employment discrimination on the basis of race, sex, age, religion, and national origin and for retaliation. On July 11, 2018, the EEOC issued a subpoena to Respondent seeking the name, title, telephone number, and email for the person overseeing Respondent's Human Resources Information System (HRIS) and all information from the personnel files for employees and applicants referred to work for a specific employer between January 1, 2014 and December 31, 2017. Specifically, the subpoena requested names, addresses, telephone numbers, emails, races, birthdates, genders, occupational backgrounds, any test or screening results, referral information, and any training provided for all employees Respondent sent to work for this employer. The Respondent filed a Petition to Revoke the Subpoena, which the EEOC denied. Respondent claimed that the subpoena is not relevant to the charging party's claims because it has agreed to a settlement with the charging party that included withdrawing the underlying charge. However, the EEOC maintains that it has discretion to continue its investigation into any systemic discrimination by the Respondent. As of the date of filing of an Application for an Order to Show Cause Why an Administrative Subpoena Should not be Enforced, the Respondent had not complied with the subpoena.					

APPENDIX E - FY 2019 SELECT SUMMARY JUDGMENT DECISIONS BY CLAIM TYPE(S)

Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motion and Result	General Issues
Disability Discrimination Failure to Accommodate	Crain Automotive Holdings LLC	U.S. District Court for the Eastern District of Arkansas, Western Division Case No. 4:17CV00627 JLH	2019 U.S. Dist. LEXIS 62513 (E.D. Ark. Apr. 11, 2019)	Employer's Motions for Summary Judgment **Result:** Pro-EEOC The court denied the defendant's motions for summary judgment on the EEOC's claim for disability discrimination and failure to accommodate.	Did the employer discriminate against an employee who suffered from anxiety, depression, and panic attacks by terminating her? Did the employer violate the ADA by failing to accommodate the charging party's conditions?

Commentary:

The EEOC alleged an auto dealership failed to accommodate an employee's disability and terminated her employment on account of her disability. Specifically, it alleged she was fired after she experienced panic attacks and left work. Upon returning to work after an episode, the charging party met with two supervisors, one of whom told her at this meeting that "it was not working out" due to her health problems and that she needed to take care of herself. The charging party suffers from anxiety, depression, and panic attacks, although the employer alleged it was not aware of these specific conditions at the time of termination.

The dealership filed two motions for summary judgment on both claims (discrimination and failure to accommodate). The defendant first claimed that the charging party is not disabled within the meaning of the ADA. However, the court noted that it is undisputed that the charging party has been diagnosed with anxiety, depression, and panic attacks. Taking the charging party's version of the facts as true, her panic attacks make her feel paralyzed, cause chest pain, and cause difficulty with her breathing, thinking, communicating with others, and reasoning. Her anxiety causes her to have difficulty breathing and communicating and an inability to think coherently. When she suffers from depression, she is unable to care for herself, communicate with others, or think coherently. The ADA specifically includes thinking, breathing, and communicating as "major life activities." Whether an individual's impairment "substantially limits" the identified "major life activity" is a question of fact for the jury.

The defendant then contended that even if the charging party were disabled, it was unaware of this disability and therefore could not have discriminated because of it. In response, the EEOC presented evidence that the charging party informed her supervisor of her chest pains, and that she said she suffers from the aforementioned maladies. The charging party also told another supervisor that she had had a heart catheterization and included a doctor's note. Finally, the charging party emailed that supervisor after she had left work early that she was having another panic attack. According to the court, taking all these facts as true, a reasonable jury could infer that the defendant had been made aware of the charging party's ailments at the time of termination.

The court then explained the difference between the burden-shifting *McDonnell Douglas* analysis when there is indirect evidence of discrimination, and what happens where there is direct evidence of discrimination. In that latter instance, the *McDonnell Douglas* analysis does not apply.

Direct evidence is evidence that shows a specific link between the discriminatory animus and the adverse employment action, which is sufficient for a reasonable jury to find that an illegitimate criterion actually motivated the adverse employment action. Thus, "direct" refers to the causal strength of the proof. Employer actions or remarks that reflect a discriminatory attitude, comments that demonstrate a discriminatory animus in the decisional process, or comments made by individuals closely involved in employment decisions may all constitute direct evidence of discrimination. In this case, the supervisor's comments that due to the charging party's health it "wasn't going to work out" constituted such direct evidence of discrimination. "If a jury found that [charging party] is disabled, and it believed these facts, it could draw the inference that an illegitimate criterion — [her] disability — actually motivated her firing."

The defendant next argued that the failure-to-accommodate claim fails because the discriminatory firing claim fails, but the court pointed out that that claim does not fail, hence both motions were denied.

Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motion and Result	General Issues
Disability Discrimination Retaliation/ Interference and Related Damages	CRST International	U.S. District Court for the Northern District of Iowa Case No. 17-cv-129	2018 U.S. Dist. LEXIS 206948 (N.D. Iowa Dec. 7, 2018)	Cross Motions for Summary Judgment **Result:** Mixed. The court found that material issues of fact surrounding the EEOC's ADA and retaliation / interference claims exist so as to preclude summary judgment, but that Section 1981 of the Civil Rights Act did not expand remedies allowing a plaintiff to seek compensatory and punitive damages for an ADA retaliation claim.	Was the charging party a qualified individual with a disability under the ADA? Could the EEOC show a causal connection between the charging party's allegedly engaging in a protected activity and the defendant's failure to hire him? Should the ADA retaliation claims proceed to trial, are compensatory and punitive damages available?

Commentary:

The EEOC alleged a company discriminated and retaliated against a driver applicant when he said he would need to ride with his emotional support dog as an accommodation for his post-traumatic stress and anxiety disorders. Specifically, the EEOC brought claims under Section 102(a) of Title I of the ADA, Section 503(a) of Title V of the ADA, and Section 503(b) of Title V of the ADA. Section 102(a) prohibits discrimination on the basis of disability, Section 503(a) prohibits retaliation against individuals who asserts their rights under the ADA, and Section 503(b) prohibits interference with an individual's exercise of their rights under the ADA. The court noted the EEOC did not sufficiently allege claims for failure to accommodate under the ADA.

The elements of a claim under Section 102 are: 1) a qualifying disability; 2) qualification to perform the essential functions of the position with or without a reasonable accommodation; and 3) an adverse employment action due to the disability. The parties agree that for the EEOC to establish a claim of retaliation under Section 503(a), it must show that the charging party engaged in a protected activity, that he suffered an adverse employment action, and that there is a causal connection between the two. A plaintiff alleging an interference claim under Section 503(b) must show that 1) the charging party engaged in activity statutorily protected by the ADA; 2) the charging party engaged in, or aided or encouraged others in, the exercise or enjoyment of ADA protected rights; 3) the defendants interfered on account of the charging party's protected activity; and 4) the defendants were motivated by an intent to discriminate.

The defendant sought summary judgment as to the EEOC's ADA claims of disability discrimination, retaliation, and interference, and the EEOC's claims for compensatory and punitive damages as to the retaliation claims. The defendant also requested that the court strike the EEOC's jury demand on the retaliation and interference claims.

At the outset, the defendant argued the charging party was not a qualified individual under the ADA because he had been involuntarily civilly committed two months prior to the date on which he underwent a medical examination to receive clearance to drive commercially. Further, the defendant argued the charging party failed to disclose the full extent of his mental health history, including having a history of impulsive and destructive behaviors, anxiety, and blackouts. The defendant presented evidence showing that had the medical examiner been aware of any of this information, the medical examiner would not have found the applicant medically fit to drive commercially.

By contrast, the EEOC pointed to the fact that the charging party was hired six month later to perform similar work for a different entity as evidence that he was in fact qualified. The court, however, determined that this was not indicative of whether the charging party was qualified to work for the defendant at the time of application. The court noted, however, that the defendant did not provide legal support for its claim that the charging party's lies about his medical history rendered him ineligible for hiring under federal motor carrier regulations.

The court, therefore, determined that a genuine dispute of material fact exists as to whether the charging party could, despite his impairments, perform the essential functions of the job at the time he applied for the job. Whether the applicant was medically fit to do so when defendant denied his application, however, is a question of fact that must be resolved by the factfinder at trial.

Regarding the retaliation claim, the EEOC must show a causal connection between the charging party's allegedly engaging in a protected activity and the defendant's failure to hire him. Although defendant asserted that the reason the applicant was not hired was because of its "no pets" policy, a reasonable factfinder could find that the applicant was not hired because he raised his right to an accommodation under the ADA, and thus this strict application of the policy interfered with the charging party's right to be free from disability-based discrimination.

The EEOC also sought damages for the retaliation and interference claims should it prevail at trial. The court denied this attempt, as Seventh Circuit precedent indicates Congress did not authorize compensatory and punitive damages for ADA retaliation claims, as it did not incorporate such remedies when it amended the ADA in 1991 to include potential recovery under the Act. Therefore, only equitable relief is available.

Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motion and Result	General Issues
Disability Discrimination	McLeod Health, Inc.	U.S. Court of Appeals for the Fourth Circuit No. 17-2335	2019 U.S. App. LEXIS 3179 (4th Cir. Jan. 31, 2019)	EEOC's Appeal of the District Court's Grant of Summary Judgment **Result:** Pro-EEOC The Fourth Circuit reversed the grant of summary judgment to the employer.	Did the record support a reasonable jury finding that defendant violated the ADA by forcing the charging party to undergo two medical exams without any reasonable belief, based on objective evidence, that the employee's condition prevented her from performing essential job functions or posed a direct threat? Could a reasonable jury find that, even if defendant was justified in subjecting the employee to one or more medical examinations, the examinations it gave the employee were neither job-related nor consistent with business necessity, in violation of the ADA? Could a reasonable jury find that defendant discriminated against the employee in violation of the ADA by putting her on involuntary unpaid leave and subsequently terminating her employment based on the results of the improper medical examinations to which it had subjected her?

Commentary:

The EEOC filed a complaint alleging that defendant violated the ADA by requiring its employee to undergo two medical examinations and by discharging her due to her disability after first placing her on forced unpaid leave. The employee at issue was required to take a fitness-for-duty test after her medical condition caused her to fall several times in a four-month period. She was placed on administrative leave pending the results of the functional capacity exam. The employee requested accommodations, but was told she could not return to work, because the proposed accommodations would prevent her from traveling, which was part of her job. She was placed on leave, and then her job was terminated. The EEOC alleged the employer improperly required her to undergo a medical exam without objective evidence that it was necessary, and that she was fired because of her disability.

Defendant moved for summary judgment, arguing that the medical examinations were appropriate in light of the employee's symptoms, and that the examinations showed the employee was no longer qualified for her position because she posed a threat to herself that could not be accommodated. On January 21, 2016, the magistrate judge issued a report and recommendation suggesting that the district court grant defendant's motion and dismiss the case. On March 31, 2016, the district court adopted the recommendation in part. It dismissed the illegal examination claim in its entirety, but rejected the magistrate judge's rationale for dismissing the wrongful termination claim and remanded the case for further consideration.

Defendant moved for reconsideration, and the district court concluded, in an order dated November 18, 2016, that additional analysis of the wrongful termination claim was necessary. It instructed the magistrate judge to give "particular attention to the role of the futile gesture doctrine, as well as whether a failure to accommodate claim exists and survives summary judgment." On June 19, 2017, the magistrate judge again recommended summary judgment on the wrongful termination claim. In an opinion dated September 21, 2017, the district court adopted the recommendation and granted summary judgment in favor of the defendant on all remaining claims.

On appeal, the EEOC argued that a reasonable jury could find that defendant violated the ADA by requiring the employee to undergo two medical examinations because defendant lacked an objectively reasonable belief that the employee could not perform her essential job function or posed a direct threat. The EEOC also argued that there was a triable issue of fact whether the medical exams were sufficiently tied to the employee's job requirements. Lastly, the EEOC argued that a reasonable jury could find that the defendant discriminatorily discharged the employee in violation of the ADA.

The Fourth Circuit reversed the grant of summary judgment to the employer. Among other findings, the court determined "(a) reasonable jury could conclude that when [defendant] required [the charging party] to take a medical exam, the company lacked a reasonable belief—based on objective evidence—that [her] medical condition had left her unable to navigate to and within the company's campuses without posing a direct threat to her own safety." Interpreting the record in the light most favorable to the EEOC, "it was not reasonable for [defendant] to believe that she had become a direct threat to herself on the job simply because (a) she had fallen multiple times recently and (b) her manager thought she looked groggy and out of breath." The court reversed the district court's ruling on the termination claim on the same basis.

Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motion and Result	General Issues
Disability Discrimination	MJC, Inc.	U.S. District Court for the District of Hawaii Case No. 17-00371	2019 U.S. Dist. LEXIS 116613 (D. Haw. July 11, 2019)	Parties' Motions for Summary Judgment **Result:** Mixed The court granted the EEOC's motion for summary judgment with respect to defendant's defenses, but denied the remainder of the EEOC's summary judgment motion, and the defendant's motion.	Should the court grant the parties' motions for summary judgment in a case alleging failure to hire in violation of the ADA?

Commentary:

The EEOC brought suit alleging a dealership discriminated against the charging party, who is deaf, by failing to hire him. Both parties moved for summary judgment, but the court granted only the EEOC's motion in part, concluding several factual disputes remain for trial. Specifically, the court granted summary judgment to the EEOC with respect to three of the employer's defenses, and denied the defendant's request to stay the case because it did not demonstrate that the EEOC failed to satisfy its conciliation requirements. Whether the charging party was able to perform the essential functions of the positions at issue remain questions of fact for trial.

The EEOC alleged the charging party interviewed with the defendant for a detailer position. The Commission claims that when the interviewer found out the charging party was deaf, he ended the interview after 5-10 minutes, and did not go through his usual round of questions. The EEOC also alleged the defendant wrongfully denied the charging party a position as a lot attendant, although it did not initially assert this in the complaint.

The EEOC alleges disparate treatment because of disability. At the outset, to establish a *prima facie* case of employment discrimination under the ADA, the EEOC must show that the charging party is a disabled person within the meaning of the statute; he is a qualified individual with a disability; and he suffered an adverse employment action because of his disability. The court addressed each element, and concluded several factual issues remained, thereby entitling neither party to summary judgment on the EEOC's ADA claims.

First, there was no dispute regarding the charging party's disability. The parties did dispute, however, whether he was a qualified individual with respect to the detailer position and the lot attendant position, and capable of performing the essential functions of the job.

Defendants argued that the court should grant summary judgment in their favor because no detailer position was available at the time of the charging party's interview. The court found this argument unpersuasive for two reasons. First, it was unclear whether a detailer position was or was not available when the charging party was interviewed. Second, for a job to be considered available, it need not necessarily be available on the day of the interview. Evidence on record showed nondisabled individuals filled such positions at a later date.

The EEOC argued that the evidence indisputably demonstrates that the charging party was capable of performing the essential functions of a detailer, while defendants claimed he was not qualified because there is no evidence he could drive a car with manual transmission, or could use a two-way radio. The court determined, however, that the evidence does not conclusively establish that that skill was an essential job function for detailers, and that allowing the charging party to text information instead of using a two-way radio was an undue hardship.

Defendant also argued that the EEOC should not be allowed to argue that the charging party qualified for a lot attendant position, as it went beyond the scope of the EEOC's complaint. The EEOC made the alternative argument that charging party was qualified for the lot attendant position, however, in rebuttal to Defendants' argument that the charging party was interviewed only for the lot attendant position. "Under these circumstances, the court does not grant summary judgment to Defendants on this point."

The defendant also argued that the individual who interviewed the charging party was not a supervisor. The court determined, however, that the defendant failed to show it cannot be vicariously liable for the interviewer's conduct during his interview. Although the interviewer did not have authority in all hiring decisions, he conducted initial interviews of applicants and made recommendations to the Service Manager, who rarely departed from the interviewer's recommendations.

Finally, the defendant sought to stay the case given the EEOC's alleged failure to conciliate. The defendant claimed, "[a]t no point during the investigation or the purported conciliation process did the EEOC inform [it] that the basis for the charges . . . was that [charging party's] hearing impairment was aided by cochlear implants." The defense argued that the Determination Letter was "impermissibly vague" and failed to provide defendant with sufficient notice of the factual allegations underlying the charges. Nonetheless, the court found the charging party's cochlear implant is a fact supporting the EEOC's claims; it is not a new claim or charge. The EEOC was therefore not required to provide defendant with a list of all its factual allegations during the conciliation process, and defendant did not explain how the allegation regarding the cochlear implant would have affected conciliation.

In sum, the court granted the motion for summary judgment with respect to defendant's defenses discussed above, but denied the remainder of the EEOC's summary judgment motion, and the defendant's motion.

Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motion and Result	General Issues
Disability Discrimination	Wesley Health System, LLC	U.S. District Court for the Southern District of Mississippi Case No. 2:17-CV-126 -KS-MTP	2018 U.S. Dist. LEXIS 193960 (S.D. Miss. Nov. 14, 2018)	Employer's Motion for Summary Judgment **Result:** Pro-EEOC The court denied the employer's motion for summary judgment.	Was heavy lifting an essential job function such that an inability to lift would render an employee with a medical restriction not a qualified individual with a disability under the ADA? Did the employer's offer for the employee to apply for another job for which she was qualified to perform without restrictions constitute a reasonable accommodation? Did the employer engage in a good-faith interactive process with the charging party?

Commentary:

A nurse in a hospital's Transitional Care Unit (TCU) injured her shoulder and took FMLA leave. When she sought to return to work after her doctor cleared her to work with restrictions, the employer determined she could not safely work in the TCU because lifting and pushing patients was purportedly an essential job function. She was directed to apply to a vacant position for which she was qualified. She applied but was not hired, and the defendant terminated her employment. The EEOC sued under the ADA.

The employer argued first that she was not a qualified individual with a disability, as she could not perform the job's essential functions – *i.e.*, lifting 50 pounds or more. In determining whether particular skills are essential functions of a job, "courts should not give blind deference to an employer's judgment, but should instead evaluate the employer's words along with its policies and practices." (citing *Credeur v. Louisiana*, 860 F.3d 785, 794 (5th Cir. 2017)). EEOC regulations provide a non-exhaustive list of factors the court should consider, including the employer's judgment as to which functions are essential, written job descriptions prepared before advertising or interviewing job applicants for the job; the amount of time spent on the job performing the function; the consequences of not requiring the incumbent to perform the function; the terms of a collective bargaining agreement; the work experience of past incumbents in the job; and/or the current work experience of incumbents in similar jobs.

In the case at hand, the nurse's job description indicated a frequent requirement was to lift and carry 50 pounds or more, and to push up to 300 pounds. However, the employer's safety guidelines instructed staff to ask for assistance if the load was too heavy. Moreover, the nurse and others testified that they never moved patients alone, and were not required to frequently lift more than 50 pounds. According to the court, this direct testimony was sufficient to create a genuine dispute of material fact as to whether the lifting/pushing requirements were in fact essential functions the job.

The court then examined whether the employer offered the nurse a reasonable accommodation. The employer contended it did so by helping her identify open positions that did not require heavy lifting. The EEOC, however, argued that the employer should have offered the nurse assistance in her old position, considering evidence that nurses frequently had help moving patients.

Moreover, the court found a jury could find the employer did not engage in the interactive process in good faith. Specifically, the TCU Director of Nursing sent an email to the Chief Nursing Officer before the charging party returned from leave, directing her to find a replacement. In the email, the Director wrote, ". . . this is a nurse [we] would rather not have back. She says she is coming back with restrictions. That's good because she can't work with restrictions, so just FYI, her FMLA will be up next week . . ." The court determined that a jury could reasonably infer from this evidence that the hospital never intended to accommodate or retain the charging party, and that it used her condition as excuse to fire her.

The court denied the employer's motion for summary judgment.

Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motion and Result	General Issues
Disability Discrimination Failure to Accommodate	Manufacturers and Traders Trust Company d/b/a M&T Bank	U.S. District Court for the District of Maryland Case No. ELH-16-3180	2019 U.S. Dist. LEXIS 154701 (D. Md. Sept. 10, 2019)	Parties' Cross Motions for Summary Judgment **Result:** Mixed. The court granted the EEOC's motion as to the failure to accommodate claim, but denied the EEOC's motion as to the unlawful discharge claim. Conversely, the court denied the defendant's motion as to the failure to accommodate claim, but granted it as to the unlawful discharge claim.	Was the defendant required to offer the charging party, who sought to return to work following FMLA and short-term disability leave, a position without competition as a reasonable accommodation? Did the defendant violate the ADA by terminating the charging party's employment because of her record of having a disability?

Commentary:

The EEOC alleged the defendant bank violated the ADA when it failed to offer the charging party an open position as a reasonable accommodation after she returned from a leave of absence, and terminated her employment. The charging party, who was pregnant, had taken FMLA to obtain surgery to prevent a miscarriage. She also filed for short-term disability benefits. While on leave, the defendant advised the charging party that it would fill her position unless she was medically cleared to return to work within 10 days. After giving birth and receiving medical clearance to resume work, the charging party was required to apply for vacant positions, but was not reassigned to those positions, allegedly because she was regarded as having a disability/had a record of a disability.

Under the defendant's policy, there are instances in which it would reassign employees with disability-related work restrictions to vacant positions upon return to work, without competition. Defendant's Employee Relations Department is charged with identifying comparable positions for employees who have been replaced or positions that will become available within 90 days following the employee's return to work. If no comparable positions are available, or if the employee is released later than 90 days after replacement, the defendant may refer the employee to its third-party outplacement vendor for 90 days' redeployment assistance. If employees do not obtain a position after the first 30 days, their status as an employee ends, but they could continue to apply for positions for the remaining 60 days with redeployment assistance.

In December 2012, the charging party took her FMLA leave, followed by short-term disability leave. Her leave ended in March 2013. Defendant sent the charging party a letter in April informing her that her position could not be held open and she would be replaced unless she could return to work in some capacity. The letter also stated the charging party would be eligible for 90 days of redeployment assistance. The charging party did not respond, but continued to submit information in support of her STD benefits claim. The charging party gave birth in June, and between August and October 2013, applied for, or expressed interest in, nine or ten vacant positions. On September 9, 2013, the 30-day period within which the charging party could apply as an internal candidate came to an end, and defendant terminated her employment due to her "failure to return from [her] leave of absence."

The EEOC claims the defendant failed to provide a reasonable accommodation "by forcing [charging party] to compete for vacant positions for which she was qualified." The defendant countered that at the time of the charging party's employment termination she was not disabled and had no record of disability. Moreover, the defendant asserts that the ADA does not require reassignment without competition.

To establish a *prima facie* case for failure to accommodate, the EEOC must show: (1) the employee was an individual with a disability within the meaning of the ADA; (2) the employer had notice of the disability; (3) with reasonable accommodation, the employee could perform the essential functions of the position; and (4) the employer refused to make such accommodations.

The EEOC contends the charging party had a *record* of a disability (incompetent cervix). The defendant argued that she was not disabled because she failed to provide notice. Specifically, when the charging party requested leave, she did not provide defendant with actual medical records or a physician's declaration. The court disagreed: "that an employee must document his or her actual medical condition in order to establish a record of disability conflicts with the ADA's lax notification requirements."

As to qualifications, the defendant conceded the charging party met the minimum qualifications for the open positions.

Next, citing *Severson v. Heartland Woodcraft, Inc.*, 872 F.3d 476 (7th Cir. 2017), the defendant argued the ADA does not require an employer to provide extended leave as a reasonable accommodation. The court, however, noted that *Severson*'s bright-line rule against extended leave conflicts with the Fourth Circuit's 2013 decision in *Wilson v. Dollar Gen. Corp.*, 717 F.3d 337 (4th Cir. 2013). There, the court concluded that "a leave request will not be unreasonable on its face so long as it (1) is for a limited, finite period of time; (2) consists of accrued paid leave or unpaid leave; and (3) is shown to be likely to achieve a level of success that will enable the individual to perform the essential functions of the job in question." *Wilson*, 717 F.3d at 345. In this case, the court determined that the charging party's leave request was reasonable.

Notably, the charging party requested leave for a finite period. She told the defendant that she would be ready to return to work after the birth of her baby. In addition, the court found it is undisputed that leave was likely to enable the charging party "to perform the essential functions of the job in question" upon her return.

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

Commentary (continued):

The court focused the majority of its opinion on whether the charging party was entitled to a noncompetitive reassignment. The defendant argued the ADA does not require it, while the EEOC argued the statute is ambiguous, and therefore deference should be accorded to the EEOC's enforcement guidance, which provides that offering noncompetitive reassignment could be an accommodation.

Although defendant asserted that reassignment is required only if the employee is the *most* qualified, the plain text requires only that the employee be "qualified." The court noted also, citing *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002), that "the Supreme Court recognized that reassignment without competition is generally a reasonable accommodation." Therefore, the court granted the EEOC's motion on its failure-to-accommodate claim.

As for the wrongful discharge claim, the EEOC must show that (1) the employee is a qualified individual with a disability; (2) the employee was discharged; (3) at the time of discharge, the employee was performing the job at a level that met the employer's legitimate expectations; and (4) the discharge occurred under circumstances that raise a reasonable inference of unlawful discrimination.

The EEOC asserts that defendant terminated the charging party's employment because of "her alleged failure to return from her disability-related leave."

The court explained: "In a [discrimination] suit where an employee has suffered an adverse employment action and an employer has asserted a legitimate, non-discriminatory reason for the decision, the district court need not—and should not—decide whether the plaintiff actually made out a *prima facie* case under *McDonnell Douglas*. Rather, in considering an employer's motion for summary judgment . . . in those circumstances, the district court must resolve one central question: Has the employee produced sufficient evidence for a reasonable jury to find that the employer's asserted non-discriminatory reason was not the actual reason and that the employer intentionally discriminated against the employee on the basis of [a protected classification]?"

In this case, in addition to arguing that the EEOC has not established a *prima facie* case under the *McDonnell Douglas* standard, defendant offered evidence of a legitimate, performance-based reason for the termination. Therefore, it was up to the EEOC to present evidence from which a factfinder could conclude this reason was pretextual. The EEOC argued that the defendant's failure to reassign the charging party occurred under circumstances that support an inference of intentional discrimination. The court, however, found that these circumstances, considered separately or together, do not support a finding of pretext.

The EEOC raised several different arguments for concluding that the defendant's stated reasons for terminating the charging party were pretextual. The court found that while the defendant "did not rigidly comply with its own rules" and may have treated the charging party unfairly, "taking all of the EEOC's arguments together, the EEOC has given no basis to doubt the veracity" of the defendant's explanations or to infer that discrimination was the real reason for the job termination.

Therefore, the court denied the EEOC's motion for summary judgment, and granted the defendant's, on this issue.

Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motion and Result	General Issues
Disability Discrimination	Mid-South Extrusion, Inc.	U.S. District Court for the Western District of Louisiana Case No. 3:17-CV-01229	2018 U.S. Dist. LEXIS 179713 (W.D. La. Oct. 18, 2018)	Defendant's Motion for Summary Judgment **Result:** Pro-EEOC. The court denied the employer's motion.	Should the court grant the defendant's motion for summary judgment on the grounds the charging party is not disabled or regarded as disabled, could not perform the "essential functions" of the position, and that, regardless of any alleged disability, the company had legitimate, non-discriminatory reasons for terminating his employment?

Commentary:

The EEOC sued a plastics manufacturer under the ADA, alleging the company fired an employee because of his actual and/or perceived disability. Specifically, the EEOC alleged the company terminated a maintenance technician after he told the company of his 50% lung capacity breathing restriction resulting from undiagnosed childhood tuberculosis, which crystalized and became dormant because of prior exposure to asbestos.

The charging party had completed a "Post Offer Medical History Questionnaire" when first hired, which disclosed that he had a prior shoulder injury. This injury left him with an 11% impairment in his range of motion and lifting overhead. The charging party did not disclose any additional impairments at this time.

After completing his 90-day probationary period, he was told he was making adequate progress and given a pay increase. Sometime after this period, his supervisor raised concerns about his performance, and suspected he was at times intoxicated while on the job, among other safety concerns.

The charging party eventually developed breathing problems, and it was determined he had the aforementioned lung capacity breathing restriction. He was referred to a cardiologist.

Prior to taking medical leave to undergo a heart catheterization procedure, the charging party met with an HR manager and told her about his TB, lung, heart, and esophagus conditions. She wrote about her concerns to the charging party's supervisor. After the charging party's medical procedure, he returned to work with a release from his doctor to work regular duty with no restrictions. About a month later, he experienced some short-lived breathing difficulties, but was able to return to work after about a 10-mintue period.

Shortly afterwards, the charging party was scheduled to receive his annual review, which would have given him a raise, 10 more sick days per year, and 40 hours paid vacation per year. The EEOC contends that, rather than allowing the charging party to vest in these benefits, his supervisor preemptively terminated his employment.

The charging party alleges that when firing him, the supervisor made negative disability-related comments, including ". . . hate to say this but we are going to have to let you go . . . you are riding the clock waiting until you get your disability because of your disability and our insurance . . . having all of these sick people makes our insurance liability and premiums higher . . . didn't know you had all these health problems . . . why didn't you go to the doctor before you came to us . . . was it because of our insurance?"

In its motion for summary judgment, the defendant contended that the charging party did not suffer from a disability during the time that he was employed; that he was not a "qualified individual" under the ADA because he could not perform the "essential functions" of a maintenance technician; and that, regardless of any alleged disability, the company had legitimate, non-discriminatory reasons for terminating him.

In its opposition motion, the EEOC claims the defendant misrepresented the relevant facts and applicable law in its motion for summary judgment, that the motion itself is premature because the parties are still engaged in discovery with the charging party's doctors, and that much of the defendant's motion relies on pre-ADAAA law.

The court sided with the EEOC, finding the Commission raised a genuine issue of material fact precluding summary judgement. Specifically, the alleged statements the supervisor made to the charging party upon termination, if true, constitute direct evidence of discrimination. "When a supervisor, in the context of firing an employee, or immediately prior to that event, says that 'we are going to have to let you go' because 'of your disability and our insurance', as well as other statements, the jury can infer an intent to discriminate . . ." This alone was enough to preclude summary judgment.

With respect to indirect evidence of discrimination, the court explained that the EEOC needs to show the charging party (1) has a disability, or was regarded as disabled, or has a record of a disability; (2) was qualified for the job; and (3) was subjected to an adverse employment decision on account of his disability. With respect to the first prong, the court determined there are genuine issues of material fact precluding summary judgment—*i.e.*, there is evidence to suggest the charging party had a disability, was regarded as disabled, or had a record of a disability.

The court acknowledged the employer did set forth several legitimate, non-discriminatory reasons for terminating the charging party, including several performance-related and safety issues. However, the court found that the EEOC was able to provide evidence—including the email from the HR manager to the supervisor, and the comments the supervisor made upon termination—that such proffered reasons could be considered pretext for discrimination. The court therefore denied the employer's motion.

Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motion and Result	General Issues
Race Discrimination	Driven Fence	U.S. District Court for the Northern District of Illinois, Eastern Division Case No. 17 CV 6817	2019 U.S. Dist. LEXIS 129935 (N.D. Ill. Aug. 2, 2019)	Employer's Motion for Summary Judgment **Result:** Pro-EEOC The court denied the employer's motion for summary judgment, finding a reasonable jury could find the employer was negligent and that the charging party was constructively discharged on account of unchecked racial harassment.	Has the EEOC shown a basis for employer liability in a case in which the charging party alleges he was subjected to racial harassment and constructively discharged?

Commentary:
The EEOC claimed the defendant violated Title VII when it allegedly subjected an employee to a hostile work environment based on his race and constructively discharged him. Specifically, several co-workers made racially offensive comments to the charging party, who is black, and hung a noose in the workplace.

When the charging party was hired, the HR manager told him that if he had any problems or questions, he should talk to the warehouse supervisor. He was also given a copy of defendant's "Rules and Regulations," which included the requirement that co-workers must treat each other with respect and that "[b]ullying behavior toward anyone is unacceptable and will not be tolerated."

The charging party told the warehouse supervisor about the comments, but the supervisor allegedly laughed off such statements. The supervisor was also aware of the noose incident. Three weeks later, the charging party quit.

The defendant moved for summary judgment, arguing that there is no basis for employer liability and that the employee was not constructively discharged. The defendant did not contest any of the other elements of the hostile work environment claim.

The court explained that whether an employer is liable for its employees' harassment depends on who the harassers were. If the harassers were the charging party's supervisors, then the defendant is strictly liable for the harassment. If the harassers were other, non-supervisory co-workers, then the defendant is liable if it was "negligent in discovering or remedying the harassment." *Nischan v. Stratosphere Quality, LLC*, 865 F.3d 922, 930 (7th Cir. 2017) (quoting *Vance v. Ball State Univ.*, 646 F.3d 461, 470 (7th Cir. 2011)). The EEOC did not argue that the warehouse supervisor or any other alleged harasser was a "supervisor" under Title VII, so the question was one of negligence. The defendant is negligent "if it knew or should have known of the harassing conduct yet failed to act." *Nischan*, 865 F.3d at 931 (citing *Faragher v. City of Boca Raton*, 524 U.S. 775, 799-800 (1998)). The court found that in this case, there is no dispute that defendant did not timely act to end the harassment. Although the charging party did not inform directly the HR manager who could have done something about the harassment, the defendant did have constructive knowledge of the harassment by way of the charging party's notice to the warehouse supervisor. An employer has constructive notice of harassment when it "come[s] to the attention of someone who ... has under the terms of his employment, ... a duty to pass on the information to someone within the company who has the power to do something about it." *Young v. Bayer Corp.*, 123 F.3d 672, 674 (7th Cir. 1997).

"Once that person learns of the [ ] harassment, the employer is considered to be on notice even if the victim never reported the harassment." *Nischan*, 865 F.3d at 931. The EEOC contends that the warehouse supervisor is the conduit of constructive notice here. He had notice of the harassment since he participated in much of it and, the EEOC argues, he was duty-bound to pass the information on to the hiring manager, who could have stopped it. A reasonable jury could find that the warehouse manager had a duty to report it. The court relied, in part, on the HR manager's and warehouse supervisor's testimony, which discussed company policy regarding bullying.

A jury could therefore find that under these rules and expectations, the warehouse supervisor was required to bring disrespectful employees, including himself, to HR's attention, and as a result, that defendant was on constructive notice of the harassment. At the same time, a jury could conclude the warehouse manager was not required to report on himself. But because it could go either way, the court explained summary judgment is not appropriate.

The EEOC also argued that defendant's ineffective anti-harassment policy demonstrates its lack of care. But this, standing alone, does not support a finding of negligence, the court found. A negligent employer must have notice of at least a probability of harassment, whether the employer has a good, bad, or nonexistent anti-harassment policy. But here, where there is evidence that could support a finding of constructive notice along with a policy that, viewed in the EEOC's favor, fails to address head-on the prospect of protected-status harassment, an inference of negligence is reasonable.

With respect to constructive discharge, the EEOC must show that "the abusive working environment became so intolerable that . . . resignation qualified as a fitting response." The EEOC must "show working conditions even more egregious than that required for a hostile work environment claim because employees are generally expected to remain employed while seeking redress, thereby allowing an employer to address a situation before it causes the employee to quit." The court agreed that the noose incident was sufficiently egregious, and denied the employer's motion for summary judgment.

Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motion and Result	General Issues
Religious Accommodation	North Memorial Health Care	U.S. Court of Appeals for the Eighth Circuit Case No. 17-2926	2018 U.S. App. LEXIS 32088 (8th Cir. Nov. 13, 2018)	EEOC's Appeal of the District Court's Grant of Summary Judgment in the Employer's Favor **Result:** Pro-Employer The appellate court affirmed the lower court's grant of summary judgment.	Does a request for a religious accommodation constitute protected activity within the meaning of Title VII's anti-retaliation provision?

Commentary:

The EEOC filed suit against defendant alleging that it violated the anti-retaliation provision of Title VII when it withdrew an offer of employment after an employee requested that she be exempt from working the Friday night shift because working that shift conflicted with her beliefs as a Seventh-day Adventist.

Defendant moved for summary judgment, arguing that a request for a religious accommodation is not considered protected activity under Title VII. Defendant further argued that even if the request was considered protected activity, the employee requested to be exempt from the Friday night shift so she would not be too tired for church, not because working the shift conflicted with her religion, and, as such, the request was not reasonable. Additionally, defendant alleged that the EEOC could not establish that its justification for withdrawing the offer, even after she expressed willingness to work on Friday nights, was pretext for discrimination because it was legitimately concerned that she would not come to work on Friday nights.

The district court granted defendant's motion and enter summary judgment in its favor. The EEOC appealed.

The Eighth Circuit affirmed the lower court's grant of summary judgment in the employer's favor, agreeing with the district court that the EEOC failed to establish a *prima facie* case of opposition-clause unlawful retaliation because "merely requesting a religious accommodation is not the same as opposing the allegedly unlawful denial of a religious accommodation," and that the charging party's initial request for a religious accommodation "simply does not 'implicitly' constitute opposition to the ultimate denial of the requested accommodation."

Retaliation Investigations/ Termination Based on Honest Belief of False Charge	HP Pelzer Automotive Systems, Inc.	2018 U.S. Dist. LEXIS 210296 Case No. 1:17-CV-31-TAV-CHS	2018 U.S. Dist. LEXIS 210296 (E.D. Tenn. Dec. 13, 2018)	Defendant's Motion to Amend its Summary Judgment Decision **Result:** Pro-EEOC. The court denied the defendant's motion.	Should the court grant the defendant's motion to amend its summary judgment decision, which found questions regarding the quality of defendant's investigation into sexual harassment allegations, and thus the reasonableness of its belief in its asserted reason for firing the charging party, were genuine disputes of material fact best left up to the jury to decide?

Commentary:

The EEOC and intervening plaintiff sued defendant alleging the individual plaintiff /charging party was fired in retaliation for filing a sexual harassment complaint. In response, defendant asserts that, based on its investigation of the sexual harassment complaint, the charging party had falsified the report Thus, defendant asserts that it terminated the charging party for making a false complaint, consistent with its harassment policy.

Defendant filed a motion for summary judgment, alleging the complaint failed as a matter of law (*i.e.*, the EEOC could not show a *prima facie* case of retaliation because the charging party did not engage in protected activity when she made the false accusations, and that plaintiffs could not show defendant's motivation for termination was retaliation versus actions in accordance with the defendant's harassment policy.

The court found the plaintiffs made out a *prima facie* case for retaliation, but that the defendant was able to proffer a legitimate, nondiscriminatory reason for termination. However, the court found that the questions regarding the quality of defendant's investigation, and thus the reasonableness of its belief in its asserted reason for firing the charging party, were genuine disputes of material fact best left up to the jury.

The defendants filed this instant action. The court found the defendant reiterated the same arguments it made in its summary judgment motion. It noted, however, that there appears to be a circuit split on the central issue in this case—the Eleventh Circuit has held that a defendant-employer's honest belief that the plaintiff-employee lied in an internal investigation of a supervisor's alleged sexual harassment was enough to grant summary judgment for the defendant on the plaintiff's retaliation claim, where the employer's belief was based on its inability to corroborate the employee's allegation with coworkers. But the Eighth Circuit has held to the contrary, finding sufficient evidence of pretext to deny a defendant's motion for summary judgment where "the belief that [plaintiff] was lying was founded solely on the statements of other employees and witnesses." The court therefore denied the defendant's motion.

Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motion and Result	General Issues
Scope of EEOC Complaint Title VII Failure to Promote Equal Pay	Denton County	U.S. District Court for the Eastern District of Texas Case No. 4:17-CV-00614	2018 U.S. Dist. LEXIS 175794 (E.D. Tex. Oct. 12, 2018)	Cross Motions for Summary Judgment **Result:** Mixed. The court granted the defendant's motion with respect to the charging party's claims that were outside the scope of the EEOC's investigation, but denied the parties' motions on the remaining issues.	Should the court grant the defendant's motion for summary judgment as to the charging party's claims that were outside the scope of the EEOC's investigation? Should the court grant the parties' motion with respect to the equal pay allegations?

Commentary:

The EEOC and a female doctor sued the county, alleging the charging party was paid at least $34,000 less than a male doctor performing substantially equal work. The charging party alleged the defendant discriminated against her by (1) failing or refusing to promote her to a position for which she was qualified because of her gender (female), (2) failing or refusing to pay her wages that were equal to male physicians performing the work of a primary care physician because of her gender (female), and (3) treating her less favorably than her male counterparts. She added a claim for retaliation since filing her complaint in intervention.

Both the EEOC and the county filed motions for summary judgment.

The court first granted the defendant's motion as to the failure-to-promote claim, as the defendant presented evidence to show that an application is required to get a job in the county, even a promotion, and the charging party never submitted an application for this promotion. The charging party did not respond to this argument, and even admitted in her reply that this constituted "background information" to her other charges, and did not constitute its own charge.

With respect to the remaining charges, the defendant argued the charging party failed to exhaust her administrative remedies on her Title VII claim based on retaliation and any claim that she was treated less favorably than male physicians aside from allegations of unequal pay, because they exceed the scope of the charge of discrimination.

The charging party claimed that her charge of discrimination was broad enough to encompass all of her claims and she has properly exhausted her administrative remedies. The EEOC determination read:

> Charging Party, a Primary Care Clinician (PCC), alleged that *she was discriminated against by the Respondent's payment of unequal wages* to her because of her sex (female). Specifically, she complains that she was *denied equal pay* because of her gender.

Thus, the EEOC investigation focused on wage disparity, which reasonably grew out of the charge of discrimination where the charging party also complained of unequal pay. The court noted that neither the charge of discrimination nor the EEOC determination even state that the charging party was terminated, which is the adverse employment action alleged for both her Title VII claim for retaliation and claim that she was treated less favorably. The court thus found that the claims were not limited to the EEOC's investigation and did not grow from the charge of discrimination, even reading the charge liberally.

The court emphasized that the administrative process and Title VII claims are separate and distinct rights. One can appeal a termination decision yet only file a Title VII claim for failure to pay equal wages.

The court therefore granted the defendant's motion for summary judgment as to its assertion that the charging party's "discrimination claim under Title VII must be limited to the single issue of alleged pay disparity between her and [her male counterpart]."

As for the remaining claims, the court denied the parties' motions, finding it was up to a jury to decide whether the pay differential was clear evidence of sex-based pay discrimination under the Equal Pay Act, or whether the doctor was paid less for reasons "other than sex."

Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motion and Result	General Issues
Sexual Harassment Retaliation	Appalachian Power Company	U.S. District Court for the Western District of Virginia Case No. 1:18CV00035	(W. D. Va. Sept. 24, 2019)	Employer's Motion for Summary Judgment **Result:** Mixed. The court granted the employer's motion on the hostile work environment claim, but denied the motions with respect to the quid pro quo sexual harassment claim and the claim for retaliation. However, on October 31, 2019, a jury found in the defendant's favor.	Was the alleged conduct sufficiently severe and pervasive to create a hostile work environment? Did the company supervisor fire the charging party for failing to accept his advances? Was the employment termination an act of unlawful retaliation under Title VII?

Commentary:

The charging party alleged her supervisor frequently expressed a romantic interest in her, provided her with expensive gifts, and ultimately terminated her employment when she did not respond to a text asking her out on a date. The supervisor claimed he terminated her employment when she failed to respond to a text about her attendance. The charging party countered that she had notified her supervisor that she had an appointment and would not be at work the day in question. Ultimately, the company fired the supervisor (and declined to re-hire the charging party) for time card fraud—the supervisor admitted altering the charging party's attendance cards.

The EEOC filed suit against the defendant, setting forth claims of hostile environment sexual harassment, quid pro quo sexual harassment, and retaliatory discharge.

With respect to the harassment claim, to establish a hostile work environment claim, the plaintiff must show that the alleged conduct (1) was unwelcome, (2) was based on her sex, (3) was sufficiently severe or pervasive to alter the conditions of her employment and create an abusive work environment, and (4) was imputable to her employer.

As to the first element, employees can demonstrate that conduct is unwelcome by voicing their objection to it to the alleged harasser or to the employer. *Strothers v. City of Laurel*, 895 F.3d 317, 328–29 (4th Cir. 2018). As to the second element, "[a]n employee is harassed or otherwise discriminated against because of his or her sex if, but-for the employee's sex, he or she would not have been the victim of the discrimination." *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 142 (4th Cir. 1996). "The 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." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998). The fourth element, imputation to the employer, is satisfied where harassment by a supervisor culminates in a tangible employment action such as termination.

The court noted the parties focused their arguments on the third element of a hostile work environment claim — that the conduct was so severe or pervasive as to create an abusive work environment. This element has both subjective and objective components. In order to prevail on such a claim, plaintiffs must show they did perceive, and a reasonable person would perceive, the environment to be abusive or hostile.

Given the facts of this case, the court concluded the charging party failed to present evidence showing that she was subjected to sexual harassment that objectively was so severe and pervasive as to alter the terms and conditions of her employment. The supervisor did not physically touch the charging party or threaten to do so, or sexually proposition her. Co-workers saw the parties laughing an interacting often, and assumed they were friends. The court emphasized that "expressing romantic interest in a coworker or subordinate or asking them out is not enough on its own to establish a Title VII hostile environment claim," and that behavior related to "a workplace crush" does not do not meet the high threshold of objectively severe and pervasive harassment necessary to establish a hostile environment claim under Title VII. Therefore, the court granted the defendant's summary judgment motion on this claim.

The court declined, however, to grant the defendant's motions with respect to the quid pro quo harassment and retaliation claims. The court explained there is a genuine dispute of material fact regarding the supervisor's reason for terminating the charging party. For example, there is evidence the supervisor condoned the charging party's prior absences, as indicated by his approval of her time sheets, which allowed her to get paid for hours she did not work. Therefore, a reasonable jury could conclude the stated reason for firing the charging party was pretextual. The court similarly denied the defendant's motion for summary judgement on the retaliation claim, finding a reasonable jury could infer pretext for the discharge.

On October 31, 2019, however, a jury found that the EEOC failed to prove "by the preponderance of the evidence" that the defendant subjected the charging party to unlawful quid-pro-quo sexual harassment, or terminated her employment in retaliation for "protected opposition."

Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motion and Result	General Issues
Sexual Harassment Retaliation	Favorite Farms, Inc.	U.S. District Court for the Middle District of Florida Case No. 8:17-cv-1292-T-30AAS	2018 U.S. Dist. LEXIS 168837 (M.D. Fla. Oct. 1, 2018)	Employer's Motion for Summary Judgment **Result:** Pro-EEOC The court denied the employer's motion.	Was the defendant able to establish a *Faragher/Ellerth* affirmative defense so as to avoid liability for a supervisor's alleged sexual assault? Did the charging party suffer any retaliatory action?

Commentary:

The EEOC brought suit on behalf of a farm worker who alleged her supervisor sexually assaulted her in her employer-provided housing unit. The supervisor gained entry under the guise of needing to inspect the property to determine whether others could live there as well. The lawsuit alleges retaliation and sexual harassment.

The employer moved for summary judgment, first arguing that the employee did not experience any retaliation. The court found this argument untenable, as there was evidence on record that the employee was suspended without pay following her report of the incident, which caused physical and emotional hardship. A jury could find that this resulted in tangible harm, the court explained, even though the defendant later reimbursed her for some of this unpaid time.

The employer next argued it could not be held vicariously liable for the supervisor's actions. An employer can be held liable for a supervisor's actions if the supervisor has immediate or successively higher authority over the employee. If the employee suffered no adverse tangible employment action as a result of the harassment, the employer can rely on the *Faragher/Ellerth* affirmative defense if it can show (a) it exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

In this case, the court found the record was "abundant" with disputed facts on this point. First, there is no evidence the charging party received the defendant's anti-harassment party. Even if she did, the record indicated 65% of the defendant's workers speak only Mixteco, an indigenous language of Mexico, and the policy was not translated into this language.

Second, the record contains facts that the defendant had prior knowledge of a prior sexual harassment complaint against the supervisor but failed to adequately investigate. Third, even if the defendant had exercised reasonable care to prevent and promptly correct harassing behavior, it is undisputed that the charging party reported the alleged rape to management immediately after it occurred, and it remains highly disputed that the defendant took appropriate corrective action, as the charging party resorted to seeking court-ordered protection against the supervisor to avoid working at the same location as the supervisor. Fourth and finally, the defendant did not make a written report and investigate the alleged assault until almost a year later in response to the EEOC's investigation.

The defendant also argued the supervisor's actions were outside the scope of employment. However, the court found a jury could conclude the supervisor used his authority to access the charging party's apartment to commit the assault, and that the supervisor oversaw inspections of the housing units.

Taken together, the court determined there remained sufficient questions of facts to present to a jury so as to deny the defendant's motion.

At trial, a jury returned a unanimous verdict in favor of the EEOC, and found that the victim was entitled to compensatory damages of $450,000 and punitive damages in the amount of $400,000.

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