THE LITTLER REPORT

Annual Report on EEOC Developments: Fiscal Year 2023

AN ANNUAL REPORT ON EEOC CHARGES, LITIGATION, REGULATORY DEVELOPMENTS AND NOTEWORTHY CASE DEVELOPMENTS

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Annual Report on EEOC Developments: Fiscal Year 2023

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

INTRODUCTION

This **Annual Report on EEOC Developments—Fiscal Year 2023** (hereafter "Report"), our thirteenth annual publication, is designed as a comprehensive guide to significant Equal Employment Opportunity Commission ("EEOC" or "the Commission") developments over the past fiscal year. The Report does not merely summarize case law and litigation statistics, but also analyzes the EEOC's successes, setbacks, changes, and strategies. By focusing on key developments and anticipated trends, the Report provides employers with a roadmap to where the EEOC is headed in the year to come.

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

Part One discusses the rise and evolving nature of religious discrimination claims. From religious-based objections to the COVID-19 vaccination to the Supreme Court's clarification of the undue hardship standard in religious accommodation cases, lawsuits alleging violations of Title VII based on sincerely held religious beliefs have notably increased. How and to what extent must an employer accommodate an employee's religious beliefs and practices? This section of the Report addresses this thorny issue.

Part Two outlines EEOC charge activity, litigation, and settlements in FY 2023, focusing on the types and location of lawsuits filed by the Commission. More details on noteworthy consent decrees, conciliation agreements, judgments and jury verdicts are summarized in Appendix A to this Report. A discussion of cases in which the EEOC filed an amicus or appellate brief can be found in Appendix B.

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

Part Four summarizes the EEOC's investigations and subpoena enforcement actions, particularly where the EEOC has made broad-based requests to conduct class-type investigations in pursuit of its goal to combat systemic discrimination. Appendix C to this Report supplements this section in summarizing subpoena enforcement actions filed by the EEOC during FY 2023.

Part Five of the Report focuses on FY 2023 litigation in which the EEOC was a party. This discussion is broken down into numerous topic areas, including: (1) pleading deficiencies raised by employers and the EEOC; (2) statutes of limitations cases involving both pattern-or-practice and other types of claims; (3) intervention and consolidation of claims with private counsel representing charging parties; (4) class issues in EEOC litigation; (5) other critical issues in EEOC litigation, including protective orders, ESI and experts; (6) general discovery issues in litigation between the parties; (7) favorable and unfavorable summary judgment rulings, which also are summarized in greater detail in Appendix D; (8) default judgments against employers; (9) trial-related issues and those tied to remedies and settlements; and (10) circumstances in which courts have awarded attorneys' fees to prevailing parties.

Appendices A-D are useful resources that should be read in tandem with the Report. **Appendix A** includes summaries of significant EEOC consent decrees, conciliation agreements, judgments, and jury verdicts. **Appendix B** highlights appellate cases where the EEOC has filed an amicus or appellant brief and decided appellate cases in FY 2023. **Appendix C** includes information on select subpoena enforcement actions filed by the EEOC in FY 2023. **Appendix D** highlights notable summary judgment decisions by claim type.

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

I. Religious Accommodation Considerations: *Groff* and Its Impact[1]

In this year's *Annual Report on EEOC Developments*, we have included a special opening chapter on religious accommodation. The subject of religious accommodation became front and center during the pandemic as many employers were confronted with requests for religious accommodations for the first time by those who opposed vaccinations. While the issue of mandatory vaccinations is no longer front-page news as the world recovers from the COVID-19 crisis, employers need to be prepared for the evolving issue of religious accommodations based on the U.S. Supreme Court's decision in *Groff v DeJoy*. This opening chapter provides an overview of the basic standards under Title VII, the impact of the *Groff* decision when employers are faced with requests for religious accommodations, and recent court decisions that have grappled with this issue.

On June 29, 2023, the U.S. Supreme Court issued the most consequential decision impacting religious accommodations analysis under Title VII in nearly 50 years.[2] In *Groff v. DeJoy*, the Court upended nearly 50 years of precedent by redefining Title VII's undue hardship standard outlined in *Trans World Airlines, Inc. v. Hardison*.[3] In *Hardison*, the Court held employers could deny—as an undue hardship—employees' religious accommodation requests if they required employers "to bear more than a de minimis cost." Courts routinely interpreted the *Hardison* standard as requiring employers to present minimal evidence to establish their undue hardship defense.[4] The Court held that lower courts misinterpreted *Hardison* and, instead, an employer alleging undue hardship must demonstrate the requested accommodation "would result in substantial increased costs in relation to the conduct of its particular business."[5] Without question, the revised undue hardship standard imposes a higher proof requirement on employers seeking to deny religious accommodation requests.

A. Title VII's Prohibition Against Religious Discrimination

It is unlawful under Title VII of the Civil Rights Act of 1964 for employers "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges [of] employment, because of such individual's … religion."[6] In subsequent amendments, Congress further defined employers' obligations by requiring them to "reasonably accommodate … an employee's or prospective employee's religious observance or practice" unless the employer is "unable" to do so "without [causing] undue hardship on the conduct of the employer's business."[7] Thus, employers have an affirmative responsibility to reasonably accommodate their applicants' and employees' religious observances and practices unless such requests cause an undue hardship on the employer's business. Whether a specific request causes an undue hardship requires an individualized analysis.[8]

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1 We wish to extend special thanks to Littler Shareholder Dionysia Johnson-Massie for her contribution in providing guidance to employers on religious accommodations in this opening chapter of this year's *Annual Report*.

2 *Groff v. De Joy*, 143 S. Ct. 2279, 216 L. Ed. 2d 1041 (2023). For a more detailed discussion, *see* Dionysia Johnson-Massie, Laura Saracina, N. Brenda Adimora, and Jim Paretti, *Nearly 50 Years Later, the Supreme Court "Clarifies" the Undue Hardship Standard in Religious Accommodation Claims*, Littler Insight (June 30, 2023).

3 *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 97 S.Ct. 2264 (1977). For further discussions of cases analyzing religious matters in the workplace pre-*Groff*, see Dionysia Johnson-Massie, *Littler on Religion in the Workplace*, *available at* https://www.littler.com/bookstore.

4 *Groff*, 143 S.Ct. at 2287 (…this was "not a difficult threshold to pass…").

5 *Id.* at 2295 ("We think it is enough to say that an employer must show that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business.")

6 42 U.S.C. § 2000e-2(a)(1).

7 *Id.* at § 2000e(j).

8 *Groff*, 143 S.Ct. at 2297 ("Having clarified the Title VII undue-hardship standard, we think it appropriate to leave the context-specific application of that clarified standard to the lower courts in the first instance"); *Harrell v. Donahue*, 638 F.3d 975, 979 (8th Cir. 2011) ("Determinations of what constitutes an 'undue hardship' must be made on a case-by-case basis.").

B. *Groff* Dismantles Hardison's Undue Hardship Standard

In *Groff*, the employer initially granted the plaintiff, an Evangelical Christian, a reasonable accommodation to avoid working on Sundays because of his religious beliefs. As background, the employer received a customer contract requiring Sunday work and negotiated with the union to have three different employee categories conduct Sunday deliveries. The plaintiff was in the third category of employees eventually required to do Sunday deliveries. To accommodate the plaintiff's request to avoid working on Sundays, the employer granted his relocation request by transferring him to another location where Sunday work was not required. However, when the new location – employing only seven people – also required Sunday work and the plaintiff lacked sufficient seniority at that location to avoid it, the employer could no longer accommodate the plaintiff's religious beliefs without requiring other employees to work more Sunday shifts or disrupting seniority rights under the contract. While the employer sought other employees to cover the plaintiff's Sunday shifts, they often declined. Importantly, the employer alleged that exempting the plaintiff from Sunday work "imposed on his coworkers, disrupted the workplace and workflow, and diminished employee morale."[9] The employer disciplined the plaintiff when he missed working his assigned Sunday shifts and the employee ultimately resigned.

The Third Circuit upheld the lower court's grant of summary judgment in the employer's favor. Specifically, the Third Circuit held the employer met its undue hardship burden under Hardison's de minimis standard and dismissed the plaintiff's case.

On appeal, however, the U.S. Supreme Court remanded the case and instructed the lower court to reconsider the facts while applying the more stringent undue hardship standard (*i.e.*, "substantial increased cost").10 The Court determined that the phrase "undue hardship" meant substantially more than simply "more than de minimis." According to the Court:

> Here, the key statutory term is "undue hardship." In common parlance, a "hardship" is, at a minimum, "something hard to bear." Random House Dictionary of the English Language 646 (1966) (Random House). Other definitions go further. See, *e.g.,* Webster's Third New International Dictionary 1033 (1971) (Webster's Third) ("something that causes or entails suffering or privation"); American Heritage Dictionary 601 (1969) (American Heritage) ("[e]xtreme privation; adversity; suffering"); Black's Law Dictionary, at 646 ("privation, suffering, adversity"). But under any definition, a hardship is more severe than a mere burden. So even if Title VII said only that an employer need not be made to suffer a "hardship," an employer could not escape liability simply by showing that an accommodation would impose some sort of additional costs. Those costs would have to rise to the level of hardship, and adding the modifier "undue" means that the requisite burden, privation, or adversity must rise to an "excessive" or "unjustifiable" level. Random House 1547; see, *e.g.,* Webster's Third 2492 ("inappropriate," "unsuited," or "exceeding or violating propriety or fitness"); American Heritage 1398 ("excessive").
>
> When "undue hardship" is understood in this way, it means something very different from a burden that is merely more than *de minimis, i.e.,* something that is "very small or trifling." Black's Law Dictionary, at 388. So considering ordinary meaning while taking *Hardison* as a given, we are pointed toward something closer to *Hardison*'s references to "substantial additional costs" or "substantial expenditures"....[11]

Clearly, the Court intends to make it substantially more difficult for employers to deny employees' religious accommodation requests. The Court also indicated that "courts must apply the test in a manner that takes into account all relevant factors...including the particular accommodations at issue and their practical impact in light of the nature, 'size and operating cost of [an] employer.'"[12] However, the new undue hardship standard for Title VII religious accommodation analysis would *not be the same standard used to analyze ADA disability accommodation claims.*[13] Further, the Court concluded it would be "imprudent" to adopt – "in toto" – the EEOC's prior undue hardship guidance while simultaneously admitting that "in all likelihood, [the EEOC's guidance would] be unaffected by our

9 *Id.* at 2287.
10 *Id.* at 2296-97.
11 *Id.* at 2295.
12 *Id.* at 2295.
13 *Id.* at 2295-96.

clarifying decision today."[14] Thus, employers are left to determine when – and to what extent – ADA precedent and EEOC guidance could be useful analytical tools when assessing undue hardship. What is clear, however, is that employers are required to think broadly about potential options, to conduct an in-depth factual and financial analysis of these accommodation options, and to assess whether – in light of all the circumstances – the employer cannot offer various options because they would cause "substantial increased costs" on the employer's business.

C. Uncertainty Concerning How Impact of a Religious Request on Other Employees Affects the Undue Hardship Analysis

For employers, a particularly challenging aspect of the Groff decision is to what extent employers may consider an employee's religious accommodation request's impact on other employees when assessing undue hardship. Without prior ADA accommodations analysis and EEOC guidance as certain guideposts to follow, employers are forced to glean "tidbits" from the decision as guidance when applying this new undue hardship standard.

Groff does provide some insights. For example (and consistent with prior EEOC guidance), employers cannot assert undue hardship when an employee's religious request requires the employer to incur temporary costs, engage in voluntary shift swapping or occasional shift swapping, or incur administrative costs (typically associated with modifying schedules or payroll information resulting from shift swaps).15 Where the accommodations request "negatively" impacts other employees, however, the Court makes clear that not every impact on other employees constitutes an impact on the conduct of the employer's business. Essentially, the impact on the other employees must be shown to result in substantial increased costs in relation to the conduct of the employer's business. Absent that showing, a co-worker's "displeasure" or related "inconvenience" – alone – appears insufficient to establish an employer's undue hardship defense. Specifically, the Court explained:

> As the Solicitor General put it, not all "impacts on coworkers ... are relevant," but only "coworker impacts" that go on to "affec[t] the conduct of the business." [citation omitted]. So an accommodation's effect on co-workers may have ramifications for the conduct of the employer's business, but a court cannot stop its analysis without examining whether that further logical step is shown in a particular case [citation omitted]. An employer who fails to provide an accommodation has a defense only if the hardship is "undue," and a hardship that is attributable to employee animosity to a particular religion, to religion in general, or to the very notion of accommodating religious practice cannot be considered "undue."[16]

While the Court makes clear that "hostility" toward a specific religion, religion generally and/or accommodating others' religious practices will not support an undue hardship defense, it remains unclear to what extent employees failing to express this "hostility" can be involuntarily required to have a "less favorable" work experience in order to ensure a co-worker's religious accommodation request is granted. Further, this "hostility" inquiry potentially places employers in the unenviable position of inquiring about co-workers' religious perspectives and/or assessing whether employees' declining to "cover" for a co-worker's religious request constitutes "hostility" toward the religion or a simple desire not to take on extra work. There is also the potential for employers to "force" employees to subordinate their preferences to the religious practices of the employee requesting an accommodation. The practical implications of this "hostility" inquiry or the degree of permissible employee "impact" have broader workplace implications on morale.

D. A Word on Reasonable Accommodations

The Court also opined on an employer's reasonable accommodation obligation. Specifically, it explained that:

> Title VII requires that an employer reasonably accommodate an employee's practice of religion, not merely that it assess the reasonableness of a particular possible accommodation or accommodations. This distinction matters. Faced with an accommodation request like Groff's, it would not be enough

14 *Id.* at 2296.

15 *Id, citing* 29 C.F.R. § 1605.2(d). Notably, Section 1605.2(d) focuses on examples of conduct considered as reasonable accommodations while 29 C.F.R. § 1605.2(e) analyzes undue hardship. The Court quoted the reasonable accommodations portion of the regulations in its analysis perhaps signaling disagreement with – or, at least, reserving the right to challenge – the EEOC's undue hardship analysis in the regulations.

16 *Id.*

for an employer to conclude that forcing other employees to work overtime would constitute an undue hardship. Consideration of other options, such as voluntary shift swapping, would also be necessary....

...The Third Circuit assumed that *Hardison* prescribed a "more than a de minimis cost" test ... and this may have led the court to dismiss a number of possible accommodations, including those involving the cost of incentive pay, or the administrative costs of coordination with other nearby stations with a broader set of employees.[17]

Thus, the Court highlights both that this heightened standard now requires employers to consider additional accommodation options that they would not have been required to consider under the lesser *Hardison* standard and underscores the essential interplay between a reasonable accommodation and an undue hardship. Because Title VII requires an employer to provide a reasonable accommodation in response to an employee's qualifying accommodation request, the only way an employer avoids its obligation is by demonstrating that there is no reasonable accommodation available that would avoid imposing an undue hardship on its business. If an accommodation option – in the appropriate circumstances (*e.g.*, considering its "practical impact in light of the nature, size and operating cost of [an] employer") does not constitute an undue hardship, then its corollary must be true – that same accommodation option must now be considered reasonable.

This interplay is underscored in the regulations ("[a] refusal to accommodate is justified only when an employer...can demonstrate that an undue hardship would in fact result from each available alternative method of accommodation.")[18] For example, the Court identifies that an employer's paying co-workers incentive pay or incurring administrative costs associated with seeking coverage from employees working at nearby job sites (not just the employee's work site) could be "possible accommodations." This means that employers failing to demonstrate that these "possible accommodations" cause undue hardship on their businesses are now required to offer these options as reasonable accommodations.

The pitfalls for employers are numerous, including whether an employer has broadly considered the many potential accommodations available in a particular circumstance, taken sufficient time to analyze the related costs and impacts on its business, and articulated sufficiently why these potential accommodations are unreasonable and cause an undue hardship by demonstrating both the impact on other co-workers *and* how that impact causes undue hardship on the employer's business. The lesser *Hardison* standard did not require employers to engage in such rigorous analysis.

E. Select Post-Groff Cases and Certain Related Considerations

1. Some Courts Disfavor Using Motions to Dismiss When Employers' Undue Hardship Defense Is at Issue

Courts clearly are requiring employers to demonstrate heightened levels of proof when seeking to show that accommodation requests cause an undue hardship on their businesses. It is insufficient for employers to simply assert that an undue hardship would result from awarding a specific accommodation request; rather, the employer must provide specific evidence of the undue hardship. For example, in *Lee v. Seasons Hospice*,[19] an employer sought to dismiss plaintiffs' religious accommodation claims challenging their terminations for failing to get COVID-19 vaccinations. In denying defendant's motion to dismiss, the court held, in part, that the defendant had provided insufficient factual support for its motion. Specifically, the court explained:

It may be true that accommodating plaintiffs by offering religious or medical exemptions would have increased the risk to staff and patients or damaged Seasons' reputation—and it may be true that the increased risks or reputational damage would have been significant enough to create an undue hardship—*but these are matters that cannot be resolved without a factual record. The Court therefore denies Seasons' motions to dismiss with respect to plaintiffs' Title VII claims.*[20]

17 *Id.* at 2296-97 (citations omitted).
18 29 C.F.R. 1605.2 (c)(1).
19 2023 WL 6387794 (D. Minn. 2023).
20 *Id.* at *4 (emphasis added).

In fact, at least one court has opined that motions to dismiss are improper tools for employers to use when claiming an undue hardship defense.[21] In *MacDonald v. Oregon Health & Science University,* a hospital asserted it would cause an undue hardship to permit a registered nurse working with vulnerable patients in its Mother and Baby unit to avoid receiving a COVID-19 vaccination for religious reasons. The plaintiff, a non-denominational Christian, expressed that her religious objections included using vaccines that are developed or tested using human cell lines derived from abortions, believing that "[her] body is the Temple of the Holy Spirit" and must be protected from "defilement," and being subjected to a state requirement requiring her, as a nurse, to be "injected with it against [her] will and God's will."[22]

The hospital determined the plaintiff's request would cause an undue hardship for several reasons, including that her job required her to have in-person interactions with vulnerable patients at risk of contracting COVID-19, and the request contravened state law requiring employers to "take reasonable steps to ensure that unvaccinated healthcare providers and healthcare staff are protected from contracting and spreading COVID-19." Further, there would be increased costs associated with complying with state law if the plaintiff remained employed because the hospital would have to incur costs to ensure that the plaintiff, as an unvaccinated employee, was protected from both contracting and spreading COVID-19 in the hospital.

In denying the employer's motion to dismiss, the *MacDonald* court expressed that limited evidence can be considered when assessing claims subject to a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). Consequently, a motion to dismiss is not a proper avenue for dismissing religious accommodations claims asserting undue hardship as a defense. Specifically, the court stated:

> When ruling on a motion to dismiss brought under Federal Rule of Civil Procedure 12(b)(6), a court may not consider matters outside the pleadings—such as party declarations, medical reports, or government websites—without converting the motion to a motion for summary judgment under Federal Rule of Civil Procedure 56.... There are two exceptions to this rule. The first is that a court may consider by incorporation "material which is properly submitted as part of the complaint" .... The second allows a court to take judicial notice of matters of public record if the facts are not "subject to reasonable dispute" ....

While the employer asserted various reasons to support its undue hardship defense and the court indicated the employer "[o]n a more robust record,... may very well be able to meet their burden...," the court held that – at this stage – it was "unable to properly consider the extrinsic evidence on which Defendants rely."[23] However, the court acknowledged that motions for summary judgment – where more developed records are permissible – have resulted in favorable outcomes for employers.[24] Thus employers considering litigation strategies that would necessarily require relying on additional evidence to support their undue hardship defenses may opt to develop the factual record more robustly and to pursue other options, including filing a motion for summary judgment.[25]

2. Rationales Offered to Justify Prohibiting Beards and Long Hair Insufficient to Support Undue Hardship Defense in Fifth Circuit's Post-*Groff* Decision

Recently, the U.S. Court of Appeals for the Fifth Circuit completely obliterated an employer's undue hardship rationales used to deny male corrections officers' religious accommodations requests to wear long hair and beards because such requests allegedly constituted safety risks and/or would require the employer to violate state law.[26] The plaintiff, a newly hired corrections officer undergoing training, sought an accommodation to wear a long beard and hair consistent with his Hebrew Nation religion. The employer initially gave the plaintiff an ultimatum to cut his hair or to take a leave of absence without pay while the employer considered his accommodation requests. Two months after the leave began, the employer ultimately denied the plaintiff's requests, citing several reasons, including that beards prohibit the proper wearing of gas masks when chemical agents are present thereby creating a safety risk, long hair presents a safety risk because offenders could use the officer's hair to overpower

21 *MacDonald v. Oregon Health & Science University*, 2023 WL 5529959 (D. Or, 2023).
22 *Id.* at * 2.
23 *Id.* at *7.
24 *Id.* at ** 6-7 (collecting cases).
25 *See* Fed. R. Civ. P. 56.
26 *Hebrew v. Texas Department of Criminal Justice*, 80 F.4th 717 (5th Cir. 2023).

an officer, hair could be used to hide contraband, and beards and long hair violate the department's dress and grooming policy.[27]

The plaintiff's lawsuit alleged the employer discriminated against him on the basis of his religion and also discriminated against him by failing to accommodate his religious beliefs in violation of Title VII. The lower court granted summary judgment to the employer on the religious discrimination claim because the plaintiff, though establishing his *prima facie* case, could not rebut the employer's legitimate non-discriminatory reasons for terminating him – to protect the safety of officers and to ensure the security of prisons. Concerning the religious accommodation claim, the lower court, applying the de minimis standard, ruled that the employer would suffer an undue hardship if it had to accommodate the hair and beard requests because it would be required to have other employees shoulder more of the plaintiff's workload.

Applying *Groff's* undue hardship standard to the plaintiff's failure to accommodate claim, the Fifth Court overruled the lower court's grant of summary judgment to the employer. Specifically, the Fifth Circuit determined the *Groff* standard requires something "far greater [than the *Hardison* standard]: an employer must prove that the burden of accommodation is 'substantial in the overall context of an employer's business.'" Further, as to the impact of a religious accommodation request on other employees, the Fifth Circuit reasoned that "[b]ecause the hardship must affect 'the conduct of the employer's business,' evidence of 'impacts on coworkers is off the table for consideration' unless such impacts place a substantial strain on the employer's business."[28] Finally, an employer is *obligated* to consider other reasonable accommodation options if the one proposed by employees causes an undue hardship.[29] An employer can only claim undue hardship *after* considering all other accommodations options.[30]

The Fifth Circuit then rejected the employer's undue hardship rationales. It found that the employer's use of the *Hardison* standard to establish an undue hardship was insufficient to meet the higher standard *Groff* requires. Moreover, the employer presented no evidence of actual costs it would incur if it granted the accommodations "much less 'substantial increased costs' affecting its entire business—if it grants this one accommodation to Hebrew"; simply identified concerns about safety and security, without any related cost information; referenced the potential for additional work other employees would be required to shoulder without providing sufficient cost information to explain the same; and presented no evidence that it considered any other possible accommodations. The court also indicated the rationales were further undermined because women could wear long hair at work and the employer also permitted men to wear shorter beards, which also impacted whether safety equipment could be worn properly.

In short, employers with operations in the Fifth Circuit would be well advised to substantially enhance their internal processes and analyses of religious accommodation requests. These internal efforts must consider both the employee's recommended accommodation *and* all others that are potentially available, too, even if the employee does not suggest them. When considering various options that could reasonably eliminate the conflict between an employee's religious beliefs and practices and a workplace requirement, employers must engage in a rigorous analysis of such costs and impacts on other employees to determine if they are "substantial" in the overall conduct of the employer's business. This case demonstrates that the Fifth Circuit requires a very high bar for employers to establish undue hardship, so internal employer efforts must demonstrate they worked diligently to find alternatives, subjected those alternatives to rigorous cost analysis, and, to the extent "co-worker impact" is considered, it must be *linked* to whether those impacts cause a substantial impact on the employer's overall business.

3. Challenging Sincerely Held Religious Beliefs

One strategy for avoiding *Groff's* heightened undue hardship standard, is to challenge – in appropriate instances – whether an employee's proposed accommodation request is based on a "sincerely held religious belief." In a post-*Groff* case, defendants challenged whether an employee objecting to a COVID-19 vaccine-related testing protocol demonstrated she had sincerely held religious beliefs meriting an accommodation.[31] In *Prima v. Option Care Enterprises, Inc*., the employer-defendants required employees to receive COVID-19 vaccinations or, if permitted a religious accommodation, to enroll in weekly COVID-19 testing program. The plaintiff sought and received a

27 *Id.* at 720.
28 *Id.* at 722.
29 *Id.*
30 *Id.*
31 *Prima v. Option Care Enterprises, Inc.*, 2023 WL 7003402 (N.D. Ohio 2023).

religious accommodation exempting her from the COVID-19 vaccination. However, the employer required her to submit to weekly testing or risk termination. She declined the testing and was fired.

The court granted the defendants' motion to dismiss on the testing accommodation claim because the plaintiff failed to demonstrate that her objections to the testing were based on a sincerely held religious belief. Concerning the testing objection, the plaintiff never "mention[ed] God, her religious beliefs, or ma[de] any references to scriptures in support of the request to be exempt from testing."[32] Rather, she objected to the testing because the testing kits allegedly contained carcinogenic or other harmful chemicals and otherwise claimed exemption based on "a variety of constitutional provisions, court precedents, and laws including scattered references to Title VII."[33] The plaintiff also cited the Bill of Rights and referenced the Nuremberg Code "for arguments against involuntary medical treatments and experiments." Though the plaintiff mentioned "that she has 'the God-given right to decline all attempts to…alter any and all of her God given biological materials,'" the court perceived many of her claims to "pertain[ ] primarily to purported natural rights and bodily autonomy."[34]

Notably, the court relied heavily on email exchanges between the plaintiff and the defendant, concluding "the email correspondence is both 'integral to the complaint' and 'incorporated by reference' in the complaint."[35] Based on this evidence – demonstrating a lack of reliance on any sincerely held religious belief – to avoid the testing accommodation, the court granted the employer's motion to dismiss on this claim.

F. Equal Employment Opportunity Commission's Post-*Groff* Guidance

In *Groff*, the U.S. Supreme Court declined to adopt – "in toto" – the EEOC's previous undue hardship guidance applying *Hardison's* more than de minimis standard.[36] But, the Court indicated the EEOC's guidance would likely require little, if any, modifications post-*Groff*.[37] Since that decision, however, the EEOC has not issued new regulations or specific guidance. Rather, it has added a statement to existing guidance highlighting the *Groff* decision and its undue hardship standard.[38] The statement indicates:

> The Supreme Court's decision in *Groff v. DeJoy,* 143 S. Ct. 2279 (2023) clarified that "showing 'more than a *de minimis* cost'… does not suffice to establish undue hardship under Title VII." Instead, the Supreme Court held that "undue hardship is shown when a burden is substantial in the overall context of an employer's business," "tak[ing] into account all relevant factors in the case at hand, including the particular accommodations at issue and their practical impact in light of the nature, size and operating costs of an employer." *Groff* supersedes any contrary information on EEOC webpages and in EEOC documents.

Thus, employers are left to determine what the Supreme Court considers as EEOC guidance and regulations consistent with *Groff* and what the EEOC considers as "contrary information" in its existing guidance and regulations that should no longer be followed. With EEOC charges skyrocketing for religious discrimination claims based on disparate treatment and/or failure to accommodate in recent years, the lack of clear guidance is extremely challenging for employers to navigate.[39] In fact, the EEOC reports that religious-based EEOC charges increased significantly from 2,111 in 2021 to 13,814 in 2022 attributed, in large part, to vaccine-related religious considerations.[40] In FY 2023, 7% of EEOC-filed lawsuits included claims based on religious discrimination, the highest number over the past five years.[41] Thus, employers wading into these cloudy waters – as employees religious discrimination claims rise and lower courts wrestle with how best to apply *Groff* – are encouraged to contact their lawyers for guidance and legal advice.

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32 *Id. at *1.*
33 *Id.*
34 *Id.* at *2.
35 *Id* at *3.
36 *Groff*, 143 S. Ct. at 2296.
37 *Id.*
38 *See*, *e.g.* EEOC, *Religious Discrimination*; EEOC, *Fact Sheet: Religious Discrimination*; U.S. Code of Federal Regulations, *Title 29 - Labor* (last visited Mar. 27, 2024).
39 *See*, *e.g.*, EEOC, *Religion-Based Charges (Charges filed with EEOC) FY 1997-FY 2022* (last visited Mar. 27, 2024).
40 *Id.*
41 EEOC, *Office of General Counsel Fiscal Year 2023 Annual Report.* In FY 2019, 4.9% of EEOC lawsuits included allegations of religious discrimination; in FY 2020, 5.4%; in FY 2021, 4.3%; in FY 2022, 3.3%.

II. Overview of EEOC Charge Activity, Litigation and Settlements

A. Review of Charge Activity, Backlog and Benefits Provided

As has become common practice over the last several years, the EEOC issued two separate reports providing financial and performance metrics for FY 2023.[42] On November 15, 2023, the Commission issued its Agency Financial Report ("FY 2023 AFR").[43] On March 11, 2024, the EEOC issued its FY 2023 Annual Performance Report ("FY 2023 APR").[44]

In FY 2023, the number of charges filed with the Commission rose by 10% in comparison to the number of charges filed in FY 2022. During the past fiscal year, the EEOC received 81,055 new charges of discrimination, up from the 73,485 charges received in FY 2022. The Commission also states that in FY 2023, it initiated 35 Commissioner charges, up from three in FY 2020, three in FY 2021, and 29 in FY 2022.[45]

Fiscal Year	Number of Charges	% Increase/Decrease
2007	82,792	--
2008	95,402	+15.23%
2009	93,277	-2.23%
2010	99,922	+7.12%
2011	99,947	+0.03%
2012	99,412	-0.54%
2013	93,727	-5.72%
2014	88,778	-5.28%
2015	89,385	+1.01%
2016	91,503	+2.37%
2017	84,254	-7.92%
2018	76,418	-9.30%
2019	72,675	-4.90%
2020	67,448	-7.19%
2021	61,331	-9.07%
2022	73,485	+19.82%
2023	81,055	+9.33%

Separately, the Commission highlights that its merit factor rate for these charges stayed relatively consistent from 18.6% in FY 2022 to 18% in FY 2023.[46] Specifically, the Agency resolved 81,180 charges and secured more than $440.5 million in monetary relief for charging parties during the administrative process. This equates to a 22.3% rise in relation to FY 2022 in which the EEOC received $342 million. The Commission further highlighted the percentage of post-investigation charge resolutions in which the EEOC was able to obtain some form of targeted, equitable relief.[47] Specifically, according to the FY 2023 APR, the EEOC obtained such relief in 98.48% of conciliation agreements during the administrative process.[48]

42 Prior to FY 2019, the EEOC issued one Performance and Accountability Report (PAR) in late fall.

43 EEOC, Fiscal Year 2023 Agency Financial Report, *available at* EEOC-2023 AFR 11.15.23.pdf.

44 EEOC, Fiscal Year 2023 Annual Performance Report, *available at* https://www.eeoc.gov/2023-annual-performance-report.

45 EEOC, Commissioner Charges and Directed Investigations, *available at* https://www.eeoc.gov/commissioner-charges-and-directed-investigations.

46 FY 2023 APR, part B, *Strengthening the Enforcement Capacity of the Agency in the Private Sector.* The EEOC has defined "Merit Resolutions" as charges with outcomes favorable to charging parties and/or charges with meritorious allegations. These include negotiated settlements, withdrawals with benefits, successful conciliations, and unsuccessful conciliations. *See* https://www.eeoc.gov/eeoc/statistics/enforcement/definitions.cfm.

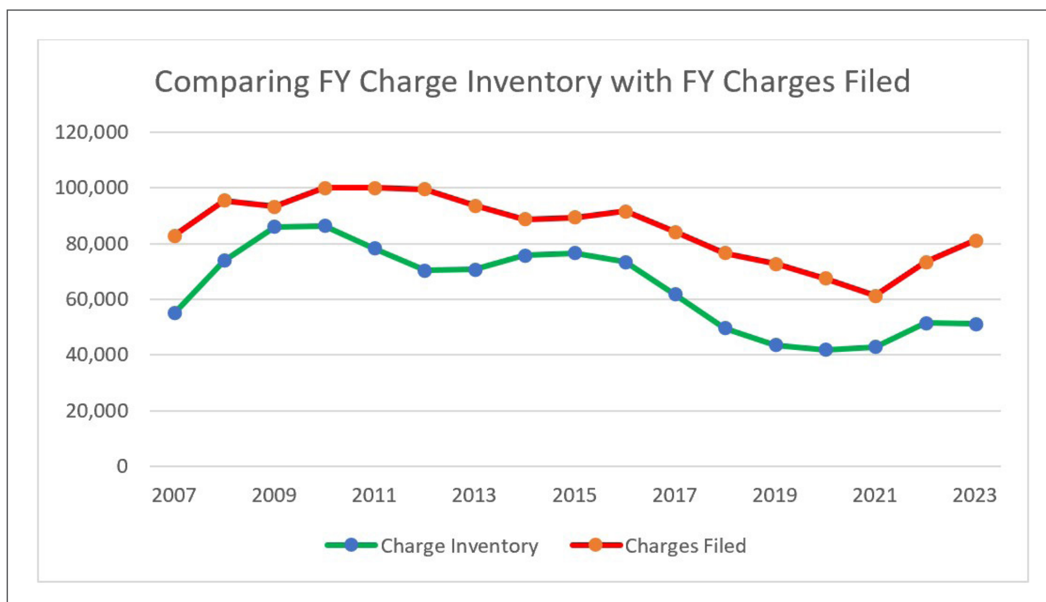
47 The EEOC defines *targeted, equitable relief* as "any non-monetary and non-generic relief (other than the posting of notices in the workplace about the case and its resolution), which explicitly addresses the discriminatory employment practices at issue in the case and either provides remedies to the aggrieved individuals or prevents similar violations in the future. Such relief may include customized training for supervisors and employees, development of policies and practices to deter future discrimination, and external monitoring of employer actions, as appropriate." *Id.*

48 FY 2023 APR, part B, *Strengthening the Enforcement Capacity of the Agency in the Private Sector.*

Overall, the EEOC secured more than $665 million for victims of discrimination in the private sector and local governments.[49] As detailed in the FY 2023 APR, approximately $440.5 million of this total went to 15,143 victims of employment discrimination in the private sector and state and local government workplaces through mediation, conciliation, and settlements. Another $22.6 million was obtained for 968 individuals as a direct result of litigation resolutions, and more than $202 million was awarded to 5,943 federal employees and applicants.[50]

With respect to the backlog of charges, the Agency reported an increased inventory of charges in FY 2023. According to the FY 2023 AFR, at the end of the fiscal year there were 51,100 pending charges, a slight decrease from the 51,399 pending charges at the end of FY 2022.

Fiscal Year	Charge Inventory	% Increase/Decrease
2007	54,970	--
2008	73,951	+34.53%
2009	85,768	+15.98%
2010	86,338	+0.66%
2011	78,136	-9.50%
2012	70,312	-10.01%
2013	70,781	+0.67%
2014	75,658	+6.89
2015	76,408	+0.99%
2016	73,559	-3.73%
2017	61,621	-16.23%
2018	49,607	-19.50%
2019	43,580	-12.15%
2020	41,951	-3.74%
2021	42,811	+2.0%
2022	51,399	+20.0%
2023	51,100	-0.58%



49 *Id.* at part E, *Recovery for Victims of Discrimination*.
50 *Id.*

According to the Commission, managing its charge inventory included fielding 522,132 calls from the public through the Agency's contact center, up from the 475,000 calls received in FY 2022. The EEOC also reportedly handled over 86,000 emails, which represents an increase of over 25% over the prior fiscal year.51 With that said, the Agency has taken steps to address the increased demand for public contact and the increasing charge backlog by hiring more than 493 employees for positions in FY 2023.52 Of these new hires, 338 are front-line staff (*i.e.*, investigators, investigative support assistants, mediators, and attorneys).[53]

With respect to staffing, the EEOC ended the fiscal year with 2,173 full-time employees (FTEs), 6% above the FY 2022 headcount[54]

Fiscal Year	Number of FTEs at End of FY	Number of FTE Increase/ Decrease	Percentage Increase/ Decrease
2007	2,158	---	---
2008	2,176	18	0.83%
2009	2,192	16	0.74%
2010	2,385	193	8.80%
2011	2,505	120	5.03%
2012	2,346	-159	-6.35%
2013	2,147	-199	-8.48%
2014	2,098	-49	-2.28%
2015	2,191	93	4.43%
2016	2,202	11	0.50%
2017	2,082	-120	-5.45%
2018	1,968	-114	-5.48%
2019	2,061	93	4.73%
2020	1,939	-122	-5.92%
2021	1,927	-12	-.62%
2022	2,041	114	5.92%
2023	2,173	132	6%

The Commission touted a number of outreach efforts conducted in the past fiscal year. Specifically, the EEOC prioritized outreach to the small business community.[55] The EEOC hosted 194 small business outreach events reaching 39,066 attendees.[56] In addition, the EEOC reported its collaboration with partner organizations to extend the Agency's reach, which included 1,120 partnership events reaching over 107,000 attendees.[57] The EEOC's outreach numbers exceeded last year's, with "3,318 fee-based and no cost outreach and training events and providing 314,199 individuals nationwide with information about employment discrimination and their rights and responsibilities."[58] Such efforts included:

- Informing the public about the Pregnant Workers Fairness Act through webinars, training, infographics, videos, and appearances on nationally syndicated and local radio stations in Spanish and English that reached over 37 million listeners.
- Increasing digital media products to enhance the public's understanding of the equal employment opportunity laws and their rights and responsibilities under those laws, resulting in the EEOC's website having more than 12 million users, an 11.1% increase over FY 2022.
- Publishing new technical assistance documents to assist EEOC stakeholders.[59]

51 FY 2023 AFR, p. 11.
52 *Id.*
53 *Id.*
54 *Id.*
55 FY 2023 APR, part B: Outreach Targeted to Small, New and Disadvantaged Business.
56 *Id.*
57 *Id.*
58 FY 2023 APR, part A: Prioritizing Private Sector Outreach.
59 FY 2023 APR. *Summary of Fiscal Year 2023 Performance Highlights*.

Finally, since 2020, the EEOC data modernization team has been developing an Agency Record Center (ARC), an end-to-end charge management solution for the Agency's private-sector processes and corresponding FEPA partner processes. The finalized ARC system was deployed on January 18, 2022 to 145 EEOC and FEPA offices. In FY 2023, ARC litigation case management and ARC litigation appeals were delivered to agency users, with the new system continuing to improve collection and validation of information for the EEOC's program data.[60]

B. Systemic Investigations and Litigation

Although most EEOC lawsuits were filed on behalf of individual charging parties, the Commission has continued to demonstrate interest in initiating systemic investigations and litigation. Discrimination is considered "systemic" if it involves a discriminatory pattern, practice or policy that has a broad impact on an industry, company or geographic area. The Commission states in its FY 2023 AFR that addressing systemic discrimination remains:

> central to the mission of the EEOC. Systemic discrimination creates barriers to opportunity that can cause widespread harm to workers, workplaces, and the economy. If not effectively addressed, the discriminatory patterns, practices, and policies persist, leading to more harm to individuals subject to such practices and potentially more individuals filing charges against their employers. A robust systemic program enables the EEOC to make change on a national, regional, or industry level, while helping substantial numbers of employees at once.[61]

During FY 2023 the EEOC filed 25 systemic lawsuits, 17.5% of all merits lawsuits filed, and nearly double the number of systemic lawsuits filed in each of the past three fiscal years.

Year	Merits Case Filings	Systemic Filings	Percentage
2009	281	19	6.8%
2010	250	20	8%
2011	261	23	8.8%
2012	122	10	8.2%
2013	131	21	16%
2014	133	17	12.8%
2015	142	16	11.3%
2016	86	18	20.9%
2017	184	30	16.3%
2018	199	37	18.6%
2019	144	17	11.8%
2020	93	13	14%
2021	116	13	11.2%
2022	91	13	14.3%
2023	143	25	17.5%

Of these 25 lawsuits challenging systemic discrimination, 11 alleged the employers engaged in a pattern or practice of discrimination. The allegations in these lawsuits included "hiring claims based on sex, race, national origin, age, and disability; harassment claims based on sex and race; claims of failure to accommodate and unlawful application of a qualification standard based on disability; discharge claims based on disability, race, color, and retaliation; and an equal pay claim based on sex."[62]

In addition, the Agency resolved 14 systemic lawsuits, obtaining over $11.7 million for 806 affected workers.[63] The EEOC also resolved 35 lawsuits (three of which were systemic cases) alleging harassment (all bases), recovering nearly $9.8 in monetary relief benefiting 184 individuals.

60 FY 2023 APR, Strategic Goal III: Strive for Organizational Excellence Through Our People, Practices, and Technology.
61 FY 2023 AFR, p. 18.
62 *Id.* at 19; *see* also FY 2023 APR, p. 15.
63 FY 2023 AFR, p. 19.

In its FY 2023 AFR, the EEOC notes that it is "continu[ing] to identify and remedy systemic discrimination in all forms and on all protected bases."[64] The Commission reports that during FY 2023 it resolved more than 370 systemic investigations on the merits and obtained more than $29 million in monetary benefits for workers subjected to systemic discrimination. In FY 2023 the EEOC achieved a 100% success rate in its systemic case resolutions.[65]

Fiscal Year	Systemic Lawsuits Filed	Monetary Recovery
2012	12	$36.2 million
2013	21	$40 million
2014	17	$13 million
2015	16	$33.5 million
2016	18	$20.5 million
2017	30	$38.4 million
2018	37	$30 million
2019	17	$22.8 million
2020	13	$69.9 million
2021	13	$24.4 million
2022	13	$29.7 million
2023	25	$11.7 million

At the end of FY 2023, the EEOC had 227 merits cases on its active district court docket, of which 47 (20.7%) were non-systemic, multiple victim cases and 48 (21.2%) involved challenges to systemic discrimination.

Fiscal Year	Number of Total Pending Litigation Cases	Number of Pending Systemic Cases	% of Systemic Cases in Litigation
2012	309	62	20.0%
2013	231	54	23.4%
2014	228	57	25.0%
2015	218	48	22.0%
2016	165	47	28.5%
2017	242	60	24.8%
2018	302	71	23.5%
2019	275	59	21.5%
2020	201	59	29.3%
2021	180	29	16.0%
2022	177	32	18.0%
2023	227	48	21.1%

Meanwhile, the EEOC had resolved 98 merits lawsuits at the federal district court level, and as a result, recovered approximately $22.6 million on behalf of 968 individuals.

64 FY 2023 AFR, p. 18.
65 *Id.*

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

The EEOC filed 143 "merits" lawsuits in FY 2023, of which 86 suits were filed on behalf of individuals—32 of these "multiple victim lawsuits" were non-systemic class suits (typically involving fewer than 20 individuals) and, as noted, 25 were systemic cases.[66]

Year	Individual Cases	"Multiple Victim" Cases (including systemic cases)	ercentage of Multiple Victim Lawsuits	Total Number of EEOC "Merits"[67] Lawsuits
2005	244	139	36%	**381**
2006	234	137	36%	**371**
2007	221	115	34%	**336**
2008	179	111	38%	**270**
2009	170	111	39.5%	**281**
2010	159	92	38%	**250**
2011	177	84	32%	**261**
2012	86	36	29%	**122**
2013	89	42	24%	**131**
2014	105	28	22%	**133**
2015	100	42	30%	**142**
2016	55	31	36%	**86**
2017	124	60	33%	**184**
2018	117	82	41%	**199**
2019	100	44	31%	**144**
2020	68	25	27%	**93**
2021	74	42	21.1%	**116**
2022	53	38	41.8%	**91**
2023	**86**	**57**	**66.2%**	**143**

The EEOC typically files scores of lawsuits at the end of the fiscal year, with FY 2016 and FY 2020 being the notable exceptions. In FY 2022, the EEOC filed at least 57 lawsuits in the last two months of the year, over 60% of all lawsuits filed during the entire fiscal year. This trend continued in FY 2023 with the EEOC filing 69 lawsuits in the month of September alone. Again, the EEOC's end-of-year filings consisted of approximately 60% of all lawsuits filed during the entire fiscal year.

In addition to providing the top states where the EEOC filed lawsuits for FY 2023, the chart below maps out the state trends since 2016 and the number of cases filed in those states.68

66 FY 2023 AFR, p. 17.

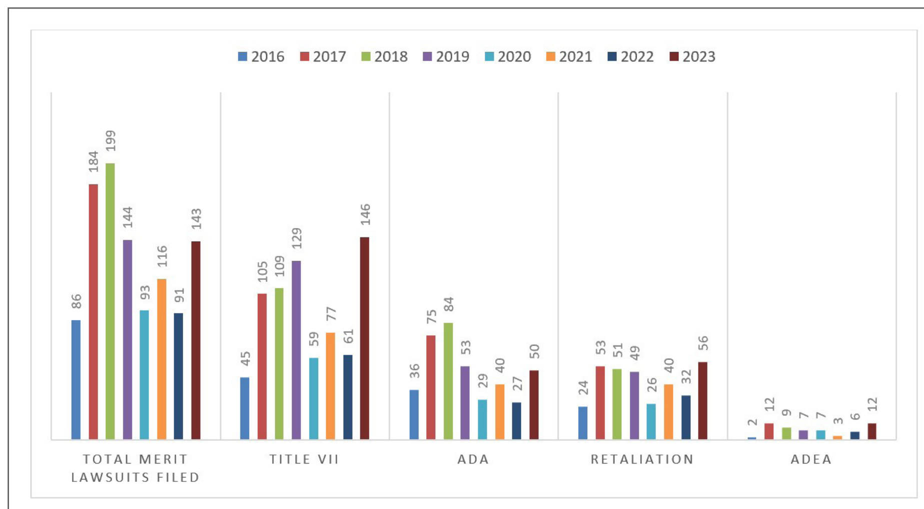
67 *See* FY 2023 AFR, p. 17. The EEOC has defined "merits" suits as direct lawsuits or interventions involving alleged violations of the substantive provisions of the statutes enforced by the EEOC as well as enforcement of administrative settlements.

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

	2017	2018	2019	2020	2021	2022	2023
1	California (20)	California (19)	Florida (13)	Texas (11)	Texas (14)	California (8)	Texas (11)
2	Maryland (16)	Texas (14)	N. Carolina (11)	Florida (9)	Florida (10)	Texas (8)	Florida (10)
3	Texas (16)	Maryland (13)	Texas (10)	California (8)	Illinois (7)	Maryland (7)	Ohio (10)
4	Illinois (13)	Georgia (13)	Maryland (9)	New York (7)	Georgia (6)	Georgia (5)	North Carolina (8)
5	Georgia (10)	N. Carolina (11)	New York (9)	Georgia (6)	Alabama (6)	Florida (5)	California (8)
6	Florida (9)	New York (10)	Georgia (7)	Michigan (6)	Colorado (6)	Washington (5)	Louisiana (7)
7	New York (8)	Florida (9)	Michigan (7)	Arkansas (5)	California (5)	North Carolina (5)	Georgia (7)
8	Tennessee (7)	Michigan (9)	California (6)	Maryland (5)	New York (5)	Louisiana (4)	New York (7)
9	Louisiana 6	Alabama (7)	Minnesota (6)	Ohio (4)	Pennsylvania (5)	Colorado (4)	Illinois (7)
10	Michigan (6)	Illinois (7)	Louisiana (5)	-	Maryland (5)	Wisconsin (4)	Nevada (6)
11	Mississippi (6)	Pennsylvania (7)	Pennsylvania (5)	-	Mississippi (4)	Illinois (2)	Maryland (6)
12	-	Tennessee (7)	Washington (5)	-	N. Carolina (4)	South Carolina (2)	Pennsylvania (5)
13	-	Washington (7)	Alabama (4)	-	-	Arizona (2)	Tennessee (5)
14	-	Wisconsin (7)	Colorado (4)	-	-	Oklahoma (1)	Alabama (5)
15	-	-	Oklahoma (4)	-	-	Arkansas (1)	Michigan (5)
16	-	-	-	-	-	Kentucky (1)	Colorado (4), Virginia, Massachusetts, and Arkansas (3)
17	-	-	-	-	-	Pennsylvania (1)	New Mexico (4)
18	-	-	-	-	-	Nebraska (1)	Oklahoma (3)
19						Tennessee (1)	Virginia (3)
20	-	-	-	-	-	New York (1)	Massachusetts (3)
21	-	-	-	-	-	-	Arkansas (3)

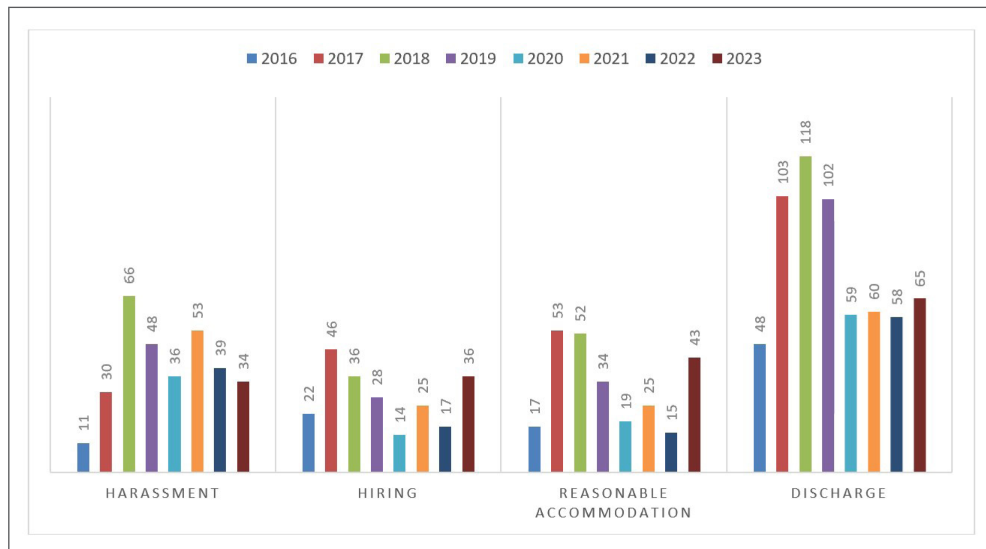
Based on these trends, the states in which the Commission appears to have consistently litigated most heavily include California, Florida, North Carolina, Louisiana, Georgia, and Texas. Interestingly, the EEOC increased the number of lawsuits filed in Ohio significantly in FY 2023.

The 143 "merits" lawsuits filed in FY 2023 alleged a wide range of bases, including retaliation (56), sex (50), disability (43, including 6 involving hearing impairments), race (24), age (12), religion (10), and national origin (8). The issues raised most frequently in these suits were discharge (65), reasonable accommodation (43), hiring (including referral, recall, assignment, and job classification) (36), constructive discharge (34), and harassment (34).[69,70] The following chart shows a year-over-year comparison for the last seven years (FY 2016-2023) for the aforementioned bases of the lawsuits filed by the EEOC.



69 FY 2023 APT, part F, *Challenging Discrimination in Federal District Court*.
70 *Id.*

For the past eight years, the EEOC's reports also provided information on the most frequently identified issues that are the subjects of its litigation efforts.[71] Every year, these most frequently identified issues have been the same – they include harassment, hiring, reasonable accommodations for disabilities, and discharge. The chart below demonstrates the variance by issue for each fiscal year.



D. New Priorities for the EEOC

The EEOC was created in direct response to the call for racial justice and human rights. As such, advancing racial justice in the workplace was one of the major priorities for the EEOC in FY 2023.[72] In its FY 2023 APR, the EEOC states that it furthered this goal by strategically leveraging tools, including education and outreach, technical assistance, and enforcement, to combat discrimination and invoke change on a broader level.[73] The EEOC also educated more than 314,000 individuals nationwide regarding workplace rights and discrimination.[74]

As noted, in FY 2023 the EEOC filed 143 lawsuits, which is more than a 50% increase from FY 2022. The EEOC also filed 19 lawsuits alleging race or national origin discrimination, achieving $4.9 million in relief for 89 individuals.[75]

The EEOC also noted an increased interest in the use of artificial intelligence (AI) and algorithmic fairness in employment decisions.[76] To address this new area of interest, the EEOC built upon the Artificial Intelligence and Algorithmic Fairness Initiative, which ensures that the use of AI complies with federal civil rights laws.[77] Further, the EEOC held a public hearing to examine the use of AI in employment decisions.[78] In 2023, the EEOC also litigated a matter in New York regarding the use of technology and resolved a public conciliation regarding the same.[79]

Throughout 2023, the EEOC demonstrated a clear interest in each of the topics. However, it is notable that in spite of the U.S. Supreme Court's ruling in Students for Fair Admissions, Inc. v. President & Fellows of Harvard College,[80] the flurry of lawsuits challenging private employers' inclusion, equity, and diversity (IE&D) programs and initiatives,[81] and the communications from legislators and state attorneys general to companies over their

71 *Id.*

72 FY 2023 APR, *A Message from the Chair.* Other notable priorities for the Commission for FY 2023 included preventing and remedying unlawful retaliation; enforcing pay equity; supporting diversity, equity, inclusion, and accessibility (DEIA); and addressing the use of artificial intelligence in employment decisions.

73 FY 2023 APR, *A Message from the Chair.*

74 *Id.*

75 FY 2023 APR, *Summary of Fiscal Year 2023 Achievements in Priority Areas.*

76 *Id., Summary of Fiscal Year 2023 Achievements in Priority Areas.*

77 *Id.*

78 *Id.*

79 *Id.* The case at issue is *EEOC v. iTutorGroup, Inc.; Tutor Group Limited; and Shanghai Ping'An Intelligent Education Technology Co. Ltd.*, No. 1:22-cv-02565 (E.D.N.Y. Sept. 8, 2023) ("EEOC alleged that providers of English-language tutoring services to students in China programmed their software to automatically reject female applicants over the age of 55 and male applicants over the age of 65. The EEOC alleged that the defendants failed to hire the charging party and more than 200 other qualified tutor applicants age 55 and older because of their age.")

80 600 U.S. 181 (2023).

81 *See, e.g.*, *Am. Alliance for Equal Rights v. Fearless Fund Mgmt., LLC*, No. 1:23-cv-03424-TWT (N.D. Ga. 2023), on appeal at No. 23-13138 (11th Cir. 2023); *Farkas v. FirstEnergy Corp. et al.*, No. cv-23-986280 (Ohio Ct. Common Pleas Cuyahoga Cty.); *Grande v. Hartford Board of Education et al.*, No. 3:24-cv-00010-JAM (D. Ct. 2024).

IE&D programs, the EEOC continues to promote the fostering and advancement of diversity, equity, inclusion, and accessibility.[82] Indeed, the Commission approved a strategic plan on August 11, 2023 in which it indicates that "[e] nhanc[ing] diversity, equity, inclusion, and accessibility in the workplace" is one of eleven key strategies that the EEOC remains focused on in order to achieve its mission.[83]

E. Mediation Efforts

In its FY 2023 APR, the EEOC notes that it achieved 7,471 successful mediations out of the 10,404 conducted (*i.e.*, 72% success rate), resulting in $201.2 million in monetary benefits for complainants through its mediation program.84 Due to the pandemic, the EEOC's mediation program has conducted only telephone and video mediations since March 2020. Overall, the EEOC reports that the vast majority of participants (98.6% of employers and 92% of charging parties) indicated they would be willing to participate in the mediation program again if the situation were to arise.[85]

F. Significant EEOC Settlements and Monetary Recovery

During FY 2023, the EEOC secured approximately $440.5 million for parties in private sector and state and local government workplaces through mediation, conciliation, and settlements.[86] The EEOC's efforts in conciliation and pre-determination settlement alone resulted in $45 million for claimants during this period. According to the EEOC, it successfully resolved 46.7% of conciliations, an increase from the 44% resolution rate in FY 2022.[87]

During the past fiscal year, the EEOC entered into at least nine consent decrees and eight conciliation agreements for at least $500,000, six more than in FY 2022. Eight of these settlements equaled or exceeded $1 million, verses six in the prior year.

In terms of allegations, seven settlements involved claims of sexual harassment or sex discrimination, six included allegations of race discrimination or harassment, four involved disability claims, one was based on age discrimination, and one included allegations of failure to accommodate employees' religious beliefs. The EEOC included claims of retaliation in at least five of these high-dollar settlements.

Appendix A of this Report includes a description of these and other notable consent decrees and conciliation agreements averaging $500,000 or more, as well as significant judgments and jury verdicts. Particularly noteworthy is an $8 million nationwide ADA settlement entered into in early FY 2023 involving ADA and pregnancy claims, which was resolved in conciliation and announced by the EEOC on November 29, 2022. According to the EEOC press release, based on multiple discrimination changes, the EEOC determined that "it had reasonable cause to believe [the employer] denied reasonable accommodations to pregnant employees and those with disabilities, subjecting them to actions such as involuntary unpaid leave, retaliation, requiring employees be 100% healed to return to work, or terminations." Based on the reported injunctive relief, the company "agreed to update its policies, as needed; appoint a coordinator to provide oversight on pregnancy-related disability policies, requests for reasonable accommodations, and maintenance of records; conduct climate surveys and exit interviews with specific attention to their accommodation process; conduct anti-discrimination training to all employees, including management; and require performance evaluation of managers include consideration of compliance with EEO laws."[88]

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

One systemic investigation resolved for $3.8 million affecting a class of 106 employees involved claims the company's COVID-19 vaccination policy failed to accommodate employees' religious beliefs and/or disabilities. This matter was initiated by an ADA and Title VII Commissioner charge.

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82 FY 2023 APR, pp. 4, 15, 17.
83 *Id.* at 37-38.
84 *Id.*
85 *Id.*, part I, Continued Focus on Alternative Dispute Resolution.
86 FY 2023 APR, Summary of Fiscal Year 2023 Performance Highlights.
87 FY 2023 APR, part H, Continued Focus on Conciliation.
88 *See* EEOC Press Release dated November 29 2022, at https://eeoc.gov.

Another systemic investigation alleged a company's non-job-related physical abilities test unlawfully screened out women applicants. Under the terms of the conciliation agreement, the company agreed to pay $592,000 to 58 female job applicants, and discontinue the use of the test. If the company implements a new hiring-related test, it must develop procedures for its implementation as well as train staff responsible for identifying, analyzing, or approving such tests.

One settlement reached right after the fiscal year ended included claims of disability and genetic discrimination. In this case, the EEOC alleged the defendant's hiring process violated the ADA and the Genetic Information Nondiscrimination Act (GINA) by requiring applicants to pass a pre-employment medical exam, during which they were required to divulge past and present medical conditions. The EEOC also alleged the defendant used qualification criteria that tended to screen out qualified individuals with disabilities.

Under the terms of the 27-month consent decree, the defendant agreed to pay $1 million to 498 applicant class members, review and revise its ADA and GINA policies, direct their medical examiners not to request family medical history, consider the medical opinion of the applicant's physician, instruct applicants how to request a reasonable accommodation if needed, and provide training.

G. Appellate Cases

The EEOC increased its participation as *amicus curiae* in U.S. appellate courts in FY 2023, filing at least 34 amicus briefs, including three in the U.S. Supreme Court. The EEOC also filed briefs in at least four appellate cases in which it was a party the past fiscal year. In addition to these pending cases, appellate courts have issued decisions in four cases, discussed below, involving the EEOC.

1. Decision in Favor of the EEOC

In one case decided in FY 2023, the Seventh Circuit addressed whether an employee with cataracts in both eyes was entitled to a modified work schedule as an accommodation under the ADA, to make his commute safer.[89] "[T]he answer is 'maybe,'" the court concluded, reversing summary judgment in favor of the employer.

The employee in the case worked as a call center operator on the 12:00 p.m. to 9:00 p.m. shift at the company's facility, a one-hour drive from where he lived. After being diagnosed with cataracts in both eyes, which made his vision blurry, an optometrist recommended that even if he wore glasses, he should avoid driving at night. Public transit was not available on his schedule, and the employee asked for a modification of his work schedule so he could start earlier and leave earlier. The company granted his request, allowing him to start at 10:00 a.m. and end at 7:00 p.m., but only for 30 days. When the company denied his request to extend this schedule, the employee filed a charge with the EEOC. After conciliation efforts failed, the EEOC filed a lawsuit claiming the company failed to accommodate the employee's disability, in violation of the ADA. The district court granted summary judgment to the employer, holding that the employer had no obligation to accommodate the employee because his disability did not affect his ability to perform any essential function of his job once he arrived at the workplace.

On appeal, the Seventh Circuit analyzed the requirements for a work schedule accommodation to facilitate an employee's commute to work: "We have no doubt that getting to and from work is in most cases the responsibility of an employee, not the employer. But if a qualified employee's disability interferes with his ability to get to work, the employee may be entitled to a work-schedule accommodation if commuting to work is a prerequisite to an essential job function, such as attendance in the workplace, and if the accommodation is reasonable under all the circumstances."

As to the first issue, all parties agreed that commuting to work was an essential function of the employee's job in this case. With respect to the reasonableness of a scheduling adjustment as an accommodation to facilitate the employee's commute, the court examined the statutory language and history of the ADA, noting that part-time or modified work schedules appeared in the illustrative list of accommodations, and that the legislative history also discussed modified work schedules to enable disabled people to get to work when public transportation "is not currently fully accessible." Nevertheless, the court noted, the employee requesting the accommodation must still show that the proposed accommodation would ameliorate the disability, not merely serve personal preferences or convenience, noting that "[a]n employee who has chosen to live far from the workplace or failed to take advantage

89 *EEOC v. Charter Commc'ns*, 75 F. 4th 729 (7th Cir. 2023).

of other reasonable options, including public transportation, will rarely if ever be entitled to an employer's help in remedying the problems." The employee must also show that the requested accommodation would be effective. Moreover, the court stated, even if the employee makes this preliminary showing, the employer can show the requested accommodation would unduly burden the business's operation because of costs or other matters, such as administrative difficulties.

Examining the specific facts of this case, the court concluded that, although an employer need not provide the exact accommodation an employee requests, here the employee's requested accommodation of a schedule change was reasonable because it would have allowed him to commute more safely to work to perform his essential job functions. The court also rejected the employer's argument that the proposed accommodation was inadequate because the employee would still have to drive at least one way in darkness during the winter. "An accommodation that mitigates the employee's difficulty need not cure all problems," the court stated, pointing out that the accommodation would alleviate driving in the dark most of the time. In addition, the court emphasized, the employer failed to demonstrate that the accommodation would have imposed an undue hardship.

Accordingly. The Seventh Circuit reversed summary judgement for the employer in this case. Significantly, however, the court refused to establish "bright-line rules as to when an employee's disability interferes with essential job attendance or whether particular accommodations are reasonable." Those questions, the court concluded, "are reserved for analysis under the facts of a particular case. But if a qualified individual's disability substantially interferes with his ability to get to work and attendance at work is an essential function, an employer may sometimes be required to provide a commute-related accommodation, if reasonable under the circumstances."

2. Decisions in Favor of the Employer

In a significant case involving the limitations on the EEOC's subpoena power, the Eleventh Circuit held that an EEOC subpoena for nationwide information in the investigation of a discrimination claim against a local facility was too broad in scope.[90] The employee in the case, who worked at one of the employer's locations in Alabama, complained to the EEOC that he was terminated in violation of the ADA following a series of disability-related FMLA absences.

The EEOC issued requests to the employer for information on every employee terminated for attendance-related infractions at each of the employer's seven domestic facilities around the country, regardless of whether the employees were disabled or had taken FMLA leave. When the company objected to the scope of the requests, the EEOC issued a subpoena and sought enforcement in federal court. The district court ordered the company to provide the information for the facility in which the employee worked but refused to enforce the subpoena as to information from other facilities, holding that nationwide information was not relevant to the EEOC's charge. The EEOC appealed.

In support of its nationwide subpoena, the EEOC claimed, among other things, that even if the charge is brought by one employee, directed at one facility, the nationwide data was relevant because the company's attendance policy applied to all its U.S. facilities. The Eleventh Circuit rejected this argument, reiterating its holding in *EEOC v. Royal Caribbean Cruises, Ltd.*, 771 F.3d 757, 761 (11th Cir. 2014), that a subpoena for the investigation of an individual charge must be relevant "to the contested issues that must be decided to resolve that charge, not relevan[t] to issues that may be contested when and if future charges are brought by others."

Although the U.S. Supreme Court has broadly construed the term "relevant" to mean "virtually any material that might cast light on the allegations against the employer," the court stated, "it also cautioned against so 'generously constru[ing] the term relevant,' as to render the statutory relevance requirement 'a nullity.'" Holding the EEOC's "incredibly broad subpoena" for information "relevant" to the charge in this case would, the Eleventh Circuit concluded, "construe that term so broadly as to render it a 'nullity.'"

A Fifth Circuit opinion issued this past fiscal year involved two employers: 1) a for-profit management company that the owner described as a "Christian" business, and 2) a nondenominational Christian church.91 Both organizations, which refused to employ individuals who are homosexual, bisexual, transgender, or "gender non-conforming," sued the EEOC seeking declaratory judgments exempting them, and other similarly situated

90 *EEOC v. Eberspaecher North America Inc.*, 67 F.4th 1124 (11th Cir. 2023).

91 *Braidwood Management v. EEOC*, 70 F.4th 914 (5th Cir. 2023).

employers, from the EEOC's enforcement guidance following the U.S. Supreme Court's decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), which held that discrimination against homosexual and transgender individuals is discrimination "on the basis of sex," in violation of Title VII.

The plaintiffs moved to certify two classes: 1) all employers that oppose hiring homosexual or transgender individuals for sincere religious reasons and 2) all employers that oppose their hiring for religious or nonreligious reasons. The district court certified a religious-business-type employers' class and a church-type employers' class, which the court held were exempt from Title VII. On the merits, the court granted summary judgment on some, but not all, of the plaintiffs' claims. Both sides appealed.

On appeal, the Fifth Circuit first addressed issues of standing and ripeness, finding in favor of the plaintiffs on both issues. As to class certification, the Fifth Circuit reversed certification of both classes, finding the class definitions "too broad and ill-defined to reach the thresholds of class certification," for a number of reasons. First, the court stated, "the class definitions are based on the class members' state of mind." In addition, the court noted, it cannot determine whether employers' codes of conduct are similar enough in practice "that their lawfulness can be resolved 'in one stroke.'" The "religious-business-type employers" class was also impermissibly vague and imprecise, the Fifth Circuit stated, because the court would be required to determine whether religion played an important role in an organization, a determination that "can be made only on a case-by-case basis."

Addressing the merits of the plaintiffs' claims, the Fifth Circuit held that, as a religious institution, the church was covered by the express statutory religious exemption to Title VII. The management company was also exempted from complying with Title VII's prohibitions against sex discrimination under the Religious Freedom Restoration Act (RFRA), the court held, because compliance "would substantially burden its ability to operate per its religious beliefs about homosexual and transgender conduct." Noting that the EEOC did not challenge the sincerity of the company's deeply held religious beliefs regarding biological sexual identity, the court rejected the EEOC's argument that "the only action that [the company] is required to take under Title VII is to refrain from taking adverse employment actions." That argument, the court stated, "is tantamount to saying the only action [the company] needs to take is to comply wholeheartedly with the guidance it sees as sinful. That is precisely what RFRA is designed to prevent."

The Fifth Circuit also found that the EEOC failed to meet its burden to establish that its interpretation of Title VII advances a "compelling government interest" and is the "least restrictive means of furthering that compelling governmental interest." In this regard, the court concluded, "[a]lthough the Supreme Court may some day determine that preventing commercial businesses from discriminating on factors specific to sexual orientation or gender identity is such a compelling government interest that it overrides religious liberty in all cases, it has never so far held that."

3. Decision with Mixed Results

The Fifth Circuit also addressed the issue of reasonable accommodations under the ADA.[92] The employee in the case was a hospital patient care technician who injured her back on the job while turning a patient. The employee applied for and received FMLA leave. While on leave, she sought help from HR to find an alternative job as an accommodation for her disability. The HR director told the employee's supervisor there was nothing the hospital could do for her and that she should "just resign." The supervisor relayed the message to the employee, but instead of resigning, she applied for a vacant scheduling coordinator position in the hospital's surgery department. The employee met the minimum qualifications for the position, and her application was forwarded to the hiring manager who selected another candidate based on the hospital's "categorical policy" of hiring "the most qualified applicant available" for every vacancy.

The EEOC filed suit challenging the hospital's most-qualified-applicant hiring policy as a violation of the ADA because the policy "categorically declines to reassign disabled employees to vacant positions for which they are qualified." The district court dismissed the claim, granting summary judgment to the hospital, concluding that "[t]he EEOC has not demonstrated that [the hospital's] policy of requiring disabled employees to compete with non-disabled applicants to hire the best candidate runs afoul of the ADA."

92 *EEOC v. Methodist Hospitals of Dallas*, 62 F.4th 938 (5th Cir. 2023).

On appeal, the Fifth Circuit noted that the ADA specifies that reasonable accommodations may include reassignment to a vacant position and proceeded to outline the two-step test in *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002) for determining when such reassignment is required. First, the employee "need only show that an 'accommodation' seems reasonable on its face, *i.e.*, ordinarily or in the run of cases.... If the plaintiff cannot demonstrate that a requested accommodation is reasonable in the run of cases, he or she 'nonetheless remains free to show that special circumstances warrant a finding that' although 'the ADA may not trump in the run of cases[], the requested 'accommodation' is 'reasonable' on the particular facts."

Applying the first step of *Barnett*, the Fifth Circuit agreed with the district court, and other circuit courts addressing the issue, that mandatory reassignment in violation of the hospital's most-qualified applicant policy would not be reasonable "in the run of cases." The court held, however, that the district court failed to address the second step of *Barnett* – whether there are special circumstances that warrant a finding that the requested accommodation is reasonable on the particular facts of the case. Accordingly, the court vacated summary judgment in favor of the employer and remanded the case to the district court to determine whether the EEOC can raise a genuine dispute of material fact as to whether there are special circumstances that would make an exception to the hospital's most-qualified-applicant policy a reasonable accommodation in this particular case.

In addition to its challenge to the hospital's most-qualified applicant policy, the EEOC also claimed that, based on the facts of the case, the employer failed to provide a reasonable accommodation to the employee in violation of the ADA. After providing temporary, light-duty pharmacy work as a reasonable accommodation, the court noted, the hospital approved the employee's FMLA leave multiple times and then offered additional leave as an accommodation. Reviewing the history of the interactions between the employee and the hospital, the court found it was the employee, not the hospital, who withdrew from the interactive process by failing to respond to the hospital's letters offering her additional leave. "[A]n employee's 'unilateral withdrawal from the interactive process is fatal to [her] claim,' so long as the employer 'engage[d] in a good-faith, interactive process with [the employee] regarding [her] request for a reasonable accommodation,'" the court held, citing prior Fifth Circuit decisions. As to the statement by the HR representative that the employee should resign, the court noted that it was made prior to hospital's offer of additional personal leave, and it therefore did not terminate the interactive process required under the ADA, nor did it result in the employee's termination. Accordingly, the Fifth Circuit upheld summary judgment for the hospital on the failure to accommodate claim.

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

III. EEOC AGENCY AND REGULATORY-RELATED DEVELOPMENTS

A. EEOC Leadership

Three years into the Biden administration, the Equal Employment Opportunity Commission (EEOC) for the first time begins a new year with a majority of Democratic members. With the Senate's confirmation last July of Commissioner Kalpana Kotagal, whose term is scheduled to expire in 2027, the Commission now has three seated Democratic members. As of this writing, the Commission is chaired by Democratic Commissioner Charlotte A. Burrows, whose term (her third) expires in July 2028. Vice Chair Jocelyn Samuels, also a Democrat, is serving her second term, which will expire in July 2026. The remaining two commissioners are Republicans Keith Sonderling, whose term expires in July 2024, and Andrea R. Lucas, whose term expires in July 2025. Also noteworthy, in October 2023, the Commission finally saw the confirmation of a presidentially appointed general counsel, Karla Gilbride. Throughout most of the Biden administration, that position had been filled on an acting or interim basis by career staff in the general counsel's office.

The chair of the Commission exercises significant control over the administrative duties and operations of the agency and its 53 offices around the country, which perform the vast majority of day-to-day operations, such as investigation, mediation, and litigation. The chair also has broad discretion in setting the Commission's agenda—what items the agency will consider and vote upon, and which it will not—as well as scheduling meetings of the Commission to examine issues or vote on disputed matters. Significant policy changes, however, require the approval of a majority of the full Commission.

Since until recently Chair Burrows has not had a Democratic majority on the Commission during her tenure as chair, as practical matter, the agency has been limited in its ability to revisit polices from the prior administration, or to move forward on new substantive policies in line with the Biden administration's agenda. With a Democratic majority on the Commission through at least the remainder of the administration, it is likely the Commission will attempt to move forward on broader policy objectives that previously lacked the support of a majority of Commissioners. Indeed, media reports and the Commission's website indicate that the number of votes taken by the Commission on matters ranging from litigation recommendations to amicus briefs has increased dramatically since Commissioner Kotagal assumed her seat.

B. Delegation of Litigation Authority

One significant policy we expect the Commission may revisit is the limitation adopted near the very end of the prior administration on the general counsel's authority to file suit without the approval of the Commission. As it currently stands, the delegation of authority provides that the full Commission must vote to approve all:

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

Perhaps more notable, even where cases do not fall within the above criteria, the current delegation provides that before filing any case, the general counsel must circulate it to all commissioners for a period of five business days. If during that period a majority of the commissioners notifies the general counsel and the other commissioners that the case should be submitted to the Commission for a vote, the litigation may not be filed without approval of the majority of the Commission. This means that, as a technical matter, a majority of

commissioners can effectively "veto" the filing of a case (first by requiring that it be presented for a Commission vote, then by voting to disapprove the recommendation to file suit), although with a Democratic majority unlikely to vote against proposed litigation, we think those instances will be extremely rare.

C. Continuing COVID-19 Concerns

1. Issues Arising from "Long COVID"

As the public health emergency relating to pandemic was ending, EEOC published guidance on how COVID and in particular "long COVID" may raise issues of discrimination under the ADA.[93] The guidance includes common examples of possible reasonable accommodations for employees with long COVID, ranging from a quiet workspace, use of noise cancelling devices, and uninterrupted worktime; alternative lighting and reducing glare to address headaches; rest breaks; and a flexible schedule or telework (discussed in more detail below) to address fatigue, noting that many of these are low or no-cost accommodations. As the agency is facing a significant rise in charges arising from vaccine mandates and requests for medical and particularly religious accommodations, the longer-term impact of the pandemic on workplace policies has yet to be fully realized.

2. COVID-19 and Remote Work

Over the last few years, the EEOC has brought suits against employers alleging they violated the ADA by failing to allow employees to work remotely as a reasonable accommodation.

Most recently, in March 2023, the agency brought suit against a financial processing company based in Columbus, Georgia alleging that the company violated the ADA when in 2020, during the course of the COVID pandemic, it denied a request to telework as a reasonable accommodation from an employee who faced increased risk if she contracted the virus.[94] The lawsuit alleges that at the time of the denial, most of the coworkers in her department were working remotely, and that following an exposure to COVID in the company's workplace, she was forced to resign when her existing leave expired. That case is currently pending in district court.

Prior to the pandemic, courts (and to a lesser extent, the EEOC itself) would often conclude that physical attendance at the worksite was an essential function of a job, or that allowing an employee to work remotely for an extended period constituted an "undue hardship" under the ADA. Given the countless number of workers who pivoted to remote work (either partially or fully) during the pandemic, in some instances it may be more difficult to make the argument now that an employee who successfully teleworked during the pandemic now must work "in person" at the worksite when such employee requests telework as a reasonable accommodation.

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

D. New Agency Priorities

As the agency now has a Democratic majority, we expect activity around a number of items the new chair and administration have articulated as priorities.

1. Pregnant Workers Fairness Act

In December 2022, as part of the year-end budget bill, Congress passed and President Biden signed into law the Pregnant Workers Fairness Act (PWFA).[95] Modeled after the ADA, the PWFA expands protections for pregnant employees and applicants by requiring employers with 15 or more employees to make reasonable accommodations to known limitations related to pregnancy, childbirth, or related medical conditions, even where such limitations

93 EEOC, Press Release, *EEOC Releases Update to Covid-19 Technical Assistance* (May 15, 2023).

94 EEOC, Press Release, *EEOC Sues Total Systems Services for Disability Discrimination and Retaliation* (Mar. 29, 2023).

95 *See* Mark T. Phillis and Jessica L. Craft, *Congress Expands Protections for Pregnant Employees and Employees Who Are Nursing*, Littler ASAP (Dec. 28, 2022).

do not rise to the level of a covered disability under the ADA. Employers must do so by engaging in an interactive process with a qualified employee or applicant covered by the PWFA to determine a reasonable accommodation, provided it does not impose an undue hardship on the employer. Additionally, an employer may not require an employee covered by the PWFA to take paid or unpaid leave if another reasonable accommodation is available. The PWFA also protects employees covered by the PWFA from retaliation, coercion, intimidation, threats, or interference if they request or receive a reasonable accommodation.

On April 15, 2024, the EEOC released its final rule implementing the PWFA. The EEOC's rule takes an exceedingly broad view of whether, when, and for how long an employer must extend such accommodations, including an expansive definition of medical conditions relating to pregnancy. Since the U.S. Supreme Court's 2015 *Young v. UPS* decision, employers have increasingly accommodated pregnant workers in the manner in which they would accommodate requests based on a disability (at least insofar as a pregnancy-related limitation rose to level of an impairment covered under the ADA). The PWFA and the EEOC's regulations codify and significantly extend these employer obligations.[96]

2. Compensation Data Reporting

Narrowing the pay gap continues to be a key EEOC priority, and we fully expect that the agency will move forward in 2024 on some proposal to collect compensation data from employers. By way of background, during the Obama administration, the EEOC revised its Form EEO-1 to require employers to report detailed information about employee compensation and hours worked, broken out by race, ethnicity, and gender. The Trump administration discontinued this collection (although a federal court ultimately found the discontinuation of the collection unlawful and ordered the agency to collect two years of pay data).

Subsequently, a National Academy of Sciences (NAS) panel evaluated the compensation data collected by the EEOC to determine its utility, and in July of 2022 published its report analyzing the EEOC's previous pay data collection effort.[97] Chair Burrows emphasized the NAS's finding that, done properly, pay data collection could assist the agency in rooting out pay discrimination. In response, then-Commissioner Janet Dhillon, a Republican, highlighted a number of flaws NAS discussed in its analysis of the agency's prior effort, as well as NAS's conclusions that the EEOC's pay data collection had used a faulty measure of pay measurement, outdated job categories, and pay bands that were overly broad, thus limiting limited the collection's utility. Republican Commissioner Sonderling likewise noted NAS's conclusions that the EEOC had used flawed methodology, failed to conduct a pilot program, and had issues with the quality of the data collected. Put simply, both proponents and detractors of pay data collection found support for their position in NAS's report.

We predict it is highly likely that the Biden EEOC will attempt again to require employers to submit employee compensation data to the agency in a future, revised iteration of the EEO-1; whether the collection mirrors what was previously done or adopts a different approach that takes into account NAS recommendations remains to be seen. It is also unclear whether the agency will advance any such proposal by way of notice-and-comment rulemaking under the Administrative Procedure Act, or proceed (somewhat ironically) under the so-called Paperwork Reduction Act, as it did in its prior pay data collection.[98] Finally, depending on how promptly the Commission moves on this initiative, new reporting requirements may come in the 2024 or 2025 reporting cycle.

3. Discrimination Influenced by or Arising from "Local, National, or Global Events"

Increasingly, employers are finding themselves being called upon to weigh in on social issues and current events that often are divisive and potentially controversial. This frequently puts employers in the difficult position of having to navigate among numerous stakeholders, including their employees, particularly where staying quiet is simply not an option. In the past, the EEOC has recognized that these issues may result in increased discrimination against certain groups, and has issued or held hearings to explore the topic (for example, backlash against Muslim

96 *See* Devjani Mishra, Mark T. Phillis, and Jessica L. Craft, *EEOC Releases Expansive Final Regulations to Implement the Pregnant Workers Fairness Act*, Littler Insight (Apr. 17, 2024).

97 EEOC, Press Release, *EEOC Announces Independent Study Confirming Pay Data Collection is a Key Tool to Fight Discrimination* (July 28, 2022).

98 In general, the Administrative Procedure Act (APA) requires the agency to engage in a more thorough analysis, and more fully justify its collection efforts. It also provides for a private right of action. The Paperwork Reduction Act (PRA) provides for less accountability to the public, although the government must still examine the burden of any collection of information as measured against its utility. The most recent pay data collection adopted by the Commission in 2016 was done by way of the PRA.

and Arab workers in the wake of 9/11, or increased discrimination against Asian Americans at the start of the COVID pandemic). The inclusion of this priority in the latest Strategic Enforcement Plan (SEP) suggests that the agency will continue to be sensitive to the effects that events and activities wholly outside the workplace—including the number of global conflicts raging and a certain-to-be divisive presidential election on the horizon—can and do have real world impact in the employment context.

4. Artificial Intelligence in Employment Decision-Making

In October 2021, the EEOC launched an initiative relating to the use of artificial intelligence (AI) in employment decision-making.[99] As stated by the agency, the initiative is intended to examine how technology impacts the way employment decisions are made, and give applicants, employees, employers, and technology vendors guidance to ensure that these technologies are used lawfully under federal equal employment opportunity laws. Since that time, the agency has issued a number of technical assistance documents, and held a lengthy public meeting examining the use of AI in the workplace and its interaction with federal civil rights laws.

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

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

Continuing this effort, in January 2023, the Commission held a public hearing examining the implications of artificial intelligence and machine learning in employment decisions. At that hearing, entitled "Navigating Employment Discrimination in AI and Automated Systems: A New Civil Rights Frontier," the Commission heard testimony from a range of stakeholders, including academics, representatives of employers, privacy advocates and others. Notably excluded from the witness list were any actual employers using AI tools in practice, and the vendors or creators of AI employment tools. This absence was noted by both Republican commissioners present.

At the meeting, a number of witnesses repeatedly expressed concern that, depending on the data on which an algorithmic tool is based, these tools might perpetuate existing patterns of bias in the workplace. Consumer and privacy advocates stressed their view that "without guardrails," data-driven technology is likely to cause harm in the workplace, or, as one witness claimed, "inevitably lead to disparities." Others noted that even where an algorithm is shown to be highly predictive based on correlation (for example, a tool determining that candidates who preferred a certain hobby would be more successful employees), correlation itself is insufficient, and the agency should require a showing of causation as well. A number of witnesses focused on the "structural bias" that may be

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

contained in existing data sets (such as credit reports or arrest and conviction records) and urged the EEOC to take the position that "de-biasing" an algorithm, even where decisions to do so are based on race or other protected characteristics, is lawful under civil rights laws. Finally, there seemed significant consensus that AI tools should be subject to audit requirements to ensure they are non-biased, although few offered specifics as to what these audits might look like, or how they might practicably be conducted.

In May 2023, the Commission published additional technical assistance, this time relating to the use of AI in employee selection procedures, and concerns those practices raise under Title VII of the Civil Rights Act of 1964. The document begins by noting that while Title VII applies to all employment practices, including recruitment, monitoring, evaluation, and discipline of employees, it is intended to address AI issues only with regard to "selection procedures," such as hiring, promotion, and firing. It defines "artificial intelligence" with reference to the National Artificial Intelligence Initiative Act of 2020 as "a machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations or decisions influencing real or virtual environments," and notes that in the employment context, this has typically meant reliance on an automated tool's own analysis of data to determine which criteria to use when making decisions. The Commission offers a number of examples of AI tools used in the employment selection procedures, including:

> [R]esume scanners that prioritize applications using certain keywords; employee monitoring software that rates employees on the basis of their keystrokes or other factors; 'virtual assistants' or 'chatbots' that ask job candidates about their qualifications and reject those who do not meet pre-defined requirements; video interviewing software that evaluates candidates based on their facial expressions and speech patterns; and testing software that provides 'job fit' scores for applicants or employees regarding their personalities, aptitudes, cognitive skills, or perceived 'cultural fit' based on their performance on a game or on a more traditional test.

The technical assistance document is expressly focused on potential disparate or adverse impact resulting from the use of such tools and does not address issues of intentional discrimination via the use of AI-driven tools in making employment selection procedures. Generally speaking, adverse or disparate impact may result when an employer uses a facially neutral test or selection procedure that excludes individuals based on protected characteristics such as sex, race, color, or religion in disproportionate number. An employer can justify the use of a neutral tool that has an adverse impact where the use of such tool is "job-related and consistent with business necessity" and there is no less-discriminatory alternative that is equally effective. The application of disparate impact principles, and the assessment of whether a selection tool is lawful under Title VII, is generally governed by the Uniform Guidelines on Employee Selection Procedures (UGESP) adopted by the EEOC in 1978.

Insofar as it does not create new policy, the scope of the technical assistance is limited. That said, it does include several key takeaways for employers using selection tools that incorporate or are driven by AI:

- *Liability for Tools Designed or Administered by a Vendor or Third Party.* The guidance notes that where an AI-powered selection tool results in disparate impact, an employer may be liable even if the test was developed or administered by an outside vendor. The EEOC recommends that in determining whether to rely on an outside party or vendor to administer an AI selection tool, the employer consider asking the vendor what steps it has taken to evaluate the tool for potential adverse impact. It further notes that where a vendor is incorrect in its assessment (for example, informing the employers that the tool does not result in an adverse impact when in fact it does), the employer may still be liable.
- *The "Four-Fifths Rule" is Not Determinative.* UGESP has long noted the "four-fifths rule" will "generally" be regarded as a measure of adverse impact—but that it is not dispositive. By way of background, the four-fifths rule provides that where a selection rate for any race, sex, or religious or ethnic group is less than 80 percent (four-fifths) of the rate of the group with the highest selection rate, that generally indicates disparate impact. For example, assume an employer uses a selection tool to screen 120 applicants (80 male, 40 female) to determine which advance and receive an interview. The tool determines that 48 men and 12 women should advance to the interview round. The "selection rate" of the tool is 60% for men (48/80) but only 30% for women (12/40). The ratio of the two rates is 50% (30/60). Because 50% is less than 80% (four-fifths), the tool would generally be viewed as having an adverse impact under the four-fifths rule. The technical assistance document notes that while the four-fifths rule is a useful "rule of thumb," it is not

an absolute indicator of disparate impact—smaller differences in selection rates may still indicate adverse impact where, for example, the tool is used to make a large number of selections, or where an employer may have discouraged certain applicants from applying. The guidance notes that the EEOC may consider a tool that passes the four-fifths test to still generate an unlawful adverse impact if it nevertheless results in a statistically significant difference in selection rates.

- *Employers Should Self-Audit Tools.* Finally, the technical assistance urges employers to self-audit selection tools on an ongoing basis to determine whether they have an adverse impact on groups protected under the law, and, where it does, consider modifying the tool to minimize such impact. While such modification may be lawful going forward, employers are urged to explore this issue closely with counsel, insofar as it may implicate both disparate treatment and disparate impact provisions of Title VII under existing Supreme Court precedent.

We continue to expect that the agency will ramp up its activity in this space, whether through additional hearings, sub-regulatory guidance, or technical assistance, in the coming year.

5. Sexual Orientation and Gender Identity Issues

In June 2021, the agency updated its website[100] and issued a "technical assistance document" regarding issues relating to LGBTQ workers, and what the EEOC is now terming "SOGI (Sexual Orientation/Gender Identity) Discrimination."[101] This was the first substantive update of EEOC guidance in this area since the Supreme Court's 2020 decision in *Bostock v. Clayton County*, in which the Court held that Title VII's prohibition on sex discrimination extends to include discrimination on the basis of sexual orientation and gender identity. Most notably, the document makes clear the EEOC's position that where an employer maintains separate restrooms for men and women, Title VII requires employers to allow employees to use the facility that corresponds to their gender identity, rather than assigned sex at birth. In addition, on March 31, 2022, the EEOC announced that it had revised its discrimination charge intake process to include a non-binary gender option.[102]

In the absence of a Democratic majority, the chair had been limited to publishing technical assistance on these issues; documents of this sort do not require Commission approval and may be issued solely on the authority of the chair. That said, technical assistance documents are not supposed to create new Commission policy, and purport to be limited to applying existing law and policy to new sets of facts (although the SOGI technical assistance has been criticized as perhaps going beyond this line). With a firm majority in place, we expect this may be an area where we see more robust guidance from the agency in the future. Employers navigating these issues in their workplaces should consult with counsel to ensure that legal and practical considerations are adequately met.

6. Anti-Harassment Guidance

In September 2023, the Commission published for public comment a draft update of its Enforcement Guidance on Harassment in the Workplace, which has not been significantly revised since 1999. The proposed guidance addresses a number of significant issues that have become more prominent in the intervening years, including protections for LGBTQ workers, the Supreme Court's decisions in *Bostock v. Clayton County* (which held that Title VII's prohibition on discrimination because of sex includes discrimination based on sexual orientation or gender identity), and the intersection of religious freedom in the workplace and civil rights protections. If adopted, the guidance, while lacking the force of law, will provide insight into how the agency interprets and enforces Title VII and other statutes, particularly where statutory language or intent may be ambiguous.

By way of background, in 2015, the Commission created a Select Task Force on the Study of Harassment in the Workplace, co-chaired by then-Commissioners Chai R. Feldblum (D) and Victoria A. Lipnic (R). Over the course of a year and a half, the Task Force held a number of public hearings, which culminated in a 2016 report as to its findings, including a number of recommendations and best practices for prevention of harassment in the workplace. On the heels of that report, in 2017, the Commission published draft guidance on workplace harassment for public comment; that draft guidance was never finalized.

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

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

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

On April 29, 2024, the Commission released the long-awaited final guidance, which replaces five prior guidance documents on workplace harassment, and covers harassment based on race, color, religion, sex (including pregnancy, childbirth or related medical conditions; sexual orientation; and gender identity), national origin, disability, age (40 or older) and genetic information.[103] The guidance includes approximately 90 pages of text and an additional 80 pages of annotation that includes 387 footnotes, citing various court decisions with brief explanations of the cases and other supporting authority for the guidance.

* * *

As the era of a restrained EEOC has come to an end, and as the balance of political power at the agency shifts, we likely can expect more aggressive regulation and enforcement for the balance of the Biden administration. As the thousands of charges of discrimination arising out of the COVID-19 pandemic, vaccination mandates, and return-to-work requirements are investigated and processed administratively, we will be monitoring to see trends in litigation (both EEOC-instituted and brought by private parties), as well as how the courts now deal with the thorny legal questions raised by nearly three years of a pandemic that has reshaped much of the employment landscape.

103 EEOC, EEOC-CVG-2024, *Enforcement Guidance on Harassment in the Workplace* (Apr. 29, 2024). *See also* Jim Paretti and Barry Hartstein, *EEOC Updates Workplace Harassment Guidance*, Littler Insight (Apr. 30, 2024).

IV. Scope of EEOC Investigations and Subpoena Enforcement Actions

A. EEOC Investigations

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

1. EEOC Authority to Conduct Class-Type Investigations

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

The Commission enjoys expansive authority to investigate systemic discrimination stemming from its broad legislated mandate.[104] 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."[105]

Title VII also authorizes the EEOC to issue charges on its own initiative (*i.e.*, commissioner's charges),[106] 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.[107]

2. Scope of EEOC's Investigative Authority

The touchstone of the EEOC's subpoena authority is the text of its originating statute. By statute, the Commission's authority to request information arises under Title VII, which permits it "at all reasonable times have access to . . . any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this subchapter and is relevant to the charge under investigation."[108] The leading case interpreting the scope of this authority is the U.S. Supreme Court decision *EEOC v. Shell Oil Co.*,[109] 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."[110] 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."[111]

104 *See* 42 U.S.C. § 2000e-5(b).

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

106 *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").

107 *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").

108 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.

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

110 *Id.* at 59.

111 *Id.*

What if the initial reason for the charge no longer exists? Courts of appeals for the Ninth and Seventh Circuits have already held that, even if the EEOC issues a right-to-sue letter or even if the charge is withdrawn, the EEOC's authority to investigate remains unabated.[112] 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*.[113] 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.[114] While the federal appellate courts have been split on this issue,[115] 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.[116]

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."[117] This established, for the *Union Pacific* court, that the EEOC's authority is not derivative.[118] 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*."[119] The upshot is that, however disposed of, the outcome of a valid charge in the Seventh Circuit does not seem to determine or define the EEOC's authority. The Ninth Circuit in *EEOC v. VF Jeanswear LP* reaffirmed its position that the EEOC's power to investigate instances of discrimination extend beyond the allegations of the individual charging party.[120] 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."[121]

a. Applicable Timelines for Challenging Subpoenas (Waiver issue)

As part of its investigative authority, the EEOC can and does issue subpoenas to employers seeking information or data. An employer may challenge an EEOC subpoena, but may be barred from doing so in a subpoena-enforcement action in circumstances where it fails to challenge or modify the subpoena in accordance with statutorily-imposed deadlines.[122] 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.[123] 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."[124]

112 *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).

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

114 *Id.* at 845.

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

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

117 *Id.* at 291.

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

119 *Id.*

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

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

122 *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).

123 *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).

124 29 C.F.R. § 1601.16(b)(1).

Over the past decade, the EEOC has taken an aggressive stance on this "waiver" issue when dealing with employers that have generally failed to respond to its requests for information and subpoenas. The most notable case on this issue is the Seventh Circuit's 2013 decision in *EEOC v. Aerotek,*[125] in which a federal appeals court supported the EEOC's position that an employer waived the right to challenge a subpoena by failing to file a Petition to Modify or Revoke. In *Aerotek*, a staffing agency was accused of placing applicants according to the discriminatory preferences of its clients. The EEOC's subpoena sought a "broad range of demographic information, including the age, race, national origin, sex, and date of birth of all internal and contract employees dating back to January 2006," in addition to information about recruitment, selection, placement, and termination decisions by the company and its clients. Despite receiving from the company about 13,000 pages of documents in response to the subpoena, the EEOC claimed the company failed to provide additional requested information. In addition, although the staffing agency had filed objections to the EEOC's petition, the objections were filed one day beyond the statutorily required five days. The district court determined that the company's objections were waived and ordered it to comply with a broadly worded subpoena, which had been pending for more than three years, because the company filed objections with the agency six days after receipt. The Seventh Circuit agreed with this decision, finding that the defendant "has provided no excuse for this procedural failing and a search of the record does not reveal one ... We cannot say whether the Commission will ultimately be able to prove the claims made in the charges here, but we conclude that EEOC may enforce its subpoena because [defendant] has waived its right to object."[126]

Since *Aerotek*, there have been examples where a court has disagreed with the EEOC's contention that an employer has waived objections to a subpoena due to its failure to timely or properly petition for revocation or modification of the subpoena. Those courts have scrutinized the justifications offered by an employer for failing to file a petition to modify or revoke within the five-day period and have applied the four-factor test articulated in *EEOC v. Lutheran Social Services*.[127]

In *Lutheran*, the U.S. Court of Appeals for the D.C. Circuit held that there is a "strong presumption that issues parties fail to present to the agency will not be heard . . ." but it also stated that the court should still consider "whether the facts and circumstances surrounding [non-compliance] are sufficiently extraordinary" to excuse non-compliance.[128] It further explained that factors that may amount to such exceptional circumstances include whether (1) the subpoena advised the recipient of the five-day petition deadline expressly or by citing the relevant law or regulation; (2) the agency investigator informed the subpoena recipient of the missed deadline; (3) the subpoena recipient repeatedly raised its objections to the agency in some form other than a revocation petition; and (4) the objections are not within the "special competence" of the EEOC.[129] The *Lutheran* court also suggested, however, that this standard would be "quite different" in the more "typical situation where a subpoena recipient's objections rest on relevance."[130]

This past fiscal year, the EEOC continued to scrutinize carefully whether an employer has timely challenged any subpoenas issued by the agency. In *EEOC v. Ferrellgas, L.P.,*[131] the Eastern District of Michigan granted the EEOC's application to enforce a subpoena. In the agency proceedings, the respondent failed to either respond to the subpoena or to properly challenge it. Citing the requirement for a respondent to file a petition to revoke or modify a subpoena within five days after service of the subpoena, the court found that the right to challenge the subpoena had been forfeited. Further, the court held that the respondent had also failed to present a basis for not enforcing the subpoena because all three requirements of the subpoena enforcement application were met: (1) the charge was valid and the EEOC was authorized to investigate it; (2) the material requested in the subpoena was relevant to the charge; and (3) the respondent failed to show that the subpoena was indefinite or made for an illegitimate purpose.[132]

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125 *EEOC v. Aerotek*, 498 Fed. Appx. 645 (7th Cir. 2013).
126 *Id.* at 648.
127 *EEOC v. Lutheran Social Servs.*, 186 F.3d 959 (D.C. Cir. 1999).
128 *Id.* at 959.
129 *Id.* at 964-66.
130 *Id.* at 959.
131 *EEOC v. Ferrellgas, L.P.*, 2023 U.S. Dist. LEXIS 25721 (E.D. Mich. Feb. 15, 2023).
132 *Id.* at *3-6 (citing *Univ. of Pa. v. EEOC*, 493 U.S. 182, 191 (1990)).

b. Procedural Issues

It is well established that to bring and maintain an enforcement action, certain procedural requirements must be met. For example, in 2020 the Fifth Circuit addressed whether these procedural requirements were satisfied in EEOC v. Vantage Energy Services, Inc.[133] Specifically, the issue on appeal was whether a "later-verified intake questionnaire" was sufficient to constitute a charge under the ADA's requirement that charges be filed within 300 days.[134]

In *Vantage Energy Services*, the claimant worked on a deep-water drillship for the defendant, and suffered a heart attack while at sea.[135] The defendant subsequently placed him on short-term disability leave, and on the day he was due to return to work, the defendant fired him, citing poor work performance.[136] The claimant, through his legal counsel, submitted a letter to the EEOC asserting the defendant had violated the ADA, and included with the letter an EEOC intake questionnaire.[137] The questionnaire included the claimant's name, address, nature of the discrimination claim, and the defendant's stated reason for the termination.[138] The claimant also checked the box at the end of the questionnaire, which stated that he "wanted 'to file a charge of discrimination' and 'authoriz[ed] the EEOC to look into the discrimination' claim," and included his unverified signature.[139]

After receiving the intake questionnaire from the claimant, the EEOC added a charge number to the questionnaire, handwriting it at the top of the document.[140] This number remained the same throughout the course of the matter.[141] The EEOC then sent the claimant two letters, which, respectively, acknowledged receipt of the "charge" and requested him to supplement the questionnaire with his address and phone number.[142] The defendant also received notice of the charge, but was informed no action was required pending receipt of a perfected charge.[143]

The perfected charge, belatedly received by the EEOC, was signed under the penalty of perjury, and was dated more than 300 days after the claimant's job termination.[144] Upon receipt of the perfected charge, the EEOC informed the defendant and requested a position statement, which the defendant submitted.[145]

After conducting an investigation, the EEOC determined there was reasonable cause to believe that the defendant violated the ADA, and the parties submitted to conciliation, which was unsuccessful, resulting in the filing of an enforcement action.[146] The defendant moved to dismiss the EEOC's complaint, arguing that it failed to exhaust administrative remedies because the formal charge was filed more than 300 days after the employee's termination.[147] The EEOC opposed the motion, asserting that the intake questionnaire, which was filed within 300 days, satisfied the requirement to exhaust administrative remedies, and it was inconsequential that the intake questionnaire was not verified pursuant *Edelman v. Lynchburg College*.[148]

Although the district court was persuaded by the defendant and dismissed the EEOC's enforcement action with prejudice, the Fifth Circuit reversed the decision, noting that the defendant's arguments, upon which the district court relied, were "all contrary to considerable precedent."[149] The Fifth Court first explained that the Supreme Court previously ruled in *Federal Express Corp. v. Holowecki*[150] that an intake questionnaire could qualify as a charge if it satisfied the charge-filing requirements and could be construed as a request for the agency to take remedial action.[151] Because the claimant's intake questionnaire in *Vantage Energy Services* identified the parties, described

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

the action complained of, specifically, the claimant's belief that the defendant had discriminated against him by discharging him immediately after finishing his short-term disability leave, and indicated that the claimant wanted to file a charge and authorized the EEOC to investigate the alleged conduct, the Fifth Circuit concluded that the intake questionnaire satisfied the *Holowecki* test.[152]

In reaching this conclusion, the Fifth Circuit noted that the EEOC's treatment of the questionnaire was ambiguous because it emphasized the need for the claimant to verify the intake questionnaire, but also had assigned it a charge number. Still, it determined that, while instructive, "the EEOC's characterization of the questionnaire is not dispositive. What constitutes a charge is determined by objective criteria."[153]

Relying on *Edelman*, the appeals court also ruled that the fact the intake questionnaire was not verified upon receipt or within the 300-day filing deadline did not render the charge untimely.[154] It explained that the purposes of the verification requirement was to protect employers from the expense and disruption of a claim unless it was supported by an oath subject to the liability for perjury.[155] The Fifth Circuit reiterated that, under *Edelman*, this purpose is maintained if the technical defect, such as a lack of verification, is corrected by the time an employer must respond to the charge.[156] Thus, because the claimant eventually complied with the verification requirement, it "related back" to the time the intake questionnaire was filed.[157]

Finally, the Fifth Circuit rejected the defendant's argument that its due process rights would be violated if the intake questionnaire was treated as a charge because it did not receive formal notice of the charge within 10 days of the EEOC's receipt, as required by 42 U.S.C. § 20003-5(e)(1).[158] The court rejected the argument because the defendant failed to demonstrate what prejudice it suffered by the delay, and there was no evidence of bad faith on part of the EEOC.[159]

3. Standard for Reviewing Subpoena Enforcement

The Supreme Court in FY 2017 decided what standard a court of appeals should use when reviewing a district court's decision to enforce or quash an EEOC subpoena. While almost all circuits used the deferential abuse-of-discretion standard, the Ninth Circuit had stood alone in applying the more searching *de novo* standard. Such was the state of the law until the Court's 2017 decision,[160] in which it brought the Ninth Circuit into line with her sister circuits. Rejecting the Ninth Circuit's approach, the Court held that a district court's decision to enforce an EEOC subpoena should be reviewed for abuses of discretion, not *de novo*.[161] 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."[162] For the Court, each favored a more deferential standard. While the Court explained that district courts need not defer to the EEOC on what is "relevant," it did emphasize Shell Oil's "established rule" that the term "relevant" be understood "generously" to permit the EEOC "access to virtually any material that might cast light on the allegations against the employer."[163]

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

As discussed, the EEOC usually is given wide latitude to investigate charges of discrimination, provided it can demonstrate it acted within the scope of its authority and the information sought is relevant and reasonable in scope.

152 *Id. at **7-9.*
153 *Id. at **9-10.*
154 *Id.* at *11.
155 *Id.*
156 *Id.*
157 *Id.* at **11-12.
158 *Id.* at *13.
159 *Id.*
160 *McLane Co. v. EEOC*, 137 S. Ct. 1159 (2017).
161 *Id.* at 1170.
162 *Id.* at 1166-67.
163 *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.

As a result, a district court typically will enforce a subpoena issued by the agency, unless the subpoenaed party can show judicial enforcement of the subpoena would be an abuse of process or create an undue burden. For example, in *EEOC v. Ferrellgas*, the EEOC issued a subpoena to a respondent during its investigation into a charge of sex and race discrimination filed by a job applicant who alleged she was conditionally hired and then unlawfully fired.[164] The employer alleged the charging party was terminated because she failed to disclose two misdemeanor convictions on her criminal record. The charging party claimed the employer discriminated against her by not hiring her for certain positions based on her race and sex, paying her less than her male counterparts, and discharging her because of her race and sex. The EEOC's subpoena sought various information on job applicants. The respondent declined to respond, claiming the subpoena was unsigned, overly broad, unduly burdensome, and not relevant to the charge. After the EEOC issued a signed subpoena, the respondent again declined to respond, objecting to the scope of the subpoena.[165]

The court granted the EEOC's application for an order to show cause why the subpoena should not be enforced, reasoning that the respondent had forfeited its right to challenge the subpoena under 29 C.F.R. § 1601.16(b)(1) and, in any event, failed to present a basis for not enforcing the subpoena. Specifically, the court rejected the respondent's arguments that the information requested in the subpoena lacked relevance to the charge, and that gathering the information sought would be unduly burdensome. As to relevance, the court held that the information requested (driving position applications) was relevant to the charge because it could "provide[] context for determining whether discrimination has taken place."[166] While the respondent provided information about applicants from one location over the past three years, this disclosure did not diminish the relevance of the additional information requested by the subpoena. Additionally, although the respondent claimed compliance would take two weeks of one full-time employee's time, and that the number of applications was in the hundreds, the respondent failed to show how compliance would impact its normal daily operations. Therefore, the court ordered the respondent to comply.[167]

Even documents containing confidential information may be subject to disclosure in response to an EEOC's subpoena—albeit with certain limitations—as exemplified in *EEOC v. Security Industry Specialists*, Inc.[168] In *Security Industry Specialists*, the EEOC filed an application for an order enforcing an administrative subpoena against the defendant, which was issued in connection with the EEOC's investigation into a charge of alleged discrimination by a former employee who provided security services for the defendant at a site of a third-party company. The court granted the EEOC's application for enforcement, but thereafter, the third party filed a motion to intervene and an application for a protective order, seeking to protect its confidential information (including the location of a business site which was not publicly known) from improper disclosure to the public. The third-party company cited the EEOC's status as a public agency subject to requests under the Freedom of Information Act in support of its motion.[169]

The court granted the third party's motion to intervene in the subpoena enforcement action to effectuate full and efficient resolution of the action, and further decided that the defendant was permitted to redact information that was not necessary to the charge of discrimination, including the location of the third party's business site whose location is confidential and not publicly known. It also allowed the defendant to redact further information that was not relevant to the action, including dollar amounts of actual or proposed payment rates made by the third party to the defendant.[170]

A recent decision from the Eleventh Circuit in *EEOC v. Eberspaecher North America Inc.* underscores a nuanced limitation on the EEOC's subpoena authority.[171] In *Eberspaecher*, the charging party, a former employee, filed a charge with the EEOC alleging he experienced discrimination on the basis of a disability when he was fired after accruing points under the respondent's point system for absences and tardiness, where his absences were disability-related. During its investigation, the EEOC uncovered information suggesting that the same discriminatory practice might have affected other employees for the respondent across the country, so it, in turn, filed a commissioner's charge against a single respondent facility rather than the corporate headquarters of the respondent. Pursuant

164 *Id.* at **1-2.
165 *Id.* at *5.
166 *Id.* at *5.
167 *Id.* at **5-7.
168 *EEOC v. Security Industry Specialists, Inc.*, 2023 U.S. Dist. LEXIS 164838 (N.D. Cal. Sept. 15, 2023).
169 *Id.* at **2-4.
170 *Id.* at **3-4.
171 *EEOC v. Eberspaecher North America, Inc.*, 2023 U.S. App. LEXIS 11466 (11th Cir. 2023).

to the charge, the EEOC requested nationwide information regarding the respondent's employees discharged pursuant to the attendance policy. The respondent refused to provide the information, noting that the underlying charge was specific to only one of respondent's facilities. In response, the EEOC issued a subpoena seeking the same information, and the respondent refused to comply. In response to an application for enforcement of the subpoena, the district court ordered the respondent to comply with the subpoena in part. Though the district court agreed with the Commission that the temporal and subject matter scope of the subpoena was "both relevant and reasonable in light of the Commissioner's ADAAA charge," it limited enforcement to the respondent facility stating: "[T]he geographic scope of the subpoena is too broad when read in conjunction with the Commissioner's Charge and Notice."[172] The district court further concluded that only records pertaining to the violations of the ADA at the facility were relevant and must be produced. The Eleventh Circuit affirmed the decision of the district court, citing the fact that the charge was specific to only one facility, and failed to provide notice of an investigation into the company's facilities nationwide.[173]

More information on the EEOC's subpoena enforcement activities for FY 2023 can be found in Appendix C to this Report.

B. Conciliation Obligations Prior to Bringing Suit

Before filing a lawsuit under Title VII based on pattern-or-practice claims under Section 707 or "class" claims under Section 706, the EEOC must investigate and then try to eliminate any alleged unlawful employment practice by informal methods of conciliation.[174] Only after pursuing such conciliation attempts may the EEOC file a civil action against the employer.[175] 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.

1. Impact of *Mach Mining*

Over the years employers have challenged the sufficiency of the EEOC's investigation and conciliation efforts. In April 2015, the Supreme Court addressed EEOC conciliation obligations in *Mach Mining v. EEOC*.[176] In this case, the Court held that the EEOC's attempts to conciliate a discrimination charge prior to filing a lawsuit *are* judicially reviewable, but that the EEOC has broad discretion in the efforts it undertakes to conciliate.

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

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

On remand, the EEOC moved to strike part of *Mach Mining's* memorandum in opposition to the EEOC's motion for partial summary judgment because it contained information from confidential settlement discussions (and the EEOC wished to bar any future disclosure of "anything said or done" during conciliation).[177] The U.S. District Court

172 *EEOC v. Eberspaecher North America, Inc.*, 2021 U.S. Dist. LEXIS 264693 (N.D. Ala. Aug. 30, 2021).
173 *Eberspaecher*, 67 F. 4th at 1132-34, 1136.
174 42 U.S.C. § 2000e-5(b).
175 42 U.S.C. § 2000e-5(f)(1).
176 *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645 (2015).
177 *EEOC v. Mach Mining, LLC*, 161 F. Supp. 3d 632, 635-636 (S.D. Ill. 2016).

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."[178] The court also held that the defendant-employer had no right to inquire about calculations for damages during the conciliation process.[179]

2. Investigation and Conciliation Obligations Post-*Mach Mining*

Courts continue to apply *Mach Mining* to clarify how charges and conciliations affect the EEOC's authority to investigate and conciliate. As discussed, pursuant to Mach Mining, the EEOC "must try to remedy unlawful workplace practices through informal methods of conciliation" prior to filing suit.[180]

For example, in *EEOC v. Hospital Housekeeping Services*,[181] in response to a motion for summary judgment filed by the EEOC, the defendant alleged the EEOC did not conciliate in good faith, and the District of Arkansas cited *March Mining* to note its "narrow" and "barebones" review of the EEOC's conciliation obligation. The court underscored the simple two-step inquiry that is to be applied when reviewing whether the EEOC met its conciliation obligations: (1) whether the EEOC "inform[ed] the employer of the specific allegation … describing both what the employer has done and which employees (or what class of employees) have suffered as a result," and (2) whether the EEOC has "engaged 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."[182] Applying the two-step test, the court granted the EEOC's motion for summary judgment and held the EEOC met its conciliation obligation because it informed the employer of the specific allegations against it in a reasonable cause letter.[183]

In *EEOC v. Princess Martha, LLC*,[184] the Middle District of Florida emphasized the same narrow review but declined to grant the EEOC's motion for judgment on the pleadings as to the defendant's failure to conciliate defense, opining that to grant judgment in the EEOC's favor on that affirmative defense was premature in light of the lack of any evidence indicating that the alleged failure to conciliate rendered the conditional defense inaccurate.

Similarly, in *EEOC v. American Flange and Greif*, Inc.,[185] the EEOC moved for partial summary judgment with respect to one of two defendant's affirmative defenses, which asserted that the EEOC did not meet its statutory obligation to attempt conciliation with that defendant. Specifically, defendant Greif's fourth affirmative defense to the EEOC's complaint asserted that the EEOC did not meet its pre-suit statutory obligation to attempt conciliation with Greif. In response to the EEOC's motion for summary judgment as to that affirmative defense, Greif argued that the EEOC failed to give it notice and an opportunity to conciliate. Based on its review of emails evidencing that the EEOC provided notice and attempts to confer about the charging party's charge, the court disagreed, and granted the EEOC's motion.[186] According to the court, per *Mach Mining*, the EEOC need only show that it tried "to engage the employer in some form of discussion," and the emails showed that it did. The court also noted that even if the EEOC failed to meet its pre-suit obligations, Greif's requested remedy—dismissal of the EEOC's claims against it—would be improper. Instead, the appropriate remedy when an employer succeeds on its failure-to-conciliate defense is to stay the case and order the EEOC to seek the employer's voluntary compliance.[187]

In *EEOC v. Telecare Mental Health Services of Washington, Inc.*,[188] the Western District of Washington examined whether the EEOC met its conciliation obligations prior to filing its lawsuit against the defendant. In its answer to the EEOC's complaint, the defendant brought an affirmative defense alleging failure to exhaust administrative remedies, which the court presumed was based on the EEOC's failure to attempt the required "informal methods of conciliation" prior to bringing suit.[189] The defendant brought this defense because at the charge stage, it responded

178 *Id.* at 635-636.
179 *Id.* at 635.
180 *Mach Mining*, 575 U.S. at 482.
181 *EEOC v. Hospital Housekeeping Services*, No. 2:21-cv-2134, 2023 U.S. Dist. LEXIS 39812 (W.D. Ark. Mar. 9, 2023).
182 *Id.* at *5 (citing *Mach Mining*, 575 U.S. at 494) (internal brackets omitted).
183 *Id.* at *6.
184 *EEOC v. Princess Martha, LLC*, 2023 U.S. Dist. LEXIS 88238 (M.D. Fla. May 19, 2023).
185 *EEOC v. American Flange and Greif, Inc.*, No. 21 C 5552, 2023 U.S. Dist. LEXIS 129587 (N.D. Ill. July 27, 2023).
186 *Id.* at **13-14, **21-26.
187 *Id.* at *25.
188 *EEOC v. Telecare Mental Health Servs. of Washington, Inc.*, 2022 U.S. Dist. LEXIS 55657 (W.D. Wash. Mar. 28, 2022).
189 *Id. at *4 & n.2.*

to the EEOC's "formal offer to conciliate" and "initial demand" with a counteroffer that was "communicated to the EEOC as an opening offer for conciliation purposes,"[190] and, instead of proceeding to conciliation, the EEOC filed a Notice of Conciliation Failure and then filed suit in federal court.[191] The EEOC brought a motion to strike the defendant's affirmative defense, arguing that under *Mach Mining*, the court lacked authority to evaluate the sufficiency of the conciliation.[192]

The Western District of Washington denied the EEOC's motion to strike, holding that "[t]he allegations before the Court do not indisputably demonstrate that EEOC met its conciliation obligations."[193] The court observed that to the contrary, "the facts show that the EEOC sent [the defendant] what amounts to a single 'take it or leave it' offer (while apparently failing to advise [the defendant] that that is what it was), did not respond to [the defendant]'s counteroffer, and unilaterally declared its conciliation efforts a failure."[194] "It is at the very least a matter of debate whether this exchange of letters can be characterized as a 'discussion.'"[195] The court reiterated that while *Mach Mining* "makes clear that the scope of judicial review of the EEOC's conciliation efforts is narrow," the scope of review still "extends as far as is necessary to determine whether a conciliation in fact took place."[196]

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

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.

Notably, in *EEOC v. CVS Pharmacy, Inc.*,[197] 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.[198]

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."[199] 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).[200] 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.[201]

4. Evidence/Documents Relating to Conciliation

Title VII expressly provides that nothing said or done during the conciliation process "may be used as evidence in a subsequent proceeding without the written consent of the persons concerned."[202] In a 2008 decision, *EEOC v. CRST Int'l, Inc.*, the Northern District of Iowa granted the EEOC's motion to strike from the record a letter containing proposed terms of conciliation.[203] 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

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190 *Id.* at *3.
191 *Id.*
192 *Id.* at **1, 6.
193 *Id.* at *5.
194 *Id.* at **5-6.
195 *Id.* at *6 (citing *Mach Mining*, 575 U.S. at 488).
196 *Id.*
197 *EEOC v. CVS Pharmacy, Inc.*, 809 F.3d 335 (7th Cir. 2015).
198 *Id.* at 340-41.
199 *Id. at 341-42.*
200 *Id.* at 342.
201 *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.
202 42 U.S.C. § 2000e-5(b).
203 *EEOC v. CRST Int'l, Inc.*, 351 F. Supp. 3d 1163, 1174 (D. Iowa 2018).

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."[204]

The Middle District of Tennessee recently provided further insight into the confines of Title VII's conciliation confidentiality protections in the absence of consent by both parties to the conciliation. Specifically, in *EEOC v. Whiting-Turner Construction Co.,*[205] the EEOC filed a motion to quash one paragraph of a subpoena issued by the defendant to a non-party job placement agency which had previously conciliated the matter with the EEOC. Paragraph 13 of the subpoena sought "any and all documents, property, and ESI which relate to any charges of discrimination filed against [the subpoenaed party] with any federal, state or local EEO agency (including the Equal Employment Opportunity Commission and the Tennessee Commission on Human Rights)," in connection with the project at issue in the case.[206] It specified that the response should include, but not be limited to, "charges and complaints, statements of position, correspondence, notes, settlement and/or conciliation agreements (including drafts), [and] responses to requests for information."[207]

The EEOC objected to Paragraph 13 of the subpoena, arguing that Title VII's confidentiality protections prevented disclosure of information regarding conciliation proceedings, and further that conciliation-related documents were not relevant to any claims or defenses in the action because they are inadmissible as evidence "without the written consent of the persons concerned," which the EEOC had not given.[208] In response, the defendant argued that the majority of the information it requested in Paragraph 13, including the final conciliation agreement between the subpoenaed party and the EEOC (if any) was "purely factual material" and therefore not subject to Title VII's confidentiality protections.[209]

Observing that Title VII's confidentiality protections protect materials reflecting what was "said or done" during conciliation efforts, but does not protect "purely factual information about the merits of the charge, gleaned by the [EEOC] during its conciliation endeavors," the court granted in part and denied in part the EEOC's motion to quash.[210] The court opined that although "proposals and counter-proposals of compromise made by the parties during [conciliation efforts]" fell under Title VII's confidentiality protections, any final agreement between the EEOC and the subpoenaed party, if one existed, was *not so protected.*[211] At the same time, the court expressed no opinion as to objections that the subpoenaed party might make on its own behalf.[212]

In *EEOC v. Heartfelt Home Healthcare Services, Inc.,*[213] the EEOC was directed to show cause why the attorney-client or other privilege should attach between itself and the charging party. Specifically, there were questions as to whether the EEOC had an obligation to share settlement offers with the charging party during the conciliation process. The Western District of Pennsylvania held that while courts have recognized the existence of a privilege under different rationales, the EEOC failed to provide sufficient evidence for the same in this particular case.[214] Further, it emphasized that even assuming privilege had attached for purposes of the litigation, it would not extend to communications made during the pre-suit investigative process.[215] In response to a question of whether the employer could require the charging party to participate in a mandatory alternative dispute resolution process, the court also held that the charging party was required to so participate.[216]

204 *Id.* at 1175 (citing *Mach Mining*, 575 U.S. at 493).
205 *EEOC v. Whiting-Turner Construction Co.*, 2022 U.S. Dist. LEXIS 140900 (M.D. Tenn. Aug. 8, 2022).
206 *Id.* at **4-5.
207 *Id.* at *5.
208 *Id.* at *6 (citing 42 U.S.C. § 2000e-5(b)).
209 *Id.* at **6-7.
210 *Id.* at **8-9.
211 *Id.* at **14-15 (emphasis added).
212 *Id.* at *15.
213 *EEOC v. Heartfelt Home Healthcare Services, Inc.*, 2023 U.S. Dist. LEXIS 17116 (W.D. Pa. Jan. 30, 2023).
214 *Id.* at **1-3.
215 *Id.* at *3 (citing *EEOC v. Texas Roadhouse, Inc.*, 2014 U.S. Dist. LEXIS 125867 (D. Mass. Sept. 9, 2014) ("The EEOC concedes that communications between claimants and witnesses and EEOC investigators and staff, during the investigative process, are not, of course, attorney work product.").
216 *Id.* at *2.

V. Review of Noteworthy EEOC Litigation and Court Opinions

A. Pleadings

1. Motion to Dismiss/Scope of Complaint

Although the courts continue to liberally construe the EEOC's complaints in response to a motion to dismiss filing by the employer, some basic pleading requirements must still be met. In 2019, for example, a federal district court in Florida placed some limitations on the liberal pleading standard, requiring the EEOC to plead separate counts for each of its claims.[217] In this case, the EEOC filed a complaint against the employer, alleging Title VII race discrimination. The employer moved to dismiss, and in response, the EEOC asserted that the employer misunderstood its legal theories, which included claims for both disparate impact and disparate treatment under Title VII. The court determined that the EEOC had failed to set forth its claims of disparate impact and disparate treatment separately, rejecting the EEOC's argument that it was not necessary to do so. Citing to F.R.C.P. Rule 10(b), the court explained, "[i]f doing so would promote clarity, each claim founded on a separate transaction or occurrence … must be stated in a separate count."[218] The court directed the EEOC to file an amended complaint with separate counts and facts in support of each count of discrimination.

In a unique circumstance, a district court in Texas considered a motion to dismiss filed by the EEOC alleging lack of subject matter jurisdiction. The employer brought an Administrative Procedure Act (APA) action against the EEOC, challenging the validity of an EEOC charge and seeking declaratory and injunctive relief on judicial review of the EEOC's issuance of right-to-sue letters.[219] In 2012, the employer received notice of a commissioner's charge stating that the EEOC was investigating the employer for possible ADA and GINA violations. Six years later, the EEOC concluded its investigation and issued 54 right-to-sue letters. The employer filed the APA action, and the EEOC moved to dismiss, arguing that the court lacked subject matter jurisdiction because a right-to-sue letter did not constitute a final agency action subject to judicial review. The court disagreed, finding that a right-to-sue letter satisfied both prongs of finality, because the EEOC had "ruled definitively," and the right-to-sue letter was an action from which legal consequences would flow. The court also determined that the employer sufficiently alleged a legal wrong, and was without an adequate alternative remedy to remedy that wrong. Accordingly, the court held that the issuance of a right-to-sue letter constituted a "final agency action" that was subject to judicial review and denied the EEOC's motion to dismiss.[220]

More recently, in *EEOC v. Murica*,[221] defendant argued in support of its motion to dismiss that the district court lacked subject matter jurisdiction over claims brought by the EEOC on behalf of several charging parties because the individuals also pursued private discrimination lawsuits. After filing its motion, but prior to receiving a report and recommendation from the magistrate, defendant settled with the charging parties, the state court dismissed their claims with prejudice, and the charging parties withdrew their motions to intervene in the EEOC matter.

The court determined that had the court issued the report and recommendation prior to the settlement, under Tenth Circuit precedent in Continental Oil, the district court would have likely agreed that the private Title VII actions terminated the EEOC's power to bring an action of its own based on the same charges.[222] However, because there was no civil action pending in which the EEOC could intervene, the district court rejected this argument.

The district court further distinguished the case from *Continental Oil*, finding the EEOC clearly alleged an act of retaliation that was not duplicative and was neither raised nor addressed in the state court action. Finally, the district court determined that the case was procedurally different from *Continental Oil* in that the Title VII claims asserted by the individual plaintiffs were brought as counterclaims to a defamation claim filed by defendant in state court. The court found that ruling in defendant's favor would provide a "sinister ramification" in that a defendant to an EEOC action could block the agency from pursuing claims of discrimination under § 706(f)(1) by filing a

217 *EEOC v. Jacksonville Plumbers & Pipefitters Joint Apprenticeship & Training Trust*, 2018 U.S. Dist. LEXIS 168834 (M.D. Fla. Oct. 1, 2018).

218 *Id.* at *2.

219 *BNSF Railway Co. v. EEOC*, 2018 U.S. Dist. LEXIS 226251 (N.D. Tex. Nov. 27, 2018).

220 In the BNSF Railway lawsuit, the employer argued that the right to sue letters were flawed because they were issued to workers who had not been aware of the charge (since it stemmed from a Commissioner's Charge) and argued that the agency violated a ban on making public the right to sue letters because the workers were not aware of the charge. On June 11, 2019, the parties jointly filed a motion for entry of an agreed final judgment bringing the matter to closure. *See BNSF Railway Company v. EEOC*, Case No. 2:18-cv-00311, Docket 23 (N.D. TX, June 11 2019).

221 *EEOC v. Murica*, 2023 U.S. Dist. LEXIS 128333 (D. Colo. July 24, 2023).

222 *EEOC v. Cont'l Oil Co.*, 548 F.2d 884, 888 (10th Cir. 1977).

sham, retaliatory civil action in another court and force the charging parties to raise Title VII claims as a defense or counterclaim.

In *Novo Nordisk*,[223] the EEOC claimed violations of the ADEA on behalf of the charging party, a then-62-year-old applicant for a vacant lateral position. The charging party, who worked as an obesity specialist for the company, was interviewed by a district manager who stated the company wanted someone who would be around "long term" before hiring a 33-year-old applicant. The company investigated the incident and found that the district manager violated its equal employment and anti-harassment policies by engaging in age-related discrimination and terminated the manager's employment. However, the company still refused to award the position and transfer the charging party. The EEOC brought suit on her behalf.

On defendant's motion to the dismiss, the district court found the EEOC did not demonstrate how the transfer denial caused harm to the charging party. Notably, the EEOC failed to show what the charging party's commute would have been had she not been denied the lateral transfer and did not establish whether it would be more convenient or less expensive for the charging party to be relocated. The court held that the EEOC's complaint, therefore, did not contain sufficient facts to plausibly allege that charging party suffered an adverse employment action, granting defendant's motion to dismiss.

Notably, however, the Fifth Circuit on *en banc* review in a recent case, *Hamilton v Dallas County*,[224] took a more expansive view of what constitutes an adverse employment action, effectively broadening the categories of personnel actions that can form the basis of a discrimination claim. Specifically, the appellate court held, "we have long limited the universe of actionable adverse employment actions to so-called 'ultimate employment decisions.' We end that [interpretation] today."

Prior to the the *en banc* decision, Fifth Circuit precedent required a showing that the plaintiff had suffered an "ultimate employment decision" to state a cognizable discrimination claim under Title VII. However, in *Hamilton*, the Fifth Circuit reversed decades of precedent holding that to sufficiently plead an adverse employment action, a plaintiff need merely allege facts plausibly showing discrimination in hiring, firing, compensation, or in the "terms, conditions, or privileges" of their employment.[225]

Similarly, in *Chambers v. District of Columbia*,[226] the *en banc* panel of the D.C. Circuit held that "[o]nce it has been established that an employer has discriminated against an employee with respect to that employee's 'terms, conditions, or privileges of employment' because of a protected characteristic, the analysis is complete," providing additional support for an expansive view of adverse employment actions.

The Supreme Court addressed this issue in spring 2024. In *Muldrow v. City of St. Louis, Missouri*,[227] the Eighth Circuit—contrary to the D.C. and Fifth Circuits—held that a city's transfer decision *did not* amount to a viable claim under Title VII because it did not involve any materially adverse employment consequence. The Court disagreed in its April 17, 2024, opinion,[228] finding that discriminatory job transfers can raise a Title VII claim even if they do not result in significant harm.

In *EEOC v. Fluor Federal*,[229] the EEOC alleged the defendant discriminated against plaintiff-intervenor, a civilian contractor, based on disability by failing to seek a medical waiver authorizing his redeployment and then firing him. The defendant is a government contractor supplying personnel. Per the military's requirements, those dispatched were required to adhere to fitness-for-duty standards, which included certain amplification standards. As civilian workers are subject to Rehabilitation Act, individual assessments are required for disability accommodation. Certain medical conditions, including cancer, precluded medical clearance. To get a medical waiver, cancers must be in complete remission for 12 months before a waiver will be considered.

The charging party was diagnosed with cancer, had surgery, and entered remission. The documentation he submitted made clear he was medically cleared to work with no restrictions, but he was told he was medically

223 *EEOC v. Novo Nordisk, Inc*., 2023 U.S. Dist. LEXIS 94363, 2023 WL 3736356 (D.N.J. May. 31, 2023).

224 *Hamilton v. Dallas County*, 2023 WL 5316716 (5th Cir. Aug. 18, 2023.)

225 *Id.* at *8.

226 *Chambers v. District of Columbia*, ___ F.3d ___, No. 19-7098 (D.C. Cir. June 3, 2022).

227 *Muldrow v. City of St. Louis, Missouri*, No. 20-2975, __F.3d__ (8th Cir. Apr. 4, 2022), *cert. granted*, 22-193 (U.S. June 30, 2023).

228 *Muldrow v. City of St. Louis*, No. 22-193, ___ U.S. ___ (2024).

229 *EEOC v. Fluor Fed. Global Projects, Inc*., 2022 U.S. Dist. LEXIS 218486 (D.S.C. Oct. 31, 2022).

disqualified because he was not in remission for 12 months. Accordingly, his position was terminated and the EEOC brought suit.

The defendant pursued two avenues: a derivative sovereign immunity claim and a political question defense. Neither theory proved successful.

The court dismissed the sovereign immunity claim, finding that, because the government did not authorize the defendant's actions, the company was not entitled to derivative sovereign immunity. Although the Fourth Circuit has consistently framed the issue as whether the government "authorized" the contractor's actions and the government "validly conferred" that authorization, the court found that it is "elementary" that a contractor cannot claim derivative immunity where federal law and government's instructions have occurred.

The defendant's political question theory met a similar fate. The court first considered whether the issue raised here – the legality of the termination – would be resolved by any branch other than the judiciary. Finding that the issue was squarely before the judiciary, the court turned to a second set of factors. The court's secondary analysis focused on whether the military's control over the defendant was "plenary" and "actual," and whether national defense interests were closely intertwined with the military's decisions governing the defendant's conduct.

The court countenanced the plaintiff's argument that a ruling which found the defendant to have violated the ADA would have no effect on the military's "final authority to set its own fitness for duty standards" or its "ability to control and regulate personnel qualifications for deployment." Accordingly, the court held that dismissal was not warranted based on the political question doctrine, and the motion to dismiss was denied.

In *EEOC v. Schuff Steel Co.,*[230] the African American charging party filed an EEOC charge alleging race discrimination. Upon investigation, the EEOC found both race and national origin discrimination against Latinos. The EEOC raised four Title VII claims against the defendant: Race-Based Hostile Work Environment (Count 1); National Origin-Based Hostile Work Environment (Count 2); Constructive Discharge (Count 3); and Retaliation (Count 4). Defendant moved to dismiss Count 2 and partially dismiss Count 3 and Count 4 to the extent those counts related to national origin discrimination.

Because the national origin discrimination claims brought by the EEOC were on behalf of Latino and not African American employees, the defendant contended that EEOC's claims impermissibly exceed the scope of the initial charge filed by the charging party, and the EEOC's authority was limited to bringing claims relating to the charging party's charge of racial discrimination.

However, the Ninth Circuit has clearly articulated that a charge is sufficient to support EEOC administrative action, as well as an EEOC civil suit, for *any* discrimination stated in the charge itself or discovered in the course of a reasonable investigation of that charge.[231] Similarly, the Ninth Circuit has also held the EEOC only needs to provide notice to the employer by including the alleged discrimination in the EEOC's cause determination and by proceeding with conciliation procedures.[232]

Accordingly, the court followed the Ninth Circuit's precedent and denied the defendant's motion to dismiss since the EEOC found cause for the national origin claims while investigating the original charge.

In an ADA failure-to-accommodate case, *EEOC v. American Flange & Greif, Inc.,*[233] the defendant filed a motion to dismiss the EEOC's first amended complaint for failure to exhaust administrative remedies.[234] The charging party filed an EEOC charge against American Flange, alleging that his firing violated the ADA. However, Greif was not named in the charge. American Flange is a wholly owned subsidiary of Greif, Inc.

The EEOC's investigation revealed that both Greif and American Flange employed the employees at the American Flange facility and that all temporary employees were paid and controlled by Greif once they obtained permanent employment. The EEOC further alleged that Greif knew or should have known that the charging party's charge concerned Greif's own conduct and employment practices, given Greif's control over American Flange's operations.

230 *EEOC v. Schuff Steel Co.*, 2023 U.S. Dist. LEXIS 35922 (D. Ariz. Mar. 3, 2023).
231 *EEOC v. Hearst Corp.*, 553 F.2d 579, 580 (9th Cir. 1976).
232 *EEOC v. Occidental Life Ins. Co. of Cal.*, 535 F.2d 533, 542 (9th Cir. 1976).
233 *EEOC v. Am. Flange*, 2023 U.S. Dist. LEXIS 129587 (N.D. Ill. July 27, 2023).
234 *EEOC v. American Flange & Greif, Inc.*, 2022 U.S. Dist. LEXIS 94683 (N.D. Ill. May 26, 2022).

Upon finding that reasonable cause existed to believe that both Grief and American Flange violated the ADA, the EEOC invited both entities to engage in conciliation. When the parties failed to reach an acceptable agreement, the EEOC initiated the lawsuit, which Greif moved to dismiss on grounds of failure to exhaust administrative remedies.

The court rejected defendant's arguments regarding whether Greif and American were a "single employer," and determined that Greif need not be named in the charge of discrimination. The court determined the proper analysis involved the narrow exception to the administrative exhaustion requirement where an unnamed party has been provided with adequate notice of the charge and where the party has been given the opportunity to participate in conciliation proceedings aimed at voluntary compliance. The court determined the EEOC adequately alleged facts warranting the exception to the general rule that a party not named in an EEOC charge cannot be sued under Title VII.

2. Lack of Particularity

In *EEOC v. Geisinger Health*,[235] the EEOC brought a class action suit against a defendant hospital and several subsidiaries, alleging the defendant violated the ADA when it required employees with disabilities to compete for reassignment to a new position even when reassignment was allegedly needed as a reasonable accommodation for employees' disabilities.

The defendant appealed the magistrate judge's refusal to grant its motion, and argued, in part, that the EEOC's pleadings suffered fatal deficiencies under various ADA claims. Specifically, defendant argued that the EEOC failed to plead that the charging party plaintiff was a qualified individual with a disability and that her impairment substantially limited one or major life activities. The defendant also argued that the agency failed to plead an interference claim.

The court partially agreed with the defendant and found that the EEOC did not establish the charging party was considered disabled as defined by the ADA. However, the court provided a thinly veiled directive in footnote 9, seemingly encouraging the agency to file an amended complaint and plead additional facts to circumvent a future motion to dismiss. Likewise, the court dismissed the class action allegations as the agency did not establish a class representative or any other employees who might fall into a successful class.

The EEOC's ADA interference claim survived, however, kept alive by the court's determination that the hospital's policy requiring workers returning from medical leave to reapply to their jobs was ripe for inquiry and the court's position that sufficient evidence demonstrated that the defendant interfered with employees' attempts to seek disability accommodations.

3. Key Issues in Class-Related Allegations

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

Although there were no cases on point decided in FY 2023, some decisions from last year are instructive. In *EEOC v. Qualtool, Inc.*, the EEOC claimed violations of Title VII on behalf of the charging party and an unidentified "class" of persons, alleging discrimination based on their sex.[236] During discovery, the EEOC's Rule 26 initial disclosures identified no "Class of Aggrieved Persons," and in its response to interrogatories, the EEOC identified only one additional individual as the sole purported "class" member. No further purported class members were identified by the EEOC until months later, when the EEOC served its first supplemental initial disclosures, asserting for the first time, three months before the discovery deadline, that it had identified 14 other purported class members. Moreover, these alleged class members were not timely added as additional parties pursuant to the pretrial schedule order entered in the case.

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

235 *EEOC v. Geisinger Health*, 2022 U.S. Dist. LEXIS 188749 (E.D. Pa. Oct. 17, 2022).
236 *EEOC v. Qualtool*, Inc., 2022 U.S. Dist. LEXIS 156361 (M.D. Fla. Aug. 30, 2022).

In *EEOC v. Green Jobworks, LLC*,[237] the defendant's motion to dismiss the EEOC's pattern-or-practice complaint was denied by the court. The EEOC asserted two counts of pattern-or-practice employment discrimination against female job applicants and employees: (1) failure to hire women for demolition and laborer positions; and (2) assigning female employees to cleaning duties instead of equipment operation and other demolition work. The defendant argued that Count I of the EEOC's complaint failed to allege facts sufficient to demonstrate more than a few isolated discriminatory acts, and that Count II failed to state any facts demonstrating discrimination in the defendant's terms and conditions of employment. The court rejected the defendant's arguments, finding that the EEOC had alleged "evidence of conduct or statements that both reflect directly the alleged discriminatory attitude and that bear directly on the contested employment decision."

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

The court further rejected the defendant's argument that, to state a pattern-or-practice claim, the EEOC must meet the standard set forth in *International Board of Teamsters v. United States*,[238] which requires "more than a mere occurrence of isolated or accidental or sporadic discriminatory acts."[239] Instead, the court held "pattern or practice" is not a separate legal claim, but rather an evidentiary framework with which a plaintiff may prove discrimination. Further, the court determined that, at the motion to dismiss stage, the plaintiff need only state a plausible claim for relief under Title VII, and direct evidence of discrimination is sufficient to carry this burden.

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

b. Other Issues

When the EEOC determines there is sufficient evidence to support some, but not all, of the alleged unlawful employment practices asserted in a complainant's charge of discrimination, the EEOC is authorized to pursue relief for those claims for which it has found reasonable cause. In a 2020 decision, *EEOC v. Pediatric Health Care Alliance, P.A.*, the district court denied the defendant's motion to dismiss the EEOC's complaint where the EEOC had determined the complainant's claim of sexual harassment was not sufficiently supported, but that there was sufficient evidence to show retaliation for reporting sexual harassment.[240] In doing so, the court found that the complaint only asserted a claim of retaliation, even though the complaint contained allegations related to the claim of sexual harassment.[241] The court also determined there was no basis to strike the allegations about the alleged sexual harassment, which the EEOC argued provided relevant background for the claim of retaliation, because the court could not conclude there was no relation between these asserted facts and the retaliation claim or that they prejudiced the defendant.[242] The court found defendant's argument regarding the sexual harassment allegations required further factual development, and thus was not appropriate to consider on a motion to dismiss.[243]

More recently, in *EEOC v. Justin Vineyards*,[244] a class action brought by the EEOC, the employer's motion to compel arbitration was granted. The court found the defendant's two contracts containing arbitration provisions applying to "all claims" brought by an employee were valid and applied to plaintiff's claims of fraud in the execution and unconscionability as to the arbitration agreement.

Regarding plaintiff's claims of being "misled" by the contracts, the court pointed to plaintiffs' failures to ask for time to review the contracts or have them fully translated. In evaluating unconscionability, the court reviewed the terms of the agreement and found that they were not "so one-sided as to shock the conscience" of the court. The court held the arbitration agreements were valid, refusing to subvert the authority of the Federal Arbitration Act, which provides that any arbitration agreement within its scope "shall be valid, irrevocable, and enforceable." In *EEOC v. Whiting-Turner Contracting*,[245] the EEOC alleged defendant exposed African American employees to a racially

237 *EEOC v. Green Jobworks, LLC*, 2022 U.S. Dist. LEXIS 74723 (D. Md. Apr. 25, 2022).
238 431 U.S. 324, 97 S. Ct. 1843 (1977).
239 *Id.* at 336.
240 *EEOC v. Pediatric Health Care Alliance, P.A.*, 2020 U.S. Dist. LEXIS 205660, **2, 4 (M.D. Fla. Nov. 4, 2020).
241 *Id.* at *4.
242 *Id.*
243 *Id.* at **4-5.
244 *EEOC v. Justin Vineyards*, 2023 U.S. Dist. LEXIS 48985 (C.D. Cal. Mar 17, 2023).
245 *EEOC v. Whiting-Turner Contracting. Co.*, 2023 U.S. Dist. LEXIS 44016 (M.D. Tenn. Mar. 15, 2023).

hostile work environment. The defendant asserted 28 affirmative defenses, and the court issued an order setting April 29, 2022 as the deadline for filing motions to amend the pleadings.

In its first set of interrogatories, defendant asked whether any class member had filed for bankruptcy. After the deadline to amend the pleadings had passed, the EEOC supplemented its responses to show one class member had filed for bankruptcy. Defendant then sought to amend its answer to add a 29th affirmative defense, specifically that the one class member's claims were barred and/or estopped because of his failure to disclose the lawsuit in his bankruptcy proceeding.

The EEOC objected, arguing the defendant had not shown good cause for filing its motion after the April 29 deadline, improperly sought to add allegations and arguments beyond its proposed 29th defense, and that the proposed affirmative defense was legally deficient. The defendant countered that good cause existed to allow its untimely proposed amended answer because the EEOC did not disclose the class member's bankruptcy until two months after the April 29, 2022 deadline for filing motions to amend the pleadings, and that the EEOC had not established that the defense was futile. Importantly, the defendant failed to cite any legal authority to support its request to amend in the final stage of proceedings.

The court considered whether defendant had good cause to file an untimely motion to amend its answer and found that, while defendant satisfied the good cause requirement, the proposed changes in its amended answer were unrelated to the bankruptcy proceeding and, as such, were not permitted. Finally, the court underscored that the EEOC, not the class member, was the party in the action. As such, defendant had not sufficiently pled its proposed estoppel affirmative defense because it had not alleged that the class member was a party to the action.

4. Who is the Employer?

In FY 2023, several district courts addressed the issue of joint liability for successor, affiliated, or integrated entities for claims brought by the EEOC.

In *EEOC v. R&L Carriers Inc.*, R&L moved for summary judgment asserting it could not be held liable for any alleged discrimination by Shared Services.[246] At the same time, the EEOC also filed a cross motion for summary judgment, arguing R&L and Shared Services were "so interrelated that they constitute an integrated enterprise under Title VII."[247] In determining whether an integrated enterprise existed between the companies, the court considered the following factors: (a) interrelation of operations, *i.e.*, common offices, common record keeping, shared bank accounts and equipment; (b) common management, common directors and boards; (c) centralized control of labor relations and personnel; and (d) common ownership and financial control.[248] The court ultimately concluded there was sufficient evidence to support a finding that R&L and Shared Services were interrelated companies.[249]

In *EEOC v. Supreme Staffing LLC*, defendants moved to dismiss the EEOC's lawsuit against two entities that were not named in the charge as plaintiff's employer, arguing that "it is well settled that a party not named in an EEOC charge may not be sued under Title VII unless there is a clear identity of interest between it and a party named in the EEOC charge."[250] The district court denied defendants' motion to dismiss the two entities not named in the charge, concluding the EEOC's allegations were sufficient to support a finding that an identity of interests existed among defendants.[251] Specifically, the EEOC alleged defendants shared common ownership and management, offices and employees, headquarters, principal address and mailing address, third-party vendor platforms, and personnel policies and procedures.[252] Thus, the court further concluded an identity of interest exists because the shared owner and headquarters would indicate that the notification sent to the named defendant, as owner for all three defendants, also provided notice to the unnamed defendants and afforded them the opportunity to participate in the conciliation proceedings.[253]

246 *EEOC v. R&L Carriers, Inc.*, 2023 U.S. Dist. LEXIS 52437, at **24-25 (S.D. Ohio Mar. 27, 2023).
247 *Id.*
248 *Id.* at *25.
249 *Id.* at **28-29.
250 *EEOC v. Supreme Staffing LLC*, 2023 U.S. Dist. LEXIS 139315, at *14 (W.D. Tenn. Aug. 10, 2023).
251 *Id.* at **15-16.
252 *Id.*
253 *Id.* at **16-17.

Similarly, in *EEOC v. Triple-S Vida*, Inc. the court also denied the parent corporation's motion to dismiss, finding the EEOC's allegations were sufficient to allege an integrated enterprise.[254] The court reasoned the EEOC's allegations went beyond merely alleging the parent corporation was plaintiff's employer or other similar conclusory allegations.[255] Instead, the court noted the EEOC had alleged specific factual matters demonstrating the parent corporation's "control over policies involving reasonable accommodation for employees like claimant" or that it "had a certain level of control over[] the claimant's employment, including reasonable accommodation requests."[256] The parent corporation denied these allegations and, in the alternative, moved to strike the same, asserting the allegations provided an "erroneous perception of" its involvement.[257] The court denied the parent corporation's motion to strike, finding that its conclusory argument that the EEOC's allegations were "incorrect" did not meet the requirements of a Rule 12(f) motion to strike.[258]

In contrast, in *EEOC v. Geisinger Health*, the district court rejected the EEOC's argument that it had alleged sufficient facts to proceed under a "single employer" theory of liability by asserting Geisinger Health and/or Geisinger Health System directed Geisinger subsidiaries to engage in a discriminatory practice.[259] The district court reasoned the EEOC pled only generalities (*i.e.*, how Geisinger Health/Geisinger Health System controlled "various employment matters" and required compliance of "employment policies") and made no mention whatsoever that Geisinger Health and/or Geisinger Health System required the subsidiaries to implement the most qualified applicant policy (*i.e.*, the discriminatory policy at issue).[260]

5. Challenges to Affirmative Defenses

There have been several decisions over the past few years addressing challenges to affirmative defenses. In *EEOC v. Hunter-Tannersville*, the EEOC moved to strike defendant's fifth affirmative defense that any differential in pay was the result of a factor other than sex, the ability to negotiate a higher salary.[261] The EEOC argued that the affirmative defense was legally insufficient because it was based on conduct not related to the performance of the job to which charging party and her comparator applied.[262] The court noted neither the Supreme Court nor the U.S. Court of Appeals for the Second Circuit had previously determined that only job-related factors could constitute a "factor other than sex."[263] As such, the court denied the EEOC's motion on the grounds it was premature as motions to strike were not intended to furnish "an opportunity for determination of disputed and substantial questions of law."[264]

Similarly, the Western District of Washington considered the EEOC's motion to strike defendant's fifth affirmative defense, which asserted the EEOC failed to conciliate and, thus, failed to exhaust its administrative remedies.[265] To support its defense, defendant claimed that while the EEOC represented it was open to conciliation, it was wholly unresponsive to defendant's counteroffer and, instead, unilaterally declared conciliation efforts failed.[266] In response, the EEOC argued the defense should be stricken because the court's conciliation review process was limited.[267] The court denied the EEOC's motion, finding disputed issues of fact existed as to whether the few exchanges between the defendant and the EEOC could be characterized as a discussion to meet the conciliation requirement.[268] In denying the motion, the court noted a motion to strike was not an appropriate vehicle for resolving disputed and substantial factual and legal issues.

More recently, in *EEOC v. Princess Martha, LLC*, the EEOC moved for partial judgment on the pleadings as to defendant's ninth defense, which alleged "charging party's claims [we]re barred under the ADA 'to the extent [they] related to persons or matters which were not made the subject of a timely charge of discrimination filed

254 *EEOC v. Triple-S Vida, Inc.*, 2023 U.S. Dist. LEXIS, at **21-22 (D. P.R. Feb. 17, 2023).
255 *Id.* at *20.
256 *Id.* at *21.
257 *Id.* at **22-23.
258 *Id.* at **23-24.
259 *EEOC v. Geisinger Health et al.*, 2022 U.S. Dist. LEXIS 188749, at **13-14 (E.D. Pa. Oct. 17, 2022).
260 *Id.*
261 *U.S. EEOC v. Hunter-Tannersville Cent. Sch. Dist.*, No. 1:21-CV-0352, 2021 U.S. 230595, at *1 (N.D.N.Y. Dec. 2, 2021).
262 *Id.* at *3.
263 *Id.* at *4.
264 *Id.* at *8.
265 *EEOC v. Telecare Mental Health Servs. Wash., Inc.*, 2022 U.S. Dist. LEXIS 55657 (W.D. Wash. Mar. 28, 2022).
266 *Id.* at **2-3.
267 *Id.* at *5.
268 *Id.*

with the EEOC/FCHR or were not investigated or conciliated by the EEOC/FCHR."[269] The EEOC argued it was entitled to judgment on the pleadings because the EEOC's failure to conciliate was not a valid affirmative defense, as the remedy is a stay rather than dismissal.[270] The court denied the EEOC's motion, noting while it would typically be entitled to judgment in its favor on the conciliation issue, that was not the defense alleged here.[271] The court reasoned the EEOC's adequate conciliation of the claims in the complaint does not render defendant's conditional defense inaccurate as such defense could be triggered if the parties attempted to raise additional claims not investigated or conciliated by the EEOC.[272]

6. Venue

Because there is a strong presumption in favor of the plaintiff's choice of forum, a defendant seeking to transfer venue must clear a high hurdle to convince a court to exercise its discretion and transfer the case. Typically, this presumption can only be overcome if private and public interest factors clearly point toward the alternative forum. Such factors include the potential jurisdiction of the transferee district; convenience of the witnesses; convenience of the parties; and the interest of justice.[273]

In *EEOC v. American Screening*, the Eastern District of Louisiana considered the defendant's motion to transfer venue from the Eastern District to the Western District of Louisiana where the defendant claimed the alleged discriminatory act occurred, where its only office was located, and where the pertinent witnesses to the case resided.[274] While the court ultimately granted defendant's motion to transfer, the court found that the Eastern District was a proper venue.[275] Specifically, the court noted because it was undisputed the alleged unlawful employment practice occurred in Louisiana, venue was proper in any district within Louisiana, including the Eastern District.[276] However, the court granted defendant's motion to transfer, finding the Western District of Louisiana was a more convenient venue given the location of documents and witnesses.[277]

B. Statutes of Limitations and Unreasonable Delay

1. Limitations Period for Pattern-or-Practice Lawsuits

Individual claims under Section 706 of Title VII are subject to certain administrative prerequisites, including that in deferral states, the discrimination charge must be 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.278 Section 707, governing pattern-or-practice actions, incorporates Section 706's procedures, raising the implication that the EEOC must bring pattern-or-practice cases within the 300-day period defined in Section 706.

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

In 2018, a district court held that alleged victims of pattern-or-practice discrimination are not bound to file timely claims within 300 days of discriminatory conduct under Title VII or the ADA, "so long as the additional discriminatory practices, or victims, have been ascertained in the course of a reasonable investigation of the charging party's complaint and the EEOC has provided adequate notice to the defendant-employer of the nature

269 *EEOC v. Princess Martha, LLC*, 2023 U.S. Dist. LEXIS 88238, at **2-3 (M.D. Fla. May 19, 2023).
270 *Id.* at **10-11.
271 *Id.*
272 *Id.*
273 *See, e.g., EEOC v. Plains Pipeline, L.P.*, 2020 U.S. District LEXIS 52863, at *2 (D.N.M. Mar. 25, 2020); *EEOC v. Hirschbach Motor Lines Inc.*, 2018 U.S. Dist. LEXIS 199243 (D. Maine Nov. 26, 2018); *EEOC v. FedEx Ground Package System, Inc.*, 2015 U.S. Dist. LEXIS 21801 (D. Md. Feb. 24, 2015).
274 *EEOC v. Am. Screening*, No. 21-1978, 2022 U.S. Dist. LEXIS 107298 (E.D. La. June 14, 2022).
275 *Id.* at *4.
276 *Id.*
277 *Id.* at *6.
278 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.

of such charges to allow resolution of the charges through conciliation."[279] 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."[280]

A handful of other district courts in recent years have similarly held that the nature of pattern-or-practice cases is inconsistent with the application of the 300-day limitations period.[281] For example, in *EEOC v. New Prime*, a Missouri district court observed that while a "few" district courts have applied the 300-day period to pattern-or-practice cases, "the very nature" of pattern-or-practice cases attacking systemic discrimination "seems to preclude" use of the 300-day period.[282] The court in *New Prime* followed the reasoning in *EEOC v. Mitsubishi Motor Manufacturing of America, Inc.*, a 1998 Illinois district court case, which found that although the language of Section 707(e) requires adherence to other procedural requirements of Section 706, "the limitations period applicable to Section 706 actions does not apply to Section 707 cases."[283] In doing so, the *Mitsubishi* court reasoned applying the limitations period would essentially act as an arbitrary bar to liability because the EEOC is generally unable to articulate any specific acts of discrimination at the time it files a pattern-or-practice charge.[284] 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 "evidence [of discrimination to] determine when the provable pattern or practice began."[285]

As another example in pattern-or-practice cases, in *EEOC v. Staffing Solutions of WNY, Inc.*, a district court upheld the magistrate judge's report and recommendation and declined to limit the EEOC's ability to seek redress for only those claims that occurred within 300 days prior to the filing of the charge.[286] The *Staffing Solutions* court went further when it also agreed that the EEOC is not subject to the 300-day charge-filing period for ADEA claims.[287]

Other courts have disagreed, however, 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.[288] If a 300-day limitations period is applied, generally, it is triggered by the filing of a charge, which means the court will look back 300 days from the date the charge was filed and require the discriminatory act occur within that timeframe to be actionable.[289] 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.[290] 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.[291] 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.[292]

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), employers have successfully argued that the trigger for the 300-day period occurs when the EEOC notifies the defendant that it is expanding

279 *EEOC v. Staffing Solutions of WNY, Inc.*, 2018 U.S. Dist. LEXIS 207186, at *4 (W.D.N.Y. Dec. 6, 2018), *citing EEOC v. Upstate Niagara Cooperative, Inc.*, 2018 WL 5312645, at *3 (W.D.N.Y. 2018).

280 *Staffing Solutions*, 2018 U.S. Dist. LEXIS 207186, at *5.

281 *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).

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

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

284 *Id.* at 1085, *accord EEOC v. LA Weight Loss*, 509 F. Supp. 2d 527, 535 (D. Md. 2007).

285 *Id.* at 1087.

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

287 *Id.*

288 *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).

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

290 *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).

291 *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).

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

its investigation to other claimants.[293] This is helpful to employers because it shortens the period during which the EEOC can reach back to draw in additional claimants.

In *Arizona ex rel. Horne v. Geo Group, Inc.*, however, the Ninth Circuit disagreed, finding Section 706's "plain language" did not permit tethering the 300-day period to any event other than the filing of the charge.[294] The Ninth Circuit observed that the trial court's choice to instead use the date of the Reasonable Cause Determination may have been due to the initial charge's failure to provide notice to the employer of potential class claims by other aggrieved female employees, but stated, "this concern fails to distinguish the time frame in which the employee is required to file their charge of discrimination (*i.e.*, 300 days after the alleged unlawful employment practice occurred) from the EEOC's responsibility to notify the employer of the results of the EEOC's investigation."[295]

Given the district court trend to apply the 300-day limitation to pattern-or-practice cases, the EEOC is increasingly relying on creative arguments or equitable defenses. For example, in cases involving age discrimination under the ADEA, the EEOC can attempt to avoid section 706 and 707 prerequisites altogether by bringing a pattern-or-practice suit outside of Title VII. For enforcement actions by the EEOC, the ADEA does not have a 300-day limitation.[296] 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).[297]

In *EEOC v. New Mexico*, the district court accepted this premise without analysis, allowing the EEOC to reach back to 2009 to include the claims of 99 additional aggrieved individuals even though some of these individuals last experienced alleged discrimination well before 300 days prior to the filing of the charge and even though their names had not been disclosed to the employer prior to discovery in the lawsuit, filed in 2015.[298] 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.[299]

2. Equitable Theories to Support Untimely Claims

In an effort to resurrect claims barred by the 300-day statute of limitations applicable to Sections 706 and 707, the EEOC often turns to equitable theories, such as waiver, estoppel, equitable tolling, the single-filing rule—which allows the EEOC to litigate a substantially related non-filed claim where it arises out of the same time frame and similar conduct as a timely filed claim—and the continuing violation doctrine, which allows a timely claim to be expanded to reach additional violations outside the 300-day period.[300]

In *EEOC v. Horizontal Well Drillers*, the district court denied an employer's motion to dismiss untimely disability failure-to-hire claims, finding the EEOC had sufficiently alleged the continuing violations theory.[301] The continuing violation doctrine only allows the enforcing party to reach back to conduct that is not "discrete."[302] Although it is sometimes difficult to draw a distinction between discrete and non-discrete actions, the guiding principle is that a discrete action is "actionable on its own" and thus alerts the charging party as to the necessity of pursuing their claim.[303] 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.[304]

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293 *See*, *e.g.*, *EEOC v. Princeton Healthcare Sys.*, 2012 U.S. Dist. LEXIS 150267, at *14 (D.N.J. Oct. 18, 2012); *see also Optical Cable Corp.*, 169 F. Supp. 2d at 547; *EEOC v. Freeman*, No. 09-2573, 2011 U.S. Dist. LEXIS 8718 at *2 (D. Md. Jan. 31, 2011).

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

295 *Id.*

296 *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").

297 *Id.*

298 *Id.* at *6 ("pattern or practice" not specifically alleged but the EEOC brought a representative action on behalf of "aggrieved" individuals).

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

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

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

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

303 *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").

304 2018 U.S. Dist. LEXIS 65719, at *51.

However, the EEOC is not always successful in arguing the continuing violation doctrine should apply to pattern-or-practice cases. In *EEOC v. Discovering Hidden Hawaii Tours, Inc.* the court 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.[305]

More recently, in *EEOC v. Army Sustainment, LLC*, the EEOC opposed an employer's motion for summary judgment on timeliness grounds, arguing the continuing violation doctrine extended the charging period and prevented dismissal of its pattern-and-practice claims as all claimants were subjected to an ongoing and continuing policy of discrimination.[306] The district court rejected the EEOC's argument, finding the continuing violation doctrine did not apply as the alleged unlawful employment practices at issue (*i.e.*, failure to grant accommodation to employees cleared to return by placing employees on unpaid leave) constituted discrete acts of discrimination.[307] In rejecting the EEOC's argument, the court explained "the continuing violation doctrine does not apply to untimely claims of discrete acts, 'even when they are related to acts alleged in timely filed charges'" and further noted "neutral policies that give present effect to the time-barred conduct do not create a continuing violation."[308] Thus, the district court ultimately granted partial summary judgment in the employer's favor finding the claims asserted by the EEOC for 7 (out of 17 individuals) arose outside the 180-day charging period and, thus, were untimely.[309]

3. Laches-type Issue: Unreasonable Delay by the EEOC

To counter the EEOC's reliance on the continuing violation doctrine to salvage untimely claims, employers may point to *Discovering Hidden Hawaii*, *USF Holland*, and other district court decisions holding that, even in the context of an "unlawful employment practice" claim, such as hostile work environment, the doctrine cannot be used to expand the scope of the claim to add new claimants unless each claimant suffered at least one act considered to be part of the unlawful employment practice, within the 300-day window.[310] Where the EEOC seeks to enlarge the number of individuals entitled to recover, rather than the number of claims a single individual may bring, the employer can make the argument that the continuing violation doctrine does not apply.

Of course, the employer can also raise equitable defenses. In *EEOC v. Baltimore County*, the court found the EEOC's eight-year unreasonable delay in bringing its lawsuit barred any award of backpay or other retroactive relief.311 In FY 2018, another district court refused to grant summary judgment to the EEOC on the employer's laches defense, finding it an issue of fact whether the EEOC's six-year delay between the filing of the charge and the lawsuit prejudiced the employer.[312]

However, laches is a flexible doctrine left to the court's discretion; the employer must show (1) the plaintiff unreasonably and inexcusably delayed filing the lawsuit; and (2) prejudice to the defendant resulted from the delay. There is no length of delay that is *per se* unreasonable. Instead, courts will consider all the facts to evaluate the reasonable of any delay.

In *EEOC v. Hospital Housekeeping Services*, an Arkansas district court denied defendant's motion for summary judgment based on the employer's equitable defense of laches, finding the evidence did not establish the EEOC unreasonably or inexcusably delayed filing suit.[313] To support its laches defense, the employer argued the EEOC had waited six years after the relevant charges of discrimination were filed and five years after it initiated its investigation before filing suit.[314] In denying the motion, the court reasoned the EEOC was in regular contact with

305 *EEOC v. Discovering Hidden Hawaii Tours, Inc.*, 2017 U.S. Dist. LEXIS 154576, at *5 (D. Haw. Sept. 21, 2017).
306 *EEOC v. Army Sustainment, LLC*, 2023 U.S. Dist. LEXIS 171406, at **12-13 (M.D. Ala. Sept. 26, 2023).
307 *Id.* at **17-18.
308 *Id.*
309 *Id.* at *20.
310 *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).
311 *EEOC v. Baltimore Cty.*, 202 F.Supp.3d 499, 522 (D. Md. 2016).
312 *EEOC v. Wynn Las Vegas, LLC*, 2018 U.S. Dist. LEXIS 115042, at **17-18 (D. Nev. July 10, 2018) (employer must show prejudice resulting from delay in order to prevail on laches defense).
313 *EEOC v. Hosp. Housekeeping Servs.*, 2023 U.S. Dist. LEXIS 39812, at *9 (W.D. Ark. Mar. 9, 2023).
314 *Id.* at *8.

the employer throughout the course of its investigation, and the employer caused some of the delay as evidenced by the EEOC's repeated request for missing information during the investigation.315

Even if an employer can prove the EEOC inexcusably and unreasonably delayed filing, employers must still also adduce evidence establishing they were prejudiced by the delay. Indeed, a delay that does not result in prejudice is insufficient to establish the defense of laches, even where the delay is both lengthy and unexcused. In *Hospital Housekeeping Services*, the court rejected the employer's argument that it had shown "demonstrable prejudice . . . through increased potential backpay liability and limited access to management witnesses and personnel records."[316] The court concluded the employer had not proffered sufficient evidence to establish prejudice as a result of the delay.[317] With respect to alleged missing personnel records, the court noted the employer had a duty to preserve and retain documents related to the charges under 29 C.F.R. § 1602.14.318 The court also reasoned summary judgment was warranted as the employer had failed to explain how the potential witnesses' lack of memory of specific details prejudiced its defense.[319]

Similarly, in *EEOC v. LogistiCare Solutions LLC*, the Arizona district court refused to grant summary judgment against the EEOC on the employer's equitable defense of laches even where the EEOC did not file suit until seven years after the relevant charges were filed.[320] The district court opined that back pay alone "is not enough to show prejudice" because the court may "take the EEOC's delay into account when crafting a remedy."[321] The court also explained that assertions of prejudice "must be supported by evidence establishing specific prejudicial losses that occurred during the period of delay."[322] While the employer adduced evidence that important fact witnesses had taken other employment during the delay period, the court was not satisfied that the employer had taken even "simple steps to contact the former employees, such as by using their contact information from when they were employed."[323]

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

315 *Id.* at *9.
316 *Id.* at **9-10.
317 *Id.* at **10-11.
318 *Id.* at **10-12.
319 *Id.*
320 *EEOC v. LogistiCare Sols. LLC*, 2020 U.S. Dist. LEXIS 215486, at *10 (D. Ariz. Nov. 18, 2020). The court also denied the employer's alternative motion to dismiss. *See id.* at *3. The employer maintained it was clear from the EEOC's complaint that the delay in filing suit was "unreasonable," which, along with prejudice, is one of the two elements of a laches defense. *Id.* The court, however, was not persuaded. It explained that even if the allegations in the complaint revealed a lengthy delay, the allegations not "provide insight on why the delay occurred." *Id.*
321 *Id.* at *9 (citing *Boone v. Mech. Specialties Co.*, 609 F.2d 956, 959 n.1 (9th Cir. 1979)).
322 *Id.* at *5.
323 *Id.* at *8. The court also observed that the employer had "not yet provided evidence that the potential witnesses have forgotten the alleged incident," other than "the conclusory statement that memories fade over time." *Id.* at *9.
324 *EEOC v. Jackson Nat'l Life Ins. Co.*, 2018 U.S. Dist. LEXIS 156258 (D. Colo. Sept. 13, 2018).
325 *Id.* at **2-15.
326 *Id.* at *16.
327 *Id.* at *18.
328 *Id.*

acts to support a hostile work environment claim."[329] By the same reasoning, the court refused to dismiss claims based on conduct alleged in the complaint that did not include specific dates or a temporal context.[330]

C. Intervention and Consolidation

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

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

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

In Title VII actions, at the court's discretion, the EEOC may intervene in private lawsuits where "the case is of general public importance."[332] Courts generally accord a great deal of deference to the EEOC's determination that a matter is of "general public importance" and usually will not require any proof of public importance beyond the EEOC's conclusory declaration.[333] The same approach is followed in dealing with intervention in ADA actions.[334]

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

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

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

Courts have stated that the timeliness requirement is flexible, subject to district judge discretion. The factors to determine timeliness include: (a) the length of time the applicant knew or should have known of its interest before making the motion; (b) prejudice to existing parties resulting from the applicant's delay; (c) prejudice to the

329 *Id.* at **22-25.
330 *Id.* at **25-27.
331 For a more in-depth discussion regarding rules applicable to intervention and case law interpreting it, please see Barry A. Hartstein, *et al., Annual Report on EEOC Developments: Fiscal Year 2013.*
332 42 U.S.C. § 2000e-5(f)(1).
333 *See Reid v. Lockheed Martin Aeronautics Co.*, 2001 U.S. Dist. LEXIS 991, at *6, n.4 (N.D. Ga. Jan. 31, 2001); *Wurz v. Bill Ewing's Serv. Ctr., Inc.*, 129 F.R.D. 175, 176 (D. Kan. 1989).
334 42 U.S.C. § 12117.
335 Fed. R. Civ. P. 24(b) (as amended Dec. 1, 2007).
336 *Id.*
337 *See EEOC v. Harris Chernin, Inc.*, 10 F.3d 1286, 1292-93 (7th Cir. 1993) and *Mills v. Bartenders Int'l Union*, 1975 U.S. Dist. LEXIS 11320, at *4 (N.D. Cal. 1975); *see also Harris v. Amoco Prod. Co.*, 768 F. 2d 669, 676 (8th Cir. 1985). In *Wilfong v. Rent-A-Center, Inc.*, 2001 U.S. Dist. LEXIS 16958, at *5 (S.D. Ill. May 11, 2001), the district court integrated the requirements of Fed. R. Civ. P. 24(b)(2) and stated, "the court must consider three requirements: (1) whether the petition was timely; (2) whether a common question of law or fact exits; and (3) whether granting the petition to intervene will unduly delay or prejudice the adjudication of rights of the original parties." *See also EEOC v. Am. Airlines Inc.*, 2018 U.S. Dist. LEXIS 68680 (D. Ariz. Apr. 24, 2018) (denying intervention because plaintiff-intervenors failed to comply with pleading requirements under Rule 24(c) and finding untimeliness when plaintiff-intervenors sought to intervene five months after judgment was entered thereby prejudicing the parties).

applicant if the motion is denied; and (d) the presence of unusual circumstances militating for or against a finding of timeliness.[338] With respect to the knowledge factor, in *EEOC v. Birchez Associates,*[339] for example, a court denied intervention to two non-charging parties who attempted to intervene a year and a half after the complaint had been filed, reasoning that they knew or should have known of their interest well before they made the motion. Similarly, in *EEOC v. Danny's Restaurants, LLC,*[340] the court denied intervention to the individual owner of the defendant restaurant who sought to intervene well after the trial on damages had concluded. While the above-referenced lawsuits involved charging parties, rather than the EEOC, similar factors most likely would apply.

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

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

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

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

Rule 24(a) provides:

(a) Intervention of Right. On timely motion,343 the court must344 permit anyone to intervene who:

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

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

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

A minor overlap between the impetus for the EEOC's case and a proposed intervenor's allegations are insignificant where the facts constituting the proposed intervenor's allegations and their requested relief are substantively different from the aggrieved's claims and requested relief.[346] If pendent claims are involved (*e.g.*, tort claims or claims arising out of state anti-discrimination statutes), those claims are analyzed under Rule 24(b).[347] Rule 24(b) may also apply if the movant is not aggrieved by the practices challenged in the EEOC's lawsuit[348] or the

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

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

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

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

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

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

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

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

346 *Id.* at *9.

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

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

movant is a governmental entity other than the EEOC.[349] Note, however, that some courts have allowed intervention solely on the basis that a motion to intervene is uncontested,[350] but will deny intervention under a traditional Rule 24(a) analysis. For example, in *EEOC v. 1618 Concepts Inc.*,[351] the court denied intervention on the remaining claims of breach of contract and constructive discharge in violation of public policy because the plaintiff failed to show that he had an interest in the subject matter of the action.

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

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

Although employees must generally exhaust their administrative remedies in order to file a Title VII or ADA civil suit independently, one court allowed the intervention of 10 former or prospective employees who had not filed a charge of discrimination at all with respect to their claims. In *EEOC v. Stone Pony Pizza, Inc.*,[355] the EEOC initiated a pattern-or-practice lawsuit alleging the company discriminated against Black employees/prospective employees by failing to hire them for front-of-house positions. Eleven individuals intervened in the action, including 10 who never filed charges of discrimination. The company filed a motion for summary judgment seeking dismissal of these individuals' claims due to their failure to exhaust their administrative remedies. The intervenors argued they were entitled to intervene as a matter of right because they were "persons aggrieved" by the company's alleged unlawful employment practices under 42 U.S.C. § 2000e-5(f)(1) or, alternatively, were entitled to permissive intervention under the "single filing rule," otherwise known as the "piggybacking rule," allowing them to exhaust their administrative remedies vicariously based on the lone charging party's exhaustion. The court allowed intervention by the 10 individuals because it found the individuals alleged "essentially the same claim" as the charging party-plaintiff—although the court declined to hold the individuals were "persons aggrieved" or entitled to application of the "single-filing rule." The court, however, dismissed the claims of intervenors that arose long before the lone charging party's claims, holding that the charging party's charge could not possibly have put the company on notice of these individuals' older claims.

One court has also applied the "single filing rule" to a charging party who failed to timely file her EEOC charge in circumstances where another charging party involving similar allegations of harassment against the same supervisor filed a timely charge. In *EEOC v. JCFB, Inc.*,[356] the charging party filed almost a year after the statutory period for filing a charge of discrimination ended. However, in rejecting defendant's attempts to distinguish charging party's claims, the court relied on a timely charge of discrimination filed by another individual involving the same supervisor and applied the "single filing" rule in permitting intervention by the late-filed claims by a second charging party based on the timely charge filed by the first.

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

349 *EEOC v. Global Horizons*, 2012 U.S. Dist. LEXIS 33346 (D. Haw. Mar. 13, 2012) (granting motion to intervene filed by the U.S. Government (Department of Justice) under Rule 24(b)).

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

351 *1618 Concepts Inc.*, 2020 U.S. Dist. LEXIS 2090, at **22-22.

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

353 *Id.* at *5.

354 *Id.* at *6.

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

356 *EEOC v. JCFB, Inc.*, 2019 U.S. Dist. LEXIS 102862 (N.D. Cal. June 19, 2019).

357 *EEOC v. N. Ga. Foods Inc.*, 2022 U.S. Dist. LEXIS 68541 (W.D.N.C. Apr. 13, 2022).

358 *Id.* at *1.

359 *Id.* at **1-2.

appearance in the case.[360] The court granted the plaintiff-intervenor's motion, recognizing that Title VII authorizes her to intervene and noting that her Rule 24 motion was timely filed.[361]

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

More recently, in *EEOC v. Papa John's USA Inc.*, the court identified four factors that should be considered when assessing whether a potential intervenor has timely filed a motion to intervene – "(1) the length of time during which the proposed intervenor knew or reasonably should have known of its interest in the case before moving to intervene; (2) the extent of prejudice to the existing parties as a result of the proposed intervenor's failure to move for intervention as soon as it knew or reasonably should have known of its interest; (3) the extent of prejudice to the proposed intervenor if its motion is denied; and (4) the existence of unusual circumstances militating either for or against a determination that its motion was timely."[367] Finding no party would be prejudiced by the potential plaintiff-intervenor intervening in the EEOC's ADA suit (which grants plaintiffs an unconditional right to intervene in ADA litigation brought by the EEOC) and given that the potential plaintiff-intervenor filed his motion to intervene less than one month after the EEOC filed suit, the court granted the Rule 24 motion.[368]

In United States *EEOC v. PRC Industries, Inc.*, another case decided in FY 2023, the court found the two potential plaintiff-intervenors, who had previously filed charges of discrimination against the defendant, satisfied the dual-factor test to intervene under Rule 24(a)(1).[369] Considering whether the potential plaintiff-intervenors had an unconditional right to intervene, the court acknowledged Title VII grants persons who timely file charges of discrimination an absolute right to intervene in the government's civil suit. And since the parties had not yet engaged in extensive motion practice after the defendant answered the complaint, the court found the potential plaintiff-intervenors satisfied the second element requiring timely intervention, and their Rule 24(a)(1) motions were granted.[370]

In *EEOC v. J & R Baker Farms, LLC*,[371] the court granted a motion to amend the complaint to add 10 additional plaintiff-intervenors in the EEOC's pattern-or-practice lawsuit, even though the individuals were not eligible to participate in the lawsuit under the single-filing rule. (The court had previously ruled potential plaintiff-intervenors whose claims arose after the date any representative plaintiff filed a representative charge could not take advantage of the single-filing rule.) Yet, the court held those individuals could permissively intervene under Rule 24(b)(1)(B) because their claims shared common questions of law and fact with those in the lawsuit.

In *EEOC v. Horizontal Well Drillers, LLC*,[372] the plaintiff-intervenor alleged class claims despite stating in his charge that he brought his charge individually. However, during the course of the EEOC investigation, the EEOC had requested additional information, including the employer's hiring policies, methods for screening and recruiting, and records of everyone hired and not hired from the applicant pool. The EEOC later issued a "Notice of Expanded Investigation and Request for Additional Info." Despite the plaintiff-intervenor's failing to state that he sought to

360 *Id.* at *2.
361 *Id.* at **2-3.
362 *United States EEOC v. Activision Blizzard Inc.*, 2021 U.S. Dist. LEXIS 250822 (C.D. Cal. Dec. 20, 2021).
363 *Id.* at **1-4.
364 *Id.* at **2-4.
365 *Id.* at **1-2, 4.
366 *Id.* at *3.
367 *EEOC v. Papa John's USA Inc.*, 2023 U.S. Dist. LEXIS 64427, at *1 (M.D. Ga. Apr. 12, 2023).
368 *Id.* at *2.
369 *United States EEOC v. PRC Indus., Inc.*, 2023 U.S. Dist. LEXIS 110639, at *1 (D. Nev. June 27, 2023).
370 *Id.* at **3-4.
371 *EEOC v. J & R Baker Farms, LLC*, 2016 U.S. Dist. LEXIS 29167 (M.D. Ga. Mar. 8, 2016).
372 *EEOC v. Horizontal Well Drillers, LLC*, 2018 U.S. Dist. LEXIS 102434 (W.D. Okla. June 18, 2018).

represent others in his charge, the court permitted intervention. The court was satisfied that the employer was on sufficient notice and should have reasonably expected class claims to grow out of the charge upon receipt of the Notice of Expanded Investigation, along with the requests for additional information.

At least one federal appellate court has held a mandatory arbitration agreement does not preempt an individual's right to intervene. In *EEOC v. PJ Utah, LLC*,[373] 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.374 In some instances, courts have permitted leave to amend the complaint to add factual detail related to pendent claims even when the plaintiff-intervenors knew most if not all of the alleged facts at the time they filed their initial complaint in intervention. In a case decided in 2021, *EEOC v. JBS USA, LLC*,[375] the plaintiff-intervenors filed amended complaints adding factual detail supporting their pendent claims in response to the defendant's motion for judgment on the pleadings, arguing the initial complaints did not contain sufficient factual detail. Although the initial complaints were filed almost nine years prior to the motion to amend, the court permitted amendment, reasoning the first time the plaintiff-intervenors were on notice of a potentially deficient complaint was when the defendant filed a motion for judgment on the pleadings, which occurred only two months before the plaintiff-intervenors' motion to seek leave to amend.

As explained above, Rule 24(b)(1)(B) allows the court, in its discretion, to permit intervention by a person "who has a claim or defense that shares with the main action a common question of law or fact." In exercising its discretion, the court "must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." This standard is commonly used for analyzing pendent claims. Further, courts will rely on 28 U.S.C. §1367 in asserting supplemental jurisdiction over state law discrimination claims in intervention actions.[376] In a 2020 decision, however, in *EEOC v. Norval Electric Cooperative, Inc.*,[377] the court held that in order for the court to hear an intervenor's state law claims, the intervenor must seek leave from the court to file an amended complaint that contains both her federal and state law claims, reasoning the court lacked authority to remove or consolidate a state court action to federal court. Further, the court also declined to exercise supplemental jurisdiction over the intervenor seeking judicial review of proceedings before the state Human Rights Commission, reasoning there was nothing to be gained in terms of judicial economy or avoidance of risk of conflicting decisions.[378]

In an older decision, *EEOC v. Mayflower Seafood of Goldsboro, Inc.*,[379] 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*,[380] the plaintiff-intervenor survived

373 *EEOC v. PJ Utah, LLC*, 822 F.3d 536 (10th Cir. 2016).

374 *EEOC v. OnSite Solutions, LLC*, 2016 U.S. Dist. LEXIS 158620, at **8-9 (W.D. Okla. Nov. 16, 2016).

375 *EEOC v. JBS USA, LLC*, 2021 U.S. Dist. LEXIS 24079, at **21-23 (D. Col. Feb. 8, 2021).

376 *EEOC v. PC Iron, Inc.*, 2017 U.S. Dist. LEXIS 141187, at **9-10 (S.D. Cal. Aug. 31, 2017); *EEOC v. Cappo Mgmt.* XXIX, 2021 U.S. Dist. LEXIS 64326, at **3-4 (E.D. Cal. Mar. 31, 2021) (exercising supplemental jurisdiction over California FEHA disability and common law claims under §1367).

377 *EEOC v. Norval Elec. Coop. Inc.*, 2020 U.S. Dist. LEXIS 58548, at **10-11 (D. Mont. Apr. 2, 2020).

378 *Id* at *7.

379 *EEOC v. Mayflower Seafood of Goldsboro, Inc.*, 2016 U.S. Dist. LEXIS 101154 (E.D.N.C. Aug. 2, 2016).

380 *EEOC v. Favorite Farms, Inc.*, 2018 U.S. Dist. LEXIS 1482 (M.D. Fla. Jan. 4, 2018).

a motion to dismiss her state law claims for assault and battery because the issue of vicarious liability was more appropriately addressed at the summary judgment stage.

In contrast, in *EEOC v. Norval Electric Cooperative, Inc.*,[381] a Montana district court held that while it could exercise pendent jurisdiction over an intervenor's state law claims that arise from the same nucleus of facts as the federal claims, in order for the court to hear those state law claims, the intervenor must ask the court for leave to file an amended complaint that contains both her federal and state law claims.

Note that in *EEOC v. LXL Learning, Inc.*,[382] 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.[383] Where individual employees or the EEOC also assert individual claims in a pattern-or-practice lawsuit initiated by the EEOC, however, managing the various individual claims becomes complicated because of the different proof schemes. While there are not any recent reported cases on this issue, *EEOC v JBS USA, LLC*[384] provides useful guidance in dealing with this issue.

In the *JBS USA* case, the EEOC sued a meatpacking company, alleging it discriminated against Somali, Muslim, and Black employees. The agency asserted several pattern-or-practice claims. At the outset of the case, the EEOC and the employer entered into a bifurcation agreement dividing discovery and trial into two phases: (1) the EEOC's pattern-or-practice claims (Phase I); and (2) individual or Section 706 claims (Phase II). More than 200 individuals intervened. At the trial of the Phase I claims, the court found in the employer's favor, and the action proceeded to Phase II. In Phase II, over 200 plaintiff-intervenors 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 plaintiff-intervenors.

The employer moved to dismiss the claims of several categories of employees, including those who were proceeding *pro se* and not engaging in discovery. The court granted the employer's motion to dismiss the claims of 16 *pro se* plaintiff-intervenors for failure to prosecute their cases. The employer also argued that the EEOC could not seek relief on behalf of 18 other individuals whose claims had previously been dismissed for failure to prosecute. The court agreed and held, based on *res judicata* principles, the EEOC could not assert claims on behalf of the individual plaintiff-intervenors whose claims had been dismissed. In a later proceeding, the court dismissed 13 remaining plaintiff-intervenors for failure to comply with a court order for each plaintiff-intervenor to file written notice of their current address and telephone number.[385]

The employer also moved to dismiss 36 individuals' claims due to their failure to file Title VII charges. The individuals argued their claims were saved under the single-filing rule, described above. The court declined to adopt a categorical rule that the single-filing rule only applies to class actions and noted only the Third Circuit has so held.386 Hence, the court denied dismissal and held seven individuals' claims were subject to the single-filing rule because the employer was on notice of potential class allegations, given multiple employees filed charges alleging similar discriminatory treatment on the same day.

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

5. Consolidation

Under Rule 42, a court may "join for hearing or trial any or all matters at issue in the actions; consolidate the actions; or issue any other orders to avoid unnecessary cost or delay" if actions before the court involve a common question of law or fact.[387] While a plaintiff's lawsuit may involve a common question of law or fact brought in a separate lawsuit by the EEOC, courts will use a balancing test to determine whether consolidation would avoid unnecessary costs or delay. Here, too, although there were not any reported decisions on this issue in FY 2023, *EEOC v. Faurecia Auto Seating, LLC*,[388] is illustrative regarding the manner in which this issue may be dealt with by the courts.

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

D. Class Issues in EEOC Litigation

1. ADEA Litigation

When the EEOC files suit under the Age Discrimination in Employment Act seeking relief on behalf of employees, it looks to Section 16(c) of the Fair Labor Standards Act (FLSA) for the procedures it must follow. In FY 2020, a Maryland district court held that the EEOC was not required to adhere to the "opt-in" procedural requirements associated with collective actions under Section 16(b) of the FLSA, because the "ADEA's statutory scheme [including legislative history] plainly permits the EEOC to pursue an enforcement action under its provisions without obtaining the consent of the employees it seeks to benefit."[389] The EEOC, therefore, could seek relief on behalf of a class under the ADEA without obtaining the consent of employees.

In FY 2023, the Southern District of New York evaluated how discovery issues should be bifurcated in an ADEA pattern-or-practice lawsuit brought by the EEOC.[390] At the outset, the parties agreed that discovery should be bifurcated into two phases, with Phase I addressing liability, and Phase II addressing individual claims of discrimination.[391] However, the parties disagreed on whether damages for individuals who testified about liability in Phase I should also be addressed in Phase I, and the parties also disagreed on whether Phase I should include discussion about whether defendant acted willfully.[392]

Acknowledging that it is within the court's discretion to determine how discovery should be bifurcated, the court decided individuals damages should be limited to Phase II because focusing on it in phase one may bog down phase one and potentially cause confusion.[393] In assessing when willfulness should be addressed in discovery, the court noted this evaluation was more complex, since willfulness bleeds into both phases of discovery insofar as it addresses the employer's conduct (which is related to liability and phase one) and it also concerns whether liquidated damages will be awarded (which is related to damages and Phase II).[394] For efficiency and economy, the court ordered Phase I of discovery to include defendant's intent, knowledge, or reckless disregard to aid in assessing willfulness.[395]

387 Fed. R. Civ. P. 42.
388 *EEOC v. Faurecia Auto Seating, LLC*, 2018 U.S. Dist. LEXIS 105391 (S.D. Miss. June 25, 2018).
389 *EEOC v. Baltimore Cty.*, 2019 U.S. Dist. LEXIS 185913, (D. Md. Oct. 28, 2019).
390 *EEOC v. Hillstone Rest. Grp., Inc.*, 2023 U.S. Dist. LEXIS 144467 (S.D.N.Y. Aug. 14, 2023).
391 *Id.* at **8-9.
392 *Id.*
393 *Id.* at **6-7, 9-10.
394 *Id.* at **11-12.
395 *Id.* at *16.

2. Religious Accommodation

In *EEOC v. JBS United States, LLC*,[396] the EEOC attempted to reverse the court's Phase I (trial) dismissal. In Phase I,397 the EEOC sued the employer for religious discrimination, among other things, alleging that the employer engaged in a pattern or practice of unlawfully denying Muslim employees reasonable religious accommodations to pray and break their Ramadan fast.[398] In finding against the EEOC in Phase I, the court concluded that while the employer had denied Muslim employees a reasonable religious accommodation, the EEOC had failed to make a requisite showing that the employees suffered a materially adverse employment action as a result of the employer's policy denying unscheduled prayer breaks.[399] Importantly, the court cited the employer's "credible and legitimate concern about work stoppages," and explained that "[i]t is error to assume … that differential treatment between a minority employee and a non-minority employee that is not explained by the employer in terms of a rational, predetermined business policy must be based on illegal discrimination because of an employee's protected class characteristics."[400]

On appeal, the EEOC argued that "the 10th Circuit's en banc decision in *Exby-Stolley v. Bd. of Cnty. Comm'rs*, 979 F.3d 784 (10th Cir. 2020), a disability-accommodation case brought under the ADA, [wa]s an intervening change in Title VII religious-accommodation law."[401] Rejecting this argument, the court reiterated the requirement in Title VII religious accommodation cases for the plaintiff to show an adverse employment action.[402] As such, Exby-Stolley did not represent a change in the law controlling Title VII religious-accommodation cases.[403]

3. Pay Discrimination

Discovery of information not directly related to systematic pay discrimination claims may still be permitted. For example, in *EEOC v. University of Miami*,[404] the EEOC alleged that the University violated the Equal Pay Act and Title VII by paying a female professor less than a male professor because of the female professor's sex. The EEOC filed a third motion to compel requesting certain data from the University, even though this request was not tailored to the information the University considered in making the salary decisions at issue.[405] In particular, the EEOC argued that it needed the requested information to test the University's explanations for its salaries.[406] The court agreed and decided that some of the data requested by the EEOC was proportional to the needs of the case, and ordered the University to produce existing faculty salary analysis spreadsheets without redactions, starting salary information for specific faculty, and any documents or information the University utilized in making the starting salary decisions.[407]

4. Race Discrimination

In *EEOC v. Supreme Staffing*,[408] a former Hispanic account supervisor filed a charge of discrimination against the defendant, selecting the boxes for national origin discrimination and retaliation on his charge.[409] While he did not select race discrimination, in the particulars of his charge, he told the EEOC he was discharged after complaining that Black applicants were turned away from seeking employment, while Hispanic applicants filled the open roles. The EEOC filed a class action on behalf of the Black applicants who were allegedly turned away.[410]

Challenging whether the EEOC met its pre-suit obligations, the defendant argued on its Rule 12(b)(6) motion that it and the other defendants did not receive notice of the putative class action before the complaint was filed, and the former employee's charge was insufficient to permit the EEOC to exhaust its administrative duties before filing the class action.[411]

396 *EEOC v. JBS United States, LLC*, 2021 U.S. Dist. LEXIS 13012, at *1 (D. Colo. Jan. 25, 2021).
397 *EEOC v. JBS USA, LLC*, 339 F. Supp. 3d 1135 (D. Colo. Sept. 24, 2018).
398 *Id.* at 1149.
399 *Id.* at 1187-88.
400 *Id.* at 1192.
401 2021 U.S. Dist. LEXIS 13012, at *8 (D. Colo. Jan. 25, 2021).
402 *Id.* at *10.
403 This lawsuit ultimately settled in May 2021 for $5.5 million.
404 *EEOC v. Univ. of Miami*, 2020 U.S. Dist. LEXIS 203841, at *2 (S.D. Fla. Nov. 2, 2020).
405 *Id.*
406 *Id.*
407 *Id.* at **3-4.
408 *EEOC v. Supreme Staffing LLC*, 2023 U.S. Dist. LEXIS 139315 (W.D. Tenn. Aug. 10, 2023).
409 *Id.* at *2.
410 *Id.* at *12.
411 *Id.* at **12-18.

Recognizing that 42 U.S.C. 2000e-5(b) only requires that, for the EEOC to satisfy its pre-suit obligation, a charge and notice of a charge be served on the employer, an EEOC investigation occurs and results in a cause finding, and the EEOC attempts conciliation, the court found the EEOC satisfied all its obligations in advance of filing the class action.[412]

Turning to whether the other defendants, Better Placements and Inspire, received proper notice before the EEOC filed the race class action, the court acknowledged that the former employee's charge was brought against Supreme Staffing, and case law requires that a party not named in the charge cannot face a subsequent lawsuit under Title VII unless there is an identity of interest between the unnamed entity and the one identified in the charge.[413]

In the Sixth Circuit, two tests determine whether there is an identity of interest sufficient to impute notice onto the unnamed entity.

The first test, the *Eggleston*[414] test, allows the court to find an identity of interest when the unnamed party has been provided adequate notice of the charge under the circumstances, which affords it the opportunity to participate in conciliation proceedings.[415] The court found the *Eggleston* test supported finding an identity of interest existed since all defendants shared the same owner and had the same headquarters, indicating that the notice of charge reached all defendants and all were aware of the allegations in the charge.[416]

Under the second test, the *Glus*[417] test, the court examines whether: (1) with reasonable effort, the charging party could have ascertained the name of the unnamed entity at the time of filing the EEOC charge; (2) it would be unnecessary to include the unnamed entity in the conciliation because the interests of the named party and unnamed party are so similar; (3) the unnamed entities' interests were actually prejudiced by not being present in the EEOC proceedings; and (4) whether the unnamed party has represented to the charging party that its relationship with the charging party should be through the named party.[418] Since the instant case was in the pre-discovery phase, the court found the record was insufficiently developed to determine if the *Glus* test also supported an identity of interest. The court opined the parties should be allowed to develop the record and it declined to dismiss the other two defendants, Better Placements and Inspire, on this basis.[419]

Testing the sufficiency of the former employee's charge to support the race class, the defendant argued the former employee's failure to check the race box on his charge doomed the EEOC's class.[420] The court disagreed, finding the particulars of the charge where the former employee shared he was retaliated against for complaining about the treatment of Black applicants, provided notice of a potential class action for racial discrimination that the defendant could reasonably expect to grow out of the charging party's allegations.[421] Finally, as to whether the named plaintiffs were required to file charges before the EEOC filed suit and met its pre-suit obligations, the court also rejected this argument, noting that each aggrieved person is not required to file a charge so long as the classes of claimants would have been covered by the investigation that ensued from the charging party's charge.[422] Finally, that the former employee was not Black, did not, as a matter of law, preclude him from being involved in the EEOC's lawsuit on behalf of the class of Black applicants.

In *EEOC v. Whiting-Turner Construction Co.,*[423] the defendant sought to strike 11 of the 34 class members as a discovery sanction under Rule 37. The court previously afforded the defendant the opportunity to depose all 34 class members but defendant chose to not depose 11 of the 34 potential deponents before discovery closed.[424]

Defendant argued Section 706 cases require individualized evidence and the court should strike the 11 plaintiffs because they were not deposed.[425] The court disagreed. While it acknowledged depositions may be the most effective

412 *Id.* at *7.
413 *Id.* at **13-15.
414 *Eggleston v. Chicago Journeymen Plumbers' Local Union No. 130, N.A.*, 657 F.2d 890, 905 (7th Cir. 1981).
415 *Id.* at **14-15.
416 *Id.* at **16-17.
417 *Glus v. G.C. Murphy Co.*, 562 F.2d 880, 888 (3d Cir. 1977).
418 *Id.* at *15.
419 *Id.* at **17-18.
420 *Id.* at *10.
421 *Id.* at **18-19.
422 *Id.* As previously discussed, the single-filing rule 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.
423 *EEOC v. Whiting-Turner Contracting Co.*, 2023 U.S. Dist. LEXIS 16001 (M.D. Tenn. Jan. 31, 2023).
424 *Id.* at *2.
425 *Id.* at **2-3.

way to gather evidence to disprove an individual's claims, it stated it is not the sole avenue, as defendants may also ensure the individuals participate in the discovery process, may interview the individuals, and may move to reopen discovery for the limited purpose of conducting additional depositions.[426]

5. ADA Discrimination

In *EEOC v. W. Distributing Co.*,[427] the EEOC brought an ADA pattern-or-practice claim on behalf of 57 aggrieved individuals that was nearing trial. The district court previously ordered the trial be bifurcated, with all the individual claims and corresponding damages heard during the second phase of trial.[428] Relying on the district court's bifurcation order, the EEOC asked the court to prohibit defendant from presenting evidence that the aggrieved individuals "were not qualified individuals, did not have a disability or did not notify defendant of their disability, did not desire reassignment, or were discharged for reasons other than their disability" in its motion in limine.[429] The court declined. Although the court noted that the crux of the initial phase of a pattern-or-practice case is centered on the alleged pattern of discriminatory decision-making, the court agreed with the defendant that bifurcating these actions does not limit the evidence an employer can use to defend itself at trial, nor does it prohibit the defendant from introducing evidence to support that the EEOC's case as inaccurate or insignificant.[430]

Next, the EEOC sought to exclude evidence that some aggrieved individuals were prescribed opioid medications from the first phase of trial.[431] The EEOC argued this evidence was not relevant to the first phase of trial since the defendant only discovered it during the pending litigation and because it was after-acquired evidence of wrongdoing, it was only relevant to damages; and Federal Rule of Evidence 403, supported excluding evidence that the aggrieved individuals were prescribed opioid medication, arguing it was prejudicial given the national spotlight around the opioid epidemic.[432] The defendant countered the EEOC's position, replying that the aggrieved individuals' use of the opioid prescriptions was relevant to the first phase of the trial because opioid use prevented the individuals from driving commercial motor vehicles, which undercut the EEOC's assertion that the defendant could have provided the aggrieved individuals reasonable accommodations.[433] The court agreed with the defendant, noting there is nothing wrong with using lawfully prescribed opioid medications and that Rule 403 did not support excluding the evidence.[434]

Then, after the court ordered the defendant to restore and search back-up tapes in an earlier dispute between the parties, the defendant claimed it discovered 14 additional individuals to whom it had previously provided ADA accommodations who were not previously disclosed to the EEOC until after the close of discovery.[435] In its motion in limine, the EEOC sought to exclude this evidence, asserting that the defendant had evidence of these accommodations before discovery closed.[436] The court elected *sua sponte* to transform this discovery dispute between the parties into a motion for sanctions under Rule 37 against the defendant.[437] In its ruling, the court allowed the defendant to call the 14 individuals as witnesses and introduce evidence of their accommodations, but the court also ordered the defendant to provide the EEOC with a detailed factual summary of the materially relevant testimony it anticipated soliciting from the individuals on direct examination along with a complete list of exhibits it planned to reference or use on direct examination, 48 hours in advance.[438] The court also informed the parties that the EEOC, was not limited to the scope of defendant's direct examination when it cross-examined the individuals about their accommodations.[439]

In its motion in limine, the EEOC also sought to exclude evidence of accommodations the defendant provided to individuals that the EEOC could not establish (and did not know) had disabilities.[440] The EEOC argued the

426 *Id.* at **3-4.
427 *EEOC v. W. Distrib. Co.*, 2023 U.S. Dist. LEXIS 2918 (D. Colo. Jan. 6, 2023).
428 *Id.* at **3-4.
429 *Id.* at **5-6.
430 *Id. at **6-7.*
431 *Id.* at *9.
432 *Id.* **9-10.
433 *Id.* at **10-11.
434 *Id.* at *11.
435 *Id.* at **11-12.
436 *Id.*
437 *Id.* at *12.
438 *Id.* at **12-13.
439 *Id. at *13.*
440 *Id.* at **13-15.

defendant's failure to tender a connection between the individual having a disability and the defendant providing an accommodation rendered evidence of the accommodation pointless to the current litigation.[441] Finding no legal basis existed to support requiring the defendant to prove that the individuals to whom it provided accommodations meet all elements of a disability discrimination claim before the defendant provided the accommodation, the court declined the to exclude evidence of the accommodations.[442]

6. Identity of Class Members in EEOC Litigation

Courts continue to address the issue of identification of class members in EEOC-led class actions. In a 2022 decision, *EEOC v. Qualtool, Inc.*,[443] the EEOC initiated suit on behalf of one named individual and an unidentified class of persons who the EEOC alleged had been similarly harmed.[444] No other person was identified in the complaint or in the EEOC's initial disclosures.[445] Only in its response to interrogatories did the EEOC identify one other person, forming a two-person class.[446]

Then, one year and three months after filing the complaint, the EEOC identified five more class members in its First Supplemental Initial Disclosures.[447] Another four class members were disclosed about a month later, and five more members were added the next week, totaling 14 additional members post-complaint and post-interrogatory responses.[448] Relying on the court's Case Management and Scheduling Order to support the timing of its disclosure since the discovery cutoff date had not yet expired, the EEOC defended its delay.[449] But the court did not agree.

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

Taking into account the significant number of potential new class members and the timing of the EEOC's disclosure of same, the court ruled that allowing any one of the 14 additional members depleted the defendant's chances of completing discovery and preparing its defense.[450] Finding the disclosure of the additional claimants untimely and prejudicial, the EEOC was left with its original two-person class.[451]

Following the court's order, another discovery battle ensued between the parties.[452] This time it was based on whether eight of the stricken potential plaintiffs, whom the EEOC relayed would now be used as fact witnesses, could be (a) excluded from providing deposition testimony pursuant to Rule 37(c)(1) and Rule 26(e) or (b) be compelled to testify at a deposition without ever being subpoenaed by the defendant or the plaintiff to do so.[453]

Initially, before the witnesses were stricken from being class members and while the EEOC still represented the witnesses, the EEOC had noticed their depositions, and the defendant decided against subpoenaing the witnesses' depositions testimony.[454] However, after the witnesses were stricken as class members, the defendant still did not subpoena their depositions.[455] The court found no merit in the defendant's argument to strike the eight witnesses from testifying at a deposition because while the EEOC was representing the witnesses, it complied with the requirements of Rule 26(a) and Rule 26(e).[456] The EEOC properly disclosed the identity of the witnesses after interviewing them and amended its responses to interrogatories to provide the name, contact information, and subject of each witnesses' testimony.[457] Because the EEOC met its requirements under Rule 26(a), Rule 26(e),

441 *Id.* **14-15.
442 *Id.*
443 *EEOC v. Qualtool, Inc.*, 2022 U.S. Dist. LEXIS 156361 (M.D. Fla., Aug. 30, 2022).
444 *Id.* at *2.
445 *Id.* at **2-3.
446 *Id.* at *2.
447 *Id.* at *3.
448 *Id.*
449 *Id.* at **3-4.
450 *Id.* at **6-7.
451 *Id.* at **2, 7.
452 *EEOC v. Qualtool, Inc.*, 2022 U.S. Dist. LEXIS 164249 (M.D. Fla., Sept. 12, 2022).
453 *Id.* at **1-2.
454 *Id.*
455 *Id.* at **3-6.
456 *Id. at **4-5.*
457 *Id.* at *5.

and Rule 37(c), the court found an exploration into whether the exceptional circumstances under Rule 37(c), which provides pathways for admitting witnesses who should be excluded, was unwarranted because the EEOC had satisfied its duties.[458]

As the defendant had failed to subpoena the witnesses' testimony in accordance with Rule 30(a)(1) and Rule 45, the court found it lacked any authority to compel the witnesses to appear for depositions, since neither the defendant nor the plaintiff ever subpoenaed their appearance.[459]

In FY 2023, a discovery dispute concerning whether the attorney-client privilege or attorney work product doctrine protected the EEOC from disclosing its communications with potential and active class members in its ADA and Title I class lawsuit.[460] The defendant provided the EEOC with a list of current and former employees who requested accommodations based on a medical condition or disability, and the EEOC culled that list to send solicitation letters and participation agreements to about 4,000 of the defendant's current and former employees inquiring about their interest in joining the class.[461] The defendant then requested the EEOC to produce (a) all solicitation letters and emails it sent to current and potential class members; (b) all responses to those solicitations; and (c) the participation agreements between the EEOC and current class members who had already been disclosed in the class action.[462]

The defendant only sought documents from (a) active class members from whom the EEOC received a response but had had not yet identified; (b) active class members whom had been identified but subsequently dropped from the case; (c) the solicitation letter or email sent to active or potential class members whom the EEOC did not invite to call to obtain legal advice; or (d) the active class member who testified or otherwise indicated that the person did not have an attorney-client relationship with the EEOC at the time the communications occurred.[463]

The court held all correspondence between the EEOC and any active class members, named or unnamed, who were involved in the class action, were protected from disclosure by the attorney-client privilege.[464] As for correspondence from active class members who testified during depositions that they did not have an attorney-client relationship with the EEOC, the court found their correspondence was also protected by the attorney-client privilege, as the deponents likely did not understand the complex nature of the class action, and their deposition testimony did not rebut the affidavits they previously executed expressing that an attorney-client relationship existed.[465] Similarly, the communications of anyone who initially responded to the EEOC's solicitation letters to discuss their claims but then was subsequently dropped from the litigation, were also protected by the attorney-client privilege since the attorney-client relationship commences when the individual takes action to manifest their intent to enter into the relationship.[466]

The court declined, however, to extend the attorney-client relationship and privilege that attaches to such communications to individuals who received the EEOC's solicitation letters and declined its representation, and it declined to extend the privilege to individuals who did not respond to the letter; the court ruled the EEOC's communications with these individuals must be produced.[467] Finally, the court found the EEOC's selection of individuals to solicit from the list the defendant produced to the EEOC, was attorney-work product, representing the EEOC's mental impressions since the EEOC alleged it spent hours culling the list and deciding whom to solicit.[468] The court found no undue hardship existed to require the EEOC turn over its solicitation list to the defendant because the defendant had the original list which included the same names the EEOC had solicited.[469]

458 *Id.* at **5-6.
459 *Id. at **6-7.*
460 *EEOC v. Scottsdale Healthcare Hosps.*, 2023 U.S. Dist. LEXIS 141769, at *1 (D. Ariz. Aug. 14, 2023).
461 *Id.* at **2.
462 *Id.* at **2-3.
463 *Id.*
464 *Id.* at **5-6.
465 *Id.* at **6-7.
466 *Id.*
467 *Id.* at **9-10.
468 *Id.* at **10-12.
469 *Id.*

E. Other Critical Issues in EEOC Litigation

1. Protective Orders

While there were no EEOC decisions issued in FY 2023 that addressed the enforceability of confidentiality agreements and protective orders, a review of recent decisions on this topic is instructive.

In 2021, the Southern District of Florida issued a decision in *EEOC v. University of Miami*, which involved claims of Equal Pay Act violations.[470] In this case, the parties entered into a confidentiality agreement stipulating specific contents of documents to be designated as confidential. During discovery, the University produced documents relating to its salary recommendations and justifications for multiple faculty members, as well as documents relating to the decision to promote the plaintiff professor and her alleged comparator. The University attached redacted versions of these documents to its motion for summary judgment, and filed a motion to seal the unredacted versions. The plaintiffs opposed the motion and the court agreed. The court noted that since the documents were filed with a pretrial motion requiring judicial resolution on the merits, they were subject to the common law right of access. Only a showing of good cause could overcome the right of access, which the court found the University failed to demonstrate. The court stated the University's motion to seal, without the benefit of reviewing the unredacted documents at issue, did not show the University's interest in redacting the names of individuals involved in the promotion and tenure review process, nor did it describe the process.

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,[471] a magistrate judge held a pre-discovery settlement conference with the parties in which she suggested disclosure of certain confidential financial information and documents might be beneficial for the settlement process. 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.[472]

The public generally has a right to judicial records. A party seeking to limit public access to such records has the burden to show sealing is appropriate and must support its position with specific reasons. In a disability discrimination case,[473] a federal court in North Carolina granted, in part, the parties' request to seal certain personal and private medical information of a kind not ordinarily made public, holding privacy interests override the public's interest in access to such records. The court sealed personal and medical information of limited or no relevance to the case, such as the claimant's medical records concerning irrelevant health conditions. The court also granted the defendant's request to seal deposition transcripts and Occupational Safety and Health Administration records containing health information of employees not parties or claimants on the grounds this information was not relevant. The court declined, however, to seal information about the nature of injuries suffered by employees because it was relevant to the court's decision. The court also denied the parties' requests to seal other types of information. For example, the court disagreed the name of the claimant's prescription drug at issue in her discharge and the results of a drug test were otherwise sensitive information. The court also refused to seal information concerning dates of treatment and diagnoses because these were relevant to the court's summary judgment decision in the case. The court found a table listing prescriptions employees disclosed per company's drug disclosure policy, but which did not contain personally identifiable detail, also was not confidential.

Although the public has a general right to access judicial records, courts continue to show a willingness to protect sensitive information, especially when there is mutual agreement by the parties, and the parties establish "good cause" to protect this material disclosed during discovery. In a FY 2022 sex discrimination case,[474] a federal court in Washington State approved a stipulated protective order protecting, among other items, the confidentiality of social security and tax numbers, financial information, credit card numbers, dates of birth, immigration status, trade secrets, and even the maiden names of mothers.

470 *EEOC v. Univ. of Miami*, 2021 U.S. Dist. LEXIS 89226, at *2 (S.D. Fla. May 11, 2021).
471 *EEOC v. Prestige Care, Inc.*, 2018 U.S. Dist. LEXIS 217857 (E.D. Cal. Dec. 27, 2018).
472 *Id.* at **1-2.
473 *EEOC v. Loflin Fabrication LLC*, 2020 U.S. Dist. LEXIS 119252 (M.D.N.C. July 8, 2020).
474 *EEOC v. Chief Orchards Admin. Servs.*, 2022 U.S. Dist. LEXIS 152289 (E.D. Wash. Aug. 24, 2022).

2. ESI: Electronic Discovery-Related Issues

With respect to electronically stored information (ESI), courts continue to show their proclivity to permit reasonable discovery considering the nature of the litigation, but emphasize the parties' obligations to cooperate in crafting search terms with ESI.

In a FY 2023 decision, *EEOC v. Qualtool*,[475] the EEOC had asked the defendant to: (a) run six search terms on (b) six email accounts and five computers (c) using Outlook and Windows File Explorer computer software. Following the first motion to compel, the court noted that the defendant offered to make additional searches with terms the EEOC identified. The EEOC sent an excel sheet with search terms, but the defendant stated it would only run search terms covering five of the EEOC's requests applicable to specified requests for production, and that this elicited no responsive documents. The court noted that while the Sedona Principles caution that the parties must cooperate to craft search terms that will effectively capture all relevant information without being too burdensome, this cooperation must be in good faith, consistent with the local court rules. Further, the court reiterated that if a party has limited the search terms following conferral according to the opposing party's input, this is typically sufficient to compel the opposing party to run the search. Ultimately, the court granted the motion, although to a limited, narrow application of the search terms.

3. Reliance on Experts, Including Systemic Cases

In line with a recent trend, expert testimony continues to be a point of emphasis in EEOC litigation.

Recently, the Southern District of Ohio weighed in on challenging the statistics of an EEOC expert. In *EEOC v. R&L Carriers*,[476] a pattern-or-practice matter which heavily relied upon statistics, the defendant identified potential shortcomings in the EEOC's expert's regression analysis. The court noted, though, that none of them, whether considered alone or in combination, were severe enough to prevent the EEOC from presenting the evidence to the jury. Therefore, the court deferred to the jury to decide whether the EEOC or the defendant had the better of the battle of the statistical experts.

In another pattern-or-practice matter, *EEOC v. Western Distributing*,[477] the defendant moved to exclude the EEOC's experts and the EEOC sought to exclude the defendant's expert. The court emphasized its role as a gatekeeper with admitting or excluding expert testimony.[478] After the court reviewed the applicable standards of evidence, the court analyzed, in depth, the defendant's bases for attempting to exclude the EEOC's experts. In part, the defendant argued the EEOC's expert had not studied the applicable EEO policies and possessed no prior formal education related to the EEO policies at issue. Thus, the defendant argued the expert's opinions were unreliable. However, the court rejected this argument, and ruled that the expert at issue was qualified to offer most of the objected-to opinions. Notably, the court delved into the specifics of whether or not an expert may testify related to the nuances of the interactive process. In part, the court reasoned that whether the company violated the ADA is an impermissible legal conclusion. Therefore, those opinions were precluded from admission. Later, in this same matter, the defendant brought additional expert-related motions , to exclude expert opinions and testimony of two of the EEOC's experts. The court continued to emphasize its gatekeeping role by denying several of the parties' expert-related motions due to procedural grounds, such as untimeliness and duplicativeness.

The District of Rhode Island also dealt with EEOC-related expert motion practice in the *EEOC v. Citizens Bank*.[479] This matter appeared quite simple: should the court exclude the defendant's expert testimony? In keeping with its gatekeeper role, the court entertained the EEOC's *Daubert* motion seeking to exclude the defendant's expert's testimony regarding whether the charging party suffered from an anxiety disorder. The court, in denying the EEOC's motion to exclude, reasoned that the expert had administered the psychological test at issue over 100 times. The court also denied the EEOC's other reasons to exclude the testimony, which further demonstrated the court's ability to take a middle-of-the-road approach with its gatekeeping function.

475 *EEOC v. Qualtool, Inc.*, 2022 U.S. Dist. LEXIS 208176 (M.D. Fla. Nov. 16, 2022).

476 *EEOC v. R&L Carriers, Inc.*, 2023 U.S. Dist. LEXIS 52437 (S.D. Ohio Mar. 27, 2023).

477 *EEOC v. Western Distributing Co.*, 2022 U.S. Dist. LEXIS 211827 (D. Colo. Nov. 22, 2022).

478 *Bitler v. A.O. Smith Corp.*, 400 F.3d 1227, 1232 (10th Cir. 2005).

479 *EEOC v. Citizens Bank, N.A.*, 2023 U.S. Dist. LEXIS 40490 (D.R.I. Mar. 10, 2023).

In *EEOC v. Jackson National Life Ins. Co.*,[480] the charging party sought to reopen discovery to endorse a new damages expert. The magistrate denied this motion and concluded that the charging party's disclosure of her $12 million damages calculation violated Rule 26. In making this ruling, the court reasoned the charging party failed to fulfill the obligation under Rule 26(e) to supplement and correct prior disclosures.

Later, in that same case, a dispute arose regarding whether an expert opinion may be excluded on the grounds of unreliability and irrelevance. The defendant objected on the grounds the expert's opinions were irrelevant, "admittedly unhelpful to the trier of fact," and were unreliable. Specifically, the defendant argued the expert's testimony was "wholly irrelevant" because, although the charging party argued she was constructively discharged on October 12, 2010, she actually resigned and therefore was not entitled to any economic damages following her resignation. The court, however, agreed with the charging party that if the jury finds that she was constructively discharged, the expert's opinions on the damages that she incurred due to constructive discharge are relevant to the claim and may be helpful to the jury in calculating damages. Moreover, while juries often calculate damages without the benefit of expert testimony, the court ruled that the testimony would help the jury conduct its calculations. The court noted the expert's methodology factored in inflation, career trajectory, ancillary benefits, and other items to determine the extent of the charging party's damages, which are not matters within the ken of an average juror. However, the court found that the expert's opinions related to the years after the charging party left a second employer following her exit from the defendant's employ would not be helpful to the jury.

F. General Discovery by Employer

The EEOC often takes an expansive view of its discovery rights, but argues that employer requests for discovery from the agency should be limited. However, courts frequently take the position that the EEOC is subject to many of the same obligations as employers in providing requested information.

1. Depositions of EEOC Personnel

In the past year, one area of discovery disputes has been the scope of deposition of EEOC personnel. This has involved judicial consideration of how various privileges, including the attorney-client privilege and the government deliberative process privilege, apply to the EEOC's investigative communications with employees.

In *EEOC v. Sunshine Raisin Corp.*,[481] the defendant issued a Rule 30(b)(6) notice of deposition, seeking to depose an EEOC representative on 19 categories of inquiry.[482] The EEOC objected to the topics identified and sought a blanket protective order.[483]

The EEOC conceded that it cannot object to providing a 30(b)(6) witness.[484] The agency maintained, however, that because it had provided its entire investigative file of more than 3,500 pages, a Rule 30(b)(6) deposition was not proportional to the needs of the case, was duplicative, and was overly burdensome to an agency with limited resources and a heavy case load.[485] The court found, however, that the EEOC cannot assert a blanket privilege or exemption to discovery under Rule 30(b)(6), but must justify its request for a protective order with particularity as to the specific categories of inquiry.[486]

In reviewing the areas of inquiry, the court noted that categories 1-6 and 10-12 pertained to factual information and documents to support and rebut claims in the complaint and remedies sought.[487] The EEOC claimed inquiry into these categories was barred based on the attorney-work product privilege, government deliberative process privilege, relevance, and duplicativeness.[488] The court disagreed, finding the weight of authority to permit the defendant to proceed with these categories of inquiry, subject to the EEOC's right to object in the deposition.[489]

480 *EEOC v. Jackson National Life Ins*. Co., 2023 U.S. Dist. LEXIS 57398 9 (D. Colo. Mar. 31, 2023).
481 *EEOC v. Sunshine Raisin Corp.*, 2023 U.S. Dist. LEXIS 102601 (E.D. Cal. June 23, 2023); *EEOC v. Sunshine Raisin Corp.*, 2023 U.S. Dist. LEXIS 152294 (E.D. Cal. Aug. 29, 2023).
482 *Sunshine Raisin Corp.*, 2023 U.S. Dist. LEXIS 152294, at *3.
483 *Id.* at **6-7.
484 *Id.* at **5-6.
485 *Id.* at *6.
486 *Id,* at **6-7.
487 *Id,* at *7.
488 *Id,* at **7-8.
489 *Id.* at *10.

Next, the court noted that categories 7-9 and 17-18 appeared to explore two distinct topics: (1) the EEOC's approach to investigation and evaluation of discrimination cases by respondent companies in general; and (2) the EEOC's own internal policies for investigation and prosecution of sexual harassment.[490] Specifically, as to category 18, the court explained that several courts had found disclosure of the EEOC's internal policies appropriate where they could be either probative of whether a defendant's own policies comported with Title VII or proof of an improper motive for the enforcement action.[491] The court agreed that whether the defendant's policies and processes for investigating sexual harassment were substantially similar to those used by the EEOC could rebut the EEOC's claims that those policies were inadequate, and denied the EEOC's motion as to category 18.[492] The court granted the EEOC's motion with respect to categories 7-19 and 17, finding that the EEOC's investigation and conciliation obligations were dependent on its actions in this case, and that such information was publicly available.[493] The court also granted the EEOC's motion with respect to category 13, which sought the names of all individuals with personal knowledge of the allegations in the complaint, since the EEOC had already provided a witness list.[494]

Categories 14, 15 and 16 sought information regarding the EEOC's claim of representation, about the EEOC's initial disclosures, and documents produced in connection with discovery.[495] The court allowed a limited inquiry into these categories, denying the EEOC's motion.[496]

Finally, category 19 sought inquiry into all steps in the EEOC's investigation of the claims asserted in its complaint.[497] The EEOC claimed this information was irrelevant, protected by the government deliberative process privilege and sought court review of the sufficiency of the EEOC investigation.[498] The court found, however, that the EEOC conflated the discovery process with judicial review of the agency's investigation and that the information sought was relevant to an affirmative defense, and therefore denied the motion as to category 19, subject to later limitation depending on what the employer argued.[499]

In another case, *EEOC v. Thomas B. Finan Center,*[500] the court considered whether the defendant can depose both the EEOC as an agency and the EEOC's investigator.[501] In holding that the defendant cannot depose the EEOC, the court noted that (1) a deposition of the EEOC would essentially be a deposition of the EEOC's counsel, (2) the noticed testimonial topics would likely impermissibly intrude upon non-waived privilege or attorney work product, and (3) the information sought was available and appeared to have been received through other forms of discovery.[502]

The court did hold the defendant could depose the EEOC's investigator as to the facts gathered during the investigation, including from whom and when they were gathered, and on any necessary factual clarifications based on the defendant's review of the materials provided.[503] In so holding, the court reasoned, "the government as a litigant seeking affirmative relief ordinarily should have to disclose materials that a private plaintiff would have to turn over in order to avoid unfair surprise to the other side."[504]

2. Discovery Involving Claimants and Charging Parties

In several cases in the past year, courts addressed the scope of discovery requested by employers concerning claimants and charging parties.

In *EEOC v. Schuff Steel Co.*[505] the court considered who is the appropriate signatory to interrogatory responses. The defendant claimed the EEOC did not comply with Rule 33(b)(3) because it did not provide verifications with its interrogatory responses.[506] The court found that, absent compelling authority to the contrary, it would not overrule

490 *Id.* at *12-13.
491 *Id.* at **15-16.
492 *Id.* at *16.
493 *Id.* at **17-18.
494 *Id.* at *18.
495 *Id.*
496 *Id.* at **19-20.
497 *Id.* at *20.
498 *Id.*
499 *Id.* at *21.
500 2023 U.S. Dist. LEXIS 62025 (D. Md. Apr. 7, 2023)
501 *Id.* at *1.
502 *Id.* at *3.
503 *Id.* at **4, 6.
504 *Id.* at *5.
505 2023 U.S. Dist. LEXIS 130611 (D. Ariz. July 14, 2023).
506 *Id. at *2.*

a common EEOC practice, reasoning that the fact that the EEOC has provided verifications signed by claimants in other cases does not compel the court to order the EEOC to do so in this case.[507] The court required only that the EEOC's trial attorney provide a verification under oath that the EEOC's responses to the defendant are accurate.[508]

In *EEOC v. Scottsdale Healthcare Hospitals,*[509] the court considered an employer request for discovery concerning claimants and potential claimants. The dispute concerned a list of current and former employees who had requested an accommodation, which the EEOC used to decide to which persons to send a solicitation letter in connection with a workplace accommodation lawsuit.[510] The EEOC objected on the basis of attorney-client privilege and the attorney-work product doctrine.[511] The court found that the attorney-client privilege applied to communications between the EEOC and active aggrieved individuals as well as those who established a relationship with the EEOC but later withdrew from the case, but did not apply to the potential aggrieved individuals who received the EEOC's letter but did not respond or who declined the invitation to speak to an EEOC attorney.[512] The court further found that the attorney work product privilege applied to the extent the defendant requested the EEOC to identify the recipients of the letters.[513] Accordingly, the court required the EEOC to produce the substance of the communications with the potential claimants who did not enter into an attorney-client relationship with the EEOC, subject to redaction of personal identifying information of those persons as attorney work product.[514]

Finally, in *EEOC v. Dolgencorp, LLC*[515] the court considered the EEOC's motion to quash a defendant employer's subpoenas to subsequent employers of three claimants, denying the motion in part and granting it in part. Each subpoena sought personnel-related documents for the claimants from their subsequent employers.[516] The EEOC moved to quash the subpoenas as overly broad and exceeding the appropriate scope of discovery, or in the alternative, to limit the scope of discovery.[517]

The court first addressed the standing of the EEOC to assert rights on behalf of claimants and found the better approach when a defendant issues subpoenas to past and subsequent employers of claimants represented by the EEOC is to give the EEOC "limited standing" to assert the interests of those claimants.[518]

The court then found that the following categories sought documents related to the claims and defenses, and that these categories were proportional to the needs of the case: categories 1 and 2, which sought documents related to the claimant's application for and offer of employment; category 3, which sought documents related to the claimant's compensation with the subsequent employer; category 4, which sought documents related to the claimant's job duties; and category 8, which sought documents related to the reasons the claimant ended the employment with the subsequent employer.[519] As to these categories, the court denied the EEOC's request for a protective order.[520]

The court found that certain categories sought relevant documents, but only insofar as limited to claims of age discrimination or retaliation under the ADEA. Categories 6 and 7 sought documents related to complaints by the claimant about work environment or co-workers, or complaints about the claimant, including allegations of discrimination.[521] The court granted a protective order, limiting these requests to ADEA claims.[522]

Finally, the court found that two categories sought documents outside the scope of discovery: category 5, which sought documents related to claimant's job performance and evaluation at the subsequent employer; and category

507 *Id.* at *3.
508 *Id.* at **3-4.
509 2023 U.S. Dist. LEXIS 141769 (D. Ariz. Aug. 14, 2023).
510 *Id.* at *2.
511 *Id.* at **3-5.
512 *Id.* at **9-10.
513 *Id.* at *10.
514 *Id. at *12.*
515 2023 U.S. Dist. LEXIS 153393 (E.D. Okla., Aug. 30, 2023).
516 *Id.* at *1.
517 *Id.* at **2-3.
518 *Id.* at **4-5.
519 *Id.* at *12.
520 *Id.* at *12.
521 *Id.* at **12-13.
522 *Id.* at *13.

9, which sought documents related to the claimant's dishonesty, write-ups or warnings.[523] The court granted a protective order as to these categories.[524]

3. Confidentiality/Protective Orders

EEOC v. Coughlin, Inc.[525] was a 2022 decision concerning protective orders addressing confidential information. A party seeking a protective order has the burden of demonstrating good cause for that order, which usually requires articulating a clearly defined and serious injury that would result absent the protective order.[526] The court, in its broad discretionary power over the discovery process, weighs the countervailing interests of both parties.[527] In *Coughlin*, which involved an alleged class hostile work environment claim, both parties moved for a protective order after trying in good faith to negotiate a stipulated protective order. The parties disputed three provisions: (1) the definition of "confidential information," (2) the scope of the protective order, including temporal scope and whether the protective order would apply to publicly filed documents, and (3) whether confidential documents would be destroyed at the conclusion of the case.[528]

The court agreed with the EEOC's more limited definition of "confidential information" as "information that constitutes or contains trade secrets pursuant to the Uniform Trade Secrets Act" or its state law counterpart.[529] The EEOC argued that defendant's proposal to expand confidential information to include "information a party in good faith contends constitutes or contains trade secrets or other confidential business information that could provide a competitor with a competitive advantage" was too broad, and failed to identify how disclosure would result in a clearly defined, serious injury.[530] The court agreed that the defendant's proposal provided only a vague definition of confidential information and did not clearly articulate what injury would occur. It agreed that the EEOC's definition was comprehensive and employable.[531]

Additionally, the *Coughlin* court addressed the temporal scope of the protective order and whether it should apply to publicly filed documents.[532] Given the presumption of openness and access to judicial documents, the court declined to extend the protective order to documents filed with the court beyond the conclusion of the case, subject to a motion to seal if confidential information covered by the protective order was placed in a public document by a party.[533] For information designated as confidential and not filed, however, the court granted the defendant's proposal to extend conditions of the protective order beyond the conclusion of the action.[534]

Finally, with respect to the destruction of documents at the conclusion of the case, the defendant proposed both parties destroy or return confidential documents.[535] The EEOC opposed the defendant's position, and the court agreed, explaining, "Courts must exercise caution when issuing confidentiality orders so as not to demand that the EEOC destroy government documents, including notes and memoranda, in conflict with the EEOC's duty to obey the requirements of the [Federal Records Act]."[536]

4. Other issues

In *EEOC v. Triple-S Vida, Inc.*,[537] the court answered the question of whether it should grant the defendants' motion for recusal based on defendants' belief that its discovery rulings were biased. During a discovery hearing, the presiding magistrate judge had ruled in the EEOC's favor against defendants, finding that defendants had failed to comply with court orders regarding discovery.[538] After the magistrate judge granted the EEOC's request

523 *Id.*
524 *Id.* **13-14.
525 2022 U.S. Dist. LEXIS 89372 (D. Vt. May 18, 2022).
526 *Id.* at *6 (citing *United States v. Int'l Bus. Machines Corp.*, 67 F.R.D. 40, 46 (S.D.N.Y. 1975)).
527 *Id.* (citing *Rossini v. Ogilvy & Mather, Inc.*, 798 F.2d 590, 601 (2d. Cir. 1986)).
528 *Id.*
529 *Id. at **9-11.*
530 *Id.* at **10-11.
531 *Id.*
532 *Id.* at **12-15.
533 *Id.* at **14-15.
534 *Id.* at *15.
535 *Id.* at *17.
536 *Id.* (quoting *EEOC v. Kronos Inc.*, 620 F.3d 287, 304 (3d Cir. 2010)).
537 2023 U.S. Dist. LEXIS 105409, at *1 (D.P.R. June 15, 2023)
538 *Id.* at **2-3.

for sanctions and attorney's fees, and warned defendants to cease dilatory discovery tactics, defendants moved for recusal, arguing the judge had developed a personal bias against defendants.[539]

Consistent with the duty to make factual determinations and evaluate his own conduct, the magistrate judge ruled on his own recusal. The court observed that recusal is required whenever impartiality might reasonably be questioned.[540] Likewise, a judge has a duty not to recuse if there is no objective basis for doing so.[541] Here, the magistrate judge developed his views from the procedures in the case and the record, and defendants failed to present a sufficient basis for recusal. The court therefore denied the defendants' motion.[542]

G. General Discovery by EEOC/Intervenor

1. Section 30(b)(6) Depositions

In *EEOC v. Qualtool, Inc.*[543] the EEOC sought deposition of a Rule 30(b)(6) witness and filed a motion to compel on the last day of discovery, arguing it had identified deposition topics with reasonable particularity and properly noticed the deposition.[544] The EEOC further argued that instead of seeking a protective order defendant merely raised boilerplate objections in response to the notice.[545] The court ruled that, although the parties are not required to agree on deposition topics, the corporation cannot decide on its own to ignore a deposition notice, but must seek a protective order if it refuses to make a Rule 30(b)(6) designation.[546] Because the corporate defendant did not move for a protective order regarding the EEOC's Rule 30(b)(6) deposition notice, the court granted the EEOC's motion to compel.[547]

2. Scope of Permitted Discovery by EEOC

In *EEOC v. Sunshine Raisin Corp.*,[548] the court considered the defendants' motion for a protective order to govern discovery. Specifically, the defendants sought to protect five categories of materials: (1) nonpublic personally identifiable information; (2) financial, marketing, or advertising data; (3) trade secret or other non-public, business-related proprietary information; (4) personnel files and employment information; and (5) a catch-all category described as "other information understood to be confidential pursuant to Rule 26(c) of the Federal Rules of Civil Procedure," which would be generally referred to as "Confidential Information."[549] The court found good cause to enter a protective order for the first four categories, as each was supported by a showing of particularized need and are routinely included in stipulated protective orders.[550] However, the court did not find good cause with respect to the catch-all category because, as framed, its language was vague and did not comply with a local rule.[551] The court struck the catch-all category and entered the proposed protective order with slight modifications as to the first four categories.[552]

In *EEOC v. Qualtool, Inc.*,[553] a dispute arose concerning multiple discovery issues upon the EEOC's motion to compel. The court considered whether to grant the EEOC's motion to compel the defendant to re-run electronically stored information (ESI) searches with particular terms against six custodians and to prevent the defendant from objecting on authentication grounds at trial on the basis that these were not the documents it originally produced.[554]

539 *Id.* at *5.
540 *Id.* at *11 (citing *Liteky v. United States*, 510 U.S. 540, 548 (1994)).
541 *Id.* at *12 (citing *In re United States*, 441 F.3d 44, 67 (1st Cir. 2006)).
542 *Id.* at *45.
543 2022 U.S. Dist. LEXIS 200752 (M.D. Fla. Nov. 3, 2022).
544 *Id.* at **11-12.
545 *Id.*
546 *Id.* at *14.
547 *Id.* at **14-15.
548 2023 U.S. Dist. LEXIS 114987 (E.D. Cal. July 5, 2023).
549 *Id.* at **2-3.
550 *Id.* at *3.
551 *Id.*
552 *Id.* at **5-6.
553 2022 U.S. Dist. LEXIS (M.D. Fla. Nov. 16, 2022).
554 *Id.* at **2-3.

With respect to ESI searches, the court observed that the parties must cooperate in good faith to craft search terms that will effectively capture all relevant information without being too burdensome.[555] As the EEOC only sought to have the defendant run six search terms against six custodians using particular software programs, the court granted the motion.[556] However, the court denied the EEOC's request to discover the Outlook search history of the searches the defendant previously had conducted as unnecessarily burdensome where the EEOC did not specifically allege misconduct.[557]

The basis for the EEOC's request to prevent the defendant from objecting on authentication grounds was the defendant's previous document production, which did not bates-label certain documents.[558] Accordingly, the EEOC produced back to the defendant the documents defendant had produced, but with bates numbers.[559] The court recognized this history and concluded the EEOC's motion essentially requested an advisory opinion because determining the propriety of authentication objections would only be necessary if the defendant were to raise those objections at trial.[560] Accordingly, it denied the motion to prevent the defendant from objecting on authenticity grounds.[561]

In *EEOC v. Triple-S Vida, Inc.*[562] the dispute concerned defendants' motion for a protective order to prevent the EEOC from deposing a human resources official who received notice of the plaintiff's EEOC charge of discrimination.[563] Although the defendants identified the official during the course of discovery as a person with potentially relevant information, they argued the court should not allow the EEOC to take her deposition because she had minimal knowledge of the facts.[564] The court disagreed that generalized argument about the official's trivial involvement in the alleged facts amounted to the showing of good cause required by Rule 26(c)(1).[565] Thus, the court denied the motion for a protective order and allowed the deposition to go forward.[566]

3. Miscellaneous

Courts have looked critically upon untimely and incomplete discovery efforts, including in executing errata sheets after depositions. In *EEOC v. Qualtool, Inc.*[567] the EEOC moved to strike errata sheets not submitted within 30 days after the deponent's transcript was available for review. Where the defendant submitted the errata sheets more than 20 days after the deadline, the court held they were untimely and struck them.[568] The court also granted the EEOC's motion to strike 27 substantive changes that were timely submitted because no specific reason was provided for each change pursuant to Rule 30I.[569] The court held that changes that fail to clarify information and are inconsistent with or unsupported by other deposition testimony are impermissible.[570] Because the errata sheets submitted included proposed substantive changes contradictory to the deponent's other deposition testimony, the court granted the EEOC's motion to strike the defendant's timely errata sheet, despite the fact that it was timely.[571]

In *EEOC v. Chris the Crazy Trader, Inc.*,[572] the EEOC moved for sanctions and attorney's fees under Rule 37(b)(2)(A) for failure to obey a discovery order.[573] The dispute arose after the defendant provided a limited response to the EEOC's interrogatory seeking the identity of individuals employed during the relevant time period, arguing it was a fishing expedition.[574] Following a minute order, the defendant provided additional information but, based on the parties' disagreement regarding the scope of the order, the EEOC alleged the defendant's supplemental responses

555 *Id.* at *10.
556 *Id.* at *12.
557 *Id.* at *13.
558 *Id.* at *5.
559 *Id.* at *6.
560 *Id.* at *7.
561 *Id.* at *8.
562 2023 U.S. Dist. LEXIS 74400 (D.P.R. Apr. 26, 2023).
563 *Id.* at *1.
564 *Id.* at *2.
565 *Id.* at *3.
566 *Id.* at *4.
567 2022 U.S. Dist. LEXIS 200752 (M.D. Fla. Nov. 3, 2022).
568 *Id.* at *6.
569 *Id.*
570 *Id.* at *8.
571 *Id.* at *10.
572 2023 U.S. Dist. LEXIS 111700 (D. Colo. June 28, 2023).
573 *Id.* at *2.
574 *Id.* at *3.

were four months late.[575] To make up for the alleged delay and prejudice, the EEOC sought non-monetary relief in the form of an order barring the defendant from disclosing other witnesses, modifications to the scheduling order to give the EEOC 17 weeks more discovery and to allow the agency to supplement expert reports to add disclosures regarding aggrieved individuals not timely identified by defendant, and an order confirming the discoverable time period.[576]

Although the court agreed with the EEOC's interpretation of the minute order, it accepted the defendant's argument that it did not understand what information the EEOC sought, and relied on the fact that the parties ultimately reached an agreement to hold a bad faith award was unwarranted.[577] Additionally, the court determined the EEOC was not unduly prejudiced by the delay, as it eventually received the information it sought.[578] Accordingly, the court denied the EEOC's motion for sanctions. The court also denied the defendant's request for attorney's fees incurred in responding to the motion for sanctions because the defendant had failed to comply with several procedural requirements in motion practice.[579]

H. Summary Judgment

In FY 2023, federal courts decided just over 20 summary judgment motions filed by either the EEOC or the employer in agency-initiated litigation. Many of these decisions involved alleged disability discrimination, though other types of discrimination (age, race, and sex) were also implicated. Summary judgment motions were often denied, and in other instances, courts would dismiss some but not all claims.

This section provides a snapshot of several notable summary judgment decisions during FY 2023.

1. Disability Discrimination

The Fifth Circuit offered a "split decision" on two disability discrimination-related claims in *EEOC v. Methodist Hospitals of Dallas*.[580] A patient care technician (PCT) who injured her back on the job while turning a patient subsequently made and was granted five requests for FMLA leave.[581] The employee then applied for a vacant scheduling coordinator position but was passed over for the most qualified applicant available, consistent with hospital policy.[582] After receiving certification that the employee would be permanently unable to perform PCT duties, the hospital sent the employee multiple letters offering six months of unpaid leave if she provided a certification that she was unable to return to work. Those communications went unanswered.[583] After the EEOC filed suit and challenged both the most-qualified-applicant policy and the hospital's alleged failure to accommodate the charging party, the district court granted summary judgment in the hospital's favor.[584]

On appeal, the Fifth Circuit agreed with the district court that "mandatory reassignment in violation of [the hospital's] most-qualified-applicant policy is not reasonable in the run of cases[,]" consistent with the first step of the analysis required under *U.S. Airways, Inc. v. Barnett*.[585] Much like seniority systems, the court reasoned, a "disability-neutral" most-qualified-applicant policy "stabilizes employee expectations" while preserving employer discretion and balancing fairness considerations with respect to other employees.[586] However, the court remanded the case so that the EEOC had the opportunity at step two of the *Barnett* framework to establish "special circumstances such that 'in th[is] particular case, an exception to [Methodist's most-qualified-applicant] policy can constitute a 'reasonable accommodation' even though in the ordinary case it cannot.'"[587] The Fifth Circuit affirmed summary judgment in the hospital's favor, however, on the individual failure-to-accommodate claim, reasoning

575 *Id.* at *4.
576 *Id.* at *9.
577 *Id.* at *14.
578 *Id.* at *15.
579 *Id.* at **20-22.
580 62 F.4th 938 (5th Cir. 2023).
581 *Id.* at 941.
582 *Id.* at 941-42.
583 *Id.* at 942.
584 *Id.*
585 *Id.* at 945 (citing *U.S. Airways, Inc. v. Barnett*, 535 US. 391, 401-02, 405 (2002)); see id. at 940-41.
586 *Methodist Hosps. of Dallas*, 62 F.4th at 946-47.
587 *Id.* at 947 (quoting *Barnett*, 535 U.S. at 405).

that the employee was responsible for the breakdown in the interactive process by not responding to the hospital's leave-related communications.[588]

In another disability discrimination case,[589] the Seventh Circuit reversed the decision of the district court (which was catalogued in last year's Annual Report) that had granted summary judgment in the employer's favor. The EEOC claimed that the employer failed to accommodate a call center representative who requested an earlier shift schedule that would allow him to avoid commuting from work in the dark due to his alleged night blindness from cataracts, where public transportation proved to be inaccessible.[590] Notably, the employer had granted an initial request for a 30-day schedule change but denied the employee's request to extend that change for another thirty days while he attempted to move closer to the workplace.[591] After the parties filed cross-motions for summary judgment, the district court ruled in the employer's favor.[592]

On appeal, however, the Seventh Circuit concluded that a reasonable jury could rule in favor of either party and remanded the matter for trial. The court reiterated that "[e]mployers usually bear no responsibility for helping an employee with a disability commute to and from work."[593] Nevertheless, the parties agreed in this case that attendance in the workplace was an essential function of the job.[594] Because the employee "was not asking for an unaccountable, work-when-able schedule or a permanent accommodation[,]" and "did not demand the company itself transport him to work[,]" but was merely requesting a temporary modification to the shift schedule solely within the employer's control, the court concluded that summary judgment was improper.[595]

Summary judgment was also denied in *EEOC v. Hospital Housekeeping Services, LLC*,[596] a job-testing case. There, the EEOC filed a claim on behalf of a putative class of charging parties and other former employees contending that the company's "use of an Essential Function Test (EFT)" created a discriminatory qualification standard that adversely affected individuals with disabilities.[597] The court concluded that there was sufficient evidence in the record to preclude summary judgment on the issue of whether the claimants had an ADA-covered disability(ies).[598] Furthermore, while an employer may avoid liability by showing the test (here, the EFT) "is 'job-related for the position in question and is consistent with business necessity,'" there was a "battle of the experts" as to "whether the EFT has been validated to show job-relatedness."[599]

2. Age Discrimination

In *EEOC v. Surfside Realty Co.*,[600] the district court adopted the magistrate judge's report and recommendation granting summary judgment in the employer's favor with respect to the agency's age discrimination claim. The EEOC filed suit after an 81-year-old Community Manager who supported various Homeowners Associations (HOA) for 25 years without being disciplined for performance issues was terminated and replaced by an individual 30 years younger.[601] The agency pointed to a comment from the company's CEO five months before the charging party's employment ended asking the charging party when she was going to retire.[602] Nevertheless, the court concluded, the employer was entitled to summary judgment because the agency only showed, at most, that "age was one of *multiple* motives" for the company's termination decision.[603] Moreover, the court gave deference to the employer's perception (even if not presented to the charging party as formal discipline) that the charging party failed to meet its expectations because she neglected to increase management fees over the course of several years, played favorites among the company's clientele (including failing to return calls she did not want to deal with), frequently came in late and left early, and added work burdens to another employee.[604]

588 *See id.* at 949-51.
589 *EEOC v. Charter Communications*, 75 F.4th 729 (7th Cir. 2023).
590 *Id.* at 731.
591 *Id.*
592 *See id.* at 731.
593 *Id.* at 740.
594 *Id.* at 739.
595 *Id.* at 742-43.
596 2023 U.S. Dist. LEXIS 72033 (W.D. Ark. Apr. 25, 2023).
597 *Id.* at **1-2.
598 *Id. at **3-4.*
599 *Id.* at *4 (quoting 42 U.S.C. § 12112(b)(6)).
600 2023 U.S. Dist. LEXIS 56476 (D.S.C. Mar. 30, 2023).
601 *Id.* at **3-5.
602 *Id. at *5.*
603 *Id.* at **8-9 (quoting *Westmoreland v. TWC Admin. LLC*, 924 F.3d 718, 725 (4th Cir. 2019)) (emphasis added).
604 *Id.* at **4-5, 9-14.

3. Race Discrimination

The Western District of Arkansas ruled that the agency failed to meet its burden of proving the Title VII race discrimination claims it filed in *EEOC v. Texar Tree & Timber, LLC*.[605] The EEOC alleged that a line clearance company that removes trees and other vegetation to install power lines in Texas, Arkansas, and Oklahoma gave preferential treatment to Hispanic job applicants by "steering" them into higher paying skilled operator positions, as compared to the six African American applicants on whose behalf the agency filed suit (who were allegedly steered into lower paying laborer jobs).[606] The court found that the EEOC failed to establish a *prima facie* case of race discrimination because it did not sufficiently show which Hispanic applicants it contended were similarly situated to the charging parties.[607] And even if the agency had made this showing, the court added, the company demonstrated a legitimate, non-discriminatory (and non-pretextual) reason for its actions, as any discrepancies in job placement and starting pay rate were based on each applicant's experience level and the geographical areas in which they worked.[608]

4. Hostile Work Environment

In *EEOC v. Golden Entertainment, Inc.*,[609] the District of Maryland held that the agency's hostile work environment (sexual harassment) claim must be resolved at trial. The agency alleged that a casino bartender was subjected to various offensive behaviors by her co-worker, who purportedly sniffed her, made several sexually suggestive comments about her buttocks, and, on two occasions – one of which was corroborated by another co-worker – pressed himself against her buttocks so that she could feel his genitals pressing into her.[610] After the charging party complained internally, management reviewed (but failed to retain) security video footage and rescheduled her shifts in an effort to avoid her having to work alongside her alleged harasser.[611] Nevertheless, in another incident after the complaint, the charging party's co-worker told her, "I'll make whatever comments I want to make about your rear-end and nothing is going to be done about it[.]"[612] The charging party also contended that she was scheduled for fewer shifts in retaliation for making her internal complaint, to the point where she was left with no choice but to resign (which the agency characterized as a constructive discharge).[613]

The District of Maryland denied the casino's motion for summary judgment as to the hostile work environment claim. The court relied on cases in the Fourth Circuit and other jurisdictions holding that while touching is not required to make out a hostile work environment claim, the conduct alleged was sufficiently severe or pervasive for the EEOC to meet its burden.[614] Moreover, a reasonable jury could find that casino management was negligent based on the facts that the co-worker made additional offensive comments to the bartender even after its internal investigation and because management had undertaken, at most, a minimal review of (and failed to retain) the security video footage.[615]

However, the court dismissed the EEOC's retaliation and constructive discharge claims. Even though the charging party worked fewer shifts after her complaint, "her wages, job title, level of responsibility or opportunity for promotion remained the same after her reassignment."[616] Likewise, because the charging party continued to work as a bartender without any change to her wages or benefits after making the complaint, the EEOC failed to show, objectively, that conditions had "bec[o]me so intolerable that a reasonable person 'would have had no choice but to resign.'"[617]

Additional information on these and other summary judgment decisions issued in FY 2023 can be found in Appendix D of this Report.

605 2023 U.S. Dist. LEXIS 176210 (W.D. Ark. Sept. 29, 2023).
606 *Id.* at **1-2, 6, 11.
607 *See id.* at **10-12.
608 *Id.* at **16-22.
609 2023 U.S. Dist. LEXIS 108703 (D. Md. June 22, 2023).
610 *Id.* at **3-6.
611 *Id.* at **6-8.
612 *Id.* at **6-7.
613 *See id.* at **9-10.
614 *See id.* at **18-22.
615 *Id.* at **22-25.
616 *Id.* at **25-26.
617 *Id.* at **28-29 (quoting *Evans v. Int'l Paper Co.*, 936 F.3d 183, 193 (4th Cir. 2019)).

I. Default Judgment

Courts apply several factors when deciding on the motion for default judgment. In a matter heard in the U.S. District Court for the Eastern District of New York in FY 2023, the court weighed the following factors when deciding on a default judgment: "(1) 'whether the defendant's default was willful; (2) whether defendant has a meritorious defense to plaintiff's claims; and (3) the level of prejudice the non-defaulting party would suffer as a result of the denial of the motion for default judgment.'"[618] In this case, *EEOC v. Stardust Diners, Inc.*, the court reiterated prior holdings in the circuit finding that, while a party's default is viewed as a concession of all well pleaded allegations of liability, it is not considered an admission of damages.[619]As such, even if the EEOC or a plaintiff establishes liability, they must still prove damages. In that matter, the court found the EEOC: (1) had sufficiently pled facts supporting the motion for default judgment; (2) had adequately demonstrated a Title VII sex-based discrimination violation and retaliation; and therefore (3) the charging party was entitled to compensatory and punitive damages, injunctive relief, and back pay plus prejudgment interest.620

Courts have discretion to set aside default judgments. For instance, in one matter out of the U.S. District Court for the District of New Mexico,[621] the EEOC served a complaint and summons on the owner of a non-emergency medical transportation company. The owner failed to file a response before the deadline, claiming confusion and relying on representations from his previous attorney that led him to believe the matter was "finished." Due to the defendant's failure to respond, the EEOC sent an email with a motion for default, seeking the defendant's position. While the owner objected to the motion, he was unaware that he could request additional time and did not formally oppose or respond to it. The EEOC proceeded to file the motion for default, which the court clerk entered.

After the default was entered, the defendant obtained legal representation and moved to set aside the entry of default. The court, finding good cause to do so, emphasized that defaults are "reserved for rare occasions." The court emphasized that "when doubt exists as to whether a default should be granted or vacated, the doubt should be resolved in favor of the defaulting party."[622] The court considered factors such as whether the default was willful, whether setting it aside would prejudice the adversary, and whether a meritorious defense was presented.[623] In this case, the court determined that the defendant would only be considered culpable if the default was willful or if there was no excuse for it. It found no culpability in the defendant's actions.[624] Despite the owner's reasonable fluency in English, other business engagements, and past dealings with other attorneys, his mistakes were not deemed sufficiently culpable to warrant the severe and uncommon sanction of an entry of default followed by an eventual default judgment. The court concluded that the EEOC would not be prejudiced, and although the defendant had not demonstrated a high likelihood of prevailing, it had shown a denial of the EEOC's version of the facts, especially those material to the outcome of the case, which was enough to set aside the default.[625]

Courts also have discretion to enter default judgement in part and deny it in part. For instance, in a sexual harassment case in the U.S. District Court for the District of Maryland, the EEOC sought a partial default judgment, alleging that the defendant's owner and CEO made unwanted advances, resulting in retaliation through termination and negative references for the charging party.[626] Despite responding to the complaint, the defendant's prolonged discovery process, which was marked by the defendant's refusal to communicate or cooperate with its counsel, who subsequently withdrew from the case, led to default entry by the clerk on January 17, 2023.[627] Although the court granted default judgment for the retaliation claim, it denied it for the harassment claim due to the brief and non-pervasive nature of the alleged incidents, occurring during one meeting and two phone calls. The court, guided by Federal Rule of Civil Procedure 55(a) and (b)(2), considered the Fourth Circuit's emphasis on deciding cases on merit.[628] Default judgment, though generally discouraged, was deemed appropriate for the retaliation claim, where the charging party had engaged in protected activity, faced unwarranted termination despite two years of solid work, and the owner admitted to fabricating the reasons for dismissal, lacking any legitimate grounds.

618 *EEOC v. Stardust Diners, Inc.* 2023 U.S. Dist. LEXIS 140037, at *21 (E.D.N.Y. Aug. 10, 2023).
619 *Id.* at *26.
620 *See id.* at **32-33.
621 *EEOC v. Sandia Transp., L.L.C.* 2023 U.S. Dist. LEXIS 154154 (D.N.M. Aug. 31, 2023).
622 *Id.* at *7.
623 *Id.*
624 *See id.* at **9-10.
625 *See id.* at **11-13.
626 *EEOC v. Key Mgmt. Partners, Inc.* 2023 U.S. Dist. LEXIS 115866 (D. Md. July 5, 2023).
627 *Id.* at *5.
628 *See id.* at **6-8.

J. Bankruptcy

A defendant's or charging party's bankruptcy declaration will not necessarily stay an EEOC lawsuit. There were few applicable cases involving the EEOC and bankruptcy for the past fiscal year; as such, prior cases are instructive.

In a 2020 case out of the Northern District of Georgia, for example, the EEOC sued the defendant under the ADA seeking injunctive relief, back pay and front pay for defendant's former employee, compensation for pecuniary and non-pecuniary losses, punitive damages, and costs.629 The former employee filed her own complaint against defendant, which was consolidated with the EEOC complaint and treated as an intervenor complaint. The defendant subsequently filed for Chapter 11 bankruptcy, filed a notice of the bankruptcy to obtain an automatic stay, and moved to stay proceedings not subject to an automatic stay.

The EEOC opposed the notice and motion to stay, contending that the Bankruptcy Code's automatic stay provision does not apply because the proceeding falls within the governmental unit or police and regulatory power exception under 11 U.S.C. § 362(b)(4). The purpose of the exception is to discourage debtors from initiating bankruptcy proceedings to evade impending governmental efforts to enjoin or deter ongoing debtor conduct that would "seriously threaten the public safety."

The defendant argued that the police-power exception did not apply because: (1) any injunctive relief the EEOC seeks is likely to be moot, because the defendant intends to sell its assets to another company; and (2) the defendant is unaware of any cases applying the police-power exception in cases involving claims brought by both the EEOC and a private litigant.[630] After surveying authority from around the country, the court "agree[d] with those courts that have considered the issue and finds that the police-power exception applies to the EEOC" because "the EEOC brings claims under the ADA for injunctive and monetary relief in the course of exercising its police or regulatory powers, and it is therefore not subject to the automatic stay."[631] The court also declined to exercise its authority to stay a case pending the resolution of a related case in another forum, finding its discretionary stay authority inapplicable where a more specific stay mechanism (*i.e.,* bankruptcy stay) expressly did not apply.[632] In doing so, the court rejected the argument that a stay of the intervenor complaint required staying the EEOC lawsuit, recognizing that "while it is true that there is some overlap between the EEOC's claims and those of the intervenor, it is not unusual for litigation to proceed as to the EEOC while the claims of an intervenor are stayed."[633]

Finally, the court stated that "the fact that the claims for injunctive relief may end up being moot at the conclusion of the bankruptcy proceedings is not a sufficient reason to stay the claims now—especially when that argument is insufficient to preclude application of the police-power exception to the automatic stay."[634]

Similarly, in the Northern District of Texas, the court emphasized that the Bankruptcy Code's automatic stay does not necessarily stop an EEOC lawsuit. In this case, the EEOC sued a medical practice for alleged Title VII violations.[635] The EEOC sought injunctive relief under Title VII, back pay with prejudgment interest, compensatory damages for past and future pecuniary and non-pecuniary losses, punitive damages, and costs. The defendant subsequently filed for Chapter 7 bankruptcy. In light of the bankruptcy, the court entered an order staying and administratively closing the case pursuant to 11 U.S.C. § 362.

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

In response, the defendant countered that Section 362(b)(4) does not apply to actions seeking money judgments. The EEOC replied by clarifying that it was seeking to prove defendant's liability for the asserted discrimination claims and obtain a judgment against the defendant for damages and injunctive relief to "prevent [defendant] from 'engaging in future discriminatory conduct in violation of Title VII.'"[636]

629 *EEOC v. Krystal Co.*, 2020 U.S. Dist. LEXIS 92482 (N.D. Ga. May 21, 2020).
630 *Id.* at **3-4.
631 *Id.* at *6.
632 *Id.* at *8.
633 *Id.* at *9.
634 *Id.*
635 *EEOC v. Shepherd*, 2018 U.S. Dist. LEXIS 175025 (N.D. Tex. Oct. 11, 2018).
636 *Id. at **2-3.*

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

In its analysis, the court acknowledged that the issue of whether an EEOC enforcement action under Title VII falls within Section 362(b)(4)'s exception was a matter of first impression in the Fifth Circuit. As such, the court looked to and relied upon the Fourth Circuit's precedent, which held that EEOC employment discrimination lawsuits brought under Title VII satisfy the public policy test—even when brought on behalf of specific individuals—because the EEOC is acting to vindicate the public interest in preventing employment discrimination. Further, the court noted the Third and Eighth Circuits have reached the same conclusion regarding Section 362(b)(4)'s application to EEOC enforcement actions.[637]

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

In another case out of the Southern District of Indiana, the court determined a claimant's failure to disclose his claims in a personal bankruptcy proceeding did not preclude the EEOC from pursuing a disability discrimination lawsuit on his behalf. In this case,[638] the EEOC alleged a trucking company violated the ADA by asking disability-related questions during the job application process. Four members of the affected class of applicants, however, did not disclose their claims against the company in their personal bankruptcy proceedings. The company alleged that the EEOC should therefore be precluded from pursuing claims on their behalf.

The court explained that 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."[639] Causes of action that arise during the court of the bankruptcy are also deemed property of the bankruptcy estate.[640] 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."[641]

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.'"[642] 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."[643] The

637 *Id.* at *8.

638 *EEOC v. Celadon Trucking Servs.*, 2015 U.S. Dist. LEXIS 84639 (S.D. Ind. June 30, 2015).

639 *Id.* at *50, citing 11 U.S.C. § 541(a)(1).

640 *Id.*, citing 11 U.S.C. § 1306(a)(1).

641 *Id.* at *51.

642 *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)

643 *Id.* at *52, citing *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 122 S. Ct. 754 (2002).

individual claimants' failure to disclose their claims in their bankruptcy proceedings therefore did not prevent the EEOC from recovering damages on their behalf. The court reasoned that because the EEOC was not a party to the bankruptcy proceedings, and the claimants were not parties to the EEOC's lawsuit, "judicial estoppel does not bar the EEOC from recovering damages predicated on harms they may have suffered."[644]

Whether an automatic stay in a defendant's bankruptcy proceeding could preclude the EEOC from enforcing a subpoena against a third party to determine whether it was a successor-in-interest came before the Western District of Pennsylvania in 2018.[645] The EEOC filed a motion to show cause why the third party should not be compelled to comply with the EEOC's discovery subpoena. The court granted the EEOC's motion. In response, the third party argued that the automatic stay in the defendant's bankruptcy proceeding applied to the EEOC's action to enforce its judgment against the third party, and therefore to the EEOC's ability to subpoena the third party to take discovery. The third party also averred that the stay barred the EEOC from enforcing the money judgment because Bankruptcy Code Section 362(b)(4)'s exception did not apply to money judgments.

The EEOC countered that the automatic stay did not apply to the third party because it is not the debtor and the bankruptcy court did not extend the stay to the third party. Further, the EEOC contended that, even if the stay applied to the third party, the EEOC was still entitled to enforce the nonmonetary portion of its judgment against it and take discovery for that purpose.[646] The court agreed with the EEOC and explained that Section 362(b)(4) explicitly exempts only the enforcement of money judgments, which implies that government agencies retain the power to enforce injunctions against a debtor in bankruptcy. Given that the EEOC can bring an action to enforce an injunction against a successor-in-interest to the defendant, the court reasoned that the EEOC must also have the ability to subpoena a putative successor-in-interest to determine whether that entity is a successor. The court declined to address whether an automatic stay under 11 U.S.C. § 362 would apply to an action to enforce a money judgment against the third party.[647]

In a 2023 case out of the Middle District of Tennessee, the court considered whether a class member declaring bankruptcy but failing to disclose the class action barred or estopped that individual's ability to participate in a lawsuit if they failed to disclose the underlying class action in their bankruptcy proceedings.[648] Specifically, the deadline for motions to amend pleadings in this Title VII action alleging a racially hostile work environment and discriminatory work conditions, was set for April 29, 2022.[649] The court, however, denied the defendant's motion to amend its answer, which included a 29th affirmative defense related to a class member's bankruptcy. The defendant, after asserting 28 defenses, sought to add a defense stating that the class member's claims were barred due to failure to disclose the lawsuit in a bankruptcy proceeding. The EEOC objected, citing the defendant's lack of good cause for filing the motion after the deadline, improper inclusion of additional allegations, and legal deficiencies in the proposed defense.[650]

The defendant argued that good cause existed because the EEOC only disclosed the bankruptcy two months after the deadline. According to Rule 16(b), a deadline can be extended only for "good cause," and Rule 15(a)(2) allows amendments "freely" when justice requires. The court noted that the "good cause" requirement is met if the original deadline could not reasonably have been met despite due diligence and the opposing party won't suffer prejudice. In this case, the court found that the defendant satisfied the good cause requirement but rejected the proposed amendments as they were unrelated to the disclosed bankruptcy.[651] The defendant claimed the amendments were minor clarifications, but the court disagreed, stating that without a stated basis for good cause, unrelated amendments could not be allowed.

Specifically, the court found that the proposed 29th defense, claiming the class member's claims are barred due to bankruptcy, lacked legal support.[652] The court considered the doctrine of judicial estoppel, which bars a party from asserting a position contrary to a prior sworn position in another proceeding. But the court found the proposed defense futile as it did not sufficiently plead estoppel, failed to establish that the class member is a party

644 *Id.* at *55.
645 *EEOC v. Scott Medical Health Ctr.*, P.C, 2018 U.S. Dist. LEXIS 183552 (W.D. Pa. Oct. 26, 2018).
646 *Id.* at *4.
647 *Id.* at *6.
648 *EEOC v. Whiting-Turner Contr. Co.*, 2023 U.S. Dist. LEXIS 44016, at *4 (M.D. Tenn. Mar. 15, 2023).
649 *Id.*
650 *Id.* at **4-5.
651 *Id.* at **8-9 .
652 *Id. at **9-10.*

to the lawsuit, and lacked specifics on how the bankruptcy petition contradicted the current case. As such, the court denied the proposed 29th defense as futile.[653]

K. Trial

1. Pre-Trial Motions

Several cases involved pre-trial motions in FY 2023.

In an ADEA case before the United States District Court for the Southern District of Ohio, the court considered a range of motions in limine brought by both the employer and the EEOC.[654] In *EEOC v. Ohio State University*, each party had an expert witness testify about the damages at issue and both moved to exclude the other's expert witness.[655] In particular, the EEOC moved to exclude the testimony and report of the employer's rebuttal expert.[656] The EEOC held that pursuant to Federal Rule of Evidence 702, *Daubert* and *Kumho Tire*, "district courts may admit proposed expert testimony only if it satisfies three requirements."[657] "First, the witness must be qualified by knowledge, skill, experience, training or education."[658] A liberal view is taken in determining what "knowledge, skill, experience, or training is sufficient to satisfy [this] requirement."[659] The factors to consider include "the length of the expert's experience in the field, whether she has previously been qualified by courts to testify as an expert, and her education and training credentials as demonstrated through course-work, hours of formal training, and designations or certificates."[660] Second, the proposed testimony must be relevant, meaning that it will assist the trier of fact to understand the evidence or to determine a fact in issue.[661] An expert opinion must "fit" the issues that need to be resolved at trial but cannot testify as to the "ultimate issue" in a trial.[662] Lastly, "the testimony must be reliable."[663] "The reliability requirement focuses on the methodology and principles underlying the testimony."[664] If, however, there is a dispute regarding expert testimony, "it is more appropriate for a judge to admit the evidence than to keep it from the fact-finder."[665]

The EEOC claimed that the employer's proferred expert witness was unqualified and the testimony neither relevant nor reliable.[666] With regard to qualification, the EEOC argued that the employer's expert witness's experience was focused on other matters rather than those at issue—employment claims.[667] The district court held that the employer's expert met the "liberal" qualifications standard under Rule 702 as he had provided deposition testimony before as an expert in wrongful termination matters and had adequate education credentials, among other reasons.[668] The EEOC also generally argued the employer's expert's opinions were "outcome-determinative" and "prepared solely for trial[.]"[669] Yet, the fact that an expert is hired to provide testimony does not require that the expert than be "accorded a presumption of *unreliability*; rather, the trial court must evaluate whether there is some objective basis for the opinion.[670] Given that the employer's expert's report was based on "objective, verifiable evidence" including information from entities such as the Bureau of Labor Statistics, the court permitted the employer's expert's rebuttal report to be presented.[671]

653 *Id.* at **10-11.
654 *EEOC v. Ohio State Univ.*, 2023 U.S. Dist. LEXIS 29911 (S.D. Ohio Feb. 27, 2023).
655 *Id.* at *4.
656 *Id.* at *9.
657 *Id.* at *5.
658 *Id.* (internal quotations and citations omitted).
659 *Id.* (internal quotations and citations omitted).
660 *Id.* at **5-6 (internal quotations and citations omitted).
661 *Id.* at *6 (internal quotations and citations omitted).
662 *Id.*
663 *Id.* (citing *In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 529 (6th Cir. 2008)).
664 *Id.* at *7.
665 *Id.* (citing *Little Hocking Water Ass'n, Inc. v. E.I. du Pont de Nemours & Co.*, 90 F.Supp.3d 746, 752 (S.D. Ohio 2015).
666 *Id.* at *8.
667 *Id.*
668 *Id.* at **8-9.
669 *Id.* at *11.
670 *Id.* at **11-12 (internal quotations and citations omitted).
671 *Id.* at *12 (opinions and testimony regarding the offset of back-pay were excluded based on *Skalak v. Fernal Env't Restoration Mgmt. Corp.*, which held that any "excess earnings [from a later, higher-paying job] are not to be subtracted from the back-pay award for the period of unemployment." (178 F.3d 414, 426 (6th Cir. 1999)).

The employer also moved to exclude the EEOC's expert on the basis the expert was not qualified and her opinions were unreliable.[672] The employer argued the EEOC's expert lacked experience or research in the issues at hand, did not identify any supporting "treatises, articles, or resources" and had only drafted reports and "never been qualified to give expert testimony at a trial[.]"[673] The district court was not persuaded and held the EEOC's expert was qualified to testify on the following bases: (1) Rule 702 did not require that an expert had to publish articles in the field; (2) it was illogical to require individuals to be qualified by a court as an expert first to serve in a later trial as an expert; and (3) the argument that the EEOC's expert failed to identify any treatise, article, or resource supporting her methodology would also exclude the employer's expert.[674]

Next, the employer argued the EEOC's expert's opinion was unreliable as her estimated range for the damages was too broad, not accompanied by an affirmation regarding the certainty of the estimate, and based on faulty analysis.[675] The district court, however, found the expert's range reliable as she had explained her methodology.[676] The EEOC then argued that the expert's calculations relied on speculative increases of future earnings as it considered two past promotions without showing how the employee "could have *reasonably* expected opportunities for job promotion in the future."[677] The district court held that the point of Rule 702 was not to "gatekeep the accuracy" of the expert's calculations but "to check whether there is a reasonable factual basis for [her] opinion[] and stated that the issues raised by the Employer were issues that could be explored at trial when the expert testifies but did not preclude the admittance of the report or testimony."[678] Lastly, the district court rejected the employer's argument regarding the unreliability of the expert's calculation. The court noted that expert witnesses are not required to testify that their testimony were made "to a reasonable degree of scientific certainty."[679]

In addition to opposing expert witnesses, the EEOC also sought to exclude the internal investigation report conducted by the employer regarding the termination at issue, as well as the testimony of the employer's HR employee who had prepared the investigation report and designated as the employer's Rule 30(b)(6) witness.[680] The EEOC argued the employer's internal investigation report was irrelevant, would mislead and confuse the jury, and was hearsay.[681] Notably, the investigation had taken place six months after the termination at issue.[682] The EEOC argued that the information in the report was not relevant since the EEOC did not allege hostile work environment and "no actions taken by [the employer] after the termination have any tendency to make a fact more or less probable."[683] The district court, however, found "there are sufficient similarities between other forms of employment discrimination and age discrimination that internal investigation reports can be relevant to the latter claims."[684]

The EEOC next argued that the report must be excluded as it contained unreliable hearsay statements from witnesses.[685] The district court, while stating the HR employee "had the necessary skills to carry out the investigation[,]" the statements in the report themselves may not be admissible as hearsay.[686] The district court therefore excluded all sections of the report that summarized HR's interviews as well as "any opinions, conclusions, and conjecture relying solely on those interviews."[687] Lastly, the EEOC argued the internal investigation report was unduly prejudicial as the report "would risk the jury substituting Defendant's process and findings for their own."[688] Ultimately, the district court found the report had probative value, as it evidences the employer's efforts to comply with the ADEA. It further held that the internal investigation report was admissible as evidence of the employer's efforts to comply after the internal complaint but not admissible as to the substance of the

672 *Id.* at *12.
673 *Id.* at *13.
674 *Id.* at **13-14.
675 *Id.* at *14.
676 *Id.* at **14-15.
677 *Id.* at *15.
678 *Id.* at **16-17 (citing *Babock Power, Inc. v. Kapsalis*, 854 F. App'x 1, 8 (6th Cir. 2021) (internal citations omitted) (emphasis in original).
679 *Id.* at *17 (citing *United States v. Cyphers*, 553 F.2d 1064, 1072 (7th Cir. 1977).
680 *Id.* at *17.
681 *Id.* at *18.
682 *Id.*
683 *Id.* (citing Fed. R. Evid. 401(a)).
684 *Id.* at **18-19 (internal citations omitted).
685 *Id.* at *19.
686 *Id.* at *20.
687 *Id.*
688 *Id.* **20-21.

investigation's findings.[689] With regard to the testimony of the HR employee who had prepared the investigation report, the district court agreed with the EEOC and excluded the HR employee's testimony based on her internal investigation interviews as they were unnecessary or duplicative and based on statements that had been made to the HR employee regarding decisions about which she had no personal knowledge.[690]

In *EEOC v. Western Distributing Co.*, a matter in front of the District Court for the District of Colorado, the court reviewed a bifurcation issue in an ADA case in which the EEOC filed a motion in limine to exclude the testimony of individuals until Phase II of trial.[691] Specifically, the EEOC argued that "all individual employment decisions and all evidence related to those decisions are…reserved for Phase II."[692] The defendant, however, argued that "bifurcation of pattern or practice actions under *International Brotherhood of Teamsters v. United States* does not limit the kinds of evidence an employer can use to defend itself and specifically permits evidence that [the] EEOC's case is inaccurate or insignificant."[693] The defendant argued that it should be permitted "to present evidence that [aggrieved individuals ("AIs")] were not qualified individuals, did not have a disability or did not notify [the employer] of their disability, did not desire reassignment, or were discharged for reasons other than their disabilities."[694] The court agreed that the Supreme Court was clear in *Teamsters* that Phase I and Phase II bifurcation does not "suggest that there was any particular limits on the type of evidence an employer may use[]" and "at the liability stage of a pattern-or-practice trial the focus *often* will not be on individual hiring decisions."[695] As such, "individual employment decisions are not rendered irrelevant during Phase I trials solely as a result of the fact that such decisions may have involved only a single AI in the first instance."[696] The district court rejected the EEOC's categorical exclusion of individual-decision evidence.[697]

In *EEOC v. Proctor Financial*, a race discrimination case out of the District Court of Michigan, the EEOC alleged the defendant retaliated against its former employee in violation of Title VII by disciplining the former employee after filing an EEOC charge alleging race discrimination.[698] In that case, in its first motion in limine, the EEOC asked the court to exclude the following items: (1) evidence regarding the former employee's job application, resumes, and prior employment history; (2) former employee's 2019 notebook; (3) former employee's social media accounts and employment information within those accounts; (4) evidence regarding civil proceedings and any other lawsuit involving the former employee; and (5) evidence regarding medical conditions that do not relate to damages for emotional harm.[699]

In response, defendant argued the former employee's employability is relevant to economic damages she may be entitled to, as well as the "garden-variety" emotional damages the EEOC seeks on her behalf.[700] Here, the court stated that with regard to the EEOC's claim for emotional damages, the defendant may introduce testimony from the former employee's medical provider subject to limiting instructions.[701] Specifically, the defendant could reveal only that the former employee had expressed to her medical provider that her emotional issues stemmed, at least in part, from an unrelated incident that had taken place 10 years prior.[702] The court held, however, that the fact that the former employe had been fired from a previous employer 10 years ago "is both irrelevant to the retaliation claim at bar and unduly prejudicial."[703] The court held, "[a]ny additional evidence in this category, even if relevant to attack [the former employee's] credibility and character for truthfulness or untruthfulness, is unduly prejudicial and will likely confuse and mislead the jury"[704] The court therefore held it was inadmissible.[705]

689 *Id.* at 22.
690 *Id.* at 23.
691 *EEOC v. W. Distrib. Co.*, 2023 U.S. Dist. LEXIS 2918 (D. Colo., Jan. 9, 2023).
692 *Id.* at *3.
693 *Id.* at *5 (internal quotations omitted) (quoting *Teamsters v. U.S.*, 431 U.S. 324, 360 (1977)).
694 *Id. at *5.*
695 *Id.* at *5 (citing *Teamsters*, 431 U.S. at 360 n. 46) (emphasis added).
696 *Id.* at **5-6.
697 *Id.* at *6.
698 *EEOC v. Proctor Fin.*, Inc., 2021 U.S. Dist. LEXIS 189562 (E.D. Mich. Sept. 30, 2021).
699 *Id.* at *6.
700 *Id.* at *8.
701 *Id.* at *9.
702 *Id.*
703 *Id.*
704 *Id.*
705 *Id.* at *10

The defendant further argued that the evidence was admissible for impeachment purposes.[706] The court in that instance agreed the defendant was permitted to impeach the former employee with any prior inconsistent statement.[707] The court also found the former employee's employment history in her social media accounts irrelevant for the same reasons—but permissible for impeachment purposes.[708]

With regard to the former employee's 2019 notebook, the court found that the former employee's "perception of the events does not bolster the EEOC's claim or void [defendant's] potential liability."[709] That evidence was therefore found to be irrelevant.[710] The court also held that the defendant should not be able to use other court proceedings in which the former employee was a party or involved "to undermine the merits" of the case, as while it was relevant to the former employee's "character for truthfulness or untruthfulness, the probative value of this evidence is outweighed by the highly prejudicial effect it would have on the EEOC."[711] "To elaborate, character evidence is impermissible to show that a person acted in conformity with certain behavior per Federal Rule of Evidence 404."[712]

Defendant's first motion in limine sought to exclude evidence of or attorney statements relating to "stray remarks" that had been made by a non-decisionmaker.[713] These statements included those directly about the EEOC charge and the former employee.[714] In support, the defendant analyzed the following four factors the Sixth Circuit established to decide whether alleged "stray remarks" should be excluded: "[1] whether the comments were made by a decision maker or by an agent within the scope of his employment; [2] whether they were related to the decision-making process; [3] whether they were more than merely vague, ambiguous, or isolated remarks; and [4] whether they were proximate in time to the act of termination."[715] The court, however, held that the remarks were "relevant to whether a causal connection exists between the protected activity and adverse employment action."[716] In response to defendant's argument that the remarks were not made by decisionmakers, the court held that a reasonable jury may not necessarily agree.[717] Furthermore, the court did not find persuasive defendant's argument that the remarks were made too long before the adverse decision—finding that such statement did not undermine the retaliatory motive expressed.[718] The court noted that evidence becomes inadmissible only "if there is a danger of unfair prejudice, not mere prejudice."[719]

In a second motion in limine, the defendant sought to exclude certain information as it pertains to the former employee's allegations of race discrimination including: (1) the former employee's EEOC charge; (2) the former employee's amended EEOC charge; (3) testimony regarding the promotion that the former employee was denied underlying her charge; (4) other documents contained in the EEOC's administrative file, as disclosed by the EEOC in its initial Disclosures; (5) any other witness testimony regarding the former employee's allegations of discrimination; and (6) defendant's position statement submitted to the EEOC.[720]

The defendant claimed that none of the evidence it sought to exclude could assist the EEOC in establishing its retaliation claim and should therefore be excluded pursuant to Federal Rule of Evidence 402 as it would be confusing or mislead the jury.[721] The court agreed and found most of the evidentiary items to be irrelevant and inadmissible with the exception of defendant's position statement.[722] The court held that the position statement was relevant to the EEOC's retaliation claim because it demonstrated that, months prior to the former employee's being issued a written disciplinary action and being suspended, the defendant felt the former employee's performance was

706 *Id.*
707 *Id.*
708 *Id.* at **12-13.
709 *Id,* at *11.
710 *Id.*
711 *Id.* at 14.
712 *Id.*
713 *Id.*
714 *See id.* at **16-17.
715 *Id.* at *18 (quoting *Cooley v. Carmike Cinemas, Inc.*, 25 F.3d 1325, 1330 (6th Cir. 1994)).
716 *Id.* at *19.
717 *Id.*
718 *Id.* at *20.
719 *Id.*
720 *Id.* at *22.
721 *Id.*
722 *Id.* at **24-27.

satisfactory overall.[723] The court therefore held that the position statement was relevant to animus and motive for retaliation and despite being "undoubtedly prejudicial, it is not unfairly so."[724]

The defendant then asked the court to also exclude evidence of its immediate acceptance of the former employee's voluntary resignation in anticipation of the EEOC asking for economic damages beyond the three-day suspension at issue.[725] In response, the EEOC argued the evidence is relevant to the EEOC's retaliation claim, including the compensatory and punitive damages and injunctive relief the EEOC sought. The court agreed.[726]

The EEOC's second motion in limine sought to exclude: (1) statements from counsel or testimony from the defendant that allegations of discrimination lacked merit; and (2) statements from counsel or testimony that the former employee engaged in fraud/criminal activity.[727] With regard to the first category, the court found the item to be moot as the EEOC was precluded from introducing evidence relating to the alleged racial discrimination the former employee suffered.[728] With regard to the second item, the court agreed with the defendant that evidence of the former employee's alleged misrepresentation was directly relevant to the EEOC's claim.[729] While the "evidence is undoubtedly prejudicial to the EEOC's claim," "[e]vidence that is prejudicial only in the sense that it paints the [plaintiff] in a bad light is not unfairly prejudicial pursuant to Rule 403."[730]

In *EEOC v. Red Roof Inns, Inc.*, an ADA case out of Ohio, the EEOC asserted two claims under the ADA—failure to accommodate and a discriminatory failure to promote.[731] The claims stemmed from a series of emails between a charging party who is visually impaired and an employee for the defendant who was responsible for filling an open position for the defendant.[732] In those emails, the charging party sought to learn information about a seminar related to the open position and asked if he could attend via Skype or another remote option. The defendant's employee claimed that this was not compatible with the text-to-speech software the charging party used. The defendant's employee wanted to "work out the bugs" before it attempted with Skype.[733] The position was filed with a non-visually impaired individual.[734]

In this case, the EEOC sought to exclude certain evidence that occurred after the events in the lawsuit: (1) charging party's performance after the exchange of the emails at issue; (2) charging party's termination; and (3) the filing of charging party's charge of discrimination.[735] The EEOC argued that "[p]resentation of such testimony and evidence is irrelevant to the disability discrimination claims at issue, and risks unfair prejudice, confusion of the issues, and wasting of the jury's and Court's time."[736] In response, the defendant argued that "[t]his evidence is relevant to any jury verdict and punitive damages award, and it is improper to withhold this information from the jury."[737] The defendant did not, however, explain how the evidence "is relevant to any jury verdict and punitive damages award," nor did defendant cite to any legal authority.[738] The court agreed with the EEOC that the evidence at issue was irrelevant to the claims before the jury.[739] The court further held that even if it had some limited relevance, its probative value would be substantially outweighed by a danger of unfair prejudice and/or confusing the issues.[740]

In *EEOC v. St. Joseph's/Candler Health System*, the EEOC sought to exclude, among other evidence, post-lawsuit offers of employment.[741] The EEOC argued that the post-lawsuit offers of employment were offers of compromise under Rule 408 as well as irrelevant and subject to exclusion under Rule 403's balancing test.[742] Defendant argued

723 *Id.* at **26-27.
724 *Id.* at *27.
725 *Id.*
726 *Id.* at **27-28.
727 *Id.* at *29.
728 *Id.*
729 *Id.* at **30-31.
730 *Id.* at *31 (citing *United States v. Cobb*, 432 Fed. Appx. 578, 587 (6th Cir. 2011) (quoting *United States v. Chambers*, 441 F.3d 438, 456 (6th Cir. 2006)).
731 *EEOC v. Red Roof Inns, Inc.*, 2022 U.S. Dist. LEXIS 226567 (S.D. Ohio Dec. 19, 2022).
732 *Id.* at *2.
733 *Id.* at **3-4.
734 *Id. *4.*
735 *Id.* at *6.
736 *Id.* at *7.
737 *Id.* at **7-8.
738 *Id. at *8.*
739 *Id.*
740 *Id.* at *9.
741 *EEOC v. St. Joseph's/Candler Health Sys.*, 2022 U.S. Dist. LEXIS 232622, at **10-15 (S.D. Ga. Dec. 28, 2022).
742 *Id.* at **10-11.

that Rule 408 did not apply as the offers of employment were unconditional, and "[a]n unconditional offer of employment is admissible for certain purposes, including as to mitigation of damages."[743]

Under Rule 408, evidence of "(1) furnishing, promising, or offering—or accepting, promising to accept, or offering to accept—a valuable consideration in compromising or attempting to compromise the claim; and (2) conduct or a statement made during compromise negotiations about the claim … is not admissible to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction."[744] Here, the court acknowledged that there was an apparent split of authority regarding whether evidence used to prove mitigation of damages is a purpose that is not prohibited by Rule 408.[745] Ultimately, however, the court held that it did not need to decide, "definitively," at the motion in limine stage whether or not the offer of employment at issue was conditioned on the charging party taking any action to compromise its claim.[746] The court therefore held that "[b]ecause the evidence *might* be admissible, granting the motion *in limine* would be improper."[747]

In an ADA discrimination case filed in the Northern District of New York, both parties filed motions in limine.[748] Among other evidence, the EEOC moved to preclude evidence of other instances in which the charging party had complained of hiring discrimination by other companies.[749] The defendant argued that it sought to introduce evidence of other complaints as relevant to the charging party's frame of mind, attitude, and motivation for pursuing a charge against the defendant.[750] The court, however, stated that evidence of the charging party's motivation was irrelevant to the issues of the case and to the extent the defendant sought to introduce the evidence for overall context, the court concluded that any probative value would be outweighed by a danger of confusing the jury.[751]

The EEOC also moved to exclude evidence a company official is a cancer survivor and considers herself disabled, as it allegedly had no bearing on the case and had "the potential to improperly appear to the jury's sympathies.[752] The court, however, disagreed and held that the evidence was relevant to the question of defendant's discriminatory motivation.[753] "It is a well-settled, albeit not dispositive, principle that where the alleged discriminator is a member of the same protected class as Plaintiff, an inference against discrimination exists and claims of discrimination become less plausible."[754]

The defendant also moved to preclude a transcript of a telecommunications relay service call, which a non-party produced in response to a subpoena.[755] The EEOC sought to introduce the transcript as evidence that the charging party put the company on notice of her disability. The defendant argued that (1) the transcript cannot be properly authenticated, (2) the "explaining relay" statement attributed to the call operator is hearsay, (3) the statements made by the unidentified representative for defendant are hearsay and do not qualify as party-opponent statements, and (4) allowing the transcript into evidence would unfairly prejudice the defendant.[756] Here, the court reserved ruling on the objection based on authentication until after the court had received the third party's testimony.[757] As for the "explaining relay," the court stated that "[u]nder the present sense impression exception, a statement 'describing or explaining an event or condition, made while or immediately after the declarant perceived it' is not barred by the rule against hearsay."[758] While the court reserved its ruling, it stated that it appeared likely that the "explaining rely" statement was inadmissible hearsay.[759] In response to defendant's argument that the statements did not qualify as party-opponent statements, the court concluded that the EEOC had laid sufficient foundation to support the introduction of the unidentified defendant representative's statements as party-opponent statements

743 *Id.* at *11.
744 *Id.* (citing Fed. R. Evid. 408) (internal quotations omitted).
745 *Id.* *12.
746 *Id.* at *14.
747 *Id.*
748 2023 U.S. Dist. LEXIS 14868 (N.D.N.Y. Jan. 30, 2023).
749 *Id.* at *3.
750 *Id.* at *4.
751 *Id.* at *5.
752 *Id.* at *6.
753 *Id.*
754 *Id.* (citing *Meyer v. N.Y. Office of Mental Health*, 174 F.Supp.3d 673, 687-88 (E.D.N.Y. 2016).
755 *Id.* at 8.
756 *Id.*
757 *Id.* at 10.
758 *Id.* (citing Fed. R. Evid. 803(1)).
759 *Id.* at *11.

under Rule 801(d)(2)(D).[760] Lastly, the court again reserved ruling on defendant's Rule 403 objection of unfair prejudice until it had received the third-party testimony.[761]

In *EEOC v. Drivers Management, LLC*, the District Court of Nebraska considered several pre-trial motions in limine filed by the parties.[762] In this case, the EEOC alleged the defendant failed to hire and accommodate the charging party diver, who is deaf. The EEOC sought to exclude evidence regarding medical and counseling records, references to charging party's job performance at other companies, outcome and verdict in a related case, testimony of an individual who was not identified as a witness, reasons for not hiring the charging party other than his disability, evidence of backpay and mitigation, evidence of threats made by the charging party, and evidence that the defendant had hired other hearing impaired employees for non-driver positions.[763]

Here, the court granted the EEOC's motion as it relates to medical records as the EEOC indicated that it would not produce medical history as it related to high blood pressure for its claim of emotional distress.[764] The court stated, however, that defendants were permitted to question the charging party about any alleged inconsistent statements but were not permitted to use extrinsic evidence.[765] The court denied the EEOC's motions as it relates to counseling records, however, as by seeking damages for emotional distress, the charging party had "put his medical condition at issue, and has waived the psychotherapist-patient privilege."[766]

The court also granted the EEOC's motion's as it relates to the charging party's job performance at other companies as it found that the "the relevance and probative value, if any, of [charging party's] subsequent job performance is outweighed by the risk of confusing the issues, undue delay, and wasting time."[767] The court did, however, permit inquiries to any issues that may have occurred while the charging party was in training as it related to defendant's safety arguments.[768]

With regard to the outcome and verdict in a related case, the court held that "[a] jury's verdict is not evidence[]" and directed the parties to refer to the related case as "another proceeding" for impeachment purposes.[769]

The court also held that the lay witness would opine as to her personal knowledge and that any alleged deficiencies in her decision-making process could be contested through cross-examination.[770] The court therefore stated it would permit the witness to testify as to the reasons behind the decision not to hire the charging party and would allow the EEOC to cross-examine the witness regarding any alleged deficiencies.[771]

The court overruled the EEOC's motion to preclude evidence of the other reasons the charging party was not hired as the court was unclear as to what the EEOC was seeking to exclude or prevent.[772] The court's ruling was without prejudice, however.[773]

The court granted the EEOC's motion regarding backpay and mitigation as the court held that it would be proper and more efficient for the court to determine the issues following trial.[774]

The court granted the EEOC's motion to exclude any evidence, statement, or argument that the charging party would pose a direct threat of harm if employed by the defendant or that his employment would create an undue hardship.[775] The court went a step further and agreed with the EEOC also to prohibit any use of the phrases "direct threat" and "undue hardship."[776] The EEOC moved to exclude this evidence, as such statements would mislead the jury and confuse the issues in violation of Rule 403, given the court's order granting summary judgment to the

760 *Id.* **13-15.
761 *Id.* at **15-16.
762 *EEOC v. Drivers Mgmt., LLC*, 2023 U.S. Dist. LEXIS 147816 (D. Neb. Aug. 23, 2023).
763 *Id.* at **2-12.
764 *Id.* at **2-3.
765 *Id.* at *3.
766 *Id.*
767 *Id.* at **4-5.
768 *Id.* at *5.
769 *Id.* at *6.
770 *Id.* at *7.
771 *Id.*
772 *Id.* at **7-8.
773 *Id.* at *8.
774 *Id.* at **8-9.
775 *Id.* at *9.
776 *Id.*

plaintiff on these defenses. The court, however, permitted the defendant to put on evidence regarding safety and other concerns with deaf drivers.[777]

Lastly, with regards to the EEOC's motion to exclude evidence of defendant's treatment of deaf applicants, the court denied the motion since the EEOC was seeking punitive damages.[778]

The defendant also sought to exclude evidence, including statements by the charging party and other employees of their subjective beliefs and bare allegations of discrimination, stray remarks, other employers' policies on hearing-impaired drivers, subsequent remedial measures, and evidence of punitive damages.[779]

Addressing statements of subjective beliefs, the court held that the evidence was not unfairly prejudicial since it was from the defendant's own employees who were testifying as to their personal knowledge and despite not being involved in the decision not to hire the charging party, their testimonies would help "the jury to understand how [the defendant] employees felt about deaf drivers generally and how they felt about their own actions."[780] The court, however, held that while the EEOC could inquire as to how people felt about certain behaviors, they could not ask whether certain behaviors themselves were discriminatory as to avoid confusing the common understanding of "discrimination" with the legal claim of "disability discrimination."[781]

The court denied the defendant's motion to exclude "stray remarks" as the court agreed with the EEOC that the "stray remarks" had been made by a high-level official for the defendant who had conversations with the decisionmaker regarding the application.[782] The court held that such statements were relevant to the punitive damages as well as motivations.[783]

The court also denied the defendant's motion to exclude evidence of other trucking companies' policies as it relates to hearing-impaired drivers as irrelevant.[784] The court stated that such evidence was relevant as to the issue of whether defendant's refusal to train its deaf drivers is reasonable.[785]

The court also denied the defendant's motion to exclude evidence of its subsequent remedial measures.[786] Specifically, the court held that the defendant's subsequent policy change speaks to whether an aspect of the training program was truly an "essential function" of the position at the time the charging party applied and held its relevance outweighed any potential prejudice.[787]

2. Pretrial Disclosures

In *EEOC v. Ohio State University*, in anticipation of trial, the parties exchanged witness lists and exhibits lists in compliance with the court's pretrial order.[788] The EEOC filed an Expedited Motion to Compel the defendant to file both a witness list and exhibit list that complies with the court's pretrial order.[789]

Pursuant to Fed. R. Civ. P. 26(a)(3), pretrial disclosures "are intended to prevent prejudice at trial by putting the parties on notice of what evidence the opposing party plans to offer and to enable the Court to conduct trial proceedings efficiently."[790] In that same vein, Rule 26(a)(3)(A) requires the parties involved to identify the witnesses, documents, and/or exhibits that they each plan to present at trial.[791] Pursuant to Rule 26, the court in this matter asked the parties to identify witnesses by name "with a brief summary of the witnesses' testimony ..., the purpose of that testimony, and the major issue about which the witness will testify," as well as "a list containing a brief description of each item of documentary or physical proof the party intends to offer in evidence as an exhibit at trial."[792] Exhibit lists are to be "more than just generalized categories of documents which [a party] intends to use

777 *Id.*
778 *Id.* at *10.
779 *Id.* at **12-21.
780 *Id.* at *13.
781 *Id. **13-14.*
782 *Id.* at **14-15.
783 *Id.* at *15.
784 *Id.* at **15-17.
785 *Id.* at *15.
786 *Id.* at **17-18.
787 *Id.* at *18.
788 *EEOC v. Ohio State Univ.*, 2023 WL 1070245, at *1 (S.D. Ohio Jan. 27, 2023).
789 *Id.*
790 *Id.* at *2.
791 *Id.*
792 *Id.*

at trial as such vagueness fails to put [the opposing party] on notice of exactly which documents it can expect to see at trial."[793] An exception would be if "voluminous items of a similar or standardized character [are] described by meaningful categories."[794] While an exhaustive description is not required for each document, a party must include more than just "catch-all phrases, broad categories, and general descriptions[.]"[795] Unless there is "a substantial justification or a showing of harmlessness," a party's failure to comply with the pretrial disclosure requirements under Rule 26(a)(3) in turn precludes the party from then using the information on its list at trial.[796]

Here, the EEOC argued that defendant's exhibit list simply listed broad categories of documents without identifying the specific documents that would be offered at trial.[797] The court agreed.[798] For example, defendant listed a nearly 2,000-page administrative record without providing any identification as to which documents or subsets of documents were being produced.[799] Defendant also included broad, catch-all categories without any specificity—for example specific handbooks or personnel file documents intended to be produced at trial.[800] In response, defendant argued that it had provided the EEOC with copies of the actual documents it intends to introduce at trial.[801] The EEOC found this to be insufficient, even before accounting for the fact defendant had only provided the actual documents *after* the EEOC had filed the motion to compel.[802] Specifically, defendant had not filed this with the court as required under Rule 26(a)(3)(A).[803] The court also agreed with the EEOC that defendant had listed specific documents as part of "non-inclusive lists," meaning defendant had listed a few specific documents but left the door open to include any other document that would be relevant to the topic, even if it was not identified in their exhibit list.[804] "A non-inclusive list inhibits the ability of the opposing party to prepare for trial and allows for the possibility of prejudicial surprises."[805] With regard to the EEOC's argument that defendant failed to specify which texts, the court stated that defendant did not need to provide a more detailed description if, as defendant claimed, they would be using all 1,600 texts.[806] Furthermore, the court stated there was no need for defendant to clarify which documents are included as "supporting documentation" to its supplemental response to the EEOC's interrogatory request if such "supporting documentation" does not exist.[807]

Turning to defendant's witness list, the court considered the EEOC's argument that defendant's witness descriptions and summaries did not include current contact information, nor did it allegedly include a sufficient brief summary of the witnesses' testimony or purpose and major topics of testimony.[808] Again, the court found that the use of "non-inclusive lists" in defendant's description of the witnesses' testimony did not comport with the court's pretrial order or Rule 26(a)(3)(A)(i).[809] The court took issue with the fact that defendant's witness list left "open the possibility that a witness will testify as to any number of unspecified and unidentified topics" that would fail to help the parties, as well as the court, prepare for trial.[810] The court held that statements that a witness would testify about the allegations at issue generally, without identifying specific aspects of the allegations, was "at odds with the purposes of pretrial disclosures."[811] The court did, however, find that the defendant did not need to provide current contact information for the EEOC to effectuate a subpoena if the parties had already come to an agreement for the defendant to arrange for the attendance of its witnesses.[812] Lastly, the court held that it was defendant's "decision whether it wishes to provide the Court with the names and addresses of specific witnesses, whether they

793 *Id.* at **2-3 (internal quotation marks omitted) (quoting *Med. Ctr. Of Central Gas., Inc. v. Denon Digital Employee Benefits Plan*, 2005 U.S. Dist. LEXIS 26957, at *8 (M.D. Ga. May 4, 2005) (emphasis in original)).
794 *Id.* at *3 (citing Fed. R. Civ. P. 26(a)(3) advisory committee's note to 1993 amendment).
795 *Id.* at *3.
796 *Id.*
797 *Id.*
798 *Id.*
799 *Id.* at **3-4.
800 *Id.*
801 *Id.*
802 *Id.*
803 *Id.* at *5.
804 *Id.*
805 *Id.*
806 *Id.* at *6.
807 *Id.*
808 *Id.* at *7.
809 *Id.*
810 *Id.*
811 *Id.*
812 *Id.* at **7-8.

were identified through the parties' document productions or disclosed by the parties during discovery, that it intends to call at trial."[813]

3. Post-Trial Motions

In *EEOC v. Drivers Management, LLC*, discussed above, the EEOC won a motion for a partial directed verdict in an ADA case concerning claims for failure to hire and failure to accommodate.[814] The EEOC requested a directed verdict on the issue of causation.[815] The defendant's position throughout the case was that it did not hire charging party because he was not qualified, as he was an inexperienced truck driver.[816] The court was unpersuaded by this argument, noting that whether the charging party was able to perform the essential functions of the job is a different element of the plaintiff's *prima facie* case, not a theory that defeats causation.[817] Accordingly, the court found that, if the jury found the EEOC met its burden to show the charging party was a qualified individual, the charging party's disability was the but-for cause of defendant's hiring decision as a matter of law.[818] The court permitted the remaining issues, *i.e.*, whether the charging party could perform the essential functions of the job, whether any reasonable accommodation would have enabled him to do so, and whether defendant's decision was justified by business necessity, to be submitted to the jury.[819]

In *EEOC v. Western Distributing Company*, the court held a jury trial on the issue of liability and both parties moved for a directed verdict.[820] At the close of the EEOC's case, the defendant moved for judgment as a matter of law on all claims and the court took the motion under advisement.[821] After resting its own case, the defendant renewed its Rule 50(a) motion as to all claims.[822] The EEOC made its own Rule 50(a) motion, seeking judgment as a matter of law on the defendant's affirmative defenses of undue hardship and business necessity.[823] The court took both motions under advisement and submitted the action to the jury, subject to the parties' motions.[824] The jury returned a verdict for the defendant on the EEOC's two disparate treatment claims, and in favor of the EEOC on its sole disparate impact claim.[825] Given this verdict, the court construed the parties' Rule 50(a) motions as renewed motions for judgment as a matter of law under Rule 50(b) and denied the motions.[826]

Viewing the totality of the trial evidence in the light most favorable to the EEOC in considering the defendant's motion, the court found that a reasonable jury could have reached the verdict reached in this case on the disparate impact claim.[827] Thus, the court denied the defendant's motion with respect to the disparate impact claim.[828]

Moreover, viewing the totality of the trial evidence in the light most favorable to the defendant in considering the EEOC's motion, the court found a reasonable jury could have found the proposed accommodations posed an undue burden on the defendant.[829] Thus, the court denied the EEOC's motion with respect to the defendant's affirmative defense of undue hardship.[830] Given that the jury returned a verdict in the EEOC's favor on the affirmative defense of business necessity, the court denied the motion as moot with respect to that issue.[831]

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813 *Id.*
814 *EEOC v. Drivers Mgmt.*, LLC, 2023 U.S. Dist. LEXIS 153977, at *1 (D. Neb. Aug. 31, 2023).
815 *Id.*
816 *Id.* at **2-3.
817 *Id.* at *3.
818 *Id.* at **5-6.
819 *Id.* at *7.
820 *EEOC v. W. Distrib. Co.*, 2023 U.S. Dist. LEXIS 24979 (D. Colo. Feb. 14, 2023).
821 *Id.* at *2.
822 *Id.*
823 *Id.*
824 *Id.*
825 *Id.*
826 *Id.* at **2-3.
827 *Id.* at **4-9.
828 *Id.* at *9.
829 *Id.* at **9-11.
830 *Id.*
831 *Id.* at **11-12.

L. Remedies

1. Costs and Fees

The cases decided in FY 2023 contained several helpful discussions of the remedies available under the statutes administered by the EEOC. A number of decisions involved both defendants' and the EEOC's motion for costs and fees incurred during litigation.

In *EEOC v. E. 40, Inc.*, the court considered an employer's motion for costs and motion for attorneys' fees and expert witness fees.[832] First, with respect to the motion for costs, the court allowed fees for transcripts and copying costs, but denied the employer's request for a private investigator fee.[833] The court agreed with the EEOC that the Eighth Circuit does not allow for taxation of private investigative costs, but it found the other costs were necessary and were thus recoverable.[834]

Second, with respect to the employer's request for attorneys' fees and expert witness fees, the court denied the employer's motion.[835] The defendant claimed such fees were awardable under 42 U.S.C. § 2000e-5(k) and 28 U.S.C. § 2412(d)(1)(B) because the EEOC's claim was not substantially justified and its position was unreasonable and groundless.[836] The EEOC contended (1) its claims were not unreasonable or groundless; (2) the fees are not awardable under 28 U.S.C. § 2412(d)(1)(B); and (3) the award of the expert fees is impermissible as a matter of law.[837] The court agreed with the EEOC and denied the defendant's motion.[838]

The court found there was sufficient evidence to support a claim for discrimination and the claim was not frivolous, unreasonable, or groundless.[839] Notably, the court denied defendant's motion for a directed verdict, indicating there were sufficient questions of fact for jury to decide.[840] The court also agreed with the EEOC that the defendant was prohibited from recovering attorney's fees under 28 U.S.C. § 2412(d)(1)(B) by Eighth Circuit precedent, which excludes Title VII actions.[841]

The defendant also requested expert fees for accountant work done during the case.[842] The EEOC claimed the expert accountant was hired for settlement, not trial, and that expert fees cannot be assessed as attorney's fees as requested by the defendant.[843] Although the court acknowledged that both 42 U.S.C. § 2000e-5(k) and 28 U.S.C. § 2412(d) expressly state an award of expert fees is permissible, it ultimately concluded the defendant failed to meet its burden under 42 U.S.C. § 2000e-5(k) and that 28 U.S.C. § 2412(d) was inapplicable.[844] Accordingly, for the same reasons the defendant was not entitled to attorney's fees, it was not entitled to the expert witness fee.[845]

The EEOC also filed motions for costs this fiscal year. In *EEOC v. Cigar City Motors, Inc.*, the court partially granted the EEOC's motion to tax costs.[846] The EEOC subsequently asked for the costs it incurred in serving deposition and trial subpoenas; acquiring deposition and trial transcripts; having its witnesses testify at depositions and at trial; and making copies.[847] The court granted the EEOC's requests for subpoenas and witness fees, subject to some reductions for certain unnecessary costs.[848] The court also permitted the EEOC to recover its costs for transcripts necessarily obtained for use in post-trial motion practice, excluding the additional cost of expedited transcripts.[849]

In *EEOC v. West Meade Place LLP*, the court also granted the EEOC's motion for costs.[850] The EEOC filed a bill of costs for $6,254.60 for witness fees, service of summons and subpoenas, and fees for transcripts and

832 *EEOC v. E. 40, Inc.*, 2023 U.S. Dist. LEXIS 84783 (D.N.D. May 15, 2023); *EEOC v. E. 40, Inc.*, 2023 U.S. Dist. LEXIS 84784 (D.N.D. May 15, 2023).
833 *EEOC v. E. 40, Inc.*, 2023 U.S. Dist. LEXIS 84783, at **4-5.
834 *Id.*
835 *EEOC v. E. 40, Inc.*, 2023 U.S. Dist. LEXIS 84784 at *1.
836 *Id.* at **1-2.
837 *Id.* at *2.
838 *Id.*
839 *Id.* at **2-4.
840 *Id.* at *4.
841 *Id.*
842 *Id.* at **4-5.
843 *Id.*
844 *Id.* at *5.
845 *Id.*
846 *EEOC v. Cigar City Motors, Inc.*, 2023 U.S. Dist. LEXIS 73743 (M.D. Fla. Apr. 27, 2023).
847 *Id.* at **5-6.
848 *Id.* at **5-11.
849 *Id.* at *8.
850 *EEOC v. West Meade Place LLP*, 2023 U.S. Dist. LEXIS 104665 (M.D. Tenn. June 14, 2023).

associated court reporter costs.[851] The court found most of the fees reasonable and recoverable, and it awarded $5,918.48 to the EEOC.[852]

2. Compensatory Damages

In *EEOC v. Coastal Drilling*, the charging party alleged that the defendant created a hostile work environment and constructively discharged him because of his race.[853] This case was tried by jury, which found in favor of the EEOC on both the hostile work environment and constructive discharge claims and awarded the charging party $24,375.00 in compensatory damages.[854]

After the jury's verdict, four issues remained before the court related to the defendant's payment of back pay to the charging party: (1) whether per diem expense reimbursements are a proper component of the back pay award; (2) whether the total aggregate amount of charging party's earnings subsequent to his separation should be deducted from the amount the charging party would have earned at defendant's organization; (3) whether prejudgment interest should be measured as simple interest or compounded quarterly; and (4) whether equitable relief should include additional compensation to offset any alleged negative tax implications that the back pay award may create.[855]

The EEOC argued that the back pay award should include $245.00 per week that the charging party received as per diem payments.[856] The defendant argued that the per diem payments should not be included as part of the charging party's back pay award because they were not "wages" and were only intended to reimburse meals and incidental expenses.[857] The per diem payments were not treated as taxable income.[858] The court noted that the EEOC, as the plaintiff, bears the burden of proving by a preponderance of evidence the amount of backpay "with reasonable certainty, not with the same exactitude that may apply to proof of lost profits in a breach of contract case."[859]

When evaluating whether the total aggregate amount of the charging party's earnings subsequent to his separation should be deducted from the amount charging party would have earned if employed with the defendant, the court held that prejudgment interest compounded annually is appropriate to strike the balance between awarding the charging party the time value of his earnings while not punishing the defendant for the time that lapsed before the resolution of the case.[860]

The court also resolved a dispute over whether prejudgment interest should be measured as simple interest or compounded quarterly.[861] The court found that charging party's back pay award should include an award of prejudgment interest at the IRS payment rate compounded annually.[862]

Finally, the EEOC requested the court to award the charging party an additional sum to account for the negative tax consequences that would result from the back pay award.[863] The defendant argued that the EEOC did not satisfy its burden to show that the charging party is entitled to a tax gross-up because the EEOC did not put forth a report from a financial or economic expert to describe the basis of the tax offset.[864] The court held that the tax calculation provided by the EEOC was insufficient to satisfy their burden because its calculation was based on its inclusion of per diem payments in the back pay award and the EEOC's calculations terminated the back pay period when charging party started his employment with the new employer.[865] Ultimately, the court was inclined to grant the charging party a tax gross-up to the extent that he will suffer negative tax consequences as a result of the back pay award.[866]

851 *Id.* at *2.
852 *Id.* at **7-8.
853 *EEOC v. Coastal Drilling E., LLC*, 2023 U.S. Dist. LEXIS 130665, at *2 (W.D. Pa. July 28, 2023).
854 *Id.*
855 *Id.*
856 *Id.*
857 *Id.* at **13-17.
858 *Id.*
859 *Id.*, *citing* Roger Mastalir, Employment Discrimination Law and Practice 271 (Wolters Kluwer Legal & Regulatory U.S. 2020).
860 *Id.* at **18-24.
861 *Id.* at *24.
862 *Id.* at *25.
863 *Id.* at *26.
864 *Id.* at **26-27.
865 *Id.* at *27.
866 *Id.*

3. Punitive Damages

In *EEOC v. Cigar City Motors, Inc.*, the court denied the employer's attempt to challenge the jury's liability finding.[867] The jury returned a unanimous verdict finding the employer was motivated by gender in denying the charging party's promotion and awarded $500,000 in punitive damages.[868] In its renewed motion for judgment as a matter of law, the defendant argued that the evidence demonstrated the charging party was not promoted for legitimate, non-discriminatory reasons.[869] The court found that, considering the entirety of the testimony and exhibits in the light most favorable to the EEOC, and construing all reasonable inferences in its favor, a reasonable jury could conclude that the employer unlawfully discriminated against the charging party on the basis of her sex.[870]

In *EEOC v. Drivers Management*, the parties filed a series of motions in limine.[871] The defendant argued that punitive damages should not be submitted to the jury. In making that argument, the defendant relied on Eighth Circuit case law that punitive damages are not warranted in an ADA case if the theory of discrimination is novel.[872]

In this case, the plaintiff alleged that the defendant intentionally, and potentially maliciously or recklessly discriminated against deaf people in contravention of their civil rights.[873] The court held that the jury may be instructed (if the evidence is sufficient) that it may award punitive damages if the defendants "acted with malice or reckless indifference" to the charging party's right to be discriminated against on the basis of a disability.[874] The court decided to handle punitive damages, and evidence of the charging party's financial status, in the same way that they were handled in a related case the court handled earlier in the year.[875] Therefore, prior to presenting evidence of charging party's financial status and net worth, the plaintiff, outside the presence of the jury, must seek the court's determination and permission on the issue of punitive damages.[876]

4. Injunctive Relief

In *EEOC v. West Meade Place, LLP*, the EEOC moved for a permanent injunction alleging that the defendant fired the charging party because it regarded her as disabled.[877] A jury found in favor of the charging party and the court entered the jury's judgment and ordered the parties to file supplements regarding back pay and injunctive relief.[878] The parties stipulated to the amount of back pay, and the EEOC later moved the court to enter a permanent injunction that does the following:

(1) enjoins the defendant from violating the ADA in the future;

(2) requires the defendant to amend its Partner Handbook to address the ADA, and include a statement that says that the defendant "will not tolerate such discrimination and … will take appropriate disciplinary action against" individuals who engage in such conduct;

(3) requires the defendant to complete anti-discrimination training administered by a third party; and

(4) requires the defendant to submit reports to the EEOC regarding the third-party training within 30 days of completion, each year for five years.[879]

The court held that the EEOC's request that the defendant have a requirement that the defendant not violate the ADA was overbroad and not sustainable under Fed. R. Civ. P. 65(d); the court therefore denied this request for relief.[880]

In response to the EEOC's request to modify its handbook to include a section on the ADA and to clarify that the defendant will not permit disability discrimination, the court noted that the handbook that was used at the

867 *EEOC v. Cigar City Motors, Inc.*, 2023 U.S. Dist. LEXIS 60171 (M.D. Fla. Apr. 5, 2023).
868 *Id.* at *8.
869 *Id.*
870 *Id.* at *30.
871 *EEOC v. Drivers Mgmt.*, LLC, 2023 U.S. Dist. LEXIS 147816, at *1 (D. Neb. Aug. 23, 2023).
872 *Id.* at *20.
873 *Id.*
874 *Id.*
875 *Id.* at *6, *EEOC and Andrew Deuschle v. Werner Enterprises*, case no. 8:18-cv-329, filing 282 at 1.
876 *Id* at *20.
877 *EEOC v. W. Meade Place, LLP*, 2023 U.S. Dist. LEXIS 174025, at *2 (M.D. Tenn. Sep. 28, 2023).
878 *Id.*
879 *Id.* at **2-3.
880 *Id.* at *5.

time of charging party's termination was no longer in place, and the new handbook provides a significant review of the ADA. Therefore, the EEOC's request that the court order the defendant to incorporate ADA provisions in their handbook is moot.[881]

The EEOC's final requests for injunctive relief were that the defendant be required to complete EEO and anti-discrimination training for all employees, and report the completion of that training within 30 days of completion for five years.[882] In evaluating the EEOC's request, the court noted that defendant bears the burden of producing evidence to show that it has taken or will take measures to ensure that the discriminatory conduct will not occur again.[883] Conversely, the EEOC bears the burden of persuading the court that notwithstanding the defendant's efforts, there is a cognizable risk that the defendant will not be effective in preventing the reoccurrence absent the injunctive relief.[884] The defendant presented declarations from members of management that attest to the policies, procedures, and trainings that are now in place.[885] In response, the EEOC contended that there is violative behavior because some of the same officers in place were employed during charging party's termination.[886] The court found this argument made by the EEOC unpersuasive, and therefore denied these injunctive requests.[887]

In a motion for non-monetary injunctive relief, the EEOC in *EEOC v. Cigar City Motors, Inc.* requested 10 specific actions to prevent recurrence of sex discrimination.[888] The court found the EEOC satisfied the first element necessary for injunctive relief because the jury determined that the defendant discriminated with either malice or reckless indifference.[889] Regarding the second element, the defendant failed to show there was no reasonable possibility of further noncompliance with the law.[890] Ultimately, the court granted some (but not all) of the EEOC's requested injunctive relief, including a "general injunction" prohibiting sex discrimination, adaptation of written anti-discrimination policies, annual in-person training, and annual reports to the EEOC relating to its compliance with the injunction, among other terms for a duration of three years.[891]

M. Settlements

In *EEOC v. Heartfelt Home Healthcare Services*, the court evaluated was whether an employer can require the charging party to participate in a settlement conference after the EEOC rejected the defendant's offer of settlement three minutes after its investigator opened defense counsel's email.[892]

The court held that the EEOC failed to support its claim of privilege.[893] More specifically, the court echoed the defendant's concern regarding the charging party's knowledge and understanding that there may be competing interests between the EEOC and the charging party.[894] In support of its argument, the defendant cited to an EEOC attorneys' manual that instructed that the claimants be advised of their right of intervention, and that the interests and highlighting that the Commission's goal may diverge from that of the claimants.[895] The court noted that the manual does not carry the force of law, but rather highlights the need for clarity regarding the relationship between the EEOC and the claimant.[896]

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."[897] By its terms, this provision allows either a prevailing private plaintiff or

881 *Id.* at **5-6.
882 *Id.* at **6-7.
883 *Id.*
884 *Id.* at **7-8.
885 *Id.*
886 *Id.*
887 *Id.*
888 *EEOC v. Cigar City Motors, Inc.*, 2023 U.S. Dist. LEXIS 60171, at **34-36 (M.D. Fla. Apr. 5, 2023).
889 *Id.* at *38.
890 *Id.*
891 *Id.* at **45-49.
892 *EEOC v. Heartfelt Home Healthcare Servs., Inc.*, 2023 U.S. Dist. LEXIS 17116, at **1-2 (W.D. Pa. Jan. 30, 2023).
893 *Id.*
894 *Id.* at **1-2.
895 *Id.* at *3.
896 *Id.*
897 42 U.S.C. § 2000e-5(k).

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."[898]

The opposite is true of a prevailing defendant. A prevailing defendant not only is not vindicating any important federal interest, according to the governing standard, but the award of attorneys' fees to prevailing defendants as a matter of course would undermine that interest by making it riskier for "private attorneys general" to bring claims.[899] Accordingly, before a prevailing defendant may be awarded fees, it must demonstrate that a plaintiff's claim was "frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so."[900] This stringent standard does not, however, require proof that the EEOC or a private plaintiff acted in bad faith.[901] 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.[902]

The last significant EEOC litigation on this issue occurred in 2019 in the Eighth Circuit. In *EEOC v. CRST Van Expedited, Inc.*, the EEOC was required to pay a prevailing employer $3.3 million in attorneys' fees for pursuing a "class" sexual harassment claim after it knew or should have known the claims were frivolous.[903] In the decade-old lawsuit, the EEOC alleged that the employer engaged in a pattern or practice of discrimination against female truck drivers and driver trainees who claimed they were sexually harassed. The employer prevailed at the district court level in 2009, but, on appeal, the Eighth Circuit held that the EEOC did not owe the company costs and fees because the EEOC's claims had not been dismissed on the merits—but rather for procedural deficiencies. The Supreme Court disagreed, finding that the EEOC can be ordered to pay costs and fees when some or all of its claims are dismissed for failure to satisfy the EEOC's pre-lawsuit requirements, and remanded the matter back to the district court.

On remand, the district court once again held that the company was entitled to attorneys' fees, expenses, and costs. Specifically, the district court applied the *Christiansburg* standard and in an exhaustive, claim-by-claim analysis, determined that the 78 claims dismissed on summary judgment were frivolous, groundless, and/or unreasonable. On appeal, the Eighth Circuit upheld the fee award, finding that the district court did not abuse its discretion in applying the Christiansburg standard. The Eighth Circuit agreed that the EEOC's failure to conciliate and investigate the claims was an unreasonable litigation tactic that resulted in frivolous, unreasonable, or groundless claims. In addition, the Eighth Circuit noted that the district court made particularized findings of frivolousness, unreasonableness, and groundlessness as to each individual claim dismissed on summary judgment. The Eighth Circuit also rejected the EEOC's allegation that it sought relief for the remaining women based on the pattern-or-practice burden of proof because the EEOC never actually alleged the company was engaged in "a pattern or practice" of illegal sex-based discrimination. The Eighth Circuit agreed with the district court's reasoning that, "[a]s the master of its own complaint, it was frivolous, unreasonable and/or groundless for the EEOC to fail to allege a pattern-or-practice violation and then proceed to premise the theory of its case on such a claim."[904]

In regard to company's calculation of attorneys' fees, the Eighth Circuit agreed that the company properly distinguished between costs associated with defending against frivolous, unreasonable, and/or groundless claims and those that did not meet that standard. In doing so, the Eighth Circuit held that the district court is not required "to become a green-eyeshade accountant pour[ing] over the record to calculate each individual claim. Instead the district court did rough justice by finding that the general method by which [the company] calculated the fees it now seeks was appropriate."[905]

898 *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 416–17 (1978).
899 *Id.* at 422.
900 *Id.*
901 *Id.* at 421.
902 *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)).
903 *EEOC v. CRST Van Expedited, Inc.*, 944 F.3d 750 (8th Cir. 2019).
904 *Id.* at 757.
905 *Id.* at 759 (quoting *EEOC v. CRST Van Expedited, Inc.*, 277 F. Supp. 3d 1000, 1052 (N.D. Iowa 2017) (internal quotations omitted)).

In a more recent matter, *EEOC v. Stardust Diners, Inc.*, the defendant's former counsel filed a motion for unpaid attorneys' fees.[906] During the course of representation, counsel sent the defendant monthly invoices, which the defendant never objected to.[907] Those invoices presented detailed entries of tasks performed and time spent.[908] The court noted that the defendant's partial payments indicated that the billed rates were reasonable, and both the hourly rate and number of hours were reasonable.[909] Ultimately, the court granted counsel's request for attorneys except for $320 of the charges requested because the court was unable to evaluate the reasonableness of the request.[910]

906 *EEOC v. Stardust Diners, Inc.*, 2023 U.S. Dist. LEXIS 140035, at *1 (E.D.N.Y. Aug. 10, 2023).
907 *Id.* at *13.
908 *Id.* at *14.
909 *Id.* at **14-15.
910 *Id.*

VI. Appendices

Appendix A – EEOC Consent Decrees, Conciliation Agreements and Judgments[911]

Select EEOC Settlements in FY 2023-2024

Settlement Amount	Claim	Description	Court	EEOC Press Release
$8 million	Disability Discrimination Pregnancy Discrimination Retaliation	The EEOC alleged a company and related entities failed to provide reasonable accommodations to employees with disabilities and those who were pregnant, and instead required them to take unpaid leave, retaliated against them, and required returning employees to be 100% healed or face termination. Under the terms of the conciliation agreement, which will be in place for four years, the company will pay $8 million, which includes a class fund to provide relief to those employees impacted by the company's policies and employed between July 10, 2009 and September 26, 2022. The company will also provide non-monetary relief, including the appointing of an EEO coordinator to provide oversight on pregnancy-related disability policies, requests for reasonable accommodations, and maintenance of records. The company will update its accommodation policies, conduct climate surveys and exit interviews, and provide employees and managers with anti-discrimination training.	This settlement was reached during conciliation before the EEOC filed a lawsuit on the merits.	11/29/2022
$6.875 million*	Age Discrimination Disability Discrimination	The EEOC alleged a medical group subjected a class of doctors to a mandatory retirement age irrespective of their ability to perform their job duties. As part of the four-year conciliation agreement, the group agreed to pay $6,875,000 to the class impacted by the policy, rescind the policy, and require leadership and human resources to attend training on the ADA and ADEA.	This settlement was reached during conciliation before the EEOC filed a lawsuit on the merits.	12/19/2023

911 Littler monitored EEOC press releases regarding settlements, jury verdicts, and judgments entered in EEOC-related litigation during FY 2023 and the early months of FY 2024. The significant consent decrees and conciliation agreements in Appendix A include those amounting to $500,000 or more. Notable conciliation agreements are included in the shaded boxes. FY 2024 settlements are marked with an asterisk (*). Appendix A also includes notable jury verdicts and judgments.

Settlement Amount	Claim	Description	Court	EEOC Press Release
$5 million	Sex Discrimination Race Discrimination	The EEOC alleged a large retailer failed to hire and promote women, Black, Asian, and Hispanic job applicants. As part of the settlement, the employer agreed to retain an expert to assist with recruitment, hiring, training, and promoting qualified applicants and employees. The company also agreed to post all promotional opportunities internally, implement anti-discrimination policies and complaint procedures, provide training, and issue a CEO statement of the company's commitment to equal employment opportunity.	This settlement was reached during conciliation before the EEOC filed a lawsuit on the merits.	n/a – See FY 2023 AFR, p. 18
$3.8 million	Religious Discrimination Disability Discrimination	The EEOC alleged a company denied religious and/or disability-related accommodations involving a COVID-19 vaccination requirement. The ADA and Title VII Commissioner charge, along with related charges, were resolved for $3.8 million and affects a class of 106 employees. The company also agreed to retain a claims administrator, and provide ADA and Title VII training for HR staff who process requests for reasonable accommodations.	This settlement was reached during conciliation before the EEOC filed a lawsuit on the merits.	n/a – See FY 2023 AFR, p. 18
$2.5 million	Race Discrimination Pay Discrimination Harassment Retaliation	The EEOC alleged a car manufacturing company paid a class of Black managers substantially less than their white peers and subjected them to retaliatory harassment as a result of their complaints of wage discrimination. Per the terms of the four-year conciliation agreement, the company agreed to pay $2.5 million for 19 aggrieved individuals, as well as provide injunctive relief to correct the wage disparities and prevent future harassment, including training for over 4,000 workers.	This settlement was reached during conciliation before the EEOC filed a lawsuit on the merits.	n/a – See FY 2023 AFR, p. 26
$2.4 million	Age Discrimination	The EEOC alleged a pharmaceutical company discriminated against older workers by announcing a plan to hire younger workers. Under the terms of the consent decree, in addition to the monetary sum, the company agreed to review and revise its hiring policies to ensure compliance with the ADEA, train hiring managers on anti-discriminatory practices, and ensure third-party recruiters comply with its policies and practices.	U.S. District Court for the Southern District of Indiana	10/11/2023

Settlement Amount	Claim	Description	Court	EEOC Press Release
$2 million	Sex Harassment	The EEOC alleged a fast-food franchise owner allowed sexual harassing behavior to persist at various locations. Under the terms of the consent decree, the owner will pay $1,997,500 to 41 individuals, retain a third-party EEO monitor to conduct audits of the franchise practices in handling harassment and retaliation claims, create a tracking system for complaints, conduct climate surveys, update its EEO policies, and conduct training.	U.S. District Court for the District of Nevada	1/6/2023
$2 million*	Sex Harassment Retaliation	The EEOC alleged the company subjected a class of female agricultural workers to a sexually hostile work environment and threatened retaliation for those who did not acquiesce to the harassment. Under the terms of the consent decree, the company will pay $2 million to the class, hire a third-party monitor, conduct training, update its policies and procedures, provide periodic reports to the EEOC, and institute reporting mechanisms.	U.S. District Court for the Eastern District of California	3/12/2024
$1.25 million	Sex Discrimination	The EEOC alleged that a trucking company discriminated against female job applicants for loader positions for approximately seven years. Under the terms of the consent decree, the company agreed to pay $1.25 million into a settlement fund to be handled by a claims administrator hired by the company, to be distributed to approximately 200 women who were denied employment. The company will also conduct training, invite rejected female job applicants to apply for open positions, and engage in recruitment efforts targeted toward women for loader positions.	U.S. District Court for the Southern District of Ohio	4/25/2023
$1.2 million	Race Harassment Retaliation	The EEOC alleged that from at least May 2018 through the fall of 2019, a contractor subjected Black employees to a racially hostile working environment and retaliated against two employees who complained. As part of the two-year consent decree, the company agreed to pay $1.2 million to 31 claimants, conduct anti-harassment training, assign an EEO liaison to each of its construction sites, and institute a strict prohibition against racist symbols, graffiti, jokes, slurs, and hate symbols into its harassment policy.	U.S. District Court for the Middle District of Tennessee	5/4/2023

Settlement Amount	Claim	Description	Court	EEOC Press Release
$1 million*	Disability Discrimination Genetic Information Discrimination	The EEOC alleged defendant's hiring process violated the ADA and GINA by requiring applicants to pass a pre-employment medical exam, during which they were required to divulge past and present medical conditions. The EEOC also alleged the defendant used qualification criteria that screened out qualified individuals with disabilities. Under the terms of the 27-month consent decree, the defendant agreed to pay $1 million to 498 applicant class members, review and revise its ADA and GINA policies, direct its medical examiners not to request family medical history, consider the medical opinion of the applicant's physician, instruct applicants how to request a reasonable accommodation if needed, and provide training.	U.S. District Court for the Northern District of Alabama	10/19/2023
$865,000	Race Harassment Retaliation	EEOC alleged a company engaged in race-based harassment and retaliation. Specifically, the EEOC claimed the company allowed a class of Black employees to be harassed by residents, co-workers, and a supervisor. Under the terms of the three-year consent decree, the company agreed to retain an EEO monitor, review policies and procedures on discrimination, harassment and retaliation, create a structure for reporting incidents of harassment/discrimination, and pay $865,000.	U.S. District Court for the Central District of California	9/28/2023
$750,000	Disability Discrimination	The EEOC alleged a company implemented policies and practices that failed to accommodate individuals with disabilities and resulted in firing employees on account of their disabilities or in retaliation for opposing discriminatory practices. Specifically, the company required employees returning from medical leave to have clearance to work full-duty or without any medical restrictions, and placed those who could not return without restrictions on 90 days' involuntary unpaid leave. Under the terms of the two-year consent decree, the employer agreed to pay $750,000 to 10 individuals in back pay and compensatory damages, revise its discriminatory policies and practices, provide annual trainings, and provide reports to the EEOC on any complaints filed.	U.S. District Court for the District of New Mexico	10/4/2023

Settlement Amount	Claim	Description	Court	EEOC Press Release
$730,000	Race Discrimination and Harassment	The EEOC alleged the company engaged in systemic race-based harassment. Under the terms of the conciliation agreement, the company agreed to pay $730,000 to the 16 affected workers and implement other forms of injunctive relief to combat discrimination and harassment.	This settlement was reached during conciliation before the EEOC filed a lawsuit on the merits.	n/a – See FY 2023 AFR, p. 22
$715,000	Sex Discrimination	The EEOC alleged an employer failed to recruit, hire, and promote women. As part of the four-year conciliation agreement, the employer agreed to pay $715,000 into a class fund for those women who were not hired and those who were denied in-store non-management positions. The company also agreed to appoint an EEO monitor, develop a nationwide online promotion platform, revise its complaint and investigation procedures, provide training, and conduct anonymous, internal climate surveys.	This settlement was reached during conciliation before the EEOC filed a lawsuit on the merits.	2/2/2023
$709,971	Sex Discrimination	The EEOC alleged a company refused to hire women for certain warehouse positions because of their sex and made their hiring preferences for men explicit. The EEOC also alleged the company assigned women to a section of the warehouse where their earning potential was less. Under the terms of the three-year consent decree, the company agreed to pay $650,000 to a class of female job applicants who were not hired, $39,971 to the charging party in this case, and $20,000 to a class of women who were subjected to certain work assignments because of their sex. The company also agreed to give hiring preferences to women who were previously denied positions, revise its hiring policies and practices, and conduct training. The EEOC will monitor the company's compliance with the terms of the consent decree.	U.S. District Court for the Northern District of Indiana	5/25/2023
$650,000	Race Discrimination Retaliation	The EEOC alleged that a restaurant subjected Black employees to race-based harassment, initially restaffed the workplace with non-Black employees following a layoff, and refused to rehire several employees who complained about the harassment and discriminatory hiring practices. Under the terms of the consent decree, the employer agreed to pay $650,000 in back pay and damages to six individuals, conduct training, revise its policies, and provide regular reports to the EEOC.	U.S. District Court for the Eastern District of Louisiana	9/5/2023

Settlement Amount	Claim	Description	Court	EEOC Press Release
$595,000	Disability Discrimination	The EEOC alleged a call center failed to provide reasonable accommodations to eligible employees. In addition to the monetary award granted to 49 individuals, the company agreed to change its attendance and ADA accommodation-related policies and provide training.	This settlement was reached during conciliation before the EEOC filed a lawsuit on the merits.	n/a – See FY 2023 AFR, p. 19
$592,000	Sex Discrimination	The EEOC alleged a utility company failed to hire women due to the improper use of a non-job-related physical abilities test. In addition to the monetary relief provided to 58 job applicants, the company agreed to discontinue the use of its physical abilities test, provide procedures for the potential implementation of future hiring-related tests, and conduct training for the company's employees in charge of identifying, analyzing, or approving tests for applicant or employee selection.	This settlement was reached during conciliation before the EEOC filed a lawsuit on the merits.	n/a – See FY 2023 AFR, p. 19
$520,000*	Disability Discrimination	EEOC alleged the company violated the ADA by requiring employees to take an Essential Functions Test (EFT) upon hire, annually, and upon return from medical leave, even when portions of the test were not job-related. Failure to pass any portion of the test would result in termination of employment. Under the terms of the three-year consent decree, the company agreed to pay $520,000, provide reasonable accommodations to individuals with disabilities during the administration of the test, refrain from taking adverse action against any employee who complains about the EFT, refrain from firing an employee based solely on the EFT's test results, and conduct training on the ADA.	U.S. District Court for the Western District of Arkansas	2/14/2024
$500,000	Sex Harassment	The EEOC alleged the defendant subjected a class of monolingual Spanish-speaking female employees to sexual harassment. Under the terms of the 2.5-year consent decree, the company will pay $500,000 in monetary relief to members of the class, provide sexual harassment training, post a notice of the settlement, and hire an outside EEO monitor to ensure it adheres to the terms of the decree.	U.S. District Court for the District of Nevada	10/13/2022

Settlement Amount	Claim	Description	Court	EEOC Press Release
$500,000*	Race Discrimination National Origin Discrimination Retaliation	The EEOC alleged the employer subjected Black and Latino employees to race- and national origin-based harassment and retaliated against employees who complained by moving them to the night shift or terminating their employment. As part of the three-year consent decree, the employer agreed to pay $500,000 to aggrieved employees, retain an outside consultant or legal counsel to review and revise the company's policies and procedures, provide training, and establish a complaint hotline.	U.S. District Court for the District of Arizona	12/20/2023
$500,000*	Age Discrimination	EEOC alleged a company declined to hire employees over age 40 and directed recruiters not to refer applicants with over 25 years of experience. Under the terms of the consent decree, the company will pay the charging party $130,000 and $370,000 to seven other claimants who were rejected on account of age. The company also agreed to provide anti-discrimination training, and create an anti-discrimination policy and complaint procedures	U.S. District Court for the District of New Jersey	n/a

Select EEOC Jury Awards or Judgments in FY 2023[912]

Jury or Judgment Amount	Claim	Description	Case Citation	EEOC Press Release
$36 million in punitive damages; $75,000 in compensatory damages* *The court later reduced this award to $335,682 ($300,000 per the damages cap, and $35,682 in lost wages)	Disability Discrimination	The EEOC alleged the defendant refused to hire or reasonably accommodate a truck driver because he is deaf. A jury returned a verdict in favor of the EEOC an awarded $36,075,000 in damages ($36 million in punitive damages and $75,000 in compensatory damages). The punitive damages award, however, is subject to the $300,000 damages cap under the ADA. The court ultimately reduced the award to $335,682.	*EEOC v. Drivers Management, LLC and Werner Enterprises, Inc.*, Case No. 8:18-cv-00462 (D. Neb. Jan. 11, 2024)	9/1/2023
$2,692,265 (this amount is subject to a damages cap)	Sex Discrimination	The EEOC alleged a staffing company discriminated against women by routinely refusing to hire or assign female workers for demolition and laborer positions. A federal court entered default judgment against the company and awarded 48 female workers $665,566 in lost wages with interest and $2,026,698 in punitive damages. This amount of punitive damages is subject to the $300,000 damages cap under Title VII.	*EEOC v. Green Jobworks LLC*, Civil Action No. 1:21-cv-01743-RDB (D. Md. Mar. 16, 2023)	3/24/2023
$1,675,000 (this amount is subject to a damages cap)	Disability Discrimination	The EEOC alleged a distribution company failed to interview a deaf job candidate for warehouse positions. A jury awarded the job applicant $25,000 in back pay, $150,000 in emotional distress damages, and $1.5 million in punitive damages.	Civil Action No. No. 5:20-cv-1628 (N.D.N.Y. Feb. 8, 2024)	2/8/2024
$80,468.62	Race Harassment	The EEOC alleged a Black employee was constructively discharged on account of unaddressed race harassment. Following a unanimous jury verdict in December 2022, the charging party was awarded $24,375 in compensatory damages. On August 16, 2023, a judge entered an order requiring defendants to pay an additional $56,093.62 in back pay and other relief.	*EEOC v. Coastal Drilling East, LLC & Coastal Well Service, LLC*, Civil Action No. 2:21-cv-01220-JFC (W.D. Pa. Aug. 16, 2023)	8/16/2023

912 Judgments and verdicts entered into in FY 2024 are denoted with an asterisk (*).

Appendix B – FY 2023 EEOC Amicus and Appellant Activity[913]

FY 2023 – Appellate Cases Where the EEOC Filed an Amicus Brief[914]

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Davis v. Legal Services Alabama, Inc.	U.S. Supreme Court No. 22-231	5/18/2023 (amicus filed)	Title VII	Race **Result:** Pending

Background: Plaintiff worked as the Executive Director of Defendant Legal Services Alabama, Inc., a non-profit legal-services organization. After multiple African American employees complained that Plaintiff (who is also African American) was giving preferential treatment to newly hired white employees and creating a hostile work environment, his employer placed him on a paid suspension pending investigation. Four days after his suspension began, Plaintiff resigned, and later Plaintiff filed suit against Legal Services Alabama and two of its Board members, bringing claims of race discrimination under Title VII and 42 U.S.C. 1981. Both the district court and the court of appeals found that Defendants were entitled to summary judgment on Plaintiff's claims because his paid suspension did not constitute a serious and material change to his employment conditions sufficient to demonstrate the adverse employment action required to sustain these claims. Plaintiff appealed to the United States Supreme Court, which invited the Solicitor General to file an amicus brief on whether the petition for writ of certiorari should be granted.

Issues EEOC is Addressing as Amicus: Whether Title VII and Section 1981 prohibit discrimination as to all "terms," "conditions," or "privileges" of employment, or whether they are limited to "significant" discriminatory actions.

EEOC's Position: The United States believes that the Court should grant the petition for a writ of certiorari, but that the question presented should be limited to the petitioner's claim under Title VII because there was a lack of meaningful briefing in the courts below, since both the parties and the courts below did not separately analyze a claim under Section 1981. The government believes that interpreting Section 2000e-2(a)(1) to cover only "significant" or "material" employment actions is incorrect. The United States took the position that even if paid, a suspension interferes with the most fundamental requirement of employment – reporting to the workplace to complete job-related tasks. The government argued that Title VII's statutory language as it relates to the "terms, conditions, and privileges of employment" is expansive, and that the Supreme Court should reject appellate courts' attempts to require that an employee show that they suffered an adverse action by an employer that would have "significant" or "tangible" harm on the employee, or those that have immediate financial consequences, such as the paid suspension at issue in the case.

Court's Decision: Pending.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Muldrow v. City of St. Louis	U.S. Supreme Court No. 22-193	5/18/2023 (amicus filed) 4/17/2024 (decided)	Title VII	Sex **Result:** Pro-Employee

Background: Plaintiff worked as a sergeant with the St. Louis Metropolitan Police Department. She claimed that she was involuntarily transferred from her position as an officer in the intelligence division because her supervisor wanted to replace her with a man. Plaintiff filed suit, alleging sex discrimination under Title VII. The district court granted Defendant summary judgment, finding that Plaintiff had not suffered an adverse employment action because her transfer did not result in a material disadvantage to Plaintiff, and the court of appeals affirmed.

Issues EEOC is Addressing as Amicus: Whether Title VII prohibits discrimination as to all "terms, conditions, or privileges of employment," or whether it is limited only to discriminatory conduct that causes an employee to suffer a materially significant disadvantage.

EEOC's Position: The United States believes that the Court should grant the petition for a writ of certiorari. The government argues that all forced job transfers and denials of job transfers based on an employee's protected characteristics are actionable under Title VII, and the Eighth Circuit's decision to interpose a requirement that the transfer result in a materially significant disadvantage in order to sustain a claim has no foundation in the text of Title VII. The United States took the position that Plaintiff's forced transfer changed the position she held, the nature of her work assignment, when, where, and with whom she was required to work. The government argued that Title VII's statutory language as it relates to the "terms, conditions, and privileges of employment" is expansive, and that the Supreme Court should reject appellate courts' attempts to require that an employee show that they suffered a materially significant disadvantage in order to sustain a claim under Title VII.

Court's Decision: The Court held that an employee challenging a job transfer under Title VII must show that the transfer brought about some harm with respect to an identifiable term or condition of employment, but that harm need not be significant.

913 The information included in Appendix B, "FY 2023–Appellate Cases Where the EEOC Filed an Amicus Brief" and "FY 2023–Appellate Cases Where the EEOC Filed as the Appellant," were pulled from the EEOC's publicly available database of appellate activity *available at* http://www1.eeoc.gov/eeoc/litigation/briefs.cfm. Appendix B includes select cases from this database. The cases are arranged in order by circuit.

914 As of March 1, 2024, the cases listed as "pending" were still in that status.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Lucas v. AFGE	U.S. Court of Appeals for the D.C. Circuit No. 23-7051	7/7/2023 (amicus filed)	Title VII ADA	Sex Disability Harassment **Result:** Pending

Background: Plaintiff, a former federal employee, brought claims of sex and disability discrimination and retaliation under Title VII and the ADA against her national and local unions. Plaintiff alleged that her local union president sexually harassed her, and then retaliated against her when she complained, that the national union failed to remedy the harassment, and that the unions otherwise discriminated against her based on her sex and disability. The district court dismissed Plaintiff's claims for lack of jurisdiction, finding that the Civil Service Reform Act gave the Federal Labor Relations Authority exclusive jurisdiction over "unfair representation" claims against federal employee unions, and that because Plaintiff's Title VII and ADA claims were premised on the same conduct as her previously pursued unfair representation claims, the FLRA had the exclusive jurisdiction to hear those claims.

Issues EEOC is Addressing as Amicus: (1) Whether federal courts have jurisdiction over Title VII and ADA claims against federal employee unions. (2) Whether Title VII and the ADA prohibit unions from harassing their members or failing to remedy union agents' harassment of members based on protected traits.

EEOC's Position: The EEOC argues that federal courts have jurisdiction over Title VII and ADA claims against federal employee unions, even when those claims are premised on conduct that could also support unfair representation claims under the Civil Service Reform Act of 1978. The EEOC contends that Title VII and the ADA prohibit a broader range of discrimination than the CSRA because those statutes extend protections to discrimination against any individual, whereas the CSRA only requires a duty of fair representation for employees in the unit the union represents. In addition, the EEOC noted that the CSRA limits it prohibition on sex or disability discrimination to issues "with regard to the terms or conditions of membership in the labor organization," and not to any conduct beyond that scope. Thus, the EEOC claims that a union's conduct may constitute discrimination even when it does not constitute unfair representation. The EEOC noted that the standard for proving unfair representation under the CSRA is more rigorous than Title VII and the ADA because courts generally accord deference to a union in the labor context but argues that there is no reason to grant unions the same deference when it comes to analyzing claims of discrimination. The EEOC also noted that the statutes of limitation are different (and shorter) under the CSRA, and that Title VII and the ADA offer broader potential remedies. The EEOC further argues that should the Court reach the issue, it should hold that unions may be liable for harassing their members or failing to remedy such harassment by union agents, because the language of Title VII and the ADA plainly encompasses this conduct.

Court's Decision: Pending

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

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

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

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

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

Court's Decision: Pending.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Banks v General Motors, LLC	U.S. Court of Appeals for the Second Circuit No. 21-2640	2/8/2022 (amicus filed) 9/7/2023 (decided)	Title VII	Sex Race Retaliation **Result:** Pro-Employee

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

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

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

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

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

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

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

Court's Decision: A three-judge panel held the lower court erred in dismissing the employee's claims. The court held that because the employee had presented sufficient evidence on the basis of which a reasonable jury could find in her favor on all claims, the court vacated the judgment of the district court and remanded.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Billings v. State of New York	U.S. Court of Appeals for the Second Circuit 22-2010	1/4/2023 (amicus filed)	Title VII	Religion **Result:** Pending

Background: Plaintiff is a practicing Muslim who works as a corrections officer for the New York State Department of Corrections. Plaintiff filed a claim for religious discrimination under Title VII against her employer, claiming that as part of a required safety demonstration, her male supervisor refused her request to remove her hijab in front of a female supervisor, and instead required her to remove it in front of him, in violation of her religious practice. The district court granted Defendant's motion to dismiss Plaintiff's claim, finding that she had failed to allege that a "material adverse event" occurred because of the denial of her request for religious accommodation.

Issues EEOC is Addressing as Amicus: Whether the district court erred when it concluded that the denial of a religious accommodation is not actionable under Title VII unless Plaintiff pleads that a further "material adverse event" occurred as a result of the employer's refusal to grant a reasonable religious accommodation.

EEOC's Position: The EEOC argues that the district court committed error when it dismissed Plaintiff's complaint, because the requirement that Plaintiff plead a "material adverse event" beyond the denial of a reasonable religious accommodation conflicts with the text and statutory purpose of Title VII. The EEOC contends that under the Supreme Court precedent set forth in *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768 (2015), to state a claim, a plaintiff is only required to allege religious discrimination with respect to the "terms, conditions, or privileges of employment," and that requiring an employee to submit to a work rule that conflicts with her religious practice without accommodation alters the terms and conditions of employment. The EEOC further argued that even if the appellate court found that Title VII required a showing of material adversity, forcing an employee to choose between the requirements of their job and the requirement of their faith is sufficient to show such material adversity.

Court's Decision: Pending.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Eisenhauer v. Culinary Institute of America	U.S. Court of Appeals for the Second Circuit 21-2919	3/10/2022 (amicus filed) 12/12/2023 (decided)	EPA	Sex **Result:** Mixed

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

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

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

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

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

Court's Decision: The court affirmed the judgment of the lower court as to the grant of summary judgment for the defendant on the EPA claim. The court vacated in part and remanded the lower court's grant of granted summary judgment for the defendant on the § 194(1) claim.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Dennison v. Indiana Univ of PA	U.S. Court of Appeals for the Third Circuit 22-2649	1/25/2023 (amicus filed) 12/12/2023 (decided)	ADEA	Age **Result:** Pro-Employer

Background: Plaintiff worked at Indiana University of Pennsylvania as Executive Director, Housing, Residential Living and Dining. Following a reorganization of the Student Affairs division, Plaintiff's supervisor changed her position to Director of Residence Life. A staff member whom Plaintiff had previously supervised became the Director of Housing and Dining, and as a result, Plaintiff no longer had supervision over housing and dining. Plaintiff sued, claiming, among other things, that the University had discriminated against her on the basis of her age under the ADEA when it transferred her position, which she characterized as a demotion. The district court granted Defendant's motion for summary judgment, finding that with respect to the job transfer, finding that minor actions, such as lateral transfers and changes in title, are generally insufficient to constitute an adverse employment action, and that Plaintiff had not offered sufficient evidence to show that she suffered an adverse employment action. The court noted that Plaintiff failed to show how her change in job title and responsibilities worsened her job position, where her salary remained the same and her new title was at the same level in the University hierarchy.

Issues EEOC is Addressing as Amicus: Whether a forced job transfer, allegedly made on the basis of an employee's age, may constitute discrimination with "with respect to . . . terms, conditions, or privileges of employment" under the ADEA, even where there is no change in benefits or salary, and the new position is not inferior to the prior position.

EEOC's Position: The EEOC argues that Plaintiff's change in job title and responsibilities is sufficient to constitute a change in the terms and conditions of employment such that it can support a claim under the ADEA. The EEOC contends that other courts have addressed the same issue under Title VII, and found that it prohibits all discriminatory job transfers, even those that do not result in changes in benefits, salary, or worsened working conditions. The EEOC argues that the ADEA bars discrimination in "any aspect of employment" because the individual is 40 years old or older. The EEOC's position is that the ADEA's statutory language as it relates to the "terms, conditions, and privileges of employment" is expansive, that the language is not limited to tangible or economic discrimination, and that if Congress had intended to limit the ADEA to only reach discriminatory conduct that resulted in a certain level or type of harm, it could have put that language in the statute.

Court's Decision: In an unpublished decision, the appellate court affirmed the judgment of the lower court.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Hitch v. The Frick Pittsburgh	U.S. Court of Appeals for the Third Circuit No. 23-2065	9/28/2023 (amicus filed)	ADA	Disability Retaliation **Result:** Pending

Background: Plaintiff alleged he was discriminated and retaliated against when the Defendant terminated him from his position as operations manager following a back injury, for which he requested accommodations. Defendant claims Plaintiff was instead fired for leasing a vehicle without permission. The district court dismissed the ADA discrimination claim on the grounds he failed to sufficiently plead a disability in two respects: (1) Plaintiff did not allege his injuries had a long-term or permanent effect on his ability to perform major life activities; and (2) he did not establish his injuries substantially limited his major life activities. With respect to retaliation claim, the court found Plaintiff did not sufficiently plead that he engaged in protected activity of reporting his disability to Defendant and requesting accommodations. Although the court acknowledged he engaged in the activity of filing an administrative complaint, the court found the complaint post-dated the alleged retaliatory conduct because Plaintiff filed the complaint after he was fired.

Issues EEOC is Addressing as Amicus: (1) Whether the district court incorrectly impose a heightened pleading standard in finding Plaintiff's allegations that he reported his disability and requested reasonable accommodations to be insufficient to plead protected activity for his ADA retaliation claim; and (2) Whether the district court erred by dismissing Plaintiff's ADA discrimination claim on the grounds that he failed to show a long-term or permanent impairment and that his allegations regarding limitations with walking and standing were insufficient to plead a disability.

EEOC's Position: The EEOC asserts that the lower court committed several legal errors with respect to Plaintiff's ADA claims, including imposing a higher pleading standard than that established by Federal Rule of Civil Procedure 8(a)(2) when dismissing his ADA retaliation and discrimination claims and requiring him to show a permanent or long-term impairment to plead a disability under the ADA.

Court's Decision: Pending.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Morgan v. Allison Crane Rigging LLC	U.S. Court of Appeals for the Third Circuit 23-1747	9/25/2023 (amicus filed)	ADA	Disability Result: Pending

Background: Plaintiff was working for Defendant for a year and a half when he injured his back on the job. Plaintiff was diagnosed with a bulged or herniated disk in his lower back, and his medical provider placed him on bending and lifting restrictions as a result. Approximately a month and a half after his injury, while Plaintiff was still under restrictions, Defendant assigned Plaintiff to drive a 12-hour trip. Plaintiff declined to do the job, both because he felt the long drive would inflame his injury and because he had an afternoon appointment that day. He offered to continue performing his light duties instead. The next day, Defendant fired Plaintiff because he "failed to show for work" the day prior. Plaintiff was released from restriction shortly after his termination. Plaintiff sued, alleging that his former employer failed to reasonably accommodate him and then terminated him because of his disability. The district court granted Defendant summary judgment, finding that no reasonable jury could find that Plaintiff had an actual disability, or that Defendant regarded him as disabled.

Issues EEOC is Addressing as Amicus: Whether a reasonable jury could find that the Plaintiff's back pain was substantially limiting and thus constituted an actual disability under the ADA, or whether a reasonable jury could find the Defendant regarded Plaintiff as disabled under the ADA.

EEOC's Position: The EEOC argues that both bending and lifting are major life activities under the ADA, as are sitting and walking. The EEOC contends that the district court used the wrong legal standard – analyzing Plaintiff's claims under the pre-2008 ADA to find that the short duration of Plaintiff's injury meant that he could not be deemed disabled under the law. The EEOC claims that the court erred when it failed to account for the ADAAA's expansion of ADA coverage of individuals "to the maximum extent permitted," and that court should not have determined that no reasonable jury could find the Plaintiff disabled simply because his medical issue was short in duration. Similarly, the EEOC also argues that the trial court erred in holding that a reasonable jury could not find that the Defendant regarded Plaintiff as disabled because Plaintiff's injury was Defendant did not think it was "anything other than transitory and minor." The EEOC argues that while Plaintiff's injury was short-term, a transitory injury could still be severe, and that a jury could objectively decide that the injury was not "minor, and thus actionable under a regarded as claim under the ADA.

Court's Decision: Pending.

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

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

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

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

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

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Porter v. Merakey Parkside Recovery	U.S. Court of Appeals for the Third Circuit No. 22-2986	3/6/2023 (amicus filed)	ADA ADEA	Disability Age **Result:** Pending

Background: Plaintiff applied for a drug and alcohol counselor position with Defendant in 2019. Plaintiff met or exceeded the job requirements listed in the job posting. While Plaintiff received an interview, he was not hired, and Defendant hired two 28-year-olds instead. Plaintiff had more experience and qualifications than the two successful candidates, neither of whom Defendant perceived as disabled. Due to a prior injury, Plaintiff walks with a limp, has difficulty standing for long periods of time, cannot move or navigate steps quickly, and has restricted movement in his leg. Plaintiff filed suit, alleging that Defendant violated the ADA, ADEA, and state law by failing to hire him. The district court granted Defendant's motion for summary judgment, finding that Plaintiff was neither disabled, nor regarded as disabled under the law. For the actual disability, the court found that Plaintiff failed to adduce any evidence, other than his own testimony, that he suffers from a long-term disability. About his "regarded as" claim, the district court held that Plaintiff failed to offer sufficient evidence that Defendant regarded him as disabled, where his only evidence was his testimony that one interviewer "looked at his leg," and the other "had his mouth wide open as he watched" Plaintiff walk. The district court also dismissed Plaintiff's age discrimination claim, finding Plaintiff had failed to demonstrate the fourth prong of his *prima facie* case – that Defendant had actual knowledge of Plaintiff's age. The district court also noted that Defendant had offered legitimate non-discriminatory reasons for its hiring decisions – that despite Plaintiff's qualifications, the other candidates interviewed better and previously worked for Defendant, and one was bilingual.

Issues EEOC is Addressing as Amicus: (1) Whether the district court erred by concluding that Plaintiff's actual disability claim required a showing of permanent impairment supported by corroborating medical evidence, and that his "regarded as" disability claim required a showing that the employer perceived him as disabled and incapable of performing his job duties. (2) Whether the district court erred in holding that the 66-year-old Plaintiff failed to establish the fourth prong of his *prima facie* case of age discrimination on the ground that the employer could not have known his age, despite his in-person interview and resume showing he graduated from college in 1973. (3) Whether a reasonable jury could find that employer's reasons for not hiring Plaintiff were pretextual, given his superior qualifications and the employer's inaccurate statement to the EEOC about why it did not hire him.

EEOC's Position: The EEOC argues that the court committed several errors – first, that the court should not have required Plaintiff to show a permanent impairment and provide corroborating medical evidence. The EEOC noted that several other circuits have rejected the exclusion of temporary conditions, or any rule that categorically requires medical testimony to establish a disability. The EEOC also argues that the court erred when finding that the Plaintiff had to show that Defendant perceived his impairment to be a disability or to render him incapable of doing the job to sustain a "regarded as" claim under the ADA. The EEOC argues that under the ADAAA, a "regarded as" plaintiff need only show that the employer took an adverse action based on an actual or perceived impairment, not that the employer perceived the impairment as disabling or otherwise precluding performance of the job. The EEOC further contends that the district court erred when it found that Plaintiff had not established his *prima facie* case of age discrimination, because his resume showed that he graduated from college in 1973 and he had an in-person interview, both of which would have put the employer on notice that he was substantially older than the two successful candidates. Lastly, the EEOC claims that the court erred when it found that Plaintiff failed to establish pretext, because there were sufficient facts for a jury to infer pretext – namely, Plaintiff's level of experience in comparison to the successful candidates, and the fact that some of the reasons the court cited as a basis for not selecting Plaintiff were not offered by Defendant, or were not corroborated by the evidence. The EEOC also claimed that because the Defendant told the EEOC in its position statement that no one was hired for the position, when in fact two candidates were hired, this shows possible pretext as well.

Court's Decision: Pending**.**

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Qin v. Vertex	U.S. Court of Appeals for the Third Circuit No. 23-1031	6/20/2023 (amicus filed)	Title VII	Race National Origin Retaliation **Result:** Pending

Background: Plaintiff was employed by Defendant as an enterprise software architect for nearly two decades. The Defendant typically promoted Plaintiff's peers after about eight years, but never promoted Plaintiff. Plaintiff also alleged that he was subjected to comments by co-workers regarding his national origin, who asked him why he did not "go back to China," and called him "China Man." In 2018, Plaintiff appeared to be on track for a promotion which was approved by his supervisor, however, that promotion did not happen. Plaintiff asked his supervisor if he had not been promoted for 18 years because he was Chinese, and his supervisor referred him to HR if he had any questions or issues. Plaintiff reached out to Defendant's HR officer, and while they discussed the Company's reporting process and policies on harassment and discrimination, Plaintiff declined to report any specific concerns. A day later, Defendant's Chief Technology Officer expressed skepticism regarding the recommendation to promote Plaintiff, and Plaintiff's supervisor agreed to postpone the decision because he was starting to feel uncomfortable with some issues that had come up in Plaintiff's review. A few months later, Plaintiff received his annual review, which included feedback that was collected shortly after he asked whether he had not been promoted due to his national origin. Plaintiff received a poor rating, and as a result, Defendant asked Plaintiff to choose between a performance improvement plan or a severance agreement. Plaintiff's poor rating differed from his prior reviews, which were positive. Plaintiff alleged that one of his negative reviewers attributed the issues raised in the review to "cultural differences," and he later complained to the Company that the review was discriminatory. Defendant later removed this individual's review from Plaintiff's assessment, but Plaintiff was placed on a Performance Improvement Plan (PIP). After Plaintiff failed to improve, he was terminated from employment. Defendant did not revisit its performance rating of Plaintiff, or its decision to place him on a PIP, despite removing one of Plaintiff's reviewers' comments from the review because they were inappropriate. Another employee who was not Chinese received the same rating as Plaintiff but was not placed on a PIP or terminated.

The trial court granted Defendant's motion for summary judgment, finding that Plaintiff had only presented that he engaged in protected activity once – when he complained that his performance evaluation was discriminatory. The prior events were inquiries only. The court found that even if all three instances were protected activity, Plaintiff had not shown a causal connection between them and his PIP/termination. The court found that there was too large of a time gap to show causation. The court further found that the Defendant had offered legitimate explanations for both the failure to promote and the subsequent termination, and thus Plaintiff had not shown pretext. The court also rejected Plaintiff's disparate treatment claim, finding there was no sufficient direct evidence of discrimination, and that under *McDonnell Douglas*, Plaintiff could not sustain his claim because he: (1) had not shown that another candidate was selected over him for promotion; and (2) had not shown that a comparator was treated more favorably. The court further found that the Defendant's proffered reasons for its decisions – that Plaintiff had failed to engage properly in formal projects and that he had failed complete his PIP – were sufficient to warrant dismissal of Plaintiff's claim.

Issues EEOC is Addressing as Amicus: (1) Whether Plaintiff engaged in protected activity when he asked his supervisor if the Company had not promoted him for 18 years because he was Chinese; (2) Whether a reasonable jury could find a causal link between Plaintiff's protected conduct and adverse actions that Defendant took against him soon after; (3) Whether a reasonable jury could find that Defendant's proffered reasons for placing Plaintiff on a performance improvement plan and later terminating him were pretextual in the context of Plaintiff's retaliation claim; (4) Whether the district court misapplied the *McDonnell Douglas* standard when it held Plaintiff had not established a *prima facie* case of disparate treatment for failure to promote and for Plaintiff's termination; and (5) Whether a reasonable jury could find that Defendant's proffered reasons for placing Plaintiff on a performance improvement plan and later terminating him were pretext for race or national origin discrimination.

EEOC's Position: The EEOC argues that Plaintiff's inquiry as to whether he was not promoted due to his national origin, and his subsequent discussion with HR regarding the Company's complaint procedures, were protected activity sufficient to support a claim for retaliation under Title VII. The Commission contends that so long as the employee holds a reasonable, good-faith belief that the activity he opposes is unlawful, even if it is held later not to be, this opposition is protected activity under Title VII. Thus, the EEOC argues that a reasonable jury could find that Plaintiff engaged in protected activity. The EEOC further argues that a reasonable jury could find a causal link between Plaintiff's protected activity and his lack of promotion and subsequent termination, because Plaintiff suffered materially adverse events shortly after asking his supervisor if he had not been promoted due to his national origin. The EEOC argues that even Plaintiff's negative performance review several months later was not so far removed in time that a reasonable jury could not rely on it to find causation. The EEOC also claims that the district court erred in finding that Plaintiff could not show pretext, because a jury could disbelieve Defendant's explanation that it decided not to promote Plaintiff because of performance issues, and instead infer retaliation, given Plaintiff's supervisor's inconsistent position regarding the promotion – first recommending the promotion and then backtracking. The EEOC argues that a jury could decide that the supervisor's change of heart, which came shortly after Plaintiff asked if his national origin played a part in his lack of promotion, demonstrated retaliation. The EEOC also contends that a jury could find that Defendant's decision to place Plaintiff on a PIP, despite agreeing to remove a negative review based upon cultural differences, was retaliatory. Lastly, the EEOC argues that the Court misapplied *McDonnell Douglas*, when it dismissed Plaintiff's claim because he could not show that Defendant promoted someone else outside his protected class instead or continued to seek other applicants despite denying Plaintiff the promotion. The EEOC asserts that the court should have looked at other evidence, such as the fact that most individuals in Plaintiff's position were promoted after eight years, but Plaintiff was not. The EEOC also claims that the court should have, at minimum, considered whether Defendant would have placed Plaintiff on a PIP or fired him if the initial biased review had not been part of his annual performance evaluation.

Court's Decision: Pending.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Russo v. The Bryn Mawr Trust Company	U.S. Court of Appeals for the Third Circuit No. 22-3235	5/19/2023 (amicus filed)	Title VII	Race Retaliation **Result:** Pending

Background: Plaintiff Russo, who is Black, worked as a teller for Defendant bank. The plaintiff alleged her manager routinely made racist remarks. In April 2018, Plaintiff filed an administrative charge with the EEOC and the Pennsylvania Human Rights Commission alleging discrimination. Around the same time Plaintiff filed her EEOC charge, defendant also began investigating her for allegedly mishandling bank keys and improperly securing a box containing vault combinations. Shortly thereafter, in May 2018, defendant placed Plaintiff on "paid administrative leave" while it completed its investigation. Ultimately, Defendant could not corroborate the allegations against Plaintiff and closed its investigation without taking any further disciplinary action. When Plaintiff returned from administrative leave in June 2018, she met with a human resources representative. During that meeting, the representative informed Plaintiff that a reporter had contacted the bank and planned to write a story about Plaintiff's EEOC charge. Believing that Plaintiff was responsible for the story, the HR representative instructed Plaintiff to contact the reporter to kill the story, intimating such a story would be bad for Plaintiff. The plaintiff ultimately contacted the reporter and gave an interview about her complaints.

Less than a year later, in May 2019, Plaintiff reported another incident to Defendant when a bank customer she was helping made a series of racist and inappropriate comments. Defendant again investigated the incident, and the customer confirmed Plaintiff's account. As a result, Defendant informed Plaintiff that it planned to "de-market" the customer, giving them 30 days to find and transfer their funds to a new institution, and that Plaintiff did not need to assist the customer if they returned. Believing that Defendant's response was inadequate, Plaintiff resigned and filed suit for discrimination and retaliation. The district court granted summary judgment in favor of the employer, reasoning that the retaliation claim was premised on unfulfilled threats, which the court deemed not materially adverse. Moreover, the court held the discrimination claim failed as a matter of law, as it was premised on paid administration leave, which the court also needed was not materially adverse under *Jones v. Southeastern Pennsylvania Transportation Authority*, 796 F.3d 323 (3d Cir. 2015).

Issues EEOC is Addressing as Amicus: (1) Whether an employer's unfulfilled threat can constitute a "materially adverse action" for purposes of a Title VII retaliation claim under the materiality standard set forth in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006); (2) Whether a paid suspension, when based on race, should be actionable as discrimination under Title VII because suspending an employee inherently affects her terms, conditions, or privileges of employment.

EEOC's Position: The EEOC asserts that an unfulfilled threat can constitute a materially adverse action for purposes of a retaliation claim under Title VII. Under *Burlington Northern*, an unfulfilled threat is materially adverse if it well might dissuade a reasonable worker from engaging in protected activity. The district court did not properly apply *Burlington Northern* in assessing whether the threats Plaintiff faced were materially adverse. Under the correct standard, a reasonable jury could find that the threats she faced were materially adverse. A paid suspension, when based on race, should be actionable as discrimination under Title VII. For the foregoing reasons, the district court's grant of summary judgment on Plaintiff's retaliatory threat claim should be reversed, and the case remanded for further appropriate proceedings.

Court's Decision: Pending. The court is waiting on the Supreme Court's decision in *Muldrow v. City of St. Louis*.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Israelitt v Enterprise Services LLC	U.S. Court of Appeals for the Fourth Circuit No. 22-1382	7/21/2022 (amicus filed) 8/16/2023 (decided)	ADA	Retaliation **Result:** Pro-Employer

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

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

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

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

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

Court's Decision: The appellate court affirmed the decision of the district court.

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

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

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

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

Court's Decision: Pending.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Hamilton v. Dallas County	U.S. Court of Appeals for the Fifth Circuit No. 21-10133	11/21/2022 (amicus filed) 8/18/2023 (decided)	Title VII	Sex **Result:** Pro-Employee

Background: Plaintiffs-appellants are women who are employed by the Dallas County Sheriff's Department and who work as Detention Service Officers (DSOs) at the Dallas County jail. They allege as follows: All DSOs are given two days off per week. Before April 2019, shift assignments and days off for DSOs were determined by seniority. After April 2019, shift assignments were determined based on sex. Specifically, only male DSOs were allowed to take full weekends off. Female DSOs were not allowed full weekends off and instead received only weekdays or partial weekends off. When plaintiffs asked a sergeant why this was so, he responded that shift scheduling was determined based on gender and that "it would be unsafe for all the men to be off during the week and that it was safer for the men to be off on the weekends." Male and female DSOs perform the same tasks, and the same number of inmates are present during the week as on weekends. Plaintiffs reported the shift assignment policy to other supervisors and human resources, but they declined to change it. Plaintiffs sued Dallas County for damages and injunctive relief, alleging, as relevant here, that the County's sex-based shift assignment policy violates Section 703(a)(1)'s prohibition on disparate treatment. The district court granted the County's motion to dismiss, explaining that, "[a]lthough Dallas County's alleged facially discriminatory work scheduling policy demonstrates unfair treatment, the binding precedent of this Circuit compel[led]" the court "to grant Dallas County's motion."

Issues EEOC is Addressing as Amicus: Whether shift assignments, made on the basis of sex, may constitute actionable discrimination "with respect to … terms, conditions, or privileges of employment" under Section 703(a)(1), 42 U.S.C. 2000e-2(a)(1), or whether the reach of Section 703(a)(1) is instead limited to prohibiting discrimination in "ultimate employment decisions," such as hiring, granting leave to, discharging, promoting, or compensating individuals."

EEOC's Position: Section 703(a)(1)'s prohibition on discrimination in the "Terms, Conditions, or Privileges Of Employment" reaches discriminatory shift assignments. "If the words of Title VII are our compass, it is straightforward to say that a shift schedule counts as a term of employment." Citing to Compliance Manual, § 613.3 (2006), 2006 WL 4672703 (explaining that employers are prohibited from discriminating with respect to "hours of work, or attendance since they are terms, conditions, or privileges of employment"). Because the "when" of employment—including whether an employee works days or nights, weekdays, or weekends—is plainly a term of employment, Section 703(a)(1) prohibits discrimination in shift assignments and work scheduling.

Court's Decision: The Fifth Circuit held that a plaintiff plausibly alleges a disparate-treatment claim under Title VII if she pleads discrimination in hiring, firing, compensation, or the "terms, conditions, or privileges" of her employment. She need not also show an "ultimate employment decision," a phrase that appears nowhere in the statute and that thwarts legitimate claims of workplace bias. Here, giving men full weekends off while denying the same to women—a scheduling policy that the County admits is sex-based—states a plausible claim of discrimination under Title VII.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Johnson v. Board of Supervisors of Louisiana State Univ. & Agricultural & Mechanical College	U.S. Court of Appeals for the Fifth Circuit 22-30699	1/30/2023 (amicus filed)	Title VII	Retaliation **Result:** Pending

Background: The plaintiff filed this suit against the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College ("LSU") based on her employment as an Administrative Coordinator 4 at the LSU Health Science Center – New Orleans. The plaintiff alleged that a doctor at the facility subjected her to ongoing sexual and racial harassment, including unwanted physical contact. The plaintiff reported this conduct to Human Resources. The defendant allegedly did not resolve her complaint for more than a month. During that time, it assigned Plaintiff to work in different offices, one of which Plaintiff claimed "had a horrible smell and a bug population." The plaintiff also claimed her co-workers engaged in racial harassment, which caused emotional distress.

When Defendant substantiated her complaint against the doctor, she was told she could return to her office and that the doctor would work elsewhere. She did not return to work because her doctor had "declared [her] disabled for work and prescribed an anti-depressant"; her psychiatrist informed Defendant that she would be out until October 8, 2018. The plaintiff remained on leave, and, in mid-December, her psychiatrist said Plaintiff could return to work if Defendant provided several accommodations. The defendant approved the accommodations, but Plaintiff remained on leave until May 2019, when Defendant terminated her employment. The plaintiff filed suit, alleging, among other things, retaliatory harassment. The court granted summary judgment in favor of Defendant, finding no evidence of an adverse action.

Issues EEOC is Addressing as Amicus: The Supreme Court held in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), that Title VII's anti-retaliation provision, 42 U.S.C. § 2000e-3(a), covers any employer action that might dissuade a reasonable employee or applicant from engaging in protected activity. Did the district court err in instead using the district court's "ultimate employment decision" standard for discrimination claims to assess Plaintiff's retaliation claim?

EEOC's Position: The EEOC argued that the district court erred by using the stricter adverse action standard for discrimination claims to evaluate Plaintiff's retaliation claim, inappropriately requiring an "ultimate employment decision." That standard does not apply to retaliation. To the contrary, the Supreme Court has held that a plaintiff may show an adverse action for a retaliation claim by showing only "that a reasonable employee would have found the challenged action materially adverse," that is, that "it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington N.*, 548 U.S. at 68 (internal quotation marks omitted); *McCoy v. City of Shreveport*, 492 F.3d 551, 559-60 (5th Cir. 2007).

Court's Decision: Pending.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Lemonia v. Westlake Management Services, Inc.	U.S. Court of Appeals for the Fifth Circuit 22-30630	1/6/2023 (amicus filed) 10/18/2023 (decided)	Title VII	Race Harassment Retaliation **Result:** Pro-Employer

Background: Plaintiff began working as an electrician at the corporate predecessor of Defendant, a chemical plant, in 1989. The plaintiff testified that before Defendant's acquisition in 2016, he saw noose-shaped objects in the workplace, white electricians called him racial epithets, and racial epithets spray-painted on the walls. The year after Defendant's acquisition, Plaintiff's supervisor transferred multiple electricians, including Plaintiff, to another plant. The plaintiff's union grieved the move, alleging that Defendant had transferred mostly Black electricians to the plant, but the company's internal investigation determined that non-Black employees had been transferred as well, so Defendant denied the grievance. A few months later, Plaintiff filed an administrative charge with the EEOC alleging that the transfer discriminated against him and other employees based on race. The EEOC issued a right-to-sue letter, but Plaintiff did not pursue the matter in court.

In September 2018, Plaintiff told his supervisor that new chairs in the break room were causing him pain because of his history of kidney stones. The plaintiff alleges his supervisor screamed and cursed at him in response, and was warned that he was prone to filing frivolous complaints. The parties dispute whether Plaintiff was told to stop making frivolous complaints or all complaints in general. Meanwhile, Plaintiff claims he was not offered a promotion while three other white electricians were. The plaintiff later filed a complaint alleging someone had fashioned a noose out of wire, prompting an internal investigation, which ultimately did not find wrongdoing.

While this investigation took place, Defendant was preparing annual performance reviews. Plaintiff's supervisor, who reported that he received negative feedback about Plaintiff from other employees, gave Plaintiff an "unsatisfactory" performance review for 2018, and he was placed on a PIP, which stated that "all Success Factors included in this Performance Improvement Plan must reach an Acceptable result level by the end of the [six-month] plan period." At the company, if an employee on a PIP does not meet its objectives, his manager works with HR to initiate a process for termination or "further discipline."

The plaintiff testified that the PIP affected his health because being put on what he viewed as an unnecessary PIP caused him significant stress. He believed Defendant was "trying to create a paper trail against" him to justify firing him. The union president attended the first-month review of Plaintiff's PIP and asked Campbell whether he had counseled Plaintiff or engaged in any progressive discipline before putting him on a PIP. The supervisor said that he had not—rather, he put him on the PIP "because I can do it." In June 2019, Plaintiff filed a new EEOC charge alleging race and age discrimination and retaliation.

Shortly thereafter, the supervisor passed away; about a month later, his replacement told Plaintiff at his next PIP review meeting that he was not allowed to speak to coworkers about non-work matters during working hours. Believing Defendant was trying to isolate him from his coworkers as part of a continuing pattern of harassment, Plaintiff suffered a panic attack and took medical leave. He received treatment for post-traumatic stress disorder "after struggling with 30 years of threats of being fired, race-based comments, and objects left in his work station." After four months, he returned to work for a short time but was so afraid in his work environment that he felt he had no choice but to resign, and he did so.

After receiving a Notice of Right to Sue from the EEOC, Plaintiff brought this suit. He alleged that Defendant subjected him to a hostile work environment based on race, failed to promote him because of his race and age, and retaliated against him for his prior complaints of race and age discrimination, culminating in his constructive discharge. The district court granted summary judgment in favor of the employer, finding the incidents in question failed to rise to an actionable level.

Issues EEOC is Addressing as Amicus: (1) Could a reasonable jury find that a Black electrician experienced a racially hostile work environment due to an extremely serious incident, where he testified and provided photographic evidence that someone had shaped his solder wire into a noose and left it in his workspace? (2) Could a reasonable jury find that placing an employee on a PIP is sufficiently adverse to support a Title VII retaliation claim, where failure to achieve the PIP's objectives in six months would mean likely termination? (3) Can a plaintiff establish a Title VII retaliation claim by showing that the retaliatory harassment he experienced could deter a reasonable employee from engaging in protected activity?

EEOC's Position: The EEOC argued that a reasonable jury could find that Plaintiff experienced actionable race-based harassment based on record evidence that someone placed a noose in his workspace. A reasonable jury could find that putting Plaintiff on a PIP was a materially adverse action supporting his retaliation claim. Retaliation in the form of harassment is actionable if the harassing conduct could deter a reasonable employee from engaging in protected activity.

Court's Decision: The Fifth Circuit affirmed the district court's decision granting Defendant's motion for summary judgment on all claims. The Fifth Circuit held that Plaintiff has not demonstrated that Defendant discriminated against him when he did not receive the supervisor position. The defendant provided sufficient, non-discriminatory reasons for declining to promote Plaintiff, and he failed to show pretext. Therefore, Defendant's failure to promote Plaintiff cannot form the basis for a discrimination or a retaliation claim. The Fifth Circuit also held that Plaintiff likewise cannot succeed on his retaliation claim based on his temporary transfer in November 2019. Relying on the same arguments he utilized for his failure-to-promote claim, Plaintiff urges that his temporary transfer from Plant B to Plant C in 2018 was in retaliation for protected conduct under Title VII. But that fails because Plaintiff has not demonstrated that the temporary transfer from Plant B to Plant C was an adverse employment action. The Fifth Circuit further held there was no evidence that Plaintiff's placement on a PIP otherwise affected his employment, so it cannot constitute an adverse employment action in support of his retaliation claim. Moreover, the Fifth Circuit held that Plaintiff avers that he suffered a "retaliatory hostile work environment," however, such a claim has never been recognized by the Fifth Circuit.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Levario v. AT&T Corporation; AT&T Service, Inc.	U.S. Court of Appeals for the Fifth Circuit 23-50401	9/22/2023 (amicus filed) 1/29/2024 (joint motion to dismiss granted)	ADA	Disability Retaliation **Result:** n/a

Background: At all relevant times, Defendant employed Plaintiff as a Senior Quality/Methods & Procedure/Process Manager. Her job duties included planning, developing, and implementing projects for Defendant. On August 16, 2013, Plaintiff slipped while walking into the office and injured her knee, ultimately requiring surgery and medical leave for her recovery.

After returning to work in December, Plaintiff met with her supervisors and requested time off to attend physical therapy appointments; her supervisors modified her work hours accordingly. Plaintiff also made a similar accommodation request through Defendant's Integrated Disability Service Center for time off to attend her physical therapy appointments. On January 15, 2014, Plaintiff lodged an internal complaint with Defendant, asserting that it had not accommodated her need for physical therapy. The following day, Defendant notified Plaintiff that her accommodation request was approved through April 21. Plaintiff then took medical leave.

One week after Plaintiff lodged her internal complaint—and one day after she went on approved medical leave—one supervisor rated her as "does not meet expectations" on her 2013 performance review and prepared to place her on a "Coaching Action Plan." But he did not give Plaintiff her performance review or implement the Coaching Action Plan because she had started her leave a day earlier. As Defendant's Rule 30(b)(6) representative, the supervisor testified that a "does not meet" performance review rating would prevent an employee from being eligible for a promotion the following year, would impact her ability to receive a pay increase, and could impact her ability to transfer to a different position. Customarily, Defendant gave its employees annual salary increases of approximately 12% when the company met certain metrics including certain revenue goals, growth goals, and customer retention goals, so long as the employee achieved a rating higher than "does not meet" on her annual performance review.

In 2013, Plaintiff did not receive an annual salary increase for the year because of her "does not meet" performance review rating. Upon Plaintiff's return to work in April she requested more time off as an accommodation and other physical accommodations. Defendant granted all these requests. About a week after making these requests, Plaintiff opened another internal complaint with Defendant, asserting that it had failed to accommodate her disability and discriminated against her by subjecting her to a Coaching Action Plan. The next day, August 14, Plaintiff began the Coaching Action Plan, which she completed in October. On October 5, Plaintiff filed her first charge with the EEOC. In December 2014, Defendant determined that there was no evidence of discrimination or retaliation regarding Plaintiff's August 13 internal complaint and October 5 charge. Throughout 2015, Plaintiff made three additional accommodation requests for short periods of time off work, each of which Defendant granted.

In late 2015, due to a "surplus," the company needed to eliminate two of the eighteen Senior Quality/Methods & Procedure/Process Manager positions. One of these managers left for another job with Defendant, leaving only one position to be eliminated. The supervisors scored each employee eligible for the reduction in force, and they ranked Plaintiff last among her colleagues. On February 5, 2016, Defendant notified Plaintiff that her position had been selected for surplus; that same day, she filed a charge with the EEOC, alleging retaliatory termination. The defendant gave Plaintiff 60 days to apply for another position at Defendant, which she did, but she was not selected for any of the positions. On April 6, 2016, Defendant terminated her employment. The plaintiff sued the defendant under the ADA, challenging (in relevant part) her 2013 performance review and 2016 termination as discrimination and retaliation. The district court granted summary judgment in favor of the Defendant.

Issues EEOC is Addressing as Amicus: (1) Whether a reasonable jury could find that Plaintiff's negative job performance review falls within the ADA's prohibition of discrimination in the "terms, conditions, or privileges of employment." (2) Whether a jury could find that an alleged act of retaliation may be materially adverse under the ADA even if Plaintiff continues to engage in protected activity thereafter. (3) Whether an ADA plaintiff relying on temporal proximity between multiple protected activities and an alleged retaliatory act to demonstrate causation may measure proximity against later activities in the series, as appropriate to the particular case.

EEOC's Position: The plaintiff's 2013 negative performance review falls well within the scope of employer conduct covered by the ADA's prohibition on disability discrimination. The "material adversity" of retaliatory conduct does not depend on whether or not the individual continued to engage in protected activity after the alleged retaliatory act. Finally, Plaintiff was not required to rely on her earliest protected activity when using temporal proximity to establish a prima facie case of retaliation.

Court's Decision: The court granted the parties' joint motion to dismiss the appeal.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Mueck v La Grange Acquisitions, L.P.	U.S. Court of Appeals for the Fifth Circuit No. 22-50064	4/18/2022 (amicus filed) 8/4/2023 (decided)	ADA	Disability **Result:** Pro-Employer

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

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

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

Court's Decision: The Fifth Circuit affirmed the district court's grant of summary judgment in favor of the employer, but noted its analysis took into account significant statutory revisions. Of note, the acknowledged, "as our sister circuits have, that, following the ADAAA's passage, an impairment need not be 'permanent or long-term' to qualify as a disability." Therefore, the appellate court found that the district court erred in granting summary judgment to the employer on both the intentional-discrimination and failure-to-accommodate claims on the basis that the employee had failed to establish that he was a qualified individual with a disability under the ADA. The court also found that the employee had established a prima face case for disability discrimination. The appellate court found, however, that the employer set forth a legitimate, non-discriminatory reasons for the employee's termination – namely, the conflict between his court-ordered substance abuse classes and his shift schedule, and that the employee did not rebut this claim. Therefore, summary judgment in the employer's favor was appropriate.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Narayanan v. Midwestern State University	U.S. Court of Appeals for the Fifth Circuit 22-11140	3/22/2023 (amicus filed) 10/11/2023 (decided)	Title VII	Race National Origin Retaliation **Result:** Pro-Employer

Background: The plaintiff, an individual of Malaysian origin, filed suit against the defendant asserting Title VII discrimination and retaliation claims, as well as disability discrimination and retaliation claims. The defendant employed Plaintiff as a professor of political science from 2007 to 2020. In 2016, Plaintiff filed a lawsuit against Defendant university claiming discriminatory and retaliatory denial of a promotion in violation of Title VII, which ultimately settled.

The plaintiff alleges that he had planned to teach summer classes in the summer of 2018 but that Defendant denied his request to do so, causing him lost income. The plaintiff claims that this was in retaliation for his 2016 lawsuit and also amounted to discrimination on the basis of his race, color, and national origin in violation of Title VII. The defendant subsequently terminated Plaintiff's employment in 2020. On the defendant's motion for summary judgment, the district court held that Plaintiff failed to establish an adverse action sufficient to sustain either claim.

Issues EEOC is Addressing as Amicus: (1) Under the court's existing standard for Title VII discrimination claims, an action implicating an individual's compensation amounts to the requisite "ultimate employment decision" necessary to sustain the claim. Should this case be remanded for the district court to consider whether the employer's denial of Plaintiff's request to teach summer classes deprived him of compensation and thus satisfied the "ultimate employment decision" standard? (2) The Supreme Court in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), specifically rejected application of an "ultimate employment decision" standard to retaliation claims, instead holding that Title VII's anti-retaliation provision covers any employer action that might dissuade a reasonable worker from engaging in protected activity. Did the district court err by nonetheless requiring Plaintiff to show an "ultimate employment decision" to sustain his retaliation claim?

EEOC's Position: The EEOC argued that remand is warranted for the district court to consider whether the denial of summer teaching opportunities affected Plaintiff's compensation and thus amounted to an "ultimate employment decision" under the court's existing standard for Title VII discrimination claims. The EEOC further argued that the "ultimate employment decision" standard that the court applies to Title VII discrimination claims does not apply to retaliation claims.

Court's Decision: The Fifth Circuit affirmed the district court's opinion on the ADA failure to accommodate claims because Defendant established undue hardship. Specifically, the court reasoned that indefinite leave requests lacking a return date, like Plaintiff requested, qualifies as an undue hardship, and does not violate ADA standards. The Fifth Circuit affirmed the district court's opinion on the ADA discrimination and retaliation claims since there was a legitimate, non-discriminatory reason to terminate Plaintiff. The Fifth Circuit remanded Plaintiff's Title VII discrimination claims for the district court to reconsider its finding on an adverse action. Specifically, the Fifth Circuit held that the district court did not consider the lost income Plaintiff experienced from Defendant denying him the opportunity to teach summer classes. Lost income can qualify as compensation under both the pre- and post-*Hamilton* interpretation of "ultimate employment decision" and "terms, conditions, or privileges of employment" if that lost income can be shown to be a significant source of income. The Fifth Circuit also remanded Plaintiff's Title VII discrimination claims for the district court to reconsider its finding on an adverse action. Specifically, the Fifth Circuit held that the district court erroneously applied the "ultimate employment decision" standard which was mandated only for discrimination claims rather than the materially adverse standard as required under *Burlington.* The court held that "failure to grant Plaintiff desired summer teaching assignments does not rise to [] level of an 'ultimate employment decision.'" The Fifth Circuit argued that the district court should consider the lost income Plaintiff incurred when Defendant denied his request to teach summer classes.

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

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

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

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

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

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Wilkinson v. Pinnacle Lodging, LLC	U.S. Court of Appeals for the Fifth Circuit No. 22-30556	11/16/2022 (amicus filed) 10/5/2023 (decided)	Title VII	Race Sex National Origin **Result:** Mixed

Background: Defendant is a majority owner of Pinnacle Lodging, LLC, the corporate entity that owns the hotel where the plaintiff worked. The plaintiff started out as front desk clerk in November 2017, was promoted to assistant general manager in May 2018, and became general manager in July 2018. As general manager, Plaintiff worked 50-60 hours per week and supervised a staff of 14-16, including head of housekeeping. The plaintiff's duties included handling "complaints, hiring, firing, payroll . . . everyday operations of a hotel." He often staffed the front desk to address problems with guests checking in or out. He assisted in inspecting rooms and trained associates on working the front desk. The plaintiff also helped with the hotel renovation by obtaining bids on work and overseeing work.

Although the defendants had a progressive discipline policy requiring two written warnings prior to termination, Plaintiff never received any written warnings, counseling, or discipline. A new supervisor began in 2019, who claimed Plaintiff needed to be replaced from their first meeting. The plaintiff, who is white and non-Hispanic, testified that when he initially met with the new supervisor, she told him that she "wanted me to get rid of everybody that was non-Hispanic, because we could hire Hispanics to work cheaper and faster," among other comments along those lines.

The plaintiff was fired on December 19, 2019, ostensibly for poor performance. The termination letter provides four reasons: Plaintiff purportedly (1) failed to contribute to rate management based on area demand and area pricing, resulting in lower profits and loss of business; (2) failed to complete some of the tasks required prior to the hotel's corporate inspection in November 2019, which caused the hotel to fail the inspection; (3) threatened to quit twice; and (4) lacked "overall hotel . . . knowledge." Plaintiff testified that he refused to sign the termination letter because it was inaccurate. For his part, Plaintiff offered evidence to counter each reason provided for his termination and pointed out inconsistences and shifts in Defendants' justifications. The plaintiff sued, but the district court granted summary judgment in favor of Defendants. Although the court determined the supervisor's comments were direct evidence of discrimination, it held Plaintiff could not establish a prima facie case or pretext under *McDonnell Douglas*, as he could not identify a comparator who was treated better under nearly identical circumstances, and Defendants showed it would have fired him regardless of any protected characteristics.

Issues EEOC is Addressing as Amicus: (1) Did the district court correctly rule that the non-Hispanic, male plaintiff adduced direct evidence of race, national origin, and sex discrimination by submitting testimony that his supervisor threatened to replace him and his staff with Hispanic workers, stated that women make better general managers, and told him he "should not be here" shortly before she fired him? (2) Did the district court err in granting summary judgment to Defendants even though evidence they would have fired Plaintiff anyway can only be a defense to certain remedies, not to liability? (3) Did the district court err in applying the burden-shifting *McDonnell Douglas* proof scheme to the evidence in this case after holding that Plaintiff offered direct evidence of discrimination? (4) Did the district court err in requiring comparator evidence to satisfy a prima facie case of discrimination under *McDonnell Douglas*?

EEOC's Position: A reasonable jury could find that Defendants fired Plaintiff because of his race, national origin, and/or gender. The district court was correct to conclude that Plaintiff provided direct evidence of discrimination. But, in light of the amended statute, that conclusion should have ended the liability analysis on summary judgment. That it did not reflects a tension in this Court's case law; some post-1991 Act decisions incorporate the statutory changes into their summary judgment analysis, but some do not. The EEOC argued that the district court should clarify the correct standard in this case. Because Plaintiff offered direct evidence of discrimination, there was no need for the district court to analyze this case under McDonnell Douglas. McDonnell Douglas is a proof scheme reserved for cases where a plaintiff presents indirect, circumstantial evidence of a discriminatory motive for the challenged decision.

The EEOC further argued that Title VII does not require comparator evidence to establish a prima facie case of race, national origin, and gender discrimination. A plaintiff may make out the fourth prong of the prima facie case by showing that he belongs to a protected class, was qualified for his job, and was subjected to an adverse employment decision "under circumstances which give rise to an inference of unlawful discrimination." *Citing to Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981). The EEOC held that the district court has sometimes described the fourth prong more narrowly as a showing that Plaintiff "was replaced by someone outside of [his] protected class or treated less favorably than other similarly-situated employees who were not in [his] protected class." *Citing Harville v. City of Houston*, 945 F.3d. 870, 875 (5th Cir. 2019). But it has, at other times, articulated a broader formulation for the fourth element, where Plaintiff can show that he "was either replaced by someone outside [his] protected class, was treated less favorably than other similarly situated employees who were not members of [his] protected class, or was otherwise discharged because of [his] [protected category]."

Court's Decision: The Fifth Circuit Court reversed on Plaintiff's discrimination claims, affirmed on Plaintiff's hostile work environment claims, and vacated on Plaintiff's retaliation claims and Louisiana Whistleblower claims.

Regarding the discrimination claim, the Fifth Circuit held that to resolve the issue of whether comments in the workplace constitute direct evidence of discrimination, this court looks to four factors: "whether the comments are (1) related to Plaintiff's protected characteristic; (2) proximate in time to the challenged employment decision; (3) made by an individual with authority over the challenged employment decision; and (4) related to the challenged employment decision." The Fifth Circuit found that the supervisor's comments to Plaintiff meet each of this court's four direct-evidence criteria.

In connection with the hostile work environment claim, the Fifth Circuit looks to the following facts: "(1) he is a member of a protected class; (2) he suffered unwelcomed harassment; (3) the harassment was based on his membership in a protected class; (4) the harassment affected a term, condition, or privilege of employment; and (5) the employer knew or should have known about the harassment and failed to take prompt remedial action." The Fifth Circuit ultimately held that there is no evidence that the supervisor's comments negatively affected Plaintiff's work environment at all. In fact, the evidence points the other way.

Finally, regarding the retaliation claims the Fifth Circuit held that because the district court relied on its erroneous analysis of Plaintiff's discrimination claims to conclude that Plaintiff could not establish pretext on his retaliation claims, it vacated the district court's grant of summary judgment on those claims and remanded for the district court to reconduct the pretext analysis for Plaintiff's retaliation claims.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Garcia v Beaumont Health Royal Oak Hospital	U.S. Court of Appeals for the Sixth Circuit No. 22-1186	5/22/2022 (amicus filed) 10/7/2022 (decided)	Title VII	Sex Retaliation **Result:** Pro-Employer

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

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

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

Court's Decision: The Sixth Circuit affirmed the lower court's grant of summary judgment in favor of the employer.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Rembert v. Swagelok Co.	U.S. Court of Appeals for the Sixth Circuit No. 22-3554	11/20/2022 (amicus filed) 5/27/2023 (decided)	Title VII	Race Harassment **Result:** Pro-Employer

Background: Defendant is an Ohio company that designs, manufactures, and delivers fluid-system products. Plaintiff began work for Defendant as a temporary employee in late January 2017. Plaintiff primarily passed out tools to the machine operators, and occasionally worked in the "grinding" area producing custom parts. Plaintiff, a Black man, alleges that immediately after beginning his job he experienced an onslaught of racial hostility from white supervisors and coworkers. In his deposition, Plaintiff testified that "in the nine months of his employment, two supervisors used the N-word "45, 50 times, if not more," and coworkers used it "a lot." In August 2017, Plaintiff testified that a coworker fashioned a hose pipe into a noose, held it around his neck, and told Plaintiff, "This is what we do here." Another coworker used his fingers to imitate a gun, pointed it at Plaintiff, and pulled the trigger. Plaintiff testified that he complained to his supervisor at least 14 times, identifying the offending employee. Defendant made Plaintiff a conditional offer of permanent employment in September 2017, but revoked the offer and terminated him in October after his background check revealed a recent domestic violence conviction. Plaintiff filed a charge of discrimination with the EEOC.

Plaintiff subsequently filed a lawsuit under Title VII alleging claims of hostile work environment, discriminatory termination, discriminatory failure to hire, and retaliation. The district court granted summary judgment to Defendant on all claims.

Issues EEOC is Addressing as Amicus: (1) Could a reasonable jury find, based on the totality of the circumstances, that Plaintiff endured a hostile work environment because of his race? (2) Could a reasonable jury find that the harassment that Plaintiff complained of is sufficiently "severe or pervasive"?

EEOC's Position: The jury could find that Plaintiff endured race- and/or sex-based harassment sufficient to constitute a hostile work environment under Title VII. Here, Plaintiff has alleged widespread, long-term, and pervasive race- and sex-based hostility.

Court's Decision: The Sixth Circuit affirmed the lower court's grant of summary judgment in favor of the employer.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Root v. Decorative Paint, Inc.	U.S. Court of Appeals for the Sixth Circuit No. 23-3404	7/10/2023 (amicus filed) 3/31/2023 (decided)	ADA	Disability **Result:** Pro-Employer

Background: Defendant provides painting and injection molding to the automotive and consumer products industry. Plaintiff was employed with Defendant as a Production Associate from September 2016 to July 2022. According to Plaintiff's job description, her duties included "loads parts, unloads parts, production tracking, labeling, moving of product onto appropriate racks, maintains production requirements during shift and completes daily tasks as required by supervision." Defendant's facility subjected its workers to paint fumes. Plaintiff alleged that she suffered from chronic obstructive pulmonary disease (COPD) and asthma for several years, including prior to her employment with Defendant. While Plaintiff testified there are paint fumes throughout the facility, she also characterized the rework department as having a more tolerable level of paint fumes than other areas at the facility, such as the "D line" area. Defendant's facility is divided into several areas, including a "rework" area and a "D line" area. The rework area is located near the main employee entrance in the front of the facility, adjacent to several employee offices. No painting occurs in the rework area. The D-line area, in comparison, is in the back of the facility, sealed from the rest of the facility by a hallway with plastic dividers. The D-line area is connected to an industrial-sized paint room where parts are freshly painted and pass through an oven system whereby the wet paint is dried and cured. Unlike the rework area, the D-line area contains various paint-related chemicals and fumes. Throughout her employment with Defendant, Plaintiff primarily worked in the rework room where she sanded down parts that needed painting.

In February 2020, Plaintiff took FMLA leave for a knee replacement surgery. While out on leave, Defendant imposed a layoff and reinstatement process of its staff due to COVID-19. Plaintiff was reinstated as a Production Associate in July 2020 and was assigned to the D-line area. On her first day back, Plaintiff worked a 10-hour shift in the D-line area, which involved prolonged exposure to heavy paint fumes. Plaintiff testified that she quickly started experiencing breathing problems, including shortness of breath. As a result, as soon has her shift ended at 1:00 pm, she scheduled a telehealth visit with her doctor for that same day. Plaintiff's records from the visit noted that Plaintiff was presented with a "different job at work," that the "fumes are flaring her asthma—can do any other job—just not that one," and that Plaintiff had "increased sob [shortness of breath] with paint fumes." During this visit, Plaintiff requested an accommodation letter for Defendant explaining that she could not work in the D-line area but that she could work in her old position concentrated in the rework area. Plaintiff's doctor authorized "a note saying that [Plaintiff] has an underlying condition—COPD & ASTHMA that makes it hard to breath[e] when around paint fumes and should not be working around it. Please feel free to call our office with any questions or concerns." The next morning, Plaintiff provided the note to her supervisor who in turn provided the not to Defendant's Human Resource department.

Defendant's disability-accommodation practices require completion of a medical certification form by the employee's physician, a survey for potential accommodations, and discussion with the employee about the condition and request. Defendant supervisors testified that they did not understand the extent of the recommendation of Plaintiff's physician and required more information from Plaintiff' to fully understand Plaintiff's needs. According to Plaintiff, her recollection of this meeting culminated with her supervisors informing her that she was a "liability" for Defendant and that she could no longer work there. Plaintiff called attempting to withdraw the doctor's letter because she needed the job. Defendant supervisor's recollection of the meeting was that she asked Plaintiff about her condition and told Plaintiff she was not firing Plaintiff but that Plaintiff could not be on the production floor due to the paint fumes. Plaintiff left the meeting with the understanding that she had been fired. Defendant supervisor testified that Plaintiff's employment ended because "she never returned, nor did she provide documentation to indicate what kind of restrictions or accommodations she needed." Defendant's work attendance records show Plaintiff left work on July 22, 2020, and incurred two unexcused absences on July 23 and July 24.

Plaintiff filed a complaint with allegations of disability discrimination and failure to accommodate under the Americans with Disabilities Act of 1990 as amended (ADA), 42 U.S.C. § 12101, et seq., and Ohio Revised Code § 4112.01, et seq., and allegations of retaliation in violation of the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. § 2601, et seq.

Defendant moved for summary judgment on all counts. The district court found that, although summary judgment was unwarranted on the issue of whether Plaintiff's COPD and asthma constituted a disability under the ADA, both of Plaintiff's ADA claims ultimately failed because she was not qualified for her position, with or without reasonable accommodation.

Issues EEOC is Addressing as Amicus: (1) Whether the district erred in finding Plaintiff unqualified for her position based on its misunderstanding of her requested ADA accommodation as calling for "zero" exposure to paint fumes; (2) Whether the district court erred in granting summary judgment to Defendant on Plaintiff's failure-to-accommodate claim where a trier of fact could find both that a reasonable accommodation was available and that Defendant failed to engage in the ADA's mandatory interactive process; (3) Whether the district court erred in granting summary judgment to Defendant on Plaintiff's disability-discrimination claim where a reasonable jury could find that Defendant called her a "liability" and immediately fired her upon receiving her accommodation request.

EEOC's Position: The EEOC opined that the district court erred in holding that Plaintiff was not qualified for her job based on its mistaken conclusion that management of her asthma and COPD required "zero" exposure to paint fumes and argued that a reasonable jury could find that Plaintiff neither needed nor asked for zero exposure to paint fumes. Rather, she simply sought a transfer back to her former rework-centered role, which entailed limited exposure to paint fumes, and which Plaintiff had performed without incident for years while managing her asthma and COPD. The EEOC argued that summary judgment was inappropriate as to Plaintiff's failure-to-accommodate claim because a jury could find both that Plaintiff was qualified for her position and that Defendant could reasonably have accommodated her by transferring her back to her former, still-vacant position. As to Plaintiff's disability-discrimination claim, the EEOC argued that summary judgment was erroneous because Plaintiff adduced sufficient evidence to support a reasonable jury finding that she was qualified for her position and that she was terminated on the basis of her disability.

Court's Decision: The Sixth Circuit affirmed the lower court's grant of summary judgment in favor of the employer. The court reasoned that there is no genuine issue of material fact regarding whether exposure to paint fumes is an essential function of Plaintiff's job. And as the note from Plaintiff's physician stated Plaintiff could not work around paint fumes—could not perform this essential function of the job—termination of Plaintiff after providing that note was not disability discrimination.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Milczak v. General Motors, LLC	U.S. Court of Appeals for the Sixth Circuit No. 23-1462	8/30/2023 (amicus filed)	ADEA	Age Harassment Charge Processing **Result:** Pending

Background: Plaintiff, a 59-year-old man, began working for Defendant in August 1994 and remains employed with Defendant. Plaintiff maintained the title of "senior manufacturing engineer" throughout his career with Defendant but has transferred locations and responsibilities several times. Starting in 2016, Plaintiff worked exclusively at the Detroit Hamtramck Plant (DHAM), where he worked on resolving manufacturing issues. According to Plaintiff, his direct supervisor called him "old" three times over a six-month period, and frequently directed profanities at Plaintiff, which Plaintiff claimed were due to his age. Plaintiff testified that he asked the supervisor to "stop calling me names" on a couple of occasions but that the supervisor "went back to the same thing." In January 2019, Defendant announced that DHAM was closing so that it could be retooled to manufacture electric vehicles. Defendant requested that employees apply for transfers to other plants or risk termination. Plaintiff did not transfer to another plant. Rather, Defendant transferred him from his plant-engineering role to a general assembly (GA) maintenance role, which involved different responsibilities, to fill the role of an employee who had moved to another plant. Plaintiff testified that he had no choice in the transfer and had previously informed Defendant that he did not want to work in maintenance. In the maintenance role, Plaintiff testified that he found the new position "high-stress," a strain on his marriage due to the long hours, and "a horrible job to perform."

On May 22, 2019, Plaintiff found, in the GA work area, a cartoon-style drawing of a dead mouse caught in a trap, with other mice surrounding and sexually assaulting the dead mouse. A handwritten statement below the picture read: "When you're down and out everyone wants to screw you." Plaintiff reported the picture to HR, which in turn investigated the incident by interviewing workers and checking printer history. Plaintiff questioned the completeness of the investigation, stating that the interviews lasted only a couple minutes and that HR did not run a handwriting analysis. Because the investigation did not reveal a perpetrator, HR provided a two-hour anti-harassment training to the trade employees, which Plaintiff stated fell far short of the two-day antiharassment training given to salaried employees.

A month after Defendant transferred Plaintiff to the Body Shop, it reassigned him to the Body Shop's "second shift," where he worked from around 2 p.m. to 10:30 p.m. daily. He opposed the second-shift reassignment for several reasons: he did not have the same opportunities to receive overtime compensation, the late hours placed even more stress on his marriage, and the position did not utilize his skillsets.

In August 2020, Plaintiff found "a picture of an old man, long hair, with eyes poked out" on his desk at the central office but did not report the picture to HR.

In December 2019, Plaintiff dual-filed a charge of discrimination with the EEOC and Michigan Department of Civil Rights (MDCR). Plaintiff listed that the "cause of discrimination" was based on "Retaliation, Age" and specified that he was both "disciplined" and "subjected to harassment" due to his age and engagement in protected activity.

After receiving a right-to-sue letter, Plaintiff timely filed his complaint alleging that he has been subjected to a hostile work environment, discrimination and retaliation due to his age, in violation of the Age Discrimination in Employment Act (ADEA). Defendant moved for summary judgment on all counts. The district court granted Defendant's motion for summary judgment finding that neither the job transfers nor the reassignment amounted to an adverse employment action under the ADEA.

Issues EEOC is Addressing as Amicus: Whether a reasonable juror could find that Defendant's involuntary job transfers and reassignment impacted the compensation, terms, and conditions of his employment and caused more than a de minimis impact.

EEOC's Position: The EEOC argued that the district court made three fundamental errors in its rejection of Plaintiff's involuntary transfers and reassignments as insufficiently adverse to be actionable. Specifically, the EEOC argued that the district court applied the wrong legal standard, omitted key facts from its analysis, and conflated the elements of an ADEA discrimination claim.

Court's Decision: Pending.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Williams v. Alabama State University	U.S. Court of Appeals for the Sixth Circuit No. 23-12692	9/29/2023 (amicus filed)	EPA	Sex **Result:** Pending

Background: Plaintiff served as the deputy athletic director and interim athletic director for Defendant before applying for and being appointed the athletic director. She resigned after three years, and was paid $135,000 at the time of resignation. Defendant posted the open position, but modified the education and experience requirements, and listed the salary as negotiable. The Defendant ultimately hired a man for the position at a starting salary of $170,000. The Plaintiff alleged sex discrimination under the EPA. The district court granted Defendant's motion for summary judgment, holding it established its affirmative defense with evidence of a factor other than sex on which Defendant could have relied and that the plaintiff then did not prove pretext. The court reasoned that experience and training can be legitimate factors other than sex so long as they "are not so subjective 'to render them incapable of being rebutted.'" The court then said that "education and experience" can be factors other than sex if they are not "used as 'pretext for differentiation because of gender.'" The court then found the Plaintiff did not prove the Defendant's reasons were pretextual.

Issues EEOC is Addressing as Amicus: (1) Whether the district court erred by finding that under the EPA, the defendant does not need to prove an affirmative defense actually caused the wage disparity in order to avoid liability. (2) Whether under the EPA, the plaintiff must prove pretext.

EEOC's Position: The district court did not hold Defendant to the appropriate burden for summary judgment on an EPA affirmative defense, and it erroneously required Plaintiff to prove pretext. The unambiguous language of the EPA, as well as decisions from the Supreme Court, this court, and many other circuits establish a burden-shifting framework tailored to the EPA. First, the plaintiff must establish a prima facie case; then, the defendant must prove an affirmative defense in fact caused the difference in pay in order to avoid liability. Under the EPA, the burden never shifts back to the plaintiff to prove pretext. The district court, however, held that Defendant prevailed on its affirmative defense by offering evidence that a factor other than sex could have caused the wage disparity and that Plaintiff had not proven pretext. These holdings conflict with the EPA's text and controlling precedent.

Court's Decision: Pending.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Yanick v. Kroger Company of Michigan	U.S. Court of Appeals for the Sixth Circuit No. 23-1439	9/29/2023 (amicus filed)	ADA	Disability **Result:** Pending

Background: Plaintiff alleges she was unfairly treated and harassed on account of her cancer diagnosis and treatment. In meetings with her supervisor she noted that following surgery she was "struggling" with her work, and had requested an accommodation in her work schedule. Because she was struggling, she was written up for poor performance. The district court granted Defendant's motion for summary judgment on Plaintiff's failure-to-accommodate claim, as Plaintiff had not specifically requested one. The court reasoned that an employee must identify the accommodation requested and that it must be a reasonable accommodation, which, according to the court, is one that "addresses a key obstacle preventing the employee from performing a necessary function of her job." As for the disparate treatment claim, the lower court held Plaintiff had no suffered an adverse action. Although Plaintiff claims she received a "constructive demotion," the court stated that "the manner in which an employer supervises and/or criticizes an employee's job performance, without more, is insufficient to establish constructive demotion as a matter of law." While a failure to reasonably accommodate could support a constructive demotion claim, in this case the court found Plaintiff had not requested such an accommodation, so there was no adverse action.

Issues EEOC is Addressing as Amicus: (1) Could a jury find that Plaintiff requested accommodation and that an accommodation modifying Plaintiff's work schedule was reasonable on its face? (2) Did the district court err in assessing whether Defendant constructively demoted Plaintiff?

EEOC's Position: A jury could find that Plaintiff had requested an accommodation and that a reasonable accommodation was available to her, and that it was reasonable on its face. The court also erred in assessing whether the Plaintiff was constructively demoted. Specifically, the court did not evaluate whether a jury could find the denial of accommodation so intolerable that a reasonable person would step down, and it articulated an unnecessarily restrictive standard for constructive demotion. When assessing if there was a constructive demotion, the district court should not look for evidence of additional intent.

Court's Decision: Pending.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Nawara v. Cook County	U.S. Court of Appeals for the Seventh Circuit No. 22-1393, 22-1430, 22-2395, 22-245	11/23/2022 (amicus filed)	ADA	Disability **Result:** Pending

Background: Plaintiff was temporarily removed from his position as a correctional officer at the Defendant Sheriff's Office, pending a fitness-for-duty examination. Plaintiff believed that Defendant's testing demand violated his rights under the Americans with Disabilities Act (ADA) and, while on leave, he filed this lawsuit. After several months of leave, however, Plaintiff underwent the examination, was found fit for duty, and immediately returned to work. Plaintiff's case proceeded to a jury trial, and on March 5, 2020, the jury entered a general verdict for Plaintiff, finding that Defendant had violated the ADA.

The district court then denied Defendant's renewed motion for judgment as a matter of law but withheld judgment on whether Defendant's violation of 42 U.S.C. § 12112(d)(4) constituted discrimination on the basis of disability and thus whether Plaintiff was entitled to back pay. According to the district court, back pay is a remedy available for a violation of Section 12112(d)(4) only when it is committed against an employee with a disability. Because Plaintiff had not alleged that he was an individual with a disability, the court held that he was not entitled to back pay for the County's violation of Section 12112(d)(4).

Issues EEOC is Addressing as Amicus: Whether back pay is available for violations of the ADA's prohibition against unjustified medical exams and disability related inquiries committed against employees without disabilities.

EEOC's Position: The EEOC argues that the district court erred in concluding that back pay is a remedy available for a violation of Section 12112(d)(4) of the ADA only when it is committed against an employee with a disability. The EEOC reason that the plain language and structure of Title I and related statutory provisions demonstrate that any violation of Section 12112(d)(4) constitutes disability discrimination. A preceding provision in that section, Section 12112(d)(1), defines Title I's general prohibition against disability discrimination as "including medical examinations and inquiries."

Court's Decision: Pending.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Garrick v. Moody Bible Institute	U.S. Court of Appeals for the Seventh Circuit No. 21-2683	9/8/2023 (amicus filed) 3/18/2024 (decided)	Title VII	Sex **Result:** Pro-Employee

Background: Plaintiff worked for over two years as an Instructor of Communications with Defendant, a religious educational institution that "holds a complementarian position that excludes women from certain roles within the church." Plaintiff is an "egalitarian Christian" who believes in "gender equality in the ministry," a fact she told Defendant during the hiring process. Nonetheless, Defendant twice renewed Plaintiff's employment contract and Plaintiff, in signing, affirmed that she "agree[d] with, personally adhere[d] to, and support[ed]" Defendant's "Doctrinal Statement" and "Institutional Positions Related to the Moody Bible Institute Doctrinal Statement." During her employment, Plaintiff suffered hostility and poor treatment based on her gender. Plaintiff claims that Defendant gave Plaintiff a heavier workload than male faculty, denied a reduction of her workload to finish an advanced degree, despite giving male faculty that accommodation, and required her to undergo peer reviews, while not requiring male faculty to do so. Plaintiff complained to Defendant administrators to no avail.

After nearly two years, Plaintiff applied for promotion to Assistant Professor, a position for which she was fully qualified and whose duties she had already largely been performing. Defendant denied her application "within one hour of receipt, stating that she needed to 'improve her fit within the division.'" Plaintiff protested her own mistreatment, speaking with supervisors about the harassment she experienced. Plaintiff also advocated generally for gender equality throughout her employment. Defendant tasked her with "forming a committee to address women's concerns on campus," called "Respect for Women Personally and Ministerially," although Defendant shut down that effort after the committee's inaugural meeting was cut short. Plaintiff also assisted a student in filing a Title IX gender discrimination complaint when Defendant excluded that student from the pastoral ministry major. Upon learning this, Defendant administrators pressured Plaintiff to quit. Shortly thereafter, Plaintiff received her first negative performance review, just two months after a positive performance review. Defendant terminated Plaintiff in March 2017 but delayed the effective date of Plaintiff's termination to December 31, 2017, requiring Plaintiff to stay on to teach the remainder of the spring semester and to serve as a non-teaching faculty member in the fall. When Plaintiff publicized her termination, Defendant effectuated Plaintiff's termination immediately.

Plaintiff filed a complaint against Defendant under Title VII of the 1964 Civil Rights Act, alleging claims of gender discrimination, religious discrimination, and retaliation. The district court dismissed Plaintiff's first amended complaint without prejudice. The court dismissed Plaintiff's claim that Defendant discriminated against her because of her "different religious beliefs," finding the claim barred by Title VII's exemptions for religious institutions. It dismissed the remainder of Plaintiff's Title VII claims, concluding that they were barred by First Amendment principles because, as pleaded, they alleged that Defendant terminated Plaintiff for objecting to Defendant's complementarian creed. The court declined to hold that Plaintiff was a minister for purposes of the ministerial exception, finding further fact development necessary before deciding that question.

Plaintiff filed a second amended complaint (SAC), alleging a hostile work environment, disparate treatment, and retaliation under Title VII. Plaintiff's SAC alleged gender-based mistreatment and claimed that Defendant's explanation that it terminated her for disagreeing with its doctrinal beliefs was pretext for gender discrimination. The court allowed Plaintiff's disparate treatment and retaliation claims to proceed to summary judgment. The court first declined to dismiss Plaintiff's claims based on Title VII's religious exemptions. It held that because Plaintiff's alleged discrimination based on her gender, not based on her religious views, the exemptions did not apply. The court also rejected Defendant's argument that the First Amendment church autonomy doctrine continued to bar the claims in their entirety. In the court's view, a factfinder could evaluate whether Defendant's explanation for firing Plaintiff—her vocal non-alignment with Defendant's doctrinal statement—was pretextual without having to impermissibly probe the validity or reasonableness of the religious doctrine itself. For example, Plaintiff could "identify disparaging comments Defendant's supervisors made about women or spotlight male instructors who disagreed with Defendant's complementarian doctrine yet retained their positions." The court also noted that allegations that amounted to challenges to Defendant's complementarian creed could not inform liability under the religious autonomy doctrine.

Issues EEOC is Addressing as Amicus: Whether the religious autonomy doctrine categorically bars Title VII gender discrimination and retaliation claims that do not question the validity of religious doctrine.

EEOC's Position: The EEOC argues that the Seventh Circuit should deny Defendant's motion because the district court properly applied the law in denying Defendant's motion to dismiss the SAC on First Amendment religious autonomy grounds.

Court's Decision: The court dismissed the appeal for lack of jurisdiction without reaching the merits of the Defendant's Title VII and First Amendment claims. Specifically, the appeal fell outside of the collateral order doctrine's narrow and selective class of claims subject to interlocutory review.

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

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

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

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

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

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

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

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

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

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

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

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

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Naes v. City of St Louis	U.S. Court of Appeals for the Eighth Circuit No. 22-2021	8/12/2022 (amicus filed) 6/14/2023 (decided)	Title VII	Sex **Result:** Pro-Employer

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

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

EEOC's Position: The appellate court should reconsider its precedent and hold that all discriminatory job transfers and denials of requested transfers are actionable under Section 703(a)(1) of Title VII because they affect an employee's "terms" and "conditions" of employment. There is no more fundamental "term" or "condition" of employment than the employee's formal job position. Forcing or denying an employee's job transfer based on a protected characteristic falls within the scope of discrimination prohibited by Section 703(a)(1). Moreover, Section 703(a)(1) does not require plaintiffs to make an additional, a textual showing of "material" or "tangible" harm. The EEOC contends the district court also erred by conflating the standard for proving a discrimination claim under Section 703(a)(1) of Title VII with the standard for proving a retaliation claim under Section 704(a). The EEOC contends the district court erroneously cited *Burlington Northern & Santa Fe Railway Co. v. White*,

548 U.S. 53, 68 (2006), as supporting a requirement to prove a material disadvantage resulting from an allegedly discriminatory transfer. But *Burlington Northern* concerns the standard for Title VII retaliation claims, not discrimination claims under Section 703(a)(1). Under Section 703(a)(1), and absent affirmative defenses not at issue, no amount of race, sex, religion, or national origin discrimination that affects the terms, conditions, or privileges of employment is lawful.

Court's Decision: The Eighth Circuit affirmed the lower court's decision.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
O'Reilly v Daugherty Systems, Inc.	U.S. Court of Appeals for the Eighth Circuit No. 21-3465	2/3/2022 (amicus filed) 3/29/2023 (decided)	EPA	Sex **Result:** Pro-Employer

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

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

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

Court's Decision: The appellate court held that because the pay disparity was justified by a legitimate factor other than sex, it affirmed the judgment of the lower court.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Sanders v. Union Pacific Railroad Co.	U.S. Court of Appeals for the Eighth Circuit No. 22-2863	4/4/2023 (amicus filed)	ADA	Disability **Result:** Pending

Background: Plaintiff began working for Defendant in or around 1979. Plaintiff held various positions and most recently worked as a Foreman General. In that capacity, Plaintiff oversaw the inspection and repair of train cars in distress. In June 2018, Plaintiff began experiencing shortness of breath at home and took an ambulance to the hospital. There, doctors discovered that Plaintiff had internal bleeding (a bleeding ulcer), which required emergency surgery. Before the surgery, blood loss caused Plaintiff's blood count to drop and his heart to stop. After Plaintiff's medical team resuscitated him, they rushed him into surgery to stop the bleeding. The operation was successful, and Plaintiff fully recovered. Given these events, Defendant required Plaintiff to undergo a fitness-for-duty evaluation before returning to work. Defendant's in-house physician oversaw the evaluation, although he never personally examined Plaintiff. At Defendant's request, Plaintiff provided numerous medical records to Defendant. The records confirmed that that Plaintiff was fit to work, and several physicians cleared him to return to work without restrictions. Despite those favorable medical evaluations, Defendant's physician remained concerned about one issue: the condition of Plaintiff's heart. Consequently, Defendant's physician ordered a "Bruce Protocol" treadmill test, which measures cardiovascular health.

As requested, Plaintiff took the test at his cardiologist's office, but the "exercise test was stopped due to Fatigue." Though Defendant disputes it, Plaintiff claimed he explained to Defendant's physician that he could not complete the test because he was experiencing knee pain and asked whether he could take an alternative, such as a bicycle test.

Defendant's physician refused and based on the treadmill-test results, concluded that Plaintiff had "limited aerobic capacity or cardiac functional capacity." As a result, Defendant's physician-imposed work restrictions that prevented Plaintiff from performing more than light physical exertion or prolonged work in excessive heat or cold. Under those restrictions, Plaintiff was unable to return to work.

Plaintiff filed his complaint against Defendant alleging violations of the Americans with Disabilities Act for failure to accommodate and disparate treatment claims. The matter proceeded to trial and the jury rendered a verdict in favor of Plaintiff on both claims, rejecting Defendant's direct threat defense. After the verdict, Defendant renewed its motion for judgment as a matter of law. The district court denied the motion. As relevant here, the district court determined that sufficient evidence allowed the jury to find that: (i) Plaintiff was disabled within the meaning of the ADA because he had an actual disability, he had a record of a disability, and Defendant regarded him as disabled; (ii) Defendant "intentionally discriminated against Plaintiff by unreasonably imposing a Bruce-protocol treadmill test requirement on Plaintiff and then misinterpreting the incomplete and unreliable Bruce-protocol results"; and (iii) Defendant did not establish that Plaintiff posed a significant risk of substantial harm to the health or safety of himself or others that could not be eliminated or reduced by reasonable accommodation.

The district court also determined the "evidence in the record establishes that Plaintiff did request an accommodation." Specifically, "Plaintiff testified that he asked [his doctor] to let him take an alternative to the treadmill test, but [he] refused." Defendant appealed, and now contends that it was entitled to judgment as a matter of law on Plaintiff's disparate treatment and failure-to-accommodate claims, as well as its direct threat defense.

Issues EEOC is Addressing as Amicus: (1) Whether the jury could have reasonably found that Plaintiff's perceived disability was a "but for" cause of an adverse employment action when the record reflects that Defendant imposed work restrictions because it believed Plaintiff had a heart condition that diminished his aerobic capacity; (2) Whether the jury could have reasonably found that Defendant regarded Plaintiff as having a disability because it believed he had a physical impairment—namely, a heart condition—and took an adverse action against him on that basis; (3) Whether the jury could have reasonably found that Defendant did not establish a direct threat defense based on the best available objective medical evidence when several physicians testified that Defendant's medical assessment was based on unreliable test results; (4) Whether the jury could have reasonably found that offering an alternative cardiovascular test would have been a reasonable accommodation for Plaintiff's knee osteoarthritis—an actual disability—when the treadmill test Defendant used did not accurately reflect Plaintiff's cardiovascular health, while other tests could.

EEOC's Position: The EEOC took exception with Defendant's argument that because the company relied on its in-house physician's medical opinion when it issued work restrictions, the company cannot be liable for disability discrimination as a matter of law. The EEOC argues that Defendant cannot establish that no reasonable jury could find in Plaintiff's favor on these issues. The EEOC argued that, on the record here, the jury could have reasonably found that Defendant took an adverse action against Plaintiff "on the basis of" his disability by imposing restrictions that prevented him from working. The EEOC further argued that Defendant regarded Plaintiff as disabled because it believed he had a physical impairment and took an adverse action against him on that basis. Finally, the EEOC argued that the jury could have reasonably found that Plaintiff's treadmill-test results reflected his knee impairment rather than his cardiovascular condition. By the same token, and based on the same evidence, the jury could have reasonably found that an alternative test could have accurately reflected Plaintiff's cardiovascular condition. Accordingly, the jury could have reasonably concluded that an alternative test was a reasonable accommodation under the circumstances.

Court's Decision: Pending.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Ashley v. Federal Express Corp.	U.S. Court of Appeals for the Ninth Circuit No. 23-35259	9/29/2023 (amicus filed)	Title VII	Retaliation **Result:** Pending

Background: After cross-filing a charge of discrimination with the state EEO agency and the EEOC, Plaintiff alleges her supervisor escalated his harassment. The district court granted Defendant's motion for summary judgment, finding that the record did not support Plaintiff's claims that her supervisor's verbal harassment rose to a level of "repeated and ongoing verbal harassment and humiliation" after she filed the initial complaint, nor did it have a "chilling effect" on her, and therefore did not amount to an adverse action, as such conduct did not change her employment conditions.

Issues EEOC is Addressing as Amicus: Does the Burlington Northern standard for assessing retaliation claims, rather than the "severe or pervasive" standard required to establish a discriminatory hostile-work environment, apply to retaliation taking the form of harassment?

EEOC's Position: The district court failed to consider whether the harassment might well have deterred a reasonable employee from "making or supporting a charge of discrimination," the correct standard for retaliation claims under *Burlington Northern & Santa Fe Railway v. White*, 548 U.S. 53, 68 (2006). Rather, the court assessed whether the charging party experienced "repeated and ongoing harassment and humiliation" that was accompanied by "some additional harm"—a framework more consistent with the "severe or pervasive" standard for discriminatory hostile-work-environment claims. Burlington Northern's prohibition on retaliation that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination" applies to all forms of retaliation, including harassment. The court should clarify that Burlington Northern applies to claims of retaliation in the form of harassment, and unpublished decisions holding otherwise are incorrect.

Court's Decision: Pending.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Sharp v. S&S Activewear LLC	U.S. Court of Appeals for the Ninth Circuit No. 21-17138	6/15/2022 (amicus filed) 6/7/2023 (decided)	Title VII	Sex Harassment **Result:** Pro-Employee

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

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

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

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

Case Decision: The Ninth Circuit vacated the lower court's dismissal, and instructed the district court to "reconsider the sufficiency of [Plaintiff's] pleadings in light of two key principles: First, harassment, whether aural or visual, need not be directly targeted at a particular plaintiff in order to pollute a workplace and give rise to a Title VII claim. Second, the challenged conduct's offensiveness to multiple genders is not a certain bar to stating a Title VII claim. An employer's "status as a purported 'equal opportunity harasser' provides no escape hatch for liability."

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Davis v. PHK Staffing, LLC	U.S. Court of Appeals for the Tenth Circuit No. 22-3246	1/24/2023 (amicus filed)	ADA	Disability **Result:** Pro-Employer

Background: Plaintiff worked in Defendant casino as a table games supervisor and dealer from July 2019 to February 2020. Defendant maintained a "no-fault" attendance policy under which the company assigned "attendance points" in varying increments for unplanned absences and other attendance-related infractions. The policy provided that if an employee exceeded 12 points at any time over a rolling 12-month period, "[t]ermination will result." Defendant's policy did, however, allow employees to incur unplanned absences without accruing attendance points under some circumstances. For instance, Defendant allowed employees to take unplanned leave for work-related injuries without accruing points, and its policy did not set a limit on that type of leave.

Beginning in October 2020, Plaintiff experienced an asthma flare-up that caused her to miss work three times over a two-week period. In total, Defendant gave Plaintiff 4.5 points for these absences After the first two absences but before the third, Plaintiff requested accommodations, asking that Defendant: (1) excuse and remove the points for her two prior absences, and (2) excuse any future asthma-related absences. Plaintiff also submitted information from her treating physician that diagnosed Plaintiff with severe asthma, stated that her impairment was temporary, estimated that the impairment would last 14-21 days, and recommended leave as a "necessary accommodation." Plaintiff also provided another note from her doctor, which stated that "[s]he may need days off from work in the future due to chronic asthma and other flare-ups." Over the next few months, Defendant tried to gather more information from Plaintiff's physician. The doctor eventually resubmitted the same form he previously provided, and Defendant ultimately denied Plaintiff's request in February 2020.

Later that month, Plaintiff suffered another asthma attack. Although Plaintiff called her supervisor to explain that she would be late to work, Defendant gave her 1.5 points for tardiness, which brought her point total to 13—above the 12-point threshold for termination. On the same day, Plaintiff met with one of Defendant's human resources representatives. The parties dispute what happened next. Plaintiff alleges that Defendant fired her, while Defendant asserts that she resigned. In either event, Plaintiff's employment with Defendant undisputedly ended that day.

After Plaintiff timely filed a charge of discrimination and the EEOC issued a right-to-sue letter, she filed a complaint against Defendant.

On summary judgment, the district court held that Plaintiff's disparate treatment and failure-to-accommodate claims failed as a matter of law for three reasons.

First, the district court determined that both claims failed because Plaintiff was not a "qualified individual." The court reasoned that regular and reliable attendance was an essential function of the job, and that she was incapable of performing that function with or without accommodation. Second, the district court determined that Plaintiff's failure-to-accommodate claim alternatively failed because the accommodations she requested were per se unreasonable. The court reasoned that Plaintiff's request that Defendant excuse her prior absences was unreasonable because the ADA does not require retroactive accommodations, and that Plaintiff's request for prospective leave was unreasonable because it was potentially unlimited. Third, the district court determined that Plaintiff's disparate treatment claim also alternatively failed because, even if she could establish a prima facie case, Defendant fired her for legitimate, nondiscriminatory reasons, namely, her failure to comply with the company's attendance policy. The court granted summary judgment to Defendant on these grounds.

Issues EEOC is Addressing as Amicus: (1) Whether a reasonable jury could find that, under the ADA, an employee with chronic asthma was a "qualified individual" with an accommodation of intermittent leave, which would have allowed her to recover from asthma attacks and enabled her to perform her essential job functions upon return; (2) Whether a reasonable jury could find that unplanned intermittent leave was a reasonable accommodation when the employee requested a short period of leave and provided an expected duration of her impairment, and the employer's attendance policies either already allowed intermittent leave or could have been modified to do so; (3) Whether a reasonable jury could find that an employer fired an employee "on the basis of" her disability when the employer's refusal to excuse the employee's asthma-related absences led to her termination and the employer's attendance policy excused other types of unplanned absences.

EEOC's Position: The EEOC argued that the district court's grant of summary judgment on Plaintiff's failure-to-accommodate and disparate treatment claims should be reversed, and the case should be remanded for further proceedings. Specifically, the EEOC opines that the district court misunderstood (and misapplied) the statutory text and ran afoul of binding precedent. The EEOC argued the district court's focus on whether attendance is an essential job function conflicts with binding precedent. Moreover, the EEOC argued that in viewing the facts in the light most favorable to Plaintiff, a reasonable jury could find that she was "qualified within the meaning of the ADA with the reasonable accommodation of intermittent leave." The EEOC went on to disagree with the district court's determination that Plaintiff's specific leave requests, whether retroactive or prospective, were per se unreasonable. The EEOC argued that excusing prior absences is no different than granting retroactive leave which, as the Sixth Circuit recently explained, is "not per se unreasonable." The EEOC further argued that under the ADA, modifying workplace policies is a form of reasonable accommodation. Thus, if Plaintiff had asked Defendant to modify its no-fault attendance policy to provide additional leave—for example, by allowing her to accrue more than 12 points—that could have been a reasonable and *prospective* form of accommodation.

Court's Decision: In an unpublished opinion, the 10th Circuit affirmed the lower court's decision, finding the plaintiff failed to establish a prima facie case for discrimination because she never requested a plausibly reasonable accommodation. The court also deferred to the employer's argument that regular attendance is an essential job function, a claim the plaintiff could not rebut. A request for an open-ended, indefinite amount of time off from work is not reasonable. So, too, was a request to have points removed for past infractions. Moreover, she failed to produce evidence that the employer's proffered reasons for her termination (*i.e.*, her violation of the company's attendance policy) was a pretext for discrimination. Therefore, her claims for failure to accommodate and disparate treatment fail.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Frank v. Heartland Rehabilitation Hospital LLC	U.S. Court of Appeals for the Tenth Circuit No. 22-3031	5/4/2022 (amicus filed) 7/11/2023 (decided)	Title VII	Retaliation **Result:** Pro-Employer

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

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

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

Case Decision: The appellate court affirmed the judgment of the district court.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Baker v. Upson Regional Medical Center	U.S. Court of Appeals for the Eleventh Circuit No. 22-11381	6/7/2022 (amicus filed) 3/8/2024 (decided)	EPA	Sex **Result:** Pro-Employer

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

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

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

Case Decision: The Eleventh Circuit affirmed the district court's decision, finding ample evidence that the hospital relied on multiple factors other than sex to set the differential in bonus structure between the male and female doctors, including the fact that at the time of hire the male physician was board-certified and had been in practice for fifteen years, whereas the female physician had two and a half years of experience as a practicing physician, and was not board certified.

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

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

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

EEOC's Position: (1) the EEOC argued it is unnecessary for a plaintiff to establish a separate "adverse employment action" when asserting a failure-to-accommodate claim. Denial of a reasonable accommodation that a disabled employee needs—whether to perform the essential functions or enjoy the equal benefits, and privileges of the workplace—itself establishes an adverse effect on that employee's "terms, conditions, and privileges of employment" by depriving that employee of equal employment opportunities. Even if denial of a reasonable

accommodation cannot be said to inherently affect the "terms, conditions, and privileges of employment," the district court erred by equating this language with the Title VII standard for an "adverse employment action," requiring "tangible" and "serious and material" adverse effect on employment. (2) The EEOC argued that nothing in the ADA's text limits the accommodation requirement to the performance of essential job functions, and the EEOC's regulations, along with a considerable body of decisions from other circuits, support the proposition that ADA also requires accommodations to enable enjoyment "of equal benefits and privileges of employment as are enjoyed . . . by other similarly situated employees without disabilities." 29 C.F.R. § 1630.2(0)(1)(iii).

Case Decision: The appellate court reversed the grant of summary judgment in favor of the employer, concluding that genuine issues of material fact do exist about whether two of Plaintiff's requested accommodations relate to his essential job functions and whether the failure to provide those two accommodations led to an "adverse employment decision."

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Belgrave v. Publix Super Markets, Inc.	U.S. Court of Appeals for the Eleventh Circuit No. 22-13021	10/21/2022 (amicus filed) 5/16/2023 (decided)	ADA	Charge Processing Disability Retaliation **Result:** Pro-Employer

Background: Plaintiff worked for Defendant as a dough room production operator from 2014 to 2019. During his employment, Defendant fired him for insubordination. Plaintiff alleges that, on the same day Defendant fired him, he raised complaints about potential discrimination with a supervisor. Plaintiff completed an EEOC intake questionnaire 168 days after his termination. Plaintiff checked "Box 2" in the questionnaire, indicating his intent to file a charge and letting the EEOC investigate. On February 10, 2020, Plaintiff filed a "Form 5" charge of discrimination, which he verified with a declaration under penalty of perjury. After the EEOC issued a right-to-sue letter, Plaintiff filed this pro se action. The district court held that Plaintiff's claims were barred because he had not timely filed a charge of discrimination with the EEOC because the questionnaire "is generally not equivalent to a charge." The district court also held that that Plaintiff could not perform the essential functions of his job.

Issues EEOC is Addressing as Amicus: (1) Whether a plaintiff's unverified EEOC intake questionnaire is a timely charge of discrimination where the questionnaire satisfies the elements of a charge, and Plaintiff later provides the required verification; (2) Whether the district court erred in granting summary judgment against Plaintiff on his discrimination and retaliation claims.

EEOC's Position: The EEOC argued that Plaintiff's EEOC intake questionnaire served as a timely charge of discrimination, as it contained information required by EEOC regulations and can reasonably be construed as a request for the agency to take remedial action to protect his rights. In this case, the Plaintiff requested that the EEOC take remedial action by checking "Box 2" on the form, indicating his intent to file a charge and letting the EEOC investigate. The EEOC further argues that a plaintiff is allowed to amend a charge to cure technical defects, "including the failure to verify the charge," and such amendments relate back to the original filing. Therefore, if an employee timely files an unverified intake form that otherwise qualifies as a charge, he may provide the required verification outside the charge-filing period. Next, the EEOC argues that the magistrate judge incorrectly concluded that Plaintiff could not perform the essential functions of his job—and is not a "qualified individual"—based only on his testimony in a workers' compensation case. Further, the EEOC further argues that the magistrate judge likewise erred in determining that the accommodation Plaintiff requested was unreasonable as a matter of law and the relevant question is whether those tasks were marginal duties rather than essential functions. Because the record is silent on that question, and neither the parties nor the magistrate judge addressed it, the proper remedy is for the court to remand for the district court to consider the issue.

Court's Decision: The Eleventh Circuit affirmed the lower court's decision. The court addressed the case on the merits and did not address the timeliness issue. Regarding the substantive failure to accommodate claim, the appellate court found it failed as a matter of law, as Plaintiff did not meet his burden of identifying and requesting a reasonable accommodation. His request for a "helper" did not amount to an accommodation that would enable him to perform the essential functions of the position. His retaliation similarly failed, as he was unable to show that he had engaged in any protected activity, as the request for accommodation was not reasonable.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Bennett v. Butler County Board of Education	U.S. Court of Appeals for the Eleventh Circuit No. 23-10186	6/15/2023 (amicus filed)	Title VII	Race **Result:** Pending

Background: Plaintiff was one of 20 employees of the Butler County Board of Education who was transferred from one job position to another in 2018 as part of a restructuring process by the Board's newly hired district superintendent. Plaintiff was reassigned from serving as a guidance counselor to working as a kindergarten teacher at the same school. Plaintiff sued the Butler County Board of Education, its board members, and its superintendent, alleging violations of Title VII and the Fourteenth Amendment. Specifically, Plaintiff alleges that defendants discriminated against her based on her race in violation of Section 703(a)(1) by transferring her from her position as guidance counselor to serve as a kindergarten teacher.

Issues EEOC is Addressing as Amicus: Whether a job transfer, allegedly made based on the employee's race, may constitute discrimination "with respect to terms, conditions, or privileges of employment" under Section 703(a)(1), even where there is no change in benefits or salary.

EEOC's Position: The EEOC argues that the Eleventh Circuit should join the D.C. Circuit in reconsidering its Title VII precedents and hold that all discriminatory job transfers and denials of requested transfers are actionable because they affect an employee's terms of employment. The EEOC further argues that because there is no more fundamental term or condition of employment than the job itself, all discriminatory job transfers fall within 703(a)(1)'s scope.

Court's Decision: Pending. The parties have been directed to file supplemental briefs within 30 days of the Supreme Court's decision in *Muldrow v. City of St. Louis*.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Hernandez v. CareerSource Palm Beach County Inc.	U.S. Court of Appeals for the Eleventh Circuit No. 23-12285	9/28/2023 (amicus filed)	Title VII	Sex **Result:** Pending

Background: Plaintiff alleges she was unlawfully fired because of rumors she was having an affair with the former CEO, and that male co-workers were not similarly treated for analogous alleged conduct. The district court dismissed her complaint for failure to state a claim. The court reasoned that Plaintiff needed to show she and her comparators were similarly situated "in all relevant respects," which it understood to mean "nearly identical," and found her alleged conduct differed in two ways. First, they alleged she and her comparators held different titles. Second, their alleged conduct differed. The men allegedly had improper relationships with subordinates, which she was rumored to have had a relationship with a superior. In addition, the court found Plaintiff had impermissibly combined her Title VII and FCRA claims into a single count.

Issues EEOC is Addressing as Amicus: (1) Whether a plaintiff's allegations that her employer fired her based on rumors that she was having an affair with the company's former CEO yet declined to fire or even discipline male employees who reputedly had in-office affairs with subordinates were sufficient to state a plausible claim for sex discrimination under Title VII. (2) Whether the district court improperly applied the plausibility pleading standard by requiring a Title VII plaintiff to allege facts sufficient to show that she and her comparators were similarly situated "in all material respects," thereby requiring her to make out a prima facie case of discrimination at the pleading stage, and by imposing a "nearly identical" standard that this court has squarely rejected. (3) Whether the district court erred by dismissing the operative complaint—with prejudice and without leave to amend—on the alternative ground that it constituted a "shotgun pleading."

EEOC's Position: Plaintiff's allegations were sufficient to state a plausible claim for sex discrimination under Title VII. The district court did not properly apply the plausibility pleading standard, as it required Plaintiff to plead enough facts to show that she and her comparators were similarly situated "in all material respects," and to make out a prima facie case under *McDonnell Douglas*. Moreover, the district court incorrectly applied a "nearly identical" standard that this court has rejected, which affected its analysis of Plaintiff's comparators allegations.

Court's Decision: Pending.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Ivey v. Crestwood Medical Center	U.S. Court of Appeals for the Eleventh Circuit No. 23-11936	9/8/2023 (amicus filed)	Title VII	Retaliation **Result:** Pending

Background: Background: Plaintiff, a Korean American woman, worked as an Emergency Room nurse for Defendant. Due to her schedule, she was supervised by both the daytime and nighttime charge nurse. Plaintiff complained about the nighttime charge nurse including through several emails. During this investigation, concerns were raised about Plaintiff's behavior, specifically speculation she was acting under the influence of drugs. After Plaintiff had a meeting with the company management regarding her complaint, she was instructed to take a urinalysis screen for drugs and told she would be suspended pending the results of her test. Plaintiff missed three shifts before she could return to work after her drug test results were negative. When she returned to work, she once again reported harassment and was subsequently put on unpaid administrative leave. Plaintiff declined to transfer to a non- emergency room shift. Plaintiff sued Defendant alleging race-based disparate treatment, hostile work environment and retaliation. The district court held that subjecting Plaintiff to a drug screen was not a materially adverse action, and that Plaintiff could not establish a causal connection between her protected activity and the drug screen because Defendant believes a drug screen was necessary.

Issues EEOC is Addressing as Amicus: (1) Whether a reasonable jury could find that Plaintiff's email, in which she elaborated on her prior complaint of race-based harassment, and complained of physical assault, constitutes protected activity under Title VII's retaliation provision. (2) Whether having to undergo a drug screening and being suspended pending the results could dissuade a reasonable employee from complaining of discrimination. (3) Whether a reasonable jury could find a causal link between Plaintiff's protected activity and Defendant's requirement she undergo a drug screening, given the events' close temporal proximity.

EEOC's Position: The EEOC argues that Plaintiff engaged in protected activity mere hours before her drug screening when she provided more information regarding her complaints. Additionally, the EEOC argues that subjecting Plaintiff to drug testing and suspending her meanwhile of the test results was a materially adverse action.

Court's Decision: Pending.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Murphy v. Darden Corp.	U.S. Court of Appeals for the Eleventh Circuit No. 22-14108	2/2/2023 (amicus filed)	Title VII	Retaliation **Result:** Pending

Background: Plaintiff, a line cook for Defendant, reported that a coworker had called him a racial slur and threatened physical violence. Four days later, Plaintiff was terminated. Plaintiff filed a pro se complaint alleging he had been terminated in retaliation for opposing conducted prohibited by Title VII. The district court determined that Plaintiff's complaint did not comply with the Federal Rule of Civil Procedure and did not state claims for which relief may be granted. Further, the magistrate judge stated that a racially derogatory remark by a co-worker, without more, does not constitute an unlawful employment practice under the opposition clause of Title VII. The magistrate judge ordered Plaintiff to file an amended complaint with factual allegations sufficient to state a claim; Plaintiff refused, however, because he claimed he had pleaded sufficient facts in his complaint. In lieu of dismissing the case for failure to prosecute and/or abide by an order, the magistrate judge once again addressed the merits and recommended that the district court dismiss the complaint without prejudice.

Issues EEOC is Addressing as Amicus: Did Plaintiff state an actionable claim of retaliation under Title VII where his pro se complaint alleged that he was terminated because he reported that a coworker had called him a racial slur and threatened him with physical violence?

EEOC's Position: The EEOC argues that Plaintiff's complaint of retaliation for opposing a hostile work environment under Title VII need be close only enough in his understanding of the underlying substantive law under the opposition clause. Specifically, the EEOC argues that Plaintiff only needs to assert that the conduct was "close enough" to a statutory violation to support an objectively reasonable belief that the conduct was unlawful. Further, the EEOC argues that the single use of the slur creates a hostile work environment.

The EEOC also argues that whether Plaintiff opposed conduct that actually amounted to a Title VII violation is not at issue; what matters is only whether the alleged conduct is close enough to render his belief he was opposing unlaw conduct objectively reasonable.

Court's Decision: Pending.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Yelling v. St. Vincent's	U.S. Court of Appeals for the Eleventh Circuit No. 21-10017	5/3/2021 (amicus filed) 10/5/2023 (decided)	Title VII	Race Harassment **Result:** Pro-Employer

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

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

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

Court's Decision: The court affirmed the judgment of the lower court. "After careful review, and with the benefit of oral argument, we conclude that (i) Yelling's hostile work environment claim fails because there is no evidence of severe or pervasive harassment; (ii) Bostock did nothing to undermine application of *McDonnell Douglas* to retaliation claims because but-for causation still applies; (iii) Yelling's retaliation claim cannot survive— either under *McDonnell Douglas* or otherwise; and (iv) Yelling's disparate-treatment claim fails because there is no evidence that race played a role in her termination. We therefore affirm."

FY 2023 – Select Appellate Cases in Which the EEOC Was a Party

Case Name	Court and Case Number	Date of Appellate Filing and/or Court Decision	Statutes	Basis/Issue/Result
EEOC v. Center One, LLC	U.S. Court of Appeals for the Third Circuit No. 22-2944	2/28/2023 (appeal filed) 2/1/2024 (decided)	Title VII	Religion **Result:** Pro-EEOC

Background: EEOC alleges that the Defendant denied the charging party a reasonable accommodation to observe holy days as required by his Messianic Jewish faith and constructively discharged him because of his religion in violation of Title VII of the Civil Rights Act. The charging party and the EEOC moved jointly, seeking summary judgment on the claims that Defendants failed to accommodate the charging party's religious observance and that Defendant constructively discharged Plaintiff and imposed discipline. The district court denied the motion and entered final judgment for Defendant.

Issues on Appeal: Whether EEOC made out a prima facie case of religious discrimination by producing evidence from which a jury could find that (a) Defendant constructively discharged the charging party when it refused to reasonably accommodate his religious observance, and (b) Defendant altered the charging party's terms, conditions, or privileges of employment when it assigned him attendance points for his absences on days that his religion forbade working.

EEOC's Position on Appeal: The EEOC argues the charging party wrongly had to provide a clergy verification by a rabbi if he wanted to take Jewish holy days off from his job, even though Defendant knew he could not meet that requirement because he was between congregations. Specifically, the EEOC argues the company forced this verification requirement on him and that writing him up for calling off work for religious reasons is a clear case of religious bias. Additionally, the EEOC argues the district court should have considered Defendant's refusal to accommodate the charging party's religion an unlawful change to his employment contract since he provided notice even before he started his employment.

Court's Decision: The Third Circuit vacated the grant of summary judgment and remanded, finding that the constructive discharge theory raises genuine issues of material fact for a jury.

Case Name	Court and Case Number	Date of Appellate Filing and/or Court Decision	Statutes	Basis/Issue/Result
EEOC v. U.S. Drug Mart	U.S. Court of Appeals for the Fifth Circuit No. 23-50075	4/11/2023 (appeal filed) 1/5/2024 (decided)	ADA	Disability **Result:** Pro-Employer

Background: The charging party worked as a pharmacy technician for Defendant. The charging party suffers from asthma which he disclosed to Defendant during his initial job interview. He also used an inhaler at the pharmacy to control his asthma symptoms which included breathing difficulties, shortness of breath, and pain and pressure in his chest. Around March 2020, as COVID-19 cases spread, charging party wore a surgical mask to work. However, Defendant instructed him to remove his mask even when he expressed his fears of infection and told his manager he needed the mask because of his asthma, his manager responded that he could either take the mask off and continue working or clock out and go home. Charing party was sent home twice, and was taunted and humiliated for questioning management's policy prohibiting masks, leading him to quit. The district court granted summary judgment to Defendant.

Issues on Appeal: Could a reasonable jury find that Defendant's actions in twice sending the charging party home without pay when he sought to wear a protective mask, and then berating the 20-year-old employee in demeaning and humiliating terms and threatening him with termination in response to his renewed mask request, were sufficiently severe to alter the terms or conditions of his employment and establish a hostile work environment under the ADA?

EEOC's Position on Appeal: The EEOC argues that the harassment the charging party experienced created a hostile work environment, and considering the full context of the harassment faced, a reasonable jury could find that it met the standard for hostile work environment. Specifically, the EEOC argues that the charging party was working in his first job, was suffering from asthma, and was confronting the possibility of exposure to a potentially deadly disease, and teased because of it, established a valid claim for harassment and hostile work environment. Thus, considering the context, a reasonable jury could have concluded that the harassment the charging party experienced was sufficiently intimidating and threatening to alter his conditions of employment.

Further, the EEOC argues that a reasonable jury could agree that a reasonable person in the charging party's position would have felt compelled to resign, as he was requesting protection against a potentially deadly disease and was met with abuse humiliation and threats of termination.

Court's Decision: The appellate court affirmed the judgment of the district court, and ordered the EEOC to pay the employer the costs on appeal.

Case Name	Court and Case Number	Date of Appellate Filing and/or Court Decision	Statutes	Basis/Issue/Result
EEOC v. Charter Communications, LLC	U.S. Court of Appeals for the Seventh Circuit No. 22-1231	4/11/2022 (appeal filed) 7/28/2023 (decided)	ADA	Disability **Result:** Pro-EEOC

Background: During the charging party's interview, he inquired about a flexible schedule explaining that he did not drive well at night and Defendant responded it would "get him out of here before dark" and to not worry. Once hired, the charging party was assigned to the night shift. He submitted an accommodation request, and further explained he did not have any viable transportation alternatives, such as public transit. Defendant granted the charging party's request on a temporary basis but refused to extend the accommodation beyond thirty days. The district court granted the Defendant's motion for summary judgment on the grounds that the disability was unrelated to the essential functions of the job.

Issues on Appeal: Whether the district court erred in holding that the charging party's disability was irrelevant to his ability to perform his essential job functions—and that under *Brumfield v. City of Chicago*, 735 F.3d 619 (7th Cir. 2013), this relieved Defendant of any duty under the ADA to accommodate him—where the charging party's cataract-related night blindness prevented him from driving safely home from work following his assigned shift.

EEOC's Position on Appeal: The EEOC argues that the charging party's disability is relevant to the performance of the essential job functions as required by *Brumfield* because it prevented him from safely driving from his home to work. Further, the EEOC argued that under the ADA reasonable accommodations may be required even when an employee can perform essential job functions without them.

Court's Decision: The Seventh Circuit reversed and remanded the district court's grant of summary judgment in favor of the Defendant, holding that an employee was possibly entitled to a modified work schedule as an accommodation to make his commute safer.

Case Name	Court and Case Number	Date of Appellate Filing and/or Court Decision	Statutes	Basis/Issue/Result
EEOC v. Village at Hamilton Pointe LLC	U.S. Court of Appeals for the Seventh Circuit No. 22-2806	2/28/2023 (appeal filed)	Title VII	Race Harassment **Result:** Pending

Background: Defendants are a residential nursing home and its managing company, which is owed by the same family. The managing company provides it with financial, human resources, and other services. The EEOC's 47 claimants are all Black and worked at the nursing home as certified nursing assistants, nurses, and other staff.

The EEOC alleges that Defendants violated Title VII by creating a racially hostile work environment, in part, by routinely catering to the racist demands of its residents by making race-based work assignments and instructing Black staff to stay out of certain residential rooms. Additionally, the claimants testified residents, coworkers, and supervisors used racial slurs.

The district court granted partial summary judgment in favor of Defendants, precluding recovery for 40 of the claimants. The court also granted partial summary judgment holding that the managing company was neither a joint employer nor a single employer.

Issues on Appeal: Whether the district court erred in granting summary judgment in favor of a residential nursing home by (1) instructing the jury on two separate harassment claims—one for coworker/resident harassment and another for supervisor harassment precluding the jury from considering the "totality of the circumstances"; (2) wrongly relying on out-of-circuit precedent to discount the impact of residents' racist statements and behavior; and (3) in finding that the managing company was neither a joint employer nor a single employer.

EEOC's Position on Appeal: The EEOC argues the district court wrongly relied on out-of-circuit precedent to discount the impact of the residents' racist statements and behavior. The EEOC argues an employer's ability to prevent and correct harassment may differ depending on the harasser's ability to self-regulate, but that this is only relevant to liability, and not to severity or pervasiveness. The EEOC argues that there is no assumption-of-risk defense to charges of workplace discrimination, and that the claimants not only suffered harassment by its residents, but also race-based harassment by co-workers and supervisors.

Further, the EEOC argues that the verdict forms provided to the jury wrongly precluded the jury from considering the "totality of the circumstances" by requiring it to evaluate supervisor harassment separately from coworker/ residential harassment. The EEOC states that it raised a single claim for hostile work environment, but the district court required the jury to disaggregate the evidence of a hostile work environment based on the harasser's identity, opposite of what the law requires.

Court's Decision: Pending.

Case Name	Court and Case Number	Date of Appellate Filing and/or Court Decision	Statutes	Basis/Issue/Result
EEOC v. Eberspaecher North America, Inc.	U.S. Court of Appeals for the Eleventh Circuit No. 21-13799	12/21/2021 (appeal filed) 5/10/2023 (decided)	ADA	Disability Subpoena Enforcement **Result:** Pro-Employer

Background: In 2017, the EEOC began investigating a charge of discrimination from a former employee of the Defendant who alleged that the company violated the ADA when, pursuant to Defendant's "point system" to discipline employees for absences and tardiness, fired the employee following a series of disability-related absences. The EEOC also uncovered information suggesting that the same discriminatory practice might have affected other Defendant employees across the country. Subsequently, an EEOC Commissioner filed a charge in July 2019 alleging that Defendant "has violated, . . . and continued to violate the ADAAA [ADA Amendments Act of 2008] by discriminating against employees on the basis of disability with respect to qualified leave." The charge listed a Defendant facility rather than Defendant corporate headquarters.

Pursuant to the charge, the EEOC requested nationwide information regarding Defendant employees discharged pursuant to the attendance policy. However, Defendant refused to provide such information, noting that the underlying charge was specific to only one of Defendant's facility. In response, the EEOC issued a subpoena seeking such information.

Defendant refused to comply with the subpoena, and the EEOC applied for judicial enforcement. The district court ordered Defendant to comply with the subpoena in part. The district court agreed with the Commission that the temporal and subject matter scope of the subpoena was "both relevant and reasonable in light of the Commissioner's ADAAA charge." But the court limited enforcement to the Defendant facility stating: "[T]he geographic scope of the subpoena is too broad when read in conjunction with the Commissioner's Charge and Notice." The district court further concluded that only records pertaining to the violations of the ADA at the facility were relevant and must be produced.

Issues on Appeal: (1) Whether the district court abused its discretion by limiting the EEOC's subpoena to a single facility when the Commissioner charge broadly alleged that Defendant was violating the ADA by disciplining and terminating employees for absences directly correlated to their disability; and (2) assuming *arguendo* that the Commissioner's charge was directly at only one Defendant facility, whether the district court abuse its discretion by holding that the nationwide information was irrelevant to the EEOC's investigation of potential discrimination at the facility.

EEOC's Position on Appeal: The EEOC argued that the district court abused its discretion in two ways by limiting the subpoena to the facility. (1) The district court misinterpreted the Commissioner's charge as alleging ADA violations at Defendant facility only. Read as a whole, the charge is directed at Defendant's companywide practices of disciplining and terminating employees whose disabilities caused workplace absences. The EEOC also argued that neither of the district court's reasons—the charge's failure to use the terms "companywide" or "nationwide," nor its use of the facility's address, justifiably limited the charge only to the Defendant facility. (2) Even if the charge was limited to the facility, the EEOC argued that the requested nationwide information would be relevant to the EEOC's investigation. The EEOC reasoned that the Supreme Court has repeatedly held that relevance has an expansive meaning in connection with the EEOC's administrative investigations. Further, the charge, on its face, is based on Defendant's practices and those practices are based on a written companywide attendance policy that applies to all of the Defendant facilities.

Court's Decision: The appellate court affirmed the district court's order enforcing only part of the EEOC's subpoena. The court held that the EEOC charged only one of defendant's facilities, providing notice that it was investigating only that particular facility. Therefore, the nationwide data sought is irrelevant to the charge.

Appendix C – Subpoena Enforcement Actions Filed by EEOC IN FY 2023[915]

Filing Date	State	Court Name / Case Number / Judge	Defendant(s)	Individual Charging Party or Systemic Investigation	Result
12/14/2022	IL	U.S. District Court for the Northern District of Illinois No. 1:22-cv-07050 Hon. Thomas M. Durkin	Admiral Theatre, Inc.	Individual Charging Party	The court granted the EEOC's petition and motion to enforce the subpoena.

Commentary:

The EEOC is investigating a charge of sex and race discrimination against the Respondent. Charging party, an exotic dancer, alleges that Respondent discriminated against her and a class of similarly situated individuals on the basis of their race (African American) and sex (female) by allowing male customers to commit physical and sexual assaults against them; failing to prevent these assaults; and retaliating against dancers who complained. Charging Party also alleged that Respondent created a hostile work environment for African American dancers by subjecting them to racially derogatory comments; assigning them undesirable shifts; and limiting the number of African American dancers permitted to perform at a time. Additionally, Charging Party alleged that Respondent misclassified her and other dancers as independent contractors, thereby depriving them of the rights of employees, including protection by Title VII.

During the course of its investigation, the EEOC issued requests for documents related to the investigation, to which the Respondent failed to respond adequately. Specifically, the EEOC sought (1) a copy of Charging Party's personnel file; (2) names and contact information for employees (including alleged contractors) at Charging Party's work location; and (3) a list of employees (including alleged contractors) who complained about race and sex discrimination at the work location.

On October 6, 2021, Respondent provided a minimal response to the RFI: It denied that it possessed a personnel file for Charging Party and denied receiving any complaints of harassment from any employee or contractor. Respondent objected to producing the names and addresses of its employees or contractors, explaining that it would be an invasion of privacy to disclose performers' identities without their consent. Respondent provided some documents, largely duplicating those previously submitted.

The EEOC sent Respondent a second Request for Information on February 23, 2022. In it, the Commission requested (1) a copy of Respondent's security policy and sexual harassment reporting policy, including supporting documents and date of adoption; (2) records showing the names and contact information for Respondent employees (including contractors); and (3) a copy of the book in which Respondent recorded reports of customer misconduct. Respondent declined to provide additional records.

The EEOC's subsequent subpoena made 11 requests for information, largely tracking the information sought in the Commission's previous RFIs. Namely, the subpoena sought: records containing the names, race, contact information, and other information for individuals working as exotic dancers; written filings, submissions, and decisions in two administrative matters in Chicago and Cook County involving Respondent; and "[d]ocuments or records sufficient to show that exotic entertainment is not integral to Respondent's business and documents or records sufficient to show any other business that Respondent engages in at [the location at issue]."

Respondent complied with some of the subpoena in part and objected in part, submitting a petition to revoke or modify certain requests. It complied with the subpoena in part by producing records showing its security policies, policies regulating the conduct of dancers, and business licenses. It renewed its objection to producing names and contact information for its employees and contractors, arguing that the request invaded the privacy of the employees/contractors and claiming the request could subject Respondent to invasion of privacy claims. Respondent also objected to providing information regarding two administrative hearing cases to which it is a party, on the grounds that "[t]hese administrative hearings have absolutely nothing to do with the issues in the complainant's complaint, as they have to do with tax burdens," and are "a matter of public records [sic] that can be obtained by the Commission." In response, on July 12, 2022, the Commission issued a Determination upholding the subpoena in part and modifying it in part. The Determination modified one request to seek: Documents, or a summary of documents, sufficient to show the respective portions of Respondent's revenue earned from (a) theatre admission or cover charges; (b) food and beverage sales; and (c) entertainment fees (including fees associated with "Pleasure Bills"), for the period from March 2020 to the present.

The Respondent failed to provide further documents, so the EEOC filed the instant motion for an order to show cause why the subpoena should not be enforced. On February 22, 2023, the court granted the EEOC's petition and motion to enforce the subpoena.

915 The summary contained in Appendix C reviews select administrative subpoena enforcement actions filed by the EEOC in FY 2023. 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
12/16/2022	CA	U.S. District Court for the Central District of California No. 2:22-mc-00246 Hon. Sherilyn Peace Garnett and Magistrate Judge Rozella A. Oliver	Laseraway Medical Group, Inc.	Individual Charging Party	The court granted the EEOC's application in part, ordering Respondent to comply with request numbers 8, 20, and 21, with a modification to request number 8 to add the time limitation "from September 1, 2020, to the present." The Respondent had already voluntarily complied with all other requests before the hearing on the application. The court denied the EEOC's request for costs.

Commentary:

The Charging Party filed a charge of discrimination alleging that Respondent discriminated against him and a class of individuals on the basis of sex (male). The Charging Party alleges that in July 2021, he inquired in writing and in person about a position with Respondent; he was told by Respondent that Respondent was not hiring male nurses at that time. In September 2021, Charging Party applied for a position at Respondent's San Francisco, Fremont, and Emeryville locations and did not receive a response.

During the course of the investigation, Respondent failed to submit a position statement to the EEOC as required, ignoring repeated requests by the EEOC including four emails and a phone call reminding Respondent of its obligation to respond. The EEOC issued an RFI seeking various categories of information and documents relevant to the charge of discrimination, including, in relevant part: a list of Respondent's locations where its policy or practice of hiring only female applicants applies (including under the purview of the same management and the California locations where Charging Party applied); an organizational chart for the locations at issue; the number of persons Respondent employed at the locations at issue; a list of the persons employed by Respondent at the pertinent locations, as such persons shed light on the allegations and/or are potential witnesses; employee handbooks; a copy of each of Respondent's policies and procedures associated with the allegation that Respondent hires only females for the applicable position(s); EEOC training records; documents pertaining to the Charging Party including applications; documents setting forth the duties, qualifications, and responsibilities for the position(s) at issue; applications submitted for the position(s) and at the locations at issue during the pertinent time frame; and a list of all persons hired into the position(s) at issue. The Respondent allegedly failed to respond, necessitating a subpoena for this information.

Despite repeated requests, the Respondent produced two pdf documents a month later, which the EEOC claimed were deficient. The EEOC then filed the instant request, seeking the following information listed in Subpoena Requests 5-10, 15-16, 19-21:

(5) List all locations, and provide each location address, that Respondent operated from January 1, 2020 to the present; this should include but is not limited to the Fremont, California, Emeryville, California, and San Francisco, California locations to which the Charging Party applied, as well as all locations under the purview of the Medical Regional and/or Regional Clinical Director of the North Bay California Region.

(6) Provide an organizational chart(s) showing the interrelationship among all of Respondent's locations; this should include but is not limited to the Fremont, California, Emeryville, California, and San Francisco, California locations to which the Charging Party applied, as well as all locations under the purview of the Medical Regional and/or Regional Clinical Director of the North Bay California Region.

(7) State the total number of persons employed by Respondent during 2020, 2021 and 2022; this should include but is not limited to the Fremont, California, Emeryville, California, and San Francisco, California locations to which the Charging Party applied, as well as all locations under the purview of the Medical Regional and/or Regional Clinical Director of the North Bay California Region.

(8) Provide a list identifying all employees; this should include but is not limited to the Fremont, California, Emeryville, California, and San Francisco, California locations to which the Charging Party applied, as well as all locations under the purview of the Medical Regional and/or Regional Clinical Director of the North Bay California Region. For each individual, provide the following: a. name, b. date of hire, c. selecting official, d. work location, e. position, f. sex, and g. last known home address, telephone number(s) and email address.

(9) Provide all employee handbooks and any revisions effective during January 1, 2020 to present.

(10) If not included in response to number (9) above, provide a copy of each of Respondent's policies and procedures associated with each issue identified on the Charge of Discrimination.

(15) Provide records that reflect all EEO training Respondent provided to management and non-management employees during 2020, 2021 and 2022. These records should include the dates of each training, the duration of each training, the name and title of those who conducted each training, and any corresponding acknowledgment forms.

(16) Provide complete unredacted copies of all documents (hard copy and/or electronic) maintained for Charging Party including, but not limited to, any and all records maintained either in the normal course of business or for any special purpose with respect to Charging Party's application(s) for employment.

(19) Submit copies of all documents which set forth the duties, responsibilities and qualifications for each of the positions for which Charging Party sought hire.

(20) Submit copies of all applications, including supporting documents such as resumes, for all persons who applied for the positions for which Charging Party also sought hire from September 1, 2020 to the present; this should include but is not limited to the Fremont, California, Emeryville, California, and San Francisco, California locations to which the Charging Party applied, as well as all locations under the purview of the Medical Regional and/or Regional Clinical Director of the North Bay California Region.

(21) Identify all persons hired into the positions for which Charging Party sought hire from September 1, 2020 to the present by providing the following; this should include but is not limited to those hired at the Fremont, California, Emeryville, California, and San Francisco, California locations, as well as all locations under the purview of the Medical Regional and/or Regional Clinical Director of the North Bay California Region. a. name, b. date of application, c. date of hire, d. selecting official, e. work location, f. position, g. sex, and h. last known home address, telephone number(s) and email address.

In response to the EEOC's application to show cause, the Respondent answered that it does not contest that it must respond to the subpoena and would work with the EEOC to provide a complete response. Respondent provided responses to request numbers 1-4, 11-14, and 16-19. Respondent also stated that it would provide responses to request numbers 5-7, 9-10, and 15 before the hearing on the application. Respondent objected, however, to the enforcement of the subpoena with respect to request numbers 8, 20, and 21, arguing that they violate third-party privacy rights guaranteed by the California Constitution, and further, that these requests are impermissibly overbroad and burdensome.

On April 17, 2023, the magistrate judge issued a report and recommendation that the EEOC's application for an order to show cause be granted in part. The court ordered the Respondent to comply with request numbers 8, 20, and 21 within 21 days of the date of entry of the order. The court modified request 8 to add a time limitation ("from September 1, 2020 to the present.") The court denied the EEOC's requests for costs. The court issued its order accepting the magistrate's report and recommendations, which was entered on July 26, 2023.

Filing Date	State	Court Name / Case Number / Judge	Defendant(s)	Individual Charging Party or Systemic Investigation	Result
1/26/2023	MI	U.S. District Court for the Eastern District of Michigan No. 2:23-mc-50094-SJM-DRG Hon. Stephen J. Murphy, III	Ferrellgas, L.P.	Individual Charging Party	The court granted the EEOC's application for an order to show cause, and the Sixth Circuit affirmed on appeal.

Commentary:

EEOC is investigating a charge of sex and race discrimination filed by a Black female job applicant who alleges she was conditionally hired and then unlawfully fired. As part of its investigation the EEOC sought the following documents: "For each Driver hired on or after 1/1/19 as listed on "item 3" of your response dated 1/5/22 (the chart listing drivers hired in the East Lansing District between 1/1/17 and 8/31/20) please provide the following: (a) A list of all applicants who applied for each driver position; (b) The application materials submitted by all applicants for each position, including resumes, applications, last known contact information and/or any other documents showing qualifications; (c) A list of all applicants selected for an interview; (d) The name and title of each Respondent employee who conducted interviews for the driver position from 1/1/19 through 1/5/22."

The respondent initially failed to respond to the subpoena, in part because the EEOC inadvertently sent the subpoena without a signature. The EEOC then signed and served the otherwise identical subpoena via its online portal. The respondent has reportedly failed to comply, instigating the EEOC's motion to show cause why an administrative subpoena should not be enforced. According to the EEOC, the respondent failed to exhaust its administrative remedies and therefore waived all objections to enforcement of the subpoena. Specifically, it did not petition the EEOC to revoke or modify the subpoena within five days of service. The EEOC also claims the respondent has no valid defense for failing to comply, as EEOC subpoena enforcement proceedings are summary in nature and involve only limited judicial review.

On February 15, 2023, the court granted the EEOC's motion for two reasons. First, the Respondent forfeited its right to challenge the subpoena, as such petitions must be filed within five days after service. Second, the Respondent failed to present a basis for not enforcing the subpoena.

Filing Date	State	Court Name / Case Number / Judge	Defendant(s)	Individual Charging Party or Systemic Investigation	Result
2/16/2023	IL	U.S. District Court for the Northern District of Illinois No. 1:23-cv-00958 Hon. Sara L. Ellis and Magistrate Judge Beth W. Jantz	First Advantage Background Services Corp.	Systemic Investigation	The court granted the EEOC's application to show cause and ordered the Respondent to comply with the subpoena.

Commentary:

EEOC issued a subpoena on November 23, 2021, as part of an investigation of discrimination. Specifically, the EEOC alleges the Respondent discriminated against three charging parties on the basis of race and denied them employment after conducting background checks. The Charging Parties allege the employer's policy had a disparate impact on them and similarly situated Black applicants. They also allege disparate treatment on account of race.

The Respondent sent a timely Petition to Revoke or Modify Subpoena. In its Petition to Revoke or Modify Subpoena to EEOC, the Respondent asserted that production of many of the documents requested in EEOC's subpoena is governed by the Fair Credit Reporting Act (FCRA). The Respondent alleges the FCRA requires that a consumer reporting agency have a "permissible purpose" to produce an individual's consumer report; one such lawful purpose is in response to the order of a court having jurisdiction to issue such an order.

The EEOC therefore requests an Order enforcing EEOC's subpoena by requiring Respondent to produce the consumer reports requested.

On March 23, 2023, the court issued an order granting the EEOC's application to enforce the subpoena.

Filing Date	State	Court Name / Case Number / Judge	Defendant(s)	Individual Charging Party or Systemic Investigation	Result
3/29/2023	CA	U.S. District Court for the Central District of California No. 2:23mc39 Hon. Judge Josephine L. Staton and Magistrate Judge Maria A. Audero	Thida Trimming Inc.	Systemic Investigation	The court granted the EEOC's application in its entirety and ordered Respondent to comply with the subpoena.

Commentary:

The EEOC is investigating a charge of discrimination based on age, race/national origin, and retaliation filed against Respondent under Title VII and the ADEA. Specifically, on September 22, 2022, Charging Party Thai Community Development Center ("Charging Party" or "Thai CDC") filed a third-party charge of discrimination alleging that Respondent discriminated and retaliated against Asian workers on the basis of race, national origin, and/or age by failing to pay them and by subjecting them to worse working conditions and termination / constructive discharge. The EEOC issued a subpoena on Respondent asking for testimony, information, and documents relevant to the EEOC's investigation into whether the Respondent discriminated against Asian workers as alleged in the Charge. Respondent has not objected or complied with the Subpoenas.

The information sought includes the following documents and information from May 2020 to the present: (1) the identity of Respondent's custodian of records for employee-related documents; (2) employment and contact information of Respondent's workers; (3) Respondent's policies and reporting procedures on discrimination, retaliation, pay, and discipline; (4) documents to identify Respondent's most knowledgeable person on hiring, employee compensation, and complaint policies; (5) information relating to Respondent's recruiters of workers; (6) information about Respondent's process of hiring non-management employees; (7) information and documents relating to complaints of discrimination; (8) identification of all sources used to recruit applicants for all non-management positions; (9) documents pertaining to EEO training; (10) information about non-management positions such as job description and compensation; (11) documents pertaining to compensation; (12) information about the jobsite addresses for Respondent's workers; and (13) a copy of the employment application for non-management positions.

The Respondent neither objected nor complied, so the EEOC filed this instant application for an order to show cause why its subpoenas should not be enforced. On August 8, 2023, the court accepted the report and recommendations of the magistrate granting the EEOC's application in its entirety. The court ordered the Respondent to comply with the subpoena within 10 days of service.

Filing Date	State	Court Name / Case Number / Judge	Defendant(s)	Individual Charging Party or Systemic Investigation	Result
4/10/2023	CA	U.S. District Court for the Northern District of California No. 4:23-mc-80112-SK Hon. Haywood S Gilliam, Jr.	Security Industry Specialists, Inc.	Two individual charging parties	The court granted the EEOC's application to enforce the subpoena. The third party then filed a motion to intervene and for a protective order, and to modify the scope of the subpoena. The court granted the motion to intervene, and the Respondent produced information with certain redactions regarding the third party. The court asked the parties for a joint statement as to why the matter should not be closed. The EEOC objects to closure, stating there are deficient in production. The Respondent and third party assert the Respondent sufficiently responded to the subpoena, and that the matter should be closed.

Commentary:

The EEOC is investigating two charges of age discrimination. Both charging parties allege the Respondent barred them from working in a "screener" position created in response to the COVID-19 pandemic on account of their age. The EEOC issued Subpoena SF-22-09, which seeks documents and information relating to (1) the scope of individuals impacted by the Screener policies; (2) the geographic scope of the Screener policies, including whether Screeners were employed only at third-party client facilities or also at Respondent's other client sites; (3) the complete duration of the period the Respondent and its clients used Screener positions; (4) who participated in the creation of the eligibility criteria for Screeners and their role in that process; and (5) how the eligibility criteria were created, adopted, and implemented. According to the EEOC, the Respondent for over two years has delayed producing such documentation, provided only "boilerplate" objections, sought to revoke the subpoena administratively, and promised to comply. The EEOC claims, however, that the Respondent merely produced the same documents, and is seeking a court order for it to comply.

The court granted the EEOC's application to enforce the subpoena and ordered production of responsive documents within 14 days. The Respondent's third-party client then moved to intervene and for a protective order for documents that purportedly contained sensitive, proprietary and/or confidential information. The parties met and conferred to resolve the issues raised in the third party's motion. The court permitted the Respondent to redact certain information related to the third-party client's locations and payment information. The court asked for a joint statement as to why the matter should not be closed. The EEOC claimed that although Respondent produced information, the production was deficient in several respects, and requested that the court keep the matter open while the parties meet and confer to resolve outstanding issues. The Respondent, however, objected, stating it has complied with the court's order, and that the court should close the matter.

Filing Date	State	Court Name / Case Number / Judge	Defendant(s)	Individual Charging Party or Systemic Investigation	Result
6/27/2023	PA	U.S. District Court for the Eastern District of Pennsylvania No. 2:23cv2460 Hon. Chad F. Kenney	Hajoca Corp.	Systemic Investigation	The parties came to an agreement regarding document production that contained limits to protect confidentiality.

Commentary:

Pursuant to a Commissioner Charge, the EEOC is investigating a charge of discrimination filed against Respondent alleging unlawful employment practices in its hiring on account of race and national origin and on the basis of disability. Specifically, the EEOC contends that “since at least January 1, 2014 and continuing to the present,” Respondent has used: (1) a particular employment practice in the form of cognitive testing for the purposes of employment selection that causes disparate impact in hiring against Black and Hispanic job applicants because of their race/national origin in violation of Title VII; (2) a particular employment practice in the form of psychological/personality testing and psychologist interviews for purposes of employment selection that causes disparate impact in hiring against Black and Hispanic job applicants because of their race/national origin in violation of Title VII; (3) a particular employment practice in the form of psychological/personality testing and psychologist interviews for purposes of employment selection that causes disparate impact in hiring against job applicants with disabilities based on their disability in violation of the ADA; and (4) psychological/personality testing and psychologist interviews for the purposes of employment selection that constitute pre-employment, pre-offer medical examinations and disability-related inquiries in violation of the ADA.

EEOC served an RFI upon Respondent on July 16, 2019, seeking, *inter alia*, documents reflecting Respondent’s policies and practices regarding uses of tests or interviews/assessments; internal regulations, guidelines, and instructions regarding each test or interview/assessment; documents utilized for internal grading or evaluation of the testing/screening of each test or interview/assessment; and documents related to Respondent’s decision to use each test or interview/assessment. EEOC contends the Respondent provided a deficient response on October 11, 2019.

On April 1, 2021, EEOC served another RFI upon Respondent, including a request for electronic production of information concerning all persons hired by Respondent at any time from January 1, 2014 to the present, and including requests for various information including the employee’s name, address, contact information, and dates of interviews, job offers, and various test, among others. EEOC contends the Respondent provided a deficient response on July 23, 2021, failing to provide any data responsive to the request, and instead referencing its previous data production that was largely non-responsive to the RFI.

Finally, EEOC served another RFI upon Respondent on December 17, 2021, which sought, inter alia, all “Selection Reports” created for any job candidates from January 1, 2014 to the present, as well as information on whether each candidate was hired. The Selection Reports were created by Respondent’s contract psychologist(s) for use by Respondent’s hiring managers and are based on candidates’ interviews with the psychologist(s) and psychologist interpretations of the candidates’ personality test responses/scores. Respondent did not produce documents responsive to these requests, and instead directed EEOC to its previous non-responsive production to the April 1, 2021 RFI.

The EEOC then subpoenaed the Respondent to provide materials plainly relevant to EEOC’s investigation of Respondent’s hiring practices, including various categories of information concerning persons hired by Respondent during the charged time period; copies of all Selection Reports created for any candidate and corresponding data about whether each candidate was hired; and communications with Respondent’s personnel concerning the Selection Reports and other employment selection procedures from January 1, 2014 to the present. The EEOC claims the Respondent has failed to produce any documents in response.

The parties entered into an agreement regarding the scope of document production that contained limits and restrictions to address the Respondent’s confidentiality concerns.

Filing Date	State	Court Name / Case Number / Judge	Defendant(s)	Individual Charging Party or Systemic Investigation	Result
6/27/2023	PA	U.S. District Court for the Eastern District of Pennsylvania No. 2:23cv2463 Hon. Chad F. Kenney	Sarita Bhakuni	Systemic Investigation	The parties came to an agreement regarding document production that contained limits to protect confidentiality.

Commentary:

Pursuant to a Commissioner Charge, the EEOC is investigating a charge of discrimination filed against Hajoca Corporation alleging unlawful employment practices in its hiring on account of race and national origin and on the basis of disability. Specifically, the EEOC contends that "since at least January 1, 2014 and continuing to the present," Hajoca has used: (1) a particular employment practice in the form of cognitive testing for the purposes of employment selection that causes disparate impact in hiring against Black and Hispanic job applicants because of their race/national origin in violation of Title VII; (2) a particular employment practice in the form of psychological/personality testing and psychologist interviews for purposes of employment selection that causes disparate impact in hiring against Black and Hispanic job applicants because of their race/national origin in violation of Title VII; (3) a particular employment practice in the form of psychological/personality testing and psychologist interviews for purposes of employment selection that causes disparate impact in hiring against job applicants with disabilities based on their disability in violation of the ADA; and (4) psychological/personality testing and psychologist interviews for the purposes of employment selection that constitute pre-employment, pre-offer medical examinations and disability-related inquiries in violation of the ADA.

The EEOC issued an administrative subpoena to Respondent, a Hajoca contractor who conducts portions of the company's job applicant assessment process and who therefore possesses first-hand knowledge of the respondent's hiring practices, seeking documents and other information relevant to the employment practices identified in the charge. Specifically, the EEOC sought relevant evidence about the Hajoca's use of "Selection Reports" in hiring—*i.e.*, "copies of all Selection Reports created for any candidate" from January 1, 2014 until the present. The EEOC claims that as of the date of filing, the Respondent has not produced any information to the EEOC. The parties, however, entered into an agreement regarding the scope of document production that contained limits and restrictions to address the Respondent's confidentiality concerns.

Filing Date	State	Court Name / Case Number / Judge	Defendant(s)	Individual Charging Party or Systemic Investigation	Result
6/27/2023	PA	U.S. District Court for the Eastern District of Pennsylvania No. 2:23cv2461 Hon. Mitchell S. Goldberg	Bob's Discount Furniture LLC	Systemic Investigation	The court ordered the Respondent to comply with the EEOC's subpoena.

Commentary:

The EEOC is investigating whether Respondent engaged in age discrimination in its company-wide layoffs and subsequent recall of employees. The investigation stems from an individual employee's allegation that the company unlawfully failed to recall him from layoff on account of his age. Specifically, the Charging Party alleged that he and other older workers over the age of 65 had been discharged because of their ages as part of Respondent's reduction-in-force during the COVID-19 pandemic in 2020. The EEOC subsequently broadened the focus of the investigation to encompass Respondent's layoff and recall practices during and since September 1, 2019. The Respondent claimed in its position statement that it furloughed and ultimately fired hundreds of employees as part of a nationwide reduction in force necessitated by the business downturn resulting from the pandemic and provided layoff statistics.

In the course of its investigation, EEOC issued a subpoena seeking evidence relating to its investigation. Specifically, the EEOC sought data compilation identifying information about all persons who worked at any of the Respondent's locations nationwide from September 1, 2019 to November 24, 2024 and their layoff and recall status; all documents and communications regarding all processes and selection criteria for layoffs and/or Reduction(s) in Force; and all information and documents related to and describing the ranking system and key performance indicators used to inform and/or determine all Reductions in Force from September 1, 2019 to November 24, 2021. The EEOC contends the Respondent provided some information, but not: (1) a report and transcription of company-wide employee data setting forth various identifying information regarding persons who were employed by Respondent for the time period September 1, 2019 to February 15, 2022 and information concerning their RIF and recall status; (2) categories of relevant employee information that were previously requested but that Respondent

refused to produce: middle initials; residence address information; job titles and work locations at time of hire; identification of whether the person was laid off between September 1, 2019 to February 15, 2022; any numerical or ranking assigned to the person for purposes of layoff or call back from layoff; job title at time of termination resulting from failure to call back from layoff; work location at time of termination resulting from failure to call back from layoff; job title at time of termination for any reason other than failure to call back from layoff (if applicable); work location at time of termination for any reason other than failure to call back from layoff (if applicable); social security number; present job title (if applicable); and present work location (if applicable); (3) communications and instructions provided to Respondent employees about all processes and selection criteria for layoffs and/or reductions in force and for recalling employees from layoffs and/or reductions in force that Respondent has not already produced; and (4) information and documents relating to and describing the ranking system and key performance indicators used to inform and/or determine all reduction(s) in force.

The EEOC alleges that as of the time of filing, the Respondent had not responded to the subpoena. On October 2, 2023, the court entered an order directing the Respondent to comply with the EEOC's subpoena.

Filing Date	State	Court Name / Case Number / Judge	Defendant(s)	Individual Charging Party or Systemic Investigation	Result
7/26/2023	FL	U.S. District Court for the Southern District of Florida No. 1:23-cv-22788 Hon. Rodolfo A. Ruiz, II	Advance Auto Parts, Inc.	Individual Charging Parties	The parties reached a voluntary settlement.

Commentary:

EEOC is investigating three charges of discrimination against Respondents in Florida and is seeking information and data relevant to those charges. Underlying the subpoenas and investigation are three active charges against Respondents alleging discrimination on the basis of race, sex, and/or national origin filed in 2020 and 2021.

Charging Party Kimberly Brown alleged that Respondents failed to promote her to a "Full Time Parts Pro position" and that she was subject to disciplinary action that amounted to disparate treatment and retaliation that resulted in her constructive discharge. Charging Party Jessica Warens, an assistant general manager, alleged that that Respondents had discriminated against her on the basis of her sex and national origin. She alleges that a Sales Associate told her she "did not have a place as a female with this company," and that Respondent transferred her to a location one hour from her house after she complained. She further alleges that she faced discrimination and/or retaliation from the company's corporate human resource department, a store manager and two different district managers in Florida. Charging Party Warens also alleges that another female faced similar discrimination. The EEOC received another charge against the company from Charging Party Millye Ramirez, alleging that Respondents had discriminated against her on the basis of her sex and national origin. Charging Party Ramirez, a store manager, alleged that Respondents' district manager subjected her to disparate treatment and ultimately terminated her employment because she is a Puerto Rican female.

EEOC sent Respondents three identical Requests for Information seeking ancestry and demographic information of employees, applicants, and managers. EEOC claimed the Respondents' response omitted much of the documents and information sought, and issued subpoenas seeking the information.

Respondents responded to portions of the subpoenas, and produced an electronic database of the name, store, job title, and date of promotion, of persons hired or promoted into supervisor or management positions from January 1, 2019 to the present, across eight counties. Respondents refused, however, to produce the following items that remain in dispute (1) Data Regarding Individuals Selected to Supervisory and Management Positions. For each person hired or promoted in the electronic database: (i) the name(s) and title(s) of person who made the selection; and (ii) information on each person who applied for the position, including but not limited to: address, phone number, email address, date of birth, sex and race, if known. (2) Relevant Job Descriptions. For each position at issue, copies of position descriptions, career descriptions, or other documents that state the minimum qualifications for the positions. (3) Application Data. For each position at issue, copies of all applications, resumes, and any other documents submitted by the applicant for the position.

Additionally, Respondent withheld all data responsive to requests related to district managers and supervisory "Pro" positions (*e.g.*, Commercial Parts Pro, Retail Parts Pro, etc.) from its responses to requests 2 and 3. The EEOC then sought the instant order to show cause why the subpoena should not be enforced.

On September 29, 2023, the court administratively closed the matter after the parties came to an agreement regarding production.

Filing Date	State	Court Name / Case Number / Judge	Defendant(s)	Individual Charging Party or Systemic Investigation	Result
9/15/2023	FL	U.S. District Court for the Southern District of Florida No. 1:23-cv-23547 Magistrate Judge Eduardo I. Sanchez	Michael Sinclair, M.D.P.A. and Epilution Med Spa, LLC	Individual Charging Party	Pending

Commentary:

EEOC issued two subpoenas seeking information as part of its investigation into allegations of sex discrimination / harassment and retaliation. The Charging Party alleges she was subjected to continuous sexual harassment by Respondents' owner, Dr. Sinclair. The subpoenas direct Respondents to (1) Produce any documents of policies related to sexual harassment, hostile work environment, and retaliation from August 1, 2019 - present, including any reporting procedures. (2) Produce all documents, including e-mails, text messages, and other communication, formal or informal regarding any allegation made in the charge of discrimination submitted by Charging Party. (3) Produce all documents, to include e-mails, text messages, or any other communication, formal or informal, related to any complaints of sexual harassment, hostile work environment, and retaliation that Charging Party made to Respondent. (4) Produce Charging Party's complete personnel file, including but not limited to all terms of compensation, bonuses, sick leave or other time off, health insurance, and any disciplinary history or commendation. (5) Produce all documents related to complaint(s) of sexual harassment, hostile work environment, and retaliation involving Michael J. Sinclair, M.D., whether made formally or informally, from August 1, 2019 to present. (6) Produce all documents related to any inquiry and/or complaint from the Department of Health from August 1, 2019 to present. (7) Produce any documents listing all persons employed by Respondent and who worked under Michael J. Sinclair, M.D. and/or with Respondent at any time from August 1, 2019 to present, to include their: a. Full name; b. Position; c. Date employment started; d. Date employment ended (if applicable); e. Sex; f. Last known address; g. Last known phone number; and h. Last known e-mail address. If such document(s) do not exist, compile this information and produce in a spreadsheet. (8) Produce a complete organizational chart of the organization and organization's leadership, and identify each person's title, as well as their role in the organization's leadership structure.

The EEOC alleges the Respondent produced incomplete information in response. EEOC alleged Respondents' production was incomplete because it did not fully respond to Subpoena Request Nos. 1 through 8. For example, for Request Nos. 5 and 6, Respondents refused to respond whatsoever, generally objecting that the requests were overly broad, vague, and not reasonably calculated to lead to discovery, and stating that it produced responsive documents. No such documents were produced. Likewise, as to Request Nos. 2-4 and 8, Respondents failed to produce any responsive documents. As to Request No. 7, which seeks employee rosters with contact information and dates of employment, Respondents' production was incomplete because it did not produce any documents for Respondent Epilution and, as to Respondent Sinclair, it produced Forms RT-6 from 2020 and 2021, which did not contain employee contact information or dates of employment, as requested. Finally, as to Request 1, which seeks Respondents' policies on sexual harassment, hostile work environment, and retaliation, including reporting procedures, from August 1, 2019 through present, Respondents' production was incomplete as it consisted only of an Employee Handbook in WORD and apparently in draft form for Respondent Sinclair, dated October 2019. No responsive documents were produced as to Respondent Epilution for Request 1.

EEOC claims the Respondents have waived all objections to enforcement of the subpoenas. In November, the court referred the application for an order to show cause to the magistrate judge for his report and recommendations.

Filing Date	State	Court Name / Case Number / Judge	Defendant(s)	Individual Charging Party or Systemic Investigation	Result
9/28/2023	AL	U.S. District Court for the Northern District of Alabama No. 2:23mc1292 Hon. Madeline Hughes Haikala	Annett Holdings, Inc.	Individual Charging Party	Pending

Commentary:

EEOC is investing a claim that a job applicant was not hired for a truck driver position because of his disability. As part of its investigation, the EEOC issued requests for information from the Respondent, but the EEOC found the responses deficient, and the Respondent refused to produce two witnesses for interviews. The EEOC then issued three subpoenas on Respondent, seeking information about persons who applied for over-the-road truck driver positions from October 18, 2020 through the present, and testimony from the two sought witnesses.

The Respondent filed a petition to revoke or modify the subpoena; the EEOC issued a determinization denying the petition. To date, the EEOC has not received a response from the subpoenas. The EEOC is therefore seeking an order to show cause.

Appendix D – FY 2023 Select Summary Judgment Decisions by Claim Type(s)

Statute and Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motivation and Result	General Issues
ADEA Age Discrimination	Surfside Realty Co.	U.S. District Court for the District of South Carolina No. 4:21-cv-0139	2023 U.S. Dist. LEXIS 56476 (D.S.C. Mar. 30, 2023)	EEOC's Motion for Summary Judgment **Result:** Pro-Employer The court accepted the magistrate's report and recommendations to grant summary judgment to the employer.	Should the court reject the magistrate's report and recommendation that summary judgment be granted to the employer, as the EEOC failed to establish a prima facie case for age discrimination, since it could not show the charging party was performing the job to the employer's expectations?

Commentary:

The EEOC filed suit on behalf of an 81-year-old employee, who claims she was fired on account of her age and replaced with a worker 30 years her junior. The magistrate issued a report and recommendation granting the employer's motion for summary judgment. The EEOC objected to the report.

To be actionable, objections to a report and recommendation must be specific. Failure to file specific objections constitutes a waiver of a party's right to further judicial review, including appellate review, if the recommendation is accepted by the district judge. In this case, the court distilled the lengthy objections to three specific ones: (1) A supervisory employee claimed the company would adopt a mandatory retirement age, although one was never adopted, and this email thread was created months before the charging party was fired. Nonetheless, the EEOC claims this alleged threat combined with his repeated inquiries about the charging party's retirement plans are sufficient facts to show discriminatory intent to survive summary judgment under the ADEA; (2) Plaintiff has satisfied the "legitimate expectations" prong of the prima facie case, and has provided sufficient evidence to discredit all alleged non-discriminatory motivations for the charging party's discharge alleged by defendant; and (3) the Report relies on inadmissible hearsay to make its recommendation that summary judgment should be granted. The court disagreed.

Plaintiff takes exception to the Report's reference to the comment about the intent to adopt a mandatory retirement age as a "stray remark" because Plaintiff believes this finding disregards the analysis recently utilized by the Fourth Circuit in *Cole v. Family Dollar Stores of Md.*, Inc., 811 Fed. Appx. 168, 175 (4th Cir. 2020). The court disagreed, stating the Report simply follows well-established precedent in the circuit that "an employee cannot prevail on an age discrimination claim by showing that age was one of multiple motives for an employer's decision; the employee must prove that the employer would not have fired her in the absence of age discrimination."

In this case, the Report found that Plaintiff could not establish a prima facie case of age discrimination because Plaintiff could not establish that the charging party was performing in accordance with defendant's legitimate expectations at the time of her termination. She claimed she was held to a higher standard than what is required. However, case law is clear that a plaintiff must show by a preponderance of the evidence that they met the employer's legitimate job expectations. In determining whether an employee has met an employer's legitimate job expectations, it is the employer's perception that is relevant, not the employee's self-assessment. Evidence showed the charging party was coming in late and leaving early, played favorites, failed to return calls she did not want to deal with, failed to charge the appropriate fees, and added work burdens to another employee. The court therefore adopted the magistrate's report and recommendations and granted summary judgment to the defendant.

Statute and Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motivation and Result	General Issues
ADA Disability Discrimination Failure to Accommodate	Allstate Beverage Co., LLC	U.S. District Court for the Middle District of Alabama No. 2:19-CV-657	2022 U.S. Dist. LEXIS 188905; 2022 WL 10197690 (M.D. Ala. Oct. 17, 2022)	Defendant's Motion for Summary Judgment **Result:** Mixed The court denied the defendant's motion for summary judgment as to the disability discrimination claim but granted the motion on the failure-to-accommodate claim.	Is a 40-lb lifting restricting an essential function of a warehouse worker's job? Did the employer fail to accommodate the worker when it refused to let him work with medical restrictions? Does the charging party's SSDI filing constitute grounds for judicial estoppel? Did the charging party fail to mitigate his damages?

Commentary:

The EEOC alleged the defendant beverage distributor discriminated against the charging party by failing to allow him to work with medical restrictions at the end of April 2018, and then terminating his employment after he had exhausted his FMLA leave in June. The defendant sought summary judgment as to both the discrimination and failure-to-accommodate claims. The employer also brought a motion for summary judgment to deny the EEOC's requested relief for back and front pay, asserting the failure-to-mitigate affirmative defense.

The EEOC claimed that the charging party suffered a pulmonary embolism, supraventricular tachycardia and deep vein thrombosis, which together substantially limited his circulatory and respiratory functions. The charging party sought to return to work with a lifting restriction (no more than 40 lbs), and assistance with pushing fully loaded and unloaded carts. The employer averred, however, that such activities were essential functions of employment.

The employer first argued that the charging party was neither disabled nor had a record of a disability when his physician cleared him to work with restrictions. The doctor's note upon which the EEOC relied stated the charging party was impacted by these conditions in February and March 2018; the alleged failure to accommodate took place at the end of April 2018, and termination in June. The court noted, "[e]ven under the broad construction of the definition of an ADA disability, the evidence cannot raise a genuine dispute of material fact that [charging party] suffered from physical impairments that substantially limited the major life activities of circulatory and respiratory functions as of May 2, 2018. The EEOC thus has not shown that [charging party] suffered an actual disability under the ADA."

Nor could the EEOC invoke a "regarded as" disability stance in a failure-to-accommodate claim, because an employee cannot receive a reasonable accommodate when an employer merely perceives him as being disabled. The court therefore granted summary judgment on this failure-to-accommodate claim, as the EEOC could not show the charging party was disabled. [Note: The court subsequently granted the employer's motion for reconsideration on this issue, which was granted. See next entry.]

As for the wrongful termination claims, however, the court determined genuine issues of material fact remain as to whether the employer wrongfully terminated the charging party. The court noted that unlike disability accommodation claims, wrongful termination claims under the ADA can be based on an employer's perception that an employee has a disability. In this case, the court found that the employer's actions, construed in a light most favorable to the EEOC, can lead a reasonable factfinder to believe that the company perceived the charging party as having a physical impairment that prevented him from performing his job.

Whether the charging party was a "qualified individual" is also a determination for trial. Although the employer argued lifting was an essential function of the job, the EEOC produced various position descriptions, none of which listed such activities in the "responsibilities" section. The charging party also testified that employees were encouraged to seek assistance in lifting/moving heavy objects. Moreover, the court disagreed with the employer's contention that the charging party could not be considered a qualified individual with a disability because he had applied for SSDI benefits. Such a judicial estoppel argument failed, according to the court, as judicial estoppel is "an equitable doctrine designed to prevent the perversion of the judicial process and protect its integrity by prohibiting parties from deliberately changing positions according to the exigencies of the moment."

Both parties cited to *Cleveland v. Policy Management System*, 526 U.S. 795, 119 S. Ct. 1597, 143 L. Ed. 2d 966 (1999), in which the Supreme Court held that "pursuit, and receipt, of SSDI benefits does not automatically estop the recipient from pursuing ADA claims." 526 U.S. at 798. In fact, there are "many situations in which an SSDI claim and an ADA claim can comfortably exist side by side." Id. at 803. For instance, where "an individual has merely applied for, but has not been awarded, SSDI benefits, any inconsistency in the theory of the claims is the kind of inconsistency that our legal system, which allows for liberal rules of pleading, normally tolerates." The court noted that "on the summary judgment record, [charging party's] claim of total disability in his SSDI application contradicts the EEOC's claim in this lawsuit that [he] is a qualified individual under the ADA." That said, the second consideration is whether the EEOC's lawsuit "makes a mockery" of the judicial system, which is a "totality of the circumstances" analysis. In this case, the charging party did not convince the SSA that he was disabled, so was denied benefits. Second, the charging party tried to explain inconsistencies and misinterpretations made on the SSDI form. Whether his explanations are credible are a matter for the jury, so the court determined that judicial estoppel is not warranted at this point.

Finally, regarding the damages mitigation argument, the employer claimed the charging party did not use reasonable diligence to find substantially similar employment, and therefore failed to mitigate his damages. The EEOC, however, demonstrated the charging party did apply for jobs, so there remains question of fact more appropriate for a jury.

Statute and Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motivation and Result	General Issues
ADA Disability Discrimination Failure to Accommodate	Army Sustainment, LLC	U.S. District Court for the Middle District of Alabama No. 2:19-CV-657	2023 U.S. Dist. LEXIS 4852 (M.D. Ala. Jan. 11, 2023)	Defendant's Motion for Reconsideration **Result:** Pro-Employer The court granted the defendant's motion to reconsider the denial of summary judgment as to the EEOC's "regarded-as" claim.	Did the EEOC fail to property plead a regarded-as disabled claim, thereby precluding the EEOC from claiming the defendant violated the ADA when it terminated his employment?

Commentary:

As noted above, the EEOC filed suit alleging defendant discriminated against the charging party, who had a medical condition stemming from a pulmonary embolism that purportedly prevented him from lifting more than 40 pounds, by failing to accommodate his disability and wrongfully terminating his employment on account of his disability. The defendant filed a motion for summary judgment, which was granted in October 2022 as to the EEOC's ADA accommodation and termination claims, as it was not shown the charging party was disabled or had a record of impairment. The court noted that the ADA's reasonable accommodation requirements apply only for actual disabilities. In its response to the defendant's motion for summary judgment, the EEOC alleged also that the charging party was fired as the employer regarded him as impaired. Summary judgment was initially denied on this regarded-as claim. In the instant matter, the defendant moved the court to reconsider as to the ruling on the regarded-as claim as being untimely. The court agreed, granted the defendant's motion, and canceled the trial.

Specifically, the defendant alleged the EEOC improperly tried to amend its complaint by adding the "regarded-as" claim in response to the summary judgment motion. The court agreed, finding the EEOC failed to plead an ADA regarded-as claim at the outset.

The ADA defines a disability in three ways: (1) a physical or mental impairment that substantially limits one or more of the major life activities of an individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment. 42 U.S.C. § 12102(1)(A)-(C). Of note, an employer does not owe a reasonable accommodation to an individual claiming ADA protection only under the regarded-as definition.

The court cited to an unpublished 11th Circuit decision, *Andrews v. City of Hartford*, 700 F. App'x 924 (11th Cir. 2017) (per curiam), in which the court addressed what a complaint needs to allege to plead an ADA regarded-as claim. "To state a 'regarded as' disability claim under the ADA, a plaintiff must allege, among other things, that he was regarded as disabled, he was a qualified individual, and that a covered entity discriminated against him [on the basis of] his disability."

The court finds that, without plausible allegations identifying under which definition of disability the plaintiff is proceeding, a defendant "will not have fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Swierkiewicz v. Sorema*, 534 U.S. 506, 512 (2002). Defendant did not have fair notice of a regarded-as claim. The court noted that "[a]t this point, it would be too late to seek an amendment, and it would have been too late at any point after the close of discovery."

Statute and Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motivation and Result	General Issues
ADA	Army Sustainment, LLC	U.S. District Court for the Middle District of Alabama No. 1:20-CV-234	2023 U.S. Dist. LEXIS 171406 (M.D. Ala. Sept. 26, 2023)	Defendant's Motion for Summary Judgment **Result:** Mixed, but mostly pro-EEOC The court granted the defendant's motion for summary judgment on some individual charging party claims on the grounds that their claims are time-barred, but denied the majority of the defendant's other claims.	Was the EEOC time-barred from bringing ADA claims on behalf of certain non-charging parties? As for substantive issues, should the court grant the defendant's motions for summary judgment on the EEOC's claims of ADA discrimination, failure-to-accommodate, imposing an impermissible screening standard, and interference?

Commentary:

The EEOC brought suit on behalf of a group of former employees, alleging the defendant violated the ADA by prohibiting employees who work in safety-sensitive positions from continuing to use certain prescription medications. The defendant maintained an alcohol and drug-free workplace policy that tested employees in safety-sensitive positions for a variety of drugs. Under an updated version of the policy, employees were required to report medications that could impact their ability to safely perform their job duties. In February 2016, defendant made additional changes to its policy, which are the subject of this lawsuit. First, prior to 2016, defendant employed a "6-to-8 Hour Rule" for employees in safety-sensitive positions who were legally prescribed 9-Panel medications. Under this rule, defendant's in-house occupational health department could independently clear an employee with a prescription 9-Panel medication to return to work so long as the employee agreed in writing that they would not take their medication within 6 to 8 hours before their shift. Employees who submitted to this written agreement were rarely required to be cleared for work by outside medical professionals. In February 2016, defendant eliminated the 6-to-8 Hour Rule and instead required employees to undergo a medical evaluation with an outside Occupational Medical Provider (OMP) to determine whether an employee's prescription medication was appropriate for use during work hours.

Per the second change, as part of the medical evaluation process, employees prescribed medications "that may affect [their] ability to safely perform their job duties"—including 9-Panel medications—were sent to an OMP to discuss alternative medications "for any medication deemed to be a risk to the employee and/or the workplace." This process included the defendant directing the OMPs to send a "Safety Sensitive Letter" to the employee's prescribing doctor to confirm whether the employee was stable on their safety-sensitive medication or whether alternative medications were available that were as effective. If the prescribing doctor indicated that no alternative medications were available, the OMPs had to determine whether the employee could safely work while taking the medication in question. The policy additionally provided that "[e] mployees determined unable to work within the parameters of the Alcohol and Drug Free Workplace Policy will be deemed disabled and therefore eligible to apply for [short-term disability] benefits. . ."

Charging parties alleged the revised prescription policy discriminated against them on the basis of their disability. One took medication for surgery. The other was diagnosed with osteoarthritis and suffered from chronic pain and ADHD. Under the change in the defendant's policy, they were no longer permitted to work while on their medications. As a result of its investigation, the EEOC found reasonable cause to conclude that defendant violated the ADA by not allowing the charging parties and a class of individuals "to continue to work or return to work while taking their disability-related medications" that were prohibited under the employer's alcohol and drug policy, and by failing to engage in the interactive process. The EEOC also claimed the defendant's alcohol and drug policy constituted a blanket policy using impermissible qualification standards that "have the effect of discrimination on the basis of disability" in violation of the ADA. Specifically, under the revised policy, approximately 72 employees were affected. The EEOC brought suit on behalf of 17.

The defendant first alleged the EEOC was time-barred from bringing claims on behalf of eight individuals, as their claims arose outside the 180-day charging period under §706. The EEOC claims that it is timely because this section does not limit the temporal scope of claims the EEOC may pursue on behalf of a group of aggrieved individuals, and that the continuing violation doctrine extends this charging period.

Regarding the temporal scope, *Occidental Life Ins. Co. of Cal. v. EEOC*, 432 U.S. 355 (1977), and *General Telephone Co. of Northwest v. EEOC*, 446 U.S. 318 (1980) establish two principles: (1) the EEOC is not required to bring an enforcement action within any maximum period of time, and (2) the EEOC is not limited to pursuing the type of alleged unlawful employment actions identified by the charge. The court, however, noted that no cases cited address the specific question at issue – *i.e.*, whether the temporal scope of an EEOC enforcement action that also seeks monetary damages is limited to claims considered "timely" under §706(e)(1). In this case, the court joined the courts that have concluded that §706 does not permit the EEOC to pursue otherwise time-bared claims for unlawful employment discrimination. The consequence of finding otherwise "would permit the EEOC to destroy all principles of repose and force employers to defend against zombie-like claims from the distant past." Moreover, the court found that the EEOC's argument that it may pursue any claim arising out of a reasonable investigation of a timely-filed charge is inconsistent with the plain language of §706 and by the 11th Circuit's interpretation of this section in past precedent.

As for the continuing violation doctrine, the court found it did not apply. The defendant's failure to grant reasonable accommodations to those impacted by its policy and placing employees on unpaid leave until medically cleared were discrete actions. Therefore, the continuing violation doctrine does not extend the actionable time period here beyond the charging period. Therefore, claims filed more than 180 days before the charging party's filed claim are time-barred.

As for the substantive arguments, the court addressed the following claims: a general ADA discrimination claim under §12112(a), a failure-to-accommodate claim under §12112(b)(5)(A), a claim for an impermissible screening standard under §§12112(b)(3) and 12112(b)(6), and an interference claim under §12203(b).

The court found that the EEOC presented sufficient evidence to establish that four particular parties suffered actionable adverse employment actions when defendant placed them on forced, unpaid leave. As to the other claimants, the court found the EEOC did not provide sufficient evidence establishing that forbidding employees from taking certain prescription medications pursuant to a company policy constituted a serious and material change to the terms, conditions, or privileges of their employment such that they suffered an adverse employment action. Thus, the court granted summary judgment to the defendant as to the claims involving the latter employees.

The court agreed with the EEOC, however, that it presented sufficient evidence to show that the individuals were "regarded" as disabled because the employer perceived them as having impairments that limited their ability to work and placing them on unpaid leave. The burden then shifted to the employer to provide a legitimate, nondiscriminatory reason for its actions. The court denied the defendant's motion as to the remaining claimants, as it had not sufficiently rebutted the presumption of discrimination at this stage.

As for count II, failure to accommodate, the court granted the employer's motion as to the remaining claimants, as the EEOC did not show any accommodations were requested and/or reasonable. And the earlier claimants did not suffer any adverse action as a result of any failure to accommodate.

As to count III, the screening out claim, the EEOC alleges that the defendant implemented an impermissible qualification standard that screens out or tends to screen out qualified individuals with disabilities. Section 12112(b)(3) prohibits "utilizing standards, criteria, or methods of administration" that (1) "have the effect of discrimination on the basis of disability;" or (2) "perpetuate the discrimination of others who are subject to common administrative control." 42 U.S.C. §12112(b)(3).

The parties dispute whether this is an adverse treatment or impact claim. The court determined that the EEOC appeared to bring a disparate impact claim, but noted it did not present any statistical evidence that the drug policy had a disparate impact on disabled individuals. To establish a prima facie case of disparate impact, a plaintiff must provide comparative evidence showing that a policy has a disparate impact on the disabled. Because the EEOC failed to provide sufficient evidence that the policy impermissibly screened out the claimants, the court granted summary judgment in the defendant's favor as to count III.

As to the final count IV, the EEOC claimed the defendant interfered against a class of subcontractor employees on the basis of disability. Under the anti-interference provision of the ADA: "It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter." While the 11th Circuit has not explicitly analyzed an ADA interference claim, other courts in the circuit have shown that a plaintiff needs to show (1) that it exercised a protected right; (2) a defendant interfered with, or coerced, intimidated, or threatened the plaintiff on account of the exercise of that right; and (3) the defendant did so because of discriminatory animus. In this case, regardless of whatever standard is applied, the defendant did not move for summary judgment on this claim. Therefore, summary judgment was not granted.

Statute and Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motivation and Result	General Issues
ADA Disability Accommodation	Citizens Bank, N.A.	U.S. District Court for the District of Rhode Island No. 19-362	2023 U.S. Dist. LEXIS 40491 (D.R.I. Mar. 10, 2023)	EEOC's Motion for Partial Summary Judgment **Result:** Pro-Employer The magistrate judge issued a report and recommendation denying the EEOC's motion.	Should the court grant the EEOC's motion for partial summary judgment on the issues of (a) whether the charging party had a disabling condition; and (b) whether reassignment to a vacant position was a reasonable accommodation?

Commentary:

The EEOC filed suit on behalf of an "on-line banking service advisor," alleging his customer service job led him to become disabled due to anxiety, which prevented him from performing an essential job function – *i.e.*, dealing with customers on the phone – and that the defendant violated the ADA by refusing a reasonable accommodation – job reassignment to position for which he was qualified that did not involve customers, resulting in his constructive discharge. The defendant refuted the claim that charging party was disabled, and that even if he was, it offered him the reasonable accommodation of remaining on leave to continue treatment and expressed a willingness to continue accommodation discussions when the charging party resigned.

Before the court were three motions, including the EEOC's motion for partial summary judgment. Specifically, the EEOC asked the court to enter judgment in its favor on two issues: (1) the charging party suffered from disabling anxiety; and (2) that the charging party could have been readily reassigned to a vacant position as a reasonable accommodation.

The defendant presented evidence that would allow a fact-finder to conclude the charging party's anxiety was not sufficiently serious, and that the goal for a reassignment was other than to deal with a disability. This included Facebook messages to a coworker downplaying his condition and post-resignation evidence that his anxiety did not limit his ability to work, particularly work involving customer interaction. Moreover, case law indicates anxiety is not per se a disability, and should be addressed on a case-by-case basis. The magistrate therefore recommended that the court should deny the EEOC's motion for summary judgment to the extent that it seeks a determination as a matter of law that the charging party suffered from ADA-disabling anxiety that adversely impacted his ability to speak with customers on the telephone.

Second, the magistrate recommended that the court deny the EEOC's motion for judgment to the extent it seeks a determination as a matter of law that there were vacant positions to which the charging party could have been reassigned as a reasonable accommodation. This determination is for the finder of fact.

Statute and Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motivation and Result	General Issues
ADA Disability Accommodation	Citizens Bank, N.A.	U.S. District Court for the District of Rhode Island No. 19-362	2023 U.S. Dist. LEXIS 40489 (D.R.I. Mar. 10, 2023)	Defendant's Motion for Summary Judgment **Result:** Pro-EEOC The magistrate judge issued a report and recommendation denying the defendant's motion.	Should the court grant the defendant's motion for summary judgment as the defendant contends the failure to accommodate claim fails, as it offered an accommodation the charging party's medical provider suggested, but the charging party wanted an alternative accommodation, and that the charging party failed to further engage in the interactive process, and instead resigned?

Commentary:

As discussed above, the EEOC filed suit on behalf of an "on-line banking service advisor," alleging his customer service job led him to become disabled due to anxiety, which prevented him from performing an essential job function – *i.e.*, dealing with customers on the phone – and that the defendant violated the ADA by refusing a reasonable accommodation – job reassignment to position for which he was qualified that did not involve customers, resulting in his constructive discharge. The defendant refuted the claim that charging party was disabled, and that even if he was, it offered him the reasonable accommodation of remaining on leave to continue treatment and expressed a willingness to continue accommodation discussions when the charging party resigned.

Before the court are three motions, including the employer's motion for partial summary judgment. The defendant claimed it offered the charging party a reasonable accommodation of remaining on leave to continue mental health treatment, the sufficiency of which is presumed because it was one of two alternative accommodations proposed by his mental health provider, and that it expressed its willingness to resume the interactive process once the charging party was able to return to work; (2) instead of continuing to engage in the interactive process, the charging party abruptly resigned; and (3) in light of the offer of the alternative reasonable accommodation of a leave to continue mental health treatment, the defendant did not constructively discharge the charging party in that his working conditions did not become onerous, abusive or unpleasant as to compel him to resign. The EEOC countered that there remains sufficient issues of fact governing each of the above propositions.

The defendant argued it is entitled to judgment as a matter of law because the undisputed facts establish that it did not refuse reasonable accommodation but rather that it offered the charging party the reasonable accommodation of remaining on leave to continue mental health treatment. It contends that this accommodation is presumptively reasonable because it was one of the two alternative accommodations proposed by the charging party's mental health provider. The magistrate, however, determined that the EEOC set forth sufficient evidence to allow a fact-finder to conclude that the charging party was never offered leave as a reasonable accommodation, but rather that he could remain on the existing FMLA leave that had under two weeks until its expiration, and that the offer to further engage in the interactive process was contingent on a medical clearance to return to work without limitations. There also remains a determination of fact as to whether the medical provider indeed suggested leave as an alternative accommodation, and whether such leave would have been sufficient. Finally, whether the charging party was constructively discharged remains in dispute, so these matters are for a finder of fact, not summary judgment. The magistrate therefore recommended that the defendant's motion be denied.

Statute and Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motivation and Result	General Issues
ADA Disability Discrimination ADA Interference Retaliation	Geisinger Health	U.S. District Court for the Eastern District of Pennsylvania No. 21-4294-KSM	2022 U.S. Dist. LEXIS 188749 (E.D. Pa. Oct. 17, 2022)	Defendant's Motion to Dismiss **Result:** Mixed The court granted the defendant's motion to dismiss the discrimination and retaliation claims, as the EEOC did not provide sufficient evidence of the charging party's disability. For this reason, the class claims were similarly dismissed. The court also dismissed claims against the defendant's subsidiaries, as they were not a single employer. The court allowed the EEOC's ADA interference claim to stand.	Did the employer discriminate against the charging party, who sought to return to work following FMLA leave taken for surgery, by requiring her to reapply for positions and then not hiring her? Was the individual considered disabled under the ADA? Did the employer interfere with her ability to obtain employment upon returning from leave? Did the defendant's subsidiaries constitute a single employer with the defendant? Could the EEOC maintain an ADA class action against the employer?

Commentary:

The EEOC brought the instant lawsuit against the hospital and several of its subsidiaries on behalf of the charging party and a class of similarly situated individuals. Specifically, the EEOC claims the hospital failed to accommodate the charging party and others who took leave for medical reasons by requiring them to re-apply upon returning to work, and requiring them to be the most qualified for any given position, and that the employer retaliated against the charging party and interfered with her and others' ADA rights.

The charging party in this case had taken FMLA leave for rotator cuff surgery and was required to reapply for her position when she sought to return to work. The health care employer allegedly kept records of employees who requested reasonable accommodations for disabilities, which were negatively tagged and accessible to those responsible for hiring decisions.

In deciding a motion to dismiss under Rule 12(b)(6), the court must determine whether the complaint contains "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). The court cited *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997), for the proposition that "a district court ruling on a motion to dismiss may not consider matters extraneous to the pleadings." There is an exception to this rule, however. If a document is integral to or explicitly relied upon in the complaint, it may be considered without converting the motion to dismiss into one for summary judgment. In this case, the court reviewed the EEOC's Letter of Determination, Amended Letter of Determination, and the defendant's "most qualified applicant" policy.

The court found that the EEOC had sufficiently pleaded some, but not all, of its administrative prerequisites. First, regarding whether the subsidiaries are a single employer with the charging party's employer, the court notes that "separate entities constitute a single employer if one of the following three circumstances is met: (1) where the company splits itself into entities with fewer than 15 employees intending to evade Title VIII's reach, (2) where a parent company has directed the subsidiary's discriminatory act of which the plaintiff is complaining; and (3) where "two or more entities' affairs are so interconnected that they collectively caused the alleged discriminatory practice." 2022 U.S. Dist. LEXIS 188749 at *15, citing *Nesbit v. Gears Unlimited, Inc.*, 347 F.3d 72, 85-86 (3d Cir. 2003). The court found the EEOC was unable to sufficiently plead these prongs. Therefore, the charges were dismissed as to the four subsidiary defendants.

The court also found that the EEOC failed to plead that the charging party had an actual disability/was substantially limited in the performance of essential life functions at the time she was released to work and/or terminated from employment. Nor did it plead she had a record of any impairment. Therefore, the court dismissed the disability discrimination and failure to accommodate claims.

Regarding the ADA retaliation claim, the court noted that to state a prima facie case of ADA retaliation, a plaintiff must plead sufficient factual allegations to raise a reasonable expectation that discovery will reveal evidence that (1) they engaged in protected activity; (2) the employer took an adverse employment action against him; and (3) there was a causal connection between the protected activity and the adverse employment action. See *Connelly v. Lane Constr. Corp.*, 809 F.3d 780, 789 (3d Cir. 2016). The defendant challenged prongs 1 and 3. Because the EEOC alleges, albeit in a conclusory fashion, that the charging party requested an accommodation, the court found prong 1 was met. That said, the court found the EEOC did not plead a causal connection between the request and the alleged retaliatory action. Such a connection can typically be made by showing either (1) an unusually suggestive temporal proximity between the protected activity and the allegedly retaliatory action, or (2) a pattern of antagonism coupled with timing to establish a causal link. In this case, the court noted the EEOC did not identify what the adverse action is, but noted the termination and denial of a request for accommodation are adverse actions. However, the time between the charging party's request for additional medical leave in December 2018 and seeking reassignment in the first quarter of 2019, and the alleged failure to accommodate or her termination at the end of March 2019, is not suggestive of retaliation. Therefore, because the EEOC failed to plead causation, the court granted the defendant's motion to dismiss the ADA retaliation claim.

The court found that the EEOC's interference claim, however, stands. The court first explained that 42 U.S.C. § 12203(b) renders it "unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed . . . any right granted or protected by this chapter." The court then noted that "there is scant case law on ADA interference claims. The Third Circuit has not ruled on what a plaintiff must plead to state an ADA interference claim. . . . As one district court in this Circuit has noted, 'cases from other Circuits' have adopted the test for anti-interference claims under the Fair Housing Act [("FHA")] in determining whether a plaintiff has stated an ADA interference claim. In turn, the Third Circuit has held that under the FHA, courts should give the word 'interference' its dictionary definition: 'the act of meddling in or hampering an activity or process.'" In this case, the EEOC stated the employer created and maintained records that associate negative tags or references, such as "litigation hold," with those who have engaged in protected activity or requested a reasonable accommodation. The EEOC averred that these files are available to decisionmakers. This suffices, the court found.

The class claim failed, however, because the EEOC could not assert the charging party was a qualified individual with a disability.

The court also found the 300-day charge-filing rule applies to the EEOC, and the continuing violation doctrine did not apply.

Finally, the court denied the defendant's motion to dismiss on the grounds its most qualified applicant policy is lawful. The court found this issue premature at the motion to dismiss stage. The case authority the defendant used to support its motion on this point involved motions for summary judgment, not motions to dismiss.

Statute and Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motivation and Result	General Issues
ADA Disability Discrimination	Hospital Housekeeping Services, LLC	U.S. District Court for the Western District of Arkansas No. 2:21-CV-2134	2023 U.S. Dist. LEXIS 39812 (W.D. Ark. Mar. 9, 2023)	Cross Motions for Summary Judgment **Result:** Pro-EEOC The court granted the EEOC's motion for partial summary in part, and denied the defendant's motion for summary judgment in part, as to the defendant's laches defense. The court reserved ruling on the remainder of the defendant's motion for summary judgment until after the hearing.	Were the EEOC's conciliation efforts sufficient? Does the doctrine of laches apply given the 5 to 6-year delay between the filing of the first charge of discrimination the EEOC's filing of the lawsuit?

Commentary:

The defendant employs an Essential Function Test (EFT) to evaluate its employees' performance of their essential job tasks. The defendant provides housekeeping services at hospitals and employs housekeepers and floor technicians to clean and sanitize. Both positions' job descriptions list identical functions. The defendant uses the EFT to determine whether the employees can safely do their jobs, as it has had to address several injuries on the jobsite. If employees fail the test, their employment is generally terminated.

Several employees filed charges, alleging the test tends to screen out those with disabilities. The EEOC filed suit on behalf of five former employees who did not file charges. The EEOC sought partial summary judgment on the defendant's affirmative defense that the EEOC failed to conciliate. The defendant, in turn, moved for summary judgment on the EEOC's ADA claims.

With respect to the failure to conciliate allegation, the defendant alleged the EEOC did not conciliate in good faith. Noting *Mach Mining*, the court referenced its "narrow" and "barebones" review of the EEOC's obligation. The court also noted that the Supreme Court has rejected any "good faith" conciliation standard. Instead, the EEOC must complete two steps only: (1) "inform the employer about the specific allegation . . . describ[ing] both what the employer has done and which employees (or what class of employees) have suffered as a result," *Mach Mining, LLC v. EEOC*, 575 U.S. 480, 494 (2015); and (2) "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." *Id*. The EEOC typically informs the employer of the specific allegations in a reasonable cause letter. *Id*. According to the court, "[t]he undisputed record evidence shows that the EEOC has followed this process exactly." 2023 U.S. Dist. LEXIS 39812, at *5. The court therefore granted the EEOC's partial motion for summary judgment because the EEOC met its statutory duty to conciliate.

Regarding the defendant's laches defense, the court reiterated that laches is a flexible doctrine left to the district court's discretion. *Whitfield v. Anheuser-Busch, Inc.*, 820 F.2d 243, 245 (8th Cir. 1987). To sustain a laches defense, the defendant must show "(1) the plaintiff unreasonably and inexcusably delayed filing the lawsuit and (2) prejudice to the defendant resulted from the delay." *Brown-Mitchell v. Kan. City Power & Light Co.*, 267 F.3d 825, 827 (8th Cir. 2001). In this case, the defense argues there was just under six years between the first charge of discrimination filed with the EEOC and the instant lawsuit and about five years between the start of the EEOC's investigation and the lawsuit. The court, however, noted that the EEOC was in regular communication with the defendant during its investigation, and that the defendant caused some of the delay because the EEOC had to ask repeatedly for missing information requested from the defendant. The EEOC initiated the conciliation process four months after the investigation closed. The court therefore could not say whether the EEOC unreasonably or inexcusably filed the lawsuit. Even if such a delay were inexcusable, the defendant failed to show that is suffered unnecessary prejudice.

Moreover, the defendant cannot claim loss of employment records, as it had a duty to retain personnel records related to charges under 29 C.F.R. § 1602.14. The defendant also argued that its exposure to backpay liability has prejudiced the company. However, because the court did not find prejudice in any form, it would not find sufficient prejudice to sustain a laches defense based on backpay liability alone.

The court therefore granted the EEOC's partial summary judgment motion and denied in part the defendant's motion regarding its laches defense. The court reserved ruling on the remainder of the defendant's motion until after a scheduled hearing.

Statute and Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motivation and Result	General Issues
ADA	Hospital Housekeeping Services, LLC	U.S. District Court for the Western District of Arkansas No. 2:21-cv-2134	2023 U.S. Dist. LEXIS 72033 (W.D. Ark. Apr. 25, 2023)	Defendant's Motion for Summary Judgment **Result:** Pro-EEOC The court denied the defendant's motion.	Are there any genuine issues of material fact in dispute that would preclude summary judgment?

Commentary:

The EEOC sued defendant on behalf of a class of charging parties and former employees, claiming that the defendant violated the ADA by (1) using a discriminatory qualification standard and (2) discharging employees for failing to pass the Essential Function Test (EFT) because of their disabilities.

At the hearing on the defendant's motion for summary judgment, the court noted there are significant material issues that remain in dispute. The main question was whether the claimants were disabled in the first place. Claimants are disabled if the EEOC can show "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. §12102(1). The court found that the record contains deposition evidence that the EEOC contends shows the claimants have conditions that substantially limit major life activities.

Moreover, there remains a genuine dispute of fact regarding the defendant's affirmative defense—specifically, whether the EFT test is job-related for the position at issue and is consistent with business necessity. Here, the parties dispute whether the EFT has been validated to show job-relatedness. The expert opinions on record show there indeed remains a dispute on this issue, so the court denied the motion for summary judgment.

Statute and Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motivation and Result	General Issues
ADA	Telecare Mental Health Services of Washington, Inc.	U.S. District Court for the Western District of Washington No. 2:21-cv-01339	2023 U.S. Dist. LEXIS 101869 (W.D. Wash. June 12, 2023)	Defendant's Motion for Summary Judgment; EEOC's Motion for Partial Summary Judgment **Result:** Pro-Employer* The court granted the defendant's motion and denied the plaintiff's motion. *[**Note:** the court subsequently granted the EEOC's motion for reconsideration]	Was the charging party whose offer for a position as a registered nurse at a mental health facility a qualified individual with a disability where the defendant claims his social media statements prove he lacks compassion towards mentally ill patients?

Commentary:

Charging party has a permanent leg impairment that precludes him from standing for long periods of time, running/jogging, and readily standing from a squatting position. He applied for and was conditionally accepted for a registered nurse position at a mental health facility pending post-offer physical evaluation. The position at issue requires, among other things, the ability to physically restrain patients who become violent. The defendant facility rescinded the offer of employment after post-offer exams indicated the charging party's permanent work restrictions precluded him from performing the job's essential job functions, *i.e.*, being able to run away from or participate in a "take down" if a patient were to become violent. The EEOC filed suit.

The court agreed with the defendant that the EEOC failed to demonstrate material issues of fact regarding several elements of its claims.

First, the EEOC failed to show the charging party was a qualified individual with a disability. In the 9th Circuit, whether a person is qualified for a position is a two-step inquiry. The court first examines whether the individual has the "requisite skill, experience, education and other job-related requirements" of the position. Then the court looks at whether the person can perform the essential functions of the position with or without a reasonable accommodation. The burden of proof lies with the plaintiff. In this case, the defendant asserted that the EEOC failed to prove either prong. The court determined that because the EEOC failed to establish the first prong, the court need not examine the second.

In this case, while the defendant does not dispute that the charging party had the requisite skill, experience, and education necessary for the job, he lacked a demonstrated compassion for patients with mental illness. The defendant pointed to social media comments in which the charging party referred to those with mental illness as "crazy" and "meth heads." The court agreed that having a compassionate view of mental health patients is essential, and that the charging party appeared to lack such empathy. Although the EEOC claimed this was prohibited after-acquired evidence, the court explained that after-acquired evidence cannot be used to rebut an otherwise discriminatory decision. In this case, the after-acquired evidence was used to support the assertion that the charging party was not qualified. The EEOC, therefore, failed to make out a prima facie case of discrimination.

Statute and Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motivation and Result	General Issues
ADA	Telecare Mental Health Services of Washington, Inc.	U.S. District Court for the Western District of Washington No. 2:21-cv-01339	2023 U.S. Dist. LEXIS 146513 (W.D. Wash. Aug. 21, 2023)	EEOC's Motion for Reconsideration of the Court's Grant of Summary Judgment in Favor of the Defendant **Result:** Pro-EEOC The court granted the EEOC's motion for reconsideration.	Did the court make a "manifest error in the prior ruling" in granting the defendant's motion for summary judgment by considering the charging party's "subjective" qualifications at the summary judgment stage?

Commentary:

The EEOC moved the court to reconsider the grant of summary judgment in favor of the defendant, discussed above. The Western District of Washington Local Rule 7(h) provides "Motions for reconsideration are disfavored. The court will ordinarily deny such motions in the absence of a showing of manifest error in the prior ruling or a showing of new facts or legal authority which could not have been brought to its attention earlier with reasonable diligence." The term "manifest error" means "an error that is plain and indisputable, and that amounts to a complete disregard of the controlling law or the credible evidence in the record."

The EEOC claims that reconsideration is necessary to correct a "manifest error in the prior ruling." The motion is based on two distinct arguments. First, EEOC argues that the court committed error in considering a "subjective" job qualification at the summary judgment stage, beyond the mere "objective" qualifications (such as education and experience), which charging party undisputedly possessed. Second, the EEOC claims that the court overlooked genuine disputes of material fact as to whether defendant would have actually found the disparaging comments disqualifying.

The court disagreed with the first argument, as the cases the EEOC cites in support were distinguishable here. Specifically, in *Lynn v. Regents of the University of California*, the Ninth Circuit reversed summary judgment dismissal of discrimination claims brought by a university professor, finding she had demonstrated that she met the "objective criteria for tenure," based on "evidence that she had the same education, experience and number of published works as others who had been granted tenure." 656 F.2d 1337, 1342 (9th Cir. 1981). It was "preferable" to consider her allegedly "deficient scholarship," which was the university's purported reason for denying her tenure, at a later stage of the case. Referring to the several steps in the McDonnell Douglas inquiry, the court observed, "[i]n our view, objective job qualifications are best treated at step one and subjective criteria, along with any supporting evidence, are best treated at the later stages of the process." Id. at 1344. The Ninth Circuit later observed in *Nicholson v. Hyannis Air Services*, Inc., 580 F.3d 1116, 1123 (9th Cir. 2009), citing Lynn, that "[t]his court has long held that subjective criteria should not be considered in determining whether a plaintiff is 'qualified' for purposes of establishing a prima facie case under *McDonnell Douglas*. Instead, '[t]he qualifications that are most appropriately considered at step one [of *McDonnell Douglas*] are those to which objective criteria can be applied.'"

In this case, the court noted that the *McDonnell Douglas* multistep, burden-shifting framework does not apply where the defendant admits it did not hire the charging party based on disability. In addition, the "subjective" qualifications at issue in those Ninth Circuit cases were not just nuanced, but rather hotly debated, making them particularly unsuitable for summary judgment.

The court did, however, grant the motion based on the second argument—it was *not* undisputed on summary judgment, as the court originally found, that defendant would not have hired a candidate who had spoken of mentally ill patients in such derogatory terms. Therefore, the court granted the EEOC's motion for reconsideration.

Statute and Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motivation and Result	General Issues
ADA	Telecare Mental Health Services of Washington, Inc.	U.S. District Court for the Western District of Washington No. 2:21-cv-01339	2023 U.S. Dist. LEXIS 129587 (W.D. Wash. Sept. 12, 2023)	Defendant's Motion for Summary Judgment; Plaintiff's Motion for Partial Summary Judgment **Result:** Mainly Pro-EEOC The court denied the defendant's motion and granted the EEOC's motion for partial summary judgment as to the conciliation affirmative defense. The court did, however, deny the EEOC's motion with respect to the defendant's failure to mitigate damages affirmative defense.	Should the court grant the defendant's motion for summary judgment on the grounds the charging party was unable to perform the essential job functions and no reasonable accommodation was available? Should the court grant the EEOC's motion for partial summary judgment on the defendant's affirmative defenses that the charging party failed to mitigate his damages and that the EEOC failed to engage in meaningful conciliation?

Commentary:

EEOC brought suit alleging the defendant failed to hire the charging party for a nurse position in a facility that provides mental health emergency care on account of his leg impairment. The defendant extended an offer of employment conditioned on a physical examination. A physician assistant concluded that the charging party was "able to fulfill requirements although requires assistance with long periods of standing/walking." The defendant requested additional information from the charging party's primary care physician, who signed a form provided by defendant and filled out by the charging party that he was unable to stand for long periods, could not run or jog, and had difficulty standing from a squatting position. The defendant then rescinded the offer of employment based on this information, concluding his permanent work restrictions precluded him from performing the essential job functions, and no reasonable accommodation was available. The EEOC filed suit, and the defendant moved for summary judgment.

First, the defendant alleged the charging party's leg injury would prevent him from restraining a patient who posed a danger to others. However, there is conflicting evidence regarding whether he could indeed perform this function, so defendant was not entitled to summary judgment on this point. Second, the defendant argued the inability to walk or stand for long periods could not be accommodated. The EEOC countered that prolonged walking or standing is not an essential job function. The court concluded there is a factual dispute as to whether the charging party was capable of standing, without rest, for the amount of time required, and/or whether allowing him to sit, as needed, would be a reasonable accommodation. Third, defendant argued the charging party was unable, without pain, to squat frequently or for long periods of time, get up quickly from a squatting position, or otherwise quickly get down to, or up off of, the floor in order to render emergency aid to a patient as necessary. However, EEOC denies that limitations on the charging party's ability to squat or kneel prevented him from being able to perform these functions. Because these all remain factual issues, summary judgment was denied.

The EEOC, in turn, moved for partial summary judgment on defendant's First Affirmative Defense that charging party failed to mitigate his backpay damages, and the Third Affirmative Defense that EEOC failed to conciliate.

A plaintiff who has allegedly been wrongfully terminated has a duty to "use reasonable diligence in finding other suitable employment." *Erickson v. Biogen, Inc.*, 417 F. Supp. 3d 1369, 1386 (W.D. Wash. 2019) (citing *Odima v. Westin Tucson Hotel*, 53 F.3d 1484, 1497 (9th Cir. 1995)). A defendant asserting failure-to-mitigate as an affirmative defense has the burden of proving that the plaintiff failed to mitigate his damages. *Sangster v. United Air Lines, Inc.*, 633 F.2d 864, 868 (9th Cir. 1980), *cert. denied*, 451 U.S. 971, 101 S. Ct. 2048, 68 L. Ed. 2d 350 (1981). To satisfy this burden, Defendant must prove both that "during the time in question there were substantially equivalent jobs available, which [the plaintiff] could have obtained, and that [the plaintiff] failed to use reasonable diligence in seeking one."

The court emphasized that whether a substantially equivalent position was available, and whether charging party exercised reasonable diligence in obtaining one, is a question that defendant is entitled to present to a jury, so the court denied the EEOC's motion on this affirmative defense.

As for the alleged failure to conciliate, the defendant claimed while the EEOC provided a determination letter ostensibly inviting conciliation, it was wholly unresponsive to defendant's counteroffer, and provided no reason nor factual basis for its decision not to respond to its counteroffer. Therefore, per the defendant, the EEOC's complaint is barred, in whole or in part, by the failure to exhaust all administrative remedies, and/or to perform all conditions precedent to suit, including but not limited to conciliating in good faith the allegations at issue herein pursuant to 29 U.S.C. § 626(b). In this case, the court agreed that the EEOC did not meet its obligation under *Mach Mining*, as it did not engage in any meaningful discussion. That said, the court denied the failure-to-conciliate affirmative defense not on its merits but on its limited remedy. "Even if the EEOC . . . had failed to conciliate prior to bringing suit, the appropriate remedy would be a stay of proceedings to permit an attempt at conciliation, not the dismissal of the aggrieved employees' claims." *Arizona ex rel. Horne v. Geo Grp., Inc.*, 816 F.3d 1189, 1199 (9th Cir. 2016). In this case, the court ordered the parties to mediation after denying the EEOC's motion to strike, although such mediation was unsuccessful. Therefore, because defendant had already been granted the remedy its failure-to-conciliate defense affords it, the court granted the EEOC's motion for summary judgment on this defense.

Statute and Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motivation and Result	General Issues
Title VII Sex Discrimination Joint Employment Pattern-or-Practice Lawsuits	R&L Carriers, Inc.	U.S. District Court for Southern District of Ohio No. 1:17-cv-515	2023 U.S. Dist. LEXIS 52437 (S.D. Ohio Mar. 27, 2023)	Defendants' Motions for Summary Judgment; EEOC's Motion for Partial Summary Judgment **Result:** Pro-EEOC The court denied the defendants' motions for summary judgment and granted the EEOC's partial motion for summary judgment regarding three of the defendants' affirmative defenses, but denied another as moot.	Should the court exclude the EEOC's expert testimony because it is unreliable? Are the co-defendants sufficiently integrated so as to constitute joint employers for Title VII liability purposes? In a pattern-or-practice lawsuit, do the individuals affected need to exhaust their administrative remedies? Is the EEOC held to the same statute of limitations as individual plaintiffs?

Commentary:

EEOC brought a *Teamsters* pattern-or-practice suit against R&L Shared Services and R&L Carriers Inc. (individually "Shared Services" and "Inc." and collectively "R&L"), alleging sex discrimination in hiring for certain positions. Shared Services and Inc. each filed a motion for summary judgment, and EEOC filed a motion for partial summary judgment on the defendant's affirmative defenses.

Shared Services' motion hinged on the EEOC's statistical expert, while Inc.'s claimed it was not a joint employer with Shared Services and therefore could not be held liable. The EEOC's motion focused on R&L's affirmative defenses.

With respect to Shared Services' motion, the EEOC's expert used a regression analysis to support the case. Shared Services moved to exclude. Generally, a court will admit an expert's opinion into evidence if it meets three requirements: (1) the witness must be qualified by knowledge, skill, experience, training, or education; (2) the testimony must be relevant, meaning that it will assist the trier of fact to understand the evidence or to determine a fact in issue; (3) the testimony must be reliable. Shared Services alleged the expert omitted several variables and was thus unreliable.

The court agreed with the defendant that the burden is on the EEOC to show the testimony is admissible, but explained that the EEOC presents persuasive cases to support the notion that when a party claims that an expert has omitted a major explanatory variable in a regression analysis, the challenging party ought to provide *some* evidence that the omitted variable is in fact major. In this case, the expert explained why he omitted the challenged variables in his rebuttal report. And while there might have been some errors, the defendant did not show they were major. The court therefore denied the defendant's motion, as it will admit the expert's testimony, and allow any challenges to be presented during cross examination and left for a jury to decide.

As for Inc.'s motion for summary judgment, an integrated enterprise exists between companies when they share: (a) interrelation of operations, *i.e.*, common offices, common record keeping, shared bank accounts and equipment; (b) common management, common directors and boards; (c) centralized control of labor relations and personnel; and (d) common ownership and financial control. The court looked at these factors and determined this test was met. Therefore, it denied Inc.'s motion.

The EEOC moved for partial summary judgment against four of defendant's affirmative defenses, *i.e.*, whether (a) the EEOC satisfied its statutory obligation to try to resolve determined violations through informal conciliation before it filed its lawsuit; (b) the EEOC's claim is barred by a statute of limitations; (c) the EEOC's claim is barred because rejected female applicants did not exhaust administrative remedies; and (d) Inc. is an employer because it is part of an integrated enterprise with Shared Services. The court denied as moot affirmative defense (a) because R&L withdrew it at oral argument. The court granted the motion as to affirmative defense (d), as the court held they were joint employers for Title VII purposes, *i.e.*, were an integrated enterprise. As to the others, the statute of limitations applies to individual defenses, but imposes no limitations on the power of the EEOC to file suit in federal court itself. This case is an EEOC-brought pattern-or-practice case. Similarly, the EEOC can bring a discrimination case on behalf of individuals, meaning there is no exhaustion requirement. Therefore, it granted the EEOC's motion for partial summary judgment as to the time-barred-related affirmative defenses and as to the joint employment allegation, but denied the conciliation argument as moot because the defendants withdrew it.

Statute and Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motivation and Result	General Issues
Title VII Constructive Discharge	Jackson National Life Insurance Co.	U.S. District Court for the District of Colorado No. 16-cv-02472	2023 U.S. Dist. LEXIS 57394 (D. Colo. Mar. 31, 2023)	Defendant's Motion for Summary Judgment **Result:** Pro-EEOC The court denied the defendant's motion.	Should the court grant the defendant's motion for summary judgement as to the claims that the charging party was not constructively discharged?

Commentary:

The EEOC filed this race- and sex-based hostile work environment, discrimination, and retaliation case. The court had granted the defendant's motion for summary judgment, but the Tenth Circuit reinstated the claims as to the retaliation claim as it related to a failure to promote theory, as it was up to a jury to decide whether the reasons for not promoting the charging party was pretext for retaliation based on her complaints of discrimination. The appellate court also reversed the grant of summary judgment on her hostile work environment and constructive discharge claims.

With respect to the constructive discharge claim, the defendant claims it should fail because the charging party quit to take a promotion at another company, and she could not show her work environment was so intolerable as to leave a reasonable person in her position no choice but to resign.

The Supreme Court has observed that when a constructive discharge case is based specifically on a hostile work environment, as opposed to other discriminatory acts, more is required than the evidence necessary to support a hostile work environment claim; a plaintiff "must show working conditions so intolerable that a reasonable person would have felt compelled to resign." The court would not deny summary judgment on this basis.

That said, the company alleged she was not constructively discharged, because she chose to quit to work at a different company. The facts show she waited until she had another job offer to quit. However, searching for or accepting a new job is not dispositive of whether an employee was constructively discharged. "The availability of the alternative job relates to the question of whether a reasonable employee would have felt compelled to leave." Courts consider the "totality of the circumstances" to determine whether a resignation was voluntary.

The court therefore declined to grant summary judgment on the constructive discharge claim as a matter of law because she secured employment before resigning. The court ordered the portion of defendant's motion for summary judgment that the court reinstated be denied.

Statute and Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motivation and Result	General Issues
Title VII Race Discrimination	Texar Tree & Timber, LLC	U.S. District Court for the Western District of Arkansas No. 4:21-cv-4061	2023 U.S. Dist. LEXIS 176210 (W.D. Ark. Sept. 29, 2023)	Defendant's Motion for Summary Judgment **Result:** Pro-Employer The court granted the defendant's motion for summary judgment and dismissed the EEOC's claims with prejudice.	Was the EEOC able to establish that the defendant violated Title VII by (1) engaging in disparate treatment of Black job applicants based on position steering; and (2) engaged in disparate treatment against Black applicants by paying them lower starting wage rates than paid to similarly situated Hispanic applicants?

Commentary:

EEOC alleges defendant violated Title VII by discriminating against claimants because of their race. Specifically, the EEOC claims the defendant favored Hispanic applicants over Black applicants and paid Hispanic applicants higher rates compared to similarly situated non-Hispanic employees. EEOC sought relief on behalf of six charging parties, alleging (1) disparate treatment based on position steering; and (2) disparate treatment based on starting wage rates. First, the court found the EEOC did not meet its burden at the prima facie stage with respect to the position-steering allegation. Specifically, the court noted the EEOC did not show how similarly situated Hispanic applicants were treated differently from the claimants. The EEOC presented a list of comparators that did not list their previous job experience on their applications and were hired into operator and climber positions. The EEOC argued this evidence shows that defendant steered Hispanic individuals with no previous experience into more skilled positions where they received higher wage rates. The court found, however, that the incomplete applications are not sworn statements, do not reflect the actual qualifications of the applicants, and do not prove a lack of work history. Thus, the court held the incomplete applications failed to establish that the claimants and comparators are similarly situated in all relevant respects. The defendant, meanwhile, provided evidence to show the qualifications/experience of specific employees and the reasons they were hired over the claimants. Therefore, because the EEOC did not show the claimants were similarly situated in all material respects, the court granted the defendant's motion on this claim.

As for the wage rate charge, the EEOC claimed the defendant paid Black laborers a starting wage less than it did Hispanic laborers for equal work. Regarding two individuals, however, the court found they were paid the same starting rate as the highest-paid Hispanic laborers.

Regarding three other charging parties who were paid less, even assuming that these claimants had made a prima facie case of salary discrimination based on their race by identifying Hispanic applicants who received a higher starting wage, the court found they could not meet their burden of showing that defendant's explanation for their compensation was pretext for discrimination. The defendant explained wage decisions were based on location and experience, which the court deemed legitimate and nondiscriminatory. Therefore, defendant was entitled to summary judgment, and the EEOC's claims were dismissed with prejudice.

Statute and Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motivation and Result	General Issues
Title VII Race Discrimination Retaliation	UFP Ranson, LLC	U.S. District Court for the Northern District of West Virginia No. 3:21-CV-149	2023 U.S. Dist. LEXIS 170629 (N.D. W.V. Aug. 17, 2023)	Defendant's Motion for Summary Judgment **Result:** Pro-EEOC The court denied the defendant's motion for summary judgment on counts II, III, and IV.	Should summary judgment be granted to the defendant on the charge of a racially hostile work environment?

Commentary:

The case involved allegations of a hostile work environment based on race and unlawful discharge based on race and in retaliation for engaging in protected activity.

In order to prove that the charging party suffered from a discriminatorily hostile or abusive work environment, the EEOC must demonstrate that the harassment was (1) unwelcome, (2) because of race, (3) sufficiently severe or pervasive to alter the conditions of employment and create an abusive atmosphere, and (4) imputable to the employer.

In this case, the EEOC alleges racial epithets were a near-daily occurrence. In its statement of facts, however, the defendant claimed that in his interview with the EEOC, the charging party never made such an allegation. The court responded that while it appreciates persuasive legal writing, including making statements favorable to the client, it was concerned that the defendant's credibility "is called into question by how much liberty has been taken when summarizing what should be undisputed material facts. The Court finds the Defendant's stated facts, as they relate to several of the individuals being represented by the EEOC, are mischaracterized at best and inaccurate at worst."

The court denied the defendant's motion for summary judgment, finding that the EEOC established its prima facie case on each of its claims, and there remains genuine disputes of material fact to be resolved at trial.

Statute and Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motivation and Result	General Issues
Title VII Sex Discrimination & Harassment	Golden Entertainment, Inc.	U.S. District Court for the District of Maryland No. 20-cv-02811	2023 U.S. Dist. LEXIS 108703 (D. Md. June 22, 2023)	Defendant's Motion for Summary Judgment **Result:** Mixed The court denied the defendant's motion as to the EEOC's hostile work environment (sexual harassment) claim, but granted the defendant's motion with respect to the EEOC's retaliation and constructive discharge claims.	Was a co-worker's alleged harassment sufficiently pervasive or severe to constitute a hostile work environment, and could liability be imputed to the employer? Did changing the employee's work location following her complaints of harassment constitute a retaliatory, adverse action? Was the employee constructively discharged?

Commentary:

The EEOC claimed the defendant subjected a female bartender to sex discrimination by failing to take sufficient action following hostile work environment allegations, retaliating against her by reassigning her to a lower-paying bar following her complaints, and by constructively discharging her. The defendant moved for summary judgment.

With respect to the claim of harassment, the EEOC alleged a coworker sexually harassed the charging party approximately 10 times over a four-month period. Such actions included inappropriate and lewd comments, and an instance of inappropriate physical contact. The defendant claimed such incidents were insufficient to rise to the level of "severe or pervasive." To demonstrate that conduct is severe or pervasive, a plaintiff must show: (1) that the employee was subjectively offended and (2) that a reasonable person in the employee's position would have found the conduct abusive or hostile. In this case, the court found that the EEOC persuasively argued that a jury could reasonably conclude that a reasonable person could find that the co-worker's alleged conduct to be so severe or pervasive as to create a hostile work environment, therefore denying the defendant's motion on this claim.

Moreover, liability can be imputed to the employer in this case. To demonstrate that the harassing conduct was imputable to the employer, a plaintiff may show that the employer was negligent in failing to prevent harassment from taking place. In this case, evidence lends support to the EEOC's claim that the defendant's actions following the charging party's complaints were not reasonably calculated toward ending the harassment and preventing its reoccurrence. For example, the co-worker continued to make comments, and the defendant's investigation into the harassment appeared to be lacking. The defendant acknowledged that it reviewed only two of 16 hours of security footage involving the charging party and her coworker, and that the defendant failed to preserve this footage. Therefore, there remains a genuine issue of material fact about the defendant's remedial actions, which precludes summary judgment.

The court denied the EEOC's retaliation and constructive discharge claims, however. To establish a prima facie case of retaliation, a Title VII plaintiff must show that: (1) she engaged in a protected activity; (2) the employer took an adverse employment action against her; and (3) a causal connection existed between the protected activity and the asserted adverse action. Relevant to this dispute, the question of whether a particular reassignment is a materially adverse employment action depends upon the circumstances of the case and should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances. The charging party acknowledged that her wages, job title, level of responsibility or opportunity for promotion remained the same after her reassignment. Therefore, the court determined that the change to the charging party's work schedule was not an adverse employment action under Title VII.

Similarly, the EEOC could not prevail on its constructive discharge claim, as it could not show her working conditions became so intolerable that a reasonable person would have had no choice but to resign. Here, dissatisfaction with a change in her work schedule was insufficient to meet this showing.

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Gdańsk, Katowice, Kraków, Poznań, Warsaw, Wrocław

Portugal
Lisbon, Algarve

Singapore
Singapore

Spain
Barcelona, Madrid, Valencia

Switzerland
Zurich

United Kingdom
London

Venezuela
Caracas, Valencia

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