

# ANNUAL REPORT ON EEOC DEVELOPMENTS: FISCAL YEAR 2012

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

January 2013

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# ANNUAL REPORT ON EEOC DEVELOPMENTS: FISCAL YEAR 2012

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

## INTRODUCTION

Over the years, Littler has provided periodic reports on significant cases, regulatory developments and other activities involving the Equal Employment Opportunity Commission (EEOC or “the Commission”). While such guidance is intended to update employers on significant EEOC developments as they arise, we believe that employers can also benefit from an annual update and overview of key EEOC developments. This **Annual Report on EEOC Developments – Fiscal Year 2012** (hereafter “Report”), our second annual report, is designed as a comprehensive guide to significant EEOC developments over the past fiscal year.

A substantial portion of this year’s Report focuses on the EEOC’s systemic initiative. On February 22, 2012, the EEOC issued its Strategic Plan for Fiscal Years 2012-2016, which underscores that over the next several years a significant emphasis will be placed on systemic investigations and related litigation. The EEOC has defined systemic cases as “pattern or practice, policy and/or class cases where the alleged discrimination has a broad impact on an industry, profession, company, or geographic location.” The EEOC provided more specific details concerning the areas it will focus on in its Strategic Enforcement Plan, which was approved by the Commission on December 17, 2012.

**Part One** of the Report provides an overview of EEOC charge activity, litigation and settlements over the past year, including highlighting the types and location of lawsuits filed by the Commission. As anticipated, there has been a continued focus on systemic and multiple victim investigations and lawsuits filed by the EEOC. Significant settlements also are highlighted. This year we are highlighting settlements reported by the EEOC that exceeded \$1 million stemming from conciliation or court settlements. We also have added two new appendices in this year’s Report – a list and summary of appellate cases in which the EEOC has been involved as the appellant or as an amicus and a list of select dispositive motions decided on the merits in litigation where the EEOC was a party.

In **Part Two**, key regulatory developments are reviewed, including the Commission’s activities beyond formal regulatory efforts, and areas in which the EEOC plans to devote its attention over the coming year. Aside from discussion of the EEOC’s Strategic Plan, as supplemented by the Strategic Enforcement Plan, the Report highlights the Commission’s updated Guidance on criminal history and new rules discussing the “reasonable factor other than age” (RFOA) defense under the Age Discrimination in Employment Act (ADEA). References are made to more comprehensive Littler updates and/or reports for in-depth discussion of the topic, as applicable. Anticipated trends also are discussed.

**Part Three** reviews EEOC investigations, particularly as part of the Commission's systemic initiative, and the basis for the EEOC's broad based authority. The Report summarizes recent administrative subpoena enforcement actions at the district court level and decisions by the appellate courts. Issues addressed include EEOC requests for information involving: (1) broad geographic coverage and (2) confidential information. Other noteworthy developments discussed include EEOC efforts to communicate ex parte with former managers, burdensomeness challenges, and jurisdictional disputes. Appendix D to this report also includes a list and summary of all subpoena enforcement actions initiated by the Commission over the past year.

**Part Four** highlights key court cases, again focusing primarily on systemic and class-type cases, and addresses a number of topics, including: (1) pleading deficiencies raised by employers and recent EEOC attacks on employer responses to complaints; (2) unreasonable delay and use of the laches defense; (3) statutes of limitations cases involving both pattern or practice claims and other types of cases; (4) employer challenges based on the EEOC's alleged failure to meet its conciliation obligations prior to filing suit; (5) intervention-related issues; (6) class discovery and general discovery issues in EEOC litigation, as filed by employers and the EEOC; (7) favorable and unfavorable summary judgment rulings and lessons learned; and (8) trial related issues.

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

## I. OVERVIEW OF EEOC CHARGE ACTIVITY, LITIGATION AND SETTLEMENTS

### A. Review of Charge Activity, Backlog and Benefits Provided

On November 19, 2012, the EEOC announced the publication of the FY 2012 Performance and Accountability Report (referenced herein as the “EEOC 2012 Annual Report”).<sup>1</sup> As discussed in its 2012 Annual Report, during FY 2012 the Commission again received nearly 100,000 charges, with the past three years involving a record number of charges in the Commission’s 47-year history.<sup>2</sup> Since FY 2006, there has been a dramatic increase in the level of charge activity, except for a minor dip in FY 2009, as shown by the following:<sup>3</sup>

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

The Commission reported a “significant reduction” in its inventory of charges, its “backlog,” having reduced its inventory from 78,136 charges to 70,312 charges. The Commission also resolved a total of 111,139 charges in FY 2012, thus resolving more charges than those filed at the agency during the past fiscal year.

### B. Continued Focus on Systemic Investigations and Litigation

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

The EEOC’s 2012 Annual Report focuses in many respects on the Commission’s new Strategic Plan for Fiscal Years 2012 through 2016, approved by the Commission on February 22, 2012, which “reiterated the importance of [the] systemic enforcement program as a top agency priority.”<sup>4</sup> The EEOC 2012 Annual Report outlines the resources devoted to strengthening the systemic program, including:

- Leveraging technology to facilitate cross-district communication and sharing of information and data, including: (1) the use of a “Systemic Portal” – an internal EEOC systemic website and (2) the development of a Systemic Watch List, which draws from the EEOC’s Integrated Management System (IMS) that tracks private sector charges and litigation with details on the applicable company and a wide range of other related data;
- Conducting advanced systemic training for more than 25 percent of its field attorneys;
- Deploying experts in the fields of statistics, industrial technology and labor market economics within headquarters and throughout the field;

<sup>1</sup> The EEOC refers to the FY 2012 Performance and Accountability Report as the “PAR” for FY 2012 (herein cited as “EEOC 2012 Annual Report”). EEOC, FISCAL YEAR 2012 PERFORMANCE AND ACCOUNTABILITY REPORT (Nov. 19, 2012), available at <http://www.eeoc.gov/eeoc/plan/index.cfm>; see also Press Release, EEOC, EEOC Releases Performance and Accountability Report Under New Strategic Plan (Nov. 19, 2012), available at <http://www.eeoc.gov/eeoc/newsroom/release/11-19-12.cfm>. See also Ilyse Schuman, *EEOC Actions Resulted in Record Amount of Monetary Benefits Awarded to Private Sector Claimants, According to FY 2012 Performance and Accountability Report*, Littler Washington D.C. Employment Law Update (Nov. 26, 2012), <http://www.dcmplemploymentlawupdate.com/2012/11/articles/eeoc-1/eeoc-actions-resulted-in-record-amount-of-monetary-benefits-awarded-to-private-sector-claimants-according-to-fy-2012-performance-and-accountability-report/>. In this section of the Report, data from the EEOC’s 2012 FY Annual Report is compared to the EEOC’s 2011 FY Annual Report (herein cited as “EEOC 2011 Annual Report”). EEOC, FISCAL YEAR 2011 PERFORMANCE AND ACCOUNTABILITY REPORT (Nov. 15, 2011), available at <http://www.eeoc.gov/eeoc/plan/2011par.cfm>.

<sup>2</sup> The EEOC’s FY 2012 commenced on October 1, 2011 and ended on September 30, 2012.

<sup>3</sup> See EEOC 2012 Annual Report at 25.

<sup>4</sup> EEOC 2012 Annual Report at 28.

- Expanding usage of the CaseWorks system, which provides a central shared source of litigation support tools that facilitate the collection and review of electronic discovery in order to support greater collaboration in development of cases for litigation; and
- Providing a litigation advisory team tasked with providing legal advice, developing litigation strategies, and providing hands on support in systemic lawsuits.<sup>5</sup>

### C. Systemic Investigations – Comparison Between FY 2011 and FY 2012

A review of the Commission’s Annual Reports in FY’s 2011 and 2012 demonstrates that although there was a slight increase in the number of systemic investigations, there was a dramatic increase in terms of results achieved:<sup>6</sup>

SYSTEMIC INVESTIGATIONS	2012	2011
Number Completed	240	235 <sup>7</sup>
Settlements or Conciliation Agreements	65 <sup>8</sup>	35
Monetary Recovery	\$36.2 million	\$9.6 million
Individuals Benefited	3,813	(Not reported)
Reasonable Cause Findings	94	96
Percentage of “Reasonable Cause” Findings	39.1 %	40.8%
Systemic Lawsuits Filed	12	23

The Commission underscored the impact of its systemic initiative during FY 2012, explaining, “The \$36 million recovered in systemic resolutions this year is four times the amount recovered in FY 2011.”<sup>9</sup> While not mentioned in the EEOC 2012 Annual Report, a “reasonable cause” finding was reached in nearly 40% of the systemic investigations in FY 2011, compared to a “reasonable cause” finding typically being made in less than 5% of all EEOC charges.<sup>10</sup> The Commission also commented that “there was a focus on promoting coordination of field activities to ensure that investigations across districts that involve common issues are handled collaboratively, bringing greater efficiencies and reinforcing the national enforcement agency model.”<sup>11</sup> The Commission pointed to the “strong collaboration between the enforcement and legal staff in all aspects of systemic work.”<sup>12</sup> The EEOC also has been strategic based on the number of actual lawsuits filed, compared to the number of charges in which there was a “reasonable cause” finding.

It should be noted that there was a decrease in the number of Commissioner charges issued between FY 2011 and FY 2012 – 47 Commissioner charges were filed in FY 2011 compared to 12 new Commissioner charges in FY 2012.

As discussed elsewhere in this Report, in the section devoted to subpoena enforcement activities, the Commission has continued to seek assistance from the courts during the course of various investigations, particularly systemic investigations. For FY 2012, the Commission referred to having filed 33 “subpoena enforcement and other actions.” This was a decrease from FY 2011 in which 39 “subpoena enforcement and other actions” were filed.<sup>13</sup> The decrease may stem, in part, from the EEOC’s known “track record” in frequently prevailing when filing subpoena enforcement actions.

In support of its strategic initiative, the Commission reports that there was more interagency coordination. Particularly noteworthy are cross-agency efforts involving equal pay and the EEOC’s role on the National Equal Pay Enforcement Task Force. As an example, in FY 2012, the Commission trained 1,492 enforcement personnel from federal, state and local agencies on “techniques for investigating and analyzing

<sup>5</sup> *Id.*

<sup>6</sup> EEOC 2012 Annual Report at 28; *see also* EEOC 2011 Annual Report at 19-20.

<sup>7</sup> At the end of FY 2011, the Commission reported that it was working on 580 systemic investigations. EEOC 2011 Annual Report at 19. Similar statistics were not included in the EEOC 2012 Annual Report.

<sup>8</sup> According to the EEOC’s 2012 Annual Report, the settlements for FY 2012 involved 46 successful conciliations of investigations and pre-determination settlements in 19 systemic investigations. EEOC 2012 Annual Report at 28.

<sup>9</sup> EEOC 2012 Annual Report at 28.

<sup>10</sup> *See* EEOC, All Statutes FY 1997 – FY 2011, <http://eoc.gov/eoc/statistics/enforcement/all.cfm> (last visited Dec. 7, 2012). *See also* EEOC 2011 Annual Report at 19-20.

<sup>11</sup> EEOC 2012 Annual Report at 28.

<sup>12</sup> *Id.*

<sup>13</sup> EEOC 2011 Annual Report at 19.

violations of compensation discrimination laws.”<sup>14</sup> The EEOC also reportedly conducted over 70 joint outreach events with the Task Force member agencies, including the OFCCP. The Commission referred to having signed a Memorandum of Understanding with the OFCCP in November 2011 to streamline information sharing and improving coordination.<sup>15</sup>

#### D. EEOC Litigation and Systemic Initiative

For FY 2012, consistent with the EEOC’s current focus on “strategic law enforcement,” the Commission filed the fewest number of “merits” lawsuits in recent memory, having filed only 122 lawsuits, which included 86 individual suits, 26 multiple “victim” suits (*i.e.*, fewer than 20 alleged “victims”) and 10 systemic suits (*i.e.*, 20 or more reported “victims”).<sup>16</sup> There has been a steady decrease in the number of merits lawsuits since FY 2005 – a total of 381 suits were filed in that year.<sup>17</sup> There even has been a dramatic decrease over the past year – 261 merits lawsuits were filed in FY 2011 compared to the 122 merits suits filed in FY 2012 – a decrease of over 50%.

YEAR	INDIVIDUAL CASES	“MULTIPLE VICTIM” CASES (INCLUDING SYSTEMIC CASES)	PERCENTAGE OF MULTIPLE VICTIM LAWSUITS	TOTAL NUMBER OF EEOC “MERITS” <sup>18</sup> 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
2011	177	84	32%	261
2012	86	36	29%	122

Particularly noteworthy is that a vast majority of the EEOC’s lawsuits are filed during the last two months of the EEOC’s fiscal year. As an example, between August 1, 2012 and September 30, 2012, the EEOC filed 69 lawsuits, which was 56.5% of the lawsuits filed during the entire fiscal year.<sup>19</sup> Similarly, during FY 2011, among the 261 lawsuit filed, 185 suits (70.8%) were filed during the last two months of the fiscal year.

In reviewing all new court filings, the EEOC lawsuits included 66 Title VII claims, 45 Americans with Disabilities Act (ADA) claims, 12 Age Discrimination in Employment Act (ADEA) claims and two Equal Pay Act (EPA) claims.<sup>20</sup> Based on a review of reported filings by the EEOC and Littler’s tracking of all EEOC filed lawsuits, a more detailed breakdown indicates the following:

CAUSES OF ACTION	NUMBER OF LAWSUITS
ADA Claims	45
Multiple Claims	26
Retaliation	25
Sexual Harassment	23
Racial Discrimination or Related Harassment	14
Age Discrimination	12
Pregnancy Discrimination	11
Religious Discrimination or Related Harassment	11
National Origin Discrimination or Related Harassment	7

<sup>14</sup> EEOC 2012 Annual Report at 32.

<sup>15</sup> *Id.*

<sup>16</sup> EEOC 2012 Annual Report at 27.

<sup>17</sup> See EEOC, All Statutes FY 1997 – FY 2011, <http://eeoc.gov/eeoc/statistics/enforcement/all.cfm> (last visited Dec. 7, 2012).

<sup>18</sup> The EEOC has defined “merits” suits as direct lawsuits or by intervention involving alleged violations of the substantive provisions of the statutes enforced by the EEOC as well as enforcement of administrative settlements. See *id.*

<sup>19</sup> Littler monitored EEOC court filings over the past fiscal year, and the information reported on the Commission’s timing for filing its lawsuits in FY 2012 is based on Littler’s monitoring efforts.

<sup>20</sup> EEOC 2012 Annual Report at 27.

The top ten states for EEOC lawsuits filed over the past fiscal year are as follows:<sup>21</sup>

STATE	NUMBER OF LAWSUITS
Illinois	14
California	11
Michigan	10
Texas	10
North Carolina	10
Indiana	8
Wisconsin	8
New York	7
Florida	7
Tennessee	6

With respect to the Commission's efforts on behalf of "multiple victims" and its systemic initiative, the EEOC's Annual Report reported on lawsuits pending in courts as follows:

- Among the 309 lawsuits on its active docket at the end of FY 2012, 75 (24%) involved alleged multiple victims and 62 (20%) involved challenges to systemic discrimination, thus showing that 44% of all pending matters involve claims on behalf of more than one purported victim.<sup>22</sup>
- In FY 2012, the Commission filed 12 systemic lawsuits.
- The Commission resolved 254 merits lawsuits during FY 2012 and recovered \$44.2 million, which included 162 Title VII claims, 72 ADA claims, 30 ADEA claims and two EPA claims.<sup>23</sup>

Based on the EEOC's new Strategic Plan, a central thrust is "combat[ing] employment discrimination through strategic law enforcement."<sup>24</sup> A key performance measure has been establishing a "baseline" focusing on the proportion of systemic cases on the active docket as of September 30, 2012 and projecting future annual targets against the baseline. For FY 2012, the Commission established a "baseline" of 20% and "[b]y FY 2016, the agency projects that 22-24 percent of cases on its active litigation docket will be systemic cases."<sup>25</sup>

## E. Mediation Efforts

Finally, in reviewing its efforts over the past year, the EEOC placed a strong emphasis on its mediation program, commenting, "The EEOC's mediation program has continued to be a very successful part of our enforcement operations."<sup>26</sup> The Commission reported that for FY 2012, the EEOC's private sector mediation program "secured a total of 8,714 mediated resolutions out of a total of 11,380 conducted."<sup>27</sup> This was a slight decrease from FY 2011 in which there was a total of 9,831 resolutions.<sup>28</sup> The Commission referred to obtaining more than \$153.2 million in monetary benefits, which was somewhat less than the \$170 million obtained through the mediation program during FY 2011.<sup>29</sup>

21 Littler monitored EEOC court filings over the past fiscal year, and the state-by-state breakdown of lawsuits filed as well as the table summarizing the types of claims filed are based upon a review of federal court filings in the United States. The EEOC does not make publicly available its data showing the breakdown of lawsuits filed on a state by state basis, although charge activity on a state-by-state basis has been available from the Commission's website since May 2012. See EEOC, FY 2009 – 2011 EEOC Charge Receipts by State (includes U.S. Territories) and Basis, [http://www1.eeoc.gov/eeoc/statistics/enforcement/charges\\_by\\_state.cfm](http://www1.eeoc.gov/eeoc/statistics/enforcement/charges_by_state.cfm) (last visited Dec. 7, 2012).

22 EEOC 2012 Annual Report at 27.

23 *Id.*

24 EEOC 2012 Annual Report at 2.

25 EEOC 2012 Annual Report at 13.

26 EEOC 2012 Annual Report at 26.

27 *Id.*

28 See EEOC 2011 Annual Report at 18.

29 EEOC 2012 Annual Report at 26.

The Commission also referred to expanded employer participation in Universal Agreements to Mediate (UAMs), which refer to an employer's commitment to consider mediating charges of discrimination. As of the end of FY 2012, the EEOC had a cumulative multi-year total of 2,140 UAMs, which the Commission referred to as a 7.1 percent increase from FY 2011.

## F. Significant EEOC Settlements

There were a sizeable number of multi-million dollar settlements during both conciliation and litigation over the past year.

Based on private sector administrative enforcement, the EEOC reported \$365.4 million in monetary benefits in FY 2012, which was the highest level ever achieved through the administrative process, and \$700,000 more than recovered in FY 2011.<sup>30</sup>

In reviewing settlements of EEOC lawsuits, a total of 254 merits lawsuits were resolved in FY 2012, resulting in \$44.2 million in monetary recovery (which was a substantial decrease from the \$90.9 million in monetary recovery during FY 2011).<sup>31</sup> Broken down by types of discrimination charges, Title VII claims were involved in 162 resolutions; ADA claims in 72; ADEA claims in 30; and EPA claims in two resolutions. With respect to the total amount of recovery by direct and intervention lawsuits, the EEOC recovered \$34.3 million in Title VII resolutions; \$5.4 million in ADA resolutions; \$3.6 million in ADEA resolutions; and \$942,000 in resolutions involving more than one statute.<sup>32</sup>

While the majority of the Commission's litigation remains "single victim" cases, the trend of the Commission's filing and settling of systemic, pattern or practice and class types of claims may assist employers when evaluating corporate policies or practices that may be susceptible to an EEOC challenge. Attached to this Report as Appendix A is a summary of significant EEOC settlements during FY 2012 based on both conciliation and as a result of EEOC litigation.<sup>33</sup>

## G. Appellate Activity By EEOC

Additionally, for the first time in FY 2012, the EEOC published online information related to its appellate activity.<sup>34</sup> Based on the EEOC's online information, the Commission filed eight amicus briefs in FY 2012 and was an appellant in 12 cases. The Commission's new repository of appellate activity is an excellent resource to assess the types of cases and issues the Commission is weighing in on as an amicus and pursuing as an appellant.<sup>35</sup>

## H. Dispositive Motions Decided on the Merits and the EEOC

While it is beneficial to know the trends related to the EEOC's filing of lawsuits, it is also helpful to have a sense for how the Commission fares in dispositive motions practice related to the strength of the underlying merits of a suit. To this end, Littler has compiled a list of select court rulings on dispositive, merits-based motions where the EEOC is a party to the litigation, which is available as Appendix C to this Report.

30 EEOC 2012 Annual Report at 3.

31 See EEOC 2012 Annual Report at 27; see also EEOC 2011 Annual Report at 19.

32 EEOC 2012 Annual Report at 27.

33 The summary of settlements is based on both settlements reported in the EEOC 2012 Annual Report at pages 28-31 and Littler monitoring of EEOC press releases announcing settlements during FY 2012. The significant settlements as summarized in Appendix A, include settlements over \$1 million and they are organized by settlement amount. The summary also identifies whether the settlement occurred the administrative process, such as through conciliation, or based upon a consent decree after a lawsuit was filed by the Commission.

34 Press Release, EEOC, EEOC Appellate Briefs Now Online (June 20, 2012), available at <http://www.eeoc.gov/eeoc/newsroom/release/6-20-12b.cfm>.

35 For a detailed analysis of the issues involved in appellate cases where the EEOC was the appellant or participated in an appeal as an amicus, please see Appendix B to this Report.

## II. UPDATE ON THE COMMISSION, ITS REGULATORY AGENDA, AND RELATED DEVELOPMENTS

### A. Update on the Commission

During FY 2012, the EEOC was poised to move forward with a wide variety of policy initiatives. Although the EEOC advanced several planned agenda items, other items remain stalled, likely as a result of the vacancy left by the departure of Commissioner Stuart Ishimaru.

In April 2012, Commissioner Ishimaru resigned early from his position to accept the position of Director of the Office of Minority and Women Inclusion (OMWI) at the Consumer Financial Protection Bureau (CFPB).<sup>36</sup> Ishimaru, a Democrat who was nominated by President George W. Bush, had been a member of the EEOC since 2003. His term was not set to expire until July 1, 2012.

Ishimaru's departure changes the political makeup of the Commission. Since his resignation, the EEOC has been operating with only four members: Democrat Jacqueline Berrien as Chair, Democrat Chai Feldblum, Republican Victoria Lipnic, and Republican Constance Barker. Democrats no longer hold a majority, affecting the EEOC's ability to approve policy initiatives supported by President Obama, effectively requiring bipartisan support for any action.

On August 2, 2012, President Obama nominated Jenny R. Yang to fill the vacant Democratic Commissioner seat,<sup>37</sup> although the timing of Senate action on her nomination remains uncertain. If the Senate confirms her nomination, Yang will serve as a Commissioner until July 1, 2017. With the reelection of President Obama, a fully seated Commission will remain Democratic – controlled and is expected to pursue an aggressive agenda, including currently stalled initiatives.

### B. EEOC Strategic Plan and Related Enforcement Plan

As its first major act of FY 2012, the EEOC set forth its strategy for achieving its fundamental mission to stop and remedy unlawful employment discrimination. On February 22, 2012, the EEOC voted 4-1 in favor of its four-year strategic plan, *The Strategic Plan for Fiscal Years 2012 – 2016* (“the Strategic Plan”),<sup>38</sup> which outlines the agency's goals and achievement benchmarks for enforcing various anti-discrimination laws under its jurisdiction, as well as its objective to carry out education and outreach efforts. The Strategic Plan places great emphasis on enforcement and the targeting of systemic discrimination.

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

One of the EEOC's strategies for reducing employment discrimination at the national and local levels includes developing and implementing a Strategic Enforcement Plan (SEP) that: “(1) establishes EEOC priorities and (2) integrates the EEOC's investigation, conciliation and litigation responsibilities in the private and state and local government sectors; adjudicatory and oversight responsibilities in the federal sector; and research, policy development, and education and outreach activities.”<sup>39</sup>

The Strategic Plan also sets forth benchmarks for measuring the EEOC's performance in achieving its strategies. For instance, under the Strategic Plan, the EEOC seeks to ensure that by 2016 a certain percentage of cases in its litigation docket are systemic cases, and that a certain percentage of the agency's administrative and legal resolutions “contain targeted, equitable relief.”

<sup>36</sup> Press Release, EEOC, Stuart J. Ishimaru to Resign from Commission (Apr. 11, 2012), available at <http://www.eeoc.gov/eeoc/newsroom/release/4-11-12.cfm>.

<sup>37</sup> Ilyse Schuman, *Obama Nominates Jenny Yang to be New EEOC Member*, Littler Washington D.C. Employment Law Update (Aug. 6, 2012), <http://www.dcmemploymentlawupdate.com/2012/08/articles/eeoc-1/obama-nominates-jenny-yang-to-be-new-eeoc-member/>.

<sup>38</sup> EEOC, UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION STRATEGIC PLAN FOR FISCAL YEARS 2012 – 2016 (2012), available at [http://www.eeoc.gov/eeoc/plan/strategic\\_plan\\_12to16.cfm](http://www.eeoc.gov/eeoc/plan/strategic_plan_12to16.cfm).

<sup>39</sup> EEOC, UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION STRATEGIC PLAN FOR FISCAL YEARS 2012 – 2016 (2012), available at [http://www.eeoc.gov/eeoc/plan/strategic\\_plan\\_12to16.cfm](http://www.eeoc.gov/eeoc/plan/strategic_plan_12to16.cfm). A summary of other strategies is discussed in the *Littler D.C. Update* at Ilyse Schuman, *EEOC Approves Strategic Plan for FY 2012-2016*, Littler Washington D.C. Employment Law Update (Feb. 24, 2012), <http://www.dcmemploymentlawupdate.com/2012/02/articles/eeoc-1/eeoc-approves-strategic-plan-for-fy-20122016/>.



On July 18, 2012, the Commission held a public meeting to solicit input as the agency drafted the SEP.<sup>40</sup> The EEOC released a draft of the SEP for public comment on September 4, 2012.<sup>41</sup> On December 17, 2012, the Commission adopted the final SEP by a vote of 3-1.<sup>42</sup>

The final SEP was revised from the draft SEP, based on more than 100 comments related to the draft SEP from individuals, organization and coalitions internal and external to the agency and from the across the nation.<sup>43</sup> The SEP identifies the following priorities for national enforcement in the private and public sectors: (1) eliminating systemic barriers in recruitment and hiring; (2) protecting immigrant, migrant and other vulnerable workers; (3) addressing emerging and developing issues, such as ADA Amendment Act issues, LGBT (lesbian, gay, bisexual and transgender individuals) coverage under Title VII, and accommodating pregnancy; (4) enforcing equal pay laws; (5) preserving access to the legal system; and (6) preventing harassment through systemic enforcement and targeted outreach.

To implement these priorities, the EEOC intends to continue prioritizing certain types of charges filed with the agency and to give preference to litigation involving SEP or EEOC District enforcement priority issues. Additionally, the SEP reaffirms the EEOC's focus on pursuing systemic cases – “pattern or practice, policy, and/or class cases where the alleged discrimination has a broad impact on an industry, occupation, business, or geographic area.”<sup>44</sup> With respect to systemic enforcement, the SEP specifically notes that the EEOC District offices are expected to coordinate with each other so as to avoid duplication and to improve efficiencies through collaboration, consultation and strategic partnerships between the offices. While the EEOC developed the SEP as a strategy for reducing discrimination, the SEP, as a whole, places more emphasis on enforcement and litigation than on prevention efforts and conciliation.

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

- a. Cases involving a major expenditure of resources, *e.g.*, cases involving extensive discovery or numerous expert witnesses and many systemic, pattern or practice or Commissioner's charge cases;
- b. Cases that present issues in a developing area of law where the Commission has not adopted a position through regulation, policy guidance, Commission decision or compliance manuals;
- c. Cases that the General Counsel reasonably believes to be appropriate for submission for Commission consideration because of their likelihood of public controversy or otherwise (*e.g.*, recently modified or adopted Commission policy); and
- d. All recommendations in favor of Commission participation as *amicus curiae*, which shall continue to be submitted to the Commission for review and approval.<sup>45</sup>

Moreover, the SEP establishes that at a minimum, one litigation recommendation from each District Office will be presented to the Commission for consideration during each fiscal year.<sup>46</sup>

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

41 EEOC, DRAFT FOR PUBLIC RELEASE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION STRATEGIC ENFORCEMENT PLAN (Sept. 4, 2012), available at [http://www.eeoc.gov/eeoc/plan/sep\\_public\\_draft.cfm](http://www.eeoc.gov/eeoc/plan/sep_public_draft.cfm).

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

43 EEOC, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION STRATEGIC ENFORCEMENT PLAN FY 2013-2016, p. 5 (Dec. 17, 2012), available at <http://www.eeoc.gov/eeoc/plan/sep.cfm>. By way of example, the September 2012 draft SEP did not highlight enforcing equal pay laws as one of the national priority items.

44 A summary of the SEP is discussed further in the *Littler D.C. Update* at Barry Hartstein, *EEOC Seeks Feedback on Draft Strategic Enforcement Plan*, Littler Washington D.C. Employment Law Update (Sept. 6, 2012), <http://www.dcemploymentlawupdate.com/2012/09/articles/eeoc-1/eeoc-seeks-feedback-on-draft-strategic-enforcement-plan/>.

45 *Id.* at 20-21.

46 *Id.* at 21.

The Commission will report on its success related to the Strategic Plan and SEP as part of its FY 2013 Performance and Accountability Report (FY 2013 PAR). The Commission has additionally committed to holding a public meeting 45 days after the release of the FY 2013 PAR, during which time it intends to discuss implementation of the Strategic Plan, including the SEP. For FY 2013, the Commission has established some key deadlines for deliverables required under the SEP as follows:

REQUIRED BY THE SEP	KEY DEADLINES
Quality Control Plan	Submitted to the Commission by March 29, 2013. Voted on by the Commission by April 30, 2013.
Federal Sector Complement Plan	Submitted to the Commission by March 29, 2013. Voted on by the Commission by May 31, 2013.
District Complement Plans (15)	Submitted to the Chair by March 29, 2013. Voted on by the Chair by May 31, 2013. <i>* If not disapproved by this date, a plan become effective.</i>
Research and Data Plan	Submitted to the Commission by June 28, 2013. Voted on by the Commission by July 31, 2013.
Federal Sector Organization Plan	Submitted to the Commission by August 30, 2013 Voted on by the Commission by September 30, 2013

## C. Noteworthy Regulatory Activities

### 1. Initial Planned Agenda and Significant Anticipated Guidance

The Commission began FY 2012 with an aggressive agenda of anticipated regulatory activity and guidance, which included issuing a final rule addressing disparate impact and reasonable factors other than age under the Age Discrimination in Employment Act (ADEA),<sup>47</sup> issuing guidance regarding employers' use of criminal history records and credit history, a renewed focus on guidance regarding leaves of absence and reasonable accommodation under the Americans with Disabilities Act (ADA),<sup>48</sup> and updated recordkeeping and data collection requirements. According to the Agency's regulatory agenda for Fall 2011, which was released in January 2012 and was the last publicly released regulatory agenda, the EEOC planned to issue a proposed rule that would update its race and ethnicity data collection method to conform with current reporting instructions for the EEO-1 Report, making employee self-identification the preferred method for collecting race and ethnic data on employees.<sup>49</sup> While the Commission was successful in executing most of its agenda items, it did not ultimately issue any guidance on credit history or the reasonable accommodations under the ADA. Further, the EEOC faced a setback in its push to collect pay data when the Paycheck Fairness Act stalled in the Senate.<sup>50</sup> That Act would have allowed the EEOC to collect pay data from employers based on race, gender, and national origin. According to a report issued by the National Academy of Science (NAS) on the collection of pay data, any increased efforts by the EEOC or Office of Federal Contract Compliance Programs (OFCCP) to gather detailed compensation information absent a more comprehensive plan for obtaining and measuring such data – as would be required under

47 Abstracts of proposed federal rules and scheduled timetables are available on [Reginfo.gov](http://www.reginfo.gov), published by the Office of Management and Budget (OMB), Office of Information and Regulatory Affairs (OIRA), General Services Administration (GSA), and Regulatory Information Service Center (RISC). The RFOA abstract is available at <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201110&RIN=3046-AA76>.

48 Press Release, EEOC, EEOC Commissioners to Explain Disability Discrimination Law in Coast-To-Coast Tour (Aug. 28, 2012), available at <http://www.eeoc.gov/eeoc/newsroom/release/8-28-12.cfm>; Press Release, EEOC, Next Commission Meeting Wednesday, April 25 (Apr. 19, 2012), available at <http://www.eeoc.gov/eeoc/newsroom/release/4-19-12.cfm>.

49 See Agency Rule List Fall 2011, Equal Employment Opportunity Commission, [http://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION\\_GET\\_AGENCY\\_RULE\\_LIST&currentPub=true&agencyCode=&showStage=active&agencyCd=3046&Image58.x=25&Image58.y=13](http://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST&currentPub=true&agencyCode=&showStage=active&agencyCd=3046&Image58.x=25&Image58.y=13) (last accessed Dec. 7, 2012).

50 S. 3220, 112th Cong. (2012). A summary of the Paycheck Fairness Act is discussed in the *Little D.C. Update* at Ilyse Schuman, *Paycheck Fairness Act Stalls in Senate*, Littler Washington D.C. Employment Law Update (June 5, 2012), <http://www.dcmplemploymentlawupdate.com/2012/06/articles/discrimination-in-the-workplac/paycheck-fairness-act-stalls-in-senate/>.

legislative and regulatory proposals – may increase employer burdens without providing the agency with beneficial statistics.<sup>51</sup> The NAS Study concluded that agencies have yet to set forth a strategy for gathering and using the wage data to combat discrimination.

## 2. Age Discrimination and the “Reasonable Factors Other Than Age” Defense

On March 29, 2012, the EEOC issued its Final Regulation on Disparate Impact and Reasonable Factors Other than Age (RFOA) under the Age Discrimination in Employment Act of 1967 (ADEA).<sup>52</sup> The Final Rule clarifies that the ADEA prohibits policies and practices that have a disparate impact on older individuals unless the employer can show that the policy or practice is based on a reasonable factor other than age.

The EEOC’s stated purpose in revising its rule on RFOA was to align the regulation with the Supreme Court’s decisions in *Smith v. City of Jackson*<sup>53</sup> and *Meacham v. Knolls Atomic Power Laboratory*.<sup>54</sup> In these decisions, the Court criticized part of the Commission’s existing ADEA regulations, which stated that if an employee establishes that an employment practice disproportionately harmed older workers, the employer had the burden of proving that the practice or policy was required as a “business necessity.” The Court did away with the business necessity requirement and instead ruled that employers need only prove that the practice was based on RFOA. While the Court also said that the RFOA defense is easier to prove than the business necessity defense, it did not otherwise explain RFOA.

The Final Rule codifies the RFOA defense for age discrimination claims,<sup>55</sup> purports to align the existing EEOC regulations with the Supreme Court’s holding that the defense to an ADEA disparate impact claim is a RFOA (not business necessity), and provides further clarification of the RFOA defense.

The Commission’s Final Rule confirms that: (1) the plaintiff bears the burden of “isolating and identifying the specific employment practice” that harms older workers substantially more than younger workers;<sup>56</sup> and (2) if the plaintiff makes this showing, the employer must demonstrate the RFOA defense.<sup>57</sup> The Final Rule explains that to establish the RFOA defense:

An employer must show that the employment practice was both reasonably designed to further or achieve a legitimate business purpose and administered in a way that reasonably achieves that purpose in light of the particular facts and circumstances that were known, or should have been known, to the employer.<sup>58</sup>

To aid in this analysis, the Final Rule includes a non-exhaustive list of considerations employers may use to assess the reasonableness of the factors other than age, including:

- The extent to which the factor is related to the employer’s stated business purpose;
- The extent to which the employer defined the factor accurately and applied the factor fairly and accurately, including the extent to which managers and supervisors were given guidance or training about how to apply the factor and avoid discrimination;
- The extent to which the employer limited supervisors’ discretion to assess employees subjectively, particularly when the criteria that the supervisors were asked to evaluate are known to be subject to negative age-based stereotypes;
- The extent to which the employer assessed the adverse impact of its employment practice on older workers; and

51 National Research Council, (2012), *Collecting Compensation Data from Employers*, Panel on Measuring and Collecting Pay Information from U.S. Employers by Gender, Race, and National Origin. Committee on National Statistics, Division of Behavioral and Social Sciences and Education. Washington, DC: The National Academic Press, available at [http://www.nap.edu/catalog.php?record\\_id=13496](http://www.nap.edu/catalog.php?record_id=13496). A summary of the report is also discussed in the *Littler D.C. Update* at Ilyse Schuman, *Report Finds Agency Plans for Compensation Data Collection Lacking*, Littler Washington D.C. Employment Law Update (Sept. 5, 2012), <http://www.demploymentlawupdate.com/2012/09/articles/eeoc-1/report-finds-agency-plans-for-compensation-data-collection-lacking/>.

52 Ilyse Schuman, *EEOC Issues Final Rule on Reasonable Factors Other Than Age Defense in Disparate Impact Age Discrimination Cases*, Littler Washington D.C. Employment Law Update (Mar. 30, 2012), <http://www.demploymentlawupdate.com/2012/03/articles/agency-rulemaking/eeoc-issues-final-rule-on-reasonable-factors-other-than-age-defense-in-disparate-impact-age-discrimination-cases/>.

53 544 U.S. 228 (2005).

54 554 U.S. 84 (2008).

55 29 C.F.R. § 1625.7.

56 29 C.F.R. § 1625.7(c).

57 29 C.F.R. § 1625.7(d).

58 29 C.F.R. § 1625.7(e)(1).

- The degree of the harm to individuals within the protected age group, in terms of both the extent of injury and the numbers of persons adversely affected, and the extent to which the employer took steps to reduce the harm, in light of the burden of undertaking such steps.<sup>59</sup>

The Final Rule also indicates that in applying these factors, no specific consideration or combination need be present to establish the RFOA defense, nor does the mere presence of one of these factors automatically establish the defense.<sup>60</sup>

Ultimately, the Final Rule suggests that an employer should be liable for a facially neutral practice if it negligently or unreasonably failed to mitigate its practice's disparate impact.<sup>61</sup> Thus, the Final Rule likely will make it more challenging for employers to implement facially neutral employment policies. Although the Commission did make changes to some provisions in the proposed rule that had been of concern to employers, the Final Rule as promulgated still portends increased difficulty for employers defending against disparate impact age discrimination claims.

Based on the new RFOA rules, employers are urged to carefully document personnel decisions that affect older workers, particularly RIFs, rely on objective factors to the extent practicable, take care in relying upon factors that may have an adverse impact on older workers, and consider training and legal guidance when making such decisions.

### 3. Criminal History Guidance

On April 25, 2012, the EEOC issued updated guidance concerning the use of criminal records by employers, titled "Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964"<sup>62</sup> (Updated Guidance). The Updated Guidance follows the EEOC's January 2012 announcement of a \$3.1 million dollar settlement with an employer following the Commission's finding that the employer allegedly screened out more than 300 African American job applicants based upon their criminal records.<sup>63</sup> The EEOC's Updated Guidance is intended to update and consolidate all of the Commission's prior statements about the use of criminal records in employment decisions into one comprehensive document and build upon previously issued court decisions and guidance. The guidance "also updates relevant data" and "illustrates how Title VII applies to various scenarios that an employer might encounter when considering the arrest or conviction history of a current or prospective employee."<sup>64</sup>

The Updated Guidance addresses both disparate treatment and disparate impact claims, and reviews the EEOC's approach regarding employer policies involving the use of both arrest and conviction records. The Commission's approach to disparate treatment has remained consistent. It also has maintained its position that while an employer may take into consideration an arrest in making an employment decision, excluding an applicant solely based upon an arrest cannot be justified by business necessity. A central focus of the Updated Guidance involves the potential adverse impact on African Americans and Hispanics based on their exclusion from employment based on criminal conviction records. An employer may be able to support an exclusion based on business necessity, if the employer "develops a targeted screen considering at least the nature of the crime, the time elapsed, and the nature of the job (the three *Green* factors), and then provides an opportunity for an individualized assessment for people excluded by the screen to determine whether the policy as applied is

59 29 C.F.R. § 1625.7(e)(2).

60 29 C.F.R. § 1625.7(3).

61 Edward Ellis and Amy Wentz, *The EEOC Misses the Mark with New Rule on the ADEA's Reasonable Factors Other Than Age Defense*, Littler ASAP (Apr. 4, 2012), <http://www.littler.com/publication-press/publication/eec-misses-mark-new-rule-adeas-reasonable-factors-other-age-defense>.

62 EEOC, ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CRIMINAL CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED. 42 U.S.C. § 2000E ET SEQ., Section II (Apr. 25, 2012), available at [http://www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm](http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm).

63 A comprehensive summary and discussion of the final rule is included in Barry Hartstein, Rod Fliegel, Marcy McGovern, and Jennifer Mora, *Criminal Background Checks: Evolution of the EEOC's Updated Guidance and Implications for the Employer Community*, Littler Report (May 17, 2012), available at <http://www.littler.com/publication-press/publication/criminal-background-checks-evolution-eeocs-updated-guidance-and-implic>. See also Ilyse Schuman, *EEOC Approves Enforcement Guidance on the Use of Criminal Records in Employment*, Littler Washington D.C. Employment Law Update (Apr. 26, 2012), <http://www.demploymentlawupdate.com/2012/04/articles/eeoc-1/eeoc-approves-enforcement-guidance-on-the-use-of-criminal-records-in-employment/>, and Rod Fliegel, Barry Hartstein, and Jennifer Mora, *EEOC Issues Updated Criminal Record Guidance that Highlights Important Strategic and Practical Considerations for Employers*, Littler ASAP (Apr. 30, 2012), available at <http://www.littler.com/publication-press/publication/eec-issues-updated-criminal-record-guidance-highlights-important-stra>.

64 EEOC, ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CRIMINAL CONVICTION RECORDS, Section II (Apr. 25, 2012), available at [http://www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm](http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm).

job related and consistent with business necessity.”<sup>65</sup> The Updated Guidance further provides that an employer may be able to exclude an individual solely on the basis of the “three *Green* factors,” without doing an individualized assessment in limited circumstance where the screen is “narrowly tailored to identify criminal conduct with a demonstrably tight nexus to the position in question.”

These developments set the stage for employers to closely review their hiring policies relating to the consideration of criminal records, assessing potential Title VII risk and opportunities to meaningfully reduce that risk without compromising other legitimate and compelling business interests. In particular, the Updated Guidance remains problematic for many employers, concerning the manner in which time bars may be considered based on certain offenses and the burden imposed on employers in demonstrating that the factors considered are job-related. Unless further clarification is provided by the Commission, the impact of the Updated Guidance may ultimately be decided by the courts.

#### 4. Recordkeeping Regulations

The EEOC amended its Title VII and ADA recordkeeping regulations to address recordkeeping obligations under the Genetic Information Nondiscrimination Act (GINA).<sup>66</sup> The final rule became effective on April 3, 2012.

### D. Current and Anticipated Trends

With Commissioner Ishimaru’s former seat vacant, the Democrats no longer hold a majority of the seats on the Commission, affecting the EEOC’s ability to advance initiatives supported by the White House. The timing of Senate confirmation of the fifth Commissioner is uncertain. Thus, the EEOC is not expected to aggressively advance its remaining agenda items until the beginning of calendar year 2013 at the earliest. With the reelection of President Obama and the Democratic gains in Congress, the EEOC can be expected to pursue its agenda with renewed vigor and to revisit stalled initiatives, including providing ADA guidance and pursuing issues related to hiring procedures and practice, pregnant workers and workers with caregiving responsibilities, and LGBT protection under Title VII. The Agency’s budget request

for FY 2013 underscores the continued emphasis on systemic litigation. The EEOC is seeking \$374 million for 2013, up from \$360 million it received for FY 2012. According to its budget request, “the priority for agency resources continues to be litigating systemic cases and maintaining a manageable inventory of cases.”<sup>67</sup>

#### 1. ADA Guidance

Since the enactment of the ADAAA, it has become easier for individuals to establish that they have a disability under the Act. As a result, the focus of disability claims has shifted to the reasonable accommodation process. The Commission held a public meeting<sup>68</sup> on the topic of leave policies and reasonable accommodations under the ADA and guidance on the topic was expected. The EEOC appeared poised to address this issue in FY 2012, announcing that it would consider enforcement guidance on reasonable accommodation and undue hardship under the ADA.<sup>69</sup> Despite these stated intentions, however, the EEOC ultimately did not issue any additional ADA enforcement guidance.<sup>70</sup> Nonetheless, the issue of reasonable accommodations will be at the forefront of the Commission’s future agenda. In September 2012, Commissioners Feldblum and Lipnic headlined EEOC-sponsored seminars in the Los Angeles, Seattle, Boston and Miami areas, offering training on reasonable accommodations for employees with disabilities under the ADAAA.<sup>71</sup> Additionally, the EEOC has identified ADAAA issues as part of its target for the next four years. Specifically, the Commission plans to focus on coverage issues and the proper application of ADA defenses, such as undue hardship, direct threat, and business necessity.<sup>72</sup>

65 EEOC, ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CRIMINAL CONVICTION RECORDS, Section I (Apr. 25, 2012), citing *Green v. Missouri Pacific Railroad*, 523 F.2d 1290 (8th Cir. 1975), available at [http://www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm](http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm).

66 29 C.F.R. § 1602. By way of background, the EEOC issued final regulations implementing the employment provisions of GINA in November 2010. A comprehensive summary is included in Ilyse Schuman, *EEOC Issues Long-Awaited Final Regulations on the Genetic Information Nondiscrimination Act*, Littler ASAP (Nov. 11, 2010), available at <http://www.littler.com/publication-press/publication/eeoc-issues-long-awaited-final-regulations-genetic-information-nondisc>.

67 White House, Office of Management and Budget, The Appendix, Budget of the United States Government, Fiscal Year 2013, Budget Request for Other Independent Agencies, available at <http://www.whitehouse.gov/omb/budget/Appendix>.

68 EEOC Meeting, *EEOC to Examine Use of Leave as Reasonable Accommodation* (June 8, 2011), available at <http://www.eeoc.gov/eeoc/meetings/6-8-11/index.cfm>.

69 Press Release, EEOC, Next Commission Meeting Wednesday, April 25 (Apr. 19, 2012), available at <http://www.eeoc.gov/eeoc/newsroom/release/4-19-12.cfm>.

70 EEOC Meeting, *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964* (Apr. 25, 2012), available at <http://www.eeoc.gov/eeoc/meetings/4-25-12/index.cfm>.

71 Press Release, EEOC, EEOC Commissioners to Explain Disability Discrimination Law in Coast-To-Coast Tour (Aug. 28, 2012), available at <http://www.eeoc.gov/eeoc/newsroom/release/8-28-12.cfm>.

72 EEOC, DRAFT FOR PUBLIC RELEASE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION’S STRATEGIC ENFORCEMENT PLAN (Sept. 4, 2012), available at [http://www.eeoc.gov/eeoc/plan/sep\\_public\\_draft.cfm](http://www.eeoc.gov/eeoc/plan/sep_public_draft.cfm).

## Spotlight on Pending ADA Case

### EEOC Challenges Random Alcohol Testing at U.S. Steel in *EEOC v. United States Steel Corp.*, No. 2:10-cv-01284 (W.D. Pa., filed Sept. 30, 2010)

Taking an aggressive stance on random alcohol testing, the EEOC has charged U.S. Steel and its unions with violating the Americans with Disabilities Act (ADA) by requiring new employees considered in a probationary status to submit to random alcohol tests. In a lawsuit filed in the United States District Court for the Western District of Pennsylvania, the Commission has alleged that the steel company violated the ADA by discharging an employee, Abigail DeSimone, and others not named in the lawsuit, on the basis of a positive alcohol test result. The lawsuit, *Equal Employment Opportunity Commission v. United States Steel Corp.*, 2:10-cv-01284, seeks to bar U.S. Steel and its unions from bargaining and implementing a policy that requires suspicionless alcohol tests and further seeks restitution for employees who were adversely affected by the policy.

The ADA limits employers' right to conduct medical examinations. Generally speaking, medical examinations are permitted for job applicants who have been extended a conditional offer of hire. However, the results of those examinations can be used only in a manner that complies with the ADA – in other words, if the employer wishes to rescind a job offer on the basis of information received through a medical examination, it can do so only to the extent its decision is consistent with business necessity. Once an individual has commenced employment, however, employers are more limited in their ability to require that an employee submit to a medical examination. An employer can require a medical examination of a current employee only to the extent that the examination itself is job-related and the results are used in a manner consistent with business necessity, as when the employer seeks to ensure that the employee can perform the essential functions of the position safely, without posing a threat to himself or another person, or when necessary to help evaluate a request for a reasonable accommodation.

Drug tests are not medical examinations, having been specifically exempted from that designation by the text of the ADA. Alcohol tests, however, are not so exempted, and the EEOC has long taken the position, in regulations and in guidance documents, that alcohol tests seek medical information, and therefore are medical examinations.

According to the EEOC, Ms. DeSimone was required to submit to an unlawful random breath alcohol test during her probationary period; U.S. Steel had no reason to believe that she might have recently used alcohol or that she had violated the its drug and alcohol policy. Ms. DeSimone tested positive. The complaint alleges that her attempts to explain to U.S. Steel that her medical condition had caused the positive result, rather than her use of alcohol, were rebuffed, and she was discharged.

In September 2012, U.S. Steel filed a motion for summary judgment, arguing that its policy of requiring random alcohol testing is both job-related and consistent with business necessity, because its probationary employees at the site in question perform safety-sensitive jobs. In support of its motion, U.S. Steel pointed out that the jobs in question involve work in and around coke ovens, which reach a temperature of 2100 degrees Fahrenheit, involve work more than 25 feet above the ground at temperatures of 160 degrees Fahrenheit, work in and around the path of cars that fully loaded may weigh more than 230 tons, and other machine operator jobs. Noting that performing those jobs while under the influence of alcohol would pose a safety risk to the employee and his or her coworkers, U.S. Steel argued that random alcohol testing has a deterrent effect on the use of alcohol and that the law does not require it to wait until an employee appears to be impaired to test for the presence of alcohol. In the alternative, U.S. Steel raised additional arguments, including an argument that the alcohol testing is part of a voluntary health program adopted by the company and its unions through the collective bargaining process. The Commission opposed the motion, arguing that medical examinations can be both job-related and consistent with business necessity only when triggered by some individualized evidence that the that the examination was warranted; in other words, the EEOC argues that a policy requiring suspicionless alcohol tests of individuals in safety-sensitive roles can never be lawful. In November 2012, oral argument was held on U.S. Steel's motion for summary judgment.

Employers are typically advised to avoid random alcohol tests of employees who do not occupy safety-sensitive roles. To date, no court has held that random alcohol testing is never permitted for individuals in safety-sensitive jobs. Employers with random alcohol testing programs should watch this case closely, although given the issues presented, it seems likely that whatever the outcome, the parties may seek appellate review.

## 2. Hiring Issues

For the past several years, the EEOC has focused on the impact certain hiring practices may have on protected groups. Now that the Commission has issued updated guidance concerning the use of arrest and conviction records in hiring and employment, the EEOC is expected to revisit other hiring practices that may disproportionately impact certain protected groups. Based on past hearings, it is likely that the EEOC will focus on the use of credit reports in hiring decisions,<sup>73</sup> and carefully review the impact of considering unemployment status in hiring decisions.<sup>74</sup> Employers also should anticipate that any pre-employment testing or other employment screening practices will be closely scrutinized by the Commission to determine whether it may improperly screen out minorities or those covered under the ADA.

## 3. Pregnant Workers, Workers with Caregiver Responsibilities and Other Concerns of Sex and Related Discrimination

The EEOC is beginning to place more attention on issues of discrimination against pregnant women, workers with caregiving responsibilities and other conduct that may result in discriminatory treatment or have an adverse impact against female workers.

In February 2012, the Commission held a meeting to address discrimination based on pregnancy and caregiving responsibilities.<sup>75</sup> In December 2012, the EEOC issued the SEP, which identifies one of its priorities as: “accommodating pregnancy-related limitations.”<sup>76</sup> Vigorous enforcement can be expected in the coming year.

In early October 2012, the EEOC also issued “Questions and Answers: The Application of Title VII and the ADA to Applicants or Employees Who Experience Domestic or Dating Violence, Sexual Assault or Stalking,” taking the position that victims of such conduct may be treated in a discriminatory manner, suffer from disparate treatment, unlawful stereotyping, potential harassment and/or discrimination based on a protected disability.<sup>77</sup>

## 4. Concerns of Human Trafficking

On March 15, 2012, EEOC Chair Jacqueline Berrien participated in a meeting at the White House regarding the Interagency Task Force to Monitor and Combat Human Trafficking.<sup>78</sup> This is an issue that is gaining increased attention across various agencies, including the EEOC. The type of activity under scrutiny includes employers and/or employment agencies luring foreign workers to the U.S. with promises of high paying jobs and/or other benefits, and thereafter, subjecting them to discriminatory, harassing, abusive and/or retaliatory conduct upon their arrival in the U.S.

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

74 Press Release, EEOC, Out of Work? Out of Luck: EEOC Examines Employers’ Treatment of Unemployed Job Applicants at Hearing (Feb. 16, 2011), available at <http://www.eeoc.gov/eeoc/newsroom/release/2-16-11.cfm>. Legal protection for the unemployed is a growing trend. Several jurisdictions, including the District of Columbia, New Jersey, and Oregon, have enacted laws affording protections to unemployed applicants. See Nancy Delogu and Jennifer Thomas, *District of Columbia First in Nation to Ban Discrimination Based on (Un)Employment Status*, Littler ASAP (June 28, 2012), available at <http://www.littler.com/publication-press/publication/district-columbia-first-nation-ban-discrimination-based-unemployment-s>.

75 Press Release, EEOC, Unlawful Discrimination Based on Pregnancy and Caregiving Responsibilities Widespread Problem, Panelist Tell EEOC (Feb. 15, 2012), <http://www.eeoc.gov/eeoc/newsroom/release/2-15-12.cfm>.

76 EEOC, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION STRATEGIC ENFORCEMENT PLAN FY 2013-2016, p. 10 (Dec. 17, 2012), available at <http://www.eeoc.gov/eeoc/plan/sep.cfm>.

77 See EEOC, QUESTIONS AND ANSWERS: THE APPLICATION OF TITLE VII AND THE ADA TO APPLICANTS OR EMPLOYEES WHO EXPERIENCE DOMESTIC OR DATING VIOLENCE, SEXUAL ASSAULT OR STALKING, available at [http://www.eeoc.gov/eeoc/publications/qa\\_domestic\\_violence.cfm](http://www.eeoc.gov/eeoc/publications/qa_domestic_violence.cfm).

78 EEOC, EEOC Chair Attends Meeting of Interagency Task Force to Monitor and Combat Trafficking in Persons, [http://www.eeoc.gov/eeoc/newsroom/trafficking\\_task\\_force.cfm](http://www.eeoc.gov/eeoc/newsroom/trafficking_task_force.cfm) (last visited Dec. 6, 2012).

## Spotlight on Human Trafficking Litigation

EEOC Prosecutes Farm Worker Human Trafficking Cases Under a “Pattern or Practice” of Discriminatory Treatment Theory in *EEOC v. Global Horizons, Inc.*, No. 1:11-cv-00257 (D. Haw., filed Apr. 19, 2011) and No. 2:11-cv-03045 (E.D. Wash., filed Apr. 19, 2011)

In April 2011, the Commission filed two separate lawsuits under Title VII in what the EEOC maintains is the “largest human trafficking case in agriculture to date.”<sup>79</sup> Both lawsuits, one in Hawaii<sup>80</sup> and one in Washington state,<sup>81</sup> were filed against Global Horizons, Inc., a labor broker, with six Hawaiian farms and two Washington state orchards being joined in the cases in their respective jurisdictions. The complaints allege that Global Horizons lured more than 200 Thai men into the country to work as farm workers on the defendant farms, with promises of high-paying wages and temporary visas. The Commission maintains that the workers were required to pay large sums of money in recruitment fees, causing them to go severely into debt. After entering the United States, the workers were allegedly subjected to a pattern or practice of discriminatory treatment based upon national origin, race, retaliation and/or constructive discharge, as well as being subjected to a hostile work environment and discriminatory terms and conditions of employment. The lawsuit alleges that the workers had their passports confiscated, were threatened with deportation, received low wages, detained in vermin-ridden and bug infested housing, denied the freedom to leave, and subjected to physical and verbal assaults.

The lawsuits follow in tandem with the Commission’s increased emphasis on coordinating with other governmental agencies to confront workplace issues. In January 2011, the EEOC held a public meeting on Combating Human Trafficking and Forced Labor.<sup>82</sup> It has since filed several lawsuits involving human trafficking, including the *Global Horizons* suits, and participates on the federal government’s Interagency Task Force to Monitor and Combat Human Trafficking.<sup>83</sup> The Commission’s Strategic Enforcement Plan highlights combating human trafficking as one of the EEOC’s enforcement initiatives.

Even though the cases were filed in April 2011, the *Global Horizons* litigation is still in its initial stages, with several motions to dismiss and amended complaints filed in each case, as well as a stay, since lifted, having been issued pending criminal proceedings. One issue both courts recently have addressed – the result of which has caused a serious blow to the Commission’s efforts to recover on behalf of the farm workers – is that of the applicable limitations period for pattern or practice claims brought under section 707 of Title VII. In July 2012 and November 2012, respectively, the Eastern District of Washington and the District of Hawaii each sided with the recent trend in district courts, holding that the 300-day limitation period found in section 706 applies to pattern or practice claims brought under section 707.<sup>84</sup> Accordingly, in both lawsuits, the EEOC is limited in seeking relief on behalf of only those individuals who were subject to an adverse action during the 300-day charge filing period.

In another important ruling, the court in the Eastern District of Washington case rejected the Commission’s theory that the two orchard defendants could be held to be a joint employer with Global Horizons, thereby rejecting vicarious liability on the part of the orchard defendants for the actions of Global Horizon in the recruiting, housing, transportation and subsistence of the workers (*i.e.*, non-orchard related activities).<sup>85</sup> The court did, however, find that the orchard defendants would be considered employers for the purpose of Title VII coverage for their actions toward the workers while they were working in the orchards.

79 Press Release, EEOC, *EEOC Files Its Largest Human Trafficking Suit Against Global Horizons, Farms* (Apr. 20, 2011), available at <http://www.eeoc.gov/eeoc/newsroom/release/4-20-11b.cfm>.

80 *EEOC v. Global Horizons, Inc., et al.*, No. 1:11-cv-00257 (D. Haw.).

81 *EEOC v. Global Horizons, Inc., et al.*, No. 2:11-cv-03045 (E.D. Wash.).

82 See *EEOC Meeting, Human Trafficking and Forced Labor* (Jan. 19, 2011), available at <http://www.eeoc.gov/eeoc/meetings/1-19-11/index.cfm>.

83 See EEOC, EEOC Chair Attends Meeting of Interagency Task Force to Monitor and Combat Trafficking in Persons, [http://www.eeoc.gov/eeoc/newsroom/trafficking\\_task\\_force.cfm](http://www.eeoc.gov/eeoc/newsroom/trafficking_task_force.cfm) (last visited Dec. 6, 2012); *EEOC Meeting, Human Trafficking and Forced Labor* (Jan. 19, 2011), available at <http://www.eeoc.gov/eeoc/meetings/1-19-11/index.cfm>; Press Release, EEOC, *EEOC Sues Marine Services Company for Labor Trafficking, Discrimination* (Apr. 20, 2011), available at <http://www.eeoc.gov/eeoc/newsroom/release/4-20-11a.cfm>.

84 *EEOC v. Global Horizons, Inc.*, 2012 U.S. Dist. LEXIS 105993, at \*\*18-21 (E.D. Wash. July 27, 2012); *EEOC v. Global Horizons, Inc.*, 2012 U.S. Dist. LEXIS 16072, at \*\*29-43 (D. Haw. Nov. 8, 2012). In an earlier ruling in the case, the court for the district of Hawaii held that the 300-day limitations period was not application to claims brought under section 707. See *EEOC v. Global Horizons, Inc.*, 2012 U.S. Dist. LEXIS 160729, at \*\*39-46 (D. Haw. Nov. 2, 2011). In its November 8, 2012 opinion, the District Court for the District of Hawaii reversed itself and affirmatively rejected its earlier ruling, noting the recent trend in the case law in district courts in other jurisdictions, including the ruling in the Eastern District of Washington.

85 *EEOC v. Global Horizons, Inc.*, 2012 U.S. Dist. LEXIS 105993, at \*\*9-13 (E.D. Wash. July 27, 2012).



The *Global Horizons* litigation represents an important enforcement activity for the EEOC as it advances its efforts to coordinate with other federal agencies and non-governmental organizations to combat human trafficking. The cases also will be closely monitored by the employer community as the Commission's human trafficking enforcement activities have the potential to significantly expand the EEOC's reach, some may argue beyond the originally intended reach of the statutes the Commission is charged to enforce, in particular Title VII.

## 5. Increased Attention on Equal Pay

In 2010, President Obama created the National Equal Pay Task Force, which brought together, the EEOC, Department of Justice, the U.S. Department of Labor and the Office of Personnel Management to address issues of gender pay disparities.<sup>86</sup> This task force came on the heels of President Obama signing the Lilly Ledbetter Fair Pay Act, which focused on expanding the time limitations period applicable to pay discrimination claims. Since that time the task force has issued its report, which referred to partnering among the federal agencies on equal pay issues, and including equal pay claims as part of the EEOC's systemic initiative.<sup>87</sup>

The Commission's effort to train enforcement personnel from other agencies on compensation discrimination laws and joint outreach efforts with other task force members, including OFCCP, is a clear sign that this focus on equal pay will likely continue. While only two equal pay lawsuits were filed this year, with a similar number of filings as reported in last year's Report, it is anticipated that there will be increased attention on systemic investigations related to equal pay, which can be initiated as "Directed Investigations" without the requirement of a discrimination charge even being filed against the employer.

## 6. LGBT Coverage Under Title VII

Another emerging issue the EEOC has indicated it will target in the next four years is the application of Title VII sex discrimination provisions to lesbian, gay, bisexual and transgender individuals.<sup>88</sup> In a trailblazing departure from earlier rulings, the Commission took the position in *Macy v. Bureau of Alcohol, Tobacco, Firearms and Explosives*,<sup>89</sup> that discrimination against an individual because that person is transgender is discrimination because of sex. The *Macy* decision has the potential to impact the EEOC's enforcement and litigation activities and is applicable to all federal agencies and departments.<sup>90</sup>

## 7. Statutory Authority for Pattern or Practice Claims

Section 707 of Title VII provides that the EEOC may bring a civil action against an employer when it "has reason to believe that any person or group of persons is engaged in a pattern or practice" of unlawful discrimination.<sup>91</sup> By contrast, section 706 of Title VII makes no mention of pattern or practice claims, but instead provides that the EEOC "shall endeavor to eliminate any . . . unlawful employment practice by informal methods of conference, conciliation, and persuasion," and if such methods are unsuccessful, "may bring a civil suit."<sup>92</sup>

Though section 706 makes no explicit mention of a pattern or practice of discrimination, there has been a split of authority among the district courts as to whether the EEOC may bring suit to remedy pattern or practice discrimination under section 706, in addition to its authority under section 707.<sup>93</sup> Until recently, no appellate court had addressed the issue. However, in November 2012, the Sixth Circuit Court of Appeals, in *Serrano and EEOC v. Cintas Corp.*, held that the EEOC may bring a civil action on a pattern or practice theory

86 White House, National Equal Pay Task Force, <http://www.whitehouse.gov/webform/national-equal-pay-task-force-submit-your-question> (last visited Dec. 7, 2012).

87 See White House, EQUAL PAY TASK FORCE ACCOMPLISHMENTS (April 2012), available at [http://www.whitehouse.gov/sites/default/files/equal\\_pay\\_task\\_force.pdf](http://www.whitehouse.gov/sites/default/files/equal_pay_task_force.pdf).

88 EEOC, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION STRATEGIC ENFORCEMENT PLAN FY 2013-2016, p. 10 (Dec. 17, 2012), available at <http://www.eeoc.gov/eeoc/plan/sep.cfm>.

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

90 Denise Visconti and Emily Chaloner, *The EEOC Opens the Door to Title VII Protection for Transgender Employees*, Littler ASAP (Apr. 25, 2012), available at <http://www.littler.com/publication-press/publication/eeoc-opens-door-title-vii-protection-transgender-employees>.

91 42 U.S.C. § 2000e-6(a), (e) (§ 707).

92 42 U.S.C. § 2000e-5(b), (f)(1) (§ 706).

93 Compare *EEOC v. Bass Pro Outdoor, LLC*, 2012 U.S. Dist. LEXIS 75597, at \*\*29-30, 39-41 (S.D. Tex. May 31, 2012) (Pattern or practice claims must be brought under section 707, not section 706) with *EEOC v. Scolari Warehouse Mkts., Inc.*, 488 F. Supp. 2d 1117, 1143 (D. Nev. 2007) (EEOC may maintain a pattern or practice claim under both section 706 and 707).

under section 706.<sup>94</sup> The court also held that the appropriate evidentiary framework for a pattern or practice claim under section 706 is the framework articulated in *Teamsters v. United States*.<sup>95</sup> The holding is significant in that it confirms that in the Sixth Circuit, the EEOC has two avenues for pursuit of class claims under section 706: (a) presenting circumstantial evidence under the familiar burden-shifting *McDonnell Douglas* or (b) meeting a heightened *prima facie* case standard to establish a pattern or practice of discrimination under *Teamsters*. More specifically, under the *Teamsters* framework, the Commission must establish “that unlawful discrimination has been a regular procedure or policy followed by an employer or group of employers,” upon which showing the EEOC need only demonstrate that an alleged victim of discrimination unsuccessfully applied for a job.<sup>96</sup> At that point, the burden shifts to the employer to prove the individual applicant was denied employment for lawful reasons.<sup>97</sup>

Because section 706 affords greater remedies (compensatory and punitive damages) than claims brought under section 707 (equitable relief), the Sixth Circuit’s decision in *Cintas* affords the Commission greater remedies in pursuing its strategic focus on pattern or practice litigation. The issue, however, continues to be litigated in other jurisdictions.<sup>98</sup> Given the importance of this issue, both to the Commission and to those employers confronted with pattern or practice claims, it is certain to continue to be litigated in the courts, with appellate review in other circuit courts of appeals likely to follow.

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94 *Serrano and EEOC v. Cintas Corp.*, 2012 U.S. App. LEXIS 23132, at \*25 (6th Cir. Nov. 9, 2012) *en banc rehearing requested*. On November 21, 2012, Cintas filed a petition requesting that the Sixth Circuit hear the case *en banc* (i.e., the whole court), compared to the 3-judge panel that initially heard the appeal.

95 See *Teamsters v. United States*, 431 U.S. 324 (1977).

96 431 U.S. at 360, 362.

97 *Id.*

98 For example, currently pending in the United States District Court for the Southern District of Texas, *EEOC v. Bass Pro Outdoor World, LLC*, 2012 U.S. Dist. LEXIS 75597, at \*\*29-30, 39-41 (S.D. Tex. May 31, 2012), another recent systemic case brought by the EEOC where, in contrast to the Sixth Circuit, the court ruled that the EEOC cannot bring a pattern or practice claim under section 706.

## Spotlight on Pending Section 706 Pattern or Practice Litigation

### Challenges to a Nationwide Race Discrimination Lawsuit by the EEOC — *EEOC v. Bass Pro Outdoor World*, No. 4:11-cv-03425 (S.D. Tex., filed Sept. 21, 2011)

On September 21, 2011, the EEOC filed a Complaint against Bass Pro in the Southern District of Texas asserting a nationwide claim of race discrimination on behalf of Black and Hispanic applicants.<sup>99</sup> The EEOC has focused on alleged discriminatory hiring practices and unlawful retaliation. The lawsuit is a prime example of the EEOC's systemic initiative in pursuing nationwide claims, taking the view it is not constrained by Rule 23 of the Federal Rules of Civil Procedure or the *Dukes v. Walmart*<sup>100</sup> decision. As significantly, the case deals with the extent to which the EEOC can assert a nationwide lawsuit relying solely on a Commissioner's charge in which there was the absence of any charging party being relied on to investigate the charge or initiate the lawsuit against the employer.

The *Bass Pro* case will be closely monitored by the employer community because this pattern and practice lawsuit by the EEOC has been vigorously challenged at the pleading stage and raises serious questions concerning the level of detail required in a nationwide pattern or practice lawsuit. Also at issue is the appropriate legal burden that should be placed on the EEOC when filing a nationwide lawsuit against an employer. The court in *Bass Pro* is faced with many of the same issues recently addressed by the Sixth Circuit in *Serrano and EEOC v. Cintas Corp.*, 2012 U.S. App. LEXIS 23132 (6th Cir. Nov. 9, 2012), except that *Bass Pro* seeks nationwide relief, as compared to a statewide claim in *Serrano*.

The first critical ruling in the case, issued on May 31, 2012,<sup>101</sup> involved a challenge to the first amended complaint.<sup>102</sup> While the court denied the employer's "invitation" to address a new pleading standard for pattern or practice cases based on *Dukes v. Wal-Mart*, focusing on the alleged absence of a uniform employment practice, except for allowing discretion by local supervisors, the court held "Wal-Mart simply did not concern pleading standards, and the Court does not find it appropriate to evaluate the Amended Complaint in Wal-Mart's shadow." Notwithstanding, the court dismissed the pattern or practice claims in the amended complaint, relying on *Iqbal* and *Twombly*, because the amended complaint suffered from a lack of specificity in the court's view. While the EEOC came forward with "extremely troubling racist comments surrounding hiring decisions," the Commission provided "few facts" and the "handful of alleged incidents" did not make a nationwide pattern or practice "plausible," but rather, according to the court, "merely offers conclusory allegations and unwarranted deductions."<sup>103</sup>

Another central focus of the decision was the extent to which the EEOC could pursue pattern or practice claims under both sections 706 and 707 of Title VII. The employer urged the court to dismiss all claims based on competing theories being relied on by the Commission. The court opined, "A § 706 claim involves the right of aggrieved *individuals* challenging [an] unlawful employment practice on an individual or class wide basis, whereas a § 707 claim involves a pattern or practice of systemic discrimination challenging widespread discrimination through a company on a *group* basis."<sup>104</sup> Additionally, "the *Teamsters* framework generally applies to pattern or practice claims brought under § 707, whereas the *McDonnell Douglas*<sup>105</sup> framework applies to individual claims brought under § 706."

In the court's May 31 ruling, it essentially adopted the employer's arguments and held that the EEOC "cannot bring a hybrid pattern or practice claim that melds the respective frameworks of § 706 and § 707."<sup>106</sup> Specifically, the court interpreted section 706 to *not provide* for pattern or practice claims. Further, the court held "§707 only permits equitable relief." The court also found the section 706 claim to be questionable in the absence of identifying a single plaintiff. The court also ruled that under sections 706 and 707, the EEOC may recover individual relief only for alleged victims whose claims fall within the applicable charge filing limitations period. Despite its lengthy and detailed May 31, 2012 opinion, the court granted the EEOC leave to amend.<sup>107</sup>

99 Press Release, EEOC, *Bass Pro Failed to Hire Blacks and Hispanics at its Stores Nationwide, EEOC Says in Suit* (Sept. 21, 2011), available at <http://www.eeoc.gov/eeoc/newsroom/release/9-21-11.cfm>.

100 131 S. Ct. 2541 (2011).

101 *EEOC v. Bass Pro Outdoor World, LLC*, 2012 U.S. Dist. LEXIS 75597 (S.D. Tex. May 31, 2012).

102 While the motion to dismiss was pending, the EEOC filed its first amended complaint, which identified additional defendants involving purported related entities and added a few anecdotes, which led the employer to move to dismiss the first amended complaint on the same grounds as the initial complaint.

103 *Bass Pro Outdoor World, LLC*, 2012 U.S. Dist. LEXIS 75597 at \*\*40-41.

104 *Id.* at \*44.

105 *Id.*

106 *Id.* at \*49.

107 See Defendants' Motion to Dismiss Second Amended Complaint (Docket 76). As of the time when this Report went to print, the Defendants' Motion to Dismiss Second Amended Complaint remained pending before the court.

The EEOC thereafter filed a motion for reconsideration of the court's May 31, 2012 ruling. On July 20, 2012, the Commission also filed a 247-page (*i.e.*, 509-paragraph) second amended complaint, which included detailed allegations of alleged discriminatory and retaliatory conduct by the employer. On October 22, 2012, at a hearing on the motion for reconsideration, the court denied the Commission's motion. A motion to dismiss concerning the second amended complaint was also filed, which led to extensive briefing by the parties. As it proceeds, the *Bass Pro* litigation will be another case for employers to watch, likely setting forth the ground rules in litigating large scale pattern or practice cases filed by the EEOC.

### III. SCOPE OF EEOC INVESTIGATIONS AND SUBPOENA ENFORCEMENT ACTIONS

As part of the investigation process, the EEOC has statutory authority to issue subpoenas and pursue subpoena enforcement actions in the event of an employer's failure and/or refusal to provide requested information or data and/or make requested personnel available for interview.<sup>108</sup> The EEOC has continued to consider this option, particularly when dealing with systemic investigations.

Discussed below is a brief review of the scope and limits on the EEOC's investigative authority, including procedural rules in challenging such authority. Both federal appellate and district court decisions over the past year are addressed. A detailed summary of all subpoena enforcement actions during FY 2012 also is included as Appendix D.

#### A. EEOC Authority to Conduct Class-Type Investigations

Systemic investigations can arise based upon any of the following: (1) a charge is filed as a pattern or practice claim and/or the EEOC expands an individual charge into a pattern or practice investigation; (2) the EEOC commences an investigation based on the filing of a "Commissioner's Charge;" or (3) the EEOC initiates on its own authority a "directed investigation" involving potential age discrimination or potential equal pay violations.

The Commission enjoys broad authority to investigate systemic discrimination stemming from its broad legislative mandate.<sup>109</sup> Unlike individual litigants asserting class action claims, the EEOC is not required to 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."<sup>110</sup>

Title VII also authorizes the EEOC to issue charges on its own initiative (*i.e.*, Commissioner Charges),<sup>111</sup> 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 (ADEA) or the Equal Pay Act (EPA). Under both statutes, the Commission can initiate a "directed investigation" even in the absence of a charge of discrimination, seeking data that may include broad-based requests for information and initiating a lawsuit for violations of the applicable statute.<sup>112</sup>

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

109 See 42 U.S.C. § 2000e-5-2000e-6.

110 *EEOC v. Caterpillar, Inc.*, 409 F.3d 831, 832 (7th Cir. 2005) (internal citation omitted). *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 individual ADA charges that did not include pattern or practice allegations where the investigation revealed no company-wide conduct that would form the basis of any pattern or practice claims).

111 See 42 U.S.C. § 2000e-5(b).

112 See, e.g., 29 U.S.C. § 626(a) (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.").

## B. Scope of EEOC's Investigative Authority

The Commission's requests for information arise under Title VII, which permits it to "at all reasonable times have access to . . . any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this subchapter and is relevant to the charge under investigation."<sup>113</sup> The leading case interpreting this authority is the U.S. Supreme Court's decision, *EEOC v. Shell Oil Co.*, which is frequently cited in subpoena enforcement litigation, particularly for the proposition that the EEOC is "entitled to access only evidence 'related' to the charge under investigation, . . . courts have generously construed the term 'relevant' and have afforded the Commission access to virtually any material that might cast light on the allegations against the employer."<sup>114</sup> However, the *Shell* court also noted, "Congress did not eliminate the relevance requirement, and we must be careful not to construe the regulation adopted by the EEOC governing what goes into a charge in a fashion that renders that requirement a nullity."<sup>115</sup>

Challenges to subpoena enforcement actions typically focus on two issues: (1) relevance and (2) burdensomeness. Though the relevance standard for EEOC subpoenas is interpreted broadly when compared with the admissibility of evidence, courts have refused to enforce administrative subpoenas that would result in a "fishing expedition."<sup>116</sup> With respect to burdensomeness, courts begin by presuming that compliance should be enforced to further the EEOC's legitimate inquiry into matters of public interest. Thus, an employer must demonstrate that the demands are unduly burdensome or unreasonably broad, such as by showing that "compliance would threaten the normal operation of a respondent's business."<sup>117</sup> Cost of compliance is also considered, taking into account the personnel or financial burden compared with the resources the employer has at its disposal.<sup>118</sup>

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

An employer may be barred from challenging a subpoena in a subpoena enforcement action in circumstances where it failed to timely move to challenge or modify the subpoena.<sup>119</sup> 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.<sup>120</sup> This waiver argument continues to be raised by the EEOC in administrative subpoena enforcement actions, particularly when dealing with an employer who generally has been nonresponsive to the EEOC's requests for information and subpoena.<sup>121</sup>

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

### 1. Appellate Court Decisions

Recent federal circuit court decisions remain consistent with prior appellate decisions, with the Tenth Circuit Court of Appeals favoring a narrower interpretation of the EEOC's subpoena power, and other circuits taking a more expansive view of the EEOC's authority to subpoena information well beyond the scope of the underlying charge of discrimination.

113 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.

114 *EEOC v. Shell Oil Co.*, 466 U.S. 54, 69 (1984).

115 *Id.*

116 See *EEOC v. United Airlines*, 287 F.3d 643 (7th Cir. 2002).

117 *Id.* at 653.

118 *Id.* at 653-54

119 See, e.g., *EEOC v. Bashas', Inc.*, 2009 U.S. Dist. LEXIS 97736, at \*\*9-29 (D. Ariz. Sept. 30, 2009) (providing an excellent discussion of the case law discussing the potential "waiver" of a right to challenge an administrative subpoena). See also *EEOC v. Cuzzens of GA., Inc.*, 608 F.2d 1062, 1064 (5th Cir. 1979); *EEOC v. Cnty. of Hennepin*, 623 F. Supp. 29, 33 (D. Minn. 1985); *EEOC v. Roadway Express, Inc.*, 569 F. Supp. 1526, 1528 (N.D. Ind. 1983).

120 29 C.F.R. § 1601.16. However, employers do not have the option to petition to revoke or modify under either the ADEA or EPA, and the EEOC can file an action directly in federal court in the event of non-compliance with a subpoena issued under these statutes. See EEOC Compliance Manual, Section 24, Subpoenas, §24.11 – Title VII/ADA Subpoena Appeals and Letter 24-E and Letter 24-F.

121 See, e.g., *EEOC v. Midwest Health Inc.*, No. 2:12-mc-00240 (D. Kan. Oct. 1, 2012) (EEOC motion to compel employer's compliance with subpoena arguing waiver by failure to file a Petition to Revoke or Modify the Subpoena where employer had failed to respond to charge of discrimination or EEOC's requests for information or subpoena); *EEOC v. On the Spot Portable Detail & Pressure Washing, LLC*, No. 5:12-mc-02646 (N.D. Ala. Aug. 7, 2012) (same). For a detailed discussion of the *Midwest Health* and *On the Spot* administrative subpoena enforcement actions, see Appendix D. But see *EEOC v. Loyola Univ. Med. Ctr.*, 823 F. Supp. 2d 835 (N.D. Ill. 2011) (denying enforcement of overbroad subpoena requesting irrelevant information despite employer's failure to file a Petition to Revoke or Modify the Subpoena, reasoning a procedural ruling was inappropriate given (1) the absence of established case law on the issue under the ADA, (2) the sensitive and confidential nature of the information subpoenaed, which related to 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).

In *EEOC v. Burlington Northern Santa Fe Railroad*,<sup>122</sup> the Tenth Circuit Court of Appeals addressed the issue of whether the district court properly declined to enforce an administrative subpoena seeking data on a nationwide basis in connection with a charge of disability discrimination filed by two men who applied and were rejected for the same type of job in the same state. Specifically, the two men applied for the position of train conductor in the state of Colorado, and were issued an offer conditioned upon the results of a medical screening procedure. Following the procedure, each conditional offer was revoked, according to the Railroad, “based on the medical requirements and safety concerns incident to the Conductor position.”<sup>123</sup>

The EEOC issued a broad information request, demanding current and former employee files on a nationwide basis. The Railroad challenged the breadth of the request and requested documentation to support the scope of the EEOC’s investigation. The EEOC responded by serving an administrative subpoena for the documents and sending a letter explaining it had broadened its investigation from the charges filed by the individual charging parties to include “pattern and practice discrimination,” which it maintained warranted the demand for nationwide information. The EEOC did not otherwise explain the reason it had expanded its investigation.

The Railroad filed a petition to revoke or modify the subpoena, which was denied. The EEOC then applied to the district court for enforcement of its subpoena. In connection with its petition for enforcement, the EEOC, for the first time, stated that the expansion of the investigation was in response to its receipt of four other complaints of discrimination against the Railroad, from Kansas, Minnesota, Texas, and Wyoming. The district court concluded that the nationwide information sought by the EEOC was not relevant to the charges under investigation, *i.e.*, the two individual charges filed by applicants in Colorado.

On appeal, the Commission first argued that the district court ignored record evidence because all six charges, taken together, warranted an investigation into an apparent pattern or practice of discrimination. The appellate court disagreed, finding, to the contrary, the EEOC was entitled only to evidence relevant to the charges under investigation, and the subpoena referenced only the charges filed by the two Colorado applicants. The Commission further attempted to justify its broad request as necessary to determine the scope of a pattern or practice of discrimination, so that it could create a tailored information request, reasoning if it determined a pattern or practice of discrimination existed, the individual charging parties’ could be part of it. The court disagreed with this approach, noting “[a]ny act of discrimination could be part of a pattern or practice of discrimination, but not every charge of discrimination warrants a pattern or practice investigation.”<sup>124</sup> In conclusion, the appellate court noted that the EEOC could, while investigating the specific charges filed by the Colorado applicants, expand its search upon ascertaining some violation warranting a broader investigation, but the nationwide recordkeeping data was not relevant to those two individual charges.

By contrast, in FY 2012, the Third and Fourth Circuit Court of Appeals reemphasized the breadth with which they interpret the EEOC’s investigatory powers. In *EEOC v. UPMC*,<sup>125</sup> the Commission challenged a decision of the District Court for the Western District of Pennsylvania, which denied the EEOC’s request for enforcement of an administrative subpoena issued to the University of Pittsburgh Medical Center (“UPMC”) in connection with the investigation of a charge of disability discrimination filed against one of its subsidiaries. Specifically, the charging party worked as a nursing assistant for the subsidiary until she was deemed to have “voluntarily” resigned when she failed to report to work on the day after a medical leave of absence. In response to the charge, the subsidiary filed a position statement in which it argued the termination was not discriminatory because it resulted from the neutral application of its policy governing personal leave, and attached a copy of a number of UPMC’s personnel policies.

Upon reviewing the subsidiary’s response, the Commission issued a request for information to UPMC as to all of its employees in the Pittsburgh region who had been terminated under its personal leave of absence or disability policies. UPMC objected to the scope of the request, was served with an administrative subpoena, and filed a petition to revoke or modify the subpoena, which the EEOC denied.

<sup>122</sup> *EEOC v. Burlington Santa Fe Railroad*, 669 F.3d 1154 (10th Cir. 2012).

<sup>123</sup> *Id.* at 1155.

<sup>124</sup> 669 F.3d at 1157-58.

<sup>125</sup> *EEOC v. UPMC*, 2012 U.S. App. LEXIS 6219 (3d Cir. Mar. 27, 2012).

The EEOC then applied to the district court for enforcement of the subpoena, arguing it had expanded the scope of its investigation when it “discovered evidence of a policy that on its face appears to bar an entire class of reasonable accommodations.”<sup>126</sup> The district court refused, faulting the EEOC for focusing on what it deemed a “fishing expedition” into UPMC’s policies while doing “almost nothing” to investigate the specific facts of the charging party’s discharge.<sup>127</sup> The court ruled the EEOC failed to explain how information relative to UPMC’s area-wide policies would cast light on the individual charging party’s claims, which claims it found unlikely to succeed given the charging party’s failure to request a reasonable accommodation or demonstrate she would have been able to perform her job duties even if given a reasonable accommodation.<sup>128</sup>

The Third Circuit Court of Appeals disagreed, noting that its recent decision in *EEOC v. Kronos*<sup>129</sup> established the Commission is entitled to access any information that might (not “would”) cast light on the charge. Additionally, it found the EEOC reasonably questioned, upon receiving the subsidiary employer’s position statement and attending exhibits, whether UPMC was engaging in a pattern of discrimination by way of its “neutral” application of leave policies in spite of its obligation to provide reasonable accommodations under the ADA.<sup>130</sup> Accordingly, the appellate court remanded the decision for reconsideration by the district court.

In *EEOC v. Randstad*,<sup>131</sup> the Fourth Circuit Court of Appeals, likewise, reversed and remanded a district court’s denial of enforcement of an EEOC subpoena. In *Randstad*, the charging party was hired by Randstad, a temporary staffing agency, for a number of temporary assignments to industrial positions. After successfully completing one assignment, the charging party was fired for poor performance by two subsequent clients within days of each assignment. More than one year later, the charging party returned to Randstad and was assigned to a warehouse position. Upon arriving at the assigned location, the charging party was asked to fill out some forms. He called his placement manager at Randstad to request assistance, at which time Randstad learned that he could not read or write. Pursuant to an “unwritten policy,” Randstad advised the charging party that it would place him for future positions only if he developed remedial reading and writing skills.

Initially, the charging party filed a charge alleging discrimination on the basis of his national origin (Jamaican). Randstad responded to the charge, explaining its policy that employees must – for safety reasons and because it is otherwise necessary for “virtually all” assignments – be able to read and write at a remedial level at minimum. The investigation remained open for two years without the EEOC making any request for information. Then, more than two years after filing his original charge of discrimination, the charging party filed an amended charge, alleging disability discrimination under the ADA, but otherwise changing none of the substantive allegations underlying his charge. The Commission issued a request for information in connection with the amended charge, seeking, among other items, information about any literacy requirements Randstad imposed and a list of all position assignments made by Randstad. Randstad refused to provide a list of position assignments, arguing the request was unduly burdensome and the information requested was irrelevant.

The Commission issued a subpoena, with which Randstad refused to comply, resulting in the EEOC’s application for enforcement filed in the District of Maryland. The EEOC argued, both that Title VII authorized the investigation because Randstad’s literacy requirement may have a disparate impact on “Jamaicans and others who are not fluent in English due to their national origins,” and that the subpoena was authorized under the ADA because the charging party’s illiteracy resulted in part from a learning disability.<sup>132</sup> Rejecting those arguments, the lower court sided with Randstad, holding the subpoena was not authorized under Title VII because literacy requirements relate to the ability to read and write, not national origin, and Jamaica is an English speaking island. The court further held that the ADA claim was untimely and, therefore, could not form the basis of the EEOC’s right to seek broad placement information. Finally, the district court provided two alternative grounds for declining to enforce the subpoena under the ADA. First, it found that the information sought was irrelevant to the

126 *Id.* at \*6.

127 *Id.*

128 *Id.* at \*\*11-12.

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

130 *UPMC*, 2012 U.S. App. LEXIS 6219, at \*\*12-13

131 *EEOC v. Randstad*, 685 F.3d 433 (4th Cir. 2012)

132 *Id.* at 439.

charge under investigation in that the subpoena covered all Randstad placements, including administrative positions, for which the charging party was concededly unqualified, for all Maryland offices, even though the charging party sought employment only through one Maryland office, and for a five-year period after the charging party's termination. Second, the district court found the cost of compliance with the subpoena, estimated by Randstad to be between \$14,000 and \$19,000, rendered the requests unduly burdensome.

In a comprehensive opinion, the Fourth Circuit Court of Appeals disagreed on all counts and ordered enforcement of the administrative subpoena. First, the appellate court held that the amended charge of discrimination did, indeed, relate back to the original filing date based on the EEOC's reasonable interpretation of its regulations providing an amended charge will relate back if the amendment "clarify[ies] and amplify[ies] allegations made therein."<sup>133</sup> Second, the court ruled that the district court improperly considered the merits of the charge under investigation when it ruled that Title VII did not authorize the EEOC's broad inquiry because, among other things, Jamaica is an English speaking island.<sup>134</sup> Third, the Fourth Circuit held the district court erred in finding the Commission's subpoena was not authorized under the ADA, reasoning information on positions other than those held by the charging party might cast light on his allegations of disability discrimination by allowing the EEOC to "test Randstad's assertion that all of its warehouse and laborer positions require basic literacy skills."<sup>135</sup> Finally, the court held that Randstad's conclusory affidavit representing that the cost of subpoena compliance was insufficient, as a matter of law, under Fourth Circuit precedent requiring a far more robust showing that compliance with a subpoena is "unduly burdensome in the light of the company's normal operating costs," or that gathering the information would "threaten" or "seriously disrupt" its "normal business operations."<sup>136</sup>

While *Burlington* raises some hope for employers in the Tenth Circuit seeking to control the scope of EEOC investigations arising out individual charges of discrimination, *UPMC* and *Randstad* (coupled with other decisions noted in the FY 2011 Report) underscore the difficulty of such efforts in other jurisdictions, where the courts have broadly interpreted the EEOC's investigative authority. Thus, recent case authority demonstrates that in most situations the most viable option is for an employer to attempt to negotiate a more circumscribed investigation by the EEOC.

## 2. District Court Decisions

### a. Requests for Information Involving Broad Geographic or Company-Wide Coverage

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

In *EEOC v. Sterling Jewelers*,<sup>137</sup> a former employee of Sterling Jewelers filed a charge alleging she suffered age and sex discrimination in connection with a promotion and was subjected to retaliatory discharge when she complained about the discrimination to her manager. During its investigation, the EEOC obtained an "Employee Counseling Report" issued to the charging party which stated, "[a]ny discussion regarding payroll need only to be made between said employee and mgr. Having inappropriate discussions only contribute to and fosters ill will amongst team members as well as being a direct violation of Sterling's code of conduct."<sup>138</sup> In the employee comments section of the counseling report, the charging party had indicated, "I feel I'm being discriminated against being a woman in this company where men always make more money than women."<sup>139</sup>

<sup>133</sup> *Id.* at 443, citing 29 C.F.R. § 1601.12(b).

<sup>134</sup> *Randstad*, 695 F.3d at 449.

<sup>135</sup> *Id.* at 450.

<sup>136</sup> *Id.* at 452, citing *EEOC v. Maryland Cup Corp.*, 785 F.2d 471, 479 (4th Cir. 1986).

<sup>137</sup> *EEOC v. Sterling Jewelers Inc.*, 2011 U.S. Dist. LEXIS 126585 (W.D.N.Y. Nov. 2, 2011).

<sup>138</sup> *Id.* at \*3.

<sup>139</sup> *Id.*



Despite Sterling's insistence that it had no policy prohibiting employees from discussing their pay, the EEOC issued a subpoena seeking the Code of Conduct and any other policies prohibiting employees from discussing their pay; and all discipline and supporting documentation issued under such policies. The EEOC then filed with the district court, an application for enforcement of the subpoena. The application coordinated with the timing of discovery in a class action filed by the EEOC and 19 individuals against Sterling in the same court. Thus, in addition to advancing the usual arguments that nation-wide information was irrelevant to the underlying charge and compliance would be unduly burdensome, Sterling argued the subpoena was an end-run around discovery in the class action. Sterling also claimed the mediation agreement it had earlier entered into with the EEOC and 19 individuals, during the administrative process proceeding the class action, relieved it of the duty to provide additional information to the EEOC in connection with the charging party's claim. It premised this argument on two provisions in the mediation agreement:

[I]n the event that counsel for Charging Parties have other clients that file charges of discrimination with the EEOC . . . arising in whole or in part out of the same or substantially the same set of circumstances, such Other Clients shall be considered Charging Parties for purposes of this Agreement; and

Sterling shall be under no obligation to provide additional information or documentation relating to the Charges.<sup>140</sup>

Thus, Sterling reasoned, it was under no obligation to provide additional information or documentation relating to the charge filed by the charging party.

The district court dismissed each of Sterling's arguments. First, it found the subpoena was issued for a legitimate purpose, and not as an end-run on the discovery process, noting the "EEOC [has] the prerogative to decide at what pace and how vigorously to pursue a given investigation."<sup>141</sup> The court also found the scope of the subpoena appropriate and the information sought relevant, given the fact that the charging party had been disciplined under what appeared to be a company-wide policy prohibiting employees from discussing their pay and her express concern that women working at Sterling made less than their male counterparts. The court found the employer's undue burden argument particularly unconvincing, observing "[i]t is difficult to understand how the subpoena, which seeks information related to Sterling's alleged policy of prohibiting employees from discussing their pay, would impose an undue burden on Sterling when they state they have no such policy."<sup>142</sup> Finally, the district court disagreed with the employer's argument that it was relieved by its earlier mediation agreement from any obligation to provide documents in connection with the charge, as the subject agreement relieved Sterling only of the obligation to produce additional information relating to the "Charges" pending at the time it was entered, not the "Charging Parties" as they were defined by that document. Accordingly, the EEOC's subpoena was enforced in its entirety.

By contrast, in *EEOC v. Loyola University Medical Center*,<sup>143</sup> the district court denied enforcement of a subpoena requesting entity-wide information where the charging party's allegations of disability discrimination related to the employer's requirement that she undergo a "fitness for duty exam" ("FDE") in violation of the ADA. The EEOC's subpoena was far reaching in scope, demanding: (1) contact information for every employee subjected to an involuntary FDE; (2) the date and reason for each FDE; (3) the name and position of each individual who required each test; (4) medical records and witness statements to support the reason for each FDE; (5) the results and copies of each FDE; (6) the reasons the employee was or was not permitted to return to work; and (7) the name and position of the person who made the decision of whether or not each employee was permitted to return to work.<sup>144</sup>

The employer objected, stating the subpoenaed information was irrelevant to the individual employee's charge of discrimination, which alleged only a single violation. The EEOC responded that the information requested was relevant to its determination of whether the FDE was "job-related and consistent with business necessity"<sup>145</sup> and, therefore, lawful. The court disagreed, observing a determination of whether

<sup>140</sup> *Id.* at \*16.

<sup>141</sup> *Id.* at \*8.

<sup>142</sup> *Id.* at \*\*14-15.

<sup>143</sup> *EEOC v. Loyola Univ. Med. Ctr.*, 823 F. Supp. 2d 835 (N.D. Ill. 2011).

<sup>144</sup> *Id.* at 837.

<sup>145</sup> *Id.* at 839, citing 42 U.S.C. § 12112(d)(4).

the FDE is “job related” is a matter that can be determined without recourse to the information requested, which merely addressed which other employees had been subjected to an FDE. The EEOC also argued that the information sought was relevant to whether the charging party had been singled out for an FDE based on her disability. However, the district court also rejected that argument, noting the subpoena was not directed to obtaining information regarding similarly situated individuals and, thus, was not sufficiently tailored to the circumstances of the investigation.

In *EEOC v. Alliance Residential Company*,<sup>146</sup> however, the Western District of Texas enforced an administrative subpoena with a similarly broad geographic scope. In that case, a former employee took leave from the employer due to a medical condition. She alleged she was then summarily and immediately discharged upon her failure to return to work after exhausting her allotted twelve weeks of FMLA leave. Alliance responded that it discharged the charging party not based on her disability, but based on its company-wide policy of “voluntarily” terminating employees who fail to return to work upon the expiration of their FMLA entitlement. In support of its position, Alliance provided the EEOC with a list of 89 terminations that had been conducted pursuant to this policy, but did not include any information concerning the identities of the employees who were subject to the termination. The EEOC, in turn, requested disclosure of the 89 individual’s identities, along with their contact information.

When Alliance refused to provide the requested information, the EEOC issued a subpoena. Alliance filed a petition to revoke or modify the subpoena, which the EEOC denied. The EEOC then applied to the district court for enforcement. Alliance objected to enforcement based, in part, on the company-wide scope of the information requested. In rejecting Alliance’s argument, the court noted that Alliance admitted that the charging party was discharged pursuant to a company-wide policy, rendering company-wide information relevant to the individual’s charge. Thus, the district court held, the information requested in the subpoena was relevant.<sup>147</sup>

Alliance also argued the EEOC could have issued a Commissioner’s Charge, which would arguably cover the information it sought in its subpoena. In support of this argument, it cited Fifth Circuit Court of Appeals authority in which the court had denied enforcement of a subpoena seeking evidence of sex discrimination in connection with a charge alleging race discrimination, noting when the EEOC discovered possible evidence of sex discrimination “[it] could have exercised its authority under 42 U.S.C. §§ 2000e-5(b), 2000e-6(e) to file a Commissioner’s Charge alleging sex discrimination, thereby freeing the EEOC to demand information [regarding potential sex discrimination].”<sup>148</sup> The court also rejected this argument, noting that the case before it involved information pertaining to the same type of discrimination alleged in the charge.

#### b. Requests for Information Involving Concerns About Protecting Confidential Information

Employers are frequently reluctant to produce information and/or documents involving their employees based upon privacy concerns. While the EEOC has long held the position that internal procedures protect privacy rights, employers have found little comfort in the Commission’s perspective. Recent decisions show that although courts typically side with the EEOC, courts also have provided employers some leeway, particularly when employee medical information is the focus of a Commission information request.<sup>149</sup>

By way of example, one of the other reasons asserted by the Northern District of Illinois in declining to enforce the EEOC’s subpoena in *Loyola, supra*, in spite of the employer’s failure to timely file a petition to revoke or modify the EEOC’s subpoena, was that the information requested, which included employee medical information relating to employees subjected to a fitness for duty exam, was highly sensitive and confidential.<sup>150</sup> In particular, the court noted, “[a]bsent any established case law on this precise issue, and due to the sensitivity of

<sup>146</sup> *EEOC v. Alliance Residential Company*, 2011 U.S. Dist. LEXIS 135869 (W.D. Tex. Nov. 18, 2011).

<sup>147</sup> *Id.* at \*\*16-17.

<sup>148</sup> *Id.* at \*18, quoting *EEOC v. Southern Farm Bureau Casualty Insurance Company*, 271 F.3d 209, 210 (5th Cir. 2001).

<sup>149</sup> An example case is illustrated by *EEOC v. Titan Wheel Corporation of Illinois*, Case No. 1:11-cv-06985 (N.D. Ill. Oct. 4, 2011), in which an employer refused to provide contact information for current or former employees other than the charging party, who worked with the alleged harasser, as part of the EEOC’s investigation to determine whether others had been subjected to harassing conduct. The requested information was not disclosed until after a subpoena enforcement action was initiated by the EEOC. See discussion of *Titan Wheel Corp.* administrative subpoena enforcement action in Appendix D.

<sup>150</sup> *EEOC v. Loyola University Medical Center*, 823 F. Supp. 2d at 838.

the information requested, this court is disinclined to rule on this motion based on Loyola's procedural shortcomings."<sup>151</sup> Employers have frequently, and with some limited success, argued the confidentiality and/or sensitivity of the information requested militates against enforcement of an administrative subpoena.

As evidenced by the district court's decision in *Alliance*, discussed *supra*,<sup>152</sup> courts often look to the statutory provisions prohibiting the EEOC from disclosing information related to a charge, when considering confidentiality-based objections to administrative subpoenas. In *Alliance*, the employer argued that privacy or confidentiality concerns prohibit the subpoena of information relating to employees discharged pursuant to a company-wide policy requiring termination upon an employee's failure to return to work at the expiration of his or her FMLA leave. Noting the statutory protections prohibiting the EEOC from making public charges of discrimination, which include the imposition of fines and imprisonment for anyone violating the confidentiality rule, the court declined the employer's request to deny enforcement of the EEOC's subpoena, even in part. The court, however, did order that the charging party was prohibited from viewing information in any personnel file other than her own.<sup>153</sup>

In *EEOC v. Bashas', Inc.*,<sup>154</sup> the court was faced with the issue of whether to limit disclosure of subpoenaed information as a result of pending litigation. In that case, there existed a strong correlation between the timing of setbacks for plaintiffs alleging similar claims in a pending class action and the EEOC's efforts in initiating a subpoena enforcement action seeking information the plaintiffs in the private lawsuit were unable to obtain. Because the court was concerned about the sufficiency of statutory protections providing for fines and imprisonment in the event charges of discrimination are made public, it ordered the parties to submit a joint confidentiality order to be applied to the subpoenaed information. When the parties were unable to reach agreement concerning the confidentiality order, each party submitted its own proposed confidentiality order to the court for consideration. The EEOC's proposed order, barely one page long, adhered to its view that Title VII's two prohibitions against public disclosure,<sup>155</sup> along with the EEOC's own similar non-disclosure rule<sup>156</sup> and section 83 of the EEOC's Compliance Manual,<sup>157</sup> were sufficient to protect the confidentiality of the information it sought. Given that the court had ordered the parties to submit a joint confidentiality order based on its conclusion that the existing statutory and regulatory protections were inadequate to protect the sensitive information requested in the subpoena, the court adopted the employer's far more restrictive confidentiality agreement almost in its entirety.<sup>158</sup>

Thus, though an employer may not altogether escape compliance with an administrative subpoena by appeal to the sensitive or confidential nature of the information requested, its subsequent use and access, particularly by plaintiffs in pending litigation, may be effectively restricted through the use of confidentiality orders.

### c. Additional Noteworthy Developments Involving Subpoena Enforcement Actions

#### i. Potential Ex Parte Communications by EEOC with an Employer's Former Managers

In *EEOC v. University of Chicago Medical Center*,<sup>159</sup> the Commission subpoenaed information in connection with allegations that the employer summarily discharged employees who failed to return to work upon the expiration of their 12 weeks of FMLA-protected leave. The information requested included the charging parties' medical files, extensive information regarding all employees who ever requested absence due to a medical condition, and most significantly, contact information for two former management employees, which the employer

151 *Id.*

152 *EEOC v. Alliance Residential Company*, 2011 U.S. Dist. LEXIS 135869 (W.D. Tex. Nov. 18, 2011).

153 *Id.* at \*\*23-26.

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

155 42 U.S.C. §2000e-5(b) (forbidding public disclosure or use in subsequent proceedings any information acquired during the informal procedures) and 42 U.S.C. § 2000e-8(e) (forbidding any officer or employee of the EEOC from making public any information obtained by the EEOC prior to the institution of any proceeding involving such information).

156 29 C.F.R. § 1601.22 (providing that an EEOC charge and any information obtained during its investigation shall not be made public prior to the institution of any proceeding under Title VII involving the information).

157 EEOC Compliance Manual § 83.1 (dealing with disclosure of information in open files).

158 *Bashas'*, 2011 U.S. Dist. LEXIS 141644, at \*\*12-16.

159 *EEOC v. University of Chicago Medical Center*, 2012 U.S. Dist. LEXIS 53298 (N.D. Ill. Apr. 16, 2012).

refused to turn over on the basis of privilege. The focal point of the dispute was whether the EEOC could independently contact the employer's former managers. The employer argued that these former managers – its former employee/labor relations manager and former Director of Recruitment and Nursing Career Center – regularly consulted with its in-house and outside counsel and made managerial decisions which could be imputed to the employer for liability purposes. Because the EEOC was conducting its investigation pursuant to the ADA, the court analyzed the issue of privilege under federal law. Referencing ABA Model Rule 4.2, Comment 7, the court noted that “represented” individuals are “employees whose acts or omissions in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.”<sup>160</sup> However, it noted that it and other district courts had declined to extend the privilege attaching to represented persons to former managers because, “unlike current employees, former employees cannot bind the corporation.”<sup>161</sup> Thus, the court concluded the subpoena would be enforced with respect to those former managers’ contact information; however, it barred former employees from discussing with the EEOC any privileged information to which they may be privy.<sup>162</sup>

## ii. Successful Challenges to Subpoena Enforcement Relating to Burdensomeness Based Upon Information Over Which the Employer Has No Control

In *Alliance*,<sup>163</sup> discussed *supra*, the employer additionally argued that the information requested, which included contact information for 89 employees discharged pursuant to a company-wide policy under which employees were allegedly summarily terminated upon the expiration of their FMLA leave upon a failure to return to work, was unduly burdensome. In particular, it argued that compliance with the subpoena would require it to locate and interview employees who no longer worked for Alliance. Noting the EEOC does not have the authority to require the production of information over which an employer has no control, the court declined to order compliance with the subpoena to the extent it would require Alliance to interview former employees over which it had no control or to whom it had no access.<sup>164</sup>

## iii. Jurisdictional Disputes Arising in Connection with Administrative Subpoena Enforcement

Recent district court decisions also have highlighted jurisdictional arguments that arise in connection with administrative subpoena enforcement actions. In *EEOC v. Titan Wheel*,<sup>165</sup> the employer refused to provide documents relating to its sexual harassment and discrimination policies, as well as the identities of its employees, barring some explanation by the EEOC as to the basis for its request for the information. The EEOC filed an application for subpoena enforcement in the Northern District of Illinois. Rather than respond to the court's order to show cause why the subpoena should not be enforced, the employer filed a motion to dismiss or transfer the case to the Central District of Illinois, where the employer is based and where it had already filed an action seeking declaratory judgment and injunctive relief relative to the EEOC's enforcement of the same subpoena.

However, by the time the court in the Northern District ruled on the employer's motion, the Central District had already dismissed the employer's action, rendering moot the employer's motion to dismiss and one of the grounds on which it premised its motion to transfer. Thus, the sole remaining basis for the transfer motion was the fact that the employer's operations were based in the Central District, which the court found insufficient to warrant transfer.

By contrast, in *EEOC v. Royal Caribbean*,<sup>166</sup> the employer was successful in having the EEOC's enforcement action transferred to another jurisdiction. In that case, the dispute arose from a charge of discrimination filed by an Argentinean foreign national employed on a cruise ship operated by the employer, who alleged the defendant discriminated against him on the basis of disability. The EEOC issued a subpoena seeking: (1) a list of all employees discharged from shipboard duty due to medical reasons because they were found unfit for sea under the regulations of the Bahamas Maritime Authority governing medical and eyesight standards for seafarers; (2) biographical and employment information for individuals on the list; (3) employment application documents and information related to documents for individuals discharged, along with the identity and location of the person making the hiring decision; (4) a list of persons who applied, but were not

<sup>160</sup> *Id.* at \*\*7-8, quoting ABA Model Rule 4.2 Comment 7.

<sup>161</sup> *Id.* at \*11, citing *Orlowski v. Dominick's Finer Foods, Inc.*, 937 F. Supp. 723 (N.D. Ill. 1996).

<sup>162</sup> *Id.* at \*12.

<sup>163</sup> *EEOC v. Alliance Residential Company*, 2011 U.S. Dist. LEXIS 135869 (W.D. Tex. Nov. 18, 2011).

<sup>164</sup> *Id.* at \*21.

<sup>165</sup> *EEOC v. Titan Wheel Corporation of Illinois*, 2012 U.S. Dist. LEXIS 65354 (N.D. Ill. May 9, 2012).

<sup>166</sup> *EEOC v. Royal Caribbean Cruises, Ltd.*, 1:12-mi-00057 (N.D. Ga.). See Appendix D for a detailed discussion of this administrative subpoena enforcement action.

hired due to medical reasons; (5) biographical and employment information for individuals not hired and the identity and location of the person making the final hiring decision; (6) a description of how employees are hired or considered for renewal of employment contracts, including the identity of the individual making the final decision; (7) all employment criteria or guidelines related to the health or medical condition of applicants or employees; and (8) a description of all business activities the employer conducted at its Miami, Florida office, including the names of the business departments located there.

The employer objected to the information request only to the extent it demanded documents and information pertaining to shipboard employees or applicants who were foreign nationals, rather than U.S. citizens, otherwise complying with the EEOC's request. The EEOC filed for enforcement in the Northern District of Georgia. Rather than responding to the court's Order to Show Cause, the employer filed a motion to dismiss the action based on lack of jurisdiction and improper venue or, in the alternative, transfer the action to the Southern District of Florida. In its motion, the employer argued that all of the disputed employment decisions occurred in the Southern District of Florida, where it maintained all of the documents and information sought by the administrative subpoena. Thus, it argued, the court should dismiss the case for lack of jurisdiction or venue or, in the alternative, transfer the case to the Southern District of Florida. Before the court could rule on the employer's motion, the parties filed a joint motion to transfer the case to the Southern District of Florida, which was granted by the court.

#### d. Review of EEOC Subpoena Enforcement Actions in FY 2012

A complete review and summary of EEOC subpoena enforcement actions filed during FY 2012 is attached to this Report as Appendix D.

## IV. REVIEW OF NOTEWORTHY EEOC LITIGATION AND COURT OPINIONS

### A. Pleadings

In FY 2012, employers continued to challenge discrimination lawsuits brought by the EEOC under the plausibility standard enunciated in *Twombly and Iqbal*,<sup>167</sup> with mixed results. In *EEOC v. The WW Group, Inc.*,<sup>168</sup> the court granted the employer's motion to dismiss a pregnancy discrimination claim, rejecting the EEOC's use of a "standardized template" complaint from "headquarters" because it failed to provide any facts supporting the claim – a deficiency the court found "incomprehensible" given the EEOC's "extraordinary pre-litigation discovery powers."<sup>169</sup> Other courts, however, have refused to dismiss the EEOC's complaints, finding that *Twombly* and *Iqbal* did not overturn precedent, which provided that an employment discrimination complaint need not plead the *prima facie* elements of the claim.<sup>170</sup> Federal district courts also have reached differing results on whether the EEOC may offensively use *Iqbal* to strike employers' affirmative defenses.<sup>171</sup>

Employers saw slightly better success rates when challenging EEOC pleadings asserting class claims. Among the pro-employer rulings are those holding that: the EEOC's complaint must adequately plead the claims of *each* class member alleging a hostile work environment;<sup>172</sup> the complaint must include facts defining the class, including who is in it, how many are in it, and who subjected the class members to discrimination;<sup>173</sup> and a section 707 claim for classwide injunctive relief must assert facts showing a facially-plausible, nationwide pattern or practice – that is, that discrimination was the defendant's "standard operating procedure."<sup>174</sup>

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

168 *EEOC v. The WW Group, Inc.*, 2012 U.S. Dist. LEXIS 22477 (E.D. Mich. Feb. 22, 2012).

169 *Id.* at \*\*6-7.

170 See, e.g., *EEOC v. Univ. Coll. of Chapman Univ.*, 2012 U.S. Dist. LEXIS 69982, at \*\*8-11 (N.D. Cal. May 18, 2012).

171 See *EEOC v. Ventura Corp. Ltd.*, 2011 U.S. Dist. LEXIS 143688, at \*4 (D.P.R. Dec. 14, 2011) (denying motion to strike affirmative defenses as premature because the defendant "should be afforded the opportunity to explore its defenses through discovery"); *EEOC v. Southern Haulers, LLC*, 2012 U.S. Dist. LEXIS 34202, at \*\*4-9 (S.D. Ala. Mar. 14, 2012) (denying motion to strike defenses and refusing to extend *Iqbal* to affirmative defenses); *EEOC v. LHC Group, Inc.*, 2012 U.S. Dist. LEXIS 110125, at \*\*5-6 (S.D. Miss. Aug. 7, 2012) (adopting minority view that *Iqbal* only applies to complaint, not affirmative defenses); but see *EEOC v. Product Fabricators, Inc.*, 2012 U.S. Dist. LEXIS 94693 (D. Minn. July 10, 2012) (granting motion to strike affirmative defenses as legally insufficient).

172 *EEOC v. Hotspur Resorts Nev., Ltd.*, 2011 U.S. Dist. LEXIS 115325, at \*\*13-14 (D. Nev. Oct. 3, 2011) ("[EEOC] cannot simply prove that an abuser harassed one or two coworkers and then collect damages multiplied by the number of other coworkers in the abuser's area in the total absence of any evidence that he abused those persons.").

173 *EEOC v. Pioneer Hotel, Inc.*, 2012 U.S. Dist. LEXIS 63553, at \*\*8-9 (D. Nev. May 4, 2012).

174 *EEOC v. Bass Pro Outdoor World, LLC*, 2012 U.S. Dist. LEXIS 75597, at \*\*29-30, 39-41 (S.D. Tex. May 31, 2012).

## Spotlight on Pending ADEA Section 707 Litigation

### EEOC Brings "Pattern or Practice" Suit Under the Age Discrimination in Employment Act in *EEOC v. Texas Roadhouse, Inc.*, Civ. No. 11-cv-11732 (D. Mass., filed Oct. 3, 2011)

In October 2011, the EEOC brought a pattern or practice action against the Texas Roadhouse restaurant chain under the Age Discrimination in Employment Act, 29 U.S.C. sections 621-634, contending that Texas Roadhouse violated the ADEA as a matter of corporate hiring policy. *EEOC v. Texas Roadhouse, Inc., et al.*, No. 11-cv-11732 (D. Mass., filed Oct. 3, 2011). The EEOC lawsuit alleged that Texas Roadhouse discriminated against employees in the protected age group for "front of the house" and other public and visible positions like hostess, server and bartender, that the discrimination occurred at all of the more than 300 Texas Roadhouse locations, and that it was directed by the highest levels of the company to promote the chain's fun, youthful image.

In July 2012, the Commission survived Texas Roadhouse's motion to dismiss on the ground that the EEOC lacks the authority to bring a pattern or practice action under the ADEA. The court, however, required the Commission to amend its complaint after an attack by Texas Roadhouse on the sufficiency of the complaint under Rule 8 of the Federal Rules of Civil Procedure.

The amended complaint, filed August 27, 2012, provides a roadmap as to the EEOC's theory on how it will prove a pattern or practice of age discrimination in a company with more than 300 locations, but having an alleged centralized management of employment policies.

#### **The Motion to Dismiss**

The original EEOC complaint contained six pages of conclusory allegations with a smattering of factual assertions. One of the factual assertions was that a management PowerPoint presentation that included a picture of a group of younger employees was proof that management had adopted a policy of hiring only teens and twenty-somethings for front-of-the-house jobs. The employer pointed out that the EEOC had investigated Texas Roadhouse for two and one-half years at 135 establishments, but in the complaint, identified not a single victim of age discrimination and not a single person responsible for the allegedly discriminatory policy.

The employer moved to dismiss the complaint on (1) *Iqbal/Twombly* grounds, (2) the failure of the EEOC to properly identify affiliated corporations, and (3) the lack of EEOC authority to bring a pattern or practice case under ADEA.

Of particular note is the third argument in the employer's motion: the challenge to EEOC's authority under the ADEA, which Texas Roadhouse argued was different from the EEOC's authority under Title VII. The employer pointed out that the ADEA contains no grant of authority to bring a pattern or practice case similar to sections 706 and 707 of Title VII, as amended. The employer also pointed out that the ADEA as originally enacted in 1967 was enforced by the Secretary of Labor on the same terms as the Fair Labor Standards Act, and that the executive branch reorganization plan of 1978 that transferred enforcement to the EEOC did not authorize the EEOC to bring pattern or practice cases. The employer cited *Gross v. FBL Financial Services*,<sup>175</sup> a case addressing the causation instruction to be given to the jury in an ADEA case, for the proposition that the EEOC was authorized to bring only individual cases subject to the "but for" causation standard. The method of proof in a pattern or practice case is governed by cases like *Teamsters v. United States*,<sup>176</sup> and *Franks v. Bowman Transportation Company*,<sup>177</sup> rather than the ADEA's "but for" standard.

#### **The Amended Complaint**

The district court did not dismiss the complaint on the ground that the EEOC lacked authority to bring the suit. It did, however, require the Commission to amend its complaint to provide the detail to move the case from conceivable to "plausible" under *Iqbal/Twombly*. The result is a 280 paragraph, 70 page, amended complaint that shows a lot about how the EEOC thinks it can bring a pattern or practice case. The amended complaint contains detail about the control Texas Roadhouse exercises from its headquarters over hiring and training at its stores nationwide, including an allegation that the company uses an "industrial psychology" company to help motivate its "young workforce."

The amended complaint also contains 141 paragraphs about the statistical evidence. For most of the 135 locations investigated, the EEOC simply compared the percentage of workers age 40 and over in front-of-the-house jobs in the restaurant with Census Bureau data

<sup>175</sup> *Gross v. FBL Financial Services*, 557 U.S. 167 (2009).

<sup>176</sup> *Teamsters v. United States*, 431 U.S. 324 (1977).

<sup>177</sup> *Franks v. Bowman Transportation Company*, 424 U.S. 747 (1976).

on the availability of workers 40 and over for front-of-the-house jobs in the restaurant's locale (usually the county or standard metropolitan statistical area). The disparity between the portion of the front-of-the-house workforce that was in the protected age group and the portion expected to be in the protected age group based on the Census Bureau data was statistically significant for all restaurants except one. For eight Texas Roadhouse locations, the EEOC alleged that it was able to determine the ages of the applicants and, thus, was able to calculate the statistical disparity using applicant flow data. It may be noteworthy that for stores where the ages of the applicants were available, the number of standard deviations found, while still statistically significant, was considerably lower than that derived when using the Census Bureau data.

Finally, in the amended complaint, the EEOC added 73 paragraphs of anecdotal evidence of discrimination — mostly stories of individuals who did not obtain jobs allegedly because of their age.

Texas Roadhouse filed a motion to transfer the case to the Western District of Kentucky, where Texas Roadhouse and its affiliates are headquartered and in large part because although the investigation was led by the EEOC's Boston office it involved 135 Texas Roadhouse locations, and the amended complaint implicated all of the company's establishments. The company urged transfer under 28 U.S.C. section 1404 because the corporate offices, most of the company records, and most of the high-level witnesses are in Louisville, which is located in the Western District of Kentucky.

On November 9, 2012, the court denied Texas Roadhouse's motion to transfer the case. The court noted that in this case, it considered the most important factor in the transfer analysis to be the convenience of the witnesses. Here, the EEOC identified 55 alleged discrimination victims, two from Massachusetts, one from Kentucky, 12 from Connecticut, and the remainder were spread throughout the country. Thus, most allegedly aggrieved persons would not be more inconvenienced by Massachusetts than by Louisville. Moreover, the court held that Texas Roadhouse's arguments as to inconvenience to corporate employee witnesses, based in Kentucky, were outweighed by the fact that it could direct these employees to appear in Massachusetts and the costs associated with doing so were not unduly burdensome.

On November 27, 2012, Texas Roadhouse filed its Amended Answer to Plaintiff's Amended Complaint. On December 10, 2012, the parties filed a joint statement pursuant to the local rules regarding their discovery plan. In the joint statement, the parties noted that they are not in agreement on a proposed discovery plan or case management order as the EEOC proposed to bifurcate discovery and trial and Texas Roadhouse opposed the bifurcation. The court has ordered the parties to meet and confer on the issue of bifurcation and to submit a new joint statement by January 17, 2013.

*EEOC v. Bass Pro Outdoor World, LLC*, is a noteworthy case because the federal district court in Texas held that the EEOC could not assert a section 707 failure-to-hire claim on behalf of a class of black and Hispanic applicants nationwide, based on a "handful" of alleged incidents involving failure to hire, even though the EEOC's complaint described overtly racist comments by hiring managers at several Bass Pro stores in the South.<sup>178</sup> The EEOC also failed to articulate a plausible section 706 class claim for retaliation because its complaint did not identify a single plaintiff.<sup>179</sup> *Bass Pro* must be contrasted, however, with the Sixth Circuit Court of Appeal's decision in *Serrano and EEOC v. Cintas Corp.*,<sup>180</sup> discussed in section II.D.7 of the Report.

The EEOC's effort to challenge United Parcel Service's (UPS) leave policies on a classwide basis again failed this year. Having previously dismissed a putative ADA class case because the EEOC had not alleged facts regarding the qualifications and disabilities of the proposed class members, a Chicago federal district court more recently denied the EEOC's request to file a second amended complaint, asserting failure to accommodate, because the proposed amended pleading did not add any "additional factual material with regard to any unidentified class member."<sup>181</sup> It should be noted, however, that an *Iqbal* challenge to a complaint pleading an individual ADA claim is less likely to meet success.<sup>182</sup>

178 The comments included, "We don't hire ni\*\*ers," "It is getting a little dark in here; you need to hire some white people"; and that one applicant's name "sounded like a 'ni\*\*er name.'" 2012 U.S. Dist. LEXIS 75597, at \*\*3-4 (S.D. Tex. May 31, 2012).

179 *EEOC v. Bass Pro Outdoor World, LLC*, 2012 U.S. Dist. LEXIS 75597, at \*50 (S.D. Tex. May 31, 2012).

180 *Serrano and EEOC v. Cintas Corp.*, 2012 U.S. App. LEXIS 23132, at \*30-31 (6th Cir. Nov. 9, 2012), *en banc rehearing requested*.

181 *EEOC v. United Parcel Service, Inc.*, 2012 U.S. Dist. LEXIS 92994, at \*5 (N.D. Ill. July 3, 2012).

182 See, e.g., *EEOC v. Alia Corp.*, 842 F. Supp. 2d 1243, 1258 (E.D. Cal. 2012) (denying motion for more definite statement where the EEOC merely alleged that employee had "mental impairments," holding that pleading a "precise diagnosis" is not required and that discovery is the "proper tool" for the employer to obtain more information about the employee's impairment).

FY 2012 saw a number of employers challenging whether the EEOC sufficiently pled an employment relationship between the employer and the employee(s) alleged to be aggrieved. More often than not, the EEOC's pleadings withstood these challenges, with courts holding that Title VII does not require a "formal employment relationship," so long as the defendant "significantly affects access . . . to employment opportunities,"<sup>183</sup> that the burden is on the employer, on a motion to dismiss, to demonstrate non-involvement in the alleged actions;<sup>184</sup> and that a party not named in the underlying EEOC charge may be sued if there is an "identity of interest" between it and the named party.<sup>185</sup> At least one court, however, denied the EEOC's request to add a purported successor as a defendant absent any evidence that it adopted the alleged discriminatory practice of the company it acquired, noting the successor's "interest in not being required to defend a claim that it had no responsibility for creating."<sup>186</sup> Not surprisingly, an employer who asserts that it is not a proper defendant opens the door to discovery about its corporate structure, ownership and related entities.<sup>187</sup>

The issue of whether the responsible employer is before the court may be particularly critical where a company imposes hiring criteria – for example, passing a drug screen – that are implemented by a temporary staffing agency, but only the agency is sued. At least one court has denied a staffing agency's motion to dismiss for failure to join the agency's client as an indispensable party, where it was the client that imposed the dress code challenged by the EEOC.<sup>188</sup>

## B. Laches Defense

Already overburdened, the Commission's focus on systemic investigations may result in increased investigation times, and possibly, increased delay before the EEOC decides to pursue litigation. Employers made to wait too long may be able to assert the defense of laches. To do so, an employer or other defendant must present evidence of two elements – an unreasonable delay by the EEOC and undue prejudice to the defendant's ability to defend the lawsuit as a result of that unreasonable delay.<sup>189</sup>

### 1. Unreasonable Delay

The EEOC's delay does not become unreasonable simply because a certain amount of time passes. Instead, the driving consideration is the EEOC's conduct during the period of delay. In *EEOC v. Propak Logistics, Inc.*,<sup>190</sup> nearly seven years passed between the charge filing date and the date the EEOC filed suit. The Commission asked the court to excuse the delay because the EEOC was "actively investigating" the charge. The court denied the Commission's request, noting that there were significant periods when the EEOC did very little, if anything, to advance its investigation. Specifically, the EEOC delayed six months before conducting an initial interview of the charging party, delayed a year between receiving the employer's position statement and a second interview with the charging party, and delayed ten months between transferring the charge to the litigation department and filing suit. The court also rejected the EEOC's attempt to blame the employer because the employer had sought only two months' worth of extensions throughout the proceedings.<sup>191</sup>

In *EEOC v. PBM Graphics, Inc.*,<sup>192</sup> the court determined that the Commission unreasonably delayed when nearly six years passed between the charge filing date and the date the EEOC filed suit. The EEOC spent eleven months analyzing the employer's defenses, four months conducting a statistical analysis, and eight months conducting another statistical analysis. Four additional months inexplicably passed without any activity. The Commission also waited two years before speaking with known key employees or asking for detailed information about the employer's main defense to the filed charge.

183 *EEOC v. The Patty Tipton Co.*, 2012 U.S. Dist. LEXIS 13243, at \*11 (E.D. Ky. Feb. 3, 2012).

184 *EEOC v. Kaplan Higher Educ. Corp.*, 2012 U.S. Dist. LEXIS 26302, at \*15 (N.D. Ohio Feb. 29, 2012).

185 *EEOC v. U-Haul Int'l Inc.*, 2012 U.S. Dist. LEXIS 93371, at \*22 (W.D. Tenn. July 6, 2012) (finding identity of interest exists between named parent and unnamed, wholly owned subsidiary because both entities had the word "U-Haul" in their name).

186 *EEOC v. Journal Disposition Corp.*, 2011 U.S. Dist. LEXIS 124169, at \*8 (W.D. Mich. Oct. 27, 2011).

187 *EEOC v. Moreland Auto Group*, 2012 U.S. Dist. LEXIS 84421 (D. Colo. June 19, 2012).

188 *See EEOC v. The Patty Tipton Co.*, 2012 U.S. Dist. LEXIS 13243, \*\*13-14 (E.D. Ky. Feb. 3, 2012) ("The fact that it may be more difficult for [defendant] to defend the action while standing alone, is no basis to dismiss the complaint.").

189 *EEOC v. Simbaki, LTD. d/b/a Berryhill Baja Grill & Cantina, et al.*, 2012 U.S. Dist. LEXIS 71799, at \*7 (S.D. Tex. May 23, 2012), citing *National Association of Gov't Employees v. City Pub. Serv. Bd. of San Antonio*, 40 F.3d 698, 709 (5th Cir. 1994).

190 *EEOC v. Propak Logistics, Inc.*, 2012 U.S. Dist. LEXIS 110096 (W.D.N.C. Aug. 7, 2012).

191 *Id.* at \*\*21-23, 24.

192 *EEOC v. PBM Graphics, Inc.*, 2012 U.S. Dist. LEXIS 89309, at \*76 (M.D.N.C. June 28, 2012).



## 2. Undue Prejudice

The second prong of the laches test – undue prejudice to the employer’s defense – is difficult to prove. However, the employer in *Propak* successfully met its burden by showing: (1) it could not locate two key witnesses; (2) it did not have contact information for other former employees who might be witnesses; (3) it no longer possessed potentially relevant personnel records; (4) the facility where the alleged Title VII violation occurred was now defunct; and (5) the EEOC’s unreasonable delay caused potential back pay to accrue unnecessarily.<sup>193</sup> From this evidence, the court found that the employer would be prejudiced in defending against the EEOC’s claims.<sup>194</sup>

The *PBM Graphics* court, however, held that it did not have sufficient evidence on a motion to dismiss to determine whether the employer had been unduly prejudiced. In *PBM Graphics*, the employer’s evidence demonstrated: (1) fourteen of the sixteen employees originally identified no longer worked for PBM; (2) only one of eight upper level managers remained with the company; (3) witnesses’ memories had faded; (4) the company had been sold; and (5) the EEOC’s delay increased potential damages. The court concluded it could not determine whether these facts resulted in undue prejudice because the EEOC had not yet fully explained its theory of the case. That the EEOC did not explain its theory of the case for six years would seem to constitute another reason that the employer had been unduly prejudiced. However, without knowledge of the EEOC’s claims, the court could not conclude that the employer’s evidence required a finding that it would be unable to defend against such claims. As a result, the court ordered the parties to engage in limited discovery on two issues: (1) the EEOC’s theory of the case and method for establishing its case, and (2) the potential prejudice to the employer resulting from the EEOC’s unreasonable delay.<sup>195</sup>

An employer asserting the defense of laches must be prepared to demonstrate specifically how the EEOC’s delay will prevent the employer from defending against the particular claims brought by the EEOC. As the above cases demonstrate, general business changes will be insufficient

### C. 300-Day Limitations Period

In recent years, the EEOC has increased its emphasis on litigating higher-impact class claims pursuant to section 707, which allows the Commission to investigate and act on cases involving a pattern or practice of discrimination in accordance with the procedures set forth in section 706.<sup>196</sup> Because section 707 incorporates section 706’s procedures, there is a strong implication that the EEOC must bring pattern or practice cases within the 300-day period defined in section 706.<sup>197</sup> Despite this implication, the EEOC routinely takes the position that the 300-day limit associated with filing a timely charge under section 706 does not apply under section 707 when the Commission seeks relief on behalf of a class of individuals in actions triggered by another individual’s timely charge.

For more than a decade, federal district courts have been split on the issue of whether the 300-day limitations period imposed on actions brought by individual claimants (section 706) should also be imposed on pattern or practice actions (section 707) filed by the EEOC.<sup>198</sup> However, in recent years, and 2012 was no exception, the growing trend is to treat both types of actions the same for the purpose of the 300-day limitations period.

Indeed, at least four courts ruling on the issue in FY 2012 specifically held that the plain language of section 706 leads to the conclusion that the class of individuals for whom the EEOC seeks relief is limited to those who could have filed an EEOC charge during the filing period.<sup>199</sup> In *U.S. Steel Corp.* the district court stated:

A charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred. ... Nothing in the text of Section 706 or 707 suggests that the EEOC can recover for individuals whose claims are otherwise time-barred.<sup>200</sup>

193 *Propak Logistics*, 2012 U.S. Dist. LEXIS 110096, at \*\* 26-34.

194 *Id.* at \*34.

195 *PBM Graphics, Inc.*, 2012 U.S. Dist. LEXIS 89309, at \*87.

196 Section 706 claims are subject to certain administrative prerequisites, including that the discrimination charge is filed with the EEOC within 300 days of the alleged discriminatory act; that the EEOC 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. See 42 U.S.C. § 2000e-5.

197 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.

198 See *EEOC v. United States Steel Corp.*, 2012 U.S. Dist. LEXIS 101872, at \*\*14-16 (W.D. Pa. July 23, 2012) (citing cases evidencing the split of authority in federal district courts).

199 *Id.* at \*\*16-17; *EEOC v. Bass Pro Outdoor World, LLC*, 2012 U.S. Dist. LEXIS 75597, at \*\*56-59 (S.D. Tx. May 31, 2012); *EEOC v. Global Horizons*, 2012 U.S. Dist. LEXIS 105993, at \*18-21 (E.D. Wash. July 27, 2012); *EEOC v. Global Horizons*, 2012 U.S. Dist. LEXIS 16072, at \*29-43 (D. Haw. Nov. 8, 2012).

200 *United States Steel Corp.*, 2012 U.S. Dist. LEXIS 101872, at \*16.

In further support of its holding, the court in *U.S. Steel Corp.* also reasoned that if Congress had intended to create a loophole by which the EEOC could revive stale claims under section 706 and 707, it should have expressly done so in the statute.<sup>201</sup> Thus, based on the plain language of the statute and absent a clear expression by Congress, there is no basis for providing the EEOC an exception from the requirement of filing timely charges and notifying employers of investigations. The alternative would place no time limits on the EEOC in pursuing pattern or practice claims.

Attempting to resurrect cases barred by the 300-day limitations period, the EEOC often turns to an alternative argument based on the continuing violation doctrine. To counter the EEOC's reliance on the continuing violation doctrine in these instances, employers can rely on federal court decisions which hold that the continuing violation doctrine does not apply to discrete acts of discrimination.<sup>202</sup> Indeed, in FY 2012, courts held "the [continuing violation] doctrine does not apply to 'discrete acts of discrimination merely because the plaintiff asserts that such discrete acts occurred as part of a policy of discrimination.'"<sup>203</sup> Moreover, the doctrine only permits the revival of stale claims, not stale parties.<sup>204</sup> In other words, where the EEOC seeks to enlarge the number of individuals entitled to recover, rather than the claims a single individual may bring, the continuing violation doctrine has no applicability.

In FY 2012, when addressing limitations period issues in EEOC litigation, federal district courts applied the limitations period to limit the scope and reach of the continuing violation doctrine. By way of example, in *PBM Graphics Inc.*, the court rejected the continuing violation doctrine's application to discrete decisions such as "each decision to limit the working hours or not hire non-Hispanics."<sup>205</sup> The court reasoned that "Linking together a series of decisions not to hire under the label of pattern or practice," ... "does not change the fact that each decision constituting the pattern or practice is discrete."<sup>206</sup>

In *U.S. Steel Corp.*, the court reached a similar conclusion when it rejected the EEOC's argument that the employer's repeated application of an alleged unlawful policy amounted to a continuing violation, and held a "serial violation involving discrete acts does not convert 'related discrete acts into a single unlawful practice for purposes of timely filing.'"<sup>207</sup> In that case, the employer successfully argued that the continuing violation doctrine did not apply to the employer's use of random breath alcohol tests because "each random breath alcohol test occurs on a readily-identifiable date certain and therefore constitutes a separate employment practice."<sup>208</sup>

Employers have also been successful attacking the continuing violation doctrine in the context of section 706 claims alleging a hostile work environment. Although hostile work environment harassment claims may be subject to the continuing violation doctrine, federal courts have held that intervening acts by the employer intended to prevent continued harassment may break the continuity of the alleged prohibited conduct such that the continuing violation doctrine is inapplicable.

By way of example, in *EEOC v. Xerxes Corp.*,<sup>209</sup> the employer successfully narrowed the scope of actionable harassment by arguing that the hostile environment was not a unitary or continuing hostile environment because of an intervening act. In *Xerxes Corp.*, the EEOC argued that certain African American employees were subjected to a hostile environment, in the form of racial slurs and pranks from 2005 through January 2006 and again in mid-2007. In response to the allegations of harassment in 2005 and 2006, the employer took prompt action and disciplined the responsible employees. The court noted that the employer's actions (in response to the allegations of harassment) were not only reasonable, but effective because there were no reported incidents of racial slurs or pranks until mid-2007. The court also noted that the 2007 slurs and pranks were of a different character, there was no reason to believe the same coworkers were involved, and there was no evidence that the 2007 events occurred because the previous remedial measures were insufficient. The court concluded that

201 *Id.* See also *Bass Pro Outdoor World, LLC*, 2012 U.S. Dist. LEXIS 75597, at \*59.

202 *EEOC v. PBM Graphics Inc.*, 2012 U.S. Dist. LEXIS 89309, at \*37 (M.D.N.C. June 28, 2012), citing *EEOC v. Freeman*, 2010 U.S. Dist. LEXIS 41336, at \*6 (D. Md. Apr. 26, 2010).

203 *PBM Graphics Inc.*, 2012 U.S. Dist. LEXIS 89309, at \*37.

204 *Id.* at \*37; see also *Bass Pro Outdoor World, LLC*, 2012 U.S. Dist. LEXIS 75597, at \*61.

205 *PBM Graphics Inc.*, 2012 U.S. Dist. LEXIS 89309, at \*\*37-38.

206 *Id.* at \*38.

207 *United States Steel Corp.*, 2012 U.S. Dist. LEXIS 101872, at \*\*19-24.

208 *Id.* at \*\*19-24 (also noting that drug tests, drug residue screening, pat-down searches, and termination of employment are all discrete acts and not susceptible to the continuing violation doctrine). See also *Bass Pro Outdoor World, LLC*, 2012 U.S. Dist. LEXIS 75597, at \*60 (holding that discrete decisions to refuse to hire and to terminate employment cannot be linked together to create a continuing violation); *EEOC v. Global Horizons, Inc.*, 2012 U.S. Dist. LEXIS 105993, at \*\*19-21 (E.D. Wash. July 27, 2012) (distinguishing retaliation, which is a discrete act and not a continuing violation, from a hostile work environment claim, which could be a continuing violation when it amounts to a series of separate acts that collectively constitute one unlawful practice).

209 *EEOC v. Xerxes Corp.*, 2011 U.S. Dist. LEXIS 125333, at \*4-5 (D. Md. Oct. 28, 2011).

the conduct prior to February 2006 was not part of a single hostile environment because of the intervening act of the employer (*i.e.*, an investigation that resulted in employer action which eliminated the hostile conduct reported at the time).<sup>210</sup> Accordingly, the conduct prior to February 2006 was not encompassed within the timely filed charge with the EEOC.

Although the EEOC has attempted to blur the line between pattern or practice claims and the continuing violation doctrine, *United States Steel Corp.*, *PBM Graphics Inc.*, *Bass Pro Outdoor World LLC*, and other cases in numerous jurisdictions have rejected such efforts. Specifically, courts distinguish between “component acts,” which cumulatively may amount to a discrimination claim, such as a hostile work environment, and “discrete acts” which, on their own, may amount to adverse action. The former are actionable if at least one of the acts occurred within the 300-day statutory period, whereas the latter are time-barred if not filed within 300 days of the discrete act.

In 2012, the trend of applying the limitations period set forth in section 706 to section 707 claims has gained strength. However, there has not been significant appellate consideration of the issue in recent years. Accordingly, it is anticipated that the EEOC in 2013 will continue to pursue its theory that the 300-day limitations period does not apply to section 707 claims. As the case law continues develop, appellate consideration likely will occur, providing employers with meaningful guidance on the state of the law in defending section 707 pattern and practice cases.

#### D. Investigation and Conciliation Obligations

Before filing a lawsuit under Title VII based on pattern or practice claims under section 707, or class claims under section 706, the EEOC is required to investigate and then “endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.”<sup>211</sup> Thus, the Commission must investigate and then engage in “conciliation” with an employer prior to filing a lawsuit. Only after “[t]hese informal efforts do not work [may the EEOC] then bring a civil action against the employer.”<sup>212</sup> As one court recently noted, “[b]efore the EEOC has standing to bring suit against an employer: (1) an administrative charge must be filed against the employer; (2) the EEOC must give the employer notice of the charge; (3) the EEOC must investigate the charge; (4) the EEOC must issue a reasonable cause determination; and (5) the EEOC must engage in a good faith effort at conciliation.”<sup>213</sup> “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.”<sup>214</sup> Employers continue to challenge the sufficiency of the Commission’s investigation and conciliation efforts – with mixed results. Below is a discussion of cases from FY 2012 that address employer challenges to claimed failures by the EEOC to investigate and conciliate in good faith, the meaning of “good faith” conciliation, its obligations regarding disclosure of the identities of class members and the substance of their claims in conciliation, the impact of EEOC misconduct during conciliation, and “traps for the unwary” regarding the EEOC’s own attacks against employers pertaining to their use of the Commission’s failure to conciliate as an affirmative defense.

##### 1. Challenging Failure to Conciliate in Litigation

Employers have challenged the sufficiency of the EEOC’s conciliation efforts after the Commission has actually filed suit, seeking dismissal based on the EEOC’s purported failure to comply with its statutory conciliation obligations. Employers have alleged that the EEOC’s pre-litigation conciliation efforts have been insufficient on both procedural and substantive grounds. Employers also have recently argued that a failure to conciliate in good faith by the EEOC prevents a federal court from even having subject matter jurisdiction to adjudicate a lawsuit. This “lack of subject matter jurisdiction” theory is not readily accepted by most courts.

For example, in *EEOC v. Pioneer Hotel*,<sup>215</sup> an employer moved to dismiss the Commission’s lawsuit pursuant to Federal Rule of Civil Procedure 12(b)(1), arguing that the court was without subject matter jurisdiction to even “hear the present Title VII action because the EEOC failed to engage in a good faith attempt at conciliation pursuant to 42 U.S.C. § 2000e-5(b).” The district court, like other courts which have rejected this argument,<sup>216</sup> held that the conciliation requirement was not a jurisdictional precedent to the Commission filing a

<sup>210</sup> *Id.* at \*4-5.

<sup>211</sup> *See, e.g., EEOC v. Global Horizons, Inc.*, 860 F. Supp. 2d 1172 (D. Haw. 2012), citing 42 U.S.C. § 2000-e5(b).

<sup>212</sup> *Id.* at 1179.

<sup>213</sup> *EEOC v. La Rana Hawaii, LLC*, 2012 U.S. Dist. LEXIS 118881, at \*15 (D. Haw. Aug. 22, 2012).

<sup>214</sup> *EEOC v. High Speed Enter., Inc.*, 2010 U.S. Dist. LEXIS 111330, at \*5 (D. Ariz. Sept. 30, 2010).

<sup>215</sup> *EEOC v. Pioneer Hotel, Inc.*, 2012 U.S. Dist. LEXIS 63553, at \*6 (D. Nev. May 4, 2012).

<sup>216</sup> *See, e.g., EEOC v. Evans Fruit Co.*, 2012 U.S. Dist. LEXIS 72836, at \*\*6-7 (E.D. Wash. May 24, 2012) (holding while Title VII’s conciliation requirement is a precondition to suit but is not a jurisdictional requirement); *see also EEOC v. Alia Corp.*, 842 F. Supp. 2d 1243, 1255 (E.D. Cal. 2012) (“Title VII’s conciliation requirement is a precondition to suit, but is not jurisdictional.”).

lawsuit.<sup>217</sup> The court noted that prior to 2006, a finding of good faith conciliation was a “jurisdictional condition precedent to suit by the EEOC.”<sup>218</sup> However, since the United States Supreme Court issued its opinion in *Arbaugh v. Y&H Corp.*<sup>219</sup> evaluating several provisions of Title VII and holding that those provisions were “claim elements” instead of jurisdictional requirements, most courts now hold that the requirement to conciliate is merely an element of an EEOC claim, not a jurisdictional requirement. Consequently, jurisdictional attacks for failure to conciliate have proved ineffective.

## 2. The Meaning of “Good Faith Conciliation”

At present, courts do not agree on the standard to be applied in examining the “good faith” efforts made by the EEOC during the conciliation process. While all courts appear to agree that “good faith” must be exercised by the Commission during conciliation, recent decisions have highlighted a “circuit split” on what the phrase “good faith” really means.<sup>220</sup>

Specifically, the Second, Fifth, and Eleventh Circuit Court of Appeals appear to require courts to evaluate “the reasonableness and responsiveness of the EEOC’s conduct under all the circumstances.”<sup>221</sup> Based on this standard, the EEOC must at least: (1) outline to the employer the reasonable cause for its belief that a violation of the law has occurred; (2) offer an opportunity for voluntary compliance; and (3) respond in a reasonable and flexible manner to the reasonable attitudes of the employer.<sup>222</sup> The Fourth and Sixth Circuit Court of Appeals, on the other hand, appear to have adopted a standard much more deferential to the EEOC.<sup>223</sup> Under this standard, a court “should only determine whether the EEOC made an attempt at conciliation. The form and the substance of those conciliations is within the discretion of the EEOC . . . and is beyond judicial review.”<sup>224</sup>

In the Tenth Circuit Court of Appeals, no clear standard has been adopted to define the meaning of “good faith” conciliation.<sup>225</sup> For example, in *EEOC v. Zia Co.*, the Tenth Circuit took the position that “a court should not examine the details of the offers and counteroffers between the parties, nor impose its [own] notions of what the agreement should provide.”<sup>226</sup> However, in *EEOC v. Prudential Federal Savings & Loan Association*, the Tenth Circuit noted that conciliation involved two parties and that the EEOC’s conciliation efforts would be acceptable, “so long as [the EEOC] makes a sincere and reasonable effort to negotiate by providing the defendant an adequate opportunity to respond to all charges and negotiate possible settlements.”<sup>227</sup> The position taken by the Tenth Circuit in *Prudential* seems more akin to the “reasonableness and responsiveness” standard from the Second, Fifth, and Eleventh Circuits.

While the First, Third, Seventh, Eighth, Ninth and D.C. Circuit Court of Appeals have not yet ruled on a standard that applies to the analysis of the EEOC’s good faith conciliation requirement, some district courts within those circuits appear to regularly apply a particular standard.<sup>228</sup> For example, in *EEOC v. Alia Corp.*, the District Court for the Eastern District of California analyzed the current circuit split on the issue, and held that the agency should be given wide deference in conciliation.<sup>229</sup> In *Alia*, the employer moved for summary judgment and, among other things, argued that the EEOC failed to conciliate in good faith. Specifically, the employer complained that the Commission refused to disclose the claimant’s disability and other substantive information regarding his claims. The employer also alleged that the EEOC

217 *Pioneer Hotel, Inc.*, 2012 U.S. Dist. LEXIS 63553, at \*7.

218 *Id.* at \*7.

219 *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 503 (2006).

220 See, e.g., *EEOC v. Alia Corp.*, 842 F. Supp. 1243, 1255-1256 (E.D. Cal. 2012); *EEOC v. La Rana Hawaii, LLC*, 2012 U.S. Dist. LEXIS 118881, at \*16 (D. Haw. Aug. 22, 2012); *EEOC v. PBM Graphics, Inc.*, 2012 U.S. Dist. LEXIS 89309, at \*61 (M.D.N.C. June 28, 2012).

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

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

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

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

225 The Tenth Circuit encompasses Oklahoma, Kansas, Colorado, Utah, and Wyoming.

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

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

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

229 *EEOC v. Alia Corp.*, 842 F. Supp. 2d 1243, 1255 (E.D. Cal. 2012).

investigator demanded over \$300,000 to settle the case and refused further negotiations. The EEOC submitted controverting evidence suggesting it made a counteroffer and notified the employer that a manager had admitted to perceiving the charging party as disabled.<sup>230</sup>

The court in *Alia* rejected the standard applied in the Second, Fifth, and Eleventh Circuits to evaluate the EEOC's "good faith" conciliation efforts.<sup>231</sup> The court noted that the Sixth Circuit applies a more deferential approach, under which the EEOC must show only that it made an *attempt* to conciliate.<sup>232</sup> It then noted that although the Ninth Circuit has not adopted a standard on this issue, the district courts in the circuit generally have adopted the deferential approach of the Sixth Circuit.<sup>233</sup> Thus, the court in *Alia* found that as long as the employer "was given an opportunity to respond to all the charges and to negotiate settlement, the EEOC fulfilled its statutory duty to conciliate in good faith."<sup>234</sup> Based on this deferential standard, the court denied summary judgment to the employer, finding that the evidence proffered by the Commission created an issue of fact as to whether the EEOC conciliated in good faith.<sup>235</sup>

Also acknowledging the circuit split on the issue of "good faith" conciliation efforts, the Eastern District of Washington in *EEOC v. Evans Fruit Company* reasoned that a "good faith" attempt at conciliation required the Commission to provide the employer with information (a) regarding the type(s) of damages sought (back pay, front pay, emotional distress); (b) justifying the amount of damages sought; (c) regarding the potential size of the local class; and (d) about whether other managers were alleged to have engaged in harassing acts.<sup>236</sup> Because the EEOC failed to provide such information to the employer during conciliation at the employer's request and instead merely ceased the conciliation without explanation for doing so, the district court ordered the parties to participate in a court-conducted mediation.

In *EEOC v. River View Coal, LLC*,<sup>237</sup> the District Court for the Western District of Kentucky, denied the employer's motion to dismiss, applying the deferential approach of the Sixth Circuit. Before filing suit on behalf of a class of African-American applicants, the EEOC proposed a conciliation agreement that included the implementation of a non-discrimination policy, management training, job offers to the class, and monetary relief of \$1,725,000. River View countered with an offer of \$26,000 in exchange for the EEOC's agreement to withdraw the charges. The Commission determined that River View's counter offer was insufficient, and advised River View that it had also determined further negotiations would be futile. After River View expressed an interest in continuing the process, the EEOC gave the company a deadline to make a "meaningful offer."<sup>238</sup> After River View advised the Commission that it did not want to "bid against itself" and was thus requesting a counteroffer from the EEOC, the Commission declined and filed a lawsuit.<sup>239</sup>

The court rejected the employer's argument that the EEOC forced it to negotiate in "a vacuum" without access to information supporting the Commission's claims and that the agency forced the employer to bid against itself and, instead, held that the EEOC is only required to notify the employer of the nature of the violation and how it could be remedied. Relying on Sixth Circuit precedent, the court found, "[t]he manner and substance of the conciliation 'is within the discretion of the EEOC as the agency created to administer and enforce our employment discrimination laws and is beyond judicial review.'"<sup>240</sup> Thus, the *River View Coal* court held that because the parties negotiated for four months, the employer was given an opportunity to make a counteroffer, and the agency re-opened conciliation at the employer's request, the EEOC had acted in good faith.<sup>241</sup>

In *Serrano and EEOC v. Cintas*, the Sixth Circuit Court of Appeals reversed the district court, finding that the inclusion in the proposed conciliation agreement of a reference to relief for "other similarly situated qualified female applicants who sought employment" provided an

<sup>230</sup> *Id.* at 1248.

<sup>231</sup> *Id.* at 1255.

<sup>232</sup> *Id.* at 1255. The court also cited to Tenth Circuit case law in support of its position that the EEOC should be granted deference in examining the sufficiency of the EEOC's conciliation efforts. As discussed above, there is Tenth Circuit precedent supporting both the "attempt at conciliation" standard used in the Sixth Circuit, as well as precedent supporting the more stringent "reasonableness and responsiveness" standard espoused by the Second, Fifth, and Eleventh Circuits. Although the *Alia* court seems to suggest that the Tenth Circuit has decisively adopted the more deferential approach of the Sixth Circuit, this point of law is not yet in fact settled in the Tenth Circuit.

<sup>233</sup> *Id.* at 1255.

<sup>234</sup> *Alia Corp.*, 842 F. Supp. 2d at 1256.

<sup>235</sup> *Id.* at 1258.

<sup>236</sup> *EEOC v. Evans Fruit Co.*, 2012 U.S. Dist. LEXIS 72836, at \*\*21-22 (E.D. Wash. May 24, 2012).

<sup>237</sup> *EEOC v. River View Coal, LLC*, 2012 U.S. Dist. LEXIS 63225, at \*\*2-3 (W.D. Ky. May 4, 2012).

<sup>238</sup> *Id.* at \*3.

<sup>239</sup> *Id.*

<sup>240</sup> *Id.* at \*\*7-8.

<sup>241</sup> *Id.* at \*\*8-9.

indication that the EEOC was seeking class-based remedies and, therefore, was sufficient to meet the Commission's good faith conciliation obligation.<sup>242</sup> While the EEOC provided no information as to nature of the relief sought, the court found the fact that the employer expressed no interest in settling the claims sufficient to meet the Commission's conciliation obligation.<sup>243</sup>

Other courts in FY 2012, however, have held that the EEOC did not meet its obligation to conciliate in good faith. For example, in *EEOC v. La Rana Hawaii, LLC*,<sup>244</sup> the District Court of Hawaii ruled against the EEOC, stayed proceedings, and ordered the agency to re-open the conciliation process. In that case, the agency demanded over \$700,000 from the defendants, but denied their requests for information regarding the Commission's alleged class of unnamed individuals, the alleged unlawful acts by the employer, or any other information that would have put defendants on notice of the class size, identities of the class members or the substance of their claims. In finding that this information would have been crucial to the defendants' ability to assess potential damages, the court noted: "[t]he EEOC cannot expect employers to make substantial offers of settlement when they are provided with no information with which to evaluate their liability."<sup>245</sup>

### 3. Failure to Identify Class Members

While it is undisputed that the EEOC must provide some information to employers to satisfy its investigation and conciliation obligations prior to filing a lawsuit, the specific types of information (and level of detail) the Commission is required to provide remains a contested issue in federal courts. Although employers had some success in challenging the EEOC's investigation and conciliation efforts where the Commission has failed to identify the members of the class on whose behalf the EEOC has sued, several decisions from FY2012 reflect that the federal courts are not in accord on the issue.

In *EEOC v. CRST Van Expedited, Inc.* ("CRST"),<sup>246</sup> the most employer-friendly of these recent decisions, the Eighth Circuit Court of Appeals held that the EEOC did not reasonably investigate class allegations of sexual harassment in the context of a section 706 class action because it did not investigate the specific allegations of any of the allegedly aggrieved class members prior to filing suit. While investigating a sole charge of sexual harassment and discrimination by a female long haul truck driver, the EEOC learned that four other female drivers had filed formal charges of sexual harassment against the employer. The Commission subsequently found reasonable cause to believe that CRST had subjected a "class of employees" to sexual harassment in violation of Title VII. In conciliation, however, the EEOC could not provide the approximate size of the class or the names of the alleged class members. Instead, the Commission proposed a letter to past and present employees to help identify class members. CRST declined to assist the Commission in developing its claims and notified the EEOC that conciliation appeared futile. Thereafter, the EEOC filed its lawsuit.

During the pendency of the litigation, it became clear that the EEOC did not know the number of potential class members for which it was seeking relief. During discovery, the EEOC sent letters to over 2,700 female employees soliciting their participation in the case. It then identified a class of 270 aggrieved individuals, which it later narrowed to a class of 67. The district court barred the EEOC from pursuing its claims as to those 67 class members, holding that the EEOC "did not conduct *any* investigation of the specific allegations of the allegedly aggrieved persons for whom it seeks relief" before filing the complaint.<sup>247</sup>

The Eighth Circuit affirmed the district court's decision, holding that the EEOC's inability to name class members or provide CRST with an estimate as to the size of the class during conciliation, and its failure to investigate any of the 67 alleged class members' claims during the investigation, deprived CRST of a meaningful opportunity to conciliate those claims. The court rejected the Commission's argument that it was required only to investigate and conciliate each type of discrimination as opposed to each instance of discrimination, holding that the EEOC's strategy of suing first and finding class members later placed CRST in the untenable position of facing "a continuously moving target of allegedly aggrieved persons, the risk of never-ending discovery and indefinite continuance of trial" as the number of potential

242 *Serrano and EEOC v. Cintas*, 2012 U.S. App. LEXIS 23132, at \*\*48-50 (6th Cir. Nov. 9, 2012)(hearing requested).

243 *Cintas*, 2012 U.S. App. LEXIS 23132, at \*\*48-49. Quoting from *EEOC v. Keco Industries, Inc.*, 748 F.2d 1097, 1101-02 (6th Cir. 1984) that "[t]he EEOC is under no duty to attempt further conciliation after an employer rejects its offer," the Sixth Circuit interpreted the employer's failure to respond for three years to the EEOC's conciliation offer to be a rejection of the offer.

244 *La Rana*, 2012 U.S. Dist. LEXIS 118881, at \*74 (D. Haw. August 22, 2012).

245 *Id.* at \*72. The *La Rana* court also acknowledged the circuit split on the meaning of good faith conciliation noting, "[a]lthough courts have taken different approaches when evaluating the EEOC's duty to engage in conciliation, there is no disagreement that the statutory duty is a real one rather than a mere formality, and that the underlying goal is to encourage settlements." *Id.* at \*7.

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

247 *Id.* at 673, citing *EEOC v. CRST Van Expedited, Inc.*, 2009 U.S. Dist. LEXIS 71396, at \*51 (N.D. Iowa Aug. 13, 2009) (emphasis in original).

class members fluctuated throughout the discovery process.<sup>248</sup> The court further held that the district court did not abuse its discretion in declining to stay the action for further conciliation in lieu of dismissal given that the “EEOC wholly failed to satisfy its statutory pre-suit obligations” and opted instead to use discovery in the lawsuit as a fishing expedition designed to uncover additional violations.<sup>249</sup>

One member of the panel dissented, arguing that Eighth Circuit precedent supported the Commission’s argument that it is required only to investigate, conciliate, and find reasonable cause as to each *type* of Title VII violation alleged by the charging party.<sup>250</sup> That precedent, the dissent argued, permits the EEOC to proceed on behalf of a local class without naming each individual class member because the employer would necessarily be put on notice that the Commission was investigating alleged misconduct with regard to a defined class.<sup>251</sup> The rule crafted by the majority, the dissent argued, places an unprecedented obligation on the EEOC to investigate and conciliate the specific claims of individual class members prior to filing class claims.

District courts addressing the issue since the decision in *CRST*, have not always agreed with the Eighth Circuit.<sup>252</sup> In *EEOC v. United Road Towing, Inc.*,<sup>253</sup> for example, the Northern District of Illinois held that the EEOC was not required to disclose the identities of class members before filing suit. There, the EEOC’s investigation was premised upon the claims of two employees alleging discrimination in violation of Title VII and the Americans with Disabilities Act. Identifying only those two individuals, the EEOC issued a determination stating that it had reasonable cause to believe that United Road Towing (“URT”) had discriminated against the two named employees and a “class of disabled individuals.” During conciliation, the EEOC declined to identify the members of the purported class. Based upon correspondence with the EEOC, however, URT believed the class was limited to employees who had been denied medical leave notwithstanding the EEOC’s cause finding. As a result, conciliation efforts broke down and the EEOC filed suit. During discovery, the Commission identified 17 allegedly aggrieved individuals in addition to the two named parties. URT sought summary judgment, arguing that the EEOC had failed to investigate or conciliate sufficiently because it had not identified the class members before filing suit. The district court denied the motion.

As to the EEOC’s investigation, the court held that Seventh Circuit Court of Appeals precedent precludes review of whether an EEOC administrative investigation sufficiently supports the claims brought in a subsequent lawsuit.<sup>254</sup> As to the EEOC’s conciliation efforts, the court held that URT was given “a meaningful opportunity to engage in conciliation” because it was aware that the EEOC’s cause finding pertained to a class of disabled individuals and the EEOC had informed URT that it was seeking relief for three specific types of violations.<sup>255</sup>

The district court in *EEOC v. Evans Fruit Company* similarly was not persuaded that the Ninth Circuit would adopt a rule similar to the majority in *CRST*, requiring the EEOC to “specifically identify, investigate and conciliate each alleged victim of discrimination before filing suit.”<sup>256</sup> Citing the dissent in *CRST*, the district court reasoned that the EEOC needs to identify the scope of the class for which it is seeking relief, but not the identities of each potential class member.<sup>257</sup> Denying the employer’s motion for summary judgment seeking dismissal of 17 class members’ claims based on the EEOC’s failure to conciliate those claims, the district court noted the following evidence to support its holding that the EEOC appropriately identified the scope of the class during investigation and conciliation:

- i. The underlying charge stated that the charging party was “subject to unwelcome sexual comments and advances by the general manager” and further alleged that the charging party “believed that a class of female employees experienced similar inappropriate actions by the general manager.”

248 *CRST*, 679 F.3d at 676.

249 *Id.* at 677. See also *EEOC v. Evans Fruit Company*, 2012 U.S. Dist. LEXIS 72836, at \*\*21-22 (E.D. Wash. May 24, 2012) (relying in part on *CRST* in holding that good faith conciliation efforts include an offer of “some justification of the amount of damages sought, potential size of the class, general temporal scope of the allegations, and the potential number of individuals . . . alleged to be involved in the harassment” and ordering judicially supervised mediation).

250 *CRST*, 679 F.3d at 696 (dissenting opinion).

251 *Id.* citing *EEOC v. Jillian’s of Indianapolis, Inc.*, 279 F. Supp. 2d 974, 983 (S.D. Ind. 2003); *EEOC v. Dillard’s Inc.*, 2011 U.S. Dist. LEXIS 76206 (S.D. Cal. July 14, 2011).

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

253 *EEOC v. United Road Towing, Inc.*, 2012 U.S. Dist. LEXIS 70203 (N.D. Ill. May 11, 2012) (This opinion was subsequently removed from the Lexis service at the request of the court. The authors of this Report, however, have a copy of the opinion on file.)

254 *Id.* at \*7, citing *EEOC v. Caterpillar, Inc.*, 409 F.3d 831, 833 (7th Cir. 2005).

255 *Id.* at \*10.

256 *EEOC v. Evans Fruit Co.*, 2012 U.S. Dist. LEXIS 72836, at \*\*9-10 (E.D. Wash. May 24, 2012).

257 *Id.* at \*\*9-11.

- ii. During the course of its administrative investigation, the EEOC discovered that there was a local class of females who worked at the Sunnyside Ranch who alleged that like the named charging parties, they too had experienced sexual harassment by the general manager.
- iii. In its determination, the EEOC found “reasonable cause to believe the charging party was subjected to sexual harassment” by the general manager and that “a class of similarly situated female employees were sexually harassed.”
- iv. During conciliation, the EEOC specifically sought relief on behalf of “all similarly situated female employees.” At this time, the EEOC identified five members of that local class and after conciliation efforts ceased, provided an additional class member before filing suit.

While the district court held that the EEOC satisfied its duty to identify the scope of the local class and, therefore, the 17 class members’ claims survived summary judgment, the district court also held that the EEOC failed to conciliate in good faith when the Commission refused to provide information supporting its conciliation demand to the employer and the court order the parties to participate in mediation.

Thus, notwithstanding the Eighth Circuit’s decision in *CRST*, employers should not assume that the Commission’s failure or refusal to identify the members of a class supporting a section 706 claim will preclude those claims. Nevertheless, *CRST* highlights the importance for employers defending EEOC class claims of continually requesting investigative findings from the EEOC, making reasonable and meaningful conciliation efforts as to class allegations, and pushing the Commission to meet its obligations to conciliate in good faith by soliciting estimates of the size and scope of any purported class.

#### 4. Impact of Misconduct Involving the Conciliation Process

Courts have taken a dim view of EEOC actions when it engages in misconduct by concealing essential information during the conciliation process. In *EEOC v. Gap, Inc.*,<sup>258</sup> during its investigation and conciliation, the Commission concealed the fact that a charging party was HIV positive, instead alleging the Gap discharged the charging party because he had a kidney disease that caused him to use the bathroom frequently. The court held that the EEOC’s decision to conceal this fact during the conciliation “denied the Defendant a reasonable opportunity to conciliate before litigation.”<sup>259</sup> Ultimately, the court concluded that “[b]y concealing the critical fact that this was an HIV case, thereby depriving the Defendant of notice of the true nature of the claim, the EEOC’s attempt at conciliation was not made in good faith, and was the equivalent of no conciliation of all.”<sup>260</sup> The court rejected the Commission’s request to stay the case to allow a second conciliation (to be conducted in good faith this time), and denied the EEOC’s motion to amend its Complaint to add a claim concerning the charging party’s HIV status. As such, the Commission’s concealment of an essential fact regarding the charging party’s alleged disability caused the court to bar the EEOC’s attempt to amend its theory of recovery.

#### 5. Traps for the Unwary – EEOC Attacks Based on the Good Faith Conciliation Defense

Employers contemplating a defense based on deficiencies in the Commission’s conciliation efforts should be aware that the EEOC may take the position that when an employer asserts a good faith conciliation defense, it has waived confidentiality of the pre-lawsuit conciliation process. In *EEOC v. Mach Mining, LLC*,<sup>261</sup> a discovery dispute arose in which the company objected to discovery requests served by the EEOC regarding the good faith conciliation defense. The EEOC argued that Mach Mining waived the confidential nature of the conciliation process by asserting a failure to conciliate defense. In examining whether the company had consented to waive the confidentiality of the conciliation process, the court noted that merely pleading failure to conciliate in good faith is not sufficient to establish waiver of the confidentiality of conciliation.<sup>262</sup> Further, the court found it persuasive that Mach Mining had done nothing to place the conciliation process into public view, such as filing a dispositive motion detailing the conciliation process or attaching documents that would reveal details of the parties’ negotiations.<sup>263</sup> The court denied the Commission’s motion, indicating that the EEOC was not prejudiced in that it could re-file its motion if circumstances in the litigation changed.

<sup>258</sup> *EEOC v. Gap, Inc.*, 2011 U.S. Dist. LEXIS 148348, at \*\*1-2 (E.D. Mich. Dec. 27, 2011).

<sup>259</sup> *Id.* at \*8.

<sup>260</sup> *Id.* at \*9.

<sup>261</sup> *EEOC v. Mach Mining, LLC*, 2012 U.S. Dist. LEXIS 96844, at \*\*2-3 (S.D. Ill. July 13, 2012).

<sup>262</sup> *Id.* at \*4.

<sup>263</sup> *Id.* at \*6.



In *EEOC v. McPherson Companies, Inc.*,<sup>264</sup> the court took a harsher approach in a ruling on the EEOC's motion to depose the employer's in-house counsel. The company asserted a failure to conciliate affirmative defense and conceded in the litigation that its in-house counsel was the sole representative for the company during the conciliation process. In response to the EEOC's motion to take McPherson's in-house counsel's deposition, the court conditioned the denial of the motion on the company making one of two of the following choices: (1) withdraw its affirmative defense that the EEOC did not engage in good faith conciliation; or (2) disqualify its in-house counsel from participation in the litigation under ethics rules barring lawyers from also serving as witnesses.<sup>265</sup>

Thus, employers should be careful to keep information regarding the conciliation process confidential (and ideally should only file such information under seal). Employers also should be careful in choosing whom they select to represent the employer during conciliation with the EEOC.

## E. Intervention

It has been said that the role of an intervenor falls "somewhere in the gray area between spectator and participant."<sup>266</sup> As an intervenor, the EEOC often assumes the role of the boisterous spectator cheering for the cause championed by private plaintiffs. At the same time, the EEOC actively participates, often by asserting claims in addition to the claims already brought by private plaintiffs or by seeking remedies beyond those already sought by private plaintiffs. No matter what its role, the intervention of the EEOC (or any other government agency) in a private lawsuit intensifies the litigation considerably.

This section examines intervention by the EEOC, as well as by private plaintiffs, and the standards courts apply to determine whether motions to intervene should be granted. This section also examines intervention-related issues decided by the courts last year, including whether private plaintiffs may assert pendent state law claims when they intervene in EEOC lawsuits, the extent of their permitted role in EEOC class claims, discovery disputes involving private plaintiffs, and recovery of fees by intervenor attorneys.

### 1. EEOC Intervention in Private Litigation

As the primary federal agency charged with enforcing antidiscrimination laws, the EEOC is empowered to intervene in private discrimination lawsuits.<sup>267</sup> This may occur even in instances in which the Commission has previously investigated and decided not to initiate litigation. Yet, some cases caution against using intervention as a vehicle to bypass the agency's duties to investigate and conciliate claims.

In deciding whether to intervene, the EEOC's paramount concern is whether the case is of "general public importance."<sup>268</sup> Indeed, before it is allowed to intervene in a Title VII or ADA case, the Commission must, among other things, certify that its intervention is of general public importance.<sup>269</sup> "Normally, to be considered of 'general public importance,' a case should directly affect a large number of aggrieved individuals, involve a discriminatory policy or practice requiring injunctive relief, or have potential for addressing significant legal issues."<sup>270</sup> Private discrimination class actions are especially vulnerable to EEOC intervention because, by their nature, they generally involve large numbers of employees, applicants, or former employees and alleged discriminatory policies or practices.

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

- **The EEOC's potential contribution, in both personnel and financial resources, to the success of the litigation:** The EEOC describes this factor as the most important factor. Although the EEOC Regional Attorney's Manual states that the EEOC should never intervene principally to fund a case, the Manual encourages intervention if the EEOC believes its participation will result in a successful resolution of the case. In such cases, the Manual notes, "[t]he work of Commission attorneys on the case must be substantial both in time spent and in the importance of their tasks. Where a trial occurs, Commission attorneys should have significant roles in the courtroom."<sup>271</sup>

<sup>264</sup> *EEOC v. McPherson Companies, Inc.*, 2012 U.S. Dist. LEXIS 56530, at \*2 (N.D. Ala. April 19, 2012).

<sup>265</sup> *Id.* at \*\*1-2.

<sup>266</sup> *Harris v. Amoco Prod. Co.*, 768 F.2d 669, 675 (5th Cir. 1985).

<sup>267</sup> While there were no significant developments in FY 2012 related to the EEOC's right to intervene in private litigation, because this is the first instance where Littler is addressing the topic of intervention in its EEOC Annual Report series, the authors are providing an in-depth overview of the topic in general.

<sup>268</sup> See EEOC, REGIONAL ATTORNEY'S MANUAL, Part 2, § IV.D, available at <http://www.eeoc.gov/eeoc/litigation/manual/index.cfm>. Limiting intervention to matters of "general public importance" is based on the express terms of Title VII. 42 U.S.C. § 2000e 5(f)(1).

<sup>269</sup> EEOC, REGIONAL ATTORNEY'S MANUAL, PART 2, § IV.D ("Certifications are not required for interventions in ADEA and EPA [Equal Pay Act] cases, but those cases should generally meet the same public importance standard.")

<sup>270</sup> EEOC, REGIONAL ATTORNEY'S MANUAL, Part 2, § IV.D.

<sup>271</sup> EEOC, REGIONAL ATTORNEY'S MANUAL, Part 2, § IV.D.

- **Private counsel's ability to litigate the case effectively without the EEOC's participation:** In assessing this factor, which correlates with the first factor described above, the EEOC evaluates the general competence of plaintiff's counsel, his or her related litigation experience, and financial resources. Even where private counsel is highly skilled and able to fund the case adequately, the Commission will consider intervening if, as described above, it believes intervention will significantly increase the likelihood of success in an important case. The EEOC describes "important cases" as those that are particularly large or complex, or in which the Commission perceives a need for injunctive relief in addition to the relief sought by the private plaintiff(s).<sup>272</sup> The EEOC also considers intervention in circumstances where involvement in one case may encourage such private litigation.
- **Timeliness of the Motion:** The EEOC also will take into account whether the motion will be considered timely by the court, but underscores that this should not be an issue if the determination is made that the Commission's involvement is important to the success of the litigation, because intervention normally will occur early in such cases. Regardless of the EEOC's view, as shown below, the courts consider timeliness of the motion to be an important consideration.

Section 706(f)(1) of Title VII essentially provides for "permissive intervention" by the EEOC in a private lawsuit at the court's discretion, explaining that: "[u]pon timely application, the court may, in its discretion, permit the Commission . . . to intervene in such civil action upon certification that the case is of general public importance."<sup>273</sup> The same approach is followed in dealing with intervention in an ADA action.<sup>274</sup>

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

Permissive Intervention. . . . On timely motion, the court may permit anyone to intervene who: (A) is given a conditional right to intervene by a federal statute; or (B) has a claim or defense that shares with the main action a common question of law or fact in common.

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In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.<sup>275</sup>

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

- whether the EEOC has certified that the action is of general importance; and
- whether the request is timely.<sup>276</sup>

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

- length of time the intervenor knew or should have known of its interest in the case;
- prejudice to the original parties caused by any delay;
- prejudice to the intervenor, if intervention is denied; and
- any unusual circumstances.<sup>277</sup>

<sup>272</sup> EEOC, REGIONAL ATTORNEY'S MANUAL, Part 2, § IV.D.

<sup>273</sup> 42 U.S.C. § 2000e-5(f)(1). Courts generally accord a great deal of deference to the EEOC's determination that a matter is of "general importance" and usually will not require any proof of public importance beyond the EEOC's conclusory declaration. See *Reid v. Lockheed Martin Aeronautics Co.*, 2001 U.S. Dist. LEXIS 991, at \*6 n.4 (N.D. Ga. Jan. 31, 2001); *Wurz v. Bill Ewing's Serv. Ctr., Inc.*, 129 F.R.D. 175, 176 (D. Kan. 1989).

<sup>274</sup> 42 U.S.C. § 12117.

<sup>275</sup> FED. R. CIV. P. 24(b) (as amended Dec. 1, 2007).

<sup>276</sup> See *Ramirez v. Cintas Corp.*, No. 3:04-cv-00281 (N.D. Cal. Apr. 26, 2005), ECF No. 88 (Order Granting EEOC's Motion for Leave to Intervene), citing *EEOC v. Harris Chernin, Inc.*, 10 F.3d 1286, 1292-93 (7th Cir. 1993) and *Mills v. Bartenders Int'l Union*, 1975 U.S. Dist. LEXIS 11320, at \*4 (N.D. Cal. 1975); see also *Harris v. Amoco Prod. Co.*, 768 F.2d 669, 676 (8th Cir. 1985). In *Wilfong v. Rent-A-Center, Inc.*, 2001 U.S. Dist. LEXIS 16958, at \*5 (S.D. Ill. May 11, 2001), the district court integrated the requirements of Federal Rule of Civil Procedure 24(b)(2) and stated that "the court must consider three requirements: (1) whether the petition was timely; (2) whether a common question of law or fact exists; and (3) whether granting the petition to intervene will unduly delay or prejudice the adjudication of rights of the original parties."

<sup>277</sup> *Wilfong v. Rent-A-Center, Inc.*, 2001 U.S. Dist. LEXIS 16958, at \*\*5-6 (S.D. Ill. May 11, 2001); *Reid v. Lockheed Martin Aeronautics Co.*, 2001 U.S. Dist. LEXIS 991, at \*6 (N.D. Ga. Jan. 31, 2001). In *Ramirez v. Cintas Corp.*, No. 3:04 cv 00281 (N.D. Cal. Apr. 26, 2005), ECF No. 88, the district court referred to three factors in deciding whether the EEOC's intervention action was timely: (1) the stage of the proceeding at which the EEOC seeks to intervene; (2) possible prejudice to other parties; and (3) the reason for and length of any delay in seeking intervention.

Although the courts generally have allowed the EEOC to intervene in cases in which they have sought to do so,<sup>278</sup> courts have also denied motions to intervene. For example, in *Reid v. Lockheed Martin Aeronautics Co.*,<sup>279</sup> the court denied the EEOC's motion to intervene in two consolidated Title VII class actions seven months after the lawsuits were filed, finding that the EEOC's delay in seeking to intervene caused "more than minimal prejudice" to the defendants.<sup>280</sup> In this regard, the court focused on the fact that the EEOC had contemplated intervening in the cases at the outset, but had delayed doing so while it engaged in unmonitored communications with potential class members. If the EEOC had intervened earlier, when it first contemplated doing so, it would have been subject to the same restrictions the court placed on the original parties regarding communications with potential class members. The trial court also found that the EEOC's intervention would have delayed adjudication of the rights of the original parties. As to this point, the court noted that most of the named parties' depositions had already been taken and over a million documents had been produced by the defendants. The EEOC's intervention, with the concomitant additional lawyers, was bound to prolong the case and raise even more discovery disputes.<sup>281</sup>

Finally, the court determined that the EEOC's intervention would improperly broaden the scope of the case, causing undue prejudice to the defendants. Although the original plaintiffs sought a nationwide class, it was uncertain that they would achieve this result because they would have to satisfy the rigorous requirements of Rule 23. On the other hand, the court noted, the EEOC, which is not subject to the restrictions of Rule 23, would likely pursue nationwide claims that would even encompass "pattern and practice" claims by named plaintiffs, – even though it had not previously issued a cause finding in a majority of the EEOC charges brought by the named plaintiffs.<sup>282</sup>

As in *Reid*, the court in *Molthan v. Temple University*,<sup>283</sup> denied the EEOC's motion to intervene on the grounds that the EEOC's intervention would expand the case by adding additional issues and further delay a case that the court believed had already progressed too slowly. At the time of the EEOC's motion to intervene in *Molthan*, the case had been pending for more than six years, a number of claims had been dismissed on summary judgment, the complaint had been amended, the class had been certified, substantial discovery on the merits had been completed, and significant discovery disputes had been resolved. EEOC intervention at this stage, the court explained, could only serve to prolong a case that "finally, after years of dilatory behavior on both sides, seems to be moving toward trial."<sup>284</sup>

These instances should be contrasted with cases in which the courts have not considered the EEOC's delay in filing an intervention motion to have prejudiced the parties. As an example, in *Ramirez v. Cintas Corp.*,<sup>285</sup> although over a year had passed from the filing of the complaint until the intervention motion was filed, initial disclosures had not been filed as of the date of the ruling on the intervention motion and neither the plaintiffs nor the employer had articulated any prejudice that would result from the intervention. Similarly, in *Colindres v. Quietflex Manufacturing Co.*,<sup>286</sup> the intervention motion was not filed until approximately one year after the initial lawsuit was filed. The court rejected the employer's reliance on *Reid*, discussed above, and underscored that the employer had not yet responded to written discovery requests or produced documents other than during the EEOC investigation, no depositions had been taken in the case, and the discovery cutoff was still seven months away.

In some cases, courts have addressed concerns about delay and the potential for expansion of the scope of the case by conditioning the EEOC's intervention on the compliance with certain conditions, such as abiding by previously set scheduling orders, not duplicating discovery already taken, or agreeing not to seek expansion of the case beyond the allegations of the complaint filed by the plaintiffs.<sup>287</sup>

278 See, e.g., *Brennan v. McDonnell Douglas Corp.*, 519 F.2d 718, 720 (8th Cir. 1975); *Colindres v. Quietflex Mfg. Co., L.P.*, 2002 U.S. Dist. LEXIS 27781 (S.D. Tex. Dec. 4, 2002); *Wilfong v. Rent-A-Center, Inc.*, 2001 U.S. Dist. LEXIS 16958 (S.D. Ill. May 11, 2001); *Evans v. Mitsubishi Motor Mfg. of Am., Inc.*, 1996 U.S. Dist. LEXIS 20993 (C.D. Ill. Dec. 12, 1996); *Billouin v. Monsanto Co.*, 162 F.R.D. 351 (E.D. Mo. 1995); *White v. City of Hannibal*, 158 F.R.D. 150, 151 (E.D. Mo. 1994); *Tsuji v. Taco Bell Corp.*, 61 Fair Empl. Prac. Cas. (BNA) 373 (D. Minn. 1993); *Bauman v. Jacobs Suchard, Inc.*, 1990 U.S. Dist. LEXIS 3159 (N.D. Ill. Mar. 20, 1990); *Wurz v. Bill Ewing's Serv. Ctr., Inc.*, 129 F.R.D. 175 (D. Kan. 1989); *Meyer v. MacMillan Publ'g Co.*, 85 F.R.D. 149 (S.D.N.Y. 1980).

279 *Reid v. Lockheed Martin Aeronautics Co.*, 2001 U.S. Dist. LEXIS 991 (N.D. Ga. Jan. 31, 2001).

280 *Id.* at \*8.

281 *Id.* at \*10.

282 *Id.* at \*\*11-12.

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

284 *Id.* at 588.

285 *Ramirez v. Cintas Corp.*, No. 3:04-cv-00281 (N.D. Cal. Apr. 26, 2005), ECF No. 88.

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

287 See, e.g., *Tsuji v. Taco Bell Corp.*, 61 Fair Empl. Prac. Cas. (BNA) at 374 (D. Minn. 1993) (EEOC's intervention limited to claims already in the original lawsuit and conditioned on its abiding by discovery orders already in place); *Bauman v. Jacobs Suchard, Inc.*, 1990 U.S. Dist. LEXIS 3159 (N.D. Ill. Mar. 20, 1990) (EEOC to coordinate discovery with the original parties and complete discovery within the time period fixed by the court).

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

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

Under 42 U.S.C. § 2000e-5(f)(1), the charging party may intervene in the EEOC's Title VII or ADA lawsuit.<sup>288</sup> If the EEOC pursues a lawsuit under the ADEA or EPA before the charging party, however, the charging party's right to intervene or commence a lawsuit terminates.<sup>289</sup>

It is the EEOC's practice to notify charging parties by telephone of Commission suits before they are filed.<sup>290</sup> Within a week of filing suit in Title VII and ADA cases, the EEOC sends a letter to the charging party, enclosing a copy of the complaint and explaining their statutory right to intervene in the action. The EEOC does not encourage the charging party to intervene, but informs the charging party that if they do intervene, they will be able to pursue individual relief separately if their interests later diverge.<sup>291</sup>

Rule 24 of the Federal Rules of Civil Procedure sets forth the legal construct by which a charging party, or a similarly situated employee, may move to intervene in a lawsuit filed by the EEOC. Under Rule 24, intervention is either a matter of right or permissive. Most courts analyze a charging party's motion to intervene under Rule 24(a), unless pendent claims are involved and then those claims are analyzed under Rule 24(b), which, as discussed above, governs permissive intervention.<sup>292</sup> Rule 24(b) may also apply if the movant is not aggrieved by the practices challenged in the EEOC's lawsuit<sup>293</sup> or the movant is a governmental entity other than the EEOC.<sup>294</sup>

### Rule 24(a) provides:

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

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

Courts are split with regard to whether a charging party has an unconditional right to intervene as set forth in Rule 24(a)(1). Some courts have concluded that an unconditional right exists under Title VII.<sup>295</sup> Other courts have concluded that an unconditional right does not exist and/or for other reasons, analyze motions to intervene under Rule 24(a)(2).<sup>296</sup>

Timely-filed motions to intervene by a charging party generally are granted. In *EEOC v. Foley Products Co.*,<sup>297</sup> the charging party filed his motion to intervene more than a year after the EEOC filed the lawsuit. The employer argued the motion should be denied because it was untimely. The charging party argued that he filed his motion within sixteen days of learning that a conflict of interest existed between himself and the EEOC. The court determined that the charging party's motion was timely and, therefore, granted the motion to intervene. In reaching its conclusion, the court stated that "[t]imeliness is not limited to chronological considerations but is to be determined from all of the circumstances."<sup>298</sup>

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

289 See 29 U.S.C. § 626(c)(1).

290 EEOC, REGIONAL ATTORNEY'S MANUAL, Part 2, § II.E.

291 EEOC, REGIONAL ATTORNEY'S MANUAL, Part 2, § II.E.

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

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

294 *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)).

295 *EEOC v. WirelessComm*, 2012 U.S. Dist. LEXIS 67835, at \*\*3-4 (N.D. Cal. May 15, 2012), citing 42 U.S.C. § 2000e-5(f)(1); *EEOC v. Occidental Life Inc. Co. of Cal.*, 535 F.2d 533, 542 (9th Cir. 1976); *EEOC v. Foley Products Co.*, 2012 U.S. Dist. LEXIS 11153, at \*2 (M.D. Ala. Jan. 31, 2012).

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

297 *Foley Products Co.*, 2012 U.S. Dist. LEXIS 11153 (M.D. Ala. Jan. 31, 2012).

298 *Foley Products Co.*, 2012 U.S. Dist. LEXIS 11153, at \*3 (quoting *Stallworth v. Monsanto Co.*, 558 F.2d 257, 263 (5th Cir. 1977)).

In *EEOC v. Signal International, LLC*,<sup>299</sup> the employer unsuccessfully argued that a motion to intervene was untimely because it was prematurely filed. The EEOC filed a lawsuit alleging unlawful employment practices in violation of sections 703(a) and 704(a) of Title VII. Within a few weeks of the filing of the complaint, the two charging parties and another similarly situated individual moved to intervene. The court concluded that the employer did not assert any specific prejudice from early intervention while recognizing the significant potential of prejudice to the movants if their motion was denied. The court further rejected the employer's argument that the intervention changed the nature of the case or allowed the similarly situated individual to "piggyback" onto the complaint.

In *EEOC v. Lehi Roller Millers Co. Inc.*,<sup>300</sup> a court granted a charging party's motion to intervene filed three years after the case was filed even though discovery was complete, several depositions had been taken and a motion for summary judgment had been filed because the charging party indicated he would not seek to reopen discovery or change any other deadline. The court noted that while the EEOC and charging party's interests had not yet diverged, "the EEOC's public interest commitment may lead to future conflicts during such decisions as settlement discussions or mediation proceedings."<sup>301</sup>

While charging party motions to intervene are often granted, such motions may be denied when the intervenor does not fall within the category of persons on whose behalf the EEOC's lawsuit was filed or if they present additional claims that would expand the scope of the lawsuit, resulting in delay or prejudice to the adjudication of the rights of the original parties. In *EEOC v. DiMare Ruskin, Inc.*,<sup>302</sup> the EEOC filed a lawsuit seeking relief on behalf of Catalina Ramirez, Lucia Reyes, and a class of similarly situated female employees who the EEOC argued were sexually harassed and retaliated against when they complained of the alleged misconduct. Both Ramirez and Reyes were seasonal employees. Six months later, Catalina Ramirez, Lucia Reyes and Francisco Chavez moved to intervene. The court granted intervention as to Ramirez and Reyes but denied the motion with respect to Chavez because he was not an aggrieved party with regard to the primary sexual harassment allegations. The court also concluded Chavez did not appear to be a similarly situated employee because he was a year-round employee who alleged retaliation by a different supervisor. The court further declined to grant permissive intervention under Rule 24(b)(1)(B) because it concluded intervention would unduly delay or prejudice the adjudication of the original parties' dispute because his claims arose from facts and issues of law not substantially related to the litigation.

In *EEOC v. Air Express International, USA, Inc.*,<sup>303</sup> the employer did not oppose intervention by seven charging parties and two "similarly situated aggrieved individuals." In ruling on the movant's pending motion to intervene, the court determined that the movants did not have an unconditional right to intervene under Rule 24(a) because the employer was not a governmental entity, and further determined that the movants failed to satisfy all requirements for intervention as a matter of right.<sup>304</sup> The court found that the movants' "conclusory assertion that their ability to protect their interests in the action will be impaired to impeded if not permitted to intervene is not sufficient to meet their burden in this regard." The court also found that their motion also did not assert any reason why their interests in the action would not be adequately represented by existing parties. The court concluded that permissive intervention under Rule 24(b) also was unwarranted because the EEOC adequately represented the movants' interests in the case.

#### a. Adding Pendent Claims

Over the past year, some courts have allowed individual intervenors to assert pendent state law claims in addition to the EEOC's federal claims. Other courts, however, appear willing to entertain defendants' motions to dismiss intervenor's pendent claims pursuant to Rule 12(b)(6) and challenges to the right to add pendent claims through intervention under Rule 24(b).

As stated above, Rule 24(b)(1)(B) allows the court, in its discretion, to permit intervention by a person "who has a claim or defense that shares with the main action a common question of law or fact."<sup>305</sup> In exercising its discretion, the court "must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights."<sup>306</sup> This standard is commonly used for analyzing pendent claims.

299 *EEOC v. Signal Int'l, LLC*, 2012 U.S. Dist. LEXIS 7615 (S.D. Miss. Jan. 24, 2012).

300 *EEOC v. Lehi Roller Millers Co. Inc.*, 2012 U.S. Dist. LEXIS 13785 (D. Utah Feb. 3, 2012).

301 *Id.* at \*\*5-6.

302 *EEOC v. DiMare Ruskin, Inc.*, 2011 U.S. Dist. LEXIS 136846 (M.D. Fla. Nov. 29, 2011).

303 *EEOC v. Air Express Int'l, USA, Inc.*, 2011 U.S. Dist. LEXIS 146715 (N.D. Tex. Dec. 21, 2011).

304 *Id.* at \*8 ("While Title VII grants the charging or aggrieved party a right to intervene, such right is not absolute or unconditional. '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.' 42 U.S.C. § 2000e-5(f)(1). As Defendant is not such an entity, Movants do not have an unconditional right to intervene.")

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

306 *Id.* at \*\*8-9 (M.D. Fla. Nov. 29, 2011).

In *EEOC v. WirelessComm Inc.*,<sup>307</sup> the charging party sought to intervene in the EEOC's lawsuit under Rule 24(a). The employer did not oppose the charging party's right to intervene, but opposed her motion on the basis that her proposed complaint added two individual defendants and four new state law counts to the EEOC's Title VII action. The Northern District of California held that the proper rule covering the charging party's proposed pendent state law claims was Rule 24(b), which allows intervention when "an applicant's claim or defense and the main action have a question of law or fact in common." Noting that the charging party's state law claims had questions of *fact* in common with the EEOC's Title VII claim (in that they all arose out of alleged sexual harassment the charging party experienced at the employer), the court held the charging party had met the standard for Rule 24(b) permissive intervention and allowed her state law claims to proceed. Additionally, the court found that Rule 20 permitted joinder of the two new individual defendants because the charging party's right to relief arose out of the same transaction or occurrence or series of transactions or occurrences as the EEOC's harassment claims against the employer-defendant.

Similarly, in *EEOC v. Simbaki LTD*,<sup>308</sup> two charging parties sought to intervene in the EEOC's action and to add multiple pendent state law claims, including battery, negligent retention, libel, and slander, as well as additional defendants. The defendants moved to dismiss the charging parties' complaints under Rule 12(b)(6). With respect to the battery and negligent retention claims, the defendants argued the claims were barred by the applicable statutes of limitation and equitable tolling should not be applied during the pendency of the intervenors' charges with the EEOC. The court agreed, citing *Dupree v. Hutchins Bros.*,<sup>309</sup> in holding that a statute of limitations is not tolled by the pendency of an administrative complaint filed with the EEOC, and dismissed the intervenors' battery and negligent retention claims. The court allowed the intervenor asserting libel and slander claims the opportunity to amend her complaint to add facts sufficient to meet the specific pleading requirements of Rule 8.

The court in *EEOC v. Coley's #101, LLC*<sup>310</sup> also entertained a motion to dismiss under Rule 12(b)(6) attacking the sufficiency of the intervenors' pleadings. The court found that the intervenors had properly pled state law claims for outrage, slander, and negligent supervision. The defendant also attacked the intervenors' complaints under Rule 24(b)(1), arguing the intervenors' state law claims did not have questions of law or fact in common with the EEOC's Title VII sexual harassment complaint. The court disagreed, and held that the outrage and negligent supervision claims and Title VII claims had significant overlap and the slander claim factually flowed from intervenors' sexual harassment complaints. Accordingly, the court allowed the intervenors to add the state law causes of action as pendent claims to the previously filed Title VII claims.

#### b. Extent of Permitted Role in EEOC class Claims

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

The distinction between sections 706 and 707 claims is critical in these instances. Section 706 allows the Commission to file a charge on behalf of one or more individual complainants.<sup>311</sup> Section 707 allows the Commission to file a claim when it has reason to believe an employer has engaged in a pattern or practice of discriminatory conduct.<sup>312</sup> An individual cannot initiate a charge or file a civil suit for a section 707 claim. In addition, while litigants in section 706 claims may be awarded equitable and/or legal damages, the remedies to aggrieved individuals identified in section 707 litigation filed by the EEOC are limited to equitable relief.

In *EEOC v. JBS USA, LLC*,<sup>313</sup> the EEOC filed suit under both section 706 and section 707 alleging the employer discriminated against Somali, Muslim, and African American employees based on their national origin, religion, and ethnicity. The court granted in part the EEOC's motion to bifurcate the trial, and ordered that it would be conducted in two phases: Phase I would include the pattern or practice claim under section 707; Phase II would include the claims the EEOC asserted under section 706. Over 200 individuals sought to intervene

307 *EEOC v. WirelessComm Inc.*, 2012 U.S. Dist. LEXIS 67835 (N.D. Cal. May 15, 2012).

308 *EEOC v. Simbaki, Ltd.*, 2012 U.S. Dist. LEXIS 71799 (S.D. Tex. May 23, 2012).

309 *Dupree v. Hutchins Bros.*, 521 F.2d 236, 238 (5th Cir. 1975).

310 *EEOC v. Coley's #101, LLC*, 2012 U.S. Dist. LEXIS 94387 (N.D. Ala. July 9, 2012).

311 See 42 U.S.C. § 2000e-5.

312 See 42 U.S.C. § 2000e-6. *But see Serrano and EEOC v. Cintas*, 2012 U.S. App. LEXIS 23132 (6th Cir. Nov. 9, 2012), in which the Sixth Circuit Court of Appeals recently held that the EEOC could bring a pattern or practice claim under section 706. On November 21, 2012, Cintas filed a petition requesting that the Sixth Circuit hear the case *en banc* (i.e., the whole court), compared to the 3-judge panel that initially heard the appeal.

313 *EEOC v. JBS USA, LLC*, 2011 U.S. Dist. LEXIS 145102 (D. Colo. Dec. 16, 2011).

in the lawsuit. The court prohibited the intervenors from participating in Phase I discovery regarding EEOC's section 707 claim, but allowed their participation in Phase II discovery related to EEOC's section 706 claim. In so ruling, the court held that the intervenors made no showing that efficiency, economy, or fairness would be advanced by allowing them to initiate discovery during Phase I (even though the intervenors also asserted pattern and practice claims), that the EEOC was better suited to gather evidence on the section 707 claim, and that the time, energy, and expense incurred by the EEOC and the employer would likely be increased by allowing intervenors to participate in discovery in Phase I.

### 3. Miscellaneous Discovery-Related Issues in Intervention Proceedings

During FY 2012, courts addressed various discovery issues raised in intervention proceedings. As shown below, discovery motions need not be filed jointly by the EEOC and charging party-intervenors.

In *EEOC v. United States Steel Corp.*,<sup>314</sup> the charging party-intervenor failed to depose witnesses prior to the deadline set by the court, and thus filed a motion to extend discovery after the deadline had passed. The court denied the motion, noting that "a motion to extend discovery shall be filed prior to the expiration of the discovery period" and that even if her motion had been timely, the charging party-intervenor failed to establish good cause for an extension based on her lack of due diligence.

In another discovery dispute, the court in *EEOC v. Giumarra Vineyards Corp.*<sup>315</sup> denied the charging party-intervenors' motion to compel defendant's production of financial information. The court held that discovery of the defendant's financial information was not justified at that stage of proceedings, but noted that the charging party-intervenors had a "right to renew the request at the time of and in connection with" the upcoming trial.<sup>316</sup>

In *EEOC v. Global Horizons, Inc.*,<sup>317</sup> the court granted in part and denied in part the motion to stay discovery filed by the U.S. Government-Intervenor (Department of Justice). The motion requested a stay of all civil discovery until the end of the related criminal action. Rather than granting or denying the motion in its entirety, the court allowed the Government to "raise objections and/or seek other appropriate relief in connection with specific discovery requests" as they arose.

In *EEOC v. Hamilton Growers, Inc.*,<sup>318</sup> the court granted the charging party-intervenors' motion to compel subpoena responses from a third party. Finding that the requested information was "relevant and material to the disputes" in the litigation, the court ordered the third party to comply with the subpoena or risk facing sanctions.

### 4. Attorneys' Fees to Intervenor Attorneys – Applicable Standard

An intervenor attorney may be awarded attorneys' fees in a Title VII case.<sup>319</sup> Courts have wide discretion in determining whether an award of attorneys' fees is warranted.<sup>320</sup> In making a determination, courts have an affirmative obligation to understand the division of labor between the EEOC and counsel for the intervenors.<sup>321</sup>

In *EEOC v. Conn-X*,<sup>322</sup> the employer failed to defend itself in a Title VII hostile work environment case. The court awarded the EEOC's requested injunction and determined the intervenors' attorney was entitled to fees. Counsel for the intervenors and the EEOC submitted a joint affidavit, which the court interpreted as attesting to two points: (1) the total time devoted to the case by the intervenors' attorney was reasonable and (2) the work done by counsel for intervenors and the EEOC did not overlap significantly. The court concluded counsel for the intervenors was entitled to \$37,530.70 in attorneys' fees.

314 *EEOC v. United States Steel Corp.*, 2011 U.S. Dist. LEXIS 149198 (W.D. Pa. Dec. 29, 2011).

315 *EEOC v. Giumarra Vineyards Corp.*, 2012 U.S. Dist. LEXIS 14109 (E.D. Cal. Feb. 6, 2012).

316 *Id.* at \*10.

317 *EEOC v. Global Horizons, Inc.*, 2012 U.S. Dist. LEXIS 33346 (D. Haw. Mar. 13, 2012).

318 *EEOC v. Hamilton Growers, Inc.*, 2012 U.S. Dist. LEXIS 105025 (M.D. Ga. July 27, 2012).

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

320 *Id.* at \*5.

321 *Id.* at \*\*4-5, citing *EEOC v. Nutri/System, Inc.*, 685 F. Supp. 568, 575 (E.D. Va. 1988) (quoting *Furtado v. Bishop*, 635 F.2d 915, 922 (1st Cir. 1980) ("Indeed, where, as here, intervenor's counsel works closely with EEOC's attorneys the time should be discounted unless there is a 'convincing description of the division of labor accompanying reports of contemporaneous or identical work performed by several attorneys.'")).

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

## F. Discovery in Class-Related Disputes

As the EEOC increases the proportion of systemic cases in its litigation docket, it is imperative for employers to be cognizant of the discovery tactics utilized by the EEOC in the prosecution of these large-scale cases and how the courts are handling the same.

### 1. Discovery Procedures

As discussed above and in the 2011 Annual Report, Section 706 claims use the familiar *McDonnell-Douglas* burden shifting method of proof; the same framework used in individual discrimination claims. Section 707 claims, however, have a markedly different framework, which was first articulated in the U.S. Supreme Court case of *International Brotherhood of Teamsters v. United States*.<sup>323</sup> In a section 707 claim, the EEOC must first demonstrate that unlawful discrimination has been a regular procedure or policy followed by an employer (*i.e.*, Phase I of the trial). If the EEOC carries this burden, the employer can attempt to defend itself by rebutting the EEOC's proof or providing a legitimate, non-discriminatory reason for its procedures. If the employer cannot meet this burden, the court can conclude that a widespread violation of the law has occurred. The EEOC is then entitled to a legal presumption that all of the members of the class are victims of that violation (often referred to as the "*Teamsters* presumption"). An employer may then rebut individual claims and/or challenge the award of damages to individual claimants (*i.e.*, Phase II of the trial), but employers face an extremely high burden during Phase II of trial, given the *Teamsters* presumption.

Similar to the bifurcated approach to trial mandated by *Teamsters*, a common litigation tactic used by the EEOC in section 707 cases is to seek bifurcated discovery, with discovery regarding individual damages coming after the liability phase (Phase I) of the trial. As ostensible support for this strategy, the EEOC often argues that individual damages related to discovery should come later in the litigation because such discovery is costly and time consuming. The EEOC's discovery bifurcation strategy was successful in *EEOC v. JBS USA, LLC*,<sup>324</sup> and allowed the EEOC to avoid depositions of certain individual claimants who possessed relevant information needed by defendant. In *JBS USA, LLC*, the parties negotiated a bifurcation agreement, which divided discovery and the trial into two phases, with Phase I to address the pattern or practice claims and Phase II to adjudicate the individual claims and relief. According to the bifurcation agreement, defendant was allowed to select and depose up to ten intervening employees and to depose up to ten individuals from the following categories: "non-aggrieved Somali Muslim employees who worked at the Grand Island, Nebraska facility during the relevant time period, non-employee witnesses, Union and *co-worker witnesses*, management (corporate and Grand Island) witnesses, and/or 30(b)(6) witnesses."<sup>325</sup> When the defendant sought, during Phase I, to depose three individuals who had filed charges of discrimination but had not intervened as plaintiffs, the EEOC moved for a protective order to preclude defendant from deposing the non-intervenors until later in the litigation. The court held the defendant to the terms of the bifurcation agreement and granted the EEOC's motion. The court found that regardless of whether good cause existed to depose those individuals during Phase I, the defendant had agreed to limit the scope of discovery in Phase I to aggrieved employees who had intervened in the action.

The EEOC did not fare as well in *EEOC v. Sterling Jewelers, Inc.*,<sup>326</sup> when it attempted to rely on the bifurcated discovery process to avoid producing certain information sought by the employer. In *Sterling Jewelers, Inc.*, the EEOC objected to several written discovery requests propounded by the employer based on the fact that the court had bifurcated discovery. In ruling on whether certain information was discoverable by the employer in Phase I, the court compromised as follows: The court sustained the EEOC's objections as to interrogatories that, on their face, pertained to Phase II damages issues, but overruled the EEOC's objections as to interrogatories, which sought information regarding the EEOC's efforts to locate current and former employees and regarding those current and former employees' involvement in legal or administrative proceedings.

In cases where employers refuse to acquiesce to the EEOC's preferred bifurcated approach to discovery, courts have demonstrated a willingness to force the Commission to litigate the full scope of the case it has brought. In *EEOC v. New Indianapolis Hotels*,<sup>327</sup> the EEOC sought to avoid the written and oral discovery of the over 100 of its applicant class members by moving to bifurcate discovery into liability and damages phases. Although the EEOC purported to be concerned about costs to both parties related to engaging in full-throttle discovery, the court noted that "[discovery] bifurcation . . . results in an even greater inefficiency; namely, denying discovery on applicant

<sup>323</sup> *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).

<sup>324</sup> *EEOC v. JBS USA, LLC*, 2012 U.S. Dist. LEXIS 904 (D. Neb. Jan. 4, 2012).

<sup>325</sup> *Id.* at \*\*5-6 (emphasis in original).

<sup>326</sup> *EEOC v. Sterling Jewelers, Inc.*, 2012 U.S. Dist. LEXIS 67220 (W.D.N.Y. May 14, 2012).

<sup>327</sup> *EEOC v. New Indianapolis Hotels*, 2012 U.S. Dist. LEXIS 12546 (S.D. Ind. Feb. 1, 2012).



class members' individualized damages until after liability is decided necessitates a separate jury be empanelled to decide damages."<sup>328</sup> The court denied the EEOC's motion for bifurcated discovery, reasoning that empanelling and familiarizing a new jury saddled both the court and the parties with more of a burden than unified discovery would.

Disputes over the bifurcation of discovery arise in section 706 class cases as well. For example, in *EEOC v. United States Steel Corp.*,<sup>329</sup> the court, according to the EEOC, "de facto" bifurcated discovery, so that discovery related to the intervening plaintiff would proceed before discovery related to the class. Arguing that such bifurcation unfairly prejudiced the EEOC and was contrary to judicial economy, the EEOC asked the court to discontinue its bifurcated discovery process. The court denied the EEOC's request on the grounds that the request was untimely and based on nothing more than the EEOC's mere disagreement with the court's phased discovery process.

## 2. Identification of and Communication with Class Members

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

In *EEOC v. Swissport Fueling, Inc.*,<sup>330</sup> the EEOC disputed an earlier court ruling that, due to its failure to adhere to a court-mandated deadline for adding additional class members, the EEOC was precluded from making such additions absent a showing of good cause. The Commission argued that it need not identify all persons on whose behalf it seeks relief during the administrative and conciliation stages. Accepting this argument, the court nonetheless held that it was not dispositive on the issue of whether the EEOC had demonstrated diligence in identifying charging parties on whose behalf it sought actual and equitable damages. The court further recognized that while the EEOC was routinely given significant time in discovery, such lengthy discovery may not be warranted after the Commission compelled the defendant to disclose the identities and contact information of all potential class members and did nothing to ascertain the actual claimants thereafter. The court allowed modification of the scheduling order for only those claimants for whom the EEOC demonstrated continued diligence to identify, stating that "the EEOC's lack of diligence cannot always be excused just because it harms others who might have had a claim for relief, but did not independently assert it."<sup>331</sup>

Courts have also prevented the EEOC from hiding the ball during its efforts to identify new class members. In *EEOC v. Evans Fruit Co.*,<sup>332</sup> the Commission's prosecution of a Title VII suit was stayed for failure to conciliate openly.<sup>333</sup> Similarly, in *EEOC v. Kaplan Higher Educ. Corp.*,<sup>334</sup> Kaplan sought to compel the EEOC to produce the identities and contact information of the individuals the EEOC claimed were aggrieved by Kaplan's use of credit information in its hiring process. The EEOC argued that such production was outside the scope of Phase I discovery and Kaplan was not entitled to "a separate identification of a group of claimants for whom EEOC will seek relief."<sup>335</sup> The district court disagreed, finding persuasive another district court decision that held that the defendant "quite reasonably [sought] to focus its attention upon the specific women on whose behalf the EEOC intend[ed] to [seek] damages."<sup>336</sup>

The *Kaplan* decision, however, can be contrasted with *Evans Fruit*, which, while recognizing the Eighth Circuit held contrarily, stated that it was "not persuaded the Ninth Circuit would adopt a rule that the EEOC must specifically identify, investigate and conciliate each alleged victim of discrimination before filing suit."<sup>337</sup> Similar to *Evans Fruit*, the court in *Sterling Jewelers Inc.*<sup>338</sup> stated that Sterling was not entitled to identification of witnesses with knowledge of "any facts relating to any issue raised by the Complaint" during Phase I (termed "Stage 1" by the court) under the bifurcation order. Additionally, the district court also overruled the EEOC's objections to producing

328 *Id.* at \*4.

329 *EEOC v. United States Steel Corp.*, 2011 U.S. Dist. LEXIS 149198 (W.D. Pa. Dec. 29, 2011).

330 *EEOC v. Swissport Fueling, Inc.*, 2012 U.S. Dist. LEXIS 65449 (D. Ariz. May 10, 2012).

331 *Id.* at \*21.

332 *EEOC v. Evans Fruit Co.*, 2012 U.S. Dist. LEXIS 72836 (E.D. Wash. May 24, 2012).

333 For a detailed discussion of *Evans Fruit Co.*, please see *supra* section IV.D.2 of this Report.

334 *EEOC v. Kaplan Higher Educ. Corp.*, 2012 U.S. Dist. LEXIS 54949 (N.D. Ohio Apr. 18, 2012).

335 *Id.* at \*14.

336 *Id.* at \*16.

337 *EEOC v. Evans Fruit Co.*, 2012 U.S. Dist. LEXIS 72836, at \*\*9-10 (E.D. Wash. May 24, 2012).

338 *EEOC v. Sterling Jewelers Inc.*, 2012 U.S. Dist. LEXIS 67220, at \*18 (W.D.N.Y. May 14, 2012) (emphasis added).

information regarding its efforts to locate current or former Sterling employees, stating that it “fail[ed] to see how the identification of efforts used to locate current or former employees has anything to do with Stage II discovery.”<sup>339</sup>

Another issue that frequently arises around the issue of identifying class members is whether the EEOC’s communications with class members and potential class members are privileged. By way of example, an Iowa federal district court held that the attorney-client privilege did not protect the EEOC’s communications with *potential* class members.<sup>340</sup> In FY 2012, however, a district court issued a protective order preventing the defendant from communicating with *named* class members based on the EEOC’s attorney-client relationship with these persons.<sup>341</sup> The court did not find that an attorney-client relationship existed across the entire class of individuals just because the EEOC filed a case and identified a named or unnamed class. Instead, the court held that an attorney-client relationship began when the individuals “t[ook] action to manifest their intent to enter the relationship.”<sup>342</sup>

### 3. Scope of Discovery

In general, the EEOC prefers to push forward with expensive and time-consuming litigation (and gain as much information as possible from employers in the process) before revealing full details about the class it claims to represent. While there were some decisions with mixed results in FY 2012, overall, the EEOC experienced several blows to its “act first, ask questions later” attitude toward its systemic investigations initiative.

As an initial example, employers received a favorable ruling in *EEOC v. Original Honeybaked Ham Co.*,<sup>343</sup> wherein the defendant successfully avoided discovery related to other potential victims who worked in numerous stores unrelated to the litigation. In *Original Honeybaked Ham Co.*, the EEOC filed a lawsuit, alleging that a general manager at one store in Highlands Ranch, Colorado had subjected the plaintiff-intervenor to sexual harassment and a hostile work environment. During the course of discovery, the number of aggrieved individuals grew from one to seventeen, and the EEOC demanded that the defendant provide the names of all employees in District 8, which comprised 15 stores in three states, to allow the agency to determine potential victims. The court denied the EEOC’s request for discovery for stores other than those in which the aggrieved individuals worked. The court also limited the EEOC’s lawsuit to those aggrieved persons identified by the deadline set in the court’s case management order. The court expressly refused to allow the EEOC to use civil discovery to uncover additional violations.

Along those same lines, a district court in Maryland refused to compel the defendant to produce information regarding its organizational structure and employee information for an overly broad time period<sup>344</sup>. The court, in fact, limited defendant’s production to a six month period before and after the aggrieved person’s date of hire and termination, respectively. The court also held that the EEOC was not automatically entitled to employee Social Security numbers.<sup>345</sup>

A New Jersey district court, in *EEOC v. FAPS, Inc.*, similarly denied the EEOC’s motion to compel the defendant to provide discovery regarding its “recruitment and hiring” for a 12-year period (*i.e.*, 2000 to 2012), where the complaint alleged only that discriminatory conduct had occurred “since at least 2004.”<sup>346</sup> In *FAPS, Inc.*, the court recognized that the “broad vista for permissible discovery holds especially true in Title VII cases” and that some courts have set limits on discovery running from three years to 12. Notwithstanding, the court held that the EEOC had failed to sustain its burden of demonstrating relevance and/or that its request may lead to admissible evidence. The court placed special emphasis on the fact that the defendant affirmatively stated that, after a search, the requested documents were not located and that they would be produced in the event they were located.

The court in *EEOC v. McCormick & Schmick’s Seafood Restaurants, Inc.*, also rebuffed the EEOC’s attempt to engage in a fishing expedition – this time with respect to the defendant’s email communications.<sup>347</sup> The court ordered the EEOC to meet and confer with the defendant to develop search terms to narrow the request, which could potentially return hundreds of thousands of e-mails, to a manageable number.

339 *Id.* at \*21.

340 *EEOC v. CRST Van Expedited, Inc.*, 2009 U.S. Dist. LEXIS 3621 (N.D. Iowa Jan. 20, 2009).

341 *EEOC v. U-Haul Int’l, Inc.*, 2012 U.S. Dist. LEXIS 76689 (W.D. Tenn. June 1, 2012).

342 *Id.* at \*4.

343 *EEOC v. Original Honeybaked Ham Co.*, 2012 U.S. Dist. LEXIS 72970 (D. Colo. May 25, 2012).

344 *EEOC v. McCormick & Schmick’s Seafood Rests., Inc.*, 2012 U.S. Dist. LEXIS 92157 (D. Md. July 2, 2012).

345 *Id.* at \*\*8-9.

346 *EEOC v. FAPS, Inc.*, 2012 U.S. Dist. LEXIS 65591 (D.N.J. May 10, 2012).

347 *EEOC v. McCormick & Schmick’s Seafood Rests., Inc.*, 2012 U.S. Dist. LEXIS 13134 (D. Md. Feb. 3, 2012).

In that same case, the court also refused to compel defendant to “[p]roduce any and all documents related to any of the claims, defenses, allegations, denials, or contentions in this action,” as requested by the EEOC.<sup>348</sup> The court recognized that the request provided no specifics describing the documents sought, and seemed expressly tailored to allow the EEOC, at any point in the litigation, to contend that the documents it wanted fell within the document request’s unrestricted scope. The court held that request did not comply with Rule 34(b)(1) (A), as it failed to “describe with reasonable particularity each item or category of items to be inspected.”<sup>349</sup>

Further, the court in *EEOC v. Princeton Healthcare Systems*,<sup>350</sup> provided employers with some authority to oppose the EEOC’s “trial by ambush” tactics, as it required the agency to identify and provide information about its alleged class members early in the litigation process — something that is critical to the defense of systemic lawsuits. In *Princeton Healthcare System*, the defendant, in an effort to simplify and streamline discovery, requested that each class member fill out a “fact sheet” regarding basic personal information, information regarding accommodation requests made by the individual, information about the individual’s medical providers, medical records, and documents related to subsequent efforts to find employment. With few exceptions, the court granted the employer’s request and required the EEOC to produce fact sheets completed by each class member.

In contrast to the above rulings, the court sided with the EEOC in its efforts to seek broad discovery in *EEOC v. Sterling Jewelers, Inc.*<sup>351</sup> In that case, the EEOC asked the defendant to identify all employees who worked for defendant in retail operations during the relevant time period and for any person who had relevant knowledge concerning any claim or defense. The EEOC’s request encompassed approximately 75,000 employees. The court required the defendant to identify all individuals for whom it had data, but did not require the employer to go back to an additional time frame beyond that which the EEOC alleged a pattern or practice of misconduct. The court reasoned that the EEOC was not “fishing” and, instead, was pursuing relevant discovery that would support its litigation, including, for example, locating potential witnesses. The New York district court distinguished its holding from the holding in *EEOC v. ABM Industries, Inc.*,<sup>352</sup> on the ground that, in *ABM Industries, Inc.*, the court determined that the EEOC requested statewide discovery for the purpose of searching for other employees with colorable claims.

Finally, at least one court in FY 2012 chastised both the EEOC and the employer alike for their respective failures to engage in the most basic discovery even nearly three years after the case was initially filed.<sup>353</sup> Ultimately, the court ordered both parties to “engage in the full sweep of necessary discovery as permitted by the Federal Civil Rules,” and to “focus less on proving a point to one another and more on disclosing and discovering the matters necessary to facilitate resolving this dispute in a timely manner.”<sup>354</sup>

#### 4. Depositions

Deposition practice related to class disputes in EEOC litigated matters often presents an array of unique issues as counsel for the EEOC, intervening plaintiff(s), and defendant each seek to assert their various interests. As an example, in *EEOC v. JBS USA, LLC*<sup>355</sup>, the defendant asked the court to enter a protective order precluding plaintiff-intervenors from attending the depositions of other plaintiff-intervenors. The court held that the defendant’s request for witness sequestration was legally untenable. Moreover, the court expressly rejected the factual reasons proffered by defendant in support of its request — *i.e.*, that allowing intervenors to hear the testimony of others would encourage the creation of “artificial evidence of a pattern” of discrimination.<sup>356</sup> The court encouraged the defendant to use other forms of evidence to call the intervenors’ credibility into question.

In *EEOC and Serrano v. Cintas Corp.*, the Sixth Circuit Court of Appeals held in a failure to hire pattern or practice case that the employer’s chief executive officer could be subject to deposition even though the Commission failed to demonstrate that the executive had personal knowledge of the decisions affecting the individual class members. Rejecting the “Apex doctrine” that “bars the deposition of high-level executives absent a showing of their ‘unique personal knowledge’ of relevant facts,” the court also concluded that the executive’s

348 *Id.* at \*\*4-5.

349 *Id.* at \*4.

350 *EEOC v. Princeton Healthcare Systems*, 2012 U.S. Dist. LEXIS 65115 (D.N.J. May 9, 2012).

351 *EEOC v. Sterling Jewelers, Inc.*, 2012 U.S. Dist. LEXIS 67220 (W.D.N.Y. May 14, 2012).

352 *EEOC v. ABM Indus., Inc.*, 2008 U.S. Dist. LEXIS 105649 (E.D. Cal. Dec. 22, 2008).

353 *EEOC v. Ruby Tuesday, Inc.*, 2012 U.S. Dist. LEXIS 80481 (W.D. Pa. June 11, 2012).

354 *Id.* at \*8.

355 *EEOC v. JBS USA, LLC*, 2012 U.S. Dist. LEXIS 37095 (D. Colo. Mar. 20, 2012).

356 *Id.* at \*\*9-10.

testimony was highly probative under the pattern or practice *Teamsters* framework. Specifically, the court found that the executive's prior statements to the effect that the company should hire more females "suggest[ed] a high-level-corporate awareness" and, thus, his testimony was fundamental to the EEOC's burden of proof.<sup>357</sup>

## G. General Discovery By Employer

Employment litigation based on federal statutes such as Title VII, the ADA and the ADEA involves proceedings before courts in various jurisdictions and utilization of the Federal Rules of Civil Procedure and Evidence. There is, however, a notable difference when the litigation is being prosecuted by the EEOC as opposed to private counsel. As many employers have learned, the motivations for the litigation are simply not the same. The prosecution by a government agency removes some of the normal considerations of litigation, including personal involvement by the claimant and business, and financial concerns of the claimant and counsel. Instead, employers are often faced with an army of government attorneys with relatively unlimited financial constraints, motivations unrelated to the recovery of legal fees and frequently an expansive view of the Commission's entitlement to discovery from the employer, coupled with the stance that only limited discovery for the employer is permitted.

### 1. Document Discovery

#### a. Scope of Document Discovery

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

For example, employers received a favorable ruling in *EEOC v. Holmes & Holmes Industrial, Inc.*,<sup>358</sup> where the defendant successfully opposed the EEOC's motion to quash its subpoena. In *Holmes & Holmes Industrial, Inc.*, the claimants asserted that the defendants used racial slurs, including the "N" word, in the workplace. Both prior to and during their employment with the defendant, the claimants engaged in writing rap songs and lyrics, many of which were produced by Beatblazer, LLC. The employer subpoenaed Beatblazer (and served document requests on the EEOC) regarding production of song lyrics and videos that the claimants wrote, produced, or otherwise published. The EEOC filed motions to quash and for protective order. The defendant argued that lyrics and videos were discoverable because the majority of the songs and accompanying music videos contained references to or variations of the "N" word. The court agreed, holding that the claimants' music lyrics and videos were relevant and should be produced. The court noted that in order for claimants to prevail upon their hostile work environment claims, they must establish that the environment was hostile from both an objective and subjective perspective and that the claimants' use of these particular words or phrases was directly relevant to claimants' subjective perceptions.<sup>359</sup>

Similarly, in *EEOC v. Abercrombie & Fitch*,<sup>360</sup> the EEOC brought suit against Abercrombie alleging that the store had discriminated against a female Muslim job applicant because she wore a hijab in public at all times. During discovery, Abercrombie requested all photographs of the claimant for a five-year period of time. Following meet and confer efforts, the parties agreed that the claimant would produce photographs for a one-year period (six months prior to her interview and six months following her interview). When the EEOC did produce some photographs from that period, Abercrombie brought a motion to compel, arguing that the production was incomplete. In response, the EEOC filed a motion for protective order, seeking to preclude Abercrombie from seeking production of additional photographs from third-party sources, including claimant's husband and father. In ordering the EEOC to produce all photographs within claimant's possession, the court acknowledged that the photographs were relevant to claimant's contention that she had a sincerely held religious belief. Further, the court denied the EEOC's request for a protective order preventing Abercrombie from using posts published on MySpace by claimant's husband before they were married and before claimant's job interview, finding that the information was already in the public record and could be "located by anyone who wished to Google it."<sup>361</sup>

<sup>357</sup> *Serrano and EEOC v. Cintas Corp.*, 2012 U.S. App. LEXIS 23132, at \*\*37-44 (6th Cir. Nov. 9, 2012).

<sup>358</sup> *EEOC v. Holmes & Holmes Indus., Inc.*, 2011 U.S. Dist. LEXIS 124916 (D. Utah Oct. 27, 2011).

<sup>359</sup> *Id.* at \*9.

<sup>360</sup> *EEOC v. Abercrombie & Fitch*, 2012 U.S. Dist. LEXIS 18358 (N.D. Cal. Feb. 14, 2012).

<sup>361</sup> *Id.* at \*10.

## b. Confidentiality/Privilege

Confidentiality and privilege issues continue to be important throughout litigation and the discovery process. Recent cases reveal that while the EEOC seeks to expand the scope of discovery on one hand, it also seeks to expand the scope of its privilege and confidentiality protections.

As reported last year, in *EEOC v. Sterling Jewelers, Inc.*,<sup>362</sup> the court rejected the defendant's motion for entry of a confidentiality order precluding disclosure of confidential information to arbitration claimants. Reasoning that it would be highly prejudicial to preclude access to such information from the arbitration claimants, who also happen to be charging parties, a confidentiality order would constrain the EEOC from fully communicating regarding the litigation. In a subsequent ruling on related issues, the court revised the defendant's proposed confidentiality order, expanding the definition of "arbitration proceeding" to include both the specific proceeding currently pending before the American Arbitration Association, "as well as any related individual arbitration proceedings."<sup>363</sup> Further, the court permitted inclusion of language allowing the EEOC to use the confidential information in "furtherance of its enforcement activities in any related matter."<sup>364</sup>

A number of recent cases have also examined the scope of various privileges and the limits upon the EEOC's assertion of the same. In *EEOC v. Dimare Ruskin, Inc.*,<sup>365</sup> the EEOC moved for a protective order on the grounds that the employer's discovery requests and third-party subpoena sought documents protected by the attorney-client and work-product privileges and sought documents related to the claimants' immigration status. Among other things, the employer sought production of the EEOC's investigative files, documents related to any communications between the EEOC and the Coalition of Immokalee Workers ("CIW"), and documents related to any communications between the claimants and the CIW. Reasoning that Title VII protects both citizens and immigrants and that the "the EEOC's mission of protecting victims of employment discrimination would be hampered if potential victims are unwilling to come forward and cooperate because of fear of removal or other immigration consequences," the court found good cause for the issuance of a protective order regarding claimants' immigration status.<sup>366</sup> Further, the court held that because claimants were not seeking back pay, front pay, or reinstatement, their immigration status was irrelevant to any damages calculation. With respect to the EEOC's assertion of privilege regarding its investigative files and communications with the CIW and its attorneys, the court reasoned that the attorney-client and common-interest privileges applied to communications occurring after the failure of conciliation. However, the court noted that factual and/or objective information was not subject to the privilege.<sup>367</sup>

In *EEOC v. Hotspur Resorts Nevada, Ltd.*,<sup>368</sup> the EEOC's attempts to assert the deliberative process and attorney-client privileges were constrained. In that case, the employer served requests for production of transcripts and summaries of interviews conducted during the EEOC's investigation of the charge. The court held that in order for the information to qualify for the deliberative process privilege, the document must be "pre-decisional" and "deliberative" and that factual information is not protected. Accordingly, the court held that information not containing an evaluation or analysis of the charge is not protected and must be produced. Similarly, in *EEOC v. Swissport Fueling, Inc.*,<sup>369</sup> the court held that investigative notes are not automatically entitled to protection within the Ninth Circuit Court of Appeals and that there must be a "sufficient connection between the notes and the agency's deliberative process."<sup>370</sup> Further, the court held that an investigator's report "does not become part of the deliberative process simply because it contains only those facts which the person making the report thinks material."<sup>371</sup>

In a recent decision, the EEOC challenged the confidentiality of a settlement agreement which had been entered into between the claimant and employer without the EEOC's involvement. In *EEOC v. GMT, LLC*,<sup>372</sup> the employer and claimant brought a joint motion

362 *EEOC v. Sterling Jewelers, Inc.*, 2011 U.S. Dist. LEXIS 67318 (W.D.N.Y. June 23, 2011).

363 *EEOC v. Sterling Jewelers, Inc.*, 2011 U.S. Dist. LEXIS 116080, at \*\*3-4 (W.D.N.Y. Oct. 7, 2011) (emphasis in original).

364 *Id.* at \*7.

365 *EEOC v. Dimare Ruskin, Inc.*, 2012 U.S. Dist. LEXIS 24951 (M.D. Fla. Feb. 15, 2012).

366 *Id.* at \*\*12-13.

367 *Id.* at \*\*18-19.

368 *EEOC v. Hotspur Resorts Nevada, Ltd.*, 2012 U.S. Dist. LEXIS 88058 (D. Nev. June 26, 2012).

369 *EEOC v. Swissport Fueling, Inc.*, 2012 U.S. Dist. LEXIS 65449 (D. Ariz. May 10, 2012).

370 *Id.* at \*44.

371 *Id.* at \*\*46-47.

372 *EEOC v. GMT, LLC*, 2012 U.S. Dist. LEXIS 96585 (D. Neb. July 12, 2012).

for protective order, seeking to preclude production of their settlement agreement, following the EEOC's discovery request served on the employer. In issuing the protective order, the court held that the agreement would be nullified if disclosed and, therefore, good cause for protection existed.

With respect to requests to file documents under seal, courts remain reluctant to seal documents absent a compelling basis for the request. In *EEOC v. Kelley Drye & Warren, LLP*,<sup>373</sup> the court denied a law firm employer's request that documents filed under seal in connection with a dispositive motion remain sealed. The documents at issue related to law firm partnership agreements and compensation, alleged excessive client development funds, and payments from third parties. The employer argued that its competitive position would be jeopardized if the documents were unsealed. The court rejected this argument, reasoning that public access to judicial documents outweighed the employer's concern over confidentiality. However, the court did permit redaction of references to client names and information.

### c. Medical Records

Medical records continue to be a hot button issue during discovery, especially as they relate to claims for emotional distress. In *EEOC v. Evans Fruit Co.*,<sup>374</sup> the employer subpoenaed healthcare providers for mental health records of class members based on emotional distress claims. The EEOC filed a motion to quash, arguing that the interrogatory responses indicated that the claimants' treatment was for non-mental health-related issues (like pregnancy and knee surgery). The court held that the claimants' "garden variety" emotional distress claims were insufficient to support the subpoena, but permitted reconsideration in the event of subsequent disclosure of mental health treatment and/or history.<sup>375</sup>

In contrast, however, the court in *EEOC v. Kohl's Department Stores, Inc.*,<sup>376</sup> permitted an employer to subpoena medical records for the period encompassing one year prior to the claimant's employment through the duration of employment. The court reasoned that the scope of the subpoena, including medical records for the claimant's entire employment period plus five months before she commenced work, was relevant based on the EEOC's ADA claim and the damages it sought (including emotional distress) related to the same.<sup>377</sup>

## 2. Third Party Subpoenas

During FY 2012, two themes arose with respect to third-party subpoenas: (1) the standing of the EEOC and/or claimants to challenge such subpoenas, and (2) the applicable scope of discovery as it relates to information obtained from third-parties.

In *EEOC v. Michael Cetta, Inc.*,<sup>378</sup> the employer served a third-party subpoena on the claimant's former employer, seeking production of personnel records, including performance reviews and resumes. In denying the motion to quash, the court held that neither the EEOC nor the claimant had asserted a sufficient proprietary interest or applicable privilege to challenge the subpoena. Further, the court held that even if the agency or the claimant had standing, the claimant's prior testimony regarding his reasons for termination from his prior employer rendered the personnel records relevant.<sup>379</sup>

In contrast, however, in *EEOC v. Southern Haulers, LLC*,<sup>380</sup> the court quashed the defendant's subpoena of the claimant's former employers. While the court acknowledged that the subpoenas might be related to the issues of mitigation and back pay, the claimant had previously produced tax returns and the defendant failed to demonstrate why these records were insufficient or what additional information would be gained by the subpoenas.<sup>381</sup> Similarly, in *EEOC v. Evening Entertainment Group, LLC*,<sup>382</sup> the court rejected the defendant's subpoena of the claimant's former employers for "any and all personnel files and other records," finding that the subpoena was overbroad. In *EEOC*

373 *EEOC v. Kelley Drye & Warren, LLP*, 2012 U.S. Dist. LEXIS 28724 (S.D.N.Y. Mar. 2, 2012). See also *EEOC v. Abbott Laboratories*, 2012 U.S. Dist. LEXIS 97213 (E.D. Wis. July 12, 2012) (requiring supplemental briefing related to the EEOC's motion to file documents designated by the employer as confidential under a protective order under seal because the EEOC had not set forth sufficient facts to show why the documents should be filed under seal).

374 *EEOC v. Evans Fruit Co.*, 2012 U.S. Dist. LEXIS 8963 (E.D. Wash. Jan. 24, 2012).

375 *Id.* at \*\*3-4.

376 *EEOC v. Kohl's Dep't Stores, Inc.*, 2012 U.S. Dist. LEXIS 25670 (D. Me. Feb. 27, 2012).

377 *Id.* at \*\*4-5.

378 *EEOC v. Michael Cetta, Inc.*, 2011 U.S. Dist. LEXIS 124488 (S.D.N.Y. Oct. 27, 2011).

379 *Id.* at \*5.

380 *EEOC v. Southern Haulers, LLC*, 2012 U.S. Dist. LEXIS 68997 (S.D. Ala. May 17, 2012).

381 *Id.* at \*\*5-6.

382 *EEOC v. Evening Ent. Goup, LLC*, 2012 U.S. Dist. LEXIS 85310, at \*3 (D. Ariz. June 20, 2012).

*v. Rexnord Industries, LLC*,<sup>383</sup> the court, in considering a motion to quash subpoenas to the claimant's former employers, reviewed each category of documents in evaluating the claimant's privacy concerns. While the court permitted production of applications and interview notes, it quashed production of payroll and benefits information as that information had previously been requested in other discovery. Further, the court quashed production of disciplinary records and held that while documents related to the claimant's medical records were relevant, they should be produced via less intrusive means.<sup>384</sup>

With respect to subpoenas requesting information from a claimant's current employer, courts appear more willing to accept arguments concerning a claimant's privacy and embarrassment. In *EEOC v. Holmes & Holmes Industrial*, the court held that there were embarrassment and harassment concerns with respect to the defendant's subpoena to the claimant's current employer and that a request for the claimant's full personnel file was overbroad.<sup>385</sup>

The fact that employment records may contain private or confidential information appears to be insufficient, on its own, to support a motion to quash. In *EEOC v. Original Honeybaked Ham Co.*,<sup>386</sup> the court refused to quash the defendant's subpoena to the claimant's former and current employers. The court rejected the EEOC's argument that the subpoenas were overbroad and that the employment records contained private and confidential information, holding that the EEOC had no standing to quash the subpoenas except on claims of privilege or privacy. The court did, however, reduce the time period of the subpoenas from a period of fourteen years to eight years.

Third-party subpoenas to entities other than a claimant's former or current employers also frequently result in discovery motions practice. In *EEOC v. 704 HTL Operating, LLC*,<sup>387</sup> the employer subpoenaed Catholic Charities for records related to the claimant and claimant's brother. The subpoena sought production of documents related to assistance the charity provided regarding immigration, job search efforts, humanitarian assistance, and medical assistance. The court held that the EEOC had no standing to quash the subpoena as it related to the claimant absent privilege or privacy grounds and that there was no standing at all to quash the subpoena as it related to the claimant's brother. In evaluating each category of documents, the court permitted production of records related to immigration because the claimant's immigration may be tied to persecution in her home country and could, therefore, relate to her emotional distress claims. The court also permitted production of records regarding the claimant's job search efforts as the request was relevant to the issue of mitigation. Records regarding medical appointments and assistance were also deemed relevant as it related to the claimant's emotional distress claim. However, the court held that records related to humanitarian aid (*i.e.*, food stamps, housing, *etc.*) were precluded from production based on privacy grounds.<sup>388</sup>

In *EEOC v. Pacific Hospitality, LLC*,<sup>389</sup> the defendant subpoenaed all claimants' unemployment records, maintaining that certain claimants had put their employment histories at issue and had falsified evidence in prior unemployment proceedings. The court limited the scope of the subpoena, permitting production of documents only for those claimants whose employment history was at issue and precluding production as to the remaining claimants.<sup>390</sup>

### 3. Depositions

#### a. Deposing the Claimant

Deposition practice related to claimants in EEOC litigated matters presents unique obstacles because courts typically deem the EEOC claimants not to be formal parties to the litigation. Where the claimant intervenes in the case, however, the employer is more likely to have broad access to depose the claimant. For example, in *EEOC v. Holmes & Holmes Industrial*,<sup>391</sup> an individual defendant, who was forced to retain new counsel after a conflict of interest arose, moved to reopen the deposition of the claimants, who had intervened as plaintiffs in the EEOC's lawsuit. The court determined that because the individual defendant's new counsel only had a few days to become familiar with

383 *EEOC v. Rexnord Indus., LLC*, 2012 U.S. Dist. LEXIS 91006 (E.D. Wis. June 29, 2012).

384 *Id.* at \*\*22-25.

385 *EEOC v. Holmes & Holmes Indus.*, 2011 U.S. Dist. LEXIS 124916, at \*\*7-8 (D. Utah Oct. 27, 2011).

386 *EEOC v. Original Honeybaked Ham Co.*, 2012 U.S. Dist. LEXIS 37107 (D. Colo. Mar. 19, 2012).

387 *EEOC v. 704 HTL Operating, LLC*, 2012 U.S. Dist. LEXIS 61248 (D.N.M. Apr. 3, 2012).

388 *Id.* at \*\*8-9.

389 *EEOC v. Pacific Hospitality, LLC*, 2012 U.S. Dist. LEXIS 68590 (W.D. Wash. May 16, 2012).

390 *Id.* at \*\*3-5.

391 *EEOC v. Holmes & Holmes Indus.*, 2011 U.S. Dist. LEXIS 140258 (D. Utah Dec. 6, 2011).

the case before plaintiffs-intervenors' depositions occurred, good cause existed to reopen the plaintiffs-intervenors' depositions. The court rejected the EEOC's argument that the costs of reopening of the plaintiffs-intervenors' depositions would outweigh any benefit. Instead, the court expressly held that the benefit of the individual defendant being able to depose the actual parties who have levied allegations against him far outweighed any burden or expense.

#### b. Deposing EEOC Personnel Generally

There continues to be a steady stream of cases that examine the extent to which a defendant can successfully require EEOC personnel to submit to a deposition in pending litigation. Generally, courts have issued orders that are favorable to defendants' rights to depose EEOC personnel to the extent that they seek factual information, and not information surrounding EEOC opinions or analysis. The distinction between a factual inquiry or clarification of ambiguous information and EEOC privileged opinion or analysis remains unclear. However, employers will benefit from using deposition notices or subpoenas that are narrowly tailored and focused on the specific testimony that is being sought.

In *EEOC v. Fry's Electronics, Inc.*,<sup>392</sup> the defendant sought to depose the EEOC investigator. The defendant argued that it must be permitted to depose the investigator so it could clarify ambiguities in the interview summaries created by the investigator and resolve conflicts between those summaries and the actual deposition testimony of several witnesses. The court agreed and stated that the defendant should have an opportunity to question the investigator regarding "(a) the meaning of any unclear or ambiguous entries, (b) his independent recollection, if any, of certain statements being made during the interviews, and (c) the process that led to the creation of the summary in order to confirm or disprove its accuracy."<sup>393</sup> In the decision, the court specifically noted that the defendant had expressly disavowed an interest in the investigator's subjective opinions, credibility determinations, the scope or adequacy of the investigation or the deliberative process that led to the filing of the lawsuit. The court further found that given the specific and limited list of areas to be covered, the deposition should be limited to one hour.

A narrow and focused deposition notice and supporting argument was also successful in *EEOC v. Southern Haulers, LLC*.<sup>394</sup> The defendant in that case argued that the deposition of the EEOC investigator was justified because it needed to understand the steps that were taken to conduct the investigation, the documents produced by the EEOC as part of the investigative file, inconsistencies in those documents and identities of individuals uncovered during the EEOC investigation. The court found the proposed line of questioning did not implicate the EEOC's deliberative process, noting that the EEOC is free to make those objections during the deposition, but that objection was insufficient to prevent the deposition from occurring. Another example of a successful narrow and focused argument is found in *EEOC v. Reed Pierce's Sportsman's Grille, LLC*.<sup>395</sup> In that case, the court denied the EEOC's motion to quash and compelled the deposition of the EEOC investigator limited only by privilege. The court noted that the defendants did not intend to inquire about internal discussions and were limiting the questioning to factual questions regarding the steps taken to conduct the investigation, the documents produced, any inconsistencies and the identification of persons having knowledge of the facts.<sup>396</sup>

The lesson taken from these employer favorable decisions is to be clear about the reasons a deposition of EEOC personnel is needed. Express those reasons to the court in a narrow and proper fashion while stating that there is no intention to delve into matters that invoke the privileges held by the EEOC in the deliberative process. It is important to note that the scope of inquiry allowed may vary depending upon which court is addressing the issue.

#### c. Taking Rule 30(b)(6) Depositions of EEOC Personnel

Similar to direct subpoena or the notice of deposition for EEOC personnel the use of a Rule 30(b)(6) deposition has been successful when a defendant limits the scope of the deposition and narrowly describes the areas in which testimony will be sought. In *EEOC v. JBS USA, LLC*,<sup>397</sup> the court sorted through a Rule 30(b)(6) deposition notice that contained 20 separate topics of proposed testimony. Many of the proposed topics specifically provided that the defendant intended to inquire into areas of evaluation and interpretation of facts, internal communication, and how the facts support or refute allegations of the complaint. Despite the overreaching by defendant, the court spent

<sup>392</sup> *EEOC v. Fry's Electronics, Inc.*, 2012 U.S. Dist. LEXIS 21448 (W.D. Wash. Feb. 21, 2012).

<sup>393</sup> *Id.* at \*\*2-3.

<sup>394</sup> *EEOC v. Southern Haulers, LLC*, 2012 U.S. Dist. LEXIS 101062 (S.D. Ala. July 20, 2012).

<sup>395</sup> *EEOC v. Reed Pierce's Sportsman's Grille, LLC*, 2012 U.S. Dist. LEXIS 107235 (S.D. Miss. Aug. 1, 2012).

<sup>396</sup> *Id.* at \*\*2-3.

<sup>397</sup> *EEOC v. JBS USA, LLC*, 2012 U.S. Dist. LEXIS 5836 (D. Neb. Jan. 19, 2012).



the time and effort to decide the topics on which the investigator might be required to provide testimony. In the end, the court limited the testimony to eight topics, narrowing the scope of the inquiry on those topics to factual information related to the investigation.<sup>398</sup>

A less tolerant judge could have very easily found the entire Rule 30(b)(6) notice to be overbroad and improperly seeking privileged material, thereby disallowing the deposition in its entirety. Such a ruling can be found in the case of *EEOC v. Evans Fruit Co.*<sup>399</sup> In *Evans*, the defendant issued a Rule 30(b)(6) deposition notice with 20 topics of proposed testimony. The defendant failed to justify the reason for the proposed testimony in terms compliant with the standards established by the case law and made no argument for factual inquiry or clarification. The court granted the EEOC's motion for a protective order, stating that the defendant was simply seeking the EEOC's analysis of the information it obtained, its witness credibility evaluations, its evaluation of the evidence, personal opinions of the EEOC representatives, and the decision-making process of the Commission.<sup>400</sup>

As noted previously, when seeking specific information in a Rule 30(b)(6) deposition notice, it is important to consider the different approaches of the various district courts. In *EEOC v. Swissport Fueling, Inc.*,<sup>401</sup> the defendant contended that the EEOC had not provided an individual with the requisite knowledge in response to a Rule 30(b)(6) deposition notice. The EEOC argued that inquiry into the adequacy of the underlying investigation was not an appropriate subject for testimony, citing numerous cases from other jurisdictions. The court acknowledged a difference between various district courts and highlighted that in the Ninth Circuit, inquiry into the adequacy of the investigation is appropriate.<sup>402</sup>

Another use of Rule 30(b)(6) depositions by employers is to inquire into the employment policies or practices of the EEOC as part of the defense of a matter. In *EEOC v. Kaplan Higher Education Corp.*,<sup>403</sup> the defendant sought testimony on the Commission's risk-level designations and credit check use for certain positions. The EEOC alleged that certain individuals were aggrieved by Kaplan's use of credit history information in employment hiring decisions. As part of its defense, Kaplan issued a Rule 30(b)(6) deposition notice on the topic of the EEOC's performance and use of background checks on applicants to the EEOC, including how risk-level designations were reached by the Commission. The court had previously granted the defendant's motion to compel such testimony, finding that the EEOC's use of background or credit checks in its own hiring of employees was relevant to Kaplan's asserted defense of business necessity in using such checks in its hiring process.<sup>404</sup> The court ordered additional Rule 30(b)(6) testimony after the EEOC failed to produce a sufficiently knowledgeable person. The court stated that

. . . how and why the EEOC makes risk level designations for position descriptions is relevant to Kaplan's defense of business necessity. Discovery as to how or whether the EEOC uses credit checks will inform the viability of Kaplan's business necessity defense and may also be relevant to Kaplan's estoppel defense if it is found that the EEOC's practices are consistent with the practices the EEOC challenges in this lawsuit.<sup>405</sup>

#### d. Deposing the CEO

The EEOC may seek the deposition of an employer's CEO without regard for the lack of actual personal knowledge that he or she may have related to the matter. In *EEOC v. Freeman*,<sup>406</sup> the defendants moved for a protective order to prevent the deposition of the CEO. The EEOC had previously deposed the vice-president of benefits, a Rule 30(b)(6) designated representative, the senior vice president of human resources and the board chairman. Consequently, the court granted the protective order and found that the deposition of the CEO would be cumulative and duplicative, that the EEOC had opportunity to gather the information from other sources, and the burdens associated with the deposition outweighed any possible benefit.<sup>407</sup>

398 *Id.* at \*\*19-20.

399 *EEOC v. Evans Fruit, Co.*, 2012 U.S. Dist. LEXIS 17003 (E.D. Wash. Feb. 10, 2012).

400 *Id.* at \*8.

401 *EEOC v. Swissport Fueling, Inc.*, 2012 U.S. Dist. LEXIS 65449 (D. Ariz. May 10, 2012).

402 *Id.* at \*\*35-37.

403 *EEOC v. Kaplan Higher Education Corp.*, 2012 U.S. Dist. LEXIS 54949 (N.D. Ohio Apr. 18, 2012).

404 *Id.* at \*3.

405 *Id.* at \*\*12-13.

406 *EEOC v. Freeman*, 2012 U.S. Dist. LEXIS 86198 (D. Md. June 21, 2012).

407 *Id.* at \*\*4-7. In contrast, see *Serrano and EEOC v. Cintas Corp.*, 2012 U.S. App. LEXIS 23132, at \*\*37-44 (6th Cir. Nov. 9, 2012), discussed at section II.D.7, above.

## H. Discovery by EEOC/Intervenor

### 1. Financial Information

One category of data often sought by the Commission is financial information. The ability of the EEOC to obtain an employer's financial information during discovery remains an area of dispute. A common rationale advanced by the EEOC in support of its requests for such information is that when punitive damages are sought by the EEOC, the EEOC is entitled to financial information to argue the appropriate amount of punitive damages.

During FY 2012, district courts in Utah,<sup>408</sup> Tennessee,<sup>409</sup> and Louisiana<sup>410</sup> have ordered defendants to disclose financial records, such as balance sheets, profit and loss statements, income statements, and federal tax returns before the EEOC established a *prima facie* case on the issue of punitive damages. In contrast, district courts in Arkansas,<sup>411</sup> Colorado,<sup>412</sup> and California<sup>413</sup> have refused to order defendants to disclose this information before the EEOC demonstrated entitlement to punitive damages. For example, in *EEOC v. Giumarra Vineyards Corp.*,<sup>414</sup> the EEOC did not seek any monetary damages beyond garden variety emotional distress. Furthermore, the charging parties had been employed by the defendant for just fourteen days, likely limiting any punitive damages to which they would be entitled. As such, the court declined to order the defendant to disclose its financial information.<sup>415</sup>

In *EEOC v. D&H Co. Dodge Bros. Giant Oil of Ark., Inc.*,<sup>416</sup> the defendant asserted an affirmative defense that the disability accommodation requested by the charging party presented an undue hardship. Despite this defense, which implicated the financial resources of the defendant, the court denied the EEOC's motion to compel the disclosure of the defendant's financial records absent a showing of specific evidence demonstrating a possible entitlement to punitive damages.

### 2. Discovery Abuses

Another trend seen in FY 2012 was the courts' willingness to penalize employers for abuse of the discovery process. These cases highlight the caution employers should take when refusing to provide information requested by the Commission or when negotiating the terms of discovery.

In *EEOC v. Baltimore County*,<sup>417</sup> the EEOC moved to determine the sufficiency of the defendant's answers and objections to the EEOC's requests for admission. The court found that the defendant had, in some instances, ignored the clear object of the requests and refused to admit some requests which, based on other evidence, should have been admitted. In addition to deeming these requests admitted, the court ordered the defendant to pay the attorneys' fees incurred by the EEOC in preparing and briefing the motion.

In *EEOC v. Fry's Electronics, Inc.*,<sup>418</sup> the EEOC learned, during a Rule 30(b)(6) deposition, that the accused sexual harasser had been previously accused of sexual harassment while working for the defendant. The court found that the defendant had intentionally withheld this information and the related documents from discovery by raising unfounded objections and negotiating a narrowing of the discovery requests, and that this conduct was unfair, unwarranted, unprincipled, and unacceptable. The court then struck the defendant's affirmative defenses, found presumptively admissible at trial certain documents related to other complaints of harassment involving the two alleged harassers, and imposed \$100,000 in sanctions on the defendant.

### 3. Scope of Discovery

Another trend during FY 2012 was the courts' willingness to limit discovery where the information sought was not relevant to the parties' claims or defenses. These cases underscore the principle that the EEOC is not necessarily entitled to all of the information it seeks, and that an employer may be successful in challenging requests that seek information irrelevant to the case.

408 *EEOC v. Holmes & Holmes Indus.*, 2011 U.S. Dist. LEXIS 124916 (D. Utah Oct. 27, 2011).

409 *EEOC v. New Breed Logistics*, 2011 U.S. Dist. LEXIS 143565 (W.D. Tenn. Dec. 13, 2011).

410 *EEOC v. Denham Springs Publ'g Co.*, 2012 U.S. Dist. LEXIS 11264 (M.D. La. Jan. 27, 2012).

411 *EEOC v. D&H Co. Dodge Bros. Giant Oil of Ark., Inc.*, 2011 U.S. Dist. LEXIS 128996 (W.D. Ark. Nov. 4, 2011).

412 *EEOC v. Original Honeybaked Ham Co. of Ga.*, 2012 U.S. Dist. LEXIS 99468 (D. Colo. July 18, 2012).

413 *EEOC v. Giumarra Vineyards Corp.*, 2012 U.S. Dist. LEXIS 14109 (E.D. Cal. Feb. 6, 2012).

414 *Id.*

415 *Id.* The parties' agreement that the defendant had sizeable economic resources also served as a factor in the court's decision.

416 *EEOC v. D&H Co. Dodge Bros. Giant Oil of Ark., Inc.*, 2011 U.S. Dist. LEXIS 128996 (W.D. Ark. Nov. 4, 2011).

417 *EEOC v. Baltimore County*, 2011 U.S. Dist. LEXIS 128483 (D. Md. Nov. 7, 2011).

418 *EEOC v. Fry's Elecs., Inc.*, 2012 U.S. Dist. LEXIS 92203 (W.D. Wash. July 3, 2012).

For example, in *EEOC v. D&H Co. Dodge Bros. Giant Oil of Ark., Inc.*,<sup>419</sup> the Commission sought information related to the number of employees employed by the defendants, including W-2 forms and tax statements issued to the employees. The EEOC also sought any document that identified the number of employees employed by the defendants since the beginning of the limitations period. The court found that although the EEOC was entitled to discovery on the number of employees of the defendants, it was not entitled to discover the employees' identities. As a result, the EEOC was only entitled to a signed, sworn statement which included the number of defendants' employees.

In *EEOC v. Evans Fruit Co.*,<sup>420</sup> the EEOC sought a "day in the life" video made by the defendant. In granting the employer's motion for a protective order, the court determined that the video was irrelevant to the critical issues in that case (*i.e.*, whether sexual harassment occurred and where it might have occurred). The EEOC was entitled to observe and inspect the defendant's facilities, but was not entitled to the video.

A third opinion illustrates that an employer does not necessarily have a duty to produce information that was created by and in the possession of a third party. In *EEOC v. D&H Co. Dodge Bros. Giant Oil of Ark., Inc.*,<sup>421</sup> the EEOC filed a motion to compel the employer to produce training materials relating to the ADA or ADAA. Although the employer produced the training materials in its possession, it did not produce materials that were created by and in the possession of the employer's insurance company. The insurance company was not a party to the lawsuit and the EEOC had not issued a subpoena to the insurance company, thus the court declined to compel the production of the requested documents.

## I. Bankruptcy

During FY 2012, case law continued to develop with regard to the impact – or lack of an impact – of a bankruptcy proceeding involving an employer or charging party on the EEOC's pursuit of litigation. While the impact of an employer's bankruptcy status on the EEOC's litigation has been considered for quite some time, an issue of first impression arose in a case from the Eighth Circuit Court of Appeals involving the EEOC's pursuit of individual relief on behalf of some charging parties who were judicially estopped from seeking individual relief for their claims, given their failure to disclose to the bankruptcy court their potential claims or interests in the EEOC's proceeding. Discussed below is the Eighth Circuit decision, as well as two recent cases regarding the impact of an employer's bankruptcy filing on the EEOC's pursuit of litigation.

### 1. When a Charging Party Does Not Disclose Her Interest in the EEOC's Lawsuit to the Bankruptcy Court

In *EEOC v. CRST Van Expedited, Inc.*,<sup>422</sup> the Eighth Circuit Court of Appeals was faced with an issue of first impression. Specifically, "whether a court can judicially estop the EEOC from bringing suit in its own name to remedy allegedly unlawful employment practices because those practices were perpetrated against an employee who [ ] is judicially estopped [from pursuing similar claims]."<sup>423</sup>

By way of background, three charging parties, who each had filed for bankruptcy, failed to disclose on their respective bankruptcy petitions their potential interest and/or involvement in the EEOC's lawsuit as a potential source of income. The appellate court affirmed the district court's order that the charging parties were judicially estopped from intervening in the EEOC's lawsuit or otherwise pursuing their individual claims because of their failure to make the requisite disclosures to the bankruptcy court.<sup>424</sup>

The appellate court, however, reversed the district court's holding that the Commission was also judicially estopped from pursuing individual relief premised on these charging parties' claims. In reaching this outcome, the appellate court noted that section 706 provides the Commission with the ability to pursue litigation in its own name and that once a charge is filed, "the EEOC is in command of its own

419 *EEOC v. D&H Co. Dodge Bros. Giant Oil of Ark., Inc.*, 2011 U.S. Dist. LEXIS 128996 (W.D. Ark. Nov. 4, 2011).

420 *EEOC v. Evans Fruit Co.*, 2012 U.S. Dist. LEXIS 65745 (E.D. Wash. May 7, 2012).

421 *EEOC v. D&H Co. Dodge Bros. Giant Oil of Ark., Inc.*, 2011 U.S. Dist. LEXIS 129001 (W.D. Ark. Nov. 4, 2011).

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

423 *Id.* at 681.

424 *Id.* at 679-80.

process.<sup>425</sup> Analogizing the issue before it to the issue in *EEOC v. Waffle House*,<sup>426</sup> the appellate court reasoned that a court cannot estop the Commission from bringing suit as the named plaintiff to pursue its public purpose of remedying employment discrimination merely because the employer discriminated against a charging party, who herself is judicially estopped from pursuing her claims. The court's decision was based upon the rationale that "whenever the EEOC chooses from among the many charges filed each year to bring an enforcement action in a particular case, the agency may be seeking to vindicate a public interest, not simply provide make-whole relief for the employee, even when it pursues entirely victim-specific relief."<sup>427</sup> Therefore, according to the Eighth Circuit, the mere fact that a charging party is estopped from pursuing her claim does not act to estop the Commission from seeking relief based on discrimination suffered by the charging party.

## 2. When Employer Has Filed for Bankruptcy

Generally, when an employer files for bankruptcy, the Bankruptcy Code requires an automatic stay of any newly filed or pending litigation where the employer is a named defendant.<sup>428</sup> An exception to the automatic stay provision exists, however, when a governmental entity pursues litigation to enforce its policy and regulatory power.<sup>429</sup> Over the past year, at least two cases have addressed the automatic stay rule in the Bankruptcy Code as it relates to the EEOC's pursuit of a lawsuit against an employer that filed for bankruptcy.

In *EEOC v. Caldwell Freight Line, Inc.*,<sup>430</sup> the EEOC and the employer, which had filed for bankruptcy, jointly filed a motion seeking an order that the Commission's lawsuit was not subject to an automatic stay because the EEOC's lawsuit fell within the Bankruptcy Code's exception to the stay provision. In granting the joint motion, the district court held that the EEOC acts pursuant to its police and regulatory powers even when it brings suit for the benefit of specific persons because in doing so it also acts to eliminate and prevent employment discrimination in all employment settings.<sup>431</sup>

In *EEOC v. Fire Mountain Restaurants, LLC*,<sup>432</sup> the district court also addressed the issue of whether the employer's pending bankruptcy proceeding operated to stay the EEOC's action. As the court noted, the Fourth Circuit's position on this issue, which has been established for some time, is as follows:

When EEOC sues to enjoin violations of . . . ADEA and seeks reinstatement of the victims of alleged discrimination and adoption of an affirmative action plan in such a case, and couples these prayers for relief with a claim for back pay, EEOC is suing in exercise of its police or regulatory power and is not subject to the automatic stay until its monetary claims are reduced to judgment.<sup>433</sup>

As the EEOC sought injunctive relief and back pay remedies in the *Fire Mountain Restaurants* case, the court ruled that it was exercising its police and regulatory power. This was true even though the EEOC also sought liquidated and punitive damages because "the EEOC's primary purpose in bringing the lawsuit [was] to advance and protect public welfare."<sup>434</sup> The court further clarified that the mere fact that there was a secondary, pecuniary interest in the litigation did not impact the exception to the Bankruptcy Code automatic stay provision unless and until the EEOC attempted to enforce, as opposed to seek entry of, any judgment obtained in the case.<sup>435</sup>

425 *Id.* at 681-82, citing *EEOC v. Waffle House*, 534 U.S. 279, 291 (2002).

426 *EEOC v. Waffle House*, 534 U.S. 279 (2002). In *Waffle House*, the Supreme Court considered "whether an agreement between an employer and employee to arbitrate employment-related disputes bars the Equal Employment Opportunity Commission (EEOC) from pursuing victim-specific judicial relief . . . in an enforcement action . . ." *Id.* at 282. The Court held that such an arbitration agreement did not preclude the EEOC from suing in federal court to seek victim-specific relief relating to the employee's injury because, in large part, the EEOC is the "master of its own case," and the statute provides the Commission with the ability to evaluate the strength of the public interest at stake in pursuing litigation. *Id.* at 291, 298.

427 *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d at 682, citing *Waffle House*, 534 U.S. at 296.

428 11 U.S.C. § 362(a)(1)-(8).

429 11 U.S.C. § 362(b)(4).

430 *EEOC v. Caldwell Freight Lines, Inc.*, 2011 U.S. Dist. LEXIS 149811 (W.D.N.C. Dec. 29, 2011).

431 *Id.* at \*2, citing *EEOC v. McLean Trucking Co.*, 834 F.3d 398, 402 (4th Cir. 1987) ("When the EEOC acts, albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination.").

432 *EEOC v. Fire Mountain Restaurants, LLC*, 2012 U.S. Dist. LEXIS 57720 (W.D.N.C. Apr. 25, 2012).

433 *Id.* at \*3, quoting *EEOC v. McLean Trucking Co.*, 834 F.3d 398, 402 (4th Cir. 1987).

434 *Id.* at \*4.

435 *Id.* The court further noted that the fact that the employer will be forced to incur the expense of litigation does not remove the exception to the automatic stay provision of the Bankruptcy Code.

## J. Trial

### 1. Pre-Trial Motions

Evidentiary issues exist in all forms of litigation, including litigation involving the EEOC. As discrimination and harassment cases are very fact specific, it is not surprising that in FY 2012 employers and the EEOC alike looked to the courts to resolve some of these issues before trial.

#### a. Motions *in Limine*

In *EEOC v. WRS Infrastructure and Environment, Inc.*,<sup>436</sup> the employer sought to preclude a charging party's testimony about a conversation the charging party had with a coworker two days before the employer terminated the charging party. The employer argued that the charging party's trial testimony should be precluded to the extent the charging party refused to testify about the conversation at his deposition. The court denied the motion, finding that the employer failed to provide any argument as to why the charging party's statements, which the coworker described during the coworker's deposition, were inadmissible.<sup>437</sup>

In *EEOC v. Ashlan Village, Inc.*,<sup>438</sup> the EEOC filed a motion *in limine* to preclude the employer from introducing testimony from three of the charging parties' former coworkers regarding the charging parties' poor work performance. The Commission claimed the testimony was irrelevant and prejudicial because the coworkers did not make the decision to terminate the charging parties. The court rejected the EEOC's arguments, noting that the decision-maker had testified that he may have relied on the coworkers in making the decision to terminate the charging parties' employment. The manager's inability to identify specifically whose information he relied upon did not change the court's opinion regarding the relevancy of the coworkers' testimony.<sup>439</sup>

The EEOC also sought to preclude testimony relating to the contents of individual personnel files and a report regarding one of the charging parties. The court held that the employer's failure to identify specifically the documents contained in each personnel file was harmless. However, the court found that the report concerning one of the charging parties should have been specifically identified in the employer's pre-trial disclosures. Therefore, the court granted the EEOC's motion as to that particular report. It denied the remainder of the EEOC's motion.<sup>440</sup>

In *EEOC v. Moreland Auto Group, LLP*,<sup>441</sup> the parties filed competing motions *in limine*. The EEOC sought an affirmative ruling that a magistrate judge should be allowed to testify on a minute order she entered in a prior enforcement action and an email she sent about settlement of that action. The Commission claimed the magistrate judge's testimony and email revealed the employer's retaliatory animus. In response, the employer moved to exclude the magistrate judge's testimony and quash the EEOC's subpoena to the magistrate judge. The employer argued that the magistrate judge's testimony was no more than collateral to the primary issues in the case, would confuse the jury, and would "contravene important policies of confidentiality."<sup>442</sup> The court disagreed, but still denied the EEOC's motion *in limine*. The court held that if the employer denied making the statements referenced in the magistrate judge's email while testifying at trial, then the court would consider whether to permit the EEOC to call the magistrate judge to impeach the employer's testimony. Due to this possible set of circumstances, the court also denied both of the employer's motions.<sup>443</sup>

In *EEOC v. Prospect Airport Services, Inc.*,<sup>444</sup> the employer sought to exclude testimony from witnesses the EEOC failed to identify during discovery and to include evidence regarding the charging party's mental health issues that were unrelated to the sexual harassment he alleged. The EEOC asked the court to exclude the testimony regarding the charging party's unrelated mental health issues. The EEOC also sought to preclude evidence concerning the charging party's work performance with previous and subsequent employers and evidence of the charging party's "past sexual behavior or alleged predisposition."<sup>445</sup>

<sup>436</sup> *EEOC v. WRS Infrastructure and Environment, Inc.*, 2012 U.S. Dist. LEXIS 82836 (N.D. Ill. June 13, 2012).

<sup>437</sup> *Id.* at \*\*4-5.

<sup>438</sup> *EEOC v. Ashlan Village*, 2012 U.S. Dist. LEXIS 97173 (D.S.C. July 13, 2012).

<sup>439</sup> *Id.* at \*\*3-6.

<sup>440</sup> *Id.* at \*\*6-8.

<sup>441</sup> *EEOC v. Moreland Auto Group, LLP*, 2012 U.S. Dist. LEXIS 102517 (D. Col. July 24, 2012).

<sup>442</sup> *Id.* at \*2.

<sup>443</sup> *Id.* at \*\*2-3.

<sup>444</sup> *EEOC v. Prospect Airport Services, Inc.*, 2011 U.S. Dist. LEXIS 140282 (D. Nev. Dec. 6, 2011).

<sup>445</sup> *Id.* at \*\*3, 7-8.

The court excluded the testimony of certain witnesses on the grounds that the EEOC's late disclosure was unduly burdensome and prejudicial to the employer. The court determined that evidence about the charging party's mental health issues, caused by events other than the alleged harassment, was probative as to the cause of the mental distress the charging party blamed on the alleged harassment. The court also allowed the employer to present evidence regarding the charging party's work performance for other employers. Finally, the court clarified that the employer was not seeking to admit testimony regarding the charging party's private sexual proclivities or sexual past. Instead, the court understood the employer to be seeking admission of testimony about statements the charging party made while working for another employer; the court allowed the testimony because it raised questions about whether the alleged harassment subjectively offended the charging party.<sup>446</sup>

In *EEOC v. Dillon Companies Inc.*,<sup>447</sup> the Commission alleged that the employer subjected the charging party to a hostile work environment and discriminatorily discharged him in violation of the ADA. The employer moved for summary judgment on both claims. The court granted the employer's motion with respect to the hostile work environment claim, but denied it with respect to the discriminatory discharge claim.

Subsequently, the EEOC moved for sanctions and the employer filed a motion *in limine*.<sup>448</sup> The employer moved to exclude: (1) evidence of the employer's harassment of the charging party; (2) testimony of three employees whom the EEOC did not identify in its Rule 26(a)(1) disclosures; and (3) evidence of discrimination charges filed by other employees. The employer argued that the court had already ruled the charging party did not experience unlawful harassment; therefore, evidence of the employer's conduct toward the charging party was irrelevant and unfairly prejudicial. The court disagreed, finding it critical that the EEOC intended to prove the employer's motive in firing the charging party through other similar acts of discrimination. For this reason, the court held that evidence of the employer's allegedly harassing behavior towards the charging party related directly to the EEOC's claim that the employer fired the charging party because of his disability. Therefore, the court held the probative value of the evidence outweighed any prejudice the employer might experience.<sup>449</sup>

The court also allowed testimony from witnesses the EEOC did not identify pursuant to Rule 26(a)(1).<sup>450</sup> The court found the witnesses were identified during depositions. Accordingly, the defendant knew of their existence, and the EEOC did not violate Rule 26(a)(1) by not supplementing its disclosures. As the EEOC did not violate the discovery rules, the court held the witnesses could testify. Likewise, the court held the complaint filed by at least one other employee was relevant because it concerned similar treatment by a manager involved in the case at issue. The court, however, did not determine whether all other employee complaints were admissible. Instead, the court stated that it is "more appropriate to wait until trial to determine whether each individual charge is relevant."<sup>451</sup>

## b. Sanctions

In *EEOC v. New Breed Logistics*,<sup>452</sup> the EEOC claimed the employer failed to preserve a key video and emails of key individuals, which thwarted the EEOC's ability to obtain necessary discovery. The central issue was the scope of the employer's duty to preserve as to two different dates – the date the employer received notice of a single charge and the date the employer received notice of the EEOC's lawsuit. The court noted that the employer had a duty to preserve documents as of the date it received notice of the single charge. However, that duty did not extend to the broader allegations in the EEOC's complaint until the employer received notice of those allegations. Because the EEOC did not notify the employer of its broader allegations until it filed suit, the employer's duty to preserve documents relevant to those claims did not arise until the EEOC filed suit.<sup>453</sup> Even though the scope of the employer's preservation duty did not expand until it received notice of the EEOC's complaint, the court found the employer still failed to preserve relevant emails.<sup>454</sup> The court concluded an adverse

446 *Id.* at \*8.

447 *EEOC v. Dillon Companies, Inc.*, 2011 U.S. Dist. LEXIS 34594 (D. Colo. Mar. 30, 2011).

448 *EEOC v. Dillon Companies, Inc.*, 839 F. Supp. 2d 1141 (D. Colo. 2011).

449 *Id.* at 1145-46.

450 *Id.* at 1146.

451 *Id.* at 1147.

452 *EEOC v. New Breed Logistics*, 2012 U.S. Dist. LEXIS 136534 (W.D. Tenn. Sept. 25, 2012); *but see EEOC v. Dillon Companies, Inc.*, 839 F. Supp. 2d 1141, 1143-45 (D. Colo. 2011) (adverse inference instruction awarded where employer failed to take actions to preserve a relevant videotape, and in fact, an employee volitionally ruined the tape), *EEOC v. Fry's Elec. Inc.*, 2012 U.S. Dist. LEXIS 65837 (W.D. Wash. May 10, 2012) (adverse inference instruction awarded where employer did not preserve information related to its affirmative defense that it terminated the plaintiff for performance issues).

453 *New Breed Logistics*, 2012 U.S. Dist. LEXIS 136534, at \*\*18-21.

454 *Id.* at \*\*21-22.

inference was not warranted because the employer did not act in bad faith.<sup>455</sup> However, fairness and equity required the employer to restore backup tapes, review data, and produce relevant emails to the EEOC within thirty days of the court's order, all at the employer's expense.<sup>456</sup>

Comparatively, in FY 2012 some courts did enter an adverse inference instruction related to the employers' failure to preserve evidence. In *EEOC v. Fry's Elecs., Inc.*,<sup>457</sup> the employer was on notice that a charge of discrimination might be filed by the plaintiff when the plaintiff responded to his suspension by referencing the EEOC. It did not, however, preserve information related to its defense that it terminated the plaintiff because of performance issues. As a result, the court held that the employer's duty to preserve evidence related not only to the plaintiff's claims, but also to the employer's defenses and issued an adverse inference instruction as to the employer's proffered justification for the termination.

Similarly, in *EEOC v. Dillon Companies, Inc.*, the incident leading to the plaintiff's termination was captured by the employer's video surveillance system.<sup>458</sup> Three copies were made of the surveillance videotape, and "erasure prevention tabs" were popped on the videotape to prevent it from being recorded over. Despite these preventative measures, a representative or agent of the defendant put masking tape on the erasure prevention tabs, resulting in the videotape being recorded over. In addition, the defendant represented that the three copies were lost. As a result, the defendant sought to present witnesses to testify as to the tape's contents. The Commission moved to preclude the defendant from offering those witnesses. Finding that allowing the tape to be recorded over was done in bad faith, the court granted the EEOC's motion and held that an adverse inference instruction would be given as to the contents of the videotape.<sup>459</sup>

## 2. Trials and Awards

In FY 2012, the EEOC obtained some favorable verdicts at trial. Two key areas of the Commission's focus were sexual harassment and disability-related issues under the ADA. This past year, the EEOC secured trial victories in each of those areas, resulting in monetary and injunctive relief against employers.

In *EEOC v. Management Hospitality of Racine, Inc.*,<sup>460</sup> the EEOC sued on behalf of two teenage servers who claimed their assistant manager had sexually harassed them. After trial, the jury returned a verdict in favor of the Commission and against the defendants, Management Hospitality of Racine, Inc. ("MHR") d/b/a International House of Pancakes ("IHOP"), Flipmeastack, Inc., and Salauddin Janmohammed. The jury awarded \$1,000 in compensatory damages to one server, and \$2,000 in compensatory damages and \$100,000 in punitive damages to the other server. The defendants moved for judgment as a matter of law. The EEOC moved for judgment against both Flipmeastack and Salauddin Janmohammed. The district court denied the defendants' motion, granted the EEOC's motions, and entered judgment in favor of the EEOC and an injunction against Flipmeastack. All three defendants appealed.

Initially, the Seventh Circuit Court of Appeals explained that Janmohammed was the principal owner and sole shareholder of MHR under which he operated the IHOP where the servers worked. The court also detailed that Janmohammed's wife solely owned Flipmeastack and that MHR contracted with Flipmeastack to provide human resources assistance, among other services. Finally, the court noted that MHR employed the servers, but Flipmeastack formulated the Sexual Harassment Policy applicable to MHR employees.

The court addressed two questions in analyzing the defendants' motion for judgment as a matter of law – whether the charging parties experienced an actionable hostile work environment and whether the defendants could assert the *Faragher/Ellerth* defense successfully. Based on the evidence, the court answered yes to the first question and no to the second.<sup>461</sup> The court found the servers experienced objectively and subjectively offensive conduct, including groping, demands for sex, and requests for sex. The court also held that the defendants could not establish the *Faragher/Ellerth* defense because the applicable harassment policy was ineffective and failed to serve a meaningful purpose. The court found it important that the defendants' policy contained severe language about filing a false complaint that could dissuade employees

455 *Id.* at \*\*22-24.

456 *Id.* at \*24-26.

457 *Fry's Elecs., Inc.*, 2012 U.S. Dist. LEXIS 65837 (W.D. Wash. May 10, 2012).

458 *EEOC v. Dillon Companies, Inc.*, 2011 U.S. Dist. LEXIS 134346 (D. Colo. Nov. 21, 2011).

459 In addition to the specter of an adverse inference instruction, failure to preserve information can lead to financial penalties. In *EEOC v. Res. for Human Dev., Inc.*, 2012 U.S. Dist. LEXIS 23206 (E.D. La. Feb. 10, 2012), the court held that the defendant was responsible for its employees' destruction of evidence and ordered the defendant to pay the attorney fees, reasonable expenses, and costs associated with the plaintiff-intervenor's motion, as well as for the cost of the plaintiff-intervenor re-taking the key employees' depositions.

460 *EEOC v. Management Hospitality of Racine, Inc.*, 666 F.3d 422 (7th Cir. 2012).

461 *Id.* at 432-37.

from filing complaints; the policy did not have a complaint procedure; the employees did not receive copies of the policy; and the defendants never investigated the servers' complaints. The court affirmed the award of compensatory damages to the individual servers. It also affirmed the award of punitive damages against MHR and Janmohammed. However, the court concluded evidentiary issues existed regarding the potential corporate liability of Flipmeastack. Therefore, the court reversed and remanded the punitive damages award against Flipmeastack and ordered the injunction against Flipmeastack dissolved.<sup>462</sup>

In *EEOC v. AutoZone, Inc.*,<sup>463</sup> the employer received partial summary judgment against the EEOC.<sup>464</sup> On the remaining failure to accommodate claim, a jury ruled in the employer's favor. Costs were taxed to the EEOC. The Commission appealed and the Seventh Circuit Court of Appeals reversed and remanded. After the second trial, the jury returned a verdict in favor of the EEOC, awarding \$100,000 in compensatory damages and \$500,000 in punitive damages. Following the verdict, the employer moved for either judgment as a matter of law, or a new trial. The Commission moved for a permanent injunction, to vacate the previous taxation of costs against the EEOC, and for prejudgment interest.

The court denied the employer's motion for judgment as a matter of law and its motion for a new trial. The court found the evidence sufficient to support the jury's conclusion that individual on whose behalf the EEOC brought suit, a sales manager, was qualified to perform the essential functions of the job. The employer argued the sales manager was not qualified because he could not mop floors. The court concluded that although the employer thought floor mopping was essential, the evidence did not require the jury to conclude that the sales manager needed to do the mopping. The court also found the evidence supported the jury's determination that the employer failed to accommodate the sales manager. The evidence revealed that the sales manager's superiors knew of his medical condition and limitations, but nevertheless directed store managers to require him to mop floors. The evidence also demonstrated that management had told the sales manager he would lose his job if he refused to mop floors.

The court also denied the employer's challenge to the jury's punitive damages award. The evidence showed the employer's management knew of the sales manager's medical conditions and his requests not to mop floors, but still required the sales manager to mop floors. From that evidence, the court found the jury's rejection of the employer's good-faith defense to be reasonable. Though the court upheld the jury's decision to impose punitive damages, the court reduced the punitive damages award to \$200,000 to bring the punitive and compensatory damages within the statutory cap. The court found the award was not excessive, including that the award was in line with awards in similar cases. Therefore, the court found no reason to adjust the award beyond what was required to bring it within the statutory cap.<sup>465</sup>

The court then addressed the EEOC's motions. First, it addressed the issue of whether the EEOC needed to pay costs resulting from the verdict of the first jury despite the fact that the EEOC won the second trial. Stated a different way, the court considered whether the employer continued to qualify as a "prevailing party" and concluded that it did not. Although the EEOC succeeded on only one of its five claims, its success was substantial based on the jury's award. Therefore, the EEOC was the "prevailing party."<sup>466</sup> As the prevailing party, the EEOC was entitled to costs. Finally, the court entered an injunction requiring the employer to: (1) make reasonable accommodations to individuals as required by the ADA; (2) for a period of three years, notify the EEOC within 30 days of any request for accommodation by an employee within the Central District of Illinois; and (3) maintain complete records for 4 years of how it responded to each accommodation request.<sup>467</sup>

## K. Remedies

Throughout FY 2012, the Commission has obtained monetary and non-monetary relief against employers for a variety of legal violations. Employers have challenged both forms of relief, often unsuccessfully.

In *EEOC v. Service Temps Inc.*,<sup>468</sup> the EEOC filed suit on behalf of a hearing-impaired woman who claimed she had been unlawfully denied the opportunity to apply for a warehouse job through a corporate staffing company. The jury found for the EEOC and awarded

<sup>462</sup> *Id.* at 437-39, 443.

<sup>463</sup> *EEOC v. AutoZone, Inc.*, 822 F. Supp. 2d 824 (C.D. Ill. 2011)

<sup>464</sup> The EEOC's complaint included three discrimination claims (failure to accommodate, discriminatory discharge, and discrimination in keeping the employee on involuntary leave) and two retaliation claims (failure to accommodate and discharge).

<sup>465</sup> *Id.* at 833-35.

<sup>466</sup> *Id.* at 839-40.

<sup>467</sup> *Id.* at 840-42.

<sup>468</sup> *EEOC v. Service Temps, Inc.*, 679 F.3d 323 (5th Cir. 2012).



\$14,400 in back pay, \$20,000 in compensatory damages, and \$150,000 in punitive damages. With the Commission's agreement, the court reduced the punitive damages award to \$68,800. The employer appealed, challenging, among other things, the punitive damages award and the court's entry of injunctive relief. The court upheld the punitive damages award, finding that the offending manager knew about the ADA, had the ability to make hiring decisions, and by denying the charging party the opportunity to apply for work, performed a duty he was hired to perform. Therefore, the court found reasonable the jury's award of punitive damages based on its findings that the offending manager acted with the requisite malice and within the scope of his employment. The court also affirmed the district court's award of injunctive relief. Specifically, the court noted that the district court had the discretion to award injunctive relief, and to avoid an injunction, the employer needed to show that there was no reasonable probability of a future violation. Because the employer failed to meet this burden, the court found reasonable the district court's imposition of an injunction requiring the employer to: (1) refrain from discriminating against disabled employees; (2) provide employees with, and publicly post, a notice explaining the ADA's protections; (3) provide ADA training to its managers; and (4) for two years, notify the EEOC every time an employee complains of disability discrimination.<sup>469</sup>

In *EEOC v. Boh Brothers Construction Co., LLC*,<sup>470</sup> the court denied the employer's motion to stay enforcement of an injunction. Pursuant to the terms of the injunction, the employer had to send a letter to every employee and post a notice concerning a judgment against it within fourteen days of the entry of the judgment. The court found that the employer failed to present anything other than conjecture about how the requirement would irreparably harm the employer. Additionally, the employer failed to present any evidence to establish how the potential harm to the employer would be greater than the harm to the public, how the requested stay would serve the public interest, or why the employer would likely be successful on appeal.<sup>471</sup>

In *EEOC v. Simmons Bedding Co.*,<sup>472</sup> the court denied the EEOC's claim for injunctive relief as moot. The Commission brought suit on behalf of a charging party who had been automatically terminated after taking six months of leave. The EEOC requested an injunction requiring the employer to amend its leave policy. The employer presented evidence that it had removed the mandatory termination provision of its leave policy. Because the employer's actions served the same purpose as the Commission's requested injunction, the court denied the EEOC's motion as moot.<sup>473</sup>

In *Prospect v. Airport Services, Inc.*,<sup>474</sup> the EEOC sought injunctive relief after receiving a favorable verdict on its sexual harassment claim. Although the court noted that the employer had taken substantial efforts to prevent future Title VII violations, the court still deemed injunctive relief necessary. As such, the court ordered the following injunctive relief: (1) no Title VII violations for sexual harassment for five years; (2) development of an anti-harassment policy that included a clear explanation of prohibited conduct and a clearly described complaint process; (3) development of a thorough and impartial investigation process; (4) development of appropriate disciplinary policies to hold employees liable for sexual harassment; (5) mandatory annual training; (6) ensuring employee awareness of the anti-harassment policy, the complaint procedures and the investigative process; (7) development of a process for employees to submit questions about sexual harassment to the human resources department; and (8) for three years, submission of a report to the EEOC every six months.<sup>475</sup>

## L. Recovery of Attorneys' Fees by Employers

The willingness by some courts to order significant attorneys' fees awards against the Commission seen in the year prior has stalled in circumstances where (a) the EEOC's litigation strategy was questioned by the court and/or (b) the EEOC pursued claims that in the court's view clearly lacked merit. In fact, the judiciary's message established by *EEOC v. CRST Van Expedited, Inc.* ("*CRST III*"),<sup>476</sup> that courts do not condone a "sue first, ask questions later" litigation strategy on the part of the EEOC, now includes the proverbial caveat, "subject to appeal."

In the seminal case *CRST III*, the district court awarded more than \$4.5 million in attorneys' fees and costs against the EEOC. The district court determined the EEOC's pursuit of the lawsuit was "unreasonable, contrary to the procedure outlined by Title VII, and imposed

<sup>469</sup> *Id.* at 338-39.

<sup>470</sup> *EEOC v. Boh Brothers Construction Company, LLC*, 2011 U.S. Dist. LEXIS 125703 (E.D. La. Oct. 31, 2011).

<sup>471</sup> *Id.* at \*\*2-8.

<sup>472</sup> *EEOC v. Simmons Bedding Co.*, 2012 U.S. Dist. LEXIS 61262 (N.D. Ga. May 2, 2012).

<sup>473</sup> *Id.* at \*\*4-6.

<sup>474</sup> *EEOC v. Prospect v. Airport Services, Inc.*, 2012 U.S. Dist. LEXIS 103256 (D. Nev. July 25, 2012).

<sup>475</sup> *Id.* at \*\*8-11.

<sup>476</sup> *EEOC v. CRST Van Expedited, Inc.*, 2010 U.S. Dist. LEXIS 11125, at \*25 (N.D. Iowa Feb. 9, 2010).

an unnecessary burden upon CRST and the court.<sup>477</sup> The EEOC appealed, contending the district court abused its discretion.<sup>478</sup> The Eighth Circuit Court of Appeals acknowledged that “[a] prevailing defendant in a discrimination suit under Title VII of the Civil Rights Act of 1964 may recover attorneys’ fees if the plaintiff’s case was frivolous, unreasonable, or without foundation.” However, the court reiterated that it would only grant prevailing party status to a Title VII defendant in “very narrow circumstances.”<sup>479</sup> Because the Eighth Circuit reversed some of the district court’s summary judgment orders, the court, not surprisingly, determined that CRST no longer qualified as a “prevailing party.”<sup>480</sup> Accordingly, the Eighth Circuit vacated the award of attorneys’ fees and expenses.<sup>481</sup>

All is not lost, however. In *EEOC v. Tricore Reference Laboratories*,<sup>482</sup> the EEOC claimed the employer violated the ADA by failing to accommodate and subsequently terminating the employment of a clinical lab assistant. The defendant obtained summary judgment on the EEOC’s claims. The district court awarded the defendant \$140,571.62.

In upholding the district court’s award of attorney fees to the defendant, the Tenth Circuit Court of Appeals noted the multiple instances when the EEOC should have realized that continued pursuit of the litigation was frivolous. Specifically, the EEOC’s failure to accommodate claim became frivolous when the Commission admitted the lab assistant could not perform essential job functions. The EEOC’s discriminatory discharge claim became untenable when the employer sent a detailed letter explaining the factual and legal deficiencies of the EEOC’s claims. Because the EEOC continued on in the face of significant evidence that its case was frivolous, the district court did not abuse its discretion in awarding fees to the defendant.<sup>483</sup>

In FY 2012, courts also analyzed other issues related to awards of attorneys’ fees and costs. For example, courts addressed whether an intervenors’ counsel is entitled to attorneys’ fees, and whether to issue an award of attorneys’ fees pursuant to the Equal Access to Justice Act (the EAJA) and 28 U.S.C. § 1927, in addition to Title VII’s fee-shifting provision.

In *EEOC v. Conn-X, LLC*,<sup>484</sup> the EEOC brought a religious harassment suit on behalf of two charging parties. The charging parties hired their own counsel and intervened. The court entered default judgment against the defendant. It then had to consider whether to award attorneys’ fees to counsel for the intervenors. The court noted its obligation to understand the division of labor between the EEOC and counsel for the intervenors. For this reason, the court requested counsel for the intervenors to demonstrate that his work was not merely duplicative of the EEOC’s. Counsel for the intervenors and the Commission submitted a joint affidavit. In the affidavit the signatory attorneys represented that the total time devoted to the case by the intervenors’ counsel was reasonable and that the work done by the intervenors’ counsel and the EEOC did not significantly overlap. On this evidence, the court awarded attorneys’ fees in the amount of \$37,530.70 to counsel for the intervenors.<sup>485</sup>

In *EEOC v. Great Steaks, Inc.*,<sup>486</sup> after successfully defending against a Title VII sexual harassment action, the defendant appealed the district court’s refusal to award attorneys’ fees under Title VII’s fee-shifting provision, the EAJA, and 28 U.S.C. § 1927.

Pursuant to Title VII, the district court has discretion to award reasonable attorneys’ fees to prevailing parties.<sup>487</sup> The standard for recovery by a prevailing plaintiff is different than the standard required for a prevailing defendant.<sup>488</sup> A Title VII plaintiff who prevails “is ordinarily entitled to attorneys’ fees unless special circumstances militate against such an award.”<sup>489</sup> On the other hand, a prevailing defendant is entitled to fees *only if* the district court “finds that the plaintiff’s claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so.”<sup>490</sup>

477 *Id.*

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

479 *Id.* at 694.

480 *Id.* at 694-95.

481 *Id.* at 695.

482 *EEOC v. Tricore Reference Laboratories*, 2012 U.S. App. LEXIS 17200 (10th Cir. Aug. 16, 2012).

483 *Id.* at \*\*13-16.

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

485 *Id.*

486 *EEOC v. Great Steaks, Inc.*, 667 F.3d 510 (4th Cir. 2012).

487 42 U.S.C. § 2000e-5(k).

488 42 U.S.C. § 2000e-5(k); *see also* *Great Steaks, Inc.*, 667 F.3d at 516, citing *EEOC v. Clay Printing Co.*, 13 F.3d 813, 817 (4th Cir. 1994).

489 *Great Steaks, Inc.*, 667 F.3d at 516, citing *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 417 (1978).

490 *Id.* at 516, quoting *Christiansburg Garment Co.*, 434 U.S. at 422.

The EAJA makes an award of fees mandatory for a prevailing party against the government unless the government's position was "substantially justified."<sup>491</sup> A fee award under 28 U.S.C. § 1927 is appropriate when the opposing party engages in bad faith and "so multiplies the proceedings in any case unreasonably and vexatiously."<sup>492</sup>

The *Great Steaks* court considered the defendant's request for attorneys' fees under each applicable statute. The Fourth Circuit Court of Appeals determined that the district court did not abuse its discretion when it did not award the defendant any attorneys' fees. The court denied the defendant's request for fees under Title VII because it agreed that the EEOC's case had a factual and legal basis from start to finish.<sup>493</sup> The court paid substantial deference to the district court's finding that the EEOC's case presented justifiable issues of fact warranting a trial, and the district court was in the best position to assess the EEOC's case as frivolous, unreasonable, or groundless assessment.

The Fourth Circuit denied the defendant's request under the EAJA, holding that the EAJA's mandatory fee provision is unavailable to prevailing Title VII defendants. The court reasoned that because Title VII contains its own fee-shifting provision allowing for prevailing defendants to obtain an award of attorneys' fees against the government, the EAJA's mandatory fee provision is unavailable.

The court also rejected the defendant's argument that it was entitled to attorneys' fees pursuant to 28 U.S.C. § 1927. First, the court stated that the defendant's argument concerning the weakness of the EEOC's case did not fall within the purview of 28 U.S.C. § 1927. Second, the court found nothing to suggest that the EEOC vexatiously multiplied the proceedings or engaged in bad faith by filing its motion to strike and motions *in limine*.<sup>494</sup> Because the Fourth Circuit did not find any compelling evidence demonstrating an abuse of discretion, the court affirmed the district court's ruling.

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491 28 U.S.C. § 2412(d).

492 *Great Steaks, Inc.*, 667 F.3d at 522, quoting 28 U.S.C. § 1927.

493 *Id.* at 519.

494 *Id.* at 522-23.

**APPENDIX A: EEOC CONSENT DECREES, CONCILIATION AGREEMENTS AND JUDGMENTS<sup>1</sup>****Select EEOC Settlements in FY 2012**

SETTLEMENT AMOUNT	CLAIM	DESCRIPTION	COURT	EEOC PRESS RELEASE
\$11,000,000	Racial Harassment	According to the EEOC, company subjected a class of African American employees at one facility to racially hostile work environment and discriminatory terms and conditions of employment. EEOC alleged employees subjected to multiple incidents of hangman's nooses and racist graffiti, comments and cartoons. Also alleged company subjected employees to harsher discipline and scrutiny than white counterparts and gave them more difficult and time-consuming work tasks. The settlement was intended to compensate as many as 324 class members.	U.S.D.C. Northern District of Illinois	6/29/2012
\$6,000,000	Disability Discrimination	According to the EEOC, workers on medical leave were denied severance benefits and transitional services that other workers received after the manufacturing plant closed. Workers were capable of returning to work during the reinstatement period (last six months of operation) but denied reinstatement. As a result, disabled workers became ineligible for the severance pay portion based on years of service. The plaintiffs' private action was filed while EEOC was still investigating the matter. The plaintiffs, the defendants, and the EEOC then participated in mediation which resulted in a final settlement agreement intending to compensate approximately 2,700 class members.	U.S.D.C. California *This settlement was reached during conciliation after a private action was filed.	8/19/2011 *Although the press release was published in August 2011, the settlement was not approved by the court until February 3, 2012.
\$5,400,000	Sex Discrimination	According to the EEOC, certain contractors participating in oil spill response did not consider women candidates for cleanup efforts because of their gender. The settlement agreement required safe guards to ensure that the contractors continued to abide by the terms of the settlement agreement in future emergent situations. As of the date of the press release, the size of the class compensated by the settlement was yet to be determined.	*This settlement was reached during conciliation before a lawsuit on the merits was filed by the Commission.	6/29/2012
\$3,130,000	Race Discrimination	According to the EEOC, its investigation revealed that more than 300 African Americans were adversely affected when the company applied a criminal background check policy that disproportionately excluded African American applicants from permanent employment. Under the former policy, applicants were asked about their arrest records and were not hired for permanent jobs even if they had never been convicted. The policy also denied employment to those arrested or convicted of certain minor offenses. The settlement was intended to compensate at least 300 class members.	*This settlement was reached during conciliation before a lawsuit on the merits was filed by the Commission.	1/11/2012
\$2,750,000	Race Discrimination, Racial Harassment, Retaliation	According to the EEOC, the company subjected seven black workers to a racially hostile environment, discriminatory employment terms and conditions of employment, and retaliated against complaining employees. The EEOC alleged the harassment included multiple hangmen's nooses, repeated use of racial slurs, less favorable assignments, and physical threats. Two complaining employees were also were laid off. The EEOC also charged that a hostile work environment was created for four workers associated with black employees, including the use of racial slurs and physical threats. The settlement agreement was intended to compensate 11 class members.	U.S.D.C. Northern District of Illinois	8/27/2012

<sup>1</sup> Littler monitored EEOC press releases regarding settlements, jury verdicts, and judgments entered in EEOC-related litigation during FY 2012. The significant settlements and judgments summarized in Appendix A, include settlements or judgments over \$1 million. The settlements are organized by settlement amount. Unlike FY 2011, the EEOC settled far fewer cases for more than \$1 million; and we therefore expanded our selected cases to include single claimant cases as well as systemic, pattern or practice and class cases for the FY 2012 appendix. In FY 2012 there were also notable conciliations reached during the administrative process for amounts over \$1 million and those entries are shaded within the tables. With respect to jury verdicts and judgments entered in EEOC-related litigation, there was only one judgment over \$1 million in FY 2012 and there were no publicized jury verdicts in EEOC-related litigation over \$1 million in FY 2012.

SETTLEMENT AMOUNT	CLAIM	DESCRIPTION	COURT	EEOC PRESS RELEASE
\$2,390,000	Age Discrimination	According to the EEOC, company's reduction-in-force policies and practices violated the Age Discrimination in Employment Act and the Older Workers Benefits Protection Act.	*This settlement was reached during conciliation before a lawsuit on the merits was filed by the Commission.	No press release was issued. The EEOC references this settlement on page 30 of the EEOC 2012 Annual Report.
\$2,328,667	Race Discrimination, Racial Harassment, Sexual Harassment	According to the EEOC, supervisors repeatedly requested sexual favors, made threatening and racially discriminatory remarks, and touched complainants' intimate body areas. This pervasive and unlawful conduct allegedly culminated in the denial of work hours, discriminatory firings, and forced resignations. The settlement agreement was intended to compensate seven class members.	U.S.D.C. Maryland	12/14/2011
\$2,300,000	Sexual Harassment, Retaliation	According to the EEOC, the assistant store manager at one store harassed a twenty year old female employee. The assistant store manager allegedly sent frequent, sexually-charged texts and invited her to his house to drink. After the assistant store manager's direct supervisor reported the harassment to the company's legal department, the company fired the direct supervisor, allegedly due to a decline in performance when his work was consistently commended. The settlement agreement was intended to compensate two employees (the employee and the direct supervisor of the assistant store manager).	U.S.D.C. Western District of Washington	8/30/2012
\$2,230,000	Sex Discrimination	According to the EEOC, manufacturing company's lifting test had a disparate impact on female applicants. Specifically, the EEOC alleged the company had hired few women to work in its plant after the inauguration of the heavy lifting test.	*This settlement was reached during conciliation before a lawsuit on the merits was filed by the Commission.	No press release was issued. The EEOC references this settlement on page 29 of the EEOC 2012 Annual Report.
\$1,680,000	Age Discrimination	According to the EEOC, company maintained a discriminatory hiring policy that used a study which advocated hiring criteria that adversely affected individuals over the age of 40.	*This settlement was reached during conciliation before a lawsuit on the merits was filed by the Commission.	No press release was issued. The EEOC references this settlement on page 29 of the EEOC 2012 Annual Report.
\$1,600,000	Disability Discrimination	According to the EEOC, approximately 2,000 individuals were affected by an employer's nationwide policy of denying additional leave as a reasonable accommodation for a disability.	*This settlement was reached during conciliation before a lawsuit on the merits was filed by the Commission.	No press release was issued. The EEOC references this settlement on page 29 of the EEOC 2012 Annual Report.
\$1,540,000	Age Discrimination	According to the EEOC, company's layoff policy had a disparate impact on employees 40 years of age or older.	*This settlement was reached during conciliation before a lawsuit on the merits was filed by the Commission.	No press release was issued. The EEOC references this settlement on page 30 of the EEOC 2012 Annual Report.

SETTLEMENT AMOUNT	CLAIM	DESCRIPTION	COURT	EEOC PRESS RELEASE
\$1,009,000	Race Discrimination	According to the EEOC, African Americans were rarely promoted into assistant general manager or general store manager positions at home improvement store.	*This settlement was reached during conciliation before a lawsuit on the merits was filed by the Commission.	No press release was issued. The EEOC references this settlement on page 29 of the EEOC 2012 Annual Report.
\$1,000,000	Sex Discrimination, Sexual Harassment, Retaliation	According to the EEOC, a company permitted male employees to create a sexually hostile work environment for female employees, some of whom were teenagers and retaliated against employees that complained. Specifically, the EEOC alleged that several male employees sexually harassed females by making comments, kissing, touching, and forcing female employees' hands onto male employees' private parts. The company also allegedly failed to take prompt and appropriate action, which forced at least one employee to quit and terminated female employees who complained of the harassment. The settlement agreement was intended to compensate ten class members.	U.S.D.C. Western District of Wisconsin	7/18/2012
\$1,000,000	Racial Harassment, Sexual Harassment	According to the EEOC, a white male co-worker harassed an African American female employee because of race and sex. Specifically, the male coworker allegedly physically assaulted the female employee and inflicted serious permanent injuries. This settlement agreement compensated one person.	U.S.D.C. Middle District of Tennessee	6/13/2012

### Select EEOC Settlements from the First Quarter of FY 2013:

SETTLEMENT AMOUNT	CLAIM	DESCRIPTION	COURT	EEOC PRESS RELEASE
\$4,850,000	Disability Discrimination	According to the EEOC, company policies violated Americans with Disabilities Act. Under company's "maximum leave policy," hundreds of employees were denied reasonable accommodation and were fired pursuant to the policy, which required that employees be automatically terminated if they required more than 12 weeks of leave. Per the EEOC, the company did not determine whether it would be reasonable to provide additional leave as an accommodation. The company also refused to make exceptions to its "no restrictions policy," under which the company refused to allow employees to return to work and failed to determine if there were reasonable accommodations that allowed employees to return to work with restrictions.	U.S.D.C. District of Colorado	11/9/2012
\$2,000,000	Disability Discrimination	According to the EEOC, company policy and practice required all employees to disclose personal and confidential medical information to be approved for sick leave. EEOC also alleged company violated Americans with Disabilities Act when it terminated a class of employees nationwide for taking sick leave beyond the maximum amount allowed.	U.S.D.C. Southern District of California	12/18/2012
\$1,000,000	Sexual Harassment	According to the EEOC, restaurant manager sexually harassed women, including teenagers. The sexually offensive conduct included sexual comments, innuendo, and unwanted touching. Some female employees allegedly quit their jobs because of the harassment and/or due to the employer's failure to provide them preventive or remedial relief.	U.S.D.C. District of New Mexico	11/13/2012

**Select EEOC Judgments in FY 2012:**

JUDGMENT AMOUNT	CLAIM	DESCRIPTION	COURT	EEOC PRESS RELEASE
\$1,375,266	Disability Discrimination Disability Harassment	EEOC alleged claims for disability discrimination and disability harassment. The discrimination claims were premised on allegations that thirty-two workers with intellectual disabilities were paid substandard wages. The EEOC moved for partial summary judgment on the discrimination claims and the company did not contest the motion. In ruling on the motion, the court held that the company violated the ADA by paying the thirty-two workers with intellectual disabilities severely substandard wages. The court entered a judgment of \$1,375,266.35 as damages for the workers' unpaid wages for the relevant two-year period, plus prejudgment interest. A jury trial is scheduled on the disability harassment claims for March 2013.	U.S.D.C. Southern District of Iowa	9/19/2012

APPENDIX B – FY 2012 EEOC AMICUS AND APPELLANT ACTIVITY <sup>2</sup>

## FY 2012 – Appellate Cases Where the EEOC Filed an Amicus Brief

CASE NAME	COURT AND CASE NUMBER	DATE FILED	STATUTES	BASIS/ISSUE/ RESULT	COMMENTARY
<u>Myers-Desco v. Lowe's HIW, Inc.</u>	U.S. Court of Appeals 9th Circuit 11-16119	10/11/2011	Title VII	Charge Processing Exhaustion of administrative remedies Pro EEOC	<p><b>Background:</b> Plaintiff/Appellant (hereinafter the plaintiff) filed a lawsuit alleging state-law claims before either the Nevada Equal Rights Commission (“NERC”) or the EEOC had investigated her charge of discrimination. Both the NERC and EEOC issued a right-to-sue notice since the plaintiff had already filed a lawsuit. After receiving the right-to-sue notice, the plaintiff amended her complaint to include her Title VII claims. The district court dismissed the plaintiff’s claims for failing to exhaust her administrative remedies because she filed her lawsuit before the NERC or EEOC could investigate her claims.</p> <p><b>Issue EEOC is Addressing as Amicus:</b> Whether the district court erred in dismissing the plaintiff’s claims because the plaintiff exhausted her administrative remedies as she filed a charge of discrimination and received her right-to-sue notice before asserting her Title VII claims?</p> <p><b>EEOC’s Amicus Brief:</b> The EEOC argued that the district court improperly limited the plaintiff’s right to access the courts by imposing pre-suit requirements beyond those specified in Title VII. The Commission claimed that the plaintiff exhausted her administrative remedies by filing a charge of discrimination and receiving a right-to-sue letter prior to raising her Title VII claims.</p> <p><b>Court’s Decision:</b> The Ninth Circuit reversed the district court’s order and held that the plaintiff exhausted her administrative remedies before asserting her Title VII claims. The Ninth Circuit also stated that whether the NERC or EEOC decided to forego any investigation into her charge of discrimination had no impact on whether the plaintiff exhausted her administrative remedies. 2012 U.S. App. LEXIS 12094 (9th Cir. June 14, 2012).</p>

<sup>2</sup> The tables included in Appendix B, including the “FY 2012 Appellate Cases Where the EEOC Filed an Amicus Brief” and “FY 2012 – 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>.



CASE NAME	COURT AND CASE NUMBER	DATE FILED	STATUTES	BASIS/ISSUE/ RESULT	COMMENTARY
<u>Johnson v. Maestri Murrell Property Management</u>	U.S. Court of Appeals 5th Circuit 11-30914	12/19/2011	Title VII	Race Failure to hire Pro EEOC – reversal of summary judgment	<p><b>Background:</b> Plaintiff/Appellant (hereinafter plaintiff) filed a lawsuit alleging that she was discriminated against on the basis of her race in violation of Title VII when she was not hired for an open position. The district court granted the defendant’s motion for summary judgment after determining that the plaintiff failed to demonstrate a <i>prima facie</i> case of discrimination under the well-known <i>McDonnell-Douglas</i> test.</p> <p><b>Issue EEOC is Addressing as Amicus:</b> Whether the district court properly applied the <i>McDonnell-Douglas</i> standard in this case, including when it accorded no weight to certain evidence offered by Plaintiff?</p> <p><b>EEOC’s Amicus Brief:</b> The EEOC argued that the district court improperly applied a rigid, more onerous, formulation of the <i>McDonnell-Douglas</i> test, which required the plaintiff to show that she was not hired for the position and the employer continued to search for candidates after plaintiff was rejected. The EEOC further argued that the district court improperly disregarded evidence of racially biased comments made by the defendant’s manager.</p> <p><b>Court’s Decision:</b> The Fifth Circuit reversed the district court’s grant of summary judgment for the employer and remanded the matter for further proceedings because the plaintiff provided sufficient evidence to withstand summary judgment. The Fifth Circuit noted that the plaintiff in this failure-to-hire case can demonstrate a <i>prima facie</i> case by showing she applied and was rejected under circumstances which given rise to an inference of discrimination. 2012 U.S. App. LEXIS 17054 (5th Cir. Aug. 14, 2012).</p>

CASE NAME	COURT AND CASE NUMBER	DATE FILED	STATUTES	BASIS/ISSUE/ RESULT	COMMENTARY
<u>Mandel v. M &amp; Q Packaging Corp.</u>	U.S. Court of Appeals 3rd Circuit 11-3193	12/22/2011	Title VII	Sexual Harassment Statute of limitations Pending	<p><b>Background:</b> Plaintiff claimed she was subject to sexual discrimination and a hostile work environment. The district court granted the defendant's motion for summary judgment partially on the ground that the plaintiff's claims were barred by the statute of limitations. Additionally, the district court struck from the record incidents of harassment which the plaintiff did not mention in her deposition, but were in her original EEOC intake form. Lastly, the district court held that the remaining incidents of harassment were not sufficiently pervasive to constitute sexual harassment.</p> <p><b>Issues EEOC is Addressing on Amicus:</b> (1) Whether the district court erred in not considering incidents which occurred more than 300 days before plaintiff filed her EEOC complaint; (2) whether the district court erred in disregarding instances of harassment that the plaintiff did not discuss in her deposition testimony, but did include in her EEOC charge; and (3) whether there was sufficient evidence for a reasonable jury to conclude the plaintiff was subject to sufficiently severe or pervasive sexual harassment in the workplace?</p> <p><b>EEOC's Amicus Brief:</b> The EEOC argued that the district court improperly excluded incidents of harassment that occurred more than 300 days before the plaintiff filed her charge of discrimination. The Commission argued that plaintiff should be able to introduce evidence outside of 300 days because they are part of the same continuing hostile work environment. Additionally, the EEOC asserted that allegations in the plaintiff's EEOC charge should not be stricken from the record simply because she did not mention these incidents during her deposition since her charge is still a sworn statement describing events that she personally witnessed. Lastly, the EEOC asserted that the plaintiff's own use of profanity and sexual humor in the workplace was not sufficient to show that, as a matter of law, her supervisor's behavior was subjectively offensive, particularly given the disparity between the two's conduct.</p> <p><b>Status of Appeal:</b> The Third Circuit Court heard oral arguments on April 26, 2012 and its decision is forthcoming.</p>

CASE NAME	COURT AND CASE NUMBER	DATE FILED	STATUTES	BASIS/ISSUE/ RESULT	COMMENTARY
<u>McDonnaugh v. Teva Specialty Pharmaceuticals, LLC</u>	U.S. Court of Appeals 3rd Circuit 11-3462	12/21/2011	Title VII	Race  Discriminatory termination  Pro employer – summary judgment upheld	<p><b>Background:</b> Plaintiff is an African American male who worked as a sales representative for a pharmaceutical company. The plaintiff was terminated after being placed on a performance improvement plan, for continued performance issues. The plaintiff's replacement was a Caucasian male. The district court granted summary judgment for the defendant, reasoning the plaintiff being replaced by a white male by itself was insufficient to support a <i>prima facie</i> case of discrimination.</p> <p><b>Issue EEOC is Addressing on Amicus:</b> Whether the district court erred in ruling that evidence that the plaintiff was replaced by a white employee is insufficient to make out a <i>prima facie</i> case of discrimination?</p> <p><b>EEOC's Amicus Brief:</b> The EEOC argued that evidence the plaintiff was replaced by a Caucasian was sufficient to make a <i>prima facie</i> case of race discrimination. The Commission stressed that the <i>prima facie</i> analysis is meant to be a non-onerous burden and is meant only to see if the plaintiff can present evidence that gives rise to an inference of discrimination. Moreover, the EEOC stressed that such an inference of discrimination was particularly valid in the instant matter as there was evidence plaintiff was performing adequately at the time of his termination.</p> <p><b>Court's Decision:</b> The Third Circuit Court of Appeals upheld summary judgment for the defendant, reasoning that although evidence that the plaintiff was replaced by a Caucasian was sufficient to establish a <i>prima facie</i> case, the plaintiff failed to meet his burden to prove that the employer's reason for termination was pretextual. Specifically, the court noted that it was undisputed that plaintiff even though the plaintiff's performance improved somewhat, he never once meet the company's performance expectations. 2012 U.S. App. LEXIS 15423 (3d Cir. July 26, 2012).</p>

CASE NAME	COURT AND CASE NUMBER	DATE FILED	STATUTES	BASIS/ISSUE/ RESULT	COMMENTARY
<u>Bertsch v. Overstock.com</u>	U.S. Court of Appeals 10th Circuit 11-4128	01/06/2012	Title VII	Retaliation/Sexual Harassment  Application of retaliation standard  Pro EEOC – reversed summary judgment on retaliation claim	<p><b>Background:</b> Plaintiff/Appellant (hereinafter the plaintiff) appealed the district court’s decision granting the defendant summary judgment on the plaintiff’s claims of hostile work environment based on gender and retaliation. Additionally, the plaintiff appealed the district court’s decision denying her motion to amend her complaint to add a claim for disparate treatment based on gender.</p> <p><b>Issue the EEOC is Addressing as Amicus:</b> Whether, in dismissing the plaintiff’s retaliation claim, the district court erred by requiring that each challenged act affect the terms of her employment to constitute retaliation under Title VII, thereby contravening the requisite application of the <i>Burlington Northern</i> standard? Also, whether the district court erred in dismissing the plaintiff’s retaliation claim by finding a lack of causation between her complaint and termination three months after she complained?</p> <p><b>EEOC’s Amicus Brief:</b> The EEOC argued that the district court used the improper standard in holding that a performance improvement plan does not constitute an adverse employment action. Specifically, the EEOC argued that the Supreme Court’s decision in <i>Burlington Northern</i> sets the controlling test for determining adverse actions in retaliation claims, and the district court improperly side-stepped this test. The Commission also argued that the plaintiff properly demonstrated causation because her performance improvement plan was an adverse employment action that was issued days after her protected activity. Additionally, the EEOC argued the district court improperly failed to consider pretext in determining there was no causation.</p> <p><b>Court’s Decision:</b> The Tenth Circuit affirmed in part, reversed in part, and remanded. The Tenth Circuit affirmed the district court’s order granting summary judgment on the plaintiff’s sexual harassment claim because the defendant promptly investigated the plaintiff’s complaints and took remedial action. The Tenth Circuit also affirmed the district court’s order denying the plaintiff’s motion to amend her complaint to add a disparate treatment claim because she failed to exhaust her administrative remedies regarding this claim. The Tenth Circuit reversed the district court’s order granting summary judgment on the retaliation claim and held that the district court erred in relying on a pre-<i>Burlington Northern</i> case in its analysis of whether the plaintiff suffered an adverse employment action. Additionally, the Tenth Circuit held that the district court erred in refusing to consider pretext in determining there was no causal connection between the plaintiff’s complaints and her termination. The retaliation claim was remanded back to district court. 685 F.3d 1023 (10th Cir. 2012).</p>

CASE NAME	COURT AND CASE NUMBER	DATE FILED	STATUTES	BASIS/ISSUE/ RESULT	COMMENTARY
<u>Robinson v. City of Philadelphia</u>	U.S. Court of Appeals 3rd Circuit 11-3852	01/24/2012	ADEA	Age  Termination during reduction in force; application of <i>Gross</i> standard  Pro employer – summary judgment affirmed	<p><b>Background:</b> Plaintiff/Appellant (hereinafter the plaintiff) filed a lawsuit alleging that he was discriminated against on the basis of his race and age when he was terminated in reduction-in-force. The district court granted partial summary judgment over the plaintiff's age claims and determined that the plaintiff failed to carry his burden under <i>Gross v. FBL Financial Services</i> which requires that age be the "but-for" reason for the adverse employment action.</p> <p><b>Issue EEOC is Addressing as Amicus:</b> Whether the district court properly applied the <i>Gross</i>' "but-for" standard when it required the plaintiff to prove that age was the sole reason for the adverse employment action?</p> <p><b>EEOC's Amicus Brief:</b> The EEOC argued that the district court improperly applied <i>Gross</i>, which according to the Commission merely holds that "but-for" means actually played a role in the decision making process and had a determinative influence on the outcome, and does not require that age be the sole reason for the decision at issue. The EEOC further argued that <i>Gross</i> does not suggest that a plaintiff cannot prevail merely because the decision at issue involves mixed motives.</p> <p><b>Court's Decision:</b> The Third Circuit Court affirmed the judgment of the district court when it determined that the district court applied the correct "but-for" standard. The Third Circuit also determined that the plaintiff could not demonstrate a <i>prima facie</i> case of age discrimination. 2012 U.S. App. LEXIS 14381 (3d Cir. July 11, 2012).</p>
<u>Fried v. LVI Services, Inc.</u>	U.S. Court of Appeals 2nd Circuit 11-cv-4791	03/05/2012	ADEA	Age/Retaliation  Discriminatory termination/neutral comment as pretext for discrimination  Pro employer – summary judgment affirmed	<p><b>Background:</b> Plaintiff/Appellant (hereinafter the plaintiff) filed his claim in federal district court alleging age discrimination and retaliation under the ADEA following his termination. The district court granted the defendant summary judgment, reasoning that a supervisor's neutral inquiry into when the plaintiff planned to retire was insufficient evidence to establish a <i>prima facie</i> case of discrimination. Moreover, the district court noted the fact that the plaintiff's job responsibilities were given to younger workers following his resignation was insufficient to demonstrate pretext.</p> <p><b>Issue EEOC is Addressing as Amicus:</b> Whether the district court erred in concluding that the supervisor's comment regarding the plaintiff's future retirement plans was sufficient to show age discrimination, particularly in the context of the supervisor's desire to have plaintiff terminated?</p> <p><b>EEOC's Amicus Brief:</b> In its Amicus Brief, the Commission asserted that the supervisor's retirement inquiry was sufficient evidence of discrimination when taken in the context of the supervisor's alleged desire to terminate the plaintiff. The Commission further argued that the district court failed to consider other evidence of pretext, such as the plaintiff's undisputed good performance, the supervisor's "campaign" to terminate the plaintiff, and other age-related comments.</p> <p><b>Court's Decision:</b> The Second Circuit affirmed the judgment of the district court. 2012 U.S. App. LEXIS 21244 (2d Cir. Oct. 15, 2012).</p>

CASE NAME	COURT AND CASE NUMBER	DATE FILED	STATUTES	BASIS/ISSUE/ RESULT	COMMENTARY
<u>Mazzeo v. Color Resolutions</u>	U.S. Court of Appeals 11th Circuit 12-10250	03/12/2012	ADA, ADEA	Age, Disability Whether the plaintiff was disabled in light of mitigating measures? Pending	<p><b>Background:</b> Plaintiff/Appellant (hereinafter the plaintiff) filed a lawsuit alleging that he was discriminated against on the basis of his age and disability. The district court granted summary judgment because it initially determined that the plaintiff was not disabled because it considered mitigating measures. The district court further determined that the plaintiff failed to apply for an open position as required to demonstrate a <i>prima facie</i> case of discrimination.</p> <p><b>Issue EEOC is Addressing as Amicus:</b> Whether the district court properly applied the ADAAA when it determined the plaintiff was not disabled and whether the district court properly determined that the plaintiff did not apply for an open position when he orally expressed interest in the position?</p> <p><b>EEOC's Amicus Brief:</b> The EEOC argued that the district court improperly applied the ADAAA when it determined the plaintiff was not disabled because the district court improperly considered a neurological disorder as non-disabling and a back injury as transitory. The EEOC further argued that the plaintiff sufficiently demonstrated interest in an open position because the formulation of a <i>prima facie</i> case is satisfied when an individual expresses interest in the position, and does not require a plaintiff to submit a formal application.</p> <p><b>Status of Appeal:</b> The Eleventh Circuit Court heard oral argument on December 4, 2012, and a decision is forthcoming.</p>

## FY 2012 – Appellate Cases Where the EEOC Filed as the Appellant

CASE NAME	COURT AND CASE NUMBER	DATE FILED	STATUTES	BASIS/ISSUE/ RESULT	COMMENTARY
<u>EEOC v. The Picture People, Inc.</u>	U.S. Court of Appeals 10th Circuit 11-1306	10/06/2011	ADA	Disability Failure to hire Pro employer – summary judgment affirmed	<p><b>Background:</b> The EEOC appealed a district court decision granting summary judgment for the defendant on the EEOC's claim that the defendant violated the ADA by discriminating and retaliating against an employee because she is deaf.</p> <p><b>Issues on Appeal:</b> (1) Whether a reasonable jury could find that the employee was qualified for her position and the defendant failed to reasonably accommodate her; (2) whether a reasonable jury could find the defendant discriminated against the employee based on her disability; and (3) whether a reasonable jury could find defendant retaliated against the employee for having engaged in conduct protected under the ADA?</p> <p><b>EEOC's Position on Appeal:</b> The EEOC argued that the district court erred in granting the defendant summary judgment because a reasonable jury could find in its favor.</p> <p><b>Court's Decision:</b> The Tenth Circuit affirmed the district court's order granting the defendant complete summary judgment because the EEOC could not establish the employee could perform the essential functions of her job and offered no evidence that the defendant's legitimate, non-discriminatory reasons were pretextual. 684 F.3d 981 (10th Cir. 2012).</p>
<u>EEOC v. Cintas Corp.</u>	U.S. Court of Appeals 6th Circuit 11-2057	10/25/2011	Title VII	Sex, Charge Processing, Attorney's Fees Whether pattern or practice claims may be brought under section 706? Whether district court's rejection of EEOC's requested amendment to its complaint was appropriate? Whether a fee award was appropriate in this case? Pro EEOC – district court's ruling reversed and remanded ( <i>en banc</i> rehearing requested by the employer)	<p><b>Background:</b> The Commission represented a class of women who were allegedly denied jobs as the result of a pattern or practice of sex discrimination and filed suit under section 706 of Title VII. The Commission's complaint was dismissed after the district court refused to allow the Commission to amend their complaint to plead a section 707 claim against the defendant. The Commission could not prove its claims under section 706 and, therefore, its complaint was dismissed as to the alleged section 706 claims.</p> <p><b>Issues on Appeal:</b> The Commission raised the following four issues in this appeal:</p> <p>(1) Whether the Commission acted frivolously, unreasonably, or without foundation when it filed the complaint in this matter alleging a pattern or practice of discrimination under section 706?</p> <p>(2) Whether the district court inappropriately rejected the Commission's proposed amendment to the complaint which sought to add section 707 claims?</p> <p>(3) Whether the district court properly considered the Commission's ability to investigate and litigate claims when it rejected the Commission's offer to prove discrimination against individual claimants?</p> <p>(4) Whether the district court's reliance on the Commission's motion practice, including its failure to have rulings issued in its favor, was appropriately considered as part of the fee award?</p>

CASE NAME	COURT AND CASE NUMBER	DATE FILED	STATUTES	BASIS/ISSUE/ RESULT	COMMENTARY
					<p><b>EEOC's Position on Appeal:</b> In appealing the district court's order on the employer's summary judgment motion and fee award against it the Commission's argument was four fold:</p> <p>(1) The EEOC's action was not frivolous, unreasonable, or without foundation. Thus, this was not the rare, egregious case where fees are appropriate. In filing the complaint in this matter, the Commission relied upon established Sixth Circuit precedent<sup>3</sup> allowing pattern or practice claims under section 706 . As a result, because of this precedent, and even if the district court did not improperly fail to apply binding precedent, the EEOC's actions were not sufficient to support the award of attorney's fees.</p> <p>(2) The district court inappropriately rejected the EEOC's amendment to the complaint (to add section 707 claims) and, therefore, the award of fees was not appropriate. Upon learning that the district court rejected Sixth Circuit precedent allowing the EEOC to bring a pattern or practice claim under section 706, the Commission sought to amend its complaint to add section 707 claims, without substantively changing the allegations against the defendant. The EEOC argued that the district court's rejection of this amendment was an abuse of discretion and, as a result, the award of fees was inappropriate.</p> <p>(3) The district court inappropriately rejected the EEOC's attempt to prove discrimination against individual claimants. The district court allegedly did not have the appropriate view of the Commission's authority to investigate and litigate claims of discrimination. Specifically, the district court incorrectly determined that, when it investigated systematic practices, the EEOC did not also investigate individual discrimination claims. The Commission argued that the district court's misunderstanding of the EEOC's authority was not sufficient to support an award of fees.</p> <p>(4) In awarding fees, the district court cited the EEOC's motion practice as part of the evidence supporting the fees award. The Commission asserted that the district court's misplaced reliance upon the EEOC's motion practice, and the EEOC's failure to have rulings issued in its favor, did not make the Commission's actions frivolous or support its award of fees.</p> <p><b>Court's Decision:</b> The Sixth Circuit reversed and remanded this matter, including the award of fees, to the district court. The Sixth Circuit determined the EEOC could pursue a pattern or practice claim because section 706 allows this type of claim and the EEOC satisfied its administrative prerequisites to the suit. 2012 U.S. App. LEXIS 23132 (6th Cir. Nov. 9, 2012) <i>en banc rehearing requested</i>.</p>

3 See *EEOC v. Monarch Machine Tool Co.*, 737 F.2d 1444 (6th Cir. 1980).



CASE NAME	COURT AND CASE NUMBER	DATE FILED	STATUTES	BASIS/ISSUE/ RESULT	COMMENTARY
<u>EEOC v. Kronos, Inc. (Kronos II)</u>	U.S. Court of Appeals 3rd Circuit 11-2834	11/14/2011	ADA	Subpoena Enforcement, Disclosure  Confidentiality; scope of subpoena; cost sharing  Pro EEOC	<p><b>Background:</b> The EEOC issued a subpoena to a third party regarding the creation and use of a customer service assessment test that was used by an employer in denying a hearing and speech impaired individual a job. The EEOC brought a subpoena enforcement action against the third party. The district court granted in part and denied in part this action, and narrowed the scope of the subpoena. The district court also entered a confidentiality order that restricted the use of confidential material, restricted who could access confidential material, and required the return of confidential material. The EEOC appealed and the Third Circuit determined that the district court abused its discretion with its decision to narrow the subpoena and determined that various categories of documents subpoenaed by the EEOC were relevant. The Third Circuit also held that a district court entering a confidentiality order must conduct a balancing test to ensure it is reasonable. The case was remanded back to the district court. The district court issued an order modifying the subpoena to be enforced and addressing the compelling reasons under the good faith balancing test that favored entry of the confidentiality order. Additionally, the district court ordered the EEOC to split the cost of subpoena enforcement 50-50 to lessen the financial burden. The Commission appealed.</p> <p><b>Issues on Appeal:</b></p> <ol style="list-style-type: none"> <li>1. By limiting the production of validity studies and evidence relied upon by the defendant in creating tests relating to disabilities, persons with disabilities, or adverse impact upon persons with disabilities, did the district court fail to comply with the Third Circuit's previous order regarding production?</li> <li>2. Did the district court abuse its discretion by determining that good cause exists to support a confidentiality order?</li> <li>3. Did the district court abuse its discretion by concluding that the defendant did not waive any defense of undue burden or cost and by concluding that complying with the EEOC's subpoena exceeds what the defendant may reasonably be expected to bear as a cost?</li> </ol> <p><b>EEOC's Position on Appeal:</b> The Commission proffered three arguments on appeal. First, it argued the district court improperly interpreted the Third Circuit's previous order and limited the scope of its subpoena. Second, the EEOC argued that the confidentiality order entered by the district court is not supported by good cause because the statutory and regulatory policies in place provide adequate protection. Third, the EEOC argued the district court abused its discretion in ordering the EEOC to pay half the costs of complying with the subpoena because there is no statutory basis for the order and the third party waived any objection regarding costs because it did not timely assert this argument.</p> <p><b>Court's Decision:</b> The Third Circuit reversed and remanded the district court's decision. With respect to the scope of the subpoena, the Third Circuit held that the district court's decision to restrict the scope of the subpoena contradicted the Third Circuit's previous order with regard to the subpoena. The Third Circuit remanded the subpoena enforcement with specific changes broadening the language of the subpoena. With respect to the confidentiality order issue, the Third Circuit remanded the issue</p>

CASE NAME	COURT AND CASE NUMBER	DATE FILED	STATUTES	BASIS/ISSUE/ RESULT	COMMENTARY
					solely for the purpose of allowing the district court to consider how the specific limitations it ordered are tied to the third party's justifiable fears regarding the disclosure of proprietary information. With respect to the cost-sharing order, the Third Circuit remanded to allow to the district court to make an individualized determination of whether the costs of production under the newly expanded subpoena are outside the scope of what the third party can reasonably expect to bear as the cost of doing business. 694 F.3d 351 (3d Cir. 2012) <i>as amended by</i> 2012 U.S. App. LEXIS 23431 (Nov. 15, 2012).
<u>EEOC v. Karenim, Inc.</u>	U.S. Court of Appeals 2nd Circuit 11-3309	11/21/2011	Title VII	Sexual Harassment Injunctive relief Pro EEOC	<p><b>Background:</b> Case involved a group of former employees that were subject to years of sexual harassment from a store manager. A jury trial ruled for the EEOC and Plaintiff-Intervenors, awarding all ten plaintiffs a total of \$10,080 in compensatory damages and \$1,250,000 in punitive damages. The EEOC then moved to alter the judgment to include injunctive relief to ensure discrimination will not re-occur and that the damages be reduced to the applicable caps of \$50,000 per claimant. The district court in turn granted the agency's request to reduce damages but denied the motion for injunctive relief.</p> <p><b>Issues on Appeal:</b> Whether the district court properly denied injunctive relief against future acts of retaliation?</p> <p><b>EEOC's Position on Appeal:</b> The supervisor at issue in this action was also the owner's fiancée. There was substantial evidence that the supervisor subjected multiple female employees to over ten years of both physical and verbal sexual harassment. The EEOC sought injunctive relief that would among other things bar the defendant from ever rehiring the supervisor, ever allow him in the store, and institute new sexual harassment training. The Commission argued that such steps were necessary given that the former supervisor was recently allowed to enter the store and the defendant's sexual harassment complaint and training procedures were still, in the EEOC's opinion, inadequate. Moreover, the EEOC argued the injunctive relief was also required given that the defendant recently banned a complainant from entering the store, making future acts of retaliation against current employees for making similar complaints more likely.</p> <p><b>Court's Decision:</b> The Second Circuit Court of Appeals issued an order on October 19, 2012, in which it vacated and remanded the post-judgment order issued by the district court. The court held that at a minimum, the district court "was obliged to craft injunctive relief sufficient to prevent further violations of Title VII by the individual who directly perpetrated the egregious sexual harassment at issue in the case." 698 F.3d 92, 92 (2d Cir. 2012).</p>

CASE NAME	COURT AND CASE NUMBER	DATE FILED	STATUTES	BASIS/ISSUE/ RESULT	COMMENTARY
<u><a href="#">EEOC v. Sumner Classics, Inc.</a></u>	U.S. Court of Appeals 11th Circuit 11-14541	12/12/2011	ADA	Disability  Statute of limitation; intake form  Pro employer – summary judgment affirmed	<p><b>Background:</b> Plaintiff is HIV positive. The defendant terminated the plaintiff's employment after he failed to provide sufficient medical records that he was able to work despite his HIV diagnosis. The district court granted summary judgment for the defendants, because the plaintiff filed his discrimination charge with the EEOC more than 180 days from his termination.</p> <p><b>Issues on Appeal:</b> Whether the plaintiff's submission of an Intake Form to the EEOC constituted filing a charge within the proscribed statute of limitations?</p> <p><b>EEOC's Position on Appeal:</b> The EEOC argued that the plaintiff's Intake Questionnaire form that he submitted to the EEOC constituted a charge of discrimination. The Commission relied on precedent from the Supreme Court decision <i>Federal Express v. Holowecki</i>, 552 U.S. 389 (2008), that a charge may be an "informal document," which can be "reasonably construed as a request for the Commission to take remedial action." Specifically, the EEOC noted that the Intake Questionnaire completed by the plaintiff requested an attorney, stated the reasons why he believed defendant engaged in illegal discrimination, and listed his emotional distress damages. Moreover, the agency also argued that this was a situation where the discrimination was so clear and pervasive that that the agency could infer a request for action just from the allegations. See <i>Federal Express</i>, 552 U.S. at 405.</p> <p><b>Court's Decision:</b> The Eleventh Circuit Court of Appeals upheld summary judgment for the defendant. In its decision, the appellate court held that the Supreme Court's decision in <i>Federal Express</i> was only in the context of charges under the Age Discrimination in Employment Act, and was not necessarily applicable to claims under the Americans with Disabilities Act. Moreover, the appellate court also noted that plaintiff never asked for the EEOC to initiate any type of remedial action in his Intake Questionnaire and instead was simply requesting for information and answers about his rights when he submitted the document.</p>
<u><a href="#">EEOC v. Memphis Health Center</a></u>	U.S. Court of Appeals 6th Circuit 11-6426,11-6427	01/17/2012	ADEA	Age, Retaliation, Attorney's Fees  Award of attorneys' fees on retaliation claim  Pending	<p><b>Background:</b> The EEOC brought a lawsuit claiming that the defendant discriminated against an individual based upon her age and retaliated against her for complaining about age discrimination when it failed to select her for a dental assistant position. The district court granted summary judgment in favor of the defendant and then awarded fees on the retaliation claim, but not the discrimination claim.</p> <p><b>Issue on Appeal:</b> Whether the district court erred or abused its discretion by awarding fees against the EEOC with respect to its retaliation claim against defendant when no fees were awarded on the Commission's discrimination claim against defendant?</p> <p><b>EEOC's Position on Appeal:</b> The EEOC argued that the district court abused its discretion and committed legal error in awarding attorneys' fees to defendant for its retaliation claim. Specifically, the Commission stated that the district court should have viewed its position as a whole. Because the EEOC's "main" discrimination claim was justified, despite the defendant's arguments to the contrary, then its position vis-à-vis the retaliation was justified and did not support the award of fees. The EEOC further argued that its retaliation claim was itself substantially justified.</p> <p><b>Status of Appeal:</b> The Sixth Circuit Court heard oral arguments from the parties on October 11, 2012. A decision is forthcoming.</p>

CASE NAME	COURT AND CASE NUMBER	DATE FILED	STATUTES	BASIS/ISSUE/ RESULT	COMMENTARY
<u>EEOC v. Thompson Contracting, Grading, Paving &amp; Utilities</u>	U.S. Court of Appeals 4th Circuit 11-1897	01/20/2012	Title VII	Religion  Supplemental discovery responses; injunctive relief  Pro employer – summary judgment affirmed	<p><b>Background:</b> Plaintiff informed his employer that his religious beliefs prevented him from working on Saturdays. The employer subsequently requested the plaintiff work on three Saturdays in order to make-up missed shifts. After the plaintiff refused and the defendant terminated his employment.</p> <p>The district court initially granted the defendant's motion for summary judgment, reasoning the plaintiff had failed to present sufficient evidence to establish a <i>prima facie</i> case of religious discrimination. The Commission successfully appealed this decision and the Fourth Circuit Court of Appeals remanded the case back to the district court. After remand, the district court invited supplemental pleadings and the defendant filed supplemental discovery responses as well as another motion for summary judgment. In its supplemental discovery responses, the defendant provided additional evidence on how allowing the plaintiff not to work on Saturdays created an undue hardship. The district court granted the defendant's motion for summary judgment. In addition, the court denied the Commission's motion for injunctive relief, reasoning that plaintiff's refusal to answer deposition questions regarding his marijuana use prohibited any type of reinstatement.</p> <p><b>Issue on Appeal:</b> (1) Whether the district court was allowed to rely on the defendant's supplemental discovery responses in granting summary judgment; and (2) whether the district court improperly denied the Commission's motion for injunctive relief?</p> <p><b>EEOC's Position on Appeal:</b> The Commission argued that the defendant should not have been allowed to submit supplementary discovery responses in support of its second motion for summary judgment. The Commission relied on Rule 37(c) of the Rules of Civil Procedure, stating that parties who fail to omit material discovery responses are prohibited from then using any supplemented information at trial or in support of a motion. Specifically, the Commission stressed that the supplemental material addressing the defendant's undue hardship was not included in its original disclosures and interrogatory responses. The Commission also pointed out that the district court's decision to rely on this information was patently unfair because the district court also granted the defendant's protective order against the Commission's additional discovery requests in response to this supplemental information. Alternatively, the Commission argued that summary judgment should not have been granted regardless of this supplemental material, as the plaintiff was only needed to work Saturdays on an infrequent basis. Lastly, the Commission asserted that the district court should not have dismissed its motion for injunctive relief because of the plaintiff's refusal to answer deposition questions, arguing in part that even if the plaintiff was not eligible for reinstatement, the Commission was still entitled to injunctive relief to prevent future acts of discrimination by the defendant.</p> <p><b>Court's Decision:</b> On December 14, 2012, in a per curiam unpublished decision the Fourth Circuit Court of Appeals affirmed the judgment of the district court. 2012 U.S. App. LEXIS 25635 (4th Cir. Dec. 14, 2012).</p>

CASE NAME	COURT AND CASE NUMBER	DATE FILED	STATUTES	BASIS/ISSUE/ RESULT	COMMENTARY
<a href="#">EEOC v. TriCore Reference Laboratories</a>	U.S. Court of Appeals 10th Circuit 11-2247	02/22/2012	ADA	Attorney's Fees Failure to accommodate; attorneys' fees Pro employer – attorneys' fees award upheld	<p><b>Background:</b> The EEOC brought a lawsuit alleging that the defendant violated the ADA by failing to accommodate an employee and terminating the employee based on her disability. The district court granted the defendant's motion for summary judgment and awarded the defendant its attorneys' fees, holding that the EEOC's claims were clearly frivolous.</p> <p><b>Issue on Appeal:</b> Whether the district court erred or abused its discretion by determining that the EEOC's termination claim and reasonable accommodation claim were clearly frivolous and granting attorneys' fees on that basis?</p> <p><b>EEOC's Position on Appeal:</b> The EEOC argued that the district court abused its discretion and committed legal error in awarding attorneys' fees to defendant. Specifically, the EEOC contended its claims were not frivolous and were supported by facts and evidence.</p> <p><b>Court's Decision:</b> The Tenth Circuit upheld the district court's award of attorneys' fees and held that the EEOC should have been aware that its claims lacked merit. 2012 U.S. App. LEXIS 17200 (Aug. 16, 2012).</p>
<a href="#">EEOC v. Peoplemark</a>	U.S. Court of Appeals 6th Circuit 11-2582	04/13/2012	Title VII	Race, Attorney's Fees Failure to hire; attorneys' fees Pending	<p><b>Background:</b> The EEOC brought a lawsuit alleging that the defendant violated Title VII by maintaining a policy of not hiring individuals with a criminal background. The defendant produced three times the amount of documents expected, which forced the Commission to move for an extension of time to file its expert report. The district court denied this request, forcing the Commission to dismiss its complaint.</p> <p><b>Issue on Appeal:</b> Whether the district court erred or abused its discretion by awarding fees against the EEOC because the EEOC could not prove its claims as the result of the district court's refusal to grant an extension of time to file its expert report?</p> <p><b>EEOC's Position on Appeal:</b> The EEOC argued that the district court abused its discretion and committed legal error in awarding attorneys' fees to defendant. Specifically, the Commission stated the vast amount of documents produced by the defendant made it impossible to analyze the data and prepare an expert report within the time allotted. If the district court had provided the additional time for its expert to provide a report, it would have been able to support its claims. The Commission further argued that, even if fees were appropriate, the award in this matter was excessive.</p> <p><b>Status of Appeal:</b> The Sixth Circuit Court heard oral arguments from the parties on December 6, 2012. A decision is forthcoming.</p>

CASE NAME	COURT AND CASE NUMBER	DATE FILED	STATUTES	BASIS/ISSUE/ RESULT	COMMENTARY
<u><a href="#">EEOC v. Thrivent Financial for Lutherans</a></u>	U.S. Court of Appeals 7th Circuit 11-2848	04/30/2012	ADA	Disability Job-related medical inquiry; confidentiality of medical information Pro employer	<p><b>Background:</b> The EEOC brought a lawsuit claiming that the defendant violated the ADA by disclosing an individual's migraine headaches to prospective employers. The district court granted summary judgment to the defendant because the defendant did not disclose information it learned pursuant to a medical inquiry, but rather it learned the information through a voluntary disclosure.</p> <p><b>Issue on Appeal:</b> Whether the district court erred in determining that the defendant did not make a job-related medical inquiry and whether the individual's medical information was not entitled to confidentiality?</p> <p><b>EEOC's Position on Appeal:</b> The EEOC argued that the district court failed to recognize that medical information provided in response to job-related inquiries is covered by the ADA's confidentiality provision and that the defendant made a performance-related inquiry that resulted in the disclosure of the individual's medical information. Finally, the Commission also argued that public policy requires that former employers keep former employees' medical information confidential.</p> <p><b>Court's Decision:</b> The Seventh Circuit Court of Appeals affirmed the district court's judgment and held that the employer did not make a job-related medical inquiry and did not disclose confidential information under the ADA. 2012 U.S. App. LEXIS 23821 (7th Cir. Nov. 20, 2012).</p>
<u><a href="#">EEOC v. Houston Funding, LTD II, et al</a></u>	U.S. Court of Appeals 5th Circuit 12-20220	05/21/2012	Title VII	Pregnancy Lactation Pending	<p><b>Background:</b> The plaintiff claimed she was terminated because she lactated following her pregnancy and required a back room to breast pump. The district court granted summary judgment for the defendants, reasoning that the plaintiff had not stated a cognizable Title VII claim, as terminating someone for lactation or breast-pumping was not sex discrimination.</p> <p><b>Issues on Appeal:</b> (1) Whether, as a matter of law, Title VII's prohibition on sex discrimination includes discrimination based on the sex-specific trait of lactation; and (2) whether the district court erred in ruling a reasonable jury could not find that the defendant fired he plaintiff because she wanted to return from maternity leave while she was still lactating?</p> <p><b>EEOC's Position on Appeal:</b> The EEOC appealed the district court's decision on the grounds that lactating falls within Title VII's prohibition on discrimination based on "pregnancy, childbirth, or related medical conditions." Moreover, the EEOC argued the defendant's inconsistent explanation that the plaintiff was terminated for job abandonment was sufficient evidence of pretext.</p> <p><b>Status of Appeal:</b> The Fifth Circuit Court heard oral arguments from the parties on November 6, 2012. A decision is forthcoming.</p>

CASE NAME	COURT AND CASE NUMBER	DATE FILED	STATUTES	BASIS/ISSUE/ RESULT	COMMENTARY
<u>EEOC v. Bashas' Inc.</u>	U.S. Court of Appeals 9th Circuit 12-15238	05/29/2012	Title VII	Subpoena Enforcement Confidentiality order	<p><b>Background:</b> The EEOC appealed the district court's entry of a confidentiality order that contains restrictions regarding the EEOC's use and disclosure of information that it obtained during the investigative process.</p> <p><b>Issue on Appeal:</b> Whether the district court abused its discretion in issuing a confidentiality order that is broader than the statutes and regulations governing the confidentiality of the EEOC's investigation?</p> <p><b>EEOC's Position on Appeal:</b> The EEOC contends that the confidentiality order was overly broad. The EEOC argues that the confidentiality restrictions set forth by the Freedom of Information Act and Title VII are sufficient to protect defendant's confidentiality concerns and the restrictions set forth by the district court in the confidentiality order hinder its investigation.</p> <p><b>Status of Appeal:</b> The appeal is currently pending.</p>

APPENDIX C – FY 2012 SELECT EEOC-RELATED DISPOSITIVE DECISIONS BY CLAIM TYPE(S)<sup>4</sup>

CLAIM TYPE(S)	DEFENDANT(S)	COURT AND CASE NO.	CITATION	MOTION	GENERAL ISSUES	COMMENTARY
Age Discrimination Disability Discrimination	DynMcDermott Petroleum Operations Company	U.S.D.C. Eastern District of Texas No. 10-cv-510	2012 U.S. Dist. LEXIS 19092 (E.D. Tex. Feb. 15, 2012)	Employer's Motion for Summary Judgment	<ol style="list-style-type: none"> <li>Whether the employer should be granted summary judgment as to the EEOC's age discrimination claim?</li> <li>Whether the employer should be granted summary judgment as to the EEOC's disability discrimination claim?</li> </ol>	The employer's motion was granted. The court granted the employer's summary judgment motion on all counts. The court reasoned that despite comments made by a supervisor, who was initially involved in the interview/hiring process, that were ageist and could be construed as derogatory toward the charging party's wife's disability, because the employer removed the supervisor who made the remarks from the hiring process upon learning of the remarks, the employer's decision to hire a younger candidate for the position was not tainted by discriminatory intent. The court analyzed the evidence presented under the <i>Gross v. FBL Fin. Svcs., Inc.</i> , 557 U.S. 167 (2009) but-for standard for the ADEA claim and the mixed motive standard for the ADA claim and concluded that summary judgment was appropriate for the employer on all counts.
Age Discrimination Retaliation	RadioShack Corporation	U.S.D.C. District of Colorado No. 10-cv-02365	2012 U.S. Dist. LEXIS 83779 (D. Co. June 18, 2012)	Employer's Motion for Summary Judgment	<ol style="list-style-type: none"> <li>Whether the employer should be granted summary judgment as to the EEOC's age discrimination claim?</li> <li>Whether the employer should be granted summary judgment as to the EEOC's retaliation claim?</li> </ol>	The employer's motion was denied in its entirety. The court found that a reasonable juror could conclude that the employer's reasons for terminating the complainant were pretextual because of the following inconsistencies: (a) the employer terminated him before the expiration of his performance improvement plan, (b) the employer failed to follow its own protocol during the investigation of the complainant's internal discrimination complaint, (c) the employer failed to discipline younger district managers whose performance and productivity were measured below complainant's, and (d) the complainant's supervisors offered conflicting testimony regarding his employment and performance. The court also denied summary judgment on the retaliation claim because of: (1) the close timing between his complaint of discrimination and termination (5 days) and (2) the evidence of pretext discussed in the discrimination analysis.

<sup>4</sup> The summary contained in Appendix C reviews select reported court opinions ruling on dispositive motions in litigation where the EEOC is a party. For purposes of this appendix, opinions are organized by claim type(s) as the opinions selected for this Appendix addressed merits-based dispositive motion filings as opposed to procedural, statute of limitations or other dispositive motion filings.



CLAIM TYPE(S)	DEFENDANT(S)	COURT AND CASE NO.	CITATION	MOTION	GENERAL ISSUES	COMMENTARY
Age Discrimination	Town of Elkton	U.S.D.C. District of Maryland No. 10-2541	2012 U.S. Dist. LEXIS 98193 (D. Md. July 13, 2012)	Employer's Motion for Summary Judgment	Whether the employer should be granted summary judgment as to the EEOC's age discrimination claim?	The employer's motion for summary judgment was denied in its entirety because the court found that a reasonable juror could determine that the employer's reason for terminating the complainant's employment (poor performance) had inconsistencies, and was thus pretextual. The court highlighted the following inconsistencies in the employer's legitimate business reason: (a) the complainant was given every raise he was eligible for, (b) the complainant's department received several awards under his leadership, and (c) the complainant received positive annual reviews.
Disability Discrimination	United Airlines	U.S. Court of Appeals for the Seventh Circuit No. 11-1774	2012 U.S. App. LEXIS 18804 (7th Cir. Sept. 7, 2012)	EEOC's appeal of the Employer's Motion to Dismiss Pursuant to 12(b)(6)	Whether the district court's dismissal of the EEOC's reasonable accommodation claim was erroneous?	The EEOC's motion to reverse and remand was granted. The court held that the district court's interpretation of the term "reassignment" was incorrect in light of the Supreme Court's opinion in <i>U.S. Airways, Inc. v. Barnett</i> , 535 U.S. 391 (2002). The decision corrected the 7th Circuit jurisprudence and held that the ADA mandates that an employer appoint employees with disabilities to vacant positions for which they are qualified, provided that such accommodations would be ordinarily reasonable and would not present an undue hardship. The court further held that preference should be given to a minimally qualified disabled employee over a more qualified non-disabled candidate for a given position as long as it does not present an undue hardship or run afoul of a collective bargaining agreement. <sup>5</sup>
Disability Discrimination (Failure to Accommodate)	Journal Disposition Corporation	U.S.D.C. Western District of Michigan No. 10-cv-886	2011 U.S. Dist. LEXIS 124177 (W.D. Mich. Oct. 27, 2011)	Employer's Motion for Summary Judgment	1. Whether the employer was entitled to summary judgment on the EEOC's failure to accommodate claim?  2. Whether the employer was entitled to summary judgment on the EEOC's request for injunctive relief?	The employer's motion was granted in part, and denied in part. The court denied the employer's motion for summary judgment on the failure to accommodate claim because genuine issues of material fact existed that had to be decided by the jury. The court granted summary judgment for the employer as to the EEOC's requested injunctive relief and dismissed the Commission's request for injunctive relief as the employer was no longer in business and therefore injunctive relief was not available.

<sup>5</sup> Peter Petesch, *Seventh Circuit Reverses Itself on Reassignments as a Reasonable Accommodation Under the ADA (or "Humiston-Keeling: An Appreciation")*, Littler ASAP (Sept. 12, 2012), available at <http://www.littler.com/publication-press/publication/seventh-circuit-reverses-itself-reassignments-reasonable-accommodation>.

CLAIM TYPE(S)	DEFENDANT(S)	COURT AND CASE NO.	CITATION	MOTION	GENERAL ISSUES	COMMENTARY
Disability Discrimination	Resources for Human Development d/b/a Family House of Louisiana	U.S.D.C. Eastern District of Louisiana No. 10-3322	2011 U.S. Dist. LEXIS 140678 (E.D. La. Dec. 7, 2011)	Employer's Motion for Summary Judgment	<ol style="list-style-type: none"> <li>Whether the ADA protects severely obese employees?</li> <li>Whether the employer was entitled to summary judgment on the EEOC's disability discrimination claim?</li> </ol>	The court denied the employer's motion for summary judgment. The court found that severe obesity is a disability under the ADA and the complainant was not required to prove an underlying physiological basis. Complainant was also disabled as a result of the diabetes and heart problems associated with the severe obesity. The court found there was a genuine issue of material fact concerning the reason the complainant's employment was terminated. On the one hand, the employer argued that the complainant's "weight limited her job performance and that was the reason for her termination." <i>EEOC v. Resources for Human Development, Inc. d/b/a Family House of Louisiana</i> , 2011 U.S. Dist. LEXIS 140678 at *30 (E.D. La. Dec. 7, 2011). On the other hand, the complainant argued that "she was discriminated against due to a perceived disability and that [the employer] failed to make 'reasonable accommodations,' as required by the ADA." 2011 U.S. Dist. LEXIS 140678, at **30-31(E.D. La. Dec. 7, 2011).
Disability Discrimination (Failure to Accommodate)	AT&T Mobility Services LLC	U.S.D.C. Eastern District of Michigan No. 10-13889	2011 U.S. Dist. LEXIS 144195 (E.D. Mich. Dec. 15, 2011)	Employer's Motion for Summary Judgment	Whether the employer was entitled to summary judgment on the EEOC's failure to accommodate claim?	The court granted the employer's motion for summary judgment. The complainant, who worked as a store manager for the employer, was restricted by her physician from working in excess of 40 hours per week and from standing or walking for more than two hours at a time. The complainant's physician indicated these restrictions were permanent and could not be lifted. According to the employer: (a) working 40 hours per week was an essential function of the position, (b) shifting the essential functions of a position on to another employee is not a reasonable accommodation, and (c) it satisfied its obligations under the ADA by giving the complainant a 30-day period to find a vacant position for which she is qualified. The court agreed with each of these contentions in granting the employer's motion.

CLAIM TYPE(S)	DEFENDANT(S)	COURT AND CASE NO.	CITATION	MOTION	GENERAL ISSUES	COMMENTARY
Disability Discrimination	Dillard's Inc. and Dillard Store Services, Inc.	U.S.D.C. Southern District of California No. 08-cv-1780	2012 U.S. Dist. LEXIS 16945 (S.D. Cal. Feb. 9, 2012)	Employer's Motion for Summary Judgment	<ol style="list-style-type: none"> <li>Whether the employer was entitled to summary judgment on the EEOC's disability discrimination claim?</li> <li>Whether the employer's inquiries regarding the nature of the complainant's absences and medical condition constituted disability discrimination?</li> </ol>	<p>The court denied the employer's summary judgment motion on the EEOC's claim that an attendance policy that required an employee to disclose the nature of an absence and the condition being treated constituted a prohibited inquiry under 42 U.S.C. § 12112(d)(4)(A). Pursuant to 42 U.S.C. § 12112(d)(4)(A), "a covered entity shall not ... make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity." Nonetheless, "[a] covered entity may make inquiries into the ability of an employee to perform job-related functions." § 12112(d)(4)(B). According to the employer's policy, an employee's health-related absence would not be excused unless the employee submitted a doctor's note stating "the nature of the absence (such as migraine, high blood pressure, etc.)" The court ultimately found that the EEOC could move forward with its claim under 42 U.S.C. § 12112(d)(4)(A). Further, the court denied the employers' motion for summary judgment on the EEOC's claim for compensatory damages, finding they may be awarded under 42 U.S.C. §1981a. The court also denied the employer's motion for summary judgment on the EEOC's claim for punitive damages, finding genuine issues of material fact regarding whether the employer engaged "in discriminatory practice ... with malice or with reckless indifference ..." <i>EEOC v. Dillard's Inc. et al, Inc.</i>, 2012 U.S. Dist. LEXIS 16945, at *21 (S.D. Cal. Feb. 9, 2012). Lastly, the court denied the employers' motion for summary judgment on the EEOC's claim for injunctive relief, finding that the employer has failed to demonstrate it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." 2012 U.S. Dist. LEXIS 16945, at *24 (S.D. Cal. Feb. 9, 2012).</p>

CLAIM TYPE(S)	DEFENDANT(S)	COURT AND CASE NO.	CITATION	MOTION	GENERAL ISSUES	COMMENTARY
Disability Discrimination	Greater Baltimore Medical Center, Inc.	U.S. Court of Appeals for the Fourth Circuit No. 11-1593	2012 U.S. App. LEXIS 7851 (4th Cir. April 17, 2012)	Employer's Motion for Summary Judgment	Whether the district court's granting of the employer's motion for summary judgment should be affirmed?	District court's granting of summary judgment for the employer affirmed. The complainant's representation to SSDI that he was totally disabled could not be reconciled with his contention that he was "disabled" ( <i>i.e.</i> , a qualified individual with a disability who could work with or without a reasonable accommodation) under the ADA and therefore summary judgment was appropriate under <i>Cleveland v. Policy Mgmt. Systems Corp.</i> , 526 US 795 (1999). The court rejected the EEOC's argument that <i>Cleveland</i> could not apply to enforcement actions like this one, concluding that the EEOC has the same factual burden as would the employee pursuing his own ADA claim in federal court.
Disability Discrimination (Failure to Accommodate)	Western Trading Company, Inc.	U.S.D.C. District of Colorado No. 10-cv-02387	2012 U.S. Dist. LEXIS 58962 (D. Col. April 27, 2012)	Employer's Motion for Summary Judgment	<ol style="list-style-type: none"> <li>1. Whether, the employer was entitled to summary judgment on the EEOC's claim of disability discrimination?</li> <li>2. Whether the employer was entitled to summary judgment on the EEOC's claim of failure to accommodate?</li> <li>3. Whether the employer was entitled to summary judgment on the EEOC's claim that it had improperly commingled the employee's personnel and medical records?</li> </ol>	The employer's motion was denied. The court denied the employer's motion for summary judgment because genuine issues of material fact existed regarding whether the employee suffered an adverse employment action when he was sent home each time he had a seizure; whether the employer failed to engage in good faith in the interactive process to accommodate the employee's disability; and whether the employer co-mingled personnel and medical records in violation of the ADA.

CLAIM TYPE(S)	DEFENDANT(S)	COURT AND CASE NO.	CITATION	MOTION	GENERAL ISSUES	COMMENTARY
Disability Discrimination (Failure to Accommodate)	United Road Towing, Inc.	U.S.D.C. Northern District of Illinois No. 10-c-6259	2012 U.S. Dist. LEXIS 70203 (N. Ill. May 11, 2012)	Employer's Motion for Partial Summary Judgment as to all Employees not Identified in EEOC's Reasonable Cause Determination Letter	Whether the EEOC's class claims on behalf of 17 employees, who were not identified by the EEOC at the charge stage, should be dismissed for failure to investigate or failure to conciliate?	<p>The court denied the employer's motion for summary judgment and dismissal of the 17 class members who were not identified by EEOC during the charge process or conciliation efforts in relation to ADA claims premised on the employer's: medical leave policy; failure to accommodate; and failure to rehire persons with disabilities. The EEOC's determination letter and conciliation efforts mentioned only two complainants and a "class of disabled individuals." With respect to the underlying investigation, the court noted that the Seventh Circuit had ruled that courts have no business limiting a suit to claims that the court finds to be supported by the evidence contained in the Commission's investigation (citing to <i>EEOC v. Caterpillar, Inc.</i>, 409 F.3d 831, 833 (7th Cir. 2005)). With respect to conciliation efforts, the court acknowledged that the Seventh Circuit has not ruled on the applicable standard (<i>i.e.</i>, "deferential" or "heightened scrutiny"), but held that under either standard, the conduct of the EEOC was sufficient to establish good faith conciliation and that any break downs in the process could be attributed to both the employer and the EEOC. For example, the EEOC's determination letters clearly indicated that the scope of the claims was broader than the claims related to the employer's medical leave policy. Rather than request more information or clarification when it received the EEOC's \$2 million settlement demand, the employer simply terminated the conciliation. In light of the conciliation concerns, however, the court stayed the instant action for 14 days to permit the parties to discuss a resolution.<sup>6</sup></p> <p><b>[Note: This case was removed from Lexis at the court's request on June 6, 2012. The court entered a consent decree ending the litigation on June 20, 2012, whereby the employer paid \$380,000 to 13 claimants and provided other relief resolving the lawsuit.]</b></p>

<sup>6</sup> The *United Road Towing, Inc.* case is discussed in more detail in the "Conciliation" section of the Report at *supra* section IV.D.3.

CLAIM TYPE(S)	DEFENDANT(S)	COURT AND CASE NO.	CITATION	MOTION	GENERAL ISSUES	COMMENTARY
Disability Discrimination	Eckerd Corp. d/b/a Rite Aid Corp.	U.S.D.C. Northern District of Georgia No.10-cv-2816	2012 U.S. Dist. LEXIS 91370 (N.D. Ga. July 2, 2012)	Employer's Motion for Summary Judgment and the EEOC's Motion for Partial Summary Judgment	<ol style="list-style-type: none"> <li>Whether the complainant was a "qualified individual?"</li> <li>Whether the requested accommodation for the complainant to be permitted to sit for half an hour per hour as a cashier constituted an undue burden to the employer?</li> </ol>	Granted as to the employer's motion; denied as to the EEOC's partial motion for summary judgment. Court held that the complainant was not a "qualified individual" under the ADA because she could not perform the essential functions of the job (e.g., walking customers to a department, cleaning, stocking shelves, unloading trucks, implementing price changes, etc.) with or without a reasonable accommodation. In light of these job duties, the court further held that complainant's request to sit every half an hour was an undue burden because standing and walking around the store were fundamental requirements of the position.
National Origin Discrimination Hostile Work Environment Harassment (National Origin) Constructive Discharge Race Discrimination Retaliation	Spitzer Management, Inc.	U.S.D.C. Northern District of Ohio No. 06-2337	2012 U.S. Dist. LEXIS 44686 (N.D. Ohio March 26, 2012)	Employer's Motion for Summary Judgment	Whether summary judgment should be granted for the employer as to all claims?	The employer's motion was granted in part and denied in part. The district court reviewed the fact-specific claims of hostile work environment, constructive discharge, race discrimination, and retaliation for each of the 5 complainants, finding for the most part that genuine issues of fact remained for a jury to decide. Only in two instances did the district court find that the employer's motion for summary judgment was appropriate: (1) where the conduct alleged by a particular claimant did not meet the severe and pervasive standard necessary to support a claim for hostile work environment, and (2) where the record did not support a finding that another claimant's <i>prima facie</i> case had been satisfied with respect to his race discrimination claim.
National Origin Discrimination Sexual Harassment	RJB Properties, Inc. ("RJB") Blackstone Consulting Inc. ("BCI")	U.S.D.C. Northern District of Illinois No. 10-c-2001	2012 U.S. Dist. LEXIS 56138 (N.D. Ill. April 23, 2012)	RJB's Motion for Summary Judgment on all National Origin Claims; BCI's Motion for Summary Judgment on the Basis that it did not Employ Any of the Complainants	<ol style="list-style-type: none"> <li>Whether summary judgment should be granted for RJB as to all national origin discrimination claims?</li> <li>Whether BCI should be dismissed from the case because it did not employ any of the complainants?</li> </ol>	<p>BCI's motion was granted in its entirety as the court held that it did not employ any of the complainants.</p> <p>RJB's motion was granted in part and denied in part. The court granted RJB's motion for summary judgment as to all claims for failure to promote that were premised on the theory that Hispanic employees were assigned from "call-in" positions to permanent positions at a slower rate than African American employees. The EEOC was permitted to proceed on national origin discrimination claims based on termination decisions on behalf of six employees; a national origin harassment claim on behalf of two employees; a retaliation claim on behalf of two employees; and a sexual harassment claim on behalf of one employee.</p>

CLAIM TYPE(S)	DEFENDANT(S)	COURT AND CASE NO.	CITATION	MOTION	GENERAL ISSUES	COMMENTARY
Pregnancy Discrimination	Houston Funding II, Ltd.	U.S.D.C. Southern District of Texas No. 11-2442	2012 U.S. Dist. LEXIS 13644 (S.D. Tex. Feb. 2, 2012)	Employer's Motion for Summary Judgment	Whether the employer should be granted summary judgment as to the EEOC's claim that the complainant was discriminated on the basis of her sex for requesting to pump breast milk at work?	The court granted the employer's motion for summary judgment. The EEOC alleged that even if the employer claimed that the complainant was terminated for job abandonment, it was pretext for the real reason – the complainant wanted to pump breast-milk. The court held that lactation is not pregnancy, childbirth, or a related medical condition. Thus, the day plaintiff gave birth, she was no longer pregnant and her pregnancy-related conditions ended. The court concluded that "firing someone because of lactation or breast pumping is not sex [or pregnancy] discrimination." 2012 U.S. Dist. LEXIS 13644, at *4 (S.D. Tex. Feb. 2, 2012).
Race Discrimination	CSX Transportation, Inc.	U.S.D.C. Southern District of Ohio No. 10-cv-667	2012 U.S. Dist. LEXIS 3404 (S.D. Ohio Jan. 11, 2012)	Employer's Motion for Summary Judgment	Whether the employer should be granted summary judgment as to the EEOC's claim that the complainant was terminated because of his race?	The court denied the employer's motion for summary judgment. With respect to the race discrimination claim, the EEOC presented evidence from which a reasonable fact finder could conclude that the employer's reason for terminating the African American complainant was pretextual. The court held that the complainant's termination for a safety violation raised questions because the employer did not terminate a similarly situated Caucasian employee engaging in the same safety violation on two prior occasions.
Race Discrimination	Kansas City Southern Railway Co.	U.S. Court of Appeals for the Fifth Circuit No. 09-30558	2012 U.S. App. LEXIS 6079 (5th Cir. March 23, 2012)	Employer's Motion for Summary Judgment	Whether the Fifth Circuit should affirm the district court's granting of the employer's summary judgment motion as to all complainants?	The district court's decision affirmed in part and reversed in part. The circuit court affirmed the district court's decision with respect to two of the four African American complainants because the EEOC failed to establish a <i>prima facie</i> case of race discrimination. The Fifth Circuit reversed the district court's decision as to the other two employees. While the EEOC set forth a <i>prima facie</i> case by presenting similarly situated Caucasian employees who were not as severely disciplined for comparable violations, the employer failed to produce admissible evidence of legitimate, nondiscriminatory reasons for its disciplinary actions. Thus, a jury question existed as to whether the decisions to discipline the other two employees were impermissibly based on race. The case was remanded for trial before the district court with respect to those remaining employees.

CLAIM TYPE(S)	DEFENDANT(S)	COURT AND CASE NO.	CITATION	MOTION	GENERAL ISSUES	COMMENTARY
Race Discrimination National Origin Discrimination	Dart Container Corporation	U.S.D.C. Eastern District of Pennsylvania No. 08-5535	2012 U.S. Dist. LEXIS 76284 (E.D. Pa. May 31, 2012)	Employer's Motion for Summary Judgment	Whether the employer should be granted summary judgment as to the EEOC's failure to promote claims based on race and national origin?	The employer's motion for summary judgment was granted. The court held that the EEOC failed to establish pretext in support of the complainant and two class members' claims for failure to promote premised on race and/or national origin. The court found that the complainants could not establish pretext for the following reasons: (a) the alleged comparator was not similarly situated, (b) the comparator was a stronger candidate, and (c) one of the positions was a lateral transfer, not a promotion. Thus, no reasonable juror could conclude that the employer's legitimate business reasons were pretextual.
Racial Harassment	Xerxes Corporation	U.S.D.C. District of Maryland No. CCB-08-1882	2011 U.S. Dist. LEXIS 125333 (D. Md. Oct. 28, 2011)	Employer's Motion for Summary Judgment	Whether the employer should be granted summary judgment as to the EEOC's claim of racial harassment?	The court granted the employer's motion for summary judgment. The EEOC alleged that African American employees were subjected to racial harassment by their co-workers at various times between 2005 and 2008. The court granted summary judgment to the employer, finding it took reasonable and effective remedial action once it had notice of the offensive and discriminatory conduct.  The court further found that the racial slurs and pranks alleged to have occurred prior to February 2006 were not part of a single hostile environment extending through the acts that occurred in April and June 2007 because they were not filed in a timely fashion with the EEOC. The court reasoned that only if the entire series of acts from 2005 through 2007 were part of the same unitary hostile environment claim, with no sufficient intervening action by the employer, could the 2007 EEOC charges permit suit on the otherwise time-barred acts in 2005. The court found that the employer took effective remedial measures, which created a significant gap in time between inappropriate incidents (one year with respect to pranks and two years with respect to inappropriate comments). Thus, the court determined that because "the abhorrent messages found by [the African-American employees] in their lockers in April and June 2007 were 'of a much different character' than the prior racial slurs and pranks [from 2005], there was no reason to believe the same co-workers were involved, and there was no evidence these incidents occurred because the actions [the employer] took in 2006 were inadequate." <i>EEOC v. Xerxes Corp.</i> , 2011 U.S. Dist. LEXIS 125333, at *4 (D. Md. Oct. 28, 2011).



CLAIM TYPE(S)	DEFENDANT(S)	COURT AND CASE NO.	CITATION	MOTION	GENERAL ISSUES	COMMENTARY
Retaliation	Cognis Corporation	U.S.D.C. Central District of Illinois No. 10-cv-2182	2011 U.S. Dist. LEXIS 142334 (C.D. Ill. Dec. 12, 2011)	Employer's Motion for Summary Judgment	Whether the employer should be granted summary judgment as to the EEOC's retaliation claim?	The court denied the employer's motion for summary judgment. The court found that there were genuine issues of material fact which precluded summary judgment. The court held that a jury could find a causal connection between the intervening complainant's protected activity of revoking a Last Chance Agreement ("LCA"), which restrained his civil rights, and his termination. The court also found that there was sufficient legal support to conclude that the employer's threat of retaliation contained in its LCAs constituted a retaliatory policy under Title VII. The court granted the intervening complainant's motion for leave to file a motion for summary judgment solely on the issue of liability.
Retaliation	Cognis Corporation	U.S.D.C. Central District of Illinois No. 10-cv-2182	2012 U.S. Dist. LEXIS 71870 (C.D. Ill. May 23, 2012)	EEOC's and Intervening Complainant's Motion for Summary Judgment	Whether the EEOC should be granted summary judgment on the basis that the employer's Last Chance Agreement contains provisions that constitute unlawful retaliation?	The EEOC's and the intervening complainant's motions for summary judgment were granted in part and denied in part. The EEOC and the complainant advanced two theories of retaliation. The first theory was that one of the complainants engaged in a protected activity by challenging and revoking the Last Chance Agreement ("LCA") and was then terminated in retaliation for this action. The second theory was that the act of requiring the complainant and the other employees to agree to the terms of the LCA in lieu of termination constituted prohibited retaliation. As to their first theory, the court found that there was direct evidence of retaliation and that there was no genuine issue of material fact. As such, the EEOC and that complainant were entitled to judgment as a matter of law on that claim. As to the second theory, the court found that because there was a genuine issue of material fact relating to whether the employer anticipated protected activity when it offered LCAs, summary judgment would be inappropriate.
Retaliation	Moreland Auto Group And Kid's Financial, Inc., and Brandon Financial	U.S.D.C. District of Colorado No. 11-cv-01512	2012 U.S. Dist. LEXIS 83783 (D. Col. June 18, 2012)	Defendants' Motion for Summary Judgment  EEOC's Motion for Additional Discovery	Whether the court should consider the defendants' motion for summary judgment on the grounds that they are not an integrated enterprise with the employer or permit further discovery on the issue to be taken by the EEOC?	The court granted the EEOC's motion and denied the defendants' motions for summary judgment without prejudice. The court held that the EEOC was entitled to conduct further discovery concerning its business relationship between the defendants. The parties were ordered to resolve the discovery dispute before the court would entertain the defendants' motions for summary judgment on the grounds that they were not the complainant's employer.

CLAIM TYPE(S)	DEFENDANT(S)	COURT AND CASE NO.	CITATION	MOTION	GENERAL ISSUES	COMMENTARY
Retaliation	Moreland Auto Group, And Kid's Financial, Inc., and Brandon Financial	U.S.D.C. District of Colorado No. 11-cv-1512	2012 U.S. Dist. LEXIS 100863 (D. Col. July 20, 2012)	Defendants' Renewed Motion for Summary Judgment	Whether the defendants established that they are not an integrated enterprise with the employer and therefore are entitled to summary judgment?	The court denied the defendants' motion for summary judgment on the grounds that the operations of the defendants were part of an integrated enterprise. Courts look at the following factors to determine whether parties are part of an integrated enterprise: (a) interrelations of operation; (b) common management; (c) centralized control of labor relations; (d) and common ownership and financial control. The EEOC demonstrated the following factors: (a) defendants operations were interrelated because they were located on the same property and maintained a lease with the employer, (b) the employer was involved in the other defendants' personnel matters, and (c) the same individuals control the finances of the defendants and the employer. Thus, the EEOC adequately satisfied the single-employer test.

CLAIM TYPE(S)	DEFENDANT(S)	COURT AND CASE NO.	CITATION	MOTION	GENERAL ISSUES	COMMENTARY
Retaliation Sexual Harassment	Safelite Glass Corp.	U.S.D.C. Eastern District of North Carolina No. 10-cv-102	2012 U.S. Dist. LEXIS 112042 (E.D.N.C. Aug. 9, 2012)	Employer's Motion for Summary Judgment	Whether the employer should be granted summary judgment as to the EEOC's claim of race discrimination?	The employer's motion was denied in part and granted in part. The court denied the employer's summary judgment motion as to complainant's claims of (1) retaliation in violation of Title VII, (2) hostile work environment under Title VII, and (3) wrongful discharge in violation of public policy. The court found that there was sufficient evidence from which a fact finder could determine that the alleged harassing conduct occurred (e.g., several lewd comments and inappropriate touching of the complainant on more than one occasion) and caused complainant's employment to be terminated. Specifically, complainant offered testimony that she complained to management about the alleged harassing conduct by her supervisor just days before her employment was terminated. Complainant also offered evidence that her supervisor said that he was disappointed in her because she complained about him to management. The court, however, granted the employer's motion for summary judgment as to complainant's North Carolina state law claims of intentional and negligent infliction of emotional distress against both defendants because the evidence showed that complainant's emotional distress stemmed only from her termination, and under North Carolina jurisprudence, retaliatory termination does not rise to the level of extreme and outrageous conduct. The court also granted the employer's motion for summary judgment as to complainant's North Carolina state law claim of wrongful discharge against individual defendant since such a claim is not viable against a supervisor. Lastly, complainant's husband's loss of consortium claim survived only as to complainant's wrongful discharge claim against defendant Safelite.

CLAIM TYPE(S)	DEFENDANT(S)	COURT AND CASE NO.	CITATION	MOTION	GENERAL ISSUES	COMMENTARY
Sexual Harassment Retaliation	Fry's Electronics, Inc.	U.S.D.C. Western District of Washington No. 10-1562	2012 U.S. Dist. LEXIS 80677 (W.D. Wash. June 11, 2012)	Employer's Motion for Partial Summary Judgment	<ol style="list-style-type: none"> <li>Whether the EEOC could pursue claims of sexual harassment on behalf of a complainant who never filed a charge of sexual harassment and whose allegations arose from the EEOC's investigation into a retaliation charge?</li> <li>Whether the employer was entitled to summary judgment on the EEOC's claims for sexual harassment based on the merits of the claims?</li> </ol>	The employer's motion was denied in its entirety. The court rejected the employer's "failure to exhaust" argument because the complainant's hostile work environment arose from and was related to her underlying claims, which were investigated by the EEOC. Under Ninth Circuit precedent, the court held that the EEOC had provided the employer with adequate notice of the sexual harassment allegations during its investigation and an opportunity to conciliate them. The court also ruled that general issues of material fact precluded summary judgment on the merits of the sexual harassment claim.

CLAIM TYPE(S)	DEFENDANT(S)	COURT AND CASE NO.	CITATION	MOTION	GENERAL ISSUES	COMMENTARY
Sexual Harassment Retaliation	CRST Van Expedited, Inc.	U.S. Court of Appeals for the Eighth Circuit No. 09-3764 No. 09-3765 No. 10-1682	2012 U.S. App. LEXIS 9304 (8th Cir. May 8, 2012)	EEOC's Appeal of the District Court's Order Granting the Employer's Summary Judgment Motion and Appeal of Costs and Fees Award	<ol style="list-style-type: none"> <li>Whether the District Court's order dismissing the EEOC's class claims on behalf of 67 class members for failure to investigate and conciliate the claims should be affirmed?<sup>7</sup></li> <li>Whether the District Court's orders dismissing the EEOC's claims based on the underlying charges of various employees should be affirmed?<sup>8</sup></li> <li>Whether the employer's Lead Drivers served as supervisors for the employer's trainees or were merely the trainees' coworkers?</li> <li>Whether the District Court's award of attorneys' fees and costs as sanctions for the EEOC's failure to investigate and conciliate the 67 class members claims should be affirmed?<sup>9</sup></li> </ol>	<p>The circuit court affirmed in part and reversed in part the decision of the district court.</p> <p>The district court's decision to dismiss the claims of the 67 class members was affirmed because the EEOC failed to investigate and conciliate the complainants' claims. The court found that the EEOC abandoned its duties to investigate the claims at the charge stage and instead used civil discovery to add to the number of class members in the suit. The court further held that the EEOC's actions were impermissible and that because the administrative prerequisites were not satisfied as to these class members, their claims should be dismissed.</p> <p>The district court's dismissal of certain intervening complainants' claims and the EEOC's claims based on conduct that they allegedly suffered on grounds of judicial estoppel because of the complainants' failures to report their interest in the EEOC's lawsuit to the bankruptcy court presiding over their bankruptcy petitions was sustained as to the intervening complainants. The district court's decision on this issue was reversed as to the EEOC's claims premised on the intervening complainants because the EEOC was a plaintiff in its own right under §706 of Title VII.</p> <p>The Eighth Circuit affirmed the district court's holding that Lead Drivers were not supervisors and therefore the employer was not vicariously liable for any harassment that its Lead Drivers allegedly perpetrated against female trainees. It also affirmed the district court's conclusion that, as a matter of law, the alleged harassment was neither sufficiently severe nor pervasive to support a hostile work-environment claim, with the exception of one employee. The circuit court reversed the district court's award of costs and attorneys' fees because, based on its ruling, reversing certain summary judgment rulings, the employer was no longer a "prevailing defendant."</p>

<sup>7</sup> The failure to investigate and/or conciliate issues that arose in *CRST Van Expedited* are discussed in more detail in the "Conciliation" section of the Report at *supra* section IV.D.

<sup>8</sup> The issues that arose in *CRST Van Expedited* because of certain complainants' failures to disclose their interests in the EEOC's litigation to bankruptcy courts presiding over their bankruptcy petitions are discussed in more detail in the "Bankruptcy" section of the Report at *supra* section IV.I.

<sup>9</sup> The Eighth Circuit's decision to overturn the attorneys' fees award in *CRST Van Expedited* is discussed in more detail in the "Attorneys' Fees Awards" section of the Report *supra* section IV.L.

APPENDIX D – SUBPOENA ENFORCEMENT ACTIONS FILED BY EEOC FILED IN FY 2012<sup>10</sup>

FILING DATE	STATE	COURT NAME/CASE NUMBER/JUDGE/RESULT	DEFENDANT(S)	INDIVIDUAL CHARGING PARTY OR SYSTEMIC INVESTIGATION	COMMENTARY
10/4/2011	IL	USDC Northern District of Illinois 1:11-cv-06985 Elaine E. Bucklo/ Sidney I. Schenkier Withdrawn based on compromise between the EEOC and the employer.	Titan Wheel Corporation of Illinois	Individual	<p>Application for an order to show cause why subpoena should not be enforced stemming from a charge by a female former employee alleging claims of sexual harassment and constructive discharge. The employer's response to the charge stated that the claimant made no complaint of sexual harassment during her employment, and contended that the charge set forth no facts upon which it could investigate the charge. The EEOC sent the employer a request for information including: (1) the employer's sexual harassment and discrimination policies; (2) all documents relating to any complaints of sexual harassment/discrimination; (3) all documents relating to the charging party's FMLA leave; (4) the identities of all employees for the prior 2.5 years; and (5) interviews of 3 employees.</p> <p>The employer refused to provide the documents requested in items 1 and 4 without first being advised of the basis for the charge. The EEOC provided no additional information, and issued a subpoena for the documents. The employer filed a petition to revoke the subpoena on the basis of the unduly broad range of documents sought and argued the charge was deficient under 29 CFR 1601.12(3) (requiring a clear and concise statement of the facts constituting the alleged unlawful practices). The EEOC denied the petition to revoke the subpoena.</p> <p>The EEOC then filed a subpoena enforcement action. Rather than respond to the order to show cause, the employer filed a motion to dismiss or transfer to the Central District of Illinois, where the employer is based and where it had already filed an action seeking declaratory judgment and injunctive relief relating to the EEOC's enforcement of the same subpoena. The Northern District of Illinois denied transfer, relying primarily upon the fact that the EEOC was investigating from Chicago, in the Northern District.</p> <p>The EEOC later agreed to withdraw the enforcement action in exchange for the employer's agreement to produce contact information for employees who worked within the departments with which the alleged harasser routinely had contact.</p>

<sup>10</sup> The summary contained in Appendix D reviews all reported administrative subpoena enforcement actions filed by the EEOC in FY 2012. 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 action, the matters are resolved prior to issuance of a court opinion.

FILING DATE	STATE	COURT NAME/CASE NUMBER/JUDGE/RESULT	DEFENDANT(S)	INDIVIDUAL CHARGING PARTY OR SYSTEMIC INVESTIGATION	COMMENTARY
10/5/2011	IL	USDC Northern District of Illinois 1:11-cv-07018 Gary Feinerman Withdrawn based on employer compliance	City of Chicago, Department of Police	Individual	<p>Application for an order to show cause why subpoena should not be enforced arising out of a former custodian's charge of discrimination on the basis of his race, age, and criminal background. The EEOC subpoenaed documents showing: (1) all contracts between the employer and all vendors for custodial services for the prior approximately 5 years; (2) personal information and employment records for each custodian who underwent a background check for the prior five years; (3) the same information for each custodian for whom the employer police department did not run a background check or for whom the employer did not make a determination as to whether the employee passed or failed the background check; (4) all documents reviewed pursuant to each background check conducted for custodians; and (5) all documents reviewed pursuant to any background check in request number 4.</p> <p>The employer did not respond to the subpoena or file a Petition to Revoke or Modify Subpoena with the Commission. The EEOC filed an Application for an Order to Show Cause Why Subpoena Should Not Be Enforced. The parties later informed the court at a status hearing that the documents in question had been produced, and the court granted a joint oral motion to dismiss.</p>
10/28/2011	MI	USDC Eastern District of Michigan 2:11-mc-51372-UAR-RSW Victoria A. Roberts Withdrawn based on employer compliance	Computer Sciences Corporation	Individual	<p>Application for order to show cause why the EEOC's subpoena should not be enforced. Individual charging party alleged that employer failed to hire him because of his race. The EEOC subpoenaed, among other records: (1) the employer's policy on credit checks; (2) documents reflecting all reasons why the employer declined to hire the charging party, as well as the names, races, and job titles of all decision makers; (3) documents reflecting the name and race of the individual hired instead of the charging party; (4) documents reflecting the identity of all others not hired because of the same or similar reasons, including name, race, and date of rejection due to credit reasons; and (5) all documents reflecting the employer's reasons for the credit checks.</p> <p>The employer did not respond to the subpoena or file a Petition to Revoke or Modify Subpoena with the Commission. The EEOC filed an Application for Order to Show Cause, and two weeks later filed a Notice of Withdrawal, stating the employer had "substantially complied with the subpoena."</p>

FILING DATE	STATE	COURT NAME/CASE NUMBER/JUDGE/RESULT	DEFENDANT(S)	INDIVIDUAL CHARGING PARTY OR SYSTEMIC INVESTIGATION	COMMENTARY
11/3/2011	KY	USDC Eastern District of Kentucky 5:11-mc-00358-JMH Joseph M. Hood Enforcement denied	Nestle Prepared Foods	Individual	<p>Application for order to show cause why an administrative subpoena should not be enforced arising out of a former employee's charge alleging genetic information discrimination in connection with a fitness for duty evaluation which included a questionnaire addressing family medical history. The EEOC issued a subpoena seeking: (1) the name, address and telephone number of each physician to whom the employer referred individuals for physical or medical examinations; and (2) the name, date of application, if hired, date of hire, if not hired, reason(s) why, and if terminated, reason(s) for termination for each individual who submitted to a physical or medical examination at the employer's request.</p> <p>The employer failed to produce the subpoenaed information, objecting that the request was beyond the scope of the charge, exceeded the EEOC's enforcement and investigative authority, and sought information not in the employer's possession, custody, or control. The employer filed a Petition to Revoke Subpoena with the Commission, which was denied.</p> <p>The EEOC filed an Application for Order to Show Cause. In its Opposition, the employer argued that the subpoena was based on the incorrect legal assumption that employers violate GINA when private physicians who are not in any contractual relationship with the employer inquire about the family medical history of a patient referred by the employer, even when it is undisputed that the employer did not request, receive, or use the information about family medical history. Moreover, the employer argued, the individual charge of discrimination did not articulate any substantive GINA violation, but rather a violation of a GINA procedural regulation that was not even in effect at the time of the events giving rise to the alleged violation.</p> <p><i>Magistrate Judge's Report and Recommendation.</i> The magistrate judge recommended the EEOC's application for enforcement be granted, finding (1) a close examination of the merits of the GINA claim was premature at the investigative stage, and (2) the Sixth Circuit applies a broad standard of relevance to the scope of the EEOC's investigative authority. <i>EEOC v. Nestle Prepared Foods</i>, No. 5:11-mc-00358-JMH (E.D. Ky. April 26, 2012).</p> <p><i>Court's Opinion.</i> The district court determined the magistrate judge did not err in failing to consider the merits of the EEOC's agency argument or in finding that the employer had notice of its obligations under GINA, but it rejected the magistrate judge's recommendation based on its relevance analysis.</p>



FILING DATE	STATE	COURT NAME/CASE NUMBER/JUDGE/RESULT	DEFENDANT(S)	INDIVIDUAL CHARGING PARTY OR SYSTEMIC INVESTIGATION	COMMENTARY
					Specifically, the court reasoned there were no other charges against the employer alleging GINA violations, and the EEOC pointed to no other information it had acquired in the course of its investigation of the individual's charge that would suggest that any other violations had occurred. Thus, the district court found that the subpoenaed information (relating to the employer's facility-wide employment practices) was irrelevant. Accordingly, it denied the EEOC's application as well as the EEOC's subsequent motion for rehearing. <i>EEOC v. Nestle Prepared Foods</i> , No. 5:11-mc-00358-JMH (E.D. Ky. May 23, 2012).
12/9/2011	MI	USDC Eastern District of Michigan 4:11-cv-15410-MAG-MAR District Judge Mark A. Goldsmith; Magistrate Judge Mark A. Randon Administrative subpoena enforced	City of Detroit Police Department	Individual	<p>Application to show cause why the administrative subpoena should not be enforced arising out of a female former police officer's charge alleging hostile work environment sexual harassment and retaliation in connection with a disciplinary suspension. The EEOC issued a subpoena seeking: (1) the charging party's personnel file; (2) complaints filed against or by the charging party, including investigative documents, disciplines or other resolutions; (3) documents explaining why the charging party was suspended; and (4) a list of similarly situated employees who worked for the same supervisor who were suspended from 2008 forward.</p> <p>The employer did not respond to the subpoena or file a Petition to Revoke or Modify the Subpoena with the Commission. The EEOC filed an Application for Order to Show Cause. The employer did not file a written response to the EEOC's Application and from the court's docket it appears that the employer did not attend the show cause hearing. The court ruled that the subpoenaed documents were relevant to the underlying charge of discrimination, and ordered the employer to produce the requested documents within 14 days. The EEOC subsequently withdrew its motion, citing the employer's substantial compliance with the subpoena.</p>
1/4/2012	CA	USDC Northern District of California 3:12-mc-80001-JW Judge James Ware Administrative subpoena enforced	San Francisco Fire Department	Individual	<p>Application to show cause why the administrative subpoena should not be enforced stemming from fire department employee's charge alleging the employer's examination for Lieutenants caused a disparate impact based on age. The EEOC requested copies of the questions and answers to the examination, but the fire department refused, citing confidentiality. The EEOC issued a subpoena seeking all versions of the written examination and answers; the fire department refused to comply.</p> <p>The EEOC filed an Application for an Order to Show Cause. The employer did not file a response, and the court issued an order enforcing the subpoena. The parties submitted a Stipulated Protective Order to the court on March 8, 2012, which was entered by the court. There has been no further activity in the case since the entry of the protective order.</p>

FILING DATE	STATE	COURT NAME/CASE NUMBER/JUDGE/RESULT	DEFENDANT(S)	INDIVIDUAL CHARGING PARTY OR SYSTEMIC INVESTIGATION	COMMENTARY
1/6/2012	IN	USDC Southern District of Indiana 1:12-mc-00003-SEB-DKL Judge Sarah Evans Barker; Magistrate Judge Denise K. LaRue Withdrawn based on the employer's compliance.	Roll Coater, Inc.	Individual	<p>Application to show cause why the administrative subpoena should not be enforced arising out of individual former employee's charge of disability discrimination. The EEOC issued a subpoena seeking: (1) the collective bargaining agreements for each of the former employer's facilities; (2) a list of all employees at specific facilities who were refused an accommodation for a medical condition, discharged because of a disability or medical condition, or because of the results of a physical examination, or whose conditional offers of employment were withdrawn as a result of disqualifying physical examination findings; (3) lists of essential job functions used by the examining physicians contracted by the employer at the same facilities to determine whether employees met the physical criteria for employment; (4) a complete list of employees at the same facilities who were discharged or not hired within 30 days of suffering an on-the-job injury, or within 30 days of notification that the employee suffered such an injury; and (5) for each employee identified in requests 2 and 4, the employee's complete personnel and medical files.</p> <p>The employer objected to providing the requested information about facilities other than those at which the charging party worked, but nevertheless provided responses for the requested facilities that were unionized. The employer filed a Petition to Revoke or Modify the Subpoena with the Commission as to the requests pertaining to its non-unionized facilities, which was denied.</p> <p>The EEOC filed an Application for an Order to Show Cause, arguing the employer's practices at its non-unionized workforce were relevant to the investigation of the individual charge because its investigation uncovered evidence of a possible company-wide practice of not accommodating workers with disabilities.</p> <p>The employer responded to the show cause order by stating it would produce the requested information regarding the non-unionized facilities in question, and the parties settled their dispute. Thus, the case was dismissed upon the EEOC's filing of a Notice of Settlement.</p>

FILING DATE	STATE	COURT NAME/CASE NUMBER/JUDGE/RESULT	DEFENDANT(S)	INDIVIDUAL CHARGING PARTY OR SYSTEMIC INVESTIGATION	COMMENTARY
1/9/2012	AZ	USDC District of Arizona 2:12-mc-00001-SRB Judge Susan R Bolton Withdrawn based on the employer's compliance.	Dole Food Company, Inc.	Individual	<p>Application for an order to show cause why an administrative subpoena should not be enforced arising out of an individual employee's charge of discrimination alleging that he had been demoted because of his age and race. The EEOC subpoenaed, among other things, a list of all employees at the facility where the charging party worked prior to the employer's decision to suspend operations at that location, including various employment and identifying information.</p> <p>The employer initially provided only limited information in response to the request on the basis of burdensomeness and attempted to negotiate a more limited request. The employer did not file a Petition to Revoke or Modify the Subpoena with the Commission.</p> <p>The EEOC filed an Application for an Order to Show Cause. The employer responded that it would comply and produce all of the requested information. The parties later filed a joint motion for dismissal, which was granted by the court.</p>

FILING DATE	STATE	COURT NAME/CASE NUMBER/JUDGE/RESULT	DEFENDANT(S)	INDIVIDUAL CHARGING PARTY OR SYSTEMIC INVESTIGATION	COMMENTARY
1/10/2012	PA	USDC Western District of Pennsylvania 2:12-mc-00019-MRH Judge Mark R. Hornak Pending	Ruby Tuesday, Inc.	Systemic Investigation	<p>Application to show cause why the administrative subpoena should not be enforced arising out of EEOC's directed investigation into alleged systemic age discrimination in the employer's hiring practices. The EEOC's directed investigation was filed on the heels of the EEOC's finding of probable cause and subsequent initiation of a class action arising out of a charge alleging age discrimination in six of the employer's restaurants in Western Pennsylvania and Eastern Ohio. The EEOC's subpoena requested: (1) information concerning the electronic format the employer used to maintain all personnel information; and (2) electronic payroll and personnel data concerning non-management restaurant employees nationwide. The employer refused to produce the requested information, arguing the subpoena inappropriately attempted to obtain litigation discovery through an administrative investigation.</p> <p>The EEOC filed an Application for an Order to Show Cause, and the employer responded, reiterating its arguments concerning the pending class action, and also averring that the subpoena was overbroad and unduly burdensome. The employer then moved to transfer the case to the judge presiding over the pending class action, which motion the EEOC opposed on the premise that the directed investigation was nation-wide, while the class action was limited to the six stores it had investigated in connection with a separate inquiry. The employer's motion was later denied as moot when the pending class action was transferred to the district court judge presiding over the subpoena enforcement action. In late July, 2012, the parties concluded supplemental and reply briefing concerning the subpoena enforcement action. As of the date this publication went to print, the court had not yet ruled on the EEOC's motion for enforcement. A status conference is scheduled in this matter for January 8, 2013.</p>

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1/13/2012	AZ	USDC District of Arizona 2:12-mc-00007-GMS Judge G Murray Snow Administrative subpoena enforced	McLane Company, Inc.	Individual and Systemic Investigation	<p>Application to show cause why the administrative subpoena should not be enforced arising out of an individual employee's charge alleging the employer's physical capabilities exam ("PCE"), to which she was subject upon her return from maternity leave, unfairly discriminated on the basis of gender/pregnancy and disability. In connection with its investigation, the EEOC sought information on a nationwide basis, including information concerning the PCE's development and validation, all persons who took the PCE, all persons terminated, transferred, not hired, or not promoted based on the PCE, all applicants for employment at any facility that used the PCE, including applicants' dates of birth, all employees, including dates of birth and contact information. For every person identified in response to any of the subpoena items, the employer was also to provide the individual's date of birth. The employer provided some of the information requested by the Commission including information regarding job titles, job task analyses, information regarding how the test was developed, and some data regarding test passage, including the age of employees. However, the employer failed to provide lists of employees and applicants who were terminated, demoted, or not hired because they failed to pass the IPCS test. The employer objected to the provision of age-related information in light of the fact that no charge had been filed alleging age discrimination. It also objected to provision of information concerning other facilities where the charging party never worked.</p> <p>Though there is no indication the employer filed a Petition to Revoke or Modify the Subpoena, the EEOC did not argue that the employer was foreclosed from objecting to the subpoena based upon any failure to so file.</p> <p>The EEOC filed an Application for an Order to Show Cause. The employer responded that the EEOC's request was overbroad in geographic scope and with respect to age-related information. The EEOC replied that it had initiated its own directed investigation into possible age discrimination arising out of the employer's use of the PCE</p> <p><i>Court's Opinion.</i> The court held that the EEOC was empowered by the ADEA (29 U.S.C. § 626(a)) to initiate a nationwide investigation into whether the PCE had a disparate impact on the basis of age, and that the information subpoenaed was relevant to that inquiry. However, it ruled that the EEOC had not explained how the names, phone numbers, addresses, genders, and social security numbers of every employee who ever took the PCE were relevant to a generalized investigation into whether the test constitutes age discrimination.</p>

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					Accordingly, it ordered the employer's compliance with the EEOC's subpoena except with respect to contact and gender information of all employees who took the test. <i>EEOC v. McLane Company, Inc.</i> , No. 2:12-mc-00007-GMS (April 4, 2012).
1/30/2012	MI	USDC Eastern District of Michigan 2:12-mc-50104-DML-RSW District Judge David M. Lawson; Magistrate Judge R. Steven Whalen  Withdrawn based on the employer's compliance.	Greektown Casino, LLC	Individual	<p>Application to show cause why the administrative subpoena should not be enforced stemming from individual former employee's charge alleging a failure to accommodate and discriminatory termination in violation of the ADA arising out of the employer's refusal to provide the charging party with a transfer to another position (as opposed to an opportunity to apply for the other position) as an accommodation for his disability. In the course of its investigation, the EEOC identified five other employees who were denied transfer to accommodate a medical condition. The EEOC issued a subpoena demanding the employer produce the employees hire date, seniority date, date of request for accommodation, and the date the employee was offered the opportunity to apply for another position.</p> <p>The EEOC filed an Application to Show Cause. Soon after the court issued an order to show cause, the EEOC voluntarily dismissed the action, indicating the employer had complied with the subpoena.</p>

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2/7/2012	MD	USDC District of Maryland 1:12-cv-00369-MJG Judge Marvin J. Garbis Case dismissed based on court's <i>sua sponte</i> ruling that the issues had been resolved.	State of Maryland Department of Human Resources	Individual	<p>Application to show cause why the administrative subpoena should not be enforced arising out of an individual employee's charge alleging a claim of sexual harassment. The employer failed to respond to the EEOC's initial requests for a statement of position as well as its subsequent detailed information request.</p> <p>The EEOC filed an Application for an Order to Show Cause. Rather than respond to the order to show cause, the employer submitted an affidavit certifying it was in full compliance with the EEOC's subpoena. The EEOC then issued a Notice of Non-Compliance with Order and Request for Hearing, in which it asserted the employer failed to comply with portions of the EEOC's subpoena, including its demand for (1) documents related to any complaint made by the charging party, including the investigative record; (2) the employment status of the alleged harasser; and (3) a list of all employees of the department where the charging party worked with the alleged harasser. The employer then filed a second affidavit asserting: (1) it had no investigative documents because it failed to perform an investigation, purportedly in response to the complainant's assertion that she did not want action to be taken against her harasser, but merely wished to receive a transfer to another department; (2) the alleged harasser was employed by a separate entity, not the respondent employer; and (3) it had provided the requested data for a narrower list consisting of all employees who worked at the office at which the charging party and the alleged harasser worked together – the relevant subset of the information requested by the subpoena. Subsequently, without further filing or motion by either party, the court issued an order dismissing the case upon its finding that the issues had been resolved and the parties agreed dismissal was appropriate.</p>

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2/14/2012	MI	USDC Eastern District of Michigan 2:12-mc-50188-SJM-RSW District Judge Stephen J. Murphy, III; Magistrate Judge R. Steven Whalen Administrative subpoena enforced in part, modified in part, and enforcement denied in part.	Henry Ford Health System	Individual	<p>Application to show cause why the administrative subpoena should not be enforced arising out of an individual former employee's charge alleging the employer discriminated against her on the basis of her race by refusing to allow her to return to work from a leave of absence. The employer submitted a statement of position indicating that, because the charging party's position was no longer available at the end of her non-FMLA eligible medical leave, it converted her leave to a personal leave of absence so that she could apply for other positions. Then, upon the expiration of her one-year leave of absence, the employer terminated the charging party's employment. The charging party then amended her charge to include allegations of disability discrimination.</p> <p>The EEOC subpoenaed information, including: (1) every instance in which an employee was placed in a position for which the charging party would have been qualified during her period of medical or personal leave; (2) all application materials submitted for the same positions; (3) all communications between the charging party and employer during the charging party's medical and personal leave periods; (4) all employees placed on personal leave because they were unable to perform their job due to one or more medical conditions; and (5) all employees discharged for similar reasons as the charging party, including the medical condition(s) that rendered them unable to return from leave. The employer filed a Petition to Revoke or Modify the Subpoena with the Commission, which was denied.</p> <p>The EEOC filed an Application for an Order to Show Cause. The employer responded, contending that the underlying charges were meritless and, therefore, could not support the administrative subpoena; the subpoena was overbroad and sought information irrelevant to the charging party's allegations; and the information requested was protected by HIPAA and other privacy laws. The court held a hearing on the matter in April 2012, but did not enter judgment or otherwise resolve the matter.</p> <p><i>Court's Opinion:</i> On October 30, 2012, the district court entered an ordering granting in part and denying in part the EEOC's application. The court disposed of the employer's argument that the underlying claims were meritless noting that in an administrative subpoena enforcement action the court "is not permitted . . . to assess the likelihood that the EEOC will be able to prove the claims made." The court then addressed the employer's arguments that certain requests were not relevant, were overly burdensome, and/or were prohibited under HIPAA and state privacy laws.</p>



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					<p>Noting that the relevancy limitation on the EEOC's investigative authority "is not especially constraining." With the perspective in mind, the court enforced the Commission's requests relating to (1) the employer's filing of five different job classifications and (2) the identity of the members of the employer's recruitment team. The court denied enforcement of the EEOC's request that the employer identify all communication it had with the complainant from August 2008-August 2009, as the employer had already produced communications that it was aware of. The court modified a request to apply to the production of information related to employees who were permitted to return to work after exhausting their available leave and similarly modified another request to apply to the production of information related to employees who were discharged after exhausting their available leave. Finally, the court denied enforcement of a request for documentation "showing the nature of the medical condition," related to employees' leaves of absence.</p>
2/16/2012	MI	<p>USDC Eastern District of Michigan 2:12-mc-50225-VAR-MKM District Judge Victoria A. Roberts; Magistrate Judge Mona K. Majzoub Administrative subpoena enforced</p>	St. John Hospital & Medical Center	Individual	<p>Application to show cause why the administrative subpoena should not be enforced arising out of individual employee's charge alleging the employer had denied her request for a reasonable accommodation in violation of the ADA by failing to reassign her to another position and by, instead, placing her on a personal leave of absence. The employer refused to transfer the employee based on its policy that employees who have active corrective action are ineligible for transfer. The EEOC requested: (1) the names and contact information of all employees who were "subjected" to the employer's personal leave policy or discharged after failing to return from a leave of absence; (2) their "known disabilities;" (3) the reasons for their absences; and (4) the dates each person's leave began and ended. The employer refused, Arguing the requested information was irrelevant, unduly burdensome, and invasive of current and past employees' privacy rights, especially with respect to the provision of home contact information and disability related information.</p> <p>The EEOC then issued a subpoena in which it expanded its information requests by further asking for any and all documents related to any of the identified leaves of absence. The employer filed a Petition to Revoke or Modify the Subpoena with the Commission, which was denied.</p> <p>The EEOC filed an Application for an Order to Show Cause. The employer contended that the information sought was overbroad and unduly burdensome and would invade the privacy rights of its employees.</p>

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					<p><i>Magistrate Judge's Report and Recommendation.</i> The magistrate judge agreed with the EEOC and recommended the district judge issue an order enforcing the subpoena. The magistrate judge agreed with the EEOC that the employer's application of its discipline and personal leave policies was a legitimate subject of inquiry because its policies and practices provide a context for the charging party's claims. The magistrate judge further found that the scope of the EEOC's subpoena did not impose an undue burden but, rather, an "inconvenient distraction," given the employer's financial resources. Finally, the magistrate judge determined adequate measures exist to protect the confidentiality of employees' home contact and medical information, reasoning Title VII imposes criminal penalties for EEOC personnel who publicize information obtained in the course of investigating charges of employment discrimination. Additionally, the magistrate judge limited the charging party to see information only in her own file. <i>EEOC v. St. John Hospital &amp; Medical Center</i>, No. 2:12-mc-50225-VAR-LJM (S.D. Mich. June 1, 2012).</p> <p><i>Court's Opinion.</i> The district court adopted the magistrate judge's recommendation and enforced the EEOC's subpoena without further analysis. <i>EEOC v. St. John Hospital &amp; Medical Center</i>, No. 2:12-mc-50225-VAR-LJM (S.D. Mich. Sept. 7, 2012).</p>
2/23/2012	NY	USDC Southern District of New York 1:12-mc-00054-P1 Withdrawn based on the employer's compliance.	Hunt's Point Multiservice Center	Individual	<p>Application to show cause why the administrative subpoena should not be enforced stemming from an individual employee's charge alleging sex and national origin discrimination in connection with her rate of pay and denial of medical benefits. Despite the EEOC's repeated requests for a statement of position and other information, the employer never responded.</p> <p>The EEOC filed an Application for an Order to Show Cause. In response, the employer complied with the subpoena providing the EEOC with a position statement and the requested information. The EEOC withdrew its Application, as the employer had fully complied with the subpoena.</p>
2/24/2012	MO	USDC Eastern District of Missouri 4:12-mc-00139-JCH Judge Jean C. Hamilton Withdrawn based on the employer's compliance.	Kirkhuff Management, Inc. d/b/a McDonalds Restaurant	Individual	<p>Application to show cause why the administrative subpoena should not be enforced arising out of former employee's charge alleging disability discrimination. The EEOC issued repeated requests for a statement of position and specific information, to which the employer provided no response.</p> <p>The EEOC filed an Application for an Order to Show Cause. The court granted the EEOC's motion. Soon after, the EEOC filed for dismissal based on the employer's compliance.</p>

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3/7/2012	CA	USDC Northern District of California 3:12-mc-80074-CRB Judge Charles R. Breyer; Magistrate Judge Jacqueline Scott Corley Withdrawn based on the employer's compliance.	Huntington Restaurants, Inc. d/b/a Burger King	Individual	<p>Application to show cause why the administrative subpoena should not be enforced arising out of a female employee's charge alleging claims of sexual harassment, sex discrimination, and retaliation. The EEOC submitted repeated requests for a statement of position and other information. When the employer failed to provide all of the information requested, the EEOC subpoenaed, among other things: (1) the charging party's personnel file and any documents concerning the employer's investigation into her allegations; (2) a list of employees in the charging party's job classification, including sex, contact information, and, if applicable, reason for separation; (3) a list of employees in the charging party's position who received disciplinary action; (4) any other complaints of harassment; (5) a list of employees who worked in the charging party's department, with contact information; (6) any other complaints or investigations of sexual harassment; and (7) the training for which the charging party and the other employees in her department were considered or received.</p> <p>The EEOC filed an Application for an Order to Show Cause. The employer opposed the Application on numerous grounds contending that certain documents requested were: (1) covered by the California and federal "privacy privileges," (2) overbroad, and (3) subject to the attorney-client and attorney work product privileges. Specifically, the employer requested the court modify the subpoena to exclude copies of all formal or informal training evaluations, copies of tests taken and copies of all results of evaluations and/or test taken, which it argued were irrelevant to the question of whether the charging party received equal training opportunities in light of the fact that she was denied certain training altogether. The employer also requested the court exclude from the subpoena payroll records of all third-party employees who worked with the charging party on the bases that such request was overbroad, unduly burdensome, and irrelevant to the employee's allegations of sexual harassment, sex discrimination, and retaliation.</p> <p>The employer further argued that California's privacy laws, which prohibit disclosure of employees' personal information absent a "compelling" and opposing state interest, militated against production of private information from all third party employees who worked with the charging party. The employer also argued employees' personal information was protected by the "federal privacy privilege" in that it would open the door to government "cold calls" relating to those individuals' employment, and production should not be ordered absent a protective order.</p>

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					<p>Finally, the employer argued the information sought by the EEOC was protected by the attorney-client and attorney work product privileges, in that the employer's counsel conducted a detailed investigation and fact-finding inquiry into the allegations made by the charging party which constitutes privileged information and which falls under the categories of documents subpoenaed by the EEOC.</p> <p>Despite initially contesting the Application, however, the employer subsequently complied with the EEOC's information requests and the EEOC withdrew its Application.</p>
4/17/2012	GA	USDC Northern District of Georgia 1:12-mi-00057-TCB-GGB Judge Timothy C. Batten, Sr; Magistrate Judge Gerrilyn G. Brill	Royal Caribbean Cruises, Ltd.	Individual	<p>Application to show cause why the administrative subpoena should not be enforced stemming from a charge alleging a claim of disability discrimination under the ADA.</p> <p>The dispute arose from a charge of discrimination filed by an Argentinean foreign national employed on a cruise ship operated by the employer. Pursuant to its investigation, the EEOC issued an administrative subpoena seeking: (1) a list of all employees discharged from shipboard duty due to medical reasons because they were found unfit for sea under the regulations of the Bahamas Maritime Authority governing medical and eyesight standards for seafarers; (2) biographical and employment information for individuals on list; (3) employment application documents and information related documents for individuals discharged and identity/location for person making final hiring decision; (4) a list of persons who applied but were not hired due to medical reasons; (5) biographical and employment information for individuals not hired and identity/location for person making final hiring decision; (6) description of how employees are hired or considered for renewal of employment contracts, including identity/location for person making final hiring decisions; (7) all employment criteria or guidelines related to health or medical condition of applicants/employees; and (8) description of all business activities RCL conducted at its Miami, Florida office, including the names of the business departments located there.</p> <p>In response to the subpoenas, the employer provided all the information concerning U.S. citizens requested in categories 1-5, and provided without limitation the information requested in categories 6-8. The employer objected to the portions of categories 1-5 only to the extent they demanded information and documents pertaining to the shipboard employees or applicants who were foreign nationals.</p>
5/30/2012 (Transferred Date)	FL	USDC Southern District of Florida 1:12-mc-22014-JEM Judge Jose E. Martinez; Magistrate Judge Chris M. McAliley Pending			

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					<p>The EEOC filed an Application to Show Cause in the Northern District of Georgia. The court issued the order. Concurrently, the employer filed a motion to dismiss the subpoena enforcement action based on lack of jurisdiction and improper venue, or in the alternative transfer the action to the Southern District of Florida. The Northern District of Georgia granted the employer's motion to transfer to the Southern District of Florida.</p> <p>The employer then opposed enforcement of the portions of the subpoena(s) that required information pertaining to foreign nationals. It argued that the ADA does not apply to such individuals, and also claimed the subpoena was overbroad and compliance unduly burdensome. The EEOC responded, claiming the ADA <i>may</i> apply to foreign nationals, that the information sought was relevant and necessary to its investigation, and that the employer failed to demonstrate undue burden.</p> <p>A hearing was held on November 6, 2012, with the magistrate judge indicating that a report and recommendation would follow. At the time this publication went to print, no report and recommendation was issued by the magistrate judge.</p>

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4/17/2012	IL	USDC Northern District of Illinois 1:12-cv-02862 Honorable Virginia M. Kendall Pending	Supply Co United Stationers	Individual	<p>Application to show cause why the administrative subpoena should not be enforced stemming from an individual employee's charge alleging disability discrimination claiming the employer illegally terminated an individual's employment upon the expiration of his medical leave just two days prior to the charging party's scheduled return to work following a period of FMLA leave.</p> <p>The EEOC subpoenaed comprehensive documentation pertaining to employees who took unpaid leave, related medical records, and identifying material. The employer filed a Petition to Revoke the Subpoena with the Commission. In response, the EEOC agreed to narrow the scope of the subpoena, and the employer subsequently provided the requested information.</p> <p>The EEOC then requested additional medical information pertaining to 43 of the employer's employees terminated at the expiration of FMLA leave. The employer refused to provide the information, and the EEOC issued a second subpoena requesting the information originally requested in the earlier subpoena. The employer filed a second Petition to Revoke the Subpoena, which the EEOC granted in part and denied in part. The EEOC modified the subpoena to require only the production of information pertaining to those employees who took a leave of absence because of their personal medical condition. The employer refused comply with the modified subpoena.</p> <p>The EEOC filed an Application for an Order to Show Cause. Shortly thereafter, the parties filed a joint motion to stay the EEOC's subpoena enforcement action pending conciliation. The matter is currently stayed, with a status hearing scheduled for February 4, 2013.</p>
4/24/2012	IN	USDC Southern District of Indiana 4:12-mc-00001-RLY-WGH Judge Richard L. Young; Magistrate Judge William G. Hussmann, Jr Withdrawn based on the employer's compliance.	CARL F. BOOTH & COMPANY, LLC	Individual	<p>Application to show cause why the administrative subpoena should not be enforced stemming from former employee's charge claiming retaliation under the ADEA and ADA. Charging party complained when the employer terminated the employment of his 59 year old father. The employer subsequently demoted and then terminated the charging party's employment. The employer failed to provide a position statement or otherwise respond to the charge.</p> <p>The EEOC filed an Application for an Order to Show Cause. The employer then voluntarily complied with the subpoena and the action was dismissed.</p>

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5/2/2012	AZ	USDC District of Arizona 2:12-mc-00041-JAT Judge James A Teilborg Voluntary dismissal by the EEOC without prejudice.	Fidelity National Law Group	Individual	<p>Application to show cause why the administrative subpoena should not be enforced stemming from a former employee's charge claiming sex discrimination and retaliation.</p> <p>The EEOC issued a subpoena for personnel files of the charging party and her direct supervisor, written policies and complaint procedures, employee data for individuals at the facility during relevant time period, a description of harassment training, and employee complaints of inappropriate conduct related to gender.</p> <p>The EEOC filed an Application for an Order to Show Cause; but one week later – before the court even issued an order to show cause – the EEOC dismissed the matter without prejudice.</p>
5/18/2012	PA	USDC Eastern District of Pennsylvania 2:12-mc-00148-RBS Honorable R. Barclay Surrick Pending	Farmers Pride, Inc.	Individual	<p>Application to show cause why the administrative subpoena should not be enforced stemming from former employee's charge claiming sex discrimination and retaliation.</p> <p>The EEOC issued a subpoena seeking: (1) all employees supervised by a specific supervisor, with names, address, telephone numbers, job titles, shift, and dates of employment; (2) all complaints of sexual harassment made "formally or informally" against three employees; and (3) all documents relating to complaints of sexual harassment made "formally or informally" within the previous four years. The employer filed a Petition to Revoke the Subpoena with the Commission, which the EEOC denied.</p> <p>After the Commission refused to revoke the subpoena, the employer initially agreed to provide the information, subject to a confidentiality agreement. Ultimately, however, the employer objected to the subpoena as overbroad and lacking proper assurances of confidentiality. In particular, the employer expressed concerns that personal contact information for hundreds of its current and former employees would be made available to the charging party's legal representatives, and such information was beyond the scope of the charge, which alleged only sexual harassment of the charging party and two other individuals by a low-level manager during the third shift in the employer's breast deboning department.</p> <p>The EEOC filed an Application for an Order to Show Cause. The employer opposed the Application as an over broad, unduly burdensome fishing expedition which would impinge on the privacy rights of hundreds of its current and former employees.</p> <p>Following a hearing, the court issued a memorandum decision granting the EEOC's application to enforce the subpoena for all documents relating to formal or informal complaints of sexual harassment at the entire facility dating back four years. The court noted that once the EEOC</p>

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					<p>begins an investigation, it is not required to ignore facts that support additional claims of discrimination. The court, however, denied the EEOC's request for costs, and entered a confidentiality order prohibiting the EEOC from disclosing the private contact information, namely addresses and phone numbers of subordinate employees to the Charging Party or the Charging Party's counsel.</p> <p>The EEOC filed a motion to stay the court's memorandum decision, and a motion for reconsideration, specifically the mandated confidentiality order. Additionally, the Charging Party's counsel filed a motion to intervene in the subpoena enforcement action. Both the EEOC and the employer opposed the motion to intervene, arguing that the Charging Party lacked a significantly protectable interest in the EEOC's subpoena enforcement action.</p> <p>As of the time this publication went to print, this matter was still pending.</p>
6/14/2012	TN	<p>USDC Middle District of Tennessee</p> <p>3:12-cv-00613</p> <p>Chief Judge Todd J. Campbell</p> <p>Enforcement denied</p>	Zeledyne, LLC; American Current Care, P.A., Co.	Individual	<p>Application to show cause why the administrative subpoena should not be enforced stemming from a charge alleging disability discrimination on the basis of an impermissible medical inquiry upon the charging party's return after an absence. The employer responded that it uses a third party company to provide medical services to its employees, to certify their fitness for duty, and review certifications that the employee is able to return to work following an absence.</p> <p>The EEOC issued a subpoena to the third party medical provider seeking medical records, including medical documentation related to all Zeledyne employees' return to work following periods of medical leave. The third party medical provider objected to the subpoena on the grounds that: (1) it provided insufficient identifying details to produce records and would require search of thousands of patient charts by hand; (2) determining responsiveness for any document was nearly impossible; and (3) it invaded patients' privacy rights under HIPAA.</p> <p>The EEOC filed an Application for an Order to Show Cause against the employer for its third party medical provider's failure to comply with the subpoena. The third party medical provider responded, reiterating its objections to production of the subpoenaed documents.</p> <p><i>Court's Order:</i> The court held a hearing and issued a summary order declining to enforce subpoena as written, finding it unduly burdensome. <i>EEOC v. Zeledyne, LLC</i>, No. 3:12-cv-00613 (M.D. Tenn. August 13, 2012).</p>



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7/27/2012	KS	USDC District of Kansas 2:12-mc-00240-KHV Chief Judge Kathryn H. Vratil Pending	Midwest Health Inc. d/b/a Valley Health Care Center	Individual	<p>Application to show cause why the administrative subpoena should not be enforced stemming from a charge alleging claims of sex discrimination and retaliation filed by a female employee. The employer was non-responsive to the EEOC's requests for information. The EEOC issued a subpoena seeking documents from the employer, including: (1) equal employment policies and procedures for reporting or complaining about discrimination or harassment; (2) the name, contact information, and employment information for all employees who held the charging party's position; (3) copies of several employees complete personnel files; (5) all documents related to harassment or retaliation complaints made by the charging party; (6) work schedules for all employees holding the charging party's position; (7) documents relating to employee time off, bereavement leave, and vacation leave; (8) a current employment application; and (9) the job description and all other documents describing the charging party's job duties.. The employer did not respond to the subpoena, either by filing a Petition to Revoke or Modify the Subpoena or otherwise.</p> <p>The EEOC filed an Application for an Order to Show Cause. The court issued an Order requiring the employer to show cause why it should not direct the employer to comply with subpoena. The employer failed to respond to the court's Order.</p> <p>On October 1, 2012, the EEOC filed a motion to compel the employer to respond to the subpoena, arguing the employer waived any objections to the subpoena's enforcement by failing to file a Petition to Revoke or Modify the Subpoena and that the subpoena is otherwise valid, requests relevant information, and was issued in accordance with all procedural requirements.</p> <p>On December 3, 2012, the court issued an order granting the EEOC's motion to compel. Pursuant to the court's order, the employer was to comply with the subpoena and provide a response on or before December 20, 2012. At the time this publication went to print, the employer's response remained outstanding.</p>

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8/7/2012	AL	USDC Northern District of Alabama 5:12-mc-02646-CLS Judge C. Lynwood Smith, Jr. Administrative subpoena enforced	On the Spot Portable Detail & Pressure Washing, LLC d/b/a On The Spot	Individual	<p>Application to show cause why the administrative subpoena should not be enforced stemming from a charge alleging pregnancy discrimination and retaliation filed by a former employee who claimed her hours and pay were reduced due to her pregnancy and she was terminated in retaliation for having filed an EEOC charge against her employer. The employer failed to respond to the charge or the EEOC's subsequent requests for information.</p> <p>The EEOC issued a subpoena seeking: (1) the charging party's personnel file, including disciplinary actions, counseling, warning, reprimands, attendance records, appraisals, payroll records, and performance evaluations; (2) equal employment policies, including those pertaining to sex, pregnancy, disability or retaliation; (3) a list of all employees, including their name, sex, job title, disability, long term illness, pregnancy, date of hire, date and reason for discharge, and home contact information; (4) the employer's articles of incorporation; and (5) the minutes from all meetings of the employer's board of directors, members, or managers during 2010. The employer failed to respond, either by filing a Petition to Revoke or Modify the Subpoena or otherwise.</p> <p>On August 7, 2012, the EEOC filed a motion to compel the employer to respond to the subpoena, arguing the employer waived any objections to the subpoena by failing to file a Petition to Revoke or Modify the Subpoena and that the subpoena is otherwise valid, requests relevant information, and was issued in accordance with all procedural requirements.</p> <p>On November 19, 2012, the court issued an order to show cause requiring the employer to respond to the EEOC's application on or before December 5, 2012. The employer, however, did not respond by December 5, 2012. At the time this publication went to print, this matter remained pending in the district court. On December 17, 2012, the court entered an order granting the EEOC's motion to compel, and requiring the employer to produce information responsive to the EEOC's subpoena by December 24, 2012. The employer filed a motion for an extension of time as to some of the requested information on December 27, 2012, stating that personnel who had access to the information were unavailable to assist the employer in responding until January 2, 2013.</p>

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8/14/2012	AZ	USDC District of Arizona 2:12-mc-81 12-cv-2469 Judge David G. Campbell Pending	McLane Company Inc.	Individual	<p>Application for an order to show cause stemming from a charge of sex and disability discrimination under Title VII and the ADA, filed by a female employee terminated after failing an Industrial Physical Capability Strength Test or similar evaluation (collectively "IPCST") upon returning from maternity leave. The EEOC further alleged the employer violated the ADA by requiring new hires and employees returning from medical leave to pass an ICPST. On August 6, 2010, the EEOC determined that use of the IPCST may also result in discrimination on the basis of age.</p> <p>On September 2, 2010, the EEOC received a second charge of disability discrimination against the employer, filed concurrently with the California Department of Fair Employment and Housing after the employer terminated the employment of an individual after he failed to pass an IPCST upon returning from medical leave. Additionally, on August 9, 2011, the EEOC received another charge of discrimination against the employer alleging sex, disability, and age discrimination based on termination following a failed IPCST administered after an employee's medical leave.</p> <p>On February 15, 2011, the EEOC issued a subpoena seeking: (1) documents reflecting nature of employer's business and corporate structure; (2) documents reflecting liability insurance for EEOC charge; (3) employee handbooks dating back to January 1, 2006; (4) identification of IPCST tests used by employer nationwide; (5) description of IPCST tests used and their application; (6) validation studies/evidence for any tests used/identified; (7) job information for all positions subject to IPCST tests; (8) identifying information for employee dating back to January 1, 2006, including name, SSN, contact information, sex, medical condition, date of application, hire, and test(s), positions of employment, and outcome of IPCST; (9) list of employer's facilities/locations dating back until January 1, 2006; (10) identifying info on employees tested by location and outcome/rationale following ICPST; (11) employment history for individuals tested with name/title of decision makers for any adverse actions; (12) data evincing any reduction of workplace injury following administration of IPCST; (13) formal/informal complaints received by employer regarding IPCST; (14-15) identifying information for all individual who applied for or sought promotions to a position requiring IPCST; (16) identifying information for all employees from January 1, 2006 through present; (17) complete personnel files for employer's corporate president, vice president, and human resources manager; (18) list of any considered alternatives to ICPST.</p>

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					<p>On February 22, 2011, the employer filed a Petition to Revoke or Modify the Subpoena. On August 24, 2011, the EEOC and the employer met and conferred. The parties failed to reach an agreement concerning identifying "pedigree" information for (1) employees or applicants terminated/demoted/not hired after failing an IPCST; and (2) employees or applicants who took an IPCST. The employer provided data pertaining to gender and IPCST scores for employees and applicants in its grocery division, but did not provide more specific information. On March 21, 2012, the EEOC issued a determination denying the employer's petition.</p> <p>On April 10, 2012, the employer agreed to provide Court ordered information pursuant to the ADEA matter (2:12-cv-00615-GMS).</p> <p>On August 14, 2012, the EEOC filed an Application for an Order to Show Cause. The employer responded, opposing the Application, and objecting to the subpoenas as unduly burdensome and seeking irrelevant information.</p> <p>A Show Cause Hearing was held on November 16, 2012. At the time this publication went to print, this matter remained pending in the district court.</p>
8/14/2012	OK	<p>USDC Northern District of Oklahoma 4:12-mc-000025-GKF-TLW Judge Gregory K. Frizzell Withdrawn based on the employer's compliance.</p>	Ingram's Investments Inc. Doing Business As Subway	Individual	<p>Application for an order to show cause stemming from a terminated employee's charge of race, color, sex, and pregnancy discrimination filed under Title VII.</p> <p>On May 31, 2012, the EEOC issued a subpoena seeking documents: (1) describing the employer's organization and legal status; (2) a position in response to the EEOC's Charge; (3) copies of the employers policies concerning discharge, harassment, and pregnancy; (4) the decision-makers and grounds for charging party's employment; (5) the charging party's personnel file; (6) harassment complaints made by the charging party; and (7) a list of employees who worked while pregnant.</p> <p>The employer failed to respond to the subpoena.</p> <p>On August 15, 2012, the EEOC filed a motion to compel the employer to respond to the subpoena, arguing the employer waived any objections to the subpoena by failing to file a Petition to Revoke or Modify the Subpoena and that the subpoena is otherwise valid, requests relevant information, and was issued in accordance with all procedural requirements.</p> <p>On August 28, 2012, the district court held a telephone conference, granted the EEO Motion, and ordered employer to respond to the subpoena.</p> <p>The employer failed to respond to the district court's order.</p>

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					<p>On September 26, 2012, the EEOC filed an Application for an Order to Show Cause for Contempt. On October 10, 2012, the Court issued a Minute Order requiring the employer to appear for the contempt hearing.</p> <p>Respondent subsequently complied with the EEOC's subpoena. On October 31, 2012, the EEOC withdrew all previous and pending motions.</p>
8/16/2012	OH	USDC Southern District of Ohio 1:12-mc-51 Judge Susan J. Dlott Settled based on compromise between the EEOC and the employer.	Shri Nathjii Krupa Corp., D/B/A Subway #2591	Individual	<p>Application for an order to show cause stemming from a terminated employee's charge of sexual harassment and retaliation filed under Title VII.</p> <p>On June 15, 2012, the EEOC issued a subpoena seeking documents that identified: (1) all restaurants owned by the employer; and (2) all current and former employees at each identified restaurant.</p> <p>The employer failed to respond to the subpoena.</p> <p>On August 16, 2012, the EEOC filed a motion to compel the employer to respond to the subpoena, arguing the subpoena is otherwise valid, requests relevant information, and was issued in accordance with all procedural requirements. On September 11, 2012, the district court granted the EEOC's Order To Show Cause.</p> <p>On November 9, 2012, the EEOC and the employer reported that they were able to settle their dispute and the court dismissed the action on December 3, 2012.</p>
9/21/2012	IN	USDC Northern District of Indiana 2:12-mc-00166 Magistrate Judge Andre P. Rodovich Pending	Support Services of America Inc.	Individual	<p>Application for order to show cause why administrative subpoena should not be enforced arising from a charge by an individual former employee, Bennie Williams, alleging that his former employer, Support Services of America, Inc., terminated him from his day porter position after he refused to clean up urine and feces without proper protective gear and training. Williams alleges that the employer gave non-African Americans preferential assignments and provided them with support that it denied him. The EEOC sent the employer the Charge in September 2011 and subsequently requested a position statement, relevant policies, and a list of employees who had worked in the same store as Williams and been terminated during the relevant time period. Five months passed, and the employer did not respond. The EEOC set a final deadline of April 13, 2012, and the employer again failed to respond. As a result, on May 31, 2012, the EEOC issued a subpoena seeking the following: (1) identification of all individuals employed as day porters at the store where Williams worked for the period February 14, 2011 to April 20, 2011, including, inter alia, their name and contact information, race, wage history, shifts assigned, and payroll summary; (2)</p>

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					<p>copies of all policies pertaining to the handling and/or disposal of biological and/or human waste; (3) copies of all documents pertaining to Williams' termination; (4) copies of all documents submitted to the Indiana unemployment agency in response to Williams' unemployment claim; and (5) a written position statement, accompanied by evidence or explanation relevant to each issue presented in Williams' charge.</p> <p>The employer did not respond to the subpoena, so the EEOC served an identical subpoena on August 22, 2012. The employer again failed to respond, and the EEOC filed its Application on September 21, 2012. The EEOC argues, <i>inter alia</i>, that the employer failed to exhaust administrative remedies by seeking an order from the EEOC modifying or revoking the subpoena, that the information sought is relevant to the claimant's allegations of disparate treatment, and that the subpoena is not unduly burdensome.</p> <p>On November 20, 2012, the court issued an order requiring the employer to file a response on or before January 4, 2013 to the EEOC's application and setting a hearing on the application for January 14, 2013.</p>
9/26/2012	AL	<p>USDC Middle District of Alabama 3:12-mc-03613 Judge Myron H. Thompson Judge Wallace Capel, Jr. Administrative subpoena enforced</p>	<p>WFP Holding, Inc. d/b/a Wellborn Forest Products, Inc.</p>	Individual	<p>Application for order to show cause why administrative subpoena should not be enforced stemming from a charge by a female former employee, Ronnifer Robertson, who alleges that she and other female senior managers were paid less, received smaller bonuses, and received inferior benefits as compared to the employer's (WFP Holding, Inc.) male senior managers. In the course of investigating Robertson's charge, on August 31, 2011, the EEOC requested that the employer provide the following information: (1) the correct legal name and contact information of incorporation for the facility named as a respondent in the charge, or alternatively a certificate of incorporation and a copy of the most recent annual report "or similar document;" (2) the number of full-time employees employed "during the relevant period" and the total number of all employees employed by the employer as of the date of its response to the request; (3) a "work force roster of employees during the relevant period" and an organizational chart or, if no organizational chart existed, " a complete copy of all position description for employees;" (4) copies of policies on bonus structures, or the contact information of the person best able to describe how each bonus policy or practice has been applied; (5) a copy of the Charging Party's personnel record; (6) "salary information including bonus awards" to several male senior management employees during the relevant period; and (7) the "complete personnel histories" for several male senior management employees.</p>

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					<p>The employer did not respond to the initial request, and the EEOC made a second written request on October 18, 2011. The employer responded on November 7, 2011, but refused to provide information regarding pay, bonus, and personnel information of the named senior management officials. The employer objected that the request was "overly broad, vague, ambiguous," and that the information requested was "confidential and privileged work product," the production of which would "violate current privacy laws and polices" of the Department of Labor and were protected by the Federal Privacy Act.</p> <p>In response, on March 20, 2012, the EEOC issued a subpoena seeking the employer's full compliance with the subpoena. The EEOC argues that the information sought is relevant to the claimant's allegations of disparate pay practices, and that the subpoena is not unduly burdensome. The district court ordered the employer to file a written response to the Application by November 20, 2012 and appear on December 5, 2012 to show cause why it should not be compelled to comply with the subpoena.</p> <p>The employer did not file a written response and did not attend the December 5, 2012 hearing. On December 5, 2012, the court ordered that the employer provide the EEOC with the documents requested in the administrative subpoena by December 10, 2012.</p> <p>On December 10, 2012, the EEOC filed a status report indicating that the employer had complied with the court's order of December 5, 2012 and had produced the documents sought in the EEOC's administrative subpoena.</p>

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9/28/2012	NC	USDC Western District of North Carolina 3:12-mc-00158 Judge Frank D. Whitney Withdrawn	Joyce Jones	Individual	<p>Application for order to show cause why administrative subpoena should not be enforced arising from a charge filed by an individual alleging that her former employer retaliated against her by removing her from the work schedule and discharging her. The Application does not identify the charging party or the employer or seek discovery from the employer. Rather, the EEOC seeks to compel a deposition of the employer's former Assistant Manager, Joyce Jones. The EEOC had attempted to contact Jones to set up an interview in the course of its investigation of the charging party's claim, but Jones did not respond.</p> <p>The EEOC subpoenaed Jones on July 20, 2012 for a deposition, but Jones failed to appear and has not contacted the EEOC. The EEOC filed its Application on September 28, 2012. In the Application, the EEOC argues that Jones failed to exhaust her administrative remedies and has thus forfeited her right to challenge the subpoena. The EEOC further argues that Jones has no valid defense to the subpoena, because the subpoena seeks information relevant to the alleged adverse employment actions and the burden of complying with the subpoena does not impose an undue burden on Jones.</p> <p>The EEOC withdrew its application and motion to compel on November 26, 2012.</p>



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