

EEOC-Initiated Litigation

Case Law Developments
in 2015 and Trends
To Watch for
in 2016



A NOTE TO OUR CLIENTS

This reference work compiles, analyzes, and categorizes the major case filings and decisions involving the EEOC in 2015. Our goal is for this report to guide clients through decisional law relative to EEOC-initiated litigation, and to enable corporate counsel to make sound and informed litigation decisions while minimizing risk. We hope that you find this report to be useful.

Gerald L. Maatman, Jr. – Co-Chair, Complex Discrimination Litigation Practice Group of Seyfarth Shaw LLP

Christopher J. DeGross – Co-Chair, Complex Discrimination Litigation Practice Group of Seyfarth Shaw LLP

Matthew J. Gagnon – Member, Complex Discrimination Litigation Practice Group of Seyfarth Shaw LLP

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ABOUT THE AUTHORS

Gerald L. Maatman, Jr.

Mr. Maatman is a partner in the Chicago and New York offices of Seyfarth Shaw LLP. He is the co-chair of the Firm's Complex Discrimination Practice Group. His primary emphasis is in defending employers sued in employment-related class actions and EEOC lawsuits brought in federal and state courts throughout the United States. Among his various cases, he successfully defended the first gender and race discrimination class action brought by the previous New York State Attorney General Eliot Spitzer against a Wall Street firm entitled *Eliot Spitzer, On Behalf of the People of the State of New York v. Garban*. Mr. Maatman also has served as lead defense counsel in some of the largest employment discrimination class actions and EEOC pattern or practice lawsuits in the country. Due to his work opposing the EEOC, the government has asked Mr. Maatman on multiple occasions to lecture on defense of EEOC litigation at the Commission's annual training symposium for its trial attorneys. He is also the editor of Seyfarth Shaw's Workplace Class Action Report, an annual compendium of Rule 23 decisions, and the editor of the Firm's blog entitled workplaceclassaction.com. The author of 6 books on employment law, Mr. Maatman is often consulted by major news organizations for his views on significant court rulings in employment cases. He has served as a legal commentator on the Public Broadcasting System and USA Talk Radio, and his comments have appeared in such publications as *The Wall Street Journal*, *The Economist*, *Business Insurance*, *USA Today*, *Fortune*, *HR Magazine*, *National Underwriter*, and *Forbes*. Mr. Maatman is also an adjunct professor at Northwestern University School of Law in trial practice and advocacy. In 2013 and again in 2014, Law 360 selected Mr. Maatman as one of the top 4 employment lawyers in the U.S.

Christopher J. DeGross

Mr. DeGross is a partner in the Chicago office of Seyfarth Shaw LLP, a member of the Labor & Employment Department, and co-chair of the Firm's Complex Discrimination Litigation Practice Group. His practice is focused on employment litigation, with a particular emphasis on EEOC pattern or practice lawsuits and class actions. Mr. DeGross's class action experience spans the entire scope of employment law theories, including claims of race, age and gender discrimination, sexual harassment, retaliation, and wage & hour matters. He also has extensive experience litigating against the EEOC, both at the early charge stage and in large-scale EEOC pattern or practice litigation. Mr. DeGross has been instrumental in defending employers against these cases, from high-profile systemic cases to matters on behalf of a single claimant. His trial experience includes jury and bench trials before federal courts, state courts, administrative tribunals, and arbitration panels, including a rare pattern or practice trial against the EEOC that resulted in a full defense verdict for our client. Mr. DeGross has written extensively on trends and cutting edge tactics employed by the EEOC and has been regularly asked to speak on those topics. He has also spearheaded initiatives within Seyfarth Shaw that enable clients to collect, aggregate, and analyze nationwide charge activity, often allowing our clients to stay a step ahead of the EEOC's shifting agenda.

Matthew J. Gagnon

Mr. Gagnon is a member of the Firm's Labor & Employment Department. Mr. Gagnon's practice is focused on complex class and collective action litigation involving federal and state anti-discrimination and wage and hour laws, as well as government-initiated investigations and litigation. Mr. Gagnon has extensive experience defending class actions alleging violations of

Title VII of the Civil Rights Act of 1964, various anti-retaliation statutes, the Age Discrimination in Employment Act, and the Americans with Disabilities Act. He has also defended many class and collective actions arising under the Fair Labor Standards Act and state wage and hour laws. Mr. Gagnon has handled cases alleging discrimination with respect to gender, race, disability, age, and the use of background checks as part of the hiring process. A significant portion of Mr. Gagnon's practice entails litigation against the Equal Employment Opportunity Commission, both at the early charge stage and in large-scale EEOC pattern or practice litigation. Mr. Gagnon has been instrumental in defending his clients against some of the EEOC's most high profile systemic cases. His clients have included financial firms, academic institutions, staffing agencies, restaurants, and retailers. In addition, Mr. Gagnon has experience counseling clients regarding compliance with the federal anti-discrimination laws, and has written extensively about EEOC-initiated litigation as well as other complex discrimination topics.

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EXECUTIVE SUMMARY

The EEOC's Fiscal Year 2015 was another year of blockbuster decisions that significantly changed the landscape of EEOC litigation. FY2015 also saw the EEOC nearing the end of its 2013-2016 Strategic Enforcement Plan ("SEP"). We have monitored the EEOC's activities throughout the life of the plan and have seen how the Commission has evolved its tactics to conform to the goals and metrics set out in the SEP. Viewing the trends and developments in the context of the SEP has revealed how regulatory trends are created and developed with the guiding hand of the EEOC.

We are always looking for ways to make our annual overview of EEOC litigation enlightening and valuable to corporate counsel and business executives. A working understanding of EEOC trends and developments is critical for employers to structure and implement personnel decisions and litigation avoidance strategies. This year, we are introducing a number of new features to add to that understanding.

Part I of this book is structured as a "Corporate Counsel's Guide to EEOC Litigation: Developments in FY2015." In that section, we address the important developments in FY2015 as they relate to each stage of an EEOC enforcement action, from the filing of a charge of discrimination through settlement or a determination on the merits. The Guide includes a special section devoted to the pivotal Supreme Court ruling in *Mach Mining, LLC v. EEOC*, which arguably changed the game with respect to the conciliation phase, a crucial phase of any EEOC matter. We served as amicus counsel for the defense in the U.S. Supreme Court briefing of *Mach Mining*.

Part II provides a broad overview of the substantive theories that the EEOC has focused on in FY2015, paying particular attention to how those theories relate to the enforcement priorities set out in the SEP. As we do every year, we have analyzed the EEOC filings in FY2015 by statute and by discrimination type under Title VII. This year, we have also taken a closer look at those trends as they relate to particular industries. The "Industry-By-Industry," section collects the number and types of filings that affect particular industries, and analyzes what this reveals about what particular industries must keep top of mind going into 2016.

We have also explored significant rulings arising under the Americans With Disabilities Act ("ADA"). Every year, ADA litigation comprises a significant portion of the EEOC's filings and the complexity of this statute often confounds employers. This year, in our "Spotlight On The Americans With Disabilities Act: An ADA Survival Guide," we have analyzed what certain filings and significant decisions mean for employers when responding to accommodation requests, and the often tricky prospect of dealing with EEOC charges that arise under the ADA.

Part III examines important legislative and political developments and takes a look at what may be on the horizon for EEOC litigation. The EEOC has increasingly focused its energies on the strategic use of large, high-profile "systemic" cases to drive its mission. These are cases that address policies or patterns or practices that have a broad impact on a region, industry or entire classes of employees or job applicants. The EEOC believes that the pursuit of those cases gives it the most "bang for its buck" because they impact a large number of employees directly, and because they can drive change in company policies and industry standards.

Part IV contains every significant court decision that came down in 2015 regarding EEOC-initiated litigation. They are categorized according to subject matter so as to provide corporate counsel with a practical reference manual for those decisions.

The EEOC's focus on systemic cases has come under withering criticism from Congress and the business community. Congress has repeatedly voiced its concern that the EEOC's methods often result in overly aggressive litigation positions with respect to emerging theories of discrimination. Employers that find themselves being used as a "test case" for the EEOC's latest theories have legitimate concerns about how the EEOC is accomplishing its goals. Although the Commission may argue that such cases eventually effect change in industry practices, it does so at the expense of the handful of employers that find themselves in the crosshairs.

When confronted with unfamiliar theories or enforcement tactics, employers are often left wondering, "how did we get here?" To help explain how the EEOC exerts its power to shape anti-discrimination law in the United States, we have included in this year's book three "Case Studies" in regulatory power.

- **Case Study No. 1: Strategic Litigation.** Our first case study examines the lead up to *Mach Mining* and its immediate aftermath to demonstrate how the EEOC takes advantage of its role as the chief enforcer of the anti-discrimination statutes to advance favored legal theories. By taking one, uniform position in cases around the country, the EEOC can often knit a handful of successes into a body of precedent that supports its favored legal position. The Seventh Circuit was the only circuit willing to break with its sister circuits and endorse the outer edges of the EEOC's argument that the federal courts have no power to review its conciliation process. That was after a long campaign waged by the EEOC to advance that theory in case after case around the country. Fortunately for employers, the Supreme Court did not agree. But now that the *Mach Mining* decision is in, we are once again seeing how the EEOC is working to develop precedent to entrench its favored interpretation of that decision into U.S. law.
- **Case Study No. 2: Quasi-Judicial Power.** Another tool at the EEOC's disposal is the quasi-judicial power that it has as the administrative agency empowered to hear and decide some types of discrimination disputes. In *Macy v. Holder*, the EEOC decided – under its power to hear discrimination claims brought by federal sector employees – that transgender discrimination is a form of sex discrimination. This decision, which some would argue was purely the EEOC's creation, then took on a life of its own in the federal courts as the EEOC built upon that precedent to establish a new and growing body of court decisions adopting its approach. Employers must be wary of this potentially viable and growing theory.
- **Case Study No. 3: Administrative Rulemaking.** Perhaps the most obvious tool that the EEOC has to shape the law is through its power to issue regulations and guidance interpreting and implementing the anti-discrimination laws. In our third case study, we examine how the EEOC has used this authority to advance new regulations governing employer health and wellness plans that are in some respects inconsistent with the regulations adopted by the Departments of Labor, Health and Human Services, and Treasury. This case study reveals how different agencies' rulemaking powers intersect, and sometimes conflict, and how the EEOC in particular appears to feel itself unbound by what other federal agencies are doing.

As always, the best way for employers to avoid EEOC litigation is to stay informed about the latest trends, and to develop a deeper understanding of how the EEOC does what it does. We hope that this book gives employers the tools they need to survive in this rapidly evolving landscape.

PART I
CORPORATE COUNSEL'S GUIDE TO EEOC LITIGATION
DEVELOPMENTS IN FY2015

A. How It All Begins: The Charge Of Discrimination

The EEOC is the federal government's most powerful agency for the enforcement of federal anti-discrimination laws in the workplace. Authorized by Congress to wield broad investigative and subpoena powers for the prevention and remediation of unlawful employment practices, the EEOC's enforcement mechanisms cover a range of activities, from individual and systemic claims investigations, conciliation, litigation and monitoring compliance, to serving as an agent for effecting broader policy change in employment sectors throughout the country. In an environment of increasing workplace regulation, the EEOC is an aggressive advocate and, at times, adversary. Understanding the EEOC's investigatory and enforcement processes is essential for employers to develop a preparedness plan to effectively reduce risk, contain costs of defense, and minimize business interruption.

Frequently an employer's first encounter with the EEOC is by receipt of a document known as a Charge of Discrimination. The charge may arrive by mail at any location where the employer does business.¹ The charge generally is a minimalistic form document that identifies the employer, the name of the individual bringing the charge, a general description of the type of discrimination, a brief statement of the harm(s) alleged, and a statement of whether similar proceedings have been instituted by any state or local agency.² Occasionally, a document called a Notice of Charge will precede receipt of the charge itself.³ Upon receipt of either document, counsel should promptly implement a plan to thoroughly investigate the charge, keeping in mind that the charge process may lead to multiple outcomes such as successful defense, negotiated resolution, and/or internal process improvements.

1. Overview Of The Charge Process

A charge that an employer has engaged in an unlawful employment practice may be brought by a person who may be aggrieved, by someone acting on that person's behalf, or by a representative of the EEOC.⁴ The charge may be made at any EEOC office or by mail, and shall be signed and verified.⁵ Regulations provide that within 10 days of the filing of the charge, the

¹ Beginning in May 2015, the EEOC initiated the ACT Digital Pilot Program, creating both a Charging Party and Respondent portal on the Internet for accessing documents associated with a charge and for uploading position statements and other documents, and for responding to invitations to mediate. See <http://www.eeoc.gov/employers/act-digital-phase-1.cfm>.

² 29 C.F.R. § 1601.12

³ 29 C.F.R. § 1601.14. While the Notice of Charge requires no responsive action by an employer, proactive counsel may wish to utilize the notice as an opportunity to understand any potential employment concerns involving the individual identified as the Charging Party, or the immediate environment in which the Charging Party works.

⁴ 29 C.F.R. §§ 1601.07; 1601.11.

⁵ 29 C.F.R. §§ 1601.08; 1601.09.

EEOC will notify the employer and provide the name of an investigator.⁶ It is not uncommon, however, for there to be a significant delay in this process.

The charge may be accompanied by an offer to engage in an EEOC-facilitated mediation or other dispute resolution process with the Charging Party, which may result in the withdrawal of the charge by the Charging Party.⁷ Employers should consider whether to accept this opportunity in lieu of proceeding with the preparation and filing of a position statement on behalf of the employer and participating in the EEOC's investigation.

An investigation may include the employer being required to respond to formal written Requests for Information, or facilitating interviews of employees, on-site visits by EEOC investigators, or the issuance of subpoenas.

Under Title VII, if the charge remains pending for 180 days, the Charging Party may request that the EEOC dismiss the charge and issue the Charging Party a written Dismissal and Notice of Rights that informs the Charging Party of his or her right to file a lawsuit based upon the matters that were the subject of the charge.⁸ Under the ADEA, a Charging Party may file a lawsuit based upon the matters that are the subject of a charge once the charge has been pending before the EEOC for 60 days. It is not necessary to obtain a Notice of Rights before commencing a civil lawsuit under the ADEA.⁹

The EEOC may also on its own initiative dismiss the charge for procedural irregularities¹⁰ or find that there is no probable cause that an unlawful employment practice has occurred.¹¹ Should the EEOC make a "no cause" determination, it will notify the Charging Party that he or she has 90 days from receipt of the determination to commence a lawsuit in federal court regarding the matters that were the subject of the charge.¹² During this 90 days and thereafter, the EEOC may reconsider its "no cause" determination and reverse it.¹³ Although less common, it is possible that a charge may be filed and closed quickly, with a right to sue notice issued to the Charging Party. Under such circumstances, an employer may receive both the charge and a copy of the notice of right to sue contemporaneously.

When a charge is not settled or dismissed, the EEOC may issue a Letter of Determination that reasonable cause exists to believe that an unlawful employment practice has occurred. Here again, the EEOC may reconsider its determination within 90 days of the issuance of the determination or thereafter; provided, however, that reconsideration issued 90 days after the determination shall not operate to revoke the EEOC's issuance of any right to sue to the

⁶ 29 C.F.R. § 1601.14

⁷ 29 C.F.R. § 1601.20. Note, however, that a settlement negotiated with the EEOC shall not affect any other charge.

⁸ 29 C.F.R. § 1601.28.

⁹ 29 U.S.C. § 626(d)(1).

¹⁰ 29 C.F.R. § 1601.18

¹¹ 29 C.F.R. § 1601.19

¹² *Id.*

¹³ *Id.*

Charging Party.¹⁴ Should a reasonable cause determination be issued regarding an unlawful employment practice, the EEOC “shall endeavor to eliminate such practice by informal methods of conference, conciliation and persuasion.”¹⁵ Should the EEOC determine that it is unable to obtain voluntary compliance by the employer and that further efforts would be futile or nonproductive, it will notify the employer of the failure of conciliation.¹⁶ The EEOC can initiate litigation in its own name or refer the matter to the Attorney General for the initiation of a civil action.¹⁷

2. Steps Employers Should Take When A Charge Comes In The Door

Upon receipt of a charge or Notice of Charge, the clock is ticking for counsel to secure and understand needed information, determine the risks presented to the employer, and plan a strategy for addressing both the allegations of the charge and any process improvements or “lessons learned” that may attend it. Achieving a successful result is often highly dependent upon thorough investigation that efficiently supports the efforts of outside counsel and internal decision-makers. Employers should consider taking steps to conduct a privileged investigation of the allegations of the charge. Those steps could include some or all of the following:

- Issue litigation holds with non-retaliation provisions;
- Review available personnel, investigatory and disciplinary records regarding the Charging Party and those named in or implicated by the charge;
- Secure and review business records, electronically stored information, and data relating to the allegations contained in the charge;
- Identify and understand all policies and procedures implicated by the allegations in the charge;
- Identify and, where appropriate, interview key stakeholders and witnesses, and expand litigation holds as needed;
- Consider potential strategies for defense or early resolution, as well as for implementation of potential “lessons learned.”

Armed with a strong factual foundation to understand both the allegations and context of a charge, employers will be well-prepared to manage key decisional points in the EEOC’s administrative charge process and avoid missteps that can lead to protracted and expensive litigation.

¹⁴ 29 C.F.R. § 1601.21.

¹⁵ 29 C.F.R. § 1601.24.

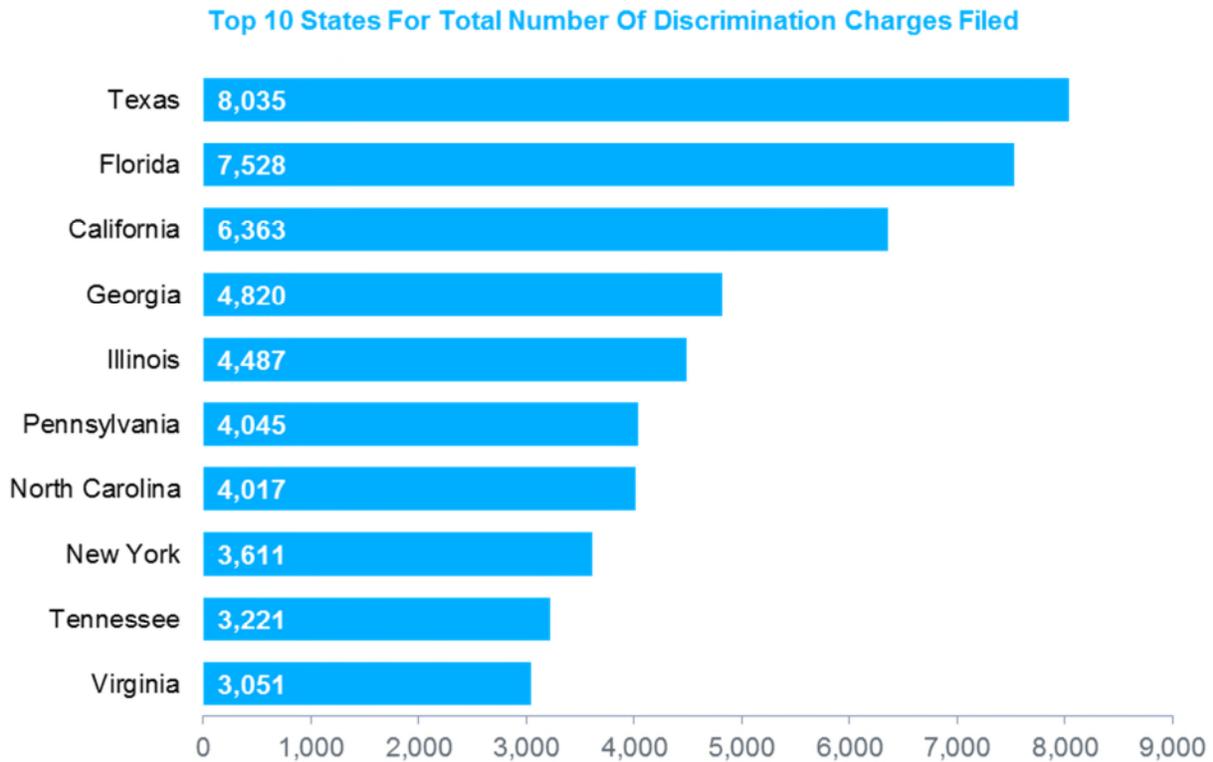
¹⁶ 29 C.F.R. § 1601.25.

¹⁷ 29 C.F.R. §§ 1601.27; 1601.29.

3. Geography Matters

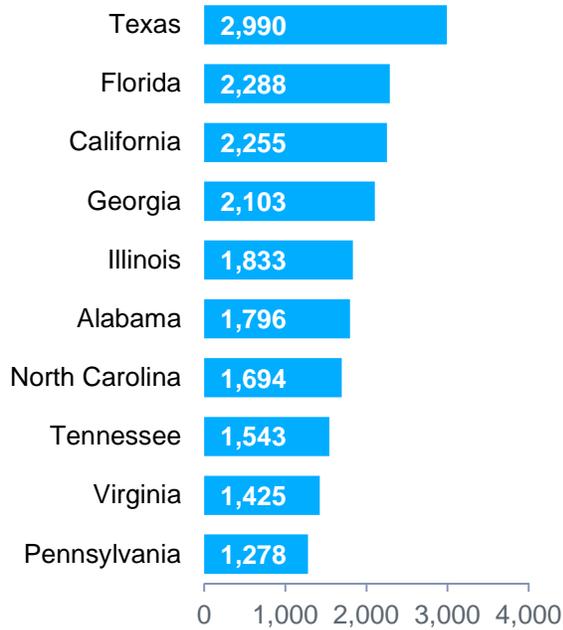
The EEOC is divided into 15 districts, each of which is led by a Regional Attorney. The level of charge activity in a particular state not only reflects the characteristics of the dominant industries in those states – some industries are more prone to receiving discrimination charges than others – but also on the characteristics of the district office overseeing the enforcement, education, and outreach efforts in those states.

Geography matters when it comes to EEOC charges and litigation, even at the initial charge stage. Some states see a disproportionate share of total EEOC charges. Others see a disproportionate share of particular types of charges. The graph below shows the ten states with the highest total number of EEOC charges in FY2014, the latest year for which such data is available.

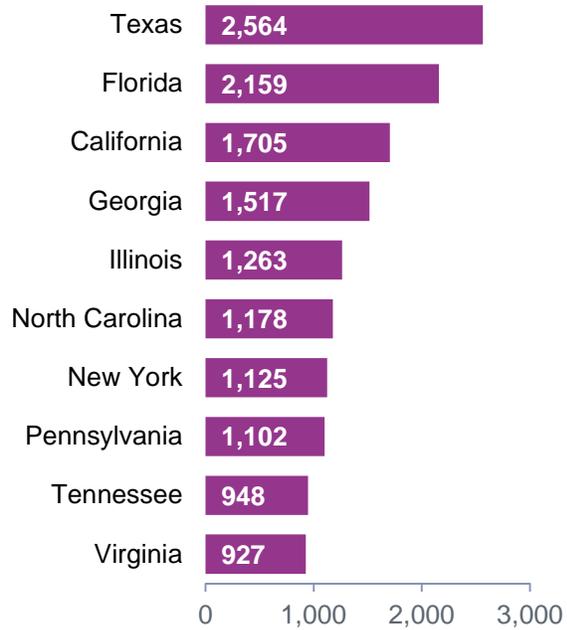


A slightly different picture emerges when charges are sorted according to the type of discrimination alleged. Below are graphs that show the top 10 states for charges categorized according to the different theories of discrimination.

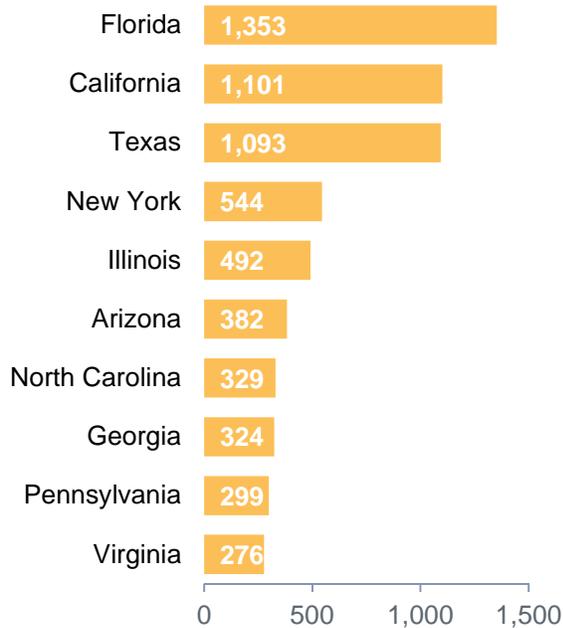
Top 10 States That Filed Discrimination Charges Based On Race/Color



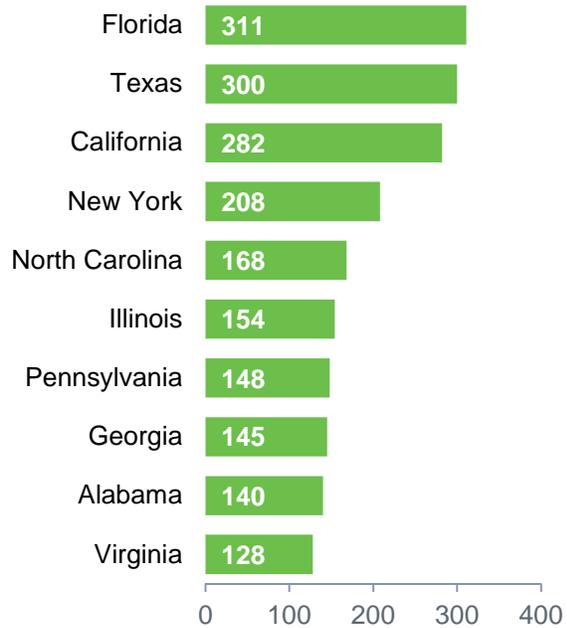
Top 10 States That Filed Discrimination Charges Based On Sex



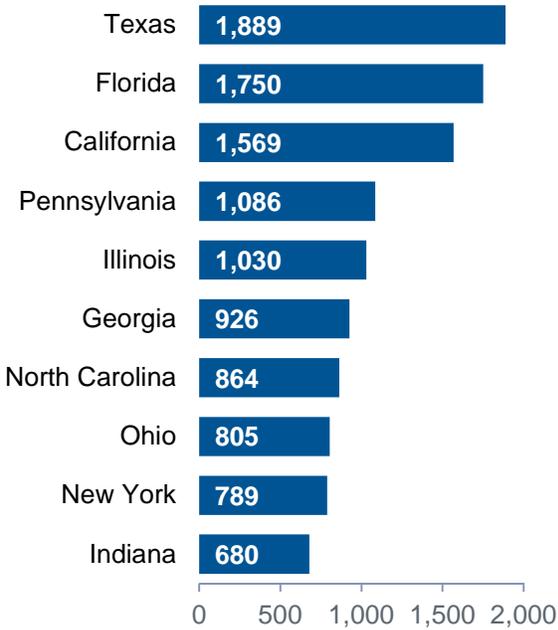
Top 10 States That Filed Discrimination Charges Based On National Origin



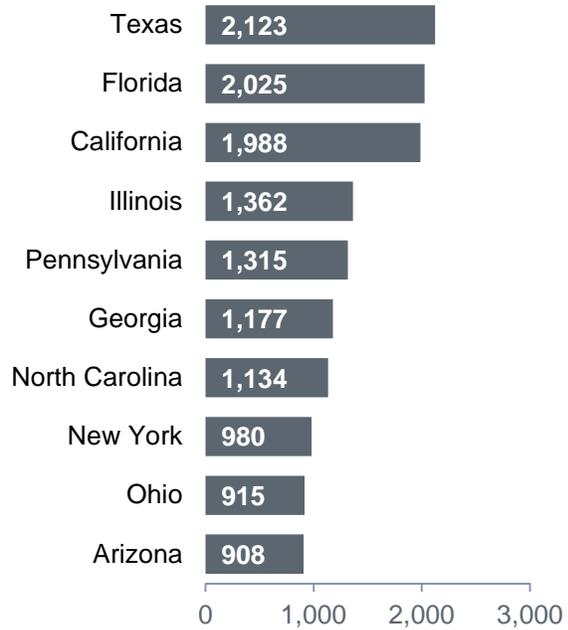
Top 10 States That Filed Discrimination Charges Based On Religion



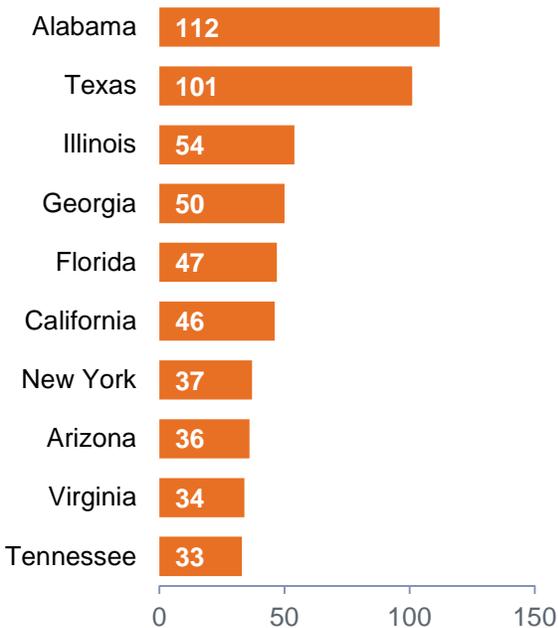
**Top 10 States That Filed
Discrimination Charges
Based On Age**



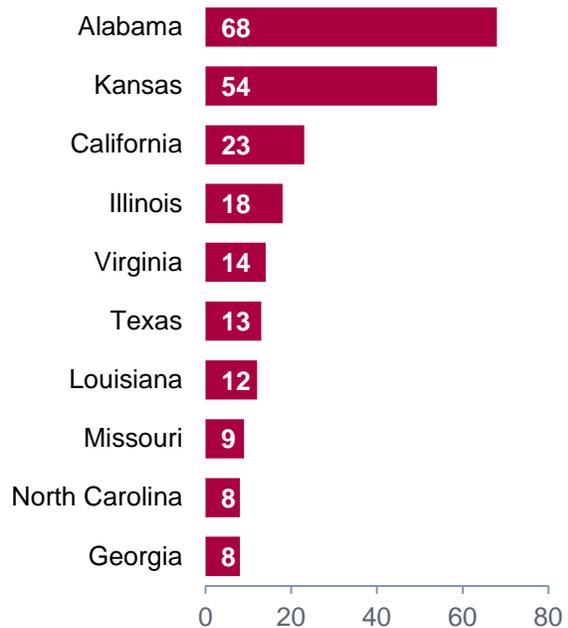
**Top 10 States That Filed
Discrimination Charges
Based On Disability**



**Top 10 States That Filed
Discrimination Charges
Based On EPA**



**Top 10 States That Filed
Discrimination Charges
Based On GINA**

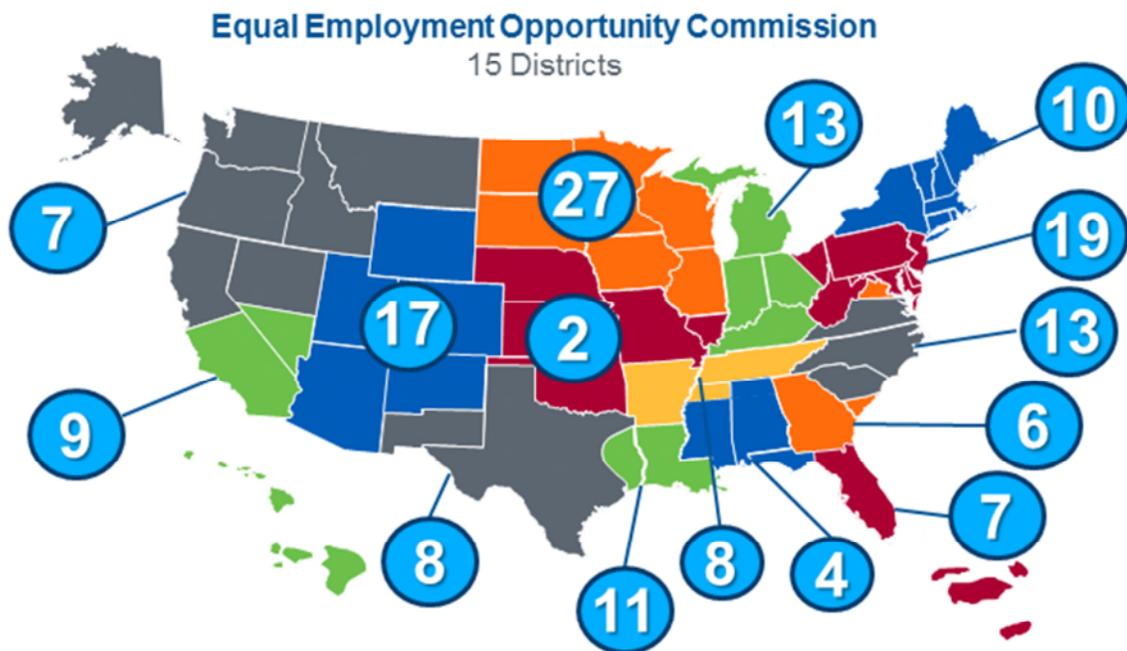


Perhaps not surprisingly, the size of a given state's population loosely correlates with the number of EEOC charges that are filed. California, Texas, and Florida, the three states with the largest populations, hold the top three spots in overall filings, and often the top spots in each of the charge categories.

This correlation does not always hold, however. California holds none of the top spots despite having approximately 12 million more people than Texas, the next largest state. Also interesting is the fact that New York, the fourth largest state, has a disproportionately low number of filings, coming in fourth or higher only in national origin and religious discrimination complaints, and not appearing at all in the top ten for race/color discrimination complaints. Conversely, Alabama, the 24th most populous state, has the fifth highest number of race/color discrimination complaints and the ninth highest number of religious discrimination complaints.

This disparity based on geography is also reflected in the number of lawsuits that the EEOC chooses to file. But that correlation is far from what one would expect if each district office operated the same way.

This chart shows where the EEOC filed lawsuits in FY2015, categorized by district office:



As this chart demonstrates, exposure to EEOC investigation and suit is not solely based on an employer's activities. Location plays a big role. Each district office has its own priorities, some of which differ from other districts and can even diverge from guidance from EEOC headquarters. Staffing levels can also play a large role in determining filings. Whereas some offices are fully staffed and can handle more suits, other offices do not always have the attorney staffing levels to bring all the suits that they could have otherwise filed. This can change year to year and is wholly separate from the goals that are particular to a given office.

For example, the relatively high number of charges filed in California could help explain why the Los Angeles and San Francisco EEOC district offices filed 16 actions in FY2015. Florida, on the

other hand, has the second highest number of charge filings of any state in the nation, but the Miami district office filed just seven lawsuits in FY2015. Compare that with the 27 lawsuits that were filed by the Chicago district office, despite the fact that Illinois is fifth on the list of total charges filed, well below Texas (19 filings in the Dallas and Houston offices combined) and Georgia (six filings out of the Atlanta office).

B. The Investigation Phase: The EEOC's Increasing Use Of Its Expansive Subpoena Power

One of the investigatory tools at the EEOC's disposal is the administrative subpoena. Typically, an investigator in pursuit of discovery from an employer will first make an informal request for information. If the employer does not produce the requested information, the District Director may issue an administrative subpoena to obtain the information. Sometimes the EEOC will even skip the informal request and proceed directly to issuing a subpoena (a sometimes frustrating practice that is actually disallowed by the EEOC's own rules).¹⁸

An employer who receives a subpoena must act quickly. The Commission's regulations permit an employer to submit to the Commission a petition to revoke or modify the subpoena on the grounds that it seeks information that is not relevant to the charge, is overly burdensome, or suffers from some other flaw. However, the petition must be filed within five business days of receipt of the subpoena, and the Commission and the courts have proven unsympathetic to employers who miss the cut-off. (Note that subpoenas issued in ADEA investigations are treated differently and petitions to revoke are not permitted.)

If, after the petition is resolved, the investigator is not satisfied with the employer's response, the EEOC may proceed to a federal district court, where it will file an application for an order to show cause why the subpoena should not be enforced.

1. EEOC Continues Its Aggressive Stance On Administrative Subpoenas

The EEOC often relies on legal authority that its subpoena powers should be afforded significant deference. And the EEOC likes to remind employers of this when it seeks information that goes far beyond the charge that it is investigating.

Given the EEOC's systemic focus – and the Commission's desire to transform single allegations into huge, sprawling systemic actions – aggressive and extensive use of EEOC subpoenas are more and more prevalent. This year saw the EEOC again push the limits of its subpoena power, attempting on several occasions to expand the investigation of a single charge of discrimination by using that charge as a springboard to obtain freewheeling discovery of documents and data to support a more expansive pattern or practice claim. Of course, simply because the EEOC says certain information is relevant does not make it so, and some employers have been successful challenging EEOC subpoenas with solid, common sense arguments.

In light of the frequent striking divide between the EEOC's demands and the apparent relevance to the charge under investigation, it is not surprising that courts are increasingly asked to police

¹⁸ See EEOC Compliance Manual § 24.

the boundaries of what is reasonable. In FY2015, the EEOC initiated 32 subpoena enforcement actions.¹⁹ It initiated 34 subpoena enforcement actions in FY2014,²⁰ and 17 in FY2013.²¹

2. Employer Success In Limiting EEOC's Subpoena Demands

The year started with some significant wins for employers in the subpoena enforcement area. The Eleventh Circuit issued two decisions that refused to enforce an overly broad and unduly burdensome administrative subpoena. In the first decision, *EEOC v. Royal Caribbean Cruises, Ltd.*,²² the Eleventh Circuit upheld a decision of the U.S. District Court for the Southern District of Florida refusing to enforce an administrative subpoena served by the EEOC on the grounds that the information sought was not relevant to the individual charge the EEOC was investigating, and because compliance with the subpoena would be unduly burdensome.²³

In 2010, Royal Caribbean discharged an Argentinean national employed as an assistant waiter on one of its cruise ships because he was diagnosed with HIV and Kaposi Sarcoma.²⁴ The employee subsequently filed a charge with the EEOC.²⁵ Royal Caribbean admitted to discharging the employee based on his medical condition, but argued that the ADA was inapplicable as the charging party was a foreign national who worked on a ship that operated in the Bahamas, and because the Bahamas Maritime Authority's ("BMA") medical standards – which Royal Caribbean is required to follow – mandated discharge given the employee's diagnosis.²⁶

During the investigation, the EEOC sought by subpoena a list of all employees who were discharged due to a medical reason for the year preceding the filing of the charge, along with detailed information for each of those discharged employees, including personnel files, contact information, and information about those responsible for hiring/firing each employee.²⁷ The EEOC also requested similar information with respect to any person Royal Caribbean did not hire because of a medical reason.²⁸ Both a Magistrate Judge and District Court Judge in the

¹⁹ U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FISCAL YEAR 2015 PERFORMANCE AND ACCOUNTABILITY REPORT, at 34, available at <http://www.eeoc.gov/eeoc/plan/upload/2015par.pdf>.

²⁰ U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FISCAL YEAR 2014 PERFORMANCE AND ACCOUNTABILITY REPORT, at 27, available at <http://www.eeoc.gov/eeoc/plan/upload/2014par.pdf>.

²¹ U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FISCAL YEAR 2013 PERFORMANCE AND ACCOUNTABILITY REPORT, at 29, available at <http://www.eeoc.gov/eeoc/plan/upload/2013par.pdf>.

²² *EEOC v. Royal Caribbean Cruises, Ltd.*, 771 F.3d 757 (7th Cir. 2014).

²³ See Gerald Maatman, Jr. and Howard M. Wexler, *Eleventh Circuit Refuses To Enforce EEOC's Broad Subpoena*, WORKPLACE CLASS ACTION BLOG (Nov. 7, 2015), available at <http://www.workplaceclassaction.com/2014/11/eleventh-circuit-refuses-to-enforce-eeocs-broad-subpoena/>.

²⁴ *Royal Caribbean Cruises, Ltd.*, 771 F.3d at 759.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 759–60.

²⁸ *Id.* at 760.

U.S. District Court for the Southern District of Florida refused to enforce the EEOC's subpoena.²⁹

The Eleventh Circuit acknowledged that the EEOC is entitled to inspect and copy any evidence that is "relevant to the charge under investigation," but it cautioned that such a standard, while broad, should not be construed "so broadly that the relevancy requirement is rendered a nullity."³⁰

The Eleventh Circuit determined that the disputed information at issue did not concern the Charging Party who filed the EEOC charge; instead, it concerned the EEOC's attempt to discover "a potential class of employee or applicants who suffered from a pattern or practice of discrimination rather than fleshing out [the Charging Party's] charge."³¹ Although statistical and comparative data may be relevant in such cases, the EEOC is nonetheless required to make "some showing that the requested information bears on the subject matter of the individual complaint."³²

The Eleventh Circuit rejected the EEOC's argument that the requested information "might cast light on the allegations" against Royal Caribbean given that it is not clear "why company-wide data regarding employees and applicants around the world with any medical condition, including conditions not specifically covered by the BMA medical standards or similar to [Charging Party's], would shed light on [the Charging Party's] individual charge that he was fired because of his HIV and Kaposi Sarcoma diagnoses."³³

The Eleventh Circuit also rejected the EEOC's argument that it "is entitled to expand the investigation to uncover other potential violations and victims of discrimination on the basis of disability."³⁴ The court refused to construe the relevancy standard so broadly, explaining that "the relevance that is necessary to support a subpoena for the investigation of an individual charge is relevant to the contested issues that must be decided to resolve that charge, not relevance to issues that may be contested when and if future charges are brought by others."³⁵ On this basis the Eleventh Circuit rejected the EEOC's subpoena as the information sought was "at best tangentially relevant" to the claims of the Charging Party and because it "failed to present a cogent argument as to how the additional information sought . . . would further aid the Commission in resolving the issues in dispute"³⁶

The Eleventh Circuit acknowledged that the EEOC has the ability to file a Commissioner's charge alleging a pattern or practice of discrimination that could support a request for the broad scope of information that it sought. However, it rejected the EEOC's apparent attempt to short circuit this process and cautioned the EEOC that it "may not enforce a subpoena in the

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 760–61.

³² *Id.* at 761.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 762.

investigation of an individual charge merely as an expedient bypass of the mechanisms required to file a Commissioner's charge."³⁷

Finally, the Eleventh Circuit also held that the burden of producing the requested information – which Royal Caribbean estimated would require between five to seven employees working forty hours per week for two months solely to gather the requested information – outweighed the “limited need” of the subpoenaed information.³⁸

The EEOC lost another fight over the breadth of its subpoena powers when the court in *EEOC v. Forge Industrial Staffing Inc.*³⁹ rejected the EEOC's strong-arm tactics and issued an opinion that provides employers with ammunition to fight “everything and the kitchen sink” subpoena requests.⁴⁰

That case concerned a former employee who had filed an EEOC charge four months after her termination, alleging sexual harassment and retaliation.⁴¹ The Commission sought extensive information from the company as part of its administrative investigation. In its subpoena, the EEOC requested all employment applications for roughly a two and a half year period because the applications purportedly required employees to agree to file all employment-related claims within six months of the event, except as prohibited by law.⁴² The EEOC views this provision as an impermissible waiver of an applicant's statutory rights.⁴³ The company argued that the requested information was irrelevant to the charge and that complying with it would be unduly burdensome.⁴⁴

At the hearing, the EEOC argued that the application waiver related to the “overall conditions of the workplace.”⁴⁵ The court rejected the EEOC's position for several reasons. First, the charge did not contain pattern or practice allegations – claims that would suggest a pervasive violation of the law.⁴⁶ Second, the charging party filed the charge within four months of the termination, meaning the clause had no impact on her willingness to file a charge.⁴⁷ As a result, the waiver could not be relevant to the charge under investigation. The court recognized that accepting the “overall condition of the workplace” argument would eviscerate the meaning of “relevance”

³⁷ *Id.*

³⁸ *Id.*

³⁹ *EEOC v. Forge Indus. Staffing Inc.*, No. 1:14-MC-90-SEB-MJD, 2014 WL 6673574 (S.D. Ind. Nov. 24, 2014).

⁴⁰ See Christopher DeGroff, Paul Kehoe, and Gerald L. Maatman, Jr., “One Step Too Far” – Court Shoots Down The EEOC's Kitchen Sink Subpoena, WORKPLACE CLASS ACTION BLOG (Nov. 25, 2014), available at <http://www.workplaceclassaction.com/2014/11/one-step-too-far-court-shoots-down-the-eeocs-kitchen-sink-subpoena/>.

⁴¹ *Forge Indus. Staffing Inc.*, 2014 WL 6673574, at *1.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at *2.

⁴⁵ *Id.* at *3.

⁴⁶ *Id.* at *4.

⁴⁷ *Id.* at *3.

because it would allow the EEOC to subpoena any information about a company at the EEOC's whim.⁴⁸

Finally, the court rejected the EEOC's standard argument that it has a broad mandate to promote the public interest, and therefore, can seek to remedy violations not alleged in a charge.⁴⁹ Based on a plain reading of Title VII, which requires relevance to the charge under investigation, the court reasoned that the EEOC could not expand a single charge into a pattern or practice case with wholly different allegations.⁵⁰

3. EEOC Victory In Obtaining Employee "Pedigree" Information

Despite those victories, the year closed on a down note for employers, as the Ninth Circuit in *EEOC v. McLane Company, Inc.*,⁵¹ reversed course on an earlier, favorable decision issued by the District of Arizona.⁵² While the District Court had refused to enforce an EEOC subpoena that sought employee pedigree information (name, address, telephone number, and social security number), and information regarding the reasons for employee terminations, the Ninth Circuit held that employee pedigree information was relevant to the EEOC's investigation and should be produced.⁵³ Further, the Ninth Circuit held that information regarding the reasons for termination was also relevant to the investigation and remanded the matter to the District Court to determine whether the production of this information would be unduly burdensome.⁵⁴

A McLane employee, Damiana Ochoa, filed a charge of discrimination against McLane.⁵⁵ Ochoa alleged that when she tried to return to work after taking maternity leave, McLane informed her that she could not resume her position unless she passed a physical capability strength test.⁵⁶ Ochoa attempted the test three times. Each time she failed and, as a result, was terminated.⁵⁷

The EEOC undertook an investigation into the charge, requesting certain information from McLane, including information on the strength test and the employees who had been required to take the test.⁵⁸ McLane complied with most of the EEOC's requests but refused to disclose

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at *7.

⁵¹ *EEOC v. McLane Co.*, 804 F.3d 1051 (9th Cir. 2015).

⁵² *EEOC v. McLane Co.*, No. 12-CV-2469-PHX-GMS, 2012 WL 5868959 (D. Ariz. Nov. 19, 2012).

⁵³ See Laura J. Maechtlen and Courtney K. Bohl, *Ninth Circuit: The EEOC Can Subpoena Extensive Employee Information*, WORKPLACE CLASS ACTION BLOG (Nov. 2, 2015), available at <http://www.workplaceclassaction.com/2015/11/ninth-circuit-the-eeoc-can-subpoena-extensive-employee-information/>.

⁵⁴ *McLane Co.*, 804 F.3d at 1059.

⁵⁵ *Id.* at 1053–54.

⁵⁶ *Id.*

⁵⁷ *Id.* at 1054.

⁵⁸ *Id.*

pedigree information of its employees and the reasons it terminated employee test takers.⁵⁹ The EEOC filed a subpoena enforcement action against McLane seeking this information.

In considering whether the EEOC was entitled to employee pedigree information, the Ninth Circuit clarified that the EEOC is entitled to “virtually any material that might cast light on the allegations against the employer.”⁶⁰ Under this loose standard, the Ninth Circuit held that employee pedigree information was relevant to the EEOC’s investigation because such information could be used by the EEOC to speak with other employees who took the test and determine whether there was any truth to Ochoa’s allegations.⁶¹

The Ninth Circuit rejected all three of McLane’s arguments against the enforcement of the subpoena. First, it rejected McLane’s argument that pedigree information was not relevant to the charge because Ochoa only alleged a disparate impact claim, not a disparate treatment claim.⁶² The Ninth Circuit found such information was relevant, reasoning that Ochoa’s charge is framed “general enough” to support either theory.⁶³ Second, it rejected McLane’s argument that pedigree information was not necessary to the EEOC’s investigation. The Ninth Circuit stressed that the governing standard was relevance, not necessity, and noted that the pedigree information was clearly relevant to Ochoa’s charge.⁶⁴

Third, the Ninth Circuit rejected McLane’s argument that pedigree information was not relevant because the strength test was neutrally applied, which McLane argued cannot, by definition, give rise to disparate treatment, systemic or otherwise.⁶⁵ The Ninth Circuit reasoned that even if the strength test applied to everyone, the test still could be applied in a discriminatory manner. For example, McLane could fire the women who failed the test but not the men who failed.⁶⁶

Finally, the Ninth Circuit turned to the issue of whether the EEOC was entitled to the reasons McLane terminated test takers.⁶⁷ Although it determined that this information was relevant to the EEOC’s investigation, it noted that McLane did not have to produce this information if it would be unduly burdensome.⁶⁸ The Ninth Circuit thus remanded this issue to the District Court for further consideration.

⁵⁹ *Id.* at 1056.

⁶⁰ *Id.*

⁶¹ *Id.* at 1056–57.

⁶² *Id.* at 1057.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 1057–58.

⁶⁶ *Id.* at 1058.

⁶⁷ *Id.* at 1058–59.

⁶⁸ *Id.* at 1059.

C. Conciliation Phase

If the EEOC finds that there is reasonable cause to believe that an employer violated one of the statutes, the District Director will issue a determination letter.⁶⁹ The determination will identify the nature of the alleged violations and generally those who the EEOC believes were harmed by the employer's conduct. Determination letters also will include an invitation to participate in conciliation efforts.

In its 2015 Performance Accountability Report, the EEOC trumpeted "record success" in conciliation of private sector charges.⁷⁰ The EEOC reported that 44 percent of conciliations ended with voluntary resolutions last year, with even greater success - 64 percent - for systemic investigations.⁷¹

The descriptions provided by the EEOC in its determinations are often so general as to leave the employer wondering the basis for the EEOC's decision. Where class-wide violations have been found, it is often not clear even who the EEOC considers to be included in the class. These vagaries pose a significant hurdle to employers trying to value the charges for conciliation purposes.

Perhaps the single most significant development in EEOC litigation this year was the decision issued by the U.S. Supreme Court on April 29, 2015, in *Mach Mining, LLC v. EEOC*.⁷² In *Mach Mining*, the Supreme Court unanimously rejected the EEOC's view that its statutorily-required conciliation activities may not be reviewed by the courts. This is a groundbreaking decision because it means that the EEOC can no longer file suit against employers without engaging in a meaningful process of conciliation. And it should give employers a chance to resolve claims before they are brought in federal court.⁷³ The far-reaching effects of this decision are difficult to

⁶⁹ 29 C.F.R. § 1601.21.

⁷⁰ U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FISCAL YEAR 2015 PERFORMANCE AND ACCOUNTABILITY REPORT, *supra* note 19, at 7.

⁷¹ *Id.*

⁷² *Mach Mining v. EEOC*, 135 S. Ct. 1645 (2015). In addition to the briefs submitted by the parties, on September 11, 2014, Seyfarth Shaw LLP submitted an amicus brief in support of Mach Mining's position on behalf of the American Insurance Association ("AIA"). See Gerald L. Maatman, Jr., Lorie Almon, Rebecca Bjork, and Christopher DeGroff, *The Defense Amicus Briefs Submitted To The SCOTUS In EEOC v. Mach Mining*, WORKPLACE CLASS ACTION BLOG (Sept. 11, 2014), available at <http://www.workplaceclassaction.com/2014/09/the-defense-amicus-briefs-submitted-to-the-scotus-in-eec-v-mach-mining/>.

⁷³ See Gerald L. Maatman, Jr., Christopher Cascino, and Matthew Gagnon, *Supreme Court Victory For Employers Today In Mach Mining v. EEOC*, WORKPLACE CLASS ACTION BLOG (Apr. 29, 2015), available at <http://www.eeocountdown.com/2015/04/29/supreme-court-victory-for-employers-today-in-mach-mining-v-eec/>; Seyfarth Shaw LLP, *SCOTUS Benchslaps The EEOC – An Analysis Of The Mach Mining v. EEOC Decision*, WORKPLACE CLASS ACTION BLOG (May 6, 2015), available at <http://www.eeocountdown.com/2015/05/06/scotus-benchslaps-the-eec-an-analysis-of-the-mach-mining-v-eec-decision/>; Gerald L. Maatman, Jr., *U.S. Supreme Court Hears Oral Argument In Mach Mining v. EEOC*, WORKPLACE CLASS ACTION BLOG (Jan. 13, 2015), available at <http://www.workplaceclassaction.com/2015/01/u-s-supreme-court-hears-oral-argument-in-mach-mining-v-eec/>; Gerald L. Maatman, Jr., *Last Brief Filed Today With The SCOTUS in Mach Mining Case*, WORKPLACE CLASS ACTION BLOG (Dec. 1, 2014), available at <http://www.workplaceclassaction.com/2014/12/last-brief-filed-today-with-the-scotus-in-mach-mining-case/>;

predict, but at a minimum, it means that employers are in a significantly better position to try to settle claims with the EEOC on reasonable terms than they have been in the past. Any employer who has ever been across the “v” from the EEOC knows that any opportunity to avoid the expense and burden of EEOC litigation is a cause for celebration.

1. Case Study No. 1: Strategic Litigation And The *Mach Mining* Decision

a. How Did We Get Here?

The EEOC has been arguing for years that its alleged failure to conciliate prior to bringing suit – as Title VII requires it to do⁷⁴ – cannot be used by employers to get an EEOC lawsuit thrown out of court.⁷⁵ In essence, the EEOC’s position was that the manner in which it conducts its statutorily-required conciliation process is immune from judicial oversight or review.⁷⁶ In December 2013, the U.S. Court of Appeals for the Seventh Circuit agreed with this position, holding that employers could not use the EEOC’s failure to conciliate as an affirmative defense to the merits of an employment discrimination suit brought by the Commission.⁷⁷ On June 30, 2014, the Supreme Court granted certiorari to review that decision.⁷⁸

The road to the Supreme Court’s *Mach Mining* decision is worth reviewing in some detail because it illustrates how the EEOC – as the primary agency in charge of enforcing the equal employment opportunity laws – is uniquely positioned to blanket the country with a consistent litigation position, and then strategically build on openings provided by lower court decisions to cement that interpretation into law.

Gerald L. Maatman, Jr., *Amicus Filed Today In Support Of The Government’s Position In Mach Mining v. EEOC*, WORKPLACE CLASS ACTION BLOG (Nov. 3, 2014), available at <http://www.workplaceclassaction.com/2014/11/amicus-filed-today-in-support-of-the-governments-position-in-mach-mining-v-eeoc/>; *The Defense Amicus Briefs Submitted To The SCOTUS In EEOC v. Mach Mining*, supra note 72; Gerald L. Maatman, Jr. and Jennifer A. Riley, *Mach Mining Gets Last Word At The SCOTUS In Its Quest For Clarification Of EEOC’s Conciliation Obligations*, WORKPLACE CLASS ACTION BLOG (June 5, 2014), available at <http://www.workplaceclassaction.com/2014/06/mach-mining-gets-last-word-at-the-scotus-in-its-quest-for-clarification-of-eeocs-conciliation-obligations/>.

⁷⁴ The ADEA also requires the EEOC to engage in conciliation prior to suit: “Before instituting any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.” 29 U.S.C. § 626(b). The ADA requires the EEOC to follow the procedures set forth in Title VII. 42 U.S.C. § 12117(a).

⁷⁵ Gerald L. Maatman, Jr. and Rebecca Bjork, *The EEOC’s Most Important Brief Of The Year Filed With The U.S. Supreme Court – The Lines Are Drawn In The Mach Mining Appeal*, WORKPLACE CLASS ACTION BLOG (Oct. 28, 2014), available <http://www.workplaceclassaction.com/2014/10/the-eeocs-most-important-brief-of-the-year-filed-with-the-u-s-supreme-court-the-lines-are-drawn-in-the-mach-mining-appeal/>.

⁷⁶ *Id.*

⁷⁷ See *Mach Mining, LLC v. EEOC*, 738 F.3d 171, 172 (7th Cir. 2013); see also Gerald L. Maatman, Jr., Jennifer A. Riley, and Rebecca S. Bjork, *SCOTUS Agrees To Consider Scope Of The EEOC’s Statutory Duty To Conciliate*, WORKPLACE CLASS ACTION BLOG (June 30, 2014), available at <http://www.workplaceclassaction.com/2014/06/scotus-agrees-to-consider-scope-of-the-eeocs-statutory-duty-to-conciliate/>.

⁷⁸ *Mach Mining, LLC v. EEOC*, 738 F.3d 171 (7th Cir. 2013).

The EEOC has been very aggressive in challenging the use of “failure-to-conciliate” as a defense through targeted motions for summary judgment, like the one that gave rise to the *Mach Mining* decision in the Seventh Circuit.⁷⁹ Over the course of many years, the EEOC’s efforts eventually resulted in a circuit split. The Fourth, Sixth and Tenth Circuits allowed district courts to review the EEOC’s conciliation efforts to determine whether those efforts met a minimal level of good faith.⁸⁰ The Second, Fifth and Eleventh Circuits applied a three-part test to evaluate the EEOC’s conciliation efforts.⁸¹ This test required a district court to assess whether the EEOC: (1) outlined to the employer its cause for believing Title VII had been violated, (2) gave the employer a chance to comply voluntarily, and (3) responded in a reasonable and flexible manner to the reasonable attitudes of the employer.⁸²

The Seventh Circuit had not opined on this issue until it issued its *Mach Mining* decision in December 2013.⁸³ But an earlier Seventh Circuit decision, *EEOC v. Caterpillar, Inc.*,⁸⁴ had opened the door to the *Mach Mining* decision in holding that the EEOC’s decision as to whether there is probable cause to sue is generally not reviewable.⁸⁵ In that case, the EEOC had investigated a single charge of discrimination, but later concluded that it had “reasonable cause to believe that Caterpillar discriminated against [the charging party] and a class of female employees, based on their sex.”⁸⁶

Caterpillar challenged the EEOC’s probable cause determination on the basis that the allegations of plant-wide discrimination were unrelated to the charging party’s charge.⁸⁷ The Seventh Circuit addressed the following question: “[i]n determining whether the claims in an EEOC complaint are within the scope of the discrimination allegedly discovered during the EEOC’s investigation, must the court accept the EEOC’s Administrative Determination concerning the alleged discrimination discovered during its investigation, or instead, may the court itself review the scope of the investigation?”⁸⁸ The Seventh Circuit ultimately held that the EEOC’s decision concerning the existence of probable cause to sue is generally not reviewable by the courts.⁸⁹

⁷⁹ See, e.g., *EEOC v. New Prime, Inc.*, 42 F. Supp. 3d 1201 (W.D. Mo. 2014); *EEOC v. Bass Pro Outdoor World, LLC*, No. 4:11-CV-3425, 2013 WL 5515345 (S.D. Tex. Oct. 2, 2013); *EEOC v. Riverview Animal Clinic, P.C.*, 761 F. Supp. 2d 1296 (N.D. Ala. 2010).

⁸⁰ See, e.g., *EEOC v. Keco Indus., Inc.*, 748 F.2d 1097, 1102 (6th Cir. 1984); *EEOC v. Radiator Specialty Co.*, 610 F.2d 178, 183 (4th Cir. 1979); *EEOC v. Zia Co.*, 582 F.2d 527, 533 (10th Cir. 1978).

⁸¹ See, e.g., *EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256, 1259 (11th Cir. 2003); *EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529, 1534 (2d Cir. 1996); and *EEOC v. Klinger Elec. Corp.*, 636 F.2d 104, 107 (5th Cir. 1981).

⁸² *Asplundh Tree Expert Co.*, 340 F.3d at 1259.

⁸³ *Mach Mining, LLC v. EEOC*, 738 F.3d 171 (7th Cir. 2013).

⁸⁴ *EEOC v. Caterpillar, Inc.*, 409 F.3d 831 (7th Cir. 2005).

⁸⁵ *Id.* at 833.

⁸⁶ *Id.* at 832.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 833.

Relying on that decision in *Mach Mining*, the Seventh Circuit broke from its sister circuits and ruled that the EEOC's failure to conciliate is not an affirmative defense to the merits of an employment discrimination suit brought by the Commission.⁹⁰ The Seventh Circuit held that "Title VII contains no express provision" for this defense and that "conciliation is an informal process entrusted solely to the EEOC's expert judgment and that the process is to remain confidential."⁹¹ The court concluded that there was no affirmative defense for "failure-to-conciliate" and that a court should look no further than the face of the complaint to determine that the EEOC had pled that it met its conciliation obligation.⁹² This is the approach that was later reversed by the Supreme Court.

b. The Supreme Court's Decision

Employers could not have asked for a more sweeping denunciation of the EEOC's position that its pre-suit conduct was beyond the scope of any judicial oversight or control. In a unanimous opinion authored by Justice Kagan, the Supreme Court held that there is a "strong presumption favoring judicial review of administrative action."⁹³ It referenced conciliation as a required step in the administrative process, and acknowledged that "[c]ourts routinely enforce such compulsory prerequisites to suit in Title VII litigation."⁹⁴ Absent the federal courts' power to review the EEOC's conciliation efforts, "the Commission's compliance with the law would rest in the Commission's hands alone." Such a result would be contrary to "the Court's strong presumption in favor of judicial review of administrative action."⁹⁵ As the Supreme Court further explained, "the point of judicial review is instead to *verify* the EEOC's say-so," and to "determine that the EEOC actually, and not purportedly" met its obligations.⁹⁶

Critically, the Supreme Court acknowledged that conciliation is a crucial step in realizing Title VII's legislative goals of making "cooperation and voluntary compliance" the "preferred means" of "bringing employment discrimination to an end."⁹⁷ The Supreme Court also observed that "the statute provides certain concrete standards pertaining to what [conciliation] must entail," pointing to the statutory language specifying the obligation to engage in "informal methods of conference, conciliation, and persuasion" regarding the "alleged unlawful employment

⁹⁰ *Mach Mining*, 738 F.3d at 172; see also SCOTUS Agrees To Consider Scope Of The EEOC's Statutory Duty To Conciliate, *supra* note 77.

⁹¹ *Mach Mining*, 738 F.3d at 174.

⁹² *Id.* at 184; see also Christopher DeGroff, Gerald L. Maatman, Jr., and Howard M. Wexler, *Seventh Circuit Gives Employers A Lump Of Coal And Says Bye-Bye To Failure To Conciliate Defense*, WORKPLACE CLASS ACTION BLOG (Dec. 21, 2013), available at <http://www.workplaceclassaction.com/2013/12/seventh-circuit-gives-employers-a-lump-of-coal-and-says-bye-bye-to-failure-to-conciliate-defense/>.

⁹³ *Mach Mining*, 135 S. Ct. at 1651 (internal quotation omitted).

⁹⁴ *Id.*

⁹⁵ *Id.* at 1652–53.

⁹⁶ *Id.* at 1653 (emphasis in original).

⁹⁷ *Id.* at 1651 (internal quotation omitted).

practice.”⁹⁸ The Court concluded that, “[i]f the Commission does not take those specified actions, it has not satisfied Title VII’s requirement to attempt conciliation.”⁹⁹

Starting with the plain language of the statute, the Supreme Court noted that Title VII requires the EEOC to attempt to settle claims prior to bringing a lawsuit through “conference, conciliation, and persuasion.”¹⁰⁰ Boiling that down to its essence, the Supreme Court held that the EEOC must “tell the employer about the claim – essentially, what practice has harmed which person or class – and must provide the employer with an opportunity to discuss the matter in an effort to achieve voluntary compliance.”¹⁰¹ A court reviewing the EEOC’s conciliation efforts must be satisfied that the EEOC has actually gone through that process.

Employers may have been happier had the Court stopped there.¹⁰² But Justice Kagan went on to write that the EEOC could fulfill its obligation by submitting an affidavit stating that it has performed its obligations.¹⁰³ If the employer then counters with a credible affidavit or other evidence that demonstrates that the EEOC “did not provide the requisite information about the charge or attempt to engage in a discussion about conciliating the claim,” then a federal court must conduct the fact-finding necessary to decide that dispute.¹⁰⁴ If the court finds that the EEOC’s efforts were inadequate, then the case should be stayed so that the EEOC can undertake the necessary efforts to satisfy its conciliation requirement.¹⁰⁵

The far-reaching implications of the *Mach Mining* decision are up for debate. On the one hand, the Supreme Court held in no uncertain terms that the EEOC is not above the law; its conciliation efforts must comply with Title VII and they are subject to judicial review. On the other hand, by setting forth such a narrow grounds for involvement by the courts, the decision raises a number of questions about how it can be used by employers who want to reign in the Commission’s excesses.

c. Where Will The Lower Courts Go With *Mach Mining*?

The *Mach Mining* decision is still just a few months old, so it is not yet clear how courts will interpret this decision when deciding employers’ challenges to the manner in which the EEOC conducts its conciliations. Ultimately, it will be up to the lower courts to define how this issue changes the landscape of EEOC litigation. This case has generated considerable interest. Now that we have the Supreme Court’s decision, the conversation has not stopped. Everyone is wondering: where do we go from here?

In one of the first decisions to apply the level of judicial review articulated in *Mach Mining*, Judge Gregory L. Frost of the U.S. District Court for the Southern District of Ohio breathed some life

⁹⁸ *Id.*

⁹⁹ *Id.* at 1652.

¹⁰⁰ *Id.* at 1651.

¹⁰¹ *Id.* at 1652.

¹⁰² See, e.g., *Supreme Court Victory For Employers Today In Mach Mining v. EEOC*, *supra* note 73.

¹⁰³ *Mach Mining*, 135 S. Ct. at 1656.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

into the conciliation defense. On June 29, 2015, Judge Frost held in *EEOC v. OhioHealth Corp.*¹⁰⁶ that the EEOC had failed to satisfy its obligation and stayed the case so that the EEOC could engage in the requisite conciliation.¹⁰⁷ The court held that this threshold issue of conciliation must be decided before reaching the merits, and to do otherwise would be “put[ting] the cart before the horse.”¹⁰⁸

Keying off the Supreme Court’s language in the *Mach Mining* decision, Judge Frost held that to meet its obligation to conciliate, the EEOC must inform the employer about the specific allegations and must try to engage the employer in some form of discussion so as to give the employer an opportunity to remedy the allegedly discriminatory practice.¹⁰⁹ The EEOC presented a sworn affidavit stating that it had issued a determination on September 15, 2011, engaged in communications with OhioHealth until October 14, 2011, and only brought suit after OhioHealth rejected the EEOC’s conciliation proposal.¹¹⁰ OhioHealth countered with its own declaration, which stated that the EEOC’s conciliation process amounted to a take-it-or-leave-it proposition, which ended in the Commission declaring the conciliation efforts a failure even though OhioHealth had made it clear that it was “ready and willing to negotiate.”¹¹¹

The court held that there were questions of fact as to whether the EEOC had properly attempted to engage in conciliation as required by statute, or if it had gone through the motions of conciliation for the sake of appearances only: “if the proceedings were for appearances only, then there never was a real attempt to engage in conciliation as the law requires.”¹¹² The court concluded that “an unsupported demand letter such as the one involved here alone cannot logically constitute an attempt to inform and engage in the conciliation process,” because it does not provide the employer with any meaningful opportunity to remedy the alleged discrimination.¹¹³

In conclusion, the court lambasted the EEOC’s approach to conciliation and opened the door for a future attack on the Commission’s conciliation procedures: “[I]f the EEOC continues down this dangerous path and fails to engage in good faith efforts at conciliation as ordered, this Court will impose any or all consequences available, including but not limited to contempt and dismissal of this action for failure to prosecute.”¹¹⁴

¹⁰⁶ *EEOC v. OhioHealth Corp.*, No. 2:13-CV-780, 2015 WL 3952339 (S.D. Ohio June 29, 2015).

¹⁰⁷ *Id.* at *4–5; see also Gerald L. Maatman, Jr. and Howard M. Wexler, *Court Shoots Down The EEOC At “Mach” Speed Based On “Sham” Conciliation Process*, WORKPLACE CLASS ACTION BLOG (July 6, 2015), available at <http://www.workplaceclassaction.com/2015/07/court-shoots-down-the-eeoc-at-mach-speed-based-on-sham-conciliation-process/>.

¹⁰⁸ *OhioHealth Corp.*, 2015 WL 3952339, at *1.

¹⁰⁹ *Id.* at *2.

¹¹⁰ *Id.*

¹¹¹ *Id.* at *3.

¹¹² *Id.*

¹¹³ *Id.* at *4.

¹¹⁴ *Id.* at *5.

On July 7, 2015, the United States District Court for the District of Columbia came to a different conclusion in *EEOC v. Blinded Veterans Association*.¹¹⁵ In that case, the court held that the EEOC satisfied its conciliation obligation when it made a specific offer that included both monetary and non-monetary terms to each of the three charging parties.¹¹⁶ The employer raised no objection to the non-monetary terms.¹¹⁷ But the employer and the Commission did go through several rounds of negotiation over the amount of the monetary terms, with both sides giving ground.¹¹⁸ It was only after the employer demanded additional concessions from one of the charging parties that the EEOC determined that conciliation had not been successful.¹¹⁹

As these rulings show, the implications of *Mach Mining* are far from decided, and how it should be applied is a matter that is still very much in dispute. Some courts have been quick to conclude that the EEOC meets its obligation as long as there is some evidence of an attempt to reach resolution by negotiation. For example, in *EEOC v. Jetstream Ground Services, Inc.*,¹²⁰ the U.S. District Court for the District of Colorado found that the EEOC had met its obligation when the parties had exchanged written conciliation proposals five times and met in person once, and when the EEOC had twice reduced its requested damages offers.¹²¹ Other courts, like Judge Frost's decision in *OhioHealth Corp.*, have been willing to send the EEOC back to the drawing board if there is little evidence that the EEOC negotiated in a meaningful way.

d. Is The Past Completely History?

The courts that have continued to fault the EEOC's conciliation efforts post-*Mach Mining* usually focus on Justice Kagan's admonition that the purpose of the conciliation requirement is to allow the employer a chance to rectify the alleged discrimination. For example, in *EEOC v. GNLV Corp.*, the court refused to grant summary judgment for the EEOC because it had not provided information about one of the charges it was attempting to conciliate, which would have allowed the employer a chance to rectify that claim of discrimination.¹²²

This focus on the employer's ability to "right the wrong" echoes the three-part test that the Second, Fifth, and Eleventh Circuits had applied to evaluate the EEOC's conciliation efforts.¹²³

¹¹⁵ *EEOC v. Blinded Veterans Ass'n*, No. 14-CV-2102, 2015 WL 5148737 (D.D.C. July 7, 2015).

¹¹⁶ *Id.* at *8.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ See, e.g., *EEOC v. Jetstream Ground Servs., Inc.*, No. 13-CV-02340, 2015 WL 5697315 (D. Colo. Sept. 29, 2015).

¹²¹ *Id.* at *5.

¹²² *EEOC v. GNLV Corp.*, No. 2:06-CV-1225, 2015 WL 3467092 (D. Nev. June 1, 2015); see also *EEOC v. Amsted Rail Co., Inc.*, No. 14-CV-1292 (S.D. Ill. July 21, 2015) (rejecting EEOC's attempt to strike failure to conciliate defense from defendant's answer).

¹²³ See, e.g., *EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256, 1259 (11th Cir. 2003); *EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529, 1534 (2d Cir. 1996); and *EEOC v. Klinger Elec. Corp.*, 636 F.2d 104, 107 (5th Cir. 1981).

And at least one court appears to have imported some elements of the Tenth Circuit's "good faith" test into the *Mach Mining* decision itself.¹²⁴

On October 23, 2015, the U.S. District Court for the District of Colorado denied the EEOC's motion to reconsider the court's earlier decision dismissing a claim for lack of conciliation.¹²⁵ In *EEOC v. CollegeAmerica Denver, Inc.*,¹²⁶ the EEOC alleged that CollegeAmerica's separation agreement violated the federal age discrimination laws because it interfered with the EEOC's statutorily assigned responsibility to investigate charges of discrimination in violation of the ADEA.¹²⁷ The case arose after a campus director signed a separation agreement in September 2012 that conditioned the receipt of separation benefits on, among other things, her promise not to file any complaint or grievance with any government agency or to disparage CollegeAmerica.¹²⁸

The EEOC alleged that the agreement would have the effect of preventing her from reporting any alleged employment discrimination to the EEOC or filing a discrimination charge.¹²⁹ In particular, the EEOC asserted three claims: (1) a claim asserting that CollegeAmerica, through the Agreement, denied the charging party the full exercise of her rights under the ADEA and interfered with the statutorily assigned responsibility of the EEOC and state Fair Employment Practices Agencies' ("FEPAs") to investigate charges of discrimination in violation of Section 7(f)(4) of the ADEA; (2) a claim asserting that CollegeAmerica, through the Separation Agreements, denied other employees the full exercise of their rights under the ADEA and interfered with the statutorily assigned responsibility of the EEOC and FEPAs to investigate charges of discrimination in violation of Section 7(f)(4) of the ADEA; and (3) a claim asserting that CollegeAmerica retaliated against the charging party by filing a state court action in violation of Section 4(d) of the ADEA.¹³⁰

¹²⁴ A version of a "good faith" standard was explicitly rejected by the Supreme Court in *Mach Mining*. But that standard was based on a test arising out of labor disputes under the NLRA. See *Mach Mining*, 135 S. Ct. at 1654-55 ("In addressing labor disputes, courts have devised a detailed body of rules to police good-faith dealing divorced from outcomes – and so to protect the NLRA's core procedural apparatus. But those kinds of rules do not properly apply to a law that treats the conciliation process not as an end in itself, but only as a tool to redress workplace discrimination.").

¹²⁵ See Gerald L. Maatman, Jr. and Howard M. Wexler, *Another One Bites The Dust At "Mach" Speed: EEOC's Age Discrimination Lawsuit Dismissed Based On Failure To Conciliate*, WORKPLACE CLASS ACTION BLOG (Oct. 29, 2015), available at <http://www.workplaceclassaction.com/2015/10/another-one-bites-the-dust-at-mach-speed-eeocs-age-discrimination-lawsuit-dismissed-based-on-failure-to-conciliate/>.

¹²⁶ *EEOC v. CollegeAmerica Denver, Inc.*, No. 14-CV-01232, 2015 WL 6437863 (D. Colo. Oct. 23, 2015).

¹²⁷ *Id.* at *1.

¹²⁸ *EEOC v. CollegeAmerica Denver, Inc.*, 75 F. Supp. 3d 1294, 1296 (D. Colo. 2015).

¹²⁹ *Id.*; see also See Chris DeGross and Laura Maechtlen, *Separation Agreement Attack Redux – EEOC Takes Another Swing At Employer's Standard Release Language, And Loses On Key Claims*, WORKPLACE CLASS ACTION BLOG (Dec. 8, 2014), available at <http://www.workplaceclassaction.com/2014/12/separation-agreement-attack-redux-eeoc-takes-another-swing-at-employers-standard-release-language-and-loses-on-key-claims/>; Press Release, Equal Employment Opportunity Commission, *CollegeAmerica Sued by EEOC For Age Discrimination and Retaliation*, (May 5, 2014), available at <http://www.eeoc.gov/eeoc/newsroom/release/5-5-14.cfm>.

¹³⁰ *CollegeAmerica Denver, Inc.*, 75 F. Supp. 3d at 1297.

On December 2, 2014, the district court dismissed the second claim for lack of jurisdiction due to the EEOC's failure to satisfy its conciliation requirement, which the court held was a jurisdictional prerequisite to bringing a lawsuit.¹³¹ In particular, the court held that the EEOC failed to provide CollegeAmerica with notice in its letter of determination that the "form" separation agreements purportedly violated the ADEA, noting that the EEOC had been unaware of their existence at that time.¹³² Because the EEOC failed to raise concerns about the "form" separation agreements at the conciliation meeting, the EEOC failed to give notice about or conciliate that issue.¹³³

Relying on Tenth Circuit precedent, the court refused to stay proceedings for further conciliation efforts because the EEOC had not made a sufficient initial effort "by providing the defendant an adequate opportunity to respond to all charges and negotiate possible settlements" that would justify a stay.¹³⁴ It was this aspect of the decision that the EEOC asked the court to reconsider.¹³⁵

On October 23, 2015, the court stuck to its prior decision even in light of the *Mach Mining* decision. The EEOC had introduced new evidence to establish that it in fact was aware of the form separation agreements at the time the letter of determination was issued.¹³⁶ The court was convinced by the evidence that the EEOC had obtained copies of the separation agreements during its investigation of the charging party's claims.¹³⁷ But that did not change the fact that the EEOC had not provided notice of the EEOC's claims when it issued its letter of determination.¹³⁸

Although the letter had requested that CollegeAmerica "revise its form severance agreement to comply with the ADEA and make it clear that employees retain the right to file charges and cooperate with the EEOC," it failed to reference the agreements in the section stating its findings of unlawful practices.¹³⁹ Moreover, it was apparent from subsequent correspondence from CollegeAmerica that the company did not understand that the form separation agreements were part of the EEOC's investigation.¹⁴⁰ Echoing – but not citing – the Tenth Circuit precedent that had driven its earlier decision, the court held that the new evidence did not alter its previous

¹³¹ *Id.* at 1302–03. The court also held that there was no justiciable controversy over the EEOC's first claim because CollegeAmerica provided evidence that it did not assert such a waiver in connection with her EEOC charges or state court action, and provided an affidavit stating that the employer did not and would never assert that the individual separation agreement constitutes a waiver of ADEA rights. *Id.* at 1299–1300.

¹³² *Id.* at 1302.

¹³³ *Id.* at 1302–03.

¹³⁴ *Id.* at 1302 (citing *EEOC v. Prudential Fed. Sav. & Loan Assoc.*, 763 F.2d 1166, 1169 (10th Cir.1985); *Marshall v. Sun Oil Co. of Pa.*, 592 F.2d 563, 566–67 (10th Cir.1979); *EEOC v. Zia Co.*, 582 F.2d 527, 533 (10th Cir.1978).

¹³⁵ See *Another One Bites The Dust At "Mach" Speed: EEOC's Age Discrimination Lawsuit Dismissed Based On Failure To Conciliate*, *supra* note 125.

¹³⁶ *CollegeAmerica Denver, Inc.*, 2015 WL 6437863, at *2.

¹³⁷ *Id.*

¹³⁸ *Id.* at *2–3.

¹³⁹ *Id.* at *2.

¹⁴⁰ *Id.* at *2–3.

finding that “there is no evidence that the Separation Agreements were addressed at the parties’ conciliation meeting or [its] conclusion that this meeting therefore likewise failed to provide the requisite notice to CollegeAmerica that these Agreements were part of the EEOC’s investigation.”¹⁴¹

Turning to *Mach Mining*, the court noted that that decision did not address Title VII’s “notice” requirement, which is comparable to that of the ADEA.¹⁴² Moreover, the court held that the EEOC’s efforts at conciliation were still inadequate under *Mach Mining* because it had “failed to provide adequate notice to CollegeAmerica that the Separation Agreements were part of the EEOC investigation and findings of unlawful practices by CollegeAmerica,” and therefore failed “to give CollegeAmerica an opportunity to voluntarily revise them.”¹⁴³ The court also found that a stay, which would allow the EEOC to conciliate the claim regarding the form separation agreements, was unwarranted due to the EEOC’s delay in bringing the motion for reconsideration.¹⁴⁴ Accordingly, the court stood by its earlier order dismissing the claim in its entirety.¹⁴⁵

The Supreme Court’s interpretation of Title VII’s conciliation requirements is that the EEOC must “inform” the employer of the “specific allegation” that describes “both what the employer has done and which employees (or what class of employees) have suffered as a result,” and that the EEOC must engage the lawyer in a discussion “so as to give the employer an opportunity to remedy the allegedly discriminatory practice.”¹⁴⁶ Under the reasoning of *CollegeAmerica*, the “inform” requirement could import some of the elements of the Tenth Circuit’s “good faith” test.

The standard articulated in *Mach Mining* also comes close to adopting the first two prongs of the three-part test of the Second, Fifth, and Eleventh Circuits, and arguably includes some of the information-sharing components implicit in the third prong.¹⁴⁷ Arguably, this prior precedent never authorized the searching level of review that the Supreme Court rejected in *Mach Mining* and, therefore, was not explicitly rejected by that decision.¹⁴⁸

If courts interpret the *Mach Mining* decision in this manner, it may open the door for employers to rely on earlier decisions for guidance as to what the EEOC must do to meet its obligation to

¹⁴¹ *Id.* at *3.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Mach Mining*, 135 S. Ct. at 1655-56.

¹⁴⁷ Compare this with the three-part test required by the district court to assess whether the EEOC: (1) outlined to the employer its cause for believing Title VII had been violated, (2) gave the employer a chance to comply voluntarily, and (3) responded in a reasonable and flexible manner to the reasonable attitudes of the employer. *Asplundh Tree Expert Co.*, 340 F.3d at 1259.

¹⁴⁸ See, e.g., *EEOC v. McGee Bros., Co.*, No. 3:10-CV-142, 2011 WL 1542148, at *4–5 (W.D.N.C. Apr. 21, 2011) (“[T]here is no requirement that the EEOC continue to negotiate once the futility of conciliation has become apparent.”); *EEOC v. Mastec N. Am., Inc.*, No. 8:05-CV-1226, 2006 WL 3949167 at *8–9 (M.D. Fla. Oct. 24, 2006) (“The fact that MasTec was dissatisfied with the EEOC’s explanation of its Determination is not a reason to find that the EEOC acted unreasonably.”).

conciliate. For example, some courts have held that the EEOC failed to conciliate when it failed to provide the basis for its theory of liability, and when it withheld basic information underlying its claim for monetary relief.

For example, in *Asplundh Tree Expert Co.*, the EEOC brought suit against a company that had contracted with the city of Gainesville, Florida to dig ditches and lay underground cable.¹⁴⁹ The EEOC alleged under a joint employer theory that one of the company's employees was subjected to racial discrimination and harassment by a city employee who visited the worksite to inspect the company's work.¹⁵⁰ The EEOC sent a proposed conciliation agreement to the employer that did not explain its theory as to why the company should be held liable for the actions of someone who was not employed by the company.¹⁵¹ The EEOC then abruptly ended the conciliation process after the company's lawyer contacted the Commission to discuss the matter.¹⁵² The Eleventh Circuit held that the EEOC had failed to conciliate because, among other things, it had failed to identify its theory of liability against the company.¹⁵³

In other cases, courts have held that the EEOC's failure to divulge the basis for its demand for monetary relief evidences a failure to conciliate. For example, in *EEOC v. High Speed Enterprises, Inc.*,¹⁵⁴ the court found that the EEOC failed to conciliate when it "refused to provide any basis for its damages calculations despite Defendant's repeated requests."¹⁵⁵ Similarly, in *EEOC v. La Rana Hawaii, LLC*,¹⁵⁶ the court found that the EEOC failed to conciliate when "despite Defendants' repeated requests, the EEOC did not furnish information regarding the class of unnamed 'aggrieved individuals,' the allegedly unlawful acts, or any other fact that would put Defendants on notice of the class or its claims."¹⁵⁷

¹⁴⁹ *Asplundh Tree Expert Co.*, 340 F.3d at 1257.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 1258.

¹⁵² *Id.*

¹⁵³ *Id.* at 1260; see also *EEOC v. UMB Bank, N.A.*, 432 F. Supp. 2d 948, 955 (W.D. Mo. 2006) ("The EEOC provided UMB with no basis for its conclusion that Graves did not require voice recognition software, other than Graves' own assertion that such software was not required. Without the opportunity to assess Graves' ability to perform the Customer Service Representative position, UMB had no foundation from which to engage in meaningful conciliation discussions or to generate a conciliation proposal.").

¹⁵⁴ *EEOC v. High Speed Enters., Inc.*, No. 08-CV-01789, 2010 WL 8367452 (D. Ariz. Sept. 30, 2010).

¹⁵⁵ *Id.* at *5.

¹⁵⁶ *EEOC v. La Rana Haw., LLC*, 888 F. Supp. 2d 1019 (D. Haw. 2012).

¹⁵⁷ *Id.* at 1045; see also *EEOC v. First Midwest Bank, N.A.*, 14 F. Supp. 2d 1028, 1032-33 (N.D. Ill. 1998) (finding that the EEOC failed to conciliate where it refused to provide any information regarding the class or its calculation of damages); *EEOC v. Anderson's Rest. of Charlotte, Inc.*, No. 86-CV-002, 1986 WL 192883, at *6 (W.D.N.C. Apr. 20, 1986) ("This Court is of the opinion that a small corporation, such as Defendant, cannot reasonably be expected to agree to the payment of such a substantial amount of damages without being provided with the basis for such a demand.").

2. How Will *Mach Mining* Impact Employers' Defense That The EEOC Failed To Investigate Its Claim Before Bringing A Lawsuit?

The EEOC may only prosecute claims pursuant to its statutory authority. The equal employment opportunity laws give the EEOC the power to bring claims on behalf of individuals and classes of individuals subject to a statutory scheme that favors the administrative rather than judicial resolution of discrimination disputes.¹⁵⁸ Under Title VII, the EEOC may not bring suit on a charge before “mak[ing] an investigation thereof,” determining whether there is “reasonable cause to believe that the charge is true,” and “endeavor[ing] to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.”¹⁵⁹ The conciliation requirement was the subject of the Supreme Court’s *Mach Mining* decision. But in squarely holding that the EEOC’s pre-suit conduct is not immune from judicial review, that decision has potential applicability to other aspects of the pre-suit phase of an EEOC enforcement action.

Another hotly disputed area is the EEOC’s duty to investigate a charge of discrimination before it files a lawsuit. The impact of *Mach Mining* is only beginning to take shape with respect to this requirement, but the initial decisions have not been entirely positive for employers. Unlike with conciliation, the first courts to apply *Mach Mining* in the context of the EEOC’s duty to investigate have focused on the limited scope of a court’s power to review the EEOC’s pre-suit conduct, rather than on the Supreme Court’s rejection of the EEOC’s position that that conduct should be immune from judicial review.

On May 5, 2015, in *EEOC v. Sterling Jewelers Inc.*,¹⁶⁰ the Second Circuit reversed the decisions of District Court Judge Richard J. Arcara and Magistrate Judge Jeremiah J. McCarthy of the U.S. District Court for the Western District of New York, which had dismissed a nationwide pattern or practice case against Sterling Jewelers, Inc. because the EEOC had failed to investigate the claim that it actually brought. In that case, the EEOC investigated 19 charges brought by women who claimed that Sterling discriminated against them in pay and/or promotions based on their sex.¹⁶¹ Sixteen of the charges alleged that Sterling engaged in a “continuing policy or pattern and practice” of sex discrimination.¹⁶² Although five investigators initially investigated the charges, the EEOC later transferred all 19 charges to one investigator.¹⁶³

As part of its investigation, the EEOC requested copies of Sterling’s company-wide protocols, including policies governing pay, promotion, and anti-discrimination; job descriptions for sales associates and management positions; and computerized personnel files listing employees’ hiring dates, responsibilities, and pay and promotion histories.¹⁶⁴ The EEOC also was able to obtain company-wide pay and promotion data through its participation in a private mediation

¹⁵⁸ See, e.g., *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657, 674 (8th Cir. 2012).

¹⁵⁹ 5 U.S.C. § 2000e-5(b).

¹⁶⁰ *EEOC v. Sterling Jewelers, Inc.*, 801 F.3d 96 (2d Cir. 2015).

¹⁶¹ *Id.* at 99.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

between the company and the charging parties (though that information was subject to a mediation agreement that made the materials inadmissible).¹⁶⁵ On January 30, 2008, the EEOC issued a Letter of Determination finding that Sterling “subjected Charging Parties and a class of female employees with retail sales responsibilities nationwide to a pattern or practice of sex discrimination in regard to promotion and compensation.”¹⁶⁶ This led to the EEOC filing a lawsuit on September 23, 2008 in the Western District of New York that alleged that Sterling engaged in sex-based pay and promotion discrimination in violation of Title VII.¹⁶⁷

On March 10, 2014, the District Court adopted Magistrate Judge McCarthy’s January 2, 2014 Report, Recommendation, And Order and dismissed the EEOC’s entire lawsuit with prejudice.¹⁶⁸ Magistrate Judge McCarthy had rejected the EEOC’s position that a court may not inquire as to the scope of the EEOC’s pre-suit investigation.¹⁶⁹ According to Magistrate Judge McCarthy, while courts will not review the sufficiency of the EEOC’s pre-suit investigation, “courts will review whether an investigation occurred,” as well as the “scope of that investigation.”¹⁷⁰ There was no evidence that the EEOC had investigated the 19 charges against Sterling on a nationwide basis.¹⁷¹ Although the charges were asserted on behalf of the charging parties and “similarly situated women,” this did not demonstrate that the EEOC investigated the nationwide pattern or practice claim that was actually brought.¹⁷² The District Court dismissed the lawsuit in its entirety.¹⁷³

On May 15, 2014, the EEOC appealed the decision to the Second Circuit,¹⁷⁴ arguing that Magistrate Judge McCarthy had conducted an impermissible inquiry into the sufficiency of the EEOC’s investigation, and noting that the District Court concluded that it “could and should determine whether the Commission had conducted an appropriate investigation.”¹⁷⁵ As with *Mach Mining*, the EEOC based its argument heavily on the Seventh Circuit’s decision in *EEOC v. Caterpillar, Inc.*¹⁷⁶

Although the Second Circuit was not willing to adopt the most extreme version of the EEOC’s position – that its pre-suit conduct is immune from any judicial scrutiny – it did largely agree with the EEOC that the District Court had overstepped its authority. Relying on *Mach Mining*, but not explaining how conciliation requirements were apples-to-apples to investigation requirements, the Second Circuit held that “[t]o ensure agency compliance with Title VII, Congress empowered

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 99–100.

¹⁶⁷ *Id.* at 100.

¹⁶⁸ *EEOC v. Sterling Jewelers, Inc.*, 3 F. Supp. 3d 57 (W.D.N.Y. 2014).

¹⁶⁹ *Id.* at 63.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 68–69.

¹⁷² *Id.* at 64.

¹⁷³ *Id.* at 60.

¹⁷⁴ *EEOC v. Sterling Jewelers, Inc.*, No. 14-1782 (2d Cir. May 15, 2014).

¹⁷⁵ *Sterling Jewelers*, Case No. 14-1782, ECF No. 42 at 40–41 (Sept. 4, 2014).

¹⁷⁶ *EEOC v. Caterpillar, Inc.*, 409 F.3d 831 (7th Cir. 2005).

federal courts to review whether the EEOC has fulfilled its pre-suit administrative obligations.”¹⁷⁷ However, the Second Circuit went on to note that the proper scope of that review is “an issue of first impression in this Circuit.”¹⁷⁸ The Second Circuit interpreted the Supreme Court’s guidance in *Mach Mining* as authorizing the federal courts to review only whether an investigation had taken place, not the sufficiency of that investigation:

Mach Mining did not address the EEOC’s obligation to investigate, but we conclude that judicial review of an EEOC investigation is similarly limited: The sole question for judicial review is whether the EEOC conducted an investigation. As the district and magistrate judges in this case recognized, courts may not review the sufficiency of an investigation – only whether an investigation occurred.¹⁷⁹

Without any analysis, the Second Circuit even adopted the Supreme Court’s proposed method of ensuring compliance, noting that “[a]s with the conciliation process, an affidavit from the EEOC, stating that it performed its investigative obligations and outlining the steps taken to investigate the charges,” should usually suffice to satisfy a court that the investigation requirement had been fulfilled.¹⁸⁰ The Second Circuit ultimately concluded that unlike other cases where it was apparent that the EEOC had failed to conduct any pre-suit investigation at all, the record in *Sterling* showed that the EEOC had conducted an investigation.¹⁸¹ And, relying on the testimony of the EEOC investigator coupled with the documents in the investigative file, the Second Circuit concluded that “the EEOC investigation was nationwide.”¹⁸² *Sterling* has subsequently filed a petition for certiorari with the U.S. Supreme Court citing numerous factual and legal errors with the Second Circuit’s ruling.

The Northern District of Illinois came to a similar conclusion in *EEOC v. Autozone, Inc.*¹⁸³ That case arose out of a claim by three individuals who alleged disability discrimination.¹⁸⁴ The EEOC investigated the three claims and initially issued reasonable cause determinations in September 2012 that stated that there was reason to believe that AutoZone discriminated against each of the charging parties by refusing to make reasonable accommodations and by discharging them in violation of the ADA.¹⁸⁵ But then in May 2013, the EEOC amended its determinations so that they stated that there was reasonable cause to believe that AutoZone discriminated against the charging parties and against a “class of other employees at its stores throughout the United States.”¹⁸⁶ The determinations based that conclusion on the fact that, “beginning in early 2009,

¹⁷⁷ *Sterling Jewelers, Inc.*, 801 F.3d at 100.

¹⁷⁸ *Id.* at 101.

¹⁷⁹ *Id.* (citing *EEOC v. Keco Indus., Inc.*, 748 F.2d 1097, 1100 (6th Cir.1984); *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657, 674 (8th Cir. 2012)).

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 102–03.

¹⁸² *Id.* at 103–04.

¹⁸³ *EEOC v. Autozone, Inc.*, No. 14-CV-3385, 2015 U.S. Dist. LEXIS 149849 (N.D. Ill. Nov. 4, 2015).

¹⁸⁴ *Id.* at *2.

¹⁸⁵ *Id.* at *2–3.

¹⁸⁶ *Id.* at *3.

AutoZone maintained an attendance policy under which employees were assessed points and eventually discharged because of absences, including disability-related absences.”¹⁸⁷

AutoZone moved to limit the scope of this litigation to the three stores where the charging parties had worked on the basis that the EEOC failed to conduct a nationwide investigation of AutoZone’s employment practices.¹⁸⁸ This case was unusual in that it arose in the Seventh Circuit, and therefore had to reconcile the reasoning of *Caterpillar* – which was still the law of the circuit – with the reasoning of the *Mach Mining* decision. The court noted that “[t]he Seventh Circuit has not addressed whether – and, if so, how – the Supreme Court’s decision in *Mach Mining* affects its holding in *Caterpillar*.”¹⁸⁹

Relying on the guidance in *Mach Mining* that “the proper scope of judicial review of the EEOC’s pre-suit investigation should match the terms of Title VII’s provisions concerning investigation,” the court concluded that Title VII does not mandate any particular investigative techniques or standards.¹⁹⁰ Rather, the court reasoned that the EEOC must only conduct an investigation, and then after that investigation is complete, determine that there is reasonable cause to believe that the charge is true.¹⁹¹ It must then issue a reasonable cause determination that describes what the employer has done and which employees (or what class of employees) have suffered as a result, so the parties can engage in conciliation.¹⁹² Following this logic to its conclusion, the court found that it was able “to determine from the EEOC’s amended determinations that the EEOC conducted an ‘investigation’ as required by the Act,” and that those amended determinations “clearly put AutoZone on notice that the EEOC has conducted an investigation of AutoZone’s attendance policy and that it may pursue charges against AutoZone for discrimination that has occurred as a result of the policy in AutoZone’s stores throughout the United States.”¹⁹³

The *Autozone* court’s interpretation of its power to review the EEOC’s investigation is therefore more limited than what the Second Circuit set forth in *EEOC v. Sterling Jewelers, Inc.* The court held that the even the limited review that the Second Circuit conducted of the EEOC’s investigative file would be prohibited under *Caterpillar* and “appears to go beyond what the Second Circuit identified as its proper role under *Mach Mining*.”¹⁹⁴ According to the Northern District of Illinois, under Seventh Circuit law, and limited to the facts of that case, “the EEOC has met its burden to show that it investigated by issuing a determination that: 1) states that the EEOC investigated and; 2) identifies the alleged discrimination discovered during the investigation.”¹⁹⁵

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at *5.

¹⁸⁹ *Id.* at *12.

¹⁹⁰ *Id.* at *12–13 (quoting *Mach Mining*, 135 S. Ct. at 1655).

¹⁹¹ *Id.* at *13.

¹⁹² *Id.*

¹⁹³ *Id.* at *13–14.

¹⁹⁴ *Id.* at *16–17.

¹⁹⁵ *Id.* at *18.

It remains to be seen how other courts will interpret the *Mach Mining* decision in the context of reviewing the EEOC's obligation to investigate a charge prior to bringing a lawsuit. The decisions so far have taken very different approaches. As with conciliation, employers will have to wait and see how this issue develops over the next few years.

3. No End In Sight: Other Theories That The EEOC Is Developing To Immunize Its Pre-Suit Conduct From Judicial Review

The EEOC is also actively exploring other avenues in its quest to increase its power and limit the scope of its judicial oversight. In two cases brought in late FY2014, the EEOC argued that it has the power to bring suit under an entirely different theory of pattern or practice liability, one that does not require the EEOC to engage in pre-suit conciliation. Although one of those courts found the EEOC's theory unpersuasive, the other did not. But as we saw with *Mach Mining*, one decision is all the EEOC needs to start opening up a line of favorable precedent, which can grow into a circuit split, and then ultimately end at the Supreme Court. The EEOC won a victory in late FY2015 that may be the beginning of just such a progression.

In *EEOC v. CVS Pharmacy, Inc.*,¹⁹⁶ and *EEOC v. Doherty Enterprises, Inc.*,¹⁹⁷ the EEOC argued that it was not required to engage in any pre-suit obligations because it was bringing a claim for "resistance" to the full enjoyment of rights created by Title VII. The EEOC claimed that its power to bring such a "resistance" claim did not arise under section 707(e), but rather under section 707(a), which does not mandate the same pre-suit procedures as are required under section 707(e).¹⁹⁸

In *CVS*, a former CVS pharmacy manager filed a charge with the EEOC alleging that CVS terminated her due to her sex and race.¹⁹⁹ Although that charge was dismissed by the EEOC, the Commission later sent CVS a letter saying that it had reasonable cause to believe that CVS was engaged in a pattern or practice of resistance to the full enjoyment of rights secured by Title VII.²⁰⁰ The basis of the EEOC's "resistance" claim was that the charging party, and other employees, had signed a standard CVS severance agreement at termination, which the EEOC claimed interfered with those employees' rights to file charges, communicate voluntarily, and participate in investigations with the EEOC and other state agencies.²⁰¹ Hence, by using this standard severance agreement, CVS had "engaged in a pattern or practice of resistance to the full enjoyment of rights secured by Title VII."²⁰²

¹⁹⁶ *EEOC v. CVS Pharmacy, Inc.*, 70 F. Supp. 3d 937 (N.D. Ill. 2014).

¹⁹⁷ *EEOC v. Doherty Enters., Inc.*, No. 14-CV-81184, 2015 U.S. Dist. LEXIS 116189 (S.D. Fla. Sept. 1, 2015).

¹⁹⁸ *CVS Pharmacy, Inc.*, 70 F. Supp. at 940–41.

¹⁹⁹ *Id.* at 938–39.

²⁰⁰ *Id.* at 939.

²⁰¹ *Id.* at 940–41.

²⁰² *Id.* at 939.

This was a new attack on employers' use of severance agreements.²⁰³ But even more importantly, it was a novel attempt by the EEOC to expand its powers under Title VII.²⁰⁴ The key issue in the case was whether the EEOC had met its obligations to conciliate before bringing suit.²⁰⁵ The EEOC argued that it was bringing a "distinct" claim under section 707(a).²⁰⁶ According to the EEOC, its power to bring claims under that section was commensurate with that of the U.S. Attorney General, which was not hampered by any pre-suit obligations.²⁰⁷ Power to enforce Title VII was transferred to the EEOC by virtue of the 1972 amendments to the Act, which among other things, added section 707(e).²⁰⁸ Section 707(e) states that "the Commission shall have authority to investigate and act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by a member of the Commission."²⁰⁹ Critically, section 707(e) expressly mandated that "such actions shall be conducted in accordance with the procedures set forth in [Section 706]."²¹⁰ One of the procedures under section 706 is that the EEOC must conciliate prior to bringing suit.²¹¹

The EEOC argued that Congress' intent in transferring enforcement power from the Attorney General to the EEOC was to give the EEOC the authority to institute the same actions that the Department of Justice had.²¹² Accordingly, since the Attorney General was not required to bring a charge or engage in conciliation prior to bringing suit, the transfer of that authority to the EEOC under Section 707(a) meant that the EEOC was similarly unconstrained by those procedures when it acted pursuant to the same authority.²¹³

The court disagreed, noting that "courts have interpreted Section 707(a) as granting authority to the EEOC to bring charges of a pattern or practice of discrimination and not as creating a separate cause of action."²¹⁴ After reviewing the legislative history and relevant case law, the court concluded that the transfer of prosecutorial authority from the Attorney General was not intended to create a cause of action for the EEOC other than what was conferred on the

²⁰³ See Christopher DeGross, Matthew Gagnon, and Gerald L. Maatman, Jr., *Not Impressed By The Chutzpah: Court Refuses To Bless The EEOC's Attempt To Create A New Form Of Pattern Or Practice Litigation*, Workplace Class Action Blog (Oct. 12, 2014), available at <http://www.workplaceclassaction.com/2014/10/not-impressed-by-the-chutzpah-court-refuses-to-bless-the-eeocs-attempt-to-create-a-new-form-of-pattern-or-practice-litigation/>.

²⁰⁴ *Id.*

²⁰⁵ *CVS Pharmacy, Inc.*, 70 F. Supp. at 942.

²⁰⁶ *Id.* at 940–41.

²⁰⁷ *Id.* at 941.

²⁰⁸ *Id.*

²⁰⁹ 42 U.S.C. § 2000e–6(e); *CVS Pharmacy, Inc.*, 70 F. Supp. at 940.

²¹⁰ 42 U.S.C. § 2000e–6(e); *CVS Pharmacy, Inc.*, 70 F. Supp. at 940.

²¹¹ Section 706 mandates that the EEOC "shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." 42 U.S.C. § 2000e–5(b); *CVS Pharmacy, Inc.*, 70 F. Supp. at 940.

²¹² *CVS Pharmacy, Inc.*, 70 F. Supp. at 941.

²¹³ *Id.*

²¹⁴ *Id.*

Commission through section 707(e).²¹⁵ Underscoring the novelty of the EEOC's approach, the court wrote:

[T]he EEOC cites to no case law distinguishing actions brought under Section 707(a) and actions brought under 707(e), nor has any case been found that supports the distinction between the two sections as argued by the EEOC. That Section 707(a) and Section 707(e) use slightly different language, *i.e.* "pattern or practice of resistance" in 707(a) and "pattern or practice of discrimination" in 707(e), is not controlling.²¹⁶

On December 17, 2015, the District Court's decision was upheld by the Seventh Circuit.²¹⁷ The Seventh Circuit also based its decision in its reading of legislative history. According to the Seventh Circuit, Congress decided to give the EEOC a cause of action to sue employers when informal methods of dispute resolution failed because it was convinced that the failure to grant the EEOC meaningful enforcement powers was a major flaw in the operation of Title VII.²¹⁸ But when that power was granted to the EEOC, it was done pursuant to the dictates of sections 707(c)-(e), which transferred the powers of the Attorney General to bring pattern or practice suits to the EEOC, while requiring the EEOC to carry out that function pursuant to the procedures set forth in section 706 (which includes the conciliation requirement).²¹⁹

The Seventh Circuit held that section 707(a) only gives the EEOC power to challenge resistance to the full enjoyment of "any of the rights secured by Title VII."²²⁰ Accordingly, "Section 707(a) does not create a broad enforcement power for the EEOC to pursue non-discriminatory employment practices that it dislikes – it simply allows the EEOC to pursue multiple violations of Title VII . . . in one consolidated proceeding."²²¹ This was a clear rejection of the EEOC's expansive and novel interpretation of its powers under section 707(a).

Despite this early setback, the EEOC won a victory in *EEOC v. Doherty Enterprises, Inc.*, when it convinced the Southern District of Florida to disregard the *CVS* decision and uphold its right to bring pattern or practice cases without any need to go through the conciliation process.²²² That case arose out of the EEOC's efforts to prohibit Doherty Enterprises, Inc. from allegedly using its arbitration agreement to deter employees from filing charges or cooperating with the EEOC.²²³ The arbitration agreement required the parties to arbitrate, among other things, "any claim, dispute and/or controversy (including but not limited to any claims of employment discrimination, harassment, and/or retaliation under Title VII . . .)."²²⁴ As with *CVS*, the EEOC

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *EEOC v. CVS Pharmacy, Inc.*, No. 14-3653, 2015 WL 9239388 (7th Cir. Dec. 17, 2015).

²¹⁸ *Id.* at *4.

²¹⁹ *Id.*

²²⁰ *Id.* at *5.

²²¹ *Id.*

²²² *Doherty Enters., Inc.*, 2015 U.S. Dist. LEXIS 116189, at *16–17.

²²³ *Id.* at *1–2.

²²⁴ *Id.* at *2.

argued that the use of this arbitration agreement constituted a pattern and practice of “resistance” to the full enjoyment of rights secured by Title VII.²²⁵

The company moved to dismiss on the grounds that the EEOC lacked standing to bring this action in the absence of an underlying charge of discrimination, and had failed to conciliate.²²⁶ The precise question for the court, therefore, was “whether the EEOC may bring a section 707 lawsuit against Defendant without an individual or Commissioner's charge of discrimination and without an attempt at conciliation which are required for the EEOC to bring a suit pursuant to its authority under section 706.”²²⁷

As with CVS, the court looked to legislative history and earlier court precedent to define the distinction between sections 707 and 706. Relying on *U.S. v. Allegheny-Ludlum Industries, Inc.*,²²⁸ a forty year old case from the Fifth Circuit (binding in the Eleventh Circuit because it was issued prior to September 30, 1981, when those circuits were split), the court concluded that “[t]he statutory language of section 707(a) provides that the EEOC only needs ‘reasonable cause’ before filing a complaint for pattern and practice of resistance to the full enjoyment of any of the rights. In other words, section 707 does not require the EEOC to receive a charge, nor does it require conciliation.”²²⁹ In so holding, the court explicitly noted that the company had cited various cases from outside the circuit, which held that the EEOC has no enforcement authority without the filing of a charge or conducting conciliation, but concluded that “[n]one of those courts are in this Circuit and bound by *Allegheny-Ludlum Industries*.”²³⁰

The *Doherty* court went further still, holding that section 707(a) provided for the separate “resistance” cause of action that the EEOC had been arguing for.²³¹ Contrary to the Seventh Circuit's interpretation, the *Doherty* court noted that Congress had not used the term “unlawful employment practices” in section 707(a), supporting the conclusion that it had not intended that a “resistance” claim be limited to cases involving unlawful employment practices, as appears in

²²⁵ *Id.* at *3–4.

²²⁶ *Id.* at *4.

²²⁷ *Id.* at *8.

²²⁸ *U.S. v. Allegheny-Ludlum Indus., Inc.*, 517 F.2d 826 (5th Cir. 1975).

²²⁹ *Id.* at *8-11 (citations omitted). The court quoted from *Allegheny-Ludlum*, which held the following:

Under s 707, the EEOC (formerly the Attorney General) may institute a “pattern or practice” suit anytime that it has “reasonable cause” to believe such a suit necessary. Section 707 does not make it mandatory that anyone file a charge against the employer or follow administrative timetables before the suit may be brought. It was unquestionably the design of Congress in the enactment of s 707 to provide the government with a swift and effective weapon to vindicate the broad public interest in eliminating unlawful practices, at a level which may or may not address the grievances of particular individuals. Rather, it is to those individual grievances that Congress addressed s 706, with its attendant requirements that charges be filed, investigations conducted, and an opportunity to conciliate afforded the respondent when ‘reasonable cause’ has been found.

Allegheny-Ludlum Indus., Inc., 517 F.2d at 843.

²³⁰ *Doherty Enters., Inc.*, 2015 U.S. Dist. LEXIS 116189, at n.4.

²³¹ *Id.* at *14–15.

section 706.²³² The court explicitly criticized the *CVS* holding to the contrary, calling it “internally inconsistent” and claiming that it gave “short shrift” to the concept of the EEOC’s authority to bring a separate “resistance” claim.²³³

The *Doherty* decision could turn out to be a powerful new tool in the EEOC’s enforcement toolbox. The Commission has now applied its “resistance” theory in two different circumstances: separation agreements and arbitration agreements. And it has received the full support of at least one district court, which has opened the door to an entirely new cause of action seemingly untethered by the normal procedural restraints of EEOC litigation. Arguably, the Commission has even successfully framed this as a circuit split, given the *Doherty* court’s reliance on Fifth/Eleventh Circuit precedent, and its explicit refusal to follow other circuit court decisions to the contrary. It is too early to say how much impact the *Doherty* decision will have, but the signs so far point to this as a significant new procedural development impacting EEOC litigation.

D. Litigation: What To Expect After A Lawsuit Is Filed

Once the EEOC has declared its efforts to resolve the charge through conciliation to be unsuccessful, it may issue a notice of a right to sue to the charging party or initiate its own lawsuit. By this point, employers should already be on a litigation footing, and this time should be used to staff a litigation team, double-check that litigation holds are being followed, and put a communications plan in place to respond to media, investor, or employee inquiries that may arise when the EEOC goes public with its allegations.

1. Unique Issues That Arise In Pattern Or Practice Cases

Once a systemic pattern or practice case is past the pre-suit phase, the focus for employers turns to shaping that case so that it presents the best opportunity for victory. A pattern or practice case often follows a two-stage burden-shifting framework set forth in *International Brotherhood of Teamsters v. United States*.²³⁴ Under that framework, the EEOC must first establish that discrimination is the employer’s “standard operating procedure.” If it meets that difficult burden of proof, some courts have held that this creates a presumption that all individuals in the EEOC’s “class” were victims of discrimination. The employer then has the opportunity to rebut that presumption as to each individual claim. However, that means that the employer must litigate each individual claim separately, often years after the relevant employment decisions were made.

The *Teamsters* framework often gives the EEOC a significant litigation advantage, and the Commission has shown an increasing willingness to expend resources to capitalize on it. This often leads to protracted battles over seemingly mundane issues related to case management and scheduling, which can have a profound impact on how the case is decided.

²³² *Id.* at *15.

²³³ *Id.* at *18-19.

²³⁴ *Int’l Bhd. of Teamsters v. U.S.*, 431 U.S. 324 (1977).

2. Challenges And Limitations Of “Bifurcation” In Pattern Or Practice Cases

One such issue is whether and how a case will be bifurcated to deal with the two different phases of a pattern or practice case. For example, in *EEOC v. JBS USA, LLC*,²³⁵ the parties agreed to bifurcate discovery and trial into two phases.²³⁶ Phase I would include the EEOC’s pattern or practice claims.²³⁷ Phase II would address all individual claims for relief.²³⁸ The case arose out of the EEOC’s allegations that a meat packing company, JBS Swift & Company, had engaged in a pattern or practice of religious discrimination when it failed to reasonably accommodate at least 153 Muslim employees by allowing them prayer breaks.²³⁹ The EEOC also alleged that the company retaliated against the employees and terminated them when they requested that the company move their evening breaks so that they could pray at sundown during the month of Ramadan.²⁴⁰

At the conclusion of Phase I, the court concluded that a single mass termination of 80 Muslim employees did not constitute a “pattern or practice.”²⁴¹ The court also decided that JBS had established its affirmative defense of undue hardship because the religious accommodation that the EEOC had requested for Muslim employees would have caused more than a *de minimis* burden on the employer and on its non-Muslim employees.²⁴² But in Phase II, the court held that its earlier rulings did not preclude the EEOC from pursuing individual claims for religious discrimination or retaliation.²⁴³

The EEOC had argued that the findings in Phase I could not be used as collateral estoppel during Phase II because the Phase I issues were decided under the first stage of the *Teamsters* burden of proof – whether discrimination was the company’s “standard operating procedure” – and therefore were not the same as what was to be litigated in Phase II.²⁴⁴ But the court noted that its earlier conclusion made no finding as to whether the EEOC had established a pattern or

²³⁵ *EEOC v. JBS USA, LLC*, No. 8:10-CV-3, 2015 WL 405038 (D. Neb. Jan. 28, 2015).

²³⁶ *Id.* at *2.

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ See Gerald L. Maatman and Jennifer A. Riley, *Mixed Ruling In EEOC Religious Discrimination Case Confirms That Single Mass Termination Does Not Create A “Pattern Or Practice”*, WORKPLACE CLASS ACTION BLOG (Apr. 25, 2013), available at <http://www.workplaceclassaction.com/2013/04/mixed-ruling-in-eeoc-religious-discrimination-case-confirms-that-single-mass-termination-does-not-cr/>.

²⁴⁰ *Id.*

²⁴¹ *JBS USA, LLC*, 2015 WL 405038, at *3.

²⁴² See Laura Maechtlen and Michael Wahlander, *The EEOC Has A Cow, And Now Must Raise Its Beef On Appeal*, WORKPLACE CLASS ACTION BLOG (Jan. 29, 2014), available at <http://www.workplaceclassaction.com/2014/01/the-eeoc-has-a-cow-and-now-must-raise-its-beef-on-appeal/>; Gerald L. Maatman, Jr. and Howard M. Wexler, *Where’s the Beef? Employer Defeats EEOC’s Religious Discrimination Pattern Or Practice Case By Establishing Undue Hardship Defense*, WORKPLACE CLASS ACTION BLOG (Oct. 16, 2013), available at <http://www.workplaceclassaction.com/2013/10/wheres-the-beef-employer-defeats-eeocs-religious-discrimination-pattern-or-practice-case-by-establishing-undue-hardship-defense/>.

²⁴³ *JBS USA, LLC*, 2015 WL 405038, at *7.

²⁴⁴ *Id.* at *5.

practice because it had based its holding on the fact that the company had established its undue hardship defense.²⁴⁵ The court ultimately concluded that although key issues relating to pattern or practice liability were raised and actually litigated in Phase I, they were not essential to the actual outcome of that phase, and so the doctrine of issue preclusion could not be used to bar successive litigation of those issues.²⁴⁶ Accordingly, the EEOC was allowed to proceed on its individual claims even after an adverse finding on its pattern or practice claims.²⁴⁷

JBS was also denied collateral estoppel effect of the Nebraska court's Phase I rulings in a different, but similar, case brought against JBS in the U.S. District of Colorado.²⁴⁸ That case arose out of almost identical allegations relating to a different JBS facility in Greeley, Colorado.²⁴⁹ JBS argued that the Nebraska court's decision estopped the EEOC from: "(1) claiming that its proposed accommodations of providing unscheduled breaks for prayer and moving scheduled breaks to sundown are non-burdensome and (2) claiming that the termination and discipline of Muslim workers during Ramadan 2008 constitutes a pattern or practice of retaliation and discrimination."²⁵⁰

The court refused to estop the EEOC from relitigating both issues. The court noted that there were important differences between the two cases, including different staffing levels, different collective bargaining agreements between the two facilities with a different break-time clause, and different employee requests.²⁵¹ Accordingly, the court held that, "[a]lthough both cases involve application of the same rule of law and involve claims that are closely related, JBS has failed to establish that the factual differences between this case and the Nebraska case are legally insignificant and the court further finds that the balance of considerations weighs against finding that the identity of issue element is satisfied."²⁵²

3. The EEOC's Efforts To Expand The Application Of The *Teamsters* Burden Shifting Framework

The Nebraska *JBS* court also faulted the EEOC for confusing the difference between the pattern or practice claims that had been dismissed and the individual claims that survived.²⁵³ In doing so, the court was addressing a hotly disputed topic in EEOC litigation, the difference between

²⁴⁵ *Id.*

²⁴⁶ *Id.* at *7.

²⁴⁷ *Id.*

²⁴⁸ *EEOC v. JBS USA, LLC*, No. 10-CV-02103, 2015 WL 4387882 (D. Colo. July 17, 2015).

²⁴⁹ *Id.* at *1; see also Gerald L. Maatman, Jr. and Howard M. Wexler, *Where's the Beef Part II: Court Refuses To "Butcher" EEOC's Religious Discrimination Claim*, WORKPLACE CLASS ACTION BLOG (July 23, 2015), available at <http://www.workplaceclassaction.com/2015/07/wheres-the-beef-part-ii-court-refuses-to-butcher-eeocs-religious-discrimination-claim/>.

²⁵⁰ *EEOC v. JBS USA, LLC*, 2015 WL 4387882, at *11.

²⁵¹ *Id.* at 12-13.

²⁵² *Id.* at *13.

²⁵³ *EEOC v. JBS USA, LLC*, No. 8:10-CV-3, 2015 WL 4506709 (D. Neb. July 24, 2015).

pattern or practice cases brought under section 707, and representative actions brought under section 706.²⁵⁴

The EEOC filed its amended complaint addressing its remaining claims on August 2, 2011, while Phase I was still being litigated.²⁵⁵ The complaint alleged that JBS unlawfully terminated some of its Muslim employees because of their religion and national origin, and in retaliation for their requests for religious accommodations.²⁵⁶ The company challenged the complaint because it did not identify the size and scope of the class for whom the EEOC was seeking relief.²⁵⁷ The court held there is “a significant distinction” between section 706 and section 707 claims.²⁵⁸ “A [section] 706 claim involves the rights of aggrieved individuals challenging an unlawful employment practice on an individual or class-wide basis, whereas a [section] 707 claim involves a pattern-or-practice of systemic discrimination challenging widespread discrimination throughout a company on a group basis.”²⁵⁹

Accordingly, although the EEOC was not required to identify each aggrieved individual, the court held that the EEOC has a continuing duty to disclose the names and factual details of the individuals for whom it is seeking relief with as much particularity as possible.²⁶⁰ The court dismissed the EEOC’s complaint because it failed to provide adequate information about the size and the scope of the class of individuals for whom it sought relief.²⁶¹ The court also concluded that the complaint was confusing because its section 706 claims depended on facts that were used to support its pattern or practice claims.²⁶²

The *JBS* court is not the only court to wrestle with the thorny issues distinguishing pattern or practice claims under section 707 from representative actions under section 706. On February 10, 2015, the Fifth Circuit agreed to hear Bass Pro’s appeal of the EEOC’s attempt to apply the *Teamsters* framework to a representative section 706 claim.²⁶³ In *EEOC v. Bass Pro Outdoor World, LLC*,²⁶⁴ Judge Ellison of the U.S. District Court for the Southern District of Texas held that the *Teamsters* analysis can apply to both section 706 and section 707 claims.²⁶⁵

²⁵⁴ Sections 706 and 707 are not a part of the ADEA.

²⁵⁵ *Id.* at *2.

²⁵⁶ *Id.*

²⁵⁷ *Id.* at *5-6.

²⁵⁸ *Id.* at *5. (citing and quoting *EEOC v. CRST Van Expedited, Inc.*, 611 F. Supp. 2d 918, 932 (N.D. Iowa 2009)).

²⁵⁹ *Id.*

²⁶⁰ *Id.* at *6.

²⁶¹ *Id.* at *7.

²⁶² *Id.*

²⁶³ Permission to Appeal Granted, *EEOC v. Bass Pro Outdoor World, LLC*, No. 15-20078 (5th Cir. Feb. 10, 2015).

²⁶⁴ *EEOC v. Bass Pro Outdoor World, LLC*, 35 F. Supp. 3d 836 (S.D. Tex. 2014).

²⁶⁵ *Id.* at 859.

The court's decision was based on an exhaustive review of relevant precedent, including decisions from the *JBS* lines of cases.²⁶⁶ The court ultimately concluded that the Colorado *JBS* court was incorrect when it forced the EEOC to proceed on its individual claims (under section 706) pursuant to the *McDonnell Douglas* framework, rather than the *Teamsters* framework that would apply to its pattern or practice claims.²⁶⁷ The *Bass Pro* court held that the statutory text of section 706 did not preclude the use of the *Teamsters* model.²⁶⁸ The court also held that the important distinctions between those sections – including different damages and procedural devices, and the fact that the EEOC can bring section 707 claims on its own initiative without a charge of discrimination – should not limit the methods by which the EEOC can prove facts that would support whichever sort of relief was sought and allowable under the different sections.²⁶⁹

Given the significant litigation leverage that the EEOC often obtains from bifurcation and proceeding under the *Teamsters* framework, these issues are some of the most hotly contested and important procedural trends affecting EEOC litigation. The two courts overseeing the *JBS* cases continue to make interesting decisions that directly impact these key issues. And the Fifth Circuit has now agreed to hear *Bass Pro's* appeal, which is fully briefed and primed for a decision in FY2016. These cases will be important ones to watch.

E. Settlements And Judgments: Is It Finally Over?

When faced with the potentially high cost of EEOC litigation, many employers opt to settle rather than litigate through trial. Particularly in its systemic cases, the EEOC frequently challenges nationwide policies and practices, and issues sweeping discovery requests and deposition notices. Extensive electronic discovery has also developed into an offensive weapon used by the EEOC to leverage litigation (and settlement) advantage. Engaging in discovery on these claims is a significant distraction from an employer's business, not to mention the prospect of proceeding to trial on the merits.

In addition, the EEOC faces fewer procedural hurdles than other civil plaintiffs when it wishes to proceed on a class-wide basis. In a pattern or practice case, the EEOC does not have to satisfy Federal Rule of Civil Procedure 23 as other litigants do.²⁷⁰ As some courts have observed, certification of a class action, even one lacking in merit, forces defendants "to stake their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to settle even if they have no legal liability."²⁷¹ Faced with the prospect of litigating class claims, many employers will elect settlement.

²⁶⁶ *Id.* at 856-59.

²⁶⁷ *Id.* at 859.

²⁶⁸ *Id.* at 847.

²⁶⁹ *Id.* at 848-53.

²⁷⁰ *Gen. Tel. Co. of Nw. v. EEOC*, 446 U.S. 318, 324 (1980) (EEOC "need look no further than § 706 [of Title VII] for its authority to bring suit in its own name for the purpose, among others, of securing relief for a group of aggrieved individuals.").

²⁷¹ *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995).

1. The High Cost Of The EEOC's Focus On Systemic Litigation

The EEOC secured some important verdicts and settlements in FY2015 with some headline-grabbing numbers. The largest of these is the \$17.4 million jury verdict levied against Moreno Farms.²⁷² The case presented an extreme set of facts: multiple women employed as farmworkers were raped, groped, propositioned, and threatened with job loss if they refused the sexual advances of their male supervisors. The employer defendant defaulted and did not participate in the trial, which was limited to damages.²⁷³ In the end, the five plaintiffs, all of whom had been terminated by the company, were awarded a combined \$2.4 million dollars in compensatory damages, and another \$15 million in punitive damages.²⁷⁴

The EEOC also garnered its largest settlement in two years – \$12.2 million – in a suit brought against Patterson-UTI Drilling Co.²⁷⁵ That case arose out of a number of charges of discrimination filed by employees and former employees of Patterson-UTI, a Texas-based oil and gas drilling company, alleging discrimination based on race or national origin.²⁷⁶ The EEOC issued its reasonable cause determination and then filed suit against the company on March 24, 2015, alleging that the company engaged in nationwide discrimination against its minority employees.²⁷⁷

The EEOC alleged that minority employees were subject to racial and ethnic slurs, jokes, and comments and verbal harassment and intimidation, and that they were relegated to lower-level positions, denied training, and were subjected to disparate treatment in discipline.²⁷⁸ The EEOC also alleged that the company had retaliated against employees who complained about discrimination or harassment.²⁷⁹ The company and the EEOC entered into a settlement the same day the complaint was filed.²⁸⁰ The \$12.2 million recovered by the EEOC almost equals the approximately \$13 million the EEOC recovered in litigation settlements for the entirety of

²⁷² Press Release, Equal Employment Opportunity Commission, EEOC Wins Jury Verdict of over \$17 Million for Victims of Sexual Harassment and Retaliation at Moreno Farms (Sept. 10, 2015), *available at* www.eeoc.gov/eeoc/newsroom/release/9-10-15.cfm.

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ See Press Release, Equal Employment Opportunity Commission, Patterson-UTI Drilling to Pay \$14.5 Million to Settle Claims of Race / National Origin Discrimination (Apr. 20, 2015), *available at* <http://www.eeoc.gov/eeoc/newsroom/release/4-20-15.cfm>.

²⁷⁶ Christopher M. Cascino and Gerald L. Maatman, Jr., *The EEOC Snares A \$12.2 Million Settlement In Colorado, Representing More Than Half The \$22.5 Million The EEOC Recovered In The Entirety Of FY 2014*, WORKPLACE CLASS ACTION BLOG (March 31, 2015), *available at* <http://www.workplaceclassaction.com/2015/03/the-eeoc-snares-a-12-2-million-settlement-in-colorado-representing-more-than-half-the-22-5-million-the-eeoc-recovered-in-the-entirety-of-fy-2014/>.

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.*

FY2014, and is more than half of the \$22.5 million it recovered, in total litigation settlements and verdicts, during the same period.²⁸¹

Though large, even this settlement could pale in comparison to another lawsuit that is just starting against the City of New York's Department of Citywide Administrative Services ("DCAS").²⁸² The EEOC accused DCAS of violating Title VII and the Equal Pay Act based on its pattern of wage suppression and subjective promotion based on sex, race, and national origin.²⁸³ The EEOC's conciliation agreement proposal demanded numerous forms of injunctive relief (e.g., EEOC monitoring, notice postings, etc.) as well as back pay, future pay, compensatory damages, and legal fees and costs totaling over \$246 million.²⁸⁴ The parties are still at the conciliation phase, but this case will be an important one to track in FY2016.

1. After The Settlement: New Considerations Affecting The Decision To Enter Into A Consent Decree

After the EEOC has filed a lawsuit, settling that lawsuit results in a public consent decree that is filed with the court. A key component of almost every consent decree is the programmatic relief designed, at least in the EEOC's opinion, to correct any problematic practices in the future.²⁸⁵ The EEOC has repeatedly stressed the importance that it places on the programmatic component of a consent decree.²⁸⁶

Those programmatic components typically impose significant obligations on an employer long after a case is resolved. The EEOC has shown an increasing willingness to reopen litigation against a company that it believes is not strictly complying with those mandates, and has even taken to threatening companies with new actions as soon as a case is settled. For example, the press release announcing an \$800,000 settlement with a Chicago-area staffing agency, Source One Staffing, included this foreboding quote from EEOC Regional Attorney, John Hendrickson:

While the consent decree puts an end to four-years of litigation between EEOC and Source One, ***the matter is far from over*** The EEOC – through the appointment of an independent monitor – will keep a watchful eye on Source

²⁸¹ *Id.*

²⁸² Gerald L. Maatman, Jr. and Howard M. Wexler, *EEOC Issues Probable Cause Determination Against New York City To The Tune Of \$246 million*, WORKPLACE CLASS ACTION BLOG (Apr. 13, 2015), available at <http://www.eeocountdown.com/2015/04/13/eec-issues-probable-cause-determination-against-new-york-city-to-the-tune-of-246-million/>.

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION STRATEGIC ENFORCEMENT PLAN FY 2013 - 2016, available at <http://www.eeoc.gov/eeoc/plan/sep.cfm>.

²⁸⁶ For example, EEOC Chair Jenny Yang has claimed that equitable relief is more important than monetary damages to the EEOC. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FISCAL YEAR 2014 PERFORMANCE AND ACCOUNTABILITY REPORT, *supra* note 20, at v-vi; see also Press Release, Equal Employment Opportunity Commission, Consent Decree Ends EEOC Race Discrimination Lawsuit Against Battaglia Distributing (Nov. 19, 2014) (quoting EEOC Regional Attorney John Hendrickson as saying: "We expect that the training and other injunctive relief called for in the decree will make Battaglia a stronger employer going forward. Resolutions of this nature are positive for both the employer and the employees"), available at <http://www.eeoc.gov/eeoc/newsroom/release/11-19-14.cfm>.

One to make sure it fulfills all of its obligations under the decree for the next three years. If Source One fails to adhere to the decree, **the EEOC will do everything in its power to ensure compliance.**²⁸⁷

And indeed, this has become a troubling new trend in EEOC-initiated litigation.

On November 30, 2010, the EEOC had brought a Title VII action against New Indianapolis Hotels, alleging that it had fired black housekeepers because of their race and in retaliation for complaints about race discrimination, and that the hotel paid lower wages to black housekeepers, excluded black housekeeping applicants on a systemic basis, and failed to maintain records required by law.²⁸⁸ On September 20, 2012, the EEOC and New Indianapolis settled the case pursuant to a consent decree.²⁸⁹ On March 26, 2014, the EEOC filed a motion for contempt, arguing that New Indianapolis violated five provisions of the consent decree, including: (1) workplace posting; (2) training of managers; (3) establishment of a new hiring procedure; (4) recordkeeping; and (5) reinstatement of alleged victims of discrimination.²⁹⁰

On March 23, 2015, the U.S. District Court for the Southern District of Indiana held New Indianapolis Hotels, LLC in contempt for violating the consent decree.²⁹¹ Then, on November 9, 2015, the court awarded the EEOC \$50,515 in fees and \$6,733.76 in costs incurred in conjunction with bringing the motion for contempt.²⁹² In announcing the result, the EEOC quoted the EEOC Regional Attorney, Laurie Young, as saying: “We will not hesitate to move for Contempt when an employer blatantly disregards one or more of its obligations under the settlement. We hope, however, that this Contempt ruling will send a message to other employers concerning the importance of satisfying their obligations under a settlement with the EEOC.”²⁹³

This trend should serve as a warning to all employers that they should be much more cautious before entering into consent decrees that contain broad programmatic provisions. Those provisions will just make it that much easier for the EEOC to reopen the case against them years later.

²⁸⁷ Press Release, Equal Employment Opportunity Commission, Source One Staffing to Pay \$800,000 to Settle Multiple EEOC Discrimination Claims (May 11, 2015) (emphasis added), *available at* <http://www.eeoc.gov/eeoc/newsroom/release/5-11-15.cfm>.

²⁸⁸ Press Release, Equal Employment Opportunity Commission, Indianapolis Hampton Inn Operators Held in Contempt for Breaching EEOC Consent Decree Settling Earlier Class Race Bias Suit (Mar. 25, 2015), *available at* <http://www.eeoc.gov/eeoc/newsroom/release/3-25-15.cfm>.

²⁸⁹ Christopher M. Cascino and Gerald L. Maatman, Jr., *Court Awards The EEOC Attorneys' Fees In Contempt Dispute*, WORKPLACE CLASS ACTION BLOG (Nov. 17, 2015), *available at* <http://www.workplaceclassaction.com/2015/11/court-awards-the-eeoc-attorneys-fees-in-contempt-dispute/>.

²⁹⁰ *Id.*

²⁹¹ Order on Plaintiff's Motion for Contempt, *EEOC v. New Indianapolis Hotels, LLC*, No. 1:10-CV-1234-WTL-DKL (S.D. Ind. Mar. 23, 2015), ECF No. 193.

²⁹² *EEOC v. New Indianapolis Hotels, LLC*, No. 1:10-CV-1234-WTL-DKL, 2015 WL 7016487 (S.D. Ind. Nov. 9, 2015).

²⁹³ Indianapolis Hampton Inn Operators Held in Contempt for Breaching EEOC Consent Decree Settling Earlier Class Race Bias Suit, *supra* note 288.

2. After The Judgment: Attorneys' Fees, Cost Shifting, And Other Issues

As the *New Indianapolis Hotels* case demonstrates, another important consideration at the end of EEOC litigation is the prospect of paying attorneys' fees and cost shifting. The EEOC is aggressive in going after employers for attorneys' fees and costs. And a few lucky employers have scored major victories in forcing the EEOC to pay for theirs. FY2015 was a big year in terms of determining who pays at the end of the case.

On April 20, 2011, the EEOC filed two lawsuits against a Beverly Hills-based farm labor contractor and eight farms, alleging that they had engaged in a pattern or practice of national origin and race discrimination by trafficking over 200 Thai farm workers to farms in Hawaii and Washington and subjecting them to severe abuse.²⁹⁴ The EEOC had mixed success. On December 19, 2014, the U.S. District Court for the District of Hawaii entered an \$8.7 million default judgment in favor of the EEOC.²⁹⁵ That was a huge win for the Commission in its relatively new pursuit of human trafficking-type claims under the U.S. anti-discrimination laws.²⁹⁶

But the EEOC was not so successful in its companion case filed in Washington. On May 28, 2014, the U.S. District Court for the Eastern District of Washington granted summary judgment for two of the three defendants.²⁹⁷ The court held that the work environment provided by the farms was not so intolerable that a reasonable person would have felt compelled to just walk away from the job.²⁹⁸ Moreover, the EEOC failed to show there was a single worker who could sustain a retaliation claim.²⁹⁹

Then, on March 19, 2015, the Washington court awarded the defendants their attorneys' fees and costs, holding that the Commission "failed to conduct an adequate investigation to ensure that Title VII claims could reasonably be brought against the Grower Defendants, pursued a frivolous theory of joint-employer liability, sought frivolous remedies, and disregarded the need to have a factual basis to assert a plausible basis for relief under Title VII against the Grower Defendants."³⁰⁰ The court was harshly critical of the EEOC's investigation, especially its refusal to share information with the defendants concerning its allegations, and its refusal to examine documents provided by the company that had been repeatedly offered prior to the onset of the

²⁹⁴ Press Release, Equal Employment Opportunity Commission, EEOC Files Its Largest Farm Worker Human Trafficking Suit Against Global Horizons, Farms (Apr. 20, 2011), available at <http://www.eeoc.gov/eeoc/newsroom/release/4-20-11b.cfm>.

²⁹⁵ *EEOC v. Global Horizons, Inc.*, No. 11-CV-257, 2014 WL 7338725 (D. Haw. Dec. 19, 2014).

²⁹⁶ See Gerald L. Maatman, Jr. and Laura Maechten, *The EEOC Nets Its Biggest Judgment Of The Year In Hawaii*, WORKPLACE CLASS ACTION BLOG (Oct. 1, 2014), available at <http://www.workplaceclassaction.com/2014/12/the-eeoc-nets-its-biggest-judgment-of-the-year-in-hawaii/>.

²⁹⁷ *EEOC v. Global Horizons, Inc.*, 23 F. Supp. 3d 1301 (E.D. Wash. 2014).

²⁹⁸ Christopher DeGroff, Kevin Fritz, and Gerald L. Maatman, Jr., *Fruit Growers' Discrimination Dismissal Makes For Both A Sweet And Sour Victory*, WORKPLACE CLASS ACTION BLOG (June 2, 2014), available at <http://www.workplaceclassaction.com/2014/06/fruit-growers-discrimination-dismissal-makes-for-both-a-sweet-and-sour-victory/>.

²⁹⁹ *Id.*

³⁰⁰ *EEOC v. Global Horizons, Inc.*, 100 F. Supp. 3d 1077, 1093 (E.D. Wash. 2014).

litigation.³⁰¹ The court entered judgment against the EEOC for \$980,033.30 in attorneys' fees and costs.³⁰²

The EEOC narrowly avoided an even bigger award on December 22, 2014, when the Eighth Circuit overturned a \$4.7 million award of attorneys' fees and costs in *EEOC v. CRST Van Expedited, Inc.*³⁰³ The U.S. District Court for the Northern District of Iowa had ordered the massive award on August 1, 2013, because of the EEOC's "frivolous, unreasonable, or groundless" litigation tactics.³⁰⁴ The EEOC appealed and persuaded the Eighth Circuit to reverse the decision and order a second review of the sanctions order.³⁰⁵ The court ordered the lower court to "individually assess each of the claims for which it granted summary judgment to CRST on the merits and explain why it deems a particular claim to be frivolous, unreasonable, or groundless."³⁰⁶ Importantly, the Supreme Court granted certiorari to review that decision on December 4, 2015.³⁰⁷

Just as with other aspects of EEOC-initiated litigation, the EEOC has been pushing to expand its powers to collect on the judgments that it obtains against employers. In *Northern Star Hospitality, Inc.*,³⁰⁸ the Seventh Circuit agreed with the EEOC that it can pursue companies under common ownership with the defendant company to satisfy a judgment.³⁰⁹ That case arose out of a claim for racial harassment discrimination against a restaurant company, Northern Star Hospitality, Inc. d/b/a Sparx Restaurant.³¹⁰ The EEOC later amended its complaint to add Northern Star Properties, LLC and North Broadway Holdings, Inc., claiming that they also were

³⁰¹ Courtney Bohl, Christopher DeGross, and Gerald L. Maatman, Jr., *Court Orders EEOC To Pay Defendants' Attorney's Fees For "Baseless, Unreasonable and Frivolous" Lawsuit*, WORKPLACE CLASS ACTION BLOG (Mar. 24, 2015), available at <http://www.workplaceclassaction.com/2015/03/court-orders-eEOC-to-pay-defendants-attorneys-fees-for-baseless-unreasonable-and-frivolous-lawsuit/>.

³⁰² *EEOC v. Global Horizons, Inc.*, No. 11-CV-3045-EFS, 2015 U.S. Dist. LEXIS 148410 (E.D. Wash. Nov. 2, 2015).

³⁰³ *EEOC v. CRST Van Expedited, Inc.*, 774 F.3d 1169 (8th Cir. 2014).

³⁰⁴ *EEOC v. CRST Van Expedited, Inc.*, No. 07-CV-95-LRR, 2013 WL 3984478 (N.D. Iowa Aug. 1, 2013); see also Eric M. Lloyd and Laura J. Maechtlen, *The EEOC "Throws A Challenge Flag" At Massive Fee Award*, WORKPLACE CLASS ACTION BLOG (Jan. 17, 2014), available at <http://www.workplaceclassaction.com/2014/01/the-eEOC-throws-a-challenge-flag-at-massive-fee-award/>.

³⁰⁵ See Gerald L. Maatman, Jr. and Jennifer A. Riley, *The CRST Saga Continues: Eighth Circuit Overturns \$4.7 Million Fee Award Against EEOC And Remands*, WORKPLACE CLASS ACTION BLOG (Dec. 23, 2014), available at <http://www.workplaceclassaction.com/2014/12/the-crst-saga-continues-eighth-circuit-overturns-4-7-million-fee-award-against-eEOC-and-remands/>.

³⁰⁶ *CRST Van Expedited, Inc.*, 774 F.3d at 1185.

³⁰⁷ *EEOC v. CRST Van Expedited, Inc.*, 774 F.3d 1169 (8th Cir. 2014), cert granted 83 U.S.L.W. 3872 (U.S. Dec. 4, 2015) (No.14-1375).

³⁰⁸ *EEOC v. N. Star Hospitality, Inc.*, 777 F.3d 898 (7th Cir. 2015).

³⁰⁹ See Christopher M. Cascino and Gerald L. Maatman, Jr., *Seventh Circuit Holds that EEOC Can Pursue Employers' Other Businesses For Violations Of Federal Employment Law By Dissolved Entities*, WORKPLACE CLASS ACTION BLOG (Feb. 4, 2015), available at <http://www.workplaceclassaction.com/2015/02/seventh-circuit-holds-that-eEOC-can-pursue-employers-other-businesses-for-violations-of-federal-employment-law-by-dissolved-entities/>.

³¹⁰ *N. Star Hospitality, Inc.*, 777 F.3d at 900.

liable for the discriminatory conduct.³¹¹ By this time, Sparx had closed and Hospitality had dissolved.³¹² Sparx was replaced by a Denny's Restaurant franchise owned by Broadway Holdings, while Northern Star Properties owned the building where Sparx and the Denny's Restaurant were located.³¹³ Northern Star Hospitality, Northern Star Properties, and Broadway Holdings were all owned by the same individual.³¹⁴

The district court held a bench trial, after which it determined that Northern Star Properties and Broadway Holdings could be held liable for the alleged discrimination under a veil-piercing theory and a successor liability theory.³¹⁵ On appeal, the Seventh Circuit noted that "successor liability is 'the default rule . . . to enforce federal labor or employment laws.'"³¹⁶ The court went on to explain that if this were not the case, "the victim of the illegal employment practice is helpless to protect his rights against an employer's change in the business."³¹⁷ The Seventh Circuit uses a five-factor test to determine successor liability in the federal employment law context: "(1) whether the successor had notice of the pending lawsuit; (2) whether the predecessor could have provided the relief sought before the sale or dissolution; (3) whether the predecessor could have provided relief after the sale or dissolution; (4) whether the successor can provide the relief sought; and (5) whether there is continuity between the operations and work force of the predecessor and successor."³¹⁸

The court focused on the first and fifth factors and ultimately concluded that successor liability should attach because there was evidence to establish that Broadway Holdings had notice of the lawsuit because both it and Northern Star Hospitality were owned by the same individual.³¹⁹ With respect to the fifth factor, the Seventh Circuit held that there was continuity between the operations and workforce of Northern Star Hospitality and Broadway Holdings because Holdings essentially carried on the same restaurant business at the same address, just under a different name and theme.³²⁰ The court noted that Broadway Holdings moved into the same building, which had been prepared for it by Northern Star Hospitality; hired more than half of the employees previously employed by Hospitality and its management team; and used the same work rules for the employees that Hospitality had used at Sparx.³²¹ Accordingly, the Seventh Circuit held that Holdings was liable as a successor to Hospitality despite the fact that Holdings did not exist at the time of the alleged wrongful conduct.³²²

³¹¹ *Id.*

³¹² *Id.* at 901.

³¹³ *Id.*

³¹⁴ *Id.* at 902.

³¹⁵ *Id.* at 901.

³¹⁶ *Id.* (quoting *Teed v. Thomas & Betts Power Solutions, LLC*, 711 F.3d 763, 769 (7th Cir. 2013)).

³¹⁷ *Id.* at 901-02 (quoting *Musikiwamba v. ESSI, Inc.*, 760 F.2d 740, 746 (7th Cir. 1985)).

³¹⁸ *Id.* at 902 (citing *Teed*, 711 F.3d at 765–66).

³¹⁹ *Id.* at 902.

³²⁰ *Id.* at 903.

³²¹ *Id.*

³²² *Id.*

After the judgment was affirmed by the Seventh Circuit, the EEOC served discovery on Broadway Holdings, seeking information about its assets.³²³ After receiving the company's response, the EEOC moved to compel more information and to recover the attorneys' fees it had expended in seeking adequate discovery responses.³²⁴ The court granted the motion on June 16, 2015, ordering Broadway Holdings to provide further discovery and to pay the EEOC attorneys' fees for time spent preparing the motion to compel.³²⁵

On July 27, 2015, the EEOC moved for sanctions because the company failed to pay the EEOC's fees and failed to provide updated discovery as ordered by the court.³²⁶ The EEOC also sought its attorneys' fees for the time it spent preparing the motion for contempt.³²⁷ The court granted the EEOC's motion for a finding of contempt.³²⁸ The company was ordered to pay \$1,000 per day starting three days following the finding of contempt for each day that it did not comply with the court's previous order.³²⁹ The EEOC was also awarded \$1,000 in fees for the two-and-a-half hours it spent drafting the motion for a finding of contempt.³³⁰

As this case amply demonstrates, the EEOC will aggressively pursue related entities to collect on its wins, including attorneys' fees, however small.³³¹

³²³ See Christopher M. Cascino and Gerald L. Maatman, Jr., *Court Awards The EEOC Attorneys' Fees And Contempt Fines In Post-Judgment Discovery Dispute*, WORKPLACE CLASS ACTION BLOG (Dec. 23, 2014), available at <http://www.workplaceclassaction.com/2015/08/court-awards-the-eec-attorneys-fees-and-contempt-fines-in-post-judgment-discovery-dispute/>.

³²⁴ EEOC's Motion to Compel Responses to Post-Judgment Discovery from Defendant North Broadway Holdings, Inc., *EEOC v. N. Star Hospitality, Inc.*, No. 3:12-CV-00214-bbc/slc (W.D. Wis. May 13, 2015), ECF No. 238.

³²⁵ Opinion and Order, *EEOC v. N. Star Hospitality, Inc.*, No. 3:12-CV-00214-bbc/slc (W.D. Wis. June 16, 2015), ECF No. 258.

³²⁶ EEOC's Motion for Entry of an Order of Civil Contempt, *EEOC v. N. Star Hospitality, Inc.*, No. 3:12-CV-00214-bbc/slc (W.D. Wis. July 27, 2015), ECF No. 262.

³²⁷ *Id.*

³²⁸ Order of Civil Contempt, *EEOC v. N. Star Hospitality, Inc.*, No. 3:12-CV-00214-bbc/slc (W.D. Wis. July 28, 2015), ECF No. 266.

³²⁹ *Id.*

³³⁰ *Id.*

³³¹ See Christopher M. Cascino and Gerald L. Maatman, Jr., *Court Awards The EEOC Attorneys' Fees And Contempt Fines In Post-Judgment Discovery Dispute*, *supra* note 323.

PART II

FY2015 SUBSTANTIVE TRENDS IN EEOC LITIGATION

A. The Types Of Lawsuits The EEOC Filed In FY2015

On November 19, 2015, the EEOC released its FY2015 Performance and Accountability Report (“PAR”).³³² The report is an annual reflection on the progress of the EEOC’s continued efforts to follow the enforcement priorities that were outlined in the 2012 SEP. In this year’s PAR, the EEOC reported that it filed 142 merits lawsuits, including 100 individual suits and 42 suits involving “discriminatory policies or multiple victims,” of which 16 (or 11%) involved challenges to alleged systemic discrimination.³³³ According to the EEOC, the systemic lawsuits challenged a variety of types of alleged systemic discrimination, including an alleged age-based refusal to hire, a refusal to accommodate religious beliefs, an imposition of unnecessary medical restrictions, and a systematic failure to maintain records.³³⁴

The number of systemic lawsuits that the Commission files per year appears to be leveling off. The EEOC reported that 21 systemic suits were filed in FY2013,³³⁵ and 17 were filed in FY2014.³³⁶ In contrast, the number of merits lawsuits has continued its upward trend. There were only 131 merits lawsuits filed in 2013³³⁷ and 133 merits lawsuits filed in 2014.³³⁸ So while the number of merits lawsuits has gone up overall, systemic suits are making up a smaller percentage of those filings.

Analyzing the EEOC’s filings reveals the types of discrimination lawsuits the EEOC is filing and provides valuable insight into how it is pursuing its enforcement agenda. The charts in this section show what types of lawsuits the EEOC is filing overall and broken out by industry.

³³² Christopher DeGroff, Gerald L. Maatman, Jr., and Jennifer A. Riley, *Employers Beware: EEOC’s 2015 Performance And Accountability Report Reaffirms Its Commitment To High Profile, Systemic Litigation*, WORKPLACE CLASS ACTION BLOG (Nov. 19, 2015), available at <http://www.workplaceclassaction.com/2014/11/eecocs-2014-performance-and-accountability-report-reflects-continued-efforts-to-pursue-high-priority-systemic-litigation/>.

³³³ U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FISCAL YEAR 2015 PERFORMANCE AND ACCOUNTABILITY REPORT, *supra* note 19, at 11.

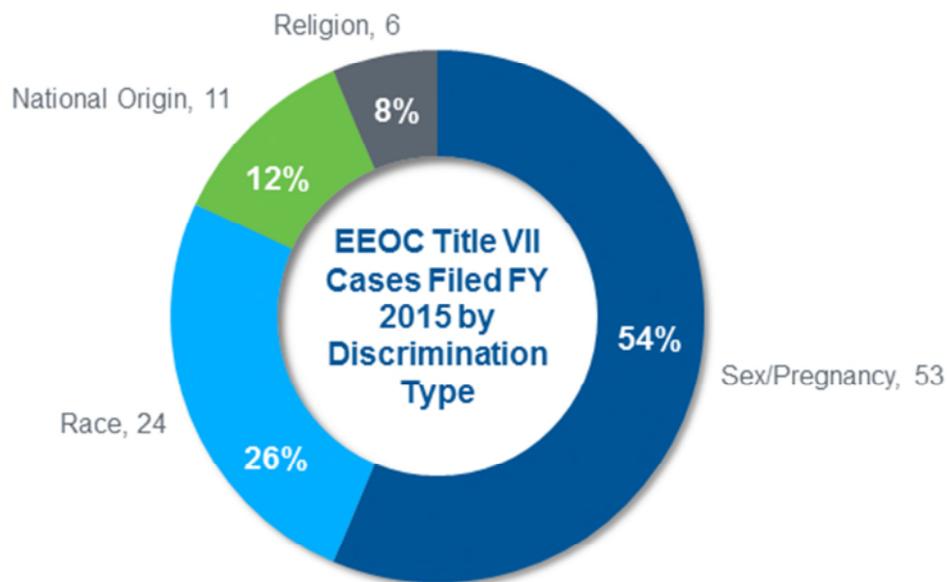
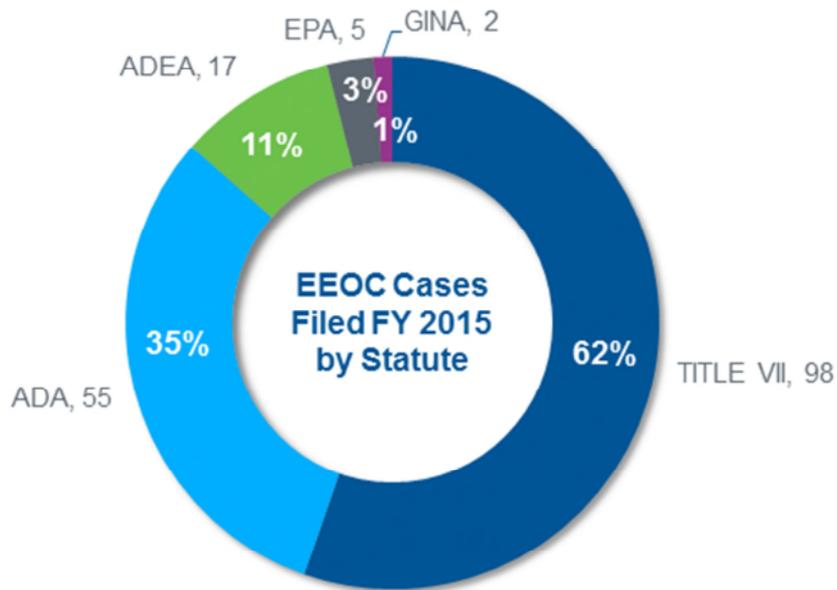
³³⁴ *Id.* at 36.

³³⁵ U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FISCAL YEAR 2013 PERFORMANCE AND ACCOUNTABILITY REPORT, *supra* note 21, at v.

³³⁶ U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FISCAL YEAR 2014 PERFORMANCE AND ACCOUNTABILITY REPORT, *supra* note 20, at v.

³³⁷ U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FISCAL YEAR 2013 PERFORMANCE AND ACCOUNTABILITY REPORT, *supra* note 21, at 3.

³³⁸ U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FISCAL YEAR 2014 PERFORMANCE AND ACCOUNTABILITY REPORT, *supra* note 20, at 3.



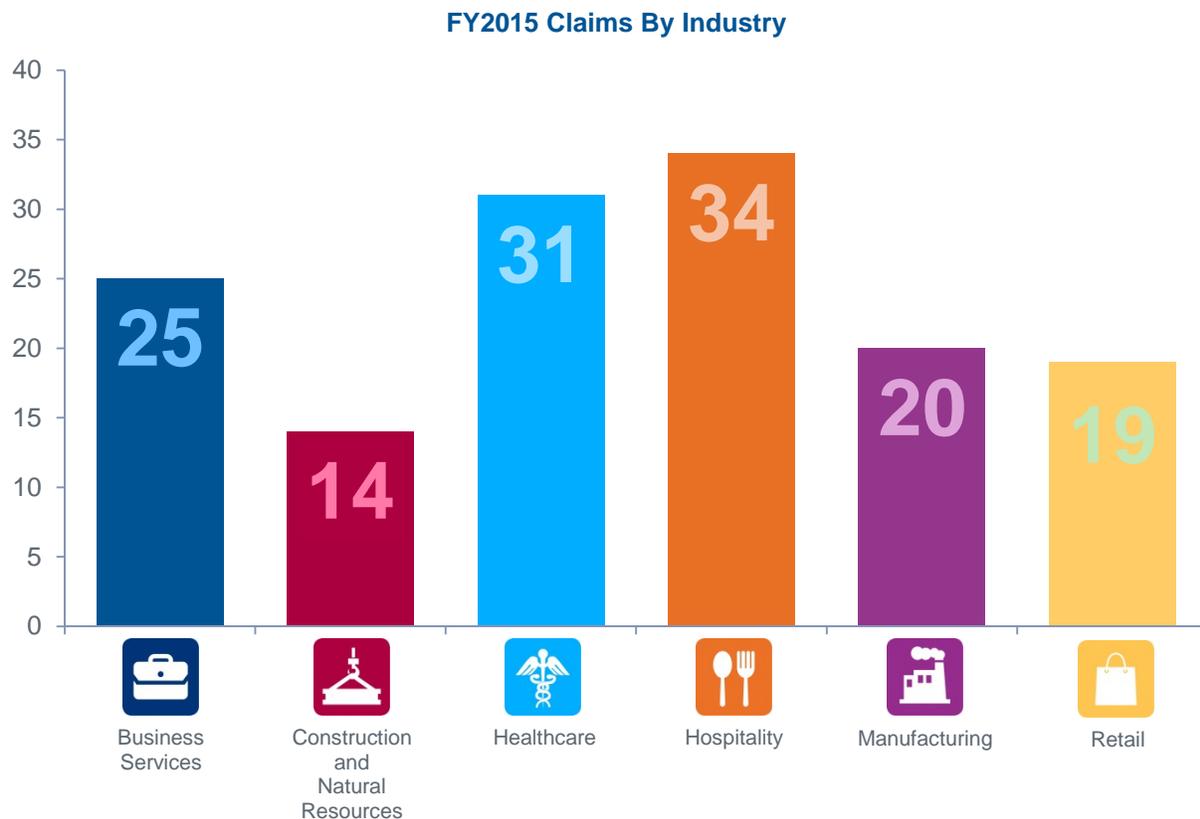
As these graphs demonstrate, the EEOC's filings this year concentrated heavily on Title VII and ADA claims, with those two types of cases constituting 86% of all of the EEOC filings. This is consistent with prior years. Within Title VII (which is divided into sex/pregnancy, religious, race, color, and national origin discrimination) sex and race discrimination made up the bulk of the filings, comprising 80% of all Title VII cases. Taken together, this means that over 40% of all EEOC Title VII filings throughout the country were focused on either sex or race.

B. Industry-By-Industry Focus

This year, we have also analyzed the filings for six industries: business services (including staffing services), construction and natural resources, healthcare, hospitality, manufacturing, and retail. While no industry is completely safe from EEOC enforcement actions, each industry has its own set of risks peculiar to that industry that turn largely on the nature of the businesses.

For example, certain industries might be more flexible in offering accommodations because less hardship is involved, whereas others have a highly structured atmosphere that requires creativity to reach appropriate solutions. Some industries may also rely on labor sources that fall within the EEOC's strategic objective to target disparate pay, job segregation, harassment, and trafficking that affect what the EEOC considers more vulnerable workers. Still others may find themselves in the crosshairs of the EEOC's latest attempt to expand the substantive rights protected by the anti-discrimination statutes.

In the following series of charts, we have analyzed the number of filings in each industry and highlighted a few cases that are representative of the types of risks faced by those employers. The following chart shows the number of lawsuits that the EEOC filed against companies within each industry. The charts that follow show the number of claims that were filed against companies within each industry by statute and by type of discrimination under Title VII.³³⁹

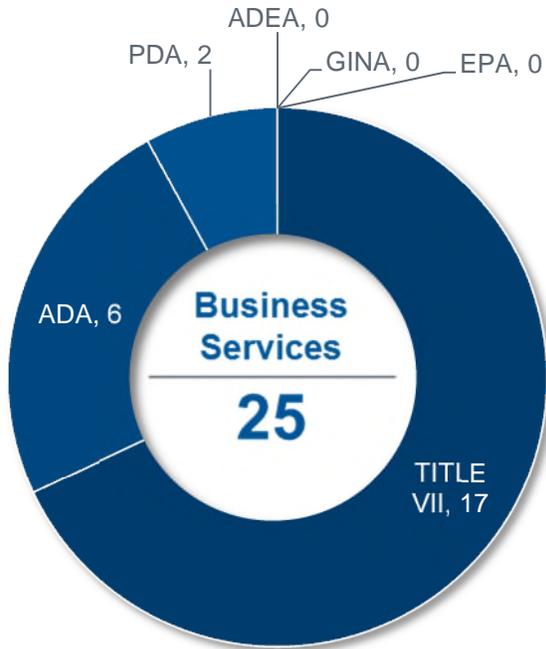


³³⁹ The number of claims may not equal the number of lawsuits because some lawsuits assert multiple claims.



BUSINESS SERVICES INDUSTRY

EEOC Claims Filed
FY2015 By Statute



EEOC Title VII Claims Filed FY2015
By Discrimination Type³⁴⁰



The claims against the Business Services industry were heavily skewed toward Title VII, followed to a lesser extent by ADA claims. Among Title VII cases, there were twice as many sex discrimination claims as claims of race discrimination, the next closest subcategory.

Several of the ADA cases illustrate the importance of flexibility when presented with disabled employees or applicants. In *EEOC v. S&B Industry, Inc. d/b/a Fox Conn S&B*, the EEOC alleged that when two hearing-impaired individuals applied for jobs repairing cell phones for the defendant, the supervisor meeting with them refused to write instructions for them (after initially complying) and refused to provide any other accommodation to allow the individuals to continue through the orientation and interview process.³⁴¹

³⁴⁰ The number of Title VII claims by discrimination type may not equal the total number of Title VII claims because some Title VII claims assert multiple types of discrimination.

³⁴¹ Complaint, *EEOC v. S&B Indus., Inc. d/b/a Fox Conn S&B*, No. 3:15-00641-D (N.D. Tex. Feb. 26, 2015), ECF No. 1.

In *EEOC v. Xerox State Healthcare, LLC*, the EEOC alleged that an applicant received a written employment offer, contingent upon successful completion of a pre-employment drug screening.³⁴² The applicant had been diagnosed with end stage renal disease, treated through hemodialysis. Though she was willing to undergo the screening, the applicant could not provide a urine sample and offered instead to have her dialysis center perform a drug test. The employer denied the request and the applicant was not hired.

Staffing companies were also a target for EEOC litigation in FY2015. For example, in *EEOC v. All Star Personnel, Inc.*, the EEOC alleged that a staffing firm assigned an employee with a hearing impairment to work at one of its client's recycling facilities, but, after learning of the impairment, the client said she could not work there.³⁴³ The matter settled a few months later with monetary relief to the charging party and remedial relief, including the creation and implementation of policies for providing reasonable accommodations to applicants and training on employee rights under the ADA.

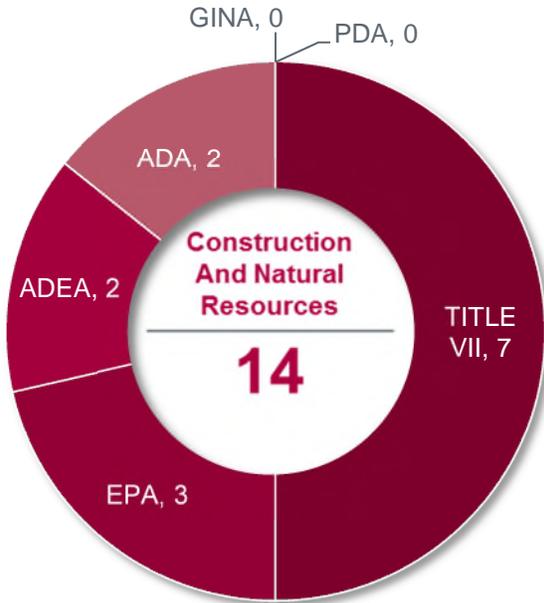
³⁴² Complaint, *EEOC v. Xerox State Healthcare*, No. 3:15-CV-00427 (W.D.N.C. Sept. 17, 2015), ECF No. 1.

³⁴³ Complaint, *EEOC v. All Star Pers.*, No. 3:15-00136 (M.D. Tenn. Feb. 18, 2015), ECF No. 1.



CONSTRUCTION/NATURAL RESOURCES

EEOC Claims Filed
FY2015 By Statute



EEOC Title VII Claims Filed FY2015
By Discrimination Type



The industry least targeted by the EEOC, at least in terms of the total numbers of lawsuits filed in FY2015, was the Construction and Natural Resources industry. The focus of the EEOC's litigation against this industry was gender discrimination, with six of the 14 cases brought against the Construction and Natural Resources industries alleging gender discrimination under either Title VII or the Equal Pay Act.

There were more Equal Pay Act claims (three) filed against this industry than the Healthcare, Hospitality, Manufacturing, Retail, and Business Services industries combined (two). Historically, these are fields that employed many more men than women. It is possible that the EEOC's focus on gender discrimination and Equal Pay Act claims may reflect the EEOC's belief that this industry is less welcoming to women employees.

The construction industry was also targeted by the EEOC to expand the scope of sex discrimination to include discrimination on the basis of perceived lack of conformity to gender

stereotypes. As explained in more detail below,³⁴⁴ this was a crucial step in the EEOC's efforts to expand Title VII's protections to cover transgender employees. In *EEOC v. Boh Brothers Construction Co.*,³⁴⁵ an ironworker on a bridge maintenance crew allegedly was subjected to verbal and physical harassment because he allegedly did not conform to how his supervisor believed a man should act.³⁴⁶ The EEOC was successful in getting the Fifth Circuit to recognize that this same-sex harassment was "because of sex" under Title VII because it was based on a perceived lack of conformity with gender stereotypes.³⁴⁷

The EEOC has also filed suit against a number of exploration and production companies alleging pay discrimination on the basis of sex.³⁴⁸ In announcing those filings, the EEOC district director of the Phoenix District Office stated: "It's not just unfair when women are paid less than men when they do substantially equal work under similar working conditions - it's against the law. The EEOC is committed to ensuring that all employees receive the equal pay they deserve."³⁴⁹

There were relatively few ADA and ADEA claims filed against the Construction and Natural Resources industries. Given the physical demands placed on employees within these industries, one might expect more actions alleging ADA and ADEA violations than in some other industries. Yet there were only four ADA and ADEA claims, combined, brought in FY2015, while there were 20 such actions brought against the Healthcare industry and 10 such actions brought against the Retail industry.

³⁴⁴ See *infra* Part II.D.2.

³⁴⁵ 731 F.3d 444 (5th Cir. 2013); see also Dennis A. Clifford and Christopher J. DeGroff, "Macho Man Discrimination" – The EEOC Scores Fifth Circuit Win In Gender-Stereotype Suit, WORKPLACE CLASS ACTION BLOG (Oct. 3, 2013), available at <http://www.workplaceclassaction.com/2013/10/macho-man-discrimination-the-eeoc-scores-fifth-circuit-win-in-gender-stereotype-suit/>; Christopher DeGroff, Reema Kapur, and Gerald L. Maatman, Jr., *The Top 5 Most Intriguing Decisions In EEOC Cases Of 2013 (And A Pre-Publication Preview Of Our Annual EEOC Litigation Report)*, WORKPLACE CLASS ACTION BLOG (Dec. 31, 2013), available at <http://www.workplaceclassaction.com/2013/12/the-top-5-most-intriguing-decisions-in-eeoc-cases-of-2013-and-a-pre-publication-preview-of-our-annual-eeoc-litigation-report/>.

³⁴⁶ *Boh Bros. Constr. Co.*, 731 F.3d at 449–50.

³⁴⁷ *Id.* at 456.

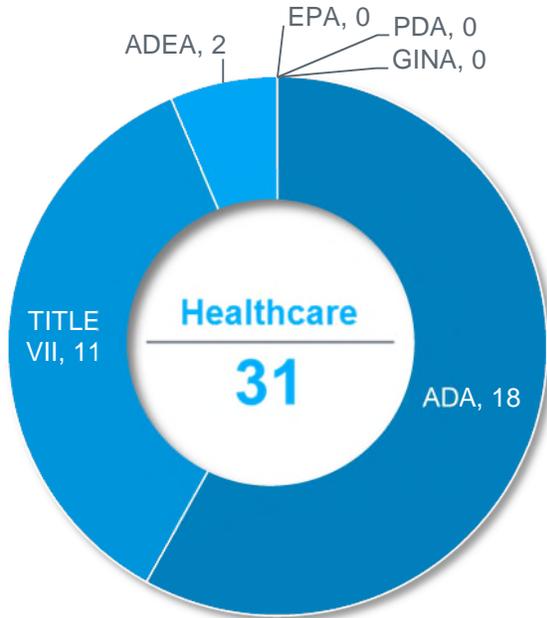
³⁴⁸ Press Release, Equal Employment Opportunity Commission, Ten Exploration and Production Companies Sued by EEOC for Sex-Based Pay Discrimination (May 18, 2015), available at <http://www.eeoc.gov/eeoc/newsroom/release/5-18-15.cfm>.

³⁴⁹ *Id.*

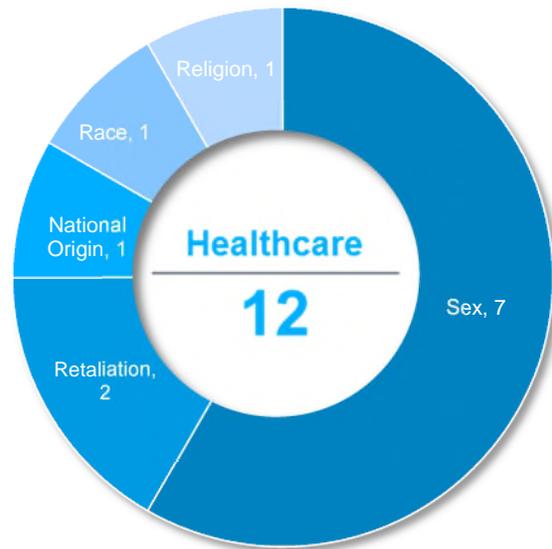


HEALTHCARE INDUSTRY

EEOC Claims Filed
FY2015 By Statute



EEOC Title VII Claims Filed FY2015
By Discrimination Type



ADA claims made up a substantially larger share of EEOC lawsuits against healthcare companies than other industries. Healthcare companies should be cognizant of the new theories that the EEOC is advancing in that area.

For example, in *EEOC v. ValleyLife*,³⁵⁰ the EEOC alleged that a non-profit serving the developmentally disabled violated the ADA by enforcing an inflexible leave policy that required employees to be discharged once they exhausted all paid and FMLA leave without the possibility of providing additional leave as an accommodation. Though the applicability of a given accommodation is determined by the facts of any given case, employers should consider whether their policies leave open the possibility of additional accommodations.

In *EEOC v. Vicksburg Healthcare, LLC*,³⁵¹ the EEOC brought an ADA action alleging that Defendant terminated a nurse technician after she returned to work with a “light work”

³⁵⁰ Complaint, *EEOC v. ValleyLife*, No. 2:15-CV-340-GMS (D. Ariz. Feb. 25, 2015), ECF No. 1.

³⁵¹ *EEOC v. Vicksburg Healthcare, LLC*, No. 3:13-CV-895, 2015 WL 5089701 (S.D. Miss. Aug. 27, 2015).

restriction.³⁵² To prove its case, the EEOC served a broad request to inspect the general operations of the Surgical Services Department of Defendant's medical center facility, the type of equipment and/or instruments commonly in use, the layout of the Department, and the feasibility of certain accommodations.³⁵³ The EEOC also wanted to collect measurements as to the amount of force required in order to push/pull certain equipment and to observe the day-to-day job functions and duties of the position in question and other positions.³⁵⁴ Although the case was ultimately dismissed because the employee had applied for disability benefits with her insurance company and stated that she was "totally disabled" with an "unknown" recovery date,³⁵⁵ it provides a cautionary tale for healthcare employers. The EEOC can take an aggressive view of the accommodations that employers should make when employees are subject to a light duty restriction.

Another issue that arises for healthcare companies is balancing the need to insure patient safety and the limitations on medical testing and information gathering under the ADA. In *EEOC v. Aurora Health Care, Inc.*,³⁵⁶ the EEOC alleged that a home care and hospice service provider's pre-employment medical history and physical screening process violated the ADA.³⁵⁷ The issue of pre-employment screening also arose in *EEOC v. Grane Healthcare*,³⁵⁸ where the EEOC claimed that the employer's pre-employment drug test was a medical exam under the ADA.³⁵⁹ Although the court found it was a permissible drug test and granted summary judgment to Defendants, it is a caution to employers that the EEOC might investigate (and even sue) to restrict the use of these types of tests.

Healthcare employers should also be aware that even where accommodations may prove difficult or challenging (a frequent occurrence when patient safety is at issue), they must work with employees to identify appropriate accommodations or risk potential investigation or liability. In both *EEOC v. Audrain Health Care, Inc.*³⁶⁰ and *EEOC v. St. Joseph's Hospital Inc.*,³⁶¹ the courts allowed questions of the appropriateness of accommodations and the sufficiency of the interactive process to go to a jury.³⁶² Failure (or arguable failure) to properly engage with and/or accommodate disabled employees could lead to unwanted scrutiny and expense.

³⁵² *Id.* at *1.

³⁵³ *EEOC v. Vicksburg Healthcare, LLC*, No. 3:13-CV-895, 2015 WL 1821581 (S.D. Miss. Apr. 22, 2015).

³⁵⁴ *Id.* at *2.

³⁵⁵ *Vicksburg Healthcare, LLC*, 2015 WL 5089701, at *4-5.

³⁵⁶ *EEOC v. Aurora Health Care, Inc.*, No. 12-CV-984-JPS, 2015 WL 2344727 (E.D. Wis. May 14, 2015).

³⁵⁷ *Id.* at *1.

³⁵⁸ *EEOC v. Grane Healthcare Co.*, No. 3:10-CV-250, 2015 WL 5439052 (W.D. Pa. Sept. 15, 2015).

³⁵⁹ *Id.* at *40, 68.

³⁶⁰ *EEOC v. Audrain Health Care, Inc.*, No. 2:12-CV-73, 2015 WL 3506023 (E.D. Mo. June 3, 2015).

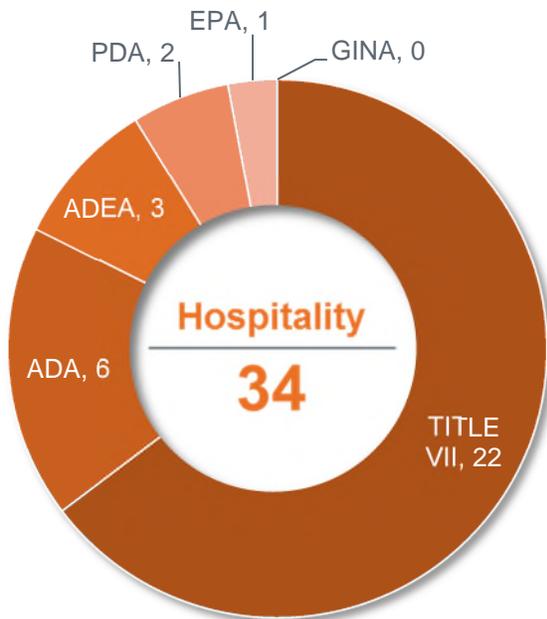
³⁶¹ *EEOC v. St. Joseph's Hosp., Inc.*, No. 8:13-CV-2723-T-30TGW 2015 WL 685766 (M.D. Fla. Feb. 18, 2015).

³⁶² *Audrain*, 2015 WL 3506023 at *3; *St. Joseph's*, 2015 WL 685766 at *10.



HOSPITALITY INDUSTRY

EEOC Claims Filed
FY2015 By Statute



EEOC Title VII Claims Filed FY2015
By Discrimination Type



The hospitality industry tied the healthcare industry for the highest number of EEOC lawsuits in any industry. Of those, 22 were Title VII cases. Within Title VII, the claim leaders by far were sex discrimination and retaliation – including multiple suits that encompassed both types of claims.

For example, in *EEOC v. Moonshine Group, LLC*,³⁶³ the complaint alleged that when a bartender was approximately five months pregnant, one of the employer’s managers told her that he did not want her working as a bartender while she was pregnant, even though the bartender had never requested any change in her job duties. One of the bases upon which the manager allegedly made his decision was his concern that customers would be offended by a pregnant person behind the bar and that they would consider the owners incompetent to allow a pregnant employee to continue bartending because of the possibility of injury. The case is a warning for employers, including those who feel like they are doing employees a service by

³⁶³ Complaint, *EEOC v. Moonshine Grp., LLC*, No. 2:15-CV-01618-MHB (D. Ariz. Aug. 20, 2015), ECF No. 1.

looking out for their interests (particularly where health issues are involved). The EEOC may take a very dim view of paternalistic attempts to govern employee conduct.

Hospitality companies often employ a younger workforce in an informal setting, which some employees may view as more accepting of inappropriate behavior. The EEOC's allegations often contain lurid details of bad behavior by managers or supervisors. Employers should consider the nature of their workplace and keep in mind that some settings may give rise to a special need to train employees in workplace anti-harassment and anti-retaliation policies. Employers should be wary of all complaints of harassment, and they must ensure that they are dealt with appropriately. It is sometimes easier for the EEOC to prove a retaliation case than the underlying claim of discrimination itself.

While sex discrimination and retaliation claims can be considered the "main course" for EEOC litigation in the hospitality industry, other "side dish" claims were filed in areas including race, national origin, age, and disability discrimination. One such case was *EEOC v. Rosebud Restaurants, Inc.*, which involved allegations that the Defendant restaurant refused to hire African-Americans on the basis of their race.³⁶⁴ Rather than identifying a specific individual who was allegedly aggrieved, the EEOC alleged that the restaurant's owner expressed a general preference not to hire African-Americans. Even though the EEOC did not name an aggrieved individual, the court denied the restaurant's motion to dismiss, noting that widespread discriminatory practice allegations were sufficient to assert a claim under Title VII.

The hospitality industry is an active field, so disability discrimination is another area for employers in this sector to monitor. For example, in *EEOC v. Young and Associates, Inc.*, a restaurant server alleged that her employer wrongfully discharged her due to a disability, specifically a digestive issue.³⁶⁵ The restaurant's manager asked her to produce a doctor's note regarding the alleged disability; after she did so the next day, the manager refused to even review the note and subsequently discharged her. The court ultimately denied the restaurant's motion to dismiss, noting that she provided fair notice to her employer of her disability.

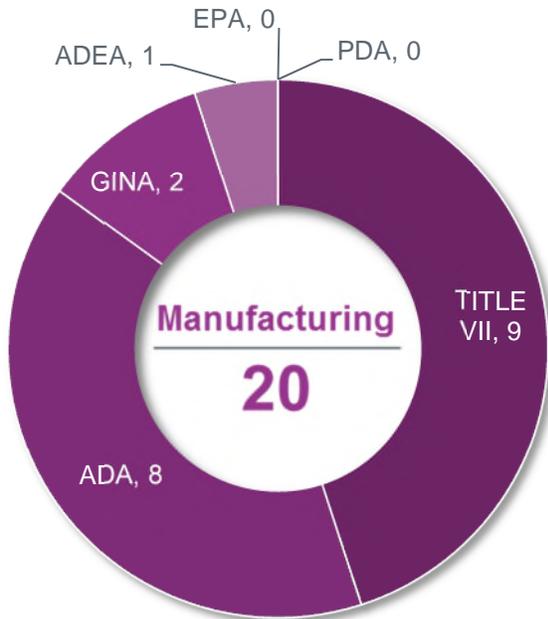
³⁶⁴ *EEOC v. Rosebud Rests., Inc.*, 85 F. Supp. 3d 1002 (N.D. Ill. 2015).

³⁶⁵ *EEOC v. Young & Assocs., Inc.*, No. 1:14-CV-00068, 2015 WL 82894 (W.D. Va. Jan. 7, 2015).



MANUFACTURING INDUSTRY

EEOC Claims Filed
FY2015 By Statute



EEOC Title VII Claims Filed FY2015
By Discrimination Type



Based on the data, manufacturers appear to be especially susceptible to lawsuits on several fronts. Many manufacturing jobs include a physical component, requiring employees to perform certain manual tasks or have certain physical capabilities to perform certain work. These requirements may at times collide with restrictions or limitations stemming from medical conditions, thus implicating the ADA and obligations to provide reasonable accommodations. Manufacturing jobs may also require employees to be physically present to perform certain tasks and therefore may be less conducive to work-from-home accommodations.

Indeed, in *EEOC v. Ford Motor Co.*,³⁶⁶ a worker with irritable bowel syndrome requested a disability accommodation in the form of permission for her to work from home as needed, up to four days per week. The employer analyzed her job responsibilities and concluded that of her ten job responsibilities, four could not be performed from home effectively and two were not significant enough to support telecommuting. In response to the request, the employer offered alternative accommodations, such as moving the employee closer to the restroom and jobs

³⁶⁶ *EEOC v. Ford Motor Co.*, 782 F.3d 753 (6th Cir. 2015).

more suited for telecommuting. The employee declined the alternatives. Both the trial court and the court of appeals agreed that working from home up to four days was not a reasonable accommodation for this employee, as her job required her to be present at the worksite.

Interestingly, two ADA cases filed against manufacturing clients also contained the only two GINA suits brought by the EEOC all year. In *EEOC v. Bedford Weaving, Inc.*,³⁶⁷ the EEOC alleged that the company's application questions regarding medical history, including past injuries, general health inquires, and questions about family members violated the ADA and GINA's respective restrictions on pre-employment and family medical inquiries. In *EEOC v. Honeywell*,³⁶⁸ the EEOC alleged that the company's practice of making employees undergo a biometric screening (with blood draw) violated the ADA,³⁶⁹ and that forcing spouses to undergo the same screening if covered by the employee's health plan violated GINA. Together, these cases suggest that manufacturers (who are rightfully concerned with employees' health given the potential hazards) should be careful about any medical related inquiries not only as they apply to an employee or applicant, but also as they pertain to a family member.

Manufacturers, especially those conducting reductions in force ("RIFs"), may also be vulnerable to allegations of age discrimination. For example, in *EEOC v. Teepro*³⁷⁰ the employer reclassified some employees from "Tech II" to "Tech III" positions, which resulted in the employees losing their seniority dates and ultimately being laid-off. Although there was no direct evidence of age discrimination, the court found that statistical evidence suggested older employees were overrepresented at a statistically significant level in both the reclassification efforts and the RIF. And despite undisputed facts confirming that the company was in financial distress and took numerous other cost saving measures that were ultimately unsuccessful, and that a RIF was necessary for its financial survival, the court denied the company's motion for summary judgment, finding genuine issues of material fact remained as to whether the company appropriately followed the lay-off policy in its employee handbook.

In the Title VII arena, race claims continue to be the biggest threat for manufacturers. In *EEOC v. BMW Manufacturing Co., LLC*,³⁷¹ the EEOC brought a Title VII action alleging that the company's use of its criminal conviction background check policy constituted an unlawful employment practice because it discriminated on the basis of race. In *EEOC v. Windings, Inc.*,³⁷² the EEOC alleged that a biracial applicant passed the employer's qualifications test but the job was awarded instead to a white applicant. Employers should be aware that the EEOC is focused on removing such "barriers" to hiring and recruitment.

³⁶⁷ Complaint, *EEOC v. Bedford Weaving, Inc.*, No. 6:15-CV-27-NKM (W.D. Va. Aug. 13, 2014), ECF No. 1.

³⁶⁸ Complaint, *EEOC v. Honeywell Int'l, Inc.*, No. 0:14-CV-4517-ADM-TNL (D. Minn. Oct. 27, 2014), ECF No. 1.

³⁶⁹ The claim was based on the allegation that the test was not work-related.

³⁷⁰ *EEOC v. Teepro*, 2015 WL 5695307 (E.D. Tenn. Sept. 28, 2015).

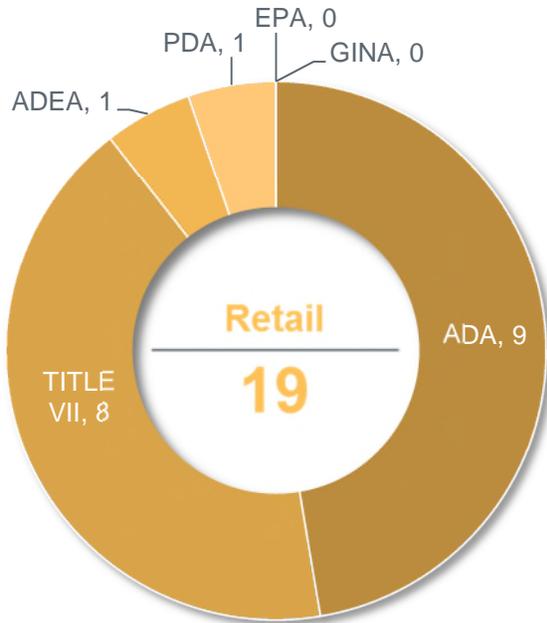
³⁷¹ *EEOC v. BMW Mfg. Co., LLC*, No. 7:13-1583, 2015 WL 5431118 (D.S.C. July 30, 2015).

³⁷² Complaint, *EEOC v. Windings, Inc.*, No. 0:15-CV-02901-PAM-JSM (D. Minn. July 1, 2015), ECF No. 1.



RETAIL INDUSTRY

**EEOC Claims Filed
FY2015 By Statute**



**EEOC Title VII Claims Filed FY2015
By Discrimination Type**



The retail industry has a myriad of entry level positions, relatively high turnover, potentially exacting attendance and performance constraints, and a wide-ranging applicant pool that yields many possible comparators, making it a primary target for claims under all aspects of Title VII. Retail industry clients were also hit with an approximately equal number of ADA claims.

In *EEOC v. Zale Delaware, Inc. d/b/a Piercing Pagoda*,³⁷³ the EEOC alleged that an employee at a mall kiosk (where employees had to stand to work in a limited space) was terminated after she requested an accommodation of sitting 15 minutes per hour due to a disc disease. The EEOC alleged that her employer failed to engage in the required interactive process when it put her on unpaid leave and later terminated her employment.

³⁷³ Complaint, *EEOC v. Zale Del., Inc. d/b/a Piercing Pagoda*, No. 4:15-CV-00149-D (E.D.N.C. Sept. 25, 2015), ECF No. 1.

The retail industry has also been the subject of the EEOC's challenge to employers' use of criminal background checks. In *EEOC v Dolgencorp*,³⁷⁴ Dollar General failed in its attempt to compel information about the EEOC's policies regarding its own use of criminal background checks in hiring,³⁷⁵ evidence that other employers have found useful in combatting similar claims by the EEOC.

The EEOC also sued Dollar General for retaliation.³⁷⁶ The EEOC alleged that Dollar General's issuance of multiple reprimands to an African American employee who, three months earlier, had filed a charge of discrimination, demonstrated that the employee was being moved along a disciplinary track toward termination.³⁷⁷ The District Court granted summary judgment against the EEOC on the retaliation claim because the employee resigned to take another job and was not under threat of termination, but allowed the EEOC to proceed on a claim for race discrimination in light of evidence of multiple racial epithets made by a supervisor to the employee. The matter settled for \$32,500.³⁷⁸

In *EEOC v. Gregg Appliances, Inc.*, the EEOC brought a claim of retaliation on behalf of a female employee who alleged she was disciplined and her employment terminated in retaliation for reporting that her general manager had sent her sexually harassing text messages.³⁷⁹ The District Court denied the EEOC's motion for a new trial in large part because there was sufficient evidence to show that the employee's complaint of sexual harassment resulted in the termination of her general manager's employment, that the employee was assigned to a new supervisor, and that the new supervisor disciplined the employee and ultimately terminated her employment for a variety of performance-related matters.³⁸⁰

Finally, the EEOC also tested the limits of discrimination under Title VII by bringing a claim of race discrimination on behalf of an African-American employee who experienced multiple transfers to different store locations.³⁸¹ In *EEOC v. Autozone, Inc.*, the District Court rejected the EEOC's theory that multiple transfers violated 42 U.S.C. § 2000e-2(a)(2) as evidencing a plan to limit, segregate, or classify employees on the basis of race.³⁸² Granting summary judgment in favor of AutoZone, the District Court found that transfers without demotion, loss of pay, or other adverse effects were not sufficient to constitute adverse employment actions under Title VII.³⁸³ The EEOC has appealed this decision.³⁸⁴

³⁷⁴ *EEOC v Dolgencorp, LLC*, No. 13-CV-04307, 2015 WL 2148394 (N.D. Ill. May 5, 2015).

³⁷⁵ *Id.* at *3.

³⁷⁶ *EEOC v Dolgencorp., LLC*, No. 1:13-CV-383, 2015 WL 439920 (S.D. Miss. Feb. 3, 2015).

³⁷⁷ *Id.* at *5.

³⁷⁸ *EEOC v Dolgencorp., LLC*, No. 1:13-CV-383, 2015 WL 5174333 (S.D. Miss. June 3, 2015).

³⁷⁹ *EEOC v. Gregg Appliances, Inc.*, No. 3:10-CV-00861, 2015 WL 4905057 (M.D. Tenn. Aug. 17, 2015).

³⁸⁰ *Id.* at *7.

³⁸¹ *EEOC v Autozone, Inc.*, No. 14-CV-5579, 2015 WL 4638065 (N.D. Ill. Aug. 4, 2015).

³⁸² *Id.* at *2.

³⁸³ *Id.* at *4.

³⁸⁴ Docket, *EEOC v Autozone, Inc.*, No. 15-3201 (7th Cir. Oct. 2, 2015).

C. Spotlight On The Americans With Disabilities Act: An ADA Survival Guide

ADA lawsuits remain a very high priority for the EEOC. In FY2015, 53 of the 142 merits lawsuits filed by the EEOC concerned purported ADA claims.³⁸⁵ Of the 155 lawsuits resolved by the EEOC in FY2015, 61 concerned ADA claims.³⁸⁶ In terms of raw numbers, the EEOC only filed and resolved Title VII lawsuits at a higher rate. Because ADA enforcement remains such a high priority for the EEOC, we have prepared the following “ADA Survival Guide” to provide employers with some considerations and pointers for handling ADA issues, and a working knowledge of the new and emerging trends that employers should watch out for.

The ADA prohibits employers from discriminating against “qualified individual[s] on the basis of disability.”³⁸⁷ In order to make out a *prima facie* case of discrimination under the ADA, the EEOC needs to establish that: (1) the individual has an ADA qualifying disability; (2) the individual is qualified for the job; and (3) the individual was discriminated against on the basis of the disability.³⁸⁸ The best way for employers to guard against EEOC-initiated ADA litigation is to develop an understanding of what the EEOC considers to be a “disability,” a “qualified individual,” and “discrimination.”

1. What Does The EEOC Call A “Disability”?

Employers must have an understanding of what a disability is under the ADA so that they can spot ADA issues when they arise. Under the ADA, a person has a “disability” if he or she (1) is substantially impaired in a major life activity; (2) has a record of such an impairment; or (3) is regarded as having such an impairment.³⁸⁹ With respect to being actually disabled, a person is actually disabled if he or she has “a physical or mental impairment that substantially limits one or more major life activities of such individual.”³⁹⁰

Over time, the EEOC has expanded the class of people who would be considered to have a covered disability within the meaning of the ADA. When the ADA was enacted, major life activities were not included in the law. By regulation, the EEOC defined “major life activities” as “caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”³⁹¹ When the ADA was amended, effective in 2009, the law included a list of major life activities, including caring for oneself, seeing, eating, walking, lifting, speaking, learning, concentrating, communicating, performing manual tasks, hearing, sleeping, standing,

³⁸⁵ See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FISCAL YEAR 2015 PERFORMANCE AND ACCOUNTABILITY REPORT, *supra* note 19, at 34.

³⁸⁶ *Id.*

³⁸⁷ 42 U.S.C. § 12112(a).

³⁸⁸ See, e.g., *Gowesky v. Singing River Hosp. Sys.*, 321 F.3d 503 (5th Cir. 2003), *cert. denied* 540 U.S. 815; *Holbrook v. City of Alpharetta, Ga.*, 112 F.3d 1522 (11th Cir. 1997).

³⁸⁹ 42 U.S.C. § 12102(2); see also 29 C.F.R. § 1630.2(g).

³⁹⁰ 42 U.S.C. § 12102(1).

³⁹¹ 29 C.F.R. § 1630.2(i).

bending, breathing, reading, thinking, and working. The EEOC added sitting, reaching and interacting with others in its regulations, which went into effect in 2011.³⁹²

The EEOC also concluded that major life activities included “the operation of a major body function, including but not limited to, functions of the immune system, special sense organs and skin; normal cell growth; and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions.”³⁹³ That includes diabetes,³⁹⁴ post-partum depression,³⁹⁵ and “minor ankle ailments.”³⁹⁶ According to the EEOC, “[t]he term ‘substantially limits’ shall be construed broadly in favor of expansive coverage.”³⁹⁷

The EEOC also considers conditions resulting from pregnancy to be disabilities, such as gestational diabetes.³⁹⁸ The EEOC has increasingly filed lawsuits based on alleged discrimination against women with pregnancy-related conditions.³⁹⁹

2. Who Is Entitled To A Reasonable Accommodation?

A person with a disability who is also a “qualified individual” is entitled to a reasonable accommodation. Under the ADA, a “qualified individual” is “an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.”⁴⁰⁰

³⁹² *Id.*

³⁹³ *Id.*

³⁹⁴ See Press Release, Equal Employment Opportunity Commission, Baker Wellness Center Illegally Fired Employee Because of Disability, EEOC Claims in Lawsuit (Dec. 31, 2014), available at <http://www.eeoc.gov/eeoc/newsroom/release/12-31-14.cfm>.

³⁹⁵ See Press Release, Equal Employment Opportunity Commission, EEOC Sues The Lash Group for Disability Discrimination (Oct. 8, 2014), available at <http://www.eeoc.gov/eeoc/newsroom/release/10-8-14.cfm>.

³⁹⁶ See Press Release, Equal Employment Opportunity Commission, Sharp Healthcare Sued by EEOC for Disability Discrimination (Sept. 1, 2015), available at <http://www.eeoc.gov/eeoc/newsroom/release/9-1-15.cfm>.

³⁹⁷ *Id.*

³⁹⁸ See GUIDANCE, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PREGNANCY DISCRIMINATION, available at <http://www.eeoc.gov/laws/types/pregnancy.cfm>.

³⁹⁹ See, e.g., Press Release, Equal Employment Opportunity Commission, Allsup’s Convenience Stores Sued by EEOC for Disability and Pregnancy Discrimination (Sept. 29, 2015), available at <http://www.eeoc.gov/eeoc/newsroom/release/9-29-15d.cfm>; Press Release, Equal Employment Opportunity Commission, EEOC Sues Landis Communities and Landis Homes Retirement Community for Pregnancy and Disability Discrimination and Retaliation (Sept. 23, 2015), available at <http://www.eeoc.gov/eeoc/newsroom/release/9-23-15d.cfm>.

⁴⁰⁰ 42 U.S.C. § 12111(8).

3. What Is A Reasonable Accommodation?

While the ADA does not define a reasonable accommodation, the statute lists examples of possible reasonable accommodations, including “making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.”⁴⁰¹

Courts have, from time to time, considered certain accommodations *per se* unreasonable. For example, some cases hold that employers are not required to create new jobs, displace other employees, or promote an employee to accommodate within the meaning of the ADA.⁴⁰² Moreover, some courts have held that employers are only required to provide some reasonable accommodation, not the reasonable accommodation the disabled employee requests.⁴⁰³ The EEOC has adopted some of these rulings in its several Guidance documents.

Courts have held that under the ADA, an employer is only required to provide a reasonable accommodation to a person with a disability if he or she can perform the essential functions of his or her position (or the position being sought by an applicant) with the reasonable accommodation.⁴⁰⁴ The ADA does not define the term “essential functions.” The determination of whether something is an “essential function” is a fact-driven inquiry. The first place the EEOC will go to review this issue is the employee’s job description. Poorly written job descriptions that do not properly state the essential functions can harm an employer’s case.

One trend that employers should be aware of is the EEOC’s increasing tendency to argue that telecommuting is a reasonable accommodation and that physical presence in an office is not an essential function of a job. Courts have not always agreed with that position. For example, in *EEOC v. Ford Motor Co.*,⁴⁰⁵ the EEOC brought suit against Ford on behalf of an employee who, because of her irritable bowel syndrome, asked to be allowed to telecommute up to four days per week.⁴⁰⁶ The EEOC argued that telecommuting was a reasonable accommodation because

⁴⁰¹ 42 U.S.C. § 12111(9).

⁴⁰² See, e.g., *Rosamond v. Pennaco Hosiery, Inc.*, 942 F. Supp. 279 (N.D. Miss. 1996); *Gomez v. Am. Bldg. Maint.*, 940 F. Supp. 255 (N.D. Cal. 1996); see also ENFORCEMENT GUIDANCE: REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT, available at <http://www.eeoc.gov/policy/docs/accommodation.html#job>.

⁴⁰³ See, e.g., *Gile v. United Airlines*, 95 F.3d 492, 499 (7th Cir. 1996); see also ENFORCEMENT GUIDANCE: REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT, *supra* note 402.

⁴⁰⁴ See, e.g., *McKane v. UBS Fin. Servs., Inc.*, 363 F. App’x 679 (11th Cir. 2010).

⁴⁰⁵ *EEOC v. Ford Motor Co.*, 782 F.3d 753 (6th Cir. 2015).

⁴⁰⁶ See Christopher M. Cascino and Gerald L. Maatman, Jr., *En Banc Sixth Circuit Reverses Itself And Finds That Nearly Unlimited Telecommuting Is Not A Reasonable Accommodation Under The ADA*, WORKPLACE CLASS ACTION BLOG (Apr. 22, 2015), available at <http://www.workplaceclassaction.com/2015/04/en-banc-sixth-circuit-reverses-itself-and-finds-that-nearly-unlimited-telecommuting-is-not-a-reasonable-accommodation-under-the-ada/>.

the charging party testified that it was, and because Ford allowed other employees in the charging party's position to telecommute on a limited basis.⁴⁰⁷

The Sixth Circuit rejected those arguments. According to the Sixth Circuit, "regularly attending work on-site is essential to most jobs."⁴⁰⁸ It found the fact that others in the charging party's position telecommuted did not make the EEOC's proposed accommodation reasonable because she was requesting a much larger accommodation than Ford had given to any of its other employees with her position.⁴⁰⁹ It criticized the EEOC's position because it would create an incentive for employers to deny limited telecommuting as an accommodation for their employees so that they would not have to grant other employees far more expansive telecommuting accommodations:

[I]f the EEOC's position carries the day, once an employer allows one person the ability to telecommute on a limited basis, it must allow all people with a disability the right to telecommute on an unpredictable basis up to 80% of the week (or else face trial). That's 180-degrees backward. It encourages – indeed, requires – employers to shut down predictable and limited telecommuting as an accommodation for any employee. A good deed would effectively ratchet up liability, which would undermine Congress' stated purpose of eradicating discrimination against disabled persons.⁴¹⁰

The Sixth Circuit also concluded that the charging party was terminated for poor performance, not because she brought a charge with the EEOC.⁴¹¹

4. Issues Employers Should Consider During The Lifecycle Of Employment

Employers must be dialed in to ADA compliance starting with the application process and continuing through termination. Each stage of the employment lifecycle presents its own unique pitfalls and challenges. Further, pursuant to EEOC Guidance, the stage of the process determines an employer's right to make disability-related inquiries and/or require a medical examination.

a. The Application Stage

The EEOC has taken the position that "[t]he ADA prohibits employers from asking questions that are likely to reveal the existence of a disability before making a job offer."⁴¹² The EEOC

⁴⁰⁷ *Id.*

⁴⁰⁸ *Id.*

⁴⁰⁹ *Id.*

⁴¹⁰ *Id.*

⁴¹¹ *Id.*

⁴¹² See GUIDANCE, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, JOB APPLICANTS AND THE AMERICANS WITH DISABILITIES ACT, available at <http://www.eeoc.gov/facts/jobapplicant.html>.

refers to these kinds of questions as “disability-related inquiries” and has filed suit against employers for asking questions that the EEOC believes might reveal a disability.⁴¹³

Given the EEOC’s position, employers who wish to stay out of the crosshairs should not ask for information about a person’s physical or mental health during the hiring process. For example, a question such as, “How many days did you miss last year due to illness?” could be viewed as a disability-related inquiry.

Employers are permitted to ask whether an applicant can perform specific job functions. For example, an employer can ask someone who is applying for a position that requires driving whether he or she can drive. Some employers have found that the EEOC’s approach to ADA compliance can be difficult to navigate in practice. Employers should consider special training for anyone interviewing potential employees about what is impermissible under the EEOC’s interpretation of the ADA, and they should review their written job application materials to ensure that they are careful in how they ask about such information. Employers are well advised to seek the assistance of legal counsel as they consider their options for ensuring ADA compliance.

b. Post Offer/Pre-Employment Stage

Once an offer of employment has been made, an employer has relatively broad rights with regard to making disability-related inquiries and requiring medical examinations, which do not have to be job related and consistent with business necessity. Requirements of the Genetic Information Non-Discrimination Act (“GINA”) must be met. Further, the employer needs to be careful in consideration of the information revealed during the post-offer pre-employment stage, as EEOC will look closely at any decision by an employer to revoke an offer of employment based on the results of a pre-employment medical examination or questionnaire response.

c. Employment Stage: Spotting ADA Issues That Arise “On The Job”

During employment, an employer may ask disability-related questions and/or require a medical examination only if it is job related and consistent with business necessity. That essentially means that there must be an objective reason for doing so. When an employer asks questions about an employee’s health status, such questions can be interpreted as attempts to find out about problematic disabilities or reasons to terminate an employee.

Unless the need for accommodation is obvious, an employee or applicant generally has to request an accommodation. If an employee requests an accommodation, the employer should focus on the job duties impacted by the impairment and what it can provide to allow the employee to work, rather than asking about the medical condition. By using open-ended questions about an employee’s needs, employers can often learn what they must know to engage in the interactive, reasonable accommodations process while minimizing the possibility of misinterpretation.

⁴¹³ See, e.g., Press Release, Equal Employment Opportunity Commission, Bedford Weaving Sued for Genetic Information and Disability Discrimination (Aug. 13, 2015), *available at* <http://www1.eeoc.gov/eeoc/newsroom/release/8-13-15.cfm?renderforprint=1>.

Given the EEOC's broad definition of what constitutes a disability, employers should consider what mechanisms they may need to put into place to make sure that the right personnel are the ones having discussions with employees who may have ADA-covered disabilities.

For example, some employers have chosen to designate an individual or group of individuals to handle all ADA issues. Managerial employees are trained to inform the individual or group responsible for ADA compliance upon learning that an employee may have a disability, either because the employee stated that he or she has a condition, or stated that he or she needs an accommodation.

Those specially trained employees would then engage in the interactive process required by the ADA to determine if an employee needs an accommodation or whether an employee can be accommodated in his or her current position. In this way, those employers hope to avoid the possibility that an untrained employee may ask questions about an employee's health status that could present problems down the road, or offer accommodations that are not reasonable. Moreover, this reduces the risk that untrained employees may refuse what the EEOC or a court might consider to be a reasonable accommodation.

Employers should be sure to document the interactive process in writing to the employee. That documentation can become very important in the event that a lawsuit is filed. Finally, employers must make sure that they are in compliance with the confidentiality requirements of the ADA. Any medical information must be kept in a separate confidential file and only shared in accordance with the ADA regulations.

d. Choosing When To Provide A Reasonable Accommodation

What is a "reasonable accommodation" will depend on the facts and circumstances of each job. Employers should keep abreast of what courts have determined to be reasonable accommodations in their industry.

Employers may want to thoughtfully consider what they consider to be the essential functions of their employees' positions in advance of any request for an accommodation. The Sixth Circuit's decision in *Ford Motor Co.* contains several lessons for employers. The EEOC's position in that case was that if an employer allows good employees to telecommute, even on a limited basis, then it has essentially admitted that the essential functions of a job can be performed at home. Put another way, the EEOC will argue that employers should allow their worst employees to work from home as a reasonable accommodation if they allowed their best employees to work from home.

Of course, not all requested accommodations are reasonable. Some employers have been successful in EEOC litigation even after they rejected a proposed accommodation that they did not consider to be reasonable and after terminating or refusing to hire in such situations. For example, this year the Fourth Circuit rejected the EEOC's argument that shifting an essential job duty to another employee was a reasonable accommodation under the ADA.⁴¹⁴

⁴¹⁴ Gerald L. Maatman, Jr. and Howard M. Wexler, *Fourth Circuit Affirms EEOC's Resounding Summary Judgment Defeat in ADA Case*, WORKPLACE CLASS ACTION BLOG (June 30, 2015), available at <http://www.workplaceclassaction.com/2015/06/fourth-circuit-affirms-eecs-resounding-summary-judgment-defeat-in-ada-case/>.

Safety is another important consideration when deciding what is reasonable. If there is a probable or significant possibility of injury, to either an employee with a disability or the employee's co-workers as a result of a disability, an employer should consider what steps it can take to eliminate or reduce the threat.⁴¹⁵ Direct threat is also a highly fact driven analysis. If an employer determines that an employee imposes a direct threat, consideration should be given to transferring the employee to another position for which the employee is qualified with or without accommodation. However, there is no obligation to create such a position. Leave is another option to consider prior to termination.

According to a recent Tenth Circuit decision, an employer can successfully assert this defense even if it is mistaken as to the threat posed by the employee. In *EEOC v. Beverage Distributors Co.*,⁴¹⁶ the EEOC alleged that an employer terminated a legally blind employee because it considered him to be a threat to safety in the employer's warehouse.⁴¹⁷ The trial court issued a jury instruction that stated that the employee actually had to be a threat for the employer to successfully assert this defense.⁴¹⁸ The Tenth Circuit held that this was reversible error.⁴¹⁹ It reasoned that the employer should have avoided liability "if it had reasonably believed the job would entail a direct threat."⁴²⁰ In other words, the Tenth Circuit held that the employer should not have been required to prove that the employee posed an actual direct threat, but rather only that it had a reasonable belief that the employee constituted a direct threat.⁴²¹

e. Avoiding ADA Issues Relating To Employee Leaves Of Absence

Employees with disabilities may need to be off work either continuously or on an intermittent basis. This can cause significant challenges for employers. Eligible employees may seek leave under the Family and Medical Leave Act ("FMLA"). Employers must be aware that while the ADA was not intended as a leave law and the FMLA was passed after ADA became effective, the EEOC has been on a mission for years to transform the ADA into a leave law. In essence, the EEOC's position is that job protected leave for employees with disabilities must be considered by an employer on a case-by-case basis. This arises for those employees who are not eligible for FMLA leave and for those who have exhausted FMLA.

One of the more frequent pitfalls for employers occurs when FMLA leave comes to an end. Under the FMLA, eligible employees are entitled to 12 weeks of unpaid leave in a 12-month period for an employee's own serious health condition.⁴²² When such a leave period is up, employers should review whether further leave could be reasonably granted. If they simply

⁴¹⁵ 42 U.S.C. §§ 12111(3), 12113(b).

⁴¹⁶ *EEOC v. Beverage Distribs. Co., LLC*, 780 F.3d 1018 (10th Cir. 2015).

⁴¹⁷ Gerald L. Maatman, Jr. and Alexis P. Robertson, *Tenth Circuit Clarifies ADA Direct-Threat Defense For EEOC Litigation*, WORKPLACE CLASS ACTION BLOG (Mar. 23, 2015), available at <http://www.workplaceclassaction.com/2015/03/tenth-circuit-clarifies-ada-direct-threat-defense-for-eEOC-litigation/>.

⁴¹⁸ *Id.*

⁴¹⁹ *Id.*

⁴²⁰ *Id.*

⁴²¹ *Id.*

⁴²² 29 U.S.C. § 2612(a)(1).

terminate, employers run the risk of being accused by the EEOC of violating the ADA because, knowing of a disability, the employer did not engage in the interactive process required by the ADA to determine whether the employee could perform his or her essential functions with an accommodation or whether providing additional job protected leave could allow the employee to return to work. One way to minimize this risk is to have a written accommodation policy that specifically mentions that job protected leave is one form of accommodation the employer will consider and sets up a protocol for the employee and the employer to follow.

In sum, the EEOC has consistently attempted to expand the scope of its ADA enforcement. ADA litigation remains, in terms of sheer volume, second only to Title VII litigation. But there are reasonable, practical steps that employers can take to protect themselves, and, as much as may be possible, take themselves out of the EEOC's crosshairs.

D. The EEOC's Strategic Initiative: Developing New Substantive Theories Of Discrimination

Perhaps the defining feature of the EEOC's 2012 Strategic Enforcement Plan, are the six priorities that the Commission identified to define its enforcement mission for Fiscal Years 2013-2016.⁴²³ The EEOC chose its priorities by weighing five criteria. According to the SEP, the EEOC focused on issues that would affect a broad number of individuals, employers, or employment practices, with a special emphasis on issues affecting the most vulnerable workers, meaning those unaware, reluctant, or unable to exercise their rights. It also sought to impact developing areas of the law where the EEOC has particular expertise and issues where the government has access to information, data, and research that would render the Commission a particularly effective advocate. Finally, the EEOC said that it would focus on practices that impede or impair enforcement of employment anti-discrimination laws.⁴²⁴

Using those criteria, the EEOC identified six national enforcement priorities:

- The elimination of systemic barriers in recruitment and hiring;
- Protection of immigrant, migrant, and other vulnerable workers;
- Addressing emerging and developing issues;
- Enforcing equal pay laws;
- Preserving access to the legal system; and
- Preventing harassment through systemic enforcement and targeted outreach.⁴²⁵

Since the SEP was enacted, employers have watched as the EEOC has used every available tool in its enforcement and rulemaking toolkit to meet its objectives – even if that means stretching the anti-discrimination laws to fit its priorities.

⁴²³ See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION STRATEGIC ENFORCEMENT PLAN FY 2013 - 2016, *supra* note 285.

⁴²⁴ *Id.*

⁴²⁵ *Id.*

2. Case Study No. 2: The EEOC's Quasi-Judicial Power And Transgender Discrimination

Last year, we identified the extension of Title VII's protections to transgender employees as one of the most important developing trends in EEOC enforcement litigation. The EEOC has continued this trend into FY2015 and has directly connected those efforts to the realization of one of its stated priorities: the "coverage of lesbian, gay, bisexual and transgender individuals under Title VII's sex discrimination provisions."⁴²⁶ The EEOC has continued to reinforce its commitment to pushing forward on this priority.⁴²⁷

The Commission's focus on transgender discrimination is particularly notable because Title VII does not explicitly mention gender identity as a protected classification.⁴²⁸ For the past 20 years, some members of Congress have attempted to add gender identity as a protected category through passage of some form of the Employment Non-Discrimination Act ("ENDA").⁴²⁹ But that legislation has never passed.⁴³⁰ The EEOC was therefore left to enforce a theory of law that has never been explicitly adopted by the U.S. Congress.

Nevertheless, at the end of FY2014, the EEOC filed two lawsuits alleging discrimination against transgender employees under Title VII. We now know that those were the first in a series of lawsuits that the EEOC would bring in FY2015 alleging the same theory of transgender discrimination. It is therefore worth taking a step back to examine the arc of the EEOC's enforcement activities to see how we ended up at this point. That history provides an interesting example of how the Commission sometimes uses the laws and procedural mechanisms available to it in creative ways to shape precedent in its favor and methodically build on that precedent to advance a new EEO theory into law. This case study is especially illustrative because it shows just how much power the EEOC can wield when it puts all of its enforcement and regulatory tools to work in a focused, systematic way.

The EEOC's efforts had an unusual beginning. The Commission exploited a relatively obscure regulatory procedure adopted by a different federal agency – a procedure that was mandated by the EEOC – to advance its theory.

⁴²⁶ See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION STRATEGIC ENFORCEMENT PLAN FY 2013 - 2016, *supra* note 285.

⁴²⁷ See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FACT SHEET ON RECENT EEOC LITIGATION-RELATED DEVELOPMENTS REGARDING COVERAGE OF LGBT-RELATED DISCRIMINATION UNDER TITLE VII, available at http://www.eeoc.gov/eeoc/litigation/selected/lgbt_facts.cfm; WHAT YOU SHOULD KNOW ABOUT EEOC AND THE ENFORCEMENT PROTECTIONS FOR LGBT WORKERS, available at http://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm.

⁴²⁸ See 42 U.S.C. § 2000e-2 (making it unlawful to discriminate against any individual "because of such individual's race, color, religion, sex, or national origin").

⁴²⁹ See, e.g., Abigail Cahak and Erin Dougherty Foley, *ENDA the Line: Anticipating the Next Change to the Federal Law Landscape – Sexual Orientation and Gender Identity*, EMPLOYMENT LAW LOOKOUT BLOG (Oct. 15, 2013), available at <http://www.laborandemploymentlawcounsel.com/2013/10/from-waterhouse-to-windsor-anticipating-the-next-change-to-the-federal-law-landscape-sexual-orientation-and-gender-identity/>.

⁴³⁰ Currently, ENDA has passed in the Senate but not in the House. See Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. (2013).

On April 20, 2012, the EEOC issued a decision in *Macy v. Holder*,⁴³¹ which explicitly held that “claims of discrimination based on gender identity, are cognizable under Title VII’s sex discrimination prohibition.”⁴³² That case arose out of a complaint by a transgender woman police detective in Phoenix, Arizona who alleged that she was denied a job at the Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”) after she informed the ATF that she was in the process of transitioning from male to female.⁴³³ On June 13, 2011, she filed her formal EEO complaint with the ATF. She identified “sex,” “female” as the basis of her complaint, but then wrote in “gender identity” and “sex stereotyping” as additional bases for her complaint.⁴³⁴

The Department of Justice has adopted administrative procedures for handling EEO complaints pursuant to EEOC regulations set forth under 29 C.F.R. Part 1614,⁴³⁵ which requires federal agencies to adopt specific procedures to ensure equal employment opportunities for federal government employees. The Department of Justice adopted procedures to adjudicate claims of sex discrimination under Title VII that were different from the procedures used for claims of gender identity discrimination.⁴³⁶ In particular, the Department of Justice procedures for gender identity claims allowed for fewer remedies and did not include the right to request a hearing before an EEOC Administrative Judge or the right to appeal the final agency decision to the Commission.⁴³⁷

On October 26, 2011, the ATF issued the complainant a Letter of Acceptance, which stated that the “claim alleged and being accepted and referred for investigation is the following: Whether you were discriminated against based on your gender identity sex (female) stereotyping when on May 5, 2011, you learned that you were not hired as a Contractor for the position of [NIBIN] Ballistics Forensic Technician in the Walnut Creek Lab, San Francisco Field Office.”⁴³⁸ But the letter also stated that “since claims of discrimination on the basis of gender identity stereotyping cannot be adjudicated before the [EEOC], your claims will be processed according to Department of Justice policy.”⁴³⁹ On December 6, 2011, the complainant appealed the ATF’s decision to the EEOC, asking that the Commission adjudicate all of her claims and arguing that the EEOC has jurisdiction over her entire claim.⁴⁴⁰

⁴³¹ *Macy v. Holder*, Appeal No. 0120120821, EEOC Doc. 012012081, 2012 WL 1435995 (Apr. 20, 2012)), available at <http://www.eeoc.gov/decisions/0120120821%20Macy%20v%20DOJ%20ATF.txt>.

⁴³² *Id.*; see also Ariel D. Cudkowicz and Laura J. Maechtlen, *Strategy & Insights: Managing Transgender Issues in the Workplace Following The EEOC’s Macy Ruling*, SEYFARTH SHAW NEWSLETTER (May 11, 2012), <http://www.seyfarth.com/publications/si051012>.

⁴³³ *Macy*, *supra* note 431.

⁴³⁴ *Id.*

⁴³⁵ See Department of Justice Order 1200.1, Chapter 4-1, B.7.j, available at <http://www.justice.gov/jmd/ps/chpt4-1.html>.

⁴³⁶ *Macy*, *supra* note 431.

⁴³⁷ *Id.*

⁴³⁸ *Id.*

⁴³⁹ *Id.*

⁴⁴⁰ *Id.*

Accordingly, the question presented to the EEOC was whether gender identity discrimination claims were cognizable under Title VII. If so, then the EEOC would have ultimate authority to adjudicate legal issues relating to such claims on appeal. The EEOC held in no uncertain terms that it did have that authority:

In the interest of resolving the confusion regarding a recurring legal issue that is demonstrated by this complaint's procedural history, as well as to ensure efficient use of resources, we accept this appeal for adjudication. Moreover, EEOC's responsibilities under Executive Order 12067 for enforcing all Federal EEO laws and leading the Federal government's efforts to eradicate workplace discrimination, require, among other things, that EEOC ensure that uniform standards be implemented defining the nature of employment discrimination under the statutes we enforce. Executive Order 12067, 43 F.R. 28967, § 1-301(a) (June 30, 1978). To that end, the Commission hereby clarifies that claims of discrimination based on transgender status, also referred to as claims of discrimination based on gender identity, are cognizable under Title VII's sex discrimination prohibition, and may therefore be processed under Part 1614 of EEOC's federal sector EEO complaints process.⁴⁴¹

In *Macy*, the EEOC decided the scope of its own jurisdiction by reading into Title VII a theory of gender identity discrimination that was not recognized by the Department of Justice and that had never been passed by Congress. That decision relied on Supreme Court precedent that was over 20 years old at the time the *Macy* decision came out.

In *Price Waterhouse v. Hopkins*,⁴⁴² the Supreme Court held that an employer had discriminated against a female employee by telling her to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”⁴⁴³ Under the EEOC's interpretation, this decision extended the definition of “sex discrimination” under Title VII to include not just discrimination based on the biological differences between men and women, but also on the basis of gender.⁴⁴⁴ From there, it was a short walk (for the EEOC, at least) to establish that transgender discrimination was tantamount to discrimination on the basis of gender stereotyping, which the EEOC argued had long been protected by Title VII.⁴⁴⁵

⁴⁴¹ *Id.*

⁴⁴² 490 U.S. 228, 239 (1989).

⁴⁴³ *Id.* at 235.

⁴⁴⁴ *Macy*, *supra* note 431 (“As used in Title VII, the term ‘sex’ encompasses both sex – that is, the biological differences between men and women – and gender.”) (quoting *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000)) (citing *Smith v. City of Salem*, 378 F.3d 566, 572 (6th Cir. 2004) (“The Supreme Court made clear that in the context of Title VII, discrimination because of ‘sex’ includes gender discrimination.”); *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) (holding that the Supreme Court in *Price Waterhouse* had held that Title VII barred “not just discrimination because of biological sex, but also gender stereotyping – failing to act and appear according to expectations defined by gender.”)).

⁴⁴⁵ *Macy*, *supra* note 431 (citing *Lewis v. Heartland Inns of Am., L.L.C.*, 591 F.3d 1033, 1041 (8th Cir. 2010); *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285 (3rd Cir. 2009); *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005); *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 874–75 (9th Cir. 2001); *Simonton v. Runyon*, 232 F.3d 33, 37 (2d Cir. 2000); *Higgins v. New Balance Athletic Shoe, Inc.*,

This line of reasoning had actually been articulated by the EEOC several years earlier in an amicus brief that it had tried (but failed) to obtain leave to file in support of the plaintiff's position in *Pacheco v. Freedom Buick GMC Truck, Inc.*⁴⁴⁶ Several years later, the EEOC filed an amicus brief in *Chavez v. Credit Nation Auto Sales, LLC*.⁴⁴⁷ That brief is especially interesting because the precise legal question that the EEOC was addressing was whether plaintiff – a transgender woman – had exhausted her administrative remedies by filing a timely charge of discrimination with the EEOC.⁴⁴⁸

In *Chavez*, the plaintiff had gone to the EEOC's Atlanta office on two separate occasions in January and September 2010 to file a charge of discrimination after she was allegedly terminated after beginning to transition from male to female.⁴⁴⁹ On both occasions, she was told by the EEOC investigator that she could not file a charge because, as a transgender woman, "she was not protected against discrimination on the basis of sex under Title VII."⁴⁵⁰ In its amicus brief, the EEOC was forced to argue that plaintiff was entitled to equitable tolling of the limitations period for her Title VII charge because the EEOC itself had "mistakenly" refused to accept her timely charge.⁴⁵¹ Relying in part on its own *Macy* decision, the EEOC argued that transgender discrimination was a recognized and cognizable claim under Title VII since the Supreme Court's decision in *Price Waterhouse* in 1989, even though it had not accepted such charges as recently as 2010.

Since *Macy*, the EEOC has been actively litigating transgender cases relying on its own authority – as articulated in *Macy* – as well as new and emerging precedent that establishes that the failure to conform to gender stereotypes is a recognized form of sex discrimination. For example, in *EEOC v. Boh Brothers Construction Co.*,⁴⁵² the Fifth Circuit held that the EEOC could prove that same-sex harassment was "because of sex" by presenting evidence that the harassment was based on a perceived lack of conformity with gender stereotypes. That case involved an ironworker on a bridge maintenance crew who was subjected to almost daily verbal and physical harassment because he allegedly did not conform to how his supervisor believed a man should act.⁴⁵³ The Fifth Circuit held that the EEOC's evidence demonstrated that the supervisor's harassment was based on a perceived lack of conformity with gender stereotypes, and therefore "because of sex" under Title VII.⁴⁵⁴

194 F.3d 252, 261 n.4 (1st Cir. 1999); *Doe by Doe v. City of Belleville*, 119 F.3d 563, 580–81 (7th Cir. 1997), vacated and remanded on other grounds, 523 U.S. 1001 (1998)).

⁴⁴⁶ *Pacheco v. Freedom Buick GMC Truck, Inc.*, No. 7:10-CV-00116 (W.D. Tex.) (motion for leave to file amicus brief denied Nov. 1, 2011).

⁴⁴⁷ *Chavez v. Credit Nation Auto Sales, LLC*, No. 1:13-CV-0312 (N.D. Ga.) (amicus brief filed June 5, 2014).

⁴⁴⁸ Brief for Equal Employment Opportunity Commission as Amicus Curiae, *Chavez v. Credit Nation Auto Sales, LLC*, No. 1:13-CV-0312 (N.D. Ga. Feb. 14, 2014), ECF No. 67.

⁴⁴⁹ *Id.* at 4–5.

⁴⁵⁰ *Id.* at 5 (quotations omitted).

⁴⁵¹ *Id.* at 2, 9–17.

⁴⁵² *Boh Bros. Constr. Co.*, 731 F.3d 444 (5th Cir. 2013).

⁴⁵³ *Id.* at 449–50.

⁴⁵⁴ *Id.* at 456.

The Commission brought two new lawsuits at the end of FY2014 alleging transgender discrimination. The two cases are: *EEOC v. Lakeland Eye Clinic* and *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*⁴⁵⁵ Both allege a similar legal theory of discrimination. In *Lakeland Eye Clinic*, the EEOC claimed that an organization of healthcare professionals fired an employee because she is transgender, because she was transitioning from male to female, and/or because she did not conform to the employer's gender-based expectations, preferences, or stereotypes.⁴⁵⁶ On April 9, 2015, U.S. District Court Judge Mary S. Scriven approved a consent decree entered into between the EEOC and Lakeland Eye Clinic, P.A. settling one of these two lawsuits.⁴⁵⁷ The clinic agreed to pay \$150,000 to settle that case in addition to programmatic relief that included onerous reporting and monitoring obligations.⁴⁵⁸

Similarly, in *R.G. & G.R. Harris Funeral Homes, Inc.*, the EEOC alleged that a Detroit-based funeral home discriminated against an employee because she was transitioning from male to female and/or because she did not conform to the employer's gender-based expectations, preferences, or stereotypes.⁴⁵⁹ The government's complaint alleges that the employee gave her employer a letter explaining that she was transgender and would soon start presenting as female in appropriate work attire.⁴⁶⁰ Allegedly, she was fired two weeks later by the funeral home's owner, who told her that what she was proposing to do was unacceptable.⁴⁶¹

On April 21, 2015, U.S. District Court Judge Sean F. Cox denied R.G. & G.R. Harris Funeral Homes Inc.'s motion to dismiss the EEOC's complaint, thereby allowing the case to proceed to discovery.⁴⁶² The court acknowledged that "even though transgendered/transsexual status is currently not a protected class under Title VII, Title VII nevertheless 'protects transsexuals from discrimination for failing to act in accordance and/or identify with their perceived sex or gender.'"⁴⁶³ Since the EEOC, in part, based its theory of liability on the defendant's alleged sex-

⁴⁵⁵ *EEOC v. Lakeland Eye Clinic*, No. 8:14-CV-2421-T35 AEP (M.D. Fla. filed Sept. 25, 2014); *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, No. 2:14-CV-13710-SFC-DRG (E.D. Mich. filed Sept. 25, 2014).

⁴⁵⁶ Laura J. Maechtlen, *EEOC Pushes Its Strategic Enforcement Plan And Advocates For Transgender Workplace Protections Under Title VII*, WORKPLACE CLASS ACTION BLOG (Sept. 30, 2014), available at <http://www.workplaceclassaction.com/2014/09/eec-pushes-its-strategic-enforcement-plan-and-advocates-for-transgender-workplace-protections-under-title-vii/>.

⁴⁵⁷ Order, *EEOC v. Lakeland Eye Clinic*, No. 8:14-CV-2421-T35 AEP (M.D. Fla. Apr. 9, 2015), ECF No. 33; Press Release, Equal Employment Opportunity Commission, Lakeland Eye Clinic will Pay \$150,000 to Resolve Transgender / Sex Discrimination Lawsuit, (Apr. 13, 2015), available at <http://www.eeoc.gov/eeoc/newsroom/release/4-13-15.cfm>.

⁴⁵⁸ See Gerald L. Maatman, Jr. and Howard M. Wexler, *The EEOC Settles Its First Transgender Suit Filed Under Title VII*, WORKPLACE CLASS ACTION BLOG (Apr. 15, 2015), available at <http://www.eeoccountdown.com/2015/04/15/the-eeoc-settles-its-first-transgender-suit-filed-under-title-vii/>.

⁴⁵⁹ Laura J. Maechtlen, *EEOC Pushes Its Strategic Enforcement Plan And Advocates For Transgender Workplace Protections Under Title VII*, *supra* note 456

⁴⁶⁰ *Id.*

⁴⁶¹ *Id.*

⁴⁶² *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 100 F. Supp. 3d 594, 599–603 (E.D. Mich. 2015).

⁴⁶³ *Id.* at 599 (quoting *Myers v. Cuyahoga Cnty., Ohio*, 182 F. A'ppx 510, (6th Cir. 2006) (citing *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004) and *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005)).

based considerations – that the charging party did not conform to the defendant’s sex-based or gender-based preferences, expectations or stereotypes – the court reasoned that the EEOC had sufficiently pled a sex-stereotyping gender discrimination claim under Title VII.⁴⁶⁴

It is worth noting, however, that Judge Cox observed that the EEOC “appears to seek a more expansive interpretation of sex under Title VII that would include transgendered persons as a protected class.”⁴⁶⁵ The court held that “there is no Sixth Circuit or Supreme Court authority to support the EEOC’s position that transgendered status is a protected class under Title VII.”⁴⁶⁶

Despite Judge Cox’s comments regarding the scope of Title VII, the EEOC has not stopped pursuing this theory. On March 30, 2015, the U.S. Department of Justice sued Southeastern Oklahoma State University and the Regional University System of Oklahoma after the EEOC investigated a charge of discrimination against a transgender employee, made a reasonable cause determination, and referred the case to the Department of Justice.⁴⁶⁷ The complaint alleges that a transgender assistant professor was denied tenure because she began presenting as a woman.⁴⁶⁸ Underscoring the EEOC’s continued focus on this issue, EEOC Chair Jenny Yang stated that this case represented “a tremendous example of how collaboration between EEOC and the Department of Justice leads to strong and coordinated enforcement of Title VII,” and that, “[t]his case furthers the EEOC’s Strategic Enforcement Plan, which includes coverage of lesbian, gay, bisexual and transgender individuals under Title VII’s sex discrimination provisions as a national enforcement priority.”⁴⁶⁹

On September 16, 2015, the EEOC was allowed to join a suit brought by a private plaintiff against First Tower Loan, LLC pending in the Eastern District of Louisiana.⁴⁷⁰ In that case, the EEOC alleged that the plaintiff was fired after informing his employer that he was a transgender man.⁴⁷¹ In particular, the EEOC alleges that plaintiff was told that he must dress and act as a female in the workplace and was asked to sign a written statement containing the following language:

I understand that my preference to act and dress as a male, despite having been born a female, is not something that will be in compliance with First Tower Loan's personnel policies. I have been advised as to the proper dress for females and

⁴⁶⁴ *Id.* at 599-603; see also Gerald L. Maatman, Jr. and Howard M. Wexler, *EEOC’s “Sex” Discrimination Lawsuit Filed On Behalf Of Transgendered Worker Survives Motion To Dismiss*, WORKPLACE CLASS ACTION BLOG (Apr. 24, 2015), available at <http://www.workplaceclassaction.com/2015/04/eecs-sex-discrimination-lawsuit-filed-on-behalf-of-transgendered-worker-survives-motion-to-dismiss/>.

⁴⁶⁵ *R.G. & G.R. Harris Funeral Homes, Inc.*, 100 F. Supp. 3d at 599.

⁴⁶⁶ *Id.*

⁴⁶⁷ Press Release, Equal Employment Opportunity Commission, Justice Department Files Lawsuit Alleging that Southeastern Oklahoma State University Discriminated Against Transgender Woman (Mar. 30, 2015), available at <http://www.eeoc.gov/eeoc/newsroom/release/3-30-15a.cfm>.

⁴⁶⁸ *Id.*

⁴⁶⁹ *Id.*

⁴⁷⁰ Order, *Broussard v. First Tower Loan, LLC*, No. 15-CV-1161 (E.D. La. Sept. 16, 2015), ECF No. 70.

⁴⁷¹ Intervenor Complaint, *Broussard v. First Tower Loan, LLC*, No. 15-CV-1161 (E.D. La. Sept. 16, 2015), ECF No. 71.

also have been provided a copy of the female dress code. I also understand that when meetings occur that require out of town travel and an overnight room is required, I will be in [sic] assigned to a room with a female.⁴⁷²

The complaint alleges that when the plaintiff refused to sign the statement, the company fired him.⁴⁷³

Employers should be aware of these recent filings, and the successes that the EEOC has enjoyed in developing this theory. The EEOC seems determined to capitalize on its gains and continue to “push the envelope” and develop precedent in this area. The number of charges filed alleging transgender or gender identity discrimination are small in comparison to the overall charge volume, but they do appear to be growing. In the final three quarters of FY2013 (January through September), EEOC received 147 charges that included allegations of sex discrimination based on gender identity/transgender status.⁴⁷⁴ In FY2014, the EEOC received 202 such charges. In just the first two quarters of FY2015, EEOC received 112 charges that included allegations of sex discrimination based on gender identity/transgender status.⁴⁷⁵

The EEOC’s official position is clear: discrimination against an individual because that person is transgender is a violation of Title VII’s prohibition of sex discrimination.⁴⁷⁶ The EEOC accepts and investigates charges from individuals who believe they have been discriminated against because they are transgender or are transitioning from one gender identity to another.⁴⁷⁷ And the Commission has shown an ever increasing willingness to file lawsuits alleging transgender discrimination. It filed its first two lawsuits at the very end of FY2014.

1. Developments In Pregnancy Discrimination

On July 14, 2014, the EEOC published its Enforcement Guidance on Pregnancy Discrimination and Related Issues.⁴⁷⁸ That guidance was controversial from the moment it was issued both because of the way that it was issued, and because of its groundbreaking substance.⁴⁷⁹ According to the EEOC, under the language of the Pregnancy Discrimination Act

⁴⁷² *Id.* ¶¶ 38–39.

⁴⁷³ *Id.* ¶ 41.

⁴⁷⁴ WHAT YOU SHOULD KNOW ABOUT EEOC AND THE ENFORCEMENT PROTECTIONS FOR LGBT WORKERS, *supra* note 427.

⁴⁷⁵ *Id.*

⁴⁷⁶ *Id.*

⁴⁷⁷ *Id.*

⁴⁷⁸ See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ENFORCEMENT GUIDANCE: PREGNANCY DISCRIMINATION AND RELATED ISSUES (July 14, 2014), *available at* http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm.

⁴⁷⁹ See Paul Kehoe, *New Guidance From The EEOC Requires Employers To Provide Reasonable Accommodations Under The Pregnancy Discrimination Act*, WORKPLACE CLASS ACTION BLOG (July 9, 2014), *available at* <http://www.workplaceclassaction.com/2014/07/new-guidance-from-the-eeoc-requires-employers-to-provide-reasonable-accommodations-under-the-pregnancy-discrimination-act/>. The EEOC’s position could be interpreted as being at odds with Congress’ own understanding of what the ADA and the PDA require. The standards adopted in the EEOC’s guidance on this issue are currently proposed in the Pregnant Workers Fairness Act (the “PWFA”). The PWFA, if enacted, would make it an unlawful

of 1978 (“PDA”), all pregnant workers are, as a practical matter, entitled to a “reasonable accommodation” as that term is understood under the ADA.⁴⁸⁰ This was new and significant because it means that a pregnant employee would be afforded the same right to reasonable accommodation under the ADA as any other individual with a disability, regardless of whether the impairment was related to pregnancy, and even for those pregnant employees whose impairments arguably do not rise to the level of a disability under the ADA (e.g., those with a “normal” pregnancy).⁴⁸¹

This view of the requirements of the PDA were unanimously rejected by the Supreme Court in *Young v. United Parcel Service, Inc.*⁴⁸² In *Young*, the employer had a policy of offering light duty only to those employees injured while on the job or suffering from a disability within the meaning of the ADA.⁴⁸³ Plaintiff sued her employer after she was placed on an extended unpaid leave of absence (rather than light duty) after her doctor imposed a 20-pound lifting restriction that made it impossible for her to perform the essential functions of her job.⁴⁸⁴

The question to be decided by *Young* was whether an employer may treat pregnant employees the same as non-pregnant employees who are not eligible for an accommodation under the employer’s policy, or if employers must always accommodate pregnant employees if they accommodate any non-pregnant employee who is similar in terms of the limitations on his or her ability to work. The Supreme Court noted that the EEOC’s July 2014 guidance purported to answer this question by clarifying that “[a]n employer may not refuse to treat a pregnant worker the same as other employees who are similar in their ability or inability to work by relying on a policy that makes distinctions based on the source of an employee’s limitations.”⁴⁸⁵ In other words, the EEOC’s guidance grants a “most favored nation” status to pregnant employees: if an accommodation is offered to any employee who is similarly-abled in terms of the performance of their job, then the employer must offer that accommodation to pregnant employees as well, regardless of whether there are other non-pregnant employees who would not be eligible for that accommodation.⁴⁸⁶

The Supreme Court acknowledged that the rulings, interpretations, and opinions of an agency charged with enforcing a particular statute were often given deference as a body of experience

employment practice not to provide a reasonable accommodation for the known limitations related to pregnancy or force a pregnant employee to take leave, among other things. The fact that that law has not passed makes it appear to some employers that the EEOC’s guidance was out of step with Congress’ own understanding of what the ADA and PDA currently require.

⁴⁸⁰ *Id.*

⁴⁸¹ *Id.*

⁴⁸² *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338 (2015).

⁴⁸³ *Id.* at 1344.

⁴⁸⁴ *Id.*

⁴⁸⁵ *Id.* at 1351 (alterations in original).

⁴⁸⁶ See Laura Maehtlen and Julie Yap, *SCOTUS Agrees To Consider Whether Pregnant Workers Must Be Able To Perform The Essential Functions Of The Job*, WORKPLACE CLASS ACTION BLOG (July 9, 2014), available at <http://www.workplaceclassaction.com/2014/07/scotus-agrees-to-consider-whether-pregnant-workers-must-be-able-to-perform-the-essential-functions-of-the-job/>.

and informed judgment to which courts may resort to for guidance.⁴⁸⁷ But the Court went on to say that the weight of the EEOC's judgment depends on the thoroughness evident in its consideration, the validity of its reasoning, and the consistency with earlier and later pronouncements.⁴⁸⁸ The Court was especially skeptical of the thoroughness of the EEOC's consideration of the issues and the timing of its guidance – which was issued right after the Supreme Court granted certiorari to hear the *Young* case.⁴⁸⁹ Ultimately, the Supreme Court declined to give the EEOC's guidance any weight whatsoever, holding “we cannot rely significantly on the EEOC's determination.”⁴⁹⁰

The Supreme Court was clear in its rejection of the EEOC's “most-favored nation” treatment of pregnant workers. But the Court also refused to adopt the contrary position – that employers are free to refuse accommodation to pregnant employees even though they offer that accommodation to some other employees who are disabled within the meaning of the ADA. Instead, the Court carved out a middle path, holding that individual pregnant workers can show disparate treatment through indirect evidence by application of the familiar *McDonnell Douglas* framework.⁴⁹¹

Under that framework, a pregnant employee could show that “the employer's policies impose a significant burden on pregnant workers, and that the employer's ‘legitimate, nondiscriminatory’ reasons are not sufficiently strong to justify the burden, but rather – when considered along with the burden imposed – give rise to an inference of intentional discrimination.”⁴⁹² For example, a pregnant employee may be able to show that her employer accommodates a larger percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers, and this would satisfy her requirement to show the burden on pregnant employees required by the *McDonnell Douglas* framework.⁴⁹³

In disregarding the EEOC's guidance and charting a different course than that advocated by either side of the *Young* case, the Supreme Court has arguably created more questions than it has resolved. How are employers supposed to view the EEOC's guidance in light of this decision? What qualifies as a significant burden on pregnant employees? Like *Mach Mining*, this decision is too new for all of its ramifications to be known. We will have to wait to see how the lower courts interpret this ruling in light of facts that arise in an ever-changing workforce. But regardless of how courts interpret this decision, employers should be aware that state legislatures are already passing pregnancy accommodation laws that track the EEOC's rejected guidance, and which are in some instances much more stringent than the evolving understanding of pregnancy discrimination at the federal level.

⁴⁸⁷ *Young*, 135 S. Ct. at 1351.

⁴⁸⁸ *Id.* at 1352.

⁴⁸⁹ *Id.*

⁴⁹⁰ *Id.*

⁴⁹¹ *Id.* at 1353.

⁴⁹² *Id.* at 1354.

⁴⁹³ *Id.*

2. Developments In Religious Discrimination Law

Religious discrimination/accommodation cases are one of the hottest trends in EEOC enforcement litigation. Not only has the EEOC won some significant victories and settlements, but – unlike with pregnancy discrimination – it had its expansive theory of religious discrimination upheld by the Supreme Court.

On March 6, 2014, the EEOC published its Guide to Religious Garb and Grooming.⁴⁹⁴ In that guidance, the EEOC took the position that an employer must accommodate an employee's religious garb or grooming practice even if it violates the employer's policy or preference regarding how employees should look: "[W]hen an employer's dress and grooming policy or preference conflicts with an employee's known religious beliefs or practices, the employer must make an exception to allow the religious practice unless that would be an undue hardship on the operation of the employer's business."⁴⁹⁵ The guidance goes on to say, however, that an employer does not necessarily need to have specific knowledge of an employee's religious practice to be liable under Title VII for failing to make a religious accommodation. According to the EEOC, even if an employer does not know that an employee's or applicant's garb or grooming practice is religious in nature, the employer may still be liable if it believes or should have known that it is – even if the employee did not ask for an accommodation.⁴⁹⁶

The EEOC got a welcome bit of news in FY2015 when the Supreme Court decided this issue in its favor in *EEOC v. Abercrombie & Fitch Stores, Inc.*⁴⁹⁷ In that case, the Supreme Court held that an employer that is without direct knowledge of an employee's religious practice can be liable under Title VII for religious discrimination if the need for an accommodation was a motivating factor in the employer's decision, whether or not the employer knew of the need for a religious accommodation.

⁴⁹⁴ U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, RELIGIOUS GARB AND GROOMING IN THE WORKPLACE: RIGHTS AND RESPONSIBILITIES (Mar. 6, 2014), available at http://www.eeoc.gov/eeoc/publications/qa_religious_garb_grooming.cfm.

⁴⁹⁵ *Id.*; see also Lynn A. Kappelman and Dawn Reddy Solowey, *Retail Detail: "You're Wearing That?" The EEOC Weighs in on Workplace Accommodations for Religious Clothing and Grooming Practices*, CLIENT ALERT (Mar. 12, 2014), <http://www.seyfarth.com/publications/4002>.

⁴⁹⁶ U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, RELIGIOUS GARB AND GROOMING IN THE WORKPLACE: RIGHTS AND RESPONSIBILITIES, *supra* note 510 ("Example 7 Aatma, an applicant for a rental car sales position who is an observant Sikh, wears a chunni (religious headscarf) to her job interview. The interviewer does not advise her that there is a dress code prohibiting head coverings, and Aatma does not ask whether she would be permitted to wear the headscarf if she were hired. There is evidence that the manager believes that the headscarf is a religious garment, presumed it would be worn at work, and refused to hire her because the company requires sales agents to wear a uniform with no additions or exceptions. This refusal to hire violates Title VII, even though Aatma did not make a request for accommodation at the interview, because the employer believed her practice was religious and that she would need accommodation, and did not hire her for that reason. Moreover, if Aatma were hired but then instructed to remove the headscarf, she could at that time request religious accommodation."); see also Dawn Reddy Solowey and Lynn Kappelman, *What Does the Employer Know and When Does It Know It? SCOTUS Grants Cert in EEOC v. Abercrombie Religious Discrimination Suit*, EMPLOYMENT LAW LOOKOUT BLOG (Oct. 9, 2014), available at <http://www.laborandemploymentlawcounsel.com/2014/10/what-does-the-employer-know-and-when-does-it-know-it-scotus-grants-cert-in-eeoc-v-abercrombie-religious-discrimination-suit/>.

⁴⁹⁷ *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028 (2015).

Abercrombie involved a practicing Muslim who wore a headscarf consistent with her religious requirements.⁴⁹⁸ When she applied to an Abercrombie store, she was rejected because her headscarf would violate Abercrombie’s “Look Policy,” which did not allow any kind of “cap.”⁴⁹⁹ Abercrombie argued that the company could not be liable under Title VII disparate treatment analysis because the applicant had not shown that it had “actual knowledge” of the applicant’s need for an accommodation.⁵⁰⁰ The Supreme Court disagreed, holding that it was enough for the applicant to show that her need for an accommodation was a motivating factor in the employer’s decision.⁵⁰¹ “[T]he rule for disparate-treatment claims based on a failure to accommodate a religious practice is straightforward: An employer may not make an applicant’s religious practice, confirmed or otherwise, a factor in employment decisions.”⁵⁰² Although the EEOC’s guidance was not specifically mentioned in the Court’s decision, this rule is consistent with the “knowledge” requirement provided in the EEOC’s guidance.

The lower courts have already started to incorporate the Supreme Court’s guidance in *Abercrombie* to religious accommodation cases across the country.⁵⁰³ For example, on September 29, 2015, in *EEOC v Jetstream Ground Services, Inc.*,⁵⁰⁴ the District of Colorado allowed the EEOC to proceed to trial on behalf of a class of Muslim women who alleged that Jetstream Ground Services failed to accommodate their wearing hijabs and long skirts on the job, failed to hire them, laid off or reduced their hours, and discriminated against them on the basis of their religion.

In deciding the EEOC’s claim on behalf of an employee who never requested accommodation, but who was observed by co-workers to change from headscarf and long skirt to the company’s uniform while at work, the court relied on *Abercrombie* in holding that an employee need only show that his or her need for accommodation was a motivating factor in the employer’s decision, regardless of the state of the actor’s knowledge.⁵⁰⁵ The Court ruled that there was a triable issue of fact as to whether Jetstream knew “or, at the very least, suspected” that the employee desired an accommodation and had laid her off to avoid giving her one.⁵⁰⁶

3. Background Check Litigation

Another substantive area that has raised many questions over the past few years is the EEOC’s focus on reducing barriers to recruitment and hiring, which is evident in its litigation involving

⁴⁹⁸ *Id.* at 2031.

⁴⁹⁹ *Id.*

⁵⁰⁰ *Id.* at 2032.

⁵⁰¹ *Id.*

⁵⁰² *Id.* at 2033.

⁵⁰³ See, e.g., Gerald L. Maatman, Jr. and Christina M. Janice, *Court Allows EEOC’s Discrimination Suit Over Religious Garb To Proceed To Jury*, WORKPLACE CLASS ACTION BLOG (Oct. 8, 2015), available at <http://www.workplaceclassaction.com/2015/10/court-allows-eecocs-discrimination-suit-over-religious-garb-to-proceed-to-jury/>.

⁵⁰⁴ *EEOC v. Jetstream Ground Servs., Inc.*, No. 13-CV-02340-CMA-KMT, 2015 WL 5697315 (D. Colo. Sept. 29, 2015).

⁵⁰⁵ *Id.* at *10.

⁵⁰⁶ *Id.* at *12–13.

credit and criminal history background checks.⁵⁰⁷ The EEOC's campaign against the use of background checks has resulted in a string of stunning, high-profile defeats for the Commission. Two of the first cases that the EEOC filed under this theory were summarily thrown out due to problems with how the EEOC used expert testimony. In *EEOC v. Kaplan Higher Education Corp.*⁵⁰⁸ and *EEOC v. Freeman, Inc.*,⁵⁰⁹ the EEOC had alleged that the companies' use of credit and criminal background checks in hiring decisions caused a disparate impact against minority applicants in violation of Title VII.

In both cases, the EEOC attempted to prove its case through the use of statistical data compiled by its expert, Dr. Kevin Murphy.⁵¹⁰ This was accomplished by subpoenaing drivers' license photos from state departments of motor vehicles, and assembling a team of "race raters" to classify applicants as "African-American," "Asian," "Hispanic," "White," or "Other" based on those photographs.⁵¹¹ The U.S. District Courts for the Northern District of Ohio and the District of Maryland threw that evidence out, holding that the EEOC's statistical evidence was not reliable and not representative of the employer's applicant pool as a whole.⁵¹²

The Sixth Circuit and the Fourth Circuit agreed with those decisions wholeheartedly. In *Kaplan*, the Sixth Circuit held that the EEOC's "homemade" methodology for determining race was, "crafted by a witness with no particular expertise to craft it, administered by persons with no particular expertise to administer it, tested by no one, and accepted only by the witness himself."⁵¹³ The Sixth Circuit also criticized the EEOC for attacking the same type of

⁵⁰⁷ See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION STRATEGIC ENFORCEMENT PLAN FY 2013 - 2016, *supra* note 285 (identifying the elimination of barriers in recruitment and hiring as one of the EEOC's national priorities, and stating that "[t]he EEOC will target class-based recruitment and hiring practices that discriminate against racial, ethnic and religious groups, older workers, women, and people with disabilities").

⁵⁰⁸ *EEOC v. Kaplan Higher Educ. Corp.*, No. 1:10-CV-2882 (N.D. Ohio).

⁵⁰⁹ *EEOC v. Freeman, Inc.*, No. 09-CV-2573 (D. Md.).

⁵¹⁰ See *EEOC v. Kaplan Higher Educ. Corp.*, 748 F.3d 749 (6th Cir. 2014); *EEOC v. Freeman, Inc.*, No. 09-CV-2573 (D. Md. Aug. 9, 2013); see also Pamela Q. Devata, Gerald L. Maatman, Jr., Jennifer A. Riley, and David J. Rowland, *EEOC Cannot Prove Disparate Impact Claim As Court Throws Cold Water On Its "Race-Rating" Theory*, WORKPLACE CLASS ACTION BLOG (Jan. 31, 2013), available at <http://www.workplaceclassaction.com/2013/01/eec-cannot-prove-disparate-impact-claim-as-court-throws-cold-water-on-its-race-rating-theory/>; Gerald L. Maatman, Jr. and Jennifer A. Riley, *Sixth Circuit Affirms Dismissal Of EEOC Credit Check Case And Rejects "Homemade" Method Of Determining Race By "Eye-Balling" Photos*, WORKPLACE CLASS ACTION BLOG (Apr. 9, 2014), available at <http://www.workplaceclassaction.com/2014/04/sixth-circuit-affirms-dismissal-of-eec-credit-check-case-and-rejects-homemade-method-of-determining-race-by-eye-balling-photos/>; Gerald L. Maatman, Jr., Pamela Q. Devata, and Howard M. Wexler, *Court Dismisses EEOC's Background Check Lawsuit Based On Its Reliance On "Laughable" And "Unreliable" Expert Report Filled Of "Errors and Analytical Fallacies"*, WORKPLACE CLASS ACTION BLOG (Aug. 9, 2013), available at <http://www.workplaceclassaction.com/2013/08/court-dismisses-eeocs-background-check-lawsuit-based-on-its-reliance-on-laughable-and-unreliable-expert-report-filled-of-errors-and-analytical-fal/>.

⁵¹¹ See *Kaplan*, 748 F.3d at 751–52.

⁵¹² *EEOC v. Kaplan Higher Educ. Corp.*, No. 1:10-CV-2882, 2013 U.S. Dist. LEXIS 11722 (N.D. Ohio Jan. 28, 2013); *EEOC v. Freeman, Inc.*, 961 F. Supp. 2d 783 (D. Md. 2013).

⁵¹³ *Kaplan*, 748 F.3d at 754.

background check policy that the EEOC itself uses and for relying on visual identification to identify race, a method that the Commission itself discourages.⁵¹⁴

The Fourth Circuit's decision was even harsher. On February 20, 2015, the Fourth Circuit affirmed the trial court's dismissal of the EEOC's suit against Freeman due to the EEOC's reliance on "laughable" and "unreliable" expert analysis.⁵¹⁵ In particularly biting language, the Fourth Circuit unanimously affirmed the District Court's rejection of the "utterly unreliable analysis" of the EEOC's expert and chided the EEOC for continuing to litigate the case long after it should have thrown in the towel.⁵¹⁶

The concurring opinion authored by Judge Steven Agee was particularly critical. Judge Agee noted that it "was not a close question," but wrote separately to criticize the EEOC for its questionable litigation tactics.⁵¹⁷ Judge Agee wrote extensively about the "record of slipshod work" by the EEOC's expert in other similar cases, including the *Kaplan* case, and critiqued the "slapdash nature of Murphy's work."⁵¹⁸ He concluded that the EEOC's expert "undeniably cherry-picked" and perhaps even "fully intended to skew the results."⁵¹⁹ Then, to add injury to insult, on September 3, 2015, the District Court added to the EEOC's embarrassing loss by awarding Freeman close to \$1,000,000 in attorneys' fees because the court held that the Commission had refused to stop litigating a case that it had no chance of winning.⁵²⁰

The Commission's public pronouncements in FY2015 leave little doubt that the EEOC has no intention of backing off of this issue even after suffering those high-profile losses.⁵²¹ In a

⁵¹⁴ *Id.* at 750, 754.

⁵¹⁵ *EEOC v. Freeman*, 778 F.3d 463 (4th Cir. 2015).

⁵¹⁶ *Id.* at 468; see also Gerald L. Maatman, Jr., Pamela Q. Devata, and Jason Englund, *Fourth Circuit Deals Body Blow To EEOC Hiring Check Enforcement Litigation*, WORKPLACE CLASS ACTION BLOG (Feb. 20, 2015), available at <http://www.workplaceclassaction.com/2015/02/fourth-circuit-deals-body-blow-to-eEOC-hiring-check-enforcement-litigation/>.

⁵¹⁷ *Freeman*, 778 F.3d at 468 (Agee, J., concurring).

⁵¹⁸ *Id.*

⁵¹⁹ *Id.*

⁵²⁰ *EEOC v. Freeman*, No. 09-CV-2573, 2015 WL 5178420 (D. Md. Sept. 3, 2015).

⁵²¹ The EEOC was particularly defiant in the face of the *Kaplan* loss. On April 16, 2014, days after the Sixth Circuit affirmed the trial court's decision, the editorial board of the Wall Street Journal published an editorial calling the decision the "opinion of the year." *Opinion of the Year*, THE WALL ST. JOURNAL (Apr. 16, 2014) available at <http://www.wsj.com/articles/SB10001424052702304512504579491860052683176>. Undeterred, the EEOC's General Counsel, David Lopez, wrote a letter to the editor that was published on May 1, 2014, wherein he made it clear that the agency was not giving up on its disparate impact theory: The letter stated:

Why, for example, should companies be permitted to refuse to hire otherwise qualified workers based on their credit history where (1) a "no-bad-credit rule" disproportionately excludes African-Americans, and (2) the employer can't prove that bad credit predicts a propensity to steal? Too many employers still uncritically assume that applicants with financial trouble equal potential embezzlers. Not so.

Poor Credit Bias in Hiring Practices, THE WALL ST. JOURNAL (May 1, 2014) available at <http://www.wsj.com/articles/SB10001424052702304518704579522011520579336>.

statement made to the U.S. Senate Committee on Health, Education, Labor and Pensions (“HELP Committee”) on May 19, 2015, Chair Jenny Yang touted the EEOC’s Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions,⁵²² which was issued in 2012, and noted that “[a]n increasing number of businesses have explicitly adopted the principles laid out in the guidance,” and praised the efforts of the states that had approved “ban-the-box” legislation.⁵²³

On May 11, 2015, the EEOC’s Office of Legal Counsel issued an informal discussion letter addressing this issue.⁵²⁴ In that letter, the EEOC staff stated that the EEOC is targeting “the use of screening tools (e.g., pre-employment tests, background checks, date-of-birth inquiries) that adversely impact particular protected groups, including older workers and women.”⁵²⁵ But the precise factual scenario that gave rise to that letter was a person who was complaining that she was not hired because her prospective employer had found out through a review of the online Public Access to Court Electronic Records (PACER) system that she had sued a previous employer under the equal employment opportunity laws.⁵²⁶ In a sure sign that the EEOC has begun interpreting “background checks” broadly, the EEOC’s letter stated that the Commission “recognizes that more and more employers are conducting background checks, and that there is a plethora of information – accurate and inaccurate – now available on the Internet that can become part of an applicant’s background check and be used in the employment decision.”⁵²⁷

FY2015 also saw the EEOC win some significant victories that may embolden the Commission to continue to push forward in this substantive area. Apart from the EEOC’s use of highly questionable expert evidence in *Kaplan* and *Freeman*, another issue that has driven litigation in this area is the stunning fact that the EEOC itself uses background checks to screen its own employees. Some employers have been successful in leveraging that fact to argue that the use of background checks must be consistent with business necessity if it is something that the United States’ premier anti-discrimination agency uses in its own hiring screens. The Northern District of Ohio opened the door to that defense in 2011 in the *Kaplan* case when it ordered the EEOC to produce documents relating to its own internal hiring processes and procedures.⁵²⁸

⁵²² See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, 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/laws/guidance/arrest_conviction.cfm.

⁵²³ Statement of Jenny R. Yang, Chair U.S. Equal Employment Opportunity Commission to Committee on Health, Education, Labor and Pensions U.S. Senate (May 19, 2015), available at http://www.eeoc.gov/eeoc/legislative/yang_5-19-15.cfm.

⁵²⁴ EEOC Office of Legal Counsel Informal Discussion Letter, Title VII/Background Checks/ Applicant Filing EEO Lawsuit (May 11, 2015), available at http://www.eeoc.gov/eeoc/foia/letters/2015/title_vii_background_checks_06_11.html.

⁵²⁵ *Id.*

⁵²⁶ *Id.*

⁵²⁷ *Id.*

⁵²⁸ *EEOC v. Kaplan Higher Educ. Corp.*, No. 10-CV-2882, 2011 WL 2115878 (N.D. Ohio May 27, 2011); see also Christopher DeGross and Gerald L. Maatman, Jr., *The EEOC Is Ordered To Show What’s Behind The Agency’s Curtain In Background Checking Suit*, WORKPLACE CLASS ACTION BLOG (Aug. 16, 2012), available at <http://www.workplaceclassaction.com/2012/08/the-eeoc-is-ordered-to-show-whats-behind-the-agencys-curtain-in-background-checking-suit/>;

Forcing the EEOC to divulge that information was a key component of the defense of that case and continues to have an impact in other credit/criminal background check lawsuits.

For example, in *EEOC v. BMW Manufacturing Co.*, the U.S. District Court for the District of South Carolina ordered the EEOC to produce information concerning its own use of background screens since “this production should not be burdensome to the EEOC, and the Court can perceive no harm to the EEOC in producing its internal policies.”⁵²⁹

But recently, in *EEOC v. DolGenCorp, LLC d/b/a Dollar General*,⁵³⁰ Judge Andrea R. Wood of the U.S. District Court for the Northern District of Illinois refused to compel the EEOC to turn over its internal background check policies. The court held that such information would only be discoverable if Dollar General could potentially use it to show that its use of criminal background checks was job related for the position in question.⁵³¹ The court declined to order the EEOC to produce information on its own hiring practices because the employer had failed to show that the functions performed by its employees were comparable to those performed by the EEOC’s employees.⁵³² The court also ordered Dollar General to turn over the contact information of Dollar General’s job applicants, even though that information did not contain any information about the race or criminal background of the job applicants.⁵³³

However, on July 30, 2015, the EEOC won another victory when it avoided summary judgment in *BMW Manufacturing Co.*⁵³⁴ Although other employers had been successful in challenging the EEOC’s use of expert testimony to support its theory of disparate impact, in this case, the EEOC convinced the judge that it had presented enough evidence of a statistical disparity to allow the case to proceed to a jury.⁵³⁵ The court refused to exclude the EEOC’s expert report, holding that “the parties’ arguments at this stage of the case involve consideration of the weight to be given the experts rather than their admissibility,” and those positions could be reargued at trial.⁵³⁶ The case settled for \$1.6 million.⁵³⁷

⁵²⁹ *EEOC v. BMW Mfg. Co., LLC*, No. 13-CV-1583, 2014 U.S. Dist. LEXIS 169849, at *3 (D.S.C. Dec. 9, 2014); see also Gerald L. Maatman, Jr. and Howard M. Wexler, *Court Orders The EEOC To Produce Internal Hiring Policies Regarding Background Checks*, WORKPLACE CLASS ACTION BLOG (Dec.10, 2014), available at <http://www.workplaceclassaction.com/2014/12/court-orders-the-eec-to-produce-internal-hiring-policies-regarding-background-checks/>.

⁵³⁰ *EEOC v. DolGenCorp, LLC d/b/a Dollar Gen.*, No. 13-CV-4307, 2015 U.S. Dist. LEXIS 58994 (N.D. Ill. May 5, 2015).

⁵³¹ *Id.* at *13–14.

⁵³² *Id.*; see also Christopher M. Cascino and Gerald L. Maatman, Jr., *The EEOC Secures Favorable Ruling Over Discovery Of The Government’s Employment Practices*, WORKPLACE CLASS ACTION BLOG (May 12, 2015), available at <http://www.workplaceclassaction.com/2015/05/the-eec-secures-favorable-ruling-over-discovery-of-the-governments-employment-practices/>.

⁵³³ *DolGenCorp, LLC d/b/a Dollar Gen.*, 2015 U.S. Dist. LEXIS 58994, at *3–6.

⁵³⁴ *EEOC v. BMW Mfg. Co. LLC*, No. 7:13-CV-01583, 2015 WL 5431118 (D.S.C. July 30, 2015).

⁵³⁵ *Id.* at *3.

⁵³⁶ *Id.* at *4.

⁵³⁷ See Press Release, Equal Employment Opportunity Commission, BMW to Pay \$1.6 Million and Offer Jobs to Settle Federal Race Discrimination Lawsuit, (September 8, 2015), available at <http://www.eeoc.gov/eeoc/newsroom/release/9-8-15.cfm/>.

The EEOC also won a victory against the State of Texas in FY2015. Texas had brought suit in the U.S. District Court for the Northern District of Texas in November 2013 seeking to enjoin the enforcement of the EEOC's guidance pertaining to the use of background checks in hiring decisions.⁵³⁸ Texas prohibits hiring felons into certain state job categories. The district court dismissed the suit, holding that Texas lacked standing to sue.⁵³⁹ The court held that because "Texas does not allege that any enforcement action has been taken against it by the Department of Justice (as the EEOC cannot bring enforcement actions against states) in relation to the Guidance," there is not a "substantial likelihood" that Texas "will face future Title VII enforcement proceedings from the Department of Justice arising from the Guidance."⁵⁴⁰ Texas immediately filed an appeal with the U.S. Court of Appeals for the Fifth Circuit.⁵⁴¹ When that decision is issued, it will be an interesting barometer as to the relevancy and efficacy of the EEOC's guidance.

⁵³⁸ See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, 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/laws/guidance/arrest_conviction.cfm; Gerald L. Maatman, Jr. and Howard M. Wexler, *Round One – Texas Loses Its Suit Against The EEOC Over Its Criminal Background Guidance*, WORKPLACE CLASS ACTION BLOG (Aug. 21, 2014), available at <http://www.eeoccountdown.com/2014/08/21/round-one-texas-loses-its-suit-against-the-eeoc-over-its-criminal-background-guidance/>.

⁵³⁹ *State of Tex. v. EEOC*, No. 5:13-CV-255 (N.D. Tex. Aug. 20, 2014).

⁵⁴⁰ *Id.* at *7.

⁵⁴¹ See Gerald L. Maatman, Jr. and Howard M. Wexler, *Showdown At The Fifth Circuit: Texas Files Opening Appellate Brief In Its Challenge Of The EEOC's Criminal Background Guidance*, WORKPLACE CLASS ACTION BLOG (Dec. 1, 2014), available at <http://www.workplaceclassaction.com/2014/12/showdown-at-the-fifth-circuit-texas-files-opening-appellate-brief-in-its-challenge-of-the-eeocs-criminal-background-guidance/>; Gerald L. Maatman, Jr. and Howard M. Wexler, *Showdown At The Fifth Circuit Continues: The EEOC Files Its Opposition Brief In Texas' Challenge To Criminal Background Guidance*, WORKPLACE CLASS ACTION BLOG (Jan. 15, 2015), available at <http://www.workplaceclassaction.com/2015/01/showdown-at-the-fifth-circuit-continues-the-eeoc-files-its-opposition-brief-in-texas-challenge-to-criminal-background-guidance/>; Gerald L. Maatman, Jr. and Howard M. Wexler, *Showdown At The Fifth Circuit Continues: Texas Gets The Last Word On Its Challenge To The EEOC's Criminal Background Guidance*, WORKPLACE CLASS ACTION BLOG (Feb. 11, 2015), available at <http://www.workplaceclassaction.com/2015/02/showdown-at-the-fifth-circuit-continues-texas-gets-the-last-word-on-its-challenge-to-the-eeocs-criminal-background-guidance/>.

PART III

LEGISLATIVE AND POLITICAL UPDATE

A. Case Study No. 3: Administrative Rulemaking And Wellness Plans

The EEOC has been harshly criticized by members of Congress for its decision to challenge employers' use of wellness plans. On November 6, 2014, the U.S. District Court for the District of Minnesota denied the EEOC's request for a preliminary injunction enjoining Honeywell International, Inc. from imposing penalties against employees who refused to undergo biomedical testing in conjunction with Honeywell's corporate wellness plan.⁵⁴² The EEOC alleged that employees who chose not to participate in that testing forfeited a contribution to a health savings account of up to \$1,500, were assessed a \$500 surcharge, and were potentially subjected to a \$1,000 nicotine surcharge.⁵⁴³

The EEOC's theory was that Honeywell's incentives made participation in the wellness plan non-voluntary under the ADA.⁵⁴⁴ The EEOC also argued that Honeywell's wellness program violates GINA because it offers employees an incentive to provide family medical history.⁵⁴⁵ According to the EEOC, Honeywell's wellness program violates GINA because it collects medical information from covered spouses, who are considered "family members" under GINA.⁵⁴⁶ This information arguably falls within the definition of "genetic information," even though the statute limits that definition in other places to "genetic tests," meaning an "analysis of human DNA, RNA, chromosomes, proteins, or metabolites, that detects genotypes, mutations, or chromosomal changes."⁵⁴⁷

Although the District Court denied the EEOC's request for a preliminary injunction, that did not stop members of Congress and the business community from forcefully criticizing the EEOC's interpretations.⁵⁴⁸ Even the White House appeared critical of the EEOC's approach as potentially at odds with the Affordable Care Act. Press Secretary Josh Earnest said on December 3, 2014, that the EEOC's position "could be inconsistent with what we know about

⁵⁴² *EEOC v. Honeywell Int'l, Inc.*, No. 14-CV-4517, 2014 U.S. Dist. LEXIS 157945 (D. Minn. Nov. 6, 2014); see also Mark Casciari, Ben Conley, and James Napoli, *EEOC Doubles Down – Attacking Employer Wellness Programs*, ERISA & EMPLOYEE BENEFITS LITIGATION BLOG (Nov. 13, 2014), available at <http://www.erisa-employeebenefitslitigationblog.com/2014/11/06/eec-doubles-down-attacking-employer-wellness-programs/>; Gerald L. Maatman, Jr. and Alexis P. Robertson, *Minnesota District Court Shoots Down The EEOC's Request For Preliminary Injunction Over Wellness Program*, WORKPLACE CLASS ACTION BLOG (Nov. 13, 2014), available at <http://www.workplaceclassaction.com/2014/11/minnesota-district-court-shoots-down-the-eecocs-request-for-preliminary-injunction-over-wellness-program/>.

⁵⁴³ *Honeywell Int'l, Inc.*, 2014 U.S. Dist. LEXIS 157945, at *4.

⁵⁴⁴ *Id.* at *11–12.

⁵⁴⁵ *Id.* at *13.

⁵⁴⁶ *Id.*; see also 29 CFR § 1635.3(a)(1).

⁵⁴⁷ *Honeywell Int'l, Inc.*, 2014 U.S. Dist. LEXIS 157945, at *13; see also 29 U.S.C. § 1191b(d)(7).

⁵⁴⁸ See Paul Kehoe and Gerald L. Maatman, Jr., *Senators Grill EEOC General Counsel Lopez In Confirmation Hearings*, WORKPLACE CLASS ACTION BLOG (Nov. 14, 2014), available at <http://www.workplaceclassaction.com/2014/11/senators-grill-eeoc-general-counsel-lopez-in-confirmation-hearings/>.

wellness programs and the fact that we know that wellness programs are good for both employers and employees.⁵⁴⁹

On April 16, 2015, the EEOC published a Notice of Proposed Rulemaking regarding the interaction between wellness plans and the ADA.⁵⁵⁰ The EEOC's proposed rule immediately raised some important questions for employers because it conflicts in some respect with regulations issued by the U.S. Departments of Labor, Health and Human Services, and the Treasury, which implemented the Affordable Care Act.⁵⁵¹

For example, the implementing regulations allow employers to offer financial incentives to employees of up to 30% of their health care premiums for participating in and reaching certain health outcomes in a wellness plan, and up to 50% for smoking cessation programs.⁵⁵² The EEOC's rule would change this so that if an employer conducts a biometric exam to test for nicotine, any incentive would be capped at 30% instead of 50%. If no disability-related inquiry is made, a 50% incentive is permissible.⁵⁵³

Then, on October 30, 2015, the EEOC issued a proposed rule that would amend the regulations implementing GINA as they relate to employer wellness programs.⁵⁵⁴ Although the GINA proposed rule appeared to address comments from the industry concerning the EEOC's piecemeal approach to addressing wellness program incentives, it ignored the major concern, which is that the EEOC's rules conflict with those issued by other federal agencies.⁵⁵⁵

Perhaps most worrisome, the EEOC has assumed for itself the authority to define a "reasonably designed" wellness program, when that term has already been defined by Congress and the ACA implementing regulations.⁵⁵⁶ By importing the "reasonable design" requirement that applies

⁵⁴⁹ Press Briefing by Press Secretary Josh Earnest (Dec. 3, 2014), *available at* <https://www.whitehouse.gov/the-press-office/2014/12/03/press-briefing-press-secretary-josh-earnest-1232014>.

⁵⁵⁰ Amendments to Regulations Under the Americans With Disabilities Act, 80 Fed. Reg. 21659 (proposed Apr. 20, 2015) (to be codified at 29 C.F.R. 1630).

⁵⁵¹ See Paul H. Kehoe and Lawrence Lorber, *The EEOC's Proposed Wellness Plan Regulation: Some Progress, But Issues Persist*, WORKPLACE CLASS ACTION BLOG (Apr. 16, 2015), *available at* <http://www.workplaceclassaction.com/2015/04/the-eeocs-proposed-wellness-plan-regulation-some-progress-but-issues-persist/>.

⁵⁵² *Id.*; see also Paul H. Kehoe, *Another Message To The EEOC On Wellness Plans: Targeting Incentives Is Inconsistent With The Affordable Care Act*, WORKPLACE CLASS ACTION BLOG (Jan. 30, 2015), *available at* [http://www.workplaceclassaction.com/2015/01/another-message-to-the-eeoc-on-wellness-plans-targeting-incentives-is-inconsistent-with-the-affordable-care-act/...](http://www.workplaceclassaction.com/2015/01/another-message-to-the-eeoc-on-wellness-plans-targeting-incentives-is-inconsistent-with-the-affordable-care-act/)

⁵⁵³ *The EEOC's Proposed Wellness Plan Regulation: Some Progress, But Issues Persist*, *supra* note 551.

⁵⁵⁴ Genetic Information Nondiscrimination Act of 2008, 80 Fed. Reg. 66853 (proposed Oct. 30, 2015) (to be codified at 29 C.F.R. 1635); see also Press Release, Equal Employment Opportunity Commission, EEOC Issues Proposed Rule to Amend Title II of GINA (Oct. 29, 2015), *available at* <http://www.eeoc.gov/eeoc/newsroom/release/10-29-15.cfm>.

⁵⁵⁵ Paul Kehoe and Larry Lorber, *Progress, But Also Perpetuated Errors, In The EEOC's Proposed GINA Rule Regarding Wellness Program Incentives*, WORKPLACE CLASS ACTION BLOG (Oct. 30, 2015), *available at* <http://www.workplaceclassaction.com/2015/10/progress-but-also-perpetuated-errors-in-the-eeocs-proposed-gina-rule-regarding-wellness-program-incentives/>.

⁵⁵⁶ *Id.*

only to “health-contingent wellness programs” under ACA regulations, the GINA Proposed Rule imputes the burdens previously associated only with health-contingent wellness programs to all wellness programs, which exceeds what is required under the ACA and other federal regulations.⁵⁵⁷

These and other variations from the implementing regulations naturally raise questions in the minds of employers who must learn to live with the regulations of all federal agencies. If these rules are promulgated, they would open the door to uncertainty as to how the EEOC will enforce wellness program-related issues given the competing agency positions on wellness plan regulations. This uncertainty makes this an important trend to watch as we move into FY2016.

B. Political Developments

The EEOC has been subjected to harsh criticism over the past few years due to some of its highly aggressive litigation positions. In particular, the EEOC’s General Counsel, David Lopez, was singled out for intense questioning at his reconfirmation hearing held on November 13, 2014, before the U.S. Senate Committee on Health, Education, Labor and Pensions (“HELP Committee”).⁵⁵⁸ Certain Committee members expressed their frustration with some of the positions that the EEOC had taken with respect to health and wellness plans and questioned the Commission’s decision to file suit against Honeywell over its wellness program.⁵⁵⁹ Others raised concerns over the EEOC’s pursuit of systemic cases, especially its tactic of initiating large-scale litigations against employers where no aggrieved person filed a discrimination charge.⁵⁶⁰

Soon after that reconfirmation hearing, on November 24, 2014, Senator Lamar Alexander, ranking member of the U.S. Senate HELP Committee, issued a scathing report about the EEOC’s enforcement activities.⁵⁶¹ A copy of that report is included here as Appendix III. The report found that the EEOC was “pursuing many questionable cases through sometimes overly aggressive means – and, as a result, has suffered significant court losses that are embarrassing to the Commission and costly to the taxpayer.”⁵⁶² The Committee was especially critical of the Commission’s interpretation of the ADA and GINA in relation to corporate wellness plans. On January 29, 2015, the HELP Committee held a special hearing on the issue.⁵⁶³ While Mr. Lopez

⁵⁵⁷ *Id.*

⁵⁵⁸ *Senators Grill EEOC General Counsel Lopez In Confirmation Hearings*, *supra* note 548.

⁵⁵⁹ *Id.*

⁵⁶⁰ *Id.*

⁵⁶¹ Ranking Member Lamar Alexander Minority Staff Report, U.S. Senate Committee on Health, Education, Labor, and Pensions, *EEOC: An Agency on the Wrong Track? Litigation Failures, Misfocused Priorities, and Lack of Transparency Raise Concerns about Important Anti-Discrimination Agency* (Nov. 24, 2014), available at http://www.help.senate.gov/imo/media/FINAL_EEOC_Report_with_Appendix.pdf

⁵⁶² *Id.*

⁵⁶³ U.S. Senate Committee on Health, Education, Labor, and Pensions Full Committee Hearing, *Employer Wellness Programs: Better Health Outcomes and Lower Costs* (Jan. 29, 2015), available at <http://www.help.senate.gov/hearings/employer-wellness-programs-better-health-outcomes-and-lower-costs>; see also *Another Message To The EEOC On Wellness Plans: Targeting Incentives Is Inconsistent With The Affordable Care Act*, *supra* note 552.

survived the Committee vote and went on to be confirmed by the full Senate, Congressional disapproval of Mr. Lopez's direction was heard loud and clear.

The U.S. House of Representatives had its opportunity to criticize the EEOC during budget negotiations. On December 13, 2014, Congress approved the FY2015 Budget, which included funding for the EEOC of approximately \$364 million, an increase of \$500,000 from the previous year, but \$1 million short of the EEOC's request. The report language accompanying the bill specifically questioned the EEOC's position that its efforts at conciliation are immune from judicial review. The budget specified that the EEOC should engage in "good faith" conciliation efforts, and it mandated that the EEOC report back regarding how it ensures that conciliation efforts are pursued in good faith.⁵⁶⁴

On March 24, 2015, the Subcommittee on Workforce Protections of the House Committee on Education and the Workforce held a hearing to examine a number of legislative proposals intended to provide greater transparency and accountability to the EEOC.⁵⁶⁵ The Subcommittee Chairman, Tim Walberg, stated that "the enforcement and regulatory approach adopted by EEOC in recent years raises serious doubts about whether our nation's best interests are being served."⁵⁶⁶ He noted, in particular, the EEOC's focus on employers' use of criminal background checks in hiring decisions, and its attack on employer wellness programs, which "is actually discouraging employers from implementing these programs, even though Congress on a bipartisan basis has expressed its clear support for employee wellness programs."⁵⁶⁷

The EEOC did not give testimony at the hearing, but it submitted a letter on April 13, 2015 for the hearing record.⁵⁶⁸ A copy of that letter is included here as Appendix IV. That letter is worth a read because it gives a clear view of how the EEOC sees its enforcement priorities and objectives. For example, the EEOC touted its success at resolving disputes through its conciliation program, noting that "[o]ver the past several years, the agency has achieved significant results, including substantial increases in the percentage of successful conciliations over the past three years from 27 percent in fiscal year 2010 to 38 percent in fiscal year

⁵⁶⁴ U.S. House Committee on Appropriations. *Commerce, Justice, Science, and Related Agencies Appropriations Bill, 2015 H.R. 448*, 113th Cong., at 83-84, available at <https://www.congress.gov/113/crpt/hrpt448/CRPT-113hrpt448-pt1.pdf>.

⁵⁶⁵ *H.R. 548, "Certainty in Enforcement Act of 2015"; H.R. 549, "Litigation Oversight Act of 2015"; H.R. 550, "EEOC Transparency and Accountability Act"; and H.R. 1189, "Preserving Employee Wellness Programs Act."* Before the Subcommittee on Workforce Protections of the H. Comm. on Education and the Workforce, 115th Cong. (Mar. 24, 2015) (Statement of Tim Walberg, Chairman of the Subcommittee on Workforce Protections), available at <http://edworkforce.house.gov/news/documentsingle.aspx?DocumentID=398603>.

⁵⁶⁶ *Id.*

⁵⁶⁷ *Id.*

⁵⁶⁸ Letter from Brett A. Brenner, Acting Director Office of Communications and Legislative Affairs, to the Honorable Tim Walberg, Chairman of the Subcommittee on Workforce Protections of the House Committee on Education and the Workforce (Apr. 13, 2015), attached as Appendix IV and available at http://www1.eeoc.gov/eeoc/legislative/hearing_record_5-24-15.cfm?renderforprint=1.

2014.”⁵⁶⁹ It also noted that in FY2014, “EEOC filed suit on fewer than 8% of the charges that did not resolve through conciliation.”⁵⁷⁰

The EEOC specifically objected to the modifications proposed in H.R. 550, “EEOC Transparency and Accountability Act of 2015,” which would add a requirement to section 706 of Title VII that the EEOC make “good faith efforts to endeavor” to resolve cause findings by “bona fide conciliation,” which efforts would be subject to judicial review.⁵⁷¹ The EEOC strenuously objected to these and other provisions, which it said would “subject the Commission’s conciliation efforts to an unprecedented level of judicial examination.”⁵⁷² It also objected to many of the proposed bill’s requirements regarding the information the EEOC would have to turn over to meet its efforts at conciliation:

HR 550 would unnecessarily add burdens to EEOC’s effective conciliation program. Requirements such as turning over all information regarding the legal and factual bases on which reasonable cause is based, describing all members of a class before the discovery process in court, and certifying that conciliation is at an impasse, among others, will not only make it more difficult to secure speedy justice for individuals who have been discriminated against, but also entail a lengthier and much more costly process for employers. It would upend decades of a conciliation process that has worked well.⁵⁷³

Lest the American public be confused about why the EEOC has taken this position, the letter clarifies that it is to *protect employers* from unnecessary burden and expense, saying that the proposed changes “would require the EEOC to request significantly more material from employers during the conciliation process, increasing the costs and burdens on employers.”⁵⁷⁴

It remains to be seen what action, if any, will be taken on this proposed legislation in the wake of the *Mach Mining* decision. Although that decision did not go as far as the EEOC would have liked, the Commission will undoubtedly use it as leverage to continue to force employers into expensive settlements with onerous programmatic provisions under the threat of enforcement in a civil proceeding. If the EEOC continues to view the conciliation process as a means of simply dictating the “terms of surrender” to employers, that could ratchet up the pressure on Congress to take action to reign in those regulatory excesses.

C. Looking ahead

What can employers expect in terms of the future of EEOC-initiated litigation? We have explored the developing trends to give our assessment of what we believe may be on the horizon for FY2016 and beyond.

⁵⁶⁹ *Id.*

⁵⁷⁰ *Id.*

⁵⁷¹ *Id.*

⁵⁷² *Id.*

⁵⁷³ *Id.*

⁵⁷⁴ *Id.*

1. Social Media

On March 12, 2014, the EEOC held a public meeting entitled *Social Media In The Workplace: Examining Implications for Equal Employment Opportunity Law*.⁵⁷⁵ The Commissioners heard testimony regarding how social media platforms impact the workplace in areas such as recruitment and hiring, harassment, records retention, and litigation.⁵⁷⁶ The issue was raised again on November 12, 2014, when NLRB General Counsel Richard Griffin, NLRB Board Member Harry Johnson, and EEOC Commissioner Chai Feldblum participated in a panel discussion regarding employers' use of social media during hiring.⁵⁷⁷ Their remarks suggest that employers should be cautious about how they do so.⁵⁷⁸

On December 7, 2015, the EEOC's Select Task Force on the Study of Harassment ("STF") in the Workplace held a public meeting to discuss, among other things, how the creative use of social media can be used to spread an anti-harassment message, especially among millennials, and give a platform for workers to bring complaints to public attention.⁵⁷⁹ The STF was established by EEOC Chair Jenny R. Yang in January, 2015, and is co-chaired by EEOC Commissioners Chai R. Feldblum and Victoria A. Lipnic. It also includes the participation of various individuals representing the worlds of academia, law, labor, and business.⁵⁸⁰ The EEOC's attention to this area will likely lead to a more intense focus on employers' use of social media, and the ways in which those platforms can be used in new ways to combat – or maybe promulgate – harassment in the workplace.

2. A Push To Solidify "Resistance" As A New Cause Of Action Nationwide

As discussed above, the EEOC has been successful in convincing at least one federal court that section 707(a) of Title VII creates an entirely different cause of action relating to the "resistance" of the full enjoyment of rights secured by Title VII.⁵⁸¹ According to the EEOC, that cause of action allows the Commission to bring pattern or practice cases without any need to go

⁵⁷⁵ Christopher DeGross and Paul Kehoe, *EEOC Social Media Meeting – Old Framework Applied To New Issues, Or Something Else?*, WORKPLACE CLASS ACTION BLOG (Mar. 13, 2014), available at <http://www.workplaceclassaction.com/2014/03/eec-social-media-meeting-old-framework-applied-to-new-issues-or-something-else/>.

⁵⁷⁶ *Id.*

⁵⁷⁷ Ashley K. Laken, *NLRB and EEOC Leaders Caution Against Looking at Employment Applicants' Social Media Activity*, EMPLOYER LABOR RELATIONS BLOG (Nov. 14, 2014), available at <http://www.employerlaborrelations.com/2014/11/14/nlr-and-eeoc-leaders-caution-against-looking-at-employment-applicants-social-media-activity/>.

⁵⁷⁸ *Id.*

⁵⁷⁹ Press Release, Equal Employment Opportunity Commission, Many Bases of Discrimination Can Lead to Harassment, Panel of Experts Tells EEOC Task Force (Dec. 8, 2015), available at <http://www1.eeoc.gov/eeoc/newsroom/release/12-8-15.cfm?renderforprint=1>.

⁵⁸⁰ *Id.*

⁵⁸¹ *Doherty Enters., Inc.*, 2015 U.S. Dist. LEXIS 116189.

through the conciliation process.⁵⁸² The EEOC has already applied that theory to challenge an arbitration agreement⁵⁸³ and a separation agreement.⁵⁸⁴

What it means to “resist” the full enjoyment of rights secured by Title VII is not well defined at this point. Arguably, the language of section 707(a) is broad, and employers should expect that the EEOC will seek to expand its meaning to the farthest stretch allowed. So far, the EEOC’s efforts have been directed at employer-employee agreements that the EEOC views as restricting those employees’ ability to communicate with the EEOC or participate in EEOC investigations or enforcement actions.

But it is not difficult to see how that reasoning could be applied in many other possible circumstances. For example, as noted above, the EEOC has stated that social media could be a legitimate tool to spread an anti-harassment message and could provide a platform to allow employees to express complaints about harassment in the workplace. If so, then the EEOC may take the position that employer policies that restrict the use of social media are an attempt to “resist” employees’ right to use social media in that fashion, and therefore as resisting their right to complain about discrimination.

3. Use Of “Quasi-Judicial” Power To Expand Title VII To Include Sexual Orientation

The EEOC appears to have successfully used its quasi-judicial powers to push forward a concept of transgender discrimination. Relying on its own administrative decision in *Macy v. Holder*,⁵⁸⁵ the EEOC has advanced and developed a body of precedent to support its view that transgender discrimination is a form of sex discrimination, a theory that some have argued does not comport with Title VII.

Employers should be aware that the EEOC is following a similar path with respect to discrimination based on sexual orientation. On July 15, 2015 in *Baldwin v. Foxx*,⁵⁸⁶ the EEOC issued an administrative opinion that held for the first time that Title VII extends to claims of employment discrimination based on sexual orientation.⁵⁸⁷ Specifically, the EEOC determined that sexual orientation discrimination is per se sex discrimination, stating that: “[w]e ...conclude that allegations of discrimination on the basis of sexual orientation necessarily state a claim of discrimination on the basis of sex.”⁵⁸⁸ Federal courts have been reluctant to apply Title VII to claims of sexual orientation discrimination because federal law does not explicitly protect

⁵⁸² *Id.* at *16–17.

⁵⁸³ *Id.* at *1–2.

⁵⁸⁴ *CVS Pharmacy, Inc.*, 70 F. Supp. at 938–39.

⁵⁸⁵ Appeal No. 0120120821, EEOC Doc. 012012081, 2012 WL 1435995 (Apr. 20, 2012)), available at <http://www.eeoc.gov/decisions/0120120821%20Macy%20v%20DOJ%20ATF.txt>.

⁵⁸⁶ EEOC Appeal No. 0120133080, 2015 WL 4397641 (EEOC July 16, 2015).

⁵⁸⁷ Laura Maechtlen and Sam Schwartz-Fenwick, *EEOC’s “Sex” Discrimination Lawsuit Filed On Behalf Of Transgendered Worker Survives Motion To Dismiss*, WORKPLACE CLASS ACTION BLOG (July 20, 2015), available at <http://www.workplaceclassaction.com/2015/07/the-eeoc-rules-that-existing-federal-law-prohibits-employment-discrimination-based-on-sexual-orientation/>.

⁵⁸⁸ *Baldwin*, 2012 WL 1435995 at *10.

workers based on sexual orientation, and an overwhelming number of states do not include sexual orientation as a protected class in state anti-discrimination statutes.⁵⁸⁹

In ruling that sexual orientation discrimination is a form of “sex” discrimination under Title VII, the EEOC has explicitly issued a decision that is contrary to some federal court rulings interpreting Title VII.⁵⁹⁰ But if this administrative decision follows the same trajectory as the *Macy* decision, employers could see courts beginning to adopt the EEOC’s reasoning, and – as with transgender discrimination – see the EEOC actively develop a body of precedent that will entrench its theory of sexual orientation discrimination as a substantive addition to the anti-discrimination legal landscape.

4. 2018 Strategic Enforcement Plan

Fiscal Year 2015 saw the EEOC nearing the end of its 2013-2016 Strategic Enforcement Plan, which sets priorities and goals for its enforcement activity through 2016.⁵⁹¹ By Fiscal Year 2018, the EEOC plans to issue and implement an updated Strategic Enforcement Plan.⁵⁹²

The Office of Management and Budget has granted the EEOC’s request to delay releasing a new strategic plan until 2018 so that the Commission will be on the same government-wide strategic plan cycle as other agencies.⁵⁹³ The EEOC has set interim goals that extend the

⁵⁸⁹ Laura Maechten and Sam Schwartz-Fenwick, *EEOC’s “Sex” Discrimination Lawsuit Filed On Behalf Of Transgendered Worker Survives Motion To Dismiss*, *supra* note 587.

⁵⁹⁰ *Id.*

⁵⁹¹ To read more about the history and development of the EEOC’s 2012 Strategic Enforcement Plan, readers are invited to read our blog posts on the subject. See Christopher DeGross, Gerald L. Maatman, Jr. and Julie G. Yap, *Final EEOC Strategic Enforcement Plan Approved: A New Vision Or Business As Usual?*, WORKPLACE CLASS ACTION BLOG (Dec. 18, 2012), available at <http://www.workplaceclassaction.com/2012/12/final-eeoc-strategic-enforcement-plan-approved-a-new-vision-or-business-as-usual/>; Christopher DeGross and Gerald L. Maatman, Jr., *The EEOC’s Strategic Plan For Fiscal Years 2012-2016 Is Still Under Construction – This Week The Commission Released Another Draft*, WORKPLACE CLASS ACTION BLOG (Sept. 5, 2012), available at <http://www.workplaceclassaction.com/2012/09/the-eeocs-strategic-plan-for-fiscal-years-2012-2016-is-still-under-construction-this-week-the-comm/>; Christopher DeGross and Annette Tyman, *“Getting The Most Bang For The Buck” – The EEOC Outlines Its Strategic Plan To Target Systemic Discrimination Claims Over The Next Four Years*, WORKPLACE CLASS ACTION BLOG (Jan. 30, 2012), available at <http://www.workplaceclassaction.com/2012/01/getting-the-most-bang-for-the-buck-the-eeoc-outlines-its-strategic-plan-to-target-systemic-discrim/>.

⁵⁹² See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FISCAL YEAR 2015 PERFORMANCE AND ACCOUNTABILITY REPORT, *supra* note 19, at 18.

⁵⁹³ *Id.* at 9 n.1. The EEOC explained:

To fully realize the benefits of implementing EEOC’s newly adopted strategic plan, approved by the Commission in February 2012, in November 2013, the agency requested a waiver from the Office of Management and Budget (OMB) to permit the agency to forego the development of an entirely new strategic plan that would have begun in 2014. On December 10, 2013, OMB granted a deferral from the requirement to formulate a new strategic plan. Moreover, on January 22, 2014, EEOC and OMB agreed that the agency would provide an interim modification, authorized under Circular A–11 section 230.17 that would: 1) permit an extension of the agency’s current plan; 2) fill the two-year gap after our Plan expires in fiscal year 2016; and 3) “position [EEOC] to join

current plan by two years to bridge the gap between the current plan and the expected FY2018 plan.⁵⁹⁴ These goals generally seek to maintain the status quo. For example, the EEOC aims to have systemic cases represent 20-22 percent of the cases on its docket.⁵⁹⁵ The EEOC also intends that 65-70 percent of its administrative and legal claims are resolved in a manner that includes targeted, equitable relief.⁵⁹⁶ The Commission also plans to maintain the number of relationships that it has with organizations representing vulnerable workers, underserved communities, and small and new businesses.⁵⁹⁷

The EEOC has not published any calendar or schedule that it intends to follow in preparing the Fiscal Year 2018 plan, but the process followed for the current SEP may be instructive. The EEOC published a draft SEP in January 2012,⁵⁹⁸ and in June 2012, asked for public input on its proposal.⁵⁹⁹ In July, it held a one-day public meeting to seek additional input.⁶⁰⁰ Additional comments were accepted in the months that followed.⁶⁰¹ The final plan was released in December 2012.⁶⁰² Employers should anticipate a similar process to unfold prior to the release of the next plan, and they should keep that schedule in mind. This will likely be employers' next best opportunity to provide their input into how they believe the Commission can better balance the competing goals of its enforcement mission and the legitimate concerns that the business community has expressed regarding the direction that the Commission has taken.

the rest of the Federal Government in releasing an updated strategic plan in February 2018" (i.e., the beginning of the next government-wide strategic plan cycle).

Id.

⁵⁹⁴ See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION STRATEGIC ENFORCEMENT PLAN FY 2013 - 2016, *supra* note 285.

⁵⁹⁵ *Id.*

⁵⁹⁶ *Id.*

⁵⁹⁷ *Id.*

⁵⁹⁸ See "Getting The Most Bang For The Buck" - The EEOC Outlines Its Strategic Plan To Target Systemic Discrimination Claims Over The Next Four Years, *supra* note 591.

⁵⁹⁹ See Christopher DeGross and Gerald L. Maatman, Jr., *Seyfarth Shaw Submits Guidance To The EEOC On Its 2012-2016 Strategic Plan*, WORKPLACE CLASS ACTION BLOG (June 19, 2012), available at <http://www.workplaceclassaction.com/2012/06/seyfarth-shaw-submits-guidance-to-the-eec-on-its-2012-2016-strategic-plan/>.

⁶⁰⁰ See Rebecca Bjork, Christopher DeGross and Gerald L. Maatman, Jr., *EEOC Holds Meeting On Strategic Enforcement Plan - But Did It Listen?*, WORKPLACE CLASS ACTION BLOG (July 18, 2012), available at <http://www.workplaceclassaction.com/2012/07/eec-holds-meeting-on-its-strategic-enforcement-plan-but-did-it-listen/>.

⁶⁰¹ See Christopher DeGross and Gerald L. Maatman, Jr., *Seyfarth Shaw Submits Its Second Set Of Comments To The EEOC On Its 2012-2016 Strategic Plan*, WORKPLACE CLASS ACTION BLOG (Sept. 19, 2012), available at <http://www.workplaceclassaction.com/2012/09/seyfarth-shaw-submits-its-second-set-of-comments-to-the-eec-on-its-2012-2016-strategic-plan/>.

⁶⁰² See *Final EEOC Strategic Enforcement Plan Approved: A New Vision Or Business As Usual?*, *supra* note 591.



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