Seyfarth

# EEOC-Initiated Litigation

**2022** Edition

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Dear Clients and Friends,

We are pleased to provide you with the latest edition of our annual analysis of trends and developments in EEOC litigation, *EEOC-Initiated Litigation: 2022 Edition*. This desk reference compiles, analyzes, and categorizes the major case filings and decisions involving the EEOC in 2021 and recaps the major policy and political changes we observed in the past year. Our goal is to guide clients through decisional law relative to EEOC-initiated litigation, and to empower corporate counsel, human resources professionals, and operations teams to make sound and informed litigation decisions. We hope that you find this report to be useful.

By any measure, 2021 was another year of great change at the Commission, but one where it was possible, finally, to discern a new direction for the agency. In its 2021 Fiscal Year, the EEOC continued to issue guidance for employers as they try to navigate the changes wrought by COVID-19. Throughout the year, that guidance switched from how to manage leave and disability policies to employers' responsibilities around vaccine mandates, vaccination status, and reasonable accommodations. In our humble opinion, the EEOC has done an admirable job throughout the pandemic in attempting to stay ahead of these issues and keep the public informed about what new responsibilities these novel issues imposed on employers.

Undeniably, 2021 was also another year of massive political change. Last year, we were only just beginning to see how the Trump administrations' picks for EEOC leadership would start to steer the agency in a new direction. Just when those efforts were picking up steam, a new administration was installed. That led to an immediate change in the Chair of the Commission from a Republican, Janet Dhillon, to Charlotte A. Burrows, a Democrat. Some of the agency's more ambitious attempts to reign in its own powers and litigation enforcement were immediately reversed because of this change in leadership.

This publication is meant to equip employers with information so they can protect themselves and their employees in this ever-changing regulatory and litigation environment.

Part I of this book is arranged to coincide with the EEOC's six enforcement priorities as outlined in its Strategic Enforcement Plan. Each subsection highlights the most important judicial decisions and other litigation activity impacting EEOC-initiated litigation, as well as the agency rule-making and other legislative efforts and initiatives that were of particular importance to the EEOC's pursuit of these priorities and objectives in FY 2021. This analysis reveals the areas and issues where employers should focus their attention while considering employment-related business decisions.

Part II is a compilation of every significant ruling decided in 2021 that impacted EEOC-initiated litigation. In that section, critical procedural and evidentiary matters are outlined in detail to provide a comprehensive look at how companies might approach these issues when facing EEOC litigation, which serves as a resource of recent case authority for our readers.

We would like to thank our many colleagues who assisted in the creation of this book, including our colleagues Sarah Bauman and Alex Karasik, who contributed research and analysis on case rulings and agency developments over the past 12 months.

Our hope is that this book provides companies and business leaders with the tools and information they need to implement well-informed personnel decisions and strategies to comply with workplace laws and craft optimal defense strategies against EEOC litigation in this rapidly evolving regulatory environment.


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# PART I
# CURRENT TRENDS IN EEOC LITIGATION

## A. Another Year Of Turnover In Commission Leadership And Shifting Strategic Priorities

### 1. Changes Made; Changes Reversed

Last year, we reported on how the new EEOC leadership, installed by the Trump administration late in his presidency, had been pushing to make substantive changes to how the EEOC approaches its litigation and enforcement programs. We made special note of two changes that we believed could have a lasting impact on EEOC litigation: the changes the EEOC tried to make to its conciliation and mediation procedures, and its efforts to scale back some of its own litigation authority by taking that authority out of the hands of the General Counsel and Regional Attorneys and placing it firmly back in the hands of the Commission. Both initiatives encountered setbacks in the new year.

On July 7, 2020, the EEOC officially announced a new pilot program intended to improve conciliation procedures at the Commission.[1] The program was built "on a renewed commitment for full communication between the EEOC and the parties, which has been the agency's expectation for many years."[2] On October 8, 2020, the EEOC released the specifics of additional proposed changes to the conciliation process in an NPRM. In its NPRM, the EEOC acknowledged that, historically, it had elected not to adopt detailed regulations relative to its conciliation efforts based on its belief that retaining flexibility over the conciliation process would "more effectively accomplish its goal of preventing and remediating employment discrimination."[3] While the Commission's NPRM made clear that the Commission still believes it is important to maintain a flexible approach to conciliation, it also acknowledged that its conciliation efforts had not been terribly successful at resolving charges.[4]

In an effort to improve the effectiveness of the conciliation process, the NPRM sought to amend the conciliation process for charges brought pursuant to Title VII, ADA, GINA, and the ADEA. The EEOC stated in the NPRM that the proposed amendments establish "basic information disclosure requirements that will make it more likely that employers have a better understanding of the EEOC's position in conciliation and, thus, make it more likely that the conciliation will be successful."[5] The EEOC's perceived lack of transparency during the conciliation process had long troubled employers, who often felt they lacked information at the conciliation stage to meaningfully evaluate risk and make decisions about settlement. The changes proposed by the EEOC were seen by many as a welcome attempt to address this issue. The Republican-led Commission adopted the Final Rule in January 2021, just before the new Biden administration was sworn in.

The new rule went into effect on February 16, 2021. But it did not last long. In the following months, Congress exercised its authority Under the Congressional Review Act, which allows it to overturn executive branch regulations within 60 legislative days of when they were issued.[6] On May 19, 2021, the

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[1] Press Release, U.S. Equal Employment Opportunity Commission, EEOC Announces Pilot Programs to Increase Voluntary Resolutions (July 7, 2020) https://www.eeoc.gov/newsroom/eeoc-announces-pilot-programs-increase-voluntary-resolutions.

[2] *Id.*

[3] Update of Commission's Conciliation Procedures, 85 Fed. Reg. 64079 (proposed Oct. 9, 2020) (to be codified at 29 C.F.R. pt. 1601 and 1626).

[4] *Id.* Over the last several years, the EEOC's conciliation efforts resolved less than half of the charges where a reasonable cause finding was made. Specifically, between fiscal years 2016 and 2019, only 41.23% of the EEOC's conciliations with employers were successful.

[5] *Id.*

[6] *See* Congressional Review Act, 5 U.S.C. § 801.

Senate approved Senate Joint Resolution 13, which rescinded the rule.[7] The House followed suit with House Joint Resolution 33 on June 24, 2021.[8] On June 30, 2021, President Biden signed the resolution that killed the new conciliation requirements.[9]

On March 10, 2020, the EEOC released information about a significant internal resolution that may drastically change how high-stakes litigation decisions are made at the EEOC.[10] The purpose of the resolution appeared to be to rein in many of the powers previously held by the EEOC's General Counsel and Regional Attorneys, who have historically wielded considerable discretion over the types of lawsuits that would be filed and the legal positions the EEOC would advance. The resolution made clear that it is now the Commissioners, and not the General Counsel, that will make the decisions to commence or intervene in litigation. According to the resolution, the Commission now has exclusive authority over cases that would, among other things, involve: systemic discrimination or a pattern or practice of discrimination, a major expenditure of agency resources, issues on which the Commission has taken a position contrary to precedent in the Circuit in which the case will be filed or on which the General Counsel proposes to take a contrary position, as well as "other cases reasonably believed to be appropriate for Commission approval in the judgment of the General Counsel, including cases that implicate areas of the law that are not settled and cases that are likely to generate public controversy," and all recommendations in favor of participation in a case as amicus curiae.[11]

The changes were reiterated and emphasized again with another resolution effective on January 13, 2021.[12] This later resolution further modified the delegation to require that the General Counsel transmit any cases that do not fit directly within the criteria above to the Commission for a 5-day review period. If, during the review period, a majority of the Commissioners believe the case is appropriate for Commission approval, the General Counsel must submit the case to the Commission for a vote before filing suit.

Some enterprising employers had already tried to use these new rules to attack EEOC litigation in court, by arguing that a lawsuit was invalid if not brought in strict compliance with those new rules. For example, in *EEOC v. Route 22 Sports Bar, Inc.*,[13] the U.S. District Court for the Northern District of West Virginia rejected such a challenge, holding that the EEOC did not pass its new procedures to shield employers from liability and therefore did not confer any procedural rights upon employers. In that case, the EEOC alleged that the employer had subjected the charging party and a class of current and former female employees to a hostile work environment on the basis of their sex.[14] The employer filed a motion for judgment on the pleadings that argued, among other things, that the EEOC failed to obtain approval from the EEOC Commission prior to filing a lawsuit alleging systemic discrimination, in violation of the EEOC's new internal litigation approval procedures.[15] But the court held that "[w]hen determining the conditions precedent that the Commission must satisfy before instituting an enforcement action, federal courts look to the statutory text of the Act.[16] Title VII includes only four conditions precedent to bringing suit: "(1) a charge of discrimination and a notice of that charge to the employer; (2) an investigation; (3) a reasonable cause

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[7] S.J. Res., 117th Cong. (2021).

[8] H.R.J. 33, 117th Cong. (2021).

[9] Remarks on Signing Legislation Regarding Methane Pollution, Predatory Lending, and Employment Discrimination, Daily Comp. Pres. Doc. DCPD-202100551 (June 30, 2021).

[10] U.S. Equal Employment Opportunity Commission, *What You Should Know About EEOC And Modified Delegation Of Litigation Authority* (Mar. 10, 2020), https://www.eeoc.gov/wysk/what-you-should-know-about-eeoc-and-modified-delegation-litigation-authority.

[11] *Id.*

[12] U.S. Equal Employment Opportunity Commission, *What You Should Know About EEOC And Modified Delegation Of Litigation Authority* (Mar. 10, 2020), https://www.eeoc.gov/wysk/what-you-should-know-about-eeoc-and-modified-delegation-litigation-authority.

[13] *EEOC v. Route 22 Sports Bar, Inc.*, No. 5:21-CV-7, 2021 WL 2557087 (N.D.W.V. June 22, 2021).

[14] *Id.* at *1.

[15] *Id.* at *2-3. The employer had checked the publicly available results of the Commissioners' votes for the period preceding the filing of the lawsuit and had found that it was not included on the list of lawsuits approved by the Commission. *Id.* at *2.

[16] *Id.*

determination; and (4) an attempt to conciliate the violations found in the determination."[17] Once those conditions are fulfilled, the statute imposes no additional conditions based on the EEOC's implementation of its own non-statutory litigation approval procedures.[18] Moreover, according to that decision, because the decision to institute an enforcement action is committed to the sole discretion of the EEOC, that decision was not justiciable: "Contrary to defendants' assertion, federal courts have recognized that administrative agencies have the discretion to alter or modify their internal procedures when such procedures are adopted for the benefit of the agency and are not primarily intended to confer important procedural benefits upon those who deal with the agency."[19]

At the time, these changes were widely seen as a significant shift in the EEOC's philosophy and practice towards a curtailment of its own powers and a shift away from using litigation as the blunt-force instrument of choice. It was therefore disappointing for many employers to see the Biden administration immediately reverse course on the conciliation requirements. Moreover, the *Route 22 Sports Bar* decision shows that the EEOC's pullback of its own litigation authority relies on a Commission that is interested and invested in limiting the powers of the agency's lawyers. It provides no self-help to employers.

The impact of the changes in delegation authority can be tracked through Commission votes.[20] From November 2019 through September 2020, the EEOC had just three Commissioners, with a Republican majority. During that period, votes were held on 33 litigation matters, with all but one gaining a majority of votes. Interestingly, Chair Dhillon cast a dissenting vote on 17 matters.

Between October 2020 and the January 13, 2021 revised delegation of authority, Commissioner Lipnic's term came to an end and Commissioners Sonderling, Samuels, and Lucas were confirmed, giving the EEOC a full slate of Commissioners, with a Republican majority. Votes were held on 15 litigation matters during that span, with approval given to all but one.

The first votes cast under the new delegation of authority began in April 2021. At the same time, the EEOC also began to disclose more robust information about the litigation matters up for consideration, including what part of the delegation resolution prompted the vote as well as a high level description of the case, whether approved or not. Since that time, 31 litigation matters have been up for vote, which is enough information to note some trends of interest to employers.

First, despite the concerns of employee rights organizations, the approval process does not appear to have significantly curtailed EEOC litigation efforts. Twenty-one litigation matters have been approved, which represents two-thirds of litigation matters put to vote. Further, more than half received unanimous approval from the Commissioners.

Second, class and systemic cases are approved at an even higher rate; of the seven matters given this designation by the EEOC, six have been approved for litigation. Interestingly, the sole matter that was not approved is described by the EEOC as relating to "ADEA, Age, Involuntary Retirement," an issue that has been a focal point for the agency in recent years.

Third, more than half of the cases (18) were put to vote per Paragraph 2 of the revised delegation of authority, which requires the General Counsel to transmit cases to the Commission for a 5-day review period even if the cases do not otherwise fit directly within the criteria requiring Commission approval. The majority of these cases (13) include claims arising under the ADA, which suggests that the Commissioners are giving greater scrutiny to such litigation matters. However, the approval rate for matters raised in this way is identical to the overall two-thirds rate.

Perhaps of most note to employers are the voting patterns of the Commissioners. While all Commissioners are more likely to vote to approve a litigation than to disapprove, since the most recent delegation went into effect, Commissioner Dhillon has cast nine votes to disapprove, Commissioner Sonderling has cast eight

[17] *Id.* (citing 42 U.S.C. § 2000e-5(b)).

[18] *Id.* at *4.

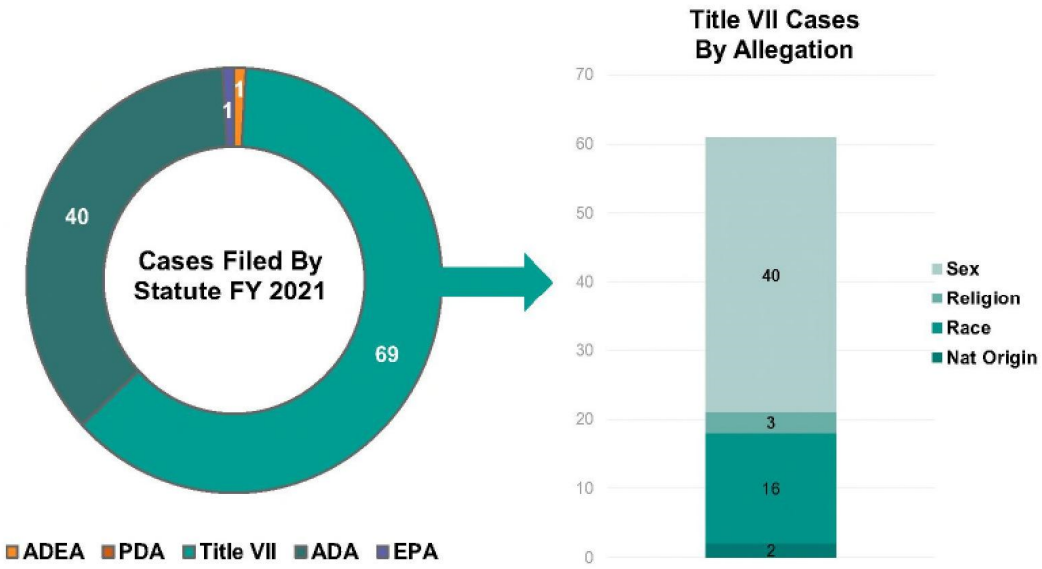
[19] *Id.* (citing *American Farm Lines v. Black Ball Freight Serv*ice, 397 U.S. 532, 538-40 (1970)).

[20] U.S. Equal Employment Opportunity Commission, *Commission Votes*, https://www.eeoc.gov/commission-votes. A special thanks to our colleague, Andrew Scroggins, for his work on compiling this voting data.

votes to disapprove, and Commissioner Lucas has cast six votes to disapprove. On the other hand, Chair Burrows and Commissioner Samuels have never cast a vote to disapprove. Commissioner Dhillon's appointment is set to end on July 1, 2022, at which time the Commission will no longer have a Republican majority. If the Biden administration is able to confirm a new Commissioner, the new Democratic majority may vote as a bloc to approve all litigation matters or even revisit the delegation rules to return authority to the General Counsel and the Regions.

## 2. Trends In Case Filings In FY 2021

Each fiscal year we also analyze the types of lawsuits the EEOC files, in terms of the statutes and theories of discrimination alleged. The chart below shows the number of lawsuits filed according to the statute under which they were filed (Title VII, Americans With Disabilities Act, Pregnancy Discrimination Act, Equal Pay Act, and Age Discrimination in Employment Act, etc.) and, for Title VII cases, the theory of discrimination alleged. This analysis can often reveal how the EEOC is shifting its strategic priorities. In FY 2021, we saw the total number of filings increase significantly (notably, demonstrating that the EEOC's more centralized decision-making has not impacted the rate at which it files cases). But when considered on a percentage basis, the distribution of cases filed by statute remained roughly consistent compared to FY 2019 and 2020. Title VII cases once again made up the majority of cases filed, making up 62% of all filings (on par with the 60% in FY 2019 and 56% in 2020). ADA cases also made up a significant percentage of the EEOC's filings, totaling 36% this year, up from 28% in FY 2020. This too is fairly typical. There was only one age discrimination case filed in FY 2021, as opposed to seven in FY 2020.



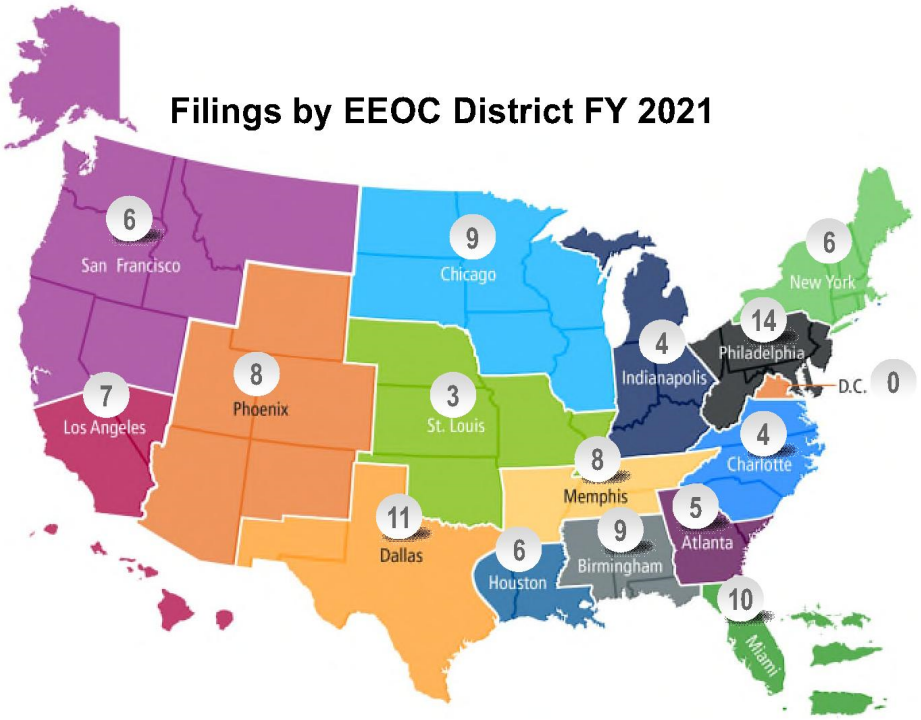
## 3. Most Active District Offices And Year-End Spike

In addition to tracking the subject matter of filings, it is useful to track which of the EEOC's 15 district offices are most actively filing new cases. Some Districts tend to be more active than others, and some focus on different EEOC priorities. Indeed, the EEOC's district offices have been tasked with creating more regional strategic priorities, but those are not shared with the public the same as national priorities have been historically. Monitoring which district offices are most active can therefore reveal which areas of the country are most heavily targeted and possibly offer clues as to which priorities the EEOC is focusing on for the coming year. The chart on the facing page shows the number of filings by EEOC district office.

The most noticeable trend of FY 2021 is the dip in some key regions compared to past years. The New York district office, for example, fell from 12 filings in FY 2020 to 6 filings in FY 2021. The California district offices in San Francisco and Los Angeles, which amounted to 16 new filings last year combined, declined in FY 2021, coming in at a combined total of 13 new filings, including San Francisco's fall from 10 to 6.

Leading the pack in new filings were the Philadelphia and Dallas district offices, with 14 and 11 filings, respectively. Philadelphia's filings shot up from eight filings last year, and Dallas up from just four filings in FY 2020. The Indianapolis office, which was one of the leaders in new filings last year, posted fairly low numbers in FY 2021. The Chicago district office, historically at the head of the pack, is back up to nine filings this year from last year's three.

As is usually the case, the EEOC ended its fiscal year with some increased activity, filing 59 lawsuits during September alone. This is nearly double the amount of lawsuits filed in September FY 2020, during which time only 33 lawsuits were filed. In sum, the EEOC filed 114 total cases in FY 2021, which includes 111 merits lawsuits and 3 subpoena and enforcement actions. This total number of filings is more than last year's total of 101 lawsuits, but still less than two years prior.



# 4. Developments In Subpoena Enforcement Actions And EEOC Investigations

The EEOC's power to issue administrative subpoenas is one of the most powerful investigatory tools at its disposal. Typically, an investigator in pursuit of information, data, or documents 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.[21] Sometimes the EEOC will even skip the informal request and proceed directly to issuing a subpoena – a practice that is actually disallowed by the EEOC's own internal guidance.[22] The EEOC argues that its subpoena power should be afforded significant deference. But subpoenas are often used by the EEOC as a means to expand a single allegation of discrimination into a massive pattern or practice or systemic case. Employers can and do push back on the scope of those subpoenas. However, recent court decisions continue to present challenges for employers that seek to do so.

Employers who receive 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.[23] However, the petition must be filed within five business days of receipt of the subpoena, and the Commission and some 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 under that statute. Subpoenas issued under the ADEA are elevated directly to the District Court.) If, after the petition is resolved, the investigator is not satisfied with the employer's response to the subpoena, the EEOC may proceed to a District Court, where it will file an application for an order to show cause why the subpoena should not be enforced.

The consequences for employers that do not promptly object to the EEOC's expansive investigatory tactics can follow them long into a litigation. For example, in *EEOC v. Scottsdale Healthcare Hospitals*,[24] the U.S. District Court for the District of Arizona upheld the scope of the EEOC's expansive document requests due to the employers' failure to object to similar requests during the investigation phase. In that case, the charging party had filed a charge alleging that she and other aggrieved individuals had been discriminated against in violation of the ADA.[25] The EEOC conducted a 15-month investigation, after which it concluded that there was reasonable cause to believe that the employer had discriminated against the charging party and "other aggrieved individuals by "implementing a policy and/or practice of requiring individuals with disabilities to compete for open positions when returning from medical leave rather than providing reasonable accommodations including reassignment."[26]

Once in litigation, the employer resisted the EEOC's discovery requests, arguing that they go beyond the charge, which was limited to individuals who took a leave of absence, were required to compete for a job upon returning, and were terminated rather than reassigned.[27] The court disagreed, holding that "even if certain claims in the Complaint do exceed the scope of Carter's initial Charge, discovery relevant to such claims may yet be obtained if the claims arose out of EEOC's reasonable investigation of that Charge and are encompassed within its letter of determination."[28] To force the EEOC to bring a separate charge of discrimination for other claims of discrimination where evidence of those claims was uncovered during its reasonable investigation would be to elevate form over substance and waste administrative resources.[29]

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[21] *See* 29 C.F.R. § 1601.16(a).

[22] *See* EEOC Compliance Manual § 24.

[23] *See* 29 C.F.R. § 1601.16(b)(1).

[24] *EEOC v. Scottsdale Healthcare Hospitals*, No. 20-CV-08194-PHX-MTL, 2021 WL 4522284 (D. Ariz. Oct. 4, 2021).

[25] *Id*. at *1.

[26] *Id*.

[27] *Id*. at *2.

[28] *Id*.

[29] *Id*.

 

The court also noted that the EEOC's investigation had provided notice of the breadth of the EEOC's claims, and the employer had responded to those requests: "[Employer's] argument that it lacked sufficient notice of the extent of EEOC's claims is therefore unpersuasive, given that [employer] itself provided the EEOC with information that gave rise to the challenged allegations in the Complaint."[30] The court explained that the employer should have challenged the scope of the EEOC's information requests during the investigation: "Had [employer] 'believed that the EEOC's investigation exceeded the permissible statutory scope, it could have refused the EEOC's demand for access and sought adjudication of its rights.'"[31]

In FY 2021, the EEOC initiated three subpoena enforcement actions. That number is considerably lower than the eight and 18 enforcement actions that were filed in FY 2019 and FY 2018, and three filed in FY 2020, respectively. And it appears to show the continuation of a trend toward fewer subpoena enforcement actions that has been developing over the past few years. The EEOC initiated 17 subpoena enforcement actions in 2017,[32] 28 in FY 2016,[33] and 32 in FY 2015.[34] It is unlikely that the EEOC is backing off of these issues, but is more likely that employers are more apt to voluntarily respond to requests for information rather than try to defend themselves in Court given the shifting and often challenging landscape of District Court decisions.

### a. Courts Upholding A Broad Scope Of EEOC Subpoenas After The Supreme Court Clarified The Standards Of Appellate Review In *McLane Co. v. EEOC*

In 2017, the U.S. Supreme Court clarified the standard of review of a District Court's decision regarding enforcement of EEOC subpoenas in *McLane Co. v. EEOC*.[35] According to the Supreme Court, abuse-of-discretion review is the longstanding and most appropriate practice for the courts of Appeals when reviewing a decision to enforce or quash an administrative subpoena.[36] The Supreme Court held that a decision to enforce or quash an EEOC subpoena is case-specific and does not depend on a neat set of legal rules. Instead, it requires the application of broad standards to "multifarious, fleeting, special, narrow facts that utterly resist generalization."[37] These types of considerations are more appropriately made by the District Courts. On remand, the Ninth Circuit applied the more deferential abuse-of-discretion standard to the District Court's decision, but reversed the trial court nonetheless. The Ninth Circuit found that the District Court's formulation of the relevance standard was too narrow.[38] The Ninth Circuit explained that, under Title VII, the EEOC may obtain evidence if it relates to unlawful employment practices and is relevant to the charge under investigation, which encompasses "virtually any material that might cast light

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[30] *Id*. at *3.

[31] *Id*. (quoting *EEOC v. Occidental Life Insurance Co. of California*, 535 F.2d 533, 541 (9th Cir. 1976)). The court also refused to examine the contents of the EEOC's efforts at conciliation to find whether the EEOC had properly conciliated all of the allegations alleged in the complaint, noting that: "[employer] asks the Court to do precisely what the Supreme Court and Ninth Circuit have said it must not do—examine the content of the parties' conciliation to determinate whether the EEOC engaged in a good-faith effort to resolve each of the allegations of discrimination directed at [employer]." *Id*. at *4.

[32] U.S. Equal Employment Opportunity Commission, Fiscal Year 2017 Performance and Accountability Report, at 36, https://www.eeoc.gov/eeoc/plan/upload/2017par.pdf.

[33] U.S. Equal Employment Opportunity Commission, Fiscal Year 2016 Performance and Accountability Report, at 36, https://www.eeoc.gov/eeoc/plan/upload/2016par.pdf.

[34] U.S. Equal Employment Opportunity Commission, Fiscal Year 2015 Performance and Accountability Report, at 34, http://www.eeoc.gov/eeoc/plan/upload/2015par.pdf.

[35] *McLane Company, Inc. v. EEOC*, 137 S. Ct. 1159 (2017). The case arose out of a Title VII charge brought by a woman who was terminated after thrice failing a physical capabilities evaluation upon returning to work from maternity leave. *McLane*, 137 S. Ct. at 1165. During the investigation, the Commission requested a list of employees who had taken the physical evaluation. Although the employer provided such a list, it refused to provide "pedigree information," including personal identifying information. *Id.* The EEOC challenged the employer's refusal, and the District Court sided with the employer, holding that such information was not "relevant" to the charge at issue. *EEOC v. McLane Company, Inc.*, No. 12-CV-2469, 2012 WL 5868959, at *5 (D. Ariz. Nov. 19, 2012). The Ninth Circuit reviewed the District Court's decision *de novo* and reversed the District Court. *EEOC v. McLane Company, Inc.*, 804 F.3d 1051, 1057 (9th Cir. 2015).

[36] *McLane*, 137 S. Ct. at 1167.

[37] *Id.*

[38] *EEOC v. McLane Company, Inc.*, 857 F.3d 813, 816 (9th Cir. 2017).

on the allegations against the employer."[39] Under this rubric, the Ninth Circuit found the requested information to be relevant.[40]

Following the *McLane* decision, some lower courts have shown a willingness to enforce broad requests for information contained in EEOC subpoenas. For example, in *EEOC v. Centura Health*,[41] the Tenth Circuit upheld a decision by the U.S. District Court for the District of Colorado enforcing an EEOC subpoena that called for, among other things, information about all employees over a three year time period who were placed on the company's non-FMLA leave or who requested an accommodation for their disability.[42] The District Court noted that relevance within the context of an EEOC subpoena is "generously construed" and upheld enforcement of the subpoena based on the number of charges the EEOC had received regarding the employer and the widespread geographic distribution of those charges.[43] The employer challenged the District Court's ruling with respect to relevance, arguing that there had been no pattern-or-practice charge filed against it, and that such class-wide information was only relevant if there is a specific and substantial connection between the charge and the information requested.[44] The Tenth Circuit nevertheless held that eleven charges of disability discrimination, which all alleged a failure to accommodate across a handful of facilities, was sufficient to warrant an investigation into potential pattern-or-practice claims.[45]

Other courts have relied on *McLane* to enforce similar requests for class-wide information, despite arising out of a handful of charges.[46] In addition to scope issues, courts have also upheld broad concepts of "relevance" to enforce EEOC subpoenas. For example, in *EEOC v. VF Jeanswear LP*,[47] the Ninth Circuit reversed a decision from the U.S. District Court for the District of Arizona that denied the EEOC's request for personal information identifying all supervisors, managers, and executive employees at a company nationwide, including various details about their positions, their employment and termination dates, and the facilities where they worked.[48] A similar concern over the scope of "relevance" was at issue in *EEOC v.*

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[39] *Id.*

[40] *The* Ninth Circuit reasoned that the pedigree information was related to the unlawful practice being investigated and "might cast light" on the allegations against the employer. *Id.* Finally, on remand in 2018, the District Court rejected the employer's burdensomeness arguments, holding that it had already produced significant data and software and had imposed an even greater burden on itself by removing the personal identifying information from this data, which was now sought by the EEOC. *EEOC v. McLane Company, Inc.*, No. 12-CV-2469, 2018 U.S. Dist. LEXIS 70127, *1, *7-8 (D. Ariz. Apr. 25, 2018).

[41] *EEOC v. Centura Health*, 933 F.3d 1203 (10th Cir. 2019).

[42] *Id.* at 1209. The underlying charges of discrimination alleged that the employer violated the ADA by terminating their employment or refusing to allow them to return to work after medical leave. *Id.* at 1205. The EEOC later informed the company that its investigation would be expanded to include related allegations by other aggrieved individuals involving bases or issues not directly affecting the charging parties, and issues not alleged in the charges. *Id.* at 1205-06.

[43] *Id.* at 1206.

[44] *Id.* at 1208. According to the employer, "the only common theme tying the requested information to the eleven individual charges is the broad fact that all the charges alleged disability discrimination." *Id.*

[45] *Id.* at 1209.

[46] For example, in *EEOC v. Nationwide Janitorial Services,* No. 18-CV-96, 2018 WL 4563053 (C.D. Cal. Aug. 17, 2018), the U.S. District Court for the Central District of California enforced an EEOC subpoena seeking the names, contact information, and additional data for all employees in the state of California. *Id*. at *3. Relying largely upon *McLane*, the District Court held that the EEOC had "evidence (apart from the vague boilerplate allegations in the original complaints) of incidents of additional potential discriminatory or violative conduct that go beyond the one-attacker-one-location allegations that commenced the investigation." *Id*. at *9. Thus, according to the EEOC, because it was investigating a pattern and practice of behavior, it was entitled to obtain broader evidence. *Id*. (citing *EEOC v. Shell Oil Co*., 466 U.S. 54, 68-69 (1984); *EEOC v. McLane Company, Inc*., 857 F.3d 813, 815-16 (9th Cir. 2017)). Given the "generous construction" of the concept of relevance, the court concluded that employee contact information is relevant to the EEOC's legitimate investigation. *Id*. (citing *McLane Co., Inc. v. EEOC*, 137 S. Ct. 1159, 1165 (2017)). Similarly, in *EEOC v. Oncor Electric Delivery Co*., No. 3:17-MC-69, 2017 U.S. Dist. LEXIS 189584 (N.D. Tex. Nov. 16, 2017), the U.S. District Court for the Northern District of Texas overruled the employer's objection to handing over widespread employee information. The EEOC requested, and then subpoenaed, a detailed list of all company employees who had suffered discipline or been discharged as a result of that policy. *Id*. at *8-9. Relying upon *McLane*, the District Court found that, based upon the evidence of a widespread policy already uncovered, the employee list was plainly relevant and well within the EEOC's authority to obtain in furtherance of its investigation. *Id.* at *17-18.

[47] *EEOC v. VF Jeanswear LP*, 769 F. App'x. 477 (9th Cir. 2019). In that case, a former employee alleged that she was harassed, demoted, underpaid, and not offered opportunities for promotion based on her sex. *Id.* at 478.

[48] The Ninth Circuit held that the District Court had abused its discretion because, in conducting its relevance analysis, it proceeded from the premise that the scope of the charge, and the relevancy of the material requested, would be limited to the part of the charge that related to the personally-suffered harm of the charging party: "EEOC subpoenas are enforceable so long as they seek information relevant to any of the allegations in a charge, not just those directly affecting the charging party." *VF Jeanswear LP*, 769

 

*Joon, LLC*,[49] where the District Court for the Middle District of Alabama held – quoting the Supreme Court's decision in *McLane Co.* – that "it is the job of the EEOC, not this court in a subpoena enforcement proceeding, to investigate the charge's allegations and 'determine whether there is reasonable cause to believe that the charge is true.'"[50]

The particular statue sued under can also play a role in determining the permissible breadth of an EEOC subpoena. For example, in *EEOC v. Stanley Black & Decker, Inc.*,[51] the charging party alleged that he was discriminated against and terminated due to his race because his employer would only provide severance pay under an agreement that required him to waive his right to file an EEOC charge.[52] The EEOC's investigation included a request that the employer "identify any other employees who had been provided similar releases, copies of the releases, and additional information regarding those employees, including their names, positions, work locations, dates of hire and termination, contact information, and whether they signed the release."[53] The court held that the subpoena "seeks information related an investigation plausibly within its delegated powers and thus is not unenforceable for lack of authority."[54]

In coming to that conclusion, the court first explained the different scope of authority available to the EEOC when proceeding under the ADEA rather than Title VII. Under Title VII, "the EEOC is entitled to seek documentary evidence that 'is relevant to the charge under investigation.'"[55] But, the court explained, "[t]he EEOC's authority pursuant to the ADEA . . . contains no charge-based relevancy requirement; the agency may conduct investigations into potential ADEA violations at its discretion and may seek records 'relating to any matter under investigation.'"[56] Because the EEOC came to believe, over the course of its investigation of the charging party's charge, that the employer "may have a systemic policy of using the releases at issue to deter its employees from filing charges of discrimination and cooperating in EEOC investigations," the court held that it was within its authority to investigate and subpoena information relating to its broadened investigation.[57] The employer also argued that the EEOC's investigation of a "facial retaliation" claim was not an arguable or plausible unlawful employment practice in the Fourth Circuit. But the court held that the EEOC was not required to show a viable cause of action or remedy at the subpoena enforcement stage. Because there was no binding precedent that would foreclose the claim under investigation, the court held that EEOC had met its burden to establish that the information it sought was at least "speculatively related" to its authority to investigate potential ADEA violations.[58]

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F. App'x. at 478. The Ninth Circuit reversed the District Court's conclusions regarding the burden of production as well, holding that a cost of approximately $11,000 to investigate systemic and unlawful discrimination should not unduly burden a company that has approximately 2,500 employees. *Id.*

[49] *EEOC v. Joon, LLC*, No. 3:18-MC-3836, 2019 WL 2134596 (M.D. Ala. May 15, 2019).

[50] *Id.* (quoting *McLane Co. v. EEOC*, 137 S. Ct. 1159, 1164 (2017)). *See also EEOC v. United Parcel Service, Inc.*, 859 F.3d 375, 379 (6th Cir. 2017) (holding that "the EEOC is entitled to evidence that shows a pattern of discrimination other than the specific instance of discrimination described in the charge."); *EEOC v. Union Pac. R.R. Co.*, 867 F.3d 843, 852 (7th Cir. 2017), *reh'g denied* (Nov. 21, 2017) (rejecting the view that the EEOC's request should have been denied because "the information sought extends beyond the allegations in the underlying charges"); *EEOC v. Aerotek, Inc.*, 815 F.3d 328, 332-33 (7th Cir. 2016) (upholding the District Court's order requiring Aerotek to produce the names of more than 22,000 clients, holding that the EEOC had the power to investigate additional potential discriminatory requests) (citing *EEOC v. Sidley Austin Brown & Wood*, 315 F.3d 696, 701 (7th Cir. 2002)); *EEOC v. Maritime Autowash, Inc.,* 820 F.3d 662, 666 (4th Cir. 2016) (enforcing an EEOC subpoena for documents stemming from the discrimination charge of an undocumented worker even though the charging party might not have been able to enforce any legal remedies, explaining that "[t]he [judicial review] process is not one for a determination of the underlying claim on its merits . . . courts should look only to the jurisdiction of the agency to conduct such an investigation"); *EEOC v. KB Staffing, LLC*, No. 14-MC-41, 2014 U.S. Dist. LEXIS 147810, at *10-11 (M.D. Fla. Aug. 28, 2014) (enforcing an EEOC subpoena for information regarding a pre-job offer health questionnaire allegedly violating the ADA even though the challenged practice had been discontinued years earlier, even beyond the statute of limitations period).

[51] *EEOC v. Stanley Black & Decker, Inc.*, No. 19-CV-2599, 2021 WL 1985017 (D. Md. May 17, 2021).

[52] *Id.* at *1.

[53] *Id.*

[54] *Id.* at *6.

[55] *Id.* at *2 (quoting 42 U.S.C. § 2000e-8(a)).

[56] *Id.* (quoting 29 U.S.C. § 626(a)).

[57] *Id.* at *3.

[58] *Id.* at *5.

### b. Cases Restricting The EEOC's Subpoena Power

After the Supreme Court affirmed the broad scope of the EEOC's subpoena powers in *McLane*, employer victories have been few and far between. But there have been some employer-favorable cases. For example, in *EEOC v. Kaiser Foundation Hospitals*,[59] the U.S. District Court for the Central District of California accepted the Report and Recommendation of the Magistrate Judge, which allowed an employer to object to an EEOC subpoena even though it had failed to make timely objections to the subpoena, and slightly narrowed the scope of what the EEOC sought in the subpoena. In that case, the employer failed to petition to revoke or modify the subpoena within the five-day deadline imposed by EEOC's regulations.[60] According to the EEOC, failure to strictly follow that timeline precludes an employer from challenging the subpoena except on constitutional grounds.[61] The District Court agreed that this requirement was an administrative remedy that generally must be exhausted before a recipient would be allowed to challenge the subpoena in court. But exceptional circumstances can sometimes allow for leniency. The District Court noted that the subpoena did not cite the regulation that imposed the five-day deadline, and that the EEOC never informed the employer that it had missed the deadline to petition for revocation.[62] Moreover, in its correspondence with the EEOC, the employer had repeatedly raised the objections that it was now making before the District Court.[63] Accordingly, the District Court held that it would consider the employer's relevance and burdensomeness objections to the subpoena.

With respect to the scope of what was requested in the subpoena, the Magistrate Judge first held that the charge sufficiently alleged class-wide discrimination, thus empowering the EEOC to investigate discrimination beyond the allegations of individual discrimination: "[i]t alleges the group of persons discriminated against (females), the discrimination methods (sexual harassment by the Pharmacist and/or failure by [employer] to take complaints of sexual harassment seriously), and the 'periods of time' in which the discrimination occurred (2017 and onward)."[64] Relying on the Ninth Circuit's remand decision in *McLane*, the District Court held that the pedigree information was relevant because "where a discrimination charge sufficiently alleges both individual and systemic discrimination, the EEOC may properly interview employees beyond those involved in the individual discrimination to determine whether there is a pattern or practice of discrimination."[65] However, the District Court agreed that the EEOC had not articulated a clear basis for extending its investigation to all current and former employees of the facility where the charging party did not work.[66] The charge alleged sexual harassment perpetrated by a single pharmacist. It was not evident how interviewing, for example, IT employees, would shed light on those matters. Accordingly, the Magistrate Judge recommended that the EEOC's subpoena request be limited to current and former employees who worked during the shift that that pharmacist worked and at the facilities where he worked, as well as information concerning female employees at another facility who submitted a claim of sexual harassment during the relevant time period.[67] The District Court agreed.[68]

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[59] *EEOC v. Kaiser Foundation Hospitals*, No. 2:19-MC-175-JAK-FFM, 2020 WL 70885 (C.D. Cal. Jan. 3, 2020). In that case, the charging party had alleged discrimination on the basis of sex at a pharmacy facility that was primarily responsible for filling mail-order prescriptions. The EEOC sought, among other things, "pedigree" information regarding employees who worked at another location, which housed other departments and operations, including a pharmacy wholesale operation, a pharmacy training department, and IT and engineering personnel. *EEOC v. Kaiser Foundation Hospitals*, No. 2:19-MC-175-JAK-FFM, 2019 WL 7494905, at *1-2 (C.D. Cal. Dec. 11, 2020). The employer objected to providing that information as irrelevant to the single allegation of sex harassment brought by an employee who worked in a separate facility.

[60] *Id.* at *4.

[61] *Id.*

[62] *Id.* at *5.

[63] *Id.*

[64] *Id.* at *8.

[65] *Id.* (citing *EEOC v. McLane Company, Inc.*, 857 F.3d 813, 816 (9th Cir. 2017), and *EEOC v. Nationwide Janitorial Services, Inc.*, No. 18-CV-96 , 2018 WL 4563053, at *4 (C.D. Cal. Aug. 17, 2018)).

[66] *Id.*

[67] *Id.*

[68] *Kaiser Found. Hosps.*, 2020 WL 70885, at *1. *See also EEOC v. Serv. Tire Truck Centers*, No. 1:18-CV-1539, 2018 U.S. Dist. LEXIS 178025, at *11-12 (M.D. Pa Oct. 17, 2018) (holding that the EEOC had not explained why entire personnel files are necessary or relevant to its investigation, and circumscribed the subpoena to exclude sensitive information such as certain medical and healthcare information, retirement plan information, names and other identifying details for spouses and dependents, personal

 

These employer wins build on some appellate court cases from recent years more favorable to employers, although those decisions were handed down before the Supreme Court decided *McLane*.[69] Employers have also sometimes been successful in challenging how the EEOC is permitted to conduct the investigation itself, and how employers may be able to fight back. For example, in *EEOC v. Chipotle Mexican Grill, Inc.*,[70] the U.S. District Court for the Northern District of California held that the facts underlying the EEOC's reasonable cause determination were protected by the deliberative process privilege. In that case, a former employee filed a charge against his employer, alleging that he was subjected to sexual harassment, retaliation, and constructive termination.[71]

The deliberative process privilege shields from disclosure intra-governmental communications relating to matters of law or policy.[72] The privilege is intended to protect the quality of governmental decision-making by "maintaining the confidentiality of advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated."[73] However, to be covered by the deliberative process privilege, information must be both "predecisional," in that it is "antecedent to the adoption of agency policy," and "deliberative," meaning that it must actually be related to the process by which policies are formulated.[74] The Court held that the deliberative process privilege protected the information sought by defendant regarding the EEOC's reasonable cause determination.[75] According to the District Court, revealing the facts which constituted the factual basis of the EEOC's probable cause finding would reveal the EEOC's evaluation and analysis of factual information gathered by the agency, which would "provide defendants unwarranted insight into how these facts played into the EEOC's decision-making process."[76]

For several years now, a trend has been developing towards ever-greater discretion regarding the scope and reach of the subpoena power placed in the hands of the EEOC. If the law continues to develop in this way, it is likely that the EEOC will get more creative and assertive in terms of the types and amount of information it seeks, and the methods it uses to try to collect that information from employers.[77]

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email addresses, copies of social security cards, and tax information beyond earnings and salary); *EEOC v. G4S Secure Solutions (USA), Inc.*, No. 18-CV-2335, 2018 U.S. Dist. LEXIS 203540, at *10 (S.D. Cal. Nov. 29, 2018) (holding that "[w]hile inquiring with other employees or former employees regarding harassment and discrimination may be important to the EEOC investigation, there is no reason that the discharged employees are relevant to the investigation, further, there is no showing that other employees (past or present) are unavailable for interview for the same purposes.").

[69] *See, e.g., EEOC v. Royal Caribbean Cruises, Ltd*., 771 F.3d 757, 760 (11th Cir. 2014) (holding that the EEOC's subpoena power should not be construed "so broadly that the relevancy requirement is rendered a nullity"); *EEOC v. TriCore Reference Laboratories*, 849 F.3d 929, 935-38 (10th Cir. 2017) (rejecting the EEOC's attempt to expand the scope of its investigation to include a "[f]ailure to accommodate persons with disabilities and/or failure to accommodate women with disabilities (due to pregnancy)," explaining that the EEOC had not justified its expanded investigation because it had "not alleged anything to suggest a pattern or practice of discrimination beyond [employer's] failure to reassign [the employee]")

[70] *EEOC v. Chipotle Mexican Grill, Inc.*, No. 17-CV-5382, 2019 WL 3811890 (N.D. Cal. Aug. 1, 2019).

[71] *Chipotle Mexican Grill, Inc.*, 2019 WL 3811890, at *1. The parties agreed that they would exchange written responses to each other's 30(b)(6) deposition notices instead of producing witnesses to testify in person. *Id.* The employer sought written responses to five topics that inquired into the basis of the EEOC's determination that there was reasonable cause to believe that the employer violated Title VII. *Id.* The EEOC did not substantively respond to those topics, arguing that the substance of its pre-suit investigation is not judicially reviewable, therefore not relevant to the lawsuit, and moreover that the information was protected by the deliberative process privilege. *Id.* at *2.

[72] *Id.* at *3.

[73] *Id.* (quoting *National Wildlife Federation v. U.S. Forest Service*, 861 F.2d 1114, 1117 (9th Cir. 1988)).

[74] *Id.* (quoting *National Wildlife Federation*, 861 F.2d at 1117).

[75] *Id.*

[76] *Id.* Moreover, the District Court found that the employer had not demonstrated its need for the materials, and the need for accurate fact-finding, overrode the EEOC's interest in non-disclosure. *Id.* at *4.

[77] *See, e.g., EEOC v. Nucor Steel Gallatin, Inc*., 184 F. Supp. 3d 561, 568 (E.D. Ky. 2016) (allowed the EEOC to conduct a warrantless, non-consensual search of private commercial property of an employer charged with hiring discrimination, explained, that "[j]ust as the warrant process requires courts to identify specific evidence of an existing violation and order only those inspections that bear 'an appropriate relationship to the violation, the Commission's statutory and regulatory schemes permit only those inspections that are 'relevant to the charges filed' and 'not unduly burdensome'"); *EEOC v. Homenurse, Inc.*, No. 1:13-CV-2927, 2013 U.S. Dist. LEXIS 147686, at *44 (N.D. Ga. Sept. 30, 2013) (calling the EEOC's unannounced, FBI-like raid, in which it showed up at the former employer and confiscated some of the company's files, many of which contained information protected by HIPAA, "highly inappropriate").

# The EEOC's Strategic Enforcement Priorities

According to the EEOC, "the purpose of the [Strategic Enforcement Priorities] is to focus and coordinate the EEOC's programs to have a sustainable impact in reducing and deterring discriminatory practices in the workplace." As in years past, the SEP establishes the EEOC's six substantive area priorities.

1 **Eliminating Barriers In Recruitment and Hiring:** The EEOC's focus within this priority is to address discriminatory recruiting and hiring practices which target "racial, ethnic, and religious groups, older workers, women, and people with disabilities." According to the EEOC, addressing this priority typically involves strategic, systemic cases.

2 **Protecting Vulnerable Workers:** The EEOC's focus within this area is to combat policies and practices directed "against vulnerable workers," including immigrant and migrant workers, as well as persons perceived to be members of these groups, and against members of underserved communities." Each EEOC District tailors its efforts to the local issues affecting individuals within its geographic area.

3 **Addressing Selected Emerging And Developing Issues:** As the name implies, the EEOC may adapt its focus within this priority on a year-to-year basis in accordance with developing case law.

4 **Ensuring Equal Pay Protections For All Workers:** While the EEOC's primary focus has been combating discrimination in pay based on sex, the EEOC also addresses pay discrimination based on any protected status, including race, ethnicity, age, and disability.

5 **Preserving Access to the Legal System:** The focus within this priority is on practices that discourage or prohibit individuals from exercising their rights, including, according to the EEOC, "overly broad waivers, releases, and mandatory arbitration provisions," failure to maintain applicant and employee data, and retaliatory practices that dissuade employees from exercising their rights.

6 **Preventing Systemic Harassment:** This priority is directed at harassment, most frequently based on sex, race, disability, age, national origin, and religion. According to the EEOC, this strategic priority typically involves systemic cases.

# 5. The EEOC's Strategic Enforcement Priorities

Despite the significant changes in leadership that have occurred over the past few years, the EEOC continues to operate under its Strategic Enforcement Plan ("SEP") for FY 2017-2021, established in October 2016.[78] The EEOC first unveiled its SEP in December 2012, stating that the plan "established substantive area priorities and set forth strategies to integrate all components of EEOC's private, public, and federal sector enforcement to have a sustainable impact in advancing equal opportunity and freedom from discrimination in the workplace."[79] The Commission's six major enforcement priorities have remained consistent across both iterations of the SEP. But the EEOC can and has changed how it interprets those priorities over the life of those Plans, which has often led to a shift in how the EEOC approaches litigation and the topics and issues it chooses to enforce in the federal courts.[80] According to the EEOC "the purpose of the [Strategic Enforcement Priorities] is to focus and coordinate the EEOC's programs to have a sustainable impact in reducing and deterring discriminatory practices in the workplace."[81]

Additionally, the 2017-2021 SEP recognized the importance of "systemic" cases to its overall mission. Systemic cases are those with a strategic impact, meaning they affect how the law influences a particular community, entity, or industry. The EEOC continues to place special emphasis on systemic lawsuits.

In November 2019, the EEOC announced that it would be replacing the combined Performance Accountability Report that used to be published in November of each year.[82] Among other things, the annual Performance Accountability Report contained data regarding the number of systemic cases being handled by the EEOC. The EEOC will now be publishing an Agency Financial Report in November and a separate Annual Performance Report in February along with the EEOC's Congressional Budget Justification. The Annual Performance Report will report on the progress of the EEOC's efforts to achieve its strategic goals and objectives. Employers will have to wait for that Report in February for updated data regarding the EEOC's pursuit of systemic cases.

As in FY 2020, the EEOC reported in this year's Agency Financial Report that the Commission again filed only 13 systemic cases, down from 17 in FY 2019 and 37 in FY 2018.[83] Systemic lawsuits accounted for 11% of total filings by the EEOC in FY 2021. In contrast, by the end of FY 2018, the EEOC had 71 systemic cases on its active docket, two of which included over 1,000 victims. Systemic cases accounted for 23.5% of all active merits lawsuits in that year. [84]

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[78] U.S. Equal Employment Opportunity Commission, *Press Release: EEOC Updates Strategic Enforcement Plan* (Oct. 17, 2016), https://www.eeoc.gov/eeoc/newsroom/release/10-17-16.cfm. To date, there has been no suggestion that the SEP will change in 2022.

[79] U.S. Equal Employment Opportunity Commission Strategic Enforcement Plan FY 2017 - 2021, https://www.eeoc.gov/eeoc/plan/sep-2017.cfm.

[80] *See* Gerald L. Maatman, Jr., Christopher J. DeGroff, Matthew J. Gagnon, and Ala Salameh, *What A Long Strange Year It's Been . . . The EEOC's Fiscal Year Comes To An Uncharacteristically Quiet Close*, Workplace Class Action Blog (Sept. 30, 2019), https://www.workplaceclassaction.com/2019/09/what-a-long-strange-year-its-been-the-eeocs-fiscal-year-comes-to-an-uncharacteristically-quiet-close/.

[81] U.S. Equal Employment Opportunity Commission Strategic Enforcement Plan FY 2017 - 2021, https://www.eeoc.gov/eeoc/plan/sep-2017.cfm.

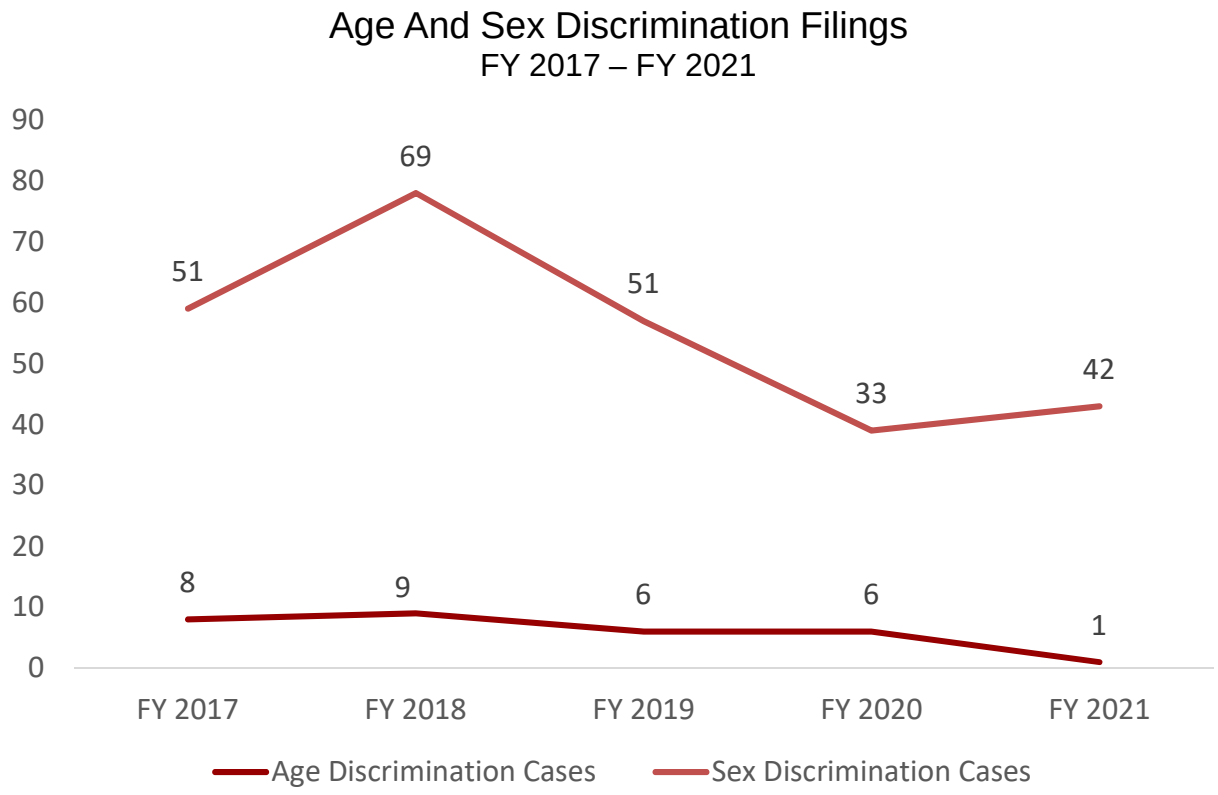
[82] U.S. Equal Employment Opportunity Commission, Fiscal Year 2019 Agency Financial Report, at 9, https://www.eeoc.gov/eeoc/plan/upload/2019afr.pdf.

[83] U.S. Equal Employment Opportunity Commission, Fiscal Year 2020 Agency Financial Report, at 11, https://www.eeoc.gov/sites/default/files/2020-11/2020-AFR.pdf.

[84] U.S. Equal Employment Opportunity Commission, Fiscal Year 2018 Performance and Accountability Report, https://www.eeoc.gov/eeoc/plan/2018par.cfm.

# Priority #1 - Eliminating Barriers In Recruitment And Hiring

The EEOC will focus on recruitment and hiring practices that discriminate against racial, ethnic, religious groups, older workers, women, and people with disabilities.




*Most of the EEOC's recent enforcement activity has focused on combatting hiring practices that could result in age discrimination. But this year saw a number of judicial decisions involving the EEOC's other attempts to combat discrimination, particularly against women.*

## B. The Elimination Of Systemic Barriers In Recruitment And Hiring

Over the past decade, the EEOC has spent a considerable amount of its enforcement budget litigating issues that it sees as barriers to recruitment and hiring.[85] Most of its recent enforcement activity has focused on combatting hiring practices that could result in age discrimination. But this year saw a number of judicial decisions involving the EEOC's other attempts to combat discrimination, particularly discrimination against women, including through the use of pre-employment screening tests.

### 1. Recent Judicial Decisions Involving Discrimination Against Women Applicants And Employees

The EEOC's efforts to eliminate potential discrimination that is delivered through the use of pre-employment screening tests has a long history. Those cases have fallen out of fashion as the EEOC has focused its attention on other ways that employers might unwittingly erect barriers to recruitment and hiring of certain groups. But the rise of third-party firms who offer assistance to employers in making employee selections could give rise to a new wave of these types of lawsuits. Employers who use such services must be certain that the methods they use are suited for their purpose and have been properly vetted for disparate impact. An employer who fails to independently verify the methodologies used by these firms run the risk of incurring discrimination charges against themselves.

For example, in *EEOC v. Stan Koch & Sons Trucking, Inc.*,[86] the U.S. District Court for the District of Minnesota granted summary judgment on liability for the EEOC and against an employer who relied on a physical abilities test to select employees for truck driver positions. The EEOC alleged that the physical abilities test had a discriminatory impact on female drivers.[87] The employer required new employees to pass a physical abilities test, called the "CRT test," during orientation. If they failed, their employment offers were revoked.[88] The EEOC introduced expert evidence that found that "93.9% of CRT tests taken by male applicants resulted in a passing score, whereas 52% of CRT tests taken by female applicants resulted in a passing score," a pass rate that was statistically significant to 24.9 standard deviations.[89] The EEOC also introduced expert evidence from an expert on employee selection, personnel management, and test validation, who found "no evidence of the validity of the CRT test that conforms to any accepted method for establishing job- relatedness," and that "the job task analyses [employer] did in 2009 and 2015 did not document the physically demanding tasks of the driver position, so they could not substitute as 'validation strategies,' and that "the job task analyses were insufficient to show that the CRT test is content-valid because they did not establish the necessary link between the tasks a driver at [employer] performed, the physical ability necessary to perform those tasks, and the physical abilities measured by the CRT."[90] The employer had not offered nay expert opinion of its own.

The Court analyzed the employer's motion under the "disparate impact" analysis of Title VII, which prohibits facially neutral employment practices that fall more harshly on one group than another and cannot

[85] *See* U.S. Equal Employment Opportunity Commission Strategic Enforcement Plan FY 2017 - 2021, at 6-9 (identifying the elimination of barriers in recruitment and hiring as one 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").

[86] *EEOC v. Stan Koch & Sons Trucking, Inc.*, No. 19-CV-2148 , 2021 WL 3910001 (D. Minn. Aug. 30, 2021).

[87] *Id*. at *1.

[88] *Id*. at *2. The CRT test "measures a person's range of motion and torque in their shoulders, knees, and trunk," and computes this information into a "Body Index Score." *Id*. The court noted that "CRT markets the test as preventing 'musculoskeletal disorder injuries to knees, shoulders, and back' by matching the physical abilities of a job applicant to the physical requirements of a job." *Id*. The employer hired another third party company, NovaCare Work Strategies, "to analyze the work tasks of its various driver positions and classify them according to exertion level, such as "medium duty" or "heavy duty," under the definitions provided in the Dictionary of Occupational Titles," which were then used to ascertain the BIS needed to perform the duties of the position. *Id*.

[89] *Id*. at *2.

[90] *Id*. at *3.

be justified by business necessity.[91] The court held that the EEOC had easily met the requirements of its prima facie case, i.e., to show: "(1) an identifiable, facially-neutral personnel policy or practice; (2) a disparate effect on members of a protected class; and (3) a causal connection between the two."[92] The court noted that the first two elements were clear: "the CRT test as a means of selecting employees is a facially-neutral personnel practice," and "[employer's] own data reveals that the test had a disparate effect on female job applicants in the form of low passage rates."[93] With respect to causation, the court noted that "courts consider tests of statistical significance to determine whether a disparity can reasonably be attributed to chance."[94] Based on the EEOC's statistical evidence of causation, the court concluded that the EEOC had met its prima facie case.

The burden then shifted to the employer to show that its test was job related and consistent with business necessity.[95] The employer relied on the fact that its cutoff scores for the CRT test were based on the professional estimates of one of CRT's founders. But that founder had passed away years ago and a number of CRT's relevant records had been destroyed in a flood.[96] Although the employer's cutoff scores were consistent with CRT's literature, the court found that CRT representatives "could not offer further specifics about the data sets or peer-reviewed literature," and although the "calculation" or "formula" CRT used was developed by the founder and programmed into the server, "no one at CRT today knows what it is."[97] Accordingly, the employer's proof of job-relatedness was based on hearsay that would be inadmissible at trial.[98]

The EEOC has historically argued that statistics play a critical role in hiring cases. In *EEOC v. Performance Food Group, Inc.*,[99] the EEOC alleged that the employer had engaged in a pattern or practice of discrimination against women for hiring into its "operative positions," *i.e.*, workers who operate machine or processing equipment or perform other factory-type duties of an intermediate skill level.[100] The EEOC presented statistical evidence that showed a statistically significant disparity in offer rates between male and female applicants for the five operative positions at issue during the relevant time periods, which had controlled for experience, online application, and, for drivers, whether the applicant had a Class A

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[91] *Id*.

[92] *Id*.

[93] *Id*.

[94] *Id*. However, the employer pointed out problems with how the EEOC's expert had determined gender for use in her statistical analysis by running applicant's first name through a website database called genderchecker.com to identify the gender(s) typically associated with that name. *Id*. at *5. However, the Court held that this issue would have impacted less than half of one percent of the sample and therefore the EEOC's expert's "handling of missing or inconsistent gender data does not materially undermine the strength or reliability of her opinions." *Id*.

[95] The EEOC argued that the employer was required to produce a validity study, as required by the EEOC's own Uniform Guidelines on Employee Selection Procedures. *Id*. at *6. The Court never addressed that question, however, as it found that the employer had failed to submit any evidence that the CRT test was relevant to the jobs applied for. *Id*. The court acknowledged that "some level of physical strength is required to be a driver at [employer]," noting that "[d]rivers have to get into and out of the cab, climb on and off the back of the truck, inspect the truck, and crank up and down the trailer's stabilizing dolly," and depending on the truck, "secure their cargo using heavy tarps and straps, and . . . assemble a decking and ramping system." *Id*. But that alone was not enough. To meet its burden, the employer had to show that the CRT test-generated BIS scores and the employer's cutoff for determining pass or fail had a "manifest relationship to the employment in question." *Id*. at *6-7 (quoting *Hawkins v. Anheuser-Busch, Inc.*, 697 F.2d 810, 815 (8th Cir. 1983)). The Court noted that "[a] cutoff score is permissible if it is 'based on a professional estimate of the requisite ability levels, or, at the very least by analyzing the test results to locate a logical 'break-point 'in the distribution of scores.'" *Id*. (quoting *Bew v. City of Chicago*, 252 F.3d 891, 895 (7th Cir. 2001)).

[96] *Id*. at *7.

[97] *Id*.

[98] The Court concluded that "even if the testimony of the CRT corporate designee about his conversations with [founder] concerning the development of the BIS formula and the relationship of BIS scores to generalized job exertional categories were somehow admissible, [employer] cannot justify its use of cutoff scores that cause a disparate impact on women by reference to unspecified data sets or literature, or computations processed through an unknown algorithm." *Id*. at *8. With respect to business necessity, the court found that "there is no evidence from which a reasonable factfinder could conclude that the use of the CRT test was "essential" to resolving Koch's "demonstrable" problem with workplace injury and workers compensation claims – or that any such problem existed in the first place." *Id*. at *9.

[99] *EEOC v. Performance Food Group, Inc.*, No. 13-CV-1712, 2020 WL 1287957 (D. Md. Mar. 18, 2020).

[100] *Id.* at *1-2.

 

license.[101] The employer argued that the EEOC's expert analysis had improperly aggregated selection rates across positions, operating companies, and years, and had failed to properly control for differences in experience among applicants. The court held that the EEOC "clearly has made out a prima facie case with respect to its pattern or practice claim," finding that "[t]he EEOC's statistical analysis shows statistically significant disparities in the hiring of male and female applicants, adverse to female applicants, across operative positions and OpCos, even when controlling for experience. It has presented other statistical evidence showing that some OpCos hired no female applicants in certain positions for the entire period 2004–2009 or 2009–2013."[102] The court stopped short of finding in favor of the EEOC with respect to liability under the two-part *Teamsters* framework applied to pattern or practice cases. Although the EEOC met its burden as to its *prima facie* case, the court held there were numerous genuine disputes of material fact regarding the statistical analysis and anecdotal evidence that precluded summary judgment.[103]

Other cases of discrimination are arguably more clear cut. Where there is direct evidence of discriminatory intent, the path for the EEOC is much easier, and the path for the employer is much more difficult. For example, in *EEOC v. NDI Office Furniture LLC*,[104] the EEOC alleged that the employer did not hire women for warehouse positions because they would be a "distraction" to male employees and retaliated against the charging party and her son due to her complaints about the allegedly discriminatory treatment.[105] Among other things, the court pointed to statements by the warehouse manager and more senior managers that the employer does not hire women for warehouse positions.[106] The court held that these statements are '"prime examples 'of direct evidence of discrimination without the need to infer discriminatory intent."[107] With respect to the pattern or practice allegations, the court held that "the content of these statements suggests a broad discriminatory policy toward *all* women," and concluded: "the existence of that evidence simply means that a jury must decide this question by balancing it against other evidence, such as the 'fact 'that there no women were employed in a warehouse role during the period contemporaneous with the statements evidencing discrimination and that Defendant failed to hire any of the eleven women who applied for the Warehouse Coordinator Position."[108]

Another case decided this year demonstrates the unique problems that the EEOC can encounter when it brings lawsuits that allege discriminatory hiring practices. In *EEOC v. USF Holland, LLC*,[109] the EEOC alleged that the employer had discriminated against female applicants for truck driving positions. The charging party was allegedly denied a position due to discrimination in May 2015, but did not file a charge of discrimination until October 8, 2015. The court held that "Section 706 authorizes the EEOC to sue on behalf of one or more 'persons aggrieved' by an unlawful employment practice," and "when a plaintiff brings a class action on behalf of aggrieved applicants, the plaintiff may allow applicants who did not file a charge to 'piggyback' onto a timely charge filed by another applicant."[110] However, The "piggyback" (or "single-filing") rule, only allows such aggrieved applicants to do so "if the discrimination they allege occurred during the relevant limitations period, as determined by the charge underlying the federal court action."[111] The relevant timeline in that case was 180 days. Accordingly, the court held that any claim predating April 11, 2015 (180 days prior to the date of the charging party's charge) was time-barred.[112]

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[101] *Id.* at *3.

[102] *Id.* at *7. The court also faulted the employer's recruiting efforts, finding that it had identified the target demographic for its radio ads as "male," and that it had intentionally sought males for warehouse positions and females for receptionist positions. *Id.*

[103] *Id.* at *8. Under that framework, the EEOC bears the initial burden of making out a prima facie case of discrimination by establishing by a preponderance of the evidence that sex discrimination was the company's standard operating procedure.

[104] *EEOC v. NDI Office Furniture LLC*, No. 2:18-CV-01592, 2021 WL 2635356 (N.D. Ala. June 25, 2021).

[105] *Id.* at *5-6.

[106] *Id.* at *9.

[107] *Id.*

[108] *Id.* at *10 (emphasis in original).

[109] *EEOC v. USF Holland, LLC*, No. 3:20-CV-270, 2021 WL 4497490 (N.D. Miss. Sept. 30, 3021).

[110] *Id*.

[111] *Id*.

[112] *Id*. Moreover, the court held that the EEOC could not resort to the "continuing violation doctrine" because that doctrine does not apply to a failure-to-hire claim, even in the case of an alleged systemic policy or pattern and practice. *Id*. at *2. This is because

## 2. Developments In The EEOC's Pursuit Of Age Discrimination Claims

As noted above, age discrimination claims continue to make up a large part of the EEOC's docket in terms of its attempts to eliminate barriers in recruitment and hiring. This focus continues to result in substantial litigation wins for the EEOC and important developments in the law of age discrimination.

For example, in *Frappied v. Affinity Gaming Black Hawk, LLC*,[113] an appeal for which the EEOC filed an *amicus curiae* brief, the Tenth Circuit held as a matter of first impression that the federal anti-discrimination laws allowed for "intersectional" sex-plus-age discrimination claims, noting that: "[r]esearch shows older women are subjected to unique discrimination resulting from sex stereotypes associated with their status as older women," which is "distinct from age discrimination standing alone."[114] In that case, former employees filed employment discrimination claims alleging that their employer terminated them on the basis of age and sex. The charging parties were employed at the employer's Golden Mardi Gras Casino. In January 2013, many of the casino's employees were laid off. The terminations were not a reduction in force, and Defendant posted an advertisement on Craigslist following the layoffs listing 59 open positions. The charging parties were nine of those terminated employees, including eight women and one man. All were forty or older when they were terminated. The female plaintiffs brought "sex-plus-age" disparate impact and disparate treatment claims under Title VII, alleging they were terminated because the employer discriminated against women over forty, and disparate impact and disparate treatment claims under the ADEA, alleging they were terminated because of their age.[115]

The Tenth Circuit held that sex-plus-age claims are cognizable under Title VII, reversing the district court's ruling. The Tenth Circuit found no material distinction between a sex-plus-age claim and the other "sex-plus" claims they have previously recognized, such as claims for which the "plus-" element is marital status or having preschool-age children.[116] Because a sex-plus-age claim alleges discrimination against an employee because of sex and some other characteristic, the Tenth Circuit found that qualifies as a sex discrimination claim. To establish discrimination under a sex-plus-age theory, the Tenth Circuit held that a plaintiff must show unfavorable treatment relative to an employee of the opposite sex who also shares the "plus-" characteristic – *i.e.*, a male employee over 40.[117]

The EEOC has won other critical precedent-setting decisions in this area in recent years. For example, in *EEOC v. Baltimore County*,[118] the U.S. District Court for the District of Maryland held that the EEOC need not follow the procedural requirements of collective actions required of private litigants under the Fair Labor Standards Act. The District Court held that the ADEA's statutory scheme plainly permitted the EEOC to pursue an enforcement action under its provisions without obtaining the consent of the employees it seeks to benefit.[119] The District Court concluded that the provisions governing FLSA collective actions are not

"[f]ailure to hire is a "discrete act" which is easy to identify and distinguished from hostile work environment claims, which the Supreme Court has found amenable to the continuing violation doctrine." *Id*.

[113] *Frappied v. Affinity Gaming Black Hawk, LLC*, 966 F.3d 1038 (10th Cir. 2020).

[114] *Id.* at 1049.

[115] *Id.* at 1045.

[116] *Id.* at 1045-46.

[117] *Id.* at 1049. Moreover, the Tenth Circuit also concluded that, accepting the EEOC's allegations, it was plausible that the employer's termination policies resulted in a significant disparate impact on workers forty or older and reversed the dismissal of their ADEA disparate impact claim. *Id.* at 1055. Finally, the Tenth Circuit affirmed the dismissal of Plaintiff's Title VII disparate treatment claim, but reversed the district court's granting of summary judgment on Plaintiffs' ADEA disparate treatment claim. *Id.* at 1058. The Title VII and ADEA disparate impact claims, along with the ADEA disparate treatment claim, were remanded back to the district court. *Id.* at 1061.

[118] *EEOC v. Baltimore County*, No. 07-CV-2500, 2019 WL 5555676 (D. Md. Oct. 28, 2019).

[119] *Id.* at *4. The ADEA does not provide its own, discrete procedures governing an action instituted by the EEOC. Rather, the statute requires that it shall be enforced in accordance with the powers, remedies, and procedures provided in certain provisions of the FLSA, including the collective action procedures found under § 216(b). Collective actions under that section require employees to opt in or consent to join a lawsuit.

 

applicable to the EEOC and therefore do not require the EEOC to obtain the consent of employees before pursuing a lawsuit on their behalf.[120]

Other decisions have been important because they demonstrate how difficult it can be for employers to dispense with age discrimination cases before trial, upping the cost and burden of such cases to employers. For example, in *EEOC v. Rockauto, LLC*,[121] the U.S. District Court for the Western District of Wisconsin held that an employer's use of discretionary exceptions to hire applicants who did not meet its stringent hiring criteria left questions for a jury to decide at trial as to whether those exceptions were used in a manner that discriminated against older employees. In that case, the EEOC brought an action on behalf of a charging party who allegedly was not hired for a position because of his age, in violation of the ADEA. Defendant filed a motion for summary judgment.[122]

Finding that the EEOC had presented sufficient evidence of similarly situated comparators who had been treated more favorably, despite not having met the employer's stringent hiring criteria, the Court denied the motion for summary judgment. In particular, the Court noted that the EEOC had "presented objective evidence in the form of comparators, other individuals who received preferential job treatment despite having equal or lesser qualifications than the plaintiff or claimant."[123] There was a question, therefore, as to whether the employer had used its discretionary exceptions, called an "Auto Pass" and a "Jim Pass," in a discriminatory manner: "[a] juror could reasonably conclude that these two factors did not justify giving a Jim Pass to [comparator] but not to [charging party], who had extensive relevant experience. And [employer's] decision is particularly notable because he credited [comparator] for showing ambition by applying while still in college, a factor that would typically apply only to younger applicants."[124]

Similarly, in *EEOC v. Board of Regents of the University of Wisconsin System*,[125] the U.S. District Court for the Western District of Wisconsin allowed an ADEA case to proceed to trial after finding that the employer's stated reasons for passing over an applicant were vague and subjective. The EEOC brought a lawsuit on behalf of a University Services Program Associate against the University of Wisconsin system, alleging that the charging party had been denied a position because of her age.[126] The employer stated the charging party's application was rejected because of her past job performance and poor interview. The District Court held that the employer's evidence was vague and that a reasonable jury could find its explanations to be pretextual.[127] The Court concluded that "[i]n light of the [employer's] failure to provide more specific reasons for its decision," "EEOC's evidence is sufficient to show a genuine issue of material fact requiring a trial."[128]

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[120] According to the district court, when the EEOC files suit under the ADEA, it must look to the section of the statute that governs procedures that would be followed by the Secretary of Labor, rather than those that would pertain to actions brought by private employees. "There is simply no reason to read the statute in such a way as to require the EEOC to obey the procedures governing *private* actions under the FLSA while ignoring those governing administrative enforcement actions under the FLSA." *Id.*

[121] *EEOC v. Rockauto, LLC*, No. 18-CV-797, 2020 WL 1505637 (W.D. Wis. Mar. 30, 2020).

[122] The EEOC alleged that the charging party was more qualified than younger candidates who advanced further in Defendant's hiring process; that Defendant's hiring system was biased against older applicants, using applicants' graduation dates as a proxy for their ages and overvaluing academic accomplishments in comparison to job experience; that Defendant scored charging party's application less favorably than similarly situated, younger applicants; and that Defendant declined to give charging party a pass in the application process but passed similarly situated, younger applicants. *Id.* at *2.

[123] *Id.* at *3.

[124] *Id.* at *4.

[125] *EEOC v. Board of Regents of the University of Wisconsin System*, No. 18-CV-602, 2019 WL 5802546 (W.D. Wis. Nov. 7, 2019).

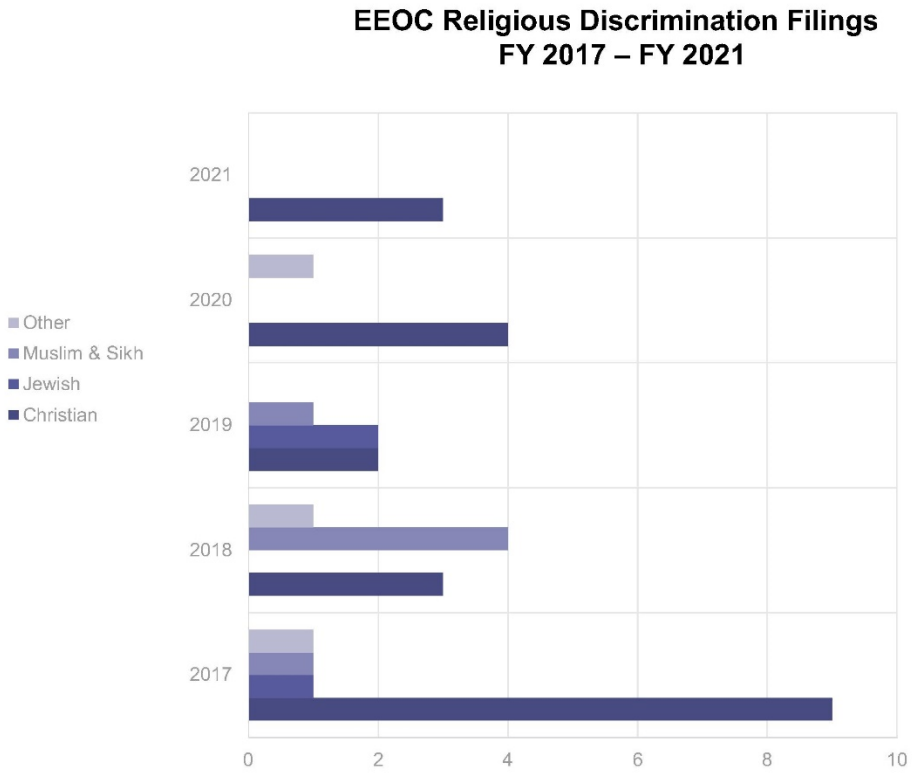
[126] *Id.* at *1-2. In response to budget cuts, the University system had consolidated its marketing departments, and the charging party's position was identified as one of the 13 positions that would be eliminated due to that reorganization. Although she was invited to apply for other positions, she was not selected for any of the positions she requested. *Id.*

[127] *Id.* at *4. It was undisputed that the charging party's performance evaluations were uniformly positive and that she received a recommendation from her former supervisor. The only evidence that the employer presented regarding her past performance were vague statements that charging party was not "responsive" or "timely." Similarly, with respect to interview performance, the District Court held that the employer's reasons for rejecting the charging party's application were vague and subjective. *Id.*

[128] *Id.* at *5.

# Priority #2 - Protecting Vulnerable Workers

The EEOC will focus on job segregation, harassment, trafficking, pay, retaliation and other policies and practices against vulnerable workers including immigrant and migrant workers, as well as persons perceived to be members of these groups, and against members of underserved communities.




*For several years, the EEOC's SEP identified as one of its top strategic enforcement priorities addressing discriminatory practices against those who are Muslim or Sikh, or persons of Arab, Middle Eastern or South Asian descent, as well as persons perceived to be members of these groups, arising from backlash against them from tragic events in the United States and abroad. According to the SEP, the EEOC continues to see an increase in charges involving religious discrimination against Muslims and those with a Middle Eastern background.*

## C. Protection Of Immigrant, Migrant, And Other Vulnerable Workers

The EEOC's SEP identifies the protection of immigrant, migrant, and other vulnerable workers as a national enforcement priority. Much of that activity in recent years has focused on three issues: (1) the protection of employees against religious bias in the workplace, especially Muslim employees; (2) national origin discrimination that is exacerbated by political and cultural developments around that world that impact U.S. society; and (3) protecting the rights of immigrants to seek assistance from the EEOC and the Courts to combat and remedy illegal discrimination.

### 1. Enforcement Developments In Religious Discrimination

For several years, the EEOC's SEP identified as one of its top strategic enforcement priorities "[a]ddressing discriminatory practices against those who are Muslim or Sikh, or persons of Arab, Middle Eastern or South Asian descent, as well as persons perceived to be members of these groups, arising from backlash against them from tragic events in the United States and abroad."[129] According to the SEP, the EEOC continues to see an increase in charges involving religious discrimination against Muslims and those with a Middle Eastern background.[130]

The EEOC's focus on anti-Muslim bias has often centered on the protection of employees who face discrimination because of their religious attire or grooming. The EEOC has repeatedly stressed that employers may not refuse to hire someone who, because of their religious attire, may make customers uncomfortable; nor can they force an employee to remove their religious attire or change their duties to keep them out of view of the public.[131] 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.[132] On June 1, 2015. In *EEOC v. Abercrombie & Fitch Stores, Inc*.[133] the U.S. Supreme Court agreed with the EEOC, holding 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.[134]

The EEOC continues to bring – and win – cases under the *Abercrombie* standard. For example, in *EEOC v. Greyhound Lines, Inc.*,[135] the EEOC alleged that the employer had discriminated against an observant Muslim woman when it refused to allow her to wear an abaya, a loose-fitting, floor-length garment worn by some women in the Muslim world.[136] Although the charging party withdrew from employment after learning of this prohibition, the EEOC alleged that this was an unlawful denial of religious accommodation, which

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[129] U.S. Equal Employment Opportunity Commission Strategic Enforcement Plan FY 2017 - 2021, https://www.eeoc.gov/eeoc/plan/sep-2017.cfm.

[130] *Id.*

[131] On March 6, 2014, the EEOC published its Guide to Religious Garb and Grooming. U.S. Equal Employment Opportunity Commission, *Religious Garb and Grooming in the Workplace: Rights and Responsibilities* (Mar. 6, 2014), http://www.eeoc.gov/eeoc/publications/qa_religious_garb_grooming.cfm. In that guidance, the EEOC instructs 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. The EEOC also recently issued guidelines relating to the employment of Muslims, Arabs, South Asians, and Sikhs. *See* U.S. Equal Employment Opportunity Commission, *Questions And Answers About Employer Responsibilities Concerning The Employment Of Muslims, Arabs, South Asians, And Sikhs*, https://www.eeoc.gov/eeoc/publications/backlash-employer.cfm.

[132] U.S. Equal Employment Opportunity Commission, *Religious Garb and Grooming in the Workplace: Rights and Responsibilities*, *supra* note 134, at Example 7.

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

[134] *Id.* at 2031-32. "The 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." *Id.* at 2033.

[135] *EEOC v. Greyhound Lines, Inc.*, No.19-CV-1651, 2021 WL 3565728 (D. Md. Aug. 12, 2021).

[136] *Id*. at *1.

 

resulted in a constructive discharge.[137] The Court first explained the basis for a religious accommodation claim under Title VII: "Under Title VII, it is 'unlawful' for an employer 'to fail or refuse to hire or to discharge any individual . . . because of such individual's . . . religion.' . . . The statute defines 'religion' to include 'all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business.' . . . This definition 'includes a requirement that an employer 'accommodate' an employee's religious expression.'"[138] Under a religious accommodation theory of discrimination, a plaintiff must establish that (1) he or she has a bona fide religious belief that conflicts with an employment requirement; (2) he or she informed the employer of this belief; and (3) he or she was disciplined for failure to comply with the conflicting employment requirement.[139] If the plaintiff meets these requirements for a prima facie case, the burden then shifts to the employer to show that it could not accommodate the religious needs without undue hardship.[140]

The employer conceded that the employee had a bona fide religious belief that conflicted with its uniform policy and that it had been informed of this belief. But it argued that the charging party had not been constructively discharged and had not suffered an adverse employment action.[141] The Court held that "even if [charging party] qualified only as an applicant, she was nonetheless entitled to be free of discrimination on the basis of religion in the hiring process."[142] The Court also found that the charging party had been presented with the employer's uniform policy as a "What are you going to do?" ultimatum.[143] The employer had plenty of time to clarify its policies and clear up any confusion with the charging party, but it had not done so.[144] Finally, the Court noted that there was some factual dispute as to the tolerability of charging party's working environment, noting that the employer questioned the charging party's affidavit in light of allegedly conflicting deposition testimony.[145] But the Court found that she had not been explicitly asked about the matters contained in the declaration at her deposition, and that "[a]t a minimum, [charging party's] averment that wearing a 'form fitting skirt' would 'prevent her from attaining paradise' creates a genuine issue of material fact regarding the intolerability of the prospective conditions of training and employment at Greyhound."[146]

Although the focus of the EEOC's efforts to combat religious discrimination have most often centered around issues of anti-Muslim bias, in more recent years, the EEOC has demonstrated a willingness to pursue religious discrimination claims on behalf of other religious groups as well.[147] On January 15, 2021,

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[137] *Id*.

[138] *Id*. at *7 (quoting 42 U.S.C. § 2000e-2(a), § 2000e(j), *Chalmers v. Tulon Company of Richmond*, 101 F.3d 1012, 1017-18 (4th Cir. 1996)) (citations omitted).

[139] *Id*. at *8 (quoting *EEOC v. Consol Energy, Inc*., 860 F.3d 131, 141 (4th Cir. 2017)).

[140] *Id*.

[141] *Id*. at *9. The employer relied on three arguments: that the charging party was a trainee at the time and therefore not an employee, that she failed to engage her employer in an interactive process in an attempt to arrive at a mutually acceptable accommodation, and that she had not experienced intolerable working conditions, an element of a claim of constructive discharge. *Id*. at *10.

[142] *Id*. at *11.

[143] *Id*.

[144] *Id*.

[145] *Id*. at 12-13. The charging party had submitted an affidavit regarding the sincerity of her religious belief and the impact that the employer's uniform policy would have on her. The employer argued that it was a "sham affidavit" because it conflicted with parts of her deposition testimony.

[146] *Id*. at 13. The court then considered and rejected the employer's arguments about undue hardship, concluding that the employer's record evidence was deficient, and "on this record, the court cannot conclude, as a matter of fact or law, that [charging party's] requested accommodation would have resulted in a safety risk or an undue burden on [employer]. Rather, the evidence creates triable issues of fact as to whether [charging party's] preferred accommodation would have caused a legitimate safety issue or imposed more than aa *de minimis* cost' on [employer]." *Id*. at *16 (quoting *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977)).

[147] The EEOC's focus on protecting employees' rights to practice their religion in the workplace is not limited to workers of Muslim or other mainstream faiths. The EEOC has brought several lawsuits in recent years that target different kinds of religious practice. For example, in *EEOC v. United Health Programs of America, Inc. and Cost Containment Group Inc.*, 213 F. Supp. 3d 377 (E.D.N.Y. 2016), the EEOC successfully argued that concepts known as "Onionhead" and "Harnessing Happiness" were entitled to Title VII protection as religious beliefs. *Id.* at *3-5. The court held that to determine whether a given set of beliefs constitutes a religion for purposes of Title VII, "courts frequently evaluate: (1) whether the beliefs are sincerely held and (2) whether they are, in [the

 

Commission approved revisions to its Compliance Manual Section on Religious Discrimination.[148] In addition to direction on religious discrimination and accommodation, the guidance also includes sections addressing religious organizations, the ministerial exception to Title VII, First Amendment protections to employers, and protections under the federal Religious Freedom Restoration Act ("RFRA"). The Commission's focus on such areas appears in part to be a reaction to the U.S. Supreme Court's *Bostock* decision, as the introduction to the updated guidance specifically refers to the Court's language in the opinion on religious liberty.[149]

The potential conflict between *Bostock* and the RFRA came to a dramatic head in *Bear Creek Bible Church v. EEOC*.[150] The plaintiffs in this case were a nondenominational Christian Church and a for-profit Christian institution who argued that they were protected from complying with LGBTQ anti-discrimination provisions due to their sincerely held religious beliefs. The court first held that the church was exempt from Title VII.[151] Finding that the institution did not qualify for Title VII's statutory exemption, the court examined whether it was nevertheless protected by the RFRA, that is, whether Title VII would substantially burden its sincere exercise of religion, and whether Title VII substantially burdens the institution's ability to conduct business in accordance with those beliefs. The court first concluded that there was "no dispute" that "[the institution] sincerely exercises its religious beliefs as embodied in its employment policies."[152] The court then considered whether plaintiff satisfied the test for establishing a substantial burden – *i.e.*, that it "(1) identif[ed] the religious exercise; (2) allege[d] that the challenged law pressures plaintiff to modify that exercise; and (3) show[ed] that the penalty for noncompliance is substantial."[153] The court concluded that the institution met this test, holding that the first element was not disputed and "[f]or the second, the religious employers are required to choose between two untenable alternatives: either (1) violate Title VII and obey their convictions or (2) obey Title VII and violate their convictions."[154]

Since plaintiffs established a "substantial burden," defendants were required to show that the "substantial burden is justified by a compelling interest and that they have chosen the least restrictive means of advancing that interest."[155] The court found the defendants' "overly broad formulation of its compelling interest" – that the government has a compelling interest "in eradicating workplace discrimination" – to be without merit.[156] Rather than relying on broadly formulated interests, courts must scrutinize the "asserted harm of granting specific exemptions to particular claimants"; the relevant question is "whether the government has a compelling interest in *denying* employers like [the institution] a religious exemption."[157] Further, the court held that "[f]orcing a religious employer to hire, retain, and accommodate employees who conduct themselves contrary to the employer's views regarding homosexuality and gender identity is not the least restrictive means of promoting that interest, especially when Defendants are willing to make exceptions to Title VII for secular purposes."[158] Accordingly, the court granted summary judgment to the plaintiffs as to their RFRA claim.

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believer's] own scheme of things, religious." *Id.* at 394.[147] Under that rubric, the court found that Onionhead was a religion under Title VII. *Id.* at 398.

[148] Press Release, Equal Employment Opportunity Commission, Commission Approves Revised Enforcement Guidance on Religious Discrimination (Jan. 15, 2021), *available at* https://www.eeoc.gov/newsroom/commission-approves-revised-enforcement-guidance-religious-discrimination.

[149] U.S. Equal Employment Opportunity Commission, EEOC Compliance Manual Section 12: Religious Discrimination at n.2 (2021).

[150] *Bear Creek Bible Church v. EEOC*, No. 4:18-CV-00824, 2021 WL 5449038 (N.D. Tex. Nov. 22, 2021).

[151] *Id.* at *23.

[152] *Id.*

[153] *Id.* (citing *Eastern Texas Baptist University v. Burwell*, 793 F.3d 449, 456 (5th Cir. 2015), *vacated and remanded sub nom. Zubik v. Burwell*, 578 U.S. 403, *and cert. granted, judgment vacated sub nom. Univ. of Dall. v. Burwell*, 578 U.S. 969 (2016)).

[154] *Id.* As to the third element, the court found that the "penalty for non-compliance would be EEOC enforcement, which would subject Braidwood to liability for backpay, compensatory damages, and punitive damages." *Id.*

[155] *Id.*

[156] *Id.*

[157] *Id.* (emphasis in original).

[158] *Id.* On this same basis, the court granted summary judgment as to plaintiffs' First Amendment claim, applying strict scrutiny to the analysis since "Title VII is not a generally applicable statute to the existence of individualized exemptions." *Id.* at *26. The court held that the defendants' "broadly formulated government interests" were insufficient to withstand First Amendment challenge. *Id.* The

The court also analyzed whether, under *Botstock v. Clayton County*, the plaintiffs' policies against bisexual conduct, concerning certain sexual activities and dress codes, prohibiting hormone treatments and genital surgery, and regarding sex-specific restrooms, violated Title VII. The court first concluded that the proper test to be applied was "favoritism, plus blindness to sex if the secondary trait is homosexuality or transgenderism."[159] The court reasoned that the "simple favoritism test" could not be "fully recognized with the Supreme Court's analogies, and neither can the blindness test standing alone given *Botstock's* articulation of the standard."[160] The court concluded that the polices against bisexual conduct "inherently target[] sex" and therefore violated Title VII, to the extent that an "individual who is bisexual inherently identifies as homosexual to some extent, even if they also identify as heterosexual, because bisexuality is some combination of the two orientations."[161] The court similarly held that the policies prohibiting hormone treatments and genital surgery violated Title VII since they would only function to discriminate against individuals with gender dysphoria.[162] As to the policies regarding certain sexual activities, dress code, and sex-specific restrooms, the court found that such policies comported with Title VII because they applied evenly to heterosexual and homosexual activity, did not "treat one sex worse than the other," and therefore did not discriminate "because of sex."[163]

The EEOC's focus on religious accommodation cases has been met with some recent setbacks. For example, in *EEOC v. Walmart Stores East LP*,[164] the U.S. District Court for the Western District of Wisconsin dismissed a Title VII claim based on an alleged failure to offer a religious accommodation due, in part, to the charging party's failure to cooperate with the employer regarding the proposed accommodation. On March 31, 2021, the Seventh Circuit affirmed the District Court's decision.[165] The Seventh Circuit held that: "[Employer] made an offer that could have put [charging party] in a management job without working on the Sabbath, but he wanted to be an assistant manager and nothing less. Unless Title VII entitles [charging party] to that position, Walmart must prevail."[166] The EEOC suggested that the employer could have allowed the charging party to trade shifts with other assistant managers or assign him to a shift that would not require him to work Fridays or Saturdays. But in either case, that would have forced other assistant managers to take more shifts on weekends, which "would not be an accommodation *by the employer*, as Title VII contemplates. This proposal would thrust on *other workers* the need to accommodate [charging party's] religious beliefs."[167] Because the EEOC's proposed accommodations would either place more than a "slight burden" on the employer or shift that burden onto other employees, the Seventh Circuit affirmed the lower court's decision.

## 2. Developments In The EEOC's Approach To National Origin Discrimination

National origin discrimination has become an increasing target of EEOC enforcement activity. The EEOC has expressed in a number of places that it is concerned about the impact that global phenomena can have on worker relations in the United States. Historically, those concerns have been focused on how global terrorism and unrest in the Middle East could lead to discrimination against Muslim or Sikh employees or those of Middle Eastern or South Asian descent, or how illegal immigration issues could give rise to discrimination against Mexican or South and Central American workers. The COVID-19 pandemic could change this focus somewhat. An outbreak of a deadly pandemic that had its origin in China has

court also found that the institution was "engaged in overt expression regarding tis religious views of homosexuality and transgender behavior." *Id.* at *28.

[159] *Id.* at 31.

[160] *Id.* (citing *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1741 (2020) ("[I]f changing the employee's sex would have yielded a different choice by the employer—a statutory violation has occurred.").

[161] *Id.*

[162] *Id.* at 35.

[163] *Id.* at 34-35.

[164] *EEOC v. Walmart Stores East LP*, No. 18-CV-804, 2020 WL 247462, at *7 (W.D. Wis. Jan. 16, 2020).

[165] *EEOC v. Walmart Stores East LP*, 992 F.3d 656 (7th Cir. 2021).

[166] *Id.* at 659.

[167] *Id.* (emphasis in original).

 

given rise to increased concerns about national origin discrimination against Asian Americans, as cautioned by Chair Dhillon in a statement issued early in the COVID-19 pandemic.[168]

The legal issues around this form of national origin discrimination have often focused on the perception of membership in a racial or ethnic group, as it is often the case that different nationalities or races are lumped together with this type of discrimination. The EEOC has long argued that discrimination on the basis of perceived national origin is just as actionable as any other kind of national origin discrimination. For example, in *EEOC v. MVM, Inc.*,[169] the U.S. District Court for the District of Maryland held that "Title VII permits claims of discrimination based on perceived national origin," and noted that "[t]o conclude otherwise would be to allow discrimination to go unchecked where the perpetrator is too ignorant to understand the difference between individuals from different countries or regions, and to provide causes of action against only those knowledgeable enough to target only those from the specific country against which they harbor discriminatory animus."[170]

## 3. Protection Of Immigrants' Rights To Combat Discrimination In The Courts

Over the past few years, the EEOC has litigated several issues related to the potential "chilling" effect that might result if employers are able to use litigation to learn the immigration status of their accusers. For example, in *EEOC v. Sol Mexican Grill LLC*,[171] the U.S. District Court for the District of Columbia refused an employer's request to take discovery that would or potentially could reveal the immigration status of charging parties, their families, and any potential claimants or witnesses.[172] The District Court held that "[f]orcing those who allege discrimination to reveal their immigration status in order to have access to the courts may cause those facing discrimination, both citizens and undocumented people, to 'fear that their immigration status would be changed, or that their status would reveal the immigration problems of their family or friends.'"[173] According to the District Court, such a chilling effect could make it less likely that other workers would bring alleged discriminatory practices to light in court.[174]

Courts have also consistently held that immigrants – even if they are in the country illegally – are protected by the federal workplace discrimination statutes. For example, last year the U.S. District Court for the District of Maryland held in *EEOC v. Phase 2 Investments, Inc.*,[175] that discrimination against undocumented workers was an unlawful employment practice under Title VII. In that case, the District Court held that "discrimination against an employee on the basis of his race, national origin, or participation in EEOC investigations is an unlawful employment practice under Title VII even if that employee is an undocumented alien, and the EEOC may therefore pursue its claim here."[176] The District Court noted that to hold otherwise would allow employers to hire undocumented workers and then unlawfully discriminate against them.[177]

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[168] U.S. Equal Employment Opportunity Commission, "Message From EEOC Chair Janet Dhillon on National Origin and Race Discrimination During the COVID-19 Outbreak," (Mar. 26, 2020), https://www.eeoc.gov/wysk/message-eeoc-chair-janet-dhillon-national-origin-and-race-discrimination-during-covid-19.

[169] *See EEOC v. MVM, Inc.*, No. 17-CV-2864, 2018 U.S. Dist. LEXIS 81268, at *1-2 (D. Md. May 14, 2018).

[170] *Id.* at *33, 36-37.

[171] *EEOC v. Sol Mexican Grill LLC*, No. 18-CV-2227, 2019 WL 2896933 (D.D.C. June 11, 2019).

[172] *Id.* at *1.

[173] *Id.* (quoting *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1065 (9th Cir. 2004)).

[174] *Id.* at *2. The Fifth Circuit came to a similar conclusion in *Cazorla v. Koch Foods of Mississippi, L.L.C.*, 838 F.3d 540 (5th Cir. 2016) (holding that defendant's requests for records relating to the worker-plaintiffs' U visa applications "may sow confusion over when and how U visa information may be disclosed, deterring immigrant victims of abuse . . . from stepping forward and thereby frustrating Congress's intent in enacting the U visa program").

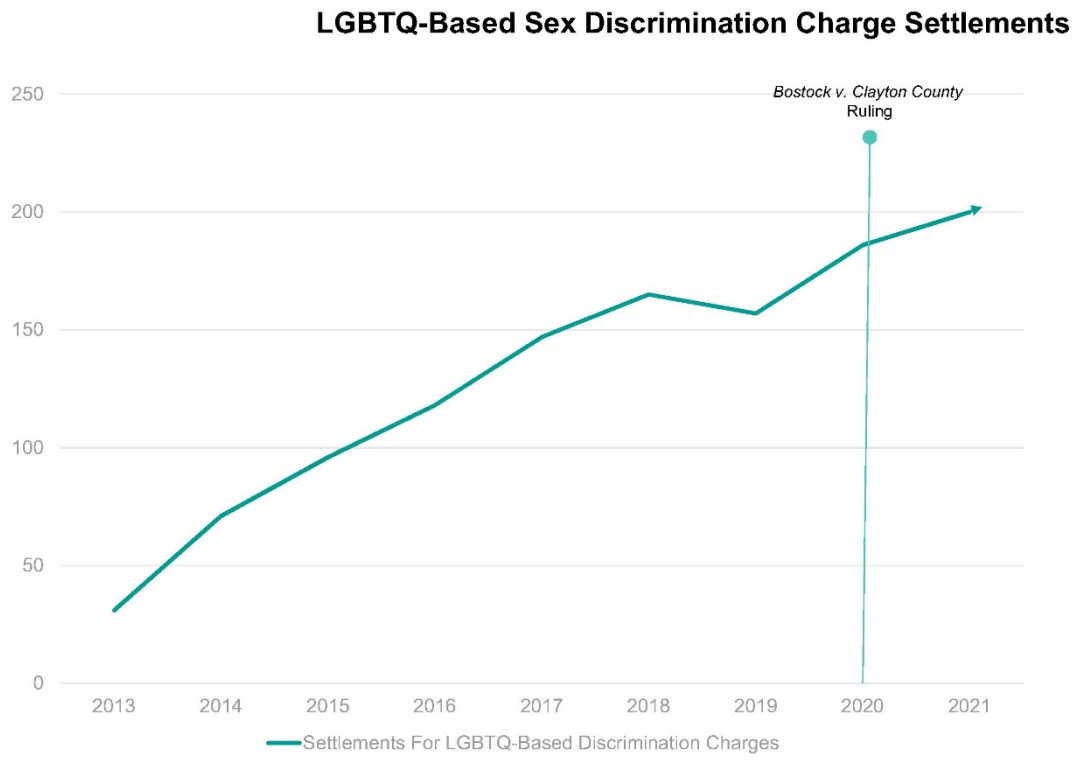
[175] *EEOC v. Phase 2 Investments Inc.*, 310 F. Supp. 3d 550, 555 (D. Md. 2018).

[176] *Id.* at 576-80.

[177] *Id.* at 579.

# Priority #3 - Emerging Issues

## As a government agency, the EEOC is responsible for monitoring trends and developments in the law, workplace practices, and labor force demographics.




*On June 15, 2020, the Supreme Court ruled in its landmark decision, R.G. and R.H. Funeral Home v. EEOC/Bostock v. Clayton Count, that Title VII prohibits discrimination against gay or transgender employees as a form of sex discrimination. The EEOC has been diligently pursuing this theory of discrimination in the courts for several years, resulting in quite a few victories in line with the Bostock decision. Employers should expect that the EEOC will be even more vigilant in enforcing this new federal workplace protection for the foreseeable future.*

# D. Addressing Emerging And Developing Issues

Part of the EEOC's mission is to monitor trends and developments in the law, workplace practices, and labor force demographics to identify emerging and developing issues that can be addressed through its enforcement program.[178] The 2017 Strategic Enforcement Plan identified five emerging and developing issues as strategic priorities:

- Qualification standards and inflexible leave policies that discriminate against individuals with disabilities;
- Accommodating pregnancy-related limitations under the Americans with Disabilities Act Amendments Act (ADAAA) and the Pregnancy Discrimination Act (PDA);
- Protecting lesbian, gay, bisexual, and transgender (LGBT) individuals from discrimination based on sex;
- Clarifying the employment relationship and the application of workplace civil rights protections in light of the increasing complexity of employment relationships and structures, including temporary workers, staffing agencies, independent contractor relationships, and the on-demand economy; and
- Addressing discriminatory practices against those who are Muslim or Sikh, or persons of Arab, Middle Eastern or South Asian descent, as well as persons perceived to be members of these groups, arising from backlash against them from tragic events in the United States and abroad.[179]

This section describes how the EEOC has interpreted and targeted these developments and, in some cases, has been active in changing the law to address them.

## 1. Recent Court Decisions Involving Pregnancy Discrimination

Pregnancy discrimination has been highlighted by the EEOC as an emerging and developing issue of concern for almost a decade. Yet cases alleging such discrimination and case law interpreting this area of the law have been few and far between. This year was a notable exception.

In *EEOC v. Wal-Mart Stores East, LP*,[180] the U.S. District Court for the Western District of Wisconsin granted summary judgment in favor of an employer defending against pregnancy discrimination claims. The EEOC alleged that the employer discriminated against the charging party and ten other pregnant employees by failing to accommodate their pregnancy-related medical restrictions by allowing them to work light duty assignments under a temporary alternative duty program.[181] The EEOC alleged that the employer required them to take unpaid leave if they could not perform their job duties, even though they allowed employees with occupational or work-related injuries to use the light duty program. The employer argued that its light duty program was pregnancy-neutral and that the EEOC therefore could not point to employees in that program as comparators.[182] Relying on the recent Supreme Court case, *Young v. United Parcel Service, Inc.*,[183] the court held that a plaintiff's burden to establish a prima facie case was not onerous. With respect to comparators, the EEOC must only show that the charging party's employer "accommodated others 'similar in their ability or inability to work.'"[184]

The court then considered the employer's reasons for restricting its light duty program to workers injured on the job, i.e., that it increased morale and loyalty, sped up recovery time, and decreased costs and legal

[178] *See* U.S. Equal Employment Opportunity Commission Strategic Enforcement Plan FY 2017 - 2021, *available at* https://www.eeoc.gov/eeoc/plan/sep-2017.cfm.

[179] *Id.*

[180] *EEOC v. Wal-Mart Stores East, LP*, No. 18-CV-783, 2021 WL 664929 (W.D. Wis. Feb. 19, 2021).

[181] *Id.* at *1.

[182] *Id.* at *8.

[183] *Young v. United Parcel Service, Inc.*, 135 S. Ct. 1338 (2015).

[184] *Wal-Mart Stores East, LP*, 2021 WL 664929, at *8 (quoting *Young*, 135 S. Ct. at 1354).

exposure.[185] The court held that *Young* allows an employee to prove pretext "by providing sufficient evidence 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."[186] Although the EEOC had shown that a significant number of workers injured on the job had been allowed access to the light duty program while no pregnant employees had been able to use that program, it had not shown whether and to what extent other injured employees – who were not injured on the job – were allowed to use that program.[187] Moreover, pregnant employees and employees who were disabled (but not injured on the job) were apparently equally able to access the employer's ADA accommodation policies. According to the court, therefore, "there [was] insufficient evidence from which a reasonable jury could determine that defendant's ADA policy treated pregnant employees less favorably than non-pregnant employees with disabilities or non-pregnant employees who had temporary medical restrictions from injuries sustained off the job."[188]

The EEOC has enjoyed more success with pregnancy discrimination claims where there is direct evidence of intentional discrimination. In *EEOC v. Nice Systems, Inc.*,[189] t the EEOC alleged that the employer had discriminated against the charging party on the basis of pregnancy through four actions: (1) transferring certain existing sales accounts to a newly hired employee; (2) refusing to assign a new sales lead in [charging party's] territory to her; (3) invoking the "windfall" provision of [charging party's] employment contract to cap the amount of commission she could receive on an audit/ settlement; and (4) upon her return from maternity leave, reassigning her Canada territory to a male colleague.[190] The EEOC presented direct evidence of intentional discrimination in the form of statements made by the charging party's supervisor referencing her "condition" and "type of situation," and questioning whether she would have the bandwidth to work on a new work opportunity "with everything else that is going on."[191] The court found that these statements "constitute[] direct evidence of [supervisor's] intention to base a disadvantageous decision regarding [charging party's] employment upon an impermissible factor. Moreover, I find that there exist genuine issues of fact regarding whether [supervisor] would have initially refused to assign [charging party] the GM Lead had he not been taking her pregnancy into consideration."[192] The court also found against the employer on the EEOC's retaliation claims, but found that its conduct did not rise to a level of severity and pervasiveness necessary to sustain a constructive discharge claim.[193]

## 2. Continuing Developments In Sexual Orientation and Transgender Discrimination After *Bostock*

Few issues have garnered as much of the EEOC's attention over the past few years as its campaign to have LGBTQ discrimination recognized as a prohibited form of discrimination under Title VII.[194] That issue was finally settled in 2020 by the U.S. Supreme Court in the landmark decision of *R.G. and R.H. Funeral Home v. EEOC/Bostock v. Clayton County.* On June 15, 2020, the Supreme Court issued its opinion, ruling

[185] *Id.* at *9.

[186] *Id.* at *10 (quoting *Young*, 135 S. Ct. at 1354).

[187] *Id.*

[188] *Id.* at *11.

[189] *EEOC v. Nice Systems, Inc.*, No. 20-CV-81021, 2021 WL 3707959 (S.D. Fla. Aug. 5, 2021).

[190] *Id.* at *1. The Court first explained the legal basis of a pregnancy discrimination claim under the Pregnancy Discrimination Act: "The Pregnancy Discrimination Act of 1978 amended Title VII to define the terms 'because of sex' or 'on the basis of sex' to include 'because of or on the basis of pregnancy, childbirth, or related medical conditions.. . . 'Women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work. . . .'" *Id.* at *3 (quoting 42 U.S.C. § 2000e(k)).

[191] *Id.* at *4.

[192] *Id.*

[193] *Id.* at *6-7.

[194] The EEOC's Strategic Enforcement Plan explicitly identifies "[p]rotecting lesbians, gay men, bisexuals and transgender (LGBT) people from discrimination based on sex" as one of its key emerging and developing issues. *Id.*

that Title VII prohibits discrimination against gay or transgender employees as a form of sex discrimination.[195] The 6-3 decision authored by Justice Gorsuch was a significant victory for the EEOC.

In its opinion, the Supreme Court held that "[a]n employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids."[196] Further, it noted that although "[t]hose who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result . . . the limits of the drafters' imagination supply no reason to ignore the law's demands."[197] After noting that "[f]ew facts are needed to appreciate the legal question we face," the Supreme Court explained that, "[e]ach of the three cases before us started the same way: An employer fired a long-time employee shortly after the employee revealed that he or she is homosexual or transgender – and allegedly for no reason other than the employee's homosexuality or transgender status."[198] The Supreme Court reasoned that because discrimination on the basis of homosexuality or transgender status requires an employer to intentionally treat individual employees differently because of their sex, an employer who intentionally penalizes an employee for being homosexual or transgender also violates Title VII.

The EEOC has been diligently pursuing this theory of discrimination in the courts for several years, resulting in quite a few victories in line with the *Bostock* decision. Employers should expect that the EEOC will be even more vigilant in enforcing this new federal workplace protection for the foreseeable future. The implications of how this decision will impact the American workforce will have to wait for future developments as *Bostock* is interpreted and applied in courts across the country.

For example, in *Roberts v. Glenn Industrial Group, Inc.*,[199] the EEOC appeared as *amicus curiae* in a case brought by an employee who alleged, among other things, that he had been subjected to same-sex sexual harassment by his supervisor. The alleged sexual harassment involved calling the charging party "gay," among many other allegations. The district court had denied his claim, holding that he had not established one of the three situations that would support a claim of same-sex sexual harassment identified in *Oncale v. Sundowner Offshore Services*,[200] In *Oncale*, the Supreme Court had held that Title VII does not bar claims of discrimination merely because the harasser and the victim are of the same sex.[201] The Supreme Court held that a victim of same-sex harassment can prove his or her claim: "(1) when there is 'credible evidence that the harasser is homosexual' and the harassing conduct involves 'explicit or implicit proposals of sexual activity;' (2) when the 'sex-specific and derogatory terms' of the harassment indicate 'general hostility to the presence of the victim's sex in the workplace'; and (3) when comparative evidence shows that the harasser treated members of one sex worse than members of the other sex in a 'mixed-sex workplace.'"[202] The District Court had held that the second and third situations did not apply because there was no evidence that the charging party's supervisor was motivated by a general hostility towards men in the workplace and because it was not a mixed-sex workplace (it was only men).[203] And the first situation did not apply because there was no evidence that the harasser was homosexual.[204]

The Fourth Circuit held that the District Court had erred in interpreting *Oncale* as setting forth an exclusive list of situations of actionable same-sex sexual harassment. According to the Fourth Circuit, this was not even the situation of *Oncale*, since in that case, the victim's claim did not fall under any of the three identified situations.[205] The court concluded: "we reject [defendant's] arguments that [charging party's] claim is limited to the evidentiary routes described in *Oncale*, and that [charging party] cannot show that

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[195] *Bostock v. Clayton County, Ga.*, 140 S. Ct. 1731 (2020).

[196] *Id*. at 1737.

[197] *Id.*

[198] *Id.*

[199] *Roberts v. Glenn Industrial Group, Inc.*, No. 19-1215, 2021 WL 2021812 (4th Cir. May 24, 2021).

[200] *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998).

[201] *Roberts*, 2021 WL 2021812, at *4.

[202] *Id.* (quoting *Oncale*, 523 U.S. at 80-81).

[203] *Id.*

[204] *Id.*

[205] *Id.*

the harassment was based on sex because [supervisor] is not gay and did not make explicit or implicit proposals of sexual activity."[206] Relying on *Bostock*, the Fourth Circuit held that "a plaintiff may prove that same-sex harassment is based on sex where the plaintiff was perceived as not conforming to traditional male stereotypes."[207] The court also instructed the District Court to further examine whether the supervisor's alleged physically abusive behaviors, such as "choking and slapping" the charging party, though not overtly sexual, "were part of a pattern of objectionable, sex-based discriminatory behavior."[208]

## 3. Developments In Disability Discrimination Law

Lawsuits alleging discrimination under the ADA are consistently the most frequently filed types of EEOC lawsuits. The ADA prohibits employers from discriminating against "qualified individual[s] on the basis of disability."[209] To establish 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.[210] Accordingly, the best way for employers to guard against EEOC-initiated ADA litigation is to develop an understanding of how the EEOC interprets these elements.

In 2020, the COVID-19 pandemic quickly became the most important topic in ADA litigation for the EEOC. Indeed, the EEOC's technical guidance for employers addressing issues arising due to COVID-19 focuses primarily on issues under the ADA and reasonable accommodation obligations for employers.[211] COVID-19 has also given rise to substantial employment litigation across the country. Many of those cases have alleged various theories of discrimination under state law that touch on principles of disability discrimination. However, employees who wish to bring an ADA claim against their employer must first exhaust their administrative remedies by filing a charge with the EEOC. The EEOC then investigates the charge and either brings a lawsuit on the charging party's behalf or issues a right to sue letter that allows the charging party to bring those claims as a private litigant in federal court. So although there is bound to be a significant uptick in ADA litigation over the next few months, the full scope of the impact that COVID-19 will have on the development of disability discrimination law will not be fully known until those issues filter through the charge handling process and into the federal courts.

### a. Recent Decisions Interpreting The ADA's Requirements Regarding "Reasonable Accommodations" And "Qualified Individuals"

One form of discrimination under the ADA is a failure to provide reasonable accommodations to employees with disabilities. What constitutes a reasonable accommodation is one of the most frequently and hotly contested issues in ADA litigation, often giving rise to seemingly conflicting case law across the country. This issue is sometimes intertwined with the concept of a "qualified" individual" under the ADA. Such individuals are those who meet the basic requirements of an employment position, and who can perform the essential functions of that position with or without reasonable accommodation.

Despite this well-worn formula for assessing the need for a reasonable accommodation, in 2021, a court agreed with the EEOC's argument that the need for a reasonable accommodation does not always depend on the requirements of a position. In *EEOC v. Kaiser Foundation Health Plan of Georgia, Inc.*,[212] the U.S. District Court for the Northern District of Georgia held that where an employer had an independent duty to provide an accommodation, there was no need for the EEOC to establish that it is needed to perform the

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[206] *Id.* at *5.

[207] *Id.* at *6.

[208] *Id.*

[209] 42 U.S.C. § 12112(a).

[210] *See*, *e.g.*, *Gowesky v. Singing River Hosp. Sys.*, 321 F.3d 503, 511 (5th Cir. 2003), *cert. denied* 540 U.S. 815; *Holbrook v. City of Alpharetta, Ga.*, 112 F.3d 1522, 1526 (11th Cir. 1997).

[211] U.S. Equal Employment Opportunity Commission, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws* (last updated Sept. 8, 2020), https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws.

[212] *EEOC v. Kaiser Foundation Health Plan of Georgia, Inc.*, No. 1:19-CV-5484, 2021 WL 3508533 (N.D. Ga. Aug. 9, 2021).

 

essential functions of a job. In that case, the employer objected to a Report & Recommendation of the Magistrate Judge who decided the parties' competing motions for summary judgment in the EEOC's favor. At issue was the Magistrate's conclusion that the employer's failure to accommodate the charging party by allowing her to use a non-revolving door to enter the workplace due to her claustrophobia amounted to a denial of reasonable accommodation.[213] The employer argued that the charging party's physical letter did not state whether the charging party's condition affected her ability to perform her job or for how long she would need an accommodation, and that it needed that information before it could grant the accommodation request.[214] The Magistrate held that employers have two separate reasonable accommodation requirements. They must accommodate employees who need such an accommodation to perform the essential functions of their job, but they must also have an independent duty to make their facilities "readily accessible to and usable by individuals with disabilities."[215]

The District Court agreed with the Magistrate's reading of the statute, finding that "[t]he statute expressly states that employees are obligated to accommodate employees by making existing facilities used by employees readily accessible to and usable by individuals with disabilities," and that the text "gives no indication that requests like [charging party's] must facilitate the essential functions of one's position to trigger the employer's obligation.[216] Because the statutory text was plain, the District Court held that its "sole function" was to "enforce it according to its terms."[217] As a matter of first impression in the Eleventh Circuit, therefore, the District Court held that a qualified disabled employee can state a claim for denial of reasonable accommodation under the provision of the ADA that requires employers to make their facilities accessible to persons with disabilities without showing that the accommodation was necessary for the performance of their job functions: "there may be circumstances in which employers are obligated to provide reasonable accommodations to their employees even though the accommodation is not tied to an essential function of the employee's job."[218]

Most reasonable accommodation cases, however, still turn on a qualified individual's ability to perform the essential functions of a job. For example, in *EEOC v. Wal-Mart Stores East LP*,[219] the EEOC alleged that an employee with Down Syndrome was fired on account of her disability after she was not able to manage a change to her regular schedule. The employer argued that her termination was because of attendance issues, and that she could not be considered a qualified individual with a disability under the ADA because she was not able to perform the essential functions of her job; namely, coming to work regularly.[220] In light of how important consistent routines are for people with Down Syndrome, the court concluded that a jury would have to decide if the charging party's attendance violations were merely a pretext for discrimination because of her disability.[221] Similarly in *EEOC v. PML Servs. LLC*,[222] the U.S. District Court for the Western District of Wisconsin denied summary judgment for an employer where the evidence showed that a housekeeper was able to do her job, provided that she was allowed some time off every once in a while to deal with her seizures, which occurred on average only once a year.[223] The court concluded that the

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[213] *Id*. at *1.

[214] *Id*.

[215] *Id*. at *2 (quoting 42 U.S.C. § 12111(9)(A)).

[216] *Id*. at *5 (citations and quotations omitted).

[217] *Id*. (quoting *Arlington Central School District Board of Education v. Murphy*, 548 U.S. 291, 296 (2006)).

[218] *Id*. at *6.

[219] *EEOC v. Wal-Mart Stores East LP*, 436 F. Supp. 3d 1190 (E.D. Wis. 2020).

[220] *Id.* at 1201. The Court noted, however, that "[i]t was only after [employer] moved to computer scheduling and changed [charging party's] shift and required her to work until 5:30 p.m. that she experienced significant problems with attendance." *Id.* at 1202. The real question, therefore, was whether the employer should have accommodated the charging party by changing her schedule back. The employer argued that her schedule was based on computer analytics regarding customer traffic and operational demand, which showed that a Sales Associate was needed between 4:00 and 5:30 p.m. *Id.* The Court noted that that the Associate did not need to be the charging party, and the employer had not shown that the requested accommodation would pose an undue hardship. *Id.* at 1202-03.

[221] *Id.* at 1205.

[222] *EEOC v. PML Servs. LLC*, No. 18-CV-805, 2020 WL 3574748 (W.D. Wis. July 1, 2020).

[223] In that case, the EEOC alleged that a hotel housekeeper was fired due to her seizure disorder without being offered a reasonable accommodation. *Id.* at *1. The employer argued that the EEOC could not establish a prima facie case of disparate treatment discrimination because it could not show that the charging party was a "qualified person with a disability" because she could not perform the essential functions of her position with or without reasonable accommodation. *Id.* at *5. The Court noted that

employer had "not shown that [charging party's] missing a few days each year to recover from a seizure amounts to her inability to perform the essential functions of her job."[224]

On the other hand, in *Elledge v. Lowe's Home Centers, LLC*,[225] the Fourth Circuit affirmed a decision by the District Court that held that an employee with a disability was not a qualified individual because he was unable to perform the essential functions of his job. The EEOC alleged that the employer discriminated against an employee whose job entailed frequent visits to stores within his geographic area after that employee underwent knee surgery that made it difficult for him to perform the required driving and walking.[226] The Fourth Circuit agreed with the trial court's determination that the essential functions of the job included: (1) standing or walking in excess of 4 hours each day; (2) travelling to all supervised stores; and (3) working in excess of 8 hour each day."[227] The Fourth Circuit also held that it was "not open to serious dispute" that the charging party could not perform those functions after his knee surgery.[228] The question was whether he could perform those duties with reasonable accommodations. The Fourth Circuit held that he could not. The record showed that the charging party had not followed his own doctor's orders regarding light duty and declined to use the motorized scooter that was offered by the employer.[229] The court concluded that "even the version of the record most favorable to [charging party] does not tell the story of a disabled employee who followed his doctor's orders regularly or utilized his accommodations fully. Instead, it tells the story of an individual who accepted or created certain accommodations, rejected others, and pushed himself beyond the limits of his doctor's orders."[230]

Questions about whether an employee can perform the essential functions of a job with reasonable accommodation often require employers to make difficult decisions that impact the safety of the workplace. For example, in *EEOC v. T&T Subsea, LLC*,[231] the U.S. District Court for the Eastern District of Louisiana had to decide whether a diver was qualified for his position even though he could not pass a dive physical when he was terminated.[232] The employer asserted a "direct threat" defense, arguing that the charging party posed a significant risk to the health or safety of others that could not be eliminated by reasonable accommodation.[233] The court denied summary judgment to the employer on that defense, however, because of the existence of "genuine issues of material fact regarding whether [employer] meaningfully assessed [charging party's] ability to perform his job safely based on the best available objective evidence and reasonably concluded that [charging party] posed a direct threat."[234]

### b. Recent ADA Decisions Regarding What Qualifies As A Disability

One frequently litigated topic in ADA litigation is what counts as a "disability" under the ADA. There is no hard and fast rule that can be applied to make this determination. Whether a condition rises to the level of

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the charging party had been terminated because she accrued three absences during her 90-day probationary period, which is two more than allowed by company policy. *Id.*

[224] *Id.* Moreover, although the employer argued that her absences placed a significant burden on its other staff, the Court concluded that there was "little evidence to show that the burden was significant," and that the charging party "ha[d] submitted evidence showing that her seizures are rare, suggesting that her requests for time off would be infrequent." *Id.* at *6.

[225] *Elledge v. Lowe's Home Ctrs., LLC*, 979 F.3d 1004 (4th Cir. 2020).

[226] *Id.* at 1007-08.

[227] *Id.* at 1009-10.

[228] *Id.* at 1011.

[229] *Id.* at 1012.

[230] *Id.*; *see also EEOC v. Austal USA, LLC*, 447 F. Supp. 3d 1252, 1269 (S.D. Ala. 2020) (holding that because the evidence showed that the charging party could not follow any work schedule on a regular basis, the EEOC had failed to show that there was any reasonable accommodation that would allow the charging party to perform the essential functions of his job).

[231] *EEOC v. T&T Subsea, LLC*, 457 F. Supp. 3d 565 (E.D. La. 2020).

[232] In that case, an employee whose job duties included diving to perform underwater welding and other commercial services was terminated after receiving cancer surgery. *Id.* at 569-70. Although the employee had informed his employer that he would be able to get medical clearance to return to work within four weeks, and in fact did get that clearance, the EEOC alleged that the employer terminated him because he could not pass the dive physical. *Id.* at 570.

[233] *Id.* at 575.

[234] *Id.* at 576. Among other things, the court pointed to the fact that the charging party was later granted clearance to dive by his physician and was hired as a diver by other companies. *Id.*

 

a disability under the ADA often depends on a fact-specific inquiry as to whether the condition substantially limits a major life activity.

For example, *EEOC v. Loflin Fabrication, LLC*[235] involved a metal fabricating business, which requires the use of dangerous equipment, including welding equipment, lasers, and heavy equipment such as cranes and forklifts.[236] Due to those dangers, the employer prohibited employees from working under the influence of any narcotic and performed random drug testing. The employer also required employees to disclose their prescribed medication so it would know if an employee was taking medicine that would affect his or her ability to work safely in potentially dangerous conditions.[237] The charging party was fired after she failed to disclose that she had been prescribed muscle relaxants for a neck condition until she was selected for a random drug test.[238] The court ultimately granted summary judgment for the employer because the EEOC had failed to establish that the pain in the charging party's neck substantially limited a major life activity.[239]

Several recent decisions considered whether and to what extent emotional and mental problems rise to the level of a disability under the ADA. For example, in *EEOC v. Crain Automotive Holdings LLC*,[240] the U.S. District Court for the Eastern District of Arkansas held that anxiety and panic attacks could rise to the level of a disability under the ADA and that whether her impairment substantially limited a major life activity was a question of fact for the jury.[241]

But in *EEOC v. West Meade Place LLP*,[242] the U.S. District Court for the Middle District of Tennessee held that a charging party's anxiety condition did not rise to the level of a disability under the ADA because the EEOC had not met its burden to establish that the charging party had a history of anxiety of such severity that it substantially limited one or more of her major life activities.[243] On February 8, 2021, however, the Sixth Circuit reversed the District Court's decision, holding that it had misapplied the ADA as amended in 2008.[244] Those amendments made it illegal for an employer to discriminate against an individual who is regarded as having a disability, "whether or not the impairment limits or is perceived to limit a major life activity."[245]

The Sixth Circuit explained that an ADA action under the "regarded as" prong "requires no showing about the severity of the impairment," and "an employee need only show that their employer believed they had a 'physical or mental impairment,' as that term is defined in federal regulations. Once an employee establishes that the employer perceived him or her as having an impairment, the employee must

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[235] *EEOC v. Loflin Fabrication, LLC*, 462 F. Supp. 3d 586 (M.D.N.C. 2020).

[236] *Id.* at 590.

[237] *Id.* at 591.

[238] The court noted that the ADA prohibits employers from requiring a medical examination or making inquiries of an employee's possible disability unless such examination or inquiry is shown to be job-related and consistent with business necessity. *Id.* at 595. However, there was inconsistent evidence as to whether the employer's policy required the disclosure of all prescriptions or just narcotic prescriptions. *Id.* at 598. Moreover, it was unclear whether the employer had ever inquired into whether the charging party's prescription was a narcotic. *Id.* Faced with those disputed issues of fact, the court denied summary judgment to the employer on this aspect of the EEOC's claim. *Id.*

[239] *Id.* at 601-03.

[240] *EEOC v. Crain Auto. Holdings LLC*, 372 F. Supp. 3d 751 (E.D. Ark. 2019).

[241] *Id.* at 755. In that case, the EEOC brought a lawsuit on behalf of a charging party who suffered from anxiety, depression, and panic attacks. *Id.* at 753. The charging party experienced chest pains and went to the emergency room. After two days of treatment, she learned that her chest pain was the result of a panic attack. *Id.* When she returned to work, she was terminated by her supervisors, who allegedly told her that "it was not working out" due to her health problems and that she needed to take care of herself. *Id.* at 753-54. The court found that the charging party's panic attacks made her feel paralyzed, caused chest pain, and caused difficulty with breathing, thinking, communicating with others, and reasoning. Moreover, her depression caused her to be unable to care for herself, communicate with others, or think coherently. *Id.* at 755.

[242] *EEOC v. West Meade Place LLP*, No. 3:18-CV-101, 2019 WL 5394314 (M.D. Tenn. Oct. 22, 2019).

[243] *Id.* at *6.

[244] *EEOC v. West Meade Place LLP*, No. 19-6469, 2021 WL 424444 (6th Cir. Feb. 8, 2021).

[245] 42 U.S.C. § 12102(3)(A).

demonstrate that the perceived impairment was a 'but-for' cause of the employer's adverse decision."[246] Accordingly, the Sixth Circuit held that it was no defense for the employer to argue that it could not have regarded the charging party as having a disability because her anxiety did not affect her ability to do her work. The magnitude of the impairment is not controlling; the employer's evidence did not "necessarily rebut the notion that [employer] could have 'perceived' her 'as having an impairment' and fired her because of that perceived limitation, particularly in light of the updated standard under the ADA."[247]

### c. Recent Cases Addressing What Constitutes Discrimination "On The Basis Of Disability"

Other ADA lawsuits hinge on what constitutes "discrimination on the basis of disability." Those determinations are often fact-intensive and require courts to weigh facts around the timing of critical employment events and an employer's imputed knowledge at those times. For example, in *EEOC v. Cracker Barrel Old Country Store, Inc.*,[248] the U.S. District Court for the District of Maryland denied summary judgment to an employer on the basis of the suspicious timing of events related to a failure to hire. In that case, the EEOC alleged that the employer refused to hire the charging party because he was hearing impaired.[249] The employer argued that it did not refuse to hire the charging party, but rather had delayed its consideration of hiring, or, alternatively, that his disability did not play a role in the employer's decision not to hire him.[250] The court disagreed, holding that the facts of the case would allow a factfinder to conclude that the charging party was not selected for hire because of his disability. Among other things, the court found that the charging party's application was "stonewalled" after the employer learned of his disability, that it had not kept interview dates and did not respond to follow-up phone calls, and the fact the employer "offered to interview [charging party] only *after* he filed his discrimination charge with the EEOC . . . may be viewed by the factfinder as a cover-tracks maneuver rather than mere forgivable 'delay.'"[251]

Some courts also consider timing a critical element to determining whether an employee can be "regarded as" having a disability.[252] Similarly, employers should be mindful of the EEOC's focus on the use of pre-job-offer questionnaires. The EEOC may take the position that they may run afoul of the ADA. Indeed, an employer does not have to take an affirmative act of turning an applicant away because of their disability. The EEOC may claim that employers are liable for ADA discrimination even when an applicant refuses to apply.[253]

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[246] *Id.* at *4 (quoting *Babb v. Maryville Anesthesiologists P.C.*, 942 F.3d 308 (6th Cir. 2019); *Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312, 321 (6th Cir. 2012) (citations and quotations omitted)).

[247] *Id.* at *5 (quoting 42 U.S.C. § 12102(3)(A)).

[248] *EEOC v. Cracker Barrel Old Country Store, Inc.*, No. 8:18-CV-2674, 2020 WL 247305 (D. Md. Jan. 16, 2020).

[249] *Id.* at *3.

[250] *Id.* at *3-4.

[251] *Id.* at *3 (emphasis in original).

[252] *See EEOC v. STME, LLC*, 938 F.3d 1305, 1316 (11th Cir. 2019) (holding that the "regarded as having" prong of the ADA requires that a disability be a present physical or mental impairment: "[i]n 'regarded as' cases, a plaintiff must show that the employer knew that the employee had an actual impairment or perceived the employee to have such an impairment at the time of the adverse employment action," and that that prong did not extend to an employer's belief that an employee might contract or develop an impairment in the future); *EEOC v. Amsted Rail Co.*, 280 F. Supp. 3d 1141, 1153 (S.D. Ill. 2017) (holding that an employer was liable under the ADA for denying individuals positions based merely on their *potential* to suffer future medical injuries due to abnormal results from a nerve conduction test, explaining that the test "does not indicate an individual's contemporaneous inability to perform the chipper job but only a prospective, future threat to his health if he were to perform the job," and that the restrictions imposed by the employer were "based on a generalized assumption about an abnormal [test] result rather than 'an individualized assessment of the individual and the relevant position,' as required under the ADA"); *EEOC v. McLeod Health, Inc.*, 914 F.3d 876, 882 (4th Cir. 2019) (noting that the employer knew that the charging party was able to perform the essential functions of her job for 28 years, even though she suffered from limited mobility and sometimes fell at work, but holding that a reasonable jury could conclude that it was not reasonable for the employer to believe that the charging party was a direct threat to herself on the job simply because she fell multiple times recently and because she looked groggy and out of breath).

[253] For example, in *EEOC v. Grisham Farm Prods., Inc.*, 191 F. Supp. 3d 994, 997 (W.D. Mo. 2016), the court held that employers may make an "acceptable inquiry" at the pre-offer stage into "the ability of an applicant to perform job-related functions," however, both the ADA's legislative history and implementing regulations make clear that such inquiries should not be phrased in terms of disability. Here, the employer required job-applicants to fill out a health history form before they were considered for the job, even if the "applicant" never actually applied for the job. The court held that it was irrelevant that the charging never actually filled out a health history form or applied for a position, since the employer's policy could deter job applications from those who are aware of the discrimination nature of the policy and were unwilling to subject themselves to the humiliation of explicit and certain rejection.

 

The EEOC has been successful in some recent cases establishing that an employment policy itself is discriminatory. For example, in *EEOC v. UPS Ground Freight, Inc.*,[254] the EEOC challenged an employer's collective bargaining agreement, which provided that commercial drivers whose licenses were suspended or revoked for non-medical reasons, including convictions for driving while intoxicated, would be reassigned to non-driving work at their full rate of pay, while drivers who become unable to drive due to medical disqualifications, including individuals with disabilities within the meaning of the ADA, were provided full-time or casual inside work at only 90% of their rate of pay.[255] The EEOC succeeded in convincing the court that the language of the collective bargaining agreement itself established a *prima facie* case of a discriminatory policy under the ADA because it paid drivers disqualified for medical reasons less than what it paid drivers disqualified for non-medical reasons.[256] The District Court granted a permanent injunction against the employer, holding that "[i]t is immaterial whether medically disqualified drivers have other options; paying employees less because of their disability is discriminatory."[257]

On March 2, 2020, the court denied cross motions for summary judgment, holding that the parties had presented insufficient evidence to conclude as a matter of law, among other things, that the charging party had an impairment that substantially limited major life activities.[258] In that decision, the court first considered the nature of the charging party's disability. By then, the EEOC had abandoned its claim that the charging party was actually disabled at the time that he suffered an adverse employment action. Instead, the EEOC claimed that he either had a record of disability or that the employer regarded him as disabled at that time.[259] The charging party had suffered a stroke that required hospitalization and left him with weakness and numbness on his right side.[260] The court first held that "no reasonable jury could conclude" that the charging party was not impaired in the past because it was undisputed that the charging party "had a stroke that affected his neurological and cardiovascular systems, caused his doctor to place a work restriction on him for a period of time, and required physical therapy."[261] The court could not decide on the evidence available, however, whether that impairment substantially limited the major life activities of self-care, eating, writing, lifting, and gripping; that decision was left for the jury.[262]

The EEOC sought reconsideration of the court's ruling, arguing, among other things, that the District Court had erred in deciding that it had not met the "awareness" prong of the "regarded-as" disability claim.[263] The court applied the reasoning of *EEOC v. STME* to hold that in regarded-as discrimination claims, a plaintiff must show that the employer knew that the employee had an actual impairment or perceived the employee to have such an impairment at the time of the adverse employment action. Although *STME* and other cases had involved claims of possible future impairment, the District Court found that the same reasoning should apply to perceptions of past impairments that are not ongoing.[264] "While the court does not consider whether [charging party's] impairment was substantially limiting or whether [employer] viewed it as substantially limiting on the regarded-as claim, it must find that [employer] perceived a current impairment – perception of a past impairment that has ended will not do."[265]

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[254] *EEOC v. UPS Ground Freight, Inc.*, 319 F. Supp. 3d 1237 (D. Kan. 2018).

[255] *Id.* at 1240-41.

[256] *Id.* at 1241.

[257] *Id.* at 1242. Moreover, it was unnecessary for the court to perform a case-by-case impact analysis of individuals who may (or may not) have been harmed by the policy because a prima facie case of liability for a pattern-or practice case does not require the EEOC to offer evidence that each individual who may seek relief was a victim of the policy; the EEOC must only "show that unlawful discrimination is part of the employer's 'standard operating procedure.'" *Id.*

[258] *EEOC v. UPS Ground Freight, Inc.*, 443 F. Supp. 3d 1270 (D. Kan. 2020).

[259] *Id.* at 1281.

[260] *Id.* at 1276.

[261] *Id.* at 1283.

[262] *Id.* at 1284-85.

[263] *EEOC v. UPS Ground Freight, Inc.*, No. 17-CV-2453, 2020 WL 1984293 (D. Kan. Apr. 27, 2020).

[264] *Id.*

[265] *Id.*

# 4. Complex Employment Relationships

The EEOC's most recent SEP added a new issue under the Emerging and Developing Issues priority: focusing on complex employment relationships and structures in the 21st century workplace, specifically with respect to temporary workers, staffing agencies, independent contractor relationships, and the on-demand economy.[266] Often these issues depend on whether one or more entities can be considered the "employer" of an employee.[267] According to the EEOC's Compliance Manual, employers that are unrelated (or not sufficiently related to qualify as an "integrated enterprise") are "joint employers" of a single employee if each employer exercises sufficient control of an individual to qualify as his/her employer. Notably, the EEOC's definition is different than the statutory definitions that apply to some of the anti-discrimination laws that the EEOC enforces.

Although the EEOC added the complex employment relationship priority to its SEP in 2017, there had been few significant case law developments in this area until recently. FY 2020 saw a significant increase in decisions regarding this issue, and that trend has continued into FY 2021. The sheer number of these cases compared to prior years, along with the fact that they were decided at the early motion to dismiss stage, may indicate a developing trend toward increased enforcement in this area.

For example, in *EEOC v. CACI Secured Transformations, LLC*,[268] the U.S. District Court for the District of Maryland held that a client company of a staffing company could be held liable to the staffing company's employee. In that case, the charging party was directly employed by a staffing agency and was assigned to work for the prime contractors of an NSA engineering-services contract. The charging party was interviewed by the contractor and hired by the staffing agency under a contract that was conditioned on her selection by the contractor to work with the contractor on the NSA contract. She was then involved in a car accident that impacted her ability to work and commute to work. The contractor eventually informed the staffing agency that they wanted the charging party removed from the contract because she did not meet performance requirements. Although the staffing company attempted to find different work for her, she was not able to meet the experience or performance requirements for those positions. The EEOC sued the contractor, alleging disability discrimination.[269] The contractor moved for summary judgment, arguing that it was not the charging party's employer.

The court acknowledged at the outset of its analysis that "[t]his dispute brings to the fore 'the reality of changes in modern employment, in which increasing number of workers are employed by temporary staffing companies.'"[270] Under the ADA, decisions about who counts as an employer are decided under the "joint employer doctrine," under which an employment relationship will be found if an entity exercised sufficient control over the terms and conditions of a worker's employment.[271] The court analyzed this issue using the nine-factor test used by the Fourth Circuit. Under that test, the court found that the contractor had significant control over charging party's hiring by the staffing agency since it was conditioned upon her selection by the contractor. It also found that it had effective control over firing her since she was effectively fired when she was removed from the contract by the contractor.[272] Although the staffing agency attempted to find her other positions, she was technically formally fired at the time that she was let go by the contractor: "[Charging Party] was fired from [staffing company] immediately upon her removal from the MWIII project, with the possibility that she would be rehired if she was later placed on a different contract."[273]

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[266] *See* U.S. Equal Employment Opportunity Commission Strategic Enforcement Plan FY 2017 - 2021, *available at* https://www.eeoc.gov/eeoc/plan/sep-2017.cfm.

[267] *Id.*; *See* EEOC Compliance Manual, Section 2: Threshold Issues § 2-III(B)(1)(A)(iii)(b), *available at* https://www.eeoc.gov/policy/docs/threshold.html.

[268] *EEOC v. CACI Secured Transformations, LLC*, No. 19-CV-2693, 2021 WL 1840807 (D. Md. May 7, 2021).

[269] *Id.* at *5.

[270] *Id.* at * 6 (quoting *Butler v. Drive Auto. Indus. of Am., Inc.*, 793 F.3d 404, 410 (4th Cir. 2015)).

[271] *Id.*

[272] *Id.* at *7.

[273] *Id.*

 

The court also found that the contractor exercised day-to-day supervisory control over the charging party's employment and determined her location and nature of work because she worked side by side with and performed the same tasks as employees who were directly employed by the contractor.[274] Based on these factors (and aa quick review of the remaining factors under the Fourth Circuit's test), the court concluded that: "Looking at which – and not just how many – factors favor a finding of joint employment convinces the Court that Defendants, 'while contracting in good faith with an otherwise independent company, have retained for themselves sufficient control of the terms and conditions of employment' to be considered [charging party's] joint employer."[275]

Many complex employment situations involve successor or related entities, where the corporate structure leaves it unclear which entity makes substantive employment decisions on behalf of employees. For example, in *EEOC v. Georgina's, LLC*,[276] the District Court for the Western District of Michigan held that a restaurant could be held liable for Title VII violations that took place at a previous restaurant that held itself out as the successor to the original restaurant. The court concluded that "[New restaurant] had notice of the discrimination charge. It also continued substantially the same business of [old restaurant], using the same Facebook page and providing the same menu items under the ownership/supervision of the same individual. These facts are sufficient to state a claim for successor liability."[277]

Similarly, in *EEOC v. 1618 Concepts, Inc.*,[278] the U.S. District Court for the Middle District of North Carolina refused to dismiss from a lawsuit two corporate affiliates of the entity that actually employed the charging party. The court noted that the employee handbook had identified 1618 concepts in large font on the front page and had repeatedly referred to that organization throughout, rather than the actual employing entity.[279] The court concluded, that "under the circumstances, the court cannot say that [charging party] should have known, through reasonable effort, that 1618 Downtown, and not 1618 Concepts, was his employer."[280] Moreover, the District Court found that the three employer entities named in the lawsuit were closely interrelated; they shared employees, common ownership, common management, and corporate officers. Common ownership and shared management personnel are often deciding factors in determining whether affiliated entities are acting as an integrated enterprise.[281]

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[274] *Id.* at *8.

[275] *Id.* at *9 (quoting *Butler*, 793 F.3d at 408).

[276] *EEOC v. Georgina's, LLC*, No. 1:18-CV-668, 2020 WL 7090215 (W.D. Mich. Dec. 4, 2020).

[277] *Id.* at *3.

[278] *EEOC v. 1618 Concepts, Inc.*, 432 F. Supp. 3d 595 (M.D.N.C. 2020).

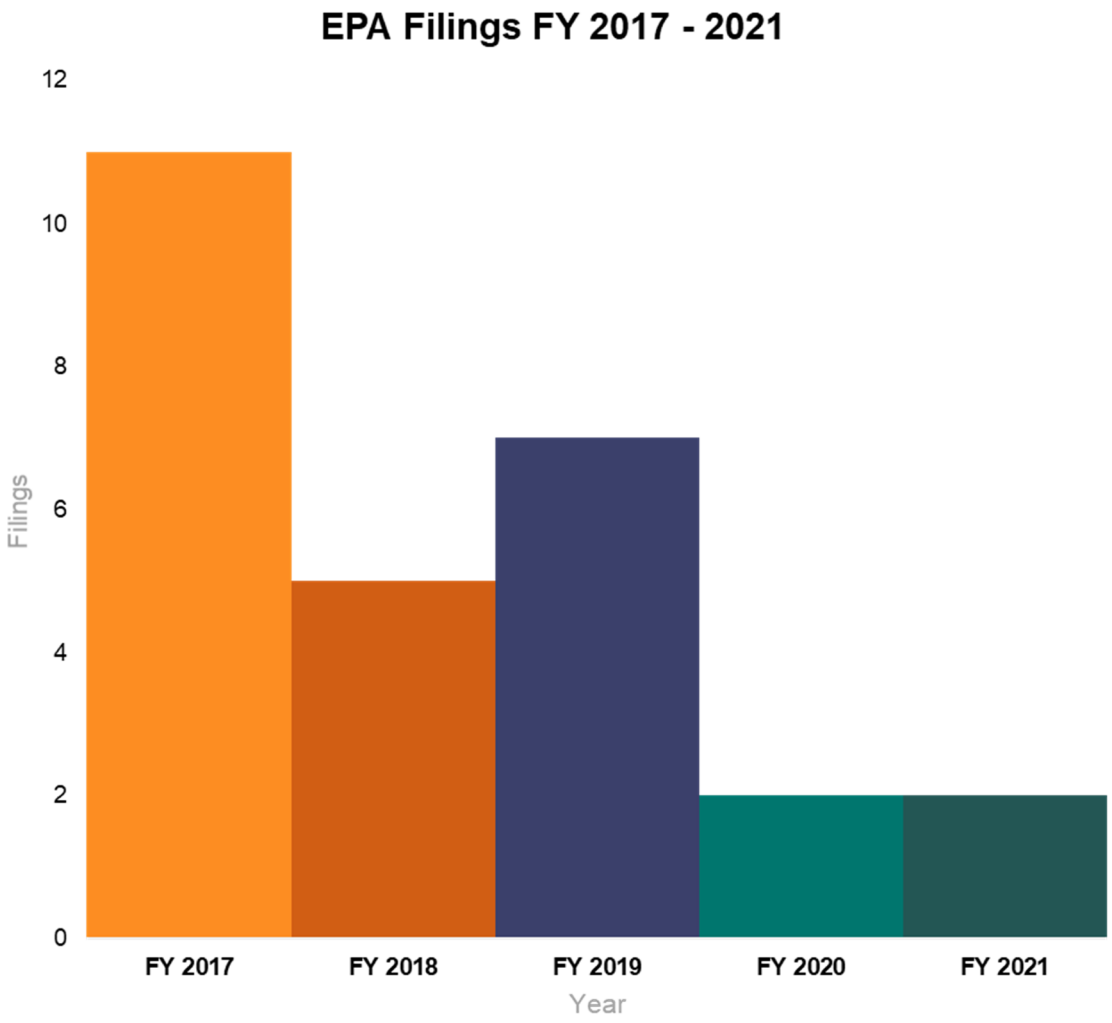
[279] *Id.* at 605.

[280] *Id.*

[281] *See EEOC v. LL Oak Two LLC*, No. 19-CV-839-F, 2020 WL 1159390, at *3 (W.D. Okla. Mar. 10, 2020) (holding that a complaint adequately alleged a single employer theory of liability with respect to the defendant entities because, among other things, it alleged that the entities hold themselves out to the public as a single enterprise, that various individuals have duties at more than one of the named defendant entities, and that individual managers that exercised control over employment decisions worked at various of those entities; the court concluded that these allegations "plausibly allege[] a single employer theory of liability"); *EEOC v. Vinca Enterprises, Inc.*, No. 2:20-CV-4021-NKL, 2020 WL 3621248, at *1 (W.D. Mo. July 2, 2020) (holding that the EEOC had met its burden to establish that the defendants acted as a single employer at the pleading stage because, among other things, the EEOC alleged that the defendants shared their manager and other personnel and shared a business address, and that both entities were owned by the same individuals, who were family members, and that this meant, among other things, that both defendants had knowledge and notice of the charging party's charge and had an opportunity to attempt reconciliation); *EEOC v. Bay Club Fairbanks Ranch, LLC*, No. 18-CV-1853 W (AGS), 2020 WL 4336297, at *5 (S.D. Cal. July 28, 2020) (holding that the EEOC's proposed amendment to its complaint was not futile because, among other things, the new owner entities "share the same corporate headquarters, common managers, and general counsel; that they commonly control all company policies including employment, accounting, payroll, club membership," and because one entity's "Company Associate Handbook" applied to all employees of the other entity). The test that is applied to determine joint-employment/integrated enterprise status can sometimes be determinative of the outcome. *See, e.g., EEOC v. The Village at Hamilton Pointe LLC*, No. 3:17-CV-147-RLY-MPB, 2020 WL 1532112, at *4-5 (S.D. Ind. Mar. 31, 2020) (applying the Seventh Circuit's factors and holding that a consultant-entity was not a joint-employer of a facility's employees because, among other things, the facility retained the authority to hire and fire employees even though the consulting entity provided guidance and input into those decisions, even though the consulting entity set the facility's budget and determined appropriate pay for its employees); *EEOC v. Global Horizons, Inc.*, 915 F.3d 631, 638 (9th Cir. 2019) (holding, as a matter of first impression, that it would apply the common law agency test to determine joint employment under Title VII).

# Priority #4 - Ensuring Equal Pay

The EEOC will continue to focus on compensation systems and practices that discriminate based on sex under the Equal Pay Act and Title VII. Pay discrimination also persists based on race, ethnicity, age, and for individuals with disabilities, and other protected groups.




*The EEOC's SEP states that the EEOC will continue to focus on compensation systems and practices that discriminate based on sex under the Equal Pay Act ("EPA") and Title VII. To date, most of the litigation involving equal pay issues has revolved around sex-based discrimination.*

## E. Ensuring Equal Pay Protections For All Workers

The EEOC's SEP states that the agency will continue to focus on compensation systems and practices that discriminate based on sex under the Equal Pay Act ("EPA") and Title VII.[282] Most of the litigation involving equal pay issues has revolved around sex-based discrimination. However, the EEOC stressed that it will also focus on compensation systems and practices that discriminate on any protected basis, such as race, ethnicity, age, or individuals with disabilities.[283]

The EPA has often been perceived as the EEOC's primary statutory weapon for combating sex-based pay discrimination. The EPA was enacted by Congress in 1963, one year before Title VII of the Civil Rights Act of 1964. The EPA prohibits employers from discriminating "between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which [it] pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions . . . ." [284] The EPA therefore overlaps with Title VII, which prohibits a broader range of discrimination on the basis of sex, including wage discrimination, and also prohibits wage discrimination against other protected groups.[285] The interplay between those two statutes has been the source of some interesting decisions over the past few years, including in the context of EEOC litigation.

For example, in *EEOC v. First Metropolitan Financial Service, Inc.*,[286] the U.S. District Court for the Northern District of Mississippi had an opportunity to apply both statutes in a way that elucidated their different burdens of proof and burden-shifting schemes. In that case, the EEOC brought a class action complaint under the EPA and Title VII, alleging that a financial lending company paid female Branch Managers less than male Branch Managers. Although brought as a class action, the EEOC later informed the court that the class of aggrieved parties who had originally joined the suit had been reduced to only two females.[287]

The employer argued that the two female Branch Managers did not have substantially similar responsibilities as their male Branch Manager comparators because they had been hired to manage a new branch, which had relatively few outstanding loans and therefore less responsibility compared to more established branches.[288] The court held that this argument was premised on a misapplication of the law. The court noted that "equal does not mean identical," and that "[i]n determining whether job differences are so substantial as to make jobs unequal, it is pertinent to inquire whether and to what extent significance has been given to such differences in setting the wage levels for such jobs."[289] Although the male managers' work in more established branches may have impacted their day-to-day responsibilities, the record did not show that those circumstances had any effect on the employer's decisions regarding their pay: "the supposed high demands imposed on [comparator] did not, according to [employer's COO's] deposition, significantly impact [employer's] decision to pay [comparator] a higher base salary."[290] The court then denied the employer's attempt to meet one of the statutory exceptions found in the EPA, finding

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[282] *See* U.S. Equal Employment Opportunity Commission Strategic Enforcement Plan FY 2017 - 2021, https://www.eeoc.gov/eeoc/plan/sep-2017.cfm.

[283] *Id.*

[284] 29 U.S.C. § 206(d). The law recognizes four exceptions where such payment is made pursuant to: (1) a seniority system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production; or (4) a differential based on any other factor other than sex. *Id.* However, an employer is prohibited from reducing the wage rate of any employee to comply with the law. *Id.*

[285] Title VII makes it unlawful for an employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment," or "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee," because of such individual's sex. *See* 42 U.S.C. § 2000e-2(a)(1)-(2).

[286] *EEOC v. First Metro. Fin. Serv., Inc.*, 449 F. Supp. 3d 638 (N.D. Miss. 2020).

[287] *Id.* at 642.

[288] *Id.* at 644.

[289] *Id.* (quoting 29 CFR § 1620.14(a)).

[290] *Id.* at 644.

 

that the differences in training and experience could not justify the wage disparity, nor could the managers' different salary demands and expectations.

Turning to the EEOC's Title VII claim, the court first noted that the two statutes apply different standards for establishing a *prima facie* case, but nevertheless concluded that "[h]aving found that the Plaintiff successfully established a *prima facie* case under the Equal Pay Act, the Court also finds that the evidence used under the EPA burden is sufficient to establish a *prima facie* case under Title VII."[291] The court explained that under the burden shifting scheme of Title VII, "[t]he burden of production now shifts to the Defendant to articulate some legitimate, non-discriminatory reason in light of the four exceptions outlined in the Equal Pay Act."[292]

The employer argued that the comparator's salary had been set at a time when it needed to hire someone quickly or close that branch, and the comparator manager had made a "take it or leave it" demand that the company felt compelled to take. The court held that that satisfied the employer's burden under the Title VII burden-shifting scheme "because an employer 'need only articulate – not prove – a legitimate, nondiscriminatory reason,'" to meet its burden of production.[293] However, the employer was not able to rebut the EEOC's claims that those purportedly legitimate reasons were merely a pretext for discrimination; the court found it "highly suspicious" that the employer's reasons had merit in light of the fact that it had sometimes allowed even larger branches to operate for short periods of time without a manager.[294]

Whether an employer's proffered explanation for a wage disparity – its "factor other than sex" – qualifies as an affirmative defense under the EPA has been a frequent target of litigation, and, increasingly, the subject of legislative developments in many states. For example, in *EEOC v. Hunter-Tannersville Central School District*,[295] the EEOC sought to strike an employer's affirmative defense, arguing that it could not be a legitimate "factor other than sex" because it was not "job related" in that it did not relate to the performance of the charging party's job. In that case, the employer had pled as an affirmative defense that the charging party and her comparator had each negotiated their salaries, and that those negotiations resulted in the alleged salary disparity.[296] The EEOC argued that this explanation was deficient as a matter of law because "there is simply no basis for the proposition that a male comparator's ability to negotiate a higher salary is a legitimate business-related justification to pay a woman less."[297]

The EEOC relied on a Second Circuit case, *Aldrich v. Randolph Central School District*, which held that: "a job classification system resulting in differential pay must be rooted in legitimate business-related differences in work responsibilities and qualifications . . . . Without a job-relatedness requirement, the factor-other-than-sex defense would provide a gaping loophole in the statute through which pretexts for discrimination would be sanctioned."[298] The court rejected the argument that *Aldrich* held that only job-related factors could constitute a factor other than sex, but noted that other circuit courts and district courts had come to different conclusions as to whether salary negotiations, by themselves, could constitute a valid defense to an EPA claim. Accordingly, given the unsettled nature of the law, the court was unwilling to adopt the EEOC's interpretation at the pleading stage: "The Court finds that the EEOC did not meet its burden to show that the affirmative defense is insufficient because there is a question of law, specifically whether *Aldrich's* job-relatedness requirement would apply to negotiations, which might allow the defense to succeed."[299]

Another frequent focus of litigation concerns the deceptively simple question of whether there exists a wage disparity at all. How should the courts compare different compensation practices to determine whether one is higher than the other? This was the issue in *Sempowich v. Tactile Systems Technology,*

[291] *Id.* at 647.

[292] *Id.* at 647-48.

[293] *Id.* at 648 (quoting *Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 258, 258 (1981)).

[294] *Id.* at 648-49.

[295] *EEOC v. Hunter-Tannersville Cent. Sch. Dist.*, No. 1:21-CV-0352, 2021 WL 5711995 (N.D.N.Y. Dec. 2, 2021).

[296] *Id.* at *3.

[297] *Id.* at *2.

[298] *Id.* (quoting *Aldrich v. Randolph Cent. Sch. Dist*., 963 F.2d 520, 525 (2d. Cir. 1992)).

[299] *Id.* at *3.

 

*Inc.*,[300] in which the EEOC participated as amicus curiae. In that case, the Fourth Circuit vacated the decision of the lower court because it had applied an incorrect legal standard to an EPA claim. The plaintiff in that case was paid a lower annual base salary than her male comparator, but made up the difference in commissions so that her total compensation was actually higher. The plaintiff – joined by the EEOC as amicus – argued that "the proper metric is the *rate* at which an employer pays the plaintiff," not total wages.[301] The District Court had relied on the statutory definition of "wages," which is defined to include "all forms of compensation . . . whether called wages, salary, profit sharing, expense account, monthly minimum, bonus . . . or some other name."[302] According to the District Court, this definition required a comparison of total compensation.

The Fourth Circuit disagreed, holding that the definition is "beside the point" because: "The term 'wages' includes commissions because, just as with salary, an employer could not pay commissions to a female employee at a lower rate than a similarly situated male employee. This does not mean that all types of remuneration should be combined into one lump sum when comparing the earnings of a male and female employee."[303] The court supported its reasoning by pointing out an absurdity that could result from adopting the District Court's position: "As a matter of common sense, total remuneration cannot be the proper point of comparison. If it were, an employer who pays a woman $10 per hour and a man $20 per hour would not violate the Equal Pay Act as long as the woman negated the obvious disparity by working twice as many hours."[304] Despite this seemingly obvious application of the law to fact in this situation, many courts have concluded that the proper comparison looks at employees' total compensation, rather than just parts of compensation.

Lawsuits brought under the EPA tend to be highly fact-driven and therefore notoriously difficult for employers to dispense with through motion practice before trial. This is especially true when it comes to EEOC-initiated litigation.[305] Several recent decisions are illustrative of this trend. For example, in *EEOC v. University of Miami*,[306] the EEOC alleged that the University paid a female professor less than her counterpart who performed the same job. The University had hired the charging party as an associate professor during the same year that it hired a male professor with comparable qualifications for a lower-ranked position in the same department at a higher salary.[307] Thereafter, the University's policy of making fixed pay increases only exacerbated the situation over time, so that by the time they became full professors, the male professor made approximately $28,000 more than the female professor.[308] The University argued that the professors did not perform substantially equal work and that the salary discrepancy could be explained by a factor other than sex.

The court first held that a reasonable jury reviewing the duties of the two professors could conclude that their positions were substantially equal.[309] Although the two professors taught different political science specialties, the court noted that they both have doctorate degrees, generally teach the same number of courses at the introductory and advanced levels, and are subject to the same University requirements regarding teaching and research.[310] The University argued that the two professors were not comparable because of their different areas of specialization and because they published in different journals, and because the male professor had published in more prestigious journals. The court found this evidence

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[300] *Sempowich v. Tactile Systems Technology, Inc.*, No. 20-2245, 2021 WL 5750450 (4th Cir. 2021).

[301] *Id.* at *7.

[302] *Id.* at *8 (quoting 29 C.F.R. § 1620.10).

[303] *Id.*

[304] (quoting *Ebbert v. Nassau County*, No. 05-CV-5445, 2009 WL 935812, at *3 (E.D.N.Y. Mar. 31, 2009).

[305] EPA lawsuits therefore put a premium on fact gathering, something that the EEOC typically excels at given its broad investigative and administrative subpoena powers. *See, e.g., EEOC v. VF Jeanswear, LP*, 769 F. App'x 477, 478 (9th Cir. 2019) (reversing the district court's decision limiting an EEOC subpoena, holding that "there is no legal basis for limiting the scope of the relevance inquiry only to the parts of the charge relating to the personally-suffered harm of the charging party. Indeed, we have held otherwise. EEOC subpoenas are enforceable so long as they seek information relevant to any of the allegations in a charge, not just those directly affecting the charging party").

[306] *EEOC v. University of Miami*, No. 19-CV-23131, 2021 WL 4459683 (S.D. Fla. Sept. 29, 2021).

[307] *Id.* at *6.

[308] *Id.*

[309] *Id.* at *8.

[310] *Id.*

unpersuasive because "the professors' specializations within the field of political science do not appear to be dispositive as to the question of substantial job similarity," but "[r]ather, subspecialties are considered when evaluating whether a professor conducted research and was subsequently published in high-ranking journals relevant to their respective specializations."[311] The court was ultimately convinced that "the quality of [comparator's] publications and number of cite counts are determinative of this inquiry because the Plaintiff's prima facie case requires a comparison of jobs, not the skills and qualifications of the individuals who hold the jobs."[312]

The University also argued that the salary disparity between the two professors was due to a factor other than sex; namely, they were "market-based," that annual raises were determined by individual performance, and that multiple salary analyses confirmed that there was no relationship between gender and salary at the University.[313] The court could not credit the "market-based" theory due to the absence of credible evidence as to what the market was at the time the two professors were hired. The court was also not convinced that the pay disparity could be explained by disproportionate performance. Although the University claimed that the charging party published in less prestigious journals than the male professor, the Dean had admitted that he had not reviewed her salary increases or the reasons for the amounts that had been awarded in each year, thus undercutting the University's proposed explanation.[314]

Moreover, the court did find evidence of gender disparities at the University, including evidence that the University placed a higher service requirement on female professors and had proactively increased male professors' salaries to close the gap with female professors, but had not done so for the charging party, despite the fact that her Department Chair had conceded that she was "grossly underpaid."[315] Turning to the Title VII claim, the court held that "[b]ecause the EEOC has established its disparate pay claim under the more rigorous analysis of the Equal Pay Act, the court finds that it has met its initial burden of showing its prima facie case under Title VII."[316] The court also found that the University had met its burden to articulate legitimate bases for the alleged pay disparity, but, for the same reasons that doomed the University's defense to the EPA claim, also held that the EEOC had "advanced sufficient evidence to cast doubt on the University's purportedly legitimate basis for the pay differential," thus meeting its burden to show that those reasons were pretextual.[317] Accordingly, the University's motion for summary judgment was denied.

Written policies regarding salary scales and job categories often factor into pay equity cases, as employers often rely on those policies to prove that salaries were set according to such policies and are therefore not discriminatory. For example, in *Enoch Pratt Free Library*, the employer pointed out that it used a Managerial and Professional Society Salary Policy ("MAPS") to determine compensation for newly hired library supervisors.[318] According to the employer, that policy is facially neutral, and clearly permitted the employer to pay the starting salaries that it did.[319] The court held, however, that that policy did not necessarily compel any specific salary to be awarded to a new hire.[320] The MAPS policy left open the possibility that the employer could apply discretion with respect to setting starting salaries.[321] Applying *Maryland Insurance Administration*, the court concluded that "[the EEOC's comparator] was hired at a rate not only higher than the female [library supervisors] represented by the EEOC, but also significantly above the salary he had received during his first tenure at [employer]. Given these facts, combined with the

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311 *Id*.

312 *Id*.

313 *Id*. at *9.

314 *Id*. at *10.

315 *Id*. at *11.

316 *Id*. at *12.

317 *Id*.

318 *EEOC v. Enoch Pratt Free Library*, No. 17-CV-2860, 2019 WL 5593279, at *3 (D. Md. Oct. 30, 2019).

319 *Id.* at *6.

320 *Id.*

321 *Id.*

 

inherent discretion within the MAPS policy, genuine factual questions exist about how defendants arrived at [the comparator's] salary."[322]

The employer lost at trial. On December 23, 2020, after the conclusion of a five-day bench trial, the court issued its conclusion that the employer had violated the EPA.[323] The EEOC easily met its burden to establish a prima facie case because the parties stipulated that the comparator's salary was higher than that of each charging party.[324] The employer argued that each library branch differed with respect to circulation size, outreach efforts, and physical footprint, thus rendering the job duties of each library supervisor to dissimilar to support a finding that they performed equal work. The court found, however, that the core job duties were the same, relying in part on evidence that the positions shared the same job description and supervisors often substituted for one another on a short- or long-term basis without requiring any additional training and without any alternation in pay.[325] The differences among library branches did not defeat the EEOC's case because "none of th[ose] differences translated into *job duties* that differed significantly from one another."[326]

The court also rejected the employer's affirmative defense, holding that the evidence simply did not support the employer's claim that the comparator was hired at a higher salary because he was able to negotiate a higher salary on the strength of his superior qualifications. According to the court, there was no evidence that the comparator had ever negotiated his salary.[327] The MAPS salary system also did not support the employer's defense because, although that system permitted a salary adjustment, it does not alone independently justify paying a male employee a higher wage for performing the same work.[328] The employer's own HR guidance actually cautioned city agencies to be careful when setting starting salaries to the MAPS midpoint in order to avoid "internal equity issues."[329] Yet the employer had not been able to show that the employer had ever compared salaries to avoid those equity issues, and even failed to do so even after one of the charging party's had complained about the disparity.[330] The employer's failure to act on that complaint also led the court to reject the employer's claim that it had acted in good faith, meaning that the court awarded the charging parties liquidated damages on top of their actual damages.[331] The court concluded that "implementation of a public pay system alone cannot justify pay disparity in the absence of any other justification," and that "mere reliance on MAPS in combination with the record evidence, does not establish that [comparator] was hired based on a factor other than sex."[332]

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[322] *Id.* at *7. *See also EEOC v. George Washington Univ.*, No. 17-CV-1978, 2019 WL 2028398, at *4 (D.D.C. May 8, 2019) (denying an employer's motion to dismiss even though the complaint at issue did not explicitly allege how the positions at issue were equal with respect to skill, effort, and responsibility, holding that the complaint "straightforwardly pleads that [plaintiff] was paid less as Executive Assistant than [comparator] was paid as a Special Assistant for substantially the same job responsibilities"); *EEOC v. Univ. of Miami*, No. 19-CV-23131-Civ-Scola, 2019 WL 6497888, at *2 (S.D. Fla. Dec. 3, 2019) (denying a motion to dismiss claims brought by professors in the *same* department because the EEOC had supported its claims of pay discrimination with numerous allegations relating to the professors job duties, such as teaching classes and publishing books and articles, and allegations that the female professor had two more years of teaching experience and had published more works, and because the EEOC had alleged that both professors were in the same department and had been promoted to full professor at the same time after a review by the same committee based on the same criteria); *EEOC v. Denton Cty.*, No. 4:17-CV-614, 2018 U.S. Dist. LEXIS 175794, at *22 (E.D. Tex. Oct. 12, 2018) (denying cross motions for summary judgment, holding that it was "not convinced that [defendant] or the EEOC has met their respective burdens demonstrating that there is no material issue of fact as to the EEOC's claim for violation of the Equal Pay Act entitling it to judgment as a matter of law").

[323] *EEOC v. Enoch Pratt Free Library*, No. 8:17-CV-2860, 2020 WL 7640845 (D. Md. Dec. 23, 2020).

[324] *Id.* at *8.

[325] *Id.* at *9.

[326] *Id.* (emphasis in original).

[327] *Id.* at *10.

[328] *Id.*

[329] *Id.*

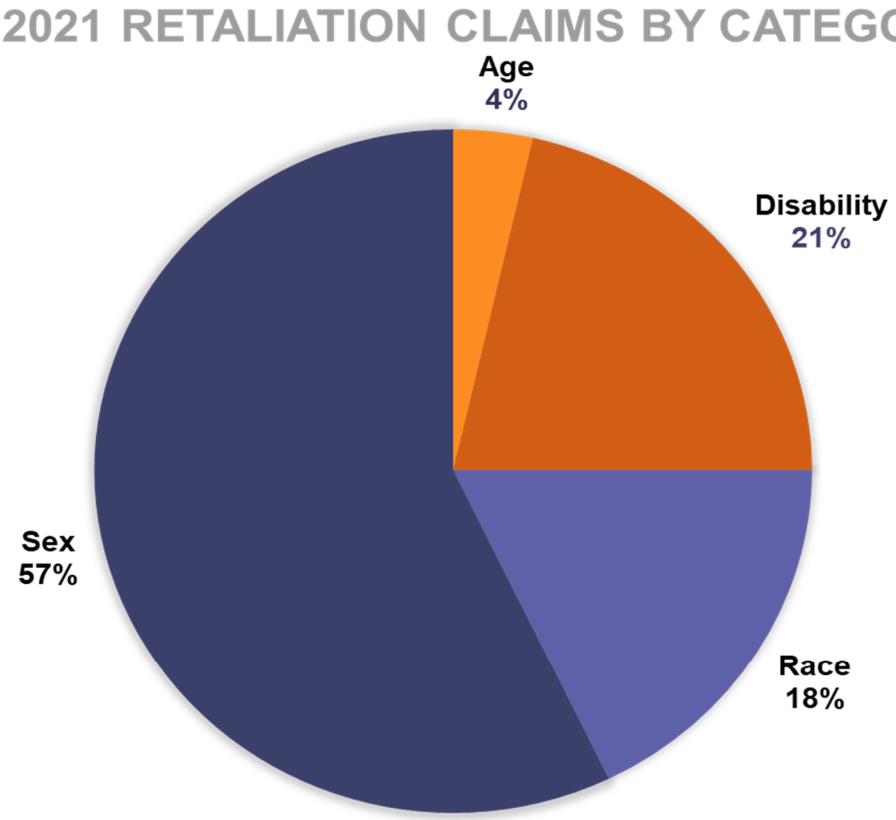
[330] *Id.*

[331] *Id.*

[332] *Id.* at *11.

# Priority #5 - Preserving Access To The Legal System

The EEOC will focus on policies and practices that limit substantive rights, discourage or prohibit individuals from exercising their rights under employment discrimination statutes, or impede EEOC's investigative or enforcement efforts.




*The EEOC's Enforcement Guidance on Retaliation states that retaliation occurs when an employer takes a materially adverse action because an individual has engaged, or may engage, in protected activity that is in furtherance of Title VII, the Age Discrimination in Employment Act, the Americans with Disabilities Act, Section 501 of the Rehabilitation Act, the Equal Pay Act, or Title II of the Genetic Information Nondiscrimination Act.*

## F. Preserving Access To The Legal System

The EEOC's Strategic Enforcement Plan also makes it a strategic objective to combat and prevent employment discrimination through the application of the EEOC's law enforcement authorities, be it through investigation, conciliation, litigation, or federal oversight. This objective has historically been reflected in the EEOC's aggressive assertion of retaliation claims against employers allegedly obstructing employees' efforts to participate in EEOC proceedings or otherwise oppose discrimination. However, under new leadership the EEOC appears to be focusing on pre-litigation activities as a significant driver of its efforts to preserve access to the legal system.

The EEOC's Enforcement Guidance on Retaliation states that retaliation occurs when an employer takes a materially adverse action because an individual has engaged, or may engage, in protected activity that is in furtherance of Title VII, the Age Discrimination in Employment Act, the Americans with Disabilities Act, Section 501 of the Rehabilitation Act, the Equal Pay Act, or Title II of the Genetic Information Nondiscrimination Act.[333] Retaliation claims premised on EEO-related activity are comprised of three elements: (1) protected activity through "participation" in an EEO process or "opposition" to discrimination; (2) materially adverse action taken by the employer; and (3) the requisite level of causal connection between the protected activity and the materially adverse action.[334]

First, protected activity generally consists of either "participation" in an EEO process or the reasonable "opposition" to discrimination.[335] These two types of protected activity arise directly from two distinct statutory retaliation clauses that differ in scope.[336] Second, the EEOC defines a "materially adverse action" as anything that could be reasonably likely to deter protected activity, even where such activity is not severe or pervasive and does not have a tangible effect on employment. This includes one-off incidents and warnings.[337] Lastly, a materially adverse action does not violate EEO laws unless there is a causal connection between the action and the protected activity. The Enforcement Guidance recognizes Supreme Court precedent requiring that the complaining party show that the employer would not have taken the adverse action, "but for" a retaliatory motive.[338]

The EEOC has championed its view of retaliation law in recent cases. In *EEOC v. Proctor Financial, Inc.*,[339] the District Court for the Eastern District of Michigan held . In that case, the EEOC alleged that the

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[333] *See* U.S. Equal Employment Opportunity Commission, Enforcement Guidance on Retaliation and Related Issues, (Aug. 25, 2016), https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm. Retaliation includes not only adverse action taken against an employee, but the threat of adverse action against an employee who has not yet engaged in protected activity for the purpose of discouraging him or her from doing so. *See, e.g., Beckel v. Wal-Mart Assocs., Inc.*, 301 F.3d 621, 624 (7th Cir. 2002) (holding that threatening to fire plaintiff if she sued "would be a form of anticipatory retaliation, actionable as retaliation under Title VII"); *Sauers v. Salt Lake Cty.*, 1 F.3d 1122, 1128 (10th Cir. 1993) ("Action taken against an individual in anticipation of that person engaging in protected opposition to discrimination is no less retaliatory than action taken after the fact.")

[334] *See* Enforcement Guidance on Retaliation and Related Issues, *supra* note 278.

[335] *Id.*

[336] *Id.* Participation in an EEO process is broadly protected, regardless of whether the EEO allegation is based on a reasonable, good faith belief that a violation occurred, and narrowly defined to include raising a claim, testifying, assisting, or participating *in any manner* in an investigation, proceeding or hearing under the EEO laws. On the other hand, opposition activity encompasses a broad range of activities by which an individual opposes any practice made unlawful by the EEO statutes. Yet, opposition activity is limited to those who act with a reasonable good faith belief that a potential EEO violation exists and who act in a reasonable manner to oppose it. Opposition to discrimination can be explicit or implicit and need not include any specific words.

[337] *Id.* (actions taken against a third party who is sufficiently close to the complaining employee, in that the individual is in the employee's "zone of interest," are considered materially adverse actions); *see also* Brief for Equal Employment Opportunity Commission as Amici Curiae Supporting Neither Party at 15*, McAllister v. Curtis L. Brunk,* No. 18-17393 (9th Cir.) ("Failure to investigate can also constitute a retaliatory adverse action under certain circumstances.").

[338] *Id.* (For retaliation claims against private sector employers and state and local government employers). By contrast, the "motivating factor" standard, which requires that retaliation is a motivating factor behind an adverse action, is applied to Title VII and ADEA retaliation claims against federal sector employers. *Id.* Evidence of causation may include suspicious timing, oral or written statements, comparative evidence of similarly situated employees treated differently, inconsistent or shifting explanations for an adverse action, and any other evidence that, when viewed together, demonstrates retaliatory intent. An employer may defeat a retaliation claim by establishing that it was unaware of the protected activity or by demonstrating legitimate non-retaliatory reasons for the challenged action.

[339] *EEOC v. Proctor Financial, Inc.*, No. 19-CV-11911, 2021 WL 4478929 (E.D. Mich. Sept. 30, 2021).

 

employer retaliated against a former employee after she filed a charge of race discrimination with the EEOC. Reviewing the record, the court found ample evidence of direct evidence of unlawful retaliation, noting the presence of emails that "reflect a clear intent to terminate or at least take some adverse employment action against [charging party] in response to her protected activity."[340] According to the court, "[t]he emails throughout Fall 2016 reflect a plan to wait for the opportunity to terminate or at least discipline [charging party] – specifically, the results of [charging party's] attempts to complete the State licensing requirements."[341] In light of such evidence, "[n]o inferences or presumptions [of discrimination] are required."[342]

The emails in that case showed that the employer's CEO had described the charging party's claims as "specious," "baseless," and required "holding your nose" to handle, which was then was followed by a discussion about how to get rid of the charging party.[343] Not only did those emails provide direct evidence of retaliation, they also satisfied the causation element of a retaliation claim: "The emails, however, provide an undisputable causal connection between [charging party's] protected activity and her suspension. In addition to communications criticizing her EEOC charge, which began within a month of its filing, emails were exchanged in early September – within two months of [charging party's] protected activity – at the very least suggesting a plan to take adverse action against her."[344] The employer attempted to justify its actions by pointing to the charging party's "continued resistance to adhering to the Company's licensing requirements and the lack of integrity displayed by her misleading actions and statements related to the New York licensing exam."[345] The court noted that the employer had not taken any action against other similarly situated employees who had not passed the required exams in a similar amount of time, and in fact, others had failed the licensing exams without reprisal.[346] The court also pointed to the emails that provided the direct evidence of retaliation as further evidence of pretext. Nevertheless, the court allowed the issue of pretext to be decided by the trier of fact: "While the court finds the evidence of retaliation to be strong, it nonetheless sees a genuine issue of material fact as to whether the reason offered by [employer] for [charging party's] discipline is pretextual. Accordingly, this issue must be resolved by the finder of fact."[347]

Causation is often a stumbling block for the EEOC as it tries to prove retaliation claims. For example, in *EEOC v. Jackson National Life Insurance Co.*,[348] the EEOC alleged a range of sexual harassment perpetrated against the charging party by her co-workers, and also that she had been retaliated against because she complained about the harassment. Among other things, the EEOC alleged that the charging party suffered adverse actions when she was put on a performance improvement plan, was not promoted, had her sales territories taken away, and was subjected to increased monitoring and background checks.[349]

The court found that the EEOC had failed to establish a causal connection between the protected conduct and the alleged adverse actions. With respect to the performance improvement plan, which had been imposed after the charging party's supervisor had given her a verbal warning about her work performance and conduct at work, the court found that the EEOC had failed to show that those reasons were pretextual.[350] With respect to the EEOC's claims regarding promotions and sales territories, the court also concluded that the EEOC failed to show that the employer's reasons for making those decisions were pretextual.[351] Finally, the EEOC had alleged that the charging party's manager had engaged in a

[340] *Id*. at *7.
[341] *Id*.
[342] *Id*.
[343] *Id*.
[344] *Id*. at *8.
[345] *Id*.
[346] *Id*. at *9.
[347] *Id.*
[348] *EEOC v. Jackson National Life Insurance Co.*, No. 16-CV-02472, 2021 WL 927638 (D. Colo. Mar. 11, 2021).
[349] *Id.* at *10.
[350] *Id.* at *11.
[351] *Id.*

 

**"**crusade" to fire her. But the facts showed that whatever actions that may have been taken as part of that crusade were taken within the ranks of HR personnel and other managers and the charging party was not even aware of them. The court held that this was fatal to her retaliation claim because it meant that those actions could not dissuade a reasonable worker from making or supporting a charge of discrimination: **"**Because [charging party] has not shown that she was aware of the efforts as they were occurring, she cannot establish genuine issue that conduct like [manager**'**s] would dissuade a reasonable employee from engaging in protected activity since a rational factfinder would not find that someone could be dissuaded by something she was not aware of."[352]

The EEOC has also actively pushed the boundaries of what counts as actionable retaliation by submitting amicus curiae briefs in cases of interest. For example, in *McAllister v. Curtis L. Brunk,* the EEOC filed an amicus brief, in support of neither party, to address the District Court's application and construction of various legal standards.[353] The EEOC's brief clarified that the reasonable belief standard applies only to the opposition clause and does not apply to the participation clause,[354] which protects the filing of a discrimination charge with the EEOC from retaliation, whether or not the charge is ultimately found meritorious.[355] The EEOC also clarified that the District Court incorrectly analyzed plaintiff's adverse action retaliation claim under the standard applied to substantive discrimination claims brought under Title VII, rather than the broader and more liberal "adverse action" standard applied to Title VII retaliation claims.[356] The EEOC has also filed amicus briefs in recent years to clarify the meaning of an "ultimate employment action" in the context of retaliation claims,[357] as well as the concepts of "protected participation" and "protected opposition."[358]

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[352] *Id.*

[353] Brief for Equal Employment Opportunity Commission as Amici Curiae Supporting Neither Party, at 1, 14-17*, McAllister v. Curtis L. Brunk,* No. 18-17393 (9th Cir.). The lower Court ruled that both the participation and opposition clauses require a plaintiff to demonstrate a reasonable belief that the employer's conduct violated Title VII. *Id.* at 7.

[354] *Id.* at 12-13 (compiling majority of circuit opinions in agreement).

[355] *Id.* at 10-11. In the Ninth Circuit, "an employer may not retaliate for the filing or threatened filing of an EEOC charge regardless of whether the charging party reasonably believes that he is complaining about a violation of Title VII." *Id.* at 9.

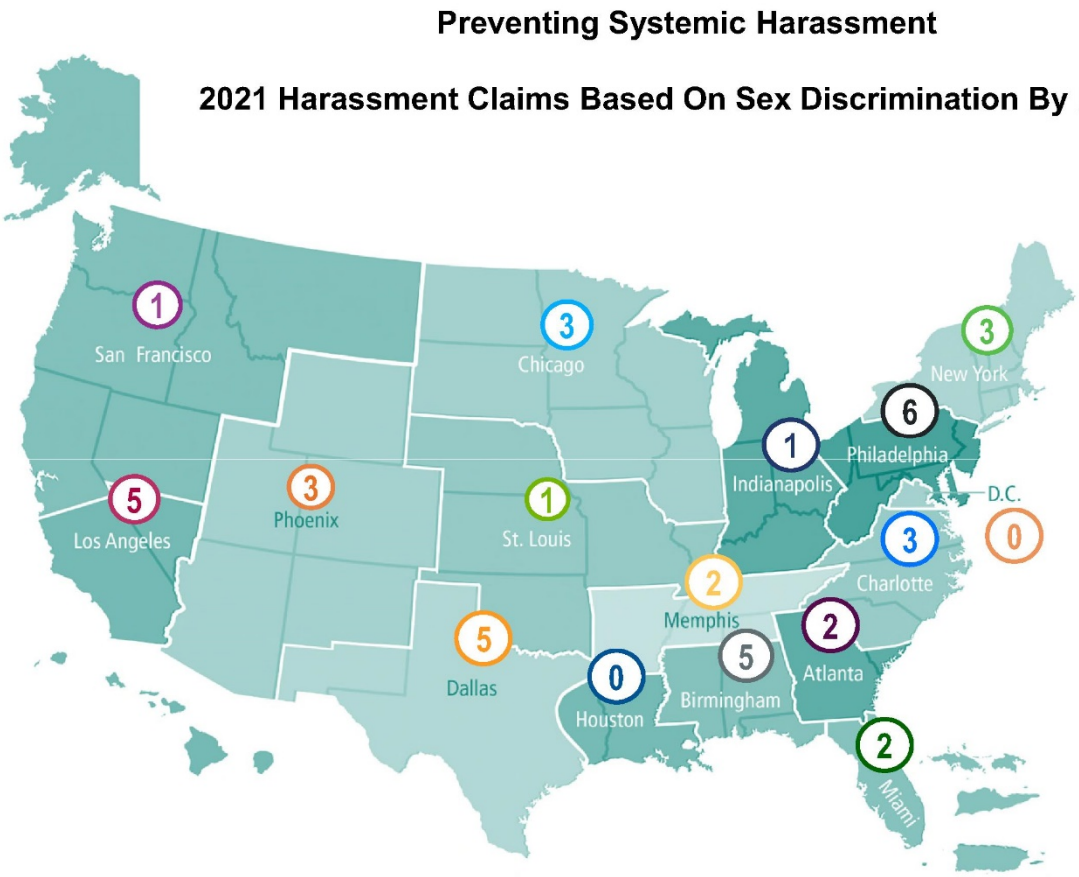
[356] The EEOC argued that a retaliation plaintiff need only show "that a reasonable employee would have found the challenged action materially adverse, 'which in this context means it might well have dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Id.* at 13 (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006)) (citations and some internal quotation marks omitted).

[357] The EEOC filed an amicus curiae brief in *Stancu v. Hyatt Corporation/Hyatt Regency Dallas*, arguing that the district court incorrectly granted summary judgment on the plaintiff's retaliation claim for failure to show an "ultimate employment decision." Brief of the Equal Employment Opportunity Commission as Amicus Curiae in Support of Appellant and in Favor of Reversal, at *4-5, *Stancu v. Hyatt Corporation/Hyatt Regency Dallas*, No. 18-11279, 2019 WL 1013132 (5th Cir.), *appealed from* No. 3:17-CV-675 and 3:17-CV-2918 (N.D. Tex.), *affirmed by Stancu v. Hyatt Corporation/Hyatt Regency Dallas*, 791 F. App'x. 446, 451 n.1 (5th Cir. 2019) (finding that plaintiff's retaliation claims failed, even when applying the correct adverse action standard advocated by the EEOC). The EEOC explained that the "ultimate employment decision" standard applies to substantive discrimination claims, and not to retaliation claims. *Id.* at *6. Most importantly, the EEOC argued, in applying the "ultimate employment decision" test, the lower Court misapplied the Supreme Court's precedent in the retaliation context, which dictates that a materially adverse action is one that "might well have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.* at *8-9 (citing *Burlington Northern*, 548 U.S. at 68).

[358] The EEOC filed an amicus brief in *Gogel v. Kia Motors Manufacturing of Georgia, Inc.* to address the District Court's decision to grant summary judgment to an employer on a retaliation claim. En Banc Brief of the U.S. Equal Employment Opportunity Commission as Amicus Curiae in Support of Plaintiff-Appellant and Reversal, *Gogel v. Kia Motors Mfg. of Ga., Inc.*, No. 16-16850 (11th Cir.), *appealed from*, No. 3:14-CV-00153 (N.D. Ga.), *granting rehearing en banc,* 926 F.3d 1290 (11th Cir. June 17, 2019). The EEOC argued, among other things, that a jury could find that the employee engaged in *protected participation* when she filed an EEOC charge, as well as *protected opposition* when complaining of sex discrimination to managers and assisting a colleague with an EEOC charge by providing the name of an attorney. *Id.* at *20-22. The EEOC argued that the termination is actionable retaliation even though based on a mistaken belief that the employee assisted another employee in filing an EEOC charge. *Id*. at *22-23. In that same vein, the EEOC argued that the "honest belief" doctrine applied by the lower Court does not apply here, as the employer terminated the employee exclusively because it believed (albeit, mistakenly) that she engaged in protected activity: "assisting a co-worker with filing an EEOC charge." *Id.* at *27-28.

# Priority #6 - Preventing Systemic Harassment

Harassment continues to be one of the most frequent complaints raised in the workplace. The most frequent bases of harassment alleged are sex, race, disability, age, national origin, and religion.




*The EEOC has had plenty of opportunity to shape the law of sexual harassment through its litigation activities. Those cases often hinge on two issues: whether the alleged actions rise to the level of unlawful harassment, and whether an employer can be held liable for harassment perpetrated by employees.*

# G. Preventing Harassment

## 1. EEOC Enforcement Efforts In The Wake Of The #MeToo Movement Collide With New Agency Priorities

The prevention of systemic workplace harassment has been one of the EEOC's national enforcement priorities since 2013. A few years ago, the EEOC published its Proposed Enforcement Guidance on Unlawful Harassment ("Proposed Guidance").[359] The Proposed Guidance was meant to replace several earlier EEOC guidance documents, aiming to define what constitutes harassment, examine when a basis for employer liability exists, and offer suggestions for preventative practices.[360] According to the Proposed Guidance, the EEOC will find harassing conduct to be unlawful if the conduct is based on an individual's race, color, national origin, religion, age, disability, or an individual or family member's genetic test or family medical history.[361] Further, the Proposed Guidance specifically sets forth the EEOC's position that as a protected basis "sex" includes, but is not limited to, sex stereotyping, gender identity, sexual orientation, and pregnancy, childbirth, or related medical issues.[362] Moreover, the EEOC announced that it will entertain harassment claims based on (1) "perceived" membership in a protected class (even if the perception is incorrect);[363] (2) for "associational harassment," where an employee who is a member of a protected class claims harassment based on his/her association with individuals who do not share their protected characteristics; [364] (3) where the alleged harassment was not directed at the employee; [365] and (4) in instances where the alleged harassment occurred outside of the workplace.[366]

This proposed enforcement guidance, however, appears to have run headlong into the changing priorities at the EEOC, now that the Commission is led by a Republican slate of Commissioners. The guidance has been on hold since early 2017, while the agency has moved quickly on issues that seem closer to its new agenda, such as the updated guidance on religious discrimination. Nevertheless, remnants of the EEOC's evolving views about harassment are evident in the types of lawsuits they have been brought around the country since the onset of the #MeToo era. Those cases are primed to have a sizeable impact on the law in this area.

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[359] Office of Legal Counsel, U.S. Equal Employment Opportunity Commission, *Proposed Enforcement Guidance on Unlawful Harassment*, (Jan. 10, 2017), https://www.regulations.gov/docket?D=EEOC-2016-0009.

[360] *See id.*

[361] *Id.* at 5-9.

[362] *Id.*; *see e.g., Price Waterhouse v. Hopkins,* 490 U.S. 228, 250 (1989) ("In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a women cannot be aggressive, or that she must not be, has acted on the basis of gender."); *Jameson v. U.S. Postal Serv.,* EEOC Appeal No. 0120130992, 2013 WL 2368729, at *2 (May 21, 2013) (stating that intentional misuse of transgender employee's new name or pronoun may constitute sex-based harassment); *Walsh v. Nat'l Computer Sys., Inc.,* 332 F.3d 1150, 1160 (8th Cir. 2003) (upholding jury verdict in pregnancy based hostile work environment claim where evidence showed that plaintiff was harassed because she had been pregnant and taken maternity leave, and might become pregnant again); *EEOC v. Houston Funding II, Ltd.,* 717 F.3d 425, 430 (5th Cir. 2013) (holding that Title VII prohibits discharging an employee because she is lactating or expressing breast milk).

[363] U.S. Equal Employment Opportunity Commission, *Proposed Enforcement Guidance on Unlawful Harassment*, *supra* note 429, at 9; *see, e.g.*, *EEOC v. WC&M Enters, Inc.,* 496 F.3d 393 (5th Cir. 2007) (concluding that the EEOC presented sufficient evidence to support its national origin harassment claim where coworkers harassing comments did not accurately describe employees actual country of origin).

[364] U.S. Equal Employment Opportunity Commission, *Proposed Enforcement Guidance on Unlawful Harassment*, *supra* note 429, at 9; *see, e.g.*, *Barrett v. Whirlpool Corp.,* 556 F.3d 502, 513-14 (6th Cir. 2009) (holding that white employees could allege claim of racial harassment based on their friendship with and advocacy on behalf of African American coworkers).

[365] U.S. Equal Employment Opportunity Commission, *Proposed Enforcement Guidance on Unlawful Harassment*, *supra* note 429, at 12; *see, e.g., Ellis v. Houston,* 742 F.3d 307, 320-21 (8th Cir. 2014) (concluding that District Court erred in evaluating plaintiffs' section 1981 and section 1983 claims of racial harassment by examining in isolation harassment personally experienced by each plaintiff, rather than also considering conduct directed at others, where every plaintiff did not hear every remark, but each plaintiff became aware of all of the conduct).

[366] U.S. Equal Employment Opportunity Commission, *Proposed Enforcement Guidance on Unlawful Harassment, supra* note 429, at 18.

 

## 2. Case Law Developments Involving Harassment Claims

The EEOC has had plenty of opportunity to shape the law of sexual harassment through its litigation activities. Those cases often hinge on two issues: whether the alleged actions rise to the level of unlawful harassment, and whether an employer can be held liable for harassment perpetrated by employees.

### a. Decisions About What Constitutes Actionable Harassment

The question of whether a pattern of conduct rises to the level of actionably harassment is highly fact-intensive and fraught with difficult judgment calls concerning the mental states of both the harasser and the victim. For example, in *EEOC v. Ecology Services, Inc.*,[367] the EEOC alleged that the employer had subjected the charging party to a hostile work environment when it failed to correct the sexually harassing behavior of her co-worker. The case went to trial, and the court had to weigh substantial evidence regarding the harassing behavior. Ultimately, the court ruled in favor of the employer. Although the EEOC had introduced voluminous evidence of sexually harassing activity, the court found that evidence to be so riddled with inconsistencies and contradictions that it undermined the EEOC's case. For example, the court noted that: "[Charging party] stated [alleged harasser] made inappropriate comments about her breasts and buttocks every time they worked together. Although she said these were made while co-workers were present, she failed to name any co-workers at any specific time the comments were made."[368] And in response to the charging party's claim that her co-worker propositioned her for sex on multiple occasions, the court noted that: "It makes little sense that [charging party] was subjected to this hostile environment, was so intimidated that she felt she could not report it and then approached the harasser and asked for a loan. I find her allegations regarding the propositioning of sex for money to be incredible."[369]

The charging party had also testified that her co-worker had "climbed up onto the [engine cover of the truck], exposed his penis to her, grabbed her right hand off the steering wheel while she was driving at 40-50 miles an hour and made her touch his exposed penis."[370] But the court noted the heat and physical dimensions of the engine cover would make that difficult, if not impossible, and that her claim that she never lost control of the truck was inconsistent with her testimony that she punched and pushed him. With respect to this instance, the court concluded as follows: "What also strikes the court is the fact that if [alleged harasser] had committed the act once already, would not [charging party] be on high alert or somehow noticing he was again climbing up onto the [engine cover] and taking down his pants? She indicated she did not notice him climbing up a second time. She did not report the incidents when they happened. Again, her story defies logic and I find that the evidence contradicts her testimony."[371] The court also could not credit the EEOC's efforts to establish employer liability, holding that it had "failed to produce credible evidence that [charging party] reported the conduct to her supervisors in order to correct the sexual harassment."[372] The court concluded as follows: "The testimony and facts do not support any of her allegations and in fact contradict the physical possibility that certain acts like the illegal touching in the cab of the truck could have even occurred. While I believe that there was something going on between [charging party] and [alleged harasser], which could have been an inability to work together, the evidence does not rise to the level of a hostile work environment that was so severe and pervasive it caused the constructive discharge of [charging party]."[373]

In *EEOC v. New Prime Inc.*,[374] the U.S. District Court for the Western District of Missouri allowed a sexual harassment claim to proceed to trial, holding that live testimony was necessary to flesh out and understand the statements made in text messages. In that case, a truck driver alleged that she was subjected to sexual harassment by her co-driver, who allegedly "asked her for sex and made sexual comments every

[367] *EEOC v. Ecology Services, Inc.*, No. 18-CV-1065, 2021 WL 3549978 (D. Md. Aug. 11, 2021).
[368] *Id.* at *8.
[369] *Id.* at *9.
[370] *Id.*
[371] *Id.* at *10.
[372] *Id.*
[373] *Id.* at *12.
[374] *EEOC v. New Prime Inc.*, No. 6:18-CV-3177, 2020 WL 555389 (W.D. Mo. Feb. 4, 2020).

 

day, a couple times a day, for five out of the six weeks they drove together," among other things.[375] The employer pointed to text messages showing that the charging party had herself use sexually charged language while working on the truck and had even told her co-driver about a sexual encounter with her boyfriend and had voluntarily asked him to join her at a bar.[376] The court held that this was not sufficient for the court to dismiss the EEOC's claims on summary judgment. "The text messages cited by [employer] do not definitively show that [charging party] was inviting [co-drivers] daily request for sex. To the contrary, some of her text messages show that she affirmatively told [co-driver] she was not interested in a sexual relationship with him and that she wanted to keep the relationship focused on making money."[377]

Similarly, in *EEOC v. Magneti Marelli of Tennessee, LLC*,[378] the EEOC brought a representative action on behalf of female employees in a manufacturing plant alleging that a male production supervisor engaged in sexual harassment of the employees. The EEOC asserted that the production supervisor created a hostile work environment for employees by constantly telling female employees to call him "Big Daddy"; frequently massaging women's shoulders and down their backs; whispering "you know you like that" to them; and singing sexually explicit song lyrics.[379] The court found that a reasonable jury could find that the claimants were subject to words and actions based on their sex and that the supervisor's conduct was severe or pervasive enough that it rose to the level of unlawful harassment: "There has been a sea change over the last quarter of a century in what is now acceptable workplace conduct and what is understood as unlawful harassment. . . . In the light most favorable to the EEOC, [supervisor's] comments and conduct was objectively offensive sexual harassment."[380] The court also held there could be a basis for employer liability and therefore denied the employer's motion for summary judgment and granted the EEOC's partial motion for summary judgment.

However, in *EEOC v. Appalachian Power Co.*,[381] the U.S. District Court for the Western District of Virginia held that conduct and comments that were consistent with a "workplace crush," although unwanted and bothersome to an employee, were insufficient to establish a hostile work environment claim. In that case, a temporary administrative worker at a power company alleged claims of hostile work environment sex discrimination, quid pro quo discrimination, and retaliation.[382] The District Court held that the totality of those circumstances did not rise to the level of an objectively hostile working environment.[383] According to the District Court, "expressing romantic interest in a coworker or subordinate or asking them out is not

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[375] *Id.* at *1. The EEOC also alleged that the charging party's co-driver had insinuated that he had killed his wife and told the charging party that she would lose her job if she got off the truck, causing the charging party to feel physically threatened at work. The employer argued that the EEOC could not establish that the co-driver's behavior was unwelcome, or that the harassment was so severe or pervasive that it affected the charging party's terms, conditions, or privileges of employment.

[376] *Id.* at *2.

[377] *Id.* The court similarly held that the record did not conclusively show a lack of severity or pervasiveness. The court noted that it was undisputed that the co-driver requested sex from the charging party more than once a day for several weeks and that the conduct alleged appeared to go beyond the type of "passing rudeness or unpleasantness inherent in the 'rough edges' of day-to-day life." *Id.* at *3. The court also rejected the employer's argument that the EEOC could not establish severity because the co-driver had never touched the charging party physically. The court held that the law is clear that an employee need not be touched to sustain a sexual harassment claim. *Id.* at *4. The court concluded: "[a]lthough the evidence may show differently at trial, the court cannot conclude as a matter of law on the present record that [co-driver's] conduct was not severe or pervasive enough to sustain a sexual harassment claim." *Id.*

[378] *EEOC v. Magneti Marelli of Tennessee, LLC*, No, 1:18-CV-74, 2020 WL 918785 (M.D. Tenn. Feb. 26, 2020).

[379] *Id.* at *1.

[380] *Id.* at *5.

[381] *EEOC v. Appalachian Power Co.*, No. 1:18-CV-35, 2019 WL 4644549 (W.D. Va. Sept. 24, 2019).

[382] The plaintiff testified that her supervisor repeatedly made inappropriate sexual comments about her, gave her gifts, including substantial monetary gifts, repeatedly declared his love for her, and became jealous and angry when she was around other men. After this conduct had gone on for several months, her supervisor sent her a text message saying that he wanted to take her out and treat her like a queen. *Id.* at *2. She did not respond to that text message. But when she next arrived at work, her supervisor confronted her about not responding to his text message and, when she tried to walk away, followed her down the hallway while making sexually explicit comments. *Id.* When she turned around to tell him to stop ("I'm not putting up with your shit today"), he terminated her on the spot. *Id.*

[383] *Id.* at *6. Among other things, the court held that the messages, conduct, and comments that plaintiff was subjected to were ambiguous in nature, and that a discriminatory intent was belied by the fact that there was no evidence that plaintiff's supervisor exhibited any hostility toward women. *Id.*

enough on its own to establish a Title VII hostile environment claim."[384] The District Court concluded that plaintiff's hostile environment claim failed as a matter of law because evidence of a "workplace crush" simply did not meet the high threshold of objectively severe and pervasive harassment that is necessary to establish such a claim under Title VII.[385]

Changing standards of workplace conduct have sometimes factored into the EEOC's legal theories and court decisions. For example, in *Parker v. Reema Consulting Services, Inc.*,[386] the EEOC filed an amicus brief, arguing that the plaintiff in that case had pled a plausible hostile work environment claim where she alleged that male employees spread a false rumor that she had been promoted because she engaged in a sexual relationship with her supervisor.[387] The District Court for the District of Maryland dismissed the complaint, holding that – however demeaning and objectionable the alleged rumor might be – it was not based upon her gender, but rather upon her alleged conduct, and therefore could not be considered discrimination "on the basis of sex."[388] The EEOC, along with a number of other women's groups and civil rights groups, filed an amicus brief arguing, among other things, that the complaint plausibly alleged that the harassment plaintiff suffered was "because of sex."[389] The Fourth Circuit agreed, holding that "the dichotomy that . . . the District Court[] purports to create between harassment 'based on gender' and harassment based on 'conduct' is not meaningful in this case because the *conduct* is also alleged to be gender-based."[390] According to the Fourth Circuit, plaintiff had plausibly alleged a rumor that invokes a deeply rooted perception that women, and not men, use sex to achieve success.[391] Because the rumor was based on traditional negative stereotypes regarding women in the workplace and their sexual

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[384] *Id.*

[385] *Id.* With respect to plaintiff's quid pro quo claim, the District Court held that there was a genuine dispute of material fact as to whether plaintiff's supervisor's reason for terminating plaintiff was because she had rebuffed his advances. *Id.* at *7. Among other things, the stated reasons for plaintiff's termination – including attendance issues and falsified time records – had been disregarded on other occasions, which could lead a jury to conclude that those reasons were merely a pretext for discrimination. *Id.* Finally, with respect to plaintiff's retaliation claim, the District Court similarly held that the EEOC had produced sufficient evidence to state a prima facie case of retaliation based on the same evidence of pretext: "the lack of documentation about attendance issues and the close proximity to [supervisor's] alleged advances further suggest that her opposition to his harassment may have been the real reason that [supervisor] terminated [plaintiff]." *Id.* at *8.

[386] *Parker v. Reema Consulting Servs., Inc.*, 915 F.3d 297 (4th Cir. 2019).

[387] That case involved a female employee of a consulting services company who had been rapidly promoted from a low level clerk to the Assistant Operations Manager of one of the company's warehouse facilities. *Id.* at 300. According to the allegations in the complaint, within weeks after receiving her promotion, the plaintiff learned that some male employees of the company had been circulating a false rumor that she was involved in a sexual relationship with one of her managers, and that she had been promoted as a result of that relationship. *Id.* Plaintiff also alleged that she was treated with open resentment and disrespect by her coworkers, including her subordinates, as a result of the rumor. *Id.* Plaintiff filed a sexual harassment complaint against some of her co-workers with the company's Human Resources Manager. *Id.* at 301. A few weeks later, one of her subordinates, who was one of the subjects of plaintiff's complaint, filed his own complaint against plaintiff. *Id.* Plaintiff alleged that she was instructed to have no contact with that subordinate, but that he was nevertheless allowed to spend time in plaintiff's work area and, during such times, that he continued to engage in harassing conduct towards her. *Id.* Plaintiff was fired shortly thereafter. She alleged that her termination was contrary to the company's "three strikes" policy and was in fact retaliation for the complaint she had filed about the harassment she had experienced. *Id.*

[388] *Id.* at 301-02. The District Court held: "this same type of a rumor could be made in a variety of other contexts involving people of the same gender or different genders alleged to have had some kind of sexual activity leading to a promotion. But the rumor and the spreading of that kind of rumor is based upon conduct, not gender." *Id.* at 302.

[389] Amicus Curiae Brief for the EEOC at 15-21, *Parker v. Reema Consulting Servs., Inc.*, 915 F.3d 297 (4th Cir. 2019) (No. 18-1206), ECF No. 23. According to the EEOC, the rumor itself was gender-based, as was the harassment that stemmed from that rumor. *Id.* at 16. The EEOC pointed out that the complaint alleged that the rumor was started and circulated by male employees, and that there was nothing gender-neutral about the circulation of a rumor that a female employee had "slept her way to the top." *Id.* at 17. "Unfounded accusations that a woman worker is a 'whore,' a siren, carrying on with her coworkers, a Circe, 'sleeping her way to the top,' and so forth are capable of making the workplace unbearable for the woman verbally so harassed, and since these are accusations based on the fact that she is a woman, they could constitute a form of sexual harassment." *Id.* (quoting *McDonnell v. Cisneros*, 84 F.3d 256, 259-60 (7th Cir. 1996)).

[390] *Parker*, 915 F.3d at 304.

[391] *Id.* at 303.

 

behavior, those same stereotypes could cause superiors and coworkers to treat women in the workplace differently, and therefore give rise to a sexual harassment claim.[392]

### b. Establishing Employer Liability

In addition to moving the law with respect to what counts as harassing conduct, the EEOC has also shaped the law as it relates to establishing when an employer can be held liable for the harassing conduct of its employees. For example, in *EEOC v. Mediacom Communications Corp.*,[393] the EEOC brought a lawsuit on behalf of several call center employees who alleged that they had been sexually harassed by a male coworker and that the employer had not done enough to put a stop to the offensive conduct. The employer argued that it could not be liable for the co-worker's conduct because it took appropriate and prompt remedial conduct, including moving the women's workstations and conducting investigations of the conduct. The court explained that the proper legal standard for determining an employer's liability for sexual harassment perpetrated by a co-worker is if the employer was negligent in controlling working conditions.[394] In this case, the court concluded that there were material issues of fact that required resolution by a jury. Among other things, the employer took no immediate action after the first complaint of misconduct and that misconduct continued. Even after it had met with the alleged perpetrator, the company still did nothing, declaring it a "he said she said" scenario.[395] And even after the employer moved the women's workstations, it did not punish the alleged perpetrator or take other steps to ensure that the unwelcome conduct did not continue. The court concluded that: " There is some evidence that [employer] responded to Plaintiffs' allegations of harassment. However, the timing and sufficiency of that response presents a question of fact that must be resolved by jury."[396]

Similarly, in *EEOC v. Dolgencorp, LLC*,[397] the EEOC brought an action alleging that the Defendant discriminated against its female employee by sexually harassing and constructively discharging her. The charging party alleged that the store manager at the location where she worked subjected her to unwanted conduct, including making comments about "sausages," turning her head toward his crotch when she was stocking shelves, attempting to massage her shoulders, and commenting on her breasts.[398] The court examined the employer's *Faragher/Ellerth* defense, in which the employer argued that it had exercised reasonable care to prevent and correct any harassing behavior and the charging party unreasonably failed to take advantage of the corrective opportunities.[399] Finding that a reasonable jury could disagree about whether the charging party unreasonably failed to take advantage of the corrective measures in place by Defendant, the court denied the motion as to the EEOC's harassment claim: "Given the compressed time period for all of the conduct in this case, a jury could conclude that [charging party's] brief delay before reporting to Human Resources, within the first month of her employment, was reasonable. Thus, the question of whether [employer] can properly avail itself of the *Faragher/Ellerth* defense presents an issue for the jury."[400]

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[392] *Id.* The Fourth Circuit also held that the alleged harassment was severe and pervasive enough that it had altered the conditions of plaintiff's employment and created an abusive atmosphere. Accordingly, plaintiff had adequately alleged a plausible claim for hostile work environment sex discrimination. *Id.* at 305.

[393] *EEOC v. Mediacom Communications Corp.*, No. 7:18-CV166, 2021 WL 1011897 (M.D. Ga. Mar. 16, 2021).

[394] *Id.* at *17.

[395] *Id.*

[396] *Id.*

[397] *EEOC v. Dolgencorp, LLC*, No. 18-CV-2956, 2020 WL 1285538 (D. Md. Mar. 18, 2020).

[398] *Id.* at *1-2. The charging party complained to the store manager of another store, who stated that she had heard other similar rumors involving charging party's supervisor. The store manager advised charging party to report the conduct to HR and transfer stores. HR began investigating the allegations and transferred charging party. *Id.* at *2. After charging party transferred stores, her previous supervisor arrived one day to help prepare the store for a visit from a corporate executive. Upon seeing her previous supervisor, charging party resigned. *Id.* The investigation into the allegations lasted two months and, while the employer could not substantiate the conduct, it informed the supervisor that any further misconduct would result in termination. *Id.* at *3.

[399] *Id.* at *4-5.

[400] *Id.* at *5. *See also EEOC v. Safie Specialty Foods Co., Inc.*, No. 18-CV-13270, 2019 WL 5734377, at *13 (E.D. Mich. Nov. 5, 2019) (holding that the EEOC had established a prima facie case that sexual harassment was severe and pervasive enough to constitute a hostile work environment, and that it had presented sufficient evidence that the employer knew or should have known

### c. Race-Based And Other Forms Of Harassment

Although the #metoo-generated headlines and resulting litigation have captured much of the attention relating to harassment litigation over the past few years, sex discrimination harassment is, of course, not the only type of harassment that the EEOC is concerned about. For example, in *EEOC v. Joe's Old Fashioned Bar-B-Que, Inc*.,[401] the EEOC brought an action alleging race discrimination. The charging party worked in carryout at a restaurant and alleged that during her employment, she worked with a coworker who harassed her on the basis of her race.[402] The charging party had reported these incidents to the restaurant, which led to members of management telling the coworker to stop his behavior and, when the charging party's coworker hit her, terminating his employment. In evaluating the partial motion for summary judgment, the court found that the employer's management did not act with reckless indifference as to justify punitive damages and that the employee's behavior was outside of the scope of the duties of his employment such that the employer was not liable for the battery and intentional infliction of emotional distress.[403]

After trial, the jury returned a verdict in favor of the employer. The EEOC moved for judgment as a matter of law and for a new trial.[404] However, the Judge found that the evidence adduced at trial was sufficient to support the jury's verdict. Among other things, the court noted that "the parties elicited conflicting testimony regarding the material elements of [charging party's] claims, especially Defendant's knowledge of [coworker's] conduct towards [charging party]."[405] The court therefore denied the EEOC's requests for judgment as a matter of law and for a new trial.

Similarly, in *EEOC v. Driven Fence, Inc.*,[406] the U.S. District Court for the Northern District of Illinois held that an employer had constructive knowledge of racial harassment based on the knowledge of a supervisor who had himself engaged in the harassing conduct.[407] The issue for the District Court was whether the company could be held liable for the harassing conduct of plaintiff's coworkers: "[i]f the harassers were [plaintiff's] supervisors, then [employer] is strictly liable for the harassment. . . . If the harassers were other, non-supervisory co-workers, then [employer] is liable if it was 'negligent in discovering or remedying the harassment.'"[408] The employer argued that it was not aware of the harassment because plaintiff had not made a concerted effort to inform the employer that a problem existed.[409] But the District Court held that a reasonable jury could conclude that the warehouse supervisor had a duty to report harassment to the company's upper management, even though that supervisor had himself participated in the harassing conduct.[410]

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about the harassment where "at least two supervisors . . . were aware of that inappropriate conduct, and that supervisors and employees were discouraged from reporting misconduct to [employer]").

[401] *EEOC v. Joe's Old Fashioned Bar-B-Que, Inc*., No. 5:18-CV-180, 2020 WL 3128599 (W.D.N.C. June 12, 2020).

[402] Specifically, her coworker muttered racial epithets to her, told jokes where the punchline included racial slurs, and, in one incident, poured sauce on her, hit her with a pan, and yelled racial slurs and racially charged remarks at her. *Id.* at *2.

[403] *Id.* at *6.

[404] *EEOC v. Joe's Old Fashioned Bar-B-Que, Inc*., No. 5:18-CV-180, 2020 WL 7318145 (W.D.N.C. Dec. 11, 2020).

[405] *Id.* at *1.

[406] *EEOC v. Driven Fence, Inc.*, No. 17-CV-6817, 2019 WL 3555211 (N.D. Ill. Aug. 2, 2019).

[407] In that case, a black employee alleged that he was subjected to several racially charged comments from his colleagues. *Id.* at *2. Among other things, plaintiff had alleged that when he had entered his place of employment on one occasion he saw a noose hanging from a rafter. *Id.* His coworkers subjected him to continued harassment regarding that incident, including saying, "if you don't do your work right, this is what's going to happen," and grabbing his arms and trying to put his head in the noose. *Id.*

[408] *Id.* (quoting *Nischan v. Stratosphere Quality, LLC*, 865 F.3d 922, 930 (7th Cir. 2017)).

[409] *Id.*

[410] *Id.* at *3. According to the company's employment policies, that supervisor was the manager who was supposed to receive employee reports of harassment and other misconduct. *Id.* at *1. According to the District Court, it would be reasonable to infer based on that policy that the supervisor was the person responsible for bringing harassing conduct to the attention of the employer's upper management. *Id.* at *3. Accordingly, "[a] jury could find that under these rules and expectations, [supervisor] was required to bring disrespectful employees, including himself, to [upper management's] attention, and as a result, that [employer] was on constructive notice of the harassment of [plaintiff]." *Id.*

 

# PART II
# COMPENDIUM OF SIGNIFICANT EEOC-LITIGATION DECISIONS IN 2021

## A. Motions To Dismiss, Procedural And Jurisdictional Attacks

### 1. Motions To Dismiss

***EEOC v. Al Meghani Enterprises*, No. 21-CV-00760, 2021 U.S. Dist. LEXIS 224558 (W.D. Tex. Nov. 19, 2021).** The EEOC filed an action on behalf of the charging party, Rebecca Garcia, alleging that Defendant subjected her to sexual harassment in violation of Title VII of the Civil Rights Act. Defendant filed a motion to dismiss pursuant to Rule 12(b)(6) for failure to state a claim. The EEOC contended that Garcia was subjected to sexual harassment under both the *quid pro quo* and hostile work environment theories as well as retaliation. Specifically, the EEOC alleged that Garcia was subject to harassing comments, sexually explicit text messages, and threats of termination by her store manager. Ultimately the store manager terminated Garcia's employment. Defendant argued that the EEOC must distinguish in its initial pleading whether the alleged sexual harassment constituted a *quid pro quo* or a hostile work environment theory, and the court should dismiss the opposing theory. *Id*. at *7. The Court disagreed. It opined that at the pleading stage, the only requirement was that EEOC's complaint include a short and plain statement showing that Garcia was entitled to relief and which gave Defendant fair notice of the grounds and cause of action. *Id*. at *8. The Court ruled that the EEOC adequately alleged a *quid pro quo* theory because Garcia expressed to her Store Manage she was not interested in, and repeatedly rejected, his sexual propositions; the Store Manager was the highest ranking employee in her location and was her supervisor; the Store Manager threatened to terminate her; and she was ultimately terminated. *Id*. The Court ruled that at this point in the litigation, the EEOC's allegations were sufficient to support a causal nexus between Garcia's termination and her rejection of the Store Manager's sexual propositions. *Id*. at *10. Defendant also contended that the EEOC failed to articulate facts sufficient to support a cause of action on the hostile work environment theory. *Id*. at *10-11. The Court ruled that Defendant's argument failed because whether it "knew or should have known" was not an element when the alleged harasser was a supervisor. The EEOC's alleged that the Store Manager was Garcia's supervisor and was the only manager who work closely with Garcia. The Court thus held that the complaint plausibly alleged facts of a hostile work environment claim when the alleged harasser was a supervisor. Finally, as to the retaliation claims, the Court reasoned that the EEOC's allegations that Garcia was terminated less than one month after being hired were sufficient to satisfy the pleading requirement to assert a causal connection between Garcia's protected activity and her termination. For these reasons, the Court denied Defendant's motion to dismiss.

***EEOC v. Danny's Restaurant, LLC*, No. 16-CV-00769, 2021 WL 3701339, at *1 (S.D. Miss. Aug. 19, 2021).** The EEOC filed an action alleging that Defendants, adult entertainment clubs, discriminated against Black dancers on the basis of their race in violation of Title VII of the Civil Rights Act. Defendants filed a motion to dismiss and for sanctions, which the Court denied. Defendants asserted that the EEOC engaged in "witness tampering" by coercing one of Defendants' managers into signing a witness statement favorable to the EEOC. *Id.* at 2. The EEOC argued Defendants' motion should be dismissed as untimely. The Court agreed with the EEOC to the extent that it was filed after the deadline for dispositive motions and "well after" Defendant was aware of the allegedly offending behavior. *Id*. at 3-4. The Court held that the EEOC did not do anything wrong by obtaining the affidavit. Further, the Court noted that it did not have the alleged affidavit and other pertinent filings with the motion, and that it was not the EEOC's responsibility to put before the Court admissible evidence received from Defendant. The Court concluded that "when the sensational verbiage" was stripped away from Defendant's allegations, there was nothing

 

sanctionable about the EEOC's actions. *Id.* at 7. For these reasons, the Court denied Defendants' motion to dismiss and for sanctions.

***EEOC v. K&L Auto Crushers*, No. 20-CV-00455, 2021 U.S. Dist. LEXIS 20248, (E.D. Tex. Feb. 1, 2021).** The EEOC brought an enforcement action against Defendant on behalf of the charging party, Claudia Vestal, alleging violations of the Americans With Disabilities Act ("ADA"). The EEOC asserted that Defendant discriminated against Vestal by failing or refusing to provide her with a reasonable accommodation, and terminating her because of her disability (cancer) in violation 42 U.S.C. § 12112(a). Specifically, the complaint alleged that Vestal sought modifications of a work schedule for the time she was undergoing chemotherapy, which Defendant either denied or to which it never responded. The EEOC sought: (i) a permanent injunction to enjoin Defendant from basing any employment decision on an employee's disability; and (ii) back-pay, compensation for past and future pecuniary and non-pecuniary losses, and punitive damages for Defendant' malicious and reckless conduct. Defendant moved to dismiss the complaint pursuant to Rule 12(b)(6). Defendant argued that Plaintiff had not sufficiently made a *prima facie* case of discrimination. Defendant contended that: (i) Vestal did not request any specific reasonable accommodation for her disability and that her complaint failed to allege that she requested accommodations; (ii) Vestal had not alleged that she provided a specific date for her anticipated return to work; (iii) indefinite leave was not a reasonable accommodation under the ADA; and (iv) the EEOC did not sufficiently allege that Vestal was a qualified individual under the ADA. The Court denied Defendant's motion. It noted that the bulk of the motion disputed facts and evidentiary issues that were more properly considered at the summary judgment stage. The Court opined that all that was required was that the EEOC plead enough facts to state a claim that was plausible on its face. The Court agreed with the EEOC's position that Defendant misrepresented the contents of the complaint, most notably on the issues of whether Vestal requested accommodation. Finally, the Court rejected Defendant's argument that the complaint should be dismissed because it failed to make a showing of each prong of the *prima facie* test for discrimination. The Court agreed with the EEOC that Defendant's argument failed to account for the Supreme Court's holding in *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506 (2002). Under *Swierkiewicz* and its progeny, the EEOC's complaint should not be dismissed if it does not allege facts establishing a *prima facie* case of discrimination. To survive a motion to dismiss, the pleadings need only give Defendant fair notice of the basis of the discrimination claim. As such, the Court concluded that the EEOC had met its burden to state a claim that Vestal was qualified individual under the ADA. The Court determined that Vestal's assertion that she requested a modified schedule with the ability to appear in person and then requested the ability to work from home implied that Vestal believed that she could perform the essential functions of her job or that she could do so with an accommodation. In sum, the Court ruled that the EEOC's allegations were enough to provide Defendant fair notice of the claim and the grounds upon which it rested. Likewise, as to the failure to accommodate claim, given the similarity of the elements in both claims, the Court also found that the EEOC had pled enough facts to sufficiently allege a failure to accommodate claim. For these reasons, the Court denied Defendant's Rule 12(b)(6) motion to dismiss.

***EEOC v. Konos Inc.*, No. 20-CV-973 (W.D. Mich. June 3, 2021).** The EEOC filed an enforcement action on behalf of a claimant against her employer, alleging it subjected to her to a hostile work environment and retaliation after she was sent home for complaining about a supervisor's sexual harassment. Defendant brought a motion to dismiss both claims, which the Court denied. It found that when taking all factual allegations as true, the EEOC's complaint sufficiently plead violations of Title VII of the Civil Rights Act. The claimant started working for Defendant on or about April 12, 2017, as an egg inspector at its facility in Martin, Michigan. *Id.* at 1. Shortly thereafter, a supervisor allegedly began sexually harassing the claimant. The harassment included text messages soliciting an intimate relationship, which she rejected. In addition, the supervisor sexually assaulted her on three separate occasions, including forced kissing, groping, and vaginal penetration. The claimant reported the assault to Defendant and the police, and obtained a personal protection order against the supervisor. Thereafter, the supervisor was prosecuted and pled no contest to fourth degree criminal sexual conduct. After the claimant complained about the alleged sexual harassment, Defendant the sent the claimant home, and she never returned to work. The EEOC's lawsuit alleged that: (i) Defendant violated Title VII by subjecting the claimant to a hostile work environment; and (ii) that it violated Title VII by retaliating against her for objecting to and complaining about a sexually hostile work environment. *Id.* at 2. In moving to dismiss both claims, Defendant asserted that the EEOC failed to allege specific facts demonstrating a hostile work environment based on sexual harassment, and

 

failed to allege specific facts to establish a claim for retaliation under Title VII. The Court noted that the EEOC's allegations, when viewed in their totality, were sufficient to state a viable claim for relief under Title VII. Further, the Court explained that although the EEOC did not specify in its complaint whether the supervisor was claimant's actual supervisor, employer liability may still be established if the employer knew or should have known of the sexual harassment, and failed to implement prompt and appropriate corrective action. *Id.* at 5. For these reasons, the Court denied Defendant's motion to dismiss the hostile work environment claim. The Court also rejected Defendant's argument that the complaint failed to allege specific facts to establish a claim for retaliation under Title VII. *Id.* at 6. The Court disagreed with Defendant's position. It opined that protected activity includes "complaining to anyone (management, unions, other employees, or newspapers) about allegedly unlawful practices." *Id.* at 6. The Court held that the EEOC properly plead a materially adverse employment action since the claimant was sent home, and that the EEOC sufficiently plead that a causal link existed between the protected activity (complaining about harassment) and the adverse employment action (being sent home). Accordingly, the Court denied Defendant's motion to dismiss the retaliation claim.

### 2. Other Procedural Attacks

***EEOC v. Hunter-Tannersville Central School District*, No. 21-CV-0352, 2021 WL 5711995 (N.D.N.Y. Dec. 2, 2021).** The EEOC filed an action alleging on behalf of the charging party, Dr. Susan Vickers, a school district superintendent, alleging that Defendant paid Dr. Vickers less and provided less favorable benefits than the previous male superintendent in violation of the Equal Pay Act ("EPA"). Defendant filed an answer asserting various affirmative defenses. The EEOC moved to strike Defendant's affirmative defense that any differential in pay that Plaintiff is able to identify was the result of a job related factors other than sex, as permitted by 29 U.S.C. § 206(d)(1)(iv)," and the "other than sex" factor was the ability to negotiate a higher salary. *Id*. at *2. The Court denied the motion. The Court explained that the EEOC must establish a *prima facie* case to prove an EPA violation by establishing three elements: "(i) the employer pays different wages to employees of the opposite sex; (ii) the employees perform equal work on jobs requiring equal skill, effort, and responsibility; and (iii) the jobs are performed under similar work conditions." *Id*. at *4. If established, the burden then shifts to the employer to offer a reason as to why the compensation differs, which it can do by showing that the difference in compensation results from: "(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex." *Id*. at *5. The EEOC contended that Defendant's affirmative defense was legally insufficient in that contract negotiations were not "related to the performance of the Superintendent job." *Id*. Defendant argued that the affirmative defense was legally sufficient because neither the U.S. Supreme Court nor the Second Circuit have ever held that negotiation was not a "factor other than sex" that an employer could rely upon to defend against an EPA claim. *Id*. at *6. Further, Defendant pointed to the fact that there were at least two circuit courts and multiple federal district courts that have specifically held that "negotiation issues" was a valid defense. *Id*. The EEOC responded that decisions outside of the Second Circuit did not require that a "factor other than sex" be "job-related," and no circuit case law authority previously had held that negotiations were a job-related factor that would justify a pay disparity under the EPA. *Id*. The Court opined that at this early stage in the proceedings, it was not convinced that only job-related factors could constitute a "factor other than sex." *Id*. The Court reasoned that the EEOC did not meet its burden to show that Defendant's affirmative defense was insufficient because there was a question of law, which might provide success on the merits to Defendant. For these reasons, the Court denied the EEOC's motion to strike the affirmative defenses.

## B. Discovery In EEOC Cases

### 1. Motions To Compel, Entries Of Confidentiality And Protective Orders, And Other Discovery Procedures

***EEOC v. Yale New Haven Hospitals, Inc.*, No. 20-CV-00187, 2021 WL 5235274 (D. Conn. Nov. 10, 2021).** The EEOC filed an enforcement action alleging that Defendant's "Late Career Practitioner Policy" - requiring neurophysiological and ophthalmologic examinations for its employees - was discriminatory and

therefore violated the Americans With Disabilities Act ("ADA") and the Age Discrimination in Employment Act ("ADEA"). During discovery, Defendant noticed the depositions of nine individuals who were subjected to its Late Career Practitioner Policy, each of whom was a current employee. Defendant informed the EEOC that, during the depositions, it would ask those individuals if they "were later diagnosed with a cognitive condition, details of those conditions, and their impact." *Id.* at 1. The EEOC filed a motion for a protective order barring Defendant from seeking discovery into any medical diagnosis of individuals outside of Defendant's own testing process. The Court granted the motion for a protective order. It found that with respect to any diagnosis of a cognitive condition received by any individual outside of Defendant's own testing process, including the details of any such condition and its impact, that information was protected by the psychotherapist privilege and was therefore shielded from discovery. The Court reasoned that any inquiry into this subject would be an invasion of privacy, and this harm was not outweighed by any probative value of the information sought. For these reasons, the Court granted the EEOC's motion for a protective order.

***EEOC v. Heart of CarDon, LLC*, No. 20-CV-00998, 2021 WL 5111917 (S.D. Ind. Oct. 29, 2021).** The EEOC filed an action on behalf of the charging party, Marsha Castellano, a Certified Nurse Aide, alleging that she lost function of her left arm after she was injured while working and Defendant refused to provide her a reasonable accommodation in violation of the Americans With Disabilities Act ("ADA"). During discovery, the EEOC filed a motion to compel production of documents and information in response to an interrogatory request seeking Defendant's most recent annual report, appraisal, or other business valuation, federal and state tax returns, financial forecasts, financial statements, resale valuations, statements of fair market value, and statements of revenues and liabilities. *Id*. at *4-5. Defendant objected on the grounds that the documents were not relevant to the EEOC's claims or Defendant's defenses. The EEOC contended that the financial information sought was within Defendant's possession and control, relevant to the EEOC's claim for punitive damages, and proportional to the needs of the case. *Id*. at *6-7. The Court determined that although Defendant attempted to argue that the information sought was not in its possession or control, the corporate structure entities in question had such a close relationship that they were almost indistinguishable and were sufficiently related. Accordingly, the Court was satisfied that the discovery sought was within Defendant's possession and control. The Court further agreed with the EEOC that the information sought was "relevant to punitive damages because those records will show the wealth of the CarDon enterprise, which is one measure the jury can use to determine the amount of punitive damages appropriate to punish Defendant for violating the ADA and to deter future violations." *Id*. at *12. Defendant contended that the scope of the interrogatory was not proportional because Defendant had "already admitted . . . that it has the ability to pay a judgment up to $500,000" and punitive damages will be capped at $300,000. *Id*. at *14. The Court opined that the Seventh Circuit had expressly rejected this argument in other cases. The Court explained that Defendant's admission that it would be able to pay a judgment up to $500,000 did not provide any measure to the jury as to how much an appropriate punishment would be should the jury find an award of punitive damages appropriate. *Id*. at *15. Accordingly, the Court granted the EEOC's motion to compel. The Court also awarded the EEOC attorneys' fees in connection with bringing the motion to compel as the prevailing party.

***EEOC v. Kelly Services*, 19-MC-01581, 2021 U.S. Dist. LEXIS 14773 (N.D. Ala. Jan. 11, 2021).** The EEOC filed an motion to compel enforcement of an administrative subpoena to Defendant. In response, Defendant argued that the scope of the subpoena was overbroad. The Court granted the motion in part and denied it in part. The Court explained that the EEOC has authority to conduct an investigation, and therefore to issue an administrative subpoena. However, the Court found that some of the information requested by the EEOC could not be utilized to advance the investigation. The Court therefore ordered the EEOC to modify its subpoena to request information for individuals who applied for employment, had an active application, or were employed as a result of an employment referral in a craft worker occupation from January 1, 2014 to December 31, 2017 in Defendant's Huntsville, Alabama location. For such individuals, the Court directed Defendant to provide the applicant's personal information, such as name, last known street address, and applicant ID number, occupations in which the applicant was seeking work, job titles applicable to applicant, skills or skill groups associated with the applicant and dates when these titles/groups were created and/or modified, occupational or competency tests taken, results of test, and eligibility rating for placement, reason for background check and results, employer requirements for referral, notes regarding applicant placement preferences, notes of staff evaluations of individual, referral

 

restrictions for the worker, job titles where individual was referred and referral dates, the company to which individual was referred, start date of employment, end date of employment, reasons for termination of employment, dates individual was interviewed by KSI and the reasons for the interviews, results of the interviews, description of and dates of other steps taken in referring or hiring individual, results of the other steps, description of training given by Defendant to individual and dates of training, results of training, training by referral employer and dates of training if known, and results of training by referral employer if known. *Id*. at *2-4. For these reasons, the Court granted in part the EEOC's motion to compel the administrative subpoena.

***EEOC v. Yale New Haven Hospitals, Inc.*, No. 20-CV-00187, 2021 WL 2661638 (D. Conn. June 29, 2021).** The EEOC filed an enforcement action alleging that Defendant's "Late Career Practitioner Policy" - requiring neurophysiological and ophthalmologic examinations - was discriminatory and therefore violated the Americans With Disabilities Act ("ADA") and the Age Discrimination in Employment Act ("ADEA"). *Id*. at 1. During discovery, the EEOC filed a motion to compel production of two sets of documents, including peer review and credentials filed for practitioners subject to the policy and the examinations used to examine the practitioners. Defendant argued that because the EEOC was only objecting to the policy, and not discrimination against any practitioners, the value of the production of the entire peer review files that might contain confidential information was minimal. Defendant further contended that the requests were overly broad and invasive. The EEOC asserted that the files it requested were highly relevant because Defendant must justify why it used an age-proxy and whether another selection criteria for identifying poor performing practitioners could be used unrelated to age. The Court agreed with the EEOC. The Court ruled that the EEOC was entitled to review the records to see if the policy was necessary, and any confidentiality concerns could be addressed though proper maintenance of confidentiality designations. The Court noted that there were only 115 files, which was not overly burdensome. The Court also determined that Defendant must produce the requested tests, including the administrator's documents, raw data, versions of tests used under the policy, and the administrator's notes. For these reasons, the Court granted the EEOC's motion to compel production of documents.

***EEOC v. Scottsdale Healthcare Hospitals*, No. 20-CV-08194, 2021 WL 4522284 (D. Ariz. Oct. 4, 2021).** The EEOC conducted a 15-month investigation in a charge alleging that charging party and other aggrieved individuals had been discriminated against in violation of the ADA. *Id.* at *1. The EEOC concluded that there was reasonable cause to believe that the employer had discriminated against the charging party and other aggrieved individuals by "implementing a policy and/or practice of requiring individuals with disabilities to compete for open positions when returning from medical leave rather than providing reasonable accommodations including reassignment." *Id.* Once in litigation, the employer resisted the EEOC's discovery requests, arguing that they went beyond the charge, which was limited to individuals who took a leave of absence, were required to compete for a job upon returning, and were terminated rather than reassigned. *Id.* at *2. The Court disagreed, holding that "even if certain claims in the Complaint do exceed the scope of Carter's initial Charge, discovery relevant to such claims may yet be obtained if the claims arose out of EEOC's reasonable investigation of that Charge and are encompassed within its letter of determination." *Id.* The Court also noted that the EEOC's investigation had provided notice of the breadth of the EEOC's claims, and the employer had responded to those requests: "[Employer's] argument that it lacked sufficient notice of the extent of EEOC's claims is therefore unpersuasive, given that [employer] itself provided the EEOC with information that gave rise to the challenged allegations in the Complaint." *Id.* at *3. The Court explained that the employer should have challenged the scope of the EEOC's information requests during the investigation: "Had [employer] 'believed that the EEOC's investigation exceeded the permissible statutory scope, it could have refused the EEOC's demand for access and sought adjudication of its rights.'" *Id.* (internal citations omitted). For these reasons, the Court ordered the employer to respond to the discovery requests at issue.

***EEOC v. Stanley Black & Decker, Inc.*, No. 19-CV-2599, 2021 WL 1985017 (D. Md. May 17, 2021).** The EEOC filed a subpoena enforcement action seeking terminated employee severance agreements in connection with its investigation into Defendant's alleged violations of the Age Discrimination in Employment Act ("ADEA"). The underlying investigation related to an employee who alleged that he was terminated, but did not sign Defendant's severance agreement that included a clause giving up rights to file a charge of discrimination with the EEOC in exchange for severance pay. The employee later filed a

charge with the EEOC alleging racial discrimination during his employment. Defendant argued that the subpoena was in reality an attempt to continue investigating a previous request for a subpoena following a similar charge of discrimination, which had been denied. Defendant further asserted that the subpoena was overly burdensome, would require review of the files of over 2,700 employees and would take over 2,000 hours of work. The Court ordered Defendant to comply with subpoena, but provided the parties three weeks in order to reach an agreement regarding the scope of requested information. The Court determined that the EEOC's authority pursuant to the ADEA contains no charge-based relevancy requirement and that the EEOC was able to conduct investigations into potential ADEA violations at its discretion. *Id*. at *6-7. The Court found that the EEOC was expanding its charges after conducting an initial, reasonable investigation, and that there was an overlap between the allegations underlying both charges appeared to stem from the fact that the EEOC learned of the potential systemic issue from the first individual charge, and not an improper purpose to fish for information. *Id*. at *9-10. The Court ruled that the EEOC's request to identity Defendant's employees who had been provided a release containing a provision requiring them to waive their right to file an agency charge and to agree not to cooperate with any proceeding against Defendant was more than "speculatively" related to the EEOC's authority to investigate potential ADEA violations. *Id*. at *14. For these reasons, the Court ordered Defendant to respond to the EEOC's subpoena.

# C. Dispositive Motions In EEOC Pattern Or Practice And Single Plaintiff Cases

## 1. ADA Cases

***EEOC v. Cash Depot*, 20-CV-03343, 2021 U.S. Dist. LEXIS 185146 (S.D. Tex. July 21, 2021).** The EEOC filed an action on behalf of the charging party, Barney Galloway, alleging that Defendant discriminated against him on the basis of his disability in violation of the Americans With Disabilities Act ("ADA"). After discovery, Defendant filed a motion for summary judgment, which the Court granted. Galloway worked for Defendant as a field service technician for its automated teller machines. During his employment, he suffered a stroke in his home. Galloway subsequently provided Defendant with a doctor's note restricting his driving ability. Thereafter, he requested a leave of absence. Upon his return to work, Galloway provided an updated doctor's note approving his return, but imposing a 25-pound lifting restriction. Defendant terminated Galloway's employment on the basis that it could not make the 25-lifting restriction accommodation. The EEOC thereafter filed an action alleging discrimination and failure to accommodate. The Court noted that it was undisputed that Galloway was a qualified individual with a disability under the ADA and that Defendant terminated his employment. However, the Court looked to whether or not Galloway was able to perform the essential functions of his job with minor accommodations for the lifting restriction. *Id*. at *2. The EEOC argued that there were three possible reasonable accommodations, including: (i) splitting the coin removals into multiple bags, (ii) scheduling other technicians to help with heavy jobs, and (iii) giving Galloway more unpaid leave. As to the first argument, the Court found no evidence to suggest that splitting removals was a reasonable accommodation, as it could lead to theft or other dangers. The Court opined that Defendant was not required under the law to hire others to help Galloway complete his job, and that paying someone else to assist in work Defendant was already paying for was not a reasonable accommodation. Finally, the Court determined that Defendant did not have to discuss a reasonable accommodation with Galloway if one did not exist. For these reasons, the Court granted Defendant's motion for summary judgment as to the EEOC's claims.

***EEOC v. Wal-Mart Stores, Texas, LLC*, No. 18-cv-3407, 2021 WL 5165694 (S.D. Tex. Nov. 5, 2021)**. The EEOC filed an action on behalf of the charging party, Jesse Landry ("Landry"), alleging discriminatory failure to hire on the basis of her disability (congenital amputee missing right forearm and hand) in violation of the Americans With Disabilities Act ("ADA"). Following discovery, Defendant filed a motion for summary judgment, which the Court denied. The EEOC alleged that Landry interviewed for myriad of open positions, during which the interviewer stated that she would be unable to perform the required job duties, including moving and loading boxes, due to her disability. Defendant argued that summary judgment was warranted because the EEOC has failed to establish disability discrimination by direct or circumstantial evidence; because the legitimate, non-discriminatory reason Landry was not hired was not pretextual and Landry's alleged disability was not a motivating factor in Defendant's failure to hire her; and because there was no

 

evidentiary basis to support an award of punitive damages. *Id*. at *7. The EEOC contended that it raised genuine issues of material fact by both direct and circumstantial evidence, which precluded granting Defendant's motion, that Defendant's shifting positions regarding its treatment of Landry raised credibility issues, and that the actions and inactions of managers supported an award of punitive damages. *Id*. The Court concluded that the EEOC cited evidence from which a reasonable fact-finder could conclude that it had established a *prima facie* case of disability discrimination for violation of the ADA because Landry suffered an adverse employment action of not being hired on account of a disability. The Court found that Defendant met its burden to state a legitimate, non-discriminatory reason for failing to hire Landry for the stocker position, *i.e*., because Landry had not applied for that position. However, the Court reasoned that Defendant failed to establish any reason for failing to hire Landry for any of the 36 positions for which she was considered, and ultimately not hired for at Wal-Mart. Further, the Court determined that Defendant was not consistent with its reasons for failing to hire Landry, and when an employer offers inconsistent explanations for its employment decision, the jury may infer that the employer's reasons are pretextual. *Id*. at *29. Accordingly, the Court concluded that genuine disputes of material fact regarding whether Defendant's stated reasons for failing to hire Landry were pretextual. *Id*. at *30. For these reasons, the Court denied Defendant's motion for summary judgment.

***EEOC v. West Meade Place, LLP*, 841 F. App'x 962 (6th Cir. 2021)**. The EEOC filed an action on behalf of the charging party, Carma Kean, alleging that Defendant discriminated against her on the basis of her disability in violation of the Americans With Disabilities Act ("ADA") when it terminated her employment. The District Court granted Defendant's motion for summary judgment. On the EEOC's appeal, the Sixth Circuit reversed and remanded the District Court's order. Defendant argued that it was unaware that Kean was disabled and that she was fired for providing a falsified document certifying that she could return to work after initially seeking medical leave. *Id*. at *2. The District Court had ruled that no reasonable jury could find that Kean met any of the statutory definitions of "disability" under the ADA. *Id*. Kean was employed as a laundry assistant at Defendant's facility and suffered from anxiety disorder that manifested in periodic "flare-ups" when she experienced panic attacks. *Id*. at *3. Kean's flare-ups caused a variety of symptoms, including a racing heart, breathlessness, breaking down and crying, and psoriasis, a skin disorder. Kean thereafter alleged that her co-workers were subjecting her to mistreatment, which caused her anxiety to increase. Kean submitted a note from her doctor to Defendant, requesting that Kean be permitted to miss work due to her condition for one-to-three days per month, and three or four times a year. The next day, Kean asked Defendant's payroll director about taking FMLA leave, in accordance with the documentation that her doctor had provided. The payroll director informed Kean that she did not qualify for FMLA because she had not been employed at West Meade for 12 full months. While the parties disputed what next occurred, Kean was ultimately terminated from her employment when she failed to produce documentation from her doctor that she was able to return to work. Defendant further asserted that Kean produced falsified doctor's documents and that was the reason she was terminated. The District Court had concluded that no reasonable jury could find that Kean had a disability as defined by the ADA. On appeal, the EEOC argued that Defendant "regarded Kean as having...an impairment," and thereby falling under the ADA's definition of "disability." *Id*. at *10. Defendant asserted that Kean's anxiety did not affect her ability to do her work. The Sixth Circuit noted that even if Defendant were able to show Kean had no other limitations in other activities, these facts did not necessarily rebut the notion that it could have "perceived" her "as having an impairment" and fired her because of that perceived limitation, particularly in light of the updated standard under the ADA. *Id*. at *14. The Sixth Circuit determined that viewed in the light most favorable to the EEOC, the record indicated that Defendant was not only aware that Kean had an impairment that intermittently affected her ability to perform her job, but also that it was related to stress. *Id*. at *16. The EEOC further argued that a jury could find that Defendant fired Kean because it regarded her as having an impairment and that Defendant's "falsification-of-documentation rationale" was entirely pretextual. *Id*. at *17. The Sixth Circuit reasoned that there too many factual disputes for the case to be resolved on the basis of summary judgment. For these reasons, the Sixth Circuit reversed and remanded the District Court's ruling granting summary judgment to Defendant.

***EEOC v. Blue Sky Vision, LLC*, No. 20-CV-285, 2021 WL 5535848 (W.D. Mich. Nov. 1, 2021).** The EEOC filed an action on behalf of the charging party, Randall Jansma, an optometrist, alleging that Defendant discriminated against Jansma on the basis of his disability, a homonymous hemianopsia or blind spot, in violation of the Americans With Disabilities Act ("ADA"). Following discovery, Defendant filed

a motion for summary judgment, and the Court denied the motion. The Court concluded that genuine issues of material fact precluded summary judgment. Due to Jansma's homonymous hemianopsia, Defendant had concerns as to whether he could perform the essential duties of his job, including being able to thoroughly exam patients' eyes, and see the entire surface and internal structures of the eyes without missing areas of concern. Defendant had offered Jansma two alternatives, including: (i) resign; or (ii) continue employment on leave and undergo a medical evaluation to determine whether he could safely perform his job duties. *Id*. at *5. Jansma agreed to undergo a medical evaluation. Thereafter, Jansma received from Defendant a questionnaire for the doctor to answer and an authorization for the release of medical information. The questionnaire directed the evaluator to answer questions such as "Does Dr. Jansma have a physical or mental impairment? If so, please describe such impairment(s) in detail;" and to authorize a designated entity "to release or disclose health information to Defendant. *Id*. at *6. Jansma objected to both, and did not provide results of an exam or medical records to Defendant; as a result, he was ultimately terminated from his employment. The EEOC alleged that the examination and request for all health information was not sufficiently narrow in scope, and thus was discriminatory under the ADA. The Court agreed. It found that the EEOC established a genuine issue of material fact as to whether the disability inquiry and the medical release were properly limited in scope. The Court opined that viewing the record in the light most favorable to the EEOC, the exam and questionnaire (the disability inquiry) did not limit the information sought by Defendant to its concerns about Jansma's homonymous hemianopsia. *Id*. at *21. The Court explained that the questionnaire asked broad questions regarding whether or not Jansma had an impairment, which left open the possibility that Jansma had more than one impairment, even though Defendant had concerns about only one disability. *Id*. at *21-22. The Court found that Defendant's inquiry was not job-related and consistent with business necessity. The Court also held that the medical record release was overly broad, as the doctor would have obtained any health information from Jansma and any of Jansma's medical records, and would be authorized to release that information to Defendant. The Court determined that a genuine issue of material fact existed as to whether Defendant had a legitimate, non-discriminatory reason for terminating Jansma. The Court reasoned that Defendant terminated Jansma at least in part because he would not submit to its demands, and if the termination was not proper, Jansma suffered an adverse employment action on the basis of his disability. *Id*. at *24. For these reasons, the Court denied Defendant's motion for summary judgment.

***EEOC v. Charter Communications LLC*, No. 18-CV-1333-BHL, 2021 WL 5988637 (E.D. Wis. Dec. 17, 2021).** The EEOC brought an action on behalf of the charging party, James Kimmons, a call center representative, alleging that Defendant failed to provide him with a reasonable accommodation in violation of the Americans With Disabilities Act ("ADA"). Following discovery, the parties filed cross-motions for summary judgment. The Court denied the EEOC's motion and granted Defendant's motion. Kimmons worked as a retention representative scheduled for nine-hour shifts each work day, and lived approximately one hour from the call center. Kimmons alleged that he suffered from cataracts, which made driving at night difficult. *Id*. at *3. Accordingly, Kimmons submitted a request for an accommodation for a shift that would allow him to avoid driving to or from work in the dark. In response, Defendant approved Kimmons for a temporary, 30-day shift change, allowing him to work the 10:00 a.m. to 7:00 p.m, rather than his previously scheduled noon to 9 p.m. shift. Kimmons requested a 30-day extension on his temporary shift change, which Defendant denied. The EEOC asserted that Defendant's denial of the shift change was discriminatory on the basis of Kimmons' disability. Defendant argued that it was not required to accommodate Kimmons when he could perform all the essential functions of his job, and even if it was required to accommodate him, Kimmons' accommodation requests were unreasonable because they would have been ineffective. *Id*. at *5. The EEOC asserted that Defendant unreasonably denied Kimmons an accommodation to which he was entitled under the ADA, and Defendant failed to adduce sufficient facts to support an undue hardship defense. *Id*. at *6. For purposes of the motion, the Court assumed that Kimmons' alleged night blindness could constitute a disability under the ADA. *Id*. at *7. The EEOC contended that the ADA imposes a duty on employers to grant reasonable and non-burdensome accommodations permitting an employee to arrive at work, even where the proposed accommodation did not relate to an essential function of the employee's job. Defendant claimed that the ADA did not require an employer to accommodate a disability unrelated to the employee's ability to perform his job's essential functions. *Id*. at *9. The Court explained that the Seventh Circuit had resolved this same dispute previously, finding that an employer's accommodation duty was "triggered only in situations where an individual who is qualified on paper requires an accommodation in order to be able to perform the essential

 

functions of the job." *Id*. Thus, a qualified employee with a disability who can perform the essential functions of his job without an accommodation had no right to request one simply because it might improve the quality of his life outside of work. *Id*. at *9-10. The Court reasoned that Kimmons requested a different shift schedule not for the benefit of his performance, but the convenience of his commute. Accordingly, the Court held that Defendant was not required to grant the request for an extension of the shift change. For these reasons, the Court granted Defendant's motion for summary judgment and denied the EEOC's motion.

## 2. Race And National Origin Discrimination/Hostile Work Environment Cases

***EEOC v. Lindsay Ford LLC*, No. 19-CV-2636, 2021 WL 5087851 (D. Md. Nov. 2, 2021).** The EEOC filed an action on behalf of the charging party, Janak Maloney, a former car salesperson, alleging that he subjected to a hostile work environment that resulted in his constructive discharge in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"). The parties filed cross-motions for summary judgment, and the Court granted the EEOC's motion and denied Defendant's motion. Maloney was of South Asian descent. He reported to intermediate sales managers who in turn reported to Jerry Clark, the General Manager of Lindsay Ford. Clark allegedly subjected Maloney to repeated insults about his appearance and called him derogatory names, and made harassing comments which were sexual in nature. Due to the on-going harassment, Maloney requested to be transferred to another dealership location. Maloney was informed of two options, both of which were rejected as undesirable, including: (i) that he could move to the service department, but would still report to Clark; or (ii) that he could transfer to a dealership 38 miles away. Thereafter, Maloney alleged that Clark grabbed his right buttock, after which he could not return to work because of feeling so sick and nauseous. Maloney reported the incidents to Defendants' human recourses department, and it investigated the alleged discrimination. Defendants determined that the discriminatory conduct was corroborated by other employees, and it thereby imposed disciplinary action on Clark and a reduced his salary by $10,000. Defendants argued that based on the evidence, the EEOC could not establish facts sufficient to establish either a hostile work environment claim or a constructive discharge claim. The EEOC contended that there was a genuine issue of material fact precluding summary judgment on the hostile work environment and constructive discharge claims. The Court determined that since the parties disputed whether Clark knew Maloney's national origin, there was at a minimum, a genuine issue of material fact to preclude summary judgment. The Court also found that there was sufficient evidence that Clark's insulting statements were motivated by a discriminatory animus. As for sex discrimination, Defendants did not put forth any specific argument as to why Clark's harassment of Maloney was not based on sex. Whereas the EEOC had presented evidence that Clark engaged in harassment that was sexual in nature - including calling him "gay" and "bitch," physically groping Maloney, displaying pornography in front of him, and sending a fake email to Maloney accusing him of touching himself in front of a customer - Defendants had not provided a specific argument as to why this harassment was not based on sex. Therefore, the Court opined that summary judgment was not warranted on this claim. *Id*. at *17. The Court also found that Maloney's conduct was sufficiently severe and pervasive. Maloney repeatedly expressed his discomfort with the harassment and requested that Clark stop calling him a "serial killer" and throwing objects at him. *Id*. at *26. Further, the Court noted that after Clark groped him, Maloney struggled to function, felt light-headed, sweaty, and nauseous, had to leave work early, and later filed a police report about Clark's behavior. The Court noted that that a reasonable jury could find that the harassment was objectively severe or pervasive. The Court also determined that Defendants could be liable for the conduct because Clark was a second-level supervisor to Maloney and the highest-ranking manager at the car dealership. In addition, the Court held that the EEOC's evidence was sufficient to support a finding of a constructive discharge, as there was genuine issue of material fact as to whether Maloney's working conditions were so intolerable that a reasonable person would have felt compelled to resign. Finally, the Court found that the undisputed facts showed that Defendants operated as an integrated enterprise and it granted the EEOC's motion for summary judgment as to that issue. Accordingly, the Court granted the EEOC's motion and denied Defendant's motion.

***EEOC v. Proctor Financial, Inc.*, No. 19-CV-11911, 2021 WL 4478929 (E.D. Mich. Sept. 30, 2021).** The EEOC brought an enforcement action on behalf of Angela Kellogg, a Claims Examiner, alleging that

Defendant retaliated against Kellogg in violation of Title VII of the Civil Rights Act of 1964. Specifically, the EEOC alleged that Defendant disciplined Kellogg after she filed an EEOC charge alleging race discrimination. The parties' cross-moved for summary judgment pursuant to Rule 56(a). The Court found that genuine issues of material fact existed with respect to the EEOC's claim, and denied the parties' motions. The Court found that there was direct and circumstantial evidence that Kellogg's protected activity motivated Defendant to take adverse action against her. At the very least, the Court concluded that the EEOC had shown a causal connection between Kellogg's EEOC filing and her suspension. Defendant nevertheless maintained it suspended Kellogg because of her continued resistance to adhering to the Defendant's licensing requirements and the lack of integrity displayed by her misleading actions and statements related to the New York licensing exam. The Court agreed that this was a legitimate, non-retaliatory reason to support the adverse employment action against Kellogg. As such, the Court turned to the issue of pretext. The Court opined that the EEOC presented evidence to create a genuine issue of material fact as to whether Defendant's reason for suspending Kellogg was a pretext for unlawful retaliation. First, for over a year and a half, the licensing requirement was in place, but nevertheless, Kellogg did not complete the New York or California exam. Yet, Defendant took no action against Kellogg or any other Claims Examiner who had not passed all the required exams during that time. It was only after Kellogg's protected activity that Defendant decided that she was not taking the requirement seriously and thereby suspended her. In addition, a few months prior to Kellogg's suspension, and before she filed her EEOC charge, her supervisors had rated Kellogg's performance as "Exceeds Expectations" and "Exceptional Performance." *Id*. at *23. Thus, the Court reasoned that this suggested that Kellogg's claimed procrastination in satisfying the licensing requirement was insufficient to motivate the adverse employment action against her. Second, Claims Examiners previously failed licensing exams without reprisal or a demand to see the results. As a result, the Court concluded that a reasonable jury could find that Defendant's reasons for suspending Kellogg were pretextual. The Court opined that this was also supported by the fact that email exchanges by Kellogg's superiors that preceded the adverse employment action manifested a scheme to find "an opportunity" to discipline her. *Id.* Accordingly, the Court ruled that Defendant's claim that her failure to take the New York exam was a legitimate, non-retaliatory reason to support is adverse employment action against Kellogg must be resolved by the finder of fact. For these reasons, the Court ruled that neither party was entitled to summary judgment on the EEOC's retaliation claim.

***EEOC v. DHL Express (USA), Inc.*, No. 10-CV-6139 (N.D. Ill. Dec. 30, 2021).** The EEOC filed an action on behalf of 83 Black truck drivers alleging that Defendant assigned them to more dangerous or demanding routes, tasked them with more arduous dock work, and segregated them from white drivers in violation of Title VII of the Civil Rights Act ("Title VII"). *Id.* at 2. Twenty-one of the drivers intervened and additionally asserted a claim under 42 U.S.C. § 1981. Defendant moved for summary judgment as to the EEOC's claims as well as the intervenors' individual claims. The Court granted in part the motion as to several intervenors' individual claims, and denied the motion as to the EEOC's claims and the remaining intervenors' claims. Defendant's drivers typically picked-up and delivered parcels along routes within certain service areas. They also perform dock assignments such as loading, unloading, and sorting freight and letters. The EEOC and the intervenors claimed that white employees were rarely assigned the hard manual labor that Black drivers were assigned, and that Black drivers were often moved to the most difficult, dangerous, and least desirable routes at several of Defendant's locations throughout the state. Defendant contended that neither assigning a driver to a more dangerous or arduous route, nor assigning a driver to more strenuous dock work, was an adverse employment action under Title VII. Defendant argued that as delivering and picking up packages and performing dock work were tasks within the scope of a driver's duties, a driver did not suffer a materially adverse employment action when the driver was assigned to perform one route or dock task versus another route or task. *Id.* at 64. The Court disagreed. It determined that when the summary judgment record was viewed in the light most favorable to the EEOC, there was evidence to support a reasonable inference that assigning a driver to a route in a predominantly Black, non-white, higher-crime area was a significantly negative work condition that might fairly be characterized as objectively creating a hardship on the driver. Further, the Court noted that most employees found routes in predominantly Black, non-white, higher-crime areas to be more difficult, and that the drivers offered evidence they were subjected to significantly different working conditions and experiences when they worked on routes in predominantly Black, non-white, higher-crime areas. *Id.* at 65-66. Additionally, the Court found evidence to support a reasonable inference that being assigned to a route

 

in a predominantly Black, higher-crime area was objectively degrading, as supervisors informed Black drivers that they were assigned to such routes based solely on their skin color, and one driver alleged that he was laughed at by white drivers who bragged that they never had to drive routes in such areas. Id. at 68. Moreover, when Black drivers complained to supervisors based on their observations that white drivers were not assigned to routes in predominantly Black, higher-crime areas, supervisors tried minimize the complaints. *Id.* at 69. Aside from the claims of several drivers, the Court ruled that the EEOC sufficiently established a triable issue as to whether being assigned routes in a higher-crime area was a significantly negative work condition that might fairly be characterized as objectively creating a hardship on the driver's employment conditions. The Court also determined that the EEOC created sufficient issues of fact as to whether being assigned to a route that required significantly more arduous work constituted an adverse employment action. The Court likewise found evidence of pretext, as Defendant could not provide evidence that it honestly believed that the routes at issue were assigned based on legitimate, non-discriminatory factors. For these reasons, the Court denied Defendant's motion for summary judgment as to the EEOC's claims and the remaining intervenors' discrimination claims.

***EEOC v. JBS USA LLC*, No. 10-CV-2103, 2021 U.S. Dist. LEXIS 13012 (D. Colo. Jan. 25, 2021).** The EEOC brought a lawsuit alleging a meatpacking plant engaged in a pattern or practice of discrimination on the basis of race, national origin, and religion. On August 8, 2011, the Court issued an order bifurcating the case. *Id*. at *5. Phase I of the trial was to address three issues, including: (i) whether Defendant engaged in a pattern or practice of unlawfully denying Muslim employees reasonable religious accommodations to pray and break their Ramadan fast from December 2007 through July 2011; (ii) whether Defendant engaged in a pattern or practice of disciplining employees on the basis of their race, national origin, or religion during Ramadan 2008; and (iii) whether Defendant engaged in a pattern or practice of retaliating against a group of black, Muslim, Somali employees for engaging in protected activity in opposition to discrimination during Ramadan 2008. The Court presided over a 16-day trial for Phase I from August 7 to August 31, 2017. *Id*. at *6. On September 24, 2018, the Court issued its Phase I Findings. *Id*. It found that: (i) while Defendant had denied Muslim employees a reasonable religious accommodation to pray during Ramadan (other than in 2009 and 2010), the EEOC had not made a requisite showing that any employees suffered a materially adverse employment action as a result of Defendant's policy denying unscheduled prayer breaks; (ii) the EEOC had failed to prove that Defendant's disciplinary actions during Ramadan 2008 were motivated by a discriminatory animus; and (iii) the EEOC had failed to demonstrate that Defendant's discipline of employees during Ramadan 2008 was for a retaliatory purpose rather for engaging in a work stoppage. As a result, the Court dismissed the EEOC's Phase I pattern or practice claims. *Id*. at *7. The EEOC moved the Court to reconsider, which the Court denied. The EEOC had asked the Court to reconsider its findings pursuant to the Tenth Circuit's recent *en banc* decision in *Exby-Stolley v. Board Of County Commissioners,* 979 F.3d 784 (10th Cir. 2020), an ADA disability-accommodation case. The EEOC argued that *Exby-Stolley* was an intervening change in Title VII religious accommodation law. The Court opined that *Exby-Stolley* was an ADA case where the jury was instructed that, in order for the Plaintiff to make out an ADA accommodation claim, the Plaintiff had to show that she had suffered an adverse employment action. *Id*. at *8-9. In holding that the ADA did not require Plaintiff to prove she suffered an adverse employment action, the Tenth Circuit compared the elements of an ADA accommodation claim with a religious accommodation claim brought under Title VII. *Exby-Stolley* explained that, while ADA claims do not require that a Plaintiff show an adverse employment action, in Title VII religious accommodation cases the *prima facie* case requires the employee to show among other things that "he or she was fired or not hired for failure to comply with the conflicting employment requirement." *Id*. at *9. The Court explained that in its Phase I Findings, and as the Tenth Circuit stated in *Exby-Stolley,* the adverse employment action requirement for Title VII religious-accommodation claims "is not new." *Id*. at *10. The Tenth Circuit explained the fact that a disparate treatment claim "would require an adverse employment action is wholly unremarkable.'" *Id*. at *10. Accordingly, the Court held that the

law concerning religious accommodation claims under Title VII remained the same as it was before the *Exby-Stolley* decision, and therefore it denied the EEOC's motion for reconsideration.

## 3. Sex/Pregnancy Discrimination/Hostile Work Environment Cases

***EEOC v. Wal-Mart Stores East, L.P.*, No. 18-CV-783, 2021 WL 664929 (W.D. Wis. Feb. 19, 2021.** The EEOC filed an action on behalf of a group of current and former female employees alleging that Defendant failed to accommodate the claimants' pregnancy-related medical restrictions in violation of Title VII and the Pregnancy Discrimination Act ("PDA"). Specifically, most of Defendant's employees were required to be able to lift between 40 and 60 pounds, but Defendant also maintained a temporary alternative duty ("TAD") program under which associates who had suffered occupational injuries could apply for temporary alternative duty or light duty. According to the EEOC, Defendant violated Title VII and the PDA by forcing pregnant employees to take unpaid leave if they could not perform their job duties, rather than allowing them to receive light duty under the TAD program. Defendant asserted that it did not discriminate against its pregnant employees because, during the relevant time period, the TAD program was a national policy applying only to associates who suffered work-related injuries. *Id.* at *2. The parties filed cross-motions for summary judgment, and the Court granted Defendant's motion while denying the EEOC's motion. As a threshold matter, the Court reasoned that the EEOC established a *prima facie* case of discrimination by alleging that the claimants were members of a protected class who sought – and were subsequently denied – an accommodation. Defendant contended that the EEOC failed to show that Defendant accommodated other non-pregnant employees with a similar inability to work, but the Court found that employees who suffered occupational injuries and applied to the TAD program were sufficiently similar for purposes of establishing a *prima facie* claim under the PDA. In response to the Court's finding, Defendant argued that the TAD program was a facially neutral policy that consistently applied only to workers injured on the job, thus making the TAD program "pregnancy blind." *Id.* at *26. The Court shifted the burden to the EEOC to show that Defendant's TAD policy imposed a significant burden on pregnant workers as compared to non-pregnant workers. To that end, the EEOC again pointed to the fact that no pregnant employees with medical restrictions were eligible for TAD. However, the Court held that the EEOC's argument said little about non-pregnant employees when its burden at this stage specifically required it to offer evidence about how Defendant treated non-pregnant employees with medical restrictions who were not injured at work. *Id.* at *31. The Court further found that the record clearly established that Defendant treated pregnant employees seeking an accommodation exactly like other employees with medical restrictions not stemming from a work-related injury. The EEOC also offered testimony by the claimants regarding allegedly harassing statements made by management about breastfeeding in general, but the Court noted that these statements were made by individuals who had no authority with respect to the TAD program or the claimants' requests for accommodations. *Id.* at *42. Therefore, the Court granted Defendant's motion for summary judgment.

***EEOC v. Schuster Co.*, No. 13-CV-4063, 2021 U.S. Dist. LEXIS 79815 (N.D. Iowa April 13, 2021).** The EEOC filed an enforcement action alleging that Defendant's use of an isokinetic strength test (the "CRT Test") had a disparate impact on female job applicants in violation of Title VII of the Civil Rights Act. *Id*. at *3. Following discovery, the parties filed cross-motions for summary judgment, which the Court denied. In its motion, the EEOC asserted that from June 2014 to present, Defendant violated Title VII by refusing to hire women who failed a pre-employment physical test that had a disparate impact on women. In support of its motion for summary judgment, the EEOC's cited its expert's opinion that Defendant's use of the CRT test had a statistically significant adverse, disparate impact on women. The EEOC argued that Defendant could not raise an issue of fact as to whether the CRT test was job-related and consistent with business necessity when: (i) it could not explain how the test was scored or whether the passing score related to the physical demands of the job; (ii) the test did not accomplish Defendant's stated goals of reducing workers' compensation injuries or costs; and (iii) Defendant retained incumbent drivers who failed the test. *Id*. at *4. Finally, the EEOC asserted that Defendant hired many males who failed the CRT test, but refused to hire more than two dozen women who failed the test, yet scored higher than the males who passed. In Defendant's motion for summary judgment, it argued it was entitled to summary judgment because: (i) the CRT test did not have a disparate impact on female applicants for the position of truck driver; (ii) it was

 

entitled to use a physical abilities test that had been validated; (iii) its use of the CRT test was job related and consistent with business necessity; and (iv) the EEOC failed to demonstrate the existence of reasonable alternatives that would effectively serve Defendant's needs while resulting in hiring more female applicants. *Id*. at *5. The EEOC's expert, a labor economist, opined that during the period of June 2, 2014 to February 10, 2020, 95% of CRT tests taken by male conditional hires to the driver position received a passing score, whereas only 76.6% of tests taken by female conditional hires to the driver position received a passing score. *Id*. at *6-7. Defendant relied on the "4/5 Rule," which states that "a selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact." *Id*. Defendant argued that the EEOC did not establish that its use of the CRT test had a disparate impact on female conditional hires. Analyzing Defendant's application of the "4/5 Rule," the Court held there was no dispute that the employer met the test, since even the EEOC's expert noted that 95% of males passed, while only 76.6% of females passed. *Id*. at *8-9. However, the Court also held that Defendant overreached in applying the 4/5 Rule because: (i) it ignored the part of the rule indicating, "[s]maller differences in selection rate may nevertheless constitute adverse impact, where they are significant in both statistical and practical terms or where a user's actions have discouraged applicants disproportionately on ground of race, sex, or ethnic group;" (ii) Defendant's own calculations were just above 80% and barely met the 4/5 Rule; and (iii) although the "4/5 Rule" is generally a benchmark, both the U.S. Supreme Court and EEOC have emphasized that courts should not treat the rule as generally decisive. *Id*. at *9-10. Finally, considering the issues of Defendant's burden to demonstrate that the CRT test was related to safe and efficient job performance and consistent with business necessity, and the EEOC's demonstration of an alternative selection method that had substantial validity and a less disparate impact, the Court held there were material facts in dispute that precluded summary judgment for either party. Accordingly, the Court denied both parties' motions for summary judgment.

***EEOC v. Stan Koch & Sons Trucking, Inc.*, No. 19-CV-2148, 2021 WL 3910001 (D. Minn. Aug. 30, 2021).** The EEOC brought an enforcement action alleging that Defendant's use of a physical abilities test for truck drivers had a discriminatory impact on female drivers in violation of Title VII of the Civil Rights Act. After discovery, the EEOC filed a motion for summary judgment, which the Court granted. The main physical requirements of the job for a driver operating a van were to get into and out of the cab of the truck, climb on and off the back of the truck, inspect the truck, which included stooping and crouching, and crank up and down the dolly legs that stabilized the trailer when it was not connected to the cab. *Id*. at *5. In April 2009, Defendant began requiring applicants to pass a physical abilities test, the "CRT test," which measured a person's range of motion and torque in their shoulders, knees, and trunk. Defendant required applicants to obtain a certain score on the test, and if they did not pass, they would either need to take the test again and pass it, or they would not be hired. Defendant contended that the test was implemented in order to reduce the amount of workplace injuries to drivers by ensuring that hired drivers had the requisite fitness required for the position. The EEOC sought relief on behalf of all women drivers who failed the CRT test between February 2013 and January 2018. To show disparate impact, the EEOC relied on the analysis of three experts. The first was from a labor economist Dr. Erin George, who submitted a report finding that 93.9% of CRT tests taken by male applicants resulted in a passing score, whereas 52% of CRT tests taken by female applicants resulted in a passing score. Dr. George opined that Defendant's use of the test was not neutral with respect to sex. Dr. Ronald Landis. a statistical analysist, evaluated the validity of the CRT test and found "no empirical evidence that supports the validity of this test in predicting relevant on-the-job injuries or the costs of those injuries." *Id*. at *9. The third expert, Dr. Charles Scherbaum, discussed employee selection, personnel management, and test validation, and opined that there was "no evidence of the validity of the CRT test that conforms to any accepted method for establishing job-relatedness." *Id*. at *10. Defendant did not offer any expert opinion evidence in its response to the EEOC's motion. The Court held that the evidence demonstrated that the disparities between male and female applicants for driver jobs were directly attributable to Defendant's use of the CRT test, and the disparities were so great that they could not have occurred by chance (nor did Defendant submit any other plausible explanation to explain the disparities). The Court thus held that the EEOC established a *prima facie* case of disparate impact. Further, the Court looked to whether Defendant established that the test was related to the needs of the job or whether it was a business necessity. The

Court determined that there was nothing connecting the dots between the jobs as performed at Defendant, the movements assessed by the CRT test, the score each test generated, and the cut-off scores selected. Accordingly, the Court ruled that Defendant failed to meet its burden to show the CRT test was job-related. Likewise, the Court reasoned that nothing in the record showed that the CRT test was "essential to eliminating" workplace injuries or claims. The Court therefore granted the EEOC's motion for summary judgment.

***EEOC v. Mediacom Communications Corp.*, No. 18-CV-166, 2021 WL 1011897 (M.D. Ga. Mar. 16, 2021).** The EEOC filed an action on behalf of three female customer service representatives ("Plaintiff-Intervenors") alleging that Defendant subjected the employees to a hostile work environment, retaliation, and constructive discharge under Title VII of the Civil Rights Act of 1964 ("Title VII") and Title I of the Civil Rights Act of 1991 ("Title I"). According to the EEOC, male customer service representative Marcus Christian regularly stared at the three Plaintiff-Intervenors and made them feel uncomfortable through inappropriate sexual conduct. Moreover, Christian allegedly touched Plaintiff-Intervenor Crystal Vinson's back through her chair a number of times, grabbed her breast on one occasion, and forcibly tried to make Vinson touch his penis. The Plaintiff-Intervenors reported Christian's conduct to Defendant, but after finding that its investigation was inconclusive, Defendant responded only by changing the Plaintiff-Intervenors' schedules and seating arrangements as to avoid contact with Christian. The EEOC further claimed that Defendant denied Plaintiff-Intervenor Vinson a raise in retaliation for reporting Christian's conduct, and that Vinson's subsequent resignation amounted to a constructive discharge related to Christian's alleged harassment. Defendant filed a motion for summary judgment, which the Court denied. With respect to the hostile work environment claim, Defendant argued that the EEOC failed to establish that: (i) the harassment was based on the Plaintiff-Intervenors' sex; (ii) the harassment was sufficiently severe or pervasive; and (iii) there was any legal basis to hold Defendant liable. *Id.* at *43. The Court reasoned that the EEOC offered adequate evidence of sex-based harassment, as testimony showed that Christian regularly followed and engaged with female employees, but never harassed any of Defendant's male employees. Additionally, the Court found Christian's conduct to be sufficiently severe or pervasive from both a subjective and objective perspective. On this issue, the Court pointed to several statements by the Plaintiff-Intervenors, including Vinson, saying that "she 'just wanted to feel comfortable again" and Plaintiff-Intervenor Vaughn asserted that "Christian looked at her 'like an animal looks at prey.'" *Id.* at *47-48. In response, Defendant contended that it adequately responded to the Plaintiff-Intervenors' complaints by conducting an internal investigation and altering the affected employees' work schedules and seating arrangements. The Court disagreed. It determined that Defendant's remedial actions did not stop Christian's conduct, and that even after five other employees confirmed the Plaintiff-Intervenors' claims, Defendant labeled the investigation as inconclusive and took no action against Christian. In terms of Plaintiff-Intervenor Vinson's individual claims, the Court allowed her constructive discharge claim to proceed since Vinson already established the presence of adverse working conditions and provided Defendant with sufficient notice of her claim. Defendant argued that the retaliation claim failed because the EEOC did not establish a causal connection between the Plaintiff-Intervenors' alleged protected activity and an adverse employment action, but the Court found that such an issue of material fact was more appropriate for a jury to resolve. For these reasons, the Court denied Defendant's motion for summary judgment.

***EEOC v. NDI Office Furniture LLC*, No. 2:18-CV-01592, 2021 WL 2635356 (N.D. Ala. June 25, 2021).** The EEOC brought an action on behalf of charging parties Alicia Jenkins ("Alicia") and her son, Arceneaux Jenkins, alleging that Defendant violated Title VII of the Civil Rights Act when it: (i) discriminated against Alicia and a group of female job applicants; (ii) engaged in a pattern or practice of failing to hire female applicants because of their sex, and (iii) retaliated against Alicia and Arceneaux. Defendant moved for summary judgment and the Court denied Defendant's motion. The Court found that the EEOC had presented direct evidence that Defendant categorically discriminated against Alicia and women working in its facilities. Specifically, the EEOC presented evidence that when Alicia inquired about a Warehouse Coordinator position she was told that Defendant "did not hire women in the warehouse." *Id*. at *5. Moreover, Defendant did not consider Alicia for the position after she inquired about it and instead it ultimately hired a man for the position. In addition to the statement that Defendant did not hire women in its warehouse, there was evidence that the manager was instructed not to hire women in the warehouse, which the Court concluded also established that Defendant had a pattern or practice of discrimination on

 

the basis of sex against female applicants. Finally, relative to the retaliation claims, the Court found that the EEOC established that Defendant retaliated against Arceneaux, when he was fired after his mother had engaged in protected activity by complaining to Defendant about its discriminatory practices of not hiring women. Defendant argued that there was nothing in the record that connected Alicia's protected activity to Defendant's actions against Arceneaux. The Court rejected that position. It opined that the close temporal proximity between the protected conduct and an adverse employment action was sufficient circumstantial evidence to create a genuine issue of material fact of a causal connection and met the minimal requirement that the protected activity and adverse action were not wholly unrelated. However, the Court determined that while Defendant asserted legitimate, non-discriminatory reasons for terminating Arceneaux, including that he had performance and attendance issues, the EEOC established a dispute of fact regarding whether Defendant's reasons for terminating Arceneaux were pretextual. Finally, the Court concluded that the termination of Alicia's son, Arceneaux, constituted an adverse action against Alicia. The Court ruled that the fact that Alicia's son was fired, after she complained about Defendant's discriminatory practices, would tend to have the effect of dissuading someone like Alicia from opposing practices that violated Title VII. As such, the Court denied Defendant' motion on that basis as well.

***EEOC v. Nice Systems, Inc.*, No. 20-CV-81021, 2021 WL 3707959 (S.D. Fla. Aug. 5, 2021).** The EEOC initiated an enforcement action alleging that Defendant subjected the Intervener-Plaintiff to pregnancy discrimination, retaliation, and constructive discharge in violation of Title VII of the Civil Rights Act. After discovery, Defendant filed a motion for summary judgment, which the Court granted in part and denied in part. The Intervenor-Plaintiff worked for Defendant from August 2015 to March 2018 as a Sales Executive. In April 2017, she informed her direct supervisor that she was pregnant. Thereafter, the Intervenor-Plaintiff complained of the discriminatory treatment to her employer's Director of Human Resources, Vice President of Solution Sales, and Regional Vice President. She also requested transfer to a different department, but the company was not able to accommodate that request. On March 2, 2018, the Intervenor-Plaintiff resigned. *Id.* at *4. The EEOC's action alleged that the employer discriminated against the Intervenor-Plaintiff on the basis of her pregnancy by undertaking four actions, including: (i) transferring her existing sales accounts to a newly hired employee on a different team; (ii) refusing to assign a new sales lead in her territory; (iii) invoking the "windfall" provision of her employment contract to cap the amount of commission she could receive on an audit/settlement that she contributed to before she went on maternity leave; and (iv) upon her return from maternity leave, reassigning her Canada territory to a male colleague, and assigning to her a different territory. *Id*. at *2-3. As to the disparate treatment claim, the Court noted that despite requesting a sales lead for approximately a month and a half prior to her maternity leave, the Intervenor-Plaintiff's supervisor did not assign one to her territory until almost two months after she returned from leave. As such, the Court held that a reasonable jury could find that the loss of this income-producing opportunity constituted an adverse employment action. Further, the Court found there was direct evidence of intentional discrimination when the supervisor announced on a conference call that he would not be assigning the Intervenor- Plaintiff new sales leads because of her "condition," in reference to her pregnancy. *Id.* at *11. Accordingly, the Court held that Defendant was not entitled to summary judgment on the EEOC's discrimination claim. Turning to the second claim asserting retaliation, the EEOC alleged, in part, that Defendant retaliated against the Intervenor-Plaintiff by paying her less commission on a deal than she should have received as a result of her maternity leave. Defendant argued that the Intervenor-Plaintiff did not originate the deal and participated minimally, and therefore she was not entitled to the sales commission. The Court concluded that summary judgment on the retaliation claim would be improper, since there was a question of fact as to whether she was entitled to the commission bonus. Finally, the Court granted Defendant's motion for summary judgment regarding the constructive discharge claim. Viewing the totality of the evidence in the EEOC's favor, the Court opined that the EEOC's best theory for establishing the constructive discharge claim was that from the time the Intervenor-Plaintiff disclosed to her supervisor that she was pregnant, he took steps to siphon off income-producing opportunities from her sales pipeline, until her commission prospects were so diminished that she would have no choice but to resign. However, the Court held that even this scenario was not enough to meet the, "intolerable work environment," standard. *Id.* at *20-21. Therefore, the Court granted Defendant's motion for summary judgment on the constructive discharge claim.

***EEOC v. University Of Miami*, No. 19-CV-23131, 2021 WL 4459683 (S.D. Fla. Sept. 29, 2021).** The EEOC brought claims of gender discrimination on behalf of the charging party, Louise Davidson-Schmich,

alleging that Defendant violated the Equal Pay Act ("EPA") and Title VII of the Civil Rights Act by paying her less than her counterpart, John Gregory Koger, a male professor who performed the same job. Following discovery, the EEOC and Defendant cross moved for summary judgment. Defendant moved for summary judgment on all the EEOC's claims. Defendant primarily argued that the record established that Davidson-Schmich and Koger did not perform the same job at the University, and even if they did perform the same job, Defendant maintained that the record established that the pay differential was based on factors other than the professors' sex. At the heart of this dispute was the question of whether Defendant discriminated against Davidson-Schmich in 2007 when it hired her as an associate professor at a salary of $72,000 and that same year hired Koger, a male professor with comparable qualifications for a lower-ranked position in the same department at a salary of $81,000. The EEOC claimed that due to the 2007 discriminatory pay differential, Defendant's fixed pay increases failed to correct the original discrepancy in that despite both the promotions of Davidson-Schmich and Koger to full professorships, he still made approximately $28,000 more than her. Defendant asserted that the EEOC could not establish a *prima facie* case of pay discrimination under the EPA because Davidson-Schmich and Koger had never performed substantially equal jobs. Further, even if the EEOC met its initial burden, Defendant maintained that it could establish a legitimate and non-discriminatory basis for the pay differential. The burden then shifted back to the EEOC to show pretext for the pay differential, which Defendant contended that it had failed to establish. In denying Defendant's motion as to the Equal Pay Act claim, the Court found that there remained a genuine issue of fact regarding whether the professors performed substantially equal jobs. The Court was not persuaded by Defendant's position that they two did not perform comparable jobs and found a genuine issue of material fact remained as to whether the pay differential was based on factors other than sex. As to the Title VII claim, because the EEOC had established its disparate pay claim under the more rigorous analysis of the EPA, the Court opined that it had also met its initial burden of showing a *prima facie* case under Title VII. While Defendant had articulated legitimate, non-discriminatory reasons for initially paying Koger more than Davidson-Schmich, the Court determined that the EEOC had cast sufficient doubt on Defendant's purportedly legitimate basis for the pay differential. Specifically, the Court held that it was particularly significant that there was evidence that Defendant increased male professor's salaries to close the gap between their salaries and those of comparable female professors and did not increase Davidson-Schmich's salary to close the gap between her and Koger. For these reasons, the Court denied Defendant's motion for summary judgment as to the EPA and Title VII claims. As to the EEOC's motion for summary judgment on Defendant's affirmative defenses of failure to conciliate, laches, and failure to mitigate, the Court granted summary judgment in favor of the EEOC as to Defendant's affirmative defenses of failure to conciliate and laches. However, the Court denied the EEOC's motion as to the defense of failure to mitigate. In sum, the Court denied Defendant's motion for summary judgment and granted the EEOC's motion for partial summary judgment in part.

## 4. Religious Discrimination Cases

***EEOC v. Greyhound Lines, Inc.*, No. 19-CV-1651, 2021 WL 3565728 (D. Md. Aug. 12, 2021).** The EEOC brought an action on behalf of the charging party Aliyah Hadith, a Muslim woman, asserting a claim of failure to provide religious accommodation in violation of Title VII of the Civil Rights Act of 1964. Defendant had extended a conditional offer of employment to Hadith, who was a bus driver in training, and informed Hadith that while she was on the job she would not be permitted to wear an untucked shirt or a loose-fitting, floor-length garment, called an abaya. Defendant's standard training uniform consisted of gray pants, a blue shirt, a red tie, a gray jacket, and a gray cap. Defendant maintained safety requirements that a driver's uniform not hang on the ground or have any loose ends because it could potentially be snagged and lead to an injury. After learning of Defendant's clothing requirement, Hadith withdrew from the training program. The EEOC maintained that Defendant's stance regarding Hadith's attire was unlawful in that it failed to provide Hadith with a reasonable accommodation for her *bona fide* religious belief and, consequently, subjected Hadith to a constructive discharge. After discovery, Defendant moved for summary judgment pursuant to Rule 56, arguing that it was entitled to judgment as a matter of law because the EEOC had not demonstrated that Hadith was subjected to an adverse employment action because she failed to comply with the uniform policy or to accept Defendant's proposed accommodation. The Court ruled that the EEOC had established a *prima facie* violation of Title VII in that it presented evidence that: (i) Hadith had a *bona fide* religious belief that conflicted with an employment requirement; (ii)

 

she informed Defendant of this belief; and (iii) she was disciplined for failure to comply with the conflicting employment requirement. In so ruling, the Court rejected Defendant's position that Hadith was not constructively discharged (because she voluntarily resigned from the training program). It held that the EEOC had presented triable issues with respect to Hadith's constructive discharge. In addition, the Court found that there was also a genuine issue of fact as to whether (i) Defendant's proposed accommodation was reasonable and (ii) Hadith's preferred accommodation constituted an undue burden on Defendant's business operations. The Court rejected Defendant's argument that the accommodation offered to Hadith was reasonable because another Muslim woman had previously accepted Defendant's similar offer of allowing her to wear a skirt that fell no more than five inches below the knee over the pants of the driver's uniform. The Court was unpersuaded and pointed out that the other Muslim driver and Hadith were not interchangeable for purposes of Title VII because two members of the same religion may have varying religious practices and forms of religious observation. Likewise, the Court rejected Defendant's argument that Hadith's preferred accommodation would have created an undue burden for Defendant. The Court reasoned that the EEOC had not offered any evidence whatsoever regarding the safety risk posed by Hadith's religious attire. Further, Defendant failed to identify any undue burden that would have resulted from Hadith wearing an untucked shirt, which was also part of her requested accommodation. Based on the record before it, the Court ruled that it could not conclude, as a matter of fact or law, that Hadith's requested accommodation would have resulted in a safety risk or an undue burden on Defendant. For these reasons, the Court denied Defendant's motion for summary judgment.

***EEOC v. Wal-Mart Stores East, L.P.*, 992 F.3d 656 (7th Cir. 2021).** The EEOC filed an action on behalf of the charging party, Edward Hedican, a Seventh Day Adventist, who worked as an assistant manager, alleging that Defendant failed to provide him with the reasonable accommodation of not working on the Sabbath for his religious beliefs in violation of Title VII of the Civil Rights Act. Hedican contended that in accordance with his religious beliefs, he could not work between sundown on Friday to sundown on Saturday each week. Defendant was open 24-hours a day and was located in a highly tourist-heavy town, such that weekend work was often very busy, particularly during the summer months. Hedican's supervisor determined that if Defendant were to accommodate Hedican in the assistant manager position, it would require the other seven assistant managers to work the weekend shifts that he was unable to work, shifts that all assistant managers would rather have off than be scheduled to work. Alternatively, Defendant would be required to hire an additional assistant manager at an additional expense to Defendant. Defendant determined that this accommodation was not reasonable, and it offered to Hedican the option to apply for an hourly supervisory position in which he could more definitely choose his hours. Hedican declined the offer to apply for the supervisory position, and filed a charge of discrimination with the EEOC. The District Court granted Defendant's motion for summary judgment on the grounds that Defendant's offer for Hedican to apply for an hourly supervisor position that did not require mandatory weekend shifts would be reasonable under the guidelines of Title VII. On appeal, the Seventh Circuit affirmed the District Court's ruling. The Seventh Circuit agreed that Title VII does not require an employer to force other managers to switch shifts with other salaried assistant managers, and requiring so would shift the duty to accommodate from Defendant onto other those other workers. The Seventh Circuit determined that if it were to rule that Defendant must revise its policy of a rotating-shift scheme for assistant managers, it would necessarily impose more than a slight burden on the company. For these reasons, the Seventh Circuit affirmed the District Court's ruling that granted Defendant's motion for summary judgment.

***Bear Creek Bible Church v. EEOC*, No. 18-CV-00824, 2021 WL 5449038 (N.D. Tex. Nov. 22, 2021).** The plaintiffs in this case were a nondenominational Christian Church and a for-profit Christian institution who argued that they were protected from complying with LGBTQ anti-discrimination provisions due to their sincerely held religious beliefs. The court first held that the church was exempt from Title VII. Finding that the institution did not qualify for Title VII's statutory exemption, the court examined whether it was nevertheless protected by the RFRA, that is, whether Title VII would substantially burden its sincere exercise of religion, and whether Title VII substantially burdens the institution's ability to conduct business in accordance with those beliefs. The court first concluded that there was "no dispute" that "[the institution] sincerely exercises its religious beliefs as embodied in its employment policies." The court then considered whether plaintiff satisfied the test for establishing a substantial burden – *i.e.*, that it "(1) identif[ed] the religious exercise; (2) allege[d] that the challenged law pressures plaintiff to modify that exercise; and (3) show[ed] that the penalty for noncompliance is substantial." The court concluded that the institution met

this test, holding that the first element was not disputed and "[f]or the second, the religious employers are required to choose between two untenable alternatives: either (1) violate Title VII and obey their convictions or (2) obey Title VII and violate their convictions." Since plaintiffs established a "substantial burden," defendants were required to show that the "substantial burden is justified by a compelling interest and that they have chosen the least restrictive means of advancing that interest." The court found the defendants' "overly broad formulation of its compelling interest" – that the government has a compelling interest "in eradicating workplace discrimination" – to be without merit. Rather than relying on broadly formulated interests, courts must scrutinize the "asserted harm of granting specific exemptions to particular claimants"; the relevant question is "whether the government has a compelling interest in *denying* employers like [the institution] a religious exemption." Further, the court held that "[f]orcing a religious employer to hire, retain, and accommodate employees who conduct themselves contrary to the employer's views regarding homosexuality and gender identity is not the least restrictive means of promoting that interest, especially when Defendants are willing to make exceptions to Title VII for secular purposes." Accordingly, the court granted summary judgment to the plaintiffs as to their RFRA claim.

The court also analyzed whether, under *Botstock v. Clayton County*, the plaintiffs' policies against bisexual conduct, concerning certain sexual activities and dress codes, prohibiting hormone treatments and genital surgery, and regarding sex-specific restrooms, violated Title VII. The court first concluded that the proper test to be applied was "favoritism, plus blindness to sex if the secondary trait is homosexuality or transgenderism." The court reasoned that the "simple favoritism test" could not be "fully recognized with the Supreme Court's analogies, and neither can the blindness test standing alone given *Botstock's* articulation of the standard." The court concluded that the polices against bisexual conduct "inherently target[] sex" and therefore violated Title VII, to the extent that an "individual who is bisexual inherently identifies as homosexual to some extent, even if they also identify as heterosexual, because bisexuality is some combination of the two orientations." The court similarly held that the policies prohibiting hormone treatments and genital surgery violated Title VII since they would only function to discriminate against individuals with gender dysphoria. As to the policies regarding certain sexual activities, dress code, and sex-specific restrooms, the court found that such policies comported with Title VII because they applied evenly to heterosexual and homosexual activity, did not "treat one sex worse than the other," and therefore did not discriminate "because of sex."

# D. Judgments And Remedies In EEOC Litigation

## 1. Attorneys' Fees, Costs, And Sanctions

***EEOC v. Doherty Enterprises Inc.*, No. 14-CV-81184 (S.D. Fla. May 18, 2021).** The EEOC filed an action against Defendant for alleged violation of Title VII of the Civil Rights Act of 1964 on the basis that Defendant maintained an arbitration agreement that allegedly interfered with the rights of employees to file discrimination charges with the EEOC. The Court previously had ruled that the arbitration agreement did not interfere with the ability of an applicant or employee to file a charge with the EEOC and the parties eventually settled the matter. Defendant subsequently moved for an award of attorneys' fees and costs as the prevailing party. The Court denied the motion. Defendant argued that the EEOC had no factual basis for the lawsuit because: (i) the clear language of the agreement was unambiguous; and (ii) when the EEOC filed the lawsuit, it was not aware of any employee that had been prevented from filing a charge of discrimination with the EEOC. *Id*. at 2. Defendant also asserted that the EEOC had no legal basis for the lawsuit and that it acted in bad faith by falsely claiming that it did not obtain the arbitration agreement from a charge of discrimination and by concealing the source of the document leading to the lawsuit. *Id*. The EEOC argued that the lawsuit was not frivolous when filed, nor did it become frivolous, and that it prevailed on novel legal issues, such as permitting a § 707(a) lawsuit without a charge and without engaging in conciliation. *Id*. at 3. The EEOC also contended that the lawsuit was not frivolous because: (i) Defendant never moved to dismiss on the wording of the agreement; (ii) Defendant ultimately changed its policy; and (iii) Defendant settled the lawsuit. The Court ruled that the lawsuit was not frivolous when it was filed, and it did not become frivolous later. The Court reasoned that it had agreed with the EEOC that it could bring a lawsuit under § 707(a) in the absence of a charge and without conciliation, and had determined that the case was not moot even after the arbitration agreement had been modified. The Court also found that the

 

EEOC did not act in bad faith in the manner in which it obtained the arbitration agreement after it had been submitted to the EEOC during an investigation. Accordingly, the Court held that Defendant was not entitled to attorneys' fees and therefore it denied Defendant's motion.

***EEOC v. Green Lantern Inn*, No 19-CV-6704, 2021 U.S. Dist. LEXIS 157379 (W.D.N.Y. Aug. 19, 2021).** The EEOC filed an enforcement action alleging that Defendant subjected female employees to sexual harassment and a hostile work environment in violation of Title VII of the Civil Rights Act. The EEOC filed a motion for sanctions for failure to respond to the Court's previously issued discovery orders. The Court granted the motion. The Court also struck several statements from Defendant's answer to the EEOC's complaint, as they were "scandalous" attacks on the EEOC's counsel. Defendant asserted that the EEOC lied on behalf of a restaurant employee and also made personal attacks on the EEOC's counsel alleging wrongdoing, including that the case was "a disgusting fraud," and that the allegations were a "lie" and an "attack." *Id*. at *11. The Court determined that the statements made by Defendant were highly prejudicial and not capable of being supported with admissible evidence. *Id*. at *12. Further, the Court ruled that several of Defendant's affirmative defenses were inapplicable and should be dismissed. Finally, the Court found that sanctions regarding the discovery requests were warranted, since Defendant deliberately delayed the discovery process. The Court determined that the an appropriate sanction would be for Defendant to pay attorneys' fees and costs associated with filing the motion for sanctions. The Court further warned that further non-compliance could result in the entry of an order stating that Defendant was aware of the sexual harassment of the female employees. For these reasons, the Court granted the EEOC's motion for sanctions.

## 2. EEOC Consent Decrees, Conciliation, And Settlements

***EEOC v. International Association Of Bridge Structural And Ornamental Ironworkers Local 580*, No. 71-CV-2877 (S.D.N.Y. Jan. 5, 2021).** The EEOC brought an enforcement action against the union and the state apprenticeship program, alleging that the program discriminated against Black and Hispanic employees on the basis of their race in violation of Title VII of the Civil Rights Act. The parties ultimately settled the matter after decades of litigation. The Special Master assigned to the action recommended that the parties' consent decree be denied. The EEOC's initial claims were resolved with a 1978 consent decree, but the Court subsequently issued three additional contempt orders since after finding in which it determined that Defendants were not in compliance with the consent decree. The parties submitted their joint consent decree to the Court and proposed ending the Special Master's involvement. The Special Master found that the consent decree included only "vague and unsupported claims" and no evidence that would justify ending the Court's role in the dispute. *Id*. at 4. Further, the Special Master determined that the proposed consent decree would prevent Black and Hispanic members from suing to recover back pay based on allegations that the discrimination led to lost job opportunities. The Special Master opined that the underlying reason for the consent decree was to afford Black and Hispanic members work opportunities equivalent to Local 580's non-minority counterparts. The Special Master observed that as to that objective, Defendants submitted no evidence of compliance, and the EEOC simply provided conclusory statements that Defendants had provided equal employment opportunities to Local 580's Black and Hispanic members. The Special Master concluded that without proper data included to analyze the compliance with the consent decree, public interest weighed in favor of denial. For these reasons, the Special Master recommended that the proposed joint consent decree be denied.

***EEOC v. Activision Blizzard*, No. 21-CV-7682 (C.D. Cal. Dec. 20, 2021)**. The EEOC filed an action on behalf of female employees alleging that they faced gender-based harassment and retaliation in violation of Title VII of the Civil Rights Act. The parties ultimately reached a settlement and filed a proposed consent decree that established a voluntary claims process. The California Department of Fair Employment and Housing ("DFEH") moved to intervene in the action for purposes of "protecting the interests of California and its workers." *Id*. at 1. The Court denied the motion. The DFEH claimed that it had a general interest in upholding the rights of California citizens and an interest in protecting the DFEH's ability to prosecute its own parallel state court case against Defendant. As a result, the DFEH sought to challenge the voluntary claims process because it asserted that the consent decree would release California state law claims, and would allow Defendants to destroy evidence relevant to the DFEH's state court case. *Id*. at 1-2. The Court found that the interest at issue actually belonged to those undergoing the claims process, not to the DFEH,

and if it were to accept the DFEH's argument, it would essentially be able to intervene in any employment action in the state. The Court opined that the DFEH's interpretation was over-broad. The Court also reasoned it would be unlikely that the Court would ever enter a consent decree that would purport to allow or mandate destruction of evidence relevant to litigation. For these reasons, the Court denied the motion to intervene.

***EEOC v. International Association Of Bridge Structural & Ornamental Ironworkers Local 580*, No. 71-CV-02877, 2021 U.S. Dist. LEXIS 239816 (S.D.N.Y. Dec. 15, 2021).** The EEOC filed an enforcement action alleging that Defendants, several labor organizations, engaged in racially discriminatory practices in selecting apprentices and providing job opportunities to minority members in violation of Title VII of the Civil Rights Act. The parties entered in to a consent decree in 1978 that the Court approved, which imposed specific obligations upon Defendants to rid the labor organizations of the effects of previous racial discrimination and to foster non-discriminatory job selection and apprenticeships in the union membership. In the following years, Defendants failed to comply with requirements of the consent decree, the EEOC instituted numerous enforcement actions to comply with the terms of the consent decree. The parties subsequently filed a joint motion to enter into a proposed consent decree that would begin a three-year process to end the previous consent decree on the grounds that Defendants had significantly increased representation of Black and Hispanic members in the labor organizations and among the leadership, Defendants' recent record of claimed cooperation with the EEOC, and the purported lack of recent Title VII violations by Defendants. *Id.* at *5-6. The Court denied the motion. It found that the parties failed to make any showing that Defendants cooperated with the consent decree beyond mere conclusory allegations. The Court explained that it needed further information regarding the alleged changed circumstances to ensure that the actual claims at issue have been resolved. *Id.* at *7. The Court thereby ordered the EEOC to produce information concerning: (i) the EEOC's outreach to Black and Hispanic members; (ii) the available employment opportunities for Black and Hispanic members; and (iii) the current work hour disparities between White union members and Black and Hispanic union members. For these reasons, the Court denied the parties' motion for a renewed consent decree.

 

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