

# EEOC-Initiated Litigation FY 2017



## **A NOTE TO OUR CLIENTS**

This reference work compiles, analyzes, and categorizes the major case filings and decisions involving the EEOC in 2017. Our goal is for this report to guide clients through decisional law relative to EEOC-initiated litigation, and to enable corporate counsel to make sound and informed litigation decisions while minimizing risk. We hope that you find this report to be useful.

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January 2018

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#### **ACKNOWLEDGMENTS**

We would like to extend a special thanks to our colleagues who contributed to this publication:

Rashal Baz  
Michael L. DeMarino  
Christina Janice  
Alex W. Karasik  
Christopher W. Kelleher  
John S. Marrese  
Kyla Miller  
James Nasiri  
Jennifer Nunez  
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Madeline Quinn  
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## EXECUTIVE SUMMARY

The EEOC is in a period of transition under the Trump Administration and Republican control of both houses of Congress. Despite this seismic shift in political geography, the aftershocks did not impact the EEOC in any measurable way this past year. Indeed, at a time when many expected retrenchments, the EEOC's Fiscal Year 2017 was marked by a significant increase in enforcement and litigation activities. Thus far, it has been difficult to discern how the new political landscape has impacted the types of matters the EEOC is pursuing, if it has at all. Given the reigning level of uncertainty, FY 2017 can perhaps best be characterized as a year of suspense.

FY 2017 is also the first year of the EEOC's new Strategic Enforcement Plan ("SEP") for FY 2017-2021. The new SEP identifies the same six enforcement priorities as the prior version of the SEP, which guided the EEOC's enforcement activity through FY 2016. We analyzed the EEOC's activities throughout the life of the 2013-2016 SEP, and we will continue to do so under the new SEP. It has proven to be a reliable guide for determining the path of the EEOC's enforcement agenda. We have consistently found that the theories of law and litigation strategies the EEOC pursues often align with the goals and metrics set forth in the SEP.

Part I of this book will give a broad examination of the substantive theories that the EEOC has focused on in FY 2017 with respect to each of the six enforcement priorities identified in the new SEP. Those priorities are: (1) the elimination of systemic barriers in recruitment and hiring; (2) protection of immigrant, migrant, and other vulnerable workers; (3) addressing emerging and developing issues; (4) enforcing equal pay laws; (5) preserving access to the legal system; and (6) preventing harassment through systemic enforcement and targeted outreach. Each of these priorities could be interpreted in multiple ways. It is only through a close analysis of the EEOC's case filings, guidance, rulemaking, and other initiatives that employers can determine how the EEOC spins these broad categories.

For example, the EEOC has consistently focused on LGBT rights as one of the most important "emerging and developing issues" affecting the workplace. The new SEP explicitly identifies the protection of "lesbians, gay men, bisexuals and transgender people from discrimination based on sex" as one of its top priorities. The EEOC's attention to this area has resulted in a formidable body of case law that now holds in many jurisdictions that discrimination against transgender individuals, or on the basis of sexual orientation, is a form of sex discrimination prohibited by Title VII. However, President Trump's Department of Justice recently disagreed with that interpretation, and so it remains to be seen whether anticipated personnel changes at the EEOC will force a reconsideration of this initiative. And even if it does, it would take an act of Congress or a decision by the Supreme Court to undo the developments in the federal case law that the EEOC has championed over the last five years. Until that happens, the law will continue to live its own life in the hands of the federal judiciary.

The EEOC has continued to focus on high-impact "systemic" cases as a means of generating large-scale changes in company policies across entire industries (and grabbing all-important headlines). Systemic cases are defined by the EEOC as those that target policies or patterns or practices that have a large-scale impact on either a region, industry, or a class of employees or job applicants. In practice, those cases often allege that employers have engaged in a "pattern or practice" of discrimination. Pattern or practice cases often pose a greater risk for employers because they implicate larger groups of employees and can be much more expensive and burdensome to defend. The EEOC's focus on systemic cases has been often criticized by Republican members of Congress, and this is one area of focus that may see some changes if and when new EEOC Commissioners are confirmed by the Republican Congress. So far, however, the EEOC has continued to file systemic cases, although they accounted for a relatively lower percentage of all new case filings in FY 2017.

Part II of this book addresses the various stages of litigation brought by the EEOC. This section tracks the notable developments in FY 2017 as they relate to each stage of an EEOC enforcement action – starting with the filing of the charge of discrimination and continuing all the way through settlement or a decision on the merits. Although less commonly discussed, we believe that the procedural issues that arise at various stages of an EEOC litigation are of equal importance when it comes to trying to understand how the EEOC is pursuing its enforcement agenda.

Finally, Part III contains summaries of all the significant decisions arising from EEOC litigation in 2017. The decisions are categorized by subject matter to allow for easy navigation to the topic of interest.

We continue to believe that the new political landscape will lead to big changes to the EEOC's enforcement agenda in FY 2018. It is therefore more important now than ever for employers to keep abreast of the EEOC's priorities and trends. It is our honor and privilege to bring this analysis to you. It is our hope that employers use this book as a tool to stay one step ahead of the EEOC's ever-evolving agenda.

# PART I

## SUBSTANTIVE TRENDS IN EEOC LITIGATION FY 2017

### A. The EEOC's Strategic Enforcement Priorities Under A New Administration

The EEOC's Strategic Enforcement Plan ("SEP") "establish[es] substantive area priorities and set[s] forth strategies to integrate all components of EEOC's private, public, and federal sector enforcement . . . ." <sup>1</sup> In short, the EEOC's SEP dictates the substantive focus and direction for the EEOC's enforcement activities. The EEOC has been operating under the aegis of its FY 2017-2021 SEP for more than a year. <sup>2</sup> While the overall impact of the Trump Administration on the EEOC's activities will play itself out over the course of the coming years, the data for FY 2017 suggests the arrival of the new Administration has moved the EEOC in the opposite direction of what many had predicted. <sup>3</sup> As compared to FY 2016, EEOC filings are up in FY 2017, and markedly so. <sup>4</sup>

#### 1. Uncertainty In A Period Of Transition

While the election of a new President – and the shift from a Democratic administration to a Republican one – are bound to quantitatively and qualitatively impact the EEOC's activities in as yet uncertain ways, FY 2017's increase in EEOC filings continues a pattern of the EEOC's resilience in the face of administration changes. <sup>5</sup>

##### a. EEOC Leadership In Flux: Vacancies At The Top

Significant changes in EEOC leadership continue, and important vacancies remain – the EEOC presently lacks a General Counsel and a permanent Chair. Former EEOC General Counsel David Lopez left the EEOC in early December 2016. <sup>6</sup> The position of EEOC General Counsel is now

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<sup>1</sup> EEOC, Strategic Enforcement Plan Fiscal Years 2017 - 2021, Title VII/Background Checks/ Applicant Filing EEO Law suit (Sep. 2017), <https://www.eeoc.gov/eeoc/plan/sep-2017.cfm>.

<sup>2</sup> See, e.g., Gerald L. Maatman, Jr., Christopher J. DeGroff and Matthew Gagnon, *2016's Top 5 Most Intriguing Developments In EEOC-Initiated Litigation (And A Preview Of Our Annual EEOC Litigation Report)*, WORKPLACE CLASS ACTION BLOG (Dec. 30, 2016), available at <https://www.workplaceclassaction.com/2016/12/2016s-top-5-most-intriguing-developments-in-eeoc-initiated-litigation-and-a-preview-of-our-annual-eeoc-litigation-report/>.

<sup>3</sup> See, e.g., Seyfarth Shaw LLP, *FY 2017 Litigation Scorecard For The EEOC – What Employer's Should Know*, WORKPLACE CLASS ACTION BLOG (Oct. 6, 2017), available at <http://www.workplaceclassaction.com/2017/03/what-2016-governmental-enforcement-litigation-trends-suggest-for-employers-in-2017/>.

<sup>4</sup> See, e.g., Gerald L. Maatman, Jr., Christopher J. DeGroff and Matthew J. Gagnon, *Tick, Tock....The EEOC Runs Out The Clock – Fiscal Year 2017 Marks A Last Minute Return To Frantic Filing*, Workplace Class Action Blog (Sep. 30, 2017), <https://www.workplaceclassaction.com/2017/09/tick-tock-the-eeoc-runs-out-the-clock-fiscal-year-2017-marks-a-last-minute-return-to-frantic-filing/>.

<sup>5</sup> See Christopher M. Cascino, *Seyfarth Attorneys Discuss Effect Of Trump Administration On Employers*, EMPLOYMENT LAW LOOKOUT BLOG (May 26, 2017), available at <http://www.laborandemploymentlawcounsel.com/2017/05/seyfarth-attorneys-discuss-effect-of-trump-administration-on-employers/>.

<sup>6</sup> Press Release, EEOC General Counsel David Lopez to Depart Agency (October 11, 2016, available at <https://www.eeoc.gov/eeoc/newsroom/release/10-11-16.cfm>).

vacant,<sup>7</sup> and President Trump has not yet made an appointment to fill the role, but the results of that appointment are likely to be significant. For example, in FY 2016 the EEOC announced that it expects to continue a shift in its litigation focus from small, individual cases, to systemic pattern or practice lawsuits on behalf of larger groups of workers – meaning employers would expect to face bigger lawsuits brought on behalf of more employees.<sup>8</sup> The President's choice for General Counsel will undoubtedly impact the EEOC's strategic direction, and potentially alter this calculus, with many predicting wholesale changes to the scope of EEOC litigation under the Trump Administration.<sup>9</sup>

On January 25, 2017, President Trump appointed Victoria Lipnic as Acting Chair.<sup>10</sup> Ms. Lipnic began her tenure at the EEOC as a Commissioner in 2010.<sup>11</sup> In a public appearance hosted by Seyfarth Shaw, Ms. Lipnic made clear that she was “very interested in equal pay issues.”<sup>12</sup> During that appearance Ms. Lipnic likewise reaffirmed the EEOC's commitment to systemic cases. However, Republican members of Congress have reacted negatively to systemic cases, and thus it remains unclear whether the EEOC would shift gears under the Trump Administration and with the Congressional Republican majority.<sup>13</sup>

On June 28, 2017, President Trump appointed Janet Dhillon as Chair of the EEOC. Ms. Dhillon comes to the EEOC with 25 years of experience in the private sector, having served as General Counsel for US Airways, J.C. Penney, and Burlington Stores, Inc.<sup>14</sup> Ms. Dhillon views litigation as a “last resort” for the EEOC, “believe[s] that most employers want to be law-abiding,” and that the EEOC should continue “providing tools to employers” to assist with compliance.<sup>15</sup>

At present, there remains one Commissioner vacancy.<sup>16</sup> On August 2, 2017, President Trump tapped Daniel M. Gade to fill the Commission's existing vacancy as the fifth Commissioner.<sup>17</sup> A 20-

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<sup>7</sup> See, e.g., EEOC, The Commission and the General Counsel, available at <https://www.eeoc.gov/eeoc/commission.cfm> (last visited December 14, 2017).

<sup>8</sup> See Gerald L. Maatman, Jr., *What 2016 Governmental Enforcement Litigation Trends Suggest For Employers In 2017*, WORKPLACE CLASS ACTION BLOG (Mar. 11, 2017), available at <http://www.workplaceclassaction.com/2017/03/what-2016-governmental-enforcement-litigation-trends-suggest-for-employers-in-2017/>.

<sup>9</sup> See Seyfarth Shaw LLP, *Government Workplace Enforcement Looking Back At 2016 and Ahead to 2017 – Trend #6*, WORKPLACE CLASS ACTION BLOG (Mar. 15, 2017), available at <http://www.workplaceclassaction.com/2017/03/government-workplace-enforcement-looking-back-at-2016-and-ahead-to-2017-trend-6/>.

<sup>10</sup> See, e.g., Gerald L. Maatman, Jr., Christopher J. DeGross and Matthew J. Gagnon, *Tick, Tock... The EEOC Runs Out The Clock – Fiscal Year 2017 Marks A Last Minute Return To Frantic Filing*, Workplace Class Action Blog (Sep. 30, 2017), <https://www.workplaceclassaction.com/2017/09/tick-tock-the-eeoc-runs-out-the-clock-fiscal-year-2017-marks-a-last-minute-return-to-frantic-filing/>.

<sup>11</sup> Press Release, President Appoints Victoria A. Lipnic EEOC Acting Chair (January 25, 2017), available at <https://www.eeoc.gov/eeoc/newsroom/release/1-25-17a.cfm>.

<sup>12</sup> Seyfarth Shaw LLP, Workplace Class Action Event Featuring Jerry Maatman and EEOC Acting Chair Victoria Lipnic (February 10, 2017), available at <https://www.workplaceclassaction.com/2017/02/workplace-class-action-event-featuring-jerry-maatman-and-eeoc-acting-chair-victoria-lipnic/>; Gerald L. Maatman, Jr., Christopher J. DeGross and Matthew J. Gagnon, *Tick, Tock... The EEOC Runs Out The Clock – Fiscal Year 2017 Marks A Last Minute Return To Frantic Filing*, Workplace Class Action Blog (Sep. 30, 2017), <https://www.workplaceclassaction.com/2017/09/tick-tock-the-eeoc-runs-out-the-clock-fiscal-year-2017-marks-a-last-minute-return-to-frantic-filing/>.

<sup>13</sup> See Gerald L. Maatman, Jr., Christopher J. DeGross, and Matthew J. Gagnon, *Midyear Peek: What Has The EEOC Been Up To In FY 2017?*, WORKPLACE CLASS ACTION BLOG (June 1, 2017), available at <http://www.workplaceclassaction.com/2017/06/midyear-peek-what-has-the-eeoc-been-up-to-in-fy-2017/>.

<sup>14</sup> *Id.*

<sup>15</sup> Statement Of Janet Dhillon, Nominee To Be A Member And Chair Of The Equal Employment Opportunity Commission Before The Committee On Health, Education, Labor And Pensions, United States Senate (September 19, 2017), available at <https://www.help.senate.gov/imo/media/doc/Dhillon.pdf>.

<sup>16</sup> See, e.g., EEOC, The Commission and the General Counsel, available at <https://www.eeoc.gov/eeoc/commission.cfm> (last visited December 14, 2017).

year veteran of the United States Army, Mr. Gade is not an attorney.<sup>18</sup> His stated priorities are to address the backlog of EEOC charges, to review the SEP “to ensure that it is plotting the right course into the future,” and to “spend time on the educational and outreach functions of the EEOC . . . .”<sup>19</sup> In an unexpected move, on December 11, 2017, President Trump re-appointed Commissioner Chai Feldblum – an Obama appointee – for a term expiring July 1, 2023.<sup>20</sup> That decision was met with immediate criticism by the right.

The EEOC is comprised of 15 District Offices,<sup>21</sup> each of which is responsible for a particular geographic area. Each District Office is led by a Regional Attorney who directs its activities,<sup>22</sup> and three new Regional Attorneys (for the Birmingham, Atlanta and Chicago District Offices) have been named since President Trump was elected on November 8, 2016.<sup>23</sup> No new Regional Attorneys have been named since President Trump took office on January 20, 2017.

## **b. Justice Gorsuch At The Supreme Court**

Given the change in administration and the shifting EEOC leadership, employers understandably face uncertainty in the coming years, at a time when several decisions with substantial ramifications for employers are before the Supreme Court.<sup>24</sup> Following the mien of Justice Scalia, Justice Gorsuch is known as a strict textualist, and has been critical of *Chevron* deference.<sup>25</sup> On balance, Justice Gorsuch’s judicial philosophy and his jurisprudence likely lend themselves to more predictability and certainty for employers, and Justice Gorsuch’s joining the Supreme Court may portend moderately pro-employer decisions from the Supreme Court.

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<sup>17</sup> White House, Eight Nominations and One Withdrawal Sent to the Senate Today (August 2, 2017), available at <https://www.whitehouse.gov/presidential-actions/eight-nominations-one-withdrawal-sent-senate-today/>.

<sup>18</sup> Statement Of Daniel M. Gade, Nominee To Be A Member Of The Equal Employment Opportunity Commission Before The Committee On Health, Education, Labor And Pensions, United States Senate (September 19, 2017), available at <https://www.help.senate.gov/imo/media/doc/Gade.pdf>.

<sup>19</sup> *Id.*

<sup>20</sup> See The White House, Office of the Press Secretary, Four Nominations Sent to the Senate Today (December 11, 2017), available at <https://www.whitehouse.gov/the-press-office/2017/12/11/four-nominations-sent-senate-today>.

<sup>21</sup> See, e.g., EEOC Office List and Jurisdictional Map, available at <https://www.eeoc.gov/field/>.

<sup>22</sup> EEOC, Office of the General Counsel, Fiscal Year 2016 Annual Report, available at <https://www.eeoc.gov/eeoc/litigation/reports/16annrpt.cfm>.

<sup>23</sup> Press Release, Marsha Rucker Named New Regional Attorney for EEOC’s Birmingham District (December 8, 2016), available at <https://www.eeoc.gov/eeoc/newsroom/release/12-8-16.cfm>; Press Release, Antonette Sewell Named New Regional Attorney For EEOC’s Atlanta District (December 13, 2016), available at <https://www.eeoc.gov/eeoc/newsroom/release/12-13-16.cfm>; Press Release, Gregory M. Gochanour Appointed Regional Attorney Of EEOC’s Chicago District Office (January 10, 2017), available at <https://www.eeoc.gov/eeoc/newsroom/release/1-10-17.cfm>.

<sup>24</sup> See Gerald L. Maatman, Jr., *What The Confirmation Hearing For Judge Gorsuch Means For Employers*, WORKPLACE CLASS ACTION BLOG (Mar. 22, 2017), available at <http://www.workplaceclassaction.com/2017/03/what-the-confirmation-hearing-for-judge-gorsuch-means-for-employers/>.

<sup>25</sup> See Michael W. Stevens, *Justice Gorsuch Likely To Have Significant Impact on Labor and Employment Cases Before the U.S. Supreme Court*, EMPLOYMENT LAW LOOKOUT BLOG (May 9, 2017), available at <http://www.laborandemploymentlawcounsel.com/2017/05/justice-gorsuch-likely-to-have-significant-impact-on-labor-and-employment-cases-before-the-u-s-supreme-court/>.

## 2. Staying The Course On The EEOC's Strategic Enforcement Priorities

In the EEOC's words, "the purpose of the SEP is to focus and coordinate the EEOC's programs to have a sustainable impact in reducing and deterring discriminatory practices in the workplace."<sup>26</sup> As in years past, the SEP establishes the EEOC's six substantive area priorities:



**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 cases.



**Protecting Vulnerable Workers, Including Immigrant And Migrant Workers, And Underserved Communities From Discrimination:** 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 office tailors its efforts to the local issues affecting individuals in its geographic area.



**Addressing Selected Emerging And Developing Issues:** As the name implies, the EEOC may tailor its focus within this priority as the law develops.



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



**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.



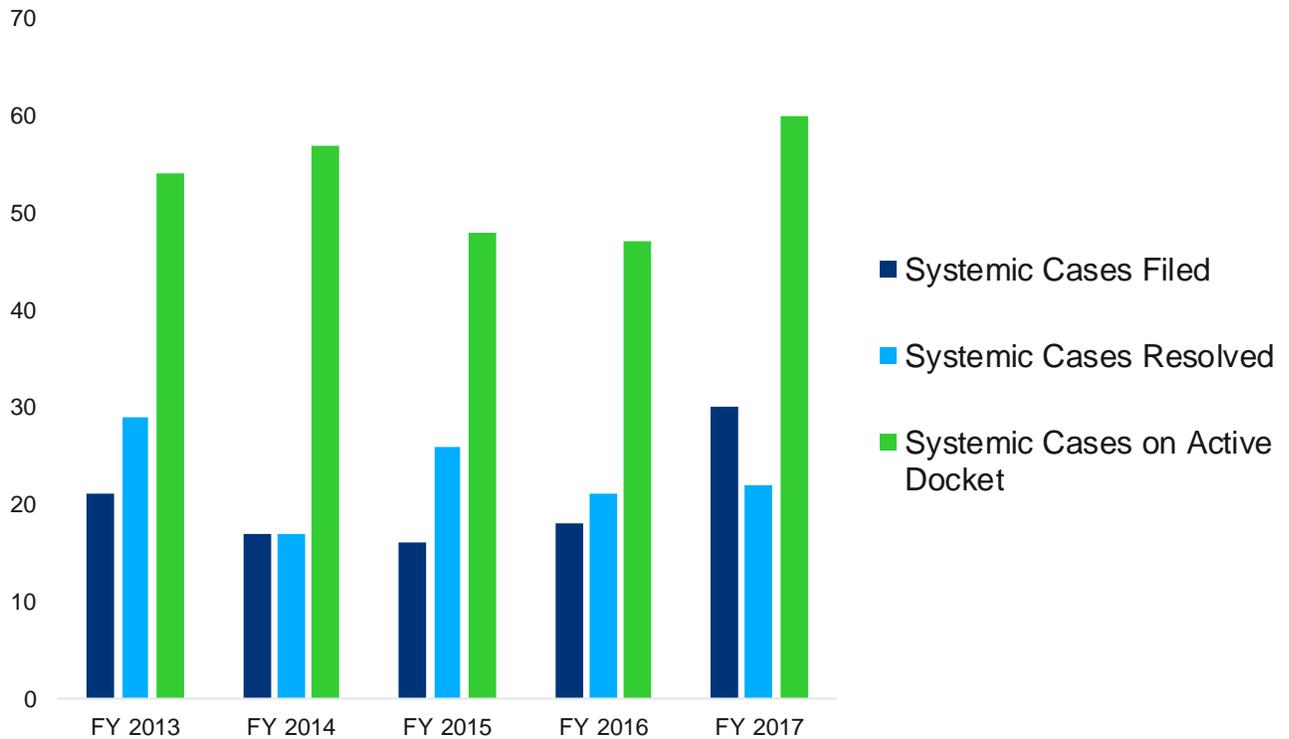
**Preventing Systemic Harassment:** This priority is directed at harassment, most frequently based on sex, race disability, age, national origin and religion. According to the EEOC, this strategic priority typically involves systemic cases.

The 2017-2021 SEP recognizes the importance of "systemic" cases to its overall mission. Systemic cases are those with a strategic impact, meaning "a significant effect of the development of the law or on promoting compliance across a large organization, community, or industry."<sup>27</sup>

<sup>26</sup> U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION STRATEGIC ENFORCEMENT PLAN FISCAL YEARS 2017 - 2021 available at <https://www.eeoc.gov/eeoc/plan/sep-2017.cfm>.

<sup>27</sup> *Id.*

## EEOC Systemic Cases: Filed, Resolved, & On Active Docket FY 2013 - 2017



The EEOC places a special emphasis on systemic lawsuits and identifies those types of cases as one the Agency's Performance Measures. Specifically, in FY 2017 the Commission aimed to ensure that 22-24% of its cases on its active docket were systemic. By year end, the EEOC had 24.8% systemic cases on its active docket.

In FY 2017, the EEOC resolved 329 systemic investigations resulting in approximately \$38.4 million returned to victims. On the litigation front, the Commission resolved 22 systemic cases, two of which included over 1,000 victims. According to the EEOC, it has a 91% rate of success in litigating systemic cases in FY 2017.

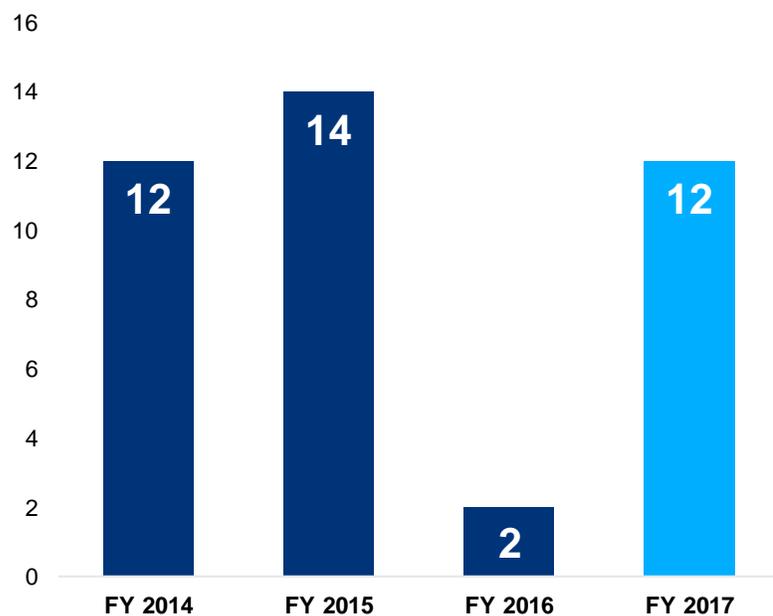
According to the 2017 Performance Accountability Report, the Commission filed 30 systemic cases this year. In FY 2016, the EEOC filed 18 systemic lawsuits, and in FY 2015 they filed 16.



## Eliminating Barriers In Recruitment & Hiring

*“Acting Chair Victoria Lipnic noted, ‘My hope is that 50 years after the enactment of the Age Discrimination in Employment Act (ADEA), we can work together to fulfill the promise of this important civil rights law...’”*

**ADEA Filings FY 2014 - 2017**



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

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

The EEOC has spent a considerable amount of its enforcement budget litigating issues that it sees as barriers to recruitment and hiring.<sup>28</sup> Most notably, the EEOC has targeted three major areas: (1) screening, testing, and the use of social media in hiring; (2) combatting hiring practices that could result in age discrimination; and (3) employers' use of credit and criminal history background checks in hiring and selection decisions.

### 1. Testing, Social Media, And Other New Developments Impacting Hiring And Recruitment

As society continues to evolve with the growth of technology and data, the same can be said for the EEOC. In the hiring context, employers are increasingly using algorithms, or "data scraping" of the internet, to evaluate tens of thousands of pieces of information about applicants.<sup>29</sup> In October 2016, at a panel in Washington D.C. featuring industrial psychologists, attorneys and labor economists, then-EEOC Chair Jenny Yang opined that, "Big Data has the potential to drive innovations that reduce bias in employment decisions and help employers make better decisions in hiring, performance evaluations, and promotions. At the same time, the EEOC has expressed that it is critical that these tools are designed to promote fairness and opportunity, so that reliance on these expanding sources of data does not create new barriers to opportunity."<sup>30</sup> Commissioner Vicki Lipnic added, "It can be a challenge to determine whether, when, and how laws may apply in our increasingly technology-driven workplaces. But I see this at the core of our responsibilities: Ensuring that our understanding of today's workplaces and our interpretation and administration of the law, are as current and fully-informed as possible. It's for that reason that holding meetings like today is so crucial to our work."<sup>31</sup> These sentiments were echoed by the Executive Office of former President Barack Obama, which noted in a report on the intersection of Big Data and civil rights that the government's "challenge is to support growth in the beneficial use of big data while ensuring that it does not create unintended discriminatory consequences."<sup>32</sup> Put simply, the EEOC is committed to monitoring employers use Big Data in the future.<sup>33</sup>

Other screening methods continue to draw the attention of the EEOC as well. Recent pronouncements by the EEOC demonstrate that it will scrutinize employers using even informal methods of checking up on new candidates. For example, on May 11, 2015, the EEOC's Office of Legal Counsel issued an informal discussion letter, stating that the Commission "recognizes that more and more employers are conducting background checks, and that there is a plethora of information – accurate and inaccurate – now available on the Internet that can become part of an

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<sup>28</sup> 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").

<sup>29</sup> Use of Big Data Has Implications for Equal Employment Opportunity, Panel Tells EEOC (Oct. 13, 2016) <https://www.eeoc.gov/eeoc/newsroom/release/10-13-16.cfm>.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> Executive Office of the President, *Big Data: A Report on Algorithmic Systems, Opportunity, and Civil Rights*, at 4 (May 2016).

<sup>33</sup> *Id.*

applicant's background check and be used in the employment decision."<sup>34</sup> The letter involved a person who had not been subjected to a formal background check; she complained that she was not hired because her prospective employer had found out through a review of the online Public Access to Court Electronic Records (PACER) system that she had sued a previous employer under the equal employment opportunity laws. The letter explained that the EEOC is targeting all manner of screening tools (e.g., pre-employment tests, background checks, date-of-birth inquiries) that "adversely impact particular protected groups, including older workers and women."<sup>35</sup>

The EEOC has also been focusing on removing barriers to *its own* recruitment and hiring initiatives. On October 27, 2016, EEOC Chair Jenny Yang gave remarks at the White House regarding the Commission's initiative to remove hiring barriers for people with disabilities.<sup>36</sup> Yang stated that it was "an honor . . . to celebrate the hiring of over 100,000 people with disabilities into the federal government. Through our collective efforts, we have met the goal President Obama set for federal agencies in Executive Order 13548. It is a huge accomplishment."<sup>37</sup> Yang indicated that "the federal government is committed to exploring new and innovative ways to improve our recruiting, hiring, retention and advancement of people with disabilities."<sup>38</sup> These remarks not only demonstrate the Commission's dedication to eliminating systemic barriers in recruitment and hiring within the federal government, but also could reveal what affirmative steps it believes private employers should be making to eliminate barriers to hiring people with disabilities.<sup>39</sup>

The EEOC's lawsuit filings and settlements that Seyfarth has analyzed over the last few years illustrate that the Commission is committed to holding employers to high standards. At approximately the time Commissioner Yang made those comments in October 2016, the Commission brought a lawsuit against a Southern Indiana manufacturing services company, alleging it refused to hire or provide reasonable accommodations to a class of job applicants because of medical information it obtained during pre-employment medical examinations.<sup>40</sup> There, the EEOC alleged that the company made job offers to experienced, qualified applicants that were conditioned on successful completion of a medical examination, and thereafter withdrew the job offers upon receiving notice of medical impairments and/or the lawful use of prescription medication without individualized analyses or good faith efforts to determine whether reasonable accommodations existed.<sup>41</sup> Noting in its press release accompanying the lawsuit that "[e]liminating barriers in recruitment and hiring, especially class-based recruitment and hiring practices," were a priority, the EEOC proclaimed that "employers must individually assess whether an applicant's medical impairments or medications prevent that applicant from performing essential job functions with or without a reasonable accommodation before rejecting an applicant because of a mental or physical impairment."<sup>42</sup> This statement is

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<sup>34</sup> EEOC Office of Legal Counsel Informal Discussion Letter, Title VII/Background Checks/ Applicant Filing EEO Law suit (May 11, 2015), [http://www.eeoc.gov/eeoc/foia/letters/2015/title\\_vii\\_background\\_checks\\_06\\_11.html](http://www.eeoc.gov/eeoc/foia/letters/2015/title_vii_background_checks_06_11.html).

<sup>35</sup> *Id.*

<sup>36</sup> Press Release, White House Remarks of EEOC Chair Jenny R. Yang On Employment of People With Disabilities in the Federal Government (October 27, 2016), <https://www.eeoc.gov/eeoc/newsroom/release/chair-remarks-white-house-10-27-16.cfm>.

<sup>37</sup> *Id.*; see also Executive Order 13548, Increasing Federal Employment of Individuals with Disabilities (July 26, 2010) <https://obamawhitehouse.archives.gov/the-press-office/executive-order-increasing-federal-employment-individuals-with-disabilities> (directing Executive Branch departments and agencies to improve their efforts to employ Federal workers with disabilities and targeted disabilities through increased recruitment, hiring, and retention of these individuals).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> Press Release, Chemtrusion Sued by EEOC for Disability Discrimination in Hiring (October 20, 2016), <https://www.eeoc.gov/eeoc/newsroom/release/10-20-16.cfm>.

<sup>41</sup> *EEOC v. Chemtrusion, Inc.*, No. 16-CV-180 (S.D. Ind. Oct. 19, 2016) (ECF No. 1), at 1.

<sup>42</sup> Press Release, Chemtrusion Sued by EEOC for Disability Discrimination in Hiring (October 20, 2016), <https://www.eeoc.gov/eeoc/newsroom/release/10-20-16.cfm>.

reflective of the Commission's goal to eliminate testing procedures for applicants that may have an adverse impact for classes of employees. Ultimately, the EEOC and company entered into a consent decree where the company is required to: (1) instruct its hiring personnel and medical providers not to conduct medical inquiries until after a conditional offer is made; (2) conduct individualized analyses before withdrawing job offers; (3) train its hiring personnel on what the ADA requires with respect to medical examinations and hiring; (4) submit decisions to rescind job offers to legal counsel for review; and (5) track rescinded offers.<sup>43</sup>

The EEOC has also targeted strength testing. In *EEOC v. CSX Transportation, Inc.*, the Commission alleged that CSX conducted isokinetic strength testing as a requirement for workers to be selected for various jobs, causing a discriminatory impact on female workers seeking jobs such as conductors and material handlers.<sup>44</sup> An EEOC regional attorney noted, "[t]he EEOC has prioritized enforcement actions to eliminate discriminatory barriers to the employment of women and other workers. Therefore, employers should carefully examine their employment practices, such as tests and other selection procedures, to make certain that those practices are not causing an unlawful disparate impact because of sex or another covered demographic category."<sup>45</sup> This case is ongoing.

In *EEOC v. Horizontal Well Drillers LLC*, the Commission alleged that an oil and gas drilling company used information from employment applications to discriminate based on applicants' age and history of filing workers' compensation claims.<sup>46</sup> Specifically, the EEOC alleged that Horizontal Well Drillers engaged in a pattern or practice of failing to hire job applicants for positions on its oil rigs based on age in violation of the Age Discrimination in Employment Act (ADEA); engaged in a pattern or practice of failing to hire qualified job applicants for drilling rig positions because of their disabilities, perceived disabilities, and / or record of disabilities as indicated by their workers compensation claim or disability pension history in violation of the Americans with Disabilities Act ("ADA"); violated the ADA by subjecting all applicants for drilling rig positions to pre-offer disability-related inquiries in violation of the ADA; failed to keep medical information confidential and properly segregated in violation of the ADA and the GINA; failed to retain employment applications as required by the ADA and 29 C.F.R. § 1602.14; conducted an unlawful medical examination of the charging party in violation of the ADA; discharged the charging party because of disability in violation of the ADA; and failed to file EEO-1 reports as required by Title VII.<sup>47</sup> The company filed a motion to dismiss the complaint, which is still pending.<sup>48</sup>

In addition to employment barriers related to testing, the EEOC has recently filed several lawsuits alleging racially discriminatory hiring practices. For example, in January 2017, the EEOC filed a lawsuit against a San Jose, California based company that produces and distributes Mexican-style dairy products, meat items, and canned and dry goods.<sup>49</sup> The lawsuit alleges that the company and its affiliates favored less-qualified Hispanic job applicants over all other races (including black, white and Asian applicants) in unskilled positions.<sup>50</sup> The EEOC further alleged that the company discouraged non-Hispanic applicants from applying for open positions, asked applicants if they

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<sup>43</sup> *EEOC v. Chemtrusion, Inc.*, No. 16-CV-180 (S.D. Ind. Oct. 19, 2016) (ECF No. 44), at 4-10.

<sup>44</sup> Press Release, EEOC Sues CSX Transportation for Company-Wide Sex Discrimination (Aug. 2, 2017), <https://www1.eeoc.gov/eeoc/newsroom/release/8-2-17.cfm>.

<sup>45</sup> *Id.*

<sup>46</sup> Press Release, Horizontal Well Drillers Sued by EEOC For Age And Disability Discrimination In Hiring (Aug. 16, 2017) <https://www1.eeoc.gov/eeoc/newsroom/release/8-16-17.cfm>.

<sup>47</sup> *EEOC v. Horizontal Well Drillers LLC*, No. 5:17-CV-879 (W.D. Okla. Aug. 16, 2017) (ECF No. 1), at 1-2.

<sup>48</sup> *EEOC v. Horizontal Well Drillers LLC*, No. 5:17-CV-879 (W.D. Okla. Nov. 20, 2017) (ECF No. 24).

<sup>49</sup> Press Release, EEOC Sues Marquez Brothers For Hispanic-Preference Hiring (January 12, 2017), <https://www.eeoc.gov/eeoc/newsroom/release/1-12-17.cfm>.

<sup>50</sup> *EEOC v. Marquez Brothers International, Inc., et al.*, No. 1:17-cv-44 (E.D. Ca. Jan. 11, 2017) (ECF No. 1), at 2.

spoke Spanish even when speaking Spanish was not a job requirement, and otherwise deterred non-Hispanic applicants.<sup>51</sup> Whereas most hiring practices lawsuits address an employer's refusal to hire a certain class of employees, this lawsuit is rare in that it alleges an employer discriminated against almost *all* races of applicants, including white applicants, in favor of hiring *only* members from one protected race.<sup>52</sup>

Similarly, at the tail end of its fiscal year in September 2017, the EEOC brought a retaliation claim against a major fast food restaurant chain, alleging it retaliated against a white restaurant manager because she opposed and refused to participate in upper management's directive to hire only white applicants.<sup>53</sup> According to the EEOC's lawsuit, the company's general and area managers demanded that a white restaurant manager in Tallahassee hire only white applicants because the company wanted "the faces behind the counter to match the customer base."<sup>54</sup> The restaurant manager was allegedly told to review the names on applications, identify those names that sounded white, and to interview only those applicants.<sup>55</sup> After the restaurant manager opposed and refused to participate in the racially discriminatory hiring directive, she was allegedly subjected to an ongoing pattern of retaliatory conduct including verbal abuse, intimidation, threats, a drastic change in schedule, and unwarranted discipline, which ultimately forced the restaurant manager to resign from her position.<sup>56</sup>

## 2. A Renewed Focus On Combatting Age Discrimination In Recruitment And Hiring

FY 2017 marked the 50th anniversary of the Age Discrimination in Employment Act.<sup>57</sup> In a June 14, 2017 press release, Acting Chair Victoria Lipnic noted that: "[w]ith so many more people working and living longer, we can't afford to allow age discrimination to waste the knowledge, skills, and talent of older workers. Outdated assumptions about age and work deprive people of economic opportunity and stifle job growth and productivity. My hope is that 50 years after the enactment of the Age Discrimination in Employment Act (ADEA), we can work together to fulfill the promise of this important civil rights law to ensure opportunities are based on ability, not age."<sup>58</sup> Given these comments, employers should not expect the EEOC to stray from this goal anytime soon.

The EEOC's filing of several age discrimination lawsuits in the hiring context suggests it is making good on its public comments.<sup>59</sup> On May 17, 2017, the EEOC alleged that a nationwide restaurant chain violated federal law by refusing to hire a qualified applicant at its Boca Raton, Florida, location because of his age.<sup>60</sup> According to the EEOC's suit, the company declined to hire a qualified applicant with over 20 years of experience in the food and beverage industry for a general manager

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<sup>51</sup> *Id.* at 5.

<sup>52</sup> *Id.*

<sup>53</sup> Press Release, EEOC Sues Whataburger for Retaliation against Manager Who Refused to Hire Only White Applicants (September 25, 2017), <https://www.eeoc.gov/eeoc/newsroom/release/9-25-17.cfm>.

<sup>54</sup> *EEOC v. Whataburger Restaurants LLC*, No. 4:17-CV-428 (N.D. Fla. Sept. 22, 2017) (ECF No.1), at 5.

<sup>55</sup> *Id.* at 4.

<sup>56</sup> *Id.* at 6.

<sup>57</sup> 29 U.S.C. 621.

<sup>58</sup> Press Release, Age Discrimination and Outdated Views Of Older Workers Persist, Experts Tell Commission (June 14, 2017), <https://www.eeoc.gov/eeoc/newsroom/release/6-14-17a.cfm>.

<sup>59</sup> *Id.*

<sup>60</sup> Press Release, EEOC Sues Ruby Tuesday For Age Discrimination (May 17, 2017), <https://www.eeoc.gov/eeoc/newsroom/release/5-17-17.cfm>.

position.<sup>61</sup> In response to an inquiry by the applicant as to why it declined to hire him, the company allegedly informed him it was seeking a candidate who could "maximize longevity."<sup>62</sup> Ultimately, the case settled for \$45,000, plus injunctive relief that included a requirement that the company identify a Diversity Director to manage the decree's provisions. It also required reports of age discrimination complaints, nationwide oversight of the corporation's age-friendly recruiting and hiring efforts, the education of its employees on an updated ADEA policy, and ADEA training for its hiring management team.<sup>63</sup>

Similarly, on August 2, 2017, the EEOC sued a full-service parking management company headquartered in Atlanta.<sup>64</sup> The EEOC alleged that during a 60-year-old applicant's interview, the operations manager told the applicant she would not be successful as a valet because of the "physicality of the job."<sup>65</sup> Instead, the operations manager told Hayden that she would be perfect for a customer service position, and told her to come back the following week to attend orientation.<sup>66</sup> The day before she was scheduled to begin her new position, the applicant called to ask what time she should report.<sup>67</sup> However, the operations manager allegedly told Hayden that the job had already been filled.<sup>68</sup> The company's records showed that after she was interviewed, it hired several male valets and customer service employees who were substantially younger than the applicant.<sup>69</sup> An EEOC regional attorney commented that "[w]hat is most disturbing about this case is that the hiring official automatically assumed that [the applicant] was not qualified to work as a valet or customer service parking manager because of her age . . . ."<sup>70</sup>

The EEOC has posted litigation wins in 2017. For example, it obtained a pair of settlements that netted the Commission \$60,000 each. In *EEOC v. City Colleges of Chicago*,<sup>71</sup> the EEOC alleged that Harold Washington College, part of the City Colleges of Chicago system, refused to hire an adjunct professor for a full-time faculty position because of her age (66).<sup>72</sup> The EEOC claimed that despite the professor's stellar record as an adjunct and excellent recommendations from several full-time faculty members, she was passed over in favor of two substantially younger and less experienced candidates.<sup>73</sup> In addition to providing for the \$60,000 in monetary relief, the consent decree settling the suit mandates that City Colleges train its employees on age discrimination and report to EEOC any complaints of age discrimination it receives.<sup>74</sup> Of particular importance for employers, the EEOC's regional attorney noted that this was "not the first time the EEOC has sued City Colleges for age discrimination," a message which should put employers on notice that they can

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> Press Release, Ruby Tuesday to Pay \$45,000 to Settle EEOC Age Discrimination Suit (Oct. 26, 2017) <https://www.eeoc.gov/eeoc/newsroom/release/10-26-17.cfm>.

<sup>64</sup> Press Release, Eagle Parking Sued by EEOC for Sex and Age Discrimination (Aug. 2, 2017) <https://www.eeoc.gov/eeoc/newsroom/release/8-2-17a.cfm>.

<sup>65</sup> *EEOC v. Eagle Parking, LLC*, No. 1:17-CV-2904 (Aug. 2, 2017) (ECF No. 1), at 5.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 6.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 6-7.

<sup>70</sup> Press Release, Eagle Parking Sued by EEOC for Sex and Age Discrimination (Aug. 2, 2017) <https://www.eeoc.gov/eeoc/newsroom/release/8-2-17a.cfm>.

<sup>71</sup> *EEOC v. City Colleges of Chicago*, No. 14-CV-5864 (N.D. Ill.).

<sup>72</sup> Press Release, City Colleges of Chicago Will Pay \$60,000 To Settle EEOC Age Discrimination Law suit (June 14, 2017), <https://www.eeoc.gov/eeoc/newsroom/release/6-14-17.cfm>.

<sup>73</sup> *EEOC v. City Colleges of Chicago*, No. 14-CV-5864 (N.D. Ill. July 31, 2014) (ECF No. 1), at 1.

<sup>74</sup> *EEOC v. City Colleges of Chicago*, No. 14-CV-5864 (N.D. Ill. June 13, 2017) (ECF No. 100), at 4, 5, 7.

expect the Commission to keep their past behavior in mind when assessing claims of discrimination.<sup>75</sup>

The Commonwealth of Pennsylvania's Office of Public Records also agreed to pay \$60,000 and costs to settle a federal age discrimination lawsuit filed by the EEOC.<sup>76</sup> The case involved an applicant for an appeals officer position with the Office of Public Records who was over 40 years old and had graduated from law school with honors and had about 30 years of legal experience, including about 17 years with the Pennsylvania Human Relations Commission.<sup>77</sup> During the applicant's second interview for the position, the executive director of the Office of Public Records supposedly expressed concerns that he might not have a long tenure with the agency since he had already worked for the commonwealth for 17 years and might be nearing retirement.<sup>78</sup> Despite the applicant's qualifications and positive employment reference, the Office of Public Affairs allegedly selected a significantly less experienced and younger applicant.<sup>79</sup> The \$60,000 settlement should illustrate to employers the pitfalls of expressing concerns during an interview that an applicant is nearing retirement.

### **3. The EEOC's Focus On Employer's Use Of Criminal And Credit History Background Checks**

In combating discriminatory hiring practices, one EEOC focus area is the use of criminal and credit history background checks. This section analyzes: (1) the EEOC's enforcement guidance relative to the consideration of arrest and conviction records in employment decisions; and (2) the EEOC's successes and failures in the context of litigating background check cases.

#### **a. The EEOC's Enforcement Guidance Concerning The Consideration Of Arrest And Conviction Records In Employment Decisions**

On April 25, 2012, the EEOC issued its Enforcement Guidance concerning the use of arrest and conviction records in employment decisions.<sup>80</sup> Among other things, the EEOC's guidance recommends that employers not ask about convictions on applications.<sup>81</sup> The EEOC cautioned that such inquiries about convictions should be job-related and consistent with business necessity.<sup>82</sup> According to the EEOC, employers should consider the following factors when evaluating criminal history information: the nature and gravity of the offense or offenses (which the EEOC explains may

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<sup>75</sup> Press Release, City Colleges of Chicago Will Pay \$60,000 To Settle EEOC Age Discrimination Law suit (June 14, 2017), <https://www.eeoc.gov/eeoc/newsroom/release/6-14-17.cfm>.

<sup>76</sup> Press Release, Pennsylvania Office of Public Records Will Pay \$60,000 to Resolve EEOC Age Suit (July 24, 2017) <https://www.eeoc.gov/eeoc/newsroom/release/7-24-17a.cfm>.

<sup>77</sup> *EEOC v. Commonwealth of Pennsylvania, Office of Open Records*, No. 15-CV-1895 (M.D. Pa. Sept. 30, 2015), at 3.

<sup>78</sup> *Id.* at 4.

<sup>79</sup> *Id.*

<sup>80</sup> See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (Apr. 25, 2012), [http://www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm](http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm).

<sup>81</sup> See Pamela Devata and Frederick Smith, *Stop The Presses – The EEOC Releases New Enforcement Guidance On Arrest And Conviction Records In The Hiring Process*, WORKPLACE CLASS ACTION BLOG (Apr. 25, 2012), <http://www.workplaceclassaction.com/2012/04/stop-the-presses-the-eeoc-releases-new-enforcement-guidance-on-arrest-and-conviction-records-in-th/>; Pamela Q. Devata, *Strategy and Insights: How Should Employers Use Criminal History in Employment Now That The EEOC Has Issued Enforcement Guidance?*, SEYFARTH SHAW NEWSLETTER (Apr. 27, 2012), <http://www.seyfarth.com/publications/si042712>.

<sup>82</sup> U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, *supra* note 80.

include evaluating the harm caused, the legal elements of the crime, and the classification, *i.e.*, misdemeanor or felony); the time that has passed since the conviction and/or completion of the sentence (which the EEOC describes as looking at particular facts and circumstances and evaluating studies of recidivism); and the nature of the job held or sought (which the EEOC explains requires more than examining just the job title, but also specific duties, essential functions, and environment).<sup>83</sup>

The EEOC's guidance was almost immediately challenged in court. The State of Texas brought suit in the District Court for the Northern District of Texas in November 2013 seeking to enjoin the enforcement of the EEOC's guidance because it conflicted with Texas law that prohibited hiring felons for certain jobs.<sup>84</sup> The District Court dismissed the suit, holding that Texas lacked standing.<sup>85</sup> The Court held that because "Texas does not allege that any enforcement action has been taken against it by the Department of Justice (as the EEOC cannot bring enforcement actions against states) in relation to the Guidance," there is not a "substantial likelihood" that Texas "will face future Title VII enforcement proceedings from the Department of Justice arising from the Guidance."<sup>86</sup> Texas immediately filed an appeal.<sup>87</sup>

On June 27, 2016, the Fifth Circuit remanded the case back to the District Court, stating that Texas had standing to challenge the EEOC guidance and that it was a final agency rule subject to court challenge.<sup>88</sup> The Fifth Circuit pointed out that Texas, in its capacity as an employer, was an "object" of the challenged EEOC guidance because it was directed at all employers, including state agencies, that conduct criminal background checks as part of their hiring process.<sup>89</sup>

The Fifth Circuit also noted that the EEOC's guidance created an increased regulatory burden on the State of Texas as an employer as it imposes a mandatory scheme for employers regarding hiring policies.<sup>90</sup> That, in and of itself, established a concrete injury against the State of Texas.<sup>91</sup> The Fifth Circuit further determined that regardless of whether the EEOC's guidance preempts Texas' laws regarding hiring bans, it did, at the very least, force the State of Texas to "undergo an analysis, agency by agency, regarding whether the certainty of EEOC investigations stemming from the []

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<sup>83</sup> *Id.*

<sup>84</sup> See *id.*; Gerald L. Maatman, Jr. and Howard M. Wexler, *Round One – Texas Loses Its Suit Against The EEOC Over Its Criminal Background Guidance*, WORKPLACE CLASS ACTION BLOG (Aug. 21, 2014), <http://www.eeoccountdown.com/2014/08/21/round-one-texas-loses-its-suit-against-the-eeoc-over-its-criminal-background-guidance/>.

<sup>85</sup> *State of Tex. v. EEOC*, No. 5:13-CV-255, 2014 WL 4782992 (N.D. Tex. Aug. 20, 2014).

<sup>86</sup> *Id.* at \*3-4.

<sup>87</sup> See Gerald L. Maatman, Jr. and Howard M. Wexler, *Showdown At The Fifth Circuit: Texas Files Opening Appellate Brief In Its Challenge Of The EEOC's Criminal Background Guidance*, WORKPLACE CLASS ACTION BLOG (Dec. 1, 2014), <http://www.workplaceclassaction.com/2014/12/showdown-at-the-fifth-circuit-texas-files-opening-appellate-brief-in-its-challenge-of-the-eeocs-criminal-background-guidance/>; Gerald L. Maatman, Jr. and Howard M. Wexler, *Showdown At The Fifth Circuit Continues: The EEOC Files Its Opposition Brief In Texas' Challenge To Criminal Background Guidance*, WORKPLACE CLASS ACTION BLOG (Jan. 15, 2015), <http://www.workplaceclassaction.com/2015/01/showdown-at-the-fifth-circuit-continues-the-eeoc-files-its-opposition-brief-in-texas-challenge-to-criminal-background-guidance/>; Gerald L. Maatman, Jr. and Howard M. Wexler, *Showdown At The Fifth Circuit Continues: Texas Gets The Last Word On Its Challenge To The EEOC's Criminal Background Guidance*, WORKPLACE CLASS ACTION BLOG (Feb. 11, 2015), <http://www.workplaceclassaction.com/2015/02/showdown-at-the-fifth-circuit-continues-texas-gets-the-last-word-on-its-challenge-to-the-eeocs-criminal-background-guidance/>.

<sup>88</sup> *State of Texas v. EEOC*, 827 F.3d 372 (5th Cir. 2016). This decision was later withdrawn so that the district court could reconsider the decision in light of *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807 (May 31, 2016).

<sup>89</sup> *Id.* at 378.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 378-79.

Guidance's standards overrides the State's interest in not hiring felons for certain jobs."<sup>92</sup> Thus, "being pressured to change state law" constituted a concrete injury for the State of Texas which was sufficient to confer constitutional standing.<sup>93</sup> Therefore, regardless that there was no enforcement action, the Fifth Circuit concluded that Texas was deemed to have standing to challenge the EEOC's guidance.

The Fifth Circuit also determined that the EEOC's guidance was "final agency action" that is subject to challenge, finding that it was the "consummation of the agency's decision-making process," from which "legal consequences would flow."<sup>94</sup> The Fifth Circuit rejected the EEOC's argument that it has no ability to enforce its guidance and instead can only do so by referring a case to the U.S. Attorney General for prosecution (as it would have to with respect to a public entity).<sup>95</sup> Instead, the Fifth Circuit held that the "legal consequence" of the EEOC's guidance is that the EEOC has committed itself to applying the guidance to "virtually all public and private employers."<sup>96</sup> The EEOC's staff is therefore bound by it to follow a certain course of action, and the only way to avoid a potential prosecution is by abiding by one of the two "safe harbor" provisions contained in the EEOC's guidance.<sup>97</sup> If the State of Texas (or any other employer) does not fall into one of these safe harbor provisions – that is, it does not do what the EEOC says – it risks an enforcement action and potential liability, and thus the EEOC's guidance has a "legal consequence," making it a final agency action that can be challenged in court.<sup>98</sup>

On September 23, 2016, the Fifth Circuit withdrew its prior opinion.<sup>99</sup> The Fifth Circuit noted that its opinion was issued shortly before the Supreme Court decided *U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S.Ct. 1807, 1816 (2016), which held in the context of the Clean Water Act that a jurisdictional determination is a final agency action that is subject to judicial review under the Administrative Procedure Act, 5 U.S.C. § 704.<sup>100</sup> The Fifth Circuit indicated it would "leave it to the district court in the first instance to reconsider this case, and its opinion, in its entirety and to address the implications of *Hawkes* for this case."<sup>101</sup> Currently pending before the District Court for the Northern District of Texas are the parties' cross-motions for summary judgment. Oral argument was held on October 17, 2017.<sup>102</sup>

## **b. Successes And Failures Litigating The Use Of Background Checks In Court**

The EEOC has aggressively litigated against companies that have used credit or criminal history background checks in hiring. On July 30, 2015, the EEOC successfully avoided summary judgment in another case alleging discrimination in the use of criminal background checks in *EEOC v. BMW*

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<sup>92</sup> *Id.* at 379.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 380.

<sup>95</sup> *Id.* at 381-82.

<sup>96</sup> *Id.* at 382.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*; see also Gerald L. Maatman, Jr., Pamela Q. Devata, Robert T. Szyba, and Ephraim J. Pierre, *Don't Mess With Texas: EEOC's Criminal Background Check Guidance Subject To Challenge*, WORKPLACE CLASS ACTION BLOG (June 28, 2016), <http://www.workplaceclassaction.com/2016/06/dont-mess-with-texas-eoocs-criminal-background-check-guidance-subject-to-challenge/>.

<sup>99</sup> *Texas v. EEOC*, 838 F.3d 511 (5th Cir. 2016).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *State of Texas v. EEOC*, No. 13-CV-255 (N.D. Tex.) (ECF No. 105).

*Manufacturing Co.*<sup>103</sup> The Court held that the EEOC had presented enough evidence of a statistical disparity to allow the case to proceed to a jury.<sup>104</sup> The Court refused to exclude the EEOC's expert report, holding that "the parties' arguments at this stage of the case involve consideration of the weight to be given the experts rather than their admissibility," and those positions could be reargued at trial.<sup>105</sup> The case then settled for \$1.6 million.<sup>106</sup>

In *EEOC v. Dolgencorp, LLC*,<sup>107</sup> two former Dollar General employees filed EEOC charges regarding Dollar General's allegedly discriminatory use of criminal background checks in hiring and firing.<sup>108</sup> The EEOC investigated and determined that there was reasonable cause to believe that Dollar General had engaged in employment discrimination on the basis of race.<sup>109</sup> The parties then engaged in written and oral communications regarding the alleged discrimination, which did not result in a conciliation agreement acceptable to the EEOC.<sup>110</sup> Thereafter, the EEOC sued Dollar General under Title VII. Among its defenses, Dollar General asserted that the EEOC's claims were barred as beyond the scope of the charges of discrimination and investigation, and that the EEOC failed to satisfy the statutory precondition for bringing suit when it failed to conciliate with Dollar General.<sup>111</sup> The EEOC contended that, on the undisputed facts, these two defenses failed as a matter of law.<sup>112</sup> The District Court of the Northern District of Illinois granted the EEOC's motion for partial summary judgment, holding that when the EEOC files suit, it is not confined to claims typified by those of the charging party, and further, that any violations that the EEOC ascertains in the course of a reasonable investigation of the charging party's complaint are actionable.<sup>113</sup>

The EEOC has suffered some significant setbacks as well. For example, in *EEOC v. Kaplan Higher Education Corp.*<sup>114</sup> and *EEOC v. Freeman, Inc.*,<sup>115</sup> the EEOC had alleged that the companies' use of credit and criminal background checks in hiring decisions caused a disparate impact against minority applicants. In both cases, the EEOC attempted to prove its case with statistical data compiled by its expert.<sup>116</sup> This was accomplished by subpoenaing drivers' license photos from state departments of

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<sup>103</sup> *EEOC v. BMW Mfg. Co. LLC*, No. 7:13-CV-01583, 2015 WL 5431118 (D.S.C. July 30, 2015).

<sup>104</sup> *Id.* at \*3.

<sup>105</sup> *Id.* at \*4.

<sup>106</sup> See Press Release, Equal Employment Opportunity Commission, BMW to Pay \$1.6 Million and Offer Jobs to Settle Federal Race Discrimination Law suit, (September 8, 2015), <http://www.eeoc.gov/eeoc/newroom/release/9-8-15.cfm>.

<sup>107</sup> *EEOC v. Dolgencorp, LLC*, 249 F.Supp.3d 890, 891 (N.D. Ill. 2017).

<sup>108</sup> Gerald L. Maatman, Jr., Christopher J. DeGroff, and Alex W. Karasik, *Denial Of Defenses: Illinois Court OK's EEOC's Pre-Suit Procedures*, WORKPLACE CLASS ACTION BLOG (Apr. 12, 2017), <https://www.workplaceclassaction.com/2017/04/denial-of-defenses-illinois-court-oks-eeocs-pre-suit-procedures/>.

<sup>109</sup> *Dolgencorp*, 249 F.Supp.3d at 891-92.

<sup>110</sup> *Id.* at 896.

<sup>111</sup> *Dolgencorp*, 249 F.Supp.3d at 892.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 892, 896-97.

<sup>114</sup> *Kaplan Higher Educ. Corp.*, 2011 WL 2115878, at \*2.

<sup>115</sup> *EEOC v. Freeman*, 961 F. Supp. 2d 783, 798 (D. Md. 2013).

<sup>116</sup> See *EEOC v. Kaplan Higher Educ. Corp.*, 748 F.3d 749 (6th Cir. 2014); *Freeman, Inc.*, 961 F. Supp. 2d at 798; see also Pamela Q. Devata, Gerald L. Maatman, Jr., Jennifer A. Riley, and David J. Rowland, *EEOC Cannot Prove Disparate Impact Claim As Court Throws Cold Water On Its "Race-Rating" Theory*, WORKPLACE CLASS ACTION BLOG (Jan. 31, 2013), <http://www.workplaceclassaction.com/2013/01/eeoc-cannot-prove-disparate-impact-claim-as-court-throws-cold-water-on-its-race-rating-theory/>; Gerald L. Maatman, Jr. and Jennifer A. Riley, *Sixth Circuit Affirms Dismissal Of EEOC Credit Check Case And Rejects "Homemade" Method Of Determining Race By "Eye-Balling" Photos*, WORKPLACE CLASS ACTION BLOG (Apr. 9, 2014), <http://www.workplaceclassaction.com/2014/04/sixth-circuit-affirms-dismissal-of-eeoc-credit-check-case-and-rejects-homemade-method-of-determining-race-by-eye-balling-photos/>; Gerald L. Maatman, Jr., Pamela Q. Devata, and Howard M. Wexler, *Court Dismisses EEOC's Background Check Lawsuit Based On Its Reliance On "Laughable" And "Unreliable" Expert Report Filled Of "Errors and Analytical Fallacies"*, WORKPLACE CLASS ACTION BLOG (Aug. 9, 2013),

motor vehicles and assembling a team of “race raters” to classify applicants as “African-American,” “Asian,” “Hispanic,” “White,” or “Other” based on those photographs.<sup>117</sup> The District Courts for the Northern District of Ohio and the District of Maryland held that this methodology was not reliable and not representative of the employer’s applicant pool as a whole.<sup>118</sup> Both decisions were upheld on appeal. In *Kaplan*, the Sixth Circuit held that the EEOC’s “homemade” methodology for determining race was, “crafted by a witness with no particular expertise to craft it, administered by persons with no particular expertise to administer it, tested by no one, and accepted only by the witness himself.”<sup>119</sup> The Fourth Circuit called the EEOC’s expert analysis “laughable” and “utterly unreliable”<sup>120</sup> and chided the EEOC for continuing to litigate the case long after it should have thrown in the towel.<sup>121</sup> On September 3, 2015, the District Court added to the EEOC’s loss by awarding Freeman close to \$1,000,000 in attorneys’ fees because the Court held that the Commission had refused to stop litigating a case that it had no chance of winning.<sup>122</sup>

Similarly, in *EEOC v. Peoplemark, Inc.*, the District Court for the Western District of Michigan held that the EEOC placed an unfounded claim with experts and allowed them to “run with it” despite the fact that the EEOC’s allegations were inaccurate.<sup>123</sup> In that case, the EEOC alleged that Peoplemark, Inc., a temporary staffing company, maintained a policy that automatically denied the hire or employment of any person with a criminal record. However, contrary to the EEOC’s allegations, Peoplemark did not have such a policy and 22% of the individuals who the EEOC alleged were not hired because of their prior felony convictions were actually found to be hired by the company.<sup>124</sup> The Court eventually awarded Peoplemark over \$750,000 in attorneys’ fees, expert witness fees, and costs.<sup>125</sup>

Despite these setbacks, the EEOC continues to push its agenda on this issue.<sup>126</sup> In July 2017, it sued a janitorial services provider Diversified Maintenance Systems, LLC, alleging the company

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<http://www.workplaceclassaction.com/2013/08/court-dismisses-eeocs-background-check-law-suit-based-on-its-reliance-on-laughable-and-unreliable-expert-report-filled-of-errors-and-analytical-fal/>.

<sup>117</sup> See *Kaplan Higher Educ. Corp.*, 748 F.3d at 751-52.

<sup>118</sup> *Kaplan Higher Educ. Corp.*, 2011 WL 2115878, at \*2; *Freeman, Inc.*, 961 F. Supp. 2d 787.

<sup>119</sup> *Kaplan*, 748 F.3d at 754. The Sixth Circuit also criticized the EEOC for attacking the same type of background check policy that the EEOC itself uses and for relying on visual identification to identify race, a method that the Commission itself discourages. *Id.* at 750, 754.

<sup>120</sup> *EEOC v. Freeman*, 778 F.3d 463 (4th Cir. 2015).

<sup>121</sup> *Id.* at 468; see also Gerald L. Maatman, Jr., Pamela Q. Devata, and Jason Englund, *Fourth Circuit Deals Body Blow To EEOC Hiring Check Enforcement Litigation*, WORKPLACE CLASS ACTION BLOG (Feb. 20, 2015), <http://www.workplaceclassaction.com/2015/02/fourth-circuit-deals-body-blow-to-eeoc-hiring-check-enforcement-litigation/>. The concurring opinion authored by Judge Steven Agee was particularly critical. Judge Agee noted that it “was not a close question,” but wrote separately to criticize the EEOC for its questionable litigation tactics. *Id.* at 468 (Agee, J., concurring). Judge Agee wrote extensively about the “record of slipshod work” by the EEOC’s expert in other similar cases, including the *Kaplan* case, and critiqued the “slapdash nature of Murphy’s work.” *Id.* He concluded that the EEOC’s expert “undeniably cherry-picked” and perhaps even “fully intended to skew the results.” *Id.*

<sup>122</sup> *EEOC v. Freeman*, No. 09-CV-2573, 2015 WL 5178420 (D. Md. Sept. 3, 2015).

<sup>123</sup> *EEOC v. Peoplemark, Inc.*, 732 F.3d 584, 614-15 (6th Cir. 2013).

<sup>124</sup> *Id.* at 614.

<sup>125</sup> *Id.*

<sup>126</sup> On May 19, 2015, Chair Jenny Yang touted the EEOC’s Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions, which was issued in 2012, and noted that “[a]n increasing number of businesses have explicitly adopted the principles laid out in the guidance,” and praised the efforts of the states that had approved “ban-the-box” legislation. Statement of Jenny R. Yang, Chair U.S. Equal Employment Opportunity Commission to Committee on Health, Education, Labor and Pensions U.S. Senate (May 19, 2015), [http://www.eeoc.gov/eeoc/legislative/yang\\_5-19-15.cfm](http://www.eeoc.gov/eeoc/legislative/yang_5-19-15.cfm). The EEOC was particularly defiant in the face of the *Kaplan* loss. On April 16, 2014, days after the Sixth Circuit affirmed the trial court’s decision, the editorial board of the Wall Street Journal published an editorial calling the decision the “opinion of the year.” Editorial, *Opinion of the Year*, WALL ST. J. (Apr. 16, 2014), <http://www.wsj.com/articles/SB10001424052702304512504579491860052683176>. Undeterred, the EEOC’s General

refused to hire a class of African-American candidates.<sup>127</sup> Specifically, the EEOC alleged that Diversified engaged in an ongoing pattern or practice of race discrimination against African-American job applicants in Maryland and the Washington D.C. and Philadelphia metropolitan areas by refusing to hire blacks for custodian, lead custodian or porter positions.<sup>128</sup> According to the EEOC, area managers were instructed to deter black applicants by repeatedly emphasizing to them that the company performed criminal background checks.<sup>129</sup> This case will be one to watch in FY 2018 and beyond.

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Counsel, David Lopez, wrote a letter to the editor that was published on May 1, 2014, in which he made it clear that the agency was not giving up on its disparate impact theory: The letter stated:

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

David Lopez, Letters, *Poor Credit Bias in Hiring Practices*, WALL ST. J. May 1, 2014, <http://www.wsj.com/articles/SB10001424052702304518704579522011520579336>.

<sup>127</sup> Press Release, EEOC Sues Diversified Maintenance Systems for Race Discrimination and Retaliation (July 5, 2017), <https://www1.eeoc.gov/eeoc/newsroom/release/7-5-17.cfm>.

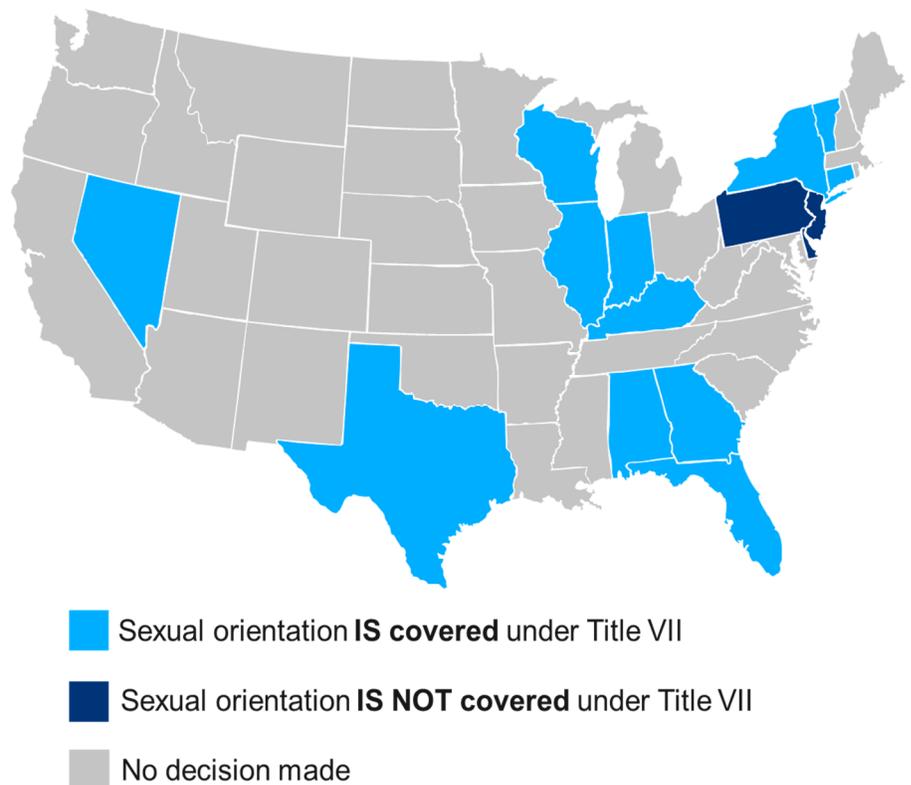
<sup>128</sup> EEOC v. Diversified Maintenance Systems, LLC, No. 8:17-CV-1835 (D. Md. July 5, 2017) (ECF No. 1), at 1.

<sup>129</sup> *Id.* at 5.



# Addressing Emerging & Developing Issues

*“LGBT rights remain a top priority under the 2017 Strategic Enforcement Plan, which explicitly identifies ‘[p]rotecting lesbians, gay men, bisexuals and transgender (LGBT) people from discrimination based on sex’”*



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

## C. Addressing Emerging And Developing Issues

Part of the EEOC's mission, as set forth in its 2017 Strategic Enforcement Plan, 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.<sup>130</sup> The 2017 Strategic Enforcement Plan identifies 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 lesbians, gay men, bisexuals and transgender (LGBT) people 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.<sup>131</sup>

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. Developments In The Law Of Religious Accommodations:

Religious discrimination targeting Muslims has been one of the workplace developments targeted by the EEOC since 9/11.<sup>132</sup> According to the EEOC, there was a 250% increase in the number of religion-based discrimination charges involving Muslims filed in the initial months after 9/11.<sup>133</sup> Although that number dwindled over time, the EEOC reports that it continues to see an increase in charges involving religious discrimination against Muslims and those with a Middle Eastern background.<sup>134</sup> This type of discrimination was specifically targeted as a focus for the EEOC in the 2012 Strategic Enforcement Plan.<sup>135</sup> The 2017 plan continues that trend, identifying one priority as: “[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

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<sup>130</sup> See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION STRATEGIC ENFORCEMENT PLAN FISCAL YEARS 2017 - 2021, *supra* note 26.

<sup>131</sup> *Id.*

<sup>132</sup> See WHAT YOU SHOULD KNOW ABOUT THE EEOC AND RELIGIOUS AND NATIONAL ORIGIN DISCRIMINATION INVOLVING THE MUSLIM, SIKH, ARAB, MIDDLE EASTERN AND SOUTH ASIAN COMMUNITIES, *available at* [https://www.eeoc.gov/eeoc/newsroom/wysk/religion\\_national\\_origin\\_9-11.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/religion_national_origin_9-11.cfm).

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION STRATEGIC ENFORCEMENT PLAN FY 2013 - 2016.

groups, arising from backlash against them from tragic events in the United States and abroad.”<sup>136</sup> The EEOC has pursued this new focus in a multitude of ways.

### **a. Targeting Religious Garb And Grooming And Anti-Muslim Discrimination**

The EEOC maintains guidelines relating to the employment of Muslims, Arabs, South Asians, and Sikhs.<sup>137</sup> Those guidelines remind employers, among other things, that employers may not refuse to hire someone who, because 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.<sup>138</sup>

Attention to religious garb and grooming has been a consistent focus for the EEOC, and it has resulted in some of the most attention-grabbing headlines in EEOC litigation. On March 6, 2014, the EEOC published its Guide to Religious Garb and Grooming.<sup>139</sup> 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: “[W]hen an employer’s dress and grooming policy or preference conflicts with an employee’s known religious beliefs or practices, the employer must make an exception to allow the religious practice unless that would be an undue hardship on the operation of the employer’s business.”<sup>140</sup>

A question quickly arose, however, as to whether an employer must have specific knowledge of an employee’s religious practice to be liable under Title VII for failing to make a religious accommodation.<sup>141</sup> The Supreme Court decided this issue in the EEOC’s favor on June 1, 2015. In *EEOC v. Abercrombie & Fitch Stores, Inc.*<sup>142</sup> the Supreme Court held that an employer that is without direct knowledge of an employee’s religious practice can be liable under Title VII for religious discrimination if the need for an accommodation was a motivating factor in the employer’s decision, whether or not the employer knew of the need for a religious accommodation.

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<sup>136</sup> U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION STRATEGIC ENFORCEMENT PLAN FISCAL YEARS 2017 - 2021, *supra* note 26.

<sup>137</sup> See QUESTIONS AND ANSWERS ABOUT EMPLOYER RESPONSIBILITIES CONCERNING THE EMPLOYMENT OF MUSLIMS, ARABS, SOUTH ASIANS, AND SIKHS, available at <https://www.eeoc.gov/eeoc/publications/backlash-employer.cfm>.

<sup>138</sup> *Id.*

<sup>139</sup> 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](http://www.eeoc.gov/eeoc/publications/qa_religious_garb_grooming.cfm).

<sup>140</sup> *Id.*; see also Lynn A. Kappelman and Dawn Reddy Solowey, *Retail Detail: "You're Wearing That?" The EEOC Weighs in on Workplace Accommodations for Religious Clothing and Grooming Practices*, CLIENT ALERT (Mar. 12, 2014), <http://www.seyfarth.com/publications/4002>.

<sup>141</sup> 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. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, RELIGIOUS GARB AND GROOMING IN THE WORKPLACE: RIGHTS AND RESPONSIBILITIES, *supra* note 139 (“Example 7 . . . . Aatma, an applicant for a rental car sales position who is an observant Sikh, wears a chunni (religious headscarf) to her job interview. The interviewer does not advise her that there is a dress code prohibiting head coverings, and Aatma does not ask whether she would be permitted to wear the headscarf if she were hired. There is evidence that the manager believes that the headscarf is a religious garment, presumed it would be worn at work, and refused to hire her because the company requires sales agents to wear a uniform with no additions or exceptions. This refusal to hire violates Title VII, even though Aatma did not make a request for accommodation at the interview, because the employer believed her practice was religious and that she would need accommodation, and did not hire her for that reason. Moreover, if Aatma were hired but then instructed to remove the headscarf, she could at that time request religious accommodation.”); see also Dawn Reddy Solowey and Lynn Kappelman, *What Does the Employer Know and When Does It Know It? SCOTUS Grants Cert in EEOC v. Abercrombie Religious Discrimination Suit*, EMPLOYMENT LAW LOOKOUT BLOG (Oct. 9, 2014), <http://www.laborandemploymentlawcounsel.com/2014/10/what-does-the-employer-know-and-when-does-it-know-it-scotus-grants-cert-in-eeoc-v-abercrombie-religious-discrimination-suit/>.

<sup>142</sup> *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028 (2015).

*Abercrombie* involved a practicing Muslim who wore a headscarf consistent with her religious requirements.<sup>143</sup> When she applied to an Abercrombie store, she was rejected because her headscarf would violate Abercrombie's "Look Policy," which did not allow any kind of "cap."<sup>144</sup> Abercrombie argued that the company could not be liable under Title VII disparate treatment analysis because the applicant had not shown that it had "actual knowledge" of the applicant's need for an accommodation.<sup>145</sup> The Supreme Court disagreed, holding that it was enough for the applicant to show that her need for an accommodation was a motivating factor in the employer's decision.<sup>146</sup> "[T]he rule for disparate-treatment claims based on a failure to accommodate a religious practice is straightforward: An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions."<sup>147</sup> Although the EEOC's guidance was not specifically mentioned in the Court's decision, this rule is consistent with the "knowledge" requirement provided in the EEOC's guidance.

Religious garb and grooming can also support a hostile work environment harassment claim. In *Ahmed v. Astoria Bank et al.*,<sup>148</sup> the Second Circuit considered a claim brought on behalf of an employee who had been terminated from her employment at the end of her probationary period for tardiness and carelessness in checking important documents.<sup>149</sup> The employee claimed that she had been subjected to a hostile work environment because she is Egyptian and Muslim.<sup>150</sup> The District Court granted summary judgment to the employer.<sup>151</sup> It reasoned that the alleged stray comments did not rise to the required "severe and pervasive" level.<sup>152</sup>

The Second Circuit reversed, holding that a reasonable jury could find that the employee was subject to severe and pervasive discriminatory harassment.<sup>153</sup> The Court relied principally on the employee's evidence that the supervisor "constantly" told her to remove her hijab head-covering, which he referred to as a "rag"; demeaned her race, ethnicity and religion "on several occasions"; and made a comment during her September 11, 2013 interview that she and two other Muslim employees were "suspicious" and that he was thankful he was "in the other side of the building in case you guys do anything."<sup>154</sup> Considering this evidence, together with allegations that another manager used hand gestures and spoke slowly to the plaintiff in everyday conversation as if to suggest she did not know English, the Second Circuit held that a jury could conclude that the plaintiff was subject to a "steady barrage of opprobrious" racial and anti-Muslim comments.<sup>155</sup> On that basis,

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<sup>143</sup> *Id.* at 2031.

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

<sup>145</sup> *Id.* at 2032.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 2033.

<sup>148</sup> *Ahmed v. Astoria Bank et al.*, 690 F. App'x 49 (2d Cir. 2017).

<sup>149</sup> *Ahmed v. Astoria Bank*, No. 14-CV-4595, 2016 WL 1254638, at \*1 (E.D.N.Y. Mar. 31, 2016), *vacated*, 690 F. App'x 49 (2d Cir. 2017).

<sup>150</sup> See *Ahmed*, 690 F. App'x at 50-51; see also Dawn Reddy Solowey, *Anti-Muslim Rhetoric in the Workplace: An Employer's Guide to Risks & Prevention*, EMPLOYMENT LAW LOOKOUT BLOG (May 23, 2017), available at <http://www.laborandemploymentlawcounsel.com/2017/05/anti-muslim-rhetoric-in-the-workplace-an-employers-guide-to-risks-prevention/>.

<sup>151</sup> *Ahmed*, 2016 WL 1254638, at \*12.

<sup>152</sup> *Id.*

<sup>153</sup> *Ahmed*, 690 F. App'x at 50.

<sup>154</sup> *Id.* at 51.

<sup>155</sup> *Id.* at 50-51.

while acknowledging the evidence was “on the knife’s edge” between summary judgment and trial, the Court reversed the District Court’s grant of summary judgment and remanded for a jury trial.<sup>156</sup>

In FY 2017, the EEOC continued to target employers that it thinks is not doing enough to accommodate and protect Muslim employees’ religious garb and grooming. For example, on July 20, 2017, the EEOC sued an employer alleging that the company violated federal law when it stopped accommodating a security guard’s religious beliefs and disciplined him for complaining about racial harassment.<sup>157</sup> According to the EEOC, the company granted a practicing Muslim employee a waiver of its grooming policy (which restricted guards’ facial hair to be no longer than one-quarter of an inch).<sup>158</sup> Davis kept his beard for approximately one year while working at the company, until one day he complained that his supervisor called him a “nigga.”<sup>159</sup> According to the EEOC, instead of taking corrective action, his supervisor and two managers retaliated against him by forcing him to shave his beard.<sup>160</sup>

The EEOC has also suffered some stinging defeats when it has pursued such cases through trial. On September 29, 2015, in *EEOC v Jetstream Ground Services, Inc.*,<sup>161</sup> the U.S. District Court for the District of Colorado allowed the EEOC to proceed to trial on behalf of a class of Muslim women who alleged that Jetstream Ground Services failed to accommodate their wearing hijabs and long skirts on the job, failed to hire them, laid off or reduced their hours, and discriminated against them on the basis of their religion.<sup>162</sup> In deciding the EEOC’s claim on behalf of an employee who never requested accommodation, but who was observed by co-workers to change from headscarf and long skirt to the company’s uniform while at work, the Court relied on *Abercrombie* in holding that an employee need only show that his or her need for accommodation was a motivating factor in the employer’s decision, regardless of the state of the actor’s knowledge.<sup>163</sup>

The Colorado Civil Rights Division transferred the charges to the EEOC, which then issued a Letter of Determination as to each Intervener’s charge, and found reasonable cause to believe JetStream had violated Title VII in regards to the Interveners.<sup>164</sup> On summary judgment, the Court ruled that the

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<sup>156</sup> *Id.* at 50.

<sup>157</sup> Complaint, *EEOC v. MVM, Inc.*, No. 1:17-CV-02025 (D. Md. July 20, 2017), ECF No. 1, at ¶ 12.; Press Release, Equal Employment Opportunity Commission, EEOC Sues MVM, Inc. for Racial Harassment, Religious Discrimination and Retaliation (July 20, 2017), <https://www.eeoc.gov/eeoc/newroom/release/7-20-17a.cfm>.

<sup>158</sup> *Id.* ¶¶ 12-14

<sup>159</sup> *Id.*; Complaint, *EEOC v. MVM, Inc.*, No. 1:17-CV-02025 (D. Md. July 20, 2017), ECF No. 1, at ¶ 14.

<sup>160</sup> *Id.* ¶¶ 15-19.

<sup>161</sup> *EEOC v. Jetstream Ground Servs., Inc.*, 134 F. Supp. 3d 1298 (D. Colo. Sept. 29, 2015).

<sup>162</sup> The employer, who had a cabin cleaning contract with United Airlines at Denver International Airport, initially refused to hire five Muslim women of Ethiopian or Somali descent (“Interveners”) due to their unwillingness to wear a gender-neutral uniform of pants, shirt, and hat. *Id.* at 1305-08. The Interveners filed Colorado Civil Rights charges alleging that JetStream discriminated against them on the basis of their sex and religion, and denied them the religious accommodations of wearing a hijab to cover their hair, ears, and neck, and of wearing long skirts to cover the form of their bodies. *Id.* at 1306, 1309-10. See also Gerald L. Maatman, Jr. and Christina M. Janice, *Court Allows EEOC’s Discrimination Suit Over Religious Garb To Proceed To Jury*, WORKPLACE CLASS ACTION BLOG (Oct. 8, 2015), <http://www.workplaceclassaction.com/2015/10/court-allow-s-eeocs-discrimination-suit-over-religious-garb-to-proceed-to-jury/>.

<sup>163</sup> *Id.* at 1317. The Court ruled that there was a triable issue of fact as to whether Jetstream knew “or, at the very least, suspected” that the employee desired an accommodation and had laid her off to avoid giving her one. *Id.* at 1318.

<sup>164</sup> *Id.* at 1309-10. In its subsequent law suit, the EEOC also asserted individual claims on behalf of two “aggrieved” individuals, Amina Oba and Milko Haji, who had been employed by JetStream and who had not filed charges. The Court dismissed Haji’s claims pursuant to Rule 56(a), and held that the EEOC failed to accurately establish the employee’s actual start date at JetStream, limiting the provable loss to a “de minimis” amount of eight hours of pay. *Id.* at 1324-26. Judge Christine M. Arguello of the District Court for the District of Colorado denied the EEOC’s motion for reconsideration, holding that a worker must be subjected to an adverse action to assert a religious bias claim under Title VII, and that the arguments advocated by the EEOC in its motion did not satisfy the requisite standard of proving clear error or manifest injustice warranting relief. *EEOC v. Jetstream Ground Servs.*, No. 13-CV-2340, 2016 U.S. Dist. LEXIS 29500, at \*6-\*7, \*21; see also

former employees met their burden of showing that hijabs that were tucked into a shirt and secured to an employee's head presented no safety problems, thus holding that accommodating such hijabs posed no undue hardship for JetStream.<sup>165</sup> However, the Court also found that JetStream presented sufficient evidence to create a disputed issue of fact as to whether it would pose an undue hardship for JetStream to permit its cabin cleaners to wear long skirts while working.<sup>166</sup> On April 29, 2016, after a fourteen-day jury trial, the jury found in favor of JetStream and against the EEOC.<sup>167</sup>

Although anti-Muslim discrimination has been a particular focus for the EEOC its willingness to pursue employers for failing to accommodate religious garb and grooming is not limited to Muslim employees. For example, on July 19, 2017, the EEOC sued Tim Horton's Café & Bake Shop for allegedly terminating an employee after she requested that she be permitted to wear a skirt instead of pants, in accordance with her Pentecostal Apostolic religious beliefs.<sup>168</sup> On September 18, 2017, the EEOC announced that the company agreed to pay \$22,500 to settle the suit.<sup>169</sup>

On April 10, 2017, the EEOC announced a settlement with U.S. Steel after the company agreed to pay \$150,000 to settle a religious discrimination and retaliation lawsuit.<sup>170</sup> The EEOC brought suit in the District Court for the Southern District of Texas alleging that the company violated federal law by revoking a worker's job offer because of his religion and in retaliation for insisting that his religious practices be accommodated.<sup>171</sup> Specifically, in 2011, the charging party applied for a utility technician position, and received an oral employment offer. But during the required hair follicle drug test, he declined to have a lock of his hair cut starting at the scalp.<sup>172</sup> The employee belongs to the Nazirite sect of the Hebrew Israelite faith, and according to the EEOC, he sincerely believes his

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Gerald L. Maatman, Jr. & Alex W. Karasik, *With Adverse Employment Action Absent, Court Denies EEOC's Motion For Reconsideration In Religious Accommodation Case*, WORKPLACE CLASS ACTION BLOG (Mar. 14, 2016), <http://www.workplaceclassaction.com/2016/03/with-adverse-employment-action-absent-court-denies-eeocs-motion-for-reconsideration-in-religious-accommodation-case/>.

<sup>165</sup> *JetStream Ground Servs.*, 134 F. Supp. 3d at 1336.

<sup>166</sup> *Id.* After the parties disputed the type of expert testimony that would be allowed, the EEOC ultimately withdrew several claims while JetStream agreed not to use certain experts, thus leaving only the hijab accommodation claims for trial. *EEOC v. Jetstream Ground Servs.*, No. 13-CV-2340, 2016 U.S. Dist. LEXIS 154109, at \*3-4 (D. Colo. Nov. 3, 2016).

<sup>167</sup> *Id.* at \*4. Thereafter, under Rules 59 and 60, the EEOC brought a motion for a new trial, arguing it was justified for several reasons including: (1) evidence regarding safety hazards was confusing and distracting to the jury, and was designed to incite jurors' fear and prejudice of Muslims; (2) new evidence was disclosed at trial; (3) JetStream's counsel committed misconduct throughout the trial; (4) the Court erred in denying sanctions for the destruction of evidence; and (5) the Court erred in deciding not to allow the EEOC to use a juror questionnaire prior to trial and in denying the EEOC's motion to strike two jurors for cause. *Id.*; see also Gerald L. Maatman, Jr. and Alex W. Karasik, *No New Trial: Court Grounds EEOC Following JetStream's Victory in Religious Discrimination Trial*, Workplace Class Action Blog (Nov. 10, 2016), [http://www.workplaceclassaction.com/2016/11/no-new-trial-court-grounds-eeoc-following-jetstreams-victory-in-religious-discrimination-trial/?utm\\_source=Seyfarth+Shaw+-+Workplace+Class+Action+Blog&utm\\_campaign=3b09dd74fd-RSS\\_EMAIL\\_CAMPAIGN&utm\\_medium=email&utm\\_term=0\\_535dd45f41-3b09dd74fd-72761765](http://www.workplaceclassaction.com/2016/11/no-new-trial-court-grounds-eeoc-following-jetstreams-victory-in-religious-discrimination-trial/?utm_source=Seyfarth+Shaw+-+Workplace+Class+Action+Blog&utm_campaign=3b09dd74fd-RSS_EMAIL_CAMPAIGN&utm_medium=email&utm_term=0_535dd45f41-3b09dd74fd-72761765). The Court denied the EEOC's motion for a new trial. Addressing the relevant legal standard under Rule 59, the Court noted that only errors that have caused substantial harm to the losing party justify a new trial, and that the verdict must stand unless it is clearly, decidedly, or overwhelmingly against the weight of the evidence. *Jetstream Ground Servs.*, 2016 U.S. Dist. LEXIS 154109, at \*5. Regarding Rule 60, the Court opined that relief under this rule is extraordinary and may only be granted in exceptional circumstances, which were not present. *Id.* at \*19-20, 24-28, 31-55.

<sup>168</sup> Complaint, *EEOC v. Sleneem Enters., LLC d/b/a Tim Horton's Café & Bake Shop*, No. 2:17-CV-12337-DPH-RSW (E.D. Mich. July 18, 2017), ECF No. 1, at ¶ 13; See also Press Release, Equal Employment Opportunity Commission, Tim Horton's In Romulus Sued By EEOC for Failure To Provide Religious Accommodation, (July 19, 2017), <https://www.eeoc.gov/eeoc/newsroom/release/7-19-17.cfm>.

<sup>169</sup> Press Release, Equal Employment Opportunity Commission, Sleneem Enterprises, LLC To Pay \$22,500 To Settle EEOC Religious Accommodation Suit, (Sept. 18, 2017), <https://www.eeoc.gov/eeoc/newroom/release/9-18-17b.cfm>.

<sup>170</sup> Press Release, Equal Employment Opportunity Commission, U.S. Steel Subsidiary to Pay \$150,000 to Settle EEOC Religious Discrimination and Retaliation Suit, (Apr. 10, 2017), <https://www.eeoc.gov/eeoc/newroom/release/4-10-17b.cfm>.

<sup>171</sup> Amended Complaint, *EEOC v. U.S. Steel Tubular Prods., Inc.*, No. 4:14-CV-2747 (S.D. Tex. Feb. 23, 2015), ECF No. 16.

<sup>172</sup> *Id.* ¶ 11.

religion forbids him from cutting hair from his scalp.<sup>173</sup> According to the EEOC, the charging party offered alternatives, such as pulling hair from his beard, but he was instructed to go home without the exam being completed, and he was not given another drug testing opportunity.<sup>174</sup>

On June 14, 2017, the EEOC announced that an Orlando staffing company had agreed to settle for \$30,000 after the EEOC alleged that it violated religious discrimination law by failing to provide an accommodation to a Rastafarian by requiring him to cut his dreadlocks to comply with its client's grooming standards in order to keep his position at an Orlando-area hotel.<sup>175</sup> The EEOC alleged that the charging party was taken off his assignment and never reassigned.<sup>176</sup> In addition to requiring the company to pay \$30,000, the settlement also required the company to amend its employee handbook and policy manual to include a clear policy providing for reasonable accommodations covering both disability and religious-based requests.<sup>177</sup> Further, the company agreed to provide training to its managers and HR personnel, and to voluntarily provide information to the EEOC concerning its handling of religious discrimination complaints for three years.<sup>178</sup> Citing the Supreme Court's opinion in *EEOC v. Abercrombie & Fitch*, the EEOC's regional attorney for the Miami District Office noted "that we must be vigilant in protecting sincere religious expression in the workplace. This is particularly important where the Commission has recognized 'the increasing complexity of employment relationships and structures, including temporary workers, staffing agencies, and independent contractor relationships' in an ever more on-demand economy."<sup>179</sup>

### **b. A New Focus On Religious Scheduling Accommodations**

FY 2017 also saw strict enforcement of the EEOC's policies regarding religious scheduling accommodations. For example, in *EEOC v. North Memorial Health Care*,<sup>180</sup> the EEOC sued an employer hospital in the District Court for the District of Minnesota, claiming that the employer retaliated against an applicant by withdrawing a conditional job offer because she asked for a scheduling accommodation for her religious beliefs.<sup>181</sup> On March 15, 2017, the employer moved for summary judgment, arguing that the retaliation claim failed because a religious accommodation request did not amount to protected activity.<sup>182</sup> The employer argued that requesting a religious accommodation is not opposing an unlawful practice, nor is it making a charge or otherwise assisting in a Title VII investigation.<sup>183</sup> The employer maintained that the EEOC had conceded as much in its retaliation guidance by stating that a person requesting accommodation "might not literally 'oppose'

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<sup>173</sup> *Id.* ¶ 14.

<sup>174</sup> *Id.* ¶¶ 11, 23.

<sup>175</sup> Press Release, Equal Employment Opportunity Commission, Hospitality Staff To Pay \$30,000 To Settle EEOC Religious Discrimination Law suit, (June 14, 2017), <https://www.eeoc.gov/eeoc/newsroom/release/6-14-17b.cfm>.

<sup>176</sup> *Id.*

<sup>177</sup> Consent Decree, *EEOC v. Ramnarian II, LLC d/b/a Hospitality Staff*, No. 6:16-CV-1250-CEM-DAB (M.D. Fla. June 14, 2017), ECF No. 27.

<sup>178</sup> *Id.* ¶¶ 11-24.

<sup>179</sup> Press Release, Equal Employment Opportunity Commission, Hospitality Staff To Pay \$30,000 To Settle EEOC Religious Discrimination Law suit (June 14, 2017), <https://www.eeoc.gov/eeoc/newsroom/release/6-14-17b.cfm>.

<sup>180</sup> *EEOC v. N. Mem. Health Care*, Civ. No. 0:15-cv-3675 (DSD/KMM) (D. Minn. July 6, 2017).

<sup>181</sup> Complaint, *EEOC v. N. Mem. Health Care*, No. 0:15-cv-3675 (D. Minn. Sept. 16, 2015), ECF No. 1.

<sup>182</sup> Memorandum of Law In Support of Defendant's Motion for Summary Judgment, *EEOC v. N. Mem. Health Care*, No. 0:15-CV-3675(DSD/KMM) (D. Minn. Mar. 15, 2017), ECF No. 21; See Dawn Reddy Solowey, Is a Request for Religious Accommodation "Protected Activity" for a Title VII Retaliation Claim?, EMPLOYMENT LAW LOOKOUT BLOG (June 16, 2017), available at <http://www.laborandemploymentlawcounsel.com/2017/03/is-a-request-for-religious-accommodation-protected-activity-for-a-title-vii-retaliation-claim/>.

<sup>183</sup> *Id.* at 16.

discrimination or ‘participate’ in a complaint process.”<sup>184</sup> The Court held that the employee’s request for religious accommodation was not protected activity within the meaning of Title VII’s prohibition on retaliation, and thus the employer’s withdrawal of the conditional offer of employment did not constitute retaliation.<sup>185</sup>

On March 20, 2017, the EEOC filed suit against J.C. Witherspoon, Jr., Inc. for allegedly refusing to accommodate a truck driver’s religious beliefs and fired him because of his religion.<sup>186</sup> The EEOC claimed that the company terminated Leroy Lawson, a Hebrew Pentecostal, because he refused to work on Saturdays.<sup>187</sup> On April 26, 2017, the EEOC filed suit against Decostar Industries because the company allegedly refused to accommodate employee Dina Lucas Velasquez when she requested to be excused from mandatory Saturday overtime.<sup>188</sup> According to the EEOC, Decostar initially granted Velasquez’s request until January 2014, when a new supervisor took over her department and denied her ongoing request for a religious accommodation. Decostar subsequently terminated Velasquez’s employment on October 27, 2014.<sup>189</sup>

On May 16, 2017, the EEOC also sued XPO Last Mile for religious discrimination when it allegedly refused to hire a candidate who could not work Rosh Hashanah due to his religious beliefs.<sup>190</sup> And on August 24, 2017, the EEOC filed suit against a senior and assisted living community, alleging that the company required two employees to work on their Sabbath.<sup>191</sup> The employees, who were members of the Seventh-Day Adventist Church, observed the Sabbath from sundown Friday to sundown Saturday. But the company allegedly told them they had to agree to work on Saturdays as part of a new work schedule.<sup>192</sup> When the two employees refused due to their religious beliefs, the company asked them to resign.<sup>193</sup>

### **c. Defining And Protecting Religious Beliefs**

In FY 2017, the EEOC continued its focus on cases addressing the definition of what is considered a “religion” entitled to protection under Title VII. On June 12, 2017, the U.S. Court of Appeals for the

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<sup>184</sup> *Id.* at 18-19.

<sup>185</sup> *EEOC v. N. Mem. Health Care*, Civ. No. 0:15-cv-3675(DSD.KMM), at \*3 (D. Minn. July 6, 2017).

<sup>186</sup> Complaint, *EEOC v. J.C. Witherspoon Jr., Inc.*, No. 2:17-cv-00745-DCN-MGB (D.S.C. March 20, 2017), ECF No. 1.

<sup>187</sup> *Id.* ¶¶ 10-11, 14; Press Release, Equal Employment Opportunity Commission, EEOC Files Religious Discrimination Law suit Against J.C. Witherspoon Jr., Inc. (Mar. 20, 2017), <https://www.eeoc.gov/eeoc/newsroom/release/3-20-17.cfm>.

<sup>188</sup> Complaint, *Equal Employment Opportunity Commission v. Decostar Indus., Inc.*, Civil Action No. 3:17-cv-00054-TCB-RGV (N.D. Ga. Apr. 26, 2017), ECF No. 1; Press Release, Equal Employment Opportunity Commission, Decostar Industries Sued By EEOC For Religious Discrimination (Apr. 26, 2017), <https://www.eeoc.gov/eeoc/newsroom/release/4-26-17d.cfm>.

<sup>189</sup> *Id.*

<sup>190</sup> Complaint, *EEOC v. XPO Last Mile, Inc.*, Civil Action No. 1:17-cv-01342-JKB (D. Md. May 16, 2017), ECF No. 1 Press Release, Equal Employment Opportunity Commission, EEOC Sues XPO Last Mile for Religious Discrimination, (May 16, 2017), <https://www.eeoc.gov/eeoc/newsroom/release/5-16-17.cfm>. When the Company called the charging party, a dispatcher/customer service representative, to work on October 3, 2016, he refused, stating he celebrated the Jewish holiday, Rosh Hashanah, on that date. The operations manager replied that he thought it would be acceptable for McCloud to start on Oct. 4. Later that evening, however, the market vice president called and told McCloud he must report to work on Oct. 3. The EEOC said the market vice president told McCloud that the company only honored federal holidays, and that if he gave McCloud a religious accommodation, he would have to extend them to other employees.

<sup>191</sup> Complaint, *EEOC v. Century Park Associates, LLC, d/b/a Garden Plaza at Greenbriar Cove*, Civil Action No. 1:17-cv-00231 (E.D. Tenn. Aug. 24, 2017), ECF No. 1; Press Release, Equal Employment Opportunity Commission, Century Park Associates / Garden Plaza at Greenbriar Cove Sued By EEOC For Religious Bias, (Aug. 25, 2017), <https://www.eeoc.gov/eeoc/newsroom/release/8-25-17a.cfm>.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

Fourth Circuit, in *EEOC v. Consol Energy, Inc.*,<sup>194</sup> affirmed the District Court's decision upholding a jury verdict against an employer who refused to provide an employee a religious accommodation by subjecting him to a biometric hand scanner for purposes of clocking in and out of work. Specifically, the employee believed the hand scanner was used to identify and collect personal information that would be used by the Christian Anti-Christ.<sup>195</sup> After trial, the jury returned a verdict in favor of the EEOC, and awarded \$150,000 in compensatory damages and over \$436,000 in front pay and back pay damages.<sup>196</sup>

The employer moved for a new trial, arguing that the Court made various legal errors and that the jury's damage award was excessive.<sup>197</sup> The Fourth Circuit affirmed the District Court's denial of the employer's three post-verdict motions.<sup>198</sup> The employer argued that it did not fail to reasonably accommodate the employee's religious beliefs because there was in fact no conflict between his beliefs and its requirement that he use the hand scanner system. The Fourth Circuit rejected this argument, noting that in both the employee's request for an accommodation and his trial testimony, the employee carefully and clearly laid out his religious objection to use of the scanner system.<sup>199</sup>

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<sup>194</sup> *EEOC v. Consol Energy, Inc.*, No. 16-1230, 2017 U.S. App. LEXIS 10385 (4th Cir. June 12, 2017); see also Gerald L. Maatman, Jr. and Alex W. Karasik, *More "Mark of the Beast" – Fourth Circuit Affirms Denial Of Employer's Post-Verdict Motions In EEOC's Anti-Christ Discrimination Case*, Workplace Class Action Blog (June 15, 2017), available at <http://www.workplaceclassaction.com/2017/06/more-mark-of-the-beast-fourth-circuit-affirms-denial-of-employers-post-verdict-motions-in-eEOCs-anti-christ-discrimination-case/>; See Dawn Reddy Solowey, *The Antichrist at Work: 4th Circuit Affirms Judgment Against Employer for Failing to Accommodate Employee's Religious Belief Regarding "Mark of the Beast"*, Employment Law Lookout Blog (June 16, 2017), available at <http://www.laborandemploymentlawcounsel.com/2017/06/the-antichrist-at-work-4th-circuit-affirms-judgment-against-employer-for-failing-to-accommodate-employees-religious-belief-regarding-mark-of-the-beast/>.

<sup>195</sup> *EEOC v. Consol Energy, Inc.*, No. 13-CV-215, 2016 U.S. Dist. LEXIS 15475, at \*2-3 (N. D. W.Va. Feb. 9, 2015); see also Gerald L. Maatman Jr. and Alex W. Karasik, *Judgment Day Dooms Employer: No New Trial In EEOC Case After Finding Of Failure To Accommodate Anti-Christ Fears*, Workplace Class Action Blog (Feb. 24, 2016), <http://www.workplaceclassaction.com/2016/02/judgment-day-dooms-employer-no-new-trial-in-eEOC-case-after-finding-of-failure-to-accommodate-anti-christ-fears/>.

<sup>196</sup> *Consol Energy, Inc.*, 2016 U.S. Dist. LEXIS 15475, at \*4. After trial, defendants filed a renewed motion for judgment as a matter of law under Rule 50(b), a motion for a new trial under Rule 59, and a motion to amend the Court's findings and conclusions under Rule 59. *Id.* at \*5. In their renewed motion for judgment as a matter of law, the employer argued (1) that the EEOC failed to present sufficient evidence to state a *prima facie* case of religious discrimination; and (2) that there was insufficient evidence to support the jury's finding that parent company Consol was the employee's employer. *Id.* at \*5-6. The Court rejected these arguments, finding that the EEOC presented sufficient evidence that the employee repeatedly requested a religious accommodation, which was denied despite the employer's awareness of a reasonable accommodation, and that the parent company Consol exercised excessive control and made employment decisions regarding the employees of the subsidiary defendant, Consolidation, such that it was his employer. *Id.* at \*8-11.

<sup>197</sup> *Id.* at \*12. The Court rejected this argument as well as the employer's arguments that the jury instructions and jury's award were improper. *Id.* at \*12-36. In their motion to amend the findings regarding back pay and front pay damages, the employer argued that the Court's findings regarding the employee's efforts to mitigate damages were not supported by the evidence. The Court rejected this argument, referencing how the employee reasonably mitigated his damages by eventually accepting another job, even though it was lower-paying and in a different industry. *Id.* at \*36-39.

<sup>198</sup> *EEOC v. Consol Energy, Inc.*, 860 F.3d 131 (4th Cir. 2017); See Gerald L. Maatman, Jr. and Alex W. Karasik, *More "Mark of the Beast" – Fourth Circuit Affirms Denial Of Employer's Post-Verdict Motions In EEOC's Anti-Christ Discrimination Case*, Workplace Class Action Blog (June 15, 2017), available at <http://www.workplaceclassaction.com/2017/06/more-mark-of-the-beast-fourth-circuit-affirms-denial-of-employers-post-verdict-motions-in-eEOCs-anti-christ-discrimination-case/>; See Dawn Reddy Solowey, *The Antichrist at Work: 4th Circuit Affirms Judgment Against Employer for Failing to Accommodate Employee's Religious Belief Regarding "Mark of the Beast"*, Employment Law Lookout Blog (June 16, 2017), available at <http://www.laborandemploymentlawcounsel.com/2017/06/the-antichrist-at-work-4th-circuit-affirms-judgment-against-employer-for-failing-to-accommodate-employees-religious-belief-regarding-mark-of-the-beast/>.

<sup>199</sup> *Consol Energy, Inc.*, 860 F.3d at 142. The employer had also raised a handful of objections that primarily related to the District Court's exclusion of evidence and various issues related to jury instructions. *Id.* at 145-46. But the Fourth Circuit noted that it would "respect the [D]istrict [C]ourt's decision absent an abuse of discretion, and will disturb that judgment only in the most exceptional circumstances." *Id.* (internal quotation marks and citation omitted). Further, it opined that, "[w]hen, as here, a new trial is sought based on purported evidentiary errors by the District Court, a verdict may be set aside only if an error is so grievous as to have rendered the entire trial unfair." *Id.* Applying this standard, the Fourth Circuit found that the

Both parties also cross-appealed the District Court's rulings on lost wages and punitive damages. The Fourth Circuit rejected the employer's argument that the employee failed to adequately mitigate his damages by accepting a lower paying job, noting that whether a worker acted reasonably in accepting particular employment is preeminently a question of fact, and that it would not second-guess the District Court.<sup>200</sup> The Fourth Circuit also rejected the EEOC's cross-appeal regarding punitive damages, holding that the District Court did not err in concluding that the EEOC's evidence fell short of allowing for a determination that Consol's Title VII violation was the result of the kind of "reckless indifference" necessary to support an award of punitive damages.<sup>201</sup>

In *EEOC v. United Health Programs of America, Inc. and Cost Containment Group Inc.*,<sup>202</sup> the EEOC successfully argued that concepts known as "Onionhead" and "Harnessing Happiness" were entitled to Title VII protection as religious beliefs.<sup>203</sup> The charging parties alleged that the program required them to use candles instead of lights to prevent demons from entering the workplace; conduct chants and prayers in the workplace; and respond to emails relating to God, spirituality, demons, Satan, and divine destinies.<sup>204</sup> They alleged they were terminated either because they rejected Onionhead's beliefs or because of their own non-Onionhead religious beliefs, while other employees who followed Onionhead were given less harsh discipline.<sup>205</sup> After unsuccessful conciliation efforts, the EEOC filed suit on October 9, 2014 on behalf of three employees who filed charges of discrimination and an additional seven employees that it discovered during its investigation.<sup>206</sup>

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 believer's] own scheme of things, religious."<sup>207</sup> Regarding the first prong, the court noted that, "a reasonable jury could find that by inviting [the CEO's aunt] into the workplace, paying her to meet and conduct workshops, authorizing her to speak to employees about matters related to their personal lives, disseminating ... material and directing employees to attend group and individual meetings with [his aunt], [the CEO] and his upper management held sincere beliefs in Onionhead and Harnessing Happiness."<sup>208</sup> As to the second prong, the Court concluded that the beliefs were religious within the meaning of Title VII due to the extensive religious discussion, the fact that the aunt was a "spiritual advisor," employees were told to pray in the workplace; and the employer

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District Court did not abuse its discretion. Regarding the jury instructions, the Fourth Circuit held that the District Court properly found that Consol failed to show any prejudice arising from any of the instructions at issue. *Id.* at 146..

<sup>200</sup> *Id.* at 140.

<sup>201</sup> *Id.* at 152.

<sup>202</sup> *EEOC v. United Health Programs of America, Inc. and Cost Containment Group Inc.*, No. 14-CV-03673, (KAM)(JO), 2016 WL 6477050 (E.D.N.Y. Sept. 30, 2016).

<sup>203</sup> *Id.* at \*3-5; see also Gerald L. Maatman, Jr. and Alex W. Karasik, *Now Something Known As "Onionhead" Is A "Religion" For Which The EEOC Can Bring A Religious Discrimination Suit*, Workplace Class Action Blog (Oct. 7, 2016), <http://www.workplaceclassaction.com/2016/10/now-something-known-as-onionhead-is-a-religion-for-which-the-eec-can-bring-a-religious-discrimination-suit/>.

<sup>204</sup> *United Health Programs*, 2016 WL 6477050, at \*7, 11-12.

<sup>205</sup> *Id.* at \*5.

<sup>206</sup> Amended Complaint at 1, *EEOC v. United Health Programs of America, Inc. and Cost Containment Group Inc.*, No. 14-CV-03673 (E.D.N.Y. Sept. 30, 2016), ECF No. 24.

<sup>207</sup> *United Health Programs of America, Inc.*, 2016 WL 6477050, at \*8 (quoting *Patrick v. LeFevre*, 745 F.2d 153, 157 (2d Cir. 1984)).

<sup>208</sup> *Id.* at \*13.

quoted numerous Onionhead publications.<sup>209</sup> Accordingly, the Court found that Onionhead was a religion for purposes of Title VII.<sup>210</sup>

In *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*,<sup>211</sup> the sincerity of the employer's religious beliefs was also at issue. There, the EEOC alleged that a funeral home wrongfully terminated its former funeral director for being transgender.<sup>212</sup> While the funeral home did not officially affiliate with a religion, its website contains scripture and various bible verses were dispersed at its locations.<sup>213</sup> The funeral home had a strict employee dress code policy with several requirements, including that men must wear suits and women must wear jackets and skirts/dresses.<sup>214</sup> After finding that the funeral home demonstrated that enforcement of Title VII would be a substantial burden to its religious exercise,<sup>215</sup> the Court determined that the EEOC failed to meet its burden of showing that its action was the least restrictive means of furthering a compelling government interest.<sup>216</sup> Accordingly, the funeral home was entitled to exemption from Title VII under the Religious Freedom Restoration Act (RFRA).<sup>217</sup>

## 2. The Changing Nature Of Work In The Modern Fissured Workplace

In its 2017 Strategic Enforcement Plan, the EEOC announced a new area of focus relating to the EEOC's concerns about complex employment relationships.<sup>218</sup> These employment relationships center around issues involving temporary workers, staffing agencies, independent contractors, and the on-demand economy.<sup>219</sup> In the context of these employment relationships, the question often arises of whether two or more entities can be considered the "employer" of one employee.<sup>220</sup> The EEOC considers employers that are unrelated (or not sufficiently related to qualify as an "integrated enterprise") to be "joint employers" of a single employee if each employer exercises sufficient control

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<sup>209</sup> *Id.* at \*13-15.

<sup>210</sup> *Id.* at \*15.

<sup>211</sup> *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, No. 14-13710, 2016 U.S. Dist. LEXIS 109716 (E.D. Mich. Aug. 18, 2016). For additional discussion of this case, see *supra* pp. 35.

<sup>212</sup> *Id.* at \*15; see also Gerald L. Maatman, Jr. and Alex W. Karasik, *EEOC Loses Landmark Transgender Discrimination Case*, Workplace Class Action Blog (Aug. 19, 2016), <http://www.workplaceclassaction.com/2016/08/eeoc-loses-landmark-transgender-discrimination-case/>.

<sup>213</sup> *R.G. & G.R. Harris Funeral Homes, Inc.*, 2016 U.S. Dist. LEXIS 109716, at \*22.

<sup>214</sup>

<sup>215</sup> *Id.* at \*45-47 (citing *Burwell v. HobbyLobby Stores, Inc.*, 134 S. Ct. 2751 (2014)).

<sup>216</sup> *Id.* at 54-66; see also Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb-1(a), (b) (The RFRA prohibits the "Government [from] substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability' unless the Government 'demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.'").

<sup>217</sup> Among other things, the Court concluded that the EEOC investigation uncovered possible unlawful discrimination (1) of a kind not raised by the claimant; and (2) not affecting the claimant. Thus, the Court instructed the EEOC to file a new claim. *R.G. & G.R. Harris Funeral Homes*, 2016 U.S. Dist. LEXIS 109716, at \*78 (citing *EEOC v. Bailey*, 563 F.2d 439 (6th Cir. 1977)).

<sup>218</sup> See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION STRATEGIC ENFORCEMENT PLAN FISCAL YEARS 2017 - 2021, *supra* note 26.

<sup>219</sup> *Id.*

<sup>220</sup> See EEOC Compliance Manual, Section 2: Threshold Issues § 2-III(B)(1)(A)(iii)(b), <https://www.eeoc.gov/policy/docs/threshold.html>.

of an individual to qualify as his/her employer.<sup>221</sup> The EEOC clarified how it determines the extent of that control in an 1997 Enforcement Guidance, where it identified 16 factors that it considers when determining whether two or more companies are joint employers of a single employee.<sup>222</sup>

The EEOC's definition is different than the statutory definitions that apply to some of the anti-discrimination laws that the EEOC enforces. For example, the EPA has a slightly different definition of "employer" than Title VII.<sup>223</sup> The EPA uses the broader definition found in the FLSA, which defines an "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee . . . ."<sup>224</sup> An "employee" is defined as "any individual employed by an employer,"<sup>225</sup> and the term "employ" means "to suffer or permit to work."<sup>226</sup> Together, those definitions have been interpreted as "the broadest definition . . . ever included in any one act."<sup>227</sup> Courts interpreting that definition have focused on the "economic realities" of the purported employment relationship.<sup>228</sup> The "economic realities" inquiry, in turn, focuses on a number of factors related to control over the employee.<sup>229</sup> Despite the different statutory basis, and different interpretations in the case law, the EEOC maintains that "there is no significant functional difference between the tests."<sup>230</sup>

In the fall of 2016, the EEOC expanded the scope of the joint-employer test in line with the controversial decision issued by the National Labor Relations Board, *Browning-Ferris Industries of California*.<sup>231</sup> This decision, however, was overturned in *Hy-Brand Industrial Contractors, Ltd. And Brandt Construction Co.*<sup>232</sup> Prior to overturning *Browning-Ferris*, the NLRB had expanded its

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<sup>221</sup> *Id.* § 2-III(B)(1)(A)(iii)(b). Another method the EEOC uses for determining whether two or more entities can be considered the "employer" of an employee turns on whether "the operations of two or more employers are so intertwined that they can be considered the single employer of the charging party." *Id.* § 2-III(B)(1)(A)(iii)(a)

<sup>222</sup> EEOC Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms (Dec. 3, 1997), <https://www.eeoc.gov/policy/docs/conting.html>. The EEOC states that its factors are drawn from *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 324 (1992) (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-752 (1989)) and Restatement (Second) of Agency § 220(2).

<sup>223</sup> Under Title VII, subject to some enumerated exceptions, an "employer" means "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person." 42 U.S.C. § 2000e(b).

<sup>224</sup> 29 U.S.C. § 203(d).

<sup>225</sup> *Id.* § 203(e)(1).

<sup>226</sup> *Id.* § 203(g).

<sup>227</sup> *U.S. v. Rosenwasser*, 323 U.S. 360, 363 n.3 (1945).

<sup>228</sup> See *Goldberg v. Whittaker House Cooperative, Inc.*, 366 U.S. 28, 33 (1961) (holding that homew orker members of a cooperative were in an employment relationship because the "economic reality" of their situation indicated an employment relationship, even if the "technical concepts" did not: "they are engaged in the same work they would be doing whatever the outlet for their products. The management fixes the piece rates at which they work; the management can expel them for substandard work or for failure to obey the regulations. The management, in other words, can hire or fire the homew orkers").

<sup>229</sup> See, e.g., *Herman v. RSR Sec. Servs., Ltd.*, 172 F.3d 132, 139 (2d Cir.1999) ("Under the "economic reality" test, the relevant factors include "whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records.") (quoting *Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8, 12 (2d Cir.1984)).

<sup>230</sup> EEOC Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms, at n.10, *supra* note 222.

<sup>231</sup> *Browning-Ferris Indus. of California*, 362 NLRB No. 186, 2015 WL 5047768 (Aug. 27, 2015).

<sup>232</sup> In *Hy-Brand Industrial Contractors, Ltd. And Brandt Construction Co.*, 365 NLRB No. 156 (Dec. 14, 2017), by a 3-2 vote, the NLRB overturned *Browning-Ferris* and restored its 30-year test for determining whether separate businesses are "joint employers" under the NLRA. See Joshua Ditelberg, *NLRB Overturns Browning-Ferris Joint Employer Standard*, SEYFARTH SHAW MANAGEMENT ALERT (Dec. 18, 2017), <http://www.seyfarth.com/uploads/siteFiles/publications/MA121817LE.pdf>. The NLRB's current position is that a putative employer will be found to be a joint employer if it "meaningfully affects matters relating to the employment relationship, such as hiring, firing, discipline, supervision and direction." *Laerco*, 269 NLRB 324, 325 (1987). Two or more entities were joint employers if they "share[d] or codetermine[d] those matters governing the

traditional joint-employer test so that “two or more entities are joint employers of a single work force if they are both employers within the meaning of the common law, and if they share or codetermine those matters governing the essential terms and conditions of employment.”<sup>233</sup> Importantly, the NLRB announced that it “will no longer require that a joint employer not only possess the authority to control employees’ terms and conditions of employment, but must also exercise that authority, and do so directly, immediately, and not in a ‘limited and routine’ manner. . . . The right to control, in the common-law sense, is probative of joint-employer status, as is the actual exercise of control, whether direct or indirect.”<sup>234</sup>

After *Browning-Ferris* was appealed to the Court of Appeals for the District of Columbia Circuit, the EEOC filed an *amicus* brief supporting the NLRB’s then-new position.<sup>235</sup> The EEOC drew similarities between the employment statutes, explaining that the definitions of “employer” are virtually identical in Title VII and the NLRA, and that this, plus those statutes’ shared remedial purpose, “suggests that the joint-employer test should be the same under both laws.”<sup>236</sup>

The EEOC argued that its own test, like that of the *Browning-Ferris* test, appropriately looks at the totality of the circumstances.<sup>237</sup> According to the EEOC, this approach is “intentionally flexible” and “consistent with common law,” in that it does not consider one factor to be decisive, but rather looks to all of the circumstances of the worker’s relationship with each business involved to determine who is an employer.<sup>238</sup> The EEOC also argued that its standard correctly allows courts to consider an entity’s right to control the terms and conditions of employment as well as its indirect control of those terms and conditions.<sup>239</sup> Crucially, the EEOC contends that an entity’s right to control the terms and conditions of employment – whether or not it actually exercises that right – is relevant to joint-employer status.<sup>240</sup>

With respect to indirect control, the EEOC similarly explained that it “has long considered indirect control to be relevant to joint employer status.”<sup>241</sup> The EEOC stated that “[a] putative joint employer exercises indirect control of the terms and conditions of employment by acting through an intermediary.”<sup>242</sup> The EEOC relied on its own administrative decisions to support this assertion.<sup>243</sup>

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essential terms and conditions of employment” and question of joint employer status needed to be assessed based on the “totality of the facts of the particular case.” *Southern California Gas Co.*, 302 NLRB 456, 461, 1991 WL 67022 (1991).

<sup>233</sup> *Browning-Ferris Indus. of California*, 2015 WL 5047768, at \*19. In addition, the NLRB stated that it will consider “the allocation and exercise of control in the workplace” and “the various ways in which joint employers may ‘share’ control over terms and conditions of employment or ‘codetermine’ them, as the Board and the courts have done in the past.” *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> See Gerald L. Maatman, Jr., Christina M. Janice and Alex W. Karasik, *Jumping For Joint Employer: The EEOC Files Amicus Brief Supporting Broadened Definition Of Joint Employer In High-Profile NLRB Litigation*, WORKPLACE CLASS ACTION BLOG (Sept. 21, 2016), <http://www.workplaceclassaction.com/2016/09/jumping-for-joint-employer-the-eeoc-files-amicus-brief-supporting-broadened-definition-of-joint-employer-in-high-profile-nlr-litigation/>.

<sup>236</sup> Brief of the United States Equal Employment Opportunity Commission as Amicus Curiae in Support of Respondent/Cross-Petitioner and in Favor of Enforcement at 7, *Browning-Ferris Indus. of Calif. Inc. v. Nat’l Labor Relations Bd.*, Nos. 16-1028, 16-1063, 16-1064 (D.C. Cir. Sept. 14, 2016). According to the EEOC, it uses a “flexible joint-employer test because employment discrimination statutes are remedial in nature.” *Id.* at 6. This remedial purpose “stems directly from the [National Labor Relations Act (NLRA)].” *Id.* at 7. This remedial purpose “stems directly from the [National Labor Relations Act (NLRA)].” *Id.*

<sup>237</sup> *Id.* at 8.

<sup>238</sup> *Id.* at 9-11.

<sup>239</sup> *Id.* at 5.

<sup>240</sup> *Id.* at 12.

<sup>241</sup> *Id.* at 13.

<sup>242</sup> *Id.* at 14.

Finally, the EEOC argued that a broad, fact-specific inquiry would be neither vague nor unworkable.<sup>244</sup> Although the EEOC concedes that “[t]he EEOC’s flexible joint-employer test, like the NLRB’s, carries more uncertainty than the NLRB’s now-discarded rule, which looked only at authority exercised directly and immediately,”<sup>245</sup> the EEOC nevertheless contends that “[u]ncertainty, however, is no basis for rejecting a rule that is consistent with statutory language, common law, and legislative purpose.”<sup>246</sup>

Although the EEOC supports the NLRB’s former expansive view of joint employment, the EEOC’s inquiry into the joint employment relationship differs from the NLRB’s in a critical respect. In contrast to the NLRB, the EEOC “does not inquire into joint employer status unless there is reason to believe that an entity knew or should have known of discrimination by another entity and failed to take corrective action within its control.”<sup>247</sup> Consequently, the EEOC’s inquiry concerning joint employer-status is narrower than the NLRB’s.

The standard articulated by the NLRB in *Browning-Ferris* and supported by the EEOC potentially inoculate the “joint employer” determinations by these agencies as fact-driven – particularly when determining the existence of unexercised or indirect control. For example, in *EEOC v. S&B Indus., Inc.*,<sup>248</sup> the EEOC asserted an ADA discrimination claim against S&B for failure to hire two employees suffering from hearing impairments. After the parties cross-moved for summary judgment, the District Court held that there was a genuine issue of material fact regarding whether S&B was a joint employer along with its staffing agency.<sup>249</sup> The EEOC argued, and the District Court agreed, that the “right to control an employee’s conduct is the most important component of the hybrid economic realities/common law control test and the component that the court must ‘emphasize.’”<sup>250</sup>

Applying this test, the District Court concluded that a reasonable jury could conclude that S&B had the right to control employees. For instance, aside from supervising workers on the production floor, the District Court concluded that the evidence suggested that S&B also had the “right to terminate and end the assignment of specific workers at S&B.”<sup>251</sup> “This evidence,” the District Court explained, “is sufficient to raise a genuine issue of material fact on the question of whether, under the ‘joint employer’ test, S&B and [the staffing company employer] were . . . joint employers.”<sup>252</sup> As this case demonstrates, the EEOC’s “right-to-control” test opens the door for a jury to decide this issue.

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<sup>243</sup> *Id.* (citing *Complainant v. Johnson*, EEOC Doc. No. 0120160989, 2016 WL 1622535, at \*3 (EEOC Apr. 14, 2016) (holding that staffing firm clients hold “de facto power to terminate” an employee if they are able to communicate to the staffing firm that they do not wish to continue with the staffing contract and merely communicate that decision to the staffing firm Project Manager, who facilitates the termination); *Rina F. v. McDonald*, EEOC Doc. No. 0120160808, 2016 WL 1729906, at \*3 (EEOC Apr. 21, 2016) (considering the fact that employee was interviewed by both contractor and agency, and contractor did not hire Complainant “until it received word from the Agency official”); *Complainant v. McHugh*, EEOC Doc. No. 0120140999, 2014 WL 3697464, at \*5 (EEOC July 15, 2014) (considering “whether the Agency indirectly controlled Complainant’s job through the on-site coordinator”); *Lee v. McHugh*, EEOC Doc. No. 0120112643, 2013 WL 393519, at \*7 (EEOC Jan. 24, 2013) (considering whether contractor terminated complainant because agency “wanted him fired”)).

<sup>244</sup> Brief of the United States Equal Employment Opportunity Commission as Amicus Curiae in Support of Respondent/Cross-Petitioner and in Favor of Enforcement at 15, *supra* note 237.

<sup>245</sup> *Id.* at 16.

<sup>246</sup> *Id.*

<sup>247</sup> *Id.* at 6. n. 2

<sup>248</sup> *EEOC v. S&B Indus., Inc.*, No. 3:15-CV-0641-D, 2016 WL 7178969, at \*1 (N.D. Tex. Dec. 8, 2016).

<sup>249</sup> *Id.*

<sup>250</sup> *Id.* at \*6.

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

Recent enforcement guidance also provides insight to the agency's view of joint employer status. On November 18, 2016, the EEOC released a final enforcement guidance on national origin discrimination.<sup>253</sup> The EEOC issued the updated guidance to inform both employers and employees how it interprets, approves, and/or disapproves of court interpretation of national origin discrimination cases.<sup>254</sup> Specifically, the guidance clarifies the definition of "national origin," and what constitutes discrimination based on "place of origin" and "ethnicity" under Title VII of the Civil Rights Act of 1964.<sup>255</sup> The updated guidance proposes an expansive joint employer definition:

Staffing firms, including temporary agencies and long-term contract firms, also are covered as employers by Title VII when each has the statutory minimum number of employees and has the right to exercise control over the means and manner of a worker's employment (regardless of whether they actually exercise that right). If both a staffing firm and its client employer have the right to control the worker's employment and have the statutory minimum number of employees, then they would be covered as "joint employers."<sup>256</sup>

Here again, the EEOC borrows from the now-overturned *Browning-Ferris* decision, reiterating the "right-to-control" test. Summary judgment on such issues will likely be a challenge for employers as the "right to control" is a vague and fact specific concept, arguably inferable from a wide variety of circumstances.

### 3. The Solidifying Definition Of LGBT Discrimination

LGBT rights remain a top priority under the 2017 Strategic Enforcement Plan, which explicitly identifies "[p]rotecting lesbians, gay men, bisexuals and transgender (LGBT) people from discrimination based on sex" as one of the selected emerging and developing issues that the EEOC will focus on.<sup>257</sup> The EEOC has noted that the number of charges filed alleging transgender or sexual orientation discrimination is growing.<sup>258</sup> Despite the change in administration, the EEOC has so far not retreated from the argument first made by the Obama administration that Title VII forbids employment discrimination based on gender identity.<sup>259</sup>

Notably, however, the Justice Department broke ranks with the EEOC on some LGBT issues in FY 2017. On July 26, 2017, the Department of Justice filed an amicus brief in the Second Circuit in *Zarda v. Altitude Express, Inc.*, in which it argued, contrary to the EEOC's position, that discrimination on the basis of sexual orientation is not prohibited under Title VII as discrimination on

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<sup>253</sup> EEOC, *Enforcement Guidance on National Origin Discrimination*, No. 915.005 (Nov. 18, 2016), available at <https://www.eeoc.gov/laws/guidance/national-origin-guidance.cfm>. The final guidance replaces the existing EEOC Compliance Manual, Volume II, Section 13: National Origin Discrimination, originally issued in December 2002.

<sup>254</sup> See *id.*

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION STRATEGIC ENFORCEMENT PLAN FISCAL YEARS 2017 - 2021, *supra* note 26.

<sup>258</sup> In FY 2015, EEOC received a total of 1,412 such charges.<sup>258</sup> In FY 2014 there were 1,100. See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FACT SHEET ON RECENT EEOC LITIGATION-RELATED DEVELOPMENTS REGARDING COVERAGE OF LGBT-RELATED DISCRIMINATION UNDER TITLE VII, [http://www.eeoc.gov/eeoc/litigation/selected/lgbt\\_facts.cfm](http://www.eeoc.gov/eeoc/litigation/selected/lgbt_facts.cfm); WHAT YOU SHOULD KNOW ABOUT EEOC AND THE ENFORCEMENT PROTECTIONS FOR LGBT WORKERS, [http://www.eeoc.gov/eeoc/newsroom/wysk/enforcement\\_protections\\_lgbt\\_workers.cfm](http://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm).

<sup>259</sup> *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, [cite]; See Sam Schwartz-Fenwick and Lucas Deloach, Despite New Administration, EEOC Maintains Position that Title VII Prohibits Gender Identity Discrimination, EMPLOYMENT LAW LOOKOUT BLOG (June 16, 2017), available at <http://www.laborandemploymentlawcounsel.com/2017/03/despite-new-administration-eeoc-maintains-position-that-title-vii-prohibits-gender-identity-discrimination/>.

the basis of gender.<sup>260</sup> Citing *Price Waterhouse v. Hopkins*,<sup>261</sup> the DOJ explained that while an employer cannot “evaluate employees by assuming or insisting that they match the stereotype associated with their group,” “the plaintiff must show that the employer actually relied on her or his gender in making its decision.”<sup>262</sup> Title VII, it argued, “does not proscribe employment practices that take account of the sex of employees but do not impose different burdens on similarly situated members of each sex.”<sup>263</sup> And it reminded that courts have long held that discrimination based on sexual orientation does not fall within Title VII’s prohibition on sex discrimination.<sup>264</sup>

#### **a. The EEOC’s Continuing Efforts To Expand Title VII Protections To Cover LGBT Discrimination**

The Commission’s focus on LGBT discrimination relies on an extension of Title VII’s prohibition of sex discrimination. Title VII does not explicitly mention sexual orientation or gender identity as a protected classification.<sup>265</sup> The EEOC’s legal theory is premised on Supreme Court precedent, as well as its own administrative decisions, which hold that “sex discrimination” under Title VII includes not just discrimination based on the biological differences between men and women, but also on the basis of gender.<sup>266</sup> In *Price Waterhouse v. Hopkins*,<sup>267</sup> the Supreme Court held that an employer had discriminated against a female employee by telling her to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”<sup>268</sup>

Contrary to the DOJ’s more recent interpretation of this precedent, the EEOC has extended the reasoning of *Hopkins* to establish that discrimination against LGBT employees is tantamount to discrimination on the basis of gender because it is discrimination that is based on a person’s perceived failure to adhere to gender stereotypes.<sup>269</sup> Notably, the EEOC has, to a large extent, relied

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<sup>260</sup> Brief for the United States as Amicus Curiae, *Zarda v. Altitude Express, Inc.*, No 15-3775 (S.D.N.Y. July 26, 2017).

<sup>261</sup> 490 U.S. 228, 251 (1989).

<sup>262</sup> Brief for the United States as Amicus Curiae, *Zarda v. Altitude Express, Inc.*, No 15-3775 (S.D.N.Y. July 26, 2017).

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

<sup>265</sup> See 42 U.S.C. § 2000e-2 (making it unlawful to discriminate against any individual “because of such individual’s race, color, religion, sex, or national origin”). For the past 20 years, some members of Congress have attempted to add gender identity as a protected category through passage of some form of the Employment Non-Discrimination Act (“ENDA”). Currently, ENDA has passed in the Senate but not in the House. See Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. (2013). The EEOC’s legal theory is therefore, arguably, one that has never been explicitly adopted by the U.S. Congress.

<sup>266</sup> See *Macy v. Holder*, EEOC Appeal No. 0120120821, 2012 WL 1435995, at \*5 (Apr. 20, 2012) (“As used in Title VII, the term ‘sex’ encompasses both sex – that is, the biological differences between men and women – and gender.”) (quoting *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000)) (citing *Smith v. City of Salem*, 378 F.3d 566, 572 (6th Cir. 2004) (“The Supreme Court made clear that in the context of Title VII, discrimination because of ‘sex’ includes gender discrimination.”); *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) (holding that the Supreme Court in *Price Waterhouse* had held that Title VII barred “not just discrimination because of biological sex, but also gender stereotyping – failing to act and appear according to expectations defined by gender.”)).

<sup>267</sup> 490 U.S. 228, 239 (1989).

<sup>268</sup> *Id.* at 235. Similarly, in *EEOC v. Boh Brothers Construction Co.*, 731 F.3d 444 (5th Cir. 2013), the Fifth Circuit held that the EEOC could prove that same-sex harassment was “because of sex” by presenting evidence that the harassment was based on a perceived lack of conformity with gender stereotypes. That case involved an ironworker on a bridge maintenance crew who was subjected to almost daily verbal and physical harassment because he allegedly did not conform to how his supervisor believed a man should act. *Id.* at 449–50. The Fifth Circuit held that the EEOC’s evidence demonstrated that the supervisor’s harassment was based on a perceived lack of conformity with gender stereotypes, and therefore “because of sex” under Title VII. *Id.* at 456. Along with *Hopkins*, his case has become a key building block and precedent for the EEOC’s theory of LGBT discrimination.

<sup>269</sup> See *Macy*, 2012 WL 1435995 (Apr. 20, 2012) (citing *Lewis v. Heartland Inns of Am., L.L.C.*, 591 F.3d 1033, 1041 (8th Cir. 2010); *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285 (3rd Cir. 2009); *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005); *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 874–75 (9th Cir. 2001); *Simonton v. Runyon*, 232 F.3d

on its own administrative powers to advance this theory.<sup>270</sup> And it has taken a similar position with respect to discrimination on the basis of sexual orientation.<sup>271</sup>

Over the past several years, the EEOC has used litigation as a vehicle to promote this view of Title VII sex discrimination and establish it as an accepted principle of anti-discrimination law.<sup>272</sup> In FY 2017 the EEOC's position found support in the Seventh Circuit in *Hively v. Ivy Tech*.<sup>273</sup> The Seventh Circuit became the first appellate court to hold that discrimination on the basis of sexual orientation is prohibited as sex discrimination under Title VII.<sup>274</sup> Hively, who was an openly gay adjunct professor, applied for six full-time positions over the course of five years, and was passed over each time.<sup>275</sup> In July 2014, her part-time adjunct contract was not renewed.<sup>276</sup>

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33, 37 (2d Cir. 2000); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261 n.4 (1st Cir. 1999); *Doe by Doe v. City of Belleville*, 119 F.3d 563, 580–81 (7th Cir. 1997), vacated and remanded on other grounds, 523 U.S. 1001 (1998)).

<sup>270</sup> *Macy*, 2012 WL 1435995 at \*4; see also Ariel D. Cudkowicz and Laura J. Maehtlen, *Strategy & Insights: Managing Transgender Issues in the Workplace Following The EEOC's Macy Ruling*, SEYFARTH SHAW NEWSLETTER (May 11, 2012), <http://www.seyfarth.com/publications/si051012>.

<sup>271</sup> On July 15, 2015, in *Baldwin v. Department of Transportation*, EEOC Appeal No. 0120133080, 2015 WL 4397641 (EEOC July 16, 2015), the EEOC issued an administrative opinion that held for the first time that Title VII extends to claims of employment discrimination based on sexual orientation. Like transgender discrimination, Title VII does not explicitly cover sexual orientation discrimination. Complainant was a Supervisory Air Traffic Control Specialist at the Federal Aviation Administration who had been denied a permanent position as a Front Line Manager. He filed a formal EEO complaint alleging that he had been subjected to discrimination “on the bases of sex (male, sexual orientation)” and reprisal for prior protected EEO activity. The agency argued that the position had never been filled, so no discrimination had occurred. Complainant alleged that he was not selected for the position because he is gay, pointing to several negative comments about his sexual orientation. The precise legal issue on appeal was whether the complainant had raised a claim that was appealable to the EEOC because it was covered by Title VII, or whether the agency was justified in determining that a claim for sexual orientation discrimination is solely appealable to the agency itself. The EEOC stated that: “[w]hen an employee raises a claim of sexual orientation discrimination as sex discrimination under Title VII, the question is not whether sexual orientation is explicitly listed in Title VII as a prohibited basis for employment actions. *It is not.*” *Id.* at \*4 (emphasis added). Rather, according to the EEOC, the question “is the same as any other Title VII case involving allegations of sex discrimination -- whether the agency has ‘relied on sex-based considerations’ or ‘take[n] gender into account’ when taking the challenged employment action.” *Id.* The EEOC concluded that “allegations of discrimination on the basis of sexual orientation necessarily state a claim of discrimination on the basis of sex.” *Id.* at \*10.

<sup>272</sup> For example, the EEOC has attempted to insert this line of reasoning into a number of pending cases through the use of *amicus* briefs. In *Pacheco v. Freedom Buick GMC Truck, Inc.*, No. 7:10-CV-00116 (W.D. Tex.) (motion for leave to file *amicus* brief denied Nov. 1, 2011), the EEOC argued that, as a matter of law, the discharge of a woman because she is transgender was discrimination because of sex in violation of Title VII. In *Chavez v. Credit Nation Auto Sales, LLC*, No. 1:13-CV-0312 (N.D. Ga.) (*amicus* brief filed June 5, 2014), the EEOC attempted to argue that a transgender woman who had twice attempted to file a charge of discrimination with the EEOC was entitled to equitable tolling of the limitations period for her Title VII charge because the EEOC had “mistakenly” refused to accept her timely charge. Brief for Equal Employment Opportunity Commission as *Amicus Curiae*, *Chavez v. Credit Nation Auto Sales, LLC*, No. 1:13-CV-0312, at 4-5 (N.D. Ga. Feb. 14, 2014), ECF No. 67. On both occasions, she was told by the EEOC investigator that she could not file a charge because, as a transgender woman, “she was not protected against discrimination on the basis of sex under Title VII.” *Id.* at 4–5. The EEOC argued that transgender discrimination was a recognized and cognizable claim under Title VII since the Supreme Court’s decision in *Price Waterhouse* in 1989, even though it had not accepted such charges as recently as 2010. *Id.* at 2, 9-17.

<sup>273</sup> *Hively v. Ivy Tech*, No. 15-720 (7th Cir. Apr. 4, 2017) (en banc); See Sam Schawrtz-Ferwick, Michael W. Stevens, and Kylie Byron, Management Alert - The Current Federal Retrenchment on LGBT Rights, EMPLOYMENT LAW LOOKOUT BLOG (Aug. 22, 2017), available at <http://www.laborandemploymentlawcounsel.com/2017/08/management-alert-the-current-federal-retrenchment-on-lgbt-rights/>.

<sup>274</sup> *Hively v. Ivy Tech. Community College*, 853 F.3d 339 (7th Cir. 2017); See Michael W. Stevens, Sam Schawrtz-Ferwick, and Laura J. Maehtlen, *Seventh Circuit Finds Discrimination on the Basis of Sexual Orientation Prohibited by the Civil Rights Act*, CLIENT ALERT, SEYFARTH SHAW LLP (Apr. 5, 2017), available at <http://www.seyfarth.com/publications/MA040517-LE>.

<sup>275</sup> *Hively*, 853 F.3d at 341.

<sup>276</sup> *Id.*

The Seventh Circuit found that sexual orientation discrimination was a form of sex stereotyping and was thus barred under Title VII.<sup>277</sup> To reach this conclusion, the Court applied the “comparative method” approach. The Court examined the counterfactual “situation in which Hively is a man, but everything else stays the same: in particular, the sex or gender of the partner.”<sup>278</sup> The Court found that Hively’s non-conformity to the female stereotype – that she should have a male partner – was sex discrimination under the gender non-conformity line of cases.<sup>279</sup> The Court also adopted Hively’s theory that discrimination based on sexual orientation is sex discrimination under the associational theory. The Court examined the application of this line of cases, beginning with *Loving v. Virginia*,<sup>280</sup> and found that the Civil Rights Act prohibits discrimination based on the sex of someone with whom a plaintiff associates.<sup>281</sup> The Court noted that it was inapposite that the *Loving* line of cases dealt with associational race discrimination, rather than associational sex discrimination.<sup>282</sup>

In reversing its previous precedent,<sup>283</sup> the Court noted both the Supreme Court’s recent marriage equality decisions, as well as the EEOC’s administrative decisions, and stated that “this court sits *en banc* to consider what the correct rule of law is now in light of the Supreme Court’s authoritative interpretations, not what someone thought it meant one, ten, or twenty years ago.”<sup>284</sup> Notably, the Court was unpersuaded by the notion that Congress has not expressly added the phrase “sexual orientation” to the list of protected categories under the Civil Rights Act, while it has used the phrase in other legislation.<sup>285</sup> Instead, the Court noted that the “goalposts” of Title VII “have been moving over the years,” but the key concept – “no sex discrimination” – remains.<sup>286</sup>

## **b. Other Key Federal Court Decisions And Settlements**

Although *Hively* was the first Court of Appeals ruling to explicitly adopt the EEOC’s reasoning that transgender and sexual orientation discrimination are forms of sex discrimination, numerous federal courts have addressed this issue.

For instance, two other appellate courts have now addressed this issue. In *Christiansen v. Omnicom Group, Inc.*,<sup>287</sup> the Second Circuit explained that although it was bound by prior decisions disallowing sexual orientation discrimination claims under Title VII, it would allow plaintiff’s claim to proceed based on the gender stereotyping theory articulated in *Price Waterhouse v. Hopkins*, which is also binding on the Second Circuit.<sup>288</sup> Similarly, in *Evans v. Georgia Regional Hospital*,<sup>289</sup> the Eleventh Circuit ruled that sexual orientation discrimination is not actionable, but the claim could proceed because the facts supported a permissible Title VII claim of sex discrimination based on gender nonconformity.<sup>290</sup> The court thus held that the district court “erred because a gender non-conformity

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<sup>277</sup> *Id.* at 342-45, 355.

<sup>278</sup> *Id.* at 345.

<sup>279</sup> *Id.* at 342, 346-47.

<sup>280</sup> *Loving v. Virginia*, 388 U.S. 1 (1967).

<sup>281</sup> *Hively*, 853 F.3d at 342, 347-48.

<sup>282</sup> *Id.* at 348.

<sup>283</sup> *Doe v. City of Belleville, Ill.*, 119 F.3d 563, *Hamm v. Weyauwega Milk Prods.*, 332 F.3d 1058, *Hamner v. St. Vincent Hosp. and Health Care Ctr., Inc.*, 224 F.3d 701, *Spearman v. Ford Motor Co.*, 231 F.3d 1080.

<sup>284</sup> *Hively*, 853 F.3d at 350.

<sup>285</sup> *Id.* at 344.

<sup>286</sup> *Id.*

<sup>287</sup> *Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195 (2d Cir. 2017).

<sup>288</sup> *Id.* at 199.

<sup>289</sup> *Evans v. Ga. Reg’l Hosp.*, 850 F.3d 1248 (11th Cir. 2017).

<sup>290</sup> *Id.* at 1254.

claim is not 'just another way to claim discrimination based on sexual orientation,' but instead, constitutes a separate, distinct avenue for relief under Title VII."<sup>291</sup> On December 11, 2017, the United States Supreme Court declined to review the Eleventh Circuit's decision in *Evans*.<sup>292</sup>

In *Boutillier v. Hartford Public Schools*,<sup>293</sup> a teacher alleged discrimination based on her sexual orientation in violation of Title VII's prohibition of discrimination based on sex. Based on the pendency of the above-referenced *Omnicom Group* case, which had not yet been decided, the District Court for the District of Connecticut denied the employer's motion for summary judgment and determined the plaintiff adequately established a right to protection under Title VII.<sup>294</sup> In *Winstead v. Lafayette County Board of County Commissioners*,<sup>295</sup> an emergency medical services employee brought a Title VII sex discrimination claim alleging discrimination based on sexual orientation or perceived sexual orientation.<sup>296</sup> Citing the EEOC's opinion in *Baldwin*, the Court denied the employer's motion to dismiss, reasoning that "[s]exual orientation as a concept cannot be defined or understood without reference to sex."<sup>297</sup> The Court stated: "Simply put, to treat someone differently based on her attraction to women is necessarily to treat that person differently because of her failure to conform to gender or sex stereotypes, which is, in turn, necessarily discrimination on the basis of sex."<sup>298</sup>

Similarly, in *EEOC v. Scott Medical Health Center, P.C.*,<sup>299</sup> the EEOC alleged that a gay male employee was harassed by his supervisor, who allegedly made homophobic comments about the employee, his orientation, and his sex life.<sup>300</sup> On November 4, 2016, Judge Bissoon of the U.S. District Court for the Western District of Pennsylvania denied the employer's motion to dismiss.<sup>301</sup> The employer cited to Third Circuit precedent, which held that Title VII does not prohibit discrimination based on sexual orientation.<sup>302</sup> The Court distinguished this earlier precedent, holding that the Third Circuit had not been confronted with "the same arguments or analytical framework as that put forth by the EEOC in this case."<sup>303</sup> In particular, the Third Circuit had not been presented with the argument that discrimination on the basis of sexual orientation was a form of sex stereotyping discrimination.<sup>304</sup> The Court also noted that "since the publications of *Bibby* and *Prowel*, district courts throughout the country have endorsed an interpretation of Title VII that includes a

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<sup>291</sup> *Id.* at 1254-55.

<sup>292</sup> Order Denying Certiorari, *Evans v. Ga. Reg'l Hosp.*, No. 17-370, 2017 WL 5012214, at \*1 (U.S. Dec. 11, 2017).

<sup>293</sup> *Boutillier v. Hartford Pub. Schs.*, 221 F. Supp. 3d 255 (D. Conn. 2016).

<sup>294</sup> *Id.* at 270.

<sup>295</sup> *Winstead v. Lafayette Cty. Bd. of Cty. Comm'rs*, 197 F. Supp. 3d 1334 (N.D. Fla. 2016).

<sup>296</sup> *Id.* at 1336.

<sup>297</sup> *Id.* at 1343.

<sup>298</sup> *Id.* at 1346-47.

<sup>299</sup> Complaint, *EEOC v. Scott Med. Health Ctr.*, No. 2:16-CV-00225 (W.D. Pa. Mar. 1, 2016), ECF No. 1.

<sup>300</sup> *Id.* ¶ 11. The EEOC also alleged that when the employee complained, management refused to take action, thus creating a hostile work environment that forced the employee to quit rather than be subjected to further harassment. *Id.*

<sup>301</sup> *EEOC v. Scott Med. Health Ctr., P.C.*, No. 16-CV-00225, 2016 WL 6569233 (W.D. Pa. Nov. 4, 2016).

<sup>302</sup> *Id.* at \*4 (citing *Bibby v. Philadelphia Coca-Cola Bottling Co.*, 260 F.3d 257 (3d Cir. 2001) and *Prowel v. Wise Business Forms, Inc.*, 579 F.3d 285 (3d Cir. 2009)).

<sup>303</sup> *Id.* at \*6.

<sup>304</sup> *Id.* The Court also called into question the holding of *Bibby*, 260 F.3d at 257 because it relied heavily on the fact that Congress had failed to enact the Employment Non-Discrimination Act, which would have explicitly covered sexual orientation discrimination, as a basis for its conclusion that Title VII does not cover sexual orientation discrimination. *Id.* at \*7. The Court noted that subsequent Third Circuit precedent had called into doubt the value of relying on Congressional inaction as a means of statutory interpretation. *Id.* (citing *In re Visteon Corp.*, 612 F.3d 210, 230 (3d Cir. 2010) ("Evidence of congressional inaction is generally entitled to minimal weight in the interpretative process.")).

prohibition on discrimination based on sexual orientation.”<sup>305</sup> The Court also pointed to the Supreme Court’s landmark decision in *Obergefell v. Hodges*,<sup>306</sup> which legalized gay marriage, as “demonstrat[ing] a growing recognition of the illegality of discrimination on the basis of sexual orientation.”<sup>307</sup>

Other courts have come to similar conclusions. For example, in *Baker v. Aetna Life Insurance*,<sup>308</sup> an employee who alleged she suffered from gender dysphoria brought a claim against her employer and third-party administrator of her health plan for denial of coverage costs of her breast augmentation surgery solely on the basis of male birth gender.<sup>309</sup> The employee alleged gender identity discrimination based on (among other things) sex and gender in violation of Title VII.<sup>310</sup> The Court ruled that the employee stated a claim against her employer for sex discrimination in violation of Title VII based on denial of coverage under the employer-provided health insurance plan.<sup>311</sup>

Similarly, in *Mickens v. General Electric Co.*,<sup>312</sup> the Court denied an employer’s motion to dismiss a Title VII sex discrimination claim in which a transgender plaintiff alleged he was unlawfully denied use of the male bathroom close to his work station, and then was fired for attendance issues resulting from having to go to a bathroom farther away.<sup>313</sup> He also alleged that once his supervisor learned of his transgender status, he was singled out for reprimands, and no action was taken in response to his reports of coworker harassment.<sup>314</sup> Rejecting the employer’s argument that discrimination based on transgender status is not actionable under Title VII, the Court cited Sixth Circuit precedent recognizing that, in light of *Price Waterhouse*, the prohibition against gender discrimination in Title VII “can extend to certain situations where the plaintiff fails to conform to stereotypical gender norms.”<sup>315</sup>

In *Roberts v. Clark County School District*,<sup>316</sup> a transgender school police officer who was transitioning to male brought an action against the Clark County School District alleging gender discrimination in violation of Title VII after the school district required the officer to use gender-neutral restrooms until the officer had a documented sex change.<sup>317</sup> The Court ruled that discrimination against a person based on transgender status is discrimination “because of sex” under Title VII.<sup>318</sup> The Court further found that the school district’s requirement that the officer use

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<sup>305</sup> *Id.* at \*7 (citing *Isaacs v. Felder Servs, LLC*, 143 F. Supp. 3d 1190, 1193 (M.D. Ala. 2015); *Terveer v. Billington*, 34 F. Supp. 3d 100 (D.D.C. 2014); *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1222 (D. Or. 2002); *Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151 (C.D. Cal. 2015) (holding that sex discrimination includes sexual orientation discrimination under Title IX)).

<sup>306</sup> *Obergefell v. Hodges*, 135 S.Ct. 2584, 2590 (2015).

<sup>307</sup> *Scott Med. Health Ctr., P.C.*, 2016 WL 6569233, at \*7.

<sup>308</sup> *Baker v. Aetna Life Ins.*, 228 F. Supp. 3d 764 (N.D. Tex. 2017).

<sup>309</sup> *Id.* at 765.

<sup>310</sup> *Id.*

<sup>311</sup> *Id.*

<sup>312</sup> *Mickens v. Gen. Elec. Co.*, No. 3:16CV-00603-JHM, 2016 WL 7015665 (W.D. Ky. Nov. 29, 2016).

<sup>313</sup> *Id.* at \*1-3.

<sup>314</sup> *Id.* at \*1.

<sup>315</sup> *Id.* at \*2.

<sup>316</sup> *Roberts v. Clark Cty. Sch. Dist.*, 215 F. Supp. 3d 1001 (D. Nev. 2016).

<sup>317</sup> *Id.* at 1004.

<sup>318</sup> *Id.* at 1014-15.

the gender-neutral restroom was an adverse employment action.<sup>319</sup> The Court therefore granted partial summary judgment in the officer's favor.<sup>320</sup>

Finally, in *Fabian v. Hospital of Central Connecticut*,<sup>321</sup> an orthopedic surgeon brought a Title VII sex discrimination claim alleging she was not hired because she disclosed her identity as a transgender woman at her interview.<sup>322</sup> Under *Price Waterhouse*, the Court held that Title VII covers sex discrimination claims by transgender individuals, and allowed Fabian's claim to proceed.<sup>323</sup>

These decisions suggest a trend that has been growing for several years. For example, on September 16, 2015, the EEOC was allowed to join a case brought by a private plaintiff against First Tower Loan, LLC pending in the U.S. District Court for the Eastern District of Louisiana.<sup>324</sup> The EEOC alleged that the plaintiff was fired after informing his employer that he was a transgender man.<sup>325</sup> In particular, the EEOC alleged that plaintiff was told that he must dress and act as a female in the workplace and was asked to sign a written statement containing the following language:

I understand that my preference to act and dress as a male, despite having been born a female, is not something that will be in compliance with First Tower Loan's personnel policies. I have been advised as to the proper dress for females and also have been provided a copy of the female dress code. I also understand that when meetings occur that require out of town travel and an overnight room is required, I will be in [sic] assigned to a room with a female.<sup>326</sup>

The complaint alleged that when the plaintiff refused to sign the statement, the company fired him.<sup>327</sup> On December 10, 2015, the Court granted the employer's motion to compel arbitration and stayed the EEOC's claims pending a decision from the arbitrator.<sup>328</sup>

And in *R.G. & G.R. Harris Funeral Homes, Inc.*,<sup>329</sup> the EEOC alleged that a Detroit-based funeral home discriminated against an employee because she was transitioning from male to female and/or because she did not conform to the employer's gender-based expectations, preferences, or stereotypes.<sup>330</sup> On April 21, 2015, Judge Sean F. Cox of the U.S. District Court for the Eastern District of Michigan denied R.G. & G.R. Harris Funeral Homes Inc.'s motion to dismiss the EEOC's complaint, thereby allowing the case to proceed to discovery.<sup>331</sup> The Court ultimately granted summary judgment in favor of the funeral home on the wrongful termination claim, as well as the EEOC's claim that the Funeral Home's policy of providing work clothes to males, but not to females,

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<sup>319</sup> *Id.* at 1015-17.

<sup>320</sup> *Id.* at 1016.

<sup>321</sup> *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509 (D. Conn. 2016).

<sup>322</sup> *Id.* at 513.

<sup>323</sup> *Id.* at 526.

<sup>324</sup> Order, *Broussard v. First Tower Loan, LLC*, No. 15-CV-1161 (E.D. La. Sept. 16, 2015), ECF No. 70.

<sup>325</sup> Intervenor Complaint, *Broussard v. First Tower Loan, LLC*, No. 15-CV-1161 (E.D. La. Sept. 16, 2015), ECF No. 71.

<sup>326</sup> *Id.* ¶¶ 38-39.

<sup>327</sup> *Id.* ¶ 41.

<sup>328</sup> *Broussard v. First Tower Loan, LLC*, 150 F. Supp. 3d 709 (E.D. La. 2015).

<sup>329</sup> *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, No. 2:14-CV-13710-SFC-DRG (E.D. Mich. Sept. 25, 2014).

<sup>330</sup> *Id.* Specifically, the government's complaint alleges that the employee gave her employer a letter explaining that she was transgender and would soon start presenting as female in appropriate work attire. Allegedly, she was fired two weeks later by the funeral home's owner, who told her that what she was proposing to do was unacceptable.

<sup>331</sup> *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 100 F. Supp. 3d 594, 599-603 (E.D. Mich. 2015).

was discrimination on the basis of sex.<sup>332</sup> The U.S. District Court for the Western District of Oklahoma came to a similar conclusion in *United States v. Southeast Oklahoma State University*.<sup>333</sup>

The EEOC has also obtained some notable settlements against employers who were alleged to have discriminated against LGBT employees. For example, in FY 2017, the EEOC brought a sexual orientation harassment lawsuit against a restaurant employer.<sup>334</sup> In the lawsuit, the EEOC alleged that a gay male server was routinely subjected to unwelcome harassing and offensive behavior based on his sexual orientation.<sup>335</sup> He was allegedly subject to homophobic epithets and taunting about his sexuality, and when he reported it, he was accused of being “too sensitive.”<sup>336</sup> The parties entered into a three-year consent decree requiring the restaurant to pay \$50,000.<sup>337</sup> The restaurant is also required to revise and distribute to its employees a complaint procedure and harassment policy and train its supervisors and employees.<sup>338</sup> Similarly, in one of the first cases brought by the EEOC under this theory, *EEOC v. Lakeland Eye Clinic*,<sup>339</sup> the employer agreed to pay \$150,000 to settle that case, along with significant programmatic relief that included substantial reporting and monitoring obligations.<sup>340</sup>

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<sup>332</sup> *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, No. 14-CV-13710, 2016 WL 4396083, at \*1 (E.D. Mich. Aug. 18, 2016). The Funeral Home argued that its enforcement of its sex-specific dress code cannot constitute impermissible sex stereotyping under Title VII. The Court rejected this argument, holding that “[t]his evolving area of the law – how to reconcile this previous line of authority regarding sex-specific dress/grooming codes with the more recent sex/gender-stereotyping theory of sex discrimination under Title VII – has not been addressed by the Sixth Circuit.” *Id.* at \*13. Relying on the Supreme Court’s landmark religious liberty decision, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), the Court held that the Funeral Home was entitled to an exemption from Title VII under the Religious Freedom Restoration Act of 1993. See 42 U.S.C. § 2000bb - 2000bb-4. Because the EEOC’s proposed resolution – requiring the funeral home to allow a funeral director who was born a biological male to wear a skirt-suit to work – was not the least restrictive method of furthering the “compelling Government interest,” the EEOC’s lawsuit violated the funeral home’s rights under the RFRA. *R.G. & G.R. Harris Funeral Homes, Inc.*, 2016 WL 4396083, at \*16-17.

<sup>333</sup> *U.S. v. Se. Okla. State University*, No. 15-CV324-C, 2015 WL 4606079, at \*2 (W.D. Okla. July 10, 2015). On March 30, 2015, upon the EEOC’s referral, the U.S. Department of Justice sued Southeastern Oklahoma State University and the Regional University System of Oklahoma. The complaint alleges that a transgender assistant professor was denied tenure because she began presenting as a woman. On July 10, 2015, the Court rejected the University’s motion to dismiss, holding that the employee established that she is a member of a protected class. The University had argued that Title VII does not cover transgender persons. Relying on Sixth Circuit precedent, the Court held that claims of transgender discrimination were tantamount to claims of sex discrimination because they involved the failure to adhere to sex stereotypes. *Id.* (citing *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004)).

<sup>334</sup> Complaint, *EEOC v. Capital Rest. Concepts Ltd. d/b/a Paolo’s - GT LLC*, No. 16-CV-02477 (D.D.C, Dec. 20, 2016), ECF No. 1; Press Release, Equal Employment Opportunity Commission, Paolo’s Ristorante to Pay \$50,000 to Settle EEOC Sexual Orientation Discrimination Law suit (July 5, 2017), <https://www.eeoc.gov/eeoc/newroom/release/7-5-17a.cfm>.

<sup>335</sup> Complaint, *EEOC v. Capital Rest. Concepts Ltd. d/b/a Paolo’s - GT LLC*, No. 16-CV-02477 (D.D.C, Dec. 20, 2016), ECF No. 1, at ¶ 12a-h.

<sup>336</sup> *Id.* ¶ 12b, d, f.

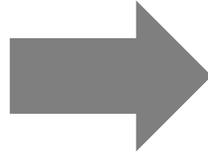
<sup>337</sup> Consent Decree, *EEOC v. Capital Rest. Concepts Ltd. d/b/a Paolo’s - GT LLC*, No. 16-CV-02477 (D.D.C, Dec. 20, 2016), ECF No. 23, at ¶¶ 2-4.

<sup>338</sup> *Id.* ¶¶ 6-8.

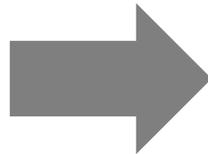
<sup>339</sup> *EEOC v. Lakeland Eye Clinic*, No. 8:14-CV-2421-T35 AEP (M.D. Fla. Sept. 25, 2014).

<sup>340</sup> Order, *EEOC v. Lakeland Eye Clinic*, No. 8:14-CV-2421-T35 AEP (M.D. Fla. Apr. 9, 2015), ECF No. 33; Press Release, Equal Employment Opportunity Commission, Lakeland Eye Clinic will Pay \$150,000 to Resolve Transgender / Sex Discrimination Law suit (Apr. 13, 2015), <http://www.eeoc.gov/eeoc/newroom/release/4-13-15.cfm>. See also Laura J. Maechtlen, *EEOC Pushes Its Strategic Enforcement Plan And Advocates For Transgender Workplace Protections Under Title VII*, WORKPLACE CLASS ACTION BLOG (Sept. 30, 2014), <http://www.workplaceclassaction.com/2014/09/eeoc-pushes-its-strategic-enforcement-plan-and-advocates-for-transgender-workplace-protections-under-title-vii/>; Gerald L. Maatman, Jr. and Howard M. Wexler, *The EEOC Settles Its First Transgender Suit Filed Under Title VII*, WORKPLACE CLASS ACTION BLOG (Apr. 15, 2015), <http://www.eeoccountdown.com/2015/04/15/the-eeoc-settles-its-first-transgender-suit-filed-under-title-vii/>.

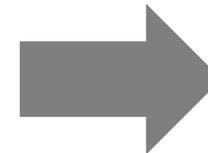
## LGBT Rights: Conflicting Interpretations Of What Constitutes Sex Discrimination Under Title VII



**7th circuit** opinion in *Hively*: “Person who alleges that she experienced employment discrimination on basis of her sexual orientation has put forth case of sex discrimination for Title VII purposes.”



“**EEOC** interprets and enforces Title VII’s prohibition of sex discrimination as forbidding any employment discrimination based on gender identity or sexual orientation.”



"The sole question here is whether, as a matter of law, Title VII reaches sexual orientation discrimination. It does not, as has been settled for decades. Any efforts to amend Title VII's scope should be directed to Congress rather than the courts," - **DOJ** amicus brief.

## 4. Developments In Disability Discrimination Law

ADA lawsuits remain a very high priority for the EEOC. For many years, lawsuits alleging discrimination under the ADA have been one of the most frequently filed types of EEOC litigation. The ADA prohibits employers from discriminating against “qualified individual[s] on the basis of disability.”<sup>341</sup> 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.<sup>342</sup> Accordingly, the best way for employers to guard against EEOC-initiated ADA litigation is to develop an understanding of what the EEOC considers to be a “disability,” a “qualified individual,” and “discrimination.”

### a. Recent ADA Decisions

Employers and the EEOC have been at odds over whether employers must automatically reassign a disabled employee to an open position as a reasonable accommodation or whether employers can maintain a policy of hiring the most-qualified individual for the position, by requiring a disabled employee to compete for open positions against other interested employees.<sup>343</sup> Two recent decisions have clarified that an employer’s policy of hiring the most-qualified individual for a job does not violate the ADA.

In *EEOC v. St. Joseph’s Hospital, Inc.*,<sup>344</sup> plaintiff, a clinical nurse in the psychiatric ward, developed spinal stenosis and required the use of a cane.<sup>345</sup> The hospital determined that it was too dangerous to allow a cane in the psychiatric ward and gave plaintiff 30 days to bid on another position.<sup>346</sup> The charging party only applied for three jobs that she was qualified for, was not hired for any of the positions, and eventually was terminated.<sup>347</sup> The Court held that “the ADA only requires an employer allow a disabled person to compete equally with the rest of the world for a vacant position” and does not require the employer to automatically reassign an employee without competition.<sup>348</sup> Similarly, in *EEOC v. Methodist Hospitals of Dallas*,<sup>349</sup> the Court confirmed “the ADA does not entitle a disabled employee to preferential treatment” and held that the employer’s policy requiring disabled employees to compete with non-disabled applicants in order to hire the best candidate did not violate the ADA.<sup>350</sup>

Although it is uncertain how courts will handle company website accessibility issues, prudent employers should focus on their website accessibility efforts. In *Gil v. Winn-Dixie Stores, Inc.*,<sup>351</sup> the Court found that grocer Winn-Dixie violated Title III of the ADA by maintaining a website that was not

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<sup>341</sup> 42 U.S.C. § 12112(a).

<sup>342</sup> 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).

<sup>343</sup> See John P. Phillips, *Is Hiring the Most-Qualified Candidate Reasonable? Two Recent Decisions Say Yes.*, EMPLOYMENT LAW LOOKOUT BLOG (Apr. 18, 2017), available at <http://www.laborandemploymentlawcounsel.com/2017/04/is-hiring-the-most-qualified-candidate-reasonable-two-recent-decisions-say-yes/>.

<sup>344</sup> *EEOC v. St. Joseph’s Hospital, Inc.*, No. 15-14551 (11th Cir., Dec. 7, 2016).

<sup>345</sup> *Id.* at \*4.

<sup>346</sup> *Id.* at \*5.

<sup>347</sup> *Id.* at \*6-10.

<sup>348</sup> *Id.* at \*26.

<sup>349</sup> *EEOC v. Methodist Hospitals of Dallas d/b/a Methodist Health System*, No. 3:15-CV-3104-G (N.D. Tex., Mar. 9, 2017).

<sup>350</sup> *Id.* at \*6.

<sup>351</sup> *Gil v. Winn-Dixie Stores, Inc.*, No. 16-23020-Civ-Scola, 2017 WL 2547242 (S.D. Fla., June 12, 2017).

useable by the plaintiff, who was blind and used screen reader software to access websites, download coupons, order prescriptions, and find store locations.<sup>352</sup> The Court adopted the Web Content Accessibility Guidelines (WCAG) 2.0 as the accessibility standard that Winn-Dixie must meet in making its website accessible.<sup>353</sup> The Court's adoption of this set of guidelines points to WCAG 2.0 AA as the *de facto* standard for website accessibility.<sup>354</sup>

Employers should also be mindful of the EEOC's focus on the use of pre-job-offer questionnaires, and how 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.<sup>355</sup>

Likewise, employers must exercise caution when approaching any requests for reasonable accommodations. For instance, the EEOC has suggested that even when an employee makes an insurance claim of "total disability," it does not mean that employers are automatically unable to provide a reasonable accommodation. In *EEOC v. Vicksburg Healthcare, L.L.C.*,<sup>356</sup> the Fifth Circuit explained that an ADA suit claiming that the plaintiff can perform her job with a reasonable accommodation may well prove consistent with a disability benefits claim that the plaintiff could not perform her own job (or other jobs) without it.<sup>357</sup>

Moreover, employers should carefully limit internal communication about charges of discrimination, especially those in the ADA context, to avoid creating the perception that they are retaliating against employees who bring charges or interfering with other employees' rights to file future charges. Indeed, the EEOC has successfully argued that an employer can retaliate against an employee for conduct occurring after that employee was already terminated, and that the same action could interfere with the rights of other employees under the ADA.<sup>358</sup>

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<sup>352</sup> *Id.* at \*7.

<sup>353</sup> WCAG 2.0 AA is a set of guidelines developed by a private group of accessibility experts and has not been adopted as the legal standard for public accommodation websites, although it has been incorporated into many consent decrees, settlement agreements, and is the standard the Department of Justice referenced in the Title II rulemaking process.

<sup>354</sup> See Minh Vu, *First Federal Court Rules That Having An Inaccessible Website Violates Title III Of The ADA*, ADA TITLE III NEWS & INSIGHTS BLOG (June 13, 2017), available at <http://www.adatitleiii.com/2017/06/first-federal-court-rules-that-having-an-inaccessible-website-violates-title-iii-of-the-ada/>.

<sup>355</sup> For example, in *EEOC v. Grisham Farm Prods., Inc.*, No. 16-CV-03105-MDH, 2016 U.S. Dist. LEXIS 76374 (W.D. Mo. June 8, 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.

<sup>356</sup> *EEOC v. Vicksburg Healthcare, L.L.C.*, No. 15-60764, 2016 U.S. App. LEXIS 18387 (5th Cir. Oct. 12, 2016).

<sup>357</sup> *Id.* at \*5-6. The Fifth Circuit held that an employee's claim of "temporary total disability," made the day after she was terminated from her job because of a disability, did not prevent the EEOC from contending that she was able to work if granted a reasonable accommodation.

<sup>358</sup> See Gerald Maatman, Jr. and Alex W. Karasik, *Dismissal Denied For Discussing Disability: EEOC Case Against Employer Survives*, WORKPLACE CLASS ACTION BLOG (Apr. 18, 2016), <http://www.workplaceclassaction.com/2016/04/dismissal-denied-for-discussing-disability-eec-case-against-employer-survives/#>.

## b. The EEOC's Challenge To Employer Wellness Programs

The EEOC has been harshly criticized for its decision to challenge employers' use of wellness plans.<sup>359</sup> In 2014, the EEOC took aim at employer wellness programs. It brought three lawsuits, alleging that employers' wellness programs are unlawful under its broad interpretation of the ADA. Section 12112(d)(4)(A) of the ADA states that employers "shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability . . . unless such examination or inquiry is shown to be job-related and consistent with business necessity."<sup>360</sup> However, Section 12112(d)(4)(B) of the ADA permits employers to conduct "voluntary medical examinations . . . which are part of an employee health program available to employees at that work site."<sup>361</sup>

In *EEOC v. Flambeau, Inc.*,<sup>362</sup> Flambeau terminated the employee's health insurance because he failed to complete a "health risk assessment" and biometric testing, which Flambeau required of employees to participate in its employer-subsidized health plan.<sup>363</sup> The court held that the ADA's safe harbor provision may extend to wellness programs that are part of an insurance benefit plan.<sup>364</sup> Recently on appeal, the Seventh Circuit declined to decide the case on the merits – deferring to another day questions of statutory interpretation and the EEOC's rulemaking authority.<sup>365</sup>

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<sup>359</sup> See Paul Kehoe and Gerald L. Maatman, Jr., *Senators Grill EEOC General Counsel Lopez In Confirmation Hearings*, WORKPLACE CLASS ACTION BLOG (Nov. 14, 2014), <http://www.workplaceclassaction.com/2014/11/senators-grill-eeoc-general-counsel-lopez-in-confirmation-hearings/>.

<sup>360</sup> 42 U.S.C. § 12112(d)(4)(A).

<sup>361</sup> 42 U.S.C. § 12112(d)(4)(B).

<sup>362</sup> *EEOC v. Flambeau, Inc.*, No. 131 F. Supp. 3d 849 (W.D. Wis. Dec. 31, 2015).

<sup>363</sup> *Id.*

<sup>364</sup> *Id.* at 853-854.

<sup>365</sup> *EEOC v. Flambeau, Inc.*, No. 16-1402, (7<sup>th</sup> Cir. Jan. 25, 2017); see also Andrew Scroggins and Mark Casciari, *Is EEOC Regulation of Wellness Plans Legal? — Seventh Circuit Declines to Say Yes*, ERISA EMPLOYEE BENEFITS LITIGATION BLOG (Jan. 30, 2017), available at <http://www.erisa-employeebenefitslitigationblog.com/2017/01/30/is-eeoc-regulation-of-wellness-plans-legal-seventh-circuit-declines-to-say-yes/>. The EEOC also challenged employer wellness programs in *EEOC v. Orion Energy Sys.*, No. 14-CV-1019, 2016 U.S. Dist. LEXIS 127292 (E.D. Wis. Sep. 19, 2016) and *EEOC v. Honeywell Int'l, Inc.*, No. 14-CV-4517, 2014 U.S. Dist. LEXIS 157945 (D. Minn. Nov. 6, 2014). In *Orion Energy Systems*, the EEOC argued that Orion's wellness program was not voluntary since it required employees that participated in the self-insured health insurance plan to choose between completing a "health risk assessment" or paying 100% of their monthly premium amount. The Court disagreed holding that "even a strong incentive is still no more than an incentive; it is not compulsion," and that, "Orion's wellness initiative is voluntary" as "it is optional." See Gerald L. Maatman, Jr. and Alex W. Karasik, *Just What The Doctor Ordered: Court Denies The EEOC's Motion For Summary Judgment In ADA Suit Regarding Employer's Wellness Program*, Workplace Class Action Blog (Sept. 23, 2016), <http://www.workplaceclassaction.com/2016/09/just-what-the-doctor-ordered-court-denies-the-eeocs-motion-for-summary-judgment-in-ada-suit-regarding-employers-wellness-program/>. In *Honeywell*, the EEOC argued that (1) Honeywell's incentives made participation in the wellness plan non-voluntary under the ADA; (2) Honeywell's wellness program violated GINA because it offers employees an incentive to provide family medical history; and (3) employees who chose not to participate in that testing forfeited a contribution to a health savings account of up to \$1,500, were assessed a \$500 surcharge, and were potentially subjected to a \$1,000 nicotine surcharge. The district court denied the EEOC's request for a temporary restraining order because the agency could not establish the threat of irreparable harm because (1) the charging parties had already submitted to biometric screening and (2) it could not establish that the screening violated any employees' right to privacy in their health information. See Mark Casciari, Ben Conley, and James Napoli, *EEOC Doubles Down – Attacking Employer Wellness Programs*, ERISA & Employee Benefits Litigation Blog (Nov. 6, 2014), <http://www.erisa-employeebenefitslitigationblog.com/2014/11/06/eeoc-doubles-down-attacking-employer-wellness-programs/>; see also Gerald L. Maatman, Jr. and Alexis P. Robertson, *Minnesota District Court Shoots Down The EEOC's Request For Preliminary Injunction Over Wellness Program*, Workplace Class Action Blog (Nov. 13, 2014), <http://www.workplaceclassaction.com/2014/11/minnesota-district-court-shoots-down-the-eeocs-request-for-preliminary-injunction-over-wellness-program/>.

On May 16, 2016, the EEOC issued two sets of final regulations affecting employer-sponsored wellness programs.<sup>366</sup> The rules went into effect on January 1, 2017.<sup>367</sup> The regulations explain that a program consisting of a measurement test, screening or collection of health-related information without providing results, follow-up information, or advice designed to improve the health of participating employees is not reasonably designed to promote health or prevent disease, unless the collected information actually is used to design a program that addresses some of the conditions identified.<sup>368</sup> A program also is not “reasonably designed” if it exists mainly to shift costs from the employer to targeted employees based on their health or simply to give an employer information to estimate future health care costs.<sup>369</sup>

Wellness programs that are part of a group health plan must also comply with the non-discrimination rules issued pursuant to HIPAA.<sup>370</sup> Finally, despite court decisions to the contrary,<sup>371</sup> the EEOC goes to great lengths to justify their position that the ADA benefit plan safe harbor does not apply to wellness programs.<sup>372</sup>

However, the EEOC will now be forced to reconsider its regulations surrounding employer-wellness programs that have been challenged by the AARP.<sup>373</sup> In October 2016, the AARP filed suit in D.C. federal court seeking an injunction against its wellness program regulations.<sup>374</sup> The court agreed with the AARP and held that the EEOC failed to offer an explanation for its decision to allow plans and insurers to offer incentives of up to 30% of the cost of self-coverage in exchange for an employee’s participation in a wellness program. However, while the regulations will be reconsidered, the rules will remain in place for the time being to avoid “disruption and confusion.”

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<sup>366</sup> FR Doc. 2016-11557, 81 FR 31143 (Filed May 16, 2016), <https://www.federalregister.gov/documents/2016/05/17/2016-11557/genetic-information-nondiscrimination-act>; FR Doc. 2016-11558, 81 FR 31125 (Filed May 16, 2016), <https://www.federalregister.gov/documents/2016/05/17/2016-11558/regulations-under-the-americans-with-disabilities-act>; See also Joy Sellstrom, Diane V. Dygert, Danita N. Merlau, *EEOC Issues Final Rules On Wellness Programs*, CLIENT ALERTS (May 18, 2016), <http://www.seyfarth.com/publications/MA051816-EB>.

<sup>367</sup> *Id.*

<sup>368</sup> FR Doc. 2016-11557, 81 FR 31143 (Filed May 16, 2016), <https://www.federalregister.gov/documents/2016/05/17/2016-11557/genetic-information-nondiscrimination-act>; FR Doc. 2016-11558, 81 FR 31125 (Filed May 16, 2016), <https://www.federalregister.gov/documents/2016/05/17/2016-11558/regulations-under-the-americans-with-disabilities-act>.

<sup>369</sup> *Id.* Wellness programs must be voluntary. To show the programs are voluntary, an employer may not, based on an employee’s non-participation, (1) deny coverage under any group health plans; (2) deny benefits within a group plan; or (3) limit the extent of benefits.<sup>369</sup> Employees must also be provided with a notice that: (1) is written so that the employee is reasonably likely to understand it; (2) describes the type of medical information that will be obtained and the purposes for which the information will be used; and (3) describes the restrictions on the disclosure of the employee’s medical information, the parties with whom the information will be shared, and the methods that the employer will use to ensure that medical information is not improperly disclosed.<sup>369</sup> In June 2016, the EEOC published a sample notice that employers may use. See Joy Sellstrom, Kathleen Cahill Slaughter, *EEOC Releases Sample Notice for Wellness Programs*, CLIENT ALERTS (June 23, 2016), <http://www.seyfarth.com/publications/MA062316-EB>.

<sup>370</sup> *EEOC Issues Final Rules On Wellness Programs*, *supra* note 367 (While many employers sought a single wellness standard for compliance, the final ADA rules state the EEOC’s position that wellness plans compliance with HIPAA is not determinative of compliance with the ADA.)

<sup>371</sup> See e.g., *EEOC v. Flambeau, Inc.*, No. 14-CV-638, 2015 U.S. Dist. LEXIS 173482 (W.D. Wis. Dec. 31, 2015).

<sup>372</sup> See *EEOC Issues Final Rules On Wellness Programs*, *supra* note 367.

<sup>373</sup> *AARP v. EEOC*, 1:16-cv-02113 (D.D.C. 2016).

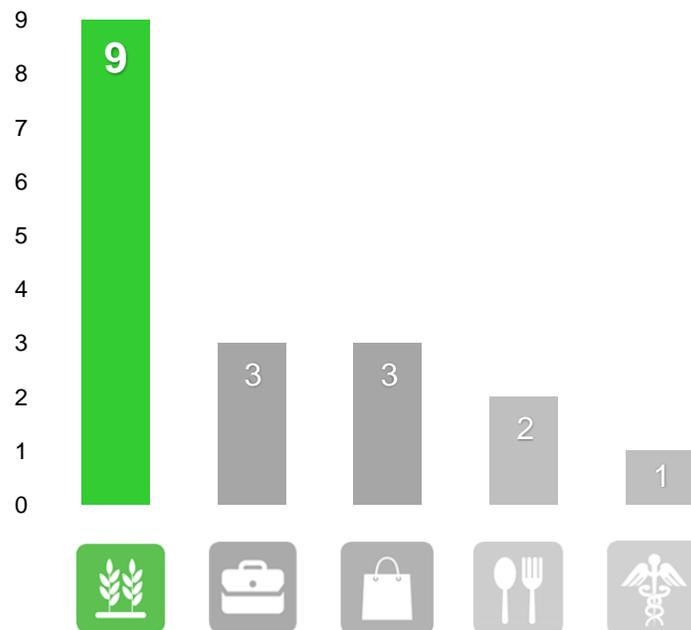
<sup>374</sup> *Id.*



# Protecting Vulnerable Workers

*“The agricultural industry has been the focus of many of the EEOC’s largest and highest-profile lawsuits that fit within this priority.”*

**FY 2013 – 2017 Cases Filed By Industry**



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.

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

The EEOC's SEP also identifies the protection of immigrant, migrant and other vulnerable workers as one of its six "national enforcement priorities."<sup>375</sup> The agricultural and hospitality industries have been the focus of many of the EEOC's largest and highest-profile lawsuits that fit within this priority.

### 1. EEOC Targets Agricultural And Restaurant Industries For Harassment And Discrimination Against Immigrants

In FY 2017, the EEOC launched several lawsuits against agricultural companies seeking redress for alleged sexual harassment. For example, the EEOC sued a farming business growing a variety of produce in Dover, Fla., alleging that the company violated federal law by subjecting a female farmworker to sexual harassment, including rape, and then suspending and firing her for complaining about it.<sup>376</sup> The EEOC alleged that the claimant, a female seasonal worker, was raped by her supervisor in the worker housing unit, which was close to the farm where she worked.<sup>377</sup> Similarly, the EEOC sued the largest grower of organic tree fruit in the United States and its integrated business, alleging that the companies violated federal law by subjecting a Latina tractor driver to sexual harassment and then retaliating against her after she reported the abuse.<sup>378</sup>

The restaurant industry, has also been a frequent target of EEOC lawsuits involving allegations of sexual harassment. For example, the EEOC sued Green Apple, LLC, dba Applebee's Grill and Bar, alleging that the company violated federal law when it subjected two female employees, sisters, to a sexually hostile work environment.<sup>379</sup> "This incredible case," said Lynette A. Barnes, regional attorney for the EEOC's Charlotte District Office, "where an abusive manager allegedly harassed one sister and then another -- reinforces the crucial need for employers to take appropriate action to stop unwelcome sexual comments and misconduct in the workplace."<sup>380</sup> The EEOC also sued Rosebud Restaurants and several franchisees of IHOP. According to the EEOC's complaint against Rosebud, the defendant subjected a female server to a hostile work environment, which included "unwelcome and offensive sexual comments, propositions, and touching by a co-worker."<sup>381</sup> In the complaint against the IHOP chain, the EEOC alleged that the restaurant owners maintained an unlawful sexual harassment policy because the policy deterred sexual harassment complaints by requiring that detailed written statements be mailed to defendants' New York office with 72 hours of the occurrence.

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<sup>375</sup> U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION STRATEGIC ENFORCEMENT PLAN FISCAL YEARS 2017 - 2021, *supra* note 26; U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION STRATEGIC ENFORCEMENT PLAN FY 2013-2016, *supra* note 135.

<sup>376</sup> Press Release, Equal Employment Opportunity Commission, EEOC Sues Favorite Farms Sexual Harassment, Including Rape And Retaliation (May 31, 2017), <https://www.eeoc.gov/eeoc/newsroom/release/5-31-17a.cfm>.

<sup>377</sup> Complaint at ¶¶ 10-35, *EEOC v. Favorite Farms, Inc.*, Case No. 8:17-cv-1292-T30-AAS (M.D. Fl. May 31, 2017).

<sup>378</sup> Press Release, Equal Employment Opportunity Commission, Stemilt Growers and Ag Services Sued By EEOC For Sexual Harassment, Retaliation, (Jun. 13, 2017), <https://www1.eeoc.gov/eeoc/newsroom/release/6-13-17.cfm>.

<sup>379</sup> Press Release, Equal Employment Opportunity Commission, EEOC Sues Applebee's Grill and Bar for Sexual Harassment, (May 4, 2017), <https://www1.eeoc.gov/eeoc/newsroom/release/5-4-17.cfm>.

<sup>380</sup> *Id.*

<sup>381</sup> Complaint at ¶¶ 11-12, *EEOC v. Rosebud Restaurants, Inc.*, Civil Action No. 17-cv-6815 (N.D. Ill. Sept. 29, 2017).

## 2. Substantive Wins And Settlements On Behalf Of Immigrant Workers

The EEOC has also won some important procedural and substantive victories that will advance its priorities and clear the path for future lawsuits on behalf of immigrant workers. For example, in *Cazorla v. Koch Foods of Mississippi, L.L.C.*,<sup>382</sup> the EEOC filed suit on behalf of workers at a poultry processing plant who had allegedly experienced sexual harassment and assault, physical abuse, and other sexist and racist actions by supervisors.<sup>383</sup> The company argued in defense that the workers, who are mostly undocumented aliens, invented their allegations to help secure U visas (nonimmigrant visas set aside for victims of crimes who have suffered mental or physical abuse).<sup>384</sup>

When the company sought records relating to the workers' U visa applications from both the EEOC and the worker-plaintiffs, the plaintiffs argued that such discovery would improperly reveal the immigrant status of applicants and their families.<sup>385</sup> The Court nonetheless allowed the requests on two conditions: (a) the EEOC did not need to comply because 8 U.S.C. § 1367 barred the EEOC from revealing information regarding the U visa applications; and (b) the information obtained from the plaintiffs could not be used for purposes unrelated to the litigation and could not be shared with law enforcement unless the failure to do so was criminal.<sup>386</sup>

On appeal from the discovery order, the Fifth Circuit found that "that the district court did not address how [such] U-visa litigation might intimidate individuals outside this litigation, compromising the U visa program . . . ." <sup>387</sup> Allowing discovery to proceed according to the district court's order "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."<sup>388</sup> The Fifth Circuit overturned the order, instructing the lower court on remand that the U-visa discovery should not reveal to the company the identities of visa applicants or their families, at least in the liability phase – where the probative value of such evidence is not affected by the claimants' identities.<sup>389</sup>

The EEOC also posted a victory on behalf of non-English speaking immigrants. In *EEOC v. Wisconsin Plastics, Inc.*,<sup>390</sup> a Wisconsin federal court denied summary judgment for a manufacturing company on race and national origin discrimination claims.<sup>391</sup> The EEOC sued the company after it

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<sup>382</sup> *Cazorla v. Koch Foods of Miss., L.L.C.*, 838 F.3d 540, 544 (5th Cir. 2016).

<sup>383</sup> See Gerald L. Maatman, Jr. and Michael L. DeMarino, *Fifth Circuit Green Lights Discovery Over Immigration Status In EEOC Litigation*, WORKPLACE CLASS ACTION BLOG (Oct. 3, 2016), <http://www.workplaceclassaction.com/2016/10/fifth-circuit-green-lights-discovery-over-immigration-status-in-eEOC-litigation/>.

<sup>384</sup> *Carzola*, 838 F.3d at 544-45. The U visa program offers temporary nonimmigrant status and the ability to apply for a green card after three years to victims of substantial physical and mental abuse. *Id.* at 545.

<sup>385</sup> *Id.*

<sup>386</sup> *Id.* at 546-47.

<sup>387</sup> *Id.* at 562.

<sup>388</sup> *Id.* at 562-63.

<sup>389</sup> *Id.* at 564.

<sup>390</sup> *EEOC v. Wisconsin Plastics, Inc.*, No. 14-CV-663, 2016 WL 2596053 (E.D. Wis. May 5, 2016).

<sup>391</sup> See Gerald L. Maatman, Jr. and Alex W. Karasik, *Lesson On EEOC Language Litigation: Employer Denied Summary Judgment After Terminating Non-English Speaking Employees*, WORKPLACE CLASS ACTION BLOG (May 10, 2016), <http://www.workplaceclassaction.com/2016/05/lesson-on-eEOC-language-litigation-employer-denied-summary-judgment-after-terminating-non-english-speaking-employees/>.

terminated a number of non-English speaking Hmong and Hispanic production operators.<sup>392</sup> Despite conceding that English-language proficiency was not required to perform the job adequately, the company argued that summary judgment was warranted because it terminated the operators based on the legitimate, non-discriminatory reason of their inability to speak English.<sup>393</sup>

In denying the company's motion, the Court opined that while English proficiency may indeed be a legitimate, non-discriminatory preference even where a position does not require English proficiency, the court could not rule, as a matter of law, that the preference was non-discriminatory under the circumstances.<sup>394</sup> The Court was persuaded by the fact that the company conceded that English proficiency was not required to perform the job and then hired 88 new production operators – over 70% of which were Caucasian – during the same period it terminated the minority employees.<sup>395</sup> Furthermore, the company's reasons for the terminations had changed throughout the litigation, from poor performance to economic circumstances.<sup>396</sup>

The EEOC continues to rack up large settlements on behalf of women and immigrant workers. For example, in the beginning of FY 2017, the EEOC announced settlement in the highly publicized case, *EEOC v. Mach Mining, LLC*.<sup>397</sup> In *Mach Mining*, the EEOC alleged that a group of affiliated mining companies' hiring practices effectively excluded women from working in the underground mines and in other coal production positions.<sup>398</sup> The cases were resolved by a single consent decree entered by Senior District Judge J. Phil Gilbert.<sup>399</sup> The decree calls for the mining companies to jointly pay a total of \$4.25 million to a group of women applicants who were denied jobs because of sex discrimination.<sup>400</sup> Additionally, the companies have agreed to hiring goals that are expected to result in at least 34 women being hired into coal production jobs in their mines that operate in Illinois.<sup>401</sup>

While the EEOC has said it will continue to pursue litigation on behalf of vulnerable workers in the coming years, the outlook in the near term is uncertain. Although the 2017 Strategic Enforcement Plan reinforces the EEOC's commitment to "[p]rotecting vulnerable workers, including immigrant and migrant workers, and underserved communities from discrimination,"<sup>402</sup> it remains to be seen whether the new administration will effect a change in this direction, at least with respect to illegal immigrant populations.

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<sup>392</sup> *Wisconsin Plastics, Inc.*, 2016 WL 2596053, at \*1. The company employed 114 production operators, 75% of which were Hmong and 5% of which were Hispanic. *Id.* During a three month-period, the company terminated 38 production operators, of which 74% were Hmong and 8% were Hispanic. *Id.*

<sup>393</sup> *Id.*

<sup>394</sup> *Id.* at \*2.

<sup>395</sup> *Id.* at \*3.

<sup>396</sup> *Id.*

<sup>397</sup> *EEOC v. Mach Mining, LLC*, No. 11-CV-00879-JPG-PMF (S.D. Ill.). See Press Release, Equal Employment Opportunity Commission, *Mach Mining and Affiliated Companies to Pay \$4.25 Million to Settle EEOC Sex Discrimination Suits*, (Jan. 25, 2017) available at <https://www1.eeoc.gov/eeoc/newsroom/release/2-12-16.cfm?renderforprint=1>.

<sup>398</sup> Press Release, Equal Employment Opportunity Commission, *Mach Mining and Affiliated Companies to Pay \$4.25 Million to Settle EEOC Sex Discrimination Suits*, (Jan. 25, 2017) available at <https://www1.eeoc.gov/eeoc/newsroom/release/2-12-16.cfm?renderforprint=1>.

<sup>399</sup> Consent Decree, *EEOC v. Mach Mining, LLC*, No. 11-CV-00879-JPG-PMF (S.D. Ill. Jan. 25, 2017), ECF No. 182.

<sup>400</sup> *Id.* ¶ 15.

<sup>401</sup> *Id.* ¶¶ 18-22.

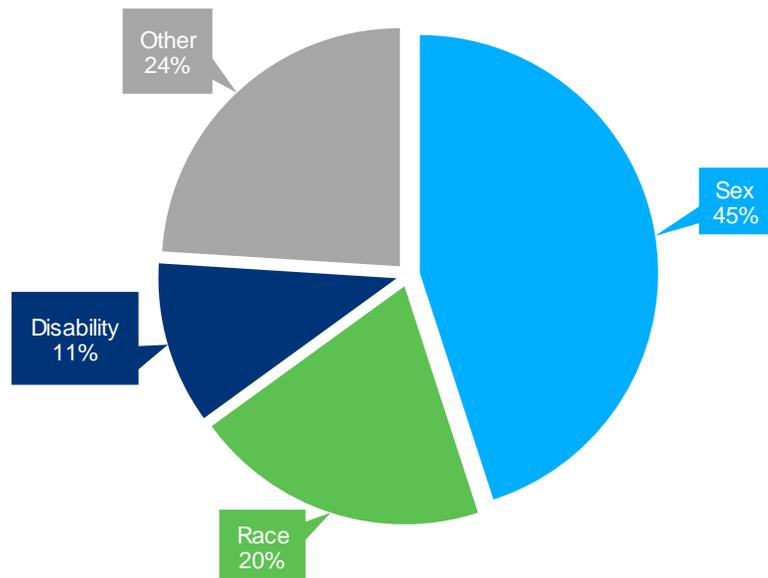
<sup>402</sup> Press Release, Equal Employment Opportunity Commission, *EEOC Updates Strategic Enforcement Plan*, (Oct. 17, 2016), <https://www.eeoc.gov/eeoc/newsroom/release/10-17-16.cfm>.



# Preserving Access To The Legal System

*“The new filings demonstrate the EEOC’s commitment to testing its expansive approach to actionable retaliation that it articulated in the Guidelines.”*

**FY 2017 Retaliation Claims By Category Of Discrimination**



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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.

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## E. Preserving Access To The Legal System

The 2017 Strategic Enforcement Plan states that this priority focuses on strengthening anti-retaliation efforts and challenging policies and practices that limit employees' substantive rights, including those that discourage or prohibit individuals from exercising their rights under the anti-discrimination laws.

### 1. Changes Made By The EEOC's New Enforcement Guidance On Retaliation

On August 29, 2016, the EEOC issued a final Enforcement Guidance on Retaliation, which replaced the prior compliance manual issued in 1998.<sup>403</sup> The Enforcement Guidance states that retaliation occurs when an employer takes a materially adverse action because an individual has engaged in, *or may engage in*, activity 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.<sup>404</sup> In so doing, the EEOC adopted a doctrine of "anticipatory retaliation" or "preemptive retaliation," which means retaliation may be actionable when an employer threatens adverse action against an employee who has *not yet engaged in protected activity* for the purpose of discouraging him or her from doing so.<sup>405</sup>

The Enforcement Guidance advises that a retaliation claim has the following three elements: (1) protected activity or participation in an EEO process or opposition to discrimination; (2) materially adverse action taken by the employer; and (3) requisite level of causal connection between the protected activity and the materially adverse action.<sup>406</sup>

Protected activity involves either participation in an EEO process or reasonably opposing conduct made unlawful by an EEO law.<sup>407</sup> The Enforcement Guidance provides that participation in the EEOC process is protected regardless of whether the EEO allegation is based on a reasonable, good faith belief that a violation occurred.<sup>408</sup> By contrast, opposition to discrimination must be based on a reasonable, good faith belief, but can be expressed explicitly or implicitly and does not have to include the words "harassment," "discrimination," or any other legal jargon.<sup>409</sup> The Enforcement Guidance states, however, that "great deference" is given to the EEOC's interpretation of opposition conduct, and there is overlap between what constitutes "participation in an EEO process" and "opposition to discrimination."<sup>410</sup>

With regard to a materially adverse action, the Enforcement Guidance expands the definition of "adverse action" to include one-off incidents and warnings, as well as anything that could be reasonably likely to deter protected activity, even if it is not yet severe or pervasive and does not

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<sup>403</sup> See ENFORCEMENT GUIDANCE ON RETALIATION AND RELATED ISSUES, at 1, <https://www.eeoc.gov/laws/guidance/upload/retaliation-guidance.pdf>.

<sup>404</sup> See ENFORCEMENT GUIDANCE ON RETALIATION AND RELATED ISSUES, *supra* note at 2-3.

<sup>405</sup> 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.").

<sup>406</sup> See ENFORCEMENT GUIDANCE ON RETALIATION AND RELATED ISSUES, *supra* note 405 at 5-6.

<sup>407</sup> *Id.*

<sup>408</sup> *Id.* at 8.

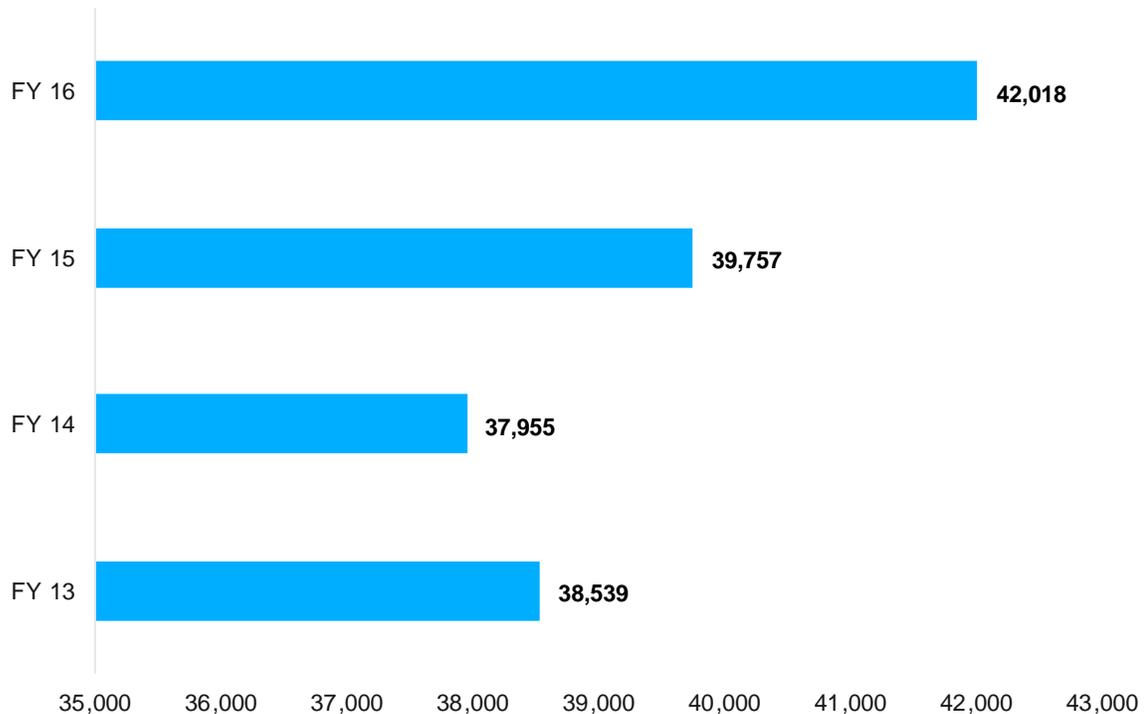
<sup>409</sup> *Id.* at 10-11.

<sup>410</sup> *Id.* at 9-10, 21.

have a tangible effect on employment.<sup>411</sup> Moreover, actions taken against a third party (*i.e.*, fiancé, husband, or other close family member or friend) who is sufficiently close to the complaining employee as to be in the employee’s “zone of interest,” constitute adverse actions to the EEOC.<sup>412</sup>

Regarding causation, the Enforcement Guidance provides that a materially adverse action does not violate EEO laws unless there is a causal connection between the action and the protected activity. For retaliation claims against private sector employers and state and local government employers, the Enforcement Guidance acknowledges that the Supreme Court has ruled that the causation standard requires that “but for” a retaliatory motive, the employer would not have taken the adverse action. In other words, the materially adverse action would not have occurred without retaliation even if there are multiple causes.<sup>413</sup> For Title VII and ADEA retaliation claims against federal sector employers, the Enforcement Guidance introduces the “motivating factor” standard, which only requires that retaliation be a motivating factor behind an adverse action.<sup>414</sup> 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 employer’s adverse action, or any other evidence which, when viewed together, demonstrate retaliatory intent. An employer may defeat a retaliation claim by establishing it was unaware of the protected activity or by demonstrating legitimate non-retaliatory reasons for the challenged action.<sup>415</sup>

### FY 2013 – 2016 Retaliation Charges



<sup>411</sup> *Id.* at 35-36, 38.

<sup>412</sup> *Id.* at 41-42.

<sup>413</sup> *Id.* at 43-44.

<sup>414</sup> *Id.* at 44.

<sup>415</sup> *Id.* at 50.

## 2. Recent Cases Involving Retaliation Claims

In 2017, the EEOC brought a case that tests its “zone of interest” theory. On August 8, 2017 the EEOC brought a lawsuit in the District Court for the District of Nevada, against creative design company Candid Litho.<sup>416</sup> In *EEOC v. Candid Litho DBA Candid Worldwide*,<sup>417</sup> the EEOC alleges that after a female production manager complained to human resources that she had been subjected to sexual harassment and discrimination, the company terminated the employee, her son, and his fiancé on the same day.<sup>418</sup>

The EEOC also targeted retaliation allegedly arising from an employee’s participation in an EEOC investigation.<sup>419</sup> On August 22, 2017, the EEOC filed *EEOC v. Lincoln Cemetery, Inc.*,<sup>420</sup> alleging that an Atlanta corporation fired an employee for participating in an EEOC investigation. Plaintiff was an administrative assistant with the company for over 30 years. In July she was interviewed by the EEOC during an investigation tied to another employee.<sup>421</sup> According to the complaint, after the employee’s interview with the EEOC investigator, the company’s owner “began overly scrutinizing her work and finding fault with everything she did.”<sup>422</sup>

The EEOC’s strong stance on Title VII protection for transgender individuals has also been the basis for retaliation claims. On June 9, 2017, the EEOC filed a lawsuit in the District Court for the Southern District of New York, alleging discrimination under Title VII when an employer’s staff allegedly made “crude and disparaging remarks about her [employee] being transgender.”<sup>423</sup> Further, the complaint states that staff intentionally referred to her with a male name and male pronouns, and made offensive comments about her genitalia.<sup>424</sup> The employee complained to management about the problem and was subsequently terminated.<sup>425</sup> Similarly, in *EEOC v. Scottsdale Wine Café, LLC*,<sup>426</sup> the EEOC pled that the company allowed its management and line staff to harass two male servers based on their sexual orientation, including name calling, comments, innuendos and touching.<sup>427</sup> The complaint alleges that the conduct was done “in such an open manner that Defendant knew or should have known that the men were being subjected to a hostile work environment because they were perceived as not conforming to sex or gender-based assumptions, expectations, norms or

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<sup>416</sup> Press Release, Equal Employment Opportunity Commission, EEOC Sues Candid Lithio for Sex Discrimination, Harassment, and Retaliation (Aug. 8, 2017), available at <https://www1.eeoc.gov/eeoc/newsroom/release/8-8-17a.cfm?renderforprint=1>.

<sup>417</sup> Complaint, *EEOC v. Candid Litho DBA Candid Worldwide*, No. 2:17-CV-02119 (D. Nev. Aug. 8, 2017), ECF No. 1.

<sup>418</sup> *Id.*

<sup>419</sup> Press Release, Equal Employment Opportunity Commission, Lincoln Cemetery Sued by EEOC for Retaliation (Aug. 22, 2017), available at <https://www.eeoc.gov/eeoc/newsroom/release/8-22-17a.cfm>.

<sup>420</sup> Complaint, *EEOC v. Lincoln Cemetery, Inc.* No. 1:17-CV-03165 (N.D. Ga. 2017), ECF No. 1.

<sup>421</sup> *Id.*

<sup>422</sup> *Id.*

<sup>423</sup> Press Release, Equal Employment Opportunity Commission, EEOC Sues Apple Metro Restaurant Chain for Sex Discrimination & Retaliation (June 9, 2017), available at <https://www1.eeoc.gov/eeoc/newsroom/release/6-9-17.cfm?renderforprint=1>.

<sup>424</sup> Complaint, *EEOC v. Apple-Metro, Inc. d/b/a Applebee’s Neighborhood Bar & Grill*, No. 17-cv-4333 (S.D.N.Y. June 8, 2017), ECF No. 1.

<sup>425</sup> *Id.*

<sup>426</sup> Press Release, Equal Employment Opportunity Commission, “5th & Wine” Bar Sued By EEOC For Sex-Based Harassment and Retaliation (Jan. 23, 2017), available at <https://www.eeoc.gov/eeoc/newsroom/release/1-23-17.cfm>.

<sup>427</sup> Complaint, *EEOC v. Scottsdale Wine Café, LLC d/b/a/5th and Wine*, No. 2:17-cv-00182-BSB (D. Ariz. Jan. 20, 2017), ECF No. 1.

stereotypes of men.”<sup>428</sup> After one employee stated he was going to take legal action, the company allegedly terminated him.<sup>429</sup>

According to the EEOC, retaliation can also extend to online comments. In *EEOC v. IXL Learning, Inc.*,<sup>430</sup> the EEOC alleged that the company fired an employee within minutes of confronting him about a negative review he wrote on Glassdoor.com, a website utilized for job recruiting and ratings.<sup>431</sup> The employee, a transgender man, felt he faced inappropriate questions about his gender identity and orientation from co-workers and that he was he was treated differently from other coworkers when he requested to telecommute (due to his post-operative recovery after gender confirmation surgery).<sup>432</sup> The employee complained on Glassdoor.com, writing: “If you’re not a family-oriented white or Asian straight or mainstream gay person with 1.7 kids who really likes softball- then you’re likely to find yourself on the outside . . . Most management do not know what the word ‘discrimination’ means, nor do they seem to think it matters.”<sup>433</sup>

In FY 2017, the EEOC won some notable victories regarding what amounts to an “adverse employment action” giving rise to a retaliation claim. On August 22, 2017, in *EEOC v. Day & Zimmerman NPS, Inc.*,<sup>434</sup> the EEOC alleged that the company retaliated against an employee by sending a letter containing information about his charge of discrimination to 146 employees who belonged to the same union.<sup>435</sup> The EEOC further alleged that the letter interfered with the employee and the 146 recipients of the letter in the exercise of their rights under the ADA.<sup>436</sup> The company argued that the letter was sent to prevent business disruption and efficiently inform the recipients that the company would be producing their contact information to the EEOC.<sup>437</sup> The court found that, while this was a legitimate, non-discriminatory reason for sending the letter, a reasonable jury could review the letter and find that the employer’s explanation was pretextual.<sup>438</sup> Notably, the Court held that if the letter had been solely intended to minimize business disruption and inform the recipients about the disclosure of their contact information to the EEOC, the letter would not need to include an entire paragraph identifying the employee, discussing the nature and subject matter of the charge, nor disclose the specific accommodations he sought, or that “his doctor told him he could not work in an area that had radiation, chemicals or exposure.”<sup>439</sup>

In *EEOC v. Hobson Bearing International, Inc.*,<sup>440</sup> the EEOC brought a retaliation claim against an employer that brought a malicious prosecution lawsuit in state court against a former project

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<sup>428</sup> *Id.*

<sup>429</sup> *Id.*

<sup>430</sup> *EEOC v. IXL Learning, Inc.*, No. 17-CV-02979 (N.D. Cal. May 24, 2017); see also Press Release, Equal Employment Opportunity Commission, IXL Learning Sued by EEOC for Retaliation (May 24, 2017), available at <https://www.eeoc.gov/eeoc/newsroom/release/5-24-17.cfm>.

<sup>431</sup> Complaint, *EEOC v. IXL Learning, Inc.*, No. 17-cv-02979 (N.D. Cal. May 24, 2017), ECF No. 1.

<sup>432</sup> *Id.*

<sup>433</sup> *Id.*

<sup>434</sup> *EEOC v. Day & Zimmerman NPS, Inc.*, 2017 WL 3613022, (D. Conn. Aug. 22, 2017).

<sup>435</sup> *Id.* at \*1-2; See also Gerald L. Maatman, Jr. and Alex W. Karasik, *Dismissal Denied For Discussing Disability: EEOC Case Against Employer Survives*, WORKPLACE CLASS ACTION BLOG (Apr. 18, 2016), <http://www.workplaceclassaction.com/2016/04/dismissal-denied-for-discussing-disability-eeoc-case-against-employer-survives/>.

<sup>436</sup> *Id.*

<sup>437</sup> *Id.* at \*15.

<sup>438</sup> *Id.* at \*16.

<sup>439</sup> *Id.*

<sup>440</sup> *EEOC v. Hobson Bearing Int'l, Inc.*, No. 3:16-CV-5034 SWH, 2016 WL 4618760 (W.D. Mo. Aug. 25, 2016).

manager who had filed a complaint of pay discrimination with the EEOC.<sup>441</sup> The employee had filed a discrimination charge with the EEOC asserting that the company violated the EPA by paying female employees less than male employees.<sup>442</sup> After the EEOC completed its investigation and dismissed the charge, the company sued the employee in state court alleging that he had maliciously filed the EEOC charge to harass the defendant and receive financial gain.<sup>443</sup> The Court held that entertaining such claims would undermine Title VII's clear policy goals.<sup>444</sup>

Courts have also decided high-profile issues regarding whether an employee has engaged in protected conduct. For example, in *EEOC v. Rite Way Service, Inc.*,<sup>445</sup> the EEOC brought a Title VII action against a janitorial services contractor, alleging that it had retaliated against an employee who witnessed two separate incidents in which her interim supervisor engaged in inappropriate conduct with a female co-worker.<sup>446</sup> That employee was identified as a witness by one of the co-workers who was subjected to the harassment. Despite discouragement from the manager, she provided a written report of what she witnessed.<sup>447</sup> Over the next few weeks, she received multiple written and verbal warnings about her job performance, and was eventually terminated for "neglect of duty" and "not following direction."<sup>448</sup>

The district court dismissed the retaliation claim, holding that "the requirement that a retaliation plaintiff have a 'reasonable belief that a Title VII violation occurred applies in the context of someone like [claimant], who was responding as a third party witness to a company inquiry."<sup>449</sup> On appeal, the EEOC argued that "requiring reactive complainants to have a reasonable belief regarding the unlawfulness of the behavior they have witnessed would frustrate the function and purpose of Title VII."<sup>450</sup> According to the EEOC, that requirement would deter third-party witnesses from coming forward "out of uncertainty whether they would be protected from retaliation."<sup>451</sup> The Fifth Circuit disagreed, holding that the opposed conduct must have "something to do with Title VII" to support a retaliation claim, and that the EEOC had failed to articulate a workable alternative standard.<sup>452</sup> The Fifth Circuit nevertheless determined that a jury could find that the claimant reasonably believed that the conduct she reported violated Title VII and reversed and remanded for further proceedings.<sup>453</sup>

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<sup>441</sup> *Id.* at \*1.

<sup>442</sup> *Id.*

<sup>443</sup> *Id.*

<sup>444</sup> *Id.* at \*2.

<sup>445</sup> *EEOC v. Rite Way Service, Inc.*, 819 F.3d 235 (5th Cir. 2016).

<sup>446</sup> *Id.* at 238.

<sup>447</sup> *Id.*

<sup>448</sup> *Id.*

<sup>449</sup> *Id.*

<sup>450</sup> *Id.* at 241 (quotations omitted).

<sup>451</sup> *Id.* (quotations omitted).

<sup>452</sup> *Id.* at 242.

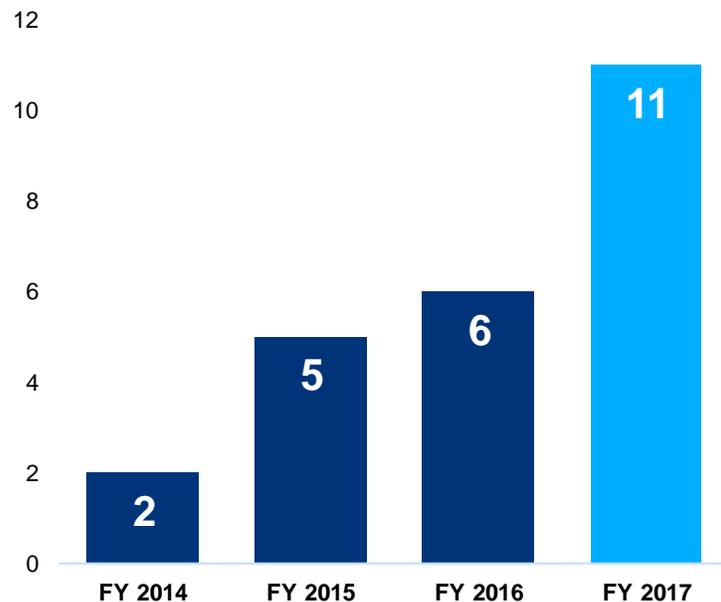
<sup>453</sup> *Id.* at 244.



# Ensuring Equal Pay Protections For All Workers

*“Some believed Acting Chair Victoria Lipnic was foreshadowing future trends when she made it clear at her first public appearance – hosted by none other than Seyfarth Shaw – that she is ‘very interested in equal pay issues’”*

**EPA Filings FY 2014 - 2017**



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.

## F. Enforcing Equal Pay Laws: A Renewed Focus

The Equal Pay Act (“EPA”) was enacted by Congress in 1963, one year before Title VII of the Civil Rights Act of 1964. The EPA added section six to the Fair Labor Standards Act of 1938 (“FLSA”) and prohibits any employer having employees subject to any provisions of the FLSA 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 . . . .”<sup>454</sup> The EPA therefore overlaps with Title VII, which prohibits a broader range of discrimination on the basis of sex, including wage discrimination.<sup>455</sup>

The EEOC has shown renewed interest in enforcing the EPA in recent years and has taken some concrete steps to increase its enforcement potential.<sup>456</sup> Arguably, the most significant of those steps are the changes that the EEOC made to the EEO-1 reports. The Trump administration, however, has blocked a portion of the EEO-1 reporting requirements.

### 1. Developments In EPA Litigation

On October 24, 2016, the District Court for the District of Maryland dealt a setback to the EEOC’s efforts to enforce the EPA. In *EEOC v. Maryland Insurance Administration*,<sup>457</sup> the EEOC filed a complaint on behalf of three female fraud investigators who claimed they were paid less than their male counterparts in violation of the EPA. The Court found that the males were not only hired at higher grades than their female counterparts, but also that the males had more experience working in the State, either in law enforcement or within the Administration itself. The court concluded that “as to all of the comparable male employees to which the EEOC points, reasons other than gender justified the pay disparity between them.”<sup>458</sup> Moreover, the court found that the EEOC did not use proper comparator evidence because they did not work in the same unit as the females who were allegedly underpaid. These employees worked as enforcement officers, not fraud investigators.<sup>459</sup>

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<sup>454</sup> 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 in order to comply with the law. *Id.*

<sup>455</sup> 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).

<sup>456</sup> Pay equity is also one of the most pressing topics on a statewide level, with numerous states passing their own equal pay laws to supplement the EPA. Last year, California led the charge and became the first state to adopt a more onerous pay equity law. 2017 Cal. Legis. Serv. Ch. 688 (A.B. 168) (West). The East Coast then joined, with stringent pay laws enacted in New York, Massachusetts, and Maryland and prior salary bans enacted in NYC, Massachusetts, Philadelphia (under challenge), and Puerto Rico. N.Y. Lab. Law § 194 (McKinney); Mass. Gen. Laws Ann. ch. 149, § 105A (West); Md. Code Ann., Lab. & Empl. § 3-304 (West); N.Y. City Council, 2017/067, File # 1253-2016, *Prohibiting employers from inquiring about a prospective employee’s salary history* (May 4, 2017); Gen. Court. Mass., Ch. 177, *An Act to Establish Pay Equity* (2016); City of Philadelphia, Bill No. 160840, Sec. 1; Puerto Rico Act. No. 16. Most recently, on June 1, 2017, Oregon followed suit and passed its own Equal Pay Act. 348 Oregon Or. Rev. Stat. Ann. § 652.220 (West). See also Christine Hendrickson, Annette Tyman, Pamela L. Vartabedian, Michael L. Childers, Chantelle C. Egan, *The Pay Equity March on the West Coast Begins: Oregon Signs Expansive Equal Pay Law and San Francisco Considers Salary History Ban* SEYFARTH SHAW CLIENT ALERTS (June 8, 2017), <http://www.seyfarth.com/publications/OMM060817-LE2>.

<sup>457</sup> *EEOC v. Maryland Insurance Administration*, No. JFM-15-1091, 2016 WL 6069488 (D. Md. Oct. 14, 2016).

<sup>458</sup> *Id.* at \*1.

<sup>459</sup> *Id.* at \*1-2.

The court additionally found these comparators inappropriate based on their hiring level and previous experience, both of which were distinguishable from the female fraud investigators.<sup>460</sup>

Despite this setback, the EEOC has continued to aggressively push forward on its pay equity initiative. On June 12, 2017, the EEOC filed two lawsuits alleging violations of the EPA. One lawsuit alleged that a Nebraska bank violated the EPA by paying women and men unequally for jobs with the same required skill, effort, responsibility, and working conditions.<sup>461</sup> One month later, on July 11, 2017, the Court entered judgment in favor of the EEOC, requiring the Nebraska bank to pay \$30,598 to a woman whom it unlawfully paid less than a man.<sup>462</sup>

In another lawsuit, the EEOC alleged that a former manager of programs and services at a juvenile correction and detention facility, violated federal law by paying a female facility investigator less than it paid the male employee who formerly held the position.<sup>463</sup> Two months later, the EEOC filed another lawsuit against Denton County, Texas alleging that Denton County violated the EPA by paying lesser wages to a female clinician than it paid to a male physician performing the same job.<sup>464</sup> In September 2017, the EEOC filed suit against a Delaware company that until recently operated a Pizza Studio restaurant, and still owns other restaurants nationwide, alleged that the company violated the EPA by withdrawing job offers from two teens after the woman complained about being offered less pay than her male friend.<sup>465</sup> On November 9, 2017, the Court entered judgment in favor of the EEOC.<sup>466</sup>

## 2. Changes To The EEO-1 Reporting Requirements

The EEO-1 Report is a survey document that has been mandated for more than 50 years. Currently, employers with more than 100 employees, and federal contractors or subcontractors with more than 50 employees, are required to collect and provide to the EEOC demographic information (gender, race, and ethnicity) in each of ten job categories (Executive & Senior-Level Officials and Managers, First/Mid-Level Officials & Managers, Professionals, Technicians, Sales Workers, Administrative Support Workers, Craft Workers, Operatives, Labors and Helpers, and Service Workers).<sup>467</sup> On February 1, 2016, the EEOC proposed changes to the EEO-1 report, which would have required more detailed reporting obligations for all employers with more than 100 employees.<sup>468</sup>

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<sup>460</sup> *Id.* at \*1; see also Gerald Maatman, Jr. and Michael L. DeMarino, *Court Rejects EEOC's EPA Lawsuit Theory*, WORKPLACE CLASS ACTION BLOG (Oct. 23, 2016), <http://www.workplaceclassaction.com/2016/10/court-rejects-eeocs-epa-law-suit-theory/>

<sup>461</sup> Press Release, Equal Employment Opportunity Commission, *EEOC Sues Heritage Bank for Paying Women Less Than Men*, (June 12, 2017) <https://www1.eeoc.gov/eeoc/newsroom/release/6-12-17b.cfm>.

<sup>462</sup> Press Release, Equal Employment Opportunity Commission, *Federal Court Enters Judgment in Favor Of EEOC In Suit Charging Equal Pay Act Violation*, (July 11, 2017) <https://www1.eeoc.gov/eeoc/newsroom/release/7-11-17.cfm>.

<sup>463</sup> Press Release, Equal Employment Opportunity Commission, *G4S Youth Services Sued by EEOC for Pay Discrimination*, (June 12, 2017) <https://www1.eeoc.gov/eeoc/newsroom/release/6-12-17a.cfm>.

<sup>464</sup> Press Release, Equal Employment Opportunity Commission, *Denton County Sued by EEOC For Discrimination Under the Equal Pay Act*, (Aug. 31, 2017) <https://www.eeoc.gov/eeoc/newsroom/release/8-31-17a.cfm>.

<sup>465</sup> Press Release, Equal Employment Opportunity Commission, *EEOC Sues Pizza Studio Restaurant Owner for Violating Equal Pay Act*, (Sept. 5, 2017) <https://www.eeoc.gov/eeoc/newsroom/release/9-5-17.cfm>.

<sup>466</sup> Press Release, Equal Employment Opportunity Commission, *Federal Court Enters Judgment in Favor Of EEOC In Suit Charging Equal Pay Act Violation By Pizza Restaurant*, (Nov. 9, 2017) <https://www1.eeoc.gov/eeoc/newsroom/release/11-9-17a.cfm>.

<sup>467</sup> See Current EEO-1 Report, <https://www.eeoc.gov/employers/eeo1survey/upload/eeo1-2.pdf>.

<sup>468</sup> See EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Agency Information Collection Activities: Revision of the Employer Information Report (EEO-1) and Comment Request*, <https://www.gpo.gov/fdsys/pkg/FR-2016-02-01/pdf/2016-01544.pdf>.

The U.S. Chamber of Commerce in February 2017 asked the Office of Management and Budget (“OMB”) to rescind its 2016 approval of the EEOC’s plan.<sup>469</sup> The Equal Employment Advisory Council, a Washington, DC based association of large employers, followed suit a month later and submitted a letter also seeking the OMB’s reconsideration.<sup>470</sup> Three weeks later, Senators Lamar Alexander (R-Tennessee) and Pat Roberts (R-Kansas) wrote another letter to the OMB urging it to rescind the new requirements.<sup>471</sup>

In their letter, the Senators called the revisions to the EEO-1 report “misguided” and said that “[t]hese revision will place significant paperwork, reporting burden and new costs on American businesses, and will result in fewer jobs and higher prices for American consumers.”<sup>472</sup> The letter also reiterated concerns echoing many employers regarding the costs associated with compliance. The EEOC projected compliance costs to be \$53.5 million and estimated it would take employers approximately 1.9 million hours to complete the report.<sup>473</sup> Citing the U.S. Chamber of Commerce’s estimates, the Senators projected costs to be far higher – \$400.8 million – and estimated that it would cost employers and federal contractors \$1.3 billion annually.<sup>474</sup>

On August 29, 2017, the EEOC announced that the OMB, per its authority under the Paperwork Reduction Act, had immediately stayed the EEOC’s pay data collection components of the EEO-1 Report that was to otherwise become effective on March 31, 2018.<sup>475</sup> The next day, Acting Chair, Victoria Lipnic, issued a statement advising employers that the EEO-1 Report used in previous years should be submitted by the March 31, 2018 deadline.<sup>476</sup> Commissioner Lipnic further stated: “The EEOC remains committed to strong enforcement of our federal equal pay laws, a position I have long advocated. Today’s decision will not alter EEOC’s enforcement efforts . . . . Going forward, we at the EEOC will review the order and our options. I do hope that this decision will prompt a discussion of other more effective solutions to encourage employers to review their compensation practices to ensure equal pay and close the wage gap.”<sup>477</sup>

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<sup>469</sup> See U.S. Chamber of Commerce, *Request for Review; EEOC’s Revision of the Employer Information Report*, <http://src.bna.com/mFi>.

<sup>470</sup> See Equal Employment Advisory Counsel, *Review of the Equal Employment Opportunity Commission’s Employer Information (EEO-1) Report (OMB Control Number 3046-0007)*, <http://src.bna.com/nUp>.

<sup>471</sup> See Letter from Lamar Alexander, Chairman of Committee on Health, Education, Labor and Pensions, & Pat Roberts, United States Senator, <http://src.bna.com/nTJ>.

<sup>472</sup> *Id.*

<sup>473</sup> *Id.*

<sup>474</sup> *Id.*

<sup>475</sup> See Annette Tyman, Lawrence Z. Lorber, Michael L. Childers, *Breaking News: Revised EEO-1 “Component 2” Stayed Effective Immediately; Component 1 Still in Effect*, SEYFARTH SHAW CLIENT ALERTS (Aug. 29, 2017), <http://www.seyfarth.com/publications/OMM082917-LE2>.

<sup>476</sup> See Annette Tyman, Lawrence Z. Lorber, Michael L. Childers, *Breaking News: Revised EEO-1 “Component 2” Stayed Effective Immediately; Component 1 Still in Effect*, SEYFARTH SHAW CLIENT ALERTS (Aug. 30, 2017), <http://www.seyfarth.com/publications/OMM082917-LE2>.

<sup>477</sup> See EEOC, *What You Should Know: Statement of Acting Chair Victoria A. Lipnic about OMB Decision on EEO-1 Pay Data Collection*, <https://www.eeoc.gov/eeoc/newsroom/ysk/eeo1-pay-data.cfm>.



# Preventing Systemic Harassment

*“The EEOC’s June 2016 Report on harassment in the workplace found that ‘anywhere from 25% to 85% of women report having experienced sexual harassment in the workplace’”*

## 2017 PAR Highlights

**30** merit cases filed under charges of harassment in FY 2017

The EEOC held **1,273** events involving harassment prevention that drew **141,044** attendees

The EEOC also conducted **72** sessions on Preventing Workplace Harassment that drew 390 Federal workers

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Harassment continues to be one of the most frequent complaints raised in the workplace. Over 30 percent of the charges filed with EEOC allege harassment, and the most frequent bases alleged are sex, race disability, age, national origin and religion, in order of frequency.

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## G. Preventing Harassment

The EEOC has declared that preventing workplace harassment has been one of its national enforcement priorities since 2013.<sup>478</sup> In June 2016, the EEOC published a Select Task Force on the Study of Harassment in the Workplace Report (“Report”) examining harassment in the workplace.<sup>479</sup> The Report found that anywhere from 25% to 85% of women report having experienced sexual harassment in the workplace, and that many women do not label certain forms of unwelcome sexually based behaviors as “sexual harassment” – even if they are viewed as problematic or offensive.<sup>480</sup> Less is known about incidents of other forms of harassment, such as gender-identity based and sexual orientation-based harassment, race-based and ethnicity-based harassment, disability-based harassment, and intersectional harassment (harassment on the basis of more than one identity group). However, the Report found that the evidence suggests that such incidents are as widely – or even more widely – underreported.<sup>481</sup>

The second part of the Report discusses the potential solutions for responding to, and preventing, workplace harassment. In recognition of numerous studies that have shown that organizational conditions are the most powerful predictors of whether harassment will occur, the Report identified risk factors in the workplace that may suggest fertile ground for harassment. Those include:

- (1) homogenous workforces;
- (2) workplaces where some workers do not conform to workplace norms;
- (3) cultural and language differences in the workplace;
- (4) coarsened social discourse outside the workplace;
- (5) workforces with many young workers;
- (6) workplaces with “high value” employees;
- (7) workplaces with significant power disparities;
- (8) workplaces that rely on customer service or client satisfaction;
- (9) workplaces where work is monotonous or consists of low-intensity tasks;
- (10) isolated workspaces;
- (11) workplace cultures that tolerate or encourage alcohol consumption; and
- (12) decentralized workplaces.<sup>482</sup>

Despite these risk factors, EEOC Acting Chair Victoria Lipnic has stated that this behavior happens to women in workplaces all over the place, noting “It’s across industries.”<sup>483</sup>

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<sup>478</sup> See EEOC, *EEOC Seeks Public Input on Proposed Enforcement Guidance on Harassment*, (Jan. 10, 2017) <https://www.eeoc.gov/eeoc/newsroom/release/1-10-17a.cfm>.

<sup>479</sup> See SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE REPORT OF CO-CHAIRS CHAI R. FELDBLUM & VICTORIA A. LIPNIC (JUNE 2016), [https://www.eeoc.gov/eeoc/task\\_force/harassment/report.cfm](https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm).

<sup>480</sup> *Id.*

<sup>481</sup> *Id.*

<sup>482</sup> *Id.*

<sup>483</sup> Braden Campbell, *‘We See This Everywhere,’ EEOC Chair Says of Weinstein*, LAW360 (Oct. 24, 2017, 8:37 PM), <https://www.law360.com/articles/977719>.

# 1. The EEOC's Proposed Enforcement Guidance on Unlawful Harassment

In January 2017, the EEOC published a companion piece to the Report entitled Proposed Enforcement Guidance on Unlawful Harassment (“Proposed Guidance”).<sup>484</sup> While the 2016 Report focused upon identifying ways to renew efforts to prevent harassment, the Proposed Guidance replaces, updates, and consolidates several earlier EEOC guidance documents. The Proposed Guidance also aims to define what constitutes harassment, examines when a basis for employer liability exists, and offers suggestions for preventative practices.<sup>485</sup>

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.<sup>486</sup> 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.<sup>487</sup> 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);<sup>488</sup> (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;<sup>489</sup> (3) where the alleged harassment was not directed at the employee;<sup>490</sup> and (4) in instances where the alleged harassment occurred outside of the workplace.<sup>491</sup>

The Proposed Guidance further explains when harassment is severe or pervasive enough to constitute a hostile work environment. The EEOC states that when the harassment results in an explicit change to the terms or conditions of employment, discrimination and liability are clear (for instance, terminating an employee for rejecting sexual advances).<sup>492</sup> Where there is no explicit change in employment status, the employee must prove a hostile work environment: conduct that is

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<sup>484</sup> Office of Legal Counsel, EEOC, *PROPOSED Enforcement Guidance on Unlawful Harassment*, (Jan. 10, 2017), <https://www.regulations.gov/docket?D=EEOC-2016-0009>.

<sup>485</sup> See *id.*

<sup>486</sup> *Id.* at 5-9.

<sup>487</sup> *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 woman 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).

<sup>488</sup> EEOC, *Proposed Guidance Harassment 2017*, *supra* note 486, at 9; see e.g., *EEOC v. WC&M Enters, Inc.*, 496 F.3d 393, 401-02 (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).

<sup>489</sup> EEOC, *Proposed Guidance Harassment 2017*, *supra* note 486, 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).

<sup>490</sup> EEOC, *Proposed Guidance Harassment 2017*, *supra* note 486, 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).

<sup>491</sup> EEOC, *Proposed Guidance Harassment 2017*, *supra* note 486, at 18.

<sup>492</sup> *Id.* at 19.

sufficiently severe or pervasive to alter the conditions of employment and create an abusive or hostile work environment.

According to the EEOC, to establish a hostile work environment, the employee must show that: (1) the conduct would be viewed objectively (by a reasonable person) to be hostile or abusive; and (2) the employee subjectively perceives the environment to be hostile or abusive. For hostile work environment claims where there is no explicit change in the terms and conditions of employment, the Proposed Guidance explains there must be a basis for employer liability, and this depends on the status of the alleged harasser.<sup>493</sup> For harassment by non-supervisors and non-employees, an employer is liable where it is negligent. The EEOC will claim negligence if an employer either failed to act reasonably to prevent harassment or failed to take reasonable corrective action in response to harassment about which it knew or should have known.<sup>494</sup>

Further, the EEOC takes the position that an employer may assert a two-part affirmative defense where no tangible employment action is taken for a hostile work environment created by supervisors. Specifically, the employer may avoid liability by showing: (1) it exercised reasonable care to prevent and correct any harassment;<sup>495</sup> and (2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to take other steps to avoid harm from the harassment.<sup>496</sup>

Finally, the Proposed Guidance sets forth suggestions for employers to prevent harassment from occurring in the workplace. First, the Proposed Guidance recommends implementing a harassment prevention strategy by: (1) clearly, frequently, and unequivocally stating that harassment is prohibited and will not be tolerated; (2) allocating sufficient resources for effective harassment prevention strategies; (3) providing appropriate authority to individuals responsible for creating, implementing, and managing harassment prevention strategies; (4) allocating sufficient staff time for harassment prevention efforts; and (5) assessing harassment risk factors and taking steps to minimize or eliminate those risks.<sup>497</sup>

Second, the Proposed Guidance recommends that every employer have a comprehensive anti-harassment policy that is written and communicated in a clear, easy-to-understand style and format, translated into all languages commonly used by employees, and provided to employees upon hire, during trainings, in the employee handbook, and posted centrally at locations commonly frequented

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<sup>493</sup> *Id.* at 24; see e.g., *Zetwick v. Cty. Of Yolo*, No. 14-17341, 2016 WL 6610225, at \*2 (9th Cir. Nov. 9, 2016) (unpublished) (concluding that reasonable jury could find that alleged sexual harassment was actionable, in part because of harasser's status as a supervisor); *Williams v. Silver Spring Volunteer Fire Dep't*, 86 F. Supp. 3d 398, 413 (D. Md. 2015) (stating that severity of harasser's conduct was exacerbated by his official authority over complainant).

<sup>494</sup> EEOC, *Proposed Guidance Harassment 2017*, *supra* note 486, at 55; see e.g., *Faragher v. City of Boca Raton*, 524 U.S. 775, 789 (1998) (in such instances, the combined knowledge and inaction may be seen as demonstrable negligence, or as the employer's adoption of the offending conduct in its results, quite as if they had been authorized affirmatively as the employer's policy).

<sup>495</sup> EEOC, *Proposed Guidance Harassment 2017*, *supra* note 486, at 43, 59; see e.g., *Crawford v. BNSF Ry. Co.*, 665 F.3d 978, 985 (8th Cir. 2012) (concluding that defendant exercised reasonable care to prevent and correct harassment when it initiated an investigation upon receiving harassment complaint, placed the alleged perpetrator on administrative leave within two days, and terminated him within two weeks; *Pantoja v. Dep't of Air Force*, EEOC Appeal No. 01995176, 2001 WL 1526459, at \*1 (Nov. 21, 2001) (affirming administrative judge's decision that agency was not liable for alleged sexual harassment where agency immediately investigated allegations and within one day moved alleged harasser to another building).

<sup>496</sup> EEOC, *Proposed Guidance Harassment 2017*, *supra* note 486, at 43, 45; see e.g., *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).

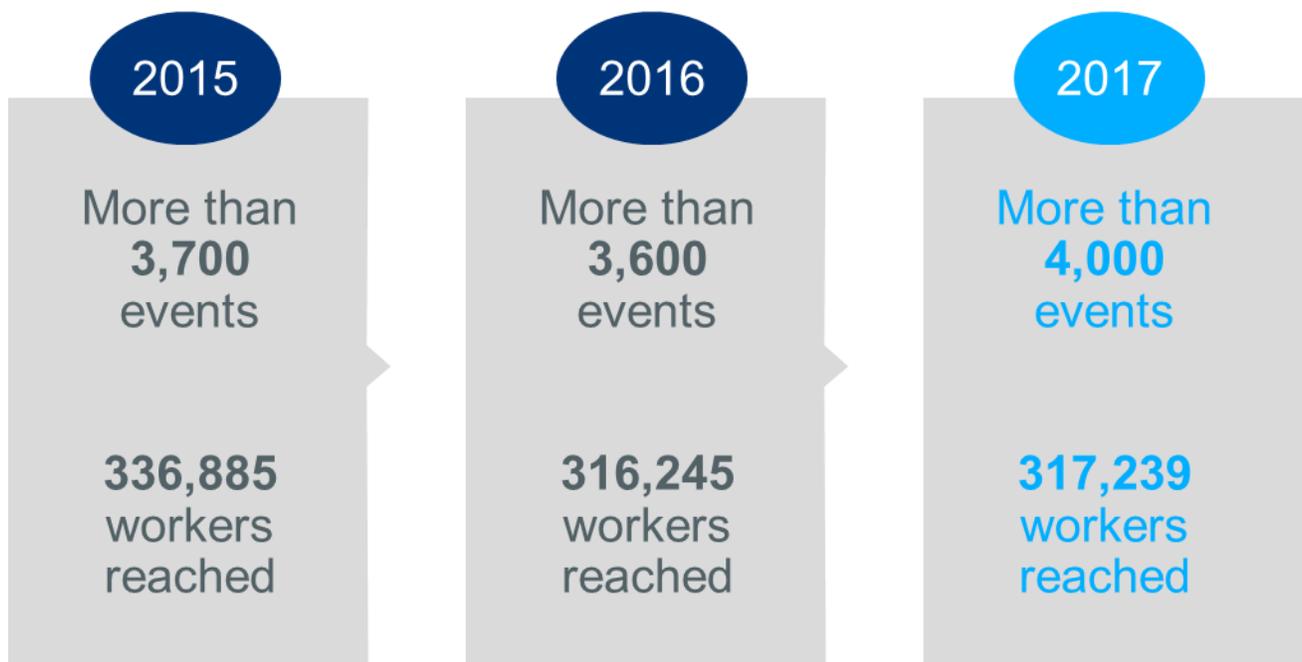
<sup>497</sup> *Id.* at 71.

by employees.<sup>498</sup> The Proposed Guidance further suggests periodically reviewing and updating the anti-harassment policy as needed.

Third, the Proposed Guidance recommends every employer have an effective harassment complaint system that is fully resourced to allow the company to effectively respond to complaints, which is translated into all languages commonly used by employees; provides multiple avenues of complaint; provides prompt, thorough, and neutral investigations; protects the privacy of alleged victims, individuals who report harassment, witnesses, alleged harassers, and other relevant individuals to the greatest extent possible; ensures that alleged harassers are not prematurely presumed guilty or disciplined for harassment; conveys the results of the complaint to the complainant and alleged harasser; and takes preventative and corrective action where appropriate.<sup>499</sup>

Fourth and finally, the Proposed Guidance emphasizes the importance of effective harassment training. This training should be supported by senior leaders, repeated and reinforced regularly, provided to all employees regardless of level and location, provided in all languages commonly used by employees, tailored to the specific workplace and workforce, conducted by qualified trainers, and regularly evaluated by participants and revised as needed.<sup>500</sup>

## EEOC Anti-Harassment Outreach Efforts



<sup>498</sup> *Id.* at 72-73.

<sup>499</sup> *Id.*

<sup>500</sup> *Id.*

## 2. Case Law Developments Impacting The EEOC's Anti-Harassment Efforts

In *EEOC v. AutoZone, Inc.*,<sup>501</sup> the EEOC alleged that AutoZone was liable under Title VII for a store manager's alleged sexual harassment of three female employees.<sup>502</sup> In May 2012, AutoZone transferred a store manager to its Cordova, Tennessee location.<sup>503</sup> The store manager could hire new hourly employees and write up employees at the store for misbehaving, but could not fire, demote, promote, or transfer employees. Authority over firing, promoting, and transferring rested with the district manager for the store.<sup>504</sup>

An employee claimed that a store manager made lewd comments and repeated sexual advances to her. Based on these allegations, AutoZone internally investigated the allegations. After two other female employees who worked at the Cordova location confirmed that the store manager made lewd sexual comments, AutoZone transferred and terminated the store manager.<sup>505</sup> Thereafter, the EEOC brought a lawsuit alleging that AutoZone harassed the three female employees. The U.S. District Court for the Western District of Tennessee granted AutoZone's motion for summary judgment, finding that the store manager was not a supervisor under Title VII and therefore AutoZone was not vicariously liable for his actions.<sup>506</sup> The EEOC appealed to the Sixth Circuit.

The Sixth Circuit affirmed the district court's grant of summary judgment, finding that because the store manager did not take any tangible employment action against his co-workers and had no authority to do so, he was not a supervisor under Title VII, and thus AutoZone was not vicariously liable for the conduct alleged.<sup>507</sup>

The Sixth Circuit further held that even if the store manager was found to be a supervisor under Title VII, AutoZone established an affirmative defense to liability.<sup>508</sup> The Sixth Circuit held that AutoZone exercised reasonable care to prevent and promptly correct any sexually harassing behavior by utilizing an appropriate anti-harassment policy to prevent harassment, and by transferring and later terminating the store manager promptly after it investigated the allegations.<sup>509</sup> The Sixth Circuit further held that the harassed employees unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or otherwise avoid harm by failing to report the store manager's behavior for several months.<sup>510</sup>

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<sup>501</sup> *EEOC v. Autozone, Inc.* 692 Fed. Appx. 280, 282 (6th Cir. 2017).

<sup>502</sup> See *id.* See Gerald L. Maatman, Jr. and Alex W. Karasik, *Sixth Circuit Shuts Down EEOC's Appeal In Sex Harassment Suit*, WORKPLACE CLASS ACTION BLOG (June 13, 2017), available at <http://www.workplaceclassaction.com/2017/06/sixth-circuit-shuts-down-eeocs-appeal-in-sex-harassment-suit/>.

<sup>503</sup> *Autozone, Inc.*, 692 Fed. Appx. at 281.

<sup>504</sup> *Id.*

<sup>505</sup> *Id.* at 282.

<sup>506</sup> *EEOC v. Autozone*, 2016 WL 9456428, at \*4 (July 13, 2016).

<sup>507</sup> *Autozone*, 692 Fed. Appx. at 283.

<sup>508</sup> *Id.* at 285-86.

<sup>509</sup> *Id.*

<sup>510</sup> *Id.* at 286.

## PART II

# THE STAGES OF AN EEOC LAWSUIT DEVELOPMENTS IN FY 2017

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

### A. How It All Begins: The Charge Of Discrimination

Frequently an employer's first encounter with the EEOC is by receipt of a document known as a Charge of Discrimination. The charge may arrive by mail at any location where the employer does business.<sup>511</sup> The charge generally is a basic form document that identifies the employer, the name of the individual bringing the charge, a general description of the type of discrimination, a brief statement of the harm(s) alleged, and a statement of whether similar proceedings have been instituted by any state or local agency.<sup>512</sup> Occasionally, a document called a Notice of Charge will precede receipt of the charge itself.<sup>513</sup> Upon receipt of either document, an employer's internal or external counsel should promptly implement a plan to thoroughly investigate the charge.

#### 1. Overview Of The Charge Process

A charge may be brought by a person claiming to be aggrieved, by someone acting on that person's behalf, or by a representative of the EEOC.<sup>514</sup> The charge may be made at any EEOC office or by mail, and must be signed and verified.<sup>515</sup> There has been some discussion of an electronic charge filing mechanism, but due to a variety of technological issues, that has not yet come to pass. Regulations provide that within 10 days of the filing of the charge, the EEOC will notify the employer and provide the name of an investigator.<sup>516</sup> It is not uncommon, however, for there to be a significant delay in this process. The charge may be accompanied by an offer to engage in an EEOC-facilitated mediation or other dispute resolution process with the charging party, which may result in the

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<sup>511</sup> Beginning in May 2015, the EEOC initiated the ACT Digital Pilot Program, creating an Internet portal for Charging Parties and Respondents for accessing documents associated with a charge for responding to invitations to mediate, and for uploading position statements and other documents. See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *ABOUT EEOC'S DIGITAL CHARGE SYSTEM*, available at <http://www.eeoc.gov/employers/act-digital-phase-1.cfm>.

<sup>512</sup> 29 C.F.R. § 1601.12

<sup>513</sup> 29 C.F.R. § 1601.14. While the notice requires no responsive action by an employer, proactive counsel may wish to utilize the notice as an opportunity to understand any potential employment concerns involving the individual identified as the charging party (the person or persons alleging discriminatory conduct), or the immediate environment in which the charging party works.

<sup>514</sup> 29 C.F.R. §§ 1601.07, 1601.11.

<sup>515</sup> 29 C.F.R. §§ 1601.08, 1601.09.

<sup>516</sup> 29 C.F.R. § 1601.14.

withdrawal of the charge by the charging party.<sup>517</sup> Employers should consider whether to accept this opportunity in lieu of proceeding with the preparation and filing of a position statement on behalf of the employer and participating in the EEOC's investigation. An investigation may include the employer being required to respond to formal written Requests for Information, or facilitating interviews of employees, or on-site visits by EEOC investigators, or the issuance of subpoenas.

Under Title VII, if the charge remains pending for 180 days, the charging party may request that the EEOC dismiss the charge and issue the charging party a written Dismissal and Notice of Rights. The Notice of Rights informs the charging party of his or her right to file a lawsuit based upon the matters that were the subject of the charge.<sup>518</sup> Under the ADEA, once the charge has been pending before the EEOC for 60 days a charging party may file a lawsuit based upon the matters that are the subject of a charge. It is not necessary to obtain a Notice of Rights before commencing a civil lawsuit under the ADEA.<sup>519</sup> Under the EPA, a charging party can go directly to court and file a lawsuit without filing a charge of discrimination with the EEOC.<sup>520</sup>

The EEOC may also on its own initiative dismiss the charge for procedural irregularities,<sup>521</sup> or find that there is no probable cause that an unlawful employment practice has occurred.<sup>522</sup> Should the EEOC make a "no cause" determination, it will notify the charging party that he or she has 90 days from receipt of the determination to commence a lawsuit in federal court regarding the matters that were the subject of the charge.<sup>523</sup> During this 90 day period and thereafter, the EEOC may reconsider and reverse its "no cause" determination.<sup>524</sup> Although less common, it is possible that a charge may be filed and closed quickly, with a right to sue notice issued to the charging party. Under such circumstances, an employer may receive both the charge and a copy of the notice of right to sue contemporaneously. In a recent Seventh Circuit case, *Goodaker v. Heartside Food Solutions, LLC*,<sup>525</sup> the charge of discrimination was not perfected because it was missing the charging party's signature.<sup>526</sup> As a result, the EEOC did not pursue investigation of the claim and sent the charging party notice of the charge's dismissal via a right to sue letter.<sup>527</sup> The charging party then filed suit, and the employer was unable to have the charge dismissed by arguing lack of jurisdiction based on the charging party's failure to exhaust administrative remedies.<sup>528</sup>

The limitations period for a Title VII claim is 300 days, which is the amount of time that an individual has to file a charge with the EEOC. However, the U.S. Court of Appeals for the Fifth Circuit recently held for the first time that employers may be facing conduct many years outside this limitations period.<sup>529</sup> In *Panagiota Health v. Southern University System Fdn.*, a university professor alleged

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<sup>517</sup> 29 C.F.R. § 1601.20. Note, however, that a settlement negotiated with the EEOC does not affect any other charge.

<sup>518</sup> 29 C.F.R. § 1601.28.

<sup>519</sup> 29 U.S.C. § 626(d)(1).

<sup>520</sup> U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, TIME LIMITS FOR FILING A CHARGE, available at <https://www.eeoc.gov/employees/timeliness.cfm>.

<sup>521</sup> 29 C.F.R. § 1601.18

<sup>522</sup> 29 C.F.R. § 1601.19

<sup>523</sup> *Id.*

<sup>524</sup> *Id.*

<sup>525</sup> *Goodaker v. Heartside Food Solutions, LLC*, No. 3:15-CV-530, 2017 U.S. Dist. LEXIS 11986 (N.D. Ind. Jan. 27, 2017).

<sup>526</sup> *Id.* at \*4.

<sup>527</sup> *Id.*

<sup>528</sup> *Id.* at \*5-6 ("[W]hile [a Charging Party's] alleged failure to exhaust administrative remedies may preclude her suit from proceeding [as an affirmative defense], it is not a jurisdictional prerequisite to her discrimination claim.").

<sup>529</sup> See Steve Shardonofsky and John P. Phillips, *Fifth Circuit Warps Time In Decision On The Continuing Violation Doctrine*, EMPLOYMENT LAW LOOKOUT BLOG (Mar. 14, 2017), available at

that she was subject to continuous harassment by her immediate supervisor beginning as far back as 2003.<sup>530</sup> The Court applied the “continuing violation doctrine” to hold that the professor could sue for harassment that occurred beyond the 300-day limitations period. The Court assessed: “(1) whether the separate acts are related, (2) whether any intervening acts by the employer “severed” the acts that preceded it from later conduct, and (3) whether there are any equitable factors that should prevent the court from considering the full scope of the continuing conduct.”<sup>531</sup>

When a charge is not settled or dismissed, the EEOC may issue a letter of determination. The EEOC may reconsider its determination within 90 days of the issuance of the determination or thereafter; provided, however, that reconsideration issued 90 days after the determination does not operate to revoke the EEOC’s issuance of any right to sue to the charging party.<sup>532</sup> If a reasonable cause determination is issued, the EEOC will “endeavor to eliminate such practice by informal methods of conference, conciliation and persuasion.”<sup>533</sup> If the EEOC determines that it is unable to obtain voluntary compliance and that further efforts would be futile or nonproductive, it will notify the employer of the failure of conciliation.<sup>534</sup> The EEOC can then initiate litigation in its own name or refer the matter to the Attorney General for the initiation of a civil action.<sup>535</sup>

In early 2016, the EEOC announced new nationwide procedures for releasing respondent position statements and obtaining responses from charging parties.<sup>536</sup> According to the EEOC, it will now “provide the Respondent’s position statement and non-confidential attachments to Charging Parties upon request and provide them an opportunity to respond within 20 days. The charging party’s response will not be provided to Respondent during the investigation.”<sup>537</sup> Employers often produce highly sensitive materials in defense of an EEOC Charge with the assurance it will be kept confidential.<sup>538</sup> That assurance is now gone, and any employer’s evidence used to defend against the charge is subject to dissemination by a charging party, who may well have an axe to grind with the employer. Employers should therefore be cautious about what information they decide to share with the EEOC.

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<http://www.laborandemploymentlawcounsel.com/2017/03/fifth-circuit-warps-time-in-decision-on-the-continuing-violation-doctrine/>.

<sup>530</sup> *Panagiota Health v. Board of Supervisors for the Southern University and Agricultural and Mechanical College*, 850 F.3d 731 (5th Cir. 2017).

<sup>531</sup> *Id.* at 738.

<sup>532</sup> 29 C.F.R. § 1601.21.

<sup>533</sup> 29 C.F.R. § 1601.24.

<sup>534</sup> 29 C.F.R. § 1601.25.

<sup>535</sup> 29 C.F.R. §§ 1601.27; 1601.29.

<sup>536</sup> Press Release, Equal Employment Opportunity Commission, EEOC Implements Nationwide Procedures for Releasing Respondent Position Statements and Obtaining Responses from Charging Parties (Feb. 18, 2016), available at [https://www.eeoc.gov/eeoc/newsroom/release/position\\_statement\\_procedures.cfm](https://www.eeoc.gov/eeoc/newsroom/release/position_statement_procedures.cfm).

<sup>537</sup> *Id.*

<sup>538</sup> See Christopher DeGross, Gerald L. Maatman, Jr., and Howard Wexler, *Opening The Vault – The EEOC’s New Position On Handing Over Position Statements To Charging Parties*, WORKPLACE CLASS ACTION BLOG (Feb. 21, 2016), available at <http://www.workplaceclassaction.com/2016/02/opening-the-vault-the-eeocs-new-position-on-handing-over-position-statements-to-charging-parties/>. For example, employers often provide confidential comparator information concerning other similarly-situated employees to demonstrate consistent, non-discriminatory approach in cases of alleged disparate treatment. They might also provide protected commercial and trade materials as exhibits to position statements.

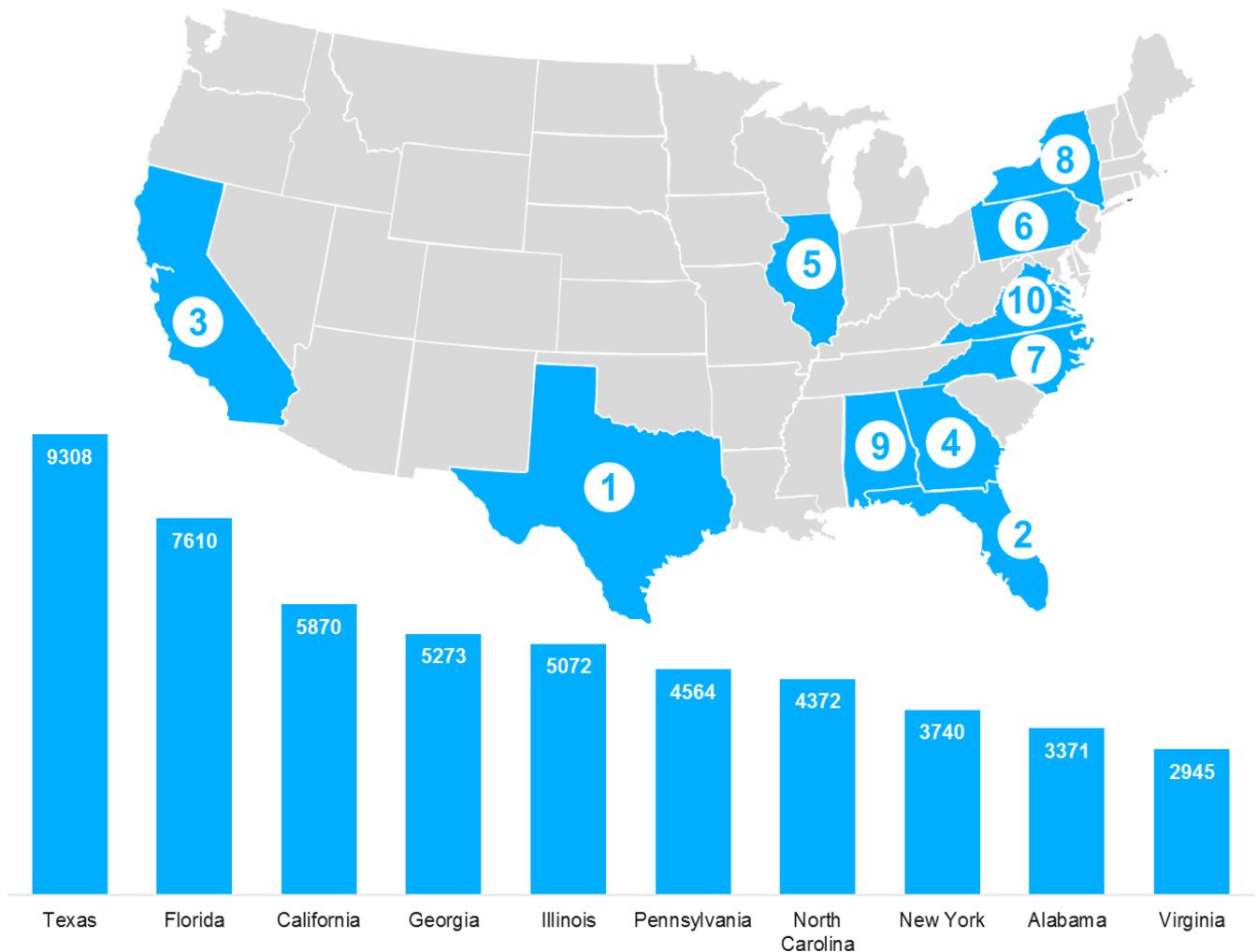
## Steps Employers Can Take To Respond To An EEOC Charge



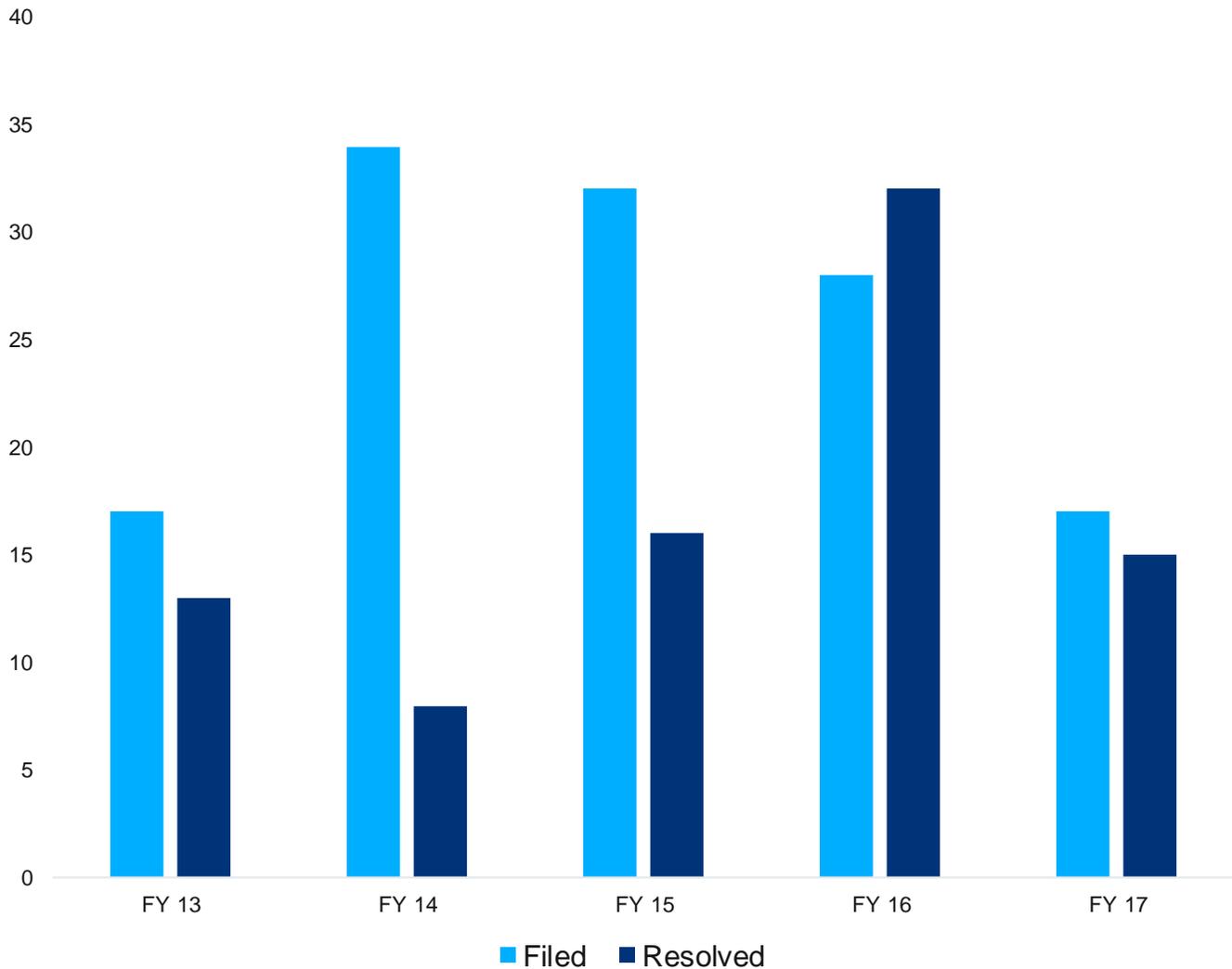
## 2. Charge Data By State

The level of charge activity in a particular state reflects the characteristics of the dominant industries within those states. Some industries are more prone to receiving particular discrimination charges than others. Geography also matters when it comes to EEOC charges and litigation, even at the initial charge stage. Some states see a disproportionate share of total EEOC charges and of a particular type of discrimination charge.

The graph below shows the top ten states that received the highest number of EEOC charges in FY 2016 (the most up-to-date information released at the time of publication).



## Subpoena Actions Filed & Resolved FY 2013 - 2017



A powerful litigation tool often utilized by the EEOC is the subpoena enforcement action. If the Commission requests information during its investigation but does not receive what it deems to be full compliance from an employer, EEOC attorneys will often convert their request for information into an administrative subpoena. If an employer still does not comply (to the EEOC's satisfaction), the EEOC can then bring an action in federal court to enforce the subpoena.

In FY 2017, the EEOC filed 17 subpoena enforcement actions, which compares to 28 such actions in FY 2016. The Commission also resolved 15 subpoena enforcement actions this year, a decrease from last year's resolution of 32.

## B. The Investigation Phase: The EEOC's Expansive Subpoena Power

One of the investigatory tools at the EEOC's disposal is the administrative subpoena. Typically, an investigator in pursuit of discovery from an employer will first make an informal request for information. If the employer does not produce the requested information, the District Director may issue an administrative subpoena to obtain the information. Sometimes the EEOC will even skip the informal request and proceed directly to issuing a subpoena-- a sometimes frustrating practice that is actually disallowed by the EEOC's own rules.<sup>539</sup>

An employer who receives a subpoena must act quickly. The Commission's regulations permit an employer to submit to the Commission a petition to revoke or modify the subpoena on the grounds that it seeks information that is not relevant to the charge, is overly burdensome, or suffers from some other flaw. However, the petition must be filed within five business days of receipt of the subpoena, and the Commission and the courts have proven unsympathetic to employers who miss the cut-off. (Note that subpoenas issued in ADEA investigations are treated differently and petitions to revoke are not permitted. Subpoenas issued under the ADEA are elevated directly to 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 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 huge pattern or practice or systemic case. Employers can and do push back on the scope of these subpoenas. However, recent court decisions continue to narrow the grounds upon which employers may seek to do so.

In FY 2017, the EEOC initiated only 17 subpoena enforcement actions.<sup>540</sup> This number is down significantly from recent years, in which the EEOC initiated 28 subpoena enforcement actions in FY 2016,<sup>541</sup> 32 enforcement actions in FY 2015,<sup>542</sup> and 34 in FY 2014.<sup>543</sup> In addition, in FY 2017, the EEOC appealed six subpoena enforcement cases and prevailed in five of them.<sup>544</sup> In FY 2016, the EEOC appealed three subpoena enforcement cases and prevailed in all three.<sup>545</sup> It is unclear if this dip in subpoena enforcement actions is because the EEOC is backing off of these issues (unlikely) or if employers are more likely to voluntarily respond to requests for information based on the shifting tide in District Court decisions (more likely).

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<sup>539</sup> See EEOC Compliance Manual § 24.

<sup>540</sup> U.S. Equal Employment Opportunity Commission, Fiscal Year 2017 Performance and Accountability Report, at 36, available at <https://www.eeoc.gov/eeoc/plan/upload/2017par.pdf>.

<sup>541</sup> U.S. Equal Employment Opportunity Commission, Fiscal Year 2016 Performance and Accountability Report, at 36, available at <https://www.eeoc.gov/eeoc/plan/upload/2016par.pdf>.

<sup>542</sup> U.S. Equal Employment Opportunity Commission, Fiscal Year 2015 Performance and Accountability Report, at 34, available at <http://www.eeoc.gov/eeoc/plan/upload/2015par.pdf>.

<sup>543</sup> U.S. Equal Employment Opportunity Commission, Fiscal Year 2014 Performance and Accountability Report, at 27, available at <http://www.eeoc.gov/eeoc/plan/2014par.pdf>.

<sup>544</sup> U.S. Equal Employment Opportunity Commission, Fiscal Year 2017 Performance and Accountability Report, at 93, available at <https://www.eeoc.gov/eeoc/plan/upload/2017par.pdf>.

<sup>545</sup> U.S. Equal Employment Opportunity Commission, Fiscal Year 2016 Performance and Accountability Report, at 96, available at <https://www.eeoc.gov/eeoc/plan/upload/2016par.pdf>.

# 1. U.S. Supreme Court Clarifies Standard Of Appellate Review On Enforcement Of EEOC Subpoenas

In 2017, the U.S. Supreme Court decided *McLane Co. v. EEOC*,<sup>546</sup> clarifying the standard of review of a District Court's decision regarding enforcement of EEOC subpoenas.<sup>547</sup> This case arose from a Title VII charge brought by a woman who worked as a "cigarette selector."<sup>548</sup> After she returned from three months of maternity leave, her employer required her to undergo a physical capabilities evaluation, which was required for all new employees and employees returning from leave or otherwise away from the physically demanding aspects of their job for more than 30 days, regardless of the reason for the leave.<sup>549</sup> After failing three times, the charging party was terminated.<sup>550</sup> The charging party then filed a charge of discrimination with the EEOC, alleging gender and disability discrimination against her employer.<sup>551</sup>

During the investigation, the Commission requested a list of employees who had taken the physical evaluation. Although the employer provided a list with each employee's gender, role at the company, evaluation score, and the reason each employee had been asked to take the evaluation, the company refused to provide "pedigree information," including names, social security numbers, addresses, and phone numbers.<sup>552</sup> While negotiating the information to be provided, the EEOC learned that McLane used its physical evaluation on a nationwide basis and, as a result, expanded the scope of its investigation nationwide.<sup>553</sup> The EEOC also filed its own charge of age discrimination against the company.

The EEOC later challenged the employer's refusal to provide pedigree information in the U.S. District Court for the District of Arizona.<sup>554</sup> However, the District Court sided with the employer, holding that such information was not "relevant" to the charge at issue because that information could not shed light on whether an evaluation represented a tool of discrimination.<sup>555</sup> On appeal, the Ninth Circuit reviewed the District Court's decision *de novo* and held that the District Court erred in finding the pedigree information irrelevant to the EEOC's investigation.<sup>556</sup>

The Supreme Court granted certiorari to resolve disagreement among appellate courts regarding the standard of review of subpoena enforcement decisions.<sup>557</sup> On review, the Supreme Court noted that, in the absence of explicit statutory command as here, the proper scope of appellate review is based

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<sup>546</sup> *McLane Co., Inc. v. EEOC*, 137 S. Ct. 1159 (2017).

<sup>547</sup> See Gerald Maatman, Jr., Christopher J. DeGroff & Matthew Gagnon, *U.S. Supreme Court Holds That An Abuse-Of-Discretion Standard Applies To Review Of EEOC Subpoenas*, WORKPLACE CLASS ACTION BLOG (Apr. 4, 2017), available at <http://www.workplaceclassaction.com/2017/04/u-s-supreme-court-holds-that-an-abuse-of-discretion-standard-applies-to-review-of-eec-subpoenas/>.

<sup>548</sup> *McLane*, 137 S. Ct. at 1165.

<sup>549</sup> *Id.*

<sup>550</sup> *Id.*

<sup>551</sup> *Id.*

<sup>552</sup> *Id.*

<sup>553</sup> *Id.* at 1166.

<sup>554</sup> *EEOC v. McLane Co., Inc.*, No. 12-CV-2469, 2012 WL 5868959 (D. Ariz. Nov. 19, 2012).

<sup>555</sup> *Id.* at \*5.

<sup>556</sup> *EEOC v. McLane Co., Inc.*, 804 F.3d 1051, 1057 (9th Cir. 2015).

<sup>557</sup> *McLane Co., Inc. v. EEOC*, 137 S. Ct. 30 (2016).

on two factors: (1) the history of appellate practice; and (2) whether one judicial actor is better positioned than another to decide the issue in question.<sup>558</sup>

Regarding the first factor, the Supreme Court noted that abuse-of-discretion review was the longstanding practice of the courts of appeals when reviewing a decision to enforce or quash an administrative subpoena.<sup>559</sup> Regarding the second factor, the Supreme Court held that the decision to enforce or quash an EEOC subpoena is case-specific, and one that does not depend on a neat set of legal rules. Rather, a District Court addressing such issues must apply broad standards to “multifarious, fleeting, special, narrow facts that utterly resist generalization.”<sup>560</sup> In order to determine whether evidence is relevant, the District Court has to evaluate the relationship between the particular materials sought and the particular matter under investigation.<sup>561</sup> These types of fact-intensive considerations are more appropriately made by the District Courts.

The Supreme Court rejected the argument that the District Court’s primary role is to test the legal sufficiency of the subpoena, which does not require the exercise of discretion.<sup>562</sup> The Supreme Court held that this view of the abuse-of-discretion standard was too narrow. The abuse-of-discretion standard is not only applicable where a decision-maker has a broad range of choices as to what to decide, but also to situations where it is appropriate to give a District Court’s decision an unusual amount of insulation from appellate revision for functional reasons.<sup>563</sup> Those functional considerations weighed in favor of the abuse-of-discretion standard rather than a *de novo* standard of review.

After finding that subpoena enforcement decisions should be reviewed for abuse of discretion, the Supreme Court remanded the case to the Ninth Circuit to apply that standard.<sup>564</sup> On remand, the Ninth Circuit applied the more deferential abuse-of-discretion standard to the District of Arizona’s decision.<sup>565</sup> Nonetheless, on May 24, 2017, the Ninth Circuit held that the District Court had abused its discretion by denying enforcement of the EEOC’s subpoena of pedigree information.<sup>566</sup> Specifically, the Ninth Circuit found that the District Court’s formulation of the relevance standard was too narrow.<sup>567</sup> The District Court had found that pedigree information was not relevant to the EEOC’s investigation because the evidence the employer had already produced would “enable the [EEOC] to determine whether the [strength test] systematically discriminates on the basis of gender.”<sup>568</sup> The Ninth Circuit held that this improperly applied a heightened “necessity” standard, rather than the governing relevance standard.<sup>569</sup>

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<sup>558</sup> *McLane*, 137 S. Ct. at 1166-67.

<sup>559</sup> *Id.* at 1167.

<sup>560</sup> *Id.*

<sup>561</sup> *Id.*

<sup>562</sup> *Id.* at 1168-69.

<sup>563</sup> *Id.*

<sup>564</sup> *Id.* at 1170.

<sup>565</sup> See Gerald L. Maatman, Jr., Christopher J. DeGroff and Alex W. Karasik, *Following U.S. Supreme Court Review, Ninth Circuit Remands EEOC Subpoena Case*, WORKPLACE CLASS ACTION BLOG (May 25, 2017), available at <http://www.workplaceclassaction.com/2017/05/following-u-s-supreme-court-review-ninth-circuit-remands-eEOC-subpoena-case/>.

<sup>566</sup> *EEOC v. McLane Co., Inc.*, 857 F.3d 813, 816-17 (9th Cir. 2017).

<sup>567</sup> *Id.* at 816.

<sup>568</sup> *Id.*

<sup>569</sup> *Id.*

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 on the allegations against the employer.”<sup>570</sup> The Ninth Circuit found that the pedigree information was relevant to the EEOC’s investigation since conversations with other McLane employees and applicants who have taken the strength test “might cast light” on the allegations against McLane.<sup>571</sup>

## 2. Cases Upholding A Broad Scope Of The EEOC’s Subpoena Power

The Supreme Court’s decision in *McLane* could be viewed as a setback for employers who hope to challenge the scope of an EEOC subpoena in court. That decision is already having an impact in the lower courts. For example, in *EEOC v. United Parcel Service, Inc.*,<sup>572</sup> the Sixth Circuit affirmed the District Court’s enforcement of a broad subpoena. The charging party, a UPS employee, alleged that UPS improperly discriminated against him on the basis of “medical examinations and inquiries” by publishing private medical information on UPS’s intranet about him, including his conditions, symptoms and the basis for his medical leave.<sup>573</sup> The employee later amended his charge to state that he was “aware that all other employees subject to Health and Safety incident action/reports have had their confidentiality breached in the same manner as me.”<sup>574</sup> The employee also claimed that after disclosing his disability and complaining of discrimination, UPS retaliated against him.<sup>575</sup>

During its investigation, the EEOC requested three categories of information: (i) information about employee injuries and accidents (e.g., nature and location of injury, whether injury or accident was an OSHA type event, and personally identifying information when not identified as a “privacy case”); (ii) UPS’ “privacy case” criteria; and (iii) similar information to its first request, but in a different, updated format.<sup>576</sup> After the EEOC denied UPS’s petition to modify the petition on the grounds that the requested information was irrelevant and unduly burdensome, the EEOC successfully obtained an order from the District Court for the Eastern District of Michigan, commanding UPS to produce all requested information.<sup>577</sup> UPS appealed.

On appeal, the Sixth Circuit affirmed the District Court’s decision to enforce the subpoena in its entirety.<sup>578</sup> The Sixth Circuit based its decision on courts’ “generous construction” of the relevancy requirement, which has “afforded the [EEOC] access to virtually any material that might cast light on the allegations against the employer.”<sup>579</sup> Under that broad standard, the EEOC’s requests for database information were easily relevant to the employee’s charge.<sup>580</sup>

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<sup>570</sup> *Id.*

<sup>571</sup> *Id.* On remand in the District Court, McLane recently moved to deny the EEOC’s petition on the grounds that it is unduly burdensome. *EEOC v. McLane Co., Inc.*, No. 2:12-CV-2469 (D. Ariz. Sept. 8, 2017), ECF No. 64. The District Court has not yet ruled upon that motion.

<sup>572</sup> *EEOC v. United Parcel Service, Inc.*, 859 F.3d 375 (6th Cir. 2017).

<sup>573</sup> *Id.* at 376-77.

<sup>574</sup> *Id.* at 377.

<sup>575</sup> *Id.*

<sup>576</sup> *Id.*

<sup>577</sup> *EEOC v. United Parcel Service, Inc.*, No. 2:16-MC-50588 (E.D. Mich. July 21, 2016), ECF No. 7.

<sup>578</sup> *United Parcel Service, Inc.*, 859 F.3d at 380.

<sup>579</sup> *Id.* at 378 (internal quotations and citations omitted).

<sup>580</sup> *Id.* at 379.

The Sixth Circuit rejected UPS's argument that the EEOC was not entitled to information in the second database because the employee's information had never actually been stored there, explaining that "the EEOC is entitled to evidence that shows a pattern of discrimination other than the specific instance of discrimination described in the charge."<sup>581</sup> The Sixth Circuit also rejected UPS's argument that the EEOC was only entitled to information regarding employees "similarly situated" to the charging party because the EEOC is entitled to any evidence which "provides context for determining whether discrimination has taken place."<sup>582</sup> The Sixth Circuit also affirmed the District Court's decision to allow the EEOC information related to UPS's "privacy case" criteria because such information might reveal UPS's understanding that the information at issue was confidential, which might in turn evidence discrimination by publishing it.<sup>583</sup>

Similarly, in *EEOC v. Union Pacific Railroad Co.*,<sup>584</sup> the Seventh Circuit affirmed the generous relevance standard applicable to EEOC subpoenas. The case arose from two charges of racial discrimination filed by two black railroad employees who were denied the opportunity to take a promotion test.<sup>585</sup> In response to the charges, the railroad provided the EEOC a position statement and a table identifying employees working in the same district as the charging parties and who had applied to take the test.<sup>586</sup> The table identified applicants' race, including six black applicants, and the result of their application.<sup>587</sup> Of the six black applicants, only the charging parties were denied permission to take the test, but no black test-taker was promoted.<sup>588</sup> On the other hand, 10 of 11 white applicants were selected to take the test and all 10 were promoted.<sup>589</sup> In response, the EEOC asked that the railroad produce a copy of the promotion test as well as company-wide information about persons who sought a promotion to the relevant position during the relevant time period.<sup>590</sup> After the railroad refused, the EEOC issued a subpoena and brought suit to enforce it.<sup>591</sup>

During the pendency of the suit in the District Court, the EEOC issued a second request for information to the railroad, this time for information about the railroad's electronic storage systems, additional testing and computer information, and details about others across the company who were similar to the charging party.<sup>592</sup> The railroad again refused to produce the requested information, and the EEOC issued another subpoena and sued to enforce it. The District Court rejected the railroad's relevance objection, granting the EEOC's motion to enforce the subpoena.<sup>593</sup> The railroad appealed.

On appeal, the Seventh Circuit emphasized the generous relevance standard afforded EEOC subpoenas, explaining that the relevance standard is in place merely to prevent "fishing

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<sup>581</sup> *Id.*

<sup>582</sup> *Id.* (internal quotations and citations omitted).

<sup>583</sup> *Id.* at 380.

<sup>584</sup> *EEOC v. Union Pac. R.R. Co.*, 867 F.3d 843 (7th Cir. 2017), *reh'g denied* (Nov. 21, 2017).

<sup>585</sup> *Id.* at 845.

<sup>586</sup> *Id.* at 845-46.

<sup>587</sup> *Id.* at 846.

<sup>588</sup> *Id.*

<sup>589</sup> *Id.*

<sup>590</sup> *Id.*

<sup>591</sup> Before a court decision, the parties reached a settlement whereby the railroad agreed to produce some of the subpoenaed information. However, the EEOC claimed that the railroad never actually produced the promised information. Thereafter, the EEOC issued a right to sue letter and both charging parties jointly filed suit. However, summary judgment was granted against their claims and the Seventh Circuit affirmed. *Id.*

<sup>592</sup> *Id.*

<sup>593</sup> *EEOC v. Union Pacific R.R. Co.*, 102 F.Supp.3d 1037, 1041-42 (E.D. Wis. 2015).

expeditions.”<sup>594</sup> The Seventh Circuit explicitly rejected the narrow view -- espoused by the railroad -- that the EEOC’s request should have been denied because “the information sought extends beyond the allegations in the underlying charges[.]”<sup>595</sup> Because the information sought “might well cast light on the allegations against the employer, the subpoena was proper.”<sup>596</sup> As such, the Seventh Circuit found that the District Court did not abuse its discretion when it ordered the railroad to comply.

These decisions follow a pattern of decisions in recent years respecting the EEOC’s broad investigative authority. For example, in *EEOC v. Aerotek, Inc.*,<sup>597</sup> the Seventh Circuit upheld enforcement of an EEOC subpoena for extensive client information.<sup>598</sup> In that case, the EEOC sought information regarding a staffing company’s placement of workers at client facilities.<sup>599</sup> After the EEOC’s initial review of Aerotek’s information revealed hundreds of allegedly discriminatory job requests by Aerotek’s clients, the EEOC issued another subpoena, seeking client names and worker names and contact information for the 62 facilities having made discriminatory job requests.<sup>600</sup> After the District Court ordered Aerotek to comply with the subpoena, Aerotek then produced the names of the workers and their contact information but did not supply the names of the clients.<sup>601</sup>

The question before the Seventh Circuit was whether the District Court erred in ordering Aerotek to produce the names of more than 22,000 clients.<sup>602</sup> Aerotek argued that the vast majority of the 22,000 clients implicated by the EEOC’s request were not related to the potentially-discriminatory job requests.<sup>603</sup> The Seventh Circuit disagreed, relying on the EEOC’s broad power to investigate on suspicion of ADEA violations without needing to bring a charge.<sup>604</sup> The fact that the EEOC had already identified hundreds of discriminatory requests by Aerotek’s clients gave the EEOC the power to investigate potential discriminatory requests not recorded.<sup>605</sup>

Similarly, in *EEOC v. Maritime Autowash, Inc.*,<sup>606</sup> the Fourth Circuit enforced 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.<sup>607</sup> The Fourth Circuit explained 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.”<sup>608</sup> The Court held that the plain language of Title VII provides that jurisdiction is

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<sup>594</sup> *Union Pac. R.R. Co.*, 867 F.3d at 852.

<sup>595</sup> *Id.*

<sup>596</sup> *Id.*

<sup>597</sup> *EEOC v. Aerotek, Inc.*, 815 F.3d 328, 330 (7th Cir. 2016).

<sup>598</sup> *Id.*; see also *EEOC v. Aerotek, Inc.*, 2011 U.S. Dist. LEXIS 3723 (N.D. Ill. Jan. 12, 2011).

<sup>599</sup> *Aerotek, Inc.*, 815 F.3d at 330.

<sup>600</sup> *Id.*

<sup>601</sup> *Id.* at 331.

<sup>602</sup> *Id.* at 332.

<sup>603</sup> *Id.*

<sup>604</sup> *Id.* at 333 (citing *EEOC v. Sidley Austin Brown & Wood*, 315 F.3d 696, 701 (7th Cir. 2002)).

<sup>605</sup> *Aerotek, Inc.*, 815 F.3d at 333.

<sup>606</sup> *EEOC v. Maritime Autowash, Inc.*, 820 F.3d 662, 663 (4th Cir. 2016).

<sup>607</sup> *Id.* at 666. See Gerald L. Maatman, Jr. and Alex W. Karasik, *Investigating Illegal Aliens’ Charges: Fourth Circuit Says EEOC Can Serve Subpoena On Employer*, WORKPLACE CLASS ACTION BLOG (Apr. 29, 2016), available at <http://www.workplaceclassaction.com/2016/04/investigating-illegal-aliens-charges-fourth-circuit-says-eec-can-serve-subpoena-on-employer/>.

<sup>608</sup> *Maritime Autowash, Inc.*, 820 F.3d at 666.

attained if there is a “plausible” or “arguable” basis for the EEOC’s subpoena.<sup>609</sup> Since the charging party was employed at Maritime’s car wash, the Fourth Circuit reasoned that his charge of discrimination rested squarely on one of the protected grounds.<sup>610</sup> Accordingly, “[t]he EEOC’s investigation . . . was therefore at least plausibly related to the authority that Congress conferred upon the Commission.<sup>611</sup> Importantly, the Fourth Circuit rejected the employer’s argument that a court must ascertain a valid charge of discrimination, which must incorporate a viable cause of action or remedy, as a “jurisdictional prerequisite” to enforcing the agency’s subpoena.<sup>612</sup>

Courts have also enforced EEOC subpoenas for information years after the allegedly discriminatory practice has been discontinued. For example, in *EEOC v. KB Staffing, LLC*,<sup>613</sup> the U.S. District Court for the Middle District of Florida enforced 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.<sup>614</sup> The Court explained that the EEOC maintains discretion to vindicate the public interest in combating systemic discrimination; the EEOC’s authority is not “merely derivative” of the claims asserted by a charging party.<sup>615</sup> The Court did not even challenge the fact that the EEOC had requested information beyond the period covered by the statute of limitations.<sup>616</sup>

### 3. Cases Upholding Restrictions On The Scope Of The EEOC’s Subpoena Power

Despite courts’ continued affirmance of the EEOC’s broad subpoena powers, employers did obtain some notable victories in FY 2017 demonstrating that the EEOC’s powers are not unlimited. For example, in *EEOC v. TriCore Reference Laboratories*,<sup>617</sup> the U.S. Court of Appeals for the Tenth Circuit affirmed a District Court’s refusal to enforce an EEOC subpoena.<sup>618</sup> In that case, a phlebotomist named Kellie Guadiana requested accommodations to her work schedule and responsibilities due to her rheumatoid arthritis, which she asserted was exacerbated by her

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<sup>609</sup> *Id.* Also at issue was Title VII’s definition of “employee,” which does not specifically bar undocumented workers from filing complaints. *Id.*

<sup>610</sup> *Id.*

<sup>611</sup> *Id.* at 665.

<sup>612</sup> *Id.* The Fourth Circuit explained that courts should not venture prematurely into the merits of employment actions that have not been brought. Accordingly, the Fourth Circuit reversed and remanded the District Court’s judgment, holding that when the EEOC is investigating charges plausibly within its delegated powers, the courts should not obstruct. *Id.* at 668. In the district court on remand, Maritime Autowash agreed to produce the documents sought by the EEOC and the parties stipulated to dismissal thereafter. *EEOC v. Maritime Autowash, Inc.*, No. 1:15-CV-869 (D. Md. Aug. 23, 2016), Nos. 12-14.

<sup>613</sup> *EEOC v. KB Staffing, LLC*, No. 14-CV-41, 2014 U.S. Dist. LEXIS 147816 (M.D. Fla. Sept. 16, 2014).

<sup>614</sup> See Gerald L. Maatman, Jr. and Jason J. Englund, *After The Charge Has Gone: Court Gives EEOC Free Reign To Press Systemic Investigation Even After Charging Party Withdraws*, WORKPLACE CLASS ACTION BLOG (Sept. 29, 2014), available at <http://www.workplaceclassaction.com/2014/09/after-the-charge-has-gone-court-gives-eec-free-reign-to-press-systemic-investigation-even-after-charging-party-withdraws/>.

<sup>615</sup> *KB Staffing, LLC*, 2014 U.S. Dist. LEXIS 147816 at \*7-8. In 2016, the EEOC initiated litigation against KB Staffing on behalf of a class of persons subjected to pre-employment medical questioning. See Complaint, *EEOC v. KB Staffing, LLC*, No. 8:16-CV-1088 (M.D. Fla. May 3, 2016), ECF No. 1; see also Amended Complaint, *EEOC v. KB Staffing, LLC*, No. 8:16-CV-1088 (M.D. Fla. Aug. 10, 2017), ECF No. 74. The parties recently entered into, and the court endorsed, a consent decree whereby KB Staffing has agreed to: (i) pay \$22,500 to applicants and employees subjected to the pre-employment medical inquiries at issue; and (ii) various forms of injunctive relief. Consent Decree, *EEOC v. KB Staffing, LLC*, No. 8:16-CV-1088 (M.D. Fla. Aug. 21, 2017), ECF No. 78.

<sup>616</sup> *KB Staffing, LLC*, 2014 U.S. Dist. LEXIS 147816 at \*12-13, n.3.

<sup>617</sup> *EEOC v. TriCore Reference Laboratories*, 849 F.3d 929 (10th Cir. 2017).

<sup>618</sup> See Gerald L. Maatman, Jr., Christopher DeGroff, and Alex W. Karasik, *No Subpoena For You! – Tenth Circuit Says EEOC’s Subpoena Out Of Line*, WORKPLACE CLASS ACTION BLOG (Mar. 2, 2017), available at <http://www.workplaceclassaction.com/2017/03/no-subpoena-for-you-tenth-circuit-says-eec-subpoena-out-of-line/>.

pregnancy.<sup>619</sup> After reviewing the doctors' notes Guadiana submitted in support of her requests, TriCore determined that she could not safely perform the essential functions of her position. TriCore offered Guadiana the opportunity to apply to other positions within the company for which she was qualified and whose essential functions she could perform.<sup>620</sup> After Guadiana did not apply to a new position, TriCore terminated her employment.<sup>621</sup> Guadiana filed an EEOC charge alleging that TriCore discriminated against her due to her disability (rheumatoid arthritis) and sex (pregnancy). In response, TriCore said it provided Guadiana a reasonable accommodation by offering her the chance to apply for other positions.<sup>622</sup>

Based on evidence uncovered during the EEOC's investigation, the EEOC informed TriCore that the scope of its investigation was expanded to include a "[f]ailure to accommodate persons with disabilities and/or failure to accommodate women with disabilities (due to pregnancy)."<sup>623</sup> The EEOC sent TriCore a letter requesting: (1) a complete list of TriCore employees who had requested an accommodation for disability, along with their personal identifying information; and (2) a complete list of TriCore employees who had been pregnant while employed at TriCore, including the employees' personal information and whether they sought or were granted any accommodations.<sup>624</sup> The EEOC sought that information for a four-year time frame. TriCore resisted, contending the EEOC did not have an actionable claim of discrimination.<sup>625</sup> Then, the EEOC submitted another letter seeking the same information but limited to a three-year time frame.<sup>626</sup> After TriCore again refused to comply, the EEOC subpoenaed the information it had sought in its letter. TriCore petitioned the EEOC to revoke the subpoena, arguing it was unduly burdensome and a "fishing expedition." The EEOC denied TriCore's petition.<sup>627</sup>

The EEOC moved to enforce in the District Court.<sup>628</sup> TriCore argued that the information requested was not relevant to Guadiana's charge.<sup>629</sup> The District Court viewed the question as a "close call," but ultimately denied the EEOC's application, noting that the "EEOC's real intent in requesting this [information was], in fact, difficult to pin down."<sup>630</sup> The District Court noted that to the extent the subpoena sought evidence to show TriCore had a pattern or practice of discrimination, Tenth Circuit case law did not support such a request.<sup>631</sup> Further, to the extent the subpoena sought evidence to compare Guadiana with other TriCore employees, the pregnancy request would not provide evidence of relevant comparators.<sup>632</sup> The EEOC appealed.

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<sup>619</sup> *TriCore Reference Laboratories*, 849 F.3d at 934.

<sup>620</sup> *Id.*

<sup>621</sup> *Id.*

<sup>622</sup> *Id.*

<sup>623</sup> *Id.* at 935.

<sup>624</sup> *Id.*

<sup>625</sup> *Id.*

<sup>626</sup> *Id.*

<sup>627</sup> *Id.*

<sup>628</sup> *EEOC v. Tricore Reference Laboratories*, No. 15-MC-46, 2016 WL 6823516 (D.N.M. Feb. 8, 2016).

<sup>629</sup> *Id.* at \*2.

<sup>630</sup> *Id.* at \*5, \*7.

<sup>631</sup> *Id.* at \*7 (citing *EEOC v. Burlington N. Santa Fe R.R.*, 669 F.3d 1154, 1156 (10th Cir. 2012)). In *Burlington*, the Tenth Circuit recognized the "wide deference" given to the scope of EEOC subpoenas, but nonetheless found that the EEOC's request did not "transcend the gap between the pattern and practice investigation and the private claims" at issue. 669 F.3d at 1156.

<sup>632</sup> *Tricore Reference Laboratories*, 2016 WL 6823516, at \*4.

The Tenth Circuit affirmed the District Court.<sup>633</sup> It explained that to show subpoenaed information is relevant, the EEOC must show that it has a realistic expectation that the information will advance its investigation, and must further establish the link between its investigatory power and the charges of discrimination. First, the Tenth Circuit held that the EEOC had not justified its expanded investigation because it had “not alleged anything to suggest a pattern or practice of discrimination beyond TriCore’s failure to reassign Ms. Guadiana.”<sup>634</sup> Second, while the Tenth Circuit agreed with the EEOC that its comparator-evidence pregnancy request might uncover information relevant to Guadiana’s charge, the Tenth Circuit held against the EEOC because it failed to present its relevance arguments to the District Court.<sup>635</sup> Finally, the Tenth Circuit noted that even if the EEOC had raised the arguments in the District Court, its request was nonetheless overbroad because it sought information having no apparent connection to Guadiana’s charge, such as information about pregnant employees who never sought an accommodation.<sup>636</sup>

In another win for employers, in *EEOC v. Southeast Food Services Co., LLC*,<sup>637</sup> the U.S. District Court for the Eastern District of Tennessee refused to enforce an EEOC subpoena for employee contact information.<sup>638</sup> That case arose from a company’s policy of conditioning promotions on employees’ signing a release of present and past claims against the company.<sup>639</sup> When the company failed to promote an employee after she refused to sign the release, she filed an EEOC charge of discrimination and retaliation.<sup>640</sup>

When, during the course of its investigation of the charge, the EEOC learned of the company’s broad practice of conditioning promotions on the release, the EEOC informed the company that it intended to expand the investigation and requested, among other things, information from the company regarding current and former employees who signed the release and had been promoted, including dates of hire, promotion and termination, reasons for termination, and titles, as well as copies of all releases that the company had employees sign during that period.<sup>641</sup> After the company refused to provide the information in response to the request in response to a subpoena, the EEOC filed an application in the District Court to enforce it.

The District Court refused to enforce the subpoena. The Court rejected the EEOC’s argument that it needed the information to contact the employees in order to determine “if those employees gave up any claim[s],” finding such information “irrelevant to resolving Ms. Cordero’s charge.”<sup>642</sup> The Court also rejected the EEOC’s argument that contacting other affected employees was the only way to verify the company’s contention that no other employees refused to sign the release. The Court found it “unclear how another employee’s refusal to sign a release ‘might cast light’ on the instant charge, particularly where there is no dispute that for the past 20 years, all employees have been required to sign a general release of all claims as a condition of promotion.”<sup>643</sup> The Court further

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<sup>633</sup> *TriCore Reference Laboratories*, 849 F.3d at 937.

<sup>634</sup> *Id.* at 939.

<sup>635</sup> *Id.* at 940-41.

<sup>636</sup> *Id.* at 942.

<sup>637</sup> *EEOC v. Se. Food Servs. Co., LLC*, No. 3:16-MC-46, 2017 WL 1155040 (E.D. Tenn. Mar. 27, 2017).

<sup>638</sup> See Gerald L. Maatman, Jr., Mark W. Wallin, and Alex W. Karasik, *Tennessee Court Rejects EEOC’s Supersized Subpoena Served On Fast Food Employer*, WORKPLACE CLASS ACTION BLOG (Mar. 31, 2017), available at <http://www.workplaceclassaction.com/2017/03/tennessee-court-rejects-eEOCs-supersized-subpoena-served-on-fast-food-employer/>.

<sup>639</sup> *Se. Food Servs. Co., LLC*, 2017 WL 1155040, at \*1.

<sup>640</sup> *Id.* at \*1.

<sup>641</sup> *Id.*

<sup>642</sup> *Id.* at \*2.

<sup>643</sup> *Id.* at \*3.

reasoned that the potential unlawfulness of the company's employment practice was not dependent on how many other employees signed a release.<sup>644</sup>

Similarly, in *EEOC v. Austal USA, LLC*, the District Court for the Southern District of Alabama refused to enforce an overbroad subpoena.<sup>645</sup> In that case, the charging party alleged that he was terminated based on his disability after violating his employer's attendance policy.<sup>646</sup> As part of its investigation, the EEOC requested that the employer produce the "names and position titles of all individuals terminated by [the employer] because of the attendance policy, and which of these terminated individuals had a medical disability."<sup>647</sup> When the employer requested an explanation of the relevance of the information given that the charging party had already settled his claim with the employer, the EEOC said it was expanding its investigation to determine if the employer's practices discriminated against disabled individuals as a class.

Thereafter, the employer produced to the EEOC a list of all employees during the relevant time period terminated for violating the attendance policy, but refused to comply with the rest of the EEOC's request.<sup>648</sup> The EEOC responded by requesting that the employer provide mail, email and phone numbers for all persons on that list.<sup>649</sup> The employer refused, but the EEOC did not issue a subpoena until five months later, at which time the employer moved to quash it.<sup>650</sup> The EEOC then withdrew the subpoena.

Eight months later, the EEOC issued a new request for information to the employer, this time asking for even broader contact information and information relating to the persons on the employer's list.<sup>651</sup> The employer again requested an explanation of that information's relevance to the EEOC's investigation, and offered to make itself available for a call or meeting with the EEOC.<sup>652</sup> This prompted the EEOC to issue a subpoena requesting contact information and information regarding requested accommodations of persons on that list, causing the employer to submit a petition to revoke the subpoena.<sup>653</sup>

In response, the EEOC denied the petition and explained that the materials sought were "clearly relevant to whether Petitioner discriminates against individuals because of their medical conditions or disabilities" as the subpoena "seeks specific information about 89 employees identified . . . who were terminated under the same attendance policy used to terminate the Charging Party."<sup>654</sup>

Thereafter, the EEOC moved to enforce the subpoena in the Southern District of Alabama. The Court refused to enforce the subpoena, finding that "the EEOC has not met its burden of demonstrating that the information subpoenaed is relevant to [the charging party]'s charge."<sup>655</sup> Indeed, the Court noted that the EEOC's request "extends beyond those employees with a medical condition or disability terminated under the attendance policy, regardless of whether those

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<sup>644</sup> *Id.*

<sup>645</sup> *EEOC v. Austal USA, LLC*, No. 17-00006, 2017 WL 4563078 (S.D. Ala. Aug. 18, 2017).

<sup>646</sup> *Id.* at \*1-2.

<sup>647</sup> *Id.* at \*3.

<sup>648</sup> *Id.* at \*4.

<sup>649</sup> *Id.*

<sup>650</sup> *Id.*

<sup>651</sup> *Id.* at \*4-5.

<sup>652</sup> *Id.* at \*4.

<sup>653</sup> *Id.* at \*6.

<sup>654</sup> *Id.*

<sup>655</sup> *Id.* at \*11.

employees had a disability or medical condition and no matter the nature of any accommodation requested.”<sup>656</sup> The Court found that the EEOC’s justifications for the wide-ranging requests pertained to the EEOC’s self-stated expansion of the charging party’s charge to a pattern or practice investigation. This, the Court explained, is an improper attempt to “use [the charging party]’s charge as a backdoor means to obtain information that is more appropriately available through other administrative vehicles,” i.e., a Commissioner’s charge to that end.<sup>657</sup> Indeed, the Court found that if it were to allow subpoenas of such sweeping information based on the notion that the charging party’s charge “might” be a part of a pattern or practice of discrimination, the relevance requirement would be rendered a “nullity.”<sup>658</sup>

These wins for employers build on a body of other decisions issued in recent years that have been more favorable to employers. For example, in *EEOC v. Royal Caribbean Cruises, Ltd.*,<sup>659</sup> the Eleventh Circuit upheld the Southern District of Florida’s refusal to enforce an EEOC subpoena because the information sought was irrelevant to the charge at issue and was unduly burdensome.<sup>660</sup> Royal Caribbean admitted to discharging an employee based on his medical condition, but argued that the ADA was inapplicable as the charging party was a foreign national who worked on a ship that operated in the Bahamas, and because the Bahamas Maritime Authority’s (“BMA”) medical standards – which Royal Caribbean is required to follow – mandated discharge given the employee’s diagnosis.<sup>661</sup> The EEOC subpoenaed a list of all employees discharged due to a medical reason for the year preceding the filing of the charge, including the employees’ personnel files, contact information, and information about those responsible for hiring/firing each employee.<sup>662</sup> The EEOC also requested information for anyone Royal Caribbean did not hire because of a medical reason.<sup>663</sup>

The Eleventh Circuit cautioned that the EEOC’s subpoena power should not be construed “so broadly that the relevancy requirement is rendered a nullity.”<sup>664</sup> The Eleventh Circuit determined that the disputed information did not concern the charging party but was rather an attempt to discover a potential class of employees.<sup>665</sup> Although statistical and comparative data may be relevant in such cases, the EEOC must make “some showing that the requested information bears on the subject matter of the individual complaint.”<sup>666</sup> The EEOC failed to make that showing.<sup>667</sup>

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<sup>656</sup> *Id.* at \*10.

<sup>657</sup> *Id.*

<sup>658</sup> *Id.*

<sup>659</sup> *EEOC v. Royal Caribbean Cruises, Ltd.*, 771 F.3d 757 (11th Cir. 2014).

<sup>660</sup> See Gerald Maatman, Jr. and Howard M. Wexler, *Eleventh Circuit Refuses To Enforce EEOC’s Broad Subpoena*, WORKPLACE CLASS ACTION BLOG (Nov. 7, 2015), available at <http://www.workplaceclassaction.com/2014/11/eleventh-circuit-refuses-to-enforce-eEOCs-broad-subpoena/>.

<sup>661</sup> 771 F. 3d at 759. In 2010, Royal Caribbean discharged an Argentinean national employed as an assistant waiter on one of its cruise ships because he was diagnosed with HIV and Kaposi Sarcoma. *Id.*

<sup>662</sup> *Id.* at 759-60.

<sup>663</sup> *Id.* at 760.

<sup>664</sup> *Id.*

<sup>665</sup> *Id.* at 760–61.

<sup>666</sup> *Id.* at 761. The Eleventh Circuit also rejected the EEOC’s argument that it was entitled to expand its investigation. *Id.* The court explained that “the relevance that is necessary to support a subpoena for the investigation of an individual charge is relevance to the contested issues that must be decided to resolve that charge, not relevance to issues that may be contested when and if future charges are brought by others.” *Id.*

<sup>667</sup> *Id.* at 762. The Eleventh Circuit acknowledged that the EEOC has the ability to file a Commissioner’s charge alleging a pattern or practice of discrimination that could support a request for the broad scope of information that it sought. However, it rejected the EEOC’s apparent attempt to short circuit this process. The court also held that the burden of producing the requested information outweighed the “limited need” of the subpoenaed information. *Id.*

Similarly, in *EEOC v. Forge Industrial Staffing Inc.*<sup>668</sup> the U.S. District Court for the Southern District of Indiana rejected an EEOC subpoena for information that the EEOC argued was related to the “overall conditions of the workplace.”<sup>669</sup> In that case, after a former employee alleged sexual harassment and retaliation, the EEOC sought all employment applications for roughly a two and a half year period because the applications purportedly required employees to agree to file all employment-related claims within six months of the event, except as prohibited by law.<sup>670</sup>

The Court recognized that accepting the EEOC’s “overall condition of the workplace” argument would eviscerate the meaning of “relevance” because it would allow the EEOC to subpoena any information about a company.<sup>671</sup> Although the EEOC has a broad mandate to promote the public interest and is often allowed to seek to remedy violations not alleged in a charge,<sup>672</sup> Title VII plainly requires that the information sought bear some relevance to the charge under investigation.

#### 4. Cases Addressing The Methods Used By The EEOC To Investigate Charges

Although most decisions regarding the EEOC’s subpoena power revolve around questions about *what information* the EEOC can seek, a number of decisions have addressed how the EEOC is permitted to conduct the investigation itself. For example, in *EEOC v. Nucor Steel Gallatin, Inc.*,<sup>673</sup> the District Court of the Eastern District of Kentucky allowed the EEOC to conduct a warrantless, non-consensual search of private commercial property of an employer charged with hiring discrimination.<sup>674</sup> The Court rejected the employer’s argument that, regardless of whether the EEOC has the statutory right to enter private commercial property, that entry cannot take place without an administrative warrant.<sup>675</sup> The Court noted that courts have long recognized that a warrant is not necessary if the enforcement procedures contained in the relevant statute and regulation provide safeguards roughly equivalent to those contained in traditional warrants.<sup>676</sup>

The Court found that the EEOC’s regulatory scheme provided safeguards roughly equivalent to those found in traditional warrants, explaining 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.’”<sup>677</sup> Having concluded that a formal judicial warrant was not required, the Court then rejected Gallatin’s

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<sup>668</sup> *EEOC v. Forge Indus. Staffing Inc.*, No. 1:14-MC-90-SEB-MJD, 2014 WL 6673574 (S.D. Ind. Nov. 24, 2014).

<sup>669</sup> See Christopher DeGroff, Paul Kehoe, and Gerald L. Maatman, Jr., “One Step Too Far” – Court Shoots Down The EEOC’s Kitchen Sink Subpoena, WORKPLACE CLASS ACTION BLOG (Nov. 25, 2014), available at <http://www.workplaceclassaction.com/2014/11/one-step-too-far-court-shoots-down-the-eecocs-kitchen-sink-subpoena/>.

<sup>670</sup> *Forge Indus. Staffing Inc.*, 2014 WL 6673574, at \*1.

<sup>671</sup> *Id.* at \*3.

<sup>672</sup> *Id.* at \*6-7.

<sup>673</sup> *EEOC v. Nucor Steel Gallatin, Inc.*, No. CR 15-53-GFVT, 2016 WL 1704542, at \*1 (E.D. Ky. Apr. 28, 2016).

<sup>674</sup> The facts in *Nucor* are straightforward. The EEOC sought a ruling authorizing it to enter the private commercial property of defendant employer Nucor Steel Gallatin, Inc. (“Gallatin”), without Gallatin’s consent and without an administrative warrant, to investigate a hiring discrimination claim. In response, Gallatin argued that, regardless of whether the EEOC has the statutory right to enter private commercial property, that entry cannot take place without an administrative warrant.

<sup>675</sup> *Nucor Steel Gallatin, Inc.*, 2016 WL 1704542, at \*1.

<sup>676</sup> *Id.*

<sup>677</sup> *Id.*

arguments that an on-site visit would be irrelevant to the EEOC's investigation, overbroad, and unduly burdensome.<sup>678</sup>

Other courts have been more willing to impose restrictions on the EEOC's regulatory power. In *EEOC v. Homenurse, Inc.*,<sup>679</sup> the EEOC was investigating a charge alleging that the charging party's former employer discriminated against people based on race, age, disability, and genetic information.<sup>680</sup> Instead of requesting information in the normal course of its investigation, the EEOC carried out an unannounced, FBI-like raid in which it showed up at the former employer and began rifling through the company's files, many of which contained information protected by HIPAA.<sup>681</sup> The EEOC's investigators confiscated some of the documents it found.<sup>682</sup> When the EEOC tried to enforce another subpoena on the employer, the District Court for the Northern District of Georgia quashed the subpoena and called the raid on the employer "highly inappropriate."<sup>683</sup>

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<sup>678</sup> *Id.*

<sup>679</sup> *EEOC v. Homenurse, Inc.*, No. 1:13-CV-2927, 2013 U.S. Dist. LEXIS 147686, at \*1 (N.D. Ga. Sept. 30, 2013);

<sup>680</sup> See Christopher DeGross and Reema Kapur, *Office Crashers: Another Court Reigns In EEOC Subpoena Authority Run Amok*, WORKPLACE CLASS ACTION BLOG (Oct. 3, 2013), <http://www.workplaceclassaction.com/2013/10/office-crashers-another-court-reigns-in-eEOC-subpoena-authority-run-amok/>.

<sup>681</sup> *Homenurse, Inc.*, 2013 U.S. Dist. LEXIS 147686, at \*3-4.

<sup>682</sup> *Id.* at \*4.

<sup>683</sup> *Id.*

## How Long Is Conciliation Likely To Last?

You've just received a letter of determination. How long can you expect the EEOC to engage in conciliation?



The median time spent by the EEOC to conciliate a charge before sending notice that conciliation has failed is **72 days**.

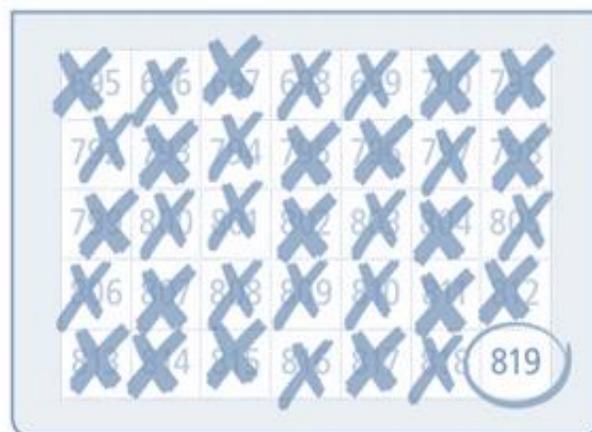
After that, the time frames becomes more variable.

### 6 DAYS



The shortest conciliation in our analysis

### 819 DAYS



The longest conciliation in our analysis

## C. Conciliation Phase

If the EEOC finds that there is reasonable cause to believe that an employer violated one of the statutes, the District Director will issue a determination letter.<sup>684</sup> The EEOC is then required by law to “endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion” before it may bring a lawsuit in court.<sup>685</sup> Determination letters include an invitation to participate in conciliation efforts.

Although the determination identifies the nature of the alleged violations and generally those who the EEOC believes were harmed by the employer’s conduct, the descriptions provided by the EEOC in its determinations are often so general as to leave the employer wondering the basis for the EEOC’s decision. Where class-wide violations have been found, it is often not clear even who the EEOC considers to be included in the class. These vagaries pose a significant hurdle to employers trying to evaluate the charges for conciliation purposes.

While the EEOC publishes a great number of statistics about the volume of charges and litigation matters it brings, it has never reported information that shows how long a charge typically is in the pipeline before it reaches litigation. Seyfarth Shaw has analyzed and collected information from nearly 300 complaints filed around the country by the EEOC from 2015 through September 2017. From that data, we could roughly calculate how long it takes for the EEOC to move from step to step, as well as the relative pace of the EEOC district offices.<sup>686</sup>

According to our analysis, the median time spent in conciliation is 64 days. For most employers, the EEOC will declare that conciliation has failed in three months or less. Nonetheless, about 5% of the time, conciliation lasts for a year or more. Employers are more likely to spend longer in conciliation when dealing with the EEOC’s district offices in New Orleans, Phoenix, Miami, Chicago, and Birmingham. Conciliation moves faster in the EEOC’s district offices in Baltimore, Little Rock, Detroit, Atlanta, and Kansas City. Notably, the trend line points to shorter periods of conciliation since the change in administration. It is unclear at this time whether that trends reflects a deliberate change at the agency.

The common assumption among employers is that it is a race to the courthouse once the EEOC deems conciliation failed. Our analysis suggests otherwise, though here too the trend is toward faster disposition. About 28% of complaints are filed within the first month after notice that conciliation has failed. The median time from the notice of conciliation failure to filing of a complaint is about two times that amount: 64 days. However, since the new administration came into power, the median time has dropped by nearly two weeks to just 51 days. The quickest to file are the EEOC district offices in Kansas City, New Orleans, Little Rock, and Oklahoma City. The EEOC moves most slowly in its district offices in Phoenix, St. Louis, Birmingham, and Dallas.

Taking both of these figures together, how much time can an employer expect to pass from determination to the start of litigation? Over the entire period for which there is data, the typical

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<sup>684</sup> 29 C.F.R. § 1601.21.

<sup>685</sup> 42 U.S.C. § 2000e-5(b). The ADEA also requires the EEOC to engage in conciliation prior to suit: “Before instituting any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.” 29 U.S.C. § 626(b). The ADA requires the EEOC to follow the procedures set forth in Title VII. 42 U.S.C. § 12117(a).

<sup>686</sup> For an earlier version of this analysis, see Gerald L. Maatman, Jr., Andrew Scroggins, and Christopher DeGroff, *New Study Of EEOC Enforcement: Demystifying EEOC Determination, Conciliation & Litigation Timeline*, *Workplace Class Action Blog* (May 23, 2017), <http://www.workplaceclassaction.com/2017/05/new-study-of-eeoc-enforcement-demystifying-eeoc-determination-conciliation-litigation-timeline/>.

employer will have about five months (159 days) before the complaint is filed. However, since the change in administration, that number has dropped sharply to under four months (115 days). A small number of matters (about 2%) went from determination to complaint in less than one month. Charges move most quickly to court in the EEOC's district offices in Kansas City, Little Rock, and Baltimore. The EEOC moves most slowly in its district offices in Phoenix, Birmingham, Dallas, and Miami, where matters on average nearly a year to proceed from determination to complaint.

The pace of moving from determination to complaint has been quickening as well. Over the full range of data we have collected, the median time is more than two months. Over the last six months of the EEOC's most recent fiscal year, however, that figure dropped to just 46 days, cutting more than two weeks off the time that employers could predict would be available to prepare.

## 1. The *Mach Mining* Decision And Its Impact

Over the years, many employers argued that the EEOC has failed to meaningfully engage in the conciliation process in violation of its statutory obligation to conciliate prior to bringing suit. In response, the EEOC argued that its alleged failure to conciliate cannot justify dismissal of the lawsuit because, according to the EEOC, the manner in which it conducts its statutorily-required conciliation process is immune from judicial oversight or review.<sup>687</sup>

On April 29, 2015, the U.S. Supreme Court decided *Mach Mining, LLC v. EEOC*,<sup>688</sup> which unanimously rejected the EEOC's view that its statutorily-required conciliation activities are not reviewable by the courts, while at the same time strictly limited the scope of that review. Before *Mach Mining*, the circuits were split on this issue. The Fourth, Sixth and Tenth Circuits allowed district courts to review the EEOC's conciliation efforts to determine whether those efforts met a minimal level of good faith.<sup>689</sup> The Second, Fifth and Eleventh Circuits applied a three-part test to evaluate the EEOC's conciliation efforts.<sup>690</sup> This test required a district court to assess whether the EEOC: (1) outlined to the employer its cause for believing Title VII had been violated, (2) gave the employer a chance to comply voluntarily, and (3) responded in a reasonable and flexible manner to the reasonable attitudes of the employer.<sup>691</sup>

In December 2013, the U.S. Court of Appeals for the Seventh Circuit broke with other circuits and held that employers could not use the EEOC's failure to conciliate as an affirmative defense to the merits of an employment discrimination suit brought by the Commission.<sup>692</sup> The court pointed to an

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<sup>687</sup> Gerald L. Maatman, Jr. and Rebecca Bjork, *The EEOC's Most Important Brief Of The Year Filed With The U.S. Supreme Court— The Lines Are Drawn In The Mach Mining Appeal*, WORKPLACE CLASS ACTION BLOG (Oct. 28, 2014), <http://www.workplaceclassaction.com/2014/10/the-eeocs-most-important-brief-of-the-year-filed-with-the-u-s-supreme-court-the-lines-are-drawn-in-the-mach-mining-appeal/>.

<sup>688</sup> *Mach Mining v. EEOC*, 135 S. Ct. 1645 (2015). In addition to the briefs submitted by the parties, on September 11, 2014, Seyfarth Shaw LLP submitted an *amicus* brief in support of Mach Mining's position on behalf of the American Insurance Association ("AIA"). See Gerald L. Maatman, Jr., Lorie Almon, Rebecca Bjork, and Christopher DeGroff, *The Defense Amicus Briefs Submitted To The SCOTUS In EEOC v. Mach Mining*, WORKPLACE CLASS ACTION BLOG (Sept. 11, 2014), <http://www.workplaceclassaction.com/2014/09/the-defense-amicus-briefs-submitted-to-the-scotus-in-eeoc-v-mach-mining/>.

<sup>689</sup> See, e.g., *EEOC v. Keco Indus., Inc.*, 748 F.2d 1097, 1102 (6th Cir. 1984); *EEOC v. Radiator Specialty Co.*, 610 F.2d 178, 183 (4th Cir. 1979); *EEOC v. Zia Co.*, 582 F.2d 527, 533 (10th Cir. 1978).

<sup>690</sup> See, e.g., *EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256, 1259 (11th Cir. 2003); *EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529, 1534 (2d Cir. 1996); and *EEOC v. Klinger Elec. Corp.*, 636 F.2d 104, 107 (5th Cir. 1981).

<sup>691</sup> *Asplundh Tree Expert Co.*, 340 F.3d at 1259.

<sup>692</sup> See *Mach Mining, LLC v. EEOC*, 738 F.3d 171, 172 (7th Cir. 2013); see also Gerald L. Maatman, Jr., Jennifer A. Riley, and Rebecca S. Bjork, *SCOTUS Agrees To Consider Scope Of The EEOC's Statutory Duty To Conciliate*, WORKPLACE CLASS ACTION BLOG (June 30, 2014), <http://www.workplaceclassaction.com/2014/06/scotus-agrees-to-consider-scope-of-the-eeocs-statutory-duty-to-conciliate/>.

earlier Seventh Circuit decision, *EEOC v. Caterpillar, Inc.*,<sup>693</sup> which held that the EEOC's probable cause decision is generally not reviewable.<sup>694</sup> Relying on that decision, the Seventh Circuit held that "Title VII contains no express provision" for this defense and that "conciliation is an informal process entrusted solely to the EEOC's expert judgment and that the process is to remain confidential."<sup>695</sup> The court concluded that there was no affirmative defense for "failure-to-conciliate" and that a court should look no further than the face of the complaint to determine that the EEOC had pled that it met its conciliation obligation.<sup>696</sup> On June 30, 2014, the Supreme Court granted certiorari to review that decision.<sup>697</sup>

In a unanimous opinion authored by Justice Kagan, the Supreme Court held that there is a "strong presumption favoring judicial review of administrative action," and "[c]ourts routinely enforce such compulsory prerequisites to suit in Title VII litigation."<sup>698</sup> Absent the federal courts' power to review the EEOC's conciliation efforts, "the Commission's compliance with the law would rest in the Commission's hands alone," which would be contrary to "the Court's strong presumption in favor of judicial review of administrative action."<sup>699</sup> Justice Kagan wrote that, "the point of judicial review is instead to *verify* the EEOC's say-so," and to "determine that the EEOC actually, and not purportedly" met its obligations.<sup>700</sup>

Critically, the Supreme Court acknowledged that conciliation is a crucial step in realizing Title VII's legislative goals of making "cooperation and voluntary compliance" the "preferred means" of "bringing employment discrimination to an end."<sup>701</sup> The statute "provides certain concrete standards pertaining to what [conciliation] must entail," and specifies the EEOC's obligation to engage in "informal methods of conference, conciliation, and persuasion" regarding the "alleged unlawful employment practice."<sup>702</sup> According to the Supreme Court, that means that the EEOC must "tell the employer about the claim – essentially, what practice has harmed which person or class – and must provide the employer with an opportunity to discuss the matter in an effort to achieve voluntary

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<sup>693</sup> *EEOC v. Caterpillar, Inc.*, 409 F.3d 831 (7th Cir. 2005).

<sup>694</sup> *Id.* at 833. In that case, the EEOC had investigated a single charge of discrimination, but later concluded that it had "reasonable cause to believe that Caterpillar discriminated against [the charging party] and a class of female employees, based on their sex." *Id.* at 832. Caterpillar challenged the EEOC's probable cause determination on the basis that the allegations of plant-wide discrimination were unrelated to the charging party's charge. *Id.* The Seventh Circuit addressed the following question: "[i]n determining whether the claims in an EEOC complaint are within the scope of the discrimination allegedly discovered during the EEOC's investigation, must the court accept the EEOC's Administrative Determination concerning the alleged discrimination discovered during its investigation, or instead, may the court itself review the scope of the investigation?" *Id.* The Seventh Circuit ultimately held that the EEOC's decision concerning the existence of probable cause to sue is generally not reviewable by the courts. *Id.* at 833.

<sup>695</sup> *Mach Mining*, 738 F.3d at 174; see also SCOTUS Agrees To Consider Scope Of The EEOC's Statutory Duty To Conciliate, *supra* note 695.

<sup>696</sup> *Id.* at 184; see also Christopher DeGroff, Gerald L. Maatman, Jr., and Howard M. Wexler, *Seventh Circuit Gives Employers A Lump Of Coal And Says Bye-Bye To Failure To Conciliate Defense*, WORKPLACE CLASS ACTION BLOG (Dec. 21, 2013), <http://www.workplaceclassaction.com/2013/12/seventh-circuit-gives-employers-a-lump-of-coal-and-says-bye-bye-to-failure-to-conciliate-defense/>.

<sup>697</sup> *Mach Mining, LLC v. EEOC*, 738 F.3d 171 (7th Cir. 2013).

<sup>698</sup> *Mach Mining*, 135 S. Ct. at 1651 (internal quotation omitted).

<sup>699</sup> *Id.* at 1652–53.

<sup>700</sup> *Id.* at 1653 (emphasis in original).

<sup>701</sup> *Id.* at 1651 (internal quotation omitted).

<sup>702</sup> *Id.*

compliance.”<sup>703</sup> The Court concluded that, “[i]f the Commission does not take those specified actions, it has not satisfied Title VII’s requirement to attempt conciliation.”<sup>704</sup>

A court reviewing the EEOC’s conciliation efforts must be satisfied that the EEOC has actually gone through that process, but the scope of that review is narrow.<sup>705</sup> The Supreme Court held that an affidavit stating that it has performed its obligations would usually suffice to establish that the obligation had been fulfilled.<sup>706</sup> If the employer counters with a credible affidavit or other evidence that demonstrates that the EEOC “did not provide the requisite information about the charge or attempt to engage in a discussion about conciliating the claim,” then a federal court must conduct the fact-finding necessary to decide that dispute.<sup>707</sup> If the court finds that the EEOC’s efforts were inadequate, then the case should be stayed so that the EEOC can undertake the necessary efforts to satisfy its conciliation requirement.<sup>708</sup>

Although the Supreme Court held in no uncertain terms that the EEOC is not above the law – its conciliation efforts must comply with Title VII and they are subject to judicial review – the strict scope of that review has affectively stymied this defense for employers. Since *Mach Mining*, the EEOC has aggressively challenged the use of “failure-to-conciliate” at an early stage of the case.<sup>709</sup> At this juncture, absent unique factual circumstances, a growing majority of district courts have sided with the EEOC, rejecting employers’ attempt to raise this defense.

#### **a. District Court Decisions Holding That The Conciliation Obligation Had Been Met**

Despite early victories for employers, after *Mach Mining* a growing number of courts reject employers’ use of the failure to conciliate defense. Most courts have concluded that the EEOC satisfied its obligation to conciliate if there is any evidence of an actual attempt to reach resolution by negotiation.

In *Mach Mining* itself, on remand, the District Court for the Southern District of Illinois granted the EEOC’s motion for partial summary judgment regarding Mach Mining’s conciliation defense, as well as its motion to strike portions of Mach Mining’s opposition.<sup>710</sup> The motion was granted because, according to the court, Mach Mining’s opposition “indicate[d] the positions of the parties and provide[d] specific actions of the EEOC during conciliation.”<sup>711</sup> The Court then held that the EEOC had satisfied its conciliation obligation because its letter of determination properly described what Mach Mining had allegedly done and which individuals (or class) had suffered as a result.<sup>712</sup> The affidavit that Mach Mining submitted to establish the conciliation defense only “indicate[d] that the EEOC did not provide the requisite information about the charge or attempt to engage in a

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<sup>703</sup> *Id.* at 1652.

<sup>704</sup> *Id.*

<sup>705</sup> See, e.g., *Supreme Court Victory For Employers Today In Mach Mining v. EEOC*.

<sup>706</sup> *Mach Mining*, 135 S. Ct. at 1656.

<sup>707</sup> *Id.*

<sup>708</sup> *Id.*

<sup>709</sup> See, e.g., *EEOC v. New Prime, Inc.*, 42 F. Supp. 3d 1201 (W.D. Mo. 2014); *EEOC v. Bass Pro Outdoor World, LLC*, No. 4:11-CV-3425, 2013 WL 5515345 (S.D. Tex. Oct. 2, 2013); *EEOC v. Riverview Animal Clinic, P.C.*, 761 F. Supp. 2d 1296 (N.D. Ala. 2010).

<sup>710</sup> See Gerald L. Maatman, Jr., Christina M. Janice, and Alex W. Karasik, *Mach Mining Part 3: Supreme Court Gem Resurfaces In Southern District Of Illinois*, WORKPLACE CLASS ACTION BLOG (Jan. 25, 2016), <http://www.workplaceclassaction.com/2016/01/mach-mining-part-3-supreme-court-gem-resurfaces-in-southern-district-of-illinois/>.

<sup>711</sup> *Mach Mining, LLC*, 161 F. Supp. 3d at 635.

<sup>712</sup> *Id.* at 637.

discussion about conciliating the claim. . . . [It] only indicates that the EEOC did not provide all the information that Mach Mining requested and not that it failed to provide the requisite information.”<sup>713</sup>

Likewise, in *EEOC v. UPS*,<sup>714</sup> a systemic case alleging religious discrimination under Title VII, the Court struck the employer’s affirmative defense that the EEOC failed to conciliate in good faith with respect to claimants allegedly identified after the conciliation process.<sup>715</sup> The employer argued that its affirmative defense should be preserved because “the EEOC could not have conciliated the claims of yet-unidentified applicants and employees against whom Defendant allegedly discriminated after the EEOC issued its Letter of Determination.”<sup>716</sup> The court rejected this argument, finding that neither the Supreme Court nor the Second Circuit has held or suggested that the EEOC must disclose the specific identities or number of aggrieved individuals prior to litigation.<sup>717</sup>

The Court reasoned that although the EEOC must disclose to the employer before litigation the claims that are subsequently raised, there is a difference between disclosing the alleged unlawful conduct and identifying specific aggrieved persons.<sup>718</sup> Indeed, the court found that after *Mach Mining*, the EEOC is not precluded from identifying new claimants within the scope of the claims that were investigated, disclosed and conciliated.<sup>719</sup> In any event, the Court held that insofar as it was permitted to review the parties’ conciliation efforts post-*Mach Mining*, the parties’ exchange of 17 letters and an in-person meeting satisfied the requirements of *Mach Mining*.<sup>720</sup> Moreover, the court found that the EEOC had properly attempted to conciliate on behalf of the class, as its Letter of Determination indicated that it was seeking relief on behalf of a nationwide class of employees and applications adversely affected by the employer’s policies.<sup>721</sup>

On April 10, 2017, the District Court for the Northern District of Illinois similarly rejected an employer’s failure to conciliate defense.<sup>722</sup> In *EEOC v. Dolgencorp, LLC*,<sup>723</sup> the court granted summary judgment in favor of the EEOC on the employer’s affirmative defense, which contended that the suit should not continue because the EEOC failed to satisfy its pre-suit obligation to conciliate.<sup>724</sup> The employer argued that the EEOC had failed to give it adequate notice of the

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<sup>713</sup> *Id.* at 638.

<sup>714</sup> *EEOC v. UPS*, No. 1:15-CV-4141, 2017 U.S. Dist. LEXIS 101564 (E.D.N.Y. June 29, 2017).

<sup>715</sup> *Id.* at \*28.

<sup>716</sup> *Id.* at \*19.

<sup>717</sup> *Id.* at \*24-25

<sup>718</sup> *Id.*

<sup>719</sup> *Id.* at \*25, (citing *Arizona ex rel. Horne v. Geo Grp., Inc.*, 816 F.3d 1189, 1200 (9th Cir. 2016) (“The Supreme Court did not articulate any further requirement of individual conciliation prior to bringing a law suit on behalf of a class of individuals. Accordingly, we will not impose any additional pre-suit conciliation requirement.”); *EEOC v. United Health Programs of Am., Inc.*, 213 F. Supp. 3d 377, 403 (E.D.N.Y. 2016) (holding that “the EEOC was not precluded from identifying new claimants (whose claims were effectively identical to the claims of the pre-existing claimants) after filing this action”); *cf. EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657, 675-76 (8th Cir. 2012) (finding that the EEOC did not fulfill its investigative obligation because it “did not investigate the specific allegations of any of the 67 allegedly aggrieved persons . . . until after the Complaint was filed”); *see generally EEOC v. Sterling Jewelers, Inc.*, 801 F.3d 96, 100 (2d Cir. 2015) (relying on *Mach Mining* to circumscribe judicial review of the EEOC’s investigation procedure and finding that, where the EEOC “interviewed at least one [c]harging [p]arty,” performed a statistical analysis and “requested and obtained numerous documents relating to the charges,” it had satisfied its Title VII obligation to investigate).

<sup>720</sup> *Id.* at \*26-27.

<sup>721</sup> *Id.* at \*27.

<sup>722</sup> See Gerald L. Maatman, Jr., Christopher J. DeGross, and Alex W. Karasik, Denial Of Defenses: Illinois Court OK’s EEOC’s Pre-Suit Procedures, Workplace Class Action Blog (Apr. 12, 2017), available at <http://www.workplaceclassaction.com/2017/04/denial-of-defenses-illinois-court-oks-eEOCs-pre-suit-procedures/>.

<sup>723</sup> *EEOC v. Dolgencorp, LLC*, No. 1:13-CV-4307, 2017 U.S. Dist. Lexis 54634 (N.D. Ill. 2017).

<sup>724</sup> *Id.* at \*7;

discrimination allegations and had failed to adequately engage it in conciliation discussions.<sup>725</sup> In particular, Dolgencorp asserted that the EEOC had not given it notice of the specific individuals allegedly harmed or the allegedly discriminatory practice.<sup>726</sup>

The Court disagreed, finding that the EEOC's letters clearly gave the employer notice because the letters expressly set forth that African-American employees and applicants had been harmed by the employer's discriminatory background check policy.<sup>727</sup> Further, the court noted that although it may be advisable for the EEOC to provide more detailed notice, under *Mach Mining*, the court's review is "barebones" and not intended to second guess the Commission's discretion.<sup>728</sup>

Likewise, the Court rejected Dolgencorp's argument that the EEOC's conciliation efforts were not adequate because the EEOC failed to provide it with sufficient information to be able to remedy the allegedly discriminatory practices.<sup>729</sup> Here too the court applied *Mach Mining*, reasoning that its review of the conciliation communications was "extremely narrow" and the it would only look to whether the EEOC attempted to conciliate – not what happened during conciliation.<sup>730</sup> Under this rubric, the Court found the EEOC had sufficiently attempted to conciliate because the parties had written and oral communications regarding the alleged discrimination for over ten months.<sup>731</sup>

The District Court for the Eastern District of New York took a similar tack in *EEOC v. AZ Metro Distributors, LLC*,<sup>732</sup> when the District Judge adopted the Magistrate's Report and Recommendation<sup>733</sup> to strike the employer's affirmative defenses that the EEOC failed to adequately investigate and conciliate in good faith prior to initiating litigation.<sup>734</sup> Relying on *Mach Mining* and Second Circuit precedent, the Magistrate reasoned that because the EEOC produced its investigative file, submitted a declaration indicating that the EEOC had conducted an investigation, and appended its determination letters, the Commission had, in fact, investigated and attempted to conciliate – and any argument regarding the sufficiency of those efforts would be frivolous.<sup>735</sup> The Magistrate's Report and Recommendation, adopted by the District Court, held that the adequacy or

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<sup>725</sup> *Id.* at \*8.

<sup>726</sup> *Id.* at \*9.

<sup>727</sup> *Id.* at \*13.

<sup>728</sup> *Id.* See also *EEOC v. Columbine Health Sys.*, No. 15-CV-01597, 2017 U.S. Dist. LEXIS 152986, \*23-24 (D. Colo. Sept. 19, 2017) (rejecting defendants' argument that EEOC failed to conciliate where defendant alleged that EEOC failed to convey settlement offers to the claimants, because, after *Mach Mining*, courts should not impose particular requirements on the EEOC regarding how it chooses to conciliate).

<sup>729</sup> *Id.*

<sup>730</sup> *Id.* at \*14. The Court further refused to examine the sufficiency of the EEOC's investigation, stating that it was beyond the scope of its review. *Id.*

<sup>731</sup> *Id.*

<sup>732</sup> *EEOC v. AZ Metro Distributors, LLC*, No. 1:15-CV-5370, 2017 U.S. Dist. LEXIS 132447 (E.D.N.Y. Aug. 9, 2017). Defendant filed a notice of appeal with the Second Circuit Court of Appeals on October 13, 2017 (ECF No. 122).

<sup>733</sup> *EEOC v. AZ Metro Distributors, LLC*, No. 1:15-CV-5370, 2016 U.S. Dist. LEXIS 176918 (E.D.N.Y. Dec. 20, 2016).

<sup>734</sup> *AZ Metro Distributors, LLC*, 2017 U.S. Dist. LEXIS 132447, \*5.

<sup>735</sup> *AZ Metro Distributors, LLC*, 2016 U.S. Dist. LEXIS 176918, at \*14-15 (citing a previous order of the District Court, *EEOC v. AZ Metro Distributors, LLC*, 2016 U.S. Dist. LEXIS 124009, \*6 (E.D.N.Y., September 6, 2016)). The Court cited the Second Circuit's decision in *EEOC v. Sterling Jewelers Inc.*, 801 F.3d 96 (2d Cir. 2015):

In order to prove that it has fulfilled its pre-suit investigative obligation, the EEOC must show that it took steps to determine whether there was reasonable cause to believe that the allegations in the charge are true. . . . The EEOC need not, however, describe in detail every step it took or the evidence it uncovered. As with the conciliation process, an affidavit from the EEOC, stating that it performed its investigative obligations and outlining the steps taken to investigate the charges, will usually suffice.

*Sterling Jewelers*, 801 F.3d at 101.

sufficiency of those efforts was beyond the scope of its review, and thus there was no question of fact or law that would allow the employer to succeed on its affirmative defenses.<sup>736</sup>

On September 18, 2017, the U.S. District Court for the Eastern District of California in *EEOC v. Marquez Bros. Int'l*, likewise rejected the defendants' motion to dismiss, in which the employer argued that the court lacked subject matter jurisdiction based upon the EEOC's alleged failure to conciliate.<sup>737</sup> Analyzing *Mach Mining*, the court reasoned that the appropriate remedy for failing to conciliate was a stay of the action, not dismissal, and "[i]f the conciliation requirement operated as a jurisdictional prerequisite, a Court would be forced to dismiss the action . . ."<sup>738</sup> The Court thus held that the conciliation prerequisite of 42 U.S.C. § 2000e-5(f)(1) was a non-jurisdictional condition precedent to suit.<sup>739</sup>

In *EEOC v. Amsted Rail Co.*,<sup>740</sup> applying *Mach Mining*, the court first concluded that the information received by the employer "when viewed as a whole, was sufficient to inform it of the specific allegations of discrimination against" it.<sup>741</sup> Turning to the second part of the test, the Court emphasized that judicial review of conciliation efforts is narrow and only focuses on whether the EEOC endeavored to conciliate – not the extent or means of conciliation.<sup>742</sup> The employer argued that the content of the conciliation discussions showed that the EEOC's effort to conciliate the case was a sham.<sup>743</sup> But the Court ultimately concluded that it could not impose additional procedural requirements on the EEOC beyond engaging in some form of discussion, even if employers see it as merely the extension of a take-it-or-leave-it offer.<sup>744</sup>

Similarly, in *EEOC v. Dimensions Healthcare Sys.*,<sup>745</sup> the employer argued that the EEOC did not try in earnest to reach a resolution prior to bringing suit.<sup>746</sup> The Court held that the EEOC had satisfied its conciliation requirements, explaining that *Mach Mining* foreclosed judicial review of the details of the conciliation process or whether the EEOC negotiated in good faith.<sup>747</sup> In *EEOC v. Jetstream Ground Services, Inc.*,<sup>748</sup> the District Court for the District of Colorado found that the EEOC had met its obligation when the parties had exchanged written conciliation proposals five times and met in person once, and when the EEOC had twice reduced its requested damages offers.<sup>749</sup> And in *EEOC v. Blinded Veterans Association*,<sup>750</sup> the Court held that the EEOC satisfied its conciliation obligation when it made a specific offer that included both monetary and non-monetary terms to each of the

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<sup>736</sup> *AZ Metro Distributors, LLC, LLC*, 2016 U.S. Dist. LEXIS 176918, at \*15.

<sup>737</sup> *EEOC v. Marquez Bros. Int'l*, No. 1:17-CV-0044, 2017 U.S. Dist. LEXIS 153339, \*7 (E.D. Cal. Sept. 18, 2017).

<sup>738</sup> *Id.* at \*9.

<sup>739</sup> *Id.* at \*10.

<sup>740</sup> *EEOC v. Amsted Rail Co.*, 169 F. Supp. 3d 877, 879 (S.D. Ill. 2016).

<sup>741</sup> *Id.* at 885.

<sup>742</sup> *Id.* at 883 (explaining that judicial review is limited to the determination of whether the EEOC attempted to confer about a charge and to what happened).

<sup>743</sup> *Id.* at 886.

<sup>744</sup> *Id.*

<sup>745</sup> *EEOC v. Dimensions Healthcare Sys.*, 188 F. Supp. 3d 517, 518 (D. Md. 2016).

<sup>746</sup> See also Gerald L. Maatman Jr. and Alex W. Karasik, *Taking The EEOC At Its Word: Court Relies On Agency's Own Declaration In Granting Summary Judgment*, WORKPLACE CLASS ACTION BLOG (June 3, 2016), <http://www.workplaceclassaction.com/2016/06/taking-the-eeoc-at-its-word-court-relies-on-agencys-own-declaration-in-granting-summary-judgment/>.

<sup>747</sup> *Dimensions Healthcare Sys.*, 188 F. Supp. 3d at 518.

<sup>748</sup> See, e.g., *EEOC v. Jetstream Ground Servs., Inc.*, 134 F. Supp. 3d 1298, (D. Colo. 2015).

<sup>749</sup> *Id.* at 1310-11.

<sup>750</sup> *EEOC v. Blinded Veterans Ass'n*, No. 14-CV-2102, 2015 WL 5148737 (D.D.C. July 7, 2015).

three charging parties.<sup>751</sup> The employer raised no objection to the non-monetary terms.<sup>752</sup> But the employer and the Commission went through several rounds of negotiation over the amount of the monetary terms, with both sides giving ground.<sup>753</sup> It was only after the employer demanded additional concessions that the EEOC determined that conciliation had failed.<sup>754</sup>

In arguing its position with respect to its conciliation obligation, the EEOC also has relied on the confidentiality provisions of Title VII to limit an employer's ability to challenge its conciliation efforts. Upon remand in *Mach Mining* itself, the lower Court granted the EEOC's motion to strike portions of Mach Mining's opposition to summary judgment on the grounds that it provided information regarding the conciliation process in violation of the non-disclosure provision pertaining to those endeavors.<sup>755</sup> In both *Dimensions Healthcare* and in *EEOC v. East Columbus Host, LLC*,<sup>756</sup> the courts struck information that disclosed the content of the parties' conciliation efforts. In *East Columbus Host*, the Court explained that, although it was "left with only the skeleton of a conciliation conversation . . . these bare bones are all the Court needs."<sup>757</sup>

### **b. District Court Decisions Holding That The EEOC Had Not Met Its Obligation To Conciliate Prior To Bringing Suit**

After *Mach Mining*, some courts still rejected the EEOC's conciliation efforts when those efforts were so perfunctory as to raise a question as to whether the EEOC was merely checking the box on the way to the courthouse and had no real interest in engaging in the conciliation process. However, as more courts have applied *Mach Mining*, they have relegated this defense to the fringes – to situations so extreme as to be clear that it was not possible for the EEOC to have conciliated at all.

In certain cases, some courts have shown a willingness to dismiss claims or individuals. For instance, on January 3, 2017, the District Court for the Southern District of Texas rejected the EEOC's attempt to reinstate previously dismissed individuals who had not applied to work for the employer at the time the EEOC issued its Letter of Determination.<sup>758</sup> In *EEOC v. Bass Pro Outdoor World, LLC*, the EEOC brought an enforcement action alleging a pattern or practice of discriminatory hiring practices by the employer under both sections 706 and 707 of Title VII.<sup>759</sup> On May 4, 2014, the court issued an opinion ruling that, among other things, the EEOC had failed to satisfy its obligation to conciliate its section 706 claims, and entered a stay as a remedy for the EEOC's

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<sup>751</sup> *Id.* at \*8.

<sup>752</sup> *Id.*

<sup>753</sup> *Id.*

<sup>754</sup> *Id.*

<sup>755</sup> *Mach Mining, LLC*, 161 F. Supp. 3d at 634-35; see also 42 U.S.C. § 2000e-5(b) ("Nothing said or done during and as part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the person concerned.").

<sup>756</sup> See *id.*; *EEOC v. E. Columbus Host, LLC*, No. 2:14-CV-1696, 2016 WL 4594727, at \*1 (S.D. Ohio Sept. 2, 2016).

<sup>757</sup> *Dimensions Healthcare Sys.*, 2016 WL 3055300, at \*3; *E. Columbus Host, LLC*, 2016 WL 4594727, at \*11.

<sup>758</sup> See Gerald Maatman, Jr., Christopher J. DeGroff & Alex W. Karasik, *No Means No – Judge Limits The EEOC's Claims In Bass Pro Case (Again)*, Workplace Class Action Blog (Jan. 6, 2017), available at <http://www.workplaceclassaction.com/2017/01/no-means-no-judge-limits-the-eeocs-claims-in-bass-pro-case-again/>.

<sup>759</sup> *EEOC v. Bass Pro Outdoor World, LLC*, No. 4:11-CV-3425, 2017 U.S. Dist. LEXIS 495, \*1-2 (S.D. TX. Jan. 3, 2017). On July 25, 2017, the Court entered a Consent Decree (ECF No. 379), which had been entered into by the parties, ending the litigation.

failure.<sup>760</sup> At the same time, the court dismissed all individuals who had not applied for positions with the employer as of the date the EEOC issued its Letter of Determination.<sup>761</sup>

Later, on July 30, 2014, the Court did an about-face with respect to its ruling that the EEOC could not proceed on its section 706 claims.<sup>762</sup> Reversing itself, the court held that the EEOC may prove its section 706 claims using the framework established by Fifth Circuit precedent.<sup>763</sup> The court further held that the EEOC had satisfied Title VII's administrative prerequisites (including investigation and conciliation) with regard to these claims.<sup>764</sup> The court, however, did not discuss the individuals who applied for positions after the EEOC issued its Letter of Determination.<sup>765</sup> After the Fifth Circuit affirmed the district court's decision, the EEOC moved to restore the eligibility of the individuals who had applied for positions post-Letter of Determination, arguing that the court's dismissal of those individuals was tied to the rulings in which the court reversed itself.<sup>766</sup>

On January 3, 2017, the Court rejected the EEOC's motion.<sup>767</sup> The Court stated that its 2014 reversal did not once mention the dismissed individuals who had applied to for work with the defendant post-Letter of Determination.<sup>768</sup> The court further reasoned that individuals who applied after the issuance of the letter of determination by definition did so after the investigation was completed, and "the Commission could not possibly have learned about these individuals during its investigation and could not possibly have conciliated their claims."<sup>769</sup>

The Supreme Court's interpretation of Title VII's conciliation requirements is that the EEOC must "inform" the employer of the "specific allegation" that describes "both what the employer has done and which employees (or what class of employees) have suffered as a result," and that the EEOC must engage the lawyer in a discussion "so as to give the employer an opportunity to remedy the allegedly discriminatory practice."<sup>770</sup> Some pre-*Mach Mining*, courts held that the EEOC's failure to divulge the basis for its demand for monetary relief evidences a failure to conciliate.<sup>771</sup>

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<sup>760</sup> *Id.* at \*2.

<sup>761</sup> *Id.*

<sup>762</sup> *Id.* at \*2-3.

<sup>763</sup> *Id.* at \*3 (citing, *Franks v. Bowman Transp. Co., Inc.*, 424 U.S. 747, 96 S. Ct. 1251 (1976) and *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977)).

<sup>764</sup> *Id.*

<sup>765</sup> *Id.*

<sup>766</sup> *Id.*

<sup>767</sup> *Id.* at \*4.

<sup>768</sup> *Id.*

<sup>769</sup> *Id.* at \*4. See also, *Karmid v. Midwest Reg'l Med. Ctr., LLC*, No. 17-CV-929, 2017 U.S. Dist. LEXIS 190250, \*6 (W.D. Okla. Nov. 17, 2017) (granting defendant employer's motion to stay based on the EEOC's complete failure to conciliate, based upon defendant's un rebutted testimony, in the form of an affidavit, that it never received a copy of the charge of discrimination, or notice of right to sue letter, and was never contacted by the EEOC).

<sup>770</sup> *Mach Mining*, 135 S. Ct. at 1655-56.

<sup>771</sup> See *EEOC v. High Speed Enters., Inc.*, No. 08-CV-01789, 2010 WL 8367452, \*5 (D. Ariz. Sept. 30, 2010) (finding that the EEOC failed to conciliate when it "refused to provide any basis for its damages calculations despite Defendant's repeated requests."); *EEOC v. La Rana Haw., LLC*, 888 F. Supp. 2d 1019, 1045 (D. Haw. 2012) (finding that the EEOC failed to conciliate when "despite Defendants' repeated requests, the EEOC did not furnish information regarding the class of unnamed 'aggrieved individuals,' the allegedly unlawful acts, or any other fact that would put Defendants on notice of the class or its claims."); see also *EEOC v. First Midwest Bank, N.A.*, 14 F. Supp. 2d 1028, 1032-33 (N.D. Ill. 1998) (finding that the EEOC failed to conciliate when it refused to provide any information regarding the class or its calculation of damages); *EEOC v. Anderson's Rest. of Charlotte, Inc.*, No. 86-CV-002, 1986 WL 192883, at \*6 (W.D.N.C. Apr. 20, 1986) ("This Court is of the opinion that a small corporation, such as Defendant, cannot reasonably be expected to agree to the payment of such a substantial amount of damages without being provided with the basis for such a demand.").

More recently, some courts have relied on *Mach Mining* to reject the EEOC's conciliation efforts because the EEOC's process did not provide the employer with a meaningful chance to rectify the alleged wrongdoing. That might be the case, for example, if the EEOC failed to provide basic information about the charges that it was attempting to conciliate. For instance, in *EEOC v. GNLV Corp.*, the Court refused to grant summary judgment for the EEOC because it had not provided information about one of the charges it was attempting to conciliate, which would have allowed the employer a chance to rectify that claim of discrimination.<sup>772</sup>

Likewise, on October 23, 2015, the District Court for the District of Colorado denied the EEOC's motion to reconsider the court's earlier decision dismissing a claim for lack of conciliation.<sup>773</sup> In *EEOC v. CollegeAmerica Denver, Inc.*,<sup>774</sup> the EEOC alleged that CollegeAmerica's separation agreement violated the federal age discrimination laws because it interfered with the EEOC's statutorily assigned responsibility to investigate charges of discrimination in violation of the ADEA.<sup>775</sup> The EEOC alleged that the agreement would have the effect of preventing her from reporting any alleged employment discrimination to the EEOC or filing a discrimination charge.<sup>776</sup> On December 2, 2014, the District Court dismissed one of the EEOC's claims, finding that the EEOC had failed to give CollegeAmerica notice that the "form" separation agreement allegedly violated the ADEA.<sup>777</sup>

In light of *Mach Mining*, the EEOC sought reconsideration, which the Court rejected. *Mach Mining* notwithstanding, and consistent with its previous decision, the court found dispositive the fact that the EEOC had not provided notice of the EEOC's claims when it issued its letter of determination.<sup>778</sup> Moreover, it was apparent from correspondence with CollegeAmerica that the company did not understand that the form separation agreements were part of the EEOC's investigation.<sup>779</sup> The Court held that the EEOC's efforts at conciliation were inadequate under *Mach Mining* because it had "failed to provide adequate notice to CollegeAmerica that the Separation Agreements were part of

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<sup>772</sup> *EEOC v. GNLV Corp.*, No. 2:06-CV-1225, 2015 WL 3467092 (D. Nev. June 1, 2015); see also *EEOC v. Amsted Rail Co., Inc.*, No. 14-CV-1292 (S.D. Ill. July 21, 2015) (rejecting EEOC's attempt to strike failure to conciliate defense from defendant's answer). This focus on the employer's ability to "right the wrong" echoes the three-part test that the Second, Fifth, and Eleventh Circuits had applied to evaluate the EEOC's conciliation efforts. See, e.g., *EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256, 1259 (11th Cir. 2003); *EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529, 1534 (2d Cir. 1996); and *EEOC v. Klinger Elec. Corp.*, 636 F.2d 104, 107 (5th Cir. 1981).

<sup>773</sup> See Gerald L. Maatman, Jr. and Howard M. Wexler, *Another One Bites The Dust At "Mach" Speed: EEOC's Age Discrimination Lawsuit Dismissed Based On Failure To Conciliate*, WORKPLACE CLASS ACTION BLOG (Oct. 29, 2015), <http://www.workplaceclassaction.com/2015/10/another-one-bites-the-dust-at-mach-speed-eeocs-age-discrimination-lawsuit-dismissed-based-on-failure-to-conciliate/>.

<sup>774</sup> *EEOC v. CollegeAmerica Denver, Inc.*, No. 14-CV-01232, 2015 WL 6437863 (D. Colo. Oct. 23, 2015).

<sup>775</sup> *Id.* at \*1. The case was brought after a campus director signed a separation agreement in September 2012 that conditioned the receipt of separation benefits on, among other things, her promise not to file any complaint or grievance with any government agency or to disparage CollegeAmerica. *EEOC v. CollegeAmerica Denver, Inc.*, 75 F. Supp. 3d 1294, 1296 (D. Colo. 2015), *rev'd in part*, 869 F.3d 1171 (10th Cir. 2017).

<sup>776</sup> *CollegeAmerica Denver, Inc.*, 75 F. Supp. 3d at 1296.

<sup>777</sup> *CollegeAmerica Denver, Inc.*, 75 F. Supp. 3d at 1302–03. The court also held that there was no justiciable controversy over the EEOC's first claim because CollegeAmerica provided evidence that it did not assert such a waiver in connection with her EEOC charges or state court action, and provided an affidavit stating that the employer did not and would never assert that the individual separation agreement constitutes a waiver of ADEA rights. *Id.* at 1299–1300. The Tenth Circuit reversed and remanded the District Court regarding its dismissal of this unlawful interference claim, when CollegeAmerica later decided to pursue an action against the former employee using the theory it had previously disavowed. *EEOC v. CollegeAmerica Denver, Inc.*, 869 F.3d 1171, 1174–75 (10th Cir. 2017). See also Gerald L. Maatman, Jr. and Alex Karasik, *Interference On The Defense? Tenth Circuit Reinstates EEOC's Formerly Dismissed Claim*, WORKPLACE CLASS ACTION BLOG (Sept. 19, 2017), <https://www.workplaceclassaction.com/2017/09/interference-on-the-defense-tenth-circuit-reinstates-eeocs-formerly-dismissed-claim/>.

<sup>778</sup> *Id.* at \*2-3.

<sup>779</sup> *Id.* at \*2-3.

the EEOC investigation and findings of unlawful practices by CollegeAmerica,” and therefore failed “to give CollegeAmerica an opportunity to voluntarily revise them.”<sup>780</sup>

Similarly, on June 29, 2015, the District Court for the Southern District of Ohio held in *EEOC v. OhioHealth Corp.*<sup>781</sup> that the EEOC had failed to satisfy its conciliation obligation and stayed the case so that the EEOC could engage in the requisite conciliation.<sup>782</sup> In that case, the EEOC had presented an affidavit stating that it had issued a determination on September 15, 2011, engaged in communications with OhioHealth until October 14, 2011, and only brought suit after its proposal was rejected.<sup>783</sup> OhioHealth countered with its own declaration, which stated that the EEOC’s conciliation process amounted to a take-it-or-leave-it proposition, which ended in the Commission declaring the conciliation efforts a failure even though OhioHealth had made it clear that it was “ready and willing to negotiate.”<sup>784</sup> The Court held that there were questions of fact as to whether the EEOC had properly attempted to engage in conciliation as required by statute, or if it had gone through the motions of conciliation for the sake of appearances only: “if the proceedings were for appearances only, then there never was a real attempt to engage in conciliation as the law requires.”<sup>785</sup>

### C. Adding Plaintiffs And Defendants After Conciliation

In 2016, the Ninth Circuit issued a decision arguably making it easier for the EEOC to conciliate class claims before knowing who falls within the class. In *Arizona ex rel. Horne v. The Geo Group, Inc.*,<sup>786</sup> the U.S. Court of Appeals for the Ninth Circuit reinstated a pattern or practice action brought by the EEOC and the Arizona Civil Rights Division, holding that the EEOC had sufficiently conciliated its class claims in light of *Mach Mining*.<sup>787</sup> In that case, a female corrections officer had filed a charge with the Arizona Civil Rights Division, alleging gender discrimination, harassment, and retaliation.<sup>788</sup> After further investigation, the Arizona Division identified other potentially aggrieved employees and issued a reasonable cause determination concluding that the employer had violated Arizona state discrimination laws against the charging party and “a class of female employees” at two correctional facilities.<sup>789</sup>

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<sup>780</sup> *Id.* The Court also found that a stay, which would allow the EEOC to conciliate the claim regarding the form separation agreements, was unwarranted due to the EEOC’s delay in bringing the motion for reconsideration. Accordingly, the court stood by its earlier order dismissing the claim in its entirety. *Id.*

<sup>781</sup> *EEOC v. OhioHealth Corp.*, 115 F. Supp. 3d 895 (S.D. Ohio June 29, 2015).

<sup>782</sup> *Id.* at 899; see also Gerald L. Maatman, Jr. and Howard M. Wexler, *Court Shoots Down The EEOC At “Mach” Speed Based On “Sham” Conciliation Process*, WORKPLACE CLASS ACTION BLOG (July 6, 2015), <http://www.workplaceclassaction.com/2015/07/court-shoots-down-the-eeoc-at-mach-speed-based-on-sham-conciliation-process/>.

<sup>783</sup> *Id.*

<sup>784</sup> *Id.* at 898.

<sup>785</sup> *Id.* The Court concluded that “an unsupported demand letter such as the one involved here alone cannot logically constitute an attempt to inform and engage in the conciliation process,” because it does not provide the employer with any meaningful opportunity to remedy the alleged discrimination. *Id.* at 899. The Court lambasted the EEOC’s approach to conciliation and opened the door for a future attack on the Commission’s conciliation procedures: “[I]f the EEOC continues down this dangerous path and fails to engage in good faith efforts at conciliation as ordered, this Court will impose any or all consequences available, including but not limited to contempt and dismissal of this action for failure to prosecute.” *Id.* at 900.

<sup>786</sup> *Arizona, ex rel. Horne v. The Geo Group, Inc.*, 816 F.3d 1189 (9th Cir. 2016).

<sup>787</sup> See Julie G. Yap and Alison H. Hong, *Conciliation Made Easy? The Ninth Circuit Reinstates EEOC Pattern Or Practice Action In Light Of Mach Mining*, WORKPLACE CLASS ACTION BLOG (Apr. 4, 2016), <http://www.workplaceclassaction.com/2016/04/conciliation-made-easy-the-ninth-circuit-reinstates-eeoc-pattern-or-practice-action-in-light-of-mach-mining/>.

<sup>788</sup> *The Geo Group, Inc.*, 816 F.3d at 1193.

<sup>789</sup> *Id.* at 1196.

The District Court granted the employer's motion for partial summary judgment dismissing, in part, the claims of several employees who were not identified until after filing of the complaint on the basis that these individuals' claims were not conciliated.<sup>790</sup> The Ninth Circuit reversed, rejecting "the District Court's premise that the EEOC and the Division must identify and conciliate on behalf of each individual aggrieved employee during the investigation process prior to filing a lawsuit seeking recovery on behalf of a class."<sup>791</sup> The Ninth Circuit reasoned that requiring conciliation on an individual basis would effectively bar recovery on behalf of those class members not yet identified at the time of filing suit.<sup>792</sup>

Similarly, in *EEOC v. Stone Pony Pizza, Inc.*,<sup>793</sup> the District Court rejected the employer's argument that the EEOC failed to conciliate in good faith, concluding instead that the EEOC satisfied its conciliation requirement under *Mach Mining* because it told the employer about the claim – essentially, what practice has harmed which person or class – and provided the employer with an opportunity to discuss the matter in an effort to achieve voluntary compliance. The EEOC had issued a proposed conciliation agreement that provided specific relief for individuals as well as class-wide relief including the establishment of a claimant fund for unidentified class members.<sup>794</sup> The Court concluded that the employer "has not articulated any reasonable basis for its argument that the EEOC failed to conciliate in good faith."<sup>795</sup>

The reasoning of these cases may not extend to adding defendants who did not have an opportunity to participate in the conciliation process. For instance, in *EEOC v. Labor Solutions of Alabama, LLC f/k/a East Coast Labor Solutions*,<sup>796</sup> the court found that the EEOC failed to exhaust its pre-suit duties under Title VII with respect to a successor entity who had not been named in the EEOC charge.<sup>797</sup> After finding that the EEOC had not sufficiently alleged that Labor Solutions of Alabama was the successor to the original entity against whom a charge was filed and conciliation undertaken, the court found that, in any event, the claim should be dismissed because the EEOC had failed to name Labor Solutions in its charge.<sup>798</sup> Nevertheless, the EEOC argued that Labor Solutions had notice of the charge, investigation, and conciliation because the same person owned and operated each company.<sup>799</sup> The Court noted however that none of those facts had been pled in the EEOC's complaint.<sup>800</sup> Accordingly, the court held that, based on the facts alleged, the EEOC had failed to discharge its pre-suit obligations under Title VII and dismissed the complaint.<sup>801</sup>

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<sup>790</sup> *Id.* at 1197.

<sup>791</sup> *Id.* at 1200.

<sup>792</sup> *Id.*

<sup>793</sup> *EEOC v. Stone Pony Pizza, Inc.*, 172 F. Supp. 3d 941 (N.D. Miss. 2016).

<sup>794</sup> *Id.* at 946.

<sup>795</sup> *Id.* at 954. See also *Marquez Bros. Int'l*, 2017 U.S. Dist. LEXIS 153339, at \*17-18 (rejecting defendants' argument that EEOC failed to give notice of the charge to its affiliate companies, also named as defendants, because the affiliates were substantially identical entities to the defendant entities given notice of the charge, and because the reasonable cause determination was directed to each entity).

<sup>796</sup> *EEOC v. Labor Solutions of Alabama, LLC f/k/a East Coast Labor Solutions*, No. 4:16-CV-1848, 2017 U.S. Dist LEXIS 38619 (N.D. Ala. March 17, 2017).

<sup>797</sup> *Id.* at \*32; see also Gerald Maatman, Jr., Christopher J. DeGroff & Alex W. Karasik, *Keys To Successor Liability: EEOC Discrimination Suit In Alabama*, Workplace Class Action Blog (Mar. 24, 2017), available at <http://www.workplaceclassaction.com/2017/03/keys-to-successor-liability-eeoc-discrimination-suit-in-alabama/>.

<sup>798</sup> *Id.* at \*34-35.

<sup>799</sup> *Id.* at \*34.

<sup>800</sup> *Id.*

<sup>801</sup> *Id.* at \*35.

Similarly, in a later decision out of *Mach Mining*, the District Court held that the EEOC was precluded from adding additional defendants with whom it had not conciliated.<sup>802</sup> Several months after the court decided that the EEOC had satisfied its conciliation obligation, the EEOC moved for leave to amend the complaint to add various additional defendants.<sup>803</sup> It was undisputed that these entities had not been part of the EEOC's conciliation efforts.<sup>804</sup> The District Court held that the EEOC had failed to demonstrate that these entities exercised a level of control over Mach Mining's hiring/firing procedures sufficient to bring them within the single employer theory."<sup>805</sup>

#### **d. Impact Of *Mach Mining* On The "Failure To Investigate" Defense**

The equal employment opportunity laws give the EEOC the power to bring claims on behalf of individuals and classes of individuals subject to a statutory scheme that favors the administrative, rather than judicial, resolution of discrimination disputes.<sup>806</sup> In addition to its conciliation requirement, the EEOC may not bring suit on a charge before "mak[ing] an investigation thereof."<sup>807</sup> *Mach Mining* has also had a significant impact on how courts interpret the scope of this requirement relative to their power to review the EEOC's efforts to meet it.

On May 5, 2015, in *EEOC v. Sterling Jewelers Inc.*,<sup>808</sup> the Second Circuit reversed a district court decision, dismissing a nationwide pattern or practice case against Sterling Jewelers Inc. because the EEOC had failed to investigate the claim that it actually brought. The EEOC investigated 19 charges brought by women who claimed that Sterling discriminated against them in pay and/or promotions based on their sex.<sup>809</sup> 16 of the charges alleged that Sterling engaged in a "continuing policy or pattern and practice" of sex discrimination.<sup>810</sup> Although five investigators initially investigated the charges, the EEOC later transferred all 19 charges to one investigator.<sup>811</sup>

On January 30, 2008, the EEOC issued a Letter of Determination finding that Sterling "subjected Charging Parties and a class of female employees with retail sales responsibilities nationwide to a pattern or practice of sex discrimination in regard to promotion and compensation."<sup>812</sup> The EEOC filed suit on September 23, 2008 in the Western District of New York, alleging that Sterling engaged in sex-based pay and promotion discrimination in violation of Title VII.<sup>813</sup> On March 10, 2014, the District Court dismissed the case, holding that, although the charges were asserted on behalf of the

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<sup>802</sup> See Gerald L. Maatman, Jr. and Alex W. Karasik, *More Mach Mining: Court Denies The EEOC's Motion For Reconsideration Of Discovery Order*, WORKPLACE CLASS ACTION BLOG (Aug. 29, 2016), <http://www.workplaceclassaction.com/2016/08/more-mach-mining-court-denies-the-eecocs-motion-for-reconsideration-of-discovery-order/>.

<sup>803</sup> *EEOC v. Mach Mining, LLC*, No. 11-CV-00879, 2016 WL 4429800, at \*1 (S.D. Ill. Aug. 22, 2016).

<sup>804</sup> *Id.* at \*3.

<sup>805</sup> *Id.*

<sup>806</sup> See, e.g., *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657, 674 (8th Cir. 2012).

<sup>807</sup> 5 U.S.C. § 2000e-5(b).

<sup>808</sup> *EEOC v. Sterling Jewelers Inc.*, 801 F.3d 96 (2d Cir. 2015).

<sup>809</sup> *Id.* at 99.

<sup>810</sup> *Id.*

<sup>811</sup> *Id.* As part of its investigation, the EEOC requested copies of Sterling's company-wide protocols, including policies governing pay, promotion, and anti-discrimination; job descriptions for sales associates and management positions; and computerized personnel files listing employees' hiring dates, responsibilities, and pay and promotion histories. *Id.* The EEOC also was able to obtain company-wide pay and promotion data through its participation in a private mediation between the company and the charging parties (though that information was subject to a mediation agreement that made the materials inadmissible). *Id.*

<sup>812</sup> *Id.* at 99–100.

<sup>813</sup> *Id.* at 100.

charging parties and “similarly situated women,” this did not demonstrate that the EEOC investigated the nationwide pattern or practice claim that was actually brought.<sup>814</sup>

On appeal, the Second Circuit held that the district court had overstepped its authority. Relying on *Mach Mining*, but not explaining how conciliation requirements were apples-to-apples to investigation requirements, the Second Circuit held that “[t]o ensure agency compliance with Title VII, Congress empowered federal courts to review whether the EEOC has fulfilled its pre-suit administrative obligations.”<sup>815</sup> However, the Second Circuit went on to note that the proper scope of that review is “an issue of first impression in this Circuit.”<sup>816</sup> The Second Circuit interpreted the Supreme Court’s guidance in *Mach Mining* as authorizing the federal courts to review only whether an investigation had taken place, not the sufficiency of that investigation.<sup>817</sup>

Without any analysis, the Second Circuit even adopted the Supreme Court’s proposed method of ensuring compliance, noting that “[a]s with the conciliation process, an affidavit from the EEOC, stating that it performed its investigative obligations and outlining the steps taken to investigate the charges,” should usually suffice to satisfy a court that the investigation requirement had been fulfilled.<sup>818</sup> The Second Circuit ultimately concluded that unlike other cases where it was apparent that the EEOC had failed to conduct any pre-suit investigation at all, the record in *Sterling* showed that the EEOC had conducted an investigation.<sup>819</sup> And, relying on the testimony of the EEOC investigator coupled with the documents in the investigative file, the Second Circuit concluded that “the EEOC investigation was nationwide.”<sup>820</sup>

Other courts have relied on *Mach Mining* to reach similar conclusions. For example, in *Dolgenercorp*, discussed previously, the court granted the EEOC summary judgment regarding the employer’s enumerated defense that the EEOC failed to properly investigate claims prior to bringing suit.<sup>821</sup> The employer argued that the EEOC’s claims were barred because they went beyond the charges of discrimination that generated the lawsuit, and further, that the EEOC failed to adequately investigate the claims prior to filing suit.<sup>822</sup> Relying upon Seventh Circuit precedent, the court reasoned that the EEOC is not confined to the claims typified in the charge of discrimination; rather, any violations that the EEOC ascertains in the course of a reasonable investigation of the charging party’s complaint are actionable.<sup>823</sup> Quoting the Seventh Circuit, the court further found that, “[i]f courts may not limit a suit by the EEOC to claims made in the administrative charge, they likewise have no business limiting the suit to claims that the court finds to be supported by the evidence obtained in the

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<sup>814</sup> *EEOC v. Sterling Jewelers, Inc.*, 3 F. Supp. 3d 57, 64 (W.D.N.Y. 2014). On May 15, 2014, the EEOC appealed the decision to the Second Circuit.

<sup>815</sup> *Sterling Jewelers Inc.*, 801 F.3d at 100.

<sup>816</sup> *Id.* at 101.

<sup>817</sup> *Id.* (citing *EEOC v. Keco Indus., Inc.*, 748 F.2d 1097, 1100 (6th Cir.1984); *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657, 674 (8th Cir. 2012)).

<sup>818</sup> *Id.*

<sup>819</sup> *Id.* at 102–03.

<sup>820</sup> *Id.* at 103–04.

<sup>821</sup> *EEOC v. Dolgenercorp, LLC*, No. 13-CV-4307, 2017 U.S. Dist. LEXIS 54634, \*5 (N.D. Ill. Apr. 10, 2017); see also *Gerald L. Maatman, Jr., Christopher J. DeGross, and Alex W. Karasik, Denial Of Defenses: Illinois Court OK’s EEOC’s Pre-Suit Procedures*, Workplace Class Action Blog (Apr. 12, 2017), available at <http://www.workplaceclassaction.com/2017/04/denial-of-defenses-illinois-court-oks-eeocs-pre-suit-procedures/>.

<sup>822</sup> *Id.* at 5.

<sup>823</sup> *Id.* at \*5-6 (citing *EEOC v. Caterpillar, Inc.*, 409 F.3d 831, 833 (7th Cir. 2005)).

Commission's investigation. The existence of probable cause to sue is generally . . . not judicially reviewable."<sup>824</sup>

Likewise, in *EEOC v. United Health Programs of America, Inc.*,<sup>825</sup> the court rejected defendant's argument that the EEOC failed to satisfy its conciliation requirement with respect to three claimants identified after the EEOC filed its suit.<sup>826</sup> The Court reasoned that the EEOC's investigation encompassed seven of the ten claimants and the additional three claimants' allegations arise out of the same alleged course of conduct, in the same office, by the same individuals, and during a time period already covered by the charges in the initial complaint. Noting that the Court is permitted only a narrow review of investigation and conciliation efforts, the Court held that the EEOC was not precluded from identifying new claimants after the action was filed.<sup>827</sup>

In *EEOC v. Western Distributing Co.*,<sup>828</sup> the EEOC brought an action alleging that an employer discriminated on the basis of disability by terminating an employee when his leave expired in violation of the ADA. The employer argued that the EEOC failed to reasonably investigate or adequately conciliate before bringing suit.<sup>829</sup> The Court noted that *Mach Mining* limited the scope of its review and concluded that the review was limited to assessing: (i) whether the EEOC informed the defendant of the specific allegations by describing what it allegedly did and to whom; and (ii) whether the EEOC tried to engage the defendant in discussions about those allegations.<sup>830</sup> The Court found that the EEOC sufficiently investigated the charges because it sent at least five requests for information to the defendant, reviewed the information received, interviewed employees potentially affected by the allegedly discriminatory practice and other employees of the defendant, and afforded the defendant the opportunity to provide additional relevant information.<sup>831</sup>

The District Court for the Northern District of Illinois came to a similar conclusion in *EEOC v. AutoZone, Inc.*<sup>832</sup> That case arose out of a disability discrimination claim asserted by three individuals.<sup>833</sup> The EEOC investigated the three claims and initially issued reasonable cause determinations in September 2012 that stated that there was reason to believe that AutoZone discriminated against each of the charging parties by refusing to make reasonable accommodations and by discharging them in violation of the ADA. But in May 2013, the EEOC amended its determinations to state that there was reasonable cause to believe that AutoZone discriminated against a "class of other employees at its stores throughout the United States."<sup>834</sup>

AutoZone moved to limit the scope of the litigation to the three stores where the charging parties had worked on the basis that the EEOC failed to conduct a nationwide investigation of AutoZone's

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<sup>824</sup> *Id.* at \*6 (quoting *Caterpillar, Inc.*, 409 F.3d at 833). See also *Marquez Bros. Int'l*, 2017 U.S. Dist. LEXIS 153339, at \*18-19 (finding that the EEOC adequately alleged that it conducted an investigation reasoning that the Court need not delve into the substantive sufficiency of the investigation).

<sup>825</sup> *EEOC v. United Health Programs of Am., Inc.*, 213 F. Supp. 3d 377, 386 (E.D.N.Y. 2016).

<sup>826</sup> *Id.* at 403.

<sup>827</sup> *Id.* 404-05.

<sup>828</sup> *EEOC v. Western Distributing Co.*, 218 F. Supp. 3d 1231 (D. Colo. Nov. 21, 2016).

<sup>829</sup> *Id.* at 1234.

<sup>830</sup> *Id.* at 1237.

<sup>831</sup> *Id.* at 1239-40.

<sup>832</sup> *EEOC v. AutoZone, Inc.*, No. 141 F. Supp. 3d 912 (N.D. Ill. 2015).

<sup>833</sup> *Id.* at 913.

<sup>834</sup> *Id.* The determinations based that conclusion on the fact that, "beginning in early 2009, AutoZone maintained an attendance policy under which employees were assessed points and eventually discharged because of absences, including disability-related absences." *Id.* at 913-14

employment practices.<sup>835</sup> Relying on the guidance in *Mach Mining* that “the proper scope of judicial review of the EEOC’s pre-suit investigation should match the terms of Title VII’s provisions concerning investigation,” the Court concluded that Title VII does not mandate any particular investigative techniques or standards.<sup>836</sup> According to the District Court of the Northern District of Illinois, under Seventh Circuit law, and limited to the facts of that case, “the EEOC has met its burden to show that it investigated by issuing a determination that: 1) states that the EEOC investigated and; 2) identifies the alleged discrimination discovered during the investigation.”<sup>837</sup> The court found that it was able “to determine from the EEOC’s amended determinations that the EEOC conducted an ‘investigation’ as required by the Act,” and that those amended determinations “clearly put AutoZone on notice that the EEOC has conducted an investigation of AutoZone’s attendance policy and that it may pursue charges against AutoZone for discrimination that has occurred as a result of the policy in AutoZone’s stores throughout the United States.”<sup>838</sup>

## 2. Other Theories That Suggest The EEOC’s Pre-Suit Conduct Is Subject To Limited Judicial Review

In *EEOC v. CVS Pharmacy, Inc.*,<sup>839</sup> and *EEOC v. Doherty Enterprises, Inc.*,<sup>840</sup> the EEOC argued that it was not required to engage in any pre-suit obligations because it was bringing a claim for “resistance” to the full enjoyment of rights created by Title VII. The EEOC claimed that its power to bring such a “resistance” claim did not arise under section 707(e), but rather under section 707(a), which does not mandate the same pre-suit procedures as are required under section 707(e).<sup>841</sup> In *CVS*, the basis of the EEOC’s “resistance” claim was that the charging party, and other employees, had signed a standard CVS severance agreement at termination, which the EEOC claimed interfered with those employees’ rights to file charges, communicate voluntarily, and participate in investigations with the EEOC and other state agencies.<sup>842</sup> This was a new attack on employers’ use of severance agreements.<sup>843</sup> The EEOC argued that this was a “distinct” claim under section 707(a).<sup>844</sup> According to the EEOC, its power to bring claims under that section was commensurate with that of the U.S. Attorney General, which was not hampered by any pre-suit obligations.<sup>845</sup>

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<sup>835</sup> *Id.* at 914.

<sup>836</sup> *Id.* at 917 (quoting *Mach Mining*, 135 S. Ct. at 1655). This case was unusual in that it arose in the Seventh Circuit, and therefore had to reconcile the reasoning of *Caterpillar* – which was still the law of the circuit – with the reasoning of the *Mach Mining* decision. The court noted that “[t]he Seventh Circuit has not addressed whether – and, if so, how – the Supreme Court’s decision in *Mach Mining* affects its holding in *Caterpillar*.” *Id.*

<sup>837</sup> *Id.* at 919.

<sup>838</sup> *Id.* at 917. The *AutoZone* court’s interpretation of its power to review the EEOC’s investigation is therefore more limited than what the Second Circuit set forth in *EEOC v. Sterling Jewelers, Inc.* The court held that the even the limited review that the Second Circuit conducted of the EEOC’s investigative file would be prohibited under *Caterpillar* and “appears to go beyond what the Second Circuit identified as its proper role under *Mach Mining*.” *Id.* at 918.

<sup>839</sup> *EEOC v. CVS Pharmacy, Inc.*, 70 F. Supp. 3d 937 (N.D. Ill. 2014).

<sup>840</sup> *EEOC v. Doherty Enterprises Inc.*, 126 F. Supp. 3d 1305 (S.D. Fla. 2015).

<sup>841</sup> *CVS Pharmacy, Inc.*, 70 F. Supp. at 940–41.

<sup>842</sup> *Id.* at 940-41.

<sup>843</sup> See Christopher DeGross, Matthew Gagnon, and Gerald L. Maatman, Jr., *Not Impressed By The Chutzpah: Court Refuses To Bless The EEOC’s Attempt To Create A New Form Of Pattern Or Practice Litigation*, Workplace Class Action Blog (Oct. 12, 2014), <http://www.workplaceclassaction.com/2014/10/not-impressed-by-the-chutzpah-court-refuses-to-bless-the-eoocs-attempt-to-create-a-new-form-of-pattern-or-practice-litigation/>.

<sup>844</sup> *CVS Pharmacy, Inc.*, 70 F. Supp. 3d at 940-41.

<sup>845</sup> *Id.* at 941. Power to enforce Title VII was transferred to the EEOC by virtue of the 1972 amendments to the Act, which among other things, added section 707(e). *Id.* Section 707(e) states that “the Commission shall have authority to investigate and act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of a person claiming to be

On December 17, 2015, the Seventh Circuit held that Congress gave the EEOC a cause of action to sue employers when informal methods of dispute resolution failed because it was convinced that the failure to grant the EEOC meaningful enforcement powers was a major flaw in the operation of Title VII.<sup>846</sup> But when that power was granted to the EEOC, it was done pursuant to the dictates of sections 707(c)-(e), which transferred the powers of the Attorney General to bring pattern or practice suits to the EEOC, while requiring the EEOC to carry out that function pursuant to the procedures set forth in section 706 (which includes the conciliation requirement).<sup>847</sup> The Seventh Circuit held that section 707(a) only gives the EEOC power to challenge resistance to the full enjoyment of “any of the rights secured by Title VII.”<sup>848</sup> Accordingly, “Section 707(a) does not create a broad enforcement power for the EEOC to pursue non-discriminatory employment practices that it dislikes – it simply allows the EEOC to pursue multiple violations of Title VII . . . in one consolidated proceeding.”<sup>849</sup> This was a clear rejection of the EEOC’s expansive and novel interpretation of its powers under section 707(a).

Despite this early setback, the EEOC, in *EEOC v. Doherty Enterprises, Inc.*, convinced the U.S. District Court for the Southern District of Florida to disregard the CVS decision and uphold its ability to bring pattern or practice cases without conciliation.<sup>850</sup> That case arose out of the EEOC’s efforts to prohibit Doherty Enterprises, Inc. from allegedly using its arbitration agreement to deter employees from filing charges or cooperating with the EEOC.<sup>851</sup> The arbitration agreement required the parties to arbitrate, among other things, “any claim, dispute and/or controversy (including but not limited to any claims of employment discrimination, harassment, and/or retaliation under Title VII . . .).”<sup>852</sup> As with CVS, the EEOC argued that the use of this arbitration agreement constituted a pattern or practice of “resistance” to the full enjoyment of rights secured by Title VII.<sup>853</sup>

As with CVS, the Court looked to legislative history and earlier court precedent to define the distinction between sections 707 and 706. Relying on *U.S. v. Allegheny-Ludlum Industries, Inc.*,<sup>854</sup> a forty-year-old case from the Fifth Circuit (binding in the Eleventh Circuit because it was issued prior to September 30, 1981, when those circuits were split), the Court concluded that “[t]he statutory language of section 707(a) provides that the EEOC only needs ‘reasonable cause’ before filing a

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aggrieved or by a member of the Commission.” 42 U.S.C. § 2000e–6(e); *CVS Pharmacy, Inc.*, 70 F. Supp. 3d at 940. Critically, section 707(e) expressly mandated that “such actions shall be conducted in accordance with the procedures set forth in [Section 706].” 42 U.S.C. § 2000e–6(e); *CVS Pharmacy, Inc.*, 70 F. Supp. 3d at 940. One of the procedures under section 706 is that the EEOC must conciliate prior to bringing suit. Section 706 mandates that the EEOC “shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.” 42 U.S.C. § 2000e–5(b); *CVS Pharmacy, Inc.*, 70 F. Supp. 3d at 940. The EEOC argued that Congress’ intent in transferring enforcement power from the Attorney General to the EEOC was to give the EEOC the authority to institute the same actions that the Department of Justice had. *CVS Pharmacy, Inc.*, 70 F. Supp. 3d at 941. Accordingly, since the Attorney General was not required to bring a charge or engage in conciliation prior to bringing suit, the transfer of that authority to the EEOC under Section 707(a) meant that the EEOC was similarly unconstrained by those procedures when it acted pursuant to the same authority. *Id.*

<sup>846</sup> *EEOC v. CVS Pharmacy, Inc.*, 809 F.3d 335, 339 (7th Cir. 2015).

<sup>847</sup> *Id.* at 340.

<sup>848</sup> *Id.* at 341.

<sup>849</sup> *Id.*

<sup>850</sup> *Doherty Enterprises Inc.*, 126 F. Supp. 3d at 1312.

<sup>851</sup> *Id.* at 1306.

<sup>852</sup> *Id.*

<sup>853</sup> *Id.* at 1307. The company moved to dismiss on the grounds that the EEOC lacked standing to bring this action in the absence of an underlying charge of discrimination, and had failed to conciliate. *Id.* The precise question for the court, therefore, was “whether the EEOC may bring a section 707 law suit against Defendant without an individual or Commissioner’s charge of discrimination and without an attempt at conciliation which are required for the EEOC to bring a suit pursuant to its authority under section 706.” *Id.* at 1308.

<sup>854</sup> *U.S. v. Allegheny-Ludlum Indus., Inc.*, 517 F.2d 826 (5th Cir. 1975).

complaint for pattern or practice of resistance to the full enjoyment of any of the rights. In other words, section 707 does not require the EEOC to receive a charge, nor does it require conciliation.”<sup>855</sup> In so holding, the court explicitly noted that the company had cited various cases from outside the circuit, which held that the EEOC has no enforcement authority without the filing of a charge or conducting conciliation, but concluded that “[n]one of those courts are in this Circuit and bound by *Allegheny-Ludlum Industries*.”<sup>856</sup>

The court in *Doherty* went further still, holding that section 707(a) provided for the separate “resistance” cause of action that the EEOC had been arguing for.<sup>857</sup> Contrary to the Seventh Circuit’s interpretation, the court in *Doherty* noted that Congress had not used the term “unlawful employment practices” in section 707(a), supporting the conclusion that it had not intended that a “resistance” claim be limited to cases involving unlawful employment practices, as appears in section 706.<sup>858</sup> The Court explicitly criticized the *CVS* holding to the contrary, calling it “internally inconsistent” and claiming that it gave “short shrift” to the concept of the EEOC’s authority to bring a separate “resistance” claim.<sup>859</sup> The court in *CVS* later exacted a modicum of revenge when it granted the employer’s motion for attorneys’ fees against the EEOC.<sup>860</sup> In its motion, the employer argued that it was entitled to attorneys’ fees because it was unreasonable for the EEOC to file suit under section 707(a) without first conciliating.<sup>861</sup> In response, the EEOC pointed to *Doherty*.<sup>862</sup> The Court rejected the EEOC’s argument, finding that the *Doherty* decision was of limited import because that court was bound by Eleventh Circuit precedent, which led it to a different result.<sup>863</sup> The Court then noted that *Doherty* failed to consider the EEOC’s own regulations which required conciliation prior to filing suit.<sup>864</sup>

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<sup>855</sup> *Doherty Enters., Inc.*, 126 F. Supp. 3d at 1310 (citations omitted). The court quoted from *Allegheny-Ludlum*, which held the following:

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

*Id.* at 1309 (quoting *Allegheny-Ludlum Indus., Inc.*, 517 F.2d at 843).

<sup>856</sup> *Id.* at 1309.

<sup>857</sup> *Id.* at 1311.

<sup>858</sup> *Id.*

<sup>859</sup> *Id.* at 1312.

<sup>860</sup> *EEOC v. CVS Pharm., Inc.*, Case No. 14-CV-863, 2017 U.S. Dist. LEXIS 7337, \*5 (N.D. Ill. Jan. 18, 2017)

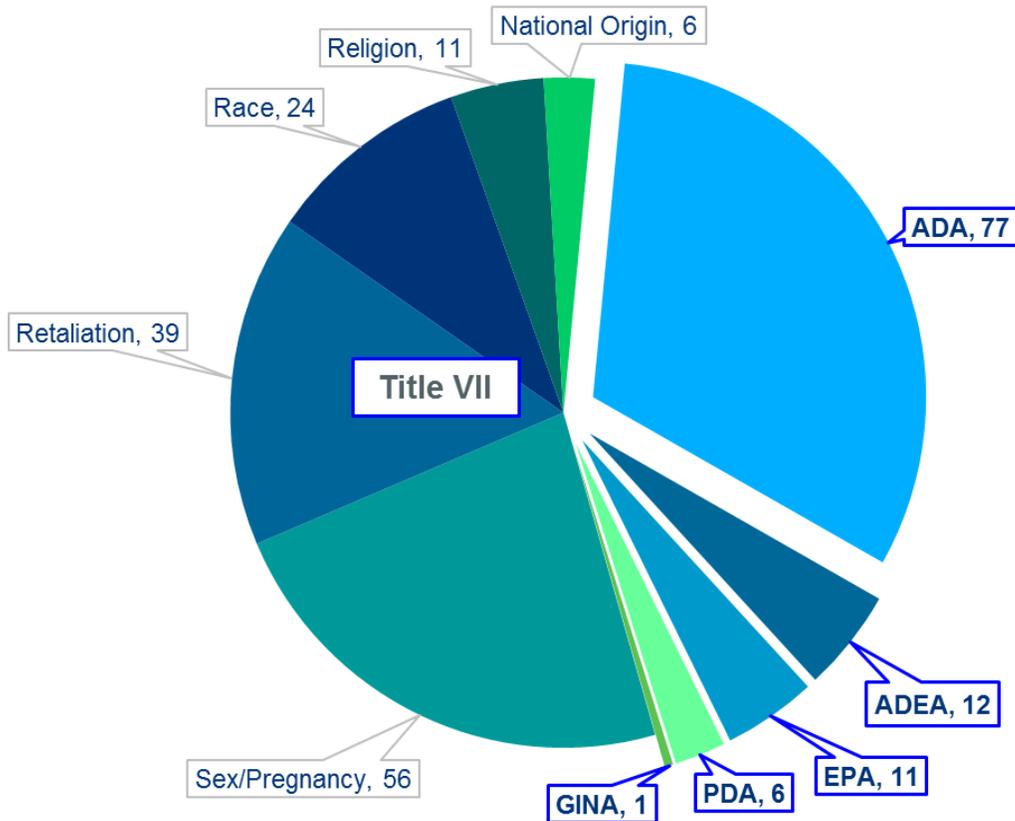
<sup>861</sup> *Id.*

<sup>862</sup> *Id.*

<sup>863</sup> See *id.* (“the Florida District Court was following the precedent of its own circuit: “a requirement to conciliate is contrary to the precedent that binds this Court.” *Doherty Enterprises, Inc.*, 126 F. Supp. 3d 1305, 1312 (citing *United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826 (5th Cir. 1975)).

<sup>864</sup> *Id.* The Court stated that the EEOC’s regulations required the agency to use informal methods of eliminating an unlawful employment practice where it has reasonable cause to believe that such a practice has occurred. *Id.* at \*5-6 (citing 29 C.F.R. § 1601.24(a)). It further noted that these regulations also provide that the EEOC may only bring a civil action if it is unable to secure “a conciliation agreement acceptable to the [EEOC].” *Id.* at \*6 (quoting 29 C.F.R. § 1601.27).

## Filings By Statute FY 2017



As with past years, Title VII and the Americans with Disabilities Act (ADA) comprised the majority of total lawsuits filed by the EEOC. Last year, there were 37 cases filed under both the ADA and Title VII. In FY 2017, those numbers increased to 77 filings for the ADA and 98 filings for Title VII. Within Title VII, allegations of sex or pregnancy discrimination led the way with 56.

The overall number of filings by the EEOC more than doubled from 86 in FY 2016 to 184 in FY 2017. As a result, nearly every workplace discrimination statute saw an increase in the number of filings in FY 2017. The only decrease was in the number of filings under Title II of the Genetic Information Nondiscrimination Act. Those filings fell from two in FY 2016 to just one in FY 2017.

The EEOC argued that its regulations only apply to unlawful employment practices, which it had not alleged.<sup>865</sup> Unpersuaded, the Court reasoned that the complaint clearly alleged that CVS was engaging in unlawful employment practices.<sup>866</sup> The EEOC next argued that it was not proceeding under a charge and therefore the regulations were not applicable.<sup>867</sup> The Court again rejected the EEOC's argument, holding that the regulation requiring conciliation is not predicated on whether or not a charge has been brought.<sup>868</sup> The Court concluded that because the EEOC failed to comply with its enabling act and regulation, the employer was entitled to attorneys' fees.

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

If conciliation is unsuccessful, the EEOC may issue a notice of a right to sue to the charging party or initiate its own lawsuit. By this point, employers should already be on a litigation footing. They should be considering potential staffing of a litigation team and have a communications plan in place to respond to media, investor, or employee inquiries that may arise when the EEOC goes public with its allegations.

### 1. Who Can Sue? A Charging Party's Unqualified Right To Intervene

In 1972, Congress amended Title VII to authorize the EEOC to bring a civil action in federal district court against employers who have violated Title VII.<sup>869</sup> Where the EEOC brings suit, the individual charging party is barred from separately filing a cause of action.<sup>870</sup> However, it is well established that a charging party has an unqualified right to intervene in the EEOC's action.<sup>871</sup> Section 706(f)(1) of Title VII, 42 U.S.C. § 2000e-5(f)(1), states in pertinent part:

If within thirty days after a charge is filed with the Commission . . . , the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. . . . The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission . . . .<sup>872</sup>

If a charging party wishes to participate in settlement negotiations or to have the right to reject any settlement agreement negotiated by the EEOC, the charging party may protect itself by intervening.<sup>873</sup> If the charging party does not intervene, it is not unfair to conclude that he or she

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<sup>865</sup> *Id.*

<sup>866</sup> *Id.*

<sup>867</sup> *Id.*

<sup>868</sup> See *id.* ("Where the Commission determines that there is reasonable cause to believe that an unlawful employment practice has occurred or is occurring, the Commission shall endeavor to eliminate such practice by informal methods of conference, conciliation and persuasion." 29 C.F.R. § 1601.24(a)).

<sup>869</sup> See *Gen. Tel. Co. of Nw. v. EEOC*, 446 U.S. 318, 326 (1980).

<sup>870</sup> *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 291 (2002).

<sup>871</sup> *Adams v. Proctor Gamble Mfg. Co.*, 697 F.2d 582, 583 (4th Cir. 1983); see also *EEOC v. Boren P.C.*, Case No. 05-2611 M/P. (W.D. Tenn. Feb. 15, 2006) ("[P]ersons aggrieved have 'unqualified right' to intervene in EEOC action.").

<sup>872</sup> 42 U.S.C.A. § 2000e-5 (West)

<sup>873</sup> *Adams*, 697 F.2d at 583.

placed the conduct of the litigation entirely upon the EEOC and expressed a conclusive willingness to be bound by the outcome, whether or not the outcome was negotiated.<sup>874</sup>

The EEOC has the authority to sue on behalf of individual claimants regardless of whether they filed charges with the EEOC. In *EEOC v. Stone Pony Pizza, Inc.*,<sup>875</sup> the EEOC brought an action alleging that a restaurant failed to hire job applicants on the basis of their race.<sup>876</sup> Eleven individual African-American job applicants intervened in the action and the restaurant moved for summary judgment.<sup>877</sup> The Court denied the restaurant's motion holding that although the EEOC's involvement was triggered by an individual's charge, the EEOC had the authority to sue on behalf of individual claimants regardless of whether they filed charges with the EEOC.<sup>878</sup>

The restaurant further argued that the individual claimants were not "persons aggrieved" because they never filed charges with the EEOC.<sup>879</sup> Due to lack of appellate precedent on the issue of who qualifies as a "person aggrieved," the Court declined to expressly hold that the claimants that did not file their own EEOC charges were "persons aggrieved" with an unconditional statutory right to intervene.<sup>880</sup> The Court, however, applied the "similarly-situated" and "nearly identical claims" prongs of the single filing rule in analyzing the meaning of the term "persons aggrieved" and held that the individual claimants were permitted to intervene in this action brought by the EEOC on their behalf.<sup>881</sup> The Court noted that because of the nearly identical nature of each individual claim, the claims shared common questions of law, and thus, the individual claimants had complied with the mandatory conditions to intervene.<sup>882</sup>

Plaintiffs intervening in litigation can, in certain cases, bring with them additional claims that can only be asserted by individuals, which the EEOC otherwise could not do. State law claims and other causes of action can thus work their way into a case brought by the EEOC, and can expand the scope of the litigation, including discovery.

For example, in *EEOC v. Mayflower Seafood Of Goldsboro, Inc.*,<sup>883</sup> the EEOC brought an action alleging that defendant subjected Liza Hill, an employee, to sexual harassment and created a sexually hostile work environment.<sup>884</sup> Hill moved to intervene in the case as a party Plaintiff, which the court granted. Neither the EEOC nor defendant opposed Hill's intervention, but defendant opposed Hill's request to assert additional state law claims against it and additional parties.<sup>885</sup> However, the court exercised supplemental jurisdiction over Hill's state law claims and found that they arose from the same actions that formed the basis of the EEOC's Title VII claims and could be tried alongside Hill's sexual harassment claims.<sup>886</sup> The court also found that allowing Hill to

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<sup>874</sup> *Id.*

<sup>875</sup> *EEOC v. Stone Pony Pizza, Inc.*, 2016 U.S. Dist. LEXIS 40229 (N.D. Miss. Mar. 28, 2016).

<sup>876</sup> *Id.* at \*1-2.

<sup>877</sup> *Id.* at \*4.

<sup>878</sup> *Id.* at \*9.

<sup>879</sup> *Id.* at \*15.

<sup>880</sup> *Id.* at \*17-18.

<sup>881</sup> *Id.*

<sup>882</sup> *Id.* at \*18-21.

<sup>883</sup> *EEOC v. Mayflower Seafood Of Goldsboro, Inc.*, Case No. 5:15-CV-00636-BO, 2016 U.S. Dist. LEXIS 101154 (E.D.N.C. Aug. 2, 2016).

<sup>884</sup> *Id.*

<sup>885</sup> *Id.*

<sup>886</sup> *Id.* at \*4.

prosecute her state law claims along with her Title VII claims, would not cause any undue delay or prejudice.<sup>887</sup>

## 2. Discovery Trends In EEOC Litigation

In recent years, the EEOC has increased its investment in technology and training. Among the EEOC's improvements is an increase in its sophistication with regard to ESI (electronically stored information) discovery. The changes have included more informed technical staff and resources, and the hiring of litigation technology consultants, including one full-time attorney with a deep background and experience in electronic discovery litigation. Nonetheless, there can be stark differences among the EEOC offices in the sophistication and aggressiveness of approach of the attorneys as it relates to ESI.

It is common to have dozens of discussions with the EEOC regarding the scope of electronic discovery and how relevant documents will be identified and produced. This may include broad demands for custodians. In a nationwide pattern or practice case against a large employer, a demand by the EEOC for documents related to all decision-makers might include hundreds of people. In addition, the EEOC often demands collection from difficult to capture sources, such as text messaging services. Although the EEOC is typically willing to discuss the use of search terms as a way to limit the number of documents to be reviewed, its proposals can sometimes be so broad as to be effectively meaningless. Where the EEOC's demands are overbroad or unduly burdensome, it is important for employers to develop a record that will demonstrate to the court that the EEOC is being unreasonable, and that the effort involved in responding to the request is disproportionate to the relevance and value of the information being sought.

### a. Recent Trial Court Opinions Concerning Discovery Issues

#### i. Preservation

The pace and sometimes vague nature of the EEOC's pre-suit investigations presents its own ESI challenges. It is not uncommon for years to pass from the date a charge commences until the EEOC files suit. Over that period of time, the EEOC's investigation may evolve, and the agency is not always forthcoming about what it has found, what theory it may litigate, the definition of the class for whom it seeks relief, and similar issues. Despite that, the EEOC takes the view, and some courts have agreed, that the preservation obligation is triggered at the time a charge is made.<sup>888</sup> Employers must be extra vigilant so that by the time litigation discovery begins, there has been no spoliation of information.

For example, the Court in *EEOC v. Ventura Corp, Ltd.*,<sup>889</sup> faced such allegations. The employer received notice of an EEOC investigation regarding discriminatory hiring practices in 2007.<sup>890</sup> After the notice of investigation and other notifications from the EEOC to preserve potentially relevant data, the employer initiated an office restructure and software migration in 2009 and 2010 respectively, which resulted in the loss of personnel data.<sup>891</sup> The EEOC sought sanctions for spoliation of the potentially relevant data. The employer argued that the destruction was not

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<sup>887</sup> *Id.*

<sup>888</sup> *EEOC v. Fry's Elecs., Inc.*, 874 F. Supp. 2d 1042, 1044 (W.D. Wash. 2012) (mere mention of the EEOC to "sophisticated corporate employer" enough to put employer on notice to preserve documents).

<sup>889</sup> *EEOC v. Ventura Corp, Ltd.*, Case No. 11-CV-1700, 2013 WL 550550 (D.P.R. Feb. 12, 2013).

<sup>890</sup> *Id.* at \*1.

<sup>891</sup> *Id.* at \*2.

deliberate or done in bad faith, that it did not have a duty to preserve under Title VII's recordkeeping requirements,<sup>892</sup> and that the EEOC had not shown that relevant evidence had been spoliated.

The Court disagreed and found that the employer had an obligation to preserve the missing records, and because the missing records were potentially relevant, that the employer failed to produce relevant evidence.<sup>893</sup> Although the Court did not find that the employer acted in bad faith, it recognized First Circuit precedent that bad faith is not necessary for sanctions to apply and imposed sanctions based on the employer's "careless" handling of evidence.<sup>894</sup>

The Court's decision may have had a different outcome had it been heard following the 2015 amendments to the Federal Rules of Civil Procedure. Under Rule 37(e), the Court would have determined if: (a) the party had a duty to preserve ESI at the time it was lost; (b) the party took reasonable steps to preserve ESI; (c) the ESI can be restored or replaced; (d) the party acted with the intent to deprive the other party from using the ESI in the litigation; and (e) if intent was not found, if the loss of ESI prejudiced the other party.<sup>895</sup> Under the new rules, a party's negligence or even gross negligence is not enough to establish intent under FRCP 37(e)(2). Here, the Court likely would have ordered measures no greater than necessary to cure the prejudice, so long as the measures did not include or have a similar affect as the severe sanctions listed under FRCP 37(e)(2).

In recent years, EEOC's attorneys have been more aggressive in seeking sanctions for what the EEOC believes to be inadequate document and ESI preservation efforts. In those cases, the EEOC usually seeks some form of evidentiary sanction or presumptive finding, including precluding the employer from producing testimony or disputing a particular fact that is key to the defense. Written discovery requests directed towards record retention practices, data deletion routines, and even legal hold procedures are becoming more common, even when there is no evidence that any relevant information has been deleted or destroyed.

For example, in *EEOC v. JBS USA, LLC*,<sup>896</sup> the EEOC alleged that a meat packing company discriminated against employees on the basis of religion by engaging in a pattern or practice of retaliation, discriminatory discipline and discharge, harassment, and denying reasonable religious accommodations.<sup>897</sup> After evidence arose of the employer's failure to preserve and produce two types of records relating to production line activity, which the EEOC alleged should have been preserved, the EEOC aggressively pursued spoliation sanctions and obtained an evidentiary sanction preventing the employer from presenting evidence or argument in its motions, at hearings, or at trial regarding production line slowdowns or stoppages involving the claimants.<sup>898</sup>

Many in the defense bar believe that the EEOC relies on spoliation arguments as a "fall back" to obtain an adverse inference when the facts do not strongly support its claims. If this is indeed the EEOC's litigation strategy, it only means that employers must make extra efforts to formulate a robust and defensible preservation strategy as soon as a notice of claim arrives or is reasonably anticipated.

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<sup>892</sup> See 29 C.F.R. §1602.14.

<sup>893</sup> *Ventura Corp, Ltd.*, 2013 WL 550550, at \*6.

<sup>894</sup> *Id.* (citing *Trull v. Volkswagen of America, Inc.*, 187 F.3d 88, 95 (1st Cir.1999)).

<sup>895</sup> Fed. R. Civ. P. 37(e).

<sup>896</sup> *EEOC v. JBS USA, LLC*, No. 10-CV-02103, 2017 WL 3334648 (D. Colo. Aug. 4, 2017).

<sup>897</sup> *Id.* at \*1.

<sup>898</sup> *Id.* at \*1-2.

## ii. Social Media Discovery

The EEOC is also wary of social media discovery, which has become a potentially valuable source of information in EEOC litigation. For example, in *EEOC v. The Original Honeybaked Ham Co. of Georgia, Inc.*,<sup>899</sup> a systemic sexual harassment and retaliation case, the employer argued that many of its employees utilized social media to communicate and therefore claimed that the employees' online statements were discoverable.<sup>900</sup> The EEOC called the employer's social media discovery requests a "proverbial fishing expedition" and claimed that they were too vague.<sup>901</sup> The Court disagreed and ruled that employees' social media content should be produced because it was "potentially relevant" to the EEOC's sexual harassment allegations.<sup>902</sup> This is not the first time a court has recognized the potential value in discovery of social media data and compelled production of content from social networking sites.<sup>903</sup>

## iii. Proportionality And Cost-Shifting

Determining a reasonable scope for ESI preservation, search, and review is paramount when confronted with an EEOC lawsuit. EEOC preservation and search expectations are generally quite broad; accordingly, it is usually good practice to negotiate and attempt to seek an agreement with the EEOC with regards to potential date range restrictions, search terms, and the potential application of Technology Assisted Review.

Since the 2015 amendments to the Federal Rules, specifically Federal Rule 26(b)(1), proportionality has been much more widely discussed and accepted.<sup>904</sup> Although the EEOC is generally amenable to the use of search terms to limit the population of documents for review, it often demands to be involved in the development of those terms. Collaboration between parties to develop search terms is widely accepted and encouraged. For example, in *EEOC v. McCormick & Schmick's Seafood Restaurants, Inc.*,<sup>905</sup> the Court held that "[i]f the producing party generates the search terms on its own, the inevitable result will be complaints that the search terms were inadequate."<sup>906</sup> The Court ordered the parties in that case to meet and confer regarding the terms.<sup>907</sup>

Open ended meet and confer discussions can lead to other ESI challenges, mostly due to the EEOC's broad demands for terms. For example, some practitioners have received search term demands that included the standalone words "he," "she," "him," and "her" in a gender discrimination case, or "white", "brown", and "black" in a racial discrimination case. In addition to insisting that terms be tied to other words to guarantee context and relevance, it can be helpful to enter search term

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<sup>899</sup> *EEOC v. The Original Honeybaked Ham Co. of Ga., Inc.*, Case No. 11-CV-02560, 2012 WL 5430974 (D. Colo. Nov. 7, 2012).

<sup>900</sup> *Id.* at \*1.

<sup>901</sup> *Id.* at \*2.

<sup>902</sup> *Id.*

<sup>903</sup> See, e.g., *EEOC v. Simply Storage Mgmt., LLC*, 270 F.R.D. 430 (S.D. Ind. 2010) (compelling production of social media data due to the probability of a sufficient showing of evidence despite EEOC's concerns regarding privacy of said data).

<sup>904</sup> See Fed. R. Civ. P. 26(b)(1) ("Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and *proportional* to the needs of the case, considering the importance of the issues at stake in the action, the amount-in-controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.") (emphasis added).

<sup>905</sup> *EEOC v. McCormick & Schmick's Seafood Rests., Inc.*, Case No. WMN-08-0984, 2012 WL 380048 (D. Md. Feb. 3, 2012).

<sup>906</sup> *Id.* at \*4.

<sup>907</sup> *Id.*

negotiations prepared with at least some sample data results in order to discuss the actual implications of particularly troublesome search expressions.

The EEOC has also been open to application of Technology Assisted Review (“TAR”), which in this instance should be interpreted to include everything from email threading and clustering to predictive coding, but often demands to be involved in that process as well. While courts have urged the cooperation of parties in search term development, the same is not necessarily true for TAR implementation. And issues concerning the level of collaboration between parties and detail of disclosures regarding TAR mechanisms and processes are not settled in eDiscovery jurisprudence.

The lack of consensus on this topic can lead to different expectations. Some parties may apply the logic of *EEOC v. McCormick & Schmick’s* and meet and confer on the issue, while other parties may view the application of TAR as their own prerogative, especially as the application of TAR is increasingly gaining acceptance in courts as a means for keeping discovery proportionate and efficient.<sup>908</sup> Generally speaking, litigants should expect the Commission to expect some fundamental information about TAR, such as its fundamental operations and document metric information. The EEOC has not yet taken the extreme position of seeking to review or access training documents or so-called “seed sets.” That level of access and involvement in the opposing party’s document review, while sometimes stipulated between the parties, is not an established right under existing court opinions.

#### **b. eDiscovery Requests Directed To The EEOC**

As recently as 2016, the EEOC was resisting even simplistic searches for ESI, and was instead insisting that a printed copy of its paper investigative file was all the documents it was required to produce in litigation. It was often frustrating for litigants who were dealing with complicated ESI search requests across multiple systems to learn that the EEOC was unwilling to discuss even basic electronic systems and searches regarding its own ESI. However, in 2017, the EEOC upgraded its email system from a distinctly 20th Century platform to something more modern. At around the same time, the EEOC signaled an awareness that it is, in fact, also required to conduct some key word searches and review of email of relevant investigators and personnel, because not every relevant communication is printed and maintained in the ubiquitous “case file” materials.

#### **c. Challenges Posed By Third Party ESI Sources**

It is common for modern companies to outsource some part of its HR functions to third party service providers. The challenge with these outsourced functions in the context of an EEOC investigation or litigation is that a large-scale preservation, customized search and export project are not usually accounted for in the existing contract or master services agreement. Additionally, some modern web based applications are not designed for the type of wholesale data exports which may be required in the investigation phase or in electronic discovery responses.

Given these concerns, employers should consider making an early assessment of third party and service provider information sources, and then put together a complete ESI preservation and production plan for those sources. This will likely involve multiple communications with technical personnel familiar with the systems and eDiscovery representatives on behalf of the company. It is important to bear in mind that attorney-client privilege may not apply to these communications, and the EEOC has been known to contact third party service providers independently in order to obtain

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<sup>908</sup> See, e.g., *Da Silva Moore, et al. v. Publicis Groupe*, Case No. 11 Civ. 1279, 2012 WL 607412 (S.D.N.Y. Feb. 24, 2012); *In Re Biomet M2a Magnum Hip Implant Prods. Liab. Litig.*, 2013 U.S. Dist. LEXIS 84440 (N.D. Ind. Apr. 18, 2013); *FDIC v. Bowden*, Case No. 4:13-CV-245, 2014 WL 2548137 (S.D. Ga. June 6, 2014); *Rio Tinto PLC v. Vale SA*, Case No. 1:14 Civ. 03042-RMB-AJP (S.D. N.Y. March 3, 2015); and *FCA US v. Cummins*, 2017 WL 2806896 (E.D. Mich. Mar. 28, 2017).

information regarding outsourced personnel systems or data. With this in mind, it is all the more important to make contact with relevant third-party vendors and service providers to instruct them that, if they do receive an informal inquiry or a formal subpoena request from the EEOC, they should consult the company's attorneys before making any contact or providing information in response. A notification and objection process for subpoenas is often included in standard vendor agreements, but it can be helpful to reaffirm in writing that the data in question belongs to the company.

### 3. Case Management Issues In Pattern Or Practice Cases

Once a systemic pattern or practice case is past the pre-suit phase, the focus for employers turns to shaping that case so that it presents the best opportunity for victory. A pattern or practice case often follows a two-stage burden-shifting framework set forth in *International Brotherhood of Teamsters v. United States*.<sup>909</sup> Under that framework, the EEOC must first establish that discrimination is the employer's "standard operating procedure." If it meets that difficult burden of proof, some courts have held that this creates a presumption that all individuals in the EEOC's "class" were victims of discrimination. The employer then has the opportunity to rebut that presumption as to each individual claim. However, that means that the employer must litigate each individual claim separately, often years after the relevant employment decisions were made.

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

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

If the government meets the difficult burden under the *Teamsters* framework, and then obtains a presumption of discrimination, this can represent a significant litigation advantage for the EEOC. At issue in a number of recent cases is whether that framework is appropriately applied to cases that originated under section 706.

On June 17, 2016, the EEOC won a major battle on this front when the Fifth Circuit decided *EEOC v. Bass Pro Outdoor World, L.L.C.*<sup>910</sup> in its favor. Judge Ellison of the U.S. District Court for the Southern District of Texas had held that the *Teamsters* analysis can apply to both section 706 and section 707 claims.<sup>911</sup> The Court's decision was based on an exhaustive review of relevant precedent.<sup>912</sup> The Court ultimately concluded that the statutory text of section 706 did not preclude the use of the *Teamsters* model.<sup>913</sup>

The Fifth Circuit affirmed the District Court's decision in full, holding that although Section 707, unlike section 706, does not explicitly authorize pattern or practice suits, Congress had not explicitly prohibited the EEOC from bringing pattern or practice suits under section 706 and therefore bringing them to trial under a bifurcated framework.<sup>914</sup> The court reasoned that "[t]he EEOC is nestled within

<sup>909</sup> *Int'l Bhd. of Teamsters v. U.S.*, 431 U.S. 324 (1977).

<sup>910</sup> *EEOC v. Bass Pro Outdoor World, L.L.C.*, 826 F.3d 791 (5th Cir. 2016).

<sup>911</sup> *EEOC v. Bass Pro Outdoor World, LLC*, 35 F. Supp. 3d 836, 859 (S.D. Tex. 2014).

<sup>912</sup> *Id.* at 856-59.

<sup>913</sup> *Id.* at 847.

<sup>914</sup> *Bass Pro Outdoor World, LLC*, 826 F.3d at 800.

a statutory framework fundamental to this case.”<sup>915</sup> Reading that statutory language, the Fifth Circuit noted that Congress had amended Title VII in 1972 in order to give the EEOC power to bring two kinds of suits against private employers alleged to have violated Title VII.<sup>916</sup> First, the EEOC could bring a claim under section 706 on behalf of an aggrieved individual if the EEOC is unable to obtain an acceptable conciliation agreement with the respondent.<sup>917</sup> Second, Congress transferred to the EEOC the Attorney General’s power to bring pattern or practice claims under section 707.<sup>918</sup> Congress amended Title VII again in 1991 to allow the EEOC to recover compensatory and punitive damages as the “complaining party” under section 706.<sup>919</sup> Those expanded remedies were limited to cases of intentional discrimination; they could not be had in cases that alleged only disparate impact.<sup>920</sup>

The Fifth Circuit then turned to Supreme Court precedent that interpreted this statutory history. In *General Telephone Co. of the Northwest v. EEOC*,<sup>921</sup> the Court held that the EEOC was not required to meet the prerequisites to class certification under Rule 23 because that would inhibit Congress’ intent to endow the EEOC with broad enforcement authority commensurate with its mission to vindicate the public interest in preventing employment discrimination.<sup>922</sup> Accordingly, the EEOC “may maintain its Section 706 civil actions for the enforcement of Title VII and may seek specific relief for a group of aggrieved individuals without first obtaining class certification pursuant to [Rule 23].”<sup>923</sup> Extrapolating from that reasoning, the Fifth Circuit held that Congress had given the EEOC broad enforcement powers to advance the public interest in preventing and remedying employment discrimination, and courts should therefore be reluctant to impose requirements on the EEOC that might disable the EEOC from advancing that public interest in the absence of clear Congressional guidance to the contrary.<sup>924</sup> Because Congress had not explicitly prohibited the EEOC from bringing pattern or practice suits under section 706, the Fifth Circuit “decline[d] to imply limits upon the trial court’s management power that not only cannot be located in the language of the statute but also confound the plain language of the Federal Rules.”<sup>925</sup>

Given the potential litigation leverage that the EEOC often obtains from bifurcation and proceeding under the *Teamsters* framework, these issues are some of the most hotly contested and important procedural trends affecting EEOC litigation. Now that the Fifth Circuit has ruled in the EEOC’s favor, employers are likely to see the agency push this issue in many more cases.

On April 28, 2017, the US Court of Appeals for the Fifth Circuit declined to rehear the panel’s discussion *en banc*, as a rehearing was not voted for by a majority of the Court’s judges who were in regular active service and not disqualified (7-7).<sup>926</sup>

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<sup>915</sup> *Id.* at 795.

<sup>916</sup> *Id.*

<sup>917</sup> *Id.* at 795-96.

<sup>918</sup> *Id.* at 796.

<sup>919</sup> *Id.*

<sup>920</sup> *Id.*

<sup>921</sup> *Gen. Tel. Co. of the Nw. v. EEOC*, 446 U.S. 318 (1980).

<sup>922</sup> *Bass Pro Outdoor World, LLC*, 826 F.3d at 797-98 (quoting *Gen. Tel. Co. of the Nw.*, 446 U.S. at 326).

<sup>923</sup> *Id.* at 799 (quoting *Gen. Tel. Co. of the Nw.*, 446 U.S. at 333-34).

<sup>924</sup> *Id.* at 800.

<sup>925</sup> *Id.*

<sup>926</sup> *Equal Employment Opportunity Commission v. Bass Pro Outdoor World, L.L.C.*, 2017 WL 1540853 (5th Cir. Apr. 28, 2017); see also Gerald L. Maatman, Jr., Christopher J. DeGroff, and Alex W. Karasik, *Dueling Fifth Circuit Panel Deadlocks, No Rehearing For Bass Pro In “Big Fish” EEOC Case*, WORKPLACE CLASS ACTION BLOG (May 3, 2017), available at

## b. “Bifurcation” In Pattern Or Practice Cases

The *Teamsters* framework lends itself to various forms of “bifurcation.” Bifurcation simply means that the case is structured in phases. For example, in *EEOC v. JBS USA, LLC*,<sup>927</sup> the parties agreed to bifurcate discovery and trial into two phases.<sup>928</sup> Phase I would include the EEOC’s pattern or practice claims.<sup>929</sup> Phase II would address all individual claims for relief.<sup>930</sup> The case arose out of the EEOC’s allegations that a meat packing company had engaged in a pattern or practice of religious discrimination when it failed to reasonably accommodate at least 153 Muslim employees by allowing them prayer breaks.<sup>931</sup> The EEOC also alleged that the company retaliated against the employees and terminated them when they requested that the company move their evening breaks so that they could pray at sundown during the month of Ramadan.<sup>932</sup>

At the conclusion of Phase I, the Court concluded that a single mass termination of 80 Muslim employees did not constitute a “pattern or practice.”<sup>933</sup> The Court also decided that JBS had established its affirmative defense of undue hardship because the religious accommodation that the EEOC had requested for Muslim employees would have caused more than a *de minimis* burden on the employer and its non-Muslim employees.<sup>934</sup> But in Phase II, the Court held that its earlier rulings did not preclude the EEOC from pursuing individual claims for discrimination or retaliation.<sup>935</sup>

The *Bass Pro* decision started a trend in EEOC pattern or practice. Rather than file a claim under Section 707 alleging a pattern or practice of discrimination, the EEOC has started to file those same claims instead under Section 706. For example, in *EEOC v. Jackson National Life Insurance Company*<sup>936</sup> (“JNL”), the EEOC alleged discrimination based on sex, race and/or color for the four named plaintiffs and “other aggrieved individuals.” JNL, which has nearly 5,000 employees, would potentially be subjected to an individual calculation of damages for all aggrieved individuals, despite the fact that this would require an insurmountable amount of fact finding on an individual basis. The complaint, alleging express authorization to bring the action under Sections 706(f)(1) and (3) of Title VII, proposes a class of plaintiffs that would typically be far too large for joinder.

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<http://www.workplaceclassaction.com/2017/05/dueling-fifth-circuit-panel-deadlocks-no-rehearing-for-bass-pro-in-big-fish-eec-case/>.

<sup>927</sup> *EEOC v. JBS USA, LLC*, Case No. 8:10-CV-3, 2015 WL 405038 (D. Neb. Jan. 28, 2015).

<sup>928</sup> *Id.* at \*2.

<sup>929</sup> *Id.*

<sup>930</sup> *Id.*

<sup>931</sup> See Gerald L. Maatman and Jennifer A. Riley, *Mixed Ruling In EEOC Religious Discrimination Case Confirms That Single Mass Termination Does Not Create A “Pattern Or Practice”*, WORKPLACE CLASS ACTION BLOG (Apr. 25, 2013), <http://www.workplaceclassaction.com/2013/04/mixed-ruling-in-eec-religious-discrimination-case-confirms-that-single-mass-termination-does-not-cr/>.

<sup>932</sup> *Id.*

<sup>933</sup> *JBS USA, LLC*, 2015 WL 405038, at \*3.

<sup>934</sup> See Laura Maechten and Michael Wahlander, *The EEOC Has A Cow, And Now Must Raise Its Beef On Appeal*, WORKPLACE CLASS ACTION BLOG (Jan. 29, 2014), <http://www.workplaceclassaction.com/2014/01/the-eec-has-a-cow-and-now-must-raise-its-beef-on-appeal/>; Gerald L. Maatman, Jr. and Howard M. Wexler, *Where’s the Beef? Employer Defeats EEOC’s Religious Discrimination Pattern Or Practice Case By Establishing Undue Hardship Defense*, WORKPLACE CLASS ACTION BLOG (Oct. 16, 2013), <http://www.workplaceclassaction.com/2013/10/wheres-the-beef-employer-defeats-eec-religious-discrimination-pattern-or-practice-case-by-establishing-undue-hardship-defense/>.

<sup>935</sup> *JBS USA, LLC*, 2015 WL 405038, at \*7.

<sup>936</sup> *EEOC v. Jackson National Life Insurance Company, et al*, Case No. 1:16-cv-02472 (D. Colo. 2017).

## 4. Developments In Trial Strategies

The EEOC tries very few of the cases it brings – resolving more than 80% of its lawsuits by consent decree or settlement agreement.<sup>937</sup> The small number of cases tried by the EEOC is no doubt partly a function of the EEOC's finite resources, as well as a reflection of the numerically-diminishing roster of trial attorneys at the EEOC. For example, in FY 2016, the EEOC had just 173 field trial attorneys nationwide, a tally that has declined by 18 percent since FY 2012.<sup>938</sup> In its Annual Report, the Office of the General Counsel reports the number EEOC suit resolutions, a broad category including “determinations on the merits by courts and juries”; however, the EEOC does not separately report resolutions by trial.<sup>939</sup> Instead, the EEOC reports resolutions by “favorable court order” and “unfavorable court order.”<sup>940</sup> The EEOC does, however, issue press releases to tout its trial victories. The EEOC proclaimed one trial success in FY 2016.<sup>941</sup> Thus far in FY 2017, the EEOC has announced just one other trial win.

### a. EEOC Trials: Past, Present, and Future

On September 19, 2016, after a four-day trial, a federal jury returned a verdict for the EEOC on behalf an employee cashier.<sup>942</sup> The jury found that the employer violated the ADA by failing to provide a reasonable accommodation for the diabetic employee's disability, and by discriminating against the employee due to her disability.<sup>943</sup> The employer was ordered to pay \$27,565 in back wages and \$250,000 in compensatory damages.<sup>944</sup> On December 21, 2016, a federal jury found in favor of an employee who was harassed and stalked by a customer of the employer, after a six-day trial. The jury found the defendant employer liable for a hostile work environment under Title VII, ordering the employer to pay \$250,000 in compensatory damages.<sup>945</sup>

On August 31, 2017, the EEOC concluded a bench trial before Judge Philip Brimmer of the United States District Court for the District of Colorado.<sup>946</sup> On behalf of Muslim employees, the EEOC alleged that a meatpacking employer discriminated and retaliated against the employees, failed to

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<sup>937</sup> EEOC, Office of the General Counsel, Fiscal Year 2016 Annual Report, *available at* <https://www.eeoc.gov/eeoc/litigation/reports/16annrpt.cfm>. In 2012, the EEOC had 211 field trial attorneys. *Id.* In 2013-2015, the totals were 195, 192 and 195, respectively.

<sup>938</sup> EEOC, Office of the General Counsel, Fiscal Year 2016 Annual Report, *available at* <https://www.eeoc.gov/eeoc/litigation/reports/16annrpt.cfm>.

<sup>939</sup> EEOC, Office of the General Counsel, Fiscal Year 2016 Annual Report, *available at* <https://www.eeoc.gov/eeoc/litigation/reports/16annrpt.cfm>.

<sup>940</sup> EEOC, Office of the General Counsel, Fiscal Year 2016 Annual Report, *available at* <https://www.eeoc.gov/eeoc/litigation/reports/16annrpt.cfm>. In FY 2016, 9.4% of the EEOC's resolutions were by way of “unfavorable court order,” and 7.9% were by “favorable court order.” *Id.*

<sup>941</sup> Early in FY 2016, the EEOC announced that a jury had awarded two Somali-American Muslims \$240,000 in compensatory and punitive damages against their trucking company employer for violating Title VII by failing to accommodate their religious beliefs. Press Release, Jury Awards \$240,000 to Muslim Truck Drivers In EEOC Religious Discrimination Suit (Oct. 22, 2015), *available at* <https://www.eeoc.gov/eeoc/newroom/release/10-22-15b.cfm>. The jury was not called on to decide liability, however, which the employer admitted in March 2015. *See id.*

<sup>942</sup> Press Release, Jury in EEOC Suit Says Dollar General Must Pay Former Employee Over \$277,565 For Disability Discrimination (Sept. 19, 2016), *available at* <https://www.eeoc.gov/eeoc/newroom/release/9-19-16a.cfm>.

<sup>943</sup> Verdict Form, *EEOC v. Dolgencorp, LLC*, Case No. 14-CV-441 (E.D. Tenn. Sept. 16, 2016), ECF No. 148.

<sup>944</sup> Verdict Form, *EEOC v. Dolgencorp, LLC*, Case No. 14-CV-441 (E.D. Tenn. Sept. 16, 2016), ECF No. 148.

<sup>945</sup> Press Release, EEOC Wins Jury Verdict in Sexual Harassment Case against Costco (Dec. 22, 2017), *available at* <https://www.eeoc.gov/eeoc/newsroom/release/12-22-16.cfm>. The matter is on appeal to the United States Court of Appeals for the Seventh Circuit. *See* Notice of Appeal, *EEOC v. Costco Wholesale Corp.*, Case No. 14-CV-6553 (N.D. Ill. July 14, 2017), ECF No. 274.

<sup>946</sup> *E.g.*, Minute Entry, *EEOC v. JBS USA, LLC*, Case No. 10-CV-2103 (D. Colo. Aug. 31, 2017), ECF No. 592.

provide religious accommodations, and failed to remedy a hostile work environment, in violation of Title VII.<sup>947</sup> Following the 16-day bench trial, the EEOC and the employer submitted proposed findings of fact and conclusions of law.<sup>948</sup> As of the date of this publication, no verdict has been entered.

## b. Emerging Trends In EEOC Trials

Given the tiny number of cases the EEOC tries (by bench trial or jury trial), the relevant data set regarding EEOC trial litigation tactics is minuscule. That said, considering the EEOC's recent trial history and its near-term slate of trials, certain trends appear to emerge from the data regarding those few cases the EEOC decides to bring to trial.

First, religious discrimination cases under Title VII made up less than 6% of EEOC's merits filings in FY 2017, and ADEA cases accounted for just 6.5%.<sup>949</sup> For FY 2016, the ratios were similar, accounting for 6% and 5% of the EEOC's merits filings, respectively.<sup>950</sup> However, two of the EEOC's three upcoming trials involve religious discrimination under Title VII, and one was recently completed. One of the EEOC's three upcoming trials involves the ADEA, and another ended in mistrial in February 2017. Thus, relative to the EEOC's overall substantive areas of focus, cases involving religious discrimination under Title VII and cases under the ADEA are significantly over-represented among the cases the EEOC brings to trial.

Second, an emerging trend in EEOC trial litigation is the EEOC's use of evidentiary sanctions to gain a tactical advantage in litigation. For example, in *EEOC v. JBS USA, LLC*,<sup>951</sup> after evidence arose of the employer's failure to preserve records relating to production line activity, the EEOC convinced the Court to impose evidentiary sanctions preventing the employer from presenting evidence or argument regarding production line slowdowns or stoppages involving the claimants.<sup>952</sup>

## E. Settlements And Judgments

When faced with the potentially high cost of EEOC litigation, many employers opt to settle rather than litigate through trial. Extensive electronic discovery has developed into an offensive weapon used by the EEOC to leverage litigation (and settlement) advantage. Particularly with systemic cases, the EEOC frequently challenges nationwide policies and practices, and issues sweeping discovery requests and deposition notices that drive up the cost of litigation.

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<sup>947</sup> Complaint, *EEOC v. JBS USA, LLC*, Case No. 10-CV-2103 (D. Colo. Aug. 30, 2010), ECF No. 1.

<sup>948</sup> Proposed Findings of Fact and Conclusions of Law by Plaintiff Equal Employment Opportunity Commission, *EEOC v. JBS USA, LLC*, Case No. 10-CV-2103 (D. Colo. Oct. 20, 2017), ECF No. 605; Proposed Findings of Fact and Conclusions of Law by Defendant JBS USA, LLC, *EEOC v. JBS USA, LLC*, Case No. 10-CV-2103 (D. Colo. Oct. 20, 2017), ECF No. 604.

<sup>949</sup> See, e.g., Gerald L. Maatman, Jr., Christopher J. DeGroff and Matthew J. Gagnon, *Tick, Tock... The EEOC Runs Out The Clock – Fiscal Year 2017 Marks A Last Minute Return To Frantic Filing*, Workplace Class Action Blog (Sep. 30, 2017), available at <https://www.workplaceclassaction.com/2017/09/tick-tock-the-eeoc-runs-out-the-clock-fiscal-year-2017-marks-a-last-minute-return-to-frantic-filing/>.

<sup>950</sup> See, e.g., Gerald L. Maatman, Jr., Christopher J. DeGroff and Matthew J. Gagnon, *The Clock Has Struck 12 On The EEOC Fiscal Year-End Countdown – Surprising Revelations For FY2016*, Workplace Class Action Blog (Oct. 1, 2016), available at <https://www.workplaceclassaction.com/2016/10/the-clock-has-struck-12-on-the-eeoc-fiscal-year-end-countdown-surprising-revelations-for-fy-2016/>.

<sup>951</sup> *EEOC v. JBS USA, LLC*, Case No. 10-CV-02103, 2017 U.S. Dist. LEXIS 122908 (D. Colo. Aug. 4, 2017).

<sup>952</sup> See, e.g., Gerald L. Maatman, Jr. and Alex W. Karasik, *EEOC's Motion For Sanctions Granted Over Employer's Failure To Preserve And Produce Records*, Workplace Class Action Blog (Aug. 7, 2017), available at <https://www.workplaceclassaction.com/2017/08/eeocs-motion-for-sanctions-granted-over-employers-failure-to-preserve-and-produce-records/>.

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

The EEOC faces fewer procedural hurdles than other civil plaintiffs when it wishes to proceed on a class-wide basis. In a pattern or practice case, the EEOC need not satisfy Federal Rule of Civil Procedure 23 as other litigants do.<sup>953</sup> As some courts have observed, certification of a class action, even one lacking in merit, forces defendants “to stake their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to settle even if they have no legal liability.”<sup>954</sup> Faced with the prospect of litigating the class-like claims of a pattern or practice lawsuit, many employers will elect to settle instead.

The EEOC obtained several large settlements and judgments in FY 2017. In a suit brought against Ford Motor Company, “the EEOC found reasonable cause to believe that personnel at two Ford facilities . . . had subjected female and African-American employees to sexual and racial harassment.”<sup>955</sup> Without admitting to liability, Ford chose to settle the case and pay up to \$10.125 million under a conciliation agreement.<sup>956</sup> The settlement also requires Ford to conduct regular training in the two facilities for the next five years as well as other reporting and compliance obligations.<sup>957</sup>

The EEOC obtained an even larger figure in its litigation against Bass Pro Outdoor World. In that case, the EEOC alleged that the retailer discriminated in the hiring process at its stores and also retaliated against employees who opposed certain corporate practices.<sup>958</sup> Further, the EEOC alleged that Bass Pro shops failed to adhere to federal record-keeping laws and regulations. That case ended in a \$10.5 million settlement.<sup>959</sup>

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<sup>953</sup> *Gen. Tel. Co. of Nw. v. EEOC*, 446 U.S. 318, 324 (1980) (EEOC “need look no further than § 706 [of Title VII] for its authority to bring suit in its own name for the purpose, among others, of securing relief for a group of aggrieved individuals.”).

<sup>954</sup> *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995).

<sup>955</sup> Press Release, Equal Employment Opportunity Commission, Ford Motor Company to Pay up to \$10.125 Million To Settle EEOC Harassment Investigation (Aug. 15, 2017), available at <https://www.eeoc.gov/eeoc/newsroom/release/8-15-17.cfm>.

<sup>956</sup> *Id.*

<sup>957</sup> *Id.*

<sup>958</sup> Press Release, Equal Employment Opportunity Commission, Bass Pro to Pay \$10.5 Million To Settle EEOC Hiring Discrimination And Retaliation Suit (July 25, 2017), available at <https://www.eeoc.gov/eeoc/newsroom/release/7-25-17b.cfm>.

<sup>959</sup> *Id.*

## What Elements Are Commonly Negotiated In Connection With A Consent Decree With The EEOC?



- 1 Duration
- 2 Non-admission clause
- 3 Monetary Award
- 4 Communication
- 5 Training
- 6 Create/define internal roles
- 7 Engage outside expert(s)
- 8 External monitor
- 9 Recordkeeping
- 10 Reports to be submitted to EEOC and/or monitor
- 11 Change policies or practices
- 12 Dispute resolution process for conflicts about the decree

After the EEOC has filed a lawsuit, settling that lawsuit results in a public consent decree that is filed with the court. A key component of almost every consent decree is the programmatic relief designed, at least in the EEOC's opinion, to correct any problematic practices in the future.<sup>1</sup> The consent decrees vary in range of time and injunctive obligations. For instance, these decrees may require: monetary settlements, revision of policies, employee training, notices, new hires, workforce monitoring, reinstatement of employee(s), and/or reporting obligations regarding the company's compliance with the decree to the EEOC.

## 2. Onerous Programmatic Relief Included In EEOC Settlements

In one very high-profile FY 2017 settlement, the EEOC agreed to settle the largest gender discrimination case it had ever brought for no monetary relief at all. On May 4, 2017, the EEOC entered into a consent decree with Sterling Jewelers that did not require either a monetary payment or an admission of liability.<sup>960</sup> The consent decree did contain some limited programmatic relief. Sterling Jewelers was required to appoint a “Compliance Officer at the level of Vice President or above” to oversee the implementation of and compliance with the consent decree and to review complaints and reports of sex discrimination and retaliation from female retail sales employees.<sup>961</sup> Other companies are often required to do more; such as appoint an equal employment opportunity consultant to ensure the company revises current policies.<sup>962</sup> Although the EEOC often pushes for this type of relief, employers should be wary of requests that require them to add another person to payroll or hire outside consultants or monitors.

Most consent decrees also include some level of new training for employees. For example, in FY 2017, Glaser Organic Farms entered into a settlement that required it to provide first-time bilingual training for its managers and all agricultural workers regarding their federal rights to be free from discrimination and retaliation.<sup>963</sup> Sometimes a settlement will require changes in hiring practices so that certain people are affirmatively recruited. This can require an overhaul in recruiting and internal human resources training.<sup>964</sup> In one settlement, an education company was required to conduct “annual, live, in-person training on anti-discrimination laws for all employees.”<sup>965</sup> Other consent decrees have mandated employers to reinstate the charging party, make reasonable efforts to place them in open positions, and provide neutral references for future job applications.<sup>966</sup>

The EEOC often includes a requirement that the employer revise or create a brand new employment policy related to the alleged basis of discrimination.<sup>967</sup> For example, one employer in FY 2017 was

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<sup>960</sup> Consent Decree, *EEOC v. Sterling Jewelers, Inc.*, Case No. 1:08-cv-00706-RJA-MJR (W.D.N.Y. May 4, 2017), ECF No. 435.

<sup>961</sup> *Id.* at 17.

<sup>962</sup> See, e.g., Press Release, Equal Employment Opportunity Commission, ABL Management to Pay \$35,000 to Settle Retaliation Law suit with EEOC (Apr. 10, 2017), available at <https://www.eeoc.gov/eeoc/newsroom/release/4-10-17a.cfm> (“[A]BL to appoint a qualified consultant who will help implement policies, provide direction for potential investigations, and train ABL employees and managers about retaliation.”); Press Release, Equal Employment Opportunity Commission, United Staffing Associates Voluntarily Settles EEOC Discrimination Charge for \$24,500 and Other Relief (Jan. 14, 2017), available at <https://www.eeoc.gov/eeoc/newsroom/release/2-14-17.cfm>.

<sup>963</sup> Press Release, Equal Employment Opportunity Commission, Glaser Organic Farms Settles EEOC Suit for National Origin and Color Harassment and Retaliation (Apr. 26, 2017), available at <https://www.eeoc.gov/eeoc/newsroom/release/4-26-17b.cfm>.

<sup>964</sup> See, e.g., Press Release, Equal Employment Opportunity Commission, KB Staffing Settles Disability Discrimination Suit (Aug. 28, 2017), available at <https://www.eeoc.gov/eeoc/newsroom/release/8-28-17.cfm> (a disability discrimination suit resulted in KB Staffing agreeing to affirmatively recruit individuals with disabilities).

<sup>965</sup> Press Release, Equal Employment Opportunity Commission, Education Company to Pay \$57,000 to Settle EEOC Sex Discrimination Suit (May 08, 2017), available at <https://www.eeoc.gov/eeoc/newsroom/release/5-8-17.cfm>.

<sup>966</sup> See, e.g., Press Release, Equal Employment Opportunity Commission, United Staffing Associates Voluntarily Settles EEOC Discrimination Charge for \$24,500 and Other Relief (Jan. 14, 2017), available at <https://www.eeoc.gov/eeoc/newsroom/release/2-14-17.cfm>.

<sup>967</sup> See, e.g., Press Release, Equal Employment Opportunity Commission, Hiatt & Mason Enterprises to Pay \$35,000 to Settle EEOC Racial Harassment Law suit (Apr. 27, 2017), available at <https://www.eeoc.gov/eeoc/newsroom/release/4-27-17.cfm> (consent decree requires Hiatt to “develop and implement a policy that prohibits race-based harassment, provides at least three alternative managers to whom employees can report harassment, and requires managers to notify the company president of all employee complaints.”).

required to amend its employee handbook and policy manual to “include a clear policy providing for reasonable accommodations covering both disability and religious-based requests.”<sup>968</sup>

Lastly, EEOC consent decrees often include obligatory reporting requirements to the EEOC based on the nature of the discrimination. The reporting usually lasts for the duration of the consent decree. For example, in FY 2017, a manufacturing company that was alleged to have withdrawn job offers based on assumptions about a job applicant’s vision after the applicant passes a physical examination was required to “report to the EEOC over a five-year period for instances when it withdraws a job offer based on the results of its post-offer physical examination.”<sup>969</sup>

If a company does not follow the requirements under the consent decree, the EEOC may file a contempt action. For example, Danny’s Downtown, a provider of adult entertainment services, entered into a consent decree on June 28, 2013 that provided for injunctive relief including a revision of company policy, mandatory training, and making periodic reports of its compliance to the EEOC.<sup>970</sup> On Sept. 28, 2016, the EEOC filed a contempt action against the business and its successors for failure to comply with the terms of the consent decree, resulting in a court-approved amended consent decree that extended the injunctive requirements by one year.<sup>971</sup> As this case demonstrates, the EEOC will aggressively pursue related entities to collect on its wins, including injunction compliance.

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<sup>968</sup> Press Release, Equal Employment Opportunity Commission, Hospitality Staff To Pay \$30,000 To Settle EEOC Religious Discrimination Law suit (Jun. 14, 2017), available at <https://www.eeoc.gov/eeoc/newsroom/release/6-14-17b.cfm>; see also Press Release, Equal Employment Opportunity Commission, Federal Court Enters Judgment In Favor of EEOC in Suit Charging Equal Pay Act Violation (Jul. 27, 2017), available at <https://www.eeoc.gov/eeoc/newsroom/release/7-11-17.cfm> (An Eighth Circuit court required Heritage Bank “to implement policies to prevent future EPA violations, requires annual anti-discrimination training, and mandates semi-annual reporting to the EEOC.”).

<sup>969</sup> Press Release, Equal Employment Opportunity Commission, C&A Tool Engineering to Pay \$35,000 to Settle EEOC Disability Discrimination Law suit (Mar. 6, 2017), available at <https://www.eeoc.gov/eeoc/newsroom/release/3-6-17.cfm>.

<sup>970</sup> Press Release, Equal Employment Opportunity Commission, Jackson Gentlemen’s Club Agrees to Extend Settlement Agreement in EEOC Race Discrimination Suit (Mar. 2, 2017), available at <https://www.eeoc.gov/eeoc/newsroom/release/3-2-17a.cfm>.

<sup>971</sup> Second Amended Consent Decree, *EEOC v. Baby O’s Restaurant, Inc. d/b/a Danny’s*, No. 3:12-CV-00681-DPJ-FKB (S.D. Miss. Mar. 2, 2017), ECF No. 42.



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