



EEOC-Initiated Litigation



2023 Edition



Dear Clients and Friends,

We are once again pleased to provide you with the latest edition of our annual analysis of trends and developments in EEOC litigation, *EEOC-Initiated Litigation: 2023 Edition*. This desk reference compiles, analyzes, and categorizes the major case filings and decisions involving the EEOC in 2022 and recaps the major policy and political changes we observed in the past year. Our goal is to guide clients through decisional law relative to EEOC-initiated litigation, and to empower corporate counsel, human resources professionals, and operations teams to make sound and informed litigation decisions. We hope that you find this report to be useful.

By any measure, 2022 was another year of great change at the Commission. Even two years into a new presidential administration, the Commission remained a bipartisan mix of individuals with differing goals and ideologies. This mix has, at times, strengthened the Commission's resolve, but often created political schisms that could leave employers guessing as to how to prioritize the agency's messages. This political dynamic has played out amidst tumultuous times for employers. Issues related to the Covid-19 pandemic that emerged years ago are just now maturing to litigation. Upheavals in the global economy are translating to real-world employment issues from coast to coast. The EEOC's mission to identify and address equal employment opportunity issues is being put to the test in profound and often unique ways.

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

Part I explores current trends in EEOC litigation, including a discussion of the political dynamics within the agency. Showcasing some new and innovative sections of this year's publication: Part 1. C includes a unique and in-depth examination of the often confounding area of conciliation, and is a particularly interesting read for those engaging in that process. Part I analyzes current trends in EEOC enforcement, from administrative charge investigation and processing through federal court litigation. This includes detailed District by District profiles and analysis of the EEOC's structure, demonstrating how an employer can expect the EEOC to operate often depends on the District it encounters. Part II of the book is an in-depth review of the EEOC's evolving strategic priorities. This includes a fascinating review of the developing conflict between religious and LGBTQ+ rights, and describes the new and emerging area of the intersection between Artificial Intelligence issues and the EEOC's agenda, among a host of other topics.

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

A special thanks to the team of lawyers and professionals who made this publication possible with tireless efforts throughout the year. This book is meant to be the start of a conversation, and we are standing by to address any further questions or issues our readers wish to share.



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PART I: Current Trends in EEOC Enforcement

A. A Year Of Shifting Leadership; A New Democratic Regime On The Horizon

Following the timeline-altering upheaval that characterized FY 2020, which led to structural changes and a new leadership regime in FY 2021, the EEOC's Republican majority remained in FY 2022. With that came a strikingly (and unexpectedly) low number of EEOC filings in FY 2022. Last year marked a bullish outlook for 2022 with a revival from a down year in 2020 contributable in large part to the pandemic. Thus, FY 2022 was a surprisingly stagnant year for the agency. Nevertheless, with a Democratic majority inevitably on the horizon, a generous budget increase to \$464,650,000—a whopping \$60 million increase from last year—as well as several new strategic objectives planned for FY 2023, a busy year may very well lie ahead.

Specifically, FY 2020 experienced a significant downturn in EEOC activity as a likely result of leadership changes and the COVID-19 pandemic. Questions thus remained as to the extent of the impact this might have on subsequent years. However, the EEOC quickly rebounded in FY 2021 with almost half of FY 2021 filings were in the month of September alone, signaling a busy year for FY 2022. But with a mere 95 filings at the close of the fiscal year, FY 2022 did not live up to that case-filing trajectory. The EEOC has seen budget boosts in the last two years, and has signaled the hiring of numerous field staff, including lawyers. The pieces seemed to be in place for a more robust year-end filing spike once again in FY 2022, but the numbers did not bear that out. This could be, in part, because the Commission was still led by a Republican majority, and the EEOC attorneys in the field are waiting for the composition to flip to the Democrats to increase the likelihood cases will receive a green light, or that the authority to file actions will once again be delegated to the field entirely.

The Commission's leadership team includes five members, including the Chair, Vice Chair, and three Commissioners, collectively appointed by the President and approved by the Senate.¹ Of the five Commissioners, no more than three may be members of the same political party, a requirement promising bipartisanship outliving administration changes.² In FY 2021, the EEOC's leadership consisted of five commissioners and a Republican majority: Charlotte A. Burrows (Chair, Democrat); Jocelyn Samuels (Vice Chair, Democrat); Janet Dhillon (Commissioner, Republican); Keith E. Sonderling (Commissioner, Republican); and Andrea R. Lucas (Commissioner, Republican).

The same leadership remained in FY 2022 until Commissioner Dhillon resigned in November 2022. Commissioner Dhillon's term expired in July, but she was able to keep her seat because Biden's nominee to fill the position, civil rights attorney Kalpana Kotagal, had not yet been confirmed by the Senate. Absent a Senate-confirmed replacement, Ms. Dhillon could have kept her seat until the end of the year. As of the publication of this book, Ms. Dhillon's seat presently remains vacant, and there is currently a 2-2 partisan split on the Commission as result. The split will remain until Ms. Kotagal, Biden's nominee, is confirmed by the Senate.

B. Changes Made; Changes Continue To Be Reversed

Last year was one of change and recovery for the EEOC as a result of the pandemic and new leadership. At the close of FY 2021, we reported on how the new EEOC leadership, installed by the Trump administration late in his presidency, had been pushing to make substantive changes to how the EEOC approaches its litigation and enforcement programs. In particular, we noted two changes that we believed could have a lasting impact on EEOC litigation: the changes the EEOC tried to make to its conciliation and mediation procedures, and its efforts to scale back some of its own litigation authority by taking that authority out of the hands of the General Counsel and Regional Attorneys and placing it firmly back in the hands of the Commission. Both encountered setbacks in FY 2021, which continued into FY 2022.

¹ U.S. Equal Employment Opportunity Commission, *Legislative Affairs: The Commission*, www.eeoc.gov/legislative-affairs/commission.

² See 42 U.S.C.A. § 2000e-4 (West).

On July 7, 2020, the EEOC officially announced a new pilot program intended to improve conciliation procedures at the Commission.³ The program was built “on a renewed commitment for full communication between the EEOC and the parties, which has been the agency’s expectation for many years.”⁴ On October 8, 2020, the EEOC released the specifics of additional proposed changes to the conciliation process in an NPRM. In its NPRM, the EEOC acknowledged that, historically, it had elected not to adopt detailed regulations relative to its conciliation efforts based on its belief that retaining flexibility over the conciliation process would “more effectively accomplish its goal of preventing and remediating employment discrimination.”⁵ While the Commission’s NPRM made clear that the Commission still believes it is important to maintain a flexible approach to conciliation, it also acknowledged that its conciliation efforts had not been terribly successful at resolving charges.⁶

In an effort to improve the effectiveness of the conciliation process, the NPRM sought to amend the conciliation process for charges brought pursuant to Title VII, ADA, GINA, and the ADEA. The EEOC stated in the NPRM that the proposed amendments establish “basic information disclosure requirements that will make it more likely that employers have a better understanding of the EEOC’s position in conciliation and, thus, make it more likely that the conciliation will be successful.”⁷ The EEOC’s perceived lack of transparency during the conciliation process had long troubled employers, who often felt they lacked information at the conciliation stage to meaningfully evaluate risk and make decisions about settlement. The changes proposed by the EEOC were seen by many as a welcome attempt to address this issue. The Republican-led Commission adopted the Final Rule in January 2021, just before the new Biden administration was sworn in.

The new rule went into effect on February 16, 2021. But it did not last long. In the following months, Congress exercised its authority Under the Congressional Review Act, which allows it to overturn executive branch regulations within 60 legislative days of when they were issued.⁸ On May 19, 2021, the Senate approved Senate Joint Resolution 13, which rescinded the rule.⁹ The House followed suit with House Joint Resolution 33 on June 24, 2021.¹⁰ On June 30, 2021, President Biden signed the resolution that killed the new conciliation requirements.¹¹

Further, despite the perceived benefits of the Commission’s previous transparency and delegation reforms, representatives have recently cried foul that they were being mismanaged under Commissioner Chair Charlotte Burrows.¹² For example, on September 27, 2022, Richard Burr of the Senate Committee on Health, Education, and Labor and Pensions, and Virginia Foxx of the House Committee on Education and Labor, called out an opinion piece written by Commissioner Dhillon and Commissioner Sonderling as evidence of EEOC mismanagement.¹³ The opinion piece claims that when a majority of the Commissioners vote against filing a proposed lawsuit, Acting General Counsel Gwendolyn Reams “withdraws” the case administratively, rather than closing the matter.¹⁴ This purportedly allows the General Counsel to bring the proposed lawsuit before the Commission again when, according to Burr and Box, it has a majority in place that will support

³ Press Release, U.S. Equal Employment Opportunity Commission, EEOC Announces Pilot Programs to Increase Voluntary Resolutions (July 7, 2020) www.eeoc.gov/newsroom/eeoc-announces-pilot-programs-increase-voluntary-resolutions.

⁴ *Id.*

⁵ Update of Commission’s Conciliation Procedures, 85 Fed. Reg. 64079 (proposed Oct. 9, 2020) (to be codified at 29 C.F.R. pt. 1601 and 1626).

⁶ *Id.* Over the last several years, the EEOC’s conciliation efforts resolved less than half of the charges where a reasonable cause finding was made. Specifically, between fiscal years 2016 and 2019, only 41.23% of the EEOC’s conciliations with employers were successful.

⁷ *Id.*

⁸ See Congressional Review Act, 5 U.S.C. § 801.

⁹ S.J. Res., 117th Cong. (2021).

¹⁰ H.R.J. 33, 117th Cong. (2021).

¹¹ Remarks on Signing Legislation Regarding Methane Pollution, Predatory Lending, and Employment Discrimination, Daily Comp. Pres. Doc. DCPD-202100551 (June 30, 2021).

¹² See Sept. 27, 2022 letter from R. Burr and V. Foxx to C. Burrows, at 2, republicans-edlabor.house.gov/uploadedfiles/9.27.22_eeoc_case_management_and_bostock_letter.pdf.

¹³ *Id.*

¹⁴ *Id.*

the agenda at issue.¹⁵ Burr and Foxx opined that such actions “render the transparency measures embodied by the reforms a mockery, as votes declining to authorize certain lawsuits do not appear publicly on EEOC’s website.”¹⁶

Employers on the wrong side of an EEOC enforcement action know all too well that the EEOC’s internal deliberations are opaque and from the employers’ perspective there can seem to be little rhyme or reason to the timeline from investigation to litigation. While as iterated above, the EEOC has apparently sought to address the issue of transparency—in particular through Commissioner Dhillon’s leadership—and also through other means like issuing Performance and Accountability Reports for each fiscal year with information about the EEOC’s strategic priorities and the volume of charges and litigation matters it brings, the Agency has never reported information that shows how long a charge typically is in the pipeline before it reaches litigation. To that end, we have performed an in-depth analysis of information that the EEOC includes in its complaint to shed light on how quickly the EEOC moves matters from letter of determination, through conciliation, and ultimately through litigation.

C. Demystifying EEOC Determination, Conciliation & Litigation Timeline

The EEOC must satisfy a number of prerequisite steps before taking any charge to litigation. Among these are issuing a letter of determination that explains the Agency has found reasonable cause to believe the employer has violated one of the statutes enforced by the EEOC, an invitation to resolve the charge through voluntary conciliate, and written notice that conciliation has failed. For charges that result in litigation, the EEOC spends, on average, about four months in conciliation. After declaring that conciliation has failed, the EEOC takes, on average, about five months to file suit. For complaints filed in FY2022, both of these figures are significantly longer than the last time we reported on this information. What remains true, however, is that location matters, and there are notable differences in speed among the EEOC’s district offices.

In April 2015, the Supreme Court issued its decision in *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645 (2015), holding that the EEOC must demonstrate that it has satisfied its statutory duty of “conference, conciliation, and persuasion” before filing suit. In an apparent effort to meet the Court’s directive, the EEOC began later that year to routinely include additional information in its complaints, such as when it had issued determinations in connection with the underlying charges and when it had declared conciliation efforts to have failed. As part of our regular tracking of EEOC complaints, we have collected and analyzed this and other information from hundreds of complaints. From this data, we are able to calculate how long it typically takes for the EEOC to move from step to step, and to compare the relative pace of different EEOC district offices.



A predicate to any EEOC-initiated litigation is receipt of a letter of determination, which triggers the EEOC and the employer to begin the conciliation process. For employers, a longer conciliation process generally is better, as it suggests that the EEOC is more engaged in a give and take process about how to resolve the dispute without resort to litigation. In contrast, a short conciliation suggests that one or both parties are unwilling to bend their positions to negotiate a mutually acceptable outcome. According to our analysis of

¹⁵ *Id.*

¹⁶ *Id.*

complaints filed in FY2022, the average time spent in conciliation is 120 days. For employers hopeful to have more time to engage in conciliation, the most accommodating EEOC District Offices are Phoenix (171 days on average), Chicago (163 days), Los Angeles (155 days), San Francisco (151 days), and Charlotte (149 days). In contrast, the EEOC District Office with the quickest trigger is Miami, which on average spends just 37 days conciliating charges that it ultimately takes to litigation. Miami is followed by Memphis (40 days), Houston (52 days), and Atlanta (73 days).

While the averages provide useful benchmarks for employers, it is important to keep in mind that each case moves at its own pace, and there can be extreme outliers in both directions. The Chicago District Office provides the best example: it is responsible for both the shortest and longest conciliations we tracked over the last year. In one case, it declared an end to conciliation in just nine days, while in another it conciliated for 706 days (nearly two years) before filing suit. But it is also true that the EEOC's annual fiscal year end push does not include rushing from determination to litigation. In fact, our review showed there were only a handful of determinations in July that resulted in complaints filed by the September 30 fiscal year end, and none at all that were based on determinations issued in August and September. To say it another way, an employer who receives a letter of determination in the final quarter of the government's fiscal year is far more likely to face litigation in the next fiscal year rather than immediately.

The common assumption among employers is that it is a race to the courthouse once the EEOC deems conciliation failed, but our analysis suggests otherwise. In FY2022, only three complaints were filed within the first month after the EEOC declared that conciliation had failed. The average time to file the complaint is 145 days, or nearly five months. The EEOC District Offices that are quickest to proceed to court are Memphis (42 days after ending conciliation, on average), Indianapolis (73 days), Dallas and Philadelphia (both 104 days), and Chicago (118 days). The slowest moving District Offices at this step are Houston (247 days), St. Louis (226), Charlotte (205), Miami (193 days), and Birmingham (155 days). Our analysis suggests that the end of the EEOC's fiscal year remains the best predictor for how long it will take for the EEOC to file a complaint. Nearly all notices that conciliation has failed which are issued in the period from May to September result in complaints filed in September. In other words, an employer that receives a conciliation failure notice in this window should expect to see the complaint during the EEOC's annual September filing push. In contrast, a conciliation failure notice served between October to April is more likely to result in a complaint filed sometime well ahead of the September 30 deadline.

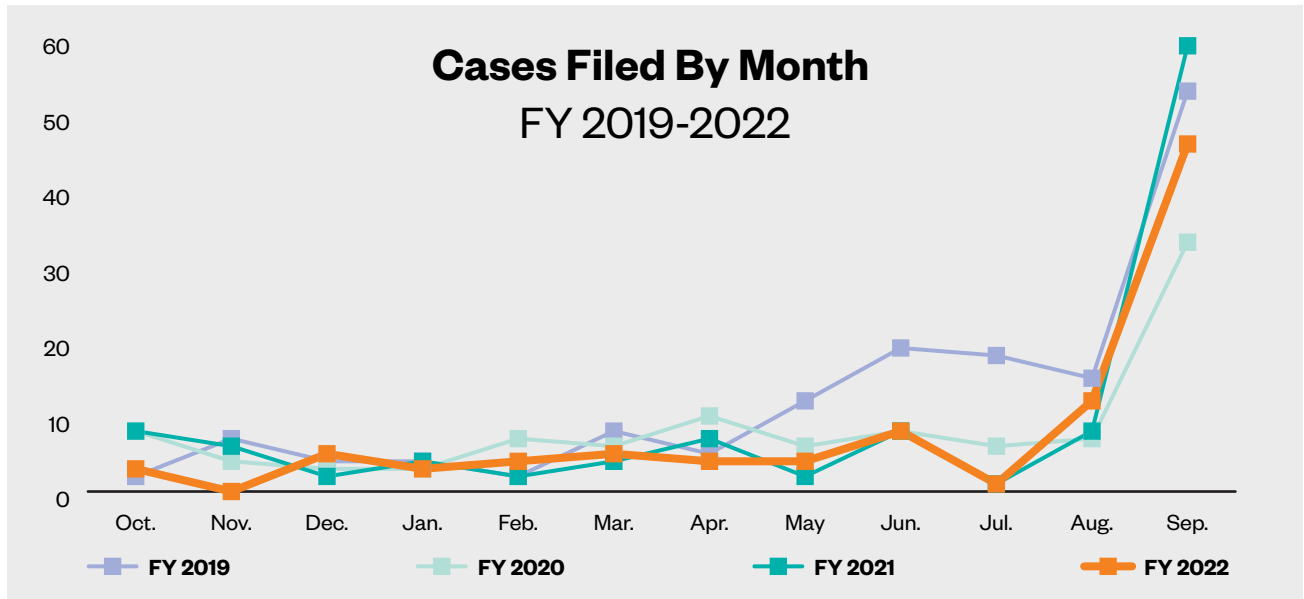
It is debatable whether employers should prefer a shorter or longer time period from the end of conciliation to filing of a complaint. On the one hand, it has been our experience that the EEOC will sometimes choose not to move forward with litigation even though it has attempted conciliation, and a longer period could mean that the EEOC is considering whether it has the resources and appetite to litigate the claim. Employers also can use this time to prepare for any anticipated litigation. On the other hand, as time passes, the memories of witnesses will continue to fade and it may be more difficult to ensure that relevant records are maintained. This is particularly so where the precise theory the EEOC may choose to litigate is not clear to the employer. When that is the case, it may be useful for employers to document what they understand the potential claims to be so that they may retain possible laches arguments if a complaint eventually is filed.

Any case that the EEOC takes to litigation proceeds through both of these steps. Taking both together, the average time from determination to complaint is 262 days. Nonetheless, there continue to be meaningful differences from one EEOC District Office to another. The EEOC's Memphis District Office is the fastest. On average, it took just 83 days to move from issuing a determination to filing a complaint. The next fast office, Indianapolis, took more than twice that amount of time, averaging 168 days. It is followed by Atlanta (200 days), Miami (209 days), and Dallas (230 days). On the slower side are the EEOC's Charlotte District Office, which on average took more than 350 days to move from determination to complaint. It is followed by St. Louis (321 days), Phoenix (320 days), and Houston and San Francisco (both 300 days).

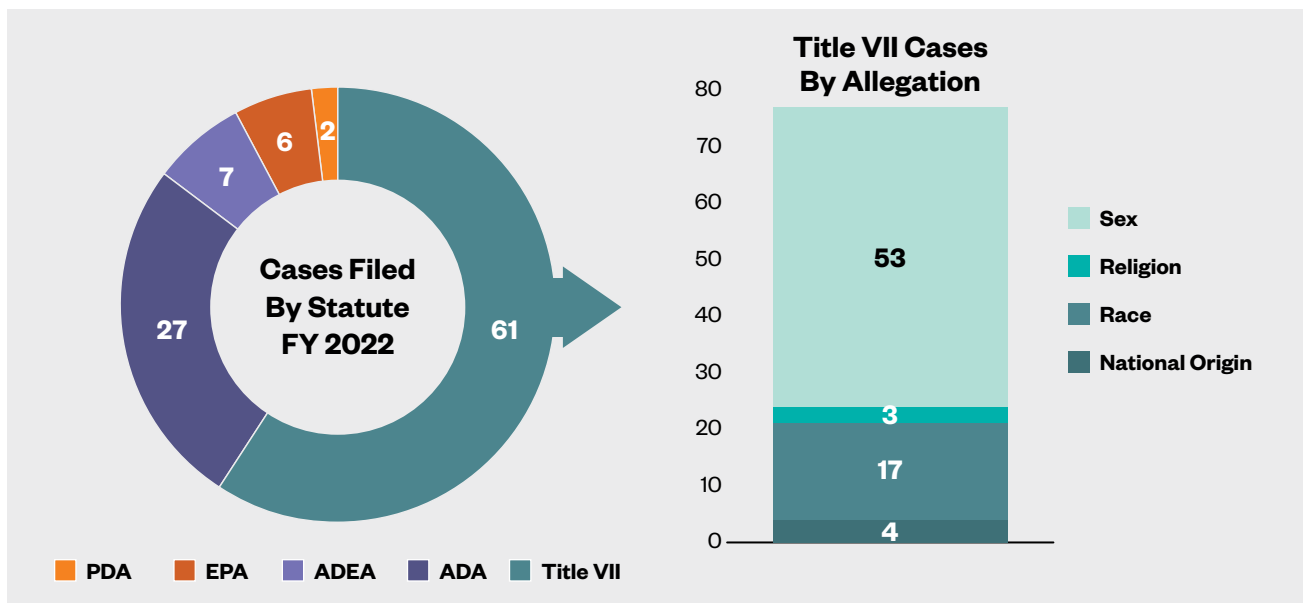
While each charge and investigation moves at its own pace, there are discernible trends evident in the data. Employers trying to gauge whether the EEOC is teeing up a charge for litigation should remain mindful of which EEOC District Office will be responsible for filing suit and what time it is on the EEOC's fiscal year clock.

D. Trends In EEOC Federal Court Filings In FY 2022

Each fiscal year we analyze the types of lawsuits the EEOC files, in terms of the statutes and theories of discrimination alleged. The chart below shows the number of lawsuits filed according to the statute under which they were filed (Title VII, Americans With Disabilities Act, Pregnancy Discrimination Act, Equal Pay Act, and Age Discrimination in Employment Act, etc.) and, for Title VII cases, the theory of discrimination alleged. This analysis can often reveal how the EEOC is shifting its strategic priorities. In FY 2022, we saw the total number of filings—95—decreased a sizable amount from FY 2021’s 114 total filings.

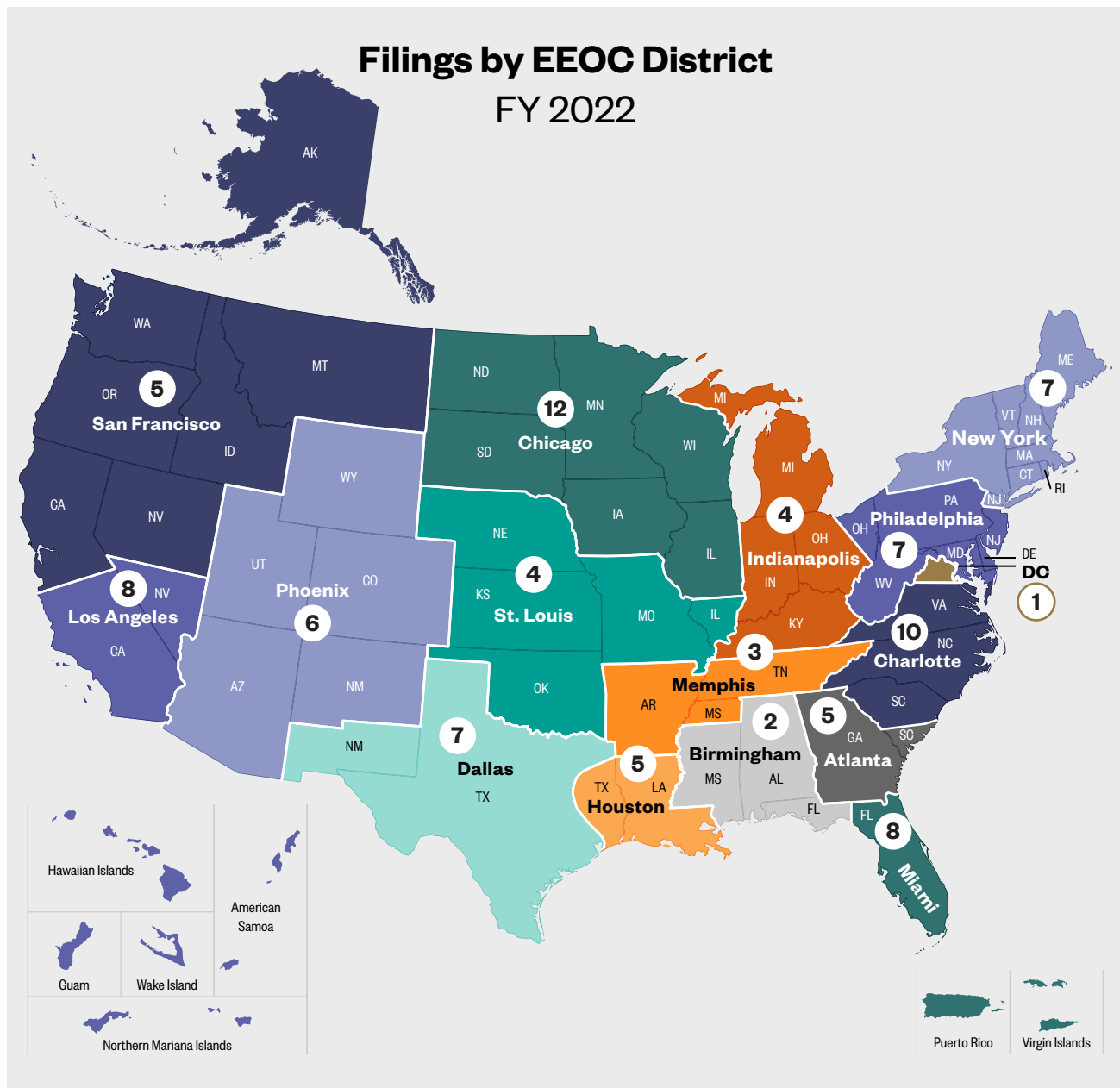


When considered on a percentage basis, however, the distribution of cases filed by statute remained roughly consistent compared to the last few years. The graphs below show the number of lawsuits filed according to the statute under which they were filed (Title VII, Americans With Disabilities Act, Pregnancy Discrimination Act, Equal Pay Act, and Age Discrimination in Employment Act) and, for Title VII cases, the theory of discrimination alleged.



When considered on a percentage basis, the distribution of cases filed by statute remained roughly consistent compared to FY 2021 and 2020. Title VII cases once again made up the majority of cases filed, accounting for 65% of all filings (on par with the 62% in 2021 and 60% in FY 2020). ADA cases also made up a significant percentage of the EEOC's filings, totaling 29% this year, a moderate decline from 36% in 2021 and 30% in FY 2020. Notably, there were 7 age discrimination cases filed this year, a significant increase from last year's single case.

The most noticeable trend of this fiscal year is a return of the usual leaders of the pack: the Chicago, Miami, and Los Angeles District Offices, with 12, 8 and 8 filings, respectively. Chicago experienced a surprising dip in FY 2020 at only 3 filings, shot back up in 2021, but still lagged behind several other districts until this year. Similarly, the Los Angeles District, which historically has been a leading district for the EEOC, ended the year on top as well. The Miami District has also been very consistent, lodging at least 8 filings for five years in a row. Finally, the biggest surprise District in FY 2022 was Charlotte, which filed 10 merit cases this year after accounting for only 4 filings last year and only 1 filing in FY 2020.

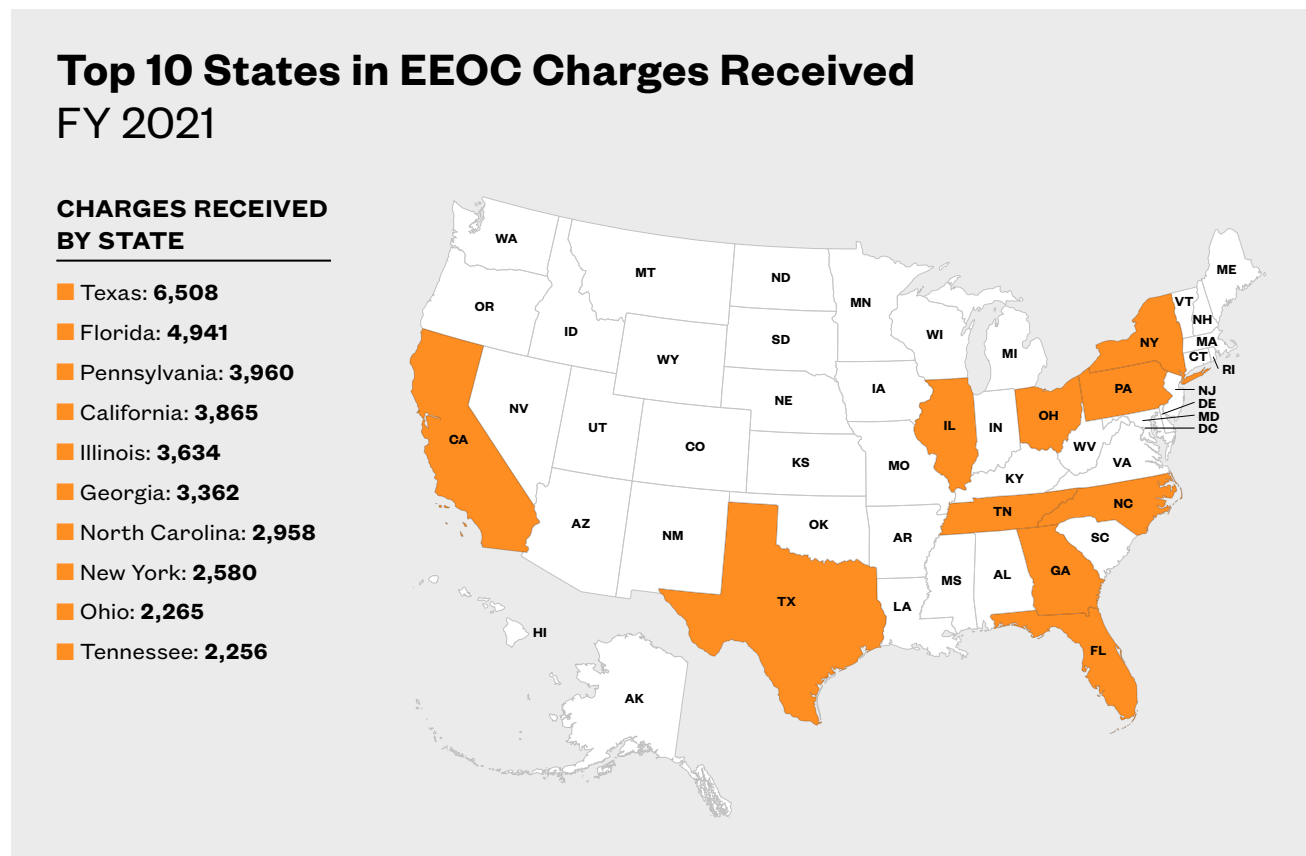


E. EEOC Charge Data Analysis

In addition to the EEOC’s annual merit filings, an in-depth analysis of EEOC charge statistics can also provide an interesting perspective on the status of the employment discrimination space. While merit filings reflect more on the Commission’s priorities, the EEOC’s charge data represents how American workers themselves feel they are being treated in the workplace.

Because filing an administrative charge with the EEOC is a prerequisite to filing a lawsuit under federal anti-discrimination law, employees throughout the country regularly file between 60,000-80,000 EEOC charges per year. To that end, the Commission received 61,331 charges in FY 2021.¹⁷ This number represented a decrease of more than 6,000 charges as compared to FY 2020, in which the EEOC saw 67,448 charges filed. In fact, the EEOC’s amount of charges received has been consistently declining since FY 2017, when the Commission received a five-year high of 84,254 charges.

With respect to where these charges are being filed, there are certain geographic “hot spots” in which employees consistently file the most EEOC charges. These states are highlighted by the map graphic below. In FY 2021, Texas outpaced the rest of the country by over 1,500 charges. Following Texas, which saw 6,508 charges filed in FY 2021, Florida (4,941), Pennsylvania (3,960), California (3,865), and Illinois (3,634) rounded out the top five most popular filing locations.



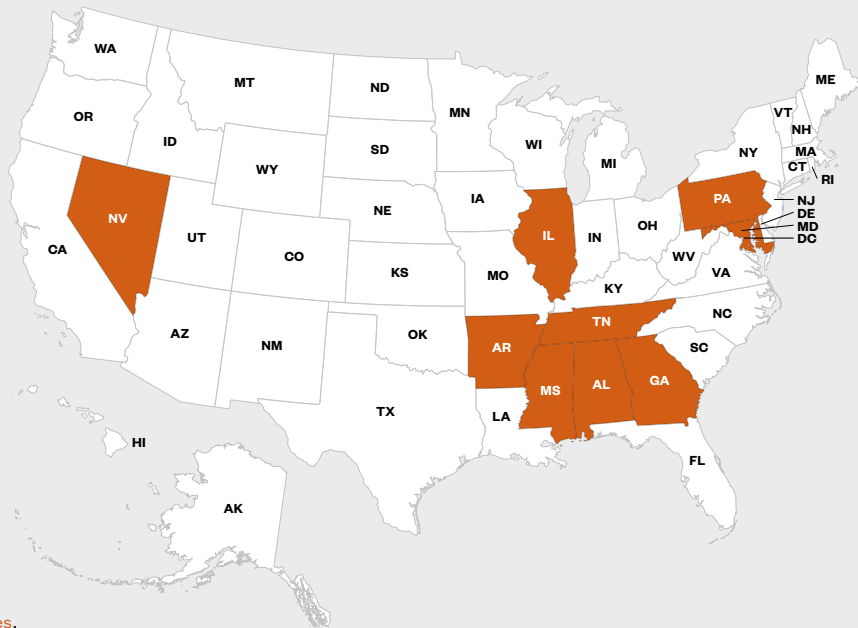
¹⁷ As of the date of publication, the most recent charge data released by the EEOC was from Fiscal Year 2021.

However, when adjusted to account for state population, the Southeast region of the country lead the way in terms of EEOC charge filings per capita. As demonstrated by the map graphic below, in FY 2021, Arkansas and Mississippi both saw over 3.5 EEOC charges filed for every 10,000 people living in the state. Other popular states in this per-capita category include Alabama, Tennessee, and Nevada.

Top 10 States in EEOC Charges Received Relative to State Population FY 2021

CHARGES RECEIVED PER 10,000 POPULATION

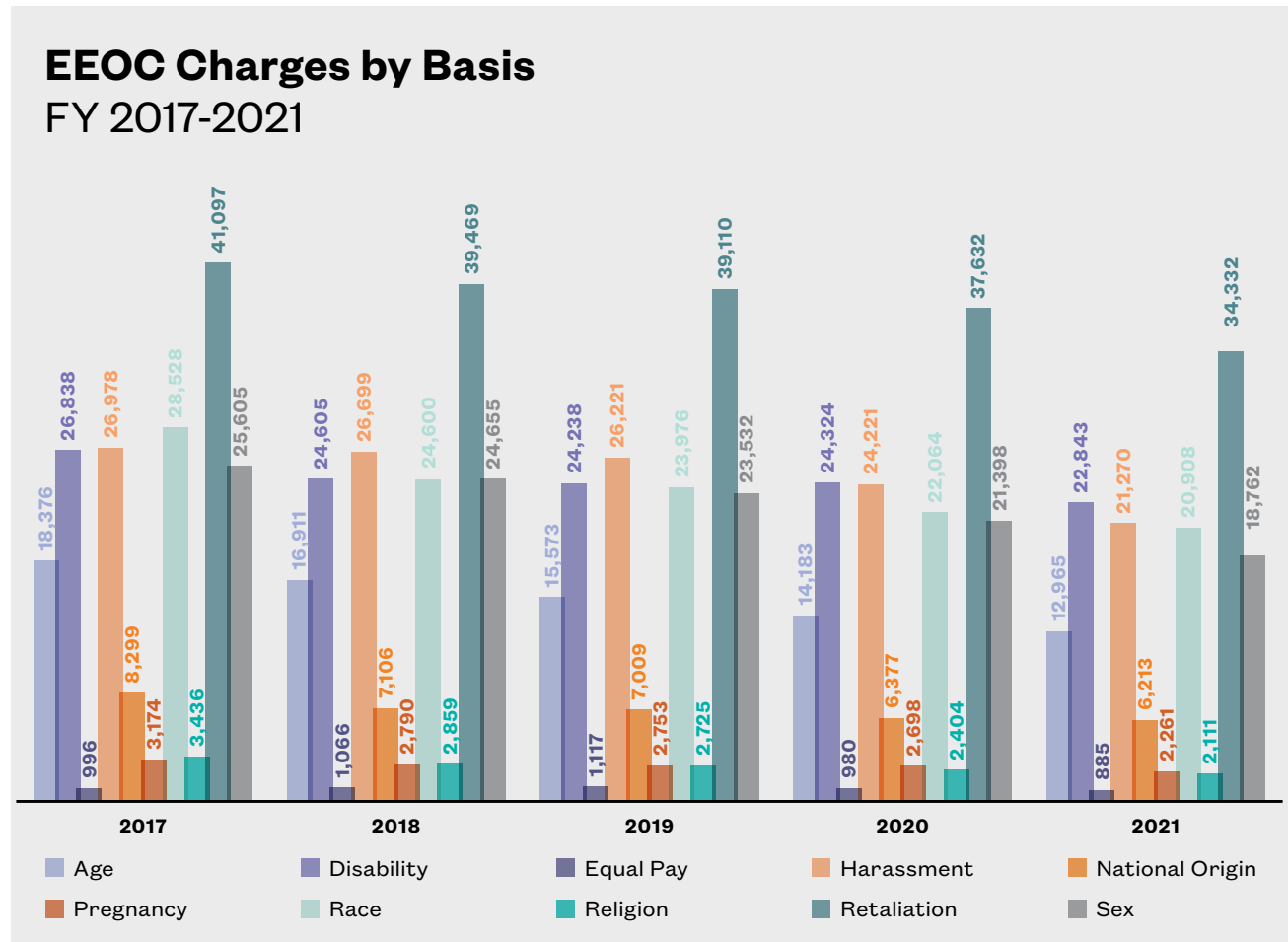
- Arkansas: 3.65
- Mississippi: 3.54
- Alabama: 3.27
- Tennessee: 3.21
- Nevada: 3.16
- Georgia: 3.08
- Pennsylvania: 3.03
- Maryland: 2.91
- Illinois: 2.84
- North Carolina: 2.79



2022 state population data courtesy of <https://worldpopulationreview.com/states>.

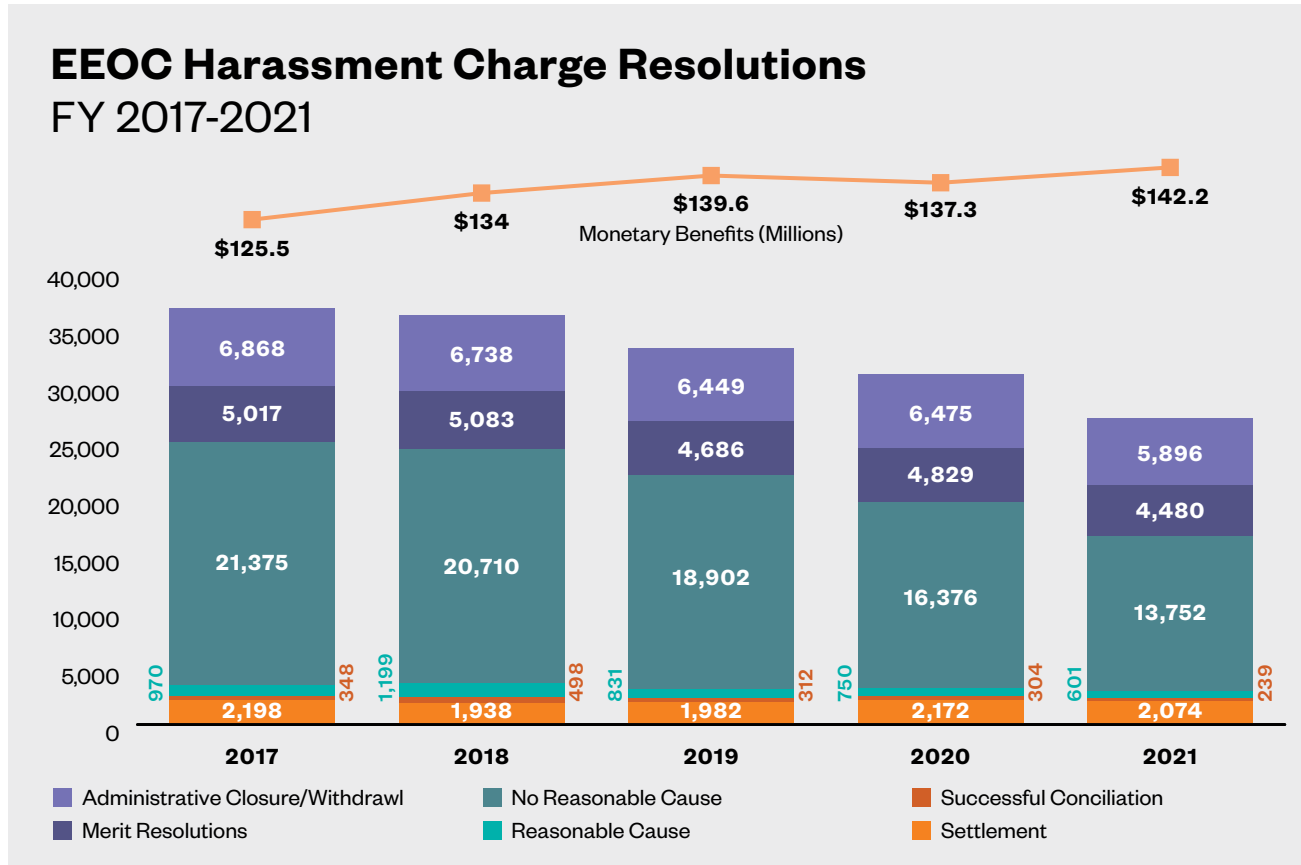
In terms of the types of charges filed with the EEOC, retaliation is consistently the most common allegation, outpacing the next most popular category (typically race discrimination) by at least 10,000 charges per year. Following with that trend, retaliation claims accounted for approximately 24% of all charges filed in FY 2021. The next most popular charge types in FY 2021 were disability discrimination, harassment, and race discrimination.

The bar graph below represents the types of charges filed with the EEOC between FYs 2017-2021. As this graph demonstrates, the amount of age, race, religion, and sex-based discrimination charges have remained relatively steady over the past five years. However, one type of charge that is becoming more prevalent is disability discrimination. ADA charges accounted for over 37% of all EEOC charges in FY 2021, compared to just over 30% in FY 2016.



Preventing sexual harassment in the workplace remains a top priority for the EEOC. Indeed, one of the six EEOC priorities is “Preventing Harassment” (and has been since 2013). The EEOC also launched a Select Task Force on the Study of Harassment in the Workplace in 2015. To this end, sexual harassment charges made up over 10% of all charges filed in FY 2019, compared to just 7% in FY 2016. In FY 2021 alone, employees filed 5,581 EEOC charges alleging sexual harassment.

Sexual harassment charges have also proven to result in significant monetary relief for the EEOC. As a result of the frequency of these types of claims, the Commission recovered over \$142 million for employees asserting sexual harassment claims in FY 2021. For perspective, in FY 2017, the EEOC recovered just \$125.5 million for the same category of claims. The graphic below demonstrates the monetary benefits received from sexual harassment charges between FYs 2017-2021, as well as how these charges were commonly resolved.

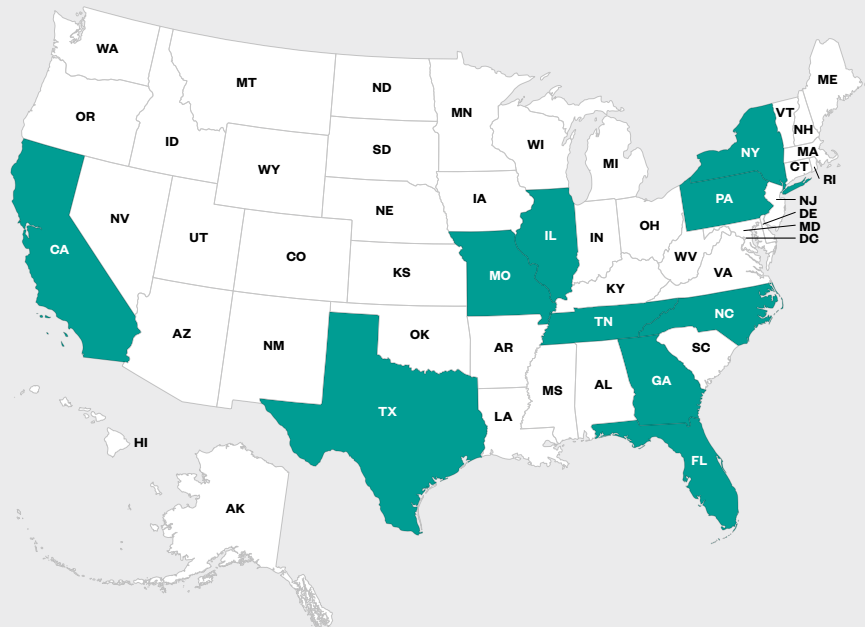


Finally, the map graphic below highlights the top 10 states in terms of the amount of Title VII sexual harassment charges received during FY 2021. Similar to the state-by-state breakdown of overall charge filings on [pg. 7](#), Texas was also the leader in sexual harassment charges received in FY 2021. After Texas, the next most popular filing locations for sexual harassment charges were Florida, Georgia, Pennsylvania, and New York. Interestingly, the only state represented in the graphic below that was not also in the top 10 states for overall charges received is Missouri.

Top 10 States in EEOC Sexual Harassment Charges Received FY 2021

SEXUAL HARASSMENT CHARGES RECEIVED BY STATE

- Texas: 596
- Florida: 501
- Georgia: 342
- Pennsylvania: 323
- New York: 307
- Illinois: 277
- California: 272
- Missouri: 229
- North Carolina: 216
- Tennessee: 208



F. EEOC District Office Profiles

While the EEOC is a national enforcement body, the Commission's 15 District Offices often take different approaches to their respective litigation and settlement activity. To that end, Subsection F provides an overview of key developments from each District Office in FY 2022. Each full-page summary begins with a District Profile, which outlines key players and litigation statistics. These statistics include: 1) the number of lawsuits filed in FY 2022, followed by the District's rank among other Offices; 2) the average time period between the issuance of a Determination Letter and the subsequent Failure to Conciliate notice; 3) the average time period between the Failure to Conciliate notice and the EEOC's Complaint; and 4) the average time period between the issuance of a Determination Letter and the EEOC's Complaint. Finally, the District breakdowns also contain summaries of notable lawsuits and settlements attributable to each Office in FY 2022.

EEOC Atlanta District Office

DISTRICT PROFILE

Director: **Darrell Graham**

Regional Attorney: **Marcus G. Keegan**

Merit Cases Filed in FY 2022: **5 (T-6th)**

Average Days Between Determination
Letter & Failure to Conciliate: **73**

Average Days Between Failure to
Conciliate & Complaint: **127**

Average Days Between Determination
Letter & Complaint: **201**



KEY CASES FILED IN FY 2022

EEOC v. Fischer Connectors, Inc., 1:22-cv-3884 (N.D. Ga.) The EEOC filed a lawsuit alleging that the defendant electrical connector manufacturer terminated the company's HR Director on the basis of his age in violation of the ADEA. According to the EEOC, executives at Fischer Connectors first informed its 67-year-old HR Director that the company would be terminating any senior managers over the age of 55, before subsequently terminating the HR Director because of his age.

EEOC v. Del Frisco's of Georgia, LLC, 1:22-cv-2234 (N.D. Ga.) In this Title VII lawsuit, the EEOC claimed that Del Frisco's of Georgia refused to grant a server's religious accommodation request to have a particular day off to attend bible study and a special church service. Furthermore, the EEOC alleged that, when this server missed work to attend her religious obligations, the defendant restaurant unlawfully terminated her employment because of her sincerely-held religious beliefs.

KEY SETTLEMENTS SECURED IN FY 2022

EEOC v. Ranew's Management Company, Inc., 5:21-cv-443 (M.D. Ga.) Ranew's, a Georgia-based industrial fabrication company, settled an EEOC-initiated lawsuit alleging that the company terminated an executive upon his return from mental health leave in violation of the ADA. Pursuant to the parties' one-year consent decree, Ranew's agreed to pay \$250,000 to the terminated executive, implement an ADA policy and training, and provide periodic compliance reports to the EEOC.

EEOC Birmingham District Office

DISTRICT PROFILE

Director: **Bradley A. Anderson**

Regional Attorney: **Marsha Rucker**

Merit Cases Filed in FY 2022: **2 (9th)**

Average Days Between Determination
Letter & Failure to Conciliate: **98**

Average Days Between Failure to
Conciliate & Complaint: **155**

Average Days Between Determination
Letter & Complaint: **253**



KEY CASES FILED IN FY 2022

EEOC v. Chipotle Mexican Grill, Inc., 2:22-cv-326 (M.D. Ala.) The EEOC sued Chipotle Mexican Grill alleging that the company's General Manager ("GM") for its Prattville, Alabama location subjected female employees to a hostile work environment in violation of Title VII. The EEOC's Complaint stated that the GM would consistently touch female employees and make inappropriate sexual comments, and that on one occasion, the GM harassed a female employee to such an extent that she promptly resigned her employment.

EEOC v. Tractor Supply Company, 2:22-cv-131 (S.D. Miss.) The EEOC filed a lawsuit on behalf of an anonymous former employee with a disability (HIV) asserting claims for disability discrimination and retaliation pursuant to the ADA. More specifically, the EEOC alleged that defendant farm products retailer improperly disclosed the employee's HIV status to various employees and customers, resulting in a disability-based hostile work environment. The EEOC further claimed that, after the employee complained of this alleged harassment, Tractor Supply Company terminated her employment in retaliation for her complaint.

KEY SETTLEMENTS SECURED IN FY 2022

EEOC v. American Freight Management Co., LLC d/b/a American Freight Furniture and Mattress, 2:19-cv-273 (N.D. Ala.) American Freight Furniture and Mattress agreed to pay \$5 million to settle an EEOC suit claiming that the company maintained a pattern or practice of discriminating against women in the hiring process. In addition to the monetary payment, American Freight signed a three-year consent decree in which it committed to retain a Title VII compliance expert, develop a recruitment plan for female applicants, and provide job offers to all eligible claimants who were previously denied employment, among other requirements.

EEOC v. Huntington Ingalls Inc. & NSC Technologies, LLC, 1:22-cv-2 (S.D. Miss.) The defendants—shipbuilder Huntington Ingalls and its recruiting agency NSC Technologies—settled a Title VII lawsuit in which the EEOC claimed that a supervisor at Huntington Ingalls subjected several female temporary employees to a hostile work environment and subsequently retaliated against them for filing complaints. Pursuant to the parties' 30-month consent decree, the defendants agreed to pay \$350,000 to two named victims, as well as a class of unnamed female temporary employees. The consent decree also required the defendants to revise their harassment and retaliation policies and conduct annual trainings focused on internal reporting procedures and Title VII compliance.

EEOC Charlotte District Office

DISTRICT PROFILE

Director: **Carmen M. Whaling (Acting)**

Regional Attorney: **Melinda Dugas**

Merit Cases Filed in FY 2022: **10 (2nd)**

Average Days Between Determination
Letter & Failure to Conciliate: **150**

Average Days Between Failure to
Conciliate & Complaint: **205**

Average Days Between Determination
Letter & Complaint: **355**



KEY CASES FILED IN FY 2022

EEOC v. R3 Government Solutions, LLC, 1:22-cv-1095 (E.D. Va.) The EEOC filed suit alleging that R3 Government Solutions violated the ADEA and Title VII with respect to the company's treatment of a former recruiter. Namely, the EEOC alleged that the federal contractor defendant instructed its in-house recruiter to place applicants into government positions on the basis of their age, race, and/or national origin. According to the EEOC, after this recruiter objected to the company's improper recruitment standards, R3 Government Solutions required her to comply with unfair performance expectations and subsequently terminated her employment because of her race and in retaliation for her internal complaints.

EEOC v. Aurora Renovations & Developments, LLC, 1:22-cv-490 (M.D.N.C.) The EEOC filed a lawsuit on behalf of two former employees of Aurora Renovations & Developments, alleging that the North Carolina-based contractor engaged in acts of religious discrimination and retaliation in violation of Title VII. More specifically, the EEOC's Complaint asserted that Aurora Renovations & Developments required employees to attend a daily Christian prayer meeting as a condition of their employment. When one former employee requested to be excused from the prayer meeting, the EEOC claimed that the company retaliated against him by reducing his wages. The EEOC further alleged that Aurora Renovations & Developments terminated both former employees at issue because of their religious beliefs (Agnostic and Atheist).

KEY SETTLEMENTS SECURED IN FY 2022

EEOC v. Strategic Equipment, LLC d/b/a TriMark Foodcraft, LLC, 1:20-cv-1000 (M.D.N.C.) TriMark Foodcraft, a North Carolina-based restaurant supply company, settled an ADA suit brought by the EEOC alleging that TriMark Foodcraft denied a disabled employee's request to use her oxygen tank as a reasonable accommodation and fired her shortly after this request. As part of the two-year consent decree, TriMark Foodcraft agreed to pay \$25,000 to the disabled employee, provide her with a letter of reference, and revise its anti-discrimination policy to elaborate on available employee accommodations.

EEOC Chicago District Office

DISTRICT PROFILE

Director: **Julianne Bowman**

Regional Attorney: **Gregory M. Gochanour**

Merit Cases Filed in FY 2022: **12 (1st)**

Average Days Between Determination Letter & Failure to Conciliate: **163**

Average Days Between Failure to Conciliate & Complaint: **119**

Average Days Between Determination Letter & Complaint: **282**



KEY CASES FILED IN FY 2022

EEOC v. Walmart Inc., 4:22-cv-37 (S.D. Ind) The EEOC filed suit alleging that Walmart subjected a Black female employee to discrimination on the basis of her sex and race in violation of Title VII. According to the EEOC's Complaint, Walmart failed to promote this employee because she had young children at home. The EEOC further claimed that Walmart provided this employee an unsanitary storage closet for expressing breastmilk, while the company provided a clean office space to a White employee for the same purpose.

EEOC v. Lacey's Place, 2:22-cv-2161 (C.D. Ill.) The EEOC's lawsuit asserted that Lacey's Place engaged in a pattern of paying female district managers at rates lower than male district managers in violation of the EPA and Title VII. The EEOC also alleged that Lacey's Place terminated a female district manager in retaliation for complaining about the supposed wage disparity.

KEY SETTLEMENTS SECURED IN FY 2022

EEOC v. Chicago Meat Authority, 19-cv-1357 (N.D. Ill.) Chicago Meat Authority entered into a three-year consent decree settling a Title VII race discrimination, harassment, and retaliation lawsuit brought by the EEOC on behalf of four African American employees and a group of African American job applicants. As part of the settlement, Chicago Meat Authority agreed to pay \$1.1 million to the discrimination victims, hire any improperly rejected job applicants, incorporate hiring goals for African American applicants, and implement anti-harassment training and policies.

EEOC v. Stan Koch & Sons Trucking, Inc., 19-cv-2148 (D. Minn.) Minneapolis-based trucking company Stan Koch & Sons Trucking settled an EEOC-initiated lawsuit alleging that the company used a strength test that discriminated against women in the hiring process. In its five-year consent decree with the EEOC, Stan Koch & Sons Trucking agreed to pay \$500,000 to the class of women whose job offers were revoked after failing the strength test, send reports to the EEOC concerning its hiring practices, and stop using the strength test at issue.

EEOC v. LJC Opco Two, LLC d/b/a Long John Silver's Store #70250, 3:21-cv-717 (S.D. Ill.) The defendant Long John Silver's franchise settled the EEOC's Title VII suit, which alleged that the franchise subjected a female employee to sexual harassment and subsequent retaliation for her complaints. The parties entered into a two-year consent decree providing for a \$200,000 payment to the female employee, as well as the implementation of anti-harassment policies and reporting requirements for any future complaints of sex discrimination.

EEOC Dallas District Office

DISTRICT PROFILE

Director: **Travis Nicholson**

Regional Attorney: **Robert Canino**

Merit Cases Filed in FY 2022: **7 (T-4th)**

Average Days Between Determination
Letter & Failure to Conciliate: **126**

Average Days Between Failure to
Conciliate & Complaint: **105**

Average Days Between Determination
Letter & Complaint: **230**



KEY CASES FILED IN FY 2022

EEOC v. Univ. of Texas Permian Basin, 7:22-cv-210 (W.D. Tex.) The EEOC filed a lawsuit pursuant to the EPA claiming that the University of Texas Permian Basin illegally paid a female Professor of Accounting at least \$8,000 less than two similarly-situated male Professors of Accounting. The EEOC's Complaint further stated that, after the female Professor complained to the Dean about this alleged pay disparity, the University lowered this Professor's performance evaluation in retaliation for her complaint.

EEOC v. Brinker Int'l Payroll Co., L.P. d/b/a Chili's Grill & Bar, 3:22-cv-2017 (N.D. Tex.) The EEOC's Complaint, filed on behalf of two female former employees of Brinker International, alleged that the company subjected these female employees to a sex-based hostile work environment in violation of Title VII. According to the EEOC, this Chili's Grill & Bar franchisee allowed its male kitchen employees to make sexual comments towards and inappropriately touch the two charging parties. The EEOC also claimed that Brinker International refused to correct this alleged behavior, even after receiving complaints from the charging parties.

EEOC v. Int'l Paper Co., 3:22-cv-810 (N.D. Tex.) The EEOC filed suit alleging that International Paper Company engaged in unlawful disability-based discrimination in violation of the ADA. Specifically, the EEOC claimed that the company made a conditional job offer to an applicant, but that after the applicant tested positive for a prescription drug, International Paper Company rescinded his job offer. The EEOC's Complaint further stated that the applicant disclosed his disability (ADHD) for which he required the medication during the drug testing process, but the company allegedly refused to grant the applicant an exception to its drug testing policy.

KEY SETTLEMENTS SECURED IN FY 2022

EEOC v. Wellpath, LLC, 5:20-cv-1092 (W.D. Tex.) Wellpath, LLC, a healthcare services provider for correctional facilities, agreed to settle a lawsuit in which the EEOC claimed that the company refused to accommodate a nurse's religious beliefs by denying her request to wear a certain type of skirt. In addition to providing the nurse with \$75,000, Wellpath's two-year consent decree also required it to implement a policy to address requests for religious accommodations and provide an anti-discrimination training to its employees.

EEOC Houston District Office

DISTRICT PROFILE

Director: **Rayford O. Irvin**

Regional Attorney: **Rudy L. Sustaita**

Merit Cases Filed in FY 2022: **5 (T-6th)**

Average Days Between Determination
Letter & Failure to Conciliate: **53**

Average Days Between Failure to
Conciliate & Complaint: **247**

Average Days Between Determination
Letter & Complaint: **300**



KEY CASES FILED IN FY 2022

EEOC v. Walgreens, Co., 1:22-cv-5357 (W.D. La.) The EEOC sued Walgreens claiming that the company subjected a female employee to discrimination on the basis of her pregnancy and disability (diabetes) in violation of Title VII and the ADA. In terms of the employee's disability, the EEOC alleged that Walgreens refused to allow her to take periodic snack breaks as required by her doctor. The EEOC also claimed that the company denied the employee's request to leave work and see her doctor immediately upon realizing that she was spotting during her pregnancy.

EEOC v. Affordable Rent-to-Own, LLC, 3:22-cv-676 (M.D. La.) The EEOC filed suit alleging that Affordable Rent-to-Own subjected an African American employee to a race-based hostile work environment pursuant to Title VII. According to the EEOC, the furniture retailer's account manager regularly used a racial slur in front of the employee. Following the employee's complaint about this alleged conduct, the EEOC claims that the company terminated this employee in retaliation for his complaint.

KEY SETTLEMENTS SECURED IN FY 2022

EEOC v. Willis-Knighton Medical Center, 2:21-cv-1774 (E.D. La.) Willis-Knighton Medical Center agreed to settle an ADA lawsuit brought on behalf of 30 putative claimants alleging that the defendant medical center placed an unlawful cap on both the amount of leave and light duty that an employee with a disability may obtain. Pursuant to the three-year consent decree, Willis-Knighton Medical Center committed to pay \$450,000 to the 30 putative claimants, revoke its caps on leave and light duty, implement ADA policies, and create various processes to handle employee complaints of discrimination.

EEOC v. Hollingsworth Richards, LLC, d/b/a Honda of Covington, 2:20-cv-2511 (E.D. La.) The defendant Honda dealership settled an EEOC-initiated ADA lawsuit which alleged that Honda of Covington subjected a sales representative with ADHD to an illegal medical examination and terminated her employment for taking her prescribed medication. In addition to providing the former sales representative with \$100,000, the three-year consent decree required Honda of Covington to put into place relevant policies, trainings, and a notice regarding employers' responsibilities under the ADA.

EEOC Indianapolis District Office

DISTRICT PROFILE

Director: **Michelle Eisele**

Regional Attorney: **Kenneth Bird**

Merit Cases Filed in FY 2022: **4 (T-7th)**

Average Days Between Determination
Letter & Failure to Conciliate: **95**

Average Days Between Failure to
Conciliate & Complaint: **73**

Average Days Between Determination
Letter & Complaint: **168**



KEY CASES FILED IN FY 2022

EEOC v. The Salvation Army, 2:22-cv-11973 (E.D. Mich.) The EEOC filed a lawsuit claiming that The Salvation Army discriminated against a cashier diagnosed with several physical and neurological conditions because of his disabilities in violation of the ADA. Specifically, the EEOC alleged that a manager at The Salvation Army's Family Store and Donation Center reprimanded the cashier for his involuntary movements and subsequently terminated him due to his physical limitations.

EEOC v. Eden Foods, Inc., 2:22-cv-10881 (E.D. Mich.) In this matter, the EEOC claimed that Eden Foods subjected a group of female employees to a sexually hostile work environment in violation of Title VII. According to the EEOC's Complaint, the company's Owner engaged in a pattern of consistent sexual harassment, which includes inappropriate touching and sexual comments directed towards a number of female employees. The EEOC further claimed that at least one employee reported the Owner's harassment to the company's HR Department, but that Eden Foods failed to remedy this alleged pattern of conduct.

KEY SETTLEMENTS SECURED IN FY 2022

EEOC v. Heart of CarDon, 1:20-cv-998 (S.D. Ind.) The defendant assisted living facility agreed to settle an ADA case in which the EEOC claimed that Heart of CarDon refused to grant an employee's request to transfer into a vacant position with reduced lifting requirements following her work injury. Per the parties' 18-month consent decree, Heart of CarDon paid \$115,000 in monetary compensation to the employee at issue. The company also agreed to implement revised ADA policies and trainings, with a special emphasis on complying with the ADA during the interactive process.

EEOC v. Konos, Inc. d/b/a Vande Bunte Eggs, 1:20-CV-973 (W.D. Mich.) Konos, a Michigan-based egg processor, settled an EEOC-initiated Title VII lawsuit claiming that a supervisor subjected an anonymous female employee to a sexually hostile work environment and retaliated against her for filing a complaint. Under the parties' three-year consent decree, Konos agreed to pay \$175,000 to the female employee, conduct a training on workplace harassment and retaliation, and provide various reports to the EEOC regarding its compliance with the decree.

EEOC Los Angeles District Office

DISTRICT PROFILE

Director: **Christine Park-Gonzalez (Acting)**

Regional Attorney: **Anna Y. Park**

Merit Cases Filed in FY 2022: **8 (T-3rd)**

Average Days Between Determination Letter & Failure to Conciliate: **168**

Average Days Between Failure to Conciliate & Complaint: **154**

Average Days Between Determination Letter & Complaint: **323**



KEY CASES FILED IN FY 2022

***EEOC v. Mexico Restaurant, Inc.*, 1:22-cv-430 (D. Haw.)** The EEOC filed suit on behalf of a class of female employees claiming that Mexico Restaurant allowed a male employee to subject female co-workers to a sexually hostile work environment. According to the EEOC, Mexico Restaurant also engaged in race-based harassment against the charging party, who supposedly complained about her co-worker's sexual harassment and subsequently was subjected to retaliatory forms of harassment. Furthermore, the EEOC claimed that Mexico Restaurant failed to preserve records as required by Section 709(c) of Title VII.

***EEOC v. Armed Forces Services Corporation dba Magellan Federal*, 3:22-cv-999 (S.D. Cal.)** The EEOC filed suit under Title VII against Magellan Federal, a government military contractor, alleged that the company harassed and discriminated against a female employee because of her sex. The EEOC also asserted that Magellan Federal subjected this employee to retaliatory conduct in response to her complaints.

***EEOC v. Goodsell/Wilkins, Inc.*, 8:22-cv-01765 (C.D. Cal.)** The EEOC filed a lawsuit on behalf of two Hispanic former employees, alleging that construction company Goodsell/Wilkins subjected the employees to race and/or national origin-based harassment, as well as retaliation, in violation of Title VII. More specifically, the EEOC alleged that Goodsell/Wilkins employees uttered racial slurs and posted prejudicial graffiti drawings targeting the charging parties. The EEOC further claimed that, following one charging party's internal complaint, the company terminated the employee who complained and continued to harass the other employee, resulting in his constructive discharge.

KEY SETTLEMENTS SECURED IN FY 2022

***EEOC v. Activision Blizzard, Inc.*, 2:21-cv-07682 (C.D. Cal.)** Activision Blizzard, a California-based video game company, settled an EEOC-initiated lawsuit alleging that the company maintained a sexually toxic work environment, with the Complaint asserting specific claims of sexual harassment, sex/pregnancy discrimination, and retaliation. As part of the settlement, Activision Blizzard created an \$18 million fund to compensate female employees who were subjected to this alleged treatment. In addition to the monetary relief, Activision Blizzard also agreed to retain a third-party EEO consultant, allow for regular audits and reports regarding the company's compliance with Title VII, implement a tracking system and hotline for internal complaints of discrimination and harassment, and provide various employee trainings, among other requirements.

EEOC Memphis District Office

DISTRICT PROFILE

Director: **Edmond C. Sims (Acting)**

Regional Attorney: **Faye Williams**

Merit Cases Filed in FY 2022: **3 (8th)**

Average Days Between Determination
Letter & Failure to Conciliate: **41**

Average Days Between Failure to
Conciliate & Complaint: **42**

Average Days Between Determination
Letter & Complaint: **83**



KEY CASES FILED IN FY 2022

EEOC v. Supreme Staffing LLC, 2:22-cv-2668 (W.D. Tenn.) The EEOC filed a lawsuit on behalf of a class of African American job applicants and employees alleging that Supreme Staffing engaged in a pattern or practice of race discrimination in violation of Title VII. According to the EEOC, the defendant staffing company maintained a practice of discriminating against African Americans individuals in terms of both job referrals and the desirability and compensation associated with African American employees' job placements. Additionally, the EEOC claimed that Supreme Staffing failed to preserve relevant records as required by Title VII.

EEOC v. Ranger Tool and Die Inc., 3:22-cv-247 (E.D. Ark.) The EEOC filed a Complaint against industrial tool shop Ranger Tool and Die asserting claims for a sexually hostile work environment and retaliation pursuant to Title VII. More specifically, the EEOC claimed that a company employee subjected two female co-workers to a pattern of inappropriate sexual conduct. Furthermore, the EEOC asserted that these two female employees—as well as a male co-worker—raised complaints about the alleged sexual harassment, and that in response, Ranger Tool and Die terminated all three employees.

KEY SETTLEMENTS SECURED IN FY 2022

EEOC v. MedicOne Medical Response of Tennessee, Inc., 3:20-cv-00912 (M.D. Tenn.) The defendant ambulance services company settled a Title VII lawsuit with the EEOC for \$450,000. According to the EEOC, MedicOne managers subjected a class of female paramedics to a sexually hostile work environment and retaliated against one paramedic for filing a complaint. In addition to the monetary payment, the parties' four-year consent decree required MedicOne to revise its sexual harassment policy, host an annual sexual harassment training, and provide semi-annual reports to the EEOC regarding its compliance with the decree.

EEOC Miami District Office

DISTRICT PROFILE

Director: **Evangeline Hawthorne**

Regional Attorney: **Robert E. Weisberg**

Merit Cases Filed in FY 2022: **8 (T-3rd)**

Average Days Between Determination
Letter & Failure to Conciliate: **37**

Average Days Between Failure to
Conciliate & Complaint: **193**

Average Days Between Determination
Letter & Complaint: **209**



KEY CASES FILED IN FY 2022

EEOC v. DLS Engineering Assoc., Inc., 3:21-cv-1214 (M.D. Fla.) The EEOC filed suit against DLS Engineering Associates pursuant to the PDA, alleging that the company discriminated against a job applicant due to her pregnancy. According to the EEOC's Complaint, DLS Engineering Associates first extended an employment offer to a female job applicant, but upon discovering that the applicant was pregnant, the company's Vice President rescinded her job offer despite the applicant's assurances that she could still perform the essential functions of the role.

EEOC v. The Crab Stop Bar and Grill, LLC, 2:22-cv-14339 (S.D. Fla.) The EEOC sued The Crab Stop Bar and Grill on behalf of a class of female employees asserting claims for sexual harassment, constructive discharge, and retaliation under Title VII. Namely, the EEOC alleged that the seafood restaurant's owner created a sexually hostile work environment for female employees through consistent inappropriate commentary and groping. The EEOC also claimed that The Crab Stop Bar and Grill constructively discharged one subject of the harassment, and that another female employee was terminated in retaliation for complaining of the alleged harassment.

KEY SETTLEMENTS SECURED IN FY 2022

EEOC v. Carrabba's Italian Grill LLC & OS Restaurant Services, LLC, 8:21-cv-2507 (M.D. Fla.) The defendant restaurant and its staffing agency settled an EEOC-initiated lawsuit alleging that a Carrabba's manager subjected female employees to sexual advances and other acts of sexual harassment in violation of Title VII. As part of the 30-month consent decree, the defendants agreed to pay \$690,000 to the female victims, create revised workplace harassment policies, and conduct anti-harassment training for managers.

EEOC v. Shelley's Septic Tank, Inc., 6:20-cv-1285 (M.D. Fla.) Shelley's Septic Tank agreed to settle the EEOC's case alleging that the company's owner subjected a male employee to same-sex harassment and later terminated his employment for reporting this conduct to the sheriff's office. By entering into a three-year consent decree with the EEOC, Shelley's Septic Tank committing to pay \$82,500 to the terminated employee, retain a third-party consultant to investigate future internal complaints, and create new anti-harassment policies and trainings.

EEOC New York District Office

DISTRICT PROFILE

Director: **Timothy Riera (Acting)**

Regional Attorney: **Jeffrey Burstein**

Merit Cases Filed in FY 2022: **7 (T-4th)**

Average Days Between Determination Letter & Failure to Conciliate: **111**

Average Days Between Failure to Conciliate & Complaint: **134**

Average Days Between Determination Letter & Complaint: **245**



KEY CASES FILED IN FY 2022

EEOC v. iTutorGroup, Inc., 1:22-cv-2565 (E.D.N.Y.) The EEOC filed suit on behalf of a class of over 200 job applicants asserting a claim for age discrimination pursuant to the ADEA. According to the EEOC's Complaint, the defendant tutoring service set its hiring software to automatically reject female applicants over the age of 55 and male applicants over the age of 60. In support of its claims, the EEOC alleged that a female applicant over the age of 55 had her tutor application rejected when she used her real birthdate, but that when she used a more recent birthdate on a subsequent applicant, iTutorGroup offered her an interview.

EEOC v. 98 Starr Road Operating Co., LLC d/b/a Elderwood at Burlington, 2:22-cv-168 (D. Vt.) In this matter, the EEOC asserted that the defendant long-term care facility subjected a group of African American nurses and nurse assistants to a racially hostile work environment in violation of Title VII. Specifically, the EEOC claimed that Elderwood at Burlington allowed its residents to repeatedly use racial slurs and hostile language toward African American employees. The EEOC also alleged that the facility's management ignored employees' complaints about this behavior.

KEY SETTLEMENTS SECURED IN FY 2022

EEOC v. AZ Metro Distributors, LLC, 15-cv-5370 (E.D.N.Y.) AZ Metro Distributors settled an ADEA lawsuit in which the EEOC alleged that the defendant iced tea distributor terminated its two oldest sales employees in their department because of their age. After a jury ruled in the EEOC's favor, the parties entered into a two-year consent decree requiring AZ Metro Distributors to pay \$300,000 to the terminated sales employees, provide annual ADEA training, and report any complaints of age discrimination or retaliation to the EEOC.

EEOC Philadelphia District Office

DISTRICT PROFILE

Director: **Jamie Williamson**

Regional Attorney: **Debra Lawrence**

Merit Cases Filed in FY 2022: **7 (T-4th)**

Average Days Between Determination
Letter & Failure to Conciliate: **134**

Average Days Between Failure to
Conciliate & Complaint: **105**

Average Days Between Determination
Letter & Complaint: **239**



KEY CASES FILED IN FY 2022

EEOC v. Sinclair Broadcast Group, Inc., 1:22-cv-2477 (D. Md.) The EEOC sued Sinclair Broadcast Group alleging that the media company subjected an IT analyst to race discrimination in violation of Title VII. More specifically, the EEOC claimed that Sinclair Broadcast Group paid an African American IT analyst less than it paid to similarly-situated employees of other races. Furthermore, after the analyst complained of this supposed pay discrepancy, the EEOC asserted that the company subjected her to further discrimination, resulting in the analyst's constructive discharge.

EEOC v. Heartfelt Home Healthcare Services, Inc., 1:22-cv-280 (W.D. Pa.) The EEOC filed a Complaint against the defendant home healthcare company asserting claims for pregnancy and disability discrimination under Title VII and the ADA. Namely, the EEOC alleged that Heartfelt Home Healthcare Services unlawfully terminated a scheduling coordinator's employment because she had to leave work for a pregnancy-related medical condition, and because the company regarded her as disabled due to her hypertension.

KEY SETTLEMENTS SECURED IN FY 2022

EEOC v. Gas Field Specialists, Inc., 4:21-cv-1615 (M.D. Pa.) Gas Field Specialists entered into a settlement ending an EEOC-initiated lawsuit alleging that the natural gas company violated the ADA by terminating a mechanic because he had a history of cancer. Under the parties' three-year consent decree, Gas Field Specialists agreed to pay \$184,000 to the terminated mechanic, host an ADA training, and document any reasons why employees are not recalled after a seasonal layoff moving forward.

EEOC v. Route 22 Sports Bar, Inc. & Crazy Mexican Restaurant & Grill, LLC, 5:21-cv-7 (N.D.W. Va.) The defendant restaurants agreed to settle a Title VII lawsuit in which the EEOC claimed that the restaurant owner's male spouse, as well as male staff members, subjected female employees to a sexually hostile work environment and subsequent retaliation for complaining. As part of the four-year consent decree, the defendants committed to pay \$217,500 to a class of eight female employees, develop revised Title VII policies and internal reporting procedures, and deny the owner's spouse from holding a supervisory position with either defendant.

EEOC Phoenix District Office

DISTRICT PROFILE

Director: **Nancy Sienko (Acting)**

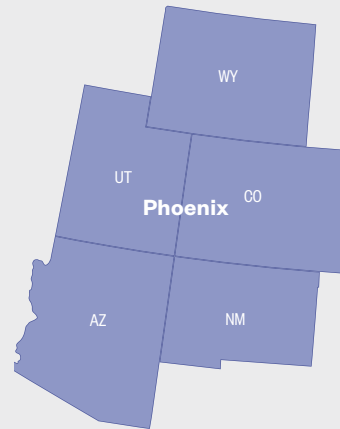
Regional Attorney: **Mary Jo O'Neill**

Merit Cases Filed in FY 2022: **6 (5th)**

Average Days Between Determination Letter & Failure to Conciliate: **171**

Average Days Between Failure to Conciliate & Complaint: **145**

Average Days Between Determination Letter & Complaint: **320**



KEY CASES FILED IN FY 2022

EEOC v. Schuff Steel Co., 2:22-cv-1653 (D. Ariz.) The EEOC's Complaint asserted that, under Title VII, Schuff Steel's plant manager subjected a group of African American and Hispanic employees to a hostile work environment on the basis of their race and national origin. To that end, the EEOC claimed that the plant manager regularly used racial slurs in the workplace, and despite several employees' complaint, the company allegedly failed to remedy this harassment. The EEOC further alleged that Schuff Steel either retaliated against or constructively discharged the employees who complained of the plant's manager supposed conduct.

EEOC v. Teamsters Local Union No. 455, 1:22-cv-2520 (D. Colo.) The EEOC filed suit on behalf of a UPS Business Manager alleging that Teamsters Local Union No. 455 subjected this individual to a sexually hostile work environment in violation of Title VII. Namely, the EEOC claimed that the Union's Business Agent made sexually suggestive comments to the female Business Manager and inappropriately touched her without consent. The EEOC also alleged that the Union was aware of its Business Agent's supposed conduct but failed to adequately address the situation.

KEY SETTLEMENTS SECURED IN FY 2022

EEOC v. Plains Pipeline, L.P., et al., 7:20-cv-82 (W.D. Tex.) Four companies that collectively run oil and gas pipelines in New Mexico and Texas settled an EEOC-initiated case alleging that the defendants subjected 16 male employees to race, national origin, and sex-based harassment, as well as acts of retaliation. The parties' three-year consent decree required these oil and gas companies to pay \$1.75 million to the aggrieved individuals, implement revised policies and trainings focused on harassment and retaliation, and provide periodic reports to the EEOC regarding Title VII compliance.

EEOC San Francisco District Office

DISTRICT PROFILE

Director: **Nancy Sienko**

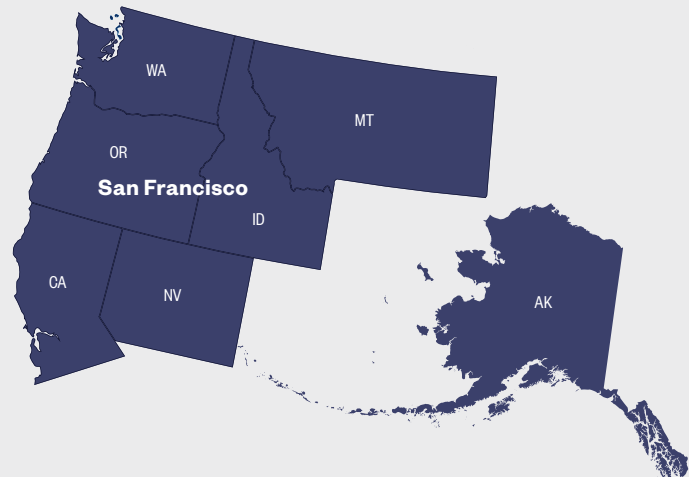
Regional Attorney: **Roberta Steele**

Merit Cases Filed in FY 2022: **5 (T-6th)**

Average Days Between Determination Letter & Failure to Conciliate: **168**

Average Days Between Failure to Conciliate & Complaint: **171**

Average Days Between Determination Letter & Complaint: **338**



KEY CASES FILED IN FY 2022

EEOC v. Chipotle Services, LLC, 2:22-cv-279 (W.D. Wash.) The EEOC filed suit on behalf of a class of at least three female employees alleging that two male Chipotle employees subjected several female employees to a pattern of sexual harassment in violation of Title VII. The EEOC's complaint further claimed that Chipotle failed to remedy this alleged pattern of harassment, and also constructively discharged at least two class members by way of this inappropriate conduct.

EEOC v. SmartTalent LLC, 22-cv-1102 (W.D. Wash.) The EEOC's pattern or practice lawsuit under Title VII claimed that temporary staffing company SmartTalent discriminated on the basis of sex in both its hiring and job placement decisions. More specifically, the EEOC alleged that, since 2015, SmartTalent has complied with its customers' staffing requests specifically asking for young male employees, while also telling interested female applicants that no such positions were available.

EEOC v. Monson Fruit Co., LLC, 1:22-cv-3133 (E.D. Wash.) The EEOC alleged that a manager at Monson Fruit subjected a female employee to unwanted sexual propositions and touching, resulting in a sexually hostile work environment in violation of Title VII. According to the EEOC's Complaint, Monson Fruit not only retaliated against this female employee for complaining and refusing the manager's sexual advances, but also terminated the female employee's spouse in retaliation for his partner's protected EEO activity.

KEY SETTLEMENTS SECURED IN FY 2022

EEOC v. GIPHX10, LLC d/b/a Hawthorn Suites by Wyndham, & Jaffer, Inc., 2:20-cv-01369 (W.D. Wash.) The defendant hotel operators agreed to pay \$370,000 to settle a Title VII sexual harassment lawsuit filed by the EEOC on behalf of two female housekeepers. In addition to this monetary payment, the parties' three-year consent decree also required the hotel operators to implement company-wide anti-harassment training and hire a consultant to help the companies develop appropriate policies and an internal complaint system.

EEOC v. Viewpoint, Inc. and CampusPoint Corp., 3:21-cv-1429 (D. Or.) Software developer Viewpoint, Inc. and its recruiter CampusPoint Corporation settled an ADA suit in which the EEOC alleged that the defendants collectively rejected a job applicant upon discovering that he required a sign language interpreter for the interview. As part of their four-year consent decree, the defendants agreed to pay \$225,000 to the applicant, incorporate various ADA policies, revise their online application process, and provide training focused on accommodating individuals who are deaf or hard-of-hearing.

EEOC St. Louis District Office

DISTRICT PROFILE

Director: **David Davis (Acting)**

Regional Attorney: **Andrea Baran**

Merit Cases Filed in FY 2022: **4 (T-7th)**

Average Days Between Determination Letter & Failure to Conciliate: **95**

Average Days Between Failure to Conciliate & Complaint: **226**

Average Days Between Determination Letter & Complaint: **321**



KEY CASES FILED IN FY 2022

EEOC v. Hobby Lobby Stores, Inc., 2:22-cv-2258 (D. Kan.) The EEOC filed suit against retailer Hobby Lobby asserting a claim for disability discrimination pursuant to the ADA. More specifically, the EEOC alleged that Hobby Lobby refused to grant a clerk’s accommodation request of having her service dog present to assist with her anxiety, depression, and PTSD. Since the clerk at issue could not work without her service dog, she stopped reporting to work. Hobby Lobby then terminated her for job abandonment, an action which the EEOC also labeled as a form of disability discrimination.

EEOC v. Landmark Dodge, Inc., 4:22-cv-614 (W.D. Mo.) The EEOC sued Landmark Dodge alleging that the Missouri-based car dealership engaged in a pattern of sex discrimination and retaliation in violation of Title VII. To that end, the EEOC claimed that Landmark Dodge separated its sales and office employees according to sex by hiring only men for sales jobs and only women for office jobs. The EEOC also asserted that, when two female employees opposed this supposed practice, the car dealership subjected them to a hostile work environment and forced them to resign in retaliation for their complaints.

KEY SETTLEMENTS SECURED IN FY 2022

N/A

PART II: EEOC's Strategic Enforcement Priorities

According to the EEOC, “the purpose of the [Strategic Enforcement Priorities] is to focus and coordinate the EEOC’s programs to have a sustainable impact in reducing and deterring discriminatory practices in the workplace.” As in years past, the SEP establishes the EEOC’s six substantive area priorities. Part II addresses each of these priorities.



A. The EEOC's Strategic Enforcement Plan

1. Background

Despite the significant changes in leadership that have occurred over the past few years, the EEOC continues to operate under its Strategic Enforcement Plan (“SEP”) for FY 2017-2021, established in October 2016.¹⁸ The term for the last SEP expired at the end of the FY 2021, but it remains in effect until modified or withdrawn. On January 10, 2023, the EEOC published for comment a proposed SEP for FY 2023-2027. Though not yet finalized, the proposal expands on the priorities that the EEOC has focused on in recent years, and adds some new areas of focus that can be expected to generate an increase in enforcement activity with the anticipated Democratic majority soon to be in place.

The EEOC first unveiled its SEP in December 2012, stating that the plan “established substantive area priorities and set forth strategies to integrate all components of EEOC’s private, public, and federal sector enforcement to have a sustainable impact in advancing equal opportunity and freedom from discrimination in the workplace.”¹⁹ The Commission’s six major enforcement priorities have remained consistent across both iterations of the SEP. But the EEOC can and has changed how it interprets those priorities over the life of those Plans, which has often led to a shift in how the EEOC approaches litigation and the topics and issues it chooses to enforce in the federal courts.²⁰ According to the EEOC “the purpose of the [Strategic Enforcement Priorities] is to focus and coordinate the EEOC’s programs to have a sustainable impact in reducing and deterring discriminatory practices in the workplace.”²¹

Additionally, the 2017-2021 SEP recognized the importance of “systemic” cases to its overall mission. Systemic cases are those with a strategic impact, meaning they affect how the law influences a particular community, entity, or industry. The EEOC continues to place special emphasis on systemic lawsuits. In November 2019, the EEOC announced that it would be replacing the combined Performance Accountability

¹⁸ U.S. Equal Employment Opportunity Commission, *Press Release: EEOC Updates Strategic Enforcement Plan* (Oct. 17, 2016), www.eeoc.gov/eeoc/newsroom/release/10-17-16.cfm. To date, there has been no suggestion that the SEP will change in 2022.

¹⁹ U.S. Equal Employment Opportunity Commission Strategic Enforcement Plan FY 2017-2021, www.eeoc.gov/eeoc/plan/sep-2017.cfm.

²⁰ See Gerald L. Maatman, Jr., Christopher J. DeGroff, Matthew J. Gagnon, and Ala Salameh, *What A Long Strange Year It's Been ... The EEOC's Fiscal Year Comes To An Uncharacteristically Quiet Close*, Workplace Class Action Blog (Sept. 30, 2019), www.workplaceclassaction.com/2019/09/what-a-long-strange-year-its-been-the-eeocs-fiscal-year-comes-to-an-uncharacteristically-quiet-close/.

²¹ U.S. Equal Employment Opportunity Commission Strategic Enforcement Plan FY 2017-2021, www.eeoc.gov/eeoc/plan/sep-2017.cfm.

Report that used to be published in November of each year.²² Among other things, the annual Performance Accountability Report contained data regarding the number of systemic cases being handled by the EEOC. The EEOC now publishes an Agency Financial Report in November and a separate Annual Performance Report in February along with the EEOC's Congressional Budget Justification. The Annual Performance Report reports on the progress of the EEOC's efforts to achieve its strategic goals and objectives. Employers will have to wait for that Report in February for updated data regarding the EEOC's pursuit of systemic cases. The EEOC reported in this year's Agency Financial Report that the Commission again filed only 13 systemic cases, the same amount of filings as in FY 2021 and down from former years. For example, in FY 2019, there were 17 filings and 37 in FY 2018.²³

2. FY 2022 Strategic Enforcement Priorities

The EEOC focused on six different strategic enforcement priorities in FY 2022, including: (1) eliminating barriers in recruitment and hiring; (2) protecting vulnerable workers; (3) addressing selected emerging and developing issues; (4) ensuring equal pay protection for all workers; (5) preserving access to the legal system; and (6) preventing systemic harassment.

Eliminating Barriers In Recruitment And Hiring. The first strategic enforcement priority is eliminating barriers in recruitment and hiring. The EEOC's focus within this priority is to address discriminatory recruiting and hiring practices which target "racial, ethnic, and religious groups, older workers, women, and people with disabilities." According to the EEOC, addressing this priority typically involves strategic, systemic cases. The EEOC has spent considerable amount of its enforcement budget litigating issues that it sees as barriers to recruitment and hiring. In recent years, there have been a number of judicial decisions involving the EEOC's attempts to combat discrimination, including through the use of pre-employment screening tests. This past fiscal year, there was a focus on how technological advancements can result in discrimination, particularly against those with disabilities. We cover this in further detail in subsection D(2)(a).

The proposed FY 2023-2027 SEP adds specific call outs for prevent barriers in the workplace for pregnant workers and those with pregnancy-related medical conditions, as well as LGBTQI+ individuals.

The EEOC's proposal also added far more detail about the types of hiring practices and policies that it intends to scrutinize. For example, prior SEPs described the EEOC's intention to prevent steering members of protected groups into specific jobs. The proposed SEP goes further to explain that the EEOC also will be examining whether employers are segregating workers in jobs, or by job duties, based on membership in a protected group.

Building further on this, the proposed SEP includes several new but related areas of focus. These include looking at practices that may limit access to work opportunities, such as advertising jobs in a manner that excludes or discourages some protected groups from applying, or denying training, internships, or apprenticeships. The EEOC also intends to scrutinize whether businesses are denying opportunities to move from temporary to permanent roles, including when permanent positions are available.

Likewise, the EEOC modified its earlier focus on screening tools that might disproportionately impact workers based on their protected status, noting explicitly that it is interested in employers' use of artificial intelligence and automated systems in that regard.

This aligns with the EEOC's increased interest in how employers use technology to recruit and hire workers. Here, the Commission has emphasized its intent to investigate whether protected groups might be harmed—whether intentionally or not—by automated systems used to target job advertisements

²² U.S. Equal Employment Opportunity Commission, Fiscal Year 2019 Agency Financial Report, at 9, www.eeoc.gov/fiscal-year-2019-agency-financial-report-us-equal-employment-opportunity-commission.

²³ U.S. Equal Employment Opportunity Commission, Fiscal Year 2020 Agency Financial Report, at 11, www.eeoc.gov/sites/default/files/2020-11/2020-AFR.pdf; U.S. Equal Employment Opportunity Commission, Fiscal Year 2022 Agency Financial Report, www.eeoc.gov/eeoc-fiscal-year-2022-agency-financial-report.

to particular populations, recruit workers, or aid in hiring decisions. The proliferation in recent years of electronic tools available to assist employers to find talent in challenging labor markets may provide fertile ground for the EEOC on this issue.

The EEOC also in this section called out a “lack of diversity” in certain industries, naming construction and high tech in particular, and stated its intent to monitor those benefiting from substantial federal investment.

Protecting Vulnerable Workers. The second strategic enforcement priority is protecting vulnerable workers. The EEOC’s focus within this area is to combat policies and practices directed “against vulnerable workers,” including immigrant and migrant workers, as well as persons perceived to be members of these groups, and against members of underserved communities.” This year there was a focus on protecting individuals who practice religion. This can be contributed to the shift in the EEOC’s political makeup and the aftermath of the *R.G. and R.H. Funeral Home v. EEOC/Bostock v. Clayton County* decision. Other considerations include the implications of the COVID-19 pandemic and employer restrictions relative to preventing the spread of the virus, such as vaccine mandates and mask mandates. Subsection B provides an in-depth overview of this strategic priority and the new developments that took place this past fiscal year.

For purposes of the SEP, “vulnerable workers” are those who may be unaware of their rights under equal employment opportunity laws, or reluctant or unable to exercise those rights. The EEOC’s proposed FY 2023-2027 SEP adds substantially to this priority as well. In a change from prior versions of the SEP, the EEOC has called out nine different categories of vulnerable workers that it aims to safeguard:

- immigrant and migrant workers;
- individuals employed in low wage jobs, particularly teen-aged workers employed in such jobs;
- individuals with arrest or conviction records;
- LGBTQI+ individuals;
- Native Americans/ Alaska Natives;
- older workers;
- people with developmental or intellectual disabilities;
- persons with limited literacy or English proficiency; and
- temporary workers.

Employers in sectors that engage many members of these communities, or who have operations in areas of the country with large populations of such workers, may expect increased inquiry.

Addressing Selected Emerging And Developing Issues. The third strategic priority is addressing selected emerging and developing issues. As the name implies, the EEOC may adapt its focus within this priority on a year-to-year basis in accordance with developing case law. As a government agency, the EEOC is responsible for monitoring trends and developments in the law, workplace practices, and labor force demographics. The 2017 SEP identified five emerging and developing issues as strategic priorities: (1) qualification standards and inflexible leave policies that discriminate against individuals with disabilities; (2) accommodating pregnancy-related limitation under the Americans with Disabilities Amendments Act and Pregnancy Discrimination Act; (3) protecting lesbian, gay, bisexual, and transgender (LGBT) individuals from discrimination based on sex; (4) clarifying the employment relationship and the application of workplace civil rights protections in light of the increasing complexity of employment relationships and structures; and (5) 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.

Few issues have attracted as much of the EEOC’s attention over the past few years as its campaign to have LGBTQ discrimination recognized as a prohibited form of discrimination under Title VII. That issue was finally settled in 2020 by the U.S. Supreme Court in the landmark decision of *Bostock v. Clayton County Georgia*, pursuant to which the U.S. Supreme Court ruled that Title VII prohibits discrimination against gay or transgender employees as a form of sex discrimination. Last year, we reported on this ruling and the theory

of discrimination involved, which the EEOC has been diligently pursuing in recent years. In subsection B, we report on the aftermath of the *Bostock* decision and in particular, the religious liberties implications that have come to light following that ruling.

The proposed FY 2023-2027 SEP leaves one priority largely unchanged from the prior SEP: qualification standards and inflexible policies or practices that discriminate against individuals with disabilities will remain an area of focus.

The EEOC has dropped two priorities that appeared in this section of the prior SEP. These include protecting LGBT people from discrimination, and clarifying the application of workplace civil rights protections in complex employment relationships and structures. However, those priorities have not fallen completely by the wayside and do appear in other areas of the proposed SEP. This is likely just an acknowledgment that these issues are no longer “emerging” areas, but rather have been fully embraced in the EEO universe.

The proposed SEP elaborates on statements from the earlier document related to pregnancy discrimination to include protection for those affected by pregnancy, childbirth, and related medical conditions and disabilities, as well as requests for reasonable accommodations related to same.

Prior versions of the SEP have discussed “backlash” discrimination, but the new proposed SEP goes further. The EEOC has noted that discrimination against some groups can arise as a backlash in response to local, national, or global events. The EEOC identifies some groups facing such discrimination now, including African Americans; individuals of Arab, Middle Eastern, or Asian descent; Jews; Muslims; and Sikhs, but also notes that the groups at issue, and the practices they are subjected to, can be expected to change over time and in response to current events.

The proposed SEP also calls out discrimination and stereotyping related to COVID-19, noting in particular that persons of Asian descent, older workers, and persons with disabilities have been targeted. This enforcement priority also extends to requests for accommodation by those with disabilities or sincerely held religious beliefs; unlawful medical inquiries and direct threat determinations; and mistreatment based on actual or perceived disabilities, including those associated with long COVID.

The final topic under this priority is “technology-related employment discrimination.” Here, the EEOC is interested in particular in employment decisions based on algorithmic decision-making; as well as automated recruitment, selection, production, and performance management tools.

Ensuring Equal Pay Protection For All Workers. The fourth strategic priority is ensuring equal protections for all workers. The EEOC’s primary focus has been combating discrimination in pay based on sex. We cover the key focus areas relative to this strategic priority in subsection C.

The proposed FY 2023-2027 SEP revises this priority to make more clear that it intends to focus on pay discrimination based on any protected category. (This prior version was more focused on sex-based differences in pay.)

The proposal departs from prior versions in two other notable ways. First, it includes a statement that the EEOC will not depend on charges from members of the public, but will use its authority to initiate directed investigations and Commissioner’s charges in order to investigate pay differences. Second, the EEOC states its intent to challenge practices that it perceives to contribute to pay disparities, including employer policies and practices that encourage secrecy around pay, reliance on past salary history to set pay, and requiring applicants to disclose expected pay rates during the application stage.

Preserving Access To The Legal System. The fifth strategic priority is 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. This objective has historically been reflected in the EEOC’s aggressive

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

Of the 95 cases that were filed by the EEOC in FY 2022, 28 cases—or roughly 30%—involved retaliation claims, signaling the EEOC's continued interest in pursuing such claims and in turn, the interests of employees' ability to pursue their rights under the anti-discrimination laws.

The proposed FY 2023-2027 SEP is largely unchanged from the prior version and focuses on overly broad agreements, including waivers, releases, non-disclosure agreements, non-disparagement agreements, and arbitration agreements; failure to maintain applicant and employee records; and practices seen as retaliatory against those who engage in protected activity.

Preventing Systemic Harassment. The sixth strategic priority is 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. Harassment continues to be one of the most frequent complaints raised in the workplace, particularly sex discrimination. The EEOC has had plenty of opportunity to shape the law of sexual harassment through its litigation activities. Those cases often hinge on two issues: whether the alleged actions rise to the level of unlawful harassment, and whether an employer can be held liable for harassment perpetrated by employees. In FY 2022, there was a total of 16 cases involving harassment claims and 11 of those cases alleged sexual harassment. Additional information on this strategic priority and related case filings appears in subsection E.

Of note, the proposed FY 2023-2027 SEP now expressly calls out harassment based on pregnancy, gender identity, and sexual orientation. The EEOC has also articulated more detailed support for employer training, including providing education, technical assistance, and policy guidance.

Continued Reliance on Systemic Investigations and Litigation to Advance Strategic Goals. In the proposed FY 2023-2027 SEP, the "Commission once again reaffirms its commitment to the agency's systemic program." The EEOC looks to its SEP priorities to decide what types of systemic investigations and cases to pursue. Indeed, the SEP priority areas are "given precedence over other cases to maximize the EEOC's strategic impact." With the EEOC soon to be comprised of Commissioners appointed by the Biden administration, we anticipate a pronounced uptick in enforcement activity. Employers should expect that the Commission will continue to make good on its promise to litigate large-scale, high-impact, and high-profile investigations and cases that address the issues identified as its enforcement priorities and areas of focus.

B. A Developing Conflict Between Religious And LGBTQI+ Rights After *Bostock*

The EEOC's SEP identifies the protection of immigrant, migrant, and other vulnerable workers as a national enforcement priority. Much of that activity in recent years has focused on the protection of employees against religious bias in the workplace, especially Muslim employees. Although the focus of the EEOC's efforts to combat religious discrimination have most often centered around issues of anti-Muslim bias, in more recent years, the EEOC has demonstrated a willingness to pursue religious discrimination claims on behalf of other religious groups as well.²⁴

On January 15, 2021, Commission approved revisions to its Compliance Manual Section on Religious Discrimination.²⁵ In addition to further direction on religious discrimination and accommodation, the guidance includes sections addressing religious organizations, the ministerial exception to Title VII, First Amendment protections to employers, and protections under the federal Religious Freedom Restoration Act ("RFRA"). The Commission's focus on such areas appears in part to be a reaction to the U.S. Supreme Court's *Bostock* decision, as the introduction to the updated guidance specifically refers to the Court's language in the opinion regarding religious liberty.²⁶

Few issues have garnered as much of the EEOC's attention over the past few years as its campaign to have LGBTQ discrimination recognized as a prohibited form of discrimination under Title VII.²⁷ That issue was finally settled in 2020 by the U.S. Supreme Court in the landmark decision, *Bostock v. Clayton County Georgia*. On June 15, 2020, the Supreme Court held that Title VII prohibits discrimination against gay or transgender employees as a form of sex discrimination.²⁸ The 6-3 decision authored by Justice Gorsuch was a significant victory for the EEOC.

In its opinion, the Supreme Court held that "[a]n employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids."²⁹ Further, it noted that although "[t]hose who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result . . . the limits of the drafters' imagination supply no reason to ignore the law's demands."³⁰ After noting that "[f]ew facts are needed to appreciate the legal question we face," the Supreme Court explained that, "[e]ach of the three cases before us started the same way: An employer fired a long-time employee shortly after the employee revealed that he or she is homosexual or transgender—and allegedly for no reason other than the employee's homosexuality or transgender status."³¹ The Supreme Court reasoned that because discrimination on the basis of homosexuality or transgender status requires an employer to intentionally treat individual employees differently because of their sex, an employer who intentionally penalizes an employee for being homosexual or transgender also violates Title VII.

The EEOC has been diligently pursuing this theory of discrimination in the courts for several years, resulting in quite a few victories in line with the *Bostock* decision. Recently, the Commission's leadership in this respect has come under scrutiny since the *Bostock* decision was issued. In June 2021, the EEOC issued guidance

²⁴ The EEOC's focus on protecting employees' rights to practice their religion in the workplace is not limited to workers of Muslim or other mainstream faiths. The EEOC has brought several lawsuits in recent years that target different kinds of religious practice. For example, in *EEOC v. United Health Programs of America, Inc. and Cost Containment Group Inc.*, 213 F. Supp. 3d 377 (E.D.N.Y. 2016), the EEOC successfully argued that concepts known as "Onionhead" and "Harnessing Happiness" were entitled to Title VII protection as religious beliefs. *Id.* at *3-5. The court held that to determine whether a given set of beliefs constitutes a religion for purposes of Title VII, "courts frequently evaluate: (1) whether the beliefs are sincerely held and (2) whether they are, in [the believer's] own scheme of things, religious." *Id.* at 394. Under that rubric, the court found that Onionhead was a religion under Title VII. *Id.* at 398.

²⁵ Press Release, Equal Employment Opportunity Commission, Commission Approves Revised Enforcement Guidance on Religious Discrimination (Jan. 15, 2021), available at www.eeoc.gov/newsroom/commission-approves-revised-enforcement-guidance-religious-discrimination.

²⁶ U.S. Equal Employment Opportunity Commission, EEOC Compliance Manual Section 12: Religious Discrimination at n.2 (2021).

²⁷ The EEOC's Strategic Enforcement Plan explicitly identifies "[p]rotecting lesbians, gay men, bisexuals and transgender (LGBT) people from discrimination based on sex" as one of its key emerging and developing issues. *Id.*

²⁸ *Bostock v. Clayton County, Ga.*, 140 S. Ct. 1731 (2020).

²⁹ *Id.* at 1737.

³⁰ *Id.*

³¹ *Id.*

to employees and employers about their rights and obligations following the *Bostock* decision.³² In their September 27, 2022 letter to Commissioner Burrows, Richard Burr and Virginia Foxx criticized this guidance as going “far beyond what the U.S. Supreme Court actually decided.”³³ They point out that the question at issue in *Bostock* was “whether an employer who *fires* someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual ‘because of such individual’s sex,’” yet “such a clear directive did not deter EEOC under [Burrows’s] leadership from issuing expansive guidance on the issue without public input or a Commission vote.”³⁴

In *Texas v. EEOC*,³⁵ the State of Texas directly challenged this guidance in the wake of the *Bostock* decision, which interpreted sections of the Affordable Care Act and the Americans with Disabilities Act to prohibit employers or federally funded agencies from discriminating against transgender individuals with respect to gender-affirming care. Texas argued that the guidances diverged from Title VII, *Bostock*, and the legal provisions they purported to interpret, and because they violated the First Amendment and the Administrative Procedures Act.³⁶ The court held that all of these difficult statutory questions could be distilled down to one question: “is the non-discrimination holding in *Bostock* cabined to ‘homosexuality and transgender *status*’ or does it extend to correlated *conduct*—specifically, the sex-specific: (1) dress; (2) bathroom; (3) pronoun; and (4) healthcare practices underlying the Guidances and the Amended Complaint?”³⁷

The court held in Texas’s favor, reasoning that Title VII prohibits employment discrimination because of sexual orientation or gender-identity, but not necessarily all correlated conduct relating to those issues. The court pointed to various instances in the *Bostock* decision where the majority opinion cabined its definitions and descriptions to the status of being homosexual or transgender, noting that it “repeatedly joined the terms ‘status’ and ‘for being’ in the sentences, paragraphs, and sections discussing these concepts.”³⁸ Moreover, the court found compelling the majority’s response to the “parade of horrors” that had been prophesied in Justice Alito’s dissent in *Bostock*, noting that Justice Alito “predicted the holding in *Bostock* would reach at least seven categories of Title VII litigation: (1) ‘bathrooms, locker rooms, or anything else of the kind’; (2) ‘women’s sports’; (3) ‘housing’; (4) ‘employment by religious organizations’; (5) ‘healthcare’; (6) ‘freedom of speech’; and (7) ‘constitutional claims.’”³⁹ The *Bostock* majority’s opinion specifically addressed those concerns by denying that its decision was in any way prejudging those issues: “Case by case, category by category, controversy by controversy, Justice Gorsuch deferred judgment, stating *Bostock* decided only what *Bostock* decided: under Title VII, ‘an employer who fires an individual merely for being gay or transgender defies the law.’”⁴⁰ Finally, the court found that the categories of issues identified in the *Bostock* dissent matched closely the policies that were at issue in Texas’s lawsuit, including sex-specific dress, bathrooms, pronouns, and healthcare practices. Because those issues were expressly reserved by *Bostock*, they remain undecided.

The court then addressed what it believed to be the core of the parties’ dispute: what does it mean to “be” homosexual or transgender, or, more particularly, what does that phrase mean in the context of the *Bostock* decision? According to Texas, that meaning should be restricted to attraction and identification, but should not extend to all associated actions, *i.e.*, correlated conduct such as sex-specific dress, bathroom usage, pronouns, and healthcare policies. The EEOC argued that such a narrow interpretation should be rejected

³² See Sept. 27, 2022 letter from R. Burr and V. Foxx to C. Burrows, at 2, republicans-edlabor.house.gov/uploadedfiles/9_27_22_eeoc_case_management_and_bostock_letter.pdf.

³³ *Id.*

³⁴ *Id.*

³⁵ *Texas v. EEOC*, No. 2:21-cv-194-Z, 2022 WL 4835346 (N.D. Tex. Oct. 1, 2022).

³⁶ *Id.* at *2.

³⁷ *Id.* (emphasis in original).

³⁸ *Id.* at *3.

³⁹ *Id.* at *4 (quoting *Bostock*, 140 S.Ct. at 1755-56, 1778-83).

⁴⁰ *Id.* (citing and quoting *Bostock*, 140 S. Ct. at 1754).

as a false distinction, citing to a line of Supreme Court and other precedent that “routinely melds” a person’s sexual attraction or identification with such correlated conduct, and arguing that status and conduct are “inextricably intertwined.”⁴¹

The court sided with Texas, pointing again to the specific language used by Justice Gorsuch in the majority *Bostock* decision: “Justice Gorsuch repeatedly pairs the status ‘being’ with the words ‘attraction’ (homosexual) and ‘identification’ (transgender).”⁴² The court also distinguished the cases cited by the EEOC as either irrelevant, overstated, or inapposite. And the court also distinguished the EEOC’s own precedent on such matters, holding that the EEOC’s quasi-judicial role over federal-sector appeals is completely irrelevant to the private sector.⁴³ The court ultimately held that the EEOC’s guidance violated provisions of the Administrative Procedures Act and Title VII because, among other things, they promulgated substantive rules without following the notice-and-comment rulemaking requirements applicable to such rules.⁴⁴

Similarly, in *Christian Employers Alliance v. EEOC*,⁴⁵ a Christian membership ministry brought suit on behalf of its member Christian organizations to contest the implementation of the same provisions of the Affordable Care Act challenged in the Texas lawsuit. The ministry’s Ethical Convictions state that “male and female are immutable realities defined by biological sex and gender reassignment is contrary to Christian Values.”⁴⁶ It argued that the statutory interpretations advanced in the wake of the *Bostock* decision by the EEOC, the Department of Health and Human Services, and the Office of Civil Rights of that Department required its members to provide health insurance coverage for gender transitions services and other gender-affirming healthcare in a manner that would violate their religious beliefs. The ministry sought, among other things, a preliminary injunction to block the enforcement of those provisions against its members.

The court applied the usual preliminary injunction factors. It first held that application of the government agencies’ statutory interpretations would irreparably harm the ministry’s members, holding that this factor weighed strongly in favor of an injunction: “Violating the Alliance’s statutory rights under RFRA is an irreparable harm, comparable to those of First Amendment rights. Additionally, the Alliance’s members will be compelled to speak in a certain manner or face harassment from these agencies in the form of enforcement proceedings or loss of funding.”⁴⁷ The court also found that the balance of harms weighed in favor of an injunction, holding that the harm to the government agencies was “minimal at best.”⁴⁸ The court also found a likelihood of success on the merits, noting that “Religious freedom cannot be encumbered on a case-by-case basis. ‘To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance ‘interests of the highest order’ and must be narrowly tailored in pursuit of those interests.”⁴⁹ Finally, the court held that an injunction would be in the public interest because it was always in the public interest to protect constitutional rights: “Religious freedoms are at the heart of this case. It is in the public interest to ensure these rights are not violated.”⁵⁰

The potential conflict between *Bostock* and the RFRA was also discussed in another recent decision, *Bear Creek Bible Church v. EEOC*.⁵¹ The plaintiffs in that case were a nondenominational Christian Church and a for-profit Christian institution who argued that they were protected from complying with LGBTQ anti-discrimination provisions due to their sincerely held religious beliefs. The court first held that the church

⁴¹ *Id.* at *5.

⁴² *Id.* at *6 (quoting *Bostock*, 140 S. Ct. at 1737-38, 1741-49, 1753-54).

⁴³ This was a particularly interesting swipe at the EEOC, given that the EEOC had long relied on its own precedent in federal court pleadings to advance the cause of LGBT rights years before the *Bostock* decision was delivered. (The EEOC has a quasi-judicial role hearing and deciding appeals for federal sector employees.) But it is noteworthy that the court did not invalidate the EEOC’s June 15 guidance as arbitrary and capricious on this basis, holding that its reliance on its own past decisions was not “outside the zone of reasonableness,” as contemplated by the Administrative Procedures Act. *Id.* at *9 (quoting *F.C.C. v. Prometheus Radio Project*, 141 S. Ct. 1150, 1160 (2021)).

⁴⁴ *Id.* at 12-13.

⁴⁵ *Christian Employers Alliance v. EEOC*, No. 1:21-cv-195, 2022 WL 1573689 (D.N.D. May 16, 2022).

⁴⁶ *Id.* at *1 (internal citations omitted).

⁴⁷ *Id.* at *7 (internal citations omitted).

⁴⁸ *Id.*

⁴⁹ *Id.* (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993)).

⁵⁰ *Id.*

⁵¹ *Bear Creek Bible Church v. EEOC*, No. 4:18-CV-00824, 2021 WL 5449038 (N.D. Tex. Nov. 22, 2021).

was exempt from Title VII.⁵² Finding that the institution did not qualify for Title VII’s statutory exemption, the court examined whether it was nevertheless protected by the RFRA, that is, whether Title VII would substantially burden its sincere exercise of religion, and whether Title VII substantially burdens the institution’s ability to conduct business in accordance with those beliefs. The court first concluded that there was “no dispute” that “[the institution] sincerely exercises its religious beliefs as embodied in its employment policies.”⁵³ The court then considered whether plaintiff satisfied the test for establishing a substantial burden—*i.e.*, that it “(1) identif[ed] the religious exercise; (2) allege[d] that the challenged law pressures plaintiff to modify that exercise; and (3) show[ed] that the penalty for noncompliance is substantial.”⁵⁴ The court concluded that the institution met this test, holding that the first element was not disputed and “[f] or the second, the religious employers are required to choose between two untenable alternatives: either (1) violate Title VII and obey their convictions or (2) obey Title VII and violate their convictions.”⁵⁵

Since plaintiffs established a “substantial burden,” defendants were required to show that the “substantial burden is justified by a compelling interest and that they have chosen the least restrictive means of advancing that interest.”⁵⁶ The court found the defendants’ “overly broad formulation of its compelling interest”—*i.e.*, “eradicating workplace discrimination”—to be without merit.⁵⁷ Rather than rely on broadly formulated interests, courts must scrutinize the “asserted harm of granting specific exemptions to particular claimants”; the relevant question is “whether the government has a compelling interest in *denying* employers like [the institution] a religious exemption.”⁵⁸ Further, the court held that “[f]orcing a religious employer to hire, retain, and accommodate employees who conduct themselves contrary to the employer’s views regarding homosexuality and gender identity is not the least restrictive means of promoting that interest, especially when Defendants are willing to make exceptions to Title VII for secular purposes.”⁵⁹ Accordingly, the court granted summary judgment to the plaintiffs as to their RFRA claim.

The court also analyzed whether, under *Bostock v. Clayton County*, the plaintiffs’ policies against bisexual conduct, concerning certain sexual activities and dress codes, prohibiting hormone treatments and genital surgery, and regarding sex-specific restrooms, violated Title VII. The court first concluded that the proper test to be applied was “favoritism, plus blindness to sex if the secondary trait is homosexuality or transgenderism.”⁶⁰ The court reasoned that the “simple favoritism test” could not be “fully recognized with the Supreme Court’s analogies, and neither can the blindness test, standing alone, given *Bostock*’s articulation of the standard.”⁶¹ The court concluded that the policies against bisexual conduct “inherently target[] sex” and therefore violated Title VII, to the extent that an “individual who is bisexual inherently identifies as homosexual to some extent, even if they also identify as heterosexual, because bisexuality is some combination of the two orientations.”⁶² The court similarly held that the policies prohibiting hormone treatments and genital surgery violated Title VII since they would only function to discriminate against individuals with gender dysphoria.⁶³ As to the policies regarding certain sexual activities, dress code, and sex-

⁵² *Id.* at *23.

⁵³ *Id.*

⁵⁴ *Id.* (citing *Eastern Texas Baptist University v. Burwell*, 793 F.3d 449, 456 (5th Cir. 2015), *vacated and remanded sub nom. Zubik v. Burwell*, 578 U.S. 403, and *cert. granted, judgment vacated sub nom. Univ. of Dall. v. Burwell*, 578 U.S. 969 (2016)).

⁵⁵ *Id.* As to the third element, the court found that the “penalty for non-compliance would be EEOC enforcement, which would subject Braidwood to liability for backpay, compensatory damages, and punitive damages.” *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* (emphasis in original).

⁵⁹ *Id.* On this same basis, the court granted summary judgment as to plaintiffs’ First Amendment claim, applying strict scrutiny to the analysis since “Title VII is not a generally applicable statute to the existence of individualized exemptions.” *Id.* at *26. The court held that the defendants’ “broadly formulated government interests” were insufficient to withstand First Amendment challenge. *Id.* The court also found that the institution was “engaged in overt expression regarding tis religious views of homosexuality and transgender behavior.” *Id.* at *28.

⁶⁰ *Id.* at 31.

⁶¹ *Id.* (citing *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1741 (2020) (“[I]f changing the employee’s sex would have yielded a different choice by the employer—a statutory violation has occurred.”)).

⁶² *Id.*

⁶³ *Id.* at 35.

specific restrooms, the court found that such policies comported with Title VII because they applied evenly to heterosexual and homosexual activity, did not “treat one sex worse than the other,” and therefore did not discriminate “because of sex.”⁶⁴

In addition to the direct challenges to the *Bostock* fallout described above, the EEOC has also started to address this conflict in its more “routine” litigation. In a surprising development, and despite the EEOC’s consistent defense of LGBTQ rights, 2022 saw the EEOC take the side of employees who claimed that they were discriminated against based on their religious belief that homosexuality is a sin. In *EEOC v. Kroger Limited Partnership*,⁶⁵ the EEOC brought a lawsuit on behalf of two employees who were terminated because they refused to wear an apron that prominently displayed a multi-colored heart symbol that the employees believed supported and promoted the LGBTQ community. The EEOC alleged that the terminations were a form of religious discrimination because the employees had sincerely held religious beliefs that homosexuality is a sin and that they were prohibited by their religion from supporting or promoting it. The EEOC also alleged that the employer had unlawfully refused to grant the employees the accommodations they requested, including placing their nametag over the heart or being allowed to purchase and wear an apron without the heart. The employer insisted that the multi-colored heart had no relation to the LGBTQ community whatsoever, and the record evidence in the case showed that significant thought had been put into the symbol, along with the marketing and branding goals it was meant to accomplish, none of which related to LGBTQ issues. But the charging parties were not convinced and ultimately were terminated because they refused to wear the apron.

The court noted that the first prong of proving a prima facie failure-to-accommodate case required the EEOC to show that the employee’s sincerely held religious beliefs—i.e., the religious observances and practices that are manifestations of that belief—conflicted with the employer’s workplace rule.⁶⁶ The employer argued that the EEOC had failed to show how wearing the apron would actually conflict with the charging parties’ religious beliefs since it had nothing to do with LGBTQ issues. The employer conceded that the court could not sit in judgment of the objective reasonableness of the employees’ sincerely held religious beliefs that homosexuality is a sin. But it argued the court can and should apply an objective-reasonableness standard to determine whether there is a conflict between the dress code and the employees’ beliefs, arguing that it was objectively unreasonable for the employees to believe that the heart symbol supported and promoted the LGBTQ community.⁶⁷

The court relied on recent Supreme Court decisions in *Burwell v. Hobby Lobby Stores, Inc.* and *Fulton v. City of Philadelphia* to hold that these two issues, the question of “religious belief” and the “conflict” question, were too bound up with each other to separate them in the way the employer suggested: “Subjecting the ‘conflict’ question to an objective-reasonableness review would inevitably subject some aspect of the employee’s religious beliefs, practices, or observances to the same standard. And we know that isn’t allowed.”⁶⁸ According to the court, the meaning of the Supreme Court’s recent religious liberty decisions was that, once the court concluded that the employees sincerely believed that wearing the heart symbol would violate their religion, it was not allowed to subject those beliefs to any further scrutiny.⁶⁹ Although that was enough to decide the case in the EEOC’s favor, the court went on to find that there was enough evidence in the record that would allow a rational juror to conclude that the employees reasonably believed the heart symbol indicated support and promotion of the LGBTQ community because the employer had made no effort to explain its meaning to the public: “Recall also that there was no campaign to explain the meaning of the multi-colored heart to customers or other non-employees. Essentially, the meaning of the Our Promise symbol was left up to the imagination and interpretation of each particular customer who saw it.”⁷⁰

⁶⁴ *Id.* at 34-35.

⁶⁵ *EEOC v. Kroger Ltd. P’ship*, No. 4:20-cv-1099-LPR, 2022 WL 2276835 (E.D. Ark. June 23, 2022).

⁶⁶ *Id.* at *11.

⁶⁷ *Id.* at *12.

⁶⁸ *Id.* at *14.

⁶⁹ *Id.*

⁷⁰ *Id.* at *15.

C. Ensuring Equal Pay Protections For All Workers

Equal pay issues seem to be everywhere these days, and EEOC litigation is no exception. Although the actual number of equal pay case filings decreased under the short tenure of the EEOC's Trump-appointed leadership, it never stopped being a top strategic priority for the agency. Since 2012, the EEOC's Strategic Enforcement Plan has included a focus on compensation systems and practices that discriminate based on sex under the Equal Pay Act ("EPA") and Title VII.⁷¹ The EPA prohibits employers from discriminating "between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which [it] pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions..."⁷² Title VII prohibits a broader range of discrimination, including wage discrimination on the basis of sex or other protected groups.⁷³ The EEOC has made use of both statutes to combat sex-based wage discrimination.

The relative dearth of new filings over the past few years has led to a decline in legal decisions: *i.e.*, fewer equal pay cases winding their way through the courts means fewer opportunities for courts to opine on equal pay issues involving the EEOC. In FY 2022, there were only 2 new cases filed by the EEOC that asserted claims under the EPA.⁷⁴ And the only substantive EEOC equal pay decision in 2022 involved a discovery dispute arising out of the long-running case, *EEOC v. George Washington University*.⁷⁵ But it was an important decision, and one that every employer dealing with equal pay issues should be familiar with.

In that case, an Executive Assistant to the employer's former Athletic Director alleged that she was paid less than a male "Special Assistant" for the same work.⁷⁶ She filed an internal grievance with the employer's EEO office and a charge with the EEOC. The employer initiated an internal investigation to review the matter, which was initially conducted by non-lawyer staff in the EEO office. The investigation was later handed over to a law firm, which then issued a Confidential Informal Grievance Report.⁷⁷ In discovery, the EEOC requested all documents relating to that investigation. The employer withheld all documents except the grievance itself under the auspices of attorney-client privilege and the work product doctrine, arguing that the investigation was done at the behest of the University's Office of General Counsel and, later, the law firm that conducted the investigation.

The EEOC argued that the employer's assertion of a good faith defense to the EEOC's claim for punitive damages put its subjective intentions at issue, thereby waiving privilege over those documents. The employer disagreed, arguing that its good-faith defense did not waive any privilege because it has disclaimed an intent to rely on the conclusions or advice of counsel in the internal investigation to support that defense.⁷⁸ The court first had to decide whether the subject materials were privileged at all, given that some of them were created by someone in the EEO office who, while an attorney, was not acting as counsel for the employer with respect to the investigation. The court held that those materials were privileged because that person had contacted the employer's Office of General Counsel within days of receiving the grievance, after determining that litigation was likely.⁷⁹ She then received guidance from the employer's in-house lawyers respecting the conduct of the investigation and reported back to them and discussed her findings with them. Under those

⁷¹ See U.S. Equal Employment Opportunity Commission Strategic Enforcement Plan FY 2017-2021, www.eeoc.gov/eeoc/plan/sep-2017.cfm.

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

⁷³ 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).

⁷⁴ *EEOC v. Lacey's Place*, 2:22-cv-2161 (C.D. Ill.); *EEOC v. Univ. of Texas Permian Basin*, 7:22-cv-210 (W.D. Tex.).

⁷⁵ *EEOC v. George Washington Univ.*, 342 F.R.D. 161 (D.D.C. 2022).

⁷⁶ *Id.* at 166.

⁷⁷ *Id.*

⁷⁸ *Id.* at 167.

⁷⁹ *Id.* at 179.

circumstances, the court held that the entire investigation was done at the direction of counsel, even before the outside law firm became involved, and that a primary purpose of the investigation was the furnishment of legal advice.⁸⁰

The court next considered the EEOC's waiver argument. Under Supreme Court precedent, a defendant in a Title VII case can avoid punitive damages by showing that it engaged in good faith efforts to comply with the statute. According to the EEOC, the assertion of that defense puts an employer's state of mind at issue, and in particular, its intent and knowledge of the law. Under this theory, the employer's investigation materials would reveal its state of mind with respect to the EEOC charge and its knowledge of the applicable law, so the EEOC should be entitled to obtain those documents in discovery.⁸¹ After surveying the law of at-issue waiver, the court applied a more narrow interpretation, holding that "a party that has interposed a good faith defense but disclaimed reliance on privileged or protected materials—such as those created in connection with an internal investigation—does not waive protection over those materials."⁸² Because the evidence the employer intended to rely on to prove its good faith defense was unconnected to its internal investigation, the court held that the privilege had not been waived: "the [employer's] [good faith] defense relies on evidence that the hiring and compensation decisions at issue here were made in a good faith effort to comply with the law. Importantly, all those decisions predate the internal investigation because 'the [employer] already had hired [comparator] as Special Assistant and already had determined his and [charging party's] pay at the time that the Internal Investigation began.'"⁸³

Lawsuits brought under the EPA tend to be highly fact-driven and therefore notoriously difficult for employers to dispense with through motion practice before trial. This is especially true when it comes to EEOC-initiated litigation.⁸⁴ But trial itself can be a different story, as the EEOC learned the hard way in a recent stunning loss for the agency. In *EEOC v. University of Miami*,⁸⁵ the EEOC alleged that the University paid a female professor less than her counterpart who performed the same job.

The court first held that a reasonable jury reviewing the duties of the two professors could conclude that their positions were substantially equal.⁸⁶ And in fact, the jury deciding the case eventually decided they were.⁸⁷ The University also argued that the salary disparity between the two professors was due to a factor other than sex; namely, they were "market-based," that annual raises were determined by individual performance, and that multiple salary analyses confirmed that there was no relationship between gender and salary at the University.⁸⁸ The court could not credit the "market-based" theory due to the absence of credible evidence as to what the market was at the time the two professors were hired. Moreover, the court found evidence of gender disparities at the University, including evidence that the University placed a higher service requirement on female professors and had proactively increased male professors' salaries to close the gap with female professors, but had not done so for the charging party, despite the fact that her Department Chair had conceded that she was "grossly underpaid."⁸⁹

Nevertheless, while these conclusions led the court to deny the University's motion for summary judgment, the jury ultimately saw it differently. Although there was no explanation accompanying the jury's verdict, it is interesting to note that the jury found that, although their jobs were equal, the charging party was not paid

⁸⁰ *Id.*

⁸¹ *Id.* at 185.

⁸² *Id.* at 187.

⁸³ *Id.* at 188-89 (internal citations omitted).

⁸⁴ EPA lawsuits therefore put a premium on fact gathering, something that the EEOC typically excels at given its broad investigative and administrative subpoena powers. See, e.g., *EEOC v. VF Jeanswear, LP*, 769 F. App'x 477, 478 (9th Cir. 2019) (reversing the district court's decision limiting an EEOC subpoena, holding that "there is no legal basis for limiting the scope of the relevance inquiry only to the parts of the charge relating to the personally-suffered harm of the charging party. Indeed, we have held otherwise. EEOC subpoenas are enforceable so long as they seek information relevant to any of the allegations in a charge, not just those directly affecting the charging party").

⁸⁵ *EEOC v. Univ. of Miami*, No. 19-CV-23131, 2021 WL 4459683 (S.D. Fla. Sept. 29, 2021).

⁸⁶ *Id.* at *8. Although the two professors taught different political science specialties, the court noted that they both have doctorate degrees, generally teach the same number of courses at the introductory and advanced levels, and are subject to the same University requirements regarding teaching and research. *Id.*

⁸⁷ See Verdict Form at 1, *EEOC v. Univ. of Miami*, No. 19-CV-23131, (S.D. Fla. Mar. 11, 2022), ECF No. 190.

⁸⁸ *Id.* at *9.

⁸⁹ *Id.* at *11.

less than her comparator for doing equal work.⁹⁰ The exact reasons for this conclusion will probably always remain obscure, but it does tend to cast doubt on the EEOC’s “compression theory” of unequal pay; i.e., the theory that a pay disparity exists when initial pay disparities compound over time through the natural process of annual percentage pay increases. The University had hired the charging party as an associate professor during the same year that it hired a male professor with comparable qualifications for a lower-ranked position in the same department at a higher salary.⁹¹ Thereafter, the University’s policy of making fixed pay increases only exacerbated the situation over time, so that by the time they became full professors, the male professor made approximately \$28,000 more than the female professor.⁹² Apparently, the jury did not find that this difference was due to any discrimination on the part of the University.

In fact, written policies and salary scales often factor into pay equity cases, as employers often rely on those policies to prove that salaries were set according to such policies and are therefore not discriminatory. For example, in *Enoch Pratt Free Library*, the employer pointed out that it used a Managerial and Professional Society Salary Policy (“MAPS”) to determine compensation for newly hired library supervisors.⁹³ According to the employer, that policy is facially neutral, and clearly permitted the employer to pay the starting salaries that it did.⁹⁴ The court held, however, that that policy did not necessarily compel any specific salary to be awarded to a new hire.⁹⁵ The MAPS policy left open the possibility that the employer could apply discretion with respect to setting starting salaries.⁹⁶ Applying *Maryland Insurance Administration*, the court concluded that “[the EEOC’s comparator] was hired at a rate not only higher than the female [library supervisors] represented by the EEOC, but also significantly above the salary he had received during his first tenure at [employer]. Given these facts, combined with the inherent discretion within the MAPS policy, genuine factual questions exist about how defendants arrived at [the comparator’s] salary.”⁹⁷

This employer lost at trial. On December 23, 2020, after the conclusion of a five-day bench trial, the court issued its conclusion that the employer had violated the EPA.⁹⁸ The EEOC easily met its burden to establish a prima facie case because the parties stipulated that the comparator’s salary was higher than that of each charging party.⁹⁹ The employer argued that each library branch differed with respect to circulation size, outreach efforts, and physical footprint, thus rendering the job duties of each library supervisor to dissimilar to support a finding that they performed equal work. The court found, however, that the core job duties were the same, relying in part on evidence that the positions shared the same job description and supervisors often substituted for one another on a short- or long-term basis without requiring any additional training and without any alternation in pay.¹⁰⁰ The differences among library branches did not defeat the EEOC’s case because “none of th[ose] differences translated into *job duties* that differed significantly from one another.”¹⁰¹

⁹⁰ See Verdict Form at 2, *EEOC v. Univ. of Miami*, No. 19-CV-23131, (S.D. Fla. Mar. 11, 2022), ECF No. 190.

⁹¹ *Id.* at *6.

⁹² *Id.*

⁹³ *EEOC v. Enoch Pratt Free Library*, No. 17-CV-2860, 2019 WL 5593279, at *3 (D. Md. Oct. 30, 2019).

⁹⁴ *Id.* at *6.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at *7. See also *EEOC v. George Washington Univ.*, No. 17-CV-1978, 2019 WL 2028398, at *4 (D.D.C. May 8, 2019) (denying an employer’s motion to dismiss even though the complaint at issue did not explicitly allege how the positions at issue were equal with respect to skill, effort, and responsibility, holding that the complaint “straightforwardly pleads that [plaintiff] was paid less as Executive Assistant than [comparator] was paid as a Special Assistant for substantially the same job responsibilities”); *EEOC v. Univ. of Miami*, No. 19-CV-23131-Civ-Scola, 2019 WL 6497888, at *2 (S.D. Fla. Dec. 3, 2019) (denying a motion to dismiss claims brought by professors in the same department because the EEOC had supported its claims of pay discrimination with numerous allegations relating to the professors job duties, such as teaching classes and publishing books and articles, and allegations that the female professor had two more years of teaching experience and had published more works, and because the EEOC had alleged that both professors were in the same department and had been promoted to full professor at the same time after a review by the same committee based on the same criteria); *EEOC v. Denton Cty.*, No. 4:17-CV-614, 2018 U.S. Dist. LEXIS 175794, at *22 (E.D. Tex. Oct. 12, 2018) (denying cross motions for summary judgment, holding that it was “not convinced that [defendant] or the EEOC has met their respective burdens demonstrating that there is no material issue of fact as to the EEOC’s claim for violation of the Equal Pay Act entitling it to judgment as a matter of law”).

⁹⁸ *EEOC v. Enoch Pratt Free Library*, No. 8:17-CV-2860, 2020 WL 7640845 (D. Md. Dec. 23, 2020).

⁹⁹ *Id.* at *8.

¹⁰⁰ *Id.* at *9.

¹⁰¹ *Id.* (emphasis in original).

The court also rejected the employer’s affirmative defense, holding that the evidence simply did not support the employer’s claim that the comparator was hired at a higher salary because he was able to negotiate a higher salary on the strength of his superior qualifications. According to the court, there was no evidence that the comparator had ever negotiated his salary.¹⁰² The MAPS salary system also did not support the employer’s defense because, although that system permitted a salary adjustment, it does not alone independently justify paying a male employee a higher wage for performing the same work.¹⁰³ The employer’s own HR guidance actually cautioned city agencies to be careful when setting starting salaries to the MAPS midpoint in order to avoid “internal equity issues.”¹⁰⁴ Yet the employer had not been able to show that the employer had ever compared salaries to avoid those equity issues, and even failed to do so even after one of the charging party’s had complained about the disparity.¹⁰⁵ The employer’s failure to act on that complaint also led the court to reject the employer’s claim that it had acted in good faith, meaning that the court awarded the charging parties liquidated damages on top of their actual damages.¹⁰⁶ The court concluded that “implementation of a public pay system alone cannot justify pay disparity in the absence of any other justification,” and that “mere reliance on MAPS in combination with the record evidence, does not establish that [comparator] was hired based on a factor other than sex.”¹⁰⁷

D. Preventing Discrimination In Recruitment And Hiring

Over the past decade, the EEOC has spent a considerable amount of its enforcement budget litigating issues that it sees as barriers to recruitment and hiring.¹⁰⁸ Most of its recent enforcement activity has focused on combating hiring practices that could result in age discrimination. But recent years have evidenced a broadening of that focus to claims ranging from sex discrimination, race discrimination, and disability discrimination. In particular, the EEOC has scrutinized how pre-employment screening tests and the use of technology of carrying out the screening process can result in discrimination against certain groups of individuals.

1. Recent Judicial Decisions Involving Discrimination Resulting From Pre-Employment Screening Tests

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

For example, in *EEOC v. Stan Koch & Sons Trucking, Inc.*,¹⁰⁹ the U.S. District Court for the District of Minnesota granted summary judgment on liability for the EEOC and against an employer who relied on a physical abilities test to select employees for truck driver positions. The EEOC alleged that the physical abilities test had a discriminatory impact on female drivers.¹¹⁰ The employer required new employees to pass a physical abilities test, called the “CRT test,” during orientation. If they failed, their employment

¹⁰² *Id.* at *10.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at *11.

¹⁰⁸ 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”).

¹⁰⁹ *EEOC v. Stan Koch & Sons Trucking, Inc.*, No. 19-CV-2148, 2021 WL 3910001 (D. Minn. Aug. 30, 2021).

¹¹⁰ *Id.* at *1.

offers were revoked.¹¹¹ The EEOC introduced expert evidence that found that “93.9% of CRT tests taken by male applicants resulted in a passing score, whereas 52% of CRT tests taken by female applicants resulted in a passing score,” a pass rate that was statistically significant to 24.9 standard deviations.¹¹² The EEOC also introduced expert evidence from an expert on employee selection, personnel management, and test validation, who found “no evidence of the validity of the CRT test that conforms to any accepted method for establishing job- relatedness,” and that “the job task analyses [employer] did in 2009 and 2015 did not document the physically demanding tasks of the driver position, so they could not substitute as ‘validation strategies,’ and that “the job task analyses were insufficient to show that the CRT test is content-valid because they did not establish the necessary link between the tasks a driver at [employer] performed, the physical ability necessary to perform those tasks, and the physical abilities measured by the CRT.”¹¹³ The employer had not offered any expert opinion of its own.

The Court analyzed the employer’s motion under the “disparate impact” analysis of Title VII, which prohibits facially neutral employment practices that fall more harshly on one group than another and cannot be justified by business necessity.¹¹⁴ The court held that the EEOC had easily met the requirements of its prima facie case, *i.e.*, to show: “(1) an identifiable, facially-neutral personnel policy or practice; (2) a disparate effect on members of a protected class; and (3) a causal connection between the two.”¹¹⁵ The court noted that the first two elements were clear: “the CRT test as a means of selecting employees is a facially-neutral personnel practice,” and “[employer’s] own data reveals that the test had a disparate effect on female job applicants in the form of low passage rates.”¹¹⁶ With respect to causation, the court noted that “courts consider tests of statistical significance to determine whether a disparity can reasonably be attributed to chance.”¹¹⁷ Based on the EEOC’s statistical evidence of causation, the court concluded that the EEOC had met its prima facie case.

The burden then shifted to the employer to show that its test was job related and consistent with business necessity.¹¹⁸ The employer relied on the fact that its cutoff scores for the CRT test were based on the professional estimates of one of CRT’s founders. But that founder had passed away years ago and a number of CRT’s relevant records had been destroyed in a flood.¹¹⁹ Although the employer’s cutoff scores were consistent with CRT’s literature, the court found that CRT representatives “could not offer further specifics about the data sets or peer-reviewed literature,” and although the “calculation” or “formula”

¹¹¹ *Id.* at *2. The CRT test “measures a person’s range of motion and torque in their shoulders, knees, and trunk,” and computes this information into a “Body Index Score.” *Id.* The court noted that “CRT markets the test as preventing ‘musculoskeletal disorder injuries to knees, shoulders, and back’ by matching the physical abilities of a job applicant to the physical requirements of a job.” *Id.* The employer hired another third party company, NovaCare Work Strategies, “to analyze the work tasks of its various driver positions and classify them according to exertion level, such as “medium duty” or “heavy duty,” under the definitions provided in the Dictionary of Occupational Titles,” which were then used to ascertain the BIS needed to perform the duties of the position. *Id.*

¹¹² *Id.* at *2.

¹¹³ *Id.* at *3.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* However, the employer pointed out problems with how the EEOC’s expert had determined gender for use in her statistical analysis by running applicant’s first name through a website database called genderchecker.com to identify the gender(s) typically associated with that name. *Id.* at *5. However, the Court held that this issue would have impacted less than half of one percent of the sample and therefore the EEOC’s expert’s “handling of missing or inconsistent gender data does not materially undermine the strength or reliability of her opinions.” *Id.*

¹¹⁸ Employee Selection Procedures. *Id.* at *6. The Court never addressed that question, however, as it found that the employer had failed to submit any evidence that the CRT test was relevant to the jobs applied for. *Id.* The court acknowledged that “some level of physical strength is required to be a driver at [employer],” noting that “[d]rivers have to get into and out of the cab, climb on and off the back of the truck, inspect the truck, and crank up and down the trailer’s stabilizing dolly,” and depending on the truck, “secure their cargo using heavy tarps and straps, and ... assemble a decking and ramping system.” *Id.* But that alone was not enough. To meet its burden, the employer had to show that the CRT test-generated BIS scores and the employer’s cutoff for determining pass or fail had a “manifest relationship to the employment in question.” *Id.* at *6-7 (quoting *Hawkins v. Anheuser-Busch, Inc.*, 697 F.2d 810, 815 (8th Cir. 1983)). The Court noted that “[a] cutoff score is permissible if it is ‘based on a professional estimate of the requisite ability levels, or, at the very least by analyzing the test results to locate a logical ‘break-point’ in the distribution of scores.” *Id.* (quoting *Bew v. City of Chicago*, 252 F.3d 891, 895 (7th Cir. 2001)).

¹¹⁹ *Id.* at *7.

CRT used was developed by the founder and programmed into the server, “no one at CRT today knows what it is.”¹²⁰ Accordingly, the employer’s proof of job-relatedness was based on hearsay that would be inadmissible at trial.¹²¹

Since the ruling in *EEOC v. Stan Koch & Sons Trucking, Inc.*, at least federal court has issued a decision in a case alleging sex discrimination based on disparate impact resulting from hiring examinations. In *Simpson v. Dart*,¹²² the U.S. District Court for the Northern District of Illinois granted the plaintiffs’ motion for class certification for a class of applicants who sought employment with the Cook County Department of Corrections. The plaintiffs argued that certain hiring examinations disparately impacted African-Americans, and were therefore discriminatory under Title VII of the Civil Rights Act. Specifically, the plaintiffs claimed that the hiring practices of Correctional Officers at the Cook County Department of Corrections were racially discriminatory against African-Americans. The hiring process at issue consists of various steps conducted by the Merit Board and Sheriff’s Office, including: (1) screening for minimum qualifications; (2) an initial written examination; (3) a second written examination; (4) a physical abilities test; (5) finger printing and drug testing; (6) a personal history questionnaire and follow-up interview; and (7) final review by the Merit Board members. Applicants must successfully complete this process and obtain certification before they are eligible for hire.

At issue in the Plaintiffs’ motion for class certification were the Merit Board’s hiring examinations, such as the initial written examination, the second written examination, and the physical abilities test. The plaintiffs claimed that the hiring examinations disparately impact African-Americans in violation of Title VII. The Court considered the Defendant’s challenge to the Plaintiffs’ attempted extension of their Title VII class period relative to three of the four sub-classes at issue, by using a start date of July 2014. Such a start date fell far earlier than 300 days from the filing of the underlying charge of discrimination (*i.e.*, the applicable statute of limitations period). In support of such a class period, the Plaintiffs relied on *Lewis v. City of Chicago, Ill.*, 560 U.S. 205, 210-11 (2010), claiming that the unlawful hiring practice at issue involves the written and physical examinations, which took place in July 2014.

The Court disagreed. It found that *Lewis* stands for the proposition that *later* implementation of a policy that causes a disparate impact can qualify as a new, actionable employment practice. Critically, the U.S. Supreme Court did not hold that a plaintiff can “reach back” to a testing date that falls outside of the 300-day statute of limitations window. Accordingly, the Court limited the class period to 300 days from the date the charge was filed—March 2015.

The Court then analyzed whether Plaintiffs met the requirements of Rule 23 for certifying the classes at issue. First, the Court held that the Plaintiffs established the commonality requirement because the hiring examinations constitute an employment policy that causes racial discrimination not justified by any business necessity. Critical to the Court’s holding in this respect was that Plaintiffs pointed to employment actions that did not involve the exercise of discretion. Second, the Court dismissed the Defendants’ argument that the claims of the named plaintiffs were not typical of the putative class. The Court opined there was “no question the named plaintiffs’ claims arise from the standardized tests and are based on the same legal theory, disparate impact,” and Defendants’ contention that such a requirement could not be satisfied because they “prepared for the standardized tests in different ways” was unavailing. Such “minor variances” made “no difference to the Court’s certification analysis.”

¹²⁰ *Id.*

¹²¹ The Court concluded that “even if the testimony of the CRT corporate designee about his conversations with [founder] concerning the development of the BIS formula and the relationship of BIS scores to generalized job exertional categories were somehow admissible, [employer] cannot justify its use of cutoff scores that cause a disparate impact on women by reference to unspecified data sets or literature, or computations processed through an unknown algorithm.” *Id.* at *8. With respect to business necessity, the court found that “there is no evidence from which a reasonable factfinder could conclude that the use of the CRT test was “essential” to resolving Koch’s “demonstrable” problem with workplace injury and workers compensation claims – or that any such problem existed in the first place.” *Id.* at *9.

¹²² *Simpson v. Dart*, No. 18-CV-0553, 2022 WL 3154205 (N.D. Ill. Aug. 8, 2022).

The Court similarly dismissed the Defendants' arguments relative to the adequacy requirement. Specifically, the Defendants claimed that the scope of certain merits issues relative to the charge of discrimination would be addressed at the summary judgment stage, but such issues had clear implications for class certification. The Court held that since such an argument was—as Defendants admitted—suited for the summary judgment stage, the Court refused to consider the argument and held the Plaintiffs are adequate class representatives.

Finally, the Court considered whether there were common questions of law or fact that predominated over individual questions. Defendants argued that an individualized analysis of each applicant would be necessary because there are more steps involved in the hiring process than just the standardized tests. However, the Court held that, in the context of disparate impact cases, Title VII guarantees protected individuals the opportunity to compete equally based on hiring criteria, and losing an opportunity to compete equally (here, via the examinations) were actionable injuries. Accordingly, the Court granted the Plaintiffs' motion for class certification.

The EEOC has historically argued that statistics play a critical role in hiring cases. In *EEOC v. Performance Food Group, Inc.*,¹²³ the EEOC alleged that the employer had engaged in a pattern or practice of discrimination against women for hiring into its “operative positions,” *i.e.*, workers who operate machine or processing equipment or perform other factory-type duties of an intermediate skill level.¹²⁴ The EEOC presented statistical evidence that showed a statistically significant disparity in offer rates between male and female applicants for the five operative positions at issue during the relevant time periods, which had controlled for experience, online application, and, for drivers, whether the applicant had a Class A license.¹²⁵ The employer argued that the EEOC's expert analysis had improperly aggregated selection rates across positions, operating companies, and years, and had failed to properly control for differences in experience among applicants. The court held that the EEOC “clearly has made out a prima facie case with respect to its pattern or practice claim,” finding that “[t]he EEOC's statistical analysis shows statistically significant disparities in the hiring of male and female applicants, adverse to female applicants, across operative positions and OpCos, even when controlling for experience. It has presented other statistical evidence showing that some OpCos hired no female applicants in certain positions for the entire period 2004–2009 or 2009–2013.”¹²⁶ The court stopped short of finding in favor of the EEOC with respect to liability under the two-part *Teamsters* framework applied to pattern or practice cases. Although the EEOC met its burden as to its prima facie case, the court held there were numerous genuine disputes of material fact regarding the statistical analysis and anecdotal evidence that precluded summary judgment.¹²⁷

Other cases of discrimination are arguably more clear cut. Where there is direct evidence of discriminatory intent, the path for the EEOC is much easier, and the path for the employer is much more difficult. For example, in *EEOC v. NDI Office Furniture LLC*,¹²⁸ the EEOC alleged that the employer did not hire women for warehouse positions because they would be a “distraction” to male employees and retaliated against the charging party and her son due to her complaints about the allegedly discriminatory treatment.¹²⁹ Among other things, the court pointed to statements by the warehouse manager and more senior managers that the employer does not hire women for warehouse positions.¹³⁰ The court held that these statements are “prime examples’ of direct evidence of discrimination without the need to infer discriminatory intent.”¹³¹ With respect to the pattern or practice allegations, the court held that “the content of these statements suggests a broad discriminatory policy toward all women,” and concluded: “the existence of that evidence simply means that a

¹²³ *EEOC v. Performance Food Group, Inc.*, No. 13-CV-1712, 2020 WL 1287957 (D. Md. Mar. 18, 2020).

¹²⁴ *Id.* at *1-2.

¹²⁵ *Id.* at *3.

¹²⁶ *Id.* at *7. The court also faulted the employer's recruiting efforts, finding that it had identified the target demographic for its radio ads as “male,” and that it had intentionally sought males for warehouse positions and females for receptionist positions. *Id.*

¹²⁷ *Id.* at *8. Under that framework, the EEOC bears the initial burden of making out a prima facie case of discrimination by establishing by a preponderance of the evidence that sex discrimination was the company's standard operating procedure.

¹²⁸ *EEOC v. NDI Office Furniture LLC*, No. 2:18-CV-01592, 2021 WL 2635356 (N.D. Ala. June 25, 2021).

¹²⁹ *Id.* at *5-6.

¹³⁰ *Id.* at *9.

¹³¹ *Id.*

jury must decide this question by balancing it against other evidence, such as the ‘fact’ that there no women were employed in a warehouse role during the period contemporaneous with the statements evidencing discrimination and that Defendant failed to hire any of the eleven women who applied for the Warehouse Coordinator Position.”¹³²

Another recent case demonstrates the unique problems that the EEOC can encounter when it brings lawsuits that allege discriminatory hiring practices. In *EEOC v. USF Holland, LLC*,¹³³ the EEOC alleged that the employer had discriminated against female applicants for truck driving positions. The charging party was allegedly denied a position due to discrimination in May 2015, but did not file a charge of discrimination until October 8, 2015. The court held that “Section 706 authorizes the EEOC to sue on behalf of one or more ‘persons aggrieved’ by an unlawful employment practice,” and “when a plaintiff brings a class action on behalf of aggrieved applicants, the plaintiff may allow applicants who did not file a charge to ‘piggyback’ onto a timely charge filed by another applicant.”¹³⁴ However, The “piggyback” (or “single-filing”) rule, only allows such aggrieved applicants to do so “if the discrimination they allege occurred during the relevant limitations period, as determined by the charge underlying the federal court action.”¹³⁵ The relevant timeline in that case was 180 days. Accordingly, the court held that any claim predating April 11, 2015 (180 days prior to the date of the charging party’s charge) was time-barred.¹³⁶

2. Preventing Disability Discrimination In Recruitment And Hiring

a. EEOC’s Guidance On Preventing AI- And Technology-Related Disability Discrimination

Disability discrimination claims continue to make up a large part of the EEOC’s docket in terms of its attempts to eliminate barriers in recruitment and hiring. From FY 2020 to FY 2021, ADA cases increased fairly significantly, and they now represent 29% of all charges filed with the EEOC. As these types of claims continue to rise, employers should be aware of the specific ways in which technological advancements like AI tools can lead to disability discrimination charges and lawsuits. This is especially important for businesses that continue to grow—thereby requiring increased efficiency in the hiring process—in the midst of a global pandemic where remote work (and use of digital platforms) have become the norm.

Consistent with this new reality, on May 12, 2022, the EEOC issued important guidance on how AI and technology-related disability discrimination can arise, particularly when such technology is used in the pre-employment screening process. That guidance followed notice from the EEOC in October 2021 of an initiative to ensure that AI and other technology used in hiring and employment decisions comply with federal anti-discrimination laws.

Entitled the “Americans With Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees,” the EEOC’s guidance discusses how existing ADA requirements may apply to the use of AI, software applications, and algorithms in employment-related decision-making processes and practices. The guidance also offers useful information and tips to employers in an effort to assist them with ADA compliance when using such tools.

Specifically, the EEOC explains how an employer’s use of AI and other technological tools can discriminate against disabled individuals within the meaning of the ADA, group the potential types of discrimination into three broad categories: (1) failing to reasonably accommodate an employee’s disability; (2) screening out qualified individuals with disabilities; or (3) posing “disability-related inquiries” or seeking information

¹³² *Id.* at *10 (emphasis in original).

¹³³ *EEOC v. USF Holland, LLC*, No. 3:20-CV-270, 2021 WL 4497490 (N.D. Miss. Sept. 30, 3021).

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* Moreover, the court held that the EEOC could not resort to the “continuing violation doctrine” because that doctrine does not apply to a failure-to-hire claim, even in the case of an alleged systemic policy or pattern and practice. *Id.* at *2. This is because “[f]ailure to hire is a “discrete act” which is easy to identify and distinguished from hostile work environment claims, which the Supreme Court has found amenable to the continuing violation doctrine.” *Id.*

that qualifies as “medical examination,” before giving the candidate a conditional offer of employment. The guidance concludes by providing employers with promising practices to be followed when assessing job applicants and employees with AI tools.

The EEOC provides several examples of how the above three ADA violations could be implicated. For example, if an employer administers a test through computer software, it risks violating the ADA if it fails to offer extended time or an alternative version of a test, such as one that is compatible with accessible technology (like a screen reader) as a reasonable accommodation to those who need it on account of their disability. Similarly, employers may run afoul of the law if AI and other tools result in lower scores or assessment results for individuals with disabilities.

The EEOC recommends several promising practices for employers when using AI tools, such as: training staff to recognize and process requests for reasonable accommodations as quickly as possible; informing job applicants and employees that reasonable accommodations are available for individuals with covered disabilities; ensuring that AI tools only measure abilities or qualifications that are truly necessary for the job; and confirming, before purchase, with AI vendors that the AI tool does not ask individuals questions likely to elicit information about a disability.

b. EEOC Pursues An Anomalous ADA Title V Claim

A noteworthy development in disability discrimination litigation this year in the recruitment and hiring realm was the EEOC’s willingness to pursue a novel claim as a means for recovering on behalf of a class of allegedly disabled individuals.

In *EEOC v. Geisinger Health, et al.*,¹³⁷ the U.S. District Court for the Eastern District of Pennsylvania ruled against the EEOC at the motion to dismiss stage, with two exceptions. Most notably, the EEOC was permitted to pursue a claim under Title V of the Americans with Disabilities Act (“ADA”), a rarely utilized section of the ADA that prohibits “interference” with the exercise or enjoyment of any right granted or protected by the ADA. The court’s willingness to entertain this rare claim past the pleadings stage renders this ruling an especially important read for companies faced with ADA litigation.

In *Geisinger Health*, the EEOC brought an enforcement action against various Geisinger entities on behalf of a former nurse of Geisinger Wyoming Valley Medical Center, Rosemary Casterline, and other aggrieved former and current employees. The EEOC alleges the Geisinger Defendants violated Title I of the ADA by discriminating against and failing to accommodate Casterline and others who took medical leave by requiring them to re-apply and compete for employment opportunities to return to work and requiring them to be the “most qualified” applicant. For similar reasons, the EEOC additionally claims that Defendants retaliated against Casterline and other employees and interfered with their ADA rights, in violation of Title V. The Defendants moved to dismiss on all counts.

The Court ruled in favor of Defendants on all but two issues. As to those decided in favor of Geisinger, the court held that the EEOC: 1) failed to plead facts sufficient to allege that the various Geisinger entities were a single employer, thus requiring dismissal of four of the seven named Defendants; 2) failed to plausibly allege that Casterline was a qualified individual with a disability, thus eviscerating her individual claim and negating the EEOC’s effort to identify a “class;” 3) failed to sufficiently allege that otherwise untimely claims could move forward under a continuing violation theory, thus limiting claims to those occurring within the 300-day statutory window; and (4) failed to plead a causal connection between Casterline’s alleged protected activity and her termination or Geisinger’s failure to accommodate her, thus requiring dismissal of the EEOC’s ADA retaliation claim.

Though undoubtedly a win for employers (for the most part), perhaps most interesting are the issues that are now ripe for summary judgment. Specifically, the court permitted the EEOC to further pursue its claim under the anomalous ADA Title V, as well as its claim that Geisinger’s policy of hiring the most qualified applicants

¹³⁷ *EEOC v. Geisinger Health*, No. CV 21-4294-KSM, 2022 WL 10208553, at *1 (E.D. Pa. Oct. 17, 2022)

rather than simply reassigning disabled employees into positions for which they are qualified. Regarding the latter, this legal issue is a hotly contested one across Circuit Courts. The court deemed it premature to reject it on the pleadings, criticizing Geisinger's reliance on only summary judgment cases as grounds for dismissal.

As to Title V of the ADA, the court first noted the “scant case law” on ADA interference claims pursued under Title V. Indeed, the U.S. Court of Appeals for the Third Circuit has not yet ruled on what a plaintiff must plead to state such a claim. The court first recognized that courts in other circuits utilize the test for anti-interference claims under the Fair Housing Act, and in turn, the Third Circuit “has held that under the FHA, courts should give the word ‘interference’ its dictionary definition: ‘the act of meddling in or hampering an activity or process.’” Without explicitly holding that such a test should apply, the court found that the EEOC sufficiently pled that Geisinger interfered with Centerline's rights under the ADA. Specifically, the EEOC alleged that Geisinger maintained records of associates with references such as “litigation hold” to individuals who engaged in protected activity or sought a reasonable accommodation. Further, the EEOC alleged that those records are “readily available to Geisinger personnel who may be involved in hiring or rehiring decisions.”

The EEOC also alleged that Geisinger told Casterline to reapply for her own position, but then removed the job posting before she had a chance to submit her application. According to the Court, the EEOC's allegations raised an “inference that Geisinger ‘meddles’ when employees attempt to exercise their rights under the ADA.” In making this determination, the court cited the 2021 case in the Eastern District of Pennsylvania of *Piotrowski v. Signature Collision Centers LLC*, which analyzed whether the plaintiff stated a plausible ADA interference claim by determining whether the allegations supported that the defendant meddled with the plaintiff's exercise of his ADA rights. The court in *Piotrowski* found that the plaintiff alleged conduct that met this definition, including that each time he gave his employer a doctor's note, the defendant “moved the goalposts and asked for more information.” The defendant allegedly did that “even though the ADA does not require any magic words to invoke its rights.” This alone was enough to state an ADA Title V interference claim.

Employers should take particular note of the court's decision to uphold the ADA Title V claim. Given its success in *Geisinger Health*—perhaps in part due to the underdeveloped nature of such claims—employers should be careful that their policies and practices cannot be construed as “meddling” when employees attempt to assert ADA-protected rights. As demonstrated in *Geisinger Health* and *Piotrowski*, the standard for stating a claim under Title V is relatively low at present. For example, under *Piotrowski*, an interference claim can survive a motion to dismiss if an employee merely alleges that his or her employer “asked for more information” than a doctor's note before granting the employee's ADA-related request. And under *Geisinger Health*, it appears that noting an employee's needs or request for an accommodation could alone be problematic, especially if decision makers involved in hiring have access to such files.

Though Geisinger allegedly removed the job posting after encouraging Casterline to reapply, one could imagine a situation where this could happen unintentionally or as a result of a miscommunication. As emphasized by this ruling, such mishaps could, ultimately, result in Title V ADA litigation.

E. Preventing Harassment In The Workplace

The prevention of systemic workplace harassment has been one of the EEOC's national enforcement priorities since 2013. A few years ago, the EEOC published its Proposed Enforcement Guidance on Unlawful Harassment ("Proposed Guidance").¹³⁸ The Proposed Guidance was meant to replace several earlier EEOC guidance documents, aiming to define what constitutes harassment, examine when a basis for employer liability exists, and offer suggestions for preventative practices.¹³⁹ 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.¹⁴⁰ 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.¹⁴¹ 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);¹⁴² (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;¹⁴³ (3) where the alleged harassment was not directed at the employee;¹⁴⁴ and (4) in instances where the alleged harassment occurred outside of the workplace.¹⁴⁵

This proposed enforcement guidance, however, appears to have run headlong into the changing priorities at the EEOC, now that the Commission is led by a Republican slate of Commissioners. The guidance has been on hold since early 2017, while the EEOC has moved quickly on issues that seem closer to its new agenda, such as the updated guidance on religious discrimination. Nevertheless, remnants of the EEOC's evolving views about harassment are evident in the types of lawsuits they have been brought around the country since the onset of the #MeToo era. Those cases are primed to have a sizeable impact on the law in this area. In fact, of the 16 new case filings this past fiscal year alleging harassment claims, 11 of those cases involved sex-based harassment/hostile work environment.¹⁴⁶

The EEOC has had plenty of opportunity to shape the law of sexual harassment through its litigation activities. Those cases often hinge on two issues: whether the alleged actions rise to the level of unlawful harassment, and whether an employer can be held liable for harassment perpetrated by employees. The question of whether a pattern of conduct rises to the level of actionable harassment is highly fact-intensive and fraught with difficult judgment calls concerning the mental states of both the harasser and the victim. For example, in *EEOC v. Ecology Services, Inc.*,¹⁴⁷ the EEOC alleged that the employer had subjected the

¹³⁸ Office of Legal Counsel, U.S. Equal Employment Opportunity Commission, *Proposed Enforcement Guidance on Unlawful Harassment*, (Jan. 10, 2017), www.regulations.gov/docket?D=EEOC-2016-0009.

¹³⁹ See *id.*

¹⁴⁰ *Id.* at 5-9.

¹⁴¹ *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).

¹⁴² U.S. Equal Employment Opportunity Commission, *Proposed Enforcement Guidance on Unlawful Harassment*, supra note 429, at 9; see, e.g., *EEOC v. WC&M Enters, Inc.*, 496 F.3d 393 (5th Cir. 2007) (concluding that the EEOC presented sufficient evidence to support its national origin harassment claim where coworkers harassing comments did not accurately describe employees actual country of origin).

¹⁴³ U.S. Equal Employment Opportunity Commission, *Proposed Enforcement Guidance on Unlawful Harassment*, supra note 429, at 9; see, e.g., *Barrett v. Whirlpool Corp.*, 556 F.3d 502, 513-14 (6th Cir. 2009) (holding that white employees could allege claim of racial harassment based on their friendship with and advocacy on behalf of African American coworkers).

¹⁴⁴ U.S. Equal Employment Opportunity Commission, *Proposed Enforcement Guidance on Unlawful Harassment*, supra note 429, at 12; see, e.g., *Ellis v. Houston*, 742 F.3d 307, 320-21 (8th Cir. 2014) (concluding that District Court erred in evaluating plaintiffs' section 1981 and section 1983 claims of racial harassment by examining in isolation harassment personally experienced by each plaintiff, rather than also considering conduct directed at others, where every plaintiff did not hear every remark, but each plaintiff became aware of all of the conduct).

¹⁴⁵ U.S. Equal Employment Opportunity Commission, *Proposed Enforcement Guidance on Unlawful Harassment*, supra note 429, at 18.

¹⁴⁶ *EEOC v. Chipotle Services, LLC*, 2:22-cv-279 (W.D. Wash.); *EEOC v. Monson Fruit Co., LLC*, 1:22-cv-3133 (E.D. Wash.); *EEOC v. Mexico Restaurant, Inc.*, 1:22-cv-430 (D. Haw.); *EEOC v. Armed Forces Services Corporation dba Magellan Federal*, 3:22-cv-999 (S.D. Cal.); *EEOC v. Teamsters Local Union No. 455*, 1:22-cv-2520 (D. Colo.); *EEOC v. Brinker Int'l Payroll Co., L.P. d/b/a Chili's Grill & Bar*, 3:22-cv-2017 (N.D. Tex.); *EEOC v. Eden Foods, Inc.*, 2:22-cv-10881 (E.D. Mich.); *EEOC v. Chipotle Mexican Grill, Inc.*, 2:22-cv-326 (M.D. Ala.); *EEOC v. The Crab Stop Bar and Grill, LLC*, 2:22-cv-14339 (S.D. Fla.); *EEOC v. Ranger Tool and Die Inc.*, 3:22-cv-247 (E.D. Ark.); *EEOC v. Landmark Dodge, Inc.*, 4:22-cv-614 (W.D. Mo.).

¹⁴⁷ *EEOC v. Ecology Services, Inc.*, No. 18-CV-1065, 2021 WL 3549978 (D. Md. Aug. 11, 2021).

charging party to a hostile work environment when it failed to correct the sexually harassing behavior of her co-worker. The case went to trial, and the court had to weigh substantial evidence regarding the harassing behavior. Ultimately, the court ruled in favor of the employer. Although the EEOC had introduced voluminous evidence of sexually harassing activity, the court found that evidence to be so riddled with inconsistencies and contradictions that it undermined the EEOC's case. For example, the court noted that: "[Charging party] stated [alleged harasser] made inappropriate comments about her breasts and buttocks every time they worked together. Although she said these were made while co-workers were present, she failed to name any co-workers at any specific time the comments were made."¹⁴⁸ And in response to the charging party's claim that her co-worker propositioned her for sex on multiple occasions, the court noted that: "It makes little sense that [charging party] was subjected to this hostile environment, was so intimidated that she felt she could not report it and then approached the harasser and asked for a loan. I find her allegations regarding the propositioning of sex for money to be incredible."¹⁴⁹

The charging party had also testified that her co-worker had "climbed up onto the [engine cover of the truck], exposed his penis to her, grabbed her right hand off the steering wheel while she was driving at 40-50 miles an hour and made her touch his exposed penis."¹⁵⁰ But the court noted the heat and physical dimensions of the engine cover would make that difficult, if not impossible, and that her claim that she never lost control of the truck was inconsistent with her testimony that she punched and pushed him. With respect to this instance, the court concluded as follows: "What also strikes the court is the fact that if [alleged harasser] had committed the act once already, would not [charging party] be on high alert or somehow noticing he was again climbing up onto the [engine cover] and taking down his pants? She indicated she did not notice him climbing up a second time. She did not report the incidents when they happened. Again, her story defies logic and I find that the evidence contradicts her testimony."¹⁵¹ The court also could not credit the EEOC's efforts to establish employer liability, holding that it had "failed to produce credible evidence that [charging party] reported the conduct to her supervisors in order to correct the sexual harassment."¹⁵² The court concluded as follows: "The testimony and facts do not support any of her allegations and in fact contradict the physical possibility that certain acts like the illegal touching in the cab of the truck could have even occurred. While I believe that there was something going on between [charging party] and [alleged harasser], which could have been an inability to work together, the evidence does not rise to the level of a hostile work environment that was so severe and pervasive it caused the constructive discharge of [charging party]."¹⁵³

Despite the number of filings alleging sex discrimination in FY 2022, there was just one substantive EEOC sex harassment decision in 2022. But it was an important decision, and one that every employer should be aware of. Specifically, in *EEOC v. BNSF Railway Co.*,¹⁵⁴ the U.S. District Court for the District of Nebraska denied the EEOC's request for a temporary restraining order ("TRO") to prevent alleged discriminatory conduct. The EEOC sought an order reinstating an employee, Rena Merker, to work and prohibiting BNSF from engaging in retaliatory action against employees who seek to cooperate with the EEOC in its pending lawsuit against BNSF. Though the District Court ultimately found that the EEOC failed to demonstrate the requisite factors for obtaining a TRO, this decision is important because of the focal basis for the District Court's denial of the EEOC's motion. The District Court ruled that because the claim in the pending lawsuit was that Merker was subjected to a sexually hostile work environment, but the TRO request was based on alleged retaliation, it was impossible for the EEOC to demonstrate the likelihood of success factor necessary for relief. Given this inconsistency, the EEOC's motion failed on its face.

In *BNSF*, Merker, a train conductor, filed a charge of discrimination with the EEOC on January 18, 2018, alleging on behalf of herself and other aggrieved individuals in non-management positions that they had been subjected to a pattern and practice of gender discrimination, sexual harassment, sex discrimination,

¹⁴⁸ *Id.* at *8.

¹⁴⁹ *Id.* at *9.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at *10.

¹⁵² *Id.*

¹⁵³ *Id.* at *12.

¹⁵⁴ *EEOC v. BNSF Railway Co.*, Case No. 8:21-CV-369 (D. Neb. April 28, 2022).

and retaliation for opposing such alleged discrimination and harassment. On November 24, 2020, the EEOC issued a letter of determination stating that the EEOC had reasonable cause to believe that BNSF violated Title VII because Merker and other female employees were subjected to harassment and Merker was disciplined for complaining about the alleged harassment.¹⁵⁵ The EEOC was unable to reach a conciliation agreement with BNSF.¹⁵⁶

On September 23, 2021, the EEOC sued BNSF under Title VII on behalf of Merker and other aggrieved individuals adversely affected by similar conduct, but amended its complaint on December 20, 2021, alleging that Merker has been harassed by coworkers' sexual and demeaning comments and other conduct.¹⁵⁷ The amended complaint further alleges that BNSF's supervisors and human resources personnel turn "blind eye" to harassment, but does not assert a claim of retaliation on behalf of Merker or other aggrieved individuals.¹⁵⁸ On April 15, 2022, the District Court granted in part and denied in part BNSF's motion to dismiss, finding that the EEOC stated a plausible claim for sexual work environment on behalf of Merker, but failed to do so on behalf of the other aggrieved individuals.¹⁵⁹ While the motion to dismiss was pending, BNSF terminated Merker for alleged attendance issues.¹⁶⁰ Before the District Court entered the above-mentioned decision on the motion to dismiss, the EEOC filed a TRO request with the District Court to immediately reinstate Merker's position and from retaliating against female employees from cooperating with the EEOC in the pending lawsuit.¹⁶¹

The District Court denied the EEOC's motion. At the outset of its analysis, the District Court held that the EEOC could not prevail on its motion because the amended complaint in the pending lawsuit did not state a claim for retaliation—the very basis for its request for a TRO.¹⁶² The District court explained that while no single factor of the TRO analysis is determinative, the "probability of success factor is the most significant."¹⁶³ This factor requires the movant to demonstrate at least a fair chance of prevailing," or an "adequate showing of a nexus between the unlawful conduct and the responsible individuals."¹⁶⁴ Critically, the District Court observed that the likelihood of success "is considered in light of the elements of the movant's claim."¹⁶⁵ In *BNSF*, the EEOC argued in support of its request for a TRO only that it is likely to succeed in proving BNSF terminated Merker in retaliation for the EEOC's lawsuit based on her charge of discrimination. That claim, however, is missing from the amended complaint—which only alleges hostile work environment—and therefore could not substantiate the crucial factor (likelihood of success) of its TRO request.

The District Court nevertheless evaluated the merits of the EEOC's TRO motion and found that it failed to show irreparable harm because the EEOC failed to demonstrate an emergency, a TRO would be unlikely to preserve the status quo, and the EEOC failed to demonstrate irreparable harm from Merker's termination. Specifically, the District Court found the EEOC's attempted bureaucratic excuse for failing to file the TRO for more than two weeks unavailing: "If the EEOC wishes to file TRO actions, it must comply with the law to do so. This means it must find a way to timely file a TRO, just as any other party must do ..."¹⁶⁶ Further, the District Court held that the EEOC's request for relief was not proper preliminary injunctive relief, but rather affirmative relief—reinstatement of Merker's position.¹⁶⁷ Lastly, the District Court found a lack of irreparable harm from Merker's termination because the EEOC failed to offer sufficient evidence supporting

¹⁵⁵ *Id.* at *2.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* (citing *Carson v. Simon*, 978 F.3d 1051, 1059 (8th Cir. 2020)).

¹⁶³ *Id.* at *15-16.

¹⁶⁴ *Id.* at *16 (citations and quotations omitted).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at *20.

¹⁶⁷ *Id.* at *21.

a “but for” connection between the EEOC lawsuit and her termination.¹⁶⁸ Rather, the evidence offered by BNSF demonstrated a rich disciplinary record relative to Merker which BNSF argued was the cause of her termination, and the EEOC failed to offer sufficient evidence to suggest otherwise.

Employers should be mindful of *BNSF* because it highlights a rather basic defense that could be overlooked when scrambling to defend these motions under strict time-constraints. In *BNSF*, the District Court rejected the EEOC’s attempt at obtaining immediate relief for something that, though related to the underlying lawsuit, was not specifically alleged in the pending complaint. When the EEOC or other plaintiff files a TRO, employers and their attorneys should first look to whether the operative complaint specifically alleges the claim that provides the underlying basis for the TRO. If there is an inconsistency in such respect, employers should rely on *BNSF* in arguing that the motion should be denied.

¹⁶⁸ *Id.* at *22.

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