Today’s Discussion Leaders

Gerald L. Maatman, Jr.
Seyfarth Shaw LLP

Christopher DeGroff
Seyfarth Shaw LLP
Today’s Discussion Points

What Is Hot In The EEOC Enforcement Litigation World?

Key Trends And Developments In 2012 & And What To Look For In 2013

The EEOC’s New Strategic Enforcement Plan

Noteworthy Settlements And Verdicts In 2012 & 2013 And What They Signal For Employers

Significant Court Rulings In 2012 & Early 2013 And What They Mean For Employers

What Should Be In Your Tool Kit?
What Is The Systemic Initiative And What Does It Mean?

- Developed in 2005-2006, But Gaining Momentum In Last 3 Years
- Concerted Move Toward Initiating More Systemic Cases
- Based On The Notion That “Where There Is Smoke (One EEOC Charge), There Is Likely To Be Fire” (Discrimination Against A Group Of Employees)
- Employers Will Face More “Class-Like” Cases, Which Are Not Governed By Rule 23 But Present Similar Exposures
Setting The Stage:
A Leaner, Stronger, Faster EEOC

- Emerging Face Of The EEOC
- Initiatives:
  - “National Law Firm Model”
  - EEOC Trial Team Program
  - EEOC Appellate Program
  - Pay Equity Audit Program
- Better Deployment Of Resources
- Augmented Technical Abilities
- Stronger Bench Of Experts
- Emphasis On Quality Over Quantity In FY2013
Setting The Stage: EEOC Federal Court Filings

FY 2012 Legal Theories

- 122 Merits Lawsuits
  - 86 Individual Suits
  - 26 Multiple-Victim Suits
  - 10 Systemic Suits
- New Filings Breakdown
  - 66 Contained Title VII Claims
  - 45 Contained ADA Claims
  - 12 Contained ADEA Claims
  - 2 Contained Equal Pay Act Claims
- 33 Subpoena Enforcement And Other Actions
Setting The Stage: Systemic Cases On EEOC’s Active Docket

Percentage of Systemic Cases on EEOC's Active Docket
FY2010 – FY2012

- FY2010: 13%
- FY2011: 14%
- FY2012: 20%
Setting The Stage: EEOC’s Shifted Focus

More bang for the buck

$365.4 MILLION
The EEOC recovered a record-high amount in 2012, led by a new focus on pursuing systemic discrimination lawsuits.

Systemic Discrimination Cases as Percentage of EEOC’s Active Docket

- FY2010: 13%
- FY2011: 14%
- FY2012: 20%

Number of Cases Filed by EEOC

- FY2010: 250
- FY2011: 261
- FY2012: 122

Percentage of systemic suits spiked in 2012, reaching a record high, while overall EEOC filings dropped sharply.
Types Of Cases Filed By EEOC FY2012

Types of Cases Filed by EEOC
FY 2012

- TITLE VII, 66, 54%
- ADA, 45, 36.8%
- ADEA, 12, 9.8%
- EPA, 2, 1.6%
Significant Settlements In 2012


Setting The Stage: EEOC National Strategic Priorities

The SEP lists six national enforcement priorities, including:

1. Eliminating barriers in recruitment and hiring
2. Protecting immigrant, migrant, and other vulnerable workers
3. Addressing emerging and developing issues
4. Enforcing equal pay laws
5. Preserving access to the legal system
6. Preventing harassment through systemic enforcement and targeted outreach
“The Big 6”: Hiring Cases

Hiring Cases – EEOC Views Itself As Uniquely Positioned To Litigate These Cases


- **EEOC v. Freeman Companies,** No. 09-CV-2573 (D. Md. 2009)

- **EEOC v. PeopleMark,** Case No. 08-CV-907 (W.D. Mich. 2008)
“The Big 6”:
Significant Harassment Cases

Significant Harassment Rulings:


• *EEOC v. South Loop Club*, No. 12-CV-7677 (N.D. Ill. Feb. 6, 2013)


“The Big 6”: Protecting Vulnerable Workers

• The EEOC identified approximately 90 significant partnerships in the “vulnerable worker” area, with goals to increase such partnerships by 10% in both FY 2012 and FY 2014.

• Example: the EEOC has aggressively pursued new and existing cases in the agriculture industry, noting publicly in one such case:

  “Unfortunately, we continue to see cases involving employees who suffer sexual exploitation at the hands of their bosses. . . . All workers are entitled to a workplace that is free of harassment and discrimination, and employers should think twice before assuming that vulnerable workers will not exercise their rights due to fear or the lack of understanding”
“The Big 6”: Pay Discrimination Now Has a Seat at the EEOC’s Table

January 2012
EEOC Issues Draft SEP
NO PAY OBJECTIVE

June 2012
Public Comment on SEP
NO PAY OBJECTIVE

July 2012
EEOC Hosts Full Day Public Meeting
NO PAY OBJECTIVE

September 2012
EEOC Issues “Revamped” Draft of SEP
NO PAY OBJECTIVE

December 2012
EEOC Approves Final SEP
PAY OBJECTIVE
FIRST TIME PAY EQUITY LISTED AS PRIORITY
“The Big 6”:
Preserving Access To The Legal System

1. Releases That Waive The Right To File Charge

2. Last Chance Agreements

3. Traditional Concepts Of Retaliation
“The Big 6”:
Preserving Access To The Legal System

• Retaliation is the #1 source of all EEOC charges
• In the last 3 months, EEOC has settled 6 large retaliation cases
  • $85,000 – EEOC v. Cappo Mgt., No. 12-CV00239 (M.D. Tenn Jan. 25, 2013)
  • $100,000 – EEOC v. South Loop Club, No. 12-CV-7677 (N.D. Ill. Feb. 6, 2013)
  • $130,000 – EEOC v. D.O.E. Technologies, No. 11-CV-000861 (D. De. Jan 24, 2013)
  • $500,000 – EEOC v. Cognis Corp. (Ill.), No. 10-CV-2182 (C.D. Ill. Jan. 25, 2013)
“The Big 6”: Emerging Issues

Novel Litigation Theories – Attempts To Push Non-Traditional Claims

- Lesbian, gay, bisexual, and transgender ("LGBT")
- Domestic / Dating Violence
- Human Trafficking
- Lactation
- Local / Regional Initiatives
Non-SEP Focus: Continued Emphasis On ADA Cases

Key Settlements

• *EEOC v. Interstate Distributor Co.*, Case No. 12-CV-02591 (D. Col. Nov. 8, 2012)

Non-SEP Focus:
Continued Emphasis On ADA Cases

Ground Zero For ADA: Accommodations


- **EEOC v. The Picture People, Inc.**, 684 F.3d 981 (10th Cir. 2012)


Non-SEP Focus: Continued Emphasis On ADEA Cases


• *EEOC v. Exxon Mobil Corp.*, No. 06-CV-1732 (N.D. Tex. Sept. 13, 2012)
Procedural Rulings:
The Application Of § 706’s Limitations Period

Procedural Rulings: Failure To Conciliate


- **EEOC v. The Original Honeybaked Ham,** No. 11-CV-02560 (D. Col. Jan. 15, 2013)


- **EEOC v. United Road Towing, Inc.,** No. 10-CV-06259 (N.D. Ill. May 11, 2012)
A Word On EEOC Subpoenas

• Record Number Of Subpoena Enforcement Actions
• The EEOC Is Using Its Subpoena Power As An Early Discovery Tool
• Pursuing More Aggressively Than Ever Before – Likely Impact Of EEOC v. CRST Van Expedited, Inc.
• Fact Of Life: There Is A Very Short Time Frame To Challenge An EEOC Subpoena (5 Days)
• Negotiation Methods To Fracture EEOC Enforcement Actions Or Position The Employer’s Defense
Scope Of Investigation And Subpoena Enforcement

Key Subpoena Rulings In 2012


Money And Power: How EEOC’s Political Environment May Affect Your Bottom Line

• One critical metric must be considered when trying to forecast how the EEOC will behave in 2013: the Commission’s budget.

• Ultimately, the EEOC’s agenda will always be a reflection of its monetary resources. In late 2011, Congressional action reduced the Commission’s annual budget by $6.6 million.

• Commissioner Constance Barker recently expressed concerns regarding the EEOC’s allocation of resources at the February 20, 2013 public meeting.
Successful Defense Approaches And Strategies To Systemic Investigations

More Comprehensive Litigation Hold Notices

Phased Or Stages Responses (To Diminish “Curb Appeal”)

Creation Of Firewalls Around Geographic Areas / Time Periods

Creating “Reasonableness” & Laying The Groundwork For A Subpoena Opposition

Selective Strategies In “Calling The EEOC’s Bluff”
General Defense Pointers

Summary Judgment Is Exceptionally Difficult To Obtain, Slicing And Confining The “Class” – By The Class Period, Geographic Regions, Etc. – Is The Goal

Experts Are Crucial To Success In Systemic Cases
Negotiating And Settling Litigation With The EEOC

• Remember Who You Are Dealing With

• Key Differences From Negotiating Settlements With The Private Plaintiffs’ Bar

• Public Interest Factor

• Media Issues
Consent Decree Essentials

“Ice In Winter” Strategy

Common Features: Training; Revised Policies; Monitoring (Internal Or External); Record-Keeping; Posting Of Notice
What Should Be In Your Tool Kit?

Robust E-Discovery And Data Management Capabilities
Rigorous Monitoring Of Key Employee Data (Hiring, Pay, And Promotions)
Ongoing Review And Assessment Of Workplace Due Process Practices
Capability To Track Charge Activity
State-Of-The-Art Leave of Absence And Anti-Retaliation Policies
Questions