



# **EEOC-Initiated Litigation: Case Law Developments In 2011 And Trends To Watch For In 2012**

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## **A NOTE TO OUR CLIENTS**

The following collection of cases represents the 79 major decisions involving the EEOC in 2011, from substantive rulings on thorny legal issues to technical subpoena enforcement and EEOC regulation disputes. We hope this booklet provides a useful guide to recent trends and judicial rulings when preparing for what may be another dramatic year of EEOC-initiated litigation in 2012.

Our goal is for this Report to guide clients through decisional law relative to EEOC-initiated litigation, and to enable corporate counsel to make sound and informed litigation decisions while minimizing risk. We hope that you find the Report to be useful.

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# EEOC-Initiated Litigation: Case Law Developments In 2011 And Trends To Watch For In 2012

## I. EXECUTIVE SUMMARY

### Unique Challenges Of Litigating Against The EEOC

Litigation with the Equal Employment Opportunity Commission (“EEOC”) is, in a word, different. The motivations shaping the EEOC’s strategy and tactics often diverge from what drives most private litigants, and is not at all homogenous across the many EEOC regions spanning the country. Indeed, we find that the EEOC’s focus – be that on particular legal theories, industries, or employer practices – often differ from one agency region to the next, and can even shift within a given region over time.

This confounding dynamic plays out each year in the cases pursued by the EEOC, creating a sometimes bewildering patchwork of rulings. One consistent theme has emerged, however: the EEOC is more committed than ever to its Systemic Initiative launched in 2006. The Systemic Initiative emphasizes the identification, investigation, and litigation of discrimination claims affecting large groups of alleged “victims,” and is the government’s attempt to get “more bang for the buck” by using high-profile, class-like litigation to further its agenda. In the EEOC’s FY 2011 Performance and Accountability Report, the government trumpeted this focus, noting that the EEOC “places a high priority on issues that impact large numbers of job seekers, and employees....”<sup>1</sup> Indeed, the number of systemic investigations and lawsuits in 2011 were the largest since adoption of the Systemic Initiative. Of the 261 lawsuits the EEOC filed in its FY 2011, 67 involved up to 20 claimants, and 23 involved claims of systemic discrimination involving – as the EEOC puts it – “large numbers of people.”<sup>2</sup> Pre-litigation systemic investigations resulted in settlements yielding \$9.6 million – a substantial jump from \$6.7 million in 2010.<sup>3</sup>

We expect employers will see even more high-impact litigation in FY 2012. The EEOC’s FY 2011 Report ominously predicts that “[b]ased on the large volume of systemic charges currently

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<sup>1</sup> EEOC FY 2011 Performance and Accountability Report (“FY2011 Report”), p. 19, available at <http://www.eeoc.gov/eeoc/plan/upload/2011par.pdf>.

<sup>2</sup> Press Release, Equal Employment Opportunity Commission, *Private Sector Bias Charges Hit All-Time High*, (January 25, 2012), available at: <http://www.eeoc.gov/eeoc/newsroom/release/1-24-12a.cfm>; see also *EEOC Litigation Statistics, FY 1997 through FY 2011*, available at: <http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm>.

<sup>3</sup> FY 2011 Report, p. 19.

in investigation, the quantity of systemic lawsuits and their representation on the total docket is expected to steadily increase.”<sup>4</sup>

## **2011 In Review – A Rollercoaster Year For Employers**

What trends can we discern from decisions in EEOC litigation in 2011? The one thing employers can count on in EEOC litigation is its *lack* of predictability. The shifting sands of the EEOC’s agenda is magnified by the diverse views of district and appellate court judges around the country. We are left with some significant employer wins and startling employer losses in the decisions coming out of 2011. That said, the contours of the EEOC’s strategy and litigation trends are also apparent from the cases decided last year.

### ***Aggressive Systemic Investigations And Subpoena Enforcement***

The case summaries in this Report start with the earliest stages of EEOC litigation – the systemic investigation. The EEOC reported that as of the close of the last fiscal year on September 30, it had 580 systemic investigations involving more than 2,000 charges under way.<sup>5</sup> This is a significant bump from last year, which saw 468 active systemic investigations. Moreover, the EEOC is moving on these investigations faster. The government wrapped up 235 systemic investigations in FY 2011, well beyond the 165 the EEOC cleared in FY 2010.<sup>6</sup> In short, the EEOC is aggressively pursuing expansive investigations in an effort to fill the pipeline of large-scale cases – a trend that will continue to play out in 2012.

As part of these systemic investigations, the EEOC is flexing its muscles through subpoena enforcement actions. The EEOC litigated a record number of subpoena actions in 2011 – a total of 36, up from 28 last year – and enjoyed a number of victories with respect to the scope of its subpoena power. Courts across the country gave the EEOC considerable latitude with respect to breadth of the information the agency could obtain, even with respect to seemingly focused charges of discrimination. This includes three significant appellate victories, including *EEOC v. Konica Minolta Business Solutions U.S.A., Inc.*, *EEOC v. Washington Suburban Sanitary Commission*, and *EEOC v. Schwan’s Home Services* discussed in Section II of this Report. In all three appellate wins, the EEOC’s subpoenas were upheld, even over privilege arguments. On the other hand, there are instances where courts have limited or denied an EEOC subpoenas, but those are certainly in the minority in 2011. *EEOC v. University Of Pittsburgh Medical Center* is, nevertheless, a compelling read for employers challenging the scope of a subpoena arising out of an individual discrimination charge.

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<sup>4</sup> *Id.* at 20.

<sup>5</sup> *Id.* at 19.

<sup>6</sup> *Id.* at 19.

## ***Increasing Intolerance By Federal Courts Of EEOC Pleadings and Tactics***

Bookending these EEOC early investigation wins are a number of encouraging cases for employers, where courts have taken the agency to task for filing slipshod lawsuits or using questionable litigation tactics. Cases like *EEOC v. Global Horizons, Inc.* and *EEOC v. United Parcel Service, Inc.*, discussed in Section III.A., demonstrate courts' increasing scrutiny of agency-initiated suits that do not articulate certain basic legal elements. Both cases relied on the Supreme Court's seminal decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), holding that simply providing the bare elements of a case is not enough to support a class-type case. Employers are well-served to focus on basic pleading standards early in EEOC litigation. The EEOC often asserts class-wide discrimination in its complaints, but those allegations dissolve when pressure-tested. Indeed, the EEOC frequently states that it expects to use the discovery process to uncover discriminatory practices, rather than having the goods to support such claims before filing a lawsuit. Employers facing bare-bones complaints should consider challenging the EEOC from the outset and, where appropriate, filing a *Twombly*-style motion to dismiss. As the *EEOC v. UPS* case shows, such a strategy may jettison large portions of the EEOC's case at the front door of litigation.

Perhaps even more satisfying for employers is the line of cases that started in earnest in 2010, where courts have sanctioned the EEOC to the tune of millions of dollars for aggressively pursuing meritless cases. Chief among them is an August 2011 decision from the U.S. District Court for the Eastern District of Michigan in *EEOC o/b/o Serrano, et al v. Cintas Corp.*, sanctioning the EEOC over \$2.6 million in fees and litigation costs for its questionable tactics. Employers facing systemic EEOC cases that ultimately go nowhere will obviously applaud these sanctions cases. EEOC-initiated pattern or practice cases are incredibly time consuming and expensive. Based on *EEOC o/b/o Serrano, et al v. Cintas Corp.* and the other sanctions cases discussed in Section VI.B. of this Report, employers have significant ammunition to make the government think twice about bringing and/or continuing to prosecute facially meritless claims.

## ***Mixed Results In Discovery, Summary Judgment, And Remedies Decisions***

Between these two extremes are a number of important and sometimes conflicting cases spanning the lifespan of an EEOC-initiated action. In Section III of this Report, we review the decisions where courts once again grapple with thorny concepts like the scope of investigation defense and the piggyback rule. Further, 2011 also saw courts revisit the critical timing issue of whether the 300-day statute of limitations in Section 706 of Title VII applies to EEOC pattern or practice lawsuits brought under Section 707 of Title VII. Both *EEOC v. Kaplan Higher Educ. Corp.* and *EEOC v. Freeman* – discussed in Section III.B. – found that it does, adding to the growing split between district courts across the country on this issue.

Courts also tackled difficult discovery and burden of proof issues in 2011. Importantly, in *EEOC v. JBS USA, LLC*, the U.S. District Court of the District of Colorado gave a split opinion on the applicability of the widely discussed bifurcation model first articulated in the U.S. Supreme Court case of *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), applying a version of that model to a certain discrimination claims, but questioning its utility for pattern or practice harassment claims. The cases discussed in Section II.C. highlight that an EEOC pattern or practice claim is a powerful device that poses significant risks for employers. Under the *Teamsters* model, a *prima facie* showing of a pattern or practice creates an early presumption that the employer violated the law for a broad class of alleged victims. It is

potentially difficult to un-ring that bell at Phase II. Fortunately, the standard for demonstrating a pattern or practice in Phase I is high, and cases like *EEOC v. JBS* show that judges can and do narrow the bifurcated *Teamsters* framework to only those claims truly susceptible to class treatment. Section IV also covers a wide variety of other discovery issues, from the timing of when the EEOC must identify the individuals it seeks to represent to the availability of discovery of the EEOC's own employment practices.

Section V highlights the key summary judgment decisions in 2011 by substantive areas. One of the most important cases in 2011 falls into this category: *EEOC v. Bloomberg L.P.*, in which the U.S. District Court of the Southern District of New York put a resounding end to nearly four years of litigation, holding that the EEOC's case was so riddled with problems that the employer should not have to face a trial as to the alleged pattern or practice of discrimination. A grant of summary judgment is rare in such a case. *EEOC v. Bloomberg* is a case study where a massive claim brought by the government was found so wanting to be booted out of the courthouse for lack of proof.

Finally, Section VI of this Report discusses the remedies available in EEOC-initiated actions, including a discussion of the scope of injunctive relief available to the EEOC when successful at trial, from the very narrow relief as discussed in *EEOC v. KarenKim, Inc.*, to the very broad relief awarded in the much-publicized case of *EEOC v. AutoZone*.

### **Looking Ahead To 2012 And Beyond**

This all sets the table for a very busy 2012. At the close of 2011, the EEOC was gearing up with more personnel and a renewed focus on systemic "big case" investigations and lawsuits against employers. We expect the EEOC will build on the aggressive tactics we saw in 2011, most of which play out in the 79 cases covered in this Report. Notably, the EEOC's budget was actually cut by the Obama administration in 2011 by over \$6 million.<sup>7</sup> While not intuitive, this will likely result in even *more* large-scale, high-profile cases – chasing small-scale cases just simply will not (at least in the EEOC's view) convey the government's message in a cost-effective way. The EEOC understands that headlines touting multi-million settlement and judgments captures employers' attention and, perhaps just as important, turns the head of legislators who hold the budgetary purse-strings. Thus, the EEOC's need to remain politically relevant makes big case filing not only probable, but also critical for the Commission.

Indeed, on January 18, 2012, the EEOC released a draft of its strategic plan covering 2012 through 2016. One of the EEOC's key strategic objectives is, not surprisingly, to:

"[u]se administrative and litigation mechanisms to identify and attack discriminatory policies and other instances of systemic discrimination."<sup>8</sup>

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<sup>7</sup> H.R. Rep. No. 112-284, at 265-266 (2011) (Conf. Rep).

<sup>8</sup> EEOC DRAFT STRATEGIC PLAN FOR FISCAL YEARS 2012 - 2016, p. 11, available at [http://www.eeoc.gov/eeoc/plan/upload/strategic\\_plan\\_12to16\\_DRAFT.pdf](http://www.eeoc.gov/eeoc/plan/upload/strategic_plan_12to16_DRAFT.pdf).

The EEOC's proposed measure of whether it has met this goal is to achieve a minimum quota of systemic cases on the agency's litigation docket each year (a percentage the EEOC has not yet set). With the agency's budget on the line, employers can be confident that the EEOC will ensure that the number of systemic cases it files will swell in 2012 and beyond.

As for specific trends, it is virtually certain that employers will see even more aggressive systemic investigations (and related subpoena enforcement actions) in the coming year. With recent wins on the scope of the EEOC's investigative power, we expect the EEOC will push the edge of this envelop in 2012. The EEOC has learned that widespread and costly investigations can be used as a lever for conciliation, allowing it to extract large settlements with a relatively smaller legal spend on the front end. Broader and deeper investigations will also allow the EEOC to avoid repeat performances of the stinging sanctions awards it absorbed in 2011 in cases where federal judges called the EEOC to task for not doing its homework. Despite the EEOC's questionable position that it serves as a "neutral" in the investigation stage, its 2012-2016 strategic plan states that it will pursue "an integrated, holistic approach to enforcement from beginning to end, without separating the investigation and conciliation stage of the EEOC's work from its litigation stage."<sup>9</sup> The translation: employers should view investigations for what they are – a tactical stage in a broader litigation strategy.

Additionally, we can expect the EEOC to join forces with other parties to achieve its objectives. In a Memorandum of Understanding ("MOU") published on November 16, 2011, the EEOC and the Office of Federal Contract Compliance Programs ("OFCCP") promised to coordinate their enforcement efforts and share discrimination claim information. The MOU provides that the EEOC and OFCCP will "share any information" relating to the employment policies and/or practices of federal contractors, including affirmative action programs, employment reports, complaints, charges, investigative files, and compliance evaluation reports/files.<sup>10</sup>

A new, perhaps even more chilling trend that we expect will play heavily in 2012 is the partnering between the EEOC and private plaintiffs' class action counsel. We saw an unprecedented amount of coordination between the EEOC and the private plaintiffs' class action bar in 2011. With the dust settling on the effects of *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), and its impact on Rule 23 class actions, there may be a migration of large-scale cases to the EEOC that is (at least for now) not saddled with the *Dukes* baggage. On the other hand, the EEOC's scarce resources means that it might benefit from partnering with private counsel, allowing for a united, stronger front against employers. *EEOC o/b/o Serrano, et al v. Cintas Corp.* discussed below is an example of a private action grafted on to an EEOC action.

We also saw a trend in 2011 of the EEOC attempting to expand its pattern or practice presence in what have traditionally "quiet" geographic areas, such as the Pacific Northwest and states that already have strong state anti-discrimination statutes like Massachusetts. We expect that trend to continue. The EEOC also will continue to push for a larger footprint in high-profile and novel areas, such as Fair Credit Reporting Act cases and substantive areas that are arguably

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<sup>9</sup> *Id.* at p. 16.

<sup>10</sup> *Id.*

not even within the EEOC's purview, such as the human trafficking and workplace condition cases it filed in Hawaii and Washington in 2011.

Employers also can expect disability discrimination to be front and center in the EEOC's 2012 agenda as well. The Americans With Disabilities Act Amendments Act of 2008 ("ADAAA"), broadened the scope of who is "disabled" under the law, and effectively eviscerated one of the primary employer defenses to disability claims, *i.e.*, that an employer does not have a legally protected disability. The EEOC has stated that enforcing ADA claims is a key goal, and the number of ADA cases in 2011 demonstrates that goal is becoming a reality. Indeed, the EEOC recently reported that ADA enforcement actions produced the highest increase in monetary relief among all of the statutes, as the administrative relief obtained for disability discrimination charges increased by almost 35.9% to \$103.4 million compared to \$76.1 million in the previous fiscal year.<sup>11</sup> One particular area of interest for the EEOC is alleged discrimination against military veterans with disabilities. In a public meeting on November 16, 2011, the EEOC noted that the agency was focused on this particular element, noting that the EEOC and others should "learn effective ways to remove barriers for veterans with disabilities." In short, employers should pay particular attention to EEOC investigations alleging violations of the ADA.

## Conclusion

Litigating against the EEOC is different. As employers are painfully aware, many of the rules that apply to private litigants do not apply to the agency, such as the class action requirements of Rule 23 and discovery safeguards that are almost effortlessly bypassed at the EEOC's investigative stage. In many cases, the EEOC simply *believes* that the rules do not apply, but with much the same effect as employers are left to expensive sparring with an adversary whose goals and resources can shift midstream, depending on the prevailing political winds.

Curiously, however, the EEOC aspires to litigate its cases more like its private-practice adversaries. Indeed, on the day the EEOC's General Counsel David Lopez was sworn into his new position in 2010, he remarked, "I intend to further develop the national law firm model for the EEOC to combat discrimination."<sup>12</sup> He was referring to one of the key thrusts of the EEOC's systemic initiative – to coordinate its efforts, personnel, and strategy to win its cases like private law firms do. In the process, however, the courts have become less tolerant of the EEOC's arguably illusory "special" status, and in 2011 we saw the first steps of a judiciary treating the government more like the private litigant it strives to be. In the cases analyzed in this Report, we see judges questioning the EEOC's interpretation of the statutes it is charged with enforcing, rejecting the EEOC's demands for a all-purpose pass on procedural rules, and outright hostility

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<sup>11</sup> Press Release, Equal Employment Opportunity Commission, *Private Sector Bias Charges Hit All-Time High*, (January 25, 2012), available at: <http://www.eeoc.gov/eeoc/newsroom/release/1-24-12a.cfm>; see also EEOC *Litigation Statistics, FY 1997 through FY 2011*, available at: <http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm>.

<sup>12</sup> Press Release, Equal Employment Opportunity Commission, *P. David Lopez Sworn in as General Counsel of the EEOC*, (April 8, 2010), available at: <http://www.eeoc.gov/eeoc/newsroom/release/4-8-10.cfm>.

for an agency taking a “shoot first, aim later” view of high stakes and costly litigation when employers are already are besieged by a struggling economy.

## II. EEOC INVESTIGATION TACTICS AND ADMINISTRATIVE SUBPOENAS

### A. Cases Where EEOC Subpoenas Upheld

***EEOC v. Osceola Nursing Home, LLP, Case No. 10-CV-4 (E.D. Ark. Mar. 9, 2011).*** The EEOC brought an action against Defendant, alleging sex discrimination and retaliation under Title VII of the Civil Rights Act of 1964. The charging parties claimed that they were subjected to lewd comments and sexual invitations, and were retaliated against for reporting allegations of sexual harassment during internal investigations. The EEOC served notice of the charges to Defendant and commenced an investigation. During the course of the investigation, the EEOC issued Requests for Information to Defendant, and it failed to respond. Subsequently, the EEOC issued an administrative subpoena seeking the requested information, including the complete personnel files of charging parties, employee handbooks and procedures, and identification of all employees discharged during the relevant time period. Defendant again failed to respond. The EEOC subsequently filed a motion for an order to show cause why Defendant should not be compelled to answer the EEOC's subpoena. The Court granted the EEOC's motion and ordered Defendant to appear and explain why Defendant should not be compelled to answer the EEOC's subpoena. The Court also warned that a failure to appear by any party might result in a court-imposed sanction. The Court subsequently conducted a hearing, and declined to draw an adverse inference based on Defendant's incomplete and tardy response to the EEOC's subpoena. The Court concluded that Defendant's unresponsive conduct merited a sanction pursuant to the Court's inherent authority to protect and promote respect for the judicial and administrative processes. The Court therefore ordered Defendant to pay \$2,500 to the EEOC for having to seek judicial enforcement of the subpoena, provide the EEOC a complete copy of Defendant's harassment investigation file with privileged or work-product information redacted, and make further good faith efforts to locate documents responsive to the subpoena. *Id.* at 2.

***EEOC v. Kronos Inc., 2011 U.S. Dist. LEXIS 47350 (W.D. Pa. May 3, 2011).*** Kronos held information, as a non-party to the EEOC's investigation, that pertained to an employer that was subject to the EEOC's administrative investigation. The Court previously issued an order enforcing the EEOC's subpoena as to Kronos with certain confidentiality provisions. At that time, the Court outlined the issue of cost shifting and ordered the parties to set forth the projected costs of compliance with the subpoena, if they were unable to agree on the allocation of costs. The parties subsequently filed a joint status report estimating that the projected cost of compliance with the EEOC's subpoena was approximately \$75,000. The EEOC, however, stated that it currently had no basis to agree or disagree with this estimate. In a previous order, the Court had discussed what the EEOC must establish to show that its demand for information was not unreasonably broad or burdensome. The Court further stated that it was guided by the pronouncements in *United States v. Friedman*, 532 F.2d 928, 937 (3d Cir. 1976), where the Government enforced summonses against banks and accountants in connection with tax examinations of two taxpayers and a corporation. *Friedman* held that a Court has the power to mandate that the Government reimburse a subpoena recipient for the reasonable cost of production. While recognizing that Rule 45 does not literally apply concerning compliance by a non-party with an EEOC subpoena, *Friedman* pointed out that Rule 45 "serves as significant precedent disclosing a broad congressional judgment with respect to fairness in subpoena enforcement proceedings." *Id.* The Court further noted that the 1991 amendments to Rule 45 made it mandatory to protect non-parties from significant compliance costs. Kronos argued that the costs of production of the documents would be exorbitant, and that the EEOC should

shoulder the financial burden of complying with the subpoena, which Kronos viewed as overbroad. The EEOC contended that the shifting of costs was not appropriate because Kronos should have reasonably expected to bear these costs as part of doing business. The Court found that given that the costs of production would amount to approximately \$75,000, the Court ordered the EEOC and Kronos to split the costs of compliance equally. Given the magnitude of the materials, the Court had ordered Kronos to produce, and the substantial costs of production, the Court found that a 50/50 cost share was fair and equitable, and would lessen the burden on Kronos, as a non-party.

***EEOC v. Infiniti Of Fairfield*, 2011 U.S. Dist. LEXIS 67121 (E.D. Cal. June 21, 2011).**

Claimant filed a complaint with the EEOC alleging that Defendant terminated him on the basis of his age and disability in violation of the ADA, ADEA, and Title VII of the Civil Rights Act of 1964. The EEOC sent a request for information letter to Defendant requesting various documents. It refused, and the EEOC served a subpoena on the employer requesting production of the same information. Defendant persisted in its refusal to respond, and the EEOC filed a motion for enforcement of administrative subpoena. The Court noted from the subpoena that the EEOC sought to obtain Defendant's documents relating to the age discrimination charge as well as the discrimination charge based on disability. The Court found that the documents and information sought by subpoena were relevant and material because they would assist the EEOC in verifying or discrediting the charges of age and disability discrimination. Accordingly, the Court directed Defendant to produce the outstanding documents requested in the EEOC's subpoena.

***EEOC v. Sterling Jewelers Inc.*, 2011 U.S. Dist. LEXIS 126585 (W.D.N.Y. Nov. 2, 2011).**

The EEOC filed an action against Sterling, alleging gender discrimination pursuant to §§ 706 and 707 of Title VII ("primary action"). The EEOC alleged that Sterling engaged in unlawful employment practices nationwide by maintaining a system of making promotion and compensation decisions that were excessively subjective and had a disparate impact on female retail sales employees. As part of the investigation of a separate charge filed by a female employee, Diane Thielker, Sterling had issued a counseling report to confirm the disciplining of Thielker, which stated that any discussion regarding payroll was to be made only between the employee and manager, the non-compliance of which was a direct violation of the company's code of conduct. The EEOC served a subpoena on Sterling requesting information on the code of conduct and other policies prohibiting employees from discussing their pay, all related disciplinary notices, and all employees disciplined under such policies. When Sterling refused to comply, the EEOC filed an application for order to show cause why its administrative subpoena should not be enforced. The Magistrate Judge recommended that the subpoena be enforced in its entirety. The Magistrate Judge analyzed whether the subpoena satisfied the criteria laid down in *EEOC v. United Parcel Service, Inc.*, 587 F.3d 136 (2d Cir. 2009). Sterling argued that the subpoena was being issued to end-run the discovery process in the primary action. The Magistrate Judge found that commencement of the primary action was not a *per se* bar to the EEOC's authority to investigate the Thielker charge. The Magistrate Judge rejected Sterling's argument that because the subpoena sought company-wide information relevant to the EEOC's pattern or practice claims in the primary action, it was being issued for an ulterior purpose. The Magistrate Judge noted that the counseling report suggested that Thielker was disciplined under Sterling's code of conduct; and as such, he reasoned that an employer's nationwide use of the practice under investigation supported the EEOC's subpoena for nationwide data on that practice. Accordingly, the Magistrate Judge concluded that the EEOC had established that the subpoena was being issued for a legitimate purpose. The Magistrate Judge also analyzed whether the subpoena requested relevant information, as 42 U.S.C.

§ 2000e-8 allows the EEOC access to all information relevant to the charge being investigated. By investigating the Thielker charge, the EEOC learned of the counseling report. The Magistrate Judge observed that the subpoena sought information relevant to the Thielker charge, which was learned directly through the EEOC's investigation of the charge. The Court noted that Sterling's representation at a later date that there was no company policy prohibiting employees from discussing their pay was in direct contravention to the statements in the counseling report and therefore, highlighted the relevancy of the information sought in the subpoena to the EEOC's investigation of Thielker's charge. The Magistrate Judge found that the EEOC therefore had met its burden of establishing that the information sought was relevant. Regarding compliance with the subpoena, Sterling argued that reviewing 54,000 employee personnel files would be burdensome and disrupt its normal business operations. The Magistrate Judge opined that this estimate seemed inflated and that the computerized records maintained by the company would enable Sterling to determine which employees had received counseling. Further, providing information related to Sterling's policy would not place an undue burden on the company. Finally, relative to Sterling's argument that the subpoena was barred by the mediation agreement entered into by 19 other employees in connection with the primary action, which sought to include Thielker as a charging party, the Magistrate Judge determined that the agreement only limited Sterling's obligation to provide additional information relating to the 19 pending charges at issue and not with respect to other charging parties. Thus, the limitation in the mediation agreement did not apply to Thielker's charge, which was filed approximately six months after the mediation concluded.

***EEOC v. Konica Minolta Business Solutions U.S.A., Inc.*, 639 F.3d 366 (7th Cir. 2011).**

Elliot Thompson, an African-American salesman, filed a charge of discrimination with the EEOC alleging that Defendant subjected him to different terms and conditions of employment, disciplined him for not meeting a sales quota, and ultimately fired him after he filed a race discrimination complaint with Defendant's human resources department. The EEOC discovered that there were only six African-American employees (of 120 total employees) employed at Defendant's facility, and all six worked in its Tinley Park facility. The EEOC also learned that there were two sales teams at the Tinley Park facility and those teams were segregated largely along racial lines. Specifically, the EEOC thought that Defendant might be intentionally segregating sales teams and assigning all African-American sales employees to the Tinley Park facility, which worked in predominantly African-American neighborhoods. The EEOC issued Defendant a subpoena seeking information about its hiring practices, requesting records relating to the hiring of sales personnel at all four of Defendant's Chicago-area facilities. The subpoena sought information about people who expressed an interest in sales work at any of those offices, the applications Konica reviewed to fill sales positions, communications with applicants about sales positions, evaluations for each applicant considered for a sales position, the personal information, including race, of each applicant hired to fill a sales position, information about whether that person was promoted or transferred, and the criteria used to evaluate applicants for sales positions. Defendant refused to comply, arguing that the requested materials were irrelevant to the charge of race discrimination. The EEOC filed an application with the District Court for an order enforcing the subpoena, which it granted. Upon Defendant's appeal, the Seventh Circuit affirmed the decision of the District Court. The Seventh Circuit observed that the charging party alleged both a specific instance and a pattern of race discrimination and that although it was true that the charging party was not averring that Defendant had refused to hire him, that did not make hiring data irrelevant. Additionally, the Seventh Circuit agreed with the EEOC that the hiring data might also cast light on whether

Defendant discriminated against the charging party when it assigned him to a particular sales territory. Thus, the Seventh Circuit found that nothing in the record suggested that the EEOC had strayed so far from either the charging party's charge or its broader mission that it had embarked on a proverbial fishing expedition. The Seventh Circuit also addressed two additional issues that Defendant raised. Defendant argued that because the charging party alleged only discipline and discharge discrimination, the District Court's finding that the charge included allegations about the discriminatory assignment of sales territories was clearly erroneous. The Seventh Circuit found that Defendant's argument was misguided. It concluded that the materials subpoenaed by the EEOC were relevant to its investigation of the charge. Further, finding that Defendant failed to develop its argument adequately that compliance with the subpoena would constitute an undue burden, the Seventh Circuit affirmed the decision to enforce the EEOC's subpoena.

***EEOC v. Schwan's Home Services, 644 F.3d 742 (8th Cir. 2011).*** In March of 2007, Defendant hired Kim Milliren for the position of Location General Manager ("LGM") on the condition that she successfully completed a General Manager Development Program ("GMDP"). Milliren completed the GMDP, but Defendant informed Milliren that she had not demonstrated the leadership skills necessary to graduate and instead offered her a customer service job, which Milliren declined. In June of 2007, Milliren filed a charge with the EEOC against Defendant, alleging that while participating in the GMDP she had suffered discrimination and harassment on the basis of her sex in violation of Title VII. The EEOC sent Defendant a written request for information requesting the list of employees who had participated in the GMDP in 2006 and 2007, including each employee's name, gender, and date of hire. Defendant failed to provide any information for 2006 and did not include a gender breakdown of employees who participated in the GMDP in 2007. Subsequently, Milliren made additional allegations of discrimination, including that she would be one of only two female LGMs out of 500 LGMs nationwide if she graduated from the GMDP. The EEOC sent a second written request to Defendant seeking information related to Milliren's additional allegations and again requested a gender breakdown of employees who participated in the GMDP in 2006 and 2007. Defendant did not respond. The EEOC subsequently issued a subpoena requiring Defendant to produce the information sought in the second request. Defendant complied with the subpoena in part, but refused to turn over information regarding the gender makeup of the company's general managers, the selection process for the GMDP position, and the gender breakdown of successful graduates of the GMDP. Milliren then filed an amended charge with the EEOC repeating her original allegations and adding an allegation of systemic gender discrimination. Defendant responded that the amendment to the charge was untimely. The EEOC served Defendant with a second subpoena requesting information, but Defendant refused to respond. The EEOC filed an application in Court for an order requiring Defendant to appear and show cause, and the Magistrate Judge ordered Defendant to comply with the subpoena. Subsequently, the Court ordered Defendant to comply with the administrative subpoena. On appeal, Defendant contended that the portion of Milliren's charge alleging systemic gender discrimination was invalid because it was filed more than 300 days after Milliren resigned, but the Eighth Circuit found this argument premature, stating that the appropriate time to address the timeliness issue was if and when an actual lawsuit was filed, not during the subpoena enforcement stage. Defendant also argued that the systemic discrimination charge was invalid because it contained nothing more than Milliren's unsubstantiated belief that a pattern of discrimination existed. The Eighth Circuit determined that this argument failed because a charge was valid regardless of the strength of its evidentiary foundation, and because Milliren's

charge of individual gender discrimination while she participated in Defendant's GM DP need not be compartmentalized from her charge of systemic gender discrimination within the GM DP in assessing the charge's validity. In addition, the Eighth Circuit pointed out that Milliren's description of her own experience itself constituted more than a mere boilerplate charge of discrimination. Accordingly, the Eighth Circuit found that the EEOC met its burden to present a valid charge in support of the administrative subpoena. The Eighth Circuit also concluded that the information sought in the subpoena was relevant to Milliren's charge of individual and systemic gender discrimination. Further, the Eighth Circuit held that even if Milliren's systemic gender discrimination charge were invalid, the information sought in the subpoena was nonetheless within the scope of the EEOC's investigative authority because the EEOC's investigation into Milliren's charge of individual gender discrimination revealed potential systemic gender discrimination. As a result, the Eighth Circuit affirmed the District Court's order enforcing the administrative subpoena.

***EEOC v. Washington Suburban Sanitary Commission, 631 F.3d 174 (4th Cir. 2011).*** The Washington Suburban Sanitary Commission ("WSSC"), a public utility, restructured its Information Technology ("IT") Department, eliminated all merit system positions and replaced them with reorganized, non-merit system positions. A group of the displaced employees, filed an age discrimination complaint with the EEOC, alleging that WSSC conducted the restructuring in violation of the ADEA, 29 U.S.C. § 621 *et seq.* The EEOC subpoenaed WSSC for records related to the restructuring and to the IT Department's training practices, employment policies, and discrimination history. WSSC declined to comply, arguing that legislative immunity and privilege shielded the materials because the restructuring was partially accomplished through county budget processes. The EEOC then sued over the subpoena in an administrative enforcement proceeding. After the EEOC dropped certain portions of its request, the District Court ordered WSSC to comply with the remainder of the subpoena. It ruled that while legislative privilege might in theory defeat the EEOC's subpoena power, the EEOC's modified subpoena asked for information about discrimination prior to and after the legislative restructuring decision, not for information about the decision to restructure. Upon WSSC's appeal, the Fourth Circuit found that it was too early to address Defendant's speculative claims of legislative privilege and affirmed the District Court's order. WSSC argued that the EEOC sought to learn whether age bias motivated WSSC's decision to restructure the IT Department, a topic that it argued would impermissibly require testimony from the WSSC Commissioners and county council members. The Fourth Circuit determined that the EEOC was not bringing suit against WSSC for ADEA violations; instead, it was merely investigating possible age discrimination at WSSC and that at this point, it was unknown whether the EEOC's investigation would develop into a lawsuit. Moreover, the Fourth Circuit observed that it had no reason to believe that WSSC's production of the requested materials would require that legislative officials divert their time and attention away from their legislative duties. The Fourth Circuit also opined that WSSC's argument – that legislative immunity and privilege require that investigations be halted where the parties might one day seek material protected by legislative privilege – was questionable because aspects of the employees' EEOC charge that would tread close to impermissible areas did not fatally undermine the EEOC's authority to investigate other instances of age discrimination that did not implicate the privilege. *Id.* at 183. The Fourth Circuit also determined that the EEOC made several efforts to avoid requesting potentially privileged information, including properly rescinding its demand for records of internal deliberations about the restructuring and for the standards used in deciding to restructure. In addition, the Fourth Circuit found that the modified subpoena's requests appeared to relate to

administrative rather than legislative acts, or the acts for which the immunity and privilege were granted and which typically involved the adoption of rules and public decision-making, including the observance of formal legislative procedures. The Fourth Circuit concluded that legislators' employment and personnel decisions were generally administrative acts as they most often affect specific individuals rather than formulate broad public policy, and are therefore not granted immunity and privilege. The Fourth Circuit found that extending blanket protection to WSSC's pre-restructuring and post-restructuring employment activities would upset this relatively stable classification system. Based on its assessment that the EEOC's modified subpoena upheld legislative intent without impairing legislative independence, the Fourth Circuit affirmed the District Court's order.

**Editors Note:** Employers' scope arguments have not enjoyed much success in the last two years. Arguments demonstrating that the cost of complying with a subpoena far outweighs the minor utility of the information sought have been more persuasive. Those arguments, however, must be detailed, supported by more than mere conjecture, and cite to real numbers.

## **B. Cases Where EEOC Subpoenas Were Rejected**

***EEOC v. University Of Pittsburgh Medical Center*, 2011 U.S. Dist. LEXIS 55311 (W.D. Pa. May 24, 2011).** In this action, the EEOC sought to enforce its administrative subpoena against UPMC. The charging party, Carol Gailey, was hired as a Certified Nursing Assistant at Heritage Shadyside nursing home, a subsidiary of UPMC. Within eight months of her employment, she notified her employer that she suffered from numerous serious health problems that would require her to miss an unspecified period of work. She was provided with a personal leave of absence ("PLOA") and short-term disability benefits in accordance with Shadyside's policies. Gailey exhausted her 14 weeks per year entitlement to PLOA leave on June 21, 2008. After she failed to report to work, Shadyside treated her failure to report to work as a voluntary resignation and terminated her employment. Gailey filed a charge of discrimination with the EEOC, alleging that she had been discharged because she did not return to work on time from short-term disability. She further alleged that she was given no warning that her employment would be terminated if she did not report to work. After Shadyside filed its position statement denying Gailey's allegations, the EEOC sent a request for information to UPMC (not to Shadyside), which requested the identities of employees at all facilities in the Pittsburgh region who had been terminated in accordance with its PLOA and/or disability policies. UPMC objected to the scope of the EEOC's request, and refused to provide the requested information. Subsequently, when the EEOC issued an administrative subpoena pursuant to Title VII and the ADA, UPMC moved to revoke or modify subpoena. Thereafter, the EEOC sought to enforce the subpoena, which the Court denied. The Court noted that the EEOC's subpoena sought 10 categories of information about all employees who were terminated after 14 weeks of a medical leave of absence pursuant to PLOA from the entire corporate entity – including UPMC, which was not Gailey's employer – as well as Shadyside. The Court concluded that the subpoena constituted an "improper fishing expedition" that sought information that was not relevant to the underlying charge. *Id.* at \*9-10. The Court observed that it was readily apparent that the EEOC was interested in pursuing an investigation of UPMC's corporate policies. Upon receipt of the UPMC policies, the EEOC immediately turned the focus of its investigation away from the specifics of the Gailey charge and toward a much larger, corporate-wide issue. The EEOC explained that the purpose of the investigation was to determine if there were any employees who were denied medical leave in excess of UPMC's maximum policy limit where such leave would have been an accommodation and would not have been an undue hardship as defined by

the ADA. In absence of charge regarding these UPMC corporate policies, the Court found that the subpoena at issue could not be justified by Gailey's charge. The Court remarked that the investigation of UPMC's corporate policies did not appear to have occurred during the course of a reasonable investigation of Gailey's charge. To the contrary, the EEOC's effort to obtain the identities of persons discharged under UPMC's country-wide policies was the first and the only step of its investigation because in the two years since Gailey filed her charge, the EEOC had done almost nothing to determine the specific facts of her discharge. The Court opined that it was unclear whether or not Gailey promised her employer that she would return to work on June 21, 2008, and whether the EEOC had investigated Gailey's qualification for long-term disability benefits, her exhaustion of PLOA leave, and her participation in the RTW program. The Court observed that the records established that Gailey never requested an accommodation and that she could not have performed the essential job functions of the certified nursing assistant position even with a reasonable accommodation. Thus, the Court reasoned that these types of narrowly-tailored, potentially-dispositive inquiries should have been pursued by the EEOC prior to launching an inquiry into a tangential alleged systemic violation. *Id.* at \*11. Furthermore, the Court found that the subpoena did not cast light on Gailey's claim because it did not even cover the time period of her employment. In addition, there were numerous factual circumstances that were unique to Gailey; thus, the facts surrounding another person's termination would be of limited benefit to her claim. The Court pointed out that because the EEOC was in possession of UPMC's policies, it was able to contend that they facially violated the ADA without the personal identity information being sought in the subpoena.

***EEOC v. Loyola University Medical Center*, 2011 U.S. Dist. LEXIS 118286 (N.D. Ill. Oct. 13, 2011).** The EEOC initiated an investigation based on the EEOC charge of Pamela Degliomini, who alleged that Defendant had subjected her to medical tests and that she had been discriminated against based on a disability in violation of the ADA. Degliomini was required to submit to a "fitness for duty exam" ("FDE") which consisted of a blood test, a breath alcohol test, and a medical exam. *Id.* at \*1-2. The EEOC served Defendant with a subpoena seeking information on every individual subjected to an involuntary FDE during the relevant period. Defendant resisted the subpoena, and the EEOC brought a lawsuit seeking enforcement of its subpoena. As an initial matter, the EEOC argued that Defendant had waived any objections to the subpoena because it failed to assert any objection in the five-day time period for raising objections set out in 29 C.F.R. § 1601.16(b), the regulation governing the procedures for employers to file a petition to revoke or modify an EEOC subpoena. The Court noted that Defendant sent the EEOC a letter stating that it would not produce the material requested on advice of counsel nearly three weeks after being served with the subpoena. The Court observed that this was not the first time that Defendant had objected to the EEOC's requests for information in the course of the investigation. In its response to the EEOC's initial request, Defendant stated that it was prohibited from disclosing confidential medical information under federal and state confidentiality laws. Moreover, when the EEOC subsequently issued a subpoena for that information, Defendant reasserted its objections. The Court concluded that absent any established case law on this precise issue, and due to the sensitivity of the information requested, it was disinclined to rule on the motion based on Defendant's procedural shortcomings. *Id.* at \*7. Furthermore, the Court reasoned that although Defendant did not follow the procedural requirements of 29 C.F.R. § 1601.16(b), it nevertheless gave notice to the EEOC of its objections on two separate occasions. Defendant asserted that the confidential patient information requested by the EEOC was not relevant to the underlying charge. The Court noted that although the charge itself provided very limited information about the alleged

discrimination, the EEOC provided more detail in its brief into the specific nature of the charge, explaining that Degliomini alleged a violation of § 102(d)(4) of the ADA. The Court held the medical records of other employees would shed no light whatsoever on whether the FDE given to Degliomini was related to the performance of her professional obligations and therefore the information sought by the EEOC was not relevant to her underlying charge. The EEOC contended that the information sought was relevant to whether Degliomini had been singled out for an FDE based on her disability, as well as whether she was subjected to different medical tests than other similarly-situated employees. The Court rejected the EEOC's position because the information it requested was not directed to obtaining information regarding individuals with the same position or similar duties as Degliomini; rather, it sought the highly sensitive medical information of every employee that was required to submit to an FDE. The Court held that it would not enforce the subpoena and denied the EEOC's administrative enforcement request.

**Editor's Note:** Most courts hold employers to the five-day deadline for objecting to an EEOC administrative subpoena. The decision in *EEOC v. Loyola University Medical Center* is one of the rare cases where the Court deemed the employer's failure to comply with the five-day period in 29 U.S.C. § 1601.16 as non-dispositive.

### C. Employer's Use Of Subpoena

***EEOC v. United Galaxy*, 2011 U.S. Dist. LEXIS 103398 (D.N.J. Sept. 13, 2011).** The EEOC brought an action on behalf of Gurpreet Kherha alleging religious discrimination by Defendant in violation of Title VII of the Civil Rights Act of 1964. Defendant served a subpoena on the Massachusetts School of Law at Andover seeking all documents relating to Kherha's enrollment at the Law School. The EEOC moved to quash the subpoena on the grounds that Defendant failed to provide prior notice of the subpoena as required by Rule 45(b)(1), and as the subpoena was overbroad and sought irrelevant and confidential information. The Court noted that generally, a party to a lawsuit does not have standing to quash a subpoena served on a non-party unless the party seeking to challenge a subpoena claims a personal right or privilege regarding information sought by the subpoena. The Court thus denied the motion, finding that the EEOC lacked standing to bring the motion to quash because Defendant served the Law School, a non-party, and not the EEOC directly, and the EEOC did not assert any claim of personal right or privilege regarding the subpoenaed documents. *Id.* at \*5. Although the EEOC contended that certain documents sought by Defendant were confidential, the Court concluded that the EEOC failed to articulate what privilege may be breached. Notably, Kherha, on whose behalf the EEOC brought the motion, had been silent about the subpoena. Finally, the Court reasoned that it was well within the Law School's rights to move to quash the subpoena if it deemed the requested documents irrelevant, confidential, or unduly burdensome to produce; instead, as the Law School produced the documents requested, the EEOC's motion was without merit.

## III. PROCEDURAL AND JURISDICTIONAL ATTACKS ON EEOC PLEADINGS

### A. The Impact Of *Twombly* Pleading Standards

***EEOC v. Global Horizons, Inc.*, 2011 U.S. Dist. LEXIS 127734 (D. Haw. Nov. 2, 2011).** The EEOC brought an action alleging that Defendants engaged in a pattern or practice of discrimination when they subjected Asian workers to harassment, disparate treatment, retaliation, and constructive discharge on the basis of their national origin and race. The EEOC

alleged that Defendant Global Horizons, Inc., with the help of the agricultural companies and farms with which it contracted (the “Farm Defendants”), targeted economically vulnerable Asian men from Thailand and promised them working conditions that complied with U.S. law in exchange for expensive recruitment fees. After their transport to Hawaii, Global allegedly harassed and intimidated the workers on a regular basis and threatened them with deportation, arrest, suspension, and/or physical violence. The EEOC also alleged that Global unlawfully confiscated the workers’ identification documents and subjected them to uninhabitable housing, insufficient food and kitchen facilities, inadequate pay, and workplace harassment. The EEOC alleged that these intolerable working conditions created a hostile work environment and ultimately resulted in constructive discharge. In 2010, a grand jury indicted various employees of Global on charges of human trafficking. Pursuant to the request made by the prosecution team in the criminal case, the EEOC filed a motion to stay its civil case and discovery pending resolution of the criminal case. The Farm Defendants objected to the stay. Global had not appeared in the EEOC’s civil case, and the Farm Defendants argued that the EEOC’s civil case should not be stayed. The Court granted the stay request in part. The EEOC contended that the substantial overlap between the criminal case against Global as well as the opportunity for Global’s employees to abuse the broad scope of civil discovery to gain an improper advantage in the criminal proceedings weighed in favor of the stay. The Court noted that in *Keating v. Office of Thrift Supervision*, 45 F.3d 322 (9th Cir. 1995), the Ninth Circuit formulated factors to consider for granting a stay of civil proceeding, including: (i) the interest of Plaintiffs in proceeding expeditiously with the litigation, and potential prejudice to Plaintiffs of a delay; (ii) the burden that a civil litigation may impose on Defendants; (iii) the Court’s convenience in the management of its cases; (iv) the interests of parties not part of the civil litigation; and (v) the interest of the public in the pending civil and criminal cases. Applying the *Keating* factors, the Court noted that as none of the criminal Defendants were named as Defendants in the EEOC’s action, their rights were not implicated in the civil proceedings. As the EEOC’s complaint alleged events that occurred as far back as 2003, some of the Farm Defendants had already closed down their business and had since let go of their former employees. The Court found that the Farm Defendants would be caused undue hardship in presenting evidence if the EEOC’s civil case was delayed. The Court determined that the burden that a civil proceeding may impose on the criminal Defendants – Global and its employees – was unclear and speculative at best. *Id.* at \*20. Furthermore, the Court determined that the Farm Defendants “have a substantial interest in proceeding expeditiously with this litigation . . . [given] the seriousness of the discrimination allegations and the substantial publicity surrounding both the civil and criminal case . . .” *Id.* at \*19. Accordingly, the Court denied the EEOC’s motion to stay with respect to the Farm Defendants, but granted it with respect to Global only (noting that Global could lift the stay when and if it ever filed an appearance in the EEOC’s civil case). *Id.* at \*23. The Court also granted the Farm Defendants’ motion to dismiss based on the EEOC’s failure to allege sufficient facts underlying its Title VII theories of liability against them. Essentially, the EEOC based its claims on a joint employer theory, which the Court noted was subject to an economic reality analysis with the other entities working with Global in employing the workers. The Court observed that the allegations in the complaint failed to demonstrate an existence of an employment relationship because the Asian workers were all contracted by Global. The Farm Defendants argued that, in essence, the EEOC was attempting to package the criminal law human trafficking claims against Global into civil Title VII allegations against the Farm Defendants due to their contractual relationships with Global. The Court rejected the EEOC’s case theory, and held that “there is a complete paucity of factual allegations” that the Farm Defendants knew or should have known of Global’s conduct. *Id.* at \*37. Accordingly, the

Court concluded that the EEOC failed to state a claim under Title VII. *Id.* at \*38-39. As the Court held that the EEOC's allegations of the alleged wrongful conduct were insufficient, it dismissed the EEOC's complaint with leave to amend.

**Editor's Note:** The ruling in *EEOC v. Global Horizons, Inc.* is noteworthy in two respects. It is one of the few rulings ever to discuss the interrelationship between a criminal case and a related EEOC lawsuit in terms of a stay of litigation sought by the EEOC. In addition, the EEOC's lawsuit is one of its high-profile attempts to use Title VII to combat alleged human trafficking, and the Court's ruling in dismissing the EEOC's theories casts doubt on the Commission's attempt to use its enforcement powers in this context.

***EEOC v. United Parcel Service, Inc.*, 2011 U.S. Dist. LEXIS 111464 (N.D. Ill. Sept. 28, 2011).**

The EEOC brought an action on behalf of Trudi Momsen, a former employee of Defendant, alleging that Defendant violated the ADA by permitting her only a twelve-month leave of absence and failing to provide her with reasonable accommodation for her disability. The Court previously dismissed the complaint for failure to plead sufficient facts that Momsen was qualified to perform the essential functions of the job with or without reasonable accommodation. The EEOC then filed a first amended complaint asserting claims on behalf of Momsen as well as another employee, Mavis Luvert, and a group of unidentified individuals with disabilities who were subjected to Defendant's allegedly unlawful employment practices. Defendant did not seek dismissal of the claims asserted on behalf of Momsen and Luvert, but moved to dismiss the EEOC's claims on behalf of the group of unidentified claimants on the grounds that the EEOC had not pleaded sufficient facts regarding their alleged disabilities, the leaves of absence they were afforded, or the reasonable accommodations that Defendant purportedly failed to provide for them. The Court granted the motion. Defendant argued that the complaint did not satisfy the pleading standards of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), because it included only conclusory statements regarding the unidentified claimants' qualification for protection under the ADA. Defendant contended that the EEOC must provide some specific evidence to support its claims, as required by *EEOC v. Concentra Health Services, Inc.*, 496 F.3d 773, 781 (7th Cir. 2007). The EEOC, in turn, asserted that its allegations on behalf of the unidentified claimants had put Defendant on notice of these claims. The Court found that the EEOC's first amended complaint used the same conclusory language with respect to the unidentified claimants that the Court concluded had failed the *Twombly* standard in *EEOC v. SuperValu, Inc.*, 674 F. Supp. 2d 1007, 1011 (N.D. Ill. 2009). The EEOC also cited a number of cases alleging sufficient violations of Title VII of the Civil Rights Act of 1964 in an effort to show that its complaint satisfied the *Twombly* requirements. The Court pointed out that discrimination on the basis of disability must be pled with adequate detail insofar as Plaintiff is qualified to perform the essential function of the job with or without reasonable accommodation. The Court also rejected the EEOC's further contention that it would be prejudiced in bringing future claims if it were required to identify all claimants before filing such claims, noting that there was a considerable difference between stating a plausible claim with sufficient detail to provide fair notice and identifying every single potential claimant. *Id.* at \*13. Moreover, the Court reasoned that the EEOC's powers and duties supported the view that it both could and should do better in presenting its allegations on behalf of unidentified claimants, so that it sets forth in more detail the factual basis for their ADA claims. Finally, the Court reasoned that although the EEOC may not have to identify the claimants for whom it is representing to be certified as a class under Rule 23 (since Rule 23 certification standards do not apply to EEOC lawsuits), it still must include sufficient facts to put Defendant on notice of the nature of the claims and must state a plausible claim for relief. *Id.* at \*16.

## **B. The Proper Scope Of An EEOC Lawsuit Based On The Commission's Administrative Investigation**

***EEOC v. Dillard's Inc.*, 2011 U.S. Dist. LEXIS 76206 (S.D. Cal. July 14, 2011).** Corina Scott, a former employee, filed a charge with the EEOC alleging disability discrimination in violation of the ADA. The EEOC notified Defendant of the claim and initiated an investigation. The charge of discrimination indicated that Scott was not filing on behalf of others. The EEOC then issued a request for information seeking termination documents and other information for 32 store associates Defendant previously identified, additional information regarding Scott, and information regarding Brittany Rios Kim, a former employee whom Defendant had not previously identified. Over the course of an approximately two-year investigation, the EEOC sought no additional information. Subsequently, the EEOC issued a cause determination letter, stating that reasonable cause existed to believe that Scott and at least one similarly-situated individual were subjected to disability-related/medical inquiries in violation of the ADA and discharge in retaliation for having opposed and/or complained about Defendant's policy. The EEOC began conciliation efforts, proposing to settle all monetary damages for Scott and identified class member Rios Kim. The conciliation offer did not seek or suggest a process for identifying other aggrieved individuals, similarly-situated individuals, or class members and it did not seek damages for a putative class. After settlement talks failed, the EEOC brought suit. Defendant moved to dismiss all of the EEOC's claims on behalf of individuals other than Scott and in the alternative to limit the EEOC's claims on behalf of current and former employees of its El Centro store. Defendant also sought to preclude as time-barred the EEOC's claims on behalf of Kim. Defendant argued that the EEOC's pre-litigation efforts did not provide sufficient notice that the scope of the potential claims against Defendant potentially extended nationwide. The EEOC argued that Defendant's motion should be denied because Rule 12(b)(1) does not permit partial dismissals, and because Title VII's pre-litigation requirements were not jurisdictional prerequisites, and therefore not subject to dismissal under Rule 12(b)(1). The Court observed that nothing in Rule 12(b)(1) required the Court to dismiss all or none of the EEOC's claims where only some claims lacked subject-matter jurisdiction. Moreover, dismissal of only those claims for which the Court lacks jurisdiction was appropriate, given the Court's obligation to dismiss claims for which it lacks subject-matter jurisdiction and the Court's inherent power to control its docket. The Court ruled that if Title VII's prerequisites are not jurisdictional, then they are elements of a claim under Title VII, and properly addressed on a Rule 12(b)(6) motion. Thus, the Court ruled that procedural formalities did not preclude the relief Defendant's sought. The Court framed the issue as whether the nature and scope of the EEOC's pre-litigation efforts were sufficient to put Defendant on notice that it potentially faced claims arising from a nationwide class of current and former employees. The Court agreed with Defendant, finding that except for one inquiry as to whether the policy in question was company-wide, the EEOC's investigation focused entirely on Defendant's El Centro store. Similarly, except for suggested changes to Defendant's company-wide disability discrimination policy, the EEOC's conciliation efforts focused on two individuals – Scott and Kim – both of whom worked at the El Centro store. Although communications from the EEOC to Defendant referred generically to other similarly-situated individuals, the EEOC provided no affirmative indication during its investigation or conciliation efforts that its allegations might result in nationwide claims on behalf of current and former employees. The Court found that the scope of the EEOC's pre-litigation efforts were sufficient to put Defendant on notice of possible claims on behalf of current and former employees of its El Centro store only. Accordingly, the Court denied Defendant's motion to the extent it sought to preclude the EEOC claims on behalf of all individuals other than Scott, but granted Defendant's motion to the extent it sought to limit the EEOC's claims to current and

former employees of the El Centro store. Defendant also sought to preclude claims brought on behalf of Kim, whose claims would have been time-barred. Stating that Title VII's time limits related to the filing of discrimination claims applied to the EEOC and considering that the EEOC made no claims suggesting equitable tolling of or any other applicable defenses, the Court found that Kim's claims were time-barred. Accordingly, the Court granted Defendant's motion to dismiss the EEOC's claims on Kim's behalf.

***EEOC v. JBS USA, LLC*, 2011 U.S. Dist. LEXIS 85868 (D. Colo. Aug. 4, 2011).** The EEOC filed an action on behalf of a group of current and former employees ("Plaintiffs-Interveners") alleging national origin, religious, and ethnic discrimination in violation of Title VII. Defendant filed a motion to dismiss a group of Interveners that sought to piggy-back on the claims of the original Plaintiffs-Interveners. The Court ordered Plaintiffs-Interveners to file a supplemental briefing on the ability of those Plaintiffs-Interveners who did not file charges of discrimination to rely on the single-filing rule. The Court opined that application of the single-filing rule required assessment of the content and time frame of the claims of both those individuals who filed charges and those who did not. *Id.* at \*4. The Court found that Plaintiffs-Interveners had provided the name of each intervener who did not file a charge of discrimination, their dates of employment, the names of their shifts, supervisors, and lines, and the properly exhausted charge upon which each Intervener intended to piggy-back. *Id.* at \*4-5. The Court found that these potential Plaintiffs-Interveners were similarly-situated to Plaintiffs-Interveners with properly exhausted charges, their claims arose out of the same discriminatory treatment, and allegedly occurred within the same time frame. *Id.* Further, each of the charges on which the Plaintiffs-Interveners sought to piggy-back gave Defendant notice of its class-wide nature. Accordingly, the Court determined that application of the single-filing rule was appropriate and denied Defendant's motion to dismiss as to Plaintiffs-Interveners who intended to piggy-back.

***EEOC v. Luihn Food Systems, Inc.*, 2011 U.S. Dist. LEXIS 106919 (E.D.N.C. Sept. 20, 2011).** The EEOC brought an action alleging that Defendant engaged in sexual harassment against four female employees and a class of similarly-situated female employees in violation of Title VII of the Civil Rights Act of 1964. Defendant, a franchisee of Kentucky Fried Chicken, owned several restaurants operating in North Carolina. The EEOC alleged that the class of female employees had been subjected to a sexually hostile work environment at the Duraleigh Road restaurant through the actions of a male co-worker. The amended complaint alleged that the four employees filed charges with the EEOC describing the co-worker's alleged conduct in the workplace and each employee notified her supervisor of his behavior. During discovery, the EEOC identified former employee Pamela Johnson as an additional individual who had been subjected to sexual harassment by the same co-worker. The EEOC's amended complaint had made no mention of Johnson, and she had never filed an EEOC charge. The EEOC admittedly never investigated her specific claim, never issued a cause determination regarding her claim, and never attempted to conciliate her specific claim with Defendant. *Id.* at \*3-4. As the EEOC had failed to satisfy these administrative procedures before pursuing Johnson's claim, Defendant moved for summary judgment as to the EEOC's claim for Johnson, arguing that the Court lacked subject-matter jurisdiction. The EEOC contended that its failure to investigate and conciliate the claims of all members of a class of aggrieved employees did not bar it from bringing suit on behalf of a class, when it had adequately conducted the administrative proceeding concerning similarly-situated employees. The Court agreed with the EEOC, and denied Defendant's motion for summary judgment. The Court relied on *EEOC v. American National Bank*, 652 F.2d 1176 (4th Cir. 1981), in which the Fourth Circuit held that despite this apparent cause-and-reconciliation requirement, the failure to identify all class members as part

of a cause determination or the failure to conciliate every class member's claim did not divest jurisdiction over a § 706 action brought by the EEOC involving such a claim. Thus, in this case, the Court concluded that the EEOC had complied with the statutory prerequisites to filing a § 706 action regarding the four employees named in its amended complaint. The Court noted that during conciliation efforts, the EEOC sought to settle the claims of the four employees, as well as the claims for at least one additional worker (not Johnson). The presence of this additional employee indicated that the EEOC maintained throughout conciliation that its claims related to the four charging parties and a class of similarly-situated female employees. *Id.* at \*14. In addition, the Court held that even though Johnson and the EEOC had not fulfilled the procedural prerequisites for her specific claim, it would allow the EEOC to proceed with Johnson's claim because her allegations were based upon the same actions of the same Defendant at the same store, during the same relevant time period as the claims of the four charging parties, and as it involved the same co-worker. *Id.*

### C. The Appropriate Statute Of Limitations For § 707 Claims Asserted By The EEOC

***EEOC v. Freeman*, 2011 U.S. Dist. LEXIS 8718 (D. Md. Jan. 31, 2011).** An African-American applicant filed a charge of discrimination with the EEOC in January of 2007 alleging that Defendant discriminated against him on the basis of his race, national origin, and sex when it used criminal history reports in its hiring process. Sometime between March and September of 2008, the EEOC expanded the scope of its administrative investigation to Defendant's entire hiring process, and notified Defendant of this by letter dated September 25, 2008. *Id.* at \*3. Subsequently, in September of 2009, the EEOC brought a lawsuit alleging that Defendant engaged in a nationwide pattern or practice discrimination against African-American, Hispanic, and male job applicants in violation of Title VII of the Civil Rights Act of 1964. Defendants moved to dismiss, arguing that Title VII precluded the EEOC from seeking relief for individuals who were subjected to an unlawful employment practice more than 300 days before the filing the administrative charge. The Court agreed, and dismissed all claims related to hiring decisions made more than 300 days before the filing of the original charge. *Id.* at \*4. Subsequently, Defendant moved for partial summary judgment on all claims that related to hiring decisions based on criminal history reports that were made more than 300 days before the date on which the EEOC notified Defendant that it had expanded its previous administrative investigation to Defendant's use of criminal history reports. The Court framed the issue as whether for claims of discrimination that were not included in the original EEOC charge, the "filing" date was the date of the filing of the original charge, or the date on which the EEOC notified Defendant that it was expanding its administrative investigation. The Court concluded that for claims not included in the original EEOC charge, the "filing" date was the date on which the EEOC notified Defendant that it was expanding its investigation to encompass the new charges. *Id.* at \*9. Accordingly, the Court granted Defendant's motion for partial summary judgment and dismissed all claims not included in the original EEOC charge made more than 300 days before notice was provided of the expanded investigation. In support of its conclusion, the Court cited *EEOC v. General Electric Co.*, 532 F.2d 359, 371-72 (4th Cir. 1976), where the Fourth Circuit held that the filing date was the date of notice to the employer for the purpose of determining back pay for charges expanded during the investigation. Similarly, the Court concluded that when *General Electric* was applied to the question of the relevant date for purposes of the 300-day time-bar in this case, the relevant date was the date of notice of the new charges, not the date of filing of the old charges. The Court disagreed with the EEOC's assertion that the plain language of Title VII required measuring the 300-day period from the

date of the initial charge, not the date notice was provided to the employer. The Court reasoned that the EEOC's right to expand the investigation without filing a new charge was a right carved out by case law and this interpretation was in accordance with that case law. The EEOC also argued that claims based on decisions made more than 300 days before the employer received notice of the expanded investigation were only precluded if the employer could demonstrate substantial prejudice from the delay in notification. The Court agreed with Defendant that there was obvious prejudice to an employer when its total liability increased due to the expansion of an investigation of which the employer was not made aware. The EEOC contended that the introductory paragraph of the original charge – wherein the employee stated that she was told she “would be hired, contingent on my passing a drug, criminal, and credit background check” – provided sufficient notice to Defendant that the employee's criminal history claims were at issue. *Id.* at \*14. The Court rejected the EEOC's position, stating that the reference to use of a criminal history check was included merely as relevant background information. The EEOC also contended that its policy pronouncements regarding the use of criminal history information in employment decisions put Defendant on notice. The Court disagreed on the grounds that “the EEOC's general statements of its view of the law – which do not have the status of law – cannot substitute for notice to an employer that it is charged with, or is being investigated for, a violation.” *Id.* at \*17. Accordingly, the Court granted Defendant's motion for partial summary judgment.

**Editor's Note:** The decision in *EEOC v. Freeman* applies the statute of limitations from § 706 of Title VII in a defense-oriented fashion. The Court rejected the EEOC's position that its ability to assert pattern or practice claims is unencumbered by a statute of limitations. The ruling provides employers with new ammunition against the EEOC in terms of asserting a statute of limitations defense, particularly where the Commission delays in disclosing the parameters of an expanded systemic investigation encompassing new claims or theories (since, according to *EEOC v. Freeman*, the statute of limitations begins to run from the date the EEOC provides the employer with such notice).

***EEOC v. Kaplan Higher Education Corp.*, 790 F. Supp. 2d 619 (N.D. Ohio 2011).** The EEOC brought an action alleging that Defendant engaged in a nationwide pattern or practice of race discrimination against African-American job applicants and current employees in violation of Title VII of the Civil Rights Act of 1964. The charging party, Shandria Nichols, had filed a charge of discrimination with the EEOC, alleging that Defendant hired her on February 5, 2009, and then discharged her on February 15, 2009, because of the results of a credit history check. She alleged she had been discriminated against because she was African-American and that African-American individuals as a class had been discriminated against through the use of credit histories. The EEOC filed its complaint on December 21, 2010, alleging that since at least January 2008 Defendant had engaged in unlawful employment practices at its facilities in the United States. The EEOC asserted that the use of credit history information as a selection criterion in hiring and discharge had a significant disparate impact on African-American job applicants and current employees and that the information was not job-related or necessary for Defendant's business. Defendant moved to partially dismiss the complaint based on Title VII's statute of limitations, arguing that the EEOC was barred from seeking any relief from employment decisions that occurred more than 300 days prior to the filing of the charge, or before May 2, 2008. The Court granted the motion. The EEOC argued that its right to remedy statutory violations did not depend on the same 300-day limitations period that applies to individual Plaintiffs under § 706 of Title VII. It argued that it did not proceed as a representative for the person who filed a charge; instead, it proceeded primarily in the public interest, and

applying the time limit of § 706 to a pattern or practice suit under § 707 was contrary to Congress's intent for the EEOC to have primary responsibility to root out systematic discrimination in the workplace. The EEOC argued that under § 707 there is no time period limiting the scope of remedies that it could use to redress a pattern or practice of discrimination, and that other case law authorities had held that actions brought by the EEOC were not subject to the time limitation of § 706(e). Disagreeing with the EEOC, the Court held that the time limitation in § 706(e)(1) was applicable in this case. The plain language of § 707(e) authorized the EEOC to investigate and act on a charge of a pattern or practice of discrimination, and mandated that such actions be taken in accordance with the procedures of § 706. *Id.* at 623. Section 706 requires a charge to be filed within 300 days after the allegedly unlawful employment practice occurred. Thus, the Court concluded that the EEOC could only act where a charge of discrimination had been filed, and such charges must be filed within 300 days of the unlawful employment practice. The Court further held that no exception existed in the statute to allow the EEOC to recover damages for individuals whose claims were otherwise time-barred. Although the EEOC argued that the time limitation of § 706(e)(1) did not apply to pattern or practice suits under § 707, the Court disagreed with the EEOC's position. Additionally, the Court found that the EEOC's ability to root out systematic discrimination in the workplace was not hampered by application of the statute of limitations in § 706(e)(1) because the time limit would primarily prevent the EEOC from recovering monetary damages on behalf of individuals with stale claims. The EEOC further argued that it had the power to bring a pattern or practice suit under § 706, and that where a pattern or practice of discrimination was proven under that section, all unlawful acts that were part of that pattern or practice – both preceding and following the 300-day charge filing limitation – were actionable. The EEOC's position was that Defendant's practice of using credit history as a selection criterion in its hiring and firing decisions was a continuing violation because the event which triggered liability was the statistically significant impact of Defendant's policy manifested over time, not any discrete failure to hire or discharge. The EEOC likewise argued that Defendant's allegedly discriminatory policy was more analogous to a hostile work environment claim than to a series of discrete acts, because the pattern or practice of discrimination produced by the policy would not become apparent to most untrained observers until the employer had implemented it with sufficient frequency to permit assessment of its class-wide adverse impact. The Court found that the continuing violations doctrine did not apply to the EEOC's claim, because refusing to hire and terminating employment were discrete decisions. *Id.* at 625. Even in a pattern or practice case such as this, the discrete decisions to refuse to hire and to terminate employment could not be linked together to create a continuing violation. Each refusal to hire or termination occurred on a readily-identifiable certain date, and was subject to the time limitation of § 706(e)(1). The Court noted that the charging party in this case, while making allegations against Defendant, identified an instance of alleged race discrimination and the date that it occurred. Thus, the Court found that this case was not like a hostile work environment claim, where instances of individual conduct may not be actionable on their own but instead must be aggregated over days or even years to constitute an unlawful employment practice. Accordingly, the Court concluded that the continuing violations exception to the time limitation under § 706(e)(1) did not apply to the EEOC's claim. For these reasons, the Court dismissed those aspects of the EEOC's lawsuit seeking damages prior to May 2, 2008.

**Editor's Note:** The ruling in *EEOC v. Kaplan* is one of the most defense-oriented statute of limitations decisions in 2011. It applies the private party statute of limitations in § 706 of Title VII to the EEOC's ability to prosecute a pattern or practice lawsuit under § 707 of Title VII.

**D. The Scope Of An Employer's Defense Based On The EEOC's Breach Of Its Duty To Engage In Good Faith Conciliation Before Filing A Lawsuit**

***EEOC v. JP Morgan Chase Bank*, 2011 U.S. Dist. LEXIS 90789 (S.D. Ohio July 6, 2011).**

Aimee Doneyhue, a mortgage consultant employed with Defendant, filed two individual charges of discrimination with the EEOC alleging discrimination on the basis of sex, and harassment by Ray Wile, Defendant's Assistant Vice President, in violation of Title VII. The EEOC conducted an investigation and issued a cause determination. The parties were unable to resolve their dispute on the administrative level. Consequently, the EEOC filed a complaint alleging that Defendant violated Title VII when it engaged in unlawful employment practices, which deprived Aimee Doneyhue and similarly-situated current and former female employees of equal employment opportunities. Defendant moved for partial summary judgment on all of the EEOC's claims brought on behalf of female employees who did not report to Ray Wile, alleging that such claims exceeded the scope of the EEOC investigation, disclosure, and conciliation efforts. Defendant argued that the EEOC did not investigate any class-wide claims relating to employees working outside Wile's team. The Court found Defendant's arguments unpersuasive. The Court reasoned that the EEOC's investigation was not limited to those who reported to Wile and had instead expanded to inquire into whether there had been sexual discrimination of other females employed in Doneyhue's department. The EEOC's investigator testified that she investigated Doneyhue's allegation of a sexually-charged work environment, and that witnesses corroborated her allegation. The EEOC found evidence that male mortgage consultants received preferential treatment by managers as it related to incoming calls at the sales department, thus showing that the investigation extended beyond Wile's team. Defendant argued that the EEOC did not provide adequate notice of the nature of the charges against it, and therefore it was not on notice of the scope of the potential claims. The Court disagreed, pointing out that while the initial requests for information served by the EEOC appeared to limit the investigation to Wile's team, Defendant was subsequently informed that Doneyhue had asserted class allegations of disparate treatment. Subsequently, the EEOC also requested additional information that reflected the fact that it had decided to expand its investigation beyond Wile's team to include an investigation of other managers in the department, including the method of call allocation as it related to Doneyhue's job classification. The Court also found unpersuasive Defendant's argument that the EEOC did not make reasonable efforts to conciliate. The EEOC's letter of determination advised Defendant that it had found evidence that Doneyhue "and a class of similarly-situated female employees were repeatedly subjected to a hostile work environment based on their sex and were denied equal terms and conditions of their employment." *Id.* at \*27. The EEOC further advised Defendant that it would attempt to resolve the matter through informal conciliation. The EEOC presented an offer to Defendant, which Defendant effectively rejected. Subsequently, the EEOC indicated it was not amendable to reconsidering its determination twice and requested Defendant's best offer. Defendant made an offer that the EEOC rejected. The Court determined that Defendant presented no evidence or law to the Court that would necessitate a characterization of the EEOC's attempt at conciliation to be anything other than made in good faith. Thus, the Court concluded that the EEOC provided Defendant a meaningful conciliatory opportunity. As a result, the Court denied Defendant's motion for summary judgment.

**Editor's Note:** The decision in *EEOC v. JP Morgan Chase Bank* endorses the EEOC's typical strategy – assert huge monetary and extensive injunctive relief settlement demands without disclosing much in the way of evidence underlying the claims – relative to pre-lawsuit settlement negotiations. The ruling gives the EEOC the benefit of the doubt concerning its duty to notify an

employer of the scope of its investigation, and adopts an exceedingly broad view of what satisfies the EEOC's duty to conciliate a matter in good faith before filing a lawsuit.

***EEOC v. Crye-Leike, Inc.*, 2011 U.S. Dist. LEXIS 85752 (E.D. Ark. Aug. 3, 2011).** The EEOC brought an action on behalf of a group of African-American applicants who were allegedly denied employment on the basis of their race in violation of 42 U.S.C. § 1981a and Title VII of the Civil Rights Act of 1964. Defendants filed a motion for summary judgment based on the failure of the EEOC to conciliate in good faith prior to filing suit. The Court denied the motion. While the EEOC was investigating the alleged charges, one Intervening Plaintiff filed a class action lawsuit against Defendants in Arkansas – called *Robinson, et al. v. Crye-Leike, Inc., et al.*, Case No. 09-CV-3562 – alleging that she and others were not hired based on their race. Defendants denied having any discriminatory employment practices. Defendants then filed a third-party complaint in the *Robinson* suit against the named Plaintiffs for common law indemnity and breach of fiduciary duty and good faith. The applicants had filed charges of discrimination with the EEOC alleging that Defendants retaliated against them by filing the third-party complaint in the *Robinson* suit. The EEOC issued a proposed conciliation agreement that required Defendants to dismiss its third-party claims and provide each charging party with compensatory damages and attorneys' fees. Defendants rejected the EEOC's proposed conciliation agreement and the EEOC issued notices of conciliation failure, so as to satisfy the pre-conditions to filing suit. Subsequently, Defendants and the charging parties' attorneys agreed to a global settlement in the amount of \$415,000, which settled the charges of the named Plaintiffs in the *Robinson* suit, and in *Fowlkes v. Crye-Leike, Inc.*, 2010 U.S. Dist. LEXIS 24553 (E.D. Ark. Mar. 16, 2010), for unlawful termination. However, the settlement was contingent on the EEOC dismissing all charges and investigations against Defendants. In the meantime, the EEOC issued final determinations of charges and served Defendants with proposed conciliation agreements. Defendants and the charging parties rejected the EEOC's proposed conciliation agreements and jointly requested the EEOC to consider the conciliation agreements they had previously submitted, which had been prepared after negotiating and settling all their disputes. The EEOC rejected the proposal and demanded that the parties return to conciliation. Defendants and the charging parties proposed mediation. After mediation efforts failed, the Court considered the joint motion for dismissal. Defendants contended that they and the charging parties were willing to abide by the terms of the joint settlement agreement but the EEOC was an impediment to resolving the charges that formed the basis of the EEOC's suit, as well as the *Robinson* suit and the *Fowlkes* suit. Defendants further contended that the EEOC failed to fulfill its statutory duty to conciliate in good faith prior to filing this action, and acted in a grossly arbitrary and unreasonable manner in refusing to acknowledge, respond to, discuss, or negotiate the terms of the joint settlement proposed by the parties. The Court noted that the EEOC admitted that the conciliation could have been handled better by sending a response explaining why Defendants' response to the conciliation proposal was inadequate and a letter explaining that it could not participate in any resolution of the charges for which it had issued no cause determinations. *Id.* at \*26. The EEOC also admitted that failure to include the class claims in its conciliation efforts was an oversight on its part. *Id.* at \*26-27. The Court, however, refused to grant summary judgment and dismiss the action, stating that such a step would be too draconian. *Id.* at \*27. The Court directed Defendants to apprise the Court whether they desired to return to conciliation or whether they deemed conciliation complete for the Court to issue a scheduling order setting a trial date.

## E. The Viability Of Various Affirmative Defenses To EEOC Pattern Or Practice Claims

***EEOC v. Kelley Drye & Warren, LLP*, 2011 U.S. Dist. LEXIS 80673 (S.D.N.Y. July 25, 2011).** The EEOC brought an action against a major law firm pursuant to the ADEA, alleging that Defendant's compensation system unlawfully discriminated against Eugene D'Ablemont and other attorneys who continued to practice after reaching the age of 70, as it under-compensated them solely on the basis of age. D'Ablemont held equity partner status with Defendant until he turned 70 years of age and entered into "life partner status" in accordance with Defendant's Partnership Agreement. *Id.* at \*2. The EEOC moved for partial summary judgment as to Defendant's nineteenth affirmative defense seeking a set-off of any damages to which D'Ablemont may be entitled based on payments to him by third-parties, allegedly excessive client development funds provided to him during the relevant period, and the value of certain legal services D'Ablemont received from the firm. Defendant asserted that these sums constituted forms of compensation that D'Ablemont received during the period of alleged discrimination. First, regarding set-off of damages against third-party payments to D'Ablemont, the Court noted that two long-standing firm clients, for whom D'Ablemont had been lead counsel, offered to enter into third-party retainer agreements with him whereby he would remain as lead counsel and receive payments directly from them. D'Ablemont entered into the proposed retainer agreements and received payments from the clients, as well as bonus or honorarium payments from Defendant. The Court found that in light of factual disputes concerning the approval of the arrangements, the relationship between the payments and bonus compensation arrangements, Defendant's normal treatment of third-party payments in connection with partner compensation, and similar matters, the EEOC failed to sustain its burden of demonstrating that it was entitled to judgment in its favor. Second, the Court granted the EEOC's motion in part insofar as it sought dismissal of the affirmative defense concerning allegedly excessive client development funds. Defendant provided its partners with client development allowances for the purpose of promoting business development with existing and prospective clients and paying certain other business-related expenses. The record indicated that Defendant voluntarily paid the allegedly excessive funds at D'Ablemont's request, as a category of business expense provision that Defendant did not treat as compensatory. The Court thus found that the record provided no basis upon which a rational fact-finder could conclude that allegedly excessive client development amounts should properly be set-off from a damage award as compensatory payments. *Id.* at \*9. Finally, the Court granted the EEOC's motion in part insofar as the affirmative defense sought an off-set of the written-off legal expenses. The Court noted that D'Ablemont assisted his son in pursuing a legal malpractice claim against a firm he had hired to represent his son in a real estate matter. D'Ablemont appeared *pro se* until trial, when he engaged the services of another partner at Defendant's firm. Defendant wrote off the fees for the legal services and D'Ablemont was never billed for the work. D'Ablemont also used Defendant's legal services for assistance with a patent application and was granted a write-off of those fees as well. Defendant argued that the value of the legal services it provided to D'Ablemont should be off-set against any future damages award, as it was neither Defendant's policy nor standard practice that D'Ablemont or any other partner received for free services of the type provided to D'Ablemont and his family members. *Id.* at \*7. The Court concluded that Defendant had offered no evidence from which a rational fact-finder could conclude that the write-offs were compensatory transactions.

## F. The Propriety Of Late Amendments To EEOC Complaints

***EEOC v. GAP, Inc.*, 2011 U.S. Dist. LEXIS 148348 (E.D. Mich. Dec. 27, 2011).** The EEOC, on behalf of Wayne Cook, a former store manager, brought an action alleging that Cook was terminated in violation of the ADA because he had glomerulonephritis, a kidney disease, which the EEOC alleged causes frequent bathroom trips. The EEOC subsequently moved to amend the complaint seeking to substitute glomerulonephritis for HIV positive. The Court denied the motion to amend. The Court noted that Cook filed his charge with the EEOC in March of 2008, the EEOC filed its complaint on November 16, 2010, and it filed the motion to amend on July 28, 2011. The EEOC stated that on June 22, 2011, it spoke with its retained nephrology expert, who allegedly stated that Cook's frequent intestinal problems were not attributable to glomerulonephritis, but rather a result of Cook's treatment for HIV. The EEOC claimed that it was justified in waiting to seek to amend because it did not know that the HIV treatment was the cause of Cook's limitations until it spoke with the nephrology expert on June 22, 2011. The EEOC further argued that Defendant was, or should have been aware of Cook's HIV status because: (i) it was clear that glomerulonephritis was often secondary to HIV, as a cursory internet search would reveal; and (ii) one of Defendant's former assistant managers had said that after Cook took leave it was fairly common knowledge at the company that he was HIV positive. *Id.* at \*4. The Court found that the EEOC's explanation for its failure to mention HIV in its initial complaint was unconvincing because if Cook's HIV status should have been obvious to Defendant, it should have been obvious to the EEOC when it began its investigation three years ago. The Court acknowledged that the EEOC was not seeking to assert "a new legal claim," but to amend "the underlying factual basis" of its ADA claim; however, the Court characterized the new facts as "not minor, insignificant facts." *Id.* at \*6. The Court thus rejected the motion to amend primarily because of the unsatisfactory reasons for the delay. Moreover, the Court observed that an amendment so late would prejudice Defendant and change the focus and complexion of this case, and would require not only new additional discovery, but would fundamentally change the defense theory and strategy.

## IV. DISCOVERY IN EEOC CASES

### A. The Proper Scope Of Discovery In An EEOC Lawsuit

***EEOC v. Smith Brothers Truck Garage, Inc.*, 2011 U.S. Dist. LEXIS 2774 (E.D.N.C. Jan. 11, 2011).** The EEOC brought an action on behalf of Stephen Kerns alleging that Defendant violated the ADA when it terminated Kerns. Defendant served interrogatories and document requests seeking information related to Kerns' medical history and issued subpoenas to non-party medical providers seeking Kerns' medical records. The EEOC subsequently moved to quash Defendant's subpoenas. Because the EEOC was seeking compensation for Kerns for non-pecuniary losses such as emotional distress, inconvenience, loss of enjoyment of life, humiliation, and loss of self-esteem, the Court held that Defendant was entitled to explore Kerns' claimed emotional distress damages, including other potential causes that might be found in his medical records. In order to protect Kerns' privacy interest in his medical history, the Court found that it would be appropriate to limit the time frame to a relevant period of two years prior to the incident at issue, which occurred in January 2006. The Court granted the EEOC's motion for a protective order, in part, to limit the documents produced by the medical providers to the relevant time period. The Court also rejected the EEOC's argument that Kerns had a privacy right for his medical record pursuant to HIPAA that outweighed Defendant's need for the records. The Court reasoned that the EEOC had made Kerns' medical history relevant

and discoverable by seeking damages for emotional distress. *Id.* at \*7. Because the Court had already restricted the time period for which the medical records were discoverable, the Court directed the parties to confer and submit a proposed protective order in order to further protect Kerns' privacy interest in his medical record. The Court also ordered the medical providers not to produce the subpoenaed documents prior to the entry of such protective order. Finally, the Court held that Defendant's discovery was neither cumulative nor duplicative. The Court noted that Defendant essentially asked for all documents related to Kerns' healthcare since January 1, 2003, and the EEOC had agreed to produce records it believed were related to Kerns' treatment. The EEOC, however, neither agreed to produce the identical documents Defendant sought from the medical providers, nor asserted that it possessed all of Kerns' records that the medical providers would produce. The Court thus concluded that the EEOC did not show that the discovery request caused it or Kerns any inconvenience, burden, or expense.

***EEOC v. McGee Brothers Co., Inc., Case No. 10-CV-142 (W.D.N.C. Mar. 23, 2011).*** The EEOC, on behalf of a class of Hispanic employees, brought an action alleging hostile work environment. The EEOC commenced an investigation of the charge of discrimination, upon the timely filing of a charge by Jose Avelar, Defendant's employee. After receiving documents and interviewing witnesses, the EEOC issued a letter of determination to Defendant stating that its investigation supported the charging party's national origin harassment claim. The EEOC then invited Defendant to participate in a conciliation conference, which it declined. The EEOC then issued a notice of conciliation failure. The EEOC subsequently filed suit. Because Defendant argued that the EEOC did not engage in good faith conciliation as required under Title VII prior to filing a complaint alleging hostile work environment, the Court ordered a temporary stay of the case to provide the parties an additional opportunity to conciliate. Although the parties' meeting, pursuant to the Court's order, evolved into a traditional judicial settlement conference, they were ultimately unable to reach an agreement. The EEOC filed a motion *in limine* to exclude evidence and testimony relating to conciliation. The Court granted the EEOC's motion, finding that the additional opportunity given to the parties failed. The Court held that because the issue presented a potential bar to consideration of the merits of a Title VII claim filed by the EEOC, it was a question solely for the Court. The Court stated that it was unaware of any case law supporting the proposition that the alleged failure of the EEOC to conciliate in good faith presented a question for the jury rather than the Court. Even assuming that the jury could consider the EEOC's conciliation effort, the Court held that it was unclear as to how such evidence could survive the prohibition against admission of compromise and compromise negotiations as provided under Rule 408 of the Federal Rules of Evidence.

***EEOC v. Evans Fruit Co., Inc., Case No. 10-CV-3033 (E.D. Wash. Mar. 24, 2011).*** The EEOC brought a pattern or practice action on behalf of a group of female employees, as well as on behalf of a class of unnamed similarly-situated female employees, alleging that Defendants subjected them to a hostile work environment because of sex. The EEOC sought injunctive relief, compensation for past and future pecuniary and non-pecuniary losses, and punitive damages. Defendant brought a motion for a declaration relative to certain burdens of proof in terms of what the EEOC must prove to recover on behalf of the allegedly injured employees, as well as for establishment of a cut-off-date to add parties. The Court determined that for each female employee, "it will be necessary for the EEOC to prove the employee was subjected to verbal or physical conduct of a sexual nature, that the conduct was unwelcome, and that the conduct was sufficiently severe or pervasive to alter the terms and conditions of her employment and create an abusive work environment." *Id.* at 3. The Court opined that it intended to allow the EEOC to introduce evidence – on behalf of the EEOC's claim for any

employee who was alleged to have been personally subjected to sexual harassment – of the alleged harasser’s sexual misconduct toward others, even if the other acts occurred outside the employee’s presence. *Id.* at 5. The Court indicated that it would take a “totality of circumstances” approach to determine the viability of the EEOC’s sexually hostile work environment claims, rather than limiting the EEOC to proof of alleged sexual harassment occurring only to the employee in question. *Id.* The Court also determined that the EEOC should identify any additional similarly-situated employees to participate in the litigation as “additional class members.” *Id.* at 6. The Court required that any such “additional class members” be identified by the EEOC in an amended complaint no later than November 29, 2011, the date established in the scheduling order for amending pleadings or adding named parties. The Court opined that this would allow Defendants sufficient time to conduct adequate discovery with respect to any additional similarly-situated employees identified by the EEOC.

***EEOC v. JP Morgan Chase Bank, N.A., 2011 U.S. Dist. LEXIS 34416 (S.D. Ohio Mar. 30, 2011).*** The EEOC brought an action alleging that Defendant subjected female employees to terms and conditions that differed from those of similarly-situated male employees, in violation of Title VII of the Civil Rights Act of 1964. The charging party, Aimee Doneyhue, worked as a mortgage consultant/home loans sales originator in the sales department of Defendant’s Ohio facility. Following Doneyhue’s termination of employment with Defendant, she filed a charge with the EEOC, alleging that Defendant engaged in unlawful employment practices, which deprived her and similarly-situated current and former female employees of equal employment opportunities on the basis of sex. The EEOC subsequently filed suit and alleged that Defendant removed female employees from the call queue and directed lucrative calls to the male employees. Discovery commenced and the EEOC served notice of depositions. Defendant objected to the scope of the EEOC’s notice, and the EEOC filed a motion to compel the depositions. The EEOC sought an order compelling Defendant to designate and produce a witness or witnesses to testify about several topics included in its notice of deposition. The Court partly granted and partly denied the motion. First, regarding the EEOC’s request to compel Defendant to produce witness who would testify about the electronic mail and messaging systems used at Defendant’s subject facility, the Court noted that Defendant had represented its willingness to produce a corporate representative to testify. Because the parties had resolved their dispute on the electronic mail and messaging systems topic, the Court denied this aspect of the EEOC’s motion to compel as moot. Second, the EEOC sought to compel Defendant to produce a witness or witnesses to testify about the identity, locations, and availability of documents showing the relative values to mortgage consultants (“MCs”) of having one skill or another assigned to them, *i.e.*, to explore the alleged disparity in the assignment of MC skills and the alleged manipulation of the Automatic Call Distribution System (“ACD”) to favor male employees. Defendant contended that this information was irrelevant because there was no disparity in skills as alleged by the EEOC, and that prior testimony of other witnesses had established that Defendant did not manipulate the ACD system to discriminate against women. The Court, however, found that Defendant was essentially asking the Court to decide an ultimate issue by contending that it had already established that it did not manipulate its ACD system, and such a determination was improper at the discovery stage. The Court also found no merit to Defendant’s argument that no one person possessed knowledge of all the identified topics. The Court thus held that the EEOC was entitled to depose a person or persons to testify about the topics identified regarding MC skills and the ACD system. Third, the EEOC sought to compel Defendant to produce a witness to testify as to the identities or nomenclature of all call queues (*e.g.*, LEADGEN, Trigger) used by the HLD (“Home Loan Direct”) staff. While

Defendant responded that the testimony of one of its witnesses regarding the names associated with the three-digit skill codes used by Defendant's ACD system had appropriately addressed the topic at issue, the EEOC argued that the witness' testimony was deficient because he could not testify about the kinds of calls that were bundled into each skill and the quality of each of the calls under each skill. The Court found that the EEOC's request simply sought production of a witness to testify as to the identities or nomenclature of all call queues, but did not seek testimony regarding the kind of calls involved in each skill, the quality of each call, or the range of values each call included. The Court therefore denied this aspect of the EEOC's motion, but held that the EEOC was free to amend its notice to seek the specific information. Finally, the EEOC sought to compel the production of a witness or witnesses to testify as to certain documents and reports. The Court noted that it was unclear as to what documents and reports the EEOC sought. Although the EEOC clarified that it was seeking data and reports that showed how skills were administered to MC's, and materials that showed the relative worth of skill assignments to MC's by what kinds of calls were bundled into each skill or queue, the Court held that this was not clear in the EEOC's deposition notice. The Court therefore denied this aspect of the EEOC's motion without prejudice to its right to amend the notice seeking specific data and reports.

***EEOC v. Giant Oil Of Arkansas, Inc.*, 2011 U.S. Dist. LEXIS 80937 (W.D. Ark. July 22, 2011).** The EEOC brought an action alleging that Defendant discriminated against Sara Vandebroek, a Store Leader, in violation of the ADA, when it allegedly failed to accommodate her and terminated her due to her seizure disorder. The EEOC sought to examine Henry Dodge, the President and Director of Defendant's company, as to why Defendant denied Vandebroek's request for a reasonable accommodation. Defendant filed a motion for entry of protective order and sought to prohibit the deposition. Defendant contended that it had directed Vandebroek's alleged request for accommodation to Nathaniel Leathers, its HR Director, and that Leathers could provide the information necessary for fact discovery. Defendant claimed Dodge was a high-level executive who had no direct or unique personal knowledge about the issues in this case that could not be obtained by other means, and that because Dodge had no unique information about the issues material to its claims, the EEOC's attempt to take his deposition could not reasonably be expected to serve any purpose other than harassment. The Court noted that Rule 26(c)(1) permits entry of a protective order for "good cause" limiting or forbidding certain discovery to "protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." *Id.* at \*3. One aspect of these protections is the "apex doctrine." *Id.* at \*4. This doctrine protects high-level corporate officers from needless depositions. For such an executive to be deposed, two requirements must be met, including: (i) the executive must have unique or special knowledge of the facts at issue; and (ii) other less burdensome avenues for obtaining the information sought have been exhausted. Based upon this doctrine, the Court found that because Dodge might have communicated with Leathers regarding Vandebroek's request for an accommodation, Dodge did have "unique or special knowledge" of the facts involved. *Id.* at \*4-5. Further, there was no other avenue for determining Dodge's personal thoughts regarding that conversation or any other communications regarding Vandebroek's request. Accordingly, the Court permitted the EEOC to depose Dodge.

***EEOC v. Propak Logistics, Inc.*, 2011 U.S. Dist. LEXIS 94321 (W.D.N.C. Aug. 22, 2011).** The EEOC brought an action alleging that Defendant had a practice of refusing to hire non-Hispanic persons for non-management positions at a Wal-Mart Distribution Center in violation of Title VII of the Civil Rights Act of 1964 and Title I of the Civil Rights Act of 1991. Defendant filed

a motion to dismiss for failure to state a claim. The Court denied Defendant's motion to dismiss, holding that the EEOC is not required to plead specific facts but may rely on notice pleading requirements. The Court found that the complaint sufficiently identified the nature of the purported discrimination, the grounds on which the discrimination was based, and the applicable time period. Defendant's motion also sought dismissal based on the defense of laches. It attached to its motion an affidavit from a human resources manager, and argued that Defendant no longer employed the site managers who were responsible for hiring decisions, and even if they could be located, their memories would have faded. Defendant further argued that the EEOC's delay in processing and investigating the charge had allowed any potential award for back pay to increase unfairly. In addition, Defendant asserted that the closing of the facility rendered moot the injunctive relief sought by the EEOC. Based on these points, Defendant further contended in the alternative that it was entitled to discovery from the EEOC to prove laches. In response, the EEOC filed the affidavit of the EEOC officer who was involved in the investigation of the discrimination charge, in which he explained the delay in investigating and processing the charge and assigned at least some cause for the delay to Defendant's requests for extensions of time in responding to document and interrogatory requests. In considering the motion to dismiss based on laches, the Court noted that both parties had submitted matters outside the pleadings for consideration. Because those matters were relevant to the issue of laches, the Court denied the motion to dismiss. The Court noted that Defendant's materials were unnecessary to a ruling on the issue of laches because the administrative and/or investigatory record would be sufficient evidence. At the same time, the Court ordered the EEOC to file a response showing why discovery on the issue of laches was necessary. The Court also required the EEOC to file the administrative record or to file an explanation as to why it could not do so. The Court noted that although there is no statute of limitations relative to pattern or practice actions filed by the EEOC, if Defendant is prejudiced by the EEOC's unexcused delay in bringing suit, the Court may fashion relief pursuant to the doctrine of laches. In response to the Court's order, the EEOC had addressed only the issue of prejudice, conceding the delay but claiming that it needed discovery in order to show that Defendant had not been prejudiced by the delay. Defendant objected to any discovery, arguing that the EEOC merely intended to prolong the litigation further in order to force settlement. Regarding the administrative record, the EEOC responded that the record consisted of 30 volumes that contained privileged documents; production of the entire record would be cumbersome and burdensome to the EEOC; production of the entire record would be cumbersome to the Court; and the contents of the record would not assist in the disposition of the issue of laches. As the EEOC had decided which documents within the record to submit, Defendant contended that the entire contents of the administrative record would be used to prove laches. Importantly, the EEOC conceded that it would produce any additional non-privileged documents required by the Court without being heard further, but there was no indication in the record that it had done so. Thus, the Court found that a limited period of discovery was necessary solely on the issue of whether Defendant had sustained prejudice as a result of the EEOC's delay.

***EEOC v. DiMare Ruskin, Inc.*, 2011 U.S. Dist. LEXIS 94681 (M.D. Fla. Aug. 23, 2011).** The EEOC brought an action alleging that Defendant, a tomato growing and packing company with operations in California and Florida, violated Title VII of the Civil Rights Act of 1964 and Title I of the Civil Rights Act of 1991, by subjecting a class of similarly-situated female employees to sexual harassment during their employment at Defendant's Immokalee facility. The alleged sexual harassment included, but was not limited to, lewd and vulgar sexual comments, as well as non-consensual physical touching such as groping, grabbing, and forcible attempts to kiss

female workers. *Id.* at \*2. The EEOC further alleged that the unlawful employment practices were intentional and that the sexual harassment was done with malicious and/or reckless disregard for the employees' federally protected rights. *Id.* Thus, in addition to seeking compensatory damages and injunctive relief, the EEOC sought punitive damages. The EEOC moved for an order directing Defendant to produce documents responsive to the EEOC's First Request for Production of Documents, and information responsive to its First Set of Interrogatories. Both requests sought discovery regarding Defendant's financial net worth during the relevant period. The Court granted EEOC's motion. The Court found that the EEOC had properly pled a request for punitive damages in its complaint as required by Rule 8(a)(3) and that the EEOC was entitled to discovery of Defendant's financial worth at that time. *Id.* at \*8. The Court agreed with Defendant that its financial worth data was particularly sensitive as the requesting party was a governmental agency subject to requests under the Freedom of Information Act. *Id.* at \*10. Accordingly, the Court stayed Defendant's obligation to produce documents and information regarding financial worth until a protective order was agreed upon by the parties.

***EEOC v. D&H Company Dodge Brothers Giant Oil Of Arkansas, Inc., 2011 U.S. Dist. LEXIS 128996 (W.D. Ark. Nov. 4, 2011).*** The EEOC brought an ADA action, alleging that Defendants discriminated against Sara Vandebroek, a Store Leader at Defendants' store in Hot Springs, Arkansas, by failing to accommodate her seizure disorder and by terminating her employment. Subsequently, Vandebroek intervened in the action and asserted similar claims. In discovery, the EEOC requested copies of Defendants' financial statements, balance sheets, federal tax returns, and profit and loss statements for 2008, 2009, and 2010. Defendants objected to producing these materials absent the EEOC's demonstration of the viability of its claim for punitive damages. Subsequently, the EEOC brought a motion to compel. In denying the motion in part, the Court found the EEOC's request was overly broad. *Id.* at \*5. The Court determined that it was not inclined to grant the request without some showing of specific evidence demonstrating the EEOC's possible entitlement to punitive damages. The EEOC also sought information related to the number of employees who worked for Defendants, which the Court granted in part and denied in part. The EEOC also requested two types of information to verify the number of individuals employed by Defendants, including: (i) W-2 wage and tax statements issued to each individual employee of Defendants; and (ii) any documents which identified the number of workers employed by Defendants from January 1, 2008 to the present. The Court found that discovery of the identity of each employee of Defendants was overly broad, but that the EEOC was entitled to discovery of the number of Defendants' employees. *Id.* at \*6. Thus, the Court concluded that the EEOC was entitled to a signed, sworn statement from Defendants, which included the number of employees, including all of the employees for which each Defendant issued a W-2 claiming to be that person's employer. The Court, however, declined to compel Defendants to produce the actual W-2 wage and tax statements of the individual employees. Finally, the Court admonished the EEOC's lawyers for filing a discovery motion in violation of the Court's local rules. *Id.* at \*7. The EEOC's lawyers had shirked their responsibilities to confer in good faith with defense counsel prior to filing the discovery motion, as the Court found that the EEOC "made no real effort to resolve the discovery dispute prior to filing its motion." *Id.* at \*8.

***EEOC v. Aaron's, Inc., 779 F. Supp. 2d 754 (N.D. Ill. 2011).*** A former employee, Otis Nash, filed an administrative charge with the EEOC alleging that Defendant discriminated against him based on his race in violation of Title VII when Defendant terminated his employment after conducting a criminal background check. Subsequently, the EEOC served Defendant with a

subpoena requesting employment applicant information. In the subpoena, the EEOC requested records of all persons who applied for employment at any of Defendant's Illinois stores from September of 2005 to December of 2009. For each applicant, the EEOC requested several items of information, including the applicant's name, race, store at which the applicant applied, position applied for, and a copy of the applicant's criminal background check. When the EEOC did not receive the requested information, it filed an application to enforce its administrative subpoena. Defendant objected to the subpoena, arguing that the request for information regarding other employees and applicants was irrelevant to the underlying charge because Nash alleged only an individual claim of discrimination. The Court observed that the EEOC sought information to determine whether Defendant's criminal background policy had a disparate impact on African-American applicants, as well as whether Defendant used the policy to treat African-American applicants differently than non-African-American applicants. Thus, the Court held that the requested information would enable the EEOC to determine whether there were patterns of racial discrimination in Defendant's hiring practices, which could give rise to an inference of racial discrimination in Nash's termination. *Id.* at 758. Additionally, the Court found that the EEOC's subpoena, which sought information from about two years before to about two years after Nash's termination, was not overly broad because pre-charge and post-charge data could provide useful information to enable the EEOC to assess whether discrimination took place. *Id.* at 759. Moreover, the Court also held that because the EEOC had agreed to accept paper copies of applications and personnel background reports in lieu of an electronic database, compliance of the EEOC's request was not unduly burdensome to Defendant. *Id.* Defendant also argued that the EEOC's subpoena was overly broad because it requested information from stores beyond the scope of the relevant decision-maker's authority. The EEOC argued that the evidence indicated that Defendant had a uniform criminal background check policy that it claimed to have applied to all applicants during the relevant period. *Id.* at 758. The Court held that because the store at issue in Nash's charge was a corporate-owned store and since Defendant did not control the hiring decisions of franchisee-owned stores, the Court decline to enforce the subpoena request to the extent that it sought information from franchisee-owned stores. Accordingly, the Court concluded that the EEOC was entitled to the requested information for all Illinois corporate-owned stores only.

***EEOC v. Endoscopic Microsurgery Associates, P.A.*, 273 F.R.D. 650 (D. Md. 2011).** The EEOC filed a lawsuit alleging that Defendant's CEO, owner, and Defendant's practice administrator subjected various female employees to a sexually hostile and retaliatory work environment. Defendant served a subpoena upon one of the claimants, Julie Johnson, a South Carolina resident, commanding her to appear in Baltimore, Maryland, for a deposition. Although the EEOC attempted to produce out-of-state claimants in Maryland for depositions, it asserted that Johnson's circumstances would result in extreme hardship if she were required to travel to Maryland for a deposition. It also argued that the Federal Rules of Civil Procedure do not require claimants to appear in the forum jurisdiction when they reside more than 100 miles from any possible deposition location. Thus, the EEOC requested that the Court order Defendant to depose Johnson within 100 miles of her residence or via videoconference. Defendant argued, conversely, that Johnson should be compelled to provide deposition testimony in Maryland because she joined this lawsuit and was seeking compensation for her alleged damages. The Court noted that this same issue had been addressed in *EEOC v. Denny's, Inc.*, No. 06-CV-2527, 2009 WL 3246940 (D. Md. Oct. 2, 2009), where the Magistrate Judge concluded that the EEOC claimants were not formal parties to the litigation and they did not choose the District of Maryland to be the forum for the case. Those considerations aside, the Magistrate Judge

focused on Rule 26(b)(2)(C) and found that even if they were parties, the cost-benefit balancing factors of that rule still would militate in favor of deposing the out-of-state claimants via telephone or videotape, rather than in person. Because it found that the same considerations governed this case, the Court expressly adopted the reasoning of *EEOC v. Denny's, Inc.* Accordingly, the Court concluded that Defendant should either travel to South Carolina and take an in-person deposition there within 100 miles of Johnson's residence or arrange for a videotaped deposition to be conducted.

## **B. The Availability Of Discovery Against The EEOC Relative To Its Own Personnel Practices**

***EEOC v. Kaplan Higher Education Corp.*, 2011 U.S. Dist. LEXIS 57829 (N.D. Ohio May 27, 2011).** The EEOC brought a Title VII race discrimination claim alleging that Defendant's use of credit history information as a selection criterion in hiring and discharge had a disparate impact on African-American job applicants and current employees. Defendant served the EEOC with a Rule 30(b)(6) deposition notice, which contained many topics of inquiry such as factual information and documents that supported the EEOC's allegations of how credit history information has a disparate impact on black job applicants and employees, and policies, procedures, and practices used by the EEOC for conducting statistical analysis pertaining to such disparate impact. Specifically, in paragraphs 7 and 8 of its deposition notice, Defendant sought testimony as to the EEOC's requirements, policies, practices, or procedures relating to the performance of background or credit checks on any employee or applicant, and use or consideration of background or credit history in employment or hiring decisions. Because the EEOC objected to these topics of inquiry, Defendant filed a motion to compel the Rule 30(b)(6) deposition. In granting the motion, the Court observed that the Federal Rules of Civil Procedure provide for broad discovery between parties, so long as the information is relevant and not privileged and that government agencies like the EEOC are not exempt from these rules. The EEOC argued that since it is a law enforcement agency, it had no independent knowledge of the information giving rise to litigation, and the responsive information could only be obtained through disclosure of its counsel's work product. It relied on *SEC v. SBM Certificates, Inc.*, 2007 WL 609888, at \*22-26 (D. Md. Feb. 23, 2007), and *EEOC v. McCormick & Schmick's Seafood Restaurants*, 2010 WL 2572809, at \*5 (D. Md. June 22, 2010), for support. The Court found the EEOC's argument unpersuasive. In *SBM Certificates*, the deposition was quashed because the topics would require preparing witness with attorney opinion work product because the deposition notice sought the SEC's communications related to the results of the investigations at issue. The Court, however, found that here, Defendant sought primarily factual information related to the EEOC's case. The Court observed that although the deposition notice in *McCormick & Schmick's* sought factual information similar to this case, *McCormick & Schmick's* followed *SBM Certificates* as a basis to decline the deposition request. The Court in *McCormick & Schmick's* found that its order was not inconsistent with the other decisions, which granted motions to compel the EEOC to submit to a Rule 30(b)(6) deposition. *McCormick & Schmick's* explained this apparent contradiction on the basis that it only allowed the deposition of an investigator designated by the EEOC as to the facts the investigator learned during her investigation, but did not allow questions that invaded work product or attorney-client privilege. Accordingly, the Court stated that it was not persuaded that *McCormick & Schmick's* supported the EEOC's position that the deposition notice in this case sought attorney work product or otherwise required the testimony of its counsel. The Court determined that the EEOC was free to designate an EEOC investigator or other agency employee to testify in response to the Rule 30(b)(6) notice, and it may designate different individuals to testify as to different categories of

information called for in the deposition notice. The Court also found that ruling on any of the EEOC's assertions of privilege prior to a deposition would be premature, and that the EEOC was at liberty to assert its objections based on privilege during the deposition. The EEOC also argued that in the Sixth Circuit, the scope of its investigation was not a relevant topic of discovery, and cited *EEOC v. Keco Industries, Inc.*, 748 F.2d 1097, 1100 (6th Cir. 1984), for support. The Court stated that it was not persuaded that *Keco* prohibited Defendant from inquiring into the scope of the investigation of the EEOC because the Sixth Circuit held only that a Defendant cannot be allowed to challenge the sufficiency of the EEOC's investigation leading to its issuance of the reasonable cause determination. Accordingly, the Court concluded that the scope of the investigation was relevant to affirmative defenses asserted by Kaplan. Finally, the Court stated that the information Defendant was seeking was relevant to the EEOC's claims and may lead to admissible evidence. The EEOC alleged that Defendant's use of credit history checks was not job-related or consistent with business necessity, and that there were less discriminatory alternatives available. The Court concluded that whether the EEOC used background or credit checks in hiring its employees was relevant to whether such measures were a business necessity.

**Editor's Note:** The ruling in *EEOC v. Kaplan Higher Education Corp.* is believed to be the first time the EEOC has been ordered to produce discovery relative to its own employment practices.

### **C. The Burdens Of Proof And Discovery Limits Between § 706 and § 707 Claims In An EEOC Pattern Or Practice Lawsuit**

***EEOC v. Hotspur Resorts Nevada, Ltd.*, 2011 U.S. Dist. LEXIS 115325 (D. Nev. Oct. 3, 2011).** The EEOC brought an action on behalf of Philomena Foy and Doris Allen, as well as on behalf of other female employees who were subjected to an alleged pervasive and severe sex-based hostile work environment at Defendants' Las Vegas facility. Specifically, the EEOC alleged that a male co-worker subjected the female employees to unwelcome touching and made vulgar sexual remarks to them. Defendants filed a motion for partial dismissal under the statute of limitations and for failure to state a claim. The Court found that it had jurisdiction over the EEOC's hostile work environment claims for Foy and Allen, because they both filed timely charges with the EEOC, and the statute of limitations had not run because they filed their charges with the EEOC within 180 days of the last date of harassment, as required under 42 U.S.C. § 2000e-5(e)(1). Defendants attempted to characterize the charges of discrimination as alleging several discrete, discriminatory acts that each had their own statute of limitations period. The Court disagreed, and stated that because at least one of the acts alleged occurred within the statutory time period, all acts relating to the alleged hostile work environment may be considered in assessing liability, and relied on *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 116-17 (2002), to support its conclusion. *Morgan* held that unlike traditional hiring or promotion discrimination claims, a single hostile work environment claim encompasses all individual acts contributing to it, and the entire claim is timely so long as any of the component acts of the claim occurred within the relevant time period. The Court also observed that the EEOC may seek monetary and equitable relief on behalf of a class of aggrieved individuals under Title VII of the Civil Rights Act of 1964, without resorting to the class certification framework under Rule 23. The Court pointed out that the EEOC also may seek equitable relief under § 2000e-5, and it may seek compensatory and punitive damages under § 1981a. Defendants also moved to dismiss Hotspur Resorts Nevada, Inc. ("HRNI") and the "Doe Defendants," asserting that only Hotspur Resorts Nevada, Ltd. ("HRNL") was the employer, and

therefore no claim had been stated against the other Defendants. *Id.* at \*11-12. The Court found that it would not dismiss the EEOC's claims as to either Defendant because it was not clear which entity the EEOC believed to have been the employer. The Court opined that the EEOC could not be expected to have untangled the corporate relationship between HRNI and HRNL at this early stage of the litigation. Finally, the Court noted that the EEOC had only pled a hostile work environment as to Foy and Allen, and not as to any unnamed victims. Thus, the Court directed the EEOC to file a more definite statement as the EEOC had not put Defendants on notice as to the class allegations. *Id.* at \*13.

***EEOC v. Sterling Jewelers Inc.*, 2011 U.S. Dist. LEXIS 116943 (W.D.N.Y. Oct. 7, 2011).** The EEOC commenced a gender discrimination action against Defendant pursuant to §§ 706 and 707 of Title VII. The EEOC's § 706 claims sought relief for individual victims of discrimination in pay and promotions, and the EEOC's § 707 claims sought relief for an alleged pattern or practice of discrimination. Relying on the EEOC's proposed bifurcated framework as well as the framework established in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 360-61 (1977), the Court bifurcated the case into two stages, including Stage I, which would adjudicate the pattern or practice claim and concern the production of personnel data necessary for statistical analyses of Defendant's policies and procedures, depositions of witnesses with knowledge relevant to the pattern or practice claims, such as managers familiar with Defendant's practices and policies, current or former employees who had experienced or witnessed discrimination, and statistical or other experts. Should the trier of fact find liability regarding the pattern or practice claims, the Court would determine appropriate class-wide injunctive remedies. At that point, Stage II discovery would commence, to be followed by a Stage II trial. Stage II discovery and trial would address issues concerning each class member's claim for relief, including whether Defendant could meet its burden of rebuttal as to each class member, and if not, the remedies to which that class member was entitled, including back pay, front pay, and compensatory and punitive damages, if any. The previous bifurcation order entered by the Court had only addressed the question of when punitive damages were to be determined, as the parties generally agreed to the bifurcated framework; however, it did not expressly present the issue which the parties currently disputed, *i.e.*, whether Stage I discovery would include all issues relating to the EEOC's § 706 claims, including identification of all women on whose behalf the EEOC was seeking relief under § 706. Pursuant to the bifurcation order, the parties submitted proposed schedules for Stage I discovery. Defendant argued that the bifurcation order did not bar § 706 discovery during Stage I because the bifurcation order addressed only the EEOC's pattern or practice claim. The EEOC contended that Defendant's proposal was contrary to the bifurcation order, which encompassed both claims. The Court agreed with the EEOC's position. Defendant argued that the § 706 and § 707 claims were distinct because, under § 706, the EEOC could seek compensatory and punitive damages, whereas it may seek only equitable relief under § 707. The Court rejected that argument, pointing out that it had previously deferred punitive damages for consideration during Stage II, a remedy that was only available for a § 706 claim, and that position could not be reconciled with Defendant's current position that the bifurcation order only addressed the EEOC's § 707 claim. Defendant also argued that the EEOC should not be permitted to seek § 706 relief under the *Teamsters* burden-shifting framework utilized in the bifurcation order. The Court noted that claims under § 706 and § 707 proceed under different burden shifting frameworks and that the *Teamsters* framework generally applies to pattern or practice claims brought under § 707, whereas the framework established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), applies to individual claims brought under § 706. The Court found, however, that it need

not decide whether the *Teamsters* burden-shifting framework could apply to a case involving only a § 706 claim, because here the EEOC sought both § 706 and § 707 relief and under those circumstances, the *Teamsters* burden-shifting framework applied. The Court reasoned that the purpose of a Stage II proceeding under the *Teamsters* model was not simply to adjudicate the issue of damages, but also to adjudicate the issue of liability for each claimant. The Court noted that, consistent with the *Teamsters* framework, which Defendant did not oppose, the bifurcation order directed that the EEOC's pattern or practice claims, including equitable remedies, if any, would be determined during Stage I, and that discovery into the EEOC's individual § 706 claims and resolution of these claims would occur (if at all) following the conclusion of Stage I. Defendant proposed that during Stage I, the EEOC identify all of the women on whose behalf it was seeking relief under § 706 and make these individuals available for depositions. The Court held that during Stage I of a pattern or practice lawsuit, the EEOC was not required to offer evidence that each person for whom it would ultimately seek relief was a victim of the employer's discriminatory policy. *Id.* at \*11-13. Likewise, the EEOC conceded that if it was unsuccessful in proving its claims during Stage I, Stage II would be unnecessary. Thus, the Court concluded that conducting all § 706 discovery into the EEOC's individual claims during Stage I, as Defendant proposed, would lead to extensive discovery that may be wholly unnecessary.

***EEOC v. JBS USA, LLC*, 2011 U.S. Dist. LEXIS 87127 (D. Colo. Aug. 8, 2011).** The EEOC filed a pattern or practice action against Defendant, a meat packing plant, alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e and Title I of the Civil Rights Act of 1991, 42 U.S.C. § 1981a. The EEOC alleged that Defendant discriminated against a large number of Somali, Muslim, and African-American workers on the basis of their national origin, religion, and ethnicity. The EEOC filed a motion to bifurcate the trial, which the Court granted in part and denied in part. The EEOC moved to bifurcate the trial and discovery, proposing that in Phase I, the jury consider all of the EEOC's pattern or practice claims and make findings as to Defendant's liability for punitive damages. In Phase II, the EEOC proposed that the jury focus on the individual claimants' entitlement to relief pursuant to the EEOC's pattern or practice claims as well as each of their individual claims that did not overlap with the pattern or practice claims. The EEOC proposed that Phase II be split into multiple trials with different juries considering the claims of smaller groups of claimants. Phase II would be necessary regardless of the result in Phase I because even if the EEOC did not prevail on its pattern or practice claims, individual claimants would be entitled to adjudication of their individual claims of discrimination. Defendant argued that the proposed bifurcation exceeded the EEOC's statutory authority by allowing the EEOC to recover punitive and compensatory damages for individuals pursuant to a pattern or practice claim. The Court noted that Defendant's argument was based on the distinction between § 706 and § 707 of Title VII wherein the remedies available under § 706, unlike those under § 707, include punitive and compensatory damages in addition to purely equitable remedies. Because the EEOC brought claims pursuant to both § 706 and § 707, the Court reasoned that the distinctions between the two sections did not necessarily prohibit bifurcation. Defendant also argued that having different juries decide claims in Phase I and Phase II would violate the Seventh Amendment's re-examination clause, which provides that no fact tried by a jury shall be otherwise re-examined. Relying upon *Taylor v. District of Columbia Water & Sewer Authority*, 205 F.R.D. 43 (D.D.C. 2002), the Court observed that multiple juries in bifurcated pattern or practice cases may hear overlapping evidence, so long as they decide distinct factual issues. During the first phase, the jury would determine the existence of a pattern or practice, and during the second phase, it would determine whether

individuals were victims of that discriminatory pattern or practice. Moreover, the Phase II jury could be specifically instructed not to re-examine the factual findings of the Phase I jury. As a result, the Court rejected Defendant's Seventh Amendment challenge. *Id.* at \*16. The Court opined that the EEOC's pattern or practice claims should proceed pursuant to the burden-shifting framework in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), and then examined each of the claims to determine if they could be efficiently tried in two phases. With respect to the hostile work environment pattern or practice claim, Defendant argued that it presented too many individualized issues to be efficiently tried in two phases. The Court agreed with Defendant's argument that the aggrieved individuals possessed varying levels of fluency in English and their perceptions of verbal or written insults would vary accordingly. The alleged harassers also may have spoken either English or Spanish, further complicating the matter. Moreover, the EEOC's allegation that the aggrieved individuals consisted of Muslim, Somali, and African-American employees meant that the hostile work environment could differ as to each of these groups, unless each individual fell within all three groups. Accordingly, the Court refused to bifurcate the hostile work environment claim on the basis that the Phase II jury could more efficiently consider both. *Id.* at \*19. Defendant further contended that the EEOC's religious accommodation pattern or practice claim presented individualized issues, thereby making it inappropriate for bifurcation. The EEOC asserted that Defendant denied Muslim workers the ability to pray and to break their fast during Ramadan; that it denied Muslim workers bathroom breaks and the ability to pray during those breaks; and that it did not provide Muslim workers a space for prayer, forcing them to pray on bathroom floors. The Court reasoned that the religious accommodation claims could be efficiently bifurcated. In Phase I, the jury would consider whether groups of Muslim workers made the requests, whether Defendant routinely and unlawfully denied them, and whether the accommodations posed an undue hardship on Defendant. In Phase II, the jury would consider whether any particular worker held a particular religious belief and suffered damages as a result of Defendant's unlawful denial of an accommodation. The Court rejected Defendant's argument that the Muslim workers at the plant had widely variant religious beliefs and that Defendant received differing accommodation requests. The Court ordered bifurcation of this claim, except the claim related to the denial of bathroom breaks as it would present individualized issues such as the time of the request, the worker's duties, when the request was made, and the supervisor present. *Id.* at \*22-23. The Court further concluded that the EEOC's retaliation and discriminatory discipline and discharge pattern or practice claims were appropriate for bifurcation, but only to the extent they were based on the Ramadan 2008 events. Other instances of retaliation, discipline, or discharge unrelated to the Ramadan 2008 events were likely to present issues that were too individualized for efficient bifurcation. *Id.* at \*24. The Court also denied the EEOC's request to have the Phase I jury consider the individual claims of compensatory and punitive damages because under the plain language of § 707, the EEOC could not seek punitive or compensatory damages for individuals pursuant to its pattern or practice claims. Accordingly, the Court ordered that individual claims for compensatory and punitive damages be decided entirely during Phase II. *Id.* at \*25. Finally, the Court granted the EEOC's request to bifurcate discovery. During Phase I discovery, the parties would be allowed to depose witnesses with questions related to claims of harassment/hostile work environment or individual alleged damages. After Phase I, the parties would commence discovery on pattern or practice claims that were not bifurcated, on individual claims for punitive and compensatory damages, and on other non-overlapping discrimination claims. *Id.* at \*26-27.

***EEOC v. JBS USA, LLC, 2011 WL 6099695 (D. Neb. Dec. 7, 2011).*** The EEOC brought an action on behalf of 153 individuals, alleging that Defendant engaged in a pattern or practice of discrimination against its Somali Muslim employees at its facility in Grand Island, Nebraska. Subsequently, some of the aggrieved employees intervened as Plaintiffs. Subsequently, the parties entered into a bifurcation agreement, which divided discovery and the trial into Phase I and Phase II, with Phase I to address the pattern or practice claims and Phase II to adjudicate the individual claims and relief. Defendant later served deposition notices for Ayan Aden, Mohamud Einab, and Hodan Ibrahim. Each of those individuals had filed charges of discrimination with the EEOC, and the EEOC sought relief on their behalf; however, they had not intervened as Plaintiffs. In response, the intervening Plaintiffs moved for a protective order barring Defendant from deposing Aden, Einab, and Ibrahim, which the Court granted. The Court noted that the issue was whether the bifurcation agreement permitted Defendant to depose Aden, Einab, and Ibrahim during Phase I of the litigation and, if not, whether good cause nevertheless existed to depose those individuals at that time. The bifurcation agreement allowed Defendant to select and depose up to 10 intervening employees and to depose up to 10 individuals from the following categories: “non-aggrieved Somali Muslim employees who worked at the Grand Island, Nebraska facility during the relevant time period, non-employee witnesses, Union and co-worker witnesses, management (corporate and Grand Island) witnesses, and/or 30(b)(6) witnesses.” *Id.* at \*2. The Court disagreed with Defendant’s contention that the proposed deponents qualified as “co-worker” witnesses within the meaning of the bifurcation agreement. *Id.* The Court pointed out that the purpose of the bifurcation agreement was to limit the number of aggrieved employees who could be deposed during Phase I of the litigation and contemplated that the depositions of aggrieved individuals be limited to those who intervened in the action. Thus, contrary to Defendant’s position, the Court found the agreement did not contemplate that “co-workers” included aggrieved individuals who had a stake in the litigation. The fact that Union and co-worker witnesses were grouped together in the same sentence of the bifurcation agreement indicated that the parties’ intention that co-worker witnesses, like Union witnesses, were to be third-party individuals who may have information bearing on whether Defendant engaged in a pattern or practice of discrimination against Somali Muslim employees, not aggrieved employees who themselves were allegedly discriminated against. Further, that intent was made more apparent by the categorization of “non-aggrieved Somali Muslim employees” as additional witnesses who may be deposed in Phase I. *Id.* The Court concluded therefore that Defendant had not shown good cause to depose Aden, Einab, and Ibrahim at that time. The Court found that although the testimony of those individuals was relevant to the issues involved in the action, Defendant had agreed to limit the scope of discovery in Phase I to aggrieved employees who had intervened in the action.

***EEOC v. JBS USA, LLC, 2011 U.S. Dist. LEXIS 145102 (D. Colo. Dec. 16, 2011).*** The EEOC filed a pattern or practice action under §§ 706 and 707 of Title VII of the Civil Rights Act of 1964, alleging that JBS discriminated against Somali, Muslim, and African-American workers at its Greeley, Colorado meat packing plant, based on their national origin, religion, and ethnicity. Over 200 workers subsequently intervened as private Plaintiffs and asserted claims for discrimination and retaliation based on race, national origin, and religion. *Id.* at \*5. The Court had previously ordered bifurcation of the trial for the EEOC’s § 707 claim. Phase I would consist of claims for denial of religious accommodation, retaliation, and discipline and discharge; in turn, Phase II would consist of claims for hostile work environment, individual damages for claims presented in Phase I, and individual claims for compensatory and punitive damages. *Id.* at \*6. The individual interveners’ claims not covered by the EEOC’s claims also would be

handled in Phase II. The parties subsequently disputed whether the individual interveners, in the absence of class certification, could participate in Phase I discovery regarding the EEOC's § 707 claim. The Court held that as the individual interveners could not intervene in the EEOC's § 707 pattern or practice claim, they could not participate in Phase I discovery. The Court opined that the statutory language underlying a § 707 pattern or practice claim brought by the EEOC is conspicuously silent regarding intervention, and that the purpose of § 707 is to provide the government with a swift and effective weapon to vindicate the broad public interest in eliminating unlawful practices at a level which may or may not address the grievances of particular individuals. In contrast, claims under § 706 address individual grievances and include requirements that charges be filed, investigations conducted, and an opportunity to conciliate be afforded to the employer when reasonable cause has been found. The Court also reasoned that the differing burdens of proof under §§ 706 and 707 were significant for purposes of discovery. Specifically, the *McDonnell-Douglas* framework – from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) – applies to § 706 claims, wherein Plaintiffs must first establish a *prima facie* case of discrimination, whereas under the *Teamsters* burden-shifting framework – from *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977) – that is applicable to the § 707 claims, the focus of the EEOC's § 707 claim will be on evidence which establishes a purported discriminatory policy or practice. The Court noted that such evidence frequently relates to statistical data, and does not necessarily focus on either individual employment experiences or damages. The Court concluded that § 707 discovery can be most efficiently and effectively conducted by the EEOC without the involvement of the individual interveners. Furthermore, because the individual interveners had not sought certification of a class for their own claims, the Court found that they had no direct stake in the evidence that would be generated through Phase I discovery. *Id.* at \*14. Despite this, and the fact that the individual interveners' entitlement to relief on the § 707 claim did not arise until it had been proved that JBS followed an employment policy of unlawful discrimination, the Court acknowledged that Rule 26(b)(1)'s permissive scope regarding discovery could be construed to afford participation to the interveners in Phase I discovery “despite their relatively minimal stake in the EEOC's Phase I claim.” *Id.* at \*15. Based on a balancing of these factors, the Court found that the interests of efficiency, economy, and fairness did not warrant permitting more than 200 individual interveners to participate in Phase I discovery. Although the individual interveners had also asserted pattern or practice claims, the Court determined that the EEOC was better suited and experienced to gather the evidence on the § 707 claim. Moreover, the EEOC could disclose the evidence it secured to the individual interveners for their use in Phase II. Accordingly, the Court declined permission to the individual interveners to participate in discovery during Phase I.

#### **D. Failure To Preserve Evidence Issues In EEOC Actions**

***EEOC v. Dillon Companies, Inc.*, 2011 U.S. Dist. LEXIS 134346 (D. Colo. Nov. 21, 2011).** The EEOC, on behalf of a developmentally disabled former employee of Defendant, brought a lawsuit alleging that Defendant discharged the employee in violation of the Americans With Disabilities Act. Defendant claimed that the employee was terminated because he violated its policy against violence when he pushed his supervisor. *Id.* at \*3. The EEOC asserted that the employee merely bumped into his supervisor and that other workers had not been discharged for similar violations. Defendant's surveillance system captured the incident in question, but the video surveillance tape had been lost or destroyed. Therefore, Defendant intended to introduce evidence of the incident through witnesses who had watched the video surveillance tape before it was lost or destroyed. Subsequently, the EEOC moved to sanction Defendant for destruction

of the video surveillance tape. The EEOC argued Defendant should be prohibited from calling witnesses to testify to what they saw on the video surveillance tape and that it should be entitled to an adverse inference instruction. *Id.* at \*4. Defendant responded that it did not act in bad faith and that the EEOC was not prejudiced because there was no material dispute about what happened during the incident. *Id.* at \*6. However, the Court rejected Defendant's arguments and held that Defendant's inability to produce a copy of the video surveillance tape, taping over the master copy, and allowing the recording to expire amounted to bad faith. The Court opined that contradictory testimony from Defendant's managerial employees regarding the video surveillance tapes led the Court to believe Defendant was "hiding the ball." *Id.* at \*8. Therefore, the Court held that the EEOC was entitled to an adverse inference instruction and excluded Defendant's witnesses as sanctions for Defendant's bad faith.

### **E. The Propriety Of EEOC Radio Advertisements To Find Claimants**

***EEOC v. McCormick & Schmick's Seafood Restaurants*, 2011 U.S. Dist. LEXIS 35258 (D. Md. Mar. 17, 2011).** The EEOC brought an action alleging that Defendants engaged in a pattern or practice of discrimination against African-American job applicants and employees at their restaurant facilities. Asserting that the EEOC had broadcast and also purchased airtime for additional broadcasts of an announcement concerning the litigation, Defendant filed an emergency motion for an order enjoining the EEOC from airing radio advertisements seeking to recruit additional claimants. The EEOC announced in the radio spot that in connection with a "class race discrimination" lawsuit, the EEOC was looking for African-American individuals who applied for employment at or used to work for Defendant; the radio spot solicited such individuals to call the EEOC. *Id.* at \*2. Defendants argued that the EEOC's announcement violated Rule 3.6 of the Maryland Rules of Professional Responsibility, which prohibits the making of "an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter." *Id.* In denying Defendants' motion, the Court held that there was no violation of the Rules of Professional Conduct. The Court noted that Rule 3.6 expressly allows attorneys to make a statement relating the claim involved, the identity of the persons involved, information contained in a public record, and that an investigation of a matter is in progress. Further, the Court opined that the rule specifically allowed a request for assistance in obtaining evidence and any information necessary thereto. The Court reasoned that the EEOC was not relaying any information other than what was in the public record and was simply reporting the pendency of a lawsuit. *Id.* at \*3. The Court therefore found that the EEOC's radio spot did not constitute a violation of Rule 3.6. Defendant also asserted that the announcement was misleading because it implied that the EEOC had brought a class action lawsuit pursuant to Rule 23. The Court noted that although it was not a class action, the EEOC's complaint clearly alleged discrimination against a class of individuals. Further, the EEOC was seeking a class-like remedy. The Court therefore held that in communicating to the general public that it had brought a "class race discrimination lawsuit," the EEOC had not made misleading statements. *Id.* at \*3-4. For these reasons, the Court denied Defendant's motion for emergency relief.

**Editor's Note:** The ruling in *EEOC v. McCormick & Schmick's* is believed to be the first to give judicial approval to the EEOC's use of radio spot ads to solicit alleged victims in an EEOC pattern or practice lawsuit.

## V. MOTIONS FOR SUMMARY JUDGMENT IN EEOC PATTERN OR PRACTICE CASES

### A. ADA Cases

***EEOC v. C.R. England, Inc.*, 2011 U.S. App. LEXIS 8971 (10th Cir. May 3, 2011).** The EEOC, on behalf of Walter Watson, a former employee of Defendant, filed an action alleging discrimination and retaliation in violation of the ADA. Watson was diagnosed with HIV in 1999, and began working as a truck driver for Defendant in 2002. The EEOC claimed that Defendant asked the truck driver trainees to sign acknowledgements that informed them that the trainer suffered from a communicable health condition, allegedly causing Watson stress and requiring him to take a leave of absence. The EEOC argued that the acknowledgement form Defendant required trainees to sign violated § 102(b)(1) of the ADA, which “prohibits discrimination by limiting, segregating, or classifying a job applicant or employee in a way that adversely affected the opportunities or status of such employees because of the disability of such applicant or employee.” *Id.* at \*24-25. The parties filed cross-motions for summary judgment, and the District Court granted Defendant’s motion. On appeal, the Tenth Circuit affirmed the District Court’s decision. The Tenth Circuit noted that although Defendant required potential trainees to sign an acknowledgement form, it did not deny Watson the opportunity to become a trainer, demote him, or reassign him due to his HIV status. The Tenth Circuit also found no evidence that he was ever segregated from other employees or trainees. The Tenth Circuit remarked that the mere act of disclosing Watson’s HIV status in itself did not amount to an actionable claim. Accordingly, the Tenth Circuit concluded that Watson did not suffer any adverse employment action. The EEOC also claimed that Watson was terminated in his capacity as a trainer and as a driver, and only because he was HIV-positive. *Id.* at \*37. The Tenth Circuit found that the reasons for the training demotion were legitimate and non-discriminatory. Among other things, the EEOC contended that because Defendant had no company policy that would require the termination of a trainer, the reasons it offered were pretextual. The Tenth Circuit, however, found no basis to conclude that an otherwise reasonable justification by an employer should be deemed pretextual merely because it was not directly reinforced by an official rule or policy. Accordingly, the Tenth Circuit concluded that the reasons offered by Defendant for terminating Watson as a trainer were not a pretext for discrimination. Likewise, the Tenth Circuit found that the EEOC failed to offer any evidence to prove that Defendant’s reasons for terminating Watson as a driver were a pretext for discrimination. *Id.* at \*67. The EEOC further asserted that Defendant violated § 102(d) of the ADA by disclosing medical information concerning Watson’s HIV-positive status to potential trainees and other employees. Defendant argued that the EEOC’s claim failed because § 102(d) did not apply to voluntarily disclosed medical information that was not gleaned from a medical examination or inquiry, and as such, Watson did not suffer a sufficient cognizable injury to sustain a claim under § 102(d). *Id.* at \*46-47. The Tenth Circuit agreed with both arguments. The Tenth Circuit determined that § 102(d) governs only medical examinations and inquiries in three distinct instances, including: (i) pre-employment, (ii) post-offer; and (iii) during the employment relationship. The Tenth Circuit noted that on its face, § 102(d) does not apply to or protect information that is voluntarily disclosed by an employee unless it is elicited during an authorized employment-related medical examination or inquiry. The parties did not dispute that Watson voluntarily disclosed that he was HIV-positive, and neither party suggested that Watson’s disclosure was the result of any sort of examination or inquiry. *Id.* at \*52. Accordingly, the Tenth Circuit affirmed summary judgment in favor of Defendant.

**EEOC v. The Picture People, Inc., 2011 U.S. Dist. LEXIS 49432 (D. Colo. May 9, 2011).** The EEOC filed a disability discrimination action on behalf of Jessica Chrysler, a profoundly deaf employee hired as a performer at Defendant's portrait studio, a position that involved photography, sales, lab work, front desk duties, and interacting with customers. The day after Chrysler was hired she requested an ASL interpreter for training, which Defendant provided. Chrysler subsequently requested an interpreter for an upcoming staff meeting, which was not provided. After the 2007 holiday season, Defendant cut Chrysler's working hours, explaining in a written notice that the reduction in performers' hours affected all performers and was normal following the holiday season. Defendant then subjected Chrysler to pursue disciplinary notice when she called into work sick several times and acted in a generally insubordinate manner in the workplace. After discovery, Defendant filed a motion for summary judgment. Relative to the EEOC's claim for failure to accommodate pursuant to the ADA, Defendant argued that the EEOC could not meet the second element of the *prima facie* case because Chrysler was not qualified, with or without accommodation, to perform the essential functions of the performer position, since she was unable to verbally communicate, a skill listed as an essential job requirement. The EEOC contended that Chrysler was able to perform all the essential functions of the job by using written communication, gestures, and limited spoken speech. The Court found that although the EEOC was correct that not every requirement listed in a job description was automatically an essential function, the Court would not second-guess the employer's judgment when its description was job-related, uniformly enforced, and consistent with business necessity. The EEOC argued that the assumption that only verbal communication can be effective was precisely the sort of stereotype the ADA was designed to combat. The Court, however, noted that Defendant pointed to speed as a concrete benefit of verbal communication that was unrelated to the feelings of unfamiliarity or discomfort a customer might experience when interacting with a deaf person. In this respect, the Court opined that the ADA did not require Defendant to lower company standards. Therefore, the Court found that the EEOC had not met its burden to show a genuine issue of material fact as to whether strong verbal communication skills were an essential function of the performer position. Because Chrysler had an extremely limited ability to vocalize words and a limited ability to read lips, the Court also determined that she was unable to perform this function without accommodation. Although the EEOC argued that Chrysler could perform this essential function with an accommodation, the Court concluded that such accommodation would amount to a modification of the essential job function, and the ADA did not require an employer to modify an essential function of an existing position in order to accommodate a disabled employee. Therefore, the Court concluded that Chrysler was not qualified for the position under the ADA and could not establish her *prima facie* case of failure to accommodate. The EEOC also asserted a claim for hostile work environment based on Defendant's failure to provide an ASL interpreter for her initial training, a manager's comment to a group of employees that orders would have to be written down for Chrysler because "she can't fucking hear," cutting her hours, failing to provide interpreters at other meetings, and disciplining her for conduct for which other employees were not disciplined. *Id.* at \*18. The EEOC also relied on an affidavit from a co-worker stating that Chrysler cried on at least two occasions after being picked on by managers and that these managers treated Chrysler worse than other employees. The Court reasoned that these conditions did not amount to a hostile work environment because they did not rise to the requisite level or type of severe and pervasive physically threatening or humiliating conduct sufficient for a claim of hostile work environment. As for the claim that Chrysler was harassed, the Court stated that the EEOC presented one stray offensive comment about her deafness and no rational jury could

find that this evidence amounted to a hostile work environment. Thus, the Court found that Defendant was entitled to summary judgment on the EEOC's hostile work environment claim.

***EEOC v. Thrivent Financial For Lutherans*, 2011 U.S. Dist. LEXIS 64042 (E.D. Wis. June 15, 2011).** The EEOC brought an action alleging that Defendant violated the ADA by disclosing confidential information about former employee Gary Messier to potential employers. While employed, Messier informed Defendant of a migraine condition through an e-mail. Messier's manager originally e-mailed him to inquire about his whereabouts for the workday, and Messier replied to the e-mail with specifics on his migraine condition. Messier subsequently quit his job with Defendant, applied for new positions elsewhere, and suspected Defendant's managers were providing negative references to prospective employers. Accordingly, Messier hired a reference-checking agency that confirmed that Defendant's manager disclosed information about Messier's migraine condition when questioned about Meissier's health. Both the parties filed motions for summary judgment on the threshold issue of whether Defendant received Messier's medical information through a medical inquiry as defined by the ADA. The Court granted Defendant summary judgment, holding that Thrivent did not receive Messier's medical information through a medical inquiry. The Court noted that under the ADA, employers may make disability-related inquiries to ascertain the ability of an employee to perform job-related functions, but medical information obtained from such inquiries is subject to specified confidentiality requirements. The Court opined that although the Seventh Circuit has not addressed this issue directly, other courts have consistently held that the ADA's confidentiality requirements do not protect medical information that is voluntarily disclosed by the employee and thus is not acquired as a result of a medical inquiry by the employer. Defendant argued that it did not make an inquiry into the ability of Messier to perform job-related functions, and Messier's disclosure of medical information to his managers was voluntary. The Court agreed. The Court noted that the facts of this case were similar to those in *Sherrer v. Hamilton County Board Of Health*, 747 F. Supp. 2d 924, 927 (S.D. Ohio 2010), and *Kingston v. Ford Meter Box Co.*, 2009 U.S. Dist. LEXIS 31710, at \*1 (N.D. Ind. April 10, 2009), in which the courts found the employees had made voluntary disclosures, and were distinguishable from *Doe v. United Postal Service*, 317 F.3d 339, 341 (D.C. Cir. 2003), and *Fischer v. Harvey*, 2006 WL 2370207, at \*5 (E.D. Tenn. Aug. 14, 2006), in which the courts found the employers had made medical inquiries. The EEOC, however, argued that the distinction between a voluntary disclosure by an employee and a disclosure as a result of a medical inquiry by an employer turned on which party initiated the interaction. The Court disagreed with the EEOC and observed that in *Sherrer*, immediately following a doctor's appointment, the employer initiated the interaction by asking "[i]s everything okay?" *Id.* at \*12 (quoting *Sherrer*, 747 F. Supp. 2d at 927). In reply, the employee disclosed her medical condition. Nonetheless, *Sherrer* found this inquiry did not constitute a medical inquiry under the ADA because the question was not about a medical condition or ability to perform job functions, nor did it require the employee to provide any medical information. The Court found that an employee's disclosure is voluntary if the disclosure was not preceded by any request or demand for medical information by the employer. The EEOC, however, argued that its guidelines prohibit questions that are likely to elicit information regarding a disability. The Court found that while it was foreseeable that Messier might have informed his managers that he was taking a sick day, the EEOC provided no reason to believe that the manager's initial e-mail inquiring about Messier's whereabouts was more likely to elicit information about a disability or medical condition than information about transportation problems, a family emergency, or any other situation preventing him from being at work. Further, there was no evidence that Messier himself perceived his manager's e-mail as

a request for actual medical information. He could have responded briefly, but Messier instead provided an extensive medical history, voluntarily and without prompting from his manager. The Court remarked that, unlike the employers in *Doe* or *Fischer*, the managers did not specifically request or require that Messier disclose any information about a medical condition, nor did they ask him anything that was particularly likely to elicit specific information about a medical condition. The Court therefore concluded that Messier's disclosure was voluntary, and was not in response to a medical inquiry by his managers as defined by the ADA, and therefore granted Defendant's motion for summary judgment.

***EEOC v. P.A.M. Transport, Inc.*, 2011 U.S. Dist. LEXIS 100329 (E.D. Mich. Sept. 7, 2011).**

The EEOC brought an action on behalf of an HIV-positive former truck driver, alleging that Defendant, an interstate trucking company, subjected him to disability-related inquiries in violation of the ADA and prohibited him from returning to work based on medical information that he produced as a result of the allegedly unlawful inquiries. The Magistrate Judge reported and recommended ("R&R") that Defendant's motion for summary judgment be granted, and that the matter be dismissed without prejudice on exhaustion grounds. The Court agreed with the Magistrate Judge's conclusion that the EEOC, in pursuing a claim on behalf of an individual, could not avoid the U.S. Department of Transportation's ("DOT") regulation requiring exhaustion of administrative remedies. As the EEOC did not specifically object to the Magistrate Judge's conclusion in the R&R that it may not bypass the exhaustion requirement when it brought an ADA claim on behalf of an aggrieved employee, the Court held that it had waived any further argument on this issue. The EEOC argued that the exhaustion requirement was inapplicable because the truck driver was not entitled to avail himself of the procedures set forth in § 391.47 for resolving disagreements among physicians. The Court agreed with the Magistrate Judge that because the truck driver already had a valid medical certificate allowing him to drive, § 391.47 merely required there to be a disagreement between the physician for the employee and the physician for the company. There was nothing in this provision suggesting that an aggrieved employee may not file a claim under this provision if he had a validly issued medical certificate. The EEOC's main objection to the R&R was that its impermissible inquiry claim should proceed, even if the unlawful separation claim was dismissed, because Defendant had not sought dismissal of the impermissible inquiry claim in its motion, and there was no legal basis supporting dismissal of that claim. The Court noted that DOT regulations provide administrative appeal procedures for instances of disagreement between the physician for the driver and the physician for the motor carrier concerning the driver's qualifications. The Court determined that the EEOC's unlawful separation claim was subject to § 391.47's exhaustion framework because that claim required the EEOC to prove the truck driver's fitness for duty. As the EEOC could not show that the truck driver was "otherwise qualified" to drive a truck unless it showed that he satisfied DOT's fitness requirements, a determination that unquestionably fell within the administrative framework of § 391.47, the Court found that the unlawful separation claim could not proceed unexhausted. *Id.* at \*13. The Court pointed out that there had been no showing, however, that the same was true of the EEOC's impermissible inquiry claim. Defendant claimed that administrative remedies under § 391.47 must be exhausted before any action could be taken under the ADA, but Defendant had not pointed to any authority demonstrating that impermissible inquiry claims under § 12112(d)(4)(A) were subject to the administrative exhaustion framework of § 391.47. Further, whether a carrier could make medical inquiries was a legal issue concerning the interplay between the regulations promulgated by the DOT and the ADA. Thus, the Court found there was no administrative procedure to exhaust with regard to the EEOC's impermissible inquiry claim. Finally, Defendant

contended that the case should be dismissed with prejudice, and not without prejudice as the Magistrate Judge recommended, because the opportunity for the EEOC to commence an administrative appeal had expired, thereby effectively ending this litigation. Because the Court had not been tasked with determining whether administrative review would be precluded, the Court concluded that the general rule – that dismissals based on failure to exhaust administrative remedies are applied without prejudice – was proper. *Id.* at \*14-15.

***EEOC v. Journal Disposition Corp.*, 2011 U.S. Dist. LEXIS 124177 (W.D. Mich. Oct. 27, 2011).** The EEOC filed an action alleging that Defendant violated the ADA by failing to provide its employee with a reasonable accommodation of continued part-time work and discharging him from employment based on its short-term disability policy. The EEOC requested damages and injunctive relief in the form of an order enjoining Defendant from engaging in employment practices that discriminated on the basis of disability. Defendants brought a motion for summary judgment. When the employee, a machinist, was diagnosed with cancer, he utilized benefits under Defendant's short-term disability policy. The employee took 26 weeks of leave under the policy and informed Defendant that he was not sure when he would resume work full-time because his treatment would continue for a few more months. Thereafter, Defendant terminated his employment. After the treatment was over the employee was re-hired by Defendant to work in the mail room as the mail line lead. The employee was content and chose not to bid for a position in the maintenance department. Subsequently, the EEOC made a claim on behalf of the employee under the ADA. Defendant argued that the EEOC did not establish a *prima facie* case of discrimination because the employee did not request a reasonable accommodation. The EEOC contended that summary judgment was inappropriate because there were questions of fact as to whether the accommodation was requested and whether it was reasonable. The EEOC argued that the requested accommodation was that the employee be allowed to work four hours a day, five days a week, every other week, for some period of time after the conclusion of his six-month short-term disability leave. The employee testified that he assumed that he indicated that he needed to work like this for 24 weeks, but he "acknowledged that his memory was not very good" about his conversation with management. *Id.* at \*12. The Court observed that including the short-term disability for six months, the employee's total request for medical leave came close to a full year. Testimony by another of Defendant's employees indicated that the former machinist was likely to return full-time after his treatment ended. Therefore, the Court found that whether the proposed accommodation was objectively reasonable was a question for the jury. The EEOC further argued that there was no evidence that the proposed accommodation would cause undue hardship. Because Defendant did not hire anyone to work overtime or use contract workers to cover for the employee when he worked part-time, the Court found no undue hardship. Moreover, the Court found that Defendant did not fill the position due to revenue shortfalls and slow work demand and that Defendant also reduced the number of people in the maintenance department, which created an issue of fact as to hardship. The Court stated that Defendant also failed to show how paying part-time wages would have created any additional financial hardship than paying full-time wages. Therefore, the Court concluded that Defendant was not entitled to summary judgment on the basis of undue hardship.

***EEOC v. Resources For Human Development, Inc.*, 2011 U.S. Dist. LEXIS 140678 (E.D. La. Dec. 7, 2011).** Lisa Harrison, a Prevention/Intervention Specialist at Defendant's long-term residential treatment facility, weighed more than 400 pounds at the time she was hired. Subsequently, Defendant terminated Harrison's employment, at which time she weighed 527 pounds. *Id.* at \*2. After Harrison filed a charge of discrimination with the EEOC alleging that

she had been terminated because Defendant regarded her as disabled due to her obesity, she died. The EEOC then filed suit on behalf of Harrison's estate alleging that Harrison had severe obesity, which was a physical impairment under the ADA, and that Defendant regarded her as disabled because of her obesity. Defendant filed a motion for summary judgment. Defendant argued that the EEOC's regulations excluded obesity from qualifying as a disability. The Court opined that a careful reading of the EEOC guidelines and the ADA revealed that the requirement to prove an underlying physiological disorder was only required when a charging party's weight was within the normal range and not if the charging party was severely obese. The Court determined that at all relevant points, Harrison was severely obese and had multiple resultant disorders. The Court recognized that severe obesity qualified as a disability under the ADA and there was no requirement to prove an underlying physiological basis. Defendant asserted that because Harrison's EEOC charge asserted that she was regarded as disabled, it precluded a finding that she was actually disabled. The Court, however, found that proceeding with both a "regarded as disabled" claim and an "actually disabled" claim was not prohibited. *Id.* at \*17. Because Harrison was actually disabled because of her resultant diabetes and there was sufficient evidence that supported the notion that Defendant regarded her as disabled, the Court found that summary judgment was inappropriate on the question of whether Harrison was a qualified individual with a disability. *Id.* at \*20. The Court also found that whether or not Harrison actually suffered an adverse employment decision due to her morbid obesity was also key issue of material fact that precluded summary judgment. Defendant also claimed that the EEOC's suit was flawed because Harrison failed to exhaust administrative remedies, as the EEOC was bringing a claim that Harrison was actually disabled even though Harrison failed to bring any charge relating to that claim. The Court reasoned that given that Harrison alleged that she was regarded as disabled in her EEOC intake form and that an allegation of actual disability was not outside the scope of the resulting EEOC investigation, the administrative remedies were properly exhausted. The Court also found that judicial estoppel was inapplicable, and as such, summary judgment was inappropriate on this issue.

***EEOC v. AT&T Mobility Services, LLC, 2011 U.S. Dist. LEXIS 144195 (E.D. Mich. Dec. 15, 2011).*** The EEOC brought an action on behalf of a former store manager, Cynthia Davey, alleging that when she returned from her disability leave, Defendant failed to accommodate her, and eventually terminated her in violation of the ADA. Davey was diagnosed with multiple sclerosis, which prevented her from working in excess of 40 hours in a week. Defendant employed Davey as a store manager, which required her to work about 50 hours a week. About a year later, Davey came back from her short-term disability leave and asked Defendant to accommodate her to allow her to work for only 40 hours a week. Defendant, however, informed her of its inability to accommodate her, put her on a 30-day paid leave, and asked her to look for other open positions within the company. Defendant terminated her after the 30-day paid leave because Davey was unable to find suitable position that she was qualified to perform. After discovery, Defendant filed a motion for summary judgment. Defendant contended that the EEOC could not establish a *prima facie* case of disability discrimination because Davey was unable to perform the essential functions of a store manager's position. Defendant argued that it was undisputed that Davey's position required that she be able to work more than 40 hours a week as an essential function of the job. Defendant asserted that as Davey's doctor indicated that she had a permanent restriction of not working more than 40 hours a week, she was not a qualified individual with a disability under the ADA. The Court noted that there was no evidence suggesting that the work restrictions presented to Defendant by Davey's doctor were flexible, as the doctor offered no clarification that the 40-hour workweek restriction was not absolute and

permanent. The only issue of fact remaining was whether working over 40 hours a week was an essential function of the job. Because Davey conceded that working over 40 hours a week, at least periodically if not regularly, was an essential function of the store manager position, the Court determined that she was unable to perform the essential function of her job. Accordingly, the Court concluded that the EEOC was unable to satisfy the second element of its *prima facie* case. Even if the EEOC were able to establish that Davey was a qualified individual with a disability, Defendant contended that the EEOC had failed to establish that Defendant should have accommodated Davey. In that respect, the only accommodation Davey sought was a reduction to 40 hours per week in her store manager's position. The Court noted that immediately after Davey sought an accommodation, Defendant engaged in discussions to what possible accommodations could be made. Defendant proposed a wheelchair, which Davey claimed would not help with her 40-hour restriction. Defendant then put her on a 30-day paid leave to enable her to look for other open positions within the company. The Court found that this evidence was sufficient to establish that Defendant accommodated her, particularly when the store manager position required her to work in excess of 40 hours a week, and Davey's doctor posed an inflexible 40-hour work restraint. Accordingly, the Court concluded that the EEOC failed to meet its burden to establish that Defendant failed to accommodate Davey. For these reasons, the Court granted Defendant's motion for summary judgment.

***EEOC v. Greater Baltimore Medical Center, Inc.*, 769 F. Supp. 2d 843 (D. Md. 2011).** The EEOC brought suit on behalf of Michael Turner, alleging disability discrimination under the ADA, 42 U.S.C. § 12101 *et seq.* Defendant moved for summary judgment on the basis that the EEOC was judicially estopped from bringing the action because Turner's Social Security Disability Insurance ("SSDI") application, which stated that Turner was disabled and unable to work, and Turner's continuing receipt of benefits based upon this application, contradicted the EEOC's claim in this case that Turner was able to work without restrictions. The Court granted Defendant's motion for summary judgment. The Court relied on *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795 (1999), where the Supreme Court considered an SSDI application in a similar set of facts. In *Cleveland*, the Supreme Court held that a Plaintiff who applied for and received SSDI benefits was not automatically barred from pursuing a claim of employment discrimination under the ADA because the definition of disabled in the Social Security context does not take into account the effects of reasonable accommodations on the ability to work. However, to survive a motion for summary judgment, a Plaintiff must explain why that SSDI representation is consistent with the ADA claim that Plaintiff could perform the essential functions of the previous job, at least with reasonable accommodation. The Court pointed out that *Cleveland* required it to ask whether Plaintiff's assertions were genuinely in conflict, and, if so, whether Plaintiff had adequately reconciled the two positions. Initially, the Court explained that a traditional judicial estoppel analysis was not the appropriate framework by which to consider the disputed claims in this case. Following the Fourth Circuit precedent in *EEOC v. Stowe-Pharr Mills, Inc.*, 216 F.3d 373 (4th Cir. 2000), the Court concluded that the EEOC can be barred from bringing an ADA suit if the EEOC does not provide a sufficient explanation for an apparent contradiction between a claimant's SSDI application and the claimant's later contentions that he or she was able to work. Applying the *Cleveland* analysis, the Court stated that on its face, Turner's SSDI application and continuing receipt of benefits contradicted the EEOC's claim that Turner could perform the essential functions of his position. To that end, the EEOC argued that Turner's statements in his SSDI application were true when he made them, but that Turner had since recovered and became able to perform the necessary functions of his position or even other positions with or without a reasonable accommodation.

The SSDI application, however, clearly required Turner to inform the Social Security Administration if his medical condition improved such that he was able to return to work, which Turner had failed to do. *Id.* at 852. The Court reasoned that as long as Turner was receiving SSDI benefits, he was continuing to represent to the SSA that he was still disabled and unable to work without a reasonable accommodation, which conflicted with the current claims. The Court found that even if Turner represented that he was able to work with reasonable accommodations in his SSDI application, the application was still at odds with his numerous statements during and after his employment that he never needed a reasonable accommodation. As a result, the Court found that Turner had taken inconsistent positions and that the EEOC was unable to prove one of the necessary elements of a *prima facie* case under the ADA. Accordingly, the Court granted Defendant's motion for summary judgment.

## B. ADEA Cases

***EEOC v. Exxon Mobil Corp.*, 2011 U.S. Dist. LEXIS 15494 (N.D. Tex. Feb. 14, 2011).** The EEOC filed a lawsuit alleging that Defendant's age-based mandatory retirement policy for pilots violated the ADEA. Defendant implemented a policy requiring its pilots to retire when they reached 60 years of age on the grounds that they have heightened risk of experiencing health events while flying, ultimately resulting in passenger safety hazards. This policy mirrored the Federal Aviation Administration's ("FAA") policy for commercial pilots. Defendant filed a motion for summary judgment. The Court granted Defendant's motion on its affirmative defense that the age of a pilot was a *bona fide* occupational qualification ("BFOQ") because of concerns for public safety. The Court found that Defendant's operations were congruent to commercial operations where FAA regulations are mandatory and that the FAA's Age 60 Rule was based on safety. The EEOC appealed and argued that it was not allowed to pursue discovery on the issue of "continuing validity" of the policy before the Court granted summary judgment. *Id.* at \*5. The Fifth Circuit agreed, and remanded the case to afford the EEOC that opportunity. Upon remand, the EEOC designated its experts for trial on the issue of "continuing validity" of Defendant's policy, questioning the effectiveness and necessity of the policy. *Id.* Defendant moved to strike the EEOC's expert witness designation, arguing that all of the EEOC's experts were irrelevant to the issue of "continuing validity" because the EEOC was mounting an impermissible collateral attack on the wisdom of the FAA's age-based mandatory rule. *Id.* The Court denied the motion. It reasoned that the opinion of the Fifth Circuit was not clear in terms of whether the panel used "continuing validity" to mean that the FAA has continued to accept that an age limit is the only proxy for adequate pilot safety, or whether it meant the EEOC was allowed to attack the reasonableness of an age-based mandatory retirement rule as applied by Defendant. *Id.* at \*6. The significance of the distinction was that under the first interpretation, Defendant must only prove that the FAA continues to believe that an age-based rule is necessary for safety to establish its BFOQ defense. Under the second, Defendant would be required to present evidence that there are no "acceptable alternatives which would advance public safety with less discriminatory impact" than the policy. *Id.* The EEOC pointed to the FAA's statements suggesting the FAA "no longer supported" its age-based rule. *Id.* at \*7. The Fifth Circuit opinion also indicated that the EEOC should be allowed to present evidence that reliable, individualized testing had been available to ascertain which among older pilots were unsafe. Defendant argued the first interpretation and the EEOC argued the second. The Court found that the answer to the first interpretation was obvious because the FAA continues to employ an age-based mandatory retirement rule for commercial pilots, 14 C.F.R. § 121.383(e) (2011), and has stated that an age-based rule remains the safest way to determine the risk of "health events" in older pilots. *Id.* The Court found it unlikely that this case was remanded for

determination of whether or not the FAA continues to stand behind its own age-based mandatory retirement regulation. Therefore, the Court observed that “continuing validity” must mean that the EEOC was allowed to attack the logic and reasonableness of an age-based mandatory retirement rule as applied by Defendant, *i.e.*, in contexts where it was not mandatory. *Id.* at \*8. As described by the EEOC, its experts would provide facts and analysis on alternative methods of safety testing for more experienced pilots. The EEOC asserted that its experts would be used to rebut evidence Defendant was required to produce as part of its BFOQ defense to age discrimination. Under the second interpretation, the Court found that the EEOC’s experts were relevant, and therefore denied Defendant’s motion to strike the EEOC’s designation of its expert witnesses.

***EEOC v. Minnesota Department Of Corrections, 648 F.3d 910 (8th Cir. 2011).*** The EEOC brought an action for injunctive and monetary relief, alleging that the Early Retirement Incentive Program (“ERIP”) in Defendants’ collective bargaining agreement unlawfully discriminated against state employees on the basis of age in violation of the ADEA. The ERIP plan provision provided that a participant who retired during the pay period of his or her 55th birthday, and who was covered by the plan, was eligible to receive an unreduced continuation of the employer’s contribution toward his or her health and dental insurance premiums until he or she reached age 65. Meanwhile, any employee between the ages of 50 and 55 who elected to retire received an ERIP benefit of lesser value. Finally, any employee between the ages of 55 and 60 who chose to retire received no continuation of employer contributions. Thus, an employee must retire at 55 or lose the early retirement benefit. An employee hired after age 55 could not obtain the early retirement benefit. The EEOC moved for summary judgment. The District Court first determined that the ERIP was facially discriminatory in that it denied employees certain benefits solely on the basis of their age and second, relying almost entirely on *Jankovitz v. Des Moines Independent Community School District*, 421 F.3d 649, 653 (8th Cir. 2005), it rejected Defendants’ argument that the facially discriminatory ERIP fell within the ADEA’s ERIP safe harbor. On Defendants’ appeal, the Eighth Circuit affirmed. It found the dispositive question was whether the otherwise invalid ERIP qualified for protection under the ADEA’s safe-harbor provision. The safe harbor provision provides that it is not unlawful for an employer to observe the terms of a *bona fide* employee benefit plan that was a voluntary early retirement incentive plan consistent with the relevant purposes of the ADEA. *Jankovitz* held that an ERIP, identical to Defendants’ ERIP in all material respects, failed to satisfy the ADEA’s ERIP safe harbor provision and specifically determined that plans of this nature, which effected adverse changes in employment benefits based solely upon age, were inconsistent with the purposes of the ADEA. The Eighth Circuit pointed out that the ERIP’s exclusively age-based reduction in benefits typified arbitrary age discrimination and therefore failed to meet the ADEA’s safe harbor requirements. *Id.* at 914. The Eighth Circuit found that although Defendants were not obliged under federal law to employ certain persons over the age of 55 for reasons that may include age, it may not discriminate against all persons over age 55 solely due to their age. The Eighth Circuit cited *Morgan v. A.G. Edwards & Sons, Inc.*, 486 F.3d 1034 (8th Cir. 2007), as an example of an ERIP that qualified for ADEA safe harbor protection. Contrasting that ERIP to the invalid one in *Jankovitz*, the Eighth Circuit found that because the ERIP did not arbitrarily discriminate on the basis of age, the plan was consistent with the purposes of the ADEA. In contrast to the permissible ERIP that the Eighth Circuit reviewed in *Morgan*, the ERIP in this case, whereby early retirement benefits vanished when an employee turned 55, arbitrarily discriminated on the basis of age. *Id.* Accordingly, the Eighth Circuit concluded that the safe

harbor provision was not applicable to the ERIP and affirmed the District Court's grant of the EEOC's motion for summary judgment.

### C. Race – Discrimination/Hostile Work Environment Cases

***EEOC v. Mike Hooks, Inc.*, 2011 U.S. Dist. LEXIS 50559 (W.D. La. May 11, 2011).** The EEOC, on behalf of a former African-American employee, Daniel Johnson, brought an action alleging that Defendant subjected him to racial discrimination, a hostile work environment, and retaliation that culminated in his discharge in violation of Title VII. Johnson alleged that a fellow employee, Kyle Hendrickson, subjected him to racial slurs and inappropriate comments. In accordance with Defendant's zero-tolerance policy, Johnson requested Defendant to terminate Hendrickson. Defendant's managers investigated the matter and could find nothing to substantiate the allegations, and therefore dismissed the allegations as personality conflicts. Subsequently, both Johnson and Hendrickson were terminated from employment, with eligibility for re-hire. Several weeks later, Hendrickson was re-hired and Defendant employed him temporarily for 18 days. Johnson never applied to be re-hired with Defendant. When Johnson discovered that Hendrickson was re-hired, he filed a complaint with the EEOC, which culminated in this action. Defendant filed a motion for summary judgment arguing that the EEOC did not have sufficient evidence to present a material issue of fact for trial. The parties did not dispute that the EEOC had established the first three elements of *prima facie* case, including: (i) Johnson belonged to the protected class; (ii) he was qualified for the employment position; and (iii) he was subject to an adverse employment action. Defendant argued that the EEOC could not establish the fourth element, *i.e.*, that Johnson was replaced by someone outside the protected class. Defendants stated that when Hendrickson was re-hired he did not replace Johnson, he merely filled the job he had once occupied. Furthermore, Johnson never sought reemployment. The Court agreed and granted summary judgment on the discriminatory termination claims. Regarding the hostile work environment claims, the EEOC asserted that a genuine issue of material fact existed because Hendrickson's actions were so objectively and subjectively offensive to satisfy its *prima facie* case. The Court remarked that a preliminary problem with the hostile work environment claim was that the EEOC simply assumed that Hendrickson's behavior was imputable to Defendant. The Court noted that an employer is vicariously liable for its employee's actions when there is a tangible employment action or when the harassing employee is a proxy for the employer. Here, Hendrickson did not exercise authority and his actions during the alleged altercation were in no way connected to his job functions. Accordingly, the Court concluded that his acts could not be attributed to Defendant, and not assignable under the principles of agency. Moreover, the Court found that Hendrickson's comments were isolated incidents and as such did not rise to the degree of being severe and pervasive. The Court reasoned that Johnson never complained or even indicated that the environment interfered with his job performance or altered the terms of his employment. Moreover, Defendant took remedial steps and reprimanded Hendrickson, who was terminated days later. The Court found that these actions constituted prompt remedial action, reasonably calculated to end the harassment. Nevertheless, the EEOC asserted that there was a material issue of fact regarding Defendant's motive for firing Johnson, as he was fired within days of complaining of alleged racial harassment. At the outset, the Court determined that Johnson did not oppose any practice made unlawful under Title VII during his meeting and therefore did not engage in a protected activity. The Court explained that Title VII only encompasses opposition activity that is based on a reasonable belief that the employer engaged in unlawful employment practices. In fact, all the meetings that Johnson attended were initiated by him seeking Hendrickson's termination. Although the EEOC argued that Johnson engaged in opposition

activity when he sought Hendrickson's discharge, the Court held that his conduct was the type of improper conduct that was not afforded protection under the Title VII. Finally, the Court concluded that the EEOC's lawsuit failed because there was nothing suspect regarding Defendant's reason for terminating Johnson. The Court explained that the evidence merely demonstrated that Defendant did not want to enforce its zero-tolerance employment policies in such a way that it would result in the termination of either or both employees. Eventually conceding to Johnson's demands, Defendant fired both men for violating the company's zero-tolerance violence policy. Accordingly, the Court granted Defendant's motion for summary judgment in its entirety.

***EEOC v. WRS Infrastructure And Environmental Inc.*, 2011 U.S. Dist. LEXIS 110149 (N.D. Ill. Sept. 27, 2011).** The EEOC and 11 former employees brought an action alleging that Defendant's worksite near Chicago was a racially hostile workplace. Specifically, seven African-American employees alleged that they were subjected to constant racial harassment, most notably a large noose placed on the work truck of one of the employees. Four white employees also asserted that their white co-workers harassed them because they associated with African-American employees. Two African-American employees also alleged they were fired because of their race and two white employees asserted they were fired for engaging in protected activity and in retaliation for associating with African-American employees. Defendant filed a motion for summary judgment as to the hostile work environment and retaliation claims. Defendant first contended that the noose should be considered as evidence of a hostile work environment only for the employee on whose work truck it was placed. The Court stated that Defendant ignored both the extreme symbolism of a noose and that the noose was placed anonymously. The Court observed that a reasonable jury could conclude that the worksite had at least some racial tension given the other nooses, threats, and racial epithets that each African-American employee experienced, and that the noose was intended to intimidate all African-Americans. Thus, the Court held that the EEOC had demonstrated a subjectively and objectively hostile work environment. The Court also found that Defendant was not entitled to summary judgment on the EEOC's hostile work environment claim because a reasonable jury could find that Defendant failed to exercise reasonable care to prevent the harassment, and Defendant was negligent in discovering and remedying the harassment. Although Defendant had a written policy forbidding harassment based on race, it did not distribute the policy to its employees, post it at the job-site, or train the employees about what constitutes harassment and how to report it. Accordingly, the Court denied summary judgment to Defendant on the EEOC's hostile work environment claim. The Court, however, determined that Defendant was entitled to summary judgment on all the hostile work environment claims brought on behalf of the white employees. The Court stated that evaluating the objective severity of the harassment must focus on harassment the white employee himself experienced because of that association and that a white employee cannot sue for a hostile work environment based on harassment of African-American employees that the white employee happened to see. The Court found that no reasonable jury could find that one or two isolated comments converted every other disagreement and incident between white employees into a racially-charged dispute based on one of the employee's association with an African-American co-worker. In evaluating the retaliation claims brought on behalf of the African-American employees, the Court stated that intervening Plaintiff McKnight presented sufficient evidence to demonstrate that for the time period before he was terminated, he performed as well as or better than his white co-workers. Stating that intervening Plaintiff Townes provided direct evidence that the supervisor who fired Townes did so because of his race (through the supervisor's comment that he could get rid of

“that . . . nigger”), the Court found that Defendant was not entitled to summary judgment on the termination claim. *Id.* at \*47. Intervening Plaintiff Benson asserted that he was fired in retaliation for complaining about racial discrimination. The Court found that his comment could reasonably be interpreted to refer to associational harassment and that it was protected activity. The Court also found that intervening Plaintiff Benson demonstrated enough of a link between the incident and termination to survive summary judgment. As intervening Plaintiff Stevenson was laid-off because the supervisor made a mistake and did not check information, the Court found that a mistake was not pretext and Defendant was entitled to summary judgment on that claim as well.

***EEOC v. Xerxes Corp.*, 639 F.3d 658 (4th Cir. 2011).** The EEOC, on behalf of a group of African-American employees, brought a pattern or practice action alleging a hostile work environment due to racial discrimination in violation of Title VII. Two employees, Pearson and Wilson, filed internal complaints of discrimination, which Defendant investigated. Based on the results of the investigation, two other employees received a two-day unpaid suspension from work, were required to attend anti-harassment training, and were placed on a final warning. About one year after the investigation, one of the employees filed a subsequent complaint alleging that he found references to the KKK in his work locker. Defendant promptly investigated, but was unable to determine who was responsible. This issue was reported to the local Sheriff’s Office, the matter was investigated, and the employees did not make any further complaints of discrimination or hostile work environment. In July of 2008, the EEOC subsequently initiated this action on behalf of the two original employees and a class of black individuals, alleging a hostile work environment. The District Court granted summary judgment to Defendant, concluding that its responses to reports of harassment were reasonable as a matter of law. On appeal, the Fourth Circuit affirmed the judgment in part. At the outset, the Fourth Circuit noted when an employee has been harassed, an employer must show that it exercised reasonable care to prevent discrimination. Here, it was undisputed that Defendant’s anti-harassment policies provided reasonable procedures for victims to register complaints. Therefore, the only aspect left in the burden shifting methodology was to ascertain whether the EEOC presented sufficient evidence to demonstrate that Defendant’s responses to the complaints made under its policies were not reasonably calculated to end the harassment and that liability for the harassment may be imputed to it. Viewing the evidence in the light most favorable to the EEOC, the Fourth Circuit concluded that a genuine issue of material fact existed as to whether Defendant had notice of the alleged racial slurs and pranks in the workplace prior to February 2006, but failed to respond with any remedial action. Pearson and Wilson each testified that prior to February 2006 they were subjected to the repeated use of racial slurs, as well as various pranks that they believed were racially motivated. They also testified that they first reported this harassment in June 2005 and November 2005, respectively, and continued as the incidents occurred thereafter, up to and including the complaints they made on February 3, 2006. They further testified that Defendant did nothing in response to their complaints until February 2006. Defendant disputed that complaints of racial harassment were made prior to February 2006. The Fourth Circuit, however, concluded a jury could reasonably credit the testimony of Pearson and Wilson and conclude otherwise. Regarding the incidents of racial harassment that were reported on February 3, 2006, and beyond, the Fourth Circuit held that Defendant’s response to each reported incident was reasonably calculated to end the harassment, and was therefore reasonable as a matter of law. The Fourth Circuit noted that as of February 2006, Defendant had in place extensive anti-harassment policies consistent with Title VII that directed plant employees to report any racial harassment immediately to their

supervisor and the plant manager. The policies assured employees that their complaints would be investigated promptly and that appropriate remedial action would be taken. In February 2006, the complaints were immediately investigated and the alleged harassers were promptly disciplined. In May 2006, when Pearson complained about other co-workers using racially-offensive terms, Defendant investigated and imposed written disciplinary action. In sum, the Fourth Circuit concluded that Defendant's response to the complaints of racial harassment in 2006 was timely and proportional to the seriousness and frequency of the various offenses. The EEOC argued that despite this demonstrable effectiveness, a reasonable jury could find that Defendant's responses were unreasonable based upon Pearson's testimony that he was subjected to two isolated racial slurs in August 2007, and Wilson's testimony that he was subjected to a single racial slur in August 2008. The Fourth Circuit disagreed, finding that the EEOC made much too of these alleged, albeit isolated racial remarks. Accordingly, the Fourth Circuit affirmed the District Court's grant of summary judgment as it pertained to this time period.

#### **D. Religion – Discrimination/Hostile Work Environment Cases**

***EEOC v. T-N-T Carports, Inc.*, 2011 U.S. Dist. LEXIS 49914 (M.D.N.C. May 9, 2011).** The EEOC brought an action against Defendant alleging that it permitted a hostile work environment against a former employee, Brenda Thompson, in violation of Title VII of the Civil Rights Act of 1964. She began working at T-N-T in 2003 and her daughter-in-law, Amy Thompson, commenced employment in 2005. Some months later, Amy Thompson received a new work assignment that was desired by a co-worker, Debbie Poindexter. Immediately thereafter, Poindexter began to harass and bully both Amy and Brenda, and used Brenda's religious faith as part of the harassment. The women complained to Defendant's supervisors about the harassing conduct, and Brenda asked to be moved to another location on five separate occasions. Both women then voluntarily resigned from their employment with T-N-T. Defendant filed a motion for summary judgment on the basis that the motivation for the harassment was not religious, but rather arose from jealousy after the daughter-in-law received a preferable work assignment. In support of its argument, Defendant relied on *Rivera v. Puerto Rico Aqueduct and Sewers Authority*, 331 F.3d 183, 189, 191 (1st Cir. 2003), in which the First Circuit held that summary judgment is appropriate when the record established that the conduct at issue was merely tinged with religious overtones and that a constellation of factors other than religious animosity led to the friction between Plaintiff and her co-workers. The Court observed that *Rivera* was generally consistent with the Fourth Circuit's case law requiring evidence that the harassment was motivated by religious animosity. The Court also noted that in *EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 318 (4th Cir. 2008), the co-workers had used religious epithets and religious derogatory terms when referring to a Muslim employee that would not have been applied to a non-Muslim employee and that the Muslim employee had been teased about his appearance and his short prayer sessions. The Fourth Circuit found in *Sunbelt Rentals* this was overwhelming evidence that disrespect for the Muslim religion was the basis of the conduct and that summary judgment was not appropriate. Here, the Court found that the record established that harassing conduct from Thompson's peers was not religious in nature but motivated by jealousy. However, the Court found that Thompson's co-workers, knowing that she was a devout Christian, engaged in conduct that clearly showed religious animosity, including suggesting she belonged to a cult and was a devil worshipper; physically intimidating her while simultaneously using derogatory words about her religion; calling her crazy about her religious beliefs; drawing devil horns, a devil tail, and a pitchfork on her Christmas photo; using profanity followed by mock apologies; and cursing the Bible and teasing her about Bible

reading. The Court concluded that these instances established that the harassment was motivated by animosity toward Thompson because of her religion. Defendant also contended that because there were only a few instances of overtly religious harassment over a relatively short time span, the hostile work environment was not severe or pervasive. The Court disagreed, and determined that it would be inappropriate simply to count the incidents, as the nature of the incidents was relevant as well as the number. The Court opined that Thompson subjectively perceived the workplace to be hostile because there were a number of incidents over time committed by several individuals in a concerted effort to humiliate and demean her. Accordingly, the Court found that a reasonable jury could find that the harassment was sufficiently severe or pervasive as to alter the terms and conditions of employment and create an abusive work environment. Finally, the Court found that a reasonable jury could find that Defendant had notice of the harassment and did not take appropriate action to end it. The Court held that Thompson repeatedly complained to superiors about the harassment and suggested simple remedies that were not adopted. Thus, the Court concluded that while the record contained evidence that T-N-T may have engaged in some remedial efforts, it was a matter for the jury to decide whether any efforts by T-N-T were reasonably designed to end the harassment and therefore summary judgment was not appropriate.

***EEOC v. Abercrombie & Fitch Stores, Inc.*, 2011 U.S. Dist. LEXIS 77181 (N.D. Okla. July 13, 2011).** The EEOC brought an action alleging religious discrimination in violation of the Title VII against a Muslim teenager, Samantha Elauf, who was not hired in conjunction with Defendant's "Look Policy" which prohibited sales models from wearing headwear. *Id.* at \*2. Defendant's Look Policy required employees to dress in clothing and merchandise consistent with that sold in the store. The Look Policy prohibited caps, but did not mention any other headwear. Elauf testified that under her religion, the headscarf becomes an obligation after one reaches a certain age, and that she wore a headscarf on a daily basis. Defendant relied on an expert's report in support of its position that making an exception to the Look Policy would create an undue burden. The defense expert testified on marketing strategy and brands and essentially opined that exceptions negatively affected the brand (when he was asked to opine on allowing exceptions to the policy to permit wearing of the headscarf). Defendant moved for summary judgment, which the Court denied, and the EEOC moved for partial summary judgment on Defendant's affirmative defense on undue hardship, which the Court granted. The EEOC offered evidence that Elauf wore a headscarf based on her religious beliefs, that this belief conflicted with Defendant's prohibition against headwear, that Defendant had notice that she wore a headscarf because of her religious belief, and that it refused to hire her because the headscarf conflicted with its Look Policy. Accordingly, the Court ruled that the EEOC had established a *prima facie* case. *Id.* at \*25. Defendant challenged two elements of the EEOC's *prima facie* case, asserting that Elauf's wearing of a headscarf was not based on a *bona fide* religious belief and the notice requirement was not satisfied. The Court reasoned that a *bona fide* religious belief was one that was religious within the employee's own scheme, and was sincerely held. The Court found that because Elauf believed that she should wear a headscarf, and that she had done so for many years, she wore a headscarf based on her belief. *Id.* at \*35. In addition, the Court determined that the record was devoid of any evidence that Elauf's belief was animated by motives of deception and fraud. Accordingly, the Court concluded that Elauf's beliefs were sincere. The Court also found that Defendant had sufficient notice that Elauf wore a headscarf because other employees had seen Elauf wear a headscarf at another retail store where Elauf previously worked and because she wore it to her job interview. Accordingly, the Court concluded that Defendant failed to rebut the EEOC's *prima facie* case. Defendant

asserted that even if it failed to rebut the EEOC's *prima facie* case, allowing Elauf to wear a headscarf would result in undue hardship. The Court noted that several executives of Defendant testified that they believed granting Elauf an exception to the Look Policy would negatively affect Defendant's brand, sales, and HR compliance. However, none of the executives had conducted any studies or cited specific examples to support their testimony and Defendant relied solely on its expert opinion. The Court found it significant that Defendant had granted numerous exceptions to the Look Policy since 2001 and, in particular, had recently granted nine headscarf exceptions. Therefore, the Court found that the defense expert's opinion was too speculative to establish actual hardship. *Id.* at \*37. For these reasons, the Court granted the EEOC's partial motion for summary judgment as to liability.

## E. Retaliation Cases

### ***EEOC v. Chrysler Group, LLC*, 2011 U.S. Dist. LEXIS 16850 (E.D. Wis. Feb. 17, 2011).**

Donna Hobbs and Michelle Zahn, former employees of Defendant, filed charges of discrimination with the EEOC alleging that Defendant's human resources supervisor retaliated against them when he threatened their employment for complaining of sex-based discrimination. The EEOC filed a complaint against Defendant, alleging that Defendant violated Title VII by retaliating against Hobbs and Zahn in anticipation of their filing sex discrimination complaints. According to the EEOC, Defendant engaged in unlawful employment practices by verbally harassing Hobbs and Zahn, threatening both with termination, and depriving them of access to the grievance procedure to which they were entitled. Defendant subsequently moved for summary judgment. The EEOC moved to strike many of Defendant's proposed statements of fact in support of its motion for summary judgment, contending that Defendant cited sources that did not support the asserted facts. The Court granted the EEOC's motion to strike Defendant's proposed facts in part. Defendant's motion for summary judgment contended that the EEOC could not establish a *prima facie* case of retaliation because neither Hobbs nor Zahn suffered any lost time, neither was tangibly disciplined in any way, lost any benefits, or were given a less desirable job, and thus neither suffered from a materially adverse action. As it was undisputed that the HR supervisor said to either Hobbs or Zahn that their allegations were being investigated and if they turned out to be unfounded, both could be subject to discipline including termination, the Court reasoned that this case hinged on whether the HR supervisor's warnings of possible termination constituted adverse action such that it constituted "anticipatory retaliation." *Id.* at \*27. The Court concluded that a reasonable trier of fact could find that the warnings were materially adverse. Although the evidence did not demonstrate that the HR supervisor threatened termination if Hobbs or Zahn filed grievances or charges, the Court observed that he may not have needed to recite these precise words in order to deter or dissuade a reasonable employee from maintaining a charge of discrimination. Accordingly, the Court found that the record contained sufficient evidence to raise a genuine issue of material fact as to whether the HR supervisor's disciplinary warnings, coupled with the surrounding circumstances, would have dissuaded a reasonable worker from making or supporting a charge of discrimination. Given the close chain of events that led to the threats of termination, the Court also determined that a reasonable finder of fact could infer the requisite causation to support a claim of retaliation. As a result, the Court denied Defendant's motion with respect to the EEOC's retaliation claim based upon the HR supervisor's alleged verbal harassment and threats of termination. The EEOC also argued that Defendant retaliated against Hobbs and Zahn by unlawfully depriving them of the internal grievance procedures in placing their grievance on "hold" solely because Hobbs and Zahn filed EEOC charges. *Id.* at \*33. The Court disagreed, stating that the EEOC could not demonstrate that Hobbs and Zahn lost a contractual

benefit, since the evidence demonstrated that their right to grieve would be scrupulously honored once the litigation had ceased. Because Hobbs and Zahn had not lost their right to grieve, the Court held that they had not suffered an adverse action, and thus the EEOC could not maintain a retaliation claim for the alleged loss of this right. Therefore, the Court found that the EEOC had failed to establish a *prima facie* case of retaliation for Defendant's alleged failure to process the internal grievance.

***EEOC v. Southeast Telecom, Inc.*, 780 F. Supp. 2d 667 (M.D. Tenn. 2011).** The EEOC brought an action on behalf of Suzanne Sword alleging that Defendant discharged Sword in retaliation for her complaint of sex discrimination, in violation of Title VII of the Civil Rights Act of 1964, and the FLSA. Defendant filed a motion for summary judgment on the EEOC's claims. The Court found that as the EEOC had presented evidence sufficient to state a *prima facie* case of retaliation, and to create an inference that Defendant's offered reasons for its adverse actions against Sword were pretextual, it denied Defendant's motion. Initially, Sword made a formal written complaint to her manager that the accounts of former sales representatives were being assigned on a discriminatory basis to a male sales representative. Although Defendant argued that it had the right to assign more accounts to another sales representative based on his previous experience and network expertise, the Court opined that this argument did not attack the viability of the EEOC's claim because it also presented evidence that Sword was particularly good at bringing in new business, regardless of her lack of network expertise, and that she was considered experienced enough for the assignment of several very large accounts. In addition, the Court pointed out that the EEOC had not brought this suit for discrimination *per se*, but only for retaliation based on Defendant's response to Sword's complaint of discrimination. The Court found that Sword may have been wrong in her belief that Defendant's distributions of accounts were discriminatory, but there was simply no evidence in the record that her belief that she was subject to discrimination was not held in good faith. Stating that as long as a complaint was made in good faith, it is irrelevant whether the allegations are ultimately determined to have violated Title VII, and on that basis, the Court denied Defendant's motion for summary judgment. The EEOC's retaliation complaint was based on Defendant disabling Sword's key fob so that she could not enter the building; disabling her access to her work voice-mail; changing the password on her work e-mail account so that she could not access her work e-mail; and suspending her with pay for two days rather than permitting her to work from home after she expressed her discomfort over the fact that these events had occurred and requested permission to work from home until the issues were resolved. According to Defendant, removal of Sword's access to her e-mail account and to the building did not occur until late in the day on Friday and Sword did not become aware of those actions until Monday morning. Defendant further maintained that none of its actions harmed Sword or constituted materially adverse actions, because she had no appointments scheduled over the weekend or the next two days. The Court disagreed, stating that a reasonable jury could find that these actions were highly irregular, unnecessary, and even threatening in light of their proximity to Sword's formal written report of perceived discrimination. The Court also found that the temporal proximity between Sword's having engaged in protected activity and her termination, along with the other events leading up to her termination, were acutely close. Sword spoke with her supervisor early on Friday morning, June 29, 2007, handing him a written letter outlining her belief that she was being discriminated against on the basis of her gender. That very day, Defendant made the decision to eliminate Sword's access to e-mail and voice-mail, and deactivated her key fob that permitted her entry into the building after hours. On Monday morning, when Sword learned about and expressed discomfort with those actions, Defendant insisted she take two days paid

leave rather than allowing her to work from home until the issues were addressed. Sword's employment was subsequently terminated on Friday, July 6, via a voice-mail left on her cell phone. The Court found these facts more than sufficient to preclude summary judgment on the EEOC's retaliation claim. Defendant further argued that in removing Sword's remote access to its computer network, building, and phone system, it was acting legitimately to protect its intellectual property and its customers, based on Sword's having, without explanation, missed a client meeting, removed files and personal belongings from her desk, and failing to respond to repeated phone calls from Defendant's human resources manager as well as from a sales engineer. Finally, Defendant asserted that its decision to terminate Sword for insubordination was clearly justified, given that Sword defied a direct order from the human resources manager and from her own direct supervisor. The EEOC argued that Defendant's reasons were unworthy of credence. First, the EEOC pointed out that there was no legitimate basis for Defendant's alleged fear that Sword would compromise its intellectual property, because Defendant had never before taken these actions against an active employee. In addition, the evidence regarding what items Sword took off her cubicle desk were vague at best, and Defendant had not presented evidence that it was unusual for Sword to take active files with her when she went out to meetings or to make cold calls. There were also factual discrepancies from the defense witnesses as to who made the decision to limit Sword's access to the computer network and to the veracity of the statement that Sword was engaged in the wholesale deletion of e-mails from her inbox. Defendant also never offered any explanation for its actions; rather, the Court found that Defendant's actions seemed calculated to escalate rather than to alleviate Sword's concerns. In particular, the Court agreed that there was a question as to whether Defendant "made a reasonably informed and considered decision" before taking any of the challenged actions against Sword. *Id.* at 691. Thus, the Court found that the facts viewed in the light most favorable to the EEOC as the non-moving party were sufficient to permit a reasonable jury to find that it had proved each element of the *prima facie* case of retaliation, and that Defendant's offered reasons for its actions were pretextual. *Id.*

#### F. Sex/Pregnancy – Discrimination/Hostile Work Environment Cases

***EEOC v. Dave's Supermarkets, Inc.*, 2011 U.S. Dist. LEXIS 19881 (N.D. Ohio Mar. 1, 2011).** The EEOC brought an action alleging that Defendant maintained a sexually hostile environment at its Harvard Lee store in Cleveland, Ohio in violation of Title VII. The EEOC alleged that Defendant's former employee, Regina Billups, was subjected to unwanted sexually explicit comments and sexual behavior from Defendant's meat department manager, Jugo Vidic, and when Billups complained about Vidic, she was eventually constructively discharged from her employment. The EEOC alleged that at the Harvard Lee store, Vidic engaged in similar patterns of sexual harassment against other female employees, including Danielle Yates, Lola Foy, Lacey Napier, and Tenisha Woods, who were also constructively discharged from their employment. Defendant filed a motion for summary judgment on the grounds that: (i) the EEOC could not satisfy the fourth element of the *prima facie* case because none of the women were subjected to a hostile work environment; and (ii) the EEOC was not entitled to recover punitive damages. Defendant asserted that Billups did not subjectively perceive Vidic's behavior to be offensive given her testimony that she considered him to be merely overly friendly and she was not offended by his comments or the first time he touched her. The Court found that those were Billups' initial reactions to Vidic's conduct and she did write a statement complaining about Vidic's conduct on the first day of her employment, and attempted to report the conduct to the store manager and co-manager. As there was evidence that Billups complained numerous times, that she was called names, and that Vidic was nasty and rude, the Court concluded that

there was an issue of fact as to whether Billups suffered from a hostile work environment. Regarding the EEOC's claims on behalf of Yates, Defendant sought summary judgment because Yates admitted that Vidic did not sexually harass her. The Court granted Defendant's motion, finding no evidence that Yates endured a hostile work environment based on her sex. The Court denied Defendant's motion as to Foy because she testified that Vidic exposed himself, made inappropriate comments, and even offered to take her to a hotel room at his expense, and that these instances created an issue of fact, particularly when Foy quit her job within five days after she began working for Defendant. Likewise, the Court found issues of fact existed as to the EEOC's claims for the remaining two women, Napier and Woods, and denied summary judgment to Defendant on these claims. The Court noted that when the EEOC seeks punitive damages for a Title VII violation, it must demonstrate that the individuals perpetrating the discrimination acted with malice or reckless disregard toward the worker's federally protected rights, and the EEOC must impute liability to the employer by establishing that the discriminatory actor worked in a managerial capacity and acted within the scope of his or her employment. The Court noted that Defendant might avoid punitive damages liability by showing that it engaged in good faith efforts to comply with Title VII. The Court opined that to have engaged in good faith efforts to comply with Title VII, Defendant had to have a written anti-discrimination policy and effectively publicize and implement its policy. *Id.* at \*35. Here, the Court found that Defendant undisputedly had a written anti-discriminatory policy, and that the policy was effectively publicized. Defendant maintained that Foy did not report any harassment, and Napier did not sufficiently report sexual harassment. The Court concluded, however, that there was an issue of fact as to whether Foy and Napier reported the harassment. This meant that there was an issue of fact as to whether Defendant failed to investigate the complaints of Foy and Napier; therefore, the Court held that it could not conclude that Defendant effectively enforced its sexual harassment policy. *Id.* at \*46. The Court also found that Defendant did not adequately prove that it provided sexual harassment training to its manager. Therefore, the Court ruled that summary judgment was not warranted on the issue of punitive damages.

***EEOC v. Carrols Corp.*, 2011 U.S. Dist. LEXIS 20972 (N.D.N.Y. Mar. 2, 2011).** The EEOC, on behalf of a group of 511 allegedly aggrieved workers brought a Title VII action prompted by a complaint filed by one of Defendant's former employees. Defendant owned and operated 350 Burger King restaurants in 16 states. *Id.* at \*3-4. The EEOC alleged: (i) hostile work environment; (ii) failure to remedy alleged instances of sexual harassment; (iii) retaliation against employees who complained about sexual harassment; and (iv) constructive discharge of employees by failing to remedy a hostile work environment. *Id.* at \*4. Defendant moved for summary judgment on all 511 claims, which the Court granted in part and denied in part. First, the Court found that there were several groups of individuals whose claims failed for procedural reasons. The groups included individuals: (i) who filed their own charges of discrimination with their state's human rights agency and/or the EEOC, and who, thereafter, either failed to avail themselves of the opportunity to seek the EEOC's review of the state agency's decision or failed to file a suit within 90 days of receiving a right-to-sue letter from the EEOC; (ii) one aggrieved person who filed a civil suit regarding the same claims and settled that case with a general release of her claims; (iii) a group of individuals whose claims were based on incidents that occurred prior to May 29, 1997, which were time-barred; and (iv) a group of allegedly aggrieved persons for whom the EEOC did not support their claims with admissible evidence. *Id.* at \*15-23. Second, regarding the EEOC's hostile work environment/sexual harassment claims, the Court carefully reviewed the claims of those aggrieved individuals whose claims were not procedurally barred, drew all reasonable inferences in favor of those persons, and found that

many of the EEOC's claims failed as a matter of law. Regarding the remaining aggrieved individuals for whom the EEOC asserted claims, the Court concluded that there were issues of fact that precluded summary judgment. The Court noted that although many of the remaining aggrieved persons worked at different stores within Defendant's franchise operations and suffered harassment and a hostile work environment, and in some cases, retaliation at the hands of different co-workers and managers, all of these aggrieved individuals alleged claims that were similar in nature, their claims arose from conduct that occurred within the relevant time frame, and all of the aggrieved individuals were harassed by managerial personnel employed by Defendant. Therefore, the Court held that the EEOC had raised a genuine issue of material fact about whether the work environment was sufficiently severe or pervasive to have a negative effect on the working conditions of a reasonable employee. To the extent that the EEOC complained about harassment of individuals at the hands of their supervisors, the Court held that the Commission had raised a genuine issue with respect to the effectiveness of Defendant's sexual harassment policy in addressing their complaints, and therefore Defendant could not prevail on its affirmative defense based on the company's existing anti-harassment policy. In addition, the EEOC contended that many of the workers were not aware of the policy, and despite their complaints of harassment, management did little or nothing to remedy the situation (and although they signed a statement stating that they had received a booklet containing Defendant's sexual harassment policy, they did not, in fact, receive it). As a result, the Court granted summary judgment to Defendant as to the bulk of the EEOC's claims, but denied the motions as to 131 of the claimants for whom the EEOC alleged sexual harassment and 14 of the claimants for whom the EEOC alleged retaliation. *Id.* at \*40-41.

***EEOC v. Willamette Tree Wholesale, Inc.*, 2011 U.S. Dist. LEXIS 25464 (D. Ore. Mar. 14, 2011).** The EEOC brought an action against Defendant on behalf of a group of employees alleging hostile work environment and retaliation in violation of Title VII of the Civil Rights Act of 1964. Subsequently, several employees intervened as Plaintiffs-Interveners. Plaintiff-Intervener Bustos alleged that she was repeatedly raped by a supervisor, and ultimately terminated for resisting an assault. Thereafter, the supervisor continued to contact Bustos by cell phone, and threatened to harm her and her family if she would report the assaults. Defendant moved for summary judgment on the ground that Bustos did not timely file an EEOC charge. Defendant argued that the EEOC lacked documentary evidence as to how long the supervisor's telephone calls to Bustos continued following her termination. The Court denied Defendant's motion. Drawing on the decision in *Stoll v. Runyon*, 165 F.3d 1238 (9th Cir. 1999), the Court found that Bustos was entitled to equitable tolling of her claim. *Stoll* provided guidance on the applicability of equitable tolling where a Plaintiff was raped by supervisors and could not protect her own rights due to duress from the harassment. The Court ruled that while Bustos' psychiatric disability did not appear to be as severe as in *Stoll*, the *Stoll* case did not present a minimum threshold of a disability that a Plaintiff must overcome before tolling could be permitted. Instead, the Court indicated that tolling would be applicable whenever a claimant was prevented from asserting a timely claim by Defendant's wrongful conduct or by extraordinary circumstances beyond the claimant's control. The Court concluded that *Stoll* could be applied here to establish the elements of equitable tolling. The Court also denied summary judgment to Defendant on its argument that Bustos failed to exhaust her administrative remedies, as she asserted constructive and not actual discharge. The Court thereby denied Defendant's motion for summary judgment.

***Genesco, Inc.*, 2011 U.S. Dist. LEXIS 62539 (D.N.M. April 12, 2011).** The EEOC brought an action on behalf of a class of female employees alleging that Defendant discriminated against

them based on gender, created a hostile work environment, and retaliated against them in violation of Title VII. One of the employees, Lauren Torres, filed an intervener complaint alleging that one of Defendant's store supervisors, Adrian Marquez, sexually harassed her during the course of her employment. Torres alleged causes of action for tortious assault and battery, tortious sexual contact, and intentional infliction of emotional distress against Defendant under the doctrine of *respondeat superior*. Subsequently, Defendant moved for partial summary judgment, arguing that Defendant was not liable under a *respondeat superior* theory for the intentional torts of its employees. The Court observed that although Defendant could be liable for an employee's torts committed within the scope of his or her employment, Torres' sexual assault and battery claim had nothing to do with Defendant's interest in selling retail goods. Thus, the Court held that sexual assault is neither "fairly and naturally incident to the business," nor is it "done while the employee is engaged upon the employer's business." *Id.* at \*6. Torres argued that because Marquez instructed employees to "flirt" with customers, such "flirting" was conduct "naturally incident" to the business, and therefore Marquez's actions were committed in the course of his employment. *Id.* at \*7. The Court rejected this argument, holding that equating "flirting" with sexual assault was untenable, and that Marquez's actions arose from his own independent personal motivations. *Id.* Torres also argued that the "aided-in-agency" theory – recognized by the New Mexico Supreme Court in *Ocana v. American Furniture Co.*, 91 P.3d 58, 71 (N.M. 2004) – should apply. Under the aided-in-agency theory, an employer may be held liable for the intentional torts of an employee acting outside the scope of his or her employment if the employee was aided in accomplishing the tort by the existence of the agency relationship between the employer and the employee. The Court reasoned that although Marquez gave Torres directions to do certain things while she was working at the store, the bare fact that his supervisory status "aided" him read too much into the test as set forth in *Ocana*. *Id.* at \*9. The Court opined that because the harassment occurred before, during, and after the period in which Marquez was Torres' supervisor, his conduct did not occur "as a result of" his supervisory status. *Id.* at \*10. The Court reasoned that a different reading of this test would turn into strict liability for employers whenever a supervisor commits a tort upon an employee while the employee is on-duty. Therefore, the Court concluded that the "aided-in-agency" exception should not swallow the rule of limited *respondeat superior* liability for intentional torts. Accordingly, the Court found that Defendant was not liable for the alleged intentional torts of its employee under the doctrine of *respondeat superior* and granted Defendant's partial motion for summary judgment as to the complaint-in-intervention.

***EEOC v. EEOC v. Genesco, Inc., Case No. 09-CV-952 (D.N.M. April 15, 2011).*** The EEOC, on behalf of a group of female employees, brought a Title VII lawsuit alleging gender discrimination and retaliation. Lauren Torres, the employee named in the original complaint, filed an Intervener complaint alleging that a supervisor sexually harassed her in December 2007 and January 2008. Defendant filed a motion for summary judgment, arguing that as an employer, it could not be held liable for the hostile work environment Torres suffered under her supervisor because of its affirmative defense that it had reasonable procedures in place to correct and prevent sexual harassment, and Torres unreasonably failed to follow those procedures. Defendant based its argument on *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765 (1998). Regarding the first element of this defense, the Court found that Defendant had in place an anti-harassment policy with complaint procedures that it provided to its employees and posted on the wall of the stockroom at the store in question. The policy contained a description of conduct that could constitute harassment, and a number of avenues by which an employee can report harassment,

including a means for reporting harassment that did not require an employee to complain to a supervisor. The Court concluded that Defendant established the first element of the *Ellerth/Faragher* defense. Regarding the second element, the Court found that Torres did not follow the complaint procedures set forth in Defendant's sexual harassment policy. The EEOC argued that Torres did make complaints to Defendant. The Court acknowledged the fact that Torres complained, but observed that Defendant took immediate action upon receiving the complaints and therefore could not be vicariously liable for any alleged harassment. The EEOC also sought to hold Defendant liable for negligence in responding to the hostile work environment at its store. The Court noted that to prevail on a negligence theory, the EEOC must establish that an employer "had actual or constructive knowledge of the hostile work environment but did not adequately respond to notice of the harassment." *Id.* at 17-18. The Court noted that the test is whether the employer's response to each incident of harassment is proportional to the incident and reasonably calculated to end the harassment and prevent future harassing behavior. The Court opined that one isolated incident of an employee hugging another employee does not put an employer on notice of a hostile work environment, and the manager's response to the situation was reasonable. The EEOC also argued that the three days between Torres' complaints to Oakley and the beginning of Reyes' investigation and Marquez' resignation rendered Defendant liable for negligence in responding to the hostile work environment at the store. The Court found that once Defendant's manager was informed, he took immediate action by beginning an investigation into the matter. Accordingly, the Court dismissed the EEOC's hostile work environment claim. The Court therefore granted Defendant's motion for summary judgment.

***EEOC v. Genesco, Inc., Case No. 09-CV-952 (D.N.M. April 20, 2011).*** The EEOC, on behalf of a group of female employees of Defendant, brought a Title VII lawsuit alleging retaliation and a hostile work environment based on gender. The EEOC alleged that Lauren Torres and a class of female employees, including Victoria Silva and Maria Martinez, were subjected to verbal and physical harassment at Defendant's store. The sexual harassment of Martinez allegedly included comments about the sales ability of women based on sex by her district manager, Chris Cavnar, as well as unwelcomed physical touching by her manager, Tobias Cordova. Defendant filed a motion for partial summary judgment regarding the EEOC's claims on behalf of Martinez. The Court denied the motion on the exhaustion defense, and granted the motion as to Martinez' sexual harassment claims. Defendant argued that the EEOC failed to exhaust administrative procedures relating to Martinez's claims. Defendant contended that the EEOC did not properly provide it notice about Martinez's allegations because the complaint did not encompass any claims of Martinez or regarding Martinez's purported harasser. The Court observed that the initial charge arising from the complaint involved the EEOC's allegations of sex discrimination and retaliation against Torres by Genesco managers. Because the EEOC is permitted to enlarge the scope of its lawsuit as long as the basic charge of discrimination remained the same, the Court found that Martinez's claim was reasonably related to Torres' claim, despite the fact that a different manager allegedly harassed Martinez. Because Martinez alleged the same basic type of discrimination at the same store location, the Court determined that this claim grew out of the individual complaint of discrimination. Defendant also argued that the EEOC never determined that there was reasonable cause to believe that Martinez's charge had merit. The Court observed that the EEOC does not need to identify all members of a potential class, as long as the employer was fully aware of the number of past and present female employees at that particular office during the relevant time period. In this case, the EEOC's determination letter gave notice to Defendant that other female employees were also

affected by the alleged discriminatory practices, which created a hostile environment for women. The determination letter did not limit the allegations to a particular manager, but directed the allegations against Genesco as the employer. In its response to interrogatories, the EEOC also stated that Martinez was one of other female employees encompassed by its determination letter. Thus, the Court concluded that Defendant was aware of the contours of the class since the conciliation, even where it involved primarily Torres. Defendant further argued that the EEOC never conciliated its claim regarding Martinez with Genesco, and thus it had no opportunity to conciliate those claims. Rejecting this argument, the Court stated that the EEOC's determination letter that opened the conciliation process put Defendant on notice of the potential class involved in this case and the type of discrimination the EEOC alleged. Based on Torres' allegations, Defendant had been aware of the location of the alleged discriminatory conduct, which was sufficient to put Defendant on notice as to the potential class size, as Defendant could presumably have checked its own employment records for the relevant time period and begun its own investigation from there. Accordingly, the Court denied Defendant's motion with regard to the legal issues of exhaustion. Regarding the hostile work environment claims, the Court noted that the EEOC investigator contacted Martinez 11 months after she resigned. In this meeting, Martinez told the investigator that she was not subject to any verbal sexual harassment. Subsequently, at her deposition, she clarified this statement by explaining that Cavnar's comments to women that "it should be easy for them to make sales" could be considered verbal sexual harassment. *Id.* at 11. Regarding unwelcome physical touching, Martinez had told the investigator that Tobias tickled her and she told him to stop. Martinez, however, testified that as a result of Cordova's harassing conduct such as tickling her, poking her on her side by her rib cage, and placing his hands on the side of her stomach near her rib cage (all over her clothes), she was uncomfortable being at work, frustrated, and anxious. The Court found that given the contradictions in her statement and the fact that she did not complain to anyone at Defendant's store, this indicated that Martinez did not have the requisite "subjective belief" that the alleged harassment was severe or pervasive enough to effectively alter the terms and conditions of her employment. *Id.* at 12. The Court also observed that the alleged harassment did not establish a hostile work environment from an "objective perspective." *Id.* Although the alleged comment about sales goals was annoying to Martinez, she admitted that male sales associates were not held to different sales goals than the women. The alleged conduct of tickling and similar touching over Martinez's clothes occurred a few times a week, and lasted from May to July of 2007, at which point Cordova was fired for a reason unknown to Martinez. Martinez continued to work for another month before resigning. Accordingly, the Court found that Martinez was not subject to sufficiently severe or pervasive conduct to constitute a hostile work environment. The Court remarked that even if the alleged conduct was actionable under Title VII, Defendant was not vicariously liable because of the *Faragher/Ellerth* affirmative defense. The Court observed that Defendant had reasonable procedures and policies in place to correct and prevent sexual harassment and Martinez unreasonably failed to follow those procedures by never reporting any alleged harassment to Genesco. Finally, the Court found that Defendant was not liable under a negligence theory, because it did not have actual or constructive knowledge of the alleged hostile work environment. The EEOC argued that Genesco had constructive knowledge of Cordova's harassment of Martinez because Cavnar was in the store frequently. The Court observed that the EEOC's argument was speculative because the notion was fanciful that Cavnar should happen to be at the store on the few times a week during the few moments when Cordova chose to brush up against Martinez in order to poke her in the ribs or tickle her.

***EEOC v. Decker Transport Company, Inc.*, 2011 U.S. Dist. LEXIS 50520 (E.D. Mich. May 11, 2011).** The EEOC filed an action on behalf of Anita Phillips, a female driver, alleging pregnancy discrimination in violation of Title VII of the Civil Rights Act of 1964. The EEOC alleged that Defendant wrongly terminated Phillips because she was pregnant. Defendant claimed that Phillips was terminated because she violated a non-discriminatory company policy when she drove the cab of a company tractor-trailer without authorization while on a medical hold. The Defendant moved for summary judgment. The Court granted the motion, and dismissed in the case. The EEOC filed a motion for reconsideration, which the Court denied. The EEOC contended that the Court erred in not finding that Defendant subjected Phillips to a discriminatory pregnancy policy. First, the EEOC argued that the Court should have found that Defendant treated Phillips differently based on evidence that a physician's letter from the emergency room was not sufficient to clear her from a medical hold (the physician's letter which discharged Phillips and advised her to follow up with her OB/GYN). The Court also considered Defendant's medical clearance policy, which required drivers to seek clearance from the Medical Compliance Department ("MCD") before resuming work. The Court relied upon the testimony of Defendant's risk manager, who stated that for all drivers, Defendant followed stringent medical clearance policies due to concern for driver and public safety, and more so for pregnant drivers because of the fairly heavy manual labor required to drive a tractor-trailer. Accordingly, the Court observed that Defendant had stringent medical clearance policies in general, and that a pregnant driver could be placed on a medical hold while waiting for a physician's letter if she had a more serious medical condition, like that of Phillips, who was concerned that she had a tubal pregnancy and had visited the emergency room. The Court concluded that the EEOC had failed to prove that Defendant's medical clearance policy was discriminatory towards pregnant women, or that it was the actual motivation for Phillips' termination. The EEOC also alleged that Defendant had a policy against pregnant drivers and asserted that a manager told Phillips that she was an insurance risk and had 30 days to get rid of her pregnancy in order to return to work. The Court rejected the EEOC's inference, finding no admissible testimony in this regard from the EEOC. The Court noted that the manager simply had advised Phillips to follow-up with her physician so that the physician could sign off on her job responsibilities, at which time she could return to work. *Id.* at \*8. Relying upon *White v. Baxter Healthcare Corp.*, 533 F.3d 381 (6th Cir. 2008), the EEOC argued that the Court erred in finding that the EEOC produced insufficient evidence for showing discriminatory animus on the part of Defendant's Safety Manager, Patricia Smith. The Court rejected the EEOC's reliance on *White*, stating that it applied to mixed motive Title VII cases, whereas this was a single motive Title VII case. The Court also found no evidence in respect of the EEOC's argument that Smith had a discriminatory animus because she relied on a manager's comments in deciding to terminate Phillips. The Court found that Phillips was terminated due to her violations of Defendant's medical policy and not due to any discriminatory motive, and thereby denied the EEOC's motion for reconsideration.

***EEOC v. CTI Global Solutions, Inc.*, 2011 U.S. Dist. LEXIS 99138 (D. Md. Sept. 2, 2011).** The EEOC, on behalf of three former female employees, brought an action alleging that Defendant removed them from a project because of their pregnancy in violation of Title VII as amended by the Pregnancy Discrimination Act ("PDA"), and sought both injunctive and monetary relief. Defendant, a government contractor, supplies staff for government projects. For one of those projects, at the FBI's Alexandria Records Center ("ARC Project"), Defendant began staffing its employees and advertised the positions with a requirement of the ability to lift 20 pounds. The job description of the position that employees received at orientation, however,

required the ability to lift 25 pounds and to climb ladders. Defendant hired Rita Tolliver, Anje Proctor, and Alfre Tisdale and later removed them from the positions because each one of them was pregnant, which prevented them from carrying weight and/or climbing ladders. The EEOC filed a motion for partial summary judgment asserting that Defendant unlawfully discriminated against those employees and that no evidence existed to support Defendant's affirmative defense of failure-to-mitigate damages as to each of the employees. Defendant also filed a cross-motion for partial summary judgment as to Tisdale's failure to mitigate damages. The Court partially granted the EEOC's motion, and denied Defendant's motion. At the very outset, the Court ruled that summary judgment was warranted as to the EEOC's claims for sex discrimination for Tolliver and Proctor. The EEOC argued that the statements made by Defendant's agents to Tolliver and Proctor immediately following their removal were direct evidence that the removal resulted solely due to their pregnancy. For example, Tolliver contended that when she inquired about the reason for removal, she was informed that she was removed from the ARC Project due to her pregnancy. Similarly, Proctor asserted that she was told that her termination from the project resulted because pregnant women could not work in the FBI file room. Because Defendant neither denied nor challenged those allegations, the Court concluded that the EEOC had presented direct evidence of discrimination. As to the EEOC's sex discrimination claims on behalf of Tisdale, Defendant argued that she was taken off the ARC project because Tisdale requested light duty as a result of her pregnancy. The Court found that this reason was sufficient to create material issues of fact that precluded summary judgment as to this claim. The EEOC also moved for summary judgment as to Defendant's affirmative defense that the employees failed to mitigate their damages. As to Tolliver, the EEOC contended that she networked extensively, posted her resume on-line, applied for numerous positions, and attended job fairs after Defendant removed her from the ARC Project. The EEOC asserted that because she was unable to find to a job, Tolliver, who was fluent in Swahili, accepted a job translating during and immediately after her pregnancy. The Court found that Tolliver's efforts to find another job met the standards that require an employee who has suffered an unlawful adverse employment action to exercise reasonable diligence to mitigate damages. While Defendant argued that Tolliver failed to meet with Defendant regarding potential reassignment, the Court found that this was insufficient to preclude summary judgment. As to Proctor's efforts, the EEOC contended that she sufficiently mitigated her damages by posting resumes on two leading job-search websites and by accepting temporary one-day assignments offered by Defendant because she needed to have an income and no better paying job was available. Defendant asserted that Proctor declined many of the temporary and long-term assignments it offered to her because it did not pay her as much as the ARC Project. The Court found that this created an issue of material fact as to whether Proctor refused many temporary positions and/or long-term assignments. Accordingly, the Court denied summary judgment as to Proctor's mitigation efforts. Similarly, the Court found genuine issues of material fact regarding Tisdale's mitigation efforts, and denied summary judgment on that issue too.

***EEOC v. Health Management Group, Inc.*, 2011 U.S. Dist. LEXIS 106780 (N.D. Ohio Sept. 20, 2011).** The EEOC brought an action alleging that Defendants Health Management Group, Inc., Diet Center Worldwide, Inc., and Physicians Weight Loss Centers of America, Inc. failed to pay Krishna McCollins and Donna Davidson the same wages as male employee Bret Smiley because of their sex, in violation of the Equal Pay Act and Title VII of the Civil Rights Act of 1964. In her position as Director of Franchise Development for Physicians Weight Loss Centers of America, Inc., McCollins sold franchises for which she received a base salary plus

commissions. Defendants brought a motion for summary judgment. To establish a *prima facie* case under the Equal Pay Act, the EEOC must show that Defendant paid women at a rate less than the rate at which it paid men, and for substantially equal work. The Court found that the EEOC had established a *prima facie* case as to its EPA claim as the base salary and commission pay rates clearly established the first prong. The base salary of the two female employees (\$53,000 and \$51,000) was less than the base salary of the male employee (\$62,500). Further, the commission rate for the two female employees was lower than the commission rate of the male employee. The Court also found that McCollins and Davidson performed substantially equal work as Smiley. Defendant's argument that a territory or type of client caused Smiley's job to be more difficult was not evidence of work inequality for an EPA claim. The Court noted that each Director had to market and sell a substantially similar product and dealt with substantially similar clientele thereby establishing the existence of a "substantial equality of skill, effort, responsibility, and working conditions." *Id.* at \*11. Further, in comparing jobs under the EPA, the Court emphasized that the jobs and not the employees were compared. Thus, only the skills actually required by the comparable jobs, not the abilities of the persons currently in those positions were relevant, and it was the job as a whole, not just selected aspects of it, that must form the basis for comparison. The Court concluded, therefore, that the EEOC had established the second prong of an EPA *prima facie* case. Finally, because Defendants had submitted only a broad general affirmative defense, the Court concluded that there was a genuine dispute of material facts and denied Defendant's motion for summary judgment.

***EEOC v. AutoZone, Inc.*, 421 Fed. Appx. 740 (9th Cir. 2011).** The EEOC, on behalf of Stacey Wing, brought an action under Title VII alleging that Defendant discriminated against Wing on the basis of her sex and created a hostile work environment. The EEOC further alleged that Defendant retaliated against Wing for bringing complaints about the allegedly unlawful sexual harassment. Pursuant to a jury verdict, the District Court awarded Wing \$15,000 in compensatory damages and \$50,000 in punitive damages on her hostile work environment claim. Defendant appealed and the EEOC cross-appealed. The Ninth Circuit affirmed the judgment. First, Defendant argued that it could not be liable for the harassment Wing endured because it established at trial the "reasonable care" defense to vicarious liability for non-tangible employment action based on *Faragher v. Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998). The Ninth Circuit found that Defendant had failed to demonstrate that a reasonable jury would not have had a legally sufficient evidentiary basis to conclude that it failed to demonstrate at trial "(i) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (ii) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise," as required by *Faragher* and *Ellerth*. *Id.* at 741. The Ninth Circuit observed that the jurors could reasonably have determined that Wing's district manager, James Monti, and her regional human resources manager, Scott Anderson, failed to exercise reasonable care to "correct promptly" the obscene and harassing behavior of Wing's manager, Jose Contreras, when Wing brought it to their attention. *Id.* The evidence established that despite AutoZone's policy requiring an immediate investigation of any harassment claim, Monti did nothing other than tell Wing to call Anderson. Although Anderson did investigate, a reasonable juror could question the efficacy and good faith of his investigation. Anderson never checked any of the video recorded by the store's loss prevention cameras, despite the fact that Wing claimed that Contreras assaulted her in the public part of the store in full view of those cameras. Despite AutoZone policy requiring managers to "thoroughly

investigate each reported allegation as confidentially as possible,” Anderson interviewed Wing about her complaint in a semi-public part of her own store. *Id.* at 741-42. Anderson never interviewed certain employees, never reported his investigation to the corporate human relations department as required by policy, and never even informed Wing of the outcome of his investigation or offered her a transfer to another store. *Id.* at 742. Accordingly, the Ninth Circuit found that AutoZone’s inability to produce any documentation corroborating that Anderson had even conducted an investigation – documentation its own policies required it to create and maintain, and its loss of the video evidence of Contreras’s conduct – casted doubt as to its actions. Further, Wing complained to Contreras immediately and repeatedly, complained to Monti within days, and complained to Anderson within two weeks of the beginning of Contreras’s harassing conduct. *Id.* Thus, the Ninth Circuit concluded that the jury had sufficient evidence to conclude that Wing did not unreasonably fail to take advantage of corrective opportunities provided by AutoZone. Regarding punitive damages, the Ninth Circuit found that AutoZone was not immune from punitive damages because a reasonable juror could certainly have determined that it had not acted in good faith to comply with Title VII because it failed to take appropriate corrective action and even failed to maintain critical evidence.

***EEOC v. Bloomberg L.P.*, 778 F. Supp. 2d 458 (S.D.N.Y. 2011).** The EEOC brought an action on behalf of class of similarly-situated women alleging that Defendant engaged in a pattern or practice of discrimination on the basis of sex and/or pregnancy in violation of Title VII of the Civil Rights Act of 1964. Defendant moved for summary judgment on the grounds that the EEOC’s evidence was insufficient as a matter of law. The EEOC based its case on four primary forms of an alleged pattern or practice of discrimination, including: (i) reduced compensation; (ii) demotions; (iii) exclusion from management meetings; and (iv) stereotypes regarding female caregivers and an organizational bias against pregnant women and mothers. The Court found that the EEOC’s evidence consisted of only anecdotal evidence of alleged discriminatory incidents. *Id.* at 470. Defendant identified 603 women who were pregnant or took maternity leave. Of those women, the EEOC alleged claims of discrimination because of pregnancy on behalf of 78 claimants. Of those claimants, the EEOC asserted that 77 had their compensation decreased because of their pregnancies and that 49 were demoted for the same reason. The Court determined that the EEOC presented no admissible statistical evidence that Defendant had discriminated against pregnant women and mothers. *Id.* The Court observed that the case law favors employers in pattern or practice cases where the EEOC presents only anecdotal evidence and no statistical evidence. *Id.* In addition, the Court held that the EEOC’s anecdotal evidence, standing on its own, was insufficient. The Court explained that even if it ignored the time-barred claims, only 78 of 603 female employees who became pregnant or took maternity leave during the class period – approximately 12.9% – had a claim of any kind. The Court observed that the fact that nearly 90% of Bloomberg’s pregnant or mother employees had no claims, significantly suggested that the EEOC’s claims were isolated, and was insufficient to establish a pattern or practice. Second, the EEOC’s evidence did not compare the alleged experiences of Defendant’s pregnant employees with other similarly-situated employees. As the EEOC purported to make that comparison, the Court criticized the EEOC’s proof, as such a comparison is vital in discrimination cases because the EEOC must show that the employee in the protected class was treated differently because she was in that protected class. *Id.* at 473. Third, even ignoring the numerical insufficiency and lack of comparative evidence, the Court concluded that the quality of the EEOC’s evidence was variable at best. The EEOC pointed to evidence of bias and negative stereotypes against women to reflect the intent of the company to perpetrate pervasive discrimination. The Court concluded that the evidence of negative

stereotypes was not evidence of discrimination. The Court determined that after eliminating the hearsay and unsupported assertions, the EEOC's case was left with statements from a handful of managers or executives. The Court remarked that in a company of 10,000, with 603 women who took maternity leave during a class period of nearly six years, this type of evidence did not make out a viable pattern or practice claim. *Id.* at 479. Accordingly, the Court concluded that the EEOC's evidence was insufficient to make out a *prima facie* case. In addition, the Court remarked that Defendant offered statistical evidence that disproved the EEOC's compensation and promotion-based pattern or practice claim. Defendant also offered statistical evidence that disproved the EEOC's promotion-based pattern or practice claim. The Court found that Defendant's statistical evidence affirmatively disproved the EEOC's pattern or practice case based on either compensation or demotions. Accordingly, the Court held that Defendant also met its burden to demonstrate that the EEOC's proof was either inaccurate or insignificant and no reasonable jury could therefore return a verdict in favor of the EEOC. For these reasons, the Court granted summary judgment to Defendant.

**Editor's Note:** The decision in *EEOC v. Bloomberg L.P.* is a rare instance of summary judgment being entered against the Commission in a major pattern or practice lawsuit. In so doing, the Court took the EEOC to task on the very underpinnings of its case theory, and issued a stunning rebuke to the Commission in one of its highest-profile cases.

***EEOC v. Boh Brothers Construction Co., LLC*, 768 F. Supp. 2d 883 (E.D. La. 2011).** The EEOC brought a same-sex sexual harassment and retaliation case on behalf of Kerry Woods, an iron worker, under Title VII of the Civil Rights Act of 1964. Woods was assigned to work on a maintenance crew. His job superintendent was Charles Wolfe, who allegedly began harassing Woods and treated him in an unprofessional manner. Woods reported the harassment to Project Superintendent Wayne Duckworth. After speaking with Duckworth about the alleged harassment and stating that he thought Wolfe was stealing gasoline and time from the company, Duckworth sent Woods home without pay for three days. When Woods returned, he was assigned to work in the equipment yard until he was "laid-off." *Id.* at 888. Defendant filed a motion for summary judgment, contending that the EEOC's same-sex hostile work environment claim failed because it could not satisfy the elements articulated in *Harvill v. Westward Communications, L.L.C.*, 433 F.3d 428 (5th Cir. 2005), for stating an actionable claim under Title VII. Defendant argued that the EEOC had not demonstrated that Woods was harassed "because of sex." *Id.* at 889. Defendant also asserted that the EEOC had not produced evidence that Wolfe was a homosexual and could not state a cause of action for sex stereotyping. The Court noted that claims of gender stereotyping under Title VII arise where the victim of the alleged harassment was discriminated against for a failure to conform to the stereotypes of his or her gender. Here, no claim or even allegation of sexual stereotyping harassment appeared in the complaint or Woods' deposition testimony. The Court found that Woods' deposition testimony was devoid of any direct mention of sexual stereotyping, and Woods testified that Wolfe "made jokes about him being gay," but never referenced any gender stereotyping. *Id.* at 893. The Court thus held that as a method of proving same-sex sexual harassment, gender stereotyping was not susceptible to summary judgment at this stage of the proceedings. Defendant also argued that the EEOC's retaliation claim should be dismissed as Woods neither engaged in protected activity, suffered an adverse employment action, nor showed a causal link between any protected activity and adverse employment action. The Court found a genuine issue of material fact as to whether Woods' three-day suspension without pay after making his complaint to Duckworth constituted an adverse employment action. The EEOC submitted that Duckworth stated that he sent Woods home without pay and thereafter

assigned him to work in the Almonaster yard “specifically because he complained about Wolfe’s harassment.” *Id.* at 894. The Court determined that this was sufficient to preclude summary judgment, as this constituted direct evidence of discriminatory intent in that a jury might reasonably find Defendant liable. The Court therefore denied summary judgment on Woods’ retaliation claim. Finally, Defendant cited *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), to support the proposition that where an employer takes no employment action, an affirmative defense might be raised by an employer to shield itself from vicarious liability arising from a hostile work environment created by a supervisor. Because there existed a genuine issue of fact as to whether Defendant’s conduct constituted an adverse employment action, the Court opined that the applicability of *Ellerth/Faragher* affirmative defense could not be determined short of a trial. *Id.* at 895-96.

***EEOC v. Rock Tenn Co.*, 774 F. Supp. 2d 961 (E.D. Ark. 2011).** The EEOC brought an action on behalf of Cynthia Brown and a class of female employees at Defendant’s plant in Conway, Arkansas alleging sexual harassment and constructive discharge based on a hostile work environment in violation of Title VII. Most of the EEOC’s allegations were focused on the conduct of one of Defendant’s employees, Steve Birch. Subsequently, Defendant filed for summary judgment on both claims. The Court noted four requirements that the EEOC must show in order to establish a *prima facie* case of hostile work environment under Title VII. The EEOC must establish: (i) that each allegedly injured individual was a member of a protected class; (ii) they were subjected to unwelcome sexual harassment; (iii) the harassment was based on sex; and (iv) it affected a term or condition of employment. *Id.* at 965. Defendant did not contest the first requirement that the women were members of a protected class. Instead, Defendant argued that the EEOC failed to show the other three requirements. The Court held that the EEOC was able to fulfill the second requirement by showing there were triable issues of fact that Defendant subjected the women to unwelcome sexual harassment. Defendant argued that most of the women simply found Birch’s conduct to be “silly,” and failed to report him promptly. *Id.* at 966. The Court reasoned that Defendant’s argument ignored the simple fact that, as time went on, Birch’s conduct became more pervasive, and the women all felt the need to approach managers or supervisors. The Court also held that the EEOC was able to fulfill the third requirement that Birch’s harassment was based on sex. Defendant argued that Birch’s harassment was not based on sex but on the fact that he was simply a “touchy-feely type of person” pointing to testimony by male employees that Birch would touch them as well. *Id.* at 966-67. The Court rejected Defendant’s argument, observing that there was no testimony that Birch touched male employees the way he allegedly touched female employees. The Court also held that the EEOC was able to show the fourth requirement, *i.e.*, the women’s terms and conditions of employment were affected by Birch’s alleged harassment. The Court reasoned that the key question in determining that the harassment affected a term or condition of employment was whether the conduct was sufficiently severe or pervasive. Factors to consider when determining if the alleged harassment affected the terms and conditions of employment include its frequency, severity, whether it is physically threatening, and whether it unreasonably interferes with an employee’s work performance. The Court observed that most of the women directly told Birch to stop, and all of the women eventually reported him to a supervisor. Additionally, Brown went out of her way at work to avoid Birch, even to the detriment of her work performance. Therefore, the Court held that the EEOC presented sufficient evidence to create triable issues of fact as to whether each of the women found the work environment subjectively hostile. On the constructive discharge claim, the Court held that the EEOC must demonstrate that Defendant deliberately made or allowed Brown’s working conditions to become so

intolerable that she had no other choice but to resign or at least that Defendant should have reasonably foreseen resignation as a consequence of the unlawful working conditions. The EEOC must also show that a reasonable person, from an objective point of view, would find the working conditions intolerable. *Id.* at 969. The EEOC alleged that after Birch's initial reprimand he continued to harass Brown. The Court reasoned that the alleged harassment, although less severe than the conduct that is alleged to have occurred before Birch's reprimand, cannot be viewed in a vacuum. It must be viewed in light of all of Birch's other actions. Therefore, the Court ruled there is a factual dispute as to whether Defendant objectively created intolerable working conditions that caused Brown to leave her employment. *Id.* Accordingly, the Court denied Defendant's motion for summary judgment on both claims.

### **G. Breach Of Contract Cases**

***EEOC v. Philip Services Corp.*, 635 F.3d 164 (5th Cir. 2011).** The EEOC brought a breach of contract action against Defendant seeking specific enforcement of an alleged oral conciliation agreement. After nine employees of Defendant alleged racial discrimination and filed charges with the EEOC, the EEOC initiated the conciliation process with Defendant. The EEOC asserted that during the conciliation discussions the parties had reached an agreement on injunctive and monetary relief, which Defendant denied. The District Court granted Defendant's motion to dismiss, holding that the confidentiality provision of Title VII was an "insurmountable impediment" to the EEOC's attempts to enforce an oral conciliation agreement. *Id.* at 165. On appeal, the Fifth Circuit noted that Title VII provides that "[n]othing said or done during and as a part of such informal endeavors may be made public by the EEOC, or used as evidence in a subsequent proceeding without the written consent of the persons concerned." *Id.* The EEOC argued that Title VII prohibits disclosure only in subsequent proceedings on the merits of the charge, and that a lawsuit to enforce an oral conciliation agreement is not a subsequent proceeding within the meaning of the statute. The Fifth Circuit rejected the EEOC's argument, reasoning that by its plain language, Title VII does not carve out any exceptions to its prohibition against disclosure of conciliation material. The Fifth Circuit also observed that Title VII contains two distinct non-disclosure provisions, including: (i) a prohibition against disclosure of filed charges; and (ii) a prohibition against disclosure of what was said and done during conciliation. *Id.* at 167. The Fifth Circuit held that keeping private what is "said or done" during conciliation is necessary to encourage voluntary settlements because the prospect of disclosure or possible admission into evidence of proposals made during conciliation efforts would tend to inhibit the kind of free and open communication necessary to achieve unlitigated compliance with the requirements of Title VII. *Id.* at 168. Therefore, the Fifth Circuit affirmed the District Court's decision granting Defendant's motion for summary judgment.

## **VI. REMEDIES IN EEOC LITIGATION**

### **A. The Scope Of Injunctive Relief Available As A Remedy In EEOC Litigation**

***EEOC v. Management Hospitality Of Racine, Inc.*, 2011 U.S. Dist. LEXIS 52879 (E.D. Wis. May 17, 2011).** The EEOC brought an action on behalf of two servers employed at an IHOP restaurant in Racine, Wisconsin, alleging that the servers were subjected to sexual harassment in violation of Title VII of the Civil Rights Act of 1964. At the conclusion of trial, the jury found in favor of the EEOC and held Defendant liable for damages. The Court entered an injunction against Defendant Flipmeastack Inc. requiring it to post a notice informing employees of the jury's verdict in a conspicuous location at all IHOP restaurants under its management.

Flipmeastack filed a motion to stay the injunction pending appeal. The Court denied the motion. Flipmeastack argued that posting notice would cause it irreparable harm because independent third-parties owned the restaurants. Flipmeastack was concerned that if the third-parties did not post the notice, it could be held in contempt. The Court observed that Flipmeastack exercised total control over the operations of its restaurants; Flipmeastack staffed the restaurants and supervised their day-to-day operations; it hired the general managers of each restaurant and supervised them through district managers; and the district managers had authority to hire and fire store-level employees without consulting anyone from the corporation that owned the restaurants. Moreover, Flipmeastack formulated and monitored compliance with all policies governing the operations of each restaurant, such as employee training, what vendors to use when purchasing food, and store promotions. The Court concluded that it had no reason to think that any third-party corporation would interfere with Flipmeastack's attempt to comply with the injunction. The Court also reasoned that if any contempt motion was initiated against Flipmeastack, the Court would take into consideration any interference that Flipmeastack asserted while deciding whether contempt sanctions are warranted. Flipmeastack also argued that requiring it to post the notice would harm employee morale, decrease the efficiency of the operation, negatively affect the restaurant's reputation, and damage the restaurant's relationship with its corporate parent IHOP. The Court, however, stated that the verdict itself was a matter of public record, and so Flipmeastack had no legitimate interest in preventing others from learning about it. Further, by posting the notice, Flipmeastack could reassure its employees that it would not allow harassment to happen to other employees. In addition, the Court reasoned that the notice could not negatively affect the reputations of Flipmeastack's clients or their relationships with corporate IHOP, because the notice did not say that the clients themselves violated Title VII or did anything else wrong. Accordingly, the Court concluded that requiring Flipmeastack to post the notice in all restaurants under its management would not cause irreparable harm, and thus declined to stay enforcement of the injunction pending appeal.

***EEOC v. AutoZone, Inc.*, 2011 U.S. Dist. LEXIS 128927 (C.D. Ill. Nov. 8, 2011).** The EEOC brought an action against Defendant alleging a violation of the ADA. The Court granted in part and denied in part Defendant's motion for summary judgment, which was reversed on appeal. The Court held a second trial as to the reversed portion of the case, resulting in a verdict in favor of the EEOC and an award of compensatory damages and punitive damages. The Court subsequently denied Defendant's motion for judgment as a matter of law, denied a motion for a new trial, and granted in part and denied in part the motion to alter or amend the judgment. In order to prove its ADA failure to accommodate claim, the EEOC had to prove that Defendant's employee, John Shepherd, was a qualified individual with a disability, that Defendant was aware of his disability, and that Defendant failed to reasonably accommodate his disability. The Court observed that the EEOC presented sufficient evidence that Shepherd was qualified because he had been promoted during the time period and had received a number of awards. Shepherd was not, however, able to mop floors, which was the focus of Defendant's contention that he was not qualified. The Court found that mopping duties could be delegated to other employees, as there were always two employees in the store at any given time, the amount of time spent mopping was marginal, and the duty itself was a routine and unskilled task. Defendant also challenged the jury's award of punitive damages on the grounds it had made good faith effort towards implementation of non-discrimination policies. The Court rejected Defendant's argument, finding that no written policy was introduced into evidence, and that there was evidence that could have led the jury to conclude that Defendant did not enforce any such policy even though they knew of their legal obligations under the ADA. For the same reasons, the

Court denied the motion for a new trial based on the Court's assessment of the general weight of the evidence. Defendant also sought reduction of both compensatory and punitive damages, asserting that evidence did not support the amounts awarded by the jury, and the judgment amounts exceeded the statutory cap. The Court concluded that a *remittitur* of the compensatory damages award was not justified in this case because there was sufficient evidence in the record to sustain the jury's determination of the value of Shepherd's physical, emotional, and mental pain. As to the award of punitive damages, the Court observed that the conduct of Defendant's managerial employees at the highest level was clearly an intentional violation of the ADA, and accordingly the Court granted the motion only to the extent that punitive damages must be remitted to bring the total verdict in line with the statutory caps of the Civil Rights Act of 1991, and denied the motion for *remittitur* in all other respects. Although Defendant argued that it was not liable for back pay, the Court reiterated that Shepherd was injured while mopping, for which he was sent home, and any argument that the specific wages lost during the period were attributable to some other cause would be without merit. Finally, Defendant argued that as the case involved a single ADA violation over eight years ago, an injunction requested by the EEOC was inappropriate. The Court rejected Defendant's position. It held that given Defendant's grudging acknowledgment of its responsibility, the Court observed that there was the possibility of future infractions and entry of an injunction requiring compliance at all its locations with the ADA was appropriate. To that end, the Court entered an injunction covering not only the store where Shepard had worked, but also all of its other stores within the Court's jurisdiction (in the U.S. District Court for the Central District of Illinois). *Id.* at \*42.

**Editor's Note:** The Court's post-trial injunctive relief order in *EEOC v. AutoZone, Inc.* is perhaps the most onerous imposition of injunctive relief in any EEOC litigation in 2011. In addition to entering an injunction covering all of Defendant's stores in Central Illinois, the Court required regular reporting of all requests for accommodations by employees to the EEOC for three years, as well as ready access to the records for the EEOC to view any such documentation in person on only 48 hours notice.

***EEOC v. KarenKim, Inc.*, 2011 U.S. Dist. LEXIS 64487 (N.D.N.Y. June 16, 2011).** The EEOC's Title VII lawsuit alleging discrimination and harassment against Defendant resulted in a jury verdict in favor of the EEOC on behalf of the claimants and Plaintiffs-Interveners. The EEOC then brought a motion seeking to amend the judgment to reflect Title VII's cap on punitive damages. Because the parties did not dispute the EEOC's motion, the Court ordered that judgment be amended to reduce the amounts the jury awarded so as to reflect the impact of the cap. The EEOC also sought extensive injunctive relief to prevent future discrimination and harassment. The EEOC argued that the Court has broad discretionary powers to craft an injunction which will bar employment discrimination likely to occur in the future and that the Court essentially had no discretion to deny injunctive relief completely given that Defendant's liability had already been established pursuant to Title VII. The Court rejected the EEOC's argument, stating that unlike the cases the EEOC cited in support, the proposed injunctive order in this case would place a substantial burden on Defendant because it would cover every present and future employee for a period of 10 years, require Defendant to alter drastically its employment practices, and require Defendant to hire an independent monitor who together with the EEOC will review and critique any present or future employment practices with respect to sexual harassment. In addition, given the existence of an anti-harassment policy and Defendant's now keen awareness of the issue, the Court found it difficult to imagine that should employees bring complaints concerning sexual harassment or employment discrimination of any other kind in the future, Defendant would not take them seriously. As a result, the Court denied

the EEOC's request for injunctive relief against Defendant. In another motion, counsel for Plaintiffs-Interveners sought an award of attorneys' fees and costs. Defendant claimed that Plaintiffs-Interveners were not entitled to recovery of any attorneys' fees because they recovered, collectively, less than \$5,000 in compensatory damages. The Court rejected this argument, stating that Plaintiffs-Interveners, having recovered on their hostile work environment claims, were nevertheless the prevailing parties under the law and were entitled to an award of reasonable attorneys' fees. Regarding the counsel's fees, however, the Court found that a 60% reduction was warranted. The Court took into consideration the fact that the counsel did not have the lead role in prosecuting the matter, the bulk of the damages awarded to the Plaintiffs-Interveners were punitive in nature and that there was little evidence of actual damages presented, a fact reflected in the rather nominal amounts awarded to Plaintiffs-Interveners in compensatory damages. As the degree of success is the most critical factor in determining the reasonableness of an attorneys' fees award, the Court concluded that awarding attorneys' fees to counsel by simply calculating the lodestar amount would be excessive based on Plaintiffs-Interveners' limited degree of success in the litigation.

## **B. Monetary Sanctions Against The EEOC For Frivolous Litigation**

***EEOC v. Peoplemark, Inc.*, 2011 U.S. Dist. LEXIS 38696 (W.D. Mich. Mar. 31, 2011).** The EEOC, on behalf of Sherri Scott and a class of unidentified similarly-situated African-American applicants, brought an action in 2008 alleging Defendant's hiring policy disparately impacted African-American applicants in violation of Title VII. The EEOC alleged that Defendant had a blanket policy of not hiring anyone with a criminal record, which the Defendant denied. The complaint followed a three-year investigation, during which the EEOC utilized administrative subpoenas to obtain over 18,000 pages of documents from Defendant. In April of 2009, the EEOC filed a discovery pleading identifying 286 individuals that the EEOC claimed it represented. Subsequently, Defendant's expert was able to determine that Defendant had actually hired 22% of these individuals. Even after the EEOC had discovery materials showing that this was the case, it still pursued the lawsuit. It was only after the EEOC failed to designate a statistical expert pursuant to a scheduling deadline that it finally agreed to dismiss the case. Subsequently, Defendant brought a motion seeking attorneys' fees, costs, and sanctions against the EEOC. Defendant argued that the EEOC had deliberately caused the company to incur attorneys' fees and costs when it should have known that Defendant did not have the blanket no-hire policy. The Court agreed. Citing *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), the Court noted that it had the authority to assess fees against the EEOC if the action it brought was "frivolous, unreasonable, or without foundation . . ." *Id.* at \*6. In the Court's view, if the EEOC had done the investigation it should have done with respect to its own represented individuals, it should have known that Defendant had, in fact, hired a number of the allegedly injured individuals, thereby undercutting the EEOC's central litigation theory. Indeed, the Court suggested that the EEOC should have known this critical flaw before it even filed the case, after three years of an extensive administrative investigation. The Court also held that the EEOC knew from the day it filed its case that it would rely heavily on expert statistical testimony, and that it would "carry a major price tag for both sides." *Id.* at \*3. Nevertheless, the EEOC failed to identify an expert within the time set in the Court's schedule, even after receiving significant extensions. The EEOC's failure to pursue the statistical component of its case led the Court to find that an award of "attorneys' fees is appropriate because of the unnecessary burden imposed on defendant." *Id.* at \*17. As a result, the Court awarded Defendant \$219,350.17 in attorneys' fees and \$526,172.00 in expert costs. The EEOC challenged the expert fees as being too high and submitted an affidavit from its own expert that stated

Defendant's expert fees were excessive. The Court found that the EEOC's argument was like comparing "apples and oranges" and rejected the government's position. *Id.* at \*32. After adding in some additional miscellaneous expenses, the Court ordered the EEOC to pay Defendant a total of \$751,942.48.

**Editor's Note:** The ruling in *EEOC v. Peoplemark, Inc.* is an example of judicial hostility to the EEOC's systemic litigation program. The Court suggested that the EEOC should have known of the critical flaws in its case before it ever filed the lawsuit after three years of an intense administrative investigation. The ruling manifests a growing judicial intolerance for the EEOC's "shoot-first, aim-later" tactics in its cases.

***EEOC v. TriCore Reference Laboratories, Case No. 09-CV-956 (D.N.M. Feb. 7, 2011).*** The EEOC brought an action on behalf of former employee, Rhonda Wagoner-Alison, alleging that Defendant failed to reasonably accommodate her disability in violation of the ADA and that it unlawfully terminated her for requesting reasonable accommodations. Wagoner-Alison worked for TriCore as a Clinical Lab Assistant II ("CLA II"), a position that required one-third to two-thirds of her time spent standing, walking, sitting, and reaching with hands and arms. In May of 2007, Wagoner-Alison underwent surgery on her right ankle. Initially, Wagoner-Alison's physician released her for, at most, "non-weight bearing 'Desk Duty only' until further notice." *Id.* at 3. Later, according to her physician, she was able to return to work as of August 20, 2007 "on light duty, desk type position for 8 hrs/day" provided that she "limit walking or standing to 1-2 hours per day intermittently" with the understanding that "she cannot climb/balance/stoop/kneel/crawl/push/pull/lift." *Id.* at 3-4. In order to comply with the limitations noted by her physician, Defendant returned Wagoner-Alison to work on a reduced schedule with her function limited exclusively to registering patients. Wagoner-Alison committed numerous errors in this capacity, ultimately posing a threat to patient safety. Wagoner-Alison's performance did not improve even after verbal coaching, so, on September 17, 2007, Defendant placed her on unpaid leave for three weeks and encouraged her to apply for other positions within the company. Although Wagoner-Alison did not apply for other positions at TriCore, she did apply for Social Security benefits, representing that she had difficulty standing and walking to complete tasks due to pain and weakness in her right ankle, and that she required at least an hour of rest after attempting to stand and walk for 5 to 10 minutes. Defendant filed a motion for summary judgment on the disability discrimination claim, which the Court granted. The EEOC admitted that standing and walking were essential functions of the position in question. Wagoner-Alison's physician released her with restriction on walking and standing and Wagoner-Alison admitted having difficulty walking. Thus, the Court found that according both to Wagoner-Alison and to her physician, she was not able to perform the essential functions of her job. The EEOC however, contended that Wagoner-Alison was able to perform sedentary work and that Defendant should have accommodated her by limiting her duties to desk work. The Court determined that because non-sedentary work constituted essential functions of Wagoner-Alison's position, Defendant was not required to eliminate these functions from the position as an accommodation for Wagoner-Alison's alleged disability. The Court also found that although Defendant was not required to do so, it attempted to accommodate Wagoner-Alison by eliminating standing and walking from her job description for a limited period of time. Assuming *arguendo* that standing and walking were not essential functions such that it would have been a reasonable accommodation for Defendant to create a completely sedentary position for Wagoner-Alison, Defendant declined to continue her sedentary assignment not because of her disability but because of her poor performance in the position. The Court concluded that there was no

evidence of discrimination on the basis of Wagoner-Alison's disability and granted Defendant's motion for summary judgment.

***EEOC v. TriCore Reference Laboratories, Case No. 09-CV-956 (D.N.M. April 27, 2011).*** The EEOC brought an action on behalf of a former employee, Rhonda Wagoner-Alison, alleging that Defendant failed to reasonably accommodate her disability pursuant to the ADA and that it unlawfully terminated her for requesting reasonable accommodations. After the Court granted TriCore summary judgment on the EEOC's claims, Defendant filed a motion for an order deeming the EEOC's claims as frivolous, unreasonable, or without foundation, which the Court granted. Defendant sought attorneys' fees pursuant to 42 U.S.C. § 12205 wherein a court has discretion to award attorneys' fees to a prevailing party in a Title VII case upon a finding that the action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith. First, the EEOC argued that Defendant waived its claim to attorneys' fees because it did not file an application for attorneys' fees until the EEOC filed its response to Defendant's motion. Given that Defendant filed its motion, which very clearly sought attorneys' fees under applicable authority, the Court found no merit in the EEOC's argument. The Court also held that the EEOC's failure to accommodate claim was frivolous, unreasonable, and without foundation. The EEOC had the burden to show a *prima facie* case that Wagoner-Alison was qualified, with or without reasonable accommodation, to perform the essential functions of the position at issue. As the EEOC admitted that standing and walking were essential functions, the Court observed that in doing so, the EEOC should have recognized that it was effectively admitting that it could not prove a *prima facie* case based on Defendant's alleged refusal to accommodate Wagoner-Alison's disability to the extent that the disability prevented her from standing and walking. Similarly, the Court found that the EEOC's discrimination claim was also frivolous, unreasonable, and without foundation. The Court observed that the EEOC did not meaningfully dispute the fact that Wagoner-Alison committed numerous errors in her data entry position during the period that Defendant voluntarily accommodated her disability. Moreover, the EEOC never offered evidence to indicate that Defendant or Wagoner-Alison's individual supervisors treated her differently from other employees based on her disability. For these reasons, the Court found that the EEOC should have been aware that its discrimination allegations lacked merit when Defendant's counsel set out the deficiencies in the EEOC's case by a letter served prior to the motion for summary judgment. Accordingly, the Court granted Defendant's motion and awarded Defendant its reasonable attorneys' fees upon a proper application.

**Editors Note:** *EEOC v. TriCore* is particularly important for two reasons. First, it is a case study in how an employer should document the fundamental flaws of a meritless EEOC case. Second, it represents a rare instance where a Court has held the EEOC to a higher standard than a private litigant, noting that the EEOC should certainly know the ADA's basic elements given it is charged with enforcing that statute.

***EEOC v. TriCore Reference Laboratories, No. 09-CV-956 (D.N.M. Oct. 26, 2011).*** The EEOC brought an unsuccessful claim on behalf of Rhonda Wagoner-Alison pursuant to the ADA, alleging that Wagoner-Alison's former employer, TriCore, had failed to reasonably accommodate her disability and unlawfully terminated her employment in retaliation for her having requested reasonable accommodations. The Court granted summary judgment in TriCore's favor, finding that the EEOC had offered no competent evidence to refute TriCore's argument that it provided a reasonable accommodation to Wagoner-Alison, even beyond its legal obligations, and that Wagoner-Alison's failure to perform her duties adequately was the legitimate, non-discriminatory reason for her termination. Subsequently, TriCore moved for a

finding that the EEOC's claims were frivolous, unreasonable, or without foundation, and the Court granted TriCore's motion and made that finding. Subsequently, TriCore filed a motion for an award of attorneys' fees, seeking a specific dollar amount in fees and supporting its request with documentation. The Court noted that beyond obtaining a judicial determination that the EEOC's action was frivolous, unreasonable, or without foundation, a Defendant applying for attorneys' fees also must prove two standard elements, including: (i) that it was the prevailing party in the proceeding; and (ii) that its fee request is reasonable. The Court observed that here, there was no dispute that TriCore was the prevailing party. TriCore also provided unrefuted evidence – in the form of affidavits and time records kept in the course of the litigation – that the fees it sought were reasonable. The EEOC conceded the reasonableness of TriCore's request for attorneys' fees; however, in the Court's opinion, the EEOC attempted to re-litigate the issue of the validity of its claims. *Id.* at 2. Because the EEOC did not offer any legitimate grounds upon which it might successfully oppose the fee request and the arguments it made were virtually identical to those the Court previously considered and rejected, the Court granted TriCore's motion. Accordingly, the Court awarded TriCore the attorneys' fees and costs it incurred in defense of this action in the amount of \$140,571.62.

**Editor's Note:** The ruling in *EEOC v. TriCore References Laboratories* is another instance of judicial hostility to the EEOC's systemic litigation program. The Court faulted the EEOC's continued prosecution of the case despite the employer having provided responses to requests for admissions of fact that gutted the EEOC's failure to accommodate claim, and despite having received correspondence from the employer that outlined the factual insufficiencies of the Commission's claims.

***EEOC o/b/o Serrano, et al v. Cintas Corp., 2011 U.S. Dist. LEXIS 86228 (E.D. Mich. Aug. 4, 2011).*** In this case, a group of applicants and employees brought a class action against Defendant in 2004 alleging gender discrimination in hiring and pay. Subsequently, the EEOC intervened in the litigation in 2005, and asserted claims for a pattern or practice of gender discrimination based on similar allegations. The Court denied the employees' motion for class certification in 2009, and the EEOC's claims became the primary focus in the litigation. The EEOC refused to identify in discovery the women it represented, claiming they should only be identified in a later phase of the case. The Court disagreed, noting that Defendant quite reasonably sought to focus its attention upon the specific women on whose behalf the EEOC requested damages. The Court relied on *EEOC v. CRST Van Expedited, Inc.*, 257 F.R.D. 513 (N.D. Iowa 2008), in which the EEOC similarly stonewalled in declining to identify who it purported to represent. Subsequently, in a series of rulings in 2010, the Court granted Defendant's motion for judgment on the pleadings and motion for dismissal of the EEOC's claims for failure to exhaust administrative remedies. After the Court's order of dismissal, Defendant sought costs of \$1,097,918.37 and attorneys' fees of \$4,595,432.89. *Id.* at \*16. Defendant argued that the EEOC's litigation tactics were unreasonable and frivolous. The Court agreed with Defendant, finding that the EEOC failed to investigate the allegations at issue until after it intervened in the employees' class action; failed to engage in any conciliation measures prior to filing suit; and failed to either identify any aggrieved victims of discrimination until after it filed suit. In sum, the Court found that "the EEOC engaged in . . . egregious and unreasonable conduct." *Id.* at \*14. After extensive briefing, the Court entered an award of fees and costs, but reduced the amounts sought by Defendant, which still left the EEOC owing over \$2.6 million in fees and costs. Defendant sought just under \$4.6 million in fees, and \$2.5 million of that was for fees it incurred between the time the case was filed by the employees to the date those they moved for (and lost) class certification. Defendant asked the Court to award it 33% of those

fees. The Court was not persuaded by Defendant's back-up documentation for the fees for this phase of the case, as it was not able to connect those fees to the EEOC-related litigation (the EEOC was only marginally involved in the case at that point), holding that the 33% factor was largely arbitrary. Thus, the Court rejected all of Defendant's pre-certification fees altogether. *Id.* at \*18. Defendant also sought over \$3 million in fees accumulated after certification was denied, which essentially was for the time frame where the EEOC truly stepped in and took over the case. As to this aspect of the fee request, the Court determined that Defendant had met its burden of showing that it was entitled to these fees, noting that the time spent by the ten-attorney defense team was reasonable and that "there is no dispute that [Defendant was] the prevailing party." *Id.* at \*20. The Court, however, reduced the requested fees to only that time related to defending the EEOC claims, and then cut an additional 10% because defense counsel's fee records had some confusing entries and block-billing. In total, the Court awarded attorneys' fees of \$1,905,387. *Id.* at \*26. For many of the same reasons it reduced the award of attorneys' fees, the Court also denied pre-certification costs, and cut individual categories of expenses like computer legal research and travel costs. The Court found that Defendant was entitled to reimbursement of \$335,607 in expert witness fees necessary to rebut the EEOC's expert, the largest cost line item in Defendant's motion for reimbursement of costs. In all, the Court awarded *Cintas* over \$730,000 in costs related to its defense of the EEOC's claims. *Id.* at \*26-33.

**Editor's Note:** The ruling in *EEOC o/b/o Serrano, et al. v. Cintas Corp.* is another in a series of set-backs for the EEOC's systemic litigation program. It is the largest fee sanction entered against the EEOC in 2011.

### C. EEOC Consent Decrees And Conciliation Agreements

***EEOC v. Wal-Mart Stores, Inc.*, 2011 U.S. Dist. LEXIS 1299 (E.D. Ky. Jan. 6, 2011).** The EEOC brought an action against Defendant alleging unlawful employment practices in violation of Title VII of the Civil Rights Act of 1964. When the matter was set for trial, the parties jointly moved for entry of a Consent Decree, which the Court had granted. The Consent Decree established a mechanism by which allegedly injured workers – called class members under the settlement – would be hired to work at Defendant's center. Subsequently, the EEOC contended that Defendant violated the Consent Decree by not hiring class members as required and by not providing documents after reasonable notice, and filed a motion to enforce the Consent Decree. The Court denied the EEOC's motion. The Court noted that Defendant subjected class members to two particular tests, including a physical abilities test and a Logistics Pre-Employment Assessment, which measured applicant characteristics, such as safety awareness, integrity, and decision-making skills. Although the EEOC acknowledged that Defendant had the right to apply a wide variety of criteria to the class members before hiring them, the EEOC asserted that Defendant used the physical abilities test and the logistics test to avoid hiring class members. The Court noted that there was nothing in the Consent Decree that prohibited Defendant from applying the tests in issue. Instead, the Court determined that the Consent Decree explicitly provided that Defendant could fill a vacant order filler position with an individual on the list provided by the EEOC "subject to criteria that was applicable for all new hires in the order filler position." *Id.* at \*6-7. Because there was no dispute that all new hires were subjected to the two tests at issue, the Court found that Defendant could subject the class members to the new tests applicable to all new hires. While the EEOC argued that the "subject to" clause was only intended to insure that class members meet certain minimal qualifications (such as being at least 18 years of age, having the legal right to work in the United States, and

having no felony convictions), the Court held that the clause did not limit itself to any particular kind of criteria. Further, the Court held that the use of the terms “instatement” and “rightful place hiring” in the Consent Decree did not contradict the plain language of the Consent Decree that Defendant could hire class members subject to the criteria that was applicable for all new hires. *Id.* at \*9. Because the Consent Decree obligated Defendant to hire from the list provided by the EEOC, the Court clarified that class members on the list, if they meet the applicable criteria, could be hired, but that applicants who were not on the list, even if they meet the criteria, could not be hired. Although Defendant never mentioned the addition of the physical abilities test or the logistics test during settlement negotiations that led to the Consent Decree, the Court held that such negotiations did not establish that Defendant intended that class members could not be subject to the tests when the plain language of the Consent Decree provided otherwise. In rejecting the EEOC’s fraud argument, the Court further stated that Defendant could not be said to have committed fraud by failing to make sure that all of the EEOC’s concerns were met in the Consent Decree. The EEOC also asserted that Defendant violated the Consent Decree by failing to produce documents after “reasonable notice” by the EEOC and thus requested the Court to order Defendant to respond to all document requests within seven days. *Id.* at \*12. Because “reasonable notice” was not defined in the Consent Decree, what was reasonable depended on the facts and circumstance of each case, the Court held that it would not set a hard and fast rule on the number of days in which Defendant must respond to every document request. The Court held that in the event of any future EEOC requests for documents, Defendant should demonstrate why its response time was “reasonable” given the facts and circumstances of each request. *Id.* at \*14.

# **APPENDIX I**

## **Court Rulings In EEOC- Initiated Litigation In 2011**

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# **APPENDIX II**

## **Blog Postings On EEOC Litigation**

## **APPENDIX II**

The following is a collection of blog postings that can be found at [www.workplaceclassaction.com](http://www.workplaceclassaction.com) for additional reading.

*When The EEOC Speaks, Employers Are Well-Served To Listen... ,*  
By Gerald L. Maatman, Jr. (Dated January 25, 2012)

*Seventh Circuit Issues Important New Guidance For Employers Seeking To Avoid Sexual Harassment Liability,*  
By Jennifer Riley and Howard Wexler (Dated January 15, 2012)

*EEOC Announces Its First Multi-Million Dollar Settlement Of 2012 - Based On Discrimination In The Use Of Criminal Histories In Hiring,*  
By Pam Devata and Kendra Paul (Dated January 12, 2012)

*EEOC Wins Sweeping Injunctive Relief Following Illinois ADA Trial,*  
By Christopher DeGroff and Matthew Gagnon (Dated November 22, 2011)

*EEOC Redefines RFOA Defense For ADEA Disparate Impact Claims,*  
By Jennifer Riley and Reema Kapur (Dated November 19, 2011)

*Employers Beware - The EEOC's FY 2011 EEOC Annual Performance And Accountability Report Confirms Its Focus On Systemic Discrimination Litigation,*  
By Gerald L. Maatman, Jr. and Christopher DeGroff (Dated November 18, 2011)

*Court Awards Over \$140,000 In Defense Fees For The EEOC's Pursuit Of Frivolous Lawsuit,*  
By Christopher DeGroff and Brian Wong (Dated November 7, 2011)

*EEOC's Subpoena Thwarted, Despite Supposedly Time-Barred Response,*  
By Gerald L. Maatman, Jr. and Christopher DeGroff (Dated October 22, 2011)

*Court Dismisses EEOC's Pattern Or Practice ADA Case (Again): Government Pleads Too Little, Too Late,*  
By Christopher J. DeGroff and Gerald L. Maatman, Jr. (Dated October 10, 2011)

*The EEOC'S Aggressive Year-End Litigation Salvo Reaches Coast-To-Coast,*  
By Gerald L. Maatman, Jr. and Christopher J. DeGroff (Dated October 3, 2011)

*Employers Beware: Some Federal Courts Continue To Afford Great Deference To The EEOC's Litigation Tactics,*  
By Alex Drummond and Erin Wetty (Dated September 23, 2011)

*In The Red-Zone With The EEOC: Effects Of The End Of The EEOC's Fiscal Year,*  
By Gerald L. Maatman, Jr. and Christopher J. DeGroff (Dated September 13, 2011)

*Court Determines That EEOC Pattern Or Practice Claim Against Bloomberg Lacks Merit For Want Of Statistical Support Or Compelling Anecdotal Evidence,*  
By Gerald L. Maatman, Jr. and Christopher J. DeGroff (Dated August 22, 2011)

*Split Bifurcation Ruling In EEOC Religious Discrimination And Retaliation Case,*  
By Gerald L. Maatman, Jr. and Christopher J. DeGroff (Dated August 11, 2011)

*Court Sanctions The EEOC For \$2.6 Million In Fees And Costs,*  
By Gerald L. Maatman, Jr. and Christopher J. DeGroff (Dated August 10, 2011)

*Court Potentially Opens Door To Pattern Or Practice Piggybacking On An Untimely EEOC Charge,*  
By Gerald L. Maatman, Jr. and Christopher J. DeGroff (Dated August 8, 2011)

*Eighth Circuit Enforces EEOC Subpoena Based On Facially Defective Charge,*  
By Gerald L. Maatman, Jr. and Christopher J. DeGroff (Dated July 26, 2011)

*Ohio Ruling Gives Pass To The EEOC's Litigation Tactics,*  
By Gerald L. Maatman, Jr. and Christopher J. DeGroff (Dated July 13, 2011)

*Mixed Ruling In EEOC Religious Discrimination Case Involving EEOC And Private Litigant Claims,*  
By Gerald L. Maatman, Jr. and Christopher J. DeGroff (Dated June 14, 2011)

*EEOC Meeting On ADA Cutting-Edge Issues - A Cautionary Tale For Employers,*  
By Ellen McLaughlin (Dated June 8, 2011)

*EEOC's "Fishing Expedition" Cut Short In Pennsylvania,*  
By Gerald L. Maatman, Jr. and Christopher J. DeGroff (Dated June 3, 2011)

*Another EEOC Lawsuit Is Rejected,*  
By Gerald L. Maatman, Jr. and Christopher DeGroff (Dated May 26, 2011)

*Defense Fees Awarded In Another Failed EEOC Case,*  
By Gerald L. Maatman, Jr. and Christopher DeGroff (Dated May 8, 2011)

*How Fast is Fast Enough? Fourth Circuit Examines Employer's Response To Racially Hostile Work Environment Allegations,*  
By Eric J. Janson and Richard Sloane (Dated May 7, 2011)

*Seventh Circuit Takes Broad View Of EEOC Subpoena Power,*  
By Gerald L. Maatman, Jr. and Christopher J. DeGroff (Dated May 2, 2011)

*EEOC's "Shoot-First, Aim Later" Tactics Result In \$751,942 Sanction,*  
By Gerald L. Maatman, Jr. and Christopher J. DeGroff (Dated April 7, 2011)

*The EEOC Has Issued Final Regulations Under the Americans With Disabilities Act ("ADA"),*  
By Condon McGlothlen and Tracy Billows (Dated March 24, 2011)

*Plaintiffs' Merits Brief Filed In Dukes,*

By Gerald L. Maatman, Jr. and David B. Ross (Dated February 22, 2011)

*New EEOC Budgetary Request To Congress Portends Increased Governmental  
Litigation In 2011/2012,*

By Gerald L. Maatman, Jr. and Christopher J. DeGroff (Dated February 17, 2011)

*Narrowing The Statute Of Limitations Period In EEOC Pattern Or Practice Cases,*

By Gerald L. Maatman, Jr., Jennifer A. Riley, and Brandon L. Spurlock (Dated  
February 6, 2011)

*The Top 5 Most Intriguing Decisions In EEOC Cases Of 2010,*

By Christopher J. DeGroff (Dated January 10, 2011)



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