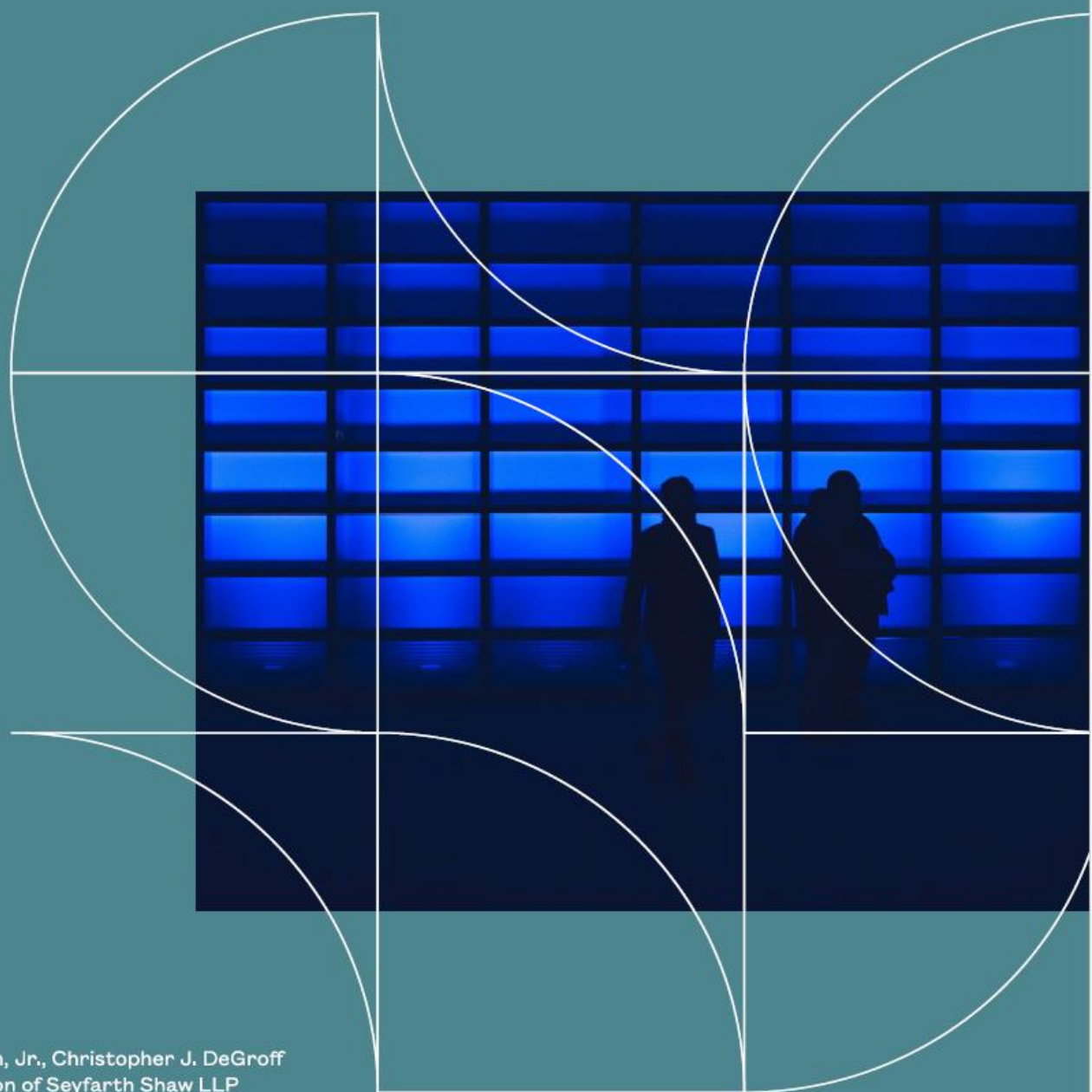




EEOC-Initiated Litigation

FY 2019



By Gerald L. Maatman, Jr., Christopher J. DeGross
and Matthew J. Gagnon of Seyfarth Shaw LLP

Dear Clients and Friends,

We are pleased to provide you with the latest edition of our annual analysis of trends and developments in EEOC litigation, *EEOC-Initiated Litigation: FY 2019*. This reference work compiles, analyzes, and categorizes the major case filings and decisions involving the EEOC in 2019. Our goal is for this report to guide clients through decisional law relative to EEOC-initiated litigation, and to empower corporate counsel, human resources professionals, and operations teams to make sound and informed litigation decisions while minimizing these risks. We hope that you find this report to be useful.

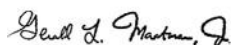
Fiscal Year 2019 again demonstrated that the EEOC is not isolated from the turmoil in Washington, nor the broader shifting political climate nationally. Between a political stalemate surrounding the re-confirmation of a former Commissioner, the government shutdown, and a general political swirl of issues, the EEOC ran on low fuel for roughly one-third of the fiscal year. Meanwhile, acceleration of the #MeToo movement, and ongoing national discussions regarding race and national origin continue to impact the workplace. Despite these external challenges and constraints that the Commission experienced this year, it remained committed to pursuing the objectives of its 2017-2021 Strategic Enforcement Plan. As always, we believe that analyzing the EEOC's litigation trends and new initiatives within the context of those objectives provides important strategic insights into existing enforcement priorities, and clues regarding matters of significance to come.

We strive to equip employers with information to protect themselves and their employees in the ever-changing regulatory and litigation environment. Part I of this book is arranged to coincide with the EEOC's six enforcement priorities as outlined in its Strategic Enforcement Plan. Each subsection highlights the most important judicial decisions and other litigation activity impacting EEOC-initiated litigation, as well as the agency rule-making and other legislative efforts and initiatives that were of particular importance to the EEOC's pursuit of these priorities and objectives in FY 2019. This analysis reveals the areas and issues where employers should direct their attention while considering employment-related business decisions. Part II is a compilation of every significant case that was decided in 2019 impacting EEOC-initiated litigation. In that section, critical procedural and evidentiary matters are outlined in detail to provide a comprehensive look at how companies might approach these issues when facing EEOC litigation, and serves as a resource of recent case authority for our readers.

We would like to thank our many colleagues who assisted in the creation of this book, including, most especially, Ala Salameh, Brendan Pedley, and Lauren Becker. Our hope is that this book provides companies and business leaders the tools and information they need to implement well-informed personnel decisions and strategies to hedge against litigation in this rapidly evolving regulatory environment.



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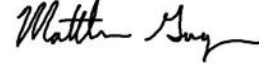


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PART I

CURRENT TRENDS IN EEOC LITIGATION

A. Changes In EEOC Leadership And Shifting Strategic Priorities

1. Changes In EEOC Leadership Positions

By any measure, FY 2019 was a “transition” year for the EEOC. The Commission’s leadership team includes five members, including the Chair, Vice Chair, and three Commissioners, collectively appointed by the President and approved by the Senate.¹ Of the five Commissioners, no more than three may be members of the same political party, a requirement promising bipartisanship outliving administration changes.² Janet Dhillon, the current EEOC Chair, was originally selected for that role by President Trump in June 2017, but was not approved by the Senate until FY 2019, starting in her role on May 15, 2019.³ She joined two Obama-appointed Commissioners, Victoria Lipnic and Charlotte Burrows, a Republican and a Democrat respectively. Two Commissioner positions remain vacant.

President Trump originally re-nominated former Commissioner Chai Feldblum for a third term.⁴ As a bipartisan federal agency, it is customary for the President to nominate Commissioners who are members of both parties. However, Feldblum was the first openly gay member of the Commission, and a champion of LGBT rights. Although President Trump re-nominated Feldblum, she was not confirmed by the Senate reportedly due to objections by various Senators with her perceived views on those issues, leading to her term’s expiration on January 2, 2019.⁵ The EEOC was therefore left with only two Commissioners until Dhillon took her seat in May.

Three acting Commissioners are required for the EEOC to exercise its powers.⁶ Between the expiration of Feldblum’s term in January and Dhillon’s appointment nearly four months later, the Commission lacked a quorum, thereby hindering its ability to act. This may, in part, explain the drop in the number of merits suits and subpoena enforcement actions we witnessed in FY 2019. The government shutdown, which lasted from December 22, 2018 to January 25, 2019, may have also played a part. Upon Dhillon’s appointment, and despite two remaining vacancies, the three-member Commission satisfies quorum and has since resumed full operations at the EEOC.⁷

Appointment of the new Chair came on the heels of 30 business organizations, including the U.S. Chamber of Commerce and American Trucking Associations, imploring Congress and the President

¹ U.S. Equal Employment Opportunity Commission, *Legislative Affairs: The Commission*, <https://www.eeoc.gov/eeoc/legislative/commission.cfm>.

² See 42 U.S.C.A. § 2000e-4 (West).

³ U.S. Equal Employment Opportunity Commission, *Press Release: Janet Dhillon Becomes Chair of the Equal Employment Opportunity Commission* (May 15, 2019), <https://www.eeoc.gov/eeoc/newsroom/release/5-15-19.cfm>. See also U.S. Equal Employment Opportunity Commission, *Biography of Janet Dhillon*, <https://www.eeoc.gov/eeoc/dhillon.cfm>; Gerald L. Maatman, Jr., Christopher DeGross, and Michael Jacobsen, *EEOC Leadership Shift: A New EEOC Chair Confirmed By Senate*, WORKPLACE CLASS ACTION BLOG (May 8, 2019), <https://www.workplaceclassaction.com/2019/05/eeoc-leadership-shift-a-new-eeoc-chair-confirmed-by-senate/>.

⁴ White House, *Presidential Action: Four Nominations Sent to the Senate Today* (Dec. 11, 2017), <https://www.whitehouse.gov/presidential-actions/four-nominations-sent-senate-today-3/>.

⁵ U.S. Equal Employment Opportunity Commission, *Agency Financial Report*, at 10, <https://www.eeoc.gov/eeoc/plan/upload/2019afr.pdf>.

⁶ See 42 U.S.C.A. § 2000e-4 (West).

⁷ See *What Employers Can Expect With The EEOC*, WORKPLACE CLASS ACTION BLOG (June 21, 2019), <https://www.workplaceclassaction.com/2019/06/what-employers-can-expect-with-the-eeoc/>.

to confirm then nominee Dhillon with expediency. Absent a quorum, the EEOC was unable to respond to newly issued court decisions and regulations impacting employers in costly ways. Among them was the March 4, 2019 decision issued by Judge Tanya Chutkan of the District Court for the District of Columbia, which has revitalized, for a time, the Obama-era requirement that employers report W-2 wage information and total hours worked for all employees by race, ethnicity, and sex within 12 proposed pay bands (EEO-1 Component 2 pay data).⁸ The EEOC was hampered in its ability to respond to that decision until the new Chair was confirmed. This case represents a critical reminder that agency direction does not pivot on short timelines. Careful attention and leadership are necessary to enact and carry out changes to any large federal bureaucratic system.

In addition to Dhillon, President Trump nominated Sharon Fast Gustafson to fill the EEOC's General Counsel vacancy on March 19, 2018, and she was confirmed by the Senate on August 1, 2019 for a term ending in 2023.⁹ Gustafson has been an employment lawyer for more than 25 years, representing both employees and employers.¹⁰ The fact that Gustafson has represented both sides in employment disputes surprised many. The EEOC General Counsel exercises significant control over the enforcement program; it remains to be seen how she will change EEOC litigation in the years to come.

2. New Voices On The Supreme Court

President Trump has now appointed two of the nine sitting Supreme Court Justices, Neil Gorsuch and Brett Kavanaugh. Justice Neil M. Gorsuch took his seat on April 10, 2017.¹¹ He came to the Supreme Court from the U.S. Court of Appeals for the Tenth Circuit, where he served since 2006. Justice Brett Kavanaugh was confirmed by the Senate on October 6, 2018, by a slim margin of 50-48.¹² Justice Kavanaugh previously served on the U.S. Court of Appeals for the District of Columbia Circuit since May 2006.¹³

While both of these new Justices were anticipated to fill the ideological shoes of the late Antonin Scalia, experience suggests that reality does not always follow expectation when it comes to a Justice's philosophy after he or she ascends to the Supreme Court. For example, recent statements by Justice Gorsuch during oral argument relating to three landmark cases dealing with LGBTQ rights, *Zarda v. Altitude Express*, *Bostock v. Clayton County*, and *R.R. & G.R. Funeral Homes v. EEOC*, surprised some to the extent they could hint at an unexpected ideological lens. Throughout questioning of counsel, Justice Gorsuch suggested that sex appeared to be a factor in each of the employee's terminations, which would be a prohibited form of discrimination under existing Title VII protections.

Among other things, Justice Gorsuch's questioning indicated that, for him, whether gender identity and sexual orientation are protected classes under Title VII is a "really close, really close" question,

⁸ See *Nat'l Women's Law Ctr. v. Office of Mgmt. & Budget*, No. 17-CV-2458, 2019 WL 1025867 (D.D.C. Mar. 4, 2019); see also *infra* p. 50.

⁹ Presidential Action, White House, *President Donald J. Trump Announces Key Additions to his Administration* (Mar. 19, 2018), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-key-additions-administration-35/>.

¹⁰ See Gerald L. Maatman, Jr. and Andrew Scroggins, *Trump Administration Nominates New EEOC General Counsel*, WORKPLACE CLASS ACTION BLOG (Mar. 20, 2018), <https://www.workplaceclassaction.com/2018/03/trump-administration-nominates-new-eeoc-general-counsel/>.

¹¹ Supreme Court of the United States, *Biography of Neil M. Gorsuch*, <https://www.supremecourt.gov/about/biographies.aspx>.

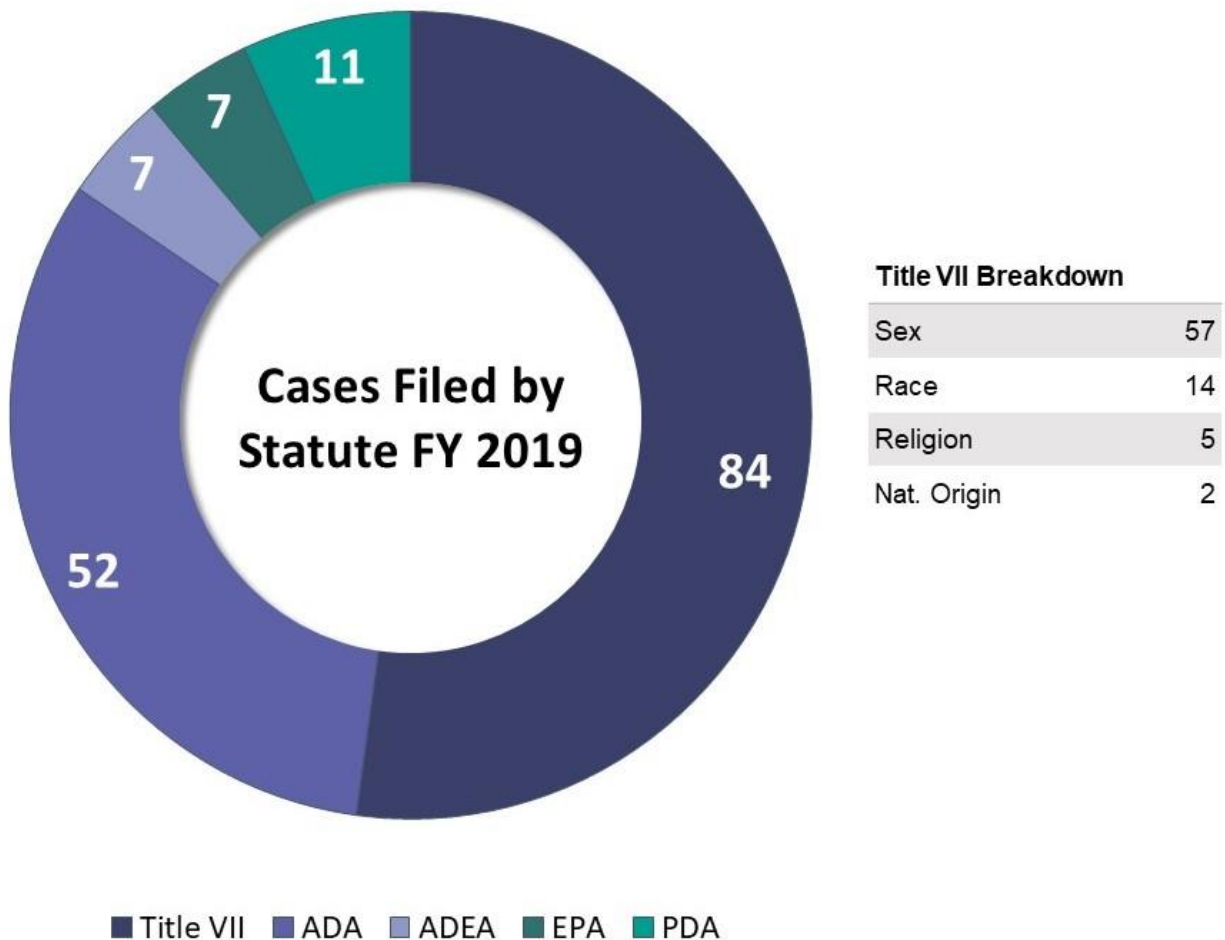
¹² White House, Briefings & Statements, *Remarks by President Trump at Swearing-in Ceremony of the Honorable Brett M. Kavanaugh as Associate Justice of the Supreme Court of the United States* (Oct. 8, 2018), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-swearing-ceremony-honorable-brett-m-kavanaugh-associate-justice-supreme-court-united-states/>.

¹³ Supreme Court of the United States, *Biography of Brett M. Kavanaugh*, <https://www.supremecourt.gov/about/biographies.aspx>.

and that he was considering the potential of creating “massive social upheaval” if Title VII was affirmatively expanded. These three cases are among the most highly anticipated decisions of the Supreme Court’s current term, both for the impact they will have on EEOC litigation and the country as a whole, as well as for what clues the decision may hold regarding the ideological direction of the Supreme Court’s most recent additions.

3. Trends In Case Filings In FY 2019

Each fiscal year we also analyze the types of lawsuits the EEOC files, in terms of the statutes and theories of discrimination alleged. The graph below shows the number of lawsuits filed according to the statute under which they were filed (Title VII, Americans With Disabilities Act, Pregnancy Discrimination Act, Equal Pay Act, and Age Discrimination in Employment Act, etc.) and, for Title VII cases, the theory of discrimination alleged.



This analysis can often reveal how the EEOC is shifting its strategic priorities.¹⁴ In FY 2019, the filing numbers – when considered on a percentage basis – were largely in line with prior years, and did not signal a seismic shift in litigation priorities in FY 2020 and beyond.

Although the total number of filings is down across the board, when considered on a percentage basis, the distribution of cases filed by statute remained broadly consistent compared to FY 2018. Title VII cases once again made up the majority of cases filed, comprising 60% of all filings (as compared with 55% in FY 2018). ADA cases also made up a significant percentage of the EEOC's filings, totaling 37% this year, as compared to 42% in FY 2018. This too is fairly typical. There were only 7 age discrimination cases filed in FY 2019, which is a relatively small number. Once again, when compared on a percentage basis, this does not represent a large shift in focus for the EEOC (5% in FY 2019 is on par with the 5% in FY 2018).

4. Most Active District Offices

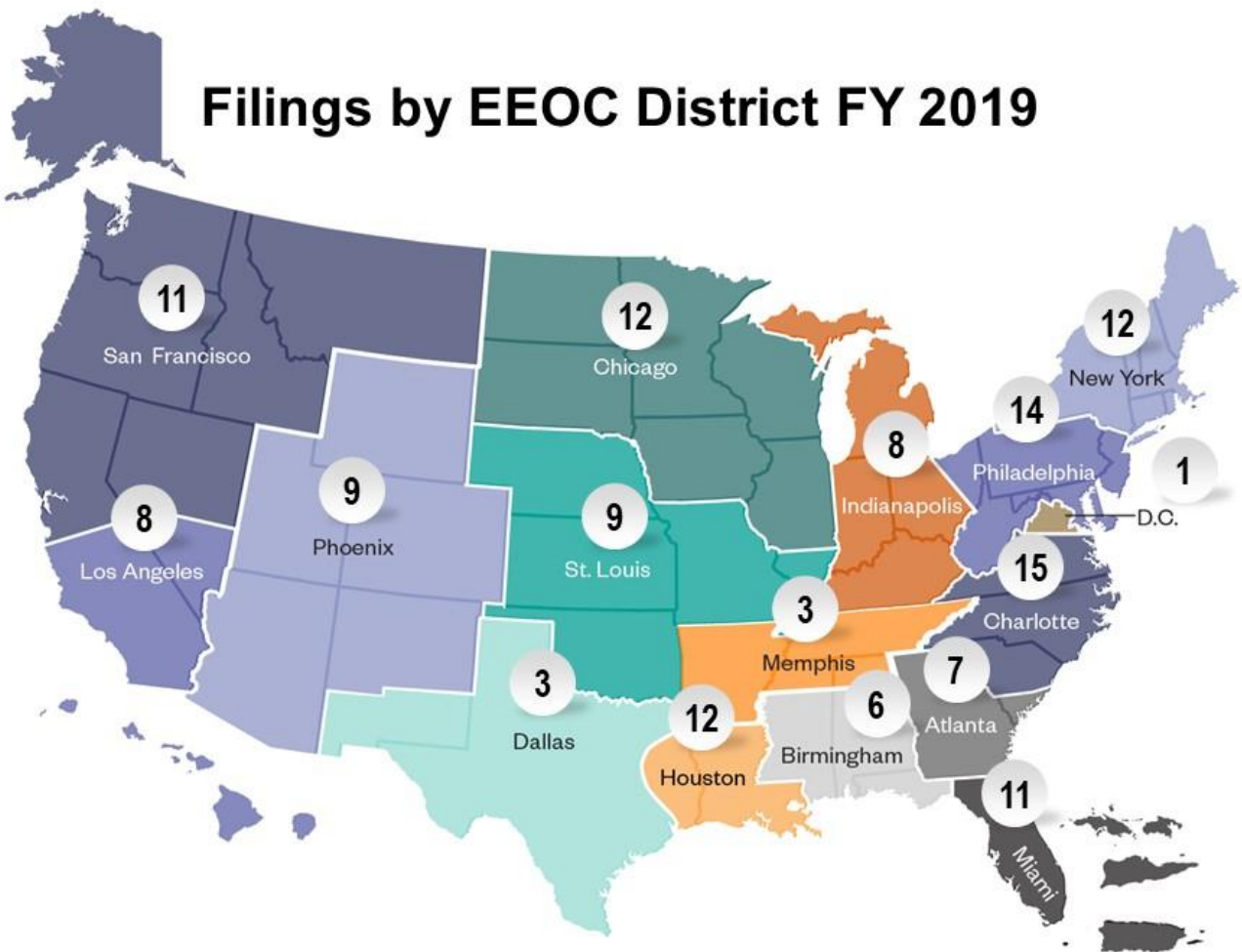
In addition to tracking the subject matter of filings, it can be useful to track which of the EEOC's 15 district offices are most actively filing new cases. Some districts tend to be more active than others, and some focus on different EEOC priorities. Indeed, the EEOC's district offices have been tasked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

The most noticeable trend of FY 2019 is the marked decrease in coast-to-coast filings compared to past years. Leading the pack in new filings are the Charlotte and Philadelphia district offices, with 15 and 14 filings respectively. The Chicago district office is typically the most prolific filer, but dropped to the shared number three spot along with New York and Houston district offices at 12 filings each. The numbers for the other district offices are also fairly close to on par with what we have come to expect. This year, the Indianapolis, St. Louis, and Phoenix district offices posted comparatively mid-range numbers. This middle of the pack performance is fairly typical of those district offices. The Dallas and Los Angeles district offices were outliers on the lower end of the spectrum. The Los Angeles district office filed just 8 new lawsuits this year compared with 17 last year, and the Dallas district office filed just 3 compared to 10 last year.

As is usually the case, the EEOC ended its fiscal year with increased activity, filing 52 lawsuits during September alone compared to the total of 12 filings during the entire first quarter of 2019. But in the end, the agency's end-of-year rush and total number of filings did not come anywhere near the number of filings completed in the last fiscal year. The EEOC filed 149 total cases in FY 2019, including 141 merits lawsuits and 8 subpoena enforcement actions. This total number of filings is significantly less than the last two years, and is more in line with the drop off in filings that we saw in FY 2016.

¹⁴ See, e.g., Gerald L. Maatman, Jr., Christopher J. DeGroff, Matthew J. Gagnon, and Ala Salameh, *New Chair Of The EEOC Begins To Make Her Mark: A Look At The EEOC's Inaugural Agency Financial Report*, WORKPLACE CLASS ACTION BLOG (Nov. 20, 2019), <https://www.workplaceclassaction.com/2019/11/new-chair-of-the-eec-begins-to-make-her-mark-a-look-at-the-eec-s-inaugural-agency-financial-report/>; Gerald L. Maatman, Jr., Christopher J. DeGroff, Matthew J. Gagnon, and Ala Salameh, *What A Long Strange Year It's Been . . . The EEOC's Fiscal Year Comes To An Uncharacteristically Quiet Close*, WORKPLACE CLASS ACTION BLOG (Sept. 30, 2019), <https://www.workplaceclassaction.com/2019/09/what-a-long-strange-year-its-been-the-eec-s-fiscal-year-comes-to-an-uncharacteristically-quiet-close/>; Michael Jacobsen, Christopher DeGroff, and Gerald L. Maatman, Jr., *And The Train Kept A-Rolling: EEOC's 2018 Enforcement And Litigation Statistics Show Charges Down But The Agency Still On The Move*, WORKPLACE CLASS ACTION BLOG (Apr. 11, 2019), <https://www.workplaceclassaction.com/2019/04/and-the-train-kept-a-rolling-eec-s-2018-enforcement-and-litigation-statistics-show-charges-down-but-the-agency-still-on-the-move/>.

Filings by EEOC District FY 2019



Atlanta 7	Birmingham 6	Charlotte 15	Chicago 12
Dallas 3	Houston 12	Indianapolis 8	Los Angeles 8
Memphis 3	Miami 11	New York 12	Philadelphia 14
Phoenix 9	San Francisco 11	St Louis 9	Washington, D.C. 1

The leading district offices for filings included Charlotte and Philadelphia with 15 and 14 filings respectively. Despite the Commission's lack of quorum and the government shutdown, the Charlotte office filed just one less case relative to FY 2018, and the Philadelphia office filed 7 fewer cases this year.

5. Developments In Subpoena Enforcement Actions And EEOC Investigations

The EEOC's power to issue administrative subpoenas is potentially the most effective investigatory tool at its disposal. Typically, an investigator in pursuit of information, data, or documents from an employer will first make an informal request for information. If the employer does not produce the requested information, the District Director may issue an administrative subpoena to obtain the information.¹⁵ Sometimes the EEOC will even skip the informal request and proceed directly to issuing a subpoena – a potentially frustrating practice that is actually disallowed by the EEOC's own internal guidance.¹⁶

The EEOC argues that its subpoena power should be afforded significant deference. But subpoenas are often used by the EEOC as a means to expand a single allegation of discrimination into a massive pattern or practice or systemic case. Employers can and do push back on the scope of those subpoenas. However, recent court decisions continue to present challenges for employers that seek to do so.

But an employer who receives a subpoena must act quickly. The Commission's regulations permit an employer to submit to the Commission a petition to revoke or modify the subpoena on the grounds that it seeks information that is not relevant to the charge, is overly burdensome, or suffers from some other flaw.¹⁷ However, the petition must be filed within five business days of receipt of the subpoena, and the Commission and the courts have proven unsympathetic to employers who miss the cut-off. (Note that subpoenas issued in ADEA investigations are treated differently and petitions to revoke are not permitted. Subpoenas issued under the ADEA are elevated directly to the District Court.) If, after the petition is resolved, the investigator is not satisfied with the employer's response to the subpoena, the EEOC may proceed to a District Court, where it will file an application for an order to show cause why the subpoena should not be enforced.

In FY 2019, the EEOC initiated 8 subpoena enforcement actions. That number is considerably lower than the 18 and 17 enforcement actions that were filed in FY 2018 and FY 2017, respectively.¹⁸ And it appears to show the continuation of a trend toward fewer subpoena enforcement actions that has been developing over the past few years. The EEOC initiated 28 subpoena enforcement actions in FY 2016,¹⁹ 32 in FY 2015,²⁰ and 34 in FY 2014.²¹ It is unlikely that the EEOC is backing off of these issues, but is more likely that employers are more apt to voluntarily respond to requests for information rather than try to defend themselves in Court given the shifting and often challenging landscape of District Court decisions.

¹⁵ See 29 C.F.R. § 1601.16(a).

¹⁶ See EEOC Compliance Manual § 24.

¹⁷ See 29 C.F.R. § 1601.16(b)(1).

¹⁸ U.S. Equal Employment Opportunity Commission, Fiscal Year 2018 Performance and Accountability Report, at 35, <https://www.eeoc.gov/eeoc/plan/upload/2018par.pdf>; U.S. Equal Employment Opportunity Commission, Fiscal Year 2017 Performance and Accountability Report, at 36, <https://www.eeoc.gov/eeoc/plan/upload/2017par.pdf>.

¹⁹ U.S. Equal Employment Opportunity Commission, Fiscal Year 2016 Performance and Accountability Report, at 36, <https://www.eeoc.gov/eeoc/plan/upload/2016par.pdf>.

²⁰ U.S. Equal Employment Opportunity Commission, Fiscal Year 2015 Performance and Accountability Report, at 34, <http://www.eeoc.gov/eeoc/plan/upload/2015par.pdf>.

²¹ U.S. Equal Employment Opportunity Commission, Fiscal Year 2014 Performance and Accountability Report, at 27, <http://www.eeoc.gov/eeoc/plan/2014par.pdf>.

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

In 2017, the Supreme Court clarified the standard of review of a District Court's decision regarding enforcement of EEOC subpoenas in *McLane Co. v. EEOC*.²² That case arose out of a Title VII charge brought by a woman who was terminated after thrice failing a physical capabilities evaluation upon returning to work from maternity leave.²³ During the investigation, the Commission requested a list of employees who had taken the physical evaluation. Although the employer provided such a list, it refused to provide "pedigree information," including personal identifying information.²⁴ The EEOC challenged the employer's refusal, and the District Court sided with the employer, holding that such information was not "relevant" to the charge at issue.²⁵ The Ninth Circuit reviewed the District Court's decision *de novo* and reversed the District Court.²⁶

The Supreme Court held that the Ninth Circuit erred in reviewing the decision *de novo*. According to the Supreme Court, abuse-of-discretion review is the longstanding and most appropriate practice for the Courts of Appeals when reviewing a decision to enforce or quash an administrative subpoena.²⁷ The Supreme Court held that a decision to enforce or quash an EEOC subpoena is case-specific and does not depend on a neat set of legal rules. Instead, it requires the application of broad standards to "multifarious, fleeting, special, narrow facts that utterly resist generalization."²⁸ These types of considerations are more appropriately made by the District Courts.

On remand, the Ninth Circuit applied the more deferential abuse-of-discretion standard to the District Court's decision, but reversed the trial Court nonetheless.²⁹ The Ninth Circuit found that the District Court's formulation of the relevance standard was too narrow.³⁰ The Ninth Circuit explained that, under Title VII, the EEOC may obtain evidence if it relates to unlawful employment practices and is relevant to the charge under investigation, which encompasses "virtually any material that might cast light on the allegations against the employer."³¹ Under this rubric, the Ninth Circuit found the requested pedigree information to be relevant.³² Finally, on remand in 2018, the District Court rejected the employer's burdensomeness arguments, holding that it had already produced significant data and software and had imposed an even greater burden on itself by removing the personal identifying information from this data, which was now sought by the EEOC.³³

Following the *McLane* decision, lower courts have shown an ever-increasing willingness to enforce broad requests for information contained in EEOC subpoenas. For example, in *EEOC v. Centura Health*,³⁴ the Tenth Circuit upheld a decision by the District of Colorado enforcing an EEOC

²² *McLane Co., Inc. v. EEOC*, 137 S. Ct. 1159 (2017). See also Gerald Maatman, Jr., Christopher J. DeGross, and Matthew Gagnon, *U.S. Supreme Court Holds That An Abuse-Of-Discretion Standard Applies To Review Of EEOC Subpoenas*, WORKPLACE CLASS ACTION BLOG (Apr. 4, 2017), <http://www.workplaceclassaction.com/2017/04/u-s-supreme-court-holds-that-an-abuse-of-discretion-standard-applies-to-review-of-eEOC-subpoenas/>.

²³ *McLane*, 137 S. Ct. at 1165.

²⁴ *Id.*

²⁵ *EEOC v. McLane Co., Inc.*, No. 12-CV-2469, 2012 WL 5868959, at *5 (D. Ariz. Nov. 19, 2012).

²⁶ *EEOC v. McLane Co., Inc.*, 804 F.3d 1051, 1057 (9th Cir. 2015).

²⁷ *McLane*, 137 S. Ct. at 1167.

²⁸ *Id.*

²⁹ See Gerald L. Maatman, Jr., Christopher J. DeGross and Alex W. Karasik, *Following U.S. Supreme Court Review, Ninth Circuit Remands EEOC Subpoena Case*, WORKPLACE CLASS ACTION BLOG (May 25, 2017), <http://www.workplaceclassaction.com/2017/05/following-u-s-supreme-court-review-ninth-circuit-remands-eEOC-subpoena-case/>; *EEOC v. McLane Co., Inc.*, 857 F.3d 813, 816-17 (9th Cir. 2017).

³⁰ *McLane*, 857 F.3d at 816.

³¹ *Id.*

³² The Ninth Circuit reasoned that the pedigree information was related to the unlawful practice being investigated and "might cast light" on the allegations against the employer. *Id.*

³³ *EEOC v. McLane Co., Inc.*, No. 12-CV-2469, 2018 U.S. Dist. LEXIS 70127, *1, *7-8 (D. Ariz. Apr. 25, 2018).

³⁴ *EEOC v. Centura Health*, 933 F.3d 1203 (10th Cir. 2019).

subpoena that called for, among other things, information about all employees over a three year time period who were placed on the company's non-FMLA leave or who requested an accommodation for their disability.³⁵

The underlying charges of discrimination alleged that the employer violated the ADA by terminating their employment or refusing to allow them to return to work after medical leave.³⁶ The EEOC later informed the company that its investigation would be expanded to include related allegations by other aggrieved individuals involving bases or issues not directly affecting the charging parties, and issues not alleged in the charges.³⁷ The District Court noted that relevance within the context of an EEOC subpoena is "generously construed" and upheld enforcement of the subpoena based on the number of charges the EEOC had received regarding the employer and the widespread geographic distribution of those charges.³⁸

The employer challenged the District Court's ruling with respect to relevance, arguing that there had been no pattern-or-practice charge filed against it, and that such class-wide information was only relevant if there is a specific and substantial connection between the charge and the information requested.³⁹ According to the employer, "the only common theme tying the requested information to the eleven individual charges is the broad fact that all the charges alleged disability discrimination."⁴⁰ The Tenth Circuit did not disagree with that characterization of the charges, but nevertheless held that eleven charges of disability discrimination, which all alleged a failure to accommodate across a handful of facilities, was sufficient to warrant an investigation into potential pattern-or-practice claims.⁴¹

Other courts have relied on *McLane* to enforce similar requests for class-wide information, despite arising out of a handful of charges. For example, in *EEOC v. Nationwide Janitorial Services, Inc.*,⁴² the U.S. District Court for the Central District of California enforced an EEOC subpoena seeking the names, contact information, and additional data for all employees in the state of California.⁴³

Although the investigation was premised on three charges, the EEOC asserted that it was investigating "class allegations in violation of Title VII," and demanded statewide employee information.⁴⁴ Relying largely upon *McLane*, and the Ninth Circuit's ruling on remand in *McLane*, the District Court held that the EEOC had "evidence (apart from the vague boilerplate allegations in the original complaints) of incidents of additional potential discriminatory or violative conduct that go beyond the one-attacker-one-location allegations that commenced the investigation."⁴⁵ Given the "generous construction" of the concept of relevance, the Court concluded that employee contact information is relevant to the EEOC's legitimate investigation.⁴⁶

³⁵ *Id.* at 1209.

³⁶ *Id.* at 1205.

³⁷ *Id.* at 1205-1206.

³⁸ *Id.* at 1206.

³⁹ *Id.* at 1208.

⁴⁰ *Id.*

⁴¹ *Id.* at 1209.

⁴² *EEOC v. Nationwide Janitorial Servs.*, No. 18-CV-96, 2018 U.S. Dist. LEXIS 161273 (C.D. Cal. Aug. 17, 2018).

⁴³ *Id.* at *3.

⁴⁴ *Id.* at *2. The employer argued that information about employees state-wide was overbroad. *Id.* at *3. The company explained that the supervisor involved in the specific conduct underlying the three original complaints worked at a limited number of identified job sites. *Id.* at *3-4.

⁴⁵ *Id.* at *9. Thus, according to the EEOC, because it was investigating a pattern and practice of behavior, it was entitled to obtain broader evidence. *Id.* (citing *EEOC v. Shell Oil Co.*, 466 U.S. 54, 68-69 (1984); *EEOC v. McLane Co., Inc.*, 857 F.3d 813, 815-16 (9th Cir. 2017)).

⁴⁶ *Id.* (citing *McLane Co., Inc. v. EEOC*, 137 S. Ct. 1159, 1165 (2017)).

Further, in *EEOC v. Oncor Electric Delivery Co.*,⁴⁷ the U.S. District Court for the Northern District of Texas overruled the employer's objection to handing over widespread employee information.⁴⁸ In that case, upon returning to work after surgery, the charging party refused to sign a return to work memorandum that required her to inform her supervisor of all medications she was taking that could affect her work performance.⁴⁹ The EEOC requested, and then subpoenaed, a detailed list of all company employees who had suffered discipline or been discharged as a result of that policy.⁵⁰ Relying upon *McLane*, the District Court found that, based upon the evidence of a widespread policy already uncovered, the employee list was plainly relevant and well within the EEOC's authority to obtain in furtherance of its investigation.⁵¹

In addition to scope issues, courts have also upheld broad concepts of "relevance" to enforce EEOC subpoenas. For example, in *EEOC v. VF Jeanswear LP*,⁵² the Ninth Circuit reversed a decision from the District Court, which had denied enforcement of an EEOC subpoena. In that case, a former employee alleged that she was harassed, demoted, underpaid, and not offered opportunities for promotion based on her sex.⁵³ The U.S. District Court for the District of Arizona denied the EEOC's attempt to enforce an administrative subpoena that sought personal information identifying all supervisors, managers, and executive employees at the company nationwide, including various details about their positions, their employment and termination dates, and the facilities where they worked.⁵⁴

The EEOC argued that the company-wide information would provide relevant context and comparative data regarding those who have been hired or promoted, and that information regarding the reasons for employees' terminations could be related to the lack of promotion opportunities.⁵⁵ This was a bridge too far for the District Court, which held that the "crux" of the inquiry was "whether [the Charging Party's] charge of demotion is enough for a companywide and nationwide subpoena for discriminatory promotion, a discriminatory practice not affecting the charging party."⁵⁶ Ultimately, the Court concluded that "even under a generous reading of relevance, the nationwide, companywide search for systemic discrimination in promotions to top positions is too removed from [the Charging Party's] charge of one-off demotion from a sales job to be relevant in a practical sense."⁵⁷

The Ninth Circuit reversed, holding the District Court abused its discretion because, in conducting its relevance analysis, it proceeded from the premise that the scope of the charge, and the relevancy of the material requested, would be limited to the part of the charge that related to the personally-suffered harm of the charging party: "EEOC subpoenas are enforceable so long as they seek information relevant to any of the allegations in a charge, not just those directly affecting the charging party."⁵⁸ Moreover, the District Court had held that compliance with the subpoena would be unduly burdensome to the extent that it would require the employer to produce information not contained in its computer systems. However the employer itself estimated the cost of compliance at under \$11,000.⁵⁹ The Ninth Circuit reversed this decision as well, holding that this cost, as part of an

⁴⁷ *EEOC v. Oncor Elec. Delivery Co.*, No. 3:17-MC-69, 2017 U.S. Dist. LEXIS 189584 (N.D. Tex. Nov. 16, 2017).

⁴⁸ *Id.* at *18.

⁴⁹ *Id.* at *4.

⁵⁰ *Id.* at *8-9.

⁵¹ *Id.* at *17-18.

⁵² *EEOC v. VF Jeanswear LP*, 769 F. App'x. 477 (9th Cir. 2019).

⁵³ *Id.* at 478.

⁵⁴ *EEOC v. VF Jeanswear, LP*, No. MC-16-CV-47, 2017 WL 2861182, at *2 (D. Ariz. July 5, 2017).

⁵⁵ *Id.* at *6.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at *7.

investigation into systemic and unlawful discrimination, should not unduly burden a company that has approximately 2,500 employees.⁶⁰

A similar concern over the scope of “relevance” was at issue in *EEOC v. Joon, LLC*.⁶¹ In that case, the U.S. District Court for the Middle District of Alabama upheld enforcement of a subpoena that was premised on a charge that was brought on behalf of third-parties and over five hundred days after the charging party resigned his employment. The charging party alleged that his employer, an automotive body parts manufacturer, harassed him to such an extent that it amounted to constructive discharge and discrimination based on his national origin (Korean).⁶² Although the employee filed a charge with the EEOC shortly after he resigned, the subpoena enforcement action before the Court was actually about a second charge the employee filed 502 days after he resigned from the company.⁶³ In that charge, the employee alleged that he witnessed disparate, discriminatory treatment against other Korean employees. In particular, he alleged that the employer subjected Korean interns to discrimination on the basis of their national origin.⁶⁴

The EEOC opened an investigation of the second, third-party charge and issued a subpoena for the production of documents relating to the company’s internship program.⁶⁵ Among other things, the subpoena asked for information about the company’s practices for recruiting and hiring interns from Korea and requested documentation as to the interns’ identities, job assignments, pay, and living arrangements.⁶⁶ At issue was whether the charging party’s second charge was timely. The District Court agreed with the conclusion of the Magistrate Judge that the charge was timely.⁶⁷ The Court noted that there were three discrete acts of discrimination that occurred during the 180 days preceding the charge. Moreover, the charge alleged that the company had engaged in discrimination of a continuing nature, and “under the continuing violation doctrine, acts of discrimination occurring outside the 180-day window are not time-barred under Title VII if they are part of a continuing violation that continued to a time within the period for filing.”⁶⁸

The employer argued that the charge was untimely because the charging party’s original charge did not mention any third-party discrimination.⁶⁹ However, the Court held – quoting the Supreme Court’s decision in *McLane Co.* – that “it is the job of the EEOC, not this court in a subpoena enforcement proceeding, to investigate the charge’s allegations and ‘determine whether there is reasonable cause to believe that the charge is true.’”⁷⁰ According to the District Court, “the face of the EEOC charge provides an arguable basis for the charge’s timeliness. No more need be said to dispense with [the employer’s] arguments”.⁷¹ The District Court also rejected the employer’s argument that the second EEOC charge contains facts beyond the charging party’s personal knowledge and therefore is invalid for lack of proper verification. The Court held that, per the statute authorizing EEOC administrative subpoenas, an unsworn declaration satisfies the verification requirements for a subpoena if it: “(1) includes a written assertion of facts that is true, (2) provides a declaration that the first assertion is made under penalty of perjury, and (3) is dated.”⁷² The District Court held that the

⁶⁰ *Id.*

⁶¹ *EEOC v. Joon, LLC*, No. 3:18-MC-3836, 2019 WL 2134596 (M.D. Ala. May 15, 2019).

⁶² *Id.* at *1.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at *2.

⁶⁶ *Id.*

⁶⁷ *Id.* at *3.

⁶⁸ *Id.* (citing *EEOC v. Joe's Stone Crabs, Inc.*, 296 F.3d 1265, 1271 (11th Cir. 2002)).

⁶⁹ *Id.* at *4.

⁷⁰ *Id.* (quoting *McLane Co. v. EEOC*, 137 S. Ct. 1159, 1164 (2017)).

⁷¹ *Id.* at *5.

⁷² *Id.* at *6.

charging party's charge had met these minimal standards and had therefore met the statute's verification requirements.⁷³

Similarly, in *EEOC v. United Parcel Service, Inc.*,⁷⁴ the Sixth Circuit affirmed the District Court's enforcement of a broad subpoena, seeking evidence of discrimination and retaliation within three categories of information: (i) information about employee injuries and accidents; (ii) UPS' "privacy case" criteria; and (iii) similar information to its first request, but in a different, updated format.⁷⁵ The Sixth Circuit based its decision on courts' "generous construction" of the relevancy requirement, which has "afforded the [EEOC] access to virtually any material that might cast light on the allegations against the employer."⁷⁶ Likewise, in *EEOC v. Union Pacific Railroad Co.*,⁷⁷ the Seventh Circuit affirmed a decision that required a railroad company to produce, among other things, company-wide information about persons who sought a particular promotion during the relevant time period.⁷⁸ The Seventh Circuit's decision emphasized the generous relevance standard afforded EEOC subpoenas, explaining that the relevance standard is in place merely to prevent "fishing expeditions."⁷⁹

b. Cases Upholding Restrictions On The Scope Of The EEOC's Subpoena Power

After the Supreme Court affirmed the broad scope of the EEOC's subpoena powers in *McLane*, employer victories have been few and far between. But there have been some employer-favorable cases. For example, in *EEOC v. Service Tire Truck Centers*,⁸⁰ the U.S. District Court for the Middle District of Pennsylvania refused to order the production of entire personnel files. In that case, the charging party alleged gender and pregnancy discrimination in violation of Title VII when she was denied a promotion.⁸¹

The EEOC sought, among other things, personnel files of the charging party's supervisor, the individual who received the promotion, and several comparator employees.⁸² The Court held that the

⁷³ *Id.*

⁷⁴ *EEOC v. United Parcel Serv., Inc.*, 859 F.3d 375 (6th Cir. 2017).

⁷⁵ *Id.* at 380.

⁷⁶ The Sixth Circuit explained that "the EEOC is entitled to evidence that shows a pattern of discrimination other than the specific instance of discrimination described in the charge." *Id.* at 379. It rejected UPS's argument that the EEOC was only entitled to information regarding employees "similarly situated" to the charging party, stating that the EEOC is entitled to any evidence which "provides context for determining whether discrimination has taken place." *Id.* (internal quotations and citations omitted).

⁷⁷ *EEOC v. Union Pac. R.R. Co.*, 867 F.3d 843 (7th Cir. 2017), *reh'g denied* (Nov. 21, 2017).

⁷⁸ *Id.* at 852. Before a court decision, the parties reached a settlement whereby the railroad agreed to produce some of the subpoenaed information. *Id.* at 846. However, the EEOC claimed that the railroad never actually produced the promised information. Thereafter, the EEOC issued a right to sue letter and both charging parties jointly filed suit. However, summary judgment was granted against their claims and the Seventh Circuit affirmed. *Id.*

⁷⁹ *Id.* The Seventh Circuit explicitly rejected the narrow view that the EEOC's request should have been denied because "the information sought extends beyond the allegations in the underlying charges[.]" *Id.* See also *EEOC v. Aerotek, Inc.*, 815 F.3d 328, 332-33 (7th Cir. 2016) (upholding the District Court's order requiring Aerotek to produce the names of more than 22,000 clients, holding that the EEOC had the power to investigate additional potential discriminatory requests) (citing *EEOC v. Sidley Austin Brown & Wood*, 315 F.3d 696, 701 (7th Cir. 2002)); *EEOC v. Maritime Autowash, Inc.*, 820 F.3d 662, 666 (4th Cir. 2016) (enforcing an EEOC subpoena for documents stemming from the discrimination charge of an undocumented worker even though the charging party might not have been able to enforce any legal remedies, explaining that "[t]he [judicial review] process is not one for a determination of the underlying claim on its merits ... courts should look only to the jurisdiction of the agency to conduct such an investigation"); *EEOC v. KB Staffing, LLC*, No. 14-MC-41, 2014 U.S. Dist. LEXIS 147810, at *10-11 (M.D. Fla. Aug. 28, 2014) (enforcing an EEOC subpoena for information regarding a pre-job offer health questionnaire allegedly violating the ADA even though the challenged practice had been discontinued years earlier, even beyond the statute of limitations period).

⁸⁰ *EEOC v. Serv. Tire Truck Ctrs.*, No. 1:18-CV-1539, 2018 U.S. Dist. LEXIS 178025 (M.D. Pa Oct. 17, 2018).

⁸¹ *Id.* at *3.

⁸² *Id.* at *3-4, 11. In response, the employer conceded that some of what was contained in the personnel files was relevant, but argued that the EEOC's request for entire personnel files was overbroad because such files included sensitive documents and information that were wholly irrelevant to resolving the charge. *Id.* at *11.

EEOC had not explained why entire personnel files are necessary or relevant to its investigation, and circumscribed the subpoena to exclude sensitive information such as certain medical and healthcare information, retirement plan information, names and other identifying details for spouses and dependents, personal email addresses, copies of social security cards, and tax information beyond earnings and salary.⁸³

Similarly, on November 29, 2018, the U.S. District Court for the Southern District of California granted in part and denied in part the EEOC's attempt to enforce a broad subpoena in *EEOC v. G4S Secure Solutions (USA), Inc.*⁸⁴ In that case, the EEOC was investigating a charge of sex and race harassment discrimination brought by a security guard.⁸⁵ She alleged that she complained about the harassment to one of her supervisors, but no action was taken.⁸⁶ The Court relied on that fact to uphold the subpoena, to the extent it requested documents regarding other complaints of harassment in the same geographic area: "In light of [charging party's] allegations that she presented her harassment complaints to [employer's] supervisor and no action was taken, documents showing complaints of harassment and [employer's] responses (or lack thereof) are plainly relevant."⁸⁷

However, the Court was unwilling to go so far as to order the production of documents relating to any individuals who were discharged during the relevant time period. The Court explained that the charging party alleged that she was transferred in retaliation for complaining about the alleged harassment; she had not alleged that she was improperly discharged.⁸⁸ The Court held that "[w]hile inquiring with other employees or former employees regarding harassment and discrimination may be important to the EEOC investigation, there is no reason that the discharged employees are relevant to the investigation, further, there is no showing that other employees (past or present) are unavailable for interview for the same purposes."⁸⁹

These employer wins build on some appellate court cases from recent years more favorable to employers, although those decisions were handed down before the Supreme Court decided *McLane*. For example, in *EEOC v. Royal Caribbean Cruises, Ltd.*,⁹⁰ the Eleventh Circuit upheld the Southern District of Florida's refusal to enforce an EEOC subpoena because the information sought was irrelevant to the charge at issue and was unduly burdensome. The Eleventh Circuit cautioned that the EEOC's subpoena power should not be construed "so broadly that the relevancy requirement is rendered a nullity."⁹¹ The Eleventh Circuit also rejected the EEOC's argument that it "is entitled to expand the investigation to uncover other potential violations and victims of discrimination on the basis of disability."⁹²

Similarly, in *EEOC v. TriCore Reference Laboratories*,⁹³ the Tenth Circuit affirmed the District Court's refusal to enforce an EEOC subpoena relating to an employer's determination that the

⁸³ *Id.* at *11-12. The EEOC also sought a complete list of employees at the branch where the charging party worked, including personal identifying and contact information. *Id.* The Court found that social security numbers were not necessary or relevant, but that the other employee information should be produced, stating that the "data sought by the EEOC would enable it to interview other employees to determine if [the employer] treated its employees differently based on gender or pregnancy, and thus the information 'might cast light' on the charge at issue." *Id.* at *13.

⁸⁴ *EEOC v. G4S Secure Solutions (USA), Inc.*, No. 18-CV-2335, 2018 U.S. Dist. LEXIS 203540 (S.D. Cal. Nov. 29, 2018).

⁸⁵ *Id.* at *2.

⁸⁶ *Id.*

⁸⁷ *Id.* at *11.

⁸⁸ *Id.* at *10.

⁸⁹ *Id.*

⁹⁰ *EEOC v. Royal Caribbean Cruises, Ltd.*, 771 F.3d 757 (11th Cir. 2014).

⁹¹ *Id.* at 760.

⁹² *Id.* at 761.

⁹³ *EEOC v. TriCore Reference Labs.*, 849 F.3d 929 (10th Cir. 2017); Gerald L. Maatman, Jr., Christopher DeGross, and Alex W. Karasik, *No Subpoena For You! – Tenth Circuit Says EEOC's Subpoena Out Of Line*, WORKPLACE CLASS ACTION BLOG

charging party could not safely perform her job upon her return from maternity leave.⁹⁴ The Tenth Circuit rejected the EEOC's attempt to expand the scope of its investigation to include a "[f]ailure to accommodate persons with disabilities and/or failure to accommodate women with disabilities (due to pregnancy)," explaining that the EEOC had not justified its expanded investigation because it had "not alleged anything to suggest a pattern or practice of discrimination beyond [employer's] failure to reassign [the employee]."⁹⁵ The Tenth Circuit noted that the request was overbroad because it sought information about employees who never sought an accommodation.⁹⁶

c. Cases Addressing The Methods Used By The EEOC To Investigate Charges And The Investigation Process Itself

Although most decisions regarding the EEOC's subpoena power revolve around questions about the scope of materials the EEOC may seek in the context of a particular lawsuit, a number of decisions addressed how the EEOC is permitted to conduct the investigation itself, and how employers may be able to fight back.

For example, in *EEOC v. Chipotle Mexican Grill, Inc.*,⁹⁷ the U.S. District Court for the Northern District of California held that the facts underlying the EEOC's reasonable cause determination were protected by the deliberative process privilege.⁹⁸ In that case, a former employee filed a charge against his employer, alleging that he was subjected to sexual harassment, retaliation, and constructive termination.⁹⁹ The parties agreed that they would exchange written responses to each other's 30(b)(6) deposition notices instead of producing witnesses to testify in person.¹⁰⁰ The employer sought written responses to five topics that inquired into the basis of the EEOC's determination that there was reasonable cause to believe that the employer violated Title VII.¹⁰¹ The EEOC did not substantively respond to those topics, arguing that the substance of its pre-suit investigation is not judicially reviewable, therefore not relevant to the lawsuit, and moreover that the information was protected by the deliberative process privilege.¹⁰²

The deliberative process privilege shields from disclosure intra-governmental communications relating to matters of law or policy.¹⁰³ The privilege is intended to protect the quality of governmental decision-making by "maintaining the confidentiality of advisory opinions, recommendations, and

(Mar. 2, 2017), <http://www.workplaceclassaction.com/2017/03/no-subpoena-for-you-tenth-circuit-says-eeocs-subpoena-out-of-line/>.

⁹⁴ *TriCore Reference Labs.*, 849 F.3d at 934.

⁹⁵ *Id.* at 939.

⁹⁶ *Id.* at 942. See also *EEOC v. Austal USA, LLC*, No. 17-CV-00006, 2017 WL 4563078, at *10. (S.D. Ala. Aug. 18, 2017) (rejecting EEOC's request for the "names and position titles of all individuals terminated by [the employer] because of the attendance policy, and which of these terminated individuals had a medical disability," finding that the EEOC's request "extends beyond those employees with a medical condition or disability terminated under the attendance policy, regardless of whether those employees had a disability or medical condition and no matter the nature of any accommodation requested"); *EEOC v. Se. Food Servs. Co., LLC*, No. 3:16-MC-46, 2017 WL 1155040, at *2-3 (E.D. Tenn. Mar. 27, 2017) (refusing to enforce an EEOC subpoena for detailed information regarding current and former employees who signed a release that the EEOC was challenging, rejecting the EEOC's argument that contacting other affected employees was the only way to verify the company's contention that no other employees refused to sign the release); *EEOC v. Forge Indus. Staffing Inc.*, No. 1:14-MC-90, 2014 WL 6673574, at *3, 7 (S.D. Ind. Nov. 24, 2014) (rejecting an EEOC subpoena for information that the EEOC argued was related to the "overall conditions of the workplace," and noting that accepting that argument would eviscerate the meaning of "relevance").

⁹⁷ *EEOC v. Chipotle Mexican Grill, Inc.*, No. 17-CV-5382, 2019 WL 3811890 (N.D. Cal. Aug. 1, 2019).

⁹⁸ See Gerald L. Maatman, Jr. and Alex W. Karasik, *Federal Court Rules That Employer Is Not Entitled To EEOC's Pre-Suit Materials*, WORKPLACE CLASS ACTION BLOG (Aug. 7, 2019), <https://www.workplaceclassaction.com/2019/08/federal-court-rules-that-employer-is-not-entitled-to-eeocs-pre-suit-materials/>.

⁹⁹ *Chipotle Mexican Grill, Inc.*, 2019 WL 3811890, at *1.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at *2.

¹⁰³ *Id.* at *3.

deliberations comprising part of a process by which governmental decisions and policies are formulated.”¹⁰⁴ However, in order to be covered by the deliberative process privilege, information must be both “predecisional,” in that it is “antecedent to the adoption of agency policy,” and “deliberative,” meaning that it must actually be related to the process by which policies are formulated.¹⁰⁵

The Court held that the deliberative process privilege protected the information sought by defendant regarding the EEOC’s reasonable cause determination.¹⁰⁶ According to the District Court, revealing the facts which constituted the factual basis of the EEOC’s probable cause finding would reveal the EEOC’s evaluation and analysis of factual information gathered by the agency, which would “provide defendants unwarranted insight into how these facts played into the EEOC’s decision-making process.”¹⁰⁷

Moreover, the District Court found that the employer had not demonstrated that its need for the materials, and the need for accurate fact-finding, overrode the EEOC’s interest in non-disclosure.¹⁰⁸ Among other things, the District Court found that the evidence sought by the employer was not relevant to the lawsuit because the EEOC’s determination of reasonable cause was not the subject of the action, and that the evidence on which the EEOC based its determination would not necessarily be coextensive with the evidence relevant to the claims and defenses at issue in the lawsuit: “[t]he question for the jury will be the sufficiency of the evidence of the claims, not the sufficiency of evidence of the EEOC’s pre-suit review.”¹⁰⁹

Other courts have addressed the means by which the EEOC seeks to collect information during an investigation. For example, in *EEOC v. Nucor Steel Gallatin, Inc.*,¹¹⁰ the U.S. District Court of the Eastern District of Kentucky allowed the EEOC to conduct a warrantless, non-consensual search of private commercial property of an employer charged with hiring discrimination.¹¹¹ The EEOC sought a ruling authorizing it to enter the private commercial property of defendant employer, without the employer’s consent and without an administrative warrant, to investigate a hiring discrimination claim.¹¹²

In response, the employer argued that, regardless of whether the EEOC has the statutory right to enter private commercial property, that entry cannot take place without an administrative warrant.¹¹³ The District Court found that the EEOC’s regulatory scheme provided safeguards roughly equivalent to those found in traditional warrants, rejecting the employer’s arguments to the contrary. The District Court explained, that “[j]ust as the warrant process requires courts to identify specific evidence of an existing violation and order only those inspections that bear ‘an appropriate relationship to the violation, the Commission’s statutory and regulatory schemes permit only those inspections that are ‘relevant to the charges filed’ and ‘not unduly burdensome.’”¹¹⁴

Other courts have been more willing to impose restrictions on the EEOC’s regulatory power. In *EEOC v. Homenurse, Inc.*,¹¹⁵ instead of requesting information in the normal course of its

¹⁰⁴ *Id.* (quoting *Nat’l Wildlife Fed’n v. U.S. Forest Serv.*, 861 F.2d 1114, 1117 (9th Cir. 1988)).

¹⁰⁵ *Id.* (quoting *Nat’l Wildlife Fed’n*, 861 F.2d at 1117).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at *4.

¹⁰⁹ *Id.*

¹¹⁰ *EEOC v. Nucor Steel Gallatin, Inc.*, 184 F. Supp. 3d 561 (E.D. Ky. 2016).

¹¹¹ *Id.* at 563-64.

¹¹² *Id.* at 565.

¹¹³ *Id.*

¹¹⁴ *Id.* at 568.

¹¹⁵ *EEOC v. Homenurse, Inc.*, No. 1:13-CV-2927, 2013 U.S. Dist. LEXIS 147686, at *1 (N.D. Ga. Sept. 30, 2013).

investigation, the EEOC carried out an unannounced, FBI-like raid in which it showed up at the former employer and confiscated some of the company's files, many of which contained information protected by HIPAA.¹¹⁶ When the EEOC tried to enforce another subpoena on the employer, the District Court for the Northern District of Georgia quashed the subpoena and called the raid on the employer "highly inappropriate."¹¹⁷

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

¹¹⁶ *Homenurse, Inc.*, 2013 U.S. Dist. LEXIS 147686, at *3-4.

¹¹⁷ *Id.* at *44.

The EEOC's Strategic Enforcement Priorities

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

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

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

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

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

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

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

6. The EEOC's Strategic Enforcement Priorities

The EEOC continues to operate under its Strategic Enforcement Plan ("SEP") for FY 2017-2021, which was put in place in October 2016.¹¹⁸ The EEOC first unveiled its SEP in December 2012, stating that the plan "established substantive area priorities and set forth strategies to integrate all components of EEOC's private, public, and federal sector enforcement to have a sustainable impact in advancing equal opportunity and freedom from discrimination in the workplace."¹¹⁹ The Commission's six major enforcement priorities have remained consistent across both iterations of the SEP. But the EEOC can and has changed how it interprets those priorities over the life of those Plans, which has often led to a shift in how the EEOC approaches litigation and the topics and issues it chooses to enforce in the federal courts.¹²⁰ According to the EEOC "the purpose of the [Strategic Enforcement Priorities] is to focus and coordinate the EEOC's programs to have a sustainable impact in reducing and deterring discriminatory practices in the workplace."¹²¹

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

In November 2019, the EEOC announced that it would be replacing the combined Performance Accountability Report that used to be published in November of each year.¹²² Among other things, the annual Performance Accountability Report contained data regarding the number of systemic cases being handled by the EEOC. The EEOC will now be publishing an Agency Financial Report in November and a separate Annual Performance Report in February 2020 along with the EEOC's Congressional Budget Justification. The Annual Performance Report will report on the progress of the EEOC's efforts to achieve its strategic goals and objectives. Employers will have to wait for that Report in February for updated data regarding the EEOC's pursuit of systemic cases.

In its last Performance Accountability Report, the EEOC reported that the Commission filed 37 systemic cases in FY 2018, up from 30 in FY 2017.¹²³ Systemic lawsuits accounted for 18.6% of total filings by the EEOC in FY 2018. By the end of FY 2018, the EEOC had 71 systemic cases on its active docket, two of which included over 1,000 victims. Systemic cases accounted for 23.5% of all active merits lawsuits in that year. Also in FY 2018, the EEOC resolved 409 systemic investigations, which resulted in over \$30 million in remedies for victims. On the litigation front, the EEOC resolved 26 systemic cases. According to the EEOC, it had a 96% rate of success in litigating systemic cases in FY 2018.

¹¹⁸ U.S. Equal Employment Opportunity Commission, *Press Release: EEOC Updates Strategic Enforcement Plan* (Oct. 17, 2016), <https://www.eeoc.gov/eeoc/newsroom/release/10-17-16.cfm>.

¹¹⁹ U.S. Equal Employment Opportunity Commission Strategic Enforcement Plan FY 2017 - 2021, <https://www.eeoc.gov/eeoc/plan/sep-2017.cfm>.

¹²⁰ See Gerald L. Maatman, Jr., Christopher J. DeGroff, Matthew J. Gagnon, and Ala Salameh, *What A Long Strange Year It's Been . . . The EEOC's Fiscal Year Comes To An Uncharacteristically Quiet Close*, Workplace Class Action Blog (Sept. 30, 2019), <https://www.workplaceclassaction.com/2019/09/what-a-long-strange-year-its-been-the-eeocs-fiscal-year-comes-to-an-uncharacteristically-quiet-close/>.

¹²¹ U.S. Equal Employment Opportunity Commission Strategic Enforcement Plan FY 2017 - 2021, <https://www.eeoc.gov/eeoc/plan/sep-2017.cfm>.

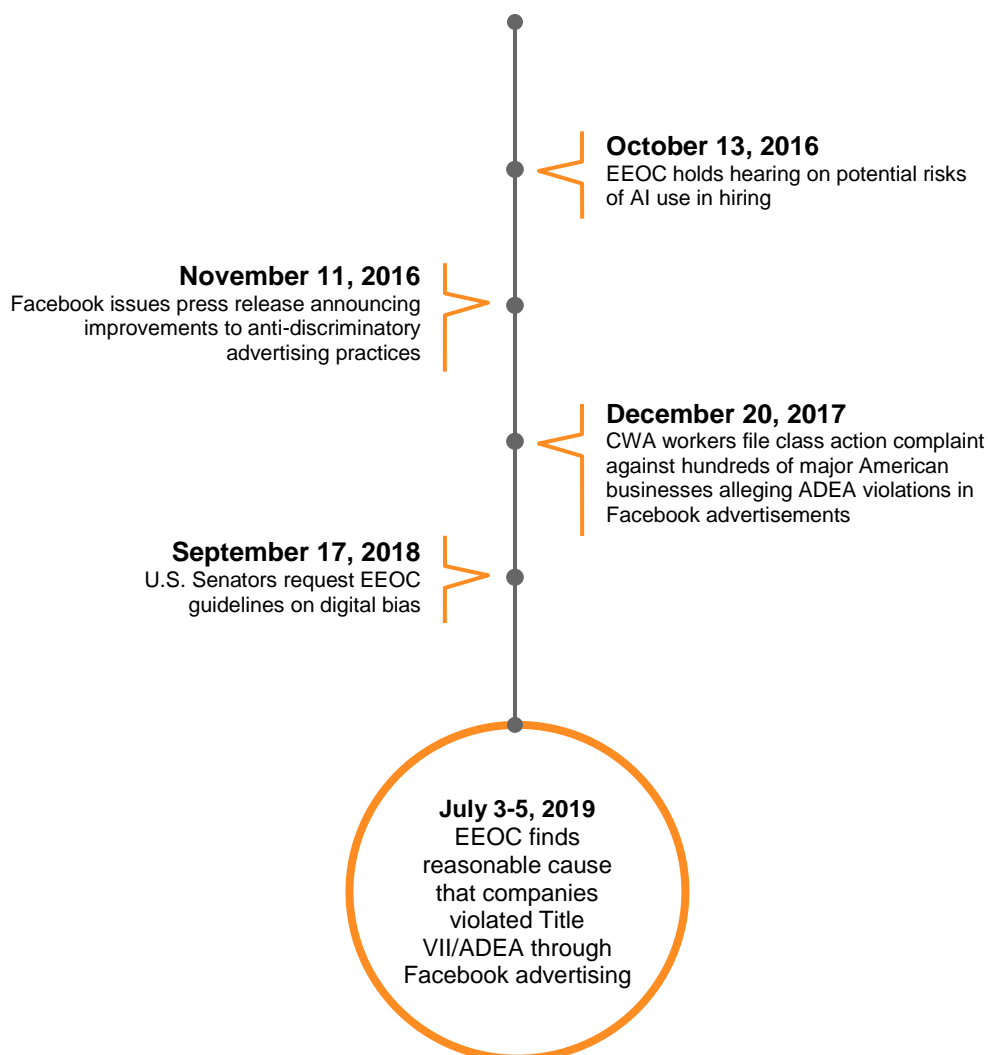
¹²² U.S. Equal Employment Opportunity Commission, Fiscal Year 2019 Agency Financial Report, at 9, <https://www.eeoc.gov/eeoc/plan/upload/2019afr.pdf>.

¹²³ U.S. Equal Employment Opportunity Commission, Fiscal Year 2018 Performance and Accountability Report, <https://www.eeoc.gov/eeoc/plan/2018par.cfm>.

Priority #1 - Eliminating Barriers In Recruitment And Hiring

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

Developments Related To Digital Bias In Hiring



B. The Elimination Of Systemic Barriers In Recruitment And Hiring

The EEOC has spent a considerable amount of its enforcement budget litigating issues that it sees as barriers to recruitment and hiring.¹²⁴ Over the past few years, most of that enforcement activity has focused on combatting hiring practices that could result in age discrimination and employers' use of credit and criminal history background checks in hiring and selection decisions.

1. A New Focus On Age Discrimination: Artificial Intelligence And Other Forms Of Digital Bias

a. The EEOC Probes Employers In The Digital Age

After referring to this issue for years, the EEOC has made good on challenging employers' use of artificial intelligence, algorithms, and "big data" to recruit, screen, and select candidates and employees. In October 2016, at a panel in Washington D.C. featuring industrial psychologists, attorneys and labor economists, then-EEOC Chair Jenny Yang opined that big data mining and algorithmic tools have "the potential to drive innovations that reduce bias in employment decisions and help employers make better decisions in hiring, performance evaluations, and promotions," but cautioned that "it is critical that these tools are designed to promote fairness and opportunity, so that reliance on these expanding sources of data does not create new barriers to opportunity."¹²⁵

On September 17, 2018, three Senators issued a letter to the EEOC requesting the development of guidelines for employers' use of facial analysis technologies, and a report on how facial recognition may violate anti-discrimination laws.¹²⁶ The Senators state that employers have used facial recognition technology for "security, tracking employee attendance, as well as for screening job candidates for emotional, social, or other characteristics that employers believe may correlate with job performance." While some argue that the use of facial recognition technology could help reduce the impact of implicit bias, studies by MIT cited by the Senators indicate that the underlying algorithms are thirty times more likely to misidentify darker-skinned women than lighter-skinned men, with similarly strong misidentification statistics for Black and Latino persons.¹²⁷ Their expressed concern is that employers will use these technologies in a way that leads to exacerbated employment discrimination.¹²⁸ The Commission has not yet issued a statement or report in response to the Senators' request, yet the growing use of new technologies remains a prominent issue for legislators and federal agencies alike.

The EEOC's focus on these issues finally appears to be bearing out in terms of new enforcement activity. For example, the Communications Workers of America (CWA) recently filed discrimination charges against sixty-six employers for allegedly engaging in discriminatory advertising on Facebook

¹²⁴ See U.S. Equal Employment Opportunity Commission Strategic Enforcement Plan FY 2017 - 2021, at 6-9 (identifying the elimination of barriers in recruitment and hiring as one of the EEOC's national priorities, and stating that "[t]he EEOC will target class-based recruitment and hiring practices that discriminate against racial, ethnic and religious groups, older workers, women, and people with disabilities").

¹²⁵ U.S. Equal Employment Opportunity Commission, *Press Release: Use of Big Data Has Implications for Equal Employment Opportunity, Panel Tells EEOC* (Oct. 13, 2016), <https://www.eeoc.gov/eeoc/newsroom/release/10-13-16.cfm>. Commissioner Vicki Lipnic added, "It can be a challenge to determine whether, when, and how laws may apply in our increasingly technology-driven workplaces. But I see this at the core of our responsibilities: Ensuring that our understanding of today's workplaces and our interpretation and administration of the law, are as current and fully-informed as possible. It's for that reason that holding meetings like today is so crucial to our work." *Id.*

¹²⁶ Senators Kamala Harris, Patty Murray, Elizabeth Warren, Letter to the U.S. Equal Employment Opportunity Commission, available at https://www.scribd.com/embeds/388920670/content#from_embed.

¹²⁷ *Id.* at 2.

¹²⁸ *Id.*

that excluded women and older workers from receiving the job ads.¹²⁹ Of the sixty-six employers charged, seven were subject of the EEOC finding of “reasonable cause to believe that” the employers violated Title VII and/or the ADEA. The EEOC’s determinations were issued between July 3, 2019 and July 5, 2019.¹³⁰

For example, one of these charges of discrimination alleged that a Respondent “violated the Age Discrimination in Employment Act (ADEA), as amended, when it advertised on Facebook for a position with its company and used language which limited who could apply.”¹³¹ The reasonable cause determination alleged that “[e]vidence gathered during the investigation established that . . . Respondent advertised on Facebook, with national exposure, and when doing so it used language to limit the age of individuals who were able to view the advertisement.”¹³² The EEOC found reasonable cause to believe that the Respondent had violated the ADEA “by advertising on a social media platform and limiting the audience for their advertisement to younger applicants.”¹³³

The EEOC’s focus on this issue is in line with its recent Report on the State of Age Discrimination and Older Workers in the U.S. 50 Years After the Age Discrimination in Employment Act.¹³⁴ The report notes that the workforce in 1967, the year the ADEA was passed, looked very different than it does today.¹³⁵ This has resulted in a dramatic change in the ages of those filing ADEA charges with the EEOC and the nature of the allegations contained in those charges.¹³⁶ Among other things, the Report notes that unlawful discharge has always been the most common practice asserted in charges, but that age-based harassment claims have more than tripled since 1992.

The Report also specifically addressed how digital bias can lead to age discrimination as a barrier to hiring. As an example, the report pointed to job postings that referred to younger workers as “digital natives,” but older workers as “digital immigrants,” and online application systems that include dates of birth or graduation-year fields that cannot be bypassed. Finally, the Report notes that mandatory retirement and discriminatory denial of benefits has also dominated ADEA litigation, along with the increasingly important trend of “intersectional discrimination,” i.e., discrimination based on more than one protected category. As described above, these trends are now working their way into the EEOC’s enforcement program and, eventually, perhaps the federal courts as well.

b. Other Developments In The Law Of Age Discrimination

On February 14, 2019, a bipartisan group Senators and members of the House of Representatives introduced bills to establish the Protecting Older Workers Against Discrimination Act, which would amend the ADEA and other federal statutes to make it easier for employees to prove age

¹²⁹ *Commc’ns Workers of Am. v. T-Mobile US Inc.*, 5:17-CV-07232 (N.D. Cal. 2017).

¹³⁰ Mindy Weinstein, U.S. Equal Employment Opportunity Commission Determination Letters, *available at* <https://www.onlineagediscrimination.com/sites/default/files/documents/eeoc-determinations.pdf>.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ Victoria A. Lipnic, The State of Age Discrimination and Older Workers in the U.S. 50 Years After the Age Discrimination in Employment Act (ADEA), <https://www.eeoc.gov/eeoc/history/adea50th/report.cfm>.

¹³⁵ Among other things, the Report noted that: “[t]oday’s US labor force has doubled in size, and is older, more diverse, more educated, and more female than it was 50 years ago.” *Id.* The most dramatic change, according to the EEOC, is that the share of workers age 55 and older in the workforce has doubled, and in recent years, workers age 65 and older are staying in or re-entering the workforce in greater numbers. The Report notes that “[m]ore than 42 percent of older workers are in management, professional, and related occupations, a somewhat higher proportion than that for all workers. Thirty-six percent of older workers are engaged in blue collar work. Workers age 65 and older are in part-time jobs at more than double the rate of younger workers, but they are increasingly seeking and obtaining full-time employment.” *Id.*

¹³⁶ According to the Report, “[i]n 1990, workers in the age 40-54 age cohort filed the majority of ADEA charges and workers in the age 65+ cohort filed relatively few. But by 2017, more charges were filed by workers ages 55-64 than the younger age cohort. Moreover, by 2017, the percentage of charges filed by workers age 65 and older was double what it was in 1990.” *Id.*

discrimination.¹³⁷ This statute, if enacted, would allow employees to establish an unlawful employment practice by demonstrating that age was a motivating factor for any unlawful employment practice, even though other factors also motivated the practice. It would therefore allow so-called "mixed motive" claims and overturn the Supreme Court's decision in *Gross v. FBL Financial Services, Inc.*, which required employees to prove that age was the "but-for" cause of the alleged discrimination.¹³⁸ This change would dramatically alter the burden of proof for establishing causation for such claims and could make age discrimination claims much easier to prove for employees and the EEOC.

Age discrimination, in whatever form it takes, continues to be a top priority for the EEOC. This focus continues to result in substantial litigation wins for the EEOC and important developments in the law of age discrimination. For example, in *EEOC v. Board of Regents of the University of Wisconsin System*,¹³⁹ the District Court for the Western District of Wisconsin allowed an ADEA case to proceed to trial after finding that the employer's stated reasons for passing over an applicant were vague and subjective. In that case, the EEOC brought a lawsuit on behalf of a University Services Program Associate against the University of Wisconsin system, alleging that the charging party had been denied a position because of her age. In response to budget cuts, the University system had consolidated its marketing departments, and the charging party's position was identified as one of the 13 positions that would be eliminated due to that reorganization. Although she was invited to apply for other positions, she was not selected for any of the positions she requested.¹⁴⁰

The employer stated that it rejected the charging party's application due to problems with her past job performance and problems with how she interviewed.¹⁴¹ The District Court held that the employer's evidence was vague and that a reasonable jury could find its explanations to be pretextual.¹⁴² It was undisputed that the charging party's performance evaluations were uniformly positive and that she received a recommendation from her former supervisor. The only evidence that the employer presented regarding her past performance were vague statements that charging party was not "responsive" or "timely." Similarly, with respect to interview performance, the District Court held that the employer's reasons for rejecting the charging party's application were vague and subjective: "[t]he [employer] doesn't explain what it means by any of that. It doesn't point to specific answers that [charging party] gave or describe why the decision makers believed that she didn't display the necessary qualities."¹⁴³ Accordingly, the District Court held that "[i]n light of the [employer's] failure to provide more specific reasons for its decision, the court concludes that EEOC's evidence is sufficient to show a genuine issue of material fact requiring a trial."¹⁴⁴

In another case decided in FY 2019, the EEOC obtained an important clarification of the law regarding its right to seek mass relief on behalf of groups of aggrieved older workers. In *EEOC v. Baltimore County*,¹⁴⁵ the U.S. District Court for the District of Maryland held that the EEOC need not follow the procedural requirements of collective actions required of private litigants under the Fair Labor Standards Act. The District Court held that the ADEA's statutory scheme plainly permitted the EEOC to pursue an enforcement action under its provisions without obtaining the consent of the employees it seeks to benefit.¹⁴⁶ According to the District Court, when the EEOC files suit under the

¹³⁷ Protecting Older Workers Against Discrimination Act, S. 485, 116th Cong. (2019); Protecting Older Workers Against Discrimination Act, H.R. 1230, 116th Cong. (2019).

¹³⁸ See *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009).

¹³⁹ *EEOC v. Bd. of Regents of the Univ. of Wisc. Sys.*, No. 18-CV-602, 2019 WL 5802546 (W.D. Wisc. Nov. 7, 2019).

¹⁴⁰ *Id.* at *1-2.

¹⁴¹ *Id.* at *3.

¹⁴² *Id.* at *4.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at *5.

¹⁴⁵ *EEOC v. Baltimore Cty.*, No. 07-CV-2500, 2019 WL 5555676 (D. Md. Oct. 28, 2019).

¹⁴⁶ *Id.* at *4. The ADEA does not provide its own, discrete procedures governing an action instituted by the EEOC. Rather, the statute requires that it shall be enforced in accordance with the powers, remedies, and procedures provided in certain

ADEA, it must look to the section of the statute that governs procedures that would be followed by the Secretary of Labor, rather than those that would pertain to actions brought by private employees. “There is simply no reason to read the statute in such a way as to require the EEOC to obey the procedures governing *private* actions under the FLSA while ignoring those governing administrative enforcement actions under the FLSA.”¹⁴⁷ The District Court concluded that the provisions governing FLSA collective actions are not applicable to the EEOC and therefore do not require the EEOC to obtain the consent of employees before pursuing a lawsuit on their behalf.

2. The EEOC’s Ongoing Focus On Employers’ Use Of Criminal And Credit History Background Checks

In addition to age discrimination, the EEOC has also attacked employers’ use of criminal and credit history background checks. But this issue has not developed as the EEOC may have hoped. After years of litigation in this area, the key legal issue that continues to make national headlines is the State of Texas’s forceful challenge to the EEOC’s authority to set national guidelines in this area.¹⁴⁸

On April 25, 2012, the EEOC issued its Enforcement Guidance concerning the use of arrest and conviction records in employment decisions.¹⁴⁹ Among other things, the guidance warns employers that they cannot deny someone employment due to criminal history information without considering the following factors: the nature and gravity of the offense or offenses (which the EEOC explains may include evaluating the harm caused, the legal elements of the crime, and the classification, i.e., misdemeanor or felony); the time passed since the conviction and/or completion of the sentence (which the EEOC describes as looking at particular facts and circumstances and evaluating studies of recidivism); and the nature of the job held or sought (which requires more than examining just the job title, but also specific duties, essential functions, and environment).

The EEOC’s guidance was immediately challenged in court. The State of Texas brought suit in the District Court for the Northern District of Texas in November 2013 seeking to enjoin the enforcement of the EEOC’s guidance because it conflicted with Texas law that prohibited hiring felons for certain jobs. The District Court dismissed the suit, holding that the State of Texas lacked standing.¹⁵⁰ The State of Texas immediately filed an appeal. On June 27, 2016, the Fifth Circuit remanded the case back to the District Court, stating that the State of Texas had standing to challenge the EEOC guidance and that it was a final agency rule subject to court challenge.¹⁵¹

With respect to standing, the Fifth Circuit pointed out that the State of Texas, in its capacity as an employer, was an “object” of the challenged EEOC guidance, which was directed at all employers, including state agencies, that conduct criminal background checks as part of their hiring process.¹⁵²

provisions of the FLSA, including the collective action procedures found under § 216(b). Collective actions under that section require employees to opt in or consent to join a lawsuit.

¹⁴⁷ *Id.*

¹⁴⁸ See Gerald L. Maatman, Jr. and Alex W. Karasik, *Fifth Circuit Rules That The EEOC Can’t Mess With Texas Over Criminal Background Checks*, WORKPLACE CLASS ACTION BLOG (Aug. 9, 2019), <https://www.workplaceclassaction.com/2019/08/fifth-circuit-rules-that-the-eeoc-cant-mess-with-texas-over-criminal-background-checks/>.

¹⁴⁹ See U.S. Equal Employment Opportunity Commission, *Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964* (Apr. 25, 2012), http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

¹⁵⁰ *State of Tex. v. EEOC*, No. 5:13-CV-255, 2014 WL 4782992, at *4 (N.D. Tex. Aug. 20, 2014). The Court held that because “Texas does not allege that any enforcement action has been taken against it by the Department of Justice (as the EEOC cannot bring enforcement actions against states) in relation to the Guidance,” there is not a “substantial likelihood” that Texas “will face future Title VII enforcement proceedings from the Department of Justice arising from the Guidance.” *Id.* at *3-4.

¹⁵¹ *State of Texas v. EEOC*, 827 F.3d 372, 387-388 (5th Cir. 2016).

¹⁵² *Id.* at 378. The Fifth Circuit also noted that the EEOC’s guidance created an increased regulatory burden on the State of Texas as an employer, as it imposes a mandatory scheme for employers regarding hiring policies that, in and of itself,

The Fifth Circuit also determined that the EEOC's guidance was a "final agency action" that is subject to challenge, finding that it was the "consummation of the agency's decision-making process," from which "legal consequences would flow."¹⁵³ On September 23, 2016, however, the Fifth Circuit withdrew its opinion so it could be reconsidered in light of the Supreme Court's decision in *U.S. Army Corps of Engineers v. Hawkes Co.*, which held in the context of the Clean Water Act that a jurisdictional determination is a final agency action that is subject to judicial review under the Administrative Procedure Act, 5 U.S.C. § 704.¹⁵⁴

On remand, the District Court granted the EEOC's motion for summary judgment and denied in part the State of Texas's motion for summary judgment and request for declaratory relief.¹⁵⁵ First, the District Court opined that the State of Texas did not have a right to maintain and enforce its laws and policies that absolutely bar convicted felons (or certain categories of convicted felons) from serving in any job that the State of Texas and its Legislature deemed appropriate.¹⁵⁶ Second, the District Court rejected the State of Texas's request that it enjoin the EEOC from issuing right-to-sue letters in relation to the denial of employment opportunities based on the criminal history of the job applicant, holding that a right to sue letter was not a determination by the EEOC that a meritorious claim exists. Finally, the District Court granted the State of Texas's motion for summary judgment as to its APA claim, noting the Guidance was a substantive rule issued without notice and the opportunity for comment.¹⁵⁷

In 2019, the lawsuit again reached the Fifth Circuit, and the results were again unfavorable for the EEOC.¹⁵⁸ The Fifth Circuit began by noting that the EEOC has limited rulemaking and enforcement powers with respect to Title VII; it may issue only procedural regulations implementing Title VII, but may not promulgate substantive rules. The Fifth Circuit then held that the Guidance was a final agency action because, among other things, "[t]he Guidance indicates that it binds EEOC staff to an analytical method in conducting Title VII investigations and directs their decisions about which employers to refer for enforcement actions. It also limits discretion respecting the use of certain

established a concrete injury against the State of Texas, *id.* at 378, and that regardless of whether the EEOC's guidance preempts Texas' laws regarding hiring bans, it did, at the very least, force the State of Texas to "undergo an analysis, agency by agency, regarding whether the certainty of EEOC investigations stemming from the [] Guidance's standards overrides the State's interest in not hiring felons for certain jobs." *Id.* at 378-79.

¹⁵³ *Id.* at 380. The Fifth Circuit rejected the EEOC's argument that it has no ability to enforce its guidance and instead can only do so by referring a case to the U.S. Attorney General for prosecution (as it would have to with respect to a public entity). *Id.* at 381-82. Instead, the Fifth Circuit held that the "legal consequence" of the EEOC's guidance is that the EEOC has committed itself to applying the guidance to "virtually all public and private employers." *Id.* at 382. The EEOC's staff is therefore bound by it to follow a certain course of action, and the only way to avoid a potential prosecution is by abiding by one of the two "safe harbor" provisions contained in the EEOC's guidance. *Id.* If the State of Texas (or any other employer) does not fall into one of these safe harbor provisions – that is, it does not do what the EEOC says – it risks an enforcement action and potential liability, and thus the EEOC's guidance has a "legal consequence," making it a final agency action that can be challenged in court. *Id.*; see also Gerald L. Maatman, Jr., Pamela Q. Devata, Robert T. Szyba, and Ephraim J. Pierre, *Don't Mess With Texas: EEOC's Criminal Background Check Guidance Subject To Challenge*, WORKPLACE CLASS ACTION BLOG (June 28, 2016), <http://www.workplaceclassaction.com/2016/06/dont-mess-with-texas-eeocs-criminal-background-check-guidance-subject-to-challenge/>.

¹⁵⁴ *State of Texas v. EEOC*, 838 F.3d 511 (5th Cir. 2016) (citing *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1816 (2016)). The Fifth Circuit noted that the Supreme Court's decision in "*Hawkes* may or may not affect other issues raised in this appeal, and we leave it to the District Court in the first instance to reconsider this case, and its opinion, in its entirety and to address the implications of *Hawkes* for this case." *Id.* at 511.

¹⁵⁵ *State of Texas v. EEOC*, No. 5:13-CV-255, 2018 U.S. Dist. LEXIS 30558 (N.D. Tex. Feb. 1, 2018); see also Gerald L. Maatman, Jr. and Alex W. Karasik, *Federal Court Rules That The EEOC Can Mess With Texas In Felon Hiring Lawsuit*, WORKPLACE CLASS ACTION BLOG (February 27, 2018), <https://www.workplaceclassaction.com/2018/02/federal-court-rules-that-the-eeoc-can-mess-with-texas-in-felon-hiring-lawsuit/>.

¹⁵⁶ *State of Texas*, 2018 U.S. Dist. LEXIS 30558, at *3. The District Court explained that although there were many categories of employment for which specific prior criminal history profiles of applicants would pose far too great a risk to the interests of the State of Texas and its citizens, there were also many conceivable scenarios where otherwise qualified applicants would pose no objectively reasonable risk. Accordingly, the District Court held that "a categorical denial of employment opportunities to all job applicants convicted of a prior felony paints with too broad a brush and denies meaningful opportunities of employment to many who could benefit greatly from such employment in certain positions." *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *State of Texas v. EEOC*, 933 F.3d 433 (5th Cir. 2019).

evidence, mandating that evidence of a racially-balanced workforce cannot overcome a showing of disparate impact. And . . . the Guidance leaves no room for EEOC staff not to issue referrals to the Attorney General when an employer uses a categorical felon-hiring ban.”¹⁵⁹

The EEOC argued that the Guidance could not be a final agency action relative to an action against the State of Texas because the EEOC has no power to bring an enforcement action against a state. The Fifth Circuit objected to this line of reasoning, however, because it would make the Guidance’s finality dependent on the identity of the party under investigation: “EEOC’s position allows the Guidance to constitute final agency action if the plaintiff is a private employer against which EEOC can bring an enforcement action, but non-final if the plaintiff is a public employer. Finality, however, cannot vary depending on who sued the agency; it depends on the rule itself.”¹⁶⁰ Because the Guidance has the effect of committing the EEOC to a view of the law, which in turn forces employers to either alter their conduct or expose themselves to potential liability, the Fifth Circuit held that legal consequences flow from the Guidance and it has the effect of determining rights and obligations.¹⁶¹

The Fifth Circuit also held that the State of Texas suffered at least two injuries, thus giving rise to constitutional standing to challenge the Guidance: Texas was subject to an increased regulatory burden and pressure to change state law, which constitutes an injury because states have a sovereign interest in the power to create and enforce their own legal codes. Moreover, those injuries were fairly traceable to the issuance of the Guidance and would be redressed by a ruling in Texas’s favor. The prerequisites to standing had therefore been met. The Fifth Circuit then considered the appropriate remedy, holding that “the Guidance is a substantive rule subject to the APA’s notice-and-comment requirement and that EEOC thus overstepped its statutory authority in issuing the Guidance.”¹⁶² Accordingly, the Fifth Circuit ruled that the EEOC may not treat the Guidance as binding in any respect.

The EEOC has aggressively litigated against companies that have used credit or criminal history background checks in hiring. While its early attempts ended in some spectacular defeats,¹⁶³ it had more success in recent cases. For example, in *EEOC v. Dolgencorp, LLC*,¹⁶⁴ two former employees

¹⁵⁹ *Id.* at 443.

¹⁶⁰ *Id.* at 444.

¹⁶¹ *Id.* at 446.

¹⁶² *Id.* at 451.

¹⁶³ For example, in *EEOC v. Kaplan Higher Educ. Corp.*, 748 F.3d 749 (6th Cir. 2014), and *EEOC v. Freeman*, 778 F.3d 463 (4th Cir. 2015), the EEOC had alleged that the companies’ use of credit and criminal background checks in hiring decisions caused a disparate impact against minority applicants. In both cases, the EEOC attempted to prove its case with statistical data compiled by its expert, which was accomplished by subpoenaing drivers’ license photos from state departments of motor vehicles and assembling a team of “race raters” to classify applicants as “African-American,” “Asian,” “Hispanic,” “White,” or “Other” based on those photographs. See *Kaplan Higher Educ. Corp.*, 748 F.3d at 751-52. In *Kaplan*, the Sixth Circuit held that the EEOC’s “homemade” methodology for determining race was, “crafted by a witness with no particular expertise to craft it, administered by persons with no particular expertise to administer it, tested by no one, and accepted only by the witness himself.” *Id.* at 754. In *Freeman*, the Fourth Circuit called the EEOC’s expert analysis “laughable” and “utterly unreliable” and chided the EEOC for continuing to litigate the case long after it should have thrown in the towel. *Freeman*, 778 F.3d at 468. On September 3, 2015, the District Court added to the EEOC’s loss by awarding Freeman close to \$1,000,000 in attorneys’ fees because the Court held that the Commission had refused to stop litigating a case that it had no chance of winning. *EEOC v. Freeman*, No. 09-CV-2573, 2015 WL 5178420 (D. Md. Sept. 3, 2015). Similarly, in *EEOC v. Peoplemark, Inc.*, 732 F.3d 584, 614-15 (6th Cir. 2013), the District Court for the Western District of Michigan held that the EEOC placed an unfounded claim with experts and allowed them to “run with it” despite the fact that the EEOC’s allegations were inaccurate. In that case, the EEOC alleged that Peoplemark, Inc., a temporary staffing company, maintained a policy that automatically denied the hire or employment of any person with a criminal record. However, contrary to the EEOC’s allegations, Peoplemark did not have such a policy and 22% of the individuals who the EEOC alleged were not hired because of their prior felony convictions were actually found to be hired by the company. *Id.* at 614. The Court eventually awarded Peoplemark over \$750,000 in attorneys’ fees, expert witness fees, and costs. *Id.*

¹⁶⁴ *EEOC v. Dolgencorp, LLC*, 249 F.Supp.3d 890 (N.D. Ill. 2017). See also *EEOC v. BMW Mfg. Co. LLC*, No. 7:13-CV-01583, 2015 WL 5431118 (D.S.C. July 30, 2015), the Court held that the EEOC had presented enough evidence of a statistical disparity to allow the case to proceed to a jury. The Court refused to exclude the EEOC’s expert report, holding that “the parties’ arguments at this stage of the case involve consideration of the weight to be given the experts rather than their admissibility,” and those positions could be reargued at trial. *Id.* at *4. The case then settled for \$1.6 million. See U.S.

filed EEOC charges regarding their employer's allegedly discriminatory use of criminal background checks in hiring and firing. The employer asserted that the EEOC's claims were barred as beyond the scope of the charges of discrimination and investigation, and that the EEOC failed to satisfy the statutory precondition for bringing suit when it failed to conciliate.¹⁶⁵ The District Court for the Northern District of Illinois granted the EEOC's motion for partial summary judgment, holding that when the EEOC files suit, it is not confined to claims typified by those of the charging party, and further, that any violations that the EEOC ascertains in the course of a reasonable investigation of the charging party's complaint are actionable.¹⁶⁶

In 2019, the EEOC reported that it had reached a \$6 million settlement in this lawsuit.¹⁶⁷ The settlement requires the employer to advise conditional hires of its background screening processes and state that having a criminal history is not an automatic bar to employment. In addition, the employer is required to clearly communicate to disqualified applicants that they may provide additional information to the employer to support reconsideration of the adverse decision. Finally, the employer must provide reports to the EEOC regarding its implementation of any new criminal history checks and its reconsideration process.¹⁶⁸ The employer remained steadfast in its position that its screening policies were lawful, and the settlement should not be viewed as any admission by the retailer of any wrongdoing.

As noted above, the EEOC has actively monitored how employers use algorithms, big data, "data scraping" of the internet, and other sophisticated tools to evaluate applicants. Those tools are increasingly capable of providing the same types of information about applicants and employees that used to be contained only within specifically curated criminal and credit history reports. This area seems ripe for heightened EEOC scrutiny into potential new barriers to recruitment and hiring. We continue to believe that this is an area employers should be focused on.

Equal Employment Opportunity Commission, *Press Release: BMW to Pay \$1.6 Million and Offer Jobs to Settle Federal Race Discrimination Lawsuit* (September 8, 2015), available at <http://www.eeoc.gov/eeoc/newsroom/release/9-8-15.cfm/>.

¹⁶⁵ *Dolgenercorp, LLC*, 249 F.Supp.3d at 892.

¹⁶⁶ *Id.* at 892, 896-97.

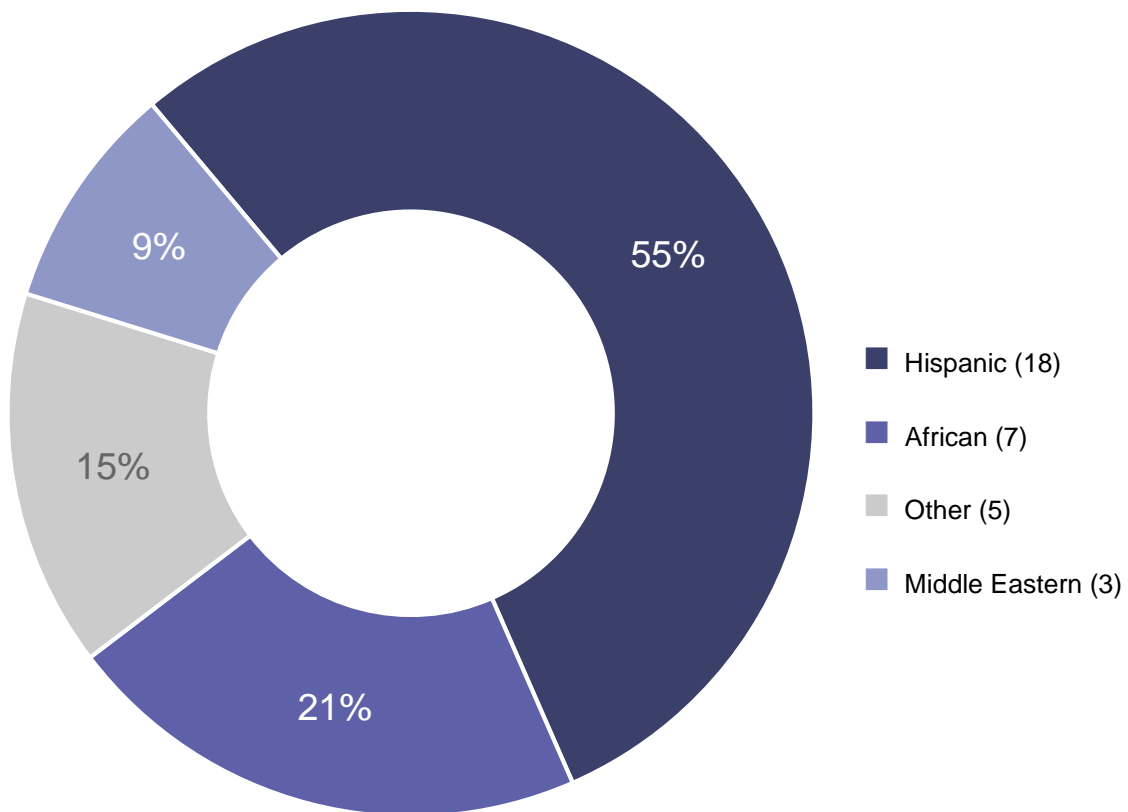
¹⁶⁷ U.S. Equal Employment Opportunity Commission, *Press Release: Dollar General to Pay \$6 Million to Settle EEOC Class Race Discrimination Suit* (Nov. 18, 2019), available at <https://www.eeoc.gov/eeoc/newsroom/release/11-18-19b.cfm>.

¹⁶⁸ See Pamela Q. Devata and Jennifer L. Mora, *EEOC Consent Decree Over Criminal History Background Checks Serves as a Reminder to Employers to Take a Fresh Look at Their Screening Practices*, EMPLOYMENT LAW LOOKOUT BLOG (Dec. 10, 2019), https://www.laborandemploymentlawcounsel.com/2019/12/eeoc-consent-decree-over-criminal-history-background-checks-serves-as-a-reminder-to-employers-to-take-a-fresh-look-at-their-screening-practices/?utm_source=Seyfarth+Shaw+-+Employment+Law+Lookout&utm_campaign=7ff7e522ac-RSS_EMAIL_CAMPAIGN&utm_medium=email&utm_term=0_0dfec06b7a-7ff7e522ac-70405841.

Priority #2 - Protecting Vulnerable Workers

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

EEOC National Origin Filings FY 2015 – FY 2019



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

The EEOC's SEP also identifies the protection of immigrant, migrant, and other vulnerable workers as a national enforcement priority.¹⁶⁹ Much of that activity in recent years has focused on two issues: (1) protecting the rights of immigrants to seek assistance from the EEOC and the Courts to combat and remedy illegal discrimination; and (2) the protection of Muslim employees against anti-Muslim bias in the workplace. These issues are often interwoven in the types of discrimination claims they raise. In addition, recent political and cultural developments may be giving rise to a third focus for the EEOC's enforcement priorities: an increased focus on national origin discrimination.

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

One of the key issues for the EEOC over the past few years involves the potential "chilling" effect that might result if employers are able to use litigation to learn the immigration status of their accusers. According to the EEOC, allowing employers to take discovery regarding the immigration status of charging parties or other aggrieved individuals could cause those individuals and other immigrants to suffer discrimination in silence rather than risk having their immigration status divulged to their employer or the government as part of a public lawsuit. According to the EEOC, this could prevent immigrants from coming forward to challenge discriminatory practices in the workplace. Courts have often sided with the EEOC on this issue.

For example, in *EEOC v. Sol Mexican Grill LLC*,¹⁷⁰ the U.S. District Court for the District of Columbia refused an employer's request to take discovery that would or potentially could reveal the immigration status of charging parties, their families, and any potential claimants or witnesses. In that case, the EEOC sought a protective order barring the employer from pursuing discovery relating to the immigration or work authorization statuses of those individuals, or relating to the employment histories of those individuals.¹⁷¹ The employer argued that this information is relevant because it was entitled to discovery as to whether participation in the litigation would have any bearing on those individuals' immigration statuses, and as to whether the EEOC is assisting in an effort to achieve more favorable statuses for those people.¹⁷²

The District Court held that the employer's arguments failed to address the chilling effect that allowing such discovery would have on employment discrimination cases.¹⁷³ "Forcing those who allege discrimination to reveal their immigration status in order to have access to the courts may cause those facing discrimination, both citizens and undocumented people, to 'fear that their immigration status would be changed, or that their status would reveal the immigration problems of their family or friends.'"¹⁷⁴ According to the District Court, such a chilling effect could make it less likely that other workers would bring alleged discriminatory practices to light in court.¹⁷⁵

¹⁶⁹ U.S. Equal Employment Opportunity Commission Strategic Enforcement Plan FY 2017 - 2021, <https://www.eeoc.gov/eeoc/plan/sep-2017.cfm>; U.S. Equal Employment Opportunity Commission Strategic Enforcement Plan FY 2013 - 2016, <https://www.eeoc.gov/eeoc/plan/sep.cfm>.

¹⁷⁰ *EEOC v. Sol Mexican Grill LLC*, No. 18-CV-2227, 2019 WL 2896933 (D.D.C. June 11, 2019).

¹⁷¹ *Id.* at *1.

¹⁷² *Id.* at *2.

¹⁷³ *Id.*

¹⁷⁴ *Id.* (quoting *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1065 (9th Cir. 2004)).

¹⁷⁵ *Id.* at *2.

The employer also sought discovery into the work histories of the charging parties, claimants, their family members, and any potential claimants or witnesses.¹⁷⁶ The employee argued that such information was relevant because the EEOC claimed, in part, that charging parties suffered adverse job consequences, such as reduced hours, difficult shifts, difficult job assignments, and termination of their employment.¹⁷⁷ According to the employer, whether and to what extent those individuals had similar experiences at other employers could be relevant to its defense.¹⁷⁸

The District Court held, however, that employment histories with other employers, who are not parties to this lawsuit, would not be relevant: “[s]uch information is not relevant to whether or not the charging parties and claimant were subjected to unlawful employment practices while working for defendants. And, even if the charging parties and claimant had suffered similar adverse employment actions at other jobs, such information would not tend to show whether or not unlawful practices caused them to suffer those same adverse employment actions while working for Defendants.”¹⁷⁹ The Court concluded by noting that, even if there was any marginal relevance to such information, that relevance would be outweighed by the potential for harassment and intimidation and the chilling effect that could result if such information had to be disclosed, because such information could potentially be used to deduce facts about their immigration statuses.¹⁸⁰

Courts have also consistently held that immigrants – even if they are in the country illegally – are protected by the federal workplace discrimination statutes. For example, last year the U.S. District Court for the District of Maryland held in *EEOC v. Phase 2 Investments, Inc.*,¹⁸¹ that discrimination against undocumented workers was an unlawful employment practice under Title VII.¹⁸² In that case, undocumented workers at a car wash company alleged that they were subjected to harassment and discrimination and that they were fired after they complained to management about the alleged mistreatment.¹⁸³ Several months prior to their termination, an audit by U.S. Immigration and Customs Enforcement revealed that 39 employees, including the charging parties, were not authorized to work in the United States.¹⁸⁴

The District Court analyzed Title VII and Supreme Court and Fourth Circuit precedent and held that “discrimination against an employee on the basis of his race, national origin, or participation in EEOC investigations is an unlawful employment practice under Title VII even if that employee is an undocumented alien, and the EEOC may therefore pursue its claim here.”¹⁸⁵ The Court noted that to hold otherwise would allow employers to hire undocumented workers and then unlawfully discriminate against them: “if the Court were to ‘sanction the formation of [that] statutorily declared illegal relationship’ by shielding [employer] . . . from Title VII scrutiny, other employers may well find

¹⁷⁶ *Id.* at *4.

¹⁷⁷ *Id.* at *5.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* The Fifth Circuit came to a similar conclusion in *Cazorla v. Koch Foods of Miss., L.L.C.*, 838 F.3d 540 (5th Cir. 2016). In that case, the Fifth Circuit overturned a discovery order allowing the defendant’s requests for records relating to the worker-plaintiffs’ U visa applications. The Fifth Circuit reasoned that allowing discovery to proceed according to the order “may sow confusion over when and how U visa information may be disclosed, deterring immigrant victims of abuse . . . from stepping forward and thereby frustrating Congress’s intent in enacting the U visa program.” See also sGerald L. Maatman, Jr. and Michael L. DeMarino, *Fifth Circuit Green Lights Discovery Over Immigration Status In EEOC Litigation*, WORKPLACE CLASS ACTION BLOG (Oct. 3, 2016), <http://www.workplaceclassaction.com/2016/10/fifth-circuit-green-lights-discovery-over-immigration-status-in-eeoc-litigation/>.

¹⁸¹ *EEOC v. Phase 2 Invs. Inc.*, 310 F. Supp. 3d 550, 555 (D. Md. 2018).

¹⁸² See Gerald L. Maatman, Jr. and Mark W. Wallin, *Unsuccessful Successor: Court Finds Employer May Be Liable In EEOC Lawsuit For Its Predecessor’s Conduct Under Title VII*, WORKPLACE CLASS ACTION BLOG (Apr. 24, 2018), <https://www.workplaceclassaction.com/2018/04/unsuccessful-successor-court-finds-employer-may-be-liable-in-eeoc-lawsuit-for-its-predecessors-conduct-under-title-vii/>.

¹⁸³ *Phase 2 Invs., Inc.*, 310 F. Supp. 3d at 556.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 576-80.

an incentive to look the other way when potential employees are unable to provide proper documentation.”¹⁸⁶

2. Developments In Combatting Religious Discrimination: A Focus On Anti-Muslim Bias

a. The EEOC’s Focus On Anti-Muslim Discrimination

For several years now, the EEOC’s SEP has identified as one of its top strategic enforcement priorities “[a]ddressing discriminatory practices against those who are Muslim or Sikh, or persons of Arab, Middle Eastern or South Asian descent, as well as persons perceived to be members of these groups, arising from backlash against them from tragic events in the United States and abroad.”¹⁸⁷ According to the SEP, the EEOC continues to see an increase in charges involving religious discrimination against Muslims and those with a Middle Eastern background.¹⁸⁸

Of particular concern to the EEOC is the protection of Muslim employees against discrimination because of their religious attire or grooming. The EEOC repeatedly stressed that employers may not refuse to hire someone who, because of their religious attire, may make customers uncomfortable; nor can they force an employee to remove their religious attire or change their duties to keep them out of view of the public. The EEOC recently issued guidelines relating to the employment of Muslims, Arabs, South Asians, and Sikhs.¹⁸⁹ On March 6, 2014, the EEOC published its Guide to Religious Garb and Grooming.¹⁹⁰ In that guidance, the EEOC instructs that an employer must accommodate an employee’s religious garb or grooming practice even if it violates the employer’s policy or preference regarding how employees should look: “when an employer’s dress and grooming policy or preference conflicts with an employee’s known religious beliefs or practices, the employer must make an exception to allow the religious practice unless that would be an undue hardship on the operation of the employer’s business.”¹⁹¹ According to the EEOC, even if an employer does not know that an employee’s or applicant’s garb or grooming practice is religious in nature, the employer may still be liable if it believes or should have known that it is – even if the employee did not ask for an accommodation.¹⁹²

¹⁸⁶ *Id.* at 579. Nevertheless, the Court noted that as a result of the charging parties’ undocumented status, the nature of relief that could be sought was limited. For instance, the Court found that it could not require the charging parties to be re-hired or award back pay. *Id.* at 580. The Court, however, was clear that the company would not “get off ‘scot-free’ if it is proven that [the company] discriminated against the Charging Parties,” as Title VII grants the Court broad discretion in fashioning relief and the public interest would be best served through “some monetary penalty.” *Id.*

¹⁸⁷ U.S. Equal Employment Opportunity Commission Strategic Enforcement Plan FY 2017 - 2021, <https://www.eeoc.gov/eeoc/plan/sep-2017.cfm>.

¹⁸⁸ *Id.*

¹⁸⁹ See U.S. Equal Employment Opportunity Commission, *Questions And Answers About Employer Responsibilities Concerning The Employment Of Muslims, Arabs, South Asians, And Sikhs*, <https://www.eeoc.gov/eeoc/publications/backlash-employer.cfm>.

¹⁹⁰ U.S. Equal Employment Opportunity Commission, *Religious Garb and Grooming in the Workplace: Rights and Responsibilities* (Mar. 6, 2014), http://www.eeoc.gov/eeoc/publications/qa_religious_garb_grooming.cfm.

¹⁹¹ *Id.*; see also Lynn A. Kappelman and Dawn Reddy Solowey, *Retail Detail: “You’re Wearing That?” The EEOC Weighs in on Workplace Accommodations for Religious Clothing and Grooming Practices*, CLIENT ALERT (Mar. 12, 2014), <http://www.seyfarth.com/publications/4002>.

¹⁹² U.S. Equal Employment Opportunity Commission, *Religious Garb and Grooming in the Workplace: Rights and Responsibilities*, *supra* note 190 (“Example 7 Aatma, an applicant for a rental car sales position who is an observant Sikh, wears a chunni (religious headscarf) to her job interview. The interviewer does not advise her that there is a dress code prohibiting head coverings, and Aatma does not ask whether she would be permitted to wear the headscarf if she were hired. There is evidence that the manager believes that the headscarf is a religious garment, presumed it would be worn at work, and refused to hire her because the company requires sales agents to wear a uniform with no additions or exceptions. This refusal to hire violates Title VII, even though Aatma did not make a request for accommodation at the interview, because the employer believed her practice was religious and that she would need accommodation, and did not hire her for that reason. Moreover, if Aatma were hired but then instructed to remove the headscarf, she could at that time request

On June 1, 2015. In *EEOC v. Abercrombie & Fitch Stores, Inc.*¹⁹³ the Supreme Court agreed with the EEOC, holding that an employer that is without direct knowledge of an employee's religious practice can be liable under Title VII for religious discrimination if the need for an accommodation was a motivating factor in the employer's decision, whether or not the employer knew of the need for a religious accommodation.¹⁹⁴ The Supreme Court held that it was enough for the applicant to show that his or her need for an accommodation was a motivating factor in the employer's decision.¹⁹⁵ "[T]he rule for disparate-treatment claims based on a failure to accommodate a religious practice is straightforward: An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions."¹⁹⁶

The *Abercrombie* decision was a significant win for the EEOC. Since then, however, the EEOC has suffered some high-profile defeats in this area. For example, in the long-running lawsuit, *EEOC v. JBS USA, LLC*,¹⁹⁷ the U.S. District Court for the District of Colorado recently denied the EEOC's request that it reconsider its findings of fact and conclusions of law with respect to the EEOC's pattern or practice allegations, and denied its request to certify an immediate appeal of the critical legal issue underpinning that decision. In that case, the EEOC alleged that a meat packing company discriminated against employees on the basis of religion by engaging in a pattern or practice of retaliation, discriminatory discipline and discharge, harassment, and denying reasonable religious accommodations.¹⁹⁸ The Court bifurcated the case into two phases. Phase I would involve the EEOC's pattern or practice claims, including: whether the employer denied Muslim employees reasonable religious accommodations to pray and break their Ramadan fast; whether the employer disciplined employees on the basis of their race, national origin, or religion during Ramadan; and whether the employer retaliated against a group of Black, Muslim, Somali employees for engaging in protected activity.¹⁹⁹ Phase II would address all individual claims for relief.

On September 24, 2018, the District Court issued its findings and conclusions of law after trial on the Phase I issues.²⁰⁰ The Court first held that "freestanding" religious accommodation claims are not

religious accommodation."); see also Dawn Reddy Solowey and Lynn Kappelman, *What Does the Employer Know and When Does It Know It? SCOTUS Grants Cert in EEOC v. Abercrombie Religious Discrimination Suit*, EMPLOYMENT LAW LOOKOUT BLOG (Oct. 9, 2014), <http://www.laborandemploymentlawcounsel.com/2014/10/what-does-the-employer-know-and-when-does-it-know-it-scotus-grants-cert-in-eeoc-v-abercrombie-religious-discrimination-suit/>.

¹⁹³ *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028 (2015).

¹⁹⁴ *Abercrombie* involved a practicing Muslim who wore a headscarf consistent with her religious requirements. *Id.* at 2031. When she applied to an Abercrombie store, she was rejected because her headscarf would violate Abercrombie's "Look Policy," which did not allow any kind of "cap." *Id.* Abercrombie argued that the company could not be liable under Title VII disparate treatment analysis because the applicant had not shown that it had "actual knowledge" of the applicant's need for an accommodation. *Id.* at 2032.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 2033. Religious garb and grooming can also support a hostile work environment harassment claim. In *Ahmed v. Astoria Bank et al.*, 690 F. App'x 49 (2d Cir. 2017). The Second Circuit considered a claim brought on behalf of an employee who had been terminated from her employment at the end of her probationary period for tardiness and carelessness in checking important documents. *Ahmed v. Astoria Bank*, No. 14-CV-4595, 2016 WL 1254638, at *1 (E.D.N.Y. Mar. 31, 2016), *vacated*, 690 F. App'x 49 (2d Cir. 2017). The employee claimed that she had been subjected to a hostile work environment because she is Egyptian and Muslim. See *Ahmed*, 690 F. App'x at 50-51. The Second Circuit reversed the District Court's grant of summary judgment to the employer, holding that a reasonable jury could find that the employee was subject to severe and pervasive discriminatory harassment. *Id.* at 50. The Court relied principally on the employee's evidence that the supervisor "constantly" told her to remove her hijab head-covering, which he referred to as a "rag"; demeaned her race, ethnicity and religion "on several occasions"; and made a comment during her September 11, 2013 interview that she and two other Muslim employees were "suspicious" and that he was thankful he was "in the other side of the building in case you guys do anything." *Id.* at 51; see also Dawn Reddy Solowey, *Anti-Muslim Rhetoric in the Workplace: An Employer's Guide to Risks & Prevention*, EMPLOYMENT LAW LOOKOUT BLOG (May 23, 2017), <http://www.laborandemploymentlawcounsel.com/2017/05/anti-muslim-rhetoric-in-the-workplace-an-employers-guide-to-risks-prevention/>.

¹⁹⁷ *EEOC v. JBS USA, LLC*, No. 10-CV-2103, 2019 WL 4778796 (D. Colo. Sept. 30, 2019).

¹⁹⁸ See *EEOC v. JBS USA, LLC*, No. 10-CV-2103, 2017 WL 3334648, at *1 (D. Colo. Aug. 4, 2017).

¹⁹⁹ *JBS USA, LLC*, 2019 WL 4778796, at *1.

²⁰⁰ *EEOC v. JBS USA, LLC*, 339 F. Supp. 3d 1135 (D. Colo. 2018).

viable in light of the Supreme Court's decision in *Abercrombie*.²⁰¹ So-called "freestanding" accommodation claims are those that are not tied to an adverse employment action.²⁰² However, the District Court held that the EEOC's pattern or practice claims were not freestanding because the EEOC alleged that the employer had denied accommodations by engaging in adverse employment actions; namely, by suspending and terminating Muslim employees for using unscheduled breaks to pray.²⁰³ Nevertheless, the District Court concluded that the EEOC could not show a pattern or practice of denying religious accommodation because it could not show that at least one employee suffered an adverse action in relation to the alleged discriminatory pattern or practice.²⁰⁴ Critical to the District Court's decision was its conclusion that the employer had established that the EEOC's proposed accommodation would have constituted an undue hardship on the employer.²⁰⁵

The EEOC sought reconsideration of the Court's conclusions or immediate certification of an appeal to the Tenth Circuit on the question of whether an employer's failure to provide a religious accommodation, by itself, may constitute an adverse employment action under Title VII.²⁰⁶ The District Court first held that it specifically addressed this issue and based its decision on an earlier case that had come to the same conclusion, *EEOC v. JetStream Ground Services, Inc.*²⁰⁷

The Court then declined to exercise its discretion to certify this issue for immediate appeal to the Tenth Circuit. The Court noted that a panel of the Tenth Circuit recently addressed this issue within the context of reasonable accommodations that are required by the Americans with Disabilities Act.²⁰⁸ The Tenth Circuit had granted rehearing *en banc* and specifically asked the parties to that lawsuit to brief "whether an adverse employment action is a requisite element of a failure-to-accommodate claim under the Americans With Disabilities Act."²⁰⁹ The District Court held that the Tenth Circuit's *en banc* decision in that case would provide guidance on the issue the EEOC sought to appeal in *JBS USA, LLC*. "Because the Tenth Circuit's *en banc* decision in *Exby-Stolley* will provide guidance on this issue, and will likely do so sooner than an appeal could be resolved in this case, the Court finds that certification of this issue for appeal would not materially advance the termination of the litigation. Rather, the potential for multiple levels of appeal may prolong the litigation further, which weighs against granting interlocutory review."²¹⁰

²⁰¹ *Id.* at 1174. The District Court was following a line of other cases that had come to the same conclusion after *Abercrombie*, citing *EEOC v. JetStream Ground Serv., Inc.*, 134 F. Supp. 3d 1298, 1324-26 (D. Colo. 2015), *reconsideration denied*, No. 13-CV-02340, 2016 WL 879625, at *3-5 (D. Colo. Mar. 8, 2016) and *Walker v. Indian River Transp. Co.*, 2017 WL 388921, at *7 (M.D. Fla. Jan. 27, 2017), *aff'd*, No. 17-10501, 741 Fed. Appx. 740, 2018 WL 3602926 (11th Cir. July 27, 2018).

²⁰² *Id.* at 1175.

²⁰³ *Id.* at 1176.

²⁰⁴ *Id.* at 1180-88.

²⁰⁵ *Id.* at 1182.

²⁰⁶ *EEOC v. JBS USA, LLC*, No. 10-CV-2103, 2019 WL 4778796, at *1 (D. Colo. Sept. 30, 2019).

²⁰⁷ *Id.* at *2. In *Jetstream Ground Servs.*, 134 F. Supp. 3d at 1298, the U.S. District Court for the District of Colorado allowed the EEOC to proceed to trial on behalf of a class of Muslim women who alleged that Jetstream Ground Services failed to accommodate their wearing hijabs and long skirts on the job, failed to hire them, laid off or reduced their hours, and discriminated against them on the basis of their religion. On summary judgment, the Court ruled that the former employees met their burden of showing that hijabs that were tucked into a shirt and secured to an employee's head presented no safety problems, thus holding that accommodating such hijabs posed no undue hardship for JetStream. *Id.* at 1336. However, the Court also found that JetStream presented sufficient evidence to create a disputed issue of fact as to whether it would pose an undue hardship for JetStream to permit its cabin cleaners to wear long skirts while working. *Id.* After the parties disputed the type of expert testimony that would be allowed, the EEOC ultimately withdrew several claims while JetStream agreed not to use certain experts, thus leaving only the hijab accommodation claims for trial. *EEOC v. Jetstream Ground Servs.*, No. 13-CV-2340, 2016 U.S. Dist. LEXIS 154109, at *3-4 (D. Colo. Nov. 3, 2016). On April 29, 2016, after a fourteen-day jury trial, the jury found in favor of JetStream and against the EEOC. *Id.* at *4.

²⁰⁸ *JBS USA, LLC*, 2019 WL 4778796, at *4-5 (citing *Exby-Stolley v. Bd. of Cty. Comm'rs, Weld Cty., Colo.*, 906 F.3d 900, 918 (10th Cir. 2018)).

²⁰⁹ *Id.* at *5 (quoting *Exby-Stolley v. Bd. of Cty. Comm'rs*, 910 F.3d 1129, 1130 (10th Cir. 2018)).

²¹⁰ *Id.*

The EEOC's focus on anti-Muslim bias and religious garb and grooming issues is part of the agency's attempt to protect employees' rights to practice their religion in the workplace. That issue is not limited to Muslims. The EEOC brought several lawsuits in recent years that target different kinds of religious practice. For example, in *EEOC v. United Health Programs of America, Inc. and Cost Containment Group Inc.*,²¹¹ the EEOC successfully argued that concepts known as "Onionhead" and "Harnessing Happiness" were entitled to Title VII protection as religious beliefs.²¹²

The Court held that to determine whether a given set of beliefs constitutes a religion for purposes of Title VII, "courts frequently evaluate: (1) whether the beliefs are sincerely held and (2) whether they are, in [the believer's] own scheme of things, religious."²¹³ Regarding the first prong, the Court noted that, "a reasonable jury could find that by inviting [the CEO's aunt] into the workplace, paying her to meet and conduct workshops, authorizing her to speak to employees about matters related to their personal lives, disseminating . . . material and directing employees to attend group and individual meetings with [his aunt], [the CEO] and his upper management held sincere beliefs in Onionhead and Harnessing Happiness."²¹⁴ As to the second prong, the Court concluded that the beliefs were religious within the meaning of Title VII due to religious discussion, the presence of a "spiritual advisor," prayer in the workplace, and numerous Onionhead publications.²¹⁵ Accordingly, the Court found that Onionhead was a religion under Title VII.²¹⁶

3. A Potential New Enforcement Trend: Heightened Awareness Of National Origin Discrimination

National origin discrimination based on one's *perception* of national origin has been in the news lately thanks to the recent comments President Trump directed towards the new crop of House Representatives, Alexandria Ocasio-Cortez, Ilhan Omar, Ayanna Pressley, and Rashida Tlaib. On July 14, 2019, President Trump insinuated that the Representatives, of minority races, "go back" to the countries from which they came instead of criticizing U.S. policies. On its website, the EEOC outlines the legal scope of national origin discrimination and specifically includes comments like "go back to where you came from" as an example of illegal national origin discrimination.²¹⁷

The EEOC has long argued that discrimination on the basis of perceived national origin is just as actionable as any other kind of national origin discrimination. For example, in *EEOC v. MVM, Inc.*,²¹⁸ the EEOC alleged that a security services firm subjected a group of African-born employees to

²¹¹ *EEOC v. United Health Programs of America, Inc. and Cost Containment Group Inc.*, No. 14-CV-03673, 2016 WL 6477050 (E.D.N.Y. Sept. 30, 2016).

²¹² *Id.* at *3-5. The charging parties alleged that the program required them to use candles instead of lights to prevent demons from entering the workplace; conduct chants and prayers in the workplace; and respond to emails relating to God, spirituality, demons, Satan, and divine destinies. *Id.* at *7, 11-12. They alleged they were terminated either because they rejected Onionhead's beliefs or because of their own non-Onionhead religious beliefs, while other employees who followed Onionhead were given less harsh discipline. *Id.* at *5. See also Gerald L. Maatman, Jr. and Alex W. Karasik, *Now Something Known As "Onionhead" Is A "Religion" For Which The EEOC Can Bring A Religious Discrimination Suit*, Workplace Class Action Blog (Oct. 7, 2016), available at <http://www.workplaceclassaction.com/2016/10/now-something-known-as-onionhead-is-a-religion-for-which-the-eeoc-can-bring-a-religious-discrimination-suit/>.

²¹³ *United Health Programs of America, Inc.*, 2016 WL 6477050, at *8 (quoting *Patrick v. LeFevre*, 745 F.2d 153, 157 (2d Cir. 1984)).

²¹⁴ *Id.* at *13.

²¹⁵ *Id.* at *13-15.

²¹⁶ *Id.* at *15. Following a three-week trial, on April 25, 2018, a jury found that the employer violated federal law by coercing ten employees to engage in religious practices at work and by creating a hostile work environment for nine of them. Jury Verdict, *EEOC v. United Health Programs of America, Inc., et al.*, No. 1:14-CV-03673 (E.D.N.Y. Apr. 27, 2018); U.S. Equal Employment Opportunity Commission, *Press Release: Jury Awards \$5.1 Million For Workers in EEOC Religious Discrimination Case Against United Health Programs of America, Inc. And Cost Containment Group, Inc.* (Apr. 26, 2018), available at <https://www.eeoc.gov/eeoc/newsroom/release/4-26-18a.cfm>.

²¹⁷ See U.S. Equal Employment Opportunity Commission, *Immigrants' Employment Rights Under Federal Anti-Discrimination Laws*, <https://www.eeoc.gov/eeoc/publications/immigrants-facts.cfm>.

²¹⁸ See *EEOC v. MVM, Inc.*, No. TDC-17-2864, 2018 U.S. Dist. LEXIS 81268, at *1-2 (D. Md. May 14, 2018).

disparate treatment, hostile work environment, and unlawful retaliation.²¹⁹ The company hired a new project manager to oversee 400 security personnel, approximately half of whom were “African or foreign-born Blacks.”²²⁰ The project manager allegedly complained that there were “too many Africans,” that he was not comfortable working with foreigners.”²²¹ The employer also allegedly engaged in a variety of negative actions against African and foreign-born black security personnel, including denying them leave, forcing them to work on their scheduled days off, forcing them to work extra hours beyond their scheduled shifts, assigning them to undesirable posts, subjecting them to heightened scrutiny, disciplining them more harshly than the discipline policy, intimidating and threatening them with termination, and denying them union representation.²²²

The employer argued that discrimination based on “perceived” national origin was not cognizable under Title VII.²²³ The District Court disagreed, holding that “Title VII permits claims of discrimination based on perceived national origin,” and noted that “[t]o conclude otherwise would be to allow discrimination to go unchecked where the perpetrator is too ignorant to understand the difference between individuals from different countries or regions, and to provide causes of action against only those knowledgeable enough to target only those from the specific country against which they harbor discriminatory animus.”²²⁴ The EEOC defines harassment based on national origin as: “[e]thnic slurs and other verbal or physical conduct because of nationality are illegal if they are severe or pervasive and create an intimidating, hostile or offensive working environment, interfere with work performance, or negatively affect job opportunities.”²²⁵ Given the recent attention to this issue in the national news media, employers should review their anti-harassment policies and ensure that they are up-to-date on all recent trends.

²¹⁹ See Gerald L. Maatman, Jr. and Alex W. Karasik, *Dismissal Denied In EEOC Race Discrimination Action Against Security Company*, WORKPLACE CLASS ACTION BLOG (May 24, 2018), <https://www.workplaceclassaction.com/2018/05/dismissal-denied-in-eeoc-race-discrimination-action-against-security-company/>.

²²⁰ *MVM, Inc.*, 2018 U.S. Dist. LEXIS 81268, at *2-3.

²²¹ *Id.*

²²² *Id.* at *3-4.

²²³ *Id.* at *16, 27-28.

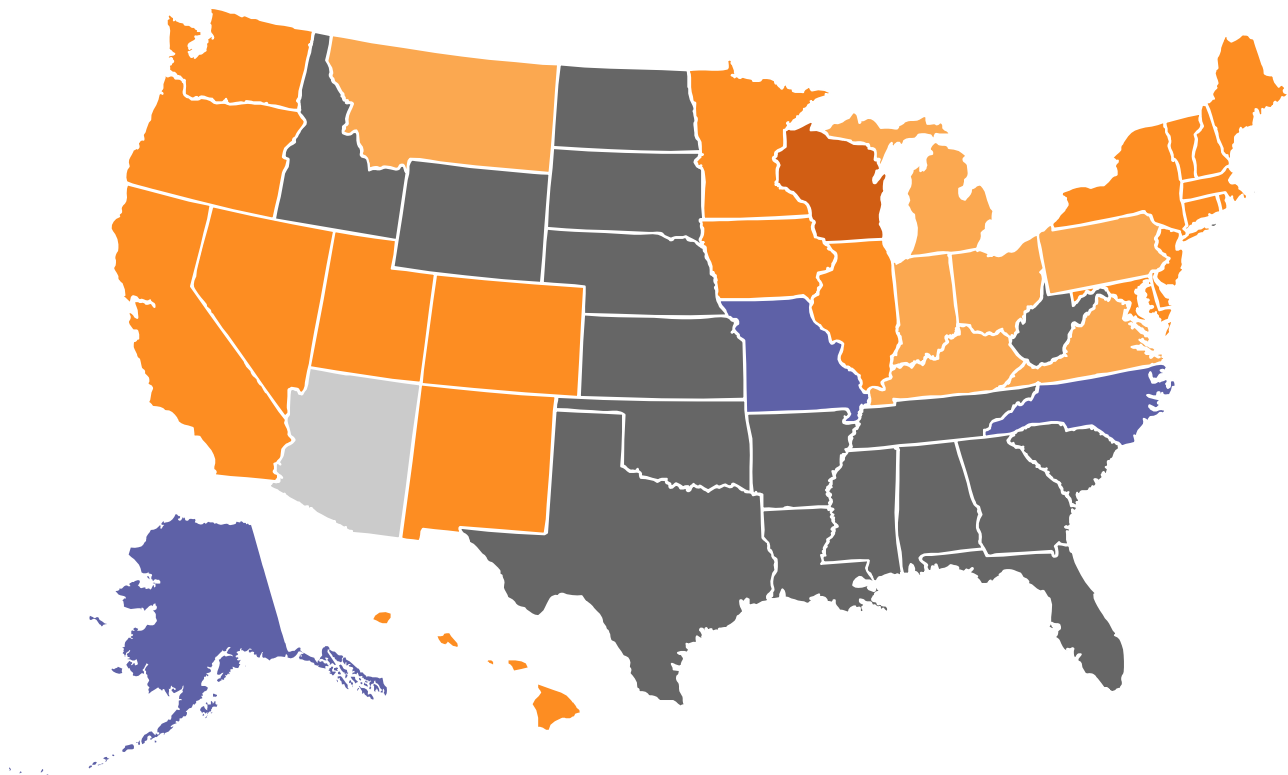
²²⁴ *Id.* at *33, 36-37.

²²⁵ See U.S. Equal Employment Opportunity Commission, *Immigrants' Employment Rights Under Federal Anti-Discrimination Laws*, *supra* note 217.

Priority #3 - Emerging Issues

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

State-Level Sexual Orientation And Gender Identity Protections Across The U.S.



- Laws prohibiting employment discrimination based on sexual orientation only (**Wisconsin**)
- Laws prohibiting employment discrimination based on sexual orientation and gender identity (**21 States and DC**)

- Laws prohibiting discrimination against public employees based on sexual orientation and gender identity (**7 States**)
- Laws prohibiting discrimination against public employees based on sexual orientation only (**4 States**)

D. Addressing Emerging And Developing Issues

Part of the EEOC's mission is to monitor trends and developments in the law, workplace practices, and labor force demographics to identify emerging and developing issues that can be addressed through its enforcement program.²²⁶ The 2017 Strategic Enforcement Plan identifies five emerging and developing issues as strategic priorities:

- Qualification standards and inflexible leave policies that discriminate against individuals with disabilities;
- Accommodating pregnancy-related limitations under the Americans with Disabilities Act Amendments Act (ADAAA) and the Pregnancy Discrimination Act (PDA);
- Protecting lesbian, gay, bisexual, and transgender (LGBT) individuals from discrimination based on sex;
- Clarifying the employment relationship and the application of workplace civil rights protections in light of the increasing complexity of employment relationships and structures, including temporary workers, staffing agencies, independent contractor relationships, and the on-demand economy; and
- Addressing discriminatory practices against those who are Muslim or Sikh, or persons of Arab, Middle Eastern or South Asian descent, as well as persons perceived to be members of these groups, arising from backlash against them from tragic events in the United States and abroad.²²⁷

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

1. Supreme Court Set To Decide Whether LGBT Discrimination Is Prohibited By Title VII

Few issues have garnered as much of the EEOC's attention over the past few years as its campaign to have LGBT discrimination recognized as a prohibited form of discrimination under Title VII.²²⁸ That campaign resulted in scores of lawsuits brought by the EEOC and almost as many victories. This issue has divided federal agencies, just as it has divided the nation.²²⁹

The EEOC's focus on LGBT discrimination relies on an extension of Title VII's prohibition of sex discrimination. Title VII does not explicitly mention sexual orientation or gender identity as a

²²⁶ See U.S. Equal Employment Opportunity Commission Strategic Enforcement Plan FY 2017 - 2021, *available at* <https://www.eeoc.gov/eeoc/plan/sep-2017.cfm>.

²²⁷ *Id.*

²²⁸ The EEOC's Strategic Enforcement Plan explicitly identifies "[p]rotesting lesbians, gay men, bisexuals and transgender (LGBT) people from discrimination based on sex" as one of its key emerging and developing issues. *Id.*

²²⁹ Despite the change in administration, the EEOC has not retreated from the argument first made by the Obama administration that Title VII forbids employment discrimination based on gender identity. The Justice Department, however, has argued, contrary to the EEOC's position, that discrimination on the basis of sexual orientation is not prohibited under Title VII as discrimination on the basis of gender. See Brief for the United States as Amicus Curiae, *Zarda v. Altitude Express, Inc.*, No 15 Civ. 3775 (S.D.N.Y. July 26, 2017), ECF No. 417. Citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989), the DOJ explained that while an employer cannot "evaluate employees by assuming or insisting that they match the stereotype associated with their group," "the plaintiff must show that the employer actually relied on her or his gender in making its decision." *Id.* at 5. Title VII, it argued, "does not proscribe employment practices that take account of the sex of employees but do not impose different burdens on similarly situated members of each sex." *Id.* And it reminded that courts have long held that discrimination based on sexual orientation does not fall within Title VII's prohibition on sex discrimination. *Id.* at 6-8.

protected classification.²³⁰ The EEOC's legal theory is premised on Supreme Court precedent, as well as its own administrative decisions, which hold that "sex discrimination" under Title VII includes not just discrimination based on the biological differences between men and women, but also on the basis of gender.²³¹ In *Price Waterhouse v. Hopkins*,²³² the Supreme Court held that an employer discriminated against a female employee by telling her to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."²³³ The EEOC extended the reasoning of *Hopkins* to establish that discrimination against LGBT employees is tantamount to discrimination on the basis of gender because it is discrimination that is based on a person's perceived failure to adhere to gender stereotypes.²³⁴ It has taken a similar position with respect to discrimination on the basis of sexual orientation.²³⁵

Over the past several years, the EEOC vigorously pursued this theory in the federal courts to establish it as an accepted principle of anti-discrimination law.²³⁶ This issue has now come to a

²³⁰ See 42 U.S.C. § 2000e-2 (making it unlawful to discriminate against any individual "because of such individual's race, color, religion, sex, or national origin"). For the past 20 years, some members of Congress have attempted to add gender identity as a protected category through passage of some form of the Employment Non-Discrimination Act ("ENDA"). Currently, ENDA has passed in the Senate but not in the House. See Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. (2013). The EEOC's legal theory is therefore, arguably, one that has never been explicitly adopted by the U.S. Congress.

²³¹ See *Macy v. Holder*, EEOC Appeal No. 0120120821, 2012 WL 1435995, at *5 (Apr. 20, 2012) ("As used in Title VII, the term 'sex' encompasses both sex – that is, the biological differences between men and women – and gender.") (quoting *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000)) (citing *Smith v. City of Salem*, 378 F.3d 566, 572 (6th Cir. 2004) ("The Supreme Court made clear that in the context of Title VII, discrimination because of 'sex' includes gender discrimination."); *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) (holding that the Supreme Court in *Price Waterhouse* had held that Title VII barred "not just discrimination because of biological sex, but also gender stereotyping – failing to act and appear according to expectations defined by gender.")).

²³² 490 U.S. 228, 239 (1989).

²³³ *Id.* at 235. Similarly, in *EEOC v. Boh Brothers Construction Co.*, 731 F.3d 444 (5th Cir. 2013), the Fifth Circuit held that the EEOC could prove that same-sex harassment was "because of sex" by presenting evidence that the harassment was based on a perceived lack of conformity with gender stereotypes.

²³⁴ See *Macy*, 2012 WL 1435995 (Apr. 20, 2012) (citing *Lewis v. Heartland Inns of Am., L.L.C.*, 591 F.3d 1033, 1041 (8th Cir. 2010); *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285 (3d Cir. 2009); *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005); *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 874-75 (9th Cir. 2001); *Simonton v. Runyon*, 232 F.3d 33, 37 (2d Cir. 2000); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261 n.4 (1st Cir. 1999); *Doe by Doe v. City of Belleville*, 119 F.3d 563, 580-81 (7th Cir. 1997), vacated and remanded on other grounds, 523 U.S. 1001 (1998)).

²³⁵ On July 15, 2015, in *Baldwin v. Department of Transportation*, EEOC Appeal No. 0120133080, 2015 WL 4397641 (EEOC July 16, 2015), the EEOC issued an administrative opinion that held for the first time that Title VII extends to claims of employment discrimination based on sexual orientation. Like transgender discrimination, Title VII does not explicitly cover sexual orientation discrimination. The EEOC stated that: "[w]hen an employee raises a claim of sexual orientation discrimination as sex discrimination under Title VII, the question is not whether sexual orientation is explicitly listed in Title VII as a prohibited basis for employment actions. *It is not.*" *Id.* at *4 (emphasis added). Rather, according to the EEOC, the question "is the same as any other Title VII case involving allegations of sex discrimination -- whether the agency has 'relied on sex-based considerations' or 'take[n] gender into account' when taking the challenged employment action." *Id.* The EEOC concluded that "allegations of discrimination on the basis of sexual orientation necessarily state a claim of discrimination on the basis of sex." *Id.* at *10.

²³⁶ For example, the EEOC has attempted to insert this line of reasoning into a number of pending cases through the use of *amicus* briefs. In *Pacheco v. Freedom Buick GMC Truck, Inc.*, No. 7:10-CV-00116 (W.D. Tex.) (motion for leave to file *amicus* brief denied Nov. 1, 2011), the EEOC argued that, as a matter of law, the discharge of a woman because she is transgender was discrimination because of sex in violation of Title VII. In *Chavez v. Credit Nation Auto Sales, LLC*, No. 1:13-CV-0312 (N.D. Ga.) (*amicus* brief filed June 5, 2014), the EEOC attempted to argue that a transgender woman who had twice attempted to file a charge of discrimination with the EEOC was entitled to equitable tolling of the limitations period for her Title VII charge because the EEOC had "mistakenly" refused to accept her timely charge. Brief for Equal Employment Opportunity Commission as *Amicus Curiae*, *Chavez v. Credit Nation Auto Sales, LLC*, No. 1:13-CV-0312, at 4-5 (N.D. Ga. Feb. 14, 2014), ECF No. 67. On both occasions, she was told by the EEOC investigator that she could not file a charge because, as a transgender woman, "she was not protected against discrimination on the basis of sex under Title VII." *Id.* at 4-5. The EEOC argued that transgender discrimination was a recognized and cognizable claim under Title VII since the Supreme Court's decision in *Price Waterhouse* in 1989, even though it had not accepted such charges as recently as 2010. *Id.* at 2, 9-17.

head: the Supreme Court is set to decide this issue in a trio of landmark cases arising out of the appellate courts.²³⁷

The EEOC's position found early support in the Seventh Circuit in *Hively v. Ivy Tech*.²³⁸ The Seventh Circuit became the first appellate court to hold that discrimination on the basis of sexual orientation is prohibited as sex discrimination under Title VII.²³⁹ The Seventh Circuit found that sexual orientation discrimination was a form of sex stereotyping and was thus barred under Title VII.²⁴⁰ To reach this conclusion, it applied the "comparative method" approach. The Court examined the counterfactual "situation in which Hively is a man, but everything else stays the same: in particular, the sex or gender of the partner."²⁴¹ The Seventh Circuit found that Hively's non-conformity to the female stereotype – that she should have a male partner – was sex discrimination under the gender non-conformity line of cases.²⁴²

In reversing its previous precedent,²⁴³ the Seventh Circuit reviewed both the Supreme Court's recent marriage equality decisions, as well as the EEOC's administrative decisions, and stated that "this court sits *en banc* to consider what the correct rule of law is now in light of the Supreme Court's authoritative interpretations, not what someone thought it meant one, ten, or twenty years ago."²⁴⁴ Notably, the Seventh Circuit was unpersuaded by the notion that Congress has not expressly added the phrase "sexual orientation" to the list of protected categories under the Civil Rights Act, while it has used the phrase in other legislation.²⁴⁵ Instead, it noted that the "goalposts" of Title VII "have been moving over the years," but the key concept – "no sex discrimination" – remains.²⁴⁶

Although *Hively* was the first Court of Appeals ruling to explicitly adopt the EEOC's reasoning that transgender and sexual orientation discrimination are forms of sex discrimination, numerous federal courts, including other Courts of Appeals, have now addressed this issue.²⁴⁷ Three of those cases are now under review by the Supreme Court.

²³⁷ See Gerald L. Maatman, Jr., Christopher J. DeGroff, Matthew J. Gagnon, and Kyla J. Miller, The Top Five Most Intriguing Developments Of 2018 In EEOC-Initiated Litigation (And Preview Of Our Annual EEOC Litigation Report), WORKPLACE CLASS ACTION BLOG (Jan. 2, 2019), <https://www.workplaceclassaction.com/2019/01/the-top-five-most-intriguing-developments-of-2018-in-eeoc-initiated-litigation-and-preview-of-our-annual-eeoc-litigation-report/>.

²³⁸ *Hively v. Ivy Tech. Cmty. Coll.*, 853 F.3d 339 (7th Cir. 2017); see also Sam Schwartz-Fenwick, Michael W. Stevens, and Kylie Byron, *Management Alert - The Current Federal Retrenchment on LGBT Rights*, EMPLOYMENT LAW LOOKOUT BLOG (Aug. 22, 2017), <http://www.laborandemploymentlawcounsel.com/2017/08/management-alert-the-current-federal-retrenchment-on-lgbt-rights/>.

²³⁹ Hively, who was an openly gay adjunct professor, applied for six full-time positions over the course of five years, and was passed over each time; eventually, her part-time adjunct contract was not renewed. *Hively*, 853 F.3d at 341.

²⁴⁰ *Id.* at 342-45, 350-51.

²⁴¹ *Id.* at 345.

²⁴² *Id.* at 346-47. The Court also adopted Hively's theory that discrimination based on sexual orientation is sex discrimination under the associational theory. The Court examined the application of this line of cases, beginning with *Loving v. Virginia*, 388 U.S. 1 (1967), and found that the Civil Rights Act prohibits discrimination based on the sex of someone with whom a plaintiff associates. *Hively*, 853 F.3d at 347-48. The Court noted that it was irrelevant that the *Loving* line of cases dealt with associational race discrimination, rather than associational sex discrimination. *Id.* at 348.

²⁴³ *Doe v. City of Belleville, Ill.*, 119 F.3d 563 (7th Cir. 1997); *Hamm v. Weyauwega Milk Prods.*, 332 F.3d 1058 (7th Cir. 2003); *Hamner v. St. Vincent Hosp. and Health Care Ctr., Inc.*, 224 F.3d 701 (7th Cir. 2000); *Spearman v. Ford Motor Co.*, 231 F.3d 1080 (7th Cir. 2000).

²⁴⁴ *Hively*, 853 F.3d at 350.

²⁴⁵ *Id.* at 344.

²⁴⁶ *Id.*

²⁴⁷ For example, in *Christiansen v. Omnicom Group, Inc.*, 852 F.3d 195, 199 (2d Cir. 2017), the Second Circuit held that although it was bound by prior decisions disallowing sexual orientation discrimination claims under Title VII, it would allow plaintiff's claim to proceed based on the gender stereotyping theory articulated in *Price Waterhouse v. Hopkins*. However, in *Evans v. Georgia Regional Hospital*, 850 F.3d 1248 (11th Cir. 2017), the Eleventh Circuit ruled that sexual orientation discrimination is not actionable. But it allowed the claim to proceed because the facts supported a permissible Title VII claim of sex discrimination based on gender nonconformity. *Id.* at 1254. The Court thus held that the District Court "erred because a gender non-conformity claim is not 'just another way to claim discrimination based on sexual orientation,' but instead, constitutes a separate, distinct avenue for relief under Title VII." *Id.* at 1254-55. See also *Boutillier v. Hartford Pub. Schs.*,

In *R.G. & G.R. Harris Funeral Homes, Inc.*,²⁴⁸ the EEOC alleged that a Detroit-based funeral home discriminated against an employee because she was transitioning from male to female and/or because she did not conform to the employer's gender-based expectations, preferences, or stereotypes.²⁴⁹ On appeal, the Sixth Circuit held that the funeral home's conduct violated Title VII, explaining that "discrimination on the basis of transgender and transitioning status is necessarily discrimination on the basis of sex" and found that firing a person because he or she will no longer represent him or herself as the gender that he or she was assigned at birth "falls squarely within the ambit of sex-based discrimination" forbidden under Title VII.²⁵⁰ In *Zarda, et al. v. Altitude Express, d/b/a Skydive Long Island, et al.*,²⁵¹ the Second Circuit ruled in favor of a skydiving instructor who claimed he was fired because he was gay, therefore ruling that sexual orientation is a protected category under Title VII.²⁵² But in *Bostock v. Clayton County Board of Commissioners*,²⁵³ the Eleventh Circuit ruled that Title VII does not prohibit discrimination based on sexual orientation.

On October 8, 2019, the U.S. Supreme Court heard two oral arguments related to these three cases. The Court heard combined oral arguments for *Bostock* and *Zarda*, which both involved claims of sexual orientation discrimination, and a separate argument for *R.G. & G.R. Harris Funeral Homes, Inc.*, which involved discrimination based on gender identity.²⁵⁴

221 F. Supp. 3d 255, 270 (D. Conn. 2016) (denying the employer's motion for summary judgment and determining that a teacher alleging discrimination based on her sexual orientation had adequately established a right to protection under Title VII); *Winstead v. Lafayette Cty. Bd. of Cty. Comm'rs*, 197 F. Supp. 3d 1334, 1346-47 (N.D. Fla. 2016) ("Simply put, to treat someone differently based on her attraction to women is necessarily to treat that person differently because of her failure to conform to gender or sex stereotypes, which is, in turn, necessarily discrimination on the basis of sex."); *EEOC v. Scott Med. Health Ctr., P.C.*, 217 F. Supp. 3d 834, 841 (W.D. Pa. 2016) (distinguishing prior Third Circuit precedent, which the Court held had not been confronted with "the same arguments or analytical framework as that put forth by the EEOC in this case," and holding that "since the publications of *Bibby* and *Prowel*, District Courts throughout the country have endorsed an interpretation of Title VII that includes a prohibition on discrimination based on sexual orientation") (citing *Bibby v. Philadelphia Coca-Cola Bottling Co.*, 260 F.3d 257 (3d Cir. 2001) and *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285 (3d Cir. 2009)); *Baker v. Aetna Life Ins.*, 228 F. Supp. 3d 764, 765 (N.D. Tex. 2017) (holding that an employee stated a claim against her employer for sex discrimination in violation of Title VII based on denial of coverage costs of her breast augmentation surgery solely on the basis of male birth gender); *Mickens v. Gen. Elec. Co.*, No. 3:16CV-00603-JHM, 2016 WL 7015665, at *2 (W.D. Ky. Nov. 29, 2016) (denying an employer's motion to dismiss a Title VII sex discrimination claim in which a transgender plaintiff alleged he was unlawfully denied use of the male bathroom close to his work station, and then was fired for attendance issues resulting from having to go to a bathroom farther away, and recognizing that the prohibition against gender discrimination in Title VII "can extend to certain situations where the plaintiff fails to conform to stereotypical gender norms"); *Roberts v. Clark Cty. Sch. Dist.*, 215 F. Supp. 3d 1001, 1015-17 (D. Nev. 2016) (holding that discrimination against a person based on transgender status is discrimination "because of sex" under Title VII and finding that a school district's requirement that the officer use the gender-neutral restroom was an adverse employment action); *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 526 (D. Conn. 2016) (holding that Title VII covers sex discrimination claims by transgender individuals and allowing claim of an orthopedic surgeon who alleged she was not hired because she disclosed her identity as a transgender woman at her interview to proceed); *U.S. v. Se. Okla. State Univ.*, No. 15-CV324-C, 2015 WL 4606079, at *2 (W.D. Okla. July 10, 2015) (holding that claims of transgender discrimination were tantamount to claims of sex discrimination because they involved the failure to adhere to sex stereotypes) (citing *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004)).

²⁴⁸ Complaint, *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, No. 2:14-CV-13710 (E.D. Mich. Sept. 25, 2014).

²⁴⁹ *Id.* Specifically, the government's complaint alleges that the employee gave her employer a letter explaining that she was transgender and would soon start presenting as female in appropriate work attire. Allegedly, she was fired two weeks later by the funeral home's owner, who told her that what she was proposing to do was unacceptable. The District Court ultimately granted summary judgment in favor of the funeral home on the wrongful termination claim, as well as the EEOC's claim that the Funeral Home's policy of providing work clothes to males, but not to females, was discrimination on the basis of sex. *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F. Supp. 3d 837, 840-42 (E.D. Mich. 2016).

²⁵⁰ *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 571 (6th Cir. 2018).

²⁵¹ *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018).

²⁵² See Gerald L. Maatman, Jr. and Alex Karasik, How The Contours Of Workplace Discrimination Laws Are In Flux, Workplace Class Action Blog, Seyfarth Shaw LLP (Mar. 16, 2018), <https://www.workplaceclassaction.com/2018/03/how-the-contours-of-workplace-discrimination-laws-are-in-flux/>.

²⁵³ *Bostock v. Clayton Cty. Bd. of Comm'rs*, 723 F. App'x 964 (11th Cir. 2018).

²⁵⁴ Transcript of Oral Argument, *Bostock v. Clayton Cty., Ga., Altitude Express, Inc. v. Zarda*, Nos. 17-1618 and 17-1623, 139 S. Ct. 1599 (2019); Transcript of Oral Argument, *R.G. & G.R. Harris Funeral Homes, Inc. v. E.E.O.C.*, No. 18-107, 139 S. Ct. 1599 (2019).

During the *Bostock/Zarda* joint argument, counsel for the employees argued that sexual orientation discrimination necessarily qualifies as sex discrimination under Title VII, reasoning that when an employer fires a male employee for dating men, but does not fire a female employee who also dates men, the employer is discriminating based on sex. Further, because the adverse employment action is based on the male employee's failure to conform to particular expectations of how men should behave, there is no discernable difference between this kind of discrimination and forms of sex discrimination that have already been recognized as unlawful by the Court. During oral argument for *R.G. & G.R. Harris Funeral Homes, Inc.*, counsel for the employee argued similarly, that transgender discrimination is prohibited under Title VII because "to accord to a generalization about how people who are assigned a particular sex based on visible anatomy at birth have to live their lives for the rest of their lives is sex discrimination."

Justices Alito and Breyer questioned the policy implications of expanding Title VII's protections to sexual orientation. Counsel responded that the Court would be going no farther than it had in *Oncale v. Sundowner Offshore Services, Inc.*²⁵⁵ and *Price Waterhouse v. Hopkins*, when it decided that Title VII prohibited same-sex harassment and sex-based stereotyping, respectively. Justice Roberts also raised concerns about the effect on religious organizations of expanding Title VII's reach. Justice Gorsuch's questions seemed to indicate he may be a swing vote on these cases. He appeared sympathetic to the employees' arguments, saying sex "appears to be a factor" in the terminations, but expressed concerns about changing "the meaning of what Congress understood sex to mean" by including sexual orientation in the definition of sex. According to Justice Gorsuch, whether Title VII bars employment discrimination on sexual orientation and gender identity is a "really close, really close" question, but he also raised concerns about "massive social upheaval" that would flow from a ruling affirming an expanded understanding of Title VII's protections. The Justices also probed counsel for the employers, asking them to explain how a person's sexual orientation can be independent of sex.

Counsel representing the employers advocated for a narrow interpretation of Title VII, arguing that sex is distinct and independent from sexual orientation and gender identity, and that Congress did not intend Title VII to prohibit gender identity discrimination. Justice Breyer suggested that sex and gender identity were as interrelated as discrimination on the basis of race and interracial marriage or religion and interreligious marriage. The employer's counsel argued that discrimination in the latter two instances resulted from discriminatory animus towards a particular race or religion, which are clearly protected under Title VII, whereas discrimination based on gender identity is motivated by an independent, and unprotected, characteristic. In response to the argument that interpreting Title VII to protect transgender employees could impact businesses with legitimate reasons for gender-based criteria, such as women's shelters, Justice Sotomayor suggested that bona fide occupational qualifications were a potential solution to a conflict between a business's sex-based policies that further legitimate objectives and the protection of transgender workers against discrimination.

In summary, the Court's four liberal justices voiced support for a broader interpretation of Title VII that would protect against sexual orientation and transgender discrimination, while several of the Court's conservative justices, particularly Justice Roberts and Justice Alito, expressed concern that Congress, not the courts, should be addressing this issue. Justice Kavanaugh remained silent throughout most of the two hours of oral argument, but Justice Gorsuch interjected frequently, at times seeming amenable to the argument that the word "sex" necessarily includes sexual orientation and transgender discrimination, but at other times voicing support for judicial restraint. In short, it is difficult to predict how the Supreme Court will decide these cases. But the impact on the American workforce is likely to be significant, whatever the outcome.

²⁵⁵ *Oncale v. Sundowner Offshore Servs, Inc.*, 523 U.S. 75 (1998).

2. Developments In Disability Discrimination Law

Lawsuits alleging discrimination under the ADA are consistently the most frequently filed types of EEOC lawsuits. The ADA prohibits employers from discriminating against “qualified individual[s] on the basis of disability.”²⁵⁶ To establish a *prima facie* case of discrimination under the ADA, the EEOC needs to establish that: (1) the individual has an ADA qualifying disability; (2) the individual is qualified for the job; and (3) the individual was discriminated against on the basis of the disability.²⁵⁷ Accordingly, the best way for employers to guard against EEOC-initiated ADA litigation is to develop an understanding of how the EEOC interprets these elements.

In FY 2019, the EEOC issued a number of statements reminding employers of the special, moral obligation shared by all Americans to ensure that veterans have opportunities to participate in the workforce and realize their dreams. Among other things, the EEOC noted that “[o]ur veterans returning from Iraq and Afghanistan since 2001 – often after lengthy deployments – have suffered from higher unemployment than other veterans and civilians,” and that they “also may face discrimination because of mental or physical disabilities.”²⁵⁸ Among other things, EEOC Chair Janet Dhillon posted a message on Veterans Day commemorating the service of former Senator and presidential nominee, Bob Dole, and reminding employers that “[a]ttacking employment discrimination doesn't present the same physical dangers as charging a Nazi machine gun nest, but it's our part of the never-ending campaign of perfecting American democracy and expanding justice in the world.”²⁵⁹

a. Recent ADA Decisions Involving “Reasonable Accommodations”

One form of discrimination under the ADA is a failure to provide reasonable accommodations to employees with disabilities. What constitutes a reasonable accommodation is one of the most frequently and hotly contested issues in ADA litigation, often giving rise to seemingly conflicting case law across the country. One of those issues is whether employers must automatically reassign a disabled employee to an open position as a reasonable accommodation or whether employers can maintain a policy of hiring the most-qualified individual for the position by requiring a disabled employee to compete for open positions against other interested employees.

For example, in *EEOC v. Manufacturers & Traders Trust Co.*,²⁶⁰ the U.S. District Court for the District of Maryland held that an employee returning from extended medical leave is entitled to noncompetitive reassignment. In that case, the EEOC sued a bank on behalf of a former employee who alleged that the bank failed to provide reasonable accommodations because of her cervical insufficiency.²⁶¹ At issue was whether the charging party was entitled to a noncompetitive reassignment after she returned from an extended leave of absence.²⁶² The employer argued that noncompetitive reassignment is tantamount to “affirmative action” and is not a reasonable accommodation under the ADA.²⁶³ After reviewing the purpose and statutory history of the ADA, the District Court held that reassignment without competition is needed for qualified individuals with

²⁵⁶ 42 U.S.C. § 12112(a).

²⁵⁷ See, e.g., *Gowesky v. Singing River Hosp. Sys.*, 321 F.3d 503, 511 (5th Cir. 2003), *cert. denied* 540 U.S. 815; *Holbrook v. City of Alpharetta, Ga.*, 112 F.3d 1522, 1526 (11th Cir. 1997).

²⁵⁸ U.S. Equal Employment Opportunity Commission, *EEOC Efforts for Veterans with Disabilities*, <https://www1.eeoc.gov/laws/types/veterans.cfm>.

²⁵⁹ Press Release, U.S. Equal Employment Opportunity Commission, *Message by EEOC Chair Janet Dhillon Veterans Day 2019*, https://www.eeoc.gov/eeoc/newsroom/wysk/veterans_day_2019.cfm; see also Press Release, U.S. Equal Employment Opportunity Commission, *Message by EEOC Chair Janet Dhillon National Disability Employment Awareness Month*, https://www.eeoc.gov/eeoc/newsroom/wysk/disability_awareness_month.cfm.

²⁶⁰ *EEOC v. Mfrs. & Traders Trust Co.*, 402 F. Supp. 3d 201 (D. Md. 2019).

²⁶¹ *Id.* at 206.

²⁶² *Id.* at 221-22.

²⁶³ *Id.* at 222.

disabilities to obtain the same workplace opportunities that those without disabilities automatically enjoy, as required by the ADA.²⁶⁴ According to the District Court, without reassignment, such employees would be terminated, whereas, employees without disabilities can remain employed in their current positions.²⁶⁵ Ultimately, the District Court concluded that “the EEOC has established that reassignment ‘seems reasonable on its face, *i.e.*, ordinarily or in the run of cases.’ . . . Defendant has not shown any ‘special’ or ‘case-specific circumstances’ demonstrating undue hardship. . . . Accordingly, plaintiff is entitled to summary judgment on her reasonable accommodation claim.”²⁶⁶

Other recent decisions have addressed the length of medical leave as it relates to a reasonable accommodation and have come to different conclusions. In *Severson v. Heartland Woodcraft, Inc.*,²⁶⁷ an employer approved an employee for 12 weeks of FMLA leave.²⁶⁸ Just weeks before his leave expired, the employee informed his employer that his condition had not improved and that he would need surgery and at least two additional months of leave.²⁶⁹ The Seventh Circuit left open the possibility that “intermittent time off or a short leave – say, a couple of days, or even a couple of weeks – may, in appropriate circumstances, be analogous to a part-time or modified work schedule,” but that the “[i]nability to work for a multi-month period removes a person from the class protected by the ADA.”²⁷⁰ In *Golden v. Indianapolis Housing Agency*,²⁷¹ after an employee took sixteen weeks of unpaid medical leave, her doctor could not say when she would be able to return to work, so plaintiff’s employer terminated her.²⁷² The Seventh Circuit affirmed its holding in *Severson*, stating that “an employee who requires a multi-month period of medical leave is not a qualified individual under the ADA or the Rehabilitation Act.”²⁷³

The Supreme Court declined to review the *Severson* and *Golden* decisions to determine whether there is a *per se* rule that a finite leave of absence of more than one month cannot be a reasonable accommodation under the ADA. Other Courts of Appeals have drawn different conclusions, leaving this an open issue for employers.²⁷⁴

Sometimes the EEOC challenges an employer’s reasonable accommodation policy as a whole. For example, in *EEOC v. Prestige Care, Inc.*,²⁷⁵ the EEOC alleged that the employer implemented and followed policies that violated the ADA, including: (i) a “100% healed/100% fit for duty” return to work policy; (ii) not offering light duty as a reasonable accommodation; and (iii) ignoring its obligation to

²⁶⁴ *Id.* at 225.

²⁶⁵ *Id.*

²⁶⁶ *Id.* at 229 (quoting *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 401 (2002)). Other courts have come to different conclusions. See *EEOC v. St. Joseph’s Hosp., Inc.*, 842 F.3d 1333, 1346 (11th Cir., 2016) (holding that the ADA “only requires an employer allow a disabled person to compete equally with the rest of the world for a vacant position” and does not require the employer to automatically reassign an employee without competition); see also *EEOC v. Methodist Hosps. of Dallas*, No. 3:15-CV-3104, 2017 WL 930923, at *2 (N.D. Tex., Mar. 9, 2017) (the Court confirmed “the ADA does not entitle a disabled employee to preferential treatment” and held that the employer’s policy requiring disabled employees to compete with non-disabled applicants in order to hire the best candidate did not violate the ADA.).

²⁶⁷ *Severson v. Heartland Woodcraft, Inc.*, 872 F.3d 476, 479 (7th Cir. 2017), *cert. denied*, 138 S. Ct. 1441 (2018).

²⁶⁸ *Id.* at 478. plaintiff had a chronic back condition that pre-dated his employment that would occasionally flare up and affect his ability to walk, bend, lift, sit, stand, move, and work. In June 2013, plaintiff experienced such a flare-up and took a leave from work. *Id.* at 479.

²⁶⁹ *Id.* In response, the employer advised plaintiff that his employment would end when his FMLA leave expired and invited plaintiff to reapply with the company when he recovered from surgery and was medically cleared to work. *Id.*

²⁷⁰ *Id.* at 481 (citing *Byrne v. Avon Prods., Inc.*, 328 F.3d 379, 381 (7th Cir. 2003)).

²⁷¹ *Golden v. Indianapolis Hous. Agency*, 698 F. App’x 835 (7th Cir. 2017), *cert. denied*, 138 S. Ct. 1446 (2018).

²⁷² *Id.* at 835.

²⁷³ *Id.* at 837. See also *EEOC v. Midwest Gaming & Entm’t, LLC DBA Rivers Casino*, No. 17-CV-6811, 2018 U.S. Dist. LEXIS 88367 (N.D. Ill., May 25, 2018).

²⁷⁴ *Severson v. Heartland Woodcraft, Inc.*, 138 S. Ct. 1441 (2018); *Golden v. Indianapolis Hous. Agency*, 138 S. Ct. 1446 (2018).

²⁷⁵ *EEOC v. Prestige Care, Inc.*, No. 1:17-CV-1299, 2018 U.S. Dist. LEXIS 119305 (E.D. Cal. July 17, 2018).

engage in an interactive process.²⁷⁶ The EEOC alleged that these policies did not permit reasonable accommodations for qualified individuals, and that it could therefore bring a lawsuit on behalf of a group of employees without showing that they were “disabled” or “qualified individuals” under the ADA.²⁷⁷ The Court disagreed, holding that “when the EEOC pursues a class claim under § 706 and chooses to identify ‘additional class members’ who have suffered some form of disability discrimination, the allegations must plausibly show that those ‘additional individuals’ are protected by the ADA.”²⁷⁸

b. Recent ADA Decisions Regarding What Qualifies As A Disability

Another frequently litigated topic in ADA litigation is what counts as a “disability” under the ADA. Several recent decisions considered whether and to what extent emotional and mental problems rise to that level. For example, in *EEOC v. Crain Automotive Holdings LLC*,²⁷⁹ the U.S. District Court for the Eastern District of Arkansas held that anxiety and panic attacks could rise to the level of a disability under the ADA.²⁸⁰ In that case, the EEOC brought a lawsuit on behalf of a charging party who suffered from anxiety, depression, and panic attacks.²⁸¹ The charging party experienced chest pains and went to the emergency room. After two days of treatment, she learned that her chest pain was the result of a panic attack.²⁸² When she returned to work, she was terminated by her supervisors, who allegedly told her that “it was not working out” due to her health problems and that she needed to take care of herself.²⁸³

The employer disputed that the charging party suffered from a disability within the meaning of the ADA. The District Court held, however, that the charging party’s panic attacks made her feel paralyzed, caused chest pain, and caused difficulty with breathing, thinking, communicating with others, and reasoning.²⁸⁴ Moreover, her depression caused her to be unable to care for herself, communicate with others, or think coherently.²⁸⁵ The employer cited evidence showing that the charging party did not have panic attacks constantly and that she was able to perform other demanding life activities such as handling her parents’ estates.²⁸⁶ The District Court concluded, however, that that did not mean that the charging party was not disabled under the ADA, and that whether her impairment substantially limited a major life activity was a question of fact for the jury.²⁸⁷ Accordingly, the District Court denied the employer summary judgment and allowed the case to proceed to trial.

In *EEOC v. West Meade Place LLP*,²⁸⁸ the U.S. District Court for the Middle District of Tennessee held that a charging party’s anxiety condition did not rise to the level of a disability under the ADA.²⁸⁹

²⁷⁶ *Id.* at *3.

²⁷⁷ *Id.* at *6.

²⁷⁸ *Id.* at *11.

²⁷⁹ *EEOC v. Crain Auto. Holdings LLC*, 372 F. Supp. 3d 751 (E.D. Ark. 2019).

²⁸⁰ See Gerald L. Maatman, Jr. and Alex W. Karasik, *Following Supervisor’s “Not Working Out” Comment, EEOC Defeats Employer’s Motion For Summary Judgment In ADA Lawsuit*, WORKPLACE CLASS ACTION BLOG (Apr. 22, 2019), <https://www.workplaceclassaction.com/2019/04/following-supervisors-not-working-out-comment-eeoc-defeats-employers-motion-for-summary-judgment-in-ada-lawsuit/>.

²⁸¹ *Crain Auto. Holdings LLC*, 372 F. Supp. 3d at 753.

²⁸² *Id.*

²⁸³ *Id.* at 753-54.

²⁸⁴ *Id.* at 755.

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *EEOC v. West Meade Place LLP*, No. 3:18-CV-101, 2019 WL 5394314 (M.D. Tenn. Oct. 22, 2019).

²⁸⁹ See Gerald L. Maatman, Jr. and Alex W. Karasik, *Tennessee Federal Court Axes ADA Anxiety Discrimination Claim And Grants Summary Judgment To Employer Against The EEOC*, WORKPLACE CLASS ACTION BLOG (Oct. 30, 2019),

In that case, the EEOC alleged that a healthcare center failed to provide a reasonable accommodation for an employee's anxiety disorder.²⁹⁰ After reviewing the testimony and other evidence, the District Court found that the EEOC had not met its burden to establish that the charging party had a history of anxiety of such severity that it substantially limited one or more of her major life activities.²⁹¹ The District Court noted that the certification of healthcare provider form that was submitted on the charging party's behalf and executed by her treating physician stated that the employee was not able to work during flare-up episodes which happened approximately one to three days per month.²⁹² The document did not identify the mental impairment for which the charging party had been diagnosed, and it did not describe any medical basis for the opinion that would suggest that the condition substantially limits the charging party's major life activities.²⁹³ Accordingly, the District Court concluded that none of the evidence submitted by the EEOC created a genuine issue of material fact upon which a reasonable jury could return a verdict in favor of the EEOC.²⁹⁴

C. Recent Cases Addressing What Constitutes Discrimination Under The ADA

Other ADA lawsuits hinge on the definition of "discrimination" under the ADEA. For example, in *EEOC v. STME, LLC*,²⁹⁵ the Eleventh Circuit held that an employer's fear that an employee might become disabled in the future (however unfounded) does not give rise to a claim of discrimination under the ADA. In that case, the EEOC had brought a lawsuit on behalf of a massage therapist who allegedly was terminated based on her employer's fear that she would contract Ebola during a planned future trip to Kenya. The District Court dismissed, holding that the employee could not have been terminated due to a disability since she did not have a disability when she was terminated.²⁹⁶

According to the EEOC, the employee could be "regarded as" having a disability because her employer held a belief that she would contract Ebola in the future.²⁹⁷ The Eleventh Circuit held that the "regarded as having" prong of the ADA requires that a disability be a present physical or mental impairment: "[i]n 'regarded as' cases, a plaintiff must show that the employer knew that the employee had an actual impairment or perceived the employee to have such an impairment at the time of the adverse employment action."²⁹⁸ That prong did not extend to an employer's belief that an employee might contract or develop an impairment in the future.²⁹⁹ The Eleventh Circuit noted that this conclusion is consistent with the EEOC's own interpretive guidance, which states that a predisposition to developing a disability is not a physical impairment.³⁰⁰

Finally, the Eleventh Circuit held that the EEOC had failed to state an association discrimination claim under the ADA.³⁰¹ An association discrimination claim arises when an employer discriminates against individuals because of a known disability of an individual with whom the employee is known to have a relationship or association.³⁰² The EEOC insisted that the employer held the belief that the

<https://www.workplaceclassaction.com/2019/10/tennessee-federal-court-axes-ada-anxiety-discrimination-claim-and-grants-summary-judgment-to-employer-against-the-eeoc/>.

²⁹⁰ *West Meade Place LLP*, 2019 WL 5394314, at *5.

²⁹¹ *Id.* at *6.

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ *Id.* at *8.

²⁹⁵ *EEOC v. STME, LLC*, 938 F.3d 1305 (11th Cir. 2019).

²⁹⁶ *Id.* at 1313.

²⁹⁷ *Id.* at 1315.

²⁹⁸ *Id.* at 1316.

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ *Id.* at 1319.

³⁰² *Id.* at 1318.

employee might come into contact with unknown individuals who had Ebola.³⁰³ But the Eleventh Circuit concluded that: “this is too attenuated to state an association discrimination claim under . . . the ADA, which requires both a known association and a known disability.”³⁰⁴

Similarly, in *EEOC v. Amsted Rail Co.*,³⁰⁵ the U.S. District Court for the Southern District of Illinois held that an employer was liable under the ADA for denying individuals positions based merely on their *potential* to suffer future medical injuries.³⁰⁶ In that case, the employer made conditional job offers to thirty-nine applicants, but placed them on medical hold because of abnormal results from a nerve conduction test.³⁰⁷ The company argued that there was a higher risk of developing carpal tunnel syndrome for those with the abnormal test results.³⁰⁸ The Court held in favor of the EEOC, in part, explaining that the test “does not indicate an individual's contemporaneous inability to perform the chipper job but only a prospective, future threat to his health if he were to perform the job,” and that the restrictions imposed by the employer were “based on a generalized assumption about an abnormal [test] result rather than ‘an individualized assessment of the individual and the relevant position,’ as required under the ADA.”³⁰⁹

And in *EEOC v. McLeod Health, Inc.*,³¹⁰ the Fourth Circuit reversed a grant of summary judgment to an employer that had required an employee to undergo a medical exam. In that case, the EEOC alleged that an employer had violated the ADA when it required an employee to undergo a medical exam to ensure that she could safely navigate to and within its campuses.³¹¹ The Fourth Circuit noted that the ADA prohibits employers from requiring an employee to undergo a medical exam unless it is shown to be job-related and consistent with business necessity.³¹² The employer argued that it had not violated the ADA because it reasonably believed that the charging party could not navigate to or within its medical campuses without posing a direct threat to herself.³¹³

The Fourth Circuit held that summary judgment on behalf of the employer was inappropriate because a reasonable jury could conclude that the employer lacked a reasonable belief that the charging party's medical condition had left her unable to safely navigate the company's premises.³¹⁴ The Fourth Circuit noted that the employer knew that the charging party was able to perform the essential functions of her job for 28 years, even though she suffered from limited mobility and sometimes fell at work.³¹⁵ The Fourth Circuit also noted that the charging party had recently fallen at work with no injury, that her falls outside of work did not cause severe injuries, and that she had recently shown up late and struggled to handle her workload.³¹⁶ Moreover, the charging party's manager thought that the charging party looked unusually winded after walking short distances and that she appeared groggy during meetings.³¹⁷ Nevertheless, the Fourth Circuit held that a reasonable jury could conclude that it was not reasonable for the employer to believe that the charging party was a direct threat to herself on the job simply because she fell multiple times

³⁰³ *Id.* at 1319.

³⁰⁴ *Id.*

³⁰⁵ *EEOC v. Amsted Rail Co.*, 280 F. Supp. 3d 1141 (S.D. Ill. 2017).

³⁰⁶ See Gerald L. Maatman, Jr. and Alex W. Karasik, *Ouch: EEOC Gets Summary Judgment Win Relative To Employer's Medical Testing*, WORKPLACE CLASS ACTION BLOG (Dec. 7, 2017), <https://www.workplaceclassaction.com/2017/12/ouch-eeoc-gets-summary-judgment-win-relative-to-employers-medical-testing/>.

³⁰⁷ *EEOC v. Amsted Rail Co.*, 280 F. Supp. 3d at 1146-47.

³⁰⁸ *Id.* at 1147-48.

³⁰⁹ *Id.* at 1153.

³¹⁰ *EEOC v. McLeod Health, Inc.*, 914 F.3d 876 (4th Cir. 2019).

³¹¹ *Id.* at 880.

³¹² *Id.*

³¹³ *Id.* at 881.

³¹⁴ *Id.* at 882.

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ *Id.*

recently and because she looked groggy and out of breath.³¹⁸ Accordingly, the Fourth Circuit reversed the District Court's decision granting the employer's motion for summary judgment.

Finally, the EEOC has been successful in some recent cases establishing that an employment policy itself is discriminatory. For example, in *EEOC v. UPS Ground Freight, Inc.*,³¹⁹ the EEOC challenged an employer's collective bargaining agreement, which provided that commercial drivers whose licenses were suspended or revoked for non-medical reasons, including convictions for driving while intoxicated, would be reassigned to non-driving work at their full rate of pay, while drivers who become unable to drive due to medical disqualifications, including individuals with disabilities within the meaning of the ADA, were provided full-time or casual inside work at only 90% of their rate of pay.³²⁰ The EEOC succeeded in convincing the Court that the language of the collective bargaining agreement itself established a *prima facie* case of a discriminatory policy under the ADA because it paid drivers disqualified for medical reasons less than what it paid drivers disqualified for non-medical reasons.³²¹ The District Court granted a permanent injunction against the employer, holding that "[i]t is immaterial whether medically disqualified drivers have other options; paying employees less because of their disability is discriminatory under any circumstance."³²²

Similarly, employers should be mindful of the EEOC's focus on the use of pre-job-offer questionnaires. The EEOC may take the position that they may run afoul of the ADA. Indeed, an employer does not have to take an affirmative act of turning an applicant away because of their disability. The EEOC may claim that employers are liable for ADA discrimination even when an applicant refuses to apply.³²³

3. Complex Employment Relationships

The EEOC's most recent SEP added a new issue under the Emerging and Developing Issues priority: focusing on complex employment relationships and structures in the 21st century workplace, specifically with respect to temporary workers, staffing agencies, independent contractor relationships, and the on-demand economy.³²⁴ Often these issues depend on whether one or more entities can be considered the "employer" of an employee.³²⁵ According to the EEOC's Compliance Manual, employers that are unrelated (or not sufficiently related to qualify as an "integrated enterprise") are "joint employers" of a single employee if each employer exercises sufficient control

³¹⁸ *Id.*

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

³²⁰ *Id.* at 1240-41.

³²¹ *Id.* at 1241.

³²² *Id.* at 1242. Moreover, it was unnecessary for the Court to perform a case-by-case impact analysis of individuals who may (or may not) have been harmed by the policy because a *prima facie* case of liability for a pattern-or practice case does not require the EEOC to offer evidence that each individual who may seek relief was a victim of the policy; the EEOC must only "show that unlawful discrimination is part of the employer's 'standard operating procedure.'" *Id.*

³²³ For example, in *EEOC v. Grisham Farm Prods., Inc.*, 191 F. Supp. 3d 994, 997 (W.D. Mo. 2016), the Court held that employers may make an "acceptable inquiry" at the pre-offer stage into "the ability of an applicant to perform job-related functions," however, both the ADA's legislative history and implementing regulations make clear that such inquiries should not be phrased in terms of disability. Here, the employer required job-applicants to fill out a health history form before they were considered for the job, even if the "applicant" never actually applied for the job. The Court held that it was irrelevant that the charging never actually filled out a health history form or applied for a position, since the employer's policy could deter job applications from those who are aware of the discrimination nature of the policy and were unwilling to subject themselves to the humiliation of explicit and certain rejection.

³²⁴ See U.S. Equal Employment Opportunity Commission Strategic Enforcement Plan FY 2017 - 2021, available at <https://www.eeoc.gov/eeoc/plan/sep-2017.cfm>.

³²⁵ *Id.*; See EEOC Compliance Manual, Section 2: Threshold Issues § 2-III(B)(1)(A)(iii)(b), available at <https://www.eeoc.gov/policy/docs/threshold.html>.

of an individual to qualify as his/her employer.³²⁶ Notably, the EEOC's definition is different than the statutory definitions that apply to some of the anti-discrimination laws that the EEOC enforces.³²⁷

In 2016, the EEOC expanded the scope of its joint-employer test in line with the controversial decision issued by the National Labor Relations Board, *Browning-Ferris Industries of California*.³²⁸ There, the NLRB announced that it "will no longer require that a joint employer not only possess the authority to control employees' terms and conditions of employment, but must also exercise that authority, and do so directly, immediately, and not in a 'limited and routine' manner. . . . The right to control, in the common-law sense, is probative of joint-employer status, as is the actual exercise of control, whether direct or indirect."³²⁹ The *Browning-Ferris* decision has lived a tortured procedural history, but it remains the law of the land until the NLRB's new regulations take effect.³³⁰

In September of 2018, the NLRB published its notice of proposed rulemaking on the issue of joint employment in the Federal Register.³³¹ According to the NLRB, the proposed rule "will foster predictability and consistency regarding determinations of joint-employer status in a variety of

³²⁶ *Id.* § 2-III(B)(1)(A)(iii)(b). Another method the EEOC uses for determining whether two or more entities can be considered the "employer" of an employee turns on whether "the operations of two or more employers are so intertwined that they can be considered the single employer of the charging party." *Id.* § 2-III(B)(1)(A)(iii)(a). The EEOC clarified how it determines the extent of that control in its 1997 Enforcement Guidance, where it identified 16 factors that it considers when determining whether two or more companies are joint employers of a single employee. See *EEOC Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms* (Dec. 3, 1997), available at <https://www.eeoc.gov/policy/docs/conting.html>. The EEOC states that its factors are drawn from *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 324 (1992) (quoting *Comty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-752 (1989)) and Restatement (Second) of Agency § 220(2).

³²⁷ For example, the EPA has a slightly different definition of "employer" than Title VII. Under Title VII, subject to some enumerated exceptions, an "employer" means "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person." 42 U.S.C. § 2000e(b). The EPA uses the broader definition found in the FLSA, which defines an "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee" 29 U.S.C. § 203(d). An "employee" is defined as "any individual employed by an employer," *id.* § 203(e)(1), and the term "employ" means "to suffer or permit to work." *Id.* § 203(g). Together, those definitions have been interpreted as "the broadest definition . . . ever included in any one act." *U.S. v. Rosenwasser*, 323 U.S. 360, 363 n.3 (1945). Courts interpreting that definition have focused on the "economic realities" of the purported employment relationship. See *Goldberg v. Whittaker House Cooperative, Inc.*, 366 U.S. 28, 33 (1961). The "economic realities" inquiry, in turn, focuses on a number of factors related to control over the employee. See, e.g., *Herman v. RSR Sec. Servs., Ltd.*, 172 F.3d 132, 139 (2d Cir.1999) ("Under the 'economic reality' test, the relevant factors include 'whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records.'" (quoting *Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8, 12 (2d Cir.1984)). Despite the different statutory basis, and different interpretations in the case law, the EEOC maintains that "there is no significant functional difference between the tests." *EEOC Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms*, at n.10, *supra* note 326.

³²⁸ *Browning-Ferris Indus. of California*, 362 NLRB No. 186, 2015 WL 5047768 (Aug. 27, 2015).

³²⁹ *Id.*

³³⁰ In *Hy-Brand Industrial Contractors, Ltd. And Brandt Construction Co.*, 365 NLRB No. 156 (Dec. 14, 2017), by a 3-2 vote, the NLRB overturned *Browning-Ferris* and restored its 30-year test for determining whether separate businesses are "joint employers" under the NLRA. See Joshua Ditelberg, *NLRB Overturns Browning-Ferris Joint Employer Standard*, SEYFARTH SHAW MANAGEMENT ALERT (Dec. 18, 2017), <https://www.seyfarth.com/news-insights/nlr-overturns-browning-ferris-joint-employer-standard.html>. At that time, the NLRB's position was that a putative employer will be found to be a joint employer if it "meaningfully affects matters relating to the employment relationship, such as hiring, firing, discipline, supervision and direction." *Laerco*, 269 NLRB 324, 325, 1984 WL 36182 (1987). Two or more entities were joint employers if they "share[d] or codetermine[d] those matters governing the essential terms and conditions of employment" and question of joint employer status needed to be assessed based on the "totality of the facts of the particular case." *S. Cal. Gas Co.*, 302 NLRB 456, 461, 1991 WL 67022 (1991). Prior to overturning *Browning-Ferris*, the NLRB had expanded its traditional joint-employer test so that "two or more entities are joint employers of a single work force if they are both employers within the meaning of the common law, and if they share or codetermine those matters governing the essential terms and conditions of employment." *Browning-Ferris Indus. of Cal.*, 2015 WL 5047768, at *19. In addition, the NLRB stated that it will consider "the allocation and exercise of control in the workplace" and "the various ways in which joint employers may 'share' control over terms and conditions of employment or 'codetermine' them, as the Board and the courts have done in the past." *Id.*

³³¹ 83 Fed. Reg. 179 (Sept. 14, 2018), available at <https://www.gpo.gov/fdsys/pkg/FR-2018-09-14/pdf/2018-19930.pdf>.

business relationships, thereby promoting labor-management stability”³³² The text of the proposed rule is as follows:

An employer, as defined by Section 2(2) of the National Labor Relations Act (the Act), may be considered a joint employer of a separate employer’s employees only if the two employers share or codetermine the employees’ essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction. A putative joint employer must possess and actually exercise substantial direct and immediate control over the employees’ essential terms and conditions of employment in a manner that is not limited and routine.³³³

The proposed rule undoes the relaxed *Browning-Ferris* standard. Under the proposed rule, an employer may be found to be a joint-employer of another employer’s employees *only* if it possesses and exercises substantial, direct and immediate control over the essential terms and conditions of employment and has done so in a manner that is not limited and routine.³³⁴ The comment period for the NLRB’s proposed rule is now closed but as of this writing, a final rule has not yet been issued.

Like the *Browning-Ferris* test, the EEOC argued that its test looks at the totality of the circumstances and is “intentionally flexible” and “consistent with common law,” in that it does not consider one factor to be decisive.³³⁵ The EEOC also argued that its standard considers an entity’s indirect control of the terms and conditions of employment.³³⁶ Crucially, the EEOC contends that an entity’s right to control the terms and conditions of employment – whether or not it actually exercises that right – is relevant to joint-employer status.³³⁷ With respect to indirect control, the EEOC explained that it “has long considered indirect control to be relevant to joint employer status.”³³⁸ The EEOC stated that “[a] putative joint employer exercises indirect control of the terms and conditions of employment by acting through an intermediary.”³³⁹

Since the NLRB’s publication of its proposed joint-employer rule, the EEOC has shown no indication that it will tighten its own joint-employer standard. As such, the EEOC’s joint-employer standard still considers the employers’ right to control, even if unexercised. Nevertheless, the EEOC’s joint employer-status is narrower than the NLRB’s in one respect: unlike the NLRB, the EEOC “does not

³³² *Id.* at 46681.

³³³ *Id.* at 46696.

³³⁴ See Joshua L. Ditelberg and Stuart Newman, *National Labor Relations Board Proposes New Joint Employer Rule*, Seyfarth Shaw Client Alerts (Sept. 13, 2018), <https://www.seyfarth.com/publications/MA091318-LE>.

³³⁵ After *Browning-Ferris* was appealed to the Court of Appeals for the District of Columbia Circuit, the EEOC filed an *amicus* brief supporting the NLRB’s then-new position. The EEOC explained that the definitions of “employer” are virtually identical in Title VII and the NLRA, and that this, plus those statutes’ shared remedial purpose, “suggests that the joint-employer test should be the same under both laws.” Brief of the United States Equal Employment Opportunity Commission as Amicus Curiae in Support of Respondent/Cross-Petitioner and in Favor of Enforcement at 7, *Browning-Ferris Indus. of Calif. Inc. v. Nat’l Labor Relations Bd.*, Nos.16-1028, 16-1063, 16-1064 (D.C. Cir. Sept. 14, 2016). According to the EEOC, it uses a “flexible joint-employer test because employment discrimination statutes are remedial in nature.” *Id.* at 6. This remedial purpose “stems directly from the [National Labor Relations Act (NLRA)].” *Id.* at 7. This remedial purpose “stems directly from the [National Labor Relations Act (NLRA)].” *Id.*

³³⁶ *Id.* at 5.

³³⁷ *Id.* at 12.

³³⁸ *Id.* at 13.

³³⁹ *Id.* at 14. The EEOC relied on its own administrative decisions to support this assertion. *Id.* (citing *Complainant v. Johnson*, EEOC Doc. No. 0120160989, 2016 WL 1622535, at *3 (EEOC Apr. 14, 2016) (holding that staffing firm clients hold “de facto power to terminate” an employee if they are able to communicate to the staffing firm that they do not wish to continue with the staffing contract and merely communicate that decision to the staffing firm Project Manager, who facilitates the termination); *Rina F. v. McDonald*, EEOC Doc. No. 0120160808, 2016 WL 1729906, at *3 (EEOC Apr. 21, 2016) (considering the fact that employee was interviewed by both contractor and agency, and contractor did not hire Complainant “until it received word from the Agency official”); *Complainant v. McHugh*, EEOC Doc. No. 0120140999, 2014 WL 3697464, at *5 (EEOC July 15, 2014) (considering “whether the Agency indirectly controlled Complainant’s job through the on-site coordinator”); *Lee v. McHugh*, EEOC Doc. No. 0120112643, 2013 WL 393519, at *7 (EEOC Jan. 24, 2013) (considering whether contractor terminated complainant because agency “wanted him fired”)).

inquire into joint-employer status unless there is reason to believe that an entity knew or should have known of discrimination by another entity and failed to take corrective action within its control.”³⁴⁰

Although the EEOC added the complex employment relationship priority to its SEP in 2017, there have been few significant case law developments in this area. This may be starting to change. For example, in *EEOC v. Global Horizons, Inc.*,³⁴¹ the Ninth Circuit revived certain claims against fruit growers in the state of Washington who had contracted with a labor contractor to obtain temporary workers from Thailand. The EEOC brought a lawsuit against the growers and the labor contractor.³⁴² The District Court divided the EEOC’s allegations into two categories: “orchard-related matters,” which referred to working conditions at the orchards themselves, and those involving “non-orchard-related matters,” which referred to things such as housing, meals, transportation, and payment of wages.³⁴³ The District Court held that the EEOC had plausibly alleged that the growers were joint employers of the foreign workers as to orchard-related matters, but not as to non-orchard-related matters. The Ninth Circuit reversed that decision to the extent it held the EEOC had not plausibly alleged joint-employment with respect to non-orchard-related matters.³⁴⁴

According to the District Court, the growers had outsourced the non-orchard-related matters to the labor contractor.³⁴⁵ The Ninth Circuit first noted that it had not yet adopted a test for determining when an entity may be held liable as a joint employer under Title VII. Accordingly, as a matter of first impression, the Ninth Circuit held that it would apply the common law agency test.³⁴⁶ Under that test, the principal guidepost is the element of control, meaning the extent of control that the putative employer may exercise over the details of the work of the putative employee.³⁴⁷ The Ninth Circuit refused to analyze the joint-employment relationship under the test of the Fair Labor Standards Act and the Migrant and Seasonal Agricultural Worker Protection Act because those statutes intentionally expanded the definition of employment beyond the common law understanding.³⁴⁸

The Ninth Circuit then noted that the H-2A program, allowing employers to hire foreign workers for agricultural labor on a temporary or seasonal basis, places the legal obligation to provide foreign guest workers with housing, transportation, and meals on the “employer.” Accordingly, the program “expands the employment relationship between an H-2A ‘employer’ and its workers to encompass

³⁴⁰ Brief of the United States Equal Employment Opportunity Commission as Amicus Curiae in Support of Respondent/Cross-Petitioner and in Favor of Enforcement at 6. n. 2, *supra* note 335. Arguably, this provides some protection to employers, as it makes the “joint employer” determinations by the EEOC a fact-driven issue – particularly when determining the existence of unexercised or indirect control. For example, in *EEOC v. S&B Indus., Inc.*, No. 3:15-CV-0641-D, 2016 WL 7178969, at *1 (N.D. Tex. Dec. 8, 2016), the EEOC asserted an ADA discrimination claim against a company for failure to hire two employees suffering from hearing impairments. The District Court held that there was a genuine issue of material fact regarding whether S&B was a joint employer along with its staffing agency. For instance, aside from supervising workers on the production floor, the District Court concluded that the evidence suggested that S&B also had the “right to terminate and end the assignment of specific workers at S&B.” *Id.* at *6. “This evidence,” the District Court explained, “is sufficient to raise a genuine issue of material fact on the question of whether, under the ‘joint employer’ test, S&B and [the staffing company employer] were . . . joint employers.” *Id.* at *8.

³⁴¹ *EEOC v. Global Horizons, Inc.*, 915 F.3d 631 (9th Cir. 2019).

³⁴² *Id.* at 633.

³⁴³ *Id.*

³⁴⁴ *Id.* at 633-34.

³⁴⁵ *Id.* at 637.

³⁴⁶ *Id.* at 638.

³⁴⁷ *Id.* (citing *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 448 (2003)). The Ninth Circuit quoted the factors articulated by the Supreme Court in *Nationwide Mutual Insurance Co. v. Darden*, for determining joint-employer liability:

the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long to work; the method of payment; the hired party’s role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

503 U.S. 318, 323-24 (1992).

³⁴⁸ *Global Horizons, Inc.*, 915 F.3d at 639.

housing, meals, and transportation, even though those matters would ordinarily fall outside the realm of the employer's responsibility."³⁴⁹ Accordingly, because the H-2A program itself places the obligation of providing housing, meals, transportation, and wages on the owner of the farm where the temporary foreign workers work, the growers therefore retained control over those aspects of employment: "[t]he power to control the manner in which housing, meals, transportation, and wages were provided to the Thai workers, even if never exercised, is sufficient to render the Growers joint employers as to non-orchard-related matters."³⁵⁰

In addition, in July 2019, the EEOC obtained a settlement on behalf of a class of aggrieved individuals against a franchisor and franchisee, asserting liability on a theory of joint-employer status.³⁵¹ According to the EEOC, all defendants "generally controlled the terms and condition of the employment of the Charging Parties and other aggrieved individuals."³⁵² Specifically, the EEOC alleged that the franchisor "had control over . . . the employment, recruitment, or hiring of employees of [franchisees]; knew or should have known of the below described unlawful employment actions; and had the power to prevent and/or correct the unlawful employment actions."³⁵³

³⁴⁹ *Id.* at 640.

³⁵⁰ *Id.* at 641.

³⁵¹ See Complaint at 3, *EEOC v. Tapioca Express, Inc.*, No. 3:18-01217 (S.D. Cal. June 16, 2018).

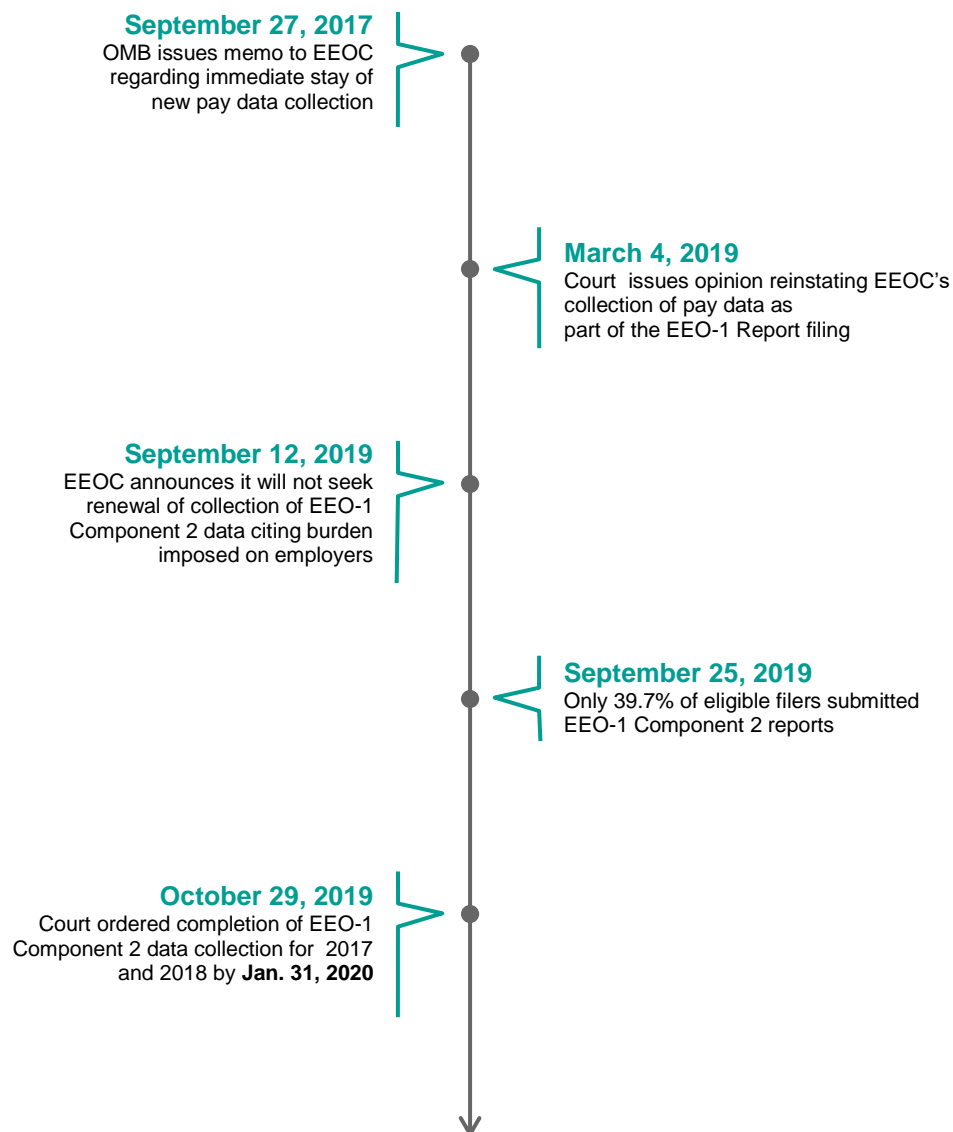
³⁵² *Id.* ¶ 11.

³⁵³ *Id.*

Priority #4 - Ensuring Equal Pay

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

Tracking Recent Developments In Pay Data Collection



E. Ensuring Equal Pay Protections For All Workers

The EEOC's SEP states that the EEOC will continue to focus on compensation systems and practices that discriminate based on sex under the Equal Pay Act ("EPA") and Title VII.³⁵⁴ Most of the litigation involving equal pay issues has revolved around sex-based discrimination. However, the EEOC stressed that it will also focus on compensation systems and practices that discriminate on any protected basis, such as race, ethnicity, age, or individuals with disabilities.³⁵⁵

The EPA has been perceived as the EEOC's primary statutory weapon for combating sex-based pay discrimination. The EPA was enacted by Congress in 1963, one year before Title VII of the Civil Rights Act of 1964.³⁵⁶ The EPA prohibits employers from discriminating "between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which [it] pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions" ³⁵⁷ The EPA therefore overlaps with Title VII, which prohibits a broader range of discrimination on the basis of sex, including wage discrimination, and also prohibits wage discrimination against other protected groups.³⁵⁸

1. Changes To The Collection Of EEO-1 Data

Arguably, the most significant step the EEOC has taken in the last few years relating to its enforcement of the federal EPA is the changes that it tried to make to employers' EEO-1 reporting obligations. The EEO-1 Report is a survey document that has been mandated for more than 50 years. Employers with more than 100 employees, and federal contractors or subcontractors with more than 50 employees, are required to collect and provide to the EEOC demographic information (gender, race, and ethnicity) in each of ten job categories.³⁵⁹ On February 1, 2016, the EEOC

³⁵⁴ See U.S. Equal Employment Opportunity Commission Strategic Enforcement Plan FY 2017 - 2021, <https://www.eeoc.gov/eeoc/plan/sep-2017.cfm>.

³⁵⁵ *Id.*

³⁵⁶ *Id.*

³⁵⁶ Pay equity is also one of the most pressing topics on a statewide level, with numerous states passing their own equal pay laws and/or salary history bans to supplement the EPA. In recent years, California, New York, Massachusetts, Maryland, Oregon, New Jersey, Connecticut, Hawaii, Washington, Vermont, Delaware, Illinois, and Puerto Rico passed equal pay laws.. See Christine Hendrickson, Annette Tyman, Rhandi Childress Anderson, *Illinois – the Newest State to Toughen its Equal Pay Laws with a Robust Salary History Ban*, SEYFARTH SHAW LEGAL UPDATE (Aug. 1, 2019), <https://www.seyfarth.com/news-insights/illinois-the-newest-state-to-toughen-its-equal-pay-laws-with-a-robust-salary-history-ban.html>; Christine Hendrickson & Annette Tyman, *Equal Pay Day 2018: Introducing Seyfarth's Trends and Developments in Pay Equity Litigation Report and the 2nd Annual 50-State Pay Equity Desktop Reference*, SEYFARTH SHAW CLIENT ALERTS (April 11, 2018), <https://www.seyfarth.com/publications/MA041118-LE>; Christine Hendrickson, Annette Tyman, Pamela L. Vartabedian, Michael L. Childers, Chantelle C. Egan, *The Pay Equity March on the West Coast Begins: Oregon Signs Expansive Equal Pay Law and San Francisco Considers Salary History Ban*, SEYFARTH SHAW CLIENT ALERTS (June 8, 2017), <http://www.seyfarth.com/publications/OMM060817-LE2>.

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

³⁵⁸ Title VII makes it unlawful for an employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment," or "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee," because of such individual's sex. See 42 U.S.C. § 2000e-2(a)(1)-(2).

³⁵⁹ See Current EEO-1 Report, available at <https://www.eeoc.gov/employers/eeo1survey/upload/eeo1-2.pdf>.

proposed changes to the EEO-1 report, which would have required more detailed reporting obligations; specifically, data on employees' W-2 earnings and hours worked.³⁶⁰

The EEOC's proposed changes came under fierce opposition by pro-business groups.³⁶¹ On August 29, 2017, the EEOC announced that the OMB, per its authority under the Paperwork Reduction Act, immediately stayed the EEOC's pay data collection components of the EEO-1 Report that was to become effective on March 31, 2018.³⁶² The next day, the EEOC advised employers to submit the EEO-1 Report used in previous years by the March 31, 2018 deadline.³⁶³

Then, on March 4, 2019, in *National Women's Law Center v. Office of Management and Budget*,³⁶⁴ the U.S. District Court for the District of Columbia held that the OMB's stay was unlawful. The OMB justified its stay based on the fact that the data file specifications that employers were to use in submitting EEO-1 data were not contained in the Federal Register notices.³⁶⁵ According to the OMB, this meant that the public was not given an opportunity to provide comment on the method by which employers were to submit data and that the EEOC's burden estimates did not account for the use of those data specifications. But the District Court held that the data file specifications merely explained how to format a spreadsheet, they did not change the content of the information collected: "[t]he government's argument therefore focuses on a technicality that did not affect the employers submitting the data."³⁶⁶ With respect to the burden estimates, the District Court noted that the OMB had not found that the data file would change the EEOC's initial estimates, just that it *may* do so, an assertion the Court said was "unsupported by any analysis."³⁶⁷ Ultimately, the District Court vacated the stay, holding that it "totally lacked the reasoned explanation that the APA requires."³⁶⁸

The 2018 EEO-1 reporting period opened on March 18, 2019. The deadline for employers to submit reports was May 31, 2019. However, when the EEOC opened the 2018 survey for employer

³⁶⁰ See U.S. Equal Employment Opportunity Commission, *Agency Information Collection Activities: Revision of the Employer Information Report (EEO-1) and Comment Request*, available at <https://www.gpo.gov/fdsys/pkg/FR-2016-02-01/pdf/2016-01544.pdf>.

³⁶¹ The U.S. Chamber of Commerce in February 2017 asked the Office of Management and Budget ("OMB") to rescind its 2016 approval of the EEOC's plan. See U.S. Chamber of Commerce, *Request for Review; EEOC's Revision of the Employer Information Report*, available at <http://src.bna.com/mFi>. The Equal Employment Advisory Council, a Washington, DC-based association of large employers, followed suit a month later and submitted a letter seeking the OMB's reconsideration. See Equal Employment Advisory Council, *Review of the Equal Employment Opportunity Commission's Employer Information (EEO-1) Report (OMB Control Number 3046-0007)*, available at <http://src.bna.com/nUp>. Three weeks later, Senators Lamar Alexander (R-Tennessee) and Pat Roberts (R-Kansas) wrote another letter to the OMB urging it to rescind the new requirements. See Letter from Lamar Alexander, Chairman of Committee on Health, Education, Labor and Pensions, & Pat Roberts, United States Senator, available at <http://src.bna.com/nTJ>. In their letter, the Senators called the revisions to the EEO-1 report "misguided" and said that "[t]hese revision will place significant paperwork, reporting burden and new costs on American businesses, and will result in fewer jobs and higher prices for American consumers." *Id.* The letter also reiterated concerns regarding the costs associated with compliance. The EEOC projected compliance costs to be \$53.5 million and estimated it would take employers approximately 1.9 million hours to complete the report. *Id.* Citing the U.S. Chamber of Commerce's estimates, the Senators projected costs to be far higher – \$400.8 million – and estimated that it would cost employers and federal contractors \$1.3 billion annually. *Id.*

³⁶² See Annette Tyman, Lawrence Z. Lorber, Michael L. Childers, *Breaking News: Revised EEO-1 "Component 2" Stayed Effective Immediately; Component 1 Still in Effect*, SEYFARTH SHAW CLIENT ALERTS (Aug. 29, 2017), <http://www.seyfarth.com/publications/OMM082917-LE2>.

³⁶³ *Id.* Then Acting-Commissioner Lipnic further stated: "The EEOC remains committed to strong enforcement of our federal equal pay laws, a position I have long advocated. Today's decision will not alter EEOC's enforcement efforts Going forward, we at the EEOC will review the order and our options. I do hope that this decision will prompt a discussion of other more effective solutions to encourage employers to review their compensation practices to ensure equal pay and close the wage gap." See U.S. Equal Employment Opportunity Commission, *What You Should Know: Statement of Acting Chair Victoria A. Lipnic about OMB Decision on EEO-1 Pay Data Collection*, <https://www.eeoc.gov/eeoc/newsroom/wysk/eeo-1-pay-data.cfm>.

³⁶⁴ *Nat'l Women's Law Ctr. v. Office of Mgmt. & Budget*, 358 F. Supp. 3d 66 (D.D.C. Mar. 4, 2019).

³⁶⁵ *Id.* at 87.

³⁶⁶ *Id.*

³⁶⁷ *Id.* at 88.

³⁶⁸ *Id.* at 90.

reporting, the EEOC website stated that it was open to receive the data that was required under the old regulations. With respect to the new reporting obligations, the EEOC stated that it is “working diligently on next steps,” and would “provide further information as soon as possible.”³⁶⁹ Plaintiffs immediately requested a status hearing with the Court to hear from the OMB and the EEOC regarding their plan to implement the Court’s order with respect to the new reporting obligations.³⁷⁰ The District Court issued an order on April 25, 2019 that, among other things, ordered the EEOC to take all necessary steps to complete the EEO-1 Component 2 data collections for calendar years 2017 and 2018 by September 30, 2019, to issue a statement on its website to that effect, and to make periodic reports concerning its efforts to implement the data collection process.³⁷¹

The order also stated that the EEO-1 Component 2 data collection would not be deemed complete until the percentage of EEO-1 reporters that have submitted their reports equals or exceeds the mean percentage of EEO-1 reporters for the past four reporting years.³⁷² After the September 30, 2019 deadline for submitting reports had passed, the parties disputed whether the EEOC had met this threshold. The Court held that it had not. On October 29, 2019, the District Court disagreed with how the EEOC had calculated the mean percentage of EEO-1 reports submitted from previous years.³⁷³ The Court ordered that “the EEOC must continue to take all steps necessary to complete the EEO-1 Component 2 data collection for calendar years 2017 and 2018 by January 31, 2020.”³⁷⁴

The end result is that the EEOC will likely be deemed to have completed its Court-ordered obligations to collect EEO-1 Component 2 data shortly after January 31, 2020. Barring any further developments with this lawsuit, that will likely bring an end to employers’ obligations to collect and submit this type of data. On September 12, 2019, the EEOC issued a Paperwork Reduction Act Notice, wherein it stated that it was planning to seek approval under the Paperwork Reduction Act to continue administering Component 1 of the EEO-1 survey, but that it was not planning to continue using the EEO-1 Report to collect Component 2 data information.³⁷⁵ The public comment period regarding that proposed change closed on November 12, 2019.³⁷⁶ On November 20, 2019, the EEOC held a public hearing regarding those proposed changes.³⁷⁷ When all is said and done, it seems likely that employers will have seen the last of this issue for the foreseeable future, at least from the data collection standpoint.³⁷⁸ EEOC will have in its possession two full years of detailed pay data. What they choose to do with that data, if anything, may or may not influence how the EEOC pursues its equal pay enforcement priority in the coming years.

³⁶⁹ See Pls.’ Req. Status Conference at 2-3, *Nat’l Women’s Law Ctr.*, No. 17-CV-2458 (D.D.C. Mar. 18, 2019), ECF No. 47.

³⁷⁰ *Id.* at 1.

³⁷¹ Order, *Nat’l Women’s Law Ctr.*, No. 17-CV-2458 (D.D.C. Apr. 25, 2019), ECF No. 71; see also Press Release, U.S. Equal Employment Opportunity Commission, EEOC Opens Calendar Years 2017 and 2018 Pay Data Collection (July 15, 2019), <https://www.eeoc.gov/eeoc/newsroom/release/7-15-19.cfm>.

³⁷² Order, *Nat’l Women’s Law Ctr.*, No. 17-CV-2458 (D.D.C. Apr. 25, 2019), ECF No. 71.

³⁷³ Order, *Nat’l Women’s Law Ctr.*, No. 17-CV-2458 (D.D.C. Oct. 29, 2019), ECF No. 91.

³⁷⁴ *Id.* at 3.

³⁷⁵ Paperwork Reduction Act Notice, 84 Fed. Reg. 48138 (Sept. 12, 2019); see also Press Release, U.S. Equal Employment Opportunity Commission, EEOC Holds Public Hearing on Proposed EEO-1 Report Amendments (Nov. 4, 2019), <https://www.eeoc.gov/eeoc/newsroom/release/11-4-19a.cfm>.

³⁷⁶ Paperwork Reduction Act Notice, 84 Fed. Reg. 48138 (Sept. 12, 2019).

³⁷⁷ Press Release, U.S. Equal Employment Opportunity Commission, Experts Examine the Efficacy of EEOC’s Pay Data Collection Model (Nov. 20, 2019), <https://www1.eeoc.gov/eeoc/newsroom/release/11-20-19.cfm?renderforprint=1>.

³⁷⁸ However, the EEOC and OMB have appealed the issue to the D.C. Circuit, arguing, among other things, that District Court exceeded its authority in directing EEOC to proceed with the collection in a particular manner. See Brief for Appellants at 2, *Nat’l Women’s Law Ctr. v. Office of Mgmt. & Budget*, No. 19-5130 (D.C. Cir. Aug. 19, 2019). It is unclear what impact the appeal could have, if successful, on the EEOC’s ability to use or rely on data it had no authority collect.

2. Recent Developments In Equal Pay Act Litigation

Lawsuits brought under the Equal Pay Act tend to be highly fact-driven and therefore notoriously difficult for employers to dispense with through motion practice prior to trial. Several recent decisions are illustrative of this trend. For example, in *EEOC v. The George Washington University*,³⁷⁹ the District Court for the District of Columbia denied an employer's motion to dismiss even though the complaint at issue did not explicitly allege how the positions at issue were equal with respect to skill, effort, and responsibility. In that case, the EEOC had brought a lawsuit on behalf of a female university Director of Athletics, who alleged that a male colleague was treated more favorably and given greater opportunities because of his sex.³⁸⁰

The University moved to dismiss the complaint. However, the District Court held that the complaint "straightforwardly pleads that [plaintiff] was paid less as Executive Assistant than [comparator] was paid as a Special Assistant for substantially the same job responsibilities."³⁸¹ The Court held that there was no reason for the complaint to get into the equal skill, effort, and responsibility, or other similar working conditions of those two positions, because at the motion to dismiss stage, a court cannot dismiss a complaint even if the plaintiff did not plead the elements of a prima facie case.³⁸²

Similarly, in *EEOC v. Enoch Pratt Free Library*,³⁸³ the U.S. District Court for the District of Maryland denied an employer's motion to dismiss an EPA lawsuit brought by the EEOC as a representative action on behalf of female librarian supervisors.³⁸⁴ Then, on October 30, 2019, the District Court also denied cross-motions for summary judgment.³⁸⁵ With respect to the motion filed by the EEOC, the District Court found that genuine issues of material fact persist regarding elements of the EEOC's prima facie case. In particular, evidence showed that library supervisors perform a wide variety of job duties across various library branches: "Overall, the branches generally have varying responsibilities in light of their different physical plants, different clientele, and different community resources. . . . A factfinder should therefore assess whether the duties performed by [supervisors] are sufficiently similar to establish a prima facie case of unequal pay for equal work."³⁸⁶

With respect to the employer's motion, the District Court applied the reasoning of the Fourth Circuit's decision in *EEOC v. Maryland Insurance Administration*.³⁸⁷ In that case, the EEOC alleged that the employer paid three former female fraud investigators less than it paid four former fraud investigators with comparable credentials and experience who were men.³⁸⁸ The Fourth Circuit held

³⁷⁹ *EEOC v. George Washington Univ.*, No. 17-CV-1978, 2019 WL 2028398 (D.D.C. May 8, 2019).

³⁸⁰ *Id.* at *1. According to the complaint, the University advertised a new position in its athletics department, but plaintiff had been informed that the job was off-limits to her because the University had already decided to hire her male coworker. The position paid far more than plaintiff's position. *Id.*

³⁸¹ *Id.* at *4.

³⁸² *Id.* at *5. The District Court also held that an Equal Pay Act claim is not subject to the EEOC's conciliation requirement. *Id.* at *8.

³⁸³ *EEOC v. Enoch Pratt Free Library*, No. 17-CV-2860, 2019 WL 5593279 (D. Md. Oct. 30, 2019).

³⁸⁴ *EEOC v. Enoch Pratt Free Library*, No. 17-CV-2860, 2018 U.S. Dist. LEXIS 13297 (D. Md. Aug. 2, 2018). The employer argued that the EEOC did not include sufficient details regarding the job responsibilities of the male librarian supervisors and the female librarian supervisors to determine whether they were performing equal work. *Id.* at *5. But the Court held that the EEOC had pled that librarian supervisors required the same educational and experiential qualifications, shared the same core duties of operating a branch library, managed moderate-sized staffs, and performed accompanying administrative duties. *Id.* at *6. From this, the Court held that it was reasonable to infer that managing different branch libraries within the same city required the same substantive responsibilities in similar working conditions: "the plaintiff here did assert the job responsibilities of the employees at issue. The factor-by-factor comparison encouraged by the defendants is not necessary to state a plausible claim sufficient to survive a motion to dismiss." *Id.* at *8.

³⁸⁵ *Enoch Pratt Free Library*, 2019 WL 5593279.

³⁸⁶ *Id.* at *5.

³⁸⁷ *EEOC v. Md. Ins. Admin.*, 879 F.3d 114, 124 (4th Cir. 2018).

³⁸⁸ *Id.* at 129. The EEOC presented evidence that while female investigators ended up earning \$45,503 to \$50,300 per year, the male investigators earned from \$47,194 to \$51,561 per year. *Id.*

that the EPA requires “that an employer submit evidence from which a reasonable factfinder could conclude not simply that the employer's proffered reasons *could* explain the wage disparity, but that the proffered reasons do *in fact* explain the wage disparity.”³⁸⁹ The employer argued that it used the state's Standard Salary Schedule, which classifies each position to a grade level and assigns each new hire to a step within that grade level. The Fourth Circuit rejected this defense because it found that the employer exercised discretion each time it assigns a new hire to a specific step and salary range based on its review of the hire's qualifications and experience.³⁹⁰

Similarly, in *Enoch Pratt Free Library*, the employer pointed out that it used a Managerial and Professional Society Salary Policy (“MAPS”) to determine compensation for newly hired library supervisors.³⁹¹ According to the employer, that policy is facially neutral, and clearly permitted the employer to pay the starting salaries that it did.³⁹² The District Court held, however, that that policy did not necessarily compel any specific salary to be awarded to a new hire.³⁹³ The MAPS policy left open the possibility that the employer could apply discretion with respect to setting starting salaries.³⁹⁴ Applying *Maryland Insurance Administration*, the District Court concluded that “[the EEOC's comparator] was hired at a rate not only higher than the female [library supervisors] represented by the EEOC, but also significantly above the salary he had received during his first tenure at [employer]. Given these facts, combined with the inherent discretion within the MAPS policy, genuine factual questions exist about how defendants arrived at [the comparator's] salary.”³⁹⁵

Finally, in *EEOC v. Denton County*,³⁹⁶ the EEOC brought an action on behalf of a physician, alleging that her employer discriminated against her based on her gender in regards to pay and promotions in violation of Title VII of the Civil Rights Act and the Equal Pay Act. The parties cross-moved for summary judgment. The EEOC's motion argued that there was no genuine issue of material fact that the EEOC has met its prima facie burden under the EPA and that the employer had failed to establish one of its statutory defenses; namely, that the salary difference was due to a factor other than sex.³⁹⁷ Defendant cross-moved, arguing that the EEOC could not establish its prima facie case and that it had established its affirmative defense.³⁹⁸ The Court refused to grant either motion with respect to this claim, saying it was “not convinced that [defendant] or the EEOC has met their respective burdens demonstrating that there is no material issue of fact as to the EEOC's claim for violation of the Equal Pay Act entitling it to judgment as a matter of law.”³⁹⁹

³⁸⁹ *Id.* The Fourth Circuit also noted that the burden on the employer “necessarily is a heavy one.” *Id.* at 120.

³⁹⁰ *Id.* The employer also argued that the pay disparities were justified by the qualifications and experience of the comparators. This defense, too, failed. The Fourth Circuit emphasized that a viable affirmative defense under the EPA requires more than a showing that a factor other than sex could explain or may explain the salary disparity. Rather, the Fourth Circuit stated that the EPA requires that a factor other than sex actually explains the salary disparity. *Id.* at 123.

³⁹¹ *Enoch Pratt Free Library*, 2019 WL 5593279, at *3.

³⁹² *Id.* at *6.

³⁹³ *Id.*

³⁹⁴ *Id.*

³⁹⁵ *Id.* at *7.

³⁹⁶ *EEOC v. Denton Cnty.*, No. 4:17-CV-614, 2018 U.S. Dist. LEXIS 175794 (E.D. Tex. Oct. 12, 2018).

³⁹⁷ *Id.* at *21.

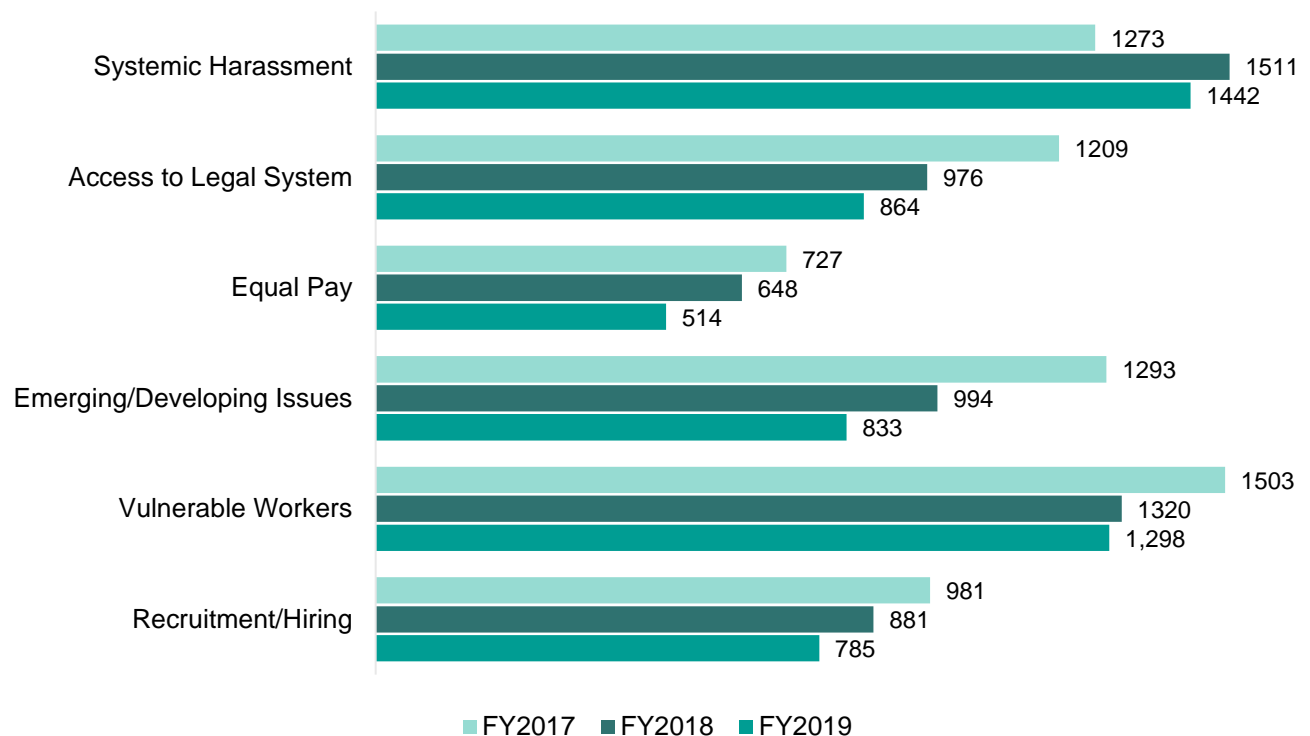
³⁹⁸ *Id.*

³⁹⁹ *Id.* at *22.

Priority #5 - Preserving Access To The Legal System

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

EEOC Public Outreach Events FY 2017 – FY 2019



F. Preserving Access To The Legal System

The Strategic Enforcement Plan also makes it a strategic objective to combat and prevent employment discrimination through the application of the EEOC's law enforcement authorities, be it through investigation, conciliation, litigation, or federal oversight. This objective is reflected in the EEOC's aggressive assertion of retaliation claims against employers allegedly obstructing employees' efforts to participate in EEOC proceedings or otherwise oppose discrimination.

1. Outreach And Education And Regulatory Guidance

In its FY 2019 Congressional Budget Justification, the EEOC indicated that one of its strategic objectives is to prevent employment discrimination through education and outreach. This was reiterated in the inaugural Agency Financial Report released on November 15, 2019.⁴⁰⁰ The EEOC conducts both free and fee-based events targeting particularly vulnerable communities that may be unfamiliar with employment law protections (i.e. low-skilled workers, new immigrant workers, etc.).

This year, the White House launched the Initiative on Historically Black Colleges and Universities ("WHIHBCU"), and the Initiative on Asian Americans and Pacific Islanders ("WHIAPPI"). In conjunction with the White House programs, the EEOC hosted 76 outreach events in concert with WHIHBCU programs, drawing in 6,987 attendees, and 142 WHIAPPI events with 22,526 attendees. Further, roughly one third of the total outreach targeted vulnerable workers and underserved communities, amounting to 1,298 outreach events involving 112,410 participants.

Other groups that the EEOC specifically seeks for outreach and training events include immigrant, farm worker communities and small businesses. Fledgling businesses lacking full-time human resources support and capabilities stand to benefit from the Commission's programming. During FY 2019, 33,927 small business representatives participated in some form of EEOC training or outreach programming, comprising 13% of the Commission's total outreach. Further, ongoing discussions and educational efforts are done in conjunction with the Small Business Administration's Office of the National Ombudsman conducting roundtable discussions nationally with institutions of all scales.

The EEOC's Enforcement Guidance on Retaliation states that retaliation occurs when an employer takes a materially adverse action because an individual has engaged, or may engage, in protected activity that is in furtherance of Title VII, the Age Discrimination in Employment Act, the Americans with Disabilities Act, Section 501 of the Rehabilitation Act, the Equal Pay Act, or Title II of the Genetic Information Nondiscrimination Act.⁴⁰¹ Retaliation claims premised on EEO-related activity are comprised of three elements: (1) protected activity through "participation" in an EEO process or "opposition" to discrimination; (2) materially adverse action taken by the employer; and (3) the requisite level of causal connection between the protected activity and the materially adverse action.⁴⁰²

⁴⁰⁰ U.S. Equal Employment Opportunity Commission, Fiscal Year 2019 Agency Financial Report, <https://www.eeoc.gov/eeoc/plan/upload/2019afr.pdf>.

⁴⁰¹ See U.S. Equal Employment Opportunity Commission, Enforcement Guidance on Retaliation and Related Issues, (Aug. 25, 2016), <https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm>. Retaliation includes not only adverse action taken against an employee, but the threat of adverse action against an employee who has not yet engaged in protected activity for the purpose of discouraging him or her from doing so. See, e.g., *Beckel v. Wal-Mart Assocs., Inc.*, 301 F.3d 621, 624 (7th Cir. 2002) (holding that threatening to fire plaintiff if she sued "would be a form of anticipatory retaliation, actionable as retaliation under Title VII"); *Sauers v. Salt Lake Cty.*, 1 F.3d 1122, 1128 (10th Cir. 1993) ("Action taken against an individual in anticipation of that person engaging in protected opposition to discrimination is no less retaliatory than action taken after the fact.")

⁴⁰² See Enforcement Guidance on Retaliation and Related Issues, *supra* note 401.

First, protected activity generally consists of either “participation” in an EEO process or the reasonable “opposition” to discrimination.⁴⁰³ These two types of protected activity arise directly from two distinct statutory retaliation clauses that differ in scope.⁴⁰⁴ Second, the EEOC defines a “materially adverse action” as anything that could be reasonably likely to deter protected activity, even where such activity is not severe or pervasive and does not have a tangible effect on employment. This includes one-off incidents and warnings.⁴⁰⁵ Lastly, a materially adverse action does not violate EEO laws unless there is a causal connection between the action and the protected activity. The Enforcement Guidance recognizes Supreme Court precedent requiring that the complaining party show that the employer would not have taken the adverse action, “but for” a retaliatory motive.⁴⁰⁶

2. Recent EEOC Amicus Briefs Highlight Agency Priorities

This year the EEOC filed three amicus briefs in retaliation cases. Those briefs provide insight into the EEOC’s focus on correcting what it considers to be the misinterpretation and misapplication of the concepts of “protected activity” and “materially adverse actions” under antidiscrimination laws, as provided in the agency’s Guidance. For example, in *McAllister v. Curtis L. Brunk*, the EEOC filed an amicus brief, in support of neither party, to address the District Court’s application and construction of various legal standards.⁴⁰⁷ First, the EEOC’s brief clarified that the reasonable belief standard applies only to the opposition clause and does not apply to the participation clause,⁴⁰⁸ which protects the filing of a discrimination charge with the EEOC from retaliation, whether or not the charge is ultimately found meritorious.⁴⁰⁹ Second, the EEOC clarified that the District Court incorrectly analyzed plaintiff’s adverse action retaliation claim under the standard applied to substantive discrimination claims brought under Title VII, rather than the broader and more liberal “adverse action” standard applied to Title VII retaliation claims, as directed by recent Supreme Court precedent.⁴¹⁰ Lastly, the EEOC addressed the District Court’s incorrect analysis of joint employer status to determine whether a staffing company could be liable for negligently allowing a third party, its client, to discriminate against a staffing company employee at the client’s worksite. Instead, the

⁴⁰³ *Id.*

⁴⁰⁴ *Id.* Participation in an EEO process is broadly protected, regardless of whether the EEO allegation is based on a reasonable, good faith belief that a violation occurred, and narrowly defined to include raising a claim, testifying, assisting, or participating *in any manner* in an investigation, proceeding or hearing under the EEO laws. On the other hand, opposition activity encompasses a broad range of activities by which an individual opposes any practice made unlawful by the EEO statutes. Yet, opposition activity is limited to those who act with a reasonable good faith belief that a potential EEO violation exists and who act in a reasonable manner to oppose it. Opposition to discrimination can be explicit or implicit and need not include any specific words.

⁴⁰⁵ *Id.* (Actions taken against a third party who is sufficiently close to the complaining employee, in that the individual is in the employee’s “zone of interest,” are considered materially adverse actions.) See also, Brief for Equal Employment Opportunity Commission as Amici Curiae Supporting Neither Party at 15, *McAllister v. Curtis L. Brunk*, No. 18-17393 (9th Cir.) (“Failure to investigate can also constitute a retaliatory adverse action under certain circumstances.”).

⁴⁰⁶ *Id.* (For retaliation claims against private sector employers and state and local government employers). By contrast, the “motivating factor” standard, which requires that retaliation is a motivating factor behind an adverse action, is applied to Title VII and ADEA retaliation claims against federal sector employers. *Id.* Evidence of causation may include suspicious timing, oral or written statements, comparative evidence of similarly situated employees treated differently, inconsistent or shifting explanations for an adverse action, and any other evidence that, when viewed together, demonstrates retaliatory intent. An employer may defeat a retaliation claim by establishing that it was unaware of the protected activity or by demonstrating legitimate non-retaliatory reasons for the challenged action.

⁴⁰⁷ Brief for Equal Employment Opportunity Commission as Amici Curiae Supporting Neither Party, at 1, 14-17, *McAllister v. Curtis L. Brunk*, No. 18-17393 (9th Cir.). The lower Court ruled that both the participation and opposition clauses require a plaintiff to demonstrate a reasonable belief that the employer’s conduct violated Title VII. *Id.* at 7.

⁴⁰⁸ *Id.* at 12-13 (compiling majority of circuit opinions in agreement).

⁴⁰⁹ *Id.* at 10-11. In the Ninth Circuit, “an employer may not retaliate for the filing or threatened filing of an EEOC charge regardless of whether the charging party reasonably believes that he is complaining about a violation of Title VII.” *Id.* at 9.

⁴¹⁰ The EEOC argued that a retaliation plaintiff need only show “that a reasonable employee would have found the challenged action materially adverse, ‘which in this context means it might well have dissuaded a reasonable worker from making or supporting a charge of discrimination.’” *Id.* at 13 (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006)) (citations and some internal quotation marks omitted).

EEOC argued, the staffing company could be held liable, according to ordinary Title VII principles,⁴¹¹ “if it knew or should have known of the discrimination and failed to take reasonable corrective measures within its control.”⁴¹²

The EEOC also filed an amicus curiae brief in *Stancu v. Hyatt Corporation/Hyatt Regency Dallas*.⁴¹³ In that brief, the EEOC argued that the District Court incorrectly granted summary judgment on the plaintiff’s retaliation claim for failure to show an “ultimate employment decision.”⁴¹⁴ The EEOC explained that the “ultimate employment decision” standard applies to substantive discrimination claims, and not to retaliation claims.⁴¹⁵ Most importantly, the EEOC argued, in applying the “ultimate employment decision” test, the lower Court misapplied the Supreme Court’s precedent in the retaliation context, which dictates that a materially adverse action is one that “might well have dissuaded a reasonable worker from making or supporting a charge of discrimination.”⁴¹⁶

The EEOC filed a third amicus brief in *Gogel v. Kia Motors Manufacturing of Georgia, Inc.*⁴¹⁷ to address the District Court’s decision to grant summary judgment to defendant-employer, Kia, on an employee’s retaliation claim. The EEOC argued, among other things, that a jury could find that the employee engaged in *protected participation* when she filed an EEOC charge, as well as *protected opposition* when complaining of sex discrimination to managers and assisting a colleague with an EEOC charge by providing the name of an attorney.⁴¹⁸ The EEOC argued that the termination is actionable retaliation even though based on a mistaken belief that the employee assisted another employee in filing an EEOC charge.⁴¹⁹ In that same vein, the EEOC argued that the “honest belief” doctrine applied by the lower Court does not apply here, as the employer terminated the employee exclusively because it believed (albeit, mistakenly) that she engaged in protected activity: “assisting a co-worker with filing an EEOC charge.”⁴²⁰

⁴¹¹ *Id.* at 16-17 (noting that “the negligence standards governing liability for third-party discrimination and liability for discrimination by a joint employer are identical.”).

⁴¹² *Id.* at 16. (citing *Freitag v. Ayers*, 468 F.3d 528, 538 (9th Cir. 2006)).

⁴¹³ Brief of the Equal Employment Opportunity Commission as Amicus Curiae in Support of Appellant and in Favor of Reversal, at *1-2, *Stancu v. Hyatt Corporation/Hyatt Regency Dallas*, No. 18-11279, 2019 WL 1013132 (5th Cir.), appealed from No. 3:17-CV-675 and 3:17-CV-2918 (N.D. Tex.), affirmed by *Stancu v. Hyatt Corporation/Hyatt Regency Dallas*, 2019 WL 5390629, at *4 n.1 (5th Cir. Oct. 21, 2019) (finding that plaintiff’s retaliation claims failed, even when applying the correct adverse action standard advocated by the EEOC).

⁴¹⁴ Brief for EEOC, at *4-5, *Stancu*. The District Court adopted the magistrate judge’s interpretation of the adverse action prong that was said to require “an ‘ultimate employment decision’ or its factual equivalent,” which “affects the terms and conditions of employment . . . such as hiring, firing, demoting, promoting, granting leave, and compensating.” *Id.* at *5 (internal citations omitted).

⁴¹⁵ *Id.* at *6.

⁴¹⁶ *Id.*, at *8-9 (citing *Burlington Northern*, 548 U.S. at 68).

⁴¹⁷ En Banc Brief of the U.S. Equal Employment Opportunity Commission as Amicus Curiae in Support of Plaintiff-Appellant and Reversal, *Gogel v. Kia Motors Mfg. of Ga., Inc.*, No. 16-16850 (11th Cir.), appealed from, No. 3:14-CV-00153 (N.D. Ga.), granting rehearing en banc, 926 F.3d 1290 (11th Cir. June 17, 2019).

⁴¹⁸ *Id.* at *20-22. The EEOC also clarified that Gogel’s assistance of her co-worker in filing an EEOC charge, as alleged by Kia, would constitute protected participation and protected opposition under Title VII. *Gogel*, at *21-*22 (“supporting another employee in reporting discrimination is protected opposition”).

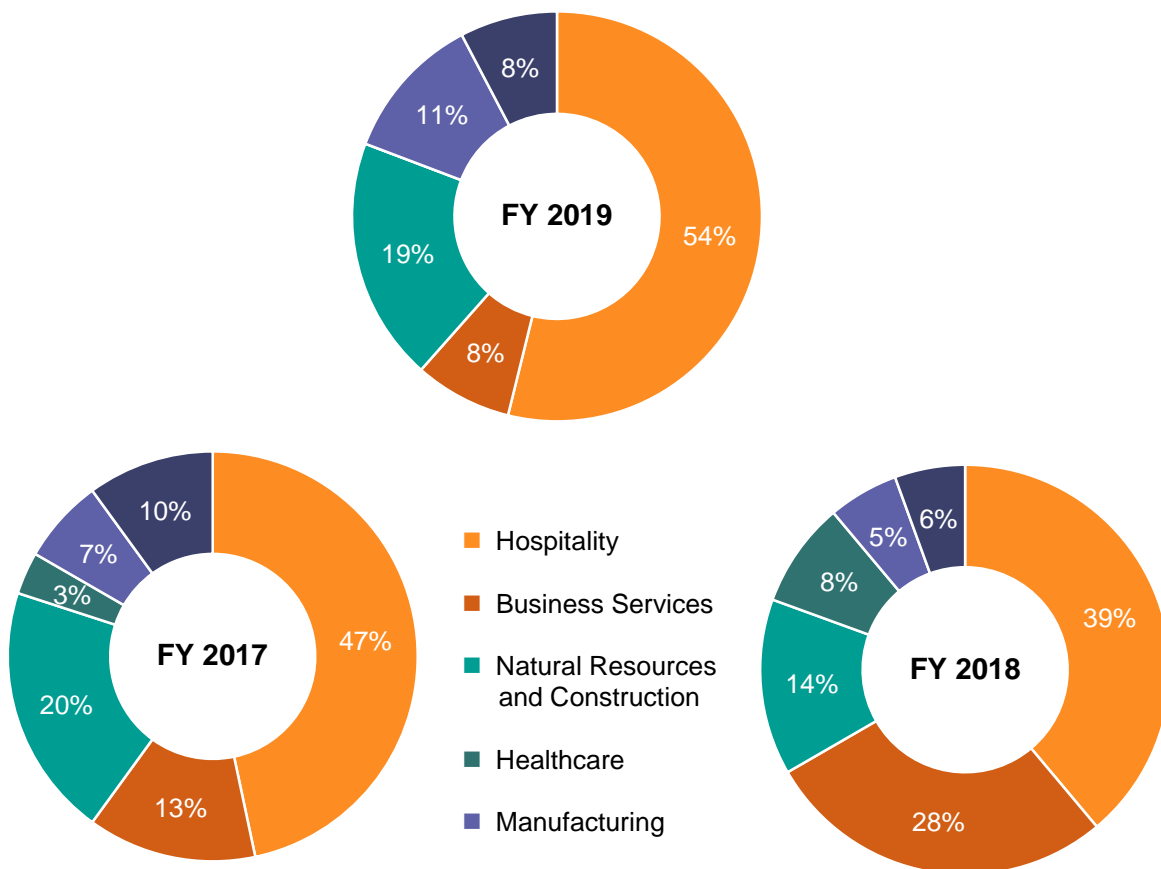
⁴¹⁹ *Id.* at *22-23 (“The EEOC argued that “an employer’s termination of an employee based on its mistaken belief that the employee engaged in protected conduct constitutes a valid basis for a retaliation claim.”).

⁴²⁰ *Id.* at *27-28.

Priority #6 - Preventing Systemic Harassment

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

#MeToo Lawsuits by Industry FY 2017 – FY 2019



G. Preventing Harassment

1. EEOC Operating In The #MeToo Era

The prevention of systemic workplace harassment has been one of the EEOC's national enforcement priorities since 2013, and recent events have only raised its profile on the enforcement agenda.⁴²¹ On March 20, 2019, the EEOC held an Industry Leaders Roundtable discussion on harassment prevention.⁴²² Joining the EEOC were 12 industry participants, many of whom represented industries that have been the most heavily targeted by the EEOC in terms of harassment filings, most notably the hospitality industry.

Among the participants was Rosanna Maietta, Executive Vice President of Communications & Public Relations of the American Hotel & Lodging Educational Foundation. She independently issued a statement in conjunction with the roundtable, wherein she outlined the concern across the hotel industry to address employee safety concerns and reiterated the commitment of industry leaders to advance the safety and security of hotel employees and guests.⁴²³ She noted those leaders' commitment to a 5-Star Promise, which includes a commitment to provide hotel employees with employee safety devices and to adopt enhanced policies, trainings, and resources to improve hotel safety, including preventing and responding to sexual harassment and assault: "[i]n an unprecedented show of unity within a fiercely competitive industry, the CEOs of Hilton, Hyatt, IHG, Marriott and Wyndham joined AHLEA president and CEO and Chairman of the AHLEA Board, for this historic announcement that will cover thousands of employees across the country."⁴²⁴

In its FY 2019 Congressional Budget Justification,⁴²⁵ the EEOC highlighted the ongoing implications of the #MeToo movement for employers. According to the EEOC, the "biggest news story in the second half of the year" – referencing the #MeToo movement – "came as no surprise to the Commission."⁴²⁶ The EEOC's Budget Justification went on to explain: "[i]n the wake of accusations against numerous public figures, the Commission's expertise and experience enforcing the law has been called upon over and over again. In response, the Commission has drawn heavily on the efforts of the EEOC's Select Task Force on the Study of Harassment in the Workplace" In June, that Task Force issued its Report Of The Select Task Force On The Study Of Harassment In The Workplace.⁴²⁷ That Report, and the Proposed Guidance that followed, offers important clues as to

⁴²¹ See U.S. Equal Employment Opportunity Commission, EEOC Seeks Public Input on Proposed Enforcement Guidance on Harassment, (Jan. 10, 2017), <https://www.eeoc.gov/eeoc/newsroom/release/1-10-17a.cfm>; U.S. Equal Employment Opportunity Commission Strategic Enforcement Plan FY 2017 - 2021, *supra* note 354.

⁴²² Press Release, U.S. Equal Employment Opportunity Commission, *Leaders Representing Industries and Associations Join EEOC for Roundtable Discussion on Harassment Prevention*, <https://www.eeoc.gov/eeoc/newsroom/release/3-20-19.cfm>.

⁴²³ Statement of Rosanna Maietta, American Hotel & Lodging Association and American Hotel & Lodging Educational Foundation, https://www.eeoc.gov/eeoc/task_force/harassment/3-20-19/ahle.cfm.

⁴²⁴ *Id.*; see also Press Release, U.S. Equal Employment Opportunity Commission, *Leaders Representing Industries and Associations Join EEOC for Roundtable Discussion on Harassment Prevention*, *supra* note 422.

⁴²⁵ U.S. Equal Employment Opportunity Commission, Fiscal Year 2019 Congressional Budget Justification, <https://www.eeoc.gov/eeoc/plan/2019budget.cfm>.

⁴²⁶ *Id.*

⁴²⁷ See Select Task Force on the Study of Harassment in the workplace Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic (June 2016), available at https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm. The Report found that anywhere from 25% to 85% of women report having experienced sexual harassment in the workplace, and that many women do not label certain forms of unwelcome sexually based behaviors as "sexual harassment" – even if they are viewed as problematic or offensive. *Id.* The Report also found that workplace harassment on any basis – race, sex, national origin or other protected characteristic – remains persistent, accounting for one-third of all EEOC charges. Although workplace harassment is under-reported by as much as 75%, the Task Force suggested that it accounts for millions of dollars in legal liability in EEOC cases, decreased productivity, increased job turnover, and reputational harm.

what the EEOC considers best practices for preventing and responding to harassment in the workplace.⁴²⁸

2. The EEOC's Proposed Enforcement Guidance On Unlawful Harassment

The EEOC later published a companion piece to the Report entitled Proposed Enforcement Guidance on Unlawful Harassment ("Proposed Guidance").⁴²⁹ The Proposed Guidance replaces several earlier EEOC guidance documents, aims to define what constitutes harassment, examines when a basis for employer liability exists, and offers suggestions for preventative practices.⁴³⁰

According to the Proposed Guidance, the EEOC will find harassing conduct to be unlawful if the conduct is based on an individual's race, color, national origin, religion, age, disability, or an individual or family member's genetic test or family medical history.⁴³¹ Further, the Proposed Guidance specifically sets forth the EEOC's position that as a protected basis "sex" includes, but is not limited to, sex stereotyping, gender identity, sexual orientation, and pregnancy, childbirth, or related medical issues.⁴³² Moreover, the EEOC announced that it will entertain harassment claims based on (1) "perceived" membership in a protected class (even if the perception is incorrect);⁴³³ (2) for "associational harassment," where an employee who is a member of a protected class claims harassment based on his/her association with individuals who do not share their protected characteristics;⁴³⁴ (3) where the alleged harassment was not directed at the employee;⁴³⁵ and (4) in instances where the alleged harassment occurred outside of the workplace.⁴³⁶

To get ahead of enforcement litigation and its consequences, the EEOC recommends implementing a harassment prevention strategy by: clearly, frequently, and unequivocally stating that harassment is prohibited and will not be tolerated; allocating sufficient resources for effective harassment

⁴²⁸ For example, the Task Force specifically recommended that the EEOC, as part of its settlement agreements, conciliation efforts, and consent decrees with employers, seek terms requiring employers to adopt policies, complaint procedures, investigatory procedures, and training compliant with EEOC expectations, including stylizing training to specific "cohorts" of employees in the workplace so as to empower front line managers to prevent harassment. *Id.*

⁴²⁹ Office of Legal Counsel, U.S. Equal Employment Opportunity Commission, *Proposed Enforcement Guidance on Unlawful Harassment*, (Jan. 10, 2017), <https://www.regulations.gov/docket?D=EEOC-2016-0009>.

⁴³⁰ See *Id.*

⁴³¹ *Id.* at 5-9.

⁴³² *Id.*; see e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989) ("In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."); *Jameson v. U.S. Postal Serv.*, EEOC Appeal No. 0120130992, 2013 WL 2368729, at *2 (May 21, 2013) (stating that intentional misuse of transgender employee's new name or pronoun may constitute sex-based harassment); *Walsh v. Nat'l Computer Sys., Inc.*, 332 F.3d 1150, 1160 (8th Cir. 2003) (upholding jury verdict in pregnancy based hostile work environment claim where evidence showed that plaintiff was harassed because she had been pregnant and taken maternity leave, and might become pregnant again); *EEOC v. Houston Funding II, Ltd.*, 717 F.3d 425, 430 (5th Cir. 2013) (holding that Title VII prohibits discharging an employee because she is lactating or expressing breast milk).

⁴³³ U.S. Equal Employment Opportunity Commission, *Proposed Enforcement Guidance on Unlawful Harassment*, *supra* note 429, at 9; see e.g., *EEOC v. WC&M Enters, Inc.*, 496 F.3d 393, 401-02 (5th Cir. 2007) (concluding that the EEOC presented sufficient evidence to support its national origin harassment claim where coworkers harassing comments did not accurately describe employees actual country of origin).

⁴³⁴ U.S. Equal Employment Opportunity Commission, *Proposed Enforcement Guidance on Unlawful Harassment*, *supra* note 429, at 9; see e.g., *Barrett v. Whirlpool Corp.*, 556 F.3d 502, 513-14 (6th Cir. 2009) (holding that white employees could allege claim of racial harassment based on their friendship with and advocacy on behalf of African American coworkers).

⁴³⁵ U.S. Equal Employment Opportunity Commission, *Proposed Enforcement Guidance on Unlawful Harassment*, *supra* note 429, at 12; see e.g., *Ellis v. Houston*, 742 F.3d 307, 320-21 (8th Cir. 2014) (concluding that District Court erred in evaluating plaintiffs' section 1981 and section 1983 claims of racial harassment by examining in isolation harassment personally experienced by each plaintiff, rather than also considering conduct directed at others, where every plaintiff did not hear every remark, but each plaintiff became aware of all of the conduct).

⁴³⁶ U.S. Equal Employment Opportunity Commission, *Proposed Enforcement Guidance on Unlawful Harassment*, *supra* note 429, at 18.

prevention strategies; providing appropriate authority to individuals responsible for creating, implementing, and managing harassment prevention strategies; allocating sufficient staff time for harassment prevention efforts; and assessing harassment risk factors and taking steps to minimize or eliminate those risks.⁴³⁷

The EEOC also recommends that every employer have a comprehensive anti-harassment policy that is written and communicated in a clear, easy-to-understand style and format, translated into all languages commonly used by employees, and provided to employees upon hire, during trainings, in the employee handbook, and posted centrally at locations commonly frequented by employees.⁴³⁸ Employers should review policies periodically, and update anti-harassment policies as needed.

Further, the EEOC recommends every employer have an effective harassment complaint system that is fully resourced to allow the company to effectively respond to complaints, which is translated into all languages commonly used by employees; provides multiple avenues of complaint; provides prompt, thorough, and neutral investigations; protects the privacy of alleged victims, individuals who report harassment, witnesses, alleged harassers, and other relevant individuals to the greatest extent possible; ensures that alleged harassers are not prematurely presumed guilty or disciplined for harassment; conveys the results of the complaint to the complainant and alleged harasser; and takes preventative and corrective action where appropriate.⁴³⁹

Finally, the EEOC in its Proposed Guidance emphasizes the importance of effective harassment training. This training should be supported by senior leaders, repeated and reinforced regularly, provided to all employees regardless of level and location, provided in all languages commonly used by employees, tailored to the specific workplace and workforce, conducted by qualified trainers, and regularly evaluated by participants and revised as needed.⁴⁴⁰

The EEOC's vision of best practices for preventing and addressing workplace harassment can also be seen in the types of lawsuits they have brought around the country since the onset of the #MeToo era. Among the alleged interpersonal conduct challenged by the EEOC were offensive comments about physical appearance or questions about sexuality or social life, showing pornographic images and videos, following or stalking, posting online photos from consensual sex acts, and various forms of physical touching such as brushing against, groping, grabbing, pinching, grinding against, and others. The EEOC has also frequently challenged employers' alleged failure to effectively address harassing conduct. In recent complaints, it has challenged employers for not having effective policies prohibiting sexual harassment or discrimination, and for failing to institute policies to prevent harassment, such as mandatory sexual harassment training and internal complaint procedures. It has also faulted employers' efforts to remedy sexual harassment, such as a failure to investigate, or to investigate thoroughly, assigning a complaining employee to work with a known harasser, or retaliating against a complaining employee in the form of reduced hours, changed assignment of lesser quality, demotion, constructive discharge, or termination.

3. Recent Decisions Involving Harassment

The recent uptick in harassment lawsuits has also given the EEOC plenty of opportunity to shape the law in this area. Those cases show that the EEOC appears committed to enforcing its vision of sexual harassment law as set forth in its Proposed Guidance. For example, in *Parker v. Reema Consulting Services, Inc.*,⁴⁴¹ the EEOC filed an amicus brief, arguing that the plaintiff in that case had pled a plausible hostile work environment claim where she alleged that male employees spread

⁴³⁷ *Id.* at 71.

⁴³⁸ *Id.* at 72-73.

⁴³⁹ *Id.*

⁴⁴⁰ *Id.*

⁴⁴¹ *Parker v. Reema Consulting Servs., Inc.*, 915 F.3d 297 (4th Cir. 2019).

a false rumor that she had been promoted because she engaged in a sexual relationship with her supervisor. That case involved a female employee of a consulting services company who had been rapidly promoted from a low level clerk to the Assistant Operations Manager of one of the company's warehouse facilities.⁴⁴² According to the allegations in the complaint, within weeks after receiving her promotion, the plaintiff learned that some male employees of the company had been circulating a false rumor that she was involved in a sexual relationship with one of her managers, and that she had been promoted as a result of that relationship.⁴⁴³ Plaintiff also alleged that she was treated with open resentment and disrespect by her coworkers, including her subordinates, as a result of the rumor.⁴⁴⁴

Plaintiff filed a sexual harassment complaint against some of her co-workers with the company's Human Resources Manager.⁴⁴⁵ A few weeks later, one of her subordinates, who was one of the subjects of plaintiff's complaint, filed his own complaint against plaintiff.⁴⁴⁶ Plaintiff alleged that she was instructed to have no contact with that subordinate, but that he was nevertheless allowed to spend time in plaintiff's work area and, during such times, that he continued to engage in harassing conduct towards her.⁴⁴⁷ Plaintiff was fired shortly thereafter. She alleged that her termination was contrary to the company's "three strikes" policy and was in fact retaliation for the complaint she had filed about the harassment she had experienced.⁴⁴⁸

The District Court for the District of Maryland dismissed the complaint, holding that – however demeaning and objectionable the alleged rumor might be – it was not based upon her gender, but rather upon her alleged conduct, and therefore could not be considered discrimination "on the basis of sex."⁴⁴⁹ "[T]his same type of a rumor could be made in a variety of other contexts involving people of the same gender or different genders alleged to have had some kind of sexual activity leading to a promotion. But the rumor and the spreading of that kind of rumor is based upon conduct, not gender."⁴⁵⁰

The EEOC, along with a number of other women's groups and civil rights groups, filed an amicus brief arguing, among other things, that the complaint plausibly alleged that the harassment plaintiff suffered was "because of sex."⁴⁵¹ According to the EEOC, the rumor itself was gender-based, as was the harassment that stemmed from that rumor.⁴⁵² The EEOC pointed out that the complaint alleged that the rumor was started and circulated by male employees, and that there was nothing gender-neutral about the circulation of a rumor that a female employee had "slept her way to the top."⁴⁵³ "Unfounded accusations that a woman worker is a 'whore,' a siren, carrying on with her coworkers, a Circe, 'sleeping her way to the top,' and so forth are capable of making the workplace unbearable for the woman verbally so harassed, and since these are accusations based on the fact that she is a woman, they could constitute a form of sexual harassment."⁴⁵⁴

The Fourth Circuit agreed with the EEOC's position, holding that "the dichotomy that . . . the District Court[] purports to create between harassment 'based on gender' and harassment based on

⁴⁴² *Id.* at 300.

⁴⁴³ *Id.*

⁴⁴⁴ *Id.*

⁴⁴⁵ *Id.* at 301.

⁴⁴⁶ *Id.*

⁴⁴⁷ *Id.*

⁴⁴⁸ *Id.*

⁴⁴⁹ *Id.* at 301-02.

⁴⁵⁰ *Id.* at 302.

⁴⁵¹ Amicus Curiae Brief for the EEOC at 15-21, *Parker v. Reema Consulting Servs., Inc.*, 915 F.3d 297 (4th Cir. 2019) (No. 18-1206), ECF No. 23.

⁴⁵² *Id.* at 16.

⁴⁵³ *Id.* at 17.

⁴⁵⁴ *Id.* (quoting *McDonnell v. Cisneros*, 84 F.3d 256, 259-60 (7th Cir. 1996)).

'conduct' is not meaningful in this case because the *conduct* is also alleged to be gender-based."⁴⁵⁵ According to the Fourth Circuit, plaintiff had plausibly alleged a rumor that invokes a deeply rooted perception that women, and not men, use sex to achieve success.⁴⁵⁶ Because the rumor was based on traditional negative stereotypes regarding women in the workplace and their sexual behavior, those same stereotypes could cause superiors and coworkers to treat women in the workplace differently, and therefore give rise to a sexual harassment claim.⁴⁵⁷ The Fourth Circuit also held that the alleged harassment was severe and pervasive enough that it had altered the conditions of plaintiff's employment and created an abusive atmosphere.⁴⁵⁸ Accordingly, plaintiff had adequately alleged a plausible claim for hostile work environment sex discrimination.

However, in *EEOC v. Appalachian Power Co.*,⁴⁵⁹ the U.S. District Court for the Western District of Virginia held that conduct and comments that were consistent with a "workplace crush," although unwanted and bothersome to an employee, were insufficient to establish a hostile work environment claim. In that case, a temporary administrative worker at a power company alleged claims of hostile work environment sex discrimination, quid pro quo discrimination, and retaliation. The plaintiff testified that her supervisor repeatedly made inappropriate sexual comments about her, gave her gifts, including substantial monetary gifts, repeatedly declared his love for her, and became jealous and angry when she was around other men. After this conduct had gone on for several months, her supervisor sent her a text message saying that he wanted to take her out and treat her like a queen.⁴⁶⁰ She did not respond to that text message. But when she next arrived at work, her supervisor confronted her about not responding to his text message and, when she tried to walk away, followed her down the hallway while making sexually explicit comments.⁴⁶¹ When she turned around to tell him to stop ("I'm not putting up with your shit today"), he terminated her on the spot.⁴⁶²

The District Court held that the totality of those circumstances did not rise to the level of an objectively hostile working environment.⁴⁶³ Among other things, the Court held that the messages, conduct, and comments that plaintiff was subjected to were ambiguous in nature, and that a discriminatory intent was belied by the fact that there was no evidence that plaintiff's supervisor exhibited any hostility toward women.⁴⁶⁴ According to the District Court, "expressing romantic interest in a coworker or subordinate or asking them out is not enough on its own to establish a Title VII hostile environment claim."⁴⁶⁵ The District Court concluded that plaintiff's hostile environment claim failed as a matter of law because evidence of a "workplace crush" simply did not meet the high threshold of objectively severe and pervasive harassment that is necessary to establish such a claim under Title VII.⁴⁶⁶

With respect to plaintiff's quid pro quo claim, the District Court held that there was a genuine dispute of material fact as to whether plaintiff's supervisor's reason for terminating plaintiff was because she had rebuffed his advances.⁴⁶⁷ Among other things, the stated reasons for plaintiff's termination – including attendance issues and falsified time records – had been disregarded on other occasions,

⁴⁵⁵ *Parker*, 915 F.3d at 304.

⁴⁵⁶ *Id.* at 303.

⁴⁵⁷ *Id.*

⁴⁵⁸ *Id.* at 304-05.

⁴⁵⁹ *EEOC v. Appalachian Power Co.*, No. 1:18-CV-35, 2019 WL 4644549 (W.D. Va. Sept. 24, 2019).

⁴⁶⁰ *Id.* at *2.

⁴⁶¹ *Id.*

⁴⁶² *Id.*

⁴⁶³ *Id.* at *6.

⁴⁶⁴ *Id.*

⁴⁶⁵ *Id.*

⁴⁶⁶ *Id.*

⁴⁶⁷ *Id.* at *7.

which could lead a jury to conclude that those reasons were merely a pretext for discrimination.⁴⁶⁸ Finally, with respect to plaintiff's retaliation claim, the District Court similarly held that the EEOC had produced sufficient evidence to state a prima facie case of retaliation based on the same evidence of pretext: "the lack of documentation about attendance issues and the close proximity to [supervisor's] alleged advances further suggest that her opposition to his harassment may have been the real reason that [supervisor] terminated [plaintiff]." ⁴⁶⁹

In addition to moving the law with respect to what counts as harassing conduct, the EEOC has also shaped the law as it relates to establishing when an employer can be held liable for the harassing conduct of its employees. For example, in *EEOC v. Driven Fence, Inc.*,⁴⁷⁰ the U.S. District Court for the Northern District of Illinois held that an employer had constructive knowledge of racial harassment based on the knowledge of a supervisor who had himself engaged in the harassing conduct. In that case, a black employee alleged that he was subjected to several racially charged comments from his colleagues.⁴⁷¹ Among other things, plaintiff had alleged that when he had entered his place of employment on one occasion he saw a noose hanging from a rafter.⁴⁷² His coworkers subjected him to continued harassment regarding that incident, including saying, "if you don't do your work right, this is what's going to happen," and grabbing his arms and trying to put his head in the noose.⁴⁷³

The issue for the District Court was whether the company could be held liable for the harassing conduct of plaintiff's coworkers: "[i]f the harassers were [plaintiff's] supervisors, then [employer] is strictly liable for the harassment. . . . If the harassers were other, non-supervisory co-workers, then [employer] is liable if it was 'negligent in discovering or remedying the harassment.'" ⁴⁷⁴ The employer argued that it was not aware of the harassment because plaintiff had not made a concerted effort to inform the employer that a problem existed.⁴⁷⁵ But the District Court held that a reasonable jury could conclude that the warehouse supervisor had a duty to report harassment to the company's upper management, even though that supervisor had himself participated in the harassing conduct.⁴⁷⁶

According to the company's employment policies, that supervisor was the manager who was supposed to receive employee reports of harassment and other misconduct.⁴⁷⁷ According to the District Court, it would be reasonable to infer based on that policy that the supervisor was the person responsible for bringing harassing conduct to the attention of the employer's upper management.⁴⁷⁸ Accordingly, "[a] jury could find that under these rules and expectations, [supervisor] was required to bring disrespectful employees, including himself, to [upper management's] attention, and as a result, that [employer] was on constructive notice of the harassment of [plaintiff]." ⁴⁷⁹

In addition, in *EEOC v. Safie Specialty Foods Company, Inc.*,⁴⁸⁰ the U.S. District Court for the Eastern District of Michigan held that the EEOC had established a prima facie case that sexual harassment was severe and pervasive enough to constitute a hostile work environment, and that it

⁴⁶⁸ *Id.*

⁴⁶⁹ *Id.* at *8.

⁴⁷⁰ *EEOC v. Driven Fence, Inc.*, No. 17-CV-6817, 2019 WL 3555211 (N.D. Ill. Aug. 2, 2019).

⁴⁷¹ *Id.* at *2.

⁴⁷² *Id.*

⁴⁷³ *Id.*

⁴⁷⁴ *Id.* (quoting *Nischan v. Stratosphere Quality, LLC*, 865 F.3d 922, 930 (7th Cir. 2017)).

⁴⁷⁵ *Id.*

⁴⁷⁶ *Id.* at *3.

⁴⁷⁷ *Id.* at *1.

⁴⁷⁸ *Id.* at *3.

⁴⁷⁹ *Id.*

⁴⁸⁰ *EEOC v. Safie Specialty Foods Co., Inc.*, No. 18-CV-13270, 2019 WL 5734377 (E.D. Mich. Nov. 5, 2019).

had presented sufficient evidence that the employer knew or should have known about the harassment. That case involved numerous allegations of repeated sexual comments and lewd behavior made by a manager toward various female subordinates. The District Court found that “at least two supervisors . . . were aware of that inappropriate conduct, and that supervisors and employees were discouraged from reporting misconduct to [employer].”⁴⁸¹ The Court also found that at least one supervisor saw some of the alleged misconduct and failed to do anything about it.⁴⁸² Accordingly, the District Court concluded that “the EEOC has presented sufficient evidence to create an issue of fact as to employer liability.”

⁴⁸¹ *Id.* at *13.

⁴⁸² *Id.*



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