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EEOC-Initiated Litigation

2021 Edition

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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 entitled *EEOC-Initiated Litigation: 2021 Edition*. This desk reference compiles, analyzes, and categorizes the major case filings and decisions involving the EEOC in 2020 and recaps the major policy and political changes we observed in the past year. Our goal is to guide clients through decisional law relative to EEOC-initiated litigation, and to empower corporate counsel, human resources professionals, and operations teams to make sound and informed litigation decisions while minimizing these risks. We hope that you find this report to be useful.

By any measure, 2020 was a difficult year. The EEOC's 2020 Fiscal Year saw the agency attempting to deal with the fallout from COVID-19, including providing guidance to employers trying to navigate that radically changed employment landscape. It also finally gave rise to some of the changes that had long been expected at the EEOC as a result of the 2016 election. The Trump Administration replaced the Chair of the Commission with a Republican, Janet Dhillon, and replaced or filled enough other seats on the Commission to give it the first Republican majority in many years. Those changes were seen by many as long overdue, given that the EEOC was forced to work part of the year in 2019 without a quorum, which stymied the Commission's ability to implement policy changes and other changes at the agency. Now that a Republican majority is in place, FY 2020 has seen some of the most significant changes to the EEOC's enforcement program in years. Although it is too early to say how those changes will impact the agency's mission, many employers remain cautiously optimistic.

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 2020. This analysis reveals the areas and issues where employers should focus their attention while considering employment-related business decisions. Part II is a compilation of every significant case that was decided in 2020 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, which 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 Alex Oxyer, Alex Karasik, and Jen Riley, who contributed research and analysis on case rulings and agency developments over the past 12 months. Our hope is that this book provides companies and business leaders with the tools and information they need to implement well-informed personnel decisions and strategies to comply with workplace laws and craft optimal defense strategies against EEOC litigation in this rapidly evolving regulatory environment.

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CURRENT TRENDS IN EEOC LITIGATION

A. Changes In EEOC Practices And Procedures, A Turnover In Commission Leadership, And Shifting Strategic Priorities

1. A Year Of Abundant Change

FY 2020 saw a flurry of activity at the EEOC, with the Commission pushing to meet objectives before the end of the Trump Administration. Notably, the EEOC made strides to update its conciliation and mediation procedures, voluntarily scaled back some of its own litigation authority, and sought opportunities to collaborate with its fellow federal agencies.

First, on March 10, 2020, the EEOC released information about a significant internal resolution that may drastically change how high-stakes litigation decisions are made at the EEOC.[1] The purpose of the resolution appeared to be to rein in many of the powers previously held by the EEOC's General Counsel, and in turn the Regional Attorneys, who historically have wielded considerable discretion over the types of lawsuits that would be filed and the legal positions the EEOC would advance. The new resolution makes it clear that it is now the Commissioners, and not the General Counsel, that will make the decisions to commence or intervene in litigation. According to the resolution, the Commission now has exclusive authority over the following:

- Cases involving systemic discrimination or a pattern or practice of discrimination;
- Cases expected to involve a major expenditure of agency resources, including staffing and staff time, or expenses associated with extensive discovery or expert witnesses;
- Cases presenting issues on which the Commission has taken a position contrary to precedent in the Circuit in which the case will be filed;
- Cases presenting issues on which the General Counsel proposes to take a position contrary to precedent in the Circuit in which the case will be filed;
- Other cases reasonably believed to be appropriate for Commission approval in the judgment of the General Counsel, including cases that implicate areas of the law that are not settled and cases that are likely to generate public controversy;
- All recommendations in favor of Commission participation as amicus curiae;
- A minimum of one litigation recommendation from each District Office each fiscal year, including litigation recommendations based on the above criteria.[2]

Even with respect to those cases that do not raise the issues enumerated above, the General Counsel is now obligated to communicate about more garden variety cases with the Chair, and at the Chair's request, shall consult with the Chair to decide whether those cases should even be brought before the Commission for a vote. It is only if the Chair does not advise the General Counsel within five business days – as to whether a particular case must be submitted to the Commission for a vote – that the General Counsel retains authority to proceed with a lawsuit on her own initiative.

These changes are a stunning and dramatic revocation of the General Counsel's litigation authority. For many years, the General Counsel and the attorneys in the field appeared to exercise broad discretion over the types of cases the EEOC would file, the theories of law that it would pursue, and the litigation tactics that it would employ. Moreover, since the General Counsel was also encouraged to delegate that authority

[1] U.S. Equal Employment Opportunity Commission, *What You Should Know About EEOC And Modified Delegation Of Litigation Authority* (Mar. 10, 2020), https://www.eeoc.gov/wysk/what-you-should-know-about-eeoc-and-modified-delegation-litigation-authority.
[2] *Id.*

to Regional Attorneys across the country, the result was a sometimes fragmented, district-by-district approach to EEOC enforcement litigation.[3]

Second, on July 7, 2020, the EEOC announced in a press release two new six-month pilot programs aimed at increasing voluntary resolutions of discrimination charges via changes to its conciliation and mediation programs.[4] Then, on October 8, 2020, the EEOC released the specifics of a Notice of Proposed Rulemaking ("NPRM") seeking to make additional changes to the conciliation process. (*See infra.* p. __, "Changes To Charge Conciliation Program.").

Third, on September 3, 2020, the EEOC issued a rare opinion letter regarding the Commission's interpretation and enforcement of § 707(a) of Title VII, which authorizes the EEOC to sue employers engaged in a "pattern or practice" of discrimination.[5] The opinion letter addressed two seemingly technical questions: (1) whether a pattern or practice claim under section 707(a) requires allegations of violations of section 703 or section 704 of Title VII; and (2) whether the EEOC must satisfy pre-suit requirements such as conciliation before it can bring a section 707 case. In a lengthy discussion, the EEOC ultimately concluded that the answer to both questions is "yes."[6]

The Commission's letter first acknowledged that "[t]he Commission, like all agencies, is a 'creature of statute' that only has the authority that Congress has given it . . . . Therefore, in performing its duties, the Commission must follow the statutory language that Congress has provided."[7] In accordance with these principles, the EEOC concluded that any suit brought pursuant to section 707(a) must be based on an alleged pattern or practice that violates either section 703 or section 704 of Title VII.[8] While the EEOC's determination appears to be technical, the result of this opinion may have a significant impact on the EEOC's approach to pattern or practice litigation. The Commission has previously alleged claims in pattern or practice suits relative to an employer's "resistance" to Title VII rights, claims which were not specifically defined in the statute. However, this new approach limits the EEOC's claims in pattern or practice suits to only concrete allegations of discrimination.[9]

The EEOC's letter further addressed whether actions under § 707 are subject to the pre-suit requirements of section 706, which mandate that any suit brought by the Commission must first have a filed charge, a reasonable cause finding, and an attempt to conciliate the dispute. Examining Title VII's statutory language, the Commission concluded that a charge must precede any action brought pursuant to section 707.[10] Section 707(e) explicitly states that pattern or practice claims will follow a charge filed either "by or on behalf of a person claiming to be aggrieved or by a member of the Commission." Further, the Commission's own regulations require that the EEOC file a civil action under Title VII only after a charge has been filed.[11]

Fourth, on November 2, 2020, the EEOC held its first public meeting of FY 2021 to consider a proposed memorandum of understanding ("MOU") between the EEOC, the Department of Labor ("DOL"), and the

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[3] Gerald L. Maatman, Jr., Christopher J. DeGroff, Matthew J. Gagnon, and Alex S. Oxyer, *The Winds Of Change Are Suddenly Gusting: EEOC Commissioners Vote to Strip The General Counsel Of Substantial Litigation Authority,,* WORKPLACE CLASS ACTION BLOG (Mar. 11, 2020), https://www.workplaceclassaction.com/2020/03/the-winds-of-change-are-suddenly-gusting-eeoc-commissioners-vote-to-strip-the-general-counsel-of-substantial-litigation-authority/.

[4] U.S. Equal Employment Opportunity Commission, *EEOC Announces Pilot Programs To Increase Voluntary Resolutions* (July 7, 2020), https://www.eeoc.gov/newsroom/eeoc-announces-pilot-programs-increase-voluntary-resolutions.

[5] U.S. Equal Employment Opportunity Commission, *EEOC Issues 707 Opinion Letter* (Sept. 3, 2020), https://www.eeoc.gov/newsroom/eeoc-issues-707-opinion-letter.

[6] U.S. Equal Employment Opportunity Commission, *Commisison Opinion Letter: Section 707* (Sept. 3, 2020), https://www.eeoc.gov/commission-opinion-letter-section-707.

[7] *Id.*

[8] *Id.*

[9] Gerald L. Maatman, Jr., Christopher J. DeGroff, Matthew J. Gagnon, and Alex S. Oxyer, *EEOC Update: The Commission Issues A Rare Opinion Letter Interpreting Requirements For Pattern Or Practice Claims,* WORKPLACE CLASS ACTION BLOG (Sept. 3, 2020), https://www.workplaceclassaction.com/2020/09/eeoc-update-the-commission-issues-a-rare-opinion-letter-interpreting-requirements-for-pattern-or-practice-claims/.

[10] *Id.*

[11] 29 C.F.R. § 1601.27.

Department of Justice ("DOJ") aimed at recommitting to collaboration between the agencies and coordinating efforts to protect civil rights in the workplace. Key provisions of the MOU included strengthening procedures for coordination between the three agencies at the field and headquarters levels, including discussions on enforcement priorities and coordinating on issues like religious liberty, conscious protections, and novel or unique issues; and bringing greater efficiencies to the investigation process.[12]

Collectively, these changes appear to represent a significant shift in the EEOC's philosophy and practice towards a curtailment of its own powers and a shift away from using litigation as the blunt-force instrument of choice. It is still too early to tell how exactly these changes will impact EEOC litigation, but the signs appear to point towards some welcome relief for employers in 2021.

2. More Turnover At The Top Of The Commission

On top of the timeline-altering upheaval that characterized FY 2020, the EEOC faced more leadership turnover at the top. 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.[13] Of the five Commissioners, no more than three may be members of the same political party, a requirement promising bipartisanship outliving administration changes.[14] Before September 2020, the EEOC's leadership included only three of five Commissioners: Chair Janet Dhillon (Republican), Vicki Lipnic (Republican), and Charlotte Burrows (Democrat). Commissioner Lipnic's term technically expired in July 2020, but she was allowed to stay on through September 2020 so the Commission still had a quorum and could still operate.[15]

On September 22 and 23, 2020, three new Commissioners, two Republicans and one Democrat, were confirmed by the Senate for the two vacant seats and the seat held by Commissioner Lipnic. The Commission must remain bipartisan by law, but these new additions effectively solidify a Republican majority at least until July 2022 when Chair Dhillon's term expires, despite the result of the 2020 election.[16]

The two new Republican Commissioners are Andrea Lucas, previously an attorney at the law firm Gibson Dunn who represented employers in labor and employment disputes, and Keith Sonderling, the former Deputy Administrator of the Department of Labor's Wage and Hour Division. Both are expected to add conservative voices at the Commission. The new Democratic Commissioner, Jocelyn Samuels, is currently the Executive Director of the Williams Institute and has served as the Director of the Office for Civil Rights at the U.S. Department of Health & Human Services. She is a strong advocate with a focus on LGBTQ+ issues.[17]

On September 30, 2020, Sonderling was sworn in as Commissioner and Vice Chair of the Commission.[18] Samuels and Lucas were sworn in as well on October 14 and October 19, 2020, respectively.[19] Since their additions to EEOC leadership, several of the votes from the Commission have split along party lines, with

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[12] U.S. Equal Employment Opportunity Commission, *MOU Effective Between EEOC, DOJ and DOL* (Nov. 3, 2020), https://www.eeoc.gov/newsroom/mou-effective-between-eeoc-doj-and-dol.

[13] U.S. Equal Employment Opportunity Commission, *Legislative Affairs: The Commission*, https://www.eeoc.gov/eeoc/legislative/commission.cfm.

[14] *See* 42 U.S.C.A. § 2000e-4 (West).

[15] Gerald L. Maatman, Jr., Christopher J. DeGroff, Matthew J. Gagnon, and Alex S. Oxyer, *EEOC Fiscal Year 2020 Fizzle? The EEOC's Year Comes To A Surprisingly Quiet Close,* WORKPLACE CLASS ACTION BLOG (Sept. 30, 2020), https://www.workplaceclassaction.com/2020/09/eeoc-fiscal-year-2020-fizzle-the-eeocs-year-comes-to-a-surprisingly-quiet-close/.

[16] *Id.*

[17] *Id.*

[18] U.S. Equal Employment Opportunity Commission, *Keith E. Sonderling Sworn In As EEOC Commissioner And Vice Chair* (Sept. 30, 2020), https://www.eeoc.gov/newsroom/keith-e-sonderling-sworn-eeoc-commissioner-and-vice-chair.

[19] U.S. Equal Employment Opportunity Commission, *Andrea R. Lucas Sworn In As EEOC Commissioner* (Oct. 19, 2020), https://www.eeoc.gov/newsroom/andrea-r-lucas-sworn-eeoc-commissioner; U.S. Equal Employment Opportunity Commission, *Jocelyn Samuels Sworn In As EEOC Commissioner* (Oct. 14, 2020), https://www.eeoc.gov/newsroom/jocelyn-samuels-sworn-eeoc-commissioner.

the conservative Commissioners often banding together to accomplish objectives with a 3-2 vote.[20] For example, votes to enter into a memorandum of understanding with the Department of Labor and Department of Justice and to publish a compliance manual on religious discrimination for public comment split along partisan lines with the EEOC Commissioners.[21]

3. More New Voices On The U.S. Supreme Court

For the past several years, we have had an opportunity to report on the nomination and confirmation of new Supreme Court Justices, first Neil Gorsuch, then Brett Kavanaugh, and now Amy Coney Barrett. Justice Neil M. Gorsuch took his seat on April 10, 2017.[22] 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.[23] Justice Kavanaugh previously served on the U.S. Court of Appeals for the District of Columbia Circuit since May 2006.[24] Finally, Justice Amy Coney Barrett was confirmed by the Senate on October 26, 2020.[25] Justice Barrett joined the Supreme Court from the U.S. Court of Appeals for the Seventh Circuit, a position she had also been nominated for by President Trump in 2017. The White House has touted the many firsts and other distinguishing characteristics that make Justice Barrett unique, including that she is the first mother of school-aged children to serve in that position and only the fifth woman, that she is a mother of a special needs child, and that she is the only current justice to have a law degree from a school other than Harvard or Yale (she graduated from Notre Dame Law School).[26]

With the confirmation of Justice Barrett, the Supreme Court now has a solid 6-3 Republican-appointed majority. Although the Justices have already shown a propensity to steer the Court in a more Republican-leaning direction on many issues, that has not always translated into victories on critical cultural issues that matter to many Republican-leaning voters. Perhaps the most significant example of this was the Court's

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[20] *See, e.g.,* U.S. Equal Employment Opportunity Commission, *EEOC Approves MOU Promoting Interagency Coordination* (Nov. 2, 2020), https://www.eeoc.gov/newsroom/eeoc-approves-mou-promoting-interagency-coordination; U.S. Equal Employment Opportunity Commission, *EEOC Votes to Publish Compliance Manual on Religious Discrimination for Public Comment* (Nov. 9, 2020), https://www.eeoc.gov/newsroom/eeoc-votes-publish-compliance-manual-religious-discrimination-public-comment.

[21] *Id.*

[22] Supreme Court of the United States, *Biography of Neil M. Gorsuch*, https://www.supremecourt.gov/about/biographies.aspx.

[23] 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/.

[24] Supreme Court of the United States, Biography of Brett M. Kavanaugh, https://www.supremecourt.gov/about/biographies.aspx.

[25] White House, Articles, *Senate Confirms Amy Coney Barrett for Supreme Court* (Oct. 26, 2020), https://www.whitehouse.gov/articles/senate-confirms-amy-coney-barrett-supreme-court/.

[26] *Id.*

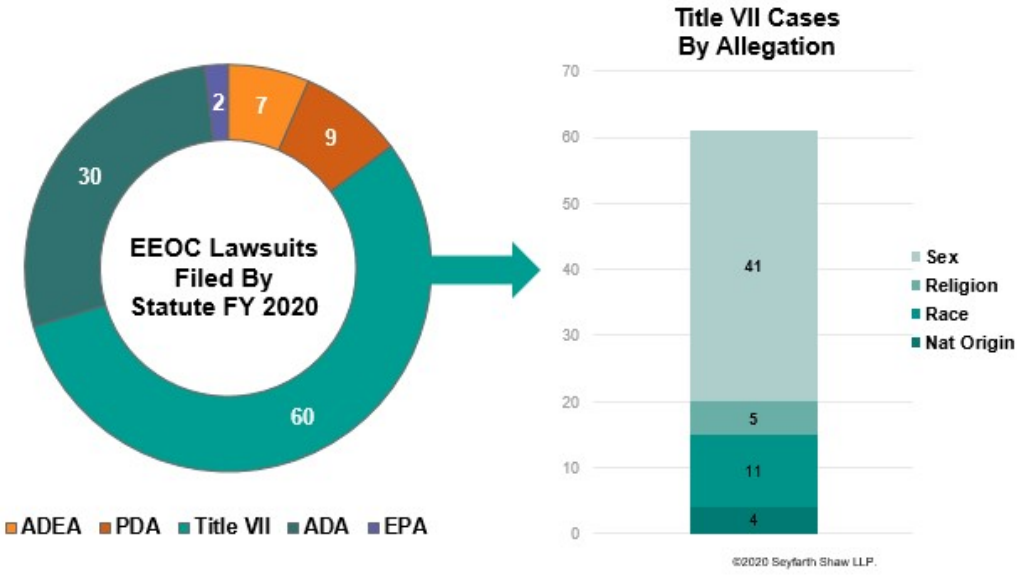
surprising decision in *R.G. and G.R. Funeral Home v. EEOC/Bostock v. Clayton County, Georgia*,[27] which held that the anti-discrimination protections of Title VII extend to gay and transgender employees because discrimination against such employees is tantamount to discrimination on the basis of sex. Trump-appointee Justice Gorsuch authored that opinion. Only time will tell how Justice Barrett will rule on these kinds of employment and cultural issues as her judicial philosophy continues to grow with the job.

4. Trends In Case Filings In FY 2020

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

This analysis can often reveal how the EEOC is shifting its strategic priorities.[28] In FY 2020, the filing numbers – when considered on a percentage basis – were largely consistent with prior years, and did not signal a seismic shift in litigation priorities in FY 2021 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 roughly consistent compared to FY 2018 and 2019. Title VII cases once again made up the majority of cases filed, making up 60% of all filings (on par with the 60% in FY 2019 and 55% in FY 2018). ADA cases also made up a significant percentage of the EEOC's filings, totaling 30% this year, though down from 37% in FY 2019. This too is fairly typical. There were only seven age discrimination cases filed in FY 2020, the same number as FY 2019.



[27] 140 S.Ct. 1731 (2020).

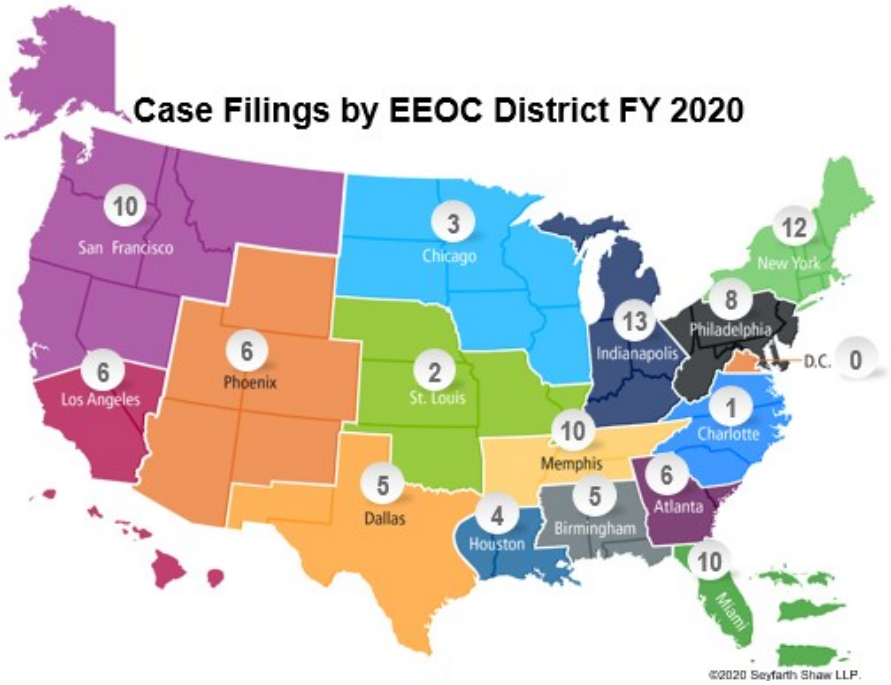
[28] *See, e.g.,* Gerald L. Maatman, Jr., Christopher J. DeGroff, Matthew J. Gagnon, and Alex S. Oxyer, *EEOC Update: Commission's Litigation Report Card Trumpets A Surge In Recoveries And A Cut In Backlog*, WORKPLACE CLASS ACTION BLOG (Nov. 16, 2020), https://www.workplaceclassaction.com/2020/11/eeoc-update-commissions-litigation-report-card-trumpets-a-surge-in-recoveries-and-a-cut-in-backlog/; 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-eeoc-begins-to-make-her-mark-a-look-at-the-eeocs-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-eeocs-fiscal-year-comes-to-an-uncharacteristically-quiet-close/.

5. Most Active District Offices

In addition to tracking the subject matter of filings, it is 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 2020 is the marked decrease in coast-to-coast filings compared to past years. Leading the pack in new filings were the Indianapolis and New York district offices, with 13 and 12 filings, respectively. Indianapolis's filings shot up from eight filings last year, and New York matched its 12 filings from FY 2019. The Charlotte office, which was one of the leaders in new filings last year, posted extremely low numbers in FY 2020. The Chicago district office has historically been at the head of the pack, but had only three new filings this year, and the Houston office was down to four filings from the 12 it posted last year. This marks one of the most substantial declines in litigation enforcement activity that we have seen on a year-over-year basis.

As is usually the case, the EEOC ended its fiscal year with some increased activity, filing 33 lawsuits during September alone. 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 101 total cases in FY 2020, including 97 merits lawsuits and four subpoena enforcement actions. This total number of filings is significantly less than the last several years.



Atlanta **6**	Birmingham **5**	Charlotte **1**	Chicago **3**
Dallas **5**	Houston **4**	Indianapolis **13**	Los Angeles **6**
Memphis **10**	Miami **10**	New York **12**	Philadelphia **8**
Phoenix **6**	San Francisco **10**	St. Louis **2**	Washington, D.C. **0**

6. Developments In Subpoena Enforcement Actions And EEOC Investigations

The EEOC's power to issue administrative subpoenas is one of the most effective investigatory tools 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.[29] Sometimes the EEOC will even skip the informal request and proceed directly to issuing a subpoena – a practice that is actually disallowed by the EEOC's own internal guidance.[30] 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.

Employers who receive 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.[31] However, the petition must be filed within five business days of receipt of the subpoena, and the Commission and some 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 2020, the EEOC initiated 4 subpoena enforcement actions. That number is considerably lower than the 8 and 18 enforcement actions that were filed in FY 2019 and FY 2018, respectively.[32] 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,[33] 32 in FY 2015,[34] and 34 in FY 2014.[35] 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.

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

In 2017, the U.S. Supreme Court clarified the standard of review of a District Court's decision regarding enforcement of EEOC subpoenas in *McLane Co. v. EEOC*.[36] According to the Supreme Court, abuse-of-

[29] *See* 29 C.F.R. § 1601.16(a).

[30] *See* EEOC Compliance Manual § 24.

[31] *See* 29 C.F.R. § 1601.16(b)(1).

[32] 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.

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

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

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

[36] *McLane Co., Inc. v. EEOC*, 137 S. Ct. 1159 (2017). The 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. *McLane*, 137 S. Ct. at 1165. 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. *Id.* 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. *EEOC v. McLane Co., Inc.*, No. 12-CV-2469, 2012 WL 5868959, at *5 (D. Ariz. Nov. 19, 2012). The Ninth

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.[37] 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."[38] 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. The Ninth Circuit found that the District Court's formulation of the relevance standard was too narrow.[39] 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."[40] Under this rubric, the Ninth Circuit found the requested information to be relevant.[41]

Following the *McLane* decision, some lower courts have shown a willingness to enforce broad requests for information contained in EEOC subpoenas. For example, in *EEOC v. Centura Health*,[42] the Tenth Circuit upheld a decision by the District of Colorado enforcing an EEOC 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.[43] 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.[44] 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.[45] The Tenth Circuit 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.[46]

Other courts have relied on *McLane* to enforce similar requests for class-wide information, despite arising out of a handful of charges.[47] In addition to scope issues, courts have also upheld broad concepts of

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Circuit reviewed the District Court's decision *de novo* and reversed the District Court. *EEOC v. McLane Co., Inc.*, 804 F.3d 1051, 1057 (9th Cir. 2015).

[37] *McLane*, 137 S. Ct. at 1167.

[38] *Id.*

[39] *EEOC v. McLane Co., Inc.*, 857 F.3d 813, 816 (9th Cir. 2017).

[40] *Id.*

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

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

[43] *Id.* at 1209. 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. *Id.* at 1205. 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. *Id.* at 1205-1206.

[44] *Id.* at 1206.

[45] *Id.* at 1208. 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." *Id.*

[46] *Id.* at 1209.

[47] For example, in *EEOC v. Nationwide Janitorial Servs.,* No. 18-CV-96 , 2018 U.S. Dist. LEXIS 161273 (C.D. Cal. Aug. 17, 2018), 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. *Id.* at *3. Relying largely upon *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." *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)). Given the "generous construction" of the concept of relevance, the Court concluded that employee contact information is relevant to the EEOC's legitimate investigation. *Id.* (citing *McLane Co., Inc. v. EEOC*, 137 S. Ct. 1159, 1165 (2017)). Similarly, in

"relevance" to enforce EEOC subpoenas. For example, in *EEOC v. VF Jeanswear LP*,[48] the Ninth Circuit reversed a decision from the U.S. District Court for the District of Arizona that denied the EEOC's request for personal information identifying all supervisors, managers, and executive employees at a company nationwide, including various details about their positions, their employment and termination dates, and the facilities where they worked.[49] A similar concern over the scope of "relevance" was at issue in *EEOC v. Joon, LLC*,[50] where the District Court for the Middle District of Alabama 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.'"[51]

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. Kaiser Foundation Hospitals*,[52] the District Court for the Central District of California accepted the Report and Recommendation of the Magistrate Judge, which allowed an employer to object to an EEOC subpoena even though it had failed to make timely objections to the subpoena, and slightly narrowed the scope of what the EEOC sought in the subpoena. In that case, the charging party had alleged discrimination on the basis of sex at a pharmacy facility that was primarily responsible for filling mail-order prescriptions. The EEOC sought, among other things, "pedigree" information regarding employees who worked at another location, which housed other departments and operations, including a pharmacy wholesale operation, a pharmacy training department, and IT and engineering personnel.[53] The employer objected to providing that information as irrelevant to the single allegation of sex harassment brought by an employee who worked in a separate facility.

The Magistrate Judge first had to consider whether it would allow the employer to object to the subpoena at all, given the fact that the employer failed to petition to revoke or modify the subpoena within the five-day

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EEOC v. Oncor Elec. Delivery Co., No. 3:17-MC-69, 2017 U.S. Dist. LEXIS 189584 (N.D. Tex. Nov. 16, 2017), the U.S. District Court for the Northern District of Texas overruled the employer's objection to handing over widespread employee information. 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. *Id*. at *8-9. 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. *Id.* at *17-18.

[48] *EEOC v. VF Jeanswear LP*, 769 F. App'x. 477 (9th Cir. 2019). In that case, a former employee alleged that she was harassed, demoted, underpaid, and not offered opportunities for promotion based on her sex. *Id.* at 478.

[49] The Ninth Circuit held that the District Court had 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." *VF Jeanswear LP*, 769 F. App'x. at 478. The Ninth Circuit reversed the District Court's conclusions regarding the burden of production as well, holding that a cost of approximately $11,000 to investigate systemic and unlawful discrimination should not unduly burden a company that has approximately 2,500 employees. *Id.*

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

[51] *Id.* (quoting *McLane Co. v. EEOC*, 137 S. Ct. 1159, 1164 (2017)). *See also EEOC v. United Parcel Serv., Inc.*, 859 F.3d 375, 379 (6th Cir. 2017) (holding that "the EEOC is entitled to evidence that shows a pattern of discrimination other than the specific instance of discrimination described in the charge."); *EEOC v. Union Pac. R.R. Co.*, 867 F.3d 843, 852 (7th Cir. 2017), *reh'g denied* (Nov. 21, 2017) (rejecting the view that the EEOC's request should have been denied because "the information sought extends beyond the allegations in the underlying charges"); *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).

[52] *EEOC v. Kaiser Found. Hosps.*, No. 2:19-mc-175-JAK-FFM, 2020 WL 70885 (C.D. Cal. Jan. 3, 2020).

[53] *EEOC v. Kaiser Found. Hosps.*, No. 2:19-mc-175-JAK-FFM, 2019 WL 7494905, at *1-2 (C.D. Cal. Dec. 11, 2020).

deadline imposed by EEOC's regulations.[54] According to the EEOC, failure to strictly follow that timeline precludes an employer from challenging the subpoena except on constitutional grounds.[55] The District Court agreed with the EEOC to the extent that an agency mandates that a subpoena recipient timely petition the agency for revocation is an administrative remedy that the subpoena recipient generally should exhaust before being allowed to challenge the subpoena in court. However, the District Court also held that exceptional circumstances can sometimes allow for leniency with respect to those exhaustion requirements. The District Court noted that the subpoena did not cite the regulation that imposed the five-day deadline and that the EEOC never informed the employer that it had missed the deadline to petition for revocation.[56] Moreover, in its correspondence with the EEOC, the employer had repeatedly raised the objections that it was now making before the District Court.[57] Accordingly, the District Court held that it would consider the employer's relevance and burdensomeness objections to the subpoena.

With respect to the scope of what was requested in the subpoena, the Magistrate Judge first held that the charge sufficiently alleged class-wide discrimination, thus empowering the EEOC to investigate discrimination beyond the allegations of individual discrimination: "[i]t alleges the group of persons discriminated against (females), the discrimination methods (sexual harassment by the Pharmacist and/or failure by [employer] to take complaints of sexual harassment seriously), and the 'periods of time' in which the discrimination occurred (2017 and onward)."[58] Relying on the Ninth Circuit's remand decision in *McLane*, the District Court held that the pedigree information was relevant because "where a discrimination charge sufficiently alleges both individual and systemic discrimination, the EEOC may properly interview employees beyond those involved in the individual discrimination to determine whether there is a pattern or practice of discrimination."[59] However, the District Court agreed with the employer that the EEOC had not articulated a clear basis for extending its investigation to all current and former employees of the facility where the charging party did not work.[60]

The charge alleged sexual harassment discrimination perpetrated by a single pharmacist. It was not evident how interviewing, for example, IT employees, would shed light on those matters.[61] Accordingly, the Magistrate Judge recommended that the EEOC's subpoena request be limited to current and former employees of both facilities who worked during the shift that that pharmacist worked regardless of which facility they worked at, as well as information concerning female employees at the other facility who submitted a claim of sexual harassment during the relevant period.[62] The District Court agreed and adopted the Magistrate's recommendation in full.[63]

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*.[64] Employers

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[54] *Id.* at *4.

[55] *Id.*

[56] *Id.* at *5.

[57] *Id.*

[58] *Id.* at *8.

[59] *Id.* (citing *EEOC v. McLane Co., Inc.*, 857 F.3d 813, 816 (9th Cir. 2017) and *EEOC v. Nationwide Janitorial Servs., Inc.*, No. 18-CV-96 ODW (MRW), 2018 WL 4563053, at *4 (C.D. Cal. Aug. 17, 2018)).

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *Kaiser Found. Hosps.*, 2020 WL 70885, at *1. *See also EEOC v. Serv. Tire Truck Ctrs*., No. 1:18-CV-1539, 2018 U.S. Dist. LEXIS 178025, at *11-12 (M.D. Pa Oct. 17, 2018) (holding that the 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); *EEOC v. G4S Secure Solutions (USA), Inc.*, No. 18-CV-2335, 2018 U.S. Dist. LEXIS 203540, at *10 (S.D. Cal. Nov. 29, 2018) (holding 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.").

[64] *See, e.g., EEOC v. Royal Caribbean Cruises, Ltd.*, 771 F.3d 757, 760 (11th Cir. 2014) (holding that the EEOC's subpoena power should not be construed "so broadly that the relevancy requirement is rendered a nullity"); *EEOC v. TriCore Reference Labs.*, 849 F.3d 929, 935-38 (10th Cir. 2017) (rejecting the EEOC's attempt to expand the scope of its investigation to include a "[f]ailure to

have also sometimes been successful in challenging 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.*,[65] 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.[66] In that case, a former employee filed a charge against his employer, alleging that he was subjected to sexual harassment, retaliation, and constructive termination.[67] 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.[68] 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.[69] 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.[70]

The deliberative process privilege shields from disclosure intra-governmental communications relating to matters of law or policy.[71] The privilege is intended to protect the quality of governmental decision-making by "maintaining the confidentiality of advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated."[72] 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.[73] The Court held that the deliberative process privilege protected the information sought by defendant regarding the EEOC's reasonable cause determination.[74] 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."[75]

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.[76]

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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]")

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

[66] *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/.

[67] *Chipotle Mexican Grill, Inc.*, 2019 WL 3811890, at *1.

[68] *Id.*

[69] *Id.*

[70] *Id.* at *2.

[71] *Id.* at *3.

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

[73] *Id.* (quoting *Nat'l Wildlife Fed'n*, 861 F.2d at 1117).

[74] *Id.*

[75] *Id.* Moreover, the District Court found that the employer had not demonstrated its need for the materials, and the need for accurate fact-finding, overrode the EEOC's interest in non-disclosure. *Id.* at *4.

[76] *See, e.g., EEOC v. Nucor Steel Gallatin, Inc.*, 184 F. Supp. 3d 561, 568 (E.D. Ky. 2016) (allowed the EEOC to conduct a warrantless, non-consensual search of private commercial property of an employer charged with hiring discrimination, 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'"); *EEOC v. Homenurse, Inc.*, No. 1:13-CV-2927, 2013 U.S. Dist. LEXIS 147686, at *44 (N.D. Ga. Sept. 30, 2013) (calling the EEOC's 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, "highly inappropriate").

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 District 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.

7. The EEOC's Strategic Enforcement Priorities

Despite the significant changes in leadership that have occurred over the past few years, the EEOC continues to operate under its Strategic Enforcement Plan ("SEP") for FY 2017-2021, established in October 2016.[77] 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."[78] 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.[79] 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."[80]

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.[81] 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 Agency Financial Report, the EEOC reported that the Commission filed only 13 systemic cases in FY 2020, down from 17 in FY 2019 and 37 in FY 2018.[82] Systemic lawsuits accounted for 13% of total filings by the EEOC in FY 2020. In contrast, 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. [83]

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[77] 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.

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

[79] *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/.

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

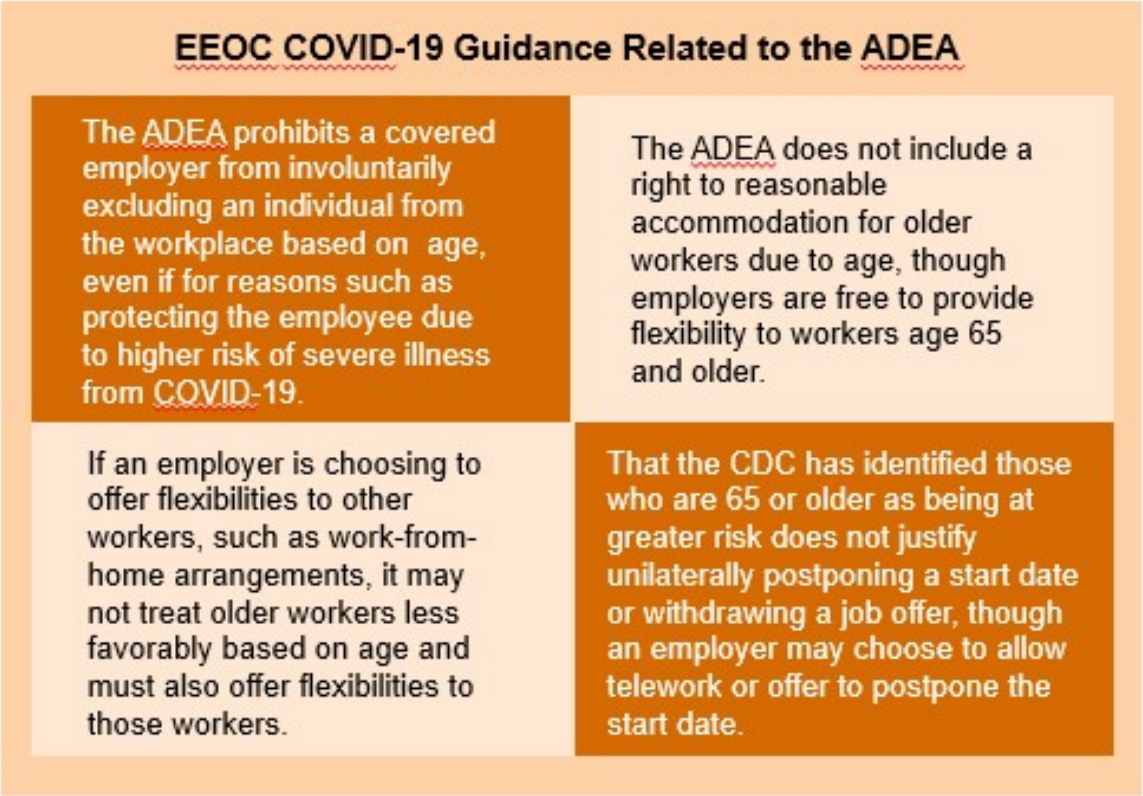
[81] U.S. Equal Employment Opportunity Commission, Fiscal Year 2019 Agency Financial Report, at 9, https://www.eeoc.gov/eeoc/plan/upload/2019afr.pdf.

[82] U.S. Equal Employment Opportunity Commission, Fiscal Year 2020 Agency Financial Report, at 11, https://www.eeoc.gov/sites/default/files/2020-11/2020-AFR.pdf.

[83] 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 recruitment and hiring practices that discriminate against racial, ethnic, religious groups, older workers, women, and people with disabilities.



The EEOC's Technical Assistance guidance relative to COVID-19 addresses several issues related to the ADEA. However, similar to litigation under the ADA, whether this interest translates to an uptick in EEOC-initiated litigation under the ADEA has yet to be seen.

B. The Elimination Of Systemic Barriers In Recruitment And Hiring

Over the past decade, the EEOC has spent a considerable amount of its enforcement budget litigating issues that it sees as barriers to recruitment and hiring.[84] Most of its recent enforcement activity has focused on combatting hiring practices that could result in age discrimination.

1. Developments In The EEOC's Pursuit Of Age Discrimination Claims

a. Case Law Developments

The EEOC's focus on age discrimination continues to result in substantial litigation wins for the EEOC and important developments in the law of age discrimination. For example, in *Frappied v. Affinity Gaming Black Hawk, LLC*,[85] an appeal for which the EEOC filed an *amicus curiae* brief, the Tenth Circuit held as a matter of first impression that the federal anti-discrimination laws allowed for "intersectional" sex-plus-age discrimination claims, noting that: "[r]esearch shows older women are subjected to unique discrimination resulting from sex stereotypes associated with their status as older women," which is "distinct from age discrimination standing alone."[86] In that case, former employees filed employment discrimination claims alleging that their employer terminated them on the basis of age and sex. The charging parties were employed at the employer's Golden Mardi Gras Casino. In January 2013, many of the casino's employees were laid off. The terminations were not a reduction in force, and Defendant posted an advertisement on Craigslist following the layoffs listing 59 open positions.[87] The charging parties were nine of those terminated employees, including eight women and one man. All were forty or older when they were terminated. The female plaintiffs brought "sex-plus-age" disparate impact and disparate treatment claims under Title VII, alleging they were terminated because the employer discriminated against women over forty, and disparate impact and disparate treatment claims under the ADEA, alleging they were terminated because of their age.[88]

The Tenth Circuit held that sex-plus-age claims are cognizable under Title VII, reversing the district court's ruling. The Tenth Circuit found that there is no material distinction between a sex-plus-age claim and the other "sex-plus" claims they have previously recognized, such as claims for which the "plus-" element is marital status or having preschool-age children.[89] Because a sex-plus-age claim alleges discrimination against an employee because of sex and some other characteristic, the Tenth Circuit found that qualifies as a sex discrimination claim. To establish discrimination under a sex-plus-age theory, the Tenth Circuit held that a plaintiff must show unfavorable treatment relative to an employee of the opposite sex who also shares the "plus-" characteristic – i.e., a male employee over 40.[90]

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

[85] *Frappied v. Affinity Gaming Black Hawk, LLC*, 966 F.3d 1038 (10th Cir. 2020).

[86] *Id.* at 1049.

[87] *Id.* at 1044-45.

[88] *Id.* at 1045.

[89] *Id.* at 1045-46.

[90] *Id.* at 1049. Moreover, the Tenth Circuit also concluded that, accepting the EEOC's allegations, it was plausible that the employer's termination policies resulted in a significant disparate impact on workers forty or older and reversed the dismissal of their ADEA disparate impact claim. *Id.* at 1055. Finally, the Tenth Circuit affirmed the dismissal of Plaintiff's Title VII disparate treatment claim, but reversed the district court's granting of summary judgment on Plaintiffs' ADEA disparate treatment claim. *Id.* at 1058. The Title VII and ADEA disparate impact claims, along with the ADEA disparate treatment claim, were remanded back to the district court. *Id.* at 1061.

The EEOC has won other critical precedent-setting decisions in this area in recent years. For example, in *EEOC v. Baltimore County*,[91] 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.[92] 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.[93]

Other decisions have been important because they demonstrate how difficult it can be for employers to dispense with age discrimination cases before trial, upping the cost and burden of such cases to employers. For example, in *EEOC v. Rockauto, LLC*,[94] the U.S. District Court for the Western District of Wisconsin held that an employer's use of discretionary exceptions to hire applicants who did not meet its stringent hiring criteria left questions for a jury to decide at trial as to whether those exceptions were used in a manner that discriminated against older employees. In that case, the EEOC brought an action on behalf of a charging party who allegedly was not hired for a position because of his age, in violation of the ADEA. Defendant filed a motion for summary judgment.[95]

Finding that the EEOC had presented sufficient evidence of similarly situated comparators who had been treated more favorably in the application process, despite not having met the employer's stringent hiring criteria, the Court denied the motion for summary judgment. In particular, the Court noted that the EEOC had "presented objective evidence in the form of comparators, other individuals who received preferential job treatment despite having equal or lesser qualifications than the plaintiff or claimant."[96] There was a question, therefore, as to whether the employer had used its discretionary exceptions, called an "Auto Pass" and a "Jim Pass," in a discriminatory manner: "[a] juror could reasonably conclude that these two factors did not justify giving a Jim Pass to [comparator] but not to [charging party], who had extensive relevant experience. And [employer's] decision is particularly notable because he credited [comparator] for showing ambition by applying while still in college, a factor that would typically apply only to younger applicants."[97]

Similarly, in *EEOC v. Board of Regents of the University of Wisconsin System*,[98] the U.S. 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.[99] The employer stated that it rejected the charging party's application due to problems with her past job

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

[92] *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 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.

[93] According to the District Court, when the EEOC files suit under the 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." *Id.*

[94] *EEOC v. Rockauto, LLC*, No. 18-CV-797-jdp, 2020 WL 1505637 (W.D. Wis. Mar. 30, 2020).

[95] The EEOC alleged that the charging party was more qualified than younger candidates who advanced further in Defendant's hiring process; that Defendant's hiring system was biased against older applicants, using applicants' graduation dates as a proxy for their ages and overvaluing academic accomplishments in comparison to job experience; that Defendant scored charging party's application less favorably than similarly situated, younger applicants; and that Defendant declined to give charging party a pass in the application process but passed similarly situated, younger applicants. *Id.* at *2.

[96] *Id.* at *3.

[97] *Id.* at *4.

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

[99] *Id.* at *1-2. 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. *Id.*

performance and problems with how she interviewed.[100] The District Court held that the employer's evidence was vague and that a reasonable jury could find its explanations to be pretextual.[101] The Court concluded 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."[102]

b. Developing Trends In EEOC-Initiated Age Discrimination Litigation

With a new Biden administration on the horizon, employers are understandably focused on what the change in administration may bring in terms of new enforcement priorities or legislation that may impact age discrimination claims.

Although it is too early to know what the administration will chose to focus on in terms of legislative priorities, there is at least one possibility relating to age discrimination that has garnered some bipartisan support. On February 14, 2019, a bipartisan group of 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 discrimination.[103] 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.[104] 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.

With respect to EEOC enforcement priorities, the fact that a Trump-appointed Republican majority of Commissioners will continue to hold sway at the EEOC for the foreseeable future renders the future murky and difficult to discern. One issue that continues to raise concerns at the EEOC and among employers is the increasing use of technology and digital resources in the workplace and the impact that will have on older applicants and employees. It is hard to see how the mass turn to remote work will alter the perception about those concerns. For example, the EEOC has expressed concern for several years about employers' use of artificial intelligence, algorithms, and "big data" to recruit, screen, and select candidates and employees.[105] The EEOC's focus on these issues has only recently started bearing fruit 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 that excluded women and older workers from receiving the job ads.[106] Of the 66 employers

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[100] *Id.* at *3.

[101] *Id.* at *4. 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. *Id.*

[102] *Id.* at *5.

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

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

[105] Among other things, on September 17, 2018, three Senators – including Vice President-Elect Kamala Harris – 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. 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. 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. *Id*. at 2. Their expressed concern is that employers will use these technologies in a way that leads to exacerbated employment discrimination. *Id*. 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.

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

charged, seven were subject of the EEOC finding of "reasonable cause to believe that" the employers violated Title VII and/or the ADEA.[107] 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."[108] 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."[109] 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."[110]

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.[111] The report notes that the workforce in 1967, the year the ADEA was passed, looked very different than it does today.[112] 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.[113] 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 have 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.

Finally, the EEOC's Technical Assistance guidance relative to COVID-19 addresses several issues related to the ADEA, including concerns related to employer obligations to older workers and cautionary reminders to employers regarding unilaterally keeping older workers out of the workplace. However, similar to litigation under the ADA, whether this interest translates to an uptick in EEOC-initiated litigation under the ADEA has yet to be seen.

2. Other Barriers To Recruitment And Hiring

Along with age and race, the EEOC also continues to pursue cases that allege barriers to hiring and/or promoting women, especially involving employment positions that have traditionally been considered male-dominated. Those types of cases, like other "barriers to recruitment and hiring" cases often rely heavily on

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[107] Mindy Weinstein, U.S. Equal Employment Opportunity Commission Determination Letters, *available at* https://www.onlineagediscrimination.com/sites/default/files/documents/eeoc-determinations.pdf. The EEOC's determinations were issued between July 3, 2019 and July 5, 2019.

[108] *Id*.

[109] *Id*.

[110] *Id*.

[111] 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.

[112] 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.*

[113] 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.*

statistical evidence. For example, in *EEOC v. Performance Food Group, Inc.*,[114] the EEOC alleged that the employer had engaged in a pattern or practice of discrimination against women for hiring into its "operative positions," i.e., workers who operate machine or processing equipment or perform other factory-type duties of an intermediate skill level.[115] The EEOC presented statistical evidence that showed a statistically significant disparity in offer rates between male and female applicants for the five operative positions at issue during the relevant time periods, which had controlled for experience, online application, and, for drivers, whether the applicant had a Class A license.[116] The employer argued principally that the EEOC's expert analysis had improperly aggregated selection rates across positions, operating companies, and years, and had failed to properly control for differences in experience among applicants.[117] The employer sought to exclude the EEOC's expert analysis altogether on these grounds, but the Court held that the analysis was both relevant and reliable and could be considered by the Court to determine liability.

The Court considered that evidence, as well as additional descriptive statistical evidence that showed, among other things, that some of the employer's operating companies had made zero offers to female applicants during the relevant time period for some positions, along with numerous emails, work documents, and testimony. In view of all of that evidence, the Court held that the EEOC "clearly has made out a prima facie case with respect to its pattern or practice claim," finding that "[t]he EEOC's statistical analysis shows statistically significant disparities in the hiring of male and female applicants, adverse to female applicants, across operative positions and OpCos, even when controlling for experience. It has presented other statistical evidence showing that some OpCos hired no female applicants in certain positions for the entire period 2004–2009 or 2009–2013."[118] The Court also faulted the employer's recruiting efforts, finding that it had identified the target demographic for its radio ads as "male," and that it had intentionally sought males for warehouse positions and females for receptionist positions.[119]

The Court stopped short of finding in favor of the EEOC with respect to liability under the two-part *Teamsters* framework applied to pattern or practice cases. Under that framework, the EEOC bears the initial burden of making out a prima facie case of discrimination by establishing by a preponderance of the evidence that sex discrimination was the company's standard operating procedure. Although the EEOC met its burden as to its prima facie case, the Court held that there were numerous genuine disputes of material fact regarding the statistical analysis and anecdotal evidence that precluded summary judgment.[120] Instead, the issue of pattern or practice liability was reserved for the jury.[121]

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

[115] *Id.* at *1-2.

[116] *Id.* at *3.

[117] *Id.*

[118] *Id.* at *7.

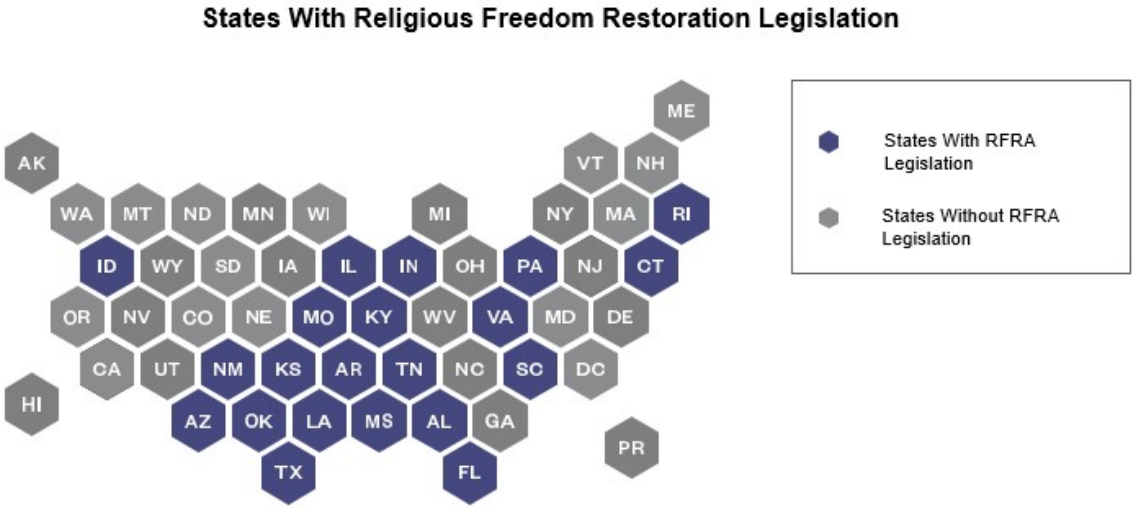
[119] *Id.*

[120] *Id.* at *8.

[121] *Id.* at *9.

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.



On November 17, 2020, the Commission requested public comment regarding updates to its religious discrimination guidance which includes sections addressing religious organizations, the ministerial exception to Title VII, First Amendment protections to employers, and protections under the federal Religious Freedom Restoration Act (it is worth noting that many states have their own versions of the Religious Freedom Restoration Act as well).

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

The EEOC's SEP identifies the protection of immigrant, migrant, and other vulnerable workers as a national enforcement priority.[122] Much of that activity in recent years has focused on three issues: (1) the protection of employees against religious bias in the workplace, especially Muslim employees; (2) national origin discrimination that is exacerbated by political and cultural developments around that world that impact U.S. society; and (3) protecting the rights of immigrants to seek assistance from the EEOC and the Courts to combat and remedy illegal discrimination.

1. Developments In Combatting Religious Discrimination

For several years, the EEOC's SEP 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."[123] 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.[124] However, in more recent years, the EEOC has demonstrated a willingness to pursue religious discrimination claims on behalf of other religious groups as well.[125] In addition, on November 17, 2020, the Commission requested public comment regarding updates to its religious discrimination guidance.[126] In addition to direction on religious discrimination and accommodation, the guidance also includes sections addressing religious organizations, the ministerial exception to Title VII, First Amendment protections to employers, and protections under the federal Religious Freedom Restoration Act (it is worth noting that many states have their own versions of the Religious Freedom Restoration Act as well). The Commission's focus on such areas appears in part to be a reaction to the U.S. Supreme Court's *Bostock* decision, as the introduction to the updated guidance specifically refers to the Court's language in the opinion on religious liberty.[127]

The EEOC's new focus on religious accommodation cases has been met with some recent setbacks. For example, in *EEOC v. Walmart Stores East LP*,[128] the U.S. District Court for the Western District of Wisconsin dismissed a Title VII claim based on an alleged failure to offer a religious accommodation due, in part, to the charging party's failure to cooperate with the employer regarding the proposed accommodation. In that case, the charging party was a Seventh-day Adventist, who observed the Sabbath by refraining from work each week from sundown on Friday night to sundown on Saturday night.[129] The EEOC alleged that the employer refused to accommodate the charging party's request to not work on

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[122] 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.

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

[124] *Id.*

[125] The EEOC's focus on protecting employees' rights to practice their religion in the workplace is not limited to workers of Muslim or other mainstream faiths. The EEOC has brought several lawsuits in recent years that target different kinds of religious practice. For example, in *EEOC v. United Health Programs of America, Inc. and Cost Containment Group Inc.*, 213 F. Supp. 3d 377 (E.D.N.Y. 2016), the EEOC successfully argued that concepts known as "Onionhead" and "Harnessing Happiness" were entitled to Title VII protection as religious beliefs. *Id.* at *3-5. The Court held that to determine whether a given set of beliefs constitutes a religion for purposes of Title VII, "courts frequently evaluate: (1) whether the beliefs are sincerely held and (2) whether they are, in [the believer's] own scheme of things, religious."*Id.* at 394.[125] Under that rubric, the Court found that Onionhead was a religion under Title VII. *Id.* at 398.

[126] U.S. Equal Employment Opportunity Commission, "EEOC Seeks Public Input on Revised Enforcement Guidance on Religious Discrimination," (Nov. 17, 2020), https://www.eeoc.gov/newsroom/eeoc-seeks-public-input-revised-enforcement-guidance-religious-discrimination.

[127] U.S. Equal Employment Opportunity Commission, *Proposed Updated Compliance Manual on Religious Discrimination* (Nov. 17, 2020), https://beta.regulations.gov/document/EEOC-2020-0007-0001.

[128] *EEOC v. Walmart Stores East LP*, No. 18-CV-804-bbc, 2020 WL 247462 (W.D. Wis. Jan. 16, 2020).

[129] *Id.* at *1.

Saturdays and had rescinded his offer of employment in retaliation for that request for religious accommodation.[130] The employer argued that it had provided the charging party a reasonable accommodation by notifying him of management positions that would not require Saturday work and inviting him to apply for those positions.[131] The Court held that the charging party's need for Saturdays off meant that "he lacked the flexibility required for the assistant manager position," and that the offer to apply for hourly managerial positions that do not require mandatory Saturday work was a reasonable accommodation because it "eliminated the conflict between [the charging party's] employment requirements and his religious practices."[132] Moreover, the Court was persuaded by the fact that the charging party had failed to engage with the employer regarding the accommodation proposal. "In this case, [charging party] declined to apply for any open positions with defendant and declined to even explore with [the human resources manager] what other positions were open."[133]

The EEOC has had more success seeking protection for religious employees who face discrimination because of their religious attire or grooming. The EEOC has 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.[134] 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.[135] On June 1, 2015. In *EEOC v. Abercrombie & Fitch Stores, Inc*.[136] 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.[137] "The 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."[138]

The *Abercrombie* decision was a significant win for the EEOC. Since then, however, the EEOC has had mixed success and has suffered some high-profile defeats in this area. For example, in *EEOC v. Publix Super Markets, Inc.*,[139] the EEOC brought an action against a super market chain alleging that it failed to provide an employee a religious accommodation and constructively discharged him from employment.[140]

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[130] *Id.* at *5.

[131] *Id.* The EEOC argued that this proposed accommodation was not sufficient because: (1) it is not reasonable just to offer an opportunity to apply for a different position rather than offering that job itself; and (2) the management positions are paid less than the assistant manager position that plaintiff had already been offered.

[132] *Id.* at *7.

[133] *Id.* at *6.

[134] On March 6, 2014, the EEOC published its Guide to Religious Garb and Grooming. 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. 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. The EEOC also recently issued guidelines relating to the employment of Muslims, Arabs, South Asians, and Sikhs. *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.

[135] U.S. Equal Employment Opportunity Commission, *Religious Garb and Grooming in the Workplace: Rights and Responsibilities*, *supra* note 134, at Example 7.

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

[137] *Id.* at 2031-32.

[138] *Id.* at 2033. Religious garb and grooming can also support a hostile work environment harassment claim. *See, e.g. Ahmed v. Astoria Bank et al.*, 690 F. App'x 49, 50-51 (2d Cir. 2017) (holding that a reasonable jury could find that employee was subject to severe and pervasive discriminatory harassment where 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").

[139] *EEOC v. Publix Super Markets, Inc.*, No. 3:17-CV-1308, 2020 WL 4904827 (M.D. Tenn. Aug. 20, 2020).

[140] *Id.* at *1.

The EEOC contended that the charging party practiced Rastafarianism, including, relevantly, maintaining his hair in dreadlocks. The EEOC asserted that when the charging party was offered a position, the employer informed him that it could not accommodate his religious beliefs by allowing an exception to its grooming policy, which prohibited male employees from wearing their hair longer than the collars of their shirts.[141] The EEOC sought partial summary judgment on the issue of liability on all of its claims. The employer sought summary judgment on all of the EEOC's claims, arguing that the charging party did not sincerely hold his religious beliefs because he did not follow every tenet of Rastafarianism and that he never requested an accommodation regarding the grooming policy. The Court denied summary judgment for both parties, finding that there were genuine issues of material fact with respect to the elements of the EEOC's claims: "[c]redibility issues such as the sincerity of an employee's religious belief are 'quintessential fact questions.'"[142]

The EEOC has also had mixed success in a long-running lawsuit, *EEOC v. JBS USA, LLC*.[143] 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.[144] The EEOC sought reconsideration of the District Court's conclusions that the EEOC had not established its pattern or practice claim, 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.[145] In 2020, litigation regarding Phase II issues began in earnest with the employer filing multiple motions for full or partial judgment on the pleadings as to the remainder of the individual allegations, which Defendant argued were not particularized enough to survive.[146] The Court found that the EEOC was not required to plead individualized or particularized facts as to each charging party in order to state a claim and that the EEOC had adequately pled its claims.[147] The Court ultimately denied Defendant's motion as to the claims brought by the EEOC.

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[141] *Id.* at *1-2. Among other things, the EEOC claimed that the charging party initially refused the employer's offer of employment but later called back and accepted. The EEOC stated that the charging party again referenced his religion and anti-discrimination laws and asked again whether the employer would still require him to cut his hair.

[142] *Id.* at *10.

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

[144] *See EEOC v. JBS USA, LLC*, No. 10-CV-2103, 2017 WL 3334648, at *1 (D. Colo. Aug. 4, 2017). 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. 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. *EEOC v. JBS USA, LLC*, 339 F. Supp. 3d 1135 (D. Colo. 2018). The Court first held that "freestanding" religious accommodation claims are not viable in light of the Supreme Court's decision in *Abercrombie*. *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), and *Walker v. Indian River Transp. Co*., 2017 WL 388921, at *7 (M.D. Fla. Jan. 27, 2017), *aff'd*, No. 17-10501, 741 F. App'x. 740, 2018 WL 3602926 (11th Cir. July 27, 2018). 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. *Id.* at 1176. 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. *Id.* at 1180-88. 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. *Id.* at 1182.

[145] *EEOC v. JBS USA, LLC*, No. 10-CV-2103, 2019 WL 4778796, at *1 (D. Colo. Sept. 30, 2019). 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. *Id.* at *2. (citing *Jetstream Ground Servs.*, 134 F. Supp. 3d at 1298). 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. *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)). The Tenth Circuit 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." *Id.* at *5 (quoting *Exby-Stolley v. Bd. of Cty. Comm'rs*, 910 F.3d 1129, 1130 (10th Cir. 2018)). 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*.

[146] *EEOC v. JBS USA, LLC*, No. 10-CV-2103-PAB-KLM, 2020 WL 5016921, at *2 (D. Colo. Aug. 25, 2020).

[147] *Id.* at *6.

Finally, in a notable decision in the COVID-19 era, a Court granted summary judgment to a Defendant after the EEOC filed an action on behalf of a former employee alleging that Defendant's policy requiring employees to either receive a flu vaccine or wear a mask if they have a religious or health-related exemption for not getting vaccinated violated Title VII of the Civil Rights Act.[148] The EEOC contended that the employee declined the vaccine because of her Christian faith. Defendant had provided the employee with a mask to wear inside the hospital buildings, but after the employee repeatedly pulled down her mask to speak with people over the phone and in person, Defendant suspended and eventually terminated her employment for failure to comply with the policy. In its ruling, the Court opined that Plaintiff had no religious objection to the mask requirement, and the Court reasoned that the EEOC failed to present any evidence from which a jury could find that the mask requirement was merely a pretext with the intention of forcing individuals to get vaccinated.

2. Developments In The EEOC's Approach To National Origin Discrimination

National origin discrimination has become an increasing target of EEOC enforcement activity. The EEOC has expressed in a number of places that it is concerned about the impact that global phenomena can have on worker relations in the United States. Historically, those concerns have been focused on how global terrorism and unrest in the Middle East could lead to discrimination against Muslim or Sikh employees or those of Middle Eastern or South Asian descent, or how illegal immigration issues could give rise to discrimination against Mexican or South and Central American workers. The COVID-19 pandemic could change this focus somewhat. An outbreak of a deadly pandemic that had its origin in China has given rise to increased concerns about national origin discrimination against Asian Americans, as cautioned by Chair Dhillon in a statement issued early in the COVID-19 pandemic.[149]

The legal issues around this form of national origin discrimination have often focused on the perception of membership in a racial or ethnic group, as it is often the case that different nationalities or races are lumped together with this type of discrimination. 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.*,[150] the U.S. District Court for the District of Maryland held 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."[151]

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

Over the past few years, the EEOC has litigated several issues related to the potential "chilling" effect that might result if employers are able to use litigation to learn the immigration status of their accusers. For

[148] *EEOC v. Baystate Medical Center*, Case No. 16-CV-30086 (D. Mass. June 15, 2020).

[149] U.S. Equal Employment Opportunity Commission, "Message From EEOC Chair Janet Dhillon on National Origin and Race Discrimination During the COVID-19 Outbreak," (Mar. 26, 2020), https://www.eeoc.gov/wysk/message-eeoc-chair-janet-dhillon-national-origin-and-race-discrimination-during-covid-19.

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

[151] *Id.* at *33, 36-37. 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." *See* U.S. Equal Employment Opportunity Commission, Immigrants' Employment Rights Under Federal Anti-Discrimination Laws (Apr. 27, 2010), https://www.eeoc.gov/laws/guidance/fact-sheet-immigrants-employment-rights-under-federal-anti-discrimination-laws#:~:text=Immigrants%20are%20protected%20from%20employment,have%20suffered%20discrimination%20in%20employment.

example, in *EEOC v. Sol Mexican Grill LLC*,[152] 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.[153] The District Court held that "[f]orcing 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.'"[154] 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.[155]

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.*,[156] that discrimination against undocumented workers was an unlawful employment practice under Title VII. In that case, the District Court 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."[157] The Court noted that to hold otherwise would allow employers to hire undocumented workers and then unlawfully discriminate against them.[158]

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

[153] *Id.* at *1. 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. 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. *Id.* at *2.

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

[155] *Id.* at *2. The District Court also held that employment histories with other employers would not be relevant: "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." *Id.* The Court concluded that any relevance of the information would be outweighed by the chilling effect that could result if such information had to be disclosed, as it could potentially be used to deduce facts about their immigration statuses. *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) (holding that defendant's requests for records relating to the worker-plaintiffs' U visa applications "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").

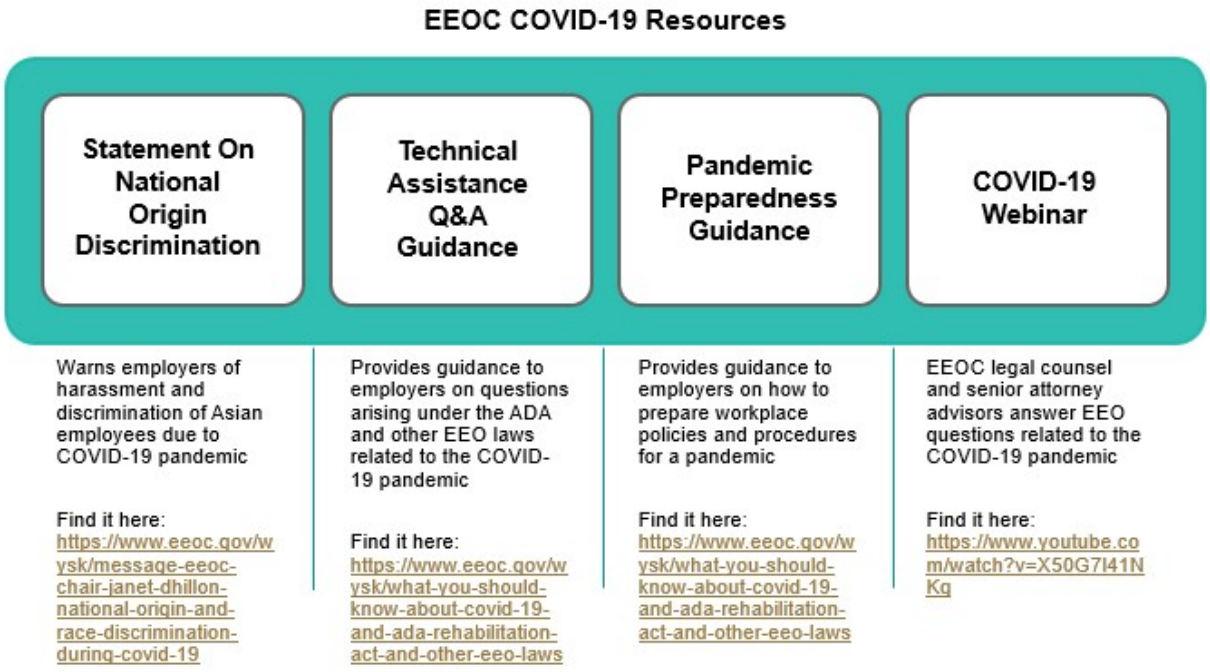
[156] *EEOC v. Phase 2 Invs. Inc.*, 310 F. Supp. 3d 550, 555 (D. Md. 2018).

[157] *Id.* at 576-80.

[158] *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, but 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.*

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.



In 2020, the COVID-19 pandemic quickly became the most important topic in ADA litigation for the EEOC. Indeed, the EEOC's technical guidance for employers addressing issues arising due to COVID-19 focuses primarily on issues under the ADA and reasonable accommodation obligations for employers.

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.[159] The 2017 Strategic Enforcement Plan identified 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.[160]

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 Decides That Sexual Orientation and Transgender 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 LGBTQ discrimination recognized as a prohibited form of discrimination under Title VII.[161] That campaign resulted in scores of lawsuits brought by the EEOC and almost as many victories. This issue has also divided federal agencies, just as it has divided the nation.[162]

That issue was finally resolved in 2020 by the Supreme Court in the landmark decision of *R.G. and R.H. Funeral Home v. EEOC/Bostock v. Clayton County*[163], which decided three cases illustrating the circuit split on this issue. Specifically, in *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*,[164] 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,

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

[160] *Id.*

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

[162] 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.

[163] 140 S. Ct. 1731 (2020).

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

preferences, or stereotypes.[165] 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.[166] In *Zarda, et al. v. Altitude Express, d/b/a Skydive Long Island, et al.,*[167] 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. But in *Bostock v. Clayton County Board of Commissioners*,[168] 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 and, on June 15, 2020, the Supreme Court issued its opinion, ruling that Title VII prohibits discrimination against gay or transgender employees as a form of sex discrimination.[169] The 6-3 decision authored by Justice Gorsuch represents a significant victory for the EEOC.

In its opinion, the Supreme Court held that "[a]n employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids."[170] Further, it noted that although "[t]hose who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result . . . the limits of the drafters' imagination supply no reason to ignore the law's demands."[171] After noting that "[f]ew facts are needed to appreciate the legal question we face," the Supreme Court explained that, "[e]ach of the three cases before us started the same way: An employer fired a long-time employee shortly after the employee revealed that he or she is homosexual or transgender – and allegedly for no reason other than the employee's homosexuality or transgender status."[172] The Supreme Court reasoned that because discrimination on the basis of homosexuality or transgender status requires an employer to intentionally treat individual employees differently because of their sex, an employer who intentionally penalizes an employee for being homosexual or transgender also violates Title VII.

In two lengthy dissenting opinions, Justices Alito, Thomas, and Kavanaugh opined that the majority's decision was "preposterous," because, "even as understood today, the concept of discrimination because of 'sex' is different from discrimination because of 'sexual orientation' or 'gender identity.'"[173] In criticism of the majority's approach, Justice Alito's dissent held that its "opinion is like a pirate ship. It sails under a textualist flag, but what it actually represents is a theory of statutory interpretation that [the late] Justice Scalia excoriated – the theory that courts should 'update' old statutes so that they better reflect the current values of society."[174]

The EEOC has been diligently pursuing this theory of discrimination in the courts for several years, resulting in quite a few victories in line with the *Bostock* decision.[175] Employers should expect that the

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[165] *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).

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

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

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

[169] *Bostock v. Clayton Cty., Ga.*, 140 S. Ct. 1731 (2020).

[170] *Id.* at 1737.

[171] *Id.*

[172] *Id.*

[173] *Id.* at 1755.

[174] *Id.*

[175] For example, in *Christiansen v. Omnicom Grp., 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. Ga. Reg. Hosp.*,

EEOC will be even more vigilant in enforcing this new federal workplace protection for the foreseeable future. The full implications of this decision's impact on the American workforce will have to wait for future developments as *Bostock* is interpreted and applied in courts across the country.

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."[176] 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.[177] 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 2020, the COVID-19 pandemic quickly became the most important topic in ADA litigation for the EEOC. Indeed, the EEOC's technical guidance for employers addressing issues arising due to COVID-19 focuses primarily on issues under the ADA and reasonable accommodation obligations for employers.[178] COVID-19 has also given rise to substantial employment litigation across the country. Many of those cases have alleged various theories of discrimination under state law that touch on principles of disability discrimination. However, employees who wish to bring an ADA claim against their employer must first exhaust their administrative remedies by filing a charge with the EEOC. The EEOC then investigates the charge and either brings a lawsuit on the charging party's behalf or issues a right to sue letter that allows the charging party to bring those claims as a private litigant in federal court. So although there is bound to be a significant uptick in ADA litigation over the next few months, the full scope of the impact that COVID-

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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.*, 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. Phila. 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. 3:16-CV-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-CV-324-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)).

[176] 42 U.S.C. § 12112(a).

[177] *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).

[178] U.S. Equal Employment Opportunity Commission, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws* (last updated Sept. 8, 2020), https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws.

19 will have on the development of disability discrimination law will not be fully known until those issues filter through the charge handling process and into the federal courts.

a. Recent Decisions Interpreting The ADA's Requirements Regarding "Reasonable Accommodations" And "Qualified Individuals"

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. This issue is sometimes intertwined with the concept of a "qualified" individual" under the ADA. Such individuals are those who meet the basic requirements of an employment position, and who can perform the essential functions of that position with or without reasonable accommodation.

For example, in *EEOC v. Wal-Mart Stores East LP*,[179] the EEOC alleged that an employee with Down Syndrome was fired on account of her disability after she was not able to manage a change to her regular schedule. The employer argued that her termination was because of attendance issues, and that she could not be considered a qualified individual with a disability under the ADA because she was not able to perform the essential functions of her job; namely, coming to work regularly.[180] In light of how important consistent routines are for people with Down Syndrome, the Court concluded that a jury would have to decide if the charging party's attendance violations were merely a pretext for discrimination because of her disability.[181] Similarly in *EEOC v. PML Servs. LLC*,[182] the U.S. District Court for the Western District of Wisconsin denied summary judgment for an employer where the evidence showed that a housekeeper was able to do her job, provided that she was allowed some time off every once in a while to deal with her seizures, which occurred on average only once a year.[183] The Court concluded that the employer had "not shown that [charging party's] missing a few days each year to recover from a seizure amounts to her inability to perform the essential functions of her job."[184]

On the other hand, in *Elledge v. Lowe's Home Centers, LLC*,[185] the Fourth Circuit affirmed a decision by the District Court that held that an employee with a disability was not a qualified individual because he was unable to perform the essential functions of his job. The EEOC alleged that the employer discriminated against an employee whose job entailed frequent visits to stores within his geographic area after that employee underwent knee surgery that made it difficult for him to perform the required driving and walking.[186] The Fourth Circuit agreed with the trial court's determination that the essential functions of the job included: (1) standing or walking in excess of 4 hours each day; (2) travelling to all supervised stores; and (3) working in excess of 8 hour each day."[187] The Fourth Circuit also held that it was "not open to

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[179] *EEOC v. Wal-Mart Stores East LP*, 436 F. Supp. 3d 1190 (E.D. Wis. 2020).

[180] *Id.* at 1201. The Court noted, however, that "[i]t was only after [employer] moved to computer scheduling and changed Spaeth's shift and required her to work until 5:30 p.m. that she experienced significant problems with attendance." *Id.* at 1202. The real question, therefore, was whether the employer should have accommodated the charging party by changing her schedule back. The employer argued that her schedule was based on computer analytics regarding customer traffic and operational demand, which showed that a Sales Associate was needed between 4:00 and 5:30 p.m. *Id.* The Court noted that that the Associate did not need to be the charging party, and the employer had not shown that the requested accommodation would pose an undue hardship. *Id.* at 1202-03.

[181] *Id.* at 1205.

[182] *EEOC v. PML Servs. LLC*, No. 18-CV-805-bbc, 2020 WL 3574748 (W.D. Wis. July 1, 2020).

[183] In that case, the EEOC alleged that a hotel housekeeper was fired due to her seizure disorder without being offered a reasonable accommodation. *Id.* at *1. The employer argued that the EEOC could not establish a prima facie case of disparate treatment discrimination because it could not show that the charging party was a "qualified person with a disability" because she could not perform the essential functions of her position with or without reasonable accommodation. *Id.* at *5. The Court noted that the charging party had been terminated because she accrued three absences during her 90-day probationary period, which is two more than allowed by company policy. *Id.*

[184] *Id.* Moreover, although the employer argued that her absences placed a significant burden on its other staff, the Court concluded that there was "little evidence to show that the burden was significant," and that the charging party "ha[d] submitted evidence showing that her seizures are rare, suggesting that her requests for time off would be infrequent." *Id.* at *6.

[185] *Elledge v. Lowe's Home Ctrs., LLC*, 979 F.3d 1004 (4th Cir. 2020).

[186] *Id.* at 1007-08.

[187] *Id.* at 1009-10.

serious dispute" that the charging party could not perform those functions after his knee surgery.[188] The question was whether he could perform those duties with reasonable accommodations. The Fourth Circuit held that he could not. The record showed that the charging party had not followed his own doctor's orders regarding light duty and declined to use the motorized scooter that was offered by the employer.[189] The court concluded that "even the version of the record most favorable to [charging party] does not tell the story of a disabled employee who followed his doctor's orders regularly or utilized his accommodations fully. Instead, it tells the story of an individual who accepted or created certain accommodations, rejected others, and pushed himself beyond the limits of his doctor's orders."[190]

Questions about whether an employee can perform the essential functions of a job with reasonable accommodation often require employers to make difficult decisions that impact the safety of the workplace. For example, in *EEOC v. T&T Subsea, LLC*,[191] the U.S. District Court for the Eastern District of Louisiana had to decide whether a diver was qualified for his position even though he could not pass a dive physical when he was terminated.[192] The employer asserted a "direct threat" defense, arguing that the charging party posed a significant risk to the health or safety of others that could not be eliminated by reasonable accommodation.[193] The Court denied summary judgment to the employer on that defense, however, because of the existence of "genuine issues of material fact regarding whether [employer] meaningfully assessed [charging party's] ability to perform his job safely based on the best available objective evidence and reasonably concluded that [charging party] posed a direct threat."[194]

One issue that has been the subject of recent litigation 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.[195] Other recent decisions have addressed the length of medical leave as it relates to a reasonable accommodation and have come to different

[188] *Id.* at 1011.

[189] *Id.* at 1012.

[190] *Id.*; *see also EEOC v. Austal USA, LLC*, 447 F. Supp. 3d 1252, 1269 (S.D. Ala. 2020) (holding that because the evidence showed that the charging party could not follow any work schedule on a regular basis, the EEOC had failed to show that there was any reasonable accommodation that would allow the charging party to perform the essential functions of his job).

[191] *EEOC v. T&T Subsea, LLC*, 457 F. Supp. 3d 565 (E.D. La. 2020).

[192] In that case, an employee whose job duties included diving to perform underwater welding and other commercial services was terminated after receiving cancer surgery. *Id.* at 569-70. Although the employee had informed his employer that he would be able to get medical clearance to return to work within four weeks, and in fact did get that clearance, the EEOC alleged that the employer terminated him because he could not pass the dive physical. *Id.* at 570.

[193] *Id.* at 575.

[194] *Id.* at 576. Among other things, the Court pointed to the fact that the charging party was later granted clearance to dive by his physician and was hired as a diver by other companies. *Id.*

[195] *See EEOC v. Mfrs. & Traders Trust Co.*, 402 F. Supp. 3d 201, 229 (D. Md. 2019) (holding that an employee returning from extended medical leave is entitled to noncompetitive reassignment: "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") (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.).

conclusions.[196] Sometimes courts have held that the EEOC's need to prove that each aggrieved individual is a "qualified individual" stands in the way of its efforts to obtain relief on behalf of a class.[197]

b. Recent ADA Decisions Regarding What Qualifies As A Disability

One frequently litigated topic in ADA litigation is what counts as a "disability" under the ADA. This issue is likely to take on increased importance in the COVID-19 era as courts across the country are called upon to determine under what circumstances its symptoms and effects rise to the level of a disability. There is no hard and fast rule that can be applied to make this determination. Whether a condition rises to the level of a disability under the ADA often depends on a fact-specific inquiry as to whether the condition substantially limits a major life activity.

For example, *EEOC v. Loflin Fabrication, LLC*[198] involved a metal fabricating business, which requires the use of dangerous equipment, including welding equipment, lasers, and heavy equipment such as cranes and forklifts.[199] Due to those dangers, the employer prohibited employees from working under the influence of any narcotic and performed random drug testing. The employer also required employees to disclose their prescribed medication so it would know if an employee was taking medicine that would affect his or her ability to work safely in potentially dangerous conditions.[200] The charging party was fired after she failed to disclose that she had been prescribed muscle relaxants for a neck condition until she was selected for a random drug test.[201] The Court ultimately granted summary judgment for the employer because the EEOC had failed to establish that the pain in the charging party's neck substantially limited a major life activity.[202]

Several recent decisions considered whether and to what extent emotional and mental problems rise to the level of a disability under the ADA. For example, in *EEOC v. Crain Automotive Holdings LLC*,[203] 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 and that whether her impairment substantially limited a major life activity was

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[196] *See Severson v. Heartland Woodcraft, Inc*., 872 F.3d 476, 479, 481 (7th Cir. 2017), *cert. denied,* 138 S. Ct. 1441 (2018) (leaving 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") (citing *Byrne v. Avon Prods., Inc*., 328 F.3d 379, 381 (7th Cir. 2003)); *Golden v. Indianapolis Hous. Agency*, 698 F. App'x 835, 837 (7th Cir. 2017), *cert. denied,* 138 S. Ct. 1446 (2018) (affirming 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." *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). 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. *Severson v. Heartland Woodcraft, Inc.*, 138 S. Ct. 1441 (2018); *Golden v. Indianapolis Hous. Agency*, 138 S. Ct. 1446 (2018).

[197] *See EEOC v. Prestige Care, Inc.*, No. 1:17-CV-1299 , 2018 U.S. Dist. LEXIS 119305, at *11 (E.D. Cal. July 17, 2018) (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").

[198] *EEOC v. Loflin Fabrication, LLC*, 462 F. Supp. 3d 586 (M.D.N.C. 2020).

[199] *Id.* at 590.

[200] *Id.* at 591.

[201] The Court noted that the ADA prohibits employers from requiring a medical examination or making inquiries of an employee's possible disability unless such examination or inquiry is shown to be job-related and consistent with business necessity. *Id.* at 595. However, there was inconsistant evidence as to whether the employer's policy required the disclosure of all prescriptions or just narcotic prescriptions. *Id.* at 598. Moreover, it was unclear whether the employer had ever inquired into whether the charging party's prescription was a narcotic. *Id.* Faced with those disputed issues of fact, the Court denied summary judgment to the employer on this aspect of the EEOC's claim. *Id.*

[202] *Id.* at 601-03.

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

a question of fact for the jury.[204] But in *EEOC v. West Meade Place LLP*,[205] 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 because 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.[206]

c. Recent Cases Addressing What Constitutes Discrimination "On The Basis Of Disability"

Other ADA lawsuits hinge on what constitutes "discrimination on the basis of disability." Those determinations are often fact-intensive and require courts to weigh facts around the timing of critical employment events and an employer's imputed knowledge at those times. For example, in *EEOC v. Cracker Barrel Old Country Store, Inc.*,[207] the U.S. District Court for the District of Maryland denied summary judgment to an employer on the basis of the suspicious timing of events related to a failure to hire. In that case, the EEOC alleged that the employer refused to hire the charging party because he was hearing impaired.[208] The employer argued that it did not refuse to hire the charging party, but rather had delayed its consideration of hiring, or, alternatively, that his disability did not play a role in the employer's decision not to hire him.[209] The Court disagreed, holding that the facts of the case would allow a factfinder to conclude that the charging party was not selected for hire because of his disability. Among other things, the Court found that the charging party's application was "stonewalled" after the employer learned of his disability, that it had not kept interview dates and did not respond to follow-up phone calls, and the fact that the employer "offered to interview [charging party] only *after* he filed his discrimination charge with the EEOC . . ., may be viewed by the factfinder as a cover-tracks maneuver rather than mere forgivable 'delay.'"[210]

Timing can also be a critical element to determining whether an employee can be "regarded as" having a disability.[211] 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.[212]

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[204] *Id.* at 755. In that case, the EEOC brought a lawsuit on behalf of a charging party who suffered from anxiety, depression, and panic attacks. *Id.* at 753. 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. *Id.* 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. *Id.* at 753-54. The court found 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. Moreover, her depression caused her to be unable to care for herself, communicate with others, or think coherently. *Id.* at 755.

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

[206] *Id.* at *6.

[207] *EEOC v. Cracker Barrel Old Country Store, Inc.*, No. 8:18-CV-2674-PX, 2020 WL 247305 (D. Md. Jan. 16, 2020).

[208] *Id.* at *3.

[209] *Id.* at *3-4.

[210] *Id.* at *3 (emphasis in original).

[211] *See EEOC v. STME, LLC*, 938 F.3d 1305, 1316 (11th Cir. 2019) (holding 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," and that that prong did not extend to an employer's belief that an employee might contract or develop an impairment in the future); *EEOC v. Amsted Rail Co.*, 280 F. Supp. 3d 1141, 1153 (S.D. Ill. 2017) (holding that an employer was liable under the ADA for denying individuals positions based merely on their *potential* to suffer future medical injuries due to abnormal results from a nerve conduction test, 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"); *EEOC v. McLeod Health, Inc.*, 914 F.3d 876, 882 (4th Cir. 2019) (noting 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, but holding 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 recently and because she looked groggy and out of breath).

[212] 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

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.*,[213] 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.[214] 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.[215] 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."[216]

On March 2, 2020, the Court denied cross motions for summary judgment, holding that the parties had presented insufficient evidence to conclude as a matter of law, among other things, that the charging party had an impairment that substantially limited major life activities.[217] In that decision, the Court first considered the nature of the charging party's disability. By then, the EEOC had abandoned its claim that the charging party was actually disabled at the time that he suffered an adverse employment action. Instead, the EEOC claimed that he either had a record of disability or that the employer regarded him as disabled at that time.[218] The charging party had suffered a stroke that required hospitalization and left him with weakness and numbness on his right side.[219] The Court first held that "no reasonable jury could conclude" that the charging party was not impaired in the past because it was undisputed that the charging party "had a stroke that affected his neurological and cardiovascular systems, caused his doctor to place a work restriction on him for a period of time, and required physical therapy."[220] The Court could not decide on the evidence available, however, whether that impairment substantially limited the major life activities of self-care, eating, writing, lifting, and gripping; that decision was left for the jury.[221]

The EEOC sought reconsideration of the Court's ruling, arguing, among other things, that the District Court had erred in deciding that it had not met the "awareness" prong of the "regarded-as" disability claim.[222] The Court applied the reasoning of *EEOC v. STME* to hold that in regarded-as discrimination claims, 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.[223] Although *STME* and other cases had involved claims of possible future impairment, the District Court found that the same reasoning should apply to perceptions of past impairments that are not ongoing.[224] "While the Court does not consider whether [charging party's] impairment was substantially limiting or whether [employer] viewed it

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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.

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

[214] *Id.* at 1240-41.

[215] *Id.* at 1241.

[216] *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.*

[217] *EEOC v. UPS Ground Freight, Inc.*, 443 F. Supp. 3d 1270 (D. Kan. 2020).

[218] *Id.* at 1281.

[219] *Id.* at 1276.

[220] *Id.* at 1283.

[221] *Id.* at 1284-85.

[222] *EEOC v. UPS Ground Freight, Inc.*, No. 17-CV-2453-JAR, 2020 WL 1984293 (D. Kan. Apr. 27, 2020).

[223] *Id.* at *4.

[224] *Id.*

as substantially limiting on the regarded-as claim, it must find that [employer] perceived a current impairment – perception of a past impairment that has ended will not do."[225]

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.[226] Often these issues depend on whether one or more entities can be considered the "employer" of an employee.[227] 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 of an individual to qualify as his/her employer.[228] Notably, the EEOC's definition is different than the statutory definitions that apply to some of the anti-discrimination laws that the EEOC enforces.[229]

Although the EEOC added the complex employment relationship priority to its SEP in 2017, there had been few significant case law developments in this area until recently. FY 2020 saw a significant increase in decisions regarding this issue, most of which pertained to motions to dismiss brought by affiliates of employer companies who argued that they should not be considered joint-employers along with the employer company. The EEOC was almost always successful in winning those motions. The sheer number of these cases compared to prior years, along with the fact that they were decided at the early motion to dismiss stage, may indicate a developing trend toward increased enforcement in this area.

For example, in *EEOC v. 1618 Concepts, Inc.*,[230] the U.S. District Court for the Middle District of North Carolina refused to dismiss from a lawsuit two corporate affiliates of the entity that actually employed the charging party. In that case, a male dishwasher alleged that he had been sexually harassed by a male coworker, that his managers witnessed at least one of those instances of sexual harassment, and that the

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[225] *Id.*

[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.*; *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.

[228] *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 N*ationwide Mut. Ins. 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).

[229] 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 228.

[230] *EEOC v. 1618 Concepts, Inc.*, 432 F. Supp. 3d 595 (M.D.N.C. 2020).

employer generally was aware of the harassment.[231] In his charge of discrimination, the charging party mistakenly identified an entity called "1618 Concepts" as his employer rather than his actual employer, "1618 Downtown." The EEOC issued a letter of determination finding reasonable cause to the charging party's employer entity, the entity the charging party mistakenly identified as his employer, and another affiliated entity.[232]

The employer argued that the two entities that were not named in the charge should be dismissed because the failure to name a party in an EEOC charge constitutes a failure to exhaust administrative remedies against that party and a subject-matter jurisdiction defect as to any Title VII claim brought against the unnamed party.[233] The District Court held, however, that the charging party was a dishwasher who had no prior knowledge of the corporate structure of the employer organization.[234] In particular, the District Court noted that the employee handbook had identified 1618 concepts in large font on the front page and had repeatedly referred to that organization throughout, rather than the actual employing entity.[235] The court concluded, that "under the circumstances, the court cannot say that [charging party] should have known, through reasonable effort, that 1618 Downtown, and not 1618 Concepts, was his employer."[236] Moreover, the District Court found that the three employer entities named in the lawsuit were closely interrelated; they shared employees, common ownership, common management, and corporate officers.[237] The District Court also found that each of the employer entities had effective notice of the EEOC's investigation and therefore could not claim prejudice, and that it was the umbrella organization, 1618 Concepts, that had responded to and engaged with the EEOC.[238]

The employer also argued that the non-employing entities should be dismissed because they did not fall under Title VII's definition of "employer."[239] The District Court rejected the argument that it should apply a joint employment theory to this question, holding that the "integrated employer" theory was the proper standard to apply in Title VII cases. That doctrine involves consideration of four elements: "(1) common management; (2) the inter-relation between operations; (3) the degree of centralized control of labor relations; and (4) the degree of common ownership and financial control."[240] The District Court held that the fact that 1618 Concepts served as the overseer of all of the 1618-themed restaurants, including the charging party's actual employer entity, and the fact those entities shared common management, operated out of the same corporate office location, and used the same handbook that referred to the restaurants as "1618 Concepts," were sufficient to establish that the three named entities were an integrated employer of the charging party.[241] Accordingly, the District Court denied the employer's motion to dismiss the two entities who had not been named in the EEOC charge.

Common ownership and shared management personnel are often deciding factors in determining whether affiliated entities are acting as an integrated enterprise.[242] The test that is applied to determine joint-

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[231] *Id.* at 599-600.

[232] *Id.* at 600.

[233] *Id.* at 600-01.

[234] *Id.* at 605.

[235] *Id.*

[236] *Id.*

[237] *Id.*.

[238] *Id.*

[239] *Id.* at 605-06.

[240] *Id.* at 606.

[241] *Id.* at 606-07.

[242] *See EEOC v. LL Oak Two LLC*, No. 19-CV-839-F, 2020 WL 1159390, at *3 (W.D. Okla. Mar. 10, 2020) (holding that a complaint adequately alleged a single employer theory of liability with respect to the defendant entities because, among other things, it alleged that the entities hold themselves out to the public as a a single enterprise, that various individuals have duties at more than one of the named defendant entities, and that individual managers that exercised control over employment decisions worked at various of those entities; the Court concluded that these allegations "plausibly allege[] a single employer theory of liability"); *EEOC v. Vinca Enterprises, Inc.*, No. 2:20-CV-4021-NKL, 2020 WL 3621248, at *1 (W.D. Mo. July 2, 2020) (holding that the EEOC had met its burden to establish that the defendants acted as a single employer at the pleading stage because, among other things, the EEOC alleged that the defendants shared their manager and other personnel and shared a business address, and that both entities were owned by the same individuals, who were family members, and that this meant, among other things, that both defendants had knowledge and notice of the charging party's charge and had an opportunity to attempt reconciliation); *EEOC v. Bay Club Fairbanks*

employment/integrated enterprise status can sometimes be determinative of the outcome.[243] Some circuits are still working through the exact test that should be applied in such situations. For example, in *EEOC v. Global Horizons, Inc.*,[244] the Ninth Circuit recently held as a matter of first impression that it would apply the common law agency test to determine joint employment under Title VII.[245]

Ranch, LLC, No. 18-CV-1853 W (AGS), 2020 WL 4336297, at *5 (S.D. Cal. July 28, 2020) (holding that the EEOC's proposed amendment to its complaint was not futile because, among other things, the new owner entities "share the same corporate headquarters, common managers, and general counsel; that they commonly control all company policies including employment, accounting, payroll, club membership," and because one entity's "Company Associate Handbook" applied to all employees of the other entity).

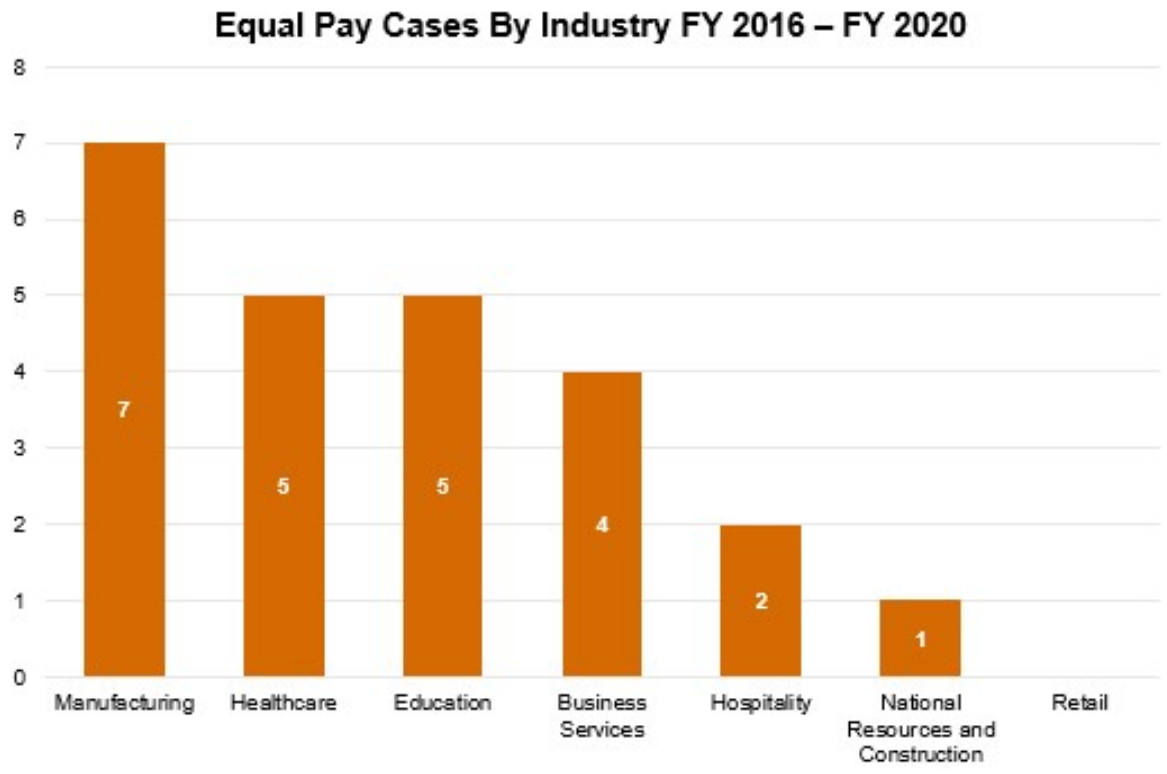
[243] *See, e.g., EEOC v. The Village at Hamilton Pointe LLC*, No. 3:17-CV-147-RLY-MPB, 2020 WL 1532112, at *4-5 (S.D. Ind. Mar. 31, 2020) (applying the Seventh Circuit's factors and holding that a consultant-entity was not a joint-employer of a facility's employees because, among other things, the facility retained the authority to hire and fire employees even though the consulting entity provided guidance and input into those decisions, even though the consulting entity set the facility's budget and determined appropriate pay for its employees).

[244] *EEOC v. Global Horizons, Inc.*, 915 F.3d 631, 641 (9th Cir. 2019) (holding that because the H-2A program places the legal obligation to provide foreign guest workers with housing, transportation, and meals on the "employer," the program "expands the employment relationship between an H-2A 'employer' and its workers to encompass housing, meals, and transportation, even though those matters would ordinarily fall outside the realm of the employer's responsibility," and therefore "[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").

[245] *Id.* at 638 (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 Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323-24 (1992) for determining joint-employer liability: 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. *Global Horizons, Inc.*, 915 F.3d at 639.

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.



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. Most of the litigation involving equal pay issues has revolved around sex-based discrimination

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.[246] 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.[247]

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. 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 . . . ." [248] 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.[249] The interplay between those two statutes has been the source of some interesting decisions over the past few years, including in the context of EEOC litigation.

For example, in *EEOC v. First Metropolitan Financial Service, Inc.*,[250] the U.S. District Court for the Northern District of Mississippi had an opportunity to apply both statutes in a way that elucidated their different burdens of proof and burden-shifting schemes. In that case, the EEOC brought a class action complaint under the EPA and Title VII, alleging that a financial lending company paid female Branch Managers less than male Branch Managers. Although brought as a class action, the EEOC later informed the court that the class of aggrieved parties who had originally joined the suit had been reduced to only two females.[251]

The employer argued that the two female Branch Managers did not have substantially similar responsibilities as their male Branch Manager comparators because they had been hired to manage a new branch, which had relatively few outstanding loans and therefore less responsibility compared to more established branches.[252] The court held that this argument was premised on a misapplication of the law. The court noted that "equal does not mean identical," and that "[i]n determining whether job differences are so substantial as to make jobs unequal, it is pertinent to inquire whether and to what extent significance has been given to such differences in setting the wage levels for such jobs."[253] Although the male managers' work in more established branches may have impacted their day-to-day responsibilities, the record did not show that those circumstances had any effect on the employer's decisions regarding their pay: "the supposed high demands imposed on [comparator] did not, according to [employer's COO's] deposition, significantly impact [employer's] decision to pay [comparator] a higher base salary."[254] The court then denied the employer's attempt to meet one of the statutory exceptions found in the EPA, finding

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[246] *See* U.S. Equal Employment Opportunity Commission Strategic Enforcement Plan FY 2017 - 2021, https://www.eeoc.gov/eeoc/plan/sep-2017.cfm.

[247] *Id.*

[248] 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.*

[249] 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).

[250] *EEOC v. First Metro. Fin. Serv., Inc.*, 449 F. Supp. 3d 638 (N.D. Miss. 2020).

[251] *Id.* at 642.

[252] *Id.* at 644.

[253] *Id.* (quoting 29 CFR § 1620.14(a)).

[254] *Id.* at 644.

that the differences in training and experience could not justify the wage disparity as a factor other than sex, nor could the managers' different salary demands and expectations.

Turning to the EEOC's Title VII claim, the court first noted that the two statutes apply different standards for establishing a *prima facie* case, but nevertheless concluded that "[h]aving found that the Plaintiff successfully established a *prima facie* case under the Equal Pay Act, the Court also finds that the evidence used under the EPA burden is sufficient to establish a *prima facie* case under Title VII."[255] The court explained that under the burden shifting scheme of Title VII, "[t]he burden of production now shifts to the Defendant to articulate some legitimate, nondiscriminatory reason in light of the four exceptions outlined in the Equal Pay Act."[256]

The employer argued that the comparator's salary had been set at a time when it needed to hire someone quickly or close that branch, and the comparator manager had made a "take it or leave it" demand that the company felt compelled to take. The court held that that satisfied the employer's burden under the Title VII burden-shifting scheme "because an employer 'need only articulate – not prove – a legitimate, nondiscriminatory reason,'" to meet its burden of production.[257] However, the employer was not able to rebut the EEOC's claims that those purportedly legitimate reasons were merely a pretext for discrimination; the court found it "highly suspicious" that the employer's reasons had merit in light of the fact that it had sometimes allowed even larger branches to operate for short periods of time without a manager.[258]

Lawsuits brought under the EPA tend to be highly fact-driven and therefore notoriously difficult for employers to dispense with through motion practice before trial. This is especially true when it comes to EEOC-initiated litigation.[259] Several recent decisions are illustrative of this trend. For example, in *EEOC v. Enoch Pratt Free Library*,[260] 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.[261] Then, on October 30, 2019, the District Court also denied cross-motions for summary judgment.[262] 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."[263]

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*.[264] In that case, the EEOC alleged that the employer paid three former female fraud investigators less than it paid four former fraud investigators with

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[255] *Id.* at 647.

[256] *Id.* at 647-48.

[257] *Id.* at 648 (quoting *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 258, 258 (1981)).

[258] *Id.* at 648-49.

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

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

[261] 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.

[262] *EEOC v. Enoch Pratt Free Library*, No. 17-CV-2860, 2018 WL 3660169(D. Md. Aug. 2, 2018).

[263] *Id.* at *5.

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

comparable credentials and experience who were men.[265] The Fourth Circuit held 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."[266] 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 assigned a new hire to a specific step and salary range based on its review of the hire's qualifications and experience.[267]

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.[268] According to the employer, that policy is facially neutral, and clearly permitted the employer to pay the starting salaries that it did.[269] The Court held, however, that that policy did not necessarily compel any specific salary to be awarded to a new hire.[270] The MAPS policy left open the possibility that the employer could apply discretion with respect to setting starting salaries.[271] Applying *Maryland Insurance Administration*, the Court concluded that "[the EEOC's comparator] was hired at a rate not only higher than the female [library supervisors] represented by the EEOC, but also significantly above the salary he had received during his first tenure at [employer]. Given these facts, combined with the inherent discretion within the MAPS policy, genuine factual questions exist about how defendants arrived at [the comparator's] salary."[272]

[265] *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.*

[266] *Id.* The Fourth Circuit also noted that the burden on the employer "necessarily is a heavy one." *Id.* at 120.

[267] *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.

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

[269] *Id.* at *6.

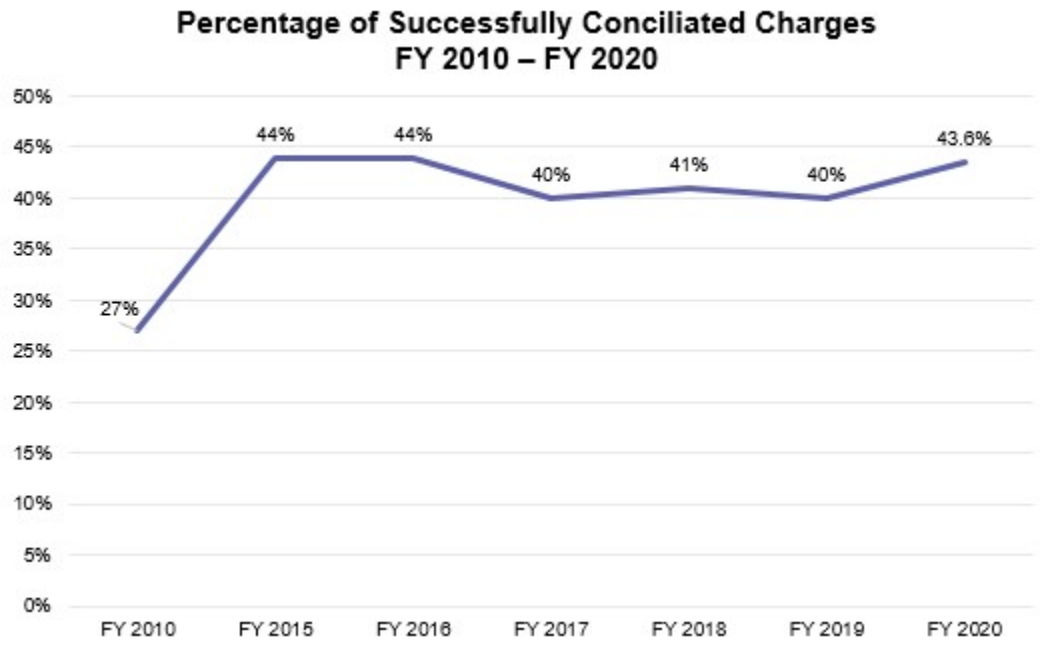
[270] *Id.*

[271] *Id.*

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

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 statues, or impede EEOC's investigative or enforcement efforts.



On July 7, 2020, the EEOC officially announced a new pilot program intended to improve conciliation procedures at the Commission. The program was built 'on a renewed commitment for full communication between the EEOC and the parties, which has been the agency's expectation for many years.

F. Preserving Access To The Legal System

The EEOC's 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 has historically been reflected in the EEOC's aggressive assertion of retaliation claims against employers allegedly obstructing employees' efforts to participate in EEOC proceedings or otherwise oppose discrimination. However, under new leadership the EEOC appears to be focusing on pre-litigation activities as a significant driver of its efforts to preserve access to the legal system.

1. Changes To Charge Conciliation Program

On July 7, 2020, the EEOC officially announced a new pilot program intended to improve conciliation procedures at the Commission.[273] The program was built "on a renewed commitment for full communication between the EEOC and the parties, which has been the agency's expectation for many years."[274] The program also added a requirement that conciliation offers be approved by a higher level of management before they are sent to employers. On October 8, 2020, the EEOC released the specifics of additional proposed changes to the conciliation process in an NPRM. In its NPRM, the EEOC acknowledged that, historically, it elected to not adopt detailed regulations relative to its conciliation efforts based on its belief that retaining flexibility over the conciliation process would "more effectively accomplish its goal of preventing and remediating employment discrimination."[275] While the Commission's NPRM makes clear that the Commission still believes that it is important to maintain a flexible approach to conciliation, it also acknowledged that, over the last several years, its conciliation efforts resolved less than half of the charges where a reasonable cause finding was made. Specifically, between fiscal years 2016 and 2019, only 41.23% of the EEOC's conciliations with employers were successful.[276]

In an effort to improve the effectiveness of the conciliation process, the NPRM seeks to amend the conciliation process for charges brought pursuant to Title VII, ADA, GINA, and the ADEA. The Commission opined that these amendments will support the EEOC's statutory obligations in the conciliation process, provide a better opportunity to resolve charges with employers, and remedy unlawful discrimination without need for litigation. Ultimately, the EEOC stated in the NPRM that the proposed amendments establish "basic information disclosure requirements that will make it more likely that employers have a better understanding of the EEOC's position in conciliation and, thus, make it more likely that the conciliation will be successful."[277]

2. Efforts To Combat Retaliation: Regulatory Guidance And Case Law Developments

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.[278] Retaliation claims premised on EEO-related activity are comprised of three

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

[274] *Id.*

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

[276] *Id.*

[277] *Id.*

[278] *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

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.[279]

First, protected activity generally consists of either "participation" in an EEO process or the reasonable "opposition" to discrimination.[280] These two types of protected activity arise directly from two distinct statutory retaliation clauses that differ in scope.[281] 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.[282] 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.[283]

The EEOC has championed its understanding of retaliation law in recent cases. 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.[284] The EEOC's brief clarified that the reasonable belief standard applies only to the opposition clause and does not apply to the participation clause,[285] which protects the filing of a discrimination charge with the EEOC from retaliation, whether or not the charge is ultimately found meritorious.[286] The EEOC also 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.[287]

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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.")

[279] *See* Enforcement Guidance on Retaliation and Related Issues, *supra* note 278.

[280] *Id.*

[281] *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.

[282] *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.").

[283] *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.

[284] 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.

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

[286] *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.

[287] 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). The EEOC also 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 EEOC argued, the staffing company could be held liable, according to ordinary Title VII principles,[287] "if it knew or should have known of the discrimination and failed to take reasonable corrective measures within its control." *Id.* at 16. (*citing Freitag v. Ayers,* 468 F.3d 528, 538 (9th Cir. 2006)).

The EEOC also filed an amicus curiae brief in *Stancu v. Hyatt Corporation/Hyatt Regency Dallas*,[288] arguing that the District Court incorrectly granted summary judgment on the plaintiff's retaliation claim for failure to show an "ultimate employment decision."[289] The EEOC explained that the "ultimate employment decision" standard applies to substantive discrimination claims, and not to retaliation claims.[290] 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."[291]

The EEOC filed a third amicus brief in *Gogel v. Kia Motors Manufacturing of Georgia, Inc.*[292] 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.[293] 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.[294] 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."[295]

[288] 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*, 791 F. App'x. 446, 451 n.1 (5th Cir. 2019) (finding that plaintiff's retaliation claims failed, even when applying the correct adverse action standard advocated by the EEOC).

[289] 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).

[290] *Id.* at *6.

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

[292] 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).

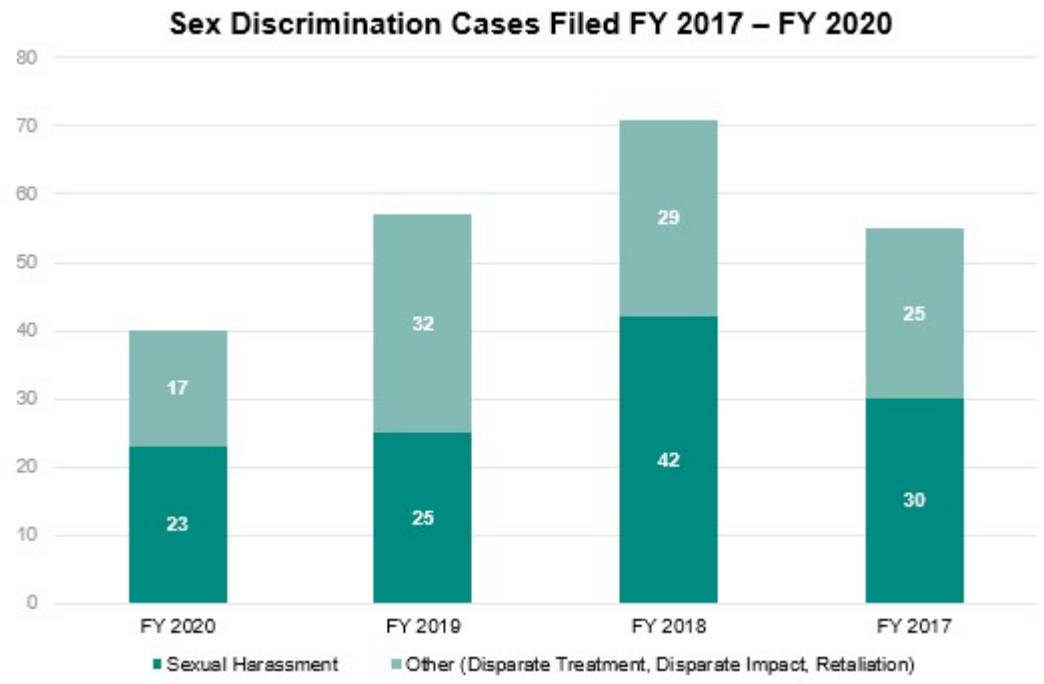
[293] *Id.* at *20-22. The EEOC also clarified that Gogel's assistance of her co-worker in filing an EEOC charge, as alleged by Kia, would constitute protected participation and protected opposition under Title VII. *Gogel*, at *21-*22 ("supporting another employee in reporting discrimination is protected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

[294] *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.").

[295] *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.



The prevention of systemic workplace harassment has been one of the EEOC's national enforcement priorities since 2013.

G. Preventing Harassment

1. EEOC Enforcement Efforts In The Wake Of The #MeToo Movement Collide With New Agency Priorities

The prevention of systemic workplace harassment has been one of the EEOC's national enforcement priorities since 2013. A few years ago, the EEOC published its Proposed Enforcement Guidance on Unlawful Harassment ("Proposed Guidance").[296] The Proposed Guidance was meant to replace several earlier EEOC guidance documents, aiming to define what constitutes harassment, examine when a basis for employer liability exists, and offer suggestions for preventative practices.[297] 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.[298] 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.[299] 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);[300] (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; [301] (3) where the alleged harassment was not directed at the employee; [302] and (4) in instances where the alleged harassment occurred outside of the workplace.[303]

This proposed enforcement guidance, however, appears to have run headlong into the changing priorities at the EEOC, now that the Commission is led by a Republican slate of Commissioners. The guidance has been on hold since early 2017, while the agency has moved quickly on issues that seem closer to its new agenda, such as the updated guidance on religious discrimination. Nevertheless, remnants of the EEOC's evolving views about harassment are evident in the types of lawsuits they have been brought around the country since the onset of the #MeToo era. Those cases are primed to have a sizeable impact on the law in this area.

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[296] 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.

[297] *See Id.*

[298] *Id.* at 5-9.

[299] *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 women 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).

[300] 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).

[301] 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).

[302] 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).

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

2. Case Law Developments Involving Harassment Claims

The EEOC has had plenty of opportunity to shape the law of sexual harassment through its litigation activities. Those cases often hinge on two issues: whether the alleged actions rise to the level of unlawful harassment, and whether an employer can be held liable for harassment perpetrated by employees.

a. Decisions About What Constitutes Actionable Harassment

The question of whether a pattern of conduct rises to the level of actionably harassment is highly fact-intensive and fraught with difficult judgment calls concerning the mental states of both the harasser and the victim. For example, in *EEOC v. New Prime Inc.*,[304] the U.S. District Court for the Western District of Missouri allowed a sexual harassment claim to proceed to trial, holding that live testimony was necessary to flesh out and understand the statements made in text messages. In that case, a truck driver alleged that she was subjected to sexual harassment by her co-driver, who allegedly "asked her for sex and made sexual comments every day, a couple times a day, for five out of the six weeks they drove together," among other things.[305] The employer pointed to text messages showing that the charging party had herself use sexually charged language while working on the truck and had even told her co-driver about a sexual encounter with her boyfriend and had voluntarily asked him to join her at a bar.[306] The court held that this was not sufficient for the court to dismiss the EEOC's claims on summary judgment. "The text messages cited by [employer] do not definitively show that [charging party] was inviting [co-drivers] daily request for sex. To the contrary, some of her text messages show that she affirmatively told [co-driver] she was not interested in a sexual relationship with him and that she wanted to keep the relationship focused on making money."[307]

Similarly, in *EEOC v. Magneti Marelli of Tennessee, LLC*,[308] the EEOC brought a representative action on behalf of female employees in a manufacturing plant alleging that a male production supervisor engaged in sexual harassment of the employees. The EEOC asserted that the production supervisor created a hostile work environment for employees by constantly telling female employees to call him "Big Daddy"; frequently massaging women's shoulders and down their backs; whispering "you know you like that" to them; and singing sexually explicit song lyrics.[309] The Court found that a reasonable jury could find that the claimants were subject to words and actions based on their sex and that the supervisor's conduct was severe or pervasive enough that it rose to the level of unlawful harassment: "There has been a sea change over the last quarter of a century in what is now acceptable workplace conduct and what is understood as unlawful harassment. . . . In the light most favorable to the EEOC, [supervisor's] comments and conduct was objectively offensive sexual harassment."[310] The court also held there could be a basis for employer liability and therefore denied the employer's motion for summary judgment and granted the EEOC's partial motion for summary judgment.

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[304] *EEOC v. New Prime Inc.*, No. 6:18-CV-3177-CV-RK, 2020 WL 555389 (W.D. Mo. Feb. 4, 2020).

[305] *Id.* at *1. The EEOC also alleged that the charging party's co-driver had insinuated that he had killed his wife and told the charging party that she would lose her job if she got off the truck, causing the charging party to feel physically threatened at work. The employer argued that the EEOC could not establish that the co-driver's behavior was unwelcome, or that the harassment was so severe or pervasive that it affected the charging party's terms, conditions, or privileges of employment.

[306] *Id.* at *2.

[307] *Id.* The court similarly held that the record did not conclusively show a lack of severity or pervasiveness. The court noted that it was undisputed that the co-driver requested sex from the charging party more than once a day for several weeks and that the conduct alleged appeared to go beyond the type of "passing rudeness or unpleasantness inherent in the 'rough edges' of day-to-day life." *Id.* at *3. The court also rejected the employer's argument that the EEOC could not establish severity because the co-driver had never touched the charging party physically. The court held that the law is clear that an employee need not be touched to sustain a sexual harassment claim. *Id.* at *4. The court concluded: "[a]lthough the evidence may show differently at trial, the court cannot conclude as a matter of law on the present record that [co-driver's] conduct was not severe or pervasive enough to sustain a sexual harassment claim." *Id.*

[308] *EEOC v. Magneti Marelli of Tennessee, LLC*, No, 1:18-CV-74, 2020 WL 918785 (M.D. Tenn. Feb. 26, 2020).

[309] *Id.* at *1.

[310] *Id.* at *5.

However, in *EEOC v. Appalachian Power Co.*,[311] 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.[312] The District Court held that the totality of those circumstances did not rise to the level of an objectively hostile working environment.[313] 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."[314] 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.[315]

Changing standards of workplace conduct have sometimes factored into the EEOC's legal theories and court decisions. For example, in *Parker v. Reema Consulting Services, Inc.*,[316] 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 a false rumor that she had been promoted because she engaged in a sexual relationship with her supervisor.[317] 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."[318] 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."[319] The Fourth Circuit agreed, holding that "the

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

[312] 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. *Id.* at *2. 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. *Id.* When she turned around to tell him to stop ("I'm not putting up with your shit today"), he terminated her on the spot. *Id.*

[313] *Id.* at *6. 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. *Id.*

[314] *Id.*

[315] *Id.* 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. *Id.* at *7. Among other things, the stated reasons for plaintiff's termination – including attendance issues and falsified time records – had been disregarded on other occasions, which could lead a jury to conclude that those reasons were merely a pretext for discrimination. *Id.* 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]." *Id.* at *8.

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

[317] 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. *Id.* at 300. 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. *Id.* Plaintiff also alleged that she was treated with open resentment and disrespect by her coworkers, including her subordinates, as a result of the rumor. *Id.* Plaintiff filed a sexual harassment complaint against some of her co-workers with the company's Human Resources Manager. *Id.* at 301. A few weeks later, one of her subordinates, who was one of the subjects of plaintiff's complaint, filed his own complaint against plaintiff. *Id.* 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. *Id.* 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. *Id.*

[318] *Id.* at 301-02. The District Court held: "this 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." *Id.* at 302.

[319] 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. According to the EEOC, the rumor itself was gender-based, as was the harassment that stemmed from that

dichotomy that . . . the District Court[] purports to create between harassment 'based on gender' and harassment based on 'conduct' is not meaningful in this case because the *conduct* is also alleged to be gender-based."[320] 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.[321] 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.[322]

b. Establishing Employer Liability

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. Dolgencorp, LLC*,[323] the EEOC brought an action alleging that the Defendant discriminated against its female employee by sexually harassing and constructively discharging her. The charging party alleged that the store manager at the location where she worked subjected her to unwanted conduct, including making comments about "sausages," turning her head toward his crotch when she was stocking shelves, attempting to massage her shoulders, and commenting on her breasts.[324] The court examined the employer's *Faragher/Ellerth* defense, in which the employer argued that it had exercised reasonable care to prevent and correct any harassing behavior and the charging party unreasonably failed to take advantage of the corrective opportunities.[325] Finding that a reasonable jury could disagree about whether the charging party unreasonably failed to take advantage of the corrective measures in place by Defendant, the Court denied the motion as to the EEOC's harassment claim: "Given the compressed time period for all of the conduct in this case, a jury could conclude that [charging party's] brief delay before reporting to Human Resources, within the first month of her employment, was reasonable. Thus, the question of whether [employer] can properly avail itself of the *Faragher/Ellerth* defense presents an issue for the jury."[326]

c. Race-Based And Other Forms Of Harassment

Although the #metoo-generated headlines and resulting litigation have captured much of the attention relating to harassment litigation over the past few years, sex discrimination harassment is, of course, not the only type of harassment that the EEOC is concerned about. For example, in *EEOC v. Joe's Old*

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rumor. *Id.* at 16. 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." *Id.* at 17. "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." *Id.* (quoting *McDonnell v. Cisneros*, 84 F.3d 256, 259-60 (7th Cir. 1996)).

[320] *Parker*, 915 F.3d at 304.

[321] *Id.* at 303.

[322] *Id.* 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. Accordingly, plaintiff had adequately alleged a plausible claim for hostile work environment sex discrimination. *Id.* at 305.

[323] *EEOC v. Dolgencorp, LLC*, No. SAG-18-CV-2956, 2020 WL 1285538 (D. Md. Mar. 18, 2020).

[324] *Id.* at *1-2. The charging party complained to the store manager of another store, who stated that she had heard other similar rumors involving charging party's supervisor. The store manager advised charging party to report the conduct to HR and transfer stores. HR began investigating the allegations and transferred charging party. *Id.* at *2. After charging party transferred stores, her previous supervisor arrived one day to help prepare the store for a visit from a corporate executive. Upon seeing her previous supervisor, charging party resigned. *Id.* The investigation into the allegations lasted two months and, while the employer could not substantiate the conduct, it informed the supervisor that any further misconduct would result in termination. *Id.* at *3.

[325] *Id.* at *4-5.

[326] *Id.* at *5. *See also EEOC v. Safie Specialty Foods Co., Inc.*, No. 18-CV-13270, 2019 WL 5734377, at *13 (E.D. Mich. Nov. 5, 2019) (holding 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 had presented sufficient evidence that the employer knew or should have known about the harassment where "at least two supervisors . . . were aware of that inappropriate conduct, and that supervisors and employees were discouraged from reporting misconduct to [employer]").

Fashioned Bar-B-Que, Inc.,[327] the EEOC brought an action alleging race discrimination. The charging party worked in carryout at a restaurant and alleged that during her employment, she worked with a coworker who harassed her on the basis of her race.[328] The charging party had reported these incidents to the restaurant, which led to members of management telling the coworker to stop his behavior and, when the charging party's coworker hit her, terminating his employment. In evaluating the partial motion for summary judgment, the court found that the employer's management did not act with reckless indifference as to justify punitive damages and that the employee's behavior was outside of the scope of the duties of his employment such that the employer was not liable for the battery and intentional infliction of emotional distress.[329]

Similarly, in *EEOC v. Driven Fence, Inc.*,[330] 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.[331] 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.'"[332] 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.[333] 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.[334]

[327] *EEOC v. Joe's Old Fashioned Bar-B-Que, Inc*., No. 5:18-CV-180-KDB-DSC, 2020 WL 3128599 (W.D.N.C. June 12, 2020).

[328] Specifically, her coworker muttered racial epithets to her, told jokes where the punchline included racial slurs, and, in one incident, poured sauce on her, hit her with a pan, and yelled racial slurs and racially charged remarks at her. *Id.* at *2.

[329] *Id.* at *6.

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

[331] In that case, a black employee alleged that he was subjected to several racially charged comments from his colleagues. *Id.* at *2. 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. *Id.* 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. *Id.*

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

[333] *Id.*

[334] *Id.* at *3. According to the company's employment policies, that supervisor was the manager who was supposed to receive employee reports of harassment and other misconduct. *Id.* at *1. 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. *Id.* at *3. 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]." *Id.*

PART II
COMPENDIUM OF SIGNIFICANT EEOC-LITIGATION DECISIONS IN 2020

A. Motions To Dismiss, Procedural And Jurisdictional Attacks

1. Motions To Dismiss

***EEOC v. Cardinal Health 200, LLC*, 2020 U.S. Dist. LEXIS 45549 (C.D. Cal. Feb. 5, 2020)**. The EEOC brought an action on behalf of the charging parties, Sequia Sims and Lisa Henry, alleging that Defendant AppleOne, a staffing agency that placed them to work at Defendant Cardinal Health, a medical equipment and supplies distributor, subjected them to discrimination on the basis of their race in violation of Title VII of the Civil Rights Act. The EEOC asserted that while working at Cardinal Health, the charging parties were subjected to name calling, racial slurs, and defaced bathroom stalls with racial names and drawings. The EEOC further alleged that the charging parties complained about the harassment to Defendants' management, but Defendants failed to take prompt and effective remedial action reasonably calculated to end the harassment. *Id*. at *2. Defendants filed a motion to dismiss three sections of the complaint that alleged that the charging parties and a group of employees were denied or given less favorable assignments compared to employees of other ethnicities, denied training opportunities, and retaliated against for reporting the alleged discrimination. *Id*. at *3. The Court granted in part and denied in part Defendants' motion. Defendants argued Paragraphs 45-47 of the complaint alleged facts not contained in the letters of determination or the charges, "and therefore are beyond the scope of what [the EEOC] may include in this lawsuit." *Id*. at *4. The EEOC conceded that Defendants first received notice of the allegations in Paragraphs 45-47 when the complaint was served. The Court determined that because the "crucial element" of the charges was "the factual statement contained therein," the allegations of paragraphs 45 to 47 of the complaint must be "like or reasonably related" to those of the charges. *Id*. at *5. The Court noted that nowhere in the administrative charges did the charging parties allege that Defendants gave less favorable or different assignments to employees based on race as alleged in paragraph 45, nor did the charges allege Defendants denied cross-training to employees based on race as alleged in paragraph 46. The Court therefore ruled that these paragraphs should be stricken from the complaint. The Court reasoned that the purpose of Title VII's pre-filing procedural requirements is to notify employers of instances of discrimination, thereby permitting the EEOC and employers to engage in meaningful conciliation and narrowing the scope of a subsequent lawsuit. *Id*. at *11. Thus, permitting EEOC to include allegations "outside the ambit of the predicate EEOC charge," such as those in paragraphs 45 and 46, "would circumvent the EEOC's investigatory and conciliatory role, as well as deprive the charged party of notice of the charge." *Id*. at *12. The Court opined that paragraph 47 stated a viable retaliation claim, as Sims alleged in her charge that she was terminated from Cardinal Health shortly after complaining of harassment, and the complaint alleged Defendants retaliated against employees who complained about discrimination by failing to hire those employees full-time, constructively discharging them, or terminating them. *Id*. at *12-13. Accordingly, the Court allowed paragraph 47 to remain in the complaint. For these reasons, the Court granted in part and denied in part Defendant' motion.

***EEOC v. LogistiCare Solutions LLC,* 2020 U.S. Dist. LEXIS 215486 (D. Ariz. Nov. 18, 2020).** The EEOC filed an action in 2020 on behalf of a female employee, alleging that Defendant dismissed her in 2013 from a two-week training program for a call center because of her pregnancy, and thereby discriminated against her on the basis of her sex in violation of Title VII of the Civil Rights Act. In its complaint, the EEOC alleged it was bringing suit on behalf of the charging party as well as "other aggrieved individuals." *Id*. at *2. Defendant moved to dismiss the EEOC's complaint, or in the alternative, for summary judgment on the grounds of laches. Defendant asserted that the delay of seven years by the EEOC from the filing of the charge until the institution of the lawsuit was unreasonable. The Court denied Defendant's motion to dismiss and motion for summary judgment on the ground of laches. It held that there was insufficient information to determine whether the elements of laches were met, and a material dispute

of fact existed over whether the employer was prejudiced by the EEOC's delay in instituting the lawsuit. Citing Ninth Circuit case law precedent, the Court explained that a claim is barred by laches where: (i) the EEOC unreasonably delays in bringing suit; and (ii) Defendant is prejudiced by the delay. *Id*. It added that determining whether delay was unreasonable and whether prejudice ensued necessarily demanded a close evaluation of all the particular facts. Accordingly, the Court opined that claims are not easily disposed of at the motion to dismiss stage based on a defense of laches. *Id*. Applying the this standard, the Court held that it was not possible to determine whether the elements of laches were met from the complaint. In rejecting Defendant's argument, the Court held that a lengthy span of time alone was not enough to prove unreasonable delay. *Id*. at *3. Further, the Court addressed whether Defendant showed it was prejudiced under the laches standard. *Id*. at *4. The Court opined that even if the EEOC's delay in filing suit was unreasonable, genuine issues of material fact existed regarding whether Defendant was prejudiced by any such delay. Defendant identified six witnesses for whom there were issues, such as locating the witnesses' whereabouts and memory losses. *Id*. at *5-6. The Court indicated that Defendant must prove that the witnesses were unavailable, and that their unavailability was a result of the EEOC's delay. The Court opined that Defendant did not explain why there was "no reasonable way" to contact its former employees. The Court also pointed out how the EEOC was able to locate and interview one of the six witnesses. *Id*. at *6. Accordingly, the Court held that it was "entirely speculative at this point whether the former employees are outside this Court's jurisdiction." *Id*. The Court further ruled that Defendant did not show it was prejudiced based on loss of memory because it could not simply rely on general statements that memories had lapsed. *Id*. at *6. Specifically, the Court observed that other than the conclusory statement that memories fade over time, Defendant did not provide evidence that the potential witnesses had forgotten the alleged incident. Finally, the Court held that although increased potential back pay was one factor that demonstrated prejudice, potential back pay liability was not enough to show prejudice on its own since the Court had the power to take the EEOC's delay into account when crafting a remedy. *Id*. at *7. Accordingly, the Court denied Defendant's motion to dismiss since the complaint did not provide sufficient information to determine whether the elements of laches were met, and denied the motion for summary judgment since there was a genuine dispute of material fact over whether Defendant was prejudiced by the EEOC's delay in filing this suit.

***EEOC v. JBS USA, LLC,* 2020 U.S. Dist. LEXIS 154371 (D. Colo. Aug. 25, 2020).** The EEOC brought an enforcement action on behalf of a group of Muslim workers against Defendant alleging unlawful employment practices on the basis of race, national origin, and religion, as well as claims of retaliation. In Phase 1 of a bifurcated trial where the Court addressed the EEOC's pattern or practice claims, the Court found that: (i) while Defendant had denied Muslim employees a reasonable religious accommodation to pray during Ramadan, the EEOC had not made a requisite showing that any employees suffered a materially adverse employment action as a result of Defendant's policy denying unscheduled prayer breaks; (ii) the EEOC had failed to prove that Defendant's disciplinary actions during Ramadan 2008 were motivated by a discriminatory animus; and (iii) the EEOC had failed to demonstrate that Defendant's discipline of employees during Ramadan 2008 was for a retaliatory purpose rather for engaging in a work stoppage. As such, the Court dismissed the EEOC's Phase I pattern or practice claims. The Court also found that the EEOC was unable to show that the workers had suffered "adverse employment actions" as a result of Defendant's supposed policy of denying prayer breaks because employees who had been reprimanded by Defendant were never ultimately suspended or fired out of Defendant's desire to deny religious accommodations. Id. at *8. As such, lacking evidence that any employee suffered a detriment to compensation, terms, conditions or privileges of employment because of such individual's religion in relation to discipline imposed for unscheduled prayer breaks, the Court concluded that the EEOC failed to prove its claim that Defendant's policy constituted an unlawful pattern or practice of discrimination. As a result of the Court's ruling, Defendant argued that the intervenors' claims should be dismissed for failure to plead individualized allegations as to each aggrieved party and that judgment on the pleadings should be granted. All intervenors had sued over substantially similar allegations, which closely mirrored the EEOC's claims. To the extent that the intervenors' claims alleged pattern or practice claims mirroring the EEOC's claims, the Court dismissed the intervenors claims with prejudice.

***EEOC v. LL Oak Two LLC*, 2020 U.S. Dist. LEXIS 41258 (W.D. Okla. Mar. 10, 2020).** The EEOC filed an action on behalf of the charging party, Mina Davari, alleging that Defendants - LL Oak Two LLC d/b/a Landers Chrysler Dodge Jeep Ram of Norman - failed to hire Davari as a car salesman on the basis of her

sex in violation of Title VII of the Civil Rights Act. Defendants filed a motion to dismiss pursuant to Rule 12(b)(6), and the Court denied the motion. Defendants argued they should be dismissed because administrative remedies were not exhausted as to them, as shown by the underlying charges filed by Davari with the EEOC. Defendants alleged that the EEOC failed to exhaust its administrative remedies because the underlying EEOC charges brought by Davari named Landers Chrysler of Norman as the only employer accused of committing discriminatory acts. *Id*. at *2. The EEOC argued that its complaint alleged that Defendants "collectively constitute a single employer and single integrated enterprise...." *Id*. Further, the EEOC contended that any potential exhaustion of remedies problem would be overcome because the complaint alleged that all Defendants were sent a determination letter which invited them to join in conciliation efforts. *Id*. at *3. Finally, the EEOC asserted that Defendants' motion to dismiss should be denied because it referenced an affidavit outside the pleadings. The Court determined that simply because Defendants submitted evidence outside the pleadings was not a reason to deny their motion. As to the EEOC's single employer argument, the Court explained that case law authorities applying the single employer test weigh four factors, including: (i) interrelations of operation; (ii) common management; (iii) centralized control of labor relations; and (iv) common ownership and financial control. *Id*. at *5. Here, the complaint alleged: (i) that Landers Chrysler of Norman (Davari's alleged employer), along with two other Defendants, use the fictitious name "Steve Landers Auto Group" and held themselves out to the public as a single enterprise; (ii) another Defendant provided management, financial, human resource, and operational services to Landers Chrysler of Norman; (iii) that various individuals had duties for more than one of the entities named as Defendants; (iv) that job openings were advertised, on the same website, on behalf of various Defendants; (v) managers who exercised control over employment decisions included individuals who were employees of various Defendants; and (vi) that Davari heard two managers discussing that sales associate positions were not for women. *Id*. at *6. The Court held that the complaint plausibly alleged a single employer theory of liability. For these reasons, the Court denied Defendants' motion to dismiss.

***EEOC v. Pediatric Health Care Alliance, P.A.*, 2020 U.S. Dist. LEXIS 205660 (M.D. Fla. Nov. 4, 2020).** The EEOC filed an action on behalf of the charging party, Chelsea Jackson, a nurse, contending that Jackson was subjected to sexual harassment, and after Jackson reported the sexual harassment, Defendant retaliated against her by transferring her to an inconvenient location, limiting her earning potential, and reducing her job duties. *Id*. at *3-4. After Jackson filed charges of sexual harassment and retaliation under Title VII of the Civil Rights Act with the EEOC, it determined that there was insufficient evidence to show sexual harassment under Title VII, but there was sufficient evidence to show retaliation. The EEOC thereafter filed the action against Defendant. In turn, Defendant moved to dismiss, or in the alternative, to strike the discrimination claims from the complaint. Defendant argued that dismissal was appropriate based on the EEOC's determination that Jackson's charge of sexual harassment was not sufficiently supported. The Court observed that the EEOC's complaint only asserted a claim of retaliation in violation of Title VII, not sexual harassment, although the pleadings referred to the harassment. Accordingly, the Court denied Defendant's motion to dismiss. In response to the motion to strike, the Court held that at this stage of the proceedings, it could not conclude that the EEOC's harassment allegations had no relation to the retaliation claim or that their presence would prejudice Defendant. *Id*. at *5. Accordingly, the Court denied Defendant's motion.

2. Other Procedural Attacks

***EEOC v. Performance Food Group*, 2020 U.S. Dist. LEXIS 46971 (D. Md. Mar. 18, 2020)**. The EEOC filed an action on behalf of numerous job applicants alleging that Defendant engaged in a pattern or practice of gender discrimination in its hiring of warehouse positions in violation of Title VII of the Civil Rights Act of 1964. Defendant filed a motion to strike various declarations, testimony, and exhibits offered by the EEOC in its pre-trial pleadings. The Court granted in part and denied in part Defendant's motion. Initially, Defendant moved to strike the testimony and declarations of 36 individuals who were not designated by the EEOC as witnesses whose testimony could be presented at trial. *Id*. at *5. Defendant relied upon the Court's first procedural order, which permitted Defendant to take depositions of only those witnesses and claimants designated by the EEOC. The EEOC countered that the first procedural order should be modified to prevent injustice. *Id*. at *6. However, the Court found that Defendant would suffer prejudice as a result of a modified order, given that Defendant only expected to depose those individuals

designated by the EEOC. Because allowing Defendant additional time to depose non-designated individuals would "further delay these already lengthy proceedings," the Court granted Defendant's motion to strike as to these declarations and testimony. *Id*. at *7. Defendant also moved to strike a number of the EEOC's exhibits as hearsay, including: (i) six statements by Defendant's employees describing the company's alleged discriminatory practices; (ii) documents from the EEOC's investigations; (iii) a complaint and a court order denying summary judgment from a separate lawsuit against Defendant; and (iv) two emails related to alleged harassment by Defendant's employees. In terms of the statements by Defendant's employees, the Court struck only one general statement regarding Defendant's alleged bias against women by an employee uninvolved in the hiring process. The Court upheld the remaining statements as legally significant to the EEOC's allegations. With respect to the EEOC's investigatory documents, the Court analyzed two letters by Defendant's employees that detailed allegedly discriminatory statements and hiring decisions made by supervisors. The Court struck one letter because the author of the letter did not adopt his statements at his deposition, and sustained the second letter as relevant to the EEOC's gender bias claims. Additionally, the Court struck both documents from the separate lawsuit against Defendant, finding that it would not be appropriate to use factual statements from another case to determine the outcome of this case. *Id*. at *20. Furthermore, regarding the email exhibits, the Court struck one email because its author did not adopt the contents of her email in her deposition. However, the Court upheld the second email related to sexual harassment because, even though harassment was not one of the EEOC's allegations, its contents "may be relevant to the motives and biases" of Defendant's supervisors. Therefore, the Court granted in part and denied in part Defendant's motion to strike.

***EEOC v. Vantage Energy Services, Inc.*, 954 F.3d 749 (5th Cir. 2020).** The EEOC filed an action on behalf of the charging party, David Poston, alleging that Defendant terminated his employment after he suffered a heart attack on the job in violation of the Americans With Disabilities Act ("ADA"). The District Court granted Defendant's motion to dismiss. On appeal, the Fifth Circuit reversed and remanded the District Court's ruling. Poston worked for Vantage on a deep-water drillship off the coast of Equatorial Guinea. After suffering his heart attack on the job, Poston was airlifted off the drillship and returned home on short-term disability leave. The day Poston was due to return to work, Defendant terminated his employment due to poor performance. Poston's attorney sent a letter and an EEOC intake questionnaire to the EEOC alleging discrimination on the basis of his disability. The intake questionnaire contained a box to check with two options: (i) indicating that he wanted to talk to an EEOC employee before deciding whether to file a charge; or (ii) that he wanted "to file a charge of discrimination" and "authorizing the EEOC to look into the discrimination" claim. *Id*. at 752. Poston checked the box choosing to file a charge of discrimination. The EEOC subsequently send Poston's attorney a letter stating that although it had notified Defendant of the initiation of "the charge filing process," it required a verified charge from Poston before beginning its investigation. However, Poston did not filed a verified charge until one year after his termination. After conducting an investigation, the EEOC determined that there was reasonable cause to believe that Defendant violated the ADA, and the EEOC filed the action. Defendant argued that Poston failed to exhaust administrative remedies because the formal charge was filed 300 days after his termination. The EEOC argued that Poston satisfied the charge-filing requirement by filing his intake questionnaire within 300 days of his termination. Defendant argued that Poston's intake questionnaire and attorney transmittal letter together did not satisfy the requirements of 29 C.F.R. § 1601.12(a). The Fifth Circuit explained that the EEOC regulations require only that a charge be "sufficiently precise to identify the parties, and to describe generally the action or practices complained of." *Id*. at 754. The Fifth Circuit found that Poston's questionnaire identified Poston as the charging party and Defendant as the employer, stated approximately the number of Defendant's employees, and explained Poston's position, salary, and dates of hire and termination. The questionnaire also asserted that Defendant discriminated against Poston when it discharged him immediately after finishing his short term disability due to his heart attack. *Id.* The Fifth Circuit thus determined that the questionnaire included a "clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices." *Id*. at 755. Defendant further argued that because Poston's intake questionnaire was unverified, it was fatally defective as a charge at the outset, and the defect was not cured in time to avoid the 300-day filing deadline. The Fifth Circuit held that this was not dispositive, as the substance of Poston's intake questionnaire was virtually identical to the substance of his verified charge. Accordingly, the Fifth Circuit reversed and remanded the District Court's ruling granting Defendant's motion to dismiss.

B. Discovery In EEOC Cases

1. Motions To Compel, Entries Of Confidentiality And Protective Orders, And Other Discovery Procedures

EEOC v. The George Washington University, 2020 U.S. Dist. LEXIS 112933 (D.D.C. June 26, 2020). The EEOC filed an action on behalf of charging party Sara Williams, an executive assistant to Defendant's director of athletics, alleging that she was denied equal pay, employment opportunities, and advancement in violation of Title VII of the Civil Rights Act and the Equal Pay Act. The EEOC further contended that Defendant hired a male comparator in an assistant role to the director of athletics who was paid more and given more opportunities than Williams. The EEOC filed a motion to compel production of four groups of documents, and the Court granted the motion in part and denied the motion in part. Defendant contended that the EEOC's discovery requests were overly broad, and that the costs it would incur to properly review and produce all the information were unreasonable because they exceeded the requested damages in the lawsuit. Defendant asserted that it would cost approximately $484,200 to produce the requested documents, more than EEOC's top-end scenario recovery of $480,000. The Court agreed with Defendant's position. It determined that the cost for production of the documents was not proportionate to the recovery possible. However, the Court granted the motion to compel as to a narrowed group of non-privileged emails from the time Williams started as an executive assistant to the time the special assistant left his job and a "random sampling" of 10% of any remaining non-privileged emails from the email accounts of the director, the special assistant, and Williams. Further, the Court granted the motion to compel with respect to any reports of alleged gender discrimination or sexual harassment made against the director by female workers or students over a five-year period. Accordingly, the Court granted in part and denied in part the EEOC's motion to compel production.

C. Dispositive Motions In EEOC Pattern Or Practice And Single Plaintiff Cases

1. ADA Cases

***EEOC v. Cracker Barrel Old Country Store*, 2020 U.S. Dist. LEXIS 7528 (D. Md. Jan. 16, 2020)**. The EEOC filed an action on behalf of charging party Donte Kess, a deaf individual, alleging disability discrimination after Defendant did not hire Kess as a dishwasher at its Linthicum Heights restaurant. After discovery, Defendant filed a motion for summary judgment, which the Court denied. Kess was a high-school graduate with years of experience in the restaurant industry, who applied for an advertised dishwasher position with Defendant using the company's online application system. Defendant's manager then emailed Kess an invitation for an interview, and requested that Kess call the restaurant to schedule the interview. *Id*. at *2. Defendant contended that it did not hear from Kess after sending the invitation to interview. Kess, however, attested that on the same day he received the offer to interview, he traveled an hour via public transportation to a Workforce Technical Center to use its videophone services, which allowed callers to use sign language to communicate to an interpreter, so he could schedule an interview. During this call, Kess communicated with Defendant's General Manager, and told her that he communicates with others using either sign language, writing on paper, or spelling with his fingers, and that communication had not presented a problem for him in prior jobs. *Id*. at *3. The manager scheduled Kess for an interview. Once he arrived for the interview, Kess was told that the interviewer was not available and then walked away. Kess left a note for the interviewer and was not contacted again, despite calling the restaurant using the videophone service to call and inquire about the job several times. Defendant's electronic records reflected that Kess was removed from consideration for the position. Kess then filed a charge with the EEOC and thereafter the EEOC initiated litigation on his behalf. The Court indicated that as to the first element of the prima facie case, Kess had a recognized disability under the ADA. As to the second and third elements, the record evidence amply demonstrated that Kess was qualified for the open dishwasher position for which he applied. *Id*. at *7. The parties disputed the sufficiency of evidence as to the fourth element; i.e., whether Kess was subjected to an adverse

employment action. Defendant argued that it did not "refuse" to hire Kess, but merely "delayed" its consideration of hiring. The Court reasoned that immediately after learning that Kess was deaf, the supervisors stonewalled Kess, did not keep an in-person interview with Kess, and his numerous follow-up phone calls went unanswered. Thereafter Defendant unilaterally took Kess out of consideration for the job. Therefore, because it concluded that genuine issues of material fact existed as to the fourth element of the prima facie case, the Court reasoned that it must deny Defendant's motion for summary judgment. *Id*. at *9. Defendant further asserted that no evidence supported the contentions that Kess' disability played a role in its non-selection of Kess. *Id*. The Court disagreed. It found that a reasonable juror could conclude that Kess was denied employment because of his hearing impairment. *Id*. at *10. Accordingly, the Court denied Defendant's motion for summary judgement.

***EEOC v. Loflin Fabrication, LLC*, 2020 U.S. Dist. LEXIS 90601 (M.D.N.C. May 22, 2020).** The EEOC filed an action alleging that Defendant required its employees to disclose their prescription medications, and terminated Deborah Shrock for her failure to provide such information or, alternatively, because of a disability in violation of the Americans With Disabilities Act ("ADA"). Defendant prohibited employees from working while under the influence of any narcotic, and since at least 2017 it had conducted random drug screening tests due to the nature of its factory work. Defendant also required employees to inform the company of prescribed medication to ensure that it knew when an employee was taking medicine that might affect the ability to safely operate or navigate around heavy equipment. Shock was prescribed a muscle relaxer for neck pain, but she did not submit the prescription to Defendant or inform anyone at Defendant about the prescription. Thereafter, Defendant randomly selected Shrock for a drug test, and she informed her supervisor that she had taken prescribed medication for neck pain the night before. Shrock's supervisor reported the fact that Shrock took the medication and did not inform Defendant. Defendant subsequently terminated Shrock from her employment for failing to inform it of the prescription drug medication. Defendant did not investigate the medication and evaluate whether it affected Shrock's ability to work before firing her. In its lawsuit, the EEOC contended: (i) that the prescription drug disclosure policy violated the ADA; (ii) that Defendant violated the ADA by terminating Shrock's employment for her failure to disclose her prescription; and (iii) that Defendant violated the ADA by terminating Shrock's employment based on an actual or perceived disability. *Id.* at *16. After discovery, Defendant moved for summary judgment, and the Court granted in part and denied in part the motion. First, the Court explained that the ADA "permits employers to make inquiries . . . when there is a need to determine whether an employee is still able to perform the essential functions of his or her job." *Id*. at *19. However, the Court explained that there were disputed questions of material fact about the intended scope of the disclosure policy, how the policy was actually applied, and whether the policy as applied was overbroad and whether it was objectively reasonable. *Id*. at *20. The Court therefore denied Defendant's motion for summary judgment as to whether Defendant's policy violated the ADA. In addition, the Court found that while Defendant presented some evidence that it had several reasons to terminate Shrock's employment, other employees gave written statements on the day of her termination that she was discharged because she did not disclose her prescription. *Id.* at *23. The Court determined that the question of Shrock's discharge was disputed and therefore summary judgment was not appropriate. Finally, the Court opined that the EEOC offered no direct or indirect evidence that Shrock was terminated because of a disability, and there was no evidence that Shrock was disabled or that Defendant regarded her as disabled as of the date of her termination. Therefore, the Court held that there was not enough evidence for a rational trier of fact to reasonably find she was disabled when she was terminated. *Id.* at *27. For these reasons, the Court granted Defendant's motion for summary judgment as to whether it regarded Shrock as disabled or terminated her employment due to a perceived disability. Hence, the Court granted in part and denied in part Defendant's motion for summary judgment.

***EEOC v. T&T Subsea, LLC*, 2020 U.S. Dist. LEXIS 75371 (E.D. La. April 29, 2020).** The EEOC filed an action on behalf of charging party Jason Woods alleging that Defendant terminated his employment on the basis of his disability in violation of the Americans With Disabilities Act ("ADA"). Following discovery, Defendant filed a motion for summary judgment, which the Court denied. Woods, a cancer patient, worked for Defendant as a diver cleaning and repairing ships. While undergoing treatment for cancer, Woods took FMLA leave. After Woods was cleared to return to full-duty work at the conclusion of his treatment, Defendant terminated his employment, stating that the cancer and subsequent treatment disqualified him from diving for five years pursuant to the Association of Diving Contractors International ("ADCI")

consensus standards. Defendant argued that the EEOC could not prove a *prima facie* case of disability discrimination because Woods was not qualified for the job of diver under the ADCI consensus standards. The EEOC argued that summary judgment was not warranted because Defendant could not rely on the ADCI guidelines to justify its actions towards Woods since such conduct is governed first and foremost by the ADA. The EEOC also argued that Defendant's admission it fired Woods because of his disability was direct evidence of discrimination, so the EEOC did not have to prove pretext. *Id*. at *9. Further, the EEOC argued that, if it had to prove pretext, there were disputed issue of material fact regarding whether Defendant uniformly applied the ADCI guidelines, which could demonstrate pretext. *Id*. at *10. The Court agreed with the EEOC that there was direct evidence that Defendant made its employment decision on the basis of Woods's disability. However, Defendant contended that it had a reason to discriminate against Woods, *i.e.*, namely, Woods would be a direct threat to safety and his termination was a business necessity because his cancer and treatment disqualified him from diving under the criteria outlined in the ADCI guidelines and Defendant's diving handbook. *Id*. at *16. The Court opined that there were genuine issues of material fact related to whether Defendant meaningfully assessed Woods's ability to perform his job safely based on the best available objective evidence and reasonably concluded that Woods posed a direct threat. The Court determined that whether Defendant relied on the best available objective evidence of Woods's condition was a disputed issue of material fact because Woods's treating physician cleared him for diving shortly after Defendant fired him and Defendant refused to rehire Woods based upon the treating physician's clearance. *Id*. at *16-17. The Court further held that Defendant failed to demonstrate conclusively, without factual dispute, that the ADCI and handbook standards are uniformly applied, job-related, and consistent with its business necessity, or that there was not some reasonable accommodation available. Accordingly, the Court denied Defendants' motion for summary judgement.

***EEOC v. PLM Services*, 2020 U.S. Dist. LEXIS 115578 (W.D. Wis. July 1, 2020).** The EEOC filed an action on behalf of charging party Leigh Hancock, a hotel housekeeper, alleging that Defendant failed to accommodate Hancock and discharged her because of her disability (seizure disorder) in violation of the Americans With Disabilities Act ("ADA"). Defendant filed a motion for summary judgment on the grounds that the EEOC's claim failed because it could not demonstrate that Hancock was disabled, that she could perform the essential functions of the housekeeper position, that she was terminated because of her disability, or that Defendant failed to accommodate her. *Id*. at *1-2. The Court denied the motion. It found that genuine questions of fact remained for a jury's determination. Defendant provided Hancock with an employee handbook at the commencement of her employment, which contained Defendant's employee policies, including a "returning to work after illness or temporary disabilities. It stated that "any time you are away from work, you may be required to provide your supervisor with a physician statement from your doctor. In all cases where the absence due to illness or temporary disability is for three or more consecutive workdays you'll be required to provide your supervisor with a doctor's release for return to work on the date of you return." *Id*. at *4. Following work one day, Hancock experienced a seizure in her home. After the seizure, she was sore, confused, and had pain that lasted for several days. Hancock notified her manager and requested to be off work the remainder of the week. Defendant contended that it requested that Hancock bring in a doctor's note, but Hancock stated that no one had asked her to provide a medical excuse for her absences. Defendant ultimately decided to terminate Hancock's employment following the two-day absence. The EEOC argued that Defendant terminated Hancock's employment because of her absences caused by the seizure. The Court determined that the EEOC submitted evidence from which a reasonable jury could conclude that Hancock's seizure disorder was a disability (on account of the history of the condition to notes and charts from her doctor). The Court further opined that the evidence suggested that Hancock was a part-time employee who missed two days of scheduled work to recover after a seizure, and Defendant failed to show that Hancock's missing a few days each year to recover from a seizure amounted to her inability to perform the essential functions of her job. *Id*. at *15. Finally, the Court held that a reasonable jury could conclude that Defendant was aware of Hancock's seizure disorder from Hancock's informing her supervisor, her statements about her condition at the termination meeting, and her attempt to bring in documents about her condition. The Court held that there were genuine disputes of material fact regarding whether Defendant could have provided Hancock a reasonable accommodation for her disability, but that it failed to do so. The Court therefore denied Defendant's motion for summary judgment.

***EEOC v. Wal-Mart Stores East, L.P.,* 2020 U.S. Dist. LEXIS 14524 (E.D. Wis. Jan. 29, 2020).** The EEOC brought an action on behalf of Marlo Spaeth, an individual with Down Syndrome, after she was terminated from her position as a sales associate. The EEOC alleged that Defendant's decision to terminate Spaeth's employment constituted unlawful discrimination under the Americans With Disabilities Act of 1990 ("ADA"). After discovery, Defendant moved for summary judgment, and the Court denied the motion. Defendant did not dispute that Spaeth was disabled under the ADA. Instead, it maintained that Spaeth was not qualified to perform the essential functions of the job, either with or without reasonable accommodations. Defendant also contended that, even if Spaeth was a qualified individual with a disability, there was no evidence that it discriminated against her in failing to accommodate her and terminating her employment. The Court rejected Defendant's position that there was no genuine dispute of material fact that Spaeth was not a qualified individual with a disability within the meaning of the ADA because, with or without reasonable accommodations, Spaeth was unable to perform an essential function of her job, *i.e*., regular attendance. The Court agreed with the EEOC that whether Spaeth was able to perform the essential function of regularly showing up for work was a disputed fact. The Court pointed out that for 16 years, Spaeth was able to perform this essential part of her job satisfactorily enough to receive positive performance evaluations and regular wage increases. It was only after Defendant moved to computer scheduling and changed Spaeth's shift and required her to work until 5:30 p.m. each day that she experienced significant problems with attendance. The EEOC argued that Defendant's decision to modify Spaeth's schedule and its refusal to change it back when it proved unworkable for her constituted a failure to reasonably accommodate her disability. Defendant asserted that: (i) the requested accommodation was unreasonable; and (ii) even with the requested accommodation, Spaeth was unable to avoid excessive absences. Because there were factual disputes as to each of Defendant's responses, the Court held that summary judgment was precluded as to the issues of whether or not Spaeth was a qualified individual. The Court determined that the evidence also was disputed as to whether allowing Spaeth the accommodation would pose an undue hardship on the operation of Defendant's business. Defendant contended that Spaeth's employment was terminated for absenteeism and there was no evidence connecting her absenteeism to her disability. The Court disagreed. It found that the opinions of the EEOC's expert, a physician with extensive experience treating people with Down Syndrome, who opined on the importance of routine for persons with Down Syndrome, was sufficient to raise a jury question as to whether Spaeth's absenteeism was a product of her Down Syndrome. Likewise, the Court rejected Defendant's argument that even if the EEOC could show that Spaeth's absenteeism was causally linked to her Down Syndrome, there was no evidence that it discriminated against her on account of her disability. Finally, the Court denied Defendants motion for summary judgment on the EEOC's punitive damages claim. The Court reasoned that fact that Defendant had policies in place concerning reasonable accommodations for people with disabilities did not mean that punitive damages were not available, especially when there was evidence that Defendant's employees failed to comply with those policies in responding to Spaeth's obvious difficulties with a change in her hours. For these reasons, the Court denied Defendant's motion for summary judgment in its entirety. *Id.* at *37.

***EEOC v. UPS Ground Freight,* 2020 U.S. Dist. 35115 (D. Kan. Mar. 2, 2020).** The EEOC brought a claim asserting disability discrimination on behalf of the charging party, Thomas Diebold, against his former employer pursuant to the Americans With Disabilities Act ("ADA"). The parties brought cross-motions for summary judgment pursuant to Rule 56(a), and the Court denied both motions. Diebold worked as a road driver for Defendant starting in 2006. Diebold had a stroke, on January 21, 2013, and was hospitalized for approximately two days. After his release from the hospital and while undergoing physical and occupational therapy, Diebold's personal physician released him back to work with no restrictions on February 6, 2013. Diebold returned to work on February 10, 2013, to the same road driver position that he had before his stroke. He performed the functions of the road driver position without complaint or concern that he was unable to perform his job until he was required to undergo a work-related medical exam on April 29, 2013. The road driver position required a commercial driver's license ("CDL") and a valid medical examiner's certificate ("MEC"). Diebold was not cleared to return to work after his April 29, 2013 exam, and was told that he must wait for one year under the U.S. Department of Transportation ("DOT") guidance that recommends a one-year waiting period after a stroke for commercial drivers because the recurrence rate of strokes is highest during the first year. The DOT examiner noted that Diebold could not drive until his next physical on January 23, 2014, but that he could work on the dock. Although Diebold still desired to drive, he sought hours as dockworker, pursuant to what he understood was Defendant's policy for those

unable to drive, including those drivers who were arrested for or convicted of driving under-the-influence ("DUI"). Diebold and his supervisor believed that Defendant's policy permitted Diebold to work on the dock and Diebold's supervisor approved him to start working on the dock as of May 13, 2013, as a full-time dock worker. However, on May 10, 2013, Diebold was informed that Defendant would not permit him to work on the dock as a full-time dock worker as the policy only applied to those whose CDL was "suspended or revoked" due to, for example, a DUI, but not to those who are medically disqualified. On December 6, 2013, Defendant offered Diebold an accommodation pursuant to its ADA policy, which would have allowed him work as a part-time dock worker for $22.35 per hour. In its motion for summary judgment, the EEOC claimed it had shown all elements of its disability discrimination claim as a matter of law. Defendant argued that summary judgment was appropriate in its favor because Diebold was not disabled as defined by the ADA. The Court ruled that the EEOC had demonstrated that Diebold's stroke was an impairment as defined by the ADA, and that his impairment included a heightened risk of stroke recurrence. However, the Court determined that there was a genuine issue of material fact as to whether this impairment substantially limited Diebold's major life activities, such that by May 13 or December 6, 2013, he had a record of impairment. Furthermore, the Court opined that there was a genuine issue of material fact about whether the loss of Diebold's MEC caused Defendant to perceive that Diebold was impaired on those two dates. Because there was a genuine issue of material fact about whether Diebold was disabled under the statute, and whether Defendant's actions on May 13 and December 6, 2013 were because of Diebold's disability, the Court concluded that summary judgment was inappropriate and it denied both parties' motions. *Id.* at *33.

***EEOC v. Austal USA, LLC,* 2020 U.S. Dist. LEXIS 8551 (S.D. Ala. Mar. 20, 2020).** The EEOC brought an enforcement action on behalf of the charging party, Jimmy Cooper, who suffered from diabetes, alleging that Defendant discriminated against Cooper by failing to provide him leave as a reasonable accommodation and instead terminating his employment for disability-related absences in violation of the Americans With Disabilities Act (ADA). Cooper worked as a Logistics Associate II and his duties were to receive, inspect, inventory, handle, move, issue, and deliver materials in a safe, accurate, and efficient manner. The position required Cooper to be present at the facility to do the work, as it could not be done from home. Defendant moved for summary judgment pursuant to Rule 56(a), and the Court granted Defendant's motion. The EEOC asserted that Cooper was terminated for medical-related absences, which constituted direct evidence of discrimination. Upon an examination of the evidence in the record, the Court determined that there was no direct evidence of disability-based disparate treatment. The Court further found that the EEOC failed to identify specific comments or incidents that could be considered unambiguous examples of discrimination. Thus, absent any direct evidence of discrimination, the Court concluded that Cooper's claims must be examined under a burden-shifting framework. Under that standard, the Court agreed with Defendant that the EEOC failed to establish a *prima facie* case because Cooper was unable perform an essential function of the job with or without reasonable accommodation and therefore was not a "qualified individual" under the ADA. Because regular attendance at work was an essential function of Cooper's position, the Court found that he could not perform his work without being present at work. Furthermore, Cooper could not foresee when he would be unable to come to work or when he would need to leave early. It was undisputed that Defendant had a detailed attendance policy and that Cooper had to be at work in order to perform his job functions. The testimony of Cooper's supervisor indicated that Cooper could not perform his job without being present and that his increasing and unpredictable absences was a problem for Defendant. Further, the Court concluded that because the EEOC failed to identify any reasonable accommodation that would have allowed Cooper to perform the essential functions of his job, the EEOC failed to present evidence that Defendant had discriminated against Cooper based on his disability. Accordingly, the Court granted summary judgment in favor of Defendant. *Id.* at *30.

2. ADEA Cases

***EEOC v. RockAuto, LLC*, 2020 U.S. Dist. LEXIS 54675 (W.D. Wis. Mar. 30, 2020)**. The EEOC filed an action on behalf of Glenn McKewen, an employment applicant, alleging that Defendant refused to hire McKewen because of his age in violation of the Age Discrimination in Employment Act ("ADEA"). Defendant filed a motion for summary judgement, which the Court denied. McKewen applied for a supply chain manager position with Defendant when he was 64 years old. Defendant utilized a standardized

application process in which an applicant with a supply chain, operations management, or industrial engineering degree who had a GPA of 3.5 or higher from a top 100 school would automatically be advanced to the next stage. However, the applicant could be awarded a “Jim Pass” to the next stage by Defendant’s General Manager James Taylor if he concluded that there was something "unusually outstanding" about an applicant's background or if Defendant was struggling to fill supply chain manager vacancies. *Id*. at *3. An applicant who passed the scoring stage would be given a written "Auto Test" of the applicant's knowledge of basic automotive concepts. *Id*. at *4. McKewen submitted his application materials and included information that he had over 12 years of supply chain leadership experience with six positions he had held between 1999 and 2016, largely in the field of supply chain management and purchasing. *Id*. at *5. McKewen further asserted that he had received an M.B.A. in marketing and supply chain management from Missouri State University with a 3.2 GPA and a B.S. in business administration from Rochester Institute of Technology with a 3.0 GPA. Id. When McKewen’s job application was scored, it received an eight, which was not higher than the 10 or more needed to move on to the next stage of the application process. Taylor declined to apply the discretionary Jim Pass to McKewen’s application. The EEOC contended that a jury could reasonably conclude that Defendant discriminated against McKewen based on evidence of four related propositions, including: (i) McKewen was more qualified than younger candidates who advanced further in the hiring process; (ii) Defendant’s hiring system was biased against older applicants, as it used applicants' graduation dates as a proxy for their ages and overvaluing academic accomplishments in comparison to job experience; (iii) Defendant scored McKewen's application less favorably than similarly-situated, younger applicants; and (iv) Taylor declined to give McKewen a Jim Pass but gave Jim Passes to similarly-situated, younger applicants. *Id*. at *6-7. The Court concluded that Taylor's refusal to give McKewen a Jim Pass created a triable issue of fact because the EEOC adduced evidence of younger comparators who were treated more favorably under Defendant’s hiring system. The Court reasoned that the EEOC specifically identified eight applicants who received Jim Passes despite receiving application scores below 10 points. Accordingly, the Court denied Defendant’s motion for summary judgment.

3. Race And National Origin Discrimination/Hostile Work Environment Cases

***EEOC v. Joe’s Old Fashioned Bar-B-Que, Inc*., 2020 U.S. Dist. LEXIS 103497 (W.D.N.C. June 12, 2020)**. The EEOC brought an enforcement action on behalf of the charging party, Shana Knox, an African-American female, who worked at Defendant’s restaurant. The EEOC alleged that she was constructively discharged in violation of Title VII of the Civil Rights Act of 1964 and Title I of the Civil Rights Act of 1991. Knox filed a complaint in intervention alleging claims for violations of Title VII and various state law claims. Defendant moved for partial summary seeking to dismiss the EEOC’s claim for punitive damages and Knox’s claims for battery, intentional infliction of emotional distress (“IIED”), and punitive damages. Knox asserted that she was battered by a co-worker when he threw barbeque sauce on her and hit her with a pan, and further contended that the co-worker’s conduct was done with the intent to cause Knox severe mental pain and emotional distress, or with reckless indifference to the likelihood that such behavior would cause severe emotional distress. Knox argued that Defendant was liable for the co-worker’s conduct because it was committed within the scope of his employment and was subsequently ratified by Defendant. The Court granted Defendant’s motions. It found that, as a matter of law, Defendant was entitled to summary judgment on Knox's state law claims for battery and IIED because she was unable to show that the actions of the her co-worker were committed within the scope of his employment or were ratified by Defendant. In so ruling, the Court concluded that neither the co-worker’s explosive outbursts nor his racial comments towards Knox were within the scope of his employment or in furtherance of Defendant’s business. Likewise, the Court found that there was insufficient evidence from which a reasonable jury could conclude that the co-worker’s battery was ratified by Defendant because the evidence established that he was fired immediately after the incident. The Court also ruled that Defendant was entitled to summary judgment on the EEOC’s punitive damages claims. The Court reasoned that while a reasonable jury could find that Defendant was liable for compensatory damages, the record did not support a claim for punitive damages under Title VII as a matter of law. Accordingly, the Court granted Defendant’s motions for partial summary judgment.

***EEOC v. Global Horizons, Inc.,* 2020 U.S. Dist. LEXIS 48836 (E.D. Wash. Mar. 20, 2020).** The EEOC filed a pattern or practice lawsuit on behalf of numerous Thai workers alleging that Defendants Global Horizons, Green Acre, and Valley Fruit subjected employees to discrimination, a hostile work environment, and constructive discharge on the basis of their national origin and race in violation of Title VII of the Civil Rights Act of 1964. Specifically, Global Horizons provided Green Acre and Valley Fruit ("the Growers") with both foreign and domestic farm workers, and according to the EEOC, Global Horizons subjected Thai workers to substandard housing conditions, unsafe transportation, inadequate compensation, and threatening behavior. *Id.* at *44-45. Earlier in the litigation, the Growers obtained summary judgment, and approximately eight months later, Global Horizons agreed to the entry of default judgment in the EEOC's favor. *Id.* at *64. In February 2019, based on an appeal, the Ninth Circuit reinstated the action against the Growers on a joint employer theory of liability, and remanded the action. The Growers thereafter moved for summary judgment, which the Court granted. The EEOC's pattern or practice case was based on Global Horizons' disparate treatment and harassment towards Thai workers, and the Growers countered that Global Horizons' allegedly poor treatment applied to all employees regardless of race or national origin. *Id.* at *45. In response, the EEOC relied almost entirely on the 2013 deposition of Jose Cuevas, a former orchard supervisor for Global Horizons. Cuevas recounted a number of discriminatory statements made by Global Horizons' leadership personnel, and also remembered seeing a leader for Valley Fruit nodding in approval, which Cuevas interpreted to signify agreement with Global Horizons' discriminatory remarks. *Id.* at *47. The Court found that "Cuevas' deposition [was] rife with evidentiary problems," insofar as the 2013 testimony was an out-of-court statement, and thus, inadmissible hearsay. *Id.* at *48-49. The Court also determined that Cuevas was not authorized to testify in a representative capacity, and that the deposition was conduct through an uncertified translator without any acknowledged credentials. *Id.* at *51-57. Furthermore, with respect to the substance of Cuevas' testimony, the Court questioned the reliability of Cuevas' interpretation of a single nod as signifying agreement with systemic discrimination, and also noted that Cuevas indicated that he struggled to clearly remember the vague statements on which the EEOC relied. Alternatively, the EEOC contended that the Court's previous default judgment settled the issue of Global Horizons' discrimination, and thus, implied liability upon all Defendants. The Court rejected this argument. It held that the Growers were not a party to the lawsuit at the time of the default judgment, and thus, they were not able to contest the Court's findings. *Id.* at *65-66. Additionally, the Court reasoned that Global Horizons was a separate entity from the Growers, so the default judgment's findings applied only to Global Horizons and its employees. *Id.* at *71. With respect to the EEOC's constructive discharge claims, the Court opined that these allegations must also be dismissed because the EEOC's evidence, which consisted of declarations by eleven former employees, failed to establish any connection between Defendants' actions and the employees' race or national origin. Finally, as to joint employer liability, the Court ruled that, even if the EEOC had submitted evidence that the Growers knew about Global Horizons' actions, the timeframe during which they allegedly possessed this knowledge was too short to have conducted any remedial action. *Id.* at *81-82. Accordingly, the Court granted the Growers' motion for summary judgment.

4. Sex/Pregnancy Discrimination/Hostile Work Environment Cases

***EEOC v. Dolgencorp, LLC*, 2020 U.S. Dist. LEXIS 46978 (D. Md. Mar. 16, 2020)**. The EEOC brought an action claiming that Defendant discriminated against the charging party, Amber Jacobs, "by sexually harassing and constructively discharging her." *Id*. at *1. Following discovery, Defendant filed a motion for summary judgement. The Court granted Defendant's motion as to the limited issue of constructive discharge, but denied as to the EEOC's remaining hostile work environment claim. Jacobs brought a charge of discrimination with the EEOC asserting that her manager, Darren Moses, subjected her to unwanted sexual comments, touching, and threatening behavior on a number of occasions. Jacobs complained of the alleged harassment and was ultimately transferred to work at another store location. Subsequently, Moses filled in as store manager at Jacobs' new store location for one shift. Jacobs asserted that she refused to work with Moses and therefore she was forced to voluntarily resign from her position with Defendant. The EEOC filed suit asserting that Jacobs was subjected to a sexually hostile work environment, including: (i) that Jacobs was subjected to unwelcome conduct; (ii) that the conduct was based upon her sex; (iii) that the conduct was sufficiently severe or pervasive to alter the conditions of

employment and to create an abusive work environment; and (iv) the conduct was imputable to the employer. *Id.* at *8-9. Defendant's motion focused on the third and fourth claims. The Court found that a genuine issue of material fact existed as to whether the conduct Jacobs experienced was sufficiently severe and pervasive to alter the conditions of her employment. *Id*. at *9. The Court opined that "viewing all facts in the light most favorable to the EEOC as the non-moving party, and assuming therefore that each incident occurred as Jacobs described, she was subjected to a significant number of harassing incidents in her small number of work shifts alongside Moses." *Id*. Turning to the issue of employer culpability, the Court explained that an employer can avert liability if it can establish: (i) the exercise of reasonable care to prevent and correct promptly any sexual harassment; and (ii) a Plaintiff's unreasonable failure to avail herself of preventative or corrective opportunities offered by the employer. *Id*. at *11. The EEOC alleged that the official acts triggering the constructive discharge were Moses working at the same store location as Jacobs after she was transferred. However, the Court determined that there was no evidence that Moses was specifically "assigned" to the store, nor that Moses was aware that Jacobs would be working the same shift at the time of his arrival. *Id*. at *13. Jacobs asserted that on that day, Moses entered the store, smiled "maliciously" at Jacobs without speaking to her, and proceeded towards the back of the store to meet with the visit preparation group. Id. The Court ruled that the alleged isolated conduct, lasting a few seconds at most, did not render Jacobs's working conditions objectively intolerable, in light of the fact that she had not otherwise been exposed to Moses, or to any other form of harassment, after her transfer. *Id*. at *14. The Court held that the one isolated incident did not create "intolerable working conditions" such that a reasonable person would be compelled to resign her position. Therefore, the Court granted Defendant's motion for summary judgment on the limited issue of constructive discharge.

***EEOC v. First Metropolitan Financial Services, Inc.,* 2020 U.S. Dist. LEXIS 53665 (N.D. Miss. Mar. 27, 2020).** The EEOC brought an action on behalf of two females employed by the Defendant alleging that its employment practices violated Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963. Defendant moved for summary judgment, and the Court denied the motion. The EEOC claimed that Defendant violated both the Equal Pay Act and Title VII by paying two female Branch Managers lower base salaries than their male counterparts. Defendant sought summary judgment pursuant to Rule 56(a) on all claims on the basis that it considered factors other than sex in establishing the salaries of its male and female Branch Managers. As to the Equal Pay Act, the Court found that EEOC had made a *prima facie* showing that the two female Branch Managers performed work in a position requiring equal skill, effort, and responsibility under similar working conditions as the male Branch Managers. Further, it was undisputed that a male Branch Manager made $48,000, while one female Branch Manager made $33,600 and the other made $23,600. The Court determined that none of the Equal Pay Act's exceptions applied, and it rejected Defendant's assertion that prior training, experience, and salary expectations were the factors other than sex that justified the differences in pay between the female and male Branch Managers. First, the Defendant claimed that the male's training and experience justified his higher pay. However, Defendant conceded in its briefing that the male Branch Manager did not have significant prior experience. Furthermore the Court pointed out that one of the female Branch Managers had ten years of prior finance management experience, while the other female had five years of management experience prior to being promoted to the Branch Manager. Considering that the two female employees had more training and experience than the male Branch Manager, the Court rejected Defendant's claim that the differential was justified based on training and experience. Likewise, the Court rejected the Defendant's claims that the salary demands and expectations of the Branch Managers were factors other than sex and therefore justified the differentials in pay. Defendant presented testimony that when interviewing Branch Managers, the male Branch Manager made a take it or leave salary demand of $48,000. The Court was unpersuaded. It pointed out that Defendant did not utilize the same practice with the female employees who did not receive their requested base salaries. As to the EEOC's Title VII claim, having found that the EEOC successfully established a *prima facie* case under the Equal Pay Act, the Court also found that the evidence used under the Equal Pay Act burden was sufficient to establish a *prima facie* case under Title VII. Thus, the Court concluded that the burden of production shifted to Defendant to articulate some legitimate, non-discriminatory reason in light of the four exceptions outlined in the Equal Pay Act. Defendant argued that the male Branch Manager's salary was based on and in response to unique business needs at the time he was hired. In particular, Defendant asserted that when he was hired it either needed to hire someone quickly, or otherwise it would have had to close the branch because it did not have a Branch Manager. The Court found that this was a legitimate, non-discriminatory reason such that

Defendant had met its burden of production under Title VII. As such the Court proceeded to the pretext analysis. On that issue, he Court agreed with the EEOC that Defendant's claim was without merit insofar as Defendant asserted that the branch was in a "bind" when it gave the male Branch Manager a higher salary, as there was undisputed evidence that Defendant routinely operated branches without managers for short periods of time. Further, the Court concluded that Defendant's assertion that it considered the individual's salary demands when setting their base salary was also meritless because it did not give female candidates the salary they requested, even when it was below the higher salary given to male candidates. Accordingly, the Court ruled that Defendant's legitimate, non-discriminatory reason and claim that the differential in pay was based on factors other than sex was without a basis in fact. In sum, because questions of fact existed as to whether the differences in pay were based on sex, the Court denied Defendant's motion for summary judgment. *Id.* at *26.

***EEOC v. Georgina's, LLC*, 2020 U.S. Dist. LEXIS 227799 (W.D. Mich. Dec. 4, 2020).** The EEOC filed an action alleged that Defendant Georgina's, LLC (previously doing business as Georgina's Taqueria), engaged in sex discrimination toward its female employees by subjecting them to sexual harassment and maintaining a hostile work environment. *Id*. at *1. The EEOC asserted that Anthony's Little G's, LLC (doing business as Little G's Fusion Cuisine) was also liable as a successor to Georgina's. Little G's filed a motion for judgment on the pleadings. The Court denied the motion. The EEOC alleged that Georgina's sole owner and head chef routinely made inappropriate and unwelcome sexual comments toward Georgina's female employees and touched them in improper ways without their consent. *Id*. at *2. After one of the female employees complained of the alleged harassment, she was terminated from her employment. The EEOC asserted that Little G's was liable because when that Georgina's closed its restaurant in May 2020, it effectively reopened as Anthony's Little G's on July 1, 2020. Little G's had the same sole owner, and therefore the EEOC contended that it had notice of the claims against Georgina's before re-opening. Little G's argued that it could not be held liable for a Title VII violation and that Plaintiff's allegations were not sufficient to make out a claim that Little G's was liable as a successor. *Id*. at *3. Little G's also contended that it was not a covered employer under Title VII because it did not have 15 or more employees. However, the Court rejected Defendant's position. It found that the EEOC's complaint sufficiently alleged that both Georgina's and Little G's had at least 15 employees at all relevant times. *Id*. at *5. The Court noted that it must take this allegation as true, and moreover, even if the EEOC failed to allege facts about the number of Little G's employees, that failure would not bar the EEOC from proceeding with its claim for successor liability against Little G's. *Id*. In addition, the Court evaluated the requirements for successor liability, including: (i) whether the successor company had notice of the charge; (ii) the ability of the predecessor to provide relief; (iii) whether the new employer used the same plant; (iv) whether there has been substantial continuity of business operations; (v) whether the new employer used the same or substantially same workforce; (vi) whether the new employer used the same or substantially same supervisory personnel; (vii) whether the same jobs existed under substantially the same working conditions; (viii) whether Defendant used the same machinery, equipment and methods of production; and (ix) whether Defendant produced the same product. *Id*. at *8. Little G's argued that the EEOC failed to plead facts to support the most important factor, which was whether Georgina's could provide relief. *Id*. at *9. The Court noted that Georgina's effectively ceased operations and transferred its business to Little G's. The Court found that these facts were sufficient to make a plausible inference that Georgina's did not have the ability to provide complete relief. The Court also determined that the fact that Little G's had notice of the discrimination charge, continued substantially the same business of Georgina's, used the same Facebook page and provided the same menu items were sufficient grounds to state a claim for successor liability. *Id*. at *10-11. Accordingly, the Court denied Little G's motion for judgment on the pleadings.

***EEOC v. Magnetti Mareli Of Tennessee LLC,* 2020 U.S. Dist. LEXIS 32804 (M.D. Tenn. Feb. 26, 2020).** The EEOC brought an action alleging that Jamil Degraffenreid, a production supervisor at Defendant's manufacturing plant, sexually harassed a group of women who worked on assembly lines that he oversaw. After discovery, the parties' cross-moved for summary judgment. The Court denied Defendant's motion for summary and granted the EEOC's motion for partial summary judgment. First, Defendant argued that the EEOC had not established that the group of female employees was subjected to sexual harassment that created a hostile work environment because Degraffenreid's conduct was insufficiently severe or pervasive. Defendant argued that Degraffenreid's behavior was not "sex-based" because asking to be called "Big Daddy," massaging employees' shoulders, threatening to whip a female, and singing explicit

songs were "not sexual." *Id*. at *4. Further, Defendant asserted that these actions and comments were all said on the assembly line with members of both sexes present, so they were not directed only at women. The Court was unpersuaded. It found that despite the fact that some comments were said in mixed company did not prevent the EEOC from meeting its burden on this element. The Court concluded that the profane terms that Degraffenreid uttered involved specific profanity directed at female employees, so his harassing behavior of singing sexually explicit song lyrics was sex-based and the unwelcome shoulder massages were also sex-based because they were given only to women. Likewise, the Court rejected Defendant's argument that Degraffenreid's conduct, although vulgar, was isolated and not extreme enough to create a hostile work environment. Because there was material evidence for a jury to find that Degraffenreid's conduct was severe or pervasive, the Court held that summary judgment for Defendant was improper. In so ruling, the Court also rejected Defendant's argument that it was not liable for his conduct because Degraffenreid was not a "supervisor," finding that a rational jury could find that Degraffenreid was a "supervisor." *Id.* at *10. Because a question of disputed material fact existed as to whether Degraffenreid might be a supervisor, Defendant would be liable unless it was able to establish the *Faragher-Ellerth* affirmative defense, by showing: (i) it exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (ii) the employees unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. The Court concluded that there was a genuine issue of disputed fact over whether Defendant had an effective sexual harassment policy, because employees testified that: (i) taking issues with a supervisor's malevolent conduct to human resources would be perilous; and (ii) the education on the sexual harassment policy was in fact limited to employees being required to sign off that they had read the policy. Thus, the Court held that summary judgment in favor of Defendant was not warranted on this affirmative defense to vicarious liability for a supervisor's harassment because a jury could reasonably find that Defendant did not exercise reasonable care. Accordingly, the Court denied Defendant's motion for summary judgment. *Id.* at *19. As to the EEOC's motion for partial summary judgment based on Defendant's defense that the EEOC did not meet its statutory requirement of conciliation before bringing suit, the Court found that there was no genuine dispute of material fact that the EEOC had met its statutory conciliation duty. *Id.* at *22. Accordingly, the Court granted the EEOC's partial motion for summary judgment as to this defense. In sum, the Court denied Defendant's motion for summary judgment, and granted the EEOC's motion for partial summary judgment.

***R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC & Bostock, et al. v. Clayton County, Georgia*, 140 S. Ct. 1731 (2020)**Error! Bookmark not defined.**.** The Supreme Court decided issues in three related actions, including *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission et al.*, No. 18-107, *Altitude Express v. Zarda*, No. 17-1623, and *Bostock v. Clayton County*, Georgia, No. 17-1618. In Zarda, Plaintiff, a sky-diving instructor, informed a client that he was gay so she would feel more comfortable being strapped to him for a tandem jump. Following Plaintiff's termination after the client's boyfriend complained, Plaintiff filed a lawsuit alleging his employment was terminated because of his sexual orientation, which constituted sex stereotyping in violation of Title VII of the Civil Rights Act. The District Court granted summary judgment dismissing his Title VII claim, and the Second Circuit affirmed, relying on precedent that a sex stereotyping claim could not be predicated on sexual orientation. Plaintiff successfully petitioned for rehearing *en banc*. A divided Second Circuit overturned the panel decision and its own circuit precedent, holding that Title VII's prohibition against discrimination on the basis of sex necessarily prohibits discrimination based on sexual orientation. In Bostock, Plaintiff alleged that he was fired because he was gay, despite having a long history of positive performance. The Eleventh Circuit ultimately reaffirmed that circuit's precedent holding sexual orientation is not protected by Title VII's prohibition against discrimination on the basis of sex. In *R.G. & G.R. Funeral Homes v. EEOC*, after the charging party disclosed to her employer in 2013 that she would transition to dressing as a woman and planned to have sex-reassignment surgery, her employer offered her a severance agreement and terminated her. The District Court granted summary judgment in favor of the employer as to the EEOC's claims, but the Sixth Circuit reversed, holding that gender identity discrimination fell squarely within Title VII's prohibition against discrimination on the basis of sex and sexual stereotyping. In a consolidated appeal of the three cases, the U.S. Supreme Court determined that Title VII prohibits employment discrimination against LGBT individuals in the workplace. The Supreme Court held that "[a]n employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the

decision, exactly what Title VII forbids." *Id.* at 1741. Further, it noted that although, "[t]hose who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result . . . the limits of the drafters' imagination supply no reason to ignore the law's demands." Id. After noting that "[f]ew facts are needed to appreciate the legal question we face," the Supreme Court explained that, "[e]ach of the three cases before us started the same way: An employer fired a long-time employee shortly after the employee revealed that he or she is homosexual or transgender — and allegedly for no reason other than the employee's homosexuality or transgender status." *Id.* The Supreme Court reasoned that because discrimination on the basis of homosexuality or transgender status requires an employer to intentionally treat individual employees differently because of their sex, an employer who intentionally penalizes an employee for being homosexual or transgender also violates Title VII. Justices Alito, Thomas, and Kavanaugh dissented, opining that the majority's decision was "preposterous," because, "even as understood today, the concept of discrimination because of 'sex' is different from discrimination because of 'sexual orientation' or 'gender identity.'" Dissent at 1745.

5. Religious Discrimination Cases

***EEOC v. Baystate Medical Center*, Case No. 16-CV-30086 (D. Mass. June 15, 2020)**. The EEOC filed an action on behalf of a former employee alleging that Defendant's policy requiring employees to either receive a flu vaccine or wear a mask if they have a religious or health-related exemption for not getting vaccinated violated Title VII of the Civil Rights Act. After discovery, Defendant filed a motion for summary judgment, which the Court granted. The EEOC contended that the employee declined the vaccine because of her Christian faith. Defendant had provided the employee with a mask to wear inside the hospital buildings. After the employee repeatedly pulled down her mask to speak with people over the phone and in person, Defendant suspended and eventually terminated her employment for failure to comply with the policy. The EEOC asserted that the mask requirement was not a reasonable accommodation for Plaintiff's religious beliefs because it ultimately interfered with her ability to perform the essential functions of her job. The EEOC further claimed that the employee's termination was in retaliation for engaging in protected activity. In ruling on the motion, the Court determined that the mask was not an accommodation at all, rather it was a requirement of employment. The Court noted that the mask option was one of two mandatory choices that employees were required to make. The Court also opined that Plaintiff had no religious objection to the mask requirement, and that the Court therefore must look to the reason for the requirement, i.e, Defendant's health and policy judgment. Moreover, the Court reasoned that the EEOC failed to present any evidence from which a jury could find that the mask requirement was merely a pretext with the intention of forcing individuals to get vaccinated. The Court found that even assuming the employee engaged in "protected conduct," Defendant established a legitimate, non-discriminatory reason for its actions, i.e., the employee's refusal to comply with Defendant's policy, and the EEOC failed to demonstrate that Defendant's reason was a pretext for retaliation. For these reasons, the Court granted Defendant's motion for summary judgment.

***EEOC v. United Health Programs Of America*, 2020 U.S. Dist. LEXIS 39587 (E.D.N.Y. Mar. 6, 2020).** The EEOC brought an action alleging that Defendants discriminated against a group of former employees on the basis of religion based on concepts known as "Onionhead" and "Harnessing Happiness." *Id.* at *2-3. Around 2007, to address corporate culture issues, Defendants hired their CEO's aunt, who had developed a program called Onionhead. They described Onionhead as a multi-purpose conflict resolution tool, while employees characterized it as a system of religious beliefs and practices. Although Onionhead was initially geared towards children, the program was expanded to apply to adults, and it further became known as "Harnessing Happiness." *Id.* The employees claimed that Onionhead and Harnessing Happiness required them to do things like 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*. Several employees asserted 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. After three former employees filed charges of discrimination in 2011 and 2012, the EEOC issued a letter of determination on March 13, 2014. After unsuccessful conciliation efforts, the EEOC filed suit on behalf the three employees who had filed charges of discrimination and an additional seven employees that it discovered during its investigation. The EEOC subsequently moved for summary judgment as to the specific issue of whether Onionhead was a

religion for purposes of Title VII. Defendants cross-moved for summary judgment as to several other claims involving religious discrimination. The Court granted the EEOC's motion for partial summary judgment on the discrete issue of whether the Onionhead beliefs constituted a religion. Thereafter, a jury initially awarded $5.1 million in compensatory and punitive damages to the workers, but that amount was later reduced to $1.8 million due to the damages caps in Title VII. Defendants thereafter moved for judgment as a matter of law and for a new trial or, in the alternative, for remittitur. The Court denied Defendants' motions. First, the Court held there was abundant evidence in the trial record supporting the jury's finding that Defendants created an objectively hostile or abusive work environment on the basis of religion. *Id*. at *14. The Court further opined that the record was "replete with examples of the severity and pervasiveness of Onionhead's religious practices and imagery in the workplace, the unreasonable interference with the employees' work, and the alteration of work conditions for the worse." *Id.* at *15. As to damages, Defendants argued that in "garden variety" cases, emotional distress damages in excess of $35,000 are inappropriate. *Id.* at *39. The Court rejected this argument. It reasoned that it would not cap garden variety emotional distress damages based on outlier case law authorities. In support of upholding the emotional damages award, the Court identified voluminous examples of evidence that supported the hostile work environment claims, including hand-holding prayers, forced hugging, visual Onionhead paraphernalia and literature, incense, and an out of state retreat for a "spa weekend." *Id* at *49. Accordingly, the Court declined to overturn the compensatory damages awards. The Court reduced the amounts awarded to the ex-employees to $100,000 each in accordance with Title VII's statutory maximum. *Id.* at *66. The Court therefore denied Defendants' motions for judgment as a matter of law and for a new trial, or, in the alternative, for remittitur.

***EEOC v. Publix SuperMarkets*, 2020 U.S. Dist. LEXIS 151066 (M.D. Tenn. Aug. 20, 2020).** The EEOC filed an action on behalf of the charging party, Guy Usher, alleging that he was subjected to employment discrimination on the basis of his religion in violation of Title VII of the Civil Rights Act. The parties filed cross-motions for summary judgment, which the Court granted in part and denied in part. Usher, an African-American, contended that he practiced Rastafarianism, including the Rastafarian practices of prayer, non-consumption of alcohol and pork, and wearing his hair in dreadlocks. Usher applied and was interviewed for a positon, at which time Defendant's Assistant Store Manager told Usher he would have to cut his hair to work there in accordance with Defendant's grooming policy. Defendant thereafter offered Usher employment as either a cashier or a produce clerk, and informed Usher that Defendant could not accommodate his religious beliefs by allowing an exception to the grooming policy, which prohibited male employees from wearing their hair longer than the collars of their shirts. Usher thereafter told Defendant he could not cut his dreadlocks. The EEOC alleged that Defendant subsequently withdrew its offer of employment, which it asserted amounted to constructive discharge and failure to provide accommodation for Usher's religious beliefs. The Court found that the EEOC provided only circumstantial evidence that could go towards meeting its burden to make a *prima facie* showing on each of the three elements of the failure-to-accommodate and failure-to-hire claims. Therefore, the Court held that neither side met its burden at the summary judgment stage on those claims. The parties also disputed the existence Usher's sincere religious belief that conflicted with Defendant's employment requirement. The Court noted that the U.S. Supreme Court precedent provided that, in order to qualify as a "religious" belief or practice entitled to constitutional protection, an alleged belief must not be merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living. *Id*. at *24. Defendant contended that Usher testified that Rastafari was "far from an organized religion," and that he did not follow all the beliefs and practices of the Rastafari religion and considered the tenets of Rastafari "optional." *Id*. at *25. The Court opined that it could not judge the sincerity of Usher's beliefs on a motion for summary judgment, and that it should be reserved for trial. The Court thus held that it could not grant summary judgment for either party on Usher's religious discrimination claims. However, the Court found that as to the constructive discharge claims, Usher did not work even one hour for Defendant, and so he had no working conditions. The Court concluded that even if Usher was deemed to have some kind of employment status based on accepting an offer of employment, he undisputedly never had any working conditions, and thus certainly no intolerable working conditions amounting to constructive discharge. Therefore, the Court granted Defendant's motion for summary judgment as to Plaintiff's constructive discharge claim.

***EEOC v. Wal-Mart Stores East, L.P.*, 2020 U.S. Dist. LEXIS 8596 (W.D. Wis. Jan. 16, 2020).** The EEOC brought an action under Title VII of the Civil Rights Act of 1964 on behalf of the charging party, Edward Hedican, alleging that Defendant subjected Hedican to religious discrimination and retaliated against him. Specifically, the EEOC contended that Defendant denied Hedican's religious accommodation request to not work on Saturdays, and rescinded its offer of employment as an assistant manager in retaliation for Hedican's request for an accommodation. *Id.* at *1. After discovery, Defendant filed a motion for summary judgment, which the Court granted. Defendant argued that it offered Hedican a reasonable accommodation when, after denying Hedican's accommodation request, it encouraged Hedican to apply for other open management positions with Defendant that would not require him to work on Saturdays. The EEOC argued that Defendant's offer regarding alternative management positions was an insufficient accommodation because it was unreasonable simply to provide the opportunity to apply for another job, rather than actually offering Hedican another job. Moreover, the EEOC contended that Defendant's proposed accommodation was lacking under Title VII because the more flexible management positions that Defendant offered as an alternative would have paid less than the assistant manager position for which Hedican originally applied. The Court rejected the EEOC's arguments. It found that the accommodation "was reasonable because it eliminated the conflict between [Hedican's] employment requirements and his religious practices," and because Hedican did not make a good faith effort to cooperate with Defendant as he never applied for any of Defendant's other management openings. *Id.* at *23-24. Furthermore, the Court held that even if Defendant's accommodation offer was not reasonable, Hedican's religious accommodation request would have resulted in undue hardship for Defendant. The EEOC argued that, among other alternatives, Defendant could have allowed Hedican to switch shifts with other assistant managers, use personal time off, or arrange a flexible arrival time to accommodate Hedican's observance of the Sabbath. *Id.* at *25. However, the Court noted that Defendant provided evidence that: (i) it did not employ enough assistant managers to cover all of Hedican's Saturday shifts; (ii) Hedican would not have accumulated personal time off until one year of employment; (iii) Saturday was the busiest day for Defendant's location at issue; and (iv) assistant managers played an integral oversight role requiring them to work schedules that included Saturday shifts. Based upon this evidence, the Court determined that Hedican's accommodation request would have required Defendant to burden its other employees with a disproportionate workload or incur additional costs by hiring an additional assistant manager to work on Saturdays. *Id.* at *27-28. Therefore, the Court granted Defendant's motion for summary judgment.

D. Judgments And Remedies In EEOC Litigation

1. Judgments, Damages, And Penalties

***EEOC v. Baltimore County*, Case No. 07-CV-2500 (D. Md. April 23, 2020)**. The EEOC filed an action alleging that Defendant engaged in unlawful employment practices by requiring older workers to pay higher contributions than those paid by younger individuals to Defendant's pension plan, and that such conduct was taken in violation the Age Discrimination in Employment Act ("ADEA"). The District Court previously had approved a joint consent order resolving the EEOC's claims for injunctive relief, and requiring Defendant to equalize pension plan contribution rates by July 1, 2018. The order did not resolve EEOC's claims for monetary relief. The EEOC thereafter moved for a determination on the availability of retroactive and prospective monetary relief. Subsequently, the District Court determined that neither retroactive nor prospective relief was appropriate in this case. On Defendant's appeal, the Fourth Circuit vacated the District Court's judgment on the grounds that "a retroactive monetary award of back pay under the ADEA is mandatory upon a finding of liability." *Id*. at 2. The Fourth Circuit remanded the case "for a determination of the amount of back pay to which the affected employees are entitled under the ADEA." *Id*. The District Court thereafter determined that the EEOC could seek back pay accruing between March 6, 2006 and April 26, 2016. The parties jointly agreed to the monetary settlement. The Court thus entered an order resolving the monetary claims for $5,399,700.65 and establishing a settlement fund.

***EEOC v. Wal-Mart Stores East, L.P.*, 2020 U.S. Dist. LEXIS 221192 (W.D. Wis. Nov. 25, 2020).** The EEOC filed an action on behalf of the charging party, Paul Reina, alleging that Defendant failed to provide him with a reasonable accommodation and terminated his employment on the basis of his disability in violation of the Americans With Disabilities Act ("ADA"). At trial, a jury awarded $200,000 in compensatory

damages and $5 million in punitive damages against Defendant. Thereafter, the EEOC brought requests for equitable and injunctive relief. The Court denied the EEOC's request for a permanent injunction and as to damages, it awarded Reina $41,224.07 in back pay, $58,124.53 in front pay, $4,495.72 in prejudgment interest, and $19,097.14 for tax consequences of the award. *Id*. at *1. Defendant thereafter filed motions for judgment as a matter of law, a new trial, and a reduction in compensatory damages. The Court denied the motions. It found that the factual issues presented were within purview of the jury, and that the jury reached a verdict adequately supported by the evidence. Reina worked as a cart attendant (or "cart pusher") with a job coach. Defendant contended that: (i) the evidence failed to prove that Reina was a qualified individual who could perform the essential functions of his cart attendant position without his job coach doing some of the work; (ii) providing Reina a full-time job coach imposed an undue hardship on Defendant; (iii) Defendant did not act with the discriminatory intent necessary to support EEOC's claims for discriminatory termination and punitive damages; and (iv) the EEOC's "novel" theory of liability did not entitle Reina to punitive damages. *Id*. at *5. As to the first contention, the Court held that Defendant failed to raise the issue in its Rule 50(a) motion and it was thus forfeited. The Court further explained that even if not forfeited, the argument failed on merits. In addition, the Court determined that a reasonable jury could conclude from the testimony that Reina was able to perform the essential job functions with help from his job coach. *Id*. at *10-11. As to Defendant's claim of undue hardship for providing the reasonable accommodation, the Court found that Defendant allowed Reina to perform his position for more than 16 years and he received numerous positive performance reviews, and thus Defendant failed to show that the jury acted irrationally in finding that it faced no undue hardship by allowing Reina to work full-time with his job coach. The Court further ruled that a reasonable jury could find that Defendant took adverse action against Reina, and that the way that Defendant handled Reina's need for an accommodation reflected discriminatory intent. Finally, the Court determined that the jury had a reasonable basis to find that an award of punitive damages was appropriate. Accordingly, the Court denied Defendant's post-trial motions.

***EEOC v. Wal-Mart Stores East, L.P.*, 2020 U.S. Dist. LEXIS 55734 (W.D. Wis. Mar. 31, 2020).** The EEOC filed an action on behalf of the charging party, Paul Reina, alleging that Defendant terminated his employment on the basis of his disabilities - deafness and developmental disabilities - in violation of the Americans With Disabilities Act ("ADA"). Reina was provided with a job coach to work along with him in performing his job duties. Reina's manager requested further information regarding Reina's disabilities and required accommodations, and placed him on leave until the information was returned to the store. Reina returned the requested information, but Defendant failed to respond to Reina's submission and ultimately terminated his employment. Following a jury trial, the jury found in favor of the EEOC and awarded Reina $200,000 in compensatory damages and $5 million in punitive damages. The EEOC subsequently moved for equitable and injunctive relief for Reina. The Court granted Reina $41,224.07 in back pay, $58,124.53 in front pay, $4,495.72 in pre-judgment interest, and $19,097.14 for compensation due to the tax consequences of the award. The Court found that the $5.2 million jury award was outside the limits of the ADA, which limits penalties for companies with more than 500 employees to $300,000. The Court noted that 42 U.S.C. § 1981(b)(3) does not prescribe a method for making an adjustment to be within the statutory cap, but pertinent Seventh Circuit case law authority provides that "in a normal suit punitive damages are something added on by the jury after it determines the Plaintiff's compensatory damages, [so] probably the sensible thing for the judge to do is not to make a pro rata reduction . . . but instead to determine the maximum reasonable award of compensatory damages, subtract that from $300,000, and denote the difference punitive damages." *Id*. at *22. Accordingly, the Court applied the jury's compensatory award of $200,000 toward the $300,000 statutory cap and reduced the punitive damages award to $100,000. The Court also denied the EEOC's request for a permanent injunction, finding that the request was far too broad for a single incident that happened at one store.

2. Attorneys' Fees, Costs, And Sanctions

***EEOC v. HP Pelzer Automotive Systems*, 2020 U.S. App. LEXIS 39743 (6th Cir. Dec. 18, 2020)**. The EEOC filed an action on behalf of Estela Black, a former employee of Defendant, alleging that Defendant retaliated against her in violation of Title VII of the Civil Rights Act when it terminated her employment after she filed a sexual harassment complaint against a co-worker. The EEOC alleged that Defendant failed to properly investigate Black's complaint of harassing comments made by the co-worker, and thereafter determined that Black falsified the complaint, after which it terminated her employment. Following a trial,

the jury found in favor of Defendant and it sought an award of attorneys' fees against the EEOC. The District Court denied the request for attorneys' fees. It held that the EEOC's claim of retaliation was not frivolous, unreasonable, or groundless, and therefore it determined that Defendant was not entitled to attorneys' fees. On Defendant's appeal of the fee award decision, the Sixth Circuit affirmed the District Court's ruling. The Sixth Circuit noted that under Title VII, a District Court may award the prevailing party "a reasonable attorney's fee." Id. at *14. When determining if a prevailing Defendant should be entitled attorneys' fees, the Sixth Circuit opined that the relevant considerations include whether: (i) Plaintiff successfully alleged a *prima facie* case of discrimination; (ii) Defendant offered to settle the case; and (iii) if the District Court dismissed the case before trial. The Sixth Circuit found that the record demonstrated that the EEOC successfully alleged a *prima facie* case of retaliation, Defendant did not offer to settle, and the EEOC's claims survived various motions, with the case being decided by a jury. *Id*. at *15. The Sixth Circuit further determined that the District Court had ruled in three separate orders that the EEOC's claim was not frivolous. The District Court had acknowledged that material factual disputes existed with regard to Defendant's investigation into Black's harassment complaint. The Sixth Circuit concluded that viewing the evidence in the light most favorable to the EEOC, the jury could find that Defendant did not rely on particularized facts in making the decision to terminate Black and therefore did not have an honest belief that Black purposely falsified her complaint. *Id.* at *17. The Sixth Circuit observed that the disputes regarding the investigation into Black's allegations of harassment created a genuine issue of material fact as to whether it was reasonable for Defendant to rely solely on its limited investigation to terminate Black's employment. The Sixth Circuit held that in light of the record and lack of evidence of bad faith, the District Court did not abuse its discretion in denying Defendant's request for attorneys' fees. *Id*. at *22-23. Finally, Defendant contended that the District Court should have imposed attorney's fees sua sponte under Rule 11 due to the EEOC's litigation conduct. The Sixth Circuit ruled that since the EEOC's claims were not frivolous, the District Court did not abuse its discretion in reaching a conclusion to the contrary. For these reasons, the Sixth Circuit affirmed the District Court's ruling denying Defendant's motion for attorneys' fees.

***EEOC v. HP Pelzer Automotive Systems,* 2020 U.S. Dist. LEXIS 35622 (E.D. Tenn. Jan. 9, 2020).** The EEOC brought an enforcement action on behalf of charging party Estela Black, alleging that Defendant subjected her to sexual harassment and retaliation in violation of Title VII of the Civil Rights Act. Following a jury trial, the jury found in favor of Defendant on the EEOC's claim of retaliatory termination. Defendant subsequently filed a motion for attorneys' fees in the amount of $627,303.93 against the EEOC. The Magistrate Judge recommended that Defendant's motion be denied. The EEOC argued that because the Court had denied Defendant's motion for summary judgment based on its finding that genuine issues of material fact existed, Defendant's motion for an award of attorneys' fees was inappropriate. Defendant argued that it was entitled to attorneys' fees from the EEOC because the agency's conduct during the pursuit of the litigation was "unreasonable, meritless, groundless, vexatious, and in bad faith." *Id*. at *5. Defendant asserted that the denial of summary judgment was immaterial to the request for attorneys' fees. The Magistrate Judge opined that the Court had found that the EEOC's case had sufficient foundation to preclude summary judgment, and therefore was not frivolous, unreasonable, or without foundation. *Id*. The Magistrate Judge opined that although the jury reached a verdict in Defendant's favor, that did not necessarily mean that it concluded that the EEOC's claims were entirely without merit. *Id*. at *6. Accordingly, the Magistrate Judge recommended that Defendant's motion for attorneys' fees be denied.

3. EEOC Consent Decrees, Conciliation, And Settlements

***EEOC v. Pirtek United States LLC*, 2020 U.S. Dist. LEXIS 227698 (M.D. Fla. Dec. 1, 2020)**. The EEOC filed an action on behalf of a charging party alleging that Defendant terminated him prior to his anticipated return to work following an illness and hospitalization based on his perceived disability in violation of the Americans With Disabilities Act ("ADA"). The parties thereafter settled the case, and the EEOC filed a motion for the approval and entry of consent decree. The proposed consent decree had a three-year term and provided that Defendant would pay the aggrieved employee $85,000. The prosed consent decree further provided injunctive relief mandating that Defendant would not engage in discriminatory practices; would adopt and distribute a policy regarding preventing discrimination on the basis of disability; would provide management and human resources personnel training on discrimination of the basis of disability; would submit to compliance, monitoring, and reporting requirements; would post the notice appended to

the Consent Decree in its workplace; and would give the aggrieved employee a neutral job reference. The Court began its analysis of the proposed consent decree by reiterating that any order involving injunctive relief must: "(i) state the reasons why it is issued; (ii) state its terms specifically; and (iii) describe in reasonable detail the act or acts restrained or required." *Id*. at *2. The Court focused on the proposed consent decree's requirement that Defendant would not engage in discriminatory practices during the term of the decree. The proposed consent decree specifically provided that "[Defendant] shall take all affirmative steps to ensure that it does not subject its employees to discrimination based on disability or perceived disability." *Id*. at *3. Citing several prior opinions from the Eleventh and Fifth Circuits holding that "obey the law" provisions - or provisions that require a party to merely follow the law - were too vague to be enforced, the Court determined that the proposed consent decree suffered the same deficiency. The Court held that the directive that Defendant take "all affirmative steps" to ensure it does not discriminate on the basis of disability provided no specificity as to what steps were required and no command capable of enforcement. Id. at *6. Accordingly, the Court ruled that the proposed consent decree could not be approved as presented.

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