RECENT DEVELOPMENTS AT THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Eric S. Dreiband

Alison B. Marshall

51 Louisiana Ave, N.W.
Washington, DC 20001

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Eric S. Dreiband

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INTRODUCTION

This paper's discussion of recent developments at the Equal Employment Opportunity Commission ("EEOC") is divided into five sections. ***Section one*** addresses the EEOC's newly approved Strategic Enforcement Plan. ***Section two*** discusses the EEOC's efforts to further some of its top litigation and regulatory priorities. ***Section three*** discusses recent litigation about the scope of EEOC subpoena power. ***Section four*** summarizes recent litigation about the EEOC's pre-suit obligations. Finally, ***Section five*** discusses some recent and noteworthy EEOC litigation and settlements.

I. EEOC'S NEW STRATEGIC ENFORCEMENT PLAN

On February 22, 2012, the EEOC approved its Strategic Plan for Fiscal Years 2012-2016. The Strategic Plan directed the EEOC to develop a Strategic Enforcement Plan ("SEP"). On June 5, 2012, the EEOC requested written input on the SEP's development, and on July 18, 2012, it held a public meeting to gather additional input. The EEOC released its draft SEP for public comment on September 4, 2012, and on December 17, 2012, the plan passed with 3-1 bipartisan support.

A. Nationwide Priorities

The SEP identifies the following as the Commission's nationwide priorities:

- "Eliminating barriers in recruiting and hiring," such as "exclusionary policies and practices, the channeling/steering of individuals into specific jobs due to their status in a particular group, restrictive application processes, and the use of screening tools (e.g., pre-employment tests, background screens, date of birth screens in online applications)."[1]
- "Protecting immigrant, migrant and other vulnerable workers" by targeting "disparate pay, job segregation, harassment, trafficking and other discriminatory

* The authors would like to thank Veronica Percia, Alexander Yabroff, Todd Dvorak, Bryan Jarrett, Michael McGinley, and Kristina Yost for their help with this paper.

[1] U.S. Equal Employment Opportunity Commission, *Strategic Enforcement Plan (SEP)*, at 9 (Dec. 17, 2012), *available at* http://www.eeoc.gov/eeoc/plan/upload/sep.pdf (last visited Feb. 15, 2012) (emphasis omitted).

practices and policies affecting immigrant, migrant and other vulnerable workers, who are often unaware of their rights…or reluctant or unable to exercise them."[2]

- "Addressing emerging and developing issues," such as:
    - "[C]ertain ADA issues, including coverage, reasonable accommodation, qualification standards, undue hardship, and direct threat, as refined by the Strategic Enforcement Teams;
    - [A]ccommodating pregnancy-related limitations under the Americans with Disabilities Act Amendments Act (ADAAA) and the Pregnancy Discrimination Act (PDA); and
    - [C]overage of lesbian, gay, bisexual and transgender individuals under Title VII's sex discrimination provisions, as they may apply."[3]
- "Enforcing equal pay laws" by targeting "compensation systems and practices that discriminate based on gender."[4]
- "Preserving access to the legal system" by targeting "retaliatory actions, overly broad waivers, settlement provisions that prohibit filing charges with EEOC or providing information to assist in the investigation or prosecution of claims of unlawful discrimination, and failure to retain records required by EEOC regulations."[5]
- "Preventing harassment through systemic enforcement and targeted outreach.."[6]

B. Delegation of Authority

The SEP reaffirms the "delegation of litigation authority to the General Counsel" as was "established in the 1996 National Enforcement Plan."[7] This delegation has provided the EEOC's

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[2] *Id*. (emphasis omitted).

[3] *Id*. at 9-10 (emphasis & citations omitted). The Commission uses equivocal language ("as they may apply") to describe Title VII's coverage of LGBT issues. However, in *Macy v. Department of Justice*, EEOC Appeal No. 0120120821, 2012 WL 1435995, at *11 (Apr. 20, 2012), the Commission unequivocally stated its position that "discrimination against a transgender individual because that person is transgender is, by definition, discrimination 'based on …sex,' and such discrimination therefore violates Title VII." Thus it is currently unclear how the Commission will interpret the scope of coverage under Title VII for, at least, lesbian, gay and bisexual individuals.

[4] *SEP*, at 10.

[5] *Id*.

[6] *Id*. (emphasis omitted). In addition to the Nationwide Priorities listed above, the EEOC is focusing on more effective collaboration with enforcement partners in federal, state, and local governments in order to eliminate redundant enforcement efforts. It is also emphasizing "aggressive and creative efforts to inform the public about the requirements of the law, with the goal of raising awareness about prohibited conduct and promoting voluntary compliance to the greatest extent possible." U.S. Equal Employment Opportunity Commission, *Fiscal Year 2013 Congressional Budget Justification* (Feb. 2012), *available at* http://www.eeoc.gov/ eeoc/plan/2013budget.cfm (last visited Nov. 19, 2012).

[7] *SEP*, at 20.

General Counsel and Regional Attorneys with "substantial authority" over litigation decisions, with few exceptions.[8]

II. EEOC ENFORCEMENT AND REGULATORY PRIORITIES

Public statements by top EEOC officials in 2012 indicate that the agency's enforcement priorities include targeting discrimination in hiring and discrimination against immigrants, pregnant women and caregivers, and individuals with disabilities. EEOC General Counsel P. David Lopez explained in August that the agency is focusing its limited resources on hiring discrimination cases and cases involving vulnerable workers like immigrants, as these cases are often overlooked by private attorneys.[9] Pregnancy and caregiver discrimination has also been a frequent target of the EEOC Commissioners, who held a meeting on February 15, 2012, to discuss current efforts and future goals in addressing such discrimination.[10]

Lopez said that EEOC litigators are bringing numerous cases under the Americans with Disabilities Act Amendments Act of 2008, hoping to establish law favorable to their position that the new legislation applies broadly to prevent disability discrimination.[11] Similarly, EEOC Commissioner Chai Feldblum stated that this is an era of "the renewal of disability rights"[12] and indicated that the ADA may provide protections for women who suffer temporary impairments related to pregnancy.[13]

The EEOC continues to focus on race and national origin discrimination through its E-RACE initiative; as part of this effort, the agency issued new guidelines in April 2012 regarding

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[8] *Id.* Exceptions include: "Cases involving a major expenditure of resources;" "Cases that present issues in a developing area of law where the Commission has not adopted a position; "Cases that the General Counsel reasonably believes to be appropriate for submission for Commission consideration because of their likelihood for public controversy;" and "All recommendations in favor of Commission participation as *amicus curiae*, which shall continue to be submitted to the Commission for review and approval." *Id.* at 20-21.

[9] Ben James, *EEOC GC Says Hiring Bias, Vulnerable Workers Are Priorities, Law360*, Aug. 2, 2012, *available at* http://www.law360.com/articles/366271/eeoc-gc-says-hiring-bias-vulnerable-workers-are-priorities (last visited Nov. 21, 2012).

[10] EEOC Meeting Minutes Tr., *Unlawful Discrimination Against Pregnant Workers and Workers with Caregiving Responsibilities* (Feb. 15, 2012), *available at* http://www.eeoc.gov/eeoc/meetings/2-15-12/index.cfm (last visited Nov. 21, 2012).

[11] Kevin P. McGowan, Patrick Dorrian, and Jay-Anne B. Casuga, *EEOC Seeks To Build on Recent Gains, Update Guidance, While Absorbing Budget Cuts, BNA Disabilities Newsletter*, Feb. 16, 2012, *available at* Bloomberg BNA Labor & Employment Law Resource Center.

[12] C. Reilly Larson, *Rules, Job Standards, Test Taking Barriers Discussed at ABA Forum on Disabilities Law, BNA Disabilities Newsletter*, June 21, 2012, *available at* Bloomberg BNA Labor & Employment Law Resource Center.

[13] Kevin P. McGowan, *Bias Based on Pregnancy, Caregiver Duties is Still Widespread, Witnesses Tell EEOC, BNA Workplace Law Rep.*, Feb. 24, 2012, *available at* Bloomberg BNA Labor & Employment Law Resource Center.

the consideration of arrest and conviction records in employment decisions.[14] Lopez has also emphasized that the EEOC is tailoring its race and national origin discrimination efforts to the "changing demographics" of the American workforce, concentrating in particular on Hispanic and other immigrant populations.[15] Finally, ending pay discrimination remains one of the EEOC's stated priorities.[16]

This section discusses recent EEOC activities consistent with these goals as well as enforcement efforts targeted to age discrimination, discrimination on the basis of gender identity or transgender status, and discrimination based on an employer's knowledge of its employees' genetic information.

A. The EEOC's Systemic Initiative

In 2006, the EEOC adopted its "Systemic Initiative" and announced that combating systemic discrimination would be an agency-wide priority. Systemic discrimination is defined as bias that has broad impact on an industry, profession, company, or geographic location. Since the initiative's launch in 2006, the number of systemic investigations and lawsuits have increased substantially. The EEOC filed a record number 23 systemic lawsuits in 2011, the highest number to date.[17]

One obstacle to the EEOC's efforts to combat systemic discrimination has been inadequate incentives for its directors and attorneys to pursue systemic cases. Indeed, "many employees in the field perceive[d] a disincentive to working on systemic cases due to the emphasis on inventory management. District Directors' performance plans and office goals no longer address systemic discrimination, office goals are not adjusted adequately to account for systemic charge development, and many employees in the field perceive that the development of systemic cases is not a Commission priority."[18] To rectify this, the EEOC Systemic Task Force

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[14] Kevin P. McGowan, *Ishimaru Cites Achievements, Challenges As He Leaves EEOC After Eight-Year Run*, *BNA Labor Relations Week*, May 2, 2012, *available at* Bloomberg BNA Labor & Employment Law Resource Center; U.S. Equal Employment Opportunity Commission, *EEOC Enforcement Guidance: Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964* (Apr. 25, 2012), *available at* http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm (last visited Nov. 28, 2012).

[15] Lydell C. Bridgeford, *Public Policies Must Recognize Changes in Demographics, EEOC Chief Litigator Says*, *BNA EEO Compliance Newsletter*, June 29, 2012, *available at* Bloomberg BNA Labor & Employment Law Resource Center.

[16] Kevin P. McGowan, *Agency Officials Say Pay Discrimination is Among Top Priorities at OFCCP, EEOC*, *BNA Workplace Law Rep.*, Mar. 30, 2012, *available at* Bloomberg BNA Labor & Employment Law Resource Center.

[17] *See* U.S. Equal Employment Opportunity Commission, *Fiscal Year 2011 Performance and Accountability Report* (2011), at 4, *available at* http://www.eeoc.gov/eeoc/plan/upload/2011par.pdf (last visited Nov. 19, 2012).

[18] U.S. Equal Employment Opportunity Commission, *Systemic Task Force Report to the Chair of the Equal Employment Opportunity Commission* (Mar. 2006), *available at* http://www.eeoc.gov/eeoc/task_reports/systemic.cfm#IIIB3 (last visited Nov. 20, 2012).

recommended incentivizing district directors and regional attorneys via "awards programs and incentive pay plans" to pursue systemic cases.[19] This recommendation was adopted when the Systemic Initiative was launched in 2006.[20]

More recently, the EEOC's Strategic Plan for Fiscal Years 2012-2016 specifies that the Commission will allocate a certain percentage of its litigation docket (to be determined at a later date) to systemic lawsuits by the end of fiscal year 2016.[21] "This performance measure will provide an incentive for the EEOC to conduct systemic investigations . . . . [It] will also require the agency . . . to bring fewer individual and small class claims of discrimination, since systemic litigation requires significantly greater resources than other types of litigation."[22]

The EEOC's increased emphasis on systemic litigation is already yielding results. In fiscal year 2012, the Commission filed twelve systemic lawsuits, which accounted for 8% of all its merits filings. And by the end of the year, systemic cases represented 20% of all its active merit suits—the largest proportion since tracking started in fiscal year 2006.[23] This percentage is established as a baseline from which to set future targets through the end of the strategic planning period in 2016.[24]

This increased focus on systemic investigations is likely to continue. In the Commission's Fiscal Year 2012 Congressional Budget Justification, EEOC Chair Jacqueline Berrien stated that an increase in the EEOC budget for systemic investigations and lawsuits would be necessary because a "strong, nationwide systemic initiative not only ensures that agency resources are directed towards addressing issues that will have broad impact in the workplace, but because systemic cases generate substantial media and other public notice, they help to deter other employers from engaging in similar prohibited conduct."[25] The recent increase in systemic investigations and merit filings, coupled with the incentives EEOC Directors and Regional Attorneys have to pursue those investigations, indicate that the EEOC's Systemic Initiative will continue to gain steam going forward.

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[19] *Id.*

[20] Press Release, U.S. Equal Employment Opportunity Commission, *EEOC Makes Fight Against Systemic Discrimination a Top Priority* (Apr. 4, 2006), *available* at http://www.eeoc.gov/eeoc/newsroom/release/4-4-06.cfm (last visited Nov. 20, 2012).

[21] *See* U.S. Equal Employment Opportunity Commission, *Strategic Plan for Fiscal Years 2012-2016*, at 12, *available at* http://www.eeoc.gov/eeoc/plan/upload/strategic_plan_12to16.pdf (last visited Feb. 15, 2013).

[22] *Id.* at 19.

[23] U.S. Equal Employment Opportunity Commission, *FY 2012 Performance and Accountability Report* (2012), *available at* http://www.eeoc.gov/eeoc/plan/2012par_performance.cfm (last visited Feb. 15, 2013).

[24] *Id.*

[25] U.S. Equal Employment Opportunity Commission, *Fiscal Year 2012 Congressional Budget Justification* (Feb. 2011), *available at* http://www.eeoc.gov/eeoc/plan/2012budget.cfm?renderforprint=1 (last visited Feb. 15, 2013).

B. Criminal Convictions, Arrest Records, and Credit Scores

1. EEOC's E-RACE Initiative

As part of the EEOC's Eradicating Racism and Colorism from Employment or "E-RACE" initiative, the EEOC has targeted certain facially-neutral employment practices that the EEOC believes may violate Title VII's race discrimination disparate impact provisions. These practices include: the use of arrest and conviction records; the use of credit scores; the use of employment and personality tests; and the use of technology such as video resumes.[26]

Of these, the EEOC has asserted that employers' use of "conviction records" is one of the "21st Century Manifestations of Discrimination" that needs to be addressed through "new strategies that will strengthen [the agency's] enforcement of Title VII" and for which the agency would "Develop Strategies, Legal Theories and Training Modules."[27] A blanket employer prohibition on hiring applicants with criminal records is likely to trigger an EEOC investigation. Mere employer consideration of criminal records, however, may also be subject to EEOC scrutiny.

a. Title VII Disparate Impact Standards

Title VII as originally enacted did not expressly prohibit employment practices that caused a disparate impact. *Griggs v. Duke Power Company*[28] recognized disparate impact as a theory of Title VII liability, and in 1991, Congress codified disparate impact standards. The statute now prohibits employers from using "a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin" if the employer is unable "to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity."[29] Unlike disparate treatment claims, disparate impact claims do not require proof of intentional discrimination.

The EEOC's theory is that the race-neutral and gender-neutral policy of using prior criminal convictions as a criterion or basis for denying employment has a "disparate impact" on minorities and men, since whites and women have relatively lower criminal conviction rates. Under this theory, the EEOC still must demonstrate statistically that a disparate impact exists in order to meet its burden of establishing a prima facie violation. The discussion below explains that this has not proven easy for the EEOC. If the EEOC does meet this burden, however, an employer would be required to prove that the use of criminal records as a hiring criterion is job-related and consistent with business necessity. "Even if the employer meets that burden,

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[26] *See* U.S. Equal Employment Opportunity Commission, *The E-RACE Initiative*, *available at* http://www.eeoc.gov/eeoc/initiatives/e-race/index.cfm (last visited Sept. 2, 2011).

[27] U.S. Equal Employment Opportunity Commission, *E-RACE Goals and Objectives*, *available at* http://www.eeoc.gov/eeoc/initiatives/e-race/goals.cfm (last visited Sept. 2, 2011).

[28] 401 U.S. 424 (1971).

[29] 42 U.S.C. § 2000e-2(k)(1)(A)(i); *see also Lewis v. City of Chi.*, 130 S. Ct. 2191, 2197 (2010).

however, [the EEOC] may still succeed by showing that the employer refuses to adopt an available alternative employment practice that has less disparate impact and serves the employer's legitimate needs."[30]

b. EEOC Criminal Conviction Litigation

The EEOC has not been very successful in convincing courts of its theory about employers' use of criminal convictions. The EEOC has pursued a wide array of investigations into many employers' use of criminal convictions in making hiring decisions. A few of the EEOC's investigations have even resulted in lawsuits. Outside the context of subpoena enforcement,[31] however, courts have largely rejected the EEOC's few attempts to litigate employer use of criminal records.

In *EEOC v. Peoplemark, Inc.*,[32] the EEOC alleged that a temporary staffing company engaged in unlawful discrimination by maintaining a blanket prohibition on the hiring of any applicants with a criminal record because this policy "has had and continues to have a disparate impact on African American applicants."[33] This complaint stemmed from a charge filed by an African-American woman with a criminal record for larceny and housebreaking whom Peoplemark allegedly refused to hire. The EEOC alleged class discrimination and filed its complaint after a three-year investigation, during which the EEOC obtained over 18,000 pages of documents.[34] The EEOC learned during litigation that Peoplemark did not categorically refuse to hire applicants with criminal records.

The district court dismissed the case and sanctioned the EEOC. The court found that the EEOC's "complaint turned out to be without foundation from the beginning."[35] It emphasized that the EEOC continued to litigate the case after it learned that Peoplemark did not have or apply any blanket policy and, in fact, had hired many people who it knew had criminal convictions. Furthermore, the court explained that the EEOC "would have had to expect that [Peoplemark] would incur considerable costs in defending" this complaint and that Peoplemark's "costs would include substantial expert fees."[36] The court ultimately ordered the EEOC to compensate Peoplemark for over $750,000 in fees.[37]

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[30] *Ricci v. DeStefano*, 129 S. Ct. 2658, 2673 (2009) (citing 42 U.S.C. §§ 2000e-2(k)(1)(A)(ii) and (C)).

[31] *See, e.g.*, *EEOC v. Aaron's, Inc.*, No. 11 C 201, 2011 WL 1357339 (N.D. Ill. Apr. 11, 2011); *EEOC v. Sears, Roebuck & Co.*, No. 10-cv-00288-WDM-KMT, 2010 WL 2692169 (D. Colo. June 8, 2010); *EEOC v. Watkins Motor Lines, Inc.*, 553 F.3d 593 (7th Cir. 2009).

[32] *EEOC v. Peoplemark, Inc.*, No. 08-cv-907, 2011 WL 1707281 (W.D. Mich. Mar. 31, 2011).

[33] Compl., *EEOC v. Peoplemark, Inc.*, No. 08-cv-907, 2008 WL 4733865 (W.D. Mich. Sept. 29, 2008).

[34] *EEOC v. Peoplemark, Inc.*, No. 08-cv-907, 2011 WL 1707281 (W.D. Mich. Mar. 31, 2011).

[35] *Id.* at *5.

[36] *Id.* at *2-3.

[37] *Id.* at *22.

The EEOC may face similar obstacles in its pending case against Freeman, a marketing company that allegedly rejected job applicants based on their past criminal and credit history.[38] The EEOC alleges that Freeman's hiring policy, to the extent that it considers criminal records and credit history, has subjected and continues to subject black, Hispanic, and male job applicants to an ongoing pattern or practice of discrimination on a nationwide basis. The EEOC's allegations stem from the charge of an African-American woman who alleged that Freeman's use of credit history (not criminal background checks) in her hiring decision at one facility violated Title VII. The EEOC may have trouble winning the support of the district court, which has already granted Freeman's motion to dismiss as time-barred all EEOC claims to the extent that the claims relate to hiring decisions made before 2007.[39]

Although the EEOC's criminal conviction litigation efforts thus far have largely failed, it has secured at least one favorable settlement. On January 11, 2012, the EEOC announced a $3.13 million settlement with Pepsi to resolve a charge of race discrimination. Pepsi's policy barred applicants who had been arrested for, but not convicted of, a crime; it also allegedly denied employment to many who were convicted of minor offenses. The EEOC alleged that Pepsi's criminal background policy disproportionately excluded more than 300 African-American applicants. In addition to the monetary payment, the settlement required Pepsi to provide job offers and training to individuals denied employment because of their criminal records.[40]

2. Conflict with the Federal Government's Own Personnel Policies

Even the federal government's own personnel practices might warrant investigation under the EEOC's theory. In 2009, the EEOC's Acting Chair warned one federal agency, the U.S. Census Bureau, that its consideration of criminal convictions may be unlawful.[41]

Federal government hiring is currently guided by the Office of Personnel Management's "suitability" standards,[42] which provide guidelines for individual agencies including wide latitude about the adoption of criminal background check policies. Security policies implemented after September 11, 2001, often require criminal background checks to be conducted for any person who regularly works on federal premises.[43] Moreover, the federal

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[38] Compl., *EEOC v. Freeman*, No. 8:09-cv-02573-RWT (D. Md. filed Sept. 30, 2009).

[39] *EEOC v. Freeman*, No. 8:09-cv-02573-RWT, 2011 WL 337339, at *7 (D. Md. Jan. 31, 2011).

[40] Press Release, U.S. Equal Employment Opportunity Commission, *Pepsi To Pay $3.13 Million and Made Major Policy Changes To Resolve EEOC Finding of Nationwide Hiring Discrimination Against African Americans* (Jan. 11, 2012), *available at* http://www1.eeoc.gov/eeoc/newsroom/release/1-11-12a.cfm (last visited Apr. 19, 2012).

[41] *See* Letter from Stuart J. Ishimaru, EEOC Chairman, to Gary Locke, U.S. Commerce Secretary, and Thomas Mesenbourg, U.S. Census Bureau Director (July 10, 2009), *available at* http://media.washingtonpost.com/wp-srv/politics/documents/letter.pdf.

[42] 5 C.F.R. §§ 731.202(c)(1)–(7).

government requires criminal background checks even for contractor employees who have access to federal facilities and systems.[44]

The 2009 letter from then-Acting Chair Ishimaru highlighted that the U.S. Census Bureau was telling applicants for its enumerator position that an arrest or conviction record would disqualify them (unless the applicant showed that the record was incorrect). The application also stated that convictions for "something other than a minor traffic violation . . . could be the basis for nonselection."[45] Ishimaru expressed concern that the Census Bureau's hiring may violate Title VII's disparate impact provisions because an arrest, in itself, is not a sufficient ground for disqualifying an applicant, and because requiring applicants to provide court records or fingerprints to contest Census Bureau information was "inconsistent with Census Bureau's obligation under Title VII, to objectively assess whether the applicant or employee in fact engaged in the conduct alleged."[46] The Acting Chairman concluded his letter by requesting information about the Census Bureau's practice or policy concerning criminal records, information about how and where the Bureau obtained applicant criminal record information, as well as copies of employment applications, job postings, and jobs descriptions for enumerators.[47]

More broadly, defendants have successfully compelled production from EEOC of EEOC's own personnel policies. In a variety of cases, employers have persuaded the federal courts that EEOC should produce information about EEOC's practices during discovery because such information may show that the defendant employer's challenged policy or practice are similar to those used by the EEOC itself. For example, the court in *EEOC v. Kaplan Higher Educ. Corp.* explained that "[w]hether the EEOC uses background or credit checks in hiring its employees is relevant to whether such measures are a business necessity."[48] Similarly, in *Freeman*, discussed above, the court ordered EEOC to produce a witness for a deposition who would testify about EEOC hiring policies, including EEOC's use of criminal records.[49] The court reasoned, "if Plaintiff uses hiring practices similar to those used by Defendant, this fact may

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[43] *See, e.g.*, Homeland Security Presidential Directive / HSPD-12: Policy for a Common Identification Standard for Federal Employees and Contractors (Aug. 27, 2007), *available at* http://www.dhs.gov/homeland-security-presidential-directive-12#0 (last visited Nov. 29, 2012); *NASA v. Nelson*, 131 S. Ct. 746 (2011) (discussing federal government security policies).

[44] *Id.*

[45] Letter from Stuart J. Ishimaru, EEOC Chairman, to Gary Locke, U.S. Commerce Secretary, and Thomas Mesenbourg, U.S. Census Bureau Director (July 10, 2009), *available at* http://media.washingtonpost.com/wp-srv/politics/documents/letter.pdf.

[46] *Id.* at 2-3.

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

[48] *EEOC v. Kaplan Higher Educ. Corp.*, No. 1:10 CV 2882, 2011 WL 2115878, at *4 (N.D. Ohio, May 27, 2011).

[49] *EEOC v. Freeman*, Civil Action No. RWT-09-2573, 2012 BL 206047 at *6 (D. Md. Aug. 14, 2012).

show the appropriateness of those practices, particularly because Plaintiff is the agency fighting unfair hiring practices."[50]

3. New EEOC Enforcement Guidance on Criminal Convictions and Arrests

a. Background

The EEOC issued policy guidance in 1987, which set out a three-part test for determining when employers may use criminal records, consistent with Title VII, to deny employment based on business necessity. The guidance explained that employers must also consider (1) the nature of the job, (2) the nature and seriousness of the offense, and (3) the length of time since the offense occurred.[51] Three years later, in 1990, the EEOC issued more guidance, discussing the use of statistical samples to defeat showings of disparate impact and the use of arrest records in employment decisions.[52]

The 2006 EEOC Compliance Manual reiterated the three-part test and clarified that a "blanket exclusion" from employment of persons with past convictions, without consideration of their circumstances, would be neither job related nor consistent with business necessity.[53] It also distinguished between conviction and arrest records, noting that the employers considering the latter as a criterion in hiring decisions must further "evaluate whether the applicant or employee actually engaged in the misconduct."[54]

b. 2012 Guidance

On April 25, 2012, the EEOC issued new enforcement guidance about employers' use of arrest and conviction records in employment decisions. The guidance states that "[t]he fact of an arrest does not establish that criminal conduct has occurred, and an exclusion based on an arrest, in itself, is not job related and consistent with business necessity."[55] An employer may, however, "make an employment decision based on the conduct underlying an arrest if the conduct makes

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[50] *Id*. at *4. *See also EEOC v. Bloomberg, L.P.*, No. 07 Civ. 8383(LAP) 2010 WL 3260150 at *3 (S.D.N.Y. Aug. 2, 2010) ("The way EEOC's offices complied with Title VII during the class period may be probative of whether Bloomberg should have viewed Bloomberg's own practices as Title VII compliant or not.").

[51] U.S. Equal Employment Opportunity Commission, *Policy Statement on the Issue of Conviction Records under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.* (1982), Feb. 4, 1987.

[52] The U.S. Equal Employment Opportunity Commission, *Policy Guidance on the Consideration of Arrest Record in Employment Decisions under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.* (1982), Sept. 7, 1990.

[53] U.S. Equal Employment Opportunity Commission, *Compliance Manual* § 15(VI)(B)(2) (2006).

[54] *Id.*

[55] *See* U.S. Equal Employment Opportunity Commission, *EEOC Enforcement Guidance: Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964* (Apr. 25, 2012), *available at* http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm (last visited Nov. 30, 2012).

the individual unfit for the position in question."[56] Unlike an arrest, a conviction "will usually" be sufficient evidence that the underlying conduct occurred.[57]

Under the new guidance, the EEOC presumes that employer use of criminal history information creates a disparate impact under Title VII. According to the EEOC, national data shows that African Americans and Hispanics are arrested and incarcerated "at rates disproportionate to their numbers in the general population."[58] Therefore, the EEOC asserts, "criminal record exclusions have a disparate impact based on race and national origin."[59] The EEOC would impose on the employer the burden of rebutting this presumption. Thus, the guidance further states that, during an EEOC investigation of policies or practices that may have a disparate impact,

> the employer also has an opportunity to show, with relevant evidence, that its employment policy or practice does not cause a disparate impact on the protected group(s). For example, an employer may present regional or local data showing that African American and/or Hispanic men are not arrested or convicted at disproportionately higher rates in the employer's particular geographic area. An employer also may use its own applicant data to demonstrate that its policy or practice did not cause a disparate impact.[60]

The guidance sets out two methods for employers to establish that the use of criminal background information in hiring is "job related and consistent with business necessity." First, the employer may perform a validation study—that is, a study that finds prior criminal conduct related to work performance or behavior and that complies with standards set forth in the EEOC's Uniform Guidelines on Employee Selection Procedures.[61] However, as the EEOC itself recognizes, such validation studies are rare. Alternatively, the employer may "develop[] a targeted screen considering at least the nature of the crime, the time elapsed, and the nature of the job," and "then provide[] an opportunity for an individualized assessment for those people identified by the screen, to determine if the policy as applied is job related and consistent with business necessity."[62] The guidance then asserts that "[a]lthough Title VII does not require

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[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Id.* This language is inconsistent with Title VII, which specifies that plaintiffs bear the burden of proof. *See* 42 U.S.C. § 2000e-2(k). Courts have yet to address this inconsistency.

[61] U.S. Equal Employment Opportunity Commission, *EEOC Enforcement Guidance: Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964* (Apr. 25, 2012), *available at* http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm (last visited Nov. 30, 2012).

[62] *Id.*

individualized assessment in all circumstances, the use of a screen that does not include individualized assessment is more likely to violate Title VII."[63]

The guidance concludes with suggested best practices for employers. The EEOC suggests that employers develop a "narrowly tailored" policy to screen employees based on criminal conduct. Toward that end, it advises employers to "[d]etermine the specific offenses that may demonstrate unfitness," "[d]etermine the duration of exclusions for criminal conduct," "[r]ecord the justification for the policy," and "[n]ote and keep a record of consultations and research considered in crafting the policy and procedures."[64] It also advises employers to limit questions about criminal history to those records "for which exclusion would be job related . . . and consistent with business necessity," and to keep information about criminal records confidential.[65]

4. Credit Scores

The EEOC has targeted the use of credit scores in employment decisions, as it believes the practice may violate Title VII's disparate impact provisions. On December 21, 2010, for instance, the EEOC filed a lawsuit alleging that Kaplan Higher Education Corporation engaged in a pattern or practice of discriminating against African-American applicants when it rejected their applications based on their credit history.[66] An African-American woman charged that Kaplan hired her and then fired her after performing a credit history check and determining that she had an unfavorable credit history. The EEOC alleged in its complaint that Kaplan had engaged in unlawful employment practices since at least 2008 by using credit history information as a selection criterion in hiring and discharge decisions.

Ultimately, the EEOC's allegations in *Kaplan* did not survive a motion for summary judgment.[67] While recognizing that the EEOC itself uses credit histories as a selection criteria in its own hiring practices, the court held that the EEOC "failed to provide reliable statistical evidence of discrimination."[68] Rather than obtaining race information directly from self-

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[63] *Id.* It is unclear how the EEOC developed its "targeted screen" and "individualized assessment" standards. Title VII's disparate impact statutory provisions say nothing about a "targeted screen" or an "individualized assessment." The EEOC's guidance does not explain how its standards comply with or are a reasonable interpretation of Title VII. In addition, the EEOC's guidance purports to interpret Title VII disparate impact standards, and nothing about the guidance limits the "targeted screen" and "individualized assessment" standards to employers' use of criminal history.

[64] *Id.*

[65] *Id.*

[66] *EEOC v. Kaplan Higher Educ. Corp.*, 1:10-cv-2882 (N.D. Ohio Dec. 21, 2010); *see also* Press Release, U.S. Equal Employment Opportunity Commission, *EEOC Files Nationwide Hiring Discrimination Lawsuit Against Kaplan Higher Education Corp.* (Dec. 21, 2010), *available at* http://www.eeoc.gov/eeoc/newsroom/release/12-21-10a.cfm (last visited Apr. 19, 2012).

[67] *EEOC v. Kaplan Higher Education Corp.*, Case No. 1:10 CV 2882, 2013 BL 21834 (N.D. Ohio Jan. 28, 2013).

[68] *Id.* at *5.

identifying applicants, the system the EEOC used to gather the race data of applicants relied on DMV records and race "analysis" by members of the expert witness's organization.[69] The use of these "race raters" was found to be inadmissible because of a lack of "sufficient evidence that the use of 'race raters' is reliable. Simply put, plaintiff offers no evidence sufficient to satisfy any of the *Daubert* factors."[70] The system of analyzing race, the court noted, amounted to little more than guesswork.[71] Because the EEOC was unable to produce reliable statistical evidence that the use of credit scores caused the exclusion of applicants because of their membership in a protected group, it was unable to make out a prima facie case of disparate impact discrimination.[72]

C. ADA: Pre-Employment Tests, Medical Examinations, and Leave Policies

Recent EEOC enforcement efforts have led to three key developments involving the ADA. *First*, there has been an increasing focus on employers' use of hiring tests. The EEOC's views on this area are unclear, other than that the EEOC seems skeptical about practically any kind of test used by employers to make employment decisions. Recent enforcement efforts suggest the potential for wide-ranging investigations and broad allegations of discrimination. *Second*, the EEOC has advanced a broad definition of "medical examinations" that threatens employers' ability to maintain safe workplaces. *Third*, a series of recent cases indicates an increased focus on employers' unpaid leave policies.

1. Pre-Employment Tests

The EEOC has pursued investigations and litigation that challenge allegedly discriminatory tests and qualification standards. Section 102(c)(6) of the ADA prohibits the use of "qualification standards, employment tests or other selection criteria that screen out or tend to screen out" disabled applicants, unless the test or qualification standard is "job-related for the position in question and is consistent with business necessity."[73] The next provision in the Act goes a step further and requires employers to ensure that test results "accurately reflect the skills, aptitude," or other relevant qualifications of disabled applicants and employees, rather than any "sensory, manual, or speaking" disabilities—"except where such skills are the factors that the test purports to measure."[74] The EEOC has relied on these two provisions for scrutiny of employers' use of personality tests in hiring on the theory that such tests "tend to screen out" those who suffer from certain disabilities. Although the Commission has not laid out extensive views on the issue, this development poses the potential for expansive investigation and enforcement efforts.

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[69] Id. at *6.

[70] *Id.*

[71] *Id*.

[72] *Id*. at *12-13.

[73] 42 U.S.C. § 12112(c)(6).

[74] *Id.* § 12112(c)(7).

EEOC v. Kronos, Inc.,[75] is a harbinger of such efforts. In this case, arising from an EEOC investigation of Kroger Food Stores, the Commission issued a subpoena to Kronos, a third-party vendor that created a personality test used in Kroger's hiring process. The test sought to "measure[] the human traits that underlie strong service orientation and interpersonal skills."[76] A hearing- and speech-impaired applicant who was not hired by Kroger filed charges with the EEOC alleging that Kroger's hiring practices, including its use of Kronos's personality test, discriminated against her on the basis of her disabilities. Specifically, Kroger had summarized the results of the Kronos test as demonstrating that she "is less likely to . . . listen carefully, understand and remember."[77] This case has yet to proceed beyond the investigation stage—the parties have spent the past few years disputing the breadth of the EEOC's subpoenas, as discussed below.[78]

Kronos raises many questions about how the EEOC might target personality tests in the future. Most obviously, it raises issues regarding the breadth of information that the EEOC may seek in pursuing these investigations—and *from whom* it may seek the information. The subpoenas at issue in *Kronos* demonstrate that the EEOC will reach far beyond the allegedly discriminatory *company* to draw in third-party test makers. In addition, the EEOC's E-RACE initiative has singled out hiring tests as an area of focus, which suggests that the EEOC is poised to attack hiring tests on racial discrimination grounds as well.[79]

2. Medical Examinations—Drug and Alcohol Testing

The EEOC has also pursued an expansive application of the ADA's limits on medical examinations and inquiries. Section 102(d) of Title I of the ADA prohibits employers from using medical testing or making inquiries as to whether an employee is disabled, or as to the severity of the disability, "unless such examination or inquiry is shown to be job-related and consistent with business necessity."[80]

In a pending suit against U.S. Steel, the Commission alleges that the company's random alcohol testing of probationary employees violates the ADA's medical testing provisions.[81] The EEOC argues that a company is permitted to administer alcohol testing *only* when it has "a

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[75] 620 F.3d 287 (3d Cir. 2010); 2009 WL 1519254 (W.D. Pa. 2009).

[76] *Kronos*, 620 F.3d at 292.

[77] *Id.* at 293.

[78] *See EEOC v. Kronos*, 2011 WL 1085677 (W.D. Pa. Mar. 21, 2011).

[79] *See* U.S. Equal Employment Opportunity Commission, *E-RACE Goals and Objectives, available at* http://www.eeoc.gov/eeoc/initiatives/e-race/goals.cfm (last visited Sept. 12, 2011).

[80] 42 U.S.C. § 12112(d)(4)(A).

[81] *See* Compl., *EEOC v. U.S. Steel Corp.*, No. 2:10-cv-01284-NBF (W.D. Pa. Sept. 30, 2010).

genuine and reasonable belief based on objective evidence that an employee is impaired by alcohol."[82]

On July 23, 2012, the district court ruled that Title VII's 300-day charge-filing period limits EEOC claims under the ADA; accordingly, the court dismissed as time-barred all claims based on tests conducted outside the 300-day window.[83] The court also found that the tests were discrete acts, and thus rejected the EEOC's continuing violation theory.[84] As discussed below, U.S. Steel's motion for summary judgment, seeking dismissal of the entire EEOC complaint, is now pending.

The EEOC recently settled a case against Dura Automotive Systems for subjecting employees at one of its facilities to blanket drug testing for legal prescription medications. After Dura discovered that the facility at issue was experiencing more workplace accidents than similar facilities, it instituted a policy that prohibited and tested for the use of certain prescription drugs—such as Xanax and Oxycodone—that may present safety hazards even when legally taken as prescribed.[85] The EEOC challenged the policy as an illegal medical examination and as a test that tended to disfavor disabled individuals. Moreover, the Commission argued that these tests were not justified as "job-related and consistent with business necessity," at least in part,

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[82] *Id*. ¶ 15.b; *see also* Press Release, U.S. Equal Employment Opportunity Commission, *EEOC Sues U.S. Steel Corporation for Nationwide Disability Discrimination* (Oct. 5, 2010), *available at* http://www.eeoc.gov/eeoc/newsroom/release/10-5-10.cfm (last visited Nov. 26, 2012) ("U.S. Steel has . . . a policy . . . which provides for the random alcohol testing of probationary employees and does not require the company to have a reasonable basis for subjecting the employee to the random test, in violation of the ADA.").

[83] *EEOC v. U.S. Steel Corp*., No. 10-1284, 2012 BL 183071, at *5 (W.D. Pa. July 23, 2012). In so ruling, the court quoted *EEOC v. Freeman*'s holding that:

> The Court need not look any farther than the plain language of Section 706(e)(1) to conclude that the class of individuals for whom the EEOC can seek relief is limited to those who could have filed an EEOC charge during the filing period. Section 706(e)(1) clearly bars claims from individuals who failed to timely file charges. *See* 42 U.S.C. § 2000e-5(e)(1) ("[A] charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred . . . ."). Nothing in the text of Section 706 or 707 suggests that the EEOC can recover for individuals whose claims are otherwise time-barred. If Congress intended to make an exception for the EEOC to revive stale claims under Sections 706 and 707, it should have said so. The plain language of Section 706(e)(1), which is incorporated into Section 707 via subsection (e), precludes the EEOC from seeking relief for individuals who were not subjected to an unlawful employment practice during the 300 days before the filing of the triggering charge.

Id. (citation omitted).

[84] *Id.* at *7.

[85] Dura also prohibits and tests for the use of illegal drugs, but the EEOC does not challenge that aspect of the company's policy. *See* Compl. ¶ 11.d, *EEOC v. Dura Auto. Sys.*, No. 1:09-cv-00059 (M.D. Tenn. Sept. 11, 2009).

because they were conducted "without . . . any cause to suspect that particular employees were using drugs or that use of drugs were adversely affecting their job performances."[86]

In essence, the Commission advanced the position that testing for anything other than illegal drugs can only be conducted once an employer has cause to suspect that drugs are being used *and* are adversely affecting an employee's performance. This is an exceedingly narrow reading of the ADA's statement that "a test to determine the illegal use of drugs shall not be considered a medical examination."[87]

The EEOC and Dura settled on August 31, 2012, and the court entered a consent decree that describes the terms of the settlement. The decree requires Dura to pay $750,000, institute ADA training, develop a new drug testing policy, and report employee complaints about the drug testing policy to the EEOC. It also provides that Dura cannot conduct "employee drug screens that are not job-related and consistent with business necessity," make "illegal disability-related or medical inquiries of its employees," or take "any adverse employment action against an employee taking legally prescribed medication without making an individualized assessment of the employee's ability to perform their job."[88]

3. Unpaid Leave as a Reasonable Accommodation

Another area where the EEOC has recently trained its gaze is unpaid leave. Specifically, the Commission has investigated and sued employers for alleged failures to provide additional unpaid leave as a "reasonable accommodation" under the ADA.[89] The Commission's guidance materials have long foreshadowed this trend. The EEOC originally issued its ADA Interpretive Guidance in 1991 and recently updated it effective May 24, 2011. Since its first publication, the Interpretive Guidance has specified that "providing additional unpaid leave for necessary treatment" may be a reasonable accommodation that employers must provide to disabled employees.[90] Likewise, the EEOC's Technical Assistance Manual, which was issued in 1992, identifies "flexible leave policies" as potentially required reasonable accommodations for certain disabilities.[91]

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[86] *Id.*

[87] 42 U.S.C. § 12114(d).

[88] Consent Decree 4-5, *EEOC v. Dura Auto*, No. 1:09-cv-00059 (M.D. Tenn. Aug. 31, 2012).

[89] 42 U.S.C. §§ 12112(a), (b)(5)(A).

[90] 29 C.F.R. pt. 1630 app. § 1630.2(o) (2011); 29 C.F.R. pt. 1630 app. § 1630.2(o) (1992).

[91] *See* Job Accommodation Network, *A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act* § 3.10(4) (Jan. 1992), *available at* http://askjan.org/links/ADAtam1.html (last visited Sept. 12, 2011).

More recently, as the EEOC's enforcement efforts were unfolding in the courts, the Commission held a hearing to "examine [the] use of leave as a reasonable accommodation."[92] At this hearing, one of the EEOC's Assistant Legal Counsels relied on the Interpretive Guidance and Technical Assistance Manual to support the Commission's increasingly aggressive position on unpaid leave.[93] It bears noting, however, that the EEOC recognizes statutory limitations to its additional leave efforts—namely, that employers are not required to provide additional unpaid leave when doing so would cause an "undue hardship."[94] And even the EEOC concedes that employers need not grant requests for indefinite leave.[95]

The recent case of *EEOC v. Verizon*[96] illustrates the EEOC's increased focus on unpaid leave policies. The EEOC argued that Verizon's attendance policy violated the ADA because it allegedly disciplined employees for absences including those related to a disability. In the EEOC's words, this policy amounted to a "no fault" leave policy (an allegation that Verizon denied).[97] Eventually, the parties reached a settlement—in fact, the largest EEOC ADA settlement ever ($20 million). The key terms of the consent decree specify that employees may not be punished for absences caused by, and expressly requested as, a reasonable accommodation of mental or physical disabilities covered by the ADA.[98] Consistent with the ADA's statutory exceptions, however, the agreement does not require Verizon to grant indefinite leaves nor does Verizon have to excuse chronic absenteeism. In addition, the consent decree permits Verizon to deny leave when an "undue hardship" would occur—including that the company may deny leave requests that are not for "a definite or reasonably certain period of time" or that pose a significant business difficulty or expense.[99]

Similarly, in *EEOC v. Denny's, Inc.*, the EEOC sued Denny's for enforcing a six-month maximum medical leave policy.[100] The parties settled for $1.3 million. The *Denny's* consent

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[92] EEOC Meeting Minutes Tr., *EEOC To Examine Use of Leave as Reasonable Accommodation* (June 8, 2011), *available at* http://www.eeoc.gov/eeoc/meetings/6-8-11/index.cfm (last visited Sept. 12, 2011).

[93] *See id.* (Written Testimony of Christopher Kuczynksi, Assistant Legal Counsel, EEOC), *available at* http://www.eeoc.gov/eeoc/meetings/6-8-11/kuczynski.cfm (last visited Sept. 12, 2011).

[94] *See id.*; *see also* 42 U.S.C. § 12111(10)(B); 29 C.F.R. § 1630.2(p).

[95] *See* U.S. Equal Employment Opportunity Commission, *The Americans with Disabilities Act: Applying Performance and Conduct Standards to Employees with Disabilities* § III.E(21) (Sept. 3, 2008), *available at* http://www.eeoc.gov/facts/performance-conduct.html#issues (last visited Sept. 12, 2011) ("Although employers may have to grant extended medical leave as a reasonable accommodation, they have no obligation to provide leave of indefinite duration.").

[96] No. 11-cv-01832 (D. Md. filed July 5, 2011).

[97] Verizon's policy did, in fact, provide exceptions for certified leave under the Family and Medical Leave Act, jury or military duty, death in the immediate family, or excused time without pay. *See* Compl. ¶ 31(b), *EEOC v. Verizon*, No. 11-cv-01832 (D. Md. July 5, 2011). Verizon also asserted that it fully complied with the ADA.

[98] *See* Consent Decree ¶ 20.03, *EEOC v. Verizon*, No. 11-cv-01832 (W.D. Md. July 6, 2011), ECF No. 5.

[99] *Id.*

[100] *See* Consent Decree, *EEOC v. Denny's, Inc.*, No. 06-cv-02527 (D. Md. June 24, 2011), ECF No. 89.

decree requires the company to provide additional unpaid medical leave beyond its maximum limit, so long as an employee specifically requests the additional leave as a reasonable accommodation for a disability.[101]

The pending case of *EEOC v. Princeton Healthcare System*[102] also highlights the Commission's focus on unpaid leave policies. In this case, the EEOC alleges that Princeton Healthcare System "strictly enforc[es] blanket leave policies without granting requests for leave as a reasonable accommodation."[103] Specifically, the Commission says that Princeton Healthcare System provides only seven days of leave for individuals not covered under the Family and Medical Leave Act.[104] Although this case has yet to proceed beyond discovery, it presents another example of the EEOC's increased focus on leave as a reasonable accommodation. In fact, the genesis of this suit was not a reasonable accommodation charge, but instead a gender discrimination charge filed by a pregnant woman seeking longer maternity leave. After determining it would not pursue the gender discrimination case, the EEOC "expand[ed] its investigation to include possible violations of the Americans with Disabilities Act."[105]

Another recent case, *EEOC v. Sears, Roebuck & Co.*,[106] illustrates that the EEOC is targeting even generous leave policies for not being "flexible" enough. In *Sears*, the company provided a standard one-year workers' compensation leave policy, and the EEOC alleged that the policy was impermissibly "inflexible" because it failed to provide disabled employees additional leave or the opportunity to return to work in a different capacity.[107] Sears denied that its policy prevented employees from returning to work or resulted in automatic termination after one year of leave. Ultimately, the parties settled the case for $6.2 million. The terms of the consent decree require Sears to provide employees on leave with written notice of their right to request reasonable accommodations that would allow them to return to work.[108] If an employee does not respond to this notification, however, the settlement permits Sears to terminate the employee after one year of leave.

The settlement agreement in *EEOC v. United Airlines, Inc.*,[109] similarly demonstrates that the EEOC is focused on allegedly "inflexible" leave policies. It also demonstrates that companies can successfully negotiate "flexible" leave policies that still protect their business

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[101] *Id.* ¶ 12.

[102] No. 3:10-cv-4126 (D.N.J. filed Aug. 11, 2010).

[103] Compl. at 1-2, No. 3:10-cv-4126 (D.N.J. Aug. 11, 2010).

[104] *See id.* at 3.

[105] *EEOC v. Princeton Healthcare Sys.*, No. 10-cv-4126, 2011 WL 2148660, at *1 (D.N.J. May 31, 2011) (order granting, in part, EEOC's motion to compel discovery).

[106] No. 04-cv-07282 (N.D. Ill. 2009).

[107] Consent Decree ¶ 1, *EEOC v. Sears, Roebuck & Co.*, No. 04-cv-07282 (N.D. Ill. Sept. 29, 2009).

[108] *See id.* ¶¶ 17-18.

[109] No. 2:06-cv-01407 (W.D. Wash. 2010).

interests. In *United Airlines*, the EEOC alleged that the company refused to allow service representatives to work reduced hours as a reasonable accommodation for covered disabilities. The parties' settlement agreement requires United to give "case-by-case" consideration to reduced hour requests. It also allows the company to require requesting employees to downgrade their status to part-time.[110] In addition, the agreement provides that any request for a work week of less than 16 hours (the minimum time allowed for part-time employees under the company's collective bargaining agreement) is *per se* an unreasonable accommodation.[111]

Similarly, in *EEOC v. Interstate Distributor Co.*, the EEOC brought suit on behalf of hundreds of Interstate employees, alleging that the company denied them reasonable accommodations and then fired them pursuant to its unlawful maximum leave policy.[112] The EEOC claimed that the employer violated the ADA because it allegedly terminated its employees if they requested more than 12 weeks of leave instead of attempting to determine whether it would be reasonable to provide additional leave as an accommodation.[113] The parties settled for $4.85 million. The *Interstate* consent decree requires Interstate to provide ADA training for its employees and report the circumstances of terminations, FMLA extensions, disability complaints, and requests for accommodations to the EEOC every six months.[114]

These cases raise three important points. First, the EEOC is ramping up enforcement efforts regarding leave policies, and it typically does so by labeling policies as "no fault," "blanket," or "inflexible," even when a policy already provides some additional leave options (like Verizon's did). As *Princeton Healthcare Systems* illustrates, the EEOC focuses on this issue even when an initial charge does not present a reasonable accommodation claim. And the potential monetary damages in these cases are significant. Second, the *Sears* settlement suggests the EEOC might begin arguing that employers must expressly inform employees of their rights under the ADA. Third, employers are nonetheless still able to refuse overly burdensome and indefinite leave requests. Indeed, this third point likely represents the next frontier in this area.

D. "Caregiver" or "Family Responsibility" Discrimination

1. EEOC's Guidance on Caregiving Responsibilities

In 2007, the EEOC issued enforcement guidance entitled "Unlawful Disparate Treatment of Workers with Caregiving Responsibilities."[115] While the guidance notes at the outset that

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[110] Consent Decree ¶ 12, *EEOC v. United Airlines, Inc.*, No. 2:06-cv-01407 (W.D. Wash. Dec. 17, 2010).

[111] *Id.* ¶ 13.

[112] Consent Decree ¶ 1, *EEOC v. Interstate Distrib. Co.*, No. 1:12-cv-02591 (D. Colo. Nov. 8, 2012).

[113] *Id.*

[114] *Id.* ¶¶ 30, 35.

[115] *See* U.S. Equal Employment Opportunity Commission, *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities* (May 23, 2007), *available at* http://www.eeoc.gov/policy/docs/qanda_caregiving.html (last visited Sept. 6, 2011) (hereinafter "Caregiving Guidance").

"[a]lthough the federal EEO laws do not prohibit discrimination against caregivers per se," it states that "there are circumstances in which discrimination against caregivers might constitute unlawful disparate treatment."[116]

The guidance then elaborates on several possible types of discrimination based on caregiver status that would constitute discrimination as defined by other statutes, including sex-based discrimination against female caregivers, stereotyping and disparate treatment of pregnant workers, sex-based discrimination against male caregivers, discrimination of women of color who have caregiving responsibilities, hostile work environment harassment based on caregiving responsibilities, and discrimination against an individual with caregiving responsibilities for a disabled individual.[117] According to the EEOC, such unlawful discrimination can include, but is not limited to, asking female applicants whether they are married and/or have young children, making stereotypic comments about pregnancy or working mothers, subjecting women to less favorable treatment after becoming aware of pregnancy or after a woman assumes caregiving responsibilities, giving more favorable treatment to childless women or men with caregiving responsibilities, and steering women with childcare responsibilities to less prestigious positions.[118]

The EEOC also issued a questions and answers document about its Caregiving Guidance.[119] Then, in 2009, the EEOC issued its "Employer Best Practices for Workers with Caregiving Responsibilities."[120] The Caregiving Best Practices acknowledges that it is providing examples of practices that "go beyond federal nondiscrimination requirements and that are designed to remove barriers to equal employment opportunity."[121] The Best Practices generally recommend practices to improve the hiring, recruitment, retention, and terms of conditions of employment of workers with caregiving responsibilities, including, but not limited to, things such as training managers on legal obligations regarding caregiver responsibilities, developing a strong EEO policy that addresses what is unlawful discrimination based on caregiving responsibilities, implementing flexible work arrangements, including flex time, part-time, and job sharing, eliminating or modifying mandatory overtime requirements, reassigning duties that employees cannot perform due to childcare obligations, providing reasonable sick time to employees, and providing resources for caregiver-related information.[122]

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[116] Caregiving Guidance at 2.

[117] *Id.* at 3.

[118] *Id.*

[119] *See* U.S. Equal Employment Opportunity Commission, *Questions and Answers about EEOC's Enforcement Guidance on Unlawful Disparate Treatment of Workers with Caregiving Responsibilities* (May 23, 2007), *available at* http://eeoc.gov/policy/docs/quanda_caregiving.html (last visited Sept. 6, 2011).

[120] *See* U.S. Equal Employment Opportunity Commission, *Employer Best Practices for Workers with Caregiving Responsibilities* (last modified Jan. 19, 2011), *available at* http://www.eeoc.gov/policy/docs/caregiver-best-practices.html (last visited Nov. 30, 2012) (hereinafter "Caregiving Best Practices").

[121] Caregiving Best Practices at 1.

[122] *Id.* at 4-7.

2. EEOC "Caregiver" Litigation

Since issuing the guidance, the EEOC has made it clear that working to eliminate discrimination against caregivers in the workplace is one of its foremost objectives. Indeed, the Commission hosted a public hearing on February 15, 2012 about "Unlawful Discrimination Against Pregnant Workers and Workers with Caregiving Responsibilities."[123] Likewise, in a recent statement, then-Acting Chairman of the EEOC Stuart Ishimaru commented on the significant impact that caregiver discrimination can have on the wages of working women.[124] He further noted that he has taken a "particular interest" in this issue during his time at the EEOC.

On September 27, 2007, the EEOC filed a pattern or practice lawsuit against Bloomberg L.P. that alleged the company discriminated against a class of employees who became pregnant and/or took maternity leave while working at the company.[125] The Complaint alleged that Bloomberg cut pregnant women's and mothers' pay, demoted them, reduced their job responsibilities, excluded them from management meetings, and subjected women to stereotypes about caregivers.[126]

Both sides proffered experts to support their positions. The EEOC proffered the opinions of Dr. Louis Lanier and Dr. Eugene Borgida, and Bloomberg offered the opinions of Dr. Michael Ward and Dr. John Johnson.[127] The EEOC proffered Dr. Lanier to provide evidence about statistical measures of pay. Dr. Borgida offered a "social framework" analysis. The court excluded both after it concluded that their work was irrelevant and unreliable. The court excluded Dr. Borgida's testimony and reports for the additional reason that "its minimal probative value is substantially outweighed by its prejudicial effect, making it inadmissible under Fed. R. Evid. 403."[128]

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[123] Transcripts of the hearing are available at http://www.eeoc.gov/eeoc/meetings/2-15-12/index.cfm (last visited Nov. 16, 2012).

[124] *See* Statement of Stuart J. Ishmaru, Acting Chairman, U.S. Equal Employment Opportunity Commission, Before the Senate Committee on Health, Education, Labor and Pensions (Mar. 11, 2010), *available at* http://www.eeoc.gov/eeoc/events/ishimaru_paycheck_fairness.cfm (last visited Nov. 30, 2012).

[125] *EEOC v. Bloomberg, L.P.*, No. 07-cv-8383 (S.D.N.Y. filed Sept. 27, 2007).

[126] Second Am. Compl. ¶ 7.

[127] *See* 2010 WL 3466370, at *1 (S.D.N.Y. Aug. 31, 2010). Dr. Ward's report studied the impact of maternity leaves when compared to non-maternity leaves on compensation and the number of direct reports before and after leave, finding that women who take maternity leave receive higher compensation than other leave takers, and maternity leave as compared to other leaves had no statistically significant impact on the number of direct reports. *Id.* at *3. Dr. Johnson's report compared base salary and Equity Equivalence Certificate ("EEC") grant values of maternity leave takers as compared to non-maternity leave takers for a period of time both before and after leave, and again found that maternity leave takers generally fared better than non-maternity leave takers. *Id.* at *3-4. Dr. Lanier, in contrast, compared the compensation outcomes of class members to non-class members and never accurately measured the impact of leave on class member compensation. *Id.* at *2. Finally, Dr. Borgida used a social frame working theory to attempt to show that stereotypes influenced decision-making as to pregnant employees and mothers at Bloomberg. *Id.* at *4.

[128] *Id.* at *18.

The court explained that Dr. Lanier's testimony should be excluded because "he does not accurately compare class members to other similarly situated Bloomberg employees, *i.e.*, leave takers," which made his analysis of differences in compensation between class members and non-class members irrelevant.[129]

In contrast, since Dr. Ward and Dr. Johnson compared class members to similarly situated individuals (leave takers), their opinions were admissible. Both demonstrated that class members received more favorable pay than similar situated employees and Dr. Ward additionally demonstrated that the Company did not reduce class member direct reports more than other similar employees.[130]

On August 16, 2011, the court granted summary judgment to Bloomberg on the pattern or practice claim, finding the EEOC's evidence was "insufficient to demonstrate that discrimination was Bloomberg's standard operating procedure."[131] At the outset, the court noted that "[a]s its standard operating procedure, Bloomberg increased compensation for women returning from maternity leave more than for those who took similarly lengthy leaves and did not reduce the responsibilities of women returning from maternity leave any more than of those who took similarly lengthy leaves."[132]

The court explained that that statistical evidence is typically the cornerstone of pattern or practice cases, yet the EEOC presented no admissible statistical evidence. Indeed, the court explained, the "case law is weighty in favor of defendants…where plaintiffs present only anecdotal evidence and no statistical evidence."[133] Since the EEOC's statistical expert had already been excluded, the court stated that "[t]he singular fact that EEOC has no statistical evidence in support of its case, while maybe not fatal in itself, is severely damaging in this case. In addition to that fact, the EEOC has presented nothing other than anecdotal evidence. The result is fatal."[134] As such, the court found that no reasonable jury could find a pattern or practice of discrimination.[135]

Further, the court found that the EEOC's case could not withstand summary judgment for the additional reason that Bloomberg's own statistical evidence in the Ward and Johnson reports disproved the EEOC's compensation and promotion claims.[136] The court elaborated that

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[129] *Id.* at *12.

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

[131] *EEOC v. Bloomberg L.P.*, 778 F. Supp. 2d 458, 462 (S.D.N.Y. 2011).

[132] *Id.*

[133] *Id.* at *8.

[134] *Id.* at *9.

[135] *Id.*

[136] *Id.* at *18.

"[a]lthough it is true that compensation 'growth for class members is below growth for those who took no leaves and those who took short leaves', this does not violate the law."[137] Moreover, "focusing a comparison only on employees who took amounts of leave similar to that taken by Class Members is precisely what is required to determine whether there is any legally cognizable discrimination in this case."[138] In other words, Bloomberg's experts provided an analysis of class members' claims in comparison to the appropriate group of similarly situated individuals—other leave takers.

The court generally found that any such evidence presented by the EEOC was similarly insufficient to establish a pattern or practice of discrimination because it either did not support the EEOC's assertions, or, in totality, such individual evidence was insufficient support for a pattern or practice claim.[139] Many allegedly discriminatory comments proffered by the EEOC were either inadmissible hearsay or proved nothing.[140] For example, evidence that managers questioned female employees "commitment" after they became mothers did not actually provide evidence of discrimination.[141] One manager allegedly responded to a claimant's questions about travel requirements for a job promotion by saying that if she "want[s] to be the nine to five…mom that was home making dinner every night, that wasn't going to happen."[142] The court found that this statement was not probative of discrimination, but rather, showed that the company provided truthful information about its expectations of employees.[143] And, the statements that were admissible did not prove any pattern or practice: "[i]n a company of 10,000, with 603 women who took maternity leave, and during a class period of nearly six years, this type of evidence does not make out a pattern or practice claim."[144]

Significantly, the court concluded that "[a]t bottom, the EEOC's theory of this case is about so-called 'work-life balance,'" and that "[i]t amounts to a judgment that Bloomberg, as a company policy, does not provide its employee-mothers with a sufficient work-life balance."[145] Though women often have to choose between work and family, "[t]he law does not mandate 'work-life balance'" and "it is not the role of the courts to dictate a healthy balance for all."[146] As such, since the EEOC did not provide sufficient evidence that discrimination against pregnant

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[137] *Id.* at *19.

[138] *Id.* at *20.

[139] *Id.* at *10-11.

[140] *Id.* at *23, n.6.

[141] *Id.* at *13.

[142] *Id.* at *14.

[143] *Id.*

[144] *Id.* at *16.

[145] *Id.* at *22.

[146] *Id.* at *22-23.

women and working mothers was the "standard operating procedure" at Bloomberg, it was appropriate to grant summary judgment to Bloomberg.[147]

In another recent "caregiver discrimination" case, the EEOC sued Houston Funding on the basis that it fired employee Donnicia Venters because she wanted to pump breast milk at work.[148] Venters had taken maternity leave on December 1, 2008. Over the following two months, she never communicated a return date to her employer. On February 10, several Houston Funding employees met and decided to discharge her. Before Venters learned of her discharge, however, she called Vice President Harry Cagle to inform him that she was able to return to work and would like to use a back room to pump breast milk. Cagle then informed her that Houston Funding had fired her for job abandonment.[149]

The EEOC argued that "job abandonment" was merely a pretext for an illegal discharge based on her desire to pump breast milk. The PDA prohibits discrimination based on "pregnancy, childbirth, or related medical conditions," and the EEOC argued that the plain meaning of "related medical conditions" must include lactation.[150]

The EEOC noted that Cagle only informed Venters of her discharge *after* she mentioned her desire to pump milk at work. In addition, a manager of Houston Funding asserted that, when he informed Cagle that Venters may need to pump milk at work, Cagle responded "NO. Maybe she needs to stay at home longer."[151] The EEOC claimed that this comment alone evinced "the sexual stereotype that a nursing mother's place is not in the workplace but at home caring for her child," and that "[i]f Cagle terminated Venters based on this view of a lactating woman's role, a jury may find he engaged in sex discrimination under Title VII."[152]

The court granted Houston Funding's motion for summary judgment because "lactation is not pregnancy, childbirth, or a related medical condition." And "firing someone because of lactation or breast pumping is not sex discrimination." Therefore, the court concluded, "the law does not punish lactation discrimination."[153]

Another recent EEOC caregiver discrimination case is *EEOC v. CTI Global Solutions*, in which the EEOC complained that CTI fired three female employees because of their pregnancies. Allegedly, CTI's CFO told one of the employees that her job would be a "risk" for her because of her pregnancy (and she could not submit medical documentation evincing otherwise); a

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[147] *Id.* at *23.

[148] Compl. ¶¶ 16-22, *EEOC v. Houston Funding II, Ltd.*, No. 11-cv-02442 (S.D. Tex. Feb. 9, 2012).

[149] *Houston Funding*, No. 11-cv-02442, slip op. at 1-2.

[150] *See* Plaintiff EEOC's Response to Defendants' Motion for Summary Judgment ¶¶ 2, 11, *Houston Funding*, No. 11-cv-02442, slip op.

[151] *Id*. ¶¶ 7, 10 (internal citation omitted).

[152] *Id*. ¶ 11 n.5 (internal citation omitted).

[153] *Houston Funding*, No. 11-cv-02442, slip op. at 2-3.

manager told another employee that her job would be unsafe for her while pregnant; and another manager told the third employee that, based on "past experiences," it "would not be fair" for her to keep her assignment.[154]

The court granted summary judgment for the EEOC on two of the women's claims because there was direct evidence of discrimination; indeed, the women's supervisors expressly told them that they removed the women from the project because of their pregnancies. The court refused to grant summary judgment on the third, however, because there were material issues of fact about a request she made for light duty and whether any similar employees ever received light duty. Since Title VII does not mandate that employers treat pregnant workers or caregivers more favorably than other employees, if the company had not given light duty to anyone, it would not constitute discrimination to deny it to her.[155]

The EEOC has also secured settlements in several other cases alleging caregiver discrimination. For example, on November 7, 2012, the EEOC secured a ten-year consent decree with the Muskegon River Youth Home to resolve a claim that the youth home maintained policies that discriminated against pregnant employees.[156] The employer required pregnant employees to: 1) report any pregnancy immediately to the company, 2) obtain a note from a physician certifying that the employee could continue to work, 3) take leave throughout the pregnancy if the employee could not obtain such a note, and 4) remain on leave for thirty days after the pregnancy.[157] The consent decree, which contained no financial penalty, required that the company rescind its policy, institute pregnancy discrimination trainings, and report to the EEOC.[158]

On December 8, 2010, the EEOC announced a settlement with the Denver Hotel Management Company ("DHMC") whereby DHMC would pay $105,000 to settle claims that the company refused to promote a single mother to a newly created position of assistant human resource director because she had children.[159] Under the terms of the settlement, DHMC is also required to revise its discrimination policies and conduct training sessions on how stereotypes regarding family responsibilities can constitute sex discrimination. The EEOC announced a

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[154] Compl. ¶ 7, *EEOC v. CTI Global Solutions, Inc.*, No. 09-cv-02570 (D. Md. Sept. 2, 2011).

[155] *CTI Global Solutions, Inc.*, No. 09-cv-02570, slip op. (D. Md. Sept. 2, 2011).

[156] *See* Press Release, U.S. Equal Employment Opportunity Commission, *EEOC Obtains Ten-Year Consent Decree in Pregnancy Discrimination Case* (Nov. 7, 2012), *available at* http://www.eeoc.gov/eeoc/newsroom/release/11-7-12a.cfm (last visited Nov. 20, 2012).

[157] *Id*.

[158] *See* Consent Decree, *EEOC v. Muskegon River Youth Home, Inc.*, No. 1:12-CV-0149-JTN (W.D. Mich. (Nov. 1, 2012).

[159] *See* Press Release, U.S. Equal Employment Opportunity Commission, *Denver Hotel Management Company To Pay $105,000 to Settle EEOC Sex Discrimination Suit* (Dec. 8, 2010), *available at* http://www.eeoc.gov/eeoc/newsroom/release/12-8-10.cfm (last visited Sept. 6, 2011).

similar settlement with The Timken Company on April 29, 2011.[160] The settlement resolved claims that Timken refused to hire the mother of a disabled child because the company believed that she would be unable to work full time and also care for her child. Under the terms of the settlement, Timken is required to pay $120,000, provide anti-discrimination training and post a notice concerning employees' rights under the federal anti-discrimination laws. Settlement of an earlier caregiver discrimination lawsuit with Centenary College for $200,000 was announced on March 28, 2008.[161] The EEOC alleged in that lawsuit that the college demanded the resignation of the women's basketball coach because she had a child.

E. EEOC's Equal Pay Initiatives

The EEOC has made pay equity a top priority. In fiscal year 2011 alone, the EEOC resolved 1,101 charges under the Equal Pay Act for a combined $23 million.[162] That sum represents a 183% increase from the $12.6 million it secured in 2010, and a 479% increase from the $4.8 million it secured in 2009.[163]

To bolster its pay equity enforcement, the EEOC is striving to develop a pay data collection tool. Such data collection was one of the more controversial provisions of the Paycheck Fairness Act, which failed to pass in Congress.[164] In August 2010, the EEOC

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[160] *See* Press Release, U.S. Equal Employment Opportunity Commission, *The Timken Company To Pay $120,000 to Settle EEOC Gender and Disability Discrimination Suit* (Apr. 29, 2011), *available at* http://www.eeoc.gov/eeoc/newsroom/release/4-29-11.cfm (last visited Sept. 6, 2011).

[161] *See* Press Release, U.S. Equal Employment Opportunity Commission, *Centenary College to Pay $200,000 to Settle EEOC Sex Discrimination Suit* (Mar. 28, 2008), *available at* http://www.eeoc.gov/eeoc/newsroom/release/archive/3-28-08.html (last visited Sept. 7, 2011).

[162] Various laws govern discrimination in compensation, one of which is the Equal Pay Act. *See* 29 U.S.C. § 206(d). The Equal Pay Act requires that men and women in the same workplace receive equal pay for equal work. The jobs need not be identical, but they must be substantially equal in terms of skill, effort and responsibility and be performed under similar work conditions. Job content (not job titles) determines whether jobs are substantially equal. By statute, the employer can defend a pay differential based on (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex. *Id.*

The EEOC takes the position that all forms of compensation are covered by the Equal Pay Act, including salary, overtime pay, bonuses, stock options, profit sharing and bonus plans, life insurance, vacation and holiday pay, cleaning or gasoline allowances, hotel accommodations, reimbursement for travel expenses, and benefits. If there is an inequality in compensation between men and women, employers cannot reduce the compensation of either sex to equalize their pay.

[163] U.S. Equal Employment Opportunity Commission, *Equal Pay Act Charges (Includes Concurrent Charges with Title VII, ADEA, and ADA): FY 1997 – FY 2011*, *available at* http://www.eeoc.gov/eeoc/statistics/enforcement/epa.cfm (last visited Nov. 26, 2012).

[164] The EEOC is not the only federal agency evaluating new ways to gather compensation data. In August 2011, for instance, the OFCCP issued an Advance Notice of Proposed Rulemaking regarding a new pay data collection tool. Specifically, in the ANPRM, the OFCCP sought input on the "scope, content, and format of the data collection tool, as well as suggestions for ensuring that the tool will be an effective and efficient means of identifying contractors" for OFCCP compliance evaluations under Executive Order 11246. *Non-Discrimination in Compensation; Compensation Data Collection Tool*, 76 Fed. Reg. 49,398, 49,400 (Aug. 10, 2011). In the ANPRM,

commissioned the National Academy of Sciences to "evaluate currently available and potential data sources, methodological requirements, and appropriate statistical techniques for the measurement and collection of employer pay data."[165]

The NAS released its findings on August 15, 2012. To begin with, it found that "there might well be an increased reporting burden on some employers," and that "there is, at present, no clearly articulated vision of how the data on wages could be used in the conduct of the enforcement responsibilities of the relevant agencies."[166] The report noted that

> [t]he main purpose for which the wage data would be collected, as articulated [by the EEOC], is for targeting employers for investigation regarding their compliance with antidiscrimination laws. But beyond this general statement of purpose, the specific mechanisms by which the data would be assembled, assessed, compared, and used in a targeting operation are not well developed. . . . The panel found no evidence of a clearly articulated plan for using the earnings data if they are collected. The fundamental question that would need to be answered is how the earnings data should be integrated into the compliance programs, for which the triggers have primarily been a complaint process that has generated relatively few complaints about pay matters.[167]

The report concluded that existing studies on the program's cost-effectiveness and the burden it would place on employers were insufficient to enable the NAS to assess accurately its true costs and benefits.[168] The report recommended that, among other things, the EEOC develop a comprehensive plan, develop the necessary infrastructure to analyze and protect compensation data, and hire an independent contractor to conduct a pilot study.[169] Given that this study is so recent, it remains unclear how the EEOC will respond to its recommendations.

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the OFCCP suggested that it might use the tool to conduct "industry-wide compensation trend analyses" and to identify "contractors in specific industries for industry focused compensation reviews." *Id*. at 49,400-01. Upwards of 2,400 comments were received, although a number of these were form responses. Jay-Anne B. Casuga, *OFCCP's Pay Data Collection Tool Proposal Draws More Than Two Thousand Comments*, BNA (Oct. 25, 2011), *available at* http://www.bna.com/ofccps-pay-data-n12884903975. The OFCCP anticipates issuing a formal NPRM for the pay data tool soon.

[165] National Research Council, *Collecting Compensation Data from Employers* 1-17 (2012), *available at* http://www.nap.edu/catalog.php?record_id=13496 (last visited Nov. 26, 2012).

[166] *Id.* at S-1.

[167] *Id*. at S-2.

[168] *Id.*

[169] *Id.* at S-1-S-4.

In the meantime, the EEOC is further bolstering its equal pay enforcement by implementing a pilot project that audits employers' compliance with the Equal Pay Act. President Obama's National Equal Pay Enforcement Task Force recommended this pilot program, and at present, the EEOC's Chicago, New York, and Phoenix offices participate in it. The EEOC need not receive a charge in order to begin the audits. Indeed, the Equal Pay Act authorizes the EEOC to investigate covered employers even when no one files a charge.

The EEOC's EPA audits start with a face-to-face meeting during which the EEOC seeks to learn about how the employer's pay system works. The EEOC then follows up with specific data requests, and after it obtains and analyzes the data, the EEOC decides whether to pursue enforcement measures against the employer.

This pilot project is very new, and the EEOC has released very little information about it. As such, it remains unclear how the EEOC selects the audit targets and whether it will implement the program in its other offices.

F. EEOC'S Final Rule on Reasonable Factors Other Than Age

On March 30, 2012, the EEOC issued its final rule on the definition of "reasonable factors other than age" under the Age Discrimination in Employment Act.[170]

Under the Age Discrimination in Employment Act ("ADEA"),[171] it is unlawful for employers to discriminate against employees who are over the age of forty by, among other things, "limit[ing], segregat[ing], or classify[ing]…employees 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 age."[172] The statute further provides that it is not unlawful "to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where . . . the differentiation is based on reasonable factors other than age."[173] This is known as the "RFOA" clause.

In *Smith v. City of Jackson*,[174] the Court found that there is a cause of action for disparate impact discrimination under the ADEA; however, the RFOA test, rather than the business necessity test, is the appropriate test to determine whether the employer has an affirmative defense to a disparate impact claim. In *City of Jackson*, a group of police officers sued the City of Jackson under the ADEA alleging that the City engaged in both disparate treatment and disparate impact discrimination by modifying its pay structure to bring starting salaries to a

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[170] *See Disparate Impact and Reasonable Factors Other Than Age Under the Age Discrimination in Employment Act*, 77 Fed. Reg. 19,080 (codified at 29 C.F.R. Part 1625.7(e)) (Mar. 30, 2012).

[171] 29 U.S.C. §§ 621 *et seq.*

[172] 29 U.S.C § 623(a)(2).

[173] 29 U.S.C § 623(f)(1).

[174] 544 U.S. 228 (2005).

competitive level, which made the rate of increase higher for workers with less seniority.[175] Only the viability of the disparate impact theory was before the Court. The Court found that the ADEA did authorize a disparate impact theory of discrimination, largely based on the fact that the ADEA and Title VII contain identical language stating that it "shall be unlawful for an employer 'to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status . . . [based on the protected characteristic].'"[176] Under both statutes, if the plaintiff makes a prima facie case of disparate impact discrimination, the employer has the option of proving an affirmative defense in order to avoid liability. Under Title VII, an employer can prove an affirmative defense that the practice causing a disparate impact is a "business necessity" in order to avoid liability,[177] whereas under the ADEA, if the employer can prove that the practice was motivated by a reasonable factor other than age, it can avoid liability.[178]

The Court in *City of Jackson* then held that "the scope of disparate-impact liability under ADEA is narrower than under Title VII" for two reasons.[179] First, liability under the ADEA is precluded if "the adverse impact was attributable to a nonage factor that was 'reasonable,'" and there is no such limitation under Title VII.[180] Second, the court noted the Civil Rights Act of 1991 codified the disparate impact theory of liability under Title VII and changed the standards used to determine whether there is a disparate impact. These standards had previously been governed by a more restrictive test under *Wards Cove Packing Co. v. Atonio*,[181] which still applied to the ADEA.[182] Under *Wards Cove*, the employee must identify the specific employment practice that is allegedly responsible for the disparate impact.[183]

The Court found that, in addition to the plaintiffs' failure to identify a specific employment practice as required under *Wards Cove*, the city's action was based on reasonable factors other than age—in particular, its desire to give pay increases based on seniority and position—and thus affirmed the Court of Appeals' decision.[184] The plan "was a decision based on a 'reasonable factor other than age' that responded to the City's legitimate goal of retaining police officers."[185] The Court stated:

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[175] *Id.* at 230.

[176] *Id.* at 233, 236-37.

[177] 42 U.S.C. § 2000e-2(k)(1)(A).

[178] 29 U.S.C § 623(f)(1).

[179] *City of Jackson*, 544 U.S. at 240.

[180] *Id.* at 239.

[181] 490 U.S. 642 (1989).

[182] *City of Jackson*, 544 U.S. at 240.

[183] *Id.* at 240-41.

[184] *Id.* at 241-42.

[185] *Id.* at 242.

> While there may have been other reasonable ways for the City to achieve its goals, the one selected was reasonable. Unlike the business necessity test, which asks whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class, the reasonableness inquiry includes no such requirement.[186]

Three years later, in *Meacham v. Knolls Atomic Power Laboratory*,[187] the Court held that the employer has the burden of proof on whether there is a "reasonable factor other than age" in a disparate impact suit under the ADEA.[188]

In response to the *City of Jackson* and *Meacham* decisions, the EEOC decided to clarify the meaning of "reasonable factors other than age" under the statute. Consequently, the EEOC proposed a rule on the scope of the RFOA defense on February 18, 2010, and adopted the final rule (with minor changes) on March 30, 2012.[189]

The EEOC's regulation defines a "reasonable" factor as one that is "objectively reasonable when viewed from the position of a prudent employer mindful of its responsibilities under the ADEA under like circumstances."[190] To establish the defense, the employer must prove that the policy or practice was "both reasonably designed to further or achieve a legitimate business purpose and administered in a way that reasonably achieves that purpose in light of the particular facts and circumstances that were known, or should have been known, to the employer."[191]

The rule also includes a non-exhaustive list of factors that are relevant to determining whether a particular employment practice is reasonable:

(1) The extent to which the factor is related to the employer's stated business purpose;

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[186] *Id.* at 243.

[187] 554 U.S. 84 (2008).

[188] These issues also continue to appear before courts. For example, in *EEOC v. Allstate Insurance Co.*, 528 F.3d 1042, 1044-45 (8th Cir. 2008), the EEOC alleged that a no re-hire policy applied to individuals who received severance packages as part of a job elimination constituted disparate impact discrimination under the ADEA. The EEOC moved for summary judgment on the liability issue, and the district court granted summary judgment on the EEOC's prima facie case, but denied the motion as to Allstate's affirmative defense because there were disputed issues of fact as to whether the policy was supported by reasonable factors other than age. *Id.* at 1046.

[189] *See Definition of "Reasonable Factors Other Than Age" Under the Age Discrimination in Employment Act*, 75 Fed. Reg. 7,212 (Feb. 18, 2010); *Disparate Impact and Reasonable Factors Other Than Age Under the Age Discrimination in Employment Act*, 77 Fed. Reg. 19,080 (codified at 29 C.F.R. Part 1625.7(e)).

[190] 29 C.F.R. § 1625.7(e)(1).

[191] *Id.*

(2) The extent to which the employer defined the factor accurately and applied the factor fairly and accurately, including the extent to which managers and supervisors were given guidance or training about how to apply the factor and avoid discrimination;

(3) The extent to which the employer limited supervisors' discretion to assess employees subjectively, particularly where the criteria that the supervisors were asked to evaluate are known to be subject to negative age-based stereotypes;

(4) The extent to which the employer assessed the adverse impact of its employment practice on older workers; and

(5) The degree of the harm to individuals within the protected age group, in terms of both the extent of injury and the numbers of persons adversely affected, and the extent to which the employer took steps to reduce the harm, in light of the burden of undertaking such steps.[192]

To avoid any confusion, the regulation adds that "[n]o specific consideration or combination of considerations need be present for a differentiation to be based on reasonable factors other than age. Nor does the presence of one of these considerations automatically establish the defense."[193]

The preamble to the EEOC's RFOA regulation asserts that "[t]he determination of whether an employer establishes a 'reasonable factors other than age' defense is a jury question."[194] This statement is inconsistent with *City of Jackson* because the Court in *City of Jackson* entered summary judgment in favor of the employer on the RFOA defense.

G. GINA Regulations

On November 9, 2010, the EEOC issued its final regulations under Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA).[195] GINA generally prohibits employers, labor organizations, and employment agencies from taking adverse employment actions against employees because of their genetic information, from limiting, segregating or classifying employees based on their genetic information, and from requesting, purchasing or requiring genetic information about their employees. The regulations clarify and expand upon several areas of the Act. Below is a summary of some of the key provisions of the new regulations.

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[192] *Id.* § 1625.7(e)(2).

[193] *Id.* § 1625.7(e)(3).

[194] *Disparate Impact and Reasonable Factors Other Than Age Under the Age Discrimination in Employment Act*, 77 Fed. Reg. 19,080 n.16.

[195] 42 U.S.C. §§ 2000ff *et seq*.

1. Definition of Genetic Information

The regulations define "genetic information" broadly to include information about family medical history, an employee's genetic tests, family members' genetic tests, a request for or participation in genetic services by the individual or his or her family members, genetic information of a fetus carried by an individual or a pregnant family member, and genetic information of an embryo legally held by an individual or a family member.[196] "Family medical history" includes "information about the manifestation of disease or disorder in family members of the individual."[197] In turn, "family members" include dependents and up to fourth-degree other relatives, such as great-great grandparents and grandchildren and first cousins once-removed.[198]

2. Acquisition of Genetic Information

In addition to prohibiting discrimination based on genetic information, GINA also prohibits employers, labor unions, and employment agencies from "request[ing], requir[ing], or purchas[ing] genetic information with respect to an employee or a family member of the employee" except in certain circumstances.[199] The Act provides that acquisition of genetic information shall not violate GINA when the information is acquired inadvertently, when it is part of a wellness program that meets certain conditions, when the information is requested in order to comply with the certification requirements of the Family and Medical Leave Act, when the employer purchases documents that are publicly available that include family medical history (not including medical or court databases), when the information is to be used pursuant to a genetic monitoring program that meets certain conditions, and when the employer conducts DNA analyses for law enforcement purposes.[200]

3. The "Safe Harbor" for Inadvertent Receipt of Genetic Information

As discussed above, the Act provides that the inadvertent receipt of genetic information may be lawful. The regulations describe several types of lawful inadvertent receipt and provide examples that purport to demonstrate when the inadvertent receipt of genetic information may cross the line from lawful to unlawful.

a. "Water Cooler" Problem

The EEOC's GINA regulations describe the so-called "water cooler problem"—that is, the inadvertent receipt of genetic or family medical history information by means of workplace conversations that occur around "the water cooler." For example, if a manager or other

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[196] *See* 29 C.F.R. § 1635.3(c).

[197] *Id.* § 1635.3(b).

[198] *Id.* § 1635.3(a).

[199] 42 U.S.C. § 2000ff-1(b).

[200] *Id.*

representative learns genetic information by overhearing a conversation between an individual and others, the inadvertent acquisition exception applies, and the acquisition of genetic information does not violate GINA.[201] In addition, if a manager or supervisor is having a casual conversation with an individual and learns genetic information in response to an "ordinary expression of concern that is the subject of the conversation," the inadvertent acquisition exception similarly applies.[202] According to the EEOC, no violation of GINA would occur if a supervisor asks a question along the lines of, "How are you?" or, "Did they catch it early?" So-called "probing follow-up questions" are another matter. According to the EEOC, asking such "probing questions," such as whether the individual has been tested or whether family members have such a condition, could result in GINA liability.[203] Consider, for example, the following dialogue between an employee and her supervisor:

> "I am really upset. I just learned that my sister has cancer."
>
> "I am sorry to hear that," responds the supervisor. "How is she doing?"
>
> "She's doing well under the circumstances."
>
> "Did they catch it early?"
>
> "Yes."
>
> "That's great. Has anyone else in your family had cancer?"

According to the EEOC's GINA's regulations, all of this exchange complies with GINA except the last question, "Has anyone else in your family had cancer?" This would be a "probing follow-up question" that seeks information about the employee's family medical history and, as a result, a violation of GINA. Whether any federal court would agree with this view remains to be seen.

The EEOC regulations also illustrate that no GINA violation occurs when a manager or supervisor learns genetic information from a social media platform which that individual was given permission to view by the creator of the profile, or when a manager learns such information without having solicited it, such as in an e-mail message.[204]

b. Lawful Requests for Medical Information with Warning

The EEOC's regulations explain that when an employer makes a lawful request for medical information and receives genetic information, the acquisition of such information will comply with GINA if the employer specifically directed or warned the individual or health care provider from whom the employer received the information not to provide genetic

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[201] 29 C.F.R. § 1635.8(b)(1)(ii)(A).

[202] *Id.* § 1635.8(b)(1)(ii)(B).

[203] *Id.*

[204] *Id.* § 1635.8(b)(1)(ii)(C)-(D).

information.[205] The regulations provide suggested language to use in a request for medical information that would satisfy this requirement:

> The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. `Genetic information' as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.[206]

The EEOC's regulations also state that a failure to include that specific language will not prevent an employer from establishing "inadvertent" acquisition if its request was "not likely to result in a covered entity obtaining genetic information."[207] This "not likely to result in" standard is vague; the EEOC's suggested language is not. So, using the EEOC's suggested warning may provide a defense to any GINA claim about any alleged acquisition of genetic information.

4. Wellness Programs

The EEOC regulations explain circumstances in which the acquisition of genetic information as part of a voluntary wellness program may comply with GINA. To comply with GINA, according to the EEOC, a wellness program must meet the following conditions:

- The provision of genetic information must be voluntary, and the individual cannot be penalized for refusing to provide it;
- The individual must provide "prior, knowing, voluntary, and written authorization" that meets the below requirements;
    - The authorization must be written so that the individual providing the information is "reasonably likely to understand it;"
    - The authorization must describe the type of genetic information that the individual will provide and the purposes it will be used for; and

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[205] *Id.* § 1635.8(b)(1)(i).

[206] *Id.* § 1635.8(b)(1)(i)(B).

[207] *Id.* § 1635.8(b)(1)(i)(B)-(C).

- The authorization must describe the restrictions on disclosing genetic information.

- Any genetic information that is individually identifiable must be given only to (1) the individual or family member who is receiving the genetic services, and (2) the health care provider or genetic counselor providing the services, and must not be available to managers, anyone who makes employment decisions, or anyone else the employee works with; and
- Individually identifiable information must not be disclosed to the covered entity unless it is provided in aggregate terms that do not disclose individual identities.[208]

One complication in this area of the regulations involves providing financial incentives to individuals for their participation in wellness programs. An employer may not offer financial incentives for anyone to provide genetic information but can provide a financial incentive for individuals to complete health risk assessments that include questions about genetic information, if it is made clear that the individual will still receive the financial incentive if those questions are not answered.[209] Further, in the case of individuals who have voluntarily provided genetic information, a covered entity may provide incentives to encourage those with an increased risk of certain conditions to participate in programs that promote a healthy lifestyle or help manage possible disease, so long as the same programs are offered to people who currently have such health conditions.[210]

A recent EEOC informal discussion letter signed by EEOC Legal Counsel Peggy Mastroianni largely reiterates the points in the recent regulations, including that "the final rule makes clear that covered entities may not offer financial inducements for individuals to provide genetic information as part of a wellness program."[211] The letter raised a related point about whether such financial inducements would be allowed under the ADA, and noted that the Commission has not yet taken a position on the issue.[212] As such, employers may consider whether any financial inducements offered to employees for their participation in wellness programs require individuals to provide genetic information, answer disability related-inquiries, or submit to medical examinations before implementing any such programs.

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[208] 29 C.F.R. § 1635.8(b)(2)(i).

[209] 29 C.F.R. § 1635.8(b)(2)(ii).

[210] 29 C.F.R. § 1635.8(b)(2)(iii).

[211] *See* EEOC Informal Discussion Letter, ADA and GINA: Incentives for Workplace Wellness Programs (June 24, 2011), *available at* http://www.eeoc.gov/eeoc/foia/letters/2011/ada_gina_incentives.html (last visited Sept. 11, 2011).

[212] *Id.*

5. GINA Enforcement and Litigation

In fiscal year 2011, the EEOC received 245 charges of discrimination under GINA, which constituted about 0.2% of the total charges it received in 2011.[213] To date, no reported decision has ruled on any EEOC claim of discrimination under GINA. Likewise, no reported decision has considered whether the EEOC's GINA regulations properly interpret GINA.[214]

H. Discrimination Based on Gender Identity, Change of Sex, and/or Transgender Status

On April 20, 2012, the EEOC issued a decision in a federal employee case that determined that Title VII prohibits discrimination based on gender identity, sex change, and transgender status. The case, *Macy v. Holder*, began on June 13, 2011, when a transgender woman, Mia Macy, filed an EEO complaint with the Bureau of Alcohol, Firearms, Tobacco, and Explosives (ATF). The complaint alleged that the ATF failed to hire her based on "sex," "gender identity" and "sex stereotyping."[215] The ATF informed her that it would not process her gender identity claim under Title VII and the EEOC's regulations because "claims of discrimination on the basis of gender identity stereotyping cannot be adjudicated before the [EEOC]."[216] Ms. Macy thereafter appealed to the EEOC and asked it to rule that the ATF should investigate her claim of "discriminatory failure to hire based on her gender identity, change of sex, and/or transgender status."[217]

The EEOC accepted the appeal for adjudication and "clarified" that "claims of discrimination based on transgender status, also referred to as claims of discrimination based on gender identity, are cognizable under Title VII's sex discrimination prohibition, and may

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[213] *See* U.S. Equal Employment Opportunity Commission, *Charge Statistics FY 1997 Through FY 2011*, *available at* http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited Sept. 1, 2012). Fiscal year 2010 is the first year in which GINA enforcement statistics are available on the EEOC website.

[214] Courts have ruled on private litigants' GINA claims, however. *See, e.g.*, *Poore v. Peterbilt of Bristol, LLC*, No. 1:11CV00088, 2012 BL 83001, at *3 (W.D. Va. Apr. 4, 2012) (dismissing plaintiff's GINA claim because "[t]he fact that [his] wife was diagnosed with multiple sclerosis has no predictive value with respect to [his] genetic propensity to acquire the disease"); *Mwabira-Simera v. Thompson Hospitality Servs., LLP*, No. WMN-11-2989, 2012 BL 68221, at *4 (D. Md. Mar. 20, 2012) (dismissing plaintiff's GINA claim because the complaint "include[d] no allegation that [the employer] asked for or obtained Plaintiff's genetic information or that [the employer] used such information to discriminate against Plaintiff); *Culbreth v. Wash. Metro. Area Transit Auth*., No. RWT 10cv3321, 2012 BL 68314, at *4-6 (D. Md. Mar. 20, 2012) (dismissing plaintiff's claims because plaintiff "never underwent genetic testing and [the employer] never had access to Plaintiff's genetic information" and ruling that Congress failed to abrogate state sovereign immunity because GINA is "not congruent or proportional to the harm to be remedied" given that "there was no evidence of a pattern or practice of discrimination by state employers on the basis of genetics").

[215] *Macy v. Holder*, Appeal No. 0120120821, U.S. Equal Employment Opportunity Commission (Apr. 20, 2012), at 3.

[216] *Id*. at 3.

[217] *Id.* at 5.

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therefore be processed under Part 1614 of EEOC's federal sector EEO complaints process."[218] The EEOC found that Title VII's use of "sex" encompassed both biological sex and gender, and that gender includes "cultural and social aspects associated with masculinity and femininity."[219] The EEOC explained:

> When an employer discriminates against someone because the person is transgender, the employer has engaged in disparate treatment "related to the sex of the victim." This is true regardless of whether the employer discriminates against an employee because the employee has expressed his or her gender in a non-stereotypical fashion, because the employer is uncomfortable with the fact that the person has transitioned or is in the process of transitioning from one gender to another, or because the employer simply does not like that the person is identifying as a transgender person.[220]

In support of its ruling, the EEOC noted that "[s]ince *Price Waterhouse*, courts have widely recognized the availability of the sex stereotyping theory as a valid method of establishing discrimination 'on the basis of sex'…. in scenarios involving transgender individuals." [221] However, this determination marks the first time the EEOC formally reached the same conclusion.

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[218] *Id.* at 5-6.

[219] *Id.* at 7.

[220] *Id.* at 8 (internal citation omitted).

[221] *Id.* at 7. To support this assertion, the EEOC identifies eight courts that have found Title VII to protect transgender status. *Id.* at 7-11; *see Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); *Schroer v. Billington*, 577 F. Supp. 293 (D.D.C. 2008); *Michaels v. Akal Sec., Inc.*, No. 09-cv-1300, 2010 WL 2573988 (D. Colo. June 24, 2010); *Lopez v. River Oaks Imaging & Diag. Group, Inc.*, 542 F. Supp. 2d 653 (S.D. Tex. 2008); *Mitchell v. Axcan Scandipharm, Inc.*, No. Civ.A. 05-243, 2006 WL 456173 (W.D. Pa. Feb. 17, 2006); *Tronetti v. TLC HealthNet Lakeshore Hosp.*, No. 03-CV-0375E(SC), 2003 WL 22757935 (W.D.N.Y. Sept. 26, 2003); *Doe v. United Consumer Fin. Servs.*, No. 1:01 CV 111, 2001 WL 34350174 (N.D. Ohio Nov. 9, 2001); *see also Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000) (relying on the parallels between Title VII and the Gender Motivated Violence Act (GMVA) in coming to the conclusion that a crime motivated by transsexuality is a crime motivated by gender under the GMVA).

However, at least *ten* courts have found that transgender status is *not* protected under Title VII, with a number of cases post-dating *Price Waterhouse*. *See Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2007); *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748 (8th Cir. 1982); *Creed v. Family Express Corp.*, No. 3:06-CV-465RM, 2009 BL 398 (N.D. Ind. Jan. 5, 2009); *Oiler v. Winn-Dixie La., Inc.*, No. Civ. A. 00-3114, 2002 WL 31098541 (E.D. La. Sept. 16, 2002); *Rentos v. Oce-Office Sys.*, No. 95 Civ. 7908 (LAP), 1996 BL 738 (S.D.N.Y. Dec. 23, 1996); *James v. Ranch Mart Hardware, Inc.*, No. 94-2235-KHV, 1994 WL 731517 (D. Kan. Dec. 23, 1994); *Dobre v. Nat'l R.R. Passenger Corp.*, 850 F. Supp. 284 (E.D. Pa. 1993); *Powell v. Read's, Inc.*, 436 F. Supp. 369 (E.D. Md. 1977); *Grossman v. Bernards Twp. Bd. of Educ.*, 11 FEP Cases 1196 (D.N.J. 1975), *aff'd*, 538 F.2d 319 (3d Cir. 1976).

More recently, the EEOC announced in its Strategic Enforcement Plan that it will target discrimination against lesbian, gay, bisexual and transgender individuals as a nationwide priority.[222]

I. Victims of Sexual Violence

The EEOC recently issued a Question and Answer publication that discusses the application of Title VII and the ADA to applicants and employees who experience various forms of sexual violence.[223] The EEOC notes at the outset that, as with caregiver discrimination, these "laws do not prohibit discrimination against applicants or employees who experience domestic or dating violence, sexual assault, or stalking as such."[224]

However, the Q&A publication offers various scenarios in which employment decisions affecting victims of sexual violence or stalking may violate Title VII or the ADA. For example, an employer may violate Title VII by terminating "an employee after learning she has been subjected to domestic violence," due to a fear of the potential "drama battered women bring to the workplace."[225] An employer may likewise violate the ADA, for instance, if it denies a sexual assault victim a reasonable accommodation of time off for treatment of depression.[226]

To date, no reported case has analyzed an EEOC case alleging discrimination against applicants or employees on the basis of their status as victims of sexual violence.

III. EEOC SUBPOENAS

Title VII of the Civil Rights Act of 1964 authorizes the EEOC to issue administrative subpoenas for information, documents, and witnesses during investigations.[227] Other EEOC-enforced statutes likewise authorize the EEOC to issue administrative subpoenas for information during investigations. These include the Americans with Disabilities Act ("ADA"), the Genetic Information Nondiscrimination Act ("GINA"), the Age Discrimination in Employment Act ("ADEA"), and the Equal Pay Act ("EPA").[228] The ADA and GINA incorporate Title VII's

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[222] U.S. Equal Employment Opportunity Commission, *Strategic Enforcement Plan (SEP)*, at 10 (Dec. 17, 2012), *available at* http://www.eeoc.gov/eeoc/plan/upload/sep.pdf (last visited Feb. 15, 2012). As mentioned *supra at* FN 3, however, the language of the SEP hedges when it uses the phrase "as they may apply" to describe the protections available for LGBT individuals under Title VII, suggesting more nuance than the *Macy* decision might allow.

[223] U.S. Equal Employment Opportunity Commission, *Question and Answers: The Application of Title VII and the ADA to Applicants or Employees Who Experience Domestic or Dating Violence, Sexual Assault, or Stalking*, *available at* http://www.eeoc.gov/eeoc/publications/qa_domestic_violence.cfm (last visited Nov. 19, 2012).

[224] *Id*.

[225] *Id*. (internal quotation marks omitted).

[226] *Id.* at 2.

[227] 42 U.S.C. § 2000e-9; 29 U.S.C. § 161(1).

enforcement process,[229] and the ADEA and the EPA incorporate the Fair Labor Standards Act's process.[230]

The EEOC has the power to subpoena "any evidence that is relevant and necessary to the resolution of any issue in an investigation, unless it would be unduly burdensome to provide the evidence."[231] The EEOC views its subpoena power as quite expansive. Subpoenas may seek an employer's nationwide data, even when charges are aimed at individual allegations of discrimination. The EEOC may pursue investigations by issuing subpoenas even after the original charging party has received a right-to-sue letter and filed suit or settled the matter.[232] In other words, the EEOC controls the investigation, no matter what the charging party decides to do.

A. Petitions to Revoke or Modify EEOC Subpoenas

Title VII, the ADA, and GINA authorize respondents to file a petition to revoke or modify the subpoena.[233] A petition to revoke or modify a subpoena may provide the investigator and the respondent another opportunity to agree to a modified production of information. Such petitions can delay an EEOC investigation, sometimes for months. To avoid this delay, the EEOC may agree to withdraw the subpoena if the respondent agrees to comply in part with the EEOC's demands or if the parties work out some other compromise.

The EEOC regulations describe the petition process. A petition must identify each portion of the subpoena with which the employer does not intend to comply and state the basis for noncompliance.[234] It is to be filed with the District Director whose office issued the subpoena or with the EEOC's General Counsel if a Commissioner issued the subpoena.[235] The Director or General Counsel will make a determination within eight days, and that determination

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[228] 42 U.S.C. §§ 12101 *et seq.*; 42 U.S.C. §§ 2000ff *et seq.*; 29 U.S.C. §§ 621 *et seq.*; 29 U.S.C. §§ 206 *et seq.*

[229] 42 U.S.C. §§ 12117(a); 2000ff-6(a).

[230] 29 U.S.C. §§ 626(a); 211(a).

[231] *EEOC Compliance Manual* § 2000e-8(a); *EEOC v. Shell Oil Co.*, 466 U.S. 54, 68-69 (1984).

[232] *EEOC v. Fed. Express Corp.*, 558 F.3d 842 (9th Cir. 2009) (EEOC permitted to continue investigation after right-to-sue letter issued and charging party filed its own lawsuit); *EEOC v. Watkins Motor Lines, Inc.*, 553 F.3d 593 (7th Cir. 2009) (EEOC permitted to continue investigation even after charging party settled with employer on employer's condition that EEOC abandon investigation); *see also EEOC v. Grays Harbor Cmty. Hosp.*, No. C10-5616BHS, 2011 WL 2173871, at *3 (W.D. Wash. June 2, 2011) ("By continuing to investigate a charge of systemic discrimination even after the charging party has filed suit, the EEOC is pursuing its obligation to serve the public interest.").

[233] *See* 29 C.F.R. § 1601.16(b)(1).

[234] *Id.* § 1601.16(b)(2).

[235] *Id.* § 1601.16(b)(1).

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will then be sent to the Commission for review and a final determination.[236] If the employer fails to file a petition with the EEOC, the employer may be barred from opposing any subsequent enforcement of the subpoena.[237]

If the EEOC determines that it will uphold all or part of the subpoena, and the employer refuses to comply,[238] the EEOC may file suit in district court to enforce its subpoena.[239] The Supreme Court articulated the standard for district courts to apply in these actions.[240] The district court must "satisfy itself that the charge is valid, and the material requested is relevant to the charge . . . [and] assess any contentions by the employer that the demand for information is too indefinite or has been made for an illegitimate purpose."[241] Courts have construed this relevance standard broadly.[242] Though employers may argue that the subpoena is overly broad, unduly burdensome, or otherwise seeks information that is not relevant to the charge under investigation,[243] these arguments have rarely succeeded beyond the district court level.

B. EEOC Subpoena Litigation

Subpoena enforcement actions may have unintended negative consequences for employers. In contrast to informal negotiations, litigation transforms confidential enforcement proceedings into public events. The EEOC will issue press releases, which may generate publicity about both the EEOC's investigation and the employer. The public nature of the

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[236] 29 C.F.R. § 1601.16(b)(2). Though the initial determination is made within eight days, the EEOC has allowed employer petitions to linger for long periods before making a final determination. *EEOC v. ABM Janitorial-Midwest, Inc*., 671 F. Supp. 2d 999, 1002 (N.D. Ill. 2009) (denying employer's petition to revoke EEOC's subpoena two years after petition was filed).

[237] *See, e.g.*, *EEOC v. Sunoco, Inc.*, No. 08-MC-145, 2009 WL 197555, at *3 (E.D. Pa. 2009) (employer waived its objections to subpoena enforcement by failing to exhaust its administrative remedy – i.e., failing to file petition with EEOC). *But see EEOC v. Aaron's, Inc.*, No. 11 C 201, 2011 WL 1357339, at *2 (N.D. Ill Apr. 11, 2011) (holding that, although employer objected to part of subpoena after the five-day period elapsed, it did not forfeit right to object to subpoena enforcement because it did timely object to another part of subpoena); *EEOC v. Bashas,' Inc.*, No. CIV 09-0209 PHX RCB, 2009 WL 3241763, at *7 (D. Ariz. Sept. 30, 2009) (excusing employer's failure to timely file petition to revoke or modify, where EEOC subpoenas did not notify employer of five-day rule and EEOC investigator was unaware of employer's five-day window to respond, and explaining that "the effect of the EEOC's silence was to lead [the employer] into a false sense of security as to the necessity of timely filing a petition to revoke or modify").

[238] For charges brought under the Fair Labor Standards Act ("FLSA"), the Age Discrimination in Employment Act ("ADEA"), and the Equal Pay Act ("EPA"), employers avoid the petition process entirely. Most litigation, however, arises in the enforcement context of Title VII and related statutes.

[239] 42 U.S.C. § 2000e-8(c); 29 C.F.R. § 1601.16(d); *EEOC Compliance Manual* § 24.13.

[240] *See EEOC v. Shell Oil Co*., 466 U.S. 54 (1984).

[241] *Id*. at 72, n.26 (internal quotations omitted).

[242] *Id*. at 68-69 (referring to any material that "might cast light on the allegations").

[243] Other potential employer arguments include the following: (1) The EEOC did not follow its own internal procedures prior to issuing a subpoena; (2) The subpoena seeks sensitive personal information or contact information; and (3) The subpoena is tied to time limitations based on the date of the charge.

dispute may alert witnesses who would otherwise not know about the case. Current or former employees of the employer may contact the EEOC and provide information against the employer.

1. Some District Courts Have Limited EEOC Subpoenas.

In recent years, the federal courts have largely ratified the EEOC's broad authority to obtain information during investigations, including by subpoena. As such, the courts often side entirely with the EEOC in subpoena enforcement actions. Some district courts, however, have limited EEOC subpoenas, but, as discussed below, the federal courts of appeals have largely endorsed the EEOC's broad view of its subpoena power.

For example, in *EEOC v. Aerotek, Inc.*,[244] the court enforced the EEOC's subpoena without limitation. Two internal employees who worked at the same Aerotek facility filed Title VII national origin charges and alleged unlawful denials of training and promotion, constructive discharge, and retaliation. The EEOC investigated these charges and ten other charges from two other Aerotek facilities. The other charges alleged age, disability, sex, and racial discrimination. Aerotek filed a petition with the EEOC to revoke or modify its subpoena, and the EEOC modified two of the subpoena's seventeen categories of information and left the remaining fifteen categories unchanged. The modified subpoena sought, among other things, information from all seven of Aerotek's locations about individuals who applied and were not hired as internal employees or temporary employees, about individuals who applied and were hired as temporary employees, and about the company's application and selection processes. When Aerotek failed to comply with the subpoena as modified, the EEOC brought an enforcement action in federal court.

Aerotek made three unsuccessful arguments: (1) the subpoena was irrelevant to the underlying charges; (2) the subpoena was overly broad; and (3) the production would be unduly burdensome. In its relevance argument, Aerotek specifically objected to requests for: information from all of its seven facilities; information about events that occurred after the charge; information unrelated to national origin discrimination; and information related to any job position other than internal employees. The district rejected all of Aerotek's arguments and ordered enforcement of the subpoena. Because the allegations included three facilities, the court reasoned that information from Aerotek's remaining four facilities "may provide a useful context for evaluating employment practices under investigation," especially if that information "constitutes comparison data."[245] Because "[c]omparative information . . . is absolutely essential to a determination of discrimination,"[246] the court found that the requested post-charge information could provide necessary context to Aerotek's practices. The court also noted that other courts have consistently enforced and upheld subpoenas that sought information about types of discrimination and job classifications that were different from those in the underlying

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[244] No. 10 C 7109, 2011 WL 124266 (N.D. Ill. Jan. 12, 2011).

[245] *Id.* at *6 (quoting *EEOC v. Kronos, Inc.*, 620 F.3d 287, 298 (3d Cir. 2010)) (internal quotation marks omitted). *See infra* at 51 for a discussion of *Kronos.*

[246] 2011 WL 124266, at *6 (quoting *Roadway Express, Inc.*, 261 F.3d 634, 642 (6th Cir. 2001)) (internal quotation marks omitted).

charge. Finally, the court rejected Aerotek's undue burden argument because it "fail[ed] to demonstrate that compliance would threaten normal business operations."[247]

In *EEOC v. BNSF Railway Company*,[248] the district court granted part of the EEOC's application to enforce a subpoena seeking nationwide information and narrowed the number of job positions for which information could be sought.

The charging party alleged that BNSF engaged in disability discrimination by rescinding his conditional offer of employment for a track laborer position after he failed a background screening, which included medical examinations. The EEOC's first subpoena sought regional information about applicant names and medical data for other applicants whose conditional offers had also been revoked. After losing an administrative challenge to the subpoena, BNSF complied fully with that subpoena. The EEOC then expanded its request and sought nationwide information related to track laborer and track maintenance positions. BNSF provided only information related to track laborer positions. After BNSF complied with another expanded information request that sought a list of all positions requiring medical screening, the EEOC issued a second subpoena. This subpoena sought nationwide information about all individuals who were not hired for positions that required medical screening. BNSF filed a petition to revoke or modify the subpoena, and the EEOC denied the petition. The EEOC then petitioned the district court for enforcement.

BNSF's argument against enforcement of the subpoena focused on relevance. It noted that the charge alleged neither class-wide nor pattern-or-practice violations, and that the charge was limited to the track laborer position. The EEOC acknowledged the limited scope of the charge and argued that the charge provided it with a "'jurisdictional springboard' to investigate any potential discriminatory practice by the employer."[249]

The court agreed with BNSF. The court explained that an assessment of relevance must begin with an examination of the nature of the underlying charge. Because the charge alleged only one instance of individual discrimination and nothing in the charge suggested systemic discrimination, the court concluded that the EEOC's charge "goes far beyond [the] allegations."[250] It also distinguished BNSF's "personalized" and "case-by-case" assessments[251]

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[247] 2011 WL 124266, at *7. On appeal, the Seventh Circuit upheld the order of the district court, not reaching the merits of Aerotek's claim. Aerotek argued that as the EEOC lacked a valid quorum of commissioners when Aerotek asked to modify the subpoena, it was unable to reject the motion. *EEOC v. Aerotek*, No. 11-1349, 2013 BL 9266, 117 FEB Cases 26 at *1 (7th Cir. Jan. 11, 2013). In rejecting the appeal, the court found that the petition to modify was untimely as it was made after the five day limit mandated by 29 C.F.R. § 1601.16(b). *Id.* at *2.

[248] No. 11-mc-0019 (JNE/JJG), 2011 WL 2261476 (D. Minn. May 17, 2011), *adopted*, No. 11-0019 (JNE/JJG), 2011 WL 2223764 (D. Minn. June 8, 2011).

[249] *Id*. at *3 (quoting *EEOC v. Gen. Elec. Co.*, 532 F.2d 359, 364 (4th Cir. 1976)).

[250] 2011 WL 2261476, at *4.

[251] *Id*. at *5.

from those addressed by the Third Circuit in *EEOC v. Kronos, Inc.*,[252] where the court upheld the EEOC's subpoena in part because the employer relied on "a single, standardized test used uniformly nationwide."[253]

The court ultimately held that the subpoena was overbroad because it requested data "that is not pertinent to the charge under investigation."[254] Rather than denying enforcement entirely, however, the court narrowed the scope of the information BNSF would have to provide by limiting it to nationwide job applicants who were not hired as track laborers during a three-and-one-half-year period.[255]

In *EEOC v. Aaron's, Inc.*,[256] the court ordered enforcement of the EEOC's subpoena with one limitation. The EEOC was entitled only to information related to the employer's corporate-owned stores but not to any information from the employer's franchisee-owned stores. The charging party was a serial felon whose convictions included armed robbery and murder. He worked as a product technician at an Aaron's franchisee-owned store when Aaron's bought that store in 2007. As part of the acquisition, Aaron's offered conditional employment to all store employees, subject to the completion of a background check. Upon learning of the charging party's criminal record, Aaron's rescinded its conditional offer of employment. The charging party filed an EEOC race discrimination charge.

The EEOC issued a subpoena that sought, among other things, an electronic database containing information about applicants at all of Aaron's Illinois stores dating back to 2005. Aaron's reached an agreement with the EEOC investigator about some of the requested information but claimed that it did not have the type of electronic database sought by the EEOC. The investigator agreed to accept the information in any form, but Aaron's never responded. In 2011, the EEOC filed an enforcement action in district court.

Aaron's advanced three arguments in opposition to enforcement: (1) The subpoena was irrelevant because the request amounted to a "fishing expedition" that exceeded the scope of the individual discrimination charge;[257] (2) Compliance with the subpoena would be unduly burdensome because the employer had no electronic database and would therefore have to search warehouses and storage facilities for the information; and (3) The subpoena was overly broad because it sought information from over a four-year period and some of the information sought was from franchisee-owned stores, which were beyond the scope of Aaron's authority. The court rejected most of these arguments.

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[252] 620 F.3d 287 (3d Cir. 2010).

[253] *BNSF Ry. Co*., 2011 WL 2261476, at *5. *See infra* at 51 for a discussion of *Kronos*.

[254] 2011 WL 2261476, at *6.

[255] *Id.*

[256] No. 11 C 201, 2011 WL 1357339 (N.D. Ill. Apr. 11, 2011).

[257] *Id.* at *3.

The court found that it was "well established" that the EEOC's request was relevant to a race discrimination charge.[258] It reasoned that the information the EEOC was seeking would enable it "to determine whether there were patterns of racial discrimination . . . , which in turn could give rise to an inference of racial discrimination in [the charging party's] termination."[259]

The court noted that that employers have a "'difficult burden' of showing that 'compliance would threaten the normal operation of business,'"[260] and rejected the undue burden argument. This conclusion, the court wrote, was supported by the EEOC's willingness to forego an electronic database in exchange for paper records.

The court also rejected the company's argument about the temporal scope of the subpoena, spanning from two years before the termination to about two years after, stating that "[p]re-charge and post-charge data can provide useful information to enable the EEOC to assess whether discrimination took place."[261]

The court agreed with Aaron's about one point: its obligation to produce information from franchisee-owned stores. The court determined that Aaron's had no such obligation and therefore partially narrowed the scope of the subpoena. Though the criminal background check policy applied to all Aaron's Illinois stores, whether corporate-owned or franchisee-owned, the court limited the subpoena to only corporate-owned stores. It supported this conclusion by noting that the underlying charge was related to activity at a corporate-owned store and that Aaron's could not have controlled hiring decisions at franchisee-owned stores.

Two recent cases illustrate how hostile-work-environment allegations may permit the EEOC to cast a broader net without judicial objection. In *EEOC v. Farmer's Pride, Inc.*,[262] the court ordered enforcement of a subpoena investigating broad allegations of sexual harassment by supervisors. The charging party alleged that his female supervisor verbally and physically harassed him and other employees, that two other male supervisors harassed female employees, and that he was forced to resign when he complained about harassment. In its investigation, the EEOC asked Farmer's Pride to turn over all documents regarding complaints of sexual harassment in the previous four years and all complaints (regardless of date) regarding the alleged perpetrators, as well as a database of all employees supervised by one of the supervisors. Farmer's Pride turned over some responsive information, but objected to the bulk of the request as overbroad, claiming the investigation should be confined to documents concerning the three alleged malefactors and the charging party and should not reach beyond their department.

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[258] *Id.* at *3 (citing *Blue Bell Boots, Inc. v. EEOC*, 418 F.2d 355, 358 (6th Cir. 1969) ("Discrimination on the basis of race is by definition class discrimination . . . .")).

[259] *Aaron's*, 2011 WL 1357339, at *3.

[260] *Id*. at *4 (quoting *EEOC v. United Air Lines, Inc*., 287 F.3d 643, 653 (7th Cir. 2002)).

[261] *Aaron's*, 2011 WL 1357339, at *4.

[262] No. 2:12-mc-00148-RBS, 2012 BL 291199 (E.D. Pa. Oct. 31, 2012).

The court rejected each challenge to relevance, holding that the allegations and initial investigation supported a broad inquiry into whether there was a hostile work environment. On a hostile-environment theory, the EEOC's inquiries into departments beyond the charging party's own or into harassment by unnamed employees were "clearly relevant" under the liberal relevance standard governing investigative subpoenas.[263]

In *EEOC v. Fisher Sand and Gravel, Co.*,[264] a magistrate judge granted the EEOC's application for enforcement without qualification. The charging party alleged a sexually hostile work environment created by a male employee, prompting the EEOC to request a week's worth of emails between the alleged harasser and another female employee, as well as a list of all persons employed at the same facility over a three-year span, with identifying information included. The magistrate judge found that the requested information was relevant, both because it could support the individual charge of harassment and because it could shed light on whether there was systemic harassment of others. As in *Farmer's Pride*, a hostile-work-environment charge permitted a broader subpoena than might have otherwise been allowed. One of the rare cases in which the court denied a subpoena entirely, *EEOC v. Nestle Prepared Foods*,[265] arose from a worker's claim that he was terminated in violation of the Genetic Information Nondiscrimination Act. The employer had sent the charging party for a fitness-for-duty examination, during which the examining physician took his family medical history; the charging party was terminated later that month. In its subpoena, the EEOC requested information on every examining physician used by the employer, and employment data (including reasons for non-hire or termination, if applicable) on every employee examined at the employer's instruction.

The court denied the subpoena for lack of relevance. Neither the charging party nor the EEOC provided any evidence of discrimination other than the bare fact of his termination within a month of his examination. Crucially, there was no sign of any systemic discrimination which might tend to prove that the charging party was also a victim. Reviewing cases which approved "investigations that reached beyond the charges involved," the court held that each involved "articulable circumstances that suggested the existence of violations beyond those specified in the charges."[266] Reaffirming its judgment upon the EEOC's motion to reconsider, the court underscored the impermissibility of a systemic inquiry absent signs of systemic discrimination: "While the EEOC is correct that the investigation of possible systemic discrimination need not

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[263] *Id.* at *5. The court did agree, however, to the employer's request that the EEOC be required not to disclose employees' identifying information to the charging party or other persons apparently involved in union organizing. *Id.* at *11. The court also declined to award costs to the EEOC, because the employer's objections were made in good faith, with some support in case law, and because the employer had made significant efforts to comply with the investigation. *Id.*

[264] No. 2:12-cv-00649-JCM-CWH, 2012 BL 235924 (D. Nev. Sept. 11, 2012) (magistrate judge).

[265] No. 5:11-mc-358-JMH-REW, 2012 BL 128495 (E.D. Ky. May 23, 2012).

[266] *Id.* at *3.

be based on multiple charges or explicit systemic allegations, here, there is no implication of systemic violations that would justify the scope of the EEOC's wide-reaching subpoena."[267]

In *EEOC v. McLane Co.*,[268] the court rejected an EEOC attempt to obtain the names and contact information of individuals who took an employer's physical capacity exam. The EEOC had requested that McLane provide it with information about the exam and how the exam was administered, as well as validation studies. It also asked for the name, contact information, and social security numbers for every individual who took the test. The court ordered McLane to provide information on the age, test score, and employment status of each test-taker. However, the court concluded that because the EEOC was investigating only disparate-impact age discrimination under the ADEA, there was no basis for it to obtain individuals' identifying information. As such, the information was irrelevant to the EEOC's underlying investigation, and the court did not compel McLane to produce it.

The court later denied the EEOC's subsequent attempt to broaden its subpoena.[269] Having analyzed the exam results it did receive under the subpoena, the EEOC claimed that its analysis showed a disparate impact on persons older than 40, and that it therefore needed individual contact information to determine what happened to persons who failed the test, to link data sets and eliminate duplicative data, and to notify prospective class members before filing suit. The court did not engage with the EEOC's arguments, however, because the alleged disparate impact did not trigger the four-fifths rule, as employed in the Ninth Circuit; that is, the pass rate for persons older than 40 was greater than 80% of the pass rate for younger persons.

While investigating McLane's alleged ADEA violation, the EEOC separately pursued a charge alleging disparate-impact sex and disability discrimination, filed by a McLane employee who failed the physical capacity exam after returning from maternity leave. Ruling on sex discrimination, the court held that individually identifying information is usually irrelevant to an investigation looking only for disparate impact, though it could become relevant later if the EEOC confirms the disparity.[270] Because the exam was used for McLane's grocery operations nationwide, however, the court granted the EEOC's request for the nationwide data necessary to identify any sex-based disparate impact (though without individually identifying information).[271]

The disability-discrimination charge, however, did not properly invoke the EEOC's jurisdiction. The charging party was not an aggrieved person with respect to the ADA, as she did not claim to have any sort of disability, nor did she bring the ADA charge on behalf of a properly-situated claimant. Instead, she made only "a blanket assertion that the test violates the

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[267] *EEOC v. Nestle Prepared Foods*, No. 5:11-mc-358-JMH-REW, 2012 BL 160274, at *1 (E.D. Ky. June 26, 2012).

[268] No. CV-12-615-PHX-GMS, 2012 WL 1132758 (D. Ariz. Apr. 4, 2012).

[269] *EEOC v. McLane Co.*, No. CV-12-615-PHX-GMS, 2012 WL 3264532 (D. Ariz. Aug. 9, 2012).

[270] *EEOC v. McLane Co.*, No. CV-12-02469-PHX-GMS, 2012 BL 304271, at *6 (D. Ariz. Nov. 19, 2012).

[271] *Id.*

ADA."[272] Reviewing the EEOC's statutory enforcement authority, the court reasoned that allowing investigations to proceed without "a specific aggrieved party" would give the commission "close to unlimited jurisdiction," making "virtually limitless any investigation the EEOC wished to undertake."[273]

In *EEOC v. Sears, Roebuck & Co.*,[274] the court limited the EEOC's subpoena both in its geographical scope and in the type of discrimination about which it could seek information. Sears had a policy that required employees to report any arrest or conviction to Sears within five days. According to the policy, Sears would then determine whether the employee posed an unacceptable risk or whether he should be allowed to continue his employment. Employees could be disciplined under the policy for not reporting arrests within the time frame. Sears learned that a cashier was arrested when she asked for time cards to prove her innocence, and a Sears human resources consultant recommended that the cashier be suspended for up to 60 days. The cashier's manager also requested more information from the cashier about the arrest. When the cashier failed to respond, Sears terminated her employment.

The cashier filed a charge of race discrimination, and the EEOC began its investigation. After Sears objected to parts of the EEOC's request for information, the EEOC issued a subpoena seeking, among other things, documents about (1) how the arrest/conviction policy was communicated to employees, (2) the purpose and intent behind the policy, and (3) all employees nationwide who reported arrests and conviction under the policy and/or were terminated for violating the policy. Sears objected to the last request and argued that it was irrelevant, overly broad, and unduly burdensome. Its objection highlighted the contrast between the individualized nature of the underlying charge and the nationwide "fishing expedition."[275] The EEOC countered that Sears' policy was applied and implemented nationwide and that the charge should be a "starting point and a springboard for a reasonable investigation."[276]

The court began its analysis by describing the burden-shifting framework imposed by the statutory scheme. The EEOC bears the initial burden of demonstrating the relevance of the requested information. If the EEOC meets that burden, the burden shifts to the employer to prove that the request is either overbroad or unduly burdensome. While the EEOC's relevancy burden is light, the employer's burden is heavy.[277]

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[272] *Id.* at *4.

[273] *Id.*

[274] No. 10-cv-00288-WDM-KMT, 2010 WL 2692169 (D. Colo. June 8, 2010), *report and recommendation adopted*, 2010 WL 2692168 (D. Colo. July 6, 2010).

[275] *Id.* at *5.

[276] *Id.* at *6 (citing *EEOC v. Gen. Elec. Co.*, 532 F.2d 359 (4th Cir. 1976) and *Gen. Tel. v. EEOC*, 446 U.S. 318 (1980)) (internal quotation marks omitted).

[277] 2010 WL 2692169, at *4-5.

Because there was neither an allegation nor evidence of discrimination stemming from the policy outside of the charge at issue, the court held that the EEOC failed to meet its burden. However, it left a door open for the EEOC to continue its investigation on a broad scale. While the court narrowed the scope of the subpoena from a nationwide request to focus on ten stores in the local Sears district, it noted that the EEOC "may revisit this issue to seek information from additional stores or districts, if justified on the basis of the information obtained about stores within the same District as the Complainant's store."[278]

The Northern District of Illinois, in *EEOC v. Quantum Foods, LLC*,[279] also narrowed the geographic scope of the EEOC's subpoena to the extent that it sought information about locations other than those where the charging party worked. Because the EEOC failed to present "information that link[ed] [the charging party's] employment discrimination and wrongful termination claims to persons with responsibilities in or practices applied at [the employer's] other facilities,"[280] the court granted only partial enforcement.[281]

In other cases similar to those addressed in *Sears* and *Quantum Foods*, the EEOC has successfully petitioned courts—after an initial investigation under a narrowed subpoena—to modify earlier limitations on the scope of the subpoena.[282]

2. The Courts Of Appeals Have Largely Endorsed EEOC's Subpoena Power.

If the EEOC loses a subpoena enforcement action at the district court level, it may appeal the decision; obtain an amended charge; obtain a new charge; or obtain a Commissioner's Charge. The EEOC may also pursue some or all of these options simultaneously, and then proceed with its investigation. And, while the district courts have at times expressed skepticism about EEOC subpoenas that were overly broad, the federal courts of appeals have generally enforced EEOC subpoenas with only very limited exceptions.

In *EEOC v. United Parcel Service, Inc.*,[283] the EEOC convinced the Second Circuit to reverse the district court's denial of the EEOC's subpoena enforcement application.

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[278] *Id*. at *7. Because the underlying charge alleged race discrimination, the court also limited the scope of the subpoena by omitting any requests for information related to national origin discrimination. Sears' undue burden argument was rejected, however, and the court enforced the remainder of the subpoena.

[279] No. 09 C 7741, 2010 WL 1693054 (N.D. Ill. Apr. 26, 2010).

[280] *Id.* at *4.

[281] Other courts have also limited or refused to grant enforcement of EEOC subpoenas. For instance, the Northern District of Illinois denied the EEOC's petition where the alleged discrimination was connected with a former employer but the subpoena sought information from a successor employer. *EEOC v. ABM Janitorial-Midwest, Inc.*, 671 F. Supp. 2d 999 (N.D. Ill. 2009).

[282] *See, e.g.*, *EEOC v. Aaron Bros., Inc*., 620 F. Supp. 2d 1102, 1108 (C.D. Cal. 2009) (granting EEOC's motion to enforce the same nationwide subpoena that the court had earlier narrowed in geographic scope).

[283] 587 F.3d 136 (2d Cir. 2009).

UPS had a Uniform and Personal Appearances Guidelines policy, under which employees in positions of "public contact" were prohibited from wearing facial hair below their lower lips.[284] After the appearance policy was in place and before the charges at issue in the case, UPS instituted an accommodation to the policy that allowed the Corporate Workplace Planning office (though some evidence showed that local personnel made these decisions) to grant limited religious-based exceptions from the facial hair rule. Two practicing Muslims filed charges and alleged that UPS applied its policy in a manner amounting to religious discrimination in violation of Title VII. One charging party was an unsuccessful driver applicant whom UPS allegedly rejected after he informed UPS that he could not shave his beard for religious reasons. UPS claimed that it did not hire him because he provided a false social security number. The other charging party was a current employee who also informed UPS of his religious reasons for not shaving his beard when he applied for a driver position and who also did not receive a transfer offer.

The EEOC investigated the first charge and issued a subpoena that sought nationwide information about how UPS applied its appearance policy. This included information from over a several-year period about (1) all applicants denied employment because of their failure to comply with the policy, (2) all employees who had requested a religious accommodation to the policy and the outcome of those requests, and (3) all employees who were terminated in connection with the policy. UPS refused to comply with the subpoena, pointed to the fact that it did not keep centralized records on this information, and argued that the request sought irrelevant information and was overly broad. The EEOC applied to the district court to enforce the subpoena. The district court denied the EEOC's application and the EEOC appealed.

The Second Circuit reversed the district court's denial and remanded the case. The court found that the district court's relevance standard was too restrictive, and emphasized that the EEOC only has to show the following to meet its burden on the relevance issue: (1) "the investigation will be conducted pursuant to a legitimate purpose"; (2) "the inquiry may be relevant to the purpose"; (3) "the information sought is not already within [the EEOC's] possession"; and (4) the EEOC followed "the administrative steps required."[285] The court considered multiple factors, including that the appearance policy applied nationwide, the religious accommodation was implemented after the appearance policy had been in place, and two separate but similar charges were filed in two of UPS's locations.

In *EEOC v. Schwan's Home Service*,[286] the EEOC won at every stage of the subpoena enforcement litigation. Schwan's extended a conditional job offer to a female applicant to work as a general manager. She first had to successfully complete the General Manager Development Program ("GMDP"). After she completed the program but did not "graduate" because of an alleged lack of leadership qualities, Schwan's offered her a different position. She declined and

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[284] *Id.* at 137.

[285] *Id.* at 139.

[286] 644 F.3d 742 (8th Cir. 2011).

filed a charge with the EEOC that alleged gender discrimination and retaliation. She later amended her charge to allege systemic class discrimination against women.

Before the charge was amended, the EEOC issued its first subpoena, which Schwan's petitioned to revoke or modify. The EEOC modified it slightly, and Schwan's only partially complied. After the charge was amended, the EEOC issued a second subpoena that requested information about the gender makeup of Schwan's general managers, the selection process for the GMDP, and the gender breakdown of successful GMDP graduates. Schwan's again petitioned to revoke or modify, the EEOC again slightly modified the subpoena, and Schwan's again refused to comply fully. The EEOC petitioned the district court for an order of enforcement. Schwan's argued that the subpoena was irrelevant, overly broad, and unenforceable because the amended charge was invalid because untimely.

A magistrate judge ordered Schwan's to comply with the subpoena in its entirety, and reasoned that that a subpoena contest was not the proper forum to weigh the validity of the amended charge.[287] The district court overruled Schwan's objections.[288]

The district court noted that the "EEOC's authority to investigate is not negated simply because the party under investigation may have a valid defense to a later suit. If every possible defense, procedural or substantive, were litigated at the subpoena enforcement stage, administrative investigations obviously would be subjected to great delay."[289] The court held that employers cannot contest procedural or substantive merits of a charge in a subpoena enforcement action. It also concluded that the subpoena was neither overbroad nor irrelevant. Schwan's appealed.

The Eighth Circuit affirmed the district court's order enforcing the subpoena.[290] On the issue of the amended charge's validity, the court found Schwan's argument "premature" because "the appropriate time to address the timeliness issue is if and when an actual lawsuit is filed."[291] On the issue of relevance, the court found the requested demographic information about Schwan's managers and the GMDP was within the scope of both the amended (systemic) charge and the scope of the original (individual) charge because the original charge "revealed potential systemic gender discrimination."[292] The court found no relevance problems with the subpoena at issue, noting that the EEOC could not have requested information relevant to systemic gender discrimination if the underlying charge were an individual charge of, for example, racial discrimination.[293]

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[287] *EEOC v. Schwan's Home Serv*., 692 F. Supp. 2d 1070, 1088 (D. Minn. 2010).

[288] *EEOC v. Schwan's Home Serv*., 707 F. Supp. 2d 980, 997–98 (D. Minn. 2010).

[289] *Id*. at 991.

[290] *EEOC v. Schwan's Home Serv*., 644 F.3d 742, 748 (8th Cir. 2011).

[291] *Id*. at 747.

[292] *Id.* at 748.

[293] *Id.* at 747-48.

The Seventh Circuit likewise recently ruled in the EEOC's favor. In *EEOC v. Konica Minolta Business Solutions U.S.A., Inc.*,[294] the court affirmed the district court's order requiring Konica to comply with the EEOC's subpoena. Konica employed six blacks out of 120 employees at its four Chicago-area facilities. All six worked at one facility, and that facility allegedly maintained racially segregated sales teams. When Konica fired one of the six, he filed a race discrimination charge related to his terms and conditions of employment, suspension, and discharge. The EEOC issued a subpoena that sought information about hiring practices at all four of Konica's Chicago-area facilities. Konica filed a petition to revoke the subpoena, and the EEOC denied the petition. When Konica declined to comply, the EEOC applied for an enforcement order with the district court.

The district court adopted the recommendation and reasoning of the magistrate judge and granted the EEOC's application. Konica appealed and argued that (1) its hiring practices were irrelevant because the underlying charge did not address the hiring process, and (2) the request for information from all four facilities was overbroad.

The Seventh Circuit began its analysis by noting the "generous standard of relevance" articulated by the Supreme Court in *EEOC v. Shell Oil*,[295] and the circuit's own distinction between the EEOC's "realistic expectation[s]" and "idle hope[s]" about the usefulness of the requested information.[296] It rejected Konica's position as "too narrow."[297] Though the charging party never alleged that Konica refused to hire him, the court found that hiring data could still be relevant. Because "[r]acial discrimination is 'by definition class discrimination,'" the court concluded that the EEOC was entitled to evidence about "'employment practices other than those specifically charged.'"[298] On the overbreadth question, the court found that the EEOC "properly tailored" its inquiry by limiting it to only the Chicago-area facilities and only sales personnel.[299]

In *EEOC v. Randstad*,[300] the Fourth Circuit reversed a district court's decision and enforced an EEOC subpoena. The case involved a Jamaican employee who suffered from a learning disability and was illiterate in English. The employee alleged that Randstad violated Title VII and the ADA when it terminated him in 2006 because he could not read and write English. During its investigation, the EEOC served a subpoena demanding production of "information on all position assignments made by [Randstad's Maryland offices] for the years

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[294] 639 F.3d 366, 371 (7th Cir. 2011).

[295] 466 U.S. 54 (1984).

[296] *EEOC v. United Air Lines, Inc*., 287 F.3d 643, 652-53 (7th Cir. 2002).

[297] *Konica Minolta*, 639 F.3d at 369.

[298] *Id.* at 369 (quoting *United Air Lines*, 287 F.3d at 653).

[299] *Id*. at 370.

[300] No. 11-1759, 2012 BL 185416 (4th Cir. July 18, 2012).

2005 through 2009," including job descriptions, copies of all applications received for the positions, and a statement as to which positions required literacy in English.[301] In response, Randstad supplied only information about the employee's individual assignments.[302]

The EEOC argued that "information about all of Randstad's positions in Maryland was relevant because if (contrary to Randstad's representation) some Randstad positions do not actually require reading skills, the fact that Randstad nevertheless hires only people who can read could be evidence of discrimination."[303] In addition, the EEOC argued, "[s]uch evidence could also uncover the existence of other individuals who have been harmed by Randstad's literacy policy."[304]

In response, Randstad argued that information about *all* of its positions was irrelevant because the employee did not allege systemic discrimination. It also argued that compliance with the subpoena would be unduly burdensome because its "Maryland branches made over 100,000 temporary assignments during the time period of the subpoena," and reviewing its job orders would entail significant expense.[305]

The district court sided with Randstad. The court found no causal link between Jamaican origin and illiteracy in English, as Jamaica is an "English speaking island."[306] It therefore found the requested information irrelevant to claims of national origin discrimination. The court also found the subpoena overly burdensome and overbroad because it requested information from several years after the employee was terminated.[307]

The Fourth Circuit reversed. It noted that EEOC assessments about the information the EEOC needs to perform an investigation are entitled to significant deference because Congress delegated investigation of discrimination charges to the EEOC's expertise.[308] It rejected the district court's finding that no factual nexus exists between Jamaican origin and English literacy, and determined that the district court's ruling "crossed the line into an assessment of the merits of [the charging party]'s claim." The district court effectively required "the EEOC to make a reasonable cause showing as a prerequisite to enforcement of the [subpoena]."[309] The Fourth

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[301] *Id*. at *4.

[302] *Id.*

[303] *Id.*

[304] *Id.* (internal quotations omitted).

[305] *Id.* at *5.

[306] *Id*. at *6.

[307] *Id.* at *7.

[308] *Id*. at *13.

[309] *Id.* at *15 (internal citations omitted).

Circuit also cited the deferential standard in its decision to accept the subpoena's time and geographical scope, although this was a "somewhat closer question."[310]

Although the federal courts of appeals have largely endorsed EEOC subpoena power, some have upheld objections to EEOC subpoenas. For instance, the Tenth Circuit rejected an EEOC subpoena in *EEOC v. Burlington Northern Santa Fe Railroad*.[311] In that case, the court affirmed the district court's decision that the EEOC's subpoena requested information that was irrelevant to the charges filed. The case involved two employment applicants who completed a medical screening procedure for Burlington Northern Santa Fe Railroad ("BNSF"). When BNSF decided to not hire them, they alleged that the decision was based on perceived disability. Based on these two individual charges, the EEOC issued a subpoena that requested information about BNSF's employees nationwide. The district court concluded that the EEOC's request was pervasive and sought plenary discovery. The Tenth Circuit agreed, and explained that the EEOC is only entitled to evidence that is "relevant to the charge[s] under investigation."[312] Because the initial two charges contained no reference to any additional charges, the court found the subpoena was overly broad.

Finally, it should be noted that the EEOC cannot use its subpoena power to obtain information protected by the attorney-client privilege or the attorney work product doctrine. Otherwise, however, the federal courts of appeals have largely deferred to the EEOC's subpoena power. The Tenth Circuit's decision in the BNSF litigation is an exception to the trend.

C. Third-Party EEOC Subpoenas

In *EEOC v. Kronos, Inc.*,[313] the Third Circuit ordered substantial compliance with a subpoena that the EEOC issued to Kronos, Inc., even though the charge that gave rise to the EEOC's investigation did not name Kronos as a respondent or otherwise make any allegations about Kronos.

In *Kronos*, a Kroger store in West Virginia allegedly unlawfully denied a hearing- and speech-impaired applicant the opportunity to work as a cashier/bagger/stocker. When a Kroger manager explained this decision to the applicant, he explained that Kroger's decision was based in part on the charging party's performance on a personality assessment. Kronos created the test to enable Kroger to evaluate service orientation and interpersonal skills.

The EEOC's investigation began with Kroger and soon moved on to Kronos. The EEOC subpoenaed nationwide information from Kronos that included validation studies, user manuals, and instructions for any tests used nationwide by Kroger. The EEOC discovered an article co-written by a Kronos employee that suggested that minority applicants scored lower on Kronos'

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[310] *Id.* at *16.

[311] 669 F.3d 1154 (10th Cir. 2012).

[312] *Id.* at 1157.

[313] 620 F.3d 287 (3d Cir. 2010).

test than non-minority applicants did, and the EEOC expanded its nationwide investigation to include information related to race discrimination (in addition to disability discrimination). In doing so, the EEOC issued a modified subpoena. Kronos petitioned the EEOC to revoke the subpoena; the EEOC denied the petition. Kronos refused to comply, and the EEOC brought an enforcement action. Kronos argued that the subpoena sought information irrelevant to the underlying ADA charge, was overbroad, and would require Kronos to expend substantial time and expense to comply with it.

The district court agreed with Kronos. It limited the scope of the EEOC's subpoena to only that work Kronos had done for Kroger in West Virginia over the course of one year.[314] The EEOC appealed.

The Third Circuit substantially reversed.[315] The court observed that the charge did not allege nationwide discrimination or challenge use of the test in other job positions. These facts did not limit the EEOC. Instead, the Third Circuit explained, Title VII's broad relevance standard lightened the EEOC's burden. Rather than "cabin[ing] its investigation to a literal reading of the allegations in the charge," the EEOC should be able to investigate "'a broader picture of discrimination which unfolds in the course of a reasonable investigation.'"[316] The EEOC was therefore entitled to the information it sought without any limitations of time, geography, or job position.[317] The Third Circuit affirmed part of the district court's ruling to the extent that the subpoena sought irrelevant information related to race discrimination. It found that such information was "wholly unrelated" to the charge, which alleged disability discrimination, and did not "fall within the ambit of reasonable expansion."[318]

On remand, the district court attempted to implement the Third Circuit's directives.[319] The parties, however, each submitted proposed orders to the court that varied from the Third Circuit's mandated subpoena. The district court found that the EEOC "translated it into something beyond what the Court of Appeals pronounced" by proposing a "new and *much* broader Order."[320] For example, the EEOC proposed to expand the scope of the subpoena to any customer of Kronos and to include information about any type of discrimination. The court

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[314] *EEOC v. Kronos, Inc.*, No. 09mc0079, 2009 WL 1519254 (W.D. Pa. June 1, 2009).

[315] *EEOC v. Kronos, Inc*., 620 F.3d 287 (3d Cir. 2010).

[316] *Id*. at 297-99 (citation omitted).

[317] This included Kronos materials that it never actually provided to Kroger but which may have been provided to other employers. *Id.* at 300.

[318] *Id*. at 301-02.

[319] *EEOC v. Kronos, Inc.*, No. 09mc0079, 2011 WL 1085677 (W.D. Pa. Mar. 21, 2011).

[320] *Id.* at *12.

found troubling that the EEOC seemed increasingly focused on Kronos rather than on Kroger,[321] and the court rejected the EEOC's attempt to expand the scope of the subpoena.

The court instead edited the language in the subpoena reviewed by the Third Circuit in an attempt to follow that court's ruling. In its order, the court directed Kronos to produce the following: (1) documents and data related to validation studies or evidence pertaining to assessment tests purchased by Kroger, including information related to personnel selection or screening instruments; (2) user's manuals and instructions for any assessment tests used by Kroger; (3) documents related to Kroger—including correspondence, data files, notes, test results, and validation efforts—but limited to information relating to disabilities; (4) documents discussing, analyzing, or measuring potential adverse impact on persons with disabilities; and (5) documents related to any job analysis performed by any person or entity related to any and all positions at Kroger.[322]

Reluctantly, the Third Circuit reversed and remanded again.[323] The district court, it held, had impermissibly narrowed the subpoena's request for validation studies to those that were "relied upon in creating or implementing the test for Kroger."[324] According to the Third Circuit, validation studies or related documents, "even if not directly connected to Kroger," are relevant "because they could reveal that the assessment had an adverse impact on disabled applicants or they could assist the EEOC in evaluating whether Kroger's use of the test constituted an unlawful employment action."[325]

The appellate court also took issue with the lower court's limiting the subpoena to disability-related issues. One such restriction purported to limit the EEOC's request for validation studies and assessments to "information relating to disabilities, persons with disabilities, or adverse impact upon persons with disabilities."[326] The Third Circuit rejected that limitation because the EEOC was entitled to learn more about how Kronos's testing works so that it may attempt to prove, per the ADA, that it "does not relate to the position at issue and is not consistent with business necessity."[327] The other restriction put an identical disability-related

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[321] *See id.* at *14 (noting that the underlying charge "appears to be just a way to target testing and the testing company"). The EEOC was also beginning to expand its investigation, which was still supposedly tied to the original, individual disability discrimination charge, to include all other employers who used Kronos tests.

[322] Order, *EEOC v. Kronos*, No. 2:09-mc-00079, 2011 BL 72022 (E.D. Pa. Mar. 21, 2011), *rev'd & remanded*, 694 F.3d 351 (3d Cir. 2012). In addition, the court entered a confidentiality order preventing the EEOC from disclosing the information to any non-EEOC person or entity, with the exception of outside experts. The confidentiality order also limited the use of any information obtained from Kronos solely to the underlying charge in this case and it required EEOC, after the case has closed, to provide Kronos with the opportunity to object to Freedom of Information Act requests for information. *Id.*

[323] *EEOC v. Kronos*, 694 F.3d 351 (3d Cir. 2012).

[324] *Id.* at 362.

[325] *Id.* at 363 (internal quotation marks omitted).

[326] *Id.* at 364.

[327] *Id.* (citation & internal quotation marks omitted).

limitation on the EEOC's request for any documents Kronos possessed that related to Kroger. The Third Circuit held that the limitation was unnecessary because the request was already restricted to Kroger-related documents, and because the requested information is "generally necessary to help the EEOC understand whether Kroger's use of the assessment was permissible."[328] While the unrestricted subpoena posed a greater risk of producing evidence related to race and not disability (in a case where no racial discrimination was alleged), that risk did not make the requests a "fishing expedition": the risk was "not inherently problematic so long as the requests do not specifically target documents related to race."[329]

The Third Circuit also addressed third-party subpoenas in *EEOC v. UPMC*.[330] In *UPMC*, the University of Pittsburgh Medical Center ("UPMC") maintained a personal leave of absence policy that required employees on leave of absence to report to work on the day after the leave expired. A UPMC subsidiary, Heritage Shadyside ("Heritage") allegedly fired a nursing assistant after she failed to return to work for approximately three weeks after her leave expired. The assistant filed a charge of discrimination and alleged her employer violated the American with Disabilities Act ("ADA") because it discharged her without warning.

The EEOC requested that UPMC—not Heritage—identify all of its employees in the Pittsburgh region who had been terminated under the policy or other disability policies. The district court denied the EEOC's petition and found that the information requested would shed no light on the underlying charge and fell entirely outside of the time period covered in the subpoena.[331]

Citing *Kronos*, the Third Circuit vacated the district court's judgment and concluded that the information the EEOC requested was critical to its case. The court warned that a charge's specific allegations should not cabin the EEOC if facts that support additional claims of discrimination are uncovered during the course of a reasonable investigation.[332]

IV. EEOC'S PRE-SUIT REQUIREMENTS

A. Background

Title VII outlines a multi-step process that the EEOC must satisfy before it can file a lawsuit. This process requires the EEOC to provide prompt notice of the charge to the employer, investigate the charge, and make a reasonable cause determination. Thereafter, the EEOC must "endeavor to eliminate any such alleged unlawful employment practice by informal methods of

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[328] *Id.* at 365.

[329] *Id.* The Third Circuit also modified the district court's confidentiality order and, though it affirmed the district court's discretionary power to order cost-sharing, remanded for more specific fact-finding on Kronos's compliance costs.

[330] 471 F. App'x 96 (3d Cir. 2012).

[331] *EEOC v. UPMC*, No. 2:11-mc-121, 2011 WL 2118274 (W.D. Pa. May 24, 2011).

[332] *EEOC v. UPMC*, 471 F. App'x 96 (3d Cir. 2012).

conference, conciliation, and persuasion."[333] The EEOC may file a lawsuit only after it "has been unable to secure from the [employer] a conciliation agreement acceptable to the Commission."[334] Every step in the process "is intended to be a condition precedent to the following step and ultimately, to suit."[335]

"The judicially created 'reasonable investigation rule' allows the EEOC to pursue in litigation '[a]ny violations that the EEOC ascertains in the course of a reasonable investigation of the charging party's complaint.'"[336] However, the charge can only support an EEOC action for "additional allegations of discrimination [that] are included in the reasonable cause determination and *subject to a conciliation proceeding*."[337] Thus, any additional claims uncovered during an investigation that were not in the original charge must be conciliated in order to be appropriate for litigation.

1. The Circuit Split

There is a circuit split among the Courts of Appeals about the appropriate level of review a court should apply in evaluating whether the EEOC met its obligation to conciliate. For example, in the Second, Fifth, and Eleventh Circuits, the EEOC is required to "1) outline[] to the employer the reasonable cause for its belief that the employer is in violation of the Act, 2) offer[] an opportunity for voluntary compliance, and 3) respond[] in a reasonable and flexible manner to the reasonable attitude of the employer."[338] In contrast, the Sixth Circuit only considers whether the EEOC attempted conciliation, and not the "form and substance of those conciliations," which are "within the discretion of the EEOC."[339] Courts in the Fourth, Eighth, Ninth, and Tenth Circuits also apply the more deferential standard of the Sixth Circuit.[340] A district court in the Northern District of Illinois recently noted that the Seventh Circuit has declined to "choose sides on this split," conceding only that "the EEOC's pre-suit conciliation efforts are subject to at least *some* level of judicial review."[341]

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[333] *See* 42 U.S.C. § 2000e-5(b).

[334] 42 U.S.C. § 2000e-5(f)(1).

[335] *EEOC v. Allegheny Airlines*, 436 F. Supp. 1300, 1304 (W.D. Pa. 1977).

[336] *EEOC v. Cintas Corp.*, Nos. 04-40132, 06-12311, 2010 WL 3733978, at *4 (E.D. Mich. Sept. 20, 2010) (quoting *Gen. Tel. Co. v. EEOC*, 446 U.S. 318, 331 (1980)), *rev'd on other grounds*, *Serrano v. Cintas Corp.*, Nos. 10-2629, 11-2057, 2012 BL 296517, at *16-17 (6th Cir. Nov. 9, 2012) *pet. to reconsider denied* (Jan. 15, 2013).

[337] 2010 WL 3733978, at *4 (quoting *EEOC v. Delight Wholesale*, 973 F.2d 664, 668-69 (8th Cir. 1992)).

[338] *EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256, 1259 (11th Cir. 2003); *EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529, 1534 (2d Cir. 1996); *EEOC v. Klingler Elec. Corp.*, 636 F.2d 104, 107 (5th Cir. 1981).

[339] *See, e.g.*, *EEOC v. Keco Indus., Inc.*, 748 F.2d 1097, 1102 (6th Cir. 1984).

[340] *See, e.g.*, *EEOC v. Zia Co.*, 582 F.2d 527, 533 (10th Cir. 1978); *EEOC v. Gold River Operating Corp.*, No. 2:04-cv-01349-LRL, 2007 WL 983853, at *4-5 (D. Nev. Mar. 30, 2007); *EEOC v. Newtown Inn Assocs.*, 647 F. Supp. 957, 959 (E.D. Va. 1986).

[341] *EEOC v. St. Alexius Medical Center*, No. 12 C 7646, 2012 WL 6590625, at *1-2 (N.D. Ill. Dec. 18, 2012); *EEOC v. Mach Mining, LLC*, No. 11-cv-879-JPG-PMF, 2013 BL 21378, at *4 (S.D. Ill. Jan. 28, 2013)

There is particular conflict between two recent courts of appeals regarding the substantive reviewability of EEOC's pre-suit conduct. In *EEOC v. CRST Van Expedited, Inc. (CRST II)*, the Eighth Circuit ruled that the EEOC could not proceed with a suit on behalf of a "class of employees and prospective employees [subjected] to sexual harassment" because EEOC did not identify class members during the pre-suit phase of the case. Rather, EEOC identified the class members during discovery.[342] The EEOC's failure to identify the members of the "class" during its pre-suit investigation subjected CRST to what the district court called a "moving target of allegedly aggrieved persons," and "the risk of never-ending discovery."[343] The Court of Appeals thus affirmed the dismissal of the EEOC's class case because EEOC failed to comply with its pre-suit obligations.[344]

The Sixth Circuit, on the other hand, took a far more deferential approach under strikingly similar facts. In *Serrano v. Cintas Corp.*, the court limited its scope of judicial review to "whether the EEOC made a good-faith effort to conciliate the claims it now asserts, thereby providing the employer with ample notice of the prospect of suit."[345] It thus concluded that the EEOC's notice to the employer that it was intending to bring suit on behalf of a class of female employees – notice nearly identical to that given in *CRST* – sufficed to fulfill the agency's pre-suit obligations.[346]

These two approaches have created what one district court has recently termed an "apparent conflict" that district courts are struggling to reconcile.[347]

1. EEOC's Administrative Procedures Act Argument

In several recent cases, the EEOC has argued that its pre-suit conduct is not subject to any judicial review at all. EEOC argues that because Title VII commits EEOC's pre-suit investigation conduct to the EEOC, the Administrative Procedures' Act insulates that process from judicial review. So far, no court to hear the argument has endorsed EEOC's position, and several have rejected it.

(adopting the reasoning of *St. Alexius* that Seventh Circuit precedent does not preclude at least some level of judicial review of the EEOC's conciliation process); *but see EEOC v. Source One Staffing, Inc.*, No. 11 C 6754, 2013 WL 25033, at *5 (N.D. Ill., Jan. 2, 2013) (finding that Seventh Circuit precedent which holds that the existence of probable cause to sue is not judicially reviewable in EEOC cases, makes clear that a company may not delve into the sufficiency of the EEOC's pre-suit investigation by demanding a Rule 30(b)(6) deposition).

[342] 679 F.3d 657, 676 (8th Cir. 2012).

[343] *EEOC v. CRST Van Expedited, Inc.*, No. 07-CV-95, 2009 WL 2524402, at *9 (N.D. Iowa Aug. 13, 2009).

[344] *CRST II*, 679 F.3d at 676-77.

[345] 699 F.3d 884, 904 (6th Cir. 2012).

[346] *Id.*

[347] *EEOC v. U.S. Steel Corp.*, No. 10-1284, 2013 BL 44123, at *21 (W.D. Pa. Feb. 20, 2013).

For example, in *EEOC v. Mach Mining, LLC*, EEOC asked an Illinois federal court to grant summary judgment on the defendant's "failure to conciliate affirmative defense" because, according to EEOC, courts cannot review the conciliation process. The court disposed of EEOC's APA argument in a footnote, calling the Act "not relevant to the Court's decision."[348] The court explained that claims under the APA are limited to persons who suffer a "legal wrong because of an agency action," and the EEOC is "not a person aggrieved by an agency action."[349]

Similarly, in *EEOC v. Swissport Fueling, Inc.*, the EEOC spent "eight pages of its brief arguing that its pre-litigation actions are not subject to judicial review," an argument which the court felt "misses the mark."[350] "Whether the EEOC fulfilled its statutory prerequisites to suit," the court determined, "is a proper issue for the Court to decide."[351]

The EEOC seems intent on pursuing this "committed to agency discretion" argument going forward. However, courts have consistently reviewed the agency's conduct for over forty years, thus the theory will have to overcome a large body of case law in order to be successful.

B. EEOC's Failure to Satisfy Pre-Suit Requirements

In the last two years, the EEOC has lost several cases because courts determined that it failed to satisfy Title VII's multi-step enforcement scheme before filing suit.

1. Failure to Conciliate On Behalf of Specific Aggrieved Individuals

Courts have dismissed several EEOC class cases because the EEOC sought relief for people whom it never identified before it filed suit. The courts found that the EEOC used discovery as a "fishing expedition" to identify alleged victims, and that the EEOC therefore failed to investigate, issue reasonable cause findings, and conciliate the claims of these individuals before it sued.

As mentioned briefly above, one of the most significant recent developments regarding judicial review of pre-suit obligations is found in the case of *CRST Van Expedited, Inc.* [352] The case involved allegations of sexual harassment against female employees. The EEOC found cause on July 12, 2007, and its Letter of Determination stated that "there is reasonable cause to believe that [CRST] has subjected a class of employees and prospective employees to sexual harassment, in violation of Title VII."[353] Conciliation failed, and on September 27, 2007, the EEOC filed a complaint under Section 706 of Title VII on behalf of the original charging party

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[348] 2013 BL 21378, at *4, n.1

[349] *Id.*; *see also St. Alexius*, 2012 WL 6590625, at *2 (rejecting the EEOC's argument that its pre-suit conciliation efforts are off-limits to any judicial inquiry).

[350] No. CV-10-02101-PHX-GMS, 2013 WL 68620, at *12 (D. Ariz, Jan 7, 2013).

[351] *Id.*

[352] No. 07-CV-95, 2009 WL 2524402 (N.D. Iowa Aug. 13, 2009).

[353] *Id.* at *6.

and "a class of similarly situated female employees."[354] As litigation progressed, it remained unclear whether the EEOC's class "involved two, twenty, or two thousand 'allegedly aggrieved persons,'" and the court eventually gave the EEOC a deadline to identify all class members.[355] The EEOC initially identified 270 class members. CRST filed a series of motions that resulted in summary judgment for all but 67 of the class members after the court determined that the EEOC was unable to prove that the defendant violated Title VII with respect to them. CRST moved for summary judgment and asked the court to dismiss the remaining 67 class members based on the EEOC's failure to engage in any pre-suit investigation or conciliation of their claims.[356] The court dismissed the remaining claims and found that the "EEOC did not conduct *any* investigation of the specific allegations of the allegedly aggrieved persons for whom it seeks relief at trial before filing the Complaint–let alone issue a reasonable cause determination as to those allegations or conciliate them."[357] The court also found that allowing the EEOC to litigate a class case by identifying victims and violations after it filed suit instead of during an investigation would "completely eviscerate Title VII's integrated, multistep enforcement procedure."[358] As a result, the court dismissed the complaint. The court acknowledged that dismissal was "a severe but appropriate remedy" and explained:

> Although dozens of potentially meritorious sexual harassment claims may now never see the inside of a courtroom, to rule to the contrary would work a greater evil insofar as it would permit the EEOC to perfect an end-run around Title VII's "integrated, multistep enforcement procedure." It would ratify a "sue first, ask questions later" litigation strategy on the part of the EEOC, which would be anathema to Congressional intent. The court cannot ignore the law as it is written by Congress and construed by the Eighth Circuit Court of Appeals in [*EEOC v. Delight Wholesale*, 973 F.2d 664 (8th Cir. 1992)].[359]

On February 22, a divided three-judge panel of the Eighth Circuit agreed with the district court and found that the EEOC did not satisfy Title VII's pre-suit requirements with respect to any of the 67 women.[360] The court rejected the EEOC's argument that it needed only to investigate, issue a cause finding as to, and conciliate each *type* of discrimination alleged, rather than each *instance* of discrimination. The court agreed with the district court that the EEOC "wholly abandoned its statutory duties" when it engaged in "fact-gathering" about the class

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[354] *Id.* at *7.

[355] *Id.* at *8-9.

[356] *Id.* at *11.

[357] *Id.* at *16.

[358] *Id.* at *17.

[359] *Id.* at *19 (citation omitted).

[360] *EEOC v. CRST Van Expedited, Inc.*, 670 F.3d 897, 912 (8th Cir. 2012).

during discovery and failed to identify, investigate, issue cause findings, and conciliate for the 67 allegedly aggrieved persons.[361]

On May 8, 2012, the panel reheard the case and again affirmed the district court's decision to dismiss the claims. The court reemphasized that the EEOC "did not reasonably investigate the class allegations of sexual harassment 'during a reasonable investigation of the charge.' Instead, it engaged in fact-gathering as to the 'class' 'during the discovery phase of an already-filed lawsuit.'"[362] Thus, the EEOC impermissibly "use[d] discovery in the resulting lawsuit as a fishing expedition to uncover more violations."[363] As such, the court concluded, "the EEOC wholly failed to satisfy its statutory pre-suit obligations as to these 67 women."[364] The Eighth Circuit denied the EEOC's petition for rehearing *en banc* on June 8, 2012.[365]

In the case of *EEOC v. Swissport Fueling, Inc*, the District of Arizona cited *CRST* in finding that the EEOC failed in its pre-suit obligation to conciliate.[366] In *Swissport*, the defendant employed immigrants who had emigrated from various countries in Africa. The EEOC brought suit alleging illegal and discriminatory treatment in the workplace, namely "harassment, disparate treatment, and retaliation."[367] The EEOC and defendant attempted to conciliate the charges over three years, with no success. However, the court found that the EEOC did not meet its obligations in providing adequate notice to the defendant of the nature of the charges. Indeed, "the EEOC did not disclose to Swissport the identities of all the claimants on whose behalf it sought relief, and in some cases did not even contact them, until after it brought suit."[368] The EEOC attempted to conciliate only with regard to the seventeen charging parties it identified before the suit was brought.[369]

The EEOC ultimately brought claims on behalf of seventeen charging parties identified prior to the initiation of the suit, and twenty-one charging parties identified after. In dismissing the claims of the parties not identified until after the charges were filed, the court pointed to the fact that over the three years of conciliation attempts, the EEOC did not attempt to conciliate with regard to those unnamed parties.[370] Furthermore, during the conciliation period, EEOC

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[361] *Id.*

[362] *EEOC v. CRST Van Expedited, Inc*., 679 F.3d 657, 676 (8th Cir. 2012).

[363] *Id.* (internal quotation omitted).

[364] *Id.* at 677

[365] Nos. 09-3764, 09-3765, 10-1682, 2012 BL 150435 (8th Cir. June 8, 2012). On February 11th, 2013, the EEOC and CRST settled the sole remaining claim, brought by a single charging party, for $50,000. *See EEOC v. CRST Van Expedited, Inc.*, Case No 1:07-cv-0095-LRR (N.D. Iowa, Feb. 13, 2013).

[366] No. CV-10-02101-PHX-GMS, 2013 WL 68620 (D. Ariz, Jan 7, 2013).

[367] *Id*. at *2.

[368] *Id*.

[369] *Id*. at *3.

[370] *Id*. at 28.

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"…informed Swissport that if it did not settle, the EEOC would seek to recover for additional claimants that it would identify during the litigation."[371] The court held that to allow the claims to move ahead would reward the EEOC for engaging in prohibited "fishing" to solicit more claimants. The court thus dismissed those claims and stayed further litigation as to the seventeen named charging parties to allow for a new round of conciliation activities.[372]

In *EEOC v. La Rana Hawaii*,[373] a district court similarly found that the EEOC had failed to satisfy its pre-suit obligations. In *La Rana*, the EEOC alleged that the defendant created a hostile work environment, disparately treated, retaliated against, and constructively discharged four female employees and a class of similarly situated female employees because of their sex. One of the defendants submitted a request under the Freedom of Information Act for information about the "class of aggrieved individuals."[374] The EEOC repeatedly denied this and other requests for similar information, although it continued to refer to "yet to be identified class members" in its correspondence with the defendant.[375] The EEOC failed to discover any additional class members during its investigations.[376]

The defendant cited *CRST* and similar cases as support for its argument that the EEOC could only pursue claims of "alleged violations and allegedly aggrieved individuals it discovered during its pre-lawsuit investigation," and that "the EEOC's failure to explain the size of the class and identify the individuals in that class is a failure to conciliate."[377]

The court agreed. It found that the EEOC "failed to conciliate in good faith" when it, among other things, failed to "furnish information regarding the class of unnamed 'aggrieved individuals,' the allegedly unlawful acts, or any other fact that would put Defendants on notice of the class or its claims."[378] As such, it ordered the EEOC to "redo the conciliation process" and inform the defendants of the "number and identity of Claimants."[379]

Likewise, the court in *Arizona v. GEO Group, Inc.*,[380] held that the EEOC did not satisfy its duty to conciliate where it refused an employer's requests to identify class members and divulge information about their claims. The EEOC alleged that GEO Group sexually harassed,

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[371] *Id*. at 27

[372] *Id*. at 32.

[373] No. 11-00799 LEK-BMK, 2012 BL 214705 (D. Haw. Aug. 22, 2012).

[374] *Id*. at *4.

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

[376] *Id*. at *15.

[377] *Id*. at *13-14 (internal quotation omitted).

[378] *Id*. at *26.

[379] *Id*. at *27.

[380] No. CV 10-1995-PHX-SRB (D. Ariz. Apr. 17, 2012).

retaliated against, and created a hostile work environment for Alice Hancock and "a class of female employees."[381] During conciliation, the EEOC informed GEO Group for the first time that it sought over $6 million in damages for Ms. Hancock and "a class of at least nineteen other similarly situated women."[382] The EEOC rebuffed GEO Group's repeated attempts to identify the nineteen class members. In addition, the EEOC "did not offer a calculation at the conciliation meeting of [the nineteen] class members' wage loss, front pay, or out-of-pocket expenses, nor [did the EEOC obtain] any medical evidence related to Ms. Hancock or any other aggrieved individuals."[383] GEO Group asserted that it "needed additional information to negotiate the claims brought on behalf of the aggrieved persons," and the EEOC thereafter ended conciliation.[384] The EEOC then filed suit and identified twenty-one class members. The EEOC had mentioned only six of those class members by name during its investigation.[385]

The court found that the EEOC "wholly failed to satisfy its statutory pre-suit obligations" for the remaining fifteen women, and accordingly dismissed those claims.[386] The court cited *CRST* and held that, "far from putting Defendant on notice of the scope of the charges against it *prior* to filing suit in court, [the EEOC appears] to have used discovery . . . to *expand* the scope of charges against Defendant."[387] The court concluded that the EEOC "engaged in fact-gathering as to the class during the discovery phase of an already-filed lawsuit."[388] And "[a]bsent an investigation and reasonable cause determination apprising the employer of the charges lodged against it, the employer has no meaningful opportunity to conciliate."[389]

Some courts have dismissed EEOC claims in response to 12(b)(6) motions arguing that the EEOC's failure to identify class members constitutes failure to state a claim. For example, in *EEOC v. Bass Pro Outdoor World*,[390] the EEOC did not identify any specific claimants in a racial discrimination complaint against Bass Pro. The EEOC alleged that Bass Pro engaged in a nationwide pattern or practice of discrimination against black and Hispanic applicants. As evidence, the EEOC pointed to several racist comments from Bass Pro management and the comparatively small portion of Bass Pro's management that was black or Hispanic. The court

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[381] *Id*. at 4 (internal citation omitted).

[382] *Id*. at 5 (internal citation omitted).

[383] *Id*. at 6.

[384] *Id*.

[385] *Id*. at 8.

[386] *Id*. at 20.

[387] *Id*. at 19 (emphasis in original).

[388] *Id*. (internal quotation omitted).

[389] *Id*. (internal quotation omitted). As for the remaining women, the court stayed the case "to allow adequate conciliation" of their claims because the EEOC "did not wholly abdicate [its] pre-suit administrative duties and did in fact uncover [their allegations] during [its] investigation and may have had these individuals in mind during conciliation proceedings." *Id*. at 26.

[390] No. 4:11-cv-03425, 2012 BL 133267 (S.D. Tex. May 31, 2012).

was not convinced. It dismissed the EEOC's complaint. In so doing, it noted that "[w]hile the EEOC is not obligated to provide the identities of all § 706 class members, the Court cannot locate a case in which the EEOC brought a § 706 claim without identifying a single plaintiff."[391] The court granted the EEOC leave to amend, however, and on July 20, 2012, the EEOC filed a 247-page amended complaint that identified several allegedly aggrieved individuals and also referenced "persons in like or related circumstances."[392] Bass Pro moved to dismiss the amended complaint on August 24, 2012, and argued that "[t]he EEOC's apparent attempt to seek relief on behalf of unidentified individuals . . . violates the Due Process rights of Bass Pro, which cannot defend against the claims of an unknown group of persons."[393] The court has yet to rule on this motion.

In *EEOC v. United Parcel Service, Inc.*, a district court similarly dismissed a class claim brought by the EEOC under the Americans with Disabilities Act, holding that the EEOC did not adequately plead that each unidentified class member was a qualified individual with a disability under the ADA.[394] The court allowed the agency's complaint to survive only with respect to the two named plaintiffs and denied the EEOC's motion for leave to file an amended complaint.[395]

However, on January 11, 2013 on its own motion to reconsider, the court decided to revisit its analysis and withdraw its earlier rulings: "Upon revisiting EEOC's first amended complaint, and drawing all reasonable inferences in the EEOC's favor, the Court concludes that the first amended complaint satisfies" the requirements of Fed. R. Civ. P. 8(a) and the allegations "provide UPS with fair notice of the claims against it and the grounds upon which they rest."[396]

In coming to this conclusion, the court both made note of the fact that "courts generally have allowed complaints with 'class' allegations comparable to those asserted here to move forward," and acknowledged the EEOC 's "unique role" in advancing the public interest through preventing and remedying employment discrimination, and the challenges it faces in pursuing an

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[391] *Id.* at *29. The court also dismissed the EEOC's complaint for failure to state a pattern or practice claim. Even though the EEOC produced evidence of "extremely troubling comments surrounding hiring decisions," the EEOC failed to produce sufficient facts to show that "any applicants were actually denied positions based on their race." *Id*. at *23. The court likewise found that the EEOC was bound by the 300-day time limitations period when pursuing suits under § 706 and § 707 and that Bass Pro's conduct did not constitute a continuing violation. As such, the court dismissed all claims based on conduct that occurred outside of that 300-day period. *Id*. at *36.

[392] *See* Second Am. Compl. ¶¶ 35-36, 178, 411, No. 4:11-cv-03425 (S.D. Tex. July 20, 2012).

[393] *See* Defendants' Memorandum of Law in Support of Motion to Dismiss Second Am. Compl. at 19, No. 4:11-cv-03425 (S.D. Tex. Aug. 24, 2012).

[394] No. 09-cv-5291, 2011 BL 249100, at *6 (N.D. Ill. Sept. 28, 2011).

[395] *Id.*

[396] *EEOC, v. United Parcel Service, Inc.*, No. 09-cv-5291 (N.D. Ill., Jan. 11, 2013). Specifically, the complaint "identifies the statutes that UPS allegedly violated; the time frame in which the alleged violations occurred; the names of two presently identified victims; a general description of the class of aggrieved persons; the specific claims alleged and their elements as to the charging party and the class of aggrieved persons; the types of conduct to which the named claimants and the unidentified class were subjected; and the remedies being sought." *Id.*

action on behalf of a nationwide class of aggrieved individuals.[397] The court therefore concluded that it "must defer to EEOC's investigatory judgment at this early stage of the case," withdraw its earlier ruling on the motion to dismiss, and grant the EEOC leave to file its second amended complaint.[398]

Other courts have taken a similarly deferential approach in determining that Title VII does not require EEOC to identify, investigate, and conciliate on behalf of each allegedly aggrieved person. For example, in *Serrano v. Cintas Corp.*,[399] the Sixth Circuit reversed the district court's grant of summary judgment for defendants in a sex discrimination case, even though none of the remaining named plaintiffs were subjects of EEOC pre-suit investigation or conciliation procedures.[400] The district court had emphasized that the EEOC did not "identify any of the thirteen allegedly aggrieved persons as members of the 'class' until after the [it] filed its initial complaint" and instead "was using discovery . . . in large part to find these individuals."[401] The court rejected the EEOC's argument that it need not engage in individualized conciliation, distinguishing the cases cited by the agency on the grounds that cases brought under § 706 of Title VII are not class-based in nature.[402]

On appeal, the Sixth Circuit held that the EEOC can appropriately bring class-based claims under § 706, relying on the *Teamsters* framework.[403] In determining whether the EEOC failed to comply with administrative prerequisites, the Sixth Circuit thus reviewed only the district court's conclusion that "the EEOC never investigated or sought to conciliate claims on a class-wide basis," ignoring the district court's determination that "class-wide conciliation was not an adequate substitute" for individualized conciliation.[404] The Sixth Circuit concluded that because 1) "the EEOC provided notice to Cintas that it was investigating class-wide instances of discrimination" and 2) Cintas did not "refute the EEOC's assertion that Cintas expressed no interest to the EEOC in reaching a settlement on these claims," the EEOC "acted appropriately in terminating conciliation and seeking to vindicate the claims through suit."[405]

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[397] *Id.*

[398] *Id.*

[399] Nos. 10-2629, 11-2057, 2012 BL 296517 (6th Cir. Nov. 9, 2012).

[400] *Id.* at *16-17.

[401] *EEOC v. Cintas Corp.*, Nos. 04-40132, 06-12311, 2010 BL 220926, at *4, *9 (E.D. Mich. Sept. 20, 2010).

[402] *Id.* at *6-10 (citing *EEOC v. CRST Van Expedited, Inc.*, No. 07-CV-95, 2009 BL 174086 (N.D. Iowa Aug. 13, 2009)).

[403] *Serrano*, 2012 BL 296517, at *6-9.

[404] *Id.* at *16.

[405] *Id.* at *17.

EEOC v. O'Reilly Automotive Inc.,[406] similarly held that the EEOC need not identify each aggrieved individual in the course of conciliation. In that case, the EEOC issued Letters of Determination on three charges that stated that the charging parties and other unnamed African-Americans at the company were subject to various types of race discrimination.[407] The EEOC then made a conciliation demand for payments to the three charging parties and unspecified payments to unidentified individuals denied promotions. O'Reilly rejected the EEOC's demand.[408] The EEOC failed conciliation and filed a lawsuit alleging various types of discrimination.[409] O'Reilly moved for summary judgment on several grounds, including that the EEOC did not adequately carry out its investigation and conciliation obligations because it did not identify the other aggrieved individuals in its letters of determination or conciliation demands.[410] The court found that though the conciliation offer was cursory, the EEOC had fulfilled its conciliation obligations.[411] The court rested its decision on several factors: (1) the identity of African Americans who had not been promoted in Houston was "not a complete mystery to O'Reilly;" (2) the EEOC had been willing to respond to inquiries from O'Reilly for more information, and O'Reilly chose not to engage in further conciliation; and (3) the number of individuals involved was not nearly as great as the number involved in *CRST*.[412]

In *EEOC v. Paramount Staffing, Inc.*,[413] the EEOC issued a Letter of Determination that stated that the employer discriminated against the charging party and a class of African American employees. The EEOC provided a proposed conciliation agreement that sought $2.9 million in damages for 200 class members.[414] Paramount made a counteroffer for about $100,000, and the parties then exchanged further counteroffers until the EEOC sent a letter stating that unless Paramount was willing to meet its monetary demand by a certain date, it would recommend failing conciliation.[415] Paramount responded that it lacked sufficient information to assess the offer, and the EEOC failed conciliation.[416] Paramount claimed that it requested information about the identities of the class members multiple times but did not receive any information, whereas the EEOC contended that Paramount received a general description of class members and a complete explanation of how damages were calculated.[417]

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[406] No. H-08-2429, 2010 WL 5391183 (S.D. Tex. Dec. 14, 2010).

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

[408] *Id.* at *2.

[409] *Id.*

[410] *Id.* at *2, *7.

[411] *Id.* at *7.

[412] *Id.*

[413] 601 F. Supp. 2d 986 (W.D. Tenn. 2009).

[414] *Id.* at 988.

[415] *Id.*

[416] *Id.*

[417] *Id.*

The court found that the parties' efforts at conciliation were sufficient using a deferential standard of review.[418] The court further held that each person within a class need not be identified as part of the conciliation process, so long as there is an outline of the class provided.[419] As such, the EEOC provided a sufficient outline of the class during conciliation so as to satisfy its conciliation obligations.[420] It may have been significant to the court here that at the conciliation stage, the EEOC did at least attempt to provide a ballpark figure as to the number of individuals in the class, unlike in the *CRST*, *La Rana*, and *Bass Pro* cases.

The court in *EEOC v. Crye-Leike, Inc.*,[421] went even further than *O'Reilly* and *Paramount Staffing* by refusing to dismiss the EEOC's class claims even after the agency admitted that it failed to include those claims in the conciliation process.[422] Despite the "oversight" of failing to conciliate class claims, the EEOC brought suit on behalf of unidentified African Americans.[423] The court acknowledged that the EEOC did not give the company an opportunity to conciliate with regard to all charges, but found that dismissing the case on this ground "would be too draconian."[424] The court did, however, grant the company the opportunity to engage in further conciliation with the EEOC, and the case eventually settled.[425]

More recently, in a pending suit against U.S. Steel, the EEOC alleges that the company's random alcohol testing policy violates the ADA's medical testing provisions, although the EEOC's complaint failed to identify the aggrieved individuals. The Western District of Pennsylvania denied U.S. Steel's motion to dismiss without prejudice on the grounds that *Iqbal* and *Twombly* do not require the EEOC to identify all aggrieved employees in its class complaint.[426] In reaching this conclusion, the court disagreed with the Eighth Circuit's ruling in *CRST*, emphasized that *CRST* was not binding precedent, and further noted that the rulings in *CRST* regarding failure to conciliate "followed extensive discovery and were made at the summary judgment stage, when the Court may fully consider all of the record evidence."[427] Accordingly, U.S. Steel moved for summary judgment on September 14, 2012. The company argued that the EEOC cannot bring a nationwide case against the company after limiting the

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[418] *Id.* at 990.

[419] *Id.*

[420] *Id.*

[421] No. 10-cv-02070, 2011 WL 3348045 (E.D. Ark. Aug. 3, 2011).

[422] *Id.* at *8.

[423] *Id.*

[424] *Id.*

[425] *Id.* at *9.

[426] *EEOC v. U.S. Steel Corp.*, No. 10-1284, 2012 BL 183071 (W.D. Pa. July 23, 2012).

[427] *Id.* at *9.

focus of its investigation and conciliation process to only one of U.S. Steel's plants.[428] The court has not yet ruled on the motion.

2. Engaging in Inflexible Conciliation

In other cases involving allegations that the EEOC failed to conciliate, the issue before the court is more generally whether the EEOC failed to engage in reasonable and flexible conciliation. For example, in *EEOC v. Agro Distribution, LLC*,[429] the Fifth Circuit affirmed judgment award for the defendant because it determined that the EEOC did not satisfy its duty to engage in good faith conciliation before it filed suit.

In *Agro*, the EEOC investigator assigned to the charge engaged in inappropriate and biased behavior both during an on-site investigation and in subsequent correspondence with the company when she misstated facts.[430] Despite Agro's counsel pointing out these misstatements of fact to the EEOC, the EEOC issued a Letter of Determination finding cause to believe there was a violation of the ADA and attaching a conciliation agreement requesting about $150,000 in damages and reinstatement.[431] On August 15, 2003, the investigator called Agro's attorney and left a message.[432] On August 18, counsel for Agro left a message for the investigator requesting a meeting. On August 19, the EEOC sent a letter to Agro notifying them conciliation had failed. On August 22, Agro sent a letter stating that it was prepared to engage in conciliation. On August 28, the EEOC responded but said that any settlement must follow its "Remedies Policy." Agro inquired further as to what that meant but received no reply. Agro then offered $3,500 in settlement. Nearly 10 months later, the EEOC rejected the offer and subsequently filed suit. The court found that this did not constitute conciliation in good faith, and was an example of an "all-or-nothing approach" condemned by earlier decisions.[433] The court found that good faith conciliation was a "precondition to suit" rather than a "jurisdictional prerequisite," but noted that under the facts of this case, dismissing the case for failure to conciliate would not have been an abuse of discretion.[434]

In another recent case, *EEOC v. Bloomberg L.P.*,[435] Bloomberg argued that summary judgment should be granted on both the EEOC's discrimination and retaliation class claims because the EEOC had not conciliated either set of claims in good faith. The case began with

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[428] Defendant's Brief in Support of Motion for Summary Judgment at 20-26, *EEOC v. U.S. Steel Corp*., No. 10-1284 (W.D. Pa. Sept. 24, 2012).

[429] 555 F.3d 462 (5th Cir. 2009).

[430] *Id.* at 466.

[431] *Id.* at 467.

[432] *Id.*

[433] *Id.* at 468.

[434] *Id*. at 469.

[435] 751 F. Supp. 2d 628 (S.D.N.Y. 2010).

three charges from women who claimed to have experienced pregnancy discrimination while working at Bloomberg. The EEOC issued a Letter of Determination that identified a class of similarly situated, yet unidentified women.[436] The EEOC sent a proposed conciliation agreement along with the Letter of Determination seeking $7.5 million on behalf of a proposed class of women.[437] After several meetings, Bloomberg sent a counterproposal offering $65,000 on behalf of each charging party and refusing to establish a class fund.[438] The EEOC then determined that conciliation had failed.[439] The court found that these efforts were sufficient to satisfy the EEOC's conciliation obligations because Bloomberg refused to discuss classwide monetary relief, the parties' financial positions were so far apart that further negotiations would have been futile, and the EEOC had provided Bloomberg with sufficient information about the claims through several meetings that enabled it to evaluate the proposed settlement.[440]

After litigation on the discrimination claims was already ongoing, the EEOC began an investigation into classwide retaliation claims and issued several determinations that alleged classwide retaliation. The EEOC sent Bloomberg a proposed conciliation agreement, and demanded more than $41 million to resolve the dispute. Bloomberg responded that it needed additional information from the EEOC as to its damages determinations and more time to investigate internally.[441] A month or so later, Bloomberg provided a written counterproposal, and stated that it was not in a position to offer monetary relief but was awaiting additional information about the EEOC's determinations on this issue.[442] The EEOC responded that it would provide a written counterproposal when Bloomberg made a monetary demand and stated that providing Bloomberg with further information was unnecessary.[443] The parties then exchanged many letters back and forth. In the correspondence, the EEOC consistently refused to provide more information about the calculation of the proposed damages, and Bloomberg consistently refused to provide a monetary offer without further information.[444] Bloomberg offered to mediate the dispute. The EEOC refused. Instead, the EEOC "stonewalled" Bloomberg's requests for information about the alleged class and about why the EEOC demanded such large amounts of money. The court found that the EEOC did not act in a "reasonable and flexible manner" in response to Bloomberg's reasonable requests for more information as to how the EEOC calculated its proposed monetary settlement of $41 million.[445]

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[436] *Id.* at 632-33.

[437] *Id.* at 633.

[438] *Id.* at 638.

[439] *Id.*

[440] *Id.* at 639.

[441] *Id.* at 641.

[442] *Id.*

[443] *Id.*

[444] *Id.* at 640-41.

[445] *Id.* at 642.

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Instead, the EEOC used the proposed conciliation agreement as a "weapon to force settlement."[446] Weighing the fact that the parties were unable to come to any agreement for five months, the Court found that dismissal of the retaliation claims was the appropriate remedy for the EEOC's failure to conciliate.[447]

A finding that the EEOC has failed to conciliate has not always led to dismissal of its claims, however. In *EEOC v. Ruby Tuesday, Inc.*, the court held that the EEOC's "conciliation by letter" approach was not akin to a sincere effort to reach a resolution.[448] "At best, its letters, unaccompanied by any effort to confer with or otherwise directly 'persuade' the Defendant to voluntarily resolve these matters, were more akin [to] 'surface bargaining' than to an attempt at conciliation or persuasion."[449] However, while the EEOC's conciliation efforts very clearly failed to pass even the lowest bar, the court found that "to dismiss the case now as the Defendant requests, in the middle of discovery, after years of party and judicial investment in its disposition, would be wholly improvident and is a remedy disproportionate to the situation now presented."[450] The court therefore ordered the parties to "meet and discuss" over the following forty five says under the general supervision of the court in order to fulfill their conciliation obligations.[451]

In *EEOC v. Evans Fruit Co., Inc.*,[452] another court found that the EEOC failed to conciliate in good faith and concluded that a stay of the claims to allow for meaningful conciliation through court supervised mediation was preferable to dismissal. On July 24, 2008, the EEOC issued amended cause determinations that found Evans Fruit had sexually harassed a class of its female employees. Evans Fruit commenced conciliation with the EEOC, although Evans Fruit repeatedly expressed concern that it lacked sufficient factual information about the employees' claims. On December 8, 2008, the EEOC informed Evans Fruit that it had identified four additional class members, but it failed to provide any factual support for these new claims aside from repeating the allegations in the original charges. The EEOC offered to settle the dispute for $1.9 million, but Evans Fruit refused the offer and stated that it would not "pay $1.9 million on the strength of an EEOC demand that does not provide any evidence to suggest the demand is appropriate."[453] Three weeks later, Evans Fruit provided the EEOC with a copy of its sexual harassment policy, and the EEOC reduced its demand without providing any "specific

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[446] *Id.*

[447] *Id.* at 643.

[448] No. 2:09-cv-01330, 2013 WL 241032, at *8 (W.D. Pa. Jan. 22, 2013).

[449] *Id.*

[450] *Id.*

[451] *Id.* at *9.

[452] No. CV-10-3033-LRS, 2012 BL 137815, at *1 (E.D. Wash. May 24, 2012).

[453] Memorandum of Points and Authorities in Support of Defendant Evans Fruit Co., Inc's Motion for Summary Judgment at 7, *EEOC v. Evans Fruit Co., Inc.*, No. CV-10-3033-LRS, 2012 BL 137815 (E.D. Wash. Mar. 15, 2012).

information about the allegations of the claimants or their damages despite repeated requests for such information by Evans Fruit."[454] On January 30, 2009, Evans Fruit yet again requested evidence that supported the claims. The EEOC responded one month later with some additional factual allegations—but no evidence. On March 13, 2009, the EEOC abruptly determined that conciliation had failed.[455]

Evans Fruit moved for summary judgment, in part, on the grounds that the EEOC had failed to conciliate in good faith. The court granted the motion and held that a "'good faith' attempt at conciliation required the EEOC to be more forthcoming regarding the type of damages sought (back pay, front pay, emotional distress, etc.), some justification for the amount of damages sought, potential size of the class, general temporal scope of the allegations, and the potential number of individuals . . . alleged to be involved in the harassment."[456] The court also concluded, however, that the EEOC was not obligated to identify specific class members in its complaint and thereby rejected the rationale of *CRST*.[457] The court found that "all of the letters from counsel for Evans Fruit to EEOC during the conciliation process represented reasonable requests and evidenced a 'reasonable attitude' on the part of the employer"; however, the "EEOC acted unreasonably in failing to respond flexibly to all of Evans Fruit's requests for information," as without it, "Evans Fruit could not knowledgeably evaluate the reasonableness of EEOC's demand."[458] The court also faulted the EEOC for "abruptly terminating the conciliation process without explanation for doing so."[459] Touting the importance of "creative solutions," the court then stayed the proceedings and ordered the parties to engage in court supervised mediation to remedy their failed conciliation.[460]

The court rejected the defendant's argument that the EEOC had failed to engage in good faith conciliation in *EEOC v. PBM Graphics*.[461] After years of investigation, the EEOC had issued a Letter of Determination alleging that PBM had discriminated against non-Hispanic temporary workers by giving them fewer work hours and failing to place them in a "core group" of workers with more job opportunities. Prior to the conciliation conference, the EEOC did not respond to PBM's requests that it provide specific information about the money damages it would be seeking or the size of the class; instead, the EEOC delayed the conciliation conference while it continued to interview class members and collect information related to damages.[462] When the parties "eventually did meet for conciliation" on July 14, 2010, the EEOC presented

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[454] *Id*.

[455] *Id*.

[456] No. CV-10-3033-LRS, 2012 BL 137815, at *8 (E.D. Wash. May 24, 2012).

[457] *Id*. at *2-7.

[458] *Id*. at *8.

[459] *Id*.

[460] *Id.* at *9.

[461] No. 1:11-cv-805, 2012 BL 195808 (M.D.N.C. June 28, 2012).

[462] *Id.* at *18.

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PBM with a draft conciliation agreement and explained that it had identified a class of 104 alleged victims of discrimination.[463] PBM indicated that it "was unwilling to pay 'anything near' the EEOC's conciliation demands," and the EEOC declared that conciliation had failed the next day. [464]

PBM moved for summary judgment on the EEOC's subsequent complaint arguing, among other things, that the EEOC had failed to fulfill its statutory duty to conciliate the claims against it.[465] The court summarily dismissed PBM's complaint that particular class members were not identified during the conciliation process, noting that "the EEOC is under no obligation to make such a disclosure."[466] In addition, the court found that PBM's argument that the EEOC did not satisfy its duty to conciliate in good faith "fail[ed] under any standard of review."[467] The court observed that "'[c]ourts find the reasonableness or flexibility of the EEOC lacking where it refuses to communicate or negotiate with the defendant.'"[468] It concluded that there was "no evidence that the EEOC failed to respond in a reasonable and flexible manner to PBM's reasonable requests" or "that it prevented PBM from responding to all charges and negotiating possible settlements."[469] The court found that many of PBM's concerns were not relevant to the good faith determination because they involved the EEOC's behavior during a post-conciliation mediation process, when the EEOC was "free to file a lawsuit regardless of what occurred."[470]

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[463] *Id.*

[464] *Id.* at *18-19.

[465] *Id.* at *14. Pointing to almost six years between the filing of the charge and formal commencement of litigation, including two nearly year-long periods of no contact between the EEOC and PBM, PBM also raised the equitable defense of laches in its motion for summary judgment. *Id.* at *24. Ironically, the court determined that because the EEOC's complaint did not "fully explain its theory of the case" or "disclose how it calculated evidence of discrimination and which employees were allegedly discriminated against," PBM could not demonstrate that it was prejudiced by the EEOC's delay in bringing suit. *Id.* at *27. The court referred the issue to a magistrate judge to allow the parties to engage in discovery on 1) whether the EEOC must disclose its theory of the case, and 2) whether the EEOC's unreasonable delay resulted in prejudice to PBM. *Id.* at *28. The parties settled before these questions were resolved.

[466] *Id.* at *21 (citing, *inter alia*, *EEOC v. Paramount Staffing, Inc.*, 601 F. Supp. 2d 986, 990 (W.D. Tenn. 2009)).

[467] 2012 BL 195808, at *22.

[468] *Id.* (quoting *EEOC v. McGee Bros. Co.*, No. 3:10-cv-142-FDW-DSC, 2011 WL 1542148, at *4 (W.D.N.C. Apr. 21, 2011)).

[469] 2012 BL 195808, at *22.

[470] *Id.*

3. Failure to Provide Sufficient Notice of Scope of Investigation

In *EEOC v. Dillard's Inc.*,[471] the charging party filed a charge alleging disability discrimination. In the course of its investigation, the EEOC sought information regarding other employees at the charging party's store in El Centro and a former employee of that store.[472] In its Letter of Determination, it found that there was reasonable cause to believe that the charging party and "at least one similarly-situated individual was subjected to disability-related/medical inquiries in violation of the ADA." The EEOC's conciliation offer sought relief for the two employees, requested that Dillard's revise its nationwide disability discrimination policy, and stated that "additional remedies…may be sought for additional class members and time periods over and above the remedies described herein . . . ."[473] After the EEOC decided to end conciliation, it filed a complaint that referred to "similarly situated individuals" but specifically identified only the two aforementioned employees. When the EEOC issued written discovery that applied nationwide, Dillard's moved to preclude claims by the EEOC against other individuals and/or claims outside of the El Centro store.

The court stated the general rule that the EEOC's investigation must grow out of the charge, and each step in the administrative process must "grow out of the one before it."[474] Relying on this law, the court held that when the scope of the administrative proceedings is limited in some way, the EEOC "may not use discovery in the resulting lawsuit as a fishing expedition to uncover more violations."[475] Since the EEOC's investigation focused exclusively on the El Centro store—except for one inquiry as to whether the discrimination policy was companywide—the EEOC had provided insufficient notice that the investigation was companywide, and the suit must be limited to the El Centro store.[476] On the other hand, the EEOC had provided sufficient notice that the suit would involve more than two employees, and the court explained that "[t]he EEOC can seek relief for individuals situated similarly to the charging party and is not required to identify every potential class member."[477] As a result, the court concluded that the EEOC could seek relief for unidentified victims who worked at the El Centro store.[478]

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[471] No. 08-CV-1780, 2011 WL 2784516 (S.D. Cal. July 14, 2011).

[472] *Id.* at *1.

[473] *Id.* at *2.

[474] *Id.* at *6 (quoting *EEOC v. Jillian's of Indianapolis, IN, Inc.*, 279 F. Supp. 2d. 974, 979 (S.D. Ind. 2003)).

[475] 2011 WL 2784516, at *7 (quoting *EEOC v. Target Corp.*, No. 02-C-146, 2007 WL 1461298, at *3 (E.D. Wis. May 16, 2007)).

[476] 2011 WL 2784516, at *8.

[477] *Id.* at *6.

[478] Other cases have refused to dismiss claims on this basis, so even if minimal notice of the geographic scope of the investigation is provided at the investigation and conciliation stage, a court may still decline to dismiss claims based on a lack of notice of a broader geographic scope. *See, e.g.*, *Bloomberg*, 751 F. Supp. 2d at 636 (rejecting argument that claims should be limited to New York and New Jersey where physical investigation was

Similarly, the court in *EEOC v. American Samoa Government*[479] rebuffed the EEOC's attempt to bring a government-wide class claim after it had limited its investigation to only one government department. The EEOC suit asserted that the American Samoa Government ("ASG") had subjected the charging party and "a class of similarly situated individuals" to adverse employment actions in violation of the Age Discrimination in Employment Act.[480] Prior to bringing the case, the EEOC had limited its investigation of the complaint to the ASG's Department of Human Resources ("DHR"). The EEOC's Letter of Determination listed DHR as the respondent, and the conciliation process sought monetary relief only on behalf of the charging party and one other class member—both employed by DHR.[481] Conciliation failed, and the EEOC filed a complaint.

During discovery, the EEOC sought information regarding not just DHR employees—of which there were approximately 47—but also all 5,000 ASG employees.[482] In response, the ASG filed a motion for summary judgment, arguing that the EEOC's pre-litigation efforts did not provide it with "sufficient notice of the potential scope of the claims" that the EEOC would seek to assert.[483]

The court dismissed the EEOC's government-wide class claims. It emphasized that "the EEOC limited its investigation to the DHR even though the facts known to the EEOC arguably opened the door to a larger investigation," and that the "scope of conciliation was similarly limited to DHR."[484] Having so limited its pre-suit activities, the court—citing *CRST*— held that the EEOC could not later attempt to expand its claims through discovery.[485]

CRST has been relied on by a number of courts reviewing the EEOC's pre-suit notice obligations, however, it is being interpreted in various ways. In the recent case of *EEOC v. The Original Honeybaked Ham Co. of Georgia, Inc.*, the EEOC initiated an investigation against Honeybaked Ham after an individual woman filed a formal charge alleging that she and other female employees had been sexually harassed by the general manager of the Highland Ranch store, and that she had been discharged in retaliation for complaining about the harassment.[486] After investigating, the EEOC filed a complaint alleging sexual harassment by supervisors of

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centered there but allegations related to company-wide policies and high-level managers and Letter of Determination included classwide language).

[479] No. 11-00525, 2012 BL 262610 (D. Haw. Oct. 5, 2012).

[480] *Id.* at *1.

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

[482] *Id.* at *1, *5.

[483] *Id.* at *6.

[484] *Id.* at *8-13.

[485] *Id.* at *9.

[486] No. 1:11-cv-02560-MSK-MEH, 2013 BL 10024, at *1 (D. Colo. Jan. 15, 2013)

Honeybaked Ham and retaliation against "a class of female employees" who complained about the hostile work environment.[487]

HBH argued that the EEOC did not give it adequate notice of the scope of the claims against it – specifically those involving a whole class of female employees and the conduct of supervisors other than the general manager – and contended that the remedies should be limited to addressing injuries suffered only by the individuals who were specifically identified during pre-litigation.[488]

The court first agreed with HBH that the EEOC's sex discrimination claim should be limited to conduct by the general manager and retaliation for complaints about his conduct, since "the EEOC only gave formal notice of and attempted to resolve charges arising from the unlawful conduct of Mr. Jackman."[489] As for the appropriate scope of aggrieved individuals, however, the court rejected "a categorical interpretation of CRST to limit the EEOC's remedy to aggrieved individuals who are specifically identified in the pre-litigation process."[490] Instead, it reasoned that "if the employer understands the nature, extent, location, time period, and persons involved in the alleged unlawful conduct, it may be able to reasonably estimate the number and identities of persons who may have been impacted." Thus, "the greater the specificity in describing the alleged unlawful conduct, the less important it becomes to specifically identify aggrieved persons." Such was the case here, where the claim was limited only to the conduct of one general manager at one store. The court therefore determined that "HBH had sufficient notice of all potentially aggrieved individuals," and the EEOC had sufficiently satisfied its pre-suit requirements with regard to the "class of female employees."[491]

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[487] *Id.* at *3.

[488] *Id.* at *1.

[489] *Id.* at *5.

[490] *Id.* at *8.

[491] *Id.* at *7-8. On February 27, 2013, a Colorado district court sanctioned the EEOC for causing unnecessary expense and delay in this case. *EEOC v. The Original HoneyBaked Ham Co. of Georgia, Inc.*, No. 1:11-cv-02560-MSK-MEH (D. Colo. Feb. 27, 2013). The EEOC mismanaged the discovery of evidence of social media communications by the Claimants, and EEOC's mismanagement caused significant delay to the proceedings and forced the defendant to incur costs unnecessarily. *Id.* Specifically, EEOC insisted on using its own information technology personnel to engage in forensic discovery of the Claimants' social media (despite the court's originally appointing a special master to do the job), but later reneged on this representation after the "powers that be" in the "higher echelons" of EEOC did not agree with the decisions made by the trial attorneys. *Id.* The court found that the EEOC's conduct, "while inappropriate and obstreperous, does not rise to a level that is sanctionable under most rules governing the litigation process." *Id.* Unable to find a rule or doctrine concerning sanctions that clearly applied to this case, the court turned to Fed. R. Civ. P. 16(f)(1), a rule which on its face applies to sanctions arising out of conduct concerning scheduling of pretrial conferences. The court quoted at length a Tenth Circuit decision which confirmed the propriety of using Rule 16(f) to sanction conduct that delayed the trial of a case: "While on the whole Rule 16 is concerned with the mechanics of pretrial scheduling and planning, its spirit, intent and purpose is clearly designed to be broadly remedial, allowing courts to actively manage the preparation of cases for trial." *Id.* (quoting *Mulvaney v. Rivair Flying Serv., Inc.*, 744 F.2d 1438, 1440-42 (10th Cir. 1984) (en banc)). Adopting this broadened application of Rule 16(f) to sanction offending conduct, the court granted in part the defendant's Motion for Sanctions and ordered the EEOC to pay the reasonable attorneys' fees and costs expended in bringing the motion. *Id.*

V. NOTEWORTHY EEOC LITIGATIONS AND SETTLEMENTS

Finally, a number of recent litigations and settlements involving the EEOC are worth mentioning. The Seventh Circuit recently upheld a judgment of compensatory and punitive damages against the automotive parts retailer AutoZone on an ADA claim, while remanding the case for further proceedings regarding one narrow issue.[492] The case concerned an employee suffering from chronic back pain and a request for a reasonable accommodation that would keep him from mopping the floors of the store.[493] Following a jury verdict on the reasonable accommodation claim, including compensatory and punitive damages, the magistrate judge granted a motion from the EEOC to impose an injunction requiring AutoZone to comply with the reasonable accommodation requirements of the ADA, to notify the EEOC of any employee who requests an accommodation during the next three years, and to maintain records of those requests.[494]

On appeal, the court upheld both the compensatory and punitive damage figures of the lower court. Furthermore it affirmed the notification and record keeping requirements of the injunction.[495] The case was remanded, however, for the narrow purpose of limiting the compliance provision of the injunction, "with instructions to modify the injunction to impose a reasonable time limit on the [compliance] provision," so as to ensure that the threat of a contempt motion on any claim arising out a store in the district would not be permanent.[496]

The EEOC continues to litigate Title VII claims of gender discrimination and retaliation against JPMorgan Chase Bank.[497] The claims concern a class of female mortgage consultants who worked at a JPMorgan facility in Columbus, Ohio. The EEOC alleges that JP Morgan subjected the class "to terms and conditions of employment that differed from similarly situated male employees."[498] The EEOC also alleges that the on-site supervisor steered potentially lucrative mortgage consulting calls from female to male employees and thereby limited the ability of female employees to earn higher compensation and bonuses.[499]

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[492] *EEOC v. AutoZone, Inc.*, No. 12-1017, 2013 BL 42338 (7th Cir., Feb. 15, 2013).

[493] *Id*. at *3.

[494] *Id*. at *29.

[495] *Id*. at *35.

[496] *Id*. at *36

[497] Press Release, *U.S. Equal Employment Opportunity Commission, JPMorgan Chase Bank Sued by EEOC for Sex Discrimination and Retaliation* (Sept. 29, 2009), available at http://www.eeoc.gov/eeoc/newsroom/release/9-29-09h.cfm (last visited Mar. 5, 2013).

[498] *EEOC v. JP Morgan Chase Bank, N.A.*, Case No. 2:09-cv-864, 2013 BL 54461 (S.D. Ohio Feb. 28, 2013).

[499] *EEOC v. JPMorgan Chase Bank, N.A.*, Case No. 2:09-cv-864, 2011 BL 333036 (S.D. Ohio July 6, 2011).

In its most recent ruling, the court in the Southern District of Ohio granted an EEOC motion for sanctions under Fed. R. Civ. P. Rule 37(d). The court found that JPMorgan willfully destroyed "skill log in data," failed to establish a litigation hold, and that "Defendant's destruction of evidence under the auspices of routine purging has hampered the ease of if not the ability to uncover exactly what if anything impermissible has transpired here."[500] The data in question described skills that were assigned mortgage consultants, and those assignments thereby controlled which mortgage calls a consultant is placed on.[501] The court held that JPMorgan was on notice that the data was relevant to the potential litigation, yet nonetheless allowed it to be deleted during routine data purging procedures. In imposing sanctions, the court ordered a permissive adverse jury instruction as it relates to the spoiled data, and denied JPMorgan's pending motion for summary judgment as it relied in part on skill log in data.[502]

On February 20, 2013, U.S. Steel Corporation won summary judgment in a case brought by the EEOC alleging that the Company's practice of conducting random alcohol testing on its probationary steel worker employees violated the Americans with Disabilities Act.[503] The EEOC contended that the testing policy was a prohibited medical examination not related to the job and inconsistent with business necessity.[504] The tests at issue were conducted in accordance with the terms of U.S. Steel's collective bargaining agreement with the union, and were administered to new employees working in highly dangerous occupations at the Company's coke plants.[505]

U.S. Steel argued that the tests were appropriate as job-related and as a business necessity. The district court agreed and granted summary judgment for the Company. The court noted that "safety is a business necessity and the testing policy genuinely serves this safety rationale and is no broader or more intrusive than necessary."[506] The narrow breadth of the testing policy on probationary employees limited the intrusion on the general employee population, and the testing practice enabled the Company to ascertain whether a new employee would be able to perform the highly dangerous work in a satisfactory and safe matter.[507]

In another recent EEOC litigation, the rent-to-own business Rent-A-Center ("RAC") was granted summary judgment in a Title VII action alleging a failure to accommodate an

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[500] *EEOC v. JP Morgan Chase Bank, N.A.*, Case No. 2:09-cv-864, 2013 BL 54461 (S.D. Ohio Feb. 28, 2013).

[501] *Id*. at *1.

[502] *Id*. at *11.

[503] *EEOC v. U.S. Steel Corp. et al*, No. 10-1284, 2013 BL 44123 (W.D. Pa. Feb. 20, 2013).

[504] Id. at *1, 42 USC §12112(d)(f)(A)

[505] Id. at *3

[506] Id. at *37.

[507] *Id*. at *8.

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employee's religious beliefs.[508] The employee, a Seventh Day Adventist and store manager at RAC, argued that his faith prohibited him from working on Saturdays. RAC's general policies required that all store managers work on Saturdays, the primary trading day for RAC. While the employee worked occasionally on Saturday's as required, he was ultimately informed that the store could no longer accommodate his request to be excused from Saturday work.[509] After being terminated for his refusal to work on Saturdays, the EEOC brought a Title VII action against RAC for failing to accommodate his beliefs.[510]

The district court found that to impose such an accommodation on RAC would cause direct harm to RAC's business and would thereby constitute an undue burden under Title VII. The court focused on the position of the store manager (the most senior on-site), the heavy reliance on Saturday trading by RAC, and the blanket policy that RAC's "most important employees [work] on the most important day of the week."[511] While the court noted that accommodations had been made for the employee on an ad hoc basis, to impose such an accommodation would squarely conflict with RAC's business model.[512]

The EEOC has recently settled several cases for significant amounts. On November 9th, 2012, the EEOC settled a case with Interstate Distributor Company ("IDC") for $4.85 million to resolve claims brought under the ADA.[513] IDC allegedly violated the ADA by maintaining "a 100% return-to-work policy" that required its employees to return to work without restrictions, by maintaining a maximum leave policy that required its employees to return to work within twelve weeks, and by retaliating against employees who requested reasonable accommodations.[514] The three-year consent decree, among other things, requires IDC to revise its policies to include reasonable accommodations for people with disabilities, report future complaints of disability discrimination to the EEOC, and provide ADA training to its employees.[515]

On August 30, 2012, the EEOC announced a $2.3 million settlement with Fry's Electronics over a sexual harassment and retaliation lawsuit.[516] The EEOC alleged that an

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[508] *EEOC v. Rent-A-Center, Inc.*, No. 1:11-cv-01170-RCL, 2013 BL 13976 (D.D.C., Jan 18, 2013).

[509] *Id*. at *3.

[510] *Id*. at *2.

[511] *Id.* at *4.

[512] *Id.* at *5.

[513] Press Release, U.S. Equal Employment Opportunity Commission, *Interstate Distributor Company to Pay Nearly $5 Million to Settle EEOC Disability Suit* (Nov. 9, 2012), *available at* http://www.eeoc.gov/eeoc/newsroom/release/11-9-12.cfm (last visited Nov. 19, 2012).

[514] Compl., *EEOC v. Interstate Distrib. Co.*, No. 1:12-CV-02591, at 1-2 (D. Colo. Sept. 28, 2010).

[515] *Id*.

[516] Press Release, U.S. Equal Employment Opportunity Commission, *Fry's Electronics Pays $2.3 Million To Settle EEOC Sexual Harassment and Retaliation Lawsuit* (Aug. 30, 2012), *available at* http://www.eeoc.gov/eeoc/newsroom/release/8-30-12.cfm (last visited Nov. 30, 2012).

assistant manager sexually harassed a 20-year-old sales associate when he, among other things, sent her sexually charged texts and invited her to his house. The EEOC also charged that Fry's fired the associate's supervisor after he reported the misconduct to Fry's legal department. The settlement requires Fry's to report any employee complaints to the EEOC, provide anti-discrimination training, and post a notice about the settlement that includes contact information for employees to report discrimination, harassment, and retaliation.[517]

Three days earlier, the EEOC announced a $2.75 million settlement with WRS Compass that resolved claims of race discrimination.[518] According to the EEOC, WRS discriminated against seven black workers, created a racially hostile work environment, and retaliated against those who complained. WRS allegedly harassed the employees with hangman's nooses, frequent use of the "N-word," physical threats, and less favorable assignments. The EEOC's complaint also alleged that WRS laid off two black workers who complained about the harassment.

WRS allegedly also created a hostile work environment for white workers who associated with the black employees. According to the EEOC, a WRS foreman physically threatened them, called one of them a "n----r lover," and called another a "coon lover."

The settlement requires WRS to revise its anti-discrimination policy, evaluate its supervisors' compliance with the revised policy, provide anti-discrimination training, and develop a policy for investigating discrimination and harassment complaints. It also requires WRS to report any complaints of discrimination to the EEOC.[519]

On July 8, 2012, the EEOC announced a $1 million settlement of a sexual harassment suit against a McDonald's franchise owner.[520] The EEOC charged that the owner allowed male employees to create a hostile work environment for female employees (many of whom were teenagers), and that the owner retaliated against anyone who complained about the harassment. More specifically, the EEOC alleged that male employees made sexual comments to their female co-workers, inappropriately touched them, kissed them, and even forced them to touch the men's private parts. The owner allegedly refused to correct the situation and even forced one of the victims to quit. In addition, the company allegedly fired other victims because they complained about the harassment.

The settlement requires the company to:

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[517] *Id.*

[518] Press Release, U.S. Equal Employment Opportunity Commission, *EEOC Obtains $2.75 Million from WRS Compass for Victims of Race Harassment at Clean-Up Site* (Aug. 27, 2012), *available at* http://www.eeoc.gov/eeoc/newsroom/release/8-27-12b.cfm (last visited Aug. 31, 2012).

[519] *Id.*

[520] Press Release, U.S. Equal Employment Opportunity Commission, *Owner of 25 McDonald's Restaurants to Pay $1 Million in EEOC Sexual Harassment Suit* (July 18, 2012), *available at* http://www.eeoc.gov/eeoc/newsroom/release/7-18-12a.cfm (last visited Aug. 31, 2012).

(1) create an ombudsperson position responsible for monitoring, soliciting and resolving complaints of sexual harassment or retaliation;

(2) establish telephone and e-mail hotlines for employees to report sexual harassment or retaliation;

(3) evaluate its managers' and supervisors' performance based in part on whether their restaurants comply with anti-harassment and anti-retaliation laws and policies;

(4) track and maintain records of all sexual harassment and retaliation complaints;

(5) implement a comprehensive training program to enable its employees to identify sexual harassment and properly investigate internal complaints;

(6) post notices at all its restaurants informing employees that it has settled a sexual harassment and retaliation lawsuit with the EEOC and publicizing some settlement terms; and

(7) provide periodic reports to the EEOC showing it is complying with the terms of the decree.[521]

Also, on December 14, 2011, the EEOC announced a settlement with Blockbuster for $2 million to resolve claims of retaliation and sex, race, and national origin discrimination.[522] The EEOC alleged that male supervisors harassed seven female employees (four of whom are Hispanic). According to the EEOC, the supervisors frequently requested sexual favors from the women, insulted and threatened them, questioned them about sex, made racist comments to them, touched them in private areas, discriminatorily discharged them, and improperly denied them work hours.[523]

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[521] *Id.*

[522] Press Release, U.S. Equal Employment Opportunity Commission, *Federal Court Signs Order for Blockbuster Inc. To Pay Over $2m To Settle EEOC Suit for Sex, Race and National Origin Discrimination, Retaliation* (Dec. 14, 2011), *available at* http://www.eeoc.gov/eeoc/newsroom/release/12-14-11b.cfm (last visited Aug. 31, 2012).

[523] *Id.*