THE LITTLER REPORT

Annual Report on EEOC Developments: Fiscal Year 2024

AN ANNUAL REPORT ON EEOC CHARGES, LITIGATION, REGULATORY DEVELOPMENTS AND NOTEWORTHY CASE DEVELOPMENTS

April 2025

Littler

IMPORTANT NOTICE

This publication is not a do-it-yourself guide to resolving employment disputes or handling employment litigation. Nonetheless, employers involved in ongoing disputes and litigation will find the information useful in understanding the issues raised and their legal context. The Littler Report is not a substitute for experienced legal counsel and does not provide legal advice or attempt to address the numerous factual issues that inevitably arise in any employment-related dispute.

ABOUT OUR FIRM

Littler Mendelson is the world's largest labor and employment law firm devoted exclusively to representing management. With over 1,800 attorneys in more than 100 offices around the globe, Littler has extensive knowledge and resources to address the workplace law needs of both U.S.-based and multi-national clients. Littler lawyers practice and have experience in at least 50 areas of employment and labor law. The firm is constantly evolving and growing to meet and respond to the changes that impact the workplace.

ABOUT OUR EEO & DIVERSITY PRACTICE GROUP

With the steady rise in the number of discrimination, harassment and retaliation claims filed each year, employers must be more vigilant and proactive than ever when it comes to their employment decisions. Since laws prohibiting discrimination statutes have existed, Littler's Equal Employment Opportunity & Diversity Practice Group has been handling discrimination matters for its clients. Members of our practice group have significant experience working with all types of discrimination cases, including age, race, gender, sexual orientation, religion and national origin, along with issues involving disability accommodation, equal pay, harassment and retaliation. Whether at the administrative stage or in litigation, our representation includes clients across a broad spectrum of industries and organizations, and Littler attorneys are at the forefront of new and innovative defenses in each of the key protected categories. Our attorneys' proficiency in handling civil cases brought by the EEOC and other state agencies enables us to develop effective approaches to defending against any EEOC litigation, whether it involves claims brought on behalf of individual claimants or class-wide allegations involving alleged "pattern and practice" claims and other alleged class-based discriminatory conduct.

In addition, our firm recognizes the value of a workforce that provides equal employment opportunities, and a sense of belonging to all people. We recognize that diversity encompasses an infinite range of individual characteristics and experiences, including gender, age, race, sexual orientation, national origin, religion, political affiliation, marital status, disability, geographic background, and family relationships. Our goal for our firm and for clients is to create a work environment where the merits, unique attributes, perspectives, backgrounds, skills and abilities of each individual are valued. To this end, our EEO & Diversity Practice Group includes attorneys with extensive experience assisting clients with their own IE&D initiatives, providing legally compliant training, and ensuring employers remain compliant with the latest discrimination laws and regulations.

For more information on Littler's EEO & Diversity Practice Group, please contact either of the following Practice Group Co-Chairs:

- Barry Hartstein, Telephone: 312.795.3260, E-Mail: bhartstein@littler.com
- Alyesha Asghar, Telephone: 206.381.4949, E-Mail: aasghar@littler.com

Table of Contents

Table of Contents

Table of Contents

Table of Contents

ANNUAL REPORT ON EEOC DEVELOPMENTS: FISCAL YEAR 2024

An Annual Report on EEOC Charges, Litigation, Regulatory Developments and Noteworthy Case Developments

INTRODUCTION

This **Annual Report on EEOC Developments—Fiscal Year 2024** (hereafter "Report"), our fourteenth annual publication, is designed as a comprehensive guide to significant Equal Employment Opportunity Commission ("EEOC" or "the Commission") developments over the past fiscal year. The Report does not merely summarize case law and litigation statistics, but also analyzes the EEOC's successes, setbacks, changes, and strategies. By focusing on key developments and anticipated trends, the Report provides employers with a roadmap to where the EEOC is headed in the year to come.

This year's Report is organized into the following sections:

Part One: *Reflections on Inclusion, Equity and Diversity Initiatives, Including Recent Developments Based on the View of Such Initiatives by the Current Administration*, discusses employer inclusion, equity, and diversity (IE&D) programs, initiatives, and trainings in light of the recent administration and public backlash against such programs. This chapter provides an overview of recent case law and executive orders challenging IE&D measures.

Part Two outlines EEOC charge activity, litigation, and settlements in FY 2024, focusing on the types and location of lawsuits filed by the Commission. More details on noteworthy consent decrees, conciliation agreements, judgments and jury verdicts are summarized in Appendix A to this Report. A discussion of cases in which the EEOC filed an amicus or appellate brief can be found in Appendix B.

Part Three focuses on the current composition of the EEOC, its regulatory activities, and other agency priorities and initiatives.

Part Four summarizes the EEOC's investigations and subpoena enforcement actions, particularly where the EEOC has made broad-based requests to conduct class-type investigations in pursuit of its goal to combat systemic discrimination. Appendix C to this Report supplements this section in summarizing subpoena enforcement actions filed by the EEOC during FY 2024.

Part Five of the Report focuses on FY 2024 litigation in which the EEOC was a party. This discussion is broken down into numerous topic areas, including: (1) pleading deficiencies raised by employers and the EEOC; (2) statutes of limitations cases involving both pattern-or-practice and other types of claims; (3) intervention and consolidation of claims with private counsel representing charging parties; (4) class issues in EEOC litigation; (5) other critical issues in EEOC litigation, including protective orders, ESI and experts; (6) general discovery issues in litigation between the parties; (7) favorable and unfavorable summary judgment rulings, which also are summarized in greater detail in Appendix D; (8) default judgments against employers; (9) trial-related issues and those tied to remedies and settlements; and (10) circumstances in which courts have awarded attorneys' fees to prevailing parties.

Appendices A-D are useful resources that should be read in tandem with the Report. **Appendix A** includes summaries of significant EEOC consent decrees, conciliation agreements, judgments, and jury verdicts. **Appendix B** highlights appellate cases where the EEOC has filed an amicus or appellant brief and decided appellate cases in FY 2024. **Appendix C** includes information on select subpoena enforcement actions filed by the EEOC in FY 2024. **Appendix D** highlights notable summary judgment decisions by claim type.

We hope that this Report serves as a useful resource for employers in their EEO compliance activities and provides helpful guidance when faced with litigation involving the EEOC.

I. Reflections on Inclusion, Equity and Diversity Initiatives, Including Recent Developments Based on the View of Such Initiatives by the Current Administration

A. Introduction

During the spring and summer of 2020, following the killing of George Floyd, the "Black Lives Matter" movement and protest rallies around the country set in motion a heightened focus on inclusion, equity and diversity (IE&D) efforts by corporate America. This included some companies announcing hiring and percentage "targets" and "commitments to specific actions" involving minority hiring. Even so, this was soon followed by COVID, major budget cuts by corporate America and some retrenchment of IE&D efforts.[1]

Fast forward to June 29, 2023, when the U.S. Supreme Court issued its decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* and *Students for Fair Admissions, Inc. v. University of North Carolina (Harvard/UNC decision)*[2] and ruled that race-conscious admissions practices at Harvard and UNC were unconstitutional. Although the Court's ruling was limited to the finding that any direct consideration of a college applicant's race in achieving diversity in higher education was unlawful,[3] the *Harvard/UNC* decision set in motion a firestorm of controversy regarding the future of IE&D efforts in the United States, as many saw the principles underlying the case in the education setting to be directly applicable in the employment context.

This is best illustrated by the controversy that followed at the U.S. Equal Employment Opportunity Commission (EEOC) on the day the ruling was issued. On June 29, 2023, the date of the decision, then-EEOC Chair Charlotte Burrows (appointed by President Biden) issued a press release regarding the impact of the decision, stating:[4]

> Today's Supreme Court decision effectively turns away from decades of precedent and will undoubtedly hamper the efforts of some colleges and universities to ensure diverse student bodies. That's a problem for our economy because businesses often rely on colleges and universities to provide a diverse pipeline of talent for recruitment and hiring. Diversity helps companies attract top talent, sparks innovation, improves employee satisfaction, and enables companies to better serve their customers.
>
> However, the decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* and *Students for Fair Admissions, Inc. v. University of North Carolina* does not address employer efforts to foster diverse and inclusive workforces or to engage the talents of all qualified workers, regardless of their background. It remains lawful for employers to implement diversity, equity, inclusion, and accessibility programs that seek to ensure workers of all backgrounds are afforded equal opportunity in the workplace.

The above comments should be contrasted with published comments, also made public on the same day as the Supreme Court's decision, by Republican EEOC Commissioner Andrea Lucas, who remains on the Commission and recently was appointed acting chair by President Trump:[5]

> Even though the Court's ruling today does not alter federal employment law, now is a good time for employers to review their compliance with existing limitations on race- and sex-conscious diversity initiatives. Companies seriously err if they evaluate their risk under federal employment law by mistakenly referring to (now outdated) standards for higher education admissions which had approved of diversity-motivated affirmative action. And today's ruling only heightens those employers' practical risks by reemphasizing the Supreme Court's rejection of diversity, nebulous "equity" interests, or

1 *See* Geri Stengel, *Black Lives Matter Protests Moves Corporate D & I Initiatives Center Stage*, Forbes (June 17, 2020) at https://www.forbes.com/sites/geristengel/2020/06/17/black-lives-matter-protests-moves-corporate-di-initiatives-into-the-spotlight/?sh=78e7d3d7a0d0. *See also* Marin Wolf and Kim Bhasin, *Wells Fargo, Delta Join a Nascent Push into Racial Hiring Quotas*, Bloomberg Law (Sept. 1, 2020). As indicated in the Bloomberg article, the initial genesis actually was in the 60s and stemmed from "affirmative action" efforts by federal contractors to ensure equal employment opportunity.

2 608 U.S. 181, 143 S.CT. 2141 (2023).

3 *See* Jim Thelen *et al.*, *U.S. Supreme Court Strikes Down Race-Conscious Admissions – What Does it Mean for Employers?*, Littler Insight (June 30, 2023).

4 EEOC, Press Releasee, *Statement from EEOC Chair Charlotte A. Burrows on Supreme Court Ruling on College Affirmative Action Programs* (June 29, 2023).

5 On March 25, 2025, President Trump nominated Acting Chair Andrea Lucas to a new five-year term. *See* EEOC, Press Release, *President Trump Renominates Andrea R. Lucas to EEOC* (Mar. 25, 2025).

> societal discrimination as justifying actions motivated — even in part — by race, sex, or other protected characteristics. Companies continuing down this path after today may violate federal antidiscrimination laws.[6]

The *Harvard/UNC* decision also must be read in tandem with the U.S. Supreme Court's April 17, 2024, decision in *Muldrow v. City of St. Louis*,[7] which rejected the long-held view that an aggrieved individual needed to demonstrate some "substantial" or "serious" harm involving "terms, conditions or privileges of employment" to successfully state a claim under federal civil rights law. Rather, all that is required is to "show some harm respecting an identifiable term or condition of employment."[8] Even at the time of the *Harvard/UNC* decision, prior to *Muldrow,* EEOC Commissioner Lucas anticipated the potential impact of *Muldrow*, explaining:[9]

> A more expansive view could have serious implications for certain diversity programs. The EEOC and DOJ's existing position is that Title VII bars discrimination in all actions affecting "terms, conditions, or privileges of employment" — including actions falling short of hiring, firing, or promotion. This expansive reading of Title VII could implicate a host of increasingly popular race-conscious corporate initiatives: from providing race-restricted access to mentoring, sponsorship, or training programs; to selecting interviewees partially due to diverse candidate slate policies; to tying executive or employee compensation to the company achieving certain demographic targets; to offering race-restricted diversity internship programs or accelerated interview processes, sometimes paired with euphemistic diversity "scholarships" that effectively provide more compensation for "diverse" summer interns.

In keeping with this position, on March 19, 2025, the EEOC, in conjunction with the U.S. Department of Justice (DOJ), issued two "technical assistance" documents "focused on educating the public about unlawful discrimination related to 'diversity, equity, and inclusion' (DEI) in the workplace." Technical assistance documents, which do not adopt new policy but apply existing policy to different sets of facts, can be issued unilaterally by the agency's head.

The first document, "What To Do If You Experience Discrimination Related to DEI at Work,"[10] was issued jointly by the EEOC and the DOJ. A second, longer document, "What You Should Know About DEI-Related Discrimination at Work,"[11] is presented in a question-and-answer format and was released by the EEOC.

The Q&A document in particular stresses that Title VII does not provide any exception for DEI or "diversity interests" in prohibiting discrimination based on race, sex, or other protected category, and a general business interest in diversity or equity is insufficient to support any employment decision being made in whole or in part on the basis of a protected characteristic. Both documents set forth the procedures for an employee who claims to have experienced DEI-related discrimination to file a charge and seek an investigation. Additionally, both include examples of what the agencies view as potential actionable discrimination if they take into account an employee or applicant's race, sex, or other protected category, including:

- Hiring;
- Firing;
- Promotion;
- Demotion;
- Compensation;
- Fringe benefits;
- Access to or exclusion from training (including training characterized as leadership development programs);
- Access to mentoring, sponsorship, or workplace networking or networks;

---

6 *See* Andrea Lucas, *With Supreme Court affirmative action ruling, it's time for companies to take a hard look at their corporate diversity programs,* Reuters (June 29, 2023).

7 601 U.S. 346, 144 S.Ct. 267 (2024). *See also* Kurt Peterson *et al.*, *High Court Lowers the Bar on Title VII Claims: "Significant" Harm No Longer Required*, Littler ASAP (Apr. 18, 2024).

8 The *Muldrow* decision involved the transfer of a female police officer to a less-favorable position, and although she did not suffer any loss in pay or benefits, she was left "worse off respecting employment terms of conditions"—she reportedly was "moved out of a 'premier position [in] the Police Department into a less 'prestigious' and more 'administrative' uniformed role." She went from a traditional 5-day workweek with weekends off to a "rotating schedule" that often involved weekend shifts, aside from other less-favorable terms.

9 *See* With Supreme Court affirmative action ruling, it's time for companies to take a hard look at their corporate diversity programs, *supra* note 5.

10 EEOC, *What To Do If You Experience Discrimination Related to DEI at Work*.

11 EEOC, *What You Should Know About DEI-Related Discrimination at Work*.

- Internships (including internships labeled as "fellowships" or "summer associate" programs);
- Selection for interviews, including placement or exclusion from a candidate "slate" or pool; and
- Job duties or work assignments.

The documents note that federal civil rights law also prohibits employers from limiting, segregating, or classifying employees or applicants based on race, sex, or other protected characteristics in a way that affects their status or deprives them of employment opportunities, including employee activities that are employer-sponsored (for example, where such activities are provided company time, facilities, premises, or other forms of official or unofficial encouragement or participation), where participation in or resources for such activities are limited on the basis of a protected characteristic.

With specific respect to employee affinity groups (such as Employee Resource Groups (ERGs), Business Resource Groups (BRGs), or other employee affinity groups), the EEOC takes the position that it is "unlawful segregation" to limit such opportunities to certain protected groups, or to restrict membership in any ERG or BRG to only members of a protected class. The EEOC also notes that it is unlawful for employers to separate workers into groups based on race, sex, or another protected characteristic when administering IE&D or any trainings, workplace programming, or other privileges of employment (like ERGs and BRGs), even if the separate groups receive the same programming content or amount of employer resources.

Rather, the EEOC takes the position that employers instead should provide "training and mentoring that provides workers of all backgrounds the opportunity, skill, experience, and information necessary to perform well, and to ascend to upper-level jobs" and ensure that "employees *of all backgrounds . . .* have equal access to workplace networks" (emphasis in original).

Finally, with respect to IE&D training, the EEOC notes that an employee may be able to show that such training created a hostile work environment where training was discriminatory in content, application or context (for example, its design or execution) in a manner that a reasonable person would consider intimidating, hostile, or abusive.

These developments, coupled with the dramatic change in approach to diversity efforts by the Trump administration, have now put employers in a difficult situation where they have to evaluate the best course of action moving forward in addressing diversity initiatives, whether they are referred to "DEI" efforts, "IE&D" efforts, "DEIA" efforts, or some other nomenclature. Indeed, some employers may elect to put such efforts in a "pause" mode while they further evaluate what best serves the needs of their employees and the organization.[12]

B. Setting the Stage – The Legal Framework for Diversity Efforts

1. Title VII of the Civil Rights Act of 1964

The starting point for any analysis of diversity efforts is Title VII of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, religion, sex or national origin. Further, Section 703(j) prohibits preferential treatment based on an individual's protected status:

> (j) Preferential treatment not to be granted on account of existing number or percentage imbalance
>
> Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons

12 On March 13, 2025, the *New York Times* reported on a study of the S& P 500's annual reports for 2025 and found, "The number of companies that have mentioned 'diversity, equity and inclusion' in their annual reports had fallen by early 60 percent from 2024." *See* Emma Goldberg *et al., How Corporate America Is Retreating From D.E.I.*, N.Y. Times, Mar. 13, 2025.

> of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

The leading case underscoring that Title VII is to be interpreted uniformly is the U.S. Supreme Court's decision in *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 280 (1976), which involved a factual pattern in which an employer fired two white employees and retained one Black employee who committed the same misconduct as the white employees. Based on this differential treatment, the Supreme Court reaffirmed that the standards of Title VII apply regardless of whether the person belongs to a majority or a minority group.[13] The Court concluded that Title VII does not permit "the illogic in retaining guilty employees of one color while discharging those of another color." In the Court's view, Title VII "prohibits all racial discrimination in employment, without exception for any group of particular employees."

2. Affirmative Action and "Preferences" Historically Have Been Permitted Only in Limited Circumstances

The Trump administration recently eliminated the requirement for affirmative action plans relating to sex, race, and ethnicity, by repealing an executive order issued approximately 60 years ago mandating affirmative action by government contractors. In 1965, shortly after the passage of Title VII, President Johnson issued Executive Order 11246, which required all government contractor and subcontractors to take affirmative action to expand job opportunities for minorities. At the time, the federal government also established the Office of Federal Contract Compliance Programs (OFCCP) in the U.S. Department of Labor to administer the order.

Based on the executive order, which continued in effect until January 22, 2025, federal contractors and subcontractors with 50 or more employees who entered into a contract of $50,000 or more with the federal government were required to prepare and maintain a written affirmative action plan for each "establishment," which included setting up goals and timetables for each job group in which members of minority groups and women were underutilized in the applicable recruiting area.

Still remaining "on the books" are two significant U.S. Supreme Court decisions, which permit affirmative action and "preferences" in limited circumstances: (1) the 1979 decision in *United Steelworkers of America v. Weber*,[14] and (2) the 1987 decision *Johnson v. Transportation Agency, Santa Clara County*.[15]

In *United Steelworkers of America v. Weber*, the employer implemented an affirmative action–based training program, collectively bargained by it and a union, to increase the number of the company's Black skilled craft workers. Under the program, half of the eligible positions in the training program would be reserved for Black employees until the percentage of Black craft workers at the company mirrored the percentage of Black workers in the local labor force. Weber, who was white, was passed over for the program. Weber claimed that he was the victim of reverse discrimination.

In upholding the affirmative action plan, the Supreme Court in *Weber* held that based on Title VII's objective to remedy discrimination, the statute's ban on discrimination "cannot be interpreted as an absolute prohibition against all private, voluntary race-conscious affirmative action efforts to hasten the elimination of such vestiges." The Court relied, in relevant part, on Section 703(j) of Title VII and expressly held:

> Congress added § 703(j), which…provides that nothing contained in Title VII "shall be interpreted to require any employer . . . to grant preferential treatment . . . to any group because of the race . . . of such . . . group on account of" a de facto racial imbalance in the employer's workforce. The section does not state that "nothing in Title VII shall be interpreted to permit" voluntary affirmative efforts to

13 There exists a significant disagreement among courts about how to analyze "reverse discrimination" claims, and this issue is currently pending before the U.S. Supreme Court in *Ames v. Ohio Department of Youth Services,* 87 F. 4TH 822 (6TH Cir. 2023) *cert. granted* (Case No. 23-1039), in which the U.S. Supreme Court granted certiorari on October 4, 2024 to review the Sixth Circuit decision holding that a high standard applied to reverse discrimination cases. *See* Alyesha Asghar and Julian G.G. Wolfson, *High Court to Review Standard Applied to "Reverse Discrimination" Cases*, Littler ASAP (Oct. 28, 2024). The U.S. Supreme Court will decide whether plaintiffs who are members of historically majority communities asserting "reverse discrimination" claims under Title VII must show there are "background circumstances" that support the inference that the defendant is the "unusual employer who discriminates against the majority." If the Supreme Court eliminates the background circumstances requirement, it will be easier for plaintiffs from historically majority communities to pursue reverse discrimination claims. Thus, if the arguments put forth by Ames prevail, employers are likely to see an uptick in the number of such claims.

14 443 U.S.193 (1979). In 1979, the EEOC also issued regulations regarding affirmative action. *See Affirmative Action Appropriate Under Title VII of the Civil Rights Act of 1964, as amended*, 44 Fed. Reg. 4422 (Jan. 19, 1979) (codified at 29 CFR 1608.1).

15 480 U.S. 616 (1987).

> correct racial imbalances. The natural inference is that Congress chose not to forbid all voluntary race-conscious affirmative action.

Even so, the Court was very clear in limiting the scope of voluntary, race-conscious affirmative action plans, only permitting such affirmative action when:

> (1) preferences are intended to "eliminate conspicuous racial imbalances in traditionally segregated job categories;"
>
> (2) the rights of nonminority employees are "not unnecessarily trammeled"- meaning the plan neither requires the termination of such employees and their replacement with minority employees, nor creates an absolute bar to advancement; and
>
> (3) preferences are temporary in their duration.

Johnson v. Transportation Agency, Santa Clara County extended the same principles in a case involving gender-based preferences. In *Johnson*, pursuant to the terms of an affirmative action plan, the company promoted a female employee to a road dispatcher job over the plaintiff, Paul Johnson. Both candidates were qualified for the job, but as an affirmative action employer, the Agency took into account the sex of the applicants in making the decision. In looking at the criteria applied in *Weber,* the Court concluded that the plan did not violate Title VII because women were underrepresented in certain skilled categories, the company did not set any quotas or specifically set aside any positions for women, and the plan was temporary.

The Court in *Johnson* underscored that employment decisions may not be justified solely by reference to an imbalance in its workforce in job categories segregated by race and sex. Further, in *Johnson*, the Court took into account that:

> In this case, ...substantial evidence shows that the Agency has sought to take a moderate, gradual approach to eliminating the imbalance in its workforce, one which establishes realistic guidance for employment decisions, and which visits minimal intrusion on the legitimate expectations of other employees. Given this fact, as well as the Agency's express commitment to "attain" a balanced workforce, there is ample assurance that the Agency does not seek to use its Plan to maintain a permanent racial and sexual balance.

The Supreme Court has not considered any Title VII case involving any type of "preferences" or "affirmative action" efforts since the *Weber* and *Johnson* decisions, which truly focused on an assessment/determination that there were racial or sexual imbalances in certain "traditionally segregated job categories," and the actions taken were viewed solely as remedial, limited in time and in circumstances where they did not "unnecessarily trammel" on the rights of other employees. It remains open to question whether the U.S. Supreme Court will revisit and reevaluate this issue in line with the *Harvard/UNC* decision.

As importantly, the U.S. Supreme Court has not yet addressed whether a private sector employer can engage in affirmative action for a non-remedial purpose, that is, show any type of "preference" based solely on its desire to achieve or maintain diversity in the workplace. However, in view of the *Harvard/UNC* decision, it would not be surprising for the U.S. Supreme Court to reject voluntary diversity efforts by private sector employers.

3. Limits on Diversity Efforts Based on Non-Remedial Purposes

Even prior to the recent initiatives and pronouncements by the current administration, courts already have rejected "preferences" that are made for the sake of "diversity." This is best illustrated by a 1997 Third Circuit ruling in *Taxman v. Board of Education,*[16] in which a federal appeals court held that an affirmative action plan aimed solely at promoting diversity, rather than remedying past discrimination, was unlawful under Title VII. The *Taxman* case was settled after the U.S. Supreme Court granted certiorari, but before the U.S. Supreme Court addressed the issue.

In *Taxman,* the Board of Education for the school district developed an Affirmative Action Program applicable to employment decisions, which initially was adopted in response to a regulation adopted by the New Jersey Board of Education. The purpose of the Program was "to make a concentrated effort to attract...minority personnel for

16 91 F. 3d 1547 (3d Cir. 1996), *cert. granted*, 521 U.S. 1117.

all positions so that their qualifications can be evaluated along with other candidates." A key hiring guideline of the Program specified, "In all cases, the most qualified candidate will be recommended for appointment. However, when candidate appear to be of equal qualification, candidates meeting the criteria of the affirmative action program will be recommended."

The dispute stemmed from a required layoff by the school district. At the time, two teachers in the Business Department, Sharon Waxman (white) and Debra Williams (Black), were of equal seniority and had begun their employment on the same day nine years earlier. Based on review of the situation, particularly the fact that Ms. Williams was the only Black employee in the Business Education Department, she was retained, and Ms. Taxman's employment was terminated. Contributing to the decision was that view that the student body was culturally diverse, and the Board was of the view that the staff also should be culturally diverse. The lawsuit followed.

In finding that the school district violated Title VII, the Third Circuit's 1996 ruling relied heavily on both Weber and Johnson, finding that actions taken as remedial efforts must be distinguished from non-remedial action, explaining:

> ...it is beyond cavil that the Board, by involving its affirmative action policy to lay off Sharon Taxman, violated the terms of Title VII. While the Court in *Weber* and *Johnson* permitted some deviation from the antidiscrimination mandate of the statute in order to erase the effects of past discrimination, these rulings do not open the door to additional non-remedial deviations.[17]

While nearly 30 years have passed since the *Taxman* decision, employers received a "wake up call" based on a $10 million jury verdict ruling in October 2021 in *Duvall v. Novant Health*, *Inc*,. involving a "reverse discrimination" claim filed in federal district court in North Carolina. The legal claim was based on the alleged displacement of a white senior-level executive as part of its employer's efforts to increase diversity within the upper echelons of the employer's leadership ranks. The plaintiff's evidence at trial focused on the employer's diversity "targets," its use of metrics to measure its progress towards meeting those targets, an array of terminations of white male senior leaders within the relevant time period, and the replacements of those employees with underrepresented minorities and females in the same general time frame.[18]

On appeal, the Fourth Circuit upheld the jury finding of liability (and merely rejected the punitive damages award) and determined that there was "sufficient evidence (direct or circumstantial) for a reasonable jury to have found that is race and/or sex played a motivating role in [the employer's] decision to fire him," explaining:[19]

> To begin, Duvall presented evidence about the context surrounding his termination. The jury heard that Duvall was fired in the middle of a widescale D&I initiative at Novant Health, which sought to "embed diversity and inclusion throughout" the company, and to ensure that its overall workforce, including its leadership, "reflect[ed] the communities [it] serve[d]." There was evidence presented that Novant Health endeavored to accomplish this goal by, among other things, benchmarking its then-current D&I levels and developing and employing D&I metrics; committing to "adding additional dimensions of diversity to the executive and senior leadership teams" and incorporating "a system wide decision making process that includes a diversity and inclusion lens," and evaluating the success of its efforts and identifying and closing any remaining diversity gaps.[20]

Thus, aside from the legal concerns based on a potential "reverse discrimination" claim, the unfavorable jury verdict in *Duvall*, upheld by the Fourth Circuit, demonstrates the serious risks posed by non-remedial diversity efforts that adversely affect non-minority employees.

17 *Id.* at 1558.

18 *See* Civil Action No. 3:19-cv-00624 (W.D.N.C. Oct. 26, 2021); *see also* Cindy-Ann Thomas and Brandon R. Mita, *$10 Million "Reverse" Race & Gender Discrimination Verdict Gives DE&I Programs a Halloween Fright*, Littler ASAP (Oct. 29, 2021).

19 *See Duvall v. Novant Health, Inc*., 95 F. 4th 778 (4th Cir. Mar. 12, 2024).

20 *Id.* at 788-789

The ruling in *Duvall* clearly is consistent with other prior court decisions which have rejected preferential treatment given to minority or female employees.[21]

4. Review of Permissible Conduct

a. Outreach to Expand Pool of Qualified Applicants

A review of applicable decisions demonstrates that merely engaging in minority outreach efforts generally has been considered to be completely within the bounds of applicable law (although in a recent memorandum addressing IE&D in the federal government, the Office of Personnel Management (essentially, the federal government's Human Resources Department) indicated that mandatory requirements for diverse hiring pools or candidate slates are in its view unlawful):

- As an example, in *Mlynczak v. Bodman*,[22] white men employed by the Department of Energy claimed that the Agency's Affirmative Action and Diversity Plans and Accomplishment Reports reflected a "sub-culture" of reverse discrimination because the plan focused on "ensuring diversity in the applicant pool for positions at the agency." The court rejected the plaintiffs' reliance on the plan to support their reverse discrimination claims in part because "policies here were of the type that expand the pool of persons under consideration, which is permitted, as long as it is not followed by an explicit policy of preferring the minority candidates in the group."
- Similarly, in *Duffy v. Wolle*,[23] the Eighth Circuit rejected a reverse discrimination claim that stemmed from an "aggressive effort…to recruit minorities and females as candidates." The appeals court underscored, "An employer's affirmative efforts to recruit minority female applicants does not constitute discrimination."[24] The appeals court went on, explaining, "An inclusive recruitment effort enables employers to generate the largest pool of qualified applicants, helps to ensure that minorities, women are not discriminatorily excluded from employment…This not only allows employers to obtain the best possible employees, but it "is an excellent way to avoid lawsuits." The only harm to white men is that they must compete against a larger pool of qualified applicants, which the court viewed as "is not an appropriate objection," and did not state a cognizable harm."

b. Diversity Training

On the other hand, diversity training has been in the "cross hairs," particularly based on the view of the current administration coupled with legislative efforts at the state level.[25] Notwithstanding, recent court decisions have shown that such training can withstand legal challenge so long as care is taken in implementing such training:

Three recent decisions rejected attacks on diversity training:

- *Vavra v. Honeywell Int'l, Inc*.[26] involved a claim by a white employee that he was retaliated against in violation of Title VII and the Illinois Human Rights Act (IHRA) after refusing to attend his employer's mandatory diversity, equity and inclusion training, which he believed discriminated against white workers. In November 2020, the company's CEO circulated an email to all employees entitled "Continue to Fight for Social Justice," which referred to "unconscious bias within us." Nine months later in August 2021, the

21 *See, e.g.*, *Barnes v. Federal Express Corp*., No. 1:95CV333, 1997 WL 271709 (N.D. Miss. May 15, 1997) (A white male plaintiff proved a *prima facie* case of reverse race discrimination where plaintiff's allegations were based on his employer's supposed desire, and its use of affirmative action plan, to hire more minority candidates, and he alleged that his termination was directly attributable to this desire. The court noted that the plaintiff had provided proof that his superiors were "catching hell" for not hiring minority employees, and that one of his supervisors had received a $2,000 bonus for meeting minority hiring goals after terminating the plaintiff and replacing him with a Black employee.). *See also White v. Alcoa*, No. 3:04-CV-78, 2006 WL 769753, at *3 (S.D. Ind. Mar. 27, 2006) (The plaintiff alleged that the employer's human resources department ignored rankings generated by interviewers and selected a lower-ranked female job candidate over the plaintiff. The employer asserted that there were legitimate, non-discriminatory reasons for not hiring the plaintiff, that there was no evidence of pretext, and that the plaintiff would not have been hired "but for" the alleged discrimination. The court disagreed, explaining that because the employer's human resources department completely ignored the interviewers' rankings when making their hiring decision, they were not entitled to rely on those same rankings in putting forth their defense to discrimination charges. The U.S. District Court for the Southern District of Indiana denied the employer's motion for summary judgment.).

22 442 F. 3d 1050, 1058 (7th Cir. 2006).

23 123 F.3d 1026, 1038-39 (8th Cir. 1997).

24 *Id.* at 1038-1039.

25 *See, e.g.*, Julian G.G. Wolfson *et al.*, *A Look at the Proliferation of New Legislation Addressing IE&D Across the Country*, Littler Insight (Apr. 25, 2024), which indicates that most legislative developments have focused on restricting diversity training at public employers. In Florida, legislation which was directed at private sector employers was permanently enjoined on July 26, 2024. *See* Kelly M. Peña *et al.*, *Escaping the "Upside Down" – Halting Florida's Stop WOKE Act*, Littler ASAP (Aug. 6, 2024).

26 106 F. 4th 702 (7th Cir. 2024).

company's DEI office rolled out an Unconscious Bias Awareness initiative in August 2021. The initiative included mandatory, online unconscious bias training, which all company employees needed to complete by February 25, 2021. The announcement email contained a link to the training. The plaintiff never clicked on the training, ignoring reminders even after the deadline passed. Instead, he sent an email claiming that the CEO was "making his non-white colleague all victims and turning his white colleagues…into villains," and asserted that neither the CEO "nor anybody else get to tell me I have unconscious bias. Numerous managers reached out to him encouraging him to take the training, emphasizing that the failure to do so would constitute insubordination. Following repeated warnings, including notice that his employment would be terminated if he failed to take the training. The plaintiff confirmed that he would not take the training and was terminated.

The Seventh Circuit affirmed the summary judgment ruling in favor of the employer, finding the employee had no basis for his belief that the training violated Title VII or the IHRA. The Seventh Circuit underscored:

"[W]e hold that an employee must have some knowledge of the conduct he is opposing for his belief to be objectively reasonable. Here, that means Vavra must have held an objectively reasonable belief that the training violated the law based on his knowledge of its contents. But Vavra had no such knowledge because he never accessed the training or otherwise discovered what it entailed, so his belief that it violated Title VII or the IHRA could not have been objectively reasonable. Vavra assumed, based on [the CEO's] email, that the training would vilify white people and treat people differently based on their race. But that presumption is purely speculative and insufficient to make his belief objectively reasonable, especially because there is no indication [that the CEO] had any involvement in creating or selecting the training's contents."[27]

- Similarly, in *Young v. Colorado Department of Corrections*,[28] the plaintiff alleged his employer, the Colorado Department of Corrections, implemented mandatory Equity, Diversity and Inclusion training that subjected him to a hostile work environment, and the employee resigned because of the training and sued, alleging that the training program created a hostile work environment "by promoting race-based policies" and alleged that the training "demeaned him because of his race" and promote divisive racial and political theories that would harm with his interactions with others at the correctional institution.

  The Tenth Circuit held that "the training materials and any resulting department policies must be so severe or pervasive as to both objectively and subjectively alter the terms of employment for its employees and create an abusive working environment." The court rejected his claim and held that the training did not constitute severe or pervasive harassment because *it only occurred once* during plaintiff's employment, but noted that the program included modules on topics such as [w]hite [f]ragility" and '[w]hite exceptionalism," included "troubling" subject matter and cautioned that "race-based training programs can create hostile workplaces when official policy is combined with ongoing stereotyping and explicit or implicit expectations of discriminatory treatment."[29]

- One of the most recent decisions involving review of diversity training, *Diemert v. City of Seattle*,[30] issued on February 10, 2025, by in the Western District of Washington, provides one of the most comprehensive discussions regarding the legal challenges to such training, and for that reason, an excerpt from the decision is included at the end of this chapter.

At least one case that permitted a hostile work environment claim to proceed based on diversity training and related activities that were objected to by the employee is worth careful review:

- In *De Piero v. Pennsylvania State University*,[31] the plaintiff, a former professor at the university, alleged in relevant part that there were a series of university sanctioned-professional development meetings and comments from supervisors that addressed racial issues in "sweeping, absolute terms." Following the

27 In an amicus brief filed by the EEOC on February 6, 2024 "in support of neither party," the EEOC asserted that "[a]nti discrimination training, including unconscious bias trainings, are not *per se* discriminatory" and instead "may serve as vital measures to prevent or remediate discrimination." *See* Brief for the EEOC as Amicus Curiae, *Vavra v. Honeywell International, Inc*., No. 23-2823 (7th Cir.) filed Feb. 6, 2024.

28 94 F. 4th 1242 (10th Cir. 2024).

29 The *Young* case provides helpful guidelines regarding the concerns that need to be addressed in any diversity training.

30 *See Diemert v. City of Seattle*, Case No. 2:22-cv0-16640 (W.D. Wash, Complaint filed Nov. 16, 2022), (motion to dismiss denied, Docket 28, Aug. 28, 2023); (summary judgment granted, Docket 91, Feb. 10, 2025).

31 *Zack K De Piero v. Pennsylvania State University et al*, Civil Case No. 2:23-cv-02281 (E.D. Pa. Complaint filed: June 14, 2023; Amended Complaint, July 18. 2023), Memorandum Opinion permitting hostile environment claims to proceed (Docket 31, Filed January 11, 2024). The lawsuit remains pending.

murder of George Floyd in May 2020 and the mass protests that followed, senior officials at the university called all faculty and staff to join a "Conversation on Racial Climate," which led him to feel discomfort during a discussion about the scope of systemic racism. Thereafter, additional training was conducted on anti-racism, which he was requested to attend, and race-focused training continued on "white privilege" and related issues. The ongoing concerns over the continued mandatory training led him to resign and file suit on numerous grounds, including claims of "hostile work environment" racial harassment.

In rejecting the university's motion to dismiss the hostile environment claims, the court looked to applicable law underscoring, "there is a distinction to be made between 'severe' and 'pervasive' harassment." After discussing certain hostile environment claims that were rejected by the courts, as cited by the university,[32] the district court concluded, "De Piero's allegations are more specific: he was obligated to attend conferences or trainings that discussed racial issues in essentialist and deterministic terms—ascribing negative traits to white people or white teachers without exception and as flowing inevitably from their race… His Amended Complaint contains at least some discussion of the content of each such meeting," referring to an event in in June 2020, in the aftermath of the murder of George Floyd, when a university official "expressed her intention to cause Penn State's white faculty to 'feel the pain' that [he] endured." In a "breathing exercise," the University official "told 'White and non-Black people of color to hold [their breath] just a little longer—to feel the pain.'" The complaint also states that his supervisor co-led a professional development meeting on multiculturalism that included "supposed examples of 'racist' comments" where every hypothetical perpetrator was white. In another instance, De Piero "alleges the facilitator 'condemn[ed] white people for no other reason than they spoke or were simply present while being 'white,'" including by "condemn[ing] . . . 'white elites' and 'white self-interest'" to name a few examples referred to by the court. According to the district court judge, *"Taken together, these allegations plausibly amount to "pervasive" harassment that, at least on a motion to dismiss, passes muster."*

- It is worth noting that in *Diemert v. City of Seattle*,[33] the district court initially denied a motion to dismiss a hostile environment claims in which the white plaintiff alleged that that he had to attend anti-racism trainings that segregated employees based on race and declared "that all white people have white privilege and are racist," that "white people are like the devil" and that "racism is in white people's DNA." The district court permitted the case to proceed based on the broad scope of the allegations in the complaint, but ultimately granted summary judgment as referenced in the prior section discussing favorable rulings on diversity training programs.

C. Changes in Diversity Efforts in the New Administration

Since the first week of the new administration, we have witnessed the most dramatic series of developments involving affirmative action and diversity initiatives in the past 50 years.

1. Rescission of Numerous Executive Orders

First, President Trump repealed some of the more noteworthy executive orders implicating inclusion, equity and diversity programs and policies. As shown below, certainly one of the most significant decisions by President Trump was the decision to repeal Executive Order 11246, as it relates to government contractors. While federal contractors will no longer have to maintain affirmative action programs for women and minorities, the obligation to maintain such programs for veterans and the disabled, including the preparation of annual plans, remains in place.

The following is a summary of the EEO and affirmative action-related executive orders that have been repealed:[34]

32 The district court stated, "Penn State points to a few out-of-circuit district court cases that reject hostile work environment claims brought by white plaintiffs relating to anti-racism trainings like the ones De Piero attended. *Young v. Colo. Dep't of Corr.*, 2023 WL 1437894 (D. Colo. Feb. 1, 2023); *Shannon v. Cherry Creek Sch. Dist.*, 2022 WL 4364151 (D. Colo. Sept. 21, 2022); *Vitt v. City of Cincinnati*, 250 F. Supp.2d 885 (S.D. Ohio 2002), aff'd, 97 F. App'x 634 (6th Cir. 2004) …. Two of these cases were resolved after discovery on motions for summary judgment, so their analysis is not particularly relevant to resolving a case at this early stage in litigation. *Shannon*, 2022 WL 4364151 at *1; *Vitt*, 250 F. Supp.2d at 888. And the third is distinguishable. In *Young*, the plaintiff alleged that facilitators of a series of mandatory trainings "made sweeping negative generalizations regarding individuals who are white" and encouraged him to review additional reading materials that "contain[ed] outright support for forms of invidious race discrimination masquerading as 'anti-racist' literature." 2023 WL 1437894, at *1-2. The district court dismissed the hostile work environment claim because the plaintiff had failed to "actually allege any specific facts describing the nature, contents, or frequency of the mandatory training" or identify which additional reading materials he reviewed. *Id.* at *7."

33 2023 WL 5530009, at *1-4 (W.D. Wash. Aug. 28, 2023).

34 *See* Alyesha Asghar and Julian G.G. Wolfson, *President Trump Relies on Executive Orders to Promote Anti-IE&D Policies*, Littler ASAP (Jan. 25, 2025).

Executive Order Repealed	Summary	Proffered Reason for Repeal
Executive Order 11246 (September 24, 1965)	Required federal contractors to implement and maintain affirmative action programs for women and minorities.	Illegal IE&D policies violate federal civil rights laws, undermine national unity, and shut out individuals from pursuing opportunities. To improve the speed and efficiency of federal acquisition, contracting, grants, and financial assistance procedures, and to comply with civil rights laws.
Executive Order 13672 (July 21, 2014)	Amended executive order 11246 to require that government contractors take affirmative action to ensure that applicants are employed and treated without regard to their sexual orientation or gender identity during their employment.	Illegal IE&D policies violate federal civil rights laws, undermine national unity, and shut out individuals from pursuing opportunities. To improve the speed and efficiency of federal acquisition, contracting, grants, and financial assistance procedures, and to comply with civil rights laws.
Executive Order 14035 (June 25, 2021)	Directed the Office of Management and Budget to: (a) coordinate a government-wide initiative to promote diversity and inclusion in the federal workforce; and (b) develop and issue a government-wide IE&D Strategic Plan. Among other things, the Strategic Plan would define standards of success for IE&D efforts based on leading policies and practices in the public and private sectors as well as identify strategies to advance IE&D, and eliminate, where applicable, barriers to equity in federal workforce functions, including in recruitment; hiring; promotion; retention; performance evaluations and awards; professional development programs; and mentoring programs or sponsorship initiatives.	To ensure that the country is united, fair, safe, and prosperous, and to ensure that IE&D does not replace hard work, merit, and equality.
Executive Order 13583 (August 18, 2011)	Directed the federal government's executive departments and agencies to develop and implement a more comprehensive, integrated, and strategic focus on diversity and inclusion as a key component of their human resources strategies, including by developing a government-wide strategic plan focusing on workforce diversity, workplace inclusion, and agency accountability and leadership.	Illegal IE&D policies violate federal civil rights laws, undermine national unity, and shut out individuals from pursuing opportunities.

2. New Executive Orders Issued by President Trump

Since January 20, 2025, President Trump also has issued numerous executive orders that set the stage regarding the manner in which the current administrations will approach IE& D programs. Based on the express terms of the newly issued executive orders it is clear that IE&D initiatives will be closely scrutinized.

This was made abundantly clear on January 20, 2025, when President Trump announced that Commissioner Andrea Lucas was being appointed acting chair of the EEOC. In her first public announcement as acting chair, she declared that she would vigorously support President Trump's initiatives in this area as indicated by her opening comments posted on the EEOC's website:[35]

> In recent years, this agency has remained silent in the face of multiple forms of widespread, overt discrimination. Consistent with the President's Executive Orders and priorities, my priorities will include rooting out unlawful DEI-motivated race and sex discrimination; protecting American workers from anti-American national origin discrimination; defending the biological and binary reality of sex and related rights, including women's rights to single-sex spaces at work; protecting workers

35 *See* EEOC, Press Release, *President Appoints Andrea R. Lucas EEOC Acting Chair* (Jan. 21, 2025).

from religious bias and harassment, including antisemitism; and remedying other areas of recent under-enforcement.

Immediately after her appointment, Acting Chair Lucas set the stage for areas of focus by the agency by releasing a statement referred to as *The State of the EEOC: Frequently asked Questions*,[36] which included her opening statement: "On January 20, 21, and 29, 2025, President Trump issued a series of executive orders restoring even-handed civil rights enforcement and directing the federal government, including the EEOC, to combat serious patterns of discrimination and harassment that have gone unchecked for too long."

Each of these executive orders referred to by EEOC Acting Chair Lucas is summarized below, highlighting key provisions that need to be taken into account by the employer community. As shown below, the potential impact of these executive orders extends beyond the jurisdiction of the EEOC, as shown by reference to certain obligations by federal contractors as well as potential risks of legal action by the U.S. Department of Justice for potential False Claims Act violations based on "material" misrepresentations tied to EEO compliance by federal contractors.

The following executive orders, as cited by EEOC Acting Chair Lucas, require careful review:

Executive Order	Notable Provisions
Initial Recissions of Harmful Executive Orders and Actions (January 20, 2025) Executive Order 14148	The "Purpose and Policy" section of this Executive Order expressly provides, "The previous administration has embedded deeply unpopular, inflationary, illegal, and radical practices within every agency and office of the Federal Government. The injection of 'diversity, equity, and inclusion' (DEI) into our institutions has corrupted them by replacing hard work, merit, and equality with a divisive and dangerous preferential hierarchy…The revocations within this order will be the first of many the United States Federal Government will take to repair our institutions and our economy." Among many executive actions repealed was Executive Order 14035, issued during the Biden administration, which directed the Office of Management and Budget to coordinate a government-wide initiative to promote diversity and inclusion in the federal workforce; and develop and issue a government-wide IE&D Strategic Plan.
Ending Radical and Wasteful Government DEI Programs and Preferencing (January 20, 2025) Executive Order 14151	The "Purpose and Policy" section of EO 14151 states, "The Biden Administration forced illegal and immoral discrimination programs, going by the name ''diversity, equity, and inclusion'' (DEI), into virtually all aspects of the Federal Government, in areas ranging from airline safety to the military. This was a concerted effort stemming from President Biden's first day in office, when he issued Executive Order 13985, ''Advancing Racial Equity and Support for Underserved Communities Through the Federal Government," resulted in "nearly every Federal agency and entity submitted ''Equity Action Plans'' to detail the ways that they have furthered DEIs infiltration of the Federal Government. The public release of these plans demonstrated immense public waste and shameful discrimination. That ends today." This Executive Order calls for the termination of all DEI programs or policies in the federal government, and for the review and revision of all existing federal employment practices, union contracts, and training policies or programs. The executive order further requires that within 60 days, all federal DEI offices and positions, initiatives, programs, and performance requirements for employees, contractors, or grantees, be terminated. In an apparent response to this order, the Office of Personnel Management issued a memorandum ordering all federal employees in DEI roles to be placed on paid leave by the evening of Wednesday, January 22, 2025.[37] The memorandum also requires offices focusing on DEI to send "an agency-wide notice to employees […] asking employees if they know of any efforts to disguise these programs by using coded or imprecise language […]." As stated in the memo, the "failure to report this information within 10 days may result in adverse consequences."

36 *See* EEOC, *The State of the EEOC: Frequently Asked Questions*.
37 *See* OMB, *Memorandum to the Heads and Acting Heads of Departments and Agencies, Initial Guidance Regarding DEIA Executive Orders* (Jan. 21, 2025).

Executive Order	Notable Provisions
Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government (January 30, 2025) Executive Order 14168	The "Purpose" of this Executive Order is described as follows: "Across the country, ideologues who deny the biological reality of sex have increasingly used legal and other socially coercive means to permit men to self-identify as women and gain access to intimate single-sex spaces and activities designed for women, from women's domestic abuse shelters to women's workplace showers. This is wrong. Efforts to eradicate the biological reality of sex fundamentally attack women by depriving them of their dignity, safety, and well-being. The erasure of sex in language and policy has a corrosive impact not just on women but on the validity of the entire American system. Basing Federal policy on truth is critical to scientific inquiry, public safety, morale, and trust in government itself." "Accordingly, my Administration will defend women's rights and protect freedom of conscience by using clear and accurate language and policies that recognize women are biologically female, and men are biologically male." This executive order focuses on two sexes—male and female and rejects the prior administration's interpretation of the U.S. Supreme Court's decision in B*ostock v. Clayton County* (2010), explaining, "The prior Administration argued that the Supreme Court's decision in *Bostock* v. *Clayton County* (2020), which addressed Title VII of the Civil Rights Act of 1964, requires gender identity-based access to single-sex spaces under, for example, Title IX of the Educational Amendments Act. This position is legally untenable and has harmed women. The Attorney General shall therefore immediately issue guidance to agencies to correct the misapplication of the Supreme Court's decision in *Bostock v. Clayton County* (2020) to sex-based distinctions in agency activities. In addition, the Attorney General shall issue guidance and assist agencies in protecting sex-based distinctions, which are explicitly permitted under Constitutional and statutory precedent." The executive order rejects the concept of "gender ideology," which "replaces the biological category of sex with an ever-shifting concept of self-assessed gender identity, permitting the false claim that males can identify as and thus become women and vice versa, and requiring all institutions of society to regard this false claim as true." The executive order further addresses "gender identify" and states that it "does not provide a meaningful basis for identification and cannot be recognized as a replacement for sex." Based on this executive order, the EEOC acting chair issued a press release on January 28, 2025, announcing that "the agency is returning to its mission of protecting women from sexual harassment and sex-based discrimination in the workplace by rolling back the Biden administration's gender identity agenda."[38] The press release further stated that Acting Chair Lucas had taken the following actions: • Announced that one of her priorities—for compliance, investigations, and litigation—is to defend the biological and binary reality of sex and related rights, including women's rights to single-sex spaces at work. • Removed the agency's "pronoun app," a feature in employees' Microsoft 365 profiles, which allowed an employee to opt to identify pronouns, content which then appeared alongside the employee's display name across all Microsoft 365 platforms, including Outlook and Teams. This content was displayed both to internal and external parties with whom EEOC employees communicated. • Ended the use of the "X" gender marker during the intake process for filing a charge of discrimination. • Directed the modification of the charge of discrimination and related forms to remove "Mx." from the list of prefix options. • Commenced review of the content of EEOC's "Know Your Rights" poster, which all covered employers are required by law to post in their workplaces. • Removed materials promoting gender ideology on the Commission's internal and external websites and documents, including webpages, statements, social media platforms, forms, trainings, and others. The agency's review and removal of such materials remains ongoing. Where a publicly accessible item cannot be immediately removed or revised, a banner has been added to explain why the item has not yet been brought into compliance.

38 *See* EEOC, Press Release, *Removing Gender Ideology and Restoring the EEOC's Role of Protecting Women in the Workplace* (Jan. 28, 2025).

Executive Order	Notable Provisions
Ending Illegal Discrimination and Restoring Merit-Based Opportunity (January 21, 2025) Executive Order 14173 (emphasis supplied)	In the opening section describing the "Purpose" of this Executive Order, reference is made to the federal civil-rights protections serving as "a bedrock supporting equality of opportunity," but cautions, "Yet today, roughly 60 years after the passage of the Civil Rights Act of 1964, critical and influential institutions of American society, including *the Federal Government, major corporations, financial institutions, the medical industry, large commercial airlines, law enforcement agencies, and institutions of higher education have adopted and actively use dangerous, demeaning, and immoral race- and sex-based preferences under the guise of* so-called 'diversity, equity, and inclusion' (DEI) or 'diversity, equity, inclusion, and accessibility' (DEIA) that can violate the civil-rights laws of this Nation." Section 2 directs "all executive department and agencies (agencies) to terminate all discriminatory and illegal preferences, mandates, policies, programs, activities, guidance regulations enforcement actions, consent orders, and requirements" and orders " all agencies to enforce our longstanding civil rights laws and to combat illegal private-sector DEI preferences, mandates, policies, programs, and activities." Section 3 contains two critical sections: First, the Executive Order expressly addresses EO 11246 stating that it is revoked, but for 90 days from the date of the order, federal contractors may continue to comply with the regulatory scheme in effect on January 20, 2025. However, the executive order states that OFCCP shall "immediately cease" promoting "diversity" or holding federal contractors responsible for taking "affirmative action." As significantly, OFCCP shall immediately cease "allowing or encouraging Federal contractors and subcontractors to engage in workforce balancing based on race, color, sex, sexual preference, religion, or national origin." Second, the executive order expressly provides that each agency shall include in every contract or grant award: (A) A term requiring the contractual counterparty or grant recipient to agree that its compliance in all respects with all Federal anti-discrimination laws is material to the government's payment decisions for purposes of section 3729(b)(b) of tile 31, United States Code [*i.e. False Claims Act violation];*[39] and (B) A term requiring such counterparty or recipient to certify that it does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws. Section 4, referred to as "*Encouraging the Private Sector to End Illegal DEI Discrimination and Preferences,* directs "(t)he heads of all agencies, with the assistance of the Attorney General," to "take all appropriate action with respect to the operation of their agencies to advance in the private sector the policy of individual initiative, excellence, and hard work," as identified in the executive order. The executive order further mandates the following plan of action:[40] (b) To further inform and advise me so that my Administration may formulate appropriate and effective civil-rights policy, the Attorney General, *within 120 days of this order,* in consultation with the heads of relevant agencies and in coordination with *the Director of OMB, shall submit a report to the Assistant to the President for Domestic Policy containing recommendations for enforcing Federal civil-rights laws and taking other appropriate measures to encourage the private sector to end illegal discrimination and preferences*, including DEI. The report shall contain a proposed strategic enforcement plan identifying: (i) Key sectors of concern within each agency's jurisdiction; (ii) The most egregious and discriminatory DEI practitioners in each sector of concern; (iii) A plan of specific steps or measures to deter DEI programs or principles (whether specifically denominated "DEI" or otherwise) that constitute illegal discrimination or preferences. As a part of this plan, each agency shall identify up to nine potential civil compliance investigations of publicly traded corporations, large non-profit corporations or associations, foundations with assets of 500 million dollars or more, State and local bar and medical associations, and institutions of higher education with endowments over 1 billion dollars; (iv) Other strategies to encourage the private sector to end illegal DEI discrimination and preferences and comply with all Federal civil-rights laws; (v) Litigation that would be potentially appropriate for Federal lawsuits, intervention, or statements of interest; and (vi) Potential regulatory action and sub-regulatory guidance.

39 Section 3729(b)(4) of Title 31 of the United States Code is part of the False Claims Act which makes it illegal to defraud the U.S. government by presenting false claims, which includes: (1) knowingly presenting a false claim for payment or approval; (2) knowingly making or using a false record or statement "material" to a false or fraudulent claim; or (3) conspiring to commit a violation, among other offenses. (*See* 31 U.S.C Sec. 3729(a). The FCA includes a civil penalty of $5,000 to $10,000 per violation and treble the amount of the government's damages. (*Id.*)

40 The Office of the Attorney General incorporated the plan of action, reference above, in a Memorandum for All Department Employees, which was issued on February 4, 2025. *See Ending Illegal DEI and DEIA Discrimination and Preferences*.

Executive Order	Notable Provisions
Additional Measures to Combat Anti-Semitism January 29, 2025 Executive Order 14188	In setting forth the "Purpose" of this executive order, President Trump referred to executive orders issued during his first administration, explaining, "My Administration has fought and will continue to fight anti-Semitism in the United States and around the world," and further elaborated on "additional measures to advance the policy thereof in the wake of the Hamas terrorist attacks of October 7, 2023, against the people of Israel." The executive order makes clear its "Policy" is "to combat anti-Semitism vigorously, using all available and appropriate legal tools, to prosecute, remove, or otherwise hold to account the perpetrators of unlawful anti-Semitic harassment and violence."

The above-referenced executive orders and recent communications from the newly appointed EEOC acting chair demonstrate that employers need to take care regarding EEO compliance and IE&D initiatives because they may face risks on numerous fronts. Employers also have been faced with private groups approaching the EEOC, urging the agency to initiate "Commissioner Charges" based on what they view as unlawful diversity initiatives, and it is anticipated that such efforts will continue.[41] Conservative activists also have engaged in major publicity campaigns and related actions to curb IE&D initiatives.[42]

As shown above, moving forward, private sector employers also may face potential challenges based on their diversity efforts from the Justice Department. The current risks may be the highest for government contractors based on the Executive Order 14173 (*i.e.*, "Ending Illegal Discrimination and Restoring Merit-Based Opportunity") and the upcoming requirement for government contractors to certify that they are not violating any applicable federal anti-discrimination laws, with the risk of potential federal False Claims Act liability hanging over their heads. As significantly, that same executive order, and related internal guidelines issued by the U.S. Department of Justice, clearly contemplate that lawsuits may be filed against employers that have DEI/IED initiatives that the current administrative determine are "illegal."

Employers also may be in the "crosshairs" in various states based their IE&D initiatives, as shown by a recent lawsuit filed by the Missouri attorney general who accuses a major national employer of using diversity programs to discriminate on the basis of race and gender.[43]

Employers clearly are in an environment in which a company's IE&D programs may be subject to closer scrutiny than ever before. As significantly, employers are faced with a certain level of uncertainty regarding what the future holds.

While the recently issued executive orders raise serious concerns for the employer community, legal challenges already have been brought regarding the executive orders. On February 19, 2025, a lawsuit was filed in the U.S. District Court for the District of Columbia in *National Urban League et al. v. Donald J. Trump, et al.*[44] Based on the 100-page complaint, the plaintiffs challenge three executive orders, including the "anti-diversity" orders titled, "Ending Radical and Wasteful Government DEI Programs and Preferencing" and "Ending Illegal Discrimination and Restoring Merit-Based Opportunity," as well as the alleged anti-gender order titled "Defending Woman from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government." The lawsuit includes various attacks on the executive orders, including the manner in which they were adopted, vagueness, constitutional violations, and ultra vires presidential actions.

41 This includes actions filed by organizations such as America First Legal, which is continually challenging DEI/IED efforts both at the EEOC and in other threatened or formal legal challenges around the U.S. *See* Woke Corporations - America First Legal.

42 Conservative activists such as Robby Starbucks have maintained high profiles in attacking DEI programs around the country with some success based on retrenchment and/or cutbacks in diversity efforts by various companies. *See* Julie Dratz, *Is DEI Over? Robby Starbuck Wants You To Think So*, Forbes (Dec. 3, 2024).

43 *See State of Missouri v. Starbucks Corp,* Case No. 4:25-cv-00165 (E.D. Mo. Filed Feb. 11, 2025).

44 *See National Urban League v. Donald J. Trump*, Case No. 1:25-cv-00471 (D.D.C. Filed Feb. 19, 2025).

A similar lawsuit was filed on similar grounds in federal court in the District of Maryland on February 3, 2025, in *National Association of Diversity Officers in Higher Education v. Donald J. Trump*,[45] which challenged certain provisions in Executive Order 14151, *Ending Radical and Wasteful Government DEI Programs and Preferencing* and Executive Order 14173, *Ending Illegal Discrimination and Restoring Merit-Based Opportunity*.[46] On February 21 2025, the federal district court judge issued a preliminary injunction involving several elements of the executive orders regarding IE&D. In an accompanying 63-page memorandum, the judge found that the plaintiffs were likely to prevail regarding the challenged provisions, and of particular note, the district court stated the U.S. Supreme Court has made clear, time and again, that the government cannot rely on the "threat of invoking legal sanctions and other means of coercion" to suppress disfavored speech.[47] The court highlighted the necessity of preserving the current state of affairs during the litigation and halting the enforcement of the contested provisions. On March 14, 2025, a panel of the Fourth Circuit granted the government's motion "for a stay of the preliminary injunction," and "set an expedited briefing schedule in the matter."[48]

Employers also should be aware that various government leaders around the United States do not share the same views as President Trump. As an example, the attorneys general for 16 states recently issued "Multi-State Guidance Concerning Diversity, Equity, Inclusion and Accessibility Employment Initiatives" to help businesses and others in their respective states understand the continued viability and important role of IE&D initiatives "in creating and maintaining legally compliant and thriving workplaces."

Employers clearly should anticipate a certain level of uncertainty in the legal landscape over the coming months. While every employer needs to make a decision regarding what is best for its organization in the current legal environment,[49] employers at a minimum need to take care that in any employment decision, the employer is not making a "preference" for a candidate or group of individuals based on their protected status. Tipping the scales in favor of a particular candidate, even if both candidates are equally qualified, for the sake of diversity, will create serious risks for an employer.

* * *

Guidance on Diversity Training

In Section B.4(b) of this opening chapter, which discusses "Diversity Training," reference is made to the district court opinion in *Joshua A. Diemert v. City of Seattle*, Case Number 2:22-cv-1640, U.S. District Court for the Western District of Washington at Seattle, which upheld a challenge to diversity training. Discussed below is an excerpt from that opinion, which provides a detailed analysis by this court of the applicable law regarding diversity training. This continues to be an evolving area of the law and decisions in this area should be closely monitored closely.

3.3.1 **The RJSI [*i.e.*, *Racial and Social Justice Initiative*] trainings were neither per se discriminatory nor harassing in effect on Diemert**

45 *See National Association of Diversity Officers in Higher Education v. Donald J. Trump*, Civil Action No. 1:25cv-00333 (D. Md. Filed Feb. 3, 2025) (herein "National Association of Diversity Officers").

46 The following provisions were challenged: (1) Executive Order 14151 § 2(b)(i) (the "**Termination Provision**," requiring the termination of all "equity-related" grants or contracts within 60 days); and (2) Executive Order 14173 §3(b)(iv) (the "**Certification Provision**," mandating that federal contracts and grants include terms requiring compliance with federal anti-discrimination laws and certification that no DEI programs violate these laws); and (3) Executive Order 14173 § 4(b)(iii) (the "**Enforcement Threat Provision**," which directs the attorney general to submit a report with recommendations for enforcing federal civil rights laws and deterring DEI programs that constitute illegal discrimination or preferences).

47 *See* Memorandum Opinion, *National Association of Diversity Officers,* Docket 44 (Feb. 21, 2025).

48 *See Nat'l Assoc. of Diversity Officers v. Trump*, Appeal No. 25-1189 (4th Cir. Order entered Mar. 14, 2025).

49 *See, e.g.*, Erica L. Green, *As Trump Attacks Diversity, a Racist Undercurrent Surfaces*, N.Y. Times (Feb. 3, 2025); Rosa Heaton, *What companies are rolling back DEI policies in 2025?*, TechTarget (Feb. 11, 2025).

The claim that efforts to address racism in the workplace—such as D.E.I. initiatives—are themselves racist presents a striking paradox. According to their proponents, these programs aim to promote fairness and inclusion by acknowledging and addressing racial disparities—they are designed to ensure that all individuals have access to opportunities. Critics, however, argue that explicitly focusing on race or addressing racial inequalities perpetuates division and unfairness. For them, the cure is worse than the disease. The tension between these views underscores the complexity employers face when talking about race and equity.

While such conversations may prompt discomfort or spark debate, they do not necessarily violate anti-discrimination laws. Multiple courts in recent years have reached the same conclusion. *See, e.g., Norgren v. Minnesota Dep't of Hum. Servs.*, No. CV 22-489 ADM/TNL, 2023 WL 35903, at *4 (D. Minn. Jan. 4, 2023), *aff'd, 96* F.4th 1048 (8th Cir. 2024) ("Requiring all employees to undergo diversity training does not amount to abusive working conditions, and does not plausibly show that [the employer] imposed across-the-board training with the intention of forcing [the plaintiff] to quit."); *Young v. Colo. Dep't of Corr.*, No. 22-CV-00145-NYW-KLM, 2023 WL 1437894, at *7 (D. Colo. Feb. 1, 2023), aff'd, 94 F.4th 1242 (10th Cir. 2024) (finding plaintiff's claims "that the [employer's] mandatory trainings 'created a 22 racially hostile environment,' [were] unaccompanied by supporting factual 23 allegations[,]" where the employee failed to refer to specific materials beyond alleging that the trainings "were based upon a glossary of terms stating that all whites are racist, that white individuals created the concept of race in order to justify the oppression of people of color, and that 'whiteness' and 'white supremacy' affect all 'people of color within a U.S. context.'"); *De Piero v. Pennsylvania State Univ.*, 711 F. Supp. 3d 410, 424 (E.D. Pa. 2024) ("To be clear, discussing in an educational environment the influence of racism on our society does not necessarily violate federal law"; noting that discussing and providing trainings on "implicit bias," particularly "in the aftermath of very real instances of racialized violence like the murder of George Floyd[,] does not violate Title VII[.]").

Quite the opposite, many courts have held that anti-discrimination trainings play a vital role in preventing workplace discrimination. The Supreme Court has held that Title VII's "primary objective was a prophylactic one." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975); *see also Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 317 (2023) [SFFA] (Kavanaugh, J., concurring) ("Federal and state civil rights laws serve to deter and provide remedies for current acts of racial discrimination."); *Faragher v. City of Boca Raton*, 524 U.S.775, 805–06 (1998) (holding that Title VII's primary goal "is not to provide redress but to avoid harm"); *Christian v. Umpqua Bank*, 984 F.3d 801, 814 (9th Cir. 2020) ("The purpose of Title VII is through law to liberate the workplace from the demeaning influence of discrimination, and to implement the goals of human dignity and economic equality in employment."). Trainings, courts have recognized, further Title VII's primary goal. *See, e.g., Holly D. v. Cal. Inst. of Tech.*, 339 F.3d 1158, 1177 (9th Cir. 2023) (finding an employer exercised reasonable care in light of its anti-harassment policy and employee trainings); *Erickson v. Wisc. Dep't. of Corrs.*, 469 F.3d 600, 605–06 (7th Cir. 2006) (noting that employers should prevent harassment with "proactive steps such as training employees"); *see also* Chai R. Feldblum & Victoria A. Lipnic, EEOC, *Select Task Force on the Study of Harassment in the Workplace*, at 44–54 (June 2016) (finding that regular trainings have proven effective in preventing and addressing harassment) (available at https://www.eeoc.gov/select-task-force-study-harassment-workplace#_ftnref170). Indeed, in line with Title VII's "basic policies of encouraging forethought by employers," the Supreme Court crafted the *Faragher-Ellerth* affirmative defense, allowing employers to avoid liability for supervisory harassment by taking a proactive approach to harassment prevention, including by implementing training. *Faragher*, 524 U.S. at 807; *Burlington Ind. Inc., v. Ellerth*, 524 U.S. 742, 764–65 (1998); *Nichols v. Azteca Rest. Enterprises, Inc.*, 256 F.3d 864, 877 (9th Cir. 2001) (finding defendant exercised reasonable care to prevent sexual harassment in its workplace by maintaining an anti-harassment policy and a "company-wide [anti-harassment] training program.").

These training programs are needed because racial discrimination and inequality are present-day problems, not problems of the distant past. See *SFFA*, 600 U.S. at 317 (Kavanaugh, J., concurring) ("[R]acial discrimination still occurs and the effects of past racial discrimination still persist."); Id. at 393 (Jackson, J. dissenting) ("The race-based gaps that first developed centuries ago are echoes from the past that still exist today."). Against this backdrop, the real threat to equality in the workplace is not the effort to expose and address racial inequalities, but a resistance to doing so.

Because the Court finds that D.E.I. and anti-discrimination trainings are not per se unlawful, Diemert's belief that such trainings constitute an illegal employment practice is viable only if he shows that the RSJI [*i.e. Race and Social Justice Initiative*] trainings—in content, implementation, or context—harassed him personally on account of his race. Diemert makes sweeping allegations about the effect of the RSJI, but as explained below, he is short on details about how it transformed his workplace into a racially hostile environment for him and other white people.

For instance, Diemert argues, "[t]he City designed the RSJI as a policy and system that would 'lead with race,' 'center People of Color,' 'de-center whiteness,' and 'prioritize the leadership of Black, Indigenous, and People of Color." He takes issue with a definition of "white supremacy" culture provided in RSJI materials, which states among other things that "[t]he culture of white supremacy perpetuates the belief and legitimizes the practice of treating people of color as inferior and white people as superior." He argues that he was not the only white employee who found the RSJI trainings to be "divisive" to the extent they "focus on our differences vs. on our similarities[.]" Beyond these general critiques, he provides no other details about the content of the RSJI trainings.

RSJI trainings no doubt contained statements about race. But exposure to material that discusses race does not by itself create an unlawful hostile-work environment. "Training on concepts such as 'white privilege,' 'white fragility,' implicit bias, or critical race theory can contribute positively to nuanced, important conversations about how to form a healthy and inclusive working environment." *DePiero*, 711 F. Supp. 3d at 424. But Diemert equates acknowledgement of institutionalized racism and implicit bias—concepts recognized by many courts with personal attacks. Not so. Passive exposure to these concepts cannot reasonably be construed as a threat to Diemert's safety or well-being or an impediment to his job. Put differently, these trainings in no way interfered with the terms and conditions of Diemert's employment. Comparing diversity trainings that use terms like "'racial bias,' 'white man's privilege,' and 'white man's guilt,' and address topics such as systemic racism, oppression, and intersectionality … to true hostile work environments … trivializes the freedom protected by [antidiscrimination laws]." *Honeyfund.com, Inc. v. DeSantis*, 622 F. Supp. 3d 1159, 1171 (N.D. Fla. 2022), *aff'd sub nom. Honeyfund.com Inc. v. Governor*, 94 F.4th 1272 (11th Cir. 2024) (citations and internal quotations omitted).

On this record, a reasonable juror could not find that the RSJI created an objectively hostile-work environment.

II. Overview of EEOC Charge Activity, Litigation and Settlements

A. Review of Charge Activity, Backlog and Benefits Provided

As has become common practice over the last several years, the EEOC issued two reports in FY 2024: one for financial metrics and the other for performance metrics.[50] On November 15, 2024, the Commission issued its Agency Financial Report ("FY 2024 AFR").[51] On January 17, 2025, the EEOC issued its FY 2024 Annual Performance Report ("FY 2024 APR").[52] The EEOC's Office of General Counsel also released its own Annual Report that specifically relates to the Commission's litigation activity in FY 2024.

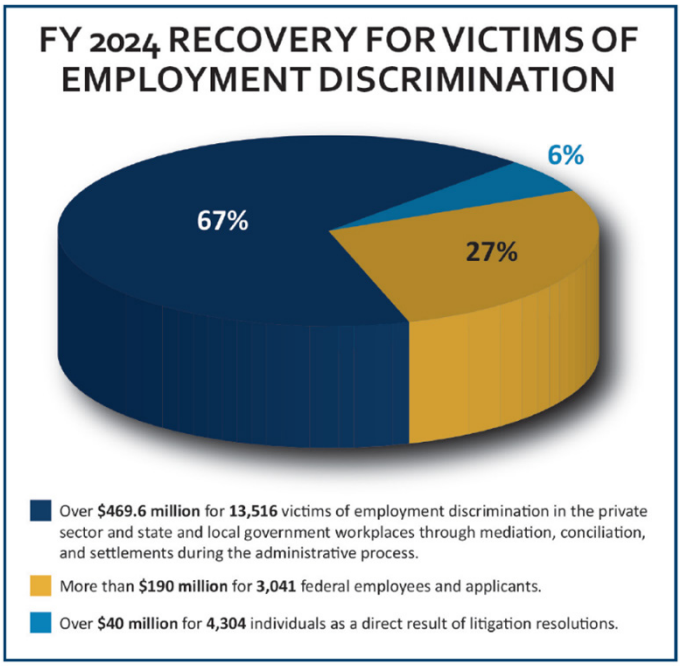
In FY 2024, the number of charges of discrimination filed with the Commission rose by 9.22% compared to FY 2023. In total, the EEOC received 88,531 new charges of discrimination, which is up from the 81,055 filed in FY 2023.[53] The Commission also states that it initiated 33 Commissioner charges in FY 24. This represents a slight dip from the 35 Commissioner charges initiated in FY 2023—but this fiscal year still represents an upward trend compared to the 29 Commissioner's charges filed in FY 2022, the three Commissioner's charges filed in each of FY 2021 and FY 2020.[54]

Fiscal Year	Number of Charges	% Increase/Decrease
2007	82,792	--
2008	95,402	+15.23%
2009	93,277	-2.23%
2010	99,922	+7.12%
2011	99,947	+0.03%
2012	99,412	-0.54%
2013	93,727	-5.72%
2014	88,778	-5.28%
2015	89,385	+1.01%
2016	91,503	+2.37%
2017	84,254	-7.92%
2018	76,418	-9.30%
2019	72,675	-4.90%
2020	67,448	-7.19%
2021	61,331	-9.07%
2022	73,485	+19.82%
2023	81,055	+9.33%
2024	88,531	+ 9.22%

Separately, the Commission highlights that its merit factor rate for these charges stayed consistent at 18%, identical to the rate from FY 2023.[55] Specifically, the EEOC claims that over the course of FY 2024, it resolved 87,219 charges and secured more than $469.6 million in monetary relief for charging parties during the administrative process.[56] This is a 6.6% increase from the $440.5 million that the EEOC recovered in FY 2023. The Commission further highlights the percentage of post-investigation charge resolutions in which the EEOC obtained some form of

50 Prior to FY 2019, the EEOC issued one Performance and Accountability Report (PAR) in late fall.
51 EEOC, Fiscal Year 2024 Agency Financial Report, *available at* https://www.eeoc.gov/fiscal-year-2024-agency-financial-report.
52 EEOC, Fiscal Year 2024 Annual Performance Report, *available at* https://www.eeoc.gov/2024-annual-performance-report.
53 *Id.* at 37-38.
54 EEOC, Commissioner Charges and Directed Investigations, *available at* https://www.eeoc.gov/commissioner-charges-and-directed-investigations.
55 EEOC FY 2024 APR at 6. The EEOC has defined "Merit Resolutions" as charges with outcomes favorable to charging parties and/or charges with meritorious allegations. These include negotiated settlements, withdrawals with benefits, successful conciliations, and unsuccessful conciliations. *See* https://www.eeoc.gov/eeoc/statistics/enforcement/definitions.cfm.
56 *Id.*

targeted, equitable relief and boasts that it obtained "targeted, equitable relief in 99.4% of conciliation agreements during the administrative process.[57] Overall, the EEOC states that it recovered $699.6 million for victims of discrimination in the private sector and local governments—$469.6 million of which went to 13,516 aggrieved individuals in the private sector and state and local government workplaces through mediation, conciliation, and settlements.[58] The EEOC secured another $40 million for 4,304 individuals as a direct result of litigation resolutions, and more than $190 million was awarded to 3,041 federal employees and applicants.[59]



The Commission reported 52,080 pending charges at the end of FY 2024, which is a slight increase from the 51,100 pending charges at the end of FY 2023.[60]

Fiscal Year	Charge Inventory	% Increase/Decrease
2007	54,970	--
2008	73,951	+34.53%
2009	85,768	+15.98%
2010	86,338	+0.66%
2011	78,136	-9.50%
2012	70,312	-10.01%
2013	70,781	+0.67%
2014	75,658	+6.89%
2015	76,408	+0.99%
2016	73,559	-3.73%
2017	61,621	-16.23%
2018	49,607	-19.50%

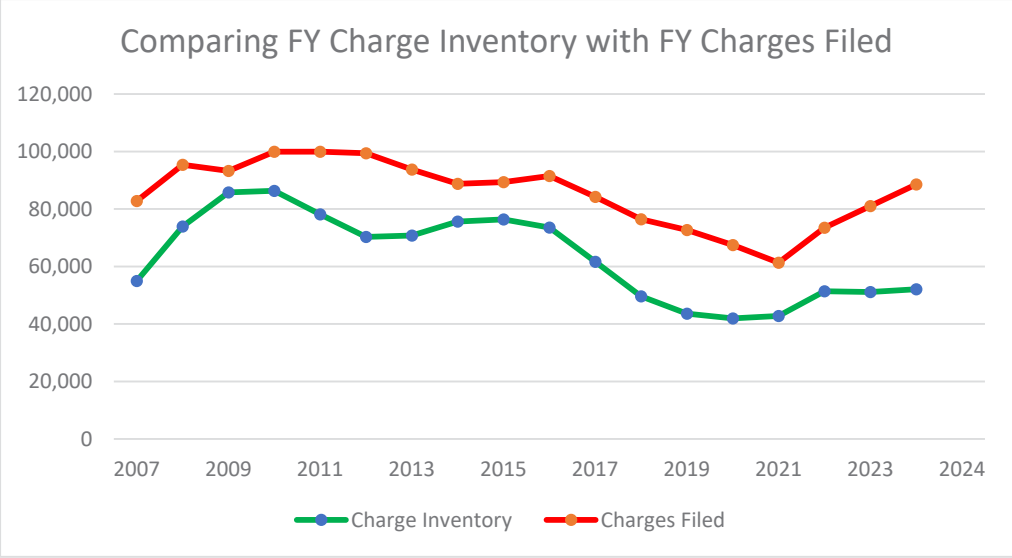
57 *Id.* at 18, 37-38. The EEOC defines *targeted, equitable relief* as "any non-monetary and non-generic relief (other than the posting of notices in the workplace about the case and its resolution), which explicitly addresses the discriminatory employment practices at issue in the case and either provides remedies to the aggrieved individuals or prevents similar violations in the future. Such relief may include customized training for supervisors and employees, development of policies and practices to deter future discrimination, and external monitoring of employer actions, as appropriate." *Id.*

58 *Id.*

59 *Id.* at 5, 11.

60 *Id.* at 6, 37.

Fiscal Year	Charge Inventory	% Increase/Decrease
2019	43,580	-12.15%
2020	41,951	-3.74%
2021	42,811	+2.0%
2022	51,399	+20.0%
2023	51,100	-0.58%
2024	52,080	+ 1.92%



According to the Commission, managing its charge inventory included fielding approximately 90,000 emails and over 553,000 calls from the public.[61] While the EEOC hired 56 new employees in 2024, the Commission ended FY 2024 with 2,170 full-time employees, which is down from the 2,300 employees the Agency had at the end of FY 2023.[62] The Commission attributed this decrease to "budgetary limitations."[63]

Fiscal Year	Number of FTEs at End of FY	Number of FTE Increase/Decrease	Percentage Increase/Decrease
2007	2,158	---	---
2008	2,176	18	+0.83%
2009	2,192	16	+0.74%
2010	2,385	193	+8.80%
2011	2,505	120	+5.03%
2012	2,346	-159	-6.35%
2013	2,147	-199	-8.48%
2014	2,098	-49	-2.28%
2015	2,191	93	+4.43%
2016	2,202	11	+0.50%
2017	2,082	-120	-5.45%
2018	1,968	-114	-5.48%

61 *Id.* at 12.
62 *Id.* at 56-57.
63 *Id.*

Fiscal Year	Number of FTEs at End of FY	Number of FTE Increase/Decrease	Percentage Increase/Decrease
2019	2,061	93	+4.73%
2020	1,939	-122	-5.92%
2021	1,927	-12	-0.62%
2022	2,041	114	+5.92%
2023	2,300	259	+12.69%
2024	2,170	-130	-5.65%

The Commission spent a sizeable amount of ink in its Reports touting its outreach efforts from this past fiscal year, which included, among other things, the EEOC's prioritization to educate small and new businesses on their legal responsibilities.[64] To this end, the EEOC held 26 partnership events focused on small business.[65] The Commission also placed considerable emphasis on educating both management-side lawyer groups and employees about the EEOC's mediation programming. In this regard, it conducted 424 events across the country in FY 2024.[66] Additionally, the EEOC conducted 3,278 in-person and virtual outreach events directed towards individuals. The EEOC proclaims that it attracted 268,864 individuals nationwide to attend these events, which were free of charge.[67] Other EEOC outreach efforts included the following:

- English and Spanish radio media tours regarding the Pregnant Workers Fairness Act (PWFA) in rural communities, communities with limited English proficiency or low literacy skills, and with individuals who may be unable to attend in-person outreach events due to limited resources or time to travel during work hours. The EEOC states that it reached over 41 million English listeners and over 4.8 million Spanish listeners through this effort during a single month.
- An animation video on the "Ways to File a Charge," which has been made available in six languages and reached over 10,000 viewers in FY 2024.[68]
- 251 listening sessions on a variety of topics across the country, keeping the Commission informed of emerging issues and trends in employment discrimination, reaching 17,532 individuals.[69]

Finally, the EEOC continued its push to modernize its case and charge management systems by implementing "E-File for Attorneys," a platform that allows attorneys to submit charges of discrimination on behalf of charging parties electronically to the EEOC.70

B. Systemic Investigations and Litigation

Although most EEOC lawsuits involved individual charging parties, the Commission has continued to initiate systemic investigations and litigation. Discrimination is "systemic" if it involves a discriminatory pattern, practice, or policy that has a broad impact on an industry, company, or geographic area. The Commission states in its FY 2024 APR that "[a]ddressing systemic employment discrimination on all protected bases is a top priority for the EEOC."[71] That said, during FY 2024, the EEOC filed 13 new systemic lawsuits, nearly half of the 25 systemic lawsuits the Commission filed in FY 2023. The systemic lawsuits, however, still make up a sizeable portion of all merits suits the EEOC filed in FY 2024. Indeed, the systemic lawsuits account for 12% of all merit cases the Commission filed this past fiscal year.

64 *Id.* at 28.
65 *Id.* at 54.
66 *Id.*
67 *Id.* at 14.
68 *Id.* at 52.
69 *Id.* at 53.
70 *Id.* at 61.
71 *Id.* at 40.

Year	Merits Case Filings	Systemic Filings	Percentage
2009	281	19	6.8%
2010	250	20	8%
2011	261	23	8.8%
2012	122	10	8.2%
2013	131	21	16%
2014	133	17	12.8%
2015	142	16	11.3%
2016	86	18	20.9%
2017	184	30	16.3%
2018	199	37	18.6%
2019	144	17	11.8%
2020	93	13	14%
2021	116	13	11.2%
2022	91	13	14.3%
2023	143	25	17.5%
2024	111	13	12%

The 13 systemic lawsuits filed by the EEOC in FY 2024 covered a broad spectrum of claims, including, but not limited to, hiring claims based on sex, race, national origin, age, and disability; harassment claims based on sex and race; claims of failure to accommodate based on disability and religion; disability claims based on unlawful application of a qualification standard; discharge claims based on age, disability, race, and retaliation; and a sex-based pay claim.[72] Besides initiating new systemic lawsuits, the EEOC resolved 16 systemic cases, which led to the EEOC obtaining over $23.9 million in monetary relief for 4,074 victims of systemic discrimination.[73] The EEOC boasts "a remarkable 100% success rate in systemic case resolutions" for FY 2024.[74]

Fiscal Year	Systemic Lawsuits Monetary Recovery
2012	$36.2 million
2013	$40 million
2014	$13 million
2015	$33.5 million
2016	$20.5 million
2017	$38.4 million
2018	$30 million
2019	$22.8 million
2020	$69.9 million
2021	$24.4 million
2022	$29.7 million
2023	$11.7 million
2024	$ 23.9 million

At the end of the fiscal year, the EEOC had 205 merits cases on its active district court docket—22% of which (or 45 active cases) involved challenges to alleged systemic discriminatory practices.

72 *Id.*
73 *Id.*
74 *Id.*

Fiscal Year	Number of Total Pending Litigation Cases	Number of Pending Systemic Cases	% of Systemic Cases in Litigation
2012	309	62	20.0%
2013	231	54	23.4%
2014	228	57	25.0%
2015	218	48	22.0%
2016	165	47	28.5%
2017	242	60	24.8%
2018	302	71	23.5%
2019	275	59	21.5%
2020	201	59	29.3%
2021	180	29	16.0%
2022	177	32	18.0%
2023	227	48	21.1%
2024	205	45	22.0%

The EEOC had notable systemic investigation conciliations, including one where the EEOC recovered $6.875 million after the EEOC's systemic investigation determined that the employer allegedly implemented a mandatory retirement age for a class of physicians, regardless of the physicians' ability to do the job.[75] In another systemic investigation, the EEOC obtained $265,000 in relief through conciliation efforts after the EEOC's systemic investigation determined that a supermarket chain allegedly subjected a group of 11 employees, including both male and female employees, to harassment and retaliation for complaining about harassment.[76]

As part of the EEOC's Strategic Plan, the Agency intends to have at least two Enforcement Unit systemic staff members in every District. In doing so, the EEOC aims to expand the Agency's capacity to conduct systemic investigations by focusing its efforts on cases with a broad impact on an industry, profession, company, or geographic region to "maximize its impact on dismantling discriminatory patterns, practices, or policies."[77]

C. EEOC Litigation Statistics – Type of Lawsuit, Location, and Claims

The EEOC filed 111 "merits" lawsuits in FY 2024, of which 76 suits were filed on behalf of individuals—22 of these "multiple victim lawsuits" were non-systemic class suits (typically involving fewer than 20 individuals) and 13 were systemic cases.[78]

Year	Individual Cases	"Multiple Victim" Cases (including systemic cases)	Percentage of Multiple Victim Lawsuits	Total Number of EEOC "Merits"[79] Lawsuits
2005	244	139	36%	381
2006	234	137	36%	371
2007	221	115	34%	336
2008	179	111	38%	270
2009	170	111	39.5%	281
2010	159	92	38%	250
2011	177	84	32%	261
2012	86	36	29%	122

75 *Id.* at 39.
76 *Id.*
77 *Id.* at 20.
78 FY 2024 AFR, pp. 17-18.
79 The EEOC has defined "merits" suits as direct lawsuits or interventions involving alleged violations of the substantive provisions of the Commission's statutes, as well as suits to enforce settlements reached during EEOC's administrative process.

2013	89	42	24%	131
2014	105	28	22%	133
2015	100	42	30%	142
2016	55	31	36%	86
2017	124	60	33%	184
2018	117	82	41%	199
2019	100	44	31%	144
2020	68	25	27%	93
2021	74	42	21.1%	116
2022	53	38	41.8%	91
2023	86	57	66.2%	143
2024	76	35	31.5%	111

With limited exception, the EEOC typically files scores of lawsuits at the end of the fiscal year, recently filings more lawsuits in the fourth quarter than the preceding three combine. In FY 2022, the EEOC filed over 60% of all lawsuits filed during the entire fiscal year in the final two month. In FY 2023 the EEOC's end-of-year filings consisted of approximately 60% of all lawsuits filed during the entire fiscal year. FY 2024 is no exception, with approximately 67% of merits lawsuit filed in the fourth quarter of FY 2024, with 53% of all suits filed in the final month of FY 2024.

In addition to providing the top states where the EEOC filed lawsuits for FY 2024, the chart below maps out the state trends since 2018 and the number of cases filed in those states.[80]

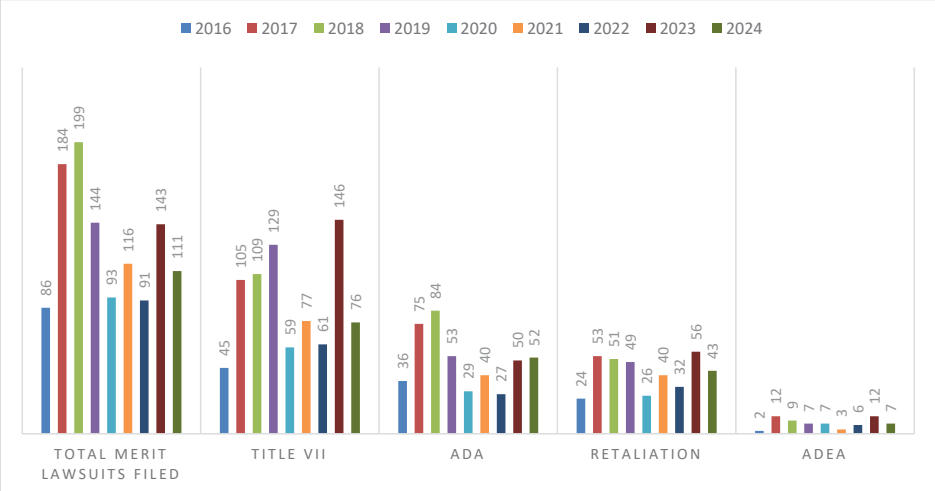
	2018	2019	2020	2021	2022	2023	2024
1	California (19)	Florida (13)	Texas (11)	Texas (14)	California, Texas (8)	Texas (11)	Georgia (12)
2	Texas (14)	N. Carolina (11)	Florida (9)	Florida (10)	Maryland (7)	Florida, Ohio (10)	Texas (11)
3	Maryland (13)	Texas (10)	California (8)	Illinois (7)	Georgia, Florida, Washington, N. Carolina (5)	N. Carolina, California (8)	Illinois (9)
4	Georgia (13)	Maryland, New York (9)	New York (7)	Georgia, Alabama, Colorado (6)	Louisiana, Colorado, Wisconsin (4)	Louisiana, Georgia, New York, Illinois (7)	Maryland (8)
5	N. Carolina (11)	Georgia, Michigan, (7)	Georgia, Michigan (6)	California, New York, Pennsylvania, Maryland (5)	Illinois, South Carolina, Arizona (2)	Nevada, Maryland (6)	Florida, New York (7)
6	New York (10)	California, Minnesota (6)	Arkansas, Maryland (5)	Mississippi, N. Carolina (4)	Oklahoma, Arkansas, Kentucky, Pennsylvania, Nebraska, Tennessee, New York (1)	Pennsylvania, Tennessee, Alabama, Michigan, (5)	Alabama, Michigan, North Carolina, Ohio (6)
7	Florida, Michigan (9)	Louisiana, Pennsylvania, Washington (5)	Ohio (4)			Colorado, New Mexico (4)	California (5)

80 Littler monitored the EEOC's court filings over the past fiscal year. The state-by-state breakdown of lawsuits filed as well as the table summarizing the types of claims filed are based upon a review of federal court filings in the United States. The EEOC has not yet made publicly available its data showing the breakdown of lawsuits filed on a state-by-state basis for this past fiscal year.

8	Alabama, Illinois, Pennsylvania, Tennessee, Washington, Wisconsin (7)	Alabama, Colorado, Oklahoma (4)				Arkansas, Oklahoma, Virginia, Massachusetts (3)	Arizona, Louisiana, Oklahoma, Washington (4)
9							Colorado, Kentucky, Minnesota, Pennsylvania, Tennessee, Virginia (3)
10							Indiana, Kansas, Massachusetts, New Jersey, Puerto Rico (2)
11							Arkansas, Mississippi, Missouri, Nevada, New Mexico, North Dakota, Utah, Wisconsin, Wyoming (1)

Based on these trends, the states in which the Commission appears to have consistently litigated most heavily include Florida, North Carolina, Georgia, and Texas, with Georgia claiming the top spot. Interestingly, the number of cases filed in California fell significantly compared to the past two years, while the number of suits filed in Alabama grew dramatically.

The 111 "merits" lawsuits filed in FY 2024 alleged a wide range of bases, including sex (52);[81] disability (48); retaliation (43); race (15); age (7); national origin (6); and religion (3). The issues raised most frequently in these suits were discharge [including constructive discharge] (85); harassment (39); reasonable accommodation (33); and hiring, including referral, recall, and assignment (21).82,[83] The following chart shows a year-over-year comparison for the last nine years (FY 2016–2024) for the aforementioned bases of the lawsuits filed by the EEOC.

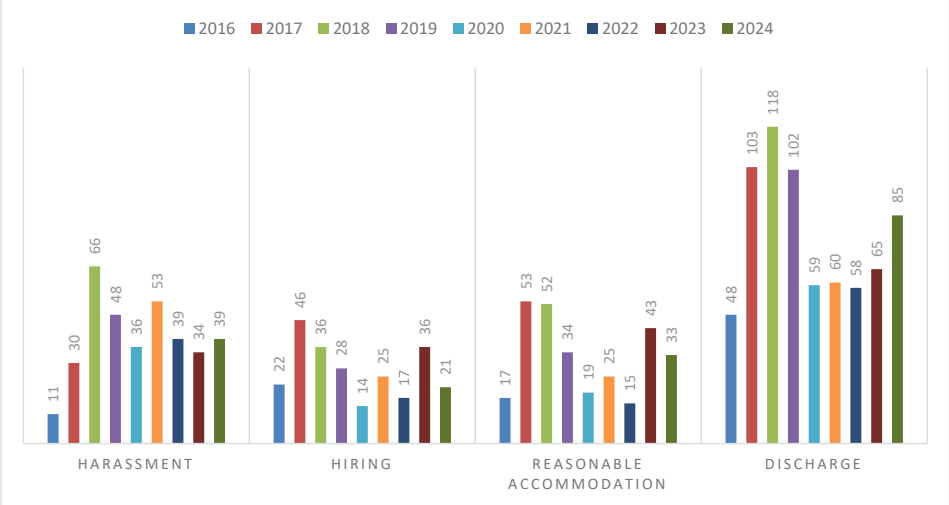


81 Of the 52 lawsuits involving various Title VII claims, the Commission highlights that five of these lawsuits involving sex discrimination were the first filed under the Pregnant Workers Fairness Act.

82 FY 2024 AFR, Litigation, *Challenging Discrimination in Federal District Court*.

83 *Id.*

For the past nine years, the EEOC's reports also provided information on the most frequently identified issues that are the subjects of its litigation efforts.[84] Every year, these most frequently identified issues have been the same – they include harassment, hiring, reasonable accommodations for disabilities, and discharge. The chart below demonstrates the variance by issue for each fiscal year.



In addition to the 111 merits suits, the EEOC also filed 18 suits for non-compliance with mandatory federal reporting requirements (EEO-1 Component 1 workforce demographic reports) in fiscal year 2024.[85] The EEOC has not filed such enforcement action in the past several years, if ever. These 18 lawsuits included at least one action in every agency district against employers that repeatedly failed to submit mandatory EEO-1 reports in prior years, including for reporting years 2021 and 2022.[86]

D. Review of EEOC Litigation Priorities

The EEOC was created in direct response to the call for racial justice and human rights. As such, the EEOC states that advancing racial justice in the workplace was one of the major priorities for the EEOC in FY 2024, as with years past.[87] In its FY 2024 APR, the Commission states that it furthered this goal by strategically leveraging tools, including education and outreach, technical assistance, and enforcement, to combat discrimination and invoke protect employees on a broader level.[88] The EEOC also educated more than 268,000 individuals nationwide regarding workplace rights and discrimination.[89]

As noted above, in non-merits litigation, in FY 2024, the EEOC filed 18 suits for non-compliance with mandatory federal reporting requirements (EEO-1 Component 1 workforce demographic reports).[90] In addition, the EEOC's first suits under the PWFA were filed in FY 2024.[91]

Beyond pure litigation, the EEOC also remained dedicated to educating the public and policymakers on the impact that AI and other automated decision-making systems have on workers' civil rights and the law.[92] To effectuate this goal, the EEOC appointed the agency's first Chief Artificial Intelligence Officer, EEOC staff testified at the "Federal Agency and Industry Practitioner Hearing on Artificial Intelligence" conducted by the U.S. Access

84 *Id.*
85 *Id.*
86 FY 2024 AFR, pp. 18-19.
87 FY 2024 APR, *A Message from the Chair.* Other notable priorities for the Commission for FY 2024 included advocating for workers who faced discrimination, implementing the Pregnant Workers Fairness Act, educating the public about the effects of artificial intelligence on workplace civil rights, and issuing guidance on harassment discrimination.
88 FY 2024 APR, *A Message from the Chair.*
89 *Id.*
90 *Id.*
91 FY 2024, AFR, pp. 26.
92 FY 2024 APR, Policy, Guidance, and Technical Assistance.

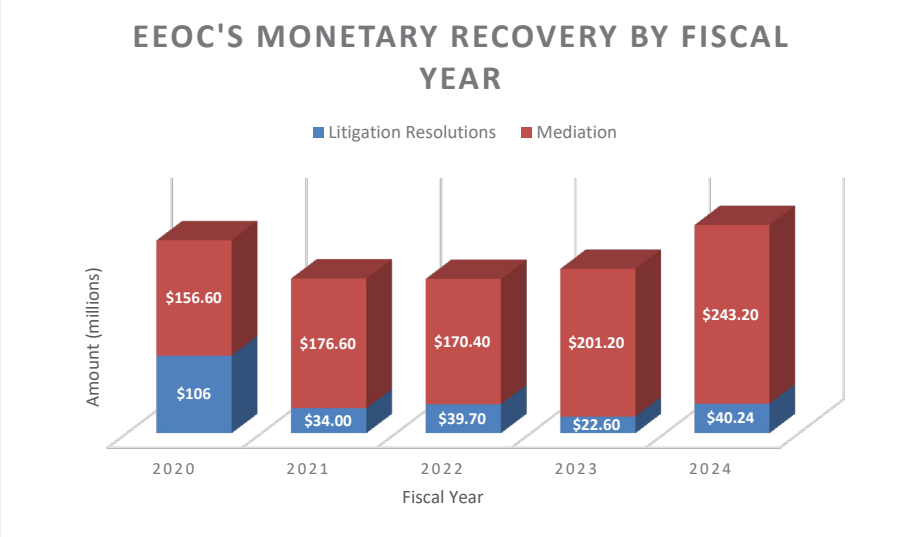
Board, and the EEOC held a pre-conference session on the topic at the 27th Annual Examining Conflicts in Employment Laws (EXCEL) Training Conference.[93]

Moreover, the EEOC also prioritized managing the public's increased demand for agency services despite budgetary challenges.[94] This included processing the increased inventory from a 9.2% increase in new charges in FY 2024 compared to the year prior.[95] While managing the increased demand for services, the EEOC also focused on upgrading its data collection, analysis, and reporting capabilities, including improvements to the agency's web-based resources for data and analytics and making pay data available via data dashboards.[96]

E. Mediation Efforts, Litigation Resolutions and Monetary Relief

In its FY 2024 APR, the EEOC notes that it achieved 8,543 successful mediations out of the 11,998 conducted (*i.e.*, 71.2% success rate), resulting in $243.2 million in monetary benefits for complainants through its mediation program.[97] During the year, the EEOC continued its outreach to respondents, highlighting the benefits of the mediation program, with over 424 events conducted for employers.[98] Overall, the EEOC reports that the vast majority of participants (99% of employers and 93% of charging parties) indicated they would be willing to participate in the mediation program again if they were a party to an EEOC charge.[99]

During FY 2024, the EEOC secured approximately $469.6 million for parties in the private sector and state and local government workplaces through mediation, conciliation, and settlements, the highest monetary recovery in recent history.[100] The EEOC's conciliation and pre-determination settlement efforts alone resulted in $40 million for claimants during this period. However, according to the EEOC, it resolved 34% of conciliations, a decrease from the 46.7% resolution rate in FY 2023.[101] However, the $40 million recovered in FY 2024 demonstrates a larger trend that the EEOC's rate of recovery for litigation resolutions has stayed below $50 million following the pandemic. Indeed the $106 million recovered from litigation resolutions, including conciliations and settlement agreements during litigation, remains an anomaly. Moreover, considering the monetary recovery for mediations consistently dwarfs the amount obtained via litigation, it is likely that the EEOC will continue to direct greater resources towards seeking favorable outcomes pre-litigation.



93 FY 2024 APR.
94 FY 2024 APR, Fiscal Year 2024 Performance Highlights, *Ensuring Prompt and Efficient Handling of Discrimination Charges and Complaints*.
95 *Id.*
96 FY 2024 APR, Fiscal Year 2024 Performance Highlights, *Upgrading Data Collection, Analysis, and Reporting Capabilities*.
97 *Id.* at 37-38.
98 *Id.* at 38.
99 *Id.*
100 *Id.*
101 *Compare id.* at 39 & EEOC FY 2023 APR, p. 11, 57

F. Appellate Cases

The EEOC increased its participation as *amicus curiae* in U.S. appellate courts in FY 2024, filing at least 39 amicus briefs, including two in the U.S. Supreme Court. The EEOC also filed briefs in one appellate cases in which it was a party the past fiscal year. In addition to these pending cases, appellate courts have issued decisions in three cases, discussed below, involving the EEOC.

1. Significant Wins for EEOC

In *EEOC v. Center One, LLC*,[102] the Third Circuit reversed summary judgment for the employer on a claim of alleged failure to accommodate religious services attendance where the employer insisted upon "an official clergy letter" after rejecting a less-formal letter from the plaintiff's rabbi. Notably, the employee had not been subjected to any discipline, but the employer denied his request to reverse three "demeritorious attendance points" accrued due to prior religious service attendance. When the employer refused to reverse the demerits, the employee resigned. The district court found the employee failed to meet the adverse element action of the failure to accommodate claim because demerit points by themselves are not significant enough to constitute an adverse action and the employee was not terminated but resigned. While the Third Circuit agreed that demerit points alone could not constitute an adverse action, there was an issue for the jury regarding whether the resignation could be deemed a "constructive termination," meaning that the conditions of employment were so intolerable that a reasonable person in the plaintiff's position would have felt forced to resign, a concept usually applied in harassment cases.[103] In an apparent expansion of this doctrine, the court stated, "The doctrine of constructive discharge does not require an employee who is seeking religious accommodation to either violate the tenets of his faith or suffer the indignity and emotional discomfort of awaiting his inevitable termination." Upon remand to the Western District of Pennsylvania, the parties settled the case.

2. Significant Wins for Employer

In *EEOC v. Village At Hamilton Pointe LLC*,[104] the Seventh Circuit affirmed summary judgment ending race-based hostile work environment claims of 40 out of 47 nursing home caregivers (the other 7 employees proceeded to a jury trial).[105] In finding the EEOC failed to establish a triable issue of material fact whether the environmental harassment was "severe and pervasive," the court held evidence of racist slurs by residents must be evaluated in context, stating, "Although certainly still offensive, the use of a racial slur by a resident in the nursing home context would be considered less offensive to a reasonable person than if the same slur were said by a co-worker or supervisor in that same setting. This observation is particularly true when the recipient is a professional trained to give care in a geriatric setting."[106] The court further found that isolated instances of patient charting stating a racial preference or instruction that were corrected within three days of a nurse's complaint were also insufficient as a matter of law.[107] Thus, the opinion stands for the proposition that while employers cannot entirely avoid liability for and must take affirmative steps to correct abuse by patients, courts will at least consider the challenges posed by some settings and industries.

102 *EEOC v. Center One, LLC*, 2024 U.S. App. LEXIS 2224 (3d Cir. Feb. 1, 2024).
103 *Id.* at *2.
104 *EEOC v. Vill. at Hamilton Pointe LLC*, 102 F.4th 387 (7th Cir. 2024).
105 *Id.*
106 *Id.* at 413.
107 *Id.* at 432.

In *EEOC v. Activision Blizzard, Inc.*,[108] the Ninth Circuit affirmed the denial of an individual plaintiff's motion to intervene in the EEOC's lawsuit on the basis of untimeliness, addressing three factors: "(1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay."[109] The court considered most significant the prejudice to defendant that would result from allowing intervention—a disruption in late-stage settlement discussions due to the individual plaintiff's intent to increase defendant's liability.[110] As to the third factor, the court found the plaintiff should have sought intervention earlier but chose not to do so, relying on her union's and the California Civil Rights Department's intervention requests, which were denied.[111] The CRD later settled its own lawsuit against the employer.[112]

For additional information regarding appellate cases in which the EEOC filed an appellate or an amicus brief, see Appendix B to this Report.

108 *EEOC v. Activision Blizzard, Inc.,* 2023 U.S. App. LEXIS 34293 (9th Cir. Dec. 27, 2023).
109 *Id.* (quoting *Orange County v. Air Cal.*, 799 F.2d 535, 537 (9th Cir. 1986)).
110 *Id.*
111 *Id.*
112 *CRD v. Activision Blizzard, Inc.*, Los Angeles Sup. Ct., 21STCV26571 (Jan. 17. 2024).

III. EEOC AGENCY AND REGULATORY-RELATED DEVELOPMENTS

A. EEOC Leadership

As this report publishes, the EEOC finds itself in an unusual posture, with two sitting commissioners, three vacant seats, and a resulting lack of a quorum. While the agency has in the past occasionally lost its quorum, those instances were occasioned by the expiration of a commissioner's term or a commissioner's resignation. The current loss of quorum was caused by the termination of two sitting commissioners' terms prior to their scheduled expiration, a move literally unprecedented in the 60+ year history of the agency.

On Inauguration Day, President Trump designated Commissioner Andrea Lucas to be acting chair of the agency. At that time, Lucas was the sole Republican on the Committee, with three of the four remaining seats filled by Democrats and one vacancy (following the expiration of Commissioner Keith Sonderling (R)'s term last year). One week later, on January 27, 2027, the White House fired two of those sitting Democratic commissioners: Charlotte Burrows, who served as chair during the Biden administration, and Jocelyn Samuels, who served as vice chair. On April 9, 2025, Samuels filed suit in federal district court challenging the legality of her termination, but no action to date has been filed by Burrows. Unlike some other presidential appointments, Title VII does not expressly limit the ability of the president to remove commissioners from their office.

That same day, the president removed EEOC General Counsel Karla Gilbride from her position (a less surprising development insofar as the Biden administration sacked the first Trump-era general counsel in March 2021); the role of acting general counsel is now filled by Andrew Rogers, a former member of Acting Chair Lucas's personal staff.

This leaves the Commission with two sitting commissioners—Acting Chair Lucas, who was renominated to a new five-year term on March 25, 2025,[113] and Commissioner Kalpana Kotagal (D), whose term is scheduled to expire in 2027. With less than three commissioners, the agency lacks a quorum, which limits its ability to make new policy, revisit old ones, or take any significant action that would require the approval of a majority of the Commission.

That said, the vast majority of the Commission's day-to-day operations, such as investigation, mediation, and litigation will continue (although as discussed below certain types of litigation may not be filed without a majority vote of a quorum of the Commission). And in December 2024, possibly anticipating these personnel actions, the Commission voted unanimously to delegate many routine and housekeeping functions to agency staff during the period in which the Commission lacks a quorum. So while its policy-making functions are limited at this time, the agency is not "closed for business" pending the restoration of a quorum.

It also bears note that irrespective of a quorum, the chair or acting chair has broad discretion in setting the Commission's agenda—what items the agency will consider and which it will not—as well as how and where to allocate resources and priorities. Significant policy changes, however, require the approval of a majority of the full Commission, which will be challenging going forward given its composition.

B. Priorities of the New Acting Chair

At the outset, much attention has been focused on the agenda the new acting chair will set for the Commission during her tenure leading the agency, both in the near term and when the Commission ultimately has a Republican majority. A number of statements she has made and actions she has taken give some insight into where she may wish to take the agency under her leadership.

On her first full day in office, Lucas issued a statement[114] acknowledging her designation as acting chair and laying out her priorities and goals for the agency:

> I look forward to restoring evenhanded enforcement of employment civil rights laws for all Americans. In recent years, this agency has remained silent in the face of multiple forms of widespread, overt discrimination. Consistent with the President's Executive Orders and priorities, my priorities will include rooting out unlawful DEI-motivated race and sex discrimination; protecting American workers

113 *See* EEOC, Press Release, *President Trump Renominates Andrea R. Lucas to EEOC* (Mar. 25, 2025).
114 EEOC, Press Release, *President Appoints Andrea R. Lucas EEOC Acting Chair* (Jan. 21, 2025).

from anti-American national origin discrimination; defending the biological and binary reality of sex and related rights, including women's rights to single-sex spaces at work; protecting workers from religious bias and harassment, including antisemitism; and remedying other areas of recent under-enforcement.

On its face her statement makes clear that Lucas will be fully supportive of the broader administration efforts by way of executive orders (discussed in detail in this report's opening chapter) to eliminate "illegal DEI" in the public and private sector.

Similarly, with respect to gender identity, Acting Chair Lucas has fully endorsed the President's Executive Order 14166, "Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government," which, among other things, directs all federal agencies and federal employees to "enforce laws governing sex-based rights, protections, opportunities, and accommodations to protect men and women as biologically distinct sexes" and orders the removal of statements, policies and other communications that "promote or otherwise inculcate" gender ideologies. The administration also contends that the Supreme Court's decision in *Bostock v. Clayton County*, 590 U.S. 644 (2020), in which it held that Title VII's prohibition of discrimination "because of … sex" prohibits discrimination on the basis of sexual orientation and gender identity has been interpreted too broadly and directs the attorney general to issue guidance to "correct" what the administration perceives as a misapplication of the case.

Among the actions Lucas identified in a recent statement[115] that she has and will take to comply with the executive order are prioritizing compliance, investigations, and litigation to "defend the biological and binary reality of sex and related rights, including women's rights to single sex spaces at work"; removing EEOC employees' ability to indicate pronouns in their communications; eliminating the use of the non-binary "X" gender marker for charges; and removing materials "promoting gender ideology" on the Commission's internal and external websites.

Lucas also indicated that there were certain documents relating to gender identity that she could not unilaterally remove or modify, because doing so would require a majority vote of the full Commission. These include the Commission's Enforcement Guidance on Harassment in the Workplace (issued by a 3-2 vote in 2024); the EEOC Strategic Plan 2022-2026 (issued by a 3-2 vote in 2023); and the EEOC Strategic Enforcement Plan Fiscal Years 2024-2028 (issued by a 3-2 vote in 2023). Lucas indicated that while she cannot currently rescind these documents without a majority vote of the Commission, she remains opposed to them. We expect that upon attaining a Republican majority on the Commission, Lucas will move to rescind or revise these documents in whole or in part.

With respect to LGBT issues more broadly, since January the agency has removed from its website a number of resources relating to sexual orientation and gender identity discrimination published during the Biden administration. And on January 31, 2025, the agency indicated that at least for the foreseeable future, all charges alleging discrimination on the basis of sexual orientation or gender identity will be sent to national headquarters for review to ensure that they "comply with applicable executive orders to the fullest extent possible." The agency also indicated that with respect to such charges it will issue a notice of right to sue if asked to by a charging party "as statutorily required."

Finally, with respect to religious discrimination, we safely predict that the EEOC will focus enforcement efforts on the rights of religious workers. During the first Trump administration, then-Commissioner Lucas co-chaired a working group with then-General Counsel Sharon Fast Gustafson that focused on the rights of religious workers, and anti-religious discrimination in the workplace. She also supported the Commission's revision of its guidance on religious discrimination in the workplace, which placed heavy emphasis on the need for employers to accommodate the religious practices of their employees. This remains a developing area of the law since the Supreme Court's decision in *Groff v. DeJoy*,[116] which dramatically increased the burden on employers to show that a requested religious accommodation is an undue hardship, and we expect that the EEOC in its investigations and litigation will seek to construe the case as broadly as possible in favor of religious workers.

115 EEOC, Press Release, *Removing Gender Ideology and Restoring the EEOC's Role of Protecting Women in the Workplace* (Jan. 28, 2025).
116 600 U.S. 447 (2023).

C. Litigation Authority in the Absence of a Quorum

The absence of a voting quorum also directly impacts the Commission's ability to file certain types of litigation in federal court.

By way of background, Title VII gives the Commission authority to commence or intervene in litigation against private sector employers to enforce antidiscrimination laws within its jurisdiction; under the statute, the Commission is required to approve litigation proposed to be filed, while the agency's general counsel is responsible for the conduct of such litigation once it is commenced. Beginning in 1995, the Commission delegated to the general counsel the authority to commence certain cases without Commission approval, presumably on the belief that "routine" cases that do not involve new interpretations of law or implicate complex fact patterns do not require the review of the full Commission, which may instead focus its efforts on policymaking functions.

Since 1995, the delegation of authority to the general counsel has been revised a number of times (usually reclaiming some of the Commission's authority and limiting the discretion of the general counsel). The scope of the delegation—and what lawsuits the Commission may file—is directly impacted by the lack of a quorum.

Under the current delegation of litigation authority adopted in 2021 and currently in effect, there are two categories of proposed cases (for ease of reference, consider them "Tier 1" cases and "Tier 2" cases).

Tier 1 cases must be approved by a majority vote of the Commission, and include:

(a) Cases involving an allegation of systemic discrimination or a pattern or practice of discrimination;

(b) Cases expected to involve a major expenditure of agency resources, including staffing and staff time, or expenses associated with extensive discovery or expert witnesses;

(c) Cases presenting issues on which the Commission has taken a position contrary to precedent in the circuit in which the case will be filed;

(d) Cases presenting issues on which the general counsel proposes to take a position contrary to precedent in the circuit in which the case will be filed;

(e) Other cases reasonably believed to be appropriate for Commission approval in the judgment of the general counsel. This category includes, but is not limited to, cases that implicate areas of the law that are not settled and cases that are likely to generate public controversy; and

(f) all recommendations in favor of Commission participation as amicus curiae.

Tier 2 cases include all other cases (consider these the routine, single plaintiff cases that present no novel issues of fact or law), which in normal operating mode must be sent to the members of the Commission for five days' notice. If during that time a majority of Commissioners requests that the proposed litigation be subject to a vote, the general counsel must submit it for such vote, and the case must be approved by a majority of the Commission.

Pursuant to the litigation delegation, during times when the Commission lacks a quorum, the general counsel has the authority to file Tier 2 cases, subject to giving the Commissioners five days' notice. There is no provision for the filing of Tier 1 cases. And when the Commission adopted a resolution concerning the conduct of activities during which it might lack a quorum (as noted above, by way of resolution adopted unanimously on 12/31/2024), this delegation of litigation authority was expressly noted to be still in effect and unchanged.

Based on the foregoing, during the time period in which the Commission lacks a quorum, it currently does not appear that the EEOC may file new litigation involving a Tier 1 case (for example, a pattern and practice case, or cases taking a position against circuit precedent). While these cases may be held for later consideration when the Commission regains its quorum, employers that may be facing allegations of systemic discrimination, or otherwise threatened with Tier 1 litigation, may wish to keep these limitations in mind.

D. Noteworthy Regulatory Activities in 2024

1. New Harassment Guidance

Almost 25 years after the EEOC last published Enforcement Guidance on Harassment in the Workplace, on April 29, 2024, the EEOC approved updated guidance which superseded the prior document. The updated guidance is intended to "protect covered employees from harassment based on race, color, religion, sex (including pregnancy, childbirth or related medical conditions; sexual orientation; and gender identity), national origin, disability, age (40 or older) or genetic information."[117] As a result of "notable changes in the law" and trends in charges filed and suits filed, the guidance reflects the EEOC's commitment to ensure the prevention of harassment of employees not only by supervisors and coworkers, but also by customers, clients, vendors, and the like. The EEOC included 77 examples, providing practical advice on each topic addressed in the updated guidance, along with suggestions for employers for preventing harassment from occurring.

Notably, the EEOC's guidance may not have the force of law, but it gives insight on the EEOC's interpretation on how it will enforce federal EEO laws. As a general matter, the guidance highlights conduct that could be considered actionable harassment, if sufficiently severe or pervasive, including:

- Saying or writing an ethnic, racial, or sex-based slur;
- Forwarding an offensive or derogatory "joke" email;
- Displaying offensive material (such as a noose, swastika, or other hate symbols, or offensive cartoons, photographs, or graffiti);
- Threatening or intimidating a person because of the person's religious beliefs or lack of religious beliefs;
- Sharing pornography or sexually demeaning depictions of people, including AI-generated and deepfake images and videos;
- Making comments based on stereotypes about older workers;
- Mimicking a person's disability;
- Mocking a person's accent;
- Making fun of a person's religious garments, jewelry, or displays;
- Asking intrusive questions about a person's sexual orientation, gender identity, gender transition, or intimate body parts;
- Groping, touching, or otherwise physically assaulting a person;
- Making sexualized gestures or comments, even when this behavior is not motivated by a desire to have sex with the victim; and
- Threatening a person's job or offering preferential treatment in exchange for sexual favors.

While the updated guidance may seem to be merely an adaptation of older guidance to a new generation of work and the work environment, it was not without some controversy. For instance, as it relates to sexual orientation and gender identity, examples provided within the updated guidance include "repeated and intentional use of a name or pronoun inconsistent with the individual's known gender identity (misgendering); or the denial of access to a bathroom or other sex-segregated facility consistent with the individual's gender identity." Acting Chair Lucas voted against the guidance when it came before the Commission in 2024, and as noted above we expect she will seek to rescind or revisit it in whole or in part when the Commission has a quorum.

2. Final Regulations on Pregnant Workers Fairness Act

The Pregnant Workers Fairness Act (PWFA) requires covered entities, including employers with at least 15 employees, to reasonably accommodate a qualified employee's and/or applicant's known limitations related to, arising out of, or affected by pregnancy, childbirth, or medical conditions related thereto, unless such accommodations would be an undue hardship on the employer. When Congress enacted the PWFA, it directed the

117 EEOC, *Enforcement Guidance on Harassment in the Workplace* (Apr. 29, 2024).

EEOC to issue implementing regulations and provide examples of reasonable accommodations. The PWFA took effect on June 27, 2023; however, the EEOC did not issue its final rules and interpretive guidance until April 15, 2024.[118] Prior to issuing its final regulations, the EEOC received over 100,000 public comments to its proposed regulations. As a result, the EEOC's final rule was not published until April 19, 2024, and did not take effect until June 18, 2024. The final regulations clarify and expand upon employers' obligation to provide reasonable accommodations under the PWFA.

First, the final regulations maintain expanded definitions of physical and mental conditions arising out of pregnancy, including abortion. The EEOC retained its expansive reading of "pregnancy, childbirth, or related medical conditions" to include current pregnancy, past pregnancy, potential pregnancy, lactation (including breastfeeding and pumping), use of contraception, menstruation, infertility and fertility treatments, endometriosis, miscarriage, stillbirth, or having or choosing not to have an abortion, among other conditions. Indeed, the EEOC provides a non-exhaustive list of related medical conditions, including "termination of pregnancy, including via miscarriage, stillbirth, or abortion; ectopic pregnancy; preterm labor; pelvic prolapse; nerve injuries; cesarean or perineal wound infection; maternal cardiometabolic disease; gestational diabetes; preeclampsia; HELLP (hemolysis, elevated liver enzymes and low platelets) syndrome; hyperemesis gravidarum; anemia; endometriosis; sciatica; lumbar lordosis; carpal tunnel syndrome; chronic migraines; dehydration; hemorrhoids; nausea or vomiting; edema of the legs, ankles, feet, or fingers; high blood pressure; infection; antenatal (during pregnancy) anxiety, depression, or psychosis; postpartum depression, anxiety, or psychosis; frequent urination; incontinence; loss of balance; vision changes; varicose veins; changes in hormone levels; vaginal bleeding; menstruation; and lactation and conditions related to lactation, such as low milk supply, engorgement, plugged ducts, mastitis, or fungal infections. As a result, the final regulations make clear that not only pregnancy, but pre-existing conditions exacerbated by pregnancy or childbirth fall within the PWFA's protections.

Second, the final regulations note that there is no level of severity required for covered entities to provide accommodations. For instance, unlike the Americans with Disabilities Act (ADA), "known limitation[s]" need not be severe and instead, "may be modest, minor, and/or episodic." As a result, the PWFA is intended to cover conditions that do not rise to the level of disability applied under the ADA.

Third, the final regulations broadly define "qualified" employees/applicants, including those who cannot perform an essential function of the job for a temporary period, if the person is or is expected to be able to perform the essential function "in the near future," and the inability to perform the essential function can be reasonably accommodated. "Temporary" is defined as "lasting for a limited time, not permanent, and may extend beyond 'in the near future." "[I]n the near future," as applied to current pregnancy, is defined as "generally forty weeks from the start of the temporary suspension of an essential function," but that phrase is left undefined for purposes of childbirth or related medical conditions. As a result, the type of qualifying medical condition will control. The time an employee is on post-partum leave is not considered when determining how long an essential function must be waived because once an employee returns to work, the time period begins again, and as a result, the regulations note this is a case-by-case determination.

Fourth, the final regulations note key differences from the ADA. Indeed, from the outset, the regulations expressly differentiate that known limitations may be a qualifying medical condition for purposes of the PWFA "whether or not such condition meets the definition of disability specified in section 3 of the Americans with Disabilities Act of 1990." Moreover, those expressly authorized to request accommodations on behalf of employees is broader than under the ADA. Unlike the ADA, the regulations encourage quicker responses to requests for accommodations, even where additional information may be needed, including providing interim accommodations while additional information is obtained. In that same vein, while the ADA requires engaging in an interactive process in most circumstances, under the PWFA, the interactive process merely "may be necessary" (and even when necessary, it is only "informal"). Accordingly, the regulations make clear the EEOC's belief that these be "simple conversation[s]" to "sufficient[ly] . . . determine the appropriate reasonable accommodation."

118 EEOC Final Rule, *Implementation of the Pregnant Workers Fairness Act*, 29 CFR Part 1636 (Apr. 19, 2024).

Fifth, the final regulations provide *de facto* reasonable accommodations. As directed by Congress, the EEOC provides a number of detailed examples of reasonable accommodations that it asserts would address known limitations related to pregnancy, childbirth or related medical conditions, including:

- Making existing facilities accessible or modifying work environment;
- Job restructuring;
- Part-time or modified work schedules;
- Reassignment to a vacant position;
- Breaks for use of the restroom, drinking, eating, and/or resting;
- Acquisition or modification of equipment, uniforms, or devices, including devices that assist with lifting or carrying for jobs that involve lifting or carrying;
- Modifying the work environment;
- Providing seating for jobs that require standing, or allowing standing for jobs that require sitting;
- Appropriate adjustment or modifications of examinations or policies;
- Permitting the use of paid leave (whether accrued, as part of a short-term disability program, or any other employer benefit) or providing unpaid leave for certain reasons
- Telework, remote work, or change of work site;
- Adjustments to allow an employee to work without increased pain or increased risk to the employee's health or the health of the pregnancy;
- Temporarily suspending one or more essential functions of the position;
- Providing a reserved parking space if the employee is otherwise entitled to use employer-provided parking; and other similar accommodations for employees with known limitations under the PWFA.

Moreover, allowing employees to carry or keep water to drink in or nearby their work area, taking additional restroom breaks, sitting or standing when required to do the opposite, and additional meal breaks, are deemed *de facto* reasonable. Referred to as "predictable assessments," the regulations assume those four accommodations will be commonly requested. Although these specific modifications will not impose an undue hardship "in virtually all cases," there may be limited circumstances to show in an individual case that they do create an undue hardship.

Acting Chair Lucas voted against the final rule. In a statement[119] after becoming chair, she indicated that while she supported parts of the rule, she disagrees with a number of its provisions, and opposes the rule insofar as it "conflat[es] pregnancy and childbirth accommodation with accommodation of the female sex, that is, female biology and reproduction. The Commission extended the new accommodation requirements to reach virtually every condition, circumstance, or procedure that relates to any aspect of the female reproductive system."

E. FY 2024 Litigation Trends

In FY 2024, the EEOC filed over 100 new merit lawsuits and non-merit suits. Merit suits concern those accusing covered entities of substantive EEO law violations, while non-merit suits include subpoena enforcement actions, failure to file EEO-1 reports, etc. Compared to the prior fiscal year, new merit suits fell significantly, while non-merit suits increased.

Notably, within the merit suits, the EEOC filed its first lawsuits against employers that allegedly violated the PWFA. Within the increase of non-merit suits, the EEOC brought suit against employers that allegedly failed to file complete EEO-1 surveys. As a general matter, the new suits track the EEOC's most recent strategic enforcement plan, which committed to "expanding the vulnerable and underserved worker priority," among other priorities such as the PWFA and monitoring underrepresentation of groups within industries and sectors.

119 EEOC, *Position of Acting Chair Lucas Regarding the Commission's Final Regulations Implementing the Pregnant Workers Fairness Act.*

For instance, and in line with the new harassment guidance the EEOC issued, many new merits cases also addressed allegations of sexual harassment against women by male supervisors and co-workers. Similarly, the EEOC filed its first lawsuits alleging violations of the PWFA. Remaining highlights included several new merits cases focused on allegations of unlawful conduct towards young, deaf, and/or blind employees. Ultimately, these merits suits demonstrate the EEOC's commitment to its strategic enforcement plan through only one channel of enforcement.

The EEOC filed more non-merit lawsuits than the prior fiscal year. In these suits, the EEOC similarly highlighted its SEP insofar as the alleged EEO-1 violations were filed against entities in industries and sectors with historical underrepresentation of individuals, such as construction and transportation.[120] At bottom, however, the increase in EEO-1 filings demonstrates that the EEOC will not overlook alleged violations of the laws it enforces, even technical ones.

What remains to be seen now is the impact of the 2024 federal elections on the agency, its budget, and its focus. While the EEOC requested an increase of approximately $33,221,000 in the FY 2025 budget, with the reelection of President Trump, it seems unlikely that a second Trump administration would continue to support that request. Equally important will be what the focus of the agency's litigation program will be both in the near term and once the agency regains a quorum and is freed of the limitations on its litigation authority discussed above.

120 EEOC, *EEOC Sues 15 Employers for Failing to File Required Workforce Demographic Reports* (May 29, 2024).

IV. Scope of EEOC Investigations and Subpoena Enforcement Actions

A. EEOC Investigations

As part of the investigation process, the EEOC has statutory authority to issue subpoenas and pursue subpoena enforcement actions if an employer fails to provide requested information or data or to make requested personnel available for interview. The EEOC continues to exercise this option, particularly when dealing with systemic investigations. As discussed below, the EEOC's authority to issue subpoenas and conduct investigations is quite broad. Because the scope of EEOC investigations and related issues are critical in guiding employer conduct in dealing with the EEOC, the discussion below is not limited to court decisions over the past fiscal year.

1. EEOC Authority to Conduct Class-Type Investigations

Systemic investigations can arise based upon any of the following: (1) an individual files a pattern-or-practice charge or the EEOC expands an individual charge into a pattern-or-practice charge; (2) the EEOC commences an investigation based on the filing of a "commissioner's charge"; or (3) the EEOC initiates, on its own authority, a "directed investigation" involving potential age discrimination or equal pay violations.

The Commission enjoys expansive authority to investigate systemic discrimination stemming from its broad legislated mandate.[121] Unlike individual litigants asserting class action claims, the EEOC need not meet the stringent requirements of Rule 23 to initiate a pattern-or-practice lawsuit against an employer. Thus, the EEOC "may, to the extent warranted by an investigation reasonably related in scope to the allegations of the underlying charge, seek relief on behalf of individuals, beyond the charging parties, who are identified during the investigation."[122]

Title VII also authorizes the EEOC to issue charges on its own initiative (*i.e.*, commissioner's charges),[123] based upon an aggregation of the information gathered pursuant to individual charge investigations. Under a commissioner's charge, the EEOC is entitled to investigate broader claims.

Finally, the EEOC may initiate a systemic investigation under either the Age Discrimination in Employment Act or the Equal Pay Act. Under both statutes, the Commission can initiate a "directed investigation" even in the absence of a charge of discrimination, seeking data that may include broad-based requests for information and initiating a lawsuit for violation of the applicable statute.[124]

2. Scope of EEOC's Investigative Authority

The touchstone of the EEOC's subpoena authority is the text of its originating statute. By statute, the Commission's authority to request information arises under Title VII, which permits it "at all reasonable times have access to . . . any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this subchapter and is relevant to the charge under investigation."[125] The leading case interpreting the scope of this authority is the U.S. Supreme Court decision *EEOC v. Shell Oil Co.*,[126] frequently cited for the proposition that "relevance" in this context extends "to virtually any material that might cast light on the allegations against the employer."[127] Less cited is the Court's admonition that "Congress did not eliminate the relevance requirement, and [courts] must be careful not to construe the regulation adopted by the EEOC governing what goes into a charge in a fashion that renders that requirement a nullity."[128]

What if the initial reason for the charge no longer exists? Courts of appeals for the Ninth and Seventh Circuits have already held that, even if the EEOC issues a right-to-sue letter or even if the charge is withdrawn, the EEOC's

121 *See* 42 U.S.C. § 2000e-5(b).

122 *EEOC v. Caterpillar, Inc.*, 409 F.3d 831, 832 (7th Cir. 2005). *But see EEOC v. Burlington Northern Santa Fe Railroad*, 669 F.3d 1154 (10th Cir. 2012) (denying enforcement of the EEOC's subpoena expanding the scope of its investigation involving two individuals); *EEOC v Royal Caribbean Cruises, Ltd.*, 771 F.3d 757 (11th Cir. 2014) (denying the EEOC's attempt to subpoena information to help support a pattern-or-practice claim, when the case at issue involved one individual only).

123 *See* 42 U.S.C. § 2000e-5(b) (a charge may be filed either "by or on behalf of a person claiming to be aggrieved, or by a member of the Commission").

124 *See, e.g.*, 29 U.S.C. § 626(a) of the ADEA (the EEOC "shall have the power to make investigations. . . for the administration of this chapter"); 29 C.F.R. § 1626.15 ("the Commission and its authorized representatives may investigate and gather data . . . advise employers . . . with regard to their obligations under the Act . . . and institute action . . . to obtain appropriate relief").

125 42 U.S.C. § 2000e-8(a); *see also* 29 U.S.C. § 626(a) (ADEA); 29 C.F.R. § 1626.15 (ADEA); 29 U.S.C. § 211 (FLSA); 29 U.S.C. § 206(d) (EPA); 29 C.F.R. § 1620.30 (EPA); EEOC Compliance Manual, § 22.7.

126 *EEOC v. Shell Oil Co.*, 466 U.S. 54 (1984).

127 *Id.* at 59.

128 *Id.*

authority to investigate remains unabated.[129] But is the same true if the charging party's underlying lawsuit is dismissed on the merits? Such was the issue of first impression for the Seventh Circuit in *EEOC v. Union Pacific Railroad*.[130] There, an employer challenged the EEOC's legal authority to continue an enforcement action after issuing a right-to-sue letter and after the underlying charges of discrimination in a private lawsuit had been dismissed on the merits.[131] While the federal appellate courts have been split on this issue,[132] the Seventh Circuit treated the issue as answered by the Supreme Court's decision in *Waffle House*, where the Court held that the charging individual's agreement to arbitrate did not bar further action on the part of the EEOC.[133]

In *Waffle House*, the Court held that "[t]he statute clearly makes the EEOC the master of its case and confers on the agency the authority to evaluate the strength of the public interest at stake."[134] This established, for the *Union Pacific* court, that the EEOC's authority is not derivative.[135] And if issuing a right-to-sue letter does not end the EEOC's authority, then the court did not see how the entry of judgment in the charging individual's civil action had any more bearing. "To hold otherwise," concluded the court, "would not only undercut the EEOC's role as the master of its case under Title VII, it would render the EEOC's authority as 'merely derivative' of that of the charging individual contrary to the Supreme Court's holding in *Waffle House*."[136] The upshot is that, however disposed of, the outcome of a valid charge in the Seventh Circuit does not seem to determine or define the EEOC's authority. The Ninth Circuit in *EEOC v. VF Jeanswear LP* reaffirmed its position that the EEOC's power to investigate instances of discrimination extend beyond the allegations of the individual charging party.[137] Citing Ninth Circuit precedent, the court emphasized, "there is no legal basis for limiting the scope of the relevance inquiry only to the parts of the charge relating to the personally-suffered harm of the charging party."[138]

a. Applicable Timelines for Challenging Subpoenas (Waiver issue)

As part of its investigative authority, the EEOC can and does issue subpoenas to employers seeking information or data. An employer may challenge an EEOC subpoena, but may be barred from doing so in a subpoena-enforcement action in circumstances where it fails to challenge or modify the subpoena in accordance with statutorily-imposed deadlines.[139] Specifically, an employer may "waive" the right to oppose enforcement of an administrative subpoena, unless it petitions the EEOC to modify or revoke the subpoena within five days of receipt of the subpoena.[140] This requirement is set forth in the regulations governing the EEOC's investigative authority. Namely, "any person served with a subpoena who intends not to comply shall petition" the EEOC "to seek its revocation or modification . . . within five days . . . after service of the subpoena."[141]

For over 10 years, the EEOC has taken an aggressive stance on this "waiver" issue when dealing with employers that have generally failed to respond to its requests for information and subpoenas. The most notable case on this issue is the Seventh Circuit's 2013 decision in *EEOC v. Aerotek*,[142] in which a federal appeals court supported the

129 *Watkins Motor Lines, Inc.*, 553 F.3d 593 (7th Cir. 2009); *EEOC v. Fed. Express Corp.*, 558 F.3d 842 (9th Cir. 2009) (holding that the issuance of a right-to-sue letter does not strip the EEOC of its authority to continue its investigation).

130 *EEOC v. Union Pacific Railroad*, 867 F.3d 843 (7th Cir. 2017).

131 *Id.* at 845.

132 *See EEOC v. Hearst*, 103 F.3d 462 (5th Cir. 1997) (holding that the EEOC's authority to investigate a charge ends when it issues a right-to-sue letter); *EEOC v. VF Jeanswear LP*, No. 17-16786, 769 Fed. Appx. 477 (9th Cir. May 1, 2019) ("there is no legal basis for limiting the scope of the relevance inquiry only to the parts of the charge relating to the personally-suffered harm of the charging party."); *Fed. Express Corp.*, 558 F.3d 842 (9th Cir. 2009) (holding that the issuance of a right-to-sue letter does not strip the EEOC of authority to continue to process the charge, including independent investigation of allegations of discrimination on a company-wide basis).

133 *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 291 (2002).

134 *Id.* at 291.

135 *Union Pacific Railroad*, 867 F.3d at 851.

136 *Id.*

137 *EEOC v. VF Jeanswear LP*, No. 17-16786, 769 Fed. Appx. 477 (9th Cir. 2019), *petition for cert. filed* (U.S. Oct. 1, 2019) (No. 19-446), *cert. denied* (U.S. Apr. 6, 2020).

138 *VF Jeanswear LP*, 769 Fed. Appx. 477, slip op. at 3, citing *EEOC v. Fed. Express Corp.*, 558 F.3d 842, 855 (9th Cir. 2009).

139 *See, e.g., EEOC v. Bashas', Inc.*, 2009 U.S. Dist. LEXIS 97736, at **9-29 (D. Ariz. 2011) (providing a thorough discussion of the case law discussing the potential "waiver" of a right to challenge administrative subpoena); *see also EEOC v. Cuzzens of GA, Inc.*, 608 F.2d 1062, 1064 (5th Cir. 1979); *EEOC v. Cnty of Hennepin*, 623 F. Supp. 29, 33 (D. Minn. 1985); *EEOC v. Roadway Express, Inc.*, 569 F. Supp. 1526, 1528 (N.D. Ind. 1983).

140 *See, e.g., EEOC v. Chrome Zone LLC*, Case No. 4:13-mc-130 (S.D. Tex. Feb. 22, 2013) (EEOC motion to compel employer's compliance with subpoena arguing waiver by failure to file a Petition to Revoke or Modify Subpoena where the employer had failed to respond to charge of discrimination or EEOC's requests for information or subpoena); *EEOC v. Ayala AG Services*, 2013 U.S. Dist. LEXIS 14831, at **11-12 (E.D. Cal. Oct. 15, 2013); *EEOC v. Mountain View Medical Center*, Case No. 2:13-mc-64 (D. Ariz. July 30, 2013) (same). *But see EEOC v. Loyola Univ. Med. Ctr.*, 823 F. Supp. 2d 835 (N.D. Ill. 2011) (denying enforcement of overbroad subpoena requesting irrelevant information despite employer's failure to file a Petition to Revoke or Modify Subpoena, reasoning a procedural ruling was inappropriate given (1) the absence of established case law on the issue under the ADA, (2) the sensitive and confidential nature of the information subpoenaed, which related to employees' medical conditions, and (3) the fact that the employer had twice objected to the scope of the EEOC's inquiry before the enforcement action was filed).

141 29 C.F.R. § 1601.16(b)(1).

142 *EEOC v. Aerotek,* 498 Fed. Appx. 645 (7th Cir. 2013).

EEOC's position that an employer waived the right to challenge a subpoena by failing to file a Petition to Modify or Revoke. In *Aerotek*, a staffing agency was accused of placing applicants according to the discriminatory preferences of its clients. The EEOC's subpoena sought a "broad range of demographic information, including the age, race, national origin, sex, and date of birth of all internal and contract employees dating back to January 2006," in addition to information about recruitment, selection, placement, and termination decisions by the company and its clients. Despite receiving from the company about 13,000 pages of documents in response to the subpoena, the EEOC claimed the company failed to provide additional requested information. In addition, although the staffing agency had filed objections to the EEOC's petition, the objections were filed one day beyond the statutorily required five days. The district court determined that the company's objections were waived and ordered it to comply with a broadly worded subpoena, which had been pending for more than three years, because the company filed objections with the agency six days after receipt. The Seventh Circuit agreed with this decision, finding that the defendant "has provided no excuse for this procedural failing and a search of the record does not reveal one … We cannot say whether the Commission will ultimately be able to prove the claims made in the charges here, but we conclude that EEOC may enforce its subpoena because [defendant] has waived its right to object."[143]

Since *Aerotek*, there have been examples where a court has disagreed with the EEOC's contention that an employer has waived objections to a subpoena due to its failure to timely or properly petition for revocation or modification of the subpoena. Those courts have scrutinized the justifications offered by an employer for failing to file a petition to modify or revoke within the five-day period and have applied the four-factor test articulated in *EEOC v. Lutheran Social Services*.[144]

In *Lutheran*, the U.S. Court of Appeals for the D.C. Circuit held that there is a "strong presumption that issues parties fail to present to the agency will not be heard . . ." but it also stated that the court should still consider "whether the facts and circumstances surrounding [non-compliance] are sufficiently extraordinary" to excuse non-compliance.[145] It further explained that factors that may amount to such exceptional circumstances include whether (1) the subpoena advised the recipient of the five-day petition deadline expressly or by citing the relevant law or regulation; (2) the agency investigator informed the subpoena recipient of the missed deadline; (3) the subpoena recipient repeatedly raised its objections to the agency in some form other than a revocation petition; and (4) the objections are not within the "special competence" of the EEOC.[146] The *Lutheran* court also suggested, however, that this standard would be "quite different" in the more "typical situation where a subpoena recipient's objections rest on relevance."[147]

The EEOC continues to scrutinize whether an employer has timely challenged any subpoenas issued by the agency. In *EEOC v. Ferrellgas, L.P.*,[148] the Eastern District of Michigan granted the EEOC's application to enforce a subpoena. In the agency proceedings, the respondent failed to either respond to the subpoena or to properly challenge it. Citing the requirement for a respondent to file a petition to revoke or modify a subpoena within five days after service of the subpoena, the court found that the right to challenge the subpoena had been forfeited. Further, the court held that the respondent had also failed to present a basis for not enforcing the subpoena because all three requirements of the subpoena enforcement application were met: (1) the charge was valid and the EEOC was authorized to investigate it; (2) the material requested in the subpoena was relevant to the charge; and (3) the respondent failed to show that the subpoena was indefinite or made for an illegitimate purpose.[149]

b. Procedural Issues

It is well established that to bring and maintain an enforcement action, certain procedural requirements must be met. For example, in 2020 the Fifth Circuit addressed whether these procedural requirements were satisfied in *EEOC v. Vantage Energy Services, Inc.*[150] Specifically, the issue on appeal was whether a "later-verified

143 *Id.* at 648.
144 *EEOC v. Lutheran Social Servs.*, 186 F.3d 959 (D.C. Cir. 1999).
145 *Id.* at 959.
146 *Id.* at 964-66.
147 *Id.* at 959.
148 *EEOC v. Ferrellgas, L.P.*, 2023 U.S. Dist. LEXIS 25721 (E.D. Mich. Feb. 15, 2023).
149 *Id.* at **3-6 (citing *Univ. of Pa. v. EEOC*, 493 U.S. 182, 191 (1990)).
150 *EEOC v. Vantage Energy Servs., Inc.*, 2020 U.S. App. LEXIS 10560 (5th Cir. Apr. 3, 2020).

intake questionnaire" was sufficient to constitute a charge under the ADA's requirement that charges be filed within 300 days.[151]

In *Vantage Energy Services*, the claimant worked on a deep-water drillship for the defendant, and suffered a heart attack while at sea.[152] The defendant subsequently placed him on short-term disability leave, and on the day he was due to return to work, the defendant fired him, citing poor work performance.[153] The claimant, through his legal counsel, submitted a letter to the EEOC asserting the defendant had violated the ADA, and included with the letter an EEOC intake questionnaire.[154] The questionnaire included the claimant's name, address, nature of the discrimination claim, and the defendant's stated reason for the termination.[155] The claimant also checked the box at the end of the questionnaire, which stated that he "wanted 'to file a charge of discrimination' and 'authoriz[ed] the EEOC to look into the discrimination' claim," and included his unverified signature.[156]

After receiving the intake questionnaire from the claimant, the EEOC added a charge number to the questionnaire, handwriting it at the top of the document.[157] This number remained the same throughout the course of the matter.[158] The EEOC then sent the claimant two letters, which, respectively, acknowledged receipt of the "charge" and requested him to supplement the questionnaire with his address and phone number.[159] The defendant also received notice of the charge, but was informed no action was required pending receipt of a perfected charge.[160]

The perfected charge, belatedly received by the EEOC, was signed under the penalty of perjury, and was dated more than 300 days after the claimant's job termination.[161] Upon receipt of the perfected charge, the EEOC informed the defendant and requested a position statement, which the defendant submitted.[162]

After conducting an investigation, the EEOC determined there was reasonable cause to believe that the defendant violated the ADA, and the parties submitted to conciliation, which was unsuccessful, resulting in the filing of an enforcement action.[163] The defendant moved to dismiss the EEOC's complaint, arguing that it failed to exhaust administrative remedies because the formal charge was filed more than 300 days after the employee's termination.[164] The EEOC opposed the motion, asserting that the intake questionnaire, which was filed within 300 days, satisfied the requirement to exhaust administrative remedies, and it was inconsequential that the intake questionnaire was not verified pursuant *Edelman v. Lynchburg College*.[165]

Although the district court was persuaded by the defendant and dismissed the EEOC's enforcement action with prejudice, the Fifth Circuit reversed the decision, noting that the defendant's arguments, upon which the district court relied, were "all contrary to considerable precedent."[166] The Fifth Court first explained that the Supreme Court previously ruled in *Federal Express Corp. v. Holowecki*[167] that an intake questionnaire could qualify as a charge if it satisfied the charge-filing requirements and could be construed as a request for the agency to take remedial action.[168] Because the claimant's intake questionnaire in *Vantage Energy Services* identified the parties, described the action complained of, specifically, the claimant's belief that the defendant had discriminated against him by discharging him immediately after finishing his short-term disability leave, and indicated that the claimant wanted to file a charge and authorized the EEOC to investigate the alleged conduct, the Fifth Circuit concluded that the intake questionnaire satisfied the *Holowecki* test.[169]

151 *Id.* at **5-6.
152 *Id.* at *2.
153 *Id.*
154 *Id.*
155 *Id.*
156 *Id.* at **2-3. "Following *Holowecki*, the EEOC revised its Intake Questionnaire to require claimants to check a box to request that the EEOC take remedial action. . . . Under the revised form, an employee who completes the Intake Questionnaire and checks Box 2 unquestionably files a charge of discrimination." *Hildebrand v. Allegheny Cty.*, 757 F.3d 99, 113 (3d Cir. 2014).
157 *Vantage Energy Servs., Inc.*, 2020 U.S. App. LEXIS 10560, at *3.
158 *Id.*
159 *Id.*
160 *Id.*
161 *Id.* at **4-5.
162 *Id.* at *4.
163 *Id.*
164 *Id.* at **4-5.
165 *Id.* at *5, citing *Edelman v. Lynchburg College*, 535 U.S. 106 (2002).
166 *Vantage Energy Servs., Inc.*, 2020 U.S. App. LEXIS 10560, at *6.
167 *Fed. Express Corp. v. Holowecki*, 552 U.S. 389 (2008).
168 *Vantage Energy Servs., Inc.*, 2020 U.S. App. LEXIS 10560, at *6.
169 *Id.* at **7-9.

In reaching this conclusion, the Fifth Circuit noted that the EEOC's treatment of the questionnaire was ambiguous because it emphasized the need for the claimant to verify the intake questionnaire, but also had assigned it a charge number. Still, it determined that, while instructive, "the EEOC's characterization of the questionnaire is not dispositive. What constitutes a charge is determined by objective criteria."[170]

Relying on *Edelman*, the appeals court also ruled that the fact the intake questionnaire was not verified upon receipt or within the 300-day filing deadline did not render the charge untimely.[171] It explained that the purposes of the verification requirement was to protect employers from the expense and disruption of a claim unless it was supported by an oath subject to the liability for perjury.[172] The Fifth Circuit reiterated that, under *Edelman*, this purpose is maintained if the technical defect, such as a lack of verification, is corrected by the time an employer must respond to the charge.[173] Thus, because the claimant eventually complied with the verification requirement, it "related back" to the time the intake questionnaire was filed.[174]

Finally, the Fifth Circuit rejected the defendant's argument that its due process rights would be violated if the intake questionnaire was treated as a charge because it did not receive formal notice of the charge within 10 days of the EEOC's receipt, as required by 42 U.S.C. § 20003-5(e)(1).[175] The court rejected the argument because the defendant failed to demonstrate what prejudice it suffered by the delay, and there was no evidence of bad faith on part of the EEOC.[176]

3. Standard for Reviewing Subpoena Enforcement

The Supreme Court in FY 2017 decided what standard a court of appeals should use when reviewing a district court's decision to enforce or quash an EEOC subpoena. While almost all circuits used the deferential abuse-of-discretion standard, the Ninth Circuit had stood alone in applying the more searching *de novo* standard. Such was the state of the law until the Court's 2017 decision,[177] in which it brought the Ninth Circuit into line with its sister circuits. Rejecting the Ninth Circuit's approach, the Court held that a district court's decision to enforce an EEOC subpoena should be reviewed for abuses of discretion, not *de novo*.[178] In so holding, the Court was guided by two principles: (1) the longstanding practice of the courts of appeals in reviewing a district court's decision to enforce or quash an administrative subpoena; and (2) whether, "as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question."[179] For the Court, each favored a more deferential standard. While the Court explained that district courts need not defer to the EEOC on what is "relevant," it did emphasize *Shell Oil*'s "established rule" that the term "relevant" be understood "generously" to permit the EEOC "access to virtually any material that might cast light on the allegations against the employer."[180]

4. Review of Recent Cases Involving Broad-Based Investigation by EEOC

The EEOC usually is given wide latitude to investigate charges of discrimination, provided it can demonstrate it acted within the scope of its authority and the information sought is relevant and reasonable in scope.

As a result, courts frequently have enforced a subpoena issued by the agency, unless the subpoenaed party can show judicial enforcement of the subpoena would be an abuse of process or create an undue burden. For example, in *EEOC v. Ferrellgas*, the Sixth Circuit upheld a district court's decision to enforce an EEOC subpoena that sought information on job applicants.[181] The case involved allegations that the charging party was not hired for certain positions because she failed to disclose two misdemeanor convictions on her criminal record, was paid less than

170 *Id.* at **9-10.
171 *Id.* at *11.
172 *Id.*
173 *Id.*
174 *Id.* at **11-12.
175 *Id.* at *13.
176 *Id.*
177 *McLane Co. v EEOC*, 137 S. Ct. 1159 (2017).
178 *Id.* at 1170.
179 *Id.* at 1166-67.
180 *Id.* at 1163. On remand, in the applicable case, *McLane Co. v. EEOC*, 857 F. 3d 813 (9th Cir. 2017), the Ninth Circuit reached the same decision, even under the deferential abuse-of-discretion standard. Citing Justice Ginsburg's concurrence in the above-referenced Supreme Court decision, the court held that, by requiring an unduly heightened showing of relevance, the district court had abused its discretion. The court therefore remanded the case to the lower court, where the employer was free to renew its argument that the EEOC's pedigree information, while perhaps not irrelevant, was unduly burdensome.
181 *EEOC v. Ferrellgas, L.P.*, 97 F.4th 338, 341 (6th Cir. 2024).

her male counterparts, and was discharged because of her race and sex.[182] The respondent argued the court should not enforce the EEOC's subpoena, as the subpoena was overly broad, unduly burdensome, and not relevant to the charge.[183] The district court granted the EEOC's petition to enforce the subpoena, reasoning that information about job applicants was relevant because it could "provide[] context for determining whether discrimination has taken place."[184] The district court further reasoned that the subpoena did not create undue burden because there was no evidence it would impact the respondent's daily operations.[185] In holding that the district court did not abuse its discretion in enforcing the EEOC subpoena, the Sixth Circuit agreed, and further explained that the respondent had previously complied with a similar subpoena without objection.[186]

One recent case, requiring careful review, also required disclosure of documents containing confidential information regarding other employees in response to an EEOC's subpoena, as exemplified in *EEOC v. MTV Food Inc*.[187] In *MTV Food*, the EEOC sought to enforce an administrative subpoena against the respondent in an action involving allegations of race, age, and sex discrimination, as well as retaliation, and a second charge related to a different employee, which was filed after the original charge.[188] The subpoena sought information applicable to the initial charging party and other employees. For example, the subpoena sought an excel spreadsheet of all of the defendant's employees for a four-year period with the following information: full name, date of birth, sex, race, date of hire, job title, department, name of supervisor, date of employment termination (if applicable) and whether the employment termination was voluntary, reason for any involuntary employment termination, and the employee's last known contact information (street address, phone number, and email address).[189] Further, the subpoena also sought "all documents (including email, text, and chat) related to [charging party's] termination."[190] The respondent sent some, but not all, information requested in response the subpoena's excel spreadsheet request.[191] In response to the request for documents regarding the charging party's termination, the respondent responded that it did not terminate her, but instead that she abandoned her job, so it had no termination-related documents to provide.[192] In granting the EEOC's petition to enforce its subpoena, the court reasoned as follows: (1) the information requested in the subpoena was relevant to the EEOC's investigation, (2) there was no basis for the respondent to withhold the requested information from the EEOC on confidentiality grounds, (3) the respondent had not demonstrated that production of the requested information would impose an undue burden, and (4) the respondent had not provided documents fully responsive to the EEOC's request for all documents related to the end of the charging party's employment.[193]

The EEOC's subpoena authority is not completely without limitations. Nationwide discovery is generally considered by courts to be an impermissible fishing expedition.[194] Thus, in *EEOC v. Visionpro Networks, Inc*., when the EEOC sought to enforce a subpoena that requested, among other things, information not limited to a charging party's geographic location in a case involving sexual harassment allegations, the court granted the EEOC's petition for enforcement, but held that some limits on the geographic scope of the subpoena were appropriate.[195] Where the charging party was the only technician in Connecticut, however, the court refused to limit the subpoena to just the Connecticut facility; instead, the court ordered that the subpoena be limited to all facilities within Connecticut and New York because the charging party's employing unit was construed as spanning both Connecticut and New York.[196]

182 *EEOC v. Ferrellgas, L.P.*, 2023 U.S. Dist. LEXIS 117964, at **1-2 (E.D. Mich. July 10, 2023).
183 *Id.* at **3-4.
184 *Id.* at **6-8.
185 *Id.* at **8-10 (brackets in original).
186 *Ferrellgas*, 97 F. 4th at 345.
187 *EEOC v. MTV Food, Inc.*, 2024 U.S. Dist. LEXIS 164906 (S.D.N.Y. Sept. 12, 2024).
188 *Id.* at **1-5.
189 *Id.* at **5-6.
190 *Id.* at *7.
191 *Id.* at *6.
192 *Id.* at **18-19.
193 *Id.* at **15-20.
194 *See, e.g., Cronas v. Willis Group Holdings, LTD*, 06 Civ. 15295 (GEL), 2008 U.S. Dist. LEXIS 81083, at *7 (S.D.N.Y. Oct. 8, 2008) (stating that nationwide discovery lead to a "fishing expedition" for plaintiff to search for other employees with similar discrimination claims); *In re Western Dist. Xerox Litig.*, 140 F.R.D. 264, 271 (W.D.N.Y. 1991) (denying company-wide discovery where plaintiffs already had data for over 1,500 similarly situated employees).
195 *EEOC v. Visionpro Networks*, 2024 U.S. Dist. LEXIS 137641 (E.D.N.Y. Aug. 2, 2024).
196 *Id.* at **24-25.

Employers also must take care in dealing with EEOC subpoenas because some courts have held that a subpoenaed party that fails to properly respond to a subpoena may waive any objections it may have to responding to the subpoena.

In *EEOC v. Cambridge Transportation, Inc.*,[197] the charging party alleged discrimination claims under Title VII, the ADA, and the EPA. The EEOC sent an RFI seeking (1) a copy of the plaintiff's personnel file, and (2) the name, race, sex, and pay rate of all drivers who drove for the respondent.[198] When the respondent did not respond to the RFI, the EEOC served a subpoena seeking the same documents sought in the RFI, as well as the respondent's tax filing information, data pertaining to all of the respondent's drivers, the total number of individuals who drove for the respondent while the charging party was employed, and a list of all positions the respondent considered to be employees as opposed to contractors.[199] According to the EEOC, the respondent's eventual response and productions were incomplete and non-responsive despite multiple extensions to comply.[200] For example, one of the spreadsheets the respondent produced listed only the gender for some individuals, did not list race information, and did not include the charging party on the list.[201]

The EEOC initiated an action seeking an order directing the respondent to appear and show cause why an order should not issue directing the respondent to comply with the subpoena in full, and an order directing the respondent to comply with the subpoena.[202] Ultimately, the court concluded the respondent had waived any arguments against enforcement of the subpoena based on its failure to respond as directed, and noted that the subpoena sought information "reasonably relevant to an authorized investigation and [was] neither unacceptably vague nor issued for an unauthorized purpose."[203]

This case underscores that while the EEOC's subpoena authority is not completely without limitations, there are serious consequences for companies that wholly fail to comply with an EEOC subpoena. As noted, in *Cambridge Transportation*, the EEOC sought to enforce a subpoena it had served on the respondent, and the district court entered an order to show cause why the EEOC's subpoena should not be enforced.[204] The EEOC filed a status report two-and-a-half months after the court's show cause order, notifying the court that it had not received any response to its subpoena, nor any responses to its requests for status updates regarding the response to its subpoena.[205] The court, in turn, ordered the respondent to retain counsel to enter an appearance on its behalf at a hearing to show cause as to why sanctions for contempt should not be entered against it pursuant to Federal Rule of Civil Procedure 45(g) for failure to comply with the court's order.[206] No representative appeared on behalf of respondent, and the court imposed civil contempt sanctions against the respondent, in the amount of $100 per day for each day that the respondent remained out of compliance with the EEOC's subpoena.[207] The EEOC requested that the court modify the civil contempt sanctions to a daily civil fine of $200 per day for each day the respondent remained out of compliance, given the respondent's "repeated disregard for judicial orders and given the lack of progress made on its compliance with the EEOC subpoena."[208] The assigned magistrate judge entered a report and recommendation recommending that the EEOC's motion to modify the civil contempt sanctions be granted,[209] and the district court accepted the report and recommendation.[210] The court imposed the $200 per day fine for each day it remained out of compliance as requested by the EEOC, and warned the respondent that more serious penalties could be imposed if its current pattern of behavior continued, *including seizure of the business*.

Where a subpoenaed party objects to responding to an agency's subpoena on grounds that the subpoena seeks irrelevant information, is too indefinite, was issued for an illegitimate purpose, or is unduly burdensome, district courts will closely scrutinize an employer's objections. For example, in *EEOC v. Do & Co Detroit, Inc.*,[211] the district

197 *EEOC v. Cambridge Transp. Inc.*, 2024 U.S. Dist. LEXIS 36506 (D. Minn. Feb. 27, 2024).
198 *Id.* at *2.
199 *Id.* at **2-3.
200 *Id.* at *3.
201 *Id.* at *4.
202 *Id.* at **5-6.
203 *Id.* at *10.
204 *Id.* at Dkt. 20.
205 *Id.* at Dkt. 23.
206 *Id.* at Dkt. 25.
207 *Id.* at Dkts. 30, 33.
208 *Id.* at Dkt. 36.
209 *Id.* at Dkt. 39.
210 *Id.* at Dkt. 42.
211 *EEOC v. Do & Co Detroit, Inc.*, 2024 U.S. Dist. LEXIS 81532 (E.D. Mich. May 3, 2024).

court denied the respondent's petition to revoke or modify a subpoena issued by the EEOC, where the charging party alleged that the respondent did not compensate Black employees and white employees equally and fired Black employees who failed mandatory drug tests but did not do the same for white employees. Following the court's denial of the respondent's petition to revoke or modify the subpoena, the respondent failed to respond to the subpoena.

The EEOC filed an application for order to show cause why the subpoena should not be enforced.[212] The Eastern District of Michigan determined that (1) the charge was valid and that the EEOC was therefore authorized to investigate the charge and subpoena evidence for periods beyond that alleged in a charge; (2) the material requested in the subpoena was relevant to the charge and the EEOC was entitled to seek evidence concerning patterns of discrimination without presenting a specific reason for disclosure of the requested information; and (3) the respondent's objections that the subpoena was (a) too indefinite, (b) was issued for an illegitimate purpose, or (c) was unduly burdensome, were unsupported.[213] The court noted that the EEOC may seek "access to virtually any material which might cast light on the allegations against the employer," and that employers may be compelled to compile information in their control to respond to a subpoena.[214] It also cited case law that privacy or "confidentiality is no excuse for noncompliance."[215] The court ultimately granted the EEOC's application and ordered the respondent to show cause within 14 days as to why the subpoena should not be enforced.[216]

Government entities are also not immune from the district court's routine enforcement of agency-issued subpoenas. In *EEOC v. Kansas City Community College*,[217] the EEOC enforced a subpoena for records where four police officers who worked for a state community college alleged age and sex discrimination. The EEOC sought (1) documents showing the respondent's policies and practices regarding pay; (2) payroll records for all of the respondent's police officers; (3) the identities of individuals who participated in setting or changing pay rates for officers; (4) personnel records for part-time officers; (5) vacancies and postings for open police officer positions; (6) applications and resumes for campus police officers; and (7) documents related to Board of Trustees' decisions regarding officer pay.[218] The District of Kansas affirmed the magistrate Judge's report and recommendation granting the EEOC's application to enforce the subpoenas.[219] In doing so, the court determined that the EEOC possessed authority to issue the subpoenas despite the respondent's being a government entity, the respondent had waived its right to object to the subpoenas because of its failure to timely respond to the subpoenas, the respondent received adequate procedural due process, the subpoena requests were relevant to the EEOC's investigation, and the subpoenas did not unduly burden the respondent.[220]

In limited circumstances, even where the agency seeks information on a nationwide basis over a several-year period, some district courts have concluded that if the information is relevant to the investigation, the subpoena is enforceable. In *EEOC v. AAM Holding Corp.*,[221] the Southern District of New York enforced subpoenas issued on the respondents—which operated adult entertainment clubs in Manhattan—where the charging party alleged sex discrimination on behalf of herself and a class of other female employees. The subpoenas sought demographic information, positions, employment dates and contact information for all of the respondents' employees across the country over a nearly four-year period.[222] The court determined that the information sought, while broad, was relevant to the investigation because the charges alleged that all women employed at the clubs in that time period had been subject to sex-based discrimination.[223] The court further concluded that the respondent's undue burden and unreasonableness arguments were unpersuasive "in light of the nature of the information sought" and "too abstract and attenuated."[224] After the court issued its order enforcing the subpoena, the respondents appealed, then moved for a stay of the order pending appeal. The Southern District of New York denied the stay because the

212 *Id.* at *2.
213 *Id.* at **4-7.
214 *Id.* at *6.
215 *Id.* at **6-7.
216 *Id.* at *7.
217 *EEOC v. Kansas City Community College*, 2024 U.S. Dist. LEXIS 139252 (D. Kan. Aug. 6, 2024).
218 *Id.* at *4.
219 *Id.* at *26.
220 *Id.* at **10-26.
221 *EEOC v. AAM Holding Corp.*, 2024 U.S. Dist. LEXIS 101025 (S.D.N.Y. June 6, 2024).
222 *Id.* at *2.
223 *Id.* at **6-7.
224 *Id.* at **8-11.

respondents "fail[ed] to make a strong showing that they [were] likely to succeed on the merits or that they [would] be irreparably injured absent a stay."[225]

A district court frequently will enforce a subpoena issued by the agency, unless the subpoenaed party can show judicial enforcement of the subpoena would be an abuse of process or create an undue burden. For example, in *EEOC v. Ferrellgas*, a case decided in 2023, the EEOC issued a subpoena to a respondent during its investigation into a charge of sex and race discrimination filed by a job applicant who alleged she was conditionally hired and then unlawfully fired.[226] The employer alleged the charging party was terminated because she failed to disclose two misdemeanor convictions on her criminal record. The charging party claimed the employer discriminated against her by not hiring her for certain positions based on her race and sex, paying her less than her male counterparts, and discharging her because of her race and sex. The EEOC's subpoena sought various information on job applicants. The respondent declined to respond, claiming the subpoena was unsigned, overly broad, unduly burdensome, and not relevant to the charge. After the EEOC issued a signed subpoena, the respondent again declined to respond, objecting to the scope of the subpoena.[227]

The court granted the EEOC's application for an order to show cause why the subpoena should not be enforced, reasoning that the respondent had forfeited its right to challenge the subpoena under 29 C.F.R. § 1601.16(b)(1) and, in any event, failed to present a basis for not enforcing the subpoena. Specifically, the court rejected the respondent's arguments that the information requested in the subpoena lacked relevance to the charge, and that gathering the information sought would be unduly burdensome. As to relevance, the court held that the information requested (driving position applications) was indeed relevant to the charge because it could "provide[] context for determining whether discrimination has taken place."[228] While the respondent provided information about applicants from one location over the past three years, this disclosure did not diminish the relevance of the additional information requested by the subpoena. Additionally, although the respondent claimed compliance would take two weeks of one full-time employee's time, and that the number of applications was in the hundreds, the respondent failed to show how compliance would impact its normal daily operations. Therefore, the court ordered the respondent to comply.[229]

As few as five discrimination charges may be sufficient grounds to support a multi-state systemic investigation and related subpoena. In a 2024 case out of the Southern District of New York, the EEOC issued a subpoena to a respondent during its investigation of five charges of pregnancy discrimination.[230] The subpoena sought data regarding employees who sought light duty or a job modification as an accommodation for injury, disability, and pregnancy in the five different states where the charging parties were employed.[231]

The respondent served on the EEOC a petition to revoke or modify the subpoena, arguing that the subpoena required it to summarize the requested case files in an inappropriate manner and instead agreed to produce the underlying case files—205,247 pages—but refused to produce the requested information.[232]

The EEOC filed a petition to require the respondent to comply with the subpoena.[233] The respondent argued, in part, that the five individual charges did not support a systemic investigation.[234] The court enforced the subpoena, reasoning that regardless of whether the systemic investigation was proper, the information sought was relevant since "[s]howing relevancy in this context is a low bar" and the subpoena targeted information squarely at the center of the EEOC's investigation.[235] The court held that the subpoena properly sought "the date of the accommodation request; the nature of the requested accommodation (*i.e.*, lifting restriction and/or additional breaks); whether the request for a lifting restriction and/or additional breaks was granted, granted in part or denied; and the date of the decision to grant, grant in part or deny the accommodation."[236] The court also held that the respondent did not show that compliance would threaten to unduly disrupt or seriously hinder normal operations of its business, since respondent tracked the disputed information and the request sought

225 *EEOC v. AAM Holding Corp.*, 2024 U.S. Dist. LEXIS 141271, at *13 (S.D.N.Y. Aug. 7, 2024).
226 *EEOC v. Ferrellgas, L.P.*, 2023 U.S. Dist. LEXIS 25721, at **1-2 (E.D. Mich. Feb. 15, 2023).
227 *Id.* at *5.
228 *Id.* at *5.
229 *Id.* at **5-7.
230 *EEOC v. Amazon.com Servs. LLC*, 2024 U.S. Dist. LEXIS 121977 (S.D.N.Y. July 11, 2024).
231 *Id.* at **2-3.
232 *Id.* at *3-4.
233 *Id.* at *4.
234 *Id.* at *8.
235 *Id.* at *7.
236 *Id.* at *8.

information for approximately one thousand case files, while the respondent has over one million employees in the United States.[237]

Even documents containing confidential information may be subject to disclosure in response to an EEOC's subpoena—albeit with certain limitations—as exemplified in *EEOC v. Security Industry Specialists, Inc.*[238] In *Security Industry Specialists*, the EEOC filed an application for an order enforcing an administrative subpoena against the defendant, which was issued in connection with the EEOC's investigation into a charge of alleged discrimination by a former employee who provided security services for the defendant at a site of a third-party company. The court granted the EEOC's application for enforcement, but thereafter, the third party filed a motion to intervene and an application for a protective order, seeking to protect its confidential information (including the location of a business site, which was not publicly known) from improper disclosure to the public. The third-party company cited the EEOC's status as a public agency subject to requests under the Freedom of Information Act in support of its motion.[239]

The court granted the third party's motion to intervene in the subpoena enforcement action to effectuate full and efficient resolution of the action, and further decided that the defendant was permitted to redact information that was not necessary to the charge of discrimination, including the location of the third party's business site whose location is confidential and not publicly known. It also allowed the defendant to redact further information that was not relevant to the action, including dollar amounts of actual or proposed payment rates made by the third party to the defendant.[240]

The Southern District of Florida found an EEOC subpoena enforceable even where there was a chance that the employer was not covered by Title VII. In *EEOC v. Sinclair*, an employee filed a charge with the EEOC alleging sex discrimination and retaliation.[241] As part of its investigation, the EEOC issued subpoenas.[242] The respondents averred that they did not have 15 employees and requested that the subpoena be limited to that effect.[243] When the EEOC did not modify or limit the subpoenas, however, the respondents served responses and objections, including an objection that the EEOC did not have authority to investigate the matter, given respondents did not have 15 employees.[244] The EEOC then filed an application for an order to show cause to enforce the subpoenas.[245] The court held that a subpoena enforcement proceeding is not the proper forum to litigate the question of the EEOC's jurisdiction over the discrimination charge.[246] Putting that issue aside, the court found that the materials and information requested were not overly vague and amorphous; the relevancy of the materials sought was uncontested; and that respondents failed to show how production of the requested materials would be unduly burdensome.[247] Accordingly, the court granted the EEOC's application for an order to show cause and ordered the parties to serve and file written objections, if any, with the district court judge.[248] The respondents did not file timely objections.[249] Thus, the district court affirmed the magistrate judge's ruling, ordering the respondents to comply with the subpoenas.[250]

A decision from the Eleventh Circuit in *EEOC v. Eberspaecher North America Inc.* underscores a nuanced limitation on the EEOC's subpoena authority.[251] In *Eberspaecher*, the charging party, a former employee, filed a charge with the EEOC alleging he experienced discrimination on the basis of disability when he was fired after accruing points under the respondent's point system for absences and tardiness, where his absences were disability-related. During its investigation, the EEOC uncovered information suggesting that the same discriminatory practice might have affected other employees for the respondent across the country, so it, in turn, filed a commissioner's

237 *Id.* at *13.
238 *EEOC v. Security Industry Specialists, Inc.*, 2023 U.S. Dist. LEXIS 164838 (N.D. Cal. Sept. 15, 2023).
239 *Id.* at **2-4.
240 *Id.* at **3-4.
241 *United States EEOC v. Sinclair*, 2024 U.S. Dist. LEXIS 142977 (S.D. Fla. Aug. 9, 2024), *report and recommendation adopted*, No. 23-23547-Civ-Scola, 2024 U.S. Dist. LEXIS 154447 (S.D. Fla. Aug. 28, 2024).
242 *Id.* at *3.
243 *Id.* at **3-4.
244 *Id.* at **4-5.
245 *Id.* at *5.
246 *Id.* at **7-8.
247 *Id.* at **12-15.
248 *Id.* at *16.
249 *United States EEOC v. Sinclair*, 2024 U.S. Dist. LEXIS 154447 (S.D. Fla. Aug. 28, 2024).
250 *Id.*
251 *EEOC v. Eberspaecher North America, Inc.*, 2023 U.S. App. LEXIS 11466 (11th Cir. 2023).

charge against a single respondent facility rather than the corporate headquarters of the respondent. Pursuant to the charge, the EEOC requested nationwide information regarding the respondent's employees discharged pursuant to the attendance policy. The respondent refused to provide the information, noting that the underlying charge was specific to only one of respondent's facilities. In response, the EEOC issued a subpoena seeking the same information, and the respondent refused to comply. In response to an application for enforcement of the subpoena, the district court ordered the respondent to comply with the subpoena in part. Though the district court agreed with the Commission that the temporal and subject matter scope of the subpoena was "both relevant and reasonable in light of the Commissioner's ADAAA charge," it limited enforcement to the respondent facility stating: "[T]he geographic scope of the subpoena is too broad when read in conjunction with the Commissioner's Charge and Notice."[252] The district court further concluded that only records pertaining to the violations of the ADA at the facility were relevant and must be produced. The Eleventh Circuit affirmed the decision of the district court, citing the fact that the charge was specific to only one facility, and failed to provide notice of an investigation into the company's facilities nationwide.[253]

Courts also may limit monetary sanctions sought by the EEOC in appropriate circumstances. In *EEOC v. Cambridge Transportation, Inc.*, the EEOC filed an application for an order to show cause regarding the respondent's failure to comply with the EEOC's subpoena.[254] After a hearing, the magistrate judge ordered the respondent to comply with the subpoena.[255] When the respondent demonstrated an unwillingness to comply with the court's order, the EEOC requested an order imposing a civil fine of $800 per day for each day that the respondent remained noncompliant with its subpoena.[256] The court issued an order to show cause why sanctions for contempt should not be imposed against respondent.[257] The respondent did not appear at the hearing or communicate with the court regarding the status of its compliance.[258] During the hearing, the EEOC stated it had received a communication earlier that day from respondent claiming that it had retained legal counsel, but claimed the attorney was on vacation and unable to enter an appearance.[259] The respondent also claimed it would comply with the subpoena in the next several days.[260] The court found that the respondent waived its defenses to the EEOC's motion, reasoning that the respondent had ample time to retain counsel to enter an appearance and ensure its counsel would be available for the hearing or move to reschedule it.[261] The court found the respondent to be in civil contempt and imposed monetary sanctions but held that the penalty that the EEOC had requested—$800 per day of noncompliance—was not justified at that time and instead imposed an initial $100 per day fine for each day the respondent remained noncompliant with the subpoena.[262] The district court affirmed the magistrate judge's ruling.[263] Notably, After the respondent's continued non-compliance, the EEOC filed a motion to modify the civil contempt sanctions for failure to comply, which the court granted, increasing the penalty to $200 per day.[264]

More information on the EEOC's subpoena enforcement activities for FY 2024 can be found in Appendix C to this Report.

B. Conciliation Obligations Prior to Bringing Suit

Before filing a lawsuit under Title VII based on pattern-or-practice claims under Section 707 or "class" claims under Section 706, the EEOC must investigate and then try to eliminate any alleged unlawful employment practice by informal methods of conciliation.[265] Only after pursuing such conciliation attempts may the EEOC file a civil action against the employer.[266] If the EEOC fails to conciliate in good faith prior to filing suit, the court may stay the proceedings to allow for conciliation or dismiss the case.

252 *EEOC v. Eberspaecher North America, Inc.*, 2021 U.S. Dist. LEXIS 264693 (N.D. Ala. Aug. 30, 2021).
253 *Eberspaecher*, 67 F. 4th at 1132-34, 1136.
254 *United States EEOC v. Cambridge Transp., Inc.*, 2024 U.S. Dist. LEXIS 121147 (D. Minn. June 11, 2024).
255 *Id.* at **2-3.
256 *Id.* at **2-4.
257 *Id.* at *4.
258 *Id.*
259 *Id.* at **4-5.
260 *Id.*
261 *Id. at **5-6.*
262 *Id.* at **6-7.
263 *EEOC v. Cambridge Transp., Inc.*, 2024 U.S. Dist. LEXIS 118857 (D. Minn. July 8, 2024).
264 *EEOC v. Cambridge Transp., Inc.*, 2024 U.S. Dist. LEXIS 180762 (D. Minn. Oct. 3, 2024).
265 42 U.S.C. § 2000e-5(b).
266 42 U.S.C. § 2000e-5(f)(1).

1. Impact of Mach Mining

Over the years employers have challenged the sufficiency of the EEOC's investigation and conciliation efforts. In April 2015, the Supreme Court addressed EEOC conciliation obligations in *Mach Mining v. EEOC*.[267] In this case, the Court held that the EEOC's attempts to conciliate a discrimination charge prior to filing a lawsuit *are* judicially reviewable, but that the EEOC has broad discretion in the efforts it undertakes to conciliate.

Specifically, the Court held that to meet its statutory conciliation obligation, the EEOC must inform the employer about the specific discrimination allegation(s), describing what the employer has done and which employees (or class of employees) have suffered. It also held that the EEOC must try to engage the employer in discussion to give the employer a chance to remedy the allegedly discriminatory practice. It then concluded that judicial review of whether these requirements are met is appropriate, but "narrow." In its view, a court is just to conduct a "barebones review" of the conciliation process and is not to examine positions the EEOC takes during the conciliation process, since the EEOC possess "expansive discretion" to decide "how to conduct conciliation efforts" and "when to end them."

The Court noted that a sworn affidavit from the EEOC stating that it has performed these obligations generally would suffice to show that the agency has met the conciliation requirement, provided that if an employer presents concrete evidence that the EEOC did not provide the requisite information about the charge or try to engage in a discussion about conciliating the claim, then a reviewing court would have to conduct "the fact-finding necessary to resolve that limited dispute." The Court then held that, even if a court finds for an employer on the issue of the EEOC's failure to conciliate, the appropriate remedy merely is to order the EEOC to undertake the mandated conciliation efforts. Thus, while some courts previously had dismissed lawsuits based on the EEOC's failure to meet its conciliation obligation, that remedy appears no longer to be available based on the Court's decision.

On remand, the EEOC moved to strike part of *Mach Mining*'s memorandum in opposition to the EEOC's motion for partial summary judgment because it contained information from confidential settlement discussions (and the EEOC wished to bar any future disclosure of "anything said or done" during conciliation).[268] The U.S. District Court for the Southern District of Illinois held that because the Supreme Court determined that "[a] court looks only to whether the EEOC attempted to confer about a charge, and not to what happened (*i.e.*, statements made or positions taken) during those discussions," it would grant the motion to strike and would bar the parties from "disclosing anything said or done during and/or as part of the informal methods of 'conference, conciliation, and persuasion.'"[269] The court also held that the defendant-employer had no right to inquire about calculations for damages during the conciliation process.[270]

2. Investigation and Conciliation Obligations Post-*Mach Mining*

Courts continue to apply *Mach Mining* to clarify how charges and conciliations affect the EEOC's authority to investigate and conciliate. As discussed, pursuant to *Mach Mining*, the EEOC "must try to remedy unlawful workplace practices through informal methods of conciliation" prior to filing suit.[271]

For example, in *EEOC v. Hospital Housekeeping Services*,[272] in response to a motion for summary judgment filed by the EEOC, the defendant alleged the EEOC did not conciliate in good faith, and the District of Arkansas cited *March Mining* to note its "narrow" and "barebones" review of the EEOC's conciliation obligation. The court underscored the simple two-step inquiry that is to be applied when reviewing whether the EEOC met its conciliation obligations: (1) whether the EEOC "inform[ed] the employer of the specific allegation … describing both what the employer has done and which employees (or what class of employees) have suffered as a result," and (2) whether the EEOC has "engaged the employer in some form of discussion (whether written or oral), so as to give the employer an opportunity to remedy the allegedly discriminatory practice."[273] Applying the two-step test, the court granted the

267 *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645 (2015).
268 *EEOC v. Mach Mining, LLC*, 161 F. Supp. 3d 632, 635-636 (S.D. Ill. 2016).
269 *Id.* at 635-636.
270 *Id.* at 635.
271 *Mach Mining*, 575 U.S. at 482.
272 *EEOC v. Hospital Housekeeping Services*, No. 2:21-cv-2134, 2023 U.S. Dist. LEXIS 39812 (W.D. Ark. Mar. 9, 2023).
273 *Id.* at *5 (citing *Mach Mining*, 575 U.S. at 494) (internal brackets omitted).

EEOC's motion for summary judgment and held the EEOC met its conciliation obligation because it informed the employer of the specific allegations against it in a reasonable cause letter.[274]

In *EEOC v. Princess Martha, LLC*,[275] the Middle District of Florida emphasized the same narrow review but declined to grant the EEOC's motion for judgment on the pleadings as to the defendant's failure to conciliate defense, opining that to grant judgment in the EEOC's favor on that affirmative defense was premature in light of the lack of any evidence indicating that the alleged failure to conciliate rendered the conditional defense inaccurate.

Similarly, in *EEOC v. American Flange and Greif, Inc.*,[276] the EEOC moved for partial summary judgment with respect to one of two of the defendant's affirmative defenses, which asserted that the EEOC did not meet its statutory obligation to attempt conciliation with that defendant. Specifically, defendant Greif's fourth affirmative defense to the EEOC's complaint asserted that the EEOC did not meet its pre-suit statutory obligation to attempt conciliation with Greif. In response to the EEOC's motion for summary judgment as to that affirmative defense, Greif argued that the EEOC failed to give it notice and an opportunity to conciliate. Based on its review of emails evidencing that the EEOC provided notice and attempts to confer about the charging party's charge, the court disagreed, and granted the EEOC's motion.[277] According to the court, per *Mach Mining*, the EEOC need only show that it tried "to engage the employer in some form of discussion," and the emails showed that it did. The court also noted that even if the EEOC failed to meet its pre-suit obligations, Greif's requested remedy—dismissal of the EEOC's claims against it—would be improper. Instead, the appropriate remedy when an employer succeeds on its failure-to-conciliate defense is to stay the case and order the EEOC to seek the employer's voluntary compliance.[278]

In *EEOC v. Telecare Mental Health Services of Washington, Inc.*,[279] the Western District of Washington examined whether the EEOC met its conciliation obligations prior to filing its lawsuit against the defendant. In its answer to the EEOC's complaint, the defendant brought an affirmative defense alleging failure to exhaust administrative remedies, which the court presumed was based on the EEOC's failure to attempt the required "informal methods of conciliation" prior to bringing suit.[280] The defendant brought this defense because at the charge stage, it responded to the EEOC's "formal offer to conciliate" and "initial demand" with a counteroffer that was "communicated to the EEOC as an opening offer for conciliation purposes,"[281] and, instead of proceeding to conciliation, the EEOC filed a Notice of Conciliation Failure and then filed suit in federal court.[282] The EEOC brought a motion to strike the defendant's affirmative defense, arguing that under *Mach Mining*, the court lacked authority to evaluate the sufficiency of the conciliation.[283]

The Western District of Washington denied the EEOC's motion to strike, holding that "[t]he allegations before the Court do not indisputably demonstrate that EEOC met its conciliation obligations."[284] The court observed that to the contrary, "the facts show that the EEOC sent [the defendant] what amounts to a single 'take it or leave it' offer (while apparently failing to advise [the defendant] that that is what it was), did not respond to [the defendant]'s counteroffer, and unilaterally declared its conciliation efforts a failure."[285] "It is at the very least a matter of debate whether this exchange of letters can be characterized as a 'discussion.'"[286] The court reiterated that while *Mach Mining* "makes clear that the scope of judicial review of the EEOC's conciliation efforts is narrow," the scope of review still "extends as far as is necessary to determine whether a conciliation in fact took place."[287]

The Northern District of California examined whether the EEOC met its conciliation obligations in ruling on the respondent's motion to dismiss and motion to stay a lawsuit for race discrimination.[288] The respondent sought a stay on several grounds, one being that the EEOC failed to engage in the required pre-suit conciliation.[289] The court

274 *Id.* at *6.
275 *EEOC v. Princess Martha, LLC*, 2023 U.S. Dist. LEXIS 88238 (M.D. Fla. May 19, 2023).
276 *EEOC v. American Flange and Greif, Inc.*, No. 21 C 5552, 2023 U.S. Dist. LEXIS 129587 (N.D. Ill. July 27, 2023).
277 *Id.* at **13-14, **21-26.
278 *Id.* at *25.
279 *EEOC v. Telecare Mental Health Servs. of Washington, Inc.*, 2022 U.S. Dist. LEXIS 55657 (W.D. Wash. Mar. 28, 2022).
280 *Id.* at *4 & n.2.
281 *Id.* at *3.
282 *Id.*
283 *Id.* at **1, 6.
284 *Id.* at *5.
285 *Id.* at **5-6.
286 *Id.* at *6 (citing *Mach Mining*, 575 U.S. at 488).
287 *Id.*
288 *EEOC v. Tesla, Inc.*, 2024 U.S. Dist. LEXIS 58268 (N.D. Cal. Mar. 29, 2024).
289 *Id.* at *11.

found that the EEOC properly notified respondent of the specific allegations against it and the class of employees who allegedly suffered as a result.[290] The court also found that the EEOC engaged in conciliation efforts with the respondent, including a seven-hour, in-person conciliation session.[291] The respondent, however, claimed that the EEOC failed to comply with the conciliation mandate because the EEOC refused to provide any specific facts allowing respondent to understand and remedy the allegedly discriminatory practices, therefore, rendering any attempts of conciliation not "meaningful" or in "good faith."[292] The court held that the EEOC was not required to provide the respondent with facts allowing it to understand what problematic practices it implemented or define the class of employees further and, moreover, the Supreme Court in *Mach Mining* expressly rejected a "good faith" requirement on pre-suit conciliation.[293]

3. EEOC's Challenge that any Conciliation Obligation Exists in Pattern-or-Practice Claims Under Section 707

In circumstances in which the EEOC solely relies on Section 707 in any "pattern or practice" lawsuit against an employer, the EEOC cannot circumvent its obligation to engage in conciliation prior to filing suit.

Notably, in *EEOC v. CVS Pharmacy, Inc.*,[294] the EEOC argued that Section 707(a) of Title VII authorizes it to bring actions challenging a "pattern or practice of resistance" to the full enjoyment of Title VII rights without alleging that the employer engaged in discrimination and without following any of the pre-suit procedures contained in Section 706, including conciliation. Specifically, the EEOC argued that Section 707(a) creates an independent power of enforcement to pursue claims alleging a pattern or practice "of resistance" and that Section 707(e), by contrast, requires only that claims alleging a pattern or practice "of discrimination" comply with Section 706 procedures.[295]

The Seventh Circuit rejected this argument, holding that "there is no difference between a suit challenging a 'pattern or practice of resistance' under Section 707(a) and a 'pattern or practice of discrimination' under Section 707(e)," and that "Section 707(a) does not create a broad enforcement power for the EEOC to pursue non-discriminatory employment practices that it dislikes—it simply allows the EEOC to pursue multiple violations of Title VII . . . in one consolidated proceeding."[296] Adopting the EEOC's interpretation, the court reasoned, would read the conciliation requirement out of Title VII because the EEOC could always contend that it was acting pursuant to its broad authority under Section 707(a).[297] Noting that the EEOC's interpretation would undermine both the spirit and letter of Title VII, the court held that the EEOC is required to comply with all of the pre-suit procedures contained in Section 706 when it pursues pattern-or-practice violations.[298]

4. Evidence/Documents Relating to Conciliation

Title VII expressly provides that nothing said or done during the conciliation process "may be used as evidence in a subsequent proceeding without the written consent of the persons concerned."[299] In a 2008 decision, *EEOC v. CRST Int'l, Inc.*, the Northern District of Iowa granted the EEOC's motion to strike from the record a letter containing proposed terms of conciliation.[300] In so doing, the court rejected the employer's arguments that the letter was essential to its ability to disprove one of the EEOC's allegedly undisputed facts, that the EEOC had waived the statute's confidentiality protections by initiating a dispute regarding the substance of conciliation, and that the letter was admissible under Fed. R. Evid. 408. Significantly, the court also held, citing *Mach Mining*, that sealing the letter, as opposed to striking the letter entirely, would not serve the purpose of guaranteeing the parties that their conciliation efforts would not "come back to haunt them in litigation."[301]

The Middle District of Tennessee in 2022 provided further insight into the confines of Title VII's conciliation confidentiality protections in the absence of consent by both parties to the conciliation. Specifically, in *EEOC v.*

290 *Id.* at *12.
291 *Id.*
292 *Id.* at *13-15.
293 *Id.* at *14-15 citing *Mach Mining, LLC*, 575 U.S. at 492.
294 *EEOC v. CVS Pharmacy, Inc.*, 809 F.3d 335 (7th Cir. 2015).
295 *Id.* at 340-41.
296 *Id.* at 341-42.
297 *Id.* at 342.
298 *Id.* at 343. *But see EEOC v. Doherty*, 126 F. Supp. 3d 1305 (S.D. Fla. 2015), in which a district court took the opposite view.
299 42 U.S.C. § 2000e-5(b).
300 *EEOC v. CRST Int'l, Inc.*, 351 F. Supp. 3d 1163, 1174 (D. Iowa 2018).
301 *Id.* at 1175 (citing *Mach Mining*, 575 U.S. at 493).

Whiting-Turner Construction Co.,[302] the EEOC filed a motion to quash one paragraph of a subpoena issued by the defendant to a non-party job placement agency which had previously conciliated the matter with the EEOC. Paragraph 13 of the subpoena sought "any and all documents, property, and ESI which relate to any charges of discrimination filed against [the subpoenaed party] with any federal, state or local EEO agency (including the Equal Employment Opportunity Commission and the Tennessee Commission on Human Rights)," in connection with the project at issue in the case.[303] It specified that the response should include, but not be limited to, "charges and complaints, statements of position, correspondence, notes, settlement and/or conciliation agreements (including drafts), [and] responses to requests for information."[304]

The EEOC objected to Paragraph 13 of the subpoena, arguing that Title VII's confidentiality protections prevented disclosure of information regarding conciliation proceedings, and further that conciliation-related documents were not relevant to any claims or defenses in the action because they are inadmissible as evidence "without the written consent of the persons concerned," which the EEOC had not given.[305] In response, the defendant argued that the majority of the information it requested in Paragraph 13, including the final conciliation agreement between the subpoenaed party and the EEOC (if any) was "purely factual material" and therefore not subject to Title VII's confidentiality protections.[306]

Observing that Title VII's confidentiality protections protect materials reflecting what was "said or done" during conciliation efforts, but does not protect "purely factual information about the merits of the charge, gleaned by the [EEOC] during its conciliation endeavors," the court granted in part and denied in part the EEOC's motion to quash.[307] The court opined that although "proposals and counter-proposals of compromise made by the parties during [conciliation efforts]" fell under Title VII's confidentiality protections, any final agreement between the EEOC and the subpoenaed party, if one existed, was *not* so protected.[308] At the same time, the court expressed no opinion as to objections that the subpoenaed party might make on its own behalf.[309]

In *EEOC v. Heartfelt Home Healthcare Services, Inc.*,310 decided in FY 2023, the EEOC was directed to show cause why the attorney-client or other privilege should attach between itself and the charging party. Specifically, there were questions as to whether the EEOC had an obligation to share settlement offers with the charging party during the conciliation process. The Western District of Pennsylvania held that while courts have recognized the existence of a privilege under different rationales, the EEOC failed to provide sufficient evidence for the same in this particular case.[311] Further, it emphasized that even assuming privilege had attached for purposes of the litigation, it would not extend to communications made during the pre-suit investigative process.[312] In response to a question of whether the employer could require the charging party to participate in a mandatory alternative dispute resolution process, the court also held that the charging party was required to so participate.[313]

302 *EEOC v. Whiting-Turner Construction Co.*, 2022 U.S. Dist. LEXIS 140900 (M.D. Tenn. Aug. 8, 2022).
303 *Id.* at **4-5.
304 *Id.* at *5.
305 *Id.* at *6 (citing 42 U.S.C. § 2000e-5(b)).
306 *Id.* at **6-7.
307 *Id.* at **8-9.
308 *Id.* at **14-15 (emphasis added).
309 *Id.* at *15.
310 *EEOC v. Heartfelt Home Healthcare Services, Inc.*, 2023 U.S. Dist. LEXIS 17116 (W.D. Pa. Jan. 30, 2023).
311 *Id.* at **1-3.
312 *Id.* at *3 (citing *EEOC v. Texas Roadhouse, Inc.*, 2014 U.S. Dist. LEXIS 125867 (D. Mass. Sept. 9, 2014) ("The EEOC concedes that communications between claimants and witnesses and EEOC investigators and staff, during the investigative process, are not, of course, attorney work product.").
313 *Id.* at *2.

V. Review of Noteworthy EEOC Litigation and Court Opinions

A. Pleadings

1. Motion to Dismiss/Scope of Complaint

In response to employer-filed motions to dismiss, the courts continue to liberally construe the EEOC's complaints to avoid dismissal. For example, in a case from the Northern District of California, the EEOC alleged the defendant subjected Black employees to severe or pervasive racial harassment.[314] The defendant moved to dismiss for failure to state a claim and a motion to stay pending "virtually identical" state proceedings, but the court denied both motions.[315]

With regard to the motion to dismiss, the court found the EEOC's factual allegations sufficient to allege a hostile work environment.[316] Additionally, in denying the motion to dismiss the retaliation claim, the court explained the complaint is not required to plead a *prima facie* case of retaliation so long as it contains a short and plain statement of the claim showing that the pleader is entitled to relief.[317] Here, the EEOC articulated facts sufficient to support the inference that the Black employees (1) engaged in activity protected under Title VII, (2) were subjected to adverse employment action, and (3) a causal link existed between the protected activity and the adverse employment action.[318]

The defendant's motion to stay did not fare much better. The motion to stay was based in part on the *Colorado River* doctrine permitting a stay of federal litigation in favor of parallel state court proceedings under "exceptional circumstances."[319] The court noted that parallelism is a threshold requirement and essentially requires concluding that the parallel state court litigation will be an adequate vehicle for the complete and prompt resolution of the issues between the parties.[320] But in this case, the state court actions did not involve Title VII claims and the EEOC was not a party to either state court case.[321] Therefore the court found that the state court actions would not completely and promptly resolve the issues between the defendant and the EEOC.[322]

In *EEOC v. Union Pacific Railroad Co.*, the EEOC brought ADA claims based on the defendant's removal of 21 employees from their jobs for failing visual-acuity tests.[323] As background, the Federal Railroad Administration (FRA) sets railroad safety standards requiring employees to meet certification requirements, including passing a color-vision test.[324] The defendant subjected its engineers and conductors to two visual-acuity tests; one was explicitly accepted by the FRA regulations and the other was not.[325] The defendant filed a motion to dismiss arguing that each of the EEOC's claims was not plausibly alleged and that, regardless, the statute of limitations barred the EEOC from pursuing the claims of 18 employees.[326] The court denied the motion to dismiss, finding that the EEOC plausibly disputed the validity of the second test, whether the removed employees were qualified, and the test's business necessity.[327]

The court also denied defendant's time-bar claim, finding persuasive the EEOC's argument to apply the continuing violation theory.[328] Moreover, each claimant asserted in their charge that they were members of a class action suit, and the Supreme Court has held that statutes of limitations toll for all intervenors and class members while a class is certified until certification is reversed.[329] Because all claimants filed their charges within 300 days

314 *EEOC v. Tesla, Inc.*, 2024 U.S. Dist. LEXIS 58268 (N.D. Cal. Mar. 29, 2024).
315 *Id.* at **1-2.
316 *Id.* at **26-27.
317 *Id.* at *27.
318 *Id.* at **27-31.
319 *Id.* at *5 (citing *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 818 (1976)).
320 *Id.* at **5-6 (*citing Ernest Bock, LLC v. Steelman,* 76 F.4th 827, 838 (9th Cir. 2023), *cert. denied,* 144 S. Ct. 554 (2024); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 28 (1983)).
321 *Id.* at **6-7.
322 *Id.* at *10.
323 *EEOC v. Union Pac. R.R. Co.*, 2024 U.S. Dist. LEXIS 118841 (D. Minn. July 8, 2024).
324 *Id.* at *1.
325 *Id.* at **4-5.
326 *Id.* at **6-7.
327 *Id.* at **16-21.
328 *Id.* at *22.
329 *Id.* at **22-23 (*citing Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974)).

of the decertification decision, their claims were timely because the statute of limitations was tolled during the related class action lawsuit.[330]

In *EEOC v. Sis-Bro Inc.*, the court found the EEOC had adequately pled its causes of action despite the defendant's arguments to the contrary.[331] The complaint generally alleged hostile work environment created by a co-worker's sexual harassment of a transitioning employee based on sex and transgender status, ultimately leading to her constructive discharge.[332] In denying the defendant's motion to dismiss, the court "dispose[d] of a number of defendant's objections in one fell swoop by reference to the liberal federal notice pleading standard."[333] The court further found that the defendant "feign[ed] ignorance of a number of obvious facts in an apparent effort to delay this case's progress to a decision on the merits" and exhibited a "disingenuous lack of understanding of obvious facts and the reasonable inferences that can be drawn therefrom."[334] For instance, the defendant complained the EEOC did not identify the charging party, her gender, or the offending coworker; did not identify which gender transition she was making; did not allege specific dates or frequency of the offending conduct; did not allege facts showing the conduct was objectively and subjectively offensive or because of the charging party's sex or transgender status; and did not allege charging party actually quit her job.[335] However, the court found that a quick read of the complaint revealed sufficient allegations on each point.[336]

In *EEOC v. Supreme Staffing, LLC*, the defendant was successful in arguing a motion to dismiss. In this case, the EEOC charged the staffing company defendant with violating Title VII, claiming retaliation based on transfer and discharge from defendant's contracted work site, Barrett Distribution Centers, LLC.[337] The charging party claimed he witnessed preferential treatment towards non-Hispanic workers and use of an English-only policy while at Barrett.[338] After he complained to Barrett, the charging party was allegedly transferred and then later terminated.[339] The staffing company moved to dismiss the retaliatory transfer charge asserting the EEOC failed to plead facts alleging the staffing company had any knowledge of the charging party's protected activity.[340] The court agreed and granted the staffing company's motion to dismiss on this count.[341] The EEOC also argued in the alternative that it plausibly alleged the staffing company was liable for retaliatory transfer because it removed the charging party from the worksite less than a month after his complaint, illustrating a causal connection between the protected activity and the adverse action.[342] The court disagreed, however, finding that mere temporal proximity between alleged protected activity and adverse action may implicate Barrett but not the staffing company.[343]

2. Lack of Particularity

In *EEOC v. Geisinger Health*,[344] the EEOC brought a class action suit against a defendant hospital and several subsidiaries, alleging the defendant violated the ADA when it required employees with disabilities to compete for reassignment to a new position even when reassignment was allegedly needed as a reasonable accommodation for employees' disabilities.

The defendant appealed the magistrate judge's refusal to grant its motion to dismiss, and argued, in part, that the EEOC's pleadings suffered fatal deficiencies under various ADA claims. Specifically, the defendant argued that the EEOC failed to plead that the charging party was a qualified individual with a disability and that her impairment substantially limited one or more major life activities. The defendant also argued that the agency failed to plead an interference claim.

The court partially agreed with the defendant and found that the EEOC did not properly allege the charging party was considered disabled as defined by the ADA, a deficiency that could be cured by an amended complaint.

330 *Id.* at **22-23 (*citing Harris v. Union Pac. R.R. Co.*, 953 F.3d 1030, 1039 (8th Cir. 2020) (reversing class certification on grounds that predominance was lacking)).
331 *EEOC v. Sis-Bro Inc.*, 2024 U.S. Dist. LEXIS 147051 (S.D. Ill. Aug. 15, 2024).
332 *Id.* at **5-6.
333 *Id.* at *8.
334 *Id.* at **8-10.
335 *Id.* at *9.
336 *Id.* at **9-10.
337 *EEOC v. Supreme Staffing, LLC*, 2024 U.S. Dist. LEXIS 128702 (W.D. Tenn. July 22, 2024).
338 *Id.* at **1-3.
339 *Id.* at **3-5.
340 *Id.* at **5-9.
341 *Id.* at *9.
342 *Id.* at **9-10.
343 *Id.* at *10.
344 *EEOC v. Geisinger Health*, 2022 U.S. Dist. LEXIS 188749 (E.D. Pa. Oct. 17, 2022).

Likewise, the court dismissed the class action allegations because the EEOC did not sufficiently establish a class representative or identify a class of aggrieved individuals.

The EEOC's ADA interference claim survived, however, kept alive by the court's determination that the hospital's policy requiring workers returning from medical leave to reapply to their jobs was ripe for inquiry and the court's position that sufficient evidence demonstrated that defendant interfered with employees' attempts to seek disability accommodations.

More recently, in *EEOC v. Il Fornaio*, the EEOC brought a class action suit against a defendant restaurant alleging it subjected the charging party and other aggrieved employees to harassment and a hostile work environment.[345]

The defendant filed a motion to dismiss the complaint in its entirety or as to the unnamed and unidentified class members, arguing the EEOC's allegations lacked the requisite specificity under the federal pleading standards.

The court declined to dismiss the hostile work environment claim as to the charging party, finding that the complaint plausibly alleged she was subjected to a hostile work environment based on the conduct of her male supervisors and coworkers.[346] However, the court found that the complaint failed to put defendant on notice as to how the hostile work environment allegations applied to the aggrieved employees and the scope of any purported class.[347] Among the litany of deficiencies cited by the court were the complaint's failure to identify which of the alleged comments and behavior applied to the charging party and which applied to the aggrieved employees; the roles held by the aggrieved employees; and the dates of complaints about the offending conduct.[348] Although the court disagreed that the EEOC had to cure each identified deficiency, it found that "all of the omissions taken together render the allegations regarding the Aggrieved Employees too vague to satisfy the Rule 8 pleading standards" and dismissed the hostile work environment claim as to the aggrieved employees with leave to amend.[349]

As to the retaliation claim, the court held that the EEOC did not plausibly state a retaliation claim as to either the charging party or the aggrieved employees.[350] The court found that the complaint did not contain any allegations about when either the charging party and/or the aggrieved employees engaged in protected activity.[351] Additionally, the complaint did not allege that the charging party, herself, was subject to any of the alleged adverse employment actions, such as reduced shifts.[352] Because the plaintiff did not sufficiently allege a protected activity, the court found that the plaintiff also failed to draw a causal connection between any such protected activity and charging party's resignation.[353] Finally, the court found that the complaint did not plead a plausible claim of retaliation for the alleged class of aggrieved employees due to the same deficiencies noted by the court with respect to the hostile work environment claim.[354] The court therefore granted defendant's motion to dismiss the retaliation claim as to both the charging party and the aggrieved parties with leave to amend.[355]

In considering the constructive discharge claim, the court held that the complaint contained sufficient allegations to put the defendant on notice of the charging party's claim, but that did not provide sufficient notice to the defendant regarding the entire class. The court therefore granted the defendant's motion on the class constructive discharge claim with leave to amend.

3. Key Issues in Class-Related Allegations

a. Challenges to Pattern-or-Practice Claims (including Section 706/707 issues)

Although no cases on this subject were decided in FY 2024, some decisions from prior years remain instructive. In *EEOC v. Qualtool, Inc.*, the EEOC claimed violations of Title VII on behalf of the charging party and an unidentified "class" of persons, alleging discrimination based on their sex.[356] During discovery, the EEOC's Rule 26 initial

345 *EEOC v. Il Fornaio*, 2024 U.S. Dist. LEXIS 18569 (C.D. Cal. Mar. 11, 2024).
346 *Id.* at *10-11.
347 *Id.* at *12.
348 *Id.* at *13.
349 *Id.* at *14.
350 *Id.* at *15.
351 *Id.* at *16.
352 *Id.*
353 *Id.*
354 *Id.*
355 *Id.*
356 *EEOC v. Qualtool, Inc.*, 2022 U.S. Dist. LEXIS 156361 (M.D. Fla. Aug. 30, 2022).

disclosures identified no "Class of Aggrieved Persons," and in its response to interrogatories, the EEOC identified only one additional individual as the sole purported "class" member. No further purported class members were identified by the EEOC until months later, when the EEOC served its first supplemental initial disclosures, asserting for the first time, three months before the discovery deadline, 14 other purported class members. Moreover, these alleged class members were not timely added as additional parties pursuant to the pretrial schedule order entered in the case.

The court weighed the EEOC's mandate to expand the scope of an existing lawsuit to include new claims determined after a reasonable investigation against the interests of the defendant, and granted the motion to strike, without prejudice, to the EEOC's right to file a separate action on behalf of the 14 purported class members.

In *EEOC v. Green Jobworks, LLC*,[357] the court denied the defendant's motion to dismiss the EEOC's pattern-or-practice complaint. The EEOC asserted two counts of pattern-or-practice employment discrimination against female job applicants and employees: (1) failure to hire women for demolition and laborer positions; and (2) assigning female employees to cleaning duties instead of equipment operation and other demolition work. The defendant argued that Count I of the EEOC's complaint failed to allege facts sufficient to demonstrate more than a few isolated discriminatory acts, and Count II failed to state any facts demonstrating discrimination in the defendant's terms and conditions of employment. The court rejected the defendant's arguments, finding that the EEOC had alleged "evidence of conduct or statements that both reflect directly the alleged discriminatory attitude and that bear directly on the contested employment decision."

The defendant further argued that the EEOC's allegations were too discrete to plausibly indicate a pattern or practice of refusing to hire women or refusing to place women in demolition and labor assignments. The court found this argument to be unavailing.

The court further rejected the defendant's argument that, to state a pattern-or-practice claim, the EEOC must meet the standard set forth in *International Board of Teamsters v. United States*,[358] which requires "more than a mere occurrence of isolated or accidental or sporadic discriminatory acts."[359] Instead, the court held "pattern or practice" is not a separate legal claim, but rather an evidentiary framework with which a plaintiff may prove discrimination. Further, the court determined that, at the motion to dismiss stage, the plaintiff need only state a plausible claim for relief under Title VII, and direct evidence of discrimination is sufficient to carry this burden.

The court also determined that the EEOC was not required to plead the existence of an express policy to state a plausible claim of a pattern-or-practice of sex discrimination in terms or conditions of employment.

b. Other Issues

When the EEOC determines there is sufficient evidence to support some, but not all, of the alleged unlawful employment practices asserted in a complainant's charge of discrimination, the EEOC is authorized to pursue relief for those claims for which it has found reasonable cause. In a 2020 decision, *EEOC v. Pediatric Health Care Alliance, P.A.*, the district court denied the defendant's motion to dismiss the EEOC's complaint where the EEOC had determined the complainant's claim of sexual harassment was not sufficiently supported, but that there was sufficient evidence to show retaliation for reporting sexual harassment.[360] In doing so, the court found that the complaint asserted a claim of retaliation only, even though the complaint contained allegations related to the claim of sexual harassment.[361] The court also determined there was no basis to strike the allegations about the alleged sexual harassment, which the EEOC argued provided relevant background for the claim of retaliation, because the court could not conclude there was no relation between these asserted facts and the retaliation claim or that they prejudiced the defendant.[362] The court found defendant's argument regarding the sexual harassment allegations required further factual development, and thus was not appropriate to consider on a motion to dismiss.[363]

357 *EEOC v. Green Jobworks, LLC*, 2022 U.S. Dist. LEXIS 74723 (D. Md. Apr. 25, 2022).
358 431 U.S. 324, 97 S. Ct. 1843 (1977).
359 *Id.* at 336.
360 *EEOC v. Pediatric Health Care Alliance, P.A.*, 2020 U.S. Dist. LEXIS 205660, **2, 4 (M.D. Fla. Nov. 4, 2020).
361 *Id.* at *4.
362 *Id.*
363 *Id.* at **4-5.

In *EEOC v. Justin Vineyards*,[364] a class action brought by the EEOC, the employer's motion to compel arbitration was granted. The court found the defendant's two contracts containing arbitration provisions applying to "all claims" brought by an employee were valid and applied to the charging parties' claims of fraud in the execution and unconscionability as to the arbitration agreement.

Regarding the charging parties' claims of being "misled" by the contracts, the court pointed to their failures to ask for time to review the contracts or have them fully translated. In evaluating unconscionability, the court reviewed the terms of the agreement and found that they were not "so one-sided as to shock the conscience" of the court. The court held the arbitration agreements were valid, refusing to subvert the authority of the Federal Arbitration Act, which provides that any arbitration agreement within its scope "shall be valid, irrevocable, and enforceable."

In *EEOC v. Whiting-Turner Contracting*,[365] the EEOC alleged the defendant exposed African American employees to a racially hostile work environment. The defendant asserted 28 affirmative defenses, and the court issued an order setting a deadline for filing motions to amend the pleadings.

In its first set of interrogatories, the defendant asked whether any class member had filed for bankruptcy. After the deadline to amend the pleadings had passed, the EEOC supplemented its responses to show one class member had filed for bankruptcy. Defendant then sought to amend its answer to add an affirmative defense, specifically that the one class member's claims were barred and/or estopped because of his failure to disclose the lawsuit in his bankruptcy proceeding.

The EEOC objected, arguing the defendant had not shown good cause for filing its motion after the deadline to amend pleadings, improperly sought to add allegations and arguments beyond its proposed additional affirmative defense, and that the proposed affirmative defense was legally deficient. The defendant countered that good cause existed to allow its untimely proposed amended answer because the EEOC did not disclose the class member's bankruptcy until two months after the deadline for filing motions to amend the pleadings, and that the EEOC had not established that the defense was futile. Importantly, the defendant failed to cite any legal authority to support its request to amend in the final stage of proceedings.

The court considered whether defendant had good cause to file an untimely motion to amend its answer and found that, while defendant satisfied the good cause requirement, the proposed changes in its amended answer were unrelated to the bankruptcy proceeding and, as such, were not permitted. Finally, the court underscored that the EEOC, not the class member, was the party in the action. As such, defendant had not sufficiently pled its proposed estoppel affirmative defense because it had not alleged that the class member was a party to the action.

More recently, in *EEOC v. Sunnybrook Education Association, IEA-NEA*,[366] the court addressed the issue of joinder of a required party under Federal Rule of Civil Procedure 19(a)(1). The EEOC's race discrimination complaint alleged that, in instances where the school district awarded a non-collective bargaining agreement (CBA) salary to non-Black union members, the union either ignored the higher salary or negotiated a memorandum of understanding with the school district. In the charging party's case, however the union filed a grievance contesting his non-conforming salary. The union filed a motion to dismiss the complaint for failure to join the school district in the litigation. The court denied the motion, holding that the union had not carried its burden to show that Federal Rule of Civil Procedure 19(a)(1) required joinder, if feasible, of the school district.

In considering whether to dismiss the complaint, the court first examined whether Rule 19(a)(1) required that the school district be joined in the litigation. The union argued that, because the complaint sought injunctive relief in the form of an order compelling the union "to eradicate the effects of its past and present unlawful employment practices," the order would have "no practical effect" absent joinder of the employer school district.[367] The court disagreed with the defendant's analysis, finding that it had not identified anything the court would need to order the school district to do, or refrain from doing, in order to provide complete relief between the existing parties.[368]

364 *EEOC v. Justin Vineyards*, 2023 U.S. Dist. LEXIS 48985 (C.D. Cal. Mar 17, 2023).
365 *EEOC v. Whiting-Turner Contracting. Co*., 2023 U.S. Dist. LEXIS 44016 (M.D. Tenn. Mar. 15, 2023).
366 *EEOC v. Sunnybrook Educ. Ass'n, IEA-NEA*, 2024 U.S. Dist. LEXIS 11671 (N.D. Ill. Jan. 23, 2024).
367 *Id.* at **4-5.
368 *Id.* at *7.

The court next analyzed whether, under Rule 19(1)(B), the absent school district "claims an interest related to the subject matter of the action" and, if so, whether one of Rule 19(a)(1)(B)'s two prongs was satisfied.[369] The court agreed that the school district had a potential interest in the interpretation of the existing CBA with the union and any subsequent CBAs, but disagreed with the union that the school district would be subjected to inconsistent obligations (*i.e.*, comply with the CBA and promote the charging party and pay him a salary that does not conform to the CBA).[370] Finally, the court reasoned that there would be no substantial impairment of the school district's ability to protect its interests, as the underlying claim involved the union's enforcement decision, and the EEOC did not any allege any discriminatory actions by the school district.[371]

In *United States EEOC v. KVP, LP*, the court considered a stipulation to continue the early neutral evaluation beyond the deadline because of an EEOC scheduling conflict.[372] The court denied the stipulation, concluding that "[g]iven that Plaintiff is a governmental agency represented by numerous attorneys, more explanation is required as to the nature of this scheduling conflict." Further, District of Nevada Local Rule 16-6(d) requires that the early neutral evaluation be held no later than 90 days after the first responding party appears in the case unless good cause is shown. In denying the stipulation, the court found that it "fails to show good cause to hold the early neutral evaluation beyond that timeframe."

4. Who Is the Employer?

Whether a defendant is an employer of the charging party is a frequent subject of litigation. Claims of employment discrimination and related retaliation claims under Title VII, the ADEA, and the ADA generally attach liability to employers only.[373] Thus, claims may be dismissed against a defendant that does not meet the legal standard to be considered the charging party's employer.

A defendant who is not a charging party's direct employer may have the legal status of an employer through allegations that the defendant is a joint employer or that the defendant and the direct employer operate as an integrated enterprise that should be treated as a single employer. The joint employer theory considers the level of control that the defendant exercises over the charging party's employment based on a totality of the circumstances.[374] The integrated enterprise theory analyzes the relationship between the entities, and courts often describe the following factors to consider: (1) interrelation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership and financial control.[375]

In addition to liability questions, recent cases have addressed how employer status issues implicate whether the administrative exhaustion requirement has been satisfied and whether a defendant has a sufficient number of employees to fall under scope of federal anti-discrimination laws.

In *EEOC v. Princess Martha, LLC*, two of the defendants, TJM Properties, Inc. and TJM Property Management, Inc., moved to dismiss on the grounds that (a) the EEOC and the charging party failed to exhaust administrative remedies because the moving defendants were not named in the charge; and (b) the complaint did not plausibly allege that the moving defendants were joint employers of the charging party or part of an integrated enterprise with the direct employer, Princess Martha, LLC.[376] The court denied the motion in its entirety. The court explained that the requirement to be named in the charge is construed liberally.[377] The court considered allegations of the interrelated operations between the moving defendants and Princess Martha, the fact that the moving defendants had received notice of the charge, and the moving defendants had an opportunity to participate in reconciliation as grounds to find the naming requirement was satisfied.[378] The court also found that the EEOC alleged sufficient facts to support an integrated enterprise claim and joint employer claim through allegations that the defendants

369 *Id.* at **7-8.
370 *Id.* at **9-10.
371 *Id.* at *11.
372 *EEOC v. KVP, LP*, 2024 U.S. Dist. LEXIS 6074, (D. Nev, Jan 10, 2024).
373 *See* 42 U.S.C. § 2000e-2(a) (Title VII discrimination claims); 42 U.S.C. § 2000e-3(a) (Title VII retaliation claims); 29 U.S.C. § 623(a) (ADEA discrimination claims); 29 U.S.C. § 623(d) (ADEA retaliation claims); 42 U.S.C. § 12112(a) (ADA discrimination claims). Courts are divided on whether the anti-retaliation provision of the ADA, 42 U.S.C. § 12203(a), permits individual liability. *See Constantine v. N.J. Dept. of Banking & Ins.*, 2024 U.S. App. LEXIS 10947, at *12 n.9 (3d Cir. May 6, 2024) (collecting cases).
374 *EEOC v. Princess Martha, LLC*, 2023 U.S. Dist. LEXIS 219651, at *29 (M.D. Fla. Dec. 11, 2023).
375 *Id.* at *22; *EEOC v. 1901 S. Lamar, LLC*, 2023 U.S. Dist. LEXIS 223816, at **7-8 (W.D. Tex. Dec. 15, 2023), *report and recommendation adopted* 2024 U.S. Dist. LEXIS 1297 (W.D. Tex. Jan. 3, 2024); *EEOC v. Tenn. Healthcare Mgmt., Inc.*, 2024 U.S. Dist. LEXIS 85928, at **6-7 (M.D. Tenn. May 13, 2024).
376 *Princess Martha, LLC*, 2023 U.S. Dist. LEXIS 219651, at **1-2.
377 *Id.* at *11.
378 *Id.* at **12-21.

shared a human resources director; that the moving defendants were involved in aspects of Princess Martha's operations such as reviewing policies, facilitating trainings, benefits, payroll policies, budgeting, information systems, supplies, insurance, job posting and hiring procedures; that the defendants shared a mailing address; and the defendants had common ownership and management.[379]

Later in the *Princess Martha* litigation, TJM Properties, Inc. and TJM Property Management, Inc. moved for summary judgment, again arguing that the administrative exhaustion requirement was not met and that the record showed no genuine dispute of material facts that the moving defendants were not joint employers.380 The court denied the motion on the administrative exhaustion issue and denied TJM Property Management's motion on the joint employer issue in light of evidence bearing out allegations of control over employees. However, the court granted TJM Properties' motion for summary judgment that it was not a joint employer because there was no evidence tying it to the relevant decisions on hiring that formed the basis of the claim.

The integrated enterprise test was also applied in *EEOC v. Tennessee Healthcare Management, Inc.*, where the court denied a motion to dismiss by HCA Healthcare, Inc.[381] The complaint alleged that Tennessee Healthcare Management and HCA Healthcare shared employees, letterhead, signatures, an address, and an employee handbook; that they shared in hiring employees; and that they alternated in compensating employees.[382] This was sufficient to plausibly allege that the defendants operated as an integrated enterprise.

In *EEOC v. 1901 South Lamar, LLC*, the court applied the integrated enterprise test to permit aggregation of employees from the two defendants to reach the 15-employee threshold to satisfy Title VII's definition of an employer.[383] Allegations that defendants shared bartending staff and inventory, had a single director of operations, and used a disciplinary form with both defendants' logos were sufficient to plead an integrated enterprise. The court also explained that this numerosity requirement was an element of plaintiff's claim, not a jurisdictional issue.[384]

In *EEOC v. Aaron Thomas Co., Inc. and Supreme Staffing LLC*, defendant Supreme Staffing, LLC was granted dismissal of claims against it by arguing it did have a relationship with the direct employer, not that it was uninvolved in the charging party's employment.[385] The EEOC and charging party had already filed two charges and lawsuits relating to the same claims. Supreme Staffing argued that the EEOC was not permitted to split their claims across multiple cases.[386] The court agreed and granted dismissal, finding that the various lawsuits shared parties and claims, and reasonable investigation of the charging party's prior claims would have uncovered a claim against Supreme Staffing.[387]

5. Challenges to Affirmative Defenses

There have been several decisions over the past few years addressing challenges to affirmative defenses. In *EEOC v. Hunter-Tannersville*, the EEOC moved to strike defendant's fifth affirmative defense that any differential in pay was the result of a factor other than sex, the ability to negotiate a higher salary.[388] The EEOC argued that the affirmative defense was legally insufficient because it was based on conduct not related to the performance of the job to which charging party and her comparator applied.[389] The court noted neither the Supreme Court nor the U.S. Court of Appeals for the Second Circuit had determined that only job-related factors could constitute a "factor other than sex."[390] As such, the court denied the EEOC's motion on the grounds it was premature as motions to strike were not intended to furnish "an opportunity for determination of disputed and substantial questions of law."[391]

379 *Id.* at **23-31.
380 *EEOC v. Princess Martha, LLC*, 2024 U.S. Dist. LEXIS 174147, at **42-43 (M.D. Fla. Sept. 26, 2024). TJM Properties, Inc., also argued that the record did not support of finding of an integrated enterprise, but admitted in its reply that a genuine dispute of material fact existed on this issue. *Princess Martha, LLC*, 2024 U.S. Dist. LEXIS 174147, at *43 n.17.
381 *EEOC v. Tenn. Healthcare Mgmt., Inc.*, 2024 U.S. Dist. LEXIS 85928, at *8.
382 *Id.* at *7.
383 *1901 S. Lamar, LLC*, 2023 U.S. Dist. LEXIS 223816, at **4-6; *see also* 42 U.S.C. § 2000e(b) (defining "employer" under Title VII)
384 *Id.* at **4-5.
385 *EEOC v. Aaron Thomas Co., Inc.*, 2024 U.S. Dist. LEXIS 164445, at *1 (W.D. Tenn. Sept. 12, 2024).
386 *Id.* at *16.
387 *Id.* at **20-23.
388 *U.S. EEOC v. Hunter-Tannersville Cent. Sch. Dist.*, No. 1:21-CV-0352, 2021 U.S. 230595, at *1 (N.D.N.Y. Dec. 2, 2021).
389 *Id.* at *3.
390 *Id.* at *4.
391 *Id.* at *8.

Similarly, the Western District of Washington considered the EEOC's motion to strike defendant's fifth affirmative defense, which asserted the EEOC failed to conciliate and, thus, failed to exhaust its administrative remedies.[392] To support its defense, defendant claimed that while the EEOC represented it was open to conciliation, it was wholly unresponsive to defendant's counteroffer and, instead, unilaterally declared conciliation efforts failed.[393] In response, the EEOC argued the defense should be stricken because the court's conciliation review process was limited.[394] The court denied the EEOC's motion, finding disputed issues of fact existed as to whether the few exchanges between the defendant and the EEOC could be characterized as a discussion to meet the conciliation requirement.[395] In denying the motion, the court noted a motion to strike was not an appropriate vehicle for resolving disputed and substantial factual and legal issues.

More recently, in *EEOC v. Princess Martha, LLC*, the EEOC moved for partial judgment on the pleadings as to defendant's ninth defense, which alleged "charging party's claims [we]re barred under the ADA 'to the extent [they] related to persons or matters which were not made the subject of a timely charge of discrimination filed with the EEOC/FCHR or were not investigated or conciliated by the EEOC/FCHR."[396] The EEOC argued it was entitled to judgment on the pleadings because the EEOC's failure to conciliate was not a valid affirmative defense, as the remedy is a stay rather than dismissal.[397] The court denied the EEOC's motion, noting while it would typically be entitled to judgment in its favor on the conciliation issue, that was not the defense alleged here.[398] The court reasoned the EEOC's adequate conciliation of the claims in the complaint does not render defendant's conditional defense inaccurate as such defense could be triggered if the parties attempted to raise additional claims not investigated or conciliated by the EEOC.[399]

6. Venue

Because there is a strong presumption in favor of the plaintiff's choice of forum, a defendant seeking to transfer venue must clear a high hurdle to convince a court to exercise its discretion and transfer the case. Typically, this presumption can only be overcome if private and public interest factors clearly point toward the alternative forum. Such factors include the potential jurisdiction of the transferee district; convenience of the witnesses; convenience of the parties; and the interest of justice.[400]

In *EEOC v. American Screening,* the Eastern District of Louisiana considered the defendant's motion to transfer venue from the Eastern District to the Western District of Louisiana where the defendant claimed the alleged discriminatory act occurred, where its only office was located, and where the pertinent witnesses to the case resided.[401] While the court ultimately granted defendant's motion to transfer, the court found that the Eastern District was a proper venue.[402] Specifically, the court noted because it was undisputed the alleged unlawful employment practice occurred in Louisiana, venue was proper in *any* district within Louisiana, including the Eastern District.[403] However, the court granted defendant's motion to transfer, finding the Western District of Louisiana was a more convenient venue given the location of documents and witnesses.[404]

B. Statutes of Limitations and Unreasonable Delay

1. Limitations Period for Pattern-or-Practice Lawsuits

Individual claims under Section 706 of Title VII are subject to certain administrative prerequisites, including that in deferral states, the discrimination charge must be filed with the EEOC within 300 days of the alleged discriminatory act; that the EEOC investigate the charge and make a reasonable cause determination; and that the

392 *EEOC v. Telecare Mental Health Servs. Wash., Inc.,* 2022 U.S. Dist. LEXIS 55657 (W.D. Wash. Mar. 28, 2022).
393 *Id.* at **2-3.
394 *Id.* at *5.
395 *Id.*
396 *EEOC v. Princess Martha, LLC*, 2023 U.S. Dist. LEXIS 88238, at **2-3 (M.D. Fla. May 19, 2023).
397 *Id.* at **10-11.
398 *Id.*
399 *Id.*
400 *See, e.g.*, *EEOC v. Plains Pipeline, L.P.*, 2020 U.S. District LEXIS 52863, at *2 (D.N.M. Mar. 25, 2020); *EEOC v. Hirschbach Motor Lines Inc*., 2018 U.S. Dist. LEXIS 199243 (D. Maine Nov. 26, 2018); *EEOC v. FedEx Ground Package System, Inc.*, 2015 U.S. Dist. LEXIS 21801 (D. Md. Feb. 24, 2015).
401 *EEOC v. Am. Screening*, No. 21-1978, 2022 U.S. Dist. LEXIS 107298 (E.D. La. June 14, 2022).
402 *Id.* at *4.
403 *Id.*
404 *Id.* at *6.

EEOC first attempt to resolve the claim through conciliation before initiating a civil action.[405] Section 707, governing pattern-or-practice actions, incorporates Section 706's procedures, raising the implication that the EEOC must bring pattern-or-practice cases within the 300-day period defined in Section 706.

There has yet to be a court of appeals decision determining whether the EEOC may seek relief under Section 707 on behalf of individuals who were allegedly subjected to a discriminatory act more than 300 days prior to the filing of an administrative charge. The EEOC has often argued that individuals whose claims of alleged harm occurred more than 300 days before the filing of the charge could still be eligible to participate in a pattern-or-practice lawsuit.

In 2018, a district court held that alleged victims of pattern-or-practice discrimination are not bound to file timely claims within 300 days of discriminatory conduct under Title VII or the ADA, "so long as the additional discriminatory practices, or victims, have been ascertained in the course of a reasonable investigation of the charging party's complaint and the EEOC has provided adequate notice to the defendant-employer of the nature of such charges to allow resolution of the charges through conciliation."[406] The court also agreed with the EEOC's contention that ADEA actions "are indisputably not subject to the 300-day charge-filing period applicable to private actions."[407]

A handful of other district courts in recent years have similarly held that the nature of pattern-or-practice cases is inconsistent with the application of the 300-day limitations period.[408] For example, in *EEOC v. New Prime*, a Missouri district court observed that while a "few" district courts have applied the 300-day period to pattern-or-practice cases, "the very nature" of pattern-or-practice cases attacking systemic discrimination "seems to preclude" use of the 300-day period.[409] The court in *New Prime* followed the reasoning in *EEOC v. Mitsubishi Motor Manufacturing of America, Inc.*, a 1998 Illinois district court case, which found that although the language of Section 707(e) requires adherence to other procedural requirements of Section 706, "the limitations period applicable to Section 706 actions does not apply to Section 707 cases."[410] In doing so, the *Mitsubishi* court reasoned applying the limitations period would essentially act as an arbitrary bar to liability because the EEOC is generally unable to articulate any specific acts of discrimination at the time it files a pattern-or-practice charge.[411] Acknowledging that such an interpretation would leave pattern-or-practice claims without a limitations period and "might place an impossible burden on defendants in other cases to preserve stale evidence," the *Mitsubishi* court proposed allowing "evidence [of discrimination to] determine when the provable pattern or practice began."[412]

As another example in pattern-or-practice cases, in *EEOC v. Staffing Solutions of WNY, Inc.*, a district court upheld the magistrate judge's report and recommendation and declined to limit the EEOC's ability to seek redress for only those claims that occurred within 300 days prior to the filing of the charge.[413] The *Staffing Solutions* court went further when it also agreed that the EEOC is not subject to the 300-day charge-filing period for ADEA claims.[414]

Other courts have disagreed, however, finding that the statute's plain language controls and there is no reason why the 300-day period cannot be calculated from the filing of the EEOC's charge.[415] If a 300-day limitations period is applied, generally, it is triggered by the filing of a charge, which means the court will look back 300 days from

405 42 U.S.C. § 2000e-5(e)(1). If a jurisdiction does not have its own enforcement agency, then the charge-filing requirement is 180 days.

406 *EEOC v. Staffing Solutions of WNY, Inc.*, 2018 U.S. Dist. LEXIS 207186, at *4 (W.D.N.Y. Dec. 6, 2018), *citing EEOC v. Upstate Niagara Cooperative, Inc.,* 2018 WL 5312645, at *3 (W.D.N.Y. 2018).

407 *Staffing Solutions*, 2018 U.S. Dist. LEXIS 207186, at *5.

408 *EEOC v. New Prime*, 2014 U.S. Dist. LEXIS 112505, at *34 (W.D. Mo. Aug. 14, 2014); *see also EEOC v. Spoa, LLC*, 2013 U.S. Dist. LEXIS 148145, at **8-9, fn. 4 (D. Md. Oct. 15, 2013) (refusing to apply 300-day period to pattern-or-practice case).

409 *New Prime*, 2014 U.S. Dist. LEXIS 112505, at *34.

410 *EEOC v. Mitsubishi Motor Mfg. of America, Inc.*, 990 F. Supp. 1059, 1085 (C.D. Ill. 1998).

411 *Id.* at 1085, *accord EEOC v. LA Weight Loss*, 509 F. Supp. 2d 527, 535 (D. Md. 2007).

412 *Id.* at 1087.

413 *EEOC v. Staffing Solutions of WNY, Inc.*, 2020 U.S. Dist. LEXIS 40474, at *3 (W.D.N.Y. Dec. 6, 2018) (*citing EEOC v. Upstate Niagara Cooperative, Inc.*, 2018 U.S. Dist. LEXIS 183904, 2018 WL 5312645, at *4 (W.D.N.Y. Oct. 26, 2018); *EEOC v. Sterling Jewelers, Inc.*, 2010 U.S. Dist. LEXIS 649, 2010 WL 86376, at *5 (W.D.N.Y. Jan. 6, 2010).

414 *Id.*

415 *EEOC v. Optical Cable Corp.,* 169 F. Supp. 2d 539, 547 (W.D. Va. 2001) (while limitations period is not particularly well-adapted to pattern-or-practice cases, problems are not insurmountable); *EEOC v. Global Horizons, Inc.,* 904 F. Supp. 2d 1074, 1093 (D. Haw. Nov. 8, 2012) (court will not disregard the statute's text or ignore its plain meaning in order to accommodate policy concerns); *see also EEOC v. FAPS,* 2014 U.S. Dist. LEXIS 136006, at *69 (D.N.J. Sept. 26, 2014) ("Like the majority of the courts that have reviewed this issue, the Court is convinced that Section 706 applies to claims brought by the EEOC"); *EEOC v. United States Steel Corp.*, 2012 U.S. Dist. LEXIS 101872, at **13-16 (W.D. Pa. July 23, 2012) (noting lack of circuit court decisions on point and citing cases evidencing the split of authority in federal district courts); *EEOC v. Global Horizons, Inc.,* 904 F. Supp. 2d 1074, 1091 (D. Haw. Nov. 8, 2012) ("spate" of recent decisions applying 300-day limitations period).

the date the charge was filed and require the discriminatory act occur within that timeframe to be actionable.[416] If the discriminatory act is a termination, the "date of the termination" is considered to be the date the employer gives the employee unequivocal notice of the termination.[417] An employer should assert the statute of limitations defense as soon as it has knowledge of facts suggesting that the discriminatory act occurred outside the 300-day window.[418] In rebutting a statute of limitations defense, the EEOC may be granted additional time to conduct discovery shedding light on which acts will be encompassed in the lawsuit.[419]

Some courts have held that, for the purposes of "expanded claims" (charges initially involving only one charging party that are broadened to include others during the EEOC's investigation), employers have successfully argued that the trigger for the 300-day period occurs when the EEOC notifies the defendant that it is expanding its investigation to other claimants.[420] This is helpful to employers because it shortens the period during which the EEOC can reach back to draw in additional claimants.

In *Arizona ex rel. Horne v. Geo Group, Inc.*, however, the Ninth Circuit disagreed, finding Section 706's "plain language" did not permit tethering the 300-day period to any event other than the filing of the charge.[421] The Ninth Circuit observed that the trial court's choice to instead use the date of the Reasonable Cause Determination may have been due to the initial charge's failure to provide notice to the employer of potential class claims by other aggrieved female employees, but stated, "this concern fails to distinguish the time frame in which the employee is required to file their charge of discrimination (*i.e.*, 300 days after the alleged unlawful employment practice occurred) from the EEOC's responsibility to notify the employer of the results of the EEOC's investigation."[422]

Given the district court trend to apply the 300-day limitation to pattern-or-practice cases, the EEOC is increasingly relying on creative arguments or equitable defenses. For example, in cases involving age discrimination under the ADEA, the EEOC can attempt to avoid section 706 and 707 prerequisites altogether by bringing a pattern-or-practice suit outside of Title VII. For enforcement actions by the EEOC, the ADEA does not have a 300-day limitation.[423] In such a case, the Commission claims its authority to bring a pattern-or-practice case derives from the ADEA's 29 U.S.C. § 626(b), which adopts "the powers, remedies, and procedures provided in" the Fair Labor Standards Act (FLSA).[424]

In *EEOC v. New Mexico*, the district court accepted this premise without analysis, allowing the EEOC to reach back to 2009 to include the claims of 99 additional aggrieved individuals even though some of these individuals last experienced alleged discrimination well before 300 days prior to the filing of the charge and even though their names had not been disclosed to the employer prior to discovery in the lawsuit, filed in 2015.[425] The court granted summary judgment to the EEOC on the employer's statute of limitations defense because the court found that Title VII's 300-day deadline did not apply to EEOC enforcement actions under the ADEA.[426]

2. Equitable Theories to Support Untimely Claims

In an effort to resurrect claims barred by the 300-day statute of limitations applicable to Sections 706 and 707, the EEOC often turns to equitable theories, such as waiver, estoppel, equitable tolling, the single-filing rule—which allows the EEOC to litigate a substantially related non-filed claim where it arises out of the same time frame and

416 *EEOC v. GMRI, Inc.*, 2014 U.S. Dist. LEXIS 106211 (D. Md. Aug. 4, 2014).
417 *EEOC v. Orion Energy Sys. Inc.*, 145 F.Supp.3d 841, 845-46 (E.D. Wis. Nov. 12, 2015) (date plaintiff overheard employer planned to terminate her employment was not unequivocal notice of final termination decision).
418 *Id.* at 844 (employer lacked diligence by waiting to assert statute of limitations defense where employee had disclosed her knowledge of the alleged discriminatory act, as well as the date she gained that knowledge, during her termination meeting).
419 *EEOC v. DHD Ventures Mgmt. Co.*, 2015 U.S. Dist. LEXIS 167906 (D.S.C. Dec. 16, 2015).
420 *See, e.g.*, *EEOC v. Princeton Healthcare Sys.,* 2012 U.S. Dist. LEXIS 150267, at *14 (D.N.J. Oct. 18, 2012); *see also Optical Cable Corp.*, 169 F. Supp. 2d at 547; *EEOC v. Freeman*, No. 09-2573, 2011 U.S. Dist. LEXIS 8718 at *2 (D. Md. Jan. 31, 2011).
421 *Arizona ex rel. Horne v. Geo Group, Inc.*, 816 F.3d 1189, 1203 (9th Cir. 2016).
422 *Id.*
423 *EEOC v. New Mexico*, 2018 U.S. Dist. LEXIS 50125, at **14-15, n. 9 (D.N.M. Mar. 27, 2018) ("no statute of limitations on EEOC enforcement actions under the ADEA").
424 *Id.*
425 *Id.* at *6 ("pattern or practice" not specifically alleged but the EEOC brought a representative action on behalf of "aggrieved" individuals).
426 *Id.* at **14-15 (D.N.M. Mar. 27, 2018).

similar conduct as a timely filed claim—and the continuing violation doctrine, which allows a timely claim to be expanded to reach additional violations outside the 300-day period.[427]

In *EEOC v. Horizontal Well Drillers,* the district court denied an employer's motion to dismiss untimely disability failure-to-hire claims, finding the EEOC had sufficiently alleged the continuing violations theory.[428] The continuing violation doctrine only allows the enforcing party to reach back to conduct that is not "discrete."[429] Although it is sometimes difficult to draw a distinction between discrete and non-discrete actions, the guiding principle is that a discrete action is "actionable on its own" and thus alerts the charging party as to the necessity of pursuing their claim.[430] Termination, failure to promote, and denial of overtime are all examples of discrete actions that are only reachable if within the 300-day limitation, even if they occur as part of a hostile work environment.[431]

However, the EEOC is not always successful in arguing the continuing violation doctrine should apply to pattern-or-practice cases. In *EEOC v. Discovering Hidden Hawaii Tours, Inc.* the court stated:

> Under the EEOC's proposal, the continuing violation doctrine protects those who have slept on their rights and resurrects their otherwise expired claims, whenever a subsequent employee whom the dilatory one may never know or be aware of fortuitously appears on scene, is subject to the same type of harassing conduct, and sees fit to file a timely charge. That cannot be the rule.[432]

More recently, in *EEOC v. Army Sustainment, LLC*, the EEOC opposed an employer's motion for summary judgment on timeliness grounds, arguing the continuing violation doctrine extended the charging period and prevented dismissal of its pattern-and-practice claims as all claimants were subjected to an ongoing and continuing policy of discrimination.[433] The district court rejected the EEOC's argument, finding the continuing violation doctrine did not apply as the alleged unlawful employment practices at issue (*i.e.*, failure to grant accommodation to employees cleared to return by placing employees on unpaid leave) constituted discrete acts of discrimination.[434] In rejecting the EEOC's argument, the court explained "the continuing violation doctrine does not apply to untimely claims of discrete acts, 'even when they are related to acts alleged in timely filed charges'" and further noted "neutral policies that give present effect to the time-barred conduct do not create a continuing violation."[435] Thus, the district court ultimately granted partial summary judgment in the employer's favor finding the claims asserted by the EEOC for 7 (out of 17 individuals) arose outside the 180-day charging period and, thus, were untimely.[436]

3. Laches-type Issue: Unreasonable Delay by the EEOC

To counter the EEOC's reliance on the continuing violation doctrine to salvage untimely claims, employers may point to *Discovering Hidden Hawaii*, *USF Holland*, and other district court decisions holding that, even in the context of an "unlawful employment practice" claim, such as hostile work environment, the doctrine cannot be used to expand the scope of the claim to add new claimants unless each claimant suffered at least one act considered to be part of the unlawful employment practice, within the 300-day window.[437] Where the EEOC seeks to enlarge the number of individuals entitled to recover, rather than the number of claims a single individual may bring, the employer can make the argument that the continuing violation doctrine does not apply.

Of course, the employer can also raise equitable defenses. In *EEOC v. Baltimore County*, the court found the EEOC's eight-year unreasonable delay in bringing its lawsuit barred any award of backpay or other retroactive relief.[438] In

427 *EEOC v. Draper Development LLC*, 2018 U.S. Dist. LEXIS 115124, at **9-10 (N.D.N.Y. July 11, 2018) (adopting flexible approach and excusing charging party's failure to verify charge where employer not prejudiced); *EEOC v. East Columbus Host, LLC*, 2016 U.S. Dist. LEXIS 118993, at *26 (S.D. Ohio Sept. 2, 2016) (restaurant server's claims against the harasser's coworker permitted where another server had timely filed a charge of discrimination against the main harasser and where the EEOC had given notice that the harassing behavior was not limited to one person); *Princeton Healthcare Sys.,* 2012 U.S. Dist. LEXIS 150267, at *10 (D.N.J. Oct. 18, 2012) (where the employer's conduct forms a continuing practice, an action is timely if the last act evidencing the practice falls with the limitations period and the court will deem actionable even earlier related conduct that would otherwise be time-barred); *EEOC v. Global Horizons, Inc.,* 904 F. Supp. 2d 1074, 1093, n. 5 (D. Haw. Nov. 8, 2012); *EEOC v. Evans Fruit Co.,* 872 F.Supp.2d 1107, 1112 (E.D. Wash. 2012); *EEOC v. Pitre, Inc.,* 908 F.Supp.2d 1165, 1175 (D.N.M. Nov. 30, 2012).

428 *EEOC v. Horizontal Well Drillers, LLC*, 2018 U.S. Dist. LEXIS 102434, at *21, following *Bruno v. W. Elec. Co*., 829 F.2d 957, 960 (10th Cir. 1987).

429 *EEOC v. Phase 2 Inv. Inc*., 2018 U.S. Dist. LEXIS 65719, at *51 (D. Md. Apr. 17, 2018).

430 *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113, 115 (2002) ("each discrete discriminatory act starts a new clock for filing charges alleging that act").

431 2018 U.S. Dist. LEXIS 65719, at *51.

432 *EEOC v. Discovering Hidden Hawaii Tours, Inc.,* 2017 U.S. Dist. LEXIS 154576, at *5 (D. Haw. Sept. 21, 2017).

433 *EEOC v. Army Sustainment, LLC*, 2023 U.S. Dist. LEXIS 171406, at *12-13 (M.D. Ala. Sept. 26, 2023).

434 *Id.* at **17-18.

435 *Id.*

436 *Id.* at *20.

437 *EEOC v. Swissport Fueling, Inc.,* 916 F. Supp. 2d 1005, 1033-34 (D. Ariz. Jan. 7, 2013); see also *Evans Fruit Co.,* 2012 U.S. Dist. LEXIS 169006, at *8 (holding that some individual claims were barred even under the continuing violation doctrine because the alleged unlawful acts were separated by up to 6-8 years).

438 *EEOC v. Baltimore Cty.*, 202 F.Supp.3d 499, 522 (D. Md. 2016).

FY 2018, another district court refused to grant summary judgment to the EEOC on the employer's laches defense, finding it an issue of fact whether the EEOC's six-year delay between the filing of the charge and the lawsuit prejudiced the employer.[439]

However, laches is a flexible doctrine left to the court's discretion; the employer must show (1) the plaintiff unreasonably and inexcusably delayed filing the lawsuit; and (2) prejudice to the defendant resulted from the delay. There is no length of delay that is *per se* unreasonable. Instead, courts will consider all the facts to evaluate the reasonable of any delay.

In *EEOC v. Hospital Housekeeping Services*, an Arkansas district court denied defendant's motion for summary judgment based on the employer's equitable defense of laches, finding the evidence did not establish the EEOC unreasonably or inexcusably delayed filing suit.[440] To support its laches defense, the employer argued the EEOC had waited six years after the relevant charges of discrimination were filed and five years after it initiated its investigation before filing suit.[441] In denying the motion, the court reasoned the EEOC was in regular contact with the employer throughout the course of its investigation, and the employer caused some of the delay as evidenced by the EEOC's repeated request for missing information during the investigation.[442]

Even if an employer can prove the EEOC inexcusably and unreasonably delayed filing, employers must still also adduce evidence establishing they were prejudiced by the delay. Indeed, a delay that does not result in prejudice is insufficient to establish the defense of laches, even where the delay is both lengthy and unexcused. In *Hospital Housekeeping Services*, the court rejected the employer's argument that it had shown "demonstrable prejudice . . . through increased potential backpay liability and limited access to management witnesses and personnel records."[443] The court concluded the employer had not proffered sufficient evidence to establish prejudice as a result of the delay.[444] With respect to alleged missing personnel records, the court noted the employer had a duty to preserve and retain documents related to the charges under 29 C.F.R. § 1602.14.[445] The court also reasoned summary judgment was warranted as the employer had failed to explain how the potential witnesses' lack of memory of specific details prejudiced its defense.[446]

Similarly, in *EEOC v. LogistiCare Solutions LLC*, the Arizona district court refused to grant summary judgment against the EEOC on the employer's equitable defense of laches even where the EEOC did not file suit until seven years after the relevant charges were filed.[447] The district court opined that back pay alone "is not enough to show prejudice" because the court may "take the EEOC's delay into account when crafting a remedy."[448] The court also explained that assertions of prejudice "must be supported by evidence establishing specific prejudicial losses that occurred during the period of delay."[449] While the employer adduced evidence that important fact witnesses had taken other employment during the delay period, the court was not satisfied that the employer had taken even "simple steps to contact the former employees, such as by using their contact information from when they were employed."[450]

In *EEOC v. Hillstone Restaurant Group*,[451] the court granted the defendant's motion to amend to include its laches defense.[452] The defendant argued the EEOC delayed identifying 303 additional claimants beyond the initial claimant until after the deadline to amend pleadings had passed.[453] The court found the EEOC possessed the necessary

439 *EEOC v. Wynn Las Vegas, LLC*, 2018 U.S. Dist. LEXIS 115042, at **17-18 (D. Nev. July 10, 2018) (employer must show prejudice resulting from delay in order to prevail on laches defense).
440 *EEOC v. Hosp. Housekeeping Servs.*, 2023 U.S. Dist. LEXIS 39812, at *9 (W.D. Ark. Mar. 9, 2023).
441 *Id.* at *8.
442 *Id.* at *9.
443 *Id.* at **9-10.
444 *Id.* at **10-11.
445 *Id.* at **10-12.
446 *Id.*
447 *EEOC v. LogistiCare Sols. LLC*, 2020 U.S. Dist. LEXIS 215486, at *10 (D. Ariz. Nov. 18, 2020). The court also denied the employer's alternative motion to dismiss. *See id.* at *3. The employer maintained it was clear from the EEOC's complaint that the delay in filing suit was "unreasonable," which, along with prejudice, is one of the two elements of a laches defense. *Id.* The court, however, was not persuaded. It explained that even if the allegations in the complaint revealed a lengthy delay, the allegations not "provide insight on why the delay occurred." *Id.*
448 *Id.* at * 9 (citing *Boone v. Mech. Specialties Co.*, 609 F.2d 956, 959 n.1 (9th Cir. 1979)).
449 *Id.* at *5.
450 *Id.* at *8. The court also observed that the employer had "not yet provided evidence that the potential witnesses have forgotten the alleged incident," other than "the conclusory statement that memories fade over time." *Id.* at *9.
451 *EEOC v. Hillstone Rest. Grp., Inc.*, No. 22-cv-3108, 2024 U.S. Dist. LEXIS 95167 (S.D.N.Y. Apr. 9, 2024).
452 *Id.* at *6.
453 *Id.* at **10-12.

information to identify additional claimants much earlier but delayed doing so, causing significant prejudice to the defendant.[454] Specifically, defendant highlighted managers who interviewed applicants had left the company, memories of interviews had faded, the primary platform used to solicit applications went out of business, and one of the two restaurants at issue had closed.[455] The court found the EEOC's argument the defendant could have "predicted" a laches defense would be applicable to the claimants the EEOC would ultimately identify ignored the fact the defense was predicated on the late disclosure.[456] In other words, the court reasoned even if the defendant could have anticipated potential claimants, the defendant did not know who those claimants were until the EEOC identified them. This case underscores the importance of timely disclosure in EEOC investigations and the potential for a successful laches defense when there is unreasonable delay and resulting prejudice.

It is worth posing one additional question before moving on to the next subsection. Setting aside whether a discrete act occurring outside the 300-day limitations period is *actionable*, may it be *considered* as relevant evidence in the context of a hostile work environment claim? In *EEOC v. Jackson National Life Insurance Co.*, a district judge issued a ruling in favor of the EEOC in an enforcement action, addressing whether the court could consider discrete acts—occurring outside the 300-day limitations period—when evaluating a hostile work environment claim.[457] The EEOC brought suit against alleged joint employers on behalf of nine former employees and other aggrieved individuals, complaining of discrimination, retaliation, and harassment on the basis of race, sex, color, and/or national origin.[458] (Seven of the individuals joined as intervenors as well.) In their motion to dismiss, defendants argued that the Title VII claims must be limited to acts occurring on or after February 10, 2009, which marked 300 days prior to the filing of a discrimination charge by the initial claimant.[459] In response, the EEOC and intervening plaintiffs pointed out that conduct predating the 300-day period may be considered by a fact-finder as part and parcel of a hostile work environment claim, and as "'background evidence' of discriminatory intent."[460] The court noted that the U.S. Supreme Court had not expressly decided the question of "whether discrete acts of discrimination falling outside the 300-day window may be considered in conjunction with a hostile work environment claim."[461] Nonetheless, the court ultimately agreed with the plaintiffs and declined to adopt a rule "categorically barring the use of discrete acts to support a hostile work environment claim."[462] By the same reasoning, the court refused to dismiss claims based on conduct alleged in the complaint that did not include specific dates or a temporal context.[463]

C. Intervention and Consolidation

This section examines intervention and consolidation by the EEOC, as well as the more common phenomenon of intervention by private plaintiffs in litigation brought by the EEOC, and the standards courts apply to determine whether to grant motions to intervene. This section also surveys recent intervention-related issues decided by courts, including allowing intervention by individuals who have not exhausted their individual administrative remedies, allowing intervention by individuals who have previously stipulated to a dismissal of claims, the complicated issues that arise when hundreds of individuals litigate their individual claims alongside EEOC pattern-and-practice claims, and the balancing of factors used in determining whether cases are consolidated.[464]

1. EEOC's and Other Non-Charging Parties' Permissive Intervention in Private Litigation

As the primary federal agency charged with enforcing anti-discrimination laws, the EEOC is empowered to intervene in private discrimination lawsuits—even in instances in which the EEOC has previously investigated the matter at issue and decided not to initiate litigation. Private discrimination class actions are more common targets for EEOC intervention. Given the agency's resource allocation concerns, however, there may be a natural reticence to

454 *Id.*
455 *Id.* at *10.
456 *Id.* at **12-13.
457 *EEOC v. Jackson Nat'l Life Ins. Co.*, 2018 U.S. Dist. LEXIS 156258 (D. Colo. Sept. 13, 2018).
458 *Id.* at **2-15.
459 *Id.* at *16.
460 *Id.* at *18.
461 *Id.*
462 *Id.* at **22-25.
463 *Id.* at **25-27.
464 For a more in-depth discussion regarding rules applicable to intervention and case law interpreting it, please see Barry A. Hartstein, *et al.*, *Annual Report on EEOC Developments: Fiscal Year 2013*.

intervene in private actions unless the agency seeks to raise issues or arguments the private plaintiffs may not be pursuing or emphasizing.

In Title VII actions, at the court's discretion, the EEOC may intervene in private lawsuits where "the case is of general public importance."[465] Courts generally accord a great deal of deference to the EEOC's determination that a matter is of "general public importance" and usually will not require any proof of public importance beyond the EEOC's conclusory declaration.[466] The same approach is followed in dealing with intervention in ADA actions.[467]

Federal Rule of Civil Procedure 24(b) generally addresses "permissive intervention" in civil cases, and provides that anyone may intervene who "(A) is given a conditional right to intervene by a federal statute [such as Title VII's grant of a conditional right to intervene to the EEOC]; or (B) has a claim or defense that shares with the main action a common question of law or fact."[468] Rule 24(b) instructs courts to consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights in determining whether to grant motions to intervene.[469]

In determining whether to exercise their discretion and permit intervention by the EEOC under Rule 24(b), courts consider:

- whether the EEOC has certified that the action is of "general importance"; and
- whether the request is timely.[470]

Courts have stated that the timeliness requirement is flexible, subject to district judge discretion. The factors to determine timeliness include: (a) the length of time the applicant knew or should have known of its interest before making the motion; (b) prejudice to existing parties resulting from the applicant's delay; (c) prejudice to the applicant if the motion is denied; and (d) the presence of unusual circumstances militating for or against a finding of timeliness.[471] With respect to the knowledge factor, in *EEOC v. Birchez Associates*,[472] for example, a court denied intervention to two non-charging parties who attempted to intervene a year and a half after the complaint had been filed, reasoning that they knew or should have known of their interest well before they made the motion. Similarly, in *EEOC v. Danny's Restaurants, LLC*,[473] the court denied intervention to the individual owner of the defendant restaurant who sought to intervene well after the trial on damages had concluded.

Most recently, in FY 2024, in *EEOC v. Activision Blizzard, Inc.*,[474] the U.S. Court of Appeals for the Ninth Circuit affirmed the district court's order denying an employee's attempt to intervene five months after the EEOC filed suit and lodged a proposed consent decree.[475] The court rejected the employee's argument her claims could be addressed with "[a]n easy fix," concluding her purpose in intervening was to force a substantive change to the agreement exposing defendant to additional legal liability, and reasoning such imposition would have upset the delicate balance the parties had reached after several rounds of negotiations.[476] The employee also attempted to justify her delay in seeking to intervene by arguing that she "was relying on both her union and [the California Civil Rights Division] to represent her interests."[477] However, the court found this reason insufficient to excuse her delay, noting she had been aware of the litigation and the district court's denial of the CRD's motion to intervene for five

465 42 U.S.C. § 2000e-5(f)(1).
466 *See Reid v. Lockheed Martin Aeronautics Co.*, 2001 U.S. Dist. LEXIS 991, at *6, n.4 (N.D. Ga. Jan. 31, 2001); *Wurz v. Bill Ewing's Serv. Ctr., Inc.*, 129 F.R.D. 175, 176 (D. Kan. 1989).
467 42 U.S.C. § 12117.
468 Fed. R. Civ. P. 24(b) (as amended Dec. 1, 2007).
469 *Id.*
470 *See EEOC v. Harris Chernin, Inc.*, 10 F.3d 1286, 1292-93 (7th Cir. 1993) and *Mills v. Bartenders Int'l Union*, 1975 U.S. Dist. LEXIS 11320, at *4 (N.D. Cal. July 23, 1975); *see also Harris v. Amoco Prod. Co.*, 768 F. 2d 669, 676 (8th Cir. 1985). In *Wilfong v. Rent-A-Center, Inc.*, 2001 U.S. Dist. LEXIS 16958, at *5 (S.D. Ill. May 11, 2001), the district court integrated the requirements of Fed. R. Civ. P. 24(b)(2) and stated, "the court must consider three requirements: (1) whether the petition was timely; (2) whether a common question of law or fact exits; and (3) whether granting the petition to intervene will unduly delay or prejudice the adjudication of rights of the original parties." *See also EEOC v. Am. Airlines Inc.*, 2018 U.S. Dist. LEXIS 68680 (D. Ariz. Apr. 24, 2018) (denying intervention because plaintiff-intervenors failed to comply with pleading requirements under Rule 24(c) and finding untimeliness when plaintiff-intervenors sought to intervene five months after judgment was entered thereby prejudicing the parties).
471 *Floyd v. City of New York*, 770 F.3d 1051, 1058 (2d Cir. 2014).
472 *EEOC v. Birchez Assocs.*, 2021 U.S. Dist. LEXIS 81104, at *6 (N.D.N.Y. Apr. 28, 2021).
473 *EEOC v. Danny's Rest., LLC*, 2021 2021 U.S. Dist. LEXIS 153632, at *1 (S.D. Miss. Aug. 16, 2021) ("The motion is not well taken and is denied. The trial of this matter has concluded, and a verdict has been rendered. The motion, therefore, is not timely.")
474 *EEOC v. Activision Blizzard, Inc.*, No. 22-55515, 2023 WL 8908774 (9th Cir. Dec. 27, 2023).
475 *Id.* at *5.
476 *Id.* at *3.
477 *Id.* at *4.

months.[478] While the above-referenced lawsuits involved individuals seeking to intervene, rather than the EEOC, similar factors most likely would apply.

2. Charging Party's Right to Intervene in EEOC Litigation

A charging party may want to intervene in a lawsuit filed by the EEOC to preserve their opportunity to pursue individual relief separately if, at any point in the litigation, the EEOC's and the charging party's interests diverge.

Title VII and the ADA expressly permit a charging party to intervene in an action brought by the EEOC against the charging party's employer.[479] The ADEA, on the other hand, makes no mention of intervention. Thus, once the EEOC pursues a lawsuit under the ADEA, the charging party's right to intervene or commence their own lawsuit terminates.[480]

With respect to intervention in a Title VII or ADA lawsuit filed by the EEOC, Rule 24 sets forth the legal construct by which a charging party, or a similarly situated employee, may move to intervene. Under Rule 24, intervention is either *a matter of right* (Rule 24(a)) or *permissive* (Rule 24(b), discussed above).

Rule 24(a) provides:

(a) Intervention of Right. On timely motion,[481] the court must[482] permit anyone to intervene who:

(1) is given an unconditional right to intervene by a federal statute; or

(2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Given Title VII's and the ADA's language expressly permitting an aggrieved person to intervene in a lawsuit brought by the EEOC, most courts analyze a charging party's motion to intervene under Rule 24(a). While courts construe Rule 24 liberally in favor of potential intervenors, an applicant for intervention bears the burden of showing that they are entitled to intervene.[483] For example, in *EEOC v. 1901 S. Lamar, LLC*,[484] the district court granted the employee's motion to intervene in the EEOC's lawsuit on her behalf alleging Title VII violations, finding the employee had a right to intervene under Rule 24(a).[485]

A minor overlap between the impetus for the EEOC's case and a proposed intervenor's allegations are insignificant where the facts constituting the proposed intervenor's allegations and their requested relief are substantively different from the aggrieved's claims and requested relief.[486] If pendent claims are involved (*e.g.*, tort claims or claims arising out of state anti-discrimination statutes), those claims are analyzed under Rule 24(b).[487] Rule 24(b) may also apply if the movant is not aggrieved by the practices challenged in the EEOC's lawsuit[488] or the movant is a governmental entity other than the EEOC.[489] Note, however, that some courts have allowed intervention solely on the basis that a motion to intervene is uncontested,[490] but will deny intervention under a traditional Rule

478 *Id.*

479 *See* 42 U.S.C. § 2000e-5(f)(1) ("The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision.").

480 *See* 29 U.S.C. § 626(c)(1); *see also EEOC v. SVT, LLC*, 297 F.R.D. 336, 341 (N.D. Ind. 2014) (explaining the differences between Title VII and the ADEA and specifically noting that the right of any person to bring suit under the ADEA is terminated when suit is brought by the EEOC); *EEOC v. Darden Restaurants, Inc.*, 2015 U.S. Dist. LEXIS 149897, at **4-5 (S.D. Fla. Nov. 3, 2015) (holding the proposed plaintiffs-intervenors "have no conditional or unconditional right to intervene in the ADEA action because the ADEA expressly eliminates such a right upon the EEOC's filing of an action on a person's behalf").

481 *See EEOC v. PC Iron, Inc.*, 2017 U.S. Dist. LEXIS 141187 (S.D. Cal. Aug. 31, 2017) (citing *U.S. v. Oregon*, 745 F.2d 550, 552 (9th Cir. 1984) ("Mere lapse of time is not determinative")) and *EEOC v. OnSite Solutions, LLC*, 2016 U.S. Dist. LEXIS 158620 (W.D. Okla. Nov. 16, 2016) ("When determining timeliness for purposes of intervention...[t]he analysis is contextual; absolute measures of timeliness should be ignored.") (citing *Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1250 (10th Cir. 2001)); *but see EEOC v. JC Wings Enters., L.L.C.,* 2019 U.S. App. LEXIS 26465 (5th Cir. Aug. 30, 2019) (denying intervention for failure to file motion to intervene within 90-day prescription period mandated by ADEA); *EEOC v. Giphx10 LLC*, 2021 U.S. Dist. LEXIS 44157, at *3 (W.D. Wash. Mar. 9, 2021) (finding motion timely as motion was made at "a very early stage of the proceedings.").

482 *See EEOC v. STME, LLC*, 938 F.3d 1305 (11th Cir. 2019) (finding error in district court's failure to consider and rule on the merits of the motion to intervene because plaintiff had an unconditional statutory right to intervene).

483 *EEOC v. Herb Hallman Chevrolet*, 2020 U.S. Dist. LEXIS 16743, at *3 (D. Nev. Feb. 3, 2020).

484 *EEOC v. 1901 S. Lamar, LLC*, 2023 U.S. Dist. LEXIS 223816 (W.D. Tex. Dec. 15, 2023).

485 *Id.* at *10.

486 *Id.* at *9.

487 *EEOC v. WirelessComm*, 2012 U.S. Dist. LEXIS 67835, at **3-4 (N.D. Cal. May 15, 2012).

488 *EEOC v. DiMare Ruskin, Inc.*, 2011 U.S. Dist. LEXIS 136846, at **8-9 (M.D. Fla. Nov. 29, 2011).

489 *EEOC v. Global Horizons*, 2012 U.S. Dist. LEXIS 33346 (D. Haw. Mar. 13, 2012) (granting motion to intervene filed by the U.S. Government (Department of Justice) under Rule 24(b)).

490 *EEOC v. 1618 Concepts Inc.*, 2020 U.S. Dist. LEXIS 2090, at **20-22 (M.D.N.C. Jan. 7, 2020); *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 2020 U.S. Dist. LEXIS 174176 (E.D. Mich. Sept. 23, 2020).

24(a) analysis. For example, in *EEOC v. 1618 Concepts Inc.*,[491] the court denied intervention on the remaining claims of breach of contract and constructive discharge in violation of public policy because the plaintiff failed to show that he had an interest in the subject matter of the action.

A plaintiff-intervenor's Title VII complaint in intervention is limited to the scope of the EEOC investigation that can reasonably be expected to "grow out of the charge of discrimination."[492] An individual is not required to thoroughly describe the discriminatory practices in order to meet the requirements of Rule 24(a).[493] Courts will also permit intervention even when the individual's complaint includes claims that are legally barred, reasoning that these claims may be used to support a claim that is timely.[494]

Courts are permissive in granting individuals' requests to intervene in lawsuits brought by the EEOC regardless of whether the proposed intervenors failed to exhaust their administrative remedies.

Although employees must generally exhaust their administrative remedies in order to file a Title VII or ADA civil suit independently, one court allowed the intervention of 10 former or prospective employees who had not filed a charge of discrimination at all with respect to their claims. In *EEOC v. Stone Pony Pizza, Inc.*,[495] the EEOC initiated a pattern-or-practice lawsuit alleging the company discriminated against Black employees/prospective employees by failing to hire them for front-of-house positions. Eleven individuals intervened in the action, including 10 who never filed charges of discrimination. The company filed a motion for summary judgment seeking dismissal of these individuals' claims due to their failure to exhaust their administrative remedies. The intervenors argued they were entitled to intervene as a matter of right because they were "persons aggrieved" by the company's alleged unlawful employment practices under 42 U.S.C. § 2000e-5(f)(1) or, alternatively, were entitled to permissive intervention under the "single filing rule," otherwise known as the "piggybacking rule," allowing them to exhaust their administrative remedies vicariously based on the lone charging party's exhaustion. The court allowed intervention by the 10 individuals because it found the individuals alleged "essentially the same claim" as the charging party-plaintiff—although the court declined to hold the individuals were "persons aggrieved" or entitled to application of the "single-filing rule." The court, however, dismissed the claims of intervenors that arose long before the lone charging party's claims, holding that the charging party's charge could not possibly have put the company on notice of these individuals' older claims.

One court has also applied the "single filing rule" to a charging party who failed to timely file her EEOC charge in circumstances where another charging party involving similar allegations of harassment against the same supervisor filed a timely charge. In *EEOC v. JCFB, Inc.*,[496] the charging party filed almost a year after the statutory period for filing a charge of discrimination ended. However, in rejecting defendant's attempts to distinguish the charging party's claims, the court relied on a timely charge of discrimination filed by another individual involving the same supervisor and applied the "single filing" rule in permitting intervention by the late-filed claims by a second charging party based on the timely charge filed by the first.

In a case from FY 2022, *EEOC v. N. Georgia Food Inc.*,[497] the EEOC brought claims against the defendant for sexual harassment and hostile work environment, pregnancy discrimination, and retaliation under Title VII of the Civil Rights Act of 1964.[498] Plaintiff-intervenor filed a motion under Rule 24(a)(1) to intervene 21 days after the EEOC commenced suit.[499] The EEOC did not oppose the motion and the defendant did not respond, as it had yet to make an appearance in the case.[500] The court granted the plaintiff-intervenor's motion, recognizing that Title VII authorizes her to intervene and noting that her Rule 24 motion was timely filed.[501]

In *EEOC v. Activision Blizzard Inc.*,[502] while in the midst of its own parallel state court lawsuit against the defendant, the California Department of Fair Employment and Housing (DFEH) sought to intervene in this federal

491 *1618 Concepts Inc.*, 2020 U.S. Dist. LEXIS 2090, at **22-22.
492 *EEOC v. Denton Cty.*, 2017 U.S Dist. LEXIS 202499 (E.D. Tex. Dec. 8, 2017).
493 *Id.* at *5.
494 *Id.* at *6.
495 *EEOC v. Stone Pony Pizza, Inc.*, 172 F.Supp.3d 941 (N.D. Miss. 2016).
496 *EEOC v. JCFB, Inc.*, 2019 U.S. Dist. LEXIS 102862 (N.D. Cal. June 19, 2019).
497 *EEOC v. N. Ga. Foods Inc.*, 2022 U.S. Dist. LEXIS 68541 (W.D.N.C. Apr. 13, 2022).
498 *Id.* at *1.
499 *Id.* at **1-2.
500 *Id.* at *2.
501 *Id.* at **2-3.
502 *United States EEOC v. Activision Blizzard Inc.*, 2021 U.S. Dist. LEXIS 250822 (C.D. Cal. Dec. 20, 2021).

case brought by the EEOC against the defendant after the parties agreed to settle and the court's consent decree was set to be entered to that effect.[503] Concerned that the consent decree could permit relevant evidence for DFEH's state law claims to be destroyed and might release relevant state law claims, DFEH moved to intervene under Rule 24(b)(1).[504] DFEH's motion was denied, but not before the court noted DFEH's declared interest in the case, to uphold the rights of all California citizens, exceeded the bounds of Rule 24, as such interest would allow DFEH to potentially intervene in almost every employment action in California.[505] Moreover, the court denied intervention because DFEH's concern about evidence destruction, although a potentially sufficient reason to allow intervention in some situations, was found insufficient here because the concern was based on mere speculation, at best.[506]

More recently, in *EEOC v. Papa John's USA Inc.*, the court identified four factors that should be considered when assessing whether a potential intervenor has timely filed a motion to intervene – "(1) the length of time during which the proposed intervenor knew or reasonably should have known of its interest in the case before moving to intervene; (2) the extent of prejudice to the existing parties as a result of the proposed intervenor's failure to move for intervention as soon as it knew or reasonably should have known of its interest; (3) the extent of prejudice to the proposed intervenor if its motion is denied; and (4) the existence of unusual circumstances militating either for or against a determination that its motion was timely."[507] Finding no party would be prejudiced by the potential plaintiff-intervenor intervening in the EEOC's ADA suit (which grants plaintiffs an unconditional right to intervene in ADA litigation brought by the EEOC) and given that the potential plaintiff-intervenor filed his motion to intervene less than one month after the EEOC filed suit, the court granted the Rule 24 motion.[508]

In *EEOC v. PRC Industries, Inc.*, a case decided in FY 2023, the court found the two potential plaintiff-intervenors, who had previously filed charges of discrimination against the defendant, satisfied the dual-factor test to intervene under Rule 24(a)(1).[509] Considering whether the potential plaintiff-intervenors had an unconditional right to intervene, the court acknowledged Title VII grants persons who timely file charges of discrimination an absolute right to intervene in the government's civil suit. And since the parties had not yet engaged in extensive motion practice after the defendant answered the complaint, the court found the potential plaintiff-intervenors satisfied the second element requiring timely intervention, and their Rule 24(a)(1) motions were granted.[510]

In *EEOC v. J & R Baker Farms, LLC*,[511] the court granted a motion to amend the complaint to add 10 additional plaintiff-intervenors in the EEOC's pattern-or-practice lawsuit, even though the individuals were not eligible to participate in the lawsuit under the single-filing rule. (The court had previously ruled potential plaintiff-intervenors whose claims arose after the date any representative plaintiff filed a representative charge could not take advantage of the single-filing rule.) Yet, the court held those individuals could permissively intervene under Rule 24(b)(1)(B) because their claims shared common questions of law and fact with those in the lawsuit.

In *EEOC v. Horizontal Well Drillers, LLC*,[512] the plaintiff-intervenor alleged class claims despite stating in his charge that he brought his charge individually. However, during the EEOC investigation, the EEOC had requested additional information, including the employer's hiring policies, methods for screening and recruiting, and records of everyone hired and not hired from the applicant pool. The EEOC later issued a "Notice of Expanded Investigation and Request for Additional Info." Despite the plaintiff-intervenor's failing to state that he sought to represent others in his charge, the court permitted intervention. The court was satisfied that the employer was on sufficient notice and should have reasonably expected class claims to grow out of the charge upon receipt of the Notice of Expanded Investigation, along with the requests for additional information.

At least one federal appellate court has held a mandatory arbitration agreement does not preempt an individual's right to intervene. In *EEOC v. PJ Utah, LLC*,[513] the Tenth Circuit reversed the district's court's denial of intervention by the allegedly aggrieved employee. The EEOC brought an enforcement action against the employer for allegedly denying a workplace accommodation to the employee and terminating his employment for requesting an

503 *Id.* at **1-4.
504 *Id.* at **2-4.
505 *Id.* at **1-2, 4.
506 *Id.* at *3.
507 *EEOC v. Papa John's USA Inc.*, 2023 U.S. Dist. LEXIS 64427, at *1 (M.D. Ga. Apr. 12, 2023).
508 *Id.* at *2.
509 *United States EEOC v. PRC Indus., Inc.*, 2023 U.S. Dist. LEXIS 110639, at *1 (D. Nev. June 27, 2023).
510 *Id.* at **3-4.
511 *EEOC v. J & R Baker Farms, LLC*, 2016 U.S. Dist. LEXIS 29167 (M.D. Ga. Mar. 8, 2016).
512 *EEOC v. Horizontal Well Drillers, LLC*, 2018 U.S. Dist. LEXIS 102434 (W.D. Okla. June 18, 2018).
513 *EEOC v. PJ Utah, LLC*, 822 F.3d 536 (10th Cir. 2016).

accommodation. The employee sought to intervene in the EEOC's lawsuit, but the district court held the employee's claims were subject to mandatory arbitration under an agreement the employee's mother had signed on his behalf. The court of appeals overturned the district court's decision, holding that the denial of a motion to intervene is a final order subject to immediate review, and finding the arbitration agreement did not affect the employee's unconditional right to intervene under Rule 24(a). The court of appeals further held the district court's order compelling arbitration was not yet appealable because it was not a final decision—as the EEOC's claim against the employer remained.

3. Adding Pendent Claims

Courts may allow individual intervenors to assert pendent state or federal law claims in addition to the EEOC's federal claims, but are willing to entertain defendants' motions to dismiss pursuant to Rules 12(b)(6) and 24(b) as discussed below. While determining timeliness for purposes of intervention is not a fixed requirement, courts will uphold the statute of limitations for pendent state law claims.[514] In some instances, courts have permitted leave to amend the complaint to add factual detail related to pendent claims even when the plaintiff-intervenors knew most if not all of the alleged facts at the time they filed their initial complaint in intervention. In a case decided in 2021, *EEOC v. JBS USA, LLC*,[515] the plaintiff-intervenors filed amended complaints adding factual detail supporting their pendent claims in response to the defendant's motion for judgment on the pleadings, arguing the initial complaints did not contain sufficient factual detail. Although the initial complaints were filed almost nine years prior to the motion to amend, the court permitted amendment, reasoning the first time the plaintiff-intervenors were on notice of a potentially deficient complaint was when the defendant filed a motion for judgment on the pleadings, which occurred only two months before the plaintiff-intervenors' motion to seek leave to amend.

As explained above, Rule 24(b)(1)(B) allows the court, in its discretion, to permit intervention by a person "who has a claim or defense that shares with the main action a common question of law or fact." In exercising its discretion, the court "must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." This standard is commonly used for analyzing pendent claims. Further, courts will rely on 28 U.S.C. §1367 in asserting supplemental jurisdiction over state law discrimination claims in intervention actions.[516] However, in a 2020 decision, *EEOC v. Norval Electric Cooperative, Inc.*,[517] the court held that in order for the court to hear an intervenor's state law claims, the intervenor must seek leave from the court to file an amended complaint that contains both her federal and state law claims, reasoning the court lacked authority to remove or consolidate a state court action to federal court. Further, the court also declined to exercise supplemental jurisdiction over the intervenor seeking judicial review of proceedings before the state Human Rights Commission, reasoning there was nothing to be gained in terms of judicial economy or avoidance of risk of conflicting decisions.[518]

In an older decision, *EEOC v. Mayflower Seafood of Goldsboro, Inc.*,[519] the court allowed the plaintiff-intervenor to assert her state law claims for assault, battery, intentional and negligent infliction of emotional distress, negligent hiring, supervision, training, and retention, and wrongful discharge because the factual bases for these claims and the Title VII gender discrimination and sexual harassment claims were closely related, and it would not require a lengthy extension of the case deadlines. Likewise, in *EEOC v. Favorite Farms*,[520] the plaintiff-intervenor survived a motion to dismiss her state law claims for assault and battery because the issue of vicarious liability was more appropriately addressed at the summary judgment stage.

In contrast, in *EEOC v. Norval Electric Cooperative, Inc.*,[521] a Montana district court held that while it could exercise pendent jurisdiction over an intervenor's state law claims that arise from the same nucleus of facts as the federal claims, in order for the court to hear those state law claims, the intervenor must ask the court for leave to file an amended complaint that contains both her federal and state law claims.

514 *EEOC v. OnSite Solutions, LLC*, 2016 U.S. Dist. LEXIS 158620, at **8-9 (W.D. Okla. Nov. 16, 2016).
515 *EEOC v. JBS USA, LLC*, 2021 U.S. Dist. LEXIS 24079, at **21-23 (D. Col. Feb. 8, 2021).
516 *EEOC v. PC Iron, Inc.*, 2017 U.S. Dist. LEXIS 141187, at **9-10 (S.D. Cal. Aug. 31, 2017); *EEOC v. Cappo Mgmt. XXIX*, 2021 U.S. Dist. LEXIS 64326, at **3-4 (E.D. Cal. Mar. 31, 2021) (exercising supplemental jurisdiction over California FEHA disability and common law claims under §1367).
517 *EEOC v. Norval Elec. Coop. Inc.*, 2020 U.S. Dist. LEXIS 58548, at **10-11 (D. Mont. Apr. 2, 2020).
518 *Id* at *7.
519 *EEOC v. Mayflower Seafood of Goldsboro, Inc.*, 2016 U.S. Dist. LEXIS 101154 (E.D.N.C. Aug. 2, 2016).
520 *EEOC v. Favorite Farms, Inc.*, 2018 U.S. Dist. LEXIS 1482 (M.D. Fla. Jan. 4, 2018).
521 *EEOC v. Norval Elec. Coop. Inc.*, 2020 U.S. Dist. LEXIS 58548, at **10-11 (D. Mont. Apr. 2, 2020).

Note that in *EEOC v. LXL Learning, Inc.*,[522] the court permitted intervention even though the parties had stipulated to dismissal of a prior lawsuit with prejudice. After the dismissal and after the EEOC had initiated its own lawsuit, the plaintiff-intervenor sought to intervene on the Title VII claim (which the employer did not oppose based on the prior agreement) under a different factual theory. The intervenor also sought to add a state law claim previously not asserted. The employer opposed such additions on the basis that the stipulated dismissal barred the plaintiff-intervenor from any claims or theories in the case beyond what the EEOC had included in its complaint. However, while the court agreed that the employer did not consent to expand the case, the court conditionally permitted intervention with the understanding that the employer may further pursue its *res judicata* defense.

4. Individual Intervenor Claims Alongside EEOC Pattern-or-Practice Claims

Courts have made clear that only the EEOC may pursue Section 707 pattern-or-practice claims, and individuals may not assert such claims.[523] Where individual employees or the EEOC also assert individual claims in a pattern-or-practice lawsuit initiated by the EEOC, however, managing the various individual claims becomes complicated because of the different proof schemes. While there are not any recent reported cases on this issue, *EEOC v JBS USA, LLC*[524] provides useful guidance in dealing with this issue.

In the *JBS USA* case, the EEOC sued a meatpacking company, alleging it discriminated against Somali, Muslim, and Black employees. The agency asserted several pattern-or-practice claims. At the outset of the case, the EEOC and the employer entered into a bifurcation agreement dividing discovery and trial into two phases: (1) the EEOC's pattern-or-practice claims (Phase I); and (2) individual or Section 706 claims (Phase II). More than 200 individuals intervened. At the trial of the Phase I claims, the court found in the employer's favor, and the action proceeded to Phase II. In Phase II, over 200 plaintiff-intervenors sought relief for their individual Title VII and state law claims and the EEOC brought suit under Section 706 on behalf of 57 individuals, some of whom were also plaintiff-intervenors.

The employer moved to dismiss the claims of several categories of employees, including those who were proceeding *pro se* and not engaging in discovery. The court granted the employer's motion to dismiss the claims of 16 *pro se* plaintiff-intervenors for failure to prosecute their cases. The employer also argued that the EEOC could not seek relief on behalf of 18 other individuals whose claims had previously been dismissed for failure to prosecute. The court agreed and held, based on *res judicata* principles, the EEOC could not assert claims on behalf of the individual plaintiff-intervenors whose claims had been dismissed. In a later proceeding, the court dismissed 13 remaining plaintiff-intervenors for failure to comply with a court order for each plaintiff-intervenor to file written notice of their current address and telephone number.[525]

The employer also moved to dismiss 36 individuals' claims due to their failure to file Title VII charges. The individuals argued their claims were saved under the single-filing rule, described above. The court declined to adopt a categorical rule that the single-filing rule only applies to class actions and noted only the Third Circuit has so held.[526] Hence, the court denied dismissal and held seven individuals' claims were subject to the single-filing rule because the employer was on notice of potential class allegations, given multiple employees filed charges alleging similar discriminatory treatment on the same day.

5. Consolidation

Under Rule 42, a court may "join for hearing or trial any or all matters at issue in the actions; consolidate the actions; or issue any other orders to avoid unnecessary cost or delay" if actions before the court involve a common question of law or fact.[527] While a plaintiff's lawsuit may involve a common question of law or fact brought in a separate lawsuit by the EEOC, courts will use a balancing test to determine whether consolidation would avoid unnecessary costs or delay. Although there were not any reported decisions on this issue in FY 2024, *EEOC v. Faurecia Auto Seating, LLC*,[528] is illustrative regarding the manner in which this issue may be dealt with by the courts.

522 *EEOC v. LXL Learning, Inc.*, 2017 U.S. Dist. LEXIS 200184 (N.D. Cal. Dec. 4, 2017).
523 *EEOC v. JBS USA, LLC*, 2012 U.S. Dist. LEXIS 167117 (D. Neb. Nov. 26, 2012).
524 *EEOC v. JBS USA, LLC*, 2016 U.S. Dist. LEXIS 110697 (D. Neb. Aug. 19, 2016).
525 *EEOC v. JBS USA, LLC*, 2017 U.S. Dist. LEXIS 63879 (D. Neb. Apr. 27, 2017).
526 *See Communications Workers of Am. v. New Jersey Dep't of Personnel*, 282 F.3d 213, 217 (3d Cir. 2002).
527 Fed. R. Civ. P. 42.
528 *EEOC v. Faurecia Auto Seating, LLC*, 2018 U.S. Dist. LEXIS 105391 (S.D. Miss. June 25, 2018).

In *Faurecia Auto Seating*, two plaintiffs with separate lawsuits sought to consolidate their cases with an EEOC lawsuit filed on behalf of 15 claimants. Both plaintiffs alleged ADA discrimination by the same employer and the EEOC did not oppose consolidation. The court denied consolidation, however, given a significant amount of discovery had already been conducted, including 29 depositions. Thus, the court noted that seeking to add the additional parties would require all 29 deponents to be re-deposed and would expand the scope and extend the time of discovery. The court further noted consolidation would also result in a significant risk of prejudice to the employer and increase litigation costs for the parties.

D. Class Issues in EEOC Litigation

1. General

In a FY 2024 EEOC decision involving class issues, the EEOC, relying on Fed. R. Civ. Pro. 42(b), sought to bifurcate a pattern-or-practice claim wherein it alleged staffing agency defendants violated Title VII of the Civil Rights Act of 1964 and Section 102 of the Civil Rights Act of 1991 by selecting, referring, placing, and assigning Hispanic applicants and employees at a disproportionate rate in comparison to Black applicants and employees (Count I). The EEOC also claimed the defendants assigned Black employees to less-desirable and lower-paying roles (Count II). Finally, the EEOC asserted the defendants failed to preserve records relevant to the determination of whether the defendants engaged in unlawful employment practices (Count III).[529]

The EEOC sought to bifurcate the discovery and trial into two phases, with phase one involving whether defendant engaged in a pattern or practice of discrimination and other class-related inquires, and phase two involving discovery and trial on issues related to the individual class members.[530] At the outset, the court denied the EEOC's motion to bifurcate on grounds it was premature since discovery had not yet commenced and such discovery may inform whether bifurcation was warranted.[531]

Considering the factors courts employ under Fed. R. Civ. Pro. 42(b) to ascertain if bifurcation was justified,[532] the EEOC took the position that bifurcation would promote judicial economy and would increase likelihood of settlement.[533] The court was unconvinced that either of those factors weighed significantly in favor of bifurcation as the court pointed out the EEOC's own position reflected that bifurcation not would result in the Commission's winding up its case and not advancing to phase two of the litigation if a jury found the EEOC had not satisfied its burden to prove pattern-or-practice discrimination existed in phase one.[534] As to bifurcation improving the chances that the parties settle, the court found the EEOC's position "rest[ed] mostly on speculation and hypotheticals," and the parties have open opportunities throughout the life of the case to engage in settlement.[535]

Months later, under Fed. R. Civ. Pro. 54(b) and Local Rule 7.3, the defendants brought a motion to reconsider their prior motion to dismiss all counts of the EEOC's complaint; specifically, the defendants had alleged Count I and Count II were untimely, and Count III was not plausible.[536]

Acknowledging that L.R. 7.3 mandates a motion for reconsideration to specifically show a material difference in fact or law from the time the court entered an interlocutory order, the occurrence of new material facts or revisions to the law since the implementation of an interlocutory order, or a failure by the court to consider dispositive law or material facts, the court found the defendants' arguments were underwhelming.[537] With respect to purported new material facts to support their instant motion, the defendants pointed to the EEOC's filing suit on behalf of two individuals after the interlocutory order was issued, which the defendants argued revealed new material facts reflecting the date they were put on notice and supporting the position that the EEOC had not satisfied the statute

529 *EEOC v. Supreme Staffing LLC*, 2024 U.S. Dist. LEXIS 47232, at *2 (W.D. Tenn. Mar. 18, 2024).
530 *Id.* at *4.
531 *Id.* at **7-8.
532 *Id.* at *3 (Factors include "the possible confusion of the jury, whether the evidence and issues sought to be bifurcated are substantially different, and whether bifurcation would enhance settlement.")
533 *Id.* at *8.
534 *Id.* at **10-11.
535 *Id.* at **14-15.
536 *EEOC v. Supreme Staffing LLC*, 2024 U.S. Dist. LEXIS 146228, at *3 (W.D. Tenn. Aug. 16, 2024).
537 *Id.* at **5-7.

of limitations.[538] The court found no new material facts existed and the defendants merely asserted bald conclusions without the benefit of discovery to flesh out their speculation.[539]

As to the defendants' argument that the court failed to follow established dispositive law, the defendants asserted the court attempted to impermissibly construe one person's claim of national origin discrimination in his charge as a claim for race discrimination to trigger the date the defendants were notified of the charging party's race discrimination claims from the date the EEOC notified the defendants it was expanding its investigation or the date the defendants received the Letter of Determination to the date the charge was filed.[540]

Agreeing that a national origin charge cannot be construed as a race discrimination charge, the court held the defendants' interpretation of the court's ruling was misplaced, as the court merely applied the expected scope of investigation test to hold that failure to select race on the charge does not mean a charging party could not bring race discrimination claims in a complaint when the body of the charge asserts facts to support discrimination on the basis of race; here, specifically, that Black job applicants were turned away from open jobs that were given to Hispanic applicants.[541] The court further clarified that a defendant is placed on notice of a charging party's race discrimination claim when the information within the body of the charge asserts facts that are identical to the EEOC's complaint; the equitable exception to the normal rule that the charge-filing date triggers defendant's notice is only changed to when defendant is noticed about an expanded investigation when the EEOC is bringing allegations in its complaint that fall outside of an initial charge.[542]

The court concluded that the extraordinary circumstances necessary to support granting an interlocutory appeal did not exist in this case as the questions posed by the defendants were neither matters of first impression nor so difficult to warrant interlocutory review.[543]

2. Identity of Class Members in EEOC Litigation

Courts continue to address the issue of identification of class members in EEOC-led class actions. This past fiscal year in *EEOC v. Aaron Thomas Co., Inc. and Supreme Staffing LLC*, the defendants moved to compel more robust Rule 26(a)(1) disclosures from the EEOC that would identify with more particularity the 11 named claimants and the basis for each of their claims.[544] Defendants asserted the EEOC must produce detailed information including why the EEOC filed a lawsuit on the claimants' behalf because (a) the district court judge previously ordered the EEOC to "disclose the individual claims and exact damages calculations for each of the eleven (11) individuals named in the complaint" and (b) the EEOC had not yet confirmed whether it represented the 11 individuals.[545] The court disagreed with the defendants' assertion that the EEOC needed to disclose more than it had already in its Rule 26(a)(1) disclosures to comply with the court's order or to explain its representation of the claimants as its initial disclosures informed the defendants that the person was a class member, identified the person's relationship to the defendants, and specified the knowledge the person may have.[546] The EEOC also served documentation with its Rule 26(a)(1) disclosures that the EEOC asserted detailed the claims in the lawsuit and (at a hearing) defendant Supreme Staffing agreed with the court that it could propound discovery requests to obtain information about the basis for the EEOC's claims (defendant Aaron Thomas Co.'s second motion to compel complete discovery responses from the EEOC was not addressed during the hearing).[547]

The court also found the EEOC's damages calculation was satisfactory as it had disclosed the method it anticipated using to calculate damages on a class basis and shared the categories of damages it sought in its Rule 26(a)(1)(A)(iii) disclosures.[548] At a hearing, the EEOC further clarified that it did not intend to seek individualized damages, but rather, anticipated retaining an expert to run a statistical model to calculate gross, class-wide backpay with a pro-rata distribution. Given the EEOC's position at the hearing, defendant Supreme Staffing echoed

538 *Id.* at **6-8.
539 *Id.* at **7-8.
540 *Id.* at *9.
541 *Id.* at **10-11.
542 *Id.* at **12-13.
543 *Id.* at **18-19.
544 *EEOC v. Aaron Thomas Co., Inc. and Supreme Staffing LLC*, 2024 U.S. Dist. LEXIS 131648, at *2 (W.D. Tenn. July 25, 2024).
545 *Id.* at **1-5.
546 *Id.*
547 *Id.* at *6, n.1.
548 *Id.* at **7-8.

that it would not seek damages calculation on an individualized damages, and the court found individualized damages calculations for the 11 identified claimants unnecessary.[549]

E. Other Critical Issues in EEOC Litigation

1. Protective Orders and Motions to Seal

In a case from the Western District of Tennessee, the defendant previously brought an Emergency Motion for a Temporary Protective Order ("Emergency Protective Order") to enjoin the EEOC from soliciting the defendant's employees via email to participate in the action and to enjoin the EEOC from operating a website that solicited the defendant's employees via survey.[550] The EEOC opposed the defendant's Emergency Protective Order, arguing the Commission's communications with the defendant's employees were privileged; in response, the defendant argued the EEOC waived any privilege, or it did not exist.[551] Notably, in its reply to the EEOC's opposition, the defendant offered an alternative path for the parties to exchange the merits of such solicitation. Specifically, the parties may exchange the EEOC's solicitation efforts to one another by marking any such communications as attorneys' eyes only ("AEO") so that the defendant would have access to the identities of its employees who received the EEOC's solicitations via email as well as the contents of the proposed survey and responses to same.[552] The court denied the defendant's Emergency Protective Order, holding that whether and for how long the court should stay the EEOC's solicitation of the defendant's employees was a separate issue from whether the solicitation efforts were discoverable.[553]

The defendant sought court intervention again, this time moving the court to revise its general protective order to (a) expand the definition of "Protected Information" to include information and communications shared between the EEOC and any person the EEOC believed had been aggrieved and (b) to include an option to designate material as AEO in the same manner the parties designated material as confidential.[554] The EEOC opposed the defendant's position, arguing the court's previous ruling on the Emergency Protective Order meant the court could only allow the parties to include an AEO designation after a party brought a motion to compel production of sensitive information and the court granted such motion or the court conducted a preliminary analysis of the merits of a motion to compel sensitive information and the court anticipated such motion would be unsuccessful.[555]

The court declined both of the two options presented by the EEOC, noting such analysis created a false dichotomy and neglected to consider a third alternative available to the court.[556] That is, anticipating this case may involve protected information that requires an AEO designation with respect to the EEOC's solicitation efforts of the defendant's employees, the court had full authority to proactively allow the parties to use such AEO designation in anticipation it may be necessary.[557] The court granted defendant's motion to revise the definition of Protected Information and allowed the parties to designate information AEO.[558] The court also acknowledged neither party forgoes the opportunity to challenge an AEO designation, and the parties may advance motions to compel before the court to ascertain whether the EEOC must inform the defendant of information related to its solicitation efforts and whether the EEOC's solicitation efforts were properly subject to an AEO designation.[559]

In another case involving alleged race discrimination premised on the alleged sighting of five nooses at various locations on the defendant's premises, the EEOC filed a motion to compel the production of responsive documentation and ESI the defendant withheld because the defendant deemed it confidential.[560]

The defendant asserted it withheld such information on grounds that the parties had not yet stipulated to entry of a protective order on confidentiality (and one had not yet been entered), and the defendant's failure to serve

549 *Id.*
550 *EEOC v. Aaron Thomas Co.*, 2024 U.S. Dist. LEXIS 80421, at *4 (W.D. Tenn. May 2, 2024).
551 *Id.* at **4-5.
552 *Id.*
553 *Id.* at *5.
554 *EEOC v. Aaron Thomas Co.*, 2024 U.S. Dist. LEXIS 80421 (W.D. Tenn. May 2, 2024).
555 *Id.* at **6-7.
556 *Id.*
557 *Id.* at *7.
558 *Id.*
559 *Id.* at **7-8.
560 *United States EEOC v. Exxon Mobil Corp.*, 347 F.R.D. 451 (M.D. La. 2024).

confidential documentation on this basis did not waive its opportunity to do so later.[561] Defendant explained that the EEOC sought court intervention while the defendant was in the midst of making good-faith efforts to discuss entry of a protective order with the Commission; but, after the parties exchanged one round of edits on a draft protective order, the EEOC emailed counsel for the defendant that it believed the parties reached an impasse and filed the instant motion to compel disclosure of subject confidential documentation two minutes later.[562]

In opposition, the EEOC advanced that the defendant's timely objections on confidentiality were insufficient since the defendant had not immediately sought a protective order on confidentiality and was not the first party to seek entry of a protective order. The court found this argument unavailing and held the defendant did not waive its objections on confidentiality because the defendant timely raised objections on the basis of confidentiality in response to the EEOC's discovery requests, the defendant provided a draft protective order and motion to the EEOC, and the EEOC prematurely brought the motion to compel.[563]

Having both the EEOC's and the defendant's separate proposed protective orders before it, the court took the opportunity to expressly require the parties to submit draft blanket protective orders to govern the exchange of documents and information in the matter that both parties would be able to utilize, including to designate information as confidential.[564] The court provided guidance on the definition of confidentiality, holding that the parties may designate materials that fall under the categories of "'propriety research, technical, or financial information' that the party has maintained as confidential and that pertain directly to the designating party's business or governmental operations" as confidential.[565] However, before providing such guidance, the court informed the defendant that its proposed definition of confidentiality was unworkable, as the defendant's definition was so broad it had initially sought to withhold documentation related to human resources policies under its proffered definition of confidentiality before vacating that position.[566]

Finally, with respect to confidentiality, the court also permitted the parties to save resources by not requiring them to redact personally identifiable information on documents marked confidential; refused to restrict the parties' ability to mark deposition testimony as confidential to the time the parties are on record at the deposition (allowing the parties 30 days after receipt of deposition testimony, instead); did not allow the defendant to pull documents that had already been disclosed outside of discovery or that were publicly available into the scope of confidential documents under the final protective order; and adopted the defendant's language to govern the filing of documents under seal that emphasized that a party must seek leave of court to file a document under seal that had been designated as confidential.[567]

Courts continue to show a willingness to protect sensitive information, especially when there is mutual agreement by the parties, and the parties establish "good cause" to protect this material disclosed during discovery. In a FY 2022 sex discrimination case,[568] a federal court in Washington State approved a stipulated protective order protecting, among other items, the confidentiality of social security and tax numbers, financial information, credit card numbers, dates of birth, immigration status, trade secrets, and even the maiden names of mothers.

While a protective order commonly governs discovery in most employment law cases, protective orders may also be used to assist in settlement discussions. In one FY 2019 case,[569] a magistrate judge held a pre-discovery settlement conference with the parties in which she suggested disclosure of certain confidential financial information and documents might be beneficial for the settlement process. Although discovery had not yet commenced, the parties agreed to be bound by a protective order for the limited purpose of engaging in settlement discussions with the magistrate judge.[570]

The public generally has a right to judicial records. A party seeking to limit public access to such records has the burden to show sealing is appropriate and must support its position with specific reasons. In a disability

561 *Id.* at 481.
562 *Id.* at 481-483.
563 *Id.* at 481.
564 *Id.* at 483.
565 *Id.* at 484.
566 *Id.* at 484-485.
567 *Id.* at 485-486.
568 *EEOC v. Chief Orchards Admin. Servs.*, 2022 U.S. Dist. LEXIS 152289 (E.D. Wash. Aug. 24, 2022).
569 *EEOC v. Prestige Care, Inc.*, 2018 U.S. Dist. LEXIS 217857 (E.D. Cal. Dec. 27, 2018).
570 *Id.* at **1-2.

discrimination case,[571] a federal court in North Carolina granted, in part, the parties' request to seal certain personal and private medical information of a kind not ordinarily made public, holding privacy interests override the public's interest in access to such records. The court sealed personal and medical information of limited or no relevance to the case, such as the claimant's medical records concerning irrelevant health conditions. The court also granted the defendant's request to seal deposition transcripts and Occupational Safety and Health Administration records containing health information of employees not parties or claimants on the grounds this information was not relevant. The court declined, however, to seal information about the nature of injuries suffered by employees because it was relevant to the court's decision. The court also denied the parties' requests to seal other types of information. For example, the court disagreed the name of the claimant's prescription drug at issue in her discharge and the results of a drug test were otherwise sensitive information. The court also refused to seal information concerning dates of treatment and diagnoses because these were relevant to the court's summary judgment decision in the case. The court found a table listing prescriptions employees disclosed per company's drug disclosure policy, but which did not contain personally identifiable detail, also was not confidential.

In 2021, the Southern District of Florida issued a decision in *EEOC v. University of Miami*, which involved claims of Equal Pay Act violations.[572] In this case, the parties entered into a confidentiality agreement stipulating specific contents of documents to be designated as confidential. During discovery, the University produced documents relating to its salary recommendations and justifications for multiple faculty members, as well as documents relating to the decision to promote the plaintiff professor and her alleged comparator. The University attached redacted versions of these documents to its motion for summary judgment, and filed a motion to seal the unredacted versions. The plaintiffs opposed the motion and the court agreed. The court noted that since the documents were filed with a pretrial motion requiring judicial resolution on the merits, they were subject to the common law right of access. Only a showing of good cause could overcome the right of access, which the court found the University failed to demonstrate. The court stated the University's motion to seal, without the benefit of reviewing the unredacted documents at issue, did not show the University's interest in redacting the names of individuals involved in the promotion and tenure review process, nor did it describe the process.

2. ESI: Electronic Discovery-Related Issues

With respect to electronically stored information (ESI), courts continue to show their proclivity to permit reasonable discovery considering the nature of the litigation, but emphasize the parties' obligations to cooperate in crafting search terms with ESI.

In a FY 2024 decision, *EEOC v. Formel D USA Inc.*,[573] the district court ruled on the steps necessary to preserve potentially discoverable ESI. In this matter, the court held that the defendant did not present sufficient evidence that it took reasonable steps to preserve ESI, such as email and telephone data. As a result, the plaintiffs were prejudiced by the lost ESI – particularly as it related to relevant text messages. Notably, the court did not take a position that the Federal Rules of Civil Procedure are silent about which party bears the burden of proving reasonableness of the steps to preserve ESI. Regardless, the court indicated that all parties possess a duty to preserve discoverable ESI as soon as they are put on notice of anticipated litigation.

In *EEOC v. Gypsum Express*,[574] the court weighed in on the importance of objecting to a Rule 34 document request seeking ESI and its impact on shifting costs. In this case, the defendant agreed to produce discovery material in a format the EEOC requested. In particular, this case involved allegations of a pattern or practice of discrimination against female driver applicants. The defendant was asked to produce all driver applicant data housed in an applicant tracking system from January 1, 2014, to the present. The defendant estimated the cost to produce this information would range from $6,000–8,000. Typically, the presumption is that the responding party bears the expense of complying with discovery requests unless it can demonstrate the requested ESI is not readily accessible or would present an undue burden. Here, the defendant failed to present evidence to satisfy either of the two aforementioned objections, and its objections to the request were therefore denied.

571 *EEOC v. Loflin Fabrication LLC*, 2020 U.S. Dist. LEXIS 119252 (M.D.N.C. July 8, 2020).
572 *EEOC v. Univ. of Miami*, 2021 U.S. Dist. LEXIS 89226, at *2 (S.D. Fla. May 11, 2021).
573 *EEOC v. Formel D USA, Inc.*, 2024 U.S. Dist. LEXIS 164520 (E.D. Mich. Sept. 12, 2024).
574 *EEOC v. Gypsum Express*, 2024 U.S. Dist. LEXIS 22736 (E.D. Ky. Jan. 24, 2024).

3. Reliance on Experts, Including Systemic Cases

In line with a recent trend, expert testimony continues to be a point of emphasis in EEOC litigation.

In *EEOC v. Defender Associates*,[575] the EEOC sued for disability discrimination, and moved to exclude the defendant's expert report from a vocational counselor. The EEOC argued that the report was supposed to opine on whether the charging party could perform the essential functions of her job, but instead focused on the reasonableness of the defendant's decision to terminate her employment. The EEOC further argued the report and opinion (1) would not help the trier of fact understand the evidence or determine a fact in issue; (2) were not based on sufficient facts or data; and (3) were not reliable. The court agreed, reasoning that it relied on largely irrelevant facts, did not state a methodology, and reached a conclusion that would be unhelpful to a jury.

EEOC v. The Modern Group Ltd.[576] involved both parties' moving to strike experts. Here, the EEOC alleged the defendant discriminated against the charging party by revoking his conditional offer of employment following the results of a pre-employment drug screen. The EEOC then moved to exclude the defendant's expert witnesses, attacking the defendant's expert's qualifications. The defendant, in turn, sought to exclude the EEOC's expert, arguing the opinion was not based upon reliable principles or methods. The court issued a lengthy analysis of the facts of the case and standards for expert testimony and granted in part and denied in part the motions. Based upon the analytical decision, and its length, it is apparent that courts are continuing to evaluate expert testimony in EEOC litigation.

4. Management of Class Discovery – Motion to Bifurcate

In FY 2024, the Western District of Tennessee evaluated how discovery issues should be bifurcated in a pattern-or-practice lawsuit brought by the EEOC.[577] The EEOC alleged the defendants (three staffing agencies allegedly functioning as an integrated enterprise) selected, referred, placed and assigned Hispanic applicants and employees at a disproportionately higher rate than Black applicants and employees for jobs that included picker, loader-unloader, forklift operator, and general warehouse worker. The EEOC alleged the defendants placed Black employees in less-desirable, lower-paying positions. The EEOC moved to bifurcate discovery and trial, which the court denied without prejudice. The court reasoned that the EEOC's motion to bifurcate was premature at the pre-discovery phase.

F. General Discovery by Employer

The EEOC often takes an expansive view of its discovery rights but argues to limit employer requests for discovery from the agency. However, courts often conclude that the EEOC is subject to much the same discovery obligations as employers in providing requested information, subject to some privileges to which it is entitled.

1. Discovery of EEOC-Related Documents and Individuals

A continuing area of discovery disputes has been the scope of documents that may be obtained and depositions that may be taken of EEOC personnel. This has involved judicial consideration of how various privileges, including the attorney-client privilege and the government deliberative process privilege, apply to the EEOC's internal and investigative communications with employees.

In *EEOC v. Sunshine Raisin Corp.*,[578] the defendant served a Rule 30(b)(6) notice of deposition, seeking to depose an EEOC representative on 19 categories of inquiry.[579] The EEOC objected and sought a blanket protective order.[580]

The EEOC conceded it could not object to providing a 30(b)(6) witness.[581] The agency maintained, however, that because it had provided its entire investigative file of more than 3,500 pages, a Rule 30(b)(6) deposition was not proportional to the needs of the case, duplicative, and overly burdensome to an agency with limited resources and

575 *EEOC v. Defender Association of Philadelphia*, 2024 U.S. Dist. LEXIS 155251 (E.D. Pa. Aug. 29, 2024).
576 *EEOC v. The Modern Group, Ltd.*, 2024 U.S. Dist. LEXIS 53275 (E.D. Tex. Mar. 25, 2024).
577 *EEOC v. Supreme Staffing LLC*, 2024 U.S. Dist. LEXIS 47232 (W.D. Tenn. Mar. 18, 2024).
578 *EEOC v. Sunshine Raisin Corp.*, 2023 U.S. Dist. LEXIS 102601 (E.D. Cal. June 23, 2023); *EEOC v. Sunshine Raisin Corp.*, 2023 U.S. Dist. LEXIS 152294 (E.D. Cal. Aug. 29, 2023).
579 *Sunshine Raisin Corp.*, 2023 U.S. Dist. LEXIS 152294, at *3.
580 *Id.* at **6-7.
581 *Id.* at **5-6.

a heavy case load.[582] The court found, however, that the EEOC could not assert a blanket privilege or exemption to discovery under Rule 30(b)(6), but had to justify its request for a protective order with particularity as to the specific categories of inquiry.[583]

In reviewing the areas of inquiry, the court noted that categories 1–6 and 10–12 pertained to factual information and documents to support and rebut claims in the complaint and remedies sought.[584] The EEOC claimed inquiry into these categories was barred based on the attorney-work product privilege, government deliberative process privilege, relevance, and duplicativeness.[585] The court disagreed, finding the weight of authority permitted the defendant to proceed with these categories of inquiry, subject to the EEOC's right to object in the deposition.[586]

The court next noted that categories 7–9 and 17–18 appeared to focus on two topics: (1) the EEOC's approach to investigation and evaluation of discrimination cases by employers in general; and (2) the EEOC's own internal policies for investigation and prosecution of sexual harassment.[587] Specifically, as to the latter category 18, the court explained that several courts had found disclosure of the EEOC's internal policies appropriate where they could be either probative of whether a defendant's own policies comported with Title VII or evidence an improper motive for the enforcement action.[588] The court agreed that whether the defendant's policies and processes for investigating sexual harassment were substantially similar to those used by the EEOC could rebut the EEOC's claims that those policies were inadequate, and denied the EEOC's protective order motion as to category 18.[589] The court granted the EEOC's protective order motion with respect to categories 7–9 and 17, finding that the EEOC's investigation and conciliation obligations depended on its actions in the case, and that such information was publicly available.[590] The court also granted the EEOC's motion with respect to category 13, which sought the names of all individuals with personal knowledge of the allegations in the complaint, since the EEOC had already provided a witness list.[591]

Categories 14, 15 and 16 sought information concerning the EEOC's claim of representation, the agency's initial disclosures, and documents produced in connection with discovery.[592] The court allowed limited inquiry into these categories, denying the EEOC's motion.[593]

Finally, category 19 sought inquiry into all steps in the EEOC's investigation of the claims asserted in its complaint.[594] The EEOC claimed this information was irrelevant and protected by the government deliberative process privilege, and improperly sought court review of the sufficiency of the EEOC investigation.[595] The court found, however, that the EEOC conflated the discovery process with judicial review of the agency's investigation and that the information sought was relevant to an affirmative defense, and therefore denied the motion as to category 19, subject to later limitation depending on what the employer sought.[596]

Later, the district judge partially granted the EEOC's motion for reconsideration on categories 1–6, 10–12, 14–16, 18 and 19.[597] The EEOC argued that the magistrate judge failed to consider the argument that the categories were "unreasonably cumulative and duplicative" as the EEOC had produced its entire investigative file, but the court noted that the magistrate judge had recognized and rejected such assertion.[598] The EEOC next argued that the 30(b)(6) deposition was unnecessary and not probative because it lacked "factual knowledge of the complaint," EEOC employees had not been identified as witnesses, and the claimants and other pertinent witnesses could speak to what occurred.[599] The court again found that the magistrate acknowledged and rejected that argument.[600]

582 *Id.* at *6.
583 *Id.* at **6-7.
584 *Id.* at *7.
585 *Id.* at **7-8.
586 *Id.*at *10.
587 *Id.* at **12-13.
588 *Id.* at **15-16.
589 *Id.* at *16.
590 *Id.* at **17-18.
591 *Id.* at *18.
592 *Id.*
593 *Id.* at **19-20.
594 *Id.* at *20.
595 *Id.*
596 *Id.* at *21.
597 *United States EEOC v. Sunshine Raisin Corp.*, 2023 U.S. Dist. LEXIS 205959 (E.D. Cal. Nov. 16, 2023).
598 *Id.* at *5.
599 *Id.*
600 *Id.* at *6.

As to categories 1–6 and 10–12, regarding the factual bases for the complaint allegations, the court agreed with the magistrate's determination allowing the defendant to proceed with the inquiry.[601] The court noted that the magistrate judge relied on pertinent in-circuit authority and that just because the EEOC cited to other in-circuit authorities does not mean the magistrate judges' determination should be reconsidered.[602]

As to category 14 regarding the basis for representation claims, the court again found that the magistrate judge's determination was not contrary to law where the inquiry was limited to pre-representation communications.[603]

The court granted the EEOC's motion to reconsider the determination on categories 15 and 16, related to information in the EEOC's initial disclosures and written discovery.[604] The court found that the EEOC met its burden to demonstrate the need for a protective order where the defendant failed to counter the EEOC's argument.[605]

The court also found the magistrate judge's decision, which allowed the deposition on the topic of how the EEOC investigates claims by its own employees of sexual harassment, to be contrary to law.[606] The court noted that "[b]ecause [defendant] does not assert that its investigatory policies or practices were informed in any way by how the EEOC investigates sexual harassment of its own employees, it cannot claim that it followed the EEOC's lead when complying with Title VII."[607]

Lastly, the court denied the EEOC's motion for reconsideration as to category 19, which sought "[a]ny and all steps in Plaintiff's investigation of the claims asserted in its Complaint."[608] The court noted that "because it is possible that claims in the complaint exceed the reasonable investigation in this case, the Magistrate Judge's order is not contrary to law." The court further clarified that "the inquiry is limited to areas of the complaint which [defendant's] counsel have a good faith basis to believe did not grow out of the investigation of the original charge."

2. Discovery Involving Claimants and Charging Parties

In several cases in the past year, courts addressed the scope of discovery requested by employers concerning claimants and charging parties.

In *EEOC v. Enterprise Leasing Company of Florida, LLC*,[609] the court considered whether the EEOC was required to produce the agency's statistical analysis performed regarding its ADEA pattern-or-practice claim. The defendant sought information about the statistical analysis performed by the EEOC through several interrogatories and requests for production.[610] The EEOC both objected to the production of that information based on the deliberative process privilege and logged the relevant documents in a privilege log.[611] The defendant moved to compel the production of such documents arguing that (1) the EEOC waived privilege by failing to timely serve the privilege log, and (2) the statistical analysis was factual and therefore should be produced as it does not fall under the deliberative process privilege.[612]

The court initially held that the EEOC did not waive its privilege by submitting the privilege log six days late, noting that the defendant did not contend that it suffered any prejudice by the six-day delay.[613]

The court next concluded, in an *in camera* review, that the contents of the documents were privileged.[614] The court said that the documents consisted of internal emails and email chains, internal memoranda, "internally created spreadsheets and other documents that reflect the individuals that the EEOC chose to include to conduct its analysis," and "miscellaneous other documents that reflect the EEOC's analysis and opinions."[615] The court found that "[a]ll of these documents reflect the EEOC's deliberations, decisions, opinions, and recommendations

601 *Id.*
602 *Id.* at **6-7.
603 *Id.* at **7-8.
604 *Id.* at **8-9.
605 *Id.*
606 *Id.* at **9-13.
607 *Id.* at *12.
608 *Id.* at *13.
609 *EEOC v. Enter. Leasing Co. of Fla.*, 2024 U.S. Dist. LEXIS 50245, (S.D. Fla. Mar. 21, 2024).
610 *Id.* at *2.
611 *Id.* at *4.
612 *Id.* at **4-10.
613 *Id.* at *5.
614 *Id.* at *9.
615 *Id.*

in the context of evaluating whether to initiate this lawsuit[,]" and therefore were subject to the deliberative process privilege.[616]

The court further denied the defendant's motion to compel information related to conciliation as "[t]he Court cannot comprehend how the defendant, being the party with whom the EEOC conciliated, would not already have in its own possession the information showing whether the EEOC met the basic requirements of conciliation."[617]

Finally, the court addressed whether the EEOC had to produce information related to its communications with claimants and potential claimants.[618] The court distinguished a request for information in ADEA actions from requests in other discrimination cases finding that, "other laws do not have the same 'distinctive enforcement scheme' as does the ADEA—the termination of an individual's right to sue once the EEOC brings an ADEA enforcement action."[619] In finding that the attorney-client privilege applied to the EEOC's communications with claimants and potential claimants, the court reasoned, "[t]here is no sound reason why employers in such cases should have available the protection of the attorney-client privilege whereas employees would not."[620]

In *EEOC v. Princess Martha, LLC*,621 the court considered the defendants' request for sanctions against the charging party for spoliation of evidence.[622] The defendants argued that the charging party failed to produce a voicemail that defendants left for the charging party.[623] Notably, the parties did not agree on the existence of the voicemail, so the burden of proof was on the defendants to establish that the stated voicemail "existed at one point."[624] The call logs from both defendants and the charging party showed a 29-30 second call from defendants' main line to the charging party.[625] Neither the charging party nor any employee of defendants remembered receiving or leaving the voicemail at issue.[626] The court held that the "defendants have not met their burden of proof that a voicemail message existed at one point, which is the evidence they contend [the charging party] spoliated" and therefore, denied the defendants' motion for sanctions.[627]

In *EEOC v. SkyWest Airlines, Inc.*,[628] the court considered the defendant's motion for leave to depose the charging party and her husband, a non-party witness, both of whom previously had been deposed.[629] The defendant had already conducted 10 depositions. In arguing good cause for the depositions, the defendant contended that "(1) 'there was an apparent change in [the charging party's] stance on the spousal communications privilege at the deposition of [her husband] . . . that differed from the stance previously taken in response to written discovery'; (2) "[the defendant] received new information through the production of text communications between [the charging party] and [her husband] in response to both its subpoena for documents to [her husband] and [the charging party's] supplemental responses to [the defendant's] written discovery requests . . .'; and (3) it has been over one year since [the charging party's] deposition, and [the defendant] wishes to question her regarding her updated medical records and state of health since that time."[630] The court held that the defendant had not demonstrated good cause for the depositions as it "already had 'ample opportunity' to obtain the information it seeks" and the information sought was "'unreasonably cumulative or duplicative' of discovery that it ha[d] already obtained."[631] Overall, the court concluded that the "burden or expense of the proposed discovery outweighs its likely benefit."[632]

In a case decided in FY 2023, *EEOC v. Thomas B. Finan Center*,[633] the court considered whether the defendant could depose both the EEOC as an agency and the EEOC's investigator.[634] In holding that the defendant cannot depose the agency, the court noted that (1) a deposition of the EEOC would essentially be a deposition of the EEOC's counsel,

616 *Id.*
617 *Id.* at **11-15.
618 *Id.* at **15-24.
619 *Id.* at *18.
620 *Id.* at *17.
621 *EEOC v. Princess Martha, LLC,* 2024 U.S. Dist. LEXIS 101459 (M.D. Fla. June 7, 2024).
622 *Id.* at *5.
623 *Id.*
624 *Id.* at *7.
625 *Id.* at *5.
626 *Id.* at **6-7.
627 *Id.* at **7-8.
628 *EEOC v. SkyWest Airlines, Inc.*, 2024 U.S. Dist. LEXIS 80193 (N.D. Tex. May 2, 2024).
629 *Id.* at *1.
630 *Id.* at **9-10.
631 *Id.* at **10-13.
632 *Id.* at *13, *citing* Rule 26(b)(1).
633 2023 U.S. Dist. LEXIS 62025 (D. Md. Apr. 7, 2023).
634 *Id.* at *1.

(2) the noticed testimonial topics likely would impermissibly intrude upon non-waived privilege or attorney work product, and (3) the information sought was available and appeared to have been received through other forms of discovery.[635]

The court did hold the defendant could depose the EEOC's investigator on the facts gathered during the investigation, including from whom and when they were gathered, and on any necessary factual clarifications based on the defendant's review of the materials provided.[636] In so holding, the court reasoned, "the government as a litigant seeking affirmative relief ordinarily should have to disclose materials that a private plaintiff would have to turn over in order to avoid unfair surprise to the other side."[637]

3. Third-Party Subpoenas

In a few cases this year, courts addressed third-party administrative discovery issues, including subpoenas.

In *EEOC v. Chipotle Services, LLC*, the defendant sought an order compelling the production of prelitigation text messages between an intervenor plaintiff ("Intervenor"), her attorney, and a third party.[638] The EEOC and Intervenor alleged that the defendant discriminated against Intervenor based on her religion, constructively discharging her from her employment.[639] The defendant served its first requests for production of documents on Intervenor on December 18, 2023, seeking communications between Intervenor and the Council on American-Islamic Relations, including among other items text messages between Intervenor and certain individuals.[640] Intervenor objected to these requests based on the common interest privilege, the attorney-client privilege, and the work product doctrine.[641] Intervenor, however, did not indicate in her discovery responses that any responsive documents were withheld on these grounds, nor did she provide a privilege log.[642]

On June 3, 2024, during the deposition of third-party non-attorney Moussa Elbayoumy, the defendant first learned of pre-litigation group text messages among Intervenor, her attorney, and Elbayoumy that were exchanged approximately 16-25 months before the EEOC filed the lawsuit.[643] Elbayoumy was identified by the EEOC and Intervenor in their initial disclosures as a fact witness "likely to have information regarding the allegations in the EEOC's complaint for Damages, the pillars of Islam, and [Intervenor's] emotional distress damages."[644] During deposition, Intervenor's counsel objected to the production of the text messages on the grounds that Elbayoumy was a "consulting expert," information not previously disclosed.[645] Defendant contended this was done at the eleventh hour "in an effort to 'shield from disclosure' these group text messages since Elbayoumy was previously listed as a fact witness."[646] Defendant contended Elbayoumy could not be considered an expert because he "has not been paid for his purported expert services, nor is there an agreement setting forth the terms or scope of his services."[647] Thus, the defendant contends Elbayoumy "is exactly what he appears to be – a fact witness."[648]

Intervenor opposed the defendant's motion on various procedural grounds, including a failure to meet and confer prior to filing the motion, and on the ground that it was untimely.[649] The court rejected these arguments, finding the defendant was kept in the dark as to the existence of the text messages and that Intervenor failed to timely notify the defendant that responsive documents were being withheld on the basis of privilege, nor did she produce a privilege log.[650] In addition, Intervenor asserted arguments that the messages were protected the attorney-client privilege, common interest privilege, and/or the work-product doctrine.[651]

635 *Id.* at *3.
636 *Id.* at **4, 6.
637 *Id.* at *5.
638 *EEOC v. Chipotle Servs., LLC*, 2024 U.S. Dist. LEXIS 18569 (D. Kan. Aug. 1, 2024).
639 *Id.* at **2-3.
640 *Id.* at **5-6.
641 *Id.*
642 *Id.* at *6.
643 *Id.* at **4, 6-7.
644 *Id.* at *5.
645 *Id.* at *7.
646 *Id.* at *8.
647 *Id.* at **8-9.
648 *Id.*
649 *Id.* at **9-17.
650 *Id.* at **15-16.
651 *Id.* at **2, 19-24.

Intervenor admitted she neglected to provide the requisite privilege log and only did so on June 23, 2024, identifying 45 separate text communications which took place over several months.[652] The court found that Intervenor waived the attorney-client and work product protections by "failing to produce her privilege log in a timely manner without justification and fail[ed] to produce a privilege log that is sufficiently detailed to determine whether the claimed protections even apply."[653] The court also found that Intervenor failed to indicate in her discovery responses that otherwise responsive documents were being withheld on the basis of a privilege or protection.[654]

The court further found that, even if it were to evaluate the application of the attorney-client privilege, the privilege did not apply to the text messages between Intervenor and her attorney because they were not made in confidence since Elbayoumy was part of the text chain.[655] The court also addressed the EEOC's assertion of the common interest privilege which "'affords two parties with a common legal interest a safe harbor where they can openly share privileged information' without risking waiver of the privilege."[656] The court noted that "[a] community of interest exists where different persons or entities have an identical legal interest with respect to the subject matter of a communication between an attorney and a client concerning legal advice," and that "the key consideration is that the nature of the interest be identical, not similar."[657] The court did not find an identical interest as Elbayoumy had an institutional or societal interest in the outcome, whereas Intervenor had a personal interest.[658]

Finally, the court noted that while the work-product doctrine potentially could apply to the communications since they were prepared in anticipation of litigation by a party or representative of that party, Intervenor waived any work product protection by failing to indicate that the text messages existed, by failing to indicate that they were being withheld in response to discovery requests, and by failing to provide a privilege log.[659]

In *EEOC v. SkyWest Airlines, Inc.,* the EEOC moved, pursuant to Fed. R. Civ. P. 26(b)(2)(C) and 26(c)(1), for a protective order quashing subpoenas served on multiple non-party witnesses, or, in the alternative, limiting the scope of the depositions and document productions.[660] The court denied the subpoenas for documents, but permitted the depositions of the third parties.[661]

Defendant had served subpoenas *duces tecum* on five individuals to appear for depositions and to produce for inspection "[d]ocuments related to any communications with [intervenor-plaintiff]" for a specified period of time.[662] Fed. R. Civ. P. 26(b)(2)(C) provides that a court "must limit the frequency or extent of discovery otherwise allowed by" the Federal Rules when "(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity to obtain the information in discovery in the action; or (iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1)."[663]

The EEOC argued that the witnesses should not be compelled to produce any documents in response to the subpoenas because (1) the requested documents were unreasonably cumulative and duplicative of discovery already produced by the intervenor-plaintiff; (2) the documents sought were outside the scope permitted by Rule 26(b)(1) because they were not relevant and their production would impose significant burden and expense on the witnesses.[664]

The court determined that the subpoenaed documents exceeded the scope of discovery permitted by Rule 26(b)(1).[665] While the subpoenas were limited to communications between specific individuals over a defined five-month period, they were not restricted to communications related to a claim or defense in the case, but required the

652 *Id.* at *7.
653 *Id.* at **13, 16.
654 *Id.* at *13.
655 *Id.* at *20.
656 *Id.* at *21.
657 *Id.*
658 *Id.* at *22.
659 *Id.* at *28.
660 *EEOC v. SkyWest Airlines, Inc.,* 2024 U.S. Dist. LEXIS 3429, *1 (N.D. Tex. Jan. 8, 2024).
661 *Id.*
662 *Id.* at **1-2.
663 *Id.* at **2-3.
664 *Id.* at *3.
665 *Id.*

witnesses to produce documents "related to *any* communications" with the intervenor-plaintiff during the five-month timeframe.[666]

Defendant also argued that several text message exchanges appeared to be incomplete, and that other witnesses might possess additional, non-duplicative documents relevant to the defendant's defenses.[667] The court held that the defendant failed to present sufficient proof of deficiencies in the EEOC's production to warrant compelling the non-party witnesses to produce what likely would be generally cumulative and duplicative discovery.[668] Thus, the court determined that the witnesses were entitled to an order protecting them from producing the documents covered by the subpoenas *duces tecum*.[669]

The EEOC also contended that the witnesses should not be deposed, or, alternatively, that the scope of their depositions be limited.[670] The EEOC argued that (1) the depositions were unreasonably cumulative and duplicative of other discovery, (2) the defendant had had ample opportunity to obtain information about the intervenor-plaintiff's alleged damages by less burdensome means, and (3) the witnesses' testimony was outside the scope of discovery permitted under Fed. R. Civ. P. 26(b)(2)(C) because the burden and expense of deposing the witnesses outweighed the likely benefit.[671] The court disagreed with the EEOC that the depositions would be unreasonably cumulative and duplicative of discovery from intervenor-plaintiff's mental health counselor, psychiatrist, and primary care physician.[672]

Defendant had indicated it intended to depose the witnesses "on their personal knowledge of [intervenor-plaintiff's] allegations against [the defendant]; observations of her emotional state during her employment [at the defendant's DFW location]; phone and/or in-person conversations about [intervenor-plaintiff's] allegations against [the defendant]; personal knowledge or her employment situation . . . mitigation of damages; party admissions from [intervenor-plaintiff]; her damages as a whole; emotional distress and perceived causes of emotional distress; and/or the omission of any of these items."[673] The court determined that, while some of this information might also be available from intervenor-plaintiff's medical and mental health professionals, the subpoenaed witnesses, who also were intervenor-plaintiff's close family and friends, likely had evidence on these subjects that the professionals did not.[674] As such, the court found that the EEOC failed to show the discovery sought via these depositions would be unreasonably cumulative or duplicative.[675] It noted that deposition testimony on the subjects the defendant listed appeared to be relevant to the defendant's causation and damages defenses because it might reveal factors not attributable to wrongful conduct of the defendant which contributed to intervenor-plaintiff's mental state and emotional distress during her employment with the defendant.[676]

Finally, the court determined that the EEOC did not demonstrate that it was entitled to a protective order precluding these depositions altogether.[677] "The party seeking the protective order bears the burden of making a specific objection and showing that the discovery fails the Rule 26(b)(1) proportionality calculation."[678] Accordingly, the court declined to grant a protective order precluding the witness depositions.[679]

4. Confidentiality/Protective Orders

EEOC v. Coughlin, Inc.[680] was a 2022 decision concerning protective orders addressed to confidential information. A party seeking a protective order has the burden of demonstrating good cause for that order, which usually requires articulating a clearly defined and serious injury that would result absent the protective order.[681] The court, in its

666 *Id.* (emphasis in original).
667 *Id.* at *5.
668 *Id.* at **5-6.
669 *Id.* at *6.
670 *Id.*
671 *Id.* at **6-7.
672 *Id.* at *7.
673 *Id.*
674 *Id.* at *8.
675 *Id.*
676 *Id.* at **8-9.
677 *Id.* at **10-11.
678 *Id.* at *10.
679 *Id.* at *12.
680 2022 U.S. Dist. LEXIS 89372 (D. Vt. May 18, 2022).
681 *Id.* at *6 (citing *United States v. Int'l Bus. Machines Corp.*, 67 F.R.D. 40, 46 (S.D.N.Y. 1975)).

broad discretionary power over the discovery process, weighs the countervailing interests of both parties.[682] In *Coughlin*, which involved an alleged class hostile work environment claim, both parties moved for a protective order after trying in good faith to negotiate a stipulated protective order. The parties disputed three provisions: (1) the definition of "confidential information," (2) the scope of the protective order, including temporal scope and whether the protective order would apply to publicly filed documents, and (3) whether confidential documents would be destroyed at the conclusion of the case.[683]

The court agreed with the EEOC's more limited definition of "confidential information" as "information that constitutes or contains trade secrets pursuant to the Uniform Trade Secrets Act" or its state law counterpart.[684] The EEOC argued that defendant's proposal to expand confidential information to include "information a party in good faith contends constitutes or contains trade secrets or other confidential business information that could provide a competitor with a competitive advantage" was too broad, and failed to identify how disclosure would result in a clearly defined, serious injury.[685] The court agreed that the defendant's proposal provided only a vague definition of confidential information and did not clearly articulate what injury would occur. It agreed that the EEOC's definition was comprehensive and employable.[686]

The *Coughlin* court also addressed the temporal scope of the protective order and whether it should apply to publicly-filed documents.[687] Given the presumption of openness and access to judicial documents, the court declined to extend the protective order to documents filed with the court beyond the conclusion of the case, subject to a motion to seal if confidential information covered by the protective order was placed in a public document by a party.[688] For information designated as confidential and not filed, however, the court granted the defendant's proposal to extend conditions of the protective order beyond the conclusion of the action.[689]

Finally, with respect to the destruction of documents at the conclusion of the case, the defendant proposed both parties destroy or return confidential documents.[690] The EEOC opposed the defendant's position, and the court agreed, explaining, "[c]ourts must exercise caution when issuing confidentiality orders so as not to demand that the EEOC destroy government documents, including notes and memoranda, in conflict with the EEOC's duty to obey the requirements of the [Federal Records Act]."[691]

Once a protective order is in place, courts may be willing to permit the use of further restrictive designations, subject to permitting the non-designating party to challenge the use of a restrictive designation. In *EEOC v. Aaron Thomas Co, Inc. and Supreme Staffing LLC*, defendant Supreme Staffing, LLC moved to add an "Attorneys' Eyes Only" (AEO) designation to the existing protective order.[692] The proposed addition would authorize the parties to designate "Protected Information," including information and communications that were the subject of later briefing in connection with defendant's emergency motion for a temporary protective order, as AEO in the same manner by which the parties could designate material as "Confidential."[693] The proposed definition of "Protected Information" as used in the protective order would broaden to include "information and communications shared or exchanged between the EEOC and any individual the EEOC believed to be aggrieved."[694]

The court explained it could anticipate that the case might involve Protected Information requiring an AEO designation related to the EEOC's solicitation efforts or otherwise, and could prepare for that with a protective order providing for such a designation before it became necessary.[695] The court stated that in doing so it did not assess the merits of any future motion to compel such information.[696] It further noted that the defendant's proposal specified that, although the AEO designation covers material that falls under the expanded definition of "Protected

682 *Id.* (citing *Rossini v. Ogilvy & Mather, Inc.*, 798 F.2d 590, 601 (2d. Cir. 1986)).
683 *Id.*
684 *Id.* at **9-11.
685 *Id.* at **10-11.
686 *Id.*
687 *Id.* at **12-15.
688 *Id.* at **14-15.
689 *Id.* at *15.
690 *Id.* at *17.
691 *Id.* (quoting *EEOC v. Kronos Inc.*, 620 F.3d 287, 304 (3d Cir. 2010)).
692 *EEOC v. Aaron Thomas Co., Inc. and Supreme Staffing LLC,* 2024 U.S. Dist. LEXIS 80421, *2 (W.D. Tenn. May 2, 2024).
693 *Id.*
694 *Id.* at **2-3.
695 *Id.* at 7.
696 *Id.*

Information," neither party concedes that such information is discoverable or admissible.[697] Further, if a party claims the AEO designation, the non-designating party reserves the right to challenge it.[698] The court thus granted defendant's motion, noting this preserves both issues in the event of a motion to compel discovery responses – whether the EEOC must disclose information related to solicitation emails and surveys, and whether such a disclosure is subject to an AEO designation.[699]

G. General Discovery by EEOC/Intervenor

1. Section 30(b)(6) Depositions

In *EEOC v. Qualtool, Inc.*,[700] a case decided in FY 2023, the EEOC sought a Rule 30(b)(6) deposition and filed a motion to compel on the last day of discovery, arguing it had identified deposition topics with reasonable particularity and properly noticed the deposition.[701] The agency further argued that instead of seeking a protective order defendant merely raised boilerplate objections in response to the notice.[702] The court ruled that, although the parties are not required to agree on deposition topics, a defendant cannot decide on its own to ignore a deposition notice, but must seek a protective order if it refuses to make a Rule 30(b)(6) designation.[703] Because the corporate defendant did not move for a protective order regarding the EEOC's Rule 30(b)(6) deposition notice, the court granted the EEOC's motion to compel.[704]

2. Scope of Permitted Discovery by EEOC

EEOC v. Gypsum Express, Ltd.,[705] underscores the importance of objecting to discovery requests as unduly burdensome when the cost of production is prohibitive. In this case, the defendant agreed to produce discovery material—including 10 years of applicant data—in the format the EEOC requested, which was estimated to cost $6,000 to $8,000 to produce.[706] The court analyzed Federal Rule of Civil Procedure 34(b)(1)(C), which allows the requesting party to specify the form in which ESI is to be produced and instructs the responding party to state the form it intends to use if it objects.[707] It is incumbent upon the producing party to object if the requested form is unduly burdensome, and the presumption that the producing party must bear the cost of discovery can be rebutted if it can demonstrate the requested electronically stored information (ESI) is not reasonably accessible due to undue burden or cost.[708]

The court examined the defendant's objection and contention that the cost of production should be shifted to the EEOC, using the factors outlined in *Zubulake v. UBS Warburg LLC*,[709] considered in descending order of importance: (1) the extent to which the request is specifically tailored to discover relevant information; (2) the availability of such information from other sources; (3) the total cost of production, compared to the amount in controversy; (4) the total cost of production, compared to the resources; (5) the relative ability of each party to control costs and its incentive to do so; (6) the importance of the issues at stake in the litigation; and (7) the relative benefits to the parties of obtaining the information.[710] The court held the defendant did not demonstrate the EEOC's request was overly broad or unduly burdensome, and noted the defendant arguably waived its right to object to the production by not objecting to this request when it was first propounded by the EEOC. Accordingly, its request to shift production costs to the EEOC was denied.[711]

697 *Id.*
698 *Id.*
699 *Id.*
700 2022 U.S. Dist. LEXIS 200752 (M.D. Fla. Nov. 3, 2022).
701 *Id.* at **11-12.
702 *Id.*
703 *Id.* at *14.
704 *Id.* at **14-15.
705 *EEOC v. Gypsum Express, Ltd,* 345 F.R.D. 442, 447 (E.D. Ky. 2024).
706 *Id.* at 447.
707 *Id.* at 448 (citing Fed. R. Civ. P. 34(b)(1)(C), 34(b)(2)(D)).
708 *Id.* (citing *In re Porsche Cars N. Am., Inc. Plastic Coolant Tubes Prod. Liab. Litig.*, 279 F.R.D. 447, 450 (S.D. Ohio 2012); *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358, 98 S. Ct. 2380, 57 L. Ed. 2d 253 (1978); Fed. R. Civ. P. 26).
709 *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003).
710 *Gypsum Express*, 345 F.R.D. at 453.
711 *Id.* at 454.

In *EEOC v. Kanes Furniture, LLC*,[712] the court considered the EEOC's motion to compel responses to production requests where the defendant had objected that requests for ESI were overbroad, unduly burdensome, and not proportional to the needs of the case.[713] In this failure to hire case, the EEOC—arguing the defendant had unreasonably delayed production—sought production of documents related to employees at locations other than the distribution center where the charging party applied, material reflecting the gender of persons the defendant had hired for the positions at issue, identifying information relating to its applicants and hires, and underlying flow data.[714] The court agreed with the EEOC and ordered the defendant to produce ESI on a rolling basis at a rate of 7,000 documents per week until all responsive ESI has been produced.[715]

In *EEOC v. Exxon Mobil Corp.*,[716] the U.S. District Court for the Middle District of Louisiana considered discovery disputes in a race discrimination and hostile work environment action where the EEOC alleged the charging party had been exposed to a noose in the workplace. The defendant partially responded to the EEOC's requests for production of documents and the parties participated in a Rule 37 conference thereafter.[717] The parties discussed the scope of discovery, and the defendant indicated it was willing to consider a "middle ground."[718] However, the EEOC moved forward with filing a motion to compel. The court, observing that the parties had not yet reached an impasse, determined the EEOC had not sufficiently engaged with the defendant on discovery and ordered them to do so.[719]

The parties further conferred after which the EEOC renewed its motion to compel discovery related to alleged noose incidents other than the one alleged in the action, as the defendant sought to limit the scope of discovery to the single noose the charging party allegedly discovered.[720] The motion to compel also sought judicial intervention with respect to designating documents as "confidential" for the purpose of discovery after the parties could not agree to a stipulated protective order.[721] Finding the parties had conferred on these issues and reached an impasse, the court granted in part and denied in part the EEOC's motion to compel.[722]

Other courts this fiscal year have similarly granted and denied motions to compel in part, making determinations on a request-by-request basis. In *EEOC v. Enterprise Leasing Company of Florida, LLC*,[723] for example, both parties filed motions to compel that the court considered simultaneously. The EEOC sought documents from the defendant related to its company holdings, applicants, orientation materials, and other complaints of discrimination.[724] The court generally granted the EEOC's motion and requests for this information, but reserved ruling on the defendant's objections based on attorney-client privilege and the work product doctrine.[725]

3. Spoliation Issues

In *EEOC v. Formel D USA, Inc.*,[726] the EEOC moved to compel production of additional documents (emails) and for spoliation sanctions. Specifically, the EEOC claimed the defendant failed to preserve emails, laptops, and cellphone data for four custodians, including of the supervisor accused of sexually harassing the charging party, and the supervisor to whom the charging party allegedly complained.[727] The court found that the defendant did not take reasonable steps to preserve the cellular phone data (the record showed no attempts), warranting remedial measures to cure the lost data.[728] In granting in part the motion for spoliation, the court relied on the EEOC's explanation that it needed to recreate some of the lost communications, increasing the number of custodians and search terms

712 *EEOC v. Kanes Furniture, LLC*, 2024 U.S. Dist. LEXIS 76210, at *1 (M.D. Fla. Apr. 26, 2024).
713 *Id.* at *3.
714 *Id.*
715 *Id.* at *4.
716 *EEOC v. Exxon Mobil Corp.*, 2024 U.S. Dist. LEXIS 100720, at *9 (M.D. La. June 5, 2024).
717 *Id.* at *4.
718 *Id.* at *8.
719 *Id.* at *9.
720 *EEOC v. Exxon Mobil Corp.*, 2024 U.S. Dist. LEXIS 171881, at *6 (M.D. La. Sep. 11, 2024).
721 *Id.* at **86-90.
722 *Id.* at *93.
723 *EEOC v. Enterprise Leasing Company of Florida, LLC*, 2024 U.S. Dist. LEXIS 50245, at *25 (S.D. Fla. Mar. 21, 2024).
724 *Id.* at **24-34.
725 *Id.*
726 *EEOC v. Formel D USA, Inc.*, 2024 U.S. Dist. LEXIS 164520 (E.D. Mich. Sept. 12, 2024).
727 *Id.* at **2-3.
728 *Id.* at **8-10.

in an effort to obtain the same type of information from existing emails, and it required production of defendant's litigation hold notice.[729]

Given the lost evidence, the court took a broader view of document discovery in considering the motion to compel.[730] The court examined whether (1) nine emails were properly withheld as attorney-client privileged, (2) whether the defendant was engaged in self-collection of ESI in violation of Fed. R. Civ. P. 26(g), and the parties' stipulated ESI order, and (3) various document discovery issues.[731] Notably, the defendant asserted that the constraints imposed by the European Union's General Data Protection Regulation (GDPR), which restricts distribution of personal data, including emails, to countries outside of the EU with less-stringent personal data protection laws, such as the United States, resulted in undue burden and expense.[732] However, the GDPR did not limit the defendant's ability to produce any relevant, responsive documents through otherwise normal collection and response practices.[733] Since the court found the EEOC's requests (the search terms and custodians) were relevant and proportional to the needs of the case, any need to go through a GDPR vendor was obviated.[734] In granting the motion to compel in part, the court ordered the defendant to conduct searches of the custodians with search terms requested by the EEOC, subject to certain limitations.[735]

4. Miscellaneous

In *EEOC v. Mariscos El Puerto, Inc.*,[736] the court considered a stipulation to extend the initial expert deadline and restructure the discovery process, so that expert disclosures took place after the close of discovery.[737] In its initial denial, the court reasoned that the stipulation failed to explain how the court could find diligence under the circumstances.[738] The court required that any renewed request include, among other things, the specific dates on which discovery was propounded and on which discovery responses were served, as well as a more fulsome discussion as to the existence of diligence.[739]

A few weeks later, the EEOC moved to extend discovery deadlines by 90 days.[740] In considering the motion, the court explained that it is well-settled that the existence of settlement talks or alternative dispute resolution is generally insufficient to establish good cause for an extension of case management deadlines.[741] However, the request at issue was predicated on the fact that the EEOC delayed seeking supplemental discovery responses from the defendants, in light of settlement talks and alternative dispute resolution efforts.[742] The court found there was no meaningful explanation as to the necessity of a 90-day extension, but noted that the parties appeared to be in agreement regarding the need for the defendants to supplement their discovery responses.[743] Therefore, in consideration of these circumstances, the court granted a 45-day extension of the case management deadlines.[744]

H. Summary Judgment

In FY 2024, federal courts decided just over a dozen summary judgment motions filed by either the EEOC or the employer in agency-initiated litigation. Many of these decisions involved allegations of disability discrimination, though other types of discrimination (age, race, and sex) were also implicated. Summary judgment motions were often denied, and in other instances, courts dismissed some but not all claims.

This section provides a snapshot of several notable summary judgment decisions during FY 2024.

729 *Id.* at **13-14.
730 *Id.*
731 *Id.*
732 *Id.* at *19.
733 *Id.* at *20.
734 *Id.* at *22.
735 *Id.* at **26-27.
736 *EEOC v. Mariscos El Puerto, Inc.*, 2024 U.S. Dist. LEXIS 109422 (D. Nev. June 21, 2024).
737 *Id.* at *1.
738 *Id.* at *3.
739 *Id.*
740 *EEOC v. Mariscos El Puerto, Inc.,* 2024 U.S. Dist. LEXIS 119697 (D. Nev. July 8, 2024).
741 *Id.* at *2.
742 *Id.*
743 *Id.*
744 *Id.*

1. Motion to Seal

In a case filed in the District of Kansas, the EEOC and an intervenor plaintiff alleged that the defendant violated Title VII and Title I by unlawfully harassing the intervenor based on her religion.[745] The intervenor contended that her former supervisor subjected her to unlawful employment practices because she wore a hijab as part of her religious beliefs and could not remove it.[746]

After the parties filed cross motions for summary judgment, the defendant moved to seal or redact provisionally sealed exhibits (time records, texts messages, and personnel records) attached to the defendant's motion for summary judgment and to the EEOC and intervenor plaintiff's joint motion for partial summary judgment.[747] The court overruled the defendant's motion to seal the exhibits attached in support of the cross motions for summary judgment because the defendant failed to show any significant interest that outweighed the public interest in access to the exhibits, including the time records, text messages, and personnel records.[748]

The district court's analysis focused heavily on the long-recognized common-law right of access to judicial records, which stems from the fundamental public interest in understanding disputes that are presented to a public forum for resolution.[749] When considering the defendant's motion to seal, the court was required to weigh the public interest, which is presumed to be paramount, against the interests advanced by the parties.[750]

To overcome the presumption favoring public access to records, a party must show that some significant interest in support of non-disclosure outweighs the public interest in access to court proceedings and documents, and to do so, the party is required to articulate a real and substantial interest to justify depriving the public of access to the records that inform the court's decision-making process.[751]

As to the exhibits consisting of various employees' time records, the court rejected the defendant's argument seeking sealing and ruled that "[t]he fact that a party designated the documents 'confidential' under a protective order does not in itself provide sufficient reason to seal."[752] The defendant also argued, without opposition, that general privacy interests cautioned against disclosure of the time records, and that the time records contained commercially sensitive information regarding scheduling and planning, including the software system used to track time.[753] Nevertheless, the court found that the defendant had not shown that competitors were unable to otherwise access information about its system to track time and scheduling, and any fear that a competitor could exploit such information was speculative.[754]

Relatedly, the court decided that the defendant failed to show how the disclosure of historical time records for a limited period would harm the defendant or its former employees.[755] Therefore, on balance, the court held that the defendant had not shown how its interests and any individual privacy interests outweighed the public interest in access to the materials that form part of the basis of the lawsuit.[756]

With respect to the exhibits containing text messages between the defendant's former managers about the intervenor's resignation notice and an attempt to contact her, the defendant alleged that the disclosure of these communications would harm its business interests and its relationship of trust and confidentiality among managers, and that because the text messages were between former managers who were not parties to the lawsuit, their privacy interests outweighed the presumption of public access.[757] However, the court found that the defendant had failed to explain how the text messages implicated business or privacy concerns or how any risk of harm to the business or defendant's former employees was more than speculative.[758] Accordingly, the court held that because the

745 *EEOC v. Chipotle Servs., LLC*, 2024 U.S. Dist. LEXIS 136330, *2 (D. Kan. Aug. 1, 2024).
746 *Id.* at **2-3.
747 *EEOC v. Chipotle Services, LLC*, 2024 U.S. Dist. LEXIS 175642, **2-3 (D. Kan. Sept. 27, 2024).
748 *Id.* at **3-6.
749 *See id.* at *2 (citing *Nixon v. Warner Commc'ns*, 435 U.S. 589, 599 (1978); *Mann v. Boatright*, 477 F.3d 1140, 1149 (10th Cir. 2007); and *Crystal Grower's Corp. v. Dobbins*, 616 F.2d 458, 461 (10th Cir. 1980)).
750 *See id.* at *2 (citing *Helm v. Kansas*, 656 F.3d 1277, 1292 (10th Cir. 2011)).
751 *Id.* (citing *Colony Ins. Co. v. Burke*, 698 F.3d 1222, 1241 (10th Cir. 2012); *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 102 n.16 (1981) (moving party must submit particular and specific facts, not merely "stereotyped and conclusory statements")).
752 *Id.* at *3 (citations omitted).
753 *Id.* at **3-4.
754 *Id.*
755 *Id.* at *4.
756 *See id.* (citation omitted).
757 *Id.* at **4-5.
758 *Id.* at *5.

defendant failed to show that these interests outweighed the public interest in access to these materials, the text messages would not be sealed.[759]

Finally, the defendant sought to seal certain personnel records, including its investigation files related to the intervenor's former supervisor's admission of a relationship with another employee, the supervisor's termination notice, and another employee's personnel file.[760] The defendant argued that the personnel records were not related to the litigation, could damage the defendant's relationship of trust and confidentiality among its managers and employees, could cause economic and emotional harm to the intervenor's former supervisor, and could implicate another employee's reputational and privacy interests.[761] However, the court held that the defendant had not explained how the disclosure of its personnel records would harm the defendant or its former employees, and that the defendant failed to show that its competitors could not otherwise obtain this information, nor had it shown how the former employees would be harmed.[762] As such, the court held that the defendant failed to meet "the heavy burden to articulate a real and substantial interest that justifies depriving the public access to the records which inform the Court's decision process."[763]

2. Joint Employment / Alter Ego

An entity that is not a claimant's formal employer may nevertheless be deemed as such pursuant to the joint employer theory of liability. Applying this legal principle, a court in the Middle District of Florida considered the EEOC's allegations of joint employer liability of three defendants for ADA violations premised in part on the failure to hire a qualified individual on the basis of disability.[764] The EEOC had attempted to hold the Princess Martha (a senior retirement living community) and two related companies liable after the Princess Martha failed to hire an applicant whose employment was conditioned on a satisfactory drug test.[765] The Princess Martha's majority ownership (84 percent) had been placed in a trust, and the same trust had full ownership (100 percent) of the two related companies, TJM Management and TJM Properties.[766]

One entity (TJM Management) was represented as the parent company of the Princess Martha in an employee handbook, and it managed the Princess Martha and other senior living facilities owned by the trust.[767] The other entity (TJM Properties) was involved with property acquisition and real property management of trust-owned facilities across the United States, and it handled trust-owned property and casualty insurance and tax paperwork.[768] The Princess Martha HR representative who made the decision not to hire the applicant had regional HR duties for trust-owned companies, and she was supervised by TJM Management in those duties, including updating the employee handed used by the Princess Martha, TJM Management, TJM Properties, and other senior living facilities.[769] At various times, the HR decision maker with the Princess Martha worked with TJM Properties' manager on issues having to do with the Princess Martha's parking garage.[770]

In response to the EEOC's joint employer allegations against the three defendants, TJM Properties moved for summary judgment and argued in part that the evidence did not support a finding that it was a joint employer with the Princess Martha.[771] The issue before the court was whether there was "sufficient evidence from which a reasonable jury could conclude that TJM Properties only, not the TJM entities considered together, may be held liable as a joint employer with Princess Martha."[772]

759 *See id.* (citation omitted).
760 *Id.*
761 *Id.* at **5-6.
762 *Id.* at *6.
763 *Id.* (citation omitted).
764 *EEOC v. Princess Martha, LLC*, 2024 U.S. Dist. LEXIS 174147 (M.D. Fla. Sept. 26, 2024).
765 *Id.* at **8, 21, 41.
766 *Id.* at **43-44.
767 *Id.* at *45.
768 *Id.* at *46.
769 *Id.*
770 *Id.* at **46-47.
771 *Id.* at **59-60.
772 *Id.* at *60.

In its decision, the district court began by describing the history of the development of the joint employer standard in Eleventh Circuit.[773] The "basic question" that determines whether an entity is a joint employer hinges on who "'in control of the fundamental aspects of the employment relationship that gave rise to the claim.'"[774] The element of control requires an examination of the totality of the employment relationship at issue.[775] Ultimately, the analysis turns on how much control the alleged joint employer had over the employee and whether it had the power to hire, fire, or modify the terms and conditions of the employment.[776]

In *Princess Martha*, the EEOC claimed that a joint employment relationship existed among all three defendants because the HR representative who made the decision not to hire the claimant had regional HR duties and drafted the employee handbooks used by all TJM companies in the region, including the anti-harassment and drug testing policies.[777] However, the district court disagreed and held that the EEOC's argument in support of joint employer status went too far because if taken to its logical conclusion, the argument would create strict liability for all trust-owned companies, including other senior living facilities, without any evidence of the TJM Properties' involvement in the relevant employment or hiring decision, merely because they used the same handbook.[778]

Even viewed in the light most favorable to the EEOC, the court found that the evidence showed that TJM *Management* employees exerted control over the Princess Martha and the HR representative that decided not to hire the applicant, but none of those individuals were employed by TJM *Properties*.[779] There was also no evidence that the HR representative's regional duties and work on the Princess Martha's parking garage with a manager for TJM Properties could lead to a reasonable finding of control by TJM Properties over the Princess Martha's hiring practices or its failure to hire the applicant.[780] As such, the district court held that TJM Properties was entitled to summary judgment.[781]

In an ADA disability discrimination case, a court in the Northern District of Illinois rejected the EEOC's argument that a parent company should be held liable as an affiliate of its subsidiary that employed the claimant based on the doctrine of alter ego or affiliate liability.[782] The district court granted summary judgment for the parent company (Greif, Inc.) that shared human resources and accounting functions with its subsidiary (American Flange) and rejected the EEOC's argument that alter ego or affiliate liability existed against the parent company because the subsidiary and parent did not constitute a single employer.[783]

Generally, under the ADA, "'parent corporations are not liable for the wrongs of their subsidiaries unless they cause the wrongful conduct (and so are directly liable).'"[784] Notwithstanding, the doctrine of alter ego liability – also known as affiliate liability – expands the scope of entities that can be considered an employer under Title VII and, by extension, the ADA.[785] In particular, the alter ego theory of liability, "'an entity affiliated with the employer or former employer of a Title VII plaintiff may be named as a Title VII defendant if it has forfeited its limited liability.'"[786]

The district court explained that a corporate entity may forfeit its limited liability status when: "'1) the traditional conditions for 'piercing the corporate veil' are present; or 2) the corporation took actions to sever the small corporation for the express purpose of avoiding liability; or 3) the corporation directed the discriminatory act, practice, or policy of which the employee is complaining; or 4) the corporation is liable based on the misdeeds of its predecessor through successor liability.'"[787] "Importantly, under [Seventh Circuit precendent], once affiliate liability

773 *Id.* at **60-61 (citing *Virgo v. Riviera Beach Associates, Ltd.*, 30 F.3d 1350, 1360 (11th Cir. 1994) (adopting joint employer standard stated in *Nat'l Labor Relations Board v. Browning-Ferris Industries*, 691 F.2d 1117, 1122 (3d Cir. 1982)); *Llampallas v. Mini-Circuits Lab, Inc.*, 163 F.3d 1236, 1244-45 (11th Cir. 1998) (holding that an entity that "had absolutely nothing to do with" the adverse employment decision cannot be liable even if it was considered a joint employer).

774 *Id.* at *62 (quoting *Lyes v. City of Riviera Beach*, 166 F.3d 1332, 1345 (11th Cir. 1999)).

775 *Id.* (citing *Peppers v. Cobb Cnty., Ga.*, 835 F.3d 1289, 1297 (11th Cir. 2016)).

776 *Id.* (citation omitted).

777 *Id.* at **62-63 (footnote omitted).

778 *Id.* at *63.

779 *Id.*

780 *Id.* at **63-64 (footnote omitted).

781 *Id.* at *64.

782 *EEOC v. American Flange & Greif, Inc.*, 2024 U.S. Dist. LEXIS 166267 (N.D. Ill. Sept. 16, 2024).

783 *Id.* at **22-27.

784 *Id.* at **23-24 (citing *Bright v. Hill's Pet Nutrition, Inc.*, 510 F.3d 766, 771 (7th Cir. 2007).

785 *Id.* at *24; *see also* 42 U.S.C. § 12117(a) (adopting to the ADA the "powers, remedies, and procedures" from Title VII).

786 *American Flange & Greif, Inc.*, 2024 U.S. Dist. LEXIS 166267, at *24 (quoting *Alam v. Miller Brewing Co.*, 709 F.3d 662, 668 (7th Cir. 2013) (in turn citing *Worth v. Tyer*, 276 F.3d 249, 260 (7th Cir. 2001)), and *citing Papa v. Katy Indus., Inc.*, 166 F.3d 937, 941 (7th Cir. 1999)).

787 *Id.* (citations omitted).

is established, courts may aggregate the total number of employees under control of the single employer for the purpose of determining the appropriate damages cap under the ADA."[788]

Against this background, the EEOC argued that affiliate liability existed for the parent company because there were conditions present for piercing the corporate veil.[789] However, the district court rejected the EEOC's theory of affiliate liability as a matter of law.[790] As the court explained, to meet its burden, the EEOC would have had to show such unity of interest and ownership between the subsidiary and parent company that separate personalities no longer existed and adherences to the fiction of separate corporate existence would sanction a fraud or promote injustice.[791] Typically, there is sufficient unity of interest "when corporations (1) fail to maintain adequate corporate records or to comply with corporate formalities, (2) commingle funds or assets, (3) undercapitalize, or (4) treat the assets of another as their own."[792]

To reinforce its argument in support of piercing the corporate veil, the EEOC claimed that the parent and the subsidiary commingled funds, that the subsidiary was undercapitalized, and that the subsidiary treated the parent's assets as its own.[793] However, the court found that the EEOC had presented no evidence in support of such contentions, and the parties did not dispute that the subsidiary and the parent company were properly incorporated as separate entities.[794]

Although the EEOC also asserted that corporate formalities were defeated by the subsidiary and parent because the entities shared human resources functions and financial functions involving payroll, the court found this argument unavailing as a matter of law.[795] Even taken in the light most favorable to the EEOC, this evidence only established that the two entities were integrated, and there was no evidence suggesting that the integration was meant to "'manipulate creditors and thus warrant[s] veil-piercing.'"[796] Because the EEOC failed to offer any evidence that the integration between the two companies "'sanctioned a fraud or promoted injustice,'" the court held that the EEOC failed to establish that the conditions of veil-piercing were present to justify imputing liability to the parent company for the subsidiary's actions.[797]

Finally, the court held there were no other situations present to warrant a finding of affiliate liability.[798] The court found that the EEOC could not argue that the parent company took actions to sever the subsidiary for the purpose of avoiding liability or that successor liability applies because of the parent's acquisition of the subsidiary.[799] Further, the EEOC did not produce any evidence suggesting that the parent company had anything to do with the claimant's termination, as the undisputed evidence demonstrated that an employee of the subsidiary was solely responsible for the termination.[800] Accordingly, the court held that the EEOC failed to show that the parent and subsidiary were a single employer or that, under Seventh Circuit precedent, the aggregation of the employees of the two entities was appropriate for purposes of the damages cap under the ADA.[801]

3. Disability Discrimination

In *EEOC v. Modern Group Ltd.,*[802] the charging party disclosed to a third-party drug testing facility that he suffered from opioid use and anxiety disorders and that he was prescribed methadone and Xanax to manage these conditions. Although this information was not disclosed to the employer, when defendants' medical review officer reviewed the results of the third-party drug screen, he concluded that the medications were sedating and, therefore, the charging party could not work in a safety-sensitive position or operate equipment.[803] Accordingly, the defendant

788 *Id.* at **24-25 (citing *Papa*, 166 F.3d at 941-43).
789 *Id.* at *25.
790 *Id.*
791 *Id.* (internal quotations and citations omitted).
792 *Id.* (citations omitted).
793 *Id.*
794 *Id.* at **25-26.
795 *Id.* at *26.
796 *Id.* (quoting *Prince v. Appleton Auto, LLC*, 978 F.3d 530, 535 (7th Cir. 2020)).
797 *Id.*
798 *Id.* at **26-27.
799 *Id.*
800 *Id.* at *27.
801 *Id.*
802 *EEOC v. Modern Group Ltd.,* 725 F. Supp. 3d 577 (E.D. Tex. Mar. 25, 2024).
803 *Id.* at 592.

rescinded its conditional offer of employment.[804] The EEOC subsequently filed suit, alleging disability discrimination in violation of the ADA.

Defendants moved for summary judgment. In response, the EEOC filed its own motion for partial summary judgment, contending that (a) defendants waived their argument that the charging party posed a "direct threat" and, therefore, was not a qualified individual with a disability and (b) defendants' admission that they had revoked the charging party's job offer due to his prescription medication use was direct evidence of discrimination.[805]

Although it rejected both of the agency's theories,[806] the district court concluded that fact issues existed as to whether the charging party's opioid and anxiety disorders and related impairments—including difficulty learning, concentrating, thinking, sleeping, feeling nervous and gastrointestinal issues—substantially limited one or more of his major life activities.[807] Accordingly, it denied defendants' motion.[808]

In three other FY 2024 decisions, employers were reminded that they are not insulated from liability under the ADA simply because the employee does not expressly request a reasonable accommodation or because others were also not permitted the requested accommodation. Rather, employers may be required "to initiate an informal, interactive process," with the employee and conduct a fact-specific assessment considering the employee's "disability-related needs" in such assessments.[809]

In *EEOC v. Keystone RV Co.*,[810] a case the court described as "illustrat[ing] one reason why the [ADA] exists," the charging party suffered from a rare and chronic disease causing him to develop kidney stones several times per year and to miss multiple days of work per year for doctors' appointments and/or surgeries. Despite informing his managers and human resources about his disability and upcoming surgeries, the charging party never actually requested an accommodation from the defendant's attendance policy and was terminated for his repeated unexcused absences.[811]

In denying the defendant's motion for summary judgment, the court held that "[e]mployers have an 'affirmative obligation to seek the employee out and work with [him] to craft a reasonable accommodation.'"[812] Moreover, an employer cannot not shield itself from liability by not following up on an employee's request and "'if it appears that the employee may need an accommodation but doesn't know how to ask for it, the employer should do what it can to help.'"[813] Here, the defendant had "no right to 'intentionally remain[] in the dark,'" and prior to terminating the charging party's employment "should have [requested] a doctor's note or [held] some other discussion with [charging party] that would have…allowed human resources to properly assess the request[,]" as "was the employer's duty."[814]

Similarly, in *EEOC v. Total System Services*,[815] the charging party—a customer service representative who suffered from hypertension, among other medical conditions—requested to work from home during the COVID-19 pandemic due to a concern by her doctor that she was high-risk. The defendant denied the request because (a) such an accommodation would have "required significant changes to her job duties," (b) the charging party's internet connection was inadequate, and (c) clients she serviced did not permit remote work.[816] The court denied the defendant's motion for summary judgment on the failure to accommodate claim and emphasized that determining whether an accommodation is reasonable is a fact-specific inquiry and an employer must "specifically consider the needs of *disabled* employees" when making such a determination.[817]

804 *Id.*
805 *Id.* at 592-93.
806 *See id.* at 593, 606-07, 619-21.
807 *Id.* at 608-14.
808 *Id.* at 614.
809 29 C.F.R. § 1630.2(o)(3).
810 *EEOC v. Keystone RV Co.,* 2024 U.S. Dist. LEXIS 54916, *1 (N.D. Ind. Mar. 27, 2024).
811 *Id.* at **3-9.
812 *Id.* at *14 (quoting *Mlsna v. Union Pac. R.R. Co.*, 975 F.3d 629, 638 (7th Cir. 2020).
813 *Id.* (quoting *Bultemeyer v. Fort Wayne Cmty. Sch.*, 100 F.3d 1281, 1285 (7th Cir. 1996)).
814 *Id.* at *17 (citation omitted).
815 *EEOC v. Total System Servs.*, 2024 U.S. Dist. LEXIS 115561 (N.D. Ga. July 1, 2024).
816 *Id.* at **9-10, 14-18, 32-33.
817 *Id.* at **41-42 (citing *Holly v. Clairson Indus., L.L.C.*, 492 F.3d 1247, 1262 (11th Cir. 2007)).

In *EEOC v. American Flange & Greif, Inc.*,[818] the court held that where a doctor's note is ambiguous as to the specific accommodation being requested, "the employer must ask for clarification."[819] The court denied the defendant's motion for summary judgment accordingly where the charging party presented a doctor's note stating the charging party suffered from seizures, requesting that the employer excused his medically-related absence, and offered to discuss further if the employer required additional information.[820]

Summary judgment was also denied in *EEOC v. Defender Association of Philadelphia* – a disability discrimination case.[821] There, the charging party—a lawyer specializing in sex-based crimes—sought FMLA leave and disability leave to accommodate her post traumatic stress and major depressive disorders. During her leave, the charging party's healthcare provider informed the defendant that although the charging party intended to return to work in the following month, the provider did not see how the charging party could return to her prior position and that it would be advisable to transfer her to a "less triggering unit."[822] After receiving this notice, the defendant terminated the charging party's employment, determining that she was not "qualified" for the position as of that date.[823]

However, the court took issue with this analysis, stating that "the appropriate inquiry [was] not whether she was able to perform the essential duties of her job" at the time the employer received the doctor's note, but rather, "whether the amount of time off…was reasonable such that it would allow 'the employee to perform…her essential job functions in the near future."[824] In addition, the court noted that although a request for an indefinite leave likely poses an undue hardship on an employer, "as it is not reasonable for [Defendant] to hold open a position…indefinitely," a request for a transfer may not post such a hardship. Indeed, if the employee is able to "demonstrat[e] (1) that there was a vacant, funded position; (2) that the position was at or below the level of the [claimant's] former job; and (3) that the [claimant] was qualified to perform the essential duties of this job with reasonable accommodation," the employer would need to demonstrate "transferring the employee would cause unreasonable hardship."[825]

4. Age Discrimination

The Central District of Illinois granted judgment in favor of the EEOC on age discrimination claims based on the defendant's pay raise policy in *EEOC v. Urbana School District*.[826] In that case, the defendant school district limited the annual earning increases of teachers over age 45 to avoid pension-contribution surcharges.[827] This practice was codified in the school's collective bargaining agreement with the union.[828] A 52-year-old teacher challenged the policy, and the EEOC filed suit, alleging the school violated the ADEA by limiting the salary increases of many teachers over age 45 and all teachers over 50, and then by limiting their supplemental pay in a similar fashion.[829]

The EEOC moved for summary judgment on the question of liability, as well as for partial summary judgment on damages "for teachers whose base pay was capped and for some teachers whose supplemental earnings were limited" by the policy.[830] The district opposed the motion, claiming that the policy was based on years of service, and not age.[831]

While the court agreed that age and years of service are analytically distinct, in that "'an employer *can* take account of one while ignoring the other,'" it ultimately held that this defendant's policy was discriminatory on its face and the undisputed record reflected the defendant "took explicit and ultimately determinative account of age" in implementing this policy.[832] The court also addressed the defendant's "reasonable factor other than age" defense and found that no reasonable fact finder could find that age was anything other than a but-for cause of the

818 *EEOC v. American Flange & Greif, Inc.,* 2024 U.S. Dist. LEXIS 18569 (N.D. Ill. Sept. 16, 2024).
819 *Id.* at *14.
820 *Id.*
821 *EEOC v. Def. Ass'n of Phila.,* 2024 U.S. Dist. LEXIS 155251 (E.D. Pa. Aug. 29, 2024).
822 *Id.* at **3-4.
823 *See id.* at **4-5.
824 *Id.* at **15-16.
825 *Id.* at **20-21.
826 *EEOC v. Urbana Sch. Dist. No. 116*, 2023 U.S. Dist. LEXIS 199744 (C.D. Ill. Nov. 7, 2023).
827 *Id.* at **4-7.
828 *Id.*
829 *Id.* at **7-9.
830 *Id.* at *14.
831 *Id.* at **17-18.
832 *Id.* at **16-17 (quoting *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 612 (1993)) (emphasis added).

discriminatory treatment of teachers over the age of 45.[833] Finally, the court granted the EEOC's partial motion for summary judgment as to damages, assessing damages for both the capped base pay and supplemental base pay for teachers over the age of 45.[834]

In *EEOC v. Dolgencorp, LLC*,[835] the Eastern District of Oklahoma adopted the magistrate judge's recommendations to resolve dueling summary judgment motions filed by the parties. The EEOC claimed the defendant discriminated against employees because of their age by insulting older workers in favor of younger workers. Specifically, the EEOC alleged that company representatives made comments about the need to "shak[e] things up" and bring in "fresh blood," which created a hostile work environment for workers over 50 and resulted in some employees' constructive discharge.[836]

The court granted in part and denied in part the defendant's summary judgment motion. Specifically, the court allowed the harassment claim to proceed to trial based on a genuine issue of material fact as to whether the plaintiff could establish that the work environment was severe or pervasive enough to alter the terms and conditions of the aggrieved individuals' work based on repeated age-based comments and representations that the alleged harasser would be "protect[ed]."[837] Relatedly, the court denied the defendant's motion for summary judgment as to its *Faragher/Ellerth* affirmative defense, finding a genuine issue of material fact as to whether the defendant's climate survey was a sufficient investigation into the plaintiff's complaints and whether that claimant's failure to complain was reasonable based on his fear of retaliation.[838]

The court, however, dismissed the constructive discharge claim as to the claimant who resigned because the EEOC failed to put forth evidence that the defendant allowed the working conditions to become so intolerable that he had no choice but to resign.[839] As for the other two claimants' termination claims, the court found that whether the reasons for their termination were pretextual remained a question for the jury to determine.[840] Finally, the court denied summary judgment as to the other two claimants' retaliation claims because the EEOC proffered sufficient evidence of disparate treatment.[841]

The EEOC's partial motion for summary judgment as to four of the defendant's affirmative defenses was also granted in part and denied in part.[842] First, the court granted in part and denied in part the EEOC's motion for summary judgment on the "failure to mitigate" defense.[843] As to the claimant who resigned, the motion was denied as moot in light of the summary judgment ruling in favor of the defendant on constructive discharge.[844] The court, however, granted judgment on this defense as to the other claimants because the defendant failed to furnish proof of suitable alternative positions.[845] The court also granted the EEOC summary judgment as to the defendant's three affirmative defenses regarding conditions precedent to filing suit.[846]

5. Sexual Harassment

In *EEOC v. SkyWest Airlines, Inc.*[847] the EEOC alleged that the defendant created a hostile work environment by subjecting the charging party to sexual comments and gestures, retaliated against her for complaining of harassment, and ultimately constructively discharged her. The plaintiff alleged she was subjected to repeated sexual comments and jokes, explicit comments about her body, speculation about sexual positions she might enjoy, and jokes and comments about rape and prostitution.[848] The charging party also claimed that she made a verbal report

833 *Id.* at **18-20.
834 *Id.* at **20-21.
835 *EEOC v. Dolgencorp, LLC*, 2024 U.S. Dist. LEXIS 18569 (E.D. Okla. Feb. 2, 2024).
836 *Id.* at **9-10.
837 *Id.* at **10-12.
838 *Id.* at **16-20.
839 *Id.* at **13-16.
840 *Id.* at **20-24.
841 *Id.* at **25-26.
842 *Id.* at **28-37.
843 *Id.* at **28-33.
844 *Id.* at **29-30, 33.
845 *Id.* at **32-33.
846 *Id.* at **33-38.
847 *EEOC v. SkyWest Airlines, Inc.*, 2024 U.S. Dist. LEXIS 21225 (N.D. Tex. Feb. 7, 2024).
848 *Id.* at *2.

to her manager who told her to let him know "if things [got] worse."[849] The charging party first took an unpaid leave of absence, allegedly because the environment caused harm to her mental health.[850]

When she returned, the harassment allegedly continued, about which she reportedly complained.[851] She then went on a paid administrative leave while the defendant investigated her allegations.[852] The defendant investigated her complaint and was able to partially substantiate it.[853] As a result, the investigator recommended formal discipline for the involved employees and mandatory sexual harassment training for all employees at the location.[854] The charging party was informed she could not return until all employees underwent sexual harassment training, but the training was delayed due to COVID-19.[855] While on leave, the charging party accepted the company's COVID-19 voluntary early retirement option, claiming she felt compelled to resign because the defendant "failed to return her to work and ceased to communicate with her about any reasonably specific date she could expect to safely return."[856]

The defendant moved for summary judgment on all of the EEOC's claims. With respect to the sexual harassment claim, the defendant argued the EEOC failed to show that the defendant knew or should have known of the harassment and failed to take prompt remedial action.[857] The Northern District of Texas disagreed. The court found a triable issue of fact as to whether the defendant had constructive knowledge of the harassment because a manager testified he was present for certain inappropriate comments.[858] The court also found triable questions regarding the promptness of the defendant's remedial action, including whether it could have conducted sexual harassment training virtually and whether the discipline imposed on the employees was effective given that one of the employees testified he was never informed he was subject to discipline.[859]

As to the retaliation claims, the court found that the charging party's paid leave of absence might be sufficient to constitute an adverse employment action.[860] Specifically, the court found that the indefinite leave of absence might reasonably dissuade a reasonable employee from engaging in protected activity because "such uncertainty could cause the employee to experience significant emotional distress and could also negatively affect her changes for future advancement within the company."[861]

On the other hand, the court found that the EEOC did not present sufficient evidence to allow a reasonable jury to find the charging party was constructively discharged.[862] The court noted that the charging party took leave at her own insistence and that the EEOC pointed to no evidence indicating that the defendant's actions were intended to force her out.[863] Specifically, the COVID-19 retirement option was a blanket offer to all employees – not just the charging party – and she voluntarily accepted that option.[864] Thus, the court dismissed the constructive discharge claim.[865]

The District of Nebraska granted summary judgment in favor of the defendant on hostile work environment claims in *EEOC v. BNSF Railway Co.*,[866] after finding that the EEOC failed to establish a genuine issue for trial that alleged harassment was sufficiently severe or pervasive to alter the charging party's working conditions. There, the EEOC alleged the defendant subjected the charging party to a sexually hostile work environment, including screaming, obscenities, comments about her body, rumors about the plaintiff's sexual activity, sexual graffiti, lewd photographs, and disparaging comments about women in general or their presence in the workplace.[867] The

849 *Id.* at *3.
850 *Id.*
851 *Id.* at **3-5.
852 *Id.* at *5.
853 *Id.*
854 *Id.* at **5-6.
855 *Id.* at *6.
856 *Id.*
857 *Id.* at **7-8.
858 *Id.* at **10-13.
859 *Id.* at **14-17.
860 *Id.* at **19-22.
861 *Id.* at **20-22.
862 *Id.* at **22-24.
863 *Id.* at **23-24.
864 *Id.* at *24.
865 *Id.*
866 *EEOC v. BNSF Railway Co.*, 726 F. Supp. 3d 994 (D. Neb. Mar. 27, 2024). While the litigation was pending, the plaintiff passed away. However, the court concluded that the EEOC could continue to pursue claims on her behalf and on behalf of the public interest. 726 F. Supp. 3d at 1009-11.
867 *Id.* at 1006-07.

defendant moved for summary judgment on the EEOC's harassment claim.[868] The court held that the case involved coworker harassment because the individual accused of inappropriate conduct had no supervisory authority over the charging party, as he had no power to hire, fire, or discipline her.[869] The court further held that neither the alleged harasser's power to recommend action for the defendant to take nor the fact that the employer's unionized environment affected the relationship between the charging party and her alleged harasser sufficed to create a supervisory relationship.[870] Accordingly, the court found that the EEOC failed to set forth a genuine issue of material fact to support the EEOC's supervisory harassment claim.[871]

The court also rejected the EEOC's continuing violation theory to seek recovery of damages for the period prior to the limitations date.[872] Because the court found there was no relationship among the allegedly harassing incidents, the EEOC could only recover for any harassment occurring during the applicable limitations period.[873] The court addressed the parties' arguments as to alleged incidents about which the plaintiff was not aware, ultimately finding that such evidence is proper to determine whether a work environment was objectively hostile and to determine whether the employer had constructive knowledge of the hostile environment.[874] After dispensing of each of these issues, the court considered the totality of the circumstances underlying the sexual harassment claim. The court ultimately held that the EEOC failed to "come forward with 'specific facts showing that there is a genuine issue for trial'" on actionable harassment because the evidence, taken as a whole, was not sufficiently severe or pervasive.[875] The court focused on conduct directed at the charging party, finding the incidents aimed at her were merely isolated or sporadic.[876]

6. Race, National Origin, and Constructive Discharge

In *EEOC v. Frontier Hot-Dip Galvanizing*,[877] the EEOC filed suit on behalf of individuals who worked for a metal coatings company through temporary staffing agencies and alleged they were discriminated against based on their race and national origin, as well as being subjected to harassment and retaliation.[878] The defendant moved for summary judgment as to four of the 19 remaining claimants, but the magistrate judge for the Western District of New York issued a report and recommendation to deny the defendant's motion as to each claimant.[879]

Regarding the first claimant, the defendant argued that he did not work for it.[880] Using the staffing company's data, the defendant argued that the notations regarding his dates worked means he never performed work for the company.[881] The EEOC challenged the records by noting discrepancies between terminology and arguing that the notations were not determinative and identifying the claimant's own testimony regarding his work for the defendant.[882] The EEOC also noted that several individuals with the same data discrepancies were known to have worked for the defendant.[883] Based on the outstanding disputes of fact regarding the staffing company's data, as well as the claimant's own recollection of working for the defendant, the magistrate judge recommended summary judgment as to that claimant be denied.[884]

The defendant asserted the *Faragher/Ellerth* affirmative defense as to the three remaining claimants.[885] The *Faragher/Ellerth* defense requires a defendant in a hostile work environment case to show both that (1) it exercised reasonable care to prevent and correct promptly any harassing behavior, and (2) the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to otherwise avoid

868 *Id.* at 1012-14.
869 *Id.* at 1014-19.
870 *Id.* at 1019.
871 *Id.*
872 *Id.* at 1023-26.
873 *Id.* at 1024-25.
874 *Id.* at 1026-29.
875 *Id.* at 1036-38 (citation omitted).
876 *Id.* at 1036-37.
877 *EEOC v. Frontier Hot-Dip Galvanizing, Inc.*, 2024 U.S. Dist. LEXIS 67499 (W.D.N.Y. Apr. 11, 2024), *adopted by EEOC v. Frontier Hot-Dip Galvanizing, Inc.*, 2024 U.S. Dist. LEXIS 115800 (W.D.N.Y. July 1, 2024).
878 *Frontier Hot-Dip Galvanizing*, 2024 U.S. Dist. LEXIS 67499, at **1-3.
879 *Id.* at **20-21.
880 *Id.* at *6.
881 *Id.*
882 *Id.* at **6-9.
883 *Id.* at **6-7.
884 *Id.* at **9, 11.
885 *Id.* at **11-13.

harm.[886] The magistrate judge also recommended that summary judgment be denied as to these claimants because the record contained evidence from which a reasonable jury could find that the defendant did not attempt to ensure the effectiveness of its anti-discrimination policy and that the claimants were not unreasonable in failing to complain of the alleged harassment.[887] Specifically, the court noted that the defendant provides temporary employees with an opportunity to review anti-discrimination and anti-harassment policies but does not give them copies.[888] The court also noted that the record evidence indicated that employees never received training on these policies.[889] Additionally, the court noted that there was no consistent enforcement of discipline for derogatory and offensive language.[890] Therefore, the court found, although there was a policy in place, the company did not take reasonable steps to ensure it was known to employees and enforced.[891] For the same reasons, the court found triable issues exist as to whether the claimants reasonably failed to take action because the alleged conduct was so pervasive that they believed management must have been aware and chose not to act.[892]

Additional information on these and other summary judgment decisions issued in FY 2024 can be found in Appendix D of this Report.

I. Default Judgment

Courts apply several factors when deciding on the motion for default judgment. In a matter heard in the U.S. District Court for the Eastern District of New York in FY 2023, the court weighed the following factors: "(1) 'whether the defendant's default was willful; (2) whether defendant has a meritorious defense to plaintiff's claims; and (3) the level of prejudice the non-defaulting party would suffer as a result of the denial of the motion for default judgment.'"[893] In this case, *EEOC v. Stardust Diners, Inc.*, the court reiterated prior holdings in the circuit finding that, while a party's default is viewed as a concession of all well pleaded allegations of liability, it is not considered an admission of damages.[894] As such, even if the EEOC or a plaintiff establishes liability, they must still prove damages. In that matter, the court found the EEOC: (1) had sufficiently pled facts supporting the motion for default judgment; (2) had adequately demonstrated a Title VII sex-based discrimination violation and retaliation; and therefore (3) the charging party was entitled to compensatory and punitive damages, injunctive relief, and back pay plus prejudgment interest.[895]

Courts have discretion to set aside default judgments. For instance, in one matter out of the U.S. District Court for the District of New Mexico,[896] the EEOC served a complaint and summons on the owner of a non-emergency medical transportation company. The owner failed to file a response before the deadline, claiming confusion and relying on representations from his previous attorney that led him to believe the matter was "finished." Due to the defendant's failure to respond, the EEOC sent an email with a motion for default, seeking the defendant's position. While the owner objected to the motion, he was unaware that he could request additional time and did not formally oppose or respond to it. The EEOC proceeded to file the motion for default, which the court clerk entered.

After the default was entered, the defendant obtained legal representation and moved to set aside the entry of default. The court, finding good cause to do so, emphasized that defaults are "reserved for rare occasions." The court emphasized that "when doubt exists as to whether a default should be granted or vacated, the doubt should be resolved in favor of the defaulting party."[897] The court considered factors such as whether the default was willful, whether setting it aside would prejudice the adversary, and whether a meritorious defense was presented.[898] In this case, the court determined that the defendant would only be considered culpable if the default was willful or if there was no excuse for it. It found no culpability in the defendant's actions.[899] Despite the owner's reasonable fluency in English, other business engagements, and past dealings with other attorneys, his mistakes were not deemed

886 *Id.* at **11-12 (citing *Leopold v. Baccarat*, 239 F.3d 243, 245 (2d Cir. 2001)).
887 *Id.* at **13-20.
888 *Id.* at **13-15.
889 *Id.* at *15 & n.8.
890 *Id.* at **16-17.
891 *Id.* at *18.
892 *Id.* at *19.
893 *EEOC v. Stardust Diners, Inc.* 2023 U.S. Dist. LEXIS 140037, at *21 (E.D.N.Y. Aug. 10, 2023).
894 *Id.* at *26.
895 *See id.* at **32-33.
896 *EEOC v. Sandia Transp., L.L.C.* 2023 U.S. Dist. LEXIS 154154 (D.N.M. Aug. 31, 2023).
897 *Id.* at *7.
898 *Id.*
899 *Id.* at **9-10.

sufficiently culpable to warrant the severe and uncommon sanction of an entry of default followed by an eventual default judgment. The court concluded that the EEOC would not be prejudiced, and although the defendant had not demonstrated a high likelihood of prevailing, it had shown a denial of the EEOC's version of the facts, especially those material to the outcome of the case, which was enough to set aside the default.[900]

Courts are also able to order discovery as to damages relating to an entry of default. In an FY 2024 case in the District of Maryland, the court ordered post-default judgment discovery regarding whether the defendant was insolvent.[901] The court entered a final judgment against defendant of over $2 million, at which point the defendant represented that it had discontinued operations and was insolvent, preventing the EEOC from collecting on the judgment.[902] The EEOC subsequently issued a subpoena seeking financial documents regarding the defendant's owners' assets, to which the owner failed to respond or object.[903] The EEOC then sought to compel the discovery, which the court granted, noting that a judgment creditor "'may obtain discovery from any person' to aid in execution of a judgment" and that the general rule is that a party may obtain discovery on nonprivileged matters relevant to any claims or defenses.[904] Upon granting the motion, the court also observed that the owner likely waived any objections by failing to object to the subpoena or file a motion to quash.[905]

Courts are also able to award a judgment after default is entered when warranted. For instance, in a sexual harassment case in the Eastern District of California, the EEOC sought default judgment, alleging the defendant's supervisor sexually harassed the charging party, repeatedly making unwanted comments during her employment, including asking her to "hook up" with him, and assaulted her in a hotel room after a holiday party, all of which she reported.[906] The defendant initially failed to respond to the complaint, resulting in a default entry that was later vacated.[907] The defendant then filed a motion for summary judgment and dismissal for failure to prosecute that was denied.[908] The defendant's attorney later withdrew as counsel based on the suspension of the corporation and the defendant never obtained new counsel.[909] The EEOC contended that the defendant corporation had not been formally dissolved and filed an amended complaint against the defendant and the company that had acquired it.[910] The defendant failed to respond to the amended complaint and the EEOC moved for default judgment again.[911]

The court weighed the following factors, known as the *Eitel* factors, in deciding on a default: "'(1) the possibility of prejudice to the plaintiff, (2) the merits of plaintiff's substantive claim, (3) the sufficiency of the complaint, (4) the sum of money at stake in the action[,] (5) the possibility of a dispute concerning material facts[,] (6) whether the default was due to excusable neglect, and (7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits.'"[912] The court found that: (1) the EEOC would face prejudice if default was not entered as no other recourse existed and the EEOC had already spent substantial time and money prosecuting the action; (2) and (3) the merits of the EEOC's claims were sufficient based on both the supervisor's allegedly harassing behavior and the company's failure to take proper remedial action after the charging party complained; (4) the damages sought were reasonable in relation to the seriousness of the defendant's conduct; (5) no dispute of material facts existed as the "court may assume the truth of well-pleaded facts in the complaint (except damages) following the clerk's entry of default"; (6) no excusable neglect existed; (7) the strong policy favoring decisions on the merits was outweighed by the defendant's failure to appear and retain counsel.[913]

Accordingly, the court recommended default be entered. As for remedies, the court recommended the charging party receive $7,916 in backpay plus prejudgment interest, $100,000 in compensatory and punitive damages (the charging party provided a declaration detailing her emotional suffering, and the defendant's failure to address the charging party's complaints and subsequent termination of her employment amounted to egregious discriminatory practices with malice and reckless indifference). The court also enjoined the defendant from engaging in

900 *Id.* at **11-13.
901 *EEOC v. Green Jobworks, LLC* 2024 U.S. Dist. LEXIS 4179 (D. Md. Jan. 9, 2024).
902 *Id.* at **1-2.
903 *Id.* at *2.
904 *Id.* at **2-3.
905 *Id.* at **3-4.
906 *EEOC v. Elite Wireless Grp.*, 2024 U.S. Dist. LEXIS 37825, at **2-4 (E.D. Cal., Mar. 4, 2024).
907 *Id.* at *6.
908 *Id.*
909 *Id.*
910 *Id.* at *7.
911 *Id.*
912 *Id.* at *8 (citing *Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986).
913 *Id.* at **9-15.

further discrimination or harassing conduct and ordered it to carry out its policies to provide equal employment opportunities for employees and eradicate unlawful employment practices.[914]

J. Bankruptcy

A defendant's or charging party's bankruptcy declaration will not necessarily stay an EEOC lawsuit. There were no applicable cases involving the EEOC and bankruptcy for the past fiscal year; as such, prior cases are instructive.

In a 2020 case out of the Northern District of Georgia, for example, the EEOC sued the defendant under the ADA seeking injunctive relief, back pay and front pay for defendant's former employee, compensation for pecuniary and non-pecuniary losses, punitive damages, and costs.[915] The former employee filed her own complaint against defendant, which was consolidated with the EEOC complaint and treated as an intervenor complaint. The defendant subsequently filed for Chapter 11 bankruptcy, filed a notice of the bankruptcy to obtain an automatic stay, and moved to stay proceedings not subject to an automatic stay.

The EEOC opposed the notice and motion to stay, contending that the Bankruptcy Code's automatic stay provision does not apply because the proceeding falls within the governmental unit or police and regulatory power exception under 11 U.S.C. § 362(b)(4). The purpose of the exception is to discourage debtors from initiating bankruptcy proceedings to evade impending governmental efforts to enjoin or deter ongoing debtor conduct that would "seriously threaten the public safety."

The defendant argued that the police-power exception did not apply because: (1) any injunctive relief the EEOC seeks is likely to be moot, because the defendant intends to sell its assets to another company; and (2) the defendant is unaware of any cases applying the police-power exception in cases involving claims brought by both the EEOC and a private litigant.[916] After surveying authority from around the country, the court "agree[d] with those courts that have considered the issue and finds that the police-power exception applies to the EEOC" because "the EEOC brings claims under the ADA for injunctive and monetary relief in the course of exercising its police or regulatory powers, and it is therefore not subject to the automatic stay."[917] The court also declined to exercise its authority to stay a case pending the resolution of a related case in another forum, finding its discretionary stay authority inapplicable where a more specific stay mechanism (*i.e.*, bankruptcy stay) expressly did not apply.[918] In doing so, the court rejected the argument that a stay of the intervenor complaint required staying the EEOC lawsuit, recognizing that "while it is true that there is some overlap between the EEOC's claims and those of the intervenor, it is not unusual for litigation to proceed as to the EEOC while the claims of an intervenor are stayed."[919]

Finally, the court stated that "the fact that the claims for injunctive relief may end up being moot at the conclusion of the bankruptcy proceedings is not a sufficient reason to stay the claims now—especially when that argument is insufficient to preclude application of the police-power exception to the automatic stay."[920]

Similarly, in the Northern District of Texas, the court emphasized that the Bankruptcy Code's automatic stay does not necessarily stop an EEOC lawsuit. In this case, the EEOC sued a medical practice for alleged Title VII violations.[921] The EEOC sought injunctive relief under Title VII, back pay with prejudgment interest, compensatory damages for past and future pecuniary and non-pecuniary losses, punitive damages, and costs. The defendant subsequently filed for Chapter 7 bankruptcy. In light of the bankruptcy, the court entered an order staying and administratively closing the case pursuant to 11 U.S.C. § 362.

Upon receiving notice of the stay, the EEOC filed a motion to reopen the case and permit it to continue with its claims against the defendant notwithstanding the bankruptcy proceeding. The EEOC averred that the Bankruptcy Code's automatic stay provision does not apply because the proceeding falls within the governmental unit or police and regulatory power exception under 11 U.S.C. § 362(b)(4).

914 *Id.* at **16-20.
915 *EEOC v. Krystal Co.*, 2020 U.S. Dist. LEXIS 92482 (N.D. Ga. May 21, 2020).
916 *Id.* at **3-4.
917 *Id.* at *6.
918 *Id.* at *8.
919 *Id.* at *9.
920 *Id.*
921 *EEOC v. Shepherd*, 2018 U.S. Dist. LEXIS 175025 (N.D. Tex. Oct. 11, 2018).

In response, the defendant countered that Section 362(b)(4) does not apply to actions seeking money judgments. The EEOC replied by clarifying that it was seeking to prove defendant's liability for the asserted discrimination claims and obtain a judgment against the defendant for damages and injunctive relief to "prevent [defendant] from 'engaging in future discriminatory conduct in violation of Title VII.'"[922]

The court applied the Fifth Circuit's "public policy test" and "pecuniary interest test," used to determine whether proceedings fall within Section 362(b)(4)'s police and regulatory power exception. The public policy test asks whether the government is effectuating public policy rather than adjudicating private rights. The pecuniary purpose test asks whether the government primarily seeks to protect a pecuniary government interest in the debtor's property, as opposed to protecting public safety and health. If the purpose of the government's action is to promote public safety and welfare or to effectuate public policy, the exception applies and the stay to the lawsuit would be lifted. If, however, the purpose of the action is to protect the government's pecuniary interest in the debtor's property or primarily to adjudicate private rights (such as seeking damages for a charging party), the exception would not apply and the stay would remain in place.

In its analysis, the court acknowledged that the issue of whether an EEOC enforcement action under Title VII falls within Section 362(b)(4)'s exception was a matter of first impression in the Fifth Circuit. As such, the court looked to and relied upon the Fourth Circuit's precedent, which held that EEOC employment discrimination lawsuits brought under Title VII satisfy the public policy test—even when brought on behalf of specific individuals—because the EEOC is acting to vindicate the public interest in preventing employment discrimination. Further, the court noted the Third and Eighth Circuits have reached the same conclusion regarding Section 362(b)(4)'s application to EEOC enforcement actions.[923]

Applying the Fourth Circuit's rationale, the court held that Section 362(b)(4)'s exception should apply. In its reasoning, the court emphasized that the EEOC's primary relief sought was a permanent injunction, which was not limited to the individuals named in the EEOC's pleadings. The court noted that, although the EEOC sought monetary relief on behalf of specific individuals, there was no indication that the EEOC was seeking to protect a pecuniary interest in the defendant's property. Further, the court underscored the EEOC's acknowledgment that it would not be able to use the proceeding to enforce any money judgment entered against the defendant. Accepting that the EEOC was focused on the public interest and not debt collection, Section 362(b)(4) applied and the stay to the EEOC's lawsuit was lifted.

In another case out of the Southern District of Indiana, the court determined a claimant's failure to disclose his claims in a personal bankruptcy proceeding did not preclude the EEOC from pursuing a disability discrimination lawsuit on his behalf. In this case,[924] the EEOC alleged a trucking company violated the ADA by asking disability-related questions during the job application process. Four members of the affected class of applicants, however, did not disclose their claims against the company in their personal bankruptcy proceedings. The company alleged that the EEOC should therefore be precluded from pursuing claims on their behalf.

The court explained that generally, under the Bankruptcy Code, a debtor must schedule as assets "all legal or equitable interests of the debtor in property as of the commencement of the case."[925] Causes of action that arise during the court of the bankruptcy are also deemed property of the bankruptcy estate.[926] The bankruptcy estate owns the claim, so the debtor lacks standing to pursue an undisclosed claim on the estate's behalf during the pendency of the bankruptcy. Once the bankruptcy has closed, the doctrine of judicial estoppel would normally preclude a claimant from pursuing a previously undisclosed claim. The court, however, emphasized that in this case, the EEOC—not the claimants—was the entity filing suit. The question the court had to consider, therefore, was "whether judicial estoppel applies when the EEOC sues on a claim previously undisclosed by individual charging parties in bankruptcy proceedings."[927]

The court responded in the negative, concluding that judicial estoppel did not apply in this instance "because the agency, in fulfilling its enforcement role, does not merely stand in the shoes of individual claimants; in other words, it is not the same 'party' that earlier took an inconsistent position before a court. The EEOC is not 'merely

922 *Id.* at **2-3.
923 *Id.* at *8.
924 *EEOC v. Celadon Trucking Servs.*, 2015 U.S. Dist. LEXIS 84639 (S.D. Ind. June 30, 2015).
925 *Id.* at *50, citing 11 U.S.C. § 541(a)(1).
926 *Id.*, citing 11 U.S.C. § 1306(a)(1).
927 *Id.* at *51.

a proxy for the victims of discrimination,' . . . nor does it sue 'as the representative of the discriminated-against employee.'"[928] The ADA in particular "makes the EEOC the 'master of its own case,' and confers upon the agency independent authority to evaluate the strength of the public interests at stake in enforcing the statute."[929] The individual claimants' failure to disclose their claims in their bankruptcy proceedings therefore did not prevent the EEOC from recovering damages on their behalf. The court reasoned that because the EEOC was not a party to the bankruptcy proceedings, and the claimants were not parties to the EEOC's lawsuit, "judicial estoppel does not bar the EEOC from recovering damages predicated on harms they may have suffered."[930]

Whether an automatic stay in a defendant's bankruptcy proceeding could preclude the EEOC from enforcing a subpoena against a third party to determine whether it was a successor-in-interest came before the Western District of Pennsylvania in 2018.[931] The EEOC filed a motion to show cause why the third party should not be compelled to comply with the EEOC's discovery subpoena. The court granted the EEOC's motion. In response, the third party argued that the automatic stay in the defendant's bankruptcy proceeding applied to the EEOC's action to enforce its judgment against the third party, and therefore to the EEOC's ability to subpoena the third party to take discovery. The third party also averred that the stay barred the EEOC from enforcing the money judgment because Bankruptcy Code Section 362(b)(4)'s exception did not apply to money judgments.

The EEOC countered that the automatic stay did not apply to the third party because it is not the debtor and the bankruptcy court did not extend the stay to the third party. Further, the EEOC contended that, even if the stay applied to the third party, the EEOC was still entitled to enforce the nonmonetary portion of its judgment against it and take discovery for that purpose.[932] The court agreed with the EEOC and explained that Section 362(b)(4) explicitly exempts only the enforcement of money judgments, which implies that government agencies retain the power to enforce injunctions against a debtor in bankruptcy. Given that the EEOC can bring an action to enforce an injunction against a successor-in-interest to the defendant, the court reasoned that the EEOC must also have the ability to subpoena a putative successor-in-interest to determine whether that entity is a successor. The court declined to address whether an automatic stay under 11 U.S.C. §362 would apply to an action to enforce a money judgment against the third party.[933]

In a 2023 case out of the Middle District of Tennessee, the court considered whether a class member declaring bankruptcy but failing to disclose the class action barred or estopped that individual's ability to participate in a lawsuit if they failed to disclose the underlying class action in their bankruptcy proceedings.[934] Specifically, the deadline for motions to amend pleadings in this Title VII action alleging a racially hostile work environment and discriminatory work conditions, was set for April 29, 2022.[935] The court, however, denied the defendant's motion to amend its answer, which included a 29th affirmative defense related to a class member's bankruptcy. The defendant, after asserting 28 defenses, sought to add a defense stating that the class member's claims were barred due to failure to disclose the lawsuit in a bankruptcy proceeding. The EEOC objected, citing the defendant's lack of good cause for filing the motion after the deadline, improper inclusion of additional allegations, and legal deficiencies in the proposed defense.[936]

The defendant argued that good cause existed because the EEOC only disclosed the bankruptcy two months after the deadline. According to Rule 16(b), a deadline can be extended only for "good cause," and Rule 15(a)(2) allows amendments "freely" when justice requires. The court noted that the "good cause" requirement is met if the original deadline could not reasonably have been met despite due diligence and the opposing party won't suffer prejudice. In this case, the court found that the defendant satisfied the good cause requirement but rejected the proposed amendments as they were unrelated to the disclosed bankruptcy.[937] The defendant claimed the amendments were minor clarifications, but the court disagreed, stating that without a stated basis for good cause, unrelated amendments could not be allowed.

928 *Id.*, citing *In re Bemis*, 279 F.3d 419, 421-422 (7th Cir. 2002) ("The EEOC's primary role is that of a law enforcement agency and it is merely a detail that it pays over any monetary relief obtained to the victims of the defendant's violation rather than pocketing the money itself.") (internal citation omitted)
929 *Id.* at *52, citing *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 122 S. Ct. 754 (2002).
930 *Id.* at *55.
931 *EEOC v. Scott Medical Health Ctr., P.C*, 2018 U.S. Dist. LEXIS 183552 (W.D. Pa. Oct. 26, 2018).
932 *Id.* at *4.
933 *Id.* at *6.
934 *EEOC v. Whiting-Turner Contr. Co.*, 2023 U.S. Dist. LEXIS 44016, at *4 (M.D. Tenn. Mar. 15, 2023).
935 *Id.*
936 *Id.* at **4-5.
937 *Id.* at **8-9 .

Specifically, the court found that the proposed 29th defense, claiming the class member's claims are barred due to bankruptcy, lacked legal support.[938] The court considered the doctrine of judicial estoppel, which bars a party from asserting a position contrary to a prior sworn position in another proceeding. But the court found the proposed defense futile as it did not sufficiently plead estoppel, failed to establish that the class member is a party to the lawsuit, and lacked specifics on how the bankruptcy petition contradicted the current case. As such, the court denied the proposed 29th defense as futile.[939]

K. Trial

1. Pre-Trial Motions

Several cases involved pre-trial motions in FY 2024.

In a case before the United States District Court for the District of Nebraska, the court faced evidentiary issues.[940] In *EEOC v. Drivers Management, LLC*, the defendants orally moved in limine to present evidence related to the employee's employment and personnel records that had previously been excluded as they were only relevant to backpay—an issue that was not before the jury.[941] The EEOC sought to exclude the records on the basis that defendant had not timely disclosed them.942 Defendants also sought to exclude the EEOC's expert calculations for damages allegedly incurred after 2019 for the same basis that the EEOC did not disclose them.[943]

Rule 26(a)(1)(A) requires parties to disclose "all documents . . . that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses," and to disclose "a computation of each category of damages claimed by the disclosing party."[944] Such disclosures must be supplemented "in a timely manner" once a party learns that disclosures are incomplete or incorrect.[945] For example, if the party obtains additional documents or amends its damages calculations, this must be disclosed.[946] Significantly, "[a] party is not allowed to use untimely disclosed evidence at trial unless the failure to timely disclose 'was substantially justified or harmless.'"[947]

The court has wide discretion to determine the remedy for the failure to comply with Rule 26(a) and (e) and will consider "the reasons for noncompliance, the surprise and prejudice to the opposing party, the extent to which the evidence would disrupt the order and efficiency of trial, and the importance of the evidence."[948] Excluding evidence "is a harsh penalty and should be used sparingly."[949]

In this matter, and in consideration of the above factors, the court accepted the defendants' argument that the failure to timely disclose the employment records at issue was a clerical oversight.[950] The court also held the EEOC could not claim surprise or prejudice given that they were aware of the employee's performance.[951] The court also noted that such evidence is relevant to calculating backpay if the employee was found to be entitled to such damages and "it would not disrupt the bench trial to admit the employment records."[952] Given this, the court tentatively admitted the evidence but stated it would make a final judgment at trial.[953]

With regards to the expert calculations, the court held that while it was the EEOC's burden show why supplementing the expert calculation was substantially justified or harmless, the court found the defendants had "not proffered any theory, and the Court [could not] envision one, which would show how the failure to disclose the updated calculations harmed [defendants]."[954] Specifically, the court found that defendants would not have prepared

938 *Id.* at **9-10.
939 *Id.* at **10-11.
940 *EEOC v. Drivers Mgmt., LLC*, 2023 U.S. LEXIS (D. Neb. Oct. 2, 2023).
941 *Id.* at *1.
942 *Id.*
943 *Id.* at **1-2.
944 *Id.* at *2.
945 *Id.* (citing Fed. R. Civ. P. 26(e).
946 *Id.*
947 *Id.* (citing Fed. R. Civ. P. 37(c)(1); *see also Trost v. Trek Bicycle Corp.*, 162 F.3d 1004, 1008 (8th Cir. 1998)).
948 *Id.* (citing *Wegener v. Johnson*, 527 F.3d 687, 692 (8th Cir. 2008).
949 *Id.* (citing *ELCA Enter5s. v. Sisco Equip. Rental & Sales*, 53 F.3d 186, 190 (8th Cir. 1995)).
950 *Id.* at *3.
951 *Id.*
952 *Id.*
953 *Id.*
954 *Id.* at *4.

for the trial any differently with an updated expert report.[955] The court again stated it would make a final ruling at trial and took the motions under advisement.[956]

In the Northern District of New York, the court considered a similar motion in limine.[957] In that case, the defendant moved to preclude a transcript of a Telecommunications Relay Service (TRS) call made by the charging party to the defendant, arguing that (1) the transcript could not be properly authenticated; (2) the "explaining relay" statement attributed to the call operator is hearsay; (3) the statements made by the unidentified defendant representative are hearsay and do not qualify as party-opponent statements; and because (4) allowing the transcript would be unduly prejudicial.[958] The court had previously rejected the third reason but reserved ruling on the remaining issues.[959]

In that case, defendant claimed the charging party has "no personal knowledge on which to rely to state that the transcript accurately reflects the contents" of the call.[960] "To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is."[961] Under Fed. R. Evid. 901, authentication "does not erect a particularly high hurdle" and can be accomplished via a testimony of a witness with knowledge "that an item is what it is claimed to be[.]"[962] While the charging party can attest to what she said, she cannot verify what the defendant said.[963] Therefore, the EEOC identified a representative who could testify as to the ability to preserve call transcripts and the operators' obligations to transcribe calls verbatim in real time.[964] Defendant consented to the potential testimony regarding authentication.[965] The court, therefore, did not need to address the issue of authentication.[966]

Defendant moved to preclude the testimony of the representative regarding training provided to TRS operators, arguing that such testimony would be irrelevant, confusing to the jury, unfairly prejudice to the defendant, and contain inadmissible hearsay.[967] The court held the EEOC must lay a foundation sufficient to establish that the representative has personal knowledge of the training the company provides to TRS operators.[968] Defendant argued the representative had no personal knowledge of what happened during the call.[969] In response, the EEOC stated the representative is a foundation witness who can provide the jury with context of how the calls are created and the transcripts generated.[970] The court found that assuming an adequate foundation is laid, the representative's testimony regarding the directives of "go ahead" and "everything that is heard will be typed" is relevant and admissible to help the jury understand TRS and the TRS transcript.[971] Given that knowledge of the charging party's disability is central to this case, the court ultimately held that the probative value of testimony that TRS operators are trained by the call carrier to refer to the internet relay service is not substantially outweighed by risk of undue prejudice.[972] Any remaining issues would wait for trial.[973]

In the Western District of Washington, the EEOC and defendant filed a series of motions in limine to exclude evidence.[974] The EEOC sought exclusion of after-acquired evidence of "subjective" qualifications for the position.[975] The claimant, who was interviewing for a position in a psychiatric facility, had made some "private comments" around the time he was interviewing for the position, which were allegedly unknown to defendant and were not learned until during discovery in the lawsuit.[976] Specifically, claimant had said "in my youth, I used to enjoy a

955 *Id.*
956 *Id.* at **4-5.
957 *United States EEOC v. McLane/Eastern, Inc.*, 2023 U.S. Dist. LEXIS 204240 (N.D.N.Y. Nov. 15, 2023).
958 *Id.* at *2.
959 *Id.*
960 *Id.* at *3.
961 *Id.* (citing Fed. R. Evid. 901(a)).
962 *Id.* (citing *SCS Communs., Inc. v. Herrick Co. Inc.*, 360 F.3d 329, 344 (2d Cir. 2004) and Fed. R. Evid. 901(b)(1)).
963 *Id.* at **3-4.
964 *Id.* at *4.
965 *Id.*
966 *Id.*
967 *Id.*
968 *Id.*at *6.
969 *Id.*
970 *Id.*
971 *Id.* at **9-10.
972 *Id.* at *10.
973 *Id.* at *11.
974 *EEOC v. Telecare Mental Health Servs. of Wash., Inc.*, 2024 U.S. Dist. LEXIS 31606 (W.D. Wash. Feb. 23, 2024).
975 *Id.* at *1.
976 *Id.* at **1-2.

good crazy person takedown, but as I got older, I enjoy these things less and less," and "fighting off meth heads isn't as much fun in my 50s as it was in my 30s."[977] Defendant argued that the statements were relevant to one of the elements of the EEOC's *prima facie* case—that claimant was a "qualified individual" capable of performing the "essential functions" of the position.[978] The EEOC argued that the "case law reflects that after-acquired subjective criteria are not relevant to an applicant's qualifications for a job."[979] However, the EEOC did not cite, and the court was unable to identify, any cases that explicitly hold that late-acquired evidence of an employee's subjective claims are not admissible in an ADA claim.[980] In response, the EEOC argued that "[a]llowing [defendant] to claim *any* newly discovered conduct is disqualifying although such conduct was unknown to decision makers at the time … permits employers to seize upon an eleventh-hour misdeed as justifications for disqualifying job applicants."[981] The court disagreed as defendant must still convince that jury that "compassion for patients who suffer from mental illness is in fact a qualification for the position."[982] The EEOC, in turn, can offer evidence that defendant was aware of claimant's attitude towards the mentally ill but still offered him the position, or argue that the comments do not necessarily reflect claimant's outlook towards the mentally ill.[983] The court held that determining which side has the better argument and evidence is a task for the jury and denied the motion.

Next, the EEOC sought exclusion of "impermissible character evidence" related to claimant—that he "is prone to criminality (*e.g.*, fraud or forgery) or that people with a martial arts training or who use the term 'takedown' to describe physical restrains are inclined to being 'trigger happy' when determining whether to restrain a volatile patient."[984] Defendant stated it had no intension to use the words "fraud" and "sham" but argued it had a right to question claimant on his decision to pre-populate the medical form, arguing it is relevant to the reliability of the physicians' assessment of claimant's fitness for the position.[985] With regards to claimant's martial arts training, the court held that "both sides should have the opportunity to argue and provide evidence of the value of that training to performing the RN position."[986]

The EEOC sought to exclude medical information related to the claimant's leg impairment or emotional distress.[987] The court denied this denied this as it was unclear what specific evidence the EEOC was asking the court to exclude.[988]

The EEOC also sought to exclude "improper hypotheticals."[989] The court denied this motion as it did little more than "merely repeat the requirements of the Federal Rules of Evidence" and is already prohibited by the court's Standing Order.[990]

As for the request to exclude any reference to the fact that claimant had pre-populated his doctor's medial report as a "sham" or a "forgery" or as "fraudulent," the court directed defendant to "avoid inflammatory characterizations of the form" but held "the subject matter is relevant to the form's reliability and an appropriate one for trial."[991]

The EEOC sought to exclude communications between the charging party and the EEOC regarding pre-suit settlement negotiations.[992] The court noted that the motion was unnecessary given that under Federal Rule of Evidence 407, a party may not introduce such evidence "either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction."[993] However, the court granted the motion.

977 *Id.* at *2.
978 *Id.* at *1 (citing 42 U.S.C. § 12112(a)).
979 *Id.* at **2-3.
980 *Id.* at *3.
981 *Id.* at *4.
982 *Id.* at *4.
983 *Id.*
984 *Id.* at *5.
985 *Id.* at *6.
986 *Id.* at *7.
987 *Id.*
988 *Id.*
989 *Id.*
990 *Id.* at *8.
991 *Id.*
992 *Id.*
993 *Id.* at **8-9.

The EEOC also moved to exclude "testimony, evidence, argument, or any comment, whether implicit or explicit, suggesting it would experience economic hardship in the event of a judgment against it."[994] The court held that in the context of the EEOC's request for punitive damages, and if the issue is raised, defendant will have the opportunity to respond.[995] The EEOC also asked the court to exclude evidence that would suggest that "an adverse judgment would be harmful" to defendant's patients or be a disservice to society overall.[996] The court agreed that such evidence would be irrelevant and granted the motion to exclude.

The EEOC sought an order to exclude prejudicial or disparaging references to the EEOC or its counsel.[997] The court held that the category of evidence was "both too broad and too vague to permit a meaningful ruling."[998] The court cautioned "both sides that it will not permit this trial to become a referendum of EEOC's 'mission' or a the pretrial conduct of the attorneys in this case."[999] The motion was neither granted nor denied.[1000]

The court then denied the EEOC's request for a "blanket exclusion" of references to defendant's charitable activities and corporate character.[1001] The court held that if defendant's reputation was put to issue, defendant would have the "opportunity to offer evidence and argument on its own behalf."[1002] However, the court did note that it could not see how the evidence would be relevant.[1003]

The court granted the EEOC's request to exclude evidence that claimant owns or possess firearms as it would be more prejudicial than probative.[1004] The court noted, however, that it believed defendant would not introduce it anyway as it would support the EEOC's argument for emotional distress damages.[1005]

The EEOC also sought to exclude all references to the claimant's treating orthopedic surgeon.[1006] Neither party listed the doctor for trial but because chart notes were introduced into evidence during the deposition of another doctor, it was admitted in that context.[1007]

The EEOC sought permission to introduce in "summary form" excerpts from defendants' discovery responses.[1008] While the court agreed "that discovery responses may be admissible as admissions of a party opponent…without more specificity, the Court is unable to rule on the admissibility of EEOC's vague, hypothetical admissions" and declined to provide a ruling on the motion at the time.[1009]

The EEOC also sought a preemptive ruling that it may introduce financial as well as tax records as evidence in support of its claim for punitive damages.[1010] While such records are generally relevant, the issue here was that defendants had produced the financial records of its parent company, which was not a party to the lawsuit.[1011] Ultimately, the court determined that a closer review of those records, in the event punitive damages are put at issue, would be required to determine which documents may be admitted, and in what form, to avoid jury confusion concerning the separate corporate entities.[1012]

The court granted the EEOC's request to allow the claimant to attend all of the trial—finding that defendant "failed to articulate what prejudice—other than a vague and unsupported concern that hearing the testimony of other witnesses might influence his—might result."[1013] The court noted that claimant is likely to be the first witness and as such would ameliorate any of defendants' concern and that as the charging claimant there was a far greater interest in the outcome than there would be for a typical witness.[1014]

994 *Id.* at *9.
995 *Id.*
996 *Id.*
997 *Id.* at *10.
998 *Id.*
999 *Id.* at **10-11.
1000 *Id.* at *11.
1001 *Id.*
1002 *Id.*
1003 *Id.*
1004 *Id.* at **11-12.
1005 *Id.* at *11.
1006 *Id.* at *12.
1007 *Id.*
1008 *Id.*
1009 *Id.* at *13.
1010 *Id.*
1011 *Id.* at *14.
1012 *Id.* at *15
1013 *Id.* at *16.
1014 *Id.* at *15.

Defendant also filed motions in limine. Specifically, defendant sought to exclude evidence that claimant could perform certain functions at his subsequent employer to support the argument that he could have performed the functions of the job at issue.[1015] The court concluded that claimant's "ability to perform certain functions" at his subsequent employer "is relevant to whether he would have been able to perform similar functions mere months earlier."[1016] The court stated the defendant would have the opportunity on cross and through other witness testimony to highlight the difference between defendant's facility and the subsequent employer.[1017] The court also stated that the defendant was free to emphasize the five-plus months between the offer and subsequent job.[1018] The court, however, stated that it would not allow evidence of functions claimant performed at his subsequent employer that was "not highly similar to those he would have been required to perform" for the defendant.[1019] The motion was denied.[1020]

Defendant also sought exclusion of evidence concerning the claimant's brother's suicide, which occurred not long after defendant rescinded its job offer.[1021] The court found that the claimant would be allowed to testify to the various ways that his mental distress from defendants' actions impacted his life.[1022] The court cautioned the parties that prolonged testimony would not be allowed and stated it was "trusting the jury" to "separate its sympathies from the facts and ascribe the appropriate significance" to claimant's testimony.[1023]

Defendant sought the exclusion of the testimony from claimant's treating primary care physician concerning whether the claimant could safely perform the job functions.[1024] The court held that it would allow the physician's testimony about his lack of specific recollection and knowledge about foundational matters.[1025] With these guidelines in mind, the court directed the parties to revise their designations of the physician's deposition and stated that if objections remained, the court would review them individually.[1026] The court also "sternly cautioned" the parties "to eliminate redundant and irrelevant material, or the Court will do so."[1027]

Defendant asked the court to exclude as hearsay two "personally references" of individuals who were to provide information about the claimant from past employers about his ability to perform the RN position at the defendant.[1028] The court denied this as it held that "[t]he references are not hearsay if they are offered as evidence of the information [the defendant] had when it extended to charging party a conditional offer, rather than for the truth of what they state, and are admissible for this purpose."[1029]

Defendant also sought to exclude evidence of its financials.[1030] The first component of the objection was essentially a cross-motion to the EEOC's motion in limine outlined above and had already been ruled on.[1031] The second component was defendant's argument that the court should not permit the EEOC to introduce evidence of the defendant's financials unless it could provide that the defendant is liable for disability discrimination—essentially asking for a bifurcation of the trial into a liability stage and damages stage.[1032] The motion was granted.[1033]

In the U.S. District Court for the Eastern District of Oklahoma, the court was faced with an age discrimination case in which both parties brought motions in limine.[1034] The EEOC sought to exclude evidence of the charging party's performance, conduct, and reasons for separation from other employers as irrelevant.[1035] Defendant claimed that such information, however, is relevant to mitigation of damages.[1036] The court granted the motion as it had

1015 *Id.* at *16.
1016 *Id.* at *17.
1017 *Id.* at *18.
1018 *Id.*
1019 *Id.*
1020 *Id.*
1021 *Id.*
1022 *Id.* at 19.
1023 *Id.* at **19-20.
1024 *Id.* at *20.
1025 *Id.* at *22.
1026 *Id.* at **22-23.
1027 *Id.* at *23.
1028 *Id.*
1029 *Id.*
1030 *Id.*
1031 *Id.* at **23-24.
1032 *Id.* at *24.
1033 *Id.*
1034 *EEOC v. Dolgencorp, LLC*, 2024 U.S. Dist. LEXIS 99805 (E.D. Okla., June 5, 2024).
1035 *Id.* at *5.
1036 *Id.*

previously granted the EEOC's motion for summary judgment on the mitigation of damages issue and constructive discharge. Therefore, there was no mitigation of damages issue, as the EEOC seeks only lost wages up to time of termination from second employer after the charging party was discharged by the defendant.[1037]

The EEOC also sought to exclude all evidence based on attorney-client privilege regarding the claimant's communications with private attorneys and whether the claimants retained a private attorney.[1038] Specifically, the EEOC sought to exclude: (1) communications claimants had with an unidentified attorney from whom they initially sought representation; (2) communications between a charging party and his attorney; (3) communications between them regarding a possible witness statement; and (4) communications between EEOC attorneys and claimants prior to conciliation.[1039] "To establish attorney-client privilege, the proponent must show: (1) a communication; (2) made between privileged persons; (3) in confidence; (4) for the purpose of seeking, obtaining, or providing legal assistance to the client."[1040] The court held that while there was communication with an attorney in contemplation of retaining is not privilege, to the extent the communications were "for purpose of seeking" legal assistance, then it is protected by attorney-client privilege.[1041]

The EEOC sought to exclude communications between the claimants and EEOC prior to conciliation as irrelevant.[1042] The court denied this request as neither party provided details of the statements as "a court is almost always better situated during the actual trial to assess the value and utility of evidence."[1043]

The EEOC sought to exclude all evidence of one claimant's emotional distress after his employment with defendants because it was not seeking emotional damages.[1044] The court stated that because it had previously dismissed the constructive discharge claim and claimant was not entitled to backpay, the claimant's emotional state and alleged alcohol abuse was only relevant to the issue of his failure to mitigate backpay.[1045]

The EEOC sought to exclude evidence related to a charging party's termination for a prior employer, his criminal conviction, and failure to disclose same on the employment application.[1046] Defendant argued this information was relevant as "after-acquired evidence defense" and for impeachment purposes.[1047] The court stated that while under Federal Rule of Evidence 6507, any party may attack a witness' credibility, "the ability to attack a witness' credibility at trial is subject to certain limitations."[1048] The court granted the EEOC's motion because it held that the prior conviction does not appear to be dishonest or constitute false statements.[1049] Furthermore, given that the conviction was more than 10 years old, the court found that the probative value was outweighed by the prejudicial effect.[1050]

Defendant sought to exclude any mention of or request for punitive damages for any claimant as well as emotional distress damages for one charging party.[1051] Because neither punitive damages nor emotional distress damages are available under the ADEA, the motion was granted.[1052]

Defendant also sought to exclude any mention of the EEOC's Letter of Determination "finding reasonable cause to believe that the ADEA was violated" or its investigation.[1053] The court granted defendant's motion as to the Letter of Determination as the EEOC stated that it would not introduce the Letter of Determination unless jurisdiction is challenged.[1054] The court stated that if jurisdiction was challenged, admissibility would be reconsidered.[1055] With regards to the EEOC's investigation, the court denied the motion because defendant made a broad and non-specific

1037 *Id.*
1038 *Id.* at *6.
1039 *Id.*
1040 *Id.* (citing *Stockton v. Housecalls Home Health Services, Inc.*, 2007 U.S. Dist. LEXIS 107162, 2007 WL 9872747, *3 (N.D. Okla. June 15, 2007) (citing Restatement (Third) of Law Governing Lawyers § 68)).
1041 *Id.* at *8.
1042 *Id.* at **9-10.
1043 *Id.* at *10 (citing *Romero v. Helmerich & Payne Int'l Drilling Co.*, 2017 U.S. Dist. LEXIS 120619, 2017 WL 3268878, at *2 (D. Colo. Aug. 1, 2017)).
1044 *Id.* at *11.
1045 *Id.* at *12.
1046 *Id.* **12-13.
1047 *Id.* at *13.
1048 *Id.* at *14.
1049 *Id.* at *15.
1050 *Id.*
1051 *Id.* at 19.
1052 *Id.*
1053 *Id.* **19-20.
1054 *Id.* at *21.
1055 *Id.*

request.[1056] Defendant also sought to exclude statements and documents as inadmissible hearsay and on relevance grounds.[1057] However, because the court did not have any information about the precise testimony and documents at issue, or the context of such evidence, it was unable to properly evaluate the probative value or any potential prejudice for a Rule 403 analysis and therefore denied the motion.[1058]

2. Post-Trial Motions

Post-trial motions are essential in litigation, allowing parties to seek relief after a trial. These motions can address issues like the taxation of costs, judgments as a matter of law, new trials, and amendments to judgments. The following cases illustrate the application and outcomes of post-trial motions, highlighting the standards courts use when ruling on them.

In a FY 2024 case from the Western District of Pennsylvania,[1059] the EEOC filed a motion to review the clerk's taxation of costs, questioning the denial of costs for private process server fees. The court upheld the clerk's decision, citing guidelines that disallow such costs unless the U.S. Court of Appeals for the Third Circuit decides otherwise. The jury had found in favor of the EEOC on a race discrimination claim, but the clerk excluded private process server fees from the awarded costs.[1060] The EEOC moved for review of the clerk's taxation pursuant to Federal Rule of Civil Procedure 54(d)(1), which generally favors awarding costs to the prevailing party. However, the court emphasized that 28 U.S.C. §1920 only allows recovery for the marshal's fee for service of process, not private process servers.[1061]

In a case from the District of Colorado,[1062] the EEOC challenged an employer's "full duty" policy for its disparate impact on disabled employees. The jury found a disparate impact but no pattern or practice of discrimination, limiting the EEOC to equitable relief.[1063] The EEOC filed for an interlocutory appeal.

In post-trial motions, the defendant argued that the EEOC lacked standing to pursue a disparate impact claim because the only available remedy was a prospective injunction.[1064] The defendant contended that the standards, criteria, or methods of administration found to have a disparate impact had been discontinued in 2015, prior to the litigation.[1065]

The court rejected this argument, affirming the EEOC's standing. The court found that the EEOC could pursue the claim despite the discontinuation of the policies, as the voluntary cessation exception to mootness did not apply to standing at the outset of litigation.[1066] The defendant sought reconsideration of the court's denial of its Rule 50(b) motion, arguing that the court had not addressed all substantive arguments from its initial Rule 50(a) motion. The court granted the motion in part, addressing the defendant's arguments regarding the full-duty policy and its disparate impact on disabled individuals.[1067] The court upheld its previous legal conclusions from the summary judgment phase, finding sufficient evidence on record to support the EEOC's claims. The EEOC filed a motion for an interlocutory appeal, seeking to challenge the court's rulings on standing and the scope of available remedies, but the motion was denied.[1068]

Courts will not grant a new trial unless the verdict is contrary to the clear weight of the evidence, or to prevent a miscarriage of justice. For instance, in one matter out of the District of Nebraska,[1069] the defendants moved for a renewed judgment as a matter of law, a new trial, or to alter or amend the judgment. The trial found in favor of the EEOC and charging party, who is deaf, and claimed he was not hired due to his disability. The jury found he was

1056 *Id.* **21-22.
1057 *Id.* at **22-29.
1058 *Id.* at *29.
1059 *EEOC v. Coastal Drilling E., LLC*, 2023 U.S. Dist. LEXIS 227226 (W.D. Pa. Dec. 21, 2023).
1060 *Id.* at **2-3.
1061 *Id.* at **8-9.
1062 *EEOC v. W. Distrib. Co.,* 2024 U.S. Dist. LEXIS 17225 (D. Colo. Jan. 31, 2024).
1063 *Id.* at *1.
1064 *Id.* at *2.
1065 *Id.*
1066 *Id.* at *11.
1067 *Id.* at **8-9.
1068 Order Denying EEOCs Motion for Certification of Interlocutory Appeal, *EEOC v. W. Distrib. Co.,* No. 1:16-cv-01727, Docket No. 1156 (filed Sept. 11, 2024).
1069 *EEOC v. Drivers Mgmt., LLC,* 2024 U.S. Dist. LEXIS 92327 (D. Neb. May 23, 2024).

qualified and could perform essential functions, and that the refusal to hire was not based on business necessity. The jury also determined the defendant acted with malice or reckless indifference, awarding damages.[1070]

The defendant argued that the court made several errors justifying a new trial under Rule 59. These errors included granting a partial directed verdict in favor of the EEOC, dismissing some of the defendant's affirmative defenses at summary judgment, admitting evidence of "stray remarks," and excluding evidence of the charging party's job performance after the defendant did not hire him.[1071] In evaluating a motion for a new trial pursuant to Rule 59(a), the key question the court considered was whether a new trial should have been granted to avoid a miscarriage of justice.[1072] Ultimately, the court denied the defendant's motions because it concluded that the verdict was not against the weight of the evidence. Thus, a new trial was not needed to avoid a "miscarriage of justice."[1073]

Courts are not inclined to grant motions for new trial unless there is a "miscarriage of result." In a matter arising out of the Western District of Washington,[1074] an ADA suit was filed on behalf of a charging party who was hired contingent upon a physical examination to determine fitness for a position as a registered nurse at a mental health provider. The defendant rescinded the offer after determining that a leg injury would leave the charging party unable to perform essential job functions. During the trial, the jury asked about the charging party's request for an accommodation and the undue hardship defense. The jury returned a verdict for the defense, agreeing that the defendant had denied employment due to the charging party's disability but also agreeing with the defense regarding the undue hardship of providing an accommodation.[1075]

After the verdict, the EEOC filed a motion for a new trial and judgment as a matter of law on the other two affirmative defenses.[1076] The court reviewed Federal Rule 59(a), which allows for a new trial in jury cases for reasons traditionally accepted in U.S. courts. In the Ninth Circuit, a new trial can be granted if the verdict contradicts the clear weight of the evidence, is based on false or perjured evidence, or to prevent a miscarriage of justice.[1077] The court found that the EEOC's motion failed, both because the court's response to the jury's question was not erroneous and because even if it was, a "miscarriage of justice" did not result.[1078]

L. Remedies

Only one FY 2024 decision involving the EEOC addressed the topic of remedies in depth, and its focus was on the jury's award of monetary and injunctive relief. In *EEOC v. Drivers Management*, the EEOC alleged that the defendants intentionally, and potentially maliciously or recklessly, discriminated against deaf job applicants. This case was tried by a jury, which found in favor of the EEOC and awarded the charging party $335,682.25, plus prejudgment interest and costs.[1079] Based on the jury's findings, the court also issued an injunction requiring the defendants to report the status of particular job applicants biannually to the EEOC.[1080] The defendants moved to stay execution of the injunction and the money judgment without a bond pursuant to Rule 62(a), which the court partially granted.[1081]

With respect to the monetary award, the defendants argued they should not be required to post a bond, as the court should not have any doubt they, as a large and financially secure company, could easily satisfy the judgment. The court agreed on that point.[1082] The court noted its discretion to stay the execution of a judgment without the supersedeas bond typically required by Rule 62(b).[1083] The court then used the following framework for evaluating whether a bond should be waived, which considers: (1) the complexity of the collection process; (2) the amount of time required to obtain a judgment after it is affirmed on appeal; (3) the degree of confidence that the district court has in the availability of funds to pay the judgment, (4) whether the defendant's ability to pay the judgment is so plain that the cost of a bond would be a waste of money, and (5) whether the defendant is in such a precarious

1070 *Id.* at **3-4.
1071 *Id.* at *4.
1072 *Id.* at *5.
1073 *Id.* at *15.
1074 *EEOC v. Telecare Mental Health Servs. of Wash., Inc.*, 2024 U.S. Dist. LEXIS 129247 (W.D. Wash. July 22, 2024).
1075 *Id.* at *4.
1076 *Id.* at *5.
1077 *Id.*
1078 *Id.* at *6.
1079 *EEOC v. Drivers Mgmt., LLC.*, 2024 U.S. Dist. LEXIS 142723 at *1 (D. Neb., Aug. 12, 2024).
1080 *Id.* at **1-2.
1081 *Id.* at *2.
1082 *Id.* at **2-3.
1083 *Id.* at *2.

financial situation that the requirement to post a bond would place other creditors of the defendant in an insecure position.[1084] Focusing on the third and fourth factors, the defendants argued that the injunction should be stayed without bond because they are "one of the largest motor carriers in the country" and could easily satisfy the judgment.[1085] The court agreed, citing evidence presented at trial of the companies' net worth, but invited the EEOC to request a bond if the defendants' financial situation changes while the appeal is pending.[1086]

The court denied the remainder of the motion, however, allowing the injunction to take immediate effect.[1087] Under Rule 62(d), courts may "suspend, modify, restore, or grant an injunction on terms of bond or other terms that secure the opposing party's rights" while appeal is pending from a final judgment that grants an injunction.[1088] Regardless of whether a stay is sought as the district court or the appellate level, courts must evaluate the following the factors before exercising such discretion: (1) whether the applicant for a stay has made a strong showing that it is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.[1089] The third and fourth factors merge in cases where the nonmoving party is the EEOC or another government entity.[1090] Under this framework, the court found the defendants had not met their burden of demonstrating the particular circumstances of this case justify the exercise of a stay.[1091]

As to the first and most important factor, the court found the defendants were unlikely to succeed on appeal.[1092] The defendants' motion had argued that reasonable minds could differ on the issue of causation, which had not been presented to the jury after the EEOC successfully moved the court for a partial directed verdict.[1093] The court disagreed, reasoning that uncontroverted trial evidence—including the defendants' own admission—established that deaf truck drivers with less than six months' experience had been categorically excluded from employment.[1094] The court further found that the Eighth Circuit was unlikely to disregard a binding Federal Motor Carrier Safety Regulation under which the charging party was qualified for work with a waiver of certain physical qualification standards.[1095]

The court determined the second, third, and fourth factors weighed against staying the injunction, as well.[1096] While it recognized that some irreparable harm would necessarily result from the injunction, the court found the defendants failed to present evidence sufficient to quantify the anticipated monetary and administrative costs of complying with its reporting obligations.[1097] Furthermore, the fact that the defendants' recruiters would need to be retrained on properly handling deaf candidates' applications weighed *against* staying the injunction, rather than for it, because the existing policy of excluding deaf candidates was unlawful.[1098]

Finally, the court found the public (and thus, the government's) interest would be harmed by staying the injunction after the EEOC succeeded in proving intentional disability discrimination.[1099] The public has an interest in preventing unlawful disability discrimination, and this interest particularly compels the denial of a stay where the record lacks evidence that the practices at issue have ceased.[1100] The court was concerned by the defendants' belief that they could continue refusing to hire deaf truck drivers with valid exemptions to federal hearing requirements.[1101] This harm to the public interest—combined with the low likelihood of success on appeal—outweighed the potential harm to the defendants and swayed the court to deny their request for a stay of the injunction.[1102]

1084 *Id.*
1085 *Id.* at **2-3.
1086 *Id.* at *3.
1087 *Id.* at **3-10.
1088 *Id.* at *3.
1089 *Id.* at **3-4.
1090 *Id.* at *8.
1091 *Id.* at **4-10.
1092 *Id.* at **4-6.
1093 *Id.* at *4.
1094 *Id.* at **4-5.
1095 *Id.* at **5-6.
1096 *Id.* at **6-10.
1097 *Id.* at **6-8.
1098 *Id.* at *9.
1099 *Id.* at **6-10.
1100 *Id.* at *8.
1101 *Id.*
1102 *Id.* at **8-9.

M. Settlements

EEOC v. Pero Family Farms Food Co.,[1103] involved a dispute about whether language in the consent decree settling the case is required to state that the complaint and all claims are dismissed with prejudice and that the court retains jurisdiction to enforce the terms of the decree. This language is not required in a consent decree, the court held, because under Federal Rule of Civil Procedure 54(a), a consent decree, unlike a settlement agreement, constitutes a final judgment that concludes the case.

The decision cites precedent clarifying the difference between a true consent decree and a settlement: "Like a settlement agreement, a consent decree embodies the parties' contractual agreement, but unlike a settlement agreement, a consent decree constitutes a final judgment."[1104] The court went on to explain that a consent decree "is a hybrid in the law, sharing features of both a voluntary settlement agreement that requires no judicial intervention and a final judgment order that throws the prestige of the court behind the compromise struck by the parties."[1105]

In this case, the court stated, "the Consent Decree expressly provides that it fully and finally resolves all matters in controversy and specifies that the Court retains jurisdiction to enforce it."[1106] Accordingly, the magistrate judge recommended that the court grant the motion for entry of the consent decree, and the district court adopted the magistrate judge's report and recommendation and granted the motion.

The parties in *EEOC v. Sunshine Raisin Corp.,*[1107] filed a joint motion asking the court to stay the proceedings, vacate the remaining deadlines in the scheduling order, and extend the time to file a proposed consent decree or a joint status report regarding settlement negotiations. In determining whether to grant a stay, the court stated, it must weigh various competing interests, including: "(1) the possible damage which may result from granting the stay; (2) the hardship to the parties if the suit is allowed to proceed; and (3) the 'orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay.'"[1108] Assessing these factors, the court found that a stay was appropriate for the purpose of finalizing settlement discussion and granted the parties' motion. The case, which was a class action alleging a sexually hostile work environment, retaliation, and constructive discharge in violation of Title VII, was ultimately settled for $2,000,000.

In *EEOC v. Anant Enterprises, LLC,*[1109] the court denied the parties' joint motion for entry of a consent decree settling an ADA discrimination case. The court noted that, unlike a private settlement agreement, a consent decree is subject to court approval and must meet multiple requirements, including the requirement that the agreement is fair, reasonable, and adequate. The court was concerned that it "would abuse its discretion if it fails to consider a relevant factor that should be given significant weight, considers or significantly weighs an irrelevant or improper factor, or commits a clear error when considering and weighing proper factors."[1110] The court concluded that "due to the limited record in this matter, [it] is concerned any analysis of these necessary requirements could be erroneous or arbitrary without more case-specific details."

Accordingly the court required the parties to provide case-specific information to support the fairness, reasonableness, and adequacy of their agreement, especially as to (1) the relationship between the defendant companies, (2) the employment relationship between the individual who was allegedly discriminated against and the various defendants, (3) the size of the defendants' workforce, (4) the frequency and duration of employee training, and (5) the duration of the court's continuing jurisdiction. The parties ultimately complied with the court's order, and the court granted the revised consent decree and entered judgment dismissing the case.[1111]

1103 *EEOC v. Pero Fam. Farms Food Co., LLC*, 2024 U.S. Dist. LEXIS 172108 (W.D. Mich. Sept. 24, 2024).
1104 *Id.* at *5, *citing Rufo v. Inmates of the Suffolk Cnty. Jail*, 502 U.S. 367, 391 (1992); *Vogel v. City of Cincinnati,* 959 F.2d 594, 598 (6th Cir. 1992).
1105 *Id.* at **5-6, *citing National Ecological Found. v. Alexander*, 496 F.3d 466, 477 (6th Cir. 2007).
1106 *Id.* at *6.
1107 *EEOC v. Sunshine Raisin Corp.*, 2024 U.S. Dist. LEXIS 6832 (E.D. Cal. Jan. 12, 2024).
1108 *Id.* at *3.
1109 *EEOC v. Anant Enters., LLC*, 2023 U.S. Dist. LEXIS 196686 (D. Neb. Nov. 2, 2023).
1110 *Id.* at *5.
1111 Memorandum and Order that the parties' Amended Joint Motion for Entry of Revised Consent Decree (Filing No. 32) is granted. *EEOC v. Anant Enters., LLC*, 8:22cv345, Docket No. 33 (filed Dec. 27, 2023).

N. Recovery of Attorneys' Fees by Employers

Title VII provides that "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person."[1112] By its terms, this provision allows either a prevailing private plaintiff or a prevailing defendant to recover attorneys' fees. The award of attorneys' fees to a prevailing plaintiff, however, involves different considerations from an award to a prevailing defendant. The prevailing plaintiff is acting as a "private attorney general" in vindicating an important federal interest against a violator of federal law, and therefore "ordinarily is to be awarded attorney's fees in all but special circumstances."[1113]

The opposite is true of a prevailing defendant. A prevailing defendant not only is not vindicating any important federal interest, according to the governing standard, but the award of attorneys' fees to prevailing defendants as a matter of course would undermine that interest by making it riskier for "private attorneys general" to bring claims.[1114] Accordingly, before a prevailing defendant may be awarded fees, it must demonstrate that a plaintiff's claim was "frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so."[1115] This stringent standard does not, however, require proof that the EEOC or a private plaintiff acted in bad faith.[1116] A decision to award fees is committed to the discretion of the trial judge who is "on the scene" and in the best position to assess the considerations relevant to the conduct of litigation.[1117]

The last significant EEOC litigation on this issue occurred in 2019 in the Eighth Circuit. In *EEOC v. CRST Van Expedited, Inc.*, the EEOC was required to pay a prevailing employer $3.3 million in attorneys' fees for pursuing a "class" sexual harassment claim after it knew or should have known the claims were frivolous.[1118] In the decade-old lawsuit, the EEOC alleged that the employer engaged in a pattern or practice of discrimination against female truck drivers and driver trainees who claimed they were sexually harassed. The employer prevailed at the district court level in 2009, but, on appeal, the Eighth Circuit held that the EEOC did not owe the company costs and fees because the EEOC's claims had not been dismissed on the merits—but rather for procedural deficiencies. The Supreme Court disagreed, finding that the EEOC can be ordered to pay costs and fees when some or all of its claims are dismissed for failure to satisfy the EEOC's pre-lawsuit requirements, and remanded the matter back to the district court.

On remand, the district court once again held that the company was entitled to attorneys' fees, expenses, and costs. Specifically, the district court applied the *Christiansburg* standard and in an exhaustive, claim-by-claim analysis, determined that the 78 claims dismissed on summary judgment were frivolous, groundless, and/or unreasonable. On appeal, the Eighth Circuit upheld the fee award, finding that the district court did not abuse its discretion in applying the *Christiansburg* standard. The Eighth Circuit agreed that the EEOC's failure to conciliate and investigate the claims was an unreasonable litigation tactic that resulted in frivolous, unreasonable, or groundless claims. In addition, the Eighth Circuit noted that the district court made particularized findings of frivolousness, unreasonableness, and groundlessness as to each individual claim dismissed on summary judgment. The Eighth Circuit also rejected the EEOC's allegation that it sought relief for the remaining women based on the pattern-or-practice burden of proof because the EEOC never actually alleged the company was engaged in "a pattern or practice" of illegal sex-based discrimination. The Eighth Circuit agreed with the district court's reasoning that, "[a]s the master of its own complaint, it was frivolous, unreasonable and/or groundless for the EEOC to fail to allege a pattern-or-practice violation and then proceed to premise the theory of its case on such a claim."[1119]

1112 42 U.S.C. § 2000e-5(k).
1113 *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 416–17 (1978).
1114 *Id.* at 422.
1115 *Id.*
1116 *Id.* at 421.
1117 *EEOC v. Propak Logistics, Inc.*, 746 F.3d 145, 151 (4th Cir. 2014) (quoting *Arnold v. Burger King Corp.*, 719 F.2d 63, 65 (4th Cir. 1983)).
1118 *EEOC v. CRST Van Expedited, Inc.*, 944 F.3d 750 (8th Cir. 2019).
1119 *Id.* at 757.

In regard to company's calculation of attorneys' fees, the Eighth Circuit agreed that the company properly distinguished between costs associated with defending against frivolous, unreasonable, and/or groundless claims and those that did not meet that standard. In doing so, the Eighth Circuit held that the district court is not required "to become a green-eyeshade accountant pour[ing] over the record to calculate each individual claim. Instead, the district court did rough justice by finding that the general method by which [the company] calculated the fees it now seeks was appropriate."[1120]

In a more recent matter, *EEOC v. Stardust Diners, Inc.*, the defendant's former counsel filed a motion for unpaid attorneys' fees.[1121] During the course of representation, counsel sent the defendant monthly invoices, which the defendant never objected to.[1122] Those invoices presented detailed entries of tasks performed and time spent.[1123] The court noted that the defendant's partial payments indicated that the billed rates were reasonable, and both the hourly rate and number of hours were reasonable.[1124] Ultimately, the court granted counsel's request for attorneys except for $320 of the charges requested because the court was unable to evaluate the reasonableness of the request.[1125]

1120 *Id.* at 759 (quoting *EEOC v. CRST Van Expedited, Inc.*, 277 F. Supp. 3d 1000, 1052 (N.D. Iowa 2017) (internal quotations omitted)).
1121 *EEOC v. Stardust Diners, Inc.*, 2023 U.S. Dist. LEXIS 140035, at *1 (E.D.N.Y. Aug. 10, 2023).
1122 *Id.* at *13.
1123 *Id.* at *14.
1124 *Id.* at **14-15.
1125 *Id.*

VI. Appendices

Appendix A – EEOC Consent Decrees, Conciliation Agreements and Judgments[1126]

Select EEOC Settlements in FY 2024-2025

Settlement Amount	Claim	Description	Court	EEOC Press Release
$8.7 million	Race Discrimination	The EEOC alleged a delivery company discriminated against a class of Black employees by assigning them to more dangerous routes and more strenuous work than it did for its white drivers. Under the terms of the four-year consent decree, the company agreed to pay $8.7 million to a class of 83 individuals who chose to participate in the lawsuit, 20 of whom were represented by private counsel. In addition to the financial settlement, the company agreed to use a compliance monitor, a former EEOC commissioner, to oversee compliance with the company's training, investigations, and complaint procedures.	U.S. District Court for the Northern District of Illinois	4/25/2024
$6.875 million	Age Discrimination Disability Discrimination	The EEOC alleged a medical group subjected a class of doctors to a mandatory retirement age irrespective of their ability to perform their job duties. As part of the four-year conciliation agreement, the group agreed to pay $6,875,000 to the class impacted by the policy, rescind the policy, and require leadership and human resources to attend training on the ADA and ADEA.	This settlement was reached during conciliation before the EEOC filed a lawsuit on the merits.	12/19/2023
$3.1 million*	Sex Discrimination	The EEOC alleged four waste removal companies systematically failed to hire women as truck drivers. Under the terms of the consent decree, the defendants, acting as a single employer, agreed to revise its recruitment policies and practices, in addition to paying $3.1 million to a group of female job seekers who were not hired between January 1, 2016, and the date of settlement. The new recruitment policies will involve the collection of job applicants' gender data, creating recruitment materials with pictures of women, and sharing job postings with women's professional organizations. The employer will also conduct trainings, and provide employees with instructions on how to file complaints through an online reporting portal.	U.S. District Court for the Northern District of Georgia	10/21/2024

1126 Littler monitored EEOC press releases regarding settlements, jury verdicts, and judgments entered in EEOC-related litigation during FY 2024 and the early months of FY 2025. The significant consent decrees and conciliation agreements in Appendix A include those amounting to $500,000 or more. Notable conciliation agreements are included in the shaded boxes. FY 2025 settlements are marked with an asterisk (*). Appendix A also includes notable jury verdicts and/or judgments.

$2.4 million	Age Discrimination	EEOC alleged that a pharmaceutical company engaged in a nationwide pattern or practice of refusing to hire individuals 40 and older for sales positions because of age when it announced a goal of 40% “early career hiring” as part of an effort to increase the number of millennials in the company’s workforce. The EEOC also alleged company managers altered their hiring practices in favor of younger candidates. Under the terms of the 2.5-year consent decree, the company agreed to pay $2.4 million to 1,980 aggrieved individuals, in addition to injunctive relief.	U.S. District Court for the Southern District of Indiana	n/a
$2.2 million	Race, National Origin, Sex, and Disability Discrimination	The EEOC alleged a staffing agency discriminated against Black, Asian, white and other non-Hispanic workers, male and female workers, and workers with disabilities in hiring. Specifically, the EEOC alleges the employer failed to recruit and refer these workers for low-skill jobs based on race, sex, and disability, and steered workers into certain positions based on their sex. Under the terms of the consent decree, the company agreed to pay $2.2 million to the class, hire a third-party monitor, provide training, creating reporting mechanisms, and update policies and procedures.	U.S. District Court for the Central District of California	4/9/2024
$2 million	Sex Harassment Retaliation	The EEOC alleged the company subjected a class of female agricultural workers to a sexually hostile work environment and threatened retaliation for those who did not acquiesce to the harassment. Under the terms of the three-year consent decree, the company will pay $2 million to the class, hire a third-party monitor, conduct training, update its policies and procedures, provide periodic reports to the EEOC, and institute reporting mechanisms.	U.S. District Court for the Eastern District of California	3/12/2024
$1.6 million	Race Harassment Retaliation	The EEOC alleged the company subjected a class of Black and Hispanic employees to a racially hostile work environment, and allocated humiliating and degrading tasks based on race and national origin. The EEOC also alleged the company retaliated against two employees who complained by terminating their employment. Under the terms of the three-year consent decree, the company agreed to a monetary payment of $1.6 million to 17 employees, create an employee relations complaint hotline, and provide training to employees on harassment. The company also agreed to conduct work environment surveys to ensure work assignments are not based on protected categories.	U.S. District Court for the Middle District of Florida	8/27/2024
$1.6 million*	Sex Discrimination	The EEOC alleged a security company engaged in systemic sex discrimination in hiring and job assignments since at least 2017. Under the terms of the three-year consent decree, the company agreed to pay $1.6 million in monetary relief to the class of women who were denied certain positions based on their sex. The company further agreed to delete all directives not to hire or select women because of sex, and will conduct training and provide reports on compliance to the EEOC.	U.S. District Court for the Northern District of Alabama	3/10/2025

$1.5 million*	Sex Discrimination	The EEOC alleged a furniture company unlawfully failed to hire women for certain warehouse and delivery positions. Under the terms of the consent decree, the company agreed to pay the charging party $33,000 in back pay and $40,000 in damages, and pay an additional $1.4 million to a settlement fund to be distributed to class members (women who were not hired for certain positions between May 1, 2021 and May 31, 2024). The company also agreed to change its hiring practices to not exclude women; notify class members of any open positions and not retaliate against them for participating in the litigation; employ an employment attorney to provide anti-bias training, review the company's hiring data, and make period reports to the EEOC; and create a hotline for reporting incidents of discrimination.	U.S. District Court for the Middle District of Florida	1/13/2025
$1.4 million*	Race and National Origin Harassment and Discrimination	The EEOC alleged the defendant failed to address harassment against Black and Haitian employees. Under the terms of the consent decree, in addition to the $1.4 million monetary settlement, the company agreed to hire a compliance officer to ensure adherence to EEO laws, review and revise its policies and procedures regarding harassment, discrimination and retaliation, and conduct annual training for its supervisors.	U.S. District Court for the Middle District of Florida	n/a
$1.4 million*	National Origin Discrimination	The EEOC alleged a hotel employer discriminated against non-Japanese employees by providing them less favorable wages, benefits, and terms and conditions of employment than their Japanese counterparts. In addition to paying affected employees $1,412,500 in monetary damages, the employer agreed to hire an external EEO monitor to oversee compliance, training and review of policies/procedures, and reinstatement of former employees interested in being rehired. The monitor will also conduct periodic audits for the consent decree's three-year term.	U.S. District Court for the Territory of Guam	2/18/2025
$1.25 million	Race Discrimination and Harassment	The EEOC alleged a company subjected 12 Black former employees and a class of similarly situated workers to frequent and severe harassment based on their race. Under the terms of the three-year consent decree, the company agreed to provide $1.25 million in monetary relief, provide training on race discrimination to management and HR officers, appoint an outside monitor to review complaints of race-based harassment, and provide reports to the EEOC on harassment complaints and how the company addressed them.	U.S. District Court for the Middle District of Florida	8/28/2024
$1.25 million	Disability Discrimination Failure to Accommodate	The EEOC alleged a staffing company failed to place or refer blind or low-vision job applicants as telephone-based customer service agents. Under the terms of the three-year consent decree, the company will provide $1.25 million to two charging parties and a class of 116 aggrieved individuals, be enjoined from refusing to provide individuals with disabilities access to the company's job board based on the need to use adaptive technology, will provide training on the ADA, revise its policies and procedures regarding reasonable accommodations, and appoint an internal ADA coordinator and external monitor to ensure compliance.	U.S. District Court for the Western District of Texas	8/8/2024

$1.1 million	Race, National Origin, and Sex Discrimination	The EEOC alleged a company failed to recruit and hire workers for low-skill positions based on race and national origin, and segregated jobs based on sex. Under the terms of the consent decree, the company agreed to establish a recruitment plan and meet hiring goals to recruit, hire, or place workers that reflects the percent of non-Hispanic hires that would be expected based on the labor pool. The company also agreed to provide periodic reports to the EEOC, designate an internal EEO coordinator, implement new EEO policies and procedures, provide training, establish a centralized tracking system for all complaints, among other forms of injunctive relief.	U.S. District Court for the Central District of California	8/7/2024
$1 million	Disability Discrimination Retaliation	The EEOC alleged that the defendant failed to provide communications accommodations, including sign language interpreters, for deaf and hard-of-hearing employees, and maintained a policy of firing employees who requested medical leave but did not qualify for leave under the FMLA. Under the terms of the five-year consent decree, the defendant agreed to pay $1,017,500 to approximately 140 current and former employees who were denied accommodations, and former employees who were fired for requesting medical leave. The company will also update its policies related to leave and reasonable accommodation and provide training to its management employees.	U.S. District Court for the District of Maryland	7/1/2024
$1 million	Disability Discrimination Genetic Information Discrimination	The EEOC alleged defendant's hiring process violated the ADA and GINA by requiring applicants to pass a pre-employment medical exam, during which they were required to divulge past and present medical conditions. The EEOC also alleged the defendant used qualification criteria that screened out qualified individuals with disabilities. Under the terms of the 27-month consent decree, the defendant agreed to pay $1 million to 498 applicant class members, review and revise its ADA and GINA policies, direct its medical examiners not to request family medical history, consider the medical opinion of the applicant's physician, instruct applicants how to request a reasonable accommodation if needed, and provide training.	U.S. District Court for the Northern District of Alabama	10/19/2023
$875,000	Sex Discrimination	The EEOC alleged a staffing agency engaged in a pattern of discrimination against women by honoring requests from clients for male workers only, and dissuaded some of its recruiters who objected to this practice. Under the terms of the three-year consent decree, the company agreed to pay $875,000 to approximately 1,060 eligible claimants, retain an independent consultant to draft and implement policies and procedures prohibiting sex discrimination, and retain a third party to conduct training, among other forms of injunctive relief.	U.S. District Court for the Western District of Washington	8/7/2024
$600,000	Sexual Harassment Retaliation	The EEOC alleged a restaurant's line cook sexually harassed female employees, which led one employee to quit, and that the employer did not take prompt or effective remedial action. Under the terms of the three-year consent decree, the company agreed to pay $600,000 to four former employees. In addition, the company will hire a third-party EEO expert to review company policies and assist with investigations and conduct training for 12 company locations.	U.S. District Court for the Western District of Washington	4/22/2024

$520,000	Disability Discrimination	The EEOC alleged the company violated the ADA by requiring employees to take an Essential Functions Test (EFT) upon hire, annually, and upon return from medical leave, even when portions of the test were not job-related. Failure to pass any portion of the test would result in termination of employment. Under the terms of the three-year consent decree, the company agreed to pay $520,000, provide reasonable accommodations to individuals with disabilities during the administration of the test, refrain from taking adverse action against any employee who complains about the EFT, refrain from firing an employee based solely on the EFT's test results, and conduct training on the ADA.	U.S. District Court for the Western District of Arkansas	2/14/2024
$515,000	Disability Discrimination Genetic Information Discrimination	The EEOC alleged defendant discriminated and retaliated against employees with hemophilia. According to the EEOC's complaint, the pharmacy defendant inquired about employee disabilities and genetic information and pressured employees with hemophilia to fill their prescriptions though the company, and fired employees who refused. Under the terms of the two-year consent decree, the company agreed to pay $515,000 to a class of affected employees, create an anonymous platform through which employees can lodge complaints, and provide yearly training on the ADA and GINA's anti-discrimination and retaliation provisions. The company must also revise its anti-discrimination policy for the EEOC's review, and refuse hire or contract with a former CEO for the duration of the consent decree.	U.S. District Court for the District of Colorado	6/14/2024
$500,000	Race Discrimination National Origin Discrimination Retaliation	The EEOC alleged the employer subjected Black and Latino employees to race- and national origin-based harassment and retaliated against employees who complained by moving them to the night shift or terminating their employment. As part of the three-year consent decree, the employer agreed to pay $500,000 to aggrieved employees, retain an outside consultant or legal counsel to review and revise the company's policies and procedures, provide training, and establish a complaint hotline.	U.S. District Court for the District of Arizona	12/20/2023
$500,000	Age Discrimination	The EEOC alleged a company declined to hire employees over age 40 and directed recruiters not to refer applicants with over 25 years of experience. Under the terms of the consent decree, the company will pay $130,000 to the charging party and $370,000 to seven other claimants who were rejected on account of age. The company also agreed to provide specialized training to workers who participate in the recruitment and hiring process, create anti-discrimination policies and complaint procedures, prohibit the vice president of a particular branch office from making final decisions regarding candidate interviews and job selection, and comply with mandatory reporting and EEOC monitoring requirements.	U.S. District Court for the District of New Jersey	7/19/2024

$500,000	Sex Harassment Retaliation	The EEOC alleged a staffing company engaged in sexual harassment and retaliation of a class of agricultural workers. Under the terms of the three-year consent decree, the company agreed to pay $500,000 as well as track complaints, train management and human resources personnel on how to prevent and address sexual harassment, train workers on their Title VII rights, and agree to EEOC monitoring.	U.S. District Court for the Eastern District of California	7/25/2024

Select EEOC Jury Awards or Judgments in FY 2024[1127]

Jury or Judgment Amount (before application of damages cap)	Claim	Description	Case Citation
$2,170,000	Sexual Harassment	The EEOC alleged an airline did not take sufficient action when an employee complained of sexual harassment. The complaint also alleged the defendant retaliated against the employee after she complained by placing her on indefinite leave. The jury did not address the retaliation claim, but found the employer failed to act on the employee's complaints. She was awarded $170,000 in compensatory and $2 million in punitive damages. This amount is subject to the $300,000 damages cap.	*EEOC v. SkyWest Airlines Inc., No. 3:22-cv-01807 (N.D. Tex. Nov. 20, 2024)*
$1,675,000	Disability Discrimination	The EEOC alleged a company failed to interview and hire a job applicant on account of her disability (deafness). The jury awarded the charging party $25,000 for lost wages and benefits, $150,000 in non-pecuniary compensatory damages, and $1.5 million in punitive damages. This amount was subject to the statutory damages cap. In a post-trial ruling, the court reduced the combined compensatory and punitive damages to the statutory cap of $300,000 and awarded over $8,000 as additional compensation for the negative tax consequences of receiving lump sum backpay.	*EEOC v. McLane Co., No. 5:20-cv-1528 (N.D.N.Y. Feb. 9, 2024)*
$110,000*	Sexual Harassment	The EEOC alleged a government contractor unlawfully fired an attorney in retaliation for refusing his advances. The court entered a partial default judgment in favor of the EEOC after the defendant failed to meaningfully participate in discovery. The defendant was ordered to pay $43,903 in lost wages and benefits, overtime, bonuses, paid time off, insurance and medical benefits, and coverage for late rents and fees incurred due to lost employment. The court also added an additional $16,234, which amounted to 6% interest on the attorneys' fee award, and $50,000 for compensatory damages.	*EEOC v. Key Management Partners, Inc., No. 8:21-cv-02496 (D. Md. Oct. 24, 2024)*

1127 Judgments and verdicts entered into in FY 2025 are denoted with an asterisk (*).

Appendix B – FY 2024 EEOC Amicus and Appellant Activity[1128]

FY 2024 – Appellate Cases Where the EEOC Filed an Amicus Brief[1129]

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis / Issue / Result
Stanley v. City of Sanford, Florida	U.S. Supreme Court No. 23-997	9/23/2024 (amicus filed)	ADA	Disability **Result:** Pending
Background: The City of Sanford employed the plaintiff as a firefighter. During her employment, the City adopted a policy shortening the duration of a post-employment health-insurance subsidy it provides to employees who retire on account of disability. After the plaintiff retired because of a disability, she filed suit alleging that the policy violates the Americans with Disabilities Act of 1990. Specifically, she alleged that the City's benefits policy "contain[ed] a disability-based distinction and [wa]s discriminatory on its face" because it provided the health insurance subsidy to "disabled retirees" for "only up to 24 months." The plaintiff argued that by "taking away the [subsidy] before age 65 from its disabled retirees," the City had violated the ADA. The district court granted the City's motion to dismiss on the grounds that any alleged discrimination occurred only after she had retired and thus was no longer performing the essential functions of the position. The appellate court affirmed. **Issues EEOC is Addressing as Amicus:** Whether the court of appeals erred in holding that the plaintiff cannot challenge the City of Stanford's allegedly discriminatory post-employment benefits policy because the benefits were paid after the plaintiff was no longer employed. **EEOC's Position:** Former employees may enforce Title I if they suffer prohibited discrimination and file a timely charge. The plaintiff has alleged discrimination "against a qualified individual" because she held a job and performed its essential functions when the City adopted and maintained its allegedly discriminatory policy. The court of appeals erred in holding that the plaintiff cannot base her claim on allegedly discriminatory acts that occurred while she was employed. Title I does not require the victim of disability-based discrimination to have a disability at the time of the alleged discrimination, and even if Title I required the victim of disability-based discrimination to have a disability at the time of the alleged discrimination, that requirement was satisfied in this case. Namely, the plaintiff alleges that the City maintained a facially discriminatory benefits policy as part of the terms and conditions of her employment throughout her post-2003 tenure—including the period after she was diagnosed with Parkinson's disease in 2016, during which it eventually became apparent that the plaintiff would be forced to take disability retirement. Finally, the appellate court erred in holding that a Title I plaintiff must hold or desire a job at the time of the alleged discrimination. **Court's Decision:** Pending				
Lambert and Shanks v. International Union of Bricklayers	U.S. Court of Appeals for the D.C. Circuit 23-7141, 23-7145	9/13/2024 (amicus filed)	Title VII	Race **Result:** Pending
Background: The plaintiffs in these consolidated cases allege that their employer, International Union of Bricklayers & Allied Craftworkers ("BAC"), enforced a policy that caused a disparate impact on Black employees by requiring that all employees be vaccinated against COVID-19 (or obtain a religious or disability-based exemption), by the same deadline, although, they claimed, most Black employees received less information and considerably less time to meet the deadline than did most white employees. The district court dismissed both cases on the pleadings, holding that the plaintiffs could not state a claim because they had voluntarily chosen not to get vaccinated, despite purportedly having an equal opportunity to do so. **Issues EEOC is Addressing as Amicus:** Whether the lower court erred by requiring proof rather than plausible allegations that BAC's vaccination policy had a disparate impact on Black employees, and suggesting that any individuals who "voluntarily" did not comply with the policy cannot establish causation in a disparate impact case. **EEOC's Position:** The plaintiffs pled plausible disparate impact claims—a disparate-impact plaintiff does not have to plead a prima facie case or provide proof that they would prevail at summary judgment or trial to survive a motion to dismiss. Here, the plaintiffs plausibly alleged that BAC's policy mandating that all employees be vaccinated or excused by the same deadline—despite different compliance periods and unequal information—caused an unlawful disparate impact on Black employees. Because they satisfied their pleading requirements, their cases should not have been dismissed at the outset. **Court's Decision:** Pending				

1128 The information included in Appendix B, *"FY 2024–Appellate Cases Where the EEOC Filed an Amicus Brief" and "FY 2024–Appellate Cases Where the EEOC Filed as the Appellant,"* were pulled from the EEOC's publicly available database of appellate activity *available at* http://www1.eeoc.gov/eeoc/litigation/briefs.cfm. Appendix B includes select cases from this database. The cases are arranged in order by circuit.

1129 As of March 1, 2025, the cases listed as "pending" were still in that status.

Lucas v. AFGE	U.S. Court of Appeals for the D.C. Circuit No. 23-7051	2/16/2024 (amicus filed)	Title VII ADA	Sex Disability Harassment **Result:** Pending

Background: Plaintiff, a former federal employee, brought claims of sex and disability discrimination and retaliation under Title VII and the ADA against her national and local unions. Plaintiff alleged that her local union president sexually harassed her, and then retaliated against her when she complained, that the national union failed to remedy the harassment, and that the unions otherwise discriminated against her based on her sex and disability. The district court dismissed the plaintiff's claims for lack of jurisdiction, finding that the Civil Service Reform Act gave the Federal Labor Relations Authority exclusive jurisdiction over "unfair representation" claims against federal employee unions, and that because the plaintiff's Title VII and ADA claims were premised on the same conduct as her previously pursued unfair representation claims, the FLRA had the exclusive jurisdiction to hear those claims.

Issues EEOC is Addressing as Amicus: (1) Whether federal courts have jurisdiction over Title VII and ADA claims against federal employee unions; and (2) Whether Title VII and the ADA prohibit unions from harassing their members or failing to remedy union agents' harassment of members based on protected traits.

EEOC's Position: The EEOC argues that federal courts have jurisdiction over Title VII and ADA claims against federal employee unions, even when those claims are premised on conduct that could also support unfair representation claims under the Civil Service Reform Act of 1978. The EEOC contends that Title VII and the ADA prohibit a broader range of discrimination than the CSRA because those statutes extend protections to discrimination against any individual, whereas the CSRA only requires a duty of fair representation for employees in the unit the union represents. In addition, the EEOC noted that the CSRA limits its prohibition on sex or disability discrimination to issues "with regard to the terms or conditions of membership in the labor organization," and not to any conduct beyond that scope. Thus, the EEOC claims that a union's conduct may constitute discrimination even when it does not constitute unfair representation. The EEOC noted that the standard for proving unfair representation under the CSRA is more rigorous than Title VII and the ADA because courts generally accord deference to a union in the labor context but argues that there is no reason to grant unions the same deference when it comes to analyzing claims of discrimination. The EEOC also noted that the statutes of limitation are different (and shorter) under the CSRA, and that Title VII and the ADA offer broader potential remedies. The EEOC further argues that should the court reach the issue, it should hold that unions may be liable for harassing their members or failing to remedy such harassment by union agents, because the language of Title VII and the ADA plainly encompasses this conduct.

Court's Decision: Pending

Sutherland v. Peterson's Oil Service, Inc.	U.S. Court of Appeals for the First Circuit No. 24-1431	7/29/2024 (amicus filed) 1/16/2025 (decided)	ADA	Disability Retaliation **Result:** Pro-Employee

Background: The plaintiff was a service technician for the defendant and was responsible for maintaining and repairing heating and air conditioning systems at customers' homes. During his interview, the plaintiff negotiated with the defendant not to perform water heater installations or take on-call shifts. A few months later, the plaintiff injured his knee, and he informed his dispatcher when the swelling and pain interfered with his work. The plaintiff asked the defendant to limit his hours to 40 hours a week to help deal with his pain and offered to provide any medical documentation necessary to support his request. The defendant states HR told dispatchers and the plaintiff's supervisor to do their best to accommodate his request, but the plaintiff alleges the defendant continued to require him to work beyond 40 hours per week. The plaintiff then provided documentation from his doctor stating he could not work more than six hours per day or five days per week; the plaintiff alleges the defendant ignored this restriction. The plaintiff then provided documentation from his surgeon stating he would have knee surgery and would be unable to work for eight weeks. Following the surgery, the plaintiff's doctor cleared him to return to work without restrictions on April 20. On April 8, in preparation for his return, the plaintiff attempted to speak with HR, but ultimately was unable to do so. The plaintiff then received a letter dated May 26, informing him that his employment was terminated effective April 20. The plaintiff filed his complaint against the defendant for disability discrimination and retaliation under the ADA, alleging the defendant failed to accommodate his disability, terminated his employment because of his disability, and retaliated against him for requesting and/or utilizing a reasonable accommodation. The district court granted the defendant's motion for summary judgment, finding the plaintiff failed to show he was disabled within the meaning of the law, as his injury was temporary, he was able to work without restrictions following his surgery, and he did not present enough evidence of his impairment. Even if the plaintiff had a covered disability, the court found he failed to establish he could perform his duties with or without a reasonable accommodation because his accommodation requests were unreasonable given his position. The court also found the plaintiff failed to produce evidence showing he expressly made a request for a reasonable accommodation and linked that accommodation to his disability. Lastly, the court dismissed the plaintiff's retaliation claims, finding they were identical to his failure-to-accommodate claims.

Issues EEOC is Addressing as Amicus: (1) Whether the district court erred when it applied a pre-ADAAA standard in concluding the plaintiff was not disabled within the meaning of the ADA; (2) Whether the district court erred in concluding the plaintiff failed to establish he expressly made an accommodation request that was linked to a disability; and (3) Whether the district court erred in dismissing the plaintiff's retaliation claim and finding it was identical to his failure to accommodate claims.

EEOC's Position: The EEOC argues a reasonable jury could find that the plaintiff is disabled under the meaning of the ADA because he meets all three subparts of the ADA's disjunctive definition: (1) he produced evidence showing he had a physical impairment that substantially limited one or more major life activities, (2) he had a record of such impairment, and (3) the defendant regarded him as having an impairment. Congress enacted the ADAAA to reject the overly strict standard the Supreme Court previously applied to determine which impairments were substantially limiting enough to qualify as disabilities under the ADA. Moreover, pursuant to the ADAAA, covered impairments no longer need to be permanent or long-term. Thus, the plaintiff did not need additional medical documentation at the summary judgment stage to establish his disability under the ADA, as he sufficiently provided a description of his limitations and pain along with contemporaneous statements to his dispatcher. The court also incorrectly applied pre-ADAAA case law to require the plaintiff to show the defendant regarded him as having an impairment that substantially limits major life activities, when the ADAAA does not require the plaintiff to prove that the impairment limits or is perceived to limit a major life activity. The EEOC also argues a reasonable jury could find the plaintiff could perform the essential functions of his job with or without reasonable accommodation and that his requested accommodations were reasonable. A reasonable jury could find that the defendant did not view working on-call duty or performing installations as essential functions, as it agreed to not require the plaintiff to do them at his interview, before the plaintiff was injured. The court also incorrectly interpreted the evidence in the defendant's favor when ruling on whether his request to work fewer hours was reasonable, when the disputed factual issue should have gone to a jury.

The EEOC also argues a jury could have found the plaintiff sufficiently requested a reasonable accommodation, as he clearly requested an accommodation on multiple occasions and tied those requests directly to his disability, and it was the employer's responsibility to then begin the interactive process.

Lastly, the plaintiff's failure-to-accommodate claim and retaliation claims are not necessarily duplicative because a reasonable jury could have found that the defendant was willing to accommodate the plaintiff's requests for reduced hours and medical leave initially, but subsequently terminated him in retaliation for having availed himself of those accommodations. Additionally, a reasonable jury could have found the temporal proximity between the plaintiff's request for an accommodation and his termination are sufficient to create an inference of causation.

Court's Decision: The appellate court vacated the lower court's judgement in part, affirmed in part, and remanded. Specifically, the court vacated the grant of summary judgment to the employer as to the discrimination and retaliation claims under the ADA, and as to the discrimination and failure to accommodate claims under state law. The court affirmed the grant of summary judgment on the plaintiff's wrongful termination claim based on an alleged violation of Massachusetts public policy, and remanded. "This case raises important questions about the governing standard for disability claims under the Americans with Disabilities Act (ADA), and the relationship between discrimination, retaliation, and failure to accommodate claims under that statute. Because we conclude that Sutherland provided sufficient evidence to survive summary judgment on his disability-related claims under the operative legal standard, we vacate in part and remand."

Tudor v. Whitehall Central School District	U.S. Court of Appeals for the Second Circuit No. 23-665	3/21/2024 (amicus filed) 3/25/2025 (decided)	ADA	Disability **Result:** Pro-Employee

Background: The plaintiff is a full-time teacher with the defendant and requested to take two 15-minute breaks each day to leave school grounds as an accommodation for her PTSD that she developed after experiencing workplace sexual harassment and assault in a prior job. The defendant allowed her to take a break to leave school grounds every morning, but the parties dispute whether she received the same accommodation in the afternoons. The defendant claims it assigned her to an unpopulated study hall, while the plaintiff argues the study hall was not always unpopulated, and she did not feel she was allowed to leave school grounds; when she did occasionally leave, she was worried she would get in trouble. In discovery, the plaintiff admitted that despite not receiving her accommodation request, she has been able to perform the essential functions of her job, but only under "great duress and harm." The district court granted the defendant's motion for summary judgment, finding the plaintiff failed to establish the third element of her failure-to-accommodate claim – that she could perform the essential functions of her job with a reasonable accommodation – because the plaintiff was able to perform the essential functions of her job despite allegedly not receiving her requested accommodation.

Issues EEOC is Addressing as Amicus: Whether an employee can establish a failure-to-accommodate claim when she can perform the essential functions of her job without a reasonable accommodation, but the reasonable accommodation is necessary to minimize disability-related pain and suffering in performing essential job functions.

EEOC's Position: There is no basis in statutory text or regulations to hold an employer need not provide a reasonable accommodation if the qualified individual is able to perform the essential functions of her job without one. The ADA requires employers to reasonably accommodate the "known physical or mental limitations" of a "qualified individual" with a disability if the failure to do so would affect the "terms, conditions, and privileges of employment." Failing to provide an accommodation by forcing an employee to work with disability-related pain and suffering affects the "terms" and "conditions" of their employment. An employer must provide a reasonable accommodation to a qualified individual, not only when they need a reasonable accommodation to perform the essential functions at all, but also when they need a reasonable accommodation to perform the essential functions with less disability-related pain or suffering. Thus, a plaintiff's ability to endure disability-related pain and suffering in the performance of the essential functions of the job is not fatal to a failure-to-accommodate claim, and the court failed to consider the plaintiff's suffering as a result of the defendant's alleged failure to accommodate her disability. The EEOC also argues that requiring employers to provide reasonable accommodations to qualified individuals with disabilities who can perform the essential functions of the job by enduring pain and suffering will not open the door to meritless claims, as the statute still requires the requested accommodation be reasonable, effective, and not unduly burdensome.

Court's Decision: The appellate court vacated and remanded the district court's decision, holding, "A straightforward reading of the ADA confirms that an employee may qualify for a reasonable accommodation even if she can perform the essential functions of her job without the accommodation.... [A]ccommodations that are not strictly necessary for an employee's performance of essential job functions may still be reasonable and therefore required by the ADA."

Cornelius v. CVS Pharmacy Inc.	U.S. Court of Appeals for the Third Circuit No. 23-2961	1/29/2024 (amicus filed) 4/2/2025 (decided)	Title VII	Sex Harassment **Result:** Pro-Employer

Background: The plaintiff, a female store manager, alleged her male supervisor subjected her to severe and pervasive negative treatment because she was a woman and treated men more favorably. She complained to the defendant about her supervisor's conduct and the hostile work environment, but alleged the defendant did not address her concerns. After the plaintiff filed a complaint against the defendant for Title VII hostile work environment, the defendant moved to dismiss her complaint and compel arbitration pursuant to the parties' predispute arbitration agreement. The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (EFAA) allows a plaintiff alleging conduct constituting a sexual harassment or sexual assault dispute bring her claims in court even if there is a predispute arbitration agreement. The district court granted the defendant's motion to compel arbitration and dismissed the plaintiff's complaint with prejudice, finding the EFAA did not apply to the plaintiff's claims because she did not allege facts to suggest her supervisor's actions were motivated by sexual desire. The district court found the EFAA applied only to claims of sexual harassment, not sex or gender discrimination.

Issues EEOC is Addressing as Amicus: (1) Whether a plaintiff seeking to resolve her sexual harassment dispute in court rather than in arbitration needs to allege sexual advances or actions motivated by sexual desire for the EFAA to apply in a Title VII lawsuit; and (2) Whether the plaintiff sufficiently pleaded a Title VII sexual harassment claim for the EFAA to apply.

EEOC's Position: The EEOC argues the district court erred in applying the wrong standard for determining the definition of a "sexual harassment dispute," and that the Title VII sexual harassment standard governs whether a plaintiff alleged a "sexual harassment dispute" under the EFAA in a Title VII lawsuit. Title VII does not require a plaintiff to allege sexual advances, overtly sexual words or actions, or that the harasser was motivated by sexual desire, to plead a sexual harassment claim. The district court misunderstood the Third Circuit's decision in *Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257 (3d Cir. 2001), on which the district court relied, as *Bibby* expressly acknowledged that Title VII sexual harassment does not require sexual motivation. The court failed to analyze whether the plaintiff's complaint pled the elements for Title VII sexual harassment. The EEOC argues the plaintiff's complaint does sufficiently plead sexual harassment, as she alleged her supervisor targeted her and subjected her to ongoing abuse because of her sex, including sending her rude and disrespectful text messages, treating her like a child, permitting a male employee to engage in conduct and receive benefits her supervisor repeatedly denied the plaintiff, undermined her work, and forced her to work up to 80 hours per week, in stark contrast to his treatment of men. As a result, the EFASASHA applies to the plaintiff's claims, and she should be permitted to continue her claim in court.

Court's Decision: The court affirmed in part, vacated in part, and remanded. The court held that the EFAA's carveout for sexual harassment claims does not apply because the plaintiff's dispute arose before carveout's effective date. The court vacated the lower court's dismissal order, however, and remand for consideration of whether discovery into the validity of the arbitration agreement is warranted under Rule 56(d) and for consideration of the plaintiff's legal challenges to the arbitration agreement under New Jersey law.

Minniti v. Crystal Window & Door Systems PA, LLC	U.S. Court of Appeals for the Third Circuit No. 21-3132	4/22/2024 (amicus filed) 10/2/2024 (decided)	Title VII	Retaliation **Result:** Pro-Employee

Background: The plaintiff worked as a plant manager for the defendant and was tasked with making the manufacturing plant more profitable. However, the COVID-19 pandemic hit a few months after the plaintiff was hired, affecting shipping inventory to customers, causing the plaintiff to be furloughed. Soon after the plaintiff returned from his furlough, he received a detailed list of concerns from his supervisor regarding a lack of progress in the plant's financial situation. The plaintiff's boss visited the plant shortly thereafter and instructed the plaintiff to terminate two employees after learning they were absent from work. The plaintiff responded by informing his boss they were both out on excused absences and would bring in doctors' notes pursuant to company policy upon their return. The plaintiff also informed his boss they were the only two Black employees at the plant. The plaintiff did not terminate their employment and later complained to HR that he was worried he would be fired if he did not comply. When his boss followed up with the plaintiff a few days later, the plaintiff stated he did not fire the employees. Shortly thereafter, the defendant terminated the plaintiff's employment. The plaintiff's termination letter stated his termination was part of a set of layoffs to ensure the financial stability of the company. The defendant, however, later maintained it fired the plaintiff for performance reasons.

The district court granted the defendant's motion for summary judgment, finding the plaintiff's statements to his boss and refusal to carry out the order were too equivocal to constitute protected activity and cannot reasonably be interpreted as having opposed unlawful racial discrimination. Because the plaintiff did not explicitly articulate a contemporaneous belief that his boss was motivated by race discrimination when he directed the plaintiff to fire the employees, no reasonable person could subjectively or objectively have believed the plaintiff was opposing discrimination. The plaintiff merely stated it would look bad, not that it would be discriminatory to do so. Because the court ruled the plaintiff failed to establish a prima facie case of retaliation, it did not rule on whether he presented sufficient evidence of pretext. However, the court observed "there are significant reasons to question" whether the defendant's proffered reason for his termination was pretext, detailing the evidence in a footnote.

Issues EEOC is Addressing as Amicus: (1) Whether the plaintiff engaged in protected activity under Title VII when he stated his opposition to, and refused to carry out, the firing of the only two Black employees at the plant he managed when they did not report to work; and (2) Whether the plaintiff provided sufficient evidence to support a reasonable jury finding the defendant terminated him in retaliation for his protected activity.

EEOC's Position: A jury could find the plaintiff engaged in protected opposition under Title VII when he voiced his disagreement with his boss's direction to fire the plant's only two Black employees, reported his discomfort with the order and its racial implications to HR, and refused to carry out the termination. The plaintiff did not just state it would look bad to fire two Black employees, but also refused to fire them after pointing out their absences would be excused and their termination could expose the company to litigation. The plaintiff then went to HR to report what he believed was a racially discriminatory act that he feared would lead to his own firing, which then occurred seven days later. The EEOC argues the plaintiff presented sufficient evidence to establish causation, citing the temporal proximity between the plaintiff's protected activity and his termination. Lastly, a reasonable jury could determine the defendant's stated nondiscriminatory reasons for terminating the plaintiff are a pretext for discrimination for all of the reasons the court acknowledged in its footnote.

Court's Decision: Reversed and remanded. The appellate court found a reasonable jury could conclude that the plaintiff engaged in protected activity by opposing the order to fire two Black employees, as evidenced by his comments to his boss and his refusal to fire them, which conveyed the plaintiff's view that his boss was engaging in race discrimination by ordering the termination of the factory's only Black employees for absences that were considered excused under company policy. The court also found the evidence supports the other elements of his case, such as a causal relationship between the protected activity and his termination, as well as pretext, given the temporal proximity and the defendant's inconsistent explanations for the plaintiff's termination.

Bolden v. CAEI, Inc.	U.S. Court of Appeals for the Fourth Circuit No. 23-2195	4/3/2024 (amicus filed)	Title VII	Charge Processing **Result:** Pending

Background: The plaintiff is a Black man who was hired by the defendant CAEI as a billing specialist to work on the defendant BGE's Collections Strategy Pilot, which focused on collecting outstanding funds due on gas and electric bills from BGE's customers. While the plaintiff's direct supervisor was a CAEI employee, BGE exercised some control over the plaintiff's employment, including performing quality checks on the plaintiff's customer calls and giving him performance rewards. The plaintiff complained of discrimination and harassment to CAEI and BGE representatives, and the next month, CAEI terminated his employment. The plaintiff dual-filed a charge of discrimination with the EEOC and Maryland Commission on Civil Rights (MCCR), naming only CAEI as the respondent. After receiving his right-to-sue letter, the plaintiff filed this action, asserting claims for sex and race discrimination, harassment, and retaliation under Title VII, but naming both CAEI and BGE as defendants. The district court granted summary judgment in favor of BGE, holding the plaintiff failed to exhaust his administrative remedies because he did not name BGE in his charge of discrimination. Unless the identity-of-interest exception to the naming requirement applied to the case, which looks at whether the party that appeared before the EEOC adequately represented the unnamed party's interests, the plaintiff could not maintain his civil action against BGE. The court found the identity-of-interest exception did not apply, applying a four-factor test articulated by the Third Circuit in *Glus v. G.C. Murphy Co.*, 562 F.2d 880 (3d Cir. 1977), because the Fourth Circuit has not formally adopted the exception.

Issues EEOC is Addressing as Amicus: (1) Whether the court should recognize the identity-of-interest exception to Title VII's naming requirement; and (2) Whether the district court properly articulated the relevant factors in determining whether the identity-of-interest exception applied in this case.

EEOC's Position: The EEOC argues the court should recognize the identity-of-interest exception to Title VII's naming requirement because (1) it comports with the general principle that courts must liberally construe charges to avoid frustrating Title VII's remedial purpose; (2) nearly all circuits have recognized the exception in some form; and (3) district courts within the Third Circuit already widely recognize the exception and apply the four-factor *Glus* test. The EEOC also argues the district court misstated several relevant factors in determining whether the identity-of-interest exception applied in this case. Notably, the EEOC does not take a position whether the misstatements undermine the district court's conclusion that the *Glus* factors, as a whole, weighed against the plaintiff, but offers the comments to help clarify the appropriate analysis. Specifically, the first factor is whether the plaintiff could have reasonably ascertained the unnamed party's role in the alleged discrimination, not overall. The district court improperly focused on how the plaintiff knew BGE and CAEI were separate companies when he filed his charge. The second factor is whether the named and unnamed parties shared sufficiently similar interests, and the district court erred when it required interrelatedness between the two parties, such as a parent-subsidiary relationship or common ownership or management. Lastly, the EEOC argues the third factor is whether the unnamed party's absence from the EEOC proceedings resulted in actual prejudice to its interests, and not an assumption that absence from the administrative proceedings by itself is enough to establish actual prejudice. The EEOC takes no position on the district court's assessment of the fourth *Glus* factor.

Court's Decision: Pending

Parker v. Children's National Medical Center, Inc.	U.S. Court of Appeals for the Fourth Circuit No. 24-1207	6/24/2024 (amicus filed)	ADA Title VII	Disability Retaliation Sex Pregnancy **Result:** Pending

Background: Defendant employed the plaintiff as a Training Specialist starting in 2018. She was a salaried employee with a regular schedule from 8:30 a.m. to 5 p.m., five days a week. However, the plaintiff testified in her deposition that the defendant frequently expected her to work longer hours, often up to 10 to 12 hours a day, depending on the circumstances. Shortly after beginning her employment, the plaintiff discovered she was pregnant, with a due date estimated for July 8, 2019. She informed her supervisor of her pregnancy, and her healthcare providers classified her pregnancy as "high risk" due to her age and a history of uterine fibroids.

In December 2018, the plaintiff suffered significant vaginal bleeding because one of her fibroids had ruptured, prompting her to visit the emergency room. The emergency room staff prescribed three days of bed rest and provided documentation for her return to work afterward. The doctor recommended limiting her work hours to eight per day for the remainder of her pregnancy and supplied her with relevant documentation. Plaintiff also shared that the return of her uterine fibroids caused significant lower abdominal pressure, necessitating a supportive brace.

Shortly thereafter, after completing a full workday, the plaintiff's supervisor requested that she take on additional tasks. The plaintiff communicated her need to restrict her work hours to eight per day, citing her pregnancy and presenting her doctor's note. According to the plaintiff, her supervisor replied that "it didn't matter if [she] was pregnant because [she] was still a salaried employee and [her] pregnancy was 'no excuse.'"

In January 2019, the complaint alleges the plaintiff's supervisor approached the defendant's human resources department for guidance on how to terminate the plaintiff's employment. Subsequently, the plaintiff submitted a reasonable accommodation request through the company's third-party insurer, seeking an eight-hour workday limit. Approximately one week later, the defendant terminated her employment.

Plaintiff later filed a lawsuit alleging that the defendant violated Title VII and the ADA by discriminating against her based on sex and disability and retaliating against her for engaging in protected activity. Defendant moved for summary judgment on all of the plaintiff's claims, and the district court granted summary judgment to the defendant on all fronts. In analyzing the Title VII pregnancy discrimination claim under the framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the court found that the plaintiff had not established a prima facie case. Although comparator evidence was not necessary for her termination claim, she failed to present sufficient evidence to create an inference of unlawful discriminatory motive.

Regarding the ADA failure-to-accommodate claim, the court concluded that the evidence did not demonstrate that her pregnancy-related medical condition constituted a statutory disability. In examining the plaintiff's ADA retaliation claim, the court highlighted her late January communication with her supervisor concerning her doctor's recommendation for an eight-hour workday. Ultimately, it found that the plaintiff's evidence was inadequate to indicate that she had clearly articulated the workday limitation as a request for accommodation.

Issues EEOC is Addressing as Amicus: (1) Could a reasonable jury find that that the plaintiff's uterine fibroid condition was a physical impairment that substantially limited her in the major life activity of reproductive function? (2) Could a reasonable jury find that the plaintiff requested a reasonable accommodation from the defendant? (3) Could a reasonable jury find that the plaintiff's request for reasonable accommodation constituted protected activity for purposes of her ADA retaliation claim?

EEOC's Position: The EEOC contended that a reasonable jury could conclude that the plaintiff's pregnancy-related medical condition meets the ADA's definition of an "impairment." They argued that a reasonable fact-finder could view the plaintiff's request to avoid working extra hours, in accordance with her doctor's recommendations, as a legitimate request for reasonable accommodation. Furthermore, the EEOC asserted that the plaintiff's request for accommodation should be recognized as protected activity under the ADA.

Court's Decision: Pending

Thatch v. FedEx Freight, Inc.	U.S. Court of Appeals for the Fourth Circuit No. 24-1781	9/13/2024 (amicus filed) 3/31/2025 (decided)	Title VII	Retaliation Race **Result:** Pro-Employer

Background: Plaintiff, who is Black, alleges his supervisor subjected him to discrimination based on race by giving him different job assignments than she gave to white employees. He also alleged she harassed him in person and through emails on a daily basis and accused him of misconduct. His employment was eventually terminated. He sued for discrimination and retaliation, and the district court granted the employer's motion to dismiss in part, allowing the plaintiff, who filed the lawsuit pro se, to amend his complaint. After the plaintiff amended his complaint, the employer moved to dismiss again, citing *James v. Booz-Allen & Hamilton, Inc.*, 368 F.3d 371, 376 (4th Cir. 2004), for the adverse action standard for the plaintiff's discrimination claim. As to the retaliation claim, the employer focused on the plaintiff's termination and did not address whether any other conduct was actionable. Following this motion, the Supreme Court issued its decision in *Muldrow v. City of St. Louis*, 601 U.S. 346 (2024), which abrogated the "significant detrimental effect" adverse action standard in *James*. The district court granted the employer's motion to dismiss the amended complaint, finding that the plaintiff had not adequately plead a race discrimination claim, which required an adverse action that "adversely affect[ed] the terms, conditions, or benefits of the plaintiff's employment."

The adverse action standard, the court reasoned, separates "those harms that work a significant detriment on employees from those that are relatively insubstantial or trivial." Applying that pre-*Muldrow* standard, the court held that the plaintiff's termination was an adverse action, but that his "allegations of pre-termination mistreatment" were not. It then held that the complaint did not include sufficient facts to suggest the employer terminated him or mistreated him because of his race. The court also found the plaintiff did not adequately plead retaliation—*i.e.*, that the employer took action because of any protected activity, and that pre-termination mistreatment did not rise to the level of an adverse action. Even if it did, the court held there was no causal connection to a protected activity.

Issues EEOC is Addressing as Amicus: (1) Did the district court err by requiring the plaintiff to plead an adverse action that imposed a "significant detriment" for his discrimination claim, even after the Supreme Court's decision in *Muldrow v. City of St. Louis*, which abrogated that standard? (2) Did the district court err by not applying the adverse action standard for retaliation claims that the Supreme Court set out in *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67-68 (2006), which looks to whether the challenged action might well dissuade a reasonable worker from complaining of discrimination?

EEOC's Position: *Muldrow* changed the adverse action standard for discrimination claims to "some harm." The district court issued its decision here almost three months after *Muldrow*, but it still applied this court's pre-*Muldrow* standard. Retaliation claims use the *Burlington Northern* dissuade-a-reasonable-worker standard for adverse actions. The district court held that the plaintiff had not alleged actions beyond his termination that "rose to the level of an adverse employment action," but did not cite *Burlington Northern* or set out the dissuade-a-reasonable-worker standard.

Court's Decision: In an unpublished opinion, the Fourth Circuit affirmed the district court's order.

Weaver v. Walgreen Co.	U.S. Court of Appeals for the Fourth Circuit No. 23-1763	2/8/2024 (amicus filed) 4/8/2025 (decided)	ADA Title VII	Disability Race Harassment **Result:** Mixed

Background: Plaintiff, a Black woman, was employed by the defendant as a pharmacist and reported several disabilities, including lupus, migraines, and post-traumatic stress disorder. She was the victim of a gunpoint robbery, an incident she alleges worsened her pre-existing medical conditions. Consequently, she took approximately four months of short-term disability leave.

Upon her return to work, the plaintiff claimed she faced harassment and discrimination related to her race and disabilities. She informed the defendant about her medical conditions and suggested accommodations, such as relocating her to a different area rather than having her continue working in the store where the robbery occurred. Plaintiff testified that her manager responded by stating he did not care about her medical issues, insisted she was not fulfilling her job responsibilities, and communicated his intention to terminate her employment. Several months later, the defendant terminated the plaintiff's position.

Following her termination, the plaintiff filed a charge of discrimination with the EEOC and subsequently received a notice-of-right-to-sue letter (NRTS). She filed suit in the Eastern District of Pennsylvania on December 27, 2019, claiming that she had done so "within 90 days of receipt of the NRTS." the defendant moved to dismiss the complaint, contending that the Eastern District of Pennsylvania lacked personal jurisdiction over the defendant. It also argued that the plaintiff had failed to state a claim under Title VII and § 1981, and that her Title VII and ADA claims were untimely since she filed her lawsuit more than 90 days after receiving the NRTS.

The Eastern District of Pennsylvania decided to transfer the case to the Eastern District of North Carolina and denied the other parts of the motion without prejudice. After the transfer, the defendant filed a second motion to dismiss, focusing solely on the timeliness of the plaintiff's ADA and Title VII claims and asserting that the plaintiff had not adequately stated a claim under Title VII and § 1981. The district court granted this motion to dismiss under Fed. R. Civ. P. 12(b)(1) and deemed the remaining claims moot without addressing the § 1981 issue. The court emphasized that the 90-day filing requirement is a jurisdictional prerequisite for initiating a complaint under both the ADA and Title VII.

Issues EEOC is Addressing as Amicus: Whether the 90-day filing requirement for Title VII and ADA claims is jurisdictional.

EEOC's Position: The EEOC argued the 90-day filing limit in 42 U.S.C. § 2000e-5(f)(1) does not affect a court's jurisdiction.

Court's Decision: The appellate court held that because the district court did not resolve all of the plaintiff's claims, the order of dismissal was not an appealable final decision. Therefore, the court dismissed the appeal for lack of jurisdiction and remanded to the district court to adjudicate the § 1981 claim.

Dike v. Columbia Hospital Corp. of Bay Area	U.S. Court of Appeals for the Fifth Circuit No. 24-40058	5/22/2024 (amicus filed) 1/28/2025 (decided)	Title VII	Race Color National Origin Harassment **Result:** Mixed

Background: Plaintiff, a Black and Nigerian individual, began working as a Certified Nursing Assistant for the defendant in June 2016. He contends that the defendant had a practice of accommodating patients' racial preferences when assigning caregivers. Plaintiff reported that he was informed by nurses on a weekly basis that room assignments had been altered because patients expressed a desire not to be cared for by a Black person. When he raised concerns about this practice, management responded that if a patient requested not to have a Black caregiver, the hospital would ensure that request was honored. While the defendant denied having an official policy of making assignments based on race, they acknowledged that if a patient requested a change due to race, they would likely accommodate it if other staff were available.

In addition to this alleged practice, the plaintiff claimed he faced other forms of offensive behavior from coworkers. He claimed colleagues mocked his accent and made derogatory remarks about his cultural background, including comments about his "African food" and explicit preferences for caregivers of different racial backgrounds. On multiple occasions, a nurse told another Black employee that he had "upgraded his status by marrying a Filipino" and was "no longer Black." He alleged one coworker instructed him to stay 12 feet away, saying he didn't "deal with people of [plaintiff's] culture" or "skin color." Additionally, on at least two occasions, the plaintiff alleged patients used racial slurs against him, openly stating their refusal to be cared for by him. He alleged he repeatedly reporting these incidents but that no meaningful action taken by the defendant.

In May 2017, the plaintiff emailed the defendant's Vice President of Human Resources to report the harassment. After an investigation, Human Resources concluded that none of the behavior violated the defendant's anti-discrimination policies. Aside from advising some of the alleged harassers to be mindful of their language, no further action was taken. The plaintiff claims he continued to voice his concerns and, in December 2017, filed a charge of discrimination with the EEOC. In March 2018, the defendant terminated the plaintiff's employment for alleged misconduct. Following termination, the plaintiff amended his charge of discrimination to include details about the harassment he faced.

Subsequently, the plaintiff filed a complaint against the defendant alleging a hostile work environment based on race, color, and national origin. After discovery, the district court granted summary judgment in favor of the defendant. The court concluded that the harassment the plaintiff described was either unsubstantiated, unrelated to his race or national origin, or not sufficiently severe and pervasive to establish a hostile work environment claim. The court also found that the plaintiff failed to adequately rebut the defendant's evidence of having investigated and responded promptly to his complaints. The plaintiff appealed the decision in a timely manner.

Issues EEOC is Addressing as Amicus: (1) Whether a reasonable jury could find that the harassment the plaintiff experienced was severe or pervasive; (2) Whether a reasonable jury could find that the defendant failed to take prompt remedial action.

EEOC's Position: The EEOC asserted that the employer's practice of accommodating patients' racial preferences, coupled with a consistent pattern of ridicule and insults directed at the plaintiff, could amount to severe or pervasive harassment. The EEOC contended that the district court applied an incorrect legal standard, mistakenly asserting that the plaintiff needed to demonstrate that the harassment was "severe and pervasive" to succeed. Additionally, the EEOC maintained that a reasonable jury could conclude that the defendant failed to respond appropriately to the plaintiff's complaints.

Court's Decision: The appellate court held that summary judgment in the employer's favor was proper except as to the plaintiff's VII hostile work environment claim. The court determined that the district court excluded key evidence and misapprehended the law, "which in turn distorted the record and obscured questions of fact that would militate against summary judgment." The court therefore affirmed summary judgment on the Title VII and retaliation claims, and all §1981 claims, but vacated summary judgment on the Title VII hostile work environment claim and remanded.

Franks v. City of Oxford	U.S. Court of Appeals for the Fifth Circuit No. 24-60295	9/11/2024 (amicus filed)	Title VII	Retaliation **Result:** Pending

Background: Plaintiff began her career as a patrol officer with the City of Oxford, Mississippi, in 2015. Two years later, she transitioned to a police officer role at the Oxford Housing Authority (OHA). Starting in 2004, the City's police department agreed to station two full-time officers at OHA to patrol and perform police duties specific to the community, with OHA compensating the City $50,000. The more senior officer at OHA was designated as the "officer in charge" (OIC), a position equivalent to a sergeant in terms of responsibility but without the accompanying pay or title. Due to high turnover at OHA, the plaintiff held the role of OIC during two periods as the sole officer present.

In August 2020, another officer who had previously worked at OHA returned to join the plaintiff. In 2021, the City established a new position for a security and services coordinator at OHA, which included an additional stipend. The Chief of Police's executive assistant informed the plaintiff that this position was predetermined to be awarded to the other officer. Only the plaintiff and the other officer applied for the position, and in August 2021, the City selected the other officer.

In September 2021, the plaintiff took FMLA leave due to emotional distress, returning to full duty with the Oxford police department by late October or early November. In December, she filed an EEOC charge, claiming that the City selected the other officer for the new position based on her race and sex.

In June 2022, the Chief of Police informed the plaintiff and the other officer that the City intended to disband the OHA police station, citing a reduced need for police oversight at the housing complex. Both the plaintiff and the other officer were offered transfers to patrol, downtown, or a school resource position; the plaintiff opted for patrol. Subsequently, the plaintiff received right-to-sue notices against both the City and OHA.

Plaintiff filed a lawsuit against the City of Oxford and OHA under Title VII, alleging race and gender discrimination and claiming retaliation for her EEOC charge by eliminating her position at OHA. The district court granted summary judgment to the defendants on all of her claims. In dismissing the plaintiff's retaliation claim, the court ruled that her transfer, prompted by the City's decision to disband the OHA station, did not constitute an "adverse employment action," which is essential for a retaliation claim. The court reasoned that the transfer did not alter the plaintiff's pay or rank, nor was there evidence that her new duties were more challenging. Additionally, the court found no evidence indicating that the Chief was motivated by retaliatory intentions when deciding to disband the OHA station.

Issues EEOC is Addressing as Amicus: Whether the district court erred in holding that the elimination of plaintiff's position, which resulted in her transfer, was not actionable under Title VII, even if it was retaliatory.

EEOC's Position: The EEOC argued that disbanding the OHA station, which resulted in the plaintiff's forced transfer, may well have dissuaded a reasonable employee in the plaintiff's position from complaining about discrimination.

Court's Decision: Pending

Palova v. United Airlines, Inc.	U.S. Court of Appeals for the Fifth Circuit No. 24-20136	7/31/2024 (amicus filed)	ADEA	Age **Result:** Pending

Background: Plaintiff began her career as a flight attendant with Continental Airlines in 1992 and continued with defendant after the merger of the two companies in 2010. At the time of her termination, the plaintiff was 58 years old and one of the most senior flight attendants employed by the defendant. Her employment terms were governed by a joint collective bargaining agreement (JCBA). Flight attendant schedules were partly determined by a seniority-based bidding process, and the JCBA allowed flight attendants to trade trips with one another, while explicitly prohibiting a practice known as "parking," which involves placing a traded trip on another flight attendant's schedule to broker, buy, or sell it to another.

In March 2019, the defendant communicated the importance of adhering to the no-parking restriction, warning that violations could lead to investigations and possible termination. This communication followed multiple complaints regarding the parking practice. The defendant later investigated and concluded that the plaintiff had engaged in parking, a claim she disputed, asserting that her trip trades complied with the JCBA. Plaintiff alleged that she was specifically targeted by defendant due to her age. The JCBA outlined a progressive discipline policy with four tiers of consequences for performance-related issues, but did not mandate termination for violations of parking rules. Defendant terminated the plaintiff's employment on February 28, 2020, citing her violation of the parking ban.

Plaintiff subsequently filed a lawsuit alleging that her termination violated the Age Discrimination in Employment Act (ADEA). Defendant responded by moving for summary judgment, claiming that the Railway Labor Act (RLA) precluded the ADEA claim as a "minor dispute" that must be resolved through mandatory arbitration due to its reliance on the interpretation of the JCBA. Plaintiff argued that her case centered on whether age discrimination motivated her termination, rather than an interpretation of the JCBA.

The district court granted summary judgment to the defendant, determining that the RLA barred the ADEA claim. The court noted that the RLA includes complex procedures for resolving "major" and "minor disputes," with minor disputes arising from grievances or the interpretation of agreements regarding pay, rules, or working conditions. The court explained that the distinguishing feature of a minor dispute is that it can be resolved entirely through interpreting the collective bargaining agreement. The court stated that the plaintiff's claim hinged on her assertion that she was authorized by the JCBA to trade trips; therefore, her case involved the interpretation of the JCBA's provisions.

The court concluded that addressing the plaintiff's claim would necessitate determining whether her trip trading constituted parking and thus justified her termination. It remarked that even if the plaintiff could establish a prima facie case of age discrimination, the defendant would likely counter that the JCBA's prohibition against parking represented a legitimate, non-discriminatory reason for her termination. The court emphasized that resolving whether the plaintiff engaged in parking was outside its jurisdiction.

Issues EEOC is Addressing as Amicus: Whether the mandatory arbitration requirement under the RLA for minor disputes precludes the plaintiff's claim under the ADEA, particularly in cases where the resolution of the claim does not depend solely on the interpretation of the collective bargaining agreement.

EEOC's Position: The EEOC argued that, based on established Supreme Court and Fifth Circuit precedent, claims that seek to enforce rights that are "independent" of a collective bargaining agreement (CBA) are not subject to the mandatory arbitration requirements of the RLA. A claim is considered independent if it cannot be "conclusively resolved" by interpreting the CBA. The EEOC contended that the age discrimination claim cannot be definitively settled through the interpretation of the JCBA, and as such, should not be classified as a "minor dispute" that would be barred by the RLA.

Court's Decision: Pending

Strife v. Aldine Independent School District	U.S. Court of Appeals for the Fifth Circuit No. 24-20269	9/3/2024 (amicus filed)	ADA	Disability Retaliation Interference **Result:** Pending

Background: Plaintiff, an Army veteran, brought claims of failure to accommodate and interference under the ADA. Plaintiff alleged that her employer unreasonably delayed in granting her accommodation request to allow her service dog to come to work with her. The district court dismissed the plaintiff's failure-to-accommodate and interference claims pursuant to FRCP 12(b)(6), finding that the employer's delay was not unreasonable because the plaintiff was able to continue working without the accommodation and faced only "possible physical and psychological danger" without her service animal. The court dismissed the plaintiff's remaining claims for disparate treatment and hostile work environment pursuant to FRCP 56 in the same order. The EEOC did not address these claims.

Issues EEOC is Addressing as Amicus: (1) Whether the district court erred in dismissing the plaintiff's ADA failure-to-accommodate claim, which is premised on her employer's alleged undue delay in providing a reasonable accommodation; (2) Whether the district court misstated the elements of an ADA interference claim.

EEOC's Position: The EEOC argues that an employer's unreasonable six-month delay in providing an accommodation can amount to a failure to accommodate in some circumstances. Furthermore, the fact that the plaintiff could continue working without accommodation and suffered no workplace injuries while her request was pending is not dispositive because an accommodation may be reasonable—and thus required—where it enables an employee with a disability to perform her job less painfully or more safely.

Additionally, the EEOC argued that the district court misstated the elements of a claim under the ADA's anti-interference provision, 42 U.S.C. § 12203(b). Contrary to the district court's understanding, the relevant statutory text does not require a plaintiff asserting an interference claim to show either that she engaged in protected activity or that her employer took an adverse action against her "on account of" any protected activity. Instead, the text encompasses employer actions that prevent or deter an employee from exercising or enjoying her ADA rights, including conduct that frustrates an employee's attainment of a reasonable accommodation.

Court's Decision: Pending

Thomas v. Dallas Independent School District	U.S. Court of Appeals for the Fifth Circuit No. 23-10882	11/21/2023 (amicus filed) 6/7/2024 (unpublished decision)	ADEA	Age **Result:** Mixed

Background: *Pro se* plaintiff alleges that her employer discriminated against her in violation of the ADEA when it rejected her for multiple positions in favor of much younger applicants. The magistrate judge issued findings, conclusions, and a recommendation that the employer's motion to dismiss be granted in full. The district adopted the report and recommendation without edit.

Issues EEOC is Addressing as Amicus: (1) Did the magistrate judge contravene the 5th Circuit's holding in *Cicalese v. University of Texas Medical Branch*, 924 F.3d 762 (5th Cir. 2019), by effectively requiring the plaintiff to plead the prima facie elements of her ADEA failure-to-hire and failure-to-promote claims rather than the "ultimate elements" of those claims? (2) Did the district court err in granting the defendant's motion to dismiss where the magistrate judge rejected the plaintiff's allegations that she was qualified and received less favorable treatment than substantially younger candidates based on standards reserved for summary judgment?

EEOC's Position: The EEOC argues that the district court erred by requiring the plaintiff to plead the prima facie elements of her ADEA claims, which is not necessary at the pleading stage. Instead, the EEOC argues that the plaintiff only needed to plead sufficient facts to make her claims plausible, as established by Supreme Court and Fifth Circuit precedents. The brief criticizes the magistrate judge for applying a heightened pleading standard by requiring the plaintiff to demonstrate her qualifications and the comparability of younger candidates, which are issues more appropriately addressed at the summary judgment stage.

The EEOC contends that the plaintiff's allegations, including her extensive experience, educational background, and the fact that she was interviewed for multiple positions, are sufficient to infer that she was qualified for the roles she applied for. Furthermore, her claims that the defendant selected significantly younger candidates with less experience support the inference of age discrimination.

Court's Decision: The appellate court affirmed the dismissal of the plaintiff's Title VII claims but vacated and remanded her ADEA claims related to failure to hire or promote. The appellate court found that the district court applied an incorrect standard by requiring the plaintiff to meet the evidentiary burden of the *McDonnell Douglas* framework at the motion to dismiss stage, rather than the plausibility standard required by *Twombly/Iqbal*. The appellate court also held that the plaintiff had sufficiently alleged facts to support an inference of age discrimination, such as her extensive experience, the hiring of younger candidates, and her qualifications compared to those hired.

Turner v. BNSF Railway Co.	U.S. Court of Appeals for the Fifth Circuit No. 24-10031	5/15/2024 (amicus filed)	ADA	Disability **Result:** Pending

Background: Plaintiff, a "trainman," has a color-vison deficiency. His color-vision deficiency prevented him from passing the initial vision test prescribed by Federal Railroad Administration (FRA) regulations. During his 15 years working for the defendant, he passed the defendant-administered field tests every three years to remain certified, as required by FRA regulations. In 2020, the plaintiff failed the secondary field test, and the defendant denied his certification and terminated his employment.

Issues EEOC is Addressing as Amicus: (1) Whether the district court erred when it held that the Federal Railroad Safety Act (FRSA) and its regulations preclude the plaintiff's ADA claim; (2) Whether the district court erred when it held that the plaintiff was not a "qualified individual" under the ADA, 42 U.S.C. § 12111(8), because the defendant denied the plaintiff's certification and because the plaintiff failed to petition for administrative review of that denial.

EEOC's Position: The EEOC contends that the FRSA does not preclude ADA claims, as the statutes have distinct scopes and purposes. The FRSA is primarily concerned with safety, while the ADA focuses on eliminating discrimination against individuals with disabilities. The EEOC argues that the district court's interpretation of the FRSA as precluding ADA claims is incorrect, as the FRSA does not explicitly preclude federal civil rights laws and allows for the coexistence of ADA protections.

The brief also addresses the plaintiff's specific case, where he was denied certification by BNSF after failing a vision test that was not mandated by FRA regulations. The EEOC argues that the plaintiff's failure of this allegedly discriminatory test does not render him unqualified under the ADA. The district court's decision that the plaintiff was not a qualified individual was based on his failure to pass defendant's discretionary testing protocol and his decision not to seek review from the FRA's Operating Crew Review Board. The EEOC contends that the Review Board lacks the authority to address the discriminatory nature of the defendant's testing protocol, and therefore, the plaintiff's failure to seek review should not disqualify him under the ADA.

Court's Decision: Pending. Oral argument is set for the week of February 4, 2025.

Weathers v. Houston Methodist Hospital	U.S. Court of Appeals for the Fifth Circuit No. 23-20536	2/1/2024 (amicus filed) 9/4/2024 (decided)	Title VII	Charge Processing Limitations **Result:** Pro-Employee

Background: Plaintiff worked for the defendant for two years when she was transferred to its Neuro ICU in a new job role in or around June 2021. Plaintiff alleges that co-workers in her new unit subjected her to race- and sex-based harassment, and after she complained, her manager initiated a performance improvement plan in retaliation that led to her termination. The defendant terminated the plaintiff's employment on October 4, 2021.

On February 11, 2022, the plaintiff submitted an online inquiry to the EEOC through its Public Portal. Due to lack of availability, the first interview she was able to obtain, scheduled for May 16, was canceled; the record is silent as to who canceled it or why. On July 7, an EEOC employee emailed the plaintiff, warning her that the statute of limitations was due to expire on August 1, 2022. On July 9, the plaintiff responded by email to the EEOC indicating that she wanted to move forward. On July 28, 2022, the EEOC scheduled the plaintiff for an August 1 telephone interview. The scheduling email, from "noreply@eeoc.gov," stated that "answering these questions is not the same as filing a charge of discrimination" and provided a general description of a "charge," but it neither warned her that a charge would not be filed promptly after her interview nor offered her any other method of submitting a charge document. After the interview took place on August 1, the EEOC interviewer emailed the plaintiff and requested that she provide "a detailed timeline of events." She complied within two hours, including additional details concerning her allegations of harassment and, in substance, retaliation. The next day, the interviewer emailed the plaintiff again and requested additional detail about the plaintiff's allegations of discrimination, which she gave later that day. On August 3, the investigator emailed the plaintiff that the charge of discrimination was ready for her signature. Plaintiff signed the Form 5 charge via the EEOC's website the same day. On August 8, the EEOC issued notice of the verified charge of discrimination to the defendant.

The EEOC thereafter issued the plaintiff a Notice of Right to Sue, and the plaintiff filed suit within 90 days. In lieu of filing an answer, the defendant moved to dismiss the complaint on the basis that the plaintiff had not fulfilled the administrative prerequisites to suit, asserting that she had not filed a charge of discrimination. While the defendant's motion to dismiss was pending, it filed a "reply" in support of its motion, clarifying that the plaintiff had filed a charge of discrimination and attaching the Form 5 charge the plaintiff had signed on August 3, 2022. At a subsequent status conference, the court granted the defendant's permission to withdraw the motion to dismiss and refile it as a motion for summary judgment.

Issues EEOC is Addressing as Amicus: (1) Whether the district court erred in granting summary judgment to the defendant on the basis that the plaintiff's verification of her formal EEOC charge after the charge-filing deadline rendered her charge untimely; (2) Whether the plaintiff's unverified submissions to the EEOC during the charge-filing period, taken as a whole, constituted a timely charge of discrimination; (3) Even if the plaintiff's timely submissions to the EEOC did not constitute a charge, whether her written correspondence with the agency prior to the charge-filing deadline demonstrates that equitable tolling of the filing deadline was warranted to render her formal charge timely.

EEOC's Position: The EEOC contends that the plaintiff's initial submissions to the EEOC should relate back to her verified charge, as per the Supreme Court's decision in *Edelman v. Lynchburg College*, which allows for subsequent verification to relate back to the original filing date. The EEOC argues that the plaintiff's submissions collectively constituted a charge under the standards set by the Supreme Court in *Federal Express Corp. v. Holowecki*, 552 U.S. 389 (2008), as they included the necessary information and demonstrated her intent for the EEOC to act. Furthermore, the EEOC asserts that equitable tolling should apply because the plaintiff followed the EEOC's instructions and promptly signed the charge once it was available, and the delay was due to the EEOC's handling of the process.

The EEOC emphasizes that the district court erred in placing the burden of proving timeliness on the plaintiff and in not considering the EEOC's role in the delay. The brief argues that the short delay in filing did not prejudice the defendant, as it received notice of the charge within the statutory timeframe.

Court's Decision: The appellate court found that the district court erred in not applying the doctrine of equitable tolling, which can extend filing deadlines in certain circumstances. The appellate court determined that the district court abused its discretion by not considering the delays attributable to the EEOC and the plaintiff's diligence in pursuing her claim. The court noted that the plaintiff actively attempted to file her charge and responded promptly to the EEOC's requests once she was able to schedule an interview. The court also found no prejudice to the defendant from the two-day delay in filing. The court emphasized that equitable tolling should be applied sparingly and only in rare and exceptional circumstances, which were present in this case due to the EEOC's delays and the plaintiff's efforts.

Yates v. Spring Independent School District	U.S. Court of Appeals for the Fifth Circuit No. 23-20441	11/2/2023 (amicus filed) 8/26/2024 (decided)	ADEA	Age Retaliation **Result:** Pro-Employer

Background: Plaintiff, a math teacher in his late sixties, alleged that the defendant discriminated and retaliated against him in violation of the ADEA. Plaintiff began working for the defendant during the 2021-2022 school year as one of two eighth-grade math teachers. A few weeks into the school year, the defendant placed the plaintiff on a "support plan." The plan required the plaintiff, among other measures, to have coaching sessions with other educators at least three times a week, observe another teacher modeling the first-period lesson daily, and receive regular walkthroughs from the instructional leadership team. Shortly after, the other eighth-grade math teacher resigned, and the defendant combined the two eighth-grade math classes and assigned a different teacher as the lead teacher. Plaintiff was assigned inside the sixth-grade math teacher's classroom working with some of that teacher's students. Plaintiff served in this role for a few weeks, until the seventh-grade math teacher resigned. The defendant initially assigned the plaintiff to fill that teacher's position but then replaced him soon after with "a brand-new teacher straight out of teach[er] college" who was in her twenties. The defendant moved the plaintiff back to the sixth-grade support position, which he occupied for about two months.

After a dispute with the sixth-grade math teacher, the plaintiff was assigned to a new support position with eighth-grade students. The defendant also placed the plaintiff on a new support plan that required him to undergo 45-minute planning and 45-minute professional development sessions each day, review a series of videos and other resources, and submit lesson plans and other materials to the defendant for review.

Plaintiff requested to transfer to another school and began working at the new school for the 2022-2023 school year. In October 2022, the defendant received complaints that the plaintiff was yelling at students and not letting them use the restroom or visit the nurse's office. The defendant placed the plaintiff on paid administrative leave for roughly four months while it investigated. Under the terms of this administrative leave, the plaintiff could not visit his school; participate in any the defendant activities; or have any contact with students, parents, or colleagues. The defendant ultimately cleared the plaintiff to return to work following the investigation. Plaintiff still works for the defendant.

Issues EEOC is Addressing as Amicus: (1) Did the district court err by relying on this court's prior "ultimate employment decision" standard for discrimination claims under Title VII—which this court abandoned in *Hamilton v. Dallas County*, 79 F.4th 494 (5th Cir. 2023) (en banc)—to hold that the conduct the plaintiff challenged was not actionable discrimination under the ADEA? (2) Did the district court err by holding that the plaintiff failed to establish a prima facie case of ADEA discrimination as to his replacement as seventh-grade math teacher by a substantially younger teacher? (3) Did the district court err by failing to analyze separately whether the conduct the plaintiff challenged could constitute actionable retaliation under the ADEA?

EEOC's Position: The EEOC contends that the district court incorrectly applied the outdated "ultimate employment decision" standard, which was abandoned by the Fifth Circuit in *Hamilton v. Dallas County*. Instead, the court should have considered whether the actions the plaintiff challenged adversely impacted the "terms, conditions, or privileges" of his employment in a more-than-de minimis manner. The EEOC argues that a jury could reasonably find that the plaintiff's reassignment to a support position, the imposition of support plans, and his placement on administrative leave constitute actionable age discrimination under the correct standard.

Furthermore, the EEOC highlights that the district court applied the wrong legal standard in evaluating the plaintiff's prima facie case of age discrimination. The court mistakenly used the elements of an ADEA retaliation claim rather than those for an age discrimination claim. The EEOC asserts that the plaintiff established a prima facie case by showing he was replaced by a significantly younger teacher, which should have been sufficient to meet the initial burden of proof for age discrimination.

Additionally, the EEOC points out that the district court failed to separately analyze the plaintiff's ADEA retaliation claim. The court did not consider whether the actions the plaintiff challenged could constitute actionable retaliation under the standard set forth in *Burlington Northern & Santa Fe Railway Co. v. White*, which requires showing that the actions might have dissuaded a reasonable worker from making or supporting a charge of discrimination.

Court's Decision: The court found that the plaintiff's claims did not amount to actionable discrimination under the revised standards set by the Fifth Circuit's decision in Hamilton v. Dallas County, which no longer requires an "ultimate employment decision" to establish discrimination.

The district court concluded that the plaintiff failed to establish a prima facie case of age discrimination, as he did not demonstrate a causal connection between his age and the adverse employment actions. The court also found that the defendant provided legitimate, nondiscriminatory reasons for its actions, such as ongoing concerns about the plaintiff's performance, which the plaintiff failed to prove were pretextual. The appellate court agreed with the district court's conclusion that the defendant rebutted any prima facie case by providing a nondiscriminatory reason for the adverse actions, thus affirming the summary judgment. The court noted that the plaintiff's opening brief did not adequately address his defamation or retaliation claims, leading to their forfeiture.

Amos v. The Lampo Group, LLC	U.S. Court of Appeals for the Sixth Circuit No. 24-5011	3/20/2024 (amicus filed)	Title VII	Religion **Result:** Pending

Background: Plaintiff, a senior video editor, alleged that his former employer discriminated against him in violation of Title VII based on religion because he failed to conform to the employer's religious beliefs and his own religious practices conflicted with an employment requirement related to COVID-19 precautions. The district court dismissed the plaintiff's Title VII claims. In doing so, the district court found that the plaintiff failed to allege a conflict between the employer's requirements and some religious belief of the plaintiff, and the plaintiff failed to sufficiently plead his own religious beliefs.

Issues EEOC is Addressing as Amicus: (1) Whether a plaintiff who alleges his employer discriminated against him for failure to conform to its religious beliefs states a claim under Title VII when the complaint describes the employer's beliefs and how the employer discriminated against the plaintiff by not conforming to the employer's beliefs; (2) Whether a plaintiff who alleges that his employer discriminated against him based on his own religious practices may state a Title VII claim by pleading a conflict between an employment requirement and his religious practice.

EEOC's Position: The EEOC argues that Title VII prohibits discrimination based on nonconformity with an employer's religious beliefs. The EEOC emphasized that only the employer's religious beliefs are at issue in a Title VII religious nonconformity claim, not the employee's own religious beliefs. The EEOC noted that for religious nonconformity claims, courts do not require plaintiffs to plead or prove that their own beliefs were religious or that those beliefs caused a conflict. Rather, plaintiffs are only required to plead or prove that their employer discriminated against them for not conforming to the employer's religious beliefs. The EEOC also argued that a plaintiff may state a Title VII claim for religious discrimination or failure to accommodate based on his religious practices. The EEOC noted that in addition to protecting religious beliefs, Title VII protects religious conduct, including religious practices and observances.

Court's Decision: Pending

Andrews v. Tri Star Sports and Entertainment Group, Inc.	U.S. Court of Appeals for the Sixth Circuit No. 23-5700	9/30/2024 (amicus filed) 10/29/2024 (decided)	ADA	Disability **Result:** Pro-Employer

Background: The plaintiff, who has asthma, uses medication and an inhaler to manage her conditions. During the pandemic, she suffered an asthma attack when coworkers sprayed Lysol to clean their workspaces. The plaintiff requested to telework, providing a note from her nurse practitioner regarding the benefits of telework for her asthma. The same month, her employer fired her, maintaining it laid off all "non-essential" employees requesting to telework. The plaintiff sued, arguing she had an actual disability due to substantial limitations on her breathing and immune function. The district court granted summary judgment to her employer on the grounds she did not have a disability under the ADA. The plaintiff appealed. On August 21, 2024, the Sixth Circuit affirmed the district court's judgment that the undisputed facts showed the plaintiff's asthma did not substantially limit her ability to breathe, and she was therefore not disabled. The plaintiff filed a petition for rehearing *en banc*.

Issues EEOC is Addressing as Amicus: The EEOC urges the court to grant panel rehearing or rehearing *en banc* because the panel majority's holding that plaintiff's asthma did not qualify as an actual or regarded-as disability relied on standards abrogated by the Americans with Disabilities Act Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008) (ADAAA) and rejected by this court and other circuits.

EEOC's Position: In enacting the ADAAA, Congress sought to "respond to years of court decisions narrowly defining who qualifies as an individual with disabilities, which left the ADA too compromised to achieve its purpose." In this case, the majority relied on a definition of "substantially limited" that the ADAAA expressly abrogated. In addition, transient or episodic impairments can be disabling; an impairment need not limit multiple major life activities; the ameliorative effects of mitigating measures should not factor into the substantially limiting determination. In addition, the majority's forfeiture rulings contravened the amended ADA and circuit precedent. Plaintiffs need not plead a specific major life activity; and regarded-as claims require no actual or perceived substantial limitation of a major life activity.

Court's Decision: The court denied the petition for rehearing en banc.

Gray v. State Farm Mutual Automobile Insurance Co. et al.[1130]	U.S. Court of Appeals for the Sixth Circuit No. 24-3086	5/16/2024 (amicus filed)	ADA	Retaliation **Result:** Pending

Background: Plaintiff brought an ADA retaliation claim against her employer and additional claims against a supervisor after her employment was terminated. Plaintiff alleged that she helped her co-worker retain a reasonable accommodation under the ADA by among other things, speaking to HR to obtain information about her co-worker's job requirements. Plaintiff also made an anonymous HR report regarding her co-worker. Several months later, the plaintiff was terminated after an independent investigation confirmed that she had falsified manual time entries 11 times in one month, including claiming she was at her desk working when records showed she was not in the building. The district court entered summary judgment on the ADA retaliation claim in favor of the employer. The district court found that the plaintiff failed to show employer's articulated reason for firing the plaintiff was pretext for retaliation.

Issues EEOC is Addressing as Amicus: (1) Whether a plaintiff engages in protected activity when she assists her coworker's efforts to obtain a reasonable accommodation; (2) Whether under the ADA, an adverse employment action is an action that might have dissuaded a reasonable worker from making or supporting a charge of discrimination; (3) Whether temporal proximity is the only evidence that can raise a causal inference for a retaliation claim.

EEOC's Position: The EEOC argues that the plaintiff's assistance to her coworker in requesting a reasonable accommodation was protected activity. The EEOC argued that the ADA's opposition clause is expansive and protects not only protestations about one's own mistreatment, but also advocacy against the mistreatment of others in the workplace. The EEOC asserts that for retaliation claims, an adverse employment action is an action that might dissuade a reasonable worker from making or supporting a charge of discrimination. The EEOC argues that temporal proximity is not the only but-for cause that can raise a causal inference for a retaliation claim and often there are multiple but-for causes that can give rise to a causal connection. The EEOC also argues that courts should not credit an employer's explanation for an adverse employment action without considering the context surrounding that explanation, including assessing whether there was selective enforcement of the rule for which a plaintiff was terminated. The EEOC also asserted that increased scrutiny after an employee engages in protected activity can establish pretext.

Court's Decision: Pending

Roberts v. Progressive Preferred Insurance Co.	U.S. District Court for the Northern District of Ohio (in the 6th Circuit) No. 1:23-cv-01597	2/22/2024 (amicus filed)	Title VII	Race **Result:** Pending

Background: Plaintiff (white) brought a discrimination claim under 42 U.S.C. § 1981 against the defendant, a private insurance company that provided a variety of grants to small business owners. Plaintiff alleged that he wanted to but did not apply for one of the defendant's grants because it was available only to Black-owned businesses. Plaintiff alleges that the grant was racially discriminatory because he would have been subjected to adverse racial discrimination if he would have applied. The defendant moved to dismiss the complaint by invoking the Title VII affirmative action framework and argued that that the challenged grant program was a valid affirmative action program under Section 1981.

Issues EEOC is Addressing as Amicus: (1) Whether Title VII permits private employers to adopt voluntary affirmative action places to remedy manifest imbalances; (2) Whether voluntary affirmative action programs implemented by private entities are subject to strict scrutiny.

EEOC's Position: The EEOC argues that Title VII standards, which courts have applied to Section 1981 claims, permit private employers to adopt voluntary affirmative action policies to remedy manifest imbalances. The EEOC also argues that voluntary affirmative action plans implemented by private entities are not subject to strict scrutiny. The EEOC notes that courts have interpreted Section 1981 to allow voluntary race-based affirmative action in employment and non-employment cases, and that courts are guided by the framework established in the Supreme Court's Title VII action case law. The EEOC notes that affirmative action plans are not a type of discrimination and are consistent with and further the purpose of Title VII. The EEOC also notes that employers enjoy a safe harbor from Title VII liability when their affirmative action plans are in writing and conform with EEOC guidelines. The EEOC argues that Section 1981 case law in the purely private sphere is guided by the Title VII affirmative action framework in which courts assess: (1) whether the plan responds to a "manifest imbalance" in "traditionally segregated job categories"; (2) whether the plan "unnecessarily trammels the rights of" employees not favored by the plan; and (3) whether the plan is temporary and intended to attain, rather than maintain, a balanced workforce. The EEOC further asserts that strict scrutiny does not apply to private entities that do not receive federal funding and points to the fact that the first prong of the strict scrutiny analysis demands a compelling governmental interest. The EEOC asserts that to subject a purely private affirmative action plan to strict scrutiny not only upsets Section 1981 affirmative action precedent but also implicates race-based affirmative action plans that are squarely permissible under Title VII.

Court's Decision: Pending

1130 Littler represents the State Farm and the individual defendant in this litigation.

Vavra v. Honeywell International, Inc.	U.S. Court of Appeals for the Seventh Circuit No. 23-2823	2/6/2024 (amicus filed) 7/10/2024 (decided)	Title VII	Retaliation **Result:** Pro-Employer (and EEOC)

Background: Plaintiff (white), a former principal applications engineer, brought a retaliation claim under Title VII against his employer. Plaintiff alleged that his employment was terminated in retaliation for his opposition to his employer's mandated unconscious bias training based on his conclusion that it was "inherently racist." The district court entered summary judgment in favor of the employer, finding that the plaintiff's refusal to take the unconscious bias training was not protected activity, plaintiff failed to establish the subjective and objective prongs used to determine whether an individual engaged in statutorily protected activity, and plaintiff failed to establish that he was terminated because he engaged in protected activity, rather than for refusing to take the mandatory training.

Issues EEOC is Addressing as Amicus: (1) Whether anti-discrimination trainings such as unconscious bias trainings, are inherently discriminatory; (2) Whether for a Title VII retaliation claim, a plaintiff must proffer evidence to show that a reasonable person could believe a mandatory anti-discrimination training, such as an unconscious bias training, is discriminatory.

EEOC's Position: The EEOC argues that anti-discrimination trainings, including unconscious bias training, are not *per se* discriminatory and may serve as vital measures to prevent or remediate workplace discrimination. The EEOC contends that opposition to an anti-discrimination training, such as an unconscious bias training, may constitute protected activity where the plaintiff provides a fact-specific basis for his belief that the training violates Title VII. The EEOC contends that there is nothing inherently discriminatory about anti-discrimination trainings because "nothing about them inherently involves a 'preference' for any group" and noted that mandatory trainings can help ensure Title VII compliance as courts have approved such training as remedial injunctive measures to address workplace discrimination. The EEOC further argues that an employee's belief that an anti-discrimination training is an unlawful employment practice is objectively reasonable only if the employee provides a fact-specific basis to show how the training could be discriminatory in content, application, context, or execution.

Court's Decision: The Seventh Circuit affirmed the district court's grant of summary judgment, holding that the employee's opposition to unconscious bias training was not protected activity and the employee failed to show a causal connection between complaints and his termination.

Abdi v. Hennepin County	U.S. Court of Appeals for the Eighth Circuit No. 24-1393	5/15/2024 (amicus filed)	ADA	Disability Retaliation **Result:** Pending

Background: Plaintiff, a social worker, brought claims for failure to accommodate and retaliation under Title I of the ADA against his employer. Plaintiff had a physical disability that required use of a wheelchair. Plaintiff requested a stand-up desk as a reasonable accommodation to perform his job duties. His employer denied the request because it deemed the request as one of convenience. Around the same time the plaintiff requested an accommodation, his coworkers made performance-based allegations against him, and he was then subjected to disciplinary investigations and a poor evaluation. Plaintiff filed a charge of discrimination and two months later he was transferred to a different position in a different office. Although the new position was considered a promotion, the salary was nearly $4,000 lower than the plaintiff's prior position. The district court dismissed the plaintiff's complaint for failure to state a claim. The district court found that plaintiff's failure to accommodate and retaliation claims failed because the plaintiff failed to show that he suffered an adverse employment action as mere disciplinary investigations and poor evaluations were not adverse employment actions.

Issues EEOC is Addressing as Amicus: (1) Whether a plaintiff must allege an "adverse employment action" separate and apart from the denial of a reasonable accommodation to state a failure to accommodate claim under Title I of the ADA. (2) Whether a disciplinary investigation and unfavorable performance evaluation satisfy the adverse employment action prong of an ADA retaliation claim.

EEOC's Position: The EEOC argues that the denial of a reasonable accommodation that implicates terms, conditions, or privileges of employment us actionable under Title I. The EEOC further argues that Title I does not require a plaintiff to show an adverse employment action separate and apart from denial of a reasonable accommodation when asserting a failure to accommodate claim. The EEOC noted that to the extent courts consider an adverse employment law action as an element of a failure to accommodate claim, courts treat the denial of a reasonable accommodation as satisfying the adverse employment action element. The EEOC argues that to establish an ADA retaliation claim, an adverse employment action is an action that might dissuade a reasonable worker from making or supporting a charge of discrimination. The EEOC notes that negative performance evaluation or disciplinary investigation might dissuade a reasonable employee from making or supporting a charge of discrimination.

Court's Decision: Pending

Meza v. Union Pacific Railroad Co.	U.S. Court of Appeals for the Eighth Circuit No. 24-1367	6/24/2024 (amicus filed)	ADA	Disability **Result:** Pending

Background: Plaintiff worked as a car inspector, a safety-sensitive position that involved inspecting, maintaining, and repairing railcars in the railyard, often with moving trains nearby. In June 2016, the plaintiff was in an off-duty motorcycle accident and suffered a serious head injury. Plaintiff's neurologist cleared him to return to work without restrictions on February 1, 2017, but the defendant's occupational physician disagreed, determining the plaintiff required certain restrictions for at least five years following the accident due to a heightened risk of sudden incapacitation. Management then determined they could not accommodate the plaintiff's restrictions, then placed him on leave. Plaintiff filed suit against the defendant, bringing a claim of disparate treatment disability discrimination under the ADA under the theory that the company improperly forced him out of work due to a perceived disability. The district court found that the defendant was entitled to summary judgment because the plaintiff failed to show that the company regarded him as having a disability as the term is defined by the ADA. Specifically, the defendant successfully argued there is a distinction between a current physical impairment and the potential risk of future health issues, and since they imposed restrictions on the plaintiff based solely on the latter, the plaintiff could not show the company perceived him to have an existing condition that amounted to an ADA disability.

Issues EEOC is Addressing as Amicus: (1) Could a jury could find that the defendant imposed work restrictions on the plaintiff because of actual or perceived physiological changes to the plaintiff's neurological system resulting from his head injuries? (2) Did the plaintiff provide direct evidence that the defendant imposed work restrictions on him on the basis of disability?

EEOC's Position: The EEOC argues a reasonably jury could find the head injuries the plaintiff suffered in June 2016 led to an actual or perceived physiological condition or disorder that fell within the ADA's definition of "impairment" at the time the defendant imposed the restrictions. Specifically, the EEOC claims the district court erred because the defendant's concerns of future health risks arose out of current actual or perceived impairments, and the court articulated an obsolete and overly narrow standard for assessing whether an impairment exists.

Court's Decision: Pending

Ringhofer v. Mayo Ambulance Clinic	U.S. Court of Appeals for the Eighth Circuit No. 23-2994, 23-2995, 23-2996, 23-2997, 23-2999	10/31/2023 (amicus filed) 5/24/2024 (decided)	Title VII	Religion **Result:** Pro-Employee

Background: Kiel and Ringhofer ("the plaintiffs") worked for the defendant as a nurse and paramedic, respectively. In October 2021, the defendant implemented a requirement that all employees be fully vaccinated for COVID-19 or approved for an exemption. The defendant provided forms employees could use to seek religious exemptions, which the plaintiffs both completed and submitted. Kiel is Christian who allegedly believes vaccines "were produced with or tested with cells from aborted human babies," and receiving the vaccine would make her a participant in the abortion that killed the unborn baby. Ringhofer is a Baptist who allegedly believes "vaccines were produced with or tested with fetal cell lines," and, like Kiel, receiving the vaccine would implicate him in abortion, which he is "strongly against…based on his interpretation of scripture." The defendant denied the plaintiffs' exemption requests, and subsequently terminated the plaintiffs' employment for failure to comply with the vaccine requirement. Plaintiffs then filed suit alleging religious discrimination under Title VII. The district court granted the defendant's motion to dismiss both claims, finding neither plaintiff plausibly pled a religious belief or proper notice to the defendant of religious beliefs that conflicted with the vaccine requirement.

Issues EEOC is Addressing as Amicus: (1) Did the plaintiffs plausibly plead religious beliefs that conflicted with the defendants' vaccination requirement? (2) Did the plaintiffs plausibly plead notice to the defendants of the conflict between their religious beliefs and the defendants' vaccination requirement?

EEOC's Position: The EEOC argued the plaintiffs both plausibly pled religious beliefs conflicting with the defendant's vaccine requirement, and the district court erred by applying an overly narrow definition in assessing the issue. The EEOC also argued the plaintiffs plausibly pled they provided fair warning that their religious beliefs conflicted with the defendant's vaccine requirement, as they each alleged they used the defendant's process to seek religious exemptions.

Court's Decision: The Eighth Circuit reversed and remanded the district court's decision, finding that the plaintiffs adequately identified religious views they believed to conflict with taking the COVID-19 vaccine, and plausibly connected their refusal to receive the vaccine with their religious beliefs. The court found that the district court improperly failed to consider the complaints on the whole, instead focusing on specific parts to conclude the anti-vaccine beliefs were merely "personal" or "medical" and not religious. The court also found the district court erred by emphasizing that many Christians elect to receive the vaccine, as Title VII protections do not extend only to beliefs shared by all members of a religious sect. The Eighth Circuit did not reach the EEOC's notice argument.

Snyder v. Arconic Corp.	U.S. Court of Appeals for the Eighth Circuit No. 23-3188	12/29/2023 (amicus filed) 8/14/2024 (decided)	Title VII	Religion **Result:** Pro-Employer

Background: Plaintiff worked as a "lead operator" at the defendant manufacturing plant. The defendant suspended and then terminated the plaintiff's employment after the plaintiff wrote on an internal electronic message board that a rainbow on the company's intranet was an "abomination to God," because it is "not meant to be displayed as a sign for sexual gender." The company found the post to be offensive and violative of its diversity and anti-harassment policies. The plaintiff filed suit against the defendant, bringing claims of religious discrimination and retaliation under Title VII. The district court found the defendant was entitled to summary judgment because the plaintiff failed to establish a conflict between his religious beliefs and the company's employment requirements (*i.e.*, prohibiting employees from making statements in the workplace that express hostility towards the LGBTQ+ community or any other person or group), and the plaintiff did not provide the defendant adequate notice of the purported conflict.

Issues EEOC is Addressing as Amicus: (1) After the Supreme Court's decision in *EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768 (2015), must a plaintiff still establish the prima facie elements of a religious-accommodation claim? (2) Did the district court correctly conclude the plaintiff failed to identify a religious practice that conflicts with a workplace requirement, as necessary to establish a prima facie case? (3) Where an employee requests an accommodation to engage in or receive leniency for religious expression that violates a company's anti-harassment policy, can the impact on coworkers establish undue hardship after the Supreme Court's decision in *Groff v. DeJoy*, 600 U.S. 447 (2023)?

EEOC's Position: The EEOC argued the district court did not err by requiring the plaintiff to establish the prima facie elements of a religious-accommodation claim, as the Supreme Court's decision in *Abercrombie* did not eliminate the prima facie framework. The EEOC also argued the district court correctly concluded the plaintiff failed to satisfy the conflict element of his prima facie case, because he did not identify any religious practice that required him to publicly object to the defendant's use of the rainbow symbol. Finally, the EEOC argued if the Eighth Circuit assessed undue hardship, it should conclude that even after *Groff*, an employer may be able to show undue hardship where an accommodation would otherwise allow an employee to violate anti-harassment rules.

Court's Decision: The Eighth Circuit affirmed the district court's decision. The court held that the plaintiff's claim failed because there was nothing in the record to show a conflict between the plaintiff's religious belief, practice, or observance and the defendant's facially neutral employment requirements.

Xu v. LightSmyth Technologies Inc.	U.S. Court of Appeals for the Ninth Circuit No. 23-35423	11/1/2023 (amicus filed) 10/24/2024 (decided)	Title VII	Sex Race National Origin Retaliation **Result:** Pro-Employee

Background: The plaintiff worked for the defendant, a manufacturing company, as a manufacturing technician and later as a supply chain manager. The plaintiff alleged she had a strained relationship with some of her supervisors, and in February 2018, she complained to the general manager about what she perceived to be "examples of abuse of power, retaliation, and discrimination." Soon after, the plaintiff requested an accommodation related to issues with her vision. In March 2018, purportedly in an effort to accommodate the plaintiff's limitations, the defendant restructured the plaintiff's role from supply chain manager to manufacturing technician, changing the plaintiff's status from overtime-exempt, salaried employee to non-exempt, hourly employee. The plaintiff alleged this was a demotion, and over the next several months, the company issued her a negative performance review, admonished her to refrain from disrespecting her co-workers, and extended a voluntary severance offer. The plaintiff left the defendant in March 2019; the plaintiff alleged she was constructively discharged, while the company contended the plaintiff left voluntarily. The district court granted summary judgment to the defendant, finding the plaintiff failed to establish constructive discharge, and the other alleged discriminatory and retaliatory actions did not meet the requisite adverse action standard. Importantly, the district court defined "adverse employment action" as "one that 'materially affect[s] the compensation, terms, conditions, or privileges of [employment],'" and said the Supreme Court "described such an action as a 'tangible employment action,'" which "'constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.'" The district court applied this same standard in analyzing the plaintiff's retaliation claim.

Issues EEOC is Addressing as Amicus: (1) Whether the district court erred by requiring the plaintiff to show a "tangible employment action" or "material" effect on the terms, conditions, or privileges of her employment to sustain her Title VII discrimination claim; (2) Whether the district court erred by subjecting the plaintiff's retaliation claim to the same "tangible employment action" standard the court applied to her discrimination claim and by otherwise treating the scope of actionable conduct as equivalent for both claims.

EEOC's Position: The EEOC argued the district court erred by requiring the plaintiff to show a "tangible employment action" or "material" effect on the terms, conditions, or privileges of her employment to sustain her discrimination claim. The EEOC further argued the district court erred by subjecting the plaintiff's retaliation claim to the same "tangible employment action" standard the court applied to her discrimination claim and by otherwise treating the scope of actionable conduct as equivalent for both claims.

Court's Decision: The Ninth Circuit vacated and remanded the district court's judgment because the district court applied the wrong standard to the plaintiff's claims. Specifically, the Ninth Circuit explained the Supreme Court held in *Muldrow v. City of St. Louis*, 601 U.S. 346 (2024), that Title VII discrimination claims do not require any heightened requirement of a "material" or "tangible" impact. Rather, Title VII discrimination only requires proof that a challenged action caused the employee "some harm respecting an identifiable term or condition of employment." Meanwhile, for purposes of a retaliation claim, a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it might well have "dissuaded a reasonable worker from making or supporting a charge of discrimination." A determination as to whether an action is materially adverse "depends upon the circumstances of the particular case, and 'should be judged from the perspective of a reasonable person in the plaintiff's position.'"

Zamora v. Arizona Board of Regents	U.S. Court of Appeals for the Ninth Circuit No. 23-16099	2/1/2024 (amicus filed)	Title VII	Charge Processing Limitations **Result:** Pending

Background: Plaintiff worked at Arizona State University (ASU) as a parking assistant. In March 2021, after ASU terminated his employment, the plaintiff filed an EEOC charge against ASU and the Arizona Board of Regents (ABOR). On September 19, 2022, before receiving a notice of right to sue, the plaintiff filed a lawsuit in federal district court alleging Title VII discrimination, among other claims. Defendants moved to dismiss the plaintiff's complaint, and on March 13, 2023, while the motion was pending, the EEOC issued a determination and notice of right to sue. Plaintiff filed the notice with the district court the next day. The district court subsequently granted the defendants' motion, finding that under Ninth Circuit authority, the plaintiff's 90-day period to file suit began to run once he became entitled to an EEOC right-to-sue letter, which occurred 180 days after he filed his charge. Plaintiff failed to file his lawsuit within 90 days of his entitlement to a right-to-sue letter, making his Title VII claim untimely.

Issues EEOC is Addressing as Amicus: When does the 90-day limitations period for filing suit begin to run: within 90 days of when an individual becomes eligible to receive a notice of right to sue, or after the individual actually receives the notice?

EEOC's Position: The EEOC argues the district court erred in holding the plaintiff had to file his lawsuit within 90 days of becoming eligible to receive a notice of right to sue, rather than within 90 days of actually receiving the right-to-sue letter.

Court's Decision: Pending

Mobley v. Workday, Inc.	U.S. District Court for the Northern District of California (in the 9th Circuit) No. 3:23-cv-00770	4/9/2024 (amicus filed) 7/12/2024 (decided)	Title VII ADA ADEA	Race Disability Age **Result:** Mixed, but primarily pro-plaintiff. The court granted in part and denied in part the motion to dismiss.

Background: Plaintiff alleged that defendant provided other employers with algorithmic applicant screening tools that discriminated against him and others similarly situated based on race, disability, and age. More specifically, the plaintiff alleged that defendant's algorithm dictated whether applicants were referred to other employers; made automated decisions on behalf of employers to reject certain candidates; and that the platform was the exclusive point of entry for many job opportunities. The defendant provides employers with automated applicant screening systems that incorporate "algorithmic decision-making tools." Plaintiff is a Black man, over the age 40, and has anxiety and depression. Plaintiff alleged that he applied for more than 100 positions with employers that used exclusively the defendant as the screening platform. The defendant filed a Motion to Dismiss the First Amended Complaint for failure to state a claim.

Issues EEOC is Addressing as Amicus: Whether the defendant is the type of the "intermediary" that Congress meant federal anti-discrimination laws to cover.

EEOC's Position: The EEOC took the position that the defendant was the type of intermediary that Congress meant federal anti-discrimination laws to cover because it operates as an employment agency, is an indirect employer exercising significant control over individuals' access to employment opportunities and is an agent of employers because employers have purportedly delegated authority to it to make some hiring decisions. More specifically, the EEOC argued that screening and referral agencies are among those classically associated with employment agencies and Title VII expressly contemplates referral activities. Because the defendant's algorithmic tools perform screening and referral functions as traditional employment agencies – even if by more sophisticated means – Title VII (and other anti-discrimination laws) applied to the defendant. Similarly, the EEOC argued that the defendant could be held liable as an indirect employer under the theory of "third-party interference." Such a theory applies where an entity discriminated against and interfered with the employees' relationship with their employers. Finally, the EEOC argued the defendant was an agent of employers, which could be held independently liable for discrimination. Because the plaintiff alleged facts suggesting that employers delegate control of significant aspects of their hiring processes to the defendant, there were sufficient facts to demonstrate agency.

Court's Decision: The court granted the motion to dismiss in part and denied in part. Ultimately, the court determined that the motion should be denied because the First Amended Complaint plausibly alleged that the defendant was liable on an agency theory. The court explained that the plain language of the anti-discrimination statutes demonstrate that employment agencies are those that "procure employees for an employer," but distinguished between an "employment agency" and an "agent of the employer." The court found that the plaintiff had not sufficiently demonstrated that defendant was liable as an "employment agency," but that it could be liable as an agent of the employers because the plaintiff sufficiently alleged that the defendant's customers delegated the traditional function of rejecting candidates or advancing them to the next stage to the defendant.

Raymond v. Spirit Aerosystems Holdings, et al.	U.S. Court of Appeals for the Tenth Circuit No. 23-3126	11/13/2023 (amicus filed) 1/7/2025 (decided)	ADEA	Age **Result:** Pro-Employer

Background: Plaintiffs alleged that defendants intentionally discriminated against older workers when it laid off 271 employees in a Wichita, Kansas manufacturing facility in a 2023 reduction in force as well as when defendants failed to later rehire many of the plaintiffs. The district court granted summary judgment to defendants on ADEA claims premised on pattern-or-practice theories regarding both the reduction in force and the subsequent failure to hire claims. More specifically, although the court considered that a reduction in force could be the basis of liability for a pattern-or-practice claim, there was insufficient evidence to show defendants engaged in any pattern or practice of discrimination. The court found the same with respect to the failure to hire claims.

Issues EEOC is Addressing as Amicus: Whether a one-time reduction in force can form the basis for ADEA liability under the *Teamsters v. United States*, 431 U.S. 342 (1977) pattern-or-practice framework.

EEOC's Position: A one-time reduction in force can form the basis for ADEA liability under the pattern-or-practice framework. The EEOC argued that although one-time reductions in force are temporally contained, they affect a significant portion of the employer's workforce and are almost invariably carried out under express policies set by the employer. Because of these circumstances, reductions in force are well-suited to the pattern-or-practice analysis. More specifically, the EEOC argued that the pattern-or-practice liability framework outlined in *Teamsters* should apply to a one-time reduction in force because a fundamental portion of a reduction in force analysis is part of an employer implemented policy, which can be discriminatory, and applying that discriminatory practice to the entire relevant workforce demonstrates a pattern of discrimination.

Court's Decision: The court affirmed the grant of partial summary judgment to the defendant on the claim of unlawful pattern or practice of discrimination. According to the appellate court, the evidence presented could not reasonably support a finding that the employer engaged in an unlawful pattern or practice of age discrimination.

Scheer v. Sisters of Charity of Leavenworth Health System, Inc.	U.S. Court of Appeals for the Tenth Circuit No. 24-1055	4/29/2024 (amicus filed)	ADA	Disability **Result:** Pending

Background: Plaintiff was previously employed by the defendant and confided in a coworker, supervisor, and department manager that she was struggling with personal issues. Although the plaintiff did not use the term "suicide" or "suicidal," at least two of these individuals interpreted her conversations as demonstrating ideations of suicide. Before these discussions, the plaintiff's supervisor intended to place the plaintiff on a performance improvement plan. Believing the plaintiff to be suicidal, however, the supervisor added additional "behavioral concerns" to the plaintiff's plan describing the plaintiff as "talk[ing] of suicide to multiple members of the team" and a "rais[ed] concern[] for her safety." The defendant included in the plan a mandatory referral to the employer's employee assistance program. In addition, the plan required that the plaintiff sign a release that allowed the program to disclose to the defendant information regarding the plaintiff's contact with the program and information regarding attendance at scheduled appointments. When the plaintiff expressed that she was uncomfortable with signing the form and asked for additional time, the defendant suspended the plaintiff without pay. The following day, the plaintiff was terminated. The district court granted the defendant's motion for summary judgment, finding that the performance improvement plan and the referral to the employee assistance program were not "adverse employment actions," and thus, the plaintiff could not establish her claims for discrimination and retaliation on the basis of her perceived disability.

Issues EEOC is Addressing as Amicus: (1) Could a jury find that the defendant regarded the plaintiff as disabled because it took prohibited actions against her based on its perception that she was suicidal? (2) Could a jury find that the plaintiff was qualified to perform the essential functions of her job based on evidence that the defendant would not have terminated her for performance reasons? (3) Would a jury be compelled to accept the defendant's affirmative defense that its actions were justified as "job-related and consistent with business necessity" where the parties disputed key facts?

EEOC's Position: The defendant discriminated against the plaintiff in violation of the ADA because it regarded the plaintiff has having a disability and took "adverse employment actions" against her because of that perceived disability. Because the defendant admitted it perceived the plaintiff has having a "mental health impairment," the defendant perceived the plaintiff as disabled. The EEOC went on to argue that the actions the defendant took were adverse employment actions. Namely, because the plaintiff was required to choose between mandatory involvement with the employment assistance program or termination, such action was an "adverse employment action," along with her termination. Finally, the EEOC argued that the Supreme Court's recent decision in *Muldrow v. City of St. Louis*, 601 U.S. 346 (2024), clarified the adverse-action test, stating "Title VII's text nowhere establishes [the] high bar" of showing a "significant change" in employment status and that this similarly applies to the ADA. Rather, according to the EEOC, the Supreme Court determined that mere injury to an individual based on a protected trait is sufficient. Thus, the EEOC argued the district court was incorrect in determining that the performance improvement plan was not an adverse employment action because it was not a "significant" change in employment. Because the performance improvement plan deprived the plaintiff of a "choice" and resulted in her termination, the EEOC argued the plaintiff did suffer an adverse employment action as a result of the defendant's perception of her having a disability.

Court's Decision: Pending

Alburquerque v. The De Moya Group Inc.	U.S. Court of Appeals for the Eleventh Circuit No. 23-13157	12/13/2023 (amicus filed) 7/8/2024 (decided)	Title VII	Retaliation **Result:** Mixed. The court affirmed in part, reversed in part, and remanded.

Background: The plaintiff, a Cuban immigrant, worked for the defendant, a construction company. The plaintiff met with his vice president of field operations to make a complaint about his direct supervisor's behavior, including his supervisor's alleged disrespect due to the plaintiff's inability to speak English and his Cuban nationality. After this report, the plaintiff's supervisor was changed to a different individual. The new supervisor told the plaintiff that he knew of the prior complaint against the plaintiff's first supervisor. Subsequently, the plaintiff and his former supervisor had a verbal dispute and then later that day, the plaintiff was in a verbal and physical altercation with the supervisor's son. The plaintiff was subsequently terminated as a result of the altercation. The plaintiff claimed his termination was the result of retaliation. The district court concluded that the termination constituted an "adverse employment action," for purposes of the plaintiff's retaliation claim, but that no other actions taken towards the plaintiff did because the plaintiff failed to show how those actions impacted his "status as an employee," or caused him to suffer "a serious and material change in the terms" of his employment. More specifically, the court found that the physical and verbal altercations were not meant to retaliate against the plaintiff for complaining of discrimination and thus, those were not retaliatory actions.

Issues EEOC is Addressing as Amicus: (1) Whether the district court should have applied the standard from *Burlington Northern* – whether the employer's conduct might have dissuaded a reasonable worker form making or supporting a charge of discrimination – for determining whether the challenged conduct is materially adverse (and thus potentially actionable) under Title VII's anti-retaliation provision; (2) Whether a reasonable jury could find that a physical assault and verbal threat by a company supervisor might have dissuaded a reasonable worker from making or supporting a charge of discrimination; (3) Whether a reasonable jury could infer that the assaulting supervisor expressed a retaliatory motive when, after the assault, he threatened to "disappear" the plaintiff if anything happened to the supervisor the plaintiff had accused of discrimination.

EEOC's Position: The EEOC took the position that the district court erred in its analysis, articulating an incorrect standard for determining whether an employer's conduct constitutes a "materially adverse action," citing to *Burlington Northern*. In addition, the EEOC argued that district court erroneously held that the physical assault and verbal threat were not materially adverse actions. The EEOC explained that *materially adverse* for purposes of a retaliation claim is an action that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination," under *Burlington Northern*. Based on that standard, the EEOC argued that the son of the supervisor against whom the plaintiff complained struck him and made a verbal threat were "materially adverse actions" for purposes of retaliation because it would reasonably dissuade an employee from making a complaint.

Court's Decision: The court determined summary judgment was inappropriate as to the retaliatory harassment theory and reversed the decision in part and remanded back to the district court. More specifically, although the court found that the district court correctly granted summary judgment on the issue of retaliatory termination, the district court erred in dismissing the retaliation claims based on the physical assault and verbal threat, because a reasonable jury could find that the actions of threatening and physically assaulting the plaintiff could reasonably dissuade a worker from making or supporting a claim of discrimination.

Batten v. K-VA-T Food Stores Inc.	U.S. Court of Appeals for the Eleventh Circuit No. 23-14199	3/5/2024 (amicus filed) 5/15/2024 (dismissed)	ADA	Disability **Result:** n/a – Parties filed a joint motion to dismiss as moot, which the court granted.

Background: Plaintiff, a former fuel clerk at K-VA-T Food Stores ("Food City"), brought claims of discrimination under the ADA against his former employer. Plaintiff alleged that his former employer failed to accommodate him in violation of the ADA by rejecting his request to continue bringing his service dog to work. The magistrate judge recommended summary judgment be granted to Food City on two grounds. First, Food City was under no obligation to accommodate the plaintiff because he could perform the essential functions of his job without reasonable accommodation. Second, the magistrate judge concluded that even if Food City was obligated to accommodate the plaintiff, the company could not be liable because the plaintiff obstructed the interactive process by insisting on his service dog, giving the company an ultimatum that precluded the company from further participating in the interactive process. The district court accepted the magistrate judge's recommendation and granted summary judgment, not deciding that Food City had an obligation to accommodate the plaintiff because he could already perform essential job functions, but rather holding that the plaintiff obstructed the interactive process by insisting on his service dog, an accommodation the defendant did not find acceptable.

Issues EEOC is Addressing as Amicus: (1) Whether disabled individuals who endure pain and risk their safety to perform their essential job functions retain their statutory right to reasonable accommodation; (2) Whether the plaintiff was responsible for the breakdown of the interactive process where the employer rejected the plaintiff's reasonable and effective accommodation and proposed only a single ineffective alternative.

EEOC's Position: The EEOC argues that an employee's ability to perform his essential job functions by enduring pain and risking his safety did not deprive him of the right to reasonable accommodation. The EEOC contends the magistrate judge and district court incorrectly concluded that the court's precedent limited ADA accommodations to those strictly necessary for performance of essential job functions. The EEOC noted that the case law the magistrate judge and district court relied on in support of their holding were inapplicable to the plaintiff's case because the plaintiff could perform his job with reasonable accommodations and the precedent did not resolve the question of whether the ADA requires accommodations beyond those needed for essential job functions. The EEOC argues the ADA's text does not suggest that an accommodation denial is actionable only where that denial precludes performance of essential job functions but rather makes it unlawful to deny an accommodation when that denial negatively impacts the disabled individual's terms, conditions, or privileges of employment. The EEOC contends that the ADA extends more broadly to goals, like making the workplace "readily accessible" to disabled employees, and ensuring equal opportunity in the workplace, not just contemplating accommodations that allow individuals to perform a position's essential functions. The EEOC further argues that even if the ADA did require a nexus to essential job functions, accommodations that allow disabled employees to work more safely or less painfully can satisfy this nexus. Additionally, the EEOC argued that the plaintiff did not obstruct the interactive process and instead that the company impeded the interactive process by providing no reason that the plaintiff's service-dog accommodation was unreasonable, objectionable, or would pose undue hardship and defendant failed to provide an effective alternative. The EEOC requests the Eleventh Circuit should reverse summary judgment and allow the plaintiff's case to be presented to a jury.

Court's Decision: The court granted the parties' joint motion to dismiss the appeal as moot.

Hall v. Coal Bed Services, Inc.	U.S. Court of Appeals for the Eleventh Circuit No. 24-10572	7/9/2024 (amicus filed)	Title VII	Race Retaliation **Result:** Pending

Background: Plaintiffs, former laborer-operators for the defendant, brought claims of race and retaliation under Title VII and 42 U.S.C. § 1981 against their former employer. The plaintiffs alleged their terminations and subsequent refusal to rehire them constitute disparate treatment based on race and retaliation. The district court granted summary judgment to the defendants on all claims. The court held that the plaintiffs could not make out a prima facie case of disparate treatment under the framework set out in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), because their comparator was not similarly situated in all material respects. The court then held that the plaintiffs did not present a convincing mosaic of circumstantial evidence that would support an inference of discrimination because their evidence consisted solely of "bits and pieces."

Issues EEOC is Addressing as Amicus: (1) Whether the district court misapplied *Lewis v. City of Union City*, 918 F.3d 1213 (11th Cir. 2019) (en banc), when it relied on non-material differences to hold the plaintiffs' comparator was not similarly situated in all material respects; (2) Whether the plaintiffs presented enough evidence to support a reasonable inference of discrimination, thereby defeating summary judgment on their Title VII disparate treatment claim, under either the *McDonnell Douglas* framework or a convincing-mosaic analysis; (3) Whether the district court erred in granting summary judgment on the plaintiffs' retaliation claim.

EEOC's Position: The EEOC argues that the burden-shifting framework does not overtake the issue in a Title VII intentional race-discrimination case: whether the challenged action was taken because of race. The EEOC contends the district court erred in holding the plaintiffs' proffered similarly situated comparator was not in fact similarly situated in all material respects, but it based that conclusion on differences that were not material. The EEOC argues that because the purported similarly situated comparator (1) worked with the plaintiffs regularly, (2) reported to the same supervisor, and (3) been fired at the same time under the same circumstances and sufficient to establish a prima facie case of discrimination. The EEOC further argues the district court erred when it held that the intervening discovery of employee misconduct can sever the casual inference created by close temporal proximity, because the plaintiffs presented a convincing evidentiary mosaic of discrimination and retaliation that are sufficient to defeat summary judgement.

Court's Decision: Pending

Valdes v. Kendall Healthcare Group, LTD	U.S. Court of Appeals for the Eleventh Circuit No. 23-12983	11/29/2023 (amicus filed) 7/10/2024 (decided)	ADEA	Age Retaliation **Result:** Pro-Employer

Background: Plaintiff, a licensed radiology technologist, brought claims of discrimination and retaliation under the ADEA. The district court granted summary judgment holding that the discontinuation of training was not an "adverse employment action" for purposes of the plaintiff's discrimination claim, reasoning that the discontinuation of mammography training did not impact the plaintiff's compensation, terms, conditions or privileges of employment because the training was not a part of her occupation as an MRI technologist, but rather, was an unrelated training that she underwent in her attempt to receive a separate certification. The court further held that because the discontinuation of training was not an adverse action for purposes of the plaintiff's discrimination claim, it likewise could not be an adverse action for purposes of her retaliation claim.

Issues EEOC is Addressing as Amicus: (1) Whether a reasonable jury could find that discontinuing an employee's participation in a paid clinical training program was an adverse employment action for purposes of an age discrimination claim; (2) Whether a reasonable jury could find that the same conduct was a materially adverse action for purposes of an ADEA retaliation claim under the standard set forth in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006).

EEOC's Position: The EEOC argues that the district court erred in holding that the company's decision to discontinue the plaintiff's participation in a paid clinical training program was not sufficiently adverse as a matter of law to support her age discrimination and retaliation claims under the ADEA. The EEOC contends that the denial of training is sufficiently adverse where it negatively impacts an employee's opportunities for professional growth or development. The EEOC claims that training opportunities are privileges of employment because the promise of education and experience in a specific skilled position is a material benefit that would qualify as a privilege of employment. The EEOC further argues that that the ADEA's plain text does not requires a serious and material adverse action to establish disparate treatment. The EEOC also contends that what counts as a materially adverse action in the retaliation context differs from what counts as an adverse employment action in the discrimination context because the anti-retaliation provision does not require impacting the compensation, terms, conditions, or privileges of employment but rather only whether it might dissuade a reasonable worker from complaining about discrimination.

Court's Decision: The appellate court affirmed the district court's granting of the company's summary judgment.

Vincent v. ATI Holdings LLC	U.S. Court of Appeals for the Eleventh Circuit No. 23-12417	10/25/2023 (amicus filed)	Title VII	Sex **Result:** Pending

Background: Plaintiff, a former athletic trainer, brought claims of discrimination and retaliation based on sex under Title VII. Defendant is a rehabilitation-services provider that places athletic trainers in schools. It hired the plaintiff as an athletic trainer and assigned her to a high school pursuant to the contract between the defendant and the high school. Plaintiff claims the defendant discriminated against her based on her sex when it removed her from the high school she was originally assigned to and reassigned her with a corresponding pay cut. The district court held that there was a dispute of material fact as to whether the defendant had control over the decision to remove the plaintiff from her position. However, the district court held the plaintiff's sex discrimination claims failed under both a "convincing mosaic framework" and a "mixed motive theory." The district court further held that the plaintiff could not establish a prima facie case of retaliation regarding her removal because her protected activity occurred after the removal decision, breaking the chain of causation.

Issues EEOC is Addressing as Amicus: (1) Whether a reasonable jury could find the defendant was an "employer" under the Title VII with control over the plaintiff's removal; (2) Whether a reasonable jury could find the defendant discriminated against the plaintiff by acquiescing to a high school's discriminatory removal request and by forcing her to transfer to an inferior position; (3) Whether a reasonable jury could find the defendant retaliated against the plaintiff by removing her from her high school assignment and by forcing her to transfer to an inferior position.

EEOC's Position: The EEOC contends that the defendant shared sufficient control over the essential terms and conditions of the plaintiff's employment to support a finding it was a joint employer. The EEOC noted the defendant retained control over the plaintiff's work and remained solely responsible for her salary and benefits and retained control over the plaintiff's removal. The EEOC argues that the Eleventh Circuit should adopt the standard used by other circuits: that an employer is liable for the discriminatory conduct of its joint-employer client if it participates in the discrimination, or it if knows or should have known of the discrimination but fails to take corrective measures within its control. The EEOC further argues that a reasonable jury could find that despite the defendant's control over the removal decision, it complied with the high school's discriminatory request. The EEOC additionally contends that the plaintiff's transfer to a lower-paid position, and the alternatives the defendant offered, are actionable as adverse actions because they impact the compensation, terms, and conditions of the plaintiff's employment.

Court's Decision: Pending

FY 2024 – Select Appellate Cases in Which the EEOC Was a Party

Case Name	Court and Case Number	Date of Appellate Filing and/or Court Decision	Statutes	Basis/Issue/Result
EEOC v. Center One, LLC	U.S. Court of Appeals for the Third Circuit No. 22-2944	2/28/2023 (appeal filed) 2/1/2024 (decided)	Title VII	Religion **Result:** Pro-EEOC
Background: EEOC alleges that the defendant denied the charging party a reasonable accommodation to observe holy days as required by his Messianic Jewish faith and constructively discharged him because of his religion in violation of Title VII of the Civil Rights Act. The charging party and the EEOC moved jointly, seeking summary judgment on the claims that the defendants failed to accommodate the charging party's religious observance and that the defendant constructively discharged the plaintiff and imposed discipline. The district court denied the motion and entered final judgment for the defendant. **Issues on Appeal:** Whether EEOC made out a prima facie case of religious discrimination by producing evidence from which a jury could find that (a) Defendant constructively discharged the charging party when it refused to reasonably accommodate his religious observance, and (b) Defendant altered the charging party's terms, conditions, or privileges of employment when it assigned him attendance points for his absences on days that his religion forbade working. **EEOC's Position on Appeal:** The EEOC argues the charging party wrongly had to provide a clergy verification by a rabbi if he wanted to take Jewish holy days off from his job, even though the defendant knew he could not meet that requirement because he was between congregations. Specifically, the EEOC argues the company forced this verification requirement on him and that writing him up for calling off work for religious reasons is a clear case of religious bias. Additionally, the EEOC argues the district court should have considered the defendant's refusal to accommodate the charging party's religion an unlawful change to his employment contract since he provided notice even before he started his employment. **Court's Decision:** The Third Circuit vacated the grant of summary judgment and remanded, finding that the constructive discharge theory raises genuine issues of material fact for a jury.				
EEOC v. U.S. Drug Mart	U.S. Court of Appeals for the Fifth Circuit No. 23-50075	4/11/2023 (appeal filed) 1/5/2024 (decided)	ADA	Disability **Result:** Pro-Employer
Background: The charging party worked as a pharmacy technician for the defendant. The charging party suffers from asthma which he disclosed to the defendant during his initial job interview. He also used an inhaler at the pharmacy to control his asthma symptoms which included breathing difficulties, shortness of breath, and pain and pressure in his chest. Around March 2020, as COVID-19 cases spread, the charging party wore a surgical mask to work. However, the defendant instructed him to remove his mask even when he expressed his fears of infection and told his manager he needed the mask because of his asthma, his manager responded that he could either take the mask off and continue working or clock out and go home. Charing party was sent home twice, and was allegedly taunted and humiliated for questioning management's policy prohibiting masks, leading him to quit. The district court granted summary judgment to the defendant. **Issues on Appeal:** Could a reasonable jury find that the defendant's actions in twice sending the charging party home without pay when he sought to wear a protective mask, and then berating the 20-year-old employee in demeaning and humiliating terms and threatening him with termination in response to his renewed mask request, were sufficiently severe to alter the terms or conditions of his employment and establish a hostile work environment under the ADA? **EEOC's Position on Appeal:** The EEOC argues that the harassment the charging party experienced created a hostile work environment, and considering the full context of the harassment faced, a reasonable jury could find that it met the standard for hostile work environment. Specifically, the EEOC argues that the charging party was working in his first job, was suffering from asthma, and was confronting the possibility of exposure to a potentially deadly disease, and teased because of it, established a valid claim for harassment and hostile work environment. Thus, considering the context, a reasonable jury could have concluded that the harassment the charging party experienced was sufficiently intimidating and threatening to alter his conditions of employment. Further, the EEOC argues that a reasonable jury could agree that a reasonable person in the charging party's position would have felt compelled to resign, as he was requesting protection against a potentially deadly disease and was met with abuse humiliation and threats of termination. **Court's Decision:** The appellate court affirmed the judgment of the district court and ordered the EEOC to pay the employer the costs on appeal.				

EEOC v. Village at Hamilton Pointe LLC	U.S. Court of Appeals for the Seventh Circuit No. 22-2806	2/28/2023 (appeal filed) 5/9/2024 (decided)	Title VII	Race Harassment **Result:** Pro-Employer

Background: Defendants are a residential nursing home and its managing company, which is owed by the same family. The managing company provides it with financial, human resources, and other services. The EEOC's 47 claimants are all Black and worked at the nursing home as certified nursing assistants, nurses, and other staff.

The EEOC alleges that the defendants violated Title VII by creating a racially hostile work environment, in part, by routinely catering to the racist demands of its residents by making race-based work assignments and instructing Black staff to stay out of certain residential rooms. Additionally, the claimants testified residents, coworkers, and supervisors used racial slurs.

The district court granted partial summary judgment in favor of the defendants, precluding recovery for 40 of the claimants. The court also granted partial summary judgment holding that the managing company was neither a joint employer nor a single employer.

Issues on Appeal: Whether the district court erred in granting summary judgment in favor of a residential nursing home by (1) instructing the jury on two separate harassment claims—one for coworker/resident harassment and another for supervisor harassment precluding the jury from considering the "totality of the circumstances"; (2) wrongly relying on out-of-circuit precedent to discount the impact of residents' racist statements and behavior; and (3) in finding that the managing company was neither a joint employer nor a single employer.

EEOC's Position on Appeal: The EEOC argues the district court wrongly relied on out-of-circuit precedent to discount the impact of the residents' racist statements and behavior. The EEOC argues an employer's ability to prevent and correct harassment may differ depending on the harasser's ability to self-regulate, but that this is only relevant to liability, and not to severity or pervasiveness. The EEOC argues that there is no assumption-of-risk defense to charges of workplace discrimination, and that the claimants not only suffered harassment by its residents, but also race-based harassment by co-workers and supervisors.

Further, the EEOC argues that the verdict forms provided to the jury wrongly precluded the jury from considering the "totality of the circumstances" by requiring it to evaluate supervisor harassment separately from coworker/ residential harassment. The EEOC states that it raised a single claim for hostile work environment, but the district court required the jury to disaggregate the evidence of a hostile work environment based on the harasser's identity, opposite of what the law requires.

Court's Decision: The appellate court affirmed the district court's grant of partial summary judgment on the claims of the 15 class members, and committed no reversible error during the trial of the remaining racial harassment claims. The court also found the district court correctly held that the defendant was not an employer within the meaning of Title VII.

EEOC v. BNSF Railway Co.	U.S. Court of Appeals for the Eighth Circuit No. 24-2082	9/13/2024 (appeal filed)	Title VII	Sex Harassment **Result:** Pending

Background: The EEOC alleged the company subjected the charging party and a class of similarly situated women to a hostile work environment, including verbal abuse, unwanted advances, sexist imagery, and other offensive conduct. The district court dismissed the EEOC's claim for class-wide relief, and later granted summary judgment to the employer on the charges related to charging party.

Issues on Appeal: (1) Whether the EEOC's operative complaint alleges facts sufficient to state a plausible hostile-work-environment claim seeking relief for a defined class of women who worked at the employer's worksite; (2) Whether genuine issues of material fact preclude summary judgment on the EEOC's hostile-work-environment claim seeking relief for the charging party.

EEOC's Position on Appeal: The EEOC alleges the lower court misstated and misapplied the proper standards for pleading class claims in EEOC enforcement actions and for proving hostile work environment claims. The EEOC's operative complaint states a plausible hostile work environment claim seeking relief for a defined class of women who worked at the employer's place of business. "The complaint generally identified or described (1) the group of aggrieved persons, (2) the nature of the harassment those individuals experienced, (3) the relevant timeframe during which the harassment occurred, (4) the source of the harassment, and (5) some basis for employer liability. No more was required. In holding otherwise, the district court imposed novel pleading requirements, which have not been adopted by any other court and find no support in the statute or precedent. Those requirements are inconsistent with the plausibility pleading standard that governs in all civil actions, misapprehend the function of EEOC enforcement actions, and rest on fundamental misunderstandings about hostile-work-environment claims." Moreover, the EEOC alleges that genuine issues of material fact should have precluded summary judgment on the EEOC's hostile-work-environment claim seeking relief for the charging party.

Court's Decision: Pending.

Appendix C – Subpoena Enforcement Actions Filed by EEOC in FY 2024[1131]

Filing Date	State	Court Name / Case Number / Judge	Defendant(s)	Individual Charging Party or Systemic Investigation	Result
10/19/2023	MN	U.S. District Court for the District of Minnesota No. 0:23-mc-00101-DJF Hon. Dulce J. Foster	Cambridge Transportation, Inc.	Individual Charging Party	The court granted the EEOC's application and ordered the Respondent to comply in full. The court then imposed daily monetary sanctions on the Respondent for continued failure to comply.

Commentary: The EEOC is investigating a charge of sex, race, national origin, disability, and equal pay discrimination filed against Respondent. The charging party is a driver who alleges Respondent discriminated against her on the bases of her sex (female), race (white), national origin (United States) and disability by paying a higher rate of compensation to men of Somalian national origin. She also alleged that employees harassed her about her disability.

The EEOC sent the Respondent notice of the charge. In its position statement, the Respondent argued the charging party is not covered by Title VII because she has a signed an agreement purporting to classify her as an independent contractor, and because it only has six employees. Having received the Position Statement, the EEOC began to investigate whether Title VII had been violated. Based upon initial investigation, EEOC concluded additional information was needed to assess both the threshold question of charging party's classification as an employee or independent contractor, and the merits of her charge.

As part of its investigation of the charge, the EEOC sent Respondent an initial Request for Information (RFI) dated October 27, 2022. It sought, in summary, (1) a copy of Charging Party's personnel file; and (2) the name, race, sex, and pay rate (specifying whether hourly, monthly, or per job performed) of all drivers (including employees and alleged contractors) who drove for Respondent. After Respondent's failure to respond, the EEOC issued a subpoena making six requests, largely tracking the information sought in the RFIs. Relevant to this action, and in summary, the subpoena requested: records containing the names, race, sex, and pay rate agreement (including whether the pay rate was hourly, monthly, or per job performed) for all individuals working as drivers (Request 4); records of the number of individuals who drove for the Respondent (Request 5); and a list of positions Respondent considered to be employees (Request 6). The subpoena required the Respondent to produce the documents by March 17, 2023. Respondent did not comply initially. Eventually, Respondent issue a partial response, which the EEOC contended was incomplete and largely nonresponsive.

In an effort to resolve the issue, EEOC extended the time for a response and was willing to accept the following: (1) documents sufficient to establish the pay rates for all drivers who performed work for Respondent and specifying the pay arrangement for each driver (including whether hourly or yearly, or on the basis of miles driven); and (2) a complete list of all drivers from the relevant time period, and information about each driver's name, race, sex, and date of hire. The Respondent did not provide this information, so the EEOC filed the instant application for an order to show cause.

The court granted the EEOC's application, ordering the Respondent to comply fully with the subpoena. The court additionally noted that if the Respondent did not fully comply with the EEOC's subpoena by the court-set date, it would hold it in civil contempt and issue daily fines for each day it remained in noncompliance. The Respondent failed to respond, so the court granted a $100/day fine. After the Respondent's continued non-compliance, the EEOC filed a motion to modify the civil contempt sanctions for failure to comply. The court granted the motion and increased the penalty to $200/day.

1131 The summary contained in Appendix C reviews select administrative subpoena enforcement actions filed by the EEOC in FY 2024. The information is based on a review of the applicable court dockets for each of these cases. The cases illustrate that in most subpoena enforcement actions, the matters are resolved prior to the issuance of a court opinion.

Filing Date	State	Court Name / Case Number / Judge	Defendant(s)	Individual Charging Party or Systemic Investigation	Result
10/20/2023	IL	U.S. District Court for the Northern District of Illinois No. 1:23-cv-15162 Hon. Joan H. Lefkow_	LAS Hardwoods, Inc.	Individual Charing Party	The EEOC moved to dismiss after Respondent submitted it has sufficient employees for Title VII coverage.

Commentary: EEOC is currently investigating a charge of sex discrimination and retaliation filed against Respondent. Charging party is a former employee who claims Respondent discriminated against him on the basis of his sexual orientation and retaliated against him for engaging in protected activity (reporting sex-based discrimination). Charging party further alleges Respondent created a hostile work environment.

In the course of its investigation, EEOC issued a subpoena seeking documents related to that investigation – an employee list and other documents showing the number of employees working for Respondent during the relevant time, which would allow the agency to determine whether Respondent is covered by Title VII. Specifically, EEOC requested a list of employees who worked at Respondent's Elmhurst location from January 1, 2021 to January 30, 2023. On February 27, 2023, Respondent provided the Elmhurst employee list. On July 14, 2023, EEOC issued Respondent a second RFI. The second RFI included a request for a list of all employees who worked at any of Respondent's three locations from January 1, 2019 through the present (July 14, 2023), including each individual's: first and last name, physical work location, date of hire, position title, date of discharge (if applicable), reason for discharge (if applicable), current or last known personal phone number, current or last known email address, and current or last known home address.

Respondent provided a response to another portion of the second RFI on July 22, 2023; however, it did not provide the employee list. Respondent also requested EEOC's regulatory authority to request the employee list. EEOC provided the authority. Respondent's attorney objected that the request was a "fishing expedition," and the EEOC explained that at list is needed to confirm the 15-employee threshold. EEOC provided Respondent's counsel with links to resources and requested that Respondent either sign and return the stipulation that it employed at least 15 employees for at least 20 weeks of each calendar year from 2019 through 2022 or submit sufficient documentation for EEOC to calculate Respondent's number of employees, by August 11, 2023. The Respondent failed to respond, so the EEOC served a subpoena on Respondent requesting: Documents sufficient to identify each individual employed by Respondent at any time between January 1, 2019 and December 31, 2022 and to demonstrate each such employee's: a. Full name; b. Home address; c. Personal phone number (cell phone, if available); d. Personal email address; e. Job title; f. Job location; g. Date of hire; and h. Date of termination; and (2) Copies of all UI 3/40 Forms (Employer's Contribution and Wage Report) filed by Respondent with the Illinois Department of Employment Security for the years 2019, 2020, 2021, and 2022.

The EEOC clamed Respondent failed to submit a complete response, so it filed the instant application, noting Respondent has made no legal argument in opposition, has rejected the agency's offer that as an alternative to production of the documents Respondent could stipulate to coverage, and yet has not produced the documents requested in the subpoena.

On October 23, 2023, the EEOC filed a motion to dismiss without prejudice its application for an order to show cause after the Respondent contacted the agency and stated it is willing to stipulate it had at least 15 employees for Title VII purposes.

12/7/2023	MD	U.S. District Court for the District of Maryland No. 8:23cv3326 Hon. Paula Xinis	EchoPark Automotive Inc.	Systemic Investigation	The court granted the EEOC's request for enforcement of the subpoena.

Commentary: EEOC received a charge alleging national origin and age discrimination in hiring. Respondent disclosed that it subjected charging party and other candidates to behavioral assessments as part of its selection process. Growing out of its investigation of the charge, EEOC is now investigating Respondent for potential unlawful employment practices associated with its use of the assessments. EEOC issued an administrative subpoena seeking documents and other information relevant to the employment practices under investigation and necessary to determining whether such practices violate Title VII and/or the ADEA, including information concerning Respondent's selection process, its reliance on assessment results, the purpose, development, administration and content of the assessments, candidate advancement/selection data (to confirm the full scope of the assessments' use as a selection procedure), and demographic data (to perform statistical analysis of possible disparate impact resulting from the assessments).

The EEOC claims the Respondent produced only limited reports from its SmartRecruiter System, and took the position that it could not produce information or data about its assessments, as they belonged to SHL, its vendor. The EEOC then issued a subpoena seeking relevant documents and information Respondent refused to produce voluntarily and/or that SHL stated required Respondent's approval for production, including: documents and information about the development and content of the assessments; how Respondent uses and relies upon assessment results; records for each assessment required to be maintained by 29 CFR § 1607 et seq.; Respondent's hiring process for positions involving assessments; contact information for recruiters who made hiring decisions for positions involving assessments; and, for each assessment used by Respondent, candidate identifying, demographic, and employment information, assessment type, and score /result.

The EEOC claims Respondent has refused to produce the subpoenaed information, and therefore asked the court for an application to show cause why the subpoena should not be enforced.

On May 20, 2024, the court granted the EEOC's request for enforcement of the subpoena.

Filing Date	State	Court Name / Case Number / Judge	Defendant(s)	Individual Charging Party or Systemic Investigation	Result
3/14/2024	PR	U.S. District Court for the District of Puerto Rico No. 24-mc-103 Hon. Silvia L. Carreno-Coll	Farmacia Carimas	Individual Charging Party	The EEOC moved to withdraw the application following the Respondent's voluntary compliance.

Commentary: Charging party alleged her manager, who is a nephew (Khalid Yassin) of the Respondent's owner (Abdullah Yassin) subjected her to ongoing sexual harassment. EEOC filed suit on her behalf. As part of its investigation, the EEOC requested information, but the company did not respond. The EEOC therefore filed a subpoena requesting much of the same information, namely:

(1) Documents sufficient to show each and every entity, including every pharmacy, owned by Abdullah Yassin and Khalid Yassin; (2) Documents sufficient to show the organizational structure of Respondent company, including, but not limited to, an organizational chart; (3) Documents consisting of policies, rules, and procedures related to sexual harassment, hostile work environment, and retaliation from October 1, 2020 through October 31, 2023. If not available in written form, a detailed explanation of the policies, rules, and procedures related to sexual harassment, hostile work environment, and retaliation; (4) All documents maintained for charging party including her complete personnel file. This request should be construed to include all terms of compensation, bonuses, sick leave or other time off, health insurance, and any disciplinary history or commendation; (5) All documents related to complaint(s) of sexual harassment, hostile work environment, and retaliation involving Khalid Yassin whether made formally or informally, from October 1, 2020 through the present; (6) All complaint(s) of sexual harassment, hostile work environment, and retaliation involving Khalid Yassin whether made formally or informally, from October 1, 2020 through the present: (a) Full name of complainant; (b) Sex; (c) Last known home phone number, email address, and home address; (d) Relationship between alleged harasser and complainant; (e) A detailed account of the conduct which was the subject of the complaint including any relevant dates. (7) An electronic database (preferably in Excel format) identifying all persons employed by all entities identified in Request No. 1 between January 1, 2020 through October 31, 2023. For each employee, provide: (a) Full name; (b) Sex; (c) Last known home phone number, email address, and home address; (d) Date of hire; (e) Date of separation (if applicable); (f) Reason for separation (if applicable); (g) Job title; (h) Employing entity; (i) Worksite; and (j) Supervisor's name.

The respondent did not file a petition to revoke or modify the subpoena, so the EEOC filed this instant application for an order to show cause why the subpoena should not be enforced.

On May 9, 2024, the EEOC moved to withdraw the application following the Respondent's voluntary compliance with the subpoena.

4/30/2024	MI	U.S. District Court for the Eastern District of Michigan No. 2:24mc50408 Hon. Linda V. Parker	Do & Co. Detroit Inc.	Individual Charging Party	The court granted the EEOC's application for an order to show cause.

Commentary: The EEOC is investigating a charge of race discrimination filed against Respondent under Title VII by a Black female human resources employee who alleges that Respondent did not compensate her and other Black employees at the same rate as her white counterparts and that Respondent terminated Black employees who failed Respondent's mandated drug test but did not terminate white employees who failed their drug test.

During its investigation, the EEOC issued a subpoena seeking information relevant to the investigation of the charge against Respondent. As of the date of the application to show cause why the subpoena has not been enforced, the Respondent had failed to comply with the subpoena. Among the information sought by the Commission was applicant flow and demographic data on individuals (applicants and employees) who applied to Respondent's Michigan commercial kitchen, whether each person was hired/not hired, the reasons for not hiring an applicant, the reason for terminating an employee, and each person's drug-test results. The subpoena also sought applicant and employee data for a four-year and nine-month period to evaluate whether Respondent's employment practices with respect to wages and drug testing violated Title VII.

On May 3, 2024, the court granted the EEOC's application for an order to show cause why the subpoena should not be enforced.

9/16/2024	MI	U.S. District Court for the Western District of Michigan No. 1:24-mc-00102 Hon. Sally J. Berens	Hearthside Food Solutions, LLC	Individual Charging Party	The EEOC moved to dismiss its application after the Respondent voluntarily complied with the subpoena.

Commentary: EEOC is investigating the charging party's allegations that his employer failed to accommodate his disability and fired him in retaliation for requesting a reasonable accommodation. As part of an investigation, the EEOC sought the charging party's medical file and a list of Respondent's employees who required more than six months of medical leave and were terminated pursuant to Respondent's leave policies. The EEOC provided Respondent with numerous extensions to provide the requested information, but the Respondent ultimately failed to provide the information. The EEOC served a subpoena seeking this information, to which the Respondent failed to comply. The EEOC then sought an order to show cause why its administrative subpoena should not be enforced.

On October 15, 2024, the EEOC voluntarily dismissed its application after the Respondent voluntarily complied with the subpoena.

Appendix D - FY 2024 Select Summary Judgment Decisions by Claim Type(s)

Statute and Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motion and Result	General Issues
ADA Disability Discrimination Failure to Accommodate	American Flange & Greif, Inc.	U.S. District Court for the Northern District of Illinois No. 21-cv-5552	2024 U.S. Dist. LEXIS 166267 (N.D. Ill. Sept. 16, 2024)	Defendants' Motions for Summary Judgment **Result:** Mixed The court denied a manufacturing plant's motion for summary judgment, but granted the wholly-owned subsidiary's motion.	Did the defendants, who maintained a point-based attendance policy, violate the ADA by failing to accommodate the charging party's disability and by firing him because of his disability? Does the doctrine of alter ego liability apply to the defendant-manufacturer and its wholly owned subsidiary in this case?

Commentary: The EEOC alleged the defendant manufacturer (Greif, Inc.) and its wholly owned subsidiary (American Flange) violated the ADA by not excusing the charging party's disability-related absences. American Flange operates a manufacturing plant. In 2001, Greif, Inc. acquired American Flange; both companies share human resources and accounting functions.

American Flange used a point-based attendance system that did not excuse disability-related absences. In the instant case, the charging party was fired following two absences connected to his seizure disorder. Under the American Flange's "temp to hire" program, workers who, under the company's no-fault attendance policy, receive three attendance points during their 90-day probationary period are terminated.

EEOC brought suit alleging failure to accommodate and disability-based discrimination. Both defendants filed motions for summary judgment.

As against American Flange, the focus of the failure to accommodate claim rested on whether the charging party could perform the job's essential functions with or without a reasonable accommodation. The court examined the charging party's attendance, which the defendant claimed was erratic and unreliable, and as such claimed it was not required to provide a reasonable accommodation. The court determined, however, that the charging party's work record was not determinative of whether he was capable of regular and consistent attendance, so this issue was best left up to the jury.

With respect to the disability discrimination charge, the court found there was no dispute that the charging party has a disability and there is a genuine dispute about whether he is a qualified individual. As to the third element the claim, the court found there is a genuine dispute about whether the charging party was terminated because of his disability. In this case, the court found there is circumstantial evidence that would allow a reasonable juror to infer that American Flange's reason for firing the charging party was pretextual. For example, he was terminated after accruing two attendance points, while the policy provides that three warrant termination. Moreover, the firing occurred shortly following the charging party's provision of a doctor's note. The court therefore denied American Flange's motion for summary judgment.

As for Greif's motion for summary judgment, the dispute centered around whether it is the charging party's employer under the ADA. First, there was a genuine dispute regarding whether this entity has enough employees (15) to be considered an employer under the ADA. Second, the court looked at alter ego liability. Generally, an ADA plaintiff may not sue their employer's parent company because "parent corporations are not liable for the wrongs of their subsidiaries unless they cause the wrongful conduct (and so are directly liable)." *Bright v. Hill's Pet Nutrition, Inc.*, 510 F.3d 766, 771 (7th Cir. 2007). The doctrine of alter ego liability—also known as affiliate liability—expands the scope of entities properly considered one's "employer" under Title VII and, by extension, the ADA. More specifically, under the alter ego theory of liability, "an entity affiliated with the employer or former employer of a Title VII plaintiff may be named as a Title VII defendant if it has forfeited its limited liability." The EEOC and Greif both correctly note, a corporate entity may forfeit its limited liability status where: 1) the traditional conditions for "piercing the corporate veil" are present; or 2) the corporation took actions to sever the small corporation for the express purpose of avoiding liability; or 3) the corporation directed the discriminatory act, practice, or policy of which the employee is complaining; or 4) the corporation is liable based on the misdeeds of its predecessor through successor liability.

Here, the court found that the affiliate liability theory fails as a matter of law. To meet its burden, the EEOC would have to show "such unity of interest and ownership [between American Flange and Greif] that the separate personalities … no longer exist" and "adherence to the fiction of separate corporate existence would sanction a fraud or promote injustice." In Illinois, there is sufficient unity of interest when corporations (1) fail to maintain adequate corporate records or to comply with corporate formalities, (2) commingle funds or assets, (3) undercapitalize, or (4) treat the assets of another as their own. In this case, even taken in the light most favorable to the EEOC, its evidence only establishes that American Flange and Greif were integrated. Here, there is no evidence suggesting that the integration of these two companies was meant to "manipulate creditors and thus warrant[s] veil-piercing." Further, the EEOC has not produced any evidence suggesting that Greif had anything to do with the charging party's termination. Accordingly, the EEOC has failed to show that American Flange and Greif are a single employer or that the aggregation of American Flange and Greif employees is appropriate.

Therefore, the court granted Greif's motion for summary judgment, but denied American Flange's.

Statute and Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motion and Result	General Issues
ADEA Age Discrimination	Urbana School District No. 116	U.S. District Court for the Central District of Illinois No. 18-cv-2212	2023 U.S. Dist. LEXIS 199744 (C.D. Ill. Nov. 7, 2023)	Parties' Cross-Motions for Summary Judgment **Result:** Pro-EEOC The court granted the EEOC's motion and denied the defendant's motion.	Did the defendant school district violate the ADEA by limiting pay raises to older teachers to comply with provisions of a collective bargaining agreement designed to avoid a pension surcharge?
Commentary: The EEOC alleged the school district employer violated the ADEA from 2014 to 2020 by limiting the annual earnings increases of teachers over age 45 to avoid a pension-contribution surcharge. This practice was codified in the school's collective bargaining agreement. The charging party was a 52-year-old teacher who claims he was paid a lower salary than he should have been on account of this policy. The EEOC moved for summary judgment on the question of liability and for partial summary judgment on damages. Specifically, on the second point, the EEOC sought summary judgment on damages "for teachers whose base pay was capped and for some teachers whose supplemental earnings were limited" by the policy. The EEOC alleges the school violated the ADEA in two ways: first by limiting the salary increases of many teachers over age 45 and all teachers over 50, and then by limiting those teachers' supplemental pay in a similarly discriminatory fashion. These claims rest on a theory of disparate treatment. "In a disparate treatment case, liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision." *Hazen Paper Co. v. Gibbins*, 507 U.S. 604, 610 (1993). The EEOC further alleges that the policy was discriminatory on its face, such that "independent proof of an illicit motive is unnecessary." *See Solon v. Gary Cmty. Sch. Corp.*, 180 F.3d 844, 855 (7th Cir. 1999) (citation omitted). An ADEA plaintiff ordinarily "bear[s] the initial burden of demonstrating that the actual motivation for the employer's decision was the employee's age." *Auerbach v. Bd. of Educ. of the Harborfields Cent. School Dist.*, 136 F.3d 104, 109 (2d Cir. 1998). But a policy "that facially discriminates based on age suffices to show disparate treatment under the ADEA." *Kentucky Ret. Sys. v. E.E.O.C.*, 554 U.S. 135, 147-48, 128 S. Ct. 2361, 171 L. Ed. 2d 322 (2008); see also *Solon*, 180 F.3d at 855. The District claimed that the policy was based on years of service, not age. The court, however, noted that "[b]ecause age and years of service are analytically distinct, an employer can take account of one while ignoring the other, and thus it is incorrect to say that a decision based on years of service is necessarily 'age based.'" *Hazen Paper*, 507 U.S. at 612. Moreover, the "undisputed record shows that the District took explicit, and ultimately determinative, account of age." For example, one of the District's designees testified that the school tracked teachers based on age, and "no reasonable factfinder could find otherwise." As for the defense of "reasonable factor other than age," the court found no reasonable factfinder could find that age was anything other than a but-for cause of the discriminatory treatment of teachers over age 45. Even if it could assert such a defense, the ADEA, "neither section 4(f)(2) nor any other section of the [ADEA] excuses the payment of lower wages or salary to older employees on account of age." 29 C.F.R. § 1625.10(b). Therefore, summary judgment was granted to the EEOC, and denied to the defendant.					
ADEA	Dolgencorp, LLC	U.S. District Court for the Eastern District of Oklahoma No. 21-295	2024 U.S. Dist. LEXIS 18569 (E.D. Okla. Feb. 2, 2024)	Defendant's Motion for Summary Judgment; EEOC's Motion for Partial Summary Judgment **Result:** Mixed. The court granted in part and denied in part both parties' motions.	Did the defendant create an environment sufficiently hostile towards older workers to result in their constructive discharge? Did the defendant retaliate against certain employees who allegedly complained about ageist comments?

Statute and Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motion and Result	General Issues
Commentary: The EEOC claims defendant discriminated against various employees on account of age by insulting older workers in favor of younger workers. The EEOC claims certain comments such as a need to "shake things up" and bringing in "fresh blood" created a hostile work environment for those over age 50, resulting in some employees' constructive discharge. In determining whether conduct is sufficiently severe or pervasive for a hostile environment claim, the Tenth Circuit considers, under the totality of the circumstances: "(1) the frequency of the discriminatory conduct; (2) the severity of the conduct; (3) whether the conduct is physically threatening or humiliating, or a mere offensive utterance; and (4) whether the conduct unreasonably interferes with the employee's work performance." *Holmes v. Regents of Univ. of Colo.*, 176 F.3d 488 (10th Cir. May 7, 1999) (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993)). In this case, the court found there is a genuine issue of material fact as to whether EEOC can show a severe or pervasive hostile work environment for various employees. The court found such comments, among others, could be interpreted as hostile towards older workers. The court did, however, grant the defendant's motion for summary judgment on one employee's constructive discharge claim, finding comments such as needing to hire "young blood" to create a "millennial team" did not rise to such an intolerable level that a reasonable employee would have no choice but to quit. "The full test for constructive discharge under the ADEA is whether the employer made working conditions so intolerable that a reasonable person would feel []he has no choice but to resign." *Delopez v. Bernalillo Pub. Sch.*, 2022 WL 17844509, at *6 n.5 (10th Cir. Dec. 22, 2022) (citing *Derr v. Gulf Oil Corp.*, 796 F.2d 340, 344 (10th Cir. 1986); *James v. Sears, Roebuck & Co.*, 21 F.3d 989, 992 (10th Cir. 1994)). As for the retaliation claims against two employees, the defendant claimed they were fired not for reporting age bias but rather for falsifying records. The court, however, found this issue was up to a jury to determine.					
Title VII Sexual Harassment Retaliation	SkyWest Airlines, Inc.	U.S. District Court for the Northern District of Texas No. 3:22-cv-1807	2024 U.S. Dist. LEXIS 21225 (N.D. Tex. Feb. 7, 2024)	Defendant's Motion for Summary Judgment **Result:** Mixed, but mostly pro-EEOC. The court granted the motion in part and denied it in part.	Should the court grant the defendant's motion for summary judgment on the grounds that the EEOC has not shown that the defendant failed to promptly address complaints of a hostile work environment, and that no adverse actions were taken against her following her complaint?
Commentary: The EEOC and plaintiff-intervenor alleged the defendant created a hostile work environment by making sexual comments and gestures. After transferring to a different department, the charging party informed her direct supervisor of the conduct at the prior location. He in turn allegedly told her to let him know if things got worse. The charging party took an unpaid leave of absence, purportedly on account of the harm to her mental health. Upon her return, the charging party stated the harassment continued, about which she reportedly complained. After filing a formal complaint, she went on paid administrative leave while the company investigated. She was informed that she could not return to work until all employees had undergone sexual harassment training, which was delayed due to the pandemic. The charging party resigned, taking the company's COVID-19 early retirement option. She alleged she felt compelled to resign because the company "failed to return her to work and ceased to communicate with her about any reasonably specific date she could expect to safely return." The charging party filed a charge with the EEOC. Defendant filed a motion for summary judgment, arguing that the EEOC failed to show that the employer knew or should have known of the harassment and failed to take prompt remedial action. The court disagreed as to the "known or should have known" element, as the EEOC presented evidence that the charging party notified management of the alleged harassing comments and behavior, and that a reasonable jury could find that the defendant had actual knowledge of the harassment as early as December 2019. In addition, a jury could find the defendant had constructive knowledge of the harassment, as a manager testified in deposition that he was present when comments were made by his subordinates. As for whether a reasonable jury could find the defendant took prompt remedial action, the EEOC claimed the defendant's response was not designed to end the harassment in question. For example, the training could have been conducted virtually, and the discipline imposed on three employees was at least partially ineffective, as one testified he had never been informed he was subject to discipline in the first place. Therefore, there remains questions of fact for the jury to assess whether the defendant's actions were effective.					

Statute and Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motion and Result	General Issues
As for the retaliation claim, the plaintiff must show "(1) that [she] engaged in activity protected by Title VII, (2) that an adverse employment action occurred, and (3) that a causal link existed between the protected activity and the adverse action." Defendant claims the EEOC has provided no evidence to show the charging party suffered an adverse employment action. EEOC, however, claims the defendant (1) subjected the charging party indefinitely to paid administrative leave and (2) forced her to resign—*i.e.*, constructively discharged her. The court found there remains a question of fact as to whether paid administrative leave constituted an adverse employment action. As for whether she was constructively discharged, the court determined a reasonable jury *could not* find that the charging party was constructively discharged. She took leave at her own insistence, and EEOC points to no evidence indicating any alleged failure by defendant to respond to the charging party's complaints were calculated to force her out. The retirement option was not offered to her individually; rather, it was a blanket offer to all eligible employees. Therefore, the court dismissed the retaliation claim on the constructive discharge theory. But the defendant is not entitled to summary judgment dismissing the retaliation claims, except to the extend the claim relies on a theory of constructive discharge.					
ADA	The Modern Group, LTD. and Dragon Rid Sales & Service, LLC	U.S. District Court for the Eastern District of Texas No. 1:21-CV-451	2024 U.S. Dist. LEXIS 53275 (E.D. Tex. Mar. 25, 2024)	Defendants' Motion for Summary Judgment; EEOC's Motion for Partial Summary Judgment **Result:** Primarily Pro-EEOC The court denied the defendants' motion and granted the EEOC's motion in part and denied in part.	Was a job applicant who took methadone and Xanax for opioid use disorder and anxiety disorder discriminated against when his job offer was rescinded following a pre-employment drug screen? Is he a qualified individual with a disability? Does he pose a direct threat to the workplace? Are the defendants an integrated enterprise? Did the defendants abandon or not properly plead certain affirmative defenses?
Commentary: The EEOC alleges the defendant violated the ADA when it rescinded the charging party's offer of employment after a pre-employment drug screen. The charging party informed the employer he took prescribed methadone and Xanax for opioid use disorder and anxiety disorder. The medical review officer (MRO) reviewed the drug screen and prescriptions and noted the charging party had prescriptions, the doses were high and had had a sedating effect, and that he would not be able to hold safety-sensitive positions. The MRO did not communicate with or examine the charging party before submitting his notes and the test results to the employer, which ultimately rescinded the job offer. The EEOC filed suit. The defendants moved for summary judgment, claiming (1) the EEOC cannot establish its prima facie case of disability discrimination under the ADA; (2) Defendants did not operate as an integrated enterprise, and Modern, the parent company, is thus not a proper defendant in this case; (3) the EEOC cannot assert a failure-to-accommodate cause of action at this juncture; (4) the EEOC cannot allege an independent claim for "failure to engage in an interactive process"; and (5) the EEOC cannot present any evidence to support an award of punitive damages against defendants. The EEOC, in turn, seeks partial summary judgment as to liability because, it contends, there is no genuine dispute of material fact as to its prima facie case, defendants have waived any direct threat defense, and defendants cannot proffer any evidence to create a genuine dispute of material fact as to whether they revoked the charging party's offer of employment for a legitimate, nondiscriminatory reason. In the alternative, the EEOC requests that the court enter summary judgment on the following issues: (1) the EEOC has established its prima facie case of disability discrimination; (2) defendants cannot produce evidence demonstrating that they revoked the charging party's offer of employment for a legitimate, nondiscriminatory reason; (3) defendants operated as an integrated enterprise; and (4) defendants cannot offer evidence to create a genuine dispute of material fact regarding their affirmative defenses of failure to mitigate damages, failure to state a claim, failure to exhaust administrative remedies, and statute of limitations/laches. With respect to the integrated enterprise question, the court examined (1) interrelation of operations; (2) centralized control of labor operations; (3) common management; and (4) common ownership or financial control, and concluded Modern and Dragon Rig, as parent and subsidiary, operated as an integrated enterprise, denying the defendants' motion on this issue.					

Statute and Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motion and Result	General Issues
The court disagreed with the EEOC, however, that defendants' concession that the job offer was revoked on account of the medications constitutes direct evidence of discrimination because the decisionmakers admitted they knew the conditions the medications treated. Defendants maintain that the EEOC relies on evidence that contains "no reference or connection to [charging party's] alleged disabilities," but rather inferences. The court agreed. The EEOC would therefore have to proceed with its prima facie case of disability discrimination. As for whether the charging party was disabled, the court found there remains a genuine issue of material fact as to whether the charging party's opioid use disorder substantially limited one or more of his major life activities. The court also determined there is a genuine issue of material fact as to whether the charging party was qualified for the position. The court disagreed with the EEOC that the defendants waived a direct threat affirmative defense. "Here, assuming arguendo that direct threat is an affirmative defense, the court concludes that the EEOC had sufficient notice of the application of the direct threat analysis to this case despite Defendants' failure to reference 'direct threat' explicitly in their answer." Although defendants' answer never expressly uses the phrase "direct threat," the EEOC nevertheless anticipated the application of the direct threat analysis to this case, as evidenced by its inclusion of an argument addressing the concept of direct threat in its own summary judgment motion. Whether the charging party in fact posed a direct threat is a question for the jury, as is whether the defendants rescinded the job offer because of his disabilities. Facts in dispute also remain whether the defendants' legitimate, nondiscriminatory reason for their actions were pretext for discrimination. Therefore, the court denied the defendants' motion for summary judgment. EEOC also moved to strike defendants' failure to mitigate defense, but the court denied it on the grounds the defendants produced sufficient evidence to create a genuine dispute of material fact as to both whether the charging party failed to exercise reasonable diligence in seeking out other employment and whether substantially equivalent employment was available to him. The EEOC is, however, entitled to summary judgment on the defendants' affirmative defenses of laches/statute of limitations and failure to exhaust administrative remedies.					
Title VII Sexual Harassment	BNSF Railway Co.	U.S. District Court for the District of Nebraska No. 8:21CV369	2024 U.S. Dist. LEXIS 54660 (D. Neb. Mar. 27, 2024)	Defendant's Motion for Summary Judgment **Result:** Pro-Employer The court granted the defendant's motion.	Can the EEOC pursue its case following the death of the charging party? If so, was the alleged harasser a supervisor or coworker? Did the alleged conduct constitute actionable harassment?
Commentary: EEOC alleges defendant subjected the charging party to a sexually hostile work environment. While litigation was pending, the charging party died. The court determined the EEOC could nonetheless proceed with its lawsuit. The death of a victim—even the original or only "aggrieved person"—does not bar the EEOC from continuing to prosecute its own independent action. The court concludes that the defendant is entitled to summary judgment on all remaining claims because such claims are not actionable as a matter of law. The court first addressed the standards to apply when assessing the charging party's claims—specifically, whether this is a "coworker harassment" case or a "supervisor harassment" case to which different standards for employer liability apply. The court determined that this is a "coworker harassment" case rather than a "supervisor harassment" case because the coworker accused of boorish and inappropriate actions toward the charging party did not have the supervisory authority required to deem him a "supervisor" under Title VII. To survive summary judgment on a hostile work environment claim—whether the harassment is by a coworker or a supervisor—a plaintiff must establish a genuine issue of material fact with regard to each of the following elements: (1) that she belongs to a protected group; (2) that she suffered unwelcome harassment; (3) that there was a causal nexus between the harassment and her membership in the protected group; (4) that the harassment affected a term, condition, or privilege of her employment; and (5) that there is a basis for employer liability. As the Eighth Circuit has explained, "Employers are not to be held strictly liable for a hostile work environment created by non-supervisory employee harassment." *Sellars v. CRST Expedited, Inc.*, 13 F.4th 681, 698 (8th Cir. 2021). Instead, "[i]n cases of coworker-on-coworker harassment, the employer is liable only if the employer's own negligence caused the harassment or led to the continuation of the hostile work environment." Determining the existence of an employer's negligence involves a two-step inquiry: (1) whether the employer had actual or constructive notice of the conduct, and (2) whether the employer took remedial action reasonably calculated to stop the harassment. In this case, the court first found the EEOC failed to show the alleged harasser had any supervisory authority over the charging party. The court then held that because the defendant is entitled to summary judgment on any supervisor harassment claim, it is unnecessary for it to consider whether any harassment attributable to employee was sufficiently severe or pervasive to be actionable standing alone. The court also rejected the EEOC's continuing violation theory of harassment, which sought recovery of damages prior to the limitations date. There must be some relationship among the alleged incidents of harassment before and after the limitations cutoff to find a "continuing violation." The EEOC's claim and any recovery could therefore only be based on alleged harassment that occurred after the March 23, 2017, limitations period.					

Statute and Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motion and Result	General Issues
The court then addressed the defendant's argument that the court should not consider instances of harassment of which the charging party was not aware or involved. The court concluded that applicable law allows it to consider such instances (1) to determine whether the work environment was objectively hostile; and (2) to determine whether the employer had constructive knowledge of the hostile environment. "Constructive notice … is established when the harassment was so severe and pervasive that management reasonably should have known of it." *Watson v. Blue Circle, Inc.*, 324 F.3d 1252, 1259 (11th Cir. 2003). In this case, the court found that even examining the "totality of the circumstances" relating to the post-March 23, 2017, harassment, as required by Eighth Circuit precedent, the EEOC has not met its burden on summary judgment to "come forward with 'specific facts showing that there is a genuine issue for trial'" on actionable harassment. Instead, the court concluded that under the applicable law the alleged harassment to which the charging party was subjected during the limitations period, taken as a whole, was not sufficiently severe or pervasive to be actionable. The defendant is therefore entitled to summary judgment.					
ADA Failure to Accommodate	Keystone RV Co.	U.S. District Court for the Northern District of Indiana No. 3:22-CV-831	2024 U.S. Dist. LEXIS 54916 (N.D. Ind. Mar. 27, 2024)	Parties' Cross Motions for Summary Judgment **Result:** Pro-EEOC The court granted the EEOC's motion and denied the defendant's motion.	Should the court grant the EEOC's motion for summary judgment on the claim that the defendant unlawfully terminated the charging party, who took time off following surgery for a medical condition, for violating the company's absenteeism policy?
Commentary: The EEOC alleges defendant unlawfully terminated the charging party for excessive absenteeism following a medically necessary surgery for a chronic disease that causes kidney stones. The defendant's attendance policy counts any absence, tardy, or early leave as unexcused, and terminates employment after seven "attendance points" within a year. Following the charging party's termination, the HR representative said the manager should have asked the charging party whether he needed an accommodation and contacted HR; the manager assumed the charging party did not give a return date, which was communicated to HR, which then claimed it could not accommodate the charging party. The manager stated he could have "absolutely" accommodated the charging party with as much as two weeks off had HR put in the request. The defendant company argued there was no evidence HR would have approved an accommodation, but the court stated this falls "far short" of showing the proposed accommodation would have been an undue hardship. Thus, a reasonable jury could conclude the employer failed to reasonably accommodate the charging party. The court noted that employers have an "affirmative obligation to seek the employee out and work with [him] to craft a reasonable accommodation." *Mlsna v. Union Pac. R.R. Co.*, 975 F.3d 629, 638 (7th Cir. 2020). "The employer has to meet the employee half-way, and if it appears that the employee may need an accommodation but doesn't know how to ask for it, the employer should do what it can to help." *Bultemeyer v. Fort Wayne Cmty. Sch.*, 100 F.3d 1281, 1285 (7th Cir. 1996). That said, "an employee who fails to uphold [his] end of the bargain—for example, by not clarifying the extent of [his] medical restrictions—cannot impose liability on the employer for its failure to provide a reasonable accommodation." *Hoppe v. Lewis Univ.*, 692 F.3d 833, 840 (7th Cir. 2012). A "request as straightforward as asking for continued employment is a sufficient request for accommodation." *Hendricks-Robinson v. Excel Corp.*, 154 F.3d 685, 694 (7th Cir. 1998). In this case, the EEOC argued the company bears responsibility for the breakdown in the interactive process because it knew he needed time off for surgery but fired him without asking for a doctor's note or working with him to find out whether he needed additional time off. The court therefore found no reasonable jury could find in the employer's favor for its role in the interactive process. Moreover, the employer produced no evidence that the charging party was asked to provide a return date before his termination. The court therefore granted the EEOC's motion for summary judgment. The defendant claimed the charging party did not take sufficient steps to mitigate his damages, but the court determined this is a factual matter for the jury. The court also denied the defendant's motion to preemptively limit injunctive relief because the court need not find a pattern of discriminatory conduct to enjoin a company. The court stated it would address the EEOC's request for a permanent injunction at the appropriate time.					

Statute and Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motion and Result	General Issues
Title VII Race and National Origin Discrimination, Retaliation, Hostile Work Environment	Frontier Hot-Dip Galvanizing, Inc.	U.S. District Court for the Western District of New York No. 16-CV-00691	2024 U.S. Dist. LEXIS 67499 (W.D.N.Y. Apr. 11, 2024) (magistrate issued report & recommendation) 2024 U.S. Dist. LEXIS 115800 (W.D.N.Y. July 1, 2024) (court accepts magistrate's report recommendation)	Defendant's Motion for Partial Summary Judgment **Result:** Pro-EEOC The magistrate's issued a report and recommendation that the motion be denied. Court later accepted the report and recommendation.	Should the court grant the defendant's motion for summary judgment on the grounds that one claimant was allegedly never employed by the defendant? Does the defendant's *Faragher/Ellerth* affirmative defense warrant an award of summary judgment as to the remaining three claimants' hostile work environment claims?

Commentary: Defendant company uses staffing agencies. EEOC began an investigation into charging parties' claims of race and national origin discrimination and harassment. The defendant moved for summary judgment as to four of 19 claimants.

Regarding claimant Wilson, the defendant argued he never worked at the company. The EEOC challenged the records and notations kept regarding any work performed at defendant, and given the conflicting testimony and reports, the magistrate recommended that the defendant's motion be denied as to this claimant.

As for the remaining three claimants, the defendant asserted the *Faragher/Ellerth* affirmative defense, *i.e.*, that (1) the employer exercised reasonable care to prevent and correct promptly any harassing behavior, and (2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

In this case, the defendant concedes that prior to May 2015, it did not have a written antidiscrimination policy, but argued that the three claimants who were all placed at the defendant's location by the staffing agency, are barred from bringing hostile work environment claims because they were provided with such policies and failed to make any complaint. The EEOC countered that summary judgment is improper because triable issues of fact exist under both prongs. The court agreed.

Specifically, the record contains evidence from which a reasonable jury could find that defendant did not attempt to ensure the effectiveness of its anti-discrimination policy and that claimants were not unreasonable in failing to lodge complaints about the alleged racial harassment to which they were subjected. The defendant manager testified that temporary employees are handed a binder with policies, but are not given copies. In addition, the record indicated derogatory and offensive language was used and there was not a consistent policy regarding discipline or company policy for this language or graffiti. Therefore, while there may have been a policy in place, the company did not take reasonable steps to see that it was made known to employees and enforced. The magistrate therefore issued a report and recommendations denying the defendant's motion.

Statute and Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motion and Result	General Issues
ADA Failure to Accommodate Retaliation Constructive Discharge	Total System Services, LLC	U.S. District Court for the Northern District of Georgia No. 1:23-CV-1311	2024 U.S. Dist. LEXIS 115561 (N.D. Ga. July 1, 2024)	EEOC's Motion for Partial Summary Judgment; Defendant's Motion for Summary Judgment **Result:** Pro-Employer Magistrate recommends defendant's motion for summary judgment on the allegations of constructive discharge and retaliation be granted, but that the motion regarding the allegation of failure to accommodate be denied. The magistrate recommends that the EEOC's motion for summary judgment as to the charging party's disability status be denied.	Should the court grant the EEOC's motion as to whether the charging party is disabled under the ADA? Should the court grant the defendant's motion for summary judgment over the allegations that it failed to accommodate the charging party's disability, retaliated against her, and constructively discharged her?

Commentary: The EEOC alleges defendant failed to reasonably accommodate the charging party's disabilities (alleged high-risk status for COVID-19) and retaliated against her for making such a request, and constructively discharged her in violation of the ADA. EEOC moved for partial summary judgment, while defendant moved for summary judgment.

The charging party spent the majority of her time handling customer service calls regarding travel benefits. Approximately eight months before the request for any accommodations, the charging party applied for an internal promotion. Her supervisor indicated that she was not a good candidate for advancement because (1) she did not "exhibit the ability to perform well under stress/pressure/deadlines"; (2) she "work[ed] more effectively in a group environment [than] individually"; (3) she had been "subject to disciplinary action"; and (4) she was "very negative and unable to adapt in a positive way." The charging party was "uncomfortable" doing the travel-related work that comprised much of her workload and relied on coworkers to help her resolve issues and customer questions. She asked to be relieved of such work, but her request was denied, as there were insufficient staff members available to handle such work.

Enter the pandemic. At the onset of the pandemic, the defendant did not permit employees to work remotely. The charging party suffered from hypertension and was pre-diabetic. As the pandemic continued, defendant began to allow remote work for certain positions – *e.g.*, positions with minimal leadership interactions and for employees with sufficient internet access at home. One of the charging party's clients did not permit remote work, which the EEOC does not dispute.

Charging party sought remote work as an accommodation, which defendant denied initially, so she took FMLA leave. Charging party's supervisor informed her that she would be edible for remote work during the next round of work from home assignments, but indicated she needed to perform an internet speed test. She performed the test, which indicated a slower-than-required speed. She was also informed that she would need to be released from FMLA leave and return to work to be trained, receive equipment, etc. From the time charging party returned to the office on July 9, 2020 through her resignation on August 7, 2020, no additional work from home slots were allocated to her team and no additional members of that group were allowed to work from home. The charging party was late to work five times during that period and received counseling. On August 7, 2020, she resigned. Four months later the charging party accepted a new position that involved working in the office half the time. She filled out a form indicating she did not have a disability or history of a disability.

The EEOC filed suit, alleging failure to accommodate, constructive discharge, and retaliation for engaging in protected activity.

To establish a failure to accommodate claim, a plaintiff must demonstrate that: (1) she was disabled; (2) she was a "qualified individual"; and (3) that she was discriminated against because of her disability by being denied a reasonable accommodation to allow her to keep working.

Statute and Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motion and Result	General Issues
Defendant did not raise the issue as to whether the charging party was disabled in the first instance, while the EEOC sought summary judgment on this point. The defendant objected, stating this is a question for the jury. The court agreed, denying the EEOC's motion for summary judgment on this point. The court then turned to whether the charging party was qualified. Court found that an issue of fact exists as to whether the charging party was qualified, and whether the described job functions were essential. Third and final issue is whether her request for an accommodation was denied. Determining what is reasonable for each individual employer is a highly fact-specific inquiry that will vary depending on the circumstances and necessities of each employment situation. An employer is not required, however, to provide an employee with "the maximum accommodation or every conceivable accommodation possible." Defendant claims that the requested accommodation (working remotely) would have "required significant changes to her job duties," as other members of her team would have had to take on her responsibilities because one of the charging party's three clients did not permit remote work. Moreover, the inadequate internet connection meant she could not reliably access defendant's technology to perform her duties remotely. Defendant also claims it provided the charging party with several "alternative reasonable accommodations," such as a safety program to reduce the risk of COVID-19 or that the charging party take unpaid leave. Court determined that this is a question of fact for the jury. Therefore, the magistrate recommended that the defendant's motion be denied as to the EEOC's failure to accommodate claim. The court granted the defendant's motion on the constructive discharge claim, however, noting that such a claim is difficult to prove. To establish a claim for constructive discharge under the ADA, a plaintiff must prove that her working conditions were "so intolerable that a reasonable person in her position would have been compelled to resign." Viewing all disputed facts in the light most favorable to the EEOC, the magistrate concluded there are insufficient facts to support a constructive discharge allegation. The pandemic created an untenable and evolving situation for most employers, and the defendant made attempts to adjust and take health and safety precautions. The denial to work remotely was not denied forever; she was given an opportunity to seek approval and obtain proper equipment, but she chose to resign after her FMLA expired. The EEOC also came up short regarding the retaliation claim. The court agreed with the defendant that the EEOC attempts to repackage the failure to accommodate as a retaliation claim. In other words, it was premised on the company's refusal to grant the accommodation. Moreover, the EEOC cannot claim the defendant's failure to engage in work-from-home logistical conversations with the charging party while she was on FMLA leave is unlawful; in fact, making her engage in work-related tasks while on leave could have violated her rights under FMLA. Therefore, the court granted the defendant's motion on this claim.					
ADA Failure to Accommodate	Defender Association of Philadelphia	U.S. District Court for the Eastern District of Pennsylvania No. 19-1803	2024 U.S. Dist. LEXIS 155251 (E.D. Pa. Aug. 29, 2024)	Parties' Motions for Summary Judgment; EEOC's Motion to Exclude Defendant's Expert **Result:** Mixed The court granted the EEOC's motion for Summary Judgment as to the Defendant's First Affirmative Defense, but otherwise denied its motion; the court granted the EEOC's motion to exclude the defendant's expert's report; the court denied the Defendant's motion.	Would the charging party be able to perform her essential job functions upon her return to work provided she had an accommodation, or would the accommodation at issue be an undue burden on the employer? Did the parties engage in an interactive process to discuss an accommodation? Should the EEOC be granted summary judgment as to the defendant's first affirmative defense (failure to conciliate)? Was the EEOC's request for injunctive relief moot? Was the charging entitled to back pay or front pay damages?

Statute and Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motion and Result	General Issues

Commentary: The EEOC alleged defendant failed to accommodate the charging party's disability (PTSD and Major Depressive Disorder) and then fired her in violation of the ADA.

The charging party, a lawyer specializing in sexually violent crimes, began therapy sessions and was eventually diagnosed with PTSD and depression. The charging party was approved for short-term disability benefits. In October 2017, the therapist recommended that she return to her job in January 2018, noting that, if feasible, she recommends the charging party work part time due to panic attacks, and that she resume work with a population other than sex offenders. This report was provided to defendant's disability insurance provider, which approved her for long-term disability benefits. Records indicated a potential January 2018 return date. The charging party was fired effective December 15, 2017, but remained on long-term disability benefits until the fall of 2018.

The EEOC sued for disability discrimination, and moved to exclude defendant's expert report from a vocational counselor on the grounds that the report was supposed to opine on whether charging party could perform the essential functions of her job, but instead focused on the reasonableness of defendant's decision to terminate her employment. The EEOC argued the report and opinion (1) will not help the trier of fact understand the evidence or determine a fact in issue; (2) are not based on sufficient facts or data; and (3) are not reliable. The court agreed, reasoning that it relies on largely irrelevant facts, does not state a methodology, and reaches a conclusion that would be unhelpful to a jury.

The parties filed cross-motions for summary judgment on EEOC's two claims brought pursuant to the ADA: (1) that the Defender Association terminated the charging party on the basis of her disability and (2) that it failed to provide her with reasonable accommodation. EEOC also seeks summary judgment on the Defender Association's First Affirmative Defense, regarding administrative prerequisites. Defendant also moved for summary judgment on the EEOC's request for injunctive relief, asserting that the claim is moot, and to limit the damages that may be awarded.

The court denied defendant's motion, which argued the charging party was not a qualified individual because she could not perform the essential job duties as of the date of her termination – *i.e.*, while she was on leave. Viewing evidence most favorable to EEOC, a reasonable jury could conclude the charging party could have performed the essential functions upon her January 2018 return to work with an accommodation (*i.e.*, not to work in the sex crimes unit). Viewing the evidence most favorable to the defendant, however, a reasonable jury could alternatively find that the charging party may require indefinite leave, and that she was not responsive about return-to-work voicemails. Therefore, on this point the court denied summary judgment for both parties, as it's up to the jury to decide.

The parties also disagreed as to whether the defendant made a good-faith effort at an accommodation. The record is unclear as to whether the charging party intended to return to work in January 2018. Moreover, if a jury concluded that the charging party was seeking indefinite leave, then a jury would likely find that such a request poses an undue hardship on the defendant, as it is not reasonable for it to hold open a position indefinitely, but again, this is a jury question.

Regarding the defendant's first affirmative defense, which states that "EEOC failed to meet its duty of good faith conciliation efforts between the parties," the court disagreed, citing *Mach Mining*: the conciliation requirement "eschew[s] any reciprocal duties of good faith negotiations." The court therefore granted the EEOC's motion for summary judgment as to this affirmative defense.

Defendant also sought summary judgment on the EEOC's request for injunctive relief on the grounds that it is moot because, during litigation, the defendant implemented all noneconomic changes the EEOC requested. Court denied summary judgment for two reasons: First, "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i.e.*, does not make the case moot." Second, EEOC actively contests that the defendant has implemented all the changes that it seeks, including a policy that specifically acknowledges medical leave as an available accommodation.

Finally, defendant claimed the charging party is not entitled to back pay or front pay damages. First, defendant argues that, even if it prematurely terminated the charging party, she would only be entitled to one month of back pay because it terminated her in December 2017, one month before she was supposedly planning to resume work. However, defendant uses an incorrect definition of backpay to reach such a conclusion. Back pay accrues "from the time of discrimination until trial," though it stops accruing "[w]hen a plaintiff finds employment that is equivalent or better than the position she was wrongly denied . . . ." Back pay would not be calculated based on the time between her termination and the date that she allegedly was set to return to work. Second, defendant argues that front pay damages are "cut off" because defendant offered to reinstate the charging party but that she failed to mitigate her damages. Court found this argument premature, as there are material disputes as to whether (1) the defendant offered to reinstate the charging party with the required level of specificity and (2) whether the charging party failed to mitigate her damages. Therefore, the court denied summary judgment as to the scope of possible relief.

Statute and Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motion and Result	General Issues
ADA Failure to Hire / Failure to Accommodate	The Princess Martha, LLC; TJM Property Management, Inc.; TJM Properties	U.S. District Court for the Middle District of Florida No. 8:22-cv-2182	2024 U.S. Dist. LEXIS 174147 (M.D. Fla. Sept. 26, 2024)	Defendants' Motions for Summary Judgment; EEOC's Motion for Partial Summary Judgment **Result:** Mixed. The court granted the Defendants' motions as to disability discrimination claim, but denied them as to the failure to accommodate claim.	Should the court grant the defendants' motion for summary judgment on the claim that they failed to hire the charging party because of her disability (failed drug test due to PTSD medication) and the claim that they failed to accommodate her disability in the hiring process? Is Defendant TJM Properties a joint employer with other defendants?

Commentary: The EEOC alleges defendants The Princess Martha, LLC ("Princess Martha"), TJM Property Management, Inc. ("TJM Management"), and TJM Properties, Inc. ("TJM Properties"), violated the ADA when it failed to hire and/or accommodate a job applicant because she took prescription drugs for post-traumatic stress disorder (PTSD). The EEOC claimed the charging party's offer was conditioned upon a negative drug test. During her interview, the charging party informed her interviewer of her medication and the reason for taking it, and that such medication would result in a positive drug test. The applicant subsequently took the drug test and received a "non-negative" result. Such results are shipped to an outside lab for additional testing to eliminate non-drug use as a cause for a positive result. Her sample was lost and never received. She contacted HR seeking to provide additional information about her prescription medications and to whom she should provide such information via voice mail. Her job offer was subsequently revoked as the decisionmaker did not receive her test results.

The lawsuit alleges two counts: Count I alleges that Princess Martha and the TJM Defendants committed disability dis-crimination against the charging party by failing to hire her; Count II alleges that they failed to reasonably accommodate her disability.

Defendants moved for summary judgment on the disability discrimination count for four reasons: 1) Charging party's PTSD does not impair her functioning enough to render her disabled; 2) she is not a qualified individual because she did not complete the drug testing that is a requirement of the position; 3) the decisionmaker for the adverse action had no knowledge of her alleged disability; and 4) the EEOC cannot show that the non-discriminatory reason for not hiring her—the lack of result for her drug test—was pretextual. With respect to the failure to accommodate claim, Princess Martha argues that the charging party never triggered Princess Martha's ADA duties by making a specific demand for accommodation.

The court addressed each issue in turn. As for Count I, the court determined there are genuine issues of fact as to whether the charging party is a qualified individual with a disability. The court noted, however, that the EEOC did not set forth evidence demonstrating the existence of a genuine dispute of fact as to the third element of a prima facie case: that the decisionmaker failed to hire the charging party "on the basis of" her disability. Accordingly, the court did not address the possibility of pretext, and determined all defendants are entitled to summary judgment as to Count I.

As for Count II, however, the court denied the motion for summary judgment, finding there remains a question for the jury as to whether the defendant has sufficient information about the charging party's disability to trigger its accommodation obligations. Specifically, the charging party's voicemail to HR seeking to clarify to whom she should provide additional information about her medications is sufficient to put the company on notice of her need for an accommodation.

Separately, the EEOC contends that TJM Properties and TJM Management are liable for the alleged ADA violations because they are joint employers and/or an integrated enterprise with Princess Martha. TJM Properties and TJM Management each moved for summary judgment based on challenges to these theories and the issue of administrative exhaustion, since the EEOC charge and investigation did not include allegations regarding joint employment or integrated enterprise theories, and didn't name the TJM entities.

Statute and Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motion and Result	General Issues
To determine whether a party not named in the EEOC charge may be sued, courts consider several non-exclusive factors: (1) the similarity of interest between the named party and the unnamed party; (2) whether the plaintiff could have ascertained the identity of the unnamed party at the time the EEOC charge was filed; (3) whether the unnamed parties received adequate notice of the charges; (4) whether the unnamed parties had an adequate opportunity to participate in the reconciliation process; and (5) whether the unnamed party actually was prejudiced by its exclusion from the EEOC proceedings. *Virgo v. Riviera Beach Associates, Ltd.*, 30 F.3d 1350, 1359 (11th Cir. 1994). The court applied the *Virgo* factors and found the TJM entities are not entitled to summary judgment based on an alleged failure to exhaust administrative remedies. The court also considered the *Virgo* factors in determining whether the EEOC exhausted its administrative remedies as applied to the TJM entities. As for the joint employer allegation, the Eleventh Circuit in *Virgo* adopted the standard for joint employment stated in *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117 (3d Cir. 1982): "The basis of the finding is simply that one employer while contracting in good faith with an otherwise independent company, has retained for itself sufficient control of the terms and conditions of employment of the employees who are employed by the other employer. Thus, the joint employer concept recognizes that the business entities involved are in fact separate but that they share or co-determine those matters governing the essential terms and conditions of employment." *Virgo*, 30 F.3d at 1360, *quoting* NLRB, 691 F.2d at 1122. In this case, the court found that while there is some evidence TJM *Management* employees exerted some control over some Princess Martha employees, none were employed by TJM *Properties*, and there is no evidence that any TJM Properties' employee did the same. Therefore, the court granted TJM Properties summary judgment on this point.					

U.S. OFFICES

Albuquerque, NM
Anchorage, AK
Atlanta, GA
Austin, TX
Birmingham, AL
Boston, MA
Charleston, WV
Charlotte, NC
Chicago, IL
Cleveland, OH
Columbus, OH
Dallas, TX
Denver, CO
Detroit, MI
Fayetteville, AR
Fresno, CA
Greenville, SC
Houston, TX
Honolulu, HI
Indianapolis, IN
Kansas City, MO
Las Vegas, NV
Lexington, KY
Long Island, NY
Los Angeles, CA
- Downtown
- Century City

Madison, WI
Memphis, TN
Miami, FL
Milwaukee, WI
Minneapolis, MN
Nashville, TN
New Haven, CT
New York, NY
Newark, NJ
Orlando, FL
Overland Park, KS
Philadelphia, PA
Phoenix, AZ
Pittsburgh, PA
Portland, ME
Portland, OR
Providence, RI
Reno, NV
Rochester, NY
Sacramento, CA
Salt Lake City, UT
San Diego, CA
San Francisco, CA
San Jose, CA
San Juan, Puerto Rico
Santa Maria, CA
Seattle, WA
St. Louis, MO
Tysons Corner, VA
Walnut Creek, CA
Washington, D.C.

GLOBAL LOCATIONS

Belgium
Bussels, Ghent, Hasselt, Mechelen
Brazil
Sao Paulo
Canada
Toronto, Ontario
Colômbia
Barranquilla, Bogotá, Cali, Medellin
Costa Rica
San José
Denmark
Copenhagen
Dominican Republic
Santo Domingo
El Salvador
San Salvador
France
Lyon, Paris
Germany
Berlin, Duesseldorf, Frankfurt, Hamburg, Munich
Guatemala
Guatemala City
Honduras
San Pedro Sula
Ireland
Dublin
Italy
Milan
México
México City, Monterrey, Saltillo
Netherlands
Amsterdam
Nicarágua
Managua
Norway
Oslo
Panamá
Panamá City
Poland
Gdańsk, Katowice, Kraków, Poznań, Warsaw, Wrocław
Portugal
Lisbon, Algarve
Singapore
Singapore
Spain
Barcelona, Madrid, Valencia
Switzerland
Zurich
United Kingdom
London
Venezuela
Caracas, Valencia

littler.com | Littler Mendelson, P.C.

littler.com | Littler Mendelson, P.C.