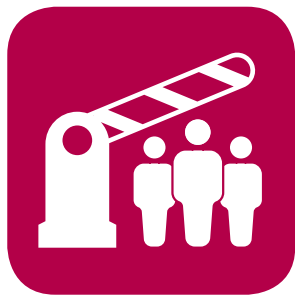


EEOC-Initiated Litigation FY 2018



ELIMINATING
BARRIERS



VULNERABLE
WORKERS



EMERGING
ISSUES



EQUAL
PAY



LEGAL
ACCESS



PREVENTING
HARASSMENT

This reference work compiles, analyzes, and categorizes the major case filings and decisions involving the EEOC in 2018. Our goal is for this report to guide clients through decisional law relative to EEOC-initiated litigation, and to enable corporate counsel to make sound and informed litigation decisions while minimizing risk. We hope that you find this report to be useful.

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January 2019

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- From a Declaration of Principles jointly adopted by a Committee of the American Bar Association and a Committee of Publishers and Associations.

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EXECUTIVE SUMMARY

Developments in past years have shown us that the EEOC will, regardless of administration, strive to remain the chief law enforcement agency for anti-discrimination legislation, and a formidable adversary in litigation. In this respect, 2018 was no different. As one might expect, the biggest story in EEOC litigation in FY 2018 was the surge in #MeToo cases. FY 2018 saw a drastic increase in sex-based discrimination filings, a large portion of which included claims of sexual harassment. Put into perspective, in the last two years, the EEOC has quadrupled its filings of sexual harassment lawsuits. The agency clearly has its finger on the pulse of this important movement.

The change in administration has not, thus far, had a discernable dampening impact on the EEOC, despite predictions to the contrary. Indeed, the EEOC's Fiscal Year 2018 was marked by a ramp-up in enforcement and litigation activity – even compared to Fiscal Year 2017, which was also a year of significantly increased litigation activity.

The EEOC's Strategic Enforcement Plan ("SEP"), which was revamped for FY 2017-2021, continues to guide the EEOC's enforcement agenda. The SEP focuses on the same six enforcement priorities as the prior version of the plan, which guided enforcement activities since 2012. The SEP has proven to be a reliable guide for predicting the path of the EEOC's enforcement agenda. Often, the cases the EEOC takes on align closely with these goals, and FY 2018 was no exception.

Part I of the book provides a broad overview of trends and developments within these six enforcement priorities, including: (1) eliminating barriers in recruitment and hiring; (2) protecting vulnerable workers; (3) addressing emerging issues; (4) ensuring equal pay protections; (5) preserving access to the legal system; and (6) preventing systemic harassment. While these priorities are broad and all-encompassing, we believe that a detailed review of the case filings, guidance, rulemaking, and other initiatives by the EEOC yields a meaningful understanding of how the EEOC views each priority, and where it intends to focus its enforcement budget within each priority.

Part II of this book contains summaries of all of the significant decisions arising from EEOC litigation in 2018. The decisions are categorized by subject matter to allow for easy navigation to the topic of interest.

We expect that the changing political landscape could lead to further changes to the EEOC's enforcement agenda in FY 2019 and beyond. It is more important now than ever for employers to keep abreast of the EEOC's shifting priorities and trends. It is our honor and privilege to bring this analysis to you. It is our hope that employers use this book as a tool to assist in their compliance activities and to avoid any issues in light of the EEOC's ever-evolving enforcement agenda.

PART I

SUBSTANTIVE TRENDS IN EEOC LITIGATION

A. New Directions In Strategic Priorities

During the 2018 fiscal year, the EEOC continued to operate under its Strategic Enforcement Plan (“SEP”) for FY 2017-2021, which was published in October 2016.¹ The EEOC first unveiled its SEP in December 2012, stating that the plan “established substantive area priorities and set forth strategies to integrate all components of EEOC’s private, public, and federal sector enforcement to have a sustainable impact in advancing equal opportunity and freedom from discrimination in the workplace.”²

While the Commission’s six major enforcement priorities have remained consistent across both iterations of the SEP, there were significant changes made to the EEOC’s approach and areas of litigation focus.³ However, despite a revised enforcement strategy and a full year under the Trump Administration, the EEOC once again followed an unexpected path. Specifically, the EEOC brought significantly more filings as compared to the last four years, and displayed an intense focus on gender discrimination and workplace harassment.⁴

1. The EEOC Prioritizes Workplace Harassment In 2018

The most prominent filing trend in FY 2018 was the substantial increase in sex-based discrimination filings. The EEOC’s gender and pregnancy discrimination numbers far exceeded those of past years, with 81 total claims under this category in FY 2018 as compared to 56 in FY 2017, only 23 in FY 2016, and 53 in FY 2015. The #MeToo movement added fuel to this area of the EEOC’s agenda, with the majority of sex-based discrimination filings including allegations of sexual harassment. Specifically, the EEOC filed 41 cases alleging sexual harassment, 11 of which were brought in the last three days of the fiscal year alone. The Commission’s heightened activity in this area marks a five-year high in sexual harassment filings. Furthermore, charges alleging sexual harassment increased by more than 12% as compared to FY 2017. As the EEOC trumpeted in a recent press release, it had collected “nearly \$70 million for the victims of sexual harassment through litigation and administrative enforcement in FY 2018, up from \$47.5 million in FY 2017.”⁵

¹ Press Release, Equal Employment Opportunity Commission, EEOC Updates Strategic Enforcement Plan (Oct. 17, 2016), available at <https://www.eeoc.gov/eeoc/newsroom/release/10-17-16.cfm>.

² U.S. Equal Employment Opportunity Commission Strategic Enforcement Plan FY 2017 - 2021, available at <https://www.eeoc.gov/eeoc/plan/sep-2017.cfm>.

³ U.S. Equal Employment Opportunity Commission Strategic Plan FY 2018 - 2022, available at https://www.eeoc.gov/eeoc/plan/strategic_plan_18-22.cfm.

⁴ See Christopher J. DeGross, Matthew J. Gagnon, Gerald L. Maatman, Jr., and Kyla J. Miller, *The EEOC Puts The Pedal To The Metal: FY 2018 Results Show Increase In Filings, With #MeToo Lawsuits Adding Fuel To The Agenda*, WORKPLACE CLASS ACTION BLOG (Sept. 30, 2018), available at <https://www.workplaceclassaction.com/2018/09/the-eeoc-puts-the-pedal-to-the-metal-fy-2018-results-show-increase-in-filings-with-metoo-lawsuits-adding-fuel-to-the-agenda/>.

⁵ Press Release, Equal Employment Opportunity Commission, EEOC Releases Preliminary FY 2018 Sexual Harassment Data (Oct. 4, 2018), available at <https://www.eeoc.gov/eeoc/newsroom/release/10-4-18.cfm>.

Outside of EEOC-initiated litigation and administrative enforcement, the Commission maintained its focus on sexual harassment through the use of press releases – a powerful public relations weapon in its arsenal. In FY 2018, the EEOC posted 65 press releases related to sexual harassment cases. Although most related to the filing or settlement of sexual harassment cases, a few upped the ante.

For example, the EEOC posted two somewhat atypical statements highlighting groups of correlated filings entitled “EEOC Files Seven Suits Against Harassment”⁶ and “EEOC Files Seven More Suits Against Harassment.”⁷ In addition, just four days after the fiscal year had ended, the EEOC took the unusual step of releasing the sexual harassment portion of its enforcement statistics right away.⁸ Most years, the EEOC releases its general statistics in November.⁹

Surprisingly, the EEOC’s total number of filings in FY 2018 increased dramatically over FY 2015 and 2016, and even surpassed the increased numbers seen in FY 2017. This year, the EEOC filed 219 actions, 199 of those filings were new merits lawsuits, and 20 were subpoena enforcement actions.

Consistent with past years, the EEOC waited until September to ramp up its filings. September filings accounted for more than twice as many filings in FY 2018 than any other month. To that end, 84 lawsuits were filed in September, including 45 in the last 3 days alone. Although the September “filing frenzy” was nothing new for the EEOC, one difference from past years was the unusually active “ramp up” period in June, July, and August, which saw 63 total filings. Of these 63 cases, 30 were brought in August, which is the highest number of August filings over the past five years. The total filings for the remaining months were minimal, with no month eclipsing double digit filings until June.

The EEOC maintains 15 District Offices, each of which tends to file lawsuits at a different rate. In FY 2018, District Offices in Chicago, Philadelphia and Los Angeles led the way with 21, 21, and 17 total filings, respectively. These three District Offices topped the charts in FY 2017 as well, though Los Angeles led with 22, followed by 21 in Chicago, and 19 in Philadelphia.

As with past years, Title VII and the ADA continue to be the largest categories of filings, accounting for nearly 90% of allegations in EEOC-initiated cases this year. On par with FY 2017, Title VII remains the leading statute, and constituted 55% of all filings. Although FY 2016 showed a dip in Title VII filings at 41%, this year’s Title VII filings beat out FY 2015 and FY 2014 as well.

While nearly all substantive areas saw increased litigation activity in FY 2018 as compared to FY 2017, there were a few noticeable declines. Despite the EEOC’s repeated focus on equal pay issues in its SEP and other public statements, the Commission actually decreased its Equal Pay Act filings in FY 2018. In addition, race filings have decreased by 5 filings, with 19 filings in FY 2018 compared to 24 filings in FY 2017.

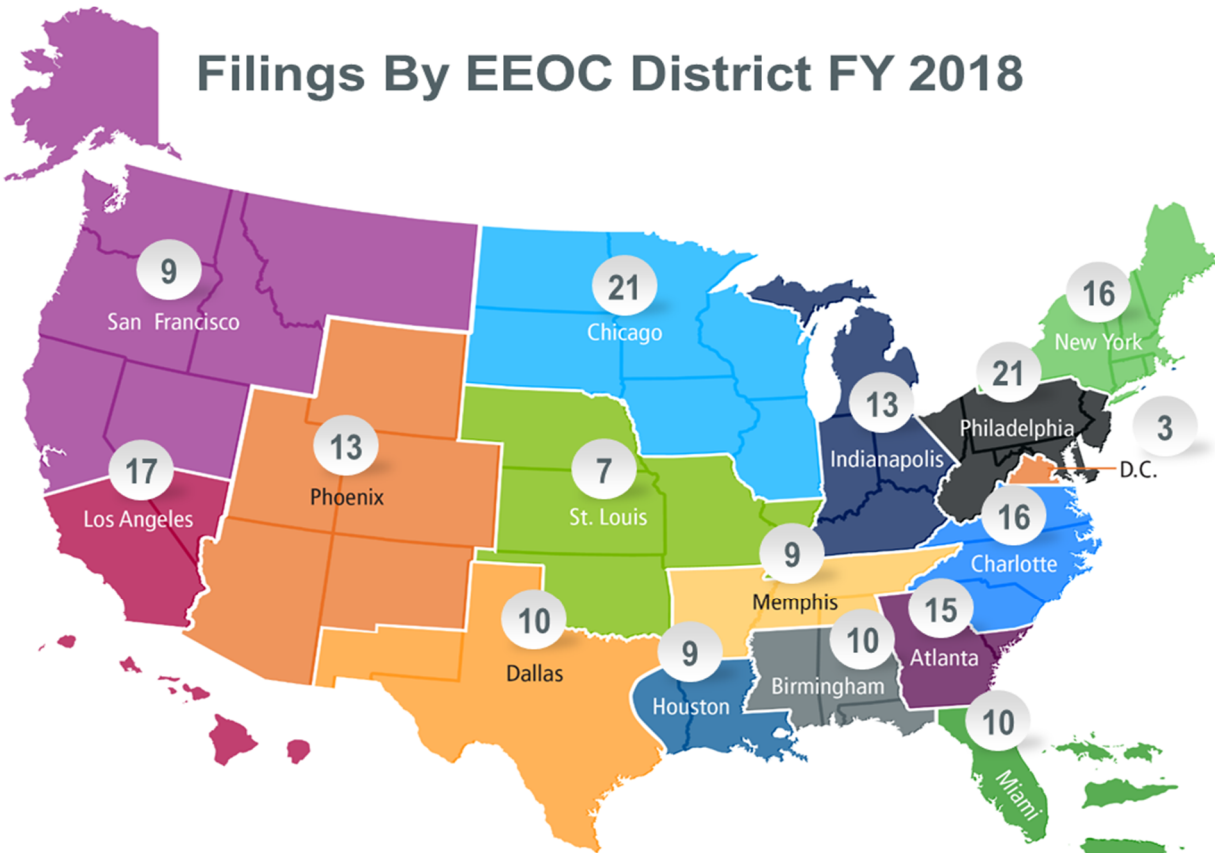
⁶ Press Release, Equal Employment Opportunity Commission, EEOC Files Seven Suits Against Harassment (June 14, 2018), available at <https://www.eeoc.gov/eeoc/newsroom/release/6-14-18.cfm>.

⁷ Press Release, Equal Employment Opportunity Commission, EEOC Files Seven More Suits Against Harassment (Aug. 9, 2018), available at <https://www.eeoc.gov/eeoc/newsroom/release/8-9-18h.cfm>.

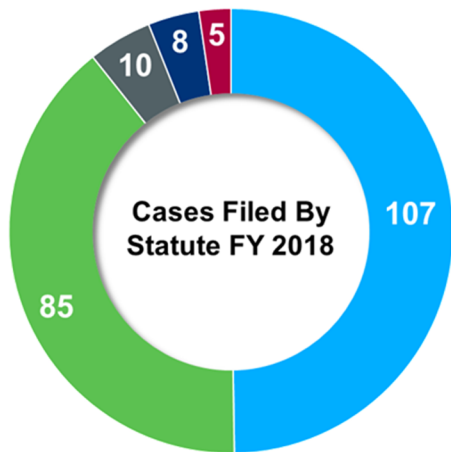
⁸ Press Release, Equal Employment Opportunity Commission, EEOC Releases Preliminary FY 2018 Sexual Harassment Data (Oct. 4, 2018), available at <https://www.eeoc.gov/eeoc/newsroom/release/10-4-18.cfm>.

⁹ Press Release, Equal Employment Opportunity Commission, EEOC Dramatically Reduces charge Inventory (Nov. 9, 2017), available at <https://www.eeoc.gov/eeoc/newsroom/release/11-9-17.cfm>.

Filings By EEOC District FY 2018



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■ Title VII ■ ADA ■ ADEA ■ PDA ■ EPA

Title VII Breakdown

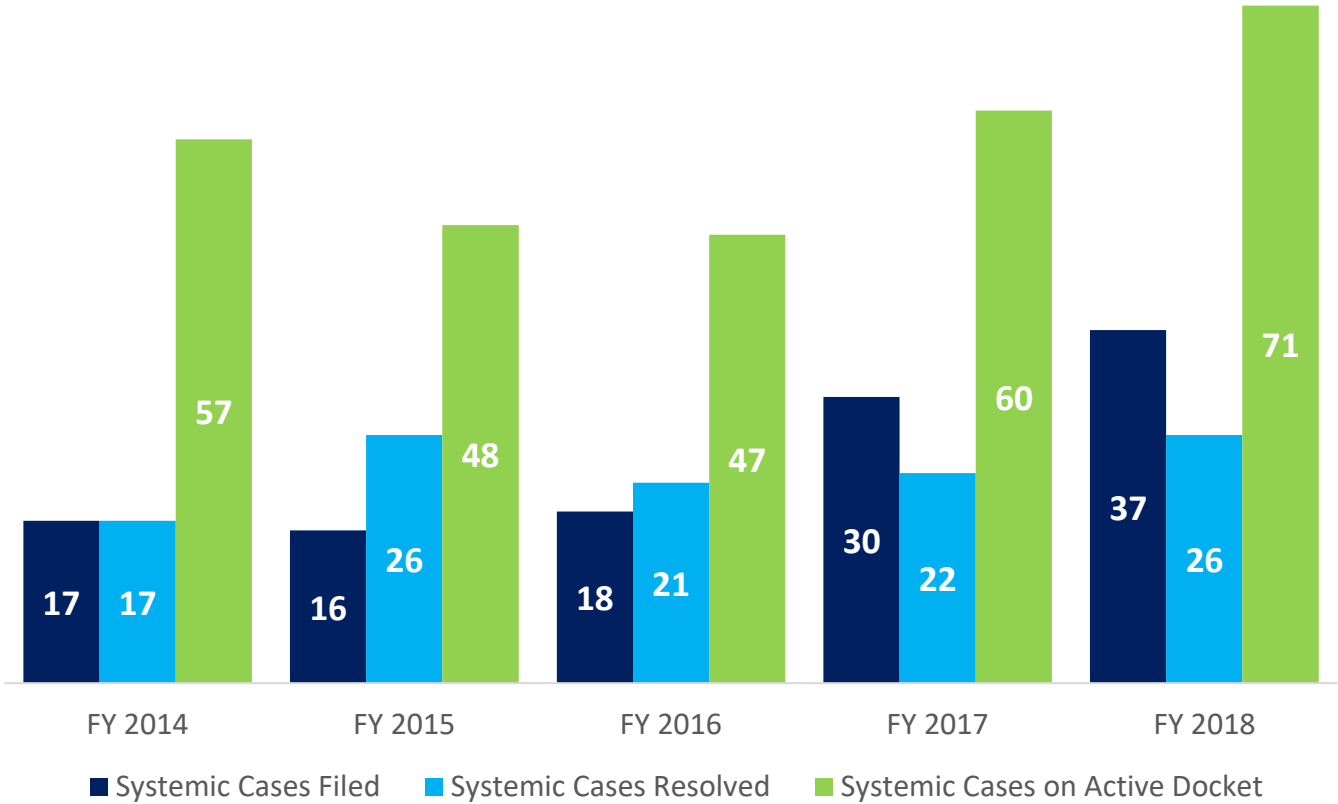
Sex/Pregnancy	81
Retaliation	43
Race	19
Religion	9
Nat. Origin	8

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As with prior years, Title VII and the ADA consumed the heavy majority of EEOC-initiated filings. In FY 2018, these statutes accounted for 195 total filings. The EEOC displayed a clear priority for gender-based discrimination and harassment, with 81 filings including such allegations.

EEOC Systemic Cases: Filed, Resolved, And On Active Docket FY 2014 - 2018



The 2017-2021 SEP recognized the importance of “systemic” cases to its overall mission. Systemic cases are those with a strategic impact, meaning they affect how the law influences a particular community, entity, or industry.

The EEOC continues to place special emphasis on systemic lawsuits. By the end of FY 2018, 71 cases on the active docket were systemic, two of which included over 1,000 victims. Systemic cases accounted for 23.5% of all active merits lawsuits.

In FY 2018, the EEOC resolved 409 systemic investigations, which resulted in over \$30 million in remedies for victims. On the litigation front, the EEOC resolved 26 systemic cases. According to the EEOC, they had a 96% rate of success in litigating systemic cases in FY 2018.

According to its Performance and Accountability Report, the Commission filed 37 systemic cases this year, up from 30 in FY 2017. Systemic lawsuits accounted for 18.6% of total filings by the EEOC in FY 2018.

2. A New Administration's Vision Still Uncertain

a. EEOC Leadership Positions Remain Vacant

After a full Fiscal Year under the Trump Administration, the impact of what was promised to be a “business-friendly” White House on EEOC-initiated litigation is still uncertain. The Senate has lagged in confirming several EEOC positions, including Janet Dhillon, the nominated Chair, and Daniel Gade, a nominated Commissioner. President Trump nominated Dhillon and Gade along with a holdover from the Obama administration, Chail Feldblum.¹⁰ Many were surprised by the decision to re-nominate Feldblum given her strong advocacy for LGBT rights while on the Commission. She subsequently came under attack by religious and social conservative groups. In December, Senator Mike Lee announced that he would hold up confirmation of Feldblum for another term, and, as of December 21, 2018, Gade withdrew from consideration, citing the delays in the confirmation process. Feldblum's term expires on December 31, 2018, meaning that the EEOC will lack a quorum of at least three Commissioners at the start of the new year, adding to the uncertainty about the EEOC's direction.

In addition to Dhillon and Gade, President Trump nominated Sharon Fast Gustafson to fill the EEOC's General Counsel vacancy on March 19, 2018.¹¹ Gustafson has been an employment lawyer for more than 25 years, representing both employees and employers.¹² The fact that Gustafson has represented both sides in employment disputes surprised many, although it is consistent with President Trump's somewhat unconventional approach to EEOC appointments thus far.

On January 31, 2018, the Trump Administration also named two career federal employees to lead key District Offices. Belinda F. McCallister was named as the director of the Dallas District Office, and Jamie Williamson was appointed to director of the Philadelphia District Office.¹³ The Dallas and Philadelphia locations are consistently two of the busier EEOC District Offices.

b. Justice Kavanaugh At The Supreme Court

For the second consecutive year, President Trump nominated and procured Senate confirmation of a new Supreme Court Justice. On October 6, 2018, by a slim margin of 50-48, the Senate confirmed Justice Brett Kavanaugh to fill the vacancy on the Supreme Court.¹⁴ Justice Kavanaugh previously served on the U.S. Court of Appeals for the District of Columbia Circuit since May 2006.¹⁵ Based on Justice Kavanaugh's conservative voting record on the D.C. Circuit, most presume that the Supreme Court will tend to issue more “pro-business” rulings in employment-related cases.

¹⁰ Presidential Action, White House, Four Nominations Sent to the Senate Today (Dec. 11, 2017), available at <https://www.whitehouse.gov/presidential-actions/four-nominations-sent-senate-today-3/>.

¹¹ Presidential Action, White House, President Donald J. Trump Announces Key Additions to his Administration (Mar. 19, 2018), available at <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-key-additions-administration-35/>.

¹² See Gerald L. Maatman, Jr. and Andrew Scroggins, *Trump Administration Nominates New EEOC General Counsel*, WORKPLACE CLASS ACTION BLOG (Mar. 20, 2018), available at <https://www.workplaceclassaction.com/2018/03/trump-administration-nominates-new-eeoc-general-counsel/>.

¹³ Press Release, Equal Employment Opportunity Commission, EEOC Announces Two High-Level Staff Appointments (Jan. 31, 2018), available at <https://www.eeoc.gov/eeoc/newsroom/release/1-31-18a.cfm>.

¹⁴ Briefings & Statements, White House, Remarks by President Trump at Swearing-in Ceremony of the Honorable Brett M. Kavanaugh as Associate Justice of the Supreme Court of the United States (Oct. 8, 2018), available at <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-swearing-ceremony-honorable-brett-m-kavanaugh-associate-justice-supreme-court-united-states/>.

¹⁵ Biography of Brett M. Kavanaugh, available at <https://www.supremecourt.gov/about/biographies.aspx>.

3. A Continued Emphasis On Aggressive Investigations

The most effective investigatory tool at the EEOC's disposal is the administrative subpoena. Typically, an investigator in pursuit of information, data, or documents from an employer will first make an informal request for information. If the employer does not produce the requested information, the District Director may issue an administrative subpoena to obtain the information.¹⁶ Sometimes the EEOC will even skip the informal request and proceed directly to issuing a subpoena – a sometimes frustrating practice that is actually disallowed by the EEOC's own rules.¹⁷

An employer who receives a subpoena must act quickly. The Commission's regulations permit an employer to submit to the Commission a petition to revoke or modify the subpoena on the grounds that it seeks information that is not relevant to the charge, is overly burdensome, or suffers from some other flaw.¹⁸ However, the petition must be filed within five business days of receipt of the subpoena, and the Commission and the courts have proven unsympathetic to employers who miss the cut-off. (Note that subpoenas issued in ADEA investigations are treated differently and petitions to revoke are not permitted. Subpoenas issued under the ADEA are elevated directly to the District Court.) If, after the petition is resolved, the investigator is not satisfied with the employer's response to the subpoena, the EEOC may proceed to a District Court, where it will file an application for an order to show cause why the subpoena should not be enforced.

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

In FY 2018, the EEOC launched 18 subpoena enforcement actions.¹⁹ That number is in line with the 17 enforcement actions that were filed in FY 2017,²⁰ but still down significantly from other years. The EEOC initiated 28 subpoena enforcement actions in FY 2016,²¹ 32 in FY 2015,²² and 34 in FY 2014.²³ It is unclear if this dip in subpoena enforcement actions is because the EEOC is backing off of these issues (unlikely), or if employers are more likely to voluntarily respond to requests for information based on the shifting tide in District Court decisions (more likely).

¹⁶ See 29 C.F.R. 1601.16(a).

¹⁷ See EEOC Compliance Manual § 24.

¹⁸ See 29 C.F.R. 1601.16(b)(1).

¹⁹ U.S. Equal Employment Opportunity Commission, Fiscal Year 2018 Performance and Accountability Report, at 35, available at <https://www.eeoc.gov/eeoc/plan/upload/2017par.pdf>.

²⁰ U.S. Equal Employment Opportunity Commission, Fiscal Year 2017 Performance and Accountability Report, at 36, available at <https://www.eeoc.gov/eeoc/plan/upload/2017par.pdf>.

²¹ U.S. Equal Employment Opportunity Commission, Fiscal Year 2016 Performance and Accountability Report, at 36, available at <https://www.eeoc.gov/eeoc/plan/upload/2016par.pdf>.

²² U.S. Equal Employment Opportunity Commission, Fiscal Year 2015 Performance and Accountability Report, at 34, available at <http://www.eeoc.gov/eeoc/plan/upload/2015par.pdf>.

²³ U.S. Equal Employment Opportunity Commission, Fiscal Year 2014 Performance and Accountability Report, at 27, available at <http://www.eeoc.gov/eeoc/plan/2014par.pdf>.

a. U.S. Supreme Court Clarifies Standards Of Appellate Review On Enforcement Of EEOC Subpoenas

In 2018 we continued to see the effects of the Supreme Court decision in *McLane Co. v. EEOC*,²⁴ which clarified the standard of review of a District Court's decision regarding enforcement of EEOC subpoenas.²⁵ This case arose from a Title VII charge brought by a woman who was terminated after thrice failing a physical capabilities evaluation upon returning to work from maternity leave.²⁶ During the investigation, the Commission requested a list of employees who had taken the physical evaluation. Although the employer provided such a list, it refused to provide "pedigree information," including personal identifying information.²⁷ The EEOC challenged the employer's refusal in the U.S. District Court for the District of Arizona.²⁸ The District Court sided with the employer, holding that such information was not "relevant" to the charge at issue.²⁹ On appeal, the Ninth Circuit reviewed the District Court's decision *de novo* and reversed the District Court.³⁰

On review, the Supreme Court held that abuse-of-discretion review was the longstanding, and most appropriate, practice of the courts of appeals when reviewing a decision to enforce or quash an administrative subpoena.³¹ The Supreme Court found that the decision to enforce or quash an EEOC subpoena is case-specific, and one that does not depend on a neat set of legal rules. Instead, a District Court addressing such issues must apply broad standards to "multifarious, fleeting, special, narrow facts that utterly resist generalization."³² These types of considerations are more appropriately made by the District Courts.

On remand, the Ninth Circuit applied the more deferential abuse-of-discretion standard to the District of Arizona's decision, but reversed the trial court nonetheless.³³ The Ninth Circuit found that the District Court's formulation of the relevance standard was too narrow.³⁴ The Ninth Circuit explained that, under Title VII, the EEOC may obtain evidence if it relates to unlawful employment practices and is relevant to the charge under investigation, which encompasses "virtually any material that might cast light on the allegations against the employer."³⁵ Under this rubric, the Ninth Circuit found the requested pedigree information to be relevant.³⁶

²⁴ *McLane Co., Inc. v. EEOC*, 137 S. Ct. 1159 (2017).

²⁵ See Gerald Maatman, Jr., Christopher J. DeGross, and Matthew Gagnon, *U.S. Supreme Court Holds That An Abuse-Of-Discretion Standard Applies To Review Of EEOC Subpoenas*, WORKPLACE CLASS ACTION BLOG (Apr. 4, 2017), available at <http://www.workplaceclassaction.com/2017/04/u-s-supreme-court-holds-that-an-abuse-of-discretion-standard-applies-to-review-of-eec-subpoenas/>.

²⁶ *McLane*, 137 S. Ct. at 1165.

²⁷ *Id.*

²⁸ *EEOC v. McLane Co., Inc.*, No. 12-CV-2469, 2012 WL 5868959 (D. Ariz. Nov. 19, 2012).

²⁹ *Id.* at *5.

³⁰ *EEOC v. McLane Co., Inc.*, 804 F.3d 1051, 1057 (9th Cir. 2015).

³¹ *McLane*, 137 S. Ct. at 1167.

³² *Id.*

³³ See Gerald L. Maatman, Jr., Christopher J. DeGross and Alex W. Karasik, *Following U.S. Supreme Court Review, Ninth Circuit Remands EEOC Subpoena Case*, WORKPLACE CLASS ACTION BLOG (May 25, 2017), available at <http://www.workplaceclassaction.com/2017/05/following-u-s-supreme-court-review-ninth-circuit-remands-eec-subpoena-case/>; *EEOC v. McLane Co., Inc.*, 857 F.3d 813, 816-17 (9th Cir. 2017).

³⁴ *Id.* at 816.

³⁵ *Id.*

³⁶ The Ninth Circuit reasoned that the pedigree information was related to the unlawful practice being investigated and "might cast light" on the allegations against the employer. *Id.*

In 2018, on remand to the District Court, the employer continued to challenge the EEOC's petition on the grounds that it would be unduly burdensome.³⁷ The District Court rejected the motion, finding that, because the employer had already produced significant data and software, it had imposed an even greater burden on itself by removing the personal identifying information from this data, which was now sought by the EEOC.³⁸ Accordingly, the District Court found that providing such information would not be unduly burdensome.

b. Cases Upholding A Broad Scope Of The EEOC's Subpoena Power

To date, the Supreme Court's decision in *McLane* has largely been seen as a setback for employers who hope to challenge the scope of an EEOC subpoena in court. For example, in *EEOC v. Nationwide Janitorial Services, Inc.*,³⁹ the U.S. District Court for the Central District of California enforced an EEOC subpoena seeking the names, contact information, and additional data for all employees in the state of California.⁴⁰ In that case, three female employees complained to the Commission, alleging that they had been sexually harassed and assaulted by a male supervisor at their job site.⁴¹ Based on information uncovered during its investigation and the allegations from the three complainants, the Commission asserted that it was investigating "class allegations in violation of Title VII."⁴² Pursuant to this investigation, the EEOC first requested, and then subpoenaed, employee information statewide, with which the employer refused to comply.⁴³

The employer argued that information about employees state-wide was overbroad.⁴⁴ The company explained that the supervisor involved in the specific conduct underlying the three original complaints worked at a limited number of identified job sites.⁴⁵ Relying largely upon *McLane*, and the Ninth Circuit's ruling on remand in *McLane*, the Court rejected this argument, holding the Commission had "evidence (apart from the vague boilerplate allegations in the original complaints) of incidents of additional potential discriminatory or violative conduct that go beyond the one-attacker-one-location allegations that commenced the investigation."⁴⁶ Thus, according to the EEOC, because it was investigating a pattern and practice of behavior, and it was entitled to obtain broader evidence.⁴⁷ Given the "generous construction" of the concept of relevance, the Court concluded that employee contact information is relevant to the Commission's legitimate investigation.⁴⁸

In *EEOC v. Oncor Electric Delivery Co.*,⁴⁹ the U.S. District Court for the Northern District of Texas likewise overruled the employer's objection to an EEOC subpoena.⁵⁰ In that case, upon returning to

³⁷ *EEOC v. McLane Co., Inc.*, No. 12-CV-2469-PHX-GMS, 2018 U.S. Dist. LEXIS 70127, *1 (D. Ariz. Apr. 25, 2018).

³⁸ *Id.* at *7-8.

³⁹ *EEOC v. Nationwide Janitorial Servs.*, No. 18-CV-96 ODW (MRW), 2018 U.S. Dist. LEXIS 161273 (C.D. Cal. Aug. 17, 2018).

⁴⁰ *Id.* at *3.

⁴¹ *Id.* at *2.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at *3.

⁴⁵ The company did not object to providing this information. *Id.* at *3-4.

⁴⁶ *Id.* at *9.

⁴⁷ *Id.* (citing *EEOC v. Shell Oil Co.*, 466 U.S. 54, 68-69 (1984), and *EEOC v. McLane Co., Inc.*, 857 F.3d 813, 815-16 (9th Cir. 2017)).

⁴⁸ *Id.* (citing *McLane Co., Inc. v. EEOC*, 137 S. Ct. 1159, 1165 (2017)).

⁴⁹ *EEOC v. Oncor Elec. Delivery Co.*, No. 3:17-MC-69-K-BN, 2017 U.S. Dist. LEXIS 189584 (N.D. Tex. Nov. 16, 2017).

⁵⁰ *Id.* at *18.

work after surgery, the charging party was asked to sign a return to work memorandum that required her to inform her supervisor of all medications she was taking that could affect her work performance.⁵¹ When the charging party refused to sign, her employer allegedly forced her to take an unpaid leave of absence.⁵² In its investigation, the EEOC reviewed the memorandum along with the employer's written company-wide policy requiring disclosure of medications.⁵³ The EEOC then requested, and then subpoenaed, a detailed list of all company employees who had suffered discipline or been discharged as a result of that policy.⁵⁴

The employer refused to comply, and the EEOC filed for an order to show cause. In its response, the employer argued that the EEOC's subpoena lacked relevance and was nothing more than a fishing expedition.⁵⁵ Relying upon *McLane*, the Court rejected this argument.⁵⁶ It found that, based upon the evidence of a wide-spread policy already uncovered, the employee list was plainly relevant and well within the EEOC's authority to obtain in furtherance of its investigation.⁵⁷

These cases continue the trend, which seems to have only accelerated since the Supreme Court's decision in *McLane*, of granting broad deference to the Commission's subpoena requests. For example, in *EEOC v. United Parcel Service, Inc.*,⁵⁸ the Sixth Circuit affirmed the District Court's enforcement of a broad subpoena, seeking evidence of discrimination and retaliation within three categories of information: (i) information about employee injuries and accidents; (ii) UPS' "privacy case" criteria; and (iii) similar information to its first request, but in a different, updated format.⁵⁹ The Sixth Circuit based its decision on courts' "generous construction" of the relevancy requirement, which has "afforded the [EEOC] access to virtually any material that might cast light on the allegations against the employer."⁶⁰ Similarly, in *EEOC v. Union Pacific Railroad Co.*,⁶¹ the Seventh Circuit affirmed a decision that required a railroad company to produce, among other things, company-wide information about persons who sought a particular promotion during the relevant time period.⁶² The Seventh Circuit's decision emphasized the generous relevance standard afforded EEOC subpoenas, explaining that the relevance standard is in place merely to prevent "fishing expeditions."⁶³

⁵¹ *Id.* at *4.

⁵² *Id.* at *5.

⁵³ *Id.*

⁵⁴ *Id.* at *8-9.

⁵⁵ *Id.* at *9-10.

⁵⁶ The District Court found that the Supreme Court recently noted "the 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.'" *Id.* at *14 (citing *McLane Co., Inc. v. EEOC*, 137 S. Ct. 1159, 1169).

⁵⁷ *Id.* at *17-18.

⁵⁸ *EEOC v. United Parcel Service, Inc.*, 859 F.3d 375 (6th Cir. 2017).

⁵⁹ *Id.* at 380.

⁶⁰ The Sixth Circuit explained that "the EEOC is entitled to evidence that shows a pattern of discrimination other than the specific instance of discrimination described in the charge." *Id.* at 379. It rejected UPS's argument that the EEOC was only entitled to information regarding employees "similarly situated" to the charging party, stating that the EEOC is entitled to any evidence which "provides context for determining whether discrimination has taken place." *Id.* at 378 (internal quotations and citations omitted).

⁶¹ *EEOC v. Union Pac. R.R. Co.*, 867 F.3d 843 (7th Cir. 2017), *reh'g denied* (Nov. 21, 2017).

⁶² *Id.* at 852. Before a court decision, the parties reached a settlement whereby the railroad agreed to produce some of the subpoenaed information. *Id.* at 846. However, the EEOC claimed that the railroad never actually produced the promised information. Thereafter, the EEOC issued a right to sue letter and both charging parties jointly filed suit. However, summary judgment was granted against their claims and the Seventh Circuit affirmed. *Id.*

⁶³ *Union Pac. R.R. Co.*, 867 F.3d at 852. The Seventh Circuit explicitly rejected the narrow view that the EEOC's request should have been denied because "the information sought extends beyond the allegations in the underlying charges[.]" *Id.*

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

With the Supreme Court's affirmance of the EEOC's broad subpoena powers, employers' victories in FY 2018 were few, and demonstrate that using a scalpel to precisely carve out irrelevant requests is the surest path to success for employers. For example, in *EEOC v. Service Tire Truck Centers*,⁶⁴ the U.S. District Court for the Middle District of Pennsylvania granted in part and denied in part the EEOC's application to enforce its subpoena. In that case, the charging party alleged gender and pregnancy discrimination in violation of Title VII when she was denied a promotion.⁶⁵ As part of its investigation, the EEOC issued a request and then a subpoena seeking, among other things, personnel files of the charging party's supervisor, the individual who received the promotion, and several comparator employees.⁶⁶ After the employer failed to provide the requested information and documents, the EEOC filed an application to enforce the subpoena.

In response, the employer conceded that some of what was contained in the personnel files was relevant, but argued that the EEOC's request for entire personnel files was overbroad because such files included sensitive documents and information that were wholly irrelevant to resolving the charge.⁶⁷ The Court agreed, finding that the EEOC had not explained why entire personnel files are necessary or relevant to its investigation.⁶⁸ Accordingly, the Court circumscribed the subpoena request to exclude sensitive information such as certain medical and healthcare information, retirement plan information, names and other identifying details for spouses and dependents, personal email addresses, copies of social security cards, and tax information beyond earnings and salary.⁶⁹

Similarly, on November 29, 2018, the U.S. District Court for the Southern District of California granted in part and denied in part the EEOC's attempt to enforce a broad subpoena in *EEOC v. G4S Secure Solutions (USA), Inc.*⁷⁰ In that case, the EEOC was investigating a charge of sex and race

See also *EEOC v. Aerotek, Inc.*, 815 F.3d 328, 332-33 (7th Cir. 2016) (upholding the District Court's order requiring Aerotek to produce the names of more than 22,000 clients, holding that the EEOC had the power to investigate additional potential discriminatory requests) (citing *EEOC v. Sidley Austin Brown & Wood*, 315 F.3d 696, 701 (7th Cir. 2002)); *EEOC v. Maritime Autowash, Inc.*, 820 F.3d 662, 666 (4th Cir. 2016) (enforcing an EEOC subpoena for documents stemming from the discrimination charge of an undocumented worker even though the charging party might not have been able to enforce any legal remedies, explaining that "[t]he [judicial review] process is not one for a determination of the underlying claim on its merits ... courts should look only to the jurisdiction of the agency to conduct such an investigation"); Gerald L. Maatman, Jr. and Alex W. Karasik, *Investigating Illegal Aliens' Charges: Fourth Circuit Says EEOC Can Serve Subpoena On Employer*, WORKPLACE CLASS ACTION BLOG (Apr. 29, 2016), available at <http://www.workplaceclassaction.com/2016/04/investigating-illegal-aliens-charges-fourth-circuit-says-eeoc-can-serve-subpoena-on-employer/>; *EEOC v. KB Staffing, LLC*, No. 14-MC-41-T-30AEP, 2014 U.S. Dist. LEXIS 147810, at *10-11 (M.D. Fla. Aug. 28, 2014) (enforcing an EEOC subpoena for information regarding a pre-job offer health questionnaire allegedly violating the ADA even though the challenged practice had been discontinued years earlier, even beyond the statute of limitations period); Gerald L. Maatman, Jr. and Jason J. Englund, *After The Charge Has Gone: Court Gives EEOC Free Reign To Press Systemic Investigation Even After Charging Party Withdraws*, Workplace Class Action Blog (Sept. 29, 2014), available at <http://www.workplaceclassaction.com/2014/09/after-the-charge-has-gone-court-gives-eeoc-free-reign-to-press-systemic-investigation-even-after-charging-party-withdraws/>.

⁶⁴ *EEOC v. Serv. Tire Truck Ctrs.*, No. 1:18-CV-1539, 2018 U.S. Dist. LEXIS 178025 (M.D. Pa Oct. 17, 2018).

⁶⁵ *Id.* at *3.

⁶⁶ *Id.* at *3-4, 11

⁶⁷ *Id.* at *11

⁶⁸ *Id.* at *11-12.

⁶⁹ *Id.* at *12. The EEOC also sought a complete list of employees at the branch where the charging party worked, including personal identifying and contact information. *Id.* The Court found that social security numbers were not necessary or relevant, but that the other employee information should be produced, stating that the "data sought by the EEOC would enable it to interview other employees to determine if [the employer] treated its employees differently based on gender or pregnancy, and thus the information 'might cast light' on the charge at issue." *Id.* at *13.

⁷⁰ *EEOC v. G4S Secure Solutions (USA), Inc.*, No. 18-CV-2335-BAS (NLS), 2018 U.S. Dist. LEXIS 203540 (S.D. Cal. Nov. 29, 2018).

harassment discrimination brought by a security guard.⁷¹ She alleged that she complained about the harassment to one of her supervisors, but no action was taken.⁷² The Court relied on that fact to uphold the subpoena, to the extent it requested documents regarding other complaints of harassment in the same geographic area: “In light of [charging party’s] allegations that she presented her harassment complaints to [employer’s] supervisor and no action was taken, documents showing complaints of harassment and [employer’s] responses (or lack thereof) are plainly relevant.”⁷³

However, the Court was unwilling to go so far as to order the production of documents relating to any individuals who were discharged during the relevant time period. The Court explained that the charging party had alleged that she was transferred in retaliation for complaining about the alleged harassment; she had not alleged that she had been improperly discharged.⁷⁴ The Court held that “[w]hile inquiring with other employees or former employees regarding harassment and discrimination may be important to the EEOC investigation, there is no reason that the discharged employees are relevant to the investigation, further, there is no showing that other employees (past or present) are unavailable for interview for the same purposes.”⁷⁵

These wins build on a body of decisions that have been more favorable to employers – albeit preceeding *McLane*. For example, in *EEOC v. Royal Caribbean Cruises, Ltd.*,⁷⁶ the Eleventh Circuit upheld the Southern District of Florida’s refusal to enforce an EEOC subpoena because the information sought was irrelevant to the charge at issue and was unduly burdensome.⁷⁷ Similarly, in *EEOC v. TriCore Reference Laboratories*,⁷⁸ the Tenth Circuit affirmed the District Court’s refusal to enforce an EEOC subpoena relating to an employer’s determination that the charging party could not safely perform her job upon her return from maternity leave.⁷⁹ The Tenth Circuit rejected the EEOC’s attempt to expand the scope of its investigation to include a “[f]ailure to accommodate persons with disabilities and/or failure to accommodate women with disabilities (due to pregnancy),” explaining that the EEOC had not justified its expanded investigation because it had “not alleged anything to suggest a pattern or practice of discrimination beyond [employer’s] failure to reassign [the employee].”⁸⁰

⁷¹ *Id.* at *2.

⁷² *Id.*

⁷³ *Id.* at *11.

⁷⁴ *Id.* at *10.

⁷⁵ *Id.*

⁷⁶ *EEOC v. Royal Caribbean Cruises, Ltd.*, 771 F.3d 757 (11th Cir. 2014).

⁷⁷ See Gerald Maatman, Jr. and Howard M. Wexler, *Eleventh Circuit Refuses To Enforce EEOC’s Broad Subpoena*, WORKPLACE CLASS ACTION BLOG (Nov. 7, 2015), available at <http://www.workplaceclassaction.com/2014/11/eleventh-circuit-refuses-to-enforce-eeocs-broad-subpoena/>. The Eleventh Circuit cautioned that the EEOC’s subpoena power should not be construed “so broadly that the relevancy requirement is rendered a nullity.” *Royal Caribbean Cruises, Ltd.*, 771 F.3d at 760. The Eleventh Circuit also rejected the EEOC’s argument that it “is entitled to expand the investigation to uncover other potential violations and victims of discrimination on the basis of disability.” *Id.* at 761.

⁷⁸ *EEOC v. TriCore Reference Labs.*, 849 F.3d 929 (10th Cir. 2017); Gerald L. Maatman, Jr., Christopher DeGroff, and Alex W. Karasik, *No Subpoena For You! – Tenth Circuit Says EEOC’s Subpoena Out Of Line*, WORKPLACE CLASS ACTION BLOG (Mar. 2, 2017), available at <http://www.workplaceclassaction.com/2017/03/no-subpoena-for-you-tenth-circuit-says-eeocs-subpoena-out-of-line/>.

⁷⁹ *TriCore Reference Laboratories*, 849 F.3d at 934.

⁸⁰ *Id.* at 939. The Tenth Circuit noted that the request was overbroad because it sought information about employees who never sought an accommodation. *Id.* at 942. See also *EEOC v. Austal USA, LLC*, No. 17-CV-00006, 2017 WL 4563078, at *10. (S.D. Ala. Aug. 18, 2017) (rejecting EEOC’s request for the “names and position titles of all individuals terminated by [the employer] because of the attendance policy, and which of these terminated individuals had a medical disability,” finding that the EEOC’s request “extends beyond those employees with a medical condition or disability terminated under the attendance policy, regardless of whether those employees had a disability or medical condition and no matter the nature of

d. Cases Addressing The Methods Used By The EEOC To Investigate Charges

Although most decisions regarding the EEOC's subpoena power revolve around questions about *what information* the EEOC can seek, a number of decisions have addressed how the EEOC is permitted to conduct the investigation itself. For example, in *EEOC v. Nucor Steel Gallatin, Inc.*,⁸¹ the U.S. District Court of the Eastern District of Kentucky allowed the EEOC to conduct a warrantless, non-consensual search of private commercial property of an employer charged with hiring discrimination.⁸² The Court found that the EEOC's regulatory scheme provided safeguards roughly equivalent to those found in traditional warrants, rejecting Gallatin's arguments to the contrary. The Court explained, that "[j]ust as the warrant process requires courts to identify specific evidence of an existing violation and order only those inspections that bear 'an appropriate relationship to the violation, the Commission's statutory and regulatory schemes permit only those inspections that are 'relevant to the charges filed' and 'not unduly burdensome.'"⁸³

Other courts have been more willing to impose restrictions on the EEOC's regulatory power. In *EEOC v. Homenurse, Inc.*,⁸⁴ instead of requesting information in the normal course of its investigation, the EEOC carried out an unannounced, FBI-like raid in which it showed up at the former employer and confiscated some of the company's files, many of which contained information protected by HIPAA.⁸⁵ When the EEOC tried to enforce another subpoena on the employer, the U.S. District Court for the Northern District of Georgia quashed the subpoena and called the raid on the employer "highly inappropriate."⁸⁶

Given the trend towards ever broader discretion given to the EEOC by the District Courts, and the discretion that is afforded to the District Courts to do so, it is likely that the EEOC will only get bolder with its EEOC subpoena enforcement activity, both in terms of the type and amount of information it seeks, and the methods it uses to try to collect that information from employers.

any accommodation requested"); *EEOC v. Se. Food Servs. Co., LLC*, No. 3:16-MC-46, 2017 WL 1155040, at *2-3 (E.D. Tenn. Mar. 27, 2017) (refusing to enforce an EEOC subpoena for detailed information regarding current and former employees who signed a release that the EEOC was challenging, rejecting the EEOC's argument that contacting other affected employees was the only way to verify the company's contention that no other employees refused to sign the release); Gerald L. Maatman, Jr., Mark W. Wallin, and Alex W. Karasik, *Tennessee Court Rejects EEOC's Supersized Subpoena Served On Fast Food Employer*, WORKPLACE CLASS ACTION BLOG (Mar. 31, 2017), available at <http://www.workplaceclassaction.com/2017/03/tennessee-court-rejects-eeocs-supersized-subpoena-served-on-fast-food-employer/>; *EEOC v. Forge Indus. Staffing Inc.*, No. 1:14-MC-90-SEB-MJD, 2014 WL 6673574, at *3, 7 (S.D. Ind. Nov. 24, 2014) (rejecting an EEOC subpoena for information that the EEOC argued was related to the "overall conditions of the workplace," and noting that accepting that argument would eviscerate the meaning of "relevance"); Christopher DeGross, Paul Kehoe, and Gerald L. Maatman, Jr., *"One Step Too Far" – Court Shoots Down The EEOC's Kitchen Sink Subpoena*, WORKPLACE CLASS ACTION BLOG (Nov. 25, 2014), available at <http://www.workplaceclassaction.com/2014/11/one-step-too-far-court-shoots-down-the-eeocs-kitchen-sink-subpoena/>.

⁸¹ *EEOC v. Nucor Steel Gallatin, Inc.*, 184 F. Supp. 3d 561 (E.D. Ky. 2016).

⁸² The EEOC sought a ruling authorizing it to enter the private commercial property of defendant employer Nucor Steel Gallatin, Inc. ("Gallatin"), without Gallatin's consent and without an administrative warrant, to investigate a hiring discrimination claim. *Id.* at 563-64. In response, Gallatin argued that, regardless of whether the EEOC has the statutory right to enter private commercial property, that entry cannot take place without an administrative warrant. *Id.* at 565.

⁸³ *Id.* at 568.

⁸⁴ *EEOC v. Homenurse, Inc.*, No. 1:13-CV-2927, 2013 U.S. Dist. LEXIS 147686, at *1 (N.D. Ga. Sept. 30, 2013); see also Christopher DeGross and Reema Kapur, *Office Crashers: Another Court Reigns In EEOC Subpoena Authority Run Amok*, WORKPLACE CLASS ACTION BLOG (Oct. 3, 2013), <http://www.workplaceclassaction.com/2013/10/office-crashers-another-court-reigns-in-eeoc-subpoena-authority-run-amok/>.

⁸⁵ *Homenurse, Inc.*, 2013 U.S. Dist. LEXIS 147686, at *3-4

⁸⁶ *Id.* at *44.

4. The EEOC's Strategic Enforcement Priorities

According to the EEOC “the purpose of the [Strategic Enforcement Priorities] is to focus and coordinate the EEOC's programs to have a sustainable impact in reducing and deterring discriminatory practices in the workplace.”⁸⁷ As in years past, the SEP establishes the EEOC's six substantive area priorities:



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



Protecting Vulnerable Workers, Including Immigrant And Migrant Workers, And Underserved Communities From Discrimination: The EEOC's focus within this area is to combat policies and practices directed “against vulnerable workers,” including immigrant and migrant workers, as well as persons perceived to be members of these groups, and against members of underserved communities.” Each EEOC office tailors its efforts to the local issues affecting individuals in its geographic area.



Addressing Selected Emerging And Developing Issues: As the name implies, the EEOC may tailor its focus within this priority as the law develops.



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



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



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

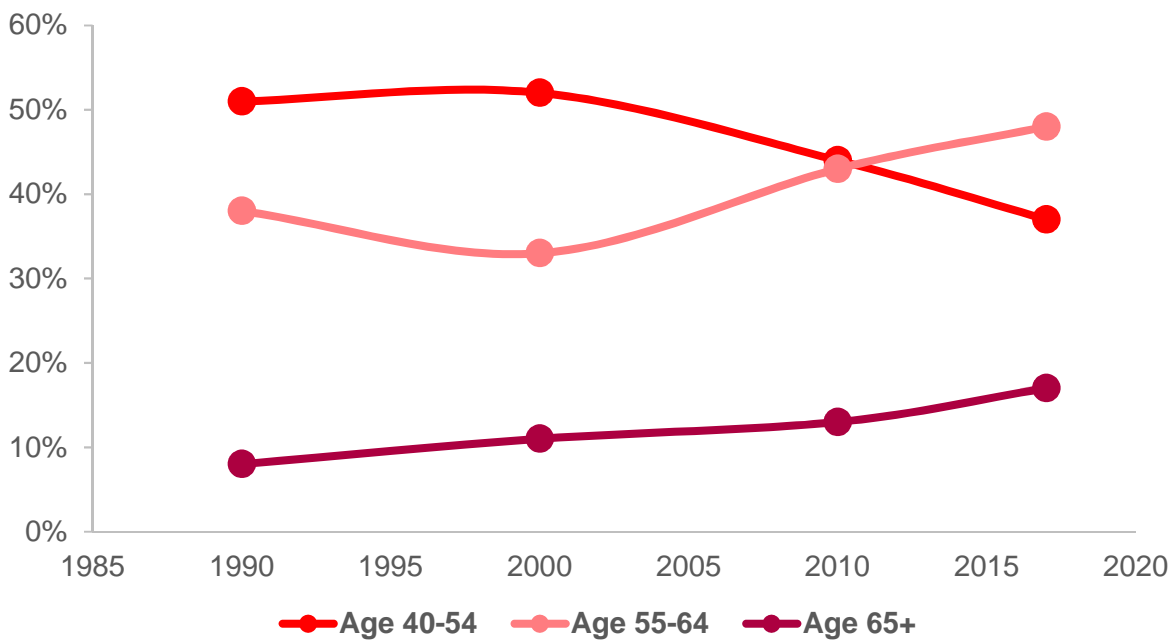
⁸⁷ U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION STRATEGIC ENFORCEMENT PLAN FISCAL YEARS 2017 - 2021 available at <https://www.eeoc.gov/eeoc/plan/sep-2017.cfm>.



Eliminating Barriers In Recruitment & Hiring

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

ADEA Charges By Age Group



“Work life has changed dramatically since Boomers entered the workforce. Instead of a career spanning one industry and a few positions as was expected at the beginning of their careers, most workers today are expected to have 11 different jobs in the modern, dynamic economy.” – Victoria Lipnic, Acting Chair

B. The Elimination Of Systemic Barriers In Recruitment And Hiring

The EEOC has spent a considerable amount of its enforcement budget litigating issues that it sees as barriers to recruitment and hiring.⁸⁸ Over the past few year, most of that enforcement activity has been focused on combatting hiring practices that could result in age discrimination; and employers' use of credit and criminal history background checks in hiring and selection decisions.

1. A Renewed Focus On Combatting Age Discrimination In Recruitment And Hiring

In its Fiscal Year 2017, the EEOC marked the 50th anniversary of the Age Discrimination in Employment Act. In a June 14, 2017 press release, Acting Chair Victoria Lipnic noted that: “[w]ith so many more people working and living longer, we can’t afford to allow age discrimination to waste the knowledge, skills, and talent of older workers. Outdated assumptions about age and work deprive people of economic opportunity and stifle job growth and productivity. My hope is that 50 years after the enactment of the Age Discrimination in Employment Act (ADEA), we can work together to fulfill the promise of this important civil rights law to ensure opportunities are based on ability, not age.”⁸⁹

This was followed up in FY 2018 with the release of its Report on the State of Age Discrimination and Older Workers in the U.S. 50 Years After the Age Discrimination in Employment Act.⁹⁰ The report notes that the workforce in 1967, the year the ADEA was passed, looked very different than it does today. According to the EEOC: “Today’s US labor force has doubled in size, and is older, more diverse, more educated, and more female than it was 50 years ago.”⁹¹ The most dramatic change, according to the EEOC, is that the share of workers age 55 and older in the workforce has doubled, and in recent years, workers age 65 and older are staying in or re-entering the workforce in greater numbers. The Report notes that “[m]ore than 42 percent of older workers are in management, professional, and related occupations, a somewhat higher proportion than that for all workers. Thirty-six percent of older workers are engaged in blue collar work. Workers age 65 and older are in part-time jobs at more than double the rate of younger workers, but they are increasingly seeking and obtaining full-time employment.”⁹²

This has resulted in a dramatic change in the ages of those filing ADEA charges with the EEOC. According to the Report, “[i]n 1990, workers in the age 40-54 age cohort filed the majority of ADEA charges and workers in the age 65+ cohort filed relatively few. But by 2017, more charges were filed by workers ages 55-64 than the younger age cohort. Moreover, by 2017, the percentage of charges filed by workers age 65 and older was double what it was in 1990.”⁹³

⁸⁸ See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION STRATEGIC ENFORCEMENT PLAN FY 2017 - 2021, at 6-9 (identifying the elimination of barriers in recruitment and hiring as one the EEOC’s national priorities, and stating that “[t]he EEOC will target class-based recruitment and hiring practices that discriminate against racial, ethnic and religious groups, older workers, women, and people with disabilities”).

⁸⁹ Press Release, Age Discrimination and Outdated Views Of Older Workers Persist, Experts Tell Commission (June 14, 2017), <https://www.eeoc.gov/eeoc/newsroom/release/6-14-17a.cfm>.

⁹⁰ Victoria A. Lipnic, THE STATE OF AGE DISCRIMINATION AND OLDER WORKERS IN THE U.S. 50 YEARS AFTER THE AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA), available at <https://www.eeoc.gov/eeoc/history/adea50th/report.cfm>.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

The report discusses how age discrimination manifests itself in a number of different ways. The Report notes that unlawful discharge has always been the most common practice asserted in charges, but that age-based harassment claims have more than tripled by 2017 since 1992. Moreover, age discrimination as a barrier to hiring remains front and center on the EEOC's radar. As an example, the report pointed to job postings that referred to younger workers as "digital natives," but older workers as "digital immigrants," and online application systems that include dates of birth or graduation-year fields that cannot be bypassed. Finally, the Report notes that mandatory retirement and discriminatory denial of benefits has also dominated ADEA litigation, along with the increasingly important trend of "intersectional discrimination," i.e., discrimination based on more than one protected category.

The EEOC posted some litigation wins related to age discrimination in hiring in 2018. For example, on March 8, 2018, the EEOC obtained a settlement of \$50,000 to resolve a claim that a staffing company, after learning an applicant's date of birth, sent the applicant an email stating that he would no longer be considered for the position because he was "born in 1945" and "age will matter."⁹⁴ And on May 3, 2018, the EEOC reached a consent decree to bring to an end its complaint that older applicants for hourly positions at a national restaurant chain were less likely to receive employment offers.⁹⁵ The decree created a \$2.85 million settlement fund to be distributed among unsuccessful applicants age 40 and over at 35 restaurant locations, as well as some changes to the employer's recruitment and hiring processes.⁹⁶

2. The EEOC's Focus On Employer's Use Of Criminal And Credit History Background Checks

In combating discriminatory hiring practices, one area the EEOC has focused on is the use of criminal and credit history background checks. On April 25, 2012, the EEOC issued its Enforcement Guidance concerning the use of arrest and conviction records in employment decisions.⁹⁷ Among other things, the guidance warns employers that they cannot deny someone employment due to criminal history information without considering the following factors: the nature and gravity of the offense or offenses (which the EEOC explains may include evaluating the harm caused, the legal elements of the crime, and the classification, i.e., misdemeanor or felony); the time that has passed since the conviction and/or completion of the sentence (which the EEOC describes as looking at particular facts and circumstances and evaluating studies of recidivism); and the nature of the job held or sought (which the EEOC explains requires more than examining just the job title, but also specific duties, essential functions, and environment).⁹⁸

⁹⁴ Press Release, IT Staffing Company Pays \$50,000 To Settle EEOC Age Discrimination Suit (Mar. 8, 2018), <https://www.eeoc.gov/eeoc/newsroom/release/3-8-18.cfm>.

⁹⁵ Press Release, Seasons 52 to Pay \$2.85 Million To Settle EEOC Age Discrimination Lawsuit (May 3, 2018), <https://www.eeoc.gov/eeoc/newsroom/release/5-3-18a.cfm>.

⁹⁶ *Id.*

⁹⁷ See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (Apr. 25, 2012), available at http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm; Pamela Devata and Frederick Smith, *Stop The Presses – The EEOC Releases New Enforcement Guidance On Arrest And Conviction Records In The Hiring Process*, WORKPLACE CLASS ACTION BLOG (Apr. 25, 2012), <http://www.workplaceclassaction.com/2012/04/stop-the-presses-the-eeoc-releases-new-enforcement-guidance-on-arrest-and-conviction-records-in-th/>; Pamela Q. Devata, *Strategy and Insights: How Should Employers Use Criminal History in Employment Now That The EEOC Has Issued Enforcement Guidance?*, SEYFARTH SHAW NEWSLETTER (Apr. 27, 2012), <http://www.seyfarth.com/publications/si042712>.

⁹⁸ U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (Apr. 25, 2012).

The EEOC's guidance was immediately challenged in court. The State of Texas brought suit in the District Court for the Northern District of Texas in November 2013 seeking to enjoin the enforcement of the EEOC's guidance because it conflicted with Texas law that prohibited hiring felons for certain jobs.⁹⁹ The District Court dismissed the suit, holding that the State of Texas lacked standing.¹⁰⁰ The State of Texas immediately filed an appeal.¹⁰¹ On June 27, 2016, the Fifth Circuit remanded the case back to the District Court, stating that the State of Texas had standing to challenge the EEOC guidance and that it was a final agency rule subject to court challenge.

With respect to standing, the Fifth Circuit pointed out that the State of Texas, in its capacity as an employer, was an "object" of the challenged EEOC guidance, which was directed at all employers, including state agencies, that conduct criminal background checks as part of their hiring process.¹⁰² The Fifth Circuit also determined that the EEOC's guidance was "final agency action" that is subject to challenge, finding that it was the "consummation of the agency's decision-making process," from which "legal consequences would flow."¹⁰³ On September 23, 2016, however, the Fifth Circuit withdrew its opinion so it could be reconsidered in light of the Supreme Court's decision in *U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S.Ct. 1807, 1816 (2016), which held in the context of the

⁹⁹ See *id.*; Gerald L. Maatman, Jr. and Howard M. Wexler, *Round One – Texas Loses Its Suit Against The EEOC Over Its Criminal Background Guidance*, WORKPLACE CLASS ACTION BLOG (Aug. 21, 2014), <http://www.eeoccountdown.com/2014/08/21/round-one-texas-loses-its-suit-against-the-eeoc-over-its-criminal-background-guidance/>.

¹⁰⁰ *State of Tex. v. EEOC*, No. 5:13-CV-255, 2014 WL 4782992 (N.D. Tex. Aug. 20, 2014). The Court held that because "Texas does not allege that any enforcement action has been taken against it by the Department of Justice (as the EEOC cannot bring enforcement actions against states) in relation to the Guidance," there is not a "substantial likelihood" that Texas "will face future Title VII enforcement proceedings from the Department of Justice arising from the Guidance." *Id.* at *3-4.

¹⁰¹ See Gerald L. Maatman, Jr. and Howard M. Wexler, *Showdown At The Fifth Circuit: Texas Files Opening Appellate Brief In Its Challenge Of The EEOC's Criminal Background Guidance*, WORKPLACE CLASS ACTION BLOG (Dec. 1, 2014), <http://www.workplaceclassaction.com/2014/12/showdown-at-the-fifth-circuit-texas-files-opening-appellate-brief-in-its-challenge-of-the-eeocs-criminal-background-guidance/>; Gerald L. Maatman, Jr. and Howard M. Wexler, *Showdown At The Fifth Circuit Continues: The EEOC Files Its Opposition Brief In Texas' Challenge To Criminal Background Guidance*, WORKPLACE CLASS ACTION BLOG (Jan. 15, 2015), <http://www.workplaceclassaction.com/2015/01/showdown-at-the-fifth-circuit-continues-the-eeoc-files-its-opposition-brief-in-texas-challenge-to-criminal-background-guidance/>; Gerald L. Maatman, Jr. and Howard M. Wexler, *Showdown At The Fifth Circuit Continues: Texas Gets The Last Word On Its Challenge To The EEOC's Criminal Background Guidance*, WORKPLACE CLASS ACTION BLOG (Feb. 11, 2015), <http://www.workplaceclassaction.com/2015/02/showdown-at-the-fifth-circuit-continues-texas-gets-the-last-word-on-its-challenge-to-the-eeocs-criminal-background-guidance/>.

¹⁰² *State of Texas v. EEOC*, 827 F.3d 372 (5th Cir. 2016). The Fifth Circuit also noted that the EEOC's guidance created an increased regulatory burden on the State of Texas as an employer as it imposes a mandatory scheme for employers regarding hiring policies that, in and of itself, established a concrete injury against the State of Texas., *id.* at 378, and that regardless of whether the EEOC's guidance preempts Texas' laws regarding hiring bans, it did, at the very least, force the State of Texas to "undergo an analysis, agency by agency, regarding whether the certainty of EEOC investigations stemming from the [] Guidance's standards overrides the State's interest in not hiring felons for certain jobs." *Id.* at 378-79.

¹⁰³ *Id.* at 380. The Fifth Circuit rejected the EEOC's argument that it has no ability to enforce its guidance and instead can only do so by referring a case to the U.S. Attorney General for prosecution (as it would have to with respect to a public entity). *Id.* at 381-82. Instead, the Fifth Circuit held that the "legal consequence" of the EEOC's guidance is that the EEOC has committed itself to applying the guidance to "virtually all public and private employers." *Id.* at 382. The EEOC's staff is therefore bound by it to follow a certain course of action, and the only way to avoid a potential prosecution is by abiding by one of the two "safe harbor" provisions contained in the EEOC's guidance. *Id.* If the State of Texas (or any other employer) does not fall into one of these safe harbor provisions – that is, it does not do what the EEOC says – it risks an enforcement action and potential liability, and thus the EEOC's guidance has a "legal consequence," making it a final agency action that can be challenged in court. *Id.*; see also Gerald L. Maatman, Jr., Pamela Q. Devata, Robert T. Szyba, and Ephraim J. Pierre, *Don't Mess With Texas: EEOC's Criminal Background Check Guidance Subject To Challenge*, WORKPLACE CLASS ACTION BLOG (June 28, 2016), <http://www.workplaceclassaction.com/2016/06/dont-mess-with-texas-eeocs-criminal-background-check-guidance-subject-to-challenge/>.

Clean Water Act that a jurisdictional determination is a final agency action that is subject to judicial review under the Administrative Procedure Act, 5 U.S.C. § 704.¹⁰⁴

On remand, the District Court granted the EEOC's motion for summary judgment, and denied in part the State of Texas's motion for summary judgment and request for declaratory relief.¹⁰⁵ First, the District Court opined that the State of Texas did not have a right to maintain and enforce its laws and policies that absolutely bar convicted felons (or certain categories of convicted felons) from serving in any job that the State of Texas and its Legislature deemed appropriate.¹⁰⁶ The District Court explained that although there were many categories of employment for which specific prior criminal history profiles of applicants would be a poor fit and pose far too great a risk to the interests of the State of Texas and its citizens, there were also many conceivable scenarios where otherwise qualified applicants with felony convictions would pose no objectively reasonable risk. Accordingly, the District Court held that "a categorical denial of employment opportunities to all job applicants convicted of a prior felony paints with too broad a brush and denies meaningful opportunities of employment to many who could benefit greatly from such employment in certain positions."¹⁰⁷

Further, the District Court addressed the State of Texas's request that it enjoin the EEOC from issuing right-to-sue letters in relation to the denial of employment opportunities based on the criminal history of the job applicant. The District Court rejected this request, holding the issuance of a right to sue letter was not a determination by the EEOC that a meritorious claim exists. However, the District Court did grant the State of Texas's motion for summary judgment as to its APA claim, noting the Guidance was a substantive rule issued without notice and the opportunity for comment.¹⁰⁸ The District Court thus enjoined the EEOC from enforcing the guidance until the notice and comment requirements were satisfied.¹⁰⁹ Accordingly, the District Court granted the EEOC's motion for summary judgment, and denied in part the State of Texas's motion for summary judgment and request for declaratory relief.¹¹⁰ Both parties have appealed the District Court's decision, and the matter is pending before the Fifth Circuit.¹¹¹

The EEOC has aggressively litigated against companies that have used credit or criminal history background checks in hiring. While its early attempts ended in some spectacular defeats,¹¹² it has

¹⁰⁴ *State of Texas v. EEOC*, 838 F.3d 511 (5th Cir. 2016). The Fifth Circuit noted that the Supreme Court's decision in "*Hawkes* may or may not affect other issues raised in this appeal, and we leave it to the district court in the first instance to reconsider this case, and its opinion, in its entirety and to address the implications of *Hawkes* for this case." *Id.* at 511.

¹⁰⁵ *State of Texas v. EEOC*, No. 5:13-CV-255, 2018 U.S. Dist. LEXIS 30558 (N.D. Tex. Feb. 1, 2018); see also Gerald L. Maatman, Jr. and Alex W. Karasik, *Federal Court Rules That The EEOC Can Mess With Texas In Felon Hiring Lawsuit*, WORKPLACE CLASS ACTION BLOG (February 27, 2018), <https://www.workplaceclassaction.com/2018/02/federal-court-rules-that-the-eEOC-can-mess-with-texas-in-felon-hiring-lawsuit/>.

¹⁰⁶ *State of Texas*, 2018 U.S. Dist. LEXIS 30558, at *3.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at *3-4.

¹¹¹ *State of Texas v. EEOC*, No. 18-CV-10638 (5th Cir.).

¹¹² For example, in *EEOC v. Kaplan Higher Educ. Corp.*, 748 F.3d 749 (6th Cir. 2014) and *EEOC v. Freeman*, 778 F.3d 463 (4th Cir. 2015), the EEOC had alleged that the companies' use of credit and criminal background checks in hiring decisions caused a disparate impact against minority applicants. In both cases, the EEOC attempted to prove its case with statistical data compiled by its expert, which was accomplished by subpoenaing drivers' license photos from state departments of motor vehicles and assembling a team of "race raters" to classify applicants as "African-American," "Asian," "Hispanic," "White," or "Other" based on those photographs.¹¹² See *Kaplan Higher Educ. Corp.*, 748 F.3d at 751-52. In *Kaplan*, the Sixth Circuit held that the EEOC's "homemade" methodology for determining race was, "crafted by a witness with no particular expertise to craft it, administered by persons with no particular expertise to administer it, tested by no one, and accepted only by the witness himself." *Id.* at 754. In *Freeman*, the Fourth Circuit called the EEOC's expert analysis "laughable" and "utterly unreliable" and chided the EEOC for continuing to litigate the case long after it should have thrown in the towel.

had more success in recent cases.¹¹³ In July 2017, the EEOC sued a janitorial services provider, alleging the company refused to hire a class of African-American candidates.¹¹⁴ Specifically, the EEOC alleged an ongoing pattern or practice of race discrimination against African-American job applicants in Maryland and the Washington D.C. and Philadelphia metropolitan areas by refusing to hire blacks for custodian, lead custodian or porter positions.¹¹⁵ According to the EEOC, area managers were instructed to deter black applicants by repeatedly emphasizing to them that the company performed criminal background checks.¹¹⁶

The EEOC also recently obtained a pre-litigation settlement arising from an employer's use of pre-employment background checks.¹¹⁷ A large furniture retailer reached a voluntary conciliation agreement to resolve allegations of race discrimination raised by an unsuccessful black applicant whose offer of employment was rescinded as a result of the company's background check policies. Under the agreement, the company agreed to remove criminal conviction questions and postpone inquiries about criminal history until after it had extended a conditional offer of employment.

One area that seems ripe for increased scrutiny and review by the EEOC is employers' use of big data and social media to find candidates or evaluate them for employment. As technology and society continues to evolve, so too will the EEOC's substantive legal theories to meet these new challenges. The EEOC has been actively monitoring how employers use algorithms, "data scraping" of the internet, and other sophisticated tools to evaluate applicants. It has often stated that while it sees the many benefits of these types of tools, as well as the use of social media platforms to call out and combat discrimination, it also worries about their potential discriminatory uses and impact. We continue to believe that this is an area that employers should focus on in 2019 and beyond.

Freeman, 778 F.3d at 468. On September 3, 2015, the District Court added to the EEOC's loss by awarding Freeman close to \$1,000,000 in attorneys' fees because the Court held that the Commission had refused to stop litigating a case that it had no chance of winning. *EEOC v. Freeman*, No. 09-CV-2573, 2015 WL 5178420 (D. Md. Sept. 3, 2015). Similarly, in *EEOC v. Peoplemark, Inc.*, 732 F.3d 584, 614-15 (6th Cir. 2013), the District Court for the Western District of Michigan held that the EEOC placed an unfounded claim with experts and allowed them to "run with it" despite the fact that the EEOC's allegations were inaccurate. In that case, the EEOC alleged that Peoplemark, Inc., a temporary staffing company, maintained a policy that automatically denied the hire or employment of any person with a criminal record. However, contrary to the EEOC's allegations, Peoplemark did not have such a policy and 22% of the individuals who the EEOC alleged were not hired because of their prior felony convictions were actually found to be hired by the company. *Id.* at 614. The Court eventually awarded Peoplemark over \$750,000 in attorneys' fees, expert witness fees, and costs. *Id.*

¹¹³ For example, in *EEOC v. BMW Mfg. Co. LLC*, No. 7:13-CV-01583, 2015 WL 5431118 (D.S.C. July 30, 2015), the Court held that the EEOC had presented enough evidence of a statistical disparity to allow the case to proceed to a jury. The Court refused to exclude the EEOC's expert report, holding that "the parties' arguments at this stage of the case involve consideration of the weight to be given the experts rather than their admissibility," and those positions could be reargued at trial. *Id.* at *4. The case then settled for \$1.6 million. See Press Release, Equal Employment Opportunity Commission, BMW to Pay \$1.6 Million and Offer Jobs to Settle Federal Race Discrimination Lawsuit, (September 8, 2015), <http://www.eeoc.gov/eeoc/newsroom/release/9-8-15.cfm>. In *EEOC v. Dolgenercorp, LLC*, 249 F.Supp.3d 890, 891 (N.D. Ill. 2017) two former Dollar General employees filed EEOC charges regarding Dollar General's allegedly discriminatory use of criminal background checks in hiring and firing. Dollar General asserted that the EEOC's claims were barred as beyond the scope of the charges of discrimination and investigation, and that the EEOC failed to satisfy the statutory precondition for bringing suit when it failed to conciliate with Dollar General. *Id.* at 892. The District Court of the Northern District of Illinois granted the EEOC's motion for partial summary judgment, holding that when the EEOC files suit, it is not confined to claims typified by those of the charging party, and further, that any violations that the EEOC ascertains in the course of a reasonable investigation of the charging party's complaint are actionable. *Id.* at 892, 896-97.

¹¹⁴ Press Release, EEOC Sues Diversified Maintenance Systems for Race Discrimination and Retaliation (July 5, 2017), <https://www1.eeoc.gov/eeoc/newsroom/release/7-5-17.cfm>.

¹¹⁵ *EEOC v. Diversified Maintenance Systems, LLC*, No. 8:17-CV-1835 (D. Md. July 5, 2017) (ECF No. 1), at 1.

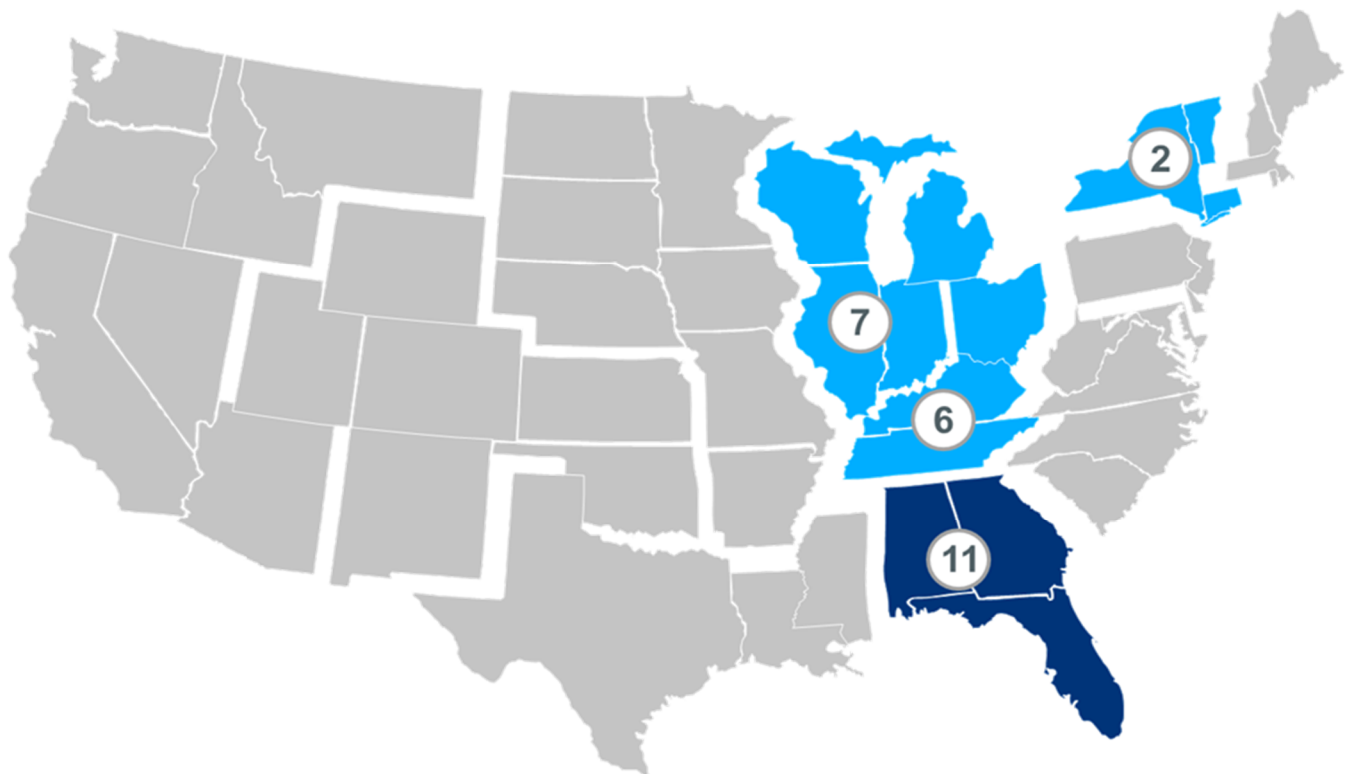
¹¹⁶ *Id.* at 5.



¹¹⁷ Press Release, Furniture Retailer Rooms to Go Adopts Revised Criminal Background Check Procedures In Cooperation With The EEOC (Sept. 24, 2018), <https://www.eeoc.gov/eeoc/newsroom/release/9-24-18.cfm>.



Addressing Emerging & Developing Issues

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



-  Circuit Courts ruling that sexual orientation is covered under Title VII
-  Circuit Courts ruling that sexual orientation is not covered under Title VII

*“This [Supreme] Court must resolve the split among the Circuits as to whether Title VII of the Civil Rights Act of 1964 prohibits discrimination against employees on the basis of sexual orientation.” – Petition for Writ of Certiorari, *Bostock v. Clayton County, Georgia**

C. Addressing Emerging And Developing Issues

Part of the EEOC's mission, as set forth in its 2017 Strategic Enforcement Plan, is to monitor trends and developments in the law, workplace practices, and labor force demographics to identify emerging and developing issues that can be addressed through its enforcement program.¹¹⁸ The 2017 Strategic Enforcement Plan identifies five emerging and developing issues as strategic priorities:

- Qualification standards and inflexible leave policies that discriminate against individuals with disabilities;
- Accommodating pregnancy-related limitations under the Americans with Disabilities Act Amendments Act (ADAAA) and the Pregnancy Discrimination Act (PDA);
- Protecting lesbians, gay men, bisexuals and transgender (LGBT) people from discrimination based on sex;
- Clarifying the employment relationship and the application of workplace civil rights protections in light of the increasing complexity of employment relationships and structures, including temporary workers, staffing agencies, independent contractor relationships, and the on-demand economy; and
- Addressing discriminatory practices against those who are Muslim or Sikh, or persons of Arab, Middle Eastern or South Asian descent, as well as persons perceived to be members of these groups, arising from backlash against them from tragic events in the United States and abroad.¹¹⁹

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

1. Developments In The Law Of LGBT Discrimination

LGBT rights remain a top priority under the EEOC's Strategic Enforcement Plan, which explicitly identifies "[p]rotecting lesbians, gay men, bisexuals and transgender (LGBT) people from discrimination based on sex" as one of the selected emerging and developing issues that the EEOC will focus on.¹²⁰ Despite the change in administration, the EEOC has so far not retreated from the argument first made by the Obama administration that Title VII forbids employment discrimination based on gender identity.¹²¹ The Justice Department, however, has parted ways with the EEOC on some LGBT issues. It has argued, contrary to the EEOC's position, that discrimination on the basis of sexual orientation is not prohibited under Title VII as discrimination on the basis of gender.¹²²

¹¹⁸ See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION STRATEGIC ENFORCEMENT PLAN FISCAL YEARS 2017 - 2021, *supra* note 2.

¹¹⁹ *Id.*

¹²⁰ See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION STRATEGIC ENFORCEMENT PLAN FISCAL YEARS 2017 - 2021, *supra* note 2.

¹²¹ *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, [cite]; See Sam Schwartz-Fenwick and Lucas DeLoach, Despite New Administration, EEOC Maintains Position that Title VII Prohibits Gender Identity Discrimination, EMPLOYMENT LAW LOOKOUT BLOG (June 16, 2017), available at <http://www.laborandemploymentlawcounsel.com/2017/03/despite-new-administration-eEOC-maintains-position-that-title-vii-prohibits-gender-identity-discrimination/>.

¹²² See Brief for the United States as Amicus Curiae, *Zarda v. Altitude Express, Inc.*, No 15-3775 (S.D.N.Y. July 26, 2017), ECF No. 417. Citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989), the DOJ explained that while an employer cannot "evaluate employees by assuming or insisting that they match the stereotype associated with their group," "the

The EEOC's focus on LGBT discrimination relies on an extension of Title VII's prohibition of sex discrimination. Title VII does not explicitly mention sexual orientation or gender identity as a protected classification.¹²³ The EEOC's legal theory is premised on Supreme Court precedent, as well as its own administrative decisions, which hold that "sex discrimination" under Title VII includes not just discrimination based on the biological differences between men and women, but also on the basis of gender.¹²⁴ In *Price Waterhouse v. Hopkins*,¹²⁵ the Supreme Court held that an employer had discriminated against a female employee by telling her to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."¹²⁶

Contrary to the DOJ's more recent interpretation of this precedent, the EEOC has extended the reasoning of *Hopkins* to establish that discrimination against LGBT employees is tantamount to discrimination on the basis of gender because it is discrimination that is based on a person's perceived failure to adhere to gender stereotypes.¹²⁷ Notably, the EEOC has, to a large extent, relied on its own administrative powers to advance this theory.¹²⁸ And it has taken a similar position with respect to discrimination on the basis of sexual orientation.¹²⁹

plaintiff must show that the employer actually relied on her or his gender in making its decision." *Id.* at 5. Title VII, it argued, "does not proscribe employment practices that take account of the sex of employees but do not impose different burdens on similarly situated members of each sex." *Id.* And it reminded that courts have long held that discrimination based on sexual orientation does not fall within Title VII's prohibition on sex discrimination. *Id.* at 6-8.

¹²³ See 42 U.S.C. § 2000e-2 (making it unlawful to discriminate against any individual "because of such individual's race, color, religion, sex, or national origin"). For the past 20 years, some members of Congress have attempted to add gender identity as a protected category through passage of some form of the Employment Non-Discrimination Act ("ENDA"). Currently, ENDA has passed in the Senate but not in the House. See Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. (2013). The EEOC's legal theory is therefore, arguably, one that has never been explicitly adopted by the U.S. Congress.

¹²⁴ See *Macy v. Holder*, EEOC Appeal No. 0120120821, 2012 WL 1435995, at *5 (Apr. 20, 2012) ("As used in Title VII, the term 'sex' encompasses both sex – that is, the biological differences between men and women – and gender.") (quoting *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000)) (citing *Smith v. City of Salem*, 378 F.3d 566, 572 (6th Cir. 2004) ("The Supreme Court made clear that in the context of Title VII, discrimination because of 'sex' includes gender discrimination."); *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) (holding that the Supreme Court in *Price Waterhouse* had held that Title VII barred "not just discrimination because of biological sex, but also gender stereotyping – failing to act and appear according to expectations defined by gender.")).

¹²⁵ 490 U.S. 228, 239 (1989).

¹²⁶ *Id.* at 235. Similarly, in *EEOC v. Boh Brothers Construction Co.*, 731 F.3d 444 (5th Cir. 2013), the Fifth Circuit held that the EEOC could prove that same-sex harassment was "because of sex" by presenting evidence that the harassment was based on a perceived lack of conformity with gender stereotypes.

¹²⁷ See *Macy*, 2012 WL 1435995 (Apr. 20, 2012) (citing *Lewis v. Heartland Inns of Am., L.L.C.*, 591 F.3d 1033, 1041 (8th Cir. 2010); *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285 (3rd Cir. 2009); *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005); *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 874–75 (9th Cir. 2001); *Simonton v. Runyon*, 232 F.3d 33, 37 (2d Cir. 2000); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261 n.4 (1st Cir. 1999); *Doe by Doe v. City of Belleville*, 119 F.3d 563, 580–81 (7th Cir. 1997), vacated and remanded on other grounds, 523 U.S. 1001 (1998)).

¹²⁸ *Macy*, 2012 WL 1435995 at *4.

¹²⁹ On July 15, 2015, in *Baldwin v. Department of Transportation*, EEOC Appeal No. 0120133080, 2015 WL 4397641 (EEOC July 16, 2015), the EEOC issued an administrative opinion that held for the first time that Title VII extends to claims of employment discrimination based on sexual orientation. Like transgender discrimination, Title VII does not explicitly cover sexual orientation discrimination. The EEOC stated that: "[w]hen an employee raises a claim of sexual orientation discrimination as sex discrimination under Title VII, the question is not whether sexual orientation is explicitly listed in Title VII as a prohibited basis for employment actions. *It is not.*" *Id.* at *4 (emphasis added). Rather, according to the EEOC, the question "is the same as any other Title VII case involving allegations of sex discrimination -- whether the agency has 'relied on sex-based considerations' or 'take[n] gender into account' when taking the challenged employment action." *Id.* The EEOC concluded that "allegations of discrimination on the basis of sexual orientation necessarily state a claim of discrimination on the basis of sex." *Id.* at *10.

Over the past several years, the EEOC has vigorously pursued this theory in the federal courts to establish it as an accepted principle of anti-discrimination law.¹³⁰ The EEOC's position found support in the Seventh Circuit in *Hively v. Ivy Tech*.¹³¹ The Seventh Circuit became the first appellate court to hold that discrimination on the basis of sexual orientation is prohibited as sex discrimination under Title VII.¹³² Hively, who was an openly gay adjunct professor, applied for six full-time positions over the course of five years, and was passed over each time.¹³³ In July 2014, her part-time adjunct contract was not renewed.¹³⁴

The Seventh Circuit found that sexual orientation discrimination was a form of sex stereotyping and was thus barred under Title VII.¹³⁵ To reach this conclusion, the Court applied the “comparative method” approach. The Court examined the counterfactual “situation in which Hively is a man, but everything else stays the same: in particular, the sex or gender of the partner.”¹³⁶ The Court found that Hively's non-conformity to the female stereotype – that she should have a male partner – was sex discrimination under the gender non-conformity line of cases.¹³⁷ The Court also adopted Hively's theory that discrimination based on sexual orientation is sex discrimination under the associational theory. The Court examined the application of this line of cases, beginning with *Loving v. Virginia*,¹³⁸ and found that the Civil Rights Act prohibits discrimination based on the sex of someone with whom a plaintiff associates.¹³⁹ The Court noted that it was irrelevant that the *Loving* line of cases dealt with associational race discrimination, rather than associational sex discrimination.¹⁴⁰

In reversing its previous precedent,¹⁴¹ the Court reviewed both the Supreme Court's recent marriage equality decisions, as well as the EEOC's administrative decisions, and stated that “this court sits *en*

¹³⁰ For example, the EEOC has attempted to insert this line of reasoning into a number of pending cases through the use of *amicus* briefs. In *Pacheco v. Freedom Buick GMC Truck, Inc.*, No. 7:10-CV-00116 (W.D. Tex.) (motion for leave to file *amicus* brief denied Nov. 1, 2011), the EEOC argued that, as a matter of law, the discharge of a woman because she is transgender was discrimination because of sex in violation of Title VII. In *Chavez v. Credit Nation Auto Sales, LLC*, No. 1:13-CV-0312 (N.D. Ga.) (*amicus* brief filed June 5, 2014), the EEOC attempted to argue that a transgender woman who had twice attempted to file a charge of discrimination with the EEOC was entitled to equitable tolling of the limitations period for her Title VII charge because the EEOC had “mistakenly” refused to accept her timely charge. Brief for Equal Employment Opportunity Commission as *Amicus Curiae*, *Chavez v. Credit Nation Auto Sales, LLC*, No. 1:13-CV-0312, at 4-5 (N.D. Ga. Feb. 14, 2014), ECF No. 67. On both occasions, she was told by the EEOC investigator that she could not file a charge because, as a transgender woman, “she was not protected against discrimination on the basis of sex under Title VII.” *Id.* at 4-5. The EEOC argued that transgender discrimination was a recognized and cognizable claim under Title VII since the Supreme Court's decision in *Price Waterhouse* in 1989, even though it had not accepted such charges as recently as 2010. *Id.* at 2, 9-17.

¹³¹ *Hively v. Ivy Tech*, No. 15-720 (7th Cir. Apr. 4, 2017) (en banc); See Sam Schwartz-Fenwick, Michael W. Stevens, and Kylie Byron, Management Alert - The Current Federal Retrenchment on LGBT Rights, EMPLOYMENT LAW LOOKOUT BLOG (Aug. 22, 2017), available at <http://www.laborandemploymentlawcounsel.com/2017/08/management-alert-the-current-federal-retrenchment-on-lgbt-rights/>.

¹³² *Hively v. Ivy Tech. Community College*, 853 F.3d 339 (7th Cir. 2017); See Michael W. Stevens, Sam Schwartz-Fenwick, and Laura J. Maechtlen, *Seventh Circuit Finds Discrimination on the Basis of Sexual Orientation Prohibited by the Civil Rights Act*, CLIENT ALERT, SEYFARTH SHAW LLP (Apr. 5, 2017), available at <http://www.seyfarth.com/publications/MA040517-LE>.

¹³³ *Hively*, 853 F.3d at 341.

¹³⁴ *Id.*

¹³⁵ *Id.* at 342-45, 355.

¹³⁶ *Id.* at 345.

¹³⁷ *Id.* at 342, 346-47.

¹³⁸ *Loving v. Virginia*, 388 U.S. 1 (1967).

¹³⁹ *Hively*, 853 F.3d at 342, 347-48.

¹⁴⁰ *Id.* at 348.

¹⁴¹ *Doe v. City of Belleville, Ill.*, 119 F.3d 563, *Hamm v. Weyauwega Milk Prods.*, 332 F.3d 1058, *Hamner v. St. Vincent Hosp. and Health Care Ctr., Inc.*, 224 F.3d 701, *Spearman v. Ford Motor Co.*, 231 F.3d 1080.

banc to consider what the correct rule of law is now in light of the Supreme Court's authoritative interpretations, not what someone thought it meant one, ten, or twenty years ago."¹⁴² Notably, the Court was unpersuaded by the notion that Congress has not expressly added the phrase "sexual orientation" to the list of protected categories under the Civil Rights Act, while it has used the phrase in other legislation.¹⁴³ Instead, the Court noted that the "goalposts" of Title VII "have been moving over the years," but the key concept – "no sex discrimination" – remains.¹⁴⁴

Although *Hively* was the first Court of Appeals ruling to explicitly adopt the EEOC's reasoning that transgender and sexual orientation discrimination are forms of sex discrimination, numerous federal courts have now addressed this issue. For instance, in *Christiansen v. Omnicom Group, Inc.*,¹⁴⁵ the Second Circuit held that although it was bound by prior decisions disallowing sexual orientation discrimination claims under Title VII, it would allow plaintiff's claim to proceed based on the gender stereotyping theory articulated in *Price Waterhouse v. Hopkins*.¹⁴⁶ Then on February 26, 2018, in *Zarda, et al. v. Altitude Express, d/b/a Skydive Long Island, et al.*,¹⁴⁷ the Second Circuit ruled in favor of a (now-deceased) skydiving instructor who claimed to be fired because he was gay, therefore ruling that sexual orientation is a protected category under Title VII.¹⁴⁸

In *R.G. & G.R. Harris Funeral Homes, Inc.*,¹⁴⁹ the EEOC alleged that a Detroit-based funeral home discriminated against an employee because she was transitioning from male to female and/or because she did not conform to the employer's gender-based expectations, preferences, or stereotypes.¹⁵⁰ The district court ultimately granted summary judgment in favor of the funeral home on the wrongful termination claim, as well as the EEOC's claim that the Funeral Home's policy of providing work clothes to males, but not to females, was discrimination on the basis of sex.¹⁵¹ On appeal, the U.S. Court of Appeals for the Sixth Circuit reversed the district court with respect to both motions and granted summary judgment in favor of the EEOC.¹⁵² The Sixth Circuit held that the funeral home's conduct violated Title VII, reinforcing its prior holdings that discrimination against employees because of their gender identity and transgender status are illegal under Title VII's prohibition of sex discrimination based on sex stereotyping. The Sixth Circuit explained that "discrimination on the basis of transgender and transitioning status is necessarily discrimination on the basis of sex" and found that firing a person because he or she will no longer represent him or

¹⁴² *Hively*, 853 F.3d at 350.

¹⁴³ *Id.* at 344.

¹⁴⁴ *Id.*

¹⁴⁵ *Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195 (2d Cir. 2017).

¹⁴⁶ *Id.* at 199.

¹⁴⁷ *Zarda, et al. v. Altitude Express, d/b/a Skydive Long Island, et al.*, No. 15-3775 (2d Cir. Feb. 26, 2018).

¹⁴⁸ See Gerald L. Maatman, Jr. and Alex Karasik, How The Contours Of Workplace Discrimination Laws Are In Flux, Workplace Class Action Blog, Seyfarth Shaw LLP (March 16, 2018), available at <https://www.workplaceclassaction.com/2018/03/how-the-contours-of-workplace-discrimination-laws-are-in-flux/>.

¹⁴⁹ *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, No. 2:14-CV-13710-SFC-DRG (E.D. Mich. Sept. 25, 2014).

¹⁵⁰ *Id.* Specifically, the government's complaint alleges that the employee gave her employer a letter explaining that she was transgender and would soon start presenting as female in appropriate work attire. Allegedly, she was fired two weeks later by the funeral home's owner, who told her that what she was proposing to do was unacceptable.

¹⁵¹ *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, No. 14-CV-13710, 2016 WL 4396083, at *1 (E.D. Mich. Aug. 18, 2016).

¹⁵² *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018); See Scott Rabe, Gerald L. Maatman, Jr., and Marlin Duro, *The Sixth Circuit Sides With The EEOC's Position On Scope Of Title VII Relative To Gender Identity*, Workplace Class Action Blog, Seyfarth Shaw LLP (March 8, 2018), available at <https://www.workplaceclassaction.com/2018/03/the-sixth-circuit-sides-with-the-eeocs-position-on-scope-of-title-vii-relative-to-gender-identity/>.

herself as the gender that he or she was born with “falls squarely within the ambit of sex-based discrimination” forbidden under Title VII.¹⁵³

However, in *Evans v. Georgia Regional Hospital*,¹⁵⁴ the Eleventh Circuit ruled that sexual orientation discrimination is not actionable. But it allowed the claim to proceed because the facts supported a permissible Title VII claim of sex discrimination based on gender nonconformity.¹⁵⁵ The court thus held that the district court “erred because a gender non-conformity claim is not ‘just another way to claim discrimination based on sexual orientation,’ but instead, constitutes a separate, distinct avenue for relief under Title VII.”¹⁵⁶

The EEOC’s broad interpretation of Title VII as it applies to LGBT individuals has not gone unchallenged. In *U.S. Pastor Council, et al., v. EEOC, et al.*,¹⁵⁷ for example, the U.S. Pastor Council and Hotze Health & Wellness Center filed suit against the EEOC, challenging the EEOC’s claim that Title VII outlaws employment discrimination on the basis of sexual orientation and gender identity without providing an exemption for religious institutions or organizations that “oppose homosexual or transgender behavior on religious grounds.”¹⁵⁸ The lawsuit alleges that the EEOC’s interpretation is insufficient to protect the autonomy and religious freedom of churches and religious institutions under the U.S. Constitution, the Religious Freedom Restoration Act, and the Administrative Procedure Act.¹⁵⁹ This lawsuit is currently pending in federal court in Texas.

¹⁵³ *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 571 (6th Cir. 2018).

¹⁵⁴ *Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248 (11th Cir. 2017).

¹⁵⁵ *Id.* at 1254.

¹⁵⁶ *Id.* at 1254-55. See also *Boutillier v. Hartford Pub. Schs.*, 221 F. Supp. 3d 255, 270 (D. Conn. 2016) (denying the employer’s motion for summary judgment and determining that a teacher alleging discrimination based on her sexual orientation had adequately established a right to protection under Title VII); *Winstead v. Lafayette Cty. Bd. of Cty. Comm’rs*, 197 F. Supp. 3d 1334, 1346-47 (N.D. Fla. 2016) (“Simply put, to treat someone differently based on her attraction to women is necessarily to treat that person differently because of her failure to conform to gender or sex stereotypes, which is, in turn, necessarily discrimination on the basis of sex.”); *EEOC v. Scott Med. Health Ctr., P.C.*, No. 16-CV-00225, 2016 WL 6569233, at *4 (W.D. Pa. Nov. 4, 2016) (districting prior Third Circuit precedent, which the Court held had not been confronted with “the same arguments or analytical framework as that put forth by the EEOC in this case,” and holding that “since the publications of *Bibby* and *Prowel*, district courts throughout the country have endorsed an interpretation of Title VII that includes a prohibition on discrimination based on sexual orientation) (citing *Bibby v. Philadelphia Coca-Cola Bottling Co.*, 260 F.3d 257 (3d Cir. 2001) and *Prowel v. Wise Business Forms, Inc.*, 579 F.3d 285 (3d Cir. 2009)); *Baker v. Aetna Life Ins.*, 228 F. Supp. 3d 764, 765 (N.D. Tex. 2017) (holding that an employee stated a claim against her employer for sex discrimination in violation of Title VII based on denial of coverage costs of her breast augmentation surgery solely on the basis of male birth gender); *Mickens v. Gen. Elec. Co.*, No. 3:16CV-00603-JHM, 2016 WL 7015665, at *2 (W.D. Ky. Nov. 29, 2016) (denying an employer’s motion to dismiss a Title VII sex discrimination claim in which a transgender plaintiff alleged he was unlawfully denied use of the male bathroom close to his work station, and then was fired for attendance issues resulting from having to go to a bathroom farther away, and recognizing that the prohibition against gender discrimination in Title VII “can extend to certain situations where the plaintiff fails to conform to stereotypical gender norms”); *Roberts v. Clark Cty. Sch. Dist.*, 215 F. Supp. 3d 1001, 1015-17 (D. Nev. 2016) (holding that discrimination against a person based on transgender status is discrimination “because of sex” under Title VII and finding that a school district’s requirement that the officer use the gender-neutral restroom was an adverse employment action); *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 526 (D. Conn. 2016) (holding that Title VII covers sex discrimination claims by transgender individuals, and allowing claim of an orthopedic surgeon who alleged she was not hired because she disclosed her identity as a transgender woman at her interview to proceed); *U.S. v. Se. Okla. State University*, No. 15-CV324-C, 2015 WL 4606079, at *2 (W.D. Okla. July 10, 2015) (holding that claims of transgender discrimination were tantamount to claims of sex discrimination because they involved the failure to adhere to sex stereotypes) (citing *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004).

¹⁵⁷ Complaint, *U.S. Pastor Council, et al., v. EEOC, et al.*, No. 4:18-CV-00824-Q (N.D. Tex. Oct. 6, 2018), ECF No. 1.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* ¶ 14, 39.

2. Developments In Disability Discrimination Law

ADA lawsuits remain a very high priority for the EEOC. For many years, lawsuits alleging discrimination under the ADA have been one of the most frequently filed types of EEOC litigation. The ADA prohibits employers from discriminating against “qualified individual[s] on the basis of disability.”¹⁶⁰ To establish a *prima facie* case of discrimination under the ADA, the EEOC needs to establish that: (1) the individual has an ADA qualifying disability; (2) the individual is qualified for the job; and (3) the individual was discriminated against on the basis of the disability.¹⁶¹ Accordingly, the best way for employers to guard against EEOC-initiated ADA litigation is to develop an understanding of what the EEOC considers to be a “disability,” a “qualified individual,” and “discrimination.”

a. Recent ADA Decisions

One form of discrimination under the ADA is a failure to provide reasonable accommodations to employees with disabilities. Employers have, for years, grappled with what constitutes a reasonable accommodation under the ADA. In two recent decisions, the Seventh Circuit held that a multiple month leave of absence cannot be a reasonable accommodation under the ADA.

In *Severson v. Heartland Woodcraft, Inc.*,¹⁶² plaintiff had a chronic back condition that pre-dated his employment that would occasionally flare up and affect his ability to walk, bend, lift, sit, stand, move, and work. In June 2013, plaintiff experienced such a flare-up and took a leave from work.¹⁶³ The employer approved plaintiff’s 12 weeks of FMLA leave.¹⁶⁴ However, just weeks before his leave expired, plaintiff informed his employer that his condition had not improved and that he would need surgery the date that his leave expired, and that the typical recovery time for the surgery was at least two months.¹⁶⁵ In response, the employer advised plaintiff that his employment would end when his FMLA leave expired and invited plaintiff to reapply with the company when he recovered from surgery and was medically cleared to work.¹⁶⁶

The Seventh Circuit left open the possibility that “intermittent time off or a short leave – say, a couple of days, or even a couple of weeks – may, in appropriate circumstances, be analogous to a part-time or modified work schedule.”¹⁶⁷ However, relying upon prior precedent,¹⁶⁸ the Seventh Circuit found that the “[i]nability to work for a multi-month period removes a person from the class protected by the ADA.”¹⁶⁹

¹⁶⁰ 42 U.S.C. § 12112(a).

¹⁶¹ See, e.g., *Gowesky v. Singing River Hosp. Sys.*, 321 F.3d 503, 511 (5th Cir. 2003), cert. denied 540 U.S. 815; *Holbrook v. City of Alpharetta, Ga.*, 112 F.3d 1522, 1526 (11th Cir. 1997).

¹⁶² *Severson v. Heartland Woodcraft, Inc.*, 872 F.3d 476, 479 (7th Cir. 2017), cert. denied, 138 S. Ct. 1441 (2018).

¹⁶³ *Id.* at 478.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 481.

¹⁶⁸ *Byrne v. Avon Prods., Inc.*, 328 F.3d 379, 381 (7th Cir. 2003).

¹⁶⁹ *Severson*, 872 F.3d at 481.

Similarly, in *Golden v. Indianapolis Housing Agency*,¹⁷⁰ plaintiff, an Indianapolis Housing Agency police officer, was diagnosed with breast cancer in November 2014.¹⁷¹ After plaintiff took sixteen weeks of unpaid medical leave, her doctor could not say when she would be able to return to work, so plaintiff's employer terminated her.¹⁷² Plaintiff sued, arguing that her employer violated the ADA by failing to accommodate her by granting six additional months of unpaid leave.¹⁷³ The Seventh Circuit affirmed its holding in *Severson*, stating that "an employee who requires a multi-month period of medical leave is not a qualified individual under the ADA or the Rehabilitation Act."¹⁷⁴

These cases cause a split among the federal circuit courts, so employers with a national footprint must proceed with caution and cannot assume this same rule will apply outside of the Seventh Circuit. The Supreme Court declined to review the *Severson* and *Golden* decisions to determine whether there is a *per se* rule that a finite leave of absence of more than one month cannot be a reasonable accommodation under the ADA.¹⁷⁵

Moreover, in *EEOC v. Midwest Gaming & Entertainment, LLC DBA Rivers Casino*,¹⁷⁶ the U.S. District Court for the Northern District of Illinois recently held that the EEOC needed more evidence from an employer before deciding whether a request for a three-month medical leave was unreasonable. In that case, plaintiff was on an approved medical leave of absence for cancer treatment through January 2016.¹⁷⁷ However, when plaintiff requested an extension of that medical leave through the beginning of March, the request was denied and he was terminated.¹⁷⁸ The employer moved for summary judgment based on the *Severson* decision. The EEOC responded by asserting that it could not properly oppose the employer's motion for summary judgment until it was permitted to conduct additional discovery.¹⁷⁹

Employers and the EEOC have also been at odds over whether employers must automatically reassign a disabled employee to an open position as a reasonable accommodation or whether employers can maintain a policy of hiring the most-qualified individual for the position by requiring a disabled employee to compete for open positions against other interested employees.¹⁸⁰ Two recent decisions have clarified that an employer's policy of hiring the most-qualified individual for a job does not violate the ADA.¹⁸¹

¹⁷⁰ *Golden v. Indianapolis Hous. Agency*, 698 F. App'x 835 (7th Cir. 2017), cert. denied, 138 S. Ct. 1446 (2018).

¹⁷¹ *Id.* at 835.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 837.

¹⁷⁵ *Severson v. Heartland Woodcraft, Inc.*, 138 S. Ct. 1441 (2018); *Golden v. Indianapolis Hous. Agency*, 138 S. Ct. 1446 (2018).

¹⁷⁶ *EEOC v. Midwest Gaming & Entm't, LLC DBA Rivers Casino*, 2018 U.S. Dist. LEXIS 88367, No. 17-CV-6811 (N.D. Ill., May 25, 2018).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ See John P. Phillips, *Is Hiring the Most-Qualified Candidate Reasonable? Two Recent Decisions Say Yes.*, EMPLOYMENT LAW LOOKOUT BLOG (Apr. 18, 2017), available at <http://www.laborandemploymentlawcounsel.com/2017/04/is-hiring-the-most-qualified-candidate-reasonable-two-recent-decisions-say-yes/>.

¹⁸¹ See *EEOC v. St. Joseph's Hospital, Inc.*, No. 15-14551 (11th Cir., Dec. 7, 2016) (holding that the ADA only requires an employer allow a disabled person to compete equally with the rest of the world for a vacant position" and does not require the employer to automatically reassign an employee without competition); see also *EEOC v. Methodist Hospitals of Dallas d/b/a Methodist Health System*, No. 3:15-CV-3104-G (N.D. Tex., Mar. 9, 2017) (the Court confirmed "the ADA does not entitle

In *EEOC v. Amsted Rail Co.*,¹⁸² the U.S. District Court for the Southern District of Illinois held that an employer was liable under the ADA for denying individuals positions based merely on their *potential* to suffer future medical injuries.¹⁸³ In that case, the employer made conditional job offers to thirty-nine applicants, but placed them on medical hold because of abnormal results from a nerve conduction test.¹⁸⁴ The company argued that there was a higher risk of developing carpal tunnel syndrome for those with the abnormal test results.¹⁸⁵ The Court held in favor of the EEOC, in part, explaining that the test “does not indicate an individual's contemporaneous inability to perform the chipper job but only a prospective, future threat to his health if he were to perform the job,” and that the restrictions imposed by the employer were “based on a generalized assumption about an abnormal [test] result rather than ‘an individualized assessment of the individual and the relevant position,’ as required under the ADA.”¹⁸⁶

Finally, a pair of cases decided under the ADA brought some interesting insight into the relative advantages and disadvantages the EEOC enjoys at the pleading stage. In *EEOC v. Prestige Care, Inc.*,¹⁸⁷ the U.S. District Court for the Eastern District of California held that the EEOC is not immune from normal pleading requirements just because the EEOC is a federal agency empowered to bring claims on behalf of other individuals.¹⁸⁸ The EEOC alleged that the employer implemented and followed policies that violated the ADA, including: (i) a “100% healed/100% fit for duty” return to work policy; (ii) not offering light duty as a reasonable accommodation; and (iii) ignoring its obligation to engage in an interactive process.¹⁸⁹ The EEOC alleged that these policies did not permit reasonable accommodations for qualified individuals.

The employer moved to dismiss, arguing that the EEOC had failed to allege facts to show that 10 of the 13 claimants identified by the EEOC were “disabled” or “qualified individuals” under the ADA because it had not alleged that those individuals had impairments that affected a major life activity, or had failed to identify essential job functions.¹⁹⁰ The EEOC argued that it was not required to do so because it was allowed to bring suit in its own name on behalf of a class of individuals without naming those individuals.¹⁹¹ The Court disagreed, holding that “when the EEOC pursues a class claim under § 706 and chooses to identify ‘additional class members’ who have suffered some form of disability discrimination, the allegations must plausibly show that those ‘additional individuals’ are protected by the ADA.”¹⁹²

a disabled employee to preferential treatment” and held that the employer’s policy requiring disabled employees to compete with non-disabled applicants in order to hire the best candidate did not violate the ADA.)

¹⁸² *EEOC v. Amsted Rail Co.*, 280 F. Supp. 3d 1141 (S.D. Ill. 2017).

¹⁸³ See Gerald L. Maatman, Jr. and Alex W. Karasik, *Ouch: EEOC Gets Summary Judgment Win Relative To Employer’s Medical Testing*, WORKPLACE CLASS ACTION BLOG (Dec. 7, 2017), available at <https://www.workplaceclassaction.com/2017/12/ouch-eeoc-gets-summary-judgment-win-relative-to-employers-medical-testing/>.

¹⁸⁴ *EEOC v. Amsted Rail Co.*, 280 F. Supp. 3d at 1146-47.

¹⁸⁵ *Id.* at 1147-48.

¹⁸⁶ *Id.* at 1153.

¹⁸⁷ *EEOC v. Prestige Care, Inc.*, No. 1:17-CV-1299 AWI SAB, 2018 U.S. Dist. LEXIS 119305 (E.D. Cal. July 17, 2018).

¹⁸⁸ See Gerald L. Maatman, Jr. and Alex W. Karasik, *California Court Dismisses Deficient Disability Claims In EEOC-Initiated Systemic Action*, WORKPLACE CLASS ACTION BLOG (July 24, 2018), available at <https://www.workplaceclassaction.com/2018/07/california-court-dismisses-deficient-disability-claims-in-eeoc-initiated-systemic-action/>.

¹⁸⁹ *EEOC v. Prestige Care, Inc.*, 2018 U.S. Dist. LEXIS 119305, at *3.

¹⁹⁰ *Id.* at *6.

¹⁹¹ *Id.*

¹⁹² *Id.* at *11.

However, in *EEOC v. UPS Ground Freight, Inc.*,¹⁹³ the U.S. District Court for the District of Kansas handed the EEOC a major win based solely on the pleadings.¹⁹⁴ In that case, the EEOC challenged an employer's collective bargaining agreement, which provided that commercial drivers whose licenses were suspended or revoked for non-medical reasons, including convictions for driving while intoxicated, would be reassigned to non-driving work at their full rate of pay, while drivers who become unable to drive due to medical disqualifications, including individuals with disabilities within the meaning of the ADA, were only provided full-time or casual inside work at only 90% of their rate of pay.¹⁹⁵

The EEOC took the unusual and aggressive step of arguing, in a motion for judgment on the pleadings, that the language of a collective bargaining agreement established a *prima facie* case of a discriminatory policy under the ADA because it paid drivers disqualified for medical reasons less than what it paid drivers disqualified for non-medical reasons.¹⁹⁶ The Court agreed and *granted a permanent injunction* against the employer, holding that “[i]t is immaterial whether medically disqualified drivers have other options; paying employees less because of their disability is discriminatory under any circumstance.”¹⁹⁷ Moreover, it was unnecessary for the Court to perform a case-by-case impact analysis of individuals who may (or may not) have been harmed by the policy because a *prima facie* case of liability for a pattern-or practice case does not require the EEOC to offer evidence that each individual who may seek relief was a victim of the policy; the EEOC must only “show that unlawful discrimination is part of the employer's ‘standard operating procedure.’”¹⁹⁸

b. Emerging Issues In ADA Enforcement Litigation

Employers should consider their website accessibility efforts. In *Gil v. Winn-Dixie Stores, Inc.*,¹⁹⁹ the Court found that grocer Winn-Dixie violated Title III of the ADA by maintaining a website that was not useable by the plaintiff, who was blind and used screen reader software to access websites.²⁰⁰ The Court adopted the Web Content Accessibility Guidelines (WCAG) 2.0 as the accessibility standard that Winn-Dixie must meet in making its website accessible,²⁰¹ thus, pointing to WCAG 2.0 AA as the *de facto* standard for website accessibility.²⁰²

Employers should also be mindful of the EEOC's focus on the use of pre-job-offer questionnaires. The EEOC may take the position that they may run afoul of the ADA. Indeed, an employer does not have to take an affirmative act of turning an applicant away because of their disability. The EEOC

¹⁹³ *EEOC v. UPS Ground Freight, Inc.*, 319 F. Supp. 3d 1237 (D. Kan. 2018).

¹⁹⁴ See Gerald L. Maatman, Jr. and Alex W. Karasik, *Federal Court Delivers EEOC A Victory Over UPS In ADA Lawsuit Regarding Pay*, WORKPLACE CLASS ACTION BLOG (Aug. 10, 2018), available at <https://www.workplaceclassaction.com/2018/08/federal-court-delivers-eEOC-a-victory-over-ups-in-ada-lawsuit-regarding-pay/>.

¹⁹⁵ *EEOC v. UPS Ground Freight, Inc.*, 319 F. Supp. 3d at 124041.

¹⁹⁶ *Id.* at 1241.

¹⁹⁷ *Id.* at 1242.

¹⁹⁸ *Id.*

¹⁹⁹ *Gil v. Winn-Dixie Stores, Inc.*, No. 16-23020-Civ-Scola, 2017 WL 2547242 (S.D. Fla., June 12, 2017).

²⁰⁰ *Id.* at *7.

²⁰¹ WCAG 2.0 AA is a set of guidelines developed by a private group of accessibility experts and has not been adopted as the legal standard for public accommodation websites, although it has been incorporated into many consent decrees, settlement agreements, and is the standard the Department of Justice referenced in the Title II rulemaking process.

²⁰² See Minh Vu, *First Federal Court Rules That Having An Inaccessible Website Violates Title III Of The ADA*, ADA TITLE III NEWS & INSIGHTS BLOG (June 13, 2017), available at <http://www.adatitleiii.com/2017/06/first-federal-court-rules-that-having-an-inaccessible-website-violates-title-iii-of-the-ada/>.

may claim that employers are liable for ADA discrimination even when an applicant refuses to apply²⁰³

Moreover, employers should be mindful of internal communication about charges of discrimination, especially those in the ADA context, to avoid creating the perception that they are retaliating against employees who bring charges or interfering with other employees' rights to file future charges. Indeed, the EEOC has successfully argued that an employer can retaliate against an employee for conduct occurring after that employee was already terminated, and that the same action could interfere with the rights of other employees under the ADA.²⁰⁴

Finally, the EEOC has attempted for years to square two seemingly conflicting sections of the ADA. Section 12112(d)(4)(A) of the ADA states that employers "shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability . . . unless such examination or inquiry is shown to be job-related and consistent with business necessity."²⁰⁵ However, Section 12112(d)(4)(B) of the ADA permits employers to conduct "voluntary medical examinations . . . which are part of an employee health program available to employees at that work site."²⁰⁶

On January 1, 2017, two sets of final regulations affecting employer-sponsored wellness programs went into effect.²⁰⁷ The regulations explain that a program consisting of a measurement test, screening or collection of health-related information without providing results, follow-up information, or advice designed to improve the health of participating employees is not reasonably designed to promote health or prevent disease, unless the collected information actually is used to design a program that addresses some of the conditions identified.²⁰⁸ A program also is not "reasonably designed" if it exists mainly to shift costs from the employer to targeted employees based on their health or simply to give an employer information to estimate future health care costs.²⁰⁹ Wellness

²⁰³ For example, in *EEOC v. Grisham Farm Prods., Inc.*, No. 16-CV-03105-MDH, 2016 U.S. Dist. LEXIS 76374 (W.D. Mo. June 8, 2016), the Court held that employers may make an "acceptable inquiry" at the pre-offer stage into "the ability of an applicant to perform job-related functions," however, both the ADA's legislative history and implementing regulations make clear that such inquiries should not be phrased in terms of disability. Here, the employer required job-applicants to fill out a health history form before they were considered for the job, even if the "applicant" never actually applied for the job. The Court held that it was irrelevant that the charging never actually filled out a health history form or applied for a position, since the employer's policy could deter job applications from those who are aware of the discrimination nature of the policy and were unwilling to subject themselves to the humiliation of explicit and certain rejection.

²⁰⁴ See Gerald Maatman, Jr. and Alex W. Karasik, *Dismissal Denied For Discussing Disability: EEOC Case Against Employer Survives*, WORKPLACE CLASS ACTION BLOG (Apr. 18, 2016), <http://www.workplaceclassaction.com/2016/04/dismissal-denied-for-discussing-disability-eeoc-case-against-employer-survives/#>.

²⁰⁵ 42 U.S.C. § 12112(d)(4)(A).

²⁰⁶ 42 U.S.C. § 12112(d)(4)(B)

²⁰⁷ FR Doc. 2016-11557, 81 FR 31143 (Filed May 16, 2016), <https://www.federalregister.gov/documents/2016/05/17/2016-11557/genetic-information-nondiscrimination-act>; FR Doc. 2016-11558, 81 FR 31125 (Filed May 16, 2016), <https://www.federalregister.gov/documents/2016/05/17/2016-11558/regulations-under-the-americans-with-disabilities-act>; See also Joy Sellstrom, Diane V. Dygert, Danita N. Merlau, *EEOC Issues Final Rules On Wellness Programs*, CLIENT ALERTS (May 18, 2016), <http://www.seyfarth.com/publications/MA051816-EB>.

²⁰⁸ FR Doc. 2016-11557, 81 FR 31143 (Filed May 16, 2016), <https://www.federalregister.gov/documents/2016/05/17/2016-11557/genetic-information-nondiscrimination-act>; FR Doc. 2016-11558, 81 FR 31125 (Filed May 16, 2016), <https://www.federalregister.gov/documents/2016/05/17/2016-11558/regulations-under-the-americans-with-disabilities-act>.

²⁰⁹ *Id.*

programs that are part of a group health plan must also comply with the non-discrimination rules issued pursuant to HIPAA.²¹⁰

However, in October 2016, the AARP filed suit in the District Court for the District of Columbia, seeking an injunction against the enforcement of these wellness program regulations.²¹¹ On August 22, 2017, the Court agreed with the AARP and held that the EEOC “failed to adequately explain its decision to construe the term ‘voluntary’ in the ADA and GINA to permit the 30% incentive level adopted in both the ADA rule and the GINA rule.”²¹² The rules would remain in place to allow time for the EEOC to reconsider them.²¹³ However, the EEOC informed the Court that it intends to issue a final rule in October 2019 that would be applicable, at the earliest, in 2021.²¹⁴ Not at all satisfied with that, the Court vacated the EEOC’s regulations, but stayed the mandate until January 1, 2019 to avoid the potential for business disruption.²¹⁵

On December 20, 2018, the EEOC officially rescinded its wellness program regulations ahead of the Court’s January 1, 2019 sunset date. This issue will therefore remain uncertain and in limbo until the EEOC undertakes a new attempt at regulations. If the EEOC holds true to the timeline it gave the District Court, that may not be until FY 2020.

3. Developments In The Law Of Religious Discrimination

a. Targeting Anti-Muslim Discrimination

The EEOC reports that it continues to see an increase in charges involving religious discrimination against Muslims and those with a Middle Eastern background.²¹⁶ This type of discrimination is specifically targeted as a focus for the EEOC in its Strategic Enforcement Plan, which identifies one of its priorities as: “[a]ddressing discriminatory practices against those who are Muslim or Sikh, or persons of Arab, Middle Eastern or South Asian descent, as well as persons perceived to be members of these groups, arising from backlash against them from tragic events in the United States and abroad.”²¹⁷

The EEOC maintains guidelines relating to the employment of Muslims, Arabs, South Asians, and Sikhs.²¹⁸ Those guidelines stress to employers that they may not refuse to hire someone who, because of their religious attire, may make customers uncomfortable; nor can they force an employee to remove their religious attire or change their duties to keep them out of view of the public.²¹⁹ In addition, on March 6, 2014, the EEOC published its Guide to Religious Garb and

²¹⁰ *EEOC Issues Final Rules On Wellness Programs*, *supra* note 207 (While many employers sought a single wellness standard for compliance, the final ADA rules state the EEOC’s position that wellness plans compliance with HIPAA is not determinative of compliance with the ADA.)

²¹¹ *AARP v. EEOC*, 1:16-cv-02113 (D.D.C. 2016).

²¹² *AARP v. EEOC*, 267 F. Supp. 3d 14, 37 (D.D.C. 2017).

²¹³ *Id.* at 38-39.

²¹⁴ *ARP v. EEOC*, 292 F. Supp. 3d 238, 240 (D.D.C. 2017).

²¹⁵ *Id.* at 241.

²¹⁶ *Id.*

²¹⁷ U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION STRATEGIC ENFORCEMENT PLAN FISCAL YEARS 2017 - 2021, *supra* note 2.

²¹⁸ See QUESTIONS AND ANSWERS ABOUT EMPLOYER RESPONSIBILITIES CONCERNING THE EMPLOYMENT OF MUSLIMS, ARABS, SOUTH ASIANS, AND SIKHS, available at <https://www.eeoc.gov/eeoc/publications/backlash-employer.cfm>.

²¹⁹ *Id.*

Grooming.²²⁰ In that guidance, the EEOC instructs that an employer must accommodate an employee's religious garb or grooming practice even if it violates the employer's policy or preference regarding how employees should look: "[W]hen an employer's dress and grooming policy or preference conflicts with an employee's known religious beliefs or practices, the employer must make an exception to allow the religious practice unless that would be an undue hardship on the operation of the employer's business."²²¹ According to the EEOC, even if an employer does not know that an employee's or applicant's garb or grooming practice is religious in nature, the employer may still be liable if it believes or should have known that it is – even if the employee did not ask for an accommodation.²²²

On June 1, 2015. In *EEOC v. Abercrombie & Fitch Stores, Inc.*²²³ the Supreme Court agreed with the EEOC, holding that an employer that is without direct knowledge of an employee's religious practice can be liable under Title VII for religious discrimination if the need for an accommodation was a motivating factor in the employer's decision, whether or not the employer knew of the need for a religious accommodation.²²⁴ The Supreme Court held that it was enough for the applicant to show that her need for an accommodation was a motivating factor in the employer's decision.²²⁵ "[T]he rule for disparate-treatment claims based on a failure to accommodate a religious practice is straightforward: An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions."²²⁶

Religious garb and grooming can also support a hostile work environment harassment claim. In *Ahmed v. Astoria Bank et al.*²²⁷ the Second Circuit considered a claim brought on behalf of an employee who had been terminated from her employment at the end of her probationary period for

²²⁰ U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, RELIGIOUS GARB AND GROOMING IN THE WORKPLACE: RIGHTS AND RESPONSIBILITIES (Mar. 6, 2014), http://www.eeoc.gov/eeoc/publications/qa_religious_garb_grooming.cfm.

²²¹ *Id.*; see also Lynn A. Kappelman and Dawn Reddy Solowey, *Retail Detail: "You're Wearing That?" The EEOC Weighs in on Workplace Accommodations for Religious Clothing and Grooming Practices*, CLIENT ALERT (Mar. 12, 2014), <http://www.seyfarth.com/publications/4002>.

²²² U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, RELIGIOUS GARB AND GROOMING IN THE WORKPLACE: RIGHTS AND RESPONSIBILITIES, *supra* note 220 ("Example 7 . . . Aatma, an applicant for a rental car sales position who is an observant Sikh, wears a chunni (religious headscarf) to her job interview. The interviewer does not advise her that there is a dress code prohibiting head coverings, and Aatma does not ask whether she would be permitted to wear the headscarf if she were hired. There is evidence that the manager believes that the headscarf is a religious garment, presumed it would be worn at work, and refused to hire her because the company requires sales agents to wear a uniform with no additions or exceptions. This refusal to hire violates Title VII, even though Aatma did not make a request for accommodation at the interview, because the employer believed her practice was religious and that she would need accommodation, and did not hire her for that reason. Moreover, if Aatma were hired but then instructed to remove the headscarf, she could at that time request religious accommodation."); see also Dawn Reddy Solowey and Lynn Kappelman, *What Does the Employer Know and When Does It Know It? SCOTUS Grants Cert in EEOC v. Abercrombie Religious Discrimination Suit*, EMPLOYMENT LAW LOOKOUT BLOG (Oct. 9, 2014), <http://www.laborandemploymentlawcounsel.com/2014/10/what-does-the-employer-know-and-when-does-it-know-it-scotus-grants-cert-in-eeoc-v-abercrombie-religious-discrimination-suit/>.

²²³ *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028 (2015).

²²⁴ *Abercrombie* involved a practicing Muslim who wore a headscarf consistent with her religious requirements. *Id.* at 2031. When she applied to an Abercrombie store, she was rejected because her headscarf would violate Abercrombie's "Look Policy," which did not allow any kind of "cap." *Id.* Abercrombie argued that the company could not be liable under Title VII disparate treatment analysis because the applicant had not shown that it had "actual knowledge" of the applicant's need for an accommodation. *Id.* at 2032.

²²⁵ *Id.*

²²⁶ *Id.* at 2033.

²²⁷ *Ahmed v. Astoria Bank et al.*, 690 F. App'x 49 (2d Cir. 2017).

tardiness and carelessness in checking important documents.²²⁸ The employee claimed that she had been subjected to a hostile work environment because she is Egyptian and Muslim.²²⁹

The Second Circuit reversed the district court's grant of summary judgment to the employer, holding that a reasonable jury could find that the employee was subject to severe and pervasive discriminatory harassment.²³⁰ The Court relied principally on the employee's evidence that the supervisor "constantly" told her to remove her hijab head-covering, which he referred to as a "rag"; demeaned her race, ethnicity and religion "on several occasions"; and made a comment during her September 11, 2013 interview that she and two other Muslim employees were "suspicious" and that he was thankful he was "in the other side of the building in case you guys do anything."²³¹

In FY 2018, the EEOC continued to target employers that it thinks is not doing enough to accommodate and protect Muslim employees. For example, on December 5, 2017, the EEOC sued an employer, alleging that the company violated federal law when it fired a Muslim security guard shortly after he asked for a modification of the company's grooming standard.²³² On January 23, 2018, the EEOC announced that the company agreed to pay \$90,000 to settle the suit.²³³

On May 7, 2018, the EEOC filed suit against an employer alleging that the company violated federal law when it fired several employees after they requested religious accommodations.²³⁴ According to the EEOC, the company maintained a policy requiring its female Passenger Service Agents to either wear pants or a knee-length skirt, instead of more modest, full-length skirts that aligned with the employees' religious beliefs.²³⁵ The individuals continued to wear full-length skirts, and were terminated under company policy.²³⁶

On June 19, 2018, the EEOC sued an employer alleging that the company failed to accommodate a Muslim employee who requested to work while wearing a head scarf.²³⁷ This case is currently

²²⁸ *Ahmed v. Astoria Bank*, No. 14-CV-4595, 2016 WL 1254638, at *1 (E.D.N.Y. Mar. 31, 2016), *vacated*, 690 F. App'x 49 (2d Cir. 2017).

²²⁹ See *Ahmed*, 690 F. App'x at 50-51; see also Dawn Reddy Solowey, Anti-Muslim Rhetoric in the Workplace: An Employer's Guide to Risks & Prevention, EMPLOYMENT LAW LOOKOUT BLOG (May 23, 2017), available at <http://www.laborandemploymentlawcounsel.com/2017/05/anti-muslim-rhetoric-in-the-workplace-an-employers-guide-to-risks-prevention/>.

²³⁰ *Ahmed*, 690 F. App'x at 50.

²³¹ *Id.* at 51.

²³² Complaint, *EEOC v. Universal Protection Servs., LP, dba Allied Universal Sec. Servs.*, No. 3:17-CV-02436-BEN-NLS (S.D. Ca. Dec. 5, 2017), ECF No. 1, at ¶¶ 12-14; Press Release, Equal Employment Opportunity Commission, Security Services Company to Pay \$90,000 to Settle EEOC Religious Discrimination Suit (Jan. 23, 2018), available at <https://www.eeoc.gov/eeoc/newsroom/release/1-23-18.cfm>.

²³³ Press Release, Equal Employment Opportunity Commission, Security Services Company to Pay \$90,000 to Settle EEOC Religious Discrimination Suit (Jan. 23, 2018), available at <https://www.eeoc.gov/eeoc/newsroom/release/1-23-18.cfm>.

²³⁴ Complaint, *EEOC v. Aviation Port Services, Inc.*, Civil Action No. 1:18-cv-10909 (D. Ma. May 7, 2018), ECF No. 1, at ¶¶ 12-25; Press Release, Aviation Port Services Sued by EEOC For Religious Discrimination and Retaliation (May 7, 2018), available at <https://www.eeoc.gov/eeoc/newsroom/release/5-7-18.cfm>.

²³⁵ *Id.* ¶¶ 13-19.

²³⁶ *Id.* ¶¶ 17-22.

²³⁷ Complaint, *EEOC v. Blue Moon Diner, LLC*, No. 1:18-CV-00567 (D. NM. June 19, 2018), ECF No. 1, at ¶ 39-44; Press Release, Blue Moon Diner Sued by EEOC For Religious Discrimination (June 19, 2018), <https://www.eeoc.gov/eeoc/newsroom/release/6-19-18.cfm>.

pending in New Mexico federal court.²³⁸ In *EEOC v. Halliburton Energy Services, Inc.*,²³⁹ the EEOC brought suit alleging that the company subjected an employee to national origin and religious discrimination when the employee was subjected to taunts and name calling regarding both his national origin and his Muslim religion.²⁴⁰ The EEOC also alleged that the company unlawfully retaliated against an employee by terminating his employment for reporting mistreatment of other employees.²⁴¹

In *EEOC v. Mission Hospital, Inc.*, the EEOC announced that the parties agreed to a settlement in the amount of \$89,000 in a similar flu shot case.²⁴² According to the EEOC, several employees requested exemptions from the company's policy requiring employees to receive annual flu vaccinations, but their requests were denied because they missed an internal deadline to do so. In addition to monetary relief, the company entered a two-year consent decree which requires it to revise its immunizations policy to permit employees to request an exemption during the same period in which flu vaccinations are to be received.²⁴³

b. Defining And Protecting Religious Beliefs

Although discrimination against Muslims has been a priority for the EEOC for many years, it continues to bring cases against employers that target any kind of religious practice. For example, in *EEOC v. United Health Programs of America, Inc. and Cost Containment Group Inc.*,²⁴⁴ the EEOC successfully argued that concepts known as "Onionhead" and "Harnessing Happiness" were entitled to Title VII protection as religious beliefs.²⁴⁵ The charging parties alleged that the program required them to use candles instead of lights to prevent demons from entering the workplace; conduct chants and prayers in the workplace; and respond to emails relating to God, spirituality, demons, Satan, and divine destinies.²⁴⁶ They alleged they were terminated either because they rejected Onionhead's beliefs or because of their own non-Onionhead religious beliefs, while other employees

²³⁸ The EEOC has also suffered some stinging defeats when it has pursued such cases through trial. In *EEOC v. Jetstream Ground Servs., Inc.*, 134 F. Supp. 3d 1298 (D. Colo. Sept. 29, 2015), the U.S. District Court for the District of Colorado allowed the EEOC to proceed to trial on behalf of a class of Muslim women who alleged that Jetstream Ground Services failed to accommodate their wearing hijabs and long skirts on the job, failed to hire them, laid off or reduced their hours, and discriminated against them on the basis of their religion. On summary judgment, the Court ruled that the former employees met their burden of showing that hijabs that were tucked into a shirt and secured to an employee's head presented no safety problems, thus holding that accommodating such hijabs posed no undue hardship for JetStream. *Id.* at 1336. However, the Court also found that JetStream presented sufficient evidence to create a disputed issue of fact as to whether it would pose an undue hardship for JetStream to permit its cabin cleaners to wear long skirts while working. *Id.* After the parties disputed the type of expert testimony that would be allowed, the EEOC ultimately withdrew several claims while JetStream agreed not to use certain experts, thus leaving only the hijab accommodation claims for trial. *EEOC v. Jetstream Ground Servs.*, No. 13-CV-2340, 2016 U.S. Dist. LEXIS 154109, at *3-4 (D. Colo. Nov. 3, 2016). On April 29, 2016, after a fourteen-day jury trial, the jury found in favor of JetStream and against the EEOC. *Id.* at *4.

²³⁹ *EEOC v. Halliburton Energy Servs., Inc.*, No. 3:18-CV-01736-N (N.D. Tex. Jul. 3, 2018).

²⁴⁰ Complaint, *EEOC v. Halliburton Energy Servs., Inc.*, No. 3:18-CV-01736-N (N.D. Tex. Jul. 3, 2018), ECF No. 1; Press Release, Equal Employment Opportunity Commission, EEOC Sues Halliburton For National Origin and Religious Discrimination (July 3, 2018), <https://www.eeoc.gov/eeoc/newsroom/release/7-3-18.cfm>.

²⁴¹ *Id.*

²⁴² Press Release, Equal Employment Opportunity Commission, Mission Hospital Agrees to Pay \$89,000 to Settle EEOC Religious Discrimination Lawsuit (Jan. 12, 2018), <https://www.eeoc.gov/eeoc/newsroom/release/1-12-18.cfm>.

²⁴³ *Id.*

²⁴⁴ *EEOC v. United Health Programs of America, Inc. and Cost Containment Group Inc.*, No. 14-CV-03673, (KAM)(JO), 2016 WL 6477050 (E.D.N.Y. Sept. 30, 2016).

²⁴⁵ *Id.* at *3-5; see also Gerald L. Maatman, Jr. and Alex W. Karasik, *Now Something Known As "Onionhead" Is A "Religion" For Which The EEOC Can Bring A Religious Discrimination Suit*, Workplace Class Action Blog (Oct. 7, 2016), <http://www.workplaceclassaction.com/2016/10/now-something-known-as-onionhead-is-a-religion-for-which-the-eeoc-can-bring-a-religious-discrimination-suit/>.

²⁴⁶ *United Health Programs*, 2016 WL 6477050, at *7, 11-12.

who followed Onionhead were given less harsh discipline.²⁴⁷ The EEOC filed suit on October 9, 2014.²⁴⁸

The Court held that to determine whether a given set of beliefs constitutes a religion for purposes of Title VII, “courts frequently evaluate: (1) whether the beliefs are sincerely held and (2) whether they are, in [the believer’s] own scheme of things, religious.”²⁴⁹ Regarding the first prong, the court noted that, “a reasonable jury could find that by inviting [the CEO’s aunt] into the workplace, paying her to meet and conduct workshops, authorizing her to speak to employees about matters related to their personal lives, disseminating ... material and directing employees to attend group and individual meetings with [his aunt], [the CEO] and his upper management held sincere beliefs in Onionhead and Harnessing Happiness.”²⁵⁰ As to the second prong, the Court concluded that the beliefs were religious within the meaning of Title VII due to religious discussion, the presence of a “spiritual advisor,” prayer in the workplace; and the employer quoted numerous Onionhead publications.²⁵¹ Accordingly, the Court found that Onionhead was a religion under Title VII.²⁵² Following a three-week trial, on April 25, 2018, a jury found that the employer violated federal law by coercing ten employees to engage in religious practices at work and by creating a hostile work environment for nine of them.²⁵³ The jury also found CCG violated federal law by firing one employee, Faith Pabon, who opposed these practices.²⁵⁴

In *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*,²⁵⁵ discussed above with respect to LGBT discrimination, the sincerity of the employer’s religious beliefs was also at issue. There, the EEOC alleged that a funeral home wrongfully terminated its former funeral director for being transgender.²⁵⁶ While the funeral home did not officially affiliate with a religion, its website contains scripture and various bible verses were dispersed at its locations.²⁵⁷ The funeral home had a strict employee dress code policy with several requirements, including that men must wear suits and women must wear jackets and skirts/dresses.²⁵⁸ After finding that the funeral home demonstrated that enforcement of Title VII would be a substantial burden to its religious exercise,²⁵⁹ the Court determined that the EEOC failed to meet its burden of showing that its action was the least restrictive means of

²⁴⁷ *Id.* at *5.

²⁴⁸ Amended Complaint at 1, *EEOC v. United Health Programs of America, Inc. and Cost Containment Group Inc.*, No. 14-CV-03673 (E.D.N.Y. Sept. 30, 2016), ECF No. 24.

²⁴⁹ *United Health Programs of America, Inc.*, 2016 WL 6477050, at *8 (quoting *Patrick v. LeFevre*, 745 F.2d 153, 157 (2d Cir. 1984)).

²⁵⁰ *Id.* at *13.

²⁵¹ *Id.* at *13-15.

²⁵² *Id.* at *15.

²⁵³ Jury Verdict, *EEOC v. United Health Programs of America, Inc., et al.*, No. 1:14-CV-03673-KAM-JO (E.D.N.Y. Apr. 27, 2018), ECF No. 207; Press Release, Equal Employment Opportunity Commission, Jury Awards \$5.1 Million For Workers in EEOC Religious Discrimination Case Against United Health Programs of America, Inc. And Cost Containment Group, Inc. (Apr. 26, 2018), <https://www.eeoc.gov/eeoc/newsroom/release/4-26-18a.cfm>.

²⁵⁴ *Id.*

²⁵⁵ *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, No. 14-13710, 2016 U.S. Dist. LEXIS 109716 (E.D. Mich. Aug. 18, 2016).

²⁵⁶ *Id.* at *15; see also Gerald L. Maatman, Jr. and Alex W. Karasik, *EEOC Loses Landmark Transgender Discrimination Case*, Workplace Class Action Blog (Aug. 19, 2016), <http://www.workplaceclassaction.com/2016/08/eeoc-loses-landmark-transgender-discrimination-case/>.

²⁵⁷ *R.G. & G.R. Harris Funeral Homes, Inc.*, 2016 U.S. Dist. LEXIS 109716, at *22.

²⁵⁸ *Id.*

²⁵⁹ *Id.* at *45-47 (citing *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014)).

furthering a compelling government interest.²⁶⁰ Accordingly, the funeral home was entitled to exemption from Title VII under the Religious Freedom Restoration Act (RFRA).

On appeal, the Sixth Circuit held that the EEOC's enforcement of Title VII against the funeral home did not violate the funeral home's rights under the RFRA.²⁶¹ A viable defense based on the RFRA requires a demonstration that the government action at issue would substantially burden a sincerely held religious exercise.²⁶² Although the Sixth Circuit treated the running of the funeral home as a sincere religious exercise by the owner, it held that the alleged burden caused by the enforcement of Title VII was not "substantial" within the meaning of RFRA.²⁶³ The Sixth Circuit reasoned that tolerating an employee's understanding of his or her sex and gender identity was not "tantamount to supporting it" and that mere compliance with Title VII, "without actually assisting or facilitating transition efforts," did not amount to an endorsement by the employer of the employee's views.²⁶⁴ Nor, the Sixth Circuit explained, could the funeral home rely on customers' "presumed biases" against transgender individuals to meet the substantial burden test.²⁶⁵ Accordingly, the Sixth Circuit held that the funeral home had not demonstrated a substantial burden on its religious exercise.

Although the Sixth Circuit could have ended its analysis there, it went on to hold that even if tolerating the employee's gender identity and transitioning status were a "substantial burden" on the funeral home's religious exercise, the EEOC did not violate the RFRA because the agency had a compelling interest in eradicating all forms of invidious employment discrimination, and enforcement of Title VII through its enforcement function was the least restrictive means for eradicating discrimination in the workforce.²⁶⁶

4. Complex Employment Relationships

In 2018, building off its Strategic Enforcement Plan, the EEOC continued to pursue claims that addressed the evolving scope of complex employment relationships.²⁶⁷ These employment relationships center around issues involving temporary workers, staffing agencies, independent contractors, the on-demand economy, and whether two or more entities can be considered the "employer" of one employee.²⁶⁸ According to the EEOC's Compliance Manual, employers that are unrelated (or not sufficiently related to qualify as an "integrated enterprise") are "joint employers" of a

²⁶⁰ *Id.* at 54-66; see also Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb-1(a), (b) (The RFRA prohibits the "Government [from] substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability" unless the Government "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.").

²⁶¹ *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 571 (6th Cir. 2018); See Scott Rabe, Gerald L. Maatman, Jr., and Marlin Duro, *The Sixth Circuit Sides With The EEOC's Position On Scope Of Title VII Relative To Gender Identity*, Workplace Class Action Blog, Seyfarth Shaw LLP (March 8, 2018), available at <https://www.workplaceclassaction.com/2018/03/the-sixth-circuit-sides-with-the-eeocs-position-on-scope-of-title-vii-relative-to-gender-identity/>.

²⁶² *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 587 (6th Cir. 2018).

²⁶³ *Id.*

²⁶⁴ *Id.* at 588-89.

²⁶⁵ *Id.* at 586-88.

²⁶⁶ *Id.* at 591-93.

²⁶⁷ The EEOC's 2017 Strategic Enforcement Plan announced a new area of focus relating to the EEOC's concerns about complex employment relationships. See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION STRATEGIC ENFORCEMENT PLAN FISCAL YEARS 2017 - 2021, *supra* note 2.

²⁶⁸ *Id.*; See EEOC Compliance Manual, Section 2: Threshold Issues § 2-III(B)(1)(A)(iii)(b), <https://www.eeoc.gov/policy/docs/threshold.html>.

single employee if each employer exercises sufficient control of an individual to qualify as his/her employer.²⁶⁹ Notably, the EEOC's definition is different than the statutory definitions that apply to some of the anti-discrimination laws that the EEOC enforces.²⁷⁰

In the fall of 2016, the EEOC expanded the scope of the joint-employer test in line with the controversial decision issued by the National Labor Relations Board, *Browning-Ferris Industries of California*.²⁷¹ There, the NLRB announced that it “will no longer require that a joint employer not only possess the authority to control employees’ terms and conditions of employment, but must also exercise that authority, and do so directly, immediately, and not in a ‘limited and routine’ manner. . . . The right to control, in the common-law sense, is probative of joint-employer status, as is the actual exercise of control, whether direct or indirect.”²⁷² The *Browning-Ferris* decision has lived a tortured procedural history, but remains the law of the land, at least until the NLRB’s new regulations take effect.²⁷³

²⁶⁹ *Id.* § 2-III(B)(1)(A)(iii)(b). Another method the EEOC uses for determining whether two or more entities can be considered the “employer” of an employee turns on whether “the operations of two or more employers are so intertwined that they can be considered the single employer of the charging party.” *Id.* § 2-III(B)(1)(A)(iii)(a). The EEOC clarified how it determines the extent of that control in an 1997 Enforcement Guidance, where it identified 16 factors that it considers when determining whether two or more companies are joint employers of a single employee. See EEOC Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms (Dec. 3, 1997), <https://www.eeoc.gov/policy/docs/conting.html>. The EEOC states that its factors are drawn from *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 324 (1992) (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-752 (1989)) and Restatement (Second) of Agency § 220(2).

²⁷⁰ For example, the EPA has a slightly different definition of “employer” than Title VII. Under Title VII, subject to some enumerated exceptions, an “employer” means “a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person.” 42 U.S.C. § 2000e(b). The EPA uses the broader definition found in the FLSA, which defines an “employer” as “any person acting directly or indirectly in the interest of an employer in relation to an employee” 29 U.S.C. § 203(d). An “employee” is defined as “any individual employed by an employer,” *id.* § 203(e)(1), and the term “employ” means “to suffer or permit to work.” *Id.* § 203(g). Together, those definitions have been interpreted as “the broadest definition . . . ever included in any one act.” *U.S. v. Rosenwasser*, 323 U.S. 360, 363 n.3 (1945). Courts interpreting that definition have focused on the “economic realities” of the purported employment relationship. See *Goldberg v. Whittaker House Cooperative, Inc.*, 366 U.S. 28, 33 (1961). The “economic realities” inquiry, in turn, focuses on a number of factors related to control over the employee. See, e.g., *Herman v. RSR Sec. Servs., Ltd.*, 172 F.3d 132, 139 (2d Cir.1999) (“Under the “economic reality” test, the relevant factors include “whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records.”) (quoting *Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8, 12 (2d Cir.1984)). Despite the different statutory basis, and different interpretations in the case law, the EEOC maintains that “there is no significant functional difference between the tests.” EEOC Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms, at n.10, *supra* note 269.

²⁷¹ *Browning-Ferris Indus. of California*, 362 NLRB No. 186, 2015 WL 5047768 (Aug. 27, 2015).

²⁷² *Id.*

²⁷³ This decision was overturned by the NLRB in *Hy-Brand Industrial Contractors, Ltd. And Brandt Construction Co.* In *Hy-Brand Industrial Contractors, Ltd. And Brandt Construction Co.*, 365 NLRB No. 156 (Dec. 14, 2017), by a 3-2 vote, the NLRB overturned *Browning-Ferris* and restored its 30-year test for determining whether separate businesses are “joint employers” under the NLRA. See Joshua Ditelberg, *NLRB Overturns Browning-Ferris Joint Employer Standard*, SEYFARTH SHAW MANAGEMENT ALERT (Dec. 18, 2017), <http://www.seyfarth.com/uploads/siteFiles/publications/MA121817LE.pdf>. At that time, the NLRB’s position was that a putative employer will be found to be a joint employer if it “meaningfully affects matters relating to the employment relationship, such as hiring, firing, discipline, supervision and direction.” *Laerco*, 269 NLRB 324, 325 (1987). Two or more entities were joint employers if they “share[d] or codetermine[d] those matters governing the essential terms and conditions of employment” and question of joint employer status needed to be assessed based on the “totality of the facts of the particular case.” *Southern California Gas Co.*, 302 NLRB 456, 461, 1991 WL 67022 (1991). Prior to overturning *Browning-Ferris*, the NLRB had expanded its traditional joint-employer test so that “two or more entities are joint employers of a single work force if they are both employers within the meaning of the common law, and if they share or codetermine those matters governing the essential terms and conditions of employment.” *Browning-Ferris Indus. of California*, 2015 WL 5047768, at *19. In addition, the NLRB stated that it will consider “the allocation and exercise of control in the workplace” and “the various ways in which joint employers may ‘share’ control over terms and conditions of employment or ‘codetermine’ them, as the Board and the courts have done in the past.” *Id.*

In September of 2018, the NLRB published its notice of proposed rulemaking on the issue of joint employment in the Federal Register.²⁷⁴ According to the NLRB, the proposed rule “will foster predictability and consistency regarding determinations of joint-employer status in a variety of business relationships, thereby promoting labor-management stability”²⁷⁵ (*Id.* at 46681.) The text of the proposed rule is as follows:

An employer, as defined by Section 2(2) of the National Labor Relations Act (the Act), may be considered a joint employer of a separate employer’s employees only if the two employers share or codetermine the employees’ essential terms and conditions of employment, such as hiring, firing, discipline, supervision, and direction. A putative joint employer must possess and actually exercise substantial direct and immediate control over the employees’ essential terms and conditions of employment in a manner that is not limited and routine.²⁷⁶

The proposed rule undoes the relaxed *Browning-Ferris* standard. Under the proposed rule, an employer may be found to be a joint-employer of another employer’s employees *only* if it possesses and exercises substantial, direct and immediate control over the essential terms and conditions of employment and has done so in a manner that is not limited and routine.²⁷⁷

Like the *Browning-Ferris* test, the EEOC argued that its test looks at the totality of the circumstances and is “intentionally flexible” and “consistent with common law,” in that it does not consider one factor to be decisive.²⁷⁸ The EEOC also argued that its standard considers an entity’s indirect control of the terms and conditions of employment.²⁷⁹ Crucially, the EEOC contends that an entity’s right to control the terms and conditions of employment – whether or not it actually exercises that right – is relevant to joint-employer status.²⁸⁰ With respect to indirect control, the EEOC similarly explained that it “has long considered indirect control to be relevant to joint employer status.”²⁸¹ The EEOC stated that “[a] putative joint employer exercises indirect control of the terms and conditions of employment by acting through an intermediary.”²⁸²

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

²⁷⁵ *Id.* at 46681.

²⁷⁶ *Id.* at 46696.

²⁷⁷ See Joshua L. Ditelberg and Stuart Newman, *National Labor Relations Board Proposes New Joint Employer Rule*, Seyfarth Shaw Client Alerts (Sept. 13, 2018), <https://www.seyfarth.com/publications/MA091318-LE>.

²⁷⁸ After *Browning-Ferris* was appealed to the Court of Appeals for the District of Columbia Circuit, the EEOC filed an *amicus* brief supporting the NLRB’s then-new position. See Gerald L. Maatman, Jr., Christina M. Janice and Alex W. Karasik, *Jumping For Joint Employer: The EEOC Files Amicus Brief Supporting Broadened Definition Of Joint Employer In High-Profile NLRB Litigation*, WORKPLACE CLASS ACTION BLOG (Sept. 21, 2016), <http://www.workplaceclassaction.com/2016/09/jumping-for-joint-employer-the-eeoc-files-amicus-brief-supporting-broadened-definition-of-joint-employer-in-high-profile-nlr-litigation/>. The EEOC explained that the definitions of “employer” are virtually identical in Title VII and the NLRA, and that this, plus those statutes’ shared remedial purpose, “suggests that the joint-employer test should be the same under both laws.” Brief of the United States Equal Employment Opportunity Commission as Amicus Curiae in Support of Respondent/Cross-Petitioner and in Favor of Enforcement at 7, *Browning-Ferris Indus. of Calif. Inc. v. Nat’l Labor Relations Bd.*, Nos.16-1028, 16-1063, 16-1064 (D.C. Cir. Sept. 14, 2016). According to the EEOC, it uses a “flexible joint-employer test because employment discrimination statutes are remedial in nature.” *Id.* at 6. This remedial purpose “stems directly from the [National Labor Relations Act (NLRA)].” *Id.* at 7. This remedial purpose “stems directly from the [National Labor Relations Act (NLRA)].” *Id.*

²⁷⁹ *Id.* at 5.

²⁸⁰ *Id.* at 12.

²⁸¹ *Id.* at 13.

²⁸² *Id.* at 14. The EEOC relied on its own administrative decisions to support this assertion. *d. (citing Complainant v. Johnson*, EEOC Doc. No. 0120160989, 2016 WL 1622535, at *3 (EEOC Apr. 14, 2016) (holding that staffing firm clients hold “de facto power to terminate” an employee if they are able to communicate to the staffing firm that they do not wish to continue with the staffing contract and merely communicate that decision to the staffing firm Project Manager, who facilitates

Since the NLRB's publication of its proposed joint employer rule, the EEOC has shown no indication that it will follow suit and tighten its own joint employer standard. As such, the EEOC's joint employer standard still considers the employers' right to control, even if unexercised. Nevertheless, the EEOC's joint employer-status is narrower than the NLRB's in one respect: unlike the NLRB, the EEOC "does not inquire into joint employer status unless there is reason to believe that an entity knew or should have known of discrimination by another entity and failed to take corrective action within its control."²⁸³

Although developments in this area have been rare, on June 16, 2018, the EEOC sued on behalf of charging parties and a class of similarly situated aggrieved individuals against a franchisor and franchisee, asserting liability on a theory of joint employer status.²⁸⁴ According to the EEOC, all defendants "generally controlled the terms and condition of the employment of the Charging Parties and other aggrieved individuals."²⁸⁵ Specifically, the EEOC alleged that the franchisor "had control over . . . the employment, recruitment, or hiring of employees of [franchisees]; knew or should have known of the below described unlawful employment actions; and had the power to prevent and/or correct the unlawful employment actions."²⁸⁶

The EEOC has consistently followed – and driven – changes to the law in response to the ever-changing nature of the American workplace. How the EEOC chooses to do so has, historically, been heavily dependent on the leadership at the EEOC, which is chosen by the administration in power. This substantive enforcement priority could therefore see the most dramatic evolution once the vacancies on the Commission, and the EEOC's powerful General Counsel role, are filled by personnel nominated by the Trump administration.

the termination); *Rina F. v. McDonald*, EEOC Doc. No. 0120160808, 2016 WL 1729906, at *3 (EEOC Apr. 21, 2016) (considering the fact that employee was interviewed by both contractor and agency, and contractor did not hire Complainant "until it received word from the Agency official"); *Complainant v. McHugh*, EEOC Doc. No. 0120140999, 2014 WL 3697464, at *5 (EEOC July 15, 2014) (considering "whether the Agency indirectly controlled Complainant's job through the on-site coordinator"); *Lee v. McHugh*, EEOC Doc. No. 0120112643, 2013 WL 393519, at *7 (EEOC Jan. 24, 2013) (considering whether contractor terminated complainant because agency "wanted him fired").

²⁸³ Brief of the United States Equal Employment Opportunity Commission as Amicus Curiae in Support of Respondent/Cross-Petitioner and in Favor of Enforcement at 6. n. 2, *supra* note 278. Arguably, this provides some protection to employers, as it makes the "joint employer" determinations by the EEOC a fact-driven issue – particularly when determining the existence of unexercised or indirect control. For example, in *EEOC v. S&B Indus., Inc.*, No. 3:15-CV-0641-D, 2016 WL 7178969, at *1 (N.D. Tex. Dec. 8, 2016), the EEOC asserted an ADA discrimination claim against a company for failure to hire two employees suffering from hearing impairments. The District Court held that there was a genuine issue of material fact regarding whether S&B was a joint employer along with its staffing agency. For instance, aside from supervising workers on the production floor, the District Court concluded that the evidence suggested that S&B also had the "right to terminate and end the assignment of specific workers at S&B." *Id.* at *6. "This evidence," the District Court explained, "is sufficient to raise a genuine issue of material fact on the question of whether, under the 'joint employer' test, S&B and [the staffing company employer] were . . . joint employers." *Id.*

²⁸⁴ See Complaint at 3, *EEOC v. Tapioca Express, Inc.*, et al., No. 3:18-01217 (S.D. Cal. June 16, 2018).

²⁸⁵ *Id.* ¶ 11.

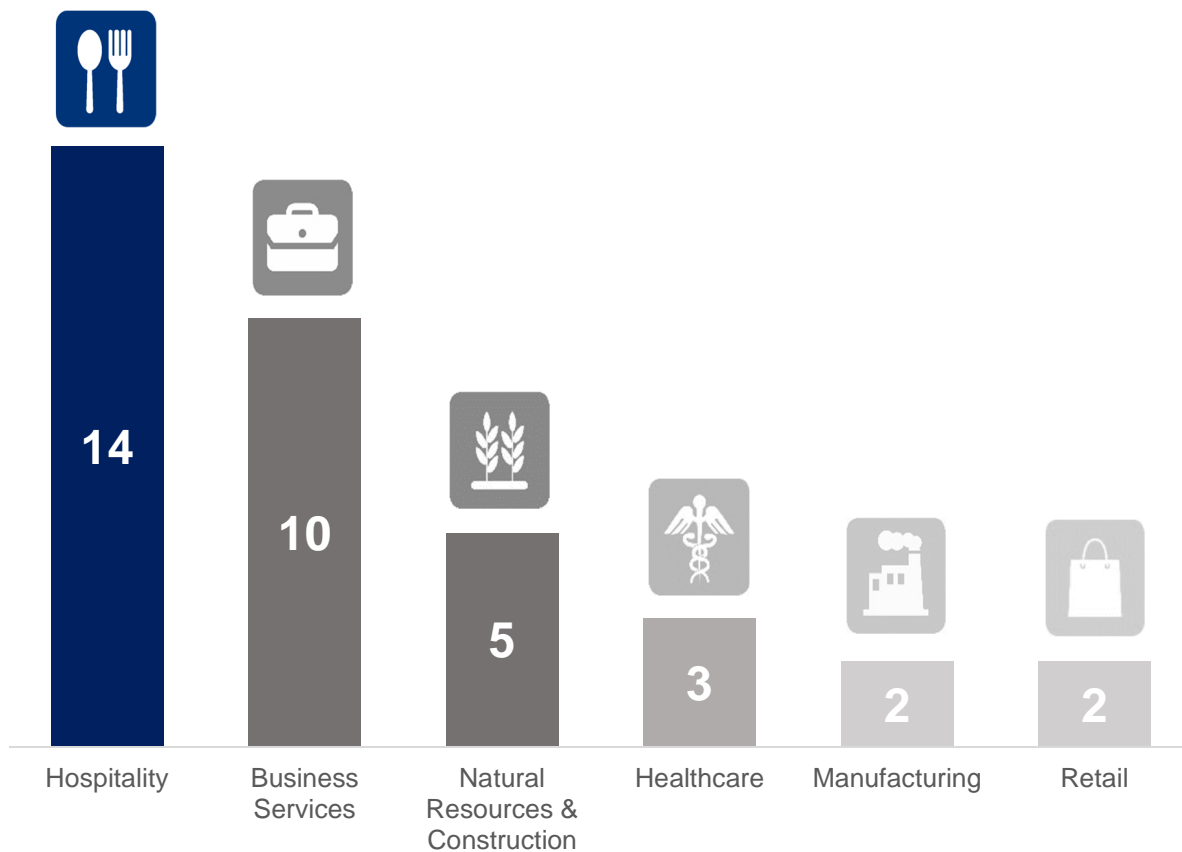
²⁸⁶ *Id.*



Protecting Vulnerable Workers

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

#MeToo Cases By Industry FY 2018



“In FY 2018, the EEOC continued to launch lawsuits against the restaurant industry for harassment, especially when that harassment was targeting younger workers.”

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

The EEOC's SEP also identifies the protection of immigrant, migrant, and other vulnerable workers as one of its six "national enforcement priorities."²⁸⁷ In FY 2017, the agricultural and hospitality industries were the focus of many of the EEOC's largest and highest-profile lawsuits that fit within this priority, many involving allegations of sexual harassment.²⁸⁸

Following several important favorable rulings in FY 2017,²⁸⁹ the EEOC has continued to secure significant substantive victories in 2018 that will advance its priorities and continue to clear the path for future lawsuits on behalf of immigrant, migrant and other vulnerable workers. Coincidentally, two of the most notable rulings in this regard were out of the U.S. District Court for the District of Maryland.

In *EEOC v. Phase 2 Invs. Inc.*,²⁹⁰ the charging parties worked for a car wash company.²⁹¹ The charging parties alleged that they were subject to harassment and discrimination and that they were fired after they complained to management about the alleged mistreatment.²⁹² Notably, several months prior to their termination, an audit by U.S. Immigration and Customs Enforcement revealed that 39 employees, including the charging parties, were not authorized to work in the United States.²⁹³ Upon their termination, in July 2013, the charging parties contacted the EEOC and eventually signed formal charges of discrimination against the company in February 2014.²⁹⁴

In August 2017, after more than three years of investigation, litigation regarding EEOC subpoenas, and failed conciliation, the EEOC filed suit against the company.²⁹⁵ Maritime moved for dismissal and summary judgment.²⁹⁶ In denying these motions, the Court addressed what it referred to as "the

²⁸⁷ U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION STRATEGIC ENFORCEMENT PLAN FY 2017 - 2021, available at <https://www.eeoc.gov/eeoc/plan/sep-2017.cfm>; U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION STRATEGIC ENFORCEMENT PLAN FY 2013 - 2016, available at <https://www.eeoc.gov/eeoc/plan/sep.cfm>.

²⁸⁸ See, e.g., Press Release, Equal Employment Opportunity Commission, Stemilt Growers and Ag Services Sued By EEOC For Sexual Harassment, Retaliation (Jun. 13, 2017), available at <https://www1.eeoc.gov/eeoc/newsroom/release/6-13-17.cfm>; Press Release, Equal Employment Opportunity Commission, EEOC Sues Favorite Farms Sexual Harassment, Including Rape And Retaliation (May 31, 2017), available at <https://www.eeoc.gov/eeoc/newsroom/release/5-31-17a.cfm>; Press Release, Equal Employment Opportunity Commission, EEOC Sues Applebee's Grill and Bar for Sexual Harassment (May 4, 2017), available at <https://www1.eeoc.gov/eeoc/newsroom/release/5-4-17.cfm>.

²⁸⁹ See, e.g., *Cazorla v. Koch Foods of Miss., L.L.C.*, 838 F.3d 540 (5th Cir. 2016); Gerald L. Maatman, Jr. and Michael L. DeMarino, *Fifth Circuit Green Lights Discovery Over Immigration Status In EEOC Litigation*, WORKPLACE CLASS ACTION BLOG (Oct. 3, 2016), available at <http://www.workplaceclassaction.com/2016/10/fifth-circuit-green-lights-discovery-over-immigration-status-in-eeoc-litigation/>.

²⁹⁰ See *EEOC v. Phase 2 Invs. Inc.*, 310 F. Supp. 3d 550, 555 (D. Md. 2018).

²⁹¹ See Gerald L. Maatman, Jr. and Mark W. Wallin, *Unsuccessful Successor: Court Finds Employer May Be Liable In EEOC Lawsuit For Its Predecessor's Conduct Under Title VII*, WORKPLACE CLASS ACTION BLOG (Apr. 24, 2018), available at <https://www.workplaceclassaction.com/2018/04/unsuccessful-successor-court-finds-employer-may-be-liable-in-eeoc-lawsuit-for-its-predecessors-conduct-under-title-vii/>.

²⁹² *Phase 2 Invs., Inc.*, 310 F. Supp. 3d at 556.

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *Id.* at 556-57, 559.

²⁹⁶ *Id.* at 558-59.

elephant in the room”: the issue of whether discrimination against an undocumented worker is an unlawful employment practice under Title VII.²⁹⁷

After analyzing Title VII itself, along with Supreme Court and Fourth Circuit precedent, the Court found that “discrimination against an employee on the basis of his race, national origin, or participation in EEOC investigations is an unlawful employment practice under Title VII even if that employee is an undocumented alien, and the EEOC may therefore pursue its claim here.”²⁹⁸ In reaching its decision, the Court noted that finding otherwise would essentially give the company and other employers the ability to both hire undocumented workers and then unlawfully discriminate against those it unlawfully hired.²⁹⁹ The Court further reasoned that “[e]ven if [the company] was unaware of the Charging Parties’ immigration status when it hired them, if the Court were to ‘sanction the formation of [that] statutorily declared illegal relationship’ by shielding Maritime . . . from Title VII scrutiny, other employers may well find an incentive to look the other way when potential employees are unable to provide proper documentation.”³⁰⁰

Nevertheless, the Court noted that as a result of the charging parties’ undocumented status, the nature of relief that could be sought was limited. For instance, the Court found that it could not require the charging parties to be re-hired or award back pay.³⁰¹ The Court, however, was clear that the company would not “get off ‘scot-free’ if it is proven that [the company] discriminated against the Charging Parties,” as Title VII grants the Court broad discretion in fashioning relief and the public interest would be best served through “some monetary penalty.”³⁰²

The Court’s ruling protecting immigrant and migrant workers is especially notable following the decision in *Cazorla v. Koch Foods of Miss., L.L.C.*³⁰³ In *Cazorla*, the Fifth Circuit overturned a discovery order allowing the defendant’s requests for records relating to the worker-plaintiffs’ U visa applications.³⁰⁴ The Fifth Circuit reasoned that allowing discovery to proceed according to the order “may sow confusion over when and how U visa information may be disclosed, deterring immigrant victims of abuse . . . from stepping forward and thereby frustrating Congress’s intent in enacting the U visa program.”³⁰⁵

Additionally, in *EEOC v. MVM, Inc.*,³⁰⁶ the EEOC alleged that a security services firm subjected a group of African-born employees to national origin discrimination, consisting of disparate treatment, a hostile work environment, and unlawful retaliation.³⁰⁷ The company had hired a new project manager to oversee 400 security personnel, approximately half of whom were “African or foreign-born blacks.”³⁰⁸ Within weeks of becoming project manager, the project manager allegedly began

²⁹⁷ *Id.* at 575-76, 581.

²⁹⁸ *Id.* at 576-80.

²⁹⁹ *Id.* at 579.

³⁰⁰ *Phase 2 Invs., Inc.*, 310 F. Supp. 3d at 579.

³⁰¹ *Id.* at 580.

³⁰² *Id.*

³⁰³ *Cazorla v. Koch Foods of Miss., L.L.C.*, 838 F.3d 540 (5th Cir. 2016).

³⁰⁴ *Id.* at 544.

³⁰⁵ *Id.* at 562-63.

³⁰⁶ See *EEOC v. MVM, Inc.*, No. TDC-17-2864, 2018 U.S. Dist. LEXIS 81268, at *1-2 (D. Md. May 14, 2018).

³⁰⁷ See Gerald L. Maatman, Jr. and Alex W. Karasik, *Dismissal Denied In EEOC Race Discrimination Action Against Security Company*, WORKPLACE CLASS ACTION BLOG (May 24, 2018), available at <https://www.workplaceclassaction.com/2018/05/dismissal-denied-in-eEOC-race-discrimination-action-against-security-company/>.

³⁰⁸ *MVM, Inc.*, 2018 U.S. Dist. LEXIS 81268, at *2-3.

complaining that there were “too many Africans” on his contract, that he was not comfortable working with foreigners and that he “couldn’t understand their accents.”³⁰⁹

During the project manager’s tenure, the company also allegedly engaged in a variety of negative actions against African and foreign-born black security personnel, including denying them leave, forcing them to work on their scheduled days off, forcing them to work extra hours beyond their scheduled shifts, assigning them to undesirable posts, subjecting them to heightened scrutiny, disciplining them more harshly than called for by its discipline policy, intimidating and threatening them with termination, and denying them union representation so as to facilitate the imposition of discipline, suspensions and termination without cause.³¹⁰

In its motion to dismiss, the company argued, among other things, that discrimination based on “perceived” national origin was not cognizable under Title VII, which argument the Court presumed was aimed at “allegations made by foreign-born black employees who were perceived to be, but were not, of African origin.”³¹¹ In denying the company’s motion in part, however, the Court concluded “that Title VII permits claims of discrimination based on perceived national origin,” noting that “[t]o conclude otherwise would be to allow discrimination to go unchecked where the perpetrator is too ignorant to understand the difference between individuals from different countries or regions, and to provide causes of action against only those knowledgeable enough to target only those from the specific country against which they harbor discriminatory animus.”³¹²

The EEOC also continues to rack up large settlements on behalf of women, immigrant and other vulnerable workers. For example, in May 2018, the EEOC announced that Goodwill Industries of the East Bay Area and its affiliate, Calidad Industries Inc., would pay \$850,000 to settle a sexual harassment and retaliation lawsuit.³¹³ The EEOC had alleged that six female janitors assigned to work the night shift at the Oakland Federal Building, including young women with developmental disabilities and who were relatively new to the workforce, faced routine sexual harassment by their direct supervisor.³¹⁴

In sum, while the outlook for the EEOC’s activity in this area may have been uncertain as the new administration was settling in, the EEOC has continued to follow through on its commitment to protect immigrant, migrant, and other vulnerable workers in its pursuit of litigation on their behalf.

³⁰⁹ *Id.*

³¹⁰ *Id.* at *3-4.

³¹¹ *Id.* at *16, 27-28.

³¹² *Id.* at *33, 36-37.

³¹³ *EEOC v. Goodwill Indus. of the Greater East Bay, Inc.*, No. 16-CV-07093-YGR (N.D. Cal.). See Press Release, Equal Employment Opportunity Commission, Goodwill and Affiliate to Pay \$850,000 to Settle EEOC Sexual Harassment Lawsuit (May 10, 2018), available at <https://www.eeoc.gov/eeoc/newsroom/release/5-10-18.cfm>.

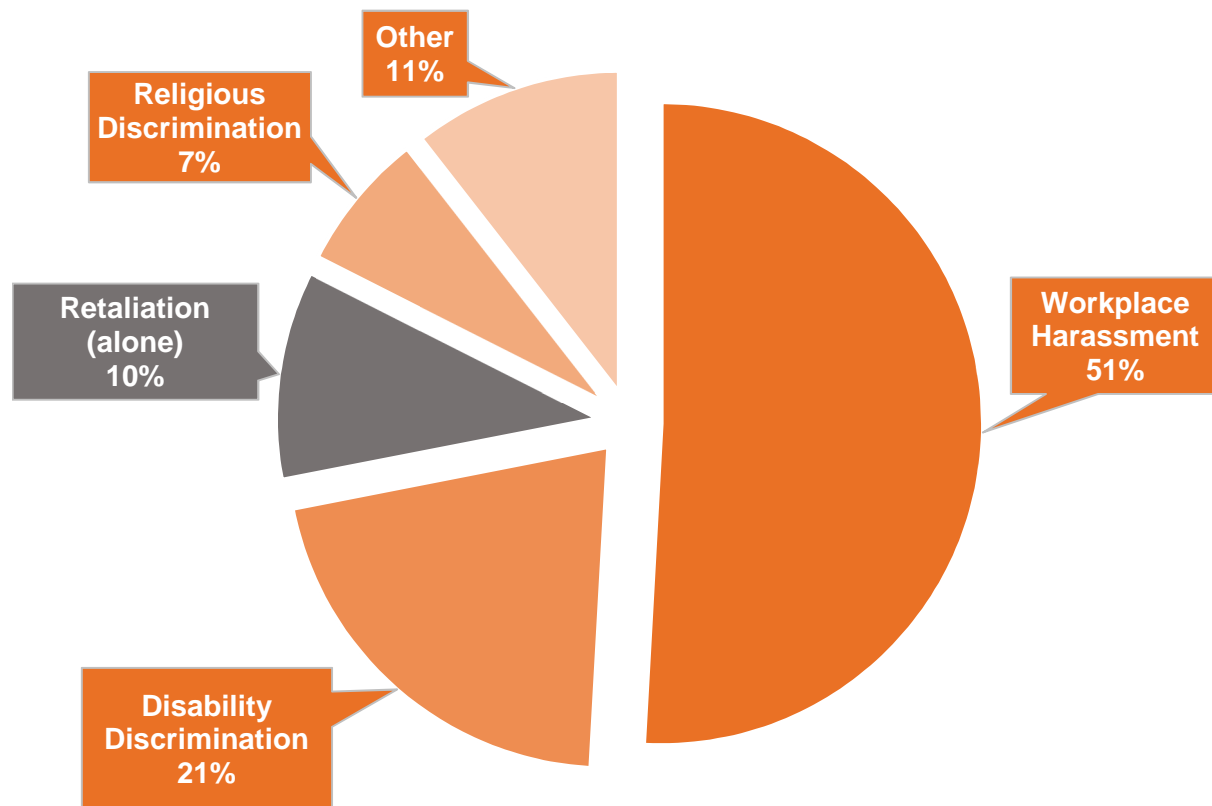
³¹⁴ See Press Release, Equal Employment Opportunity Commission, Goodwill and Affiliate to Pay \$850,000 to Settle EEOC Sexual Harassment Lawsuit (May 10, 2018), available at <https://www.eeoc.gov/eeoc/newsroom/release/5-10-18.cfm>.



Preserving Access To The Legal System

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

FY 2018 Retaliation Claims By Category Of Discrimination



“The single most frequent area of recovery for retaliation claims in FY 2018 was in the ‘#MeToo’ sexual harassment space.”

E. Preserving Access To The Legal System

The Strategic Enforcement Plan states that a strategic objective of the EEOC is to combat and prevent employment discrimination through the strategic application of the EEOC's law enforcement authorities, be it through investigation, conciliation, litigation or federal oversight. This objective is reflected in the EEOC's aggressive and successful assertion of retaliation claims against employers allegedly obstructing employee access to justice by participating in EEOC proceedings or otherwise opposing discrimination.

1. The Broad Scope Of Actionable Retaliation

The EEOC's Enforcement Guidance on Retaliation states that retaliation occurs when an employer takes a materially adverse action because an individual has engaged in, *or may engage in*, activity in furtherance of Title VII, the Age Discrimination in Employment Act, the Americans with Disabilities Act, Section 501 of the Rehabilitation Act, the Equal Pay Act, or Title II of the Genetic Information Nondiscrimination Act.³¹⁵

Retaliation considered actionable by the EEOC has three elements: (1) protected activity or participation in an EEO process or opposition to discrimination; (2) materially adverse action taken by the employer; and (3) requisite level of causal connection between the protected activity and the materially adverse action.³¹⁶

Protected activity involves either participation in an EEO process or reasonably opposing conduct made unlawful by an EEO law.³¹⁷ Participation in the EEOC process is protected regardless of whether the EEO allegation is based on a reasonable, good faith belief that a violation occurred.³¹⁸ By contrast, opposition to discrimination must be based on a reasonable, good faith belief, but can be expressed explicitly or implicitly and does not have to include the words "harassment," "discrimination," or any other legal jargon.³¹⁹ The EEOC takes the position in its Enforcement Guidance that "great deference" is given to the EEOC's interpretation of opposition conduct, and there is overlap between what constitutes "participation in an EEO process" and "opposition to discrimination."³²⁰

With regard to a materially adverse action, the EEOC defines this element to include one-off incidents and warnings, as well as anything that could be reasonably likely to deter protected activity, even if it is not yet severe or pervasive and does not have a tangible effect on employment.³²¹ Moreover, actions taken against a third party (*i.e.*, fiancé, husband, or other close

³¹⁵ See ENFORCEMENT GUIDANCE ON RETALIATION AND RELATED ISSUES, (Aug. 25, 2016) available at <https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm>. Retaliation includes not only adverse action taken against an employee, but the threat of adverse action against an employee who has not yet engaged in protected activity for the purpose of discouraging him or her from doing so. See, *e.g.*, *Beckel v. Wal-Mart Assocs., Inc.*, 301 F.3d 621, 624 (7th Cir. 2002) (holding that threatening to fire plaintiff if she sued "would be a form of anticipatory retaliation, actionable as retaliation under Title VII"); *Sauers v. Salt Lake Cty.*, 1 F.3d 1122, 1128 (10th Cir. 1993) ("Action taken against an individual in anticipation of that person engaging in protected opposition to discrimination is no less retaliatory than action taken after the fact.")

³¹⁶ See ENFORCEMENT GUIDANCE ON RETALIATION AND RELATED ISSUES, *supra* note 315.

³¹⁷ *Id.*

³¹⁸ *Id.* at 8.

³¹⁹ *Id.* at 10-11.

³²⁰ *Id.* at 9-10, 21.

³²¹ *Id.* at 35-36, 38.

family member or friend) who is sufficiently close to the complaining employee as to be in the employee's "zone of interest," constitute adverse actions to the EEOC.³²²

Finally, with respect to causation, the EEOC acknowledges that a materially adverse action does not violate EEO laws unless there is a causal connection between the action and the protected activity. For retaliation claims against private sector employers and state and local government employers, the Enforcement Guidance acknowledges that the Supreme Court has ruled that the causation standard requires that "but for" a retaliatory motive, the employer would not have taken the adverse action. In other words, the materially adverse action would not have occurred without retaliation even if there are multiple causes.³²³ Evidence of causation may include suspicious timing, oral or written statements, comparative evidence of similarly situated employees treated differently, inconsistent or shifting explanations for an employer's adverse action, or any other evidence which, when viewed together, demonstrate retaliatory intent.

An employer may defeat a retaliation claim by establishing that it was unaware of the protected activity or by demonstrating legitimate non-retaliatory reasons for the challenged action.³²⁴

2. Recent EEOC Successes Pursuing Retaliation Claims

Numerous settlements in 2018 underscore the EEOC's success in leveraging retaliation claims in connection with other forms of discrimination, to obtain both monetary relief for employees and injunctive relief to reshape employer conduct.

In *Koch Foods of Mississippi, Inc.*,³²⁵ the EEOC recovered \$3.75 million in compensatory damages on behalf of seven charging parties and a class of 150 Hispanic employees who allegedly were subjected to a hostile work environment based on race, national origin or sex (female), and who suffered retaliation for complaining about the unlawful treatment.³²⁶ The EEOC obtained a consent decree enjoining the employer from further discrimination and retaliation, requiring EEOC policies to be provided in English and Spanish, and requiring anti-harassment training in English and Spanish.³²⁷

The single most frequent area of recovery for retaliation claims this year was in the "#MeToo" sexual harassment space. Alleging male-on-male sexual harassment and retaliation against those employees who reported it, the EEOC obtained a \$570,000 recovery against three Hawai'i tour companies in the case of *EEOC v. Discovering Hidden Hawaii Tours, Inc.*³²⁸ The three year consent decree requires that the alleged harasser have no further involvement in the operations of the companies, and be divested of their control.³²⁹ The consent decree further requires the designation

³²² *Id.* at 41-42.

³²³ *Id.* at 43-44. By contrast, for Title VII and ADEA retaliation claims against federal sector employers, the Enforcement Guidance introduces the "motivating factor" standard, which only requires that retaliation be a motivating factor behind an adverse action. *Id.* at 44.

³²⁴ *Id.* at 50.

³²⁵ *Koch Foods of Mississippi, Inc.*, No. 3:11-00391 (S.D. Miss.). See U.S. EQUAL OPPORTUNITY COMMISSION, FISCAL YEAR 2018 PERFORMANCE AND ACCOUNTABILITY REPORT, at 39, available at <https://www.eeoc.gov/eeoc/plan/upload/2018par.pdf>.

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ *EEOC v. Discovering Hidden Hawaii Tours, Inc., et al.*, No. 1:17-00067-DHW-KSC (D. Haw.). See Press Release, Equal Employment Opportunity Commission, Discovering Hidden Hawaii Tours To Pay \$570,000 To Settle EEOC Male-On-Male Sexual Harassment Suit (May 30, 2018), available at <https://www.eeoc.gov/eeoc/newsroom/release/5-30-18.cfm>.

³²⁹ *Id.*

of an external equal employment opportunity consultant, an independent complaint and impartial investigation process, and annual training for supervisors, managers and officers.³³⁰

The EEOC also successfully recovered \$180,000 for a female executive assistant and marketing officer in *EEOC v. Coral Gables Trust Company*.³³¹ The EEOC obtained a consent decree requiring the employer to designate two board members to receive future complaints of harassment, discrimination or retaliation, to revise and distribute new policies, to retain an independent equal employment opportunity consultant to investigate all complaints of sex-based harassment, discrimination or retaliation, and to provide training to all employees, managers and the company's chief wealth officer.³³² The EEOC achieved a similar outcome in *EEOC v. Rosebud Restaurants, Inc.* by securing \$160,000 for two female employees who alleged sexual harassment, one of whom was terminated after complaining about African-American slurs in the workplace.³³³ Here, the two year consent decree required the employer to implement annual training and to provide the EEOC with semi-annual reports of any complaints of harassment or retaliation.³³⁴

3. New Filings Test The Limits Of Actionable Retaliation

While most new retaliation lawsuits filed in FY 2018 allege termination of employment in retaliation for making an internal complaint or filing a charge of discrimination with the EEOC, several new lawsuits demonstrate the EEOC's attempts to enlarge the scope of actionable retaliation.

Continuing to test the theory of "zone of interest" retaliation, the EEOC brought suit against an office furniture distributor, alleging that the employer engaged in unlawful retaliation by firing the son of a female employee who opposed the employer's policy of not allowing females to work in its Birmingham warehouse.³³⁵

Expanding the concept of "adverse employment action" to include lost, contingent employment opportunities, the EEOC brought suit against the Tampa non-profit aid organization, alleging that the employer engaged in unlawful retaliation by excluding a male employee from applying for any positions in the organization after he complained about not being considered for the employer's maternity home program on the basis of his sex, male.³³⁶ Similar complaints were filed for alleged failure to promote in retaliation for making an internal complaint about discrimination.³³⁷

Finally, testing the notion of "anticipatory retaliation," the EEOC brought suit against a North Carolina builder for terminating the employment of an African-American male who notified his supervisor that he *intended* to file a charge of discrimination.³³⁸

³³⁰ *Id.*

³³¹ *EEOC v. Coral Gables Trust Company*, No. 1:18-21148 (S.D. Fla.). See Press Release, Equal Employment Opportunity Commission, Coral Gables Trust Company To Pay \$180,000 To Settle EEOC Sexual Harassment And Retaliation Suit (April 4, 2018), available at <https://www.eeoc.gov/eeoc/newsroom/release/4-4-18.cfm>.

³³² *Id.*

³³³ *EEOC v. Rosebud Restaurants, Inc.*, No. 17-6815 (N.D. Ill.). See Press Release, Equal Employment Opportunity Commission, Rosebud Restaurants To Pay \$160,000 To Settle EEOC Sexual Harassment And Retaliation Lawsuit (Oct. 15, 2018), available at <https://www.eeoc.gov/eeoc/newsroom/release/10-15-18.cfm>.

³³⁴ *Id.*

³³⁵ Complaint, *EEOC v. NDI Office Furniture, LLC*, No. 2:18-1592-JHE (N.D. Ala. Sep. 28, 2018), ECF No. 1.

³³⁶ Complaint, *EEOC v. Children's Home, Inc.*, No. 8:17-02262-EAK-JSS (M.D. Fla. Oct. 3, 2017), ECF No. 1.

³³⁷ See, e.g., Complaint, *EEOC v. Fanatics Retail Group, Inc.*, No. 3:18-900-J-32PDB (M.D. Fla. July 24, 2018), ECF No. 1.

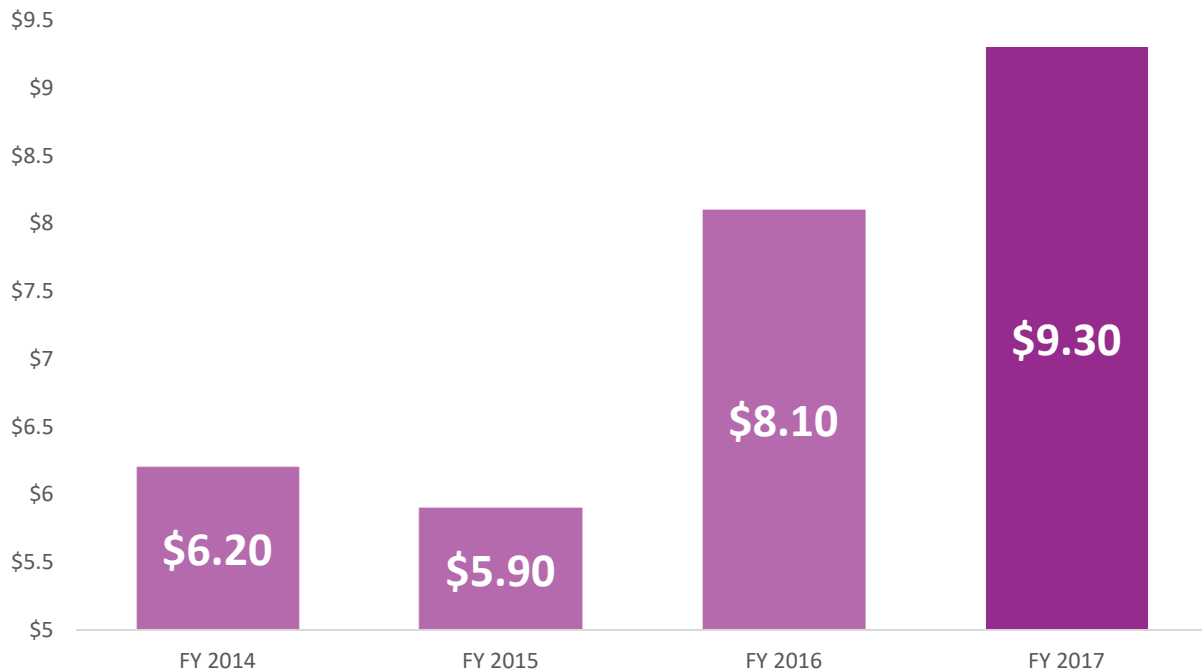
³³⁸ Complaint, *EEOC v. Recreational Ventures, Inc. d/b/a Court One*, No. 1:18-00806 Sep. 26, 2018), ECF No. 1.



Ensuring Equal Pay Protections For All Workers

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

Settlements of EPA Charge FY 2014 - 2017 (in millions)



“We don't just decry pay discrimination, we combat it over and over.... I remain committed to the EEOC's push for equal pay and have worked to ensure that our agency remains a leader in this area.” – Victoria Lipnic, Acting Chair

F. Enforcing Equal Pay Laws

The Equal Pay Act (“EPA”) was enacted by Congress in 1963, one year before Title VII of the Civil Rights Act of 1964. The EPA added section six to the Fair Labor Standards Act of 1938 (“FLSA”) and prohibits any employer having employees subject to any provisions of the FLSA from discriminating “between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which [it] pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions”³³⁹ The EPA therefore overlaps with Title VII, which prohibits a broader range of discrimination on the basis of sex, including wage discrimination.³⁴⁰

The EEOC has shown renewed interest in enforcing the EPA in recent years and has taken some concrete steps to increase its enforcement potential.³⁴¹

1. Recent Developments In Equal Pay Act Litigation

The EEOC has continued to aggressively push forward on its pay equity initiative. For example, on September 18, 2018, the EEOC filed suit against First Metropolitan Financial Services, Inc., a Memphis-based consumer loan and finance company, alleging that the company violated the EPA when it paid a class of female branch managers less than their male counterparts for doing essentially the same work.³⁴² The EEOC's lawsuit challenged the company's compensation system which has paid female branch managers less than males performing the same job since at least 2010. The purported class consists of female branch managers at different company branches in different cities across Tennessee and Mississippi. The EEOC alleges that in 2017, a female branch manager who worked in for the company in Tupelo and Fulton, Mississippi, brought the pay disparity issue to the company's attention. The EEOC alleges that the company refused to discuss the pay disparity or address her complaint. In the EEOC's press release regarding the filing of this complaint,

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

³⁴⁰ Title VII makes it unlawful for an employer to “fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment,” or “to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee,” because of such individual's sex. See 42 U.S.C. § 2000e-2(a)(1)-(2).

³⁴¹ Pay equity is also one of the most pressing topics on a statewide level, with numerous states passing their own equal pay laws and/or salary history bans to supplement the EPA. In 2018, New Jersey, Connecticut, Hawaii, Washington, Vermont, Delaware, and Illinois passed equal pay laws, joining California, New York, Massachusetts, Maryland, Oregon, and Puerto Rico. N.J. Stat. Ann. 34:11-56.13 (West); Conn. Gen. Stat. § 31-40z.; Hawaii Rev. Stat. § 378-2.3 (West); Wash. Rev. Code Ann. § 49.58.005 (West); Vt. Stat. Ann. Tit. 21, § 495m(c) (West); 19 Del. Code Ann. § 709B, 711; 820 Ill. Comp. Stat. Ann. 112/10 (West); Cal. Lab. Code § 1197.5 (West); N.Y. Lab. Law § 194 (McKinney); Mass. Gen. Laws Ann. ch. 149, § 105A (West); Md. Code Ann., Lab. & Empl. § 3-304 (West); Gen. Court. Mass., Ch. 177, *An Act to Establish Pay Equity* (2016); City of Philadelphia, Bill No. 160840, Sec. 1; Puerto Rico Act. No. 16; 348 Oregon Or. Rev. Stat. Ann. § 652.220 (West). See also Christine Hendrickson & Annette Tyman, *Equal Pay Day 2018: Introducing Seyfarth's Trends and Developments in Pay Equity Litigation Report and the 2nd Annual 50-State Pay Equity Desktop Reference* SEYFARTH SHAW CLIENT ALERTS (April 11, 2018), <https://www.seyfarth.com/publications/MA041118-LE>; Christine Hendrickson, Annette Tyman, Pamela L. Vartabedian, Michael L. Childers, Chantelle C. Egan, *The Pay Equity March on the West Coast Begins: Oregon Signs Expansive Equal Pay Law and San Francisco Considers Salary History Ban* SEYFARTH SHAW CLIENT ALERTS (June 8, 2017), <http://www.seyfarth.com/publications/OMM060817-LE2>.

³⁴² Complaint, *EEOC v. First Metropolitan Financial Services, Inc.*, No. 1:18-cv-00177 (N.D. Miss. Sept. 18, 2018), ECF No. 1.

Delner Franklin-Thomas, district director of the EEOC's Memphis District Office, reaffirmed the EEOC's commitment to enforcing equal pay violations: "Enforcing laws that require equal pay for women and men performing the same jobs remains a priority for the EEOC," said Delner Franklin-Thomas.³⁴³ "Equal pay is about fairness for everyone. Although we have made great strides in narrowing the wage gap between men and women, this case demonstrates that pay discrimination remains a serious problem in the workplace."³⁴⁴

In a setback for employers, on January 5, 2018, the U.S. Court of Appeals for the Fourth Circuit, in a 2-1 decision, reversed the District Court's grant of summary judgment in favor of the employer on an EPA claim and remanded the case for further proceedings. In *EEOC v. Maryland Insurance Administration*,³⁴⁵ the EEOC alleged that the Maryland Insurance Administration ("MIA") paid three former female fraud investigators less than it paid four former fraud investigators with comparable credentials and experience who were men. The EEOC presented evidence that while female investigators ended up earning \$45,503 to \$50,300 per year, the male investigators earned from \$47,194 to \$51,561 per year.³⁴⁶ The Fourth Circuit found that the plaintiffs met their prima facie burden of wage discrimination under the EPA. In assessing the employer's affirmative defenses, it noted that the burden on the employer "necessarily is a heavy one."³⁴⁷ The Fourth Circuit further agreed with the Tenth Circuit in holding that the EPA requires "that an employer submit evidence from which a reasonable factfinder could conclude not simply that the employer's proffered reasons *could* explain the wage disparity, but that the proffered reasons do *in fact* explain the wage disparity."³⁴⁸

MIA presented two reasons, other than gender, for the wage disparities. First, MIA used the state's Standard Salary Schedule, which classifies each position to a grade level and assigns each new hire to a step within that grade level. The Fourth Circuit rejected this defense, finding that MIA exercises discretion each time it assigns a new hire to a specific step and salary range based on its review of the hire's qualifications and experience.³⁴⁹ Second, MIA argued that the pay disparities were justified by the qualifications and experience of the comparators. This defense, too, failed. The Fourth Circuit emphasized that a viable affirmative defense under the EPA requires more than a showing that a factor other than sex could explain or may explain the salary disparity. Rather, the Fourth Circuit stated that the EPA requires that a factor other than sex actually explains the salary disparity.³⁵⁰

Two other cases in FY 2018 addressed pleading and proof requirements under the EPA. In *EEOC v. Enoch Pratt Free Library*,³⁵¹ The EEOC brought a representative action on behalf of female librarian supervisors alleging pay discrimination. The employer moved to dismiss, arguing that the EEOC did not allege pay discrimination with sufficient specificity because the complaint did not include sufficient details regarding the job responsibilities of the male librarian supervisors and the female librarian supervisors to determine whether they were performing equal work.³⁵² The Court disagreed, holding that the EEOC had pled that librarian supervisors required the same educational and

³⁴³ Press Release, Equal Employment Opportunity Commission, *EEOC Sues First Metropolitan Financial Services for Equal Pay Act Violation*, (Sept. 18, 2018), <https://www.eeoc.gov/eeoc/newsroom/release/9-19-18b.cfm>.

³⁴⁴ *Id.*

³⁴⁵ *EEOC v. Maryland Insurance Administration*, 879 F.3d 114, 124 (4th Cir. 2018).

³⁴⁶ *Id.* at 129.

³⁴⁷ *Id.* at 120.

³⁴⁸ *Id.*

³⁴⁹ *Id.*

³⁵⁰ *Id.* at 123.

³⁵¹ *EEOC v. Enoch Pratt Free Library*, No. 17-CV-2860, 2018 U.S. Dist. LEXIS 13297 (D. Md. Aug. 2, 2018).

³⁵² *Id.* at *5.

experiential qualifications, shared the same core duties of operating a branch library, managed moderate-sized staffs, and performed accompanying administrative duties.³⁵³ From this, the Court held that it was reasonable to infer that managing different branch libraries within the same city required the same substantive responsibilities in similar working conditions: “the plaintiff here did assert the job responsibilities of the employees at issue. The factor-by-factor comparison encouraged by the defendants is not necessary to state a plausible claim sufficient to survive a motion to dismiss.”³⁵⁴

In *EEOC v. Denton County*,³⁵⁵ the EEOC brought an action on behalf of a physician, alleging that her employer discriminated against her based on her gender in regards to pay and promotions in violation of Title VII of the Civil Rights Act and the Equal Pay Act. The parties cross-moved for summary judgment. The EEOC’s motion argued that there was no genuine issue of material fact that the EEOC has met its prima facie burden under the EPA and that the employer had failed to establish one of its statutory defenses; namely, that the salary difference was due to a factor other than sex.³⁵⁶ Defendant cross-moved, arguing that the EEOC could not establish its prima facie case and that it had established its affirmative defense.³⁵⁷ The Court refused to grant either motion with respect to this claim, saying it was “not convinced that [defendant] or the EEOC has met their respective burdens demonstrating that there is no material issue of fact as to the EEOC’s claim for violation of the Equal Pay Act entitling it to judgment as a matter of law.”³⁵⁸

2. Significant Settlements

The EEOC also settled a wave of pay equity lawsuits in FY 2018. In November 2017, the EEOC accepted an offer of judgment by a restaurant company. The U.S. District Court for the District of Kansas entered judgment in favor of the EEOC and found that the employer violated the EPA by paying men and women differently and by retaliating against a female employee who complained about the disparate treatment.³⁵⁹ Two high school friends had applied for and were offered jobs as pizza artists at the restaurant. When the female learned her male friend was offer \$8.25 per hour while her offer was \$8.00 per hour, she complained about the unequal pay. The company then allegedly withdrew both offers of employment because they had discussed pay.³⁶⁰ The Court ordered the employer to pay back pay, liquidated damages, compensatory damages and punitive damages for the violation. The Court further ordered the company to institute policy and training changes, and collect, analyze and report wage data to the EEOC for all of the company’s locations.³⁶¹

In July 2018, the EEOC settled an EPA case against a professional membership organization headquartered in Washington, D.C.³⁶² The EEOC had filed a complaint ten months earlier in September 2016 alleging that the organization paid a former Associate Editor lower wages than

³⁵³ *Id.* at *6.

³⁵⁴ *Id.* at *8.

³⁵⁵ *EEOC v. Denton County*, 2018 U.S. Dist. LEXIS 175794 (E.D. Tex. Oct. 12, 2018).

³⁵⁶ *Id.* at *21.

³⁵⁷ *Id.*

³⁵⁸ *Id.* at *22.

³⁵⁹ Complaint, *EEOC v. PS Holding LLC*, No. 2:17-cv-02513 CM-GEB (D. Kan. Sept. 5, 2017), ECF No. 1.

³⁶⁰ *Id.*

³⁶¹ Order, *EEOC v. PS Holding LLC*, No. 2:17-cv-02513 CM-GEB (D. Kan. Nov. 9, 2017), ECF No. 7.

³⁶² Press Release, Equal Employment Opportunity Commission, *National Association for The Education Of Young Children To Pay \$41,777 To Settle EEOC Equal Pay Lawsuit*, (July 17, 2018), <https://www.eeoc.gov/eeoc/newsroom/release/7-17-18b.cfm>.

those paid to a male counterpart for performing equal work.³⁶³ The organization had hired her in October 2011 as an Associate Editor in the Publications Department, receiving a starting salary of \$48,000. The EEOC alleged that she had over 30 years of editing and writing experience. Approximately five months later in March 2012, the EEOC alleged that the organization hired a male with 21 years of experience as an Associate Editor in the Publications Department, receiving a starting salary of \$56,000.³⁶⁴ The EEOC further alleged that in March 2015, the organization increased the charging party's salary to \$49,400 but increased the male counterpart's salary to \$57,680. The parties reached settlement, and the organization agreed to pay \$41,777.00 in back pay and liquidated damages and will furnish what the EEOC calls "significant equitable relief" to settle the lawsuit.³⁶⁵

The EEOC settled another lawsuit against a Washington D.C. business in early 2018. According to the lawsuit, the EEOC alleged that a commercial janitorial services company, paid a female janitorial worker less wages than a male janitorial worker for substantially equal duties.³⁶⁶ The EEOC alleged that in retaliation for asking about the pay disparity and asking the employer to increase her pay, the employer added cleaning the men's bathrooms to the female complainant's duties, even though the male janitor was responsible for the women's bathrooms, and made demeaning comments to her.³⁶⁷ In settling the lawsuit, the company agreed to pay \$23,461.60 in back pay and \$13,000 for other damages alleged by the EEOC. The settlement also includes injunctive relief in the form of an order prohibiting sex-based pay discrimination and retaliation, requirements that the employer revise its current discrimination and retaliation policies in English and Spanish, the provision of three hours of live, interactive anti-discrimination training, the retention of pay data for relevant jobs, and monitoring by the EEOC.³⁶⁸

The EEOC recently settled a lawsuit the agency had filed in June 2017 in U.S. District Court for the Eastern District of Arkansas. The EEOC alleged that a manager of programs and services at a juvenile correction facility in Alexander, Arkansas, hired a female as a facility investigator but paid her \$10,000 less than the male who had recently resigned the position.³⁶⁹ In July 2018, the parties reached settlement where the employer agreed to pay \$38,000 to the former employee, consisting of \$15,000 in back pay and \$23,000 in compensatory damages.³⁷⁰ As part of the consent decree, the employer also agreed to conduct EPA training for all employees by a qualified consultant. Faye A. Williams, regional attorney of the EEOC's Memphis District Office, stated: "[o]ne of EEOC's priorities is ensuring employees are paid equally when the employees perform the same job. An employee's gender can never be the basis for disparate treatment and pay."³⁷¹

³⁶³ Complaint, *EEOC v. National Association for the Education of Young Children.*, No. 1:17-cv-01989-BAH (D.C. Cir. Sept. 26, 2017), ECF No. 1.

³⁶⁴ *Id.*

³⁶⁵ Press Release, Equal Employment Opportunity Commission, *National Association for The Education Of Young Children To Pay \$41,777 To Settle EEOC Equal Pay Lawsuit*, (July 17, 2018), <https://www.eeoc.gov/eeoc/newsroom/release/7-17-18b.cfm>.

³⁶⁶ Complaint, *EEOC v. Vador Ventures d/b/a Total Quality Building Services*, No. 1:17-cv-01083-TSE-IDD (E.D. Va. 2017), ECF No. 1.

³⁶⁷ *Id.*

³⁶⁸ Order, *EEOC v. Vador Ventures d/b/a Total Quality Building Services*, No. 1:17-cv-01083-TSE-IDD (E.D. Va. 2018), ECF No. 13.

³⁶⁹ Complaint, *EEOC v. TrueCore Behavioral Solutions*, No. 1:17-cv-01989-BAH (E.D. Ark.) July 5, 2018), ECF No. 1.

³⁷⁰ *Id.*

³⁷¹ Press Release, Equal Employment Opportunity Commission, *TrueCore Behavioral Solutions to Pay \$38,000 To Settle EEOC Equal Pay and Title VII Lawsuit*, (July 6, 2018) <https://www.eeoc.gov/eeoc/newsroom/release/7-6-18.cfm>.

One month earlier, in June 2018, the EEOC settled another EPA case in the U.S. District Court of Colorado involving a class of female full professors at a law school in Denver, Colorado.³⁷² The EEOC's lawsuit alleged that as of October 2013, the difference between salaries of female full professors was \$19,781 less than those of male full professors, for substantially equal work.³⁷³ The EEOC further alleged that in December 2012, the dean of the law school authored a memorandum regarding the allocation of raises and admitted the salary disparity between male and female full law professors. However, the EEOC alleged that the university declined to take corrective action by adjusting salaries of female full professors.³⁷⁴ After twenty months of litigation, the parties settled for \$2,660,000 in monetary damages to seven female full professors.³⁷⁵ As part of the settlement, the university is required to increase the 2018 salaries of the seven female professors, implement an anti-discrimination policy and related complaint procedures, issue an annual, written publication of salary and compensation data for tenure, tenure-track, and contract faculty at the law school, and employ a labor economist to conduct an annual compensation equity study.³⁷⁶

Arguably, the most significant step the EEOC has taken in the last few years to ramp up its enforcement of the EPA is the changes that it tried to make to EEO-1 reports. The EEO-1 Report is a survey document that has been mandated for more than 50 years. Currently, employers with more than 100 employees, and federal contractors or subcontractors with more than 50 employees, are required to collect and provide to the EEOC demographic information in certain job categories.³⁷⁷ On February 1, 2016, the EEOC proposed changes to the EEO-1 report, which would have required more detailed reporting obligations for all employers with more than 100 employees.³⁷⁸ However, this decision came under widespread attack by business groups and Republican lawmakers.³⁷⁹ On August 29, 2017, the EEOC announced that the OMB, per its authority under the Paperwork Reduction Act, had immediately stayed the EEOC's pay data collection components of the EEO-1 Report that was to become effective on March 31, 2018.³⁸⁰ The next day, Acting Chair Lipnic, issued a statement advising employers that the EEO-1 Report used in previous years should be submitted by the March 31, 2018 deadline and stated that the EEOC would "review the order and our options."³⁸¹

³⁷² Press Release, Equal Employment Opportunity Commission, *University of Denver to Pay \$2.66 Million and Increase Salaries to Settle EEOC Equal Pay Lawsuit*, (June 1, 2018) <https://www.eeoc.gov/eeoc/newsroom/release/6-1-18.cfm>.

³⁷³ Complaint, *EEOC v. University of Denver*, No. 1:16-cv-02471-WYD-MJW (D Colo. 2016), ECF No. 132.

³⁷⁴ *Id.*

³⁷⁵ Consent Decree, *EEOC v. University of Denver*, No. 1:16-cv-02471-WYD-MJW (D Colo. 2018), ECF No. 132.

³⁷⁶ *Id.*

³⁷⁷ See Current EEO-1 Report, <https://www.eeoc.gov/employers/eeo1survey/upload/eeo1-2.pdf>.

³⁷⁸ See EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Agency Information Collection Activities: Revision of the Employer Information Report (EEO-1) and Comment Request*, <https://www.gpo.gov/fdsys/pkg/FR-2016-02-01/pdf/2016-01544.pdf>.

³⁷⁹ See U.S. Chamber of Commerce, *Request for Review; EEOC's Revision of the Employer Information Report*, <http://src.bna.com/mFi>; Letter from Lamar Alexander, Chairman of Committee on Health, Education, Labor and Pensions, & Pat Roberts, United States Senator, <http://src.bna.com/nTJ>; Equal Employment Advisory Counsel, *Review of the Equal Employment Opportunity Commission's Employer Information (EEO-1) Report (OMB Control Number 3046-0007)*, <http://src.bna.com/nUp>; Letter from Lamar Alexander, Chairman of Committee on Health, Education, Labor and Pensions, & Pat Roberts, United States Senator, <http://src.bna.com/nTJ>.

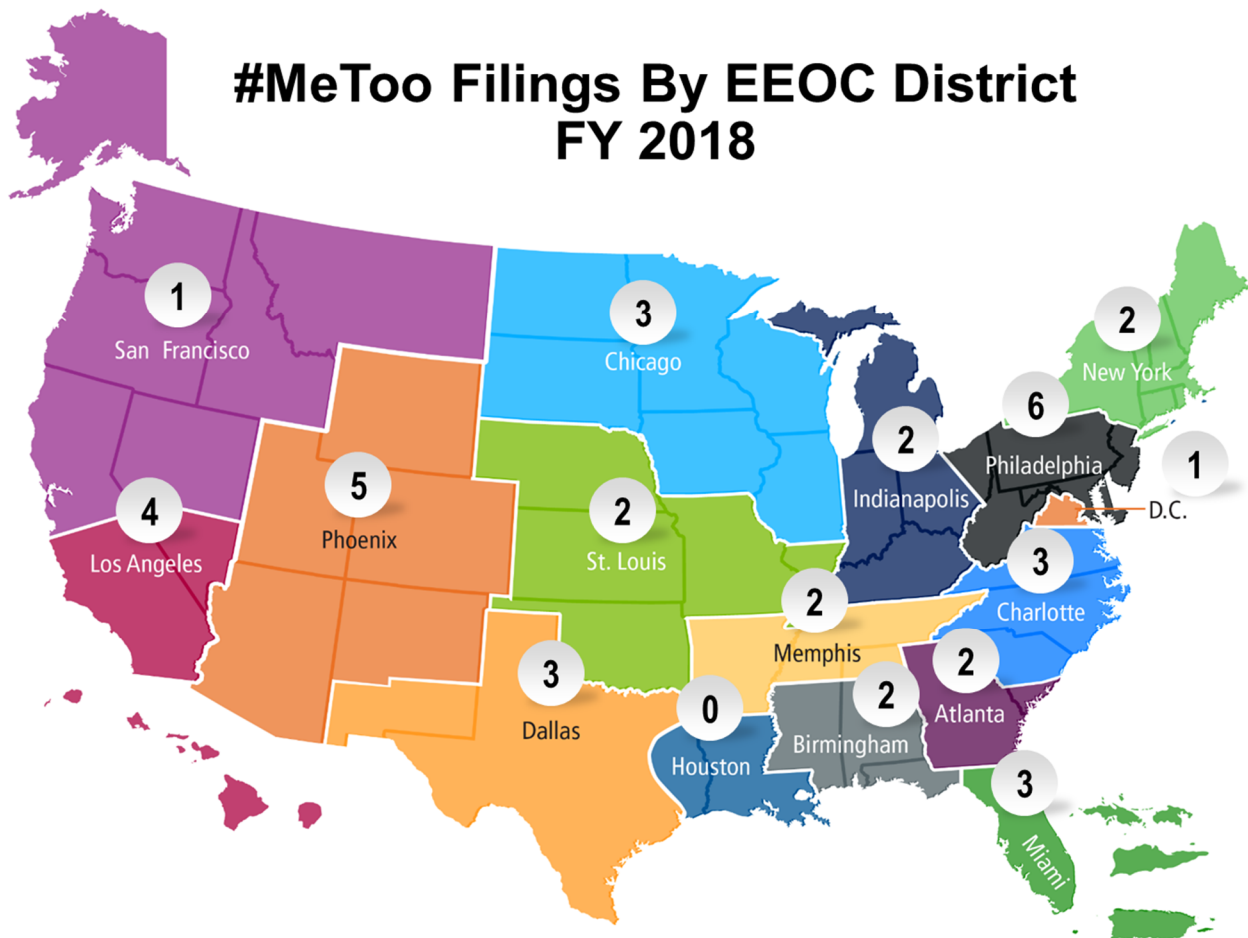
³⁸⁰ See Annette Tyman, Lawrence Z. Lorber, Michael L. Childers, *Breaking News: Revised EEO-1 "Component 2" Stayed Effective Immediately; Component 1 Still in Effect*, SEYFARTH SHAW CLIENT ALERTS (Aug. 29, 2017), <http://www.seyfarth.com/publications/OMM082917-LE2>.

³⁸¹ See EEOC, *What You Should Know: Statement of Acting Chair Victoria A. Lipnic about OMB Decision on EEO-1 Pay Data Collection*, <https://www.eeoc.gov/eeoc/newsroom/wysk/eeo1-pay-data.cfm>.



Preventing Systemic Harassment

Harassment continues to be one of the most frequent complaints raised in the workplace. Over 30 percent of the charges filed with EEOC allege harassment, and the most frequent bases alleged are sex, race disability, age, national origin and religion, in order of frequency.



“Combating all forms of workplace harassment remains a top priority of the EEOC. From the launch of the Select Task Force on the Study of Harassment in the Workplace in 2015, to the release of the Co-Chairs' Report in 2016, and through this past fiscal year, the EEOC ramped up its role as enforcer, educator, and leader.”

G. Preventing Harassment

1. The EEOC's Priorities And Objectives In The “#MeToo” Era

The EEOC has declared that preventing systemic harassment remains a substantive enforcement priority for 2017-2021.³⁸² Workplace harassment has been one of the EEOC's national enforcement priorities since 2013,³⁸³ and was among the subjects of a broader study of workplace harassment that in June, 2016 Report Of The Select Task Force On The Study Of Harassment In The Workplace (“Report”).³⁸⁴

The Report, co-authored by the EEOC's now Acting Chair Victoria Lipnic, found that workplace harassment on any basis – race, sex, national origin or other protected characteristic – remains persistent, accounting for one-third of all EEOC charges.³⁸⁵ Although workplace harassment is under-reported by as much as 75%, the Task Force suggested that it accounts for millions of dollars in legal liability in EEOC cases, decreased productivity, increased job turnover, and reputational harm.³⁸⁶

The Task Force made recommendations to both the EEOC and to employers for the effective prevention of workplace harassment. The Task Force recommended that the EEOC, as part of its settlement agreements, conciliation efforts, and consent decrees with employers, seek terms requiring employers to adopt policies, complaint procedures, investigatory procedures, and training compliant with EEOC expectations; including stylizing training to specific “cohorts” of employees in the workplace so as to empower front line managers to prevent harassment.³⁸⁷

In the year that followed, the EEOC published a companion piece to the Report entitled Proposed Enforcement Guidance on Unlawful Harassment (“Proposed Guidance”).³⁸⁸ The Proposed Guidance replaces several earlier EEOC guidance documents, aims to define what constitutes harassment, examines when a basis for employer liability exists, and offers suggestions for preventative practices.³⁸⁹ According to the Proposed Guidance, the EEOC will find harassing conduct to be unlawful if the conduct is based on an individual's race, color, national origin, religion, age, disability, or an individual or family member's genetic test or family medical history.³⁹⁰ Further, the Proposed Guidance specifically sets forth the EEOC's position that as a protected basis “sex” includes, but is not limited to, sex stereotyping, gender identity, sexual orientation, and pregnancy, childbirth, or

³⁸² See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION STRATEGIC ENFORCEMENT PLAN FY 2017 - 2011, *available at* <http://www.eeoc.gov/eeoc/plan/sep-2017.cfm>.

³⁸³ See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *EEOC Seeks Public Input on Proposed Enforcement Guidance on Harassment*, (Jan. 10, 2017) <https://www.eeoc.gov/eeoc/newsroom/release/1-10-17a.cfm>.

³⁸⁴ See SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE REPORT OF CO-CHAIRS CHAI R. FELDBLUM & VICTORIA A. LIPNIC (JUNE 2016), https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm. The Report found that anywhere from 25% to 85% of women report having experienced sexual harassment in the workplace, and that many women do not label certain forms of unwelcome sexually based behaviors as “sexual harassment” – even if they are viewed as problematic or offensive. *Id.*

³⁸⁵ *Id.*

³⁸⁶ *Id.*

³⁸⁷ *Id.*

³⁸⁸ Office of Legal Counsel, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *PROPOSED Enforcement Guidance on Unlawful Harassment*, (Jan. 10, 2017), <https://www.regulations.gov/docket?D=EEOC-2016-0009>.

³⁸⁹ See *id.*

³⁹⁰ *Id.* at 5-9.

related medical issues.³⁹¹ Moreover, the EEOC announced that it will entertain harassment claims based on (1) “perceived” membership in a protected class (even if the perception is incorrect),³⁹² (2) for “associational harassment,” where an employee who is a member of a protected class claims harassment based on his/her association with individuals who do not share their protected characteristics;³⁹³ (3) where the alleged harassment was not directed at the employee;³⁹⁴ and (4) in instances where the alleged harassment occurred outside of the workplace.³⁹⁵

To get ahead of enforcement litigation and its consequences, the EEOC recommends implementing a harassment prevention strategy by: clearly, frequently, and unequivocally stating that harassment is prohibited and will not be tolerated; allocating sufficient resources for effective harassment prevention strategies; providing appropriate authority to individuals responsible for creating, implementing, and managing harassment prevention strategies; allocating sufficient staff time for harassment prevention efforts; and assessing harassment risk factors and taking steps to minimize or eliminate those risks.³⁹⁶

The EEOC also recommends that every employer have a comprehensive anti-harassment policy that is written and communicated in a clear, easy-to-understand style and format, translated into all languages commonly used by employees, and provided to employees upon hire, during trainings, in the employee handbook, and posted centrally at locations commonly frequented by employees.³⁹⁷ Employers should review policies periodically, and update anti-harassment policies as needed.

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

³⁹¹ *Id.*; see e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989) (“In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.”); *Jameson v. U.S. Postal Serv.*, EEOC Appeal No. 0120130992, 2013 WL 2368729, at *2 (May 21, 2013) (stating that intentional misuse of transgender employee’s new name or pronoun may constitute sex-based harassment); *Walsh v. Nat’l Computer Sys., Inc.*, 332 F.3d 1150, 1160 (8th Cir. 2003) (upholding jury verdict in pregnancy based hostile work environment claim where evidence showed that plaintiff was harassed because she had been pregnant and taken maternity leave, and might become pregnant again); *EEOC v. Houston Funding II, Ltd.*, 717 F.3d 425, 430 (5th Cir. 2013) (holding that Title VII prohibits discharging an employee because she is lactating or expressing breast milk).

³⁹² U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *PROPOSED Enforcement Guidance on Unlawful Harassment*, *supra* note 388, at 9; see e.g., *EEOC v. WC&M Enters, Inc.*, 496 F.3d 393, 401-02 (5th Cir. 2007) (concluding that the EEOC presented sufficient evidence to support its national origin harassment claim where coworkers harassing comments did not accurately describe employees actual country of origin).

³⁹³ U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *PROPOSED Enforcement Guidance on Unlawful Harassment*, *supra* note 388, at 9; see e.g., *Barrett v. Whirlpool Corp.*, 556 F.3d 502, 513-14 (6th Cir. 2009) (holding that white employees could allege claim of racial harassment based on their friendship with and advocacy on behalf of African American coworkers).

³⁹⁴ U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *PROPOSED Enforcement Guidance on Unlawful Harassment*, *supra* note 388, at 12; see e.g., *Ellis v. Houston*, 742 F.3d 307, 320-21 (8th Cir. 2014) (concluding that district court erred in evaluating plaintiffs’ section 1981 and section 1983 claims of racial harassment by examining in isolation harassment personally experienced by each plaintiff, rather than also considering conduct directed at others, where every plaintiff did not hear every remark, but each plaintiff became aware of all of the conduct).

³⁹⁵ U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *PROPOSED Enforcement Guidance on Unlawful Harassment*, *supra* note 388, at 18.

³⁹⁶ *Id.* at 71.

³⁹⁷ *Id.* at 72-73.

for harassment; conveys the results of the complaint to the complainant and alleged harasser; and takes preventative and corrective action where appropriate.³⁹⁸

Finally, the EEOC in its Proposed Guidance emphasizes the importance of effective harassment training. This training should be supported by senior leaders, repeated and reinforced regularly, provided to all employees regardless of level and location, provided in all languages commonly used by employees, tailored to the specific workplace and workforce, conducted by qualified trainers, and regularly evaluated by participants and revised as needed.³⁹⁹

2. Enforcement Litigation Filings Increase Dramatically In FY 2018

The coupling of the “#MeToo” movement with the Task Force Report, the Proposed Guidance and the EEOC’s strategic priorities yielded a fiscal year that saw a dramatic, coordinated increase in EEOC enforcement litigation filings for sexual harassment. The EEOC filed 41 enforcement litigations in 23 states plus the District of Columbia, a 50% increase from FY 2017.⁴⁰⁰ Fourteen of fifteen district offices plus the District of Columbia Field Office filed sexual harassment lawsuits in FY 2018, with the Philadelphia District Office leading the way with six filings, followed by the Phoenix District Office with five filings, the Los Angeles District Office with four filings, and the Chicago, Birmingham and Miami district offices filing three apiece.

The EEOC’s campaign of nationwide filings challenging workplace harassment across a broad cross-section of industries and employers, particularly targeting fast food and other restaurants, staffing agencies, and senior care or assisted living facilities and services. While most frequently the EEOC brought enforcement litigation relative to the interests of one or two charging parties, the EEOC also brought numerous lawsuits bringing claims not only against specifically named charging parties, but also on behalf of the interests of unnamed “aggrieved individuals” who were alleged to have been subjected to unlawful sexual harassment by the employer.

Among the alleged interpersonal conduct challenged by the EEOC were:

- offensive comments about physical appearance;
- offensive comments or questions about sexuality or social life;
- showing pornographic images and videos, particularly on cell phones;
- following or stalking;⁴⁰¹
- posting online photos from consensual sex acts;
- physical touching such as brushing against, groping, grabbing, pinching, grinding against, causing an employee to fall; placing employee in a choke hold; forcing an employee onto “all fours”; or touching genitalia;

³⁹⁸ *Id.*

³⁹⁹ *Id.*

⁴⁰⁰ Press Release, Equal Employment Opportunity Commission, EEOC Releases Preliminary FY 2018 Sexual Harassment Data (Oct. 4, 2018), available at <https://www1.eeoc.gov/eeoc/newsroom/release/10-4-18.cfm>.

⁴⁰¹ See e.g., Complaint, *EEOC v. Mediacom Communications Corp.*, No. 7:18-00166 (M.D. Ga. Sept. 26, 2018), ECF No. 1 at 4-5; Complaint, *EEOC v. Total Maintenance Solutions*, No. 1:18-00413 (S.D. Ohio June 13, 2018), ECF No. 1 at 4; Complaint, *EEOC v. United Airlines, Inc.*, No. 5:18-00817 (W.D. Tex. Aug. 9, 2018), ECF No. 1 at 7.

- assault or rape;
- *quid pro quo* - offering favorable terms of employment in exchange for sex acts; and
- retaliation, including cutting hours, demotion, terminating employee or her family member after employee complained about offensive conduct.

Leveraging specific and often salacious allegations of misconduct against individually named employees, the EEOC also is framing its complaints to challenge as unlawful the following alleged practices or omissions of employers:

- No or ineffective policies prohibiting sexual harassment or discrimination;
- No or ineffective policies regarding internal complaint procedures;
- No or ineffective sexual harassment training for the workforce;
- Failure to post EEOC notices in the workplace;
- Refusal to accept an internal complaint from an employee;
- Failure to investigate, or to investigate thoroughly;
- Assigning a complaining employee to work with a known harasser;
- Subjecting a complaining employee to reduced hours, changed assignment of lesser quality, demotion, constructive discharge or termination; and
- Allowing conduct so notorious and pervasive that the employer “knew or should have known” of a hostile work environment in the workplace.

3. Enforcement Litigation Advances “#MeToo” Cases For Men

Consistent with its stated priorities and Proposed Guidance to treat discrimination and harassment on the basis of sexual identity, orientation, or the perception of orientation as unlawful harassment on the basis of sex, the EEOC brought four new enforcement litigations seeking relief on behalf of men complaining of sexual harassment.

In *EEOC v. Michael L. Riddle Painting, Inc.*,⁴⁰² the EEOC alleges sexual harassment against a male employee by male co-workers who engaged in persistently offensive sexual comments, pinching the complainant’s nipples, and other offensive touching.⁴⁰³ The EEOC alleges that the employer had no effective sexual harassment policies in place, and constructively discharged the complainant.⁴⁰⁴

In *EEOC v. Master Marine, Inc.*,⁴⁰⁵ the EEOC alleges pervasive sexual comments by a lead welder about the complainant’s body, and offensive touching by grabbing or poking the complainant’s buttocks.⁴⁰⁶ Here the EEOC also alleges that the harassment was open and notorious, but that

⁴⁰² Complaint, *EEOC v. Michael L. Riddle Painting, Inc., d/b/a Riddle Painting & Coating*, No.2:18-02990-DLR (D. Ariz. Sep. 21, 2018), ECF No.1.

⁴⁰³ *Id.* at 4-5.

⁴⁰⁴ *Id.* at 5.

⁴⁰⁵ Complaint, *EEOC v. Master Marine, Inc.*, No. 1:18-cv-00269 (S.D. Ala. June 13, 2018), ECF No. 1.

⁴⁰⁶ *Id.* at 3-4.

human resources and the employer's president failed to respond to complaints about the harassing conduct.⁴⁰⁷

In *EEOC v. Atlas Electrical Construction, Inc.*,⁴⁰⁸ the EEOC alleges that a supervisor and co-workers used graphically sexual language and slurs, calling the complainant a "fag" and "transvestite," and subjecting him to offensive touching.⁴⁰⁹ The EEOC alleges that the employee requested a transfer due to the harassment, that the employer knew or should have known of the unlawful conduct, and yet upon receipt of the employee's complaint and request for transfer, the employer terminated the complainant's employment ostensibly for walking off the job.⁴¹⁰

Finally, in *EEOC v. Mejia Corp. d/b/a El Tio Tex-Mex Grill*,⁴¹¹ the EEOC alleges that the complainant was subjected to harassment including mocking his voice and anti-gay statements including that "all gays should just die."⁴¹² Here, the EEOC seeks relief not only for the complainant, but also for other "aggrieved individuals" subjected to harassment by the employer on the basis of sexual orientation and, therefore, sex.⁴¹³

4. Notable EEOC Harassment Settlements In FY 2018

The EEOC achieved early success on its FY 2018 filings with its prompt resolution of *EEOC v. Anchor Staffing, Inc.*⁴¹⁴ on June 22, 2018. The EEOC recovered \$30,000 in settlement for a female employee of a staffing company who complained of sexual harassment while on assignment.⁴¹⁵ The EEOC also secured a consent decree with the staffing company pursuant to which it was required to monitor complaints of sexual harassment by its assigned personnel for a period of two years.⁴¹⁶

The EEOC also announced a settlement for \$3.5 million in a FY 2017 sexual harassment litigation, *EEOC v. Alorica, Inc.*⁴¹⁷ There, the EEOC recovered a monetary settlement on behalf of a class of both male and female employees allegedly subjected to sexual harassment in the workplace.⁴¹⁸ The EEOC also negotiated a three year consent decree, pursuant to which the employer was required to hire a third-party monitor, create new positions for compliance officer and equal employment opportunity consultant, revise its policies, and implement civility and bystander intervention training for its employees.⁴¹⁹

⁴⁰⁷ *Id.* at 5.

⁴⁰⁸ Complaint, *EEOC v. Atlas Electrical Construction, Inc.*, No. 1:18-000903 (D.N.M. Sep. 25, 2018), ECF No. 1.

⁴⁰⁹ *Id.* at 3-4.

⁴¹⁰ *Id.* at 6-7.

⁴¹¹ Complaint, *EEOC v. Mejia Corp. d/b/a El Tio Te-Mex Grill*, No. 1:18-01226 (E.D. Va. Sep. 26, 2018), ECF No. 1.

⁴¹² *Id.* at 3-4.

⁴¹³ *Id.* at 7.

⁴¹⁴ Press Release, Equal Employment Opportunity Commission, Anchor Staffing To Pay \$30,000 To Settle EEOC Sex Harassment And Retaliation Case (June 22, 2018), available at <https://www.eeoc.gov/eeoc/newsroom/release/6-22-18.cfm>

⁴¹⁵ *Id.*

⁴¹⁶ *Id.*

⁴¹⁷ Press Release, Equal Employment Opportunity Commission, Alorica Settles EEOC Sexual Harassment Lawsuit For \$3.5 Million (Aug. 1, 2018), available at <https://www.eeoc.gov/eeoc/newsroom/release/8-1-18.cfm>.

⁴¹⁸ *Id.*

⁴¹⁹ *Id.*

Given the continuing attention being paid to this issue by the EEOC, the news media, and the public at large, we expect that this trend of increased enforcement of sexual harassment lawsuits will continue for the foreseeable future.



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