

ANNUAL REPORT ON EEOC DEVELOPMENTS: FISCAL YEAR 2011

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

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

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INTRODUCTION

Over the years, Littler has provided periodic reports on significant cases, regulatory developments and other activities involving the Equal Employment Opportunity Commission (“EEOC” or “Commission”). While such guidance is intended to update employers on significant EEOC developments as they arise, we believe that employers can also benefit from an annual update and overview of key EEOC developments. Accordingly, Littler is pleased to provide this inaugural edition of its **Annual Report on EEOC Developments—Fiscal Year 2011** (hereafter this “Report”).

Over the past fiscal year, we have monitored EEOC lawsuits, subpoena enforcement actions, EEOC settlements, regulatory developments and related activities, and court opinions in which the EEOC has been a party. Within this report, we have highlighted significant developments and trends that we believe may be helpful in your day-to-day dealings with the EEOC.

Part One of this Report provides an overview of EEOC charge activity, litigation and settlements over the past year, including highlighting the types and location of lawsuits filed by the EEOC. As anticipated, there has been a continued focus on systemic and multiple victim lawsuits. Significant settlements and jury trial verdicts also are highlighted.

In **Part Two**, key regulatory developments are reviewed, including the EEOC’s activities beyond formal regulatory efforts, as well as areas in which the EEOC plans to focus its efforts during the coming year.

Part Three highlights key court cases addressing a number of topics, including: (1) the permitted scope of EEOC investigations and noteworthy subpoena enforcement actions; (2) significant pleading issues that have arisen in lawsuits filed by the EEOC; (3) recent developments involving the limitations period applicable to individuals on whose behalf the EEOC may seek relief in pattern or practice litigation; (4) conciliation efforts and cases in which courts have challenged EEOC actions based on the Commission’s failure to engage in good faith conciliation; (5) recent cases addressing discovery, including reviewing a recent trend by the courts to treat the EEOC in a manner similar to other plaintiffs in EEO litigation; (6) noteworthy summary judgment rulings in EEOC litigation, particularly focusing on pattern or practice litigation; and (7) rulings in which courts have awarded attorneys’ fees and costs to employers that have prevailed in actions initiated by the EEOC.

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

I. OVERVIEW OF EEOC CHARGE ACTIVITY, LITIGATION AND SETTLEMENTS

A. Level of Charge Activity

On November 15, 2011, the EEOC announced the publication of the FY 2011 Performance and Accountability Report (referenced herein as the “EEOC Annual Report”).¹ As discussed in its Annual Report, during FY 2011 the EEOC received a record number of charges—a total of 99,947 charges—the highest number of charges in its 46-year history.² Since FY 2006, there has been a dramatic increase in the level of charge activity, except for a minor dip in FY 2009, as shown by the following:

FISCAL YEAR	NUMBER OF CHARGES
2006	75,768
2007	82,792
2008	95,402
2009	93,277
2010	99,922
2011	99,947

B. Time Targets in Response to Discrimination Charges

It is anticipated that during FY 2012 the EEOC will continue to press employers to timely respond to charges of discrimination. Based on performance standards placed on the EEOC for FY 2011, the Commission was expected to resolve 51% of its private sector charges within 180 days.³ As of the end of FY 2011, the Commission had processed 40.7% of its charges within 180 days or less, which was significantly below its target. The EEOC attributed its failure to meet this target to its large pending backlog (*i.e.*, referred to as its “inventory”) of charges, the increased number of charges, and a shortage of front line staff. Notwithstanding these factors, the EEOC underscored its inventory reduction from FY 2010 by more than 8,000 charges. Despite this reduction, as of the end of FY 2011, the Commission still had a backlog of 78,136 charges.⁴

Employers should anticipate that EEOC investigators will have greater pressure placed on them by District Directors during the coming year in hitting the 180-day target, which means that the EEOC may not be particularly receptive to granting extensions for the initial response to a charge, and will likely provide very short timelines for supplemental requests for information.⁵

C. Continued Focus on Systemic Investigations and Litigation

In March 2006, as part of the EEOC’s Systemic Task Force Report, the Commission reported that “combating systemic discrimination should be a top priority at [the] EEOC and an intrinsic, ongoing part of the agency’s daily work.” While the EEOC had been involved in systemic investigations long before the Task Force was formed, the Commission clearly has been committed to expanding this initiative since 2006. The EEOC’s Systemic Task Force defined systemic cases as “pattern or practice, policy and/or class cases where the alleged discrimination has a broad impact on an industry, profession, company, or geographic location.”

In the 2011 Annual Report, the EEOC underscored that the agency “places a high priority on issues that impact large numbers of job seekers, and employees,” and “therefore devoted resources to investigating and litigating cases of systemic discrimination as a top agency priority.”⁶ The Commission described its investment in resources to focus on these cases, explaining:⁷

1 The EEOC refers to the FY 2011 Performance and Accountability Report as the “PAR” for FY 2011. See <http://www.eeoc.gov/eeoc/plan/2011par.cfm> and EEOC Press Release (11/15/11) at <http://eeoc.gov/eeoc/newsroom/release/11-15-11a.cfm>. See also Littler’s Washington D.C. Employment Law Update blog (herein “Littler D.C. Update”), EEOC Receives a Record Number of Private Sector Discrimination Charges and Secures Highest Amount in Damages in FY 2011 (B. Hartstein, Nov. 18, 2011). Various data discussed above based on the 2011 FY Annual Report are compared to the 2010 FY Annual Report available at, <http://www.eeoc.gov/eeoc/plan/2010par.cfm>

2 The EEOC’s FY 2011 commenced on October 1, 2010 and ended on September 30, 2011.

3 EEOC Annual Report at 13. In 2010, the EEOC’s target was 48% of private sector charges resolved within 180 days. For FY 2012, the target percentage will increase to 54% of private charges resolved within 180 days. See <http://www.eeoc.gov/eeoc/plan/2010par.cfm>.

4 EEOC Annual Report at 17.

5 Certain EEOC offices have a longstanding policy of not granting an employer any extensions in its initial response to a charge.

6 EEOC Annual Report at 19.

7 EEOC Annual Report at 19.

The agency has hired experts in the fields of statistics, industrial psychology and labor market economics who will partner with district offices to work on larger cases. The agency will continue to assess whether additional or different types of expertise would aid in building the systemic program.

The EEOC has relied on “systemic coordinators, lead investigators, and attorneys with a dedicated portal for shared access to national case information, systemic libraries, and systemic guidance documentation” within its Document Management System. The Annual Report also referred to the Commission’s expanded use of its “CaseWorks” system, “which provides a central shared source of litigation support tools that facilitate the collection and review of electronic discovery and enable collaboration in the development of cases for litigation.”⁸

At the end of FY 2011, the EEOC maintained 580 active systemic investigations (*i.e.*, as compared with 465 active systemic investigations at the end of FY 2010), involving 2,067 charges. There also has been a steady increase in the number of Commissioner Charges, which focus on systemic-related claims.⁹ As an example, 47 Commissioner Charges were issued in FY 2011, as compared to 39 Commissioner Charges in FY 2010. Even more striking is the fact that there were only 15 Commissioner Charges in investigation as of March 2006, when the systemic initiative began.¹⁰

The FY 2011 Annual Report also referred to having filed 39 “subpoena enforcement and other actions,” which typically involved systemic investigations. The EEOC reported that it had “resolved” 36 of these actions by the end of FY 2011. In comparison, the EEOC filed only 21 subpoena enforcement actions in FY 2010.¹¹

As part of its systemic initiative, the EEOC also reported that it has been “building systemic enforcement partnerships,” both within the EEOC and with other federal agencies. The Commission pointed to cooperative efforts among various field offices, citing the filing of a systemic lawsuit against a private sector employer based on such efforts. The Annual Report also noted a pilot project between the EEOC and the DOL’s Office of Federal Contract Compliance Programs (OFCCP) in which the two agencies “shared systemic case information” and “subsequently met to discuss case strategies and available information for further examination of specific employers.”¹²

In dealing with “strategic enforcement,” such as equal pay compliance, the EEOC referred to playing a leading role in developing an “integrated, interagency civil rights agenda to address compensation discrimination in employment.”¹³ Aside from the National Equal Pay Enforcement Task Force, which met during the summer of 2010 and developed various recommendations, follow up efforts included a February 8, 2011, EEOC-hosted forum involving the EEOC, DOJ and OFCCP, which led to the development of various training and pilot programs for EEOC, DOJ and OFCCP personnel focusing on equal pay issues.¹⁴

D. EEOC Litigation and Systemic Initiative

For FY 2011, the EEOC filed 261 “merit-based” lawsuits across the U.S. This was an increase of 11 lawsuits over FY 2010. This included a total of 177 individual lawsuits and 84 “multiple victim” lawsuits (32% of the total).¹⁵

In reviewing all new court filings, the EEOC reported that the lawsuits filed included 162 Title VII claims, 80 Americans with Disabilities Act (ADA) claims, 26 Age Discrimination in Employment Act (ADEA) claims and two Equal Pay Act (EPA) claims.¹⁶

With respect to the EEOC’s efforts on behalf of “multiple victims” and the EEOC’s systemic initiative, the EEOC’s Annual Report noted as follows:

- For FY 2011, the EEOC completed work on 235 systemic investigations that resulted in 35 settlements or conciliation agreements and the EEOC reported recovering \$9.6 million based upon settlement of the various systemic cases.¹⁷

8 EEOC Annual Report at 21.

9 A discussion of the EEOC’s legal authority for Commissioner charges is discussed in Section III, *infra*, in the section the “Scope of EEOC Investigations and Subpoena Enforcement Actions.”

10 EEOC Annual Report at 19. *See also*, EEOC 2010 Annual Report, available at, <http://www.eeoc.gov/eeoc/plan/2010par.cfm>.

11 EEOC Annual Report at 19.

12 EEOC Annual Report at 20.

13 EEOC Annual Report at 21.

14 EEOC Annual Report at 22.

15 EEOC Annual Report at 19.

16 EEOC Annual Report at 19.

17 EEOC Annual Report at 19. In the Annual Report, the Commission also noted that it resolved 34 systemic cases, eight of which included at least 100 aggrieved individuals. EEOC Annual Report at 20.

- For FY 2011, 96 systemic investigations resulted in “reasonable cause” determinations.¹⁸
- Among the 443 lawsuits on its active docket at the end of FY 2011, 116 (26%) involved alleged multiple victims and 63 (14%) involved challenges to systemic discrimination.¹⁹
- Among the 84 multiple victim suits filed in FY 2011,²⁰ this included 23 systemic cases with at least 20 known expected class members—the EEOC described the FY 2011 systemic filings as “9 percent of all merit filings,” which was “the largest volume of systemic suit filings since tracking started in FY 2006.”²¹

E. Review of EEOC Litigation

YEAR	INDIVIDUAL CASES	“MULTIPLE VICTIM” CASES	PERCENTAGE
2005	244	139	36%
2006	234	137	36%
2007	221	115	34%
2008	179	111	38%
2009	170	111	39.5%
2010	159	92	38%
2011	177	84	32%

Particularly noteworthy is that a substantial number of EEOC lawsuits were filed in the last 2 months of the EEOC’s fiscal year. Between August 1, 2011 and September 30, 2011, the EEOC filed approximately 185 lawsuits. Among these cases, approximately 65 cases involved multiple-victim claims.

The top states for EEOC lawsuits over the past fiscal year were as follows:²²

JURISDICTION	# OF LAWSUITS FILED
California (CA)	26
Texas (TX)	26
Georgia (GA)	18
North Carolina (NC)	18
Michigan (MI)	16
Illinois (IL)	15
Indiana (IN)	15
Arizona (AZ)	13
Tennessee (TN)	10
Maryland (MD)	9
New Mexico (NM)	9
Virginia (VA)	9

¹⁸ EEOC Annual Report at 19-20.

¹⁹ EEOC Annual Report at 4.

²⁰ Among the 84 new court filings in FY 2011 involving “multiple victims,” 61 suits were described as having fewer than 20 victims. See EEOC Annual Report at 19.

²¹ The Annual Report reviewed the increase in the number of systemic lawsuits filed over the past five years. The EEOC reported: (1) 20 systemic suits were filed in FY 2010; (2) 19 systemic suits were filed in FY 2009; (3) 17 systemic suits were filed in FY 2008; (4) 14 systemic suits were filed in FY 2007; and (5) 11 systemic suits were filed in FY 2006. EEOC Annual Report at 20.

²² Littler monitored EEOC court filings over the past fiscal year. The above state-by-state breakdown of lawsuits filed as well as the table summarizing the types of claims filed are based upon a review of federal court filings in the United States. The EEOC does not publish a report that is publicly available with this type of information.

It also is noteworthy that among the various lawsuits filed over the past fiscal year, the following types of claims were included among the various causes of action:

TYPE OF CLAIM	INCLUDED IN # OF LAWSUITS ²³
Disability Discrimination	80
Retaliation	73
Sexual Harassment	56
Race Discrimination	34
Subpoena	32
Age Discrimination	21
Pregnancy Discrimination	20
National Origin Discrimination	16
Sex Discrimination	18
Religious Discrimination	14
Racial Harassment	8
National Origin Harassment	3
Wage Discrimination	2
Age Harassment	1
Color Discrimination	1

F. Mediation Efforts

Finally, in reviewing its efforts over the past year, the EEOC placed a strong emphasis on its mediation program, commenting, “The EEOC’s mediation program has continued to be a very successful part of our enforcement operations.”²⁴ The EEOC reported that for FY 2011, the EEOC’s private sector mediation program resulted in the “highest number of resolutions in the history of the program, with a total of 9,831 resolutions, 5 percent more than the 9,362 resolutions reported in FY 2010.”²⁵ The EEOC referred to obtaining more than \$170 million through the mediation program, which was an increase from \$141 million in FY 2010.

The Commission reported that according to a survey of participants in the mediation program, 96.9 percent reported confidence in the program and that they would return to the EEOC’s mediation program in the future.²⁶

The EEOC also referred to expanded employer participation in Universal Agreements to Mediate (UAMs), which refer to an employer’s commitment to consider mediating charges of discrimination. As of the end of FY 2011, the EEOC had a cumulative multi-year total of 1,998 UAMs, which the EEOC referred to as an 11.8 percent increase from FY 2010.²⁷

G. Significant EEOC Settlements and Jury Verdicts

There were a sizeable number of multi-million dollar settlements and some noteworthy jury verdicts involving the EEOC over the past year. According to the EEOC, in FY 2011 a total of 277 merits suits were resolved resulting in \$90.9 million in monetary recovery.²⁸ Broken down by types of discrimination charges, Title VII claims were involved in 215 resolutions; ADA claims in 42; ADEA claims in 26; and EPA claims in two resolutions. With respect to monetary recovery for direct, indirect, and intervention lawsuits by statute, the EEOC secured \$54.3 million in Title VII resolutions; \$27.1 million in ADA resolutions; \$8.4 million in ADEA resolutions; and \$1.1 million in resolutions involving more than one statute.²⁹

23 The information set forth in this chart is based upon Littler’s monitoring efforts as discussed in footnote 22, *supra*. The EEOC frequently filed lawsuits with multiple claims and we catalogued the type of claim based on its inclusion in a lawsuit, whether it was the only claim or one of many claims. As an example, of the 73 retaliation cases, 51 also included discrimination or harassment claims. For the lawsuits that involved solely discrimination, seven of those involved two or more protected classifications.

24 EEOC Annual Report at 18.

25 EEOC Annual Report at 18.

26 EEOC Annual Report at 18.

27 EEOC Annual Report at 18.

28 EEOC Annual Report at 19.

29 EEOC Annual Report at 19.

While the majority of the EEOC's litigation remains "single victim" cases, the trends of the Commission's filing and settling of systemic, pattern or practice and "class" types of claims may assist employers when evaluating their corporate policies or practices that may be susceptible to an EEOC challenge. Attached to this report as "Appendix A" is a summary of significant EEOC settlements and jury verdicts for FY 2011 involving systemic, pattern or practice and "class" related litigation.³⁰

II. EEOC REGULATORY AGENDA, RELATED DEVELOPMENTS AND PLANNED AGENDA

A. Update on the Commission

During FY 2011, the EEOC was positioned to move forward with various policy initiatives. In March 2010, President Obama announced the recess appointments of Democrat Jacqueline Berrien as Chair, Democrat Chai Feldblum, and Republican Victoria Lipnic to the Commission. Prior to their appointment, the Commission had been operating with only two Commissioners since the end of December 2009. Berrien, Feldblum and Lipnic joined Democrat Stuart Ishimaru and Republican Constance Barker to complete the five-member Commission.

On December 23, 2010, the Senate officially confirmed Berrien, who had previously worked as Associate Director-Counsel of the NAACP Legal Defense and Educational Fund, to a term ending on July 1, 2014. At the same time, the Senate confirmed Feldblum, who had been Director of Georgetown Law Center's Federal Legislation and Administrative Clinic, and co-director of Workplace Flexibility 2010, to a term ending on July 1, 2013.³¹ Lipnic, who had served as U.S. Assistant Secretary of Labor for Employment Standards from 2002 until 2009, was confirmed for a term ending July 1, 2015. The Senate also confirmed P. David Lopez in the critical position of General Counsel.³² Barker's term expired July 1, 2011, but she was renominated for another five-year term, and was confirmed by the Senate on September 27, 2011.

Commissioner Ishimaru's term expires July 1, 2012. With the full five-member Commission and General Counsel confirmed, employers over the past year have witnessed an active regulatory agenda and aggressive and strategic enforcement activities.

B. EEOC Regulatory Agenda

The Commission already has in motion an extremely ambitious agenda, which includes recently enacted regulations involving the Genetic Non-Discrimination Act of 2008 (GINA), final regulations under the Americans With Disabilities Act Amendments Act (ADAAA), renewed focus on age discrimination issues and updated recordkeeping and data collection requirements. In connection with the regulatory Executive Order 13563, the EEOC solicited public comments on its plan to conduct a retrospective review of its existing significant regulations to determine whether any of those regulations should be modified, streamlined, expanded, or repealed, to make the EEOC's regulatory program³³ more effective and/or less burdensome in achieving its regulatory objectives.³⁴

1. GINA Final Regulations

As one of its first acts as a full Commission, the EEOC approved the final regulations implementing Title II of GINA. The Commission issued its final rule on November 9, 2010, providing guidance on an employer's compliance obligations under GINA, which implicate a number of policies and programs ranging from fitness-for-duty exams to wellness programs. The final regulations reflect, to some degree, consideration of employer concerns with the proposed rule.³⁵

30 Littler monitored EEOC press releases regarding settlement during FY 2011. The significant settlements as summarized in Appendix A, include settlements over \$1 million in systemic, pattern or practice and class cases, and they are organized by settlement amount. To be sure, the EEOC settled some single claimant claims as well as some systemic, pattern or practice and "class" litigation for amounts well under \$1 million. For purposes of this report, however, we have provided a snapshot of the areas where employers might be most exposed based on their policies and practices.

31 Workplace Flexibility 2010 is a campaign to support the development of a comprehensive national policy on workplace flexibility, discussed at <http://www.workplaceflexibility2010.org/>.

32 A more detailed background on the Chair, Commissioners and EEOC General Counsel is contained in the EEOC Press Release announcing the recent confirmations at <http://www.eeoc.gov/eeoc/newsroom/release/12-23-10.cfm>.

33 <http://www.eeoc.gov/laws/regulations/index.cfm>.

34 See http://www.eeoc.gov/laws/regulations/comment_retrospective.cfm.

35 The final GINA regulations are summarized in the *Littler D.C. Update* available at, <http://www.dcmplemploymentlawupdate.com/2010/11/articles/agency-rulemaking/eeoc-issues-final-gina-regulations/>. A comprehensive summary also is included in Littler's ASAP, *EEOC Issues Long-Awaited Final Regulations On the Genetic Information Nondiscrimination Act*, (Nov. 2010) which is available on Littler.com.

2. ADAAA Final Regulations

On March 25, 2011, the EEOC issued the long-awaited final regulations implementing the ADAAA.³⁶ The ADAAA, which was signed into law on September 25, 2008, significantly expands the definition of disability, enabling more individuals to be covered by the ADA. In September 2009, the EEOC issued proposed regulations to reflect its position that the expanded ADA definition of disability should be interpreted broadly.³⁷ Following active outreach based on various public meetings held around the country, the EEOC approved the final regulations in December 2010 in a 4-1 vote, the new Commission crossing party lines to reach consensus in passage of the regulations.

Highlighting the importance of engaging in the public comment process, the final regulations address several key concerns raised by the employer community. Notably, instead of providing a list of impairments that would “consistently,” “sometimes,” or “usually not” be disabilities, the final regulations provide nine rules of construction to guide the analysis and explain that by applying those principles, there will be some impairments that virtually always constitute a disability. The final rule provides examples of impairments that should easily be concluded to be disabilities, including epilepsy, diabetes, cancer, HIV infection, and bipolar disorder. In addition, language in the proposed rule describing how to demonstrate that an individual is substantially limited in “working” was deleted from the final regulations and moved to the appendix. The final rule also retains the existing familiar language of “class or broad range of jobs” rather than introducing a new term, as the proposed rule did. Unlike the proposed rule, the final rule does not explicitly address the issue of discrimination based on symptoms or mitigating measures under the “regarded as” prong. While the final rule made positive improvements compared to the initial proposal, employers should recognize that the ADAAA statute itself fundamentally altered the dynamics for ADA compliance by broadly expanding the law’s coverage.

3. Proposed Rules Under the ADEA

Age discrimination is an issue of concern to the Commission in view of recent U.S. Supreme Court decisions,³⁸ and the EEOC currently plans to proceed with its proposed rules clarifying both the meaning of the “reasonable factors other than age” (RFOA) defense to an Age Discrimination in Employment Act (ADEA) claim,³⁹ and the disparate impact burden of proof under the ADEA.⁴⁰ In *Smith v. City of Jackson*,⁴¹ the U.S. Supreme Court held that disparate impact claims were cognizable under the ADEA, and that the appropriate standard for determining the legality of a practice that disproportionately affects older workers is the RFOA test, not the more stringent “business necessity” test used for other types of discrimination claims. To that end, in March 2008, the Commission issued a notice of proposed rulemaking (NPRM) regarding disparate impact claims under the ADEA. In this NPRM, the EEOC asked whether more information was needed on the meaning of RFOA in this context. In light of the 2008 U.S. Supreme Court opinion in *Meacham v. Knolls Atomic Power Lab*,⁴² in which the Court held that the employer bears the burden of production and persuasion when using an RFOA defense in an ADEA case, and comments it received from its NPRM, the EEOC stated that before issuing final regulations concerning disparate impact claims under the ADEA, it would issue a new NPRM to address the scope of the RFOA defense.

In February 2010, the EEOC issued proposed rules. The comment period on that NPRM ended in April 2010. During a public meeting held on November 16, 2011, the EEOC voted 3-2 in favor of a draft final rule defining the parameters of the RFOA defense.⁴³ The Office

36 76 Fed. Reg. 16,978 (Mar. 25, 2011). A summary of the final ADAAA regulations is discussed in the *Littler D.C. Update* at <http://www.dcmplemploymentlawupdate.com/2011/03/articles/agency-rulemaking/final-rule-implementing-employment-provisions-of-the-adaaa-released/>. A comprehensive summary and discussion of the final rule is also included in Littler’s ASAP, *EEOC Issues Final Regulations Under the ADA Amendments Act*, (March 2011), which is available on Littler.com.

37 A summary of the proposed ADAAA regulations is discussed in the *Littler D.C. Update* at <http://www.dcmplemploymentlawupdate.com/2009/09/articles/discrimination-in-the-workplac/eec-releases-proposed-regulations-to-implement-the-equal-employment-provisions-of-the-americans-with-disabilities-act/>.

38 On May 10, 2010, EEOC Chair Berrien addressed the Senate Committee on Health, Education, Labor and Pensions, expressing concern regarding recent court developments and referred to an EEOC hearing held in July 2009 to address these issues, which thereafter led to the notice of proposed rule-making (“NPRM”) on age discrimination. While urging a legislative solution, EEOC Chair Berrien stated, “The Commission will continue to use all available means at its disposal—including issuing regulations and policy guidance, providing outreach and training, conducting administrative enforcement, and litigating ADEA cases—to safeguard equal employment opportunity for older workers.” See http://www.eeoc.gov/eeoc/events/berrien_protecting_older_workers.cfm. More recently, on November 17, 2010, a Commission hearing was held to address concerns of older workers as more fully discussed at <http://www.eeoc.gov/eeoc/meetings/11-17-10/>.

39 Abstracts of proposed federal rules and scheduled timetables are available on Reginfo.gov, published by the Office of Management and Budget (OMB), Office of Information and Regulatory Affairs (OIRA), and the General Services Administration (GSA), Regulatory Information Service Center (RISC). The RFOA abstract is available at <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201104&RIN=3046-AA87>.

40 See <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201104&RIN=3046-AA76> and <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201104&RIN=3046-AA87>.

41 544 U.S. 228 (2005).

42 554 U.S. 84 (2008).

43 See <http://www.eeoc.gov/eeoc/newsroom/release/11-16-11.cfm>.

of Management and Budget must review and approve the rule prior to its publication in the *Federal Register* as a final rule. Those voting in favor of the final rule were EEOC Chair Jacqueline Berrien and Commissioners Stuart Ishimaru and Chai Feldblum. The two Republican members of the Commission—Constance Barker and Victoria Lipnic—voted against the rule. While details about the final rule are not yet available, the party-line vote indicates that the new rule may be substantially similar to the proposal and make it more difficult for an employer to present an affirmative defense in an ADEA disparate impact case.

4. Recordkeeping Regulations

The EEOC also plans to amend its current Title VII and ADA recordkeeping regulations to address recordkeeping obligations under GINA.⁴⁴

5. Race and Ethnicity Data Collection Methods

Also at the proposed rule stage, the agency intends to issue regulations revising its race and ethnicity data collection method to conform with current reporting instructions for the EEO-1 Report, making employee self-identification the preferred method for collecting race and ethnic data on employees.⁴⁵ According to the EEOC, current regulations allow employers to gather race and ethnic data about employees by visual surveys of the workforce or from employment records. The agency planned to issue its proposed rule in December 2011.⁴⁶

C. EEOC Enforcement Agenda

1. National Law Firm Model and Systemic Initiative

In FY 2010, the EEOC reported that private sector workplace discrimination charge filings hit a then-unprecedented level of 99,922.⁴⁷ Commenting on the number of charges, Chair Jacqueline Berrien stated that:

We are pleased to see that our rebuilding efforts are having an impact on how efficiently and effectively the Commission enforces the civil rights laws protecting the nation's workers. Discrimination continues to be a substantial problem for too many job seekers and workers, and we must continue to build our capacity to enforce the laws that ensure that workplaces are free of unlawful bias.⁴⁸

Under Berrien's leadership, it is expected that the Commission will seek to accomplish this by the prudent use of limited resources that will include: (1) the more effective use of technology and (2) a focus on the systemic initiative, which may include using the national law firm model to avoid duplication of efforts.⁴⁹ For example, a recent ADA pattern or practice case in Chicago that included hundreds of depositions in a compressed discovery schedule involved attorneys from numerous EEOC offices working on the case, thus demonstrating cross-district collaboration.⁵⁰ This initiative may also include partnering with the private plaintiffs' bar in appropriate cases and more cross-agency efforts, including the sharing of information between the OFCCP and the Justice Department. According to the FY 2012 budget request, "the priority for agency resources continues to be litigating systemic cases and maintaining a manageable inventory of cases."⁵¹

2. Expanded Commission Role in Setting Policy Through Investigations/Litigation

The EEOC has announced that it will develop and implement investigative and litigation strategies to address what it views as discriminatory practices. Illustrative of this development is the Commission's E-Race (*i.e.*, Eradicating Racism and Colorism from Employment) initiative, under which the EEOC's investigation and litigation strategies focus on selection criteria and methods that it believes may foster discrimination based on race and other prohibited bases, "such as credit and background checks, arrest and conviction records [and] employment tests."⁵²

44 The abstract of the recordkeeping regulations is available at <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201104&RIN=3046-AA89>.

45 *Id.*

46 It is noteworthy that only the ADA and GINA make express reference to the EEOC adopting substantive rules relating to the respective statutes. In contrast, Title VII does not include such a provision and the general practice instead is to provide interpretive guidance.

47 See EEOC website at <http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm>. As noted previously, the private sector charge filings increased again in FY 2011 to 99,947. EEOC Annual Report at 4.

48 See <http://www.eeoc.gov/eeoc/newsroom/release/1-11-11.cfm>.

49 At his swearing in ceremony, General Counsel Lopez referred to his commitment to "further develop the national law firm model to fight discrimination." <http://www.eeoc.gov/eeoc/newsroom/release/4-8-10.cfm>. The EEOC initially adopted the approach of beginning to use the national law firm model based on the EEOC's systemic task force report issued in April 2006. See <http://www.eeoc.gov/eeoc/newsroom/release/4-4-06.cfm>.

50 See *EEOC v. Supervalu, Inc.*, Case No. 1:09-cv-5637 (N.D. Ill.), and discussion in the EEOC Press Release dated Jan. 15, 2011, announcing the settlement at <http://www.eeoc.gov/eeoc/newsroom/release/1-5-11a.cfm>.

51 See <http://www.whitehouse.gov/omb/budget/Appendix>.

52 See <http://www.eeoc.gov/eeoc/initiatives/e-race/goals.cfm#goal3>.

3. Initiation of Class Action Type Lawsuits

As part of its enforcement agenda, the EEOC stressed that it would continue to focus on class action type “pattern or practice” lawsuits, remedying what it views as systemic discriminatory practices by employers. The above-referenced statistics demonstrate that the EEOC has proceeded according to plan. It is anticipated that the EEOC’s current trend will continue in which over 30% of all lawsuits initiated by the EEOC will involve class action-type lawsuits. Significantly, under this pattern or practice litigation, the EEOC is not bound by Federal Rule of Civil Procedure 23 requirements applicable to class actions initiated by plaintiffs’ attorneys.

D. Anticipated Trends

1. Equal Pay

While legislation to amend the Equal Pay Act (EPA) and the Paycheck Fairness Act has been stalled in Congress, this issue will remain front and center at the EEOC (in tandem with other agencies such as DOL, OFCCP, and DOJ) based on the recently commissioned National Equal Pay Enforcement Task Force.⁵³ Employers are often not aware that the EEOC on its own can initiate “directed investigations” and address what it believes are systemic pay discrimination issues (based on gender), even without a charging party. The EEOC also has commissioned a study by the National Academy of Science to determine what data it should collect to most effectively enhance its wage discrimination law enforcement efforts. To avoid duplicative efforts, the EEOC will likely work in tandem with the OFCCP “when evaluating data collection needs, capabilities and tools.”⁵⁴

2. Hiring Issues

The EEOC recently held a series of meetings to examine the impact of certain hiring practices on protected groups. In July 2011, the Commission held a public meeting to discuss the impact of criminal history on hiring decisions.⁵⁵ In October 2010, the EEOC held a public hearing focusing on the use of credit reports in hiring decisions.⁵⁶ These hearings, coming after an earlier Commission hearing advancing its view of both credit and criminal history as having a discriminatory impact on African Americans and Hispanics, demonstrate the EEOC’s continued focus on hiring-related issues.⁵⁷ Recent Commission-initiated litigation also indicates this issue will remain among the forefront of the EEOC’s systemic litigation agenda.⁵⁸ Other hiring concerns also are likely to be addressed, as evidenced by a February 2011 EEOC hearing involving “unemployed” applicants and “examining the impact of considering only those employed for job vacancies.”⁵⁹

3. ADA Issues

Prior to enactment of the ADAAA, disability cases were bogged down in litigation over individual coverage under the Act. For a period of time, EEOC initiated cases could not even be filed without approval from the Commission. Such hurdles have now been removed and the battleground has shifted to the reasonable accommodation process. Vigorous enforcement can be expected in the coming year, as already has been the case over the past year. A rise in ADA cases coupled with GINA claims is expected. One area that employers should keep front and center is the use of blanket rules involving leaves of absence. The EEOC will continue to challenge employers with fixed leave of absence policies in which adverse action is taken after individuals remain on leave for disability-related reasons beyond specified time periods. The Commission’s targeting of this area is illustrated by recent significant settlements with major employers, who entered into Consent Decrees after extensive litigation,⁶⁰ as well as by the number of lawsuits that continue to be filed against employers with similar policies.⁶¹

53 In his weekly radio address, on March 11, 2011, President Obama reiterated his commitment to the issue of equal pay, including passage of the Paycheck Fairness Act. See <http://www.whitehouse.gov/blog/2011/03/12/weekly-address-women-s-history-month-fair-pay>.

54 *Id.*

55 See <http://www.eeoc.gov/eeoc/meetings/7-26-11/index.cfm>.

56 See summary of October 10, 2010, EEOC meeting on use of credit history as a screening tool at <http://www.eeoc.gov/eeoc/meetings/10-20-10/index.cfm>.

57 See summary of November 20, 2008, EEOC meeting on use of criminal history records in the hiring process at <http://www.eeoc.gov/eeoc/meetings/11-20-08/index.cfm>.

58 See, e.g., *EEOC v. Freeman*, Case No. 8:09-cv-02573 (D. Md.) (pending pattern or practice lawsuit on behalf of Black, Hispanic and male job applicants based on alleged exclusion from hire based on credit and criminal history); *EEOC v. Kaplan Higher Education Corporation*, Case No. 1:10-cv-02882 (N.D. Ohio) (pending pattern or practice race discrimination lawsuit involving rejection of job applicants based on credit history).

59 See <http://www.eeoc.gov/eeoc/newsroom/release/2-16-11.cfm>.

60 See EEOC Press Release dated Jan. 5, 2011, at <http://www.eeoc.gov/eeoc/newsroom/release/1-5-11a.cfm> and EEOC Press Release dated Sept. 29, 2009 revising settlement in *EEOC v. Sears Roebuck and Co.* at <http://www.eeoc.gov/eeoc/newsroom/release/9-29-09.cfm>; see also Appendix A.

61 See, e.g., *EEOC v. Princeton Healthcare Sys.*, Case No. 3:10-cv-04126 (D.N.J.), discussed at <http://www.eeoc.gov/eeoc/newsroom/release/8-11-10.cfm>, and *EEOC v. United Row Towing*, Case No. 1:10-cv-06259 (N.D. Ill.), discussed at <http://www.eeoc.gov/eeoc/newsroom/release/9-30-10j.cfm>.

III. REVIEW OF NOTEWORTHY COURT OPINIONS INVOLVING THE EEOC

This section is designed as a comprehensive primer on EEOC litigation over the past year. As shown below, there has been a significant amount of litigation arising out of subpoenas issued by the Commission during the investigation stage of its administrative process. In these subpoena enforcement actions, the EEOC has not hesitated to seek assistance from the courts based on the Commission's expansive view of its investigatory authority.

Attention then turns to recent opinions in which employers have challenged EEOC lawsuits on several grounds, including: (1) inadequate pleadings based on *Iqbal/Twombly* pleading standards;⁶² (2) challenges to limit the scope of the EEOC's lawsuits based on the individuals on whose behalf the EEOC can seek relief under the specific time limitations in Title VII; and (3) failure to conciliate in good faith as required by Title VII prior to initiating legal action against an employer.

Thereafter is a discussion of recent cases involving the "nuts and bolts" of litigation with the EEOC, particularly focusing on discovery-related issues. The discussion includes not only the permitted scope of discovery by the EEOC, but also efforts by employers seeking discovery from the EEOC and the recent trend by the courts to permit employers to seek more expansive discovery from the EEOC.

This section of the report concludes with a review of noteworthy summary judgment rulings in pattern or practice and class-based litigation and recent relief granted to employers in circumstances where the EEOC had engaged in tactics called into question by the courts.

A. Scope of EEOC Investigations and Subpoena Enforcement Actions

As part of the investigation process, the EEOC has statutory authority to issue subpoenas and pursue subpoena enforcement actions in the event of an employer's failure and/or refusal to provide requested information or data and/or make requested personnel available as part of its investigation process. As discussed at the outset, the EEOC filed 39 subpoena enforcement actions in FY 2011, particularly involving pattern or practice and/or systemic investigations.⁶³ Before discussing recent cases, some background information as to the EEOC's investigative authority and guidelines in addressing any subpoena enforcement action is useful to understanding those cases and their import.

1. EEOC Authority to Conduct Class-Type Investigations

Systemic investigations can arise based on one of the following: (1) a charge is filed as a "pattern or practice" claim and/or the EEOC expands an individual charge into a "pattern or practice" investigation; (2) the EEOC initiates on its own authority a "directed investigation" involving potential age discrimination or potential equal pay violations; or (3) the EEOC commences an investigation based on the filing of a "Commissioner's Charge."

The EEOC's authority to investigate systemic discrimination stems from its broad legislative mandate. The EEOC has authority to file lawsuits against an employer under either section 706 or section 707 of Title VII of the Civil Rights Act of 1964.⁶⁴ Section 707 expressly provides authority to file "pattern or practice" (*i.e.*, class type) lawsuits against an employer. While the Supreme Court's recent decision in *Wal-Mart v. Dukes*,⁶⁵ may dramatically change the landscape for employment discrimination class actions under Rule 23 of the Federal Rules of Civil Procedure, the ruling may embolden the Commission because unlike private litigants, the EEOC is not required to meet the stringent requirements of Rule 23 to initiate a pattern or practice lawsuit against an employer.

To the dismay and frustration of many employers, various courts have permitted the EEOC to expand the scope of its investigations, and convert an individual charge to a "pattern or practice" investigation and/or lawsuit against an employer. As one court explained, the EEOC "may, to the extent warranted by an investigation reasonably related in scope to the allegations of the underlying charge, seek relief

⁶² See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 644 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

⁶³ A comprehensive analysis of subpoena enforcement actions over the past year is discussed in *An Employer's Guide to Systemic Investigations and Subpoena Enforcement Actions*, by Barry A. Hartstein, Littler Mendelson, P.C. (Aug. 2011). The discussion herein summarizes the primary findings of that report.

⁶⁴ 42 U.S.C. § 2000e-5 and 42 U.S.C. § 2000e-6. For a discussion regarding the distinctions between a section 706 to section 707 claim, please see Appendix B. Similarly, section 107(a) of the ADA, 42 U.S.C. § 12117(a), incorporates these provisions, "The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment." The ADEA and Equal Pay Act also permit broad based systemic investigations, as further discussed in footnote 72, *infra*, and the accompanying text.

⁶⁵ 131 S. Ct. 2541 (2011).

on behalf of individuals beyond the charging parties who are identified during the investigation.⁶⁶ Therein, the Seventh Circuit permitted to proceed a class-type lawsuit stemming from an individual charge of harassment, stating, “If courts may not limit a suit by the EEOC to claims made in the administrative charge, they likewise have no business limiting the suit to claims that the court finds to be supported by the evidence obtained in the Commission’s investigation.”⁶⁷

Title VII also provides that EEOC Commissioners have authority to issue charges on their own initiative (*i.e.*, Commissioner charges).⁶⁸ In the leading case on Commissioner charges, *EEOC v. Shell Oil Co.*, 466 U.S. 54 (1984), the U.S. Supreme Court underscored that it is “crucial that the Commission’s ability to investigate charges of systemic discrimination not be impaired,” and based on amendments to Title VII in 1972, “Congress made clear that Commissioners could file and the Commission could investigate such charges.”⁶⁹ Further, in several cases involving successful employer challenges to broad-based requests for information or data by the EEOC, courts have commented that they would have been more inclined to compel production of such information or data from the employer had the EEOC based its subpoena enforcement action on a Commissioner’s charge.⁷⁰

Systemic investigations also may arise under both the Age Discrimination in Employment Act (ADEA) and Equal Pay Act (EPA). Under both statutes, the EEOC can initiate what is referred to as a “directed investigation” even in the absence of a charge of discrimination. Specifically, the EEOC, on its own authority, can commence an investigation, seeking information and/or data that may include broad based requests for information,⁷¹ and initiate a lawsuit for violations of the applicable statute.⁷²

2. Scope of EEOC’s Investigative Authority

The starting point for any EEOC request for information is the applicable provision in Title VII:

In connection with any investigation of a charge filed under section 2000e-5 of this title, the commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this subchapter and is relevant to the charge under investigation.⁷³

The key issue is the manner in which the courts have interpreted the scope of the EEOC’s investigative authority. The leading case involving EEOC requests for information is the U.S. Supreme Court’s decision, *EEOC v. Shell Oil Co.*, which is frequently cited in subpoena enforcement litigation. The Court in *Shell Oil* underscored that although the EEOC is “entitled to access only to evidence ‘relevant’ to the charge under investigation, ... courts have generously construed the term ‘relevant’ and have afforded the Commission access to virtually

66 See, *e.g.*, *EEOC v. Caterpillar, Inc.* 409 F.3d 831 (7th Cir. 2005). As discussed below, however, one court recently denied enforcement of a subpoena seeking nationwide data based on the EEOC expanding the scope of its investigation involving two individual ADA charges. The court denied enforcement of the subpoena, in relevant part, because the underlying discrimination charges did not include “pattern or practice” allegations of discrimination. See *EEOC v. Burlington Northern Santa Fe Railroad*, Case No. 1:10-cv-03008, Docket No. 10 (Transcript of Show Cause Hearing) (D. Colo. Feb. 3, 2011). The EEOC filed a Notice of Appeal to the Tenth Circuit on March 23, 2011, and the matter remains pending on appeal with oral argument scheduled for January 17, 2012. *EEOC v. Burlington Northern Santa Fe Railroad*, Appellate No. 11-1121, Docket Entry Nov. 14, 2011.

67 *Caterpillar, Inc.*, 409 F.3d at 833.

68 42 U.S.C. § 2000e-5(b) (a charge may be filed either “by or on behalf of a person claiming to be aggrieved, or by a member of the Commission”).

69 466 U.S. at 70.

70 See, *e.g.*, *EEOC v. United Airlines, Inc.*, 287 F.3d 643 (7th Cir. 2002); *EEOC v. Southern Farm Bureau Cas. Ins. Co.*, 271 F.3d 209 (5th Cir. 2001); *EEOC v. UPMC*, 2011 U.S. Dist. LEXIS 55311, at *8 n.4 (W.D. Pa. May 24, 2011).

71 As an example, in one recent case the court enforced a broad based request for nationwide data stemming from an EPA directed investigation. See *EEOC v. Performance Food Group Company L.L.C.*, Case No. 1:09-cv-02200, Docket No. 29 (Memorandum and Order re Subpoena Enforcement) (D. Md. Feb. 18, 2010).

72 See, *e.g.*, 29 U.S.C. § 626(a) of ADEA (“the Equal Employment Opportunity Commission shall have the power to make investigations ... for the administration of this chapter”); 29 C.F.R. § 1626.15 (ADEA: “the Commission and its authorized representatives may investigate and gather data...advise employers ... with regard to their obligations under the Act ... and institute action ... to obtain appropriate relief”); 29 U.S.C. § 211 of FLSA, which includes the prohibitions relating to the EPA, 29 U.S.C. § 206 (“The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment ... as he may deem necessary or appropriate to determine whether any person has violated any provision of this chapter”); 29 C.F.R. § 1620.30 (EPA: “the Commission and its authorized representatives ... may investigate and gather data...advise employers regarding any changes necessary or desirable to comply with the Act ... [and] initiate and conduct litigation”). See also EEOC Compliance Manual, § 22.7.

73 The EEOC follows an identical approach regarding investigations under Title VII, ADA and GINA. See 29 C.F.R. § 1601.16. Similar language applies to investigations under the ADEA and EPA. See, *e.g.*, 29 U.S.C. § 626(a) of ADEA; 29 C.F.R. § 1626.15 (ADEA); 29 U.S.C. § 211 of FLSA, which includes the prohibitions relating to the EPA, 29 U.S.C. § 206(d); 29 C.F.R. § 1620.30 (EPA). See also EEOC Compliance Manual, § 22.7.

any material that might cast light on the allegations against the employer.” The Court further stated, “[i]t is crucial that the Commission’s ability to investigate charges of systemic discrimination not be impaired.”⁷⁴

Employers, on the other hand, have relied on limitations on the scope of the EEOC’s authority, which also are referenced in *Shell Oil*. Specifically, the Court highlighted the limitation on the right only to access documents or data “relevant to the charge under investigation.” Further explaining, the Court stated, “Congress did not eliminate the relevance requirement, and we must be careful not to construe the regulation adopted by the EEOC governing what goes into a charge in a fashion that renders that requirement a nullity.”⁷⁵

Any challenge to a subpoena enforcement action typically focuses on two issues: (1) relevance and (2) burdensomeness. While the courts generally support the EEOC in subpoena enforcement actions, one frequently cited case, *EEOC v. United Airlines Inc.*,⁷⁶ is helpful in setting the stage for evaluating subpoenas and any potential challenge to a subpoena enforcement action.

The Seventh Circuit’s decision in *EEOC v. United Airlines*, has been relied on to challenge both “relevance” and “burdensomeness” of EEOC subpoenas. In *United Airlines*, the focus of the underlying national origin and sex discrimination charge involved denial of benefits to an American employee working in France, as compared to French coworkers who received certain benefits based on the French social security system. As part of the investigation, the EEOC expanded the scope of its investigation and requested identification of each employee working abroad who had taken or been placed on medical or disability leave and sought information regarding all of the employer’s benefit programs. A subpoena enforcement action was filed based on the employer’s failure to respond as requested. The Seventh Circuit denied enforcement of the subpoena.

The court in *United Airlines* initially reviewed the case authority and cited *Shell Oil* to shed light on the meaning of “relevance” in the subpoena context. The court noted that the courts have adopted a much broader concept of “relevance” when dealing with subpoenas, as compared with admissibility of evidence.⁷⁷ The appellate court cautioned, however, that “relevance requirements should not be construed so broadly as to render the statutory language a ‘nullity,’” and underscored that “(t)he requirement of relevance ... is designed to cabin the EEOC’s authority and prevent ‘fishing expeditions.’”⁷⁸ In applying this standard to the facts, the Seventh Circuit reviewed the nature of the charge and concluded that the information request was not limited to individuals who may be “similarly situated” or by location (*i.e.*, France) and was overbroad in requesting information involving all employees residing abroad.⁷⁹

Additionally, even assuming “relevance,” the court stated that “burdensomeness” is a consideration that the district court must consider in determining whether to enforce, modify or quash a subpoena.⁸⁰ A “presumption” exists that compliance should be enforced to further the Commission’s legitimate inquiry into matters of public interest. Thus, an employer “carries the difficult burden of showing that the demands are unduly burdensome or unreasonably broad,” such as by showing that “compliance would threaten the normal operation of a respondent’s business.”⁸¹ Cost of compliance also is a consideration, taking into account the “personnel or financial burden ... compared to the resources

74 466 U.S. at 69. In view of recent court decisions that have penalized the EEOC for failing to properly conciliate based on the failure to fully investigate charges concerning individuals on whose behalf the agency is seeking relief, the EEOC may be more inclusive and thorough in various requests for information in pattern or practice and systemic investigations. *See, e.g., EEOC v. CRST*, 2010 U.S. Dist. LEXIS 11125 (N.D. Iowa Feb. 9, 2010).

75 466 U.S. at 69.

76 *EEOC v. United Airlines, Inc.*, 287 F.3d 643 (7th Cir. 2002).

77 The court also noted *Blue Bell Boots, Inc. v. EEOC*, 418 F.2d 355 (6th Cir. 1969), and cited the case as standing for the proposition that evidence concerning practices other than those specifically charged by complainants may be sought by an EEOC administrative subpoena.

78 *United Airlines*, 287 F.3d at 653. While not relying on “fishing expedition” language, earlier court decisions took a similar approach in limiting the scope of EEOC subpoenas. In *Joslin Dry Goods v. EEOC*, 483 F.2d 178 (10th Cir. 1973), the court limited a subpoena to a particular facility because the applicable facility was a “separate employing unit,” and there was no showing that the Charging Party was the purported victim of company-wide hiring and firing policies and practices. *See also EEOC v. Packard Electric Division*, 569 F.2d 315 (5th Cir. 1978) (court limited production to applicable departments based on narrow scope of charge and denied facility-wide data).

79 The court opined that in the event the EEOC found evidence of a broader pattern of discrimination, “It is, of course, free to file a commissioner’s charge incorporating those allegations and broaden its investigation accordingly.” *United Airlines*, 287 F.3d at 655. The Seventh Circuit cited with approval the Fifth Circuit’s decision in *EEOC v. S. Farm Bureau Cas. Ins. Co.*, 271 F.3d 209 (5th Cir. 2001), which reached a similar conclusion, when it refused to enforce a subpoena involving a request for information involving potential sex discrimination in circumstances in which the charge solely alleged race discrimination. More recently, this same conclusion was reached by the Third Circuit in *EEOC v. Kronos Inc.*, 620 F.3d 287 (3d Cir. 2010), in which the court denied enforcement of a subpoena involving a request for race-related information based on an ADA charge.

80 *United Airlines*, 287 F.3d at 653-55. As discussed *infra*, a recent case upholding an employer on burdensomeness grounds is *EEOC v. Randstad et al*, 765 F. Supp. 2d 734 (D. Md. 2011).

81 *United Airlines*, 287 F.3d at 653.

the employer has at its disposal.”⁸² Each case has to be reviewed on an individual basis, but “conclusory allegations of burdensomeness are insufficient.”⁸³ In the *United Airlines* case, the court concluded that the “financial and administrative demand placed on [the employer] is significant and, in light of the tangential need for the information, an undue burden on [the employer].”⁸⁴

3. Review of Recent Cases Involving Broad Based Investigations by EEOC⁸⁵

a. EEOC Requests for Information Involving Personnel Decisions Unrelated to the Underlying Charge

In dealing with specific requests for information, one issue that frequently frustrates employers involves EEOC requests for information concerning personnel actions unrelated to the underlying charge. Two recent cases illustrate the courts’ tendency, nonetheless, to uphold such requests and provide the rationale for the courts’ decision: (1) *EEOC v. Konica Minolta Business Solutions U.S.A., Inc.*,⁸⁶ and (2) *EEOC v. Schwan’s Home Service*.⁸⁷

In *Konica*, the employer was confronted with a subpoena enforcement action based on a request for hiring data in circumstances where the charging party (herein “CP”) had been hired. The CP’s race discrimination charge focused on the claim that he was subjected to different terms and conditions of employment, disciplined for failing to meet a sales quota and fired after he filed a discrimination complaint with the employer’s human resources department. The CP further alleged that there was a pattern of race discrimination by his former employer.

Throughout the CP’s brief eight-month tenure, he worked at one facility in the Chicago area. As part of the investigation, the employer initially responded to various general inquiries regarding its operations, including demographic information regarding its eight Illinois facilities. This data revealed that there were only six African Americans employed and all of them were on one sales team at the facility where the CP had been employed. The EEOC then began focusing, in part, on whether any illegal steering was involved and ultimately issued a subpoena requesting hiring data for all of the employer’s Chicago area facilities, including any communications with applicants. After the employer refused to comply with the request for hiring information, the EEOC initiated the subpoena enforcement action.

In affirming the district court’s order enforcing the subpoena, the Seventh Circuit, in reliance on *Shell Oil*, addressed the permitted scope of the EEOC subpoenas, explaining, “(I)nformation concerning whether an employer discriminated against other members of the same class for the purposes of hiring or job classification may cast light on whether an individual person suffered discrimination, [and] (f)or that reason, the EEOC is authorized to subpoena evidence concerning employment practices other than those specifically charged by complainants in the course of its investigation.”⁸⁸

The Seventh Circuit underscored that the EEOC limited its inquiry to the Chicago locations and thus “the information sought by the EEOC in this case is properly tailored to matters within its authority,” thus distinguishing the *United Airlines* case which did not limit its inquiry to employees who were “similarly situated.”⁸⁹ To the extent that the EEOC subsequently attempted to expand the scope of its investigation, the Seventh Circuit opined, “We remind the parties that should the agency later conclude that a broader investigation is warranted, the Commission is entitled to file its own charge, *see* 42 U.S.C. § 2000e-5(b), in which it can allege a pattern or practice of discrimination and calibrate its investigation accordingly.”⁹⁰

82 *United Airlines*, 287 F.3d at 653-54. Recently, in *EEOC v. Bashas’ Inc.*, 2011 U.S. Dist. LEXIS 133447 (D. Ariz. Sept. 30, 2011), the court held that it would be unduly burdensome for Bashas’ to produce requested data for certain years based on Bashas’ credible testimony regarding what it would cost the employer to do so and the fact that Bashas’ was in bankruptcy. Accordingly, the court shifted the cost and labor associated with obtaining accurate records to the EEOC for the years May 1, 2004 through December 31, 2007, by ordering Bashas’ to only make available the data requested by the EEOC at Bashas’ place of business. Bashas’ was ordered, however, to produce the narrowed subpoenaed information from January 1, 2008 forward in electronic format based on its assertions that doing so would not be unduly burdensome.

83 *United Airlines*, 287 F.3d at 653.

84 *Id.* at 655. The court also may have been influenced, in part, by the EEOC conceding that a treaty between the U.S. and France also precluded the employer from making the contributions that formed the basis for the charge, thus indicating, “The EEOC cannot justify further investigating a charge for which it has conceded there is a valid defense.” *Id.*

85 As an inaugural edition of the annual report on recent EEOC decisions, several noteworthy cases are discussed which have arisen in the past several years, rather than restricting the update to EEOC decisions over the past year.

86 *EEOC v. Konica Minolta Business Solutions U.S.A., Inc.*, 639 F.3d 366 (7th Cir. 2011).

87 *EEOC v. Schwan’s Home Service*, 707 F. Supp. 2d 980 (D. Minn. 2010), *aff’d* 644 F.3d 742 (8th Cir. 2011).

88 *Konica*, 639 F.3d at 639 (internal citations omitted).

89 *Konica*, 639 F.3d at 370. *See also EEOC v. United Airlines, Inc.*, 287 F.3d 643 (7th Cir. 2002).

90 *Konica*, 639 F.3d at 371. As the court noted, the Seventh Circuit had previously addressed that same issue in *United Airlines*, 287 F.3d at 655 n.7, in which the appellate court stated, “Should the EEOC discover, in the course of a significantly narrowed inquiry, evidence of a broader pattern of discrimination, it is, of course, free to file a commissioner’s charge and broaden its investigation accordingly.” *See EEOC v. S. Farm Bureau Cas. Ins. Co.*, 271 F.3d 209, 211 (5th Cir. 2001). Without a broader charge, however, the EEOC’s current request cannot be sanctioned.”

A federal district court in Minnesota made a similar ruling in the *Schwan's* case, subsequently affirmed on appeal, involving alleged sex discrimination.⁹¹ In *Schwan's* the CP filed a sex discrimination charge after failing to “graduate” from a General Manager Development Program (GMDP). Based on the charge, the CP further alleged retaliation for having complained about sexual harassment. The subpoena enforcement action was filed following an amended charge in which class-based allegations were added and the EEOC requested nationwide data regarding the selection process for participation in the GMPD as well as information regarding the hiring and retention of general managers.

In rejecting the employer’s challenge in *Schwan's*, the court stated, “Courts have routinely authorized enforcement of administrative subpoenas that request information that goes beyond the information directly tied to the charging party’s personal experiences and circumstances.” The court addressed the case authority relied on by both the employer and EEOC, but ultimately concluded that the authority cited by the EEOC was more persuasive based on the view that the information requested in the subpoena was “like and related to the acts specified in the charge.”⁹²

While *Konica* and *Schwan's* raise obvious concerns in challenging EEOC requests for information dealing with personnel practices beyond the specific allegations in the charge, the recent decisions in *EEOC v. BNSF Railway Company*⁹³ and *EEOC v. UPMC*⁹⁴ provide at least a glimmer of hope that the courts may place some limits on broad based requests unrelated to the charge.

In the *BNSF Railway Company* case, the underlying charge dealt with a CP, who was not hired as a track laborer after he was extended a conditional offer of employment because of a disclosed medical condition. The CP’s charge alleged only that he was discriminated against under the ADA (*i.e.*, there were no class allegations or allegations of systemic or pattern or practice discrimination). Initially, the EEOC requested information from BNSF about other applicants for the track laborer position, who received conditional offers of employment, which were subsequently revoked due to disclosure of a medical condition. Although BNSF objected to the request for information and continued to object to a subpoena including the topics in the request through the EEOC’s administrative processes, BNSF fully responded to the subpoena after the Commission determined the scope of the subpoena was proper.

Subsequently, the EEOC expanded its request for information to applicants, who were not hired for track maintenance and laborer positions nationwide. In response, BNSF provided names and medical information for all applicants nationwide who were not hired as a track laborer from January 1, 2009 to April 30, 2010.

Thereafter, the EEOC sought an electronic database containing information regarding applicants, who were not hired because they were not medically qualified for the job, for any position where a medical screening was required by BNSF from January 1, 2007 to present. In response to this request, BNSF offered to produce nationwide data on applicants for the track laborer positions from January 1, 2007 through April 30, 2010. The EEOC, however, insisted on full compliance and filed an application to show cause as to why the subpoena should not be enforced with the U.S. District Court for the District of Minnesota.

BNSF challenged the subpoena enforcement action by primarily arguing that the information sought was not relevant based on the scope of the underlying charge. Citing to *United Airlines* for the relevance analysis, the court noted that the EEOC’s subpoena sought information that went far beyond the allegations set forth in the charge and that enforcing it may “render null the statutory requirement that the investigation be relevant to the charge.”⁹⁵ Moreover, the court distinguished BNSF’s background screening procedure from the employment test that was at issue in *EEOC v. Kronos*.⁹⁶ Specifically, the court noted that the “individualized nature of the background screen” and “the medical officer’s [case-by-case] consideration and assessment of unique medical records” meant that the data sought by the EEOC could not be reduced to provide comparative statistics or a useful context to the CP’s specific charge of discrimination.⁹⁷

The court held that the subpoena was “overbroad” and that the data requested was not “pertinent to the charge under investigation.” The

91 *Schwan's*, 707 F. Supp. 2d 980 (D. Minn. 2010), *aff'd* 644 F.3d 742 (8th Cir. 2011).

92 The district court’s order enforcing the subpoena was upheld on appeal on July 13, 2011. *See EEOC v. Schwan's Home Serv.*, 644 F.3d 742 (8th Cir. 2011).

93 *EEOC v. BNSF Railway Company, Inc.*, 2011 U.S. Dist. LEXIS 63933 (D. Minn. May 17, 2011), adopted by *EEOC v. BNSF Railway Company, Inc.*, 2011 U.S. Dist. LEXIS 61221 (D. Minn. June 8, 2011).

94 *EEOC v. UPMC*, 2011 U.S. Dist. LEXIS 55311 (W.D. Pa. May 24, 2011).

95 *BNSF*, 2011 U.S. Dist. LEXIS 63933, at *12.

96 *EEOC v. Kronos*, 620 F.3d 287 (3d Cir. 2010), discussed *infra* pp. 18 – 20.

97 *BNSF*, 2011 U.S. Dist. LEXIS 63933, at *14.

court did, however, grant enforcement of the subpoena as narrowed by BNSF's offer to produce names and medical information for all job applicants nationwide who were not hired as track laborers between January 1, 2007 and April 30, 2010.⁹⁸

In the *UPMC* case, the employer successfully challenged the subpoena enforcement action on the grounds that the EEOC was engaged in an improper "fishing expedition" beyond the scope of the underlying charge. The underlying charge dealt with a CP whose employment was terminated after failing to return from an extended medical leave after having represented that she would be returning to work. The CP had been granted a medical leave and received 26 weeks of STD benefits. After her STD benefits expired, the CP was granted a personal leave of absence until June 21, 2008, based on the CP's representation that she would return to work on that date. When she did not return to work on the agreed-upon date, the employer viewed the CP as having voluntarily terminated her employment. When the CP contacted the employer several weeks later concerning her ability to return to work, she was advised that her employment had been terminated. In her charge, the CP claimed she was discriminated against on the basis of her disability because the employer purportedly knew of her recent surgery, but failed to contact or warn her that she would be discharged.

The subpoena enforcement action arose after the EEOC received the company's disability policy as part of the employer's response to the charge. The EEOC subpoena requested information involving a time period following the employee's termination and inquired about employees terminated after 14 weeks of a medical leave of absence, pursuant to the employer's personal leave of absence and/or disability policy. Yet, the CP's situation did not even fall within that policy because she had been granted leave of nearly 29 weeks (*i.e.*, the maximum leave under the STD policy, plus extended personal leave) and only was terminated after she failed to return to work on her expected return to work date.

In rejecting the EEOC's subpoena enforcement action, the district court noted the EEOC's failure to investigate the underlying charge and underscored that the subpoena did not even cover the period of the CP's employment. For these reasons and others, the court held that the subpoena was an improper "'fishing expedition' to discover the existence of other potential claimants rather than a reasonable effort to develop information relevant to [charging party's] charge of discrimination."⁹⁹

b. Requests for Information Involving Broad Geographic Coverage

As shown by the *Schwan's* case referenced above, to the extent that the EEOC believes that the employment practice and/or policy is national in scope, the Commission will frequently make requests for nationwide information and data. The *Schwan's* case illustrates that the courts have supported EEOC requests for nationwide data in such circumstances. Recently, in *EEOC v. Burlington Northern Santa Fe*, however, the district court denied enforcement of a nationwide subpoena.¹⁰⁰

In *Burlington Northern*, the investigation initially was based on two individual ADA charges. In one charge, the CP alleged he was advised that he was not medically qualified for a conductor trainee position due to significant risk of aggravation or recurrence of a prior injury. In the other, the CP filed a charge based on retraction of a job offer following disclosure of various surgeries and impairments. As part of its investigation of the charges, despite the absence of any pattern or practice allegations, the EEOC notified the employer of its "intentions to broaden its investigation into a nationwide investigation" and requested any computerized personnel data maintained for employees and applicants throughout the United States. As support for its subsequent nationwide subpoena, the EEOC also referred to other individual ADA charges filed against the employer in others parts of the country. In defending against the subpoena, the employer cited to authority for the principle that relying on the individual charges as a bootstrap for the nationwide subpoena was inappropriate and amounted to an improper "fishing expedition."¹⁰¹ Following a show cause hearing, the district court judge denied enforcement of the subpoena, underscoring, "There are no allegations of a pattern and practice." The court further explained its opinion, "The demand for data on a nationwide basis with two individual claims involving only applicants in Colorado is excessive. And while wide deference to administrative inquiries and investigations—wide deference to the scope of the subpoenas is given, it does not transcend the gap between the pattern and practice investigation and the private claims that have been shown here."¹⁰²

98 *Id.* at **16-17.

99 *UPMC*, 2011 U.S. Dist. LEXIS 55311, at *12 (W.D. Pa. May 24, 2011).

100 *EEOC v. Burlington Northern Santa Fe*, Case No. 1:10-cv-03008, Docket No. 10 (Transcript of Show Cause Hearing) (D. Colo. Feb. 3, 2011).

101 *Id.* at Docket No. 7, Respondent's Answer to Application to Show Cause Why Administrative Subpoena Should Not Be Enforced, Filed Jan. 14, 2011, which included reliance on *EEOC v. Sears, Roebuck and Co.*, 2010 U.S. Dist. LEXIS 67579 (D. Colo. June 8, 2010), *approved*, 2010 U.S. Dist. LEXIS 67344 (July 6, 2010).

102 *Burlington Northern Santa Fe*, Case No. 1:10-cv-03008, Docket No. 10 (Transcript of Show Cause Hearing) (D. Colo. Feb. 3, 2011).

Other recent cases demonstrate that courts may limit the geographical scope of an EEOC subpoena in circumstances where the decision-making is more localized in nature.¹⁰³ The foregoing decisions limiting the geographical scope of an EEOC subpoena must be contrasted with recent decisions in which the EEOC succeeded in subpoena enforcement actions involving broad geographic requests for information.

The challenge in dealing with EEOC requests for nationwide data is that courts have been particularly supportive of the Commission when nationwide policies are in issue. The Second Circuit's decision in *EEOC v. United Parcel Service*, is an example in which the EEOC succeeded in a subpoena enforcement action seeking nationwide information from an employer, particularly because a purported national policy was the focus of the EEOC's investigation.¹⁰⁴ In *United Parcel Service*, the Commission was investigating the employer's appearance policy, which stemmed from two separate charges: (1) an individual charge of religious discrimination (*i.e.*, Muslim) filed at the EEOC's Buffalo, NY office by the CP, who claimed he was barred from wearing a beard based on a purported nationwide policy prohibiting facial hair for those in "public-contact" positions; and (2) a second charge filed in Dallas on similar grounds, which also alleged a "pattern or a practice of refusing to accommodate the religious ... beliefs of its employees." The EEOC subsequently requested nationwide data relating to the employer's appearance guidelines. The employer objected to the request and explained that such information was not retained in any central location. The EEOC filed a petition to enforce its subpoena, which was denied by the district court as being overly broad based on the view that nationwide information was not relevant to the individual charges being investigated. Upon appeal by the EEOC, the Second Circuit reversed the district court ruling.

In remanding the case for enforcement of the subpoena, the Second Circuit in the *UPS* case adopted the view that the courts are to play an "extremely limited" role in subpoena enforcement actions.¹⁰⁵ In applying *Shell Oil*, the appellate court held that the district court applied "too restrictive a standard of relevance" in determining that nationwide information about the appearance standards was not relevant to the charges being investigated. The Second Circuit focused on the fact that the appearance guidelines were applied nationwide and the employer had limited exceptions to its policy, thereby restricting those who did not comply with the standards from working in public contact positions. The court further opined that during the investigatory stage, the EEOC is "not required to show that there is probable cause to believe that discrimination occurred or to produce evidence to establish a *prima facie* case of discrimination."¹⁰⁶ A similar result occurred in *EEOC v. Kronos, Inc.*,¹⁰⁷ which upheld a subpoena for nationwide testing data based on the view that "an employer's nationwide use of a practice under investigation supports a subpoena for nationwide data on that practice."¹⁰⁸

c. Requests for Information Involving Employees in a Different Protected Class

Aside from broad based requests for information involving practices beyond those in the underlying charge, the EEOC frequently requests information involving employees in a protected class different from those raised in the underlying charge. Recent court decisions remain mixed in addressing this issue, but substantial delays by the EEOC in making such requests have been successfully challenged by employers.

As an example, in *EEOC v. Randstad*,¹⁰⁹ the district court rejected the EEOC's untimely attempt to expand a national origin investigation to address a potential ADA claim against the employer. The initial charge was based on a claim that the CP was denied a placement by the respondent staffing firm due to his national origin (*i.e.*, Jamaican). Two years after the original charge was filed, an amended charge was filed adding a disability discrimination claim and the EEOC issued a determination that the CP was discriminated against in violation of the

103 See, *e.g.*, *EEOC v. Sears, Roebuck and Co.*, 2010 U.S. Dist. LEXIS 67579 (D. Colo. June 8, 2010) (court denied nationwide subpoena based on individual charge of discrimination involving employer arrest and conviction policy that required reporting of arrests based on individual charge of discrimination and limited subpoena to 10 stores in district where CP worked; court even denied EEOC's proposed narrowing of geographic scope to region of 140 stores); *EEOC v. Quantum Foods, L.L.C.*, 2010 U.S. Dist. LEXIS 41846 (N.D. Ill. April 26, 2010), (court declined a request for company-wide data in circumstances where the decision-making impacting on the allegations in the charge were more localized in nature). It is worth noting that the judge who ruled in the *Quantum* case reached a divergent holding in upholding a state-wide subpoena in *EEOC v. Aaron's Inc.*, 779 F. Supp. 2d 754 (N.D. Ill. 2011).

104 *EEOC v. United Parcel Serv.*, 587 F.3d 136 (2d Cir. 2009).

105 To obtain enforcement of an administrative subpoena, "an agency must show only: (1) that the investigation will be conducted pursuant to a legitimate purpose; (2) that the inquiry may be relevant to the purpose; (3) that the information sought is not already within [the agency's] possession; and (4) that the administrative steps required ... have been followed." *EEOC v. UPS*, 587 F.3d at 139.

106 *UPS*, 587 F.3d at 140.

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

108 See detailed discussion of the *Kronos* decision *infra* pp. 18 – 20.

109 *EEOC v. Randstad*, 765 F. Supp. 2d 734 (D. Md. 2011).

ADA. The EEOC then reopened its investigation and subsequently requested company-wide information for all placements made by every branch in the U.S. (375 branches) going back over five years. In the subsequent subpoena enforcement action seeking the ADA-related data, the employer argued that the EEOC did not have jurisdiction over the disability claim in addition to arguing that the information being sought was “irrelevant and unduly burdensome.”

The district court in *Randstad* cited *Shell Oil* for the basic proposition that a valid charge of discrimination is a “jurisdictional prerequisite to judicial enforcement of a subpoena by the EEOC.” Significantly, the court further stated, “[E]nforcement of administrative subpoenas is ‘not absolute,’ and a court should not enforce a subpoena where the ‘defense raised is “jurisdictional” in nature ... when the agency lacks jurisdiction over the subject of the investigation.’”¹¹⁰ At the heart of the subpoena enforcement action was whether the disability claim, which did not arise until two years after the initial charge, could “relate back” to the initial charge. The EEOC argued that the ADA claim related back because it arose out of the same facts and circumstances as the original charge. Rejecting that argument, the district court cited a wealth of authority providing that an amendment to a charge alleging a new theory of recovery does not relate back to the original charge.¹¹¹ The court thus held that the EEOC lacked jurisdiction to enforce the subpoena because the disability discrimination claim was untimely.¹¹²

Even when not dealing with a timeliness challenge, various courts also have refused to enforce a subpoena involving requests for information regarding employees in a different protected class.¹¹³ In short, these cases demonstrate that certain courts will not “rubber stamp” EEOC subpoenas involving requests for such information.

Yet, the courts remain split on this issue, as best illustrated by a recent district court decision in the Northern District of Illinois, *EEOC v. Aerotek, Inc.*¹¹⁴ In that case, the EEOC sought information involving sex, race and disability as part of its investigation of a charge alleging national origin discrimination. Without even discussing the contrary authority referenced above,¹¹⁵ the court enforced the subpoena, and held, “(C)ourts have consistently enforced subpoenas seeking information on different types of discrimination where only one type has been included in the charge.”¹¹⁶

¹¹⁰ *Id.* at 738.

¹¹¹ The court cited cases from various courts of appeal rejecting the EEOC’s theory: *Evans v. Technologies Applications & Serv. Co.*, 80 F.3d 954, 963 (4th Cir. 1996); *Manning v. Chevron Chem. Co. L.L.C.*, 332 F.3d 874, 878 (5th Cir. 2003); *Chanda v. Engelhard/ICC*, 234 F.3d 1219, 1224-25 (11th Cir. 2000); *Simms v. Oklahoma ex rel Dep’t of Mental Health & Substance Abuse Servs.*, 165 F.3d 1321, 1327 (10th Cir. 1999); *Pejic v. Hughes Helicopters, Inc.*, 840 F.2d 667, 675 (9th Cir. 1988). The district court also rejected the EEOC’s attempted reliance on 29 C.F.R. § 1626.22(c), which provides, “Whenever a charge is filed under one statute and it is subsequently believed that the alleged discrimination constitutes an unlawful employment practice under another statute administered and enforced by the Commission, the charge may be so amended and timeliness determined from the date of filing of the original charge.” The district court held that this provision relates only to claims brought under the ADEA.

¹¹² The court also rejected the requested information on burdensomeness grounds, citing *EEOC v. United Airlines, Inc.*, 287 F.3d 643, 653 (7th Cir. 2002).

¹¹³ See, e.g., *EEOC v. Bashas’ Inc.*, 2011 U.S. Dist. LEXIS 133447 (D. Ariz. Sept. 30, 2011) (court denied enforcement of subpoena as it pertained to the EEOC’s request for the “sex of an employee,” “union code,” “union id number,” and “union eligibility date” during its investigation of a national origin Commissioner’s charge); *EEOC v. Kronos Inc.*, 2009 U.S. Dist. LEXIS 45449 (W.D. Pa. June 1, 2009), *enf’d in part and denied in part*, 620 F.3d 287 (3d Cir. 2010) (court denied to enforce subpoena as it pertained to the EEOC’s request for race-related information during its investigation of an ADA charge); *EEOC v. Sears, Roebuck and Co.*, 2010 U.S. Dist. LEXIS 67579 (D. Colo. June 8, 2010) (magistrate decision), approved, 2010 U.S. Dist. LEXIS 67344 (July 6, 2010) (court denied to enforce subpoena as it pertained to the EEOC’s request for national origin related information where the CP only alleged race discrimination); *EEOC v. Southern Farm Bureau Casualty Insurance Co.*, 271 F.3d 209 (5th Cir. 2001) (court rejected the EEOC’s subpoena enforcement action seeking gender-related information in an investigation involving a race discrimination charge).

¹¹⁴ *EEOC v. Aerotek*, 2011 U.S. Dist. LEXIS 3723 (N.D. Ill. Jan. 12, 2011).

¹¹⁵ In opposing the subpoena enforcement action, the employer cited both the Third Circuit decision in *Kronos* and Fifth Circuit decision in *Southern Farm Bureau*, which were not even addressed in the court’s opinion. Compare *EEOC v. Aerotek, Inc.*, Case No. 1:10-cv-07109, Docket No. 14 (employer memorandum) and Docket No. 18 (opinion of court).

¹¹⁶ *Aerotek*, 2011 U.S. Dist. LEXIS 3723, at **16-17.

4. Additional Noteworthy Developments Involving Subpoena Enforcement Actions

a. Subpoenas to Third Parties By EEOC

Although not decided in FY 2011, the leading case discussing third party subpoenas and EEOC enforcement actions is *EEOC v. Kronos Inc.*¹¹⁷ The investigation initially stemmed from the CP being turned down for a bagger, stocker and/or cashier job at one of the respondent employer's grocery stores in West Virginia allegedly because the CP was disabled (*i.e.*, CP alleged that she has a hearing and speech impediment). After the filing of the initial charge, the EEOC subsequently expanded its investigation into a class-based charge focusing on hiring and use of an assessment test created by Kronos, a testing consultant. The EEOC subpoenaed Kronos seeking a broad range of documents, data, tests and other materials as part of the nationwide investigation against the employer. During the course of the investigation, the EEOC sought to expand the investigation to involve the failure to hire based on race.

Ultimately, the EEOC subpoenaed documents on a nationwide basis, including documents measuring adverse impact on individuals with disabilities and/or an individual's race. Kronos filed a petition to revoke the subpoena on relevance grounds submitting that the requested information and documents were not relevant to the CP's charge and because the information contained confidential trade secrets, which the EEOC was seeking without adequate protection. Following the EEOC's denial of the petition, the EEOC initiated a subpoena enforcement action in federal court.

The district court limited the subpoena to the state of West Virginia and for the job positions that formed the basis of the charge, and also limited enforcement to information relating to disability discrimination, not race. The district court further ordered the parties to enter into an appropriate confidentiality order to protect any trade secrets/confidential information of Kronos and the personal information of those taking the assessment test.

The EEOC appealed the district court's decision, alleging that the lower court abused its discretion by narrowing the subpoena's terms, rather than enforcing it as written. The following issues were addressed by the Third Circuit: (1) positions covered by the subpoena; (2) geographic scope of the subpoena; (3) the applicable time period for the subpoena; (4) potential adverse impact of the test based on other users of the test; (5) application beyond disability to cover race; and (6) the standard to be applied regarding confidentiality of the information covered by the subpoena.

Positions Covered. The Third Circuit initially concluded that based on the *Shell Oil* relevancy standard; there was no reason to confine the subpoena to the positions in the charge because information relating to other positions "may shed light on whether the Assessment has an adverse impact on persons with disabilities."¹¹⁸

Geographic Scope. Similarly, the appellate court ruled that the district court misapplied the relevance standard in limiting the subpoena to the state of West Virginia based on the view that "an employer's nationwide use of a practice under investigation supports a subpoena for nationwide data on that practice."¹¹⁹

Applicable Time Period. The Third Circuit also ruled that a broader time period was more appropriate dating back to the full duration of the period when the test was used by the employer, taking the view, "Evidence related to the employment practice under investigation prior to and after [the charging party's] charge provides valuable context that may assist the EEOC in determining whether discrimination occurred."

Use of Kronos Test By Other Employers. Here, too, the Third Circuit determined that "such information, regardless of whether it was 'performed specifically for' or 'relates specifically to and only to' [the employer], certainly might shed light on the charge of discrimination." In other words, if the test had an adverse impact on others using the test, this could be probative and, thus, the court allowed the EEOC's request.

117 *EEOC v. Kronos, Inc.*, 2009 WL 1519254 (W.D. Pa. June 1, 2009), *enf'd in part and denied in part*, 620 F.3d 287 (3rd Cir. 2010). Following remand, the district court has dealt with crafting an appropriate order consistent with the ruling by the Third Circuit. See *EEOC v. Kronos Incorporated*, 2011 U.S. Dist. LEXIS 29127 (W.D. Pa. Mar. 21, 2011) (order on remand) and 2011 U.S. Dist. LEXIS 47348 (W.D. Pa. May 3, 2011) (denial of EEOC motion for reconsideration, except that the court modified its order in certain limited respects).

118 *Kronos*, 620 F.3d at 298. The Third Circuit cited *EEOC v. Roadway Express, Inc.*, 261 F.3d 634, 642 (6th Cir. 2001), which held that the EEOC is entitled to information relating to job positions other than those at issue because such information met the *Shell Oil* standard of relevance.

119 *Kronos*, 620 F.3d at 298. The Third Circuit placed primary reliance on *EEOC v. United Parcel Service*, 587 F.3d 136, 139 (3d Cir. 2009), where the court enforced a nationwide subpoena because the appearance guidelines in issue purportedly involved nationwide guidelines used by the employer.

Limiting EEOC Request for Information Relating to Potential Race Discrimination. This is one area in which the Third Circuit limited the subpoena, finding that the subpoena for materials involving race constituted an impermissible “fishing expedition.”¹²⁰ The Third Circuit relied, in principal part, on the Fifth Circuit’s decision in *EEOC v. Southern Farm Bureau Casualty Insurance Co.*,¹²¹ which is frequently cited to challenge the EEOC’s expansion of an investigation to cover other types of discrimination claims. Therein, the appellate court rejected the EEOC’s efforts to expand an investigation, through its subpoena power, to request information relating to potential sex discrimination in circumstances where the charge dealt with race discrimination.¹²²

Confidentiality of Documents Produced. The Third Circuit reversed the district court’s confidentiality order that had protected from disclosure under the Freedom of Information Act various records ordered to be produced by Kronos. According to the appellate court, any order of confidentiality required application of a “good cause balancing test,” weighing in the balance public interests against private interests.¹²³ On remand, the district court applied the “good cause balancing test,” and held that the factors related thereto weighed in favor of entering a confidentiality order in the matter.¹²⁴ Specifically, the district court noted that the following factors weighed in favor of the entry of a confidentiality order: “(1) disclosure of the information sought by the EEOC would certainly violate privacy interests of potentially millions [sic] job applicants, and (2) would potentially cause the job applicants embarrassment; (3) the information is not critical to public health or safety; and, (4) Kronos (and presumably the job applicants as well) as the party benefitting from the entry of a confidentiality order, is not a public entity or official.”¹²⁵ Additionally, the district court noted that a very compelling factor for entry of a confidentiality order was that it would protect Kronos’ trade secrets and/or proprietary information.¹²⁶ The Commission appealed, among other things, the district court’s March 21, 2011 order and that appeal remains pending with the Third Circuit.¹²⁷

On the issue of confidentiality, another recent decision involving third party subpoenas is *EEOC v. Concentra Health Services*,¹²⁸ which involved a subpoena enforcement action relating to medical records.¹²⁹ In *Concentra Health*, the EEOC successfully argued that HIPAA did not preclude disclosure of various medical records for those who were determined not to be medically cleared for employment.

Finally, the issue of costs associated with production of records by a third party recently was addressed by the *Kronos* court. In a follow up decision in *EEOC v. Kronos Inc.*,¹³⁰ the court addressed the issue of protection of third parties from significant costs based on compliance with an EEOC subpoena. The case provides an excellent summary of the case law involving the need to protect non-parties from significant production expenses.¹³¹ Therein, based on principles of “cost shifting/cost sharing,” the district court ruled that the EEOC and Kronos should split the cost of compliance equally (50%/50%), finding this approach “fair and equitable,” but stayed the proceedings for 70 days to

120 *Kronos*, 620 F.3d at 301. The court relied on *EEOC v. United Airlines, Inc.*, 287 F.3d, 643, 653 (7th Cir. 2002).

121 *EEOC v. Southern Farm Bureau Casualty Ins. Co.*, 271 F.3d 209 (5th Cir. 2001).

122 In rejecting an expansion of the EEOC’s investigation based on the disability charge to cover race discrimination, the Third Circuit in *Kronos* pointed out that based on 42 U.S.C. § 2000e-5(b), the EEOC always had the option of filing a commissioner’s charge. The Seventh Circuit took the same approach in *EEOC v. United Airlines, Inc.*, 287 F.3d 643, 654 n.7 (7th Cir. 2002), when limiting the scope of the EEOC’s investigation.

123 *Kronos*, 620 F.3d at 302. The factors required to be considered include: (1) whether the disclosure will violate any privacy interests; (2) whether the information is being sought of a legitimate purpose or an improper purpose; (3) whether disclosure of the information will cause a party embarrassment; (4) whether confidentiality is being sought over information important to public health and safety; (5) whether the sharing of information among litigants will promote fairness and efficiency; (6) whether a party benefitting from the order of confidentiality is a public entity or official; and (7) whether the case involves issues important to the public. *Id.* citing *Glenmade Trust Co. v. Thompson*, 56 F.3d 476, 483 (3rd Cir. 1995) (citing *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 787-91 (3rd Cir. 1994)).

124 *EEOC v. Kronos Inc.*, 2011 U.S. Dist. LEXIS 29127, at **40-43 (W.D. Pa. Mar. 21, 2011).

125 *Id.* at **41-42.

126 *Id.* at *42. The district court also noted the following factors that weighed against issuing a confidentiality order: (1) the fact that the information being sought may be primarily for legitimate purposes; (2) the sharing of information among litigants might promote efficiency and fairness; and (3) this case involves issues which are important to the public. *Id.* On balance, however, the district court decided that the factors weighed in favor of the entry of a confidentiality order.

127 The appeal was filed on July 1, 2011. The EEOC appealed the following: (a) Order of Court Enforcing Subpoena Two with Applicable Confidentiality Provisions (Docket No. 51, Mar. 21, 2011); (b) Order on Motion for Reconsideration or, in the Alternative, to Alter or Amend Judgment (Docket No. 56, May 3, 2011); and (c) Memorandum Order on Cost Shifting (Docket No. 57, May 3, 2011). See Case No. 2:09-mc-00079-AJS, Docket No. 58 (W.D. Pa. July 1, 2011). The docket number for the appeal before the Third Circuit is 11-2834.

128 *EEOC v. Concentra Health Serv.*, Case No. 1:11-mc-00039, Docket No. 1 (Motion) (S.D. Ind., Filed Apr. 6, 2011).

129 *Id.* at Docket No.17 (Transcript of Show Cause Hearing) (S.D. Ind. June 1, 2011). As of July 1, 2011, the court entered an order confirming that Concentra had substantially complied with the subpoena and that the show cause action was withdrawn and closed upon request of the EEOC. *Id.* at Docket No. 20 (S.D. Ind. July 1, 2011).

130 *EEOC v. Kronos Inc.*, 2011 U.S. Dist. LEXIS 47350 (W.D. Pa. May 3, 2011).

131 *Id.* at **2-6.

provide the parties the opportunity to appeal.¹³² The Commission appealed the district court's cost splitting order, among other things, and the appeal remains pending with the Third Circuit.¹³³

b. Subpoenas Involving Witness Interviews

EEOC v. Z Foods, Inc. dba Zoria Farms, involved a motion for reconsideration of a magistrate judge's order enforcing an EEOC subpoena relating to an alleged pattern or practice of sexual harassment.¹³⁴ The EEOC's investigation stemmed from 14 charges of alleged preferential treatment toward younger women, "quid pro quo" harassment and sexual misconduct (*i.e.*, assault). The EEOC's investigation included an on-site visit and interview of a supervisor, who was one of the alleged harassers.

The initial source of the dispute with the EEOC stemmed from a company attorney not permitting the witness to respond to questions regarding female employees not named in the charge. The Company attorney also instructed the supervisor not to answer questions regarding the supervisor's alleged relationships with female employees beyond one charging party, invoking the supervisor's privacy rights. Based on the failure and/or refusal to respond, as requested, the EEOC served a subpoena requiring attendance of the witness at the EEOC's offices to respond to inquiries regarding the supervisor's sexual activity with current and/or former employees. In response, the employer's attorney requested an advance copy of the interview questions to determine if they invaded the supervisor's right to privacy.

In the subsequent subpoena enforcement action, the magistrate judge ruled that the employer and its counsel had impeded the EEOC's investigation, ordered the supervisor to appear at EEOC offices and barred the company's personnel or legal counsel from intimidating any witness cooperating with the EEOC.

Following a motion for reconsideration, the district court cited case authority for the proposition that a district court's role is "extremely limited" and the critical questions are: "(1) whether Congress has granted the authority to investigate; (2) whether procedural requirements have been followed; and (3) whether the evidence is relevant and material to the investigation." Assuming these factors were demonstrated, a subpoena would be enforced unless the party objecting "proves the inquiry is unreasonable because it is overbroad or unduly burdensome." Citing *Shell Oil*, the court highlighted the broad "relevancy" standard, but qualified that broad standard by stating that the administrative subpoena may not be used as a "fishing expedition."¹³⁵

In focusing specifically on the areas of requested inquiry by the EEOC, the court concluded that it was entirely appropriate for the Commission to investigate and ask questions of the supervisor regarding his sexual relationships with current and former employees to determine whether supervisors engaged in a pattern or practice of sexual harassment. The court also relied on case authority that the EEOC is not limited to inquiries solely referenced in the charge and could thus investigate whether others were subjected to sexual harassment. The court denied the employer's claim that it should be entitled to the EEOC's questions in advance.

c. Challenges to EEOC Subpoenas Based on Claim of "Improper Purpose"

Finally, one area worth mentioning involves challenges to EEOC subpoenas based on employer claims that the subpoenas were issued for an "improper purpose." Employers have challenged subpoenas on this basis in at least two recent cases: (1) *EEOC v. Bashas' Inc.*,¹³⁶ and (2) *EEOC v. Sterling Jewelers, Inc.*¹³⁷

In *EEOC v. Bashas' Inc.*, the underlying charge was a Commissioner's charge that had been pending for an extended period of time and involved the issue of whether the employer engaged in discrimination against Hispanic employees on the basis of national origin with respect to wages and promotions. The employer argued that a subpoena issued by the EEOC requesting its entire employee database coincided with the timing of a denial of such data in a private class action lawsuit against the employer. The employer challenged the subpoena claiming that it was issued for the purpose of providing the information to plaintiffs' counsel in the private litigation against the employer, which the employer submitted was an abuse of process. Specifically, the employer argued that: (1) the timing was suspicious based on developments in

¹³² *Id.* at *6.

¹³³ See *supra* footnote 127.

¹³⁴ See *EEOC v. Z Foods, Inc. d/b/a Zoria Farms*, 2011 U.S. Dist. LEXIS 17667 (E.D. Cal. Feb. 23, 2011).

¹³⁵ *Id.* at *14. The court also cited *Peters v. United States*, 853 F.2d 692 (9th Cir. 2009) and *EEOC v. United Airlines, Inc.*, 287 F.3d 643 (7th Cir. 2002).

¹³⁶ *EEOC v. Bashas' Inc.*, 2011 U.S. Dist. LEXIS 133447 (D. Ariz. Sept. 30, 2011); see also *EEOC v. Bashas' Inc.*, 2009 U.S. Dist. LEXIS 97736 (D. Ariz. Sept. 30, 2009).

¹³⁷ *EEOC v. Sterling Jewelers, Inc.*, 2011 U.S. Dist. LEXIS 126585 (W.D.N.Y. Nov. 2, 2011).

the private lawsuit, which created the suspicion that the subpoena was not issued in good-faith; and (2) the EEOC was sharing information with attorneys in the private litigation. In reviewing such factors, the district court held a hearing on the employer's request for limited discovery and determined that the employer made the requisite showing of abuse of process to justify limited discovery.¹³⁸

After completion of the limited discovery, the EEOC filed a renewed application for an order to show cause as to why the court should not enforce its subpoena. Following an evidentiary hearing¹³⁹ and additional briefing on the EEOC's renewed application, the court issued its opinion, enforcing the subpoena. Bashas' primary argument against enforcement of the subpoena was that the EEOC's motive in issuing the subpoena, and in some regards instituting a Commissioner's Charge in the first instance, was the agency's desire to "bolster the struggling [private] litigation." In support of its position, Bashas' continued to rely on the timing of the subpoena and the fact that the EEOC and the private litigants' counsel shared information.

Even after the limited discovery, the court noted that Bashas' evidence remained the same, despite the fact that post-discovery its burden of proof was higher. Bashas' did not have specific proof of a direct causal connection between the EEOC Commissioner's Charge and subpoena enforcement action and the private litigation. Moreover, Bashas' did not present substantial evidence that the EEOC acted in bad faith. While noting that the EEOC was aggressive, with a process that was not always fully transparent and actions that were not always timely, the court held that Bashas' was "unable to get beyond that initial 'preliminary and substantial demonstration of abuse,' and to clear the high hurdle necessary to prove 'an abuse of process of lack of institutional good faith.'"¹⁴⁰

In *EEOC v. Sterling Jewelers, Inc.*,¹⁴¹ the employer challenged the EEOC for allegedly using the investigation process and its subpoena powers in investigating an individual charge of discrimination to obtain documents and information that the EEOC failed to secure in a pending EEOC nationwide pattern or practice lawsuit against the same employer. The lawsuit, pending in the Western District of New York, involved claims of discrimination in pay and promotion. Discovery had not yet commenced in the nationwide lawsuit, and the parties had not yet exchanged initial disclosures. The employer argued that the subpoena enforcement action to secure certain data and information was an improper effort to secure premature discovery and, thus, was an abuse of process, warranting revocation of the subpoena.

On November 2, 2011, the magistrate judge assigned to the case issued a report and recommendation.¹⁴² The court noted that the commencement of another civil action is not a *per se* bar to the EEOC's authority to investigate a charge. Further, the court stated that the scope of the EEOC's subpoena did not indicate bad faith on the part of the agency because the counseling report at issue in the charge indicated that the CP was disciplined under the employers "code of conduct" prohibiting employees from discussing their pay. In light of the fact that the CP believed that women were paid less than their male counterparts and that she was disciplined for discussing pay, the court recommended the subpoena be enforced, citing *Kronos* for the proposition that "an employer's nationwide use of a practice under investigation supports a subpoena for nationwide data on that practice."¹⁴³

After the magistrate judge issued the report and recommendation, Sterling Jewelers sought clarification of the scope of the subpoena. On November 28, 2011, the district court held a telephonic hearing with both the EEOC and the employer. On November 29, 2011, the district court entered a text order on the docket indicating that in accordance with the parties' telephonic conference, "the parties agree that Sterling will respond to the January 20, 2010 subpoena (NY-A10-006) by formalizing its prior representations that it is not in possession of any responsive documents (other than the Code of Conduct) because it has no company policy prohibiting employees from discussing their pay, thereby mooting Sterling's motion for clarification."¹⁴⁴

5. Considerations for Employers Regarding the EEOC's Administrative Subpoenas

The broad scope of requests for information in many EEOC investigations has been a concern for the employer community, particularly based on the EEOC's continued focus on systemic and pattern or practice investigations and related litigation. As the foregoing overview of

138 *Bashas'*, 2009 U.S. Dist. LEXIS 97736, at **30-42.

139 The court held a two and a half day hearing regarding the EEOC's renewed order, during which it heard the testimony of 20 witnesses and admitted 45 exhibits into evidence.

140 *EEOC v. Bashas' Inc.*, 2011 U.S. Dist. LEXIS 133447 (D. Ariz. Sept. 30, 2011).

141 Case No. 1:11-mc-00028, Docket No. 17 (Memorandum in Opposition to EEOC's Application for Order to Show Cause Why Administrative Subpoena Should Not be Enforced) (W.D.N.Y. Filed Apr. 15, 2011).

142 *EEOC v. Sterling Jewelers, Inc.*, 2011 U.S. Dist. LEXIS 126585 (W.D.N.Y. Nov. 2, 2011).

143 *Id.* at **8-9.

144 See *EEOC v. Sterling Jewelers, Inc.*, Case No. 1:11-cv-00938, Docket No. 29 (Nov. 29, 2011).

court decisions involving administrative subpoena enforcement actions evidences, courts decide these actions in divergent manners, largely based on the scope of the subpoena request and the employer's grounds for challenging them. Employers are urged to closely monitor case developments in this area because it is clear that over the next several years the EEOC will continue to focus on systemic and pattern or practice investigations and related litigation. Employers are also urged to consider the cases in this area when they strategize as to how to respond to a particular request for information from the EEOC during the pendency of a charge. If an employer anticipates challenging a subpoena and standing behind its challenge after being served with an administrative subpoena, it will be better positioned to lay the ground work for its challenge, and to investigate its ability to support the challenge, from the moment it objects or refuses to respond to the EEOC's particular request for information.

B. Pleadings-Related Motions

The EEOC typically has pled its complaints very tersely, taking full advantage of the minimal "notice" pleading requirements of Federal Rule of Civil Procedure 8(a), which requires only a "short and plain statement of the claim showing that the pleader is entitled to relief." Although usually not particularly problematic in cases where the EEOC represents a single aggrieved party, this approach presents greater problems for employers in class cases where, because Rule 23 is inapplicable to EEOC-initiated actions, it often has been difficult to determine the size, scope and theory of the EEOC's case from the allegations of its complaint.¹⁴⁵

Because the ADA's definitions of "disability" and "qualified individual with a disability" require individual analysis, the prospect of private ADA class actions has always seemed improbable, but the EEOC never had to be concerned with Rule 23 requirements in bringing class cases under the ADA. However, the EEOC is not exempt from another development in the law, which is the heightened pleading standard required by the Supreme Court's opinions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 644 (2007), and *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009). Together, *Iqbal* and *Twombly* established a standard of "plausibility," requiring that pleadings state "sufficient factual matter" to "allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."

These issues came together in the most important pleadings-related case of FY 2011 involving the EEOC. In *EEOC v. United Parcel Service, Inc.*,¹⁴⁶ the EEOC's proposed ADA class case against United Parcel Service, Inc. (UPS) was dismissed because it failed adequately to allege specific facts concerning the qualifications and disabilities of the proposed class members.

In *United Parcel Service*, the employer filed a motion to dismiss the EEOC's first amended complaint, seeking dismissal not of the claims of the two identified aggrieved parties, but of the claims of all the putative class members on the basis that the EEOC had not pled sufficient facts about their alleged disabilities, the leaves of absence they received or the reasonable accommodations UPS purportedly failed to provide them to support the claims. In its first amended complaint, the EEOC simply alleged that each unidentified class member was disabled and "could perform the essential duties of his or her job with or without reasonable accommodation," and that UPS failed reasonably to accommodate the unidentified class members' disabilities by maintaining an inflexible 12-month leave policy that resulted in termination of their employment rather than accommodation of their disabilities. The EEOC did not allege any specific facts regarding the disabilities of unidentified class members, the circumstances of their termination or leave, or what accommodations would have permitted them to return to work. UPS argued that this did not satisfy the *Twombly/Iqbal* pleadings standard because it included only conclusory and formulaic statements about how the unidentified class members qualified for protection under the ADA. The EEOC argued in response that its allegations satisfied the *Twombly* standard because they put UPS on notice of its claims against the company. The EEOC supported its argument with cases alleging violations of Title VII, rather than ADA cases.

Citing *EEOC v. Concentra Health Services, Inc.*,¹⁴⁷ and his own earlier order in the *UPS* case, Judge Robert Dow found that allegations of Title VII violations, like race or sex discrimination, can be more generalized, but allegations of ADA violations must provide adequate detail of an employee's qualifications to perform the essential functions of his or her job. The EEOC argued that identifying all class members before filing a claim could cause companies like UPS to stonewall investigations, but the court noted there was a gulf "between stating a

¹⁴⁵ See *EEOC v. Hobson Air Conditioning, Inc.*, 2010 U.S. Dist. LEXIS 103631, at *6 (N.D. Tex. Sept. 28, 2010) ("... in this case, the court was required to pore over the Complaint and analyze the parties' written materials. All of this could have been avoided had [EEOC] taken about twenty minutes to add a few sentences with more factual detail. Such approach conserves scarce judicial resources and saves valuable time for litigants. The court does not understand a 'just-enough-to-get-by' approach in which [EEOC] unnecessarily runs the risk of being ordered to replead or having the action dismissed").

¹⁴⁶ *EEOC v. United Parcel Serv., Inc.*, 2011 U.S. Dist. LEXIS 111464 (N.D. Ill. Sept. 28, 2011) ("*UPS*").

¹⁴⁷ *EEOC v. Concentra Health Servs., Inc.*, 496 F.3d 773 (7th Cir. 2007).

plausible claim with sufficient detail to provide fair notice” and identifying “every single potential class member.”¹⁴⁸ The court agreed with UPS’s observation that the EEOC is required to investigate and conciliate claims before suing, and that the agency also has subpoena power, which “provides a strong antidote to the EEOC’s professed concerns about concealment of relevant information.” The court further noted that, although EEOC is exempt from Rule 23 requirements, it “is not exempt from the standard pleading requirements” of Rule 8.¹⁴⁹

The court concluded that with respect to the unidentified class members, the EEOC failed to plead with adequate specificity facts establishing the plausibility of the claim that each class member is a qualified individual under the ADA who could have performed his or her job without reasonable accommodation. Thus, the court granted UPS’s motion to dismiss the claims with respect to those class members, subject to providing the EEOC one final opportunity to file another amended complaint to cure the pleading defects.

One other aspect of the *Twombly/Iqbal* rule that should be noted by employers is the extent to which it applies to affirmative defenses—an issue that has generated a multitude of opinions and a far-from-clear split of authority in district courts around the country. The EEOC has argued for application of the rule to affirmative defenses in at least one case, but in the written opinion there, the district court refused to apply the plausibility standard to affirmative defenses, opting instead to apply prior Fifth Circuit precedent.¹⁵⁰

C. Statute of Limitations for Pattern or Practice Lawsuits

Recent decisions by federal district courts reflect a growing movement toward imposing the same 300-day statute of limitations on “class” oriented actions filed by the EEOC as imposed on actions brought on behalf or by an individual claimant. Yet, not all federal courts are in accord, and the issue has not been settled by the courts of appeals.

While employers tend to be most familiar with discrimination claims brought by an individual employee (or former employee), the EEOC has increased its emphasis on litigating higher-impact class claims over the years.¹⁵¹ These particular claims are still subject to administrative prerequisites—namely that a discrimination charge is filed with the EEOC within 300 days of the alleged discriminatory act (such as a failure to hire or a termination); that the EEOC investigate the charge and make a reasonable cause determination; and that the EEOC first attempt to resolve the claim through conciliation before initiating a civil action.¹⁵²

Section 706 of Title VII provides the EEOC authority to sue on behalf of one or more persons aggrieved by an unlawful discriminatory employment practice where the individual filed a charge with the Commission within 300 days after the alleged act.¹⁵³ Likewise, section 707 allows the Commission to investigate and act on cases involving a pattern or practice of discrimination in accordance with the procedures set forth in section 706.¹⁵⁴ The EEOC nonetheless takes the position that the 300-day limit associated with filing a timely charge (under section 706) does not apply in any respect when the Commission seeks relief on behalf of a class of individuals in actions triggered by another individual’s timely charge.

Employers have shown increasing success in challenging the EEOC’s position on the limitations period associated with section 707 pattern or practice actions. Most recently, a district court in Ohio rejected the EEOC’s efforts to seek relief under Title VII for individuals participating as “class” claimants in pattern or practice suits brought by the Commission, but claiming to be aggrieved more than 300 days before the filing of the administrative charge triggering the EEOC’s investigation.¹⁵⁵

At issue in *EEOC v. Kaplan Higher Education Corp.*, was whether the 300-day filing requirement expressed in section 706 applies to pattern or practice claims brought under section 707. In *Kaplan*, the EEOC alleged that the defendant engaged in a nationwide pattern or practice of race discrimination by relying on credit histories to make hiring and other employment decisions, asserting that the practice has a disparate impact on black job applicants and employees. The allegations were first made known to the EEOC by a former Kaplan employee, who alleged she was terminated in February 2009 on the basis of her credit history report. She filed a charge of discrimination with the

148 *UPS*, 2011 U.S. Dist. LEXIS 111464, at *13.

149 *Id.* at *15.

150 *EEOC v. Courtesy Building Servs. Inc.*, 2011 U.S. Dist. LEXIS 5938, at **7-8 (N.D. Tex. Jan. 21, 2011).

151 For a discussion of the EEOC’s authority to pursue class claims, see *supra* pp. 10 – 11 and Appendix B.

152 42 U.S.C. § 2000e-5(e)(1). For a discussion of the recent developments regarding the EEOC’s conciliation requirements see *infra* pp. 25 – 28.

153 42 U.S.C. § 2000e-5(e)(1). If a jurisdiction does not have its own enforcement agency, then the charge-filing requirement is 180 days. For a detailed discussion regarding the distinctions between a section 706 and section 707 claim, please see Appendix B.

154 42 U.S.C. § 2000e-6(e).

155 *EEOC v. Kaplan Higher Educ. Corp.*, 790 F. Supp. 2d 619 (N.D. Ohio 2011).

EEOC within a couple weeks of her discharge, and the EEOC filed its complaint in federal court in December 2010, asserting unlawful discrimination dating as far back as January 2008. The EEOC asserted that the 300-day requirement does not come into play in its pattern or practice lawsuits, and that any act resulting from the pattern or practice is actionable under section 707 regardless of the time restriction. In other words, the EEOC relied on section 707 to broaden its “class” of claimants to individuals who may have been aggrieved long before the 300-day filing deadline.

The court in *Kaplan* disagreed, and held that the plain language of the statute does not carve out an exception for the EEOC to bring untimely claims. The court, following an emerging line of decisions by other district courts, rejected the EEOC’s arguments, reasoning that the plain language of the statute makes clear that Congress intended discrimination claims to be resolved promptly.

Finding the plain language of the law controlling, the court narrowed the “class” of potential claims by barring as untimely those claimants who may have been affected more than 300 days before the operative charge giving rise to the lawsuit. Indeed, the court agreed with another recent decision in the District of Maryland, which explained that “[i]f Congress intended to make an exception for the EEOC to revive stale claims under Section 706 and 707, it should have said so.”¹⁵⁶ Other courts have even opined that this 300-day time limit should begin to run for claims arising within 300 days of the employer first being made aware of a broader EEOC investigation into possible “class” or pattern or practice claims, and not necessarily from the earlier date that an individual charge was filed (*i.e.*, if a pattern or practice of discrimination, or an alleged discriminatory policy was not asserted in the original charge).¹⁵⁷

In the *Kaplan* case and in other cases involving stale “class” claims, the EEOC relied on the policy argument that, given its enforcement mission and power to bring pattern or practice claims, Congress did not intend to limit the EEOC’s ability to reach back beyond the charge filing limit to attempt to remedy alleged instances of discrimination. Some district courts have sided with the EEOC on this question,¹⁵⁸ and no U.S. Court of Appeals has decided the issue. For this reason, given the EEOC’s emphasis on bringing the more sweeping pattern or practice claims on behalf of larger “classes” of claimants, the EEOC can be expected to continue asserting that it has no time restrictions in recruiting and proceeding on behalf “class” members similarly affected by the challenged pattern or practice.

This issue was also raised but not squarely decided when another employer attempted to raise the timeliness issue in the context of a discovery dispute, rather than a dispositive motion. In *EEOC v. Princeton Healthcare System*,¹⁵⁹ the EEOC brought a section 707 claim challenging the employer’s blanket leave policies under the Americans with Disabilities Act. The EEOC sought discovery on individuals terminated under the defendant’s leave of absence policy since January 1, 2000. The defendant challenged the temporal scope of the discovery request, looking to cases limiting “class” membership to claims arising within 300 days of the underlying EEOC charge. Although the court discussed the diverging case law on the 300-day issue, it noted that the defendant raised the issue in the context of a discovery dispute, rather than a motion to dismiss or a motion for summary judgment, which the court held were the proper vehicles for doing so. As a result, the court declined to rule on the limitations issue, and ordered production of discovery pertaining to claims falling outside of the 300-day window.

Employers opposing the Commission’s position and favoring imposing the limitations period set forth in section 706 on EEOC pattern or practice claims have argued as follows: absent a clear expression by Congress, there is no reason for providing the EEOC an exception from Congress’ policy favoring the filing of prompt charges and notifying employers of investigations. The alternative, as posited by the EEOC, is to free the agency from any time limits.

Although the language of the law makes clear that the 300-day requirement also applies to the section 707 pattern or practice claims, the EEOC has contended—with mixed results—that such a requirement is contrary to Congress’s intent for the EEOC to remedy systemic discrimination in the workplace. The EEOC argues that it does not proceed as a representative of either the individual who filed the initial charge or for any others for whom it seeks relief; rather, it proceeds primarily in the public interest. Alternatively, the EEOC argues that when it succeeds in proving an unlawful pattern or practice of unlawful discrimination, all unlawful acts that stem from that pattern or practice are actionable regardless of whether such acts occurred before the 300-day charge filing limitation.

156 *EEOC v. Freeman*, 2010 U.S. Dist. LEXIS 41336, at *13 (D. Md. Apr. 27, 2010). See *Kaplan*, 790 F. Supp. at 623; see also *EEOC v. Bloomberg, L.P.*, 751 F. Supp. 2d 628 (S.D.N.Y. 2010); *EEOC v. CRST Van Expedited, Inc.*, 615 F. Supp. 2d 867 (N.D. Iowa 2009) (section 706 action); *EEOC v. Burlington Med. Supplies, Inc.*, 536 F. Supp. 2d 647 (E.D. Va. 2008); *EEOC v. Custom Cos., Inc.*, Case Nos. 1:02-cv-03768 and 1:03-cv-02293 (N.D. Ill. Apr. 7, 2004); *EEOC v. Optical Cable Corp.*, 169 F. Supp. 2d 539 (W.D. Va. 2001).

157 *EEOC v. Freeman*, 2011 U.S. Dist. LEXIS 8718 (D. Md. Jan. 31, 2011); *EEOC v. Optical Cable Corp.*, 169 F. Supp. 2d 539 (W.D. Va. 2001).

158 See *EEOC v. LA Weight Loss*, 509 F. Supp. 2d 527 (D. Md. 2007); *EEOC v. Sterling Jewelers, Inc.*, 2009 U.S. Dist. LEXIS 122102 (W.D.N.Y. 2009).

159 *EEOC v. Princeton Healthcare Sys.*, 2011 U.S. Dist. LEXIS 58056 (D.N.J. May 31, 2011).

The EEOC alternatively has argued that its pattern or practice lawsuits fit within the exceptions to the 300-day limitations period provided by the “continuing violations” doctrine. The continuing violations doctrine allows courts to consider the cumulative effect of individual acts that, on their own, do not amount to actionable discrimination, but considered as a whole may give rise to unlawful discrimination, such as the creation of a hostile work environment. In such a case, so long as an act contributing to the claim occurred within the 300-day period, the court may consider component acts giving rise to the hostile work environment that occurred outside the statutory period.¹⁶⁰

Although the EEOC has attempted to blur the line between pattern or practice claims and the continuing violations doctrine, *Kaplan* and other courts have rejected such efforts. Specifically, courts distinguish between “component acts,” which cumulatively may amount to a discriminatory claim, such as a hostile work environment, and “discrete acts” which, on their own, may amount to adverse action. The former are actionable if at least one of the acts occurred within the 300-day statutory period, whereas the latter are time-barred if not timely filed. In short, pattern or practice allegations should not be used to allow the EEOC to seek relief on behalf of otherwise time-barred parties when the challenged practice involves discrete acts of discrimination.¹⁶¹

The rulings in cases such as *Kaplan*, *Freeman*, and *Bloomberg* restrict the EEOC’s ability to resurrect untimely claims by limiting the scope of its pattern or practice lawsuits to those employment decisions made within 300 days of the charge that triggered the EEOC’s investigation (or, in some cases, the date the EEOC expanded its investigation to include the claims forming the basis for the pattern or practice claim) and lawsuit. Although the EEOC may continue to argue in favor of being allowed to side-step Title VII’s time restrictions, the most recent opinions are beginning to limit these efforts in litigation.

With such limitations in place, the EEOC remains able to litigate pattern or practice claims and challenge practices the Commission believes are discriminatory, but it is simply prevented from resurrecting stale claims and, importantly, is limited in its ability to expand the number of claimants in litigation and extract larger settlements under the threat of larger “classes.” The pendency of similar timeliness motions in other EEOC pattern or practice cases may have helped leverage less onerous settlements for employers. Moreover, these recent decisions afford relief to employers who otherwise may have been forced to locate witnesses with fading memories or who may no longer work for the company—a reality of “class” litigation that grows exponentially more difficult for older claims, particularly in industries with higher employee turnover. Even with the limitations arising out of the 300-day rule, employers in these “class” cases often encounter difficulty finding witnesses with clear recollections of events surrounding newly identified claimants because actual litigation brought by the EEOC, and identification of all claimants, often occurs years after the filing of the initial charge. The emerging trend of district court rulings like *Kaplan*, *Freeman* and *Bloomberg*, nonetheless, places limited restraints on the EEOC with respect to claims not promptly pursued.

D. Investigation and Conciliation Obligations

The EEOC’s pattern or practice claims under section 707 and “class” claims under section 706 have also been challenged on the grounds that the EEOC failed to satisfy its statutory prerequisites to bringing suit. Before filing a lawsuit, the EEOC is required to investigate and then attempt to “eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.”¹⁶² As one court recently noted, “[t]he Court’s role in reviewing efforts to conciliate, while not inert, is modest; the EEOC, as the enforcement agency, has discretion to formulate conciliation efforts in each situation, but it must do so in good faith.”¹⁶³ Several recent decisions, however, underscore the principle that deference to the EEOC on its investigations and conciliation efforts has its limits.

In *Bloomberg*, the EEOC filed a complaint alleging gender and pregnancy discrimination, and later retaliation, by the employer. The defendant moved for summary judgment, contending not only that certain claims were time-barred under the 300-day limitations period, but also that the EEOC failed to investigate and conciliate prior to filing suit. With respect to the gender and pregnancy discrimination claims, the court denied summary judgment for the employer on the investigation and conciliation argument. The court noted that the EEOC had expanded its investigation of the initial charges, and sought and received information on “hundreds of women who had taken maternity leave companywide.” It interviewed potential claimants, and requested further information from the employer. The EEOC then

¹⁶⁰ By contrast, discrete acts—such as failure to hire, failure to promote, or a termination—are barred as untimely if they are not raised in a discrimination charge within 300 days. For a detailed discussion on the differences between a continuing violation and discrimination premised on a discrete act, see *Kaplan*, 790 F. Supp. 2d at 623-24.

¹⁶¹ *Kaplan*, 790 F. Supp. 2d at 624.

¹⁶² E.g., *EEOC v. Bloomberg L.P.*, 751 F. Supp. 2d 628 (S.D.N.Y. 2010) (citing 42 U.S.C. § 2000e-5(b)).

¹⁶³ *Bloomberg*, 751 F. Supp. 2d at 637.

included findings on former and current female employees in its letter of determination. In its initial conciliation agreement demand, the Commission proposed formation of a claim fund, and attempted to define the class.

The court held that the EEOC need not provide notice of the particulars of the investigation, and can expand the scope of its initial investigation. It must, however, provide notice of the charges and findings it seeks to conciliate—an obligation that the court held the Commission satisfied in this case.¹⁶⁴ In particular, the court looked to the “discernable definition of the class of potential claimants” in the conciliation proposal, and the prior notice that far more claimants than the original charging parties existed.

Moving on to the conciliation process, the court rejected the defendant’s arguments that the EEOC did not respond in a “reasonable and flexible manner” to its conciliation overtures with respect to the discrimination claims. The court noted:

The EEOC’s efforts were sufficient to satisfy the conciliation requirement in this context. The parties discussed different aspects of conciliation for nearly two months, during which time the parties met twice and exchanged letters and telephone calls.... Throughout, the EEOC insisted on three fundamental areas of conciliation: individual monetary relief, injunctive relief, and classwide monetary relief.¹⁶⁵

The court found that the EEOC had provided sufficient information for the employer to evaluate the discrimination claims, and respond or at least have a basis for requesting additional information. That the parties had strongly diverging positions on monetary relief did not signal a failure to conciliate in good faith.¹⁶⁶

The court, however, arrived at a very different conclusion with respect to the EEOC’s conciliation efforts on the retaliation claims. There, the EEOC had made a demand for over \$41 million, and refused to offer sufficient information about its basis for its determinations. The court held that “[t]he EEOC’s approach to conciliation here reeks of using the proposed agreement as a ‘weapon to force settlement.’”¹⁶⁷ The court found that the EEOC took an inflexible approach on the retaliation demand, and did not respond to the employer’s requests for more information from which it could formulate an intelligent monetary counteroffer. Rather, the court viewed the EEOC’s approach as requiring the employer “simply to pony up or face a lawsuit.”¹⁶⁸ Given the late timing of the EEOC’s demand in the retaliation case, and the stage of the litigation, the court dismissed the retaliation claims rather than opting for a stay pending conciliation.

The court in *EEOC v. CRST Van Expedited, Inc.* (“CRST”)¹⁶⁹ addressed a very different set of facts, in which the EEOC did not investigate any of the underlying “class” claims prior to filing suit. CRST involved claims of sex discrimination and sexual harassment brought under section 706, on behalf of an undefined number of claimants. The matter began with the charge of one truck driver. During the investigation, the EEOC learned that four other female drivers had filed complaints of sexual harassment against the company, and the Commission sought information on other charges and on others trained by the alleged harassers. In addition to finding cause for the charging party, the Commission issued a determination letter finding reasonable cause to believe that the employer subjected a class of employees and prospective employees to sexual harassment. In conciliation, however, the EEOC could not provide names of the class members, or any indication on the size of the class. The Commission proposed a letter to past and present employees to help identify class members. Conciliation failed, and the EEOC filed its complaint.

During the pendency of litigation, the EEOC sent letters to over 2,700 former female employees soliciting their participation in the case, and ultimately identified 270 “class” members (later reduced to 67). The employer challenged the EEOC’s ability to bring a section 706

¹⁶⁴ *Id.* at 633-34 (citations omitted).

¹⁶⁵ *Id.* at 638.

¹⁶⁶ *Id.* at 639-40.

¹⁶⁷ *Id.* at 642 (citing *EEOC v. Agro Distrib., L.L.C.*, 555 F.3d 462, 468 (5th Cir. 2009)).

¹⁶⁸ *Id.* at 642.

¹⁶⁹ *EEOC v. CRST Van Expedited, Inc.*, 2009 U.S. Dist. LEXIS 71396 (N.D. Iowa Aug. 13, 2009) (“CRST”). There are a number of other decisions in the case discussed herein, including a prior decision focusing in part on the difference between section 706 and 707 claims (*EEOC v. CRST Van Expedited, Inc.*, 611 F. Supp. 2d 918 (N.D. Iowa 2009) (N.D. Iowa 2009) (“CRST I”)) and an attorneys’ fees and costs award decision against the EEOC (*EEOC v. CRST Van Expedited, Inc.*, 2010 U.S. Dist. LEXIS 11125 (N.D. Iowa Feb. 9, 2010) (“CRST III”)), discussed *infra* at pp. 33 – 34. The case is currently on appeal before the U.S. Court of Appeals for the Eighth Circuit. See also *EEOC v. Carolls Corp.*, 2011 U.S. Dist. LEXIS 20972 (N.D.N.Y. Mar. 2, 2011) (discussing the general principles and standards in CRST).

suit, seeking substantial damages, without satisfying its investigation and conciliation predicates.¹⁷⁰

The court found the EEOC's investigation and conciliation efforts to fall woefully short, and dismissed the class claims. Although the court noted that the EEOC was entitled to expand its investigation beyond the scope of the initial charge, and would not second-guess the EEOC's determination, the court held:

[T]he case at bar is one of those exceptionally rare § 706 cases in which the record shows that the EEOC did not conduct *any* investigation of the specific allegations of the allegedly aggrieved persons for whom it seeks relief at trial before filing the Complaint—let alone issue a reasonable cause determination as to those allegations or conciliate them.¹⁷¹

The court faulted the EEOC for not investigating any of the alleged class members' claims until after filing the complaint, and not even having a sense of the size of the "class" in conciliation.¹⁷² It accused the EEOC of attempting to "bootstrap the investigation, determination and conciliation of the allegations of [the charging party] and a handful of other allegedly aggrieved persons into a § 706 lawsuit with hundreds of allegedly aggrieved persons."¹⁷³ This failure to investigate, and therefore conciliate, barred the EEOC from proceeding with its section 706 claims.¹⁷⁴ The court noted that the failure to investigate deprived the employer of a meaningful opportunity to engage in conciliation. Even if the EEOC could not necessarily identify every class member in a determination and in conciliation, the mere reference to a "class" in the determination letter was inadequate, especially in view of the employer's attempt to obtain information from the EEOC on the size of its unarticulated "class."¹⁷⁵ The court held that anything less than dismissal "would ratify a 'sue first, ask questions later' litigation strategy on the part of the EEOC, which would be anathema to Congressional intent."¹⁷⁶ The court dismissed the class claims, and awarded attorneys' fees in favor of the employer.¹⁷⁷

Following *CRST*, the court in *EEOC and Serrano v. Cintas Corporation*¹⁷⁸ dismissed another section 706 suit brought by the EEOC as an intervening plaintiff. In *Cintas*, the Commission claimed discriminatory hiring practices against female applicants under section 706. Yet, the EEOC did not identify any of the 13 claimants as "class" members until after it filed suit. In discovery, the Commission for the first time disclosed 46 individuals asserting claims, with the list was later pared-down to 13 claimants. The EEOC did not investigate the specific allegations of any of the 13 claimants until after filing suit. It did not make a cause determination as to any of the 13 claimants. It did not conciliate on behalf of any of the 13 claimants.¹⁷⁹ Looking to the analysis in *CRST*, the court dismissed the EEOC's section 706 claims brought on behalf of the 13 individuals.

Not all defective conciliation efforts, however, have been found by the courts to necessarily warrant dismissal. The court in *EEOC v. High Speed Enterprise, Inc.*¹⁸⁰ discussed the differing approaches among the Courts of Appeal on the standard for evaluating whether the EEOC satisfies its statutory obligation to conciliate in good faith, and reconciled all approaches as recognizing that the duty is real, rather than a formality.¹⁸¹ In *High Speed*, a single-claimant case, the court faulted the EEOC's conciliation effort not because of the magnitude of the

170 In *CRST I*, the court explained the difference between section 706 and 707 claims, noting that the Commission did not advance a section 707 claim. The court explained that the Commission is not authorized under section 707 to seek compensatory or punitive damages that are available under section 706. *CRST I*, 611 F. Supp. 2d at 929-33.

171 *CRST*, 2009 U.S. Dist. LEXIS 71396, at *51.

172 *Id.* at *52.

173 *Id.* at *53.

174 The EEOC did not bring a section 707 pattern or practice claim on behalf of the claimants. The court did not rule on whether the EEOC's investigation, determination, and conciliation efforts would suffice to support a section 707 pattern or practice action. *CRST*, 2009 U.S. Dist. LEXIS 71396, at *54 n.21. Section 707, however, adopts the same procedures as 706, as discussed above in the section on limitations of actions.

175 *CRST*, 2009 U.S. Dist. LEXIS 71396, at **61-62.

176 *Id.* at *64.

177 *Id.* at *67; see also *CRST III*, 2010 U.S. Dist. LEXIS 11125 (N.D. Iowa Feb. 9, 2010). But see *EEOC v. O'Reilly Automotive, Inc.*, 2010 WL 5391183 (S.D. Tex. Dec. 14, 2010) (holding the EEOC's failure to identify other aggrieved "class" members in determination letter or conciliation proposal did not warrant dismissal, because EEOC had been willing to provide further information to employer, and employer chose not to engage in additional conciliation); *EEOC v. Paramount Staffing, Inc.*, 601 F. Supp. 2d 986 (W.D. Tenn. 2009) (the EEOC need not identify each person within "class" in conciliation, if it can provide guidance or outline on the extent of the class).

178 *EEOC and Serrano v. Cintas Corp.*, 2010 U.S. Dist. LEXIS 99050 (E.D. Mich. Sept. 20, 2010).

179 *Id.* at **14-15.

180 *EEOC v. High Speed Enter., Inc.*, 2010 U.S. Dist. LEXIS 111330 (D. Ariz. Sept. 30, 2010).

181 *Id.* at **6-8.

EEOC's settlement demand, but because the Commission failed, despite repeated requests from the employer, to provide information or a basis on how it calculated its damage demand.¹⁸² This, the court held, deprived the employer from participating in the conciliation process fully, and being able to evaluate the EEOC's conciliation offer. In this single-claimant instance, however, the court opted to stay the matter for 60 days to allow the EEOC to fulfill its duty, rather than dismiss the case altogether.¹⁸³

Employers should not assume that *CRST* and *Cintas* will shield them from class claims if there is the slightest defect in the EEOC's investigation, if the "class" is not fully defined in a determination letter and in conciliation, or if the Commission adopts an ambitious stance in conciliation. Yet, the decisions in *CRST* and other cases highlighted above signal a trend, particularly in EEOC "class" cases, warranting a stronger focus on the Commission's underlying investigation, identification of findings, and efforts to reach a meaningful conciliation (with adequate disclosure). Already, defendants are paying much greater attention in discovery to these predicate issues, with a strategic goal toward eliminating or paring-down the breadth of class claims. For its part, the EEOC can be expected to devote greater time and resources, including subpoena enforcement actions (described above) at the investigative stages, for cases it envisions as candidates for larger "class" claims under section 706 or 707.

E. Discovery in Matters Litigated with the EEOC

Employment litigation based on federal statutes such as Title VII, the ADA and the ADEA involves proceedings before courts in various jurisdictions and utilization of the Federal Rules of Civil Procedure and Evidence. There is, however, a notable difference when the litigation is being prosecuted by the EEOC as opposed to private counsel. As many employers have learned, the motivations for the litigation are simply not the same. The prosecution by a government agency removes some of the normal consideration of litigation, including personal involvement by the claimant and business and financial concerns of the claimant and counsel. Instead, employers are often faced with an army of government attorneys with relatively unlimited financial constraints, motivations unrelated to the recovery of legal fees and frequently an expansive view of the Commission's entitlement to discovery from the employer, coupled with the stance that only limited discovery for the employer is permitted.

1. Document Discovery

a. Scope of Document Discovery

The EEOC's expansive view regarding the appropriate breadth and scope of discovery is an area of growing concern for employers. Many cases over the past several years highlight the EEOC's attempts to obtain as much employer information as possible, often serving employers with extremely broad requests for production. In *EEOC and Serrano v. Cintas Corp.*,¹⁸⁴ the EEOC filed a motion to compel *Cintas* "to produce documents related to its hiring practices at all of its Michigan facilities—including those locations at which no ... claimant had applied, and outside the time frames when ... claimants applied at other Michigan facilities."¹⁸⁵ *Cintas* opposed the motion, arguing that the discovery requested was overly broad and unrelated to the pending matter. The district court affirmed the magistrate judge's denial of the motion to compel, holding that the document request would be unduly burdensome and that "seeking documents related to *other* Michigan facilities not at issue in [the pending] litigation [was] *not* relevant to the EEOC's current ... action."¹⁸⁶

Other courts, however, have continued to side with the EEOC in its efforts to expand the boundaries of discovery. In *EEOC v. JP Morgan Chase Bank*,¹⁸⁷ the court examined the proper scope of discovery and held that the EEOC was entitled to numerous documents that defendants failed to produce. The Commission requested computer information that it alleged would show that a manager had created and forged an employee's resignation letter. In response to the defendant's statement that it had "been unable to recover any responsive documentation," the court required the defendant to "confirm whether or not this information exist[ed], either through [the defendant's] own search or through production of the requested storage devices to the EEOC for examination."¹⁸⁸ Further, the court required the defendant to comply with the EEOC's date-specific requests for production of documents where the defendant produced documents for only certain periods of

¹⁸² *Id.* at *12.

¹⁸³ *Id.* at *17.

¹⁸⁴ *EEOC and Serrano v. Cintas Corp.*, 2010 U.S. Dist. LEXIS 99953 (E.D. Mich. Sept. 22, 2010).

¹⁸⁵ *Id.* at *8.

¹⁸⁶ *Id.* at *13.

¹⁸⁷ *EEOC v. JP Morgan Chase Bank*, 2011 U.S. Dist. LEXIS 34409 (S.D. Ohio Mar. 30, 2011).

¹⁸⁸ *Id.* at *7.

time within the requested periods, as well as additional data on specific employees that defendant neglected to produce in its supplemental productions. With regard to producing daily call records for call center employees, the defendant argued that the request was overly broad and should be narrowed in scope. The court rejected this argument, and found that there was “no evidence to support [the employer’s] position that retrieving the requested information [was] unduly burdensome.”¹⁸⁹ Taking note of the latter ruling, employers should address any overly broad or unduly burdensome request with specific evidence, affidavits and detail to support its argument.

b. Confidentiality and Privilege Issues

Confidentiality and privilege issues have continued to take an enhanced role in litigation and related discovery, particularly given the EEOC’s expansive view of the scope of discovery related to company and employee information. The results have been mixed over the past year in litigation with the EEOC.

On the one hand, employers received a favorable ruling in *EEOC v. Kelley Drye & Warren L.L.P.*,¹⁹⁰ wherein the defendant successfully argued that an internal memorandum was protected by the attorney-client privilege. The protected relationship at issue was between the defendant, itself a law firm, and the defendant’s in-house counsel. The claimant in the case, also an attorney, had drafted a memorandum to the in-house counsel regarding a conflict of interest in the claimant’s representation of a particular client. The court held that the attorney-client privilege protected this memorandum because it “involved communications intended ... to elicit a legal opinion from [the in-house counsel]” and the claimant’s “memorandum was seeking to persuade [the in-house counsel] and the law firm decision-makers to adopt an analysis and decision consistent with [the claimant’s] position.”¹⁹¹ Rejecting the EEOC’s argument that “the memorandum should be characterized as simply an intra-firm communication, with no significance attached to the role of ... the in-house counsel of the law firm,” the court held that the claimant’s communications with the in-house counsel fell within the protection of the attorney-client privilege.¹⁹²

The above ruling should be contrasted with the court’s ruling in *EEOC v. Sterling Jewelers, Inc.*,¹⁹³ in which the court rejected a request for confidentiality. *EEOC v. Sterling Jewelers Inc.* involved a defendant’s motion for entry of a confidentiality order because of concerns that the EEOC would share confidential information with arbitration claimants, and that those claimants would use the information in their arbitrations. The court held that “it would be highly prejudicial to preclude the arbitration claimants, who are also the charging parties ... and the EEOC from fully communicating regarding [the] litigation.”¹⁹⁴ Further, the court concluded, “the EEOC has a legitimate need to show ... potential class members relevant information to help them decide if they were victims of discrimination, and ultimately, whether to file a claim and seek EEOC representation.”¹⁹⁵ Defendant proposed that any confidential communication the EEOC disclosed to arbitration claimants be used only for the purposes of the litigation at hand, and not be available for any commercial, competitive, or future litigation purposes. To that end, the defendant requested that the court prohibit the EEOC from sharing confidential information related to claims of pattern-or-practice discrimination with individual claimants, arguing that pattern-or-practice discovery was irrelevant to those with individual discrimination claims. The court disagreed, noting that “... pattern-or-practice evidence may be relevant to proving an otherwise-viable individual claim for disparate treatment.”¹⁹⁶ The court added that the arbitrators could later determine which discovery materials were ultimately admitted.

In *Sterling Jewelers*, the employer also requested that the EEOC have claimants read and sign a confidentiality agreement, and provide copies of all signed agreements to the defendant. The court held that the EEOC would have to comply with the read and sign request, but that to provide copies to the defendant would violate attorney work-product privileges. The defendant also requested that the EEOC be prohibited from disclosing any confidential information to expert witnesses who might be business competitors of the defendant. The court held that this fear was “premature, as any information disclosed to the EEOC’s experts [would] be subject to the confidentiality order and usable only for purposes of [that] litigation and related arbitrations.”¹⁹⁷

¹⁸⁹ *Id.* at *19.

¹⁹⁰ *EEOC v. Kelley Drye & Warren L.L.P.*, 2011 U.S. Dist. LEXIS 6343(S.D.N.Y. Jan. 20, 2011).

¹⁹¹ *Id.* at *5.

¹⁹² *Id.*

¹⁹³ *EEOC v. Sterling Jewelers Inc.*, 2011 U.S. Dist. LEXIS 67318 (W.D.N.Y. June 23, 2011).

¹⁹⁴ *Id.* at *7.

¹⁹⁵ *Id.* at **8-9 (citing *EEOC v. Morgan Stanley & Co., Inc.*, 206 F. Supp. 2d 559, 564 (S.D.N.Y. 2002)).

¹⁹⁶ *Id.* at **11-12 (citing *Bacon v. Honda of Am. Mfg., Inc.*, 370 F.3d 565, 575 (6th Cir. 2004)), *cert. denied*, 543 U.S. 1151 (2005)).

¹⁹⁷ *Id.* at *17.

c. Medical Records

The ability of an employer to obtain complete copies of claimants' medical records remains an area of continued dispute. The EEOC frequently challenges the relevance of claimants' medical records requested by defendants, arguing that it is only seeking "garden variety" emotional distress damages on behalf of the claimant and, accordingly, discovery of medical records should be limited. If it does determine some medical records are relevant and should be produced, the Commission regularly attempts to collect and sift those medical records before their production to defendants. The EEOC's position overlooks the fact that medical issues of all sorts may be discussed in the medical records, which demonstrate either additional unrelated emotional stressors or lack of any complaint of emotional distress at all. In this ongoing discovery struggle, recent cases have shown that medical records can be extremely relevant in establishing damages and employers are increasing the rate of success through narrowed and thoughtful arguments justifying thorough disclosure, include obtaining the actual medical records directly from the treating physician.

In *EEOC v. Smith Bros. Truck Garage, Inc.*,¹⁹⁸ the defendant requested complete medical records from three years prior to the claimant's employment termination to the present stage of litigation. The EEOC argued that such records were irrelevant in time and scope, as they related to medical conditions other than those for which the claimant sought relief, and the conditions at issue occurred prior to the claimant's employment termination. Acknowledging the causation issue highlighted by defendant, the court rejected the EEOC's arguments, holding that the defendant was "entitled to explore [the claimant's] claimed emotional distress damages, including other potential causes that may be found in his medical records."¹⁹⁹ However, the court limited the discovery to medical records within two years prior to the claimant's termination as a means to protect the claimant's privacy while balancing the defendant's need for relevant information. Notably, the court stated that "by seeking damages for [the claimant's] emotional distress, [the EEOC] has made [the claimant's] medical history relevant and discoverable."²⁰⁰

Another issue involving medical records is the EEOC's right to request records in its quest to identify additional class members or prove widespread discrimination. While employee privacy may appear at first blush to provide a potential shield to production, the courts have broadly interpreted the EEOC's right to such information in pursuit of ADA-related claims. This broad reach permitted by some courts is illustrated by the decision in *EEOC v. Princeton Healthcare System*,²⁰¹ which involved the EEOC's request for medical record information for every employee who requested a medically-related leave of absence or reasonable accommodation during a ten-year period, as well as any documents related to each employee request. The defendant argued that the temporal scope of the EEOC's request extended beyond the limitations period for which any aggrieved individuals could bring claims and, thus, many of the requested documents were irrelevant. Siding with the EEOC's expansive view of discovery, the court disagreed, holding that the information was "relevant in order to provide [EEOC] grounds to accumulate class members, context, background, and possibly rebut a defense by [the defendant] that it acted appropriately, reasonably, and in accordance with the law."²⁰² The defendant further argued that the extent of the request was unduly burdensome. The court rejected this argument as well, finding that the "probative value of production outweigh[ed] the burden and/or expense imposed as a consequence thereof."²⁰³ The court did, however, limit the defendant's burden of production to a term of six, rather than ten, years.

d. Third Party Subpoenas

Despite the broad reach permitted by the EEOC in various rulings, the courts have also started to treat the EEOC similar to plaintiffs in class-type litigation, despite the Commission's claim that the employees for whom the EEOC is seeking relief are not formal parties to the litigation (since the EEOC is filing the lawsuit on their behalf). In *Cintas*, the court addressed whether defendants could request documents—specifically, medical and employment record releases—where the EEOC argued that individual claimants were not "parties" to the litigation and thus not subject to interrogatories. The court rejected this argument, holding that the records were relevant to whether the claimant employees were qualified for the positions they had been denied. Citing the defendant's response brief, the court noted that

¹⁹⁸ *EEOC v. Smith Bros. Truck Garage, Inc.*, 2011 U.S. Dist. LEXIS 2774 (E.D.N.C. Jan. 11, 2011).

¹⁹⁹ *Id.* at *6.

²⁰⁰ *Id.* at *7.

²⁰¹ *EEOC v. Princeton Healthcare*, 2011 U.S. Dist. LEXIS 58056 (D.N.J. May 31, 2011).

²⁰² *Id.* at *51.

²⁰³ *Id.* at *52.

“even if the EEOC is charged with protecting the ‘public interest,’ it does not get a ‘free pass’ to avoid discovery obligations on individual [sexual discrimination] claims.”²⁰⁴

A similar result occurred in permitting discovery directly from an aggrieved claimant, on whose behalf the EEOC was seeking relief, even if documents already had been produced by the EEOC. In *EEOC v. Premier Well Services, L.L.C.*,²⁰⁵ the EEOC filed a motion to quash a subpoena of claimant for documents in his possession. The defendant had subpoenaed the claimant’s tax returns and other financial documents to assess his damages claim. The Commission did not dispute the relevance of the documents, but argued that the request was duplicative as the EEOC had already provided the claimant’s W-2 forms to the defendant. Putting aside the issue of whether the EEOC had standing to challenge the subpoena, the court held that the defendant was entitled to the claimant’s documents, noting that “there is no absolute rule prohibiting a party from seeking to obtain the same documents from a non-party as can be obtained from a party,” and that this often leads to parties discovering documents that were not otherwise disclosed.²⁰⁶

2. Depositions

a. Deposing Claimants

Deposition practice related to claimants in EEOC litigated matters presents unique obstacles because of the sometimes tenuous relationship between the EEOC and the claimant themselves. In *EEOC v. Endoscopic Microsurgery Associates*,²⁰⁷ the Commission stated that it could not guarantee the appearance of the claimant for deposition. Accordingly, the defendant subpoenaed an out-of-state claimant to appear in person for a deposition. The EEOC objected, arguing that the claimant’s circumstances “would result in extreme hardship if she were required to travel to [the] deposition.”²⁰⁸ The defendant countered that the claimant should appear because she had elected to join the lawsuit and seek compensation for her claims. The court sided with the EEOC, noting that EEOC claimants are not formal parties to the litigation, and that any benefits of forcing the claimant to appear in person were outweighed by the costs. As a result, the court held that the defendant could either send its counsel to the claimant’s home state to conduct an in-person deposition, or arrange for a video deposition.

b. Deposing EEOC Investigators/Agents

There have been a number of recent cases examining the extent to which a defendant can subpoena EEOC investigators and/or directors for depositions. Generally, the trend seems to favor defendants’ rights in examining investigators to the extent that they seek factual information, and not information surrounding EEOC opinions or analysis. Although that distinction is far from clear, employers will benefit from issuing deposition notices that are narrowly tailored and focused.

In *EEOC v. Luihn Food Systems, Inc.*, the defendant subpoenaed an EEOC investigator for a deposition.²⁰⁹ In response, the EEOC filed a motion to quash the subpoena and argued that any information the investigator could provide would either violate the deliberative process privilege, or would be readily available from other sources. The investigator contended that she had no independent recollection of any interviews she conducted in furtherance of her investigation. The court found this unconvincing, holding that the defendant was “entitled to test for itself the recollections of [the subpoenaed investigators] or such other person that would testify for plaintiff.”²¹⁰ Though the deliberative process privilege applies to the content of the investigators’ depositions, the court held that “the privilege does not prevent the taking of the depositions noticed by defendant or the disclosure of purely factual information.”²¹¹ Another interesting issue in *Luihn* centered on whether the defendant could compel the Commission to produce information about claimants’ EEOC charges against former employers, and on this issue, the results were less favorable. The court held that “Title VII expressly prohibits the EEOC from disclosing to a third party any information obtained during an EEOC investigation” and thus “the information and documents sought by the instant requests [came] within the scope of the prohibition against disclosure.”²¹²

²⁰⁴ *Cintas*, 2010 U.S. Dist. LEXIS 99953, at *16 (E.D. Mich. Sept. 22, 2010) (citing Defendant’s Brief, Doc. No. 825, p.10).

²⁰⁵ *EEOC v. Premier Well Servs., L.L.C.*, 2011 U.S. Dist. LEXIS 64112 (E.D. Ark. June 3, 2011).

²⁰⁶ *Id.* at *4 (citing *Coffeyville Resources Refining & Mktg., L.L.C. v. Liberty Surplus Ins. Corp.*, 2008 U.S. Dist. LEXIS 91224, at *1 (E.D. Ark. Nov. 6, 2008)).

²⁰⁷ *EEOC v. Endoscopic Microsurgery Assocs.*, 2011 U.S. Dist. LEXIS 48571 (D. Md. May 5, 2011).

²⁰⁸ *Id.* at *2.

²⁰⁹ *EEOC v. Luihn Food Sys., Inc.*, 2011 U.S. Dist. LEXIS 13911 (E.D.N.C. Feb. 11, 2011).

²¹⁰ *Id.* at *9.

²¹¹ *Id.* at *12.

²¹² *Id.* at *19.

The *Luihn Food Systems* case should be contrasted with the ruling in *EEOC v. Pinal County*,²¹³ in which a court rejected an employer's efforts to subpoena for deposition the Acting Director of an EEOC local office. Instead of seeking factual information, the defendant sought to "obtain clarification and interpretation of the EEOC's determination letter itself."²¹⁴ In this case, the court said, clarification "would undoubtedly require revealing information about the EEOC's deliberative process, such as its analysis of the information obtained by its witness credibility evaluations, its evaluation of the evidence, the personal opinions of EEOC representatives, and the decision-making process of the EEOC."²¹⁵ The court held that the deliberative process privilege protects such information. Further, the court held that the limited amount of discoverable information that the defendant could gain by deposing the Acting Director would be easily obtained from other sources. The defendant failed to show that the Acting Director possessed "relevant, non-privileged information that [was] not cumulative or duplicative to the information contained in the EEOC investigative file" that had already been produced.²¹⁶

A particularly interesting development arose over the past year involving the potential right to serve a rule 30(b)(6) deposition on the EEOC, requesting testimony on particular factual issues relevant to the litigation. In *EEOC v. Kaplan Higher Education Corp.*, the EEOC took strong exception to such requested discovery, arguing that "the deposition would be duplicative in light of [the EEOC's] future document production and because the deposition would require the testimony of [EEOC's] counsel and would violate a number of privileges."²¹⁷ The defendant argued that the EEOC must adhere to the same discovery rules as private parties, including the designation of a Rule 30(b)(6) deponent. The court held that the defendant was entitled to depose a Rule 30(b)(6) appointee to the extent that it sought "primarily factual information related to [the] case."²¹⁸ In order to avoid issues of attorney-client and work-product privileges, the court noted that the plaintiff was "free to designate an EEOC investigator or other agency employee, and [...] may designate different individuals to testify as to different categories of information."²¹⁹ Further, the court held that any objections related to privileged information should be raised during the deposition.

3. Summary of Trends Regarding EEOC Discovery

Although litigation with the EEOC remains and arguably is an escalating challenge, there is good news to embrace. Recent district court rulings appear to be leveling the playing field and in some cases applying the same standards expected of private litigants. Courts appear to be according less deference to the Commission in evaluating discovery requests or opposition to discovery based on the argument that the EEOC is the government and charged with enforcement of civil rights statutes. Cases like *Cintas* help advance the argument that the EEOC is bound by a reasonable interpretation of the scope of discovery. On the other hand, the *JP Morgan* case illustrates the importance of well-crafted objections, and the importance of outlining to the court the significant burden that would be placed on the employer in objecting to certain EEOC requested discovery. Moreover, discovery requests served on the EEOC, including requests for medical records and records involving those on whose behalf it is seeking relief, have met with increasing success over the past year.

Particularly noteworthy are recent developments permitting fact-based depositions of EEOC personnel in various circumstances. Such depositions can be very useful, but employers are cautioned to follow the boundaries for crafting notices of those depositions outlined in cases such as *Kaplan* and *Pinal County*. Employers litigating with the EEOC also may want to consider the potential option of a Rule 30(b)(6) deposition in some limited circumstances. To date, the *Kaplan* case is the most notable decision over the past year to address the 30(b)(6) issue, and the law remains unsettled as to the approach that will be taken by other courts.

F. Summary Judgment Motions

When litigating with the EEOC, a critical issue is whether an employer can prevail on summary judgment in challenging pattern or practice and class-related claims and thus avoid a lengthy trial. A recent ruling by one federal court indicates that the courts will strike down an EEOC's pattern or practice claim in appropriate circumstances.

²¹³ *EEOC v. Pinal County*, 714 F. Supp. 1073 (S.D. Cal. April 30, 2010).

²¹⁴ *Id.* at 1078.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *EEOC v. Kaplan Higher Educ. Corp.*, 2011 U.S. Dist. LEXIS 57829, at *4 (N.D. Ohio May 27, 2011).

²¹⁸ *Id.* at *7.

²¹⁹ *Id.* at *9.

The most notable summary judgment decision of FY 2011,²²⁰ involving the Commission as a party, was *EEOC v. Bloomberg L.P.*,²²¹ wherein the court dismissed an EEOC suit claiming that financial services and media giant Bloomberg engaged in a pattern or practice of discrimination against pregnant employees and women recently returned from maternity leave. Granting summary judgment to Bloomberg on the EEOC's claim under Title VII, the court found no basis to conclude that the Commission "proffered evidence from which a fact-finder could conclude that Bloomberg engaged in a ... practice of decreasing the pay, responsibility, or other terms and conditions of employment"²²² of its pregnant or newly returned from maternity leave female employees.

The EEOC alleged that Bloomberg had reduced the pay and responsibilities of pregnant women and women recently returned from maternity leave, left them out of management meetings, demoted them in title or in number of direct reports, and subjected them to negative stereotypes regarding female caregivers. Discovery ultimately established that of Bloomberg's 10,000 employees, 603 women were pregnant or took maternity leave between 2002 and 2009. The Commission claimed that 78 of these women were victims of discrimination.

In finding that the EEOC failed to establish the basic foundation of a pattern or practice claim, the court first noted that the EEOC's failure to offer statistical evidence was "severely damaging" to its case, particularly since pattern or practice cases are characterized by "heavy reliance" on statistics.²²³ It added that the EEOC also did not provide evidence of an explicit discriminatory policy or of the "inexorable zero" to complement its anecdotal evidence. Second, the court said that the EEOC's anecdotal evidence was not enough to allow a reasonable jury to find a pattern of pregnancy-based discrimination. The fact that almost 90 percent of the 603 employees who became pregnant or took maternity leave during the class period had no claim was "significant." Further, the EEOC did not attempt to compare the experience of women who took leave for pregnancy-related reasons to that of employees who took leave for other reasons, so no inference of disparate treatment could be drawn. The court found that the Commission's evidence was not of the quality to permit an inference of discrimination—it consisted of isolated instances of individual discrimination, which even if they occurred, did not establish a pattern or practice of discrimination. Third, the EEOC's evidence of pervasive bias and negative stereotypes against women consisted of a mere handful of isolated comments from a few managers over the course of almost six years.

In contrast, Bloomberg presented evidence that it did not discriminate against pregnant women in either compensation or job responsibilities. Bloomberg's statistical experts showed that the EEOC's class members received greater compensation increases than employees who took leaves for reasons other than pregnancy. Even though the compensation growth for class members was lower than for employees who took no leaves or short leaves, the court found this lawful, pointing out that a policy may discriminate between employees who take long leaves to raise children and those who either do not have children or can raise them using little or no leave, without violating Title VII. Further, the court again noted that employees who did not take leave were not similarly situated to Commission's class members.

The court acknowledged that Bloomberg was a demanding employer—one that advised its employees that it expected them to put work ahead of family demands. The court concluded, however, that the law does not "mandate work-life balance" and that the EEOC did not establish any company-wide discriminatory practice that violated the law.²²⁴

For those who have litigated pattern or practice cases against the EEOC, some of the findings in this case may ring true. The *Bloomberg* case is a clear lesson on some of the points of vulnerability for the Commission in its pattern or practice cases: non-existent or flawed statistics; insufficient supporting evidence; and less than reliable anecdotal evidence that, when tested, is not as compelling as initially described.

G. Attorneys' Fees and Costs Awards for Employers

Finally, another issue that has received attention over the past year has been a willingness by some courts to order significant attorneys' fees awards against the EEOC in circumstances where (a) the Commission's litigation strategy was questioned by the court and/or (b) the Commission pursued claims that in the court's view clearly lacked merit. The seminal cases in this area have arisen under Title VII, which

220 Another notable summary judgment decision occurred in the *EEOC and Serrano v. Cintas* case, which is discussed in the Investigation and Conciliation Obligations section of this report, *supra* pp. 27 – 28.

221 *EEOC v. Bloomberg, L.P.*, 2011 U.S. Dist. LEXIS 92677 (S.D.N.Y. Aug. 17, 2011).

222 *Id.* at **2-3.

223 *Id.* at **32, 60.

224 *Id.* at **73-79.

makes available attorneys' fees to a prevailing defendant if plaintiff's action are "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith."²²⁵

In *EEOC v. CRST Van Expedited, Inc.*, ("CRST III")²²⁶ the court entered an award of over \$4.5 million in attorneys' fees and costs against the EEOC because the agency's actions in pursuing the lawsuit were "unreasonable, contrary to the procedure outlined by Title VII, and imposed an unnecessary burden upon CRST and the court."²²⁷ At the time of the award, all claims that had been filed by the Commission on behalf of 270 women had been dismissed with prejudice on various grounds.²²⁸ The court's award in *CRST* underscored a strong message from the judiciary that courts do not condone a "sue first, ask questions later' litigation strategy on the part of the EEOC."²²⁹ This case is on appeal to the Eighth Circuit.

In FY 2011, the EEOC was the subject of two significant awards of attorneys' fees and costs in *EEOC v. Peoplemark, Inc.*²³⁰ and *EEOC and Serrano v. Cintas Corp.*²³¹ These decisions reaffirm the courts' disapproval of a sue first, ask questions later approach and further emphasize that just as all other plaintiffs, the Commission has a duty to forego pursuit of a claim once discovery shows that the claim is meritless. In *EEOC v. Peoplemark, Inc.*, the district court approved the magistrate judge's award of \$751,942 in attorneys' fees and costs as a sanction for the Commission's litigation tactics. The Commission filed a complaint alleging that Peoplemark maintained a policy that "denied the hiring or employment of any person with a criminal record," which adversely impacted African Americans in violation of Title VII.²³² After the court required the EEOC to identify who it represented, the EEOC identified 286 individuals, 22 percent of whom had actually been hired and placed by the company despite felony convictions on their criminal records. Despite this evidence, the EEOC did not amend its complaint. Additionally, although the EEOC knew that the case would rise and fall on expert statistical evidence, the Commission never retained such an expert. After Peoplemark filed its motion for summary judgment, the EEOC was—by its own admission—unable to respond because it did not have any statistical evidence to rebut Peoplemark's statistical evidence. Accordingly, the parties filed a joint motion to dismiss with prejudice.²³³

Thereafter, Peoplemark sought an award of attorneys' fees and costs. In its motion, Peoplemark argued that the EEOC deliberately caused the company to incur attorneys' fees and costs when it should have known that the company did not have a blanket no-hire policy. The court agreed, noting that if the EEOC had conducted an investigation with the 286 persons it represented, it should have known that Peoplemark did not have a "blanket policy," and had in fact hired some of the persons the Commission represented.²³⁴ The court also took issue with the EEOC's failure to identify an expert witness. Accordingly, based on the Commission's failure to pursue the statistical component of the case, coupled with the EEOC's failure to amend, the court held that an "award of attorneys' fees is appropriate because of the unnecessary burden imposed on defendant."²³⁵

225 *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978). See also 42 U.S.C. § 2000e-5(k), which provides, "In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person."

226 *EEOC v. CRST Van Expedited, Inc.*, 2010 U.S. Dist. LEXIS 11125, at *25 (N.D. Iowa Feb. 9, 2010) ("*CRST III*"), currently on appeal with the Eighth Circuit at Appellate Docket No. 10-1682.

227 *Id.* at *26. The facts regarding the underlying action in *CRST* are discussed in detail in the Investigation and Conciliation Obligations subsection of this report *supra* at pp. 26 – 27.

228 By way of background as set forth in the district court's opinion, in 2007, the EEOC brought a Title VII section 706 action against CRST on behalf of 270 women it said had been subjected to sexual harassment. The EEOC, however, only made 150 of them available to CRST for depositions. The district court dismissed the claims of the 120 women who were not produced for depositions. Subsequently, the district court also entered summary judgment against the claims on behalf of most of the rest of the women and on behalf of the EEOC itself for a variety of reasons. In general, however, summary judgment was entered on these claims because the EEOC failed to provide sufficient evidence from which a reasonable jury could infer a pattern or practice of tolerating sexual harassment. The claims on behalf of sixty-seven women remained. Ultimately, the court dismissed the action as to the sixty-seven remaining women because the EEOC had not investigated the charges of these women before it filed the action, nor did it attempt to conciliate their claims and avoid litigation. *CRST III*, 2010 U.S. Dist. LEXIS 11125, at **3-5.

229 *Id.* at *25.

230 *EEOC v. Peoplemark, Inc.*, 2011 U.S. Dist. LEXIS 38696 (W.D. Mich. Mar. 31, 2011), adopted by district court at Docket No. 1:08-cv-00907, Document No. 147 on October 17, 2011.

231 *EEOC and Serrano v. Cintas*, 2011 U.S. Dist. LEXIS 86228 (E.D. Mich. Aug. 4, 2011), currently on appeal with the Sixth Circuit at Appellate Docket No. 11-2057.

232 *Peoplemark*, 2011 U.S. Dist. LEXIS 38696, at *2.

233 *Id.* at **2-4.

234 *Id.* at **8-11. Additionally, the court suggested that the EEOC should have known that a blanket policy did not exist and would have known such a fact had it done a more thorough investigation between its investigation of the charge and the filing of the complaint.

235 *Id.* at *17.

Finally, in *EEOC and Serrano v. Cintas Corp.*, the court entered an award over \$2.6 million for attorneys' fees and costs.²³⁶ At the time of the award, all claims that had been filed by the EEOC in 2005, alleging discriminatory hiring practices based on sex, had been dismissed with prejudice.²³⁷ By way of background, in 2009, the court denied class certification to the private plaintiffs. In February 2010, the court precluded the EEOC from pursuing a pattern or practice claim as the EEOC had not appropriately pled the same. Thereafter, the court dismissed with prejudice all remaining individual claims as well as the EEOC's section 706 class claims in September 2010. In its September 2010 Opinion & Order, the court found the following:

- The EEOC did not investigate the specific allegations of any of the thirteen allegedly aggrieved persons until after the *Serrano* plaintiffs filed their initial complaint, and after it filed its own complaint years later.
- The EEOC did not engage in *any* conciliation measures as required by § 706 prior to filing suit on behalf of the named Plaintiffs.
- The EEOC did not identify *any* of the thirteen allegedly aggrieved persons as members of the "class" until after the EEOC filed its initial complaint.
- The EEOC failed to make an individualized reasonable cause determination as to the specific allegations of any of the thirteen named plaintiffs in this action.²³⁸

Moreover, the court also noted the EEOC filed and lost over a dozen motions and failed to properly respond to Cintas' discovery request, requiring Cintas to file a motion to compel.²³⁹ The court additionally referenced the EEOC's failure, after the action was pending for nearly ten years, to identify any of the individual plaintiffs on whose behalf the EEOC sought to pursue a section 706 claim. Finally, the court noted that once the EEOC identified approximately 40 individuals, Cintas deposed seven of them and a number of them testified that they did not believe that they had claims against Cintas or testified that they did not intend to advance claims against Cintas at all. Based on the foregoing conduct, the court concluded that the EEOC had engaged in a "reckless 'sue first, ask questions later' strategy."²⁴⁰ Relying on the decision in *EEOC v. CRST Van Expedited, Inc.*, the district court held that attorneys' fees and costs should be awarded in this case because "[a]n award of fees is necessary to guarantee that Title VII's procedures are observed in a manner that maximizes the potential for ending discriminatory practices without litigation in federal court."²⁴¹ The case is on appeal to the Sixth Circuit.

236 *Cintas*, 2011 U.S. Dist. LEXIS 86228 (E.D. Mich. Aug. 4, 2011). In addition to the information set forth herein, facts regarding the underlying action in *Cintas* are discussed in detail in the Investigation and Conciliation Obligations subsection of this report *supra* at pp. 27 – 28.

237 By way of background, the court denied class certification in 2009. In February 2010, the court precluded the EEOC from pursuing a pattern or practice claim as it had not appropriately pled the same. Subsequently, the court granted Cintas' motions for summary judgment against all individual plaintiffs and against the EEOC as an intervening plaintiff in September 2010, thereby dismissing all of the EEOC's claims with prejudice. *Cintas*, 2011 U.S. Dist. LEXIS 86228, at **7-10.

238 *Id.* at **13-14.

239 *Id.* at *14. Notably, with respect to the EEOC's shortcomings in its discovery production, in ruling for Cintas and requiring production by the EEOC, in a prior opinion in this case the magistrate judge stated, "There appears to be no purpose for [the EEOC's] position [to withhold the questionnaires] other than to increase the difficulty and expense of the defense of this action by Cintas." *Id.* (internal citations omitted).

240 *Id.* at *15.

241 *Id.* at *16 (internal citation omitted). The remainder of the court's opinion focused on the determination of the exact amounts of fees and costs to award Cintas.

IV. APPENDIX A: SUMMARY OF NOTEWORTHY EEOC SETTLEMENTS AND JURY VERDICTS— FISCAL YEAR 2011²⁴²

SETTLEMENT AMOUNT	CLAIM TYPE	DESCRIPTION	COURT	EEOC PRESS RELEASE
\$20,000,000	ADA Failure to Accommodate	According to the EEOC, communications company violated the ADA by refusing to make exceptions to its "no fault" attendance plans to accommodate employees with disabilities. Under the attendance plans, if an employee accumulated a designated number of "chargeable accidents," the company placed the employee on a disciplinary progressive discipline program that could ultimately lead to more serious disciplinary consequences, including termination. The plan had no exception for qualified individuals whose "chargeable absences" were caused by their disabilities. The settlement amount is intended to compensate approximately 800 class members.	U.S.D.C. Maryland	July 6, 2011
\$10,000,000	Hostile Work Environment	According to the EEOC, transportation company subjected African America employees at two facilities to racially hostile work environments and racial discrimination. Allegations included, incidents involving hangman's nooses, racist graffiti, racist comments and cartoons and that black employees were given harder, more time consuming work than their white counterparts. The settlement amount was intended to compensate approximately 259 class members.	U.S.D.C. Northern District of Illinois	September 15, 2010
\$8,000,000	Hostile Work Environment	According to the EEOC, a consulting firm has a pattern or practice of sexually harassing female employees. Allegations included a systemic pattern of sexual assaults, propositions, inappropriate touching, and crude sexual comments. The settlement amount is intended to compensate the eighty-two (82) class members.	U.S.D.C. Eastern District of Illinois	March 28, 2011
\$3,000,000	Failure to Hire	According to the EEOC, the janitorial company refused to recruit and hire African American applicants for entry level janitorial and driver positions. The settlement amount was intended to compensate approximately 539 class members.	U.S.D.C. Northern District of Illinois	November 8, 2010
\$3,000,000	Age Discrimination	According to the EEOC, a technology company unlawfully laid off hundreds of employees over the age of 45 during a series of reductions in force. The EEOC also asserted that older employees were denied leadership training and laid off to make way for younger employees. The settlement amount was intended to compensate approximately 290 former employees.	U.S.D.C. Minnesota	August 22, 2011
\$2,000,000	Hostile Work Environment	According to the EEOC, the manager and limited partner of a franchised fast food restaurant subjected a class of women to a sexually hostile work environment. Allegations included that the women were subjected to unwanted touching and that employees who requested that the conduct stop were retaliated against by having their hours reduced. The settlement amount was intended to compensate 70+ class members.	U.S.D.C. New Mexico	June 15, 2011
\$1,620,000	Pregnancy Discrimination	According to the EEOC, the national security company had a pattern or practice of forcing pregnant women, who worked as security guards, to take leave and then discharging the women due to their pregnancy. The company allegedly prevented the women from taking required firearms tests while pregnant and filed a criminal charge against a woman who purportedly filed the complaint. The settlement was intended to compensate all twenty-six (26) class members.	U.S.D.C. Kansas	December 1, 2010
\$1,300,000	ADA Failure to Accommodate	According to the EEOC, national restaurant chain had a policy and practice of limiting employee medical leaves, regardless of whether those employees were disabled within the meaning of the ADA and require additional medical leave, in any combination of paid or unpaid, as a form of reasonable accommodation. The settlement was intended to compensate approximately thirty-four (34) class members.	U.S.D.C. Maryland	June 27, 2011
\$1,000,000	Hostile Work Environment	According to the EEOC, class of women who worked at a franchised national restaurant chain, we subjected to a sexually hostile work environment. Allegations included that the manager groped female employees, solicited sexual relations, told sexually explicit stories and jokes, exposed himself and also exposed employees to pornography. The settlement amount was intended to compensate the seventeen (17) class members.	U.S.D.C. North Dakota	September 1, 2011

²⁴² Littler monitored EEOC press releases regarding settlement during FY 2011. The significant settlements as summarized in Appendix A, include settlements over \$1 million in systemic, pattern or practice and class cases, and they are organized by settlement amount. To be sure, the EEOC settled some single claimant claims as well as some systemic, pattern or practice and "class" litigation for amounts well under \$1 million. For purposes of this report, however, we have provided a snapshot of the areas where employers might be most exposed based on their policies and practices.

Select EEOC Jury Awards in FY 2011:

SETTLEMENT AMOUNT	CLAIM TYPE	DESCRIPTION	COURT	EEOC PRESS RELEASE
\$1,260,000	Sexual Harassment	Sexual harassment of employees, including teenagers, at grocery chain.	U.S.D.C. Western District of New York	January 21, 2011
\$1,500,000	Sexual Harassment and Retaliation	Sexual harassment and retaliation directed toward three female employees.	U.S.D.C. Western District of Tennessee	March 4, 2011

V. APPENDIX B: A DISCUSSION OF THE DISTINCTIONS BETWEEN SECTION 706 AND SECTION 707 LAWSUITS AS EXCERPTED FROM EEOC AND *SERRANO V. CINTAS*²⁴³

[...]

Lawsuits under § 706

Section 706 permits the EEOC to sue a private employer on behalf of a “person or persons aggrieved” by an employer’s unlawful employment practice. 42 U.S.C. § 2000e-5(f)(1). The EEOC may file a § 706 lawsuit against a private employer, after the filing of a charge of unlawful employment discrimination with the EEOC, if the EEOC finds “reasonable cause” to believe that the employer violated Title VII. *See, e.g., Occidental Life Ins. Co. of Calif. v. EEOC*, 432 U.S. 355, 359-60, 97 S. Ct. 2447, 53 L. Ed. 2d 402 (1977). In *General Tel. Co. of the Northwest, Inc. v. EEOC*—regarded as “the seminal § 706 case,” *EEOC v. CRST Van Expedited, Inc.*, 611 F.Supp.2d 918, 929 (N.D. Iowa 2009)—the Supreme Court explained as follows:

[785] Title VII ... authorizes the procedure that the EEOC followed in this case. Upon finding reasonable cause to believe that [a private employer] had discriminated ... the EEOC filed suit... . [T]he EEOC need look no further than § 706 for its authority to bring suit in its own name for the purpose, among others, of securing relief for a group of aggrieved individuals.

General Telephone, 446 U.S. at 324 (emphasis added).

The EEOC is “master of its own case” when bringing suits on behalf of aggrieved persons in a § 706 lawsuit, and may bring such suits with or without the consent of the aggrieved persons. *EEOC v. Waffle House*, 534 U.S. 279, 291-92, 122 S. Ct. 754, 151 L. Ed. 2d 755 (2002). “Nonetheless, it is axiomatic that *the EEOC stands in the shoes of those aggrieved persons in the sense that it must prove all the elements of their [discrimination] claims to obtain individual relief for them.*” *CRST*, 611 F.Supp.2d at 929 (emphasis added).

Plaintiffs in a § 706 action pursue their claims under the familiar burden-shifting scheme outlined in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). *See Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 760 (4th Cir. 1998). Under the *McDonnell-Douglas* framework, plaintiffs must first establish a *prima facie* case of discrimination. *McDonnell-Douglas*, 411 U.S. at 802. Once the plaintiff has established a *prima facie* case of discrimination, the burden of production shifts to the employer to rebut the plaintiff’s *prima facie* case by articulating a legitimate, nondiscriminatory reason for the adverse employment action. *Id.* If the employer articulates such a legitimate, nondiscriminatory reason, the plaintiff bears the burden of proving that the employer’s articulated reason is a pretext for discrimination. *Id.*

If the EEOC prevails in a § 706 action, the EEOC is entitled to equitable relief for the individuals upon whose behalf the EEOC brought suit, 42 U.S.C. § 2000e-5(g), and may also pursue compensatory and punitive damages, 42 U.S.C. § 1981a(a)(1).

Lawsuits Under § 707

Section 707 permits the EEOC to bring suit against employers whom it has reasonable cause to believe are engaged in a “pattern or practice” of unlawful employment discrimination. 42 U.S.C. § 2000e-6; *see also General Telephone*, 446 U.S. at 327 n.9 (“If, for any reason, [the] EEOC... believes a pattern or practice of discrimination exists in [a private employer], its recourse is to file a suit under § 707.” (citations and emphasis omitted)). “A pattern or practice case seeks to eradicate systemic, company-wide discrimination and focuses on an objectively verifiable policy or practice of discrimination by a private employer against its employees.” *EEOC v. Mitsubishi Motor Mfg. of America, Inc.*, 990 F.Supp. 1059, 1070 (C.D. Ill. 1998).

Like § 706, § 707 grants the EEOC the right to seek equitable relief—such as an injunction—against employers found to have engaged in a pattern or practice of unlawful employment discrimination. 42 U.S.C. § 2000e-6(a). Unlike § 706, however, the EEOC is not authorized to seek compensatory or punitive damages under § 707 - 42 U.S.C. § 1981a only authorizes the recovery of compensatory and punitive damages “in an action brought by a complaining party under [§ 706].” 42 U.S.C. § 1981a(a)(1).

²⁴³ The text of this Appendix B, explaining the distinction between section 706 and section 707 claims is excerpted in its entirety from the court’s opinion in *EEOC and Serrano v. Cintas*, 711 F. Supp. 2d 782, 784-87 (E.D. Mich. 2010).

[786] As *General Telephone* is regarded as the seminal § 706 case, the U.S. Supreme Court's holding in *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1977) is regarded as the seminal § 707 case. To prove a pattern or practice claim under § 707, the EEOC must "establish by a preponderance of the evidence that racial discrimination was the company's standard operating procedure - the regular rather than the unusual practice" *Id.* at 336. That is, the EEOC is required "to prove more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts." *Id.* A pattern or practice is:

... present only where the denial or rights consists of something more than an isolated, sporadic incident, but is repeated, routine, or of a generalized nature. There would be a pattern or practice if, for example, a number of companies of persons in the same industry or line of business discriminated, if a chain of motels or restaurants practiced racial discrimination through all or a significant part of its system, or if a company repeatedly and regularly engaged in acts prohibited by the statute. The point is that single, insignificant, isolated acts of discrimination by a single business would not justify a finding of a pattern or practice... .

Id. (internal citations and quotations omitted).

Teamsters also adopted a burden-shifting framework for § 707 actions, separate and distinct from the *McDonnell-Douglas* burden-shifting framework utilized in § 706 actions, as explained below:

The plaintiff in a pattern-or-practice action is the Government, and its initial burden is to demonstrate that unlawful discrimination has been a regular procedure or policy followed by an employer or group of employers. *At the initial, "liability" stage of a pattern or practice suit[,] the Government is not required to offer evidence that each person for whom it will ultimately seek relief was a victim of the employer's discriminatory policy. Its burden is to establish a prima facie case that such a policy existed.* The burden then shifts to the employer to defeat the prima facie showing of a pattern or practice by demonstrating that the Government's proof is either inaccurate or insignificant. An employer might show, for example, that... during the period it is alleged to have pursued a discriminatory policy it made too few employment decisions to justify the inference that it had engaged in a regular practice of discrimination.

If an employer fails to rebut the inference that arises from the Government's prima facie case, a trial court may then conclude that a violation has occurred and determine the appropriate remedy. Without any further evidence from the Government, a court's finding of a pattern or practice justifies an award of prospective relief. Such relief might take the form of an injunctive order... or any other order "necessary to ensure the full enjoyment of the rights" protected by Title VII.

When the Government seeks individual relief for the victims of the discriminatory practice, a district court must usually conduct additional proceedings after the liability phase of the trial to determine the scope of individual relief. [A]s is typical of Title VII pattern-or-practice suits, the question of individual relief does not arise until it has been proved that the employer has followed an employment policy of unlawful discrimination. The force of that proof does not dissipate at the remedial state of the trial. The employer cannot, [787] therefore, claim that there is no reason to believe that its individual employment decisions were discriminatorily based; it has already been shown to have maintained a policy of discriminatory decision-making.

The proof of the pattern or practice supports an inference that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuant of that policy. *The Government need only show that an alleged individual discriminatee unsuccessfully applied for a job and therefore was a potential victim of the proved discrimination. The burden then rests on the employer to demonstrate that the individual applicant was denied an employment opportunity for lawful reasons.*

Teamsters, 431 U.S. at 360-62 (footnotes and citations omitted) (emphasis added).

Differences Between § 706 Actions and § 707 Actions

“There is a significant distinction between §§ 706 and 707 claims.” *EEOC v. Scolari Warehouse Mkts, Inc.*, 488 F.Supp.2d 1117, 1143 (D. Nev. 2007). As the Supreme Court has recognized:

A Commissioner [of the EEOC] may file a charge in either of two situations. First, when a victim of discrimination is reluctant to file a charge... because of fear of retaliation, a Commissioner may file a charge on behalf of the victim. [42 U.S.C. § 2000e-5]. Second, when a Commissioner has reason to think that an employer has engaged in a “pattern or practice” of discriminatory conduct, he may file a charge on his own initiative. [42 U.S.C.] § 2000e-6.

EEOC v. Shell Oil Co., 466 U.S. 54, 62, 104 S. Ct. 1621, 80 L. Ed. 2d 41 (1984).

Similarly, the Central District of Illinois noted as follows:

[A] § 706 case is based on one or more individual charges or complaints of unlawful discrimination by an employer, and a § 707 case is based on a pattern or practice of systemic discrimination by an employer. Although both a § 706 case and a § 707 case can be filed by the EEOC in its own name and initiated by a “Commissioner’s charge,” rather than an individual charge, the converse is not true. A § 707 case cannot be initiated by an individual charge, and it cannot be filed as a civil suit by an individual. A § 707 case is a “pattern or practice” case that challenges systemic, wide-spread discrimination by an employer. Conversely, a § 706 case seeks to vindicate... the rights of aggrieved individuals who are challenging an unlawful employment practice by an employer. The distinction is subtle and not immediately apparent from the language of Title VII, but it is, nonetheless, an important distinction.

Mitsubishi Motor, 990 F.Supp. at 1084 (citation and footnote omitted). Finally, as explained *supra*, § 706 actions and § 707 actions have the following distinctions directly pertinent to this motion: Section 706 actions proceed under the *McDonnell-Douglas* burden-shifting framework, and if the EEOC prevails, it may secure equitable and/or legal damages (including punitive damages); Section 707 actions, however, proceed under the *Teamsters* burden-shifting framework, and may only seek equitable, as opposed to legal, damages.

[...]

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