

**UNITED STATES
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**



**OFFICE OF GENERAL COUNSEL
FISCAL YEAR 2010 ANNUAL REPORT**

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I. Structure and Function of the Office of General Counsel

A. Mission of the Office of General Counsel

The Equal Employment Opportunity Act of 1972 amended Title VII of the Civil Rights Act of 1964 (Title VII) to give litigation authority to the Equal Employment Opportunity Commission (EEOC or Commission) and provide for a General Counsel, appointed by the President and confirmed by the Senate for 4-year term, with responsibility for conducting the Commission's litigation program. Under a 1978 Presidential Reorganization Plan, the General Counsel became responsible for conducting Commission litigation under the Equal Pay Act of 1963 (EPA) and the Age Discrimination in Employment Act of 1967 (ADEA) (both formerly enforced by the Department of Labor). Subsequently, the General Counsel was given authority for Commission litigation under the employment provisions of the Americans with Disabilities Act of 1990 (ADA) (Title I; effective July 26, 1992) and the employment provisions of the Genetic Information Nondiscrimination Act of 2008 (GINA) (Title II; effective November 21, 2009)

The mission of EEOC's Office of General Counsel (OGC) is to conduct litigation on behalf of the Commission to obtain relief for victims of employment discrimination and ensure compliance with the statutes that EEOC is charged with enforcing. Under Title VII, the ADA, and GINA the Commission can sue nongovernmental employers with 15 or more employees. The Commission's suit authority under the ADEA (20 or more employees for private employers) and the EPA (no employee minimum, but for most private employers \$500,000 or more in annual business) includes state and local governmental employers as well as private employers. Title VII, the ADA, GINA, and the ADEA also cover labor organizations and employment agencies, and the EPA prohibits labor organizations from attempting to cause an employer to violate that statute. OGC also represents the Commission on administrative claims and litigation brought by agency applicants and employees, and provides legal advice to the agency on employment-related matters.

B. Headquarters Programs and Functions

1. General Counsel

The General Counsel is responsible for managing, coordinating, and directing the Commission's enforcement litigation program. He or she also provides overall guidance and management to all components of OGC, including district office legal units. The General Counsel recommends cases for litigation to the Commission and approves other cases for

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filing under authority delegated to the General Counsel under the Commission's 1996 National Enforcement Plan. The General Counsel also reports regularly to the Commission on litigation activities, including issues raised in litigation which may affect Commission policy, and advises the Chair and Commissioners on agency policies and other matters affecting enforcement of the statutes within the Commission's authority.

2. Deputy General Counsel

The Deputy General Counsel serves as the alter ego of the General Counsel and as such is charged with the daily operations of OGC. The Deputy is responsible for overseeing all programmatic and administrative functions of OGC, including the litigation program. OGC functions are carried out through the operational program and service areas described below, which report to or through the Deputy.

3. Litigation Management Services

Litigation Management Services (LMS) oversees and supports the Commission's court enforcement program in the agency's district offices. Also, in conjunction with the Office of Field Programs (OFP), LMS oversees the integration of district office legal units into the investigative enforcement structure of the district offices. LMS staff provide direct litigation assistance to district offices as needed, draft guidance (including maintaining the *Regional Attorneys' Manual*), develop training programs and materials, and collect and create litigation practice materials. LMS also reviews proposed suit filings by regional attorneys under their redelegated litigation authority from the General Counsel. LMS has an assistant general counsel for technology responsible for providing technical guidance and oversight to OGC headquarters and district offices on the use of technology in litigation and the development of OGC's computer systems. LMS and OFP staff make joint visits to district offices to provide technical assistance regarding the integration of the district legal and investigative units.

4. Internal Litigation Services

Internal Litigation Services represents the Commission and its officials on claims brought against the Commission by agency employees and applicant for agency jobs, and provides legal advice to the Commission and agency management on employment-related matters.

5. Litigation Advisory Services

Litigation Advisory Services (LAS) evaluates district office suit recommendations in cases that require General Counsel or Commission authorization, and drafts litigation

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recommendations to the General Counsel for approval or submission to the Commission. LAS responds to Commissioner inquiries on cases under consideration for litigation, acting as OGC's liaison and contact point between the Commissioners and the district office legal units. LAS also performs special assignments as requested by the General Counsel.

6. Appellate Services

Appellate Services (AS) is responsible for conducting all appellate litigation where the Commission is a party. AS also participates as amicus curiae, as approved by the Commission, in United States courts of appeals, as well as federal district courts and state courts, in cases involving novel issues or developing areas of the law. AS represents the Commission in the United States Supreme Court through the Department of Justice's Office of the Solicitor General. AS also makes recommendations to the Department of Justice in cases where the Department is defending other federal agencies on claims arising under the statutes the Commission enforces. AS reviews EEOC policy materials, such as proposed regulations and enforcement guidance drafted by the Commission's Office of Legal Counsel, prior to their issuance by the agency.

7. Research and Analytic Services

Research and Analytic Services (RAS) provides expert and analytical services for cases in litigation, assists EEOC attorneys in obtaining expert services from outside the agency, and provides technical support to field staff investigating charges of discrimination. RAS has a professional staff with backgrounds and advanced degrees in the social sciences, economics, statistics, and psychology who serve as testifying and consulting experts on cases in litigation. RAS also provides services to other agency offices, such as conducting social science research on issues related to civil rights enforcement, advising the agency on the collection of workforce data, and developing and maintaining special census files by geography, race/ethnicity and sex, and occupation.

8. Administrative and Technical Services Staff

OGC's Administrative and Technical Services Staff (ATSS) provides administrative and technical services to all headquarters components of OGC. ATSS also is responsible for preparing the OGC budget request to the EEOC Chair for submission to the Office of Management and Budget and Congress as well as for handling various budget execution duties such as transferring funds to district offices and monitoring expenditures. ATSS maintains nationwide data on the Commission's litigation activities.

C. District Office Legal Units

District office legal units conduct Commission litigation in the geographic areas covered by the respective offices and provide legal advice and other support to district staff responsible for investigating charges of discrimination. In addition to the district office itself, OGC trial attorneys are stationed in most of the other offices – field, area, and local – within districts. Legal units are under the direction of regional attorneys, who manage staffs consisting of supervisory trial attorneys, trial attorneys, paralegals, and support personnel.

II. Fiscal Year 2010 Accomplishments

In fiscal year 2010, OGC filed 250 merits lawsuits and resolved 289, obtaining over \$85 million in monetary relief. Section A below contains summary statistical information on the fiscal year's trial court litigation results (more detailed statistics appear in section III. of the Annual Report). Sections B and C contain descriptions of selected trial and appellate cases. Section D describes some of the outreach conducted by OGC staff during the year.

A. *Summary of District Court Litigation Activity*

OGC filed 250 merits suits in FY 2010. Merits suits consist of (1) direct suits and interventions alleging violations of the substantive provisions of the Commission's statutes, and (2) suits to enforce settlements reached during EEOC's administrative process. No interventions were filed during the fiscal year; two suits were filed to enforce administrative settlements. In addition to merits suits, OGC filed 20 actions to enforce subpoenas issued during EEOC investigations and 2 suits seeking preliminary relief.

OGC's FY 2010 merits suit filings had the following characteristics:

- 192 contained claims under Title VII (75.8%)
- 2 contained claims under the EPA (.8%)
- 29 contained claims under the ADEA (11.6%)
- 41 contained claims under the ADA (16.4%)
- 95 cases sought relief for more than one person (38%)

The above claims exceed the number of suits filed (and percentages total over 100) because cases sometimes contain claims under more than one statute. There were 14 (5.6%) of these "concurrent" suits among the FY 2010 filings.

OGC resolved 289 merits suits in fiscal year 2010, resulting in monetary relief of \$85,580,600. These resolutions had the following characteristics:

- 201 contained claims under Title VII (69.6%)
- 39 contained claims under the ADEA (13.5%)
- 59 contained claims under the ADA (20.4%)
- 115 cases sought relief for more than one person (39.8%)
- 10 were concurrent suits (3.5%)

Section III of the Annual Report contains detailed statistical information on OGC's FY 2010 litigation activities, as well as summary information for past years.

B. Significant District Court Resolutions

1. Title VII

a. Race Discrimination

(1) Hiring and Assignment

In *EEOC v. Vanguard Group, Inc.* (E.D. Pa. Jan. 4, 2010), EEOC alleged that an international investment management firm based in Malvern, Pennsylvania, failed to hire an African American applicant for a financial planning manager position at its Charlotte, North Carolina, office because of her race. The applicant, the only African American among four candidates, had a master's degree in finance and extensive financial management experience, much of it in a supervisory capacity. She received highly favorable comments as she progressed through defendant's multistep process that included interviews with high-level managers, and an in-person assessment by a third party on matters such as personality and aptitude. At the conclusion of her final interview, in March 2005, defendant's managing director told the applicant she was "obviously qualified for the position"; however, defendant offered the job to two less qualified white applicants -- the first declined and the second accepted. A 2-year consent decree provides \$300,000 to the applicant (\$50,000 in backpay and \$250,000 in damages), enjoins defendant from hiring decisions based on race, and prohibits retaliation.

In *EEOC v. John Wieland Homes and Neighborhoods, Inc.* (N.D. Ga. June 22, 2010), EEOC alleged that a land developer and home builder with a number of locations in the Southeastern United States failed to hire or assign African Americans to work as sales agents in predominantly white communities in the Atlanta metropolitan area. EEOC also alleged that defendant subjected a human resources representative to a hostile work environment by prohibiting her from doing her job in compliance with employment discrimination laws, and that due to her opposition to defendant's unlawful conduct she was forced to resign in May 2004. Defendant assigned black sales agents to predominately black communities with lower priced homes and less qualified buyers, resulting in fewer sales and lower commissions than attained by white sales agents assigned to predominately white communities. A 6-year consent decree resolved both the suit and an EEOC Commissioner's Charge, which alleged a companywide practice of failing to hire and promote women and African Americans into management positions because of their sex or race. The decree provides \$378,500 to be

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distributed to six affected individuals (each person's share consisting of 40% backpay and 60% damages). Defendant will make good faith efforts to hire qualified African American and female applicants into management positions consistent with their application rates for those positions, and must offer at least five management positions to qualified African American applicants and five management positions to qualified female applicants during the term of the decree.

In *EEOC v. Paramount Staffing, Inc.* (W.D. Tenn. Aug. 19, 2010), EEOC alleged that a supplier of temporary employees for light industrial work failed to place African Americans in warehouse positions with a major client based on their race and national origin (American). EEOC also alleged that defendant discharged a black employee in retaliation for complaining about the discrimination. Under a contract obtained in February 2004, defendant provided hundreds of workers daily to the Memphis facility of a distributor of electronic media. Defendant passed over black applicants that the prior contracting agency had regularly sent to the facility, and instead referred Hispanics. A defendant manager told a black staffing coordinator to hire Mexicans and not African Americans because the latter "just don't work hard enough." A 2-year consent decree covering all of defendant's Memphis operations provides for a \$585,000 class fund (with \$65,000 to the discharged employee) to be distributed through a notice and claims procedure. The decree enjoins defendant from failing to hire and place African Americans on the basis of race or national origin and from retaliation.

In *EEOC v. Noble Metal Processing, Inc.* (E.D. Mich. May 25, 2010), EEOC alleged that an automotive parts supplier headquartered in Warren, Michigan, denied nonwhite employees promotional opportunities because of race, and retaliated against two employees for opposing race discrimination. From 2006 through 2007, eight nonwhite production workers (seven African Americans and one from Bangladesh) were denied promotions to maintenance jobs, which paid the highest nonskilled hourly wage. Over the same period, defendant filled four maintenance jobs with white workers, three of whom were temporary employees trained on the job. An African American employee was promoted to a maintenance job after he filed a discrimination charge, but was immediately demoted when he refused to sign a form stating that he wasn't presently qualified for a maintenance position. During a temporary white employee's interview for a maintenance job, two managers used the term "nigger" in reference to a black employee. The white employee complained about this to the union, and was discharged the same day the union transmitted his complaint to human resources. Defendant has closed the subject plant, but pursuant to a consent decree will pay \$190,000 in compensatory damages to seven individuals in amounts ranging from \$25,500 to \$35,000.

(2) Terms and Conditions of Employment

In *EEOC v. Corporate Express Office Products, Inc.* (M.D. La. Nov. 23, 2009), EEOC alleged that a national supplier of office products and services denied an African American account manager appropriate wages because of his race. The employee was hired in January 2003 as a junior account manager in defendant's Baton Rouge, Louisiana, office at an annual salary of \$32,500 plus commissions. He was told he was in a training position and that after 6 to 8 months he would be promoted to account manager with an increase in his base salary. The employee was promoted in August 2003 and was the only African American account manager in his region. However, unlike a white colleague, his salary was never increased despite good performance. He resigned in October 2006 and the white person hired as a junior account manager to replace him earned a higher base salary than African American employee had earned as an account manager. An 18-month consent decree provides \$80,000 to the individual (\$22,500 as backpay and \$57,500 as compensatory damages) and prohibits defendant from race discrimination.

In *EEOC v. Linvatech Corporation d/b/a Conmed Linvatech* (N.D. Ill. Jan. 4, 2010), EEOC alleged that an international designer and manufacturer of medical devices subjected a black employee to disparate terms and conditions of employment and discharged him because of his race. The employee was the only black sales representative (out of 13) in defendant's Midwest region. A regional branch director who started in January 2007 held the black sales representative to different performance standards than white sales representatives, and removed him from top accounts and assigned him poorer producing accounts. Despite continued good performance (top third in sales in the region), the black sales representative was terminated in April 2007 while no action was taken against poorer performing white sales representatives. A 2-year consent decree provides the black sales representative \$250,000 (half backpay and half damages), and requires defendant to employ him as a sales representative in its north Texas region at a designated salary and commission, and to pay up to \$15,000 in relocation expenses. The decree enjoins defendant from race discrimination in its north Texas region or any other region to which the employee is assigned.

In *EEOC v. RACE-Radiological Assistance, Consulting and Engineering, LLC* (W.D. Tenn. Dec. 31, 2009), EEOC alleged that a provider of low-level radioactive waste processing and support services subjected a class of black shop employees at its Memphis, Tennessee, facility to racial harassment and disparate terms and conditions of employment, including increased exposure to hazardous radioactive waste. From at least early 2004, a white shop supervisor directed racial comments and slurs at black employees on a daily basis, and gave them discriminatory work assignments. Repeated complaints about the supervisor were made to managers but no action was taken. A 2-year consent decree provides \$650,000 in compensatory damages to be distributed among 23 individuals as directed by EEOC. The

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decree enjoins defendant from race discrimination and retaliation, and provides that defendant will never reemploy the white supervisor. Defendant must conduct exit interviews with consenting departing employees about fair and equal treatment by supervisors. Defendant also must report to EEOC monthly on job assignments, indicating employees' names, race, and duration in minutes working in each area of the facility.

(3) Harassment

In *EEOC v. CMRI, Inc., dba Bahama Breeze* (N.D. Ohio Dec. 11, 2009), EEOC alleged that an operator of 23 Caribbean-themed casual restaurants subjected a class of black employees at its Bahama Breeze restaurant in Beachwood, Ohio, to a racially hostile work environment and disparate terms and conditions of employment, and constructively discharged one employee. Black employees who worked at the restaurant between 2003 and 2007 said that managers regularly directed racially derogatory comments at black staff ("hood guys," "nigga people," "Aunt Jemima," "home boy," "you people"), and mocked stereotyped black language, dress, and mannerisms. Defendant disproportionately assigned black employees to back-of-the-house (kitchen) positions, and gave them menial and/or more difficult duties and less desirable schedules than nonblack employees. Defendant also applied work rules (attendance, access to food, breaks) more stringently to black than to nonblack employees. Many of the black employees complained to management about the harassment and discriminatory treatment, but the situation did not improve. One employee resigned due to the continuing racial harassment and unequal working conditions. A 3-year consent decree enjoins defendant from racial harassment and retaliation and provides \$1.26 million in compensatory damages to 37 class members, to be distributed as determined by EEOC.

In *EEOC v. Big Lots, Inc.* (C.D. Cal. Feb. 16, 2010), EEOC alleged that a nationwide discount retailer subjected a maintenance mechanic and other black employees at defendant's distribution center in Rancho Cucamonga, California, to a racially hostile work environment. The mechanic's immediate supervisor and several coworkers repeatedly directed racially offensive jokes, comments, slurs, and gestures to him, including use of the "n" word. Several black coworkers experienced similar treatment. Repeated complaints to management were not investigated by defendant until after the black mechanic filed an EEOC charge. A 3-year consent decree provides \$400,000 in compensatory damages to be distributed at EEOC's discretion through a notice and claims procedure. Potential eligible claimants are African Americans employed by defendant after January 1, 2004.

In *EEOC v. S & H Thomson, Inc., d/b/a Stoke-Hodges Chevrolet Cadillac Buick Pontiac GMC* (S.D. Ga. Jan. 13, 2010), EEOC alleged that an operator of nine car dealerships in Georgia and South Carolina subjected a black sales manager at a dealership in Thomson, Georgia, to a racially hostile work environment. From the time of his hire in May 2006 until his

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termination in September 2006 (not a claim in the suit), the black manager was subjected to racial slurs from a white individual who worked as a private consultant for defendant and visited the dealership on a regular basis. The harassment included continuously referring to the manager as “nigger” and “blacky.” These and other racial comments were made in front of other managers and sales staff. The black manager complained to the general manager, and although the consultant was told to stop his comments, the racial slurs continued. The general manager complained to defendant’s owner about the consultant’s racially derogatory comments, but she did nothing to address the situation. A 3-year consent decree provides \$140,000 in compensatory damages to the black manager, and prohibits discrimination under Title VII.

(b) Sex Discrimination

(1) Hiring

In *EEOC v. Outback Steakhouse of Florida, LLC and OS Restaurant Services, LLC* (D. Colo. Dec. 29, 2009), EEOC alleged that defendants (collectively “Outback”), which operate restaurant chains throughout the United States, engaged in a pattern or practice of sex discrimination by failing to hire and promote women into management positions and subjecting them to less favorable terms and conditions of employment in job assignments, training opportunities, and opportunities for advancement. On November 2, 2007, the court granted Outback’s motion to dismiss EEOC’s nationwide claims and limited the suit to a three-state region (Colorado, Wyoming, and Montana). On December 20, 2007, an EEOC Commissioner filed a nationwide gender discrimination charge against Outback. A 4-year consent decree resolved EEOC’s suit (including the claims of three interveners), the Commissioner’s charge, and claims of gender discrimination, gender harassment, and related retaliation that EEOC could bring based on pending charges of discrimination against Outback identified in a sealed exhibit. EEOC’s statistical evidence showed that women were significantly underrepresented in management positions in Outback’s restaurant chains. The decree provides a \$19 million settlement fund for members of the hiring and promotion class, interveners (including their attorney’s fees), and individuals with pending gender and related retaliation charges. Payments will be apportioned as 75% compensatory damages and 25% backpay. The decree covers all corporately-owned Outback Steakhouse restaurants within the United States, and enjoins gender discrimination and retaliation. Outback will develop a nationwide web-based Registry of Interest to generate applicant pool lists for designated positions, and hiring managers must make selections from the lists. Outback must submit semiannual reports on the filling of Registry positions to EEOC and to a consent decree consultant retained by Outback to (among other responsibilities) analyze promotions to Registry positions.

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In *EEOC v. Lawry's Restaurants, Inc., d/b/a Lawry's The Prime Rib, Five Crowns, and Tam O'Shanter Inn* (C.D. Cal. Nov. 4, 2009), EEOC alleged that an operator of three restaurant chains failed to employ men as servers because of their sex. In the summer of 2001, a male busser at a Lawry's The Prime Rib restaurant in Las Vegas, Nevada, began requesting promotion to a server position. The restaurant's general manager told him defendant hired only women as servers, but said he would check with "corporate" to see if they would make an exception and hire the male busser as a "back" food server. The male busser was not hired as a server until after he filed his EEOC charge. During EEOC's investigation, the general manager admitted it was his practice to hire only women as servers. Between 2000 and July 2003, defendant hired 200 food servers at its three restaurant chains, all of whom (with one possible exception) were women. A 3-year consent decree provides a class fund of \$390,000 to be distributed through a claims process to men who applied for server (or for "any" or "all") positions during the period May 1, 2002, to September 30, 2004. The decree enjoins defendant from sex discrimination and retaliation. Defendant will make a good faith effort to maintain a hiring rate of 37% to 40% men into server positions. Defendant will spend at least \$300,000 on an advertising campaign to change the public's perception that defendant hires only women as servers. Semiannually, defendant will report to EEOC on applicants and hires for server positions by sex.

In *EEOC v. Wal-Mart Stores, Inc.* (E.D. Ky. March 1, 2010), EEOC alleged that the international discount retailer failed to hire women for orderfiller positions at its London, Kentucky, distribution center because of their sex. The distribution center bundles and ships bulk perishable and nonperishable food items to Wal-Mart retail grocery stores. Orderfillers load bulk food items from the warehouse floor onto pallets and deliver the stacked goods to be shrinkwrapped by machine and then shipped by freight trucks. A woman working at Wal-Mart's retail store in London filed an EEOC charge when she was denied a transfer in October 1998 to the distribution center. An analysis by EEOC's labor economist for the years 1998 through 2004 showed a statistically significant disparity between female applicants for warehouse positions, almost all of which were for orderfillers, and their selection for warehouse jobs. The 5-year consent decree provides for \$11,700,000 (\$8,405,877 in backpay and \$3,294,123 in compensatory damages) to be paid into a qualified settlement fund account established by a third party settlement claims administrator. Defendant will pay the administrator's expenses up to \$250,000. Eligible claimants are women who sought employment at the London distribution center from January 1, 1998, through February 15, 2005, and were denied employment at least once during this period. The decree enjoins defendant from sex discrimination in hiring for the orderfiller position at the London distribution center. EEOC will provide defendant a list of eligible claimants for instatement, and defendant will fill the first 50 orderfiller positions at the London facility from the list; for the next 50 openings, defendant will fill every other job from the list and thereafter every third position. Defendant will report annually to EEOC on its compliance with the decree,

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including the number of men and women who apply and are hired for orderfiller positions or for an unspecified hourly warehouse job, information on individuals promoted or transferred into orderfiller positions, and instatement information.

In *EEOC v. Les Schwab Tire Centers of Washington* (W.D. Wash. March 10, 2010), EEOC alleged that a tire retailer with facilities in seven western states failed to hire women into its sales/service departments because of their sex. Sales/service department jobs involve changing tires and various mechanical work on automobiles, and experience in that department is a prerequisite for management positions. Two female employees with several years of sales/administration department experience at Les Schwab stores in Washington State filed charges with EEOC after unsuccessfully attempting to transfer into the sales/service department in order to obtain experience necessary to move into management positions. An analysis by EEOC's labor economist for the years 2004 through 2007 showed a statistically significant disparity between female applicants for sales/service positions and their selection for those positions. A 4-year consent decree provides for \$2 million to be paid into a class fund with class members and distributions to be determined by EEOC. (The two women who filed EEOC charges resolved their individual claims against defendant and were not included in EEOC's settlement.) Defendant will target recruitment efforts to promote the employment of women in sales/service positions, and will make best efforts to hire women into sales/service positions in proportion to their availability in the qualified applicant pool. Annually, defendant will report to EEOC on its recruitment efforts and on applicants and hires into sales/service positions.

(2) Pregnancy

In *EEOC v. The Terminix International LP, d/b/a Terminix* (E.D. Ark. July 1, 2010), EEOC alleged that a worldwide provider of pest control services placed a female employee on forced medical leave and terminated her because of her pregnancy. The employee was hired as a pest technician servicing commercial and residential clients out of defendant's McGehee, Arkansas, facility. When she learned in June 2007 that she was pregnant, she obtained a doctor's note restricting her from working around chemicals. Initially, defendant permitted her to perform termite reinspections, which does not require working around or with chemicals. However, defendant later placed her on medical leave, allegedly because there were not enough reinspections for her to perform, and terminated her in February 2008 for not returning to work within its 6-month medical leave period. A 2-year consent decree, which applies to defendant's nine Little Rock Region branches, provides \$80,000 (\$50,000 in backpay and \$30,000 in compensatory damages) to the female employee, and enjoins defendant from placing pregnant employees on leaves of absence or terminating employees on maternity leave in violation of Title VII. Defendant will create and distribute a written pregnancy discrimination policy that includes a statement on the availability of

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reassignments for pregnant pest technicians who cannot be exposed to or handle chemicals. Defendant will report semiannually on pregnant technicians whose doctors have requested they not handle or be exposed to chemicals, indicating defendant's response to the request.

In *EEOC v. Kohler Company* (N.D. Ga. Nov. 23, 2009), EEOC alleged that a Wisconsin-based international retailer of household fixtures placed an employee on probation and terminated her because of her pregnancy. The employee was hired as a showroom sales executive in defendant's Atlanta, Georgia, branch office in January 1999. After she informed her supervisor in May 2004 that she was pregnant, he began treating her more harshly, and spoke to her in a way that caused her to believe he was trying to get her to quit. The supervisor placed her on probation for 60 days, and although she successfully completed the probation, she was terminated just 2 weeks later, about a month before her due date. She was told only that she wasn't "driving the business hard enough." Other employees heard the employee's supervisor make negative references about employees who became pregnant. Prior to announcing her pregnancy, the employee had been given a performance evaluation of "above expectations" and a 9.5% merit increase. A 2-year consent decree provides \$175,000 to the employee.

In *EEOC v. Imagine Schools, Inc.* (W.D. Mo. April 12, 2010), EEOC alleged that an owner/operator of private schools failed to hire two women because of their pregnancies. The women worked at a charter school in Kansas City, Missouri, one as a parent coordinator and administrative assistant at the middle school campus, and the other as a business manager at the high school campus. In June 2006, the charter school was converted into a private school owned and operated by defendant. Defendant consolidated the middle and high schools into one campus and reduced the staff. It did not select the women, both pregnant at the time, for positions at the new school. Defendant's executive director made numerous negative comments about the women's pregnancies and their need for maternity leave, and defendant's regional director told the director of business operations that the women were not retained because they were pregnant. The 2-year consent decree provides the women, who intervened, with \$570,000 (\$295,000 to one and \$275,000 to the other) in backpay, compensatory damages, and attorney's fees, and prohibits sex and pregnancy discrimination at Missouri facilities where the executive director has oversight responsibilities.

(3) Harassment

In *EEOC v. Management Hospitality of Racine, Inc.* (E.D. Wis. Nov. 19, 2009), EEOC alleged that the owner of an International House of Pancakes restaurant in Racine, Wisconsin, and a corporation that managed the restaurant, subjected two teenage female servers to a sexually hostile work environment and discharged one of them because she resisted and complained about the harassment. At the 4-day trial, the women testified that in early 2005 a male

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assistant manager at the restaurant made sexually offensive comments, propositioned them, and grabbed and touched them inappropriately. They testified that they complained about the conduct to the other assistant manager and to the general manager, but with no result. The jury returned a verdict for EEOC on the sexual harassment claims and for defendants on the retaliation claim, awarding the discharged employee \$1,000 in compensatory damages and the other employee \$4,000 in compensatory damages and \$100,000 in punitive damages.

In *EEOC v. Corrections Corp. of America and Dominion Correctional Services LLC* (D. Colo. Oct. 2, 2009), EEOC alleged that defendants, successive operators of Crowley County Correctional Facility, a prison with a capacity of 1,200 male inmates located in Olney Springs, Colorado, subjected female employees at the prison to a sexually hostile work environment and retaliated against individuals who opposed the harassment. Security chiefs and other high-ranking male officers engaged in ongoing sexually offensive conduct, including sexual advances, intrusive physical conduct, and coerced sex. After resisting or reporting the conduct, female employees experienced hostile verbal and physical attacks, undesirable shift or work assignments (including failure to provide backup in dangerous situations), false charges of unprofessional conduct, and discharge or constructive discharge. A 3-year consent decree entered judgment against defendants for \$1,160,000 in backpay and compensatory damages, payable to 21 class members. The decree enjoins Corrections Corp. of America, the current operator of the prison, from sexual harassment and retaliation. Corrections Corp. will expunge from the personnel files of each class member records relating to suspensions and involuntary terminations, and any discharged class member may submit a letter of resignation effective as of the date of her discharge. Each defendant will provide a written apology to the class members it employed.

In *EEOC v. ABM Industries Inc., ABM Janitorial Services, Inc., and ABM Janitorial Northern California* (E.D. Cal. Sept. 27, 2010), EEOC alleged that from 2004 through at least 2006, defendant ABM Industries, a national provider of janitorial and maintenance services, and two California subsidiaries, subjected a class of female employees to a sexually hostile work environment, resulting in the constructive discharge of some of them. The women worked out of ABM Janitorial Services' Bakersfield, California facility on the nightshift. Their immediate supervisor subjected them to sexually offensive conduct, including sexual comments and groping, and offered some of them money, better jobs, and more hours of work in exchange for sex. Women complained to the district supervisor (the harasser's brother), but nothing was done, and some of the women quit because of the harassment. A 3-year consent decree provides for \$5.8 million in compensatory damages to be distributed to 21 female claimants at EEOC's discretion. Defendants will hire a person to implement and monitor compliance with the decree. Defendants will establish a 24/7 toll-free hotline in English and Spanish, and ABM Industries will conduct unannounced audits at California

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sites to investigate harassment and retaliation, and will report the results to the monitor and EEOC.

In *EEOC v. Arnold Logistics, LLC* (N.D. Ill. May 26, 2010), EEOC alleged that a provider of distribution center management and reverse logistic services subjected female employees to a sexually hostile work environment, and discharged an employee for complaining about sexual harassment. A female lead auditor who started at defendant's Joliet, Illinois, facility in November 2004 was touched inappropriately by a male shift supervisor, and when she complained to human resources, the supervisor threw a copy of an email documenting her complaint in her face, and began retaliating against her with unwarranted discipline. In August 2006, the supervisor terminated the lead auditor for leaving her shift early, even though he had given her and another employee (who was not discharged) permission to leave for the day. Other female employees allege that the shift supervisor made offensive sexual comments and advances to them and touched them inappropriately; one female employee was forced to resign due to the harassment. A 2-year consent decree provides for \$625,000 (\$125,000 each to the discharged and constructively discharged the London distribution center employees, and the rest to be distributed to 10 other affected individuals) and enjoins defendant from sexual harassment, sex discrimination, and retaliation at its facility in Monee, Illinois (and the Joliet facility if it reopens).

In *EEOC v. The Cheesecake Factory* (D. Ariz. Nov. 6, 2009), EEOC alleged that a chain of upscale casual dining restaurants with over 100 locations subjected male employees (mainly servers and food expeditors) at its Chandler, Arizona, restaurant to a sexually hostile work environment, resulting in the constructive discharge of one employee. From about December 2005 through most of 2006, male kitchen workers engaged in offensive sexual conduct toward other male employees, including group physical assaults, touching of genitals, and derogatory comments (e.g., "bitch," "Putta" (whore)). Managers were aware of the conduct, but no corrective action was taken. One employee resigned due to a particularly brutal and humiliating attack in October 2006. A 2-year consent decree provides \$345,000 to six individuals in amounts ranging from \$15,000 to \$175,000, and enjoins defendant from sex discrimination. Defendant will appoint an ombudsman from outside the Chandler location to process discrimination complaints.

In *EEOC v. Affordable Care, Inc., and Nelson Wood, DMD, PC* (D. Mass. June 2, 2010), EEOC alleged that defendant Affordable Care, Inc. (ACI), which provides administrative services to over 150 dental practices in 37 states, and an affiliated dental practice located in Springfield, Massachusetts, subjected two female dental assistants hired in November 2006 to racial (black) and sexual harassment, and in mid-2007 constructively discharged one of them due to the harassment and discharged the other in retaliation for complaining about the harassment. Under a 3-year consent decree, ACI will pay \$75,000 each to the two women. The decree

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enjoins defendants from creating or maintaining a racially or sexually hostile work environment and from retaliation. ACI will contract with Employment Practices Solutions, Inc., to serve as its EEO Coordinator and assist ACI in administering the antidiscrimination and antiharassment policies applicable to its affiliated practices. ACI will distribute an interpretive memorandum to affiliated practice owners nationwide stating that it will consider any violation of the antidiscrimination and antiretaliation laws referenced in management service agreements as a material breach of the agreement that may result in termination of the affiliation.

In *EEOC v. Lafayette College* (E.D. Pa. April 22, 2010), EEOC alleged that a college in Easton, Pennsylvania, subjected a class of female public safety department employees to a sexually hostile work environment and constructively discharged one of the employees. For years the male officer in charge of loss prevention subjected female public safety officers to offensive physical touching, sexual advances, lewd comments, and the display of pornography. Defendant received numerous complaints from the women about the male officer, but did not take effective corrective action and his conduct continued. Defendant finally discharged the male officer in November 2007, several weeks after receiving an investigative finding that he had “violated [defendant’s] policies against sexual assault and sexual harassment and . . . should be terminated.” Two female employees filed assault and stalking charges against male officer with the county police department; he pled guilty to stalking and in January 2009 was sentenced to 18 months probation and 50 hours of community service. A 2-year consent decree provides five individuals a total of \$1 million (\$9,000 in backpay to a constructively discharged employee and the rest in damages), and prohibits sexual harassment and retaliation.

In *EEOC v. Tim Dahle Imports, Inc., a Utah Corporation, doing business as Tim Dahle Nissan of Sandy* (D. Utah Oct. 21, 2009), EEOC alleged that women employed at a Nissan automobile dealership in Sandy, Utah, were subjected to a sexually hostile work environment, and that a female salesperson (one of only two women out of about 20 sales staff) was terminated in retaliation for complaining about the harassment. Male employees subjected the female salesperson, hired in April 2005, to sexually demeaning comments and requests for sex, commented about her body, and left sexually suggestive voicemails for her; other female employees experienced similar behavior. The female salesperson complained to the general manager, but the harassment continued, and she was discharged in August 2005 for being a “no call/no show” when she overslept and arrived at work about 2 hours late. She was told by the dealership’s floor manager that he had been told to fire her and that in the 5 years he had worked at defendant no one had been fired for being late. A 4-year consent decree entered judgment against defendant for \$455,000 in compensatory damages to five individuals in amounts ranging from \$52,200 to \$135,275 (each also will receive letters of apology and positive letters of reference), and enjoins defendant from sexual harassment and

retaliation. Defendant will inform all vendors and suppliers that failure to conform to its sexual harassment policy may result in defendant ceasing to do business with them.

(4) Discharge

In *EEOC v. The Boeing Company* (D. Ariz. Jan. 27, 2010), EEOC alleged that a manufacturer of commercial airliners and military aircraft and equipment transferred and terminated a female engineer at its Mesa, Arizona, location because of her sex and in retaliation for her complaints to management about sex discrimination, and discharged a second female engineer at the Mesa location because of her sex. Both women had many years of experience with defendant at the time of a 2002 reduction in force (RIF). The first employee complained several times to managers about gender-based harassment by male coworkers and requested transfers, which were denied. She was finally transferred months after she complained, and when she asked whether the transfer would affect her upcoming RIF assessment she was assured it would not; however, she was assessed poorly based on her performance in an unfamiliar position and discharged just a month later. She was the only woman of 28 engineers assessed for the RIF and was the only person discharged. The second employee was the only female manufacturing engineer of 32 assessed for the RIF, and of 7 employees selected for the RIF, she was the only one discharged. A 2-year consent decree, which applies to defendant's Rotocraft Systems Division at the Mesa location, provides \$280,000 in compensatory damages to be divided equally between the two women, and permanently enjoins defendant from sexual harassment and retaliation.

c. National Origin Discrimination

(1) Assignment

In *EEOC v. Titan Concrete Industries, Inc., d/b/a City Concrete* (W.D. Tenn. March 10, 2010), EEOC alleged that a supplier of concrete and concrete products to the construction industry removed an employee of Thai ancestry from a sales position because of his national origin and age (54); subjected him to harassment because of his national origin; and subjected him to adverse terms and conditions of employment in retaliation for filing an EEOC charge, which forced him to resign. The employee was an assistant to the sales and marketing director, but when the director left in April 2006, he was removed from the sales department and offered a driver or mechanic position. He selected the driver position, and although he was paid the same, he lost his company-issued vehicle, gas reimbursement card, and cell phone. Defendant's sales manager said that customers couldn't understand the employee because he was Asian and that he didn't see why the company had to have a foreigner in the sales department. Defendant's operations manager referred to the employee as a "Jap." After the employee filed a national origin and age discrimination charge over his removal

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from the sales position, defendant's operations manager complained to him about the charge, and according to the employee defendant began assigning him to trucks with mechanical problems. The employee quit his job in March 2007 because he feared he would be injured driving the defective trucks. A 4-year consent decree provides \$135,000 in monetary relief and enjoins defendant from discrimination because of national origin or age, and from retaliation.

(2) Harassment

In *EEOC v. Cannon & Wendt Electric Co, Inc.* (D. Ariz. April 12, 2010), EEOC alleged that an electrical contractor that provides services to construction projects throughout Arizona subjected a mechanic at its Phoenix tool shop to a hostile work environment due to his Mexican national origin, and terminated him because of his national origin and in retaliation for complaining about the harassment. Starting in April 2003, the mechanic's supervisor made anti-Mexican comments -- e.g., that he hated Mexicans and that all Mexicans were worthless -- to the mechanic and to others in the mechanic's presence. The mechanic complained twice to defendant's owner, but the harassment continued, and shortly after his complaints, defendant posted a job advertisement for his position and then discharged him in May 2005, ostensibly for tardiness and safety violations. Under a 3-year consent decree, defendant will provide the mechanic with \$100,000 (\$80,000 in compensatory damages and \$20,000 in backpay), a positive letter of reference stating that his "contributions were valued" and that he is eligible for rehire, and a letter of apology. Defendant also will expunge references to involuntary termination from the mechanic's personnel file and change its records to reflect that he resigned. The decree enjoins defendant from national origin discrimination and retaliation.

d. Religious Discrimination

(1) Reasonable Accommodation

In *EEOC v. Systems Group, Inc.* (N.D. Tex. Feb. 17, 2010), EEOC alleged that a provider of security services failed to reasonably accommodate the religious practices of a security officer, and discharged her due to her religion (nondenominational Christian—Lamb of God Church of Deliverance). Defendant hired the security officer in March 2003 to fill a vacant protective services officer position at its Lake Ray Hubbard site in Rockwall, Texas. She informed defendant during her interview that she could not work the Sunday 6 a.m. to 6 p.m. shift because she had to attend church. For about the first 6 months, she was not scheduled to work Sunday, but defendant then put her on the schedule to work some Sundays. On her first scheduled Sunday, the security officer informed defendant she was unable to work on Sundays due to her religious commitment and defendant then fired her for insubordination.

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A 5-year consent decree provides \$219,558 to the security officer and reinstates her to a full time security officer position with retroactive seniority. Defendant will not require the security officer to work on Sundays.

In *EEOC v. Mesaba Airlines* (D. Minn. Dec. 22, 2009), EEOC alleged that a regional airline based in Eagan, Minnesota (a subsidiary of Northwest Airlines that flies as Northwest Airlink), refused to permit schedule modifications for customer service agent (CSA) applicants and incumbents during the first 90 days of employment as reasonable accommodations for their religious practices. CSA shift assignments are based on seniority, and defendant had a policy, since rescinded, that CSAs were not allowed to trade shifts during their 90-day probationary period. An orthodox Jew was fired in October 2006, a month after she started, because she was unable to complete an on-the-job training shift that extended into her Sabbath, which occurs from sundown Friday to sundown Saturday. A 2-year consent decree provides \$130,000 in monetary relief to five individuals (\$65,000 to the Orthodox Jew and from \$10,000 to \$20,000 to each of four applicants). The nationwide decree prohibits defendant from discriminating based on religion, requires it to provide reasonable accommodations for its employees' and applicants' sincerely held religious beliefs, and prohibits retaliation under Title VII.

(2) Harassment

In *EEOC v. Administaff, Inc., and Conn-X, LLC* (D. Md. March 15, 2010), EEOC alleged that Conn-X, a cable subcontractor headquartered in Havre de Grace, Maryland, and Administaff, a national provider of human resources services to small and medium-sized businesses, subjected two brothers hired in September 2005 and March 2006 to a hostile work environment based on their religion, Judaism. One brother worked as a service technician supervisor and the other as a service technician. Conn-X managers, supervisors, and coworkers made anti-Semitic remarks to the brothers – e.g., “dirty Jew,” “stupid Jew,” “you killed Jesus” -- on a daily basis until their discharges in the first half of 2008 (not claims in the case). The harassment included physically threatening conduct (the supervisor was pushed, thrown in a dumpster, and shot at with BBs). The brothers complained unsuccessfully to a Conn-X's project manager and a staff person at Administaff. EEOC resolved its claims against Administaff through a 2-year consent decree that provides \$115,000 to the brothers, and enjoins employees of Administaff's EEO Compliance Group and their supervisors who provide human resources services to clients in Maryland from discriminating on the basis of religion. EEOC's suit against Conn-X continued.

In *EEOC v. Sunbelt Rentals, Inc.* (D. Md. Oct. 9, 2009), EEOC alleged that a national provider of rental equipment to the building and construction industries subjected a Muslim employee to religious harassment, and disciplined and discharged him in retaliation for his complaints

about the harassment. The district court granted summary judgment to defendant on both claims; EEOC appealed on the harassment claim and the Fourth Circuit reversed and remanded the case for trial. The Muslim employee was hired as a truck driver at defendant's Gaithersburg, Maryland, location, and was later promoted to rental manager. Throughout his employment (November 2001 to February 2003), his coworkers made disparaging remarks about his religion and ridiculed him for praying at work. His business cards were defaced and his timecards removed, and a shop foreman said it would be "the end of him" if the foreman saw him praying at work. The employee complained to the facility's manager and to the company's human resources department, but defendant failed to make any meaningful effort to correct the situation. A consent decree provides \$64,641.24 in compensatory damages to the Muslim employee and prohibits defendant from discrimination and retaliation under Title VII.

e. Multiple Bases

(1) Racial and National Origin Harassment and Terms and Conditions of Employment

EEOC v. Albertson's LLC fka Albertson's, Inc. (D. Colo. Dec. 14, 2009) involved three consolidated lawsuits against a national grocery chain. In a June 2006 complaint, EEOC alleged that defendant subjected black and Hispanic employees at its Aurora, Colorado, distribution center warehouse (now closed) to harassment based on their race and national origin through the display of offensive and threatening graffiti, which included racial epithets, swastikas, and depictions of lynchings and other threats of violence. Although managers were aware of the graffiti and employees frequently complained that it was offensive to them, no action was taken to identify the perpetrator(s) or prevent the conduct from recurring. EEOC also alleged that defendant assigned black and Hispanic employees more difficult work than less senior white employees, and applied its attendance policy more stringently to black and Hispanic employees resulting in disparate discipline (including suspensions and terminations). In a March 2008 complaint, EEOC alleged that defendant retaliated against individuals who complained about the graffiti and discriminatory working conditions, including assigning them less desirable work, disciplining them, and denying them training, transfers, and promotions. A November 2008 suit involved an individual race (black) discharge claim. A 4-year consent decree resolved the three suits for a payment of \$8.9 million (including attorney's fees for 10 represented individuals, 9 of whom intervened) to be distributed to 168 eligible class members. The decree contains injunctive and affirmative relief that will apply if defendant reopens a distribution center in Colorado during the decree's term.

(2) Racial and Sexual Harassment

In *EEOC v. Whirlpool Corp.* (M.D. Tenn. Dec. 21, 2009), EEOC alleged that a global manufacturer of home appliances subjected an African American woman to a racially and sexually hostile work environment that resulted in her constructive discharge. The woman worked for many years as an assembler at defendant's LaVergne, Tennessee, facility. Evidence at a 4-day bench trial showed that a white male coworker who was transferred to the woman's line in January 2004 regularly made racial and sexual comments to her. She told the coworker to leave her alone and repeatedly complained to her direct supervisor about him, but the conduct continued. In March 2004, the coworker punched the woman in the face, knocking her onto the assembly line where she was hit by an air conditioner coming down the line. She later resigned upon the advice of her health care providers. The court ruled for EEOC and awarded the woman \$773,261 in front and backpay and \$300,000 in compensatory damages.

In *EEOC v. SWMW Management, Inc., Bell Road Automall, Inc., and Big Bell 21 LLC dba Bell Road Kia* (D. Ariz. Dec. 4, 2009), EEOC alleged that related Phoenix, Arizona, automobile dealerships and a entity that manages them subjected female employees to a sexually hostile work environment, and subjected employees who opposed the harassment to adverse terms and conditions of employment that forced two of them to resign. EEOC also alleged that defendant subjected a black employee to a racially hostile work environment. The dealerships' male general manager and male sales managers subjected female employees to unwelcome physical contact and offensive comments. Defendants reprimanded an employee for not being a team player after he pressed for implementation of sexual harassment policies; forced another employee to sign a false affidavit to defeat a discrimination charge; and threatened to blackball an employee from the car sales industry if she talked to the EEOC. Also, white managers and employees regularly subjected a black salesperson to racially stereotyped comments, and defendants failed to take corrective action when he complained. Under a 3-year consent decree, defendants will pay \$500,000 in compensatory damages to five individuals in equal shares of \$100,000 each, and provide each of them a written apology. The decree enjoins defendants from discrimination or harassment on the basis of race or sex and from retaliation under Title VII.

2. Age Discrimination in Employment Act

a. Hiring

In *EEOC v. Chesco Services f/k/a Chesterfield Bd. of Disabilities and Specialist Needs* (D.S.C. Dec. 10, 2009), EEOC alleged that a nonprofit agency providing services to developmentally disabled individuals in five South Carolina counties failed to select a 73-year-old applicant

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for a Coordinator II position due to his age. In February 2007, defendant assumed operations of two facilities formerly run by Babcock Center: Wynn Way and Percival. The two individuals holding coordinator I positions at those facilities, one age 73 and the other age 43, applied for the same positions with defendant. Defendant combined the coordinator I positions into one coordinator II position and selected the 43-year-old. The person selected had 18 years seniority with Babcock (mostly as a behavioral specialist working with individual clients), including 6 months as a Coordinator I, but did not have a college degree; the 73-year-old had 16 years seniority with Babcock (mostly supervisory and managerial positions), including 14 months as a Coordinator I, and held bachelor's and master's degrees in business related areas. A 30-month consent decree provided \$80,000 in monetary relief to the applicant and prohibits defendant from discriminating on the basis of age and from retaliating under the ADEA.

In *EEOC v. The University of Louisiana at Monroe* (W.D. La. April 19, 2010), EEOC alleged that a university (ULM) failed to hire a former employee for the position of associate dean of the college of business administration and for two teaching positions in the department of management and marketing because of his age (67 and 68) and/or in retaliation for engaging in activity protected under the ADEA. The former employee served as dean of the college of business administration at ULM for 13 years and as an administrator for 25 years. He retired from ULM in 1989, but was immediately rehired as a professor in the department of management and marketing. Defendant terminated him in 1996 under a new policy regarding the reemployment of retirees. The former employee and another long-time professor at ULM filed age discrimination charges against ULM, which resulted in an EEOC lawsuit filed in 1998 and resolved in 2001. According to ULM's dean of the college of business administration, ULM's provost said during a discussion of the former employee's subsequent applications that the university administration would not hire him "because of the lawsuit." A ULM department head told the former employee that a university official said at a committee meeting that the employee had had his chance and it was time for someone younger. A 5-year consent decree provides the former employee with \$450,000 in monetary relief, and prohibits defendant from discrimination and retaliation under the ADEA.

b. Benefits

In *EEOC v. Minnesota Dept. of Corrections* (D. Minn. April 8, 2010), EEOC alleged that a state agency that operates prisons discriminated on the basis of age by maintaining early retirement incentive programs that denied benefits to employees retiring at age 55 or older. The court granted summary judgment on liability to EEOC, finding that the programs were facially discriminatory. Defendant's early retirement incentive programs were included in collective bargaining agreements with various unions beginning in the early 1980s. (EEOC

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named six unions as Rule 19(a) defendants.) Under the programs, employees with 3 years of service who retired during the pay period of their 55th birthdays were eligible to receive a continuation of the employer's contribution toward health and dental insurance premiums until the employee reached age 65. Employees retiring after attaining age 55 received no employer contributions. The court awarded backpay of \$724,237 to 35 claimants and frontpay of \$457,919 to 19 of the 35 claimants.

In *EEOC v. University of Puerto Rico* (D.P.R. Jan. 27, 2010), EEOC alleged that after the Older Workers Benefits Protection Act became applicable to public employers on October 16, 1992, defendant university continued to deny employees age 55 and older entry into its retirement system. When in February 2001 defendant did permit employees age 55 and older to become members of the system, it did not allow former employees who worked after October 16, 1992, to become members, and did not allow then-current employees hired at age 55 and older to become members unless they paid both the employee and employer contributions to the system. A consent decree permanently enjoins defendant from discriminating against employees applying for membership in its retirement system because of their age. The decree requires that defendant provide retirement credit and make appropriate employer contributions for affected current employees who pay their outstanding employee contributions for the period October 16, 1992, to the present. Affected former employees who make the necessary contributions will receive an award of retirement benefits calculated from the date of their retirement, plus interest.

In *EEOC v. Bayville Fire Co., Village of Bayville, Village of Mill Neck, and Village of Centre Island* and *EEOC v. Selden Fire Dist.* (E.D.N.Y. April 8 and 16, 2010), EEOC alleged that defendants prevented volunteer firefighters from accruing service credits in their respective length of service award programs (LOSAPs) due to their age. Under New York State law, volunteer fire departments can establish LOSAPs that provide credit toward retirement benefits for active volunteer firefighters. Firefighters have to accrue 5 years of creditable service to receive a length of service award, but under defendants' LOSAPs, firefighters could not accrue additional service award credits after reaching the entitlement age (65 for Bayville and 55 for Selden) for receiving benefits. EEOC entered into separate 5-year consent decrees resolving the two lawsuits. The Selden decree provides 23 firefighters with service credit adjustments (up to 14 years) and \$263,360 in retroactive service credit payments. The Bayville decree provides a methodology for awarding service credit adjustments and retroactive service credit payments to the aggrieved class of firefighters. Both decrees permanently enjoin defendants from preventing active volunteer firefighters from receiving LOSAP service award credits due to their age.

c. Discharge

In *EEOC v. Astea International, Inc.* (E.D. Pa. Jan. 26, 2010), EEOC alleged that a global provider of software products discharged a vice president of strategic alliances because of his age, 47. The vice president reported to the vice president of sales, who made several age biased comments to him – saying that individuals in their 40s and 50s were “burnouts” and that he wanted to hire “younger, hungrier” employees into his department. The vice president of sales discharged the vice president of strategic alliances in January 2006, telling him he wanted a “new direction” and wanted to bring in someone with “new energy, new blood and more objectivity.” The vice president was replaced by an individual in his 30s. The 2-year consent decree provides the vice president \$175,000 in backpay, and enjoins defendant from age discrimination.

In *EEOC v. TIN, Inc., dba Temple-Inland* (D. Ariz. June 11, 2010), EEOC alleged that a manufacturer of corrugated packaging and specialty packaging products with plants across the United States and in Mexico and Puerto Rico, discharged three managers at its Glendale, Arizona, plant between January 2003 and January 2005 because of their ages (56, 60, and 63). The court granted summary judgment to defendant in June 2008, finding that age-based statements (e.g., older employees were “retiring on the job,” “this is a young man’s game,” “we need young blood”) by two managers -- the Vice President and the Pacific Regional Manager of defendant’s International Group -- did not show bias against all older workers. EEOC appealed, and in October 2009, the Ninth Circuit reversed and remanded. A 2-year consent decree provides \$140,000 to a former general manager of the plant, and \$60,000 and \$50,000 to a former production manager and a former controller. The decree applies to the Glendale facility and permanently enjoins defendant from age discrimination and retaliation.

In *EEOC v. Republic Services, Inc., and Republic Silver State Disposal, Inc.* (D. Nev. Sept. 21, 2010), EEOC alleged that a national provider of solid waste collection services and its Nevada subsidiary discharged employees age 40 and over (garbage collectors, drivers, and supervisors) at their southern Nevada facilities between 2003 and 2005 because of their age. Numerous ageist comments were made about and to older employees, and older employees were forced to work in a manner that made it difficult for them to keep up with the garbage collection vehicles. EEOC’s action was consolidated with a lawsuit filed by two discharged garbage collection supervisors. A 3-year consent decree, which applies to defendants’ Las Vegas operations (four locations identified in the decree), provides for \$2,975,000, with \$1.8 million in backpay going to approximately 20 unrepresented individuals in amounts determined by EEOC, and the remainder to the two garbage collections supervisors and their counsel. Defendants will change the termination codes for 37 individuals named in the decree to voluntary terminations.

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In *EEOC v. Kmart Corporation* (D. Haw. March 23, 2010), EEOC alleged that a nationwide general merchandiser subjected a pharmacist at a Honolulu, Hawaii, store to age-based harassment, causing her to resign. The pharmacy manager told the 73-year-old pharmacist that she was too old, was incompetent, and was being greedy for continuing to work at her age. He assigned her unfavorable schedules and wrote her a note saying she couldn't do her job and needed to retire. The pharmacist complained to various defendant officials about the manager's conduct, but they either failed to respond or were indifferent (e.g., the store's general manager said, "I can understand if you don't want to work here"). The pharmacist resigned in July 2006. A 3-year consent decree applies to pharmacy units in defendant's three stores on the island of Oahu. The decree provides the pharmacist \$120,000 and enjoins age discrimination in terms and conditions of employment, including permitting a hostile work environment, and retaliation.

3. Title VII/Age Discrimination in Employment Act

a. Sexual Harassment and Sex and Age Discharge

In *EEOC v. Arapahoe Motors, Inc., d/b/a Ralph Schomp Automotive* (D. Colo. Jan. 7, 2010), EEOC alleged that an automobile dealership with four locations in the Denver, Colorado, area subjected women in sales and management positions to a sexually hostile work environment and to disparate treatment in transfers, promotions, and pay, and demoted and discharged them because of their sex. The complaint also alleged that defendant terminated individuals based on age. Between November 2005 and October 2006, female employees complained to various management officials about sexual remarks and touching by male employees, but nothing was done to correct the situation. Starting in 2005, a newly installed manager, the son of defendant's owners, began demoting or terminating employees in their late 40s and older and replacing them with younger, less qualified individuals. He said during a management meeting: "If it were up to me, I would get rid of all the managers over 45." A 2-year consent decree permanently enjoins defendant from sex and age discrimination and retaliation at its Colorado facilities. The decree provides for a class settlement fund of \$1,505,000, to be distributed to 10 individuals employed during the class liability period -- January 1, 2002, through the effective date of the decree.

b. Failure to Refer

In *EEOC v. Area Temps, Inc.* (N.D. Ohio July 21, 2010), EEOC alleged that since 2004, a privately-held temporary employment agency that places workers into clerical and light manufacturing jobs in the Greater Cleveland, Ohio, area referred applicants based on race, national origin, sex, and age, and retaliated against employees who opposed the discriminatory referrals. A 3-year consent decree provides \$650,000 in compensatory

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damages (\$579,650 into a class fund and \$70,350 to four interveners), paid over a 3-year period and personally guaranteed by defendant's controlling shareholder. Individuals eligible for relief are African Americans, females, Hispanics, and individuals age 40 and over who applied between January 1, 2002, and August 11, 2008, and were not referred for temporary employment. The decree enjoins defendant from discriminating on the basis of race, sex, national origin, or age 40 and over in classifying, hiring, firing, and placing temporary employees, and from retaliation. Defendant will send to all current and future clients a letter setting forth defendant's obligations under federal antidiscrimination laws and emphasizing its commitment to abide by such laws. The decree provides that defendant will contract with a local nonprofit agency to conduct five "tests" of defendant by requesting one or more temporary workers of a particular race, sex, national origin, or age. The agency will report on the contact and the response to EEOC and defendant. Defendant will report to EEOC in a database format on assignments made, with applicants identified by race, national origin, gender, and age, along with the length of the assignments and the average earnings received.

4. Americans with Disabilities Act

a. Hiring

In *EEOC v. Olsten Staffing Services Corp.* (W.D. Wis. March 18, 2010), EEOC alleged that a temporary employment agency with offices in 13 states failed to place a deaf applicant in temporary jobs at one of its clients because of his disability. In early 2007, the individual sought employment through defendant's LaCrosse, Wisconsin, office as a production worker. In March 2007, a staffing specialist emailed a business about an opening for him, stating in part: "He wants to work in the production area but our only concern is that he is deaf. . . . [I]s that too much of a concern for you?" The client responded that it was not interested in a deaf employee "at this time," and defendant subsequently failed to refer the individual for two openings at the client in May and July 2007. A 2-year consent decree that applies to defendant's LaCrosse facility and a related entity provides \$75,000 to the individual (\$5,000 in backpay and \$70,000 in compensatory damages) and enjoins defendant from discriminating or retaliating in violation of the ADA.

In *EEOC v. Starbucks Corp. dba Starbucks Store 11743* (E.D. Ark. June 14, 2010), EEOC alleged that the international coffeehouse chain failed to hire an individual with multiple sclerosis (MS) as a part-time barista at a store in Russellville, Arkansas, due to his disability. The individual uses a cane and a wheelchair to ambulate and has to be hospitalized for MS-related complications once or twice a year (approximately 1 week each time). In September 2007 he applied at a store where his sister worked, and after failing to hear anything, he appeared at the store on a day interviews were being conducted. The store manager

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included him in a group interview with two other applicants, but the interview was cursory and the individual believed he was not considered as a serious candidate. Defendant hired 6 of the 30 people interviewed, but rejected the individual with MS ostensibly because he had limited availability and inadequate food and customer service experience. However, some of the individuals hired had less availability or relevant experience, and if asked at the interview the individual would have mentioned his prior food service and hospitality-oriented jobs and his availability to work evenings. An 18-month consent decree provides the individual with \$80,000 (\$56,000 in compensatory damages and \$24,000 in backpay), and enjoins defendant at nine stores in Starbucks District 365 in Arkansas from disability discrimination and retaliation. Defendant will make good faith efforts to hire individuals with disabilities, and will notify Arkansas Rehabilitation Services in writing of all job openings at the Russellville store and provide copies of the notifications to EEOC.

In *EEOC v. Glenn O. Hawbaker, Inc.* (M.D. Pa. Sept. 20, 2010), EEOC alleged that defendant rescinded an offer to an individual with diabetes of a backhoe operator job on highway construction projects in and around State College, Pennsylvania, because of his disability. The individual passed a performance field test in May 2007 and was conditionally offered the job, but after he informed the nurse during his preemployment physical that he was an insulin-dependent diabetic, she told him he failed the medical screening. Defendant's human resources department thereafter notified the individual that it was rescinding its offer of employment because his diabetes prevents him from passing a Department of Transportation (DOT) physical; however, DOT certification is not a requirement for backhoe operators. A 4-year consent decree that applies to all of defendant's operations (Pennsylvania and southern New York) provides \$200,000 (\$50,444 in backpay and \$149,556 in compensatory damages) to the individual and enjoins defendant from denying employment on the basis of disability and from failing to provide reasonable accommodations.

b. Reasonable Accommodation

In *EEOC v. Hudson Valley Hospital Center* (S.D.N.Y. Dec. 1, 2009), EEOC alleged that an operator of medical centers and related facilities in several counties in southeastern New York failed to reasonably accommodate a nurse's insulin-dependent diabetes and discharged her because of her disability. The nurse worked for defendant for more than 10 years, first as a LPN and then as an employee health nurse, and for about 4 years had worked a 3-day a week schedule (Monday, Wednesday, Friday). Her duties included administering tuberculosis screening tests, reading them -- which must be done within 48 to 72 hours of administration -- and performing other health-related tasks. Other employees performed these duties in her absence. In late winter 2005, the nurse had a diabetic seizure and went into a coma. After a 2-week leave from work, she submitted a request from her treating endocrinologist for a schedule change from alternate days to 3 consecutive days (Monday,

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Tuesday, Wednesday) to allow her to better manage her blood sugar levels. For about 2 months, defendant granted her request, but then told her she would have to return to an alternate-day schedule, leaving her no option but to resign. A 2-year consent decree provides the nurse with \$142,500 (\$46,700 in backpay, \$48,300 in compensatory damages, and \$47,500 in attorney's fees), prohibits defendant from discriminating based on disability, and enjoins retaliation under the ADA.

In *EEOC v. Celestica Corp.* (M.D. Tenn. April 7, 2010), EEOC alleged that a Toronto-based provider of electronic services failed to reasonably accommodate an employee's physical impairments -- ventricular cardiomyopathy, chronic obstructive pulmonary disease, and Lupus -- that substantially limit her in walking. The employee worked as an order management lead specialist from May 2004 through April 2006 for defendant's predecessor at a Mt. Juliet, Tennessee, warehouse filling and shipping orders from Dell Computer for printers. She used a golf cart to get around the warehouse when her impairments made walking difficult. Around May 1, 2006, defendant was awarded the Dell contract, and hired the employee through a job placement agency to continue doing the same work. Defendant moved the employee's desk to the warehouse floor and removed the golf cart. The employee had to walk further to get from the parking lot to her desk in the warehouse, once collapsing before she got to her desk and another time collapsing when she reached the desk. In May 2007, she asked permission to use her electric wheelchair in the warehouse as needed, and for a handicapped parking space near the side entrance of the facility to shorten the walk to her desk, but both requests were denied. In August 2007, the employee suffered a tachycardia episode (excessively rapid heartbeat) and resigned at the direction of her doctor. A 2-year consent decree provides the employee with \$101,800 (\$100,000 in compensatory damages and \$1,800 in backpay), and enjoins defendant from disability discrimination in the United States.

c. Terms and Conditions of Employment and Harassment

In *EEOC v. PETCO Animal Supplies, Inc.* (D. Colo. July 10, 2010), EEOC alleged that a nationwide pet supply/services store subjected a deaf employee to disparate terms and conditions of employment and a hostile work environment because of her disability, resulting in her constructive discharge. The employee worked as a dog groomer in defendant's Aurora, Colorado, store. The store's grooming manager severely restricted her schedule and appointment bookings, ridiculed her speech, and failed to provide a sign language interpreter for staff meetings. The employee complained about these matters, but was told by the store manager that scheduling was the grooming manager's business, not his. The employee resigned in August 2006. A 3-year consent decree covering defendant's District 51 (14 stores in Colorado, Wyoming, and South Dakota) provides \$145,000 in compensatory damages and attorney's fees to the employee, who intervened, and enjoins practices that violate the ADA.

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In *EEOC v. Alstrun, LLP dba McDonald's* (E.D. Pa. Feb. 25, 2010), EEOC alleged that the owner of several McDonald's restaurant franchises in Pennsylvania subjected an individual with cognitive limitations to harassment and constructively discharged him from his position as a lot and lobby worker due to his disability. The employee was hired in October 2004 to work part time performing janitorial duties at a Philadelphia McDonald's restaurant. Starting in about July 2008, the employee's supervisors, managers, and coworkers began calling him "dumb," "retarded," and "stupid," and said he was too slow completing his work. Beginning in August 2008, the employee's mother complained repeatedly to defendant's management, but the hostile treatment continued. After the employee was threatened by a coworker with a box cutter on December 20, 2008, the his mother contacted an attorney who drafted a resignation letter for his signature. A 2-year consent decree provides the employee \$90,000 (\$74,971.46 in compensatory damages, \$5,028.54 in backpay and interest, and \$10,000 in frontpay). The decree enjoins Alstrun-owned/operated McDonald's restaurants in the region (including restaurants in Parksburg and Brookhaven, Pennsylvania) from discrimination based on disability, including harassment and termination.

d. Discharge

In *EEOC v. Wal-Mart Stores, Inc.* (N.D. Ill. Nov. 18, 2009), EEOC alleged that defendant failed to accommodate an employee with epilepsy who worked as a greeter/stocker at a Rockford, Illinois, Wal-Mart store, and discharged her because of disability. Shortly after she was hired in April 2006, the employee told her manager she had a seizure disorder and requested that she be escorted to the back of the store and given 10-15 minutes to recover if she had a an episode while working. The employee had a seizure about every other week at work, during which she was unable to control her behavior. Defendant generally placed her in a wheelchair and moved her to the back of the store while the seizure ran its course. During an episode in late September 2006, however, defendant called paramedics, and the employee swore at them when they tried to attend to her. Defendant sent her home, and a few weeks later discharged her for seizure-related incidents, including leaving work early one day, using profanity during the September seizure, and missing work following the September seizure while waiting to see a doctor. A 2-year consent decree provides \$137,500 to the employee (\$10,320 in backpay and \$127,180 in compensatory damages), and enjoins defendant from disability discrimination and retaliation at the Rockford store.

In *EEOC v. Saks, Inc., d/b/a Saks Fifth Avenue* (E.D. La. Jan. 6, 2010), EEOC alleged that a high-end department store with 54 locations across the United States discharged a makeup artist at its New Orleans store because of her disability, ulcerative colitis, an inflammatory bowel disease that substantially limits her in eating and waste removal. Several years after she started at defendant, her condition required five major surgeries resulting in absences totaling about 26 weeks in a year's time. Shortly before returning to work from short term

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disability leave, the employee broke her wrist. She worked the first week back with a brace and sling, but then was fired upon reporting to work with a cast after wrist surgery she had on her day off. Although she did not request an accommodation and performed satisfactorily her first week back, her supervisor told her that a broken wrist could not be accommodated. The separation notice stated that the employee received an "outstanding" on her last evaluation and was discharged for "health reasons." A 2-year consent decree provides \$170,000 (\$20,000 in backpay and \$107,500 in compensatory damages to the employee, who intervened, and \$42,500 in attorney's fees), and prohibits discharge because of disability at the New Orleans store.

In *EEOC v. Balance Staffing and Balance Staffing dba Balance Financial, Inc.* (N.D. Ill. June 15, 2010), EEOC alleged that providers of staffing services discharged a legally blind individual from an executive recruiter position due to her disability, and failed to pay her for hours previously worked. The individual has Enhanced S-Scone Syndrome, a degenerative condition of the retinas. She cannot drive, but can read with significant magnification. Defendants offered her a position as an executive recruiter starting August 6, 2006, in its newly forming Chicago office, and at their request she began performing work in June. She was fired on August 9 by defendants' owner, who refused to give her a reason, and was not paid for the approximate 160 hours she had already worked. According to the local manager, the owner indicated he did not believe a blind person could do the job. A 3-year consent decree provides the individual \$100,000 and permanently enjoins defendants and a related entity, Balance Professional, Inc., from disability discrimination and retaliation.

5. Retaliation

In *EEOC v. Eagle Wings Industries* (C.D. Ill. Jan. 27, 2010), EEOC alleged that a Rantoul, Illinois, automobile parts manufacturer subjected female employees to a sexually hostile work environment, required an employee to undergo medical examinations in retaliation for complaining of sexual harassment, and discharged the employee in retaliation for refusing to submit to the examinations, which were not job related and consistent with business necessity. The employee was one of 3 women who worked in the press room alongside 36 men. Over the years, the employee reported sexually offensive conduct by male employees to managers, human resources, and even the police, but defendant failed to correct the situation. When the employee returned to work in June 2006 following a disability leave related to an incident in which a team leader (fired by defendant for the conduct) exposed himself, she was again sexually harassed, and reported the conduct to defendant and the police. Defendant insisted she undergo a battery of psychological tests and stop taking her prescribed medications as conditions for returning to work, and then discharged her in March 2007 for refusing to undergo the testing. A 2-year consent decree provides \$428,500 (\$388,500, including attorney's fees, to the discharged employee, who intervened, and \$30,000

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and \$10,000 to two other female employees), and enjoins defendant from sex and disability discrimination and retaliation.

In *EEOC v. Memphis Goodwill Industries, Inc.* (W.D. Tenn. Jan. 21, 2010), EEOC alleged that a nonprofit organization that sells donated merchandise at nine retail stores in the Memphis, Tennessee, area discharged its director of transportation, an African American woman, because of her race and sex and because she opposed racially discriminatory conduct. Defendant hired the director of transportation in May 2006, and later hired a vice president of operations. The vice president acted as if he did not want a woman in the director of transportation position. In June 2007, the vice president said to a group of African American employees he claimed were talking loudly and cursing, "this is not the ghetto." The transportation director told him she thought the comment was racially insensitive, and he thereafter became aloof and issued unjustified reprimands to her. The director of transportation was fired in August 2007, purportedly for financial reasons, but was replaced by a white male whom defendant had located on the Internet the day before her discharge. Under a 2-year settlement agreement defendant will pay the transportation director \$105,000 (half backpay and half compensatory damages), and provide her with a favorable letter of reference.

In *EEOC v. Creative Networks, LLC* (D. Ariz. May 24, 2010), EEOC alleged that a provider of social, educational, and vocational services to the mentally and physically disabled discharged a coordinator for filing a charge of race and national origin discrimination, and disciplined and threatened to terminate a service coordinator because she was named as a witness in the first coordinator's charge. The coordinator filed an EEOC charge on May 23, 2003, and on May 30, 2003, defendant's State Director/CEO told her she had a bad attitude and fired her. Also on May 30, the State Director told the service coordinator she would be closely monitored and given the opportunity to improve her attitude, and if she did not she would be fired. An 18-month consent decree provides \$110,000 in compensatory damages (\$65,000 to the coordinator and \$45,000 to the service coordinator) and permanently enjoins defendant from retaliation.

C. *Appellate Court Litigation*

1. **EEOC's Investigative Authority**

EEOC v. United Parcel Service, Inc., 587 F.3d 136 (2d Cir. Nov. 19, 2009)

This action to enforce an administrative subpoena involved EEOC's efforts to investigate an alleged companywide policy or practice of failing to accommodate religious practices. A Muslim applicant for a seasonal driver's helper position at UPS's Rochester, New York, facility filed an EEOC charge when he was denied a job because of his beard, which he wore for religious reasons. A Muslim package handler at UPS's Dallas, Texas, facility, who also wore a beard for religious reasons, filed a charge when he was denied a driver position because of the beard. EEOC subpoenaed information about UPS's application of its appearance standards companywide, in part because of UPS's policy that to achieve consistent results, requests for exceptions to its Appearance Guidelines could not be decided at the local level. The district court held that EEOC was entitled only to information related to the UPS facilities where the two charge filers applied or worked. The court said that companywide information was not relevant because the charges alleged only "individual" discrimination.

The Second Circuit reversed, holding that the district court's relevance standard was too restrictive, and that under the proper standard EEOC was entitled to the companywide information. The court emphasized that UPS's Appearance Guidelines applied to its facilities throughout the country; that prior to 1999 the company did not provide any religious exemptions; that the post-1999 policy required corporate review of all accommodation requests; that both individuals denied positions were told they could not drive a UPS truck wearing a beard and were not informed of the exemption process; and one of the EEOC charges expressly alleged a pattern or practice of refusing to accommodate religious practices.

EEOC v. Kronos, Inc., 620 F.3d 287 (3d Cir. Sept. 7, 2010)

This case involved EEOC's efforts to enforce a third-party administrative subpoena it issued to Kronos, a developer of preemployment tests, in connection with an investigation of a disability discrimination charge filed against Kroger Food Stores. An applicant for a position as a bagger, cashier, or stocker at a Kroger store in Clarksburg, West Virginia, alleged in an EEOC charge that she was denied a job because of her speech and hearing impairments. In response, Kroger said that the applicant's low score on a computerized "customer service assessment" indicated she might not render good customer service. EEOC sought further

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information from Kroger about the test and its use, and learned that Kronos administers and scores the customer service assessment for Kroger retail positions nationwide. Because Kroger failed to produce all of the requested information about the test, and it was unclear whether Kroger had access to some of the information, EEOC issued a subpoena to Kronos.

EEOC subsequently notified Kroger that it was expanding the scope of its ADA investigation to cover all facilities nationwide. After discovering an article cowritten by a Kronos employee indicating that the Kronos customer service assessment may have had a disparate impact on minority test takers when given by an unnamed large retailer, EEOC informed Kroger that it was further expanding its investigation to include potential race discrimination. EEOC rescinded its subpoena to Kronos and issued a new one reflecting the investigation's expanded scope.

In EEOC's enforcement action, the district court narrowed the temporal, geographic, and job parameters of the subpoena; deleted the request for race data; narrowed the production of validity and impact information to materials relating only to Kroger; and narrowed production of user's manuals and instructions to only those provided to Kroger. The district court then entered a restrictive confidentiality order limiting use of subpoenaed information solely to the original charge or any subsequent charge filed by the same person; permitting disclosure only to EEOC employees with a need to know; requiring return of confidential materials to Kronos within 10 days of the conclusion of the investigation; and prohibiting entry of any information obtained into a centralized data base.

The Third Circuit agreed with the district court that EEOC could not investigate race discrimination in connection with a charge of disability discrimination. On all other points, however, the court of appeals agreed with the Commission that the district court applied a too restrictive standard of relevance in narrowing EEOC's subpoena. Specifically, the court held that EEOC was entitled to information about all jobs, not just bagger, stocker, and/or cashier/checker positions, because information about other job descriptions "may shed light" on whether the Kronos assessment has an adverse impact on persons with disabilities and also, at the very least, would provide comparative data. Similarly, the court held EEOC was entitled to information about the test as used nationwide, not just in West Virginia, because an employer's nationwide use of a practice under investigation "supports a subpoena for nationwide data on that practice." The court also agreed that the Commission was entitled to information about the entire duration of Kroger's use of the Kronos test, without a temporal restriction. Further, the court held the district court abused its discretion by limiting Kronos's production of the user's manual and instructions for the test to only materials provided to Kroger, because any such materials may help EEOC assess the test's potential impact on the disabled.

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Last, the court held that the district court abused its discretion regarding the confidentiality order. The court of appeals said that Kronos bore the burden of demonstrating “with specificity” that the order was needed to avoid a “clearly defined and serious injury,” and that the burden was not met with “broad allegations of harm, unsubstantiated by specific examples or articulated reasoning.” Moreover, a district court entering a confidentiality order must conduct a “good cause balancing test,” applying various factors and articulating the reasoning and rationale for each term it chooses to impose. The court remanded the case to the district court to conduct this balancing test, cautioning the court to be mindful that EEOC should not be required to destroy documents, including notes and memoranda, in conflict with the Federal Records Disposal Act.

EEOC v. Buffalo Rock, No. 10-11014 (11th Cir.), brief as appellant filed May 17, 2010, reply brief filed July 12, 2010

This appeal involves a district court’s entry of a protective order to shield salary information from disclosure during EEOC’s investigation of charges filed by nine African American employees alleging that Buffalo Rock was discriminating against them on the basis of race, principally by assigning them less profitable and more dangerous routes than it assigned to white drivers, and by rejecting their applications to transfer into sales positions. EEOC requested detailed assignment and salary information (with base salary, commissions, and bonuses itemized separately), and Buffalo Rock provided only summary salary information, with total gross income figures. The Commission issued a subpoena for the information, received no response, and filed an action to enforce the subpoena. The district court granted enforcement, but imposed a sweeping protective order, drafted by Buffalo Rock, in part because EEOC had attached to its petition for enforcement the summary salary information Buffalo Rock provided, and Buffalo Rock persuaded the court that this demonstrated a lack of concern for the confidentiality of that information.

On appeal, EEOC argued that the district court abused its discretion by entering a protective order because the court identified no justification for imposing judicial oversight on top of the confidentiality provisions contained in Title VII, EEOC’s regulations and procedures, and other federal statutes. To the extent the salary information should not have been disclosed, ordering the documents sealed was a sufficient remedy. Further protection was unnecessary and a number of the protective order’s provisions violated precedent or exceeded the court’s authority. For example, the court erred by barring EEOC from disclosing to the individuals who filed EEOC charges information obtained during the agency’s investigation. The court also erred by giving Buffalo Rock unilateral authority to designate documents as confidential; by exercising authority over documents not responsive to the subpoena; and by entering an order with no termination provision.

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EEOC v. Washington Suburban Sanitary Commission, No. 09-2263 (4th Cir.), brief as appellee filed July 2, 2010

This case involves a “legislative immunity” defense raised by a public utility (WSSC) to the Commission’s efforts to investigate age discrimination charges filed by 15 former employees of the utility’s Information Technology (IT) Department. The employees alleged they were denied IT training because of their ages, and then discharged and replaced by younger workers as part of an IT Department restructuring that was actually a pretext for replacing older IT workers with younger workers. WSSC acknowledged that the discharges were connected to the IT Department restructuring, which WSSC said was undertaken to enhance and modernize the department’s capabilities. But WSSC claimed that any information connected to the IT Department restructuring, including any information about the discharge of existing IT employees and hiring of new IT employees, was protected by legislative immunity from disclosure to EEOC in an administrative investigation. In an action to enforce an administrative subpoena for information relating to the charges, EEOC modified the subpoena to exclude requests for documents on the reasons for the restructuring. The district court ordered WSSC to comply with the subpoena, and WSSC appealed.

On appeal, the Commission argued that the information sought – on the hiring, discharge, and training of former and current IT Department employees -- is all relevant to the investigation of the ADEA charges. EEOC is not required to investigate every allegation in the charges, and will not consider allegations that age animus motivated WSSC to restructure the IT Department. Instead, EEOC seeks only basic personnel information that would permit the agency to compare who worked in the IT Department before and after the restructuring, who applied for the new positions, and who received training before and after the restructuring. WSSC also argued, incorrectly, that EEOC’s investigation (and, in particular, the subpoena) necessarily intruded on matters that are legislative in nature because all of WSSC’s IT personnel decisions and actions, even those that WSSC took before and after the restructuring, were “integral steps in the legislative process.” The district court properly rejected these arguments and correctly determined that none of EEOC’s requested subpoena items related to the thought processes of any legislative body or individual legislator concerning WSSC’s decision to restructure the IT Department. The district court correctly determined that legislative immunity does not bar EEOC from access to any of the information EEOC sought in the modified subpoena.

2. Conditions Precedent to EEOC Suits

EEOC v. CRST Van Expedited, Nos. 09-3764, 09-3765, 10-1682 (8th Cir.), brief as appellant filed May 28, 2010

The district court's disposition of this sexual harassment action raises significant questions about the Commission's presuit conciliation requirements where it seeks relief for a class of affected individuals, as well as the test for supervisor status in a sexual harassment case and the standards for assessing severity, pervasiveness, and notice to the employer when the alleged harassment occurs in isolated trucks rather than in a common work area. CRST is a long-haul trucking company that offers customers expedited freight delivery by pairing drivers so that one can drive while the other rests. CRST gives new drivers 28 days of over-the-road training with an experienced driver (called a "trainer" or "lead driver"). During their training, and later while on driving assignments, CRST trainees and drivers may be on the road for up to 3 or 4 weeks at a time, away from CRST managers and with only radio contact with their dispatchers. Several women drivers and trainees filed EEOC charges alleging they were sexually harassed by male codrivers or lead drivers while on over-the-road driving assignments. After the investigation of one of these charges, EEOC made a class cause finding, and when conciliation efforts were unsuccessful, brought suit seeking relief for a class of women trainees and drivers.

During discovery, EEOC identified over 250 women who said they had been sexually harassed while driving for CRST. The court excluded 99 of the women because they were not produced for depositions by the court's deadline. In a series of decisions, the court ruled that trainers and lead drivers were not the trainees' "supervisors" for purposes of establishing CRST's vicarious liability, and ruled that EEOC could not seek relief for particular women because (a) they filed for bankruptcy without declaring their claims against CRST in bankruptcy court; (b) they failed to notify CRST of the harassment while it was happening; (c) CRST responded adequately to their harassment complaints; or (d) the harassment was not sufficiently "severe or pervasive" to be actionable under Title VII. With respect to the remaining 67 women, the district court ruled that EEOC had failed to satisfy the statutory prerequisites of investigation and conciliation for anyone other than the trainee whose charge provided the basis for EEOC's suit, and who had been "dismissed" in the court's bankruptcy ruling. The court then dismissed the EEOC's lawsuit in its entirety and awarded CRST \$4.5 million in attorney's fees and costs.

The Commission's principal arguments on appeal were that: (1) its conciliation efforts were adequate because CRST knew the Commission was seeking both monetary relief for victims who would be identified through a process to be worked out between the agency and CRST, and injunctive relief to modify CRST's harassment policies; (2) EEOC cannot be estopped

from seeking relief for women who filed bankruptcy claims because EEOC was not a party to the bankruptcy proceedings; (3) the district court misapplied summary judgment and harassment standards in concluding that particular women did not experience severe or pervasive harassment; (4) the district court erred in concluding that CRST responded adequately to individual women's complaints of harassment where the record showed that the complaints continued unabated and CRST never imposed significant discipline or revised its training or counseling of employees about what type of workplace conduct it would consider unacceptable; (5) the district court erred in concluding that the lead drivers were not supervisors for purposes of imposing liability on CRST where the lead drivers had total control over trainees' working conditions during the 4-week training program, as well as, through their "pass/fail driving evaluations" at the end of the training, near total control over whether a trainee would be hired; and (6) even if the district court's substantive rulings were upheld, the fee award could not be sustained because EEOC's conduct in the case was not "frivolous, unreasonable, or without foundation."

3. Administrative Prerequisites for Private Actions

Rodriguez v. Wet Ink, LLC, 603 F.3d 810 (10th Cir. April 26, 2010)

This case involved the trigger for the 90-day Title VII suit filing period when right-to-sue notices were sent by both a state fair employment practices agency and EEOC. Patricia Rodriguez filed a charge of discrimination with the Colorado Civil Rights Division (CCRD) alleging sex and national origin discrimination by her former employer, Wet Ink. Her charge was dual-filed with the Commission pursuant to its worksharing agreement with CCRD. The charge was investigated by CCRD because it was initially received by that agency. CCRD found a violation of state law, and when the parties' mediation efforts were unsuccessful, Rodriguez requested right-to-sue notices from both CCRD and EEOC. CCRD issued its notice on November 25, 2007, and informed Rodriguez that under state law she had 90 days to file suit; the notice did not mention EEOC, Title VII, or Rodriguez' rights under federal law. On January 28, 2008, EEOC issued Rodriguez a notice of right to sue, which stated that she had 90 days from receipt of the notice to file a Title VII lawsuit. On April 25, 2008, 88 days after the Commission issued its notice of right to sue, Rodriguez filed a complaint in federal court alleging that Wet Ink violated Title VII by discriminating against her based on her sex and national origin. The district court granted the defendant's motion to dismiss, holding that Rodriguez should have brought her action within 90 days from the CCRD letter.

The Tenth Circuit reversed, agreeing with the Commission's arguments as amicus curiae that Rodriguez' 90-day period for filing her Title VII action was not triggered by a right-to-sue notice issued by CCRD. The court ruled that EEOC's worksharing agreement with CCRD

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did not empower the state agency to issue right-to-sue notices on behalf of the Commission, and that even if it had, the state-issued notice was inadequate to inform Rodriguez of her federal rights.

Brooks & Taylor v. District Hospital Partners, L.P., 606 F.3d 800 (D.C. Cir. June 1, 2010)

This case involved the administrative exhaustion requirements for members of a Rule 23 class action who did not themselves file Title VII charges. The case arose from a decision by defendant hospital to eliminate the position of nursing assistant and replace it with a new position called multi-skilled technician (MST). To be considered for the MST position, both internal applicants (i.e., former nursing assistants) and external applicants had to pass the same three screening tests, designed to measure reading, writing, and arithmetic skills. Renae Marable, a former nursing assistant, filed a charge on behalf of herself and other black former nursing assistants, alleging that the tests discriminated on the basis of race. The charge stated that nursing assistants had to pass screening tests that were “not job related to the skills required for the [MST position]” and were “discriminatory.” Following EEOC’s investigation, Marable and five other individuals filed suit on behalf of themselves and all similarly situated black former nursing assistants, and after some discovery, moved to certify a class of all black applicants – both internal and external – for MST positions who failed to pass the screening tests.

The district court denied class certification because of a failure to meet Rule 23(a)’s commonality requirement due to inclusion of both internal and external applicants in the class. The court then permitted intervention by Monica Brooks and Tracee Taylor, two external black applicants who failed the screening tests, so they could serve as representatives of a subclass of rejected external applicants. Despite permitting their intervention, the court denied their motion to certify a class of black external applicants because “none of the proposed class members, most importantly the named representatives, ha[d] exhausted administrative remedies.” The Brooks plaintiffs then moved to sever their claims from those of the internal applicants. The court granted the motion, but then dismissed the Brooks plaintiffs’ claims. The Brooks plaintiffs appealed.

The Commission filed an amicus curiae brief to argue that the appellants, who did not themselves file EEOC charges, vicariously satisfied the administrative exhaustion requirements because their claims were sufficiently similar to those of the charge filers to afford the defendant notice and an opportunity to conciliate. The Commission further argued that similarity between the two groups’ claims is the critical consideration, regardless of the procedural context in which the exhaustion issue arises. The court of appeals reversed, holding that the two groups’ claims were indeed sufficiently similar to justify application of

the “single-filing rule.” The court did deem it significant that, procedurally, the appellants remained part of the same action as some of the original charge filers.

4. Arbitration

Hall v. Treasure Bay Virgin Islands Corp. d/b/a Divi Carina Bay Casino, 371 Fed Appx. 311 (3d Cir. March 16, 2010) (unpublished)

The Commission filed an amicus curiae brief in this Title VII action arguing that the district court properly found that the arbitration agreement the plaintiff signed contained multiple unconscionable provisions that rendered the entire agreement unenforceable. The Third Circuit agreed. The court of appeals first concluded that the plaintiff had met her burden of showing that the “loser pays costs” provision was substantively unconscionable by offering undisputed evidence that the arbitrator’s fees for even a 3-day hearing were \$5,400 and that when the plaintiff started working for the defendant she made just \$8 an hour. Next, the court agreed with the Commission that the agreement’s “constraint provision,” which prohibited an arbitrator from altering or amending any discipline imposed by the employer, was substantively unconscionable because it “improperly limit[ed] [the] arbitrator’s abilities to craft an appropriate remedy.” Finally, the court said that defendant did not dispute that a 30-day notice provision and a provision banning an award of attorney’s fees and costs were unconscionable. The court agreed with the Commission that the unconscionable provisions evinced the defendant’s deliberate attempt to impose an arbitration scheme designed to discourage an employee from arbitration, or to produce results biased in the employer’s favor. Therefore, the court concluded, the district court properly determined that the unconscionable provisions were not severable from the remainder of the arbitration agreement.

Nino v. Jewelry Exchange, Inc., 609 F.3d 191 (3d Cir. June 15, 2010)

In this Title VII action, the district court concluded that the plaintiff’s predispute arbitration agreement was procedurally unconscionable and contained a number of substantively unconscionable provisions, but that the unconscionable provisions could be severed from the agreement. On appeal the Commission filed an amicus curiae brief arguing that the district court properly found that the plaintiff’s arbitration agreement contained unconscionable provisions, but erred in concluding they were severable. The Third Circuit agreed that the arbitration agreement was procedurally unconscionable because the employer had greater bargaining power and presented the agreement on a take-it-or-leave-it basis to the plaintiff. The court also found that the agreement contained three substantively unconscionable provisions: (1) a 5-day deadline for the plaintiff to file a grievance and preserve his opportunity to arbitrate, which did not apply to the employer; (2) a ban on awarding the

plaintiff his attorney's fees and costs; and (3) allowance to the employer of two arbitrator strikes from a pool of four but only one strike from the pool to the plaintiff. The court found that the unconscionable provisions evinced the employer's deliberate attempt to impose an arbitration scheme designed to discourage the plaintiff's resort to arbitration, and that therefore the invalid provisions were not severable.

5. Private Class Actions

Dukes v. Wal-Mart Stores, 603 F.3d 571 (9th Cir. April 26, 2010) (en banc)

This case was filed as a nationwide class action alleging discrimination against women in pay and promotion. Plaintiffs claimed that due largely to Wal-Mart's subjective decisionmaking practices and strongly centralized corporate structures, which together permit gender stereotyping, female employees were paid less and promoted into management positions more slowly and less often than similarly situated male employees. Plaintiffs challenged these practices under both disparate impact and disparate treatment/pattern or practice theories and sought injunctive and declaratory relief as well as backpay and punitive damages, but no compensatory damages.

Plaintiffs moved to certify a class under Rule 23(b)(2), and in support offered regression analyses performed on a regional level; a comparison of the percentage of women in management at Wal-Mart and 20 other "benchmark" employers; a sociological study indicating that the lack of female managers at Wal-Mart may result from gender stereotyping; evidence of company policies and practices, including the extent of home office oversight of each store; and anecdotal evidence detailing the experiences of 120 affected individuals.

Wal-Mart opposed the motion, arguing mainly that a nationwide class action was improper because it could include up to 1.5 million women. In addition, Wal-Mart argued that its decisionmaking processes were subjective and decentralized, and that therefore any discrimination was store- or even manager-specific, making plaintiffs' regional statistics unpersuasive. The company also argued that it was entitled to address liability, backpay, and punitive damages on an individual basis in face-to-face minitrials with each potential class member — a logistical impossibility given the size of the potential class.

The district court granted in large part plaintiffs' motion to certify a class under Rule 23(b)(2). On the pay claims, the court granted plaintiffs' certification motion as to issues of sex discrimination and all forms of requested relief. On the promotion claims, the court certified the proposed class with respect to issues of sex discrimination, punitive damages, and injunctive and declaratory relief, but not on backpay except where objective evidence as to

class members' interest in promotion was available. The court also ordered notice and an opportunity to opt out of the punitive damages portion of the class.

A panel of the Ninth Circuit largely affirmed the district court's ruling. The full court granted en banc rehearing, and the Commission filed an amicus curiae brief addressing the propriety of classwide determinations of backpay and punitive damages, issues that arise in its own systemic cases. The en banc Ninth Circuit, in a 6-5 decision, agreed with the Commission on both issues. The court held that in appropriate cases, including this one, backpay could be assessed on a classwide basis and punitive damages would not necessarily require individualized determinations for each class member.

The court of appeals upheld certification of a Rule 23(b)(2) class consisting of all women employed at any domestic Wal-Mart store on or after suit was filed in 2001 for liability as well as declaratory, injunctive, and equitable relief, including backpay. The court concluded, however, that because Rule 23(b)(2) certification is proper only where claims for injunctive and declaratory relief "predominate" over claims for monetary relief, the lower court abused its discretion in certifying the punitive damages claims without first determining whether such claims "rendered final relief 'predominantly' related to monetary damages." The court remanded the case to the district court to determine whether the punitive damages claims could be certified under either Rule 23(b)(2) or (b)(3), and whether certification of an additional class of individuals employed only prior to suit filing would be appropriate for monetary relief only. The dissent would have reversed, finding that the lower court abused its discretion in failing to ensure that the prerequisites of Rule 23(a) had been met and in ignoring Wal-Mart's right to raise defenses as to each individual regarding liability, backpay, and punitive damages.

6. Government Employees Rights Act

Marion County v. EEOC & John Linehan, 612 F.3d 924 (7th Cir. July 27, 2010)

John Linehan brought this race discrimination and retaliation case under the Government Employees Rights Act (GERA), 42 U.S.C. § 2000e-16c, to contest his removal from his position as chief deputy coroner in Marion County, Indiana. Linehan's claims are governed by GERA because as the chief deputy coroner, he was employed at a "policymaking level" by the elected coroner of Marion County. The coroner, who is African American, demoted Linehan, who is white, from his chief deputy coroner position and terminated him a few weeks later. An EEOC administrative law judge ruled in Linehan's favor and awarded him backpay, frontpay, attorney's fees, and \$200,000 in compensatory damages. EEOC affirmed.

The County petitioned for review of EEOC's order, contending that EEOC should not have exercised jurisdiction under GERA because at the time Linehan was terminated he was no longer employed in a policymaking position. The County also challenged the merits determination, contending that Linehan did not demonstrate that its reasons for firing him were pretextual, and it argued that the damages award was excessive and unsupported by the evidence.

The Seventh Circuit held that EEOC properly exercised GERA jurisdiction because after stripping Linehan of his supervisory duties, the coroner told him only that he was "going to make a change in chief deputies," so it was reasonable for EEOC to believe that Linehan continued to be the chief deputy coroner until he was fired. The court also agreed with EEOC's determination that the coroner's asserted reason for firing Linehan was pretextual, and thus denied the petition as to the race discrimination and retaliation judgment. The court vacated the \$200,000 damages award as excessive and remanded the damages issue to EEOC for further proceedings unless Linehan accepted a remittitur to \$20,000.

7. Jurisdiction

EEOC v. Peabody Western Coal Company; Navajo Nation, Rule 19 Defendant, 610 F.3d 1070 (9th Cir. June 23, 2010)

This case, filed in 2001, raises the question whether Title VII prohibits tribal-specific hiring preferences by companies operating on or near an Indian reservation. EEOC alleges that Peabody Coal's refusal to hire members of the Hopi and Otoe tribes for jobs for which they were qualified constituted national origin discrimination. Peabody relies on provisions in its leases with the Navajo Nation (on whose reservation Peabody's coal mines are located) requiring that Peabody give preference in hiring to Navajos. Because the mining leases were key to Peabody's defense, Peabody moved for summary judgment on the grounds that the Navajo Nation was an indispensable party that could not be joined under Title VII (due to the exemption of Indian tribes from Title VII's employer definition and EEOC's lack of authority to sue governments), and that the case raised a nonjusticiable political question because it involved a policy clash between the Department of the Interior, which approved the coal mining leases, and EEOC. The district court agreed with Peabody and dismissed the action.

On EEOC's first appeal, the Ninth Circuit found that the Nation was a necessary party, but held that it was feasible to join the Nation under Rule 19 even though EEOC could not obtain affirmative relief from the Nation, because EEOC did not seek such relief, but only to have the Nation bound by res judicata to any judgment against Peabody. The Ninth Circuit further held that EEOC's lawsuit did not present a nonjusticiable political question because the federal courts are capable of resolving clashes between different federal statutory

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schemes. The Ninth Circuit remanded the case, and when EEOC filed an amended complaint naming the Navajo Nation as a Rule 19 defendant, the Nation moved to dismiss. The Nation argued that EEOC sought affirmative relief against it in violation of Title VII, and that in any event, the Navajo-Hopi Rehabilitation Act of 1950 expressly authorized the Navajo hiring preference in the coal mining leases. The Nation also argued that the Secretary of Interior was a necessary and indispensable party, an argument Peabody embraced as well. The district court dismissed EEOC's lawsuit for a second time, agreeing with the Nation and Peabody on all three grounds.

On EEOC's second appeal, the Ninth Circuit again rejected the Nation's argument against joinder under Rule 19, finding that joinder was feasible even if EEOC's amended complaint could be read as seeking injunctive relief against the Nation, because the court could simply deny such relief. The court, however, affirmed the district court's dismissal of EEOC's monetary claim against Peabody. The court reasoned that the Secretary could not be joined to the lawsuit because EEOC cannot sue a government under Title VII, and although Peabody could file a third-party complaint against the Secretary for indemnification of damages awarded to EEOC, recovery of monetary relief would be barred by the federal government's sovereign immunity. Thus the court concluded it would be unfair to hold Peabody liable for damages when it would have no recourse against the Secretary. The court reversed the district court's dismissal of EEOC's claim for injunctive relief against Peabody, reasoning that although EEOC cannot sue the Secretary, Peabody and the Nation can bring a third-party claim against the Secretary for prospective relief from the terms of the leases if EEOC ultimately prevails on the merits of its claim that Title VII prohibits tribal-specific hiring preferences.

8. Enforcement of Conciliation Agreements

EEOC v. Phillips Services Corporation, No. 10-20291 (5th Cir.), brief as appellant filed June 28, 2010, reply brief filed Sept. 9, 2010

This case involves the enforceability of oral settlements reached during EEOC's conciliation process. Former and current black employees of Philips Services Corporation (PSC) filed race discrimination charges with the Commission's Houston District Office. The district office made reasonable cause findings on the charges, and entered into conciliation discussions with PSC. EEOC filed suit alleging that during conciliation the parties agreed on terms resolving the claims of eight individuals who filed charges and a "class" of black employees, and that PSC subsequently repudiated and failed to comply with the agreements. EEOC contended that the parties orally agreed to a specific amount of monetary relief for seven of the charge filers, and that EEOC made clear it was willing to settle any number of the nine charges and would not condition settling one on settling any of the others, and that PSC

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agreed to these terms. EEOC also contended that the parties agreed on injunctive relief. The general terms of the agreement were memorialized in a written document that EEOC contended PSC said was acceptable. PSC denied agreeing to settle some but not all of the charges.

The district court held that provisions in section 706(b) of Title VII prohibiting the Commission from making public what occurs during conciliation, and prohibiting the use of conciliation information “as evidence in a subsequent proceeding,” were “an insurmountable impediment to proving the existence of an oral conciliation agreement,” because filing suit to enforce the agreement would necessarily make public what was said and done in the conciliation process and would constitute the use of that information in a subsequent proceeding.

On appeal the Commission argued that oral agreements are generally enforceable and section 706(b) of Title VII should not be read to create an exception. The district court’s interpretation of section 706(b) was inconsistent with the Fifth Circuit’s decision in *EEOC v. Safeway Stores*, 714 F.2d 567 (5th Cir. 1983), which held that EEOC can enforce a conciliation agreement in federal court, and affirmed the lower court’s interpretation of an agreement where the court had relied on evidence of negotiations between the parties. EEOC argued that a suit to enforce a conciliation agreement should not be viewed as the type of “subsequent proceeding” identified in section 706(b); rather, that term should be limited to subsequent proceedings on the merits of a charge. Under the district court’s and PSC’s interpretation of section 706(b), EEOC would be unable to enforce any conciliation agreement, written or oral, and that limitation would frustrate Title VII’s goals of favoring conciliation and voluntary resolution of charges.

9. Damages Caps

Hernandez-Miranda v. Empresas Diaz Masso, No. 10-1639 (1st Cir.) amicus curiae brief filed Sept. 21, 2010

Under the Civil Rights Act of 1991, the damages cap in Title VII cases is based on the number of people employed by the defendant “in the current or preceding calendar year,” 42 U.S.C. § 1981a(b)(3). The issue in this case is the relevant year for counting employees to determine the cap. The jury returned a verdict for the plaintiff in a sexual harassment action and awarded her \$300,000 in compensatory damages. On defendant’s motion, the court reduced the award to \$50,000 (the applicable cap for employers with fewer than 101 employees), reasoning that the statutory language referred to the year of the judgment, and citing evidence that defendant had no more than 98 employees during that year or the prior year. The Commission filed an amicus curiae brief and argued that “current or preceding year”

refers to the year the discrimination occurred, not the year of the judgment. This position is consistent with the Commission's view -- which the First Circuit, Supreme Court, and other courts have accepted -- that nearly identical language in 42 U.S.C. § 2000e(b) defining "employer" under Title VII, refers to the year of the discrimination, not the year of the judgment. Additionally, at least two circuits have expressly held that "current or preceding year" in 42 U.S.C. § 1981a(b)(3) refers to the year of the discrimination, and no circuit has held to the contrary. Because defendant admitted that it had more than 200 employees in the year that the discrimination occurred, the court should have reduced the award to \$200,000, which is the applicable cap for employers with more than 200 but fewer than 501 employees.

10. Disparate Impact

Lewis v. City of Chicago, 130 S. Ct. 2191 (May 24, 2010)

This case involved the time limits governing a challenge under Title VII to the disparate impact of a test. In July 1995, the City of Chicago administered a written exam to 26,000 applicants for firefighter positions. The City scored applicants on a 100-point scale and grouped them into categories: applicants who scored 89 or above were "well qualified," those who scored between 65 and 88 were "qualified," and those whose scores fell below 65 "failed." While 12.6% of the white applicants scored in the "well qualified" category, only 2.2% of black applicants did.

In January 1996, the City notified applicants of their scores and categories. The notice to "qualified" applicants informed them it was not likely they would be selected, but also said their names would be kept on the City's eligibility list as long as that list was used. Applicants who failed the exam were told they would no longer be considered and would receive no more communications about the exam. The City began hiring firefighters from the "well qualified" group in May 1996. On October 1, 1996, the City hired again from the list, and it did so nine additional times until 2001. The City then ran out of "well qualified" applicants and began hiring "qualified" applicants.

Meanwhile, between March 31 and September 17, 1997, six black applicants filed charges of discrimination alleging that the test had a disparate impact on African Americans. The March 31, 1997, charge was filed within 300 days of the second round of hiring in October 1996, although not within 300 days of the first hiring in May 1996. When the black applicants filed suit, the City filed a motion for summary judgment arguing that the suit was untimely because it was not filed within 300 days of when the applicants' claims accrued, which the City contended was the date they were notified of the exam results. The district court denied the motion, reasoning that the City's ongoing reliance on the discriminatory exam scores in making hiring decisions constituted a continuing violation under Title VII. The City

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stipulated that the 89-point cutoff score had a racially disparate impact on African Americans but claimed that the cutoff score was justified by business necessity. After a bench trial, the district court disagreed and entered judgment for the black applicants. The City appealed the district court's ruling that the suit was timely but not the court's disparate impact finding. The Seventh Circuit concluded that the claims were untimely under the logic of *Delaware State College v. Ricks*, 449 U.S. 250 (1980), where the Supreme Court held that a professor's discrimination claim accrued when he was told he would not get tenure, not on the date of the termination of his employment. The Seventh Circuit reasoned that in the present case, the discrimination occurred only at the time the City scored the exams and categorized the applicants.

The Supreme Court differentiated the claims that may arise from the adoption of a discriminatory practice from those that arise from subsequent application of the practice. In a unanimous decision, the Court held that an individual who fails to file a timely charge challenging the *adoption* of a practice -- here, the City's decision to hire only those applicants who scored above 88 on a written test -- still may assert a disparate impact claim in a timely charge challenging the *application* of that practice -- here, the City's subsequent use of the exam results to make hiring decisions. In reaching this conclusion the Court agreed with the position advocated by the Solicitor General in an amicus curiae brief joined by EEOC. Starting with the Title VII language in 42 U.S.C. § 2000e-5(e)(1), the Court said that a charge must be filed within 300 days of when an "unlawful employment practice occurred." Because it was undisputed that the black applicants filed charges within 300 days of the City's hiring of other applicants, the question presented was whether the City's practice of hiring only those who had scored above 88 on the exam could be the basis for a disparate impact claim. The Court then looked at 42 U.S.C. § 2000e-2(k)(1)A(i), which states that an unlawful employment practice is established, subject to an affirmative defense, when a plaintiff shows that an employer "uses a particular employment practice that causes a disparate impact on the basis" of a protected trait. Here, the Court said, the City "use[d]" an employment practice -- offering positions only to those who scored above 88 -- in each round of hiring, and the black applicants alleged that this caused a disparate impact based on race. Therefore, their charges were timely except as to the first round of hiring, which occurred more than 300 days before any charge was filed.

11. Proof

EEOC v. Con-Way Freight, Inc., 622 F.3d 933 (8th Cir. Sept. 22, 2010)

This race discrimination case challenging Con-Way's failure to hire Roberta Hollins, an African American applicant for a dispatcher job with a trucking company, turned on whether the Commission could prove a causal link between the hiring official's racial animus and the

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hiring decision. Hollins submitted an application and was the first choice of Gaffney, the official who interviewed her. Hollins noted on her application that she had two criminal convictions from shoplifting incidents 20 years earlier, but Gaffney assured her these would be no barrier to her employment because of the age of the convictions. When Gaffney sought authority to hire her, his superior, Beers, warned him that it would be “opening a can of worms” if he selected a black candidate for the dispatcher job. Gaffney thus began to consider other candidates but was fired for unrelated reasons before a final selection was made. His replacement, unaware of Gaffney’s preference for Hollins, selected a white applicant. The district court granted summary judgment for Con-Way. The court held that the Commission had not presented direct evidence of discriminatory intent, because Gaffney continued to consider Hollins for the job even after Beers’ racial remark and the hiring official was unaware of Hollins’ application, and that under an indirect evidence analysis, Con-Way had shown Hollins would not have been hired due to her theft convictions.

On appeal, the Eighth Circuit held that even if Con-Way failed to consider Hollins’ application because she was black, Title VII was not violated because regardless of the discriminatory animus, she would not have been hired due to the company’s policy of not hiring applicants with theft convictions. Because Hollins listed two misdemeanor theft convictions on her application, the court held, EEOC could not establish a causal link between the alleged discriminatory animus and the decision not to hire her.

Merritt v. Old Dominion Freight Line, Inc., 601 F.3d 289 (4th Cir. April 9, 2010)

This case involved the issue of whether the defendant’s articulated reason for terminating the plaintiff was a pretext for sex discrimination. Deborah Merritt began working at defendant’s Lynchburg, Virginia, terminal as a line haul driver in January 1996. She tried to obtain a pickup and delivery (“P&D”) driver position but was passed over and the jobs went to less qualified men. P&D drivers deliver and unload freight, and additional lifting duties make the job more physically demanding than the line haul position. Merritt was told by the terminal manager that “it was decided that they could not let a woman have [the P&D] position,” and that a regional vice president “had concerns [Merritt] would not be able to do the job” and “was afraid [she] would get hurt.” Merritt finally was hired as a P&D driver in March 2004. She was placed on probationary status for the first 3 months despite the fact that defendant did not require male P&D drivers to complete a probationary period. Only six of defendant’s over 3,000 P&D drivers were women, and Merritt was the only woman P&D driver in defendant’s mid-South region.

In September 2004 Merritt sprained her left foot and was informed she could not return to work unless she passed a physical fitness test. No such test had ever been required of a driver after an injury, and the test had never been given to new hires to determine their

fitness. Merritt failed the test, most of which had nothing to do with the condition of her foot: for example, she was required to lift a box from a table to a shelf above her head. Merritt was told her upper body strength was inadequate and that she wasn't "physically able to drive a truck." She was discharged and the reason put on the termination form was "inability to perform job."

The district court granted summary judgment to defendant on Merritt's discharge claim. The court said there was not a close enough link between the decisions by defendant's vice president of safety and personnel to require Merritt to take the fitness test and then to discharge her and the regional vice president's remarks about women not belonging in the P&D job. The court did not address the evidence offered that defendant's justification for requiring Merritt to take the fitness test and then firing her was untrue.

Agreeing with arguments the Commission advanced as *amicus curiae*, the court of appeals reversed and remanded the case for trial. The court held that Merritt introduced sufficient evidence that defendant's proffered explanation for her discharge -- her failure of the fitness test -- was unworthy of credence, because use of the test after a relatively minor ankle injury could permit a jury to find that defendant was simply looking for a reason to get rid of Merritt, and that its argument about the need for the test was "a post-hoc rationale, invented for the purposes of litigation." The court also rejected the company's argument that there was insufficient evidence that the decisionmaker had a discriminatory motive. Because the decisionmaker required Merritt but not male drivers to take the fitness test, he "could be seen by a jury to embrace beliefs that women are unsuited for some of the more remunerative forms of manual labor and, once injured, are less resilient in their ability to recover." The court also found evidence of a corporate culture reflecting "a very specific yet pervasive aversion" to the idea of female P&D drivers, and a shared view that women were "unfit for that position." According to the court, the evidence was sufficient to support a finding that the company never wanted to hire Merritt for the position in the first place and "lends credence to the view that it was looking for a reason to fire her."

See also *Jones v. Oklahoma City Public Schools*, 617 F.3d 1273 (10th Cir. Aug. 24, 2010), at page 57 *infra*.

12. Employer Liability

EEOC v. Everdry Marketing and Management and Everdry Management Services, 348 Fed. Appx. 677 (2d Cir. Oct. 14, 2009) (unpublished)

In this sexual harassment case seeking relief for 13 women who worked as telemarketers for Everdry Marketing and Management, the Commission won a jury verdict and the defendants

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appealed the issue of whether Everdry Marketing and its management company, Everdry Management Services, should have been held liable as an integrated enterprise for the demonstrated violation of Title VII. The district court denied the defendants' motion for judgment as a matter of law on that issue, and on appeal the Second Circuit agreed with the Commission and the lower court that there was sufficient evidence of an interconnection between the two Everdry companies to consider them a single employer in that the same individual owned both, a number of management officials moved from one company to the other, and the managers of Everdry Management Services hired and oversaw the employment of the discrimination victims in the case, who were employed directly by Everdry Marketing.

Whitten v. Fred's, Inc., 601 F.3d 231 (4th Cir. April 1, 2010)

This individual sexual harassment case involved the issue of when an accused harasser has the status of a supervisor so that his conduct can impose vicarious liability on his employer. Clara Whitten was transferred to assistant manager of a Fred's store in Belton, South Carolina. Matthew Green was the store manager, and during Whitten's 2 days at the Belton store, Green twice rubbed his body against hers, and told her she would not get weekends off unless she was nice to him. Whitten complained to the district manager and quit when told she was overreacting. The district court held that defendant could not be held liable for Green's conduct because Green did not have the authority to take tangible employment actions with regard to Whitten, and that defendant was not negligent in responding to Green's conduct because Whitten quit before defendant had any knowledge of her complaints.

Whitten appealed, and the Commission filed a brief as amicus curiae to argue that an individual may be considered a supervisor for purposes of imposing vicarious liability for a hostile work environment if he has the authority to direct the employee's day-to-day work activities, even if he cannot take tangible employment actions. The Commission argued there was sufficient evidence to support a finding that Green was a supervisor under this standard. The Fourth Circuit vacated the district court's decision, agreeing with the Commission that "the district court erred by viewing the ability to take tangible employment actions as dispositive of supervisory status." Rather, the court held, the key question is whether, as a practical matter, the harasser's employment relation with the victim is one that makes her "vulnerable to and defenseless" against his conduct in ways that comparable conduct by a mere coworker would not.

See also *EEOC v. CRST Van Expedited*, Nos. 09-3764, 09-3765, 10-1682 (8th Cir.), at page 36 *supra*.

13. Racial Harassment

Armstrong v. Whirlpool Corp., 363 Fed. Appx. 317 (6th Cir. Jan. 26, 2010) (unpublished)

In this racial harassment suit, after refusing to certify a class action, the district court examined whether each of the five plaintiffs had alleged sufficient harassing conduct to support his or her individual claim. The plaintiffs testified that during the course of their employment at a Whirlpool plant in LaVergne, Tennessee, they personally experienced and heard of numerous instances of racial epithets and stereotypes, racist graffiti, hostile treatment, and, in some instances, racial threats. Many of the alleged racist incidents involved an employee named Dale Travis, who worked in the plant from 1990 to 2003 and served as a union shop steward. The plaintiffs testified that Travis continually used racial slurs, including various permutations of “nigger” and references to the Ku Klux Klan, openly and on a daily basis. They also testified about racial conduct not involving Travis, including white employees displaying Confederate flags on their clothing and tow motors, repeated references by white coworkers to the KKK, use of the word “nigger” in a variety of forms, racial stereotypes, and racist jokes.

The district court granted summary judgment to defendant, finding that the harassment the plaintiffs endured was not sufficiently severe or pervasive to create an actionable hostile work environment. The court said the evidence was deficient because much of the conduct was not directed specifically at the plaintiffs and the plaintiffs could not recall details of comments they heard. The Commission argued as amicus curiae that all five plaintiffs adduced evidence sufficient to permit a reasonable jury to find that they were subjected to a severe or pervasive racially hostile work environment within the meaning of Title VII. The Commission also argued that the district court erred as a matter of law by analyzing the claims of each of the plaintiffs in isolation and without regard to the totality of the racially hostile environment in which they worked.

The Sixth Circuit agreed with the Commission in part, and remanded for trial the claims of three of the plaintiffs. In the court of appeals’ view these individuals had sufficiently alleged that racial harassment was ongoing, commonplace, and continuous at the Whirlpool facility and had provided specific examples of racial harassment sufficient for a jury to determine the objective severity of the harassment. To the extent the three plaintiffs did not each recall the specific content of many of the racist remarks, this went to the weight to be accorded the evidence by a jury and could not support summary judgment on their claims.

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Brown v. Progress Energy, 364 Fed. Appx. 556 (11th Cir. Feb. 4, 2010) (unpublished)

This case brought under 42 U.S.C. § 1981 involved whether the denial of training can support a claim of race discrimination, and whether there was sufficient evidence to support a race-based hostile work environment claim. The district court ruled against the plaintiff on both issues. The Commission filed an amicus curiae brief to argue that the denial of training in itself constituted an adverse action. Even if it did not, the Commission argued, the plaintiff offered evidence that he had to transfer teams to get the training he needed for promotion. On the hostile work environment claim, the Commission argued there was sufficient evidence for a jury to find the harassment was severe or pervasive where one of the plaintiff's coworkers called him "nigger" behind his back on five to six occasions, he was forced to dig ditches while his white coworkers watched, he was denied training given to white coworkers, and he was denied the use of new trucks. Finally, the Commission argued that a jury could find the employer was liable for the coworker harassment because the employer knew about it but did nothing to stop it.

The Eleventh Circuit affirmed the district court's entry of summary judgment for the employer. The court concluded there was no objective evidence to support the plaintiff's hostile work environment claim. The court agreed with the Commission's legal argument on training denials, and stated that "a failure to train claim is not necessarily dependent on a showing of an additional adverse employment action," but concluded that the evidence was insufficient to show that the plaintiff was denied training due to his race.

Chaney v. Plainfield Healthcare Center, 612 F.3d 1908 (7th Cir. July 20, 2010)

This suit pitted a black healthcare worker's right to a nondiscriminatory workplace against patients' demands for white-only healthcare providers. Brenda Chaney worked for Plainfield, a long-term care facility, as a Certified Nursing Assistant (CNA). Her duties included assisting residents to the bathroom and with bedpans; changing and cleaning residents; changing bed linens; stabilizing residents; and generally watching over residents. Plainfield maintained a practice of acceding to the racial preferences of residents. Chaney thus received daily assignment sheets noting that she was not to work with particular residents who preferred "no black CNAs." She also was subjected to racially derogatory remarks by coworkers, who questioned why Plainfield "keeps hiring these black niggers." Chaney was fired for reasons she said were fabricated by the hospital. The district court rejected Chaney's claim that Plainfield's race-based patient assignment policy, and the racially derogatory comments of some coworkers, subjected Chaney to a hostile work environment. The court held that Plainfield had responded to complaints about the racially derogatory remarks, and could not be liable for its assignment policy because state law permits patients to choose their caregivers. EEOC argued as amicus curiae that principles of

federal supremacy dictate that state law could not absolve Plainfield of liability for subjecting Chaney to racially discriminatory terms and conditions of employment, and that her evidence was sufficient to support her claims.

The Seventh Circuit agreed with the Commission. The court held that catering to perceived racial preferences of customers cannot be a defense to treating employees differently based on race, and that if a state law permitted such a policy it would be preempted by Title VII. The court did not think state law required the policy Plainfield had adopted, and suggested that the long-term care facility had several options for dealing with hostile customers that would not require violating the rights of its employees, such as warning the customers of its nondiscrimination policy and allowing them to retain private nurses at their own expense. The court also agreed that Chaney's evidence was sufficient to state claims of a racially hostile work environment and discriminatory discharge, and remanded the case for trial.

14. Sexual Harassment

Reeves v. C.H. Robinson Worldwide, Inc., 594 F.3d 798 (11th Cir. Jan. 20, 2010) (en banc)

This individual sexual harassment suit involved the issue of whether generalized hostile and derogatory remarks about women that are not directed specifically at the plaintiff can demonstrate an actionable hostile work environment based on sex. Ingrid Reeves was the only female sales representative in the Birmingham, Alabama, branch of C.H. Robinson Worldwide, a shipping business. She complained of crude language and jokes, sexually explicit conversations and radio broadcasts, and frequent use of sex-specific epithets in referring to female customers and employees. The district court granted summary judgment for defendant, holding that because none of the offensive conduct specifically targeted or referenced Reeves, and her male colleagues were equally exposed to the same crude language and radio programs, she had not suffered harassment "on the basis of her sex." The court considered it significant that the conduct had been the same before Reeves came to work at C.H. Robinson, and thus could not have been directed at her.

On appeal, a panel of the Eleventh Circuit reversed, but the full court vacated the panel's decision and scheduled argument and sought further briefing on the questions of whether Reeves was harassed "because of" her sex, and whether such a hostile work environment claim should be evaluated as a claim of disparate treatment or instead disparate impact. The Commission filed a brief as amicus curiae and argued that an employer who maintains a workplace permeated with language or conduct that a reasonable person would find particularly offensive to women engages in disparate treatment because of sex by subjecting female employees to disadvantageous working conditions to which males are not subject. The en banc court unanimously held, consistent with the Commission's position, that "ample

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evidence of gender-specific, derogatory comments made about women on account of their sex” was sufficient to present a jury question of disparate treatment, regardless of whether Reeves’ coworkers directed their offensive conduct at her or engaged in the same behavior before she was hired. The court emphasized that gender-specific terms like “bitch,” “whore,” and “cunt” are “humiliating and degrading based on sex” despite their indiscriminate usage.” The court said that once Reeves entered the workplace, the sexually offensive conduct became legally actionable, because Congress has determined that all employees have a right not to suffer humiliating, abusive, or degrading treatment because of their sex.

EEOC v. Fairbrook Medical Clinic, P.A., 609 F.3d 320 (4th Cir. June 18, 2010)

In this individual sexual harassment case, the district court granted summary judgment for defendant Fairbrook Medical Clinic on the ground that the sexually offensive conduct of Fairbrook’s male owner, Dr. Kessel, towards a female doctor, Deborah Waechter, was insufficiently severe or pervasive to be actionable, and was not directed at Waechter because of her sex in that Kessel was just a generally vulgar person. EEOC appealed, and the Fourth Circuit reversed. The court of appeals agreed with the Commission that a reasonable jury could find a hostile work environment based on Kessel’s repeated dirty jokes, comments about Waechter’s breasts and wanting to help “pump” or see them while she was expressing breast milk for her infant son, sexually demeaning comments about other women who visited the office, and repeatedly showing Waechter and others an x-ray that showed his penis, which he called “Mr. Happy.” The court concluded that a jury could find that Kessel’s comments “were based on sex and that their intimate nature was intended to make women in his employ feel acutely embarrassed and uncomfortable.” The court also concluded that the conduct was sufficiently severe or pervasive to be actionable, rejecting the notion that vulgarity in a medical setting is merely a form of humor to reduce tension, or that it is necessarily less severe since all employees deal with human bodies on a daily basis. Here, the court held, a jury could find that the remarks Kessel made were highly personalized and intended to demean and humiliate Waechter.

EEOC v. Prospect Airport Services, 621 F.3d 991 (9th Cir. Sept. 3, 2010)

EEOC alleged in this case that defendant subjected a male employee to a sexually hostile work environment by ignoring his requests for help in dealing with a female employee’s relentless romantic pursuit of him. Rudolpho Lamas, a passenger service attendant at the Las Vegas, Nevada, airport, complained to defendant managers that Silvia Munoz, a coworker, sent him flirtatious notes telling him he turned her on, asking him to go out with her, and describing “crazy” dreams about being in a bathtub with him; gave him a provocative photograph displaying her cleavage; and persisted in this conduct for months, undeterred by his clear statement that he had no romantic or sexual interest in her. Defendant took no

effective steps to stop Munoz' campaign. The district court concluded that Munoz' conduct was not severe and pervasive enough to amount to sexual harassment of a reasonable man, stating that Lamas admitted that "most men in his circumstances would have 'welcomed' the behavior he alleged was discriminatory."

The Ninth Circuit held that EEOC presented sufficient evidence for a reasonable jury to conclude that the sexual harassment was severe or pervasive and that defendant knew about the harassment but failed to take prompt and effective action. The court rejected the district court's view that a different standard applied because, according to the district court, most men welcome that sort of attention. The court characterized that view as a "stereotype" and concluded that because welcomeness is subjective, "it does not matter . . . whether other men might have welcomed Munoz' sexual propositions." The court concluded that even though Munoz never touched Lamas, a reasonable jury could find that her conduct constituted severe or pervasive harassment because Munoz clearly knew it was unwelcome, she relentlessly persisted over many months to the point that it crossed the line into abusiveness, the attention bothered Lamas emotionally, and Lamas' work was impaired by the sexual advances.

See also *EEOC v. CRST Van Expedited*, Nos. 09-3764, 09-3765, 10-1682 (8th Cir.), at page 36 *supra*.

15. Religious Discrimination

EEOC v. Hosanna-Tabor Evangelical Lutheran Church, 597 F.3d 769 (6th Cir. March 9, 2010)

This case involved the judicially created exception to employment discrimination laws designed to prevent courts from interfering with religious institutions' choices of their ministerial employees. Hosanna-Tabor operates a parochial school in which it employs lay (or "contract") teachers, and "called" teachers who are designated "Commissioned Ministers" by the Lutheran Church-Missouri Synod. Hosanna-Tabor employs both Lutherans and non-Lutherans as contract teachers, and assigns the same responsibilities to all teachers, whether "called" or contract (Lutheran or non-Lutheran). Cheryl Perich worked as an elementary school teacher at Hosanna-Tabor from 2001 through 2005. She started as a contract teacher, and after a year on the job completed a series of courses at a Lutheran college to earn designation as a "Commissioned Minister," and became a "called" teacher the following school year. Her job duties, like those of every other teacher at the school, consisted primarily of instructing students in secular subjects, with about 45 minutes of each schoolday devoted to religious instruction and prayer.

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Perich became ill during the summer of 2005 and took medical leave at the beginning of the 2005-2006 schoolyear. When she obtained a medical release and sought to return to work, Hosanna-Tabor would not let her return, and when she informed school officials that she had contacted an attorney and planned to assert her rights against disability discrimination, Hosanna-Tabor discharged her. EEOC's suit alleged that Hosanna-Tabor fired Perich in retaliation for asserting her rights under the ADA. The district court dismissed the case on the ground that Perich was a ministerial employee.

The Sixth Circuit concluded that Perich was not subject to the ministerial exemption, a determination that the court said turned on "the function, or 'primary duties' of the employee." Because Perich spent approximately 6 hours and 15 minutes of her 7-hour day teaching secular subjects through secular textbooks, and without incorporating religion into the secular material, the court said it was clear that her primary function was teaching secular subjects, not spreading the faith. Although Perich led some religious activities throughout the day, this did not make her primary function religious, particularly where teachers did not have to be "called" or even Lutheran, to conduct these religious activities. The court said that Perich's title of Commissioned Minister did not transform the *primary duties* of called teachers from secular to religious, as this determination requires looking at job functions, not titles. Since all teachers at Hosanna-Tabor performed the same functions, holding Perich exempt would mean that all teachers, whether lay (Lutheran or non-Lutheran) or "called," would be excluded from the protection of federal law, which the court thought would be "both illogical and contrary to the intention behind the exception."

EEOC v. Kelly Services, Inc., 598 F.3d 1022 (8th Cir. March 25, 2010)

The issue in this religious accommodation case was whether an employment agency has an obligation to assure that its customers provide religious accommodations. Asma Suliman, a Muslim woman, applied to Kelly Services for a position doing light industrial work. Suliman wears a khimar, a traditional headscarf, due to her religion. She passed Kelly's initial screening and a Kelly supervisor told her about a job that was available at Nahan Printing Company, but said Suliman would have to remove her khimar to work at Nahan. The supervisor was relying on Nahan's rule against head coverings, which Nahan had implemented for safety reasons. No one from Kelly contacted Nahan to see whether Suliman's religious need to wear her khimar could be safely accommodated. Suliman refused to remove her khimar and was not referred for the job. She was, however, subsequently offered several other assignments by Kelly.

EEOC sued Kelly Services for religious discrimination based on its failure to determine whether Nahan could have accommodated Suliman's religious practice of wearing a khimar. The district court granted summary judgment to Kelly, holding that EEOC could not

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establish a prima facie case because Suliman had sought temporary employment and had, in fact, been offered several temporary jobs. The court said that Suliman “did not have a guarantee or reasonable expectation of being placed with any particular employer.” In the alternative, the district court held that even if EEOC had established a prima facie case, Kelly would be entitled to summary judgment because it would have been an undue hardship for Kelly to place Suliman at Nahan and because Kelly had offered Suliman alternative jobs.

On appeal, the Eighth Circuit held that because EEOC had failed to show that Nahan actually had a referable position on the day that Suliman applied, it had no need to decide whether an employment agency’s failure to refer an applicant for employment qualifies as an “adverse employment action.” But even assuming EEOC had shown an adverse action, the court said Kelly would still be entitled to summary judgment because it provided a legitimate, nondiscriminatory reason for its failure to refer Suliman to Nahan for employment – Nahan’s rule against head coverings – and EEOC failed to show this reason was pretextual. Rejecting EEOC’s interpretation of Title VII’s religious accommodation provision, the court held that an employment agency is not required to demonstrate that *the employer* to which it would be referring the temporary worker would suffer an undue hardship if it had to accommodate that worker.

EEOC v. The GEO Group, Inc., 616 F.3d 265 (3d Cir. Aug. 2, 2010)

In this religious accommodation case, the Commission alleged that The GEO Group, which operates a prison in Pennsylvania, violated Title VII when it adopted a “zero-tolerance” policy for employee headgear within the secured areas of the prison that did not allow for reasonable accommodation of religious practices. Three female Muslim employees who had been wearing khimars (headscarves) for religious reasons were immediately affected by the policy. One of the women refused to cease wearing her khimar and was terminated; the other two acceded to the new policy despite the conviction that they were violating the tenets of their religious faith. The district court granted GEO’s motion for summary judgment, holding that under Third Circuit precedent, “it is permissible for the employer of personnel working within a prison to refuse to permit a Muslim employee to wear a head covering while on duty.”

A divided court of appeals panel affirmed the district court’s decision. Although the majority agreed with the Commission that there is no per se rule of law about religious head coverings or safety that would govern all prison, paramilitary organization, or police department cases, but held that the circuit’s decision in *Webb v. City of Philadelphia*, 562 F.3d 256 (3d Cir. 2009), upholding a police department ban on headgear, was relevant by analogy because the security and uniformity interests in *Webb* were implicated in the prison context as well. Conceding it was a close call, the majority held it would constitute an “undue

hardship” within the meaning of Title VII to require the prison to permit its Muslim female employees to wear khimars on the job, because there would be some costs associated with maintaining security and checking the women’s headgear at each checkpoint. The dissent said there were genuine disputes of material fact as to both the existence of a safety risk and the magnitude of the burden of accommodating the risk.

On September 16, 2010, the Commission filed a petition for rehearing en banc arguing that the panel majority had impermissibly weighed the evidence, made credibility determinations, and disregarded basic summary judgment principles in affirming summary judgment for GEO, and in particular, had disregarded the circuit’s precedent that the existence of undue hardship in a religious accommodation case is a quintessential factual determination for a jury.

16. Age Discrimination

Jones v. Oklahoma City Public Schools, 617 F.3d 1273 (10th Cir. Aug. 24, 2010)

This case involved the burden of proof on an ADEA plaintiff at the summary judgment stage. The plaintiff, Judy Jones, was the executive director of curriculum and instruction for an Oklahoma City, Oklahoma, public school district. In 2006, when Jones was in her late 50s, several school district officials asked her about her retirement plans. In 2007 Jones’ position was eliminated during a reorganization of administrative staff, and Jones was reassigned to work as an elementary school principal. The reassignment resulted in a substantial salary decrease, and a loss of vacation and retirement benefits. The district superintendent who eliminated Jones’ position said the decision was related to budgetary concerns, but shortly after Jones was reassigned, the superintendent created a new position, titled director of teaching and learning, with duties and responsibilities strikingly similar Jones’ prior position. In August 2007 a person 13 years younger than Jones was hired to fill the new position.

The district court granted the school district’s motion for summary judgment. The court first found there was sufficient evidence to establish a prima facie case of age discrimination, rejecting the school district’s argument that Jones’ reassignment was not an adverse employment action. The court also determined there was sufficient evidence to support a finding that the district’s asserted nondiscriminatory reason for its action -- that the superintendent wanted to create a new position in a revenue-neutral manner -- was “inconsistent or unworthy of belief.” The court nonetheless decided that summary judgment was warranted. In the court’s view, the case was one of the exceptions noted by the Supreme Court in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), in which summary judgment can be appropriate despite establishment of a prima facie case and rejection of the employer’s explanation for its action. Characterizing Jones’ evidence of pretext as “not

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particularly strong,” and noting a lack of evidence suggesting age discrimination, the court concluded that no rational juror could find in Jones’ favor.

Agreeing with arguments the Commission advanced as amicus curiae, the Tenth Circuit held that the district court erred in requiring the plaintiff to present evidence of age discrimination beyond that necessary to establish a prima facie case and show the falsity of the defendant’s proffered reason for her reassignment. The court of appeals also concluded that the Supreme Court’s recent decision in *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343 (2009), establishing a “but-for” proof standard in age discrimination cases, did not vitiate circuit precedent permitting an ADEA plaintiff to prove discriminatory motive by means of the *McDonnell-Douglas* three-part analytical model.

EEOC v. TIN, Inc., 349 Fed. Appx. 190 (9th Cir. Oct. 20, 2009) (unpublished)

This age discrimination action involved the proper assessment of age biased remarks by decisionmakers. The district court granted summary judgment to the defendant, a paper manufacturer, on the Commission’s claim that five employees at defendant’s Phoenix, Arizona, plant were discharged because of their ages, characterizing the Commission’s evidence of age animus as stray remarks. On appeal, the Commission challenged the result as to three of the employees. The termination decisions were made by the vice president of TIN’s International Group, and a regional manager within the Group. Both decisionmakers made repeated, explicit comments denigrating older workers. Various witnesses testified that the vice president inquired about employees’ and applicants’ ages and expressed concerns about their relative energy levels, vitality, and tendency to “retire on the job,” and compared older employees unfavorably to younger employees, who he called his “dream team,” “young blood,” and “roster of champions.” Witnesses testified that the regional manager referred to older employees as “viejos perros” [old dogs].

The Ninth Circuit reversed and remanded. The court held that “[r]egardless of whether [the decisionmakers’] comments [we]re considered direct evidence or substantial and specific indirect evidence, the EEOC ha[d] provided sufficient evidence from which a jury could find, ‘by a preponderance of the evidence, that age was the “but-for” cause of the challenged adverse employment action[s],’” (quoting *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2352 (2009)).

EEOC v. Baltimore County, 385 Fed. Appx. 322 (4th Cir. June 25, 2010) (unpublished)

The Commission alleged that Baltimore County violated the ADEA by maintaining a pension system that deducted a higher percentage of an employee’s salary the older the employee was when joining the system. The district court granted summary judgment to the County,

ruling that this case was governed by *Kentucky Retirement Systems v. EEOC*, 128 S. Ct. 2361 (2008). In *Kentucky Retirement*, Kentucky credited younger but not older disabled employees with extra years of service in determining eligibility for disability retirement. The Commission challenged this practice, but the Supreme Court held it did not constitute an ADEA violation because the difference in treatment was not based directly on the employee's age, but rather on his or her "pension status," i.e., on whether the disabled employee was eligible for normal retirement, even though eligibility for normal retirement depended in part on age (as the ADEA permits). The district court in *Baltimore County* ruled that the difference in treatment here also depended on "pension status" (which the court defined as the number of years remaining until the employee reached the normal retirement age of 60), and that the different percentage rates were caused not by age discrimination but by the County's decision to take into account the time value of money – i.e., the fact that the younger employee's contributions will have more years to accrue earnings.

On appeal the Commission argued that *Kentucky Retirement* was distinguishable, and that the County violated the ADEA because it gave employees who were older at enrollment less take-home pay than it gave similarly situated employees who were younger at enrollment. The court of appeals did not address *Kentucky Retirement*, and ruled that the Commission had waived the pay discrimination argument by not raising it in the district court. The court, however, found that the district court erred in determining that the different percentage rates were justified by the time value of money. The court pointed out that under the County's pension system employees can retire after certain periods of service regardless of age, and therefore an employee starting on the same day as a younger person but retiring after the same number of years of service would have to make larger contributions even though the time value of each employee's contributions – the number of years the contributions could accrue earnings – would be the same. The court accordingly reversed and remanded the case to the district court to decide whether the different percentage rates are "justified by permissible financial considerations."

17. Disability Discrimination

Harrison v. Benchmark Electronics Huntsville, 593 F.3d 1206 (11th Cir. Jan. 11, 2010)

This decision addressed important questions about the scope of the ADA's prohibition on preemployment medical inquiries, who may challenge such inquiries, and how to plead and prove such a violation. The plaintiff, John Harrison, has epilepsy, for which he takes phenobarbital. He worked as a contract employee for defendant, troubleshooting electronic circuit boards. His supervisor told him that a full-time position was available and that he should take the company's drug test and apply for the job. Harrison completed an application and took the drug test. Before an offer of employment had been made,

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Harrison's supervisor told him he failed the test because it showed barbiturates in his system. Harrison explained that he was taking a prescription medication for epilepsy. The supervisor decided not to hire Harrison as a permanent employee, and defendant informed the staffing company that employed Harrison that his services were no longer needed. Harrison sued, alleging, inter alia, that defendant violated the ADA by conducting a prohibited preoffer medical inquiry into his disability status.

The district court granted summary judgment to defendant. The court ruled that Harrison did not properly plead his medical inquiry claim, but that even if he had, and assuming there is a private cause of action for violating the preemployment medical inquiries provision of the ADA, Harrison's evidence did not support his claim.

The Eleventh Circuit reversed, agreeing with the arguments presented by the Commission as amicus curiae. The court joined all other courts of appeals to have considered the question, and held that the text and legislative history of the ADA demonstrate that Congress provided a private cause of action for violations of the statute's prohibition on preemployment disability related medical inquiries. The court also held that the plain language of the statute demonstrates that such a claim is available regardless of the plaintiff's disability status. Next the court held that Harrison adequately pled this claim by specifically referring to preemployment medical inquiries in his complaint. Finally, the court held that Harrison presented sufficient evidence for a jury to find in his favor. The court expressly relied on EEOC's regulations and enforcement guidance in determining that Harrison could establish a violation of the prohibition against preemployment medical inquiries, and noted that Harrison had alleged sufficient injury flowing from the prohibited inquiry in that he did not get a permanent position as a result.

Colwell v. Rite Aid Corp., 802 F.3d 495 (3d Cir. April 8, 2010)

This ADA case involved the issue of whether a visually impaired employee's request for a change from night to day shifts because she cannot drive safely at night is a request for a reasonable accommodation that an employer must provide absent undue hardship. Plaintiff Jeannette Colwell worked as a part-time cashier at a Rite Aid store in Old Forge, Pennsylvania. Colwell has vision in only one eye, and alleged that Rite Aid's refusal to alter her work schedule so that she would not have to drive to or from work at night violated the ADA. She also alleged that the store's refusal to accommodate her resulted in her constructive discharge when she quit after being assigned to work three consecutive night shifts. The district court granted summary judgment to Rite Aid, holding that it was not obligated to accommodate Colwell because the ADA does not require an employer to facilitate an employee's commute. The court also found that Colwell's constructive discharge

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claim failed because she was not subject to any adverse action or an intolerable working environment, and she quit her job without exhausting all avenues of relief.

The EEOC filed an amicus curiae brief in the court of appeals, arguing that Colwell's monocular vision constituted a disability under the ADA; that the ADA's reasonable accommodation provision required Rite Aid, absent proof of undue hardship, to accommodate Colwell's request for a change in her work schedule from night shift to day shift so that she could get to work without facing the safety risks associated with night driving; and that the district court erred in granting summary judgment on the constructive discharge claim because Rite Aid's insistence on scheduling Colwell for evening hours, despite its knowledge that night driving posed dangerous risks for her, could be viewed by a reasonable jury as creating intolerable working conditions.

The Third Circuit agreed with the Commission that Colwell's night driving limitation was probative of her ability to see, and that she had presented sufficient evidence that she was substantially limited in seeing. On the failure to accommodate issue, the court rejected Rite Aid's assertion that "it had no duty to even consider changing Colwell's shift because Colwell's difficulties amounted to a commuting problem unrelated to the workplace." To the contrary, the court held that "as a matter of law," changing a work schedule to alleviate an employee's disability related difficulties in getting to work is a type of accommodation that the ADA contemplates. Because scheduling of shifts is entirely within the employer's control, and is done inside the workplace, it is the type of accommodation that must be provided absent proof of undue hardship. The court also concluded that it was for a jury to decide whether the failure of the interactive process in this case was attributable to Rite Aid or Colwell. On the constructive discharge claim, the Third Circuit agreed with the district court that a reasonable juror could not find that Rite Aid's responses to Colwell would have forced a reasonable person to resign.

EEOC v. UPS Supply Chain Solutions, 620 F.3d 1103 (9th Cir. Aug. 27, 2010)

EEOC alleged in this ADA case that UPS failed to reasonably accommodate the limitations of a deaf employee in its accounts payable department. Mauricio Centeno worked as a file clerk recording and sorting checks received, filing surety bonds, distributing mail, and generally sorting and filing paperwork and letters. His duties grew to include copying and imaging responsibilities. Centeno's primary language is American Sign Language (ALS). He has limited proficiency in written English, which caused him considerable difficulty in comprehending communications at work. In particular, he did not fully understand what was being communicated at weekly staff meetings that he was expected to attend. He requested an ASL interpreter, but defendant determined that written summaries provided after the meetings were sufficient. EEOC argued in the district court that defendant violated

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the ADA by failing to provide accommodations that were effective in enabling Centeno to participate fully in the privileges and benefits of employment. The court granted summary judgment to UPS, holding that by providing Centeno with written notes of the meetings, and giving him an English language dictionary to look up words he did not understand in the notes and various policy documents, the company had reasonably accommodated him as a matter of law.

EEOC appealed and the Ninth Circuit reversed and remanded. The court said there was a genuine factual issue as to whether defendant's provision of notes and summaries would allow a deaf employee, even one who was fluent in written English, to enjoy the benefits and privileges of attending and participating in the departmental meetings. The court said its conclusion was especially true in light of Centeno's limited proficiency in written English. The court further found that there was a factual issue as to whether defendant was or should have been aware that its accommodation efforts, which relied on Centeno's ability to understand written English, were ineffective and did not enable him to understand what was occurring. The court also said there was evidence that defendant failed to explore possible accommodations in good faith.

Wurzel v. Whirlpool Corp., No. 10-3629 (6th Cir.), brief as amicus curiae filed July 27, 2010

This was one of the first cases to reach a court of appeals on the question of coverage under the recent amendments to the ADA (the ADAAA, effective January 1, 2009). The plaintiff, Brian Wurzel, has angina, a heart condition that causes unpredictable spasms. In 2008, Whirlpool transferred him out of a driving job because of safety concerns and moved him to the paint department where he worked near moving machinery. In 2009, Whirlpool suspended Wurzel from the paint department job, again because of safety concerns. Wurzel sued under the ADA (for the 2008 transfer) and the ADAAA (for the 2009 suspension). The district court granted summary judgment to Whirlpool. The court said that Wurzel was neither actually disabled nor regarded as disabled. In any event, the court said, Wurzel had not shown he was qualified for the jobs at issue because he failed to prove he was not a direct threat to himself or others.

The Commission filed an amicus curiae brief to argue that the district court had misapplied the governing standards of the ADAAA. The Commission argued that the court erred in holding that Wurzel was not disabled under the amended statute, and also was wrong in holding that he posed a direct threat as a matter of law.

With respect to coverage, the district court erred by not recognizing that under the ADAAA Wurzel is actually disabled as a matter of law, in that his angina, when it flares up, is a substantially limiting condition. The record indicated that spasms such as Wurzel's block

part or all of the blood flow to the heart and body, causing symptoms that can be identical to a heart attack and can even result in death. Because Wurzel's symptoms block his blood flow, he is substantially limited in the operation of his circulatory system, which is a major life activity under the ADAAA (42 U.S.C. § 12102(2)(B) (2009), defining major life activity to include the operation of a major bodily function and identifying circulation as such a function).

The court also erred by using Whirlpool's defense on the merits to trump Wurzel's assertion that he was regarded as disabled. Under the ADAAA, an employer regards an employee as disabled whenever it takes a prohibited employment action because of an employee's actual or perceived physical or mental impairment, as long as the impairment is not transitory and minor. The district court held that Whirlpool had not taken a prohibited action because acting out of safety concerns is not prohibited. The court's analysis improperly entangled the coverage inquiry with potential defenses to claims of disability discrimination. The Commission argued that by admitting that it suspended Wurzel because it feared his sudden incapacitation – a consequence of his impairment – Whirlpool conceded that it regarded Wurzel as disabled.

On the merits, the district court erred in several respects. Contrary to the court's analysis, "direct threat" is an affirmative defense. It was therefore Whirlpool's burden to show that Wurzel posed a "significant risk of substantial harm," not Wurzel's burden to prove otherwise. The court also erred in deferring to Whirlpool's assessment of the medical evidence. Whether an individual is a direct threat must be assessed objectively, and good faith reliance on an objectively unreasonable conclusion is not a defense. Finally, the district court erred by not considering Wurzel's testimony about how his spasms affect him and how he responds to them in the workplace. That testimony, together with the medical evidence, could support a jury finding that Wurzel did not pose a direct threat.

18. Retaliation

Gant v. Kash n' Karry, 390 Fed. Appx. 943 (11th Cir. Aug. 4, 2010) (unpublished)

This case raised the issue of whether complaints to an employer about racial comments in the workplace constituted protected conduct for purposes of a Title VII retaliation claim. Natika Gant was a customer service manager in defendant's supermarket. In July of 2007, she heard the store's evening manager Robert Price say, "I can't stand ghetto black niggers." Gant, who is black, had heard Price make other offensive racial comments: Price asking a black employee to remove her head scarf because, according to Price, "this isn't the ghetto," and Price instructing a black employee to watch black but not white customers, because Price believed that black customers would steal from the store. Gant also was told of offensive

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racial comments made by Price, including Price stating that a black employee had a “black ghetto booty,” and that a black employee should go work at the “MLK” store location because of his hairstyle.

Gant complained about Price’s conduct to her store manager and district manager; the store manager and the company’s human resources director met with Gant about 2 weeks later. Three days after the meeting, Gant and Price had a confrontation when an employee called Gant to say she would be late to work. Price told Gant that Gant was a “nobody” and that the employee should have called him rather than her. Gant, upset by this interaction, called two other store managers in an attempt to find a manager to cover her shift. When the district manager learned that Gant had mentioned to the two other store managers her complaint about Price’s racist comments, he fired her for violating company policy. Gant then brought suit alleging that defendant violated Title VII by firing her because she complained about Price’s racially derogatory statements.

The district court granted summary judgment to defendant. The court said that even accepting Gant’s version of events, Price’s conduct did not create an objective racially abusive or hostile work environment because the conduct was not frequent, threatening, or humiliating, and did not interfere with Gant’s work performance. The court therefore held that Gant’s complaints that Price’s conduct constituted racial discrimination were not objectively reasonable, and thus did not constitute “opposition” to discrimination protected under Title VII’s antiretaliation provisions. The court also held that even if Gant had established a prima facie case of retaliation, defendant proffered a legitimate, nonretaliatory reason for her termination -- violation of the company’s confidentiality policy -- and Gant failed to establish that this reason was a pretext for discrimination.

The Commission filed an amicus curie brief to argue that Gant’s complaints were protected opposition conduct. The Eleventh Circuit affirmed the district court’s decision on the ground that Gant failed to establish that the employer’s proffered reason for her termination was pretextual. The court therefore found it unnecessary to address the issue briefed by the Commission – whether Gant’s complaints were protected “opposition” under Title VII because she had a reasonable belief that she was opposing an unlawful employment practice.

Kasten v. St. Gobain Performance Plastics Corp., No. 09-834 (S. Ct.), amicus curiae brief filed June 23, 2010

The issue in this case is whether an oral complaint about a potential Fair Labor Standards Act (FLSA) violation constituted protected conduct for purposes of a FLSA retaliation claim. Plaintiff, an hourly production employee, orally complained to supervisors about the location of the company’s timeclocks, which he said prevented employees from being paid for the

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time spent putting their protective gear on and taking it off. Subsequently he was disciplined and then fired, ostensibly for failing to clock in correctly. The district court rejected his retaliation claim, reasoning that the FLSA antiretaliation provision covers only written complaints. The Seventh Circuit affirmed, and the en banc court denied review, with three judges dissenting. The Supreme Court granted plaintiff's petition for certiorari.

The Commission joined the amicus curiae brief filed by the Solicitor General arguing that the FLSA antiretaliation provision (which applies to the Equal Pay Act, a part of the FLSA) covers oral as well as written complaints. The government argued that: (1) The FLSA's provision prohibiting an employer from discriminating against an employee "because such employee has filed any complaint," includes both written and oral complaints. (2) The plain and historical meaning of the term "filed" can encompass oral complaints. (3) The decision below discourages informal resolution of pay disputes, creates a trap for unwary employees who comply with company procedures, encourages prompt termination of employees who complain orally, deters employees from asserting their rights, and disproportionately harms workers with low incomes or limited English skills. (4) The decision threatens to undermine other statutory schemes that rely on similar antiretaliation provisions. (5) To the extent the FLSA's provision is ambiguous, the Secretary of Labor and EEOC are entitled to resolve that ambiguity, and their consistent interpretation for nearly a half-century that oral complaints are protected is reasonable.

Thompson v. North American Stainless, No. 09-291 (Supreme Court), brief as amicus curiae filed Sept. 10, 2010

This case involves the question whether Title VII's antiretaliation provisions provide a cause of action to an employee who did not engage in protected activity, but suffered an adverse employment action because of another employee's discrimination complaint. Miriam Regalado and Eric Thompson worked as quality control engineers at a stainless steel manufacturing plant in Kentucky owned by defendant. They began dating and were engaged to be married. In September 2002, Regalado filed a sex discrimination charge with EEOC. EEOC notified defendant of the charge on February 13, 2003, and on March 7, 2003, defendant terminated Thompson. Thompson filed a charge with EEOC alleging that defendant had terminated him solely because of his fiancée's protected activity and that this conduct violated the antiretaliation provisions of Title VII.

Thompson filed suit and the district court granted summary judgment to defendant, concluding that "under its plain language, the statute does not permit a retaliation claim by a plaintiff who did not himself engage in protected activity." The Sixth Circuit initially reversed, but then granted defendant's petition for rehearing en banc and affirmed the district court's grant of summary judgment, concluding that the plain text of Title VII's

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antiretaliation provisions limited “the authorized class of claimants . . . to persons who have personally engaged in protected activity.”

The Commission joined the amicus curiae brief filed by the Solicitor General, arguing that under Supreme Court precedent there is no question that firing an employee's spouse or fiancé because of the employee's EEOC complaint is unlawful retaliation against the complaining employee. The prospect that such a fate could befall a spouse, family member, or other closely associated person might well “dissuade a reasonable worker” from exercising her statutory right to complain about discrimination -- the standard for showing retaliation under the Supreme Court’s decision in *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 68 (2006). Further, the associated person can state a claim under Title VII because he falls within the meaning of the “person aggrieved” language of the statute’s remedial provisions. The government urged the Court to continue its practice of giving a “broad and inclusive” reading of statutory cause of action provisions providing remedies to those “aggrieved” by unlawful actions, as it did in *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972), which construed identical language in the statute prohibiting discrimination in housing.

Although the Sixth Circuit concluded that Thompson was aggrieved by the loss of his job, it found he had no “cause of action” under Title VII, mistakenly examining the statute's prohibition on retaliation in isolation and attempting to divine whether Congress would have wanted individuals like Thompson to be able to enforce that provision. This exercise was unnecessary since section 706 of Title VII, 42 U.S.C. § 2000e-5, provides an express textual answer to the court of appeals’ question, stating that a “person claiming to be aggrieved” by an unlawful employment practice may bring “a civil action . . . against the respondent named in the charge.” This position is consistent both with EEOC's longstanding interpretation of the relevant law and with sound enforcement policy. For more than 30 years, EEOC has said that it is unlawful to dismiss an employee's family member due to the employee's protected activity.

Interpreting Title VII's antiretaliation provisions to permit such a pernicious form of retribution would undermine the statutory scheme, which depends on employees' willingness to file complaints. Moreover, EEOC has consistently taken the position that the affected employee can file suit under Title VII to remedy the violation. That position also best effectuates the statutory scheme, as it is the dismissed employee who has the greatest economic interest in suing and is the most likely candidate to vindicate the statutory interest in a workplace free of unlawful retaliation.

D. Outreach: Educating the Public

Office of General Counsel attorneys engage in a variety of informational activities, sometimes in conjunction with investigative staff, regarding the laws enforced by the agency and agency processes. In fiscal year 2010, legal staff made presentations at 499 “outreach” events involving almost 30,000 participants. Some examples are provided below.

Commission Initiatives and Recent Legislation

The Los Angeles regional attorney spoke about EEOC’s Systemic Initiative and the agency’s efforts to support low wage earners at the National Employment Law Project conference. The New York regional attorney spoke to reporters at *Outside Counsel* magazine about the Systemic Initiative, at ABC News about the Youth@Work Initiative, and at the *Wall Street Journal* about discrimination resulting from the use of criminal records. She also spoke about pay issues and the Youth@Work Initiative on a “Learn More Now to Earn More Later” panel sponsored by the Department of Labor, and participated in panels at the ABA National Conference on Equal Employment Opportunity Law about Commission litigation under section 707 of Title VII and about criminal records screens. The Phoenix regional attorney spoke about the Americans with Disabilities Act Amendments Act of 2008 (the ADAAA) with the National Association of ADA Coordinators. A Houston senior trial attorney gave an EEOC update and discussed the ADAAA, GINA, the Lily Ledbetter Act, and caregiver discrimination at a Louisiana State Bar Association CLE program. A Dallas trial attorney gave a presentation on EEOC, GINA, and the ADAAA to a National Labor Relations Board office. A Charlotte trial attorney discussed GINA with genetic counselors, physicians, and staff at the Georgetown University Lombardi Cancer Center and gave a presentation on GINA to employees and managers at the National Institutes of Health. An Atlanta trial attorney discussed GINA at the Southern Legislative Conference of the Council of State Governments.

Advocacy Organizations and Vulnerable Populations

At an Alabama NAACP Conference, the Birmingham regional attorney discussed the laws EEOC enforces and its investigative procedures with branch representatives who deal with employment discrimination complaints. The San Francisco regional attorney provided training to California Rural Legal Assistance on the ADA and farmworkers as part of a statewide training conference; he also provided sexual harassment training for Asian Pacific American organizations that serve domestic violence and sexual assault victims. An Atlanta supervisory trial attorney provided outreach to farmworkers in Vidalia, Georgia. The Phoenix regional attorney and a trial attorney gave sexual harassment training to the

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Wyoming Coalition against Domestic Violence and Sexual Assault. The New York regional attorney presented “Litigating Issues Relating to Foreign Nationals” and “Who’s Knocking at my Door? Immigration and Customs Enforcement Raids and Worker/Employer Rights” at the 3rd Annual CLE Conference for the ABA Section of Labor and Employment Law. A New York trial attorney gave a panel presentation on assuring equal opportunity in the New York construction industry for the Association of Women Construction Workers of America. An Indianapolis trial attorney provided a legal update at the Metro Louisville Human Relations Commission’s Annual Race Relations Conference. The Memphis regional attorney and legal staff met with members of the public and provided information about EEOC during a legal clinic sponsored by the Pro Bono Section of the Memphis Bar Association.

Human Resources Professionals

The San Francisco regional attorney discussed workplace investigations and retaliation with a group of human resources professionals. A San Francisco trial attorney spoke about the ADA and the role of human resources professionals with student-members of a human resources organization. A Houston trial attorney discussed the ADAAA and GINA with human resources and other administrative professionals of the Louisiana Department of Education and the Louisiana Recovery School District. A Memphis supervisory trial attorney discussed the ADAAA regulations with human resources managers.

Law and Bar Groups

EEOC’s Office of General Counsel sponsored a seminar at the 85th Annual Convention of the National Bar Association. The panel included representatives from the EEOC Offices of Federal Operations, Legal Counsel, Field Programs, and General Counsel, and was moderated by General Counsel David Lopez. The panel’s objective was to convey practical information about the Commission’s processes to enhance practitioners’ effectiveness in interacting with the Commission across its various programmatic operations. At the Diversity in Practice Conference sponsored by *The Indiana Lawyer*, the Indianapolis regional attorney spoke about the legal requirements for affirmative action and methods to make diversity sustainable in the workplace. The Atlanta regional attorney discussed EEOC under the Obama administration at a labor & employment law seminar. The San Francisco regional attorney discussed retaliation at the ABA Labor and Employment Law Conference and at the State Bar of California Labor and Employment Conference. The New York regional attorney gave a presentation on religious discrimination issues at the State Bar of California Conference. A San Francisco trial attorney spoke at the ABA convention in San Francisco to encourage law students to practice employment law. An Atlanta supervisory trial attorney discussed EEOC’s mission and employment with the Commission during a National Job Fair.

Media Contacts

The Houston regional attorney appeared on the television program "Great Day Houston." A Memphis supervisory trial attorney appeared on the ABC News program "20/20" to discuss sexual harassment affecting teen workers. The New York regional attorney spoke to reporters at the *New York Times* about race, national origin, and religious discrimination, at *Forbes* magazine about religious discrimination, at the *Wall Street Journal* about age discrimination and about women on Wall Street, and at the *New York Post* about sex and age discrimination. She also discussed age discrimination on "The Brian Lehrer Show" on WNYC Radio, and spoke to a producer at ABC News about teen sexual harassment.

III. Litigation Statistics

A. Overview of Suits Filed

In FY 2010, the field legal units filed 250 merits lawsuits: 248 direct suits and 2 actions to enforce administrative settlements. (Merits suits include direct suits and interventions alleging violations of the substantive provisions of the Commission’s statutes, and suits to enforce settlements reached during EEOC’s administrative process.) Ninety-five of the suits sought relief for more than one person. The field legal units also filed 20 actions to enforce subpoenas issued during EEOC investigations, and 2 suits seeking preliminary relief.

Merits Filings in FY 2010	
	<u>Count</u>
Direct	248
Intervention	0
Administrative Settlements	2
Total	250
155 Individual Suits	
95 Class Suits	

1. Litigation Workload

The FY 2010 litigation workload (merits cases active at the start of the fiscal year plus merits suits filed during the fiscal year) totaled 708.

FY 2010 Litigation Workload		
<u>Active</u>	<u>Filed</u>	<u>Workload</u>
458	250	708

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2. Filing Authority

In EEOC’s National Enforcement Plan, adopted in February 1996, the Commission delegated litigation filing authority to the General Counsel in all but a few areas. The General Counsel has redelegated much of this authority to the regional attorneys. Redelegated cases are reviewed by staff in the Office of General Counsel prior to suit filing. The chart below shows the filing authority for FY 2010 merits suits.

FY 2010 Merits Suit Authority		
	<u>Count</u>	<u>Percent</u>
Regional Attorney	199	79.6%
General Counsel	48	19.2%
Commission	3	1.2%

3. Statutes Invoked

Of the 250 merits suits filed, 76.8% contained Title VII claims, .8% contained EPA claims, 11.6% contained ADEA claims, 16.4% contained ADA claims, and 5.6% were filed under multiple statutes. (Statute numbers in the chart below exceed the number of suits filed and percentages total over 100% because suits filed under multiple statutes (“concurrent” cases) are included in the totals of suits filed under each of the statutes.)

Merits Filings in FY 2010 by Statute		
	<u>Count</u>	<u>Percent of Suits</u>
Title VII	192	76.8%
EPA	2	.8%
ADEA	29	11.6%
ADA	41	16.4%
Concurrent	14	5.6%

4. Bases Alleged

As shown in the next chart, sex discrimination (42%) and retaliation (37.6%) were the most frequently alleged bases in EEOC suits. Race discrimination was alleged in 17.2% of the suits, disability in 14.8%, and age in 10.4%. Bases numbers in the chart exceed the total suit filings (250) because suits often contain multiple bases.

	<u>Count</u>	<u>Percent of Suits</u>
Sex	105	42.0%
Retaliation	94	37.6%
Race	43	17.2%
Disability	37	14.8%
Age	26	10.4%
Religion	24	9.6%
National Origin	21	8.4%
Equal Pay	1	.4%

5. Issues Alleged

Discharge was the most frequently alleged issue in EEOC suits filed (56.8%) and harassment the second (39.6%). Terms and conditions was an issue in 12.4 % of the suits, and hiring in 11.2%.

	<u>Count</u>	<u>Percent of Suits</u>
Discharge	142	56.8%
Harassment	99	39.6%
Terms and Conditions	31	12.4%
Hiring	28	11.2%
Disability Accommodation	18	7.2%
Religious Accommodation	15	6.0%
Promotion	14	5.6%
Pay	8	3.2%

B. Suits Filed by Bases and Issues

1. Sex Discrimination

As shown below, 65.7% of cases with sex as a basis contained a harassment allegation. Discharge was the second most frequently alleged issue in sex claims (49.5%).

Frequently Alleged Sex Discrimination Issues		
	<u>Count</u>	<u>Percent</u>
Harassment	69	65.7%
Discharge	52	49.5%
Terms/Conditions	13	12.4%
Hiring	5	4.8%

2. Race Discrimination

Harassment was also the most frequently alleged issue in race discrimination claims (63.3%); discharge was an issue in 27.9% of race cases.

Frequently Alleged Race Discrimination Issues		
	<u>Count</u>	<u>Percent</u>
Harassment	23	53.5%
Discharge	12	27.9%
Terms/Conditions	8	18.6%
Promotion	7	16.3%

3. National Origin Discrimination

As shown in the next chart, harassment was by far the most frequently alleged issue where national origin was the basis (71.4%).

Frequently Alleged National Origin Discrimination Issues		
	<u>Count</u>	<u>Percent</u>
Harassment	15	71.4%
Terms and Conditions	4	19.0%
Discharge	4	19.0%

4. Religious Discrimination

Discharge and failure to accommodate were issues in most of the religious discrimination cases.

Frequently Alleged Religious Discrimination Issues		
	<u>Count</u>	<u>Percent</u>
Reasonable Accommodation	15	62.5%
Discharge	14	58.3%
Hiring	6	25.0%

5. Age Discrimination

Discharge was an issue in half of the age discrimination cases.

Frequently Alleged Age Discrimination Issues		
	<u>Count</u>	<u>Percent</u>
Discharge	13	50.0%
Hiring	6	23.1%

6. Disability Discrimination

Discharge was the most frequently alleged issue in disability suits (64.9%), followed by failure to accommodate (48.6%).

Frequently Alleged Disability Discrimination Issues		
	<u>Count</u>	<u>Percent</u>
Discharge	24	64.9%
Reasonable Accommodation	18	48.6%
Hiring	5	13.5%

7. Retaliation

Discharge was an issue in over 80% of retaliation claims.

Frequently Alleged Retaliation Issues		
	<u>Count</u>	<u>Percent</u>
Discharge	79	84.0%
Terms/Conditions	15	16.0%
Harassment	7	7.4%

C. Bases Alleged in Suits Filed from FY 2006 through FY 2010

The table below shows, by year, the bases on which EEOC suits were filed over the last 5 years.

Bases Alleged in Suits Filed FY 2006- 2010									
<u>Percent Distribution</u>									
<u>FY</u>	<u>Sex (F)</u>	<u>Sex (P)</u>	<u>Sex (M)</u>	<u>Race</u>	<u>Nat. Or.</u>	<u>Relig.</u>	<u>Dis.</u>	<u>Age</u>	<u>Retal.</u>
2006	33.3%	8.6%	3.2%	21.3%	10.0%	6.5%	10.5%	12.4%	32.3%
2007	30.1%	8.6%	4.8%	19.3%	11.3%	7.7%	14.0%	9.5%	37.8%
2008	30.0%	8.6%	2.1%	23.4%	7.2%	6.2%	12.8%	13.1%	35.2%
2009	26.7%	5.7%	3.9%	17.4%	6.8%	3.9%	25.6%	8.2%	35.9%
2010	31.6%	6.8%	3.6%	17.2%	8.4%	9.6%	14.8%	10.4%	37.6%

D. Suits Resolved

In FY 2010, the Office of General Counsel resolved a total of 289 merits lawsuits, recovering \$85,590,600 in monetary relief.

1. Types of Resolutions

As the chart below indicates, 88.3% of EEOC’s suit resolutions were settlements, 9.4% were determinations on the merits by courts or juries, and 3.4% were voluntarily dismissed (two of the seven voluntary dismissals were without prejudice). (The figures on favorable and unfavorable court orders do take appeals into account.)

Types of Resolutions FY 2010		
	<u>Count</u>	<u>Percent</u>
Consent Decree	243	84.1%
Settlement Agreement	12	4.2%
Favorable Court Order	10	3.5%
Unfavorable Court Order	17	5.9%
Voluntary Dismissal	7	2.4%
Total	289	100%

2. Statutes Invoked

Of the 289 merits suits resolved during the fiscal year, 70% contained Title VII claims. ADA claims were present in 20.4% of the resolutions and ADEA claims in 13.5%. (Statute numbers in the chart below exceed the number of suits resolved and the percentages total over 100% because suits resolved under multiple statutes (“concurrent” cases) are also included in the totals of suits resolved under each statute.)

	<u>Count</u>	<u>Percent of Suits</u>
Title VII	201	69.6%
ADEA	39	13.5%
ADA	59	20.4%
Concurrent	10	3.5%

As shown below, Title VII suits accounted for over 85% of monetary relief obtained in FY 2010. Recoveries in concurrent suits are not included in the totals for the particular statutes.

<u>Statute</u>	<u>Relief (millions)</u>	<u>Relief Percent</u>
Title VII	\$74.0	86.5%
ADEA	\$5.8	6.8%
ADA	\$2.9	3.4%
Concurrent	\$2.9	3.4%
Total	\$85.6	100.0%

3. Bases Alleged

As shown in the following table, sex was a basis in almost 40% of the suits resolved, retaliation in 33%, race in almost 20%, disability in 18%, and age in 13%. The total count exceeds suits resolved (289) because suits often contain multiple bases.

	<u>Count</u>	<u>Percent of Suits</u>
Sex	114	39.4%
Retaliation	95	32.9%
Race	57	19.7%
Disability	52	18.0%
Age	38	13.1%
Religion	20	6.9%
National Origin	17	5.9%

4. Issues Alleged

Similar to the suits filed statistics, discharge and harassment were by far the most frequently alleged issues in resolved cases.

	<u>Count</u>	<u>Percent of Suits</u>
Discharge	181	62.6%
Harassment	120	41.5%
Hiring	50	17.3%
Terms and Conditions	36	12.5%
Disability Accommodation	21	7.3%
Religious Accommodation	12	4.2%
Pay	10	3.5%
Promotion	8	2.8%

E. Resources

1. Staffing

In FY 2010, field staff increased by 13 people, but attorney staff dropped by 2. The following table shows field and headquarters staffing numbers for the last 5 years.

OGC Staffing (On Board)			
<u>Year</u>	<u>HQ</u>	<u>All Field</u>	<u>Field Attorneys*</u>
2006	56	308	200
2007	55	299	194
2008	51	296	193
2009	54	311	211
2010	57	324	209

*** Includes Regional Attorneys, Supervisory Trial Attorneys, and Trial Attorneys**

2. Litigation Budget

As indicated in the table below, OGC’s litigation support budget increased by over \$1 million in FY 2010.

Litigation Support Funding (Millions)	
<u>FY</u>	<u>FUNDING</u>
2006	\$3.48
2007	\$3.35
2008	\$3.58
2009	\$4.60
2010	\$4.96

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F. Historical Summary: Tables and Charts

1. EEOC 10-Year Litigation History: FY 2001 through FY 2010

Litigation Statistics, FY 2001 through FY 2010

	FY01	FY02	FY03	FY04	FY05	FY06	FY07	FY08	FY09	FY10
All Suits Filed	428	370	400	421	416	403	362	325	316	272
Merits Suits	388	342	366	378	381	371	336	290	281	250
Suits with Title VII Claims	289	268	298	297	295	294	268	224	188	192
Suits with ADA Claims	66	44	49	46	49	42	46	37	76	41
Suits with ADEA Claims	42	39	27	46	44	50	32	38	24	29
Suits with EPA Claims	14	12	12	5	13	10	7	0	2	2
Suits filed under multiple statutes ¹	19	19	19	14	17	22	16	9	9	14
Subpoena and Preliminary Relief Actions	40	28	34	43	35	32	26	35	35	22
All Resolutions	362	381	381	380	378	418	387	367	352	318
Merits Suits	321	351	351	346	338	383	364	336	324	289
Suits with Title VII Claims	232	266	275	277	259	295	297	265	254	201
Suits with ADA Claims	48	65	50	43	41	50	41	46	40	59
Suits with ADEA Claims	39	26	35	34	45	50	36	39	38	39
Suits with EPA Claims	15	9	13	9	12	8	14	3	5	0
Suits filed under multiple statutes	12	15	21	14	18	17	19	16	13	10
Subpoena and Preliminary Relief Actions	41	30	30	34	40	35	23	31	28	29
Monetary Benefits (\$ in millions)²	49.8	56.2	146.6	168.6	104.8	44.3	54.8	101.1	81.6	85.6
Title VII	33.6	29.2	85.1	158.5	98	34.3	38.9	64.9	64.5	74.0
ADA	2.3	15.1	2.3	2.5	3.4	2.8	3.1	3.3	9.5	2.9
ADEA	3.1	1.4	57.8	5.4	2.4	5.1	2.4	29.9	6.7	5.8
EPA	0.2	0.2	0	0	0	0	0.2	1.0	0.02	0
Suits filed under multiple statutes ³	10.7	10.3	1.5	2.3	1	2.1	10.2	1.7	0.9	2.9

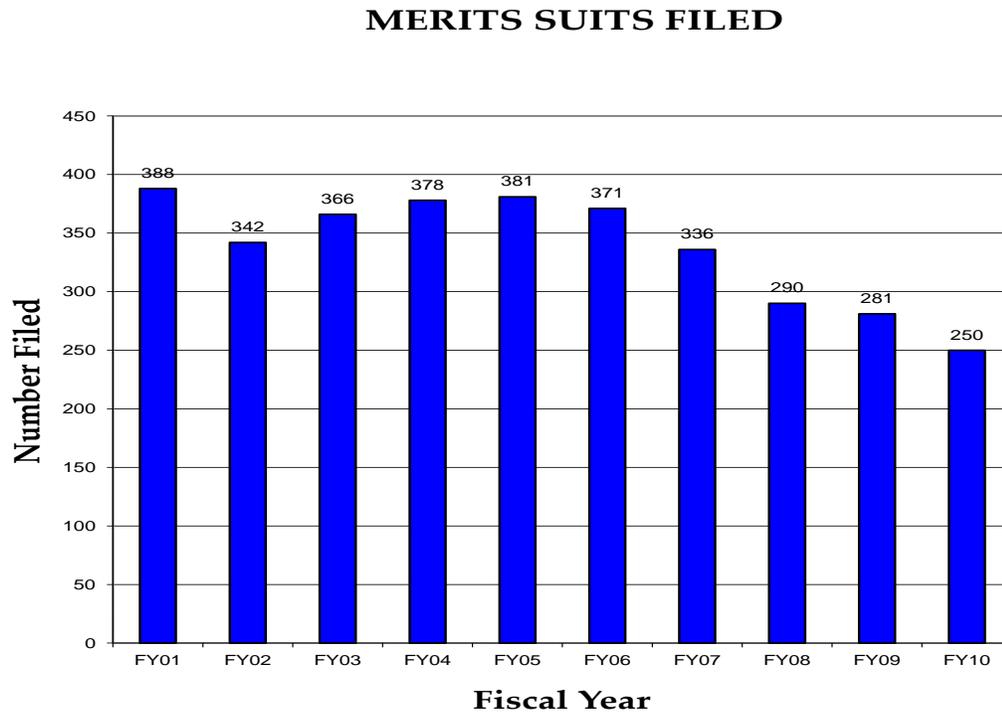
¹ Suits filed or resolved under multiple statutes are also included in the tally of suits filed under the particular statutes.

² The sum of the statute benefits in some years will be different from total benefits for the year due to rounding.

³ Monetary benefits recovered in suits filed under multiple statutes are counted separately and are not included in the tally of suits filed under the particular statutes.

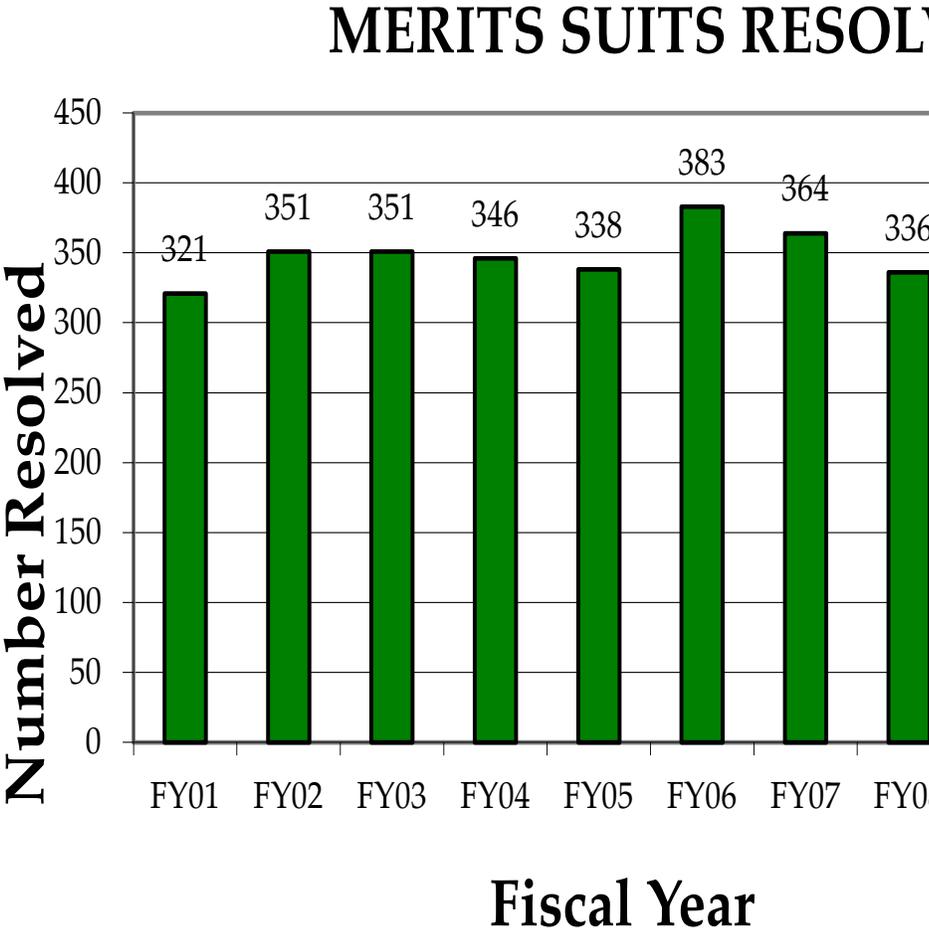
2. Merits Suits Filed FY 2001 through FY 2010.

The chart below shows the number of merits suits filed for FY 2001 through FY 2010.



3. Merits Suits Resolved FY 2001 through FY 2010

The chart below shows the number of merits suits resolved for FY 2001 through FY 2010.



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4. Monetary Recovery FY 2001 through FY 2010

The chart below shows the monetary recovery for FY 2001 through FY 2010.

