

**UNITED STATES
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**



**OFFICE OF GENERAL COUNSEL
FISCAL YEAR 2013 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's authority was extended to 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 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) and the EPA (no employee minimum, but for most private employers \$500,000 or more in annual business) includes state and local governmental 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.

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 filing under authority delegated to the General Counsel under

the Commission's 1996 National Enforcement Plan. The General Counsel provides reports regularly to the Commission on litigation activities, 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 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 EEOC's 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 provides 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, and reviews various litigation related matters, such as requests to contract for expert services and proposed resolutions in cases in which OGC has retained settlement authority. LMS contains a unit that provides technical support to field offices in matters such as producing, receiving, and organizing electronically stored information in discovery, extracting and preserving digital media, and collecting and preserving information from social media sites. 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 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 areas such as economics, statistics, and psychology, who serve as consulting and testifying 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 coordinates with EEOC's procurement division in contracting for expert and other services that due to the cost (over \$25,000) require headquarters approval.

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 field, area, and local offices 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 2013 Accomplishments

In fiscal year 2013, OGC filed 131 merits lawsuits and resolved 213, obtaining over \$39 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 part 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 131 merits suits in FY 2013. Merits suits consist of 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. No interventions were filed during the fiscal year; one suit was filed to enforce an administrative settlement. In addition to merits suits, OGC filed 18 actions to enforce subpoenas issued during EEOC investigations.

OGC's FY 2013 merits suit filings had the following characteristics:

- 77 contained claims under Title VII (58.8%)
- 5 contained claims under the EPA (3.8%)
- 7 contained claims under the ADEA (5.3%)
- 49 contained claims under the ADA (37.4%)
- 3 contained claims under GINA (2.3%)
- 46 sought relief for multiple individuals (18.3%)

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 9 (6.9%) of these "concurrent" suits among the FY 2013 filings.

OGC resolved 213 merits suits in fiscal year 2013, resulting in monetary relief of \$39,004,152. These resolutions had the following characteristics:

- 137 contained claims under Title VII (64.3%)
- 4 contained claims under the EPA (1.9%)
- 17 contained claims under the ADEA (8%)
- 60 contained claims under the ADA (28.2%)

1 contained claims under GINA (.5%)
83 cases sought relief for multiple individuals (39%)
6 were concurrent suits (2.8%)

Part III of the Annual Report contains detailed statistical information on OGC's FY 2013 litigation activities, as well as summary information for past years.

B. Significant District Court Resolutions

1. Title VII

a. Race Discrimination

(1) Hiring

In *EEOC v. Alliant Techsystems, Inc.*, No. 11-02785 (D. Minn. Nov. 20, 2012), EEOC alleged that a Minnesota-based aerospace and defense manufacturer denied employment to a black applicant for an information technology (IT) position because of her race. The applicant went through a series of interviews for a position providing immediate (anytime, anywhere) IT support for CEO-level executives. At her final interview, at which she had her hair in cornrows, the head of the IT team on which she would be working told her the team did not think she could properly represent them with the CEOs of the company, and suggested she apply for a help desk-type job. The next month, defendant hired a white person for the position. A 3-year consent decree provides \$100,000 to the black applicant and enjoins defendant from race discrimination in hiring and from retaliation.

In *EEOC v. River View Coal, LLC*, No. 4:11-cv-00117 (W.D. Ky. July 25, 2013), EEOC alleged that the operator of a coal mine in Waverly, Kentucky, failed to hire a class of black applicants for underground mining positions because of their race. When hiring in 2008-09 for work at its new mine in Waverly that was expected to open in August 2009, defendant rejected black applicants in favor of white applicants with less experience. A 2-year consent decree provides \$245,000 (\$82,000 in backpay and \$163,000 as compensatory damages) to be distributed to 19 rejected black applicants, and prohibits defendant from race discrimination and retaliation. Defendant will advertise all open underground positions with four employment services, identified in the decree, located in Illinois, Kentucky, and Indiana. Defendant will report to EEOC annually on applications and hires by race for underground positions.

(2) Harassment

In *EEOC v. A.C. Widenhouse, Inc.*, No. 1:11-cv-498 (M.D.N.C. Jan. 28, 2013), EEOC alleged that a provider of specialized freight transportation services subjected two African American truckdrivers at its Concord, North Carolina, facility to a racially hostile work environment, consisting of repeated racially derogatory comments and racial slurs from the facility's white general manager and other white employees, and threats involving nooses. Following a week-long trial, the jury returned a verdict for EEOC, awarding one employee \$30,000 in compensatory damages and the other \$20,000 in compensatory damages and \$75,000 in punitive damages (reduced by the court to \$20,000 in compensatory and \$30,000 in punitive damages to conform to the \$50,000 Title VII cap applicable to defendant). One of the employees had intervened, alleging racial and retaliatory discharge claims under Title VII and 42 U.S.C. § 1981, and was awarded \$75,000 in punitive damages by the jury (section 1981 claims are uncapped) and \$71,662.92 in backpay and \$16,846.97 in interest by the court on those claims. The court permanently enjoined defendant from discrimination on the basis of race, African American, and from retaliation, and ordered extensive remedial relief, including posting of a notice for 3 years at all of defendant's facilities describing the jury's racially hostile work environment verdict.

In *EEOC v. Rock-Tenn Services Co., Inc.*, No. 3:10-CV-01960 (N.D. Tex. Dec. 3, 2012), EEOC alleged that a leading manufacturer of paperboard, container board, and consumer paper product subjected black employees at its Dallas, Texas, plant to a racially hostile work environment. The conduct consisted of racially offensive comments (some from supervisors), violent racist graffiti on the bathroom walls (such as Confederate flags, "KKK," "Die Nigger," and swastikas), and on several occasions, nooses displayed in the workplace. Black employees and the union repeatedly complained about the racist language, graffiti, and nooses, but defendant minimized the conduct and failed to take corrective action. A 2-year consent decree provides \$500,000 to 14 individuals in amounts determined by EEOC, and enjoins defendant from race discrimination, racial harassment, and retaliation. Defendant will adopt a policy stating that workplace graffiti will be considered vandalism to company property, and will use graffiti-resistant surfaces on the walls in the men's locker room.

In *EEOC v. U-HAUL International, Inc.*, and *U-HAUL Company of Tennessee*, No. 2:11-cv-02844 (W.D. Tenn. Sept. 23, 2013) EEOC alleged that a national provider of rental

moving vans and trailers and related supplies and its Tennessee affiliate (UHTN) subjected African American employees at UHTN's Lamar Avenue facility in Memphis, Tennessee, to a racially hostile work environment. For close to 2 years, the facility's shop manager, the shop manager's daughter-in-law (a UHTN employee), and at least one other white employee regularly used racial slurs to degrade and demean African American mechanics and maintenance workers. The offensive language included frequent use of the word "nigger" and references to African American employees as monkeys and "boy." Employees complained to the shop manager about his daughter-in-law's conduct, and at least one employee complained to the marketing company president about the shop manager. The marketing company president conducted a perfunctory investigation and took the shop manager's word over the employee's. Under a 2-year consent decree, UHTN will pay \$750,000 in compensatory damages to eight former African American employees. The decree enjoins UHTN from discriminating against African Americans based on race and from subjecting any employee to a racially hostile work environment.

b. Sex Discrimination

(1) Hiring

In *EEOC v. Presrite Corp.*, No. 1:11-CV-00260 (N.D. Ohio April 24, 2013), EEOC alleged that a manufacturer of forged metal parts, with two plants in Cleveland and one in Jefferson, Ohio, failed to hire women into entry-level laborer and operative jobs because of their sex. The case originated from a Commissioner's Charge based on information obtained in an investigation of a staffing agency that provided employees to defendant. Between 2004 and 2008 defendant hired only 12 women, while hiring approximately 300 men; although applicant flow data was incomplete, there were at least 300 female applicants during this period. Also, the disparity between the external availability of women for entry-level heavy production jobs (based on census data) and defendant's percentage of female hires was statistically significant. A 3-year consent decree provides \$700,000 in compensatory damages to rejected female applicants in amounts determined by EEOC. Defendant will offer positions to at least 40 previously rejected female applicants who express interest in employment during the claims process. The decree enjoins defendant from gender-based recruiting and hiring discrimination and from retaliation. Defendant is required to make good faith efforts to find female candidates to fill vacancies in laborer and operative jobs.

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In *EEOC v. Illini Precast, LLC.*, No. 12-cv-07603 (N.D. Ill. June 27, 2013), EEOC alleged that a manufacturer of prefabricated concrete construction panels failed to hire a female applicant into a production/general laborer position because of her sex. The applicant, who had prior experience in construction and concrete work, applied for a general laborer position at defendant's Marseilles, Illinois, production facility, first through a staffing agency and then directly at the facility, but was not selected. Male applicants were hired as general laborers during the timeframe in which she applied, and she was told by defendant's site supervisor that the staffing agency did all of defendant's hiring and would not hire her because defendant did not want to employ women. A 3-year consent decree provides \$27,682.50 in compensatory damages to the rejected applicant; she also received \$60,000 in backpay and damages through the successful conciliation of her EEOC charge against the staffing agency (the terms of the conciliation agreement permit EEOC to comment publically on the conciliation). The decree enjoins defendant from discrimination on the basis of sex in hiring and in accepting leased employees from staffing firms, and prohibits retaliation.

In *EEOC v. It's Just Lunch*, No. 13-cv-61518 (S.D. Fla. July 19, 2013), EEOC alleged that a national matchmaking service engaged in a pattern or practice of refusing to hire males as inside sales representatives and dating directors, and discharged the human resources director at its Hallandale Beach, Florida, headquarters in retaliation for opposing the hiring discrimination. Inside sales representatives sell dating services memberships, and dating directors match and introduce members. Defendant's chief executive officer and its director of sales and training believed that clients preferred interacting with women in the sales representative and dating director positions, and from the opening of the Hallandale Beach location in 2007 until the human resources director filed her EEOC charge in early 2009, defendant did not hire any men into these positions in Hallandale Beach. When the human resources director complained in January 2009 to defendant's new upper management that prior managers would not allow her to interview male candidates, she was terminated 2 days later. A 3-year consent decree provides the former human resources director \$30,000 in backpay, \$70,000 in damages, and \$30,659 in attorney's fees, and establishes a class fund of \$769,341. The decree prohibits sex discrimination in hiring, and prohibits retaliation for opposing practices unlawful under Title VII. Defendant will conduct quarterly reviews of its applicant flow and submit reports to EEOC summarizing the findings along with an electronic copy of defendant's applicant tracking system.

(2) Promotion

In *EEOC v. Exel, Inc.*, No. 1:10-CV-03132 (N.D. Ga. June 7, 2013), EEOC alleged that an international provider of supply-chain management and logistical services denied a female inventory control lead at its Pittsburgh Paint and Glass facility in Fairburn, Georgia, a promotion to an inventory supervisor position because of her sex. During a 4-day trial, EEOC presented evidence that the female inventory control lead was recognized as the most knowledgeable person in inventory control; presented testimony from the lead's former supervisor that when he recommended her for the inventory supervisor position, defendant's general manager told him he would never put a woman in that position; and presented testimony from the male selected for the inventory supervisor position that the female inventory control lead was required to train him because he had no inventory experience. The jury returned a verdict in favor of EEOC, awarding the female inventory control lead \$25,000 in compensatory and \$475,000 in punitive damages. The court reduced the damages awards to the \$300,000 Title VII cap, and awarded the inventory control lead, who had left defendant, \$1,184.37 in backpay and \$293.33 in interest.

(3) Harassment

In *EEOC v. New Breed Logistics*, No. 10-2696 (W.D. Tenn. May 9, 2013), EEOC alleged that a provider of supply-chain logistics with over 50 distributions centers in the United States subjected three female production workers at a Memphis, Tennessee, warehouse to a sexually hostile work environment, discharged them in retaliation for opposing the sexual harassment, and discharged a male employee for supporting their harassment complaints. During a 7-day trial, EEOC presented evidence that the female employees worked under the male receiving department supervisor, who regularly made sexually offensive comments to them and touched one of them inappropriately. One woman was fired shortly after complaining about the supervisor on defendant's hotline and the other two were fired shortly after telling the supervisor to stop his sexually offensive conduct. A male forklift driver told defendant's human resources manager during an investigation of sexual harassment complaints against the supervisor that he had seen the supervisor engage in sexually offensive conduct towards female employees. Shortly after the forklift driver's interview with the human resources manager, the receiving department supervisor falsely reported that the forklift driver was stealing company time, causing the forklift driver's discharge. The jury returned a verdict for EEOC on all claims, awarding each of the three former female employees \$100,000 in compensatory

damages and \$200,000 in punitive damages, and backpay and benefits in amounts of \$80,163.30, \$61,552.87, and \$20,412.57. The jury awarded the forklift driver \$14,966.23 in backpay and benefits, \$186,000 in compensatory damages, and \$250,000 in punitive damages (later reduced by the court to \$114,000 to conform to the \$300,000 damages cap applicable to the employer).

In *EEOC v. Michael Cetta, Inc., d/b/a Sparks Steakhouse*, No. 09-CV-10601 (S.D.N.Y. Nov. 15, 2012), EEOC alleged that an upscale New York City restaurant subjected male employees to a sexually hostile work environment, and retaliated against employees who complained. Male managers made sexually explicit comments to male servers and groped them and touched their genitals. Employees who complained about the harassment were given lower paying runner assignments, disciplined, and discharged. A 3½-year consent decree provides \$600,000 to 22 individuals, and enjoins harassment and discrimination based on sex, and retaliation. Defendant will establish a 24-hour telephone hotline to report suspected discrimination, harassment, or retaliation; provide all employees with a laminated wallet card containing the hotline number; adopt a policy against harassment and discrimination; distribute to all employees a letter from defendant's owner emphasizing his commitment to abide by the federal laws prohibiting employment discrimination; and issue written warnings to two named managers and provide them with individual EEO training.

In *EEOC v. Carrols Corp.*, No. 98-CV-1772 (N.D.N.Y. Jan. 10, 2013), EEOC alleged that an operator of restaurants in 13 states subjected female employees at its Burger King restaurants in the Midwest, Southeast, and Northeast United States to sexual harassment, and retaliated against employees for opposing the harassment. The harassment, perpetrated mainly by managers, included sexually explicit comments and jokes, propositions, offensive touching, strip searches, exposure of genitalia, and rapes. Some of the women who complained about their treatment had their hours cut or were disciplined or discharged. A 2-year consent decree provides \$2.5 million (\$205,876 in backpay and \$2,294,124 in compensatory damages) to 89 individuals, in amounts determined by EEOC. The decree enjoins defendant from harassment of females based on sex, and from retaliation against females for opposing discrimination. Defendant will maintain a toll-free hotline run by an outside provider and an email address for employees to report complaints of sexual harassment. Defendant will offer departing employees the opportunity to fill out a written exit interview form that will ask about sexual harassment and complaints of sexual harassment at the restaurant where the employee worked.

c. National Origin Discrimination

(1) Hiring

In *EEOC v. PBM Graphics, Inc.*, No. 1:11cv00805 (M.D.N.C Dec. 19, 2012), EEOC alleged that a provider of graphics products assigned non-Hispanic temporary production workers at its Durham, North Carolina, manufacturing facilities fewer hours than Hispanic temporary workers, and failed to assign non-Hispanic temporary workers to its core group of regular workers, due to their non-Hispanic national origin. Defendant asked a staffing service to refer only Hispanic temporary workers, and disproportionately assigned Hispanic workers into a core group who worked every day, and sometimes were hired as permanent employees. Also, equally or more qualified non-Hispanic workers were hired for fewer days and shorter assignments than Hispanic workers. A 2-year consent decree provides \$334,000 to about 60 individuals in amounts determined by EEOC. The decree prohibits national origin discrimination and retaliation. The decree sets forth nondiscriminatory criteria for defendant's selection of temporary employees for its "returning or regular" group of workers, and for assigning hours to temporary employees. Defendant will report to EEOC on temporary employees selected for inclusion in the "returning or regular" workers group and on numbers of hours worked by each temporary employee.

(2) Pay

In *EEOC v. Mitsuwa Corp., dba Mitsuwa Marketplace*, No. 2:09-CV-04733 (D.N.J. April 15, 2013), EEOC alleged that an operator of eight megasupermarkets in the United States selling Japanese foods and specialty products, paid Hispanic employees (clerks, cashiers, bakers) in its Edgewater, New Jersey, store less than similarly situated non-Hispanic (almost exclusively Asian) employees due to the Hispanic employees' national origin. Using defendant's wage data for hires from July 2005 through July 2007, EEOC found significant wage differences across all categories of entry-level jobs that could not be explained by prior experience. A 3-year consent decree provides 40 individuals with \$250,000 in monetary relief, consisting of \$205,000 in backpay and \$45,000 in compensatory damages. Approximately 22 current Hispanic workers will receive wage increases of 5.4% (if hired before January 1, 2011) or 4.4% (if hired on or after January 1, 2011). The decree enjoins national origin discrimination in compensation and terms and conditions of employment and enjoins retaliation.

(3) Harassment

In *EEOC v. Mesa Systems, Inc.*, No. 2:11-cv-01201 (D. Utah Sept. 27, 2013), EEOC alleged that a provider of moving and storage services in Colorado, Utah, and Idaho, subjected Hispanic employees at its Salt Lake City, Utah, warehouse to a hostile work environment due to their national origin and maintained an English-only policy that had a disparate impact on Hispanics, Asians/Pacific Islanders, and other employees whose ethnic group or nationality favors a language other than English. In 2006, defendant prohibited employees working in the Salt Lake City warehouse from speaking any language other than English. In addition, the warehouse manager subjected Hispanic workers to ethnic slurs, and referred to them as “fucking Mexicans” and “lazy Mexicans.” A 3-year consent decree provides \$400,000 to 18 affected individuals, and permanently enjoins defendant from discriminating on the basis of national origin and from retaliation. Defendant will rescind its English-only policy at the Salt Lake City warehouse and verbally communicate to each employee that the policy is no longer in effect.

In *EEOC v. Sierra Pacific Industries*, No. 2:08-CV-01470 (E.D. Cal. Oct. 23, 2012), EEOC alleged that a manufacturer of wood products subjected a production employee at its Red Bluff Millwork in Tehama, County, California, to a hostile work environment due to his Arab/Egyptian national origin, and discharged him because of his national origin and for complaining about the harassment. Following the terrorist attacks of September 11, 2001, the employee’s coworkers made derogatory remarks to him, such as “Sadam, “stupid Egyptian,” “Osama,” and “camel jockey”). The employee complained to many different managers, but the conduct continued, and defendant terminated him in April 2004 under circumstances in which non-Egyptian employees received lesser discipline. A 2-year consent decree provides the former employee with \$95,000 in damages, and enjoins, at defendant’s Red Bluff Millwork plant, discrimination on the basis of national origin, including harassment, and enjoins retaliation for opposing national origin discrimination.

In *EEOC v. RJB Properties, Inc.*, No. 1:10-CV-2001 (N.D. Ill. May 1, 2013), EEOC alleged that a provider of janitorial services in the Chicago, Illinois, area subjected a class of Hispanic employees working at the Illinois Institute of Technology in Chicago to harassment, adverse terms and conditions of employment, and discharge because of their national origin; failed to hire and promote Hispanics because of their national origin; and retaliated against employees for opposing discriminatory conduct. Supervisors referred to Hispanic janitors as “spic,” “fucking Mexican,” “bean eater,” and “donkey.” Hispanic janitors were forced to work through breaks and lunch, denied

overtime, subjected to excessive scrutiny, and terminated based on false accusations. Hispanic oncall janitors were not placed into regular janitor positions on the same basis as black oncall janitors. Employees were demoted, transferred, and discharged in retaliation for complaining about discriminatory conduct or refusing to comply with directions to treat Hispanic employees adversely. A 2-year consent decree provides \$360,000 in compensatory damages to 10 individuals in amounts ranging from \$10,000 to \$48,750; permanently enjoins defendant from national origin and sex discrimination, including harassment; and prohibits retaliation.

In *EEOC v. Swift Aviation Services, Inc.*, No. 12-01867 (D. Ariz. July 24, 2013), EEOC alleged that a provider of aircraft fueling, hangaring, and maintenance services at Phoenix Sky Harbor International Airport subjected a Turkish/Palestinian Muslim line service technician to national origin and religious harassment that resulted in his constructive discharge. Throughout the line service technician's employment, managers subjected him to derogatory comments relating to his national origin and religion, including questions about whether he was going to blow up the World Trade Center and statements that "towelheads" should be killed. In addition, he was scrutinized more closely than other employees and denied assignment requests. The employee reported the harassment to nonharassing supervisors, but defendant failed to take corrective action, causing him to resign. A 24-month consent decree provides the former line service technician \$5,000 in backpay and \$45,000 in compensatory damages, and enjoins defendant from national origin and religious harassment and from retaliation. Copies of EEOC's complaint, the charge of discrimination, and the consent decree will be placed in the personnel files of three identified employees.

d. Religious Discrimination

(1) Hiring

In *EEOC v. Voss Electric Company d/b/a Voss Lighting*, No. 4:12-cv-00330 (N.D. Okla. March 20, 2013), EEOC alleged that a national distributor of lighting products headquartered in Nebraska rejected an applicant for a management position because of his religion. Defendant represents itself as having both a business and a biblical mission: the business mission is to provide premier lighting products, and the biblical mission is to "sell" its products so that it can "tell" everyone it can about God's soul-saving, life transforming gospel message as instructed by Jesus. A person recommended as a strong candidate by the current operations supervisor (who was being promoted) applied and was interviewed for an operations supervisor job in Tulsa,

Oklahoma. During the interview, defendant's branch manager questioned the applicant in detail about his religious beliefs and practices, and became upset at his responses, which indicated that the applicant did not attend church regularly. Defendant did not offer the applicant the job, and sought additional candidates for the position. A 3-year consent decree provides \$82,500 in compensatory damages to the rejected applicant and prohibits religious discrimination and retaliation.

(2) Reasonable Accommodation

In *EEOC v. ABM Security Services, Inc.*, No. 2:12-cv-0407-JD (E.D. Pa. July 22, 2013), EEOC alleged that a national provider of security services failed to reasonably accommodate the religious practices of a Muslim applicant for a security officer position and denied her a job because of her religion. When she submitted her application at the Pennsylvania Convention Center in Philadelphia in February 2011, the applicant was wearing a solid black khimar – a headscarf worn by Muslim women as an expression of their religious faith -- that covered her hair, ears, and neck. When she reported for her first day of work a week later, defendant's area operations manager told her she would not be able to wear her headscarf because it was not part of defendant's uniform. She responded that she could not remove the scarf because she wore it for religious reasons, and when told she had to remove it to work at the convention center, she left. A 3-year consent decree provides \$15,000 in backpay and \$50,000 in compensatory damages to the rejected applicant and enjoins defendant from religious discrimination. The decree applies to a region encompassing Pennsylvania, Delaware, and 11 counties in New Jersey. Defendant will provide security officers with a revised dress code policy stating that it will accommodate employees' sincerely held religious beliefs provided such accommodations do not impose an undue hardship on defendant.

In *EEOC v. Ozarks Electric Cooperative Corporation*, No. 5:12-CV-05014 (W.D. Ark. March 25, 2013), EEOC alleged that an organization that supplies electric power to members in northwest Arkansas and northeast Oklahoma denied the request of a Jehovah's Witness employed as a customer service representative at its Fayetteville, Arkansas, call center to attend a religious event, and discharged her because of her religion. In January 2010, the employee asked her supervisor for a day of leave in June to attend an annual religious convention. The supervisor denied her request, and denied a second request she made in June the day before she needed take the leave. Following the June denial, the employee spoke with defendant's vice president of member relations, who also denied her request. After the employee said she still was planning to go to the convention because she couldn't chose her job over her religious beliefs, the vice

president told her to clean out her desk and leave. A 2-year consent decree provides \$95,000 to the former employee; prohibits defendant from denying employees reasonable accommodation of their religious beliefs or terminating or otherwise adversely affecting employees' employment because of their beliefs; and prohibits retaliation.

In *EEOC v. Abercrombie & Fitch Stores, Inc.*, Nos. 5:10-CV-03911 and 5:11-cv-3162 (N.D. Cal. Sept. 3, 2013), judges in separate EEOC cases granted summary judgment to the agency on the issue of whether allowing Muslim employees to wear hijabs – headscarves worn by Muslim women as an expression of their religious beliefs – would constitute an undue hardship to a national clothing retailer due to the retailer's practice of using its employees as "models" for its products. The courts found no evidence supporting the retailer's argument that deviations from its "Look Policy," which prohibits headware, affected either store performance or "brand image." The suits were settled together through a 3-year stipulated judgment and decree providing \$2,500 in backpay and \$20,500 in compensatory damages to an applicant denied employment at a store in Milpitas, California, after answering in an interview that she was Muslim and had to wear a headscarf, and \$120 in backpay and \$47,800 in compensatory damages to a Muslim employee fired from a San Mateo, California, store for failing to remove her hijab while on the clock. The stipulated judgment and decree prohibits failure to reasonably accommodate an applicant's or employee's religious practices absent a showing of undue hardship, and requires the retailer to adhere to a revised accommodation policy attached to the decree, and to inform managers that employees may be permitted to wear headscarves as set forth in the policy and that requests to wear headscarves as religious accommodations must be forwarded to the human resources department for consideration.

2. Equal Pay Act

In *EEOC and United States v. Texas Department of Agriculture and General Land Office*, No. A-11-CV-827 (W.D. Tex. Nov. 19, 2012), EEOC alleged that defendants' predecessor, the Texas Department of Rural Affairs, which provided state and federal resources to rural Texas communities, paid a female program specialist doing disaster recovery work \$25,000 a year less than a male program analyst doing the same or substantially equal work. EEOC's Equal Pay Act suit was consolidated with a Title VII action filed by the U.S. Department of Justice alleging that defendants discriminated against the program specialist and two other female employees in compensation because of their sex, and terminated them in retaliation for complaining about the discrimination. A settlement

agreement resolving the consolidated actions provides \$175,000 in backpay to be shared equally by the three female employees.

In *EEOC v. Cty. Comm'rs of Worcester*, No. 1:12-cv-02595 (D. Md. Aug. 29, 2013), EEOC alleged that the successor to the Liquor Control Board of Worcester County (LCB), the wholesale dispensary for distilled spirits and wine to retailers in Worcester County on Maryland's Eastern Shore, paid three female store clerks in retail outlets LCB operated less than two male store clerks who performed the same duties. The pay discrimination began with the hire in April 2010 of a male clerk at an hourly rate \$2-\$4 above what the three female clerks were paid, and ended on July 1, 2011, when Worcester County's newly-created Department of Liquor Control took over LCB's operations. A 3-year consent decree provides \$60,000 to the three female clerks, approximately half backpay and half liquidated damages. The decree enjoins Worcester County from engaging in wage discrimination on the basis of sex.

In *EEOC v. PFERD Milwaukee Brush Company, Inc.*, No. 12-CV-982 (E.D. Wis. May 8, 2013), EEOC alleged that the American subsidiary of a German business that designs and manufactures specialty tools and brushes paid a female production coordinator less than her male predecessor for doing substantially similar work. When defendant's male production coordinator retired in May 2010 he was earning about \$60,000 a year. A female production clerk earning about \$37,000 a year was put into the position, but when she asked if she would be paid the same as the former coordinator, defendant told her "No," because the job was going to be restructured and she would not be performing the same job functions as the former production coordinator. The former production coordinator, however, said the female production coordinator was performing the same duties he had performed, plus some others. A 3-year consent decree provides the female production coordinator \$65,000, enjoins defendant from paying female employees less than male employees in the same job position because of sex or for work considered equal under the EPA, and prohibits retaliation.

3. Age Discrimination in Employment Act

a. Hiring

In *EEOC v. Marymount Manhattan College*, No. 12-cv-2388 (S.D.N.Y. Jan. 3, 2013), EEOC alleged that a New York City liberal arts college rejected a 64-year-old applicant for an assistant professor of dance composition position because of her age. The applicant was one of 3 finalists out of over 50 applicants for a tenure track position in defendant's dance department. After eliminating the other two finalists, the search committee

enlarged the finalist pool to include a 37-year-old individual who applied late in the process; defendant then hired the 37-year-old applicant. At the time of the selection, the 64-year-old applicant, who had extensive experience as a teacher at defendant and other colleges, was in the last year of a 3-year appointment as an Artist in Residence in defendant's dance department. The search committee said the person selected, who had limited college teaching experience, was "at the right moment of her life for a commitment to a full-time position." A 4-year consent decree provides \$125,000 in backpay to the older applicant, enjoins defendant from using age as a factor in any hiring decision in violation of the ADEA, and enjoins ADEA retaliation.

In *EEOC v. Western Energy Services of Durango, Inc.*, No. 1:11-CV-0866 (D.N.M. April 8, 2013), EEOC alleged that a provider of electrical utility services in Arizona, New Mexico, and Utah, refused to hire two individuals at jobsites in northwestern New Mexico because of their ages, 72 and 61. The IBEW local union referred the individuals for journeymen/linemen jobs with defendant in August and September 2009, but defendant refused to accept the referrals, telling the union dispatcher that the individuals were too old. Defendant instead hired less experienced individuals in their 20s. A 3-year consent decree provides \$65,000 (half backpay and half liquidated damages) to the 61-year-old and \$25,000 in backpay to the 72-year-old's estate. The decree applies to all of defendant's facilities and enjoins age discrimination and retaliation under the ADEA.

b. Discharge

In *EEOC v. Town of Elkton*, No. 1:10-CV-02541 (D. Md. Oct. 16, 2012), EEOC alleged that a town of about 15,000 people in Cecil County, Maryland, discharged its assistant town administrator/finance director because of his age. At a May 2007 meeting of the town's mayor and four commissioners, one of the commissioners said the town needed "a young guy out of college," who could be groomed for the town administrator position. Following a meeting in November 2007, the mayor and commissioners directed the town administrator to fire the 70-year-old assistant town administrator/finance director, who retired in lieu of being discharged; he was replaced by a finance director in his 40s and an assistant town administrator in her late 20s. A 3½-year consent decree provides the former assistant town administrator/finance director with \$235,000 in monetary relief, and enjoins the town from age discrimination.

In *EEOC v. Hutchinson Sealing Systems, Inc.*, No. 2:12-cv-10264 (E.D. Mich. June 12, 2013), EEOC alleged that a Michigan-based manufacturer of parts for the transportation

industry laid off three project engineers at its Auburn Hills, Michigan, facility because of their ages: 62, 51, and 48. They were the only project engineers laid off, and were 3 of the 4 oldest of defendant's 12 project engineers. In laying off the 51- and 48-year-olds 2 months after the 62-year-old, defendant applied a new selection criterion that lowered their scores compared to younger project engineers. A 2½-year consent decree enjoins defendant from considering age as a basis for selecting employees for layoff or termination and from retaliation, and provides \$100,000 in backpay for the 62-year-old former project engineer, \$60,000 for the 51-year-old, and \$50,000 for the 48-year-old.

In *EEOC v. AT&T Corp.*, No. 4:11-cv-990 (W.D. Mo. Sept. 4, 2013), EEOC alleged that a multinational telecommunications conglomerate disciplined and terminated a 53-year-old sales coach manager at its Lee's Summit, Missouri, facility because of her age. In 2007, a new facility general manager told the two center sales managers to put their subordinate sales coach managers on performance improvement plans if they failed to meet performance expectations over an extended period. The 53-year-old sales coach manager, who had worked for defendant since 1992, was placed on a performance improvement plan and then terminated even though she was meeting defendant's employment standards to a greater degree than significantly younger sales coach managers, who were allowed to stay in the department or transfer to different positions. A 2-year consent decree provides the former sales coach manager with \$125,000 in backpay and an equal amount in liquidated damages.

In *EEOC v. Kumbar Management, LLC*, No. 4:12-cv-422 (N.D. Okla. Sept. 4, 2013), EEOC alleged that a provider of management services for downtown Tulsa, Oklahoma, commercial real estate discharged a 53-year-old property manager because of her age. On October 29, 2010, defendant's new chief operating officer, who had started the day before, told the property manager, a long-time employee with an exceptional performance record, that her position was being eliminated. Three days later, defendant replaced the property manager with two substantially younger women (ages 23 and 39), increasing the number of property managers from three to four. The new chief operating officer told defendant's controller that he terminated the property manager because he wanted "younger and prettier" property managers to meet with potential tenants and entertain them after work. A 3-year consent decree provides the former property manager \$140,000 in backpay, and prohibits defendant from discriminating against any applicant or employee because of age.

4. Americans with Disabilities Act

a. Hiring

In *EEOC v. New Hanover Regional Medical Center*, No. 7:09-CV-00085 (E.D.N.C. Oct. 3, 2012), EEOC alleged that a Wilmington, North Carolina, operator of health care facilities denied employment to individuals taking legally prescribed narcotic medications because it regarded them as substantially limited in thinking, concentrating, or working due to side effects it assumed they suffered from the medications. Applicants given conditional offers of employment were rejected after their drug screens were positive for a narcotic, even though they submitted evidence that the medication was prescribed and produced no side effects. A 2-year consent decree provides \$146,000 to 15 individuals in amounts determined by EEOC. Defendant is prohibited from disqualifying applicants and employees from employment solely because they are taking prescribed narcotic medicine, and must revise three of its policies (on alcohol and drugs, postemployment offer medical assessments, and medical examinations) to bring them into compliance with the ADA. Defendant will submit detailed reports to EEOC semiannually on applicants disqualified and employees terminated based on the appropriate use of lawful narcotic medication prescriptions.

In *EEOC v. J.A. Thomas & Assoc.*, No. 2:11-CV-13347 (E.D. Mich. Dec.20, 2012), EEOC alleged that a Smyrna, Georgia-based business that assists hospitals in managing clinical documentation refused to hire a former employee for a remote (working from home) health information management specialist position due to her disability, amputation of both legs below the knees. Under a settlement agreement, defendant will provide the former employee \$325,000 in backpay and \$25,000 in nonpecuniary compensatory damages.

b. Reasonable Accommodation

In *EEOC v. ITT Education Services, Inc. d/b/a ITT Technical Institutes*, No. 2:11-cv-02504 (E.D. Cal. June 18, 2013), EEOC alleged that a national private technology-oriented college system refused to accommodate a blind applicant for an educational recruiter position at the college's Rancho Cordova, California, site, and denied him the job because of his disability. The applicant was required to take a timed Wonderlic assessment test administered over the Internet, and after starting the test, he realized his screen-reading software wouldn't permit him to complete it within the 8-minute limit. He telephoned defendant and asked for possible accommodations such as extra time or

a reader, but defendant refused and eliminated him from further consideration. A 3-year consent decree provides \$74,775 in damages to the rejected applicant and \$24,225 in attorney's fees to the legal aid society that represented him as an intervenor. The decree enjoins defendant from disability discrimination and retaliation, and requires defendant to indicate on all hiring materials that accommodations are available for applicants with disabilities; to create a plan to ensure that its applications and employment-related testing are accessible to persons with sensory disabilities; and to instruct entities it retains to perform recruiting or hiring functions to notify it of any request for reasonable accommodations from persons with sensory impairments.

In *EEOC v. Interstate Distributor Company*, No. 12-cv-02591 (D. Colo. Nov. 8, 2012), EEOC alleged that a national truckload freight carrier maintained policies requiring disabled employees to return to work from medical leaves of absence within 12 weeks and without restrictions. A 3-year consent decree provides \$4,850,000 (allocated as 25% backpay and 75% compensatory damages) to be distributed by EEOC following a notice and claims procedure. The decree enjoins defendant at all facilities from disability discrimination and from retaliation for opposing discrimination under the ADA. Defendant will notify all employees in writing that it no longer has full-duty or maximum leave policies and will distribute guidance addressing how reasonable accommodations will be provided and to whom accommodation requests should be made. Defendant will report to EEOC every 6 months on reasonable accommodation requests and the outcome.

In *EEOC v. Harris Bank*, No. 12-C-7793 (N.D. Ill. May 2, 2013), EEOC alleged that a financial services organization with over 300 branches in Illinois, Indiana, and Wisconsin failed to reasonably accommodate, terminated, and failed to rehire a class of disabled employees who took medical leaves of absences. Defendant maintained a medical leave policy that provided only FMLA job-protected leave. After an employee's FMLA leave was exhausted, his or her job was posted and the employee was reinstated only if the position had not been filled; when the job had been filled, the employee was terminated as of his or her return to work date. A 2-year consent decree provides \$400,000 in compensatory damages to 14 individuals and enjoins defendant from not providing reasonable accommodations to employees who want to return to work from medical leaves, and from retaliation. No employee on a medical leave will be terminated without the approval of an accommodation consultant, and employees who take a medical leave of absence will be informed in writing by of how long their positions will be held for them; their right to request that defendant hold their jobs for a longer period of time as an accommodation; and the name of and contact information for the accommodation consultant. For employees interested in returning to work, but

whose positions have been filled, defendant will consider reassignment to an open position (process detailed in the decree).

In *EEOC v. Cont'l Structural Plastics, Inc.*, No 1:11-cv-02081 (N.D. Ohio Aug. 30, 2012), EEOC alleged that a manufacturer of molded plastic automobile parts with operations in several states failed to reasonably accommodate the disability of a laborer referred by a temporary agency who had no fingers on his right hand. The laborer was assigned to operate a punch machine at defendant's Conneaut, Ohio, facility, but was unable to push a button (surrounded by a guard) on the right side of the machine while simultaneously operating a press on the left side. Defendant discharged him after 1 day without considering reasonable accommodations such as modifying the guard on the machine or obtaining a prosthesis that the employee could strap onto his right hand to enable him to push the button on the machine. A 2-year consent decree provides the laborer with \$80,000 in compensatory damages and \$25,000 in backpay, and enjoins defendant from discriminating based on disability.

In *EEOC v. Creative Networks, LLC*, No 2:09-cv-02023 (D. Ariz. Sept. 19, 2013), EEOC alleged that a provider of job training and educational support to individuals with disabilities or other special needs failed to provide hearing impaired applicants reasonable accommodations for required preemployment training and orientation, thus denying them employment due to their disabilities. Defendant limited payment for interpreter services to \$200 for the required 24 hours of preemployment training. A 2-year consent decree provides an applicant with sensorineural hearing loss, who was rejected because she couldn't afford the over \$2,000 cost of an interpreter for the training, with \$14,375 in backpay and \$43,125 in compensatory damages. The decree permanently enjoins defendant from discriminating against applicants based on disability. Defendant will not categorically limit accommodations or cap the monetary amount it will spend on accommodations, and will eliminate its practice of limiting accommodations to \$200 for sign language interpreter services for hearing-impaired applicants and eliminate any other monetary limitations imposed on accommodations for defendant's 24 hours of required preemployment training.

c. Harassment and Terms and Conditions of Employment

In *EEOC v. Hill Country Farms, Inc., d/b/a Henry's Turkeys*, No. 3:11-cv-00041 (S.D. Iowa May 1, 2013), EEOC alleged that a labor contractor subjected intellectually disabled employees at a turkey processing plant in West Liberty, Iowa, to a disability-based hostile work environment and adverse terms and conditions of employment. On

EEOC's summary judgment motion based on discriminatory pay, the court awarded 32 individuals a total of \$1,374,266.53 based on the difference between the \$65 per month the intellectually disabled employees were paid during a 2-year period and the comparative or market wage rates (\$11-\$12 an hour) paid to similarly situated or comparably qualified workers having equivalent tenure. At a week-long trial on the harassment claim, EEOC presented the employees' stories through a behavioral psychologist with expertise in the care and treatment of individuals with intellectual and developmental disabilities. Evidence was presented that the employees were physically and verbally abused, including being hit and kicked and forced to carry heavy weights as punishment, and were referred to by expressions such as "retarded," "stupid," and "dumb ass." The jury found for EEOC and awarded the 32 intellectually disabled employees \$5.5 million each in compensatory damages and \$2 million each in punitive damages. The court later reduced the claimants' damages awards to the applicable \$50,000 ADA cap, for a total of \$1.6 million; awarded prejudgment interest of \$283,568.03 on the backpay awards and \$138,109.12 on the damages awards; and permanently enjoined defendant from discriminating against applicants and employees with physical, mental, or intellectual impairments in violation of the ADA.

d. Medical Inquiries

In *EEOC v. Dillard's, Inc.*, No. 0:08-CV-01780 (S.D. Cal. Dec. 18, 2012), EEOC alleged that a national department store chain required employees to disclose the nature of their illnesses in order to obtain medical excuses for absences. A consent decree provides \$2 million in monetary relief and enjoins defendant from discriminating in terms and conditions of employment based on disability, from requiring the disclosure of confidential medical information, and from retaliation. Defendant will retain an EEO consultant, approved by EEOC, to implement and monitor compliance with the decree, and will rescind its medical disclosure policy.

e. Discharge

In *EEOC v. University of Maryland Faculty Physicians, Inc.*, No. 1:12-cv-02887 (D. Md. Feb. 14, 2013), EEOC alleged that a provider of administrative and medical services to the University of Maryland School of Medicine discharged a newly hired receptionist/scheduler because of her disability. The employee started at defendant's Baltimore, Maryland, Pediatric Specialty Clinic on September 8, 2009, and while still in her probationary period, took 16 days of unpaid leave (4 days in November 2009 and 12

consecutive days in December 2009 and January 2010) to receive medical treatment for abdominal pain, fever, diarrhea, and vomiting. On January 7, 2010, the employee's physician diagnosed her condition as Crohn's disease. The employee called her supervisor the same day and told her of the diagnosis and that she had been cleared to return to work on January 11. Defendant fired the employee the next day. A 3-year consent decree provides the former employee with \$55,000 in backpay and \$37,500 in nonpecuniary compensatory damages, and enjoins defendant from discriminating against or denying reasonable accommodations to qualified individuals with disabilities.

In *EEOC v. Probat Inc., and Probat Burns, Inc., d/b/a Bauermeister, Inc.*, No. 2:11-cv-02851 (W.D. Tenn. May 6, 2013), EEOC alleged that German businesses operating a facility in Memphis, Tennessee, that grinds coffee beans and other food products, discharged a mechanic with bipolar disorder because of his disability. The employee suffered a manic episode in March 2009 and was hospitalized for a week. He completed an intensive outpatient program and the clinical director of the program wrote a letter stating that he had made excellent progress since his hospitalization, no longer exhibited mental health instability, and could return to work. Defendants did not permit employee to return, and asked him for an evaluation by a second psychiatrist, which the employee provided on May 15; this evaluation also stated that the employee was able to return to work without restrictions. Defendants continued to require fitness for duty exams, and fired the employee on June 30, 2009. A 2-year consent decree provides the former employee \$80,416.59 in backpay and \$19,583.41 in compensatory damages and enjoins defendants from disability discrimination and from failing to provide accommodations in violation of the ADA.

In *EEOC v. Fidelity Engineering Corporation*, No. 1:13-cv-00098 (D. Md. June 7, 2013), EEOC alleged that a provider of heating, ventilation, and air conditioning services in the mid-Atlantic States area discharged a sheet metal mechanic at its Sparks, Maryland, facility because of a heart impairment. The employee's job involved fabricating and installing tin and sheet metal. After undergoing aortic valve replacement surgery in September 2010, the employee was permanently placed on blood thinner medication. His doctor cleared him to return to work effective January 4, 2011, with no restrictions, noting that because of the blood thinning medication the employee "ha[d] to be careful about receiving cuts, but normal precaution should be adequate for him to perform his usual work." Defendant determined it was unsafe for the employee to work as a sheet metal mechanic while on blood thinners and discharged him. A 3-year consent decree provides \$25,000 in backpay and \$53,500 in damages to the former employee, and enjoins defendant from disability discrimination and retaliation.

In *EEOC v. Western Trading Company, Inc.*, No. 10-cv-02387 (D. Colo. July 2, 2013), EEOC alleged that a retailer of Army-Navy surplus gear, men's wear, and camping equipment with two locations in Colorado failed to reasonably accommodate the epilepsy of a stocking clerk at its Englewood, Colorado, store and discharged him because of his disability. A few days after he started at defendant in May 2008, the stocking clerk had a seizure and was sent home. He was allowed to return about 2 weeks later after providing releases from his medical providers. The stocking clerk had a seizure at home about a week after his return to work, and defendant would not let him work again despite receiving additional information from his medical providers. Following a 4-day trial, the jury returned a verdict for EEOC on the discharge claim and for defendant on the failure to accommodate claim, and awarded the former employee \$24,000 in backpay, \$20,000 in compensatory damages, and \$65,000 in punitive damages. The court reduced the compensatory and punitive damages awards to a combined total of \$50,000 (the ADA statutory cap), and granted EEOC judgment as a matter of law on defendant's failure to mitigate defense, vacating the jury's backpay award and awarding the former employee \$46,422 in backpay and \$5,618 in interest. A 3-year consent decree permanently enjoins defendant from discriminating on the basis of disability or on the need to provide reasonable accommodations for qualified individuals with disabilities.

In *EEOC v. The Scooter Store – Levittown, LLC and the Scooter Store, Inc.*, No. 0-11-CV-04226 (E.D.N.Y. Dec. 21, 2012), EEOC alleged that a national supplier of scooters and power chairs and its New York subsidiary failed to provide an employee who assembled and repaired wheelchairs at defendants' Farmingdale, New York, distribution center a leave of absence to obtain medical treatment, and discharged him because of his disability, psoriatic arthritis, a chronic autoimmune disease that causes joint inflammation. On April 1, 2009, the employee injured his right knee and his psoriatic arthritis complicated his treatment and recovery. He notified defendants he would need time off for treatment, and provided regular status updates. On April 7, 2009, the employee informed defendant that his rheumatologist said he probably would need a knee replacement and was incapacitated until further notice. Defendants terminated the employee several days later for violating its 3-day no-call, no-show policy. A 5-year consent decree provides \$49,500 in backpay and \$49,500 in compensatory damages to the former employee. The decree enjoins defendants from failing to accommodate disabilities and from terminating employees based on disability. Defendants revised their no-call, no-show policy to provide that employees with disabilities who have notified defendants of an absence need not continue to call in. Americans with Disabilities Act and the Genetic Information Nondiscrimination Act

5. Americans with Disabilities Act and the Genetic Information Nondiscrimination Act

In *EEOC v. Fabricut Inc.*, No. 13-CV-248 (N.D. Okla. May 7, 2013), EEOC alleged that a Tulsa, Oklahoma-based wholesale distributor of decorative fabrics, refused to hire an applicant for a memo clerk position because it regarded her as disabled, and that the employer unlawfully sought genetic information about applicants for employment. Defendant offered a temporary memo clerk a permanent position, and during her preemployment physical examination, she was required to complete a form that requested family medical information on 12 separate disorders, including heart disease, hypertension, cancer, and tuberculosis. Because the temporary employee experienced tingling in her hands during an examination procedure, she was required to see a doctor to be tested for carpal tunnel syndrome. Despite receiving a note from the doctor stating that the temporary employee did not have carpal tunnel syndrome, defendant refused to hire her. A 2-year consent decree provides \$50,000 in compensatory damages to the rejected applicant, prohibits discrimination on the basis of disability or genetic information, and prohibits retaliation. Defendant will abstain from inquiring, directly or indirectly, into the genetic information of an applicant or applicant's family member.

6. Retaliation

a. Waivers of Employment Discrimination Rights

In *EEOC v. Trinity Health Corp.*, No. CV-00309 (N.D. Ind. Dec. 18, 2012), EEOC alleged that the fourth largest Catholic healthcare system in the United States violated the retaliation provisions of Title VII and the ADEA by denying severance payments to employees who file discrimination charges with EEOC. A laundry attendant at the South Bend, Indiana, campus of St. Joseph Regional Medical Center, a ministry of defendant that provides healthcare services in north central Indiana, filed an EEOC charge in late 2008, and when she was notified she would be discharged March 21, 2009, filed a second charge on February 5, 2009. On February 17, 2009, the employee signed a severance agreement with defendant and St. Joseph's providing various benefits in return for which she released defendant from "legal claims or demands." When she did not receive her severance payment, she called St. Joseph's human resources department and was told she would not receive severance benefits because she had filed an EEOC charge in violation of the severance agreement. A 2-year consent decree provides the former employee with \$25,000 in damages, \$3,617.40 in unpaid severance, and \$470.40

in interest. The decree prohibits defendant from: (1) retaliating against any employee or former employee under Title VII or the ADEA, (2) instituting or maintaining a severance agreement and general release that prohibits an employee from filing a charge with EEOC, and (3) denying or delaying severance payments to any employee or former employee who has signed a severance agreement and general release and has filed a charge with EEOC or a state or local agency.

In *EEOC v. Cognis Corp.*, No. 2:10-CV-2182-MPM-DGB (C.D. Ill. Jan. 28, 2013), EEOC alleged that a chemical manufacturer retaliated against employees at its Kankakee, Illinois, facility by requiring as a condition of continued employment that they waive their right to file charges with EEOC and prospectively waive their right to pursue relief regarding future discrimination. In May 2007, defendant told a long-term employee that it was going to fire him for unsatisfactory performance, but that he could remain employed if he entered into a "Last Chance Agreement," which, among other provisions, waived his right to file charges with EEOC or seek recovery for future discrimination under Title VII. The employee signed the agreement, but during the 9-day revocation period, he asked defendant to remove the waivers. Defendant refused and the employee revoked the agreement on May 21, 2007. Defendant terminated him the same day. In a May 2012 decision, the court granted EEOC summary judgment on its claim that terminating the employee for revoking an agreement that required him to give up his rights under employment discrimination laws constituted retaliation under Title VII. The court also found that defendant's policy requiring employees to waive their rights to file a discrimination charge was void as a violation of public policy. A 2-year consent decree, executed by both Cognis and BASF Corporation, which purchased Cognis during the litigation, provides a total of \$500,000 to six individuals affected by the last chance agreement. The decree prohibits BASF at the Kankakee facility from retaliating under Title VII and from maintaining any last chance agreement that deters or interferes with employees' right to file charges with, or participate in investigations by, EEOC and State fair employment practices agencies. The six individuals affected by the last chance agreement will be notified of their right to file a charge of discrimination regardless of any contrary language in the agreement, and BASF will waive the limitations period for these individuals so long as they file a charge within 120 days of the date of the entry of the decree.

b. Discharge

In *EEOC v. Holmes & Holmes Industrial, Inc.*, No. 2:10-CV-00955 (D. Utah April 15, 2013), EEOC alleged that a Utah construction contractor subjected African American employees to a racially hostile work environment, and discharged employees for opposing the racial harassment. Defendant's superintendent/foreman on a Chevron project in Magna, Utah, regularly used racial slurs in referring to African American employees and directed racial jokes and derogatory racial comments at them. African American employees complained to management about the racial slurs and comments, and when the workplace atmosphere did not improve, two employees met with defendant's owners in August 2008. The owners expressed concern that the employees had invited Chevron's human resources manager to the meeting (he did not attend), and fired them shortly thereafter. A 3-year consent decree provides three former African American employees with \$230,000 in monetary relief (\$80,000 in backpay to one of them and \$150,000 in compensatory damages divided equally among all three) and written apologies. The decree enjoins defendant from race discrimination, racial harassment, and retaliation. Defendant is prohibited from rehiring the superintendent/foreman or engaging him in any capacity. Defendant will hire an Ombudsman to receive and investigate employee complaints of discrimination and harassment.

In *EEOC v. National Food Corp.*, No. 12-CV-0550 (E.D. Wash. May 15, 2013), EEOC alleged that an egg supplier headquartered in Everett, Washington, subjected a female barnworker at its Lind, Washington, facility to sexual harassment and discharged her because of her sex and in retaliation for complaining of sexual harassment, and discharged or constructively discharged four other employees for opposing discriminatory practices. The facility's male farm manager subjected the barnworker to sexually offensive conduct that included requests for sexual acts, and when she rejected his demands, he assigned her more difficult work, disciplined her unfairly, and reduced her work hours. In July 2009, a farm employee held a meeting at her home that was attended by defendant's production manager, who supervised the farm manager. At the meeting, employees complained about the farm manager sexually harassing female employees, but defendant took no action. The female barnworker was discharged in February 2010, after the farm manager learned in January that she participated in the July 2009 meeting and after she refused to perform a sexual act with him. Over the period February to September 2010, four other employees who attended the July 2009 meeting were either discharged or forced to resign due to adverse working conditions. A 4-year consent decree applicable to defendant's egg production facilities in eastern Washington and in South Dakota provides \$650,000 to the female barnworker and the

four other discharged employees, and enjoins defendant from sexual harassment and retaliation. Defendant will provide letters of apology to the five former employees, signed by the company president, and will not rehire the farm manager in any capacity.

In *EEOC v. River Point Farms, LLC and RPF Holdings, LLC d/b/a River Point Farms, LLC*, No. 2:12-CV-01775 (D. Ore. May 13, 2013), EEOC alleged that a large onion grower and processor subjected a female laborer at its Hermiston, Oregon, farm to a sexually hostile work environment, discharged her because of her sex, and laid her off and failed to rehire her in retaliation for her complaints of discrimination. The work at the farm is seasonal and the female laborer and most other workers are routinely laid off and recalled to work. The female laborer's supervisor made sexually offensive remarks to her, and in September 2010 terminated her after she complained about being physically abused by a male coworker. The female laborer was rehired after complaining to defendant's human resources department, but was transferred to a less favorable crew and laid off about 6 weeks later in October 2010. She was not recalled until 8 months later, after filing an EEOC charge. A 3-year consent decree provides \$150,000 to the female laborer and enjoins defendant from sexual harassment and retaliation.

Defendant will place complaint boxes at all facilities and create a toll-free number for reporting complaints. Defendant will provide the female laborer with a letter of regret signed by the company's president, and will not rehire the supervisor in any capacity.

In *EEOC v. Torqued-Up Energy Services, Inc.*, No. 6:12-CV-0051 (S.D. Tex. May 28, 2013), EEOC alleged that a Tyler, Texas-based provider of products and services to petroleum and gas industry operations in Texas, Oklahoma, and Louisiana subjected a black equipment operator on a pump truck to a racially hostile work environment and retaliated against him for complaining about the harassment and filing an EEOC charge. When hired by defendant in July 2010, the employee had about 30 years of experience in the oil industry, but no pump truck experience, and he took the job with defendant with the hope that he would advance to higher paying positions. The employee's supervisors did not permit him to operate the pumps on the trucks, and used racial slurs when talking to him, including the terms "nigger" and "boy." After the employee complained to various managers about the racial slurs, he was reassigned from the pump truck crew to washing trucks in the shop. The employee left defendant in October 2010, and defendant's general manager told a subsequent employer that the employee had filed an EEOC charge and that the employer should "cut his losses." The employee was discharged by his subsequent employer shortly thereafter. A 2-year consent decree provides the former employee \$150,000 (\$15,000 representing backpay), and enjoins defendant from race discrimination, including harassment, and from

retaliation. The decree requires that defendant provide the former employee with a reference letter stating that he performed his duties satisfactorily.

In *EEOC v. Help at Home, Inc.*, No. 4:12-cv-01498 (E.D. Mo. Aug. 6, 2013), EEOC alleged that a provider of in-home personal care services to elderly and disabled individuals in 10 Midwest and Southeast States subjected two female homecare schedulers at its Hillsboro, Missouri, facility to gender-based harassment, and fired them and the facility's branch manager for opposing the harassment. The regional director of defendant's Missouri sites, a woman, flaunted her sexual relationship with a female employee, invited the two female schedulers to participate in sexual conduct with her and the female employee, and made offensive sexual comments to the schedulers. The schedulers complained to the branch manager, who sent an email to a defendant vice president and defendant's owners reporting the complaints. Defendant fired the schedulers a few days later, and a few months later, fired the branch manager for alleged performance problems, none of which had been documented in her file. A 2-year consent decree provides the three former employees, who intervened, \$75,625 each (two thirds backpay and a third compensatory damages), and \$75,620 in attorney's fees. The decree prohibits defendant from engaging in discrimination based on sex and from retaliating against anyone for opposing sexual harassment or retaliation.

C. Appellate and Amicus Cases

1. EEOC's Investigative Authority

EEOC v. Aerotek Inc., 498 F.App'x 645 (7th Cir. Jan. 11, 2013) (unpublished)

The district court ordered enforcement of an EEOC administrative subpoena served on Aerotek, a staffing agency, and Aerotek appealed. The subpoena sought broad demographic information about internal and contract employees as well as information about recruitment, selection, placement, and termination decisions. In response to Aerotek's untimely petition to modify or revoke the subpoena, EEOC modified two categories of information sought. Aerotek refused to comply fully with the modified subpoena, and in EEOC's enforcement action, the district court rejected Aerotek's argument that the Commission did not have a quorum when it reviewed Aerotek's petition to revoke or modify, and that therefore the court lacked jurisdiction over EEOC's action. The court also rejected all of Aerotek's objections based on relevance and burdensomeness.

The Seventh Circuit held that Aerotek had waived its right to challenge the subpoena because its petition to revoke or modify was untimely. The court of appeals therefore did not need to address the question whether the Commission's lack of a quorum affected its ability to act on the petition, saving that issue for another day. For the same reason, the court of appeals did not reach any of Aerotek's relevance or burdensomeness arguments.

2. Limitations Periods

a. Charge Filing

Whorton v. Washington Metro. Area Transit Auth., 924 F.Supp.2d 334 (D.D.C. Feb. 21, 2013)

In a Statement of Interest filed at the district court's request, EEOC and the Department of Justice told the court that the charge-filing period for Washington Metro employees is 180 days. The government explained that although plaintiff filed a charge dually with EEOC and the Prince George's County Human Rights Commission, the county agency did not have authority to grant or seek relief for the alleged discriminatory conduct by the Washington Metro; therefore, she could not take advantage of the extended 300-day limitations period applicable where a state or local fair employment practices agency has such authority. The district court acknowledged the government's Statement of Interest and held that the limitations period for plaintiff's charge was 180 days. Despite the shortened limitations period, the court found that many of the plaintiff's claims were timely because of the rule that hostile work environment claims can be filed within 180 days of the last act contributing to the hostile environment.

b. Harassment Claims

Mandel v. M & Q Packaging Corp., 706 F.3d 157 (3d Cir. Jan. 14, 2013).

Plaintiff claimed that throughout her employment she was sexually harassed and discriminated against by male managers, supervisors, and owners, by being referred to with sexist terms, having her clothing and physical appearance commented upon, and being told to clean the bathroom and make coffee while male employees were not given such tasks. The district court excluded most of the plaintiff's evidence of sexual harassment as time barred, inadmissible because contained only in her charge, or

otherwise insufficient, and then held that no reasonable jury could find from the remaining evidence that she was subjectively offended by the alleged conduct. On appeal, the Third Circuit agreed with EEOC's position as amicus curiae that plaintiff alleged at least one act falling within the limitations period, and many of the earlier acts involved similar conduct by the same individuals, and remanded the case to the district court to consider whether the alleged incidents were part of a single hostile work environment. The court added that as part of this inquiry the district court should consider the incidents plaintiff described in her signed EEOC charge because an affidavit attached to a signed charge can be used to raise genuine issues of material fact.

c. Waiver

Boaz v. FedEx Customer Info. Servs., Inc., 725 F.3d 603 (6th Cir. Aug. 6, 2013).

The plaintiff sued FedEx, alleging it paid her less than it had paid her male predecessor in violation of the EPA and failed to pay her overtime wages in violation of the Fair Labor Standards Act (FLSA). The district court granted summary judgment to defendant because the plaintiff failed to file suit within the 6-month period required by her employment agreement. EEOC and the Department of Labor filed a joint amicus curiae brief, contending that an employer may not use an employment contract to shorten the statutory limitations period. The Sixth Circuit agreed and reversed, ruling that employers cannot shorten the limitations period in the FLSA because this would have the same effect in many cases as waiving the claim, and the Supreme Court has ruled that employees cannot waive their FLSA rights. The court said the same is true for the EPA because it is part of the FLSA.

3. Fair Labor Standards Act Collective Actions

In re Wells Fargo, No. 12-20605 (5th Cir. March 12, 2013)

In a joint amicus curiae brief opposing Wells Fargo's petition for a writ of mandamus, EEOC and the Department of Labor argued that the district court did not abuse its discretion in conditionally certifying this overtime collective action under the Fair Labor Standards Act (FLSA). The district court applied a two-step certification approach routinely used in FLSA collective actions. At Step 1 – the “notice” or “conditional certification” stage – the named plaintiff makes a preliminary showing that a class of employees are similarly situated to him or her, and the court then authorizes discovery of the names and addresses of those employees and the mailing of a court-approved

notice to them regarding their rights to join the plaintiff's action. At this stage, since the issue is only whether to allow the mailing of notices to potential opt-in plaintiffs, the court uses a relatively relaxed standard for determining whether the employees likely are similarly situated. Later, at Step 2 – the potential “decertification” stage – the court will apply a more rigorous analysis in determining whether the initial plaintiff and the employees who have opted in are actually similarly situated. If they are not, the court will decertify the collective action, requiring the opt-in plaintiffs to pursue their claims independently.

Wells Fargo asked the Fifth Circuit to vacate the district court's conditional-certification decision, arguing that the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 1541 (2011), should apply to FLSA collective actions, and that the two-step approach for certifying FLSA collective actions is impermissible. EEOC and DOL argued in their amicus brief that the district court's ruling did not remotely meet the criteria for resort to a circuit court's extraordinary mandamus power. The agencies explained that district courts almost uniformly apply the two-step approach, which furthers the basic purposes underlying the FLSA. The agencies also stressed that Federal Rule of Civil Procedure 23 does not apply to FLSA collective actions, rendering *Dukes* inapposite. In a one-line order, without explanation, the Fifth Circuit denied Wells Fargo's petition for a writ of mandamus.

Sutherland v. Ernst & Young LLP, 726 F.3d 290 (2d Cir. Aug. 9, 2013).

This proposed collective action seeking overtime pay under the Fair Labor Standards Act (FLSA) involved the enforceability of a class action waiver in an arbitration agreement the plaintiff signed. The district court, following circuit precedent, denied defendant's motion to compel arbitration of plaintiff's individual claim, ruling that the plaintiff could not effectively vindicate her substantive FLSA rights in an individual arbitration proceeding because it would cost her about \$200,000 to recover less than \$2,000. EEOC and the Department of Labor filed a joint amicus curiae brief arguing that the district court applied the Second Circuit precedent correctly. Following submission of the agencies' brief, the Supreme Court upheld the enforceability of a class action waiver in an arbitration agreement in a case involving antitrust claims, *Am. Express Co. v. Italians Colors Rest.*, 133 S. Ct. 2304 (2013). The Court held that the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* the remedy. Applying this decision, the Second Circuit ruled that the FLSA does not prohibit class action waivers and that the high costs that plaintiff would incur in

arbitrating her claim on an individual basis did not justify invalidating the class action waiver in her arbitration agreement.

4. Proof

a. Direct Evidence

EEOC v. DynMcDermott Petroleum Operations Co., 537 F.App'x 437 (5th Cir. July 26, 2013) (unpublished)

EEOC alleged that defendant violated the ADEA and ADA by refusing to hire a former employee for a planner/scheduler position because of his age (56) and his relationship with his wife, who had cancer. The former employee had received excellent evaluations from defendant in the planner/scheduler position, but he left to take another job and then was laid off in a reduction in force. When the planner/scheduler position became vacant again, defendant's lead scheduler pressed for the former employee's rehire, and the hiring manager stated that he really knew the job. Defendant's site director, however, stated repeatedly, orally and in emails, that despite his qualifications the former employee should not be hired because he was too old; his wife had cancer, which likely would cause him to miss too much work; and the company needed younger employees because of its aging workforce. Defendant hired a younger person for the job, who had experience as a planner but, unlike the former employee, knew nothing about a specialized program used at defendant, which was a critical skill for the position.

The district court granted summary judgment to defendant, concluding that the site director's statements were mere stray remarks, that he was not the decisionmaker, and that EEOC's other evidence did not show that defendant's proffered reason for selecting the younger individual — his superior qualifications — was a pretext for discrimination. The Fifth Circuit reversed, holding that viewed in the light most favorable to EEOC, the evidence could support a finding that the former employee was denied employment because of his age or his association with his disabled wife. The court said that the site director's statements could be considered either direct or highly persuasive circumstantial evidence because a jury could find that he had influence or leverage over defendant's decisionmaking. The court also said there was ample evidence of pretext: the discriminatory statements and the former employee's substantial prior experience, factual inconsistencies surrounding the hiring, and the hiree's lack of knowledge about defendant's specialized program.

Fried v. LVI Services, Inc., 500 F.App'x 39 (2d Cir. Oct. 15, 2012)

The 70-year-old plaintiff in this age discrimination suit worked as the defendant's executive chairman and chairman of the board. He resigned after the company brought on a new CEO, age 47, who immediately began a campaign to get him to retire, including reassigning all of his existing duties to younger workers. When the plaintiff asked why his duties were being reassigned, the CEO responded: "You're 71 years of age, how long do you expect to work. And what if you get hit by a bus, and we have to plan for the future." The district court granted summary judgment to defendant. It characterized the CEO's age-related comment as a stray remark, and said that the single, isolated mention of plaintiff's age could not, standing alone, create a fact issue. The court also rejected as insufficient evidence of age discrimination emails from the CEO indicating that he wanted plaintiff to retire, and the reassignment of plaintiff's job responsibilities to younger employees.

On appeal, EEOC argued as amicus curiae that the district court erred in characterizing the CEO's statement to the plaintiff as a stray remark; that there was sufficient additional evidence of age discrimination in the record; and that the district court erred in disaggregating the evidence in the record and concluding that each individual category of evidence identified was insufficient, standing alone, to show pretext. The Second Circuit affirmed. The court acknowledged that the remark about plaintiff's age was made by defendant's new CEO less than 6 weeks prior to plaintiff's termination and expressly referenced his age in the context of a dispute about job duties. The court concluded, however, that plaintiff failed to carry his burden to show that a reasonable jury could find that he would not have been fired, or his duties reassigned, "but for" his age.

b. Honest Belief Rule

Tibbs v. Calvary United Methodist Church, 505 F.App'x 508 (6th Cir. Nov. 20, 2012) (unpublished)

The African American plaintiff in this race discrimination action had worked as a preschool teacher for the defendant for over 20 years when she was terminated for purported insubordination. She argued that Caucasian teachers who had engaged in the same or similar misconduct and worked under the same supervisor as she did were not fired. Without addressing plaintiff's comparator evidence, the district court granted summary judgment to the defendant, holding that the "honest belief" rule barred plaintiff's claim because she could not dispute that the defendant honestly believed she

had engaged in insubordination. Plaintiff appealed and EEOC filed an amicus curiae brief arguing that the honest belief rule did not bar plaintiff's claim because she offered evidence that the employer did not honestly believe she had engaged in misconduct, and she had offered other evidence suggesting that the reason given for her termination was a pretext for race discrimination. The Sixth Circuit affirmed, concluding that the honest belief rule applied because it was undisputed that the plaintiff left a heated meeting without her supervisor's permission. The court also concluded that plaintiff's proffered comparators were not similarly situated because the circumstances and seriousness of the other incidents of misconduct varied and none were analogous to hers.

c. Vicarious Liability

Vance v. Ball State Univ., 133 S. Ct. 23 (June 24, 2013).

The Supreme Court held in this case that in order to qualify as a supervisor for purposes of establishing an employer's vicarious liability for harassment under the Court's decisions in *Faragher v. City of Boca Raton*, 524 U.S. 774 (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), an employee must have the power to take a "tangible employment action." EEOC joined an amicus curiae brief filed by the United States arguing that EEOC's 1999 Enforcement Guidance: *Vicarious Employer Liability for Unlawful Harassment by Supervisors* reflects the proper standard for determining supervisory status. The Guidance states that a supervisor is an individual with (1) the authority to undertake or recommend tangible employment decisions affecting an employee, and/or (2) the authority to direct the employee's daily work activities. In its Guidance and as amicus, EEOC explained that this understanding of "supervisor" was faithful to the agency law principles, and policy purposes, outlined in *Faragher* and *Ellerth*. EEOC also contended that its longstanding definition reflects the reality that many individuals who lack the authority to take tangible employment actions nonetheless can (and do) harass employees by abusing their power to direct a person's daily work activities, rendering vicarious liability appropriate.

The Court rejected EEOC's definition, finding that the agency's Guidance lacked persuasive power and thus was not entitled to deference. The Court said that under *Faragher* and *Ellerth*, the authority to take tangible employment actions was "the defining characteristic of a supervisor." According to the Court, it was because supervisors had the authority to take tangible employment actions – and that the potential use of that power "hangs as a threat over the victim" – that the Court in

Faragher and *Ellerth* believed vicarious liability could be justified. Further, the Court reasoned, a rule defining supervisory status by reference to the ability to take tangible employment actions is easily workable and readily applied at both the summary judgment stage and at trial. By contrast, the Court concluded, use of what it characterized as the EEOC's "nebulous" two-pronged definition would require complex line-drawing and be too context-specific.

d. Pattern or Practice Framework

Serrano & EEOC v. Cintas Corp., 699 F.3d 884 (6th Cir. Nov. 9, 2012)

EEOC expanded its investigation of an individual sex discrimination charge and found reasonable cause to believe defendant discriminated against a class of female applicants for service sales representative positions (van pickup and delivery drivers with sales responsibilities) throughout the State of Michigan. After conciliation failed, EEOC intervened in a private action (later dismissed) and sought to present the case under the pattern or practice proof framework. The district court held that that method of proof was unavailable because EEOC had brought suit under section 706 of Title VII, rather than section 707 (which expressly refers to pattern or practice actions), and later denied EEOC's motion to amend its complaint to add a reference to section 707. The district court also ruled that EEOC had to identify at the prelitigation administrative stage each woman for whom it later planned to seek relief in court, and found that EEOC had failed to meet this requirement for the 13 female applicants EEOC (following exclusion of its pattern or practice proof) intended to litigate as individual claims. In addition, the court granted summary judgment to defendant on the merits of the 13 individual claims. Last, the court ordered EEOC to pay \$2,638,443.93 in attorney's fees and costs, largely based on EEOC's purported failure to satisfy its administrative prerequisites to suit.

On appeal, the Sixth Circuit held that the district court erred in concluding that EEOC cannot use the pattern or practice proof framework in a case brought only under section 706 of Title VII. The court also said that the absence of any reference to the pattern or practice framework in EEOC's complaint did not entitle defendant to judgment because a plaintiff is not required to plead the evidentiary proof framework it will seek to use. In addition, the court found that EEOC fulfilled its investigation and conciliation obligations by providing notice to defendant that it was investigating and seeking to conciliate a class claim. The court ruled favorably on other issues EEOC had raised, including reversing the district court's ruling that EEOC could not depose defendant's

CEO, who in a speech had referred to a myth among defendant managers that “females cannot be sales service representatives.” Based on its reversal of the district court’s dismissal of EEOC’s suit, the Sixth Circuit vacated the court’s attorney’s fees and costs award.

e. Harassment Claims

Waldo v. Consumers Energy Co., No. 726 F.3d 802 (6th Cir. Aug. 9, 2013).

Plaintiff, the only woman on a crew working on electricity transmission lines, alleged a sexually hostile work environment and obtained a favorable jury verdict. Defendant appealed, and EEOC filed an amicus curiae brief to argue that a hostile work environment plaintiff is not required to prove that the harassment unreasonably interfered with her work performance; rather, such unreasonable interference is merely one of the factors a court should consider in determining whether the harassment was sufficiently severe or pervasive to alter the conditions of the person’s employment. The Sixth Circuit affirmed the judgment in plaintiff’s favor without explicitly requiring plaintiff to demonstrate unreasonable interference. The court also cited relevant language from Supreme Court precedent making clear that unreasonable interference is only one factor in the severe/pervasive analysis.

EEOC v. Boh Bros. Constr. Co., 731 F.3d 444 (5th Cir. Sept. 27, 2013) (en banc)

EEOC obtained a favorable jury verdict on a claim that defendant violated Title VII by failing to stop the male superintendent of an isolated, all-male bridge maintenance crew from harassing one of the crew members on the basis of his sex. The jury awarded substantial compensatory and punitive damages (later reduced to the statutory cap), and the court ordered significant injunctive relief. A panel of the Fifth Circuit reversed, finding that even if a plaintiff could prove same-sex sexual harassment using gender stereotyping evidence, EEOC had failed to introduce sufficient proof that the crew member in fact failed to conform to masculine stereotypes.

On rehearing en banc, the full court affirmed the jury verdict except for the punitive damages award. The court held first that a plaintiff alleging same-sex sexual harassment can show that the harassment occurred because of sex by showing that it was motivated by the harasser’s subjective perception that the victim failed to conform to gender stereotypes. The court agreed with EEOC that this rule follows from the Supreme Court’s decisions in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and *Oncale*

v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998). The court then ruled that EEOC had offered sufficient evidence to sustain the jury's verdict that the harassment was because of sex -- here, because the superintendent viewed the crew member as not manly enough -- and that the harassment was sufficiently severe or pervasive to create a hostile work environment. The court also upheld the jury's finding that defendant failed to prove as a matter of law that it had "exercised reasonable care to prevent and correct any sexually harassing behavior." Further, the court rejected the defendant's challenge to the district court's award of injunctive relief.

The court agreed with defendant, however, that EEOC failed to offer sufficient evidence to support the jury's award of punitive damages because EEOC failed to show that the employer knew it might be acting in violation of federal law. Since the district court had reduced the jury's award of compensatory damages to comply with the statutory cap, the court remanded the case to the district court to decide whether some or all of that award should be restored.

See also *Mandel v. M & Q Packaging Corp.*, 706 F.3d 157 (3d Cir. Jan. 14, 2013), at p. 31 *supra*.

f. Retaliation Claims

Univ. of Tex. S.W. Med. Ctr. v. Nassar, 133 S. Ct. 2517 (June 24, 2013).

The Supreme Court rejected the position of EEOC and the United States as amicus curiae and held that Title VII retaliation claims require "but-for" causation and are not subject to mixed-motive analysis. The Court held that the plain language of section 703(m) – Title VII's "mixed-motive" provision – applies only to "status-based" discrimination and not to retaliation. The Court rejected the government's argument that the reference in section 703(m) to discrimination because of race, color, sex, religion, and national origin necessarily encompasses (inherently related) retaliatory conduct. The Court reasoned that in light of its decision in *Gross v. FBL Financial Services*, 557 U.S. 167 (2009), requiring "but-for" causation in age discrimination actions, and given the lack of any meaningful textual difference between the ADEA provision at issue in *Gross* and the Title VII provision at issue in the present case, "but-for" proof was required for retaliation claims. Lessening the causation standard for retaliation claims, the Court said, "could also contribute to the filing of frivolous claims, which would siphon resources from efforts by employer [sic], administrative agencies, and courts to combat workplace harassment."

McKinley v. Skyline Chili, Inc., 534 F.App'x 461 (6th Cir. Aug. 21, 2013) (unpublished)

The plaintiff in this Title VII/ADEA action alleged that she was fired because of her sex and age and in retaliation for complaining about sex and age discrimination. The Sixth Circuit agreed with EEOC's view as amicus curiae that plaintiff's complaint to defendant's human resources department that all other district managers were significantly younger than she was and some were male, and that she felt she was being discriminated against because she was the only person disciplined for a customer complaint, could constitute protected opposition under the antiretaliation provisions of Title VII and the ADEA. The court, however, rejected EEOC's argument that plaintiff had offered sufficient evidence of pretext and affirmed the district court's grant of summary judgment to defendant on all of her claims.

5. Injunctive Relief

EEOC v. KarenKim, Inc., 698 F.3d 92 (2d Cir. Oct. 19, 2012)

EEOC alleged that KarenKim, a grocery store, violated Title VII by subjecting at least 10 female employees, many in their teens, to a sexually hostile work environment. After a trial, the jury found KarenKim liable for failing to prevent and promptly remedy physical and verbal sexual harassment by the male store manager, and awarded compensatory and punitive damages to the affected female employees. The district court, however, denied EEOC's request for injunctive relief. On appeal, the Second Circuit held that the district court abused its discretion in not ordering relief specifically directed toward ensuring that the former store manager was no longer in a position to sexually harass KarenKim employees. Merely firing the store manager was insufficient because his engagement to the store owner made it likely he would remain a presence at the store. At a minimum, the district court should have prohibited KarenKim from reemploying the store manager and from allowing him to enter the premises. The court of appeals also questioned the adequacy of KarenKim's complaint procedure -- saying that the language appeared ill-suited to the store's mainly teenage workforce and that there was no apparent justification for requiring employees to submit written complaints within 30 days of an alleged discriminatory act; however, the court left to the district court's discretion whether to reform these policies.

Ellis v. Ethicon, Inc., 529 F.App'x 310 (3d Cir. July 9, 2013) (unpublished)

The plaintiff alleged that her employer violated the ADA by denying her a reasonable accommodation for her disability (postconcussion syndrome and mild traumatic brain injury) and terminating her because of her disability. After her termination, plaintiff worked in a comparable position at another company, but then left that company and failed to seek further employment. The jury returned a verdict for plaintiff, and the district court ordered defendant to reinstate her. Defendant appealed the jury's verdict and the reinstatement order. EEOC argued as amicus curiae that plaintiff's failure to mitigate her monetary damages fully by continuing to seek employment after leaving the second company did not bar her reinstatement because that is the preferred remedy in discriminatory discharge cases, and a failure to earn replacement wages after a discriminatory termination is not relevant to whether the victim should be placed back in her original position. The Third Circuit affirmed the jury's verdict and the district court's order requiring reinstatement.

See also *EEOC v. AutoZone, Inc.*, 707 F.3d 824 (7th Cir. Feb. 15, 2013), at p. 43 *infra*.

6. Sex Discrimination

EEOC v. Houston Funding Corp., 717 F.3d 425 (5th Cir. May 30, 2013)

This EEOC appeal addressed whether firing a female worker because she is lactating or expressing breast milk constitutes sex discrimination under Title VII. While on approved maternity leave, an employee contacted Houston Funding's vice president and asked if she could bring a breast pump to work upon her return from leave. After a long pause, the vice president told her her spot has been filled and terminated her. The district court granted summary judgment to defendant, ruling that even if EEOC could demonstrate that defendant's stated reason for terminating the employee (job abandonment) was pretextual, her discharge did not violate Title VII because lactation is not pregnancy, childbirth, or a related medical condition under the Pregnancy Discrimination Act (PDA), and because firing someone because of lactation or breast pumping is not sex discrimination.

On appeal, the Fifth Circuit agreed with EEOC that discharge of an employee because she is lactating or expressing milk constitutes sex discrimination under Title VII. The court reasoned that an adverse employment action motivated by these factors is discrimination based on sex because it clearly imposes upon women a burden that male

employees need not – and indeed, could not – suffer. The court also held that firing a woman on this basis also violates the PDA because lactation, like menstruation, is an aspect of female physiology affected by pregnancy that seems to fit easily within the PDA’s scope.

7. Religious Accommodation

EEOC v. Thompson Contracting Grading, Paving, & Utilities, Inc., 499 F.App’x 275 (4th Cir. Dec. 14, 2012) (unpublished)

EEOC alleged in this religious accommodation action that defendant violated Title VII when it fired a dump truck driver for refusing to work on Saturdays, his Sabbath as a member of the Hebrew Israelite faith. The district court granted summary judgment to defendant and the Fourth Circuit affirmed. The court of appeals concluded that defendant proved that two of the three religious accommodations EEOC had identified would have imposed an undue hardship on its business, and that defendant was not obligated to offer the third – transfer to a nondriver position -- because defendant reasonably believed the employee would have rejected the offer.

8. Americans with Disabilities Act Issues

a. Confidentiality of Medical Information

EEOC v. Thrivent Financial for Lutherans, 700 F.3d 1044 (7th Cir. Nov. 20, 2012)

In this appeal, EEOC argued that defendant violated the ADA’s confidentiality provisions when it informed prospective employers about a former employee’s medical condition -- severe migraine headaches -- that the employee disclosed in response to a inquiry about his absence from work. EEOC conceded that the inquiry about the employee’s absence was not a medical inquiry or likely to elicit information about a disability, but contended that an inquiry about an employee’s absence is tantamount to an inquiry “into the ability of an employee to perform job-related functions,” which is expressly covered by the ADA’s confidentiality provisions. In EEOC’s view, any medical information provided in response to a job performance-related inquiry is entitled to confidentiality. The Seventh Circuit affirmed summary judgment for defendant, ruling that the ADA’s confidentiality provisions apply only to job-related *medical* inquiries, not all job-related inquiries.

b. Reasonable Accommodation

EEOC v. AutoZone, Inc., 707 F.3d 824 (7th Cir. Feb. 15, 2013)

EEOC alleged that AutoZone violated the ADA when it refused to accommodate a parts sales manager who had a back injury and could perform all the functions of his job except the marginal task of mopping the floor of the store. Because AutoZone required the employee to mop, he reinjured his back and hasn't worked since. EEOC brought three claims: (1) that AutoZone failed to reasonably accommodate the employee before his reinjury; (2) that AutoZone failed to accommodate him by refusing to allow him to return to work after his reinjury; and (3) that AutoZone's refusal to allow him to return constituted disparate treatment based on disability. The district court granted summary judgment on the first claim, reasoning that during the relevant time period the employee was not disabled. The other two claims were tried to a jury, which returned a verdict for AutoZone. EEOC appealed the grant of summary judgment on the first claim and the Seventh Circuit reversed. The first claim was then tried to a jury, which returned a verdict for EEOC. The district court approved \$100,000 in compensatory damages and \$200,000 in punitive damages awarded by the jury; awarded \$115,000 in backpay; vacated an award of costs to AutoZone from the first trial; and ordered various injunctive relief.

AutoZone appealed, arguing that the first trial precluded the second jury from reaching its verdict against AutoZone; that a new trial should be ordered because EEOC had the employee's treating physician testify as an expert without first submitting a written report; and that the compensatory damages, punitive damages, and injunction were improper. The Seventh Circuit rejected all of AutoZone's arguments, except that it found inappropriate the district court's permanent requirement that AutoZone reasonably accommodate employees' disabilities, and remanded the case for the court to impose a reasonable time limit on that injunctive provision.

Basden v. Professional Transp., Inc., 714 F.3d 1034 (7th Cir. May 8, 2013).

Plaintiff, a transportation dispatcher, missed 20 days of work over an 11-month period due to symptoms ultimately diagnosed as multiple sclerosis (MS). Although her employer knew she was undergoing tests for MS, it denied her request for a 30-day leave of absence to obtain treatment and fired her for excessive absenteeism. Her ADA suit alleged that defendant denied her a reasonable accommodation and then fired her in retaliation for requesting leave. The district court held that the plaintiff failed to offer sufficient evidence that a 30-day leave would have enabled her to return to work and

perform the essential functions of her job. The court granted summary judgment to defendant, and on appeal EEOC argued as amicus curiae that even where attendance is an important job requirement, an employee unable to work for a limited period of time because of a need for medical treatment can still be a qualified individual with a disability.

The Seventh Circuit affirmed, holding that an employee whose disability prevents her from coming to work regularly cannot perform the essential functions of her job and thus cannot be a qualified individual under the ADA. The court said that the plaintiff failed to offer evidence that the medication she planned to take would alleviate her symptoms sufficiently to return to work on a regular basis following the leave. Although the court acknowledged that defendant's response to plaintiff's request for accommodation was insufficient, it said that a failure to engage in the interactive process was not an independent basis for liability.

9. EEOC Liability for Attorney's Fees

EEOC v. Memphis Health Center, 526 F.App'x 1034 (6th Cir. May 17, 2013) (unpublished)

EEOC alleged that defendant failed to rehire a former employee for a dental assistant position because of her age and in retaliation for complaining of age discrimination. The district court granted summary judgment to defendant, and EEOC did not appeal. Defendant moved for attorney's fees under the Equal Access to Justice Act (EAJA), which allows for fees to be awarded against the government when the government's position lacks substantial justification, "except as otherwise specifically provided by statute." EEOC argued that because the ADEA provides for attorney's fees to prevailing plaintiffs but not defendants, the EAJA does not apply to Commission actions under the ADEA, and that even if it did, the agency's position, viewed as a whole, was substantially justified. The district court concluded that the EAJA applied and that the age discrimination claim was substantially justified but the retaliation claim was not. The court awarded defendant 50% of its attorney's fees and EEOC appealed.

The Sixth Circuit held that the EAJA applies to EEOC actions under the ADEA. The court agreed with EEOC that the EAJA requires examining the government's position as a whole, rather than analyzing each claim independently. The court also agreed with EEOC that defendant waived any argument that the age discrimination claim lacked substantial justification because it failed to object to the magistrate judge's finding on

that issue. The court remanded the case to the district court to determine whether EEOC's position taken as a whole was substantially justified. The Sixth Circuit said that this inquiry required the district court to consider whether the discrimination and retaliation claims were distinct, and, if so, which claim was more prominent in driving the case; or whether the claims were so intertwined that an insubstantial justification as to one rendered EEOC's entire position unjustified.

D. Outreach: Educating the Public

Office of General Counsel staff engage in a variety of informational activities, regarding EEOC's mission, processes, and enforcement efforts. In fiscal year 2013, legal staff made presentations at over 650 "outreach" events involving almost 46,000 participants. Some examples are provided below.

Immigrant Communities

EEOC's General Counsel provided an overview of the agency to Muslim and Somali community groups. He also discussed immigration reform with the National Immigration Law Center. The New York Regional Attorney discussed outreach to the Muslim, Arab, and Sikh communities at an event at the Al Khoei Foundation sponsored by the United States Attorney's office. A Phoenix Trial Attorney participated in a free legal clinic at El Centro Humanitario, providing Spanish-speaking workers with information about their legal rights. The San Francisco Regional Attorney discussed recent EEOC litigation affecting Asian Charging Parties at a conference sponsored by the Filipino Bar Association of Northern California. A New York Trial Attorney participated on a panel on national origin and religious discrimination at the New York Asian American and Pacific Islander Forum, sponsored by the Department of Education. A San Francisco Trial Attorney provided an overview of EEOC's statutes to the National Asian Pacific Center on Aging. The San Francisco Regional Attorney spoke on two panels at the National Employment Lawyers Association conference on immigrant workers: "Developing and Litigating Sexual Harassment Cases of Immigrants: The Role of Retaliation," and "Effective Partnerships in Representing Immigrants in Employment Cases."

Employer Advocates and Business Groups

The Atlanta Regional Attorney provided a legal update at the Labor and Employment Conference sponsored by The Seminar Group. The San Francisco Regional Attorney presented his “Top Ten Tips for Respondents” at the Washington Farm Labor Association conference. A New York Trial Attorney provided training to New York City Transit Authority employees who receive and respond to requests for reasonable accommodations under the ADA. A Dallas Trial Attorney discussed severance and employment agreements and downsizing at the 23rd Annual Southwest Benefits Association Conference. A Dallas Supervisory Trial Attorney gave a presentation on reasonable accommodation under the ADA and on EEOC’s arrest and conviction enforcement guidance to the El Paso division of Society for Human Resource Management. A Chicago Trial Attorney spoke with the U.S. Poultry and Egg Association about EEOC litigation, sexual assault, retaliation, and communicating with workers who speak different languages. A Charlotte Trial Attorney gave a presentation to United Fuels, LLC, d/b/a Quick Check on “Working with the EEOC: How to Avoid Complaints & What to Do When You Can’t.” An Indianapolis Trial Attorney discussed “Best Practices for Responding to an EEOC Charge” at an event sponsored by the law firm Taft, Stettinius & Hollister.

Employee Advocates and Interest Groups

The General Counsel discussed EEOC’s activities and litigation at a town hall meeting with plaintiff attorneys in Salt Lake City, Utah. The Phoenix Regional Attorney addressed the interaction of EEO laws for convicted felons with Second Chance, a statewide advocacy group; and discussed EEO protections for victims of violence at the 2013 National Center for Victims of Crime National Conference. The San Francisco Regional Attorney presented a webinar on “Domestic Violence and Sexual Assault in the Workplace,” that was sponsored by the White House and the Center for Survivor Agency and Justice. A Dallas Trial Attorney discussed the laws enforced by EEOC and the charge filing process with the Workers Defense Project/Proyecto Defensa Laboral, a nonprofit worker advocacy group; and discussed EEOC’s strategic enforcement and targeted educational and outreach efforts related to the LGBT community at the annual Lavender Law Conference, sponsored by the National LGBT Bar Association. The Charlotte Regional Attorney also coordinated and participated on a panel entitled “Using your J.D. in the Public Sector: Challenges and Rewards” at the annual conference sponsored by the Leadership Institute of Women of Color in Law and Business. The Phoenix Regional Attorney presented “Combating the Use of Background Checks and Credit Reports in Hiring Decisions” at the 2013 National Employment

Lawyers Association Annual Convention. The San Francisco Regional Attorney was the keynote speaker and discussed religious accommodation at the Seventh Day Adventist Attorneys Western Regional Conference. An Atlanta Trial Attorney discussed Title VII at the Atlanta Legal Aid Saturday Law Program.

Government Entities

The General Counsel presented a workshop on human trafficking and modern slavery to the Royal Netherlands Embassy and Dutch Public Prosecution Service, The General Counsel met with the Office of Personnel Management and the White House for a Hispanic and Disability Roundtable on federal employment. He also provided an overview of EEOC and discussed the model memorandum of understanding between EEOC and American Indian tribes at the annual meeting of the National Conference of American Indians. The New York Regional Attorney participated in a panel discussion on the ADEA at the United Nations Open-Ended Work Group on Aging. A New York Trial Attorney hosted and participated in a panel for interns with the National Labor Relations Board and the Department of Labor's Solicitor's Office and Employee Benefits Security Administration. A Dallas Trial Attorney discussed gender-stereotyping discrimination under Title VII and Title VII protections for the LGBT community at a presentation to state and local fair employment practice agencies. An Indianapolis Trial Attorney discussed background checks in employment decisions and EEOC guidance on arrest and conviction records with the Louisville Metro Human Relations Commission. Another Indianapolis Trial Attorney provided mediation training for the United States District Court for the Southern District of Indiana. A Miami Trial Attorney spoke with OFCCP investigators about EEOC's enforcement guidance on arrest and conviction records.

Bar Associations

The General Counsel discussed EEOC litigation and immigration issues at the ABA's National Conference on Equal Employment Opportunity Law; discussed EEOC activities, litigation, and recent agency developments at the 6th Annual ABA Labor and Employment Section Conference; discussed arbitration and harassment at the 39th Annual Labor & Employment Institute, sponsored by the Minnesota State Bar Association; and discussed with the ABA cross-agency coordination, eliminating systemic barriers in recruitment and hiring, and immigrant and vulnerable worker discrimination. The Memphis Regional Attorney discussed EEOC's Strategic Enforcement Plan and the Memphis office litigation program with the Business Section of the Arkansas Bar Association. The Charlotte Regional Attorney was on a panel on

“Better Cross Examinations: Special Problems and Suggested Solutions” at the 6th Annual American Bar Association Labor and Employment Law Conference. The Houston Regional Attorney provided an “Insider’s Perspective of the EEOC” at the Federal Bar Association’s Biennial Labor and Employment Section meeting. At the Atlanta Bar Association’s Advanced Labor and Employment Law Seminar, an Atlanta Supervisory Trial Attorney discussed the ramifications of employment policies requiring confidentiality regarding internal investigations. A Charlotte Trial Attorney presented “Trends and Priorities at the EEOC” to the Employment Law Section of the Mecklenberg County Bar Association.

Educational Institutions

The Miami Regional Attorney discussed recent EEOC litigation with law students and professors at the University of Miami School of Law. A Houston Trial Attorney participated on a panel entitled “The Role of Attorneys in the Civil Rights Movement: Yesterday, Today, and Tomorrow” at an event sponsored by the South Texas Chapter of the Black Law Students Association. An Atlanta paralegal discussed her work and the laws enforced by EEOC at an event at Atlanta Technical College. An Indianapolis Trial Attorney discussed the ADA at a program sponsored by the Indiana Continuing Legal Education Foundation. The Miami Regional Attorney was a guest lecturer at the University of Miami on “Workplace Discrimination and Harassment and the laws EEOC enforces.” A San Francisco Trial Attorney gave a presentation on workplace rights to high school students as part of the annual Future of the Law Institute program. A Dallas Trial Attorney gave a presentation about sexual harassment at historically black Jarvis College. A New York Trial Attorney spoke to students at Fairleigh Dickinson University about the Equal Pay Act. A Memphis Trial Attorney provided an overview of EEOC for college, high school, and middle school students as part of a Black History Month program. The New York and Chicago Regional Attorneys spoke at the Practicing Law Institute about EEOC’s Strategic Plan, GINA, disparate impact under the ADEA, and other issues relating to systemic discrimination. The New York Regional Attorney participated on a panel about the ADEA at the Practicing Law Institute. The Miami Regional Attorney discussed outreach to underserved groups, such as agricultural workers and homeless individuals, with representatives of the Florida International University Department of Global & Sociocultural Studies.

Media Contacts

The New York Regional Attorney spoke with reporters from a variety of media, including: *Newsday* about religious discrimination, the Equal Pay Act, and the ADA; the

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New York Times and *Bloomberg View* about discrimination in the financial services industry; the *Wall Street Journal* about the ADA and GINA; and *New Scientist Magazine* about the ADA and GINA. *Channel 12 News* interviewed the Phoenix Regional Attorney about an EEOC sex discrimination action against a State correctional facility. A Phoenix Trial Attorney had a television interview with an NBC affiliate about the office's recent settlement of a traumatic brain injury lawsuit. The New York Regional Attorney spoke with reporters at *fortune.com* about caregiver discrimination. *Telemundo* interviewed a Houston Trial Attorney in Spanish about vulnerable populations.

III. Litigation Statistics

A. Overview of Suits Filed

In FY 2013, the field legal units filed 131 merits lawsuits. (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.) One hundred and thirty were direct suits and 1 was an action to enforce an administrative settlement; 46 were class or systemic suits. The field legal units also filed 18 actions to enforce subpoenas issued during EEOC investigations.

Merits Filings in FY 2013	
	<u>Count</u>
Direct	130
Intervention	0
Administrative Settlements	1
Total	131
85 Individual Suits 24 Class Suits 22 Systemic Suits	

1. Litigation Workload

The FY 2013 litigation workload (merits cases active at the start of the fiscal year plus merits suits filed during the fiscal year) totaled 362.

FY 2013 Litigation Workload		
<u>Active</u>	<u>Filed</u>	<u>Workload</u>
231	131	362

2. Filing Authority

In EEOC’s National Enforcement Plan adopted in February 1996, and reaffirmed in the Commission’s December 2012 Strategic Enforcement Plan, 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 EEOC’s 15 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 2012 merits suits.

	<u>Count</u>	<u>Percent</u>
Regional Attorney	112	85.5%
General Counsel	6	4.6%
Commission	13	9.9%

3. Statutes Invoked

Of the 131 merits suits filed, 58.8% contained Title VII claims, 3.8% contained EPA claims, 5.3% contained ADEA claims, 37.4% contained ADA claims, 2.3% contained GINA claims, and 6.9% 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.)

	<u>Count</u>	<u>Percent of Suits</u>
Title VII	77	58.8%
EPA	5	3.8%
ADEA	7	5.3%
ADA	49	37.4%
GINA	3	2.3%
Concurrent	9	6.9%

4. Bases Alleged

As shown in the next chart, disability (34.4%), retaliation (34.4%), and sex discrimination (26.7%) were the most frequently alleged bases in EEOC suits. Race discrimination was alleged in 10.7% of the suits, and religion in 9.2%. Bases numbers in the chart exceed the total suit filings (131) because suits often contain multiple bases.

Bases Alleged in Suits Filed		
	<u>Count</u>	<u>Percent of Suits</u>
Disability	45	34.4%
Retaliation	45	34.4%
Sex	35	26.7%
Race	14	10.7%
Religion	12	9.2%
Age	7	5.3%
National Origin	6	4.6%
Equal Pay	4	3.1%
Genetic Info.	3	2.3%

5. Issues Alleged

Discharge was the most frequently alleged issue in EEOC suits filed (64.9%) and hiring the second (21.4%). Harassment was an issue in 20.6% of the suits, disability

Issues Alleged in Suits Filed		
	<u>Count</u>	<u>Percent of Suits</u>
Discharge	85	64.9%
Hiring	28	21.4%
Harassment	27	20.6%
Disability Accommodation	24	8.3%
Terms and Conditions	17	13.0%
Religious Accommodation	9	6.9%
Prohibited Med. Inq./Exam	8	6.1%
Discipline	8	6.1%
Wages	6	4.6%
Benefits	2	1.5%
Promotion	2	1.5%
Assignment	1	.075%

accommodation in 18.3%, and terms and conditions of employment in 13%.

B. Suits Filed by Bases and Issues

1. Sex Discrimination

As shown below, 45.7% of cases with sex as a basis contained a discharge allegation. Harassment was the second most frequently alleged issue in cases with sex discrimination claims (42.9%).

Sex Discrimination Issues		
	<u>Count</u>	<u>Percent</u>
Discharge	16	45.7%
Harassment	15	42.9%
Hiring	7	20.0%
Terms/Conditions	4	11.4%
Wages	3	8.6%
Discipline	1	2.9%

2. Race Discrimination

Hiring was the most frequently alleged issue in cases with race discrimination claims (50%).

Race Discrimination Issues		
	<u>Count</u>	<u>Percent</u>
Hiring	7	50.0%
Harassment	6	42.9%
Terms/Conditions	3	21.4%
Discharge	3	21.4%
Discipline	1	7.1%
Assignment	1	7.1%

3. National Origin Discrimination

As shown in the next chart, harassment was the most frequently alleged issue in suits where national origin was a basis (66.7%).

National Origin Discrimination Issues		
	<u>Count</u>	<u>Percent</u>
Harassment	4	66.7%
Discharge	2	33.3%
Hiring	1	16.7%
Terms/Conditions	1	16.7%
Wages	1	16.7%

4. Religious Discrimination

Failure to accommodate and discharge were issues in most of the religious discrimination cases.

Religious Discrimination Issues		
	<u>Count</u>	<u>Percent</u>
Reasonable Accommodation	9	75.0%
Discharge	9	75.0%
Harassment	3	25.0%
Terms/Conditions	3	25.0%
Hiring	1	8.3%
Involuntary Retirement	1	8.3%

5. Age Discrimination

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

Age Discrimination Issues		
	<u>Count</u>	<u>Percent</u>
Discharge	5	71.4%
Hiring	1	14.3%
Promotion	1	14.3%
Harassment	1	14.3%
Terms/Conditions	1	14.3%

6. Disability Discrimination

Discharge was the most frequently alleged issue in disability discrimination suits (71.1%), followed by failure to accommodate (53.3%). Hiring was in issue in 24.4% of suits containing disability discrimination claims.

Disability Discrimination Issues		
	<u>Count</u>	<u>Percent</u>
Discharge	32	71.1%
Reasonable Accommodation	24	53.3%
Hiring	11	24.4%
Prohibited Med. Inq./Exam	5	11.1%
Discipline	2	4.4%
Terms/Conditions	2	4.4%
Posting Notices	2	4.4%

7. Retaliation

Discharge was an issue in 86.7% of suits with retaliation claims.

Retaliation Issues		
	<u>Count</u>	<u>Percent</u>
Discharge	39	86.7%
Discipline	7	15.6%
Terms/Conditions	6	13.3%
Harassment	4	8.9%
Hiring	4	8.9%
Demotion	3	6.7%

8. Genetic Information

Prohibited medical inquiry was the issue in all cases raising GINA claims.

Genetic Information Issues		
	<u>Count</u>	<u>Percent</u>
Prohib. Med. Inq./Exam	3	100%

C. Bases Alleged in Suits Filed from FY 2009 through FY 2013

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 2009-2013										
<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>Gen. Info.</u>	<u>Age</u>	<u>Retal.</u>
2009	26.7%	5.7%	3.9%	17.4%	6.8%	3.9%	25.6%	0.0%	8.2%	35.9%
2010	32.4%	7.6%	4.0%	17.2%	8.4%	9.6%	14.8%	0.0%	10.4%	37.6%
2011	24.5%	7.3%	2.3%	12.3%	8.4%	5.7%	29.9%	0.0%	7.7%	35.6%
2012	20.5%	9.0%	1.6%	9.0%	4.1%	7.4%	36.1%	0.0%	9.0%	25.4%
2013	16.8%	7.6%	2.3%	10.7%	4.6%	9.2%	34.4%	2.3%	5.3%	34.4%

D. Suits Resolved

In FY 2013, the Office of General Counsel resolved a total of 213 merits lawsuits, recovering \$39,004,152 in monetary relief.

1. Types of Resolutions

As the chart below indicates, 81.7% of EEOC's suit resolutions were settlements, 15%

were determinations on the merits by courts or juries, and 3.3% were voluntarily dismissals. (The figures on favorable and unfavorable court orders do not take appeals into account.)

	<u>Count</u>	<u>Percent</u>
Consent Decree	170	79.8%
Settlement Agreement	4	1.9%
Favorable Court Order	12	5.6%
Unfavorable Court Order	20	9.4%
Voluntary Dismissal	7	3.3%
Total	213	100%

2. Statutes Invoked

Of the 213 merits suits resolved during the fiscal year, 64.3% contained Title VII claims. ADA claims were present in 28.2% of the resolutions and ADEA claims in 8%. (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	137	64.3%
EPA	4	1.9%
ADEA	17	8.0%
ADA	60	28.2%
GINA	1	0.5%
Concurrent	6	2.8%

As shown in the next chart, Title VII suits accounted for about 58% of monetary relief obtained in FY 2013 and ADA suits for about 36%. Recoveries in concurrent suits are not included in the totals for the particular statutes.

FY 2013 Monetary Relief by Statute (rounded)		
<u>Statute</u>	<u>Relief (millions)</u>	<u>Relief Percent</u>
Title VII	\$22.4	57.5%
EPA	\$0.24	0.6%
ADEA	\$2.1	5.3%
ADA	\$14.0	35.9%
GINA	\$0.00	0.0%
Concurrent	\$0.24	0.6%
Total	\$39.0	100.0%

3. Bases Alleged

As shown in the chart below, sex was a basis in 36.6% of the suits resolved, retaliation in 34.7%, disability in 27.2%, race in 11.7%, age in 7%, religion in 6.6%, and national origin in 5.6%. The total count exceeds the number of suits resolved (213) because suits often contain multiple bases.

Bases Alleged in Suits Resolved		
	<u>Count</u>	<u>Percent of Suits</u>
Sex	78	36.6%
Retaliation	74	34.7%
Disability	58	27.2%
Race	25	11.7%
Age	15	7.0%
Religion	14	6.6%
National Origin	12	5.6%
Equal Pay	4	1.9%
Gen. Info Discrim.	1	0.5%

4. Issues Alleged

Discharge was an issue in 65.7% of the cases resolved, and harassment in 37.1%.

Issues Alleged in Suits Resolved		
	<u>Count</u>	<u>Percent of Suits</u>
Discharge	140	65.7%
Harassment	79	37.1%
Hiring	30	14.1%
Terms and Conditions	35	16.4%
Disability Accom.	26	12.2%
Discipline	11	5.2%
Religious Accom.	10	4.7%
Pay	8	3.8%
Recordkeep. Violation	5	2.3%
Prohib. Med. Inq/Exam	4	1.9%
Benefits	3	1.4%
Promotion	1	0.5%

E. Appellate Activity

EEOC filed appeals in 11 merits cases during fiscal year 2013, and defended appeals in 3 cases. EEOC also filed one appeal in an action to enforce an administrative subpoena during the fiscal year. At the end of the fiscal year, OGC had 30 cases pending in the United States courts of appeals involving merits suits, 22 as appellant and 8 as appellee. EEOC’s Appellate Services also filed 19 briefs as amicus curiae during fiscal year 2013.

F. Attorney’s Fees Awarded against EEOC

EEOC v. Towersite Resources, LLC, No. 1:10-cv-2997 (N.D. Ga. March 29, 2013)
(unreported)

EEOC alleged in this Title VII action that defendant subjected an African American employee to a racially hostile work environment resulting in his constructive discharge. The district court granted summary judgment to defendant on the ground that defendant did not meet the 15-employee minimum required for coverage under Title

VII, and awarded defendant attorney’s fees and expenses from the time the court found EEOC should have known it could not establish that defendant was an employer under Title VII. The court awarded defendant \$98,904 in attorney’s fees and \$5,153.54 in expenses. EEOC did not appeal either the grant of summary judgment or the award of attorney’s fees and expenses.

G. Resources

1. Staffing

Total field staff fell 6.6% and field attorneys fell 7.6% from FY 2012.

OGC Staffing (On Board)			
<u>Year</u>	<u>HQ</u>	<u>All Field</u>	<u>Field Attorneys*</u>
2009	54	311	211
2010	57	324	209
2011	56	333	213
2012	52	317	211
2013	50	296	195

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

2. Litigation Budget

As indicated in the chart below, OGC’s FY 2013 litigation support budget was approximately the same as in the two prior fiscal years.

Litigation Support Funding (Millions)	
<u>FY</u>	<u>FUNDING</u>
2009	\$4.60
2010	\$4.96
2011	\$4.10
2012	\$4.07
2013	\$4.13

H. Historical Summary: Tables and Charts

1. EEOC 10-Year Litigation History: FY 2004 through FY 2013

	FY04	FY05	FY06	FY07	FY08	FY09	FY10	FY11	FY12	FY13
All Suits Filed	421	416	403	362	325	316	272	301	155	149
Merits Suits	378	381	371	336	290	281	250	261	122	131
Suits with Title VII Claims	297	295	294	268	224	188	192	162	66	77
Suits with ADA Claims	46	49	42	46	37	76	41	80	45	49
Suits with ADEA Claims	46	44	50	32	38	24	29	26	12	7
Suits with EPA Claims	5	13	10	7	0	2	2	2	2	5
Suits with GINA Claims	0	0	0	0	0	0	0	0	0	3
Suits filed under multiple statutes ¹	14	17	22	16	9	9	14	9	3	9
Subpoena and Preliminary Relief Actions	43	35	32	26	35	35	22	40	33	18
All Resolutions	380	378	418	387	367	352	318	318	280	228
Merits Suits	346	338	383	364	336	324	289	278	251	213
Suits with Title VII Claims	277	259	295	297	265	254	201	215	159	137
Suits with ADA Claims	43	41	50	41	46	40	59	43	72	60
Suits with ADEA Claims	34	45	50	36	39	38	39	26	29	17
Suits with EPA Claims	9	12	8	14	3	5	0	0	2	4
Suits with GINA Claims	0	0	0	0	0	0	0	0	0	1
Suits filed under multiple statutes	14	18	17	19	16	13	10	8	11	6
Subpoena and Preliminary Relief Actions	34	40	35	23	31	28	29	40	29	15
Monetary Benefits (\$ in millions)²	168.6	104.8	44.3	54.8	101.1	81.6	85.6	89.7	43.2	39.0
Title VII	158.5	98	34.3	38.9	64.9	64.5	74.0	53	34.2	22.4
ADA	2.5	3.4	2.8	3.1	3.3	9.5	2.9	27.1	5.5	14.0
ADEA	5.4	2.4	5.1	2.4	29.9	6.7	5.8	8.4	2.6	2.1
EPA	0	0	0	0.2	1.0	0.02	0	0	0	.24
GINA	0	0	0	0	0	0	0	0	0	0
Suits filed under multiple statutes ³	2.3	1	2.1	10.2	1.7	0.9	2.9	1.1	0.9	.24

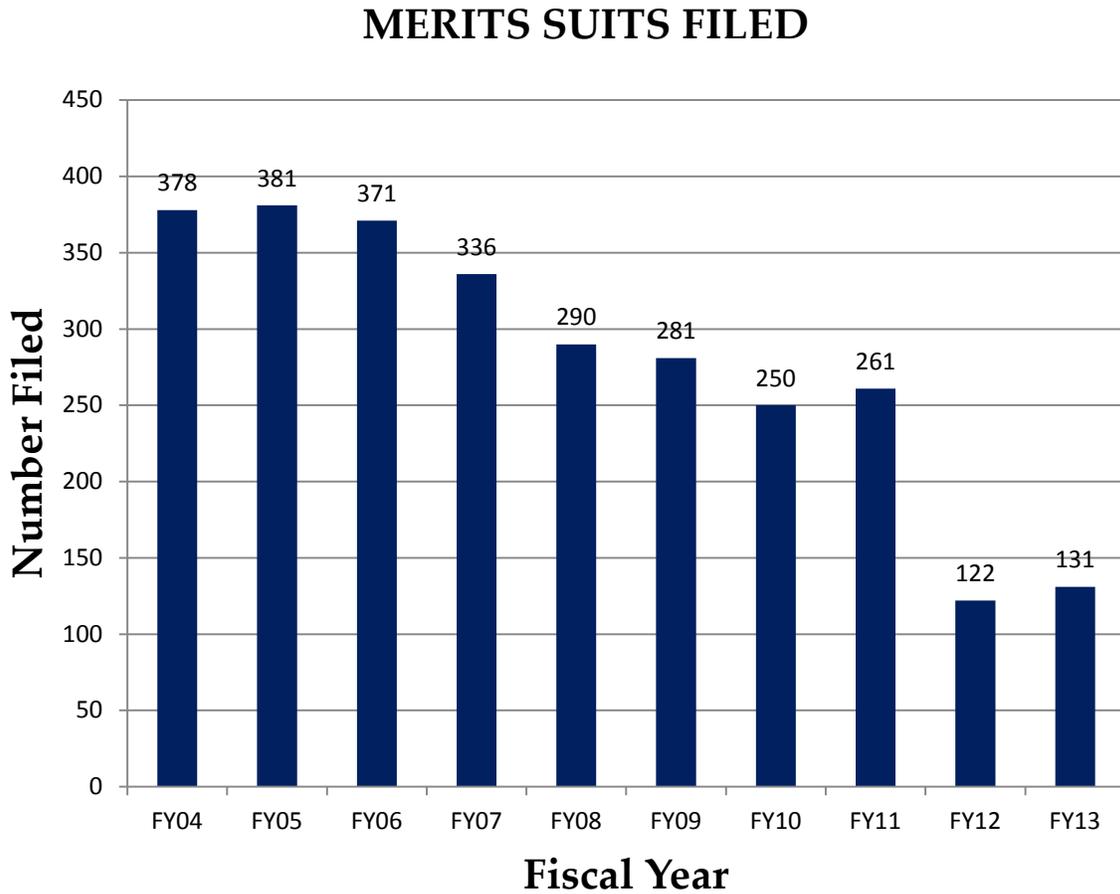
¹ Suits filed or resolved under multiple statutes are also included in the tally of suits filed under the particular statutes.

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.

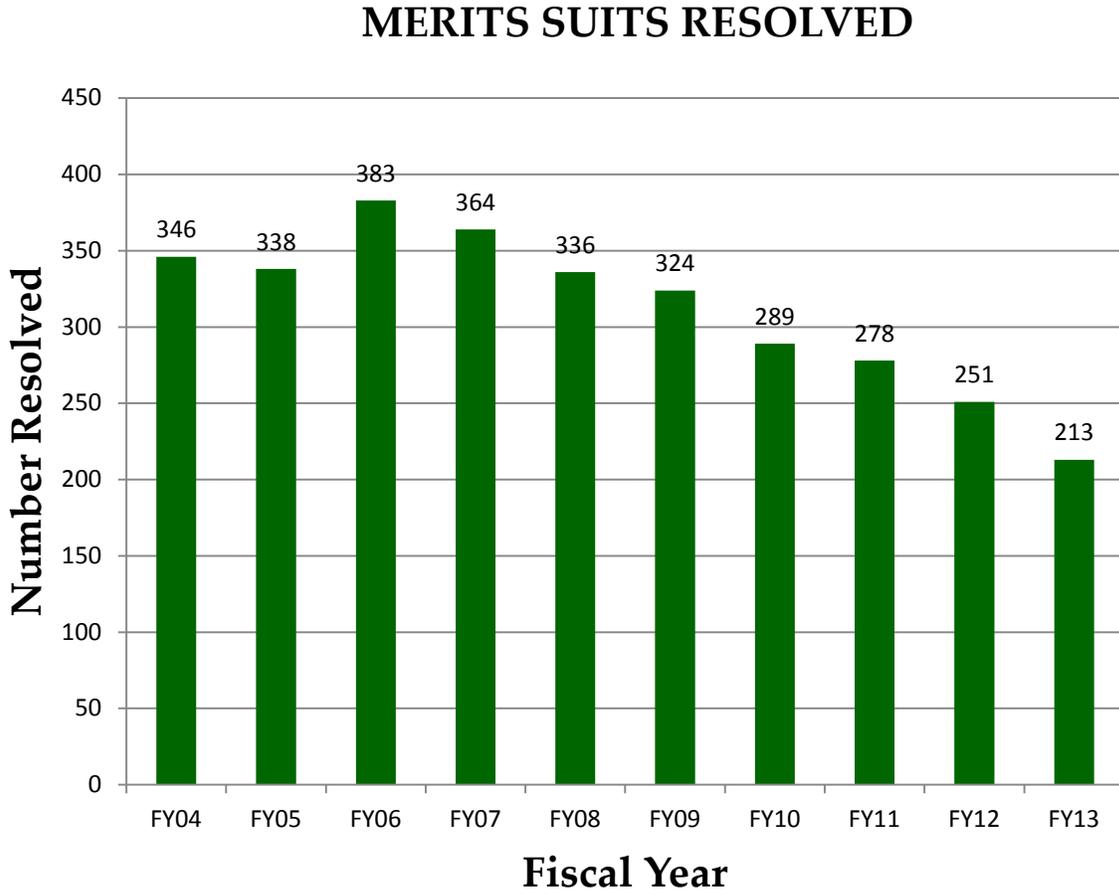
2. Merits Suits Filed FY 2004 through FY 2013

The chart below shows the number of merits suits filed for FY 2004 through FY 2013



3. Merits Suits Resolved FY 2004 through FY 2013

The chart below shows the number of merits suits resolved for FY 2004 through FY 2013.



4. Monetary Recovery FY 2004 through FY 2013

The chart below shows the monetary recovery for FY 2004 through FY 2013.

