**TABLE OF CONTENTS**

I. Structure and Function of the Office of General Counsel ............................................ 1
   A. Mission of the Office of General Counsel ......................................................... 1
   B. Headquarters Programs and Functions .......................................................... 1
      1. General Counsel ...................................................................................... 1
      2. Deputy General Counsel ......................................................................... 2
      3. Litigation Management Services ............................................................ 2
      4. Internal Litigation Services ...................................................................... 2
      5. Litigation Advisory Services .................................................................... 3
      6. Appellate Services .................................................................................... 3
      7. Research and Analytic Services ............................................................... 3
      8. Administrative and Technical Services Staff ......................................... 4
   C. District Office Legal Units ............................................................................... 4

II. Fiscal Year 2011 Accomplishments .............................................................................. 5
   A. Summary of District Court Litigation Activity .............................................. 5
   B. Significant District Court Resolutions ............................................................ 6
      1. Title VII .................................................................................................... 6
         a. Race Discrimination ............................................................................ 6
            (1) Hiring and Promotion .................................................................. 6
            (2) Pay ............................................................................................... 7
            (3) Harassment and Terms and Conditions of Employment .......... 8
            (4) Discharge .................................................................................... 10
         b. Sex Discrimination ............................................................................ 10
            (1) Hiring .......................................................................................... 10
            (2) Assignment and Promotion ....................................................... 11
            (3) Pregnancy ................................................................................... 12
            (4) Harassment ................................................................................ 14
            (5) Discharge .................................................................................... 17
         c. National Origin Discrimination .............................................................. 18
            (1) Hiring .......................................................................................... 18
            (2) Harassment ................................................................................ 18
         d. Religious Accommodation ................................................................... 20
      2. Title VII and the Equal Pay Act .................................................................... 21
      3. Age Discrimination in Employment Act .................................................... 22
         a. Hiring .................................................................................................. 22
         b. Benefits .............................................................................................. 23
         c. Discharge ............................................................................................ 24
4. Title VII and the ADEA/Race, Sex, and Age Harassment .......... 26
5. Americans with Disabilities Act ............................................. 26
   a. Hiring .................................................................................. 26
   b. Reasonable Accommodation .............................................. 28
   c. Terms and Conditions of Employment ............................. 31
   d. Discharge ........................................................................... 31
6. Retaliation .................................................................................. 32
C. Appellate Court Litigation .......................................................... 34
   1. EEOC’s Investigative Authority .............................................. 34
   2. Equitable Tolling of the Charge-Filing Period .................... 40
   3. Arbitration of Class Claims ............................................... 41
   4. Enforceability of Oral Conciliation Agreements .................. 42
   5. Pattern or Practice Issues ................................................... 44
   6. Discovery of Immigration Status ........................................ 47
   7. Proof of Causation ............................................................... 48
   8. Proof of Harassment ............................................................ 51
   9. Liability for Harassment ..................................................... 55
10. Damages .................................................................................... 57
11. Americans with Disabilities Act .............................................. 59
    a. Disability Status ............................................................... 59
    b. Causation Standard .......................................................... 60
    c. Transfer as a Reasonable Accommodation ....................... 61
    d. Confidentiality of Medical Information ............................ 64
12. Age Discrimination in Employment Act ................................ 65
13. Equal Pay Act ........................................................................... 66
14. Retaliation .................................................................................. 67
    a. Protected Activity ............................................................. 67
    b. Causation .......................................................................... 70
D. Outreach: Educating the Public .................................................. 71
III. Litigation Statistics ....................................................................... 75
   A. Overview of Suits Filed ....................................................... 75
      1. Litigation Workload .......................................................... 75
      2. Filing Authority ............................................................... 76
      3. Statutes Invoked .............................................................. 76
      4. Bases Alleged ................................................................. 77
      5. Issues Alleged ................................................................. 77
   B. Suits Filed by Bases and Issues ............................................. 78
      1. Sex Discrimination ......................................................... 78
      2. Race Discrimination ....................................................... 78
3. National Origin Discrimination ................................................................. 79
4. Religious Discrimination .............................................................................. 79
5. Age Discrimination ....................................................................................... 79
6. Disability Discrimination ............................................................................. 80
7. Retaliation ....................................................................................................... 80
C. Bases Alleged in Suits Filed from FY 2007 through FY 2011 .............. 81
D. Suits Resolved ....................................................................................................... 81
   1. Types of Resolutions ............................................................................. 81
   2. Statutes Invoked .................................................................................... 82
   3. Bases Alleged .......................................................................................... 83
   4. Issues Alleged .......................................................................................... 83
   5. Cases on Appeal ........................................................................................ 84
E. Resources ............................................................................................................ 84
   1. Staffing .................................................................................................... 84
   2. Litigation Budget ...................................................................................... 84
F. Historical Summary: Tables and Charts ......................................................... 85
   1. EEOC 10-Year Litigation History: FY 2002 through FY 2011 .......... 85
   2. Merits Suits Filed FY 2002 through FY 2011 ...................................... 86
   3. Merits Suits Resolved FY 2002 through FY 2011 ............................. 87
   4. Monetary Recovery FY 2002 through FY 2011 .................................. 88
I. Structure and Function of the Office of General Counsel

A. Mission of the Office of General Counsel

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

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

B. Headquarters Programs and Functions

1. General Counsel

The General Counsel is responsible for managing, coordinating, and directing the Commission’s enforcement litigation program. He or she also provides overall
guidance and management to all components of OGC, including district office legal units. The General Counsel recommends cases for litigation to the Commission and approves other cases for 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 General Counsel is charged with the daily operations of OGC. The Deputy is responsible for overseeing all programmatic and administrative functions of OGC, including the litigation program. OGC functions are carried out through the operational program and service areas described below, which report to or through the Deputy.

3. Litigation Management Services

Litigation Management Services (LMS) oversees and supports the Commission’s court enforcement program in the agency’s district offices. Also, in conjunction with the Office of Field Programs (OFP), LMS oversees the integration of district office legal units into the investigative enforcement structure of the district offices. LMS staff provided direct litigation assistance to district offices as needed, draft guidance (including maintaining the *Regional Attorneys’ Manual*), develop training programs and materials, and collect and create litigation practice materials. LMS also reviews proposed suit filings by regional attorneys under their redelegated litigation authority from the General Counsel. LMS has an assistant general counsel for technology responsible for providing technical guidance and oversight to OGC headquarters and district offices on the use of technology in litigation and the development of OGC’s computer systems. LMS and OFP staff makes 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 the social sciences, economics, statistics, and psychology who serve as testifying and consulting experts on cases in litigation. RAS also provides services to other agency offices, such as conducting social science research on issues related to civil rights enforcement, advising the agency on the collection of workforce data, and developing and maintaining special census files by geography, race/ethnicity and sex, and occupation.
8. Administrative and Technical Services Staff

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

C. District Office Legal Units

District office legal units conduct Commission litigation in the geographic areas covered by the respective offices and provide legal advice and other support to district staff responsible for investigating charges of discrimination. In addition to the district office itself, OGC trial attorneys are stationed in most of the other offices – field, area, and local – within districts. Legal units are under the direction of regional attorneys, who manage staffs consisting of supervisory trial attorneys, trial attorneys, paralegals, and support personnel.
II. Fiscal Year 2011 Accomplishments

In fiscal year 2011, OGC filed 261 merits lawsuits and resolved 278, obtaining over $89 million in monetary relief. Section A below contains summary statistical information on the fiscal year’s trial court litigation results (more detailed statistics appear in section III. of the Annual Report). Sections B and C contain descriptions of selected trial and appellate cases. Section D describes some of the outreach conducted by OGC staff during the year.

A. Summary of District Court Litigation Activity

OGC filed 261 merits suits in FY 2011. Merits suits consist of (1) direct suits and interventions alleging violations of the substantive provisions of the Commission’s statutes, and (2) suits to enforce settlements reached during EEOC’s administrative process. No interventions were filed during the fiscal year; one suit was filed to enforce an administrative settlement. In addition to merits suits, OGC filed 40 actions to enforce subpoenas issued during EEOC investigations.

OGC’s FY 2011 merits suit filings had the following characteristics:

162 contained claims under Title VII (62.1%)
2 contained claims under the EPA (.8%)
26 contained claims under the ADEA (10.0%)
80 contained claims under the ADA (30.7%)
93 cases sought relief for more than one person (35.2%)

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 (3.4%) of these “concurrent” suits among the FY 2011 filings.

OGC resolved 278 merits suits in fiscal year 2011, resulting in monetary relief of $89,688,868. These resolutions had the following characteristics:

215 contained claims under Title VII (77.3%)
26 contained claims under the ADEA (9.4%)
43 contained claims under the ADA (15.5%)
121 cases sought relief for more than one person (43.5%)
8 were concurrent suits (2.9%)
Section III of the Annual Report contains detailed statistical information on OGC’s FY 2011 litigation activities, as well as summary information for past years.

B. **Significant District Court Resolutions**

1. **Title VII**

   a. **Race Discrimination**

      (1) **Hiring and Promotion**

      In *EEOC v. Scrub, Inc.*, No. 09 C 4228 (N.D. Ill. Nov. 9, 2010), EEOC alleged that a provider of janitorial services, mainly at O’Hare airport in Chicago, Illinois, discriminated against African Americans in recruitment and hiring because of their race and national origin. Defendant recruited through media directed at Eastern European immigrants and Hispanics and hired people from those groups over African Americans. A 4-year consent decree provides $3 million in compensatory damages to a class of approximately 550 people (African Americans denied employment between October 20, 2004, and December 31, 2009), payable over a 3-year period and personally guaranteed by defendant’s owner. Defendant is enjoined from discriminating against applicants or employees on the basis of race or national origin and from retaliation. Defendant will hire interested rejected African American applicants for entry-level positions (janitorial and driver) at a rate of one out every three hires (with each applicant having a right of one refusal), and after exhausting the instatement list will make best efforts to hire African Americans at the applicant flow rate of the preceding 6 months. Defendant is required to actively recruit African Americans, both generally and through a number of identified sources. Defendant will retain an outside Monitor to report semiannually on defendant’s implementation of the decree. Defendant will report every 6 months on hiring from the instatement list; progress in meeting its hiring benchmarks; applicants and hires for janitorial and driver positions; and efforts to recruit African Americans.

      In *EEOC v. Federal Insurance Co. d/b/a Chubb & Son*, No. 10-C-849 (E.D. Wis. May 3, 2011), EEOC alleged that a worldwide property and casualty insurer failed to promote an Asian underwriting associate due to her race and in retaliation for opposing race discrimination and filing an EEOC charge. The employee was born in Laos. She began working for defendant in 2005 as an underwriting associate in its Milwaukee, Wisconsin, office. Underwriting associates perform background work to put together
insurance policies, which underwriters then market to insurance agents. The employee was denied an underwriter position in Milwaukee in 2006, which was given to a non-Asian with much less relevant experience. The employee filed an EEOC charge on February 7, 2007, based on her race and national origin (Hmong). Defendant told a number of managers in its Milwaukee and Chicago offices about the charge. In June 2007, the employee applied for an underwriter trainee position in Chicago, but was not selected. A 3-year consent decree provides the employee $110,000 ($60,000 in backpay and $50,000 in compensatory damages), and enjoins defendant from race discrimination and retaliation under Title VII. A senior vice president will issue a letter to the employee, who still works for defendant, acknowledging her positive contributions and stating that she is valued as an employee.

In *EEOC v. Dots, LLC*, No. 2:10-CV-00319 (N.D. Ind. June 2, 2011), EEOC alleged that a discount women’s specialty retailer with about 400 stores in 24 states, refused to hire white applicants for sales clerk and assistant manager positions at its Merrillville, Indiana, store because of their race. In April 2008, the Merrillville store manager (black) told a white applicant with over 8 years experience in retail sales, 4 as an assistant manager, that she did not hire white people. Statistical evidence also showed a significant underrepresentation of white employees in the district (10 stores) in which the Merrillville store was located. Under a 3-year consent decree, defendant will pay $246,500 to 32 rejected white applicants, and will offer four of them preferential interviews for open hourly sales positions at the Merrillville store. Defendant will maintain a log indicating the race of applicants and the reasons any applicant interviewed was not hired or was hired for a different position than the one sought, and will report to EEOC on applicants and hires, by race, for sales associate and assistant store manager positions.

(2) Pay

In *EEOC v. Williams Sausage Co., Inc.*, No. 1:10-cv-01263 (W.D. Tenn. Aug. 10, 2011), EEOC alleged that a meat processor headquartered in Union City, Tennessee, paid a black employee less than his white counterparts, and constructively discharged him due to his race. Defendant hired the employee into a general maintenance position in July 2007, at $9 an hour, raised to $9.50 a year later. He was the only black maintenance department employee, and performed the same tasks as the white employees, who were paid $1 to $4 an hour more. In July 2008, defendant adopted a new pay plan linking performance on a proficiency test to pay, but did not allow the black employee to take the test. Subsequently, defendant gave all of the white maintenance department employees raises to $13 per hour—including eight who did not meet the proficiency
standards and three who did not take the test—but did not give the black employee a raise. The employee complained about not receiving the raise, and shortly thereafter, in early December 2008, defendant transferred him to a production job at $9.50 an hour. Rather than accept the transfer to a less skilled job, the black employee resigned. Under a 5-year consent decree, defendant will pay the employee $60,000 in compensatory damages and provide him with a letter of apology signed by defendant’s highest-ranking official. The decree enjoins defendant from racial discrimination against African Americans in hiring and compensation in its maintenance department; from subjecting any maintenance department employee to a racially work environment; and from retaliation.

(3) Harassment and Terms and Conditions of Employment

In EEOC v. Roadway Express, Inc., and YRC, Inc., Nos. 06-CV-4805 and 08-CV-5555 (N.D. Ill. Dec. 20, 2010), EEOC alleged that a less-than-truckload motor carrier with terminals throughout North America subjected black employees at two Illinois facilities to racial harassment and race discrimination in terms and conditions of employment. In a 2006 suit, EEOC alleged that from at least 2002, defendant Roadway subjected black dockworkers, switchers, and janitors at its Chicago Heights terminal to racist and racially-threatening comments, racist graffiti in bathrooms, and the display of hangman’s nooses, and maintained racially segregated workgroups. In a 2008 suit, EEOC alleged that from at least 2005, white employees at Roadway’s Elk Grove Village terminal directed racist comments and graffiti at black dockworkers, switchers, and janitors and displayed hangman’s nooses. EEOC alleged in both suits that Roadway subjected black workers to disparate terms and conditions of employment, including more difficult and demanding work assignments than white employees. A 5-year consent decree resolved both suits and a related private class action filed under 42 U.S.C. § 1981 for $10 million in monetary relief, which includes $1.5 million in attorney’s fees and costs to private class counsel. The decree enjoins race discrimination against black employees at defendant YRC’s (a successor of Roadway) Chicago break bulk dock operation (the Chicago Heights facility) and prohibits retaliation at that facility. YRC will retain an outside Monitor to oversee decree implementation and assess YRC’s compliance with the decree at Chicago Heights. The Monitor will file detailed annual reports with YRC, EEOC, and the court regarding YRC’s compliance with the decree, including race discrimination and harassment complaints received and investigations conducted, and work assignments and discipline by race.

In EEOC v. Ganley Lincoln of Bedford, Inc., No. 1:07-CV-02829 (N.D. Ohio April 19, 2011), EEOC alleged that a Bedford, Ohio, car and truck dealership subjected black
salespersons to racial harassment and disparate terms and conditions of employment. The dealership’s general manager used racial epithets, made derogatory statements about black employees and customers, and engaged in discriminatory practices such as providing referrals to white salespersons and placing their names in dealership advertisements, while not doing this for black salespersons. The general manager also manipulated the sales and commission structure so that black salespersons received lower commissions than white salespersons. A 2-year consent decree provides $300,000 in compensatory damages to be distributed among four individuals. The decree enjoins discriminatory employment practices and retaliation under Title VII.

In *EEOC v. Austin Foam Plastics, Inc.*, No. 1:09-CV-00180 (W.D. Tex. Oct. 15, 2010), EEOC alleged that a producer and distributor of corrugated box and cushion packaging with locations throughout the U.S. subjected black employees at its Pflugerville, Texas, facility to racial harassment from at least August 2006 and subjected male employees at the facility to sexual harassment from at least October 2006. White employees and managers regularly emailed racially derogatory jokes, cartoons, and other materials to coworkers, and posted racially offensive photographs on the bulletin board outside the human resources office. They also engaged in threatening and intimidating conduct toward black employees, such as tampering with the brake lines and air hoses of a black driver’s truck. In addition, a female manager subjected male subordinates to offensive sexual comments, requests for sexual favors, and physical contact (hugs and kisses), and provided compliant employees with more favorable working conditions. Management failed to take corrective action in response to employee complaints. A 2-year consent decree provides eight individuals with $600,000 in monetary relief and enjoins race and sex (male) discrimination under Title VII and retaliation.

In *EEOC v. HiCare, Inc., dba Home Instead Senior Care*, No. 1:10-CV-02692 (D. Md. Dec. 10, 2010), EEOC alleged that a provider of home healthcare to seniors in Anne Arundel and Howard counties in Maryland discriminated based on race in assigning caregivers. Defendant coded the preferences of clients who requested white caregivers, and made assignments based on those preferences. Defendant claimed that it ceased the coding practice in 2008, but admitted that it continued to take client racial preferences into account in making caregiver assignments. A 5-year consent decree provides $150,000 in compensatory damages to caregivers employed by defendant from October 2007 through entry of the decree, in amounts determined by EEOC based on length of service and employment status. The decree enjoins defendant from racial coding and race-based caregiver assignments. The injunction survives the decree.
(4) Discharge

In *EEOC v. Briggs Equipment*, No. 5:10-cv-00108 (S.D. Tex. Aug. 24, 2011), EEOC alleged that a firm that sells and services material handling equipment such as forklifts, backhoes, and rollers subjected a black employee to a racially hostile work environment and disparate discipline, and discharged him because of his race. The employee was hired as a mechanic at defendant’s Laredo, Texas, facility in 2002. From May 2008 until February 2009, his supervisor, the facility’s service manager, used racial epithets in his presence, told racial jokes, yelled and cursed at him, and subjected him to heightened scrutiny and more stringent performance standards than nonblack mechanics. Due to an economic downturn, defendant decided to lay off one mechanic in Laredo. Although the black employee was the most senior mechanic, and according to a coworker the only mechanic who knew how to troubleshoot electrical problems, defendant laid him off because the service manager said he had a weak performance record. He was the only black mechanic of eight supervised by the service manager. Under a 2-year consent decree, the employee will receive $385,000 in monetary relief, including $273,000 paid to medical providers. The decree enjoins race discrimination at the Laredo facility.

b. Sex Discrimination

(1) Hiring

In *EEOC v. Digital Cable & Communications South, Inc.*, No. 1:09 CV 02035 (N.D. Ohio Nov. 8, 2010), EEOC alleged that a provider of installation services to operators of cable television systems in northern Ohio rejected female applicants for cable technician positions because of their sex. The qualifications for the cable technician job were minimal, and many of the men hired possessed no greater experience or qualifications than women not hired. A 5-year consent decree provides a total of $70,000 in monetary relief to two rejected female claimants, and enjoins defendant from failing to hire women for cable technician positions and from retaliation. Defendant will use the Cleveland organization Hard Hatted Women (HHW) as a source to recruit and hire women for cable technician positions. HHW will provide two free 40-hour classes annually to train women for technician positions. Defendant will maintain detailed records on applicants and hires for cable technician positions and provide a summary of that information annually to EEOC.

In *EEOC v. Norfolk Southern Railway Co.*, No. 1:09-2566 (D. Md. June 13, 2011), EEOC alleged that one of the nation’s largest rail transporters refused to allow a long-term
female clerical employee at its Baltimore, Maryland, trainyard to train for a yardmaster position because of her sex. In June 2007 due to the elimination of clerical positions at the trainyard, defendant allowed the female employee to train for a yardmaster position. A male employee who had been denied training challenged her selection based on defendant’s nepotism policy, causing defendant to remove her from training on the ground that as yardmaster she would be supervising her husband. The nepotism policy had not been strictly applied to male employees supervising relatives, and the female employee’s husband, a conductor, was supervised by an independent contractor rather than a yardmaster. Under a 4-year consent decree, defendant will pay the female employee $60,000 ($40,000 as lost wages and $20,000 as compensatory damages) and offer her the next available yardmaster position at the Baltimore Terminal that is filled by a method other than seniority. The decree enjoins defendant from sex discrimination in hiring and promotion and from the sex-based application of corporate policies.

(2) Assignment and Promotion

In *EEOC v. Polycon Industries, Inc.*, No. 2:09-CV-00141 (N.D. Ind. Feb. 19, 2011), EEOC alleged that a plastic bottle manufacturer located in Merrillville, Indiana, maintained sex-segregated job classifications and failed to promote women into higher-paid positions due to their sex. From March 2004 into 2007, female employees, who held 40% of defendant’s production jobs, were assigned only to the two lowest-paid positions, packer (with an average wage of $7.65/hr.) and printer ($11.17/hr.). Men held all of the higher-paid positions – process, maintenance, machine operator, and utility -- at hourly rates ranging from $13 to $19. Male supervisors did not consider female applicants for the higher-paid positions and supervisors told women they could not handle the machine operator position and that it was “too dirty and greasy” for them. A consent decree creates a $170,000 settlement fund for women who between September 2005 and March 2010 were placed in packer positions or expressed interest in machine operator positions. The decree prohibits sex discrimination, and will remain in effect for the shorter of 5 years or until, consistent with external availability, women hold 50% of utility production positions and 14.5% of machine operator positions. Defendant will offer two utility production positions to qualified women for each one it offers to a qualified man until women constitute 50% of the incumbents. Defendant will provide female production employees with written notice of each machine operator opening, and will offer these positions to women unless no qualified woman applies.

In *EEOC v. Dynasty Food Corp., Dynasty Meat Corp., and 50-18 Meat Corp., d/b/a Key Food Supermarkets*, No. 09 CV 3584 (E.D.N.Y. Sept. 23, 2011), EEOC alleged that the operators
of three supermarkets in Queens, New York, segregated jobs by sex and failed to hire women because of their sex. From January 1, 2006, defendants had employed no women in their grocery, produce, dairy, bakery, or frozen food departments; employed substantially more men than women in their deli departments (over 90% men); and primarily assigned women to the cashier position (over 90% women). In April 2006, a woman who applied for a job as a cashier or stocker was told that defendants did not hire “girls” as stockers. A 3-year consent decree provides $115,000 ($65,000 in a claims fund and $20,000 and $30,000 to two rejected female applicants), and enjoins defendants from sex discrimination and retaliation. Defendants will use their best efforts to hire women for stocker positions, including posting a notice with the New York State Department of Labor in Queens and Brooklyn. The notice and defendants’ application will contain the statement: “Women are encouraged to apply for positions requiring lifting including unloading of trucks and stocking of boxes and food items.” Defendants will report quarterly to EEOC on applicants and hires (by gender, date of hire, position, and hourly rate) for all stores.

In EEOC v. Denver Hotel Management Co., Inc., dba Brown Palace Hotel & Spa, No. 1:10-CV-01712 (D. Colo. Dec. 8, 2010), EEOC alleged that a historic hotel in Denver, Colorado, failed to promote a female employee with two young children to assistant human resources director due to her sex and childcare responsibilities. The employee had worked for defendant for about 7½ years, and had been both an employment manager and benefits manager in the human resources department when defendant created a new assistant human resources director position in November 2008. Defendant did not advertise the job, but simply announced that another female employee was being given the new position. Defendant’s officials told the employee with children that she did not get the position because she would be unable to relocate or to work the 50 or 60 hours per week the job was expected to require because she was a single mother. The employee had never been asked if she would relocate or work extended hours, and was willing to do both. Under a 2-year consent decree, defendant will pay the employee $105,000, and place her on paid administrative leave, with current benefits, from December 6, 2010, until August 28, 2011 (valued at $41,000). The decree enjoins sex discrimination and retaliation.

(3) Pregnancy

In EEOC v. Akal Security, Inc., No. 08-CV-1274 (D. Kan. Dec. 2, 2010), EEOC alleged that a national provider of security services discriminated against pregnant security guards at eight Army bases between April 2004 and the termination of defendant’s contracts with the bases. The facility chiefs at the eight bases took away job duties of pregnant
guards, required them to take unscheduled physical agility tests, moved them to part-
time desk jobs, and forced them to take maternity leave prematurely and to reapply and
retrain after maternity leave. Defendant gave guards with nonpregnancy-related short-
term medical conditions modified duties, such as office positions, while they
recuperated. A 2-year consent decree provides $1,620,000 in monetary relief to 26
individuals that includes $670,000 in fees to attorneys representing nine intervenors and
two other women. The decree prohibits pregnancy discrimination and retaliation.
Defendant will report to EEOC every 6 months on pregnant women required to take
physical agility tests, including accommodations available and requested; pregnant
women not permitted to take a physical agility or weapons test; pregnant women who
fail a physical agility or weapons test; and pregnant women who are required to take a
leave of absence or are separated from the company.

In *EEOC v. Crothall Services Group dba Crothall Healthcare, Inc.*, No. 4:10-CV-01221 (E.D.
Ark. Dec. 22, 2010), EEOC alleged that a provider of housekeeping, maintenance, and
other services to healthcare institutions terminated a female employee at Arkansas State
Hospital in Little Rock because of her pregnancy. The employee was 5 months
pregnant when she was hired as a housekeeper in November 2008. She completed
training and successfully performed the housekeeping job for several days before the
housekeeping supervisor learned she was pregnant. The supervisor expressed concern
for the safety of the employee and her baby and asked her to resign with the option of
rehire after she had the baby. The employee refused to resign and defendant fired her.
She reapplied after she had the baby, but was not hired. A 2-year consent decree
provides the employee 88,422.23, and requires that defendant reinstate her into her
former position and shift with retroactive seniority and benefits, and issue her a letter of
apology signed by defendant’s regional manager. The decree enjoins sex
discrimination.

In *EEOC v. KLD Labs, Inc.*, No. 2:10-cv-04449 (E.D.N.Y. July 30, 2011), EEOC alleged that
an engineering firm headquartered in Huntington Station, New York, rescinded a job
offer to a female applicant because of her pregnancy. The applicant was referred to
defendant through a staffing firm, and after interviewing her, defendant told the firm to
offer her an administrative position. The applicant contacted defendant on July 28,
2008, to accept the offer, and after a start date was agreed upon, she told defendant’s
finance manager she was pregnant and due in February. Later that day, the finance
manager called the staffing firm and told it to rescind the job offer because the applicant
was pregnant and defendant could not have someone out on medical leave. A 3-year
consent decree provides the applicant $95,000 and enjoins defendant from sex
discrimination and retaliation.
(4) Harassment

In *EEOC v. Karen Kim, Inc., d/b/a Paul’s Big M*, No. 5:08-CV-1019 (N.D.N.Y. Jan. 20, 2011), EEOC alleged that a grocery store in Oswego, New York, subjected female employees to a sexually hostile work environment, resulting in the constructive discharge of three employees, and retaliated against an employee for complaining of the harassment. Following an 8-day trial, the jury returned a verdict for EEOC on the sexually hostile work environment claim, awarding 10 individuals a total of $10,080 in compensatory damages and $1.25 million in punitive damages. The jury found for defendant on the constructive discharge and retaliation claims. The damages awards are subject to $50,000 caps. At trial, EEOC presented evidence that since 2001, the store’s male general manager, who was engaged to the store’s owner and had a child with her, subjected female employees, many of whom were teenagers, to sexually intrusive touching and grabbing and offensive sexual comments and gestures. In May 2007, the general manager put his tongue in the mouth of a teenage female employee; he was arrested, pled guilty to harassment in the second degree, and was sentenced to a 1-year conditional discharge, 100 hours of community service, and a fine. Defendant’s owner then suspended the general manager for 30 days, but with full pay. Defendant continued to employ the general manager until the summer of 2010, when he was fired following a complaint that he had sexually harassed a young female employee.

In *EEOC v. Mid-American Specialties, Inc.*, No. 2:09-cv-02203 (W.D. Tenn. March 2, 2011), EEOC alleged that a Memphis, Tennessee-based telemarketer of promotional products and office supplies subjected three female sales representatives to a sexually hostile work environment and discharged two of them for complaining about the harassment. Following an 8-day trial, the jury returned a verdict for EEOC on all claims, awarding one sales representative $75,000 in compensatory damages and $450,000 in punitive damages; a second $250,000 in compensatory damages, $450,000 in punitive damages, and $50,650 in backpay; and a third $25,000 in compensatory damages, $200,000 in punitive damages, and $4,317 in backpay. The court reduced the damages awards to the $50,000 caps. The court later ordered injunctive relief, effective for 3 years. Among other requirements, defendant must send a letter to all employees signed by its CEO advising them of the verdict, including the full amount of backpay and damages awarded by the jury, and enclosing defendant’s policy prohibiting sexual harassment and retaliation; and must designate a corporate management representative to receive and investigate reports of sexual harassment in accordance with procedures set out in the court’s order.
In EEOC v. Boh Brothers Construction Co., LLC, No. 09-6460 (E.D. La. March 24, 2011), EEOC alleged that a construction contractor operating in the New Orleans, Louisiana, and Gulf South areas subjected a male employee to a sexually hostile work environment and suspended and transferred him in retaliation for complaining about sexual harassment. Following a 2½-day trial, the jury returned a verdict for EEOC on the sexual harassment claim and for defendant on the retaliation claim. The jury awarded the employee $1,000 in backpay and benefits, $200,000 in nonpecuniary compensatory damages, and $250,000 in punitive damages. The damages cap is $300,000. The employee was hired as an ironworker in November 2005, and assigned to a project repairing the twin span bridges over Lake Pontchartrain in southern Louisiana. At trial, EEOC presented evidence that a male job superintendent subjected the employee to language and gestures indicating that he considered the employee feminine. The conduct included calling the employee names such as “faggot,” “pussy,” and “princess,” and making jokes about the employee being gay. In November 2006, the employee reported the harassment and other misconduct by the job superintendent to the project superintendent, and was sent home without pay for 3 days while the project supervisor investigated. The employee was then transferred to a different department, from which he was laid off in February 2007.

In EEOC v. International Profit Associates, Inc., No. 01 C 442 (N.D. Ill. March 2, 2011), EEOC alleged that a Buffalo Grove, Illinois, telemarketer of small business consulting packages, subjected female employees to sexual and sex-based harassment, including crude sexual comments, propositions, inappropriate touching, and sexual assaults. EEOC contended that defendant’s highest ranking officers not only fostered a pattern or practice of sexual harassment, but participated in the conduct. In June 2010, defendant consented to a court order finding it had engaged in a pattern or practice of tolerating sexual harassment against its female employees from November 25, 1997, to February 14, 2005. A 3-year consent decree enjoins defendant from sexual harassment and from retaliatory conduct based on opposition to or participation in proceedings regarding sex discrimination or sexual harassment. The decree establishes an $8 million settlement fund (including court determined fees of $431,667 to attorneys for three intervenors and one other person), paid in four installments over the term of the decree. The future payments are personally guaranteed by defendant’s owner and secured with liens against three of his personal real estate interests. The money will be distributed as compensatory damages to 82 individuals in amounts determined by EEOC based on criteria set out in the decree. Two external Monitors will oversee compliance with the decree and report annually to EEOC, the court, and defendant. Defendant must implement the Monitors’ recommendations for changes in and additions to its policies and practices unless it successfully objects to the court.
In *EEOC v. Bardon, Inc., t/a Aggregate Industries*, No. 8:08-CV-01883 (D. Md. Oct. 1, 2010), EEOC alleged that a supplier of ready-mix concrete and other building materials, with operations in both the United States and United Kingdom, subjected a female employee to sexual harassment and discharged her because of her sex and in retaliation for complaining about sexual harassment. The employee was defendant’s only female field quality control technician during her tenure from August 2004 until January 2007. She travelled to facilities in Maryland and Virginia to sample defendant’s products, and delivered the samples to a Maryland laboratory for analysis. Male employees at the facilities where she collected samples subjected her to sexually offensive and derogatory comments, made sexual advances, touched her inappropriately, urinated in front of her, and at one facility urinated all over the women’s restroom and left pornography there. The employee complained to defendant’s officials, but was told to keep quiet. After investigating a November 2006 complaint by the female employee about a male employee’s conduct at a King George, Virginia, facility, defendant admonished her for encouraging the male employees’ behavior with “playful and flirty” conduct. The following month, the employee told a state safety inspector she was accompanying to the King George’s facility that she was uncomfortable at the facility because of how defendant had handled her sexual harassment complaint. In January 2007, defendant officials vigorously questioned the employee about what she said to the inspector and then fired her, allegedly for violating a work rule regarding disclosure of confidential internal matters. A 3-year consent decree provides the employee with $325,000, and enjoins sex discrimination and retaliation.

In *EEOC v. US Security Associates, Inc.*, No. 2:09-cv-598 (N.D. Ala. May 31, 2011), EEOC alleged that beginning in 2006, a national provider of security services subjected female employees based in its Birmingham, Alabama, district office to a sexually hostile work environment through the conduct of the male district manager, which included sexually demeaning comments, sexual gestures, requests for sex, and inappropriate touching, and requiring female employees to watch pornography with him. Complaints about the district manager to regional management were unsuccessful. A 42-month consent decree provides $1.95 million to seven individuals, one of whom intervened; the figure includes sums paid to one of the seven in resolution of Title VII claims in an earlier suit she had filed. The decree prohibits sex discrimination and retaliation.

employees at a Bismarck, North Dakota, Applebee’s restaurant to sexual harassment and retaliation. Starting in 2002, the restaurant’s general manager subjected female servers and bartenders to sexual comments and propositions, requests for sex for improved working conditions, exposure to pornography, and inappropriate touching. Defendants’ officials received numerous complaints about the manager, but no effective corrective action was taken. Female employees who opposed the sexual harassment were given unfavorable schedules and less profitable work assignments, verbally abused, and denied training. The manager was fired in December 2007, a month after EEOC charges were filed. A 3-year consent decree provides $1 million in compensatory damages to 17 individuals, payable over 3 years and personally guaranteed by defendants’ two owners. The decree prohibits sexual harassment and retaliation. Defendants will create an ombudsperson position to monitor working conditions and resolve discrimination complaints at their restaurants. Defendants will establish a confidential sexual harassment/retaliation 24/7 toll-free hotline, operated by a third-party vendor.

(5) Discharge

In EEOC v. Kraft Foods Global, Inc., d/b/a Maxwell House Coffee Company, No. 3:10-cv-884 (M.D. Fla. July 15, 2011), EEOC alleged that a multinational food and beverage conglomerate, disciplined and discharged a long-term female employee at its Jacksonville, Florida, Maxwell House Coffee facility because of her sex. In June 2008, the employee made an error resulting in the loss of approximately 48,000 pounds of coffee and was suspended for 4 days. At least six male employees who had made errors causing similar losses received only verbal warnings; all six had disciplinary records similar to the female employee (no discipline in the preceding 2 years, which eliminates any prior discipline). In early October 2008, the female employee and a male coworker were involved in incidents where coffee was again damaged and became unusable. The female employee was discharged (due to the June suspension) and the male was given a verbal warning for a first incident. The female employee was reinstated effective March 1, 2010, through a union grievance, but without backpay. A 2-year consent decree provides the female employee $100,000. Defendant will provide her all benefits, including accrued leave, bonuses, and vacation time, she would have received had she not been discharged. The decree enjoins sex discrimination in the discipline of female hourly employees at the Jacksonville facility.
c. National Origin Discrimination

(1) Hiring

In EEOC v. Express Services, Inc., AJK Enterprises, LLC dba Express Employment Professional, and Proformance Group, Inc., No. 6:11-CV-00279 (D.S.C. June 10, 2011), EEOC alleged that defendants discharged an employee due to her Guatemalan national origin. Express Employment Professional (EEP) is a franchise of Express Services, a worldwide staffing service. EEP hired the employee in October 2008 to work for Proformance Group, an industrial projects subcontractor, in a parts assembly position at an Ohio nuclear facility. The position required U.S. citizenship, and Proformance Group’s general manager told EEP that the employee had to produce a U.S. birth certificate to work on the project. The general manager said that the employee did not look like an American and he wanted to ensure that EEP checked her status. The employee is a U.S. citizen, but because she was born in Guatemala she could not produce the birth certificate. She offered to produce her U.S. passport, which constituted sufficient evidence of citizenship to work on the nuclear facility project, but EEP would not accept it. The Proformance Group general manager did not ask EEP to produce a birth certificate for a non-Hispanic individual hired the same day, although he knew there was no birth certificate on file for that individual. A 2-year consent decree provides the employee with $42,500 ($4,232 of which represents unpaid wages), and prohibits defendants from discriminating on the basis of national origin in hiring or discharge and from retaliating.

(2) Harassment

In EEOC v. Wal-Mart Stores, Inc., dba Sam’s Club, No. 1:09-CV-00804 (E.D. Cal. April 27, 2011), EEOC alleged that a Wal-Mart Sam’s Club in Fresno, California, subjected food service workers of Mexican descent to harassment based on their national origin. From late 2005 until December 2006, an employee subjected Mexican employees to a barrage of insults about Mexicans. The Mexican employees complained repeatedly to managers, and the employee was twice suspended for a day, but she continued making ethnic insults and also began engaging in physically intimidating conduct toward the Mexican employees. Defendant did not conduct a formal investigation until November 2006, when the employee admitted to using the term “wetback”; it terminated her on December 4, 2006. A 3-year consent decree provides $440,000 in compensatory damages to 11 individuals. The decree prohibits defendant from engaging in national origin discrimination.
In *EEOC v. New York University*, No. 1:10-CV-07399 (S.D.N.Y. Aug. 12, 2011), EEOC alleged that the nation’s largest private university subjected a library mailroom employee to national origin (Ghanaian) and race (black) harassment, and to further harassment in retaliation for complaining about the harassment. The employee began working for defendant in 2004 as a mail supply assistant. Beginning in the summer of 2007, the African American mailroom supervisor made hostile and derogatory comments about the employee’s nationality and race. He called the employee a monkey and a gorilla, said he spoke gibberish, and mocked his intelligence. Starting in August 2007, the employee made a series of complaints to the university, which investigated some of them and acknowledged the harassment but downplayed its seriousness. The supervisor treated the employee with more hostility after learning of his complaints, subjecting his work to intense scrutiny and disciplining him for minor actions. In January 2009, defendant granted the employee’s request to transfer into a position with another supervisor. Under a 3-year consent decree, the employee will receive $210,000 in monetary relief. The decree enjoins defendant from harassment based on race or national origin and from retaliation. Defendant will not rehire the former mailroom supervisor.

In *EEOC v. Gordon Gaming Corp. dba Sahara Hotel & Casino, Stockbridge/SBE Holdings, LLC dba Sahara Hotel & Casino, SBEHG Las Vegas I, LLC dba Sahara Hotel & Casino*, No. 2:09-CV-01356 (D. Nev. Dec. 7, 2010), EEOC alleged that the former and current owners of the Sahara Hotel & Casino, a Las Vegas resort, subjected a food service worker to harassment based on his Egyptian national origin and retaliated against him because of his complaints about the harassment. The employee was hired in July 2004 as a kitchen runner delivering food to the hotel buffet. From early 2005, his supervisors and coworkers subjected him repeatedly to offensive comments about his national origin (including “[expletive] Egyptian,” “Camel,” “Taliban,” “bin Laden”), placed offensive graffiti in the men’s locker room, and told him to “go back to Egypt.” The employee complained to management, and in February and June 2005 filed union grievances. The harassment continued and management assigned the employee extra work, subjected his work to increased scrutiny, and issued him disciplinary notices resulting in a suspension in June 2005. Under a 3-year consent decree, the employee will receive $85,000 in compensatory damages, and an additional $15,000 will be paid to the Nevada Equal Rights Commission for purposes of education and training. The decree enjoins national origin-based harassment, and retaliation.
d. Religious Accommodation

In *EEOC v. Abercrombie & Fitch Stores, Inc.*, No. 09-CV-602 (N.D. Okla. July 21, 2011), EEOC alleged that a national clothing retailer failed to reasonably accommodate the religious practices of a Muslim applicant for a sales associate position, and rejected her for the position because of her religion. The applicant, then age 17, applied at an Abercrombie Kids store (targeting customers ages 8-16) in Tulsa, Oklahoma, in June 2008. She was wearing a black head scarf (known as a hijab) due to her religious practice of covering her head as a symbol of her faith and of modesty. Defendant has a “Look Policy,” which requires sales associates -- referred to by defendant as “models” -- to dress in clothing and merchandise consistent with that sold in the store. Defendant’s district manager told the assistant manager who interviewed the Muslim applicant that the assistant manager could not hire her because employees were not allowed to wear hats at work, and if the applicant wore the head scarf other associates would think they could wear hats. The court granted summary judgment on liability to EEOC. The court found that defendant knew the applicant wore the head scarf due to her religious beliefs, and rejected defendant’s evidence, including expert testimony, that permitting the applicant to wear a head scarf would have caused it undue hardship because such an exception to its Look Policy would negatively impact its “brand identity,” which defendant claimed was communicated through the “in-store brand experience” that included interaction with employees. Following a 2-day trial on relief, the jury awarded the applicant, who had no backpay losses, $20,000 in compensatory damages.

In *EEOC v. Measurement, Inc.*, No. 1:10-cv-00623 (M.D.N.C. Jan. 6, 2011), EEOC alleged that a North Carolina-based developer of educational tests refused to accommodate the religious practices of a team leader in its scanning department and discharged her because of her religion, Children of Yisrael. The employee supervised 25 to 30 temporary workers who scanned copies of standardized tests. During its spring and summer busy seasons, defendant operates three shifts Monday through Friday, and the scanning department also worked on Saturdays. In 2006, the employee became a member of the Children of Yisrael religion and began to observe the Sabbath from sundown Friday to sundown Saturday. Initially, she was able to swap shifts with two other team leaders during the busy seasons, but one was transferred and the other left defendant’s employment. In September 2008, defendant told the employee she would have to work on Saturdays. The employee identified a new team leader who agreed to cover for her on Saturdays, but defendant refused to permit this, saying the team leader did not have enough experience. Defendant discharged the employee in October 2008 when she refused to sign a memorandum stating that her religious beliefs were not compatible with a team leader’s functions and that accommodating her religious
practices would be an undue hardship for defendant. A 3-year consent decree provides $110,000 in backpay and compensatory damages and a positive letter of reference to the employee, and prohibits defendant from discrimination on the basis of religion.

In EEOC v. Lowe’s Home Centers, Inc., a wholly owned subsidiary of Lowe’s Companies, Inc., No. 2:10-cv-00063 (E.D. Tenn. Sept. 20, 2011), EEOC alleged that a national home improvement retailer denied an employee a reasonable accommodation for his religious observances, and retaliated against him for requesting religious accommodations. The employee began working for defendant in 2002 as a customer service associate in the delivery department of its Morristown, Tennessee, store. In 2006, he was baptized as a Christian, and since then has held a sincere religious belief against working on his Sabbath, Sunday. In September 2007, defendant contracted out its delivery services and the employee was transferred to the outdoor lawn and garden department where he was required to work some Sundays. The employee asked defendant managers for accommodations to observe his Sabbath, but his requests were denied, causing him to lose 8 hours of pay for each Sunday he was assigned to work. The employee was laid off in late November 2008, and called back part time in March 2009. A 3-year consent decree provides $120,000 to the employee ($19,000 in backpay and $101,000 in compensatory damages), and enjoins defendant from failing to reasonably accommodate the sincerely held religious beliefs of any employee.

2. Title VII and the Equal Pay Act

In EEOC v. Hyundai Ideal Electric Company, No. 1:10-cv-1882 (N.D. Ohio May 10, 2011), EEOC alleged that a Korean manufacturer of medium and high power generators paid a female design drafter less than a male design drafter performing substantially equal work, and discharged her in retaliation for complaining about sex-based wage discrimination. The female employee was hired in August 2007 at defendant’s Mansfield, Ohio, facility at $36,000 a year. She possessed an associate’s degree in drafting and design, was working towards her bachelor’s degree in business management (obtained in summer 2008), and had nearly 10 years of drafting experience. While working on a project in late 2008, the employee saw on defendant’s Intranet shared drive that a male design drafter hired in March 2008, who had not completed an associate degree, was paid $40,000 a year. On November 11, 2008, she informed defendant’s human resources manager about the salary disparity and attributed it to her gender. The HR manager responded by repeatedly asking her who told her about the pay difference. The employee replied that no one had. The next day, the HR manager accused the employee of discussing salary information and told her he was firing her. The employee protested that she was being terminated for complaining
about her salary, and told the HR manager how she obtained the salary information; however, he claimed not to believe her. A 2-year consent decree provides $188,000 to the employee ($58,000 of which constitutes backpay) and prohibits defendant from sex discrimination in terms and conditions of employment.

3. Age Discrimination in Employment Act

a. Hiring

In *EEOC v. Cavalier Telephone, LLC*, No. 3:10CV664 (E.D. Va. July 15, 2011), EEOC alleged that a provider of telephone, Internet, and digital TV services demoted a sales director and sales manager because of their ages (48 and 43) and in retaliation for opposing age discrimination, and subjected the sales manager to adverse conditions of employment, discipline, and discharge because of his age, opposition to age discrimination, and participation in age discrimination proceedings. EEOC also alleged that defendant failed to hire applicants age 40 and over into account executive positions in its mid-Atlantic region. A recruiter hired in May 2003 made ageist comments regarding defendant’s hiring strategy, saying that defendant was on a “youth movement” and was looking for recent college graduates who were “young and fit.” A 3-year consent decree provides $1 million to 25 individuals, and enjoins defendant from age discrimination and prohibits retaliation. Defendant will interview rejected age 40 and older applicants identified by EEOC as interested in employment, and if qualified, will offer them sales positions within 50 miles of their home addresses as vacancies occur. Defendant will make specified efforts to recruit individuals age 40 and older into commissioned direct sales positions, and will make a good faith effort to hire qualified individuals age 40 and older into open sale positions at or above the rate at which they apply for such positions. Every 6 months, defendant will compare the percentage of applicants age 40 and older with the percentage hired, report the results to EEOC, and explain any negative disparities in hiring rates.

In *EEOC v. Burlington Northern & Santa Fe Railway Co.*, No. CIV-07-734-D (W.D. Okla. Nov. 17, 2010), EEOC alleged that the operator of one of the largest railroad networks in the United States failed to hire individuals age 40 and over because of their ages. In October 2005, a 55-year-old applicant responded to an advertisement for a maintenance of way position (a title that covers three different jobs: trackworker, truckdriver, and welder) at defendant’s Oklahoma City, Oklahoma, facility. The applicant had 18 years of experience at another railway as a switchman, brakeman, and conductor, and 8 years as a master welder with a heavy equipment manufacturer. Fifteen applicants (nine under age 40, five over 40, and one age unknown), including the 55-year-old, passed
both phases of the screening process: aptitude testing and a structured interview. Eight of the applicants offered jobs were under age 40 and the ninth was 41; none had ever worked for a railroad, while all the rejected age 40 and older applicants were well qualified. A 2-year stipulated order provides $75,000 in lost wages to the 55-year-old applicant and $20,000 to one other applicant, and prohibits discrimination and retaliation under the ADEA.

In *EEOC v. City of Greensboro*, No. 1:09-cv-00576 (M.D.N.C. Jan. 13, 2011), EEOC alleged that a North Carolina municipal government failed to hire a 58-year-old applicant because of his age. In March 2007, the person applied for an electronic processes specialist position, a job involving maintaining and repairing communication systems used by defendant’s police, fire, and rescue departments. He had 28 years of experience and possessed a Federal Communications Commission (FCC) license that the job description listed as a necessary qualification. He and four other applicants (ages 25, 30, 38, and 39) were interviewed by a four-person panel of supervisors and managers. The 58-year-old applicant received the third highest interview score and was the only candidate with the FCC license, but was not selected. A 3-year consent decree provides $91,000 to the applicant and prohibits age discrimination in hiring and retaliation.

b. Benefits

In *EEOC v. Brentwood Fire District and the Brentwood Fire Department*, No. 09-3298 (E.D.N.Y. March 14, 2011), EEOC alleged that providers of firefighting services for the hamlet of Brentwood, located in the Town of Islip, New York, engaged in age discrimination by refusing to allow volunteer firefighters age 62 and older to accrue credit towards a length of service award benefit. In 1989, pursuant to a 1988 State law, defendants established a length of service award program (LOSAP). A requirement in creating a LOSAP is establishment of an “entitlement” age, at which a firefighter can receive benefits. Defendants established an entitlement age of 62, and did not permit firefighters who reached that age to accrue additional firefighting service. Defendants amended their program in 2005 to permit current active firefighters to accrue service credits without regard to age, but on a prospective basis only. A 3-year consent decree provides $465,600 in benefits to 28 individuals who were members of the Brentwood Fire Department at any time between January 1, 1990, and the present who but for the age limitation in effect from 1990 to 2004 would have received 1 or more years of additional firefighting service. Defendants will credit individuals with the years of firefighting service set forth in an attachment to the decree, recalculate their length of service awards based on inclusion of the additional firefighting service, and provide retroactive benefits due through February 28, 2011. The decree permanently enjoins
defendants from preventing active volunteer firefighters from receiving service award credit in the LOSAP because of age.

In *EEOC v. Minnesota Department of Human Services*, No. 11-CV-00678 (D. Minn. April 7, 2011), EEOC alleged that a Minnesota State agency (MDHS) violated the ADEA by maintaining an early retirement incentive (ERI) plan that denied employer contributions toward health and dental insurance premiums to individuals who retired after reaching age 55. Employees who retired during the pay period when they turned 55 received contributions until age 65, but employees retiring after the age-55 pay period received no further contributions. In April 2010, a district court granted summary judgment on liability to EEOC in a suit against another Minnesota State agency (the Department of Corrections or MDOC) challenging the same ERI plan. The consent decree in MDHS adopts the holdings in the MDOC suit regarding the invalidity of the ERI plans and the scope of available relief. The decree provides for the payment of $467,165 to 29 individuals who retired after age 55, representing the full amount of the employer’s contribution to premiums that would have been paid through April 30, 2011, had the individual received the ERI. Defendant also will offer 20 retirees under age 65 enrollment in the State insurance plan on the same terms they would have received if they had enrolled at the time of retirement, or if this is not possible for administrative or other reasons, defendant will provide them frontpay measured by the employer’s premium contributions until age 65.

c. Discharge

In *EEOC v. Tandy Brands Accessories, Inc.*, No. 4:10-cv-03506 (S.D. Tex. March 25, 2011), EEOC alleged that an international designer and manufacturer of fashion accessories discharged a 62-year-old foreperson at its Yoakum, Texas, distribution center, with 37 years experience, because of her age. During defendant’s phasing out of operations at the facility, a process that ended in March 2010, defendant laid off the seven oldest supervisors (ages 58, 60, 61, 62, 70, 72, and 75), while retaining the two youngest (in their early 40s). One of the retained supervisors was placed in a position (receiving and returns supervisor) that the 62-year-old foreperson previously held and for which the retained employee required substantial training. A 2-year consent decree that applies to all of defendant’s business offices and facilities provides $95,000 to the foreperson and enjoins defendant from discrimination in violation of the ADEA.

In *EEOC v. Asian World of Martial Arts, Inc.*, No. 10-5062 (E.D. Pa. May 23, 2011), EEOC alleged that a leading mail and retail distributor of martial arts supplies discharged its controller because of his age, 74. The controller was hired in 1981. On November 14,
2007, while he was in the hospital recovering from hip surgery, he was informed by defendant’s president/owner that defendant was implementing a mandatory retirement policy and that, effective December 1, 2007, he would no longer be employed because he was over the age of 67. A 2-year consent decree provides $100,000 to the controller and enjoins defendant from age discrimination and retaliation under the ADEA. Defendant confirms in the decree that it does not have a policy or requirement for employees to retire based on age.

In *EEOC v. 3M Company*, No. 11-2408 (D. Minn. Sept. 19, 2011), EEOC alleged that a global manufacturer of office and home products, during reductions in force occurring in the United States from July 1, 2003, through December 31, 2006, terminated employees age 46 and older holding salaried positions below the level of director, or below salary grade 18 or L3, because of their ages. Individuals are considered to have been terminated in connection with a reduction in force if they were offered severance pay or benefits under the then-applicable 3M U.S. Job Elimination Severance Pay Plan. A 3-year consent decree provides $3 million in monetary relief (half backpay and half liquidated damages) to 290 individuals. The decree enjoins defendant from discriminating against employees age 46 or older when implementing reductions in force, in violation of the ADEA, and from retaliation. Defendant will maintain a termination review process for job eliminations and reductions in force and will not use eligibility for retirement benefits in selecting employees for job elimination and reductions in force.

In *EEOC v. Resource Real Estate Mgt., Inc., d/b/a Resource Residential*, No. 4:10-CV-0230-(S.D. Ga. July 22, 2011), EEOC alleged that a real estate management firm with multifamily properties in at least 15 states discharged three property managers because of their ages. In July 2007, defendant purchased the Georgia properties where the managers worked. Defendant’s president and other management officials made age-related statements indicating they wanted to get rid of older employees to present a younger image. A 64-year-old community manager was first demoted, and in September 2008 was pressured to resign. A 60-year-old community manager was discharged in November 2008 and replaced with a 36-year-old. A 53-year-old assistant community manager was discharged in February 2009 and replaced with a 23-year-old. Between February and September 2009, defendant hired five property managers and nine leasing agents in its Georgia Region, all under age 40. A 3-year consent decree provides $335,000 in backpay and liquidated damages to the three property managers, and enjoins defendant from age discrimination.
4. **Title VII and the ADEA/Race, Sex, and Age Harassment**

In *EEOC v. Autotainment Partners Limited Partnership dba Planet Ford and Worldwide Autotainment, Inc.*, No. 4:09-CV-03096 (S.D. Tex. Oct. 12, 2010), EEOC alleged that a Spring, Texas, car dealership and its general partner subjected a 50-year-old white male used car salesperson (Robinson) to a hostile work environment based on his age, race, and sex, and constructively discharged him due to the harassment and adverse employment actions taken against him because he complained about the harassment; and subjected a 50-year-old African American male used car salesperson (Cotton) to a hostile work environment based on his age and sex. Beginning in about June 2006, an African American male sales supervisor subjected Robinson daily to derogatory comments about his age and race and to degrading sexual comments. From about May 2006, the sales supervisor subjected Cotton to derogatory comments about his age and to sexual advances. Robinson reported the conduct to several managers, but rather than taking corrective action, the director of used car sales joined in the harassing conduct. In August 2006, Robinson transferred to a lower-paid sales position to avoid the sales supervisor; however, in May 2007, the sales supervisor transferred to a position in finance where he was responsible for approving paperwork on all sales, and he refused to process any of Robinson’s sales transactions, causing Robinson to resign the same month. Under a 2-year consent decree, Robinson and Cotton will share a $160,000 in amounts determined by EEOC. Defendants will state that each is eligible for rehire. The decree enjoins sex and race discrimination and retaliation in violation of Title VII and age discrimination under the ADEA.

5. **Americans with Disabilities Act**

   a. **Hiring**

In *EEOC v. Service Temps, Inc., db/a Smith Personnel Solution*, No. 3:08-CV-1552-D (N.D. Tex. Jan. 11, 2011), EEOC alleged that a staffing agency with operations throughout Texas failed to refer a deaf applicant for a position because of her disability. The applicant, who has been deaf since birth, applied at defendant’s Dallas office on June 29, 2006, in response to a posting on the Texas Workforce Commission’s website for a position packaging cosmetic products. The posting stated that no experience or education was required to apply for the job. The applicant was accompanied by a sign language interpreter she obtained through a vocational services provider. At a 3-day trial, EEOC presented evidence that a defendant account manager rejected the applicant on the ground that it would be difficult for her to work in a warehouse if she could not communicate with other employees and her employer. The jury returned a verdict for
EEOC, awarding the applicant $14,400 in backpay, $20,000 in compensatory damages, and $150,000 in punitive damages. The court remitted the punitive damages award to $68,800 (twice the total of backpay and compensatory damages). The court permanently enjoined defendant from discriminating against any employee on the basis of disability and required defendant to post notices of the resolution in conspicuous places in each of its offices.

In *EEOC v. Hussey Copper Ltd.*, No. 2:08-CV-00809 (W.D. Pa. Feb. 10, 2011), EEOC alleged that a manufacturer of copper products rejected an applicant for a laborer position at its Leetsdale, Pennsylvania, plant because of his record of opiate addiction and because it regarded him as substantially limited in working due to opiate addiction. In July 2007, defendant offered the applicant a laborer position conditioned on passing a physical exam and background check. The applicant’s blood and urine tested positive for methadone. In response to a phone call from defendant’s physician, the applicant explained that he was participating in a supervised methadone treatment program. The physician supervising the treatment program provided defendant with information about the applicant’s successful participation in the program. Without performing an individualized assessment, defendant’s physician recommended against employing the applicant in “safety sensitive work” due to his “current medications,” and defendant revoked its job offer. Following a 3-day bench trial, the parties entered into a 5-year consent decree under which defendant will provide the applicant $85,000 in backpay and hire him as a full-time mason utility laborer at its Leetsdale plant. The decree permanently enjoins defendant from disability discrimination and retaliation.

In *EEOC v. John Muir Health*, No. 08-02634 (N.D. Cal. March 15, 2011), EEOC alleged that a health care system with hospitals and outpatient facilities in northern California failed to hire eight individuals because it regarded them as substantially limited in working due to latex allergies. The individuals applied for positions (seven as registered nurses and one as a lab technician) at defendant’s hospital in Walnut Creek, California, between June 2003 and September 2004. Each received an offer of employment conditioned on passing a preemployment physical exam that included a medical history questionnaire. When an affirmative answer was given regarding latex allergies, defendant conducted a blood test designed to detect elevated latex-specific immunoglobulin E (IgE) antibodies in the blood. After the eight applicants received blood test results indicating elevated IgE levels, the examining physician, who had no specialized training in allergies, informed defendant that each had a life threatening latex allergy. Defendant then withdrew its job offers to the applicants because of the pervasive use of latex in hospitals. Subsequent to their exclusion, a number of the applicants were tested by allergists who determined that they either were not allergic to
latex or that their allergies were minor. An 18-month consent decree provides for
$340,000 in compensatory damages to the eight individuals and prohibits ADA
discrimination.

In *EEOC v. The Timken Company*, No. 1:10CV113 (M.D.N.C. May 2, 2011), EEOC alleged
that an international manufacturer of precision ball bearings and power transmission
products failed to hire a part-time employee at its Asheboro, North Carolina, facility
into a full-time position because she is the female caregiver of a disabled child and
because of her association with a person with a disability. The employee’s son is
developmentally disabled. She began working for defendant in 2003 as a part-time
process associate. In July 2007, she applied for a full-time process technician position.
She was qualified for the job and advanced through defendant’s multistep hiring
process, but was not selected even though she scored higher during the various phases
of the hiring process than most of the 12 selectees. Three individuals involved in the
decision making process expressed concerns about the employee’s ability to work full
time and care for a disabled child, and one of them told her she was not selected
because defendant had concerns about her availability and flexibility due to her
disabled child. A 2-year consent decree provides for payment of $120,000 ($10,000 in
backpay, $70,000 in compensatory damages paid into a special needs trust for the
employee’s son, and $40,000 in attorney’s fees). The decree prohibits discrimination
because of an employee’s or applicant’s association with an individual with a disability
or the perception that the employee or applicant is the primary caregiver of an
individual with a disability, and prohibits retaliation. Defendant will provide the
employee with a positive letter of reference.

b. **Reasonable Accommodation**

national automobile parts and supplies retailer failed to reasonably accommodate the
disability of a parts sales manager at its Macomb, Illinois, store. Due to an accident in
1996, the employee suffered from impairments to the trapezius and rhomboid muscles
of the upper left side of his back and from degenerative disc disease and/or disc
herniation of the cervical vertebrae. Parts sales manager is a sales and customer service
position that also involves tasks such as mopping and buffing floors at the end of the
day. At a 3-day trial, limited to the issue of whether defendant failed to reasonably
accommodate the employee’s limitations during the period March 2003 to September
12, 2003, EEOC presented evidence that the employee’s neck and back impairments
substantially limited him in caring for himself; that mopping and buffing aggravated
his impairments and were not essential functions of the parts sales manager job; and
that defendant was aware of the employee’s physical limitations and his need to be excused from mopping and buffing, but failed to excuse him from these tasks, resulting in an injury on September 1, 2003, that required him to take medical leave. The jury returned a verdict for EEOC, awarding the employee $100,000 in compensatory damages and $500,000 in punitive damages (subject to a $300,000 cap), and $115,000 in backpay.

In *EEOC v. Supervalue, Inc., American Drug Stores LLC, and Jewel Food Stores, Inc.*, No. 1:09-CV-05637 (N.D. Ill. Jan. 5, 2011), EEOC alleged that a grocery/drug chain operating in northeastern Illinois and portions of Wisconsin and Indiana, and its parent corporations: (1) prohibited disabled employees who were on or eligible for defendants’ 1-year paid disability leave from returning to work unless they had no restrictions and could work without accommodation, and terminated such employees at the end of the 1-year leave period; and (2) prohibited disabled employees not injured on the job from participating in defendants’ 90-day light-duty program. A 3-year consent decree, applicable to Jewel and Jewel-Osco stores in Illinois, Indiana, and Wisconsin, enjoins defendants from disability discrimination by not providing reasonable accommodations to persons wanting to return to work from disability leave, and prohibits retaliation under the ADA. The decree establishes a $3.2 million settlement fund to be distributed as compensatory damages to 110 individuals. Defendants will maintain a Medical Accommodations Administration Team responsible for ensuring that defendants’ disability leave policies comply with the ADA, and to which all requests for accommodation must be referred. Defendants will retain a consultant to ensure that job descriptions do not contain unnecessarily strenuous physical demands, and a consultant to prepare a report listing possible accommodations for common physical limitations in various nonmanagerial jobs.

In *EEOC v. Denny’s, Inc.*, No. 1:06-CV-02527 (D. Md. June 24, 2011), EEOC alleged that a national restaurant chain maintained a medical leave policy that denied reasonable accommodations to individuals with disabilities. Defendant’s policy set limits on the duration of medical leave (26 weeks and in some instances 12 weeks) during a 1-year period. Employees who exceeded the leave period were discharged regardless of whether they were disabled and required additional leave as a reasonable accommodation. Under a 2-year nationwide consent decree, defendant will provide $1.3 million to 34 individuals; payments will be considered 25% backpay and 75% compensatory damages. Defendant will offer reinstatement to seven individuals (six to management positions) with retroactive seniority, and will provide reasonable accommodations to them if necessary. Defendant will modify its medical leave policy to allow exceptions to the maximum leave period when necessary to provide a
reasonable accommodation. Each year, defendant’s corporate legal department will audit not less than 5% of reasonable accommodation reviews of any type for ADA compliance.

In *EEOC v. United Airlines, Inc.*, No. 2:06-CV-01407 (W.D. Wash. Dec. 17, 2010), EEOC alleged that a major commercial airline failed to provide reasonable accommodations to reservation sales and service representatives (RSSRs) with disabilities that limit the number of hours they are able to work each week, thus forcing them out of their jobs. Full-time employees in defendant’s sales and reservations division work a maximum of 40 hours per week and part-time employees a maximum of 30. In March 2003, defendant implemented a nationwide policy requiring RSSRs to work the full shift for which they bid and restricting reduced schedules to 90 days; thus, all part-time employees had to work a full 30 hours a week. A 3-year consent decree provides $600,000 in monetary relief (50% backpay and 50% for emotional distress and other nonwage damages) to be allocated at EEOC’s discretion among 26 disabled individuals unable to work full shifts. The nationwide decree permits RSSRs with long-term or permanent medical restrictions who cannot work their full shift to request a reduced-hours accommodation. After engaging in the interactive process and considering the availability of other effective accommodations and any formal objections by the union, defendant must grant requests that are reasonable and do not cause undue hardship.

In *EEOC v. Verizon, Maryland, Inc.*, No. 1:11-cv-01832-JKB (D. Md. Sept. 9, 2011), EEOC alleged that 24 subsidiaries of Verizon Communications, a national provider of broadband Internet services, television services, and other telecommunications services, violated the ADA by not making exceptions to their "no fault" attendance plans to provide reasonable accommodations to individuals with disabilities. Under defendants’ attendance plans, nonmanagerial employees were subjected to progressive discipline for absences. When an employee accumulated a designated number of “chargeable” absences, he or she was placed on a disciplinary step for 6 months, and additional chargeable absences during that period would result in placement on higher steps and discipline progressing from warnings, to increasingly lengthy suspensions, to termination. No exceptions were made for absences due to disabilities. A 3-year consent decree provides for a $20 million settlement fund to be distributed to union-represented former United States employees covered by attendance plans who were qualified individuals with disabilities discharged by defendants for an absence during the period January 1, 2004, through the effective date of the decree. Payments will be apportioned 50% as wages and 50% as nonwage compensation. The decree enjoins defendants from discriminating on the basis of disability by implementing attendance plans that do not provide for reasonable accommodations to current associates (union-
represented employees) who are qualified individuals with disabilities, and from suspending or discharging a current associate based on an absence that should not be chargeable due to satisfaction of criteria (set out in the decree) excepting certain disability-related absences. Defendants will modify their attendance and ADA policies to include measures for accommodating qualified individuals with disabilities.

c. Terms and Conditions of Employment

In EEOC v. Target Corp. a/k/a Target Stores, Inc., No. CV 09-0963 (C.D. Cal. July 21, 2011), EEOC alleged that a national department store chain failed to reasonably accommodate an employee’s disabilities -- cerebral palsy and cognitive limitations -- and reduced his work hours because of his disabilities. The employee was hired at defendant’s Foothill Ranch, California, store as a part-time stocker in 2002, and later worked as a cart attendant. He is limited in speaking and walking, cannot read or write, and usually needs his father’s help to communicate. He worked under a job coach during his 90-day probationary period. A new manager started at the store in the fall of 2003. She did not include the employee’s job coach when conducting his performance reviews, and when the job coach complained, told him she hadn’t hired the employee and wouldn’t have hired him. When the employee returned in June 2004 from a short medical leave, defendant substantially reduced his hours (from 16.4 to 7 a week) in spite of requests for more hours from his job coach and his father. The employee eventually resigned to accept a job with more hours. A 3-year consent decree provides the employee $160,000 ($155,000 in compensatory damages into a special needs trust and $5,000 in backpay) and enjoins defendant from ADA discrimination and retaliation at stores in corporate district 22.

d. Discharge

In EEOC v. ENGlobal Engineering, Inc., No. 1:10-CV-00514 (E.D. Tex. June 16, 2011), EEOC alleged that a provider of engineering, construction, and other services to the energy sector at locations throughout North America discharged a safety supervisor at its Beaumont, Texas, facility because it regarded him as substantially limited in working due to a diagnosis of multiple sclerosis. The employee was hired in July 2007, and a few weeks later experienced numbness and tingling in his extremities and felt weak. He had a series of medical tests and in August 2007 was preliminarily diagnosed with multiple sclerosis. He informed his supervisor, and even though he was able to continue working, defendant placed him on medical leave on August 16 and immediately filled his position. In mid-September, when the safety supervisor position was again vacant, the employee submitted a full medical release and asked to return to
work. Defendant said no position was open. A 30-month consent decree provides the employee with $100,000 and prohibits disability discrimination and retaliation for opposing practices unlawful under the ADA. Defendant will place a copy of the charge and EEOC’s Letter of Determination in the personnel files of the former regional safety manager and the former human resources manager involved in the employee’s discharge and will notify EEOC if it rehires or contracts with either manager.

In *EEOC v. Pepsi Bottling Group, Inc.*, No. 3:09-CV-04594 (N.D. Cal. Aug. 1, 2011), EEOC alleged that a multinational producer and distributor of beverages failed to accommodate an employee’s post-traumatic stress disorder (PTSD), and terminated him from his driver position at its Hayward, California, facility due to his disability. After being robbed at gunpoint while in his truck in a parking lot in 1999, the employee developed severe problems with anxiety and fear and was diagnosed with PTSD, which substantially limits him in thinking and interacting with others. In the years following the robbery, the employee had several flareups of PTSD that rendered him unable to work for extended periods; however, defendant conceded that he was qualified to work. On July 26, 2005, the employee’s PTSD symptoms flared up after a long wait in his truck in a parking lot, and he told his supervisor that day and again on July 29 that he needed medical leave to receive treatment. On August 8, 2005, defendant’s human resources manager wrote to the employee saying he had not called in since August 1 (which the employee disputes) and that upon returning to work he needed to provide a doctor’s excuse to avoid assessment of points under defendant’s no call/no show policy. The following day, before the employee could have received the human resources manager’s letter, defendant sent the employee a letter terminating him for violating defendant’s no call/no show policy. Under a 2-year consent decree, the employee will receive $120,000 in monetary relief. The decree enjoins disability discrimination and retaliation at the Hayward facility.

6. Retaliation

In *EEOC v. Southeastern Telecom, Inc.*, No. 3:09-cv-0887 (M.D. Tenn. March 18, 2011), EEOC alleged that a provider of telecommunications services and systems, with offices and subsidiaries in four states, discharged an account executive in retaliation for complaining of sex discrimination in pay. The employee was hired in February 2007. She often worked from home as her job required her to call personally on clients within a 250-mile radius of defendant’s Nashville, Tennessee, office. On Friday, June 29, 2007, she complained to her immediate supervisor, the office’s sales manager, about the allocation of sales commissions and accounts between her and a male account executive, alleging sex discrimination. The sales manager told her he would look into
it, and then sent an email to defendant’s human resources manager describing the employee’s complaints. The human resources manager disabled the employee’s access to her computer and the building, and had her phone calls forwarded to the sales manager. Defendant fired her a few days later, allegedly for failing to come into the office for a meeting with the sales manager. A 2-year consent decree provides $95,000 in monetary relief to the employee and enjoins defendant from retaliation under Title VII and the Equal Pay Act.

In *EEOC v. Bell BCI, LLC, and The Bell Company, LLC*, Nos. 1:10-cv-01342 and 1:10-cv-02710 (D. Md. July 12, 2011), EEOC alleged that a Rochester, New York, regional construction and electrical contractor and its subsidiary subjected a female heavy equipment operator to sexual harassment and adverse terms and conditions of employment because of her sex, harassed and discharged her in retaliation for complaining about sex discrimination, and discharged a male foreman in retaliation for opposing the discriminatory treatment of the female employee. The female employee began working for defendants in June 2008 at a federal construction site in Aberdeen, Maryland, where she was the only woman performing skilled construction work. She was subjected to abusive conduct by her male supervisor, and when she complained to the project manager he was dismissive. In August 2008, the employee was reassigned to a second foreman, and when this foreman reported the prior foreman’s continuing harassment of the employee to the project superintendent, he was told to fire the employee. He refused, but the female employee was permanently laid off on December 5, 2008. She filed an EEOC charge on December 8, and in January 2009, the second foreman was asked by managers whether he was assisting her with her EEOC claim. He said he had not yet been asked, but would not “be put in a position where [he] was expected to lie.” He was fired on February 4, 2009. A 2-year consent decree provides $190,000 to the female employee ($67,000 as backpay and $123,000 as compensatory damages) and $40,000 in compensatory damages to the foreman, and enjoins defendants from sex-based harassment and from retaliation against any employee who opposes sexual harassment.

In *EEOC v. Mike Enyart & Sons, Inc.*, No. 5:10-CV-00921 (S.D. W. Va. Oct. 6, 2010), EEOC alleged that a South Point, Ohio-based contractor that constructs and installs water and sewer lines racially harassed a black laborer working at its sewer installation site in White Sulphur Springs, West Virginia, and discharged him in retaliation for complaining about the harassment. The employee was hired on June 30, 2009, and during the next 2 months was subjected to a barrage of racially offensive epithets and slurs, as well as threatening language and conduct, from his white foreman and white coworkers. In late August 2009, the employee submitted a written complaint to the
superintendent about the racial harassment. After meeting with the employee’s coworkers, the superintendent told him he could not guarantee his safety and he could not return to work while he continued to press his complaint. The employee refused to drop his complaint and defendant fired him. A 5-year consent decree provides the employee with $87,205 ($47,205 as backpay and $40,000 as punitive damages) and reinstatement into a laborer position. The decree permanently enjoins race discrimination and retaliation.

C. Appellate Court Litigation

1. EEOC’s Investigative Authority


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

On appeal, the Commission argued that the information sought by EEOC – on the hiring, discharge, and training of former and current IT Department employees -- was relevant to the investigation of the age discrimination charges. EEOC is not required to investigate every allegation in the charges, and the Commission said it would not consider allegations that age animus motivated WSSC to restructure the IT Department. Instead, EEOC sought only basic personnel information that would permit the agency to compare who worked in the IT Department before and after the restructuring, who applied for the new positions, and who received training before and after the restructuring. WSSC argued that EEOC’s investigation (and, in particular, the subpoena) necessarily intruded on matters that are legislative in nature because all of
WSSC’s IT personnel decisions and actions, even those that WSSC took before and after the restructuring, were “integral steps in the legislative process.”

The Fourth Circuit affirmed the district court’s order enforcing the subpoena. Although recognizing that legislative immunity provides an important protection to legislators from “intrusive and costly inquiries into their legislative acts,” the court of appeals rejected WSSC’s privilege assertion as both overbroad and premature, emphasizing that the EEOC had not yet filed suit against the WSSC.


This case involved the ability of EEOC to subpoena class information in its investigation of an individual charge. Elliot Thompson worked as a salesman for Konica Minolta Business Solutions (Konica) for 8 months before being fired. Thompson, an African American, filed a charge with EEOC alleging that he was subjected to disparate terms and conditions of employment and discipline, and was fired after filing a complaint of race discrimination with Konica’s human resources department. Konica initially cooperated with EEOC’s investigation, and the agency uncovered evidence of large disparities in the racial composition of Konica’s workforce that suggested the company was using discriminatory hiring practices to steer black employees to a particular sales team. EEOC issued a subpoena seeking information about Konica’s hiring practices at its four Chicago-area facilities, including the applications Konica reviewed to fill sales positions and communications with applicants about sales positions, and sought enforcement in court when Konica refused to comply. The district court granted EEOC’s application for enforcement and ordered compliance.

Konica appealed and the Seventh Circuit affirmed. The court of appeals said that a court must enforce an administrative subpoena “[a]s long as the investigation is within the agency’s authority, the subpoena is not too indefinite, and the information sought is reasonably relevant.” The court relied upon the Supreme Court’s decision in *EEOC v. Shell Oil Co.*, 466 U.S. 54, 68-69 (1984), in stating that an agency should be able to obtain “virtually any material that might cast light on the allegations against the employer.” The Seventh Circuit explained that in the instant case the employer’s perspective was too narrow and that the relevant question was not whether Thompson specifically alleged discrimination in hiring, but whether information regarding Konica’s hiring practices will “cast light” on Thompson’s race discrimination complaint.
This case involved the expansion of an EEOC investigation of an individual charge of discrimination into an investigation of systemic discrimination against women in a management development program of a national home delivery fast-food business. Kim Milliren filed a charge with EEOC alleging that she was discriminated against based on her sex during her tenure in Schwan’s General Manager Development Program (GMDP), and retaliated against for complaining about sexual harassment. Milliren said in her charge that she was called “woman” twice by a supervisor and exposed to sexist offensive emails exchanged by company managers, and that 3 weeks after complaining to managers about the offensive emails she was told she was not displaying leadership skills and would not graduate from the program. Milliren resigned a week after being told she would not graduate. Milliren told EEOC that she was one of only 2 women in the 60-person training class and that the other female trainee had been told to act more like the boys to succeed in the program. During its investigation, EEOC requested information about the GMDP, including selection criteria for the program, and the breakdown by sex of those selected and those who successfully completed the program. Schwan’s refused to turn over the information. Milliren later amended her charge, alleging that Schwan’s discriminated against women as a class with regard to the GMDP; EEOC sought the same information that it had previously, and issued a subpoena when Schwan’s continued to refuse to produce the information. The magistrate judge recommended that the subpoena be enforced, finding that the information sought was relevant to EEOC’s investigation; the district court agreed, and said that the information was also relevant to Milliren’s original charge.

Schwan’s appealed and the Eighth Circuit affirmed. The court rejected the company’s argument that Milliren’s amended charge adding an allegation of classwide gender discrimination in the GMDP was untimely, ruling that such an argument was premature and inappropriate in a subpoena enforcement proceeding. The court also rejected the company’s argument that Milliren’s amended charge was invalid because it contained only Milliren’s unsubstantiated “belief” that a pattern of discrimination existed. The court then found that the information sought in the subpoena was relevant to the Commission’s investigation of Milliren’s amended charge, saying that “the gender demographic of Schwan’s’ general managers and graduates of the GMDP and the selection process for the GMDP is relevant to the determination of whether Schwan’s illegally discriminates against women through the operation of the GMDP.” The court also said that even if the amended charge was invalid, the information sought was within the scope of EEOC’s investigative authority because the agency’s
investigation of Milliren’s initial charge revealed potential systemic gender discrimination.

_EEOC v. BNSF Railway Co._, No. 11-1121(10th Cir.), opening brief as appellant filed May 25, 2011, reply brief filed Aug. 22, 2011

This is an action to enforce a subpoena issued by EEOC as part of its efforts to expand the investigation of individual charges into a nationwide investigation of hiring discrimination under the ADA. Burlington Northern Santa Fe Railroad (BNFS) is a freight railroad that operates in 28 States and has approximately 40,000 employees. Individuals filed charges in various EEOC offices alleging that BNSF violated the ADA by failing to hire or by firing them because of their actual or perceived medical limitations. As part of its investigation of two charges filed in EEOC’s Denver Field Office, the Commission issued a subpoena seeking preliminary data about BNSF’s electronic recordkeeping practices. In EEOC’s action to enforce the subpoena, the district court refused to require BNSF to provide any of the requested information.

On appeal to the Tenth Circuit, the Commission argued that the district court erred in holding that before the Commission can subpoena information regarding possible systemic discrimination, it must have a charge explicitly alleging a pattern or practice claim. Nothing in the ADA or governing case law construing the Commission’s subpoena authority imposes such a requirement. To the contrary, the only constraint on EEOC’s authority is that the information EEOC seeks relate to an unlawful employment practice under the ADA and be relevant to a charge under investigation. Here, information about whether BNSF has a practice of screening out individuals on the basis of disability relates to unlawful employment practices covered by the ADA. In addition, information about such a practice is relevant to the two charging parties’ allegations that BNSF revoked job offers to them due to their disabilities or perceived disabilities. Thus, the request at issue in this case – for information on how BNSF keeps electronic personnel data – relates to unlawful employment practices under the ADA and is relevant to the charges. Further, the Commission’s request for this preliminary data for BNSF positions companywide falls within the scope of a reasonable investigation. The EEOC has received six charges filed in various states, suggesting that BNSF is applying the same or a similar screen-out policy to jobs in Colorado, Kansas, Minnesota, Texas, and Wyoming. Taken together, the six charges provide justification for the preliminary nationwide data request at issue. Thus, the district court abused its discretion in refusing to enforce the Commission’s subpoena as written.
In its reply brief, the Commission further argued that BNSF and the district court have an unduly restrictive interpretation of relevance and of the Commission’s authority to expand an investigation based on information received in other charges against the same employer. The literal language in a charge does not dictate the outer boundaries of a permissible EEOC investigation of that charge. In EEOC v. General Electric Co., 532 F.2d 359, 365 (4th Cir. 1976), the Fourth Circuit explained that “[i]f the EEOC uncovers during [an] investigation facts which support a charge of another [type of] discrimination [other] than that in the filed charge, it is neither obliged to cast a blind eye over such discrimination nor to sever those facts and the discrimination so shown from the investigation in process and file a Commissioner’s charge thereon, thereby beginning again a repetitive investigation of the same facts already developed in the ongoing investigation.” Every court of appeals to address this issue has ruled similarly.

BNSF claims “[i]t is highly questionable whether the EEOC can properly justify broad subpoena requests issued under the name of one charge with allegations made in another charge.” But an otherwise legitimate expansion of an EEOC investigation does not become improper simply because the expansion was triggered by the receipt of other charges of discrimination – especially where, as here, the other charges have been filed against the same respondent, raise the same or similar allegations, and may all involve the same decisionmaker. Similarly, there is no reason to require EEOC to issue new subpoenas based on the other charges rather than simply expand its initial investigation.

BNSF argues that EEOC cannot investigate a pattern or practice of discrimination without a charge that makes that specific allegation. But to be “relevant” for purposes of EEOC’s subpoena authority, the information sought does not have to relate back to an explicit allegation or to precise language in the underlying charge. “Relevant” means just what it suggests – that the information sought bears some relationship to the charge in question. Thus, for example, courts have routinely recognized that information about general patterns of discrimination in a workplace are inherently “relevant” to specific allegations of individual discrimination at that workplace. Further, BNSF is incorrect to suggest that the Commission must secure a Commissioner’s charge to obtain the broader information. Nothing in Title VII or the ADA makes a Commissioner’s charge alleging a pattern or practice a prerequisite to a systemic investigation, and there is no reason to require the Commission to secure a Commissioner’s charge in a case like this (i.e., where the EEOC already has a number of other individual charges alleging the same or substantially similar ADA violations in different areas of the country, most (potentially all) involving the same company official).
EEOC v. UPMC, No. 11-2869 (3d Cir.), opening brief as appellant filed Sept. 14, 2011

This subpoena enforcement action involves EEOC’s attempt to investigate the operation of an employer’s leave policy based on an individual charge. Carol Gailey, a certified nursing assistant with significant medical problems, worked at a UPMC nursing home. In late May 2008 she took leave for cancer surgery. In late July she contacted UPMC about returning to work and learned she had been terminated in June. She filed an ADA charge alleging that UPMC terminated her without warning at a time when it knew she was on leave for cancer surgery. In its position statement, UPMC stated that Gailey’s termination was the result of the neutral application of its personal-leave policy. That policy allows employees with at least 6 months of service to take 14 weeks of personal leave (in addition to 12 weeks of FMLA leave if they are eligible for that leave; Gailey was not), but treats an employee’s failure to return to work at the end of those 14 weeks as a voluntary resignation. The policy has no provision allowing additional leave as a reasonable accommodation.

After UPMC refused to comply with EEOC’s request for information, the Commission issued a subpoena requiring UPMC to identify (and provide certain information about) all employees who were terminated (or who returned to work) after taking 14 weeks of medical leave. The district court denied enforcement of the subpoena for two reasons. First, and principally, the court believed EEOC should have investigated the facts relating to Gailey’s discharge before focusing on the broader question of UPMC’s leave policy. Second, the court ruled that the information sought in the subpoena was not relevant to the individual violation alleged in the charge.

On appeal the Commission argued that a district court’s role in a subpoena enforcement proceeding is quite limited, and the court erred in denying enforcement as a way to control the direction of the agency’s investigation. The district court also erred by defining “relevant” too narrowly. Under the proper definition, the information the subpoena sought is relevant to Gailey’s charge. The Third Circuit’s recent decision in EEOC v. Kronos, Inc., 620 F.3d 287 (2010), is on point and requires reversal. In Kronos the court held that an investigation that expanded the job titles and geographic and temporal scope beyond the terms of the charging party’s allegations was a proper search for relevant information, and the court should reach the same result in this case.
2. Equitable Tolling of the Charge-Filing Period

Granger & Descant v. Aaron’s, Inc., 636 F.3d 708 (5th Cir. March 24, 2011)

This case involved the application of tolling principles to save the claims of two individuals who erroneously filed sexual harassment charges with the Department of Labor’s Office of Federal Contract Compliance (OFCCP) instead of EEOC. Casey Descant and Angel Granger worked as customer service representatives for Aaron’s, a business that sells and rents furniture, appliances, and electronics. Descant was employed from March 8 to June 30, 2007; Granger was employed from July 7 to September 23, 2007. Each alleged that she was forced to resign because of sexual harassment by her supervisor. The women contacted an attorney, who mistakenly filed their charges of discrimination with OFCCP instead of EEOC. The attorney repeatedly telephoned OFCCP to monitor the progress on the case and was told the case was being investigated. OFCCP did not follow its policy of informing the employer of the complaints within 10 days, nor did it ever inform the women’s attorney that the complaints had been filed with the wrong agency. OFCCP transferred the complaints to EEOC after the 300-day charge-filing period for each woman had expired. EEOC assured the women that their complaints would be deemed timely and issued notice of the charges to Aaron’s. The women received right-to-sue notices from EEOC and brought suit under Title VII.

The defendant moved to dismiss or for summary judgment, arguing that the charges were untimely. The plaintiffs responded that under a Memorandum of Understanding (MOU) between EEOC and OFCCP, the charges were considered “dual-filed” with EEOC when they were submitted to OFCCP, adding that EEOC agreed and had treated the charges as timely. Alternatively, plaintiffs argued that the 300-day deadline should be equitably tolled because of OFCCP’s representations that it was processing their complaints. The district court held that the MOU did not apply, and thus the charges were not “dual-filed,” because defendant was not a federal contractor and OFCCP therefore never had jurisdiction over the charges. Because the charges did not fall within the jurisdiction of OFCCP and Executive Order 11246 at all, the court reasoned, they did not “also” fall within the jurisdiction of EEOC and Title VII. The court, however, agreed that the charge-filing period should be equitably tolled, and denied defendant’s motion. The Fifth Circuit permitted defendant to take an interlocutory appeal.

The court of appeals held that the district court did not abuse its discretion in applying equitable tolling to allow plaintiffs’ lawsuit to go forward despite their arguably
untimely filed charges. Agreeing with the position advocated by EEOC as amicus curiae, the court of appeals ruled that tolling was warranted by the circumstances, including that apart from the mistaken filings, plaintiffs were diligent in pursuing their rights, securing an attorney soon after their resignations and submitting their complaints to the government months before the 300-day period expired; plaintiffs’ attorney’s staff repeatedly telephoned OFCCP to check on the progress of the investigation; OFCCP’s 10-month delay in processing the charges was “egregious and exceptional”; both OFCCP and EEOC treated the charges as timely; and defendant did not demonstrate any prejudice. The court did not resolve the issue of whether the charges should be deemed timely filed under the MOU between OFCCP and EEOC even though the defendant was not a federal contractor within OFCCP’s jurisdiction.

3. Arbitration of Class Claims

Jock v. Sterling Jewelers, Inc., 646 F.3d 113 (2d Cir. July 1, 2011)

This case involved the question whether an employer’s arbitration agreement permitted arbitration of class claims of gender discrimination in pay and promotion under Title VII. In March 2008, Laryssa Jock and 18 other female retail sales employees of Sterling Jewelers filed a nationwide class action alleging that Sterling Jewelers maintained discriminatory promotion and compensation policies based on gender. Shortly thereafter, the plaintiffs filed a class arbitration complaint, pursuant to the mandatory dispute resolution provision in their employment contracts. Sterling opposed class treatment of the claims, arguing that the arbitration agreement prohibited class arbitration. The arbitrator disagreed, ruling that the arbitration agreement “cannot be construed to prohibit class arbitration.” Applying Ohio contract law, as the arbitration agreement required, the arbitrator “determined that merely agreeing to the [dispute resolution process] could not constitute a waiver of the employee’s right to participate in a collective action.”

Sterling moved in district court to vacate the arbitrator’s ruling. The district court denied the motion, and Sterling appealed to the Second Circuit. While the appeal was pending, the Supreme Court issued its decision in Stolt-Nielsen v. Animalfeeds International Corp., 559 U.S. 662 (2010), holding that an arbitration panel had exceeded its powers under the Federal Arbitration Act when it found that the applicable arbitration clause permitted class arbitration, even though the parties had stipulated that the arbitration clause was silent with respect class arbitration. Sterling then moved in district court for relief from the court’s earlier denial of its motion. The court of appeals issued a limited remand to permit the district court to rule on the pending
motion, and the district court vacated the arbitrator’s ruling. The court reasoned that
the arbitrator’s interpretation of the agreement was in excess of her powers, and
“plainly incompatible” with Stolt-Nielsen. The plaintiffs appealed the district court’s
ruling to the Second Circuit.

The Second Circuit reversed, holding that because the parties properly placed the issue
before the arbitrator, and she had “colorable justification under Ohio law to reach [her]
decision,” the arbitrator had not exceeded her authority. The court of appeals reasoned
that the district court erroneously substituted its own legal interpretation of the
arbitration agreement for that of the arbitrator, explaining that the proper inquiry was
“whether the arbitrator[] had the power . . . to reach a certain issue, not whether the
arbitrator correctly decided that issue” (court’s emphasis). The court of appeals further
held, consistent with the position advocated by EEOC as amicus curiae, that the recent
Supreme Court decision in Stolt-Nielsen was not controlling because, unlike the parties
in this case, who disputed whether the arbitration agreement permitted arbitration of
class claims, the parties in Stolt-Nielsen had stipulated that their agreement was “silent”
as to class arbitration. Even though the agreement in the present case contained no
express provision permitting class arbitration, the court of appeals said that Stolt-Nielsen
“did not create a bright-line rule requiring that arbitration agreements can only be
construed to permit class arbitration where they contain express provisions.”

4. Enforceability of Oral Conciliation Agreements

EEOC v. Philip Serv. Corp., 635 F.3d 164 (5th Cir. March 4, 2011)

This case involved the enforceability of an oral settlement reached during EEOC’s
administrative conciliation process. Former and current black employees of Philips
Services Corporation (PSC) filed race discrimination charges with the Commission’s
Houston District Office. The district office made reasonable cause findings on the
charges, and entered into conciliation discussions with PSC. EEOC filed suit to enforce
agreements it alleged were reached during the conciliation process. EEOC contended
that during conciliation the parties agreed on terms resolving the claims of eight
individuals who filed charges and a “class” of black employees, and that PSC
subsequently repudiated and failed to comply with the agreements. EEOC said that the
parties orally agreed to a specific amount of monetary relief for seven of the charge
filers, that the agency made clear it was willing to settle any number of the nine charges
and would not condition settling one on settling any of the others, and that PSC agreed
to proceed in this manner. EEOC also claimed that the parties agreed on injunctive
relief. The general terms of the agreements were memorialized in a written document
that, according to EEOC, PSC said was acceptable. PSC denied agreeing to settle some
but not all of the charges.

The district court held that provisions in section 706(b) of Title VII prohibiting the
Commission from making public what occurs during conciliation, and prohibiting the
use of conciliation information “as evidence in a subsequent proceeding,” precluded
proof of an oral conciliation agreement, because filing suit to enforce the agreement
would necessarily make public what was said and done in the conciliation process and
would constitute the use of that information in a subsequent proceeding.
On appeal to the Fifth Circuit, the Commission argued that oral agreements generally
are enforceable and section 706(b) of Title VII should not be read to create an exception.
The district court’s interpretation of section 706(b) was inconsistent with the Fifth
Circuit’s decision in *EEOC v. Safeway Stores*, 714 F.2d 567 (5th Cir. 1983), which held that
EEOC can enforce a conciliation agreement in federal court, and affirmed the district
court’s interpretation of a written agreement where the district court had relied on
evidence of negotiations between the parties. EEOC argued that a suit to enforce a
conciliation agreement should not be viewed as the type of “subsequent proceeding”
identified in section 706(b); rather, that language necessarily referred only to
proceedings on the merits of a charge. Under the district court’s and PSC’s
interpretation of section 706(b), EEOC would be unable to enforce any conciliation
agreement, written or oral, and that limitation would frustrate Title VII’s goals of
favoring conciliation and the voluntary resolution of charges.

The Fifth Circuit affirmed the district court’s decision dismissing EEOC’s action. The
court of appeals said that under the plain language of the statute, there were no
exceptions to the prohibition against disclosure of conciliation material, and therefore
litigation of EEOC’s suit would violate Title VII’s confidentiality provision. The court
also ruled that policy concerns in promoting voluntary settlements of employment
discrimination claims weighed against allowing suits to enforce oral agreements
because “the prospect of disclosure or possible admission into evidence of proposals
made during conciliation efforts would tend to inhibit the kind of free and open
communication necessary to achieve unlitigated compliance with the requirements of
Title VII.”
5. Pattern or Practice Issues

_EEOC v. GNLV Corp.,_ 427 F.App’x 599 (9th Cir. April 18, 2011) (unpublished)

This case involved EEOC’s ability to litigate individual claims where it has alleged a pattern or practice of discrimination in its complaint and is unsuccessful in showing a pattern or practice. EEOC sued GNLV, a Nevada casino, under sections 706 and 707 of Title VII, alleging that the casino had subjected the charging party and “similarly situated individuals” to a hostile work environment based on their sex and/or race. The district court granted summary judgment to the defendant on the section 707 pattern or practice claim, holding that EEOC had not presented sufficient evidence to demonstrate that harassment was the casino’s standard operating procedure. Based on this holding, the district court dismissed EEOC’s individual claims seeking relief for six alleged victims of harassment as moot. Prior to this dismissal, the district court had also refused to allow EEOC to add four other individuals to its case. The court said that the four claimants were identified too late because they were named after the deadline for naming additional parties had expired. The court rejected EEOC’s arguments that individuals for whom EEOC seeks relief are not “parties” in EEOC suits, that EEOC had named the four additional claimants well within the discovery deadline, and that the casino had ample time to depose them (and, in fact, actually did depose them) before discovery ended. The Commission appealed the dismissal of the individual claims and the district court’s refusal to allow the addition of the four claimants.

The Ninth Circuit agreed with EEOC that dismissal of a pattern or practice claim does not render individual claims for relief moot (citing _Cooper v. Fed. Reserve Bank of Richmond_, 467 U.S. 867, 878 (1984)). The court agreed with EEOC’s view that pattern or practice claims are different from claims seeking relief for one or more individuals, and that because the two types of claims differ and have different evidentiary burdens, they cannot have a preclusive effect on one another. A majority of the panel, however, held that the district court did not abuse its discretion in excluding the four additional claimants. The majority recognized the public interest served by EEOC’s ability to expand the scope of an existing lawsuit to include related claims, but concluded that “it was [not] an abuse of discretion for the court to draw that line where it did, when the names of the four class members had been provided to EEOC over four years earlier, the new claims would require plaintiff-specific discovery, and less than ninety days remained until the discovery cut-off date.”

In his partial dissent, Judge Tarnow agreed with EEOC that the four individuals were “claimants,” not “parties,” and that the deadline for naming parties therefore did not
apply. He added that although he agreed in the abstract with the majority that at some point discovery must end, he “disagree[d] that precluding these individuals here was warranted where nothing in the parties’ joint Stipulated Discovery Plan and Proposed Scheduling Order or any subsequent order the district court entered required that these class members be identified at some point other than prior to the close of discovery.” Judge Tarnow stressed that GNLV was aware from the outset of litigation that the EEOC was seeking relief on behalf of claimants yet to be named, that the parties had agreed to multiple extensions of the discovery deadlines, and that GNLV did, in fact, depose all four proposed claimants prior to the filing of its dispositive motions.


The main issue in this case is whether EEOC can use the pattern or practice method of proof in cases brought only under section 706 of Title VII. Mirna Serrano filed an EEOC charge alleging that she was denied a position as a Service Sales Representative (“SSR”) at Cintas, a national supplier of work uniforms and other products to businesses, because of her sex. (SSRs drive trucks; they sell defendant’s products and deliver clean uniforms and other products and retrieve dirty items.) EEOC expanded its investigation to encompass all of Cintas’ Michigan facilities, and found reasonable cause to believe that Cintas discriminated against a class of female SSR applicants throughout the State. When conciliation efforts were unsuccessful, EEOC intervened in a class suit filed by Serrano, and after the district court denied Serrano’s motion for class certification, EEOC amended its complaint to seek relief for the Michigan class.

EEOC sought to present its case under the two-stage pattern or practice framework, but 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. The court subsequently denied EEOC’s motion to amend its complaint to include section 707 as a statutory basis for the action. The focus then shifted to the 13 rejected applicants EEOC was able to identify by a deadline set by the court to name individual section 706 claimants. The court first issued an “omnibus” summary judgment ruling in which it dismissed EEOC’s claims for the 13 individuals on the ground that EEOC could recover only for women identified in the administrative process. The court then, in separate opinions, granted Cintas summary judgment on each of the 13 claimants on various merits-related grounds.

On appeal to the Sixth Circuit, EEOC argued that it can use the _Teamsters_ method of proof ( _Int’l Bhd. of Teamsters v. U.S._, 431 U.S. 324 (1977)) for a claim brought only under
section 706 of Title VII. It has long been recognized that EEOC “need look no further than §706 [of Title VII] for its authority to bring suit . . . for the purpose . . . of securing relief for a group of aggrieved individuals.” *Gen. Tel. Co. of Nw. v. EEOC*, 446 U.S. 318, 324 (1980). EEOC invoked this authority when it sued Cintas under section 706 to obtain relief for a class of women and sought to prove its claim in bifurcated proceedings, using the same pattern or practice framework that, following the Supreme Court’s decision, EEOC used at trial in *General Telephone*. Cintas argues that EEOC cannot invoke the pattern or practice framework, but the Sixth Circuit already considered -- and rejected -- the precise argument Cintas makes in this case. In *EEOC v. Monarch Machine Tool Co.*, 737 F.2d 1444 (6th Cir. 1980), this court ruled that section 706 gives EEOC authority to pursue a claim under the pattern or practice framework. The district court dismissed the *Monarch Machine* finding as mere dicta in an old Sixth Circuit opinion, but age cannot affect the precedential weight of the circuit’s decisions. There was no basis for the district court to revisit an issue definitively resolved in the Sixth Circuit.

After the district court issued its section 706 ruling, EEOC sought to amend its complaint to conform with the court’s ruling that EEOC must invoke section 707 to proceed under the pattern or practice framework. EEOC did not attempt to change the nature of its claim (sex discrimination in hiring against a class of women in violation of section 703); it simply sought to proceed under the same pattern or practice paradigm already identified in the action. In denying EEOC leave to amend, the district court disregarded Sixth Circuit precedent and abused its discretion.

In its “omnibus” summary judgment ruling, the district court again dismissed binding Sixth Circuit precedent – this time, authority holding that EEOC’s reference to class claims during investigation and conciliation satisfies its obligations at the administrative stage when the agency later files suit under section 706. *EEOC v. Keco Indus.*, 748 F.2d 1097, 1100-02 (6th Cir. 1984). The district court explained its disregard of *Keco* by stating, inexplicably, that the present case has never been a class-based lawsuit. But this is, and has always been, a case seeking relief for a class of women denied employment by Cintas, and Cintas has conceded as much: “Cintas . . . does admit that the EEOC gave notice, through its investigation, of a potential Michigan class.”
6. Discovery of Immigration Status

_EEOC & Sanchez v. Evans Fruit_, No. 11-80235 (9th Cir.), Petition for Interlocutory Appeal filed Sept. 6, 2011

This proposed interlocutory appeal involves the circumstances under which a defendant can inquire into the immigration status of individuals for whom EEOC is seeking relief in a Title VII action. The Commission alleged that defendant Evans Fruit subjected a group of female employees, including intervenor Sanchez, to sexual harassment. The district court ruled defendant was entitled to inquire in discovery about Sanchez’s immigration status for purposes of defending her request for emotional distress damages. The district court had earlier ruled that immigration status was irrelevant to such damages, but it changed its position on the issue without signaling that it intended to do so or permitting the plaintiffs to challenge the ruling or advocate for the most stringent protections available regarding any such disclosure. EEOC and Sanchez moved the court to certify for interlocutory appeal the question of whether, even if immigration status may be potentially relevant to emotional distress damages, the court erred in not ordering bifurcation of discovery in order to mitigate the potential harm attendant to a claimant’s disclosure of immigration status. The district court granted the motion and certified the following question for interlocutory appeal:

In a Title VII case as to which immigration status is potentially relevant to the issue of damages, where the court bifurcates the issues of liability and damages, is it also compelled to bifurcate discovery regarding liability and damages such that discovery regarding immigration status is stayed pending resolution of liability?

The Ninth Circuit recognized in _Rivera v. NIBCO, Inc_, 364 F.3d 1057 (9th Cir. 2003), that substantial harm may befall civil rights plaintiffs compelled to disclose their immigration status; that “the chilling effect such discovery could have on the bringing of civil rights actions unacceptably burdens the public interest”; and that “discovery of [a] plaintiff’s immigration status constitutes a substantial burden, both on the plaintiffs themselves and on the public interest in enforcing Title VII.” Although acknowledging this potential for harm, the district court failed to consider and apply the most protective conditions under which immigration status information relating to emotional distress damages could be disclosed to the defendant -- through a bifurcated discovery process wherein the question of discoverability is reserved until after liability has been determined. Instead, the court compelled disclosure of immigration status information prior to a determination on liability, even though it recognized that bifurcation of trial was necessary given the irrelevance of such information to the question of whether Title
VII had been violated. By bifurcating liability and damages, the court removed any justification for requiring disclosure of immigration status prior to a determination on the merits, but still required such disclosure to be made. As such, the district court’s action exacerbated, rather than minimized, the threat of harm.

There are substantial grounds for differences of opinion on this question. NIBCO is the only decision in the Ninth Circuit dealing with the discovery of immigration status information in a Title VII suit. That decision did not address the issue presented here, and the parties substantially disagree over whether NIBCO compels the district court to take more protective measures under the circumstances of this case. Nor does there appear to be any settled law on this particular question. Finally, an immediate appeal from the district court’s discovery order may materially advance the ultimate termination of the litigation because this issue is likely to recur throughout the litigation regarding possible discovery of other claimants’ immigration status, and a present ruling would help avoid a second trial after appeal from a final judgment.

7. Proof of Causation


This case addressed the question of whether a “cat’s paw” theory can be applied to find an employer liable under the Uniformed Services Employment and Reemployment Rights Act (USERRA) for firing an employee because of his military service, where the actual decisionmaker was not biased but relied upon input from subordinates who were. The plaintiff, Vincent Staub, alleged that his direct supervisor and her supervisor were openly hostile toward his service in the Army Reserves, and that they influenced Proctor Hospital’s vice president of human resources – Linda Buck – to terminate his employment. At trial, Staub offered testimony that the two supervisors provided false information to Buck, which she subsequently relied on in her decision to fire him. The district court instructed the jury that Proctor Hospital was liable if the subordinate supervisors exerted a “singular influence over the decision maker.” The jury returned a verdict in Staub’s favor, finding that he had been dismissed from his job due to his service in the Reserves.

Proctor Hospital appealed and the Seventh Circuit reversed, holding that according to circuit precedent a “cat’s paw” theory can be successful only if the biased nondecisionmakers exhibited influence over the decisionmaker to such an extent that the termination decision was the product of “blind reliance.” The court said that Buck had conducted her own investigation into Staub’s supervisors’ complaints, which
meant that she was not wholly dependent upon a single source of information when making her decision. The Supreme Court granted certiorari to hear the case, and the Solicitor General filed a brief as amicus curiae – which EEOC joined – arguing that the Seventh Circuit’s “singular influence” standard should be abandoned.

The Supreme Court agreed with the government’s arguments and reversed the Seventh Circuit’s decision that that Proctor Hospital was entitled to judgment as a matter of law. The Court said that USERRA’s motivating factor provision, 38 U.S.C. § 4311(c), is very similar to the language embodied in Title VII’s parallel provision, 42 U.S.C. § 2000e-2(m), and held that if a supervisor performs an act motivated by antimilitary animus that is intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, the employer is liable under USERRA. Specifically, the Court said: “Animus and responsibility for the adverse action can both be attributed to the earlier agent if the adverse action is the intended consequence of that agent’s discriminatory conduct. So long as the agent intends, for discriminatory reasons, that the adverse action occur, he has the scienter required to be liable under USERRA.” The Court also rejected Proctor Hospital’s argument that a decisionmaker’s independent investigation negates the causal link to the supervisor’s discrimination.


This case involved the proof necessary to establish discriminatory intent in an age discharge action. Maria and Fernando Rosales, a married couple both age 61, were longtime employees of a hospital owned and operated by defendant Banner Health. They requested leave for the week after Christmas 2005 and received oral approval from their supervisor, Danny Armstrong. When they returned from leave, Armstrong told the Rosaleses their employment with the hospital had been terminated because they had been no-calls/no-shows for an extended period. Within a few weeks of terminating the Rosaleses, Armstrong hired four people between the ages of 21 and 50 to perform the same work the Rosaleses had been doing. EEOC also introduced evidence that a younger employee similarly situated to Maria Rosales had accumulated a large number of unexcused absences and could have been terminated under company policy, but unlike Maria, the younger employee received only light discipline. The district court granted summary judgment to Banner Health, holding that EEOC’s evidence was insufficient to establish a prima facie case.

EEOC appealed and the Ninth Circuit affirmed. The court held that even assuming EEOC established a prima facie case, it did not raise a triable issue on whether the
Rosaleses were terminated because of their ages, stating that EEOC did no more than deny the credibility of Armstrong’s testimony that he did not grant the Rosaleses time off, without producing “additional evidence showing that Banner’s action was taken for impermissibly discriminatory reasons.” The court also essentially held that it was immaterial whether or not Armstrong orally granted the Rosaleses’ leave requests, because “it [wa]s undisputed that the Rosaleses failed to follow Banner’s policy requiring them to obtain written approval of their time-off request. As a result, they missed several scheduled shifts of work -- a terminable offense.”

*Lopez v. Pac. Mar. Ass’n*, 657 F.3d 762 (9th Cir. March 2, 2011)

This case involved disparate treatment and disparate impact proof issues under the ADA. Santiago Lopez, a rehabilitated drug addict, claimed that the Pacific Maritime Association (PMA), which enforces policies governing the employment of longshore workers on the West coast, denied him employment because of his disability. Lopez applied to be a casual longshoreman in 1997. He was addicted to drugs and alcohol at the time and failed PMA’s preemployment drug screening. Pursuant to PMA’s one-strike rule, he was permanently barred from being considered for a longshoreman position. Lopez was clean and sober in 2004, and reapplied at PMA to be a casual longshore worker. He was told he was disqualified from consideration because he had failed the requisite drug test 7 years earlier. Lopez filed suit alleging both disparate treatment and disparate impact discrimination, and both parties moved for summary judgment. The district court granted summary judgment to the defendant, and Lopez appealed to the Ninth Circuit.

A divided panel of the Ninth Circuit affirmed. In rejecting Lopez’s disparate treatment claim, the court found that the triggering event disqualifying Lopez was the failed drug test, not Lopez’s drug addiction. The court said: “The ADA prohibits employment decisions made because of a person’s qualifying disability, not decisions made because of factors merely related to a person’s disability.” The court then said that to survive summary judgment on his disparate impact claim, Lopez needed evidence that the one-strike rule disproportionately excluded recovering or recovered drug addicts from PMA’s workforce, “result[ing] in fewer recovered drug addicts in Defendant’s employ, as compared to the number of qualified recovered drug addicts in the relevant labor market.” The court found that the record contained no statistical or anecdotal evidence to that effect.

EEOC filed an amicus curiae brief in support of Lopez’ petition for rehearing or rehearing en banc. On Lopez’s disparate treatment claim, EEOC argued that the Ninth
Circuit’s position that the ADA does not prohibit covered entities from taking adverse actions based on “factors merely related to a person’s disability” conflicts with Supreme Court and Ninth Circuit case law recognizing that factors related to a disability (such as symptoms) often are indistinguishable from the disability itself (citing Sch. Bd. of Nassau Cty. v. Arline, 480 U.S. 273 (1987)). On the disparate impact claim, the Commission argued that an individual plaintiff could succeed in proving an ADA “screen-out” claim under 42 U.S.C. § 12112(b)(6) without proof of disparate impact on a group of people with disabilities. The Ninth Circuit denied the petition for rehearing, but amended its original opinion to acknowledge that a plaintiff may be able to prevail on an ADA “screen-out” claim without adducing proof of disparate impact on a protected group. The court did not change the portion of its original opinion concluding that the ADA does not protect against adverse actions based on “factors merely related to a disability."

8. Proof of Harassment

Cherry v. Shaw Coastal, Inc., No. 11-30403 (5th Cir.), brief as amicus curiae filed May 19, 2011

In this case, plaintiff John Cherry alleged that he was sexually harassed by male coworker Michael Reasoner and that the defendant ignored his complaints, ultimately forcing him to resign. After a jury found in Cherry’s favor, the court ruled that Cherry had failed to produce sufficient evidence to show that the harassment was “because of” Cherry’s sex, that it was severe or pervasive, or that the defendant failed to respond adequately to Cherry’s complaints. The court vacated the jury’s verdict and granted judgment as a matter of law to defendant.

On Cherry’s appeal to the Fifth Circuit, the Commission argued as amicus curiae that the district court failed to examine the evidence under the appropriate standard, erroneously concluding that no reasonable jury could have rendered a verdict in Cherry’s favor. There was abundant evidence supporting the jury’s conclusion that Reasoner’s harassment of Cherry was perpetrated “because of” Cherry’s sex. Reasoner’s favorable comments about Cherry’s appearance, his text messages to Cherry referring to “want[ing] cock” and to his own penis, his repeated rubbing, caressing, and other touching of Cherry, and his invitation to Cherry to spend the night at his home and wear his underwear, were sufficient for a reasonable jury to find that Reasoner was either explicitly or implicitly proposing sexual activity with Cherry. Similarly, there was ample evidence supporting the jury’s finding that Reasoner’s harassment of Cherry was sufficiently severe or pervasive to create a hostile work environment. In reaching
the contrary conclusion, the district court improperly interpreted the evidence in a light favorable to the defendant. Finally, the district court also overlooked evidence supporting the jury’s conclusion that defendant failed to respond to the harassment in a manner that would preclude liability.


Homer Howard worked for Cromer Food, which sells food and beverages through vending machines that it places on customers’ premises. Howard’s primary job responsibility was to stock vending machines at Cromer’s largest client, Greenville Hospital. He worked the second shift, from 3 to 11 p.m., and needed to work that shift because his son was ill and Howard was responsible for driving him to receive routine and emergency medical care during the day. About 5 months after Howard started his job at Cromer Food, two male employees of Greenville Hospital began regularly making offensive sexual statements and unwanted sexual propositions to him. Howard complained to numerous Cromer Food managers, including his first- and second-level supervisors and the chairman of the board, C.T. Cromer; each responded with either indifference or hostility. After Howard complained directly to Greenville Hospital, the harassment stopped briefly, but then resumed and included unwanted physical contact. Howard filed a sex discrimination charge with EEOC, and C.T. Cromer told him that he would be terminated if he did not accept a shift change. The shift change would have involved a pay cut and interfered with Howard’s ability to drive his son to the hospital for treatments; Howard turned it down and was terminated.

EEOC sued Cromer Food, arguing that the company failed to take effective action to stop the harassment despite Howard’s repeated complaints, and then retaliated against him by giving him an ultimatum either to transfer to a shift that would have made him worse off or be terminated. Cromer Food filed a motion for summary judgment that was granted by the district court despite the magistrate judge’s contrary recommendation. The court held that (1) liability for the harassment could not be imputed to Cromer Food, and (2) Cromer Food took no material adverse action against Howard following his protected activity.

EEOC appealed and the Fourth Circuit vacated the district court’s grant of summary judgment and remanded the case for trial. The court of appeals said that it had yet to consider whether employers can be liable for harassment by nonemployees, but that consistent with the EEOC’s regulations, other circuit courts have held that employers can be held liable under a negligence standard similar to that applied in coworker harassment cases. The court also determined that a jury could find that Cromer Food
had actual or constructive knowledge of the harassment suffered by Howard in view of the record evidence that Howard repeatedly complained to Cromer Food managers but was laughed at and told to “quit being a crybaby.” Additionally, the court said that in the Fourth Circuit, claims of harassment cannot be avoided with a “see no evil, hear no evil strategy”; that knowledge of harassment can be imputed when a “reasonable person, intent on complying with Title VII, would have known about it”; and that knowledge can be constructive if the procedure for registering complaints is not reasonable.

*Hoyle v. Freightliner, LLC*, 650 F.3d 321 (4th Cir. April 1, 2011)

Kimberley Hoyle, worked as a truck assembler at one of defendant Freightliner’s manufacturing plants beginning in 1988. The majority of Freightliner’s employees were male. Hoyle filed a sex discrimination suit against Freightliner based on a number of harassing incidents that occurred during 2005. These included Hoyle finding tampons attached to a truck’s key ring, finding pictures of women in G-string bikinis taped inside the mechanic’s toolbox, seeing calendars depicting women in wet bathing suits, and having a screensaver depicting a naked woman placed on her computer. When Hoyle complained about the calendars and the pictures on toolboxes, managers removed the offending material; however, the pictures reappeared elsewhere, and male coworkers complained about being told what they could and could not put on their toolboxes. Shortly after Hoyle complained about the computer images, Freightliner moved her to a different position within her work area. This caused a change in Hoyle’s duties; she was now responsible for tasks such as cleaning, sweeping, sorting, and marking lines to be painted. Hoyle contended that this was a janitorial job usually assigned to a person who volunteered to do the tasks for a shift or a week, and that she was unaware of anyone else who had been required to do the job on a permanent basis. One day while working an overtime shift, Hoyle’s supervisor ordered her to cleanup outside in the pouring rain. Hoyle called in sick the next day and was fired, allegedly because she had called the reporting line too late. She challenged the termination in accordance with the collective bargaining agreement and after going to arbitration was reinstated.

Hoyle sued Freightliner, claiming a sexually hostile work environment and retaliation. On Freightliner’s summary judgment motion, the district court rejected Hoyle’s harassment claim, holding that a plaintiff must show she is the “target” of hostility to satisfy the “because of sex” element of the claim. The court said Hoyle had not proven she was a target, as much of the offensive conduct took place in group settings and was experienced by many employees. The district court also rejected Hoyle’s retaliation
claim, holding that her assignment to the janitorial job could not be unlawful retaliation because it did not affect the terms or conditions of her employment. Hoyle appealed to the Fourth Circuit.

The Commission filed an amicus curiae brief, arguing that an employee need not show she was the target of harassment in order to establish that harassment was “because of sex,” as long as she can show that her work environment exposed to her to disadvantageous conditions to which men were not exposed. The Commission also argued that a humiliating job reassignment may constitute actionable retaliation because it would deter employees from asserting their rights. The Fourth Circuit, emphasizing the arguments made in the Commission’s amicus brief, reversed the district court’s decision and held that a juror could find that the photos created a hostile work environment because of sex by sexualizing the workplace, and that the photos could be deemed particularly offensive to women. The court also held that a reasonable jury could find that the various incidents and displays, which consistently painted women in a sexually subservient and demeaning light, were sufficiently severe or pervasive to create an abusive work environment. The court of appeals agreed with EEOC that Hoyle’s reassignment was an adverse action, but found that Hoyle had failed to show the reassignment was retaliatory.

_Dediol v. Best Chevrolet, Inc.,_ 655 F.3d 435 (5th Cir. Sept. 12, 2011)

Milan Dediol, a 65-year-old, born-again Christian, worked as a used car salesman for Best Chevrolet from June 1 through August 30, 2007. Dediol contended that from July 3, when he sought permission to come in late the following day in order to participate in a church event, his direct supervisor, Donald Clay, who was in his 30s, engaged in a relentless campaign of age- and religion-based harassment toward him. Numerous times each day, Clay called Dediol names such as “old scum,” “old man,” and “pops.” Clay also disparaged Dediol’s religion at least 12 times over a 2-month period. Further, Clay frequently threatened to beat up Dediol, including in an August 29 meeting in front of their coworkers, when Clay ran towards Dediol with his arms raised as if to hit him until two salespeople intervened. Dediol resigned the following day and later said that he was too afraid of Clay to even pick up his last paycheck.

Dediol sued Best Chevrolet, claiming the he was subjected to a hostile work environment and constructively discharged due to his age and religion. The district court granted summary judgment to Best Chevrolet on all claims. On the age harassment claim, the court found that (1) although the age-based comments were pervasive, no reasonable jury could find that they were severe; (2) Dediol presented
insufficient evidence that Clay’s violent outbursts were motivated by age-related animus; (3) Dediol failed to demonstrate sufficient impact on his work performance to rise to the level of an actionable employment claim; and (4) Dediol did not show any “adverse employment action.” On the religious harassment claim, the court found that Dediol’s disparaging comments were just stray remarks and that did Dediol did not show an adverse employment action. Dediol appealed to the Fifth Circuit and EEOC submitted an amicus curiae brief in order to correct the district court’s erroneous application of the standards for finding an actionable hostile work environment.

The Fifth Circuit reversed. In an issue of first impression for the circuit, the court adopted EEOC’s position that a hostile work environment claim is actionable under the ADEA. The court then found that Clay’s conduct was sufficient to raise a genuine issues of material fact on age and religion hostile work environment claims. The court agreed with EEOC that the district court had failed to consider the totality of the circumstances in holding that the conduct alleged was not actionable. The court also found that Dediol’s claim of constructive discharge should have survived summary judgment due to the fact that Dediol had sought a transfer to a different department in order to maintain his employment with Best Chevrolet.

See also EEOC v. Xerxes Corp., 639 F.3d 658 (4th Cir. April 26, 2011), immediately below, and King v. PMI-Eisenhart, No. 11-1876 (7th Cir.), at page 66 infra.

9. Liability for Harassment

EEOC v. Xerxes Corp., 639 F.3d 658 (4th Cir. April 26, 2011)

In this racial harassment suit, the Commission sought relief for three African American men who worked at the defendant’s fiberglass manufacturing plant. The claimants maintained that they were targeted with pranks and various explicit racial slurs (including “nigger,” “Buckwheat,” “Benson,” “Yellow Boy,” “boy,” and “Curious George,” among others) between 2004 and 2008. The men complained about the harassment immediately, but Xerxes managers took no action until February 2006, when management held a staff meeting and told employees that racial harassment was prohibited and that employees would be disciplined if they made offensive remarks. Despite an investigation by Xerxes’ Minneapolis-based EEO coordinator, the harassment continued, and two of the claimants received death threats in the spring of 2007, one in the form of a written message referencing the KKK, and the other in the form of a drawing of a hanging stick figure with the words “IH IH my nigger” written below it. Xerxes investigated both incidents, and reported the KKK threat to the sheriff’s
Office of General Counsel FY 2011 Annual Report

office, but ultimately concluded that it could not identify the perpetrators. Xerxes moved for summary judgment, arguing that no basis existed to impute liability to Xerxes because, first, the incidents involved coworker harassment and Xerxes had taken prompt and adequate remedial action with respect to all of them, and second, the harassment alleged by two of the claimants was insufficiently “severe and pervasive” to be actionable.

The district court granted summary judgment to Xerxes. The court “assumed without deciding” that EEOC had established that the harassment in question was “severe or pervasive,” but found that Xerxes was not liable for any of the harassment because the company “acted quickly and reasonably effectively to end” any harassment it knew about, and its ignorance of other harassment was due to the claimants’ failure to notify Xerxes’ management. EEOC appealed.

The Fourth Circuit affirmed in part. The court said “[a] remedial action that effectively stops the harassment will be deemed adequate as a matter of law, [but] it is possible that an action that proves to be ineffective in stopping the harassment may nevertheless be found reasonably calculated to prevent future harassment and therefore adequate . . . as a matter of law.” Applying this standard, the court determined that Xerxes’ responses were legally adequate starting in 2006. The court, however, found there was a triable question as to the sufficiency of Xerxes’ pre-2006 notice of the harassment, and therefore turned to whether the claimants had experienced actionable harassment during that period. The court found that the conduct to which one claimant was subjected was not sufficiently severe or pervasive to alter the terms and conditions of his employment, saying that the “EEOC must clear a high bar in order to satisfy the severe or pervasive test.” The court said that the conduct to which the other two claimants were subjected was sufficiently severe or pervasive to constitute a racially hostile work environment, and vacated the district court’s judgment and remanded the case for further proceedings as to the period prior to February 2006, finding that there was a genuine issue of material fact in the record as to whether the defendant was on notice of the harassment for this earlier timeframe.

AutoZone, Inc. v. EEOC, 421 F.App’x 740 (9th Cir. March 15, 2011) (unpublished)

Stacy Wing, a newly hired part-time customer service representative at AutoZone, Inc., was sexually harassed both verbally and physically within the first month of her employment by the store manager, Jose Contreras, who was Wing’s immediate supervisor. Despite Wing’s complaints to Contreras, he continued harassing her to the point of grabbing her by the neck, pushing her face towards his crotch, and pulling out
his penis. Wing reported Contreras’ conduct to the district manager, but was referred to the regional human resources manager, who concluded there was no evidence to corroborate Wing’s claims and that Contreras had not violated company policy. Contreras resigned after two other employees reported his harassing behavior. Wing twice took training to be qualified for a promotion to parts service manager, but was told by managers that she would not be promoted, despite her qualifications, because she had filed internal and EEOC discrimination complaints. EEOC filed suit and following a trial a jury found that Wing had been sexually harassed and awarded her $15,000 in compensatory damages and $50,000 in punitive damages; the jury found against EEOC on the retaliation claim.

Both parties appealed, and the Ninth Circuit affirmed in all respects. The court agreed with EEOC that AutoZone had not proven its affirmative defense and that punitive damages were appropriate. The court ruled that the jurors could have reasonably determined that the district manager and regional human resources manager failed to exercise reasonable care to correct promptly “the obscene and harassing behavior” of Wing’s store manager when she brought it to their attention, and also that “a reasonable juror could question the efficacy and good faith” of the investigation that was conducted. The court also found that EEOC had not proven reversible error with respect to its retaliation claim because it had abandoned the theory on which it sought an adverse action jury instruction by not including the theory in its pretrial order.

10. Damages

_Hernández-Miranda v. Empresas Díaz Massó, Inc._, 651 F.3d 167 (1st Cir. June 29, 2011)

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

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

This was an issue of first impression for the First Circuit. The court reviewed the legislative history of 42 U.S.C. § 1981a(b)(3), as well as decisions of circuits interpreting the phrase “current year” in other provisions of Title VII to mean the year in which the discrimination occurred. The First Circuit agreed with the Commission’s position in all respects, and added that employers bear the burden of showing that a damages award should be reduced under 42 U.S.C. § 1981a(b)(3). The court remanded the case to the district court, ordering it to award the plaintiff $200,000.


This case involved the question whether damages are available for a retaliation claim under the ADA. Douglas Baker filed suit against Windsor Republic Doors (WRD) alleging violations of the ADA and two Tennessee State statutes. Baker worked at a manufacturing plant of WRD. He suffered from an enlarged heart, causing fatigue and shortness of breath. Baker took a leave of absence in 2005 to have a pacemaker and defibrillator installed to prevent heart failure. After a number of communications with Baker’s cardiologist regarding possible harm to Baker’s pacemaker from electrical sources in the plant, WRD refused to allow Baker to return to work unless he waived his workers’ compensation benefits, which he refused to do. Following a 4-day trial, a jury found that WRD had failed to reasonably accommodate Baker’s disability and had retaliated against him, and awarded him $84,000 in backpay and $29,500 in compensatory damages. The defendant moved for judgment as a matter of law, which the district court granted on the disability claim but not the retaliation claim. The district court also upheld the jury’s award of compensatory damages on the retaliation claim.

Both parties appealed to the Sixth Circuit, and EEOC and the Civil Rights Division of the Department of Justice filed a joint amicus curiae brief addressing a matter of first
impression in the circuit: whether victims of retaliation under section 503 of the ADA are eligible for compensatory and punitive damages under the Civil Rights Act of 1991, 42 U.S.C. § 1981a (a)(2). Courts considering the issue have reached different results, as the statutory language omits reference to the ADA retaliation provision in identifying the types of claims for which damages are available under the ADA. The Commission argued that Congress intended that damages be available and that its intent is discernible from the ADA enforcement provisions incorporating Title VII’s enforcement and remedies provisions. The Sixth Circuit held that it was unnecessary to reach this issue because the defendant did not dispute that compensatory damages were available under state law for disability-based retaliation claims. Accordingly, the court of appeals affirmed the award of compensatory damages.

11. Americans with Disabilities Act

a. Disability Status

_EEOC v. AutoZone, Inc_, 630 F.3d 635 (7th Cir. Dec. 30, 2010)

This case involved whether an individual limited in performing self-care tasks was disabled under the ADA. John Shepherd worked as a parts sales manager for AutoZone in Macomb, Illinois. His job involved assisting customers in the purchase of autoparts, but included other tasks such as routine cleaning and maintenance of the store, stocking shelves, and moving merchandise. The daily nonsales tasks were randomly distributed to the employees on duty by a computer-generated assignment system; however, the store manager retained discretion to reassign tasks. Due to a back injury suffered at a prior job, Shepherd experienced flareups of debilitating pain when carrying out tasks that required him to lift, or to twist or rotate his torso. Shepherd testified at his deposition that he needed assistance 4 or 5 days each week with dressing himself, brushing his hair, and bathing. He also experienced difficulty in tying his shoes and in properly caring for his teeth. On September 13, 2003, notwithstanding Shepherd’s limitations, his store manager required that he mop the store’s floor, causing Shepherd to injure himself. Shepherd was placed on medical leave, and despite two medical evaluations permitting him to work with restrictions, AutoZone did not allow him to return and eventually discharged him in February 2005.

The Commission filed suit alleging: (1) that from at least March 2003 until his injury in September 2003 AutoZone failed to reasonably accommodate Shepherd’s disability by exempting him from mopping floors; (2) AutoZone’s decision not to return Shepherd to work in January 2004 was due to his disability or the need to accommodate his
disability; (3) AutoZone’s decision not to return Shepherd to work in January 2004 constituted a failure to make reasonable accommodations to his disability; and (4) AutoZone retaliated against Shepherd for filing EEOC charges by keeping him on an involuntary leave for over a year, and ultimately firing him. AutoZone moved for summary judgment on all claims. The district court granted summary judgment on the March to September 2003 accommodation claim, finding that prior to September 13, 2003, Shepherd was not substantially limited in caring for himself. The district court found there were material factual disputes on the other three claims and allowed them to proceed to trial, where AutoZone prevailed. EEOC appealed only the adverse summary judgment decision on the March to September 2003 accommodation claim, arguing that the evidence supported a finding that Shepherd was substantially limited in the major life activity of caring for himself during that period.

The Seventh Circuit reversed the district court’s summary judgment decision on the March to September 2003 accommodation claim. The court said that Shepherd’s and his wife’s testimony that during this period Shepherd was unable to tie his shoes or care for his teeth, and needed assistance with dressing himself, brushing his hair, and bathing 4 or 5 days each week, coupled with AutoZone’s admissions regarding Shepherd’s limitations and need for assistance, constituted sufficient evidence for a reasonable jury to find that Shepherd was substantially limited in caring for himself. The court agreed with EEOC that self-care (now included in a statutory definition) is a major life activity under the ADA.

b. Causation Standard

*Lewis v. Humboldt Acquisition Corp.*, No. 09-6381 (6th Cir.), brief as amicus curiae in support of Petition for Rehearing en banc filed April 20, 2011

This case challenges the applicability to the ADA of the Sixth Circuit’s precedent under the Rehabilitation Act that plaintiffs must establish that their disability was the “sole” cause of the challenged employment action. Susan Lewis, a registered nurse working at Humboldt Manor Nursing Home, developed a medical condition affecting her lower extremities. Lewis was discharged and filed suit under the ADA alleging that the reasons given by Humboldt Manor for her discharge were false, and that the real reason was her disability. At trial, over Lewis’ objection, the district court instructed the jury that Lewis needed to prove that her “disability was the sole reason for the defendant’s decision to terminate [her].” During the course of its deliberations, the jury sent the district court a note asking, “Do we have to find . . . that the reason for Ms. Lewis’s termination was . . . solely because of her disability?” The jury’s note further asked the
court, “What if we believe it may only have been a contributing factor?” The district court noted that the word “solely” was underlined in the jury’s note. The court responded to the jury that “[t]he instructions as given to you are what they say. . . . [Y]ou need to apply them as they are written.” The jury found that Lewis was disabled and a qualified individual, but concluded that Humboldt Manor had not discriminated against Lewis under the ADA, “as defined by these instructions.”

Lewis appealed and the Sixth Circuit affirmed, holding that it was powerless to overrule circuit precedent that requires an ADA plaintiff to prove “that his disability was the ‘sole reason’ for the adverse employment action.” The court said that unless the Sixth Circuit precedent was overruled by the full court sitting en banc, it remained good law.

The Commission file an amicus curiae brief in support of Lewis’ petition for rehearing en banc, arguing that the Sixth Circuit should grant the petition because the “sole cause” or “sole reason” requirement is applied inconsistently within the circuit; is unsupported by the language of the ADA, and as such is in conflict with a recent Supreme Court decision (Gross v. FBL Financial Services, Inc., 557 U.S. 167 (2009), holding that the causation standard of Title VII did not apply to the ADEA even though the statutes contained similar language); is rejected by virtually every other court of appeals; and is an issue of exceptional importance because causation goes to the heart of proving a discrimination claim. The Commission also argued that on remand, the district court should instruct the jury that Lewis needs to prove only that her disability was a motivating factor in the decision to terminate her.

c. Transfer as a Reasonable Accommodation

EEOC v. United Airlines, No. 11-1774 (7th Cir.), brief as appellant filed July 19, 2011

This case involves the question whether it is lawful under the ADA to require that an individual with a disability compete for an opportunity to transfer to another job he or she needs as an accommodation. United Airlines’ reasonable accommodation guidelines recognize that reassignment or transfer can be a reasonable accommodation, but specify that United’s process is “competitive”: employees receive assistance in applying for jobs, but they get the job only if no other applicant is better qualified. EEOC filed suit alleging that United violated the ADA by denying disabled employees the reasonable accommodation of reassignment to a vacant position for which they are qualified when due to their disabilities they can no longer function effectively in their current jobs.
EEOC filed suit in San Francisco, but on United’s motion for a change of venue, the district court transferred the case to the northern district of Illinois, where there is controlling Seventh Circuit precedent adverse to EEOC’s position, *EEOC v. Humiston-Keeling*, 227 F.3d 1024 (7th Cir. 2000). *Humiston-Keeling* held that an employer can prefer a better qualified applicant over a disabled employee needing reassignment if the employer has a best-qualified selection policy. The district court granted defendant’s motion to dismiss based on *Humiston-Keeling*. The court acknowledged EEOC’s argument that the Supreme Court in *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002), held, contrary to *Humiston-Keeling*, that preferences may be required under the ADA and that reasonable accommodations can sometimes require violation of an employer’s disability-neutral rules and policies. The district court said, however, that *Mays v. Principi*, 301 F.3d 866 (7th Cir. 2002), found that *Barnett* “bolsters” *Humiston-Keeling* by recognizing that a seniority system, which *Mays* considered indistinguishable from a best-qualified selection policy, may trump the need for reassignment.

On appeal, the Commission argued that dismissal was incorrect because: (1) As EEOC and the en banc Tenth and D.C. Circuits have concluded, the plain language and legislative history of the ADA’s reassignment provision, along with the structure and purpose of the ADA, strongly suggest that absent undue hardship, where an employee can no longer function effectively in his current position due to a disability, the employer must reassign him to a vacant equivalent position for which he is qualified without requiring that he compete for the position with other applicants; (2) The court should revisit *Humiston-Keeling* because (a) it is based on policy rather than an examination of the statute and legislative history, which compel a contrary result; (b) the rationale for *Humiston-Keeling* – that a reasonable accommodation need never violate an employer’s policy and that preferences are never required – was rejected by *Barnett*, and defendant’s contrary arguments are unpersuasive; and (c) *Mays* is simply wrong in holding that an exception for seniority systems to the rule that reassignments are normally a required accommodation also extends to a best-qualified selection policy like United’s.

*Jackson v. FUJIFILM Mfg. USA, Inc.*, No. 11-1129 (4th Cir.), brief as amicus curiae filed July 29, 2011

Timothy Jackson alleged in this suit that his employer violated the ADA when it failed to reasonably accommodate his disability by reassigning him to vacant positions for which he was qualified, even if he was not the most qualified candidate. The district court granted summary judgment to the employer, rejecting Jackson’s argument and
asserting that the ADA is not an “affirmative action statute,” and does not require employers to prefer less qualified candidates who need an accommodation. The court added that Jackson was not entitled to the accommodation of his choice, and that the employer had attempted to provide him with a reasonable accommodation. Jackson appealed to the Fourth Circuit.

The Commission argued as amicus curiae that the district court’s conclusion that the ADA does not require employers to provide reasonable accommodations to disabled employees by reassigning them to vacant positions for which they are qualified, without regard to whether there are more qualified candidates, runs contrary to the ADA, its legislative history, and the Commission’s regulations and policy guidance regarding reasonable accommodation. Title I of the ADA defines reasonable accommodation to include both “reassignment to a vacant position” and “appropriate adjustment or modifications of . . . policies.” The congressional committee reports stated: “If an employee, because of disability, can no longer perform the essential functions of the job that she or he has held, a transfer to another vacant job for which the person is qualified may prevent the employee from being out of work and the employer from losing a valuable worker.” And the Commission’s regulations -- which are entitled to deference -- incorporate the statutory definition of “reasonable accommodation,” including “reassignment to a vacant position.” The Commission’s enforcement guidance provides that as long as an employee with a disability is qualified for the opening, he or she “does not need to be the best qualified individual for the position in order to obtain it as a reassignment” and need not compete for the opening, and an employer may be required to modify its normal policies governing job transfers to provide reassignment as a reasonable accommodation. Because the Commission’s guidance is fully consistent with its regulation, and was issued publically after consideration of comments submitted during legislative rulemaking, it represents a controlling interpretation of the law. Further, the Tenth and D.C. Circuits in en banc decisions have agreed with the Commission’s interpretation of the statute’s reassignment requirements.

Additionally, the district court’s rationale and construction of the ADA was considered and squarely rejected by the Supreme Court in U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (2001). In Barnett, the Court said: “The ADA requires preferences in the form of ‘reasonable accommodations’ that are needed for those with disabilities to obtain the same workplace opportunities that those without disabilities automatically enjoy. By definition any special ‘accommodation’ requires the employer to treat an employee with a disability differently, i.e., preferentially. And the fact that the difference in treatment violates an employer’s disability-neutral rule cannot by itself place the accommodation
beyond the Act’s potential reach.” Barnett also implicitly overruled the Fourth Circuit’s earlier decision in *EEOC v. Sara Lee Corp.*, 237 F.3d 349 (4th Cir. 2001), to the extent that that decision stands for the proposition that the ADA does not require preferences for disabled workers.

d. Confidentiality of Medical Information


Walter Watson, worked for C.R. England (CRE) as a truckdriver. During a conversation with the company’s human resources manager that the manager assured him would be kept confidential, Watson disclosed that he was HIV-positive. A few months later, CRE placed Watson into a company program to train student truckdrivers. When the HR manager learned that Watson had become a trainer, she talked to CRE’s in-house attorney about Watson’s HIV status. The HR manager and in-house attorney then presented Watson with a choice to either forego the opportunity to be a trainer or acquiesce in having his potential trainees sign a form -- not naming Watson -- stating that “his/her trainer suffers from . . . HIV.” A trainee signed the form and worked with Watson for a brief period before Watson quit and filed a charge of discrimination. EEOC’s suit alleged that (1) CRE violated the ADA’s prohibition against “limiting, segregating, or classifying” an individual based on disability when it forced Watson to choose between disclosing his HIV status to his trainees or foregoing being a trainer, and (2) violated the statute’s prohibition against disclosure of an employee’s medical information when the HR manager told the in-house attorney about Watson’s HIV status. The district court granted summary judgment to defendant on the disability discrimination claim on the ground that because the forced disclosure to trainees did not result in any lost training opportunities, Watson had not suffered an adverse action, and on the confidentiality of medical information claim on the ground that the statute does not require that voluntary disclosures be kept confidential, notwithstanding statements to the contrary in EEOC guidance.

EEOC appealed and the Tenth Circuit affirmed. The court held that the ADA’s confidentiality provisions do not prohibit disclosure by employers of medical information that employees volunteer, even where, as here, the employee was promised confidentiality. The court also held that defendant did not discriminate against Watson by requiring him to assent to the trainee form because defendant did not deny him the opportunity to be a trainer. The court rejected the Commission’s argument that the form constituted an adverse action because it carried a significant risk of humiliation and damage to reputation.
12. Age Discrimination in Employment Act

_EEOC v. Minnesota Dep’t of Corr.,_ 648 F.3d 910 (8th Cir. Aug. 10, 2011)

EEOC alleged that the Minnesota Department of Corrections (DOC), a state agency operating 10 correctional facilities and employing around 4,000 people, maintained an age discriminatory early retirement incentive plan (ERIP). Although DOC employees with the requisite years of service can elect to retire at age 55, none of the jobs at the DOC are subject to mandatory retirement. DOC offers employees ERIPs that are mandatory subjects of bargaining with various unions representing DOC employees, and are contained within collective bargaining agreements negotiated between the State and the unions. As originally structured, the ERIPs imposed a so-called “age-55 cliff.” The age-55 cliff provided that eligible employees who retired at age 55 and were covered by the Correctional Employee Retirement Plan or the State Patrol Retirement Fund would receive employer-paid contributions for health and dental insurance until age 65, when the retiree became Medicare-eligible. The age-55 cliff meant that in order to obtain the insurance benefit, employees had to retire at 55, or forever lose the opportunity to obtain the benefit. When DOC learned that employees who wanted to work beyond age 55 felt forced to retire because of the age 55 cliff, it obtained an opinion from the State Attorney General in early 2001 regarding the plan’s legality. The Attorney General concluded that the plan was facially discriminatory, but noted the possibility of a safe harbor defense under the ADEA.

Subsequently, the State and many unions agreed to eliminate the age-55 cliff, but one union refused to negotiate modifications to the ERIP. EEOC, DOC, and the union all moved for summary judgment, and the district court granted EEOC’s motion and denied DOC’s and the union’s motions. The court held that EEOC had established a prima facie case of age discrimination because “[a]ge [wa]s the only distinguishing trait” in determining whether an employee could receive the ERIP benefits. The court said that the plan did not fall within the ADEA’s safe harbor for early retirement incentive plans because it was inconsistent with the ADEA’s purpose of prohibiting arbitrary age discrimination. The court relied on _Jankovitz v. Des Moines Independent Comm. Sch. Dist.,_ 421 F.3d 649 (8th Cir. 2005), where the Eighth Circuit held that a plan that offered early retirement benefits only until age 65 and defined “early” by age rather than years of service was unlawful under the ADEA.

The union appealed and the Eighth Circuit affirmed, finding that the plan was “discriminatory on its face,” and stating that the “exclusively age-based reduction in benefits typifies ‘arbitrary age discrimination’ and therefore fails to meet the ADEA safe
harbor’s requirements.” The court of appeals rejected the union’s argument that because the State could (but did not) impose a mandatory retirement age of 55 on the union’s DOC members, the State could give workers an incentive to retire at age 55, but not thereafter.

See also Dediol v. Best Chevrolet, Inc., 655 F.3d 435 (5th Cir. Sept. 12, 2011), at page 54 supra.

13. Equal Pay Act

King v. PMI-Eisenhart, No. 11-1876 (7th Cir.), brief as amicus curiae filed July 29, 2011

In this EPA/Title VII suit, Susan King alleged that her employer (PMI) subjected her to a sexually hostile work environment, and paid her less than male employees performing the same work because of her sex. The court granted summary judgment to PMI on King’s EPA claim, finding that PMI had provided reasons for paying the men more than King and that King had failed to establish that these reasons were pretextual. The court granted summary judgment to PMI on King’s hostile work environment claim on the ground that she had not shown the harassment was sufficiently severe or pervasive to alter the terms of her employment either within 300 days of her charge or during any time prior to that 300-day period. King appealed.

On King’s appeal to the Seventh Circuit, the Commission argued as amicus curiae that the district court failed to apply the correct legal standard in evaluating King’s EPA claim. Rather than requiring that PMI respond to King’s prima facie case by proving that the pay disparity between King and her male colleagues resulted from one of the four statutorily-provided defenses to liability -- here, that the pay differential was based on a factor other than sex -- the court held PMI to a mere burden of production, and instead imposed on King the additional burden of showing that the company’s asserted reasons for the pay differential were false. Under the correct standard applicable to a defendant who moves for summary judgment based on an affirmative defense, PMI could prevail only upon a showing that the evidence was so one-sided that no reasonable jury could rule for King. The evidence presented in this case would not support an award of summary judgment to the employer under that standard. In addition, the district court applied an incorrect evidentiary standard to King’s hostile work environment claim. In evaluating such claims, it is well established that courts must examine all the evidence together to determine whether the alleged harassing conduct was sufficiently severe or pervasive to constitute a violation of Title VII. The district court, however, separated the harassment evidence into conduct occurring
before the 300-day period preceding King’s discrimination charge, and conduct within that period, and concluded that the evidence from each period, viewed independently, was insufficient to establish a violation of Title VII. In so doing, the court failed to abide by wellsettled principles regarding Title VII hostile work environment claims.

See also Kasten v. Saint-Gobain Performance Plastics Corp., 131 S. Ct. 1325 (March 22, 2011), at page 69 infra.

14. Retaliation

a. Protected Activity


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

Thompson filed suit and the district court granted summary judgment to defendant, concluding that “under its plain language, the statute does not permit a retaliation claim by a plaintiff who did not himself engage in protected activity.” The Sixth Circuit initially reversed, but then granted defendant’s petition for rehearing en banc and affirmed the district court’s grant of summary judgment, concluding that the plain text of Title VII’s antiretaliation provisions limited “the authorized class of claimants . . . to persons who have personally engaged in protected activity.”

On Thompson’s appeal to the Supreme Court, the Commission joined an amicus curiae brief filed by the Solicitor General, arguing that under Supreme Court precedent firing an employee’s spouse or fiancée because of the employee’s EEOC complaint is unlawful retaliation against the complaining employee. The prospect that such a fate could befall a spouse, family member, or other closely associated person might well “dissuade a
reasonable worker” from exercising her statutory right to complain about discrimination -- the standard for showing retaliation under the Supreme Court’s decision in Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53, 68 (2006). Further, the associated person can state a claim under Title VII because he falls within the meaning of the “person aggrieved” language of the statute’s suit authorization provisions. The government urged the Court to continue its practice of giving a “broad and inclusive” reading of statutory cause of action provisions providing remedies to those “aggrieved” by unlawful actions, as it did in Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972), which construed identical language in a statute prohibiting discrimination in housing.

Although the Sixth Circuit concluded that Thompson was aggrieved by the loss of his job, it found he had no cause of action under Title VII, mistakenly examining the statute’s prohibition on retaliation in isolation and attempting to divine whether Congress would have wanted individuals like Thompson to be able to enforce that provision. This exercise was unnecessary since section 706 of Title VII provides an express textual answer to the court of appeals’ question, stating that a “person claiming to be aggrieved” by an unlawful employment practice may bring “a civil action . . . against the respondent named in the charge.” This position is consistent both with EEOC’s longstanding interpretation of the relevant statutory provisions and with sound enforcement policy. For more than 30 years, EEOC has said that it is unlawful to take an adverse action against an employee’s family member due to the employee’s exercise of his or her rights under the statute. Interpreting Title VII’s antiretaliation provisions to permit such third-party retribution would undermine the statutory scheme, which depends on employees' willingness to file complaints. Moreover, EEOC has consistently taken the position that the affected employee can file suit under Title VII to remedy the violation. That position also best effectuates the statutory scheme, as it is the adversely affected employee who has the greatest economic incentive to sue and is the most likely candidate to vindicate the statutory interest in a workplace free of unlawful retaliation.

In a unanimous opinion, the Supreme Court adopted the government’s argument and held that an employer’s termination of an employee in retaliation for the protected activity of his fiancée, also an employee, is unlawful retaliation under Title VII that may be challenged in a lawsuit brought by the terminated employee. The opinion ratifies the longstanding and consistent view of the Commission that Title VII prohibits third-party retaliation, and that both the employee engaging in protected activity and the terminated employee have a cause of action. The Court stated: “We think it obvious that
a reasonable worker might be dissuaded from engaging in protected activity if she
knew that her fiancé would be fired.” In addressing the question of Thompson’s
standing, the Court held that Title VII incorporates a “zone of interests” test, “enabling
suit by any plaintiff with an interest ‘arguably [sought] to be protected by the statutes’.
. . while excluding plaintiffs who might technically be injured in an Article III sense but
whose interests are unrelated to the statutory prohibitions in Title VII.” (quoting Nat.
Credit Union Admin. v. First Nat. Bank & Trust Co., 522 U.S. 479, 495 (1998)). The Court
concluded that Thompson easily fell within Title VII’s zone of interests because
“hurting him was the unlawful act by which the employer punished [his fiancée].”


This case involved the issue of whether an oral complaint constitutes protected activity
for purposes of a retaliation claim under the Fair Labor Standards Act (FLSA) (and
consequently the Equal Pay Act, which is part of the FLSA). The plaintiff, Kevin Kasten,
orally complained repeatedly to his employer about the placement of the time clock
recording when hourly employees began and ended the workday. Kasten worked as an
hourly manufacturing and production employee on the first and third shifts. He
believed the company’s placement of the time clock prevented employees from being
paid, as required by the FLSA, for donning and doffing work related protective gear.
Kasten was discharged and brought suit under the antiretaliation provision of the
FLSA, 29 U.S.C. § 215(a)(3), claiming he was fired because of his complaints about the
time clock. The FLSA provision makes it unlawful for an employer “to discharge or in
any other manner discriminate against any employee because such employee has filed
any complaint . . . under or related to [the Act].” The district court granted summary
judgment to the defendant, holding that the FLSA antiretaliation provision protects
only employees who complain in writing. Kasten appealed, and the Seventh Circuit
affirmed and denied rehearing en banc. EEOC joined an amicus curiae brief filed by the
Solicitor General in the Supreme Court arguing for reversal.

In a 6-2 decision, the Court held that the “file any complaint” language in the FLSA
antiretaliation provision applies to both oral and written complaints. The Court
reasoned that interpretation of that language “depend[ed] upon reading the whole
statutory text, considering the purpose and context of the statute, and consulting any
precedents or authorities that inform the analysis.” Taking that approach, the Court
held that although “the language of the provision, considered in isolation, may be open
to competing interpretations . . . considering the provision in conjunction with the
purpose and context” compelled the conclusion that it applies to oral as well as written
complaints. The Court said that because the Act relies on information and complaints
from employees for the enforcement of its substantive wage and overtime standards, limiting coverage to written complaints “would undermine the Act’s basic objectives.”

The court said that in reaching its decision it gave a degree of weight to the views of the federal agencies charged with enforcing the statute. The Court said that the Secretary of Labor has “consistently held the view that the words ‘filed any complaint’ cover oral, as well as written, complaints,” and that EEOC has taken a similar position in its compliance manual and in multiple briefs. The Court said that the agencies’ views “add[ed] force to [its] conclusion” because they are reasonable and consistent with the Act. Finally, the majority declined to decide whether 29 U.S.C. § 215(a)(3) protects only complaints to a governmental agency and not to an employer, saying that the defendant did not timely raise the issue on rehearing or in opposing certiorari.

b. Causation


This case involved the factual sufficiency of pleadings in a Title VII retaliation action. Margaret Templeton worked as a loan officer for defendant bank beginning in 1986. Templeton complained to management that in October 2005 she was sexually harassed by her immediate supervisor; she resigned in June 2006 due to the supervisor’s retaliation against her for complaining. Two years later, Templeton reapplied to the bank at the invitation of a manager who told her the supervisor who harassed her was no longer working there. Templeton was not hired, and she filed suit, alleging that the president of the bank blocked her rehire because, according to the president, she had “issues with management,” and that this conduct was in retaliation for her prior complaints of sexual harassment and retaliation. The district court dismissed Templeton’s complaint for failure to state a claim. Citing *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), the court held that Templeton had not alleged facts that would permit a reasonable inference of retaliation. The court said that the bank’s president’s statement, made without reference to Templeton’s previous reports of sex discrimination, was insufficient to show a causal connection between her protected activity and the bank’s refusal to rehire her, particularly where the protected activity had taken place 2 years before the president’s decision.

Templeton appealed to the Fourth Circuit, and EEOC filed a brief as amicus curiae, arguing that Templeton’s Title VII complaint alleged sufficient facts to create an inference of illegality consistent with the pleading standards of *Iqbal* and the Supreme
Court’s earlier decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and that the district court had erected too high a burden. In a per curiam decision, the court of appeals reversed the district court’s dismissal of Templeton’s retaliation claim. The court of appeals disagreed with the district court that too much time had elapsed between Templeton’s harassment complaint and the bank’s refusal to rehire her to permit a plausible inference of retaliation. The court said that because Templeton had resigned shortly after complaining of harassment, she “was retaliated against, if at all, upon the employer’s first opportunity to do so, *i.e.*, when Templeton expressed her interest in being rehired approximately two years after her resignation.”

**D. Outreach: Educating the Public**

Office of General Counsel attorneys engage in a variety of informational activities, sometimes in conjunction with investigative staff, regarding the laws enforced by the agency and agency processes. In fiscal year 2011, legal staff made presentations at over 500 “outreach” events involving over 35,000 participants. Some examples are provided below.

**Commission Initiatives and Recent Legislation**

EEOC’S General Counsel presented “Meeting Employer and Job Seeker Needs: Criminal Records Policies that Work” at the National H.I.R.E. Network 6th Annual NYS Reentry Policy Conference. He also presented "Taking on the Challenges Facing Workers with Criminal Records: Advancing the Legal and Policy Advocacy Agenda" to the National Employment Law Project. A Charlotte Trial Attorney discussed EEOC and its systemic initiative at the Midwinter Meeting of the ABA’s Section of Labor & Employment Law. A New York supervisory trial attorney spoke to the New York City Bar Association about systemic discrimination. A Phoenix supervisory trial attorney appeared on three panels and discussed the American with Disabilities Act Amendments Act of 2008 (the ADAAA), GINA, and class cases for an ALI-ABA program. The Dallas regional attorney discussed the ADAAA and EEOC’s recent final regulations, and EEOC litigation strategies, with the International Organization of Human Rights Agencies. Two Philadelphia trial attorneys discussed GINA and the ADA with the Labor and Employment Law Section of the Allegheny County Bar Association.
Advocacy and Interest Groups

EEOC’s General Counsel spoke with the National Women’s Law Center and other women’s organizations about systemic cases, including pay discrimination, pregnancy discrimination, caregiver issues, harassment, women in nontraditional fields, and contraceptive coverage. He discussed segregated and sheltered employment and EEOC’s ADA regulations at the National Disability Rights Network annual conference; discussed discrimination in the workplace as a community concern with the American-Arab Anti-Discrimination Committee; and discussed low wage immigrant employment issues with the Southern Poverty Law Center. A New York trial attorney discussed equal pay at the Women, Money, Power Summit hosted by the Feminist Majority Foundation. A Dallas trial attorney discussed the EPA and the ADA with Federally Employed Women and with Jarvis Christian College, an Historically Black University. A San Francisco trial attorney discussed religious and national origin discrimination with the Sikh Coalition. The Miami regional attorney participated in a panel discussion on employment opportunities in the public sector at the Seventh Annual Minority Mentoring Picnic. Two trial attorneys with Indianapolis made presentations at the 15th Annual Race Relations Conference in Louisville, Kentucky. A New York trial attorney spoke to the Commission for the Blind & Visually Impaired about "It's Your Right to Know: Protecting the Rights of People Who Are Blind or Visually Impaired.”

Business Groups

The San Francisco regional attorney discussed “Why Workplace Investigations Go Wrong and Why Companies Mess Up" at the first annual conference of the California Association of Workplace Investigators. He also discussed recent EEOC developments at a roundtable of Silicon Valley in-house counsel. A Los Angeles trial attorney discussed the laws enforced by EEOC with Thai small business owners and with Rotary Club members. New York’s regional attorney spoke to the New York City Business Leadership Network about the ADAAA. A San Francisco supervisory trial attorney spoke at the inaugural state conference of the Idaho Business Leadership Network on the ADAAA, GINA, and the Lily Ledbetter Act.

Government Agencies

An Indianapolis trial attorney discussed the ADAAA, social networking, and the EEO Laws at a National Labor Relations Board seminar. New York’s acting regional attorney and an acting supervisory trial attorney made presentations at a seminar on Intentional Patterns or Practices of Discrimination sponsored by the Department of
Justice Employment Litigation Section. EEOC’s General Counsel was the keynote speaker at a Tennessee Human Rights Commission Employment Law Seminar. An Indianapolis trial attorney provided a legal update to civil rights agencies and FEPAs and discussed EEOC’s processes and procedures with the Indiana Civil Rights Consortium. A Charlotte trial attorney participated in a panel discussion and hearing on the ADEA before the Alexandria, Virginia, Human Rights Commission. A Birmingham trial attorney made a presentation on race and religious discrimination to supervisors and managers from the City of Gulf Shores.

Law and Bar Groups

An Associate General Counsel participated on a panel entitled “Government Investigations: Navigating the Water from the Investigation through Trial” for the Leadership Institute for Women of Color Attorneys. The acting regional attorney for New York discussed “Leaves of Absence as a Reasonable Accommodation under the ADA” at the NELA annual convention. The San Francisco regional attorney presented “Leveraging Resources to Assist Low Wage Workers: Co-counseling with the EEOC” at the California Employment Lawyers Association Non-Profit Summit. A supervisory trial attorney with Los Angeles discussed “Serving Your Community: How Lawyers in Various Fields Found Their Calling” as part of a panel at Whittier Law School. EEOC’s General Counsel discussed EEOC at an Annual Comprehensive Tribal Employment Law & Legal Updates Conference. A Senior Trial Attorney from Chicago presented “Cutting-Edge and Re-Emerging Disparate Impact Issues” at the 37th Annual Labor & Employment Law Institute. A Dallas trial attorney was the moderator for the LGBT Law Section’s day long CLE program at the Texas State Bar Annual Meeting. A New York Trial Attorney spoke at a Public Interest Career program sponsored by the Bar Association of the City of New York. A New York supervisory trial attorney spoke to the New York City Bar Association about systemic discrimination.

Media Contacts

EEOC’s General Counsel was interviewed about religious discrimination against Muslims by HR Magazine. The Birmingham regional attorney answered questions about the statutes enforced by the Commission as a guest on two episodes of the live call-in television show “Law Call.” A Houston trial attorney was interviewed by Univision for a Spanish language local public affairs program for the District Office’s Equal Pay Day event. The New York regional attorney spoke to reporters at the New York Times about age discrimination and mandatory retirement policies, to Newsday
about charge filing procedures, to *Bloomberg News* about the systemic initiative, and to the New York German press about sex discrimination in the financial services industry.
III. Litigation Statistics

A. Overview of Suits Filed

In FY 2011, the field legal units filed 261 merits lawsuits: 260 direct suits and 1 action to enforce an administrative settlement. (Merits suits include direct suits and interventions alleging violations of the substantive provisions of the Commission’s statutes, and suits to enforce settlements reached during EEOC’s administrative process.) Ninety-two of the suits sought relief for more than one person. The field legal units also filed 40 actions to enforce subpoenas issued during EEOC investigations.

<table>
<thead>
<tr>
<th>Merits Filings in FY 2011</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>Direct</td>
<td>260</td>
</tr>
<tr>
<td>Intervention</td>
<td>0</td>
</tr>
<tr>
<td>Administrative Settlements</td>
<td>1</td>
</tr>
<tr>
<td>Total</td>
<td>261</td>
</tr>
</tbody>
</table>

169 Individual Suits
92 Class Suits

1. Litigation Workload

The FY 2011 litigation workload (merits cases active at the start of the fiscal year plus merits suits filed during the fiscal year) totaled 702.

<table>
<thead>
<tr>
<th>FY 2011 Litigation Workload</th>
<th>Active</th>
<th>Filed</th>
<th>Workload</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>441</td>
<td>261</td>
<td>702</td>
</tr>
</tbody>
</table>
2. Filing Authority

In EEOC’s National Enforcement Plan, adopted in February 1996, the Commission delegated litigation filing authority to the General Counsel in all but a few areas. The General Counsel has redelegated much of this authority to the regional attorneys. Redelegated cases are reviewed by staff in the Office of General Counsel prior to suit filing. The chart below shows the filing authority for FY 2011 merits suits.

<table>
<thead>
<tr>
<th>FY 2011 Merits Suit Authority</th>
</tr>
</thead>
<tbody>
<tr>
<td>Count</td>
</tr>
<tr>
<td>Regional Attorney</td>
</tr>
<tr>
<td>General Counsel</td>
</tr>
<tr>
<td>Commission</td>
</tr>
</tbody>
</table>

3. Statutes Invoked

Of the 261 merits suits filed, 62.1% contained Title VII claims, .8% contained EPA claims, 10% contained ADEA claims, 30.7% contained ADA claims, and 3.4% 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.)

<table>
<thead>
<tr>
<th>Merits Filings in FY 2011 by Statute</th>
</tr>
</thead>
<tbody>
<tr>
<td>Count</td>
</tr>
<tr>
<td>Title VII</td>
</tr>
<tr>
<td>EPA</td>
</tr>
<tr>
<td>ADEA</td>
</tr>
<tr>
<td>ADA</td>
</tr>
<tr>
<td>Concurrent</td>
</tr>
</tbody>
</table>
4. Bases Alleged

As shown in the next chart, retaliation (35.6%), sex discrimination (34.1%), and disability (30%) were the most frequently alleged bases in EEOC suits. Race discrimination was alleged in 12.3% of the suits, and age in 10%. Bases numbers in the chart exceed the total suit filings (261) because suits often contain multiple bases.

<table>
<thead>
<tr>
<th>Bases Alleged in SuitsFiled</th>
<th>Count</th>
<th>Percent of Suits</th>
</tr>
</thead>
<tbody>
<tr>
<td>Retaliation</td>
<td>93</td>
<td>35.6%</td>
</tr>
<tr>
<td>Sex</td>
<td>89</td>
<td>34.1%</td>
</tr>
<tr>
<td>Disability</td>
<td>78</td>
<td>29.9%</td>
</tr>
<tr>
<td>Race</td>
<td>32</td>
<td>12.3%</td>
</tr>
<tr>
<td>National Origin</td>
<td>22</td>
<td>8.4%</td>
</tr>
<tr>
<td>Age</td>
<td>20</td>
<td>7.7%</td>
</tr>
<tr>
<td>Religion</td>
<td>15</td>
<td>5.7%</td>
</tr>
<tr>
<td>Equal Pay</td>
<td>1</td>
<td>.4%</td>
</tr>
</tbody>
</table>

5. Issues Alleged

Discharge was the most frequently alleged issue in EEOC suits filed (55.6%) and harassment the second (33.7%). Hiring was an issue in 14.9% of the suits, terms and conditions in 12.3%, and disability accommodation in 11.1%.

<table>
<thead>
<tr>
<th>Frequently Alleged Issues in Suits Filed</th>
<th>Count</th>
<th>Percent of Suits</th>
</tr>
</thead>
<tbody>
<tr>
<td>Discharge</td>
<td>145</td>
<td>55.6%</td>
</tr>
<tr>
<td>Harassment</td>
<td>88</td>
<td>33.7%</td>
</tr>
<tr>
<td>Hiring</td>
<td>39</td>
<td>14.9%</td>
</tr>
<tr>
<td>Terms and Conditions</td>
<td>32</td>
<td>12.3%</td>
</tr>
<tr>
<td>Disability Accommodation</td>
<td>29</td>
<td>11.1%</td>
</tr>
<tr>
<td>Religious Accommodation</td>
<td>8</td>
<td>3.1%</td>
</tr>
<tr>
<td>Pay</td>
<td>6</td>
<td>2.3%</td>
</tr>
</tbody>
</table>
B. Suits Filed by Bases and Issues

1. Sex Discrimination
As shown below, 67.4% of cases with sex as a basis contained a harassment allegation. Discharge was the second most frequently alleged issue in sex claims (41.6%).

<table>
<thead>
<tr>
<th>Frequently Alleged Sex Discrimination Issues</th>
</tr>
</thead>
<tbody>
<tr>
<td>Harassment</td>
</tr>
<tr>
<td>Discharge</td>
</tr>
<tr>
<td>Terms/Conditions</td>
</tr>
<tr>
<td>Hiring</td>
</tr>
</tbody>
</table>

2. Race Discrimination
Harassment was also the most frequently alleged issue in race discrimination claims (40.6%); discharge was an issue in 34.4% of race cases.

<table>
<thead>
<tr>
<th>Frequently Alleged Race Discrimination Issues</th>
</tr>
</thead>
<tbody>
<tr>
<td>Harassment</td>
</tr>
<tr>
<td>Discharge</td>
</tr>
<tr>
<td>Terms/Conditions</td>
</tr>
</tbody>
</table>
3. National Origin Discrimination

As shown in the next chart, harassment was the most frequently alleged issue where national origin was the basis (68.2%), followed by discharge (36.4%) and terms and conditions of employment (31.8%).

<table>
<thead>
<tr>
<th>Frequently Alleged National Origin Discrimination Issues</th>
</tr>
</thead>
<tbody>
<tr>
<td>Count</td>
</tr>
<tr>
<td>-------</td>
</tr>
<tr>
<td>Harassment</td>
</tr>
<tr>
<td>Discharge</td>
</tr>
<tr>
<td>Terms and Conditions</td>
</tr>
</tbody>
</table>

4. Religious Discrimination

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

<table>
<thead>
<tr>
<th>Frequently Alleged Religious Discrimination Issues</th>
</tr>
</thead>
<tbody>
<tr>
<td>Count</td>
</tr>
<tr>
<td>-------</td>
</tr>
<tr>
<td>Discharge</td>
</tr>
<tr>
<td>Reasonable Accommodation</td>
</tr>
</tbody>
</table>

5. Age Discrimination

Discharge was an issue in 25% of the age discrimination cases and hiring and terms and conditions were each an issue in 15%.
6. Disability Discrimination

Discharge was the most frequently alleged issue in disability suits (69.2%), followed by failure to accommodate (34.6%) and hiring (26.7%).

<table>
<thead>
<tr>
<th>Frequently Alleged Disability Discrimination Issues</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Count</strong></td>
</tr>
<tr>
<td>Discharge</td>
</tr>
<tr>
<td>Reasonable Accommodation</td>
</tr>
<tr>
<td>Hiring</td>
</tr>
</tbody>
</table>

7. Retaliation

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

<table>
<thead>
<tr>
<th>Frequently Alleged Retaliation Issues</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Count</strong></td>
</tr>
<tr>
<td>Discharge</td>
</tr>
<tr>
<td>Terms/Conditions</td>
</tr>
<tr>
<td>Harassment</td>
</tr>
</tbody>
</table>
C. Bases Alleged in Suits Filed from FY 2007 through FY 2011

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

<table>
<thead>
<tr>
<th>FY</th>
<th>Sex (F)</th>
<th>Sex (P)</th>
<th>Sex (M)</th>
<th>Race</th>
<th>Nat. Or.</th>
<th>Relig.</th>
<th>Dis.</th>
<th>Age</th>
<th>Retail</th>
</tr>
</thead>
<tbody>
<tr>
<td>2007</td>
<td>30.1%</td>
<td>8.6%</td>
<td>4.8%</td>
<td>19.3%</td>
<td>11.3%</td>
<td>7.7%</td>
<td>14.0%</td>
<td>9.5%</td>
<td>37.8%</td>
</tr>
<tr>
<td>2008</td>
<td>30.0%</td>
<td>8.6%</td>
<td>2.1%</td>
<td>23.4%</td>
<td>7.2%</td>
<td>6.2%</td>
<td>12.8%</td>
<td>13.1%</td>
<td>35.2%</td>
</tr>
<tr>
<td>2009</td>
<td>26.7%</td>
<td>5.7%</td>
<td>3.9%</td>
<td>17.4%</td>
<td>6.8%</td>
<td>3.9%</td>
<td>25.6%</td>
<td>8.2%</td>
<td>35.9%</td>
</tr>
<tr>
<td>2010</td>
<td>32.4%</td>
<td>7.6%</td>
<td>4.0%</td>
<td>17.2%</td>
<td>8.4%</td>
<td>9.6%</td>
<td>14.8%</td>
<td>10.4%</td>
<td>37.6%</td>
</tr>
<tr>
<td>2011</td>
<td>24.5%</td>
<td>7.3%</td>
<td>2.3%</td>
<td>12.3%</td>
<td>8.4%</td>
<td>5.7%</td>
<td>29.9%</td>
<td>7.7%</td>
<td>35.6%</td>
</tr>
</tbody>
</table>

D. Suits Resolved

In FY 2011, the Office of General Counsel resolved a total of 278 merits lawsuits, recovering $89,688,868 in monetary relief.

1. Types of Resolutions

As the chart below indicates, 82.3% of EEOC’s suit resolutions were settlements, 13.7% were determinations on the merits by courts or juries, and 4% were voluntarily dismissed (5 of the 11 voluntary dismissals were without prejudice). (The figures on favorable and unfavorable court orders do not take appeals into account.)
2. Statutes Invoked

Of the 278 merits suits resolved during the fiscal year, 77.3% contained Title VII claims. ADA claims were present in 15.5% of the resolutions and ADEA claims in 9.4%.

(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.)

As shown below, Title VII suits accounted for about 60% of monetary relief obtained in FY 2011 and ADA suits for about 30%. Recoveries in concurrent suits are not included in the totals for the particular statutes.
3. Bases Alleged

As shown in the following table, sex was a basis in 44% of the suits resolved, retaliation in 38%, race in 15%, disability in just under 15%, age and national origin each in 8%, and religion in 7.6%. The total count exceeds suits resolved (278) because suits often contain multiple bases.

<table>
<thead>
<tr>
<th>Bases Alleged in Suits Resolved</th>
<th>Count</th>
<th>Percent of Suits</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sex</td>
<td>123</td>
<td>44.2%</td>
</tr>
<tr>
<td>Retaliation</td>
<td>106</td>
<td>38.1%</td>
</tr>
<tr>
<td>Race</td>
<td>42</td>
<td>15.1%</td>
</tr>
<tr>
<td>Disability</td>
<td>41</td>
<td>14.7%</td>
</tr>
<tr>
<td>Age</td>
<td>22</td>
<td>7.9%</td>
</tr>
<tr>
<td>National Origin</td>
<td>22</td>
<td>7.9%</td>
</tr>
<tr>
<td>Religion</td>
<td>21</td>
<td>7.6%</td>
</tr>
<tr>
<td>Equal Pay</td>
<td>2</td>
<td>.7%</td>
</tr>
</tbody>
</table>

4. Issues Alleged

Discharge was an issue in 63.7% of the cases resolved, and harassment in 42.1%.

<table>
<thead>
<tr>
<th>Frequently Alleged Issues in Suits Resolved</th>
<th>Count</th>
<th>Percent of Suits</th>
</tr>
</thead>
<tbody>
<tr>
<td>Discharge</td>
<td>177</td>
<td>63.7%</td>
</tr>
<tr>
<td>Harassment</td>
<td>117</td>
<td>42.1%</td>
</tr>
<tr>
<td>Terms and Conditions</td>
<td>38</td>
<td>13.7%</td>
</tr>
<tr>
<td>Hiring</td>
<td>32</td>
<td>11.5%</td>
</tr>
<tr>
<td>Disability Accommodation</td>
<td>20</td>
<td>7.2%</td>
</tr>
<tr>
<td>Religious Accommodation</td>
<td>13</td>
<td>4.7%</td>
</tr>
<tr>
<td>Promotion</td>
<td>9</td>
<td>3.2%</td>
</tr>
<tr>
<td>Pay</td>
<td>7</td>
<td>2.5%</td>
</tr>
</tbody>
</table>
5. Cases on Appeal

EEOC filed appeals in 18 merits cases during fiscal year 2011 and defended appeals in 6 cases. At the end of the fiscal year, OGC had 22 cases pending in the United States courts of appeals involving merits suits, 16 as appellant and 6 as appellee.

E. Resources

1. Staffing

Both total field staff and field attorneys increased slightly from FY 2010. The following table shows field and headquarters staffing numbers for the last 5 years.

<table>
<thead>
<tr>
<th>Year</th>
<th>HQ</th>
<th>All Field</th>
<th>Field Attorneys*</th>
</tr>
</thead>
<tbody>
<tr>
<td>2007</td>
<td>55</td>
<td>299</td>
<td>194</td>
</tr>
<tr>
<td>2008</td>
<td>51</td>
<td>296</td>
<td>193</td>
</tr>
<tr>
<td>2009</td>
<td>54</td>
<td>311</td>
<td>211</td>
</tr>
<tr>
<td>2010</td>
<td>57</td>
<td>324</td>
<td>209</td>
</tr>
<tr>
<td>2011</td>
<td>56</td>
<td>333</td>
<td>213</td>
</tr>
</tbody>
</table>

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

2. Litigation Budget

As indicated in the chart below, OGC’s FY 2011 litigation support budget was $860,000 less than in the prior year.

<table>
<thead>
<tr>
<th>FY</th>
<th>Funding (Millions)</th>
</tr>
</thead>
<tbody>
<tr>
<td>2007</td>
<td>$3.35</td>
</tr>
<tr>
<td>2008</td>
<td>$3.58</td>
</tr>
<tr>
<td>2009</td>
<td>$4.60</td>
</tr>
<tr>
<td>2010</td>
<td>$4.96</td>
</tr>
<tr>
<td>2011</td>
<td>$4.10</td>
</tr>
</tbody>
</table>
### F. Historical Summary: Tables and Charts

#### 1. EEOC 10-Year Litigation History: FY 2002 through FY 2011

**Litigation Statistics, FY 2002 through FY 2011**

<table>
<thead>
<tr>
<th></th>
<th>FY02</th>
<th>FY03</th>
<th>FY04</th>
<th>FY05</th>
<th>FY06</th>
<th>FY07</th>
<th>FY08</th>
<th>FY09</th>
<th>FY10</th>
<th>FY11</th>
</tr>
</thead>
<tbody>
<tr>
<td>All Suits Filed</td>
<td>370</td>
<td>400</td>
<td>421</td>
<td>416</td>
<td>403</td>
<td>362</td>
<td>325</td>
<td>316</td>
<td>272</td>
<td>301</td>
</tr>
<tr>
<td>Merits Suits</td>
<td>342</td>
<td>366</td>
<td>378</td>
<td>381</td>
<td>371</td>
<td>336</td>
<td>290</td>
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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 2002 through FY 2011

The chart below shows the number of merits suits filed for FY 2002 through FY 2011.
3. Merits Suits Resolved FY 2002 through FY 2011

The chart below shows the number of merits suits resolved for FY 2002 through FY 2011.

**MERITS SUITS RESOLVED**
4. Monetary Recovery FY 2002 through FY 2011

The chart below shows the monetary recovery for FY 2002 through FY 2011.

**MONETARY RECOVERY**

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<th>Fiscal Year</th>
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