EEOC-Initiated Litigation
Case Law Developments in 2014 and Trends To Watch for in 2015

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I. EXECUTIVE SUMMARY

The EEOC’s Fiscal Year 2014 was another roller coaster year with ups, downs, twists and turns. The EEOC’s strategic mission and tactics continue to evolve, and employers faced with working with – and often against – the EEOC are well-served to understand where the EEOC stands on key issues, where it is headed, and how it is attempting to get there. We hope that corporate counsel and business executives will find our annual EEOC overview enlightening and helpful in structuring and implementing personnel decisions and litigation avoidance strategies.

The EEOC’s FY 2014 marks another important year in the lifespan of the EEOC’s 2013-2016 Strategic Enforcement Plan (“SEP”). The EEOC created the SEP in 2012 to guide its enforcement activity, including setting specific goals, metrics, and priorities for its enforcement program.¹ We continue to see the enduring stamp that the SEP has on the types of cases that the EEOC is pursuing and how it is litigating those cases.

In general, we see the agency making more nuanced, strategic decisions as to how it uses its finite resources. One of the goals set forth in the SEP is an increased focus on pursuing systemic cases. Consistent with that goal, in recent years the EEOC has chosen to challenge procedural roadblocks that, if the EEOC is successful, would eliminate barriers to the government launching these types of large, systemic class-like cases. For example, the EEOC is actively challenging courts’ oversight of how it fulfills its pre-suit obligations to conduct an investigation and conciliate in good faith prior to bringing suit in court. One of those cases, Mach Mining, LLC v. EEOC, is set to be decided by the Supreme Court this term. In another case, EEOC v. Sterling Jewelers Inc., the EEOC is contesting a decision by the U.S. District Court for the Western District of New York that dismissed the largest EEOC case in the country because the EEOC failed to investigate the nationwide pattern or practice claim that it brought against the company. That case is currently on appeal before the Second Circuit.

If the EEOC is successful in immunizing its pre-suit conduct from judicial review based on its position in *Mach Mining, LLC v. EEOC*, that could have a far-reaching impact on EEOC behavior for years to come. If employers are no longer able to challenge the EEOC’s pre-suit conduct in court, the EEOC could be emboldened to treat its obligations as merely “speed bumps” to large scale litigation. Employers could conceivably be forced to either accept whatever the EEOC demands at conciliation – no matter the evidence – or face the prospect of expensive, protracted litigation in court. It is this asymmetric dynamic that has been raised in courts around the country and has become a hot topic in all three branches of our government.

But these procedural issues are not the only way that the EEOC is seeking to solidify and expand its enforcement powers. It has also staked out new ground in the substantive areas covered by the anti-discrimination laws. For example, in 2014 the EEOC asserted the position in a number of recent cases that discrimination against transgender employees is a violation of Title VII as a form of gender discrimination because it is motivated by a perceived failure to conform to gender norms or stereotypes. It has also recently issued guidance that would require employers to provide reasonable accommodations to pregnant employees under the Americans with Disabilities Act (“ADA”) if they are unable to perform the essential functions of their job due to pregnancy-related restrictions. These edge-of-the-envelope theories highlight the EEOC’s intent not just to enforce the law, but also to shape it.

Apart from these procedural and substantive issues, FY 2014 also saw the EEOC test driving new enforcement tactics aimed at increasing its ability to wage large-scale, systemic litigation. For example, the EEOC is now showing a renewed willingness to pursue employers even after a case has been settled. The EEOC has also continued to increase the use of its broad subpoena powers during the pre-suit investigation phase. EEO laws give the EEOC authority to issue subpoenas, which the EEOC claims are limited only insofar as the evidence sought must “relate” to the matter under investigation and must be described with sufficient particularity. This gives the EEOC a powerful tool to begin building its case against the employer even before a lawsuit is brought and discovery is commenced.

The EEOC’s aggressive attempts to expand its authority by pushing new theories of discrimination, coupled with a string of high-profile defeats, has led to some severe criticism from Congress. Republican members of Congress vented their frustrations publicly at the confirmation hearing for the EEOC’s General Counsel, David Lopez. On November 13, 2014, the U.S. Senate Health, Education, Labor and Pensions Committee subjected Mr. Lopez to an unusually probing inquiry into how the agency has fared under his leadership. In particular, the Senate Committee questioned Mr. Lopez about the EEOC’s litigation practices, including its focus on mandatory retirement provisions, a lack of transparency related to the EEOC’s sub-regulatory guidance process, and its questionable focus on prosecuting employers who offer wellness plans to their employees in light of the Affordable Care Act’s encouragement of wellness plans.
If history is any guide, such criticism is unlikely to deter the EEOC from continuing its attempts to expand its enforcement powers. It is also unlikely to sway the EEOC from the course charted out in its SEP, including its focus on systemic litigation. There are still two years left to go in the 2012 SEP. We fully expect the EEOC will use those years to continue to aggressively push its agenda, even in the face of harsh criticism.

II. EEOC LITIGATION FOCUS

A. FY 2014 Litigation Statistics Tell A Story Of A Struggling Agency

Each year we dissect the EEOC’s filings to uncover how and where the EEOC is focusing its energies and to pinpoint current and future litigation trends. A statistical breakdown of the kinds of cases that the EEOC is filing and the subject matter of those cases can reveal where the EEOC is putting its litigation resources and provide useful guidance to employers as to where the future targets are likely to be.


The report is an annual reflection on the progress of the EEOC’s continued efforts to follow the enforcement priorities that were outlined in the 2012 SEP. In its FY 2014 PAR, the EEOC reported that in Fiscal Year 2014, the agency filed 133 merits lawsuits, 17 of which were systemic suits. At the end of Fiscal Year 2014, the agency had 228 cases on its active docket, of which 57 involved systemic challenges to discrimination. The EEOC defines systemic cases as cases that “address policies or patterns or practices that have a broad impact on a region, industry or entire class of employees or job applicants.” The EEOC is open about why it pursues these cases: deterrence. As the EEOC itself states, it “places a high priority on pursuing systemic enforcement,” since “these cases typically impact a large number of employees or job seekers directly and can benefit untold numbers of workers and employers indirectly through public awareness and changes in company policies and industry standards.”

Although the 133 filed merits lawsuits are about the same as last year’s total of 131, this is still a dramatic drop from the high point of 261 filings in 2011. But this is consistent with the EEOC’s 2012 SEP, which directed its regional offices to pursue more systemic, class-wide employment discrimination cases (implicitly in place of smaller, single-claimant cases). The drop in total filings reflects the agency’s focus on those cases, even if it means pursuing riskier theories on larger cases rather than smaller cases that might obtain relief for individuals who may have more meritorious claims. This is

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4 Id. at 28.
confirmed by the fact that the agency set a target of occupying 19-21% of its active docket with systemic cases in FY 2014. The EEOC exceeded that goal in FY 2014, with 25% of its active docket now representing systemic litigation.\(^5\)

And the number of systemic actions brought by the EEOC is likely to grow. In FY 2014, the EEOC doubled the number of “Lead Systemic Investigators” – a team of investigators dedicated solely to high-impact matters – from 9 to 18.\(^6\) The EEOC also reports piloting “systemic units” within some of its district offices.\(^7\) The EEOC has not defined precisely what role these “systemic units” will play in its chain of command, but it clearly signals additional focus on these class-like cases. The EEOC is also adding more muscle to its investigations staff generally. During FY 2014, the EEOC added 60 investigators, bringing the total number of EEOC investigators to 716.\(^8\) This will allow the EEOC to process more charges and clear them more quickly.\(^9\) Further, the EEOC hired an additional 140 employees as it came out of a two-year hiring freeze.\(^10\) The agency could use the extra help, as it still faces a backlog of an estimated 75,935 private-sector discrimination charges.\(^11\) That is an increase of approximately 5,000 unresolved charges over FY 2013, or a 7.28% increase.\(^12\) The EEOC blames the government shutdown in early FY 2014 and the decrease of investigation staff from FY 2012 to FY 2013 for that increase.\(^13\) But that number has remained relatively stable for the last several years, and Congress has pointed to that persistent backlog of unresolved charges as a point of criticism in how the EEOC is pursuing its mission.\(^14\)

The timing of the EEOC’s filing of lawsuits is equally significant. The EEOC has developed a predictable trend of filing a large number of lawsuits in the last days of its fiscal year, which ends on September 30.\(^15\) This pattern continued in FY 2014. As the following graph shows, FY 2014 saw a gradual increase in filings throughout the year, punctuated by a final blast of 61 cases filed in September alone.\(^16\) This is 13 more than

\(^5\) Id. at 15.
\(^6\) Id. at 29.
\(^7\) Id.
\(^8\) Id. at 46.
\(^9\) Id.
\(^10\) Id. at 49.
\(^11\) Id. at 46.
\(^12\) Id.
\(^13\) Id.
\(^16\) Id. The numbers of lawsuits contained in this chart reflect how those lawsuits were counted by Seyfarth Shaw LLP. Those numbers may not match up with the official statistics published by the EEOC in the FY 2014 PAR because of the different methodologies used to count and categorize EEOC lawsuits.
were filed in September 2013, which itself was a high-water mark year in terms of September filings.\textsuperscript{17} There was also a slight uptick in December, but this was most likely a result of the agency trying to clear a backlog caused by the October 2013 government shut down.\textsuperscript{18} The EEOC, like most other government agencies, probably needed a few weeks to get its legs back beneath it before it got back to business as usual.

One of the most useful trends to consider is the breakdown in litigation type as revealed by the number of cases that are filed both by statute, and by discrimination type. The following two graphs show that breakdown for FY 2014.\textsuperscript{19}

\begin{itemize}
\item \textsuperscript{17} Id.
\item \textsuperscript{18} Id.
\item \textsuperscript{19} Id. The official statistics as reflected in the FY 2014 PAR show a similar percentage breakdown, but with slightly different numbers. According to the FY 2014 PAR, 76 of the merits lawsuits contained Title VII claims, 49 contained Americans with Disabilities Act (ADA) claims, 12 contained Age Discrimination in Employment Act (ADEA) claims, two contained Equal Pay Act (EPA) claims, and two contained Genetic Information Non-Discrimination Act (GINA) claims. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FISCAL YEAR 2014 PERFORMANCE AND ACCOUNTABILITY REPORT at 27, November 18, 2014, available at http://www.eeoc.gov/eeoc/plan/upload/2014par.pdf.
\end{itemize}
EEOC Cases Filed FY 2014 By Statute

- TITLE VII, 83, 59%
- ADA, 46, 32%
- ADEA, 9, 6%
- EPA, 2, 2%
- GINA, 2, 2%

EEOC Title VII Cases Filed FY 2014 By Discrimination Type

- Sex/Pregnancy, 41, 55%
- Race, 15, 20%
- National Origin, 10, 14%
- Religion, 8, 11%

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The EEOC also measures its success, at least in part, by the amount of money it recovers from employers during a given fiscal year. During FY 2014, the EEOC resolved fewer lawsuits than it did last year, and recovered less money from those cases. Specifically, the EEOC resolved 136 merits lawsuits during FY 2014 for a total recovery of $22.5 million, as compared to the 209 lawsuits it resolved during FY 2013 for a total recovery of $39 million. Critically, this represents the lowest recovery amount in at least the past 17 years. Indeed, the EEOC’s largest recovery in a case in FY 2014 was for only $3.6 million. In the EEOC’s PAR section reserved for its “hit parade” of the year before, the EEOC was relegated to citing as a “major success” a settlement of $575,000 for 200 people – or $2,875 per alleged discrimination victim – and a $325,000 settlement with a nationwide grocery chain. What does such an anemic FY 2014 mean for employers? The EEOC will almost certainly be looking for big wins in FY 2015 – either in Court or through settlement. Securing injunctive relief, while certainly an important EEOC objective, will most likely take a back seat to posting larger numbers in this fiscal year – numbers that can justify a successful push for a larger budget in the future.

Despite the general downward trend in litigation recoveries, the EEOC scored some sizable litigation victories at the very end of 2014. On December 19, 2014, the U.S. District Court for the District of Hawaii entered an $8.7 million default judgment for the EEOC in EEOC v. Global Horizons, Inc. That case alleged race and/or national origin discrimination on behalf of a class of foreign migrant workers who were employed by Global Horizons under the Department of Labor’s guest worker program to provide farm labor at various locations in California, Hawaii, and Washington. It is the largest judgment obtained by the EEOC in 2014 and represents a big win for the agency in its relatively new pursuit of human trafficking-type claims under the U.S. anti-discrimination laws.

Then, on December 22, 2014, the EEOC dodged a significant bullet in EEOC v. CRST Van Expedited, Inc. That case had resulted in a spectacular loss by the EEOC when the U.S. District Court for the Northern District of Iowa ordered the agency to pay $4.7 million in attorneys’ fees, expenses, and costs to CRST as a result of what the court found was the EEOC’s “frivolous, unreasonable, or groundless” litigation tactics. The

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20 U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FISCAL YEAR 2014 PERFORMANCE AND ACCOUNTABILITY REPORT at 28.
22 Id. at 30-32.
EEOC appealed this decision on January 16, 2014 and ultimately was successful in getting the Eighth Circuit to reverse the decision and order a second review of the sanctions order. The court ordered the lower court to “individually assess each of the claims for which it granted summary judgment to CRST on the merits and explain why it deems a particular claim to be frivolous, unreasonable, or groundless.” This is still a loss for the EEOC, but it may roll back a portion of the millions it previously owed the employer for its aggressive litigation tactics. Although these wins did not come during FY 2014, they may portend a more robust year of recovery in FY 2015 as a newly emboldened EEOC continues to push the envelope of its enforcement agenda in terms of both substance and tactics.

As to where the money came from in FY 2014, Title VII was far-and-away at the top of the list. And although ADA actions were second, both in terms of lawsuits resolved and monies recovered, the monies recovered in ADA actions paled in comparison to the monies recovered in Title VII actions. These substantive trends are summed up in the graphics below.

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27 U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FISCAL YEAR 2014 PERFORMANCE AND ACCOUNTABILITY REPORT at 28.  
28 See id.
Another trend that continued in 2013, the last year for which we have data, was the increase in ADA claims brought to the EEOC. During 2013, 75,858 ADA claims were brought to the EEOC, representing a 66.3% increase since 2010.  

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Among ADA claims themselves, “reasonable accommodation” claims continued to be brought to the EEOC at an increased rate in 2013, with 14,197 such claims brought in 2013, representing a 69% increase since 2010.\(^{30}\)

\(^{30}\) Id.
Sex and pregnancy issues continue to be the dominant discrimination theories alleged in Title VII cases in FY 2014. Together, they made up 55% of all Title VII cases filed in FY 2014, 21 of which were filed in September 2014 alone.\(^\text{31}\) The EEOC has repeatedly represented that this area is a priority for the agency. In a recent press release, the EEOC stressed that “[t]he law is clear – employers cannot refuse to hire or discharge women because of their pregnancy,” and that “[c]ombating pregnancy discrimination remains a priority.”\(^\text{32}\) During FY 2014, the EEOC conducted 405 events on pregnancy discrimination that were attended by 26,880 people.\(^\text{33}\) Moreover, the EEOC pointed to its pregnancy-related guidance that was issued on July 1, 2014 as one of its most significant publications in FY 2014.\(^\text{34}\)

FY 2014 also saw a continued strong focus on disability discrimination. Disability cases made up 32% of all EEOC filings this year, close to what we have seen in previous

\(^{31}\text{Déjà Vu All Over Again: EEOC’s Fiscal Year-End Lawsuit Blitz Once Again Catches Dozens Of Employers In Litigation Net, supra note 15.}\)


\(^{34}\text{Id. at 4.}\)
Significant EEOC Litigation Rulings In 2014

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years. Disability cases made up 36% of all filings in FY 2013.) What is new in FY 2014 is the EEOC’s push to challenge employer health/wellness plans that provide incentives to employees to participate in wellness programs. The ADA prohibits employers from discriminating against workers because of health status. Because wellness programs can involve financial incentives – including penalties – the EEOC has taken the position that those plans can result in discrimination on the basis of an employee’s health.

Filings alleging race discrimination were slightly down in FY 2014 as compared to last year. There were only 14 new race cases in FY 2014, as compared to 17 in FY 2013. This was balanced out by a fairly sizable uptick in age discrimination filings. There were 12 cases alleging age discrimination filed this year, as compared to the five that were filed in FY 2013.

Despite some recent setbacks, the EEOC has continued to focus its attention on the potential adverse impact that employers’ use of credit and criminal background checks in hiring and employment decisions has on minority applicants and employees. The EEOC has also made significant efforts to educate the public about what it considers to be the proper use of criminal convictions in company hiring decisions. During FY 2014, the EEOC conducted 335 events, reaching 23,829 people, about the use of arrest and conviction records in employment. It also issued two fact sheets about employment background checks, titled Background Checks: What Employers Need to Know and Background Checks: What Job Applicants and Employees Need to Know. In its employer fact sheet, the EEOC warns employers to “take special care when basing employment decisions on background problems that may be more common among people of a certain race, color, national origin, sex, or religion. For example, employers should not use a policy or practice that excludes people with certain criminal records if the policy or practice significantly disadvantages individuals of a particular race, national origin, or another protected characteristic, and does not accurately predict who will be a responsible, reliable, or safe employee.”

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35 Déjà Vu All Over Again: EEOC’s Fiscal Year-End Lawsuit Blitz Once Again Catches Dozens Of Employers In Litigation Net, supra note 15.
37 Id.
38 Id.
39 Id.; see also U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FISCAL YEAR 2014 PERFORMANCE AND ACCOUNTABILITY REPORT.
40 U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FISCAL YEAR 2014 PERFORMANCE AND ACCOUNTABILITY REPORT at 37.
41 Id. at 4.
employees also contains this advice, and encourages people who think they were discriminated against as the result of a background check to contact the EEOC.

B. The “Where” Is An Important Question For All EEOC Activity

We are all familiar with the concept that it is all about location, location, location. That is especially true with the EEOC. Despite attempts by the EEOC leadership to create more seamless operations between Districts, the EEOC remains a highly balkanized agency, with Districts often working independently, and sometimes even in competition with each other. Where an employer faces the EEOC is often one of the most important factors in assessing risk.

The following chart provides an overview of District-by-District Filings in FY 2014:

Based on the frequency and aggressiveness of EEOC filings, we have identified five District offices that are particularly aggressive in terms of how many cases they file, the types of cases they bring, and how aggressively they pursue those cases.
Year in and year out, the EEOC’s Chicago District office consistently leads the nation in the number of case filings. This year was no different. The Chicago office filed 26 cases in FY 2014, up from the 22 cases it filed in FY 2013. The Chicago office is led by regional attorney John Hendrickson who is readily identifiable as one of the most talented and aggressive regional attorneys in the country. He distinguishes himself not only by the sheer number of filings, but also in the aggressiveness with which those cases are pursued, and the novel, boundary-pushing theories that he champions. Some of the most interesting litigation stories discussed below arose out of the Chicago office.

The Philadelphia office is also known for its aggressive enforcement. That office filed 17 cases in FY 2014. It has also taken the lead on the EEOC’s challenge to employers’ use of criminal and credit history background checks in hiring decisions, an issue that we expect will continue to be front and center with the EEOC for years to come. The regional attorney in charge of that office, Debra Lawrence, is known as perhaps the most aggressive regional attorney after Mr. Hendrickson. Ms. Lawrence has focused her office’s energies on company leave policies and reasonable accommodation under the ADA. For example, in 2011, that office obtained a $20 million settlement from Verizon Communications based on that company’s alleged refusal to make exceptions to its “no fault” attendance plans to accommodate employees with disabilities. The Philadelphia office also led the charge against U.S. Steel, alleging that its random drug and alcohol testing policy was a violation of the ADA.

Déjà Vu All Over Again: EEOC’s Fiscal Year-End Lawsuit Blitz Once Again Catches Dozens Of Employers In Litigation Net, supra note 15.

Id.

Id.

Id.


New York District Office: The New York office has also been quite active. Although that office filed only eight cases in FY 2014, it has distinguished itself by pursuing a handful of high profile pregnancy and sex discrimination cases that are still winding their way through the courts.\textsuperscript{49} Perhaps chief among those cases is \textit{EEOC v. Sterling Jewelers Inc.}, Case No. 08-CV-706 (W.D.N.Y. Mar. 10, 2014), one of the largest pattern or practice cases on the EEOC’s docket in FY 2014, which was recently dismissed in its entirety by Judge Arcara of the U.S. District Court for the Western District of New York and is now up for appeal before the Second Circuit.\textsuperscript{50} Robert D. Rose was appointed regional attorney of the New York office in May 2014.\textsuperscript{51} It remains to be determined whether he will continue the historical aggressive nature of the New York office.

Phoenix District Office: The Phoenix office is also well known for the number of high-profile cases that it files and the aggressiveness with which it pursues those cases. Although that office has had a couple of “quiet” years in that it has filed relatively few cases as compared with its historical trend (for example, it filed only 4 cases in FY 2013), it came roaring back in FY 2014 with 14 cases filed. Its regional attorney, Mary Jo O’Neill, is also known as one of the most aggressive regional attorneys at the EEOC.

Houston District Office: The Houston office is led by regional attorney Jim Sacher. Although this office is not known for filing a large number of cases (it filed only 3 in FY 2013), that appears to be changing. The office filed nine cases in FY 2014. It has also made a name for itself for the novel, boundary-pushing theories that it pursues. For example, that office challenged Boh Brothers Construction Co. on a theory that it allowed a supervisor to harass an employee for being “insufficiently masculine,” the first case to successfully pursue a same-sex harassment theory based on gender stereotyping.

\textsuperscript{49} Déjà Vu All Over Again: EEOC’s Fiscal Year-End Lawsuit Blitz Once Again Catches Dozens Of Employers In Litigation Net, supra note 15.

\textsuperscript{50} Id.; \textit{EEOC v. Sterling Jewelers, Inc.}, 3 F. Supp. 3d 57 (W.D.N.Y. 2014).

C. Developments In Sex And Pregnancy Discrimination

1. Extending Title VII To Protect Transgender Employees

One trend that we see developing in the EEOC’s enforcement strategy is to push the boundaries of Title VII so that its protections extend to cover transgender employees. As the EEOC has noted, the SEP includes “coverage of lesbian, gay, bisexual and transgender individuals under Title VII’s sex discrimination provisions, as they may apply” as a top Commission enforcement priority. Accordingly, the Commission’s General Counsel formed an LGBT working group to provide advice and input to the agency’s litigators on developing legal theories and tactics, and to help coordinate internal initiatives and policies, train internal staff, conduct outreach with and for external stakeholders, and comment on pending executive actions and potential legislation. EEOC Commissioner Chai Feldblum has been particularly vocal on this topic. Her bio notes that she has “worked to advance lesbian, gay, bisexual and transgender rights, and was one of the drafters of the Employment Nondiscrimination Act.” The agency has also bolstered its outreach efforts on this topic, conducting 520 events on LGBT rights that were attended by 33,002 people.

The EEOC has taken the position in a number of cases that disparate treatment of an employee because he or she is transgender is discrimination on the basis of sex because it is tantamount to discrimination for failure to conform to gender norms or stereotypes. The EEOC has also argued that discrimination against an employee because he or she intends to change, is changing, or has changed his or her sex, is prohibited by Title VII.

In *EEOC v. Boh Brothers Construction Co.*, the Fifth Circuit lent support to the EEOC’s theory, holding that the EEOC could prove that same-sex harassment was

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53 Id.


57 Id.

“because of sex” by presenting evidence that the harassment was based on a perceived lack of conformity with gender stereotypes. In that case, an ironworker on a bridge maintenance crew was subjected to almost daily verbal and physical harassment because he allegedly did not conform to how his supervisor believed a man should act. Among other things, his supervisor: (1) ridiculed him because he used baby wipes instead of traditional toilet paper; (2) called him “pu–y,” “princess,” and “fa–ot”; (3) stood behind him and simulated intercourse; (4) exposed his penis while waving and smiling; and (5) joked about forcing oral sex upon him. The Fifth Circuit held that the EEOC’s evidence demonstrated that the supervisor thought the victim did not adhere to gender stereotypes.

This case breaks from the three evidentiary paths set forth by the Supreme Court for addressing same-sex harassment as articulated in *Oncale v. Sundowner Offshore Services*. The Fifth Circuit agreed with the Third, Seventh, Eighth, and Tenth Circuits that those paths were merely “illustrative, not exhaustive.” As a result, the EEOC was allowed to prove that the same-sex harassment was “because of sex” by presenting evidence that the harassment was based on a perceived lack of conformity with gender stereotypes; it was enough to show that the harasser admitted his epithets were directed at the victim’s masculinity.

The EEOC now appears to be doubling down on this win by using it as a springboard to extend Title VII’s protections to transgender employees. The agency brought two new filings at the end of Fiscal Year 2014 alleging transgender discrimination. The two cases are: *EEOC v. Lakeland Eye Clinic*, and *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.* Both allege a similar legal theory of discrimination.

In *Lakeland Eye Clinic*, the EEOC claims that an organization of healthcare professionals fired an employee because she is transgender, because she was transitioning from male to female, and/or because she did not conform to the employer's gender-based expectations, preferences, or stereotypes. The complaint alleges that even though the claimant had been performing her duties satisfactorily, she was terminated soon after she began presenting as a woman and informed her employer that she was transgender. Similarly, in *R.G. & G.R. Harris Funeral Homes, Inc.*, the

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59 *Boh Brothers Construction Co.*, 731 F.3d at 449-50.

60 Id. at 456.


62 *Boh Brothers Construction Co.*, 731 F.3d at 455.

63 Id. at 456.

64 Id. at 457, 459-60.


67 Id.
EEOC alleged that a Detroit-based funeral home discriminated against an employee because she was transitioning from male to female, and/or because she did not conform to the employer’s gender-based expectations, preferences, or stereotypes. The government’s complaint alleges that the employee gave her employer a letter explaining that she was transgender and would soon start presenting as female in appropriate work attire. Allegedly, she was fired two weeks later by the funeral home’s owner, who told her that what she was proposing to do was unacceptable.

While these cases are still in their infancy, they are being watched closely by practitioners and employers around the country. One possible criticism of the EEOC’s theory is that Title VII does not explicitly mention gender identity as a protected classification. Employers might argue that the EEOC’s theory appears to be in conflict with Congress’ own understanding of what is covered by Title VII. For the last 20 years, Congress has tried and failed to pass some form of the Employment Non-Discrimination Act (“ENDA”), which would explicitly extend Title VII protection to cover sexual orientation and gender identity. Currently, ENDA has passed in the Senate but not in the House. The fact that Congress and EEOC Commissioner Feldblum believe that such legislation is necessary is a powerful indication that they do not believe that those protections already exist under Title VII.


Extending the coverage of the federal anti-discrimination laws to include transgender employees is not the only area where the EEOC is trying to extend its reach. The EEOC has also sought to extend the reach of the ADA’s reasonable accommodation provisions to cover pregnant employees who are experiencing normal pregnancies. This is an issue that is directly before the U.S. Supreme Court this term. The Court is set to decide whether an employer is required to accommodate an employee who is unable to perform the essential functions of her job due to pregnancy-related restrictions. In Young v. United Parcel Service, Inc., the Fourth Circuit held that if an employer has a policy restricting work limitations that treats both pregnant workers and non-pregnant workers alike, an employer has complied with the Pregnancy

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68 Id.
69 Id.
70 Id.
71 See 42 U.S.C. § 2000e-2 (making it unlawful to discriminate against any individual “because of such individual’s race, color, religion, sex, or national origin”).
74 U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FISCAL YEAR 2014 PERFORMANCE AND ACCOUNTABILITY REPORT at 87.
75 707 F.3d 437 (4th Cir. 2013).
Discrimination Act ("PDA"). The plaintiff petitioned for certiorari, which was granted on July 1, 2014.

In Young, the essential functions of the plaintiff’s job required her to lift, lower, push, pull, leverage, and manipulate packages weighing up to 70 pounds. The employer also had a policy of offering light duty only to those employees injured while on the job or suffering from a permanent impairment cognizable under the ADA. The plaintiff sued after her employer placed her on an extended unpaid leave of absence because the plaintiff’s midwife imposed a 20-pound lifting restriction. In her Petition for Review, the plaintiff reasserted her argument that the essential functions of the job, as well as the employer’s neutral policy regarding light duty work, be disregarded and replaced with a policy granting more favorable treatment to pregnant employees.

The question to be decided by Young is essentially whether employers must always make reasonable accommodations for pregnant employees. On July 14, 2014, the EEOC jumped ahead of the Supreme Court by publishing guidance on its website addressing the treatment of pregnancy under the ADA. The guidance essentially answers this question: “yes.” While a broad number of pregnancy-related impairments, such as anemia, pregnancy-related sciatica, pre-eclampsia, and gestational diabetes, would likely rise to an ADA-covered disability, a “normal” pregnancy has never been considered an impairment under the ADA.

The EEOC’s new guidance states that the reasonable accommodation requirement applies even for “normal” pregnancies that do not involve impairments that rise to the level of a disability under the ADA.

Like the EEOC’s position on Title VII’s coverage of transgender employees, employers may be expected to argue that this position is at odds with Congress’ apparent understanding of what the ADA and the PDA already require. The standards adopted in the EEOC’s guidance on this issue are currently proposed in the Pregnant Workers Fairness Act (the "PWFA"). The PWFA, if enacted, would make it an unlawful employment practice not to provide a reasonable accommodation for the known limitations related to pregnancy or force a pregnant employee to take leave, among

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76 Id. at 449.
79 Id.
82 Id.
other things. Employers could argue that the mere fact that Congress believes that the PWFA is necessary certainly appears to support the view that the ADA and PDA do not currently require reasonable accommodations for normal pregnancies. It is therefore a bit of a risk for the EEOC to promulgate this guidance before the Supreme Court has its say in Young. The Supreme Court has shown that it is quite willing to reject the EEOC’s guidance in recent years, and it may very well do so again in this case. But regardless of what Congress, the Supreme Court, or the EEOC do in 2015, employers nationwide must be aware that state legislatures are already passing pregnancy accommodation laws that track the requirements of the PWFA, and which are in some instances far more onerous than what has been proposed at the federal level.

D. Developments In ADA Enforcement

The EEOC’s efforts to expand the reach of the anti-discrimination laws and its enforcement powers is not limited to just sex and pregnancy discrimination. As noted above, the agency has also recently begun to challenge employers’ use of health and wellness programs that offer employees incentives to participate in wellness programs, such as programs that encourage smoking cessation and hypertension control.

In EEOC v. Honeywell International, Inc., the U.S. District Court for the District of Minnesota denied the EEOC’s request for a temporary restraining order against Honeywell’s wellness program. The EEOC alleged that the program violates the ADA and GINA. In particular, the agency alleged that Honeywell’s wellness program violates the ADA because it imposed financial penalties on employees who chose not to participate in the program, rendering it “involuntary.” Those penalties could amount to up to $4,000 annually. The EEOC also alleged that Honeywell’s wellness program violates GINA because it offers employees an incentive to provide family medical history. According to the EEOC, Honeywell provides contributions to health savings accounts if the employee and his/her spouse go through a biometric screening process, but it imposes a $1,000 surcharge if they do not. That is allegedly a violation of GINA because that statute protects information relating to a manifestation of a disease or disorder in family members, which includes spouses even though spouses are not genetically related.

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83 Id.
86 EEOC Doubles Down – Attacking Employer Wellness Programs, supra note 85.
87 Id.
88 Id.
89 Id.
On November 6, 2014, the district court denied the EEOC’s request for a temporary restraining order.90 The agency could not establish the threat of irreparable harm because the three charging parties had already submitted to biometric screening for 2015, and because it could not establish that the screening violated any employees’ right to privacy in their health information and so had only established injury that could be compensable by monetary damages.91 The court also found that the harm that would result from an injunction freezing all surcharges would be greater than the harm that would occur if no injunction were to issue.92 If an injunction were issued freezing all surcharges, then Honeywell employees who opted out of the biometric testing could ultimately be required to pay a surcharge if Honeywell’s view prevailed.93 If the EEOC were to prevail, on the other hand, the result would be that Honeywell employees who were initially wrongfully assessed a surcharge because they did not participate in the testing could easily be made whole by a refund.94

Finally, the court held that the EEOC had failed to establish a likelihood of success on the merits. The court noted the uncertainty in the law regarding whether Honeywell’s wellness program was covered under the ADA’s safe harbor provisions, whether its testing was a “genetic test” under GINA, and how the provisions of the ADA and GINA would square with the wellness program provision of the Affordable Care Act.95

The court’s decision is limited because it was decided under the standards applicable to preliminary injunctions; it does not affect the merits of the case. The case will now revert back to the administrative charge process, including further agency investigation and an attempt to conciliate with Honeywell.96 Given that the Affordable Care Act encourages the use of employee wellness programs like the one at issue in this decision, this will be an important issue for employers to monitor as the case continues to develop. It has also resulted in particularly strong and vocal criticism from Congress. Several Senators took issue with the EEOC’s decision to file suit against Honeywell because of its wellness program during David Lopez’s confirmation hearing.97 Ranking Member of the Senate Health, Education, Labor and Pensions Committee Lamar Alexander has been especially critical of the agency’s decision to bring this suit.98

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91 Id. at *7-8.
92 Id. at *9-10.
93 Id.
94 Id. at *10.
95 Id. at *13-14.
96 Minnesota District Court Shoots Down The EEOC’s Request For Preliminary Injunction Over Wellness Program, supra note 36.
98 EEOC: An Agency on the Wrong Track? Litigation Failures, Misfocused Priorities, and Lack of Transparency Raise Concerns about Important Anti-Discrimination Agency, supra note 14, attached as Appendix III.
E. EEOC Still Interested In Criminal/Credit Background Checks

The EEOC has recently suffered some stinging defeats in its pursuit of employers who use credit and criminal history background checks in hiring and other employment decisions. Its theory is that the use of those background checks has a disproportionate impact on minority applicants and employees because minorities tend to have disproportionately worse credit and criminal histories. Although the EEOC has not brought many cases against employers under this theory of discrimination, it remains an agency priority. Given the high-profile defeats suffered by the agency under this theory, it is possible that the EEOC is waiting to see how the pending cases are resolved so that it can reassess its theory and method for bringing these types of lawsuits, with the goal of prosecuting them more successfully in the future.

1. Stunning Defeats In EEOC v. Kaplan And EEOC v. Freeman

Two of the first and most high-profile credit and criminal background check cases were filed in 2010. In EEOC v. Kaplan Higher Education Corp., the EEOC had filed suit against Kaplan alleging that its use of credit checks causes it to screen out more African-American applicants than white applicants, creating a disparate impact in violation of Title VII. The EEOC attempted to prove its case through the use of statistical data compiled by its expert, Dr. Kevin Murphy. Because Kaplan’s credit check process was race-blind, the EEOC subpoenaed records regarding Kaplan’s applicants from state departments of motor vehicles. As a result of those subpoenas, the EEOC obtained approximately 900 drivers’ license photos from thirty-six states and the District of Columbia. Murphy assembled a team of five “race raters” and directed them to review the photos and classify them as “African-American,” “Asian,” “Hispanic,”

102 Kaplan, 748 F.3d at 750.
103 Id. at 751.
104 Id.
“White,” or “Other.” Those designations became the basis for the EEOC’s finding of disparate impact.

On January 28, 2013, Judge Patricia A. Gaughan of the U.S. District Court for the Northern District of Ohio granted summary judgment in favor of Kaplan, finding that the EEOC’s statistical evidence of disparate impact was not reliable and not representative of Kaplan’s applicant pool as a whole. On the EEOC’s appeal, the Sixth Circuit found no abuse of discretion. The EEOC’s “homemade” methodology for determining race – by asking its “race raters” to label photographs – was, in the Sixth Circuit’s words, “crafted by a witness with no particular expertise to craft it, administered by persons with no particular expertise to administer it, tested by no one, and accepted only by the witness himself.” The Sixth Circuit also criticized the EEOC for attacking the same type of background check that the EEOC itself uses, and for relying on a method for determining race – visual identification – that the agency itself discourages.

The Sixth Circuit’s decision was issued on April 9, 2014. On April 16, 2014, the editorial board of the Wall Street Journal published an editorial calling the decision the “opinion of the year.” The General Counsel of the EEOC, David Lopez, then followed up with a letter to the editor that was published on May 1, 2014. While he “accepted” the Sixth Circuit’s “narrow holding” that the district court did not abuse its discretion in rejecting the EEOC’s expert evidence, he made it clear that the agency was not giving up on its disparate impact theory:

Why, for example, should companies be permitted to refuse to hire otherwise qualified workers based on their credit history where (1) a "no-bad-credit rule" disproportionately excludes African-Americans, and (2) the employer can't prove that bad credit predicts a propensity to steal? Too many employers still uncritically assume that applicants with financial trouble equal potential embezzlers. Not so.

The EEOC made a similar set of allegations against Freeman, Inc., alleging that its use of credit and criminal background checks caused a disparate impact against African-American, Hispanic, and male job applicants. That case was dismissed by the United States District Court for the District of Maryland on August 9, 2013. The reasons for
the dismissal were similar to the *Kaplan* case. The district court was simply not persuaded that it could rely on the statistical analysis prepared by the EEOC’s expert, Dr. Kevin Murphy.

On October 29, 2014, the Fourth Circuit heard oral argument in *EEOC v. Freeman*. As the Sixth Circuit did in *EEOC v. Kaplan*, the court focused on the questionable methodology of the EEOC’s expert.\(^{113}\) The reliability of Dr. Murphy’s report was the heart of the issues on appeal. The EEOC argued that this was not a true *Daubert* challenge, trying to draw a line between the data that the EEOC gathered and how that data was analyzed.\(^{114}\) The EEOC’s lawyer admitted that it was not an “A-plus report,” but argued that its flaws should have been considered in relation to its credibility, not its admissibility under the *Daubert* standards.\(^{115}\) The court’s close questioning of the EEOC’s lawyer on this point could suggest that it believes that the reliability of the expert evidence used to prove the EEOC’s case in chief is not above *Daubert* scrutiny.

Depending on how the *Freeman* case turns out, the EEOC may take a step back to retool its legal theories, especially the methods that it uses to try to prove up disparate impact in these cases. Employers should continue to monitor this issue closely. As the EEOC’s comments in response to the *Kaplan* decision show, there is no indication that the EEOC is giving up on this theory.

Apart from the EEOC’s use of highly questionable expert evidence in *Kaplan* and *Freeman*, another issue that has driven the outcome of those cases is the stunning fact that the EEOC itself uses background checks to screen its own employees. Forcing the EEOC to divulge that information has been a key component of the defense of those cases and continues to have an impact in other credit/criminal background check cases.

In *EEOC v. BMW Manufacturing Co.*, the EEOC filed suit against BMW alleging that “its criminal conviction background check policy constitutes an unlawful employment practice in violation of . . . Title VII . . . because BMW’s policy had, and continues to have, a significant disparate impact on black employees and applicants and is not job-related and consistent with business necessity.”\(^{116}\) In defending the suit, BMW sought discovery concerning the EEOC’s own use of criminal background checks and credit histories in its hiring practices.\(^{117}\) The Magistrate Judge denied BMW’s request

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\(^{113}\) See audio recording of Fourth Circuit argument, [available at](http://coop.ca4.uscourts.gov/OAarchive/mp3/13-2365-20141029.mp3).

\(^{114}\) Id.

\(^{115}\) Id.


\(^{117}\) Gerald L. Maatman, Jr. and Howard M. Wexler, *Court Orders The EEOC To Produce Internal Hiring Policies Regarding Background Checks*, [WORKPLACE CLASS ACTION BLOG](http://www.workplaceclassaction.com/2014/12/court-orders-the-eeoc-to-produce-internal-hiring-policies-regarding-background-checks/).
because “considering the burdens of proof in a disparate impact case and in light of BMW’s motion to compel, BMW has failed to explain how production of the EEOC’s convictions policy contributes to its ability to prove that BMW’s criminal conviction policy at issue is job-related and/or is consistent with a stated business necessity.”

District Judge Herlong disagreed with the Magistrate Judge’s reasoning, finding instead that the EEOC had the burden of establishing “why its objections are proper given the broad and liberal construction of the federal rules,” and that it failed to meet this burden. Although Judge Herlong noted that the EEOC based its argument on the fact that its own policies are not relevant because “the positions for which the EEOC utilized its policy were not similar to the positions at issue in this litigation,” he held that BMW is not simply required to sit back and “accept the EEOC’s position” without discovery regarding the agency’s policies or information concerning the positions for which they are used. Accordingly, Judge Herlong ordered the EEOC to produce the requested information since “this production should not be burdensome to the EEOC, and the Court can perceive no harm to the EEOC in producing its internal policies.”

Unless and until the EEOC changes its own practice of requiring applicants to submit to background checks, it should expect employers to continue to press for this type of information. The fact that it is engaging in the same conduct that it alleges causes a disparate impact when engaged in by other employers remains a very practical impediment to its efforts to police this conduct.

2. Political Challenges To The EEOC’s Background Check Theory

The EEOC’s focus on the use of credit and criminal history in hiring decisions has also come under close political scrutiny. This has resulted in at least one lawsuit brought by a state proactively challenging the EEOC’s position because it could have an impact on how the state government itself makes hiring decisions. The State of Texas brought suit in the U.S. District Court for the Northern District of Texas in November 2013 seeking to enjoin the enforcement of the guidance issued by the EEOC on April 25, 2012. Like other states, Texas has enacted statutes prohibiting the hiring of felons in certain job categories. In March of this year, Texas amended its complaint to include more specific allegations of injury. The EEOC challenged the complaint on three bases: (1) lack of jurisdiction because the EEOC’s guidance is not legally binding and does not constitute a final agency action; (2) Texas lacks standing to pursue its claims given that the guidance has no binding authority; and (3) Texas’ claims are not ripe.

119 Id. at *3.
120 Id.
121 Id.
The district court dismissed the suit, holding that it lacked subject matter jurisdiction because Texas lacked standing.124 Because “Texas does not allege that any enforcement action has been taken against it by the Department of Justice (as the EEOC cannot bring enforcement actions against states) in relation to the Guidance,” Judge Cummings held that there is not a “substantial likelihood” that Texas “will face future Title VII enforcement proceedings from the Department of Justice arising from the Guidance.”125 As standing to bring suit “cannot be premised on mere speculation,” Judge Cummings determined that Texas lacked the necessary standing to maintain its suit against the EEOC.126

Texas immediately filed an appeal with the U.S Court of Appeals for the Fifth Circuit.127 Briefing before the Fifth Circuit has just begun. Texas filed its opening brief in support of its appeal on November 19, 2014.128 Texas put forth several arguments for why the district court erred in dismissing the suit on the basis of its lack of standing. Specifically, Texas argued that its complaint was not based on the “mere speculation” of injury because, among other things, Texas state agencies apply various criminal background policies that are required by state law and are prohibited by the EEOC’s criminal history guidance. This creates a conflict with state law that makes the state the “object” of the EEOC’s administrative action, thus satisfying the standing requirements of Article III. In addition, Texas argued that it was unfair to allow the EEOC to change the State’s hiring policies through the adoption of its criminal history guidance and at the same time object that the State lacks standing to challenge that change in policy. Texas pointed out that the Rule expressly purports to preempt state law hiring policies, which alone vests Texas with Article III standing to defend its laws.

The district court held that that was still not enough to confer standing because “there are no allegations that any enforcement action has been taken by the EEOC or Department of Justice” based on Texas’ “felony conviction” rule.129 Because the EEOC’s guidance is not a final agency action and because no enforcement proceeding was pending against Texas, the court held that Texas was “seeking a premature adjudication in the abstract without any actual facts and circumstances relating to the employment practices at issue.”130

Texas countered those arguments in its appellate brief, arguing that the lawsuit represents a facial challenge to the EEOC’s rule, and because “without federal court intervention, the [EEOC] will be able to continue to use its threat of enforcement to bully employers into abandoning their no-felons policies.” Texas also argued that the


125 Id. at *7.
126 Id.
127 Showdown At The Fifth Circuit: Texas Files Opening Appellate Brief In Its Challenge Of The EEOC’s Criminal Background Guidance, supra note 100.
128 Id.
130 Id. at *7-8.
EEOC’s guidance is a final agency action because it binds the EEOC’s staff and/or forces regulated entities to change their behavior. Finally, the fact that the EEOC’s guidance is not a “legislative rule” does not foreclose judicial review since otherwise agencies like the EEOC could promulgate self-proclaimed guidance documents and use them against employers without ever facing judicial review over their actions.

Given that the EEOC does not appear to be abandoning its efforts to police employers’ use of credit and criminal history in hiring and other employment decisions even in the face of some stiff political opposition, the Fifth Circuit’s ruling in the Texas case could have a profound impact on employers across the country.

III. KEY LEGAL DEVELOPMENTS IN EEOC LITIGATION

A. Pre-Suit Obligations Under Scrutiny

Like other federal agencies, the EEOC may only prosecute claims pursuant to its statutory authority. Federal EEO laws grant the EEOC the power to bring claims on behalf of individuals and classes of individuals subject to a particular statutory scheme that favors the administrative rather than judicial resolution of discrimination disputes. In particular, under Title VII, the EEOC may not bring suit on a charge before “mak[ing] an investigation thereof,” determining whether there is “reasonable cause to believe that the charge is true,” and “endeavor[ing] to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.”

The investigation and conciliation requirements, in particular, have been the subject of a number of recent cases.

1. Supreme Court Set To Review Conciliation Obligation In Mach Mining

On June 30, 2014, the Supreme Court granted certiorari in Mach Mining, LLC v. EEOC. The Seventh Circuit ruled in December 2013 that the EEOC’s failure to conciliate is not an affirmative defense to the merits of an employment discrimination suit brought by the Commission. The Seventh Circuit held that it will not scrutinize the EEOC’s pre-suit obligations in the context of conciliation obligations, so long as the EEOC’s complaint pleads that it has complied with all procedures required under Title VII, and the relevant documents are facially sufficient. Mach Mining sought Supreme Court review due to conflicting rulings amongst the circuit courts about the courts'
authority and standards for reviewing the EEOC’s pre-suit conciliation conduct, and the EEOC did not oppose the petition for certiorari.\textsuperscript{136}

That case arose out of the EEOC’s allegations that Mach Mining engaged in a pattern or practice of not hiring women for mining and related positions or, in the alternative, maintaining a neutral hiring policy that has a disparate impact on women. The employer asserted a number of affirmative defenses, one of which was that the EEOC failed to conciliate in good faith before initiating its lawsuit.\textsuperscript{137} The EEOC moved for summary judgment on just that affirmative defense, relying on the Seventh Circuit’s decision in \textit{EEOC v. Caterpillar, Inc.}\textsuperscript{138} to argue that the EEOC’s conciliation process is not subject to judicial review.

Although the District Court denied the EEOC’s motion for summary judgment, it immediately granted the Commission’s motion to certify the order for appeal to the Seventh Circuit pursuant to § 1292(b). The questions certified for appellate review, include: (1) whether district courts may review the EEOC’s informal efforts to secure a conciliation agreement acceptable to the Commission before filing suit; and (2) if district courts may review the EEOC’s conciliation efforts, should that review apply a deferential or heightened scrutiny standard of review.

The Seventh Circuit agreed with the EEOC, holding that Title VII does not include an affirmative defense for “failure to conciliate.”\textsuperscript{139} The court held that “Title VII contains no express provision” for this defense and, in support of the EEOC’s position, makes clear that “conciliation is an informal process entrusted solely to the EEOC’s expert judgment and that the process is to remain confidential.”\textsuperscript{140} The Seventh Circuit also did not believe that there was any workable standard of review by which district courts could meaningfully judge whether the EEOC conciliated in “good faith”: “[a] court reviewing whether the agency negotiated in good faith would almost inevitably find itself engaged in a prohibited inquiry into the substantive reasonableness of particular offers – not to mention using confidential and inadmissible materials as evidence – unless its review were so cursory as to be meaningless.”\textsuperscript{141}

Finally, the Seventh Circuit held that the “failure to conciliate” defense was not consistent with Congress’ intent to promote resolution of EEOC investigations outside of the judicial process because “offering the implied defense invites employers to use the conciliation process to undermine enforcement of Title VII rather than to take the

\textsuperscript{136} Id.
\textsuperscript{137} \textit{Mach Mining}, 738 F.3d at 173.
\textsuperscript{138} 409 F.3d 831 (7th Cir. 2005).
\textsuperscript{140} \textit{Mach Mining}, 738 F.3d at 174.
\textsuperscript{141} Id.
The conciliation process seriously as an opportunity to resolve a dispute.” Moreover, “if an employer engaged in conciliation knows it can avoid liability down the road, even if it has engaged in unlawful discrimination, by arguing that the EEOC did not negotiate properly – whatever that might mean – the employer’s incentive to reach an agreement can be outweighed by the incentive to stockpile exhibits for the coming court battle.”

The Supreme Court granted certiorari on June 30, 2014. Mach Mining filed its brief on September 4, 2014, the EEOC responded on October 27, 2014, and Mach Mining filed its reply on November 26, 2014. In addition to the briefs submitted by the parties, the case attracted considerable attention from other interested parties. On September 11, 2014, two amicus briefs were submitted in support of Mach Mining’s position. One of those was submitted by Seyfarth Shaw LLP on behalf of the American Insurance Association (“AIA”).

The AIA brief argued that the Seventh Circuit’s decision undermines the ability of employers and insurers to reasonably assess settlement issues, and therefore undercuts a purpose of Title VII to promote resolution of discrimination claims outside of court through the conciliation process. According to the AIA, while Title VII does not specify how conciliation proceedings must be conducted or what information must be disclosed or exchanged, it clearly requires the EEOC to conduct those proceedings in good faith. If the Supreme Court adopts the Seventh Circuit’s position, then it would mean that the EEOC could arguably skip over the statutory requirement of conciliation without any consequence. Moreover, AIA argued that the Seventh Circuit simply failed to account for the practical realities of its holding. Its decision encourages the EEOC to forego a reasonable approach to conciliation even though employers often have both financial and business reputation reasons to resolve litigation as quickly and cost-efficiently as possible. The EEOC, employers, and alleged victims have an incentive to cooperate in the conciliation process so that victims can receive compensation more quickly and employers can resolve the litigation as quickly as possible without having to defend an EEOC lawsuit in federal court.

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142 Id. at 177.
143 Id. at 178.
146 Id. at 7.
147 Id. at 2.
148 Id. at 3.
149 Id.
150 Id. at 3-4.
The EEOC’s position was also supported by an amicus brief, which was submitted by six advocacy groups representing the interests of workers and plaintiffs’ class action lawyers. It was authored by the Civil Rights Clinic of the Dickinson School of Law and The Impact Fund, and represents the collective views of multiple public interest organizations, including the National Employment Lawyers Association, The Impact Fund, the American Association of Retired Persons, the Asian Americans Advancing Justice-Asian Law Caucus, Disability Rights California, and Public Counsel.\(^{151}\)

The government’s position, as expressed in the EEOC’s brief as well as the amicus submission, is that Title VII left it to the EEOC to control the conciliation process.\(^{152}\) The EEOC’s position is that federal judges cannot adjudicate any issue relative to the EEOC’s conciliation efforts because Congress entrusted the EEOC with exclusive authority over whether to enter into pre-lawsuit settlements, and that the entire process “is committed to the agency’s discretion.”\(^{153}\) According to the EEOC, this makes it fundamentally “incompatible with judicial review of the conciliation process.”\(^{154}\)

The EEOC also argued that judicial review of the adequacy of its conciliation efforts would undermine the effective enforcement of Title VII because it gives employers a weapon to fight EEOC litigation through discovery and delay.\(^{155}\) Allowing judicial review of its conciliation efforts would only result in employers using the conciliation process as a means to arm themselves for further litigation over the EEOC’s conciliation efforts.\(^{156}\) Finally, the EEOC argued that conciliation is not a “final agency action,” and is therefore committed to the agency’s discretion and not reviewable by the courts.\(^{157}\)

Employers and practitioners alike have, of course, encouraged the EEOC to engage in good faith conciliation efforts for years. For example, on May 24, 2013, Seyfarth Shaw submitted a comment to the EEOC’s proposed Quality Control Plan in which it suggested that the EEOC rethink and expand its conciliation parameters since, from an


\(^{154}\) Id.

\(^{155}\) Id. at 11.

\(^{156}\) Id. at 40.

\(^{157}\) Id. at 10.
employer’s perspective, a meaningful negotiation regarding the appropriate value of the EEOC’s claims must include a discussion regarding the merits.\textsuperscript{158}

And indeed, Congress has finally taken action against what some employers view as the EEOC’s overbearing litigation position. On December 13, 2014, Congress approved the FY 2015 Budget for the federal government. That bill included funding for the EEOC of approximately $364 million, an increase of $500,000 from the previous year but $1 million short of the EEOC’s request. The report language accompanying the bill included a provision on the EEOC’s conciliation requirement. It specifically requires the EEOC to engage in good faith conciliation efforts and to report within 90 days on how it ensures that conciliation efforts are pursued in good faith.\textsuperscript{159}

The outcome of the \textit{Mach Mining} case could have a significant impact on EEOC litigation. If the Supreme Court adopts the agency’s position, then it could mean that the EEOC will continue to use the conciliation process as a means of simply dictating the “terms of surrender” to employers. Most employers feel that it is only through the judicial review of the EEOC’s conciliation efforts that the process will maintain its integrity as a legitimate dispute-resolution process rather than just a box that the agency has to check off on its way to the courthouse.

\textbf{2. Can Courts Review The EEOC’s Investigation?}

Several courts agree that there should be limits on the EEOC’s ability to sue based on the scope and substance of its investigation and conciliation efforts. For example, on March 10, 2014, Judge Richard J. Arcara of the U.S. District Court for the Western District of New York adopted Magistrate Judge McCarthy’s January 2, 2014 Report, Recommendation, And Order in \textit{EEOC v. Sterling Jewelers Inc}.\textsuperscript{160} and dismissed the EEOC’s entire lawsuit with prejudice. This case raises important issues concerning a court’s power to examine whether the EEOC conducted an investigation of the underlying charge of discrimination before bringing suit.

In \textit{Sterling Jewelers}, between May 2005 and November 2006, 19 female employees filed charges with the EEOC claiming that Sterling discriminated against them in pay and/or promotions based on their sex.\textsuperscript{161} The EEOC initially assigned the charges to five investigators and in June 2007, transferred and assigned them to a single investigator in its Buffalo office.\textsuperscript{162} On January 3, 2008, the EEOC issued a Letter of Determination claiming that, through its investigation, it determined that Sterling subjected a “class of female employees with retail sales responsibilities nationwide to a

\textsuperscript{158} Rebecca Bromet, Christopher DeGroff and Gerald L. Maatman, Jr., \textit{EEOC’s Quality Control Plan For Investigations And Conciliations - Written Submission Of Seyfarth Shaw LLP}, attached as Appendix IV.


\textsuperscript{160} 3 F. Supp. 3d 57 (W.D.N.Y. 2014).

\textsuperscript{161} \textit{Id}. at 60.

\textsuperscript{162} \textit{Id}.
pattern or practice of sex discrimination in regard to promotion and compensation."\(^{163}\)

On September 23, 2008, the EEOC filed suit asserting similar claims, *i.e.*, that Sterling “engaged in unlawful employment practices throughout its stores nationwide.”\(^{164}\)

Magistrate Judge McCarthy rejected the EEOC’s contention that a court may not inquire as to the scope of the EEOC’s pre-lawsuit investigation.\(^{165}\) He ruled that while courts will not review the sufficiency of the EEOC’s pre-suit investigation, “courts will review whether an investigation occurred,” as well as the “scope of that investigation.”\(^{166}\) In short, he found no evidence that the EEOC investigated its claims against Sterling on a nationwide basis.\(^{167}\) He found that the charges themselves – asserted on behalf of the charging parties and “similarly situated women” – did not demonstrate that the EEOC investigated the charges, let alone the scope of any investigation that the EEOC might have conducted.\(^{168}\) Magistrate McCarthy’s recommendation was adopted by the District Court and the suit was dismissed in its entirety.\(^{169}\)

On May 15, 2014, the EEOC appealed the decision to the Second Circuit.\(^ {170}\) The crux of the agency’s argument on appeal is that Magistrate McCarthy conducted an impermissible inquiry into the sufficiency of the EEOC’s investigation, concluding that it “could and should determine whether the Commission had conducted an appropriate investigation.”\(^ {171}\) The EEOC attempted to draw a sharp line between its case and a decision relied on by Magistrate McCarthy, *EEOC v. Pierce Packing Co.*\(^ {172}\) In that case, the Ninth Circuit affirmed the trial court’s dismissal because the EEOC had conducted no investigation at all. The Ninth Circuit agreed, holding that “[g]enuine investigation, reasonable cause determination and conciliation are jurisdictional conditions precedent to suit by the EEOC which are conspicuously absent here.”\(^ {173}\)

The EEOC based its argument heavily on *EEOC v. Caterpillar, Inc.*\(^ {174}\) In that case, one former employee at Caterpillar’s Aurora plant filed a charge with the EEOC claiming sex discrimination.\(^ {175}\) The EEOC investigated the charge and later notified Caterpillar that it had “reasonable cause to believe that Caterpillar discriminated against [the charging party] and a class of female employees, based on their sex.”\(^ {176}\) The parties failed to reach agreement at conciliation, and the EEOC brought suit against Caterpillar alleging

\(^{163}\) Id. at 61.
\(^{164}\) Id. at 62.
\(^{165}\) Id. at 63.
\(^{166}\) Id.
\(^{167}\) Id. at 68-69.
\(^{168}\) Id. at 64.
\(^{169}\) Id. at 60.
\(^{171}\) Sterling Jewelers, No. 14-1782, ECF No. 42 at 40-41 (Sept. 4, 2014).
\(^{172}\) Id. at 42-43; EEOC v. Pierce Packing Co., 669 F.2d 605 (9th Cir. 1982).
\(^{173}\) Pierce Packing, 669 F.2d at 608.
\(^{174}\) 409 F.3d 831 (7th Cir. 2005).
\(^{175}\) Id. at 831-32.
\(^{176}\) Id. at 832.
discrimination against a class of female employees at the Aurora plant. \(^{177}\) Caterpillar moved for summary judgment on the basis that the allegations of plant-wide discrimination were unrelated to the charging party’s charge. \(^{178}\) The district court denied the motion, but certified the ruling for interlocutory appeal to address the following question: “In determining whether the claims in an EEOC complaint are within the scope of the discrimination allegedly discovered during the EEOC’s investigation, must the court accept the EEOC’s Administrative Determination concerning the alleged discrimination discovered during its investigation, or instead, may the court itself review the scope of the investigation?” \(^{179}\)

The Seventh Circuit upheld the decision, concluding that the existence of probable cause to sue is generally not reviewable. \(^{180}\) However, the decision is not without its problems for the EEOC’s position. That case did not address whether a court has the power to determine whether the EEOC has actually fulfilled its obligation to investigate each claim that it brings. In fact, it held the opposite: “Any violations that the EEOC ascertains in the course of a reasonable investigation of the charging party's complaint are actionable.” \(^{181}\) In other words, courts are empowered to review the EEOC’s investigation to ensure that an investigation took place, but they may not review the investigation to determine whether substantial evidence supported the Commission’s finding of reasonable cause. It remains to be seen how the Second Circuit will respond to the reasoning in Caterpillar when it decides the Sterling case. Whatever the outcome, this decision will have a sizable impact on EEOC litigation for years to come.

### 3. Other Cases Examining The EEOC’s Pre-Suit Obligations

Along with the Mach Mining decision, the Sterling decision has the potential to considerably change the landscape of EEOC litigation as a ruling in the EEOC’s favor could significantly curtail employers’ and the court’s ability to examine whether the EEOC has actually met its pre-suit obligations as required by Title VII. But these are only two of the most high-profile decisions. A number of other cases have turned on similar issues.

For example, in EEOC v. Bass Pro Outdoor World, LLC, \(^{182}\) Judge Keith Ellison of the U.S. District Court for the Southern District of Texas rejected the argument that the EEOC had not sufficiently fulfilled its obligations to conciliate prior to bringing suit. Bass Pro had moved for summary judgment, asserting that the EEOC had not sufficiently fulfilled its obligations to conciliate the Section 706 claims on behalf of individuals who had not been identified before filing suit. \(^{183}\) In rejecting this argument, the court noted that the EEOC could conduct an adequate investigation even when it does not know the

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177 Id.
178 Id.
179 Id.
180 Id. at 833.
181 Id. (quoting Gen. Tel. Co. of the Nw., Inc. v. EEOC, 446 U.S. 318, 331 (1980) (emphasis added).
183 Id. at 664.
specific identities of all those allegedly aggrieved.\(^\text{184}\) The decision left untouched the court’s earlier ruling that the EEOC cannot sue on behalf of claimants that had not even applied at the time the parties conciliated the underlying claims.\(^\text{185}\)

The EEOC has shown an increasing willingness to front this issue by seeking summary judgment against defendants that raise the EEOC’s failure to abide by its pre-suit obligations as a substantive defense to the merits of the EEOC’s claims. For example, in *EEOC v. Midwest Regional Medical Center, LLC*,\(^\text{186}\) the U.S. District Court for the Western District of Oklahoma held as a matter of law that the individual on whose behalf the EEOC filed suit was disabled within the meaning of the ADA because she had a record of having skin cancer prior to her termination. In that case, the EEOC sought summary judgment on the defendant’s affirmative defenses of failure to conciliate and failure to mitigate damages. Although the defendant ultimately withdrew its conciliation defense, and the court found an issue of material fact with respect to its mitigation defense, this motion may foreshadow a shift in tactics by the EEOC.\(^\text{187}\)

And in *EEOC v. New Prime, Inc.*,\(^\text{188}\) Judge Douglas Harpool of the United States District Court for the Western District of Missouri granted in part the EEOC’s motion for summary judgment, finding that it satisfied its pre-suit investigation and conciliation obligations despite the court being “underwhelmed by the EEOC’s attempt at conciliation.”\(^\text{189}\) That case was unusual because both the EEOC and the defendant employer brought the issue of EEOC’s pre-suit obligations to the court. The EEOC moved for summary judgment arguing that all conditions precedent to the filing of the lawsuit were met.\(^\text{190}\) The employer filed its own motion on this point, arguing that the EEOC failed to adequately investigate and conciliate the matter before filing suit.\(^\text{191}\)

The court acknowledged that the EEOC is obligated to conciliate in good faith, and that in order to satisfy that requirement, the EEOC must “(1) outline to the employer the reasonable cause for its belief that the law has been violated; (2) offer an opportunity for voluntary compliance; and (3) respond in a reasonable and flexible manner to the reasonable attitudes of the employer.”\(^\text{192}\) Furthermore, the court held that whether the EEOC adequately fulfilled its obligation to conciliate is dependent upon the “reasonableness and responsiveness of the [EEOC’s] conduct under all the circumstances.”\(^\text{193}\) With respect to conciliation, the court found that the EEOC met the “low hurdle of attempting a reasonable and responsive conciliation process” despite

\(^{184}\) Id. at 665.
\(^{185}\) Id. at 660 n.4.
\(^{187}\) Id. at *21-23.
\(^{189}\) Id. at *21.
\(^{190}\) Id. at *11.
\(^{191}\) Id. at *11-12.
\(^{192}\) Id. at *13.
\(^{193}\) Id.
shutting down conciliation one week after the employer submitted its initial response to
the EEOC.  

With respect to its investigatory function, the court held that the EEOC’s initial letters put
New Prime on notice that it was investigating on behalf of “similarly situated individuals
with regard to the same-sex training policy.” Furthermore, New Prime was put on
notice through the initial charge and the subsequent investigation that any females that
were subject to the policy, or more specifically put on the waiting list, were part of the
EEOC’s investigation. Since it found that “the EEOC’s scope of the investigation in
this matter was clear – it pertained to the same-sex training policy implemented by
Prime, including the female waiting list for potential applicants, trainees and potential
employees,” the court held that the EEOC adequately investigated the matter with
respect to its class-wide claims prior to filing suit.

B. A New Focus On Separation Agreements?

The EEOC’s robust challenges to judicial oversight of its pre-suit obligations are not the
only way that the agency has sought to increase the scope of its enforcement impact.
In another recent case, the EEOC tried out a new theory attacking what it believes is an
impediment standing in the way of employees’ ability to assist the agency in pursuit of
its mission. In EEOC v. CVS Pharmacy, Inc., the EEOC alleged that various specific
provisions of CVS’s standard severance agreement violate Title VII because they
interfere with employees’ rights to file charges and communicate voluntarily and
participate in investigations with the EEOC and other state agencies. This is an
entirely novel attack on employers’ severance agreements.

The case arose out of a former CVS pharmacy manager who was discharged in July
2011. She filed a charge with the EEOC alleging that CVS terminated her due to her
sex and race. On June 13, 2013, the EEOC dismissed the charge, but it then sent
CVS a letter saying that it had reasonable cause to believe that CVS was engaged in a
pattern or practice of resistance to the full employment of rights secured by Title VII by
virtue of the severance agreements that the charging party and others signed at
termination. Specifically, the EEOC claimed that the agreement deters the filing of

194 Id. at *21.
195 Id. at *15-16.
196 Id. at *16-17
197 Id.
199 Id. at *5.
200 See Christopher DeGroff, Matthew Gagnon, and Gerald L. Maatman, Jr., Not Impressed By The
Chutzpah: Court Refuses To Bless The EEOC’s Attempt To Create A New Form Of Pattern Or Practice
Litigation, Workplace Class Action Blog (Oct. 12, 2014), available at
http://www.workplaceclassaction.com/2014/10/not-impressed-by-the-chutzpah-court-refuses-to-bless-the-
eeocs-attempt-to-create-a-new-form-of-pattern-or-practice-litigation/.
201 CVS Pharmacy, 2014 U.S. Dist. LEXIS 142937 at *3.
202 Id.
203 Id.
charges and interferes with employees’ ability to communicate voluntarily with the 
EEOC and other federal and state agencies.\textsuperscript{204}

This case was ultimately decided in CVS’s favor, but only because the EEOC did not 
engage in any effort to conciliate prior to bringing suit.\textsuperscript{205} The EEOC argued that it was 
not required to engage in conciliation procedures because it was not bringing a garden-
variety pattern or practice claim under section 707(e), but rather was alleging a pattern 
or practice of resistance to the full enjoyment of rights created by Title VII. That 
“resistance” claim was brought under section 707(a), which does not mandate the same 
pre-suit procedures as are required under section 707(e).\textsuperscript{206} The court disagreed, 
holding that section 707(e) expressly mandates that all such actions must be conducted 
in accordance with the procedures set forth in section 706, which, among other things, 
requires the EEOC to engage in conciliation procedures before filing suit.\textsuperscript{207}

The EEOC is pursuing a similar theory against a different employer in the U.S. District 
Court for the District of Colorado in \textit{EEOC v. CollegeAmerica Denver, Inc.} The EEOC 
sued \textit{CollegeAmerica} on April 30, 2014, alleging that it violated federal age 
discrimination laws by including unlawful provisions in a separation agreement with one 
of its former campus directors.\textsuperscript{208} According to the complaint, the campus director 
signed a separation agreement in September 2012 that conditioned the receipt of 
separation benefits on, among other things, her promise not to file any complaint or 
grievance with any government agency or to disparage CollegeAmerica.\textsuperscript{209} The EEOC 
alleged that those provisions would prevent her from reporting any alleged employment 
discrimination to the EEOC or filing a discrimination charge.\textsuperscript{210} In particular, the EEOC 
asserted three claims: (1) that the charging party’s separation agreement denied her the 
full exercise of her rights under the ADEA and interfered with the agency’s ability to 
investigate charges of discrimination under the ADEA; (2) through the “form” standard 
separation agreements used with employees other than the charging party, 
CollegeAmerica denied employees full exercise of their rights under the ADEA; and (3) 
CollegeAmerica retaliated against the charging party by filing the state court action 
alleging breach of her separation agreement’s non-disparagement clause.\textsuperscript{211}

\begin{footnotesize}
\textsuperscript{204} Id. at *5.
\textsuperscript{205} Id. at *12.
\textsuperscript{206} Id. at *9.
\textsuperscript{207} Id. at *11-12.
\textsuperscript{209} Id.
\textsuperscript{210} See EEOC Press Release, \textit{CollegeAmerica Sued by EEOC For Age Discrimination and Retaliation}, 
\textsuperscript{211} See Chris DeGroff and Laura Maechtlen, \textit{Separation Agreement Attack Redux – EEOC Takes Another 
Swing At Employer’s Standard Release Language, And Loses On Key Claims}, \textsc{Workplace Class Action Blog} 
(Dec. 8, 2014), available at \url{http://www.workplaceclassaction.com/2014/12/separation-agreement-
attack-redux-eeoc-takes-another-swing-at-employers-standard-release-language-and-loses-on-key-
claims/}.
\end{footnotesize}
On December 2, 2014, the district court dismissed the EEOC’s suit, again faulting the agency for failing to properly conciliate prior to bringing suit. The court held that there was no justiciable controversy over the EEOC’s first claim because CollegeAmerica provided evidence that it did not assert such a waiver in connection with her EEOC charges or state court action, and provided an affidavit stating that the employer did not and would never assert that the individual separation agreement constitutes a waiver of ADEA rights.

The court also held that it lacked jurisdiction over the EEOC’s second claim because the EEOC failed to provide CollegeAmerica with notice that the “form” separation agreements purportedly violate the ADEA and failed to engage in conciliation with respect to those agreements. Because the EEOC was unaware of the existence or terms of the “form” separation agreements when it issued its Letter of Determination and failed to raise concerns about the “form” separation agreements at the conciliation meeting, the EEOC failed to give notice about or conciliate that issue. Since the exhaustion of administrative remedies, including conciliation, is a jurisdictional prerequisite to filing suit, the second claim was dismissed for want of jurisdiction.

Although the EEOC’s third claim against CollegeAmerica for retaliation survived the motion to dismiss, that claim will most likely not decide the substantive issues concerning separation agreements that are at issue in CVS and CollegeAmerica. That issue represents a new method by which the EEOC hopes to clear away the hurdles that stand in the way of its ability to bring and prosecute systemic cases. So far, it has survived to be fought another day.

C. Are Pattern Or Practice Suits Allowed Under Both Sections 706 And 707?

Another theory that the EEOC has advanced as a means to increase its enforcement powers is the aggressive defense of its right to bring pattern or practice cases under either section 706 or 707 of Title VII. Historically, the EEOC has used two avenues for suing employers for alleged discrimination under Title VII – section 706 and section 707. Section 706 cases have traditionally been viewed as “representative” actions, where the EEOC steps into the shoes of individual claimants and sues on their behalf (some of these actions are one-off, single-claimant actions, while others involve a group of similar claimants). Section 707, on the other hand, authorizes the EEOC to bring a systemic case alleging a universally applied “pattern or practice” of discrimination.

Because a section 707 case is brought directly by the EEOC on its own behalf, it may only obtain equitable relief and damages, such as back pay. Pattern or practice cases follow a burden-shifting framework set forth in International Brotherhood of Teamsters v. EEOC v. CollegeAmerica, Inc., No. 14-CV-1232, 2014 U.S. Dist. LEXIS 167055 (D. Colo. Dec. 2, 2014).

Id. at *7-10.

Id. at *17-18.

Id.
The *Teamsters* framework typically requires a showing by the EEOC that discrimination is the employer’s “standard operating procedure.” If the government meets that difficult burden of proof, it arguably creates a presumption that all individuals in the EEOC’s “class” were victims of discrimination, leaving it to the employer to rebut individual claims, often years after employment decisions were made. The *Teamsters* framework, therefore, can represent a significant litigation advantage for the EEOC. At issue in a number of recent cases is whether that framework is appropriately applied to cases that originated under section 706.

In *EEOC v. Bass Pro Outdoor World, LLC*[^217], the EEOC attempted to bring a novel “hybrid” claim, using the *Teamsters* pattern or practice framework typically used under section 707 in a section 706 action. Bass Pro opposed this move, arguing that inserting the *Teamsters* model into a section 706 case would essentially make a section 707 case redundant and obsolete. The court ultimately held that the *Teamsters* analysis can be applied to both section 706 and section 707 claims.

Originally, the court had sided with Bass Pro. On May 31, 2012, the court held that “the EEOC cannot bring a hybrid pattern or practice claim that melds the respective frameworks of section 706 and section 707.”[^218] The court reasoned that the differences in remedies available under each section counseled in favor of applying two different frameworks, and section 707, unlike section 706, expressly authorized the use of a pattern or practice framework.[^219] After that ruling, the EEOC repeatedly asked the court to revisit its decision. Eventually the court took another look at the issue and then abruptly reversed its own ruling, holding that the *Teamsters* analysis can apply to both section 706 and section 707 claims.[^220]

The court reasoned that even though section 706 does not expressly authorize pattern or practice litigation as section 707 does, Congress must have been aware of the *Teamsters* framework when it drafted section 706 and so Congress must have implicitly included it in that section even though it was only specifically expressed in section 707.[^221] The court also held that although different damages are authorized under sections 706 and 707, this should not by itself limit the methods by which the EEOC can prove those facts that would support whichever sort of relief was sought and allowable under the different sections.[^222]

The court also rejected an argument based on the different procedural devices available under each section. In particular, jury trials are available under section 706 but not for

[^221]: *Id.* at *48-49.
[^222]: *Id.* at *48.
section 707 claims, which are tried to the court. Bass Pro argued that the application of the Teamsters framework in a jury trial would create Seventh Amendment problems. Because the Teamsters framework essentially requires a two-step process for determining liability, Bass Pro argued that a second jury would be required to re-examine facts already decided by a first jury. Although the court acknowledged the constitutional problems that such a framework could entail, it decided to defer those issues until later in the litigation when it was actually considering how the framework would apply in practice, noting that it “will carefully consider the Seventh Amendment implications . . . when the Court revisits a case management plan.”

The court’s about-face on this point demonstrates that this issue is still in flux and subject to change. The court even noted that “lower courts have been riven by disagreement” and that “this is an area of law ripe for further illumination from the appellate courts.” In fact, the court appeared to go so far as to invite an appeal of its decision, noting that it “would look favorably upon a motion for certification” for an immediate appeal. Bass Pro promptly sought and obtained the right to appeal the decision to the Fifth Circuit. The district court relied heavily on the reasoning of the Sixth Circuit’s decision in Serrano v. Cintas Corp., which held that the EEOC could bring section 706 claims using a Teamsters framework. Whether the Fifth Circuit will follow the reasoning of the Sixth Circuit is anyone’s guess. Only time will tell whether the Bass Pro decision is a bellwether for where the courts are going with this issue.

D. New And Troubling Trends In Litigation And Enforcement Tactics

The EEOC is not just challenging the procedural bases and hurdles to its enforcement objectives that are found in the anti-discrimination laws themselves. It is also focused on extending the procedural tools that it has at its disposal through the settlement and litigation process. In particular, the EEOC has shown an aggressive pattern of enforcing the injunctive provisions that it includes in almost every consent decree to police employer conduct even after a case has been resolved. It has also been increasing its use of its subpoena power to expand the pre-suit investigation process into a weapon to prepare the ground for future litigation.

1. Enforcement Of Injunctive Relief In Settlement Agreements

Most EEOC-initiated lawsuits end in settlement, and those settlements result in a public consent decree that an employer enters into with the EEOC and that is filed with the court. The EEOC almost always insists that some form of injunctive relief is included in the consent decree that is ostensibly aimed at correcting discriminatory employment

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223 Id. at *50.
224 Id. at *51.
225 Id. at *52.
226 Id. at *3-4.
227 Id. at *46.
228 699. F.3d 884 (6th Cir. 2012).
practices and ensuring that those practices will be curbed in the future. Indeed, Chair Jenny Yang has claimed that equitable relief is more important than monetary damages to the EEOC. This is also consistent with the SEP’s stated litigation priority of ending and remedying unlawful discrimination through a targeted and integrated approach to enforcement. The EEOC set a goal of having 60-65% of its FY 2014 administrative and legal resolutions contain targeted equitable relief, and the EEOC exceeded that goal with 73.5% of those case resolutions including such equitable relief. Those injunctive mandates typically impose significant obligations on an employer long after a case is resolved – often for several years. Now the EEOC has shown a willingness to reopen litigation against a company that it believes is not strictly complying with those mandates.

For example, on May 9, 2014, the EEOC filed a fourth suit against AutoZone alleging that AutoZone failed to accommodate as required by the ADA. In two of the prior suits against AutoZone, the EEOC had been granted injunctive relief that applied against AutoZone in the areas where the alleged violations occurred. Despite the fact that it achieved its goals in two of its prior suits against AutoZone and has another suit still pending, the EEOC stated that it was important to keep filing litigation against AutoZone:

> The obligation to provide reasonable accommodations for qualified individuals with disabilities has been the law of the land for over two decades, and businesses large and small, operating coast to coast have found ways to bring their operations into compliance with the law. So it is especially disappointing any time a huge national employer with tens of thousands of employees repeatedly engages in unlawful discrimination against individuals with disabilities and declines to share responsibility for maintaining a level playing field for disabled American workers. In those cases, the EEOC is ready to litigate, repeatedly if necessary, to assure that somehow the ADA does not apply to it.

If this becomes a general trend – with the EEOC doggedly pursuing employers even after they have settled with the agency and agreed to injunctive relief – it may make employers less willing to agree to the broad injunctive mandates that the EEOC favors.

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229 Déjà Vu All Over Again: EEOC’s Fiscal Year-End Lawsuit Blitz Once Again Catches Dozens Of Employers In Litigation Net, supra note 15.
232 U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FISCAL YEAR 2014 PERFORMANCE AND ACCOUNTABILITY REPORT at 17, 27.
235 EEOC Sues AutoZone for Fourth Time for Violating Americans with Disabilities Act, supra note 233.
This could in turn result in further strain on the agency’s litigation budget if employers become less willing to settle on the EEOC’s terms.

2. Aggressive Use Of Broad Subpoena Power

One of the powers granted to the EEOC is the power to issue administrative subpoenas in aid of its pre-suit investigation.\(^\text{236}\) That power is quite broad; it is limited only insofar as the testimony or evidence sought by the EEOC must “relate to any matter under investigation, or any matter in question in such proceedings,” and the subpoena itself must “describe with sufficient particularity the evidence whose production is required.”\(^\text{237}\) The EEOC has been steadily increasing the use of these broad subpoena powers in its pre-suit investigations to begin building its litigation case against the employer as soon as possible prior to filing suit. Fiscal year 2014 saw 34 subpoena actions versus the 17 that were filed last year.\(^\text{238}\) In addition, many courts continue to give the agency considerable leeway to conduct searching pre-suit investigations, even where those investigations appear to some employers as having little or no connection to the underlying charge.

For example, in *EEOC v. KB Staffing, LLC*,\(^\text{239}\) Judge James Moody of the U.S. District Court for the Middle District of Florida allowed the EEOC to conduct an open-ended investigation into matters that the company argued had little or no connection with the charge that started the investigation.\(^\text{240}\) The EEOC’s investigation originally stemmed from a charge alleging that KB Staffing had violated the ADA by requiring job applicants to complete a pre-offer health questionnaire.\(^\text{241}\) The charging party alleged that the company refused to hire her after she declined to complete the health questionnaire.\(^\text{242}\) By the time she filed her charge with the EEOC six months later, KB Staffing had already discontinued the use of the health questionnaire.\(^\text{243}\)

Even though the challenged practice had been discontinued years earlier, the EEOC issued a broad administrative subpoena against KB Staffing on May 23, 2014.\(^\text{244}\) The subpoena sought copies of the health questionnaires of every single person who applied for employment with KB Staffing within the three years prior to the date of the


\(^{237}\) See 29 U.S.C. § 161(1).

\(^{238}\) U.S. DEPARTMENT OF LABOR, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FISCAL YEAR 2014 PERFORMANCE AND ACCOUNTABILITY REPORT at 27; Déjà Vu All Over Again: EEOC’s Fiscal Year-End Lawsuit Blitz Once Again Catches Dozens Of Employers In Litigation Net, supra note 15.


\(^{242}\) Id. at *7.

\(^{243}\) Id. at *2.

\(^{244}\) Id. at *13-14.
charge, as well as the health questionnaires for all current employees. The court enforced the subpoena. The court held that the EEOC had retained authority to continue its investigation even after the charging party withdrew the underlying charge because the EEOC maintains discretion to vindicate the public interest in combating systemic discrimination; the EEOC’s authority is not “merely derivative” of the claims asserted by a charging party. The court did not even challenge the fact that the EEOC had requested information for three years prior to the date of the charge, even though the appropriate statute of limitations period was only one year.

Some employers have had better luck persuading courts to reign in what they regard as overbroad EEOC subpoenas. For example, in EEOC v. Forge Industrial Staffing Inc., Magistrate Judge Mark Dinsmore of the U.S. District Court for the Southern District of Indiana rejected a particularly overbroad subpoena. In that case, a former employee filed an EEOC charge alleging sexual harassment and retaliation after her termination. The EEOC then issued a subpoena seeking extensive information as part of its administrative investigation. The subpoena requested all employment applications for roughly a two and a half year period because the EEOC claimed that those applications required employees to agree to file all employment-related claims within six months of the event, except as prohibited by law. The EEOC viewed that provision as an unlawful waiver of an applicant’s statutory rights. The company argued that the requested information was irrelevant to the charge and complying with it would be unduly burdensome.

The EEOC argued that the application waiver was related to the charge because it related to the “overall conditions of the workplace.” The court rejected the EEOC’s position, noting that the charge did not contain pattern or practice allegations, which may have suggested the pervasive violation of the law that the EEOC’s subpoena seemed to assume. Also, because the charging party had filed her charge within four months of her termination, the clause could not have had any impact on her willingness to file a charge. The clause therefore could not be relevant to the charge under investigation.

If the EEOC’s argument concerning the “overall condition of the workplace” were accepted, it would essentially eliminate any limitation on an EEOC subpoena based on relevance as it would effectively allow the EEOC to subpoena any information about the

245 Id.
246 Id. at *8.
247 Id. at *12-13, n.3.
251 Id. at *7.
252 Id.
While the court acknowledged that the EEOC has a broad mandate to promote the public interest and can seek to remedy violations not alleged in a charge, it held that this does not mean that the EEOC can stretch the plain language of its statutory authority to issue subpoenas that do not adhere to the requirement that they be relevant to the charge under investigation. The EEOC may not use its broad enforcement authority as a means to expand a single charge into a pattern or practice case premised on a wholly different claim.

\textit{EEOC v. Homenurse, Inc.} provides an even more extreme example of investigatory overreach. In that case, the EEOC was investigating a charge alleging that the charging party’s former employer discriminated against people based on race, age, disability, and genetic information. Instead of requesting information in the normal course of its investigation, the EEOC carried out an unannounced, FBI-like raid in which it showed up at the former employer with a subpoena in hand and began rifling through the company’s files, many of which contained information protected by HIPAA. The EEOC’s investigators also confiscated some of the documents it found during that raid. When the EEOC tried to enforce another subpoena on the former employer, Magistrate Judge Walter Johnson of the Northern District of Georgia quashed the subpoena and called the raid on the employer “highly inappropriate.”

While these cases resulted in some common-sense limitations on the EEOC’s subpoena power, they are rare examples of courts actually pushing back on the agency’s investigative reach. In most instances, the EEOC has been successful in using its subpoena power to conduct far-reaching, expansive investigations even where those investigations are arguably only tangentially related to the underlying charge.

\textbf{IV. LEGISLATIVE UPDATE AND LOOKING AHEAD}

\textbf{A. Pressure From Congress}

The EEOC approved its Strategic Enforcement Plan for FY 2013-2016 in December 2012. The EEOC’s actions since then reveal that the SEP has functioned as the agency’s blueprint for its enforcement activity in FY 2013 and FY 2014, and the EEOC...
has given no indication that it will back off any of its initiatives through FY 2016. The SEP has been especially influential in driving the EEOC to pursue more systemic cases. Specifically, the SEP notes that “meritorious systemic charges and cases that raise SEP or district priority issues [will] be given precedence over individual priority matters and over all non-priority matters, whether individual or systemic.” But the SEP was also transparent in that it stated that the EEOC would be pursuing this and its other initiatives despite a lack of sufficient resources. In practice, the combination of a greater emphasis on systemic cases and a lack of sufficient resources has resulted in some high-profile defeats by the EEOC and some real criticism from the business community and, increasingly, Congress itself.

On June 10, 2014, the House Committee on Education and the Workforce, Subcommittee on Workforce Protections held a hearing entitled “The Regulatory and Enforcement Priorities of the EEOC: Examining the Concerns of Stakeholders.” The House Committee heard testimony from different stakeholders, including representatives from the business community. The U.S. Chamber of Commerce testified about the effect that the EEOC’s lengthy investigation process has on U.S. employers, pointing out that both the plaintiff and defense bars believe that EEOC investigations “[are] too long, inconsistent and of questionable quality.” The Chamber noted that the EEOC has so far failed to address those legitimate criticisms by requiring investigators to comply with standards for timeliness and quality. And it spoke about two of the key issues discussed above, namely the agency’s propensity to file litigation without conducting a sound investigation or good faith conciliation.

The House Committee hearing was followed on June 25, 2014 with the introduction of the Equal Employment Opportunity Commission (EEOC) Transparency and Accountability Act (H.R. 4959) by Rep. Richard Hudson (R-N.C.). In a press release announcing the bill, Congressman Hudson had this to say:

The EEOC is tasked with a noble mission to protect American workers and job-seekers from discrimination in the workplace and hiring practices. Recently, however, the EEOC has overstepped its bounds by litigating numerous cases found to be frivolous, groundless, and baseless that has caused undue burdens on numerous businesses and industries. It is critical that Congress provides meaningful oversight to certify that the EEOC stays focused on carrying out its core mission. This legislation will increase transparency and accountability at the EEOC to help ensure that

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260 Id.
262 Id. at 5-8.
the agency fulfills its duty and adequately balances the interests of both employers and workers.\textsuperscript{265}

The proposed legislation would require the EEOC to post certain information on its website and in its annual report, including any case in which the EEOC was required to pay fees or costs or where a sanction was imposed against it by a court, the total number of charges filed by an EEOC member or as a result of a directed investigation, and each systemic discrimination lawsuit brought by the EEOC.\textsuperscript{266}

The legislation could also settle once and for all the conciliation issue on appeal before the Supreme Court, as it would require the EEOC to conduct conciliations in good faith and would subject those efforts to judicial review.\textsuperscript{267} It would also require the EEOC’s Inspector General to notify Congress within 14 days when a court has ordered sanctions against the agency.\textsuperscript{268} And the EEOC’s Inspector General would have to conduct a thorough investigation of why the agency brought the case, and submit a report to Congress within 90 days of the court’s decision explaining why sanctions were imposed.\textsuperscript{269} Finally, the bill would require the EEOC to submit a report to Congress within 60 days of the court’s decision detailing the steps that the EEOC would take to reduce instances in which it is subject to court-ordered sanctions, which would then have to be posted on its website within 30 days of submitting it to Congress.\textsuperscript{270}

The EEOC has also been under pressure from the Senate. On November 24, 2014, Senator Lamar Alexander issued a report that was highly critical of the EEOC.\textsuperscript{271} The report found that the EEOC was “pursuing many questionable cases through sometimes overly aggressive means – and, as a result, has suffered significant court losses that are embarrassing to the agency and costly to the taxpayer.”\textsuperscript{272} It also found that the EEOC was failing to recover for actual victims of discrimination,\textsuperscript{273} and that the EEOC lacked transparency.\textsuperscript{274} Senator Alexander’s report does a fine job describing many of the deficiencies in the EEOC’s enforcement program over the last few years. It is well worth a read by all employers. A copy of that report is attached as Appendix III.


\textsuperscript{266} Id.

\textsuperscript{267} Id.

\textsuperscript{268} \textit{EEOC Oversight: Congress Considers A New Proposal For Accountability}, supra note 261.

\textsuperscript{269} Id.

\textsuperscript{270} Id.

\textsuperscript{271} \textit{EEOC: An Agency on the Wrong Track? Litigation Failures, Misfocused Priorities, and Lack of Transparency Raise Concerns about Important Anti-Discrimination Agency}, supra note 14, attached as Appendix III.

\textsuperscript{272} Id.

\textsuperscript{273} Id.

\textsuperscript{274} Id.
B. Political Developments

FY 2014 saw some important political developments at the EEOC, including some significant appointments and confirmations.

- **Chair Jenny Yang:** Jenny Yang was named Chair of the EEOC by President Barack Obama on September 1, 2014. She served as a Senior Trial Attorney with the United States Department of Justice before becoming a partner at Cohen Milstein Sellers & Toll PLLC where she represented employees in complex civil rights and employment actions. She also currently represents the EEOC on the White House Initiative on Asian Americans and Pacific Islanders, as well as on the White House Equal Pay Enforcement Task Force. Chair Yang has indicated in interviews that in 2015 she will be focusing on compliance guidelines for employer wellness programs and pregnancy accommodation, and that she plans to continue the EEOC’s initiative to apply Title VII to workplace discrimination claims based on gender identity and sexual orientation.

- **General Counsel David Lopez:** The EEOC’s General Counsel, David Lopez, was originally nominated for the job by President Barack Obama on April 8, 2010. Before nomination, he served as an attorney for the EEOC for twelve years. He is also Co-Chair of the committee that developed the EEOC’s Strategic Enforcement Plan for 2013-2016 and the Chair of the EEOC’s Immigrant Worker Team, which focuses on strengthening EEOC enforcement and outreach on discrimination issues affecting immigrant worker communities.

Mr. Lopez faced an intense level of scrutiny at his re-confirmation hearing held on November 13, 2014. While the U.S. Senate Committee on Health, Education, Labor and Pensions (“HELP Committee”) eventually voted to confirm Mr. Lopez for another four-year term as General Counsel, the Committee members made it clear that they were concerned with the direction that the agency had taken under Mr. Lopez’s leadership. Among other things, Mr. Lopez was intensely questioned about the EEOC’s litigation focus. In particular, several Senators expressed frustration with the case that the EEOC filed against Honeywell regarding its wellness program. Others raised concerns over the EEOC’s pursuit of systemic cases, especially its tactic of initiating large-scale litigations.

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against employers where no aggrieved person filed a discrimination charge. Mr. Lopez survived the Committee by a vote of 12 to 10. The vote was strictly along party lines, with all Democrats voting in favor of confirmation and all Republicans voting against. In the full Senate, the vote for confirmation was 53 to 43, also strictly along party lines.

- **Commissioner Charlotte Burrows:** The HELP Committee also voted to confirm Charlotte Burrows as a new EEOC Commissioner for a five-year term. Unlike Mr. Lopez, Ms. Burrows made it through on a voice vote, meaning that she had almost total support from the Committee. She was confirmed by the Senate on December 3, 2014 by a vote of 93 to 2. Before taking her place on the Commission, she was Associate Deputy Attorney General with the Department of Justice. It remains to be seen how she will impact the agency. However, her confirmation means that the EEOC now has a full slate of commissioners for the first time since August 31, 2014. This means that the agency is now once again free to act on hot-button issues, including perhaps issuing additional guidance that may have been delayed while that post was vacant.

### C. New And Expected EEOC Guidance

#### 1. Pregnancy Discrimination Guidance

New agency guidance is always a crucial indicator of where the EEOC is likely to focus its enforcement priorities. On July 14, 2014, the EEOC issued its new Enforcement Guidance on Pregnancy Discrimination and Related Issues. This is the first comprehensive guidance on this issue since 1983 and supersedes earlier guidance. This guidance was controversial from its inception, obtaining the support of only three of the Commission’s five members. Two Commissioners, Constance S. Barker and Victoria A. Lipnic, issued public statements questioning the agency’s adoption of the guidance. Their comments reveal that they are especially concerned about the agency’s decision to issue the guidance without making it available for public review and comment, and that it was issued prior to the Supreme Court’s decision in the *Young* case.

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In addition to the procedural problems, Commissioners Barker and Lipnic pointed to substantive areas of disagreement with the guidance. In particular, Commissioner Lipnic noted that “[t]he Guidance takes the novel position that under the language of the [Pregnancy Discrimination Act (“PDA”)], a pregnant worker is, as a practical matter, entitled to ‘reasonable accommodation’ as that term is defined by the Americans with Disabilities Act (“ADA”),” and noting that “[n]o federal Court of Appeals has adopted this position,” and some have rejected it.

Commissioner Lipnic also took issue with the fact that the guidance states that non-pregnant workers receiving such reasonable accommodations are appropriate comparators for PDA compliance, which she describes as a radical departure from the EEOC’s prior position and the language of the PDA. She also stated that the guidance makes it unlawful for an employer to have a policy of providing light duty only to employees with on-the-job injuries. According to the guidance, all employers must provide accommodations to pregnant employees, even those experiencing normal, healthy pregnancies. Finally, Commissioner Lipnic was troubled by the tone that the guidance takes towards some pregnancy-related inquiries or discussion in the workplace, noting that the guidance appears to assume that employer inquiries or discussions regarding pregnancy or potential pregnancy are indicative of discrimination. She fears that “the cumulative effect of this will put both employers and employees in an untenable position.”

Despite these criticisms, employers should take careful note of this new guidance. Unless the Supreme Court limits its reach when it decides the Young case, it will very likely provide a blueprint for the EEOC’s litigation position in future pregnancy-related discrimination cases.

2. The EEOC’s Published Guide To Religious Garb And Grooming

On March 6, 2014, The EEOC published its Guide to Religious Garb and Grooming. That publication supports the EEOC’s position that any affectation, behavior, or mode of dress that can be tied to religious practice must be accommodated, so long as it does not cause “undue hardship” for the employer. Accommodation is required regardless of how sincere an employee’s religious practice may seem, how recently adopted that practice is, or how that practice affects business.

Because the EEOC typically requires accommodation of religious garb or grooming, an employer must be cautious when enforcing a dress code or uniform policy. Garb and

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281 Id.

282 Id.

283 Id.

284 Id.

grooming may take the form of religious symbols worn, restrictions on shaving or hair length, tattoos that must be displayed openly, and specific items of clothing required by a religion as well as many other expressions of religious identity. Similarly, an employer should be careful not to assign employees to specific areas, tasks, or positions based upon their garb or grooming.

According to the guide, an employer does not necessarily have to have specific knowledge of an employee’s religious practice in order to be liable under Title VII for discrimination. If an employer believes or should have known that an employee’s garb or grooming is religious in nature, the EEOC may still treat that employer as liable for restricting the employee’s freedom of religion – whether or not the employer actually had knowledge of the religious restriction. That question: whether an employer that is without direct knowledge of an employee’s religious practice can be liable under Title VII for religious discrimination is currently pending before the United States Supreme Court to be answered this term in the case of EEOC v. Abercrombie & Fitch.286 For the time being however, prudent employers will make sure to be aware of employee garb and grooming, inquire respectfully if accommodation is necessary, and then work with the employee towards accommodation rather than expose themselves to the risk of liability that can arise by unknowingly appearing to restrict an employee’s religious practice.287

3. Should Employers Expect Additional Guidance Next Year?

It is difficult to predict where the EEOC will focus its attention in the next few years. However, with a full slate of Commissioners, it is not unreasonable to expect that the EEOC may take action on some additional guidance. For example, some members of the defense bar believe that the EEOC likely will issue an update to its reasonable accommodations guidance. The current version of that guidance dates from October 2002.288 Another area that employers may expect to see some additional guidance from the EEOC is in the area of health and wellness plans. As noted above, the HELP Committee publicly has declared its misgivings about the EEOC’s recent pursuit of the Honeywell case during David Lopez’s confirmation hearing. That, plus the fact that the EEOC’s position seems to be at odds with provisions in the Affordable Care Act that encourage and incentivize employers to adopt such plans, argues in favor of some quick agency action clarifying the EEOC’s position on this issue.

At a recent White House press conference, Press Secretary Josh Earnest was questioned about the EEOC’s position. Although he would not comment on any pending litigation, Secretary Earnest made it clear that the administration fully supports

286 Supreme Court Case No. 14-86 (Docketed July 28, 2014).
health and wellness plans and sees them as an important component of the Affordable Care Act:

As you know, the EEOC is an independent agency, so it’s not an agency over which we exercise much, if any, control. And I don’t want to be in a position of commenting on pending litigation. But I can say, as a general matter, that the administration, and particularly the White House, is concerned that this is – or this at least could be inconsistent with what we know about wellness programs and the fact that we know that wellness programs are good for both employers and employees.289

D. What Lies Ahead For The EEOC’s Agenda?

The EEOC needs to justify its existence and stay relevant – to show that it matters. Pushing novel legal theories and aggressive new tactics is one way it has historically attempted to demonstrate its value. This commitment to being unpredictable makes identifying the road ahead challenging. But we have seen some glimmers of what may be on the horizon in 2015 and beyond.

One area appears to be social media. On March 12, 2014, the EEOC held a public meeting entitled Social Media In The Workplace: Examining Implications for Equal Employment Opportunity Law.290 The Commissioners heard testimony from five individuals regarding how social media platforms impact the workplace in areas such as recruitment and hiring, harassment, records retention, and litigation. The meeting was intended to be an information gathering session for the EEOC rather than a signal that the agency would consider adopting guidance in this area. Representatives of management and workers were invited to attend, and there was a debate about the appropriate boundaries of obtaining social media postings during discovery. The issue was raised again on November 12, 2014 when NLRB General Counsel Richard Griffin, NLRB Board Member Harry Johnson, and EEOC Commissioner Chai Feldblum participated in a panel discussion regarding, among other things, employers’ use of social media during the hiring process.291 Their remarks suggest that employers should be cautious about how they use social media in hiring decisions.

Similarly, the use of “big data” in hiring and other employment decisions appears to be on the EEOC’s radar screen. Big data refers to the extensive data collections that some

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companies have acquired about consumers that can be used to find out key facts about consumer demographics and behavior. That data is typically used by companies to better target their marketing initiatives or to predict consumer behavior relating to employment, housing, credit, or insurance. (One common example is how some online retailers will suggest additional items for purchase based on an algorithm that takes account of a consumer’s past purchases compared with the past purchases of other consumers in their data set.) In September 2014, Assistant Legal Counsel Carol Miaskoff warned that employers’ use of big data and social media could violate employment discrimination laws if it is used in a way that results in a disparate impact against a protected group.

The EEOC’s 2012 Strategic Enforcement Plan made “addressing emerging and developing issues” one of its six priorities for Fiscal Years 2013 through 2016. Employers’ use of “big data” and social media are cutting edge issues that have the potential to change how employers make hiring and other employment decisions. Those issues may therefore be ripe for action from the EEOC. Prudent employers will continue to pay attention to how the EEOC is approaching those issues in its public statements and comments, and will act with caution before using social media and big data in their hiring processes.

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