EEOC's New Focus on Systemic Discrimination Litigation

Preparing for Increased Scrutiny, Navigating Complex Legal Issues, and Minimizing Exposure to Systemic Lawsuits

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THE EEOC’s NEW FOCUS ON SYSTEMIC DISCRIMINATION LITIGATION

Preparing for Increased Scrutiny, Navigating Complex Legal Issues, and Minimizing Exposure to Systemic Lawsuits

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II. COMMON LEGAL ISSUES DURING SYSTEMIC LITIGATION

A. The Impact of the Systemic Initiative

In 2006, the EEOC adopted its Systemic Initiative. This Initiative makes the identification, investigation, and litigation of systemic discrimination cases – pattern and practice, policy, and/or class cases where the alleged discrimination has a broad impact on an industry, profession, company, or geographic area – a top priority. The Systemic Initiative also seeks to ensure that the EEOC has a coordinated, strategic, and effective approach to such cases. The Initiative requires the EEOC to effectively use its administrative and litigation tools – including Commissioner Charges, directed investigations, and the strategic use of empirical data – to identify and stop discriminatory policies and other instances of systemic discrimination. The EEOC’s Strategic Plan for Fiscal Years 2012-2016 reemphasizes the importance of systemic litigation and identifies the use of systemic litigation as one of its key strategies. Although it has not yet identified the percentage goals, it identified a performance measurement that beginning in 2012, establishes a baseline and projected increasing future targets for the percentage of the agency’s litigation that will be systemic cases.

This performance measure will provide an incentive for the EEOC to conduct systemic investigations when it finds evidence of potential widespread discriminatory practices. This measure will also require the agency to prioritize the systemic cases it chooses to litigate and to bring fewer individual and small class claims of discrimination, since systemic litigation requires significantly greater resources than other types of litigation.

As the EEOC gradually increases the proportion of systemic cases in its litigation docket, the strategic selection of individual and small class cases will take on greater importance. In making these strategic selections, the Commission will be cognizant of its statutory mandate of preventing unlawful employment discrimination under all of the statutes it enforces, under all protected bases, and involving a wide range of employment actions. In addition, the Commission will be mindful that in some regions of the country, the federal government has an even greater role to play in ensuring individual victims of employment discrimination can seek legal redress.

At the end of FY 2011, the EEOC had 443 cases on its active docket, of which 116 (26 percent) involved multiple aggrieved parties (but fewer than 20) and 63 (14 percent) involved challenges to systemic discrimination.
At the end of FY 2011, the EEOC was working on 580 systemic investigations, involving more than 2,067 charges. This figure includes 47 Commission-initiated charges. In FY 2011, EEOC field offices completed work on 235 systemic investigations resulting in 35 settlements or conciliation agreements, recovering $9.6 million. In addition, cause findings were issued in 96 systemic investigations. Those that were not resolved in conciliation were referred to field legal divisions for consideration of litigation.

During the year, there was a particular focus on building systemic enforcement partnerships, both within the EEOC and with other federal agencies. For example, a systemic lawsuit was filed against Bass Pro Shops, the result of investigations by the Houston, Birmingham and Miami field offices. Another partnership focused on a pilot project of four EEOC district offices and the Department of Justice (DOJ) to establish effective interagency procedures needed for enforcement of Title VII in the public sector, where DOJ has statutory authority to litigate. The pilot resulted in DOJ visits to all four district offices, identification of numerous cases in investigation that are of interest to DOJ, and ongoing case development discussions between EEOC enforcement staff and DOJ legal staff. During a second project, the EEOC shared systemic case information with the Department of Labor’s Office of Federal Contract Compliance Programs (OFCCP) and subsequently met to discuss strategies and available information for further examination of specific employers.

When the EEOC makes a finding of systemic discrimination and efforts to secure voluntary compliance fail, it may choose to file suit to enforce the law. In FY 2011, the Commission filed 23 lawsuits with at least 20 known or expected class members. This comprises nine percent of all merits filings, and is the largest volume of systemic suit filings since tracking started in FY 2006. The Commission filed 20 such suits in FY 2010, 19 such suits in FY 2009, 17 in FY 2008, 14 in FY 2007 and 11 in FY 2006. Expressed differently, 63 cases on the active docket at the end of FY 2011 were systemic cases, accounting for 14 percent of all active merits suits. This is slightly higher than the volume of systemic cases in our active docket at the end of FY 2010. Based on the large volume of systemic charges currently in investigation, the quantity of systemic lawsuits and their representation on the total docket is expected to continue to steadily increase. This past year, the EEOC resolved 34 systemic cases, eight of which included at least 100 aggrieved individuals.

Below is a sampling of significant resolutions of systemic discrimination lawsuits in FY 2011:

EEOC v. Verizon Maryland, Inc., et al. – In this nationwide ADA suit, the EEOC alleged that Verizon unlawfully denied reasonable accommodations to hundreds of employees with disabilities, and disciplined or fired them pursuant to inflexible attendance policies that did not provide accommodation for disability-related absences. A three-year consent decree provided a $20 million fund to compensate approximately 800 victims, and
represents the largest disability discrimination settlement in a single lawsuit in EEOC history. The decree also requires the company to revise its attendance plans and ADA policy to include reasonable accommodations for persons with disabilities.

EEOC v. Roadway Express, Inc. – In this series of cases filed in Illinois against a trucking firm, the EEOC alleged that the firm gave black employees at several Chicago-area facilities inferior work assignments and subjected them to harsher discipline and harassment based on their race, including multiple incidents of hangman’s nooses and racist graffiti and cartoons. A consent decree provides $10 million to 259 victims and requires the development of new anti-harassment policies and specific recordkeeping and complaint reporting procedures. The decree also requires the firm to retain consultants to examine the company’s discipline and work assignment procedures and recommend changes to prevent racial disparities.

EEOC v. International Profit Association-- In a widespread sexual harassment case, the EEOC alleged that a telemarketing firm in Illinois systemically subjected female employees to sexual assaults and propositions, inappropriate touching, and crude sexual comments. The court agreed with the EEOC that the firm’s conduct constituted a pattern or practice of discrimination, meaning that the harassment was so pervasive that it was the firm’s standard operating procedure. A consent decree provides $8 million to 82 victims.

EEOC v. Scrub Inc.-- In a major hiring discrimination case, the EEOC alleged that a janitorial services company at Chicago’s O’Hare Airport refused to hire black applicants based on their race. A consent decree provides $3 million to 539 victims, mandates the hiring of certain claimants who still want jobs, and requires the firm to use its best efforts to reach certain hiring goals.

EEOC v. 3M Company– In this nationwide age discrimination lawsuit, the EEOC charged that 3M unlawfully laid off hundreds of employees over the age of 45 during a series of reductions in force. The EEOC also asserted that older employees were denied leadership training and laid off to make way for younger leaders. A three-year consent decree provides $3 million to approximately 290 former employees. In addition, 3M will implement a review process for termination decisions and training on how to prevent age bias. The company will also post openings for positions it had not advertised previously, to enable older employees to apply.

EEOC v. AKAL Security-- In a nationwide pregnancy discrimination case filed in Kansas, the EEOC alleged that a security services firm engaged in a pattern or practice of forcing its pregnant employees, working as contract security guards on U.S. Army bases, to take leave and then discharging them because of pregnancy. A consent decree provides $1.6 million to 26 female security guards.
EEOC v. Denny’s Inc.— In this nationwide ADA suit filed in Maryland, the Commission challenged the restaurant’s maintenance of a maximum medical leave policy that automatically denied additional medical leave beyond a pre-determined limit. A consent decree provides $1.3 million to 34 victims and provides substantial programmatic relief, including changes to the medical leave policy, a corporate-level oversight and auditing process for leave decisions, and reporting to the EEOC.

To facilitate and enhance communication and collaboration on systemic efforts, the EEOC provided systemic coordinators, lead investigators, and attorneys with a dedicated portal for shared access to national case information, systemic libraries, and systemic guidance documentation within its Document Management System. In addition, the EEOC expanded usage of its CaseWorks system, which provides a central shared source of litigation support tools that facilitate the collection and review of electronic discovery and enable collaboration in the development of cases for litigation.

B. “Beyond Scope of Underlying Investigation” Arguments

The EEOC has subpoena power and the authority to pursue subpoena enforcement actions in the event the employer fails or refuses to provide the requested information or make the requested individuals available.

Title VII gives the EEOC the following broad power:

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

It is becoming increasingly common, almost to the point of the regular practice, for the EEOC to request information that goes far beyond the parameters of the individual charge, i.e., to potentially turn every individual claim into a systemic one. During the course of the investigation of that charge, the EEOC issues a subpoena requiring the employer to provide extensive information about its internal employee (and potentially external contractor) workforce, purportedly as part of the original charges. At this point, the employer should be on high alert, because such a subpoena usually indicates that the EEOC is considering this to be a systemic case. Deciding how to respond is an important strategic decision.

Systemic investigations can also arise out of a charge that is initially filed as a “pattern or practice” claim, a charge that the EEOC initiates on its own authority (which is almost always a systemic claim), or through a Commissioner’s Charge (which again is almost always a systemic claim). A Commissioner’s Charge is one that an EEOC Commissioner issues on
his/her own initiative. This ability was upheld by the U.S. Supreme Court in *EEOC v. Shell Oil Co.*, 466 U.S. 54 (1984). A similar process is allowed under The Age Discrimination in Employment Act (ADEA) and the Equal Pay Act (EPA), which allow the EEOC to initiate a “directed investigation” in the absence of a charge or discrimination. The ability to turn a “directed investigation” into a systemic claim was upheld in *EEOC v. Performance Food Group Company LLC*, Case No. 1:09-ev-02200, Docket No. 20 (D. Md. Feb. 18, 2010). As mentioned above, it is not uncommon for a systemic case to start off as a claim by one or two claimants.

It may be possible to limit the scope of the subpoena through communications with the assigned EEOC personnel and reach a mutually agreeable scope. However, many employers will probably just provide the requested information or not, without much thought. This is dangerous.

The employer has choices that must be made rather rapidly: does it comply and hope the evidence persuasively shows there is no violation, or does it decline to comply with the subpoena. If the latter, there are also strategic decisions that must be made rapidly: how to argue that the subpoena should not be complied with, and what avenues to take to resist the subpoena.

In the event a subpoena is issued, the employer is required to comply, just as with a subpoena issued in other litigation. Under each of the laws enforced by the EEOC except two (the ADEA and the EPA), the employer can file a petition to revoke or modify the subpoena. Under the ADEA and EPA, these procedures are not an option and the employer’s only choice is to refuse to comply; this is likely to trigger an enforcement action, which is a public proceeding.

Many courts have allowed the EEOC to greatly expand the scope of its investigations. As the Seventh Circuit said in *EEOC v. Caterpillar, Inc.*, 409 F.3d 831, 833 (7th Cir. 2005), the EEOC

> “may, to the extent warranted by an investigation reasonably related in scope to the allegations of the underlying charge, seek relief on behalf of individuals beyond the charging parties who are identified during the investigation.”

In light of the EEOC’s broad authority, its increased willingness to use it to file systemic cases or to turn an individual case into a systemic case, as well as many courts’ willingness to go along with the EEOC in this regard, employers should realize that they may face a formidable battle to limit the scope of the investigation. Nevertheless, there are arguments that employers can use, which typically focus on two issues: (1) relevance, and (2) burdensomeness.”
The leading case involving the scope of the EEOC’s request for information is *EEOC v. Shell Oil, supra.* In that case, the Supreme Court stated that although the EEOC is “entitled to access only to evidence ‘relevant’ to the charge under investigation, . . . courts have generously construed the term ‘relevant’ and have afforded the Commission access to virtually any material that might cast light on the allegations against the employer.”

The Court went on to say that it was crucial that the EEOC’s ability to investigate charges of systemic discrimination not be impaired. However, the Court also gave employers helpful language that is relied on by employers when resisting broad EEOC investigations. The *Shell* Court highlighted the limitation on the right only to access documents or data “relevant to the charge under investigation” and said that “Congress did not eliminate the relevance requirement, and we must be careful not to construe the regulation adopted by the EEOC governing what goes into a charge in a fashion that renders that requirement a nullity.”

A case that is often relied on by employers to challenge both relevance and burdensomeness is *EEOC v. United Airlines,* 287 F.3d 643 (7th Cir. 2002). In this case, the focus of the charge was a difference in benefits received by an American employee working in France compared with French co-workers. It was brought as a national origin and sex discrimination case. The EEOC expanded its investigation to seek identification of each employee working abroad who had taken or been placed on medical or disability leave, and sought information regarding all of the employer’s benefit programs. After the employer failed to respond as requested, the EEOC brought a subpoena enforcement action, and the Seventh Circuit denied enforcement of the subpoena.

The *United Airlines* decision observed that the courts have adopted a much broader concept of “relevance” when dealing with subpoenas compared with the admissibility of evidence. However, it cautioned that this more expansive concept should not make the relevance definition a nullity, and that relevance is designed to prevent “fishing expeditions” by the EEOC. In applying this standard to the facts of the case, the court considered the nature of the charge and concluded that the information request was not limited to individuals who might have been “similarly situated” by location (France) and was overbroad in requesting information about all employees who resided abroad. It went to opine that even if the requested information was relevant, “burdensomeness” is a factor that must be considered in determining whether to enforce, modify or quash a subpoena. It set forth that a “presumption” exists that compliance should be enforced to further the EEOC’s legitimate mandate to inquire into matters of public interest, and cautioned that an employer carries the “difficult burden” of showing that the demands are unduly burdensome or unreasonably broad. This can be done,
for example, by showing that “compliance would threaten the normal operation of a respondent’s business.” Cost of compliance is also a consideration, taking into account the “personnel or financial burden…compared to the resources the employer has at its disposal.” Each case has to be reviewed on an individual basis, and “conclusory allegations” of burdensomeness will be insufficient. However, in United Airlines, the employer carried the day and the court concluded that the

“financial and administrative demand placed on [the employer] is significant and, in light of the tangential need for the information, an undue burden on the employer.”

An overview of the decisions involving the EEOC’s subpoena enforcement actions evidences that courts can and do reach different decisions, primarily based on the scope of the subpoena and the grounds relied on in the challenge. An employer who is responding to a particular request for information should review the cases before it decides whether and on what ground to resist.

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

The charging party’s race discrimination claim focused on the claim that he was subjected to different terms and conditions of employment, disciplined for failing to meet his sales quota, and fired after he filed an internal discrimination complaint. He had always worked at one facility in the Chicago area. Nevertheless, the EEOC requested, and the employer provided, information about its operations including demographic information regarding its eight Chicago facilities. This information showed that there were only six Black employees, all employed at the same facility as the charging party. The EEOC began focusing, in part, on whether there was any illegal steering. It ultimately issued a subpoena seeking data for all of the employer’s area facilities, including any communications with applicants. After the employer refused to comply with the subpoena for hiring information, the EEOC initiated a subpoena enforcement action. The Seventh Circuit, relying on Shell Oil, affirmed the district court’s order enforcing the subpoena. The court emphasized that the subpoena was directed towards other members of the same class as the charging party and limited to the Chicago geographic area. It thus felt that the subpoena was sufficiently narrow as to focus on “similarly situated” employees, distinguishing United Airlines. In a comment distinctly unhelpful to employers, it also reminded the parties that should the EEOC later conclude that a broader investigation was warranted, the EEOC could file its own charge in which it alleged a pattern or practice of discrimination and “calibrate its investigation accordingly.”
The charging party alleged sex discrimination when she failed to “graduate” from a general manager development program, and retaliation for having complained about sexual harassment. The charge was amended to add class-based allegations. The EEOC requested nationwide data regarding the selection process for participation in the development program, as well as information about the hiring and retention of general managers. When the employer failed to comply with the subpoena, the EEOC brought an enforcement action. The court granted enforcement, finding that the case authority cited by the EEOC was more persuasive based on its conclusion that the subpoenaed information was “like and related to the acts specified in the charge.”

The charging party alleged disability discrimination in hiring. The employer initially objected to a request for information regarding other applicants for the same position who were treated the same way as the charging party. After the objection had worked its way through the EEOC’s administrative processes and the scope found to be appropriate, the employer fully responded to the subpoena. The EEOC then expanded its request to information about applicants who were not hired not only for the charging party’s position but another position, and sought information on a nationwide basis. The employer provided the requested information on a nationwide basis but only for the charging party’s position, and for a limited time period. The EEOC then sought an electronic database containing information regarding applicants who were not hired because they were not medically qualified for the job, for any position where the employer required medical screening, for an extended period of time. The EEOC rejected the employer’s offer to produce nationwide data on applicants for the charging party’s position for a relatively shorter period of time, and filed an application to show cause as to why the subpoena should not be enforced. The employer challenged the subpoena primarily by arguing that the information sought was not relevant based on the scope of the underlying charge and amounted to a fishing expedition. The court noted that the EEOC’s subpoena was overbroad and went far beyond the allegations in the charge, and further distinguished the case from Kronos (see discussion of Kronos below) based on the individualized nature of the medical screening and the medical officer’s individualized consideration and assessment of unique medical records, both of which meant that the data sought could not be reduced to provide comparative statistics or a
useful context to the charging party’s specific charge of discrimination. The court also noted that there were no allegations of a pattern and practice. In language helpful to employers, the court stated: “The demand for data on a nationwide basis with two individual claims involving only applicants in Colorado is excessive. And while wide deference to administrative inquiries and investigations—wide deference to the scope of the subpoenas is given, it does not transcend the gap between the pattern and practice investigation and the private claims that have been shown here.”


In this case, the court denied a nationwide subpoena based on individual charge of discrimination involving the employer’s arrest and conviction policy that required the reporting of arrests, based on an individual charge of discrimination. It also limited the subpoena to ten stores in the district where the charging party worked. The court denied the EEOC’s proposed narrowing of the geographic scope to a region of 140 stores. The court also denied enforcement of the EEOC’s subpoena as it pertained to the EEOC’s request for national origin related information where the underlying claim only alleged race discrimination.


The court declined a request for company-wide data in circumstances where the decision-making impacting on the allegations in the charge were more localized in nature. (Note: The judge in the Quantum case reached a different decision that upheld a state-wide subpoena in *EEOC v. Aaron’s Inc.*, 779 F. Supp. 2d 754 (N.D. Ill. 2011).

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

In this case, the EEOC successfully sought nationwide information from an employer, particularly because its investigation was focused on a purportedly national policy. The employer’s appearance policy in this case arose from two separate charges, one of which alleged religious discrimination in a New York office due to the policy prohibiting facial hair on employees in “public contact” positions, and the second of which alleged a pattern and practice of refusing to accommodate the religious beliefs of employees that was filed in Dallas. The EEOC requested nationwide data regarding the employer’s appearance guidelines. The employer objected to the request, explaining that such
information was not retained in any central location. Although the district court denied the EEOC’s petition to enforce its subpoena, the Second Circuit reversed. In reaching its decision, the court opined that courts have an “extremely limited” role in subpoena enforcement actions. It focused on the fact that the appearance guidelines applied nationwide and the employer had limited exceptions to the policy that resulted in those who did not comply being prohibited from working in public contact positions. According to the court, at the investigatory stage the EEOC is not required to show that there is probable cause to believe that discrimination occurred or to produce evidence to establish a prima facie case of discrimination.


In this case, the court enforced a subpoena seeking nationwide testing data based on its opinion that an employer’s nationwide use of a practice under investigation supports a subpoena for nationwide data on that practice. However, the court denied enforcement of a subpoena as it pertained to the EEOC’s request for race-related information during its investigation of an ADA charge. This case is noteworthy because the initial charge involved an employer who used a test created by Kronos, a testing consultant. The EEOC also subpoenaed data from this third party. Kronos filed a petition to revoke the subpoena on relevance grounds, arguing that the data was not relevant to the charging party’s charge and that it contained confidential trade secret information that would not be adequately protected by the EEOC. In Kronos’ portion of the case, the Third Circuit concluded (a) there was no reason to limit the subpoena to positions in the charge because information relating to other positions might shed light on whether the assessment had an adverse impact on persons with disabilities; (b) the employer’s nationwide use of a practice under investigation supported a subpoena for nationwide data on that practice; (c) a broader time period was more appropriate dating back to the full duration of the time when the test was used by the employer since it might provide a valuable context assisting the EEOC to determine whether there was a violation; and (d) requesting information relating to the use of the Kronos test by other employers might shed light on the charge. Although the Third Circuit reversed the district court’s confidentiality order that protected certain information provided by Kronos from disclosure under the Freedom of Information Act, on remand the district court applied the required balancing test and held that the factors weighed in favor of the confidentiality order not only due to the privacy interests of potentially millions of individuals, but that the information might cause those
individuals embarrassment, was not critical to public health or safety, and neither Kronos nor the job applicants were public entities or public officials. The district court also noted that a very compelling factor in favor of the confidentiality order was the protection of Kronos’ trade secrets and proprietary information. In a related decision, the court considered the significant costs that would be incurred by Kronos (who was a third party) and reviewed the case law on this issue; it ultimately decided that cost shifting/cost sharing principles militated that the EEOC and Kronos should split the compliance costs 50/50.


The EEOC belatedly tried to expand a national origin investigation to address a disability claim against the employer. Two years after the original charge was filed, an amended charge was filed adding a disability claim. The EEOC then reopened its investigation and requested company-wide information for all placements made by all of the employer’s 375 branches nationwide for over five years. The court denied enforcement of the subpoena for the disability information. In this case, the employer argued that the EEOC did not have jurisdiction over the disability claim in addition to arguing that the information being sought was irrelevant and overly burdensome. The court cited *Shell Oil* for the premise that a valid charge of discrimination is a jurisdictional prerequisite to judicial enforcement of a subpoena by the EEOC, and because it rejected the EEOC’s argument that the disability claim “related back” to the original claim, the disability claim was untimely and therefore the EEOC lacked jurisdiction to enforce the subpoena.


The court denied enforcement of the EEOC’s subpoena as it pertained to the EEOC’s request for the sex of an employee, “union code,” union identification number, and union eligibility date during its investigation of a national origin Commissioner’s charge. In a related proceeding, involving alleged national origin discrimination in wages and promotions, the employer argued that the EEOC subpoena requesting its entire employee database coincided with the timing of a denial of such data in a private class action against the employer. The employer challenged the subpoena on “improper purpose” grounds claiming that it was issued for the purpose of giving the information to plaintiffs’ counsel in the private litigation and was therefore an abuse of process. In reviewing the timing and information sharing evidence, the district court found that the employer made the requisite showing of abuse of process to justify limited discovery. After limited
discovery was completed, the EEOC filed a renewed application for an order to show cause as to why the court should not enforce its subpoena. This time, the employer’s main argument was that the EEOC’s motive in issuing the subpoena and in some regards in filing a Commissioner’s Charge, was the EEOC’s desire to assist the “struggling” private litigation. The employer submitted the same evidence as it had initially, even though its post-discovery burden of proof was higher. It didn’t have any specific proof of a direct causal relationship between the Commissioner’s Charge and the private litigation, or substantial evidence that the EEOC acted in bad faith. The court observed that the EEOC was being aggressive and had a process that was not always fully transparent and actions that were not always timely; it nevertheless held that the employer could not get beyond the initial “preliminary and substantial demonstration of abuse” to prove “an abuse of process of lack of institutional good faith.”

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

The court refused to enforce the EEOC’s subpoena seeking gender-related information in an investigation involving a race discrimination charge. This case is frequently cited to challenge the EEOC’s expansion of an investigation to cover other kinds of discrimination.


The EEOC brought an enforcement action seeking information involving sex, race and disability although the underlying claim only alleged national origin discrimination. The court enforced the subpoena without addressing contrary precedent, commenting that courts have consistently enforced subpoenas seeking information on different types of discrimination where only one basis has been included in the charge.

- EEOC v. Concentra Health Services, Case No. 1:11-me-00039, Docket No. 1 (S.D. Ind., filed Apr. 6, 2011)

In this case, the EEOC successfully argued that HIPAA did not preclude disclosure of various medical records for those who were determined not to be medically cleared for employment.

The EEOC’s investigation arose from fourteen charges of alleged preferential treatment toward younger women, quid pro quo harassment and sexual assault. The investigation included an on-site visit and interview of a supervisor who was one of the alleged harassers. The initial discovery dispute involved the company’s attorney not permitting the supervisor to respond to questions regarding female employees who were not named in the charge, and a direction not to answer questions regarding the supervisor’s alleged relationships with female employees other than the charging party. The company attorney invoked the supervisor’s privacy rights. The EEOC then served a subpoena requiring the supervisor to appear at the EEOC’s office and respond to inquiries regarding the supervisor’s sexual activity with current and/or former employees. The company attorney requested an advance copy of the interview questions to determine if they invaded the supervisor’s privacy rights. In the later enforcement action, a magistrate judge ruled that the employer and its attorney had impeded the EEOC’s investigation, ordered the supervisor to appear, and barred the company’s human resources or legal counsel from intimidating any witness who was cooperating with the EEOC. In connection with a motion for reconsideration, the district court cited precedent for the “extremely limited” role of the court and identified the critical questions as (a) whether the EEOC had the authority to investigate, (b) whether procedural requirements were followed, and (c) whether the evidence was relevant and material to the investigation. According to the court, if these factors were demonstrated, the subpoena should be enforced unless the objecting party proved that the inquiry was unreasonable because it was overbroad or unduly burdensome. Using this standard, the district court concluded that it was appropriate for the EEOC to ask the supervisor about his sexual relationships with current and former employees to determine whether the supervisor engaged in a pattern or practice of sexual harassment. The court also denied the employer’s claim that it should receive the questions in advance.


The employer in this case challenged a subpoena on the ground that the EEOC was using its investigative process and its subpoena powers in an individual charge of discrimination to get documents and information that it had failed to obtain in a pending EEOC nationwide pattern or practice lawsuit against the same employer. Discovery had not yet commenced in the nationwide case nor had the parties yet exchanged initial disclosures. The employer argued that the subpoena enforcement action was an improper effort to conduct premature discovery and was therefore an abuse of process. The magistrate judge recommended that the subpoena be
enforced, based on the proposition that an employer’s nationwide use of a practice under investigation supported a subpoena for nationwide data on that practice. The employer then sought clarification of the scope of the subpoena, resulting in an order that the employer would formalize its prior representation that it did not have any documents (other than its Code of Conduct) that were responsive because it did not have a company policy prohibiting employees from discussing their pay.

C. The Difference Between 706 and 707 Claims

The EEOC can initiate a lawsuit against an employer under either section 706 or 707 of Title VII.

Section 706 gives the EEOC authority to sue on behalf of one or more persons aggrieved by an unlawful discrimination employment practice where the individual filed a charge with the EEOC within 300 days after the alleged act. This is the typical single-claimant case and most closely resembles a lawsuit filed by a single plaintiff.

Section 707 expressly gives the EEOC authority to file “pattern or practice” lawsuits in accordance with the procedures set forth in section 706. However, the EEOC has taken the position that the 300-day limit associated with section 706 does not apply when it seeks relief on behalf of a class of individuals in actions that are triggered by another individual’s timely charge.

Statutes of Limitations

A district court recently rejected the EEOC’s attempt to obtain relief for “class” claimants in pattern and practice suits brought by the EEOC under section 707 but who claimed to have been aggrieved more than 300 days before the filing of the administrative charge triggering the EEOC’s investigation. EEOC v. Kaplan Higher Educ. Corp., 790 F. Supp. 619 (N.D. Ohio 2011). In Kaplan, the court narrowed the “class” by barring as untimely those claimants who may have been affected more than 300 days before the charge that gave rise to the lawsuit. In essence, this applies the private party statute of limitations of section 706 to the EEOC’s ability to pursue a pattern or practice action under section 707.

Other courts have also found that the 300-day period should begin to run later, i.e., when the employer is first made aware of a broader EEOC investigation into possible pattern or practice violations. See, e.g., EEOC v. Freeman, 2011 U.S. Dist. LEXIS 8718 (D. Md. Jan. 31, 2011); EEOC v. Optical Cable Corp., 169 F. Supp.2d 539 (W.D. Va. 2001). Employers should be alert to any attempt by the EEOC to try to use the continuing violation theory to expand the time within which to bring a pattern or practice lawsuit, as well as cases requiring a timely filing. In particular, the Freeman decision applied the statute of limitations from section 706 in an employer-friendly way.
Exhaustion of Administrative Remedies

The district court in *EEOC v. Cintas*, 711 F. Supp.2d 782 (E.D. Mich. 2010), agreed with the employer that the EEOC had failed to exhaust administrative remedies on behalf of the named plaintiffs. The district court decision is currently on appeal to the 6th Circuit.

On February 22, 2012, the 8th Circuit, in the split decision in *EEOC v. CRST Van Expedited, Inc.*, held that the EEOC must satisfy its investigation and good faith conciliation requirements under Title VII for each purported class member before bringing suit to maintain a section 706 class action, as opposed to a pattern or practice action. The EEOC obviously strongly disagrees with this requirement, since it makes the EEOC do extensive work to develop class-wide evidence prior to bringing a class action. As a practical matter, while seen as a victory for employers, this decision may result in the EEOC pursuing more on-site investigations to develop class-type evidence and issue and enforce more and broader subpoenas.

Burdens of Proof

In a single-plaintiff/single-claimant claim, the courts use the analytical framework set forth in *McDonnell Douglas v. Green*, 422 U.S. 792 (1973) and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981). Under this framework, the plaintiff must present evidence to establish a prima facie case of discrimination; if the plaintiff does so, the defendant must articulate a legitimate, non-discriminatory reason for its action; if the defendant does so, the plaintiff must provide evidence that the articulated reason is a pretext for discrimination.

In a pattern or practice claim, the framework is the one set forth in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1997). Under this framework, the plaintiff/EEOC provides statistical evidence of over/underrepresentation in the context of the claim; if the plaintiff does so, the defendant can use the *McDonnell/Burdine* defense for pattern statistics and the defense for individual claims usually follows this defense framework; the plaintiff’s requirement for showing pretext is the same as under *McDonnell Douglass* and *Burdine* both as to the overall claim and the individual claims.

No Rule 23 Requirements

If the EEOC brings suit in its own name, class certification is not subject to Rule 23 certification procedures. In *General Telephone Company of the Northwest v. EEOC*, the Supreme Court upheld the EEOC’s authority to seek class-wide relief for victims of discrimination, without being restricted by the class action rules applicable to private litigants. The Court emphasized that when the EEOC files suit, it acts to vindicate the “overriding public interest in equal employment opportunity.” However, if the EEOC has already filed an
action on their behalf, individual employees cannot sue on their own behalf. 29 U.S.C. § 216(b)-(c).

The above principles have several consequences for employers facing EEOC litigation and their defense counsel.

First, due to the lack of any need to meet Rule 23 requirements, (a) numerosity, “similarly situated” and other factors used in class certification have no applicability; (b) the “class” can be – and often is - very small; (c) the “class” can be – and often is – not well-defined; (c) the EEOC typically does extensive and invasive discovery to determine the definition and scope of the “class”; and (d) there is no opportunity to decertify the class.

**EEOC Intervention in Individual and Class Cases**

The EEOC may either bring suit in its own name or intervene in a suit brought by a private plaintiff. If the EEOC intervenes in a case, it can easily turn a single-plaintiff case into a “class action,” albeit it one not subject to Rule 23.

Class actions can be filed under the Equal Pay Act, but they are subject to the FLSA class procedures that require each member to “opt in” by filing a written consent to be included in the action. 29 U.S.C. § 216(b).

Under both Title VII and the ADA, intervention is contingent on the EEOC’s certification that the case is of “general public importance.” Generally this means that the case directly affects a large number of aggrieved individuals, involves a discriminatory policy or practice requiring injunctive relief, or has potential for addressing significant legal issues.

Other factors relevant to intervention include:

1. The EEOC’s contribution to the success of the litigation. This is the most important secondary factor in the EEOC’s decision and can include personnel and financial resources, and it is of prime importance to defense counsel. EEOC intervention means that the resources of the federal government will be brought to bear against the employer.

2. Private counsel’s ability to litigate the case effectively without EEOC participation. This factor, while related to the factor above, can also include the attorney’s general competence as an attorney, related litigation experience, and financial resources. Even where private counsel is highly skilled and able to adequately fund the case, the EEOC may intervene if to do so significantly increases the likelihood of success in an important case, e.g., if the case is particularly large or complex, or if there is a need for injunctive relief beyond what is being sought by the private plaintiff(s). If the results of the private action are not likely to be affected by the EEOC’s participation, intervention becomes less likely.
3. Because it is in the EEOC’s interest for private attorneys to accept meritorious cases, the extent to which intervention in a particular case may encourage such private litigation (separate from the case at issue) is a factor in determining whether the EEOC will intervene.

4. Normally, intervention has to occur early in the case for the EEOC to play a significant role in the litigation. Thus, the timing of the intervention is a factor.

Prior to intervention, the EEOC also has an understanding with private counsel regarding the EEOC’s role, including personnel and financial commitments, litigation strategy, relief sought (including the value of the private plaintiff’s claims), and the EEOC’s nonconfidentiality policy on settlements. Where this understanding cannot be reached, the EEOC typically declines the opportunity to intervene, although it may participate as amicus curiae.

The EEOC’s intervention in a case can turn a relatively simple case into a class action.

II. BEST PRACTICES TO RESPOND TO INDIVIDUAL EEOC CHARGES AND AVOID SYSTEMIC LITIGATION

It should be clear by now that no employer, no matter how large or small, should underestimate what is at issue when an EEOC claim is filed. Even if filed as an individual charge, it risks expanding into a systemic investigation and charge, whether expanding to include a “class” of individuals at the same location, a “class” of individuals at all of the employer’s locations, or additional claims of different types of discrimination. This is because the EEOC has the authority and power to investigate any discrimination that is uncovered or suspected during an investigation, and the fact that the EEOC is increasingly using this authority to have a greater impact from its investigations and enforcement activities.

- Be familiar with the law and recent developments in order to better determine what arguments may be available and which to make in any given case

- At the position statement stage, be sure that the response is carefully drafted to avoid expanding the issues, and that it be drafted with the mindset that it will be used as “Exhibit A” in any further proceedings or litigation. Therefore, it must be complete, factually accurate, persuasive, and reflect the position that the employer is prepared to consistently take during a potentially lengthy and far-ranging civil case. Therefore, conducting a thorough investigation prior to drafting the position statement is more important than ever, and the importance of protecting the investigation in a manner that preserves available privileges (e.g., attorney-client privilege, trade secrets). It should clearly preserve the right to provide additional information, include a statement that it does not concede
the timeliness of any part of the charge and that it does not include all affirmative defenses. It is a good idea to include a statement that it is being submitted as a Compromise or Offer to Compromise under Federal Rule of Evidence 408.

- Where there is a possibility of an individual case morphing into a systemic case, consider resolving the individual case early. Although this does not legally limit the EEOC’s investigation or enforcement rights, it may result in the EEOC moving on to other cases. Of course, any settlement must include a no admission of liability provision.

- Attempt to negotiate reasonable limitations on EEOC discovery request. There are many ways to approach this, and no one size fits all cases. However, examples of objections include (a) objections to the extent the request seeks information or data that is protected by the attorney-client privilege or attorney work product doctrine or other available privileges, (b) objections that it is unduly burdensome or the expense outweighs the probative value of the information (particularly applicable where the request seeks the production, creation, and/or indexing of extensive electronically stored data), (c) the requested information is not relevant to the charge that was filed, nor is it reasonably calculated to lead to the discovery of admissible evidence in any proceeding related to the allegations in the charge, (d) the requested information relates to individuals who or issues that are not similar to the charging party or the allegations of the charge that was filed, (e) the request is not limited in time or scope (particularly if there is a statute of limitations issue), (f) it does not request information or data with sufficient particularity (coupled with the reservation of the right to supplement or amend in the event the EEOC clarifies what it is seeking and the clarification is different from the employer’s current interpretation of the request), (g) it seeks information of data in the custody and control of a third party, (h) it seeks information that is subject to employee privacy rights, trade secret or proprietary business information protection, or (i) any other reason making it overly broad and unduly burdensome. In other words, asserting any and all evidentiary objections that the employer would make if it were currently in the middle of a hotly contested civil lawsuit. While these and other appropriate objections can and should be made, an aggressive defense is likely to raise the level of scrutiny by the EEOC; therefore the employer should, at the same time, attempt to work in a conciliatory manner with the EEOC to narrow the scope of the request.

- As in an individual charge, the EEOC has broad subpoena power to require the production of documents, information, data, and even depositions or sworn
testimony. Any employer who receives a subpoena should quickly decide whether to file a Petition to Revoke or Modify the subpoena – the time limit for doing so is five (5) days from the receipt of the subpoena! Typically the EEOC rejects these petitions and will go to federal district court to enforce the subpoena. At this point, the employer should realize that it has a real fight on its hands, and one that could become expensive and have far-ranging implications. Once an enforcement action is filed, the case becomes public. Therefore, the employer needs to find a balance between providing information that is responsive to the charge that was actually filed, while deciding what and how to defend itself with respect to the other discovery that is sought. Furthermore, the employer should back up any objection regarding burdensomeness with specific facts and details (e.g., number of person-hours estimated as required to assemble the information, cost of assembling, etc.).

- Review the complaint and any discovery for compliance with statute of limitations
- Be careful when responding to discovery requests to minimize the likelihood the responses will open door to an expanded scope of investigation
- Require the EEOC to engage in its investigation and conciliation obligations prior to bring a civil claim
- Challenge the scope of EEOC discovery where appropriate
- Challenge civil actions on the ground that the EEOC has failed to include sufficient details in its complaint
- Document any deficiency or failure on the part of the EEOC to follow the law or its own internal procedures
- Preserve the right to challenge the EEOC, even if at a later time
- Consider requesting other interested organizations to file amicus briefs. There have been a number of cases, particularly at the circuit court level, in which organizations such as the Equal Employment Advisory Counsel, the Chamber of Commerce for the United States of America, the Society for Human Resource Management, the National Federation of Independent Business Small Business Legal Center, the National Association of Manufacturers, and similar employer-oriented organizations have filed such briefs, adding additional resources to an employer’s own legal defense team.
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EEOC’s Focus on Systemic Discrimination Litigation

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INTRODUCTION

Since its adoption of the Systemic Initiative in 2006, systemic discrimination litigation has become a key objective in the Equal Employment Opportunity Commission’s “(EEOC)” strategic plans. The Systemic Initiative focuses on identifying, investigating, and litigating cases involving a pattern or practice or policy of discrimination that has a broad impact on an industry, profession, company or geographic location. The number of systemic investigations and lawsuits has increased substantially. In fact, according to the EEOC’s Fiscal Year 2011 Performance and Accountability Report, the EEOC filed 261 lawsuits – an increase of 11 over the prior year – including 23 systemic litigation suits. Last year, the EEOC worked on 580 systemic investigations involving over 2,000 charges. See U.S. Equal Employment Opportunity Commission, Fiscal Year 2011 Performance and Accountability Report, available at http://www.eeoc.gov/eeoc/plan/upload/2011par.pdf (last visited Apr. 19, 2012)


BARRIERS TO EMPLOYMENT (BACKGROUND CHECKS, CREDIT CHECKS, PRE-EMPLOYMENT TESTING)

As part of the EEOC’s E-RACE (“Eradicating Racism and Colorism from Employment”) initiative, the agency has recently targeted specific facially neutral employment practices that it believes may violate Title VII’s by creating a disparate impact. The EEOC has identified an employer’s use of background checks, credit history scores and pre-employment testing as a few of the “21st Century Manifestations of Discrimination” that need to be addressed through “new strategies that will strengthen [the EEOC’s] enforcement of Title VII.” See U.S. Equal Employment Opportunity Commission, The E-RACE Initiative, available at http://www.eeoc.gov/eeoc/initiatives/e-race/ (last visited Apr. 19, 2012).

Although employers may use prescreening tests, credit history reports, criminal records and other mechanisms to select qualified candidates from its applicant pool, employers should exercise caution before implementing policies that the EEOC may view as violating anti-discrimination laws. The following sections contain brief summaries of relevant statutes, EEOC Guidance, and recently filed or settled pre-employment discrimination cases brought by the EEOC.

1. Title VII Disparate Impact Standards

Title VII of the Civil Rights Act of 1964 makes it “an unlawful employment practice for an employer” to “refuse to hire or to discharge any individuals, or otherwise to discriminate against any individual . . . because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a)(1). In 1991, Congress codified the disparate impact standard articulated in Griggs v. Duke Power Company, 401 U.S. 424 (1971) to also make it unlawful for
an employer “to limit, segregate, or classify its membership or applicants for membership, or to classify or fail to refuse to refer for employment any individual, in any way, which would deprive or tend to deprive any individual of employment opportunities . . . .” Id. § 2000e-2(c)(2).

Unlike disparate treatment claims, disparate impact claims do not require proof of intentional discrimination.

Courts apply a three-step test when they analyze alleged disparate impact under Title VII. First, a plaintiff must make a prima facie case that an employer uses a particular employment practice that causes a disparate impact on the basis of a prohibited factor, such as race or gender. 42 U.S.C. § 2000e-2(k)(1)(A)(i); Lewis v. City of Chicago, --- U.S. ---, 130 S. Ct. 2191 (2010); Ricci v. DeStefano, 557 U.S. 557, 129 S. Ct. 2658, 2672-73 (2009). If the plaintiff fails to make this showing, the case will be dismissed. See, e.g., Grant v. Metropolitan Gov’t of Nashville, 446 F. App’x 737, 742 (6th Cir. 2011); Aliotta v. Bair, 614 F.3d 556, 561 n. 4 (D.C. Cir. 2010). If, however, the plaintiff establishes a prima facie case, the case proceeds to the second stage of the analysis: whether the employment practice “is job related for the position in question and consistent with business necessity.” 42 U.S.C. § 2000e-2(k)(1)(A)(i). If the employer carries that burden, the analysis addresses a third and final question: whether the employer refused to adopt an available alternative employment practice that has a less disparate impact and serves the employer’s legitimate needs. 42 U.S.C. § 2000e-2(k)(1)(A)(ii) & (C); see generally Ricci, 129 S. Ct. at 2673; Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 997-98 (1988).

2. Background Checks
   a. EEOC’s Guidance on the Use of Criminal Background Checks

   Federal law does not specifically prohibit employers from accessing or using an applicant’s criminal history during the hiring process. However, for decades, the EEOC has stated that Title VII of the Civil Rights Act of 1964 (“Title VII”) limits the consideration of criminal background information to the extent that such consideration has a discriminatory effect, or disparate impact, on protected classes, including African Americans, Hispanics, and men.

   In 1987, the EEOC issued a guide to employers, setting forth a three-part test for determining when the use of criminal background information to deny employment is properly based on business necessity.: (1) the nature and gravity of the offense or offenses; (2) the time that has passed since the conviction and/or completion of the sentence; and (3) the nature of the job held or sought (the three factors identified by the court in Green v. Missouri Pacific Railroad, 549 F.2d 1158 (8th Cir. 1977) and referred to as the “Green Factors.”

   Further, the EEOC imposed additional restrictions on the use of arrest information because, unlike convictions, the EEOC did not consider arrests alone to be reliable evidence that an individual engaged in unlawful conduct. Therefore, in order to establish a business necessity to rely on arrest records, an employer had to not only consider the three factors listed above, but also conduct an evaluation of whether the applicant engaged in the misconduct alleged in the arrest record.

   In recent years, the EEOC has increased its focus on employer use of criminal history information. In July 2011, the full Commission held a public meeting to examine "employment
barriers faced by individuals with arrest and conviction records." During the meeting, the EEOC Chair Jacqueline Berrien stated that the use of criminal records in hiring decisions is a "long-standing concern" of the EEOC, and noted that the EEOC was considering amending or revising its guidance on the issue because "when reentry fails, public safety, our economy, the future of families, and the community as a whole are placed at risk."

On April 25, 2012, the Commission voted four to one to enact new enforcement guidance on the use of criminal information by employers. While the EEOC’s new guidance is not binding on the courts, the guidance reflects the approach the Commission will be taking in investigating and/or deciding whether to litigate the allegations of a charge.

As an initial matter, the new guidance briefly touches on disparate treatment claims, explaining that an employer may violate Title VII if it treats similarly situated individuals with criminal records differently based on race, national origin, religion or another protected class. This guidance is generally consistent with the EEOC’s previous position on disparate treatment claims.

The primary focus of the EEOC’s new guidance is on the potential disparate impact associated with employers’ use of criminal background information in hiring and the employers’ burden of proving that its use of such information is job related and consistent with business necessity. This new guidance is not simply a reiteration of the EEOC’s prior policy. Instead, it imposes additional duties on employers using criminal convictions in the hiring process.

First, in discussing how disparate impact will be determined, the Commission points to national conviction rates which show that Africans Americans and Caucasians are convicted at rates disproportionate to their representation in the population. The Commission suggests that, during an investigation, the employer may show that its use of conviction records does not have a disparate impact either by showing that the convictions in its geographic region do not have the same disproportionate impact or by using its own applicant data to show that there is no adverse impact.

The new guidance then sets out two methods for employers to establish that the use of criminal background information in hiring is “job related and consistent with business necessity.” First, employers can formally validate the relationship between the criminal conduct and the duties of the particular position at issue using the EEOC’s Uniform Guidelines on Employee Selection Procedures. However, as the EEOC itself recognized, “social science studies that assess whether convictions are linked to future behaviors, traits, or conduct with workplace ramifications, and thereby provide a framework for validating some employment exclusions, such studies are rare at the time of this drafting.”

Second, assuming the employer is unable to validate the relationship between the criminal conduct and its job, it can use targeted exclusions that are guided by the Green Factors. According to the EEOC, targeted exclusions are those “tailored to the rationale for their adoption, in light of the particular criminal conduct and jobs involved, taking into consideration fact-based evidence, legal requirements, and/or relevant and available studies.”
However, even if the employer uses the “targeted screen” approach to establish job relatedness and business necessity, the EEOC suggests that it should also conduct an individualized assessment of each person screened out by his or her criminal background information. As an example of the individualized assessment, the EEOC states that applicant could be given the opportunity to explain why he or she should not be denied a position due to the criminal information obtained by the employer. The EEOC specified the following factors that employers should assess when making the individualized inquiry into an individual with a criminal history:

- The facts or circumstances surrounding the offense or conduct;
- The number of offenses for which the individual was convicted;
- Older age at the time of conviction, or release from prison;
- Evidence that the individual performed the same type of work, post-conviction, with the same or a different employer, with no known incidents of criminal conduct;
- The length and consistency of employment history before and after the offense or conduct;
- Rehabilitation efforts, e.g., education/training;
- Employment or character references and any other information regarding fitness for the particular position; and
- Whether the individual is bonded under a federal, state, or local bonding program.

Further, the EEOC explained that even if the employer is able to establish job relatedness and business necessity, that is not the end of the analysis. A plaintiff can still prevail in a disparate impact claim against the employer if he or she is able to show that the employer refused to adopt a less discriminatory “alternative employment practice” that “serves the employer’s legitimate goals as effectively as the challenged practice.”

With respect to arrest records, the EEOC noted that such records alone should not form the basis of an employment decision. However, the employer may make employment decisions based on an individual’s underlying conduct associated with the arrest. Although the guidance does not specifically address whether employers should engage in an independent inquiry into the conduct associated with arrest, such an inquiry is contemplated in the examples provided by the EEOC and was required by previous EEOC guidance.

Finally, the new guidance recognizes that some employers are subject to federal statutory and/or regulatory requirements that prohibit them from hiring individuals with criminal records in certain positions. The EEOC indicated that their new guidance does not preempt such other federal guidelines, but employers may be subject to a claim under Title VII if they scrutinize individuals to a higher degree than required under applicable federal requirements.
b. Recent Investigations, Settlements and Criminal Background Check Discrimination Cases

   i. Pepsi Beverages

On January 11, 2012, the EEOC announced a settlement with Pepsi Beverages (“Pepsi”), to pay $3.13 million to resolve a charge of race discrimination filed in the Minneapolis area office of the EEOC. At the time of its investigation, Pepsi maintained a policy of barring applicants who had been arrested, but not convicted of a crime, and also denied employment to others who were convicted of minor offenses. Based on the EEOC’s investigation, Pepsi’s criminal background policy disproportionately excluded more than 300 African-American applicants from being hired. The settlement also required Pepsi to provide job offers and training to the individuals denied employment because of their criminal record history. Press Release, U.S. Equal Employment Opportunity Commission, Pepsi to Pay $3.13 Million and Made Major Policy Changes to Resolve EEOC Finding of Nationwide Hiring Discrimination Against African Americans (Jan. 11, 2012), available at http://www1.eeoc.gov/eeoc/newsroom/release/1-11-12a.cfm (last visited Apr. 19, 2012).

   ii. EEOC v. Peoplemark, Inc.

The Western District of Michigan recently dismissed the EEOC’s case against Peoplemark, Inc. and sanctioned the EEOC for continuing to litigate after it learned that Peoplemark did not categorically refuse to hire individuals with criminal records. EEOC v. Peoplemark, Inc., No. 1:08-cv-907, 2011 WL 1707281 (W.D. Mich. Mar. 31, 2011). The EEOC’s complaint originally stemmed from a charge filed by an African-American woman with prior felony convictions for larceny and housebreaking, after Peoplemark refused to hire her. Following a three-year investigation of the company during which it obtained over 18,000 pages of documents, the EEOC filed a complaint alleging that Peoplemark maintained a policy “which denied the hiring or employment of any person with a criminal record.” Id. at *1 (emphasis omitted). The district court dismissed the complaint as one that “turned out to be without foundation from the beginning.” Id. at *3. The court further sanctioned the EEOC for continuing to litigate the case even after it became aware that Peoplemark did not maintain a blanket policy of refusing to hire any applicant with a criminal record. The court ultimately compensated Peoplemark for over $750,000 in attorneys’ fees and costs.

   iii. EEOC v. Freeman

In EEOC v. Freeman, an African-American applicant filed a charge of discrimination alleging that Freeman discriminated against him in violation of Title VII when it used credit history reports in its hiring process. After investigating the charge, the EEOC subsequently expanded its investigation to include Freeman’s use of criminal history information in its hiring process. The EEOC subsequently filed a suit alleging that Freeman engaged in a nationwide pattern or practice of discriminating against African-American, Hispanic and male job applicants in violation of federal anti-discrimination laws. The court granted Freeman’s motion to dismiss all claims related to Freeman’s hiring decision made before March 2007. EEOC v. Freeman, No. RWT 09cv2573, 2010 WL 1728847 (D. Md. Apr. 27, 2010). The court subsequently granted Freeman’s motion for partial summary judgment to dismiss all claims asserted in the complaint

iv. *Subpoena Enforcement*

The EEOC has been successful in using its subpoena power to investigate employers’ use of criminal convictions in making hiring decisions. For example, the Seventh Circuit reversed the lower court in *EEOC v. Watkins Motor Lines, Inc.*, 553 F.3d 593 (7th Cir. 2009), holding that the EEOC had the authority to issue a subpoena for records pertaining to its policy of not hiring applicants who had been convicted of a violent crime. See also *EEOC v. Aaron’s, Inc.*, 779 F. Supp. 2d 754 (N.D. Ill. 2011) (holding that the EEOC was entitled to information pertaining to an employer’s criminal background policy in its investigation to determine whether the policy had a disparate impact on African American applicants); *EEOC v. Sears, Roebuck & Co.*, No. 10-cv-00288-WDM-KMT, 2010 WL 2692169 (D. Colo. June 8, 2010) (enforcing a subpoena for information about the application of the employer’s arrest/conviction policy from a ten-store district area).

3. **Credit History**

a. **The Fair Credit Reporting Act**

The Fair Credit Reporting Act (“FCRA”), 15 U.S.C. §§ 1681, *et seq.*, authorizes employers to obtain a consumer report from a consumer reporting agency for employment purposes such as evaluating an individual for employment, promotion, reassignment or retention. The FCRA defines “consumer report” broadly to include any written, oral or other communication of any information by a consumer reporting agency including credit history and criminal background checks. See 15 U.S.C.A. § 1681a(d).

The FCRA requires that the employer provide written notice that such a report may be obtained for employment purposes. If the information is used in any adverse employment action, employers must provide another written notice upon taking the adverse action, provide the contact information for the consumer reporting agency, explain that the agency played no role in the employment decision, give notice of the right to obtain a free copy of the report within 60 days. 15 U.S.C. § 1681m(a).

b. **Recent Investigations, Settlements and Credit Background Check Discrimination Cases**

i. *EEOC v. Kaplan Higher Education Corporation*

case stemmed from a charge filed by an African-American woman alleging that Kaplan hired her and then terminated after because of the results of a credit history check. The EEOC alleged in its complaint that Kaplan had been engaging in unlawful employment practices since at least 2008 by specifically using credit history information as selection criterion in hiring and discharge. Although the parties remain in a discovery dispute, Kaplan has been successful in having the court grant its partial motion to dismiss the EEOC’s complaint precluding the EEOC from making any challenges to employment decisions made more than 300 days prior to the filing of the charge. See EEOC v. Kaplan Higher Educ. Corp., 790 F. Supp. 2d 619 (N.D. Ohio 2011).

ii. EEOC v. Freeman

As discussed in detailed above, on October 1, 2009, the EEOC announced that it filed a lawsuit against Freeman, alleging that it had engaged in a pattern or practice of unlawful discrimination by refusing to hire a class of African American, Hispanic and male job applications nationwide based on their credit history and/or criminal convictions. See Press Release, U.S. Equal Employment Opportunity Commission, EEOC Files Nationwide Hiring Discrimination Lawsuit Against Freeman (Oct. 1, 2009), available at http://www.eeoc.gov/eeoc/newsroom/release/10-1-09b.cfm (last visited Apr. 19, 2012).

iii. EEOC v. Von Maur, Inc.


4. Pre-Employment Testing

a. EEOC’s Guidance on Pre-Employment Testing

In 1978, the EEOC adopted the Uniform Guidelines on Employee Selection Procedures (“UGESP”), 29 C.F.R. Part 1607, to regulate employee tests and selection procedures under Title VII. The UGESP has identified three different “validation studies” that employers can use to show that their employment tests and other selection criteria are job-related and consistent with business necessity to defeat disparate impact claims. The three validation studies are: (1) content-validity; (2) criterion-related validity; and (3) construct validity. 29 C.F.R. §§ 1607.5; 1607.14. The UGESP provides detailed guidance about each method of test validation. The EEOC has referred to this guidelines to challenge employers’ hiring and selection procedures.
b. Recent Investigations, Settlements and Pre-Employment Testing Discrimination Cases

   i. EEOC v. Kronos, Inc.

   In *EEOC v. Kronos, Inc.*, the EEOC sought information pertaining to a personality test created by Kronos, a third party vendor, who provided the test to Kroger Food Stores (“Kroger”). No. 09-mc-0079, 2011 WL 1085677 (W.D. Pa. 2011 Mar. 21, 2011). Kroger became the target of an EEOC administrative investigation after using the personality test Kronos crafted to reject a hearing-and-speech impaired applicant from a position at the grocer. The purpose of the test was to “measure the human traits that underlie strong service orientation and interpersonal skills.” *Id.* at *2*. Kroger had rejected the applicant based in part on the results of the Kronos test, demonstrating that she was less likely to listen carefully, understand and remember. As a non-party to the EEOC investigation, Kronos objected to supplying the EEOC with the information pertaining to the personality test. The EEOC sought to enforce its subpoena against Kronos. On appeal, the Third Circuit permitted the EEOC to obtain the information it requested, but limited the request to a specific geographic scope. The case is currently still in the investigation stage.

   ii. EEOC v. Dial Corporation

   In *EEOC v. Dial Corp.*, 469 F.3d 735 (8th Cir. 2006), the Eighth Circuit affirmed the lower court’s determination that Dial Corporation, a meat packing corporation, was not entitled to judgment as a matter of law after a jury concluded that use of a pre-employment strength test had an unlawful disparate impact against women. In 2000, Dial implemented a new strength test requiring applicants to engage in repetitive heavy lifting of a 35-pound rod of sausage to a height of up to 65 inches. Less than 40% of women were able to successfully complete the strength test. The court noted that the statistical disparities were significant indicator of the employer engaging in a pattern or practice of discrimination. The court similarly rejected Dial’s arguments that use of the strength test was “criterion valid” simply because overall injuries and strength related injuries decreased after the test was implemented. *Id.* at 743.

   iii. EEOC v. Ford Motor Company

   In 2007, Ford Motor Company, along with two related companies and a national union, entered into a settlement with the EEOC to pay $1.6 million to a class of 700 African Americans to settle a race discrimination case filed by the EEOC. The EEOC charged that a written test used by Ford and others to determine whether hourly employees would be eligible for a skilled apprenticeship program disproportionately adversely impacted African-American employees. As part of the settlement, Ford also agreed to place 55 African-American employees on the apprenticeship list and to develop a new selection method for the apprenticeship program using an expert. Press Release, U.S. Equal Employment Opportunity Commission, *Ford Motor Co., Affiliates, UAW Agree to Pay $1.6 Million to Settle Class Racial Bias Lawsuit* (Dec. 20, 2007), available at http://www.eeoc.gov/eeoc/newsroom/release/12-20-07.cfm (last visited Apr. 19, 2012).
iv. **EEOC v. Great Lakes Chemical Corporation**

On July 12, 2011, the EEOC announced a settlement with Great Lakes Chemical Company, a global specialty chemicals company, in the amount of $80,000 following a lawsuit brought by the EEOC alleging race discrimination. The EEOC alleged that Great Lakes violated anti-discrimination laws when it terminated five African-American employees based on results of tests taken one month after they were hired. *See* Press Release, U.S. Equal Employment Opportunity Commission, *Great Lakes Chemical Corporation Settles EEOC Racial Discrimination Lawsuit* (July 12, 2011), *available at* http://www.eeoc.gov/eeoc/newsroom/release/7-12-11.cfm (last visited Apr. 19, 2012).

v. **Recent Subpoenas Issued for Selection Criteria Investigations**

As discussed in detail below, the EEOC also has recently issued a number of subpoenas to obtain information pertaining to employers’ use of tests and other criteria in their hiring or promotion policies. *See, e.g., EEOC v. Federal Express Corporation*, 558 F.3d 842 (9th Cir.), *cert. denied*, 130 S. Ct. 574 (Nov. 9, 2009) (requesting computer files on hiring, promotions and testing); *see also EEOC v. McLane Co., Inc.*, No. CV-12-615-PHX-GMS, 2012 WL 1132758 (D. Ariz. Apr. 4, 2012) (requesting information pertaining to employer’s use of a physical capacity exam).
EEOC’S FOCUS ON PREGNANCY AND CHILDCARE DISCRIMINATION


At least sixteen cases brought by EEOC in the last five years specifically involved allegations of pregnancy discrimination by two or more employees. The remainder of this section briefly summarizes the Pregnancy Discrimination Act and EEOC’s guidance on caregiver responsibilities, and several systemic pregnancy discrimination cases recently filed or settled by EEOC.¹

1. The Pregnancy Discrimination Act

Title VII prohibits discrimination “against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex . . . .” 42 U.S.C. § 2000e-2(a). The Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k), amends Title VII and provides as follows:

The terms “because of sex” or “on the basis of sex” include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of

¹ As of the date of this paper, there were no systemic caregiver discrimination cases filed by the EEOC in the last ten years.
benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work.”

2. **EEOC’s Guidance on Caregiver Responsibilities**


3. **Systemic Pregnancy Discrimination Cases**

   a. **CTI**

      On September 2, 2011, the EEOC obtained summary judgment against CTI Global Solutions for discrimination against two of its employees on the basis of pregnancy. CTI had removed the women from a project and clearly stated that it was due to their pregnancies. The EEOC failed to obtain summary judgment for a third woman, however, as the court found material issues of fact regarding the woman’s request for light duty and whether similar employees received light duty. *EEOC v. CTI Global Solutions, Inc.*, 815 F. Supp. 2d 897 (D. Md. 2011).

   b. **AA Enterprises**


   c. **Bloomberg**

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² In 2011, the EEOC issued an additional guidance on this issue in the form of best practices. See *Employer Best Practice for Workers with Caregiving Responsibilities*, http://www.eeoc.gov/policy/docs/caregiver-best-practices.html
On August 16, 2011, Bloomberg obtained summary judgment against the EEOC on claims that Bloomberg discriminated against pregnant women and women who had taken maternity leave. Bloomberg’s experts demonstrated that class members actually received more favorable pay than employees who took non-maternity leave. They also demonstrated that Bloomberg did not reduce the job responsibilities for class members any more than for employees who took non-maternity leave. *EEOC v. Bloomberg, L.P.*, 778 F. Supp. 2d 458 (S.D.N.Y. 2011).

d. Akal Security

On December 1, 2010, the EEOC announced the settlement of a pregnancy discrimination case against Akal Security. The EEOC claimed that Akal forced its pregnant employees, who were contract security guards on U.S. Army bases nationwide, to take leave and then discharged them because of their pregnancy. The EEOC also claimed that Akal prevented some pregnant women from completing annual agility and firearms tests and forced others to take those tests before their certifications had expired. Akal paid $1.6 million to twenty-six female security guards to settle the case. Press Release, U.S. Equal Employment Opportunity Commission, *Akal Security Pays $1.62 Million to Settle EEOC Class Pregnancy Discrimination Claims* (Dec. 1, 2010), available at http://www.eeoc.gov/eeoc/newsroom/release/12-1-10.cfm (last visited Apr. 19, 2012).

e. Southwest Dental Group

On September 21, 2010, the EEOC announced the settlement of a pregnancy discrimination lawsuit against Southwest Dental Group. The EEOC claimed that upper-level management routinely asked female job candidates during interviews whether they were married, were planning on becoming pregnant, or had children. Management also fired or demoted at least three female employees because of their pregnancies. The settlement required Southwest Dental Group to pay $130,000. Press Release, U.S. Equal Employment Opportunity Commission, *Southwest Dental Group Pays $ 130,000 to Settle EEOC Pregnancy Discrimination Suit* (Sept. 21, 2010), available at http://www.eeoc.gov/eeoc/newsroom/release/9-21-10b.cfm (last visited Apr. 19, 2012).

f. Greenforest-McCalep

On March 26, 2010, the EEOC announced the settlement of a pregnancy discrimination case against Greenforest-McCalep Christian Academic Center, a subsidiary of Greenforest Community Baptist Church. The school’s headmaster allegedly rescinded a prospective teacher’s offer upon learning that she was pregnant. Separately, the school’s director questioned a teacher about rumors that she was pregnant, and when she confirmed she was pregnant, the director informed her that “today is your last day.” The school agreed to pay the two women $53,000 to settle the case. Press Release, U.S. Equal Employment Opportunity Commission, *Baptist Church School to Pay $53,000 to Settle Two EEOC Pregnancy Discrimination Suits* (Mar. 26, 2010), available at http://www.eeoc.gov/eeoc/newsroom/release/3-26-10.cfm (last visited Apr. 19, 2012).

g. Imagine Schools
On March 18, 2010, the EEOC announced a settlement with Imagine Schools, a nationwide operator of charter schools. Imagine Schools had closed a middle school and opened a new school at the same location, but it refused to rehire two of its former employees. The EEOC alleged that the refusal to rehire stemmed from the employees’ pregnancies. The settlement required Imagine Schools to pay $570,000 in back pay, emotional distress damages, and attorneys’ fees. Press Release, U.S. Equal Employment Opportunity Commission, Imagine Schools to Pay $570,000 to Settle EEOC Pregnancy Discrimination Lawsuit (Mar. 18, 2010), available at http://www.eeoc.gov/eeoc/newsroom/release/3-18-10.cfm (last visited Apr. 19, 2012).

h. 99 Cents Supermarkets

On April 8, 2009, the EEOC announced the settlement of its sexual harassment, pregnancy discrimination, and retaliation suit against operators of grocery markets in Saipan. The EEOC charged, among other things, that the defendants failed to renew two cashiers’ employment contracts because they were pregnant. The settlement required the defendants to pay $80,000 in damages to six women. Press Release, U.S. Equal Employment Opportunity Commission, Saipan Supermarket Chain Settles EEOC Suit; Sex Harassment, Pregnancy Bias, Retaliation Alleged (Apr. 8, 2009), available at http://www.eeoc.gov/eeoc/newsroom/release/archive/4-8-09e.html (last visited Apr. 19, 2012).

i. Britthaven

On March 31, 2009, the EEOC announced a settlement with Britthaven, a nursing home and assisted living chain. The EEOC alleged that Britthaven compelled pregnant employees to obtain full medical clearances before they could continue working. This practice caused several women to take medical leave and be terminated – even though their pregnancies did not impede their job performance. The settlement required Britthaven to pay $300,000 in back pay and compensatory damages. Press Release, U.S. Equal Employment Opportunity Commission, Britthaven to Pay $300,000 to Settle Pregnancy Discrimination Suit (Mar. 31, 2009), available at http://www.eeoc.gov/eeoc/newsroom/release/archive/3-31-09a.html (last visited Apr. 19, 2012).

j. Catholic Healthcare West

On January 1, 2008, the EEOC obtained summary judgment against Catholic Healthcare West for a hospital policy that prohibited pregnant employees from performing certain procedures in a cardiac catheterization lab. The hospital transferred at least two pregnant employees out of the lab pursuant to the policy. The court found the policy facially discriminatory and held that any “good intentions” to protect fetuses did not make the policy legal. The court granted summary judgment to the EEOC on liability and remanded the question of whether to award punitive damages to the jury. EEOC v. Catholic Healthcare W., 530 F. Supp. 2d 1096, 1102 (C.D. Cal. 2008).

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On March 30, 2012, EEOC issued its final rule on the “reasonable factors other than age” defense under the Age Discrimination in Employment Act (“ADEA”). See 29 C.F.R. § 1625.7. The final rule reframes an employer’s duty in a way that focuses on how and why the employer decided to use non-age factors in employment decisions, instead of on the reasonableness of the non-age factors themselves. This is arguably a more difficult burden than was described by the Supreme Court and one that employers should be aware of if they become the target of an EEOC investigation or lawsuit.

1. **The Age Discrimination in Employment Act**

The ADEA prohibits employment discrimination based on age. See 29 U.S.C. §§ 621 to 634. Specifically, the ADEA makes it unlawful for employers, unions, and others:

1. to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age;

2. to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s age; or

3. to reduce the wage rate of any employee in order to comply with [the ADEA].

Id. § 623(a). The ADEA also contains protections against retaliation. Id. § 623(d).

2. **Disparate Treatment**

In a disparate treatment case brought under the ADEA, a plaintiff must prove that the alleged discrimination was intentional by showing that age was the reason for, or “but for” cause of, the employer’s adverse action(s). Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343, 2350-51 (2009); Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993). Factors such as years of service that merely correlate with age are “analytically distinct” from age, and do not “necessarily” prove age-based intent. Hazen Paper Co., 507 U.S. at 611. Also, unlike cases decided under Title VII, the employer does not have to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision. Gross, 129 S. Ct. at 2352.

3. **Disparate Impact**

Before the Supreme Court’s decision in Smith v. City of Jackson, 544 U.S. 228 (2005), the United States Courts of Appeals disagreed on whether the ADEA permitted claims based upon facially neutral employment practices that had a disparate impact on older employees. Id.
at 237 n.9 (describing Circuit split). *City of Jackson* resolved the issue and determined that the ADEA authorizes disparate impact claims. *Id.* at 243.

The Court in *City of Jackson* also held that the scope of disparate impact claims under the ADEA is “narrower” than that of claims brought under Title VII. *City of Jackson*, 544 U.S. at 240. A plaintiff must identify the specific employment practice responsible for any adverse impact on older workers. *Id.* at 241. If the plaintiff satisfies this burden, the disparate impact claim cannot survive if the employer shows that the employment practice is based on “reasonable factors other than age” (“RFOA”). *Id.* The employer’s minimal burden is to “produce evidence raising the [RFOA] defense” and “persuade the factfinder of its merit.” *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 87 (2008). “[I]f the adverse impact was attributable to a nonage factor that was ‘reasonable,’” the employer can avoid liability. *City of Jackson*, 544 U.S. at 239.

It has been difficult, but not impossible, for disparate impact plaintiffs to survive summary judgment in the wake of the *City of Jackson* and *Meacham* decisions. For example, in *Allen v. Highlands Hospital Corp.*, 545 F.3d 387, 404-05 (6th Cir. 2008), the court rejected the plaintiffs’ disparate impact claim because the plaintiffs only identified the defendant’s general desire to terminate the highest paid employees and did not provide statistics showing that the desire impacted older workers. Similarly, in *Jagla v. Harris Bank*, No. 05 C 5422, 2007 WL 433112, at *3-4 (N.D. Ill. Feb. 2, 2007), the court held that the plaintiff’s general allegation about the employer’s “purported preference for recent college graduates in entry-level positions” was not a specific employment practice. Also, in *Pippin v. Burlington Resources Oil & Gas Co.*, 440 F.3d 1186 (10th Cir. 2006), the court held that even if the plaintiff had established a prima facie case of age discrimination, the employer’s policies of terminating employees based on prior job performance and skill set, and honoring prior commitments to hire new employees just out of school, were reasonable.

In *EEOC v. Allstate Insurance Co.*, 458 F. Supp. 2d 980, 993-94 (E.D. Mo. 2006), aff’d, 528 F.3d 1042 (8th Cir. 2008), *reh’g en banc granted, opinion vacated* (Sept. 8, 2008), however, the court granted partial summary judgment in favor of the plaintiffs on their disparate impact claim because they showed that over 90% of employees terminated as part of the defendant’s reorganization were over forty. The *Allstate* court also held that the RFOA analysis was a jury question. 458 F. Supp. 2d at 994.

4. Regulations Regarding the RFOA Defense

In response to the *City of Jackson* and *Meacham* decisions, EEOC proposed a rule clarifying the scope of the RFOA defense. See Definition of “Reasonable Factors Other Than Age” Under the Age Discrimination in Employment Act, 75 Fed. Reg. 7212 (Feb. 18, 2010). The rule, which EEOC approved and adopted on March 30, 2012, with minor changes, imposes an obligation on employers to show that “the employment practice was both reasonably designed to further or achieve a legitimate business purpose and administered in a way that reasonably achieves that purpose in light of the particular facts and circumstances that were known, or should have been known, to the employer.” *Id.* See also 29 C.F.R. § 1625.7(e). The final rule also includes a non-exhaustive list of factors that are relevant to determining whether a particular employment practice is reasonable:
(1) the extent to which the factor is related to the employer’s stated business purpose;

(2) the extent to which the employer defined the factor accurately and applied the factor fairly and accurately, including the extent to which managers and supervisors were given guidance or training about how to apply the factor and avoid discrimination;

(3) the extent to which the employer limited supervisors’ discretion to assess employees subjectively, particularly where the criteria that the supervisors were asked to evaluate are known to be subject to negative age-based stereotypes;

(4) the extent to which the employer assessed the adverse impact of its employment practice on older workers; and

(5) the degree of the harm to individuals within the protected age group, in terms of both the extent of injury and the numbers of persons adversely affected, and the extent to which the employer took steps to reduce the harm, in light of the burden of undertaking such steps.

Again, these factors impose a much greater burden on employers to evaluate the reasons why they chose non-age factors, rather than focusing on the reasonableness of the non age-related factors.

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EEOC SUBPOENA POWER

Title VII of the Civil Rights Act of 1964 confers on EEOC the power to issue administrative subpoenas in furtherance of its investigations. 42 U.S.C. § 2000e-9; 29 U.S.C. § 161(1). The ability to issue such subpoenas is an important tool available to the EEOC as it focuses increasingly on claims and charges of systemic discrimination. The EEOC has used its subpoena power to seek nationwide employment data and information even in investigations of individual charges of discrimination. The following is a brief summary of some of the recent cases in which courts have addressed key issues regarding the scope of EEOC subpoenas and the process for opposing them.

1. Subpoena Enforcement After a Right-To-Sue Notice is Issued

Employers increasingly are finding themselves subject to EEOC investigations that continue after the original charging party has obtained a right-to-sue notice and filed his or her own lawsuit or settled his or her claims. While many employers resist such investigation efforts, EEOC may issue subpoenas to acquire this information. Furthermore, the courts of appeals have largely enforced EEOC’s subpoena power over employer objections.

a. EEOC v. Federal Express Corporation

In EEOC v. Federal Express Corp., 558 F.3d 842 (9th Cir.), cert. denied, 130 S. Ct. 574 (2009) (“FedEx”), the Ninth Circuit held that the EEOC’s subpoena power survives the issuance of a right-to-sue notice and the filing of a lawsuit by the charging party. The original charge was filed in 2004, by an African-American employee who alleged that a cognitive test FedEx used in making promotion decisions had a adverse impact against African-American and Latino employees. The EEOC later issued a right-to-sue notice, stating that it would continue to process the employee’s charge. Several months later, the EEOC issued an administrative subpoena to FedEx seeking information about the computer files it maintains. The EEOC rejected FedEx’s petition to revoke and filed an enforcement action in district court, which the court upheld. On appeal, the Ninth Circuit concluded that although the EEOC normally terminates the processing of a charge when it issues a right-to-sue, it can continue to investigate the allegations and this power to investigate includes the authority to subpoena information relevant to the charge.


In EEOC v. Watkins Motor Lines, Inc., 553 F.3d 593 (7th Cir. 2009), the charging party filed a complaint challenging the company’s refusal to hire him because of his criminal record. The company instituted a policy of not hiring anyone convicted of a violent crime after a series of serious workplace violence incidents. During its investigation, the EEOC issued a subpoena seeking information to determine whether the policy had a disparate impact on minority applicants and whether the policy was job-related and consistent with business necessity. The charging party and the employer settled during EEOC’s investigation. Although the settlement was conditioned on the EEOC abandoning its investigation, it nevertheless decided to press ahead with an investigation.

The Seventh Circuit held that “[o]nce [a charge] has been filed, the EEOC rather than the employee determines how the investigation proceeds.” Id. at 596. The Court further cautioned
against using settlement as way to curtail EEOC investigates because settling “allows litigants to achieve their settlement by injuring other, unrepresented persons.” Id. According to the court, “the Executive Branch rather than the Judicial Branch is entitled to decide where investigative resources should be devoted.” Id. at 598.

2. The Scope of an EEOC Subpoena

In opposing an EEOC subpoena, respondents frequently argue that the request is overly broad, unduly burdensome, or otherwise seeks information that is not relevant to the charge under investigation. However, with only limited exception, courts have rejected such arguments and have upheld EEOC administrative subpoenas, even when the subpoenas seek nationwide employment data in investigations of individual charges.

a. EEOC v. United Parcel Service, Inc.

In EEOC v. United Parcel Service, Inc., 587 F.3d 136 (2d Cir. 2009), the Second Circuit rejected an employer’s objections that an EEOC subpoena was overly broad and sought irrelevant information. In that case, UPS maintained a nationwide Uniform and Personal Appearance Guidelines policy, which prohibited employees in “public-contact positions” from wearing any facial hair below the lower lip. Id. at 137. UPS developed a religious accommodation policy that granted limited exceptions to this prohibition for religious beliefs. Two individual charges were subsequently filed by practicing Muslims alleging that the UPS’s policy was applied in a manner that violated Title VII for religious discrimination.

The EEOC sent an RFI to UPS seeking nationwide data about the application of the Appearance Guidelines. UPS objected arguing that the request was unduly burdensome. The Second Circuit reversed the lower court and held that the EEOC could enforce the petition as long as it could show that (1) the investigation would be conducted with a legitimate purpose, (2) the inquiry would be relevant to the purpose, (3) that the EEOC did not already have the information it sought, and (4) the administrative steps required were followed. Id. at 139. Applying those requirements, the Second Circuit enforced the subpoena taking into account the fact that the guidelines applied to all UPS facilities, the religious accommodations policy was implemented after the appearance policy was in place and neither of the charging parties were permitted to apply for an exemption.


In EEOC v. Konica Minolta Business Solutions U.S.A., Inc., 639 F.3d 366, 371 (7th Cir. 2011), the Seventh Circuit affirmed the lower court’s holding that Konica must comply with the EEOC’s subpoena requesting information about its hiring practices from all four of its Chicago-area facilities. The case stemmed from a charge filed by an African-American employee who was terminated from his position. The EEOC’s investigation revealed that Konica employed only six African-Americans out of 120 employees. The Seventh Circuit rejected Konica’s argument that information pertaining to its hiring practices at its other facilities were germane to the employee’s charge. Although the employee never alleged that Konica refused to hire him, the Court concluded that the EEOC was entitled to have evidence about “employment practices
other than those specifically charged.” Id. at 369 (citation & quotation marks omitted). The Court further noted that subpoena request was sufficiently tailored to the Chicago-based facilities.

c. **EEOC v. Schwan’s Home Service**

In *EEOC v. Schwan’s Home Service*, 644 F.3d 742 (8th Cir. 2011), the Eighth Circuit affirmed that the EEOC’s issuance of a second subpoena requesting information about the gender make up of Schwan’s general managers, the selection process for its General Manager Development Program (“GMDP”), and gender breakdown of successful GMDP graduates. In that case, a female employee who was not selected for a general manager position as Schwan’s filed a charge alleging that she was discriminated against based on her gender. After Schwan’s had partially complied with the EEOC’s initial subpoena, the employee filed an amended charge alleging that the company discriminated against female employees as a class. The EEOC thereafter served Schwan’s with another administrative subpoena.

Although Schwan’s argued on appeal that the second subpoena was invalid, and overly broad, the Eighth Circuit disagreed. On the issue of the amended charge’s validity, the court concluded, that Schwan’s argument was premature because timeliness should only be addressed if and when a lawsuit if filed. The court similarly found no problems with relevance and breadth of the subpoena because the original charge suggested potential systematic gender discrimination.

3. **Third Party Subpoenas**

a. **EEOC v. Kronos Inc.**

At least one circuit court has upheld administrative subpoenas seeking nationwide employer information from a third party. In *EEOC v. Kronos Inc.*, 620 F.3d 287 (3d Cir. 2010), the EEOC sought to enforce a third party subpoena that it issued to Kronos regarding an investigation into a discrimination charge against Kroger Food Stores (“Kroger”), after a hearing-and-speech impaired woman alleged that she was discriminated against when she was denied a position as a cashier, bagger, and stocker at a Kroger store in West Virginia.

In making its hiring decision, Kroger had relied in part on a Customer Service Assessment created by Kronos. The EEOC issued a subpoena to Kronos seeking validation studies, user manuals and instructions for any Kronos tests used by Kroger at any of its facilities nationwide and by other employers. The district court limited the subpoena in terms of time, employment positions, and geographic scope. On appeal, the Third Circuit emphasized that the EEOC has the “power to investigate ‘a broader picture of discrimination which unfolds in the course of a reasonable investigation . . . .’” Id. at 297 (citation omitted). The court concluded that the district court applied too restrictive a relevance standard and the EEOC was entitled to access the information it requested without any geographic limitations or limitations on time or job position.

b. **EEOC v. UPMC**

In *EEOC v. UPMC*, No. 11-2869, 2012 WL 1010856 (3d Cir. Mar. 27, 2012), the University of Pittsburgh Medical Center’s (“UPMC”) maintained a personal leave of absence policy that required employees on leave of absence to report to work on the day after the leave
expires. A nursing assistant who worked for the Heritage Shadyside (“Heritage”), a subsidiary of UPMC, was terminated after she failed to return to work for approximately three weeks after her leave expired. She filed a charge of discrimination alleging that her employer violated the American with Disabilities Act (“ADA”) because it discharged her without warning.

The EEOC requested that UPMC – not Heritage – identify all of its employees in the Pittsburgh region who had been terminated under the policy or other disability policies. Citing Kronos, the Third Circuit concluded that the information the EEOC requested would be crucial to supporting its case. The Court further warned that the EEOC should not be cabined by the specific allegations included in a charge if facts that support additional claims of discrimination are uncovered during the course of a reasonable investigation.

4. Limiting EEOC Subpoena Power

Although the EEOC’s investigatory powers have been broadly construed, these powers are not plenary and objections to EEOC subpoenas have been upheld in certain circumstances.

a. EEOC v. Burlington Northern Sante Fe Railroad

The Tenth Circuit in EEOC v. Burlington Northern Sante Fe Railroad, recently affirmed that the EEOC’s subpoena request was not relevant to the charges filed. 669 F.3d 1154 (10th Cir. 2012). Two individuals filed discrimination charges with the EEOC alleging that they were discriminated against based on a perceived disability after not being hired by BNSF after completing a medical screening procedure. Based on these two individual charges, the EEOC issued a subpoena requesting information about BNSF’s employees nationwide. The district court concluded that the EEOC’s request was pervasive and sought plenary discovery. The Tenth Circuit agreed, holding that the EEOC is only entitled to evidence that is “relevant to the charge[s] under investigation.” Id. at 1157. Where there was no reference in the original charges to any other additional charges, the subpoena was overly broad.

b. EEOC v. McLane Co., Inc.

In EEOC v. McLane Co., Inc., No. CV-12-615-PHX-GMS, 2012 WL 1132758 (D. Ariz. Apr. 4, 2012), the EEOC requested that McLane provide it with information on its physical capacity exam, how it was administered, and validation studies regarding the test. It also asked for the name, contact information, and social security numbers for every individual who had taken the test. The district court first concluded that because the EEOC may only investigate age discrimination under the ADEA, there was no basis for it to obtain the name and contact information for individuals under the age of 40. Second, because the names and contact information were not relevant to the EEOC’s underlying investigation of McLane’s use of a physical capacity test, McLane was not compelled to provide such information to the EEOC.

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EEOC’S DUTY TO CONCILIATE

EEOC’s systemic litigation program has recently come under fire for its handling of its duty to investigate and conciliate Title VII class claims. Specifically, several courts have questioned the agency’s methods of fulfilling its pre-suit obligations. These courts have found that EEOC may not file class action claims on behalf of persons EEOC never identified and investigated before it filed suit.

Not surprisingly, the EEOC disagrees with these court decisions and is pursuing appeals. The Commission claims that it can sue an employer first, and later use discovery to identify, investigate, and seek relief for previously unidentified individuals. If the trend reflected by recent cases continues, however, EEOC will have to reconsider how it investigates and litigates class claims. The following is a brief summary of the EEOC’s statutory duty to conciliate and selected cases that discuss what EEOC must do to satisfy this duty.

1. Sections 706 and 707 of Title VII of The Civil Rights Act of 1964


Section 706 also requires EEOC to satisfy certain procedural requirements before it can file a lawsuit. These procedures are mandatory and begin with a charge of discrimination, followed by prompt notice to the employer, an investigation, and a reasonable cause determination. Thereafter, if EEOC determines that there is reasonable cause to believe that the charge is true, the EEOC must endeavor to eliminate any alleged unlawful employment practices by informal methods of conference, conciliation, and persuasion. 42 U.S.C § 2000e-5(b).

Section 707 of Title VII authorizes EEOC to sue an employer if it determines that an employer is engaged in a “pattern or practice” of unlawful employment discrimination. 42 U.S.C. § 2000e-6(a). If EEOC prevails under Section 707, it can seek equitable relief, but cannot seek compensatory or punitive damages. 42 U.S.C. §§ 2000e-6(a), 1981a(a)(1).

2. EEOC’s Failure to Meet Its Pre-Suit Obligations

a. EEOC v. Dillard’s, Inc.

On July 14, 2011, the U.S. District Court for the Southern District of California dismissed EEOC’s nationwide class claim against Dillard’s after it found that EEOC did not tell the company before it filed suit that the company faced a nationwide class claim. EEOC v. Dillard’s, Inc., No. 08-CV-1780-JEG, 2011 WL 2784516 (S.D. Cal. July 14, 2011). The court found that EEOC made one inquiry about company policy and otherwise focused its investigation on Dillard’s El Centro store. During the conciliation process, EEOC did not seek or suggest a process for indentifying other aggrieved individuals, and it did not seek damages for a putative class. The court also found that the EEOC’s conciliation efforts focused on two individuals—the charging party and one other person—and that both of them worked at the El Centro store. EEOC’s lawsuit sought relief for the charging party, one other individual it identified pre-suit,
and an unspecified class of “other similarly-situated individuals.” Id. at *2. Dillard’s moved to dismiss on multiple grounds, including that EEOC improperly did not provide pre-suit notice of its nationwide class claim. The court dismissed EEOC’s nationwide class claim and limited EEOC’s case to Dillard’s El Centro store.

b. EEOC v. United Parcel Service, Inc.

On September 28, 2011, a federal court in Chicago dismissed EEOC’s Americans with Disabilities Act class claim against United Parcel Service (“UPS”) after it determined that EEOC failed to identify class members in its complaint. EEOC v. United Parcel Service, No. 09–cv–5291, 2011 WL 4538450 (N.D. Ill. Sept. 28, 2011). The court rejected EEOC’s assertion that it would be prejudiced by having to identify all class members because employers could “stonewall[]” during EEOC investigations, and noted that the ADA, like Title VII, “require[s] the EEOC to investigate and conciliate claims before it files suit.” Id. at *4. The court wrote that EEOC’s power to subpoena information and witnesses during investigations, “provides a strong antidote to the EEOC’s professed concerns about concealment of relevant information.” Id. As a result, EEOC “both can and should do better in presenting its class allegations” and “it would appear that the EEOC could have used its investigative power to learn considerably more about the putative class members and the basis for their claims even without the aid of formal discovery in this lawsuit.” Id. at *5.

After granting UPS’ motion to dismiss, the court gave EEOC “one final opportunity” to “cure” EEOC’s “pleading defects.” Id. EEOC subsequently failed to identify any more class members, and UPS again moved to dismiss EEOC’s class claim. UPS’ renewed motion to dismiss is pending.

c. EEOC v. CRST Van Expedited, Inc.

In EEOC v. CRST Van Expedited, Inc., No. 07-CV-95-LRR, 2009 WL 2524402 (N.D. Iowa Aug. 13, 2009), EEOC asserted sexual harassment claims for 67 women despite the fact that it did not engage in any pre-suit investigation of their claims and, instead, identified them during discovery. The district court dismissed EEOC’s class claim after it found that “the EEOC did not investigate, issue a reasonable cause determination or conciliate the claims of the 67 allegedly aggrieved persons.” Id. at *19. The court also ordered EEOC to pay CRST more than $4.5 million in costs and fees.

On February 22, a divided three-judge panel of the Eighth Circuit agreed with the district court and found that EEOC did not satisfy Title VII’s pre-suit requirements with respect to any of the 67 women. EEOC v. CRST Van Expedited, Inc., Nos. 09–3764, 09–3765, 10–1682, 2012 WL 555510, at *1 (8th Cir. Feb. 22, 2012). The court rejected EEOC’s argument that it needed only to investigate, issue a cause finding as to, and conciliate each type of discrimination alleged, rather than each instance of discrimination. The court agreed with the district court that EEOC “wholly abandoned its statutory duties” when it failed to identify, investigate, issue cause findings, and conciliate about the 67 allegedly aggrieved persons, and instead improperly engaged in “fact-gathering” about the class during discovery. Id. at *8. The court did reinstate EEOC’s claims on behalf of the charging party and one other class member, and as a result,
vacated the district court’s award of costs and fees “without prejudice.” *Id.* at *28. EEOC filed a petition for a rehearing on April 9, 2012.

d. **EEOC v. Cintas Corporation**

In *EEOC v. Cintas Corp.*, Nos. 04-40132, 06-12311, 2010 WL 3733978 (E.D. Mich. Sept. 20, 2010), *appeal docketed*, No. 10-2629 (6th Cir. Dec. 14, 2010), EEOC alleged that Cintas failed to hire women because of their sex. A district court judge dismissed EEOC’s case because EEOC “freely admit[ted] that it pursued no individual investigation [or] conciliation proceedings on the thirteen individuals involved in this § 706 action before it filed suit as an intervenor.” *Id.* at *9. Instead, EEOC used discovery to find the individuals, and in so doing, violated Title VII’s pre-suit requirements. *Id.*

EEOC appealed, and oral argument occurred on April 20. EEOC contends that the district court was wrong because EEOC “spent over two years actively investigating whether Cintas engaged in hiring discrimination . . . and spent well over two-and-a-half years vigorously engaging in conciliation on the claim that Cintas discriminated against a class of women.” *Id.* at 59. EEOC also contends that the district court cannot “dictate[] how the agency must investigate and conciliate,” and instead, the court should only have determined whether EEOC had attempted conciliation. *Id.* at 59.

3. **EEOC’s Satisfaction of Its Pre-Suit Duties**

While the recent trend appears to disfavor EEOC’s position, some courts have agreed with the Commission’s view of its pre-suit obligations. In *EEOC v. Keco Industries, Inc.*, 748 F.2d 1097, 1100 (6th Cir. 1984), for example, the Sixth Circuit reversed and remanded the district court’s award of summary judgment for Keco, holding that the district court erred when it “inquire[d] into the sufficiency of the Commission’s investigation . . . because the nature and extent of an EEOC investigation into a discrimination claim is a matter within the discretion of that agency,” and the “class-based claim is basically the same as [the charging party’s] claim; only the number of plaintiff’s has changed.” Similarly, in *EEOC v. Rhone-Poulenc, Inc.*, 876 F.2d 16, 17 (3d Cir. 1989), the Third Circuit affirmed the district court’s holding that the “EEOC is not required to provide documentation of individual attempts to conciliate on behalf of each potential claimant.” *Id.* (citation & quotation marks omitted). The Fourth Circuit in *EEOC v. American National Bank*, 652 F.2d 1176, 1185–86 (4th Cir. 1981), *reh’g denied*, 459 F.2d 923 (4th Cir. 1982), reversed the district court’s dismissal of EEOC’s claims as to bank branches that were not part of the Commission’s investigation, “because there was, through the EEOC’s investigation and attempted conciliation with regard to [one branch location], adequate notice to the defendant of the practices under investigation and ample opportunity for conciliation concerning those practices.” *Id.* at 1185.

*****
CONCILIATION AGREEMENT

IN THE MATTER OF:

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

and

Charge No. 340-2003-10938

Mr. Matthew Cusick
2917 Craiglawn Rd
Silver Spring, MD 20904

Charging Party

Cirque du Soleil (US), Inc.
980 Kelly Johnson Drive Ste 200
Las Vegas, NV 89119

Respondent

An investigation having been made under Title I of the Americans with Disabilities Act of 1990, by the United States Equal Employment Opportunity Commission (EEOC), and reasonable cause having been found under Title I, the parties do resolve and conciliate this matter as follows:
I. GENERAL PROVISIONS

1. This conciliation agreement fully and completely resolves all issues arising out of Charge #340-2003-10938 through the effective date of this agreement. The EEOC and the Charging Party will take no further legal action with respect to, and will not initiate any action pertaining to, the facts and events which led to the filing of the charge.

2. Nothing in this Agreement shall be construed to preclude EEOC and/or any aggrieved individual(s) from bringing suit to enforce this Agreement in the event that the Respondent fails to perform the promises and representations contained herein. Neither does it preclude the EEOC from filing charges in the future concerning events occurring after the execution of this conciliation agreement. The EEOC shall determine whether the Respondent has complied with the terms of this agreement. In the event that EEOC determines that the Respondent has not complied with the terms hereof, EEOC shall send written notice to the Respondent outlining in detail such non-compliance, following which the Respondent shall be given a reasonable time period to remedy such non-compliance.

3. The parties agree that this agreement may be specifically enforced in court and may be used as evidence in a subsequent proceeding in which any of the parties allege a breach of this agreement.

4. EEOC reserves all rights to proceed with respect to matters like and related to these matters but not covered in this Agreement and to secure relief on behalf of aggrieved persons not covered by the terms of this Agreement.

5. The Respondent agrees that it shall comply with all requirements of Title I of the Americans with Disabilities Act (ADA) of 1990, the Age Discrimination in Employment Act of 1967, as amended, Title VII of the Civil Rights Act of 1964, as amended, and the Equal Pay Act of 1963, as amended, as well as any other applicable laws or regulations of the jurisdiction in which Respondent conducts business.
6. The Parties agree that there shall be no discrimination or retaliation of any kind against any person because of opposition to any practice declared unlawful under the Title I of the ADA; or because of the filing of a charge; giving of testimony or assistance; or participation in any manner in any investigation, proceeding, or hearing under any statute administered by the EEOC.

7. This agreement constitutes the good faith, fair and equitable settlement of disputed claims. Respondent’s entry into and performance of the terms and conditions of this agreement is not and shall not in any way be construed as an admission by Respondent of any wrongful act, acts of discrimination, violations of any federal, state, or local law, or that any treatment of Charging Party or any other person was unwarranted, unjustified, discriminatory, or otherwise unlawful.

8. The Respondent agrees that EEOC may review compliance with this Agreement. As a part of such review, EEOC may require written reports regarding compliance, may inspect the Respondent's premises, interview witnesses, and examine and copy documents. EEOC agrees it shall provide Respondent with written notice of any requests for information and/or inspections and shall allow Respondent reasonable time to respond, which shall not be less than ten business days.

9. The effective date of this agreement is the date that the last signature is affixed to this agreement.

10. This agreement shall remain in full force and effect for two years subsequent to the date of its execution. If the Respondent has failed to meet any of the provisions in the agreement at the end of the two years, without having remedied such failure as provided in paragraph 2 of this section I, General Provisions, the duration of this agreement may be extended for a period to be agreed upon in writing between EEOC and the Respondent.

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Charge No. 340-2003-10938
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II. GENERAL RELIEF
1. Respondent agrees that it shall not engage in any employment practice that unlawfully discriminates against an applicant or employee based on disability, record of a disability, or perceived disability. Specifically, Respondent will not refuse to hire an applicant because of disability; discharge an employee because of disability; or subject an individual to different terms and conditions of employment because of disability.

2. Within seven days from the effective date of this agreement, Respondent will appoint an EEO Officer to oversee the implementation and fulfillment of this agreement.

3. Within ten days of the effective date of this agreement, Respondent agrees to issue a policy statement to all employees affirming its strong affirmation of anti-discrimination laws and its zero tolerance for employment discrimination. Specific reference will be made to Title I of the ADA which prohibits employment discrimination on the basis of disability and prohibits retaliation for opposing any form of employment discrimination for filing a complaint, testifying, assisting in or participating in any manner in an investigation, proceeding, or hearing regarding any form of employment discrimination.

4. Within thirty days of the effective date of this agreement, the Respondent agrees to produce a training schedule for the conducting of at least three hours of annual EEO training specific for its Supervisors and Managers and those individuals in the Human Resources departments. Such training shall be provided by an instructor who has specific experience and education in Human Resources and EEO laws. Supervisors and Managers will be advised that their failure to abide by the Respondent’s anti-discrimination policies and federal laws prohibiting such discrimination will result in their discipline up to and including discharge.

CONCILIATION AGREEMENT
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5. Within thirty days of the effective date of this agreement, Respondent shall begin providing at least two hours of EEO training to all employees. The training shall have an emphasis on the ADA law including the hiring of individuals with disabilities and the providing of reasonable accommodations in
compliance with the ADA and sensitivity training regarding working with individuals with disabilities with a special emphasis on HIV/AIDS. Company-wide EEO training shall be given annually to all employees.

6. Within thirty days of the effective date of this agreement, Respondent agrees to include EEO training as part of the new employee orientation for all new employees.

7. Throughout the effective date of this agreement, Respondent agrees to keep logs of the names, position titles, dates and times of attendance for all training attendees. Copies of the logs will be provided to the EEOC on a quarterly basis.

8. Within ten days of the effective date of this agreement, Respondent agrees to post: “Notice to Applicants and Employees” which is identified as Attachment “A” to this agreement.

9. Respondent agrees that full public disclosure may be made of the terms and conditions of this agreement by the parties hereto, provided that such parties conduct themselves in good faith in making such disclosure. The parties to this agreement may issue separate press releases after the last signature is affixed to this agreement.

10. Within thirty days of the effective date of this agreement, Respondent shall produce a copy of its policy in accordance with Title I of the ADA law, with a special emphasis on reasonable accommodation and hiring practices.

11. Throughout the term of the agreement, Respondent agrees to maintain applicant flow and hire data of all its positions.

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III. CHARGING PARTY RELIEF

1. Within ten days of the effective date of this agreement, Respondent agrees to pay the sum of $300,000.00 in compensatory damages to Charging Party. This payment by Respondent shall be reported on IRS form 1099 issued to
Charging Party, and Charging Party agrees that any and all tax liability resulting from said payment shall be solely Charging Party’s responsibility.

2. Within ten days of the effective date of this agreement, Respondent agrees to pay Charging Party the sum of $200,000.00, representing front pay for approximately five years. It is agreed that this sum to be paid by Respondent has been precipitated by Charging Party’s refusal to accept reinstatement in a performance role offered by Respondent. This payment by Respondent shall be reported on IRS form 1099 issued to Charging Party, and Charging Party agrees that any and all tax liability resulting from said payment shall be solely Charging Party’s responsibility.

3. Within ten days of the effective date of this agreement, Respondent agrees to pay Charging Party lost wages for the time period of 4/4/03 to 3/4/04, in the amount of $60,000.00, which includes $1,333.43 in interest, less normal payroll withholding. This payment by Respondent shall be reported on IRS form W-2 issued to Charging Party.

4. Within ten days of the effective date of this agreement, Respondent agrees to pay Charging Party’s Attorney fees in the amount of $40,000.00. This payment shall be reported by Respondent on IRS form 1099 issued to Charging Party’s Attorney.

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IV. REPORTING REQUIREMENTS

1. Within ten days of the effective date of this agreement, Respondent agrees to provide the Director of the EEOC’s Los Angeles District Office, Attention: DJ Lichten, Federal Investigator:
A. Confirmation of the payment of the Charging Party’s individual monetary relief and the payment of Attorney’s fees referenced herein.

B. Confirmation of the appointment of an EEO Officer.

C. Copy of the Non-Discrimination Policy Statement issued to all employees.

D. Confirmation of the posting of the “Notice to Applicants and Employees” referenced as Attachment “A” to this Agreement.

2. Within sixty days of the effective date of this agreement and on a quarterly basis thereafter, Respondent agrees to provide the Director of the EEOC’s Los Angeles District Office, Attention: DJ Lichten, Federal Investigator:

   A. All documents in the training sessions referred to in part II of the Agreement, including but not limited to, any training manuals or outlines used. Copies of training materials specific to training on HIV/AIDS shall be shared with Lambda Legal for review.

   B. Copies of the training attendance logs which will contain the attendees names, position titles, dates and times of attendance for all training attendees. Copies of the logs will be provided for the EEOC on a quarterly basis with a list of attendees.

   C. All documents and correspondence should be mailed to the Equal Employment Opportunity Commission, 255 E. Temple Street, Fourth Floor, Los Angeles, CA 90012, to the attention of DJ Lichten, Federal Investigator.

D. The data may be provided in summary form but the Respondent shall make available to the EEOC complete copies of all underlying documentation for review and inspection, upon request by the EEOC.
SIGNATURES

I have read the foregoing Conciliation Agreement and I accept and agree to the provisions contained therein:

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Date Cirque du Soleil (US), Inc.

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Date Matthew Cusick

Approved on Behalf of the Commission:

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Date Olophius E. Perry, Director
Los Angeles District Office
IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,  
Plaintiff,  
v.  
SUPervalu INC.,  
AMERICAN DRUG STORES LLC, and  
JEWEL FOOD STORES, INC.,  
Defendants.  

Case No. 09-cv-5637  
Judge: Ronald A. Guzman  
Magistrate Judge: Michael Mason

EEOC’S AGREED MOTION FOR APPROVAL OF CONSENT DECREES

Now comes the Plaintiff, United States Equal Employment Opportunity Commission, and hereby requests that this Honorable Court approve the parties’ proposed Consent Decree, attached as Exhibit A, resolving Case No. 09-cv-5637.

Respectfully submitted,

/s/ Ethan M. M. Cohen
Ethan M. M. Cohen  
Deborah Hamilton  
Trial Attorneys

Ethan M. M. Cohen  
A.R.D.C. #6206781  
United States Equal Employment Opportunity Commission  
500 W. Madison, #2000  
Chicago, IL 60661  
(312) 869-8104  
ethan.cohen@eeoc.gov
CERTIFICATE OF SERVICE

I, Deborah Hamilton, an attorney, hereby certify that on January 3, 2011, I caused a copy of the foregoing Agreed Motion for Entry of Consent Decree to be filed with all counsel of record through the Court’s electronic case management system.

Respectfully submitted,

s/ Deborah Hamilton
Deborah Hamilton
Trial Attorney

Deborah Hamilton
ARDC # 6269891
United States Equal Employment
Opportunity Commission
500 W. Madison, #2000
Chicago, IL 60661
(312) 869-8110
Deborah.hamilton@eeoc.gov
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

v.

SUPERVALU INC., AMERICAN DRUG STORES LLC, JEWEL FOOD STORES, INC.,

Defendants.

Case No. 1:09 CV 05637

Judge Ronald A. Guzman

CONSENT DECREES

Plaintiff Equal Employment Opportunity Commission ("EEOC") filed this action in 2009 alleging Defendants SUPERVALU INC., Jewel Food Stores, Inc. and American Drug Stores LLC have violated the Americans with Disabilities Act of 1990 ("ADA") since November 1, 2003 by:

a) Prohibiting disabled employees who were on Defendants’ one-year paid disability leave, or eligible for it, from returning to work unless they could return without any accommodation to full service and had no physical or mental restrictions, and terminating such employees at the end of the one-year leave period.

1 Defendants filed an Answer stating that the Charging Parties named in the Complaint were never employed by an entity called “Jewel-Osco,” but were instead employed by Jewel Food Stores, Inc. or its predecessors. Defendants also filed a Notification of Affiliates disclosing that Jewel Food Stores, Inc. is a wholly owned entity of Jewel Companies, Inc., which is a wholly owned entity of American Stores Company, LLC, which is a wholly-owned entity of New Albertson’s, Inc., which is a wholly owned entity of SUPERVALU INC. Accordingly, EEOC amended its complaint on January 3, 2011, such that SUPERVALU INC., American Drug Stores LLC, and Jewel Food Stores, Inc. are the named Defendants in this suit. SUPERVALU INC., solely in its capacity as the ultimate parent company of Jewel Food Stores, Inc. and American Drug Stores LLC, and Jewel Food Stores, Inc. and American Drug Stores LLC are hereinafter referred to in this Decree as “Jewel-Osco” or the “Company.”
b) Prohibiting disabled employees who were not injured on the job from participating in Defendant’s 90-day light duty program.  

The Complaint alleges that persons harmed by these practices include May Allen, Anthony Kwit, Thomas Riffle, Ann Stauffer, Elizabeth Vazquez, and a class of similarly situated employees. The Complaint also alleges that Anthony Kwit was harassed because of his disability. In response, the Company denies that they violated the ADA, discriminated against or harassed any employee, or failed to provide for reasonable accommodation of employees with disabilities. Nothing in this Decree shall be construed as an admission or denial of the claims or defenses in this case.

1. In the interest of resolving this matter, and as a result of having engaged in comprehensive settlement negotiations, the parties have agreed that this action should be finally resolved by entry of this Consent Decree (hereinafter “Decree”). This Decree fully and finally resolves any and all issues and claims arising out of the Complaint filed by EEOC in this action. No party admits the claims or defenses of the other.

2. This Decree shall apply to the following facilities in Illinois, Indiana, and Wisconsin: (a) each Jewel and Jewel-Osco store; and (b) the distribution center located at Melrose Park, Illinois, operated by or for the benefit of Jewel Food Stores, Inc. and/or American Drug Stores LLC. All employees at such locations shall be covered by this Decree.

3. As used below and where not otherwise specified, the term “disability leave” means a leave of absence due to the employee’s own “disability” as defined by the ADA, as amended, including when employees take such a leave in conjunction with a short term disability leave or a workers’ compensation leave.

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2 This Consent Decree does not address the Company’s Temporary Alternative Work program, nor does it require any change to this program.
FINDINGS

4. Having carefully examined the terms and provisions of this Decree, and based on the pleadings, record, and stipulations of the parties, the Court finds the following:

   a. This Court has jurisdiction of the subject matter of this action and of the parties.

   b. The terms of this Decree are adequate, fair, reasonable, equitable, and just. The rights of EEOC, May Allen, Anthony Kwit, Thomas Riffle, Ann Stauffer, Elizabeth Vazquez, the Eligible Claimants (as defined herein), and the public interest are adequately protected by this Decree.

   c. This Decree conforms with the Federal Rules of Civil Procedure and the ADA and is not in derogation of the rights or privileges of any person. The entry of this Decree will further the objectives of the ADA, and will be in the best interests of the parties, May Allen, Anthony Kwit, Thomas Riffle, Ann Stauffer, Elizabeth Vazquez, the Eligible Claimants (as defined herein), and the public.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED THAT:

INJUNCTION AGAINST DISABILITY DISCRIMINATION

5. The Company is hereby enjoined from discriminating on the basis of disability by not providing reasonable accommodation(s) to persons desiring to return to work from a disability leave.

INJUNCTION AGAINST RETALIATION

6. The Company shall not engage in any form of retaliation against any person because such person has opposed any practice as unlawful under the ADA, filed a Charge of Discrimination under the ADA, testified or participated in any manner in any investigation, proceeding, or hearing under the ADA, or asserted any rights under this Decree.
MONETARY RELIEF

7. Within twenty-one (21) days of the Approval of this Decree ("Approval Date" or "Entry of the Decree") by the District Court, the Company shall request and cooperate fully with the Claims Administrator to establish a Qualified Settlement Fund under §468(b) of the Internal Revenue Code ("QSF"), which will be funded by the Company in the principal amount of three million, two hundred thousand dollars ($3,200,000) for the purpose of providing individual monetary awards to Eligible Claimants, listed in Exhibit A ("Eligible Claimants"), who participate. The Claims Administrator shall have authority to issue checks from the account to Eligible Claimants. EEOC shall have the sole authority to determine the class of individuals who are Eligible Claimants and the amount to be paid to each Eligible Claimant in accord with procedure outlined in the following paragraphs regarding the claims procedure.

CLAIMS PROCEDURE

8. The Claims Administrator shall: (a) transmit notifications of monetary awards; (b) issue checks to Eligible Claimants from the QSF; (c) issue related tax documents; and (d) perform such other administrative tasks as directed to facilitate the claims process. All reasonable expenses, fees, and costs of the Claims Administrator shall be paid by the Company.

A. Identification of Eligible Claimants. Within seven (7) days of the Approval Date, EEOC shall transmit to the Claims Administrator and the Company’s counsel a computer-readable list containing the full names, social security numbers, and last known addresses for all of the Eligible Claimants. The Company may provide additional or more updated contact information if it determines that there is any inaccuracy in the information provided. The Company, however, will not challenge
the eligibility of the Eligible Claimants.

B. **Deceased Claimants.** Monetary awards may be paid on behalf of deceased Eligible Claimants through representatives of their estate or next of kin if appropriate documentation (e.g., letters testamentary or the equivalent) is provided. Any monetary awards paid to a deceased Eligible Claimant shall be made payable to the estate of the deceased Eligible Claimant.

C. **Determination of Monetary Awards.** Within one hundred twenty (120) days of the Approval Date, EEOC shall determine the amount of each monetary award for each Eligible Claimant. In making such determinations, EEOC may consider whatever evidence EEOC deems appropriate, including, but not limited to, evidence received by EEOC in its investigation of the charges of discrimination underlying this action and in connection with its litigation of this action.

D. **Factors Bearing on Allocation of Monetary Relief.** EEOC will determine the amount of each Eligible Claimant’s monetary award in its sole discretion based on the following factors: the extent to which the Eligible Claimant suffered from a physical or mental impairment that caused him or her to be substantially limited in a major life activity at the time of his or her termination; the extent to which the Eligible Claimant could have worked in any position during and subsequent to his or her disability leave of absence with or without a reasonable accommodation; whether the Eligible Claimant was offered the opportunity to return to work in a position that was consistent with the Eligible Claimant’s work restrictions during or subsequent to his or her disability leave of absence; whether the Eligible Claimant worked subsequent to his or her employment with the Company; whether the Eligible Claimant’s
termination occurred within three-hundred (300) days prior to the date of the filing of the charge that resulted in this litigation; whether the Eligible Claimant was a Charging Party; time or effort devoted to the litigation by the Eligible Claimant; damages incurred by the Eligible Claimant.

E. Allocation of Monetary Relief. EEOC shall be the sole determiner of the amount of monetary relief to be received by any Eligible Claimant under this Decree. The Company will not participate in or object to EEOC’s determinations.

F. Motion for Approval of Allocation of the QSF. Upon the determination of all monetary awards, EEOC shall file a motion with the District Court seeking approval of the allocation of the QSF which shall contain the name and proposed gross settlement amount for each Eligible Claimant. The Company shall not challenge the proposed settlement distribution list.

G. Notification of Awards. Within seven (7) days of the above Order, EEOC shall cause the Claims Administrator to notify each Eligible Claimant via U.S. First Class Mail of the amount of his/her monetary award.

H. Release of Claims. Along with the Notification of Award, the Claims Administrator shall mail to each Eligible Claimant a Release, a copy of which is attached hereto as Exhibit B. Each Eligible Claimant will be notified by letter that in order to receive monetary payments under this Decree, he/she must execute and deliver to the Claims Administrator the Release. The letter will inform each Eligible Claimant that such Release must be signed and mailed to the Claims Administrator so that it is actually received by the Claims Administrator within forty-five (45) days of the mailing of the Notification of Award. Any Eligible Claimant whose executed Release is not
actually received by the Claims Administrator within forty-five (45) days of its mailing shall be ineligible for and forever barred from receiving any relief under this Decree. The Claims Administrator shall provide all original signed Releases to the Company.

I. Distribution of the QSF. Within fourteen (14) days of the receipt of a Release signed by an Eligible Claimant, the Claims Administrator will mail a check to the Eligible Claimant in the amount indicated in the Notice of Award.

J. Tax Treatment of Monetary Awards. The monetary awards shall be allocated 100 percent to compensatory damages. An IRS Form 1099 shall be issued to each Eligible Claimant with regard to the monetary award. Each Claimant shall bear full responsibility for any tax implications resulting from receipt of the monetary award.

K. Undistributed Funds. In the event that checks are returned (or a Release is not timely submitted) and the QSF is not completely distributed for any reason within one hundred and twenty (120) days after the Order Approving the Allocation of the QSF, the remaining sum shall be handled in accordance with all relevant laws, including those regarding wages, as determined by the Claims Administrator. Any remaining sums will become part of a cy pres fund to be distributed to Thresholds.

POSTING OF NOTICE

9. Within thirty (30) days after the Approval Date, the Company shall post at all stores and facilities to which this Decree applies, as specified in Paragraph 2, letter-sized (approximately 8 1/2 x 11) same-sized copies of the Notice attached as Exhibit C to this Decree on bulletin boards or posting areas usually used for communicating with employees. The Notice shall remain posted for the duration of this Decree.
10. The Company shall take all reasonable steps to ensure that the posting is not altered, defaced, or covered by any other material. The Company shall certify to EEOC in writing within forty (40) days after the Approval Date that the Notice has been properly posted. A representative of EEOC will be permitted to enter their stores and facilities to which this Decree applies for purposes of verifying compliance with this Paragraph at any time during business hours so long as upon arrival he/she contacts a managerial employee, such as a Store Director or Assistant Store Director (or successor positions) so he/she will promptly be escorted into the relevant, non-public areas where the posting is located, by such managerial employee.

RECORDKEEPING

11. For the duration of this Decree, the Company shall maintain a record of their attempts to accommodate all employees who have been on a disability leave who have notified the Company they are released to return to work with restrictions or who have been out on a disability leave for more than 26 weeks. Such records shall include each employee’s name, address, and phone number; each employee’s job title and work location; a description of each employee’s limitations (including copies of any Reports of Attending Physician or doctor’s releases provided to the Company from its agents, third party benefits or leave administrators, or the employee during the employee’s disability leave); the date each employee’s leave began and ended; the employee’s termination date (if any); a description of any accommodations discussed with each employee and considered by the Company; information regarding whether each employee returned to work at the Company; and identification of the personnel who handled the accommodation or termination process for the employee.
12. Upon the EEOC’s request, the Company shall make all documents or records referred to in Paragraph 11, above, as well as a list of all positions which have been posted or filled during the employee’s period of leave at the Company’s location where an employee who has not been returned to work was last employed prior to going on disability leave, available for inspection and copying within ten (10) business days after EEOC so requests, or a reasonable time period if the volume of the request would make compliance within ten (10) business days a substantial hardship.

REPORTING

13. The Company shall furnish to EEOC written reports semi-annually for the duration of this Decree. The first report shall be due six (6) months following the Approval Date, and the reporting shall continue every six (6) months thereafter, though if the duration of this Decree is three (3) years, the final report shall be submitted sixty (60) days prior to the date set for termination of the Decree at the time that it is finally entered. In addition to having the records maintained and available for inspection pursuant to Paragraph 12, above, each such report shall contain the following information for each employee on disability leave who has been released to work with restrictions or who has been on a disability leave of absence which exceeds 26 weeks: the name, job title, a brief description of the status of the employee’s disability leave, a brief description of attempts to accommodate the employee (where applicable, i.e., when the employee is released to return to work with restrictions) including a description of the employee’s medical restrictions, and the last known contact information in the Company’s records for each employee. The first report shall pertain to all reportable events, as described above, occurring during the first five (5) months of the period of the Decree. Each subsequent report shall pertain to reportable events occurring during the
subsequent six month period; as such, each report will be due thirty (30) days after the time period on which it reports. If the duration of this Decree is three years, the final report shall detail events occurring during the time period of the twenty-ninth through thirty-fourth (29-34) month of the decree; thus, the final report shall pertain to a five (5) month period and be due sixty (60) days prior to the expected termination of the Decree. Each report need only contain reporting on events which occurred during the reporting period. However, if an issue arises in one reporting period and is resolved in a subsequent reporting period, that issue will be noted in both reports. If EEOC so requests, the parties shall meet within twenty-one (21) days of the submission of any report to discuss its contents. EEOC shall provide the Company with ten (10) days notice of its request for a meeting. The Company shall also provide a certification that the Notice required by Paragraph 9, above, has been properly posted for the six (6) month period preceding the report.

TRAINING

14. During each year of the duration of this Decree, all employees of the Medical Accommodations Administration Team shall be trained regarding (i) the duty to accommodate employees under the Americans with Disabilities Act; (ii) the Company’s procedures for providing accommodations to employees on a disability leave of absence; and (iii) the range of accommodations available in the Company’s stores and other facilities covered by the terms of this Decree. The first training shall take place within ninety (90) days of entry of this Decree. The trainer shall be an attorney from the law firm Morgan, Lewis & Bockius who is experienced in issues related to the Americans with Disabilities Act and the required training topics.

15. The Company shall certify to the EEOC in writing within five (5) business days after each
training has occurred that the training has taken place and that the required personnel have attended. Such certification shall include: (i) the date, location and duration of the training and (ii) a copy of an attendance list, which shall include the name and position of each person in attendance. The Company shall provide EEOC with copies of all training materials distributed to the participants upon request.

JOB DESCRIPTION CONSULTANT

16. Within thirty (30) days from the entry of this Decree, the Company will engage a consultant to assist it in reviewing and revising the Company’s job descriptions in order to ensure that the job descriptions do not contain unnecessarily strenuous physical demands (the “Job Description Consultant”). The Job Description Consultant has been chosen by the Company and shall be Scott Ege of Ege Worksmart Solutions, PC of Rockton, Illinois (“Ege”). Prior to the commencement of work by the Job Description Consultant, the EEOC and the Company shall separately meet with the Job Description Consultant within 14 days of the engagement to discuss the scope of his work as set forth in this Consent Decree.

17. The Job Description Consultant shall perform a physical job demand analysis of the non-managerial retail store jobs. The Job Description Consultant will provide the Company with a detailed assessment of the physical requirements of each job, including, but not limited to, lifting, bending, pushing, pulling, standing, and squatting requirements and the frequency with which the duties of the job require the performance of each physical requirement. Within one hundred fifty (150) days from the Entry of this Decree, the Job Description Consultant will complete his/her review of the Company’s job descriptions and issue a report to the Company and the EEOC (hereinafter referred to as the “Job Description Consultant’s Report”). This report will contain the physical job demand analyses for each job to ensure
that they are current and accurately reflect the actual physical demand requirements for each position, and do not include artificially strenuous physical requirements.

18. The Company shall make available to the Job Description Consultant any reasonably requested, relevant documents or information regarding the positions. The Company shall allow the Job Description Consultant reasonable access to stores requested by the Job Description Consultant and shall allow reasonable interviews of any employees requested by the Job Description Consultant. The Company shall respond within ten (10) business days of all such requests. If the Company asserts that any request of the Job Description Consultant is unreasonable or cannot be complied with, it shall, within fourteen (14) days of the request, meet and confer with the Job Description Consultant, either by phone or in person, in an attempt to resolve the dispute. If after so meeting and conferring, the Company continues to assert that any further or renewed request of the Job Description Consultant is unreasonable or cannot be complied with, it shall explain in writing to the EEOC, within ten (10) days of the meet and confer, the basis for its decision not to comply with the request (this shall be referred to as the “meet, confer and report process”). If the EEOC does not agree with the Company’s decision not comply with the request, the EEOC and the Company shall meet and confer in an attempt to work out any disagreements. The Job Description Consultant may be included, at any party’s request, in the meet and confer discussions. If no agreement is reached, the parties may seek relief from the Court pursuant to the dispute resolution procedure set forth in Paragraph 39.

19. Within fourteen (14) days of receiving the Job Description Consultant’s Report, the EEOC may raise, in writing to the Job Description Consultant and the Company, any objection that it has to the Job Description Report. If the EEOC does raise such an objection, it may
request that the Job Description Consultant provide it with copies of the documents, notes, and data upon which the report was based, and request that the Job Description Consultant shall provide these within seven (7) days of the EEOC’s request. Within seven (7) days of receiving the requested information or fourteen (14) days of the objection, whichever is later, the parties and the Job Description Consultant shall meet and confer either by phone or in person, in an attempt to resolve the dispute. If no agreement is reached regarding the objections, the parties may seek relief from the Court pursuant to the dispute resolution procedure set forth in Paragraph 39.

20. Within sixty (60) days of receiving the Job Description Consultant’s Report and the resolution of any objections by the EEOC related to the matters in paragraph 19, the Company shall implement the Job Description Consultant’s recommendations for the appropriate physical demand requirements for its retail store facilities unless they are inaccurate, unreasonable, or the Company otherwise determines that it will not implement all or part of the recommendations for the physical demand requirements, for good cause, provided, however, that the Company must provide an alternative that accurately depicts the physical demand requirements.

21. If the Company elects not to implement any of the Job Description Consultant’s recommendations on changing of physical demand requirements of the job descriptions, it shall engage in the “meet, confer and report process” as described in paragraph 18 above. Prior to the “meet, confer and report process” it may request that the Job Description Consultant provide it with copies of the documents, notes, and data upon which the report was based. If the EEOC does not agree with the Company’s decision not to implement a recommendation contained in the Job Description Consultant’s Report or does not agree with
the Company’s alternative recommendation, the EEOC and the Company shall meet and confer in an attempt to work out any disagreements. The Job Description Consultant may be included, at any party’s request, in the meet and confer discussions. If no agreement is reached, the parties may seek relief from the Court pursuant to the dispute resolution procedure set forth in Paragraph 39.

22. Any information obtained and/or in the possession of the Job Description Consultant due to the consulting work described above shall be used solely for the purposes of this Consent Decree.

**ACCOMMODATIONS CONSULTANT**

23. Within thirty (30) days from the entry of this Decree, the Company will engage an accommodations consultant to assist it in identifying possible accommodations to common physical limitations experienced by the Company’s employees employed in non-managerial retail store positions (the “Accommodations Consultant”). Within five (5) days from the Entry of the Decree (or prior to that if the EEOC chooses), the EEOC shall provide the Company with any additional names it wishes to add to the Consultant List, attached as Exhibit D. The EEOC also agrees to at a minimum consider names from the Company which it may choose to add to the list in Exhibit D. The Company shall choose the Accommodations Consultant from the list provided by the EEOC. Prior to the commencement of work by the Accommodations Consultant, the EEOC, and the Company shall separately meet with the Accommodations Consultant to discuss the scope of his/her work as set forth in this Consent Decree.

24. The Company shall make available to the Accommodations Consultant any reasonably requested, relevant documents or information regarding the positions, including the Job
Description Consultant’s Report. The Company shall allow the Accommodations Consultant reasonable access to stores requested by the Accommodations Consultant and shall allow reasonable interviews of any employees requested by the Accommodations Consultant. The Company shall respond within ten (10) business days of all such requests. If the Company asserts that any request of the Accommodations Consultant is unreasonable or cannot be complied with, it shall engage in the “meet, confer and report process” as set forth in paragraph 18 above.

25. Within one hundred eighty (180) days from the Entry of this Decree or sixty (60) days from the Job Description Consultant’s Report, whichever is later, the Accommodations Consultant will complete its review of the Company’s job descriptions, the Job Description Consultant’s Report, the Company’s facilities, its past history of accommodating employees, i.e., the accommodation chart dating back to 2008, which includes its past history of finding that it was unable to accommodate employees, and issue a report to the Company and the EEOC which will be a list of recommendations as to how common physical limitations may be accommodated in the relevant environment for each specific job; this list of potential accommodations shall be considered along with other potential reasonable accommodations for the purposes of making individualized accommodations decisions (the “Accommodations Consultant’s Report” or “List”).

26. In performing his/her work, the Accommodations Consultant may communicate with, and make reasonable requests for information from the Job Descriptions Consultant in order to expedite his/her work.

27. Within fourteen (14) days of receiving the Accommodations Consultant’s Report, the Company may raise, in writing to the Accommodations Consultant any objection that it has
to the Accommodations Report. If the Company does raise such an objection, it may request that the Accommodations Consultant provide it with copies of the documents, notes, and data upon which the report was based, and the Accommodations Consultant shall provide these within seven (7) days of the request. Within fourteen (14) days of the objection, the parties and the Accommodations Consultant shall meet and confer either by phone or in person, in an attempt to resolve the dispute. If no agreement is reached regarding the objections, the parties may seek relief from the Court pursuant to the dispute resolution procedure set forth in Paragraph 39.

28. Within sixty (60) days of receiving the Accommodations Consultant’s Report, the Company shall begin using the List along with other potential reasonable accommodations, if any, for consideration in the individualized accommodation process for its Jewel Food Stores, Inc. and American Drug Stores LLC employees, unless a recommendation on the List is unreasonable, would impose a substantial or undue hardship, violates the terms of the ADA, as amended, or another law, or the Company otherwise determines that it is unable to use all or part of the List.

29. If the Company elects not to use all or part of the List, it shall engage in the “meet, confer and report process” as set forth in paragraph 18 above. Prior to the “meet, confer and report process” the Company may request that the Accommodations Consultant provide it with copies of the documents, notes, and data upon which the report was based, and the Accommodations Consultant shall provide these within seven (7) days of the Company’s request. If the Accommodations Consultant and the Company cannot reach a resolution, and the EEOC does not agree with the Company’s decision not to implement use of the List and does not agree with the Company’s alternative recommendation, if any, the EEOC and the
Company shall meet and confer in an attempt to work out any disagreements to finalize a list that will be used by the Medical Accommodations Administration Team in considering future reasonable accommodations. The Accommodations Consultant may be included, at any party’s request, in the meet and confer discussions. If no agreement is reached, the parties may seek relief from the Court pursuant to the dispute resolution procedure set forth in Paragraph 39.

30. The above-referenced report or other information in possession of the Accommodations Consultant, and any testimony sought from the Accommodations Consultant, shall be used solely for the purposes of this Consent Decree.

**REVISION OF POLICIES AND COMMUNICATIONS WITH EMPLOYEES ON DISABILITY LEAVE REGARDING DISABILITY DISCRIMINATION AND ACCOMMODATIONS**

31. Within forty (40) calendar days of the Approval Date, the Company will revise their Americans with Disabilities Act Policy prohibiting discrimination on the basis of disability and providing reasonable accommodations to include, at a minimum, the following:

A. Instructions to employees as to how to request a reasonable accommodation and examples of the types of reasonable accommodations that are available to employees, including modified duty, part-time work, reassignment to a vacant position, acquisition or modification of equipment or assistive devices, and additional leave.

B. An explicit statement that the Company will provide reasonable accommodations to qualified individuals with disabilities which may include work restrictions, so that they can perform the essential functions of the job.

C. The Company must post a copy of such revised policy on the Company’s intranet, and with the Notice attached as Exhibit C until such time as it distributes a copy of
such revised policy to Jewel Food Stores, Inc. and American Drug Stores LLC employees. The Company will enclose a copy of the Notice with each 26 week letter it sends to employees on disability leave until such time as it distributes a copy of such revised policy to employees.

32. For the duration of the Decree, the Company shall maintain a Medical Accommodations Administration Team which will be responsible for ensuring that the implementation of the Company’s disability leave complies with the ADA as detailed in this Decree. All requests for accommodation from employees who have been on a disability leave of absence during the duration of this Decree shall be referred to the Medical Accommodations Administration Team. No employee on such a leave of absence will be terminated without the approval of a member of the Company’s Medical Accommodations Administration Team.

33. All store directors and personnel coordinators who work at stores or facilities covered by the terms of this Decree shall be instructed to forward any Reports of Attending Physician or doctor’s notes received from an employee on disability leave to the Medical Accommodations Administration Team.

34. Within forty (40) calendar days of the Approval Date, the Company will revise the documents that are provided to employees on a disability leave of absence to include, at a minimum, the following:

A. A revised twenty-six (26) week letter to be sent via U.S. mail to the last known address on file of any employee who is on a disability leave of absence after such employee has completed twenty-six weeks of leave. Each such letter must inform the employee of the ability to request a reasonable accommodation to enable the employee to return to work and specifically indicate that any of the following may
constitute a reasonable accommodation depending on the circumstances: modified
duty, part-time work, reassignment to a vacant position, acquisition or modification of
equipment or assistive devices, and additional leave if a reasonable return to work
date is provided ("Accommodations Information"). The letter must instruct the
employee to direct all such requests to the Company's Medical Accommodations
Administration Team and include a phone number for the Medical Accommodations
Administration Team. The letter must explain to the employee that the failure to
respond to the letter may result in termination upon the expiration of the leave period.
The letter must advise employees that they are not required to be free of all
restrictions in order to return to work.

**B.** A revised forty (40) week letter to be sent via U.S. mail to any employee who is on a
disability leave of absence after such employee has completed forty (40) weeks of
leave. Each such letter must inform the employee of Accommodations Information,
must instruct the employee to direct all such requests to the Company's Medical
Accommodations Administration Team, and include a phone number for the Medical
Accommodations Administration Team. The letter must explain to the employee that
the failure to respond to the letter may result in termination upon the expiration of the
leave period. The letter must advise employees that they are not required to be free of
all restrictions in order to return to work.

**C.** A revised leave-end letter to be sent to any employee on a disability leave of absence
(including a workers' compensation leave) at least ten (10) business days prior to the
termination of each such employee. The letter must inform the employee of the
Accommodations Information. The letter must instruct the employee to direct all
such requests to the Company's Medical Accommodations Administration Team and include a phone number for the Medical Accommodations Administration Team. The letter must explain to the employee that the failure to respond to the letter will result in termination upon the expiration of the leave period. The letter must advise employees that they are not required to be free of all restrictions in order to return to work.

After twenty-six (26) weeks of leave and after forty (40) weeks of leave for any employee, and at least four (4) weeks prior to terminating an employee for failing to return from a leave of absence, the Company will request from any third party leave or benefits administrator responsible for the leave or benefits of the employee (including any workers' compensation benefits or leave administrator and any disability leave or benefits administrator) a copy of the most recent doctor's release or Report of Attending Physician form and any other information in the possession of the third-party necessary to make an informed decision consistent with the ADA for review by the Medical Accommodations Administration Team. The Medical Accommodations Administration Team will consider the information contained in these documents in determining whether the employee can be returned to work with or without an accommodation. If the Medical Accommodations Team determines that the employee can be returned to work, the Medical Accommodations Team will make a written return to work offer to the employee including the accommodation available to the employee.

The inclusion of Paragraphs 27-36 in the Decree does not represent the Court's or EEOC's approval of the Company policies regarding leave and the accommodation process.

FACILITATING ADA COMPLIANCE AS A PERFORMANCE EVALUATION CRITERION

Commencing with the Fiscal Year 2012 (March 2011 to February 2012) performance review,
the Company will include "facilitating compliance with the ADA" within the diversity competency for each employee who is a member of the Medical Accommodations Administration Team.

38. Within forty-five (45) days of the Approval Date, the Company will inform any employee who will be evaluated for "facilitating compliance with the ADA" of this new performance evaluation criterion including each of the members of the Medical Accommodations Administration Team.

DISPUTE RESOLUTION

39. In the event that either party believes that the other party has failed to comply with any provisions of the Decree, the complaining party shall notify the alleged non-complying party in writing of such non-compliance and afford the alleged non-complying party fourteen (14) days to remedy the non-compliance or satisfy the complaining party that the alleged non-complying party has complied. If the alleged non-complying party has not remedied the alleged non-compliance or satisfied the complaining party that it has complied within fourteen (14) days, the complaining party may apply to the Court for appropriate relief.

DURATION OF CONSENT DEGREE AND RETENTION OF JURISDICTION

40. All provisions of this Decree shall be in effect (and the Court will retain jurisdiction of this matter to enforce this Decree) for a period of three (3) years immediately following Entry of the Decree, provided, however, that if, at the end of the three (3) year period, any disputes under Paragraph 39 above remain unresolved ("the Dispute(s)")

EEOC shall release the Company from the obligations of this Decree after two (2) years
based on a pattern of compliance, a lack of unresolved disputes, or for other good cause shown.

MISCELLANEOUS PROVISIONS

42. The terms of this Decree shall be binding upon the Company and any successor of the Company during the Term of this Decree. The Company and any successor(s) of the Company, shall provide a copy of this Decree to any organization or person who proposes to acquire or merge with the Company, or any successor of the Company, prior to the effectiveness of any such acquisition or merger. This paragraph shall not be deemed to limit any remedies available in the event of any finding by the Court regarding a violation of this Decree.

43. If any provision(s) of the Decree are found to be unlawful, only such provision(s) shall be severed, and the remainder of the Decree shall remain in full force and effect.

44. When this Decree requires a certification by the Company of any fact(s), such certification shall be made under oath or penalty of perjury by an officer or management employee of the Company to the best of such officer's or management employee's knowledge, information, and belief.

45. When this Decree requires notifications, reports, and communications to the Parties, they shall be made in writing and hand-delivered, mailed, e-mailed, or faxed to the following persons:

For EEOC:

SUPERVALU INC. Settlement, c/o Regional Attorney, EEOC, 500 West Madison Street, Suite 2000, Chicago, IL 60661.

For the Company:
Anne Marie Estevez, Morgan, Lewis & Bockius, LLP. 5300 Wachovia Financial

Center, 200 South Biscayne Boulevard, Miami, FL 33131-2339

Any party may change such addresses by written notice to the other party, setting forth a new address for this purpose.
Agreed to in form and content:

FOR PLAINTIFF
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

P. David Lopez
General Counsel

Gwendolyn Young Reams
Associate General Counsel

FOR DEFENDANTS SUPERVALU INC.
JEWEL FOOD STORES, INC. AND
AMERICAN DRUG STORES LLC

TODD N. SHELDON
Senior Vice President and General Counsel

Date: January 3, 2011

JOHN C. HENDRICKSON
Regional Attorney

GREGORY GOCHANGOR
Supervisory Trial Attorney

DEBORAH HAMILTON
Trial Attorney

Equal Employment Opportunity Commission
500 W. Madison St., Suite 2000
Chicago, IL 60661

Date: Jan 3, 2011

ENTER: DATE:

The Honorable Ronald A. Guzman
United States District Judge
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EXHIBIT B

RELEASE AGREEMENT

I, ________________, in consideration for $ __________ paid to me by SUPERVALU INC. and/or Jewel Foods, Inc. and/or American Drug Stores LLC, in connection with the resolution of EEOC v. Supervalu, Inc. et al., Case No 09 CV 5637 (N.D. Ill.), waive my right to recover for any claims of disability discrimination arising under the Americans with Disabilities Act, that I had against SUPERVALU INC., Jewel Food Stores, Inc., American Drug Stores LLC and their owners, affiliates, subsidiaries, divisions, predecessors, successors, licensees, assigns, employees, officers, directors, agents, insurers and attorneys prior to the date of this release and that were included in the claims alleged in EEOC's complaint in EEOC v. Supervalu, Inc. et al., Case No 09 CV 5637 (N.D. Ill.).

Date: ________________  Signature: ____________________
EXHIBIT C

NOTICE TO EMPLOYEES

This Notice is being posted pursuant to a Consent Decree entered by the federal court in EEOC v. Supervalu, Inc. et al., Case No 09 CV 5637 (N.D. Ill.), resolving a lawsuit filed by the Equal Employment Opportunity Commission ("EEOC") against SUPERVALU INC., Jewel Food Stores, Inc. and American Drug Stores LLC ("Defendants").

In its suit, the EEOC alleged that the Defendants violated the Americans with Disabilities Act ("ADA") by prohibiting disabled employees who were on Defendants' one-year paid disability leave, or eligible for it, from returning to work unless they could return without any accommodation to full service and had no physical or mental restrictions, and terminating such employees at the end of the one-year leave period. In response, Defendants deny that they violated the ADA, discriminated against any employees or failed to provide reasonable accommodations.

To resolve the case, the Defendants and the EEOC have entered into a Consent Decree that provides, among other things, that:

1) Defendants will make monetary payments to a class of Eligible Claimants.

2) Defendants will not require employees seeking to return to work from disability leave that they be fully or 100% recovered, but will provide reasonable accommodations to employees desiring to return to work in their former position or into another open, available position for which they are qualified. Defendants will hire a consultant to provide recommendations regarding reasonable accommodations for disabled employees.

3) Defendants will not retaliate against employees who have made allegations of disability discrimination or participated in any way in a proceeding involving disability discrimination; and

4) Defendants will provide training to designated personnel of Defendants.

If you are an employee with a disability and need an accommodation to work at Jewel or Jewel-Osco, you may contact the Medical Accommodations Administration Team at (630) 948-6460.

The EEOC enforces the federal laws against discrimination in employment on the basis of race, color, religion, national origin, sex, age or disability. If you believe you have been discriminated against, you may contact the EEOC at (312) 869-8000. The EEOC charges no fees and has employees who speak languages other than English.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This Notice must remain posted during the duration of the Consent Decree and must not be altered, defaced or covered by any other material. Any questions about this Notice or compliance with its terms may be directed to: The SUPERVALU INC. ADA Leave Settlement, EEOC, 500 West Madison Street, Suite 2000, Chicago, Illinois 60661.

Date

The Honorable Judge Guzman
EXHIBIT D

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