The U.S. Equal Employment Opportunity Commission

Office of General Counsel

Annual Report
Fiscal Year 2002

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I. STRUCTURE AND FUNCTION OF THE OFFICE OF GENERAL COUNSEL

A. Mission of the Office

> The General Counsel conducts litigation on behalf of the Commission under four federal statutes, seeking relief for victims of the basis of race, color, religion, gender, national origin, age and disability.

In 1964 Congress passed the Civil Rights Act, which prohibits discrimination on the basis of race, color, religion, sex and national origin. The Civil Rights Act of 1964 created the U.S. Equal Employment Opportunity Commission to oversee the employment provisions prohibiting discrimination, which were embedded in Title VII of the Act. The Commission, however, had no ability to enforce these provisions until Congress amended Title VII in 1972 and authorized the EEOC to file suit in federal court. At the same time, Congress created the position of General Counsel, responsible for conducting the Commission's litigation. The General

Counsel is appointed by the president and confirmed by the Senate for a four year term.

As the EEOC's statutory duties have grown, so has the litigation responsibility of the General Counsel. In 1979, a Presidential Order transferred the enforcement functions for the Age Discrimination in Employment Act (ADEA) and the Equal Pay Act (EPA) from the Department of Labor to the EEOC. In 1990, Congress enacted the Americans with Disabilities Act (ADA), vesting authority for the enforcement of the employment provisions with the EEOC.

Title VII and the ADA cover employers with 15 or more employees; the ADEA covers employers with 20 or more employees; and the EPA covers all private employers. Although the Department of Justice brings suits against state and local governments under Title VII and the ADA, the Commission files suits against state and local governments under the ADEA and the EPA.

B. Headquarters Programs

- **Litigation Management Services**

  Litigation Management Services (LMS) manages and oversees the Commission's court enforcement program in the Commission's 24 District Offices. Also, in conjunction with the Office of Field Programs (OFP), LMS oversees the interaction of District Office legal units with the investigative enforcement units within those offices.

  LMS is directed by an Associate General Counsel who supervises three Assistant General Counsels responsible for field oversight. Each Assistant General Counsel directs a staff of attorneys and is responsible for liaison functions with the District Office legal units in one of OGC's three geographic areas. The Assistant General Counsels oversee litigation activity as well as legal unit interaction with investigative enforcement units. In complex District Office litigation, this responsibility includes monitoring expert procurement and evaluating case prosecutions and settlements.

  LMS staff provide specific litigation assistance to District Offices as needed and maintain litigation guidance on the Commission's internal web site as a brief bank, expert listings, jury instructions and other trial practice information. LMS prepares weekly and monthly reports on current litigation as well as quarterly reports for distribution to the Commission. LMS also provides annual updates of Americans with Disabilities Act (ADA) cases, which describe all active and resolved EEOC litigation under the ADA, including appellate and amicus matters, and which is indexed by both issue and impairment. This "ADA Docket" is distributed within the agency and to interested outside individuals and organizations, and is available on the EEOC webpage.

  In addition to overseeing field litigation and district office legal unit operations, Litigation Management Services provides ongoing support for the field's litigation activities.

  LMS also has an Assistant General Counsel for Technology responsible for providing technical guidance, oversight and training to OGC headquarters and field offices on the use of technology in litigation. This AGC also consults with staff on statistical and technical issues in litigation, coordinates field training on data analysis and statistics, and develops OGC's computer systems. The Assistant General Counsel for Technology also serves as OGC's representative to the Commission's Technology Steering Committee.

- **Systemic Enforcement**

  The Office of General Counsel's systemic enforcement program has two components. Systemic Litigation Services (SLS) conducts litigation on behalf of the EEOC in cases alleging patterns or practices of employment discrimination or involving complex legal or factual issues. SLS's responsibilities include evaluating and preparing litigation recommendations in complex cases, litigating those cases, and providing legal advice to the other service component, Systemic Investigations and Review Program (SIRP), during the investigation and conciliation of systemic charges.

  Systemic Investigations and Systemic Litigation develop and litigate complex cases involving egregious discrimination against numerous individuals

Headquarter's SIRP investigates pattern and practice systemic charges. Although SIRP uses the same case processing procedures as those in the field, its focus differs from that of a field office systemic unit. SIRP's primary function is to administratively process Commissioner charges that are regional or nationwide in scope, focusing specifically on novel issues with significant complexity or sensitive areas of concern to the Commission. SIRP also develops standards, policies and procedures for conducting systemic investigations for both headquarters and the field offices.

An Associate General Counsel oversees both SLS and SIRP. SLS is staffed with two Assistant General Counsels who each supervise a team of trial attorneys, paralegal specialists and clericals. SIRP is staffed with one Assistant General Counsel who supervises a staff of lawyers, investigators and one program analyst.

- **Litigation Advisory Services**

Litigation Advisory Services (LAS) evaluates legal unit recommendations for litigation in cases that the General Counsel or the Commission must approve. LAS also drafts litigation recommendations to the General Counsel for approval or submission to the Commission. LAS represents OGC during Commission meetings discussing cases under consideration for litigation. In addition, LAS responds in writing to Commissioner inquiries on those cases. In responding to such inquiries, LAS acts as OGC's liaison and contact point between the Commission and the field legal units or Systemic Litigation Services. Lastly, LAS performs special assignments as requested by the General Counsel.

Litigation Advisory Services analyzes cases from the field and recommends whether they should be litigated

LAS is under the supervision of an Assistant General Counsel who reports directly to the Deputy General Counsel.

- **Appellate Services**

Appellate Services conducts all appellate litigation where the Commission is a party. Also, Appellate Services participates as amicus curiae in both appellate and district court cases involving novel issues or developing areas of the law. Appellate Services also represents the Commission in the United States Supreme Court through the Solicitor General.

Appellate Services conducts the EEOC's litigation on appeal and files amicus briefs on cutting-edge issues.

In every adverse judgment received by the EEOC, Appellate Services submits a written recommendation to the General Counsel whether to appeal. In amicus cases, Appellate Services drafts memoranda recommending Commission participation which, if approved by the General Counsel, are submitted to the Commission for authorization under a notice and hold procedure.

Appellate Services also offers comments, subject to General Counsel review, to the Department of Justice and Solicitor General on all cases arising under the statutes EEOC enforces in which the federal government is a defendant. In addition, Appellate Services reviews EEOC policy matters, such as proposed policy statements, regulations, etc., from the Office of Legal Counsel to determine the effect of such proposals on litigation.

Appellate Services is directed by an Associate General Counsel, who oversees three Assistant General Counsels, each supervising a team of attorneys.

- **Research and Analytic Services**

Research and Analytic Services (RAS) provides expert and analytic services to attorneys and investigators on cases and charges of employment discrimination. RAS also conducts general social science research on issues related to civil rights enforcement.

RAS is headed by a director who reports to the Deputy General Counsel. The professional staff of RAS consists of experts in social science research, economics,

The Office of General Counsel has an in-house

statistics, and psychology, all with advanced degrees. OGC has estimated that RAS saves the Commission at least two million dollars each year in expert service costs and other types of contract costs. In addition to providing expert services for class cases in litigation, RAS provides expert and analytic support to field staff investigating charges in the administrative process and on special research projects within the Agency. Other primary functions of RAS include providing expert and technical advice in implementing the Uniform Guidelines on employee Selection Procedures (UGESP); developing and maintaining special Census files by geography, race/ethnicity and sex,and detailed occupations; developing labor market availability estimates; constructing large employer personnel data files and work history records by coding and converting paper records into computer files; and conducting statistical analyses of complex employment practices.

staff of experts to assist in litigation and investigation.

During Fiscal Year 2002, staff from RAS were retained as consulting witnesses in 25 cases in various stages of litigation and provide hands-on technical assistance to headquarters and field offices on many matters not yet in litigation.

- **Administrative and Technical Services Staff**

The Administrative and Technical Services Staff (ATSS) have two main functions. ATSS serves in several administrative capacities, acting as the liaison between OGC and EEOC's service organizations such as the Office of the Chief Financial Officer and Administrative Services on financial concerns and the Office of Human Resources on personnel matters. ATSS also prepares the OGC budget request to the Commission for OMB and Congress and handles various budget execution duties such as monitoring financial obligations.

Administrative and Technical Services Staff provide financial, budgetary and personnel services as well as data on cases in litigation

ATSS also manages numerous technical functions. It maintains the General Counsel Data Base, which contains the database on the Commission's litigation activity. To enable OGC managers to assess various aspects of EEOC's nationwide litigation activity, ATSS prepares periodic reports on the number and types of lawsuits filed and resolved as well as the monetary and injunctive relief obtained through litigation. ATSS also provides information from the General Counsel Data Base to the Office of Research, Information and Planning and responds to inquiries from OGC managers, other offices within EEOC, members of Congress, other governmental agencies, and the media, including requests under the Freedom of Information Act (FOIA).

C. District Office Legal Units

Located throughout the country, the EEOC's District Office Legal Units help investigate discrimination charges and litigate cases filed in court.

The Commission currently has 24 District Offices, each, except for Albuquerque, containing a legal unit which conducts Commission litigation. The legal units also provide advice and other legal support to the District Office enforcement units, which are responsible for investigating charges of discrimination. Thus, in addition to litigating cases, legal unit attorneys work closely with the enforcement units in the intake and investigation of charges and responding to Freedom of Information Act requests.

Each District Office legal unit is under the direction of a Regional Attorney. The Regional Attorneys manage staffs of one to two supervisory trial attorneys and five to fifteen trial attorneys, as well as support staff. Since 1999, the Regional Attorneys also manage trial attorneys stationed in approximately twenty-one local and area offices as well as in the Washington Field Office. Additionally, many Regional Attorneys supervise a Hearings Unit, composed of administrative judges who conduct hearings on claims of discrimination in federal employment.

II. SUMMARY OF ACCOMPLISHMENTS

A. Overview of Fiscal Year 2002

- **Summary of Litigation Activity**

In FY 2002, the Office of General Counsel(OGC) filed 332 merit suits: 326 direct suits, one intervention and five suits to enforce administrative settlements.[1]

> In FY 2002, the Office of General Counsel obtained over $52 million for persons who had been harmed by discrimination

Of the 332 merits suits filed, 246 were filed under Title VII of the Civil Rights Act of 1964 (Title VII), 41 under the Americans with Disabilities Act (ADA), 28 under the Age Discrimination in employment Act (ADEA), two under the Equal Pay Act(EPA), and 13 under more than one statute ("concurrent" suits).

The Office of General Counsel resolved a total of 345 suits: 340 direct suits, two interventions and three suits to enforce administrative settlements.[2] Of the 345 merits suits resolved, 247 were Title VII suits, 61 were ADA suits, 20 were ADEA suits, three were EPA suits and another 14 suits were filed under more than one statute. Through these resolutions, OGC obtained more than $52 million in monetary relief for individuals who had experienced discrimination.

- **EEOC Issues Comprehensive Litigation Report**

During FY 2002, OGC conducted an extensive five-year study, examining the EEOC's litigation program in both the district and appellate courts. The study revealed that over 90% of all EEOC suits were resolved successfully, i.e., resolved by consent decree, settlement agreement or favorable court order, resulting in some form of relief for individuals who have experienced discrimination, such as monetary relief, placement in a job, changes in discriminatory policies or practices, a reasonable accommodation for a disability or for religious beliefs and training for employees.

Some of the highlights of the study include:

- The Commission filed 1,963 suits during the five-year period examined, including 1768 direct suits and 14 interventions.
- Of the 1782 direct suits and interventions, 570 were filed on behalf of a class (31.9%) and 1,212 (68.1%) on behalf of individuals.
- In FY 1997, the number of class cases on the active litigation docket was 112, or 30%; by FY 2001, this increased to 210 class cases on the active litigation docket, or 40%.

> From Fiscal Years 1997-2001, over 90% of EEOC's lawsuits were successfully resolved; over 60% of trials were won

- The Commission conducted 87 trials during the five-year period and prevailed in 50 or over 60% (four of the trials resulted in hung juries), compared to a success rate of 26.8% for private plaintiffs in employment discrimination trials.
- EEOC resolved 1,723 suits during the five-year period, including 1,534 direct suits and 18 interventions.
- EEOC obtained $409.7 million in monetary relief through those resolutions, with average monetary benefits per lawsuit resolved at $263,945.

In reflecting on the results of the litigation study, EEOC Chair Cari M. Dominguez stated, "The EEOC must make the greatest impact possible in the workplace using all the resources at its disposal. While proactive prevention of discrimination is our first priority, we will not hesitate to use litigation when necessary and appropriate."

The complete report is available on the EEOC web site at www.eeoc.gov.

- **Outreach Activities**

During FY 2002, attorneys in the field legal units participated in more than 600 events designed to educate employers, employees, civil rights lawyers, other federal and state agencies as well as the general public about the federal employment discrimination laws and the EEOC charge filing process. These efforts reached over 36,000 individuals. Examples of these activities include:

- The Regional Attorney in the Atlanta District Office participated as a panelist at a training seminar of the National Labor Relations Board, discussing the latest EEOC legal trends and charge processing.
- A Trial Attorney from the Cleveland District Office spoke to Asian community leaders from Akron and Cleveland at a Asian Federation/Coalition meeting on issues affecting Asian workers.

EEOC field attorneys participated in more than 600 events to inform the public about EEOC procedures and employment discrimination issues

- In Fresno, the San Francisco Regional Attorney presented basic EEO Training, including on sexual harassment and national origin discrimination, to the Central Valley Refugee Forum, attended by community leaders and representatives from state agencies.
- A Minneapolis Area Office Trial Attorney addressed business and labor leaders, law professors and students at the New York Law School Symposium 2001 on the subject of "The Use of Genetic Testing in the Workplace" as it pertains to issues arising under the ADA.
- A Spanish-speaking Trial Attorney from the Denver District Office participated in two monthly meetings of Legal Night at Centre Bienistar. These meetings were designed to help individuals in the immigrant community learn about their legal rights under the employment discrimination laws.
- A Supervisory Trial Attorney from the Seattle District Office presented a talk about gender discrimination issues at a Women in Firefighting Conference.

B. Litigation Highlights

- **Race Discrimination**
  - **Hiring and Promotion**

Eagle Global Logistics settles race, national origin and gender discrimination suit for $8.5 million

In ***EEOC v. Eagle Global Logistics***, the company, an air freight forwarder, provided $8.5 million to resolve allegations that it discriminated against African Americans, Hispanics, women and older workers in hiring and promotion; and paid African Americans, Hispanics and women less than white male employees doing similar work and subjected them to a hostile work environment. The monetary relief will be distributed through a claims procedure. The company also agreed to establish a $500,000 Leadership Development Program to prepare women and minorities for leadership positions.

Hiring issues were also the focus in ***EEOC v. Optical Cable Corp.***, which alleged that the company failed to hire African Americans, denied training to one black employee and then fired him because of his race. The suit also alleged that the company assigned female production department employees to the lowest paying jobs because of their sex. The settlement provided $75,000 in monetary relief to the discharged employee, $850,000 to the African American applicants and female employees, and $75,000 for training and recruitment efforts.

Manufacturer of fiber optic cable settles claims of race discrimination in hiring and sex discrimination in assignments for $1 million

EEOC v. Crest Discount Foods, Inc., was brought on behalf of a black man who had been refused an entry level grocery store position because of his race. The applicant received $50,000 in relief. In another hiring case, ***EEOC v. Greensheet, Inc.***, the Commission alleged that an advertising newspaper failed to hire black applicants for press helper jobs, filling those positions only with Hispanics. The company agreed to pay $135,000 to rejected black applicants and hire qualified blacks for press helper jobs.

The Commission also settled a case on behalf of an employee denied a promotion to a yard master position because of his race (African American). The employee received $250,000. See

EEOC v. Union Pacific Railroad.

EEOC v. Sterling McCall Lexus alleged that a car dealership promoted a white employee to sales manager over a more qualified black salesman because of race. The company provided the employee over $23,000 in back pay and nearly $47,000 in compensatory damages. See also ***EEOC v. Enterprise Leasing Co.*** (black male management trainee who was repeatedly denied advancement received over $100,000).

- **Assignment**

In EEOC v. McKesson Water Products Co., the Commission alleged that the company discriminated against African American employees by assigning them to routes in minority and low income neighborhoods where they earned less than drivers assigned to more affluent routes. The suit included claims that the company denied commission increases to black employees, denied them promotions, disciplined them more severely and subjected them to racially derogatory comments.

Drinking water processing and distribution company paid over $1.2 million to black drivers assigned to lower paying distribution routes

The employees received a total of $1,245,000 in monetary relief as well as extensive affirmative relief, including an objective system for determining route assignments, compensation, promotions and performance evaluations.

- **Wages**

In ***EEOC v. Spirtas Wrecking Co.***, the Commission alleged that a wrecking company paid black laborers a lower hourly rate to do the same salvage work as white employees; refused to hire a black applicant who would not accept the lower wages; and fired two black workers for complaining about the pay disparity. This case was resolved through a settlement providing $135,000 to the laborers who were discharged and $5,000 to two other claimants.

African American workers paid less than white employees doing the same work receive monetary relief

Discriminatory wages were also an issue in ***EEOC v. PSE&G Power, LLC.*** The utility company allegedly paid an African American environmental health and safety coordinator less than non-black employees. The suit also claimed that the company assigned the coordinator to a lower job classification and grade, and failed to promote him on 16 separate occasions because of his race. The company agreed to promote the coordinator, increase his salary by $10,000 and pay him $120,000 in damages.

- **Terms and Conditions**

In ***EEOC v. Keane, Inc.***, the Commission alleged that the company, a national information technology firm, treated black employees unequally in bonuses, project assignments and client development, and subjected them to a racially hostile environment. Seven African American current and former employees received $350,000 in monetary relief.

The Commission also obtained $60,000 in monetary relief for an African American woman who had been demoted and denied the same schedule accommodations given white employees. When she complained about being treated discriminatorily, her hours were cut. ***EEOC v. Nuero-Restorative Associates, Inc., d/b/a/ Timber Ridge University Medical Center.***

- **Racial Harassment**

African American employees continue to encounter racial harassment on the job, including hangmen's nooses and racial slurs

Of particular note among suits alleging racial harassment is ***EEOC v. Pipefitters Ass'n., Local***

597, which involved a union that contributed to the racially hostile environment at a construction job site. Several black union members had complained about racial graffiti, including swastikas, which was present at almost all of the portable toilets at the site. The union argued that racial graffiti was common at all construction sites and that the black pipefitters could not have been offended by the graffiti because they did not complain immediately.

Court holds union responsible for allowing racially hostile graffiti at construction job site

Agreeing with the Commission, the court found that the union had a duty to report or remedy the racially hostile work environment. The court ordered the union to pay $155,000 in compensatory and punitive damages to eight black workers and also permanently enjoined the union from allowing such conduct at any job site.

In FY 2000, in a separate action against the general contractor at the job site, the Commission had obtained $1.325 million in compensatory damages for approximately 100 people and an injunction permanently barring the employer from discriminating on the basis of race and sex. ***EEOC v. Foster Wheeler Constructors, Inc.***

In an innovative case resolution, the company in ***EEOC v. Scientific Colors, Inc., d/b/a/ Apollo Colors*** not only agreed to inspect and remove any racial graffiti, derogatory references, images and photographs on a daily basis, but also to install video cameras in an effort to identify culpable employees. The racial harassment had included graffiti and hangmen's nooses. The company, a printing ink manufacturer, paid $1.45 million to private litigants in a consolidated suit and an additional $375,000 for 23 workers included in the EEOC's case.

A Commission suit against a nationwide cable TV company alleged that a technical operations manager subjected black employees to racial epithets, placed a noose in his office and on a company-sponsored "bring your child to work day," hung the noose over his office door, where it was clearly visible to black employees and their children. Six employees received $1.05 million in damages. ***EEOC v. Adelphia Cable Partners, L.P., d/b/a Adelphia Cable***.

Nationwide cable TV company provides over $1 million in damages to black employees after a manager hung a noose over his office door

In ***EEOC v. Bauer Built Tire & Battery, Inc.***, the coworkers of a black driver allegedly displayed a hangman's noose, "joked" by saying "your turn next" to the driver and then tried to place the noose around his neck. The driver's supervisor participated in the incident, which resulted in the driver resigning. The company paid the driver $193,000 in damages.

In another case, the Commission alleged that a major retailer tolerated coworkers'constant use of racial slurs and derogatory terms when talking to a black employee. ***EEOC v. Best Buy Co.*** The suit also claimed that the company falsely accused the employee of theft because of his race. The company provided the employee with $250,000 in monetary relief.

In ***EEOC v. Ford Motor Co.*** the Commission alleged that black employees at Ford's New Model Development Center were racially harassed, including by the display of nooses. Twenty-three black employees received $300,000 in monetary relief. Ford also agreed to establish a toll free hotline for employees to report any further incidents of harassment.

In yet another case, a black maintenance mechanic was allegedly subjected to displays of Ku Klux Klan symbols, nooses and threats of violence. ***EEOC v. Celanese Acetate, LLC.*** The mechanic received $75,000 in damages. In ***EEOC v. Dana Corp. and Spicer Mfg., Inc.***, the Commission obtained $430,000 in damages for 14 African American employees who were subjected to racial harassment, including a hangman's noose.

In ***EEOC v. Colonial Management Group, L.P., d/b/a St. Louis Metro Treatment***, a black dependency counselor at a methadone clinic alleged that she was the target of frequent comments about her race as well as racial aspects of her speech. She further claimed the clinic director threatened her verbally and physically because of her race. The counselor received $150,000 in damages to resolve her claims.

Other cases involving racial harassment include ***EEOC v. Transit Mix Concrete and Materials Co.*** ($150,000 in damages for harassment) and ***EEOC v. Val Ward Cadillac, Inc.*** ($80,000 in damages for harassment).

- **Discharge**

In a case involving the discharge of a black female assistant store manager, an upscale women's clothier agreed to resolve the allegation of race discrimination by paying the former manager $100,000 in monetary relief. ***EEOC v. C.P. Shades, Inc.***

In ***EEOC v. WFC L.P., d/b/a World Finance Corp.***, the Commission claimed that a loan company discriminated against a black male employee and a white female supervisor by discharging them because they were dating. No other employees had ever been fired for dating a coworker or supervisor. The case was settled when the employer agreed to pay the two individuals $119,000 in damages.

In another case, ***EEOC v. Charleston Area Medical Center, Inc.***, the Commission obtained $45,000 in damages on behalf of a black nurse who was discharged during a reduction-in-force, despite having greater seniority and a better work record than her white coworkers.

- **Religious Discrimination**
  - **9/11 Backlash Suits**

In the wake of the terrorist attacks, EEOC filed suit against companies who fired Muslim employees with no previous problems

In the aftermath of the terrorist attacks on September 11, 2001, several employers fired Muslim employees with no previous problems. The EEOC filed two suits in fiscal year 2002 to address these issues. For example, in ***EEOC v. Worcester Art Museum***, the Commission alleged that the museum fired a security guard because of his religion (Muslim) and his national origin (Afgan). After 9/11, the guard was ostracized by his coworkers; one coworker falsely reported him to authorities as a suspected terrorist. The guard had worked at the museum since 1994; he had emigrated to the United States with his parents in the early 1980s to escape the Soviet occupation of Afghanistan.

In a second backlash case, ***EEOC v. Alamo Rent-A-Car***, the company refused to allow a customer service representative to cover her head with a scarf during the holy month of Ramadan, consistent with her beliefs as a Muslim. Although she had been allowed to wear a scarf during Ramadan in 1999 and in 2000, Alamo fired her for failing to remove her scarf during the holy month in December 2001.

Both suits were pending in court at the end of FY 2002. See also National Origin, 9/11 Backlash Suits, infra.

  - **Accommodation of Religious Beliefs**

In ***EEOC v. Harbor Hospital Center***, new management withdrew permission for a cafeteria employee to attend church on her Sabbath and subsequently fired her for refusing to work on Sundays. Previous management had allowed the worker, who had been with the company for 19 years, to attend Sunday services after she became a devout Christian. The company paid the former employee $112,500 in damages.

Title VII requires employers to provide reasonable accommodations for the religious beliefs of employees, unless an undue hardship would result

In another case, the Commission alleged that a telecommunications equipment provider refused to accommodate the religious practices of two customer service representative trainees who were practicing Muslims. The company denied their request to attend prayer services at a Mosque for a short period on Friday afternoons and then fired them when they left work to attend the services. The two individuals received $60,000 in monetary relief. ***EEOC v. Motorola, Inc.***

In a similar case, ***EEOC v. Rekrem***, the Commission alleged that a natural foods store refused to allow Muslim employees to pray at work during their lunch hour and discharged Muslim employees because of their religion. The case resolution provided $715,000 to 11 individuals.

EEOC settles suit with natural foods store that fired Muslim employees who prayed at work during their lunch hour

See also ***EEOC v. Vintage Pharmaceuticals, Inc.*** (Seventh Day Adventist fired from her line packing position because she could not work on Saturday, her Sabbath, received $40,000 in monetary relief); ***EEOC v. Ford Motor Credit Co.*** ($70,000 in settlement for failure to accommodate Seventh Day Adventist through modified schedule).

- **Terms and Conditions**

In ***EEOC v. Preferred Management Corp.***, a jury reached a verdict for the Commission, awarding seven employees $20,000 in compensatory damages and $250,000 in punitive damages. The owner of the home health care company had required all employees to conform to her fundamentalist religious beliefs and practices, including six Catholics and a Unitarian, who objected.

The owner refused to hire the Unitarian. She required one employee to implement a self-improvement plan requiring daily bible readings. The jury agreed that the owner's attempts to impose her beliefs on her employees violated Title VII.

- **Discharge**

Other cases involve an employer's hostility towards a particular religious belief. For example, in ***EEOC v. University of Chicago Hospitals***, the Commission alleged that the hospital forced a personnel recruiter to resign because of her Evangelical Christian Baptist religious beliefs. The hospital allegedly told the recruiter not to hire "church people" and to remove religiously oriented accessories on her desk. The hospital settled the case by providing the employee with $60,000 in monetary relief.

In ***EEOC v. Friglebert Koch Architects, Inc.***, the Commission alleged that an architectural firm created a religiously hostile environment when the company president and a supervisor made derogatory remarks about a project architect's Jewish religion. When the architect complained to the human resources department about the anti-Jewish remarks, he was fired. The architect received $100,000 in damages.

See also ***EEOC v. U.S. Airways*** (employee discharged because of his religion (Rastafarian) and national origin (Jamaican) received $50,000 in monetary relief).

- **Hiring**

EEOC resolved suits against companies that refused to hire applicants because of their religious beliefs about wearing dread locks or head coverings

The Commission alleged that a bus company refused to hire an applicant as a driver because he wouldn't cut his dread locks, in keeping with his Rastafarian religious beliefs. The company agreed to provide the applicant with $33,000 in compensatory damages. ***EEOC v. Greyhound Lines, Inc.***

In ***EEOC v. American Airlines***, the employer rejected a Muslim woman who had applied to be a passenger service agent, allegedly because she wore a hijab (head covering), as required by her religion. After the charge was filed, the company changed its uniform policy to allow accommodations for the religious practices of its employees. The applicant received $45,000 in relief.

- **Sex Discrimination**
  -

Hiring

EEOC obtains agreement to provide $47 million to more than 5,000 women discriminated against in hiring and discharge

The Commission filed a ground-breaking $47 million consent decree in a suit against Rent-a- Center, alleging that the nationwide rent-to-own company discriminated against women in hiring, in terms and conditions of employment and in discharge. The decree, which is subject to court approval, provides monetary relief to a class of over 5,000 female applicants and employees. In addition, the decree requires the company to make wide-ranging institutional changes, including creating a Human Resources Department to be headed by a vice president reporting directly to the CEO. The company also agreed to seek qualified women to serve on its all-male Board of Directors and to offer jobs to women denied employment or discharged.

In ***EEOC v. Heil Trailer Int'l***, the Commission alleged that a trailer manufacturer failed to hire female applicants for entry level factory positions and otherwise assigned, segregated and limited the job opportunities of female employees because of their sex. The company agreed to provide $250,000 to women harmed by these practices.

In another case involving a traditionally male job, the Commission obtained $50,000 in relief for a female cement finisher. EEOC claimed that the company failed to recall her after a seasonal layoff because of her sex. ***EEOC v. Anthony Allega Cement Contractor, Inc.***

- **Pregnancy Discrimination**

Since 1979, discrimination against women because they are pregnant has been illegal. Pregnancy discrimination can take many forms: firing a woman, altering her assignments or providing lesser benefits.

Court preliminarily approves multi-million dollar settlement of major class suit alleging pregnancy discrimination in calculations of pension benefits

For example, ***EEOC v. Bell Atlantic and NYNEX (Verizon)*** alleged that the companies unlawfully denied female employees service credit for pregnancy and maternity leaves of absence taken prior to the Pregnancy Discrimination Act in calculating their eligibility for and benefits under new retirement programs. The court preliminarily approved a settlement of this major class suit, pending a fairness hearing scheduled late in the fiscal year. The precise size of the class and value of the benefits will be determined through a claims procedure; however, thousands of current and former female employees are anticipated to receive millions of dollars in lost pension benefits.

In ***EEOC v. Delta Airlines***, the Commission alleged that an airline discharged one ramp agent and required another to take unpaid medical leave because they where pregnant. The case settlement provided the discharged agent with $60,000 in back pay and $50,000 in compensatory damages; the second ramp agent received $15,000 in back pay and $25,000 in compensatory damages.

In ***EEOC v. Bean Lumber Co.***, the Commission alleged that the company refused to promote a employee and then discharged her because of her pregnancy. Additionally, the company's maternity leave policy placed restrictions on pregnant employees who attempted to work past their fourth month. The discharged employee received $45,000. The company also agreed to eliminate the restrictions on pregnant women continuing to work.

EEOC v. Marchfirst,Inc. alleged that a management and technology consulting firm demoted an employee from her position as an executive assistant to the chief financial officer because of her pregnancy. Subsequently, the company placed the employee on indefinite probation, resulting in her constructive discharge. The company agreed to pay the individual $120,000 in damages.

The EEOC claimed that a food and facilities management company unlawfully discharged a day porter in her sixth month of pregnancy. The company provided the employee with $50,000 in monetary relief. ***EEOC v. Sodexho Marriott Services, Inc.***

- **Wages** [3]

In ***EEOC v. SuperValu Holdings, Inc.***, the Commission alleged that a wholesale grocery warehousing business paid women less than men doing the same work. Twenty-two women received a total of $400,000 in back pay and damages.

In a case involving a unique kind of work, the Commission alleged that an entertainment company providing trick horse riders, subjected female riders to a hostile work environment and paid them less than the male trick riders. The company agreed to pay the women $135,000 in monetary relief. ***EEOC v. Dixie Stampede Dinner Attractions, Inc.***

Warehousing business provided $400,000 to 22 women who were paid less than men for the same work

In ***EEOC v. Phoenix Management Limited Co.***, the Commission recovered $120,000 on behalf of a female comptroller who was paid less by a management and financial services company than the man who previously held her position. See also ***EEOC v. Four Corners, Inc. d/b/a/ Key Energy Services, Inc.***, Four Corners Division (female controller paid less than male predecessor receives $25,000 and an increase in salary to $80,000).

- **Sexual Harassment**

Women at all levels of employment still encounter sexual harassment. Sexual harassment involves abusive and offensive behavior, sexually derogatory language or other unwelcome sexual conduct that rises to the level of a hostile environment in the workplace.

For example, ***EEOC v. Technicolor, Inc.*** involved harassment consisting of sexually derogatory slurs, lewd graffiti and pictures, obscene language, sexually charged conduct and unwelcome physical touching. The defendant, a video and DVD processing plant, is owned by the leading global supplier of DVDs, CDs and videos.

Video and DVD processing plant to provide $875,000 in damages to 18 women affected by pervasive sexually derogatory slurs, pornographic materials and unwelcome touching

The Commission alleged that women who worked as video cassette duplicators in the plant were sexually harassed by male coworkers and supervisors. Many women who complained were disciplined, demoted and even fired. At least half of the women who were targeted are Hispanics with limited English proficiency. The company agreed to resolve the suit by paying $875,000 in damages to 18 women. Additionally, the company agreed to hire a consultant to implement anti-harassment training, complaint procedures and centralized monitoring.

In ***EEOC v. Hanson Motors, Inc.***, the Commission alleged that a car dealership subjected three saleswomen to a sexually hostile work environment primarily through the conduct of the general manager and other male supervisors. The conduct included physical assaults and threats of violence. When the women complained, they were forced to quit. The case was resolved when the company agreed to pay the women $670,000 in damages and to hire a monitor to oversee its compliance with the law prohibiting sexual harassment.

In ***EEOC v. American Home Products Corp. d/b/a Fort Dodge Animal Health and Fort Dodge Laboratories, Inc.***, the Commission claimed that the company unlawfully fired two human resources managers whose investigative report confirmed that sexual harassment was occurring at the Fort Dodge facilities. The suit further alleged that the harasser had been promoted to the top executive position at those facilities and continued to sexually harass female employees after his promotion.

EEOC obtained $487,500 on behalf of six sexually harassed female employees and the two discharged human resource employees. Additionally, the facilities extensively revised their complaint procedures; American Home Products,

Sexual harassment continues to pervade the workplace, aimed at women of all races, ethnic backgrounds and job levels and sometimes

their parent company, will monitor all sexual harassment complaints and will report each to EEOC.

even aimed at men

In ***EEOC v. Danka Office Imaging Co.***, the Commission obtained $375,000 on behalf of black females who were subjected to a racially and sexually hostile environment and were assigned the least desirable jobs when they complained.

In yet another case, ***EEOC v. Lagadinos, Inc. d/b/a Double T Diner***, the Commission uncovered widespread sexual harassment by male staff members directed at female food servers, including abusive sexual language and inappropriate touching. A settlement provided $300,000 in monetary relief to 12 women affected by these practices.

In ***EEOC v. Ray Ramon d/b/a Casa del Sol***, the owner of a nursing care service company subjected a woman employee to offensive and vulgar comments, requested sexual favors, threatened bodily harm and assaulted the employee during a job interview. The case was resolved when the company agreed to pay her $225,000 in damages.

See also ***EEOC v. River Oaks Diagnostic Center*** ($275,000 in damages to five women subjected to a sexually hostile environment and then fired or forced to resign for complaining about the conduct); ***EEOC v. Sandman, Inc., d/b/a/ Star Concrete*** (female employee harassed by owner's son and retaliated against for complaining received $250,000 in damages); and ***EEOC v. Good Samaritan Community Healthcare d/b/a/ Good Samaritan Surgery Center*** (nurses subjected to sexually hostile environment and reduced hours when they complained received $170,000 in damages).

Harassment because of sex is unlawful under Title VII regardless of the gender of the offender or the victim. Sometimes the typical case of a male harassing a female is reversed. For example, in ***EEOC v. Blue Dot Services Co.***, the Commission alleged that a male employee was sexually harassed by his female supervisor and was subsequently discharged for complaining. The company agreed to pay the employee $75,000 in damages.

Sometimes the genders of the harasser and the victim are the same. One such case involving allegations of "same sex" sexual harassment occurred in ***EEOC v. Spitzer Management, Inc.*** and Spitzer Autoworld Monroeville, LLC., which alleged that a male supervisor and a male coworker engaged in crude and hostile sexual aggression towards a male employee. Working conditions became so intolerable that the employee resigned. The male employee received $70,000 in monetary relief.

- **Benefits**

In a cutting-edge case dealing with insurance coverage of oral contraceptives, EEOC contended that UPS's Flexible Benefits Plan discriminated against women unlawfully. ***EEOC v. United Parcel Service***. Under the Plan, female employees and the spouses of male employees were denied coverage for oral contraceptives prescribed to treat female hormonal disorders. The Plan did not exclude any prescription treatments for male hormonal disorders.

To resolve the suit, UPS agreed to change the Plan to provide coverage for oral contraceptives prescribed for birth control or for other medical reasons on the same terms as other prescription drugs. The company also agreed to pay the cost of oral contraceptives for three years to 36 employees affected by the policy.

In cutting-edge case, UPS agrees to cover oral contraceptives for women

- **Discharge**

In an action brought against a trucking company, the Commission alleged that the company discharged a female driver from her over-the road truck driver position because of her sex. The female driver had driven for the company both as a team driver with her husband and as a solo driver. When her husband resigned, the company discharged her. The case was resolved through a settlement providing her with $80,000 in damages. ***EEOC v. Samuel J. Piazza & Son, Inc., d/b/a Piazza Trucking.***

from traditionally male jobs because of gender

And in another case dealing with a traditionally male job, an asbestos removal company discharged two Hispanic female workers because of their sex. In that case, a high level manager allegedly ordered a subordinate manager to fire the two women because he did not want women working as asbestos abatement workers. The company agreed to settle the case for a payment of $47,000 to the discharged employees. ***EEOC v. Project Development Group***, Inc.

- **National Origin Discrimination**
  - **9/11 Backlash Suits**

    Following the tragic events of September 11, 2001, the Commission held a public meeting to focus on employment discrimination in the wake of the September 11 terrorist attacks. Of particular concern were issues of workplace bias and harassment in a backlash against employees and job applicants who are, or are perceived to be, of Arab, Middle Eastern, or South Asian national origin. The hearing also discussed Muslim and Sikh employees and applicants who were targeted by employers because of their religious beliefs. Subsequently, the Office of General Counsel filed three lawsuits related to "backlash" discrimination.

    In ***EEOC v. Chromalloy Castings Tampa Corp.***, the Commission alleges that a manufacturer of castings for the aerospace industry singled out and discharged a naturalized American citizen of Palestinian descent within days of the September 11 attacks, for no reason other than his national origin.

    Another suit, ***EEOC v. Worcester Art Museum***, alleges that the museum fired a security guard on the basis of his national origin (Afghan) and religion (Muslim). See discussion, supra, in Religious Discrimination, 9/11 Backlash Suits. See also ***EEOC v. Alamo Rent-A-Car*** (Muslim employee fired for refusing to remove head covering during holy week of Ramadan), supra.

  - **Harassment**

    Workers receive monetary relief for supervisors' ethnically derogatory remarks

    In ***EEOC v. Roquemore, Pringle & Moore, Inc.***, the Commission alleged that a law firm's managing partner subjected two Hispanic paralegals to derogatory remarks about their national origin and fired one of them because she complained about the harassment. The case, which also included claims of sexual harassment, was resolved for $135,000 in monetary relief.

    In ***EEOC v. Gaming Entertainment***, the employer allegedly required Asian employees working at its Chinese buffet to work more hours than their non-Asian counterparts. The complaint also claimed that Asian employees were harassed and disparaged because of their national origin. For example, the sous chef, who is Chinese, was harassed by his supervisor and demoted to the position of cook. The settlement included $45,000 in damages to the sous chef and $5,000 in monetary relief to other employees. It also required that the company provide translators for all employee meetings; provide translators for employees not proficient in English, and provide copies of all employment policies in the employees' native language.

    See also ***EEOC v. Kmart Corp.*** (Hispanic employee allegedly subjected to ethnically derogatory comments by his supervisor received $50,000 in compensatory damages); ***EEOC v. Sam's Club, a division of Wal-Mart Stores, Inc.*** (employee of British national origin allegedly subjected to derogatory names by a supervisor, given less desirable work schedule and denied full time hours, received $65,000 in damages); ***EEOC v. Northwest Airlines*** ($280,000 in damages for disparate treatment, including work assignments, directed against black and foreign-born Senegalese, Nigerian, Pakistani and Ethiopian ramp workers).

  - **Hiring**

    EEOC v. Ferasa, Inc., d/b/a/ Gauchos Restaurant involved allegations that a restaurant refused to hire dark skinned Hispanics and blacks and that the restaurant's manager was forced to resign because he opposed this policy. When the restaurant failed to respond to discovery or comply with scheduling orders, the court found it in default and ordered it to pay $100,000 in damages and court costs.

In ***EEOC v. Sun-Rich of Immokalee, Inc.***, the Commission alleged that the company failed to rehire its former Haitian and black employees after a company-wide layoff. The company, which grades, packs and ships tomatoes, agreed to provide $210,000 to nine former employees. In an earlier settlement, 14 individuals had received $187,500 in damages, making a total of $397,000 recovered by EEOC.

> and Haitian employees after a layoff; 23 former employees receive $397,500 in monetary relief

- **Discharge**

The Commission filed a preliminary injunction to preserve the jobs of Filipino employees who allegedly were fired and replaced with workers from Nepal because their employer believed they were less likely to support unions. ***EEOC v. Asia Pacific Hotels***. The suit also alleged that the company refused to promote the Filipino employees because of their non-Japanese national origin and fired a chef because he filed a charge alleging national origin discrimination. The hotel agreed to reinstate two discharged employees and preserve the jobs of 22 others who had been reinstated under a prior action by the National Labor Relations Board.

An Hispanic worker, allegedly discharged from his job operating a conveyor because of his national origin, received $80,000 in monetary relief in ***EEOC v. Vulcan Materials Co.*** The Commission obtained $125,000 in damages for a Mexican program assistant allegedly fired because she complained about coworkers' derogatory remarks about ethnic minorities. ***EEOC v. Minnesota Valley Action Council***.

In a case involving discrimination against West Africans, the Commission alleged that a wire and cable manufacturer disciplined them more harshly and subjected them to adverse terms and conditions of employment because of their race and national origin. The Commission also alleged that two West African machine operators were fired because of their race and national origin and in retaliation for complaining about racist treatment by their shift supervisor. The two machine operators received $75,000 in monetary relief. See ***EEOC v. BICC General Cable Industries***, Inc., et al.

- **Accent Discrimination**

Often employers engage in national origin discrimination when taking an adverse employment action against an individual because of a foreign accent. For example, in ***EEOC v. Innovative Medical Research***, the Commission alleged that the medical research firm discriminated against applicants with foreign accents for Medical Recruiter/ Interviewer positions. Individuals in these positions conduct telephone interviews of potential participants in medical research projects. Twenty-two applicants, including the Nigerian charging party, received a total of $200,000 in damages.

- **English-Only Policies**

When job safety requires clear communication, employers may lawfully require that their employees speak only English. However, employers may not prohibit employees from speaking other languages when their job duties are unaffected and the policy is not required for safety.

> Nationwide chain of hair salons paid $240,000 in damages to Hispanic hair stylists after ordering them not to speak Spanish at work

For example, ***EEOC v. Regis Corporation*** alleged that a nationwide chain of hair salons discriminated against Hispanic employees by requiring employees to speak only English at all times. The case also involved allegations that the company assigned Hispanic hair stylists to workstations away from the front of the salon, gave them additional janitorial duties, and fired them when they complained about the discriminatory treatment. Six Hispanic employees received $240,000 in damages. The salon also agreed to rescind its policy unless it can establish a business necessity.

- **Wages**

In ***EEOC v. A.T.M.I. Precast Inc.*** and Waubonesee Development Co., Inc., the Commission

alleged that a prefabricated concrete construction company paid a group of Hispanic workers lower wages than non-Hispanic workers and discharged two of the employees because they complained. The case settlement provided four Hispanic employees a total of $132,500 in damages. The company also agreed to post wage information on job vacancies in both English and Spanish.

- **Age Discrimination**
  - **Hiring and Promotion**

In ***EEOC v. Pabst Brewing Co.***, the beer company allegedly refused to hire a 54-year-old applicant as a quality assurance supervisor because of his age. The Commission obtained $37,000 in monetary relief for the individual.

Older worker received $70,000 in monetary relief after car dealership refused to promote him because of his age (72)

In ***EEOC v. Mercedes-Benz USA, Inc.***, the Commission alleged that a car dealership refused to promote an employee to the position of National Customer Assistant representative because of his age, 72. The case was resolved in a settlement providing the employee with $70,000 in monetary relief.

In another case involving promotion, the Commission claimed that a bank refused several times to promote an employee to a telephone bank unit manager position because of his age (47). The bank agreed to settle the case by providing the individual with $80,000 in damages. See ***EEOC v. Bank One Arizona.***

  - **Discharge**

The Commission alleged in ***EEOC v. Applied Industrial Technologies, Inc.***, that a nationwide manufacturer of power transmission equipment and other industrial items laid off a sales manager and a customer service representative because of their ages (47 and 57). Other employees allegedly discharged because of their ages were included in the suit. The company agreed to provide $600,000 to ten former workers.

Nationwide manufacturer of auto transmission equipment paid $600,000 to a group of older workers laid off or discharged because of their age

In ***EEOC v. BellSouth Telecommunications, Inc.***, the Commission recovered $200,000 in back pay and pension credits for a systems application manager who was allegedly fired from her job because of her age (50). An unlawful termination was also the focus in ***EEOC v. Kraft Foods North America***. The company, a successor to Nabisco, Inc., allegedly discharged an account manager during a reorganization because of his age, 48. The former manager received $275,000 in monetary relief.

  - **Early Retirement Incentive Plans**

Although the Older Workers Benefit Protection Act provides safe harbors for voluntary early retirement incentive plans, some employers fail to structure their plans to conform with the law.

For example, in ***EEOC v. Orleans Central Advisory Board of School Directors***, a district court ruled that the school district discriminated against older teachers by treating them differently depending upon their age when they retired. The early retirement incentive plan expressly linked increasing age with decreasing benefits. The court agreed with the Commission that this plan was facially discriminatory and awarded two older teachers the same benefits that a person age 55 would have received ($10,000 and $5,000). The court set a later date for a hearing on the issue of liquidated damages.

Similarly, ***EEOC v. Coatesville Area***

School District and Coatesville Area Teacher's Ass'n, involved an early retirement incentive plan that offered teachers aged 53 to 60 cash payments which declined as the age of the individual increased. The plan offered no cash payments to individuals 61 and older.

decreasing early retirement incentives as age of teachers increased

The case was resolved by a settlement providing $476,672 in back pay and interest to 71 teachers and four other school district employees. The settlement also enjoined the school district from limiting benefits under early retirement plans on the basis of age. The union agreed to notify the Pennsylvania State Education Association about the settlement and request that the Association inform its approximately 900 affiliated unions about the problems with such incentive plans.

See also ***EEOC v. Averill Park Central School District*** (nine teachers and administrative employees whose incentive benefits were reduced based on age received $106,517).

- **Disability Discrimination**
  - **Genetic Testing**

In a ground-breaking preliminary injunction action filed last fiscal year, the Commission sought to stop a railroad company from requiring employees to submit to medical examinations that included genetic testing. ***EEOC v. Burlington Northern and Santa Fe Railway Company***. The railroad targeted workers who had filed injury reports of work-related carpal tunnel syndrome. Without informing them of the purpose of the examinations or obtaining their consent, the company required them to give blood samples, which were then submitted to a lab for genetic analysis.

Burlington Northern agrees to end genetic testing and pay more than $2 million in relief to adversely affected employees

The court granted the preliminary injunction. The company agreed to stop gathering blood samples and refrain from using any previously obtained genetic analyses, pending a final resolution of all employee charges that such testing is discriminatory.

The parties resolved the charges through mediation which took place over several months in fiscal year 2002. The railroad agreed to provide over $2 million in monetary relief to 36 individuals as well as eliminate its program of genetic testing.

  - **Reasonable Accommodation**

The district court found for the EEOC in a suit filed on behalf of a truck driver with a permanent back injury that had occurred on the job. ***EEOC v. Yellow Freight Systems, Inc***. The driver could not sit longer than 45 minutes without significant pain. As a reasonable accommodation, the trucker had requested a transfer to a job as yard jockey, which required driving only short distances.

EEOC wins bench trial in case of truck driver where company refused to provide him with reasonable accommodation for disability incurred on the job

The company, however, rejected that option, suggesting instead that he pull his truck off the road and stretch "every so often." When the driver pointed out that he would not be able to make deliveries on time, he was fired.

In the bench trial, the court determined that the company's proposed accommodation was neither reasonable nor effective and awarded the driver $156,867 in back pay and $50,000 in punitive damages.

In ***EEOC v. Institute for Child and Family Development***, the Commission alleged that the institute refused to provide an administrative assistant with a

Many reasonable accommodations for employees with disabilities are inexpensive,

designated parking space and an accessible work area for her wheelchair as accommodations for her disability (multiple sclerosis). She was subsequently fired because she missed work when she couldn't find a place to park in the institute's lot. The assistant received $50,000 in monetary relief.

> such as a designated parking space for a wheelchair user or time off for medical treatment

In ***EEOC v. Temcor, Inc.***, the Commission contended that a company which makes aluminum geodesic domes discriminated against a deaf employee. When the employee, who worked as a fabricator/helper, attempted to discuss reasonable accommodations to assist him in performing his job, the company failed to follow through and fired him instead. The Commission obtained $135,000 in back pay and damages on his behalf.

In ***EEOC v. East Northport Residential Health Care Facility***, an employee requested a reasonable accommodation of three days off to receive treatment for her infertility. The health care facility responded by firing her. The case resolution provided the former employee with $135,000 in monetary relief.

In ***EEOC v. Frisch's Restaurants, Inc.***, the Commission contended that a restaurant failed to reasonably accommodate a management trainee who was severely hearing impaired. She had requested a headset to assist her in understanding take-out orders from customers but was fired rather than accommodated. The case was settled when the restaurant agreed to provide the trainee with $60,000 in damages.

- **Harassment**

In ***EEOC v. GMRI, Inc., d/b/a The Olive Garden***, the Commission alleged that a nationwide restaurant chain allowed coworkers to physically and verbally abuse a dishwasher who was mentally retarded. The abuse included putting him in a headlock, pulling down his pants in front of coworkers, and calling him offensive names. When he began to have difficulty on the job because of the abuse, he was fired.

The dishwasher received $115,000 in monetary relief in settlement of the case. The restaurant also agreed to discuss employment related problems with the guardian or job coach of mentally retarded employees. Additionally, the restaurant will post a revised and expanded anti-harassment policy in all of its 478 restaurants located throughout the United States.

- **Pre-employment Inquiries**

Wal-Mart, the world's largest retailer, agreed to pay $6.8 million and change its hiring practices in ***EEOC v. Wal-Mart Stores, Inc.***, which alleged that the company systematically discriminated against job seekers with disabilities. The Commission contended that in its facilities throughout the country, the company used an unlawful pre-employment screening device, called the "Matrix of Essential Job Functions," which asked applicants about disabilities and medical conditions. Pursuant to the settlement, the company agreed to discontinue using the matrix and institute new hiring procedures that comply with the ADA.

> Wal-Mart agrees to discontinue questionnaire that screened out applicants with disabilities and to pay $6.8 million to compensate those applicants and other victims of disability discrimination

The monetary relief was divided into two funds: $3 million to compensate individuals who were denied employment because of the pre-employment screening device; and $3.8 million to compensate individuals included in the Commission's 13 pending ADA suits against Wal-Mart.

For example, one individual who was denied a reasonable accommodation worked as a "loader/scanner" at a distribution center. Because of a hearing impairment, he was unable to hear the scanner's beeping sound signaling that a product's bar code had been read. Rather than provide him with adaptive equipment or transfer him to another job, Wal-Mart fired him. As a result of the settlement, the individual will receive a job and more than $200,000 in back pay and compensatory damages.

Wal-Mart agreed to notify potential "matrix" claimants through postings at Wal-Mart hiring locations, web sites and print media, including notices in People, USA Weekend, and Parade magazines. Individuals who file claims and who are determined to be eligible for relief will share in the $3 million fund and be given hiring preference at the company's distribution centers.

In another case involving pre-employment medical inquiries, the Commission alleged that an auto manufacturer unlawfully asked applicants about medical conditions before extending job offers. After making job offers, the company conducted physical examinations and then used the information to revoke job offers rather than assessing each applicant's ability to perform the job. ***EEOC v. Ford Motor Co. and Visteon Corp.***, Eleven applicants received a total of $415,000.

- **Hiring**

In ***EEOC v. Windmill Inns of America***, the Commission alleged that a hotel refused to hire an applicant as a receptionist because she is blind. The applicant had worked five years in a similar position for an international hotel chain. Additionally, the Oregon Commission for the Blind had offered to provide a technical consultant, adaptive equipment and any training required to help her do the job. The hotel agreed to pay the applicant $35,000 in compensatory damages.

In another case, the Commission alleged that an airline failed to hire an applicant as a reservations agent because of his disability (quadriplegia). The company agreed to change its policy regarding reasonable accommodation requests and to pay the applicant $150,000 in back pay and damages. See ***EEOC v. American Airlines, Inc***.

The company in ***EEOC v. Bath & Body Works*** learned that an applicant had multiple sclerosis through a reference check with the applicant's former employer and allegedly refused to hire her as a store manager as a result. The EEOC recovered $30,000 in monetary relief on her behalf.

> Company compensates applicant with multiple sclerosis for refusing to hire her after it learned about her disability

See also ***EEOC v. Houston Area Sheet Metal Joint Apprenticeship Committee*** (deaf and mute applicant denied admission to an apprenticeship program received $30,000 and admission to program); ***EEOC v. Oak Brook Hills Hotel & Resort*** ($40,000 obtained for a deaf applicant denied a position as a sous chef); and ***EEOC v. Routh Packing Co***. (meat processor withdrew offer for cutter position to applicant with epilepsy; paid $25,000 in compensatory damages).

- **Discharge**

In ***EEOC v. United Parcel Service***, the Commission alleged that the nationwide package delivery service discriminated against a class of employees who tried to return to work after taking medical leave. UPS required all employees to obtain a "full medical release" before it allowed them to resume work, rather than assessing whether the employees could perform their jobs with or without reasonable accommodations. Under this policy, UPS fired a package car driver after an isolated nocturnal seizure, without considering the possibility of accommodation. The case was resolved for $375,000, including $48,000 in compensatory damages for the former driver and a total of $327,000 in compensatory damages to eight others.

> UPS rescinds its policy requiring employees to return to work without medical restrictions and agrees to assess need for reasonable accommodations instead

In ***EEOC v. The Red Wing Company***, Inc., the Commission alleged that a manufacturer of jams and condiments refused to permit a quality assurance inspector to return to her job after she injured her back at work. She was diagnosed with disc dessication and herniation, which significantly restricted her ability to lift. The former employee received $65,000 in damages.

In ***EEOC v. Trader Joe's Co.***, the Commission obtained $50,000 in monetary relief for a part-time crew member who was fired because she could not lift her arm. Her mobility was

limited as a result of nerve damage from a spinal cord injury. The settlement also provided for a $10,000 donation to the Christopher Reeves Spinal Injury Research Foundation.

In ***EEOC v. Jetson Midwest Mailers, Inc.***, the Commission argued that the company regarded a mail sorter as disabled when it fired her after she suffered a mild stroke. She received $32,500 in damages. In another discharge case, ***EEOC v. Schofield Foods, Inc., d/b/a/ Quality Foods IGA***, a grocery store fired a 15-year-old part-time bagger and stock person because she was HIV-positive. The former employee received $1,000 in lost wages and $89,000 in compensatory damages.

In ***EEOC v. Greenville Ford-Mercury, Inc.***, a jury found for the Commission and awarded a mechanic $85,000 in compensatory and punitive damages. The Commission had alleged that the auto repair/sales company fired the mechanic because he had insulin-dependent diabetes. Only two days after the employee fainted as a result of low blood sugar, the company discharged him.

Jury finds car repair company wrongfully fired mechanic because he had insulin-dependent diabetes

Pursuant to the statutory cap on damages, the court reduced the award to $50,000. The mechanic, who found a higher paying job shortly after losing his job, also received $526 in back pay and $949 for his medical expenses.

- **Retaliation**

Employees who complain about or oppose employment discrimination are protected against retaliation under the laws enforced by the Commission. Retaliation can take many forms, including discharge, harassment, demotion, reduction in pay or other action that adversely affects employment. Because retaliation discourages individuals from asserting their rights, cases involving this issue are a priority in the Commission's enforcement program.

In ***EEOC v. Red River Beverage Co.***, the jury returned a verdict, finding that a country and western dance hall fired an employee in retaliation for filing an EEOC charge alleging the dance hall discriminated against her because she was pregnant. The jury awarded her $155,000 in damages.

In Crest Discount Foods, Inc., a grocery business allegedly fired a white woman when she complained to the NAACP about being treated differently because she was married to a black man. To resolve the case, the company agreed to pay $75,000 in monetary relief.

The Commission contended that a white customer service manager was demoted in retaliation for complaining about the company's hiring policy. Eighty percent of the applicants she hired were black, in contravention of the policy to hire individuals who "reflect the community," which was predominantly white. When counseling didn't work, the company demoted her from her managerial position to a job with no hiring authority. The EEOC obtained $105,000 in monetary relief on her behalf. Additionally, the company agreed to eliminate any policy of hiring to mirror the community. See ***EEOC v. Wal-Mart Stores, Inc.***

Company compensates manager who was demoted after protesting policy that prohibited hiring too many blacks for store in predominantly white community

In ***EEOC v. Nanticoke Health Services, Inc.***, the Commission obtained $50,000 in monetary relief for a male registered nurse whose work was excessively scrutinized and then was discharged because he complained about the sexual harassment of female nurses by a male staff physician.

EEOC settles case against medical research center accused of retaliating against a Sri Lankan physician by questioning his visa status in letter to INS

In another case, the Commission alleged that a medical center retaliated against a Sri Lankan medical research physician when he claimed he was being discriminated against on the basis of his national origin. Shortly after

the physician lodged an internal complaint, the medical center contacted the Immigration and Naturalization Service to retract its support for his permanent visa application. The INS initiated a hearing into his immigration status, requiring him to hire a lawyer to defend his lawful resident status. He received $150,000 for emotional distress damages in the case resolution. ***EEOC v. The Queen's Medical Center, Inc.***

In ***EEOC v. Renter's Choice, Inc.,*** the Commission alleged that a furniture and appliance rental company demoted a group of black and Pakistani managerial employees in retaliation for their claims of race and national origin discrimination. The company agreed to provide the employees with $250,000 in back pay and damages.

After a receptionist complained that a female coworker was sexually harassing her, the company allegedly retaliated against her by disciplining her, eliminating her job duties and transferring her to another work area. ***EEOC v. Central Bucks Specialists***. After she filed a complaint with the EEOC, she was fired. The receptionist received $50,000 in a settlement with the employer.

Witnesses are also protected against retaliation. For example, in ***EEOC v. United Engines, Inc.***, a diesel engine company allegedly fired a service manager in retaliation for supporting a coworker's sexual harassment claim. Not only was he identified as a witness to the discriminatory treatment but he also provided information to assist in her lawsuit against the company. The Commission obtained $125,000 in damages on his behalf.

III. STATISTICAL ANALYSIS OF EEOC LITIGATION

A. Generally

On October 1, 2001, the start of fiscal year 2002, there were 523 merit cases in active litigation. (Direct suits, interventions and suits to enforce conciliation agreement are "merit" suits.) In FY 2002, OGC filed 332 merit suits for a total litigation workload of 855. OGC also resolved 345 merit cases throughout this year. At the end of the fiscal year (September 30, 2002), there were 510 cases in active litigation. The 345 merit resolutions yielded a total of $52,845,499 in monetary relief.

B. Suits Filed

In FY 2002, the field legal units filed 332 merit lawsuits; 327 direct suits and interventions and five suits to enforce conciliation agreements.[4]

Merit Filings in FY 2002

	Count	Percent
Direct	326	98.2%
Intervention	1	0.3%
Administ. Enf	5	1.5%
Total	332	100.0%

- **Litigation Workload**

  The FY 2002 litigation workload (cases active at the start of the fiscal year plus merit cases filed during the fiscal year) remained substantial with 855 suits in total. In FY 2001, the workload reached 842 suits.

Workload

	Active	Filed	Workload
FY 2001	457	385	842
FY 2002	523	332	855

- **Class Suits**

Of the 332 merit suits filed, 109, or 32.8%, were class cases; 223, or 67.2%, were individual cases. A "class" case is : (1) a case challenging a policy that applies to a group of similarly situated individuals; or (2) a case challenging a practice that affects a group of similarly situated individuals.

- **Delegated Authority**

Approximately 77% of the cases filed were authorized by the Regional Attorneys under their delegated authority.

FY 2002 Suit Authority

	Count	Percent
Commission	58	17.5%
General Counsel	17	5.1%
Regional Attorney	257	77.4%

Cases approved for litigation by the Regional Attorneys constituted a substantial proportion of all suits filed (77.4%), an increase over the percentage approved by the Regional Attorneys in FY 2001. (See below).

FY 2001 Suit Authority

	Count	Percent
Commission	76	19.6%
General Counsel	39	10.1%
Regional Attorney	270	70.4%

- **Statutes Invoked**

Of the 332 merit suits filed, 74.1% were filed to enforce Title VII, 12.3% were filed under the ADA, 8.7% were filed under the ADEA, 0.6% under the EPA, and 4.2% were filed under more than one statute.

Merit Filings in FY 2002 by Statute

	Count	Percent
Title VII	246	74.1%
ADA	41	12.3%
ADEA	29	8.7%
EPA	2	0.6%
Concurrent	14	4.2%
Total	332	100.0%

- **Issues Alleged**

As indicated in the table below, discharge was an issue in over 63% of the merit cases filed when constructive discharge is included. Harassment of all varieties was involved in 44.6% of suits filed. **Note:** Total count exceeds suits filed (332) because suits often contain more than one issue.

Issues Alleged in Suits Filed

	Count	Percent
All Harassment	148	44.6%
Sex Harassment	111	33.4%
All Discharge	211	63.6%
Discharge	150	45.2%
Const. Discharge	67	20.2%
Hiring	42	12.7%
Promotion	20	6.0%
Wages	21	6.3%
Reas. Accom. (Disability)	22	6.6%
Reas. Accom. (Religious)	16	4.8%
Invol. Retirement	4	1.2%
Language	2	0.6%

- **Bases Alleged**

As shown in the next table, Sex discrimination (38.8%) and Retaliation (35.8%) were the most often alleged bases for suits filed on the merits. Race (15.4%) and Disability discrimination (12.1%) were the next most frequently alleged bases. **Note:** Total count exceeds suits filed (332) because suits often contain multiple bases.

Bases Alleged in Suits Filed

	Count	Percent
Sex (Female)	129	38.8%
Sex (Pregnancy)	16	4.8%
Sex (Male)	20	6.0%
Race	51	15.4%
National Origin	26	7.8%
Disability	40	12.1%
Age	34	10.2%
Religion	20	6.0%
Equal Pay	6	1.8%
Retaliation	119	35.8%

- **Sex Discrimination**

As shown below, 72.7% of cases with sex as a basis alleged some form of harassment; 68.3% of cases with sex as a basis alleged sexual harassment.

Sex Discrimination Issues

	Count	Percent

All Harassment	117	72.7%
Sexual Harassment	110	68.3%
Discharge	57	35.4%
Const. Discharge	56	34.8%
Wages	13	8.1%
Hiring	9	5.6%
Promotion	5	3.1%

- **Race Discrimination**

As shown below, cases with race alleged as a basis had a higher percentage of discharge alleged (37%) than any other issue; race cases alleging harassment ran second (34.3%).

Race Discrimination Issues

	Count	**Percent**
Discharge	26	37.1%
Const. Discharge	6	8.6%
Harassment	24	34.3%
Promotion	9	12.9%
Hiring	7	10.0%
Wages	7	10.0%

- **Disability Discrimination**

As the table below indicates, discharge also figures prominently in suits with disability as a basis - again, it was the most frequently alleged issue (60% of all suits filed). Reasonable accommodation was the issue next most often alleged (55%).

Disability Discrimination Issues

	Count	**Percent**
Discharge	24	60.0%
Const. Discharge	2	5.0%
Reas. Accom.	22	55.0%
Hiring	6	15.0%
Terms & Cond.	2	5.0%
Promotion	2	5.0%
Wages	2	5.0%

- **Religious Discrimination**

As shown below, reasonable accommodation was the issue most often alleged in religious discrimination suits, with discharge a close second.

Religious Discrimination Issues

	Count	**Percent**

Reas. Accom.	16	88.9%
Discharge	13	72.2%
Hiring	5	27.8%
Harassment	3	16.7%

- **Age Discrimination**

Discharge was the most frequently alleged issue in age discrimination suits (41.2%). Unlike all other bases, hiring was the second most frequently alleged issue in age cases (38.2%); harassment was the least frequently alleged issue (2.9%).

Age Discrimination Issues

	Count	Percent
Discharge	14	41.2%
Const. Discharge	1	2.9%
Hiring	13	38.2%
Invol. Retirement	4	11.8%
Promotion	2	5.9%
Harassment	1	2.9%

- **National Origin Discrimination**

Harassment was the most frequently alleged issue in national origin suits (61.9%), followed by discharge with 57.1% of the suits.

National Origin Discrimination Issues

	Count	Percent
Harassment	13	61.9%
Const. Discharge	7	33.3%
Discharge	12	57.1%
Hiring	4	19.1%
Terms & Cond.	3	14.3%
Promotion	3	14.3%
Wages	2	9.5%
Language	2	9.5%

C. Suits Resolved

In FY 2002, the Office of General Counsel resolved a total of 345 merit lawsuits (direct suits, interventions and suits to enforce administrative settlements).[5] These 345 resolutions yielded a total of $52,845,499 in relief.

Merit Resolutions in FY 2002

	Count	Percent
Direct	340	98.5%
Intervention	2	0.6%
Administ. Enf.	3	0.9%
Total	345	100.0%

As shown in the table below, the number of merit resolutions was up in FY 2002 compared with FY 2001. Similarly, the total monetary relief was up by $1.6 million.

Resolutions in FYs 2001 and 2002

	FY 2001	FY 2002	Change
Merit Suits	319	345	+ 8.2%
Relief (in millions)	$51.2	$52.8	+ 3.1%

The number of merit resolutions in FY 2002 was greater than the average of the last five fiscal years (see table below).

Resolutions Since FY 1997

	Average FYs 1997-2001	FY 2002
Merit Suits	310.4	345

- **Types of Resolutions**

  As the next table indicates, of the 345 resolutions of merit suits, 69.3% were resolved by consent decree; 16.8% by settlement agreement; 5.5% by favorable court order, 5.5% by unfavorable court order and 2.9% were voluntarily dismissed.

  Types of Resolutions

	Count	Percent
Consent Decree	239	69.3%
Settlement Agreement	58	16.8%
Favorable Court Order	19	5.5%
Unfavorable Court Order	19	5.5%
Vol. Dismissal	10	2.9%
Total	345	100.0%

- **Rate of Success**

  The rate of merit suits successfully resolved in FY 2002 is 91.6% (includes consent decrees, settlement agreements and favorable court orders). This success rate is slightly higher than the five year average from FYs 1997-2001 (see table, below).

Success Rate Since 1997

	Average FYs 1997-2001	FY 2002
Merit Suits	90.7%	91.6%

- **Class Cases Resolved**

Of the 345 merit resolutions, 113 had been filed as class cases compared with 232 filed as individual cases. The class cases averaged $267,784 in relief; the individual cases averaged $59,714 (see table on next page).

Class/Individual Suits

Type	Count	Total Relief	Average
Class	113	$38,991,862	$345,060
Individual	232	$13,853,637	$59,714

- **Delegated Authority**

Of the 345 merit suits resolved, the Commission had approved 59 or 17.1% for filing, the General Counsel had approved 41 or 11.9% for filing under his authority delegated by the Commission, and Regional Attorneys had approved another 245 or 71% for filing under their authority redelegated from the General Counsel. Because those suits authorized directly by the Commission generally involve major class cases, the monetary relief obtained by them is significantly higher on average ($323,235) than those approved by either the General Counsel ($224,284) or the Regional Attorneys ($100,322).

Suit Authority

	Count	Total Relief	Average
Commn.	59	$19,070,876	$323,235
GC	41	$9,195,639	$224,284
RA	245	$24,578,984	$100,322
Total	345	$52,845,499	$153,175

- **Statutes Invoked**

Of the 345 merit suits resolved during the fiscal year, 71.6% were filed to enforce Title VII, 17.7% were filed under the ADA, 5.8% were filed under the ADEA, 0.9% under the EPA, and 4.1% were filed under more than one statute (concurrent cases).

FY 2002 Resolutions By Statute

	Count	Percent
Title VII	247	71.6%
ADA	61	17.7%
ADEA	20	5.8%
EPA	3	0.9%
Concurrent	14	4.1%
Total	345	100.0%

As shown below, Title VII suits accounted for more than half of all relief obtained. Except for concurrent suits, ADA suits obtained the highest average monetary relief ($197,213); EPA averaged the lowest ($56,666).

FY 2002 Monetary Relief By Statutes

Statute	Relief (millions)	Relief (Percent)	Relief (per Suit)
Title VII	$28.95	54.8%	$117,206
ADA	$12.03	22.8%	$197,213
ADEA	$1.39	2.6%	$69,500
EPA	$0.17	0.3%	$56,666
Concurrent	$10.3	19.5%	$735,714
Total	$52.84	100.00%	$153,175

- **Issues Alleged**

Issues Alleged

	Count	Percent
All Harassment	140	40.6%
Sex Harassment	86	24.9%
Discharge	118	34.2%
Const. Discharge	62	18.0%
Hiring	51	14.8%
Reasonable Accom. (Disability)	27	7.8%
Promotion	26	7.5%
Wages	20	5.8%
Reasonable Accom. (Religious)	16	4.6%
Language	2	0.6%

The issues alleged in the suits resolved follow a distribution pattern similar to those alleged in the suits filed. The most frequent issue alleged in suits resolved involved some form of harassment (40.6%), similar to the percentage in suits filed (44.6%). Resolved suits alleging discharge, however,

were a significantly lesser percentage (34.2%) than those filed alleging discharge (45.2%). The issue of hiring was involved in 14.8% of suits resolved and in 12.7% of suits filed. Reasonable accommodation (disability) was an issue in 7.8% of all suits resolved and an issue in 6.6% of all suits filed. **Note:** Total count exceeds suits resolved (345) because suits often contain multiple issues.

- **Bases Alleged**

The bases alleged in the suits resolved are largely the same as those alleged in the suits filed. Sex (female) was alleged in 33.9% of suits resolved and in 38.8% of suits filed; race was alleged in 22.6% of suits resolved compared with 15.4% of suits filed. Retaliation was represented almost equally in suits filed (35.8%) and suits resolved (32.5%), while the percentage of National Origin suits filed (7.8%) was exactly the percentage resolved (7.8%). The percentage of resolved suits alleging disability discrimination (17.7%) was higher than the percentage of filed suits alleging disability discrimination (12.1%). **Note:** Total count exceeds suits resolved (345) because suits often contain multiple bases.

Bases Alleged in Suits Resolved

	Count	Percent
Sex (Female)	117	33.9%
Sex (Pregnancy)	16	4.6%
Sex (Male)	7	2.0%
Retaliation	112	32.5%
Race	78	22.6%
Disability	61	17.7%
National Origin	27	7.8%
Age	24	7.0%
Religion	17	4.9%
Equal Pay	7	2.0%

As the following table indicates, during the past five fiscal years, cases alleging discrimination on the basis of sex (female)ranged from about 30% to about 40% of cases filed each year by the EEOC. In four of those years, cases on the basis of sex (female)represented the highest percentage of cases filed. However, in FY 2001, suits alleging retaliation topped the list. In the other four years, retaliation suits represented the second highest percentage of cases filed. Roughly 20% of all cases filed over the period alleged race discrimination while allegations of national origin discrimination were present in approximately 10% of all suits filed. Suits filed on the basis of pregnancy represented less than 2% of all cases filed in two years but reached a high of 4.8% in FY 2002. Cases filed on the basis of sex (male) rose to a five-year high of 6% in FY 2002. Of all the bases presented, cases filed on the basis of age have fluctuated the least over the five year period, with a maximum fluctuation rate of only 1.5 percentage points. Cases filed on the basis of religion also fluctuated very little, with a maximum rate of only 1.8 percentage points. Conversely, disability cases fluctuated the most, from a low of 9% to a high of 27.8%.

Bases Alleged in Cases Filed FY 1997 - 2002

Percent Distribution

FY	Sex(F)	Sex(P)	Sex(M)	Disab.	Age	Retal.	Relig.	NO	Race
1997	39.5%	1.3%	2.7%	27.8%	14.7%	26.1%	5.7%	11.7%	13.4%
1998	37.7%	0.0%	2.4%	23.2%	11.3%	28.3%	5.9%	10.2%	17.0%
1999	38.7%	3.7%	4.3%	12.4%	10.5%	35.6%	6.2%	6.6%	20.6%
2000	42.4%	3.1%	2.4%	9.0%	11.0%	26.6%	5.9%	13.4%	20.0%
2001	30.4%	1.0%	2.1%	16.5%	9.8%	32.7%	4.4%	7.5%	20.9%
2002	38.8%	4.8%	6.0%	12.1%	10.2%	35.8%	6.0%	7.8%	15.4%

Total	38.8%	2.9%	3.4%	15.5%	11.0%	30.8%	5.7%	9.3%	18.4%	
Count										
FY	Sex(F)	Sex(P)	Sex(M)	Disab.	Age	Retal.	Relig.	NO	Race	Total
1997	118	4	8	83	44	78	17	35	46	299
1998	140	0	9	86	42	105	22	38	63	371
1999	169	16	19	54	46	153	27	29	90	437
2000	123	9	7	26	32	77	17	39	58	290
2001	143	16	8	40	34	119	17	29	81	388
2002	129	16	20	40	34	119	20	26	51	332
Total	822	61	71	329	232	651	120	196	389	2117

D. Resources

- **Staffing**

From FY 1999 through FY 2001, OGC experienced a significant increase in the number of field employees -- from 308 to 383, an addition of 75 staff. In FY 1999, trial attorneys were assigned to area offices to increase attorney/investigator interaction in investigating charges. In FY 2001, OGC was provided additional staff to enhance the litigation program, raising the number of field staff to 383 on board. Since that high, however, OGC staff on board in the field decreased a total of 30 employees -- from 383 to 353.

Headquarters staffing has declined each year in the last five years - from a high of 102 in FY 1998 to a low of 79 in FY 2002, representing a decrease of 22.5%. In addition, of the 79 employees at headquarters OGC, 42 were in line services: 19 in Systemic Litigation Services and 23 in Appellate Services.

OGC Staffing (On Board)

Year	HQ	All Field	Field Attorneys*
1998	102	308	195
1999	98	365	248
2000	89	359	226
2001	81	383	248
2002	79	353	229

* - Includes Regional Attorneys and Supervisory Trial Attorneys

- **Litigation Budget**

The litigation support budget for FY 2002 was $2.86 million, down about 17% from the $3.45 million spent in FY 2001.

Year	Litigation Support Funding
1998	$2.19
1999	$2.88
2000	$3.75
2001	$3.45
2002	$2.86

EEOC Litigation: 1993 - 2002

	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00	FY01	FY02
ALL SUITS FILED	**481**	**425**	**373**	**193**	**330**	**411**	**464**	**328**	**430**	**364**
MERITS	**398**	**357**	**328**	**167**	**299**	**371**	**437**	**290**	**385**	**332**
TITLE VII	260	235	193	106	174	235	325	222	269	246
ADA	3	34	81	38	79	79	51	23	62	41
ADEA	115	74	41	13	36	36	41	27	32	29
EPA	2	0	1	1	0	2	3	3	5	2
CONCURRENT	18	14	12	9	10	19	17	15	17	14
SUBPOENA	83	68	45	26	31	40	27	38	45	32
ALL RESOLUTIONS	**427**	**469**	**338**	**296**	**245**	**331**	**349**	**438**	**360**	**373**
MERITS	**362**	**408**	**319**	**278**	**214**	**295**	**319**	**405**	**319**	**345**
TITLE VII	235	266	216	175	122	181	192	305	219	247
ADA	1	9	25	52	45	69	65	52	42	61
ADEA	99	109	61	35	35	35	41	35	34	20
EPA	2	3	2	0	0	1	0	4	6	3
CONCURRENT	25	21	15	16	12	9	21	9	18	14
SUBPOENA	65	61	19	18	31	36	30	33	41	28
BENEFITS	**$36.4**	**$39.5**	**$18.9**	**$50.8**	**$114.7**	**$95.5**	**$98.4**	**$49.8**	**$51.2**	**$52.8**
TITLE VII	$7.0	$23.6	$9.0	$18.8	$95.0	$62.0	$49.2	$35.1	$29.8	$29.0
ADA	$0.2	$0.4	$1.4	$2.5	$1.1	$2.4	$2.9	$3.0	$2.2	$12.0
ADEA	$26.6	$15.0	$8.0	$10.5	$18.0	$29.5	$42.5	$11.2	$3.1	$1.3
EPA	$0.1	$0.0	$0.2	$0.0	$0.3	$0.7	$0.3	$0.2	$0.3	$0.2
CONCURRENT	$2.5	$0.5	$0.3	$19.0	$0.3	$0.9	$3.5	$0.3	$15.8	$10.3

IV. SIGNIFICANT APPELLATE DECISIONS AND BRIEFS

A. Appellate Highlights

The Supreme Court issued four decisions in fiscal year 2002 in cases in which the Commission participated to address employment discrimination issues. In each case, the Court adopted the position urged by the Commission. ***EEOC v. Waffle House, Inc.***; ***Chevron, U.S.A., Inc. v. Echazabal***; ***Edelman v. Lynchburg College***; and ***Swierkiewicz v. Sorema N.A.*** (See descriptions, below.)

An FY 2002 study of the EEOC's Litigation Program over a five-year period (fiscal years 1997 through 2001)

demonstrated that its Appellate Services has an extremely effective record. During the period studied, the EEOC won 12 of 15 appeals of trials that were decided. This represents a success rate of 80%, which compares favorably to the 16% success rate of employment discrimination cases handled by the private bar, as reported in Eisenberg and Schwab, Double Standard on Appeal: An empirical Analysis of employment Discrimination Cases in the U.S. Courts of Appeals (July 16, 2001).

In the 11 cases where EEOC had prevailed at trial, it succeeded in ten or 90.9% on appeal, compared with the success rate of 56.4% on appeals by private plaintiffs who had won below. EEOC won two of the four cases it had lost below or 50%, compared with private plaintiffs who won only 5.8% of the cases they had lost below. See Eisenberg and Schwab, supra.

B. Significant Decisions

- **Supreme Court Decisions**

EEOC v. Waffle House, Inc.,
534 U.S. 279 (January 15, 2002)

Supreme Court rules that private arbitration agreement does not prevent the Commission from seeking victim-specific remedies in court

In this ADA case, the Supreme Court ruled 6-3, that a private arbitration agreement between an individual and an employer does not prevent the Commission from filing a court action and recovering victim specific remedies (e.g., back pay, punitive damages). The Court reversed a Fourth Circuit ruling that the EEOC was precluded from recovering remedies for an individual who had agreed with his employer to arbitrate any discrimination claims.

The Court recognized that the Commission is authorized to bring suit in its own name and has the prerogative, as a federal enforcement agency, to decide the appropriate relief to seek. Rejecting the argument that the Commission is a mere proxy for the individuals for whom it seeks relief in its actions, the Court ruled that the Commission can decide to bring a claim for monetary damages in court, even on behalf of an individual who would be required to pursue his or her own claim in arbitration. In a ringing endorsement of EEOC's public enforcement role, the Court recognized that the statutory enforcement scheme makes the Commission the "master of its own case."

Chevron, U.S.A., Inc. v. Echazabal
122 U.S. 2045 (June 10, 2002)

Supreme Court reverses appellate court and upholds EEOC's direct threat regulation

In this ADA case, the. Supreme Court unanimously agreed that the Ninth Circuit erred in invalidating the EEOC's threat-to-self regulations (29 C.F.R. §§ 1630.2(r), 1630.15 (b)(2)), which provide a defense for discrimination against an individual with a disability if the job would create a "significant risk of substantial harm to his health or safety." The Commission urged that the regulations were consistent with the text of the ADA and otherwise reflected a reasonable interpretation of the ADA, thus entitling them to deference under ***Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.***, 467 U.S. 837 (1984). In upholding the regulations, the Court stressed that they avoid impermissible paternalism by requiring "that judgments based on the direct threat provision be made on the basis of individualized risk assessments."

Edelman v. Lynchburg College
122 S. Ct. 1145 (March 19, 2002)

The Supreme Court unanimously upheld EEOC's regulation providing that a verified charge filed outside the time period will relate back to an earlier unverified charge that was timely filed. Six justices joined the opinion upholding the regulation as "an unassailable interpretation of § 706" of Title VII, explaining that the verification requirement "provide[s employers with] some degree of insurance against catchpenny claims of disgruntled, but not necessarily aggrieved, employees." This latter objective "demands an oath only by the time the employer is obliged to respond to the charge, not at the time an employee files it with the EEOC." The remaining three justices would have upheld the regulation because it is a "reasonable" interpretation of the statute, thus entitled to judicial deference.

Supreme Court unanimously approves EEOC's "relation-back" regulation

Swierkiewicz v. Sorema N.A.
122 S. Ct. 992 (February 26, 2002)

In another unanimous decision agreeing with the Commission's position, the Supreme Court held that an employment discrimination complaint need not allege facts sufficient to establish a prima facie case of discrimination. Rather, such a complaint need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief."

Following the analysis in the Commission's amicus curiae brief, the Court held that the prima facie case under McDonnell Douglas "is an evidentiary standard, not a pleading requirement." The requirements for a prima facie case were never meant to apply "to the pleading standard that plaintiffs must satisfy in order to survive a motion to dismiss." According to the Court, imposing those requirements in employment discrimination cases conflicts with the general rule that litigants only need to give a short statement of the claim that would entitle them to relief.

- **Appellate Court Decisions**
  - **Title VII**

EEOC v. Joe's Stone Crab, Inc.,
296 F. 3d 1265 (11th Cir. July 12, 2002)

In a *per curiam* opinion, the Eleventh Circuit affirmed the district court finding that Joe's Stone Crab, an upscale restaurant, had an implicit policy of excluding women from food server positions and that qualified women were deterred from applying as a result. The court noted in particular the lower court's finding that the exclusionary policy was based on a stereotype which associated "fine-dining ambience" with all-male service.

EEOC v. Wal-Mart Stores, Inc.,
2002 WL 1003133 (9th Cir. May 16, 2002)

Appellate court rejects Wal-Mart's arguments on punitive damages issues in EEOC pregnancy case

The Ninth Circuit Court ruled in the Commission's favor for the second time on the question of punitive damages in this case. In 1994, the EEOC prevailed at trial with the jury agreeing that the company violated Title VII when it refused to hire Ms. Stern because she was pregnant. The district court, however, refused to submit the issue of punitive damages to the jury, ruling that the EEOC did not present sufficient evidence to support an award of punitive damages. Reversing that ruling, the Ninth Circuit remanded the matter for a new trial solely on the issue of punitive damages. See ***EEOC v. Wal-Mart Stores, Inc., 156 F.3d 989, 992-93 (9th Cir. 1998).***

In a subsequent trial on punitive damages, the district court refused to allow the Commission to present evidence of Wal-Mart's deliberate cover-up. Further, the lower court allowed Wal-Mart officials to tell the jury their discredited version of Ms. Stern's interview. When the jury found for Wal-Mart, EEOC again appealed, challenging these two evidentiary rulings of the district court.

Reversing and remanding for yet another trial, the Ninth Circuit again agreed with the EEOC, holding that the district court erred in both rulings. The court stated that the evidence of Wal-Mart's post-discrimination cover-up "is highly probative for a determination of punitive damages." The court further found that the first jury necessarily rejected Wal-Mart's version of events and credited EEOC's when it decided that Wal-Mart had intentionally discriminated against Ms. Stern; thus its version should not have been allowed in as evidence.

Townsend v. Lumbermen's Mutual,
294 F. 3d 1232 (10th Cir. June 24, 2002)

In this race discrimination action, the Tenth Circuit agreed with the Commission that the district court committed reversible error by refusing to instruct the jury on pretext. The EEOC argued as amicus that the jury should have been informed it could infer the defendant acted for a discriminatory reason if it found that the employer's stated reasons for the action in issue were not its true reasons.

Quoting the Commission's brief, the court stated, "[W]e are persuaded by the position of the

EEOC that the issue is whether in the absence of any instructions about pretext, 'the jury found for the defendant because it believed the plaintiff could not prevail without affirmative evidence that his race was a motivating factor in the challenged employment decisions.'"

Wilkerson v. Grinnell Corp.,
270 F.3d 1314 (11th Cir. October 22, 2001)

Agreeing with the Commission's argument as amicus curiae, the court ruled that Title VII's verification requirements for charge filing were satisfied when the plaintiff signed her intake questionnaire under penalty of perjury. The court vacated the district court's grant of summary judgment and remanded the plaintiff's Title VII claims.

Scruggs v. Univ. Health Services, Inc.,
No. 00-10935 (11th Cir. December 5, 2001) (unpublished)

Agreeing with the Commission's position as amicus curiae, the Eleventh Circuit held "that the district court erred in finding that Mr. Scruggs's verified intake questionnaire was not a proper charge." In deciding this issue, the appellate court relied on its recent decision in ***Wilkerson v. Grinnell***, 270 F.3d 1314 (11th Cir. 2001) and on 29 C.F.R. § 1601.12(a). The court thus vacated the district court's grant of summary judgment in favor of the defendant and remanded the case.

Cush-Crawford v. Adchem Corp.,
271 F. 3d 352 (2d Cir. November 16, 2001)

Adopting the EEOC's position as amicus curiae, the Second Circuit held that a jury may award punitive damages under Title VII regardless of whether it awards compensatory or nominal damages. The court also agreed with the Commission's position that the employer's failure to respond to plaintiff's complaints of sexual harassment was sufficient to support the jury's award of punitive damages.

EEOC v. Circuit City Stores,
285 F. 3d 404 (6th Cir. February 28, 2002).

Following the Supreme's Court's decision in ***EEOC v. Waffle House***, appellate court refused to stay EEOC's sexual harassment suit against Circuit City

In this consolidated appeal, the Sixth Circuit dismissed Circuit City's interlocutory appeal as moot. Upholding the lower court's denial of the company's request for a stay of EEOC's sexual harassment suit against it, the court also affirmed the dismissal of Circuit City's action against the charging party. Rejecting the company's suit to compel the charging party to arbitrate her "claim," the court noted that charging party had not filed suit herself nor failed to arbitrate after receiving a notice of right to sue. Thus, according to the court, "nothing in Circuit City's complaint alerts the district court that Circuit City even has a case or controversy against [charging party]."

The Court concluded that, particularly after the Supreme Court's decision in ***EEOC v. Waffle House***, 122 S. Ct. 754 (2002), there is "neither a constitutional nor a prudential basis for asserting federal court jurisdiction over Circuit City's complaint," which, moreover, "lacks any theory upon which recovery could be based."

In Re Bemis Company, Inc.,,
279 F. 3d 419 (7th Cir. January 25, 2002)

Seventh Circuit rejects employer's efforts to apply class certification requirements to EEOC suits

The Commission filed suit seeking relief for a class of black employees who had been subjected to racial harassment, including nooses in the workplace. As a defense to the action, the company asserted that the EEOC had failed to plead the class action requirements of FRCP 23.

The district court granted the EEOC's motion to strike the Rule 23 defense on the ground that

the EEOC is not required to comply with the requirements of class certification, as the Supreme Court decided in ***General Telephone v. EEOC***, 446 U.S. 318 (1980).

The appellate court agreed and dismissed the company's appeal, noting that the Supreme Court's decision in ***EEOC v. Waffle House, Inc.***, 534 U.S. 279 (January 15, 2002), emd General Telephone with approval. Further, the court noted that in Waffle House, the Supreme Court held "even after the addition of compensatory and punitive damages to the EEOC's arsenal of remedies, the EEOC does not sue as the representative of the . . . employees who may benefit from the relief it obtains . . . ."

AT&T v. EEOC
270 F.3d 973 (D.C. Cir. November 16, 2001)

AT&T filed this declaratory judgment action, seeking a ruling that it had not unlawfully refused to give former female employees credit for work time they missed due to pregnancy before the enactment of the Pregnancy Discrimination Act ("PDA"). The district court dismissed the action, reasoning that immediate review was not warranted because the EEOC had not engaged in final agency action. On appeal, the D.C. Circuit affirmed the district court's judgment.

In ***AT&T v. EEOC***, D.C. Circuit rejects employer's efforts to challenge EEOC policy position under the Administrative Procedure Act

The appellate court noted that it was authorized to review the EEOC's actions only if its conduct constituted final agency action under the Administrative Procedure Act (APA). The court first stated that if the Commission had filed a lawsuit, the suit would constitute final agency action. Such a decision, however, could not be challenged under the APA because AT&T could simply defend itself in the lawsuit.

The court then ruled that the Commission has not taken a final agency action when it embraces one view of the law over another. No injury would be inflicted on AT&T because the EEOC's expressed view of the law "has force only to the extent the agency can persuade a court to the same conclusion."

Under these circumstances, the court stated, it could not permit AT&T to institute litigation against the Commission over the lawfulness of its policy. Such a suit would allow AT&T "to preempt the Commission's discretion to allocate its resources as between this issue and this employer, as opposed to other issues and other employers, as well as its ability to choose the venue for its litigation[.]"

Crowley v. L.L. Bean, Inc.,
2002 WL 31056020 (1st Cir. September 19, 2002)

Following the Supreme Court's decision in Morgan, appellate court upholds jury verdict finding company liable for sexual harassment on continuing violation theory

The First Circuit affirmed the district court's order upholding a jury verdict in favor of plaintiff in this sexual harassment action. Following ***Nat'l R.R. Passenger Corp. v. Morgan***, 122 S. Ct. 2061 (2002), the court held that a jury not only could consider the harasser's conduct outside the 300-day period as relevant background evidence, but also could hold the company liable for acts of harassment that occurred earlier if there was an act contributing to the hostile environment within the 300-day filing period. The court further recognized that its practice of categorizing continuing violations as either serial or systemic was no longer necessary after Morgan.

- **ADEA**

EEOC v. Bd. of Regents of the Univ. of Wisconsin,
288 F. 3d 296 (7th Cir. April 30, 2002)

The Board of Regents of the University of Wisconsin (UW) appealed a jury verdict finding that the University's Graduate Press had fired four individuals on the basis of their age and had done so willfully. Rejecting UW's argument that the EEOC's claim for victim-specific relief was barred

by the state's Eleventh Amendment's sovereign immunity, the court of appeals emd the " well-established principle that the fact that states retain sovereign immunity from private lawsuits [as they do under the ADEA] does not mean that they are protected from suit by the federal government."

Lauderdale v. Johnston Industries, Inc.,
2002 WL 338631 (11th Cir. February 7, 2002)

Employer's misrepresentation of reasons for layoff invalidates waiver of rights to bring age claim

Adopting the Commission's reasoning as amicus curaie, the Eleventh Circuit reversed the district court's grant of summary judgment dismissing the plaintiff's age discrimination claim on the ground that he had signed a valid waiver of his right to challenge his discharge. The plaintiff had argued the waiver was invalid under the Older Workers' Benefit Protection Act (OWBPA) because he had relied on the company's false assertion that his job was being eliminated. The lower court decided a waiver could never be invalidated by a claim that a company lied about the reasons for its actions.

Noting that "a waiver procured by fraud may not be executed knowingly or voluntarily," the appellate court ruled the plaintiff had shown the waiver was invalid through credible evidence that he had justifiably relied on defendant's misrepresentation in signing the release.

EEOC v. Complete Dewatering, Inc.,
281 F. 3d 1283 (Table) (11th Cir. December 11, 2001)

The Eleventh Circuit reversed the district court's grant of attorney's fees to the defendant in a unanimous, per curiam opinion. Applying the "substantially justified" standard of the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412, the lower court had awarded $215,000 in attorney's fees.

Appellate court reverses award of attorney's fees to prevailing defendant, finding that the EEOC's case was substantially justified

On appeal, the Commission argued that the EAJA's "substantially justified" standard did not apply to its enforcement actions. Additionally, the EEOC contended that its position was substantially justified. The appellate court agreed with the second contention, finding that the EEOC's evidence "could have provided enough indication of direct evidence of discrimination to give the EEOC substantial justification to pursue the case." Acknowledging that a prior panel of the Eleventh Circuit had discounted the same evidence in affirming summary judgment, the court nonetheless found that a ruling against a party on summary judgment does not preclude a finding that the case was substantially justified. The court did not reach the broader question posed by the Commission - "whether the EAJA requires application of the 'substantially justified' standard to actions.for attorney's fees brought against the government by prevailing defendants in ADEA actions."

- **Americans with Disabilities Act**

Waddell v. Valley Forge Dental Assocs., Inc.,
276 F. 3d 1275 (11th Cir. December 21, 2001)

Waddell, a dental hygienist, claimed that his employer unlawfully terminated him because he is HIV-positive. Granting summary judgment for the employer, the district court reasoned that the dental hygienist was not a qualified individual with a disability. According to the court, Waddell posed a direct threat to his patients because there was a significant risk that he could transmit HIV while cleaning their teeth.

Court finds that dental hygienist with HIV carries burden of proving he is not a direct

On appeal, the Eleventh Circuit affirmed. Rejecting the Commission's position as amicus, the court decided Waddell carried the burden of proving that he was not a

direct threat or that reasonable accommodations were available. Ignoring objective medical evidence and expert witness testimony to the contrary, the court further ruled that the hygienist posed a significant risk of transmitting the virus, even though he performed no exposure-prone procedures and adhered to universal precautions.

threat to patients

C. Significant Appellate Briefs

Appellate Services filed 89 briefs during fiscal year 2002: 55 as a party in Commission cases on appeal and 34 as amicus curiae. Some of the more notable briefs are discussed below:

- **Title VII**

EEOC v. Joe's Stone Crab, Inc.
No. 01-12917 (11th Cir.)
Brief as Appellee
Filed 10/1/01

For a five year period beginning in October 1986, Joe's Stone Crab Restaurant hired 108 men and no women as food servers. Based in part on this evidence, the Commission filed a Title VII complaint alleging that the restaurant intentionally discriminated against women and that its word-of-mouth recruiting and subjective interviewing practices had a disparate impact on women. At trial, company hiring officials testified that waiting tables at the restaurant was traditionally "a male server type of job." The Commission introduced evidence that Joe's widespread reputation for not hiring women deterred women from applying.

Initially rejecting the disparate treatment claim without explanation, the district court held the restaurant liable under a disparate impact theory. However, the court made findings suggestive of intentional discrimination.

On appeal, the Eleventh Circuit reversed the disparate impact holding, but remanded on the issue of disparate treatment. The court held that the district court's findings suggest that Joe's "intentionally excluded women from food serving positions in order to provide its customers with an 'Old World,' fine-dining ambience."

On remand, the district court found Joe's had intentionally discriminated against female servers. It reaffirmed its prior relief award - namely, injunctive relief and monetary damages - for four women who either applied or testified they were deterred by knowledge that applying would be a futile gesture.

EEOC urges court to uphold finding of intentional discrimination against restaurant whose officials testified that waiting tables was "traditionally" a male job

In the instant appeal, the Commission first argued that the district court's finding of intentional discrimination is supported by substantial evidence in the record. Second, the court already rejected the restaurant's argument in the previous appeal that the Commission's claim is untimely. Finally, the district court properly exercised its discretion in its monetary damages award.

Burns v. City of Detroit
No. 98-213029 (Michigan Court of Appeals)
Brief as Amicus Curiae
Filed May 31, 2002

Burns was subjected to unwelcome sexual and sexist comments from two co-workers. None of her supervisors took her complaints about the harassment seriously. After she complained, her co-workers continued with their sexual comments and also threatened her with bodily harm. At a meeting in response to Burns' complaint, a supervisor belittled her allegations. Burns filed a charge alleging claims of sex discrimination and retaliation.

EEOC contends that comments supporting a finding of a sexually hostile work environment are not protected speech under the First Amendment. Burns prevailed at trial on her claims of sexual harassment and retaliation under Michigan's Elliott-Larsen Civil Rights Act (ELCRA). On appeal, the

Michigan Court of Appeals affirmed the judgment with respect to plaintiff's sexual harassment and retaliation claims. On further appeal, however, the Michigan Supreme Court remanded to the court of appeals with instructions to consider whether "the remarks that supported the 'hostile environment' sexual harassment claims are protected speech under the Constitution" and thus could not form the basis for liability. Additionally, the state Supreme Court instructed, the lower court should consider whether a finding of liability based on such remarks would raise vagueness and overbreadth concerns under the same constitutional provision.

Appearing as amicus before the state court of appeals, the Commission argued that the comments supporting a hostile work environment in this case are akin to threats and fighting words, and therefore do not trigger First Amendment analysis. Furthermore, Title VII is concerned with addressing the secondary effects of harassing speech workplace discrimination and only incidentally aimed at particular speech, thus warranting only intermediate scrutiny. Even if liability for sexual harassment under Title VII were subject to strict scrutiny review, the statute passes muster because the government has a compelling interest in reducing sex discrimination in the workplace and Title VII is narrowly tailored to effectuate that interest.

Durkin v. City of Chicago
No. 02-2358 (7th Cir.)
Brief as Amicus Curiae
Filed August 26, 2002

Commission argues the City of Chicago is liable for sexual harassment that effectively denied a probationary police officer adequate firearms training

Durkin claimed she was subjected to sex discrimination, sexual harassment, and retaliation while employed as a probationary police officer. During her firearms training at the Academy, Durkin alleged that a range instructor subjected her to a barrage of gender-based verbal hostility and abuse and engaged in other conduct designed to undermine, rather than enhance, her skills and confidence. Durkin claimed that, as a result of the harassment, she was denied appropriate firearms training and an equal opportunity to qualify as a police officer because of her gender. Finally, she alleged that she was fired almost immediately after complaining to superiors about discriminatory treatment and abusive comments.

The district court granted summary judgment for the City. On appeal, the Commission argued that the lower court erred in rejecting Durkin's sex discrimination and harassment claims. The City is vicariously liable for sexual harassment that effectively denied Durkin adequate firearms training and resulted in her discharge. In addition, the district court erred in rejecting Durkin's retaliation claim. A jury could find that Academy officials retaliated against her by ignoring her state-certified firearms qualification and by undermining efforts to respond to her complaints of harassment and abuse.

Frank, et al. v. Xerox Corp.,
Nos. 02-20516, 20517, 20518, 20519 (5th Cir.)
Brief as Amicus Curiae
Filed September 20, 2002

Commission challenges Xerox's race conscious hiring decisions as direct evidence of discrimination

In a complaint filed under Title VII and 42 U.S.C. § 1981, six African American plaintiffs alleged that Xerox denied them promotions and pay raises because of their race and forced them to work in a racially hostile work environment. Xerox had implemented a Balanced Workforce (BWF) Initiative that set explicit racial goals for each job category. The BWF numbers showed African Americans as "over-represented" and whites as "under-represented" in virtually every job category. Consequently, plaintiffs contended, Xerox favored whites over blacks throughout the 1990s to attain an appropriate racial "balance" in the work force.

In granting summary judgment to Xerox, the district court essentially ignored the BWF evidence. The court held that Frank could not prevail because she didn't prove she was "clearly better qualified" than the successful non-black candidate for the promotion.

On appeal, the Commission argued that the district court erred in granting summary judgment to the company in light of the evidence of Xerox's balanced workforce initiative. That initiative constitutes direct evidence of discrimination because it indicates that Xerox made race-conscious job decisions. This practice may have affected some or all of the decisions challenged in the instant case. At minimum, it constitutes evidence of pretext.

Furthermore, the district court incorrectly held that Frank was required to show she was "clearly better qualified" for a particular position. Where, in addition to her comparative qualifications, the plaintiff provides evidence to support her claim of pretext, that standard does not apply.

EEOC v. Harbert-Yeargin
No. 00-5150 (6th Cir.)
Petition for Reh'g En Banc
Filed November 5, 2001

EEOC contends panel majority erred in ruling that male supervisor's unwanted and offensive touching of male workers is tantamount to "towel-snapping in the locker room."

In this same-sex harassment suit, the EEOC argued that Harbert-Yeargin allowed Carlton and other male employees to be subjected to a hostile work environment in violation of Title VII. A jury found for the EEOC and intervenor Carlton on the claim of sexual harassment and the district court denied the employer's motion for judgment as a matter of law.

On appeal, however, the panel majority reversed the district court's judgment, holding that the behavior in this case was not actionable harassment because of sex. The majority reasoned that the female comparators were not similarly situated because they did not work in the field or have contact with the harasser. Additionally, the majority found that the conduct was merely "gross, vulgar, male horseplay in a male workplace" which, if actionable, could lead to penalizing "towel-snapping in the locker room."

In its petition for rehearing en banc, the Commission argued that the majority rested its decision on a misapprehension and re-evaluation of the facts, misapprehension of the law governing same-sex harassment, and policy considerations not implicated by the facts of the case. These errors culminated in an improper substitution of its judgment for that of the jury. A male employee who is subjected to unwanted and offensive touching by a male supervisor, who targets only men for abuse and has declared that he did not and would never harass female employees, has been subjected to harassment because of sex.

Doe v. Goldstein's Deli
No. 02-1361 (3d Cir.)
Brief as Amicus Curiae
Filed July 16, 2002

Company's failure to produce required records under circumstances indicating tax evasion warrants adverse inference as to its number of employees

The company moved to dismiss this Title VII suit, asserting that it did not have the requisite number of employees to fall within Title VII coverage. Rather than producing payroll records to support its contention, however, the company produced a pay check register, which was shown to be inaccurate and incomplete. The plaintiff introduced evidence that the company engaged in tax evasion by paying some employees under the table and, thus, understating its number of employees on its pay check register. Although the district court noted that "perhaps there were many records that if kept and made available would have may possibly have supported the plaintiff's case," the court nonetheless ruled in the defendant's favor and dismissed the case.

On appeal, the Commission filed an amicus curiae brief, arguing that the lower court should have applied the adverse inference rule to hold that the defendant is a covered employer under Title VII. Under the adverse inference rule, where a party fails to produce records that it is required by law to maintain, or where it fails to produce records under circumstances suggestive of fraud or a desire to suppress the truth, it is proper to infer that the absent records would support the position of the

opposing party on the issue in dispute.

Spain v. Mecklenburg County School Board
No. 01-2282 (4th Cir.)
Brief as Amicus Curiae
Filed March 8, 2002

Spain was involuntarily transferred from a position as director of a department to a supervisory position with fewer responsibilities. Although he retained his pay, he lost decision-making authority over the Special Education Department as well as the responsibility for supervising all the staff. Instead, Spain supervised only the special education teachers. Further, he reported to the new director, whom he had supervised and evaluated when she was the supervisor and he was the director. Spain filed a Title VII suit, contending that he was discriminatorily demoted on the basis of his gender.

The district court granted summary judgment to the School Board on the ground that Spain had failed to prove his demotion constituted an adverse action. Spain appealed and the Commission entered an appearance as amicus, arguing that the lower court erred in granting summary judgment for the School Board. Whether characterized as a demotion or a transfer with significantly decreased responsibilities, Spain's switch in positions constituted an adverse action because it negatively affected his terms and conditions of employment. Further, the district court erred in reasoning that because the School Board's policy and state law permitted the switch, there was no adverse action. Whether an action is adverse is a matter of federal not state law.

- **Age Discrimination in Employment Act**

EEOC v. Sidley, Austin, Brown & Wood
No. 02-1605 (7th Cir.)
Brief as Appellee
Filed June 10, 2002

Commission seeks to enforce subpoena in ADEA investigation to determine whether law firm's "partners" who were demoted to "counsel" are really employees

The Commission began a directed investigation of Sidley & Austin to ascertain whether the demotion of 32 attorneys from "partner" to "counsel" and a change in the firm's mandatory retirement policy for partners violated the ADEA. Although the firm produced some information requested by the Commission, the firm claimed other information was irrelevant to the question of whether its partners are covered by the ADEA and refused to produce it.

The Commission filed a motion to compel enforcement of its subpoena. The district court agreed with the Commission and enforced the subpoena, concluding that Sidley had failed to show the facts on coverage were so clear that the firm should be entitled to judgment as a matter of law.

The firm appealed. As appellee, the Commission argued it would be premature to decide the question of coverage at the subpoena enforcement stage. In addition to the facts already produced, the facts that have yet to be produced on issues such as remuneration, ownership, and management could show that some Sidley partners are more like employees than employers.

Robert H. Tice, et al. v. American Airlines, Inc.,
No. 01-3513 (7th Cir.)
Brief as Amicus Curiae
Filed November 13, 2001

A group of former pilots brought this private ADEA suit to challenge their mandatory retirement from American Airlines. Disqualified by federal regulation from serving as a captain or co-captain once they reached age 60, the pilots were forced to retire when the airline refused to allow them to down-bid to the third cockpit position of flight officer.

Commission contends that a collective bargaining agreement

Dismissing the suit for lack of subject matter jurisdiction, the district court decided that the

cannot resolve claims of airline pilots that they were forced to retire in violation of the ADEA

interpretation of a provision in the collective bargaining agreement (CBA) "would be dispositive of the plaintiffs' [ADEA] claims." Consequently, their federal statutory claims were precluded by the Railway Labor Act (RLA), which requires exclusive and binding arbitration of claims arising under a CBA between an airline and its employees.

On appeal, the Commission contended as amicus that the district court erred in holding this ADEA suit was precluded by the RLA. The retired pilots' claim that the airline denied their requests to down-bid to flight engineer jobs once the FAA's age-60 rule disqualified them from being captains states a cognizable claim of disparate treatment in violation of the ADEA.

Further, this federal statutory claim cannot be conclusively resolved through an interpretation of the CBA between the airline and the pilots' union.

- **Americans With Disabilities Act**

Chevron U.S.A., Inc. v. Echazabal
No. 01-1406 (S. Ct.)
Brief as Amici Curiae
Filed December 21, 2001

Chevron refused to employ Mr. Echazabal in its oil refinery because its doctors believed his liver condition would be exacerbated by exposure to petrochemicals. In an earlier amicus brief filed in the Ninth Circuit, the Commission had argued that the company had not met its burden of proving Echazabal's employment in the refinery would have posed a direct threat to his health. The Commission posited that Chevron had not relied on the best available medical evidence in reaching its decision. The Ninth Circuit, however, held that the statute does not contain any defense for cases in which an individual's performance of the job poses a direct threat to self. In so doing, the Ninth Circuit invalidated the Commission's direct threat regulations, which include a threat-to-self defense.

EEOC defends its direct-threat to self regulation which requires an individualized inquiry based on best available medical evidence

The government's brief in the Supreme Court argued that the Ninth Circuit had erred in invalidating the EEOC's regulations. The brief noted that EEOC's direct threat regulations were issued pursuant to the ADA's specific rulemaking authority and are entitled to deference under ***Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*** 467 U.S. 837 (1984).

Furthermore, the EEOC argued, the threat-to-self regulation is reasonable because it reflects an employer's legitimate interest in ensuring that an individual is not subjected to a significant risk of injury on the job. In addition, because the regulation requires an individualized inquiry into the disabled person's ability to do the job safely, it also guards against paternalistic employment decisions based on a generalized notion that individuals with certain disabilities pose a threat to themselves. (See also Supreme Court Decisions, supra).

Echazabal v. Chevron U.S.A., Inc.
No. 98-55551 (9th Cir.)
Supplemental Brief as Amicus Curiae
Filed August 8, 2002

On remand from the Supreme Court, the Ninth Circuit directed the parties to address whether Chevron's exclusion of Echazabal because he posed a 'direct threat' was based on an individualized inquiry as required by law. The Commission argued that it was not.

In Echazabal on remand, the Commission argued that Chevron failed to demonstrate any scientific basis for its assessment that Echazabal posed a "direct threat" to self

Although Chevron had made a decision based on its doctors' recommendations, Chevron should have obtained more objective and accurate information about Echazabal's liver function, the chemicals in the plant, their effect on liver function, and the actual effect on Echazabal's liver from working in the refinery. Chevron did not meet its burden of demonstrating that its doctors had any scientific basis for assessing Echazabal's risk.

It is well settled that the direct threat defense is an affirmative defense. The employer, therefore, has the burden of proving that an employee or applicant poses a direct threat. In light of these standards, it was error for the district court to hold that Chevron's direct threat determination was sufficient as a matter of law.

EEOC & Aikens, et al. v. UPS,
Nos. 01-15410, 01-15796, 01-15797 (9th Cir)
Brief as Appellee/Cross-Appellant
Filed November 8, 2001

In this case, the Commission challenged UPS's policy barring anyone with monocular vision from driving UPS vehicles, regardless of the vehicle's size. Agreeing with the Commission that UPS should provide otherwise-qualified monocular applicants with a "fair and individualized opportunity" to show they can drive safely, the lower court had enjoined UPS from using its vision protocol. The court found all but two monocular applicants were qualified and were covered under the ADA because they were "regarded as disabled."

The district court had also ruled, however, that UPS was not liable for discrimination before July 1995 when DOT clarified that its vision standard does not apply to drivers of small trucks, such as those in issue here.

As appellee, the EEOC argued that the district court properly enjoined use of the protocol because UPS had not shown a business necessity. The protocol measures vision but not the essential function of safe driving. The lower court had reasonably found that many persons with monocular vision drive as safely as binocular drivers. Rejecting UPS' argument that it needed some vision standard because it cannot determine which monocular drivers are unsafe, the district court had found that the same is true for binocular drivers. UPS cannot insist on a 100%-safe guarantee only for monocular applicants.

The Commission further argued the court below had properly found that UPS regards all monocular applicants as substantially limited in seeing. Most people with monocular vision are substantially limited in seeing, and UPS's protocol screens out all equally.

As cross-appellant, the Commission argued that the district court had erroneously found two claimants were not qualified to enter UPS's driver training program. Both met UPS's standards for safe driving as judged by their driving records. Lastly, because UPS did not rely on any ambiguity in the applicability of the DOT vision standard, the court erred in absolving the company of liability for discrimination before the regulations were clarified.

Fenney v. Dakota, Minnesota & Eastern R.R. Corp.
No. 02-1479 (8th Cir.)
Brief as Amicus Curiae
Filed April 30, 2002

Commission argues that railroad engineer's limited use of dominant hand and arm is a disability, not just a "minor inconvenience," as the lower court found

Fenney, an on-call engineer, sued the Railroad under the ADA for failing to accommodate his disability. As a result of an injury, Fenney had lost his thumb and part of a finger on his dominant hand and had sustained permanent damage to his dominant arm bone. He had requested a modest amount of additional time to report to work once he was called, because it took him twice as long as the average person to bathe, dress, fix a meal, and perform similar tasks. He argued that these injuries substantially limited his ability to care for himself.

The district court held that Fenney was not an individual with a disability. Caring for himself without full use of his dominant hand and arm was a minor inconvenience rather than a substantial limitation, according to the court, which noted that Fenny did not use special equipment or an assistant.

Even if Fenney could demonstrate that he had a disability, the court decreed that summary judgment for the Railroad was proper because Fenney had not demonstrated an adverse employment action. Further, Fenney failed to raise a factual dispute about whether the Railroad's legitimate nondiscriminatory reason -- efficiency -- was a pretext for unlawful discrimination.

The Commission argued a reasonable fact finder could determine that Fenney is an individual with a disability within the meaning of the ADA. Further, The Commission contended that an ADA plaintiff is not required to demonstrate an independent adverse action and pretext in a failure-to-accommodate

claim.

Felix, et al. v. New York City Transit Authority
No. 01-7767 (2d Cir.)
Brief as Amicus Curiae
Filed December 14, 2001

Felix, an underground transit clerk, alleged that her employer failed to reasonably accommodate her. She had become disabled by post-traumatic stress disorder after witnessing another clerk in the same station burn to death when his booth was firebombed. As a result, she requested a transfer to a job Commission argues the ADA does not require a "causal connection" between a subway worker's request to work above ground as a reasonable accommodation and her substantial limitation in sleeping which resulted from witnessing the firebombing of a co-workerabove ground. Although vacant clerical jobs above ground were available and Felix had clerical training and experience, the Transit Authority refused to transfer her.

The district court found that Felix was substantially limited in the major life activity of sleeping, but rejected her ADA claim. According to the court, there was no "nexus or causal connection" between that substantial limitation and the accommodation she was seeking.

On appeal, the Commission argued that the district court erred in holding that the Transit Authority was not required to reasonably accommodate Felix's inability to work in the subways. Her limitation unquestionably resulted from her disabling post-traumatic stress disorder. The ADA does not require a "causal connection" between the accommodation she was seeking -- working above ground -- and her "ADA-qualifying limitation" -- her inability to sleep. Instead, the ADA's reasonable accommodation provision requires employers to accommodate any work-related "limitations" that result from a disability, not merely those related to a substantially limited major life activity. EEOC's interpretive guidance on reasonable accommodation as well as case law interpreting the employer's reasonable accommodation duty all reach the same conclusion.

EEOC v. Woodbridge Corp.
No. 01-1045 (8th Cir.)
Brief as Appellant
Petition for Reh'g and Suggestion for Reh'g En Banc.
Filed October 5, 2001

In 1994, Woodbridge, concerned about the increased incidence of carpal tunnel syndrome (CTS) among its production workers, added a "neurometry" test to its pre-employment medical examination in an effort to screen applicants for the presence or propensity to develop CTS. Although the company had been advised that the neurometry test is an unreliable screening tool for CTS, it used the test until April 1997.

Based on the test results, Woodbridge withdrew employment offers from applicants with abnormal neurometry scores. The Commission sought relief for 19 applicants on the theory that the company regarded them as substantially limited in working. Agreeing with the company, the district court granted summary judgment finding the claimants did not have a disability because Woodbridge did not regard them as substantially limited in working. The claimants were not perceived as precluded from a broad range or class of jobs; only the Woodbridge manufacturing jobs which the court deemed "unique."

On appeal, the panel looked at the jobs for which the test was used and held that the applicants were only regarded as precluded from those jobs. Thus, the company did not regard them as substantially limited in working.

Urging the court to rehear the case, the Commission argued that to determine whether an employer regards an individual as substantially limited in working, a court should consider all the evidence about the limitations that would flow from the perceived impairment. Here, the court should have considered: (1) the testimony of company officials that they believed the claimants could not perform jobs with high levels of repetitive motion; (2) the report of the Commission's vocational expert indicating that between 57% and 99% of the other jobs in the Kansas City area for which the rejected applicants were otherwise qualified had comparable levels of repetitive hand and wrist motion; and (3) testimony of doctors that persons with CTS would potentially be precluded from a broad range of jobs in the Kansas City area. This evidence supports a finding that the company regarded the applicants as substantially limited in working.

Rauen v. U.S. Tobacco
No. 01-3973 (7th Cir.)
Brief as Amicus Curiae
Filed August 9, 2002

Rauen, who had worked for U.S. Tobacco since 1968, was diagnosed with cancer in 1996. After several surgeries, Rauen experienced complications that caused her to go to the bathroom constantly, to drink two liters of fluid a day, and to wear an ostomy appliance. Rauen also experiences rapid heartbeat, fatigue and a weakened immune system.

> The ADA requires that an employer reasonably accommodate a disabled employee even when she can perform the essential functions of the job without an accommodation

Rauen requested that U.S. Tobacco provide her with a home office as a reasonable accommodation. The interactive process between the parties broke down and Rauen filed suit. Granting summary judgment to the company on the federal claims, the district court decided that the employer had no obligation to provide a reasonable accommodation because Rauen had conceded she was able to perform the essential functions of her job without one.

The Commission's amicus brief argued that the district court's holding was in error. The plain language of the ADA requires that an employer reasonably accommodate a disabled employee even when she can perform the essential functions of the job without an accommodation. Moreover, the statute, federal regulations, Commission guidance, and case law all provide numerous examples where employers are required to accommodate disabled employees who can perform the essential functions of the job.

Conneen v. MBNA Am. Bank
No. 02-1504 (3d Cir.)
Brief as Amicus Curiae
Filed May 13, 2002

Conneen, a marketing manager for MBNA, suffered from morning sedation as a side effect of her medication. As a result, she was often late to work. She requested a deviation from MBNA's regular schedule as a reasonable accommodation, submitting her doctor's opinion in support. Although the company granted her request for a while, it eventually required her to return to an 8:00 a.m. start time. When she continued to be late for work, MBNA fired her.

> Commission urges appellate court to hold that "essential functions" of a job are specific tasks that must be accomplished, rather than aspects such as arrival time

The district court held that Conneen was not qualified for her job as a marketing manager, because she could not perform the essential functions of "arriving at work at 8:00 a.m." and "punctual attendance." Alternatively, the court held that Conneen was not entitled to a reasonable accommodation because MBNA was not on notice of her continuing need for a modified work schedule.

On appeal, the Commission argued that neither arriving at work at 8:00 a.m. nor punctual attendance is an essential function of Conneen's position because they are not functions. As Commission regulations and guidance provide, only "job duties" that is, specific tasks that must be accomplished can be essential functions. The court should determine first whether Conneen has asked for a reasonable accommodation, and second whether the accommodation would cause MBNA undue hardship.

- **Selected Issues**
  - **Arbitration**

Morrison v. Circuit City
No. 99-4099 (6th Cir.)
Supplemental brief as Amicus Curiae

Filed December 7, 2001
Response brief as Amicus Curiae
Filed January 24, 2002

As part of her job application, Morrison signed a prospective agreement that required her to arbitrate any claims against the store that might arise either from her application or her subsequent employment. When she was rejected for the position, she filed suit, alleging that Circuit City discriminatorily refused to hire her. The company moved for summary judgment, contending that the arbitration agreement in the employment application barred the suit. The district court, however, denied summary judgment because the "agreement" to arbitrate lacked consideration and therefore was unenforceable to bar the suit.

Circuit City appealed. The Fourth Circuit disagreed with the lower court, holding that there was sufficient consideration to support contract formation. Accordingly, it vacated the district court's judgment and remanded for further consideration of Circuit City's summary judgment motion.

On remand, the district court denied Circuit City's summary judgment motion again. The district court held that the arbitration agreement was invalid because it truncated substantive remedies such as back pay and punitive damages. Thus, the agreement did not permit Morrison to vindicate her federal rights effectively.

On the second appeal, the EEOC argued that Circuit City's arbitration agreement is unenforceable. The arbitral forum at issue deprives her of rights and remedies otherwise available in a suit under federal law. Circuit City's arbitration agreement also includes several arbitration rules, including a cost-sharing requirement, that impede access to the arbitral forum.

Booker v. Robert Half International, Inc.
No.1:01CV01127(RCL)(US DC)
Response Brief as Amicus Curiae
Filed February 7, 2002

Commission continues to challenge pre-dispute mandatory arbitration agreements which deprive employees of federal statutory rights and remedies

When Booker filed suit under the District Columbia of Human Rights Act alleging race discrimination, the defendant sought enforcement of an arbitration agreement which Booker had signed as a condition of employment.

The Commission argued as amicus that the arbitration agreement is unenforceable because it impermissibly limits the damages to which the plaintiff would be entitled in a judicial forum. In addition, the defendant may not unilaterally agree to modifications in the agreement as a way of securing its enforcement.

Spinetti v. Service Corp., Internat'l
No. 01-4415 (3rd Cir.)
Brief as Amicus Curiae
Filed June 3, 2002

Spinetti filed suit against Service Corporation International (SCI) alleging she was fired because of age and gender discrimination. SCI moved to compel Spinetti to arbitrate based on a pre-dispute arbitration agreement. Spinetti objected because the agreement required employees to pay one-half the costs of arbitration and did not allow them to recover attorney's fees if they prevailed.

SCI offered to waive the ban against an award of attorney's fees. The arbitration agreement, however, barred any modifications except by a written agreement to which both parties concurred. Invoking this provision, Spinetti declined to modify the arbitration agreement.

The district court agreed with Spinetti that the cost-sharing requirement and the ban on an award of attorney's fees were invalid. Nevertheless, the lower court held that the objectionable provisions could be excised and ordered Spinetti to arbitrate.

The Commission's amicus brief argued the district court properly held that both the cost-sharing requirement and the ban against attorney's fees were invalid, but erred in enforcing the agreement with these provisions excised. Public policy considerations require that courts refuse to enforce such agreements in their entirety to ensure that employers have no incentive to impose invalid arbitration provisions on their employees.

Cooper v. MRM Investment Co.
No. 02-5702 (6th Cir.)
Brief as Amicus Curiae
Filed September 3, 2002

Cooper filed suit alleging sexual harassment discrimination in violation of Title VII. The company moved to compel arbitration pursuant to a pre-dispute agreement which Cooper was required to sign as a condition of employment. The district court denied the company's motion, ruling that the agreement was unenforceable because it required the employee to pay one-half of the arbitrator's fees. The court further declined the company's invitation to strike the agreement's invalid fee-splitting provision and to compel arbitration under the modified agreement.

On appeal, the Commission urged the court to uphold the lower court's decision, arguing that the arbitration agreement contained an invalid fee-shifting provision. Additionally, the severance remedy should not be employed to save an otherwise invalid arbitration agreement.

- **Retaliation/Interference**

Brown v. City of Tucson
No. 01-16938 (9th Cir.)
Brief as Amicus Curiae
Filed January 29, 2002

Although Brown had been officially excused from nighttime duty as a reasonable accommodation for her disability (depression), her supervisor continually asked her about the reasons for the accommodation, accused her of sloughing off and threatened her with transfer, demotion or medical retirement if she did not stop her medications temporarily. Brown filed suit under the ADA's "interference" provision, claiming that her supervisor's conduct interfered with the exercise of her rights under federal law.

The district court dismissed the plaintiff's claim, ruling that to implicate the protections of the "interference" provision, an employer's conduct must be either an "adverse employment decision" or sufficiently "severe or pervasive" to meet the standard for a hostile working environment.

The Commission's amicus brief argued that an employer's threatening or coercive conduct need not be an "adverse employment decision" or be sufficiently "severe or pervasive" to meet the standard for a hostile working environment to implicate the protections of the interference provision.

Commission argues that statutory provision prohibiting interference with an employee's exercise of federal rights does not require an employer's conduct to be "an adverse employment decision"

EEOC & Pettis v. Royer Homes of Mississippi, Inc.,
No. 02-60039 (5th Cir.)
Brief as Appellee
Filed June 5, 2002

Pettis sold manufactured homes for Royer Home. Convinced that the company would never promote her because of her gender, she resigned. A company official told Pettis that she would be paid $3,000 in accrued salary and commissions only if she first signed a release of all claims she may have against the company. Pettis refused to sign the release and Royer refused to pay any of the $3,000.

The Commission sued, alleging that the company discriminated against Pettis by denying her promotions on the basis of her gender and retaliated against her by demanding that she release

a viable Title VII claim before the company would pay her for work already performed.

Commission contends that company's refusal to pay former employee $3,000 in earned salary and commissions unless she released her Title VII claims constituted retaliation

After trial, the jury returned a verdict for Royer Homes on the discrimination claim but for the Commission on the retaliation claim, awarding $75,000 in damages. The district court entered judgment on the verdict, denying the company's post-judgment motion.

In its appeal, Royer Homes argued that Pettis did not engage in any protected activity. In response, the Commission contended that the facts demonstrated otherwise. First, Pettis' supervisor had made openly discriminatory comments and thus knew that Pettis had a viable Title VII claim against the company. Second, the company had refused to pay Pettis money owed for work she had already performed unless she first released all her claims. Under these circumstances, Pettis's refusal to sign the release is protected under Section 704(a). Although the company may have been free to request a release in return for extra benefits, it is not permitted to demand a release before paying an employee money it already owed her.

- **Procedural Issues**

Swierkiewicz v. Sorema N. A.,
No. 00-1853 (S. Ct.)
Brief as Amici Curiae
Filed November 16, 2001

Swierkiewicz filed suit under Title VII and the ADEA claiming that Sorema unlawfully terminated him "on account of his age and national origin." He alleged that the company demoted him despite his satisfactory performance. Additionally, the complaint alleged that Sorema transferred his duties to a less experienced employee who was both a French national and 16 years younger. Swierkiewicz further stated in his complaint that after two years of continuing age and national origin discrimination, he requested a separation package comparable to those offered other executives who were terminated. Instead, the company offered him the choice of resigning without any benefits or being fired.

The district court granted the company's motion to dismiss under Fed. R. Civ. P. 12(b)(6) on the ground that Swierkiewicz failed to allege a prima facie case; the court of appeals upheld for the same reason.

The brief filed jointly by the Solicitor General and the Commission argued that Petitioner Swierkiewicz's complaint satisfies Fed. R. Civ. P. 8 because it identifies a claim for which relief could be granted and provides fair notice of the factual circumstances giving rise to the claim.

In re Rent-A-Center
No. 02-1008 (7th Cir.)
Response to a Petition for a Writ of Mandamus
Filed January 11, 2002

EEOC contends that district court correctly refused to stay class suit pending settlement of a parallel suit in another court

This case involved parallel Title VII nationwide class actions pending in Missouri and Illinois. EEOC intervened in the Illinois case. After the named plaintiffs in the Missouri suit were ordered to arbitrate, they and the company stipulated to class certification and entered into a proposed settlement. The district court tentatively approved the proposed settlement, which the Commission considered inadequate. The notice to the class did not mention any other suit.

On learning of the Missouri settlement and notice, the Illinois court certified a plaintiff class there; approved a notice alerting class members to other actions and setting the same opt-out date as in the Missouri case; denied a stay pending a settlement in the Missouri case; and

denied defendant's objections to the notice. Defendant petitioned for a writ of mandamus and emergency stay. The Seventh Circuit entered a stay and ordered plaintiffs to respond.

The Commission's brief argued that mandamus is a drastic remedy, appropriate only in extraordinary circumstances amounting to a judicial usurpation of power. The petitioner must demonstrate a clear and indisputable right to the relief and no other adequate means to obtain the desired relief.

The defendant has not met that stringent standard. The district court arguably could have entered a stay to control its own docket; its refusal to do so is not an abuse of discretion. Rather, the lower court reasonably concluded the Missouri suit does not provide a superior vehicle to resolve the class claims. Further, absent class members could not make a reasoned opt-out decision without notice of all other suits -- which the Missouri notice did not provide.

Hiller v. Oklahoma
No. 01-6402 (10th Cir.)
Brief as Amicus Curiae
Filed February 20, 2002

In this Title VII case, the district court granted summary judgment in favor of Defendant State of Oklahoma. According to the court, Title VII requires the Attorney General, not the EEOC, to issue right-to-sue notices against governmental respondents after the EEOC has dismissed a charge. In this case, the plaintiff had failed to obtain a right-to-sue letter from the Attorney General before filing suit, requiring its dismissal.

The Commission's amicus brief argued that the district court erred in granting summary judgment for Oklahoma. The statutory provision in § 706(f)(1) is ambiguous with respect to whether the Attorney General or the EEOC issues right-to-sue notices against governmental respondents. Thus, the EEOC's regulation at 29 C.F.R. § 1601.28(d)(1), which assigns this task to the EEOC, is entitled to deference.

Moreover, the regulation was promulgated 22 years ago at the urging of the Department of Justice in response to two courts of appeals opinions. Both courts had concluded that the ninety-day right-to-sue period began to run from the date the EEOC sent notice of the dismissal of a charge, not from the date of receipt of any subsequently issued right-to-sue notice. The regulation was thus issued to clarify agency responsibilities and prevent charging parties from inadvertently allowing the right-to-sue period to lapse.

EEOC v. Dillon Companies
No. 01-1478 (10th Cir.)
Brief as Appellant
Filed December 18, 2001
Reply Brief
Filed February 22, 2002

Bexley, an insulin-dependent diabetic, alleged that Dillon violated the ADA by refusing to provide her with a reasonable accommodation and, thereby, constructively discharging her. During the investigation, the company refused to comply with EEOC's subpoena requesting a list of employees who were placed into the position Bexley sought in other non-union stores. The EEOC filed suit to enforce its subpoena.

Citing Supreme Court precedent, EEOC appeals district court's refusal to enforce subpoena for information relevant to investigation of a charge

The district court held that information regarding other positions in the store in which Bexley worked was relevant but that information regarding clerks in other stores was not relevant. It was undisputed, according to the lower court, that clerk positions at the other stores were governed by a collective bargaining agreement which provided a defense to the charge.

On appeal, the Commission argued that the positions at issue were not governed by a CBA. In any event, the court's decision overlooked Supreme Court precedent expressly holding that it is improper to conduct an inquiry on the merits of a charge in determining whether subpoenaed

information is relevant to an EEOC investigation. While the company may have had an employment policy that would have precluded Bexley's transfer to another store, it is relevant only to the ultimate decision on the merits of the case. The existence of such a policy does not render the information irrelevant to an investigation of the charge.

Crowley v. L.L. Bean, Inc.,
No. 01-2732 (1st Cir.)
Brief as Amicus Curiae
Filed May 28, 2002

Crowley filed a sexual harassment charge with the EEOC and the Maine Human Rights Commission against L.L. Bean. During trial, the district court ruled that Crowley would be permitted to present evidence of sexual harassment that occurred more than 300 days before she filed her charge. The jury was instructed that such conduct could be considered only as background evidence to assist the jury in determining whether unlawful conduct occurred within the limitations period. If it found a violation within the limitations period, the jury was then asked to decide whether it was a continuing violation. The jury could award damages for pre-limitations-period conduct only if it found a continuing violation. The jury found that LL Bean had violated Title VII. The company appealed.

The Commission argued that the evidence in this case was sufficient to support the jury's finding of a hostile work environment. The district court properly allowed the jury to consider evidence of events occurring outside the limitations period in determining whether Crowley established that unlawful sexual harassment occurred within the limitations period. Time-barred discriminatory acts may be considered by a fact-finder as background evidence with respect to timely claims.

Evidence of events occurring outside the limitations period is relevant to determine whether discrimination occurred within the limitations period

1. Also, 31 subpoena enforcement actions were filed and one suit seeking preliminary relief.

2. Another 28 suits to enforce administrative subpoenas were also resolved.

3. These cases are brought under the Equal Pay Act and/or Title VII.

4. The field legal units also filed 31 subpoena enforcement actions, and one action seeking preliminary relief.

5. OGC also resolved 28 subpoena enforcement actions.

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