OFFICE OF GENERAL COUNSEL
FISCAL YEAR 2008 ANNUAL REPORT

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I. Structure and Function of the Office of General Counsel

A. Mission of the Office of General Counsel

The Equal Employment Opportunity Act of 1972 amended Title VII of the Civil Rights Act of 1964 (Title VII) to give litigation authority to the Equal Employment Opportunity Commission (EEOC or Commission) and provide for a General Counsel, appointed by the President and confirmed by the Senate for 4-year term, with responsibility for conducting the Commission's litigation program. Following transfer of enforcement functions from the U.S. Department of Labor to the Commission under a 1978 Presidential Reorganization Plan, the General Counsel became responsible for conducting Commission litigation under the Equal Pay Act of 1963 (EPA) and the Age Discrimination in Employment Act of 1967 (ADEA). With the enactment of the Americans with Disabilities Act of 1990 (ADA), the General Counsel became responsible for conducting Commission litigation under the employment provisions of that statute (Title I; effective July 1992).

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

B. Headquarters Programs and Functions

1. General Counsel

The General Counsel is responsible for managing, coordinating, and directing the Commission's enforcement litigation program. He or she also provides overall guidance and management to all the components of OGC, including district office legal units. The General Counsel recommends cases for litigation to the Commission and approves other cases for filing under authority delegated to the General Counsel under the Commission's 1996 National Enforcement Plan. The General Counsel also reports regularly to the Commission on litigation activities, including issues raised in litigation which may affect Commission policy, and advises the Chair and Commissioners on agency policies and other matters affecting the enforcement of the statutes within the Commission's authority.

2. Deputy General Counsel

The Deputy General Counsel serves as the alter ego of the General Counsel and as such is charged with the daily operations of OGC. The Deputy is responsible for overseeing all programmatic and administrative functions of OGC, including the litigation program. OGC functions are carried out through the operational program and service areas described below, which report to or through the Deputy.

3. Litigation Management Services

Litigation Management Services (LMS) oversees and supports the Commission's court enforcement program in the agency's district offices. Also, in conjunction with the Office of Field Programs (OFP), LMS oversees the integration of district office legal units into the investigative enforcement structure of the district offices. LMS staff provide direct litigation assistance to district offices as needed, draft guidance (including maintaining the *Regional Attorneys' Manual*), develop training programs and materials, and collect and create litigation practice materials. LMS also reviews proposed suit filings by regional attorneys under their redelegated litigation authority from the General Counsel. LMS has an assistant general counsel for technology responsible for providing technical guidance and oversight to OGC headquarters and district offices on the use of technology in litigation and the development of OGC's computer systems. LMS and OFP staff make joint visits to district offices to provide technical assistance regarding the integration of the district legal and investigative units.

4. Internal Litigation Services

Internal Litigation Services represents the Commission and its officials on administrative claims and litigation brought by Commission applicants and employees, and provides legal advice to the Commission and agency management on employment-related matters.

5. Litigation Advisory Services

Litigation Advisory Services (LAS) evaluates district office suit recommendations in cases that require General Counsel or Commission authorization, and drafts litigation recommendations to the General Counsel for approval or submission to the Commission. LAS responds to Commissioner inquiries on cases under consideration for litigation, acting as OGC's liaison and contact point between the Commissioners and the district office legal units. LAS also performs special assignments as requested by the General Counsel.

6. Appellate Services

Appellate Services (AS) is responsible for conducting all appellate litigation where the Commission is a party. AS also participates as amicus curiae, as approved by the Commission, in United States courts of appeals, as well as federal district courts and state courts, in cases involving novel issues or developing areas of the law. AS represents the Commission in the United States Supreme Court through the Department of Justice's Office of the Solicitor General. AS also makes recommendations to the Department of Justice in cases where the Department is defending other federal agencies on claims arising under the statutes the Commission enforces. AS reviews EEOC policy materials, such as proposed regulations and enforcement guidance drafted by the Commission's Office of Legal Counsel, prior to their issuance by the agency.

7. Research and Analytic Services

Research and Analytic Services (RAS) provides expert and analytical services for cases in litigation, assists EEOC attorneys in obtaining expert services from outside the agency, and provides technical support to field staff investigating charges of discrimination. RAS has a professional staff with backgrounds and advanced degrees in the social sciences, economics, statistics, and psychology who serve as testifying and consulting experts on cases in litigation. RAS also provides services to other agency offices, such as conducting social science research on issues related to civil rights enforcement, advising the agency on the collection of workforce data, and developing and maintaining special census files by geography, race/ethnicity and sex, and occupation.

8. Administrative and Technical Services Staff

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

C. District Office Legal Units

District office legal units conduct Commission litigation in the geographic areas covered by the respective offices and provide legal advice and other support to district staff responsible for investigating charges of discrimination. In addition to the district office itself, OGC trial attorneys are stationed in most of the other offices

– field, area, and local – within districts. Legal units are under the direction of regional attorneys, who manage staffs consisting of supervisory trial attorneys, trial attorneys, paralegals, and support personnel.

II. Fiscal Year 2008 Accomplishments

In fiscal year 2008 the Office of General Counsel filed 290 lawsuits and resolved 336, obtaining over $100 million in monetary relief. Section A. below contains summary statistical information on the fiscal year's trial court litigation results (more detailed statistics appear in section III. of the Annual Report). Sections B. and C. contain descriptions of selected trial and appellate cases. And section D. describes some of the outreach conducted by OGC staff during the year.

A. Summary of District Court Litigation Activity

OGC filed 290 merits suits in FY 2008. Merits suits consist of (1) direct suits and interventions alleging violations of the substantive provisions of the Commission's statutes, and (2) suits to enforce settlements reached during EEOC's administrative process. No interventions were filed during the fiscal year; three suits were filed to enforce administrative settlements. In addition to merits suits, OGC filed 35 actions to enforce subpoenas issued during EEOC investigations.

OGC's FY 2008 merits suit filings had the following characteristics:

224 contained claims under Title VII (77.2%)
38 contained claims under the ADEA (13.1%)
37 contained claims under the ADA (12.8%)
112 cases sought relief for multiple aggrieved individuals (38.6%)

The above claims exceed the number of suits filed because cases sometimes contain claims under more than one statute. There were 9 (3.1%) of these "concurrent" suits among the FY 2008 filings.

OGC resolved 336 merits suits in fiscal year 2008, resulting in monetary relief of $101,074,690. These resolutions had the following characteristics:

265 contained claims under Title VII (78.9%)
46 contained claims under the ADA (13.7%)
39 contained claims under the ADEA (11.6%)
3 contained claims under the EPA (.9%)
123 cases resulted in relief for multiple aggrieved individuals (36.6%)
16 were concurrent suits (4.8%)

Section III of the Annual Report contains detailed statistical information on OGC's FY 2008 litigation activities, as well as summary information for past years.

B. Litigation in Federal District Courts

In this section of the Annual Report, we provide descriptions of representative cases resolved in trial courts during the fiscal year. The cases are organized by statute, with a separate subsection at the end on retaliation, a claim that arises under all the laws EEOC enforces. Retaliation claims also appear in many of the cases discussed in the preceding subsections.

1. Title VII

a. Race Discrimination

(1) Hiring

In *EEOC v. Concrete Applied Construction Technologies Corp. d/b/a CATCO Construction Co.* (W.D.N.Y. Nov. 13, 2007), EEOC alleged that a Buffalo-area construction firm denied employment to a black applicant because of his race. In mid-March 2002, defendant's owner told a white union member that defendant needed three or four heavy construction equipment operators. The white member told a black union member, who telephoned defendant and was told work was available. The black union member was a licensed operating engineer with 6 years of experience and had unsuccessfully applied to defendant two or three times a year since 1996. Both union members went to defendant to apply, but were told by the owner there was no work. They completed applications anyway, and between mid-March and early May 2002, defendant hired eight operating engineers, all white. As of early May 2002, all 21 operating engineers employed by defendant were white. A 2-year consent decree provided the black applicant, who intervened, $100,000 plus $50,000 in attorney's fees. The decree prohibits defendant from race discrimination and retaliation and enjoins defendant from word-of-mouth recruiting. Defendant must advertise for skilled craftsmen twice yearly in the local newspaper and accept applications whether or not openings exist.

In *EEOC v. Target Corp.* (E.D. Wis. Dec. 10, 2007), EEOC alleged that Target, a national retail discount chain, discriminated against African Americans in hiring for executive team leader positions (jobs managing particular areas of a Target store) at stores in District 110, covering the Milwaukee and Madison, Wisconsin metropolitan areas. In early 2001, three African American applicants submitted resumes and were told to call the store manager in charge of recruiting for District 110 for an interview. The manager, who had reviewed their resumes (all three of which contained information indicating the applicants were African American), told one of them, Kalisha White, that he was too busy to schedule an interview, and failed to make scheduled telephone interview calls to the other two. Kalisha White became suspicious and submitted essentially the same resume under the fictitious name "Sarah Brucker" and had a white friend call using that name. The store manager scheduled an interview with "Sarah Brucker," but when White called him a short time later he told her again he was too busy to interview her. The district court granted summary judgment to defendant in August 2004, but EEOC appealed and 2 years later the Seventh Circuit reversed (460 F.3d 946) and remanded the case for trial. The suit was resolved through a 30-month consent decree providing $510,000 to four rejected African American applicants and enjoining defendant from engaging in race discrimination in District 110. Defendant must report to EEOC annually on applicants for executive positions, including name, address, and race (if known), interviews conducted and the results, and hiring and rejection decisions.

(2) Assignment and Promotion

In *EEOC v. Walgreen Company* (S.D. Ill. March 24, 2008), EEOC alleged that defendant engaged in a nationwide pattern or practice of race discrimination against African Americans by (1) assigning African American management trainees, assistant store managers, store managers, pharmacists, and pharmacy managers to stores in African American neighborhoods or in low income neighborhoods because of their race, and (2) denying promotions to African American employees in the retail and pharmacy career paths because of their race. The case was consolidated with an earlier filed private class action containing similar claims. Following a fairness hearing, the case was resolved through a 5-year consent decree providing a $24,532,500

in monetary relief: $18,692,500 for class members (about 10,000 individuals), $5,715,000 for attorney's fees and expenses, and $125,000 for costs associated with distributing the settlement fund. Covered positions are management trainee, executive assistant manager, store manager, pharmacist, and pharmacy manager. The decree enjoins defendant from violating Title VII and 42 U.S.C. § 1981 by discriminating on the basis of race in the selection of persons in covered positions for promotion, and provides that defendant will not make store assignments in covered positions based on the race of the employee. Walgreen will establish promotional benchmarks for executive assistant managers, store managers, district managers, pharmacy managers, and pharmacy supervisors (individuals in charge of pharmacies at several stores) and use its best efforts to fill those positions with African Americans in percentages at least equal to the percentage of African Americans employed in designated eligibility pool positions.

In *EEOC v. Automotive Components Holdings, LLC, Visteon Corp., and Ford Motor Co.* (S.D. Ohio Dec. 20, 2007), EEOC alleged that defendants used a written test for skilled trades apprentice positions (electrical, millwright, plumber-pipefitter, machine repair, and tool and die) that had a disparate impact on African American applicants. The case was consolidated with a private class action filed in conjunction with EEOC's suit, and was resolved through a settlement agreement approved by the court through a consent order entered following a fairness hearing. The class consists of current and former Ford Motor Co. and Visteon (a former manufacturer of automotive components for Ford) employees of African descent who took the Apprentice Training Selection System test at 14 North American Visteon facilities between January 1, 1997, and the date of preliminary approval of the settlement (September 9, 2007), and were not placed on an apprenticeship program eligibility list. (Ford ceased using the apprenticeship test in August 2004, and it was not used at the Visteon facilities after June 2003.) The settlement provides that Ford will select 55 class members for placement on a Ford apprenticeship program eligibility list at one of the 14 former Visteon facilities or a Ford facility. Approximately 666 class members will receive $2,400 each, for a total recovery of approximately $1.6 million.

In *EEOC v. Tobacco Superstores, Inc.* (E.D. Ark. Aug. 4, 2008), EEOC alleged that the operator of approximately 80 retail tobacco stores in four Southern States denied African Americans promotions into management positions because of their race. The case arose from an EEOC charge filed by an African American cashier at a Blytheville, Arkansas store who resigned in October 2001 after twice being passed over for assistant manager positions in favor of less experienced white employees. Witnesses told EEOC that the store manager said she did not want a "nigger" as an assistant manager. One of the white employees promoted over the African American cashier said he was told by defendant's area manager that he would lose his job if he promoted blacks into management positions. Statistics showed that almost no black employees were promoted at defendant's stores. A 3-year consent decree provided $425,000 to affected individuals identified by EEOC, and enjoins defendant from failing to promote African American employees on the basis of race and from retaliating against any employee or applicant for employment. Defendant will report to EEOC annually on each assistant manager or manager vacancy, providing identifying information and race for applicants and successful candidates.

(3) Discharge

In *EEOC v. Presbyterian Homes* (N.D. Ill. Nov. 28, 2007), EEOC alleged that a not-for-profit operator of five high-end retirement communities in the Chicago area demoted and discharged a Filipino registered nurse because of her race and national origin. The nurse was hired at defendant's Lake Forest, Illinois facility in 1999 and promoted to director of nursing in March 2002. In July 2002, defendant hired a new administrator (white,

non-Asian) at the facility, who immediately began acting in an abusive manner towards nonwhite employees, yelling and swearing at them and treating them abrasively. Employees complained to defendant's vice president and to the human resources manager, but defendant took no action in response. The administrator told the Filipino nurse that she preferred white nurses to Filipino nurses and that she was sick and tired of "Oriental" employees. The administrator told a white registered nurse that she wanted a culture change at defendant because its facilities were upscale and it catered to wealthy clients. About 3 months after starting at the facility, the administrator removed the Filipino nurse from her director of nursing position, ostensibly for lack of management and leadership skills; the nurse left defendant rather than accept a lower position. A 2-year consent decree provided the Filipino nurse $20,000 in backpay and $105,000 in compensatory damages, and enjoins defendant from race or national origin discrimination. Defendant will take affirmative steps to recruit and hire Asian registered nurses at its Lake Forest location consistent with their availability in designated Illinois and Wisconsin counties, including advertising in predominantly Asian newspapers and/or periodicals. Every 6 months, defendant must provide EEOC with a current list of registered nurses at the Lake Forest facility by race and date of hire.

In *EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles, d/b/a Phoenix Coca-Cola Bottling Co. and Coca-Cola Bottling Co. of Albuquerque* (D.N.M. April 11, 2008), EEOC alleged that an Albuquerque, New Mexico subsidiary of Coca-Cola Enterprises, Inc., terminated an African American senior merchandiser because of his race. On Friday September 28, 2001, defendant's district manager ordered the black employee to work the following Sunday, normally an offday, or risk termination for insubordination. On Saturday September 29, the employee went to the hospital and was diagnosed with a sinus infection and told by the doctor that he was exhausted and overworked. That evening, the employee contacted his immediate supervisor and told him he was too ill to work on Sunday, and the supervisor excused him. When the employee reported to work on Monday, he was fired for insubordination. The employee had missed only 2 days of work in 6½ years with defendant. On June 30, 2004, the district court granted summary judgment to defendant, finding that even though the district manager had made statements indicating bias towards African Americans, the decision to discharge the black employee had been made independently by a corporate HR official. EEOC appealed, and in June 2006 the Tenth Circuit reversed and remanded the case (450 F.3d 476). The case was resolved through a 2-year consent decree providing $250,000 to the employee, converting his termination to a voluntary resignation, and expunging any references to an involuntary termination from his personnel file. The decree enjoins defendant at its Albuquerque facility from race discrimination and retaliation.

b. Racial Harassment

In *EEOC v. Lockheed Martin, dba Lockheed Martin Logistics Management, Inc.* (D. Haw. Jan. 14, 2008), EEOC alleged that a Greenville South Carolina-based unit of a business that provides aircraft maintenance, repair, and modification services for the United States Government subjected a black aviation mechanic to a racially hostile work environment and selected him for transfer and layoff in retaliation for his complaints about the racial harassment. While employed at Whidbey Island, Washington from June to October 2000, the mechanic was subjected to racial jokes and remarks from white coworkers. After filing complaints about the harassment in November 2000, he was transferred to a different work crew at the same facility. In March 2001, he was transferred to Oahu, Hawaii, where he was subjected to harassment from the same white coworkers, who had been transferred shortly after him. The white employees' conduct included derogatory comments about black people, remarks about "lynching," "Hitler," and "slavery," and references to the mechanic as "nigger." In August 2001, the mechanic complained to his supervisor, who threatened to discharge him if he filed a complaint about

the conduct. Four days later, the supervisor informed the mechanic he was being transferred to Maine with the white coworkers who were harassing him. When he rejected the assignment, defendant selected him for layoff. The 2-year consent decree provided $2.5 million to the former mechanic, who intervened, and enjoins defendant from racial discrimination and retaliation. Defendant will terminate and permanently bar from employment the four individuals who subjected the mechanic to harassment and the mechanic's Oahu supervisor (all named in the decree).

In *EEOC v. Les Schwab Tire Centers of Montana, Inc., and Les Schwab Warehouse Center, Inc.* (D. Mont. June 27, 2008), EEOC alleged that a Native American (Blackfeet Nation) employee at defendants' Kalispell, Montana Tire Center was subjected to a racially hostile work environment and discharged because of his race and in retaliation for complaining about the racial harassment. Starting in spring 2002, coworkers subjected the employee to jokes and racial slurs about Native Americans and Browning, Montana -- the employee's hometown and a Blackfeet reservation -- often in front of the assistant managers. Over the next 2½ years, the employee complained to management about the racially offensive conduct at least 30 times. Defendants characterized the conduct as "horseplay" and failed to stop it. In December 2004, the employee complained to an assistant manager about three coworkers calling him "slow injun" and "prairie nigger." The same day he was involved in an altercation with one of the coworkers and management wrongly blamed him for the incident; when he refused to sign a false incident report, he was fired. A 2-year consent decree requires Les Schwab Tire Centers of Montana to pay $185,000 to the former employee and prohibits the company from engaging in racial harassment and retaliation at its Kalispell, Montana store.

In *EEOC v. Novellus Systems, Inc.* (N.D. Cal. June 23, 2008), EEOC alleged that a San Jose-based manufacturer of chemical equipment used for semiconductors subjected a black assembly technician to a racially hostile work environment and laid him off in retaliation for complaining about the harassment. The employee had worked at defendant's San Jose facility for about 10 years when, in January 2004, a coworker began making racially offensive comments and taunting him, for example by playing rap music and dancing around him. The employee complained repeatedly to his supervisor, but the conduct continued. In July 2004, defendant conducted a brief investigation, warned the coworker, and issued a policy banning offensive music and conduct in the workplace. Beginning the same month, defendant engaged in several acts of reprisal towards the black employee -- depriving him of a tool box he had used for 8 years and cancelling a long-standing scheduling accommodation - - culminating in his layoff on October 15, 2004. Under a 2-year consent decree, defendant will pay the former employee $168,000 and develop and implement EEO harassment policies at all U.S. facilities. The decree enjoins defendant from engaging in racial discrimination and harassment under Title VII.

In *EEOC v. Connectiv* (E.D. Pa. May 8, 2008), EEOC alleged that a general contractor (Connectiv) and three subcontractors, acting as joint employers on a project to build an energy power plant in Bethlehem, Pennsylvania, subjected black welders and electricians to a racially hostile work environment. From early 2002 until completion of the project in October 2003, black employees were subjected to derogatory racial comments and slurs from white managers and coworkers and to racially offensive graffiti (e.g., "I love the Ku Klux Klan," "if u not white u not right") on the walls of portable toilets. Also, a hangman's noose was displayed at the jobsite. The black employees complained to upper management and supervisors and managers were aware of the conduct, but defendants did not take corrective action. Four separate 4-year consent decrees provided $1.6 million to four individuals, three of whom intervened in EEOC's suit: $750,000 from Connectiv, $450,000 from

defendant Bogan, Inc./Hake Group, $250,000 from defendant Steel Suppliers Erectors, Inc., and $200,000 from defendant A.C. Dellovade, Inc. The four defendants were enjoined from racial harassment and retaliation.

In *EEOC v. Washington Group International, Inc.* (D. Mass. March 17, 2008), EEOC alleged that an engineering and construction firm, acting as the general contractor in charge of building a power plant in Everett, Massachusetts in 2002, subjected black employees to a racially hostile work environment. White employees at the jobsite used racially offensive language such as “nigger,” and “ape,” and racist graffiti was displayed which included death threats and references to the KKK. Many of the racial comments took place in front of supervisors, and the black employees complained about the comments and the graffiti, but supervisors failed to correct the situation. Graffiti was allowed to remain in place for months. A 2-year consent decree prohibits defendant’s power unit from racial discrimination, racial harassment, and retaliation, and provides a total of $1.5 million to 17 individuals.

In *EEOC v. Helmerich & Payne Int’l Drilling Co.* (S.D. Miss. Oct. 9, 2007), EEOC alleged that an oil driller with operations in the United States, South American, and Africa subjected black employees working on a platform rig in the Gulf of Mexico, to a racially hostile work environment. White employees told racial and ethnic jokes, made racially disparaging remarks, hung nooses in the work area, and threatened black employees. Black employees complained to several supervisors on the rig, and in June 2001 reported hanging ropes and racist jokes to the rig superintendent, but no corrective action was taken. In July 2002, after the termination of its drilling contract with a large energy company, defendant shut the rig down and laid off the employees or assigned them to other rigs. Under a 2-year consent decree, seven affected individuals will receive $290,000 in compensatory damages.

In *EEOC v. Henredon Furniture Industries, Inc.* (M.D.N.C. Jan. 23, 2008), EEOC alleged that a leading manufacturer of high-end furniture subjected African American employees at its High Point, North Carolina facilities to a racially hostile work environment. White supervisors and coworkers regularly told racial jokes and used racial slurs such as “nigger,” “coon,” and “monkey.” Managers were aware of and participated in the racially offensive conduct. Complaints about racial slurs were made to the human resources manager, but no corrective action was taken. Even after discrimination charges were filed with EEOC in November 2004, April 2005, and June 2005, the harassment continued, including a noose incident in June 2005. A 3-year consent decree provided $465,000 to seven individuals, each of whom received a positive letter of reference. The decree prohibits discrimination and retaliation under Title VII.

c. Sex Discrimination

(1) Hiring

In *EEOC v. Razzoo’s, Inc.* (N.D. Tex. May 6, 2008), EEOC alleged that the operator of a chain of Cajun-theme restaurants in and around Dallas-Fort Worth, Austin, and Houston, Texas denied males bartender positions because of their sex and subjected them to disparate terms and conditions of employment. EEOC contended that defendant attempted to maintain an 80% to 20% female to male ratio for its bartending staff, resulting in men not being hired as bartenders despite their qualifications, or if they were hired, receiving fewer hours. A 30-month consent decree provided a $775,000 settlement fund to be distributed by EEOC to affected individuals. The decree requires defendant, at a cost of at least $225,000, to retain an external human resources consultant, or establish an internal human resources department, to develop and implement revised polices and practices on EEO rights and obligations.

In *EEOC v. BFI Waste Services, LLC d/b/a Allied Waste Services of Little Rock* (E.D. Ark. March 27, 2008), EEOC alleged that a national garbage pickup service denied truck driver jobs to women at its Little Rock, Arkansas facility because of their sex. Women filed charges with EEOC after being discouraged from applying at defendant and denied interviews in spite of their driving experience. As of December 2006, all of the approximate 40 drivers at defendant's Little Rock facility were men. A 3-year consent decree provided $190,780 to three women denied driver jobs and enjoins defendant from failing to hire female applicants on the basis of sex. Defendant must report to EEOC twice during the decree on hiring for driver positions.

In *EEOC v. Robertson's Ready Mix, LLC* (C.D. Cal. April 1, 2008), EEOC alleged that a producer of concrete and aggregates used in the construction industry, with 24 plants in central and southern California, denied women jobs driving cement mixer trucks because of their sex. Between November 1997 and September 2001, defendant filled 755 mixer driver positions and hired only 3 women, all after an EEOC charge had been filed. There was evidence that women were not given applications and that women's applications were not retained. The disparity between defendant's hiring of women drivers and their availability in the relevant geographic area was highly statistically significant. Also, there was evidence that defendant failed to interview and hire women who met all of its stated hiring criteria, while interviewing and hiring men who applied at about the same time but did not meet one or more of the minimum criteria. Defendant told some women applicants that the job was man's work and attempted to discourage them from seeking positions. Under a 3-year consent decree that covers all of defendant's facilities, defendant will pay $550,000 into a class fund to be distributed to female applicants denied hire during the period from January 1, 1997, to entry of the decree, who meet certain qualifications set out in the decree. Defendant must report semiannually to EEOC on applicants and hires for mixer driver positions.

(2) Discharge

In *EEOC v. McCombs Pontiac-GMC Truck, Ltd.* (W.D. Tex. Feb. 13, 2008), EEOC alleged that a San Antonio new and used car dealership discharged its female finance director because of her sex. The finance director was promoted to that position in April 2005 by the dealership's general manager, who retired shortly thereafter. Defendant hired a new general manager in May 2005, and he fired the finance director a few days later, telling another manager that he didn't need a woman running the finance department. A 2-year consent decree provided the former finance director $125,000 and enjoins defendant from engaging in sex-based discrimination against female employees.

In *EEOC v. Centenary College of Louisiana* (W.D. La. March 26, 2008), EEOC alleged that a private coeducational college in Shreveport, Louisiana with about 1000 undergraduate students discharged the female head coach of the college's women's intercollegiate basketball team because of her sex. After serving as an assistant coach and interim head coach, the head coach assumed the position full time prior to the 2004-05 season. She had a child in September 2005 while unmarried. In March 2006, defendant's athletic director fired the head coach, after first giving her the option to resign, which she refused. According to the head coach, the director told her that raising a child was not consistent with her coaching duties. An assistant athletic director told the head coach that the athletic director told him he was concerned with her "life choice" to become a single mother. The head coach was replaced by a man. A 2-year consent decree provided the former head coach $200,000 and prohibits sex discrimination. Defendant will provide the former head coach with a letter of reference signed by the current college president which indicates that her commitment to the basketball program was "laudable" and that defendant regrets her resignation.

(3) Pregnancy

In *EEOC v. Kaiser Permanente Health Plan, Inc.* (D. Haw. Oct. 30, 2007), EEOC alleged that a nonprofit health organization withdrew a job offer to a registered nurse for the position of director of nursing for obstetrics and pediatrics at its clinic in Maui, Hawaii because of the nurse's pregnancy. Defendant hired the nurse at its Baldwin Park, California facility in April 1998. She accepted defendant's offer of the Maui nursing director's job with a start date of October 1, 2003. In speaking to a human resources consultant about the transfer, the nurse said she was pregnant and would need to take maternity leave in late 2003 or early 2004. The HR consultant informed the Maui nursing manager of the nurse's pregnancy, and the nursing manager immediately withdrew defendant's offer for the Maui nursing director job. The case was resolved through a payment of $180,000 to the nurse.

In *EEOC v. SoBran, Inc.* (D. Md. March 27, 2008), EEOC alleged that a provider of technical, management, and operational support services to government agencies and other organizations in various security fields discharged pregnant employees pursuant to a contractual agreement with a federal agency. A woman hired in December 2005 as a support technician specialist for a federal agency under contract with defendant was told when she informed her supervisor in July 2006 of her pregnancy that she had to resign or be discharged, and that if she did not resign she could not work for defendant again. The employee submitted her resignation letter that same day. Defendant's contract with the agency provided: "Personnel who are, or are suspected to be pregnant, immuno-compromised, immuno-deficient, or immuno-suppressed may not work or visit SG [Secret Government] facilities." A 3-year consent decree provide $81,742 to the former female employee and $22,605 to another woman affected by the pregnancy prohibition in the contract. The decree enjoins defendant from pregnancy discrimination, including forced resignation or termination because of pregnancy, and from entering into contracts with clients or customers requiring resignation or termination because of pregnancy. The decree also prohibits retaliation.

d. Sexual Harassment

In *EEOC v. Bellair Cleaners, Inc.* (S.D. Tex. Feb. 7, 2008), EEOC alleged that eight dry cleaning establishments in the Houston metropolitan area, which operated as an integrated enterprise, subjected a female employee to a sexually hostile working environment, resulting in her constructive discharge. The employee, a high school student at the time, worked for defendants for about 2 months in early 2005. One of defendants' owners regularly made sexually offensive remarks to her, including comments about her virginity and comparisons of himself to younger men, and touched her inappropriately. On her final night of employment, the employee was trapped with the owner in his truck for several hours when instead of driving her directly from one of the two cleaners in which she worked to the other, he drove her around the city propositioning her and questioning her about her sex life. The employee never returned to work. The case was tried to a jury, which returned a verdict of $100,000 in compensatory and punitive damages for the employee, which the court reduced to $50,000 in conformance with the Title VII damages cap. The court enjoined the entities comprising the integrated enterprise from engaging in sex discrimination, including sexual harassment, and required posting in each facility for 3 years a copy of the court's judgment, in English and Spanish, describing the jury verdict.

In *EEOC v. Touro College* (S.D.N.Y. Sept. 23, 2008), EEOC alleged that a female student employed as an assistant to a male professor in the graduate school of business of a national educational institution was subjected to a sexually hostile work environment and discharged in retaliation for complaining about sexual harassment. From the start of the student's employment in February 2004, the professor for whom she worked

touched her inappropriately, made offensive sexual comments, and threatened adverse actions if she did not engage in a sexual relationship with him. In February and May 2005, the professor told her that her life was in his hands, an apparent reference to the fact that the student needed the professor's signature in order to graduate. On May 24, 2005, the student made a written complaint to the vice president of the university about the professor's conduct. The vice president told the student to resign if she did not want to work with the professor, and the school discharged her the same day. The professor was ultimately terminated when the student's successor also complained of sexual harassment. A 3-year consent decree provided $415,000 to the student, who intervened, and enjoins defendant from sex discrimination. The decree prohibits defendant from rehiring the professor, and requires defendant's president to send a memo to all current and future employees describing coverage of the federal antidiscrimination laws, stating defendant's commitment to comply with the laws, and explaining how to make a discrimination complaint.

In *EEOC v. SunWest Federal Credit Union* (D. Ariz. Dec. 12, 2007), EEOC alleged that a Phoenix community chartered federal credit union subjected female employees to a sexually hostile work environment and retaliated against an employee for complaining about the harassment. Defendant hired a new male marketing manager in January 2004, who used derogatory terms toward women (e.g., calling them "bitches"), looked down the blouses of female vendors, and yelled at and intimidated female employees. Defendant's business development manager and its finance director, both women, reported the marketing manager's conduct to defendant's CEO and to the human resources department, but defendant's only corrective action was to caution the marketing manager about looking down vendors' blouses. After the business development manager complained, the marketing manager threatened to "take [her] out," removed some of her managerial duties, and increased her sales goal from 13 to 40 new accounts per month. Defendant placed her on 90 days probation in June 2004 and terminated her in August. Following another complaint from the finance manager, defendant finally interviewed female employees about the marketing manager's conduct and terminated him in October 2004. Under a 2-year consent decree the business development manager will receive $230,000 and the finance director $20,000. The decree enjoins defendant from sexually harassing employees and from retaliation. Defendant will provide positive employment references for the business development director and the finance manager.

In *EEOC v. Leo Palace Resort* (D. Guam March 13, 2008), EEOC alleged that a large resort hotel on the island of Guam subjected three female employees (two front desk clerks and a front desk supervisor) to a sexually hostile work environment, and retaliated against two of them for complaining of the harassment, causing their constructive discharges. In June 2004, a month after her hire, a female front desk clerk began making sexual overtures to the three women, directed sexually explicit comments and gestures toward them, and touched them inappropriately. Between June and August 2004, the women complained to a number of managers, but defendant took no corrective action. Finally, after receiving a complaint on August 10 of offensive touching, defendant terminated the offending employee on August 13, claiming this was the first it had learned of her conduct. After one of the three women retained an attorney to pursue a sexual harassment claim, defendant's general manager began behaving in an intimidating manner towards her and her hours were cut, causing her to resign on August 28 2004. A second woman resigned on October 15, 2004, when upon returning from a 2-week leave, she learned that defendant had assigned her new tasks and had told coworkers and supervisors about her sexual harassment complaints, causing them to ridicule her. A 3-year consent decree provided $243,000 to the three women and enjoins defendant from sexual harassment and retaliation.

In *EEOC v. Joslin Dry Goods Company d/b/a Dillard's* (D. Colo. March 31, 2008), EEOC alleged that an owner and operator of Dillard's Department Stores in 29 states subjected female employees to a sexually hostile work

environment. Three days after she began working at defendant's Westminster, Colorado store as a sales associate in January 2003, an 18-year-old female high school student filed a police report due to the sexually offensive verbal and physical conduct of a male assistant manager. The assistant manager admitted touching the employee, and on January 22, 2003, was charged with unlawful sexual contact. Although defendant discharged the assistant manager 3 days later, it had transferred him to Colorado knowing he had sexually harassed female employees at defendant's store in Palmdale, California (and had not notified the manager of the Westminster store of his prior conduct). Defendant also was aware of two prior incidents of harassment by the assistant manager at the Westminster store. A 3-year consent decree applicable to defendant's stores in Palmdale and Westminster provided a total of $500,000 in monetary damages to 12 affected female employees and enjoins defendant from gender discrimination and retaliation. Defendant will permanently maintain all complaints of sexual harassment in the files of accused employees, and will provide notice to new store managers if such employees are transferred.

In *EEOC v. Bonneville Hot Springs, Inc., d/b/a Bonneville Hot Springs Resort & Spa* (W.D. Wash. Aug. 22, 2008), EEOC alleged that a resort and mineral hot springs spa located in North Bonneville, Washington subjected female employees to a sexually hostile work environment. Defendant's male food and beverage director regularly made sexually offensive comments to female employees and propositioned them. In response to complaints, defendant conducted an investigation in May 2005, but determined there was no evidence of wrongdoing. A 3–year consent decree provided a $470,000 settlement fund to be distributed by EEOC through a claims process to women presenting credible evidence that they were subjected to sexual or gender-based harassment at defendant between May 27, 2004, and August 12, 2008. The decree enjoins defendant from harassment based on sex.

e. National Origin Discrimination

(1) Language Policies

In *EEOC v. Beauty Enterprises, Inc.* (D. Conn. Aug. 19, 2008), EEOC alleged that a beauty supply company discriminated against Hispanic employees at its Hartford, Connecticut warehouse by maintaining a policy prohibiting employees from speaking any language other than English in the workplace and enforcing the policy against Hispanic employees in an abusive, hostile, and intimidating manner. EEOC also alleged that defendant retaliated against employees who opposed the English-only policy by increased monitoring of their work, intimidation, discipline, and discharge. EEOC alleged that defendant disciplined and discharged employees who violated the English-only policy, and constructively discharged employees through enforcement of the English-only policy and retaliatory conduct. A 5-year consent decree provided $220,000 in compensatory damages to 10 individuals. One person will be given a full-time warehouse worker position with benefits. Defendant will eliminate the English-only policy and replace it with guidelines, translated into Spanish, on language use in the workplace that have been reviewed and approved by EEOC. Defendant will inform EEOC of any discipline taken under the new guidelines.

(2) Promotion

In *EEOC v. Brown and Brown Chevrolet, Inc., an Arizona Corporation* (D. Ariz. Aug. 21, 2008), EEOC alleged that a Mesa, Arizona car dealership denied a sales associate from Nigeria a finance manager position due to his accent. The sales associate started in January 2001, and in September 2002, the dealership's general sales manager told him he was being considered for promotion to finance manager, but first had to hire a speech

therapist to eliminate his accent. The general sales manager said he had done this himself to eliminate his South Korean accent. The dealership promoted a non-Nigerian employee to the finance manager position in the period from September through December 2002. In December 2002, the Nigerian sales associate filed an internal complaint about the promotion denial and resigned. A 2-year consent decree provided $99,000 to the former sales associate and prohibits national origin discrimination and retaliation.

(3) Discharge

In *EEOC v. Albion River Inn, Inc.* (N.D. Cal. Feb. 27, 2008), EEOC alleged that a hotel and restaurant in Mendocino, California terminated a Moroccan dining room manager because of his national origin and in retaliation for opposing a customer's use of hostile racial/ethnic comments. The dining room manager was hired in April 2004 and had an outstanding work record. On November 16, 2004, a customer repeatedly and loudly cursed at an Arab waiter from Tunisia, berating him for his French accent and his limited English ability. The customer also pushed the waiter. The dining room manager was not present at the time, but was told about the incident when the same customer came to the restaurant the following night. The manager introduced himself to the customer and politely asked him not to repeat his conduct of the previous night. The customer responded with a verbal tirade directed at the manager's foreign origin. When the manager asked the customer to leave, the customer pushed him and challenged him to a fight. The next day, defendant directed the manager to prepare a written letter of apology to the customer. The manager refused and was fired. A 3-year consent decree provided the former manager $165,000 in monetary relief.

In *EEOC v. Supreme Corp. and Supreme Northwest, LLC* (D. Ore. Dec. 31, 2007), EEOC alleged that an Indiana-based truck body manufacturer and its Woodburn, Oregon production facility (Supreme Northwest) harassed, demoted, and discharged Hispanic employees at the Woodburn facility because of their national origin. The Woodburn plant manager, who started in March 2005, complained about the number of Mexican employees on the production line, questioned Hispanic employees' English skills, and told them not to speak Spanish. He also assigned more tasks to Hispanic than to non-Hispanic employees, and laid off or discharged a number of Hispanic employees between June and September 2005. A 3-year consent decree provided $427,000 in damages to seven individuals and requires Supreme Northwest to comply with Title VII. The decree prohibits defendants from employing the former Woodburn plant manager, or the former general manager who failed to respond to complaints about the plant manager.

In *EEOC v. NCL America, Inc.* (D. Haw. June 4, 2008), EEOC alleged that an operator of cruise ships discharged seven Yemeni, Muslim crewmembers -- all licensed merchant mariners who were either U.S. citizens or permanent residents -- from the ship Pride of Aloha because of their national origin and religion. In July 2004, after receiving a complaint that an unidentified Arab crewmember was expressing dissatisfaction with Americans, defendant searched its database and identified crewmembers with Arabic names. Defendant gave the names to the FBI, which boarded the ship on July 24, 2004, and conducted background checks on the Yemeni crewmembers, interviewed them, and searched their cabins. The FBI told defendant there was no evidence indicating a threat. Defendant nevertheless discharged the Yemeni crewmembers the same day as "security risks." A 2-year consent decree enjoins defendant from discriminating on the basis of national origin or religion in an employee's terms and conditions of employment and from retaliation. The decree provided $485,000 to the seven affected individuals.

f. Religious Discrimination/Denial of Reasonable Accommodation

In *EEOC v. Southwestern Bell Telephone, L.P.* (E.D. Ark. Oct. 19, 2007), EEOC alleged that a regional provider of telephone services denied religious accommodations to two Jehovah's Witnesses employed as customer service technicians at its Jonesboro, Arkansas facility, and suspended and discharged them because of their religion. Following a 5-day trial, a jury returned a verdict for EEOC, awarding one employee $136,000 in lost wages and benefits and $230,000 in compensatory damages, and the other $160,000 in lost wages and benefits and $230,000 in compensatory damages. Following the jury's verdict, the court ordered defendant to reinstate both employees and pay them frontpay until the were rehired; awarded them $15,765 and $13,983 in prejudgment interest; and enjoined defendant from religious discrimination. The employees had been given leave each year since their hires (in 1997 and 1999) to attend an important religious convention. In January 2005, they submitted written leave requests to defendant's new manager of installation and repair to attend the convention in July. The manager refused to grant them the 1-day of leave they needed, and when they did not appear for work on July 15, 2005, defendant suspended them and 2 weeks later discharged them.

In *EEOC v. Vonage America, Inc., & Vonage Holding Corp.* (D.N.J. July 3, 2008), EEOC alleged that related communications businesses failed to accommodate a Jewish employee's religious observances and discharged him due to his religion. The employee was hired in September 2005 as a technician, a job involving troubleshooting and resolving customer technical problems. He informed an HR representative during his interview that he was an Orthodox Jew and could not work on his Sabbath (from sundown Friday until sundown Saturday). The HR representative indicated there would be no problem, but when the employee reported to work, he was told by a customer service supervisor that he could not miss any days during his training, a period of 6 weeks. The employee explained that the training would present a conflict with several Jewish holidays in September and October. Defendants rescheduled the employee's training, but there were again conflicts with Jewish holidays. The employee asked in December 2005 if he could be placed in a different position, but was told that the only positions then available would require him to work on Saturdays. He was also told he "just will not fit here." Under a 3-year consent decree, the employee received $72,000 in backpay and damages and was reinstated into a technical support agent position with seniority, pay, and benefits based on his original hire date. The decree prohibits religious discrimination and retaliation.

EEOC v. Texas Hydraulics, Inc. (E.D. Tenn. June 18, 2008), EEOC alleged that a manufacturer of single-stage welded hydraulic cylinders failed to reasonably accommodate the Sabbath observances of an employee at its Athens, Tennessee facility and discharged him because of his religious beliefs. The employee does not belong to an organized church, but based on his reading of the Bible and his understanding that Jesus Christ requires his followers to obey God's commandments, he believes working on the Sabbath (sundown Friday to sundown Saturday) is a sin. The employee had worked for defendant since 1994 but had not been scheduled to work on a Saturday until 2003, when defendant began scheduling a lot of mandatory overtime. The employee asked to be excused on religious grounds from working on Saturdays, but defendant refused. The employee did not appear for work when scheduled on Saturdays and was fired in October 2005 for accumulating too many attendance points. EEOC contended that defendant could have accommodated the employee without undue hardship because on most Saturdays only a portion of his overtime group worked, and usually for only about 4 hours. A 2-year consent decree provided the former employee $80,000. The decree enjoins defendant from discriminating against individuals because of their sincerely held religious beliefs, including failing to provide reasonable accommodations, and prohibits retaliation under Title VII.

g. Harassment Claims under Multiple Bases

In *EEOC v. Tavern on the Green Ltd, P'ship* (d/b/a Tavern on the Green) (S.D.N.Y. June 3, 2008; amended June 19, 2008), EEOC alleged that a restaurant in New York City's Central Park subjected female, black, and Hispanic employees to a hostile work environment based on their sex, race, or national origin. The restaurant's director of operations subjected women to continuous sexual comments and requests for sex, physically accosted them, and exposed himself. The director also made derogatory racial and ethnic comments to black and Hispanic employees, used racial epithets, and ridiculed employees' accents. When employees objected to the director's conduct, he reduced their pay and their opportunity to earn tips, and denied them work. A 5-year consent decree provided for payment of $2.2 million into a claims fund that will be distributed as compensatory damages to approximately 50 individuals who worked at the restaurant between January 1, 1999, and September 24, 2007. The decree enjoins defendant from discriminating based on sex, race, and/or national origin, and from retaliation under Title VII. Defendant must establish a hotline for employment discrimination complaints.

In *EEOC v. Sizzler USA Restaurants, Inc.* (N.D. Cal. Aug. 28, 2008), EEOC alleged that a female cook at the Redwood, California location of a national restaurant chain was subjected to a hostile work environment due to her sex and her Mexican national origin. A male coworker subjected the female cook to continuous crude and offensive sexual comments, grabbed her, and threatened her with knives. He also referred to her as a "fucking Mexican" and made derogatory comments about Mexican employees generally. The male employee's conduct often occurred in front of other employees, including the restaurant's general manager. The female cook resigned in October 2004 after the general manager failed to respond adequately to her report of a knife threat from the male coworker. A 5-year consent decree provided $300,000 in monetary relief to the former cook and enjoins defendant from discrimination or harassment on the basis of sex or national origin.

In *EEOC v. Specialty Restaurants Corp.* (C.D. Cal. May 15, 2008), EEOC alleged that an operator of upscale and casual restaurants in over a dozen states subjected female employees at a number of restaurants to a sexually hostile work environment that involved both offensive sexual comments and inappropriate touching by male supervisors and coworkers. The case also included a claim that the general manager of defendant's Monterey Park, California restaurant made disparaging comments about the national origin (Middle Eastern) of the restaurant's catering sales manager, referring to her as "Taliban" and telling her to stop watching Al-Zereh television. A 30-month consent decree covering all of defendant's restaurants enjoins defendant from sex or national origin discrimination in an employee's terms and conditions of employment and from retaliation. Defendant must retain an EEO consultant/trainer to investigate complaints of discrimination, harassment, or retaliation where the alleged discriminatory actor is part of upper management. The decree provided $625,000 in compensatory damages to affected employees.

In *EEOC v. Allied Aviation Services, Inc.* (N.D. Tex. March 10, 2008), EEOC alleged that a provider of fueling services to commercial airlines in North and Latin America subjected black and Hispanic employees at its Dallas/Fort Worth Airport facility to a hostile work environment. Supervisors and coworkers regularly referred to black employees as "niggers" and Hispanic employees as "wetbacks." Black employees were threatened by references to hangings and the KKK. Complaints were made to various defendant officials, but effective corrective action was not taken. Defendant's general manager responded to a complaint about racial epithets by saying, "You are in Texas, you should expect that." A 3-year consent decree provided a total of $1,885,000 to 15 individuals.

In *EEOC v. Bridgestone/Firestone North American Tire, LLC* (N.D. Ill. May 21, 2008), EEOC alleged that a national tire manufacturer subjected black and Hispanic employees at its Woodridge, Illinois warehouse and distribution center to a hostile work environment and adverse terms and conditions of employment due to their race and national origin. White employees used the term "nigger," placed racist graffiti in the restroom, and displayed confederate flags on cars and clothing. Hispanic employees were referred to as "wetbacks" and "spics." Defendant made some efforts to address the harassment, but the conduct continued. EEOC also alleged that black and Hispanic employees were given less flexibility in their assignments, less break time, and less opportunity for light duty assignments when injured. A 2-year consent decree provided $425,000 to 17 individuals and enjoins defendant at the Woodbridge facility from discrimination on the basis of race, color, or national origin and from retaliation.

In *EEOC v. Video Only, Inc.* (D. Ore. July 30, 2008), EEOC alleged that a home electronics retailer with 13 stores in Washington, California, and Oregon subjected two sales associates at a Portland, Oregon store to racial, national origin, and religious harassment. One associate is black and was in the process of converting to Judaism. The other associate is Hispanic with Jewish heritage. Managers and coworkers told offensive jokes with references to the Holocaust and slavery, made racial and religious slurs, and used the term "nigger." Objections to the conduct did not help, and when the employees' attorney sent defendant a letter in November 2005 detailing the harassment, defendant hired a private investigator to delve into the employees' personal lives. EEOC's suit was resolved through a consent decree enjoining retaliation and providing the two employees, who intervened, with $500,000 in monetary relief.

h. Enforcement of Administrative Settlements

In *EEOC v. Stein World, LLC* (W.D. Tenn. May 27, 2008), EEOC alleged that an international importer and wholesaler of accent furniture breached an agreement reached during EEOC's mediation of a race discrimination charge. After being served with EEOC's complaint alleging breach of the mediation agreement, defendant filed a third-party complaint against the former employee who had filed the charge, alleging that he committed fraud during the mediation conference. EEOC then amended its complaint to allege that defendant's third-party complaint constituted retaliation. The mediation agreement at issue, executed in July 2005, provided that defendant would pay medical expenses the former employee incurred as a result of any hospitalization during the 30-day period after he left defendant's employ (May 5, 2005). When the former employee presented a hospital bill of approximately $158,000 to defendant, $48,426.41 of which was covered by the mediation agreement (6 days of hospitalization), defendant claimed that the former employee had agreed to cap the medical expenses at $5,000, and refused to pay more than that amount. Defendant also claimed that the former employee had a preexisting medical condition and had fraudulently induced defendant into agreeing to pay his medical expenses. A 1-year consent decree provided $15,000 in compensatory damages to the former employee for defendant's retaliatory third-party complaint, and $48,426.41 to the Regional Medical Center for medical services received by the former employee. The Medical Center agreed to write off the remaining portion of the $150,000 bill ($109,532) after receiving the payment under the consent decree.

2. Equal Pay Act

In *EEOC v. New York State Department of Correctional Services* (S.D.N.Y. May 21, 2008), EEOC alleged that the State entity responsible for administering New York's 69 correctional facilities violated the Equal Pay Act by transferring female employees from workers' compensation leave to less beneficial maternity leave on or before the birth of their children, without determining whether the underlying work-related injuries were ongoing. The

Department of Justice (DOJ) filed suit a few months after EEOC, alleging pregnancy discrimination under Title VII based on the same facts. (EEOC cannot sue public employers under Title VII.) Defendant's workers' compensation policy provides full pay without charge to leave for up to 6 months; its maternity leave policy treats pregnancy the same as any other disability, providing for use of accrued sick leave with pay and then, if approved, sick leave at half pay and leave without pay. A consent decree resolving both suits (5-year term for EEOC, 3 years for DOJ) provides for $972,000 to 23 individuals in amounts set forth in an attachment to the decree. Some employees also will receive restoration of accrued leave. The decree applies to all defendant facilities and enjoins defendant from pregnancy discrimination and from removing women from workers' compensation leave due solely to the birth of a child.

3. Age Discrimination in Employment Act

a. Coverage

In *EEOC v. Sidley Austin, LLP* (N.D. Ill. Oct. 5, 2007), EEOC alleged that a Chicago-based international law firm violated the ADEA by expelling 32 partners in October 1999 because of their ages, and by maintaining an age-based retirement policy. (The expelled partners were permitted to remain with the firm under 18-month contracts, and over half of them did.) The expelled partners shared in the firm's profits, losses, and liabilities, but the firm's governance structure placed control of all significant matters in two self-perpetuating committees constituting less than 10% of the firm's partners. The case raised the important question of the circumstances under which members of a professional partnership can be considered employees under the ADEA (and employment discrimination laws generally). The consent decree, effective through December 31, 2009, provides that for purposes of resolving the matter, Sidley agrees that each person for whom EEOC sought relief was an employee for purposes of the ADEA as of the dates when Sidley made and carried out the decision to remove him or her from the status of partner. The decree required Sidley to pay $27.5 million into a settlement fund to be distributed to 32 eligible claimants in amounts determined by EEOC (ranging from, approximately, $122,000 to $1.8 million). The decree prohibits Sidley from: (1) terminating, expelling, retiring, reducing the compensation of, or otherwise adversely changing the partnership status of a partner because of age; (2) maintaining any formal or informal mandatory partner retirement policy or practice based on age; (3) pressuring a partner to change partnership status or to retire because of age; or (4) requiring partners to cease their service on any firm committee (except the Executive or Management Committees), or as a practice group head, because of age. Sidley is required to retain extensive information on any partner age 40 or older who withdraws, voluntarily or involuntarily, from the partnership.

b. Discharge and Layoff

In *EEOC v. Gresham Nissan, Inc.* (D. Ore. Dec. 3, 2007), EEOC alleged that a Gresham, Oregon car dealership, subjected a 62-year-old used car sales manager to an age-based hostile work environment, demoted him in retaliation for protesting the age harassment, and constructively discharged him. The dealership's general manager/vice president regularly told jokes about the sales manager's age and made derogatory age-based comments. In early 2006, just a week after the sales manager told the vice president that the comments about his age bothered him, the vice president transferred him to a lower paying nonmanagerial position in the wholesale division, with a much longer commutes and no office, telephone, or support staff. The sales manager resigned shortly after the transfer. A 2-year consent decree provided the former sales manager $100,000 and enjoins defendant from age discrimination and retaliation.

In *EEOC v. Mike Albert Leasing, Inc.* (S.D. Tex. Feb. 21, 2008), EEOC alleged that a national lessor of automobiles, trucks, and vans fired the oldest fleet sales area manager at its Houston facility in July 2005 because of his age, 60. In 2003 and 2004, the manager was one of the company's top sales performers. At a June 2004 sales meeting, and on other occasions, the company's president (daughter of the CEO) said the sales force was old and aging and needed fresh young blood. A 4-year consent decree provided $100,000 in monetary relief to the former manager and enjoins defendant from age discrimination and retaliation.

In *EEOC v. Lockheed Martin Corp. and Lockheed Martin Global Telecommunications, Inc.* (D. Md. April 4, 2008), EEOC alleged that Lockheed Martin, a defense and aerospace company, through its subsidiary Lockheed Martin Global Telecommunications (LMGT) discharged eight employees during an October 2000 reduction-in-force (RIF) because of their ages (six were in their 60s, one was 53, and one was 47). LMGT acquired and merged with COMSAT Corporation in August 2000 and then implemented a reorganization resulting in the permanent layoff of 44 salaried employees at 6 former COMSAT units. The claims in this case involved COMSAT's Mobile Communications (CMC) Division. The CMC RIF was implemented under the direction of a vice president/general manager, who indicated a preference for discharging "senior" employees while retaining "junior" ones. The RIF process grouped employees with similar positions and then ranked them against each other on four elements. With one exception, the oldest employee in each group received the worst score; no employee under age 40 was laid off. A 3-year consent decree provided $773,000 in backpay to the eight discharged employees, which is in addition to severance pay they received. (EEOC argued that the releases signed as a condition of receiving severance pay, which waived age discrimination claims, were invalid because defendants failed to comply with several of the ADEA's section 7(f) waiver requirements.) LMGT ceased its business operations in 2002, but if it resumes operations within the 3-year term of the decree, it will be enjoined from age-based discrimination under the ADEA.

4. Title VII and the Age Discrimination in Employment Act

In Renhill Group, Inc., d/b/a Renhill Staffing Services (N.D. Ind. April 15, 2008), EEOC alleged that an employment agency that places individuals in permanent and temporary clerical and light industrial jobs used race and age as factors in making referrals. Employees of defendant said they were told to mark applications by race and age and to make race- and age-based referrals. EEOC alleged that defendant threatened to discharge two employees and discharged a third for opposing the discriminatory referrals. The suit was resolved through a 3-year consent decree providing $465,000 in compensatory damages to African American applicants and applicants age 40 and older who applied at defendant's Fort Wayne or Decatur, Indiana offices during the period July 1, 2003, to May 31, 2005, and were not referred.

In *EEOC v. Straub Clinic & Hospital and Hawaii Pacific Health* (D. Haw. Dec. 14, 2007), EEOC alleged that Straub Hospital in Honolulu discriminated on the basis of sex and age in filling security guard positions when it brought the security function in-house in July 2004. Straub invited its former contract security officers to submit applications and told them they would be considered external applicants and that a hiring preference would be given to internal candidates. In June 2004, 23 applicants (14 male and 9 female) applied for 15 posted security guard positions. Straub filled 12 positions, all of them with men under age 40. Some of the hires did not meet minimum qualifications, some were less qualified than the rejected female and older applicants, and a few had not even submitted applications. Defendant rejected five female (three over age 40) security officers formerly assigned to Straub, including the site supervisor and two other supervisory security officers. It also rejected four female applicants with security experience elsewhere. The 27-month consent decree provides for $450,000 in

compensatory damages to affected individuals and requires Straub to actively recruit women and individuals age 40 and above in the State of Hawaii and to report to EEOC annually on the sex and age of applicants and hires for security guard jobs.

5. Americans with Disabilities Act

a. Hiring

In Hollywood Entertainment Corp. (S.D. Ind. May 14, 2008), EEOC alleged that a nationwide operator of movie and video game rental stores refused to hire an applicant with muscular dystrophy for an entry level guest service representative position at its Kokomo, Indiana Game Crazy store because of his disability. The store's director recommended to the district manager that the applicant, a frequent customer, be hired, but when the district manager learned that the applicant had to use a wheelchair, he told the store director that he does not hire the handicapped or people in wheelchairs. The defendant is in Chapter 11 bankruptcy, and the 2-year consent decree provides for $325,883.39 in monetary relief ($300,000 in compensatory damages) subject to the bankruptcy court's approval of a claim in that amount. If the claim is not approved, EEOC can reinstate the lawsuit.

In *EEOC v. Wal-Mart Stores, Inc.*, EEOC alleged that defendant failed to hire an applicant with cerebral palsy at its Richmond, Missouri SuperCenter because of his disability. The person applied in February 2001 for any position. He appeared at his interview in a wheelchair and was told he was best suited for the greeter position. In refusing to offer him any job, Wal-Mart claimed he would pose a safety risk to himself or customers if he worked at the store using a wheelchair or crutches. The district court granted summary judgment to Wal-Mart in August 2005, but EEOC appealed and in February 2007, the Eighth Circuit reversed and remanded the case for trial (477 F.3d 567). The appeals court held that an employer contending that a disabled employee or applicant poses a direct threat to the health or safety of himself or others bears the burden of proof on that issue. The case was resolved through a 2-year consent decree providing $300,000 to the applicant and prohibiting discrimination under the ADA. Wal-Mart must notify designated Kansas City-area job services agencies that it encourages applications from persons with disabilities and must publish print advertising in the Kansas City Star indicating that it is committed to employing persons with disabilities in a variety of jobs. Wal-Mart also must report quarterly to EEOC on individuals with disabilities that apply at the Richmond SuperCenter.

In *EEOC v. National Jewish Medical and Research Center* (D. Colo. Dec. 14, 2007), EEOC alleged that a Denver hospital specializing in respiratory, immune, and allergy disorders rescinded a job offer for a clinical laboratory coordinator position because of its belief that the applicant might have infectious tuberculosis. The hospital made a conditional offer of employment to the applicant on May 7, 2003. At the applicant's postoffer medical screening several days later, she disclosed that she had received a positive TB skin test when she was a teenager, but (now age 49) had never had a positive chest X-ray or TB symptoms. The hospital asked the applicant for medical records clarifying whether she had infectious TB. On May 15, the applicant's personal physician gave her a chest x-ray and called the hospital with the negative results. The hospital nevertheless revoked the job offer on May 16. A 2-year consent decree, applicable to all of defendant's facilities, provided $150,000 in monetary relief to the applicant and enjoins defendant from disability discrimination and retaliation.

In *EEOC v. Longview Fibre Paper and Packaging Inc.* (W.D. Wash. May 28, 2008), EEOC alleged that a Longview, Washington pulp and paper manufacturer withdrew an offer for an engineering aide position (a largely sedentary job performed at a computer) because the applicant used methadone to manage the pain he

suffers from a spinal injury. Defendant offered the applicant the position in June 2006 subject to a physical examination and drug screening; defendant's doctor then determined that his "narcotic use" and spinal injury posed unacceptable safety risks. The applicant had been prescribed methadone for about 4 years, did not experience any physical or mental side effects from its use, and had been cleared for the engineering aid position by his doctor, who indicated that the methadone caused the applicant no impairment. A 2-year consent decree provided the applicant $175,000 in compensatory damages.

b. Reasonable Accommodation

In *EEOC v. Kaufman Container* (D. Minn. Jan. 17, 2008), EEOC alleged that a packaging sourcing business headquartered in Cleveland, Ohio failed to reasonably accommodate the visual impairment of an employee at its Minneapolis facility and discharged her because of her disability. The employee had worked as a machine operator at the facility for many years when she was diagnosed with diabetes in May 2001. A few months later she began treatment for diabetic retinopathy, a complication of the disease that causes damage to the tiny blood vessels inside the retina. The deterioration in the employee's vision made it difficult for her to perform her machine operator position, and in December 2001 she was given packer responsibilities, which required her to inspect and pack newly labeled bottles. Her failing eyesight affected production, and in October 2003, she was transferred to the job of parts feeder. When that position was eliminated in the summer of 2004, defendant asked the employee what accommodations she needed to move into a packer or machine operator job. She suggested a magnifying glass, which defendant rejected on the grounds that there were none that could be worn directly on the eyes. The employee contended that there were magnifying devices on the market that can be mounted on the head or worn as glasses, which would enable her to read the fine print on labels while having her hands free to perform the other functions of the packer job. After receiving a note from the employee's doctor in October 2004 confirming her poor vision, defendant fired her. A 2-year consent decree provided $120,000 in monetary relief to the former employee and requires that defendant comply with the ADA.

In *EEOC v. Mears Marina Associates Limited Partnership d/b/a Red Eye's Dock Bar* (D. Md. March 17, 2008), EEOC alleged that an operator of a dockside bar on Maryland's Eastern Shore refused to allow an accommodation to its uniform requirement and discharged a bartender because she refused to wear a tankini top with thin straps that would reveal her scars from breast cancer surgeries. Under a 3-year consent decree, defendant will reinstate the bartender and pay her $75,000. The decree enjoins defendant from refusing to reasonably accommodate an employee's disability and from retaliation.

In *EEOC v. Wal-Mart Stores, Inc.* (D. Md. June 9, 2008), EEOC alleged that Wal-Mart refused to reasonably accommodate the physical impairments of a pharmacy technician working at its Abington, Maryland store. Due to a spinal cord injury suffered in the mid-1990s, the technician has weakness and spasticity in her lower extremities that limit her in walking and require her to change positions frequently. Wal-Mart accommodated her informally for 8 or 9 years by providing sitdown breaks as needed, but in April 2003, the pharmacy district manager required that she submit a reasonable accommodation request form. She submitted a form requesting primarily sedentary work with limited walking and standing and position changes as necessary, and attached a doctor's note. Wal-Mart denied her request and discharged her in July 2003 for "inability to perform job." A 3-year consent decree provided $250,000 in monetary relief to the former pharmacy technician and enjoins defendant from disability discrimination. Wal-Mart must provide ADA training to all managers in the district with reasonable accommodation responsibilities, and to the store manager and district manager involved in the failure to reasonably accommodate the pharmacy technician.

In Virginia Mason Medical Center (W.D. Wash. July 28, 2008), EEOC alleged that a Seattle nonprofit medical provider failed to reasonably accommodate a surgical technologist who due to an injury at work in November 2004 suffered damage to her vertebrae and sciatic nerve that restricted her from lifting more than 20 pounds and from prolonged standing. Defendant determined that the technologist could no longer do her job, and denied her requests to be placed in temporary part-time status (so she could rest between surgeries), or to transfer to a vacant position. Through a 2-year consent decree, the former technologist will receive $195,000 and a recommendation letter. The decree enjoins the defendant from disability discrimination.

6. Retaliation (all statutes)

a. Waivers

In *EEOC v. Ralph's Grocery Co.* (N.D. Ill. May 20, 2008), EEOC alleged that a grocery chain retaliated against a former employee for filing a charge of discrimination by filing suits against her in federal and state court claiming that her charge violated defendant's mandatory arbitration policy. EEOC also alleged that defendant maintained a mandatory arbitration policy that interfered with employees' rights to file discrimination charges. When the former employee was hired as an assistant manager in December 2002, she was required to sign an arbitration agreement that provided in part that she waived any right to have "dispute resolution proceedings concerning [employment discrimination] take place in a[n] . . . agency." In February 2003, she filed a charge of discrimination under Title VII and the ADA with the Illinois Department of Human Rights (IDHR), which was dual-filled with EEOC. On September 5, 2003, defendant filed suit in federal court against the former employee and the IDHR seeking to compel the former employee to arbitrate her claims and stay the IDHR's administrative investigation. The court dismissed the case for lack of jurisdiction (insufficient amount in controversy) 5 days later. On November 20, 2003, defendant filed a similar lawsuit in state court. EEOC filed an application in federal court to enjoin the state court suit, which was granted on January 20, 2004 (300 F. Supp. 2d. 637). A 2-year consent decree provided $70,000 in damages to the former employee and prohibits defendant from retaliation and from maintaining an arbitration agreement that deters or interferes with employees' rights to file charges with EEOC or a state fair employment practices agency. Individuals who filed arbitration requests with defendant in 2004 and 2005 will be notified by letter that they have 120 days from the date of the decree to file a timely charge with EEOC.

In *EEOC v. Eli Lilly and Co.* (S.D. Ind. June 12, 2008), EEOC alleged that an international pharmaceutical manufacturer retaliated against an employee for filing EEOC charges by conditioning her receipt of benefits under its severance plan on withdrawal of the charges and an agreement not to cooperate with EEOC's investigation. The employee filed a race and sex discrimination charge against defendant in March 2005, which was later amended to include disability. She was fired on May 3, 2005, and the next day filed a second charge, alleging retaliatory termination. In offering the employee severance benefits ($54,400 based on 23 years service), defendant added to the waiver provision in the severance agreement a clause requiring her to withdraw her EEOC charges, to not cooperate with the Commission's investigation, and to indemnify defendant for all costs and fees incurred in defending any released claim. The employee refused to sign the agreement and filed a third charge challenging the agreement as retaliatory. An agreed order resolving the case provided $65,400 to the employee, which included severance benefits, interest, and compensatory damages. For the next 3 years, defendant's severance agreements must include language stating that the signer is not required to waive his or her rights to file an EEOC charge or to cooperate in EEOC investigations as a condition of receiving benefits.

b. Discharge

In *EEOC v. Florida Gulf Coast University Board of Trustees* (M.D. Fla. Feb. 8, 2008), EEOC alleged that a state university reassigned and demoted the 62-year-old Dean of the College of Public and Social Services in retaliation for complaining about age discrimination. The Dean filed a separate lawsuit alleging gender discrimination and retaliation under Title VII, which was consolidated with the Commission's suit. Defendant's Provost had offered the Dean in April 2004 a 5-year extension on his teaching contract and a 3-year extension as Dean, which the Dean accepted. In February 2005, 6 months before the new contract was to take effect, a new Provost rescinded the offer and offered the Dean a shorter, less prestigious contract with lower pay, which she told the Dean would take him to retirement age (65). The Dean emailed the university's EEO director to express his concerns about possible age and gender discrimination. The EEO director forwarded the email to the Provost, who told the Dean the next day that she was withdrawing the job offer, placing him on a 5-month "professional development leave," and reassigning him to a criminal justice professor position after the leave ended (at a substantially lower salary and without authority for administering two ongoing grants). A 4-year consent decree provided the Dean with $350,000 in monetary relief and employment as a full professor of justice studies in the College of Professional Studies at a base salary of $121,959 per 12-month year, subject to future adjustments and additional benefits provided to similarly-situated employees. The decree enjoins defendant from discrimination based on age or gender, and from retaliation.

In The Vanguard Group, Inc. (E.D. Pa. March 6, 2008), EEOC alleged that a large investment management firm retaliated against an African American employee for complaining of race discrimination and filing charges with EEOC. The employee was hired as an information systems engineer at defendant's Malvern, Pennsylvania corporate headquarters in 1993. In 2001, he was transferred to the production service group under new supervision, and between April 2002 and May 2003, complained about race discrimination to human resources staff and a defendant principal. Defendant investigated his complaints, and although it disciplined his supervisor for failing to give performance feedback, it told the employee it uncovered no evidence of race discrimination. The employee filed a race discrimination charge in May 2003, and engaged in unsuccessful EEOC mediation on July 23, 2003. Two days later, defendant asked the employee to immediately turn over a software program he had developed in 1996. The employee told defendant he would turn over the software, but filed a second discrimination charge alleging retaliation related to defendant's sudden insistence on the software. In an effort to resolve the dispute, EEOC advised defendant of the second charge on the day it was filed, July 28, 2003. The next day, during a meeting over the software with defendant's attorney and a human resources representative, the employee tried to give defendant the software, and also handed defendant a memo indicating he had filed a second charge with EEOC. The employee was immediately fired for not making a "good faith effort" to turn over the software because he allegedly tried to connect EEOC to a copyright issue relating to the software. A 2-year consent decree provided the former employee $500,000 and prohibits defendant from retaliation.

In *EEOC v. Eby-Brown Co., LLC* (S.D. Ind. Dec. 20, 2007), EEOC alleged that a distributor of consumer products to convenience stores subjected a French-speaking black man from Guinea (West Africa) to harassment based on his race, color, and national origin, and disciplined and discharged him in retaliation for filing a charge with the EEOC. The employee was hired at defendant's Indianapolis distribution center in June 2003. White coworkers taunted him about his race, color, and national origin, and the managers to whom he complained failed to take effective corrective action. The harassment escalated and eventually one of the white coworkers provoked a fight with the black employee. Defendant terminated both men for fighting, and the black employee filed a union grievance and an EEOC charge. In settlement of the grievance, defendant reinstated the

black employee in October 2004, but defendant's HR manager then began asking him to withdraw his EEOC charge, which he refused to do. Over the next year, the employee received numerous disciplinary writeups, all for either petty rule infractions or communication problems between him and coworkers. In October 2005, defendant discharged the black employee after he was arrested for selling cigarettes without tax stamps; defendant's HR manager was directly involved in setting up the arrest. The 2-year consent decree provided the former employee with $100,000.

In *EEOC v. Curbs Plus, Inc.* (N.D. Ga. Dec. 7, 2007), EEOC alleged that a manufacturer of roof curbs used to support heating and air conditioning units disciplined and discharged an African American shift manager for filing a discrimination charge. The shift manager was hired in September 2005 at defendant's Rossville, Georgia location. In May 2006, he filed a charge with EEOC alleging racial harassment and retaliation and within a month was given a written warning (his first) for poor job performance and was placed on 30 days probation. Defendant terminated the shift manager in August 2006, the same day EEOC conducted an onsite investigation of his charge. Defendant said it discharged the shift manager for poor performance, but also gave as a reason that he had made false accusations of hostile treatment and discrimination against the company. A 3-year consent decree provided the shift manager $115,350 and requires compliance with Title VII.

C. Appellate Court Litigation

The Office of General Counsel's appellate litigation program is the agency's primary vehicle of law development. Practicing before the federal courts of appeals, in the Supreme Court in conjunction with the Solicitor General's Office of the Department of Justice, and on occasion in federal district courts and state courts, OGC Appellate Services attorneys represent the agency when it is a party in cases on appeal and, as approved by the Commission, as amicus curiae in private actions. Representing the Commission as a party involves review of the record of proceedings below and, in cases where the agency lost below, advancing an independent analysis of the likelihood of success on appeal in a recommendation to the General Counsel. This year, appellate lawyers prepared 36 briefs on appeal in Commission cases. Appellate Services attorneys also reviewed more than 2,000 district court decisions in private lawsuits filed under EEOC's statutes and prepared recommendations for participation as amicus curiae in 14 cases raising novel or important issues under the statutes. The Commission approved all amicus recommendations made by the General Counsel. This section of the Annual Report, contains summaries of some of the appellate cases decided or briefed during fiscal year 2008.

1. Charge Filing Requirements

Federal Express Corp. v. Holowecki, 128 S. Ct. 1147 (Feb. 27, 2008)

The Supreme Court held that a submission to EEOC constitutes a charge under the ADEA when it includes the information required by EEOC's regulations and can reasonably be construed as a request for EEOC to take remedial action to protect the employee's rights or to otherwise settle a dispute between the employer and the employee. In reaching this conclusion, the Court agreed with the position advocated by the Commission as amicus curiae. The Court held that the Commission's position represents a reasonable interpretation of the statutory provisions and of the Commission's own regulations, and, as such, is entitled to judicial deference.

Holender v. Mutual Indus. N., Inc., 527 F.3d 352 (3d Cir. June 3, 2008)

The Court of Appeals for the Third Circuit reversed the district court's grant of summary judgment to the defendant in this private ADEA suit. The district court held that although the plaintiff had submitted a timely charge form to the Commission containing the information required by EEOC's regulations and requesting legal relief, he did not exhaust his administrative remedies because he failed to respond to a letter from the EEOC district office stating that it would not docket his charge until he provided further information. The court of appeals agreed with the Commission's argument as amicus curiae that Holender fully satisfied all the statutory requirements for filing a charge and that the fact that EEOC "asked for further, unnecessary information d[id] not . . . change the result."

2. Coverage and Immunity

Sandoval v. American Building Maintenance, Inc., No. 08-2271 (8th Cir.), brief as amicus curiae filed June 30, 2008

This case involves the proper test for holding a parent company liable as an employer for sexual harassment of its wholly-owned subsidiary's employees. Plaintiffs sued the parent company of their immediate employer for sexual harassment under Title VII, alleging that the parent and subsidiary operated as an integrated enterprise and therefore were both liable for the harassment. The district court held that the parent could not be found liable, applying a strong presumption that a parent cannot be held liable for its subsidiary's actions except in extraordinary circumstances.

EEOC argued as amicus curiae that the district court erred in failing to apply the traditional four-prong integrated enterprise test adopted by the Eighth Circuit more than 30 years ago in *Baker v. Stuart Broadcasting Co.*, 560 F.2d 389 (8th Cir. 1977). EEOC explained that the test originated in cases under the National Labor Relations Act and that since Title VII's definition of employer was modeled on that statute, it makes sense that most courts have applied the same test under Title VII. EEOC emphasized that the Commission has endorsed this test in administrative guidance, and that Congress expressly codified it as the test for coverage of foreign subsidiaries of U.S. corporations under the ADEA, Title VII and the ADA. EEOC argued that the evidence in the present case showed that the parent exerted centralized corporate control of labor relations and human resources and thus should be viewed as plaintiffs' employer under a proper application of the integrated enterprise test. EEOC suggested that the Eighth Circuit's recent decision in *Brown v. Fred's, Inc.*, 494 F.3d 736 (8th Cir. 2007), which held that a parent can be considered the employer of its subsidiary's employees only if the parent dominates the subsidiary's operations, can be reconciled with its earlier (correct) decision in *Baker* by viewing the traditional four-factor integrated enterprise standard as the means by which plaintiffs can demonstrate corporate dominance over a subsidiary's operations.

EEOC v. University of Louisiana, Monroe, No. 08-30327 (5th Cir.), brief as appellee filed July 25, 2008

In this ADEA action, the defendant appealed from a district court order rejecting its contention in its motion to dismiss that as a state entity it is immune from suit pursuant to the Eleventh Amendment. On appeal, the Commission argued that although the Eleventh Amendment protects a state from private suits for damages without its consent, the federal government, in contrast, may bring suit in federal court against a state to enforce the state's compliance with federal law. EEOC is the federal agency charged by Congress with enforcement of the ADEA, and it has long been settled that the prohibitions of the ADEA extend to state employers. Accordingly, the Eleventh Amendment poses no obstacle to the Commission's suit to require a state university to comply with the ADEA's prohibitions against age discrimination and retaliation in hiring. The Commission also

argued that nothing in the Supreme Court's decision in *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), alters the fundamental principle that states have no sovereign immunity against the federal government. Kimel, an ADEA action, explicitly limited its Eleventh Amendment immunity holding to suits by private parties, and reaffirmed the holding in *EEOC v. Wyoming*, 460 U.S. 226 (1983), that state and local government employers are covered by the ADEA. The Supreme Court has consistently recognized that Eleventh Amendment immunity does not extend to the federal government in its decisions in University of*Alabama v. Garrett*, 531 U.S. 356 (1987); *Alden v. Maine*, 527 U.S. 706 (1999); and *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

3. EEOC's Investigative Authority and Disclosure Policies

EEOC v. Federal Express Corp., 543 F.3d 531 (9th Cir. Sept. 10, 2008), amended opinion on denial of rehearing, 558 F.3d 842 (9th Cir. March 3, 2009)

The Court of Appeals for the Ninth Circuit affirmed a district court order enforcing an EEOC subpoena. The court rejected FedEx's argument that the appeal was moot because the company had turned over the information sought in the subpoena in the context of a different EEOC investigation. Dismissal of this appeal would, according to the court of appeals, permit FedEx to raise the same objection to EEOC's investigative authority the next time the agency sought information in its ongoing investigation of the company. On the merits, the court said that as long as jurisdiction is not "plainly lacking," a subpoena should be enforced. Applying that standard, and rejecting a contrary decision by the Fifth Circuit in EEOC v. Hearst Corp., 103 F.3d 462 (5th Cir. 1997), the court held EEOC retained the authority to issue a subpoena on a charge even after the charging party has been issued a notice of right to sue and instituted a private action based on the charge.

V*enetian Casino Resort, L.L.C. v. EEOC*, 530 F.3d 925 (D.C. Cir. June 27, 2008)

The Court of Appeals for the District of Columbia Circuit reversed a district court decision dismissing an employer's challenge to EEOC's policy governing the disclosure of information contained in open ADEA charge files. The court of appeals rejected the plaintiff's contention that EEOC's policy violates the Trade Secrets Act and the Freedom of Information Act (FOIA), but held that the policy violates the Administrative Procedures Act because it is inconsistent with the agency's own FOIA regulations.

4. Proof and Evidence Issues

Sprint/United Mgmt. Co. v. Mendelsohn, 128 S. Ct. 1140 (Feb. 26, 2008)

In this age discrimination action, the Supreme Court considered the proper application of the Federal Rules of Evidence to an individual's claim that she was selected for a reduction-in-force (RIF) based on her age, and agreed with the Commission's position as amicus curiae that there should be no per se rule governing the admissibility of evidence of the treatment of other employees during the RIF. The plaintiff sought to introduce the testimony of other employees over the age of 40 who were terminated as part of the same RIF. In response to the defendant's motion in limine, the district court ruled that the plaintiff could not introduce any evidence of the defendant's alleged discriminatory treatment of employees who did not share the same supervisor as the plaintiff and whose employment decisions did not occur in temporal proximity to her own. The Tenth Circuit reversed, holding that the evidence the plaintiff sought to introduce was both relevant to her claim and not more prejudicial than probative under Fed. R. Evid. 403. In an amicus brief joined by the Commission, the Solicitor General argued that in an employment discrimination case, evidence of discriminatory conduct by other supervisors is sometimes admissible and sometimes inadmissible, on a case-by-case basis; that the district

court erred insofar as it adopted a per se rule excluding the evidence in this case; and that the Tenth Circuit erred insofar as it ordered categorically that the evidence at issue be admitted.

The Supreme Court agreed with the Commission's and Solicitor General's position. The Court emphasized that relevance under Fed. R. Evid. 401 and prejudice under Rule 403 are determined in the context of the facts and arguments in a particular case, and thus generally are not amenable to broad per se rules. The Court stated that "[t]he question whether evidence of discrimination by other supervisors is relevant in an individual ADEA case is fact based and depends on many factors, including how closely related the evidence is to the plaintiff's circumstances and theory of the case," and said that the prejudice analysis under Rule 403 is likewise a "fact-intensive, context-specific inquiry." Holding that the admissibility of other-supervisor evidence is an extremely fact-specific and context-based inquiry, the Court vacated the Tenth Circuit's judgment ordering that the testimony be admitted, and remanded with instructions that the district court clarify the basis for its ruling.

Davis v. Coca Cola Bottling Co., 516 F.3d 955 (11th Cir. Feb. 6, 2008)

Nine current or former employees at defendant's Mobile, Alabama plant brought suit under Title VII and 42 U.S.C. § 1981 alleging, among other claims, that defendant engaged in a pattern or practice of discriminating against black employees in promotion and other employment actions. The district court dismissed all of the plaintiffs' claims and plaintiffs appealed. The Commission argued as amicus curiae that the district court erred in ruling that the plaintiffs could not pursue their pattern-or-practice claims because they had not sought class certification under Fed. R. Civ. P. 23, and erred in dismissing the promotion claims of one of the plaintiffs, Terry Jackson. The court of appeals agreed with the Commission with respect to Jackson's promotion claims, but held that, at least under the circumstances in this case, plaintiffs, as individuals, could not pursue claims under the pattern-or-practice framework described in *Teamsters v. United States*, 431 U.S. 324 (1977).

Germano v. Int'l Profit Ass'n, Inc., 544 F.3d 798 (7th Cir. Sept. 12, 2008)

In this ADA case, the district court granted summary judgment in favor of the defendants on the plaintiff's claim of disability discrimination in hiring. The Commission filed an amicus brief in the Seventh Circuit arguing that the district court erred in ruling that statements made by the employer to a deaf job applicant via a third-party operator during a telecommunications relay service call were inadmissible under Fed. R. Evid. 801(d)(2)(C) or (D) as admissions of a party opponent because the third-party operator added a level of hearsay. The Commission also argued that the district court erred in concluding that the plaintiff had failed to establish a prima facie case of disability discrimination and in finding that there was insufficient evidence to establish a jury question as to pretext. Addressing an issue of first impression in any circuit, the Seventh Circuit agreed with the Commission that absent specific evidence of unreliability or a motive to mislead, transmission of a statement through a telecommunications relay service operator does not add a layer of hearsay. The court also agreed that the evidence was sufficient to establish a prima facie case and a jury question as to pretext and therefore remanded the case for trial.

EEOC v. Bobrich Enterprises, Inc., No. 08-10162 (5th Cir.), brief as appellee filed June 16, 2008

The Commission brought this ADA harassment and constructive discharge case to obtain relief for Tammy Gitsham, who has a severe hearing impairment and was subjected to persistent public ridicule by her senior managers throughout the 2 years of her employment. The Commission prevailed on both claims before a jury.

The district court granted the defendant's motion for judgment as a matter of law on the constructive discharge claim (not appealed by EEOC), and defendant appealed the harassment verdict.

Defendant argued to the Fifth Circuit that the evidence did not support the jury's verdict under the circuit's "elevated standard" for "severe and pervasive" conduct; that the district court abused its discretion in excluding proffered evidence of Gitsham's misrepresentations on her employment application; and that EEOC did not provide sufficient evidence to support the conclusion that Gitsham has a covered disability. In response, the Commission first argued that the evidence was sufficient to support the jury's conclusion that Gitsham is covered under the ADA because her hearing is substantially limited even when she wears her hearing aids. The Commission argued that the evidence also could support a conclusion that Bobrich managers regarded Gitsham as substantially limited in hearing. The Commission then pointed out that Bobrich had waived any challenge to the sufficiency of the evidence of harassment because it did not raise that ground for judgment as a matter of law until after the verdict was returned; regardless, the evidence was sufficient under controlling Supreme Court and circuit standards for establishing a hostile work environment. Finally, the Commission argued that the district court properly excluded the evidence that Bobrich sought to offer about Gitsham's prior convictions and misstatements on her application because Bobrich wanted to use the evidence only to challenge Gitsham's "character for truthfulness" and such extrinsic evidence is absolutely barred by Fed. R. Evid. 608.

5. Damages

EEOC v. Harris Farms, Inc., 274 Fed. Appx. 511 (9th Cir. April 17, 2008) (unpublished)

The Court of Appeals for the Ninth Circuit affirmed the district court's judgment awarding over $1 million in backpay, frontpay, compensatory and punitive damages, and attorney's fees to Olivia Tamayo, who intervened in the Commission's Title VII action, adding claims under California law. A jury found that Tamayo was subjected to a sexually hostile work environment and disciplined in retaliation for complaining about sexual harassment. Rejecting defendant's arguments for reversal, the appellate court held that (1) Tamayo's assertion of parallel state law claims as an intervenor was not untimely; (2) defendant waived its right to challenge the admission of evidence regarding the harassment of other women, and in any event the evidence was properly admitted; and (3) ample evidence supported the award of $300,000 (the statutory cap) in punitive damages on the Title VII claims.

Heaton v. The Weitz Company, Inc., 534 F.3d 882 (8th Cir. July 24, 2008)

The Eighth Circuit affirmed the district court's denial of defendant Weitz Company's motion for judgment as a matter of law, thereby preserving plaintiff Edward Heaton's receipt of compensatory and punitive damages in this Title VII retaliation case. As the Commission had urged as amicus curiae, the court of appeals held that: (1) Heaton presented sufficient evidence that he was subjected to adverse employment actions in retaliation for complaining about a supervisor's racially offensive comments; (2) Heaton's evidence of emotional distress was sufficient to support the jury's award of $73,320 in compensatory damages; and (3) the evidence of Weitz's reckless disregard for Heaton's federally protected rights sufficed to support the jury's award of $25,000 in punitive damages.

EEOC v. Federal Express Corp., 513 F.3d 360 (4th Cir. Jan. 23, 2008)

The Fourth Circuit upheld a jury's award of punitive damages in this ADA reasonable accommodation case. The Commission alleged that FedEx refused to provide Ronald Lockhart with a reasonable accommodation for his hearing impairment throughout his 3-year employment with the company. The jury returned a verdict for the Commission, awarding Lockhart $8,000 in compensatory damages, and after determining that FedEx acted with malice or reckless indifference to Lockhart's federally protected rights, $100,000 in punitive damages. FedEx filed a motion for judgment as a matter of law, arguing that the punitive damages award was not warranted because the company did not act in disregard of Lockhart's needs and that remittitur was alternatively appropriate because the punitive damages award was excessive. The district court denied FedEx's motion and FedEx appealed.

Relying on the Supreme Court's decision in *Kolstad v. American Dental Association*, 527 U.S. 526 (1999), the court of appeals said that punitive damages may be available to a plaintiff under the ADA if, "at a minimum, the plaintiff is able to prove 'recklessness in its subjective form' . . . [i.e.,] that his employer 'at least discriminate[d] in the face of a perceived risk that its actions [would] violate federal law.'" Given the evidence presented at trial, the court concluded that the jury was entitled to find that managers acted to deny Lockhart's requested accommodation "in the face of a perceived risk of violating the ADA" because they knew of the ADA obligation to provide reasonable accommodations to Lockhart for his deafness. The court also rejected FedEx's argument for remittitur on the $100,000 punitive damages award, finding that the award was constitutional in light of the guideposts identified by the Supreme Court in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

6. Racial Harassment

Bailey v. USF Holland, Inc., 526 F.3d 880 (6th Cir. May 16, 2008)

The Sixth Circuit Court of Appeals affirmed the district court's ruling in favor of plaintiffs Bobby Bailey and Robert Smith on their Title VII racial harassment claims. Consistent with the Commission's arguments as amicus curiae, the court held that the trial court's factual findings were not clearly erroneous. The employer had argued on appeal that the district court erred by considering all of the alleged harassing conduct as a whole instead of only those incidents that were proven to have been racially motivated, and by improperly considering only events that negatively affected the plaintiffs' work environment while ignoring evidence of a positive work environment for other African Americans at the facility where the plaintiffs worked. The court of appeals agreed with the district court that the overtly racial conduct of some of the harassment was probative of a racial motivation behind some of the more ambiguous conduct.

Tademy v. Union Pacific Corp, 520 F.3d 1149 (10th Cir. April 1, 2008)

The Tenth Circuit Court of Appeals vacated the district court's decision granting summary judgment to the defendant on the plaintiff's Title VII claim that he was subjected to a racially hostile work environment. Agreeing with the position taken by the Commission as amicus curiae, the court held that nearly all of the racially hostile acts alleged by the plaintiff could be considered part of a single hostile work environment under the Supreme Court's decision in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), and that the plaintiff could obtain relief for the entire period of the hostile work environment at issue notwithstanding the fact that he failed to file suit after receiving a notice of right to sue on an earlier Title VII charge challenging the racial harassment.

Barrett v. Whirlpool Corp., No. 08-5307 (6th Cir.), brief as amicus curiae filed May 7, 2008

In this Title VII racial harassment case brought by white employees harassed because of their association with black coworkers, the district court ruled that the white plaintiffs could not proceed with their claim because their "association" with their black coworkers was not close enough. The Commission argued that an employee targeted for harassment because of her association with employees of a different race may establish a claim for a race-based hostile work environment under Title VII without establishing any particular degree of closeness to the coworkers. The evidence in the record was therefore sufficient to support a finding that the plaintiffs were subjected to a hostile work environment because of their association with black employees. The evidence was also adequate to support a finding that the plaintiffs were targeted for harassment based on their advocacy on behalf of their black coworkers, which could, in turn, support either a hostile work environment claim, or a retaliation claim under Title VII's "opposition clause."

7. Sexual Harassment

EEOC v. V & J Foods, Inc., 507 F.3d 575 (7th Cir. Nov. 7, 2007)

In this Title VII sexual harassment and retaliation case, the Commission alleged that V & J Foods, Inc., a Burger King franchisee, should be liable for the sexual harassment of a 16-year-old female employee by the restaurant's 35-year-old male general manager. The Commission also alleged that the general manager retaliated against the employee for her complaints and the complaints her mother made about the sexual harassment. Although the district court agreed that the employee had been subjected to a severe or pervasive sexually hostile work environment, the court granted V & J's motion for summary judgment on the ground that the company had made out an affirmative defense under the Supreme Court's decisions in*Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998), because the employee had not availed herself of the company's complaint procedures. The court granted summary judgment on the retaliation claim based on its view that the employee's and her mother's complaints to management were not protected activity under Title VII.

The Seventh Circuit reversed, holding that there was evidence of tangible employment actions rendering the *Faragher/Ellerth*defenses inapplicable to the hostile environment claim. Because of its relevance to damages for the harassment the employee suffered, the court of appeals also addressed the adequacy of defendant's complaint mechanism. The court emphasized that a complaint mechanism must be reasonable, and said that "what is reasonable depends on 'the employment circumstances.'" The court then held that the employer's harassment complaint mechanism was inadequate, especially in light of the age and inexperience of many Burger King employees. Finally, the court held that in complaining on behalf of her daughter, the employee's mother was in effect acting as her agent, and thus the complaint constituted protected opposition under Title VII.

EEOC v. The Boeing Co., 317 Fed. Appx. 608 (9th Cir. July 31, 2008) (unpublished)

Kelley Miles was subjected to a near-daily barrage of hostile and abusive behavior by several of her male coworkers. The conduct included interfering with her tools and other work equipment; criticizing her work and accusing her of breaking and hiding tools; drawing witch faces on her identification badge; and calling her names such as bitch, lesbian, and manhater. One male coworker who had previously been transferred because he sexually harassed female employees told Miles frequently that she "wanted" him and "loved" him; he also grabbed Miles, hugged her, rubbed her shoulders, and tried to force her to kiss him. Miles complained constantly to Boeing management about the harassment, but management either ignored her complaints, or

called her a troublemaker and a crybaby for reporting her coworkers. The district court granted summary judgment to Boeing, stating that there was no evidence that the harassment was based on Miles' sex. Instead, the court attributed the harassing incidents to a "less than ideal working relationship" between Miles and the men in her unit. EEOC appealed, and the Ninth Circuit reversed and remanded the case for trial. The court of appeals held that viewing the evidence under the proper summary judgment principles, a reasonable jury could infer that the conduct to which Miles was subjected "was both objectively and subjectively offensive and that Miles was so targeted because of her gender." The court also held that there was a genuine issue of material fact on the question of whether Boeing's responses to Miles' complaints were adequate. The court said that while Boeing had taken action against two male coworkers, "a reasonable jury could find that these two employees were part of a much larger problem with respect to Miles' treatment."

Patane v. Clark, 508 F.3d 106 (2d Cir. Nov. 28, 2007) (per curiam)

The district court dismissed this Title VII sexual hostile work environment and retaliation case for failure to state a claim, and the Second Circuit reversed, agreeing with the Commission's argument as amicus curiae that the plaintiff had pled enough facts to state a plausible claim for relief on both counts. The plaintiff alleged that her male supervisor repeatedly watched hard-core pornographic videotapes at the office and that, as his secretary, she was responsible for opening the mail containing these videotapes and giving them to him. She also alleged that she once found hard-core pornographic websites that had been viewed on her computer. She alleged that after she complained, defendant removed virtually all of her secretarial functions in a deliberate effort to get her to quit her job.

The Second Circuit found the facts sufficient to support a sexual hostile work environment claim, saying that it had "specifically recognized that the mere presence of pornography in a workplace can alter the 'status' of women therein." The court then noted that the day after the district court dismissed the plaintiff's retaliation claim, the Supreme Court changed the standard for evaluating such claims in *Burlington Northern & Santa Fe Railway Co. v. White*, 126 S. Ct. 2405 (2006). The court of appeals said that the plaintiff's allegation that defendant removed her responsibilities in order to make her leave surely met the Burlington standard, as "[a]ny reasonable employee that believed that her employers would engage in a concerted effort to drive her from her job if she engaged in Title VII protected activity would think twice about doing so." The court rejected defendant's argument that because the plaintiff had reported the harassment a second time she was not dissuaded by defendant's conduct, finding it "entirely unconvincing, since it would require that no plaintiff who makes a second complaint about harassment could ever have been retaliated against for an earlier complaint."

Gallagher v. C.H. Robinson Worldwide, Inc., No. 08-3337 (6th Cir.), brief as amicus curiae filed May 30, 2008

The plaintiff lost her sexual harassment case on summary judgment and appealed. The Commission argued that the court made legal errors in finding: (1) that the alleged harassing conduct, considered as a whole, did not meet the standard for severe or pervasive sexual harassment; (2) that language and conduct not directed at the plaintiff could not be considered in assessing her hostile environment claim; and (3) that the defendant could not be held liable for the coworker harassment because the plaintiff only complained about it to her supervisor rather than using other complaint mechanisms.

Bright v. Hill's Pet Nutrition, Inc., 510 F.3d 766 (7th Cir. Dec. 21, 2007)

The plaintiff lost her Title VII sexual harassment case following a trial and appealed, arguing there were reversible errors in the district court's jury instructions. The Commission argued as amicus curiae that the district court erred in instructing the jury that in evaluating the plaintiff's hostile work environment claim it could not consider (1) evidence of pornography at the workplace because the defendant had effectively remedied it when it learned about it, (2) events that occurred more than 300 days before the plaintiff filed her charge because they were untimely, and (3) events that occurred in the "Processing" area of defendant's plant because the plaintiff worked in a different area of the plant when she filed her charge. The Seventh Circuit agreed with the Commission: (1) that the pornography evidence should not have been excluded because the employer did not remedy it when it learned of it and because any remedial efforts by an employer go to its vicarious liability for the harassment, not to the question of whether the harassment was actionable; (2) that the district court erroneously disaggregated the plaintiff's hostile work environment in contravention of the Supreme Court's decision in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), and Seventh Circuit case law; and (3) that the hostile environment constituted one continuous unlawful employment practice despite the plaintiff's transition from one section of the plant to another area. The court of appeals remanded the case for a new trial.

8. Religious Discrimination

EEOC v. Sunbelt Rentals, Inc., 521 F.3d 306 (4th Cir. March 31, 2008)

The Fourth Circuit reversed the district court's decision granting summary judgment to the defendant in this Title VII action and remanded the case for trial. The Commission alleged that Sunbelt Rentals violated Title VII by subjecting a Muslim employee to a hostile work environment based on his religion. The district court ruled that the harassment was not sufficiently severe or pervasive to create a hostile work environment, and that there was an inadequate basis for holding Sunbelt liable for the harassment. In reversing, the court of appeals held that there was sufficient evidence to support a finding that the employee was required to work in a hostile environment based on his religion and that employee's managers had notice of the harassment and failed to make any meaningful effort to stop it.

EEOC v. Firestone Fibers & Textiles Co., 515 F.3d 307 (4th Cir. Feb. 11, 2008), petition for rehearing filed March 27, 2008

The Fourth Circuit affirmed the district court's grant of summary judgment for Firestone in this Title VII case in which David Wise, a member of the Living Church of God, was fired because he missed work due to his religion's prohibition against working on the Sabbath (sundown Friday to sundown Saturday) and his observance of a number of religious holidays (14 days a year in addition to Sabbath days). The court of appeals agreed with the district court that Firestone (e.g., through its attendance and leave policies and shift-swapping possibilities) had provided a reasonable accommodation for Wise's religious practices. On appeal, the Commission contended that under Title VII, absent undue hardship an employer must provide a reasonable accommodation that completely eliminates conflicts between an employee's religious practices and a work requirement. The Fourth Circuit disagreed, and held that Title VII requires an employer only to "*reasonably* accommodate" and that "this is not an area for absolutes." The court said that while the "reasonably accommodate" and "undue hardship" inquiries are separate and distinct, they are nevertheless interrelated. The court found that Firestone had made many efforts to accommodate Wise's religious practices, and that the "failure to achieve a total accommodation rest[ed] on the simple fact that Wise's request for such an extraordinary number of hours exceeded what could be reasonably accommodated under the circumstances."

In support of rehearing, the Commission argued that the court misinterpreted the statute and controlling Supreme Court precedent in holding that an employer can meet its reasonable accommodation obligation without offering a means to eliminate the employee's religious conflict. The Commission also argued that the court's standard for determining when a proposed accommodation is reasonable improperly conflates the concepts of reasonableness and undue hardship, essentially reading the undue hardship inquiry out of the statute.

9. Disability Discrimination

Bates v. United Parcel Service, Inc., 511 F.3d 974 (9th Cir. Dec. 28, 2007) (en banc)

In this ADA class action challenging UPS's requirement that all applicants for driver jobs pass the Department of Transportation hearing test, the Ninth Circuit, sitting en banc, vacated the district court's judgment in favor of the plaintiffs and lifted that court's injunction requiring individualized assessments of deaf applicants. The district court had followed *Morton v. UPS*, 272 F.3d 1249 (9th Cir. 2001), which held that the ADA's business necessity defense to a safety-based qualification standard is essentially the same as a BFOQ defense under Title VII or the ADEA, and a panel of the Ninth Circuit initially affirmed. The Commission as amicus curiae argued on en banc rehearing that to justify a safety-based blanket exclusion policy, an employer must prove direct threat or, at a minimum, that the challenged test or qualification standard accurately measures the ability to do essential job functions and no reasonable accommodation would enable an individual screened out by the test to do the job.

The en banc court overruled *Morton*, reasoning that "the plain language of the ADA does not support [that decision's] construction [of the ADA]." The court held that on remand plaintiffs must prove that they are "otherwise qualified" in that they satisfy all of the job prerequisites besides the hearing standard and can drive package cars "safely." The burden then would shift to defendant to prove that the hearing standard is "job-related and consistent with business necessity," and if it is, that "no reasonable accommodation currently available would cure the performance deficiency or that such reasonable accommodation poses an 'undue hardship' on the employer."

Brady v. Wal-Mart Stores, Inc., 531 F.3d 127 (2d Cir. July 2, 2008)

Patrick Brady, who has physical and mental limitations resulting from cerebral palsy, was hired as a part-time pharmacist assistant at Wal-Mart. From the start, the pharmacy manager was "short" with Brady and repeatedly failed to schedule him for shifts. Within a few weeks, the manager had him transferred out of the pharmacy. Brady was first sent to collect shopping carts and trash in the parking lot, purportedly because no other jobs were available. Brady's father complained to the store manager the next day about the transfer, suggesting disability discrimination, and Brady was then moved to a job stocking shelves in the food department. At day's end he was given a schedule that conflicted with his community college classes. Frustrated, he quit and sued under the ADA and state law. A jury found that Brady was disabled or regarded as disabled and had been subjected to an adverse employment action when he was transferred to the parking lot, despite his brief time in that position. The jury also found that Wal-Mart violated the ADA by failing to provide Brady a reasonable accommodation, even though he did not request or believe he needed one. The Second Circuit upheld the jury verdict. Consistent with the Commission's amicus curiae brief, the appellate court held that the evidence supported the jury's finding that transferring Brady from the pharmacy to a job collecting shopping carts and trash in the parking lot constituted an adverse employment action. The court also affirmed the jury's findings that Brady had or was regarded as having a disability, and that because Wal-Mart knew or reasonably should have

known of Brady's disability, it violated the ADA by failing to provide him a reasonable accommodation whether or not he asked for one.

10. Age Discrimination

Meacham v. Knolls Atomic Power Laboratory, 128 S. Ct. 2395 (June 19, 2008)

In this disparate impact case under the ADEA, the Supreme Court vacated the judgment of the Second Circuit which had dismissed the suit because the plaintiffs failed to prove that the employer's explanation for the challenged employment practice was "unreasonable." Agreeing with the Commission's position as amicus curiae, the Supreme Court held that the defendant, not the plaintiff, bears the burden of persuading the factfinder that a practice shown to have a significant disparate impact on older workers is based on a reasonable factor other than age under 29 U.S.C. § 623(f)(4).

Jefferson County Sheriff's Department, Kentucky Retirement Systems, and Commonwealth of Kentucky v. EEOC, 128 S. Ct. 2361 (June 19, 2008)

The Supreme Court reversed the en banc decision of the Sixth Circuit in this EEOC suit and held that the employee benefit plan offered by Kentucky to public employees does not discriminate "because of age," in violation of the ADEA, by using age-based pension eligibility to limit the amount of disability retirement benefits paid to workers who become disabled at or near normal retirement age. The Court adopted a rule for dealing with "the quite special case of differential treatment based on pension status, where pension status – with the explicit blessing of the ADEA – itself turns, in part, on age." The rule is: "Where an employer adopts a pension plan that includes age as a factor, and that employer then treats employees differently based on*pension status*, a plaintiff, to state a disparate treatment claim under the ADEA, must adduce sufficient evidence to show that the differential treatment was 'actually motivated' by age, not pension status."

EEOC v. Allstate Insurance Co., 528 F.3d 1042 (8th Cir. June 10, 2008), brief in opposition to interlocutory appeal filed February 14, 2007; *opinion vacated and Allstate's interlocutory appeal dismissed*, September 8, 2008

In November 1999, Allstate decided to discharge all of its approximate 6,200 insurance sales agents as part of a reorganization program, and shortly thereafter implemented a policy classifying the terminated employee-agents as temporarily (1 to 2 years depending on receipt of severance benefits) ineligible for rehire into other positions with the company. The individuals affected by the policy were almost all 40 years of age or older, and were, as a group, significantly older than Allstate's nonagent workforce. The Commission alleged that the moratorium on rehiring terminated agents violated the ADEA because it had a disparate impact based on age and was not based on a reasonable factor other than age.

The district court granted EEOC's motion for partial summary judgment, ruling that the case was cognizable under a disparate impact theory and that the statistical evidence presented by EEOC established that the policy had a disparate impact. The district court certified two questions for interlocutory appeal pursuant to 28 U.S.C. § 1292(b): (1) whether defendant's hiring moratorium was an "employment policy" subject to a disparate impact challenge under section 4(a)(2) of the ADEA (29 U.S.C. § 623(a)(2)); and (2) whether the method of showing a disparate impact used by the Commission and adopted by the district court was adequate "as a matter of law" to establish a disparate impact. Over the Commission's objection, the court of appeals granted Allstate's petition for permission to pursue interlocutory review of these questions.

The court of appeals affirmed the district court's ruling in favor of the Commission. The court agreed with the district court that the policy at issue was subject to a disparate impact challenge under section 4(a)(2) of the ADEA. Defendant argued that because the hiring moratorium was implemented after the reorganization program, it affected only *former employees*, who under the Supreme Court's decision in *Smith v. City of Jackson*, 544 U.S. 228 (2005), cannot bring a disparate impact claim under section 4(a)(2), which permits disparate impact challenges to employment, but not hiring, policies. The court of appeals, however, found that because the hiring moratorium applied *only* to employee-agents discharged as a result of the reorganization program, the moratorium was part of that program and thus constituted an employment policy under section 4(a)(2). The court also held that two of the statistical comparisons offered by the Commission established that the rehire policy had a disparate impact on the basis of age. The case was remanded for a determination as to whether the policy constitutes a reasonable factor other than age. After Allstate filed a petition for rehearing en banc, the court of appeals vacated its earlier decision as well as the earlier order permitting interlocutory appeal and dismissed Allstate's appeal.

11. Retaliation

Gomez-Perez v. Potter, 128 S. Ct. 1931 (S. Ct. May 27, 2008)

The Supreme Court held that a federal employee can pursue a retaliation claim under the federal sector provision of the Age Discrimination in Employment Act, 29 U.S.C. § 633a(a), rejecting the government's arguments that retaliation is not encompassed by that provision. EEOC had consistently urged the government to accept the agency's interpretation in its federal sector regulations that all the antidiscrimination statutes necessarily encompass protection from retaliation. The Supreme Court relied largely on its prior rulings in two cases addressing analogous issues of whether retaliation was encompassed by a prohibition on "discrimination," and held that the statutory prohibition of "any discrimination based on age" includes retaliation for making an age discrimination complaint.

Thompson v. North American Stainless, LP, 520 F.3d 644 (6th Cir. March 31, 2008)

The Court of Appeals for the Sixth Circuit reversed the district court's grant of summary judgment to defendant on the plaintiff's claim that he was fired in retaliation for his fiancée's filing of an EEOC charge against their employer, North American Stainless. EEOC filed an amicus curiae brief in support of plaintiff on appeal. The court of appeals held that Title VII prohibits "retaliatory action against employees not directly involved in protected activity, but who are so closely related to or associated with those who are directly involved, that it is clear that the protected activity motivated the employer's action." [This decision was subsequently withdrawn and superseded by the decision of the Sixth Circuit en banc court that such retaliation is not prohibited by Title VII. See 567 F.3d 804 (6th Cir. June 5, 2009)].

Crawford v. Metropolitan Gov't of Nashville & Davidson County, TN, No. 06-1595 (S. Ct.), brief as amicus curiae filed April 17, 2008

The Sixth Circuit held that Crawford did not state a claim for retaliation because her statements during her employer's internal sexual harassment investigation did not constitute either protected participation or opposition under Title VII as her conduct was merely passive and responsive to questions. The Commission joined the brief of the Solicitor General in the Supreme Court, which argued that participation in an internal investigation constitutes protected "opposition" under Title VII's retaliation provisions, and that there was no

basis for the court of appeals' assumption that such conduct must be more active than answering questions during an investigation or that an individual's opposition must be overtly expressed where her specific disclosure of inappropriate behavior conveys a reasonable belief that the conduct she described was unlawful. The government argued that the court should not have required any affirmative conduct beyond complaining to come within the protection of the opposition clause.

The government also argued that participation in an internal investigation constitutes protected "participation" under Title VII, because that clause should be given great breadth, and there is no basis for limiting it to EEOC investigations, or to employer-initiated investigations undertaken in response to the filing of an EEOC charge. Employers that investigate potential violations of Title VII not only ensure that they qualify for the affirmative defense the Court created in harassment cases, but also act in conformity with Title VII's central objective to prevent and deter harm. These investigations occur "under" Title VII's framework because they fulfill Title VII's objectives and because they are themselves subject to scrutiny in litigation challenging the efficacy of the employer's efforts.

Tate v. Executive Management Services, Inc., No. 07-2575 (7th Cir.), brief as amicus curiae filed February 8, 2008

In this sexual harassment and retaliatory discharge case, a jury found for defendant on the sexual harassment claim and for plaintiff on the retaliatory discharge claim. The district court denied defendant's motions for judgment as a matter of law and defendant appealed. EEOC filed an amicus brief on the following two issues: (1) whether saying no to a supervisor's insistence that the employee continue a sexual relationship can constitute protected opposition for purposes of a Title VII retaliation claim, and (2) whether there was a basis for imputing the supervisor's retaliatory animus to the employer. On the first issue, the Commission argued that saying "no" to the harasser is paradigmatic opposition conduct, citing *Ogden v. Wax Works, Inc.*, 214 F.3d 999 (8th Cir. 2000) (holding that rejection of a supervisor's verbal and physical advances constitutes protected activity). On the issue of employer liability when a lower-level supervisor harbors animus of which the decisionmaker is unaware, the Commission argued that the plaintiff's supervisor's false report of insubordination was a substantial factor behind defendant's decision to discharge the plaintiff. The Seventh Circuit's recent decision emphasizing that employers are shielded from liability in such situations if they conduct an independent investigation (*See Brewer v. Bd. of Trs. of Univ. of Ill.*, 479 F.3d 908 (7th Cir. 2007)) did not compel reversal in the present case because the evidence permitted the jury to conclude that the decisionmaker did not conduct a real investigation.

EEOC v. Allstate Life Ins. Co., No. 08-1122 (3d Cir.) (lead case: No. 07-4460), brief as appellant filed June 2, 2008, reply brief filed September 8, 2008

In November 1999, Allstate announced its Preparing for the Future program, under which all of its approximately 6,200 insurance sales agents would be discharged on June 30, 2000. The terminated employee-agents were given four options, three of which required signing a release of all claims against the company. A release was required: (1) to continue selling Allstate insurance after converting to independent contractor status, (2) to convert to independent-contractor status briefly in order to sell his or her book of business, or (3) to receive enhanced severance benefits (a year of pay). Terminated employee-agents who did not sign a release received Allstate's standard severance benefits (up to 13 weeks of pay depending on years of service).

EEOC's suit challenged the release requirement as a violation of the antiretaliation provisions of the ADEA, Title VII, and the ADA. The Commission's suit was consolidated with a private class action (*Romero v. Allstate*) alleging retaliation in addition to age discrimination and other claims. The district court initially granted partial summary judgment to plaintiffs on defendant's liability for retaliation, but following a Seventh Circuit decision on a similar retaliation claim (*Isbell v. Allstate Ins. Co.*, 418 F.3d 788 (7th Cir. 2005)), the court reversed itself and granted summary judgment to Allstate on all claims. On appeal, the Commission argued that the 19 employee-agents who refused to sign the release engaged in protected "participation" under the statutes' retaliation provisions because their refusal could be viewed as a threat to sue the company. Consequently, Allstate's conditioning their right to continue selling the company's insurance products on signing the release constituted retaliation. The Commission also argued that it is a per se violation of the antiretaliation provisions for an employer to require its employees to release all their claims in order to continue working for the company; therefore, the releases signed by the employee-agents who converted to independent-contractor status should be voided.

D. Outreach: Educating the Public

The Office of General Counsel engages in significant and varied outreach activities in its efforts to educate the public, including stakeholder and community groups, particularly vulnerable populations; industry and employer groups; national and local bar groups; and individuals pursuing careers in the law. In fiscal year 2008, legal staff made presentations at 676 outreach events addressing almost 25,000 people. Highlights of some of OGC's educational efforts are described in this section.

Stakeholder and Community Groups

The regional attorney for Memphis arranged for representatives from the offices of Senator Lamar Alexander and Congress member Steve Cohen to visit the office to discuss the EEOC's enforcement and litigation programs. The Phoenix regional attorney discussed retaliation at the annual Arizona Association of Affirmative Action conference. The Los Angeles regional attorney provided an overview of the laws enforced by the EEOC at the Corporate Advisory Committee and Los Angeles Diversity Conference. The Birmingham regional attorney and an attorney from that office spoke at the Southeastern Regional meeting of Esperanza. An attorney from Charlotte discussed national origin and religious discrimination in the workplace at the Empowerment Summit, an event sponsored by the Urban League of Hampton Roads, Virginia. An attorney from Indianapolis gave a Supreme Court update at the 12th Annual Race Relations Conference hosted by the Louisville Office and the Louisville Jefferson County Human Rights Commission. A trial attorney from Atlanta spoke with the Fulton County EEO Office about caregiver responsibilities. Assistant general counsels from the appellate and trial sections of OGC's headquarters office spoke about the history of EEOC with the Commissioner for the Equal Employment Opportunity Commission of Israel.

Vulnerable Populations and Groups Advocating on their Behalf

The regional attorney from San Francisco spoke at a Southeast regional meeting of farm worker advocates on "Sexual Harassment of Farm Workers and the Role of the EEOC"; presented "Trafficking, Title VII, and the Role of the EEOC" at the East Bay Anti-Trafficking Task Force Conference; and gave presentations on harassment based on immigration status to advocates for sexual assault victims at the National Conference to End Violence Against Immigrant Women. A trial attorney from San Francisco spoke about EEOC processing and evaluating a case for settlement at a joint EEOC and California Rural Legal Assistance training session. The Phoenix

regional attorney discussed refugees in Arizona at the Arizona Refugee Resettlement Program Annual Conference. The Dallas regional attorney discussed immigrants and low wage workers at the State Bar of Texas 16th Annual Advanced Employment Law Course in Houston, Texas. An attorney from New York spoke with members of the Low Income Immigrant Rights Coalition. An attorney from Los Angeles gave an EEOC overview for the Volunteer Legal Services of the Salvation Army. An attorney from St. Louis spoke to management employees of Clarice Home Care Services, Inc. in Steeleville, Illinois.

Industry and Employer Groups

An assistant general counsel for appellate services participated in a SHRM cyber chat on recent Supreme Court decisions, and appellate attorneys participated in a cyber chat for OCLA and SHRM on ADEA-related issues. A trial attorney from Charlotte provided an EEOC overview and a legal update to division chiefs and department managers of the City of Virginia Beach. An attorney from Chicago discussed harassment with the Wisconsin Department of Transportation. An attorney from Houston spoke about diversity to human resource managers and officials of the utility company Entergy. An attorney from Miami conducted training for managers of the Palm Beach County School Board on Title VII. The regional attorney from Houston spoke to managers at a car dealership about sexual harassment and retaliation. An attorney from Memphis conducted EEO training, with an emphasis on harassment, to office workers and management personnel at Gilley Construction.

National and Local Bar Groups

General Counsel Ronald S. Cooper participated in an ABA panel on the ten most important issues in employment law, and discussed “Employee Selection Procedures in the New Millennium” as part of a teleconference sponsored by the ABA Section of Labor and Employment Law. Regional attorneys from Atlanta, New York, and San Francisco presented “EEOC Claims: What Employers are Doing Wrong” to ALI-ABA. An assistant general counsel for Appellate Services presented a Supreme Court update to the DC Bar Labor and Employment Section. The Houston regional attorney discussed litigating race cases at NELA’s national meeting in Atlanta, Georgia. An appellate attorney gave a presentation on the Equal Pay Act as part of a panel discussing options after the Supreme Court’s decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), at the NELA conference. A trial attorney from New York presented “Tackling National Origin Discrimination” at a NELA event. The regional attorney from Los Angeles discussed recent EEOC initiatives and emerging trends at the mid-year meeting of the International Association of Defense Counsel. An attorney from Dallas participated in a panel discussion on employment discrimination based on sexual orientation and gender identity at the 2008 Lavender Law Conference 2008, which was sponsored by the national Lesbian and Gay Law Association.

Individuals Pursuing Careers in the Law

The regional attorney from Indianapolis spoke about ensuring success in the legal profession at the Midwest Regional Meeting of the Black Law Students Association’s annual retreat hosted by Indiana University School of Law. An attorney from Atlanta discussed EEOC with the Black American Law Students Association at Emory University. The regional attorney from San Francisco spoke about civil rights’ careers with law students at an event sponsored by the Filipino Bar Association of Northern California. A Los Angeles attorney participated in a panel on Asian American attorneys at the Southern California Asian Pacific American Law Student Association Conference. An attorney from St. Louis discussed EEOC’s mission at the Oklahoma University College of Law Pro Bono Fair in Norman, Oklahoma. An attorney from Chicago spoke about working for EEOC during a panel

on careers held at IIT-Kent Law School in Chicago, Illinois. Attorneys from Atlanta discussed interning at the EEOC at the Public Interest Forum at Georgia State School of Law.

Attorneys from New York served as moot court judges at New York Law School and guest lectured in an employment law class for undergraduates at St. John's University. A trial attorney from Miami discussed employment discrimination law as a panelist for the Federal Law Clerk Training Program for law clerks in the Middle District of Florida. An attorney from Dallas discussed employment discrimination at the Texas Advanced Paralegal Seminar in San Antonio. An attorney from San Francisco discussed legal careers with the Filipino-American club at Lowell High School.

E-RACE, Systemic, and Youth-at-Work Initiatives

The General Counsel spoke about EEOC's systemic initiative, as well as other agency-related topics, at the ALI-ABA Annual CLE Conference in Washington, D.C. and at the Memphis Bar Association's Labor & Employment Law Section Annual Seminar. A trial attorney from St. Louis discussed the systemic initiative with the Enforcement Division of the Missouri Commission on Human Rights, and a trial attorney from Dallas discussed the initiative with the Labor and Employment Section of the Dallas Bar Association.

The regional attorney for Memphis discussed the E-RACE initiative at the annual Black History program sponsored by the Nashville Area Office and the Small Business Administration. An attorney from Birmingham discussed E-RACE with the Montgomery chapter of the NAACP. A trial attorney from Philadelphia was interviewed for a cable television show about EEOC and E-RACE by the Cleveland NAACP President. The regional attorney from Memphis discussed E-RACE with students attending Strayer University. A paralegal from the Miami office participated in an E-RACE program in Puerto Rico on race and color discrimination.

Attorneys from EEOC offices including New York, Philadelphia, Miami, Charlotte, and Indianapolis, gave Youth-at-Work presentations to various high school classes. An attorney from Charlotte discussed Youth@Work at Strayer University. A trial attorney from Philadelphia discussed E-RACE and Youth@Work at the University of Delaware's "Public Service Careers Expo." The regional attorney for Philadelphia provided an EEOC update and discussed all three EEOC initiatives with the Business Law Section of the Philadelphia Bar Association. The Phoenix regional attorney discussed recent EEOC initiatives with the Arizona Employment Lawyers Association.

ADA

The Phoenix regional attorney conducted a number of presentations at the National ADA Coordinators conference in Florida. A trial attorney from Dallas spoke about the ADA to a group of attorneys and other professionals at La Hacienda, a residential treatment center for drug addiction and alcoholism in Hunt, Texas. An attorney from Philadelphia discussed the ADA at an Allegheny County Community College class for job coaches of individuals with disabilities. An attorney from Indianapolis spoke about discipline and disability discrimination in a joint program with the Indiana Juvenile Detention Association. An attorney from Philadelphia spoke to a John Hopkins University graduate school class about the ADA. A trial attorney from San Francisco conducted ADA training for community college human resources professionals.

Media Efforts

The regional attorney from New York spoke to Conde Nast Portfolio and the Wall Street Journal about pregnancy discrimination; to Working Mother and Employment 360 about caregiver discrimination; to *Newsday,*

HR Magazine, the *Los Angeles Times*, the *Boston Globe*, and CNN radio about English-only language rules, and to CNBC and the *New York Post*about charge processing procedures. The regional attorney from Houston participated in the making of a film on the legal rights of teen workers for the Texas Young Lawyer's Group. The Miami regional attorney was interviewed by the *Miami Herald* on the practice of using a Spanish-language requirement as an artificial barrier to employment for African-Americans and other non-Latinos, for a program broadcast on Miami's public radio station. An attorney from Chicago was interviewed by the BNA *Daily Labor Report* about waivers and releases.

III. Litigation Statistics

A. Overview of Suits Filed

In FY 2008, the field legal units filed 290 merits lawsuits: 287 direct suits and 3 actions to enforce administrative settlements. (Merits suits include direct suits and interventions alleging violations of the substantive provisions of the Commission's statutes, and suits to enforce settlements reached during EEOC's administrative process.) One hundred and twelve of the suits sought relief for multiple aggrieved individuals. The field legal units also filed 35 actions to enforce subpoenas issued during EEOC investigations.

Merits Filings in FY 2008	
	Count
Direct	287
Intervention	0
Administrative Settlements	3
Total	290
178 Individual Suits	
112 Class Suits	

1. Litigation Workload

The FY 2008 litigation workload (merits cases active at the start of the fiscal year plus merits suits filed during the fiscal year) totaled 778.

Litigation Workload			
	Active	**Filed**	**Workload**
FY 2008	488	290	778

2. Filing Authority

In EEOC's National Enforcement Plan, adopted in February 1996, the Commission delegated litigation filing authority to the General Counsel in all but a few areas. The General Counsel has redelegated much of this authority to the regional attorneys. Redelegated cases are reviewed by staff in the Office of General Counsel prior to filing. The chart below shows the filing authority for FY 2008 merit suits. (Subpoena enforcement actions (not indicated below) are within the authority of the regional attorneys and are not reviewed by OGC prior to filing.)

FY 2008 Merits Suit Authority		
	Count	Percent
Regional Attorney	243	83.8%
Commission	39	13.4%
General Counsel	8	2.8%

3. Statutes Invoked

Of the 290 merits suits filed, 77.2% contained Title VII claims, 13.1% contained ADEA claims, 12.1% contained ADA claims, and 3.1% were filed under multiple statutes. (Statute numbers in the table below exceed the number of suits filed and percentages total over 100% because suits filed under multiple statutes ("concurrent" cases) are included in the tally of suits filed under each of the statutes.)

Merits Filings in FY 2008 By Statute		
	Count	Percent of Suits
Title VII	224	77.2%
ADEA	38	13.1%
ADA	37	12.8%
EPA	0	0.0%
Concurrent	9	3.1%

4. Bases Alleged

As shown in the next table, sex discrimination (40.7%) and retaliation (35.2%) were the most frequently alleged bases in EEOC suits. Race discrimination was alleged in 23.4% of FY 2008 suit filings. Suit numbers in the table exceed the total filings (290) because suits often contain multiple bases.

Bases Alleged in Suits Filed		
	Count	Percent of Suits
Sex	118	40.7%
Retaliation	102	35.2%
Race	68	23.4%
Age	38	13.1%
Disability	37	12.8%
National Origin	21	7.2%
Religion	18	6.2%

5. Issues Alleged

Discharge was the most frequently alleged issue in EEOC suits filed (65.2%) and harassment the second (39.7%). Hiring was an issue in 16.6% of the suits.

Frequently Alleged Issues in Suits Filed		
	Count	**Percent of Suits**
All Discharge	189	65.2%
Constructive Discharge	49	16.9%
Harassment	115	39.7%
Hiring	48	16.6%
Promotion	16	5.5%
Religious Accommodation	11	3.8%
Disability Accommodation	10	3.4%
Pay	10	3.4%

B. Suits Filed by Bases and Issues

1. Sex Discrimination

As shown below, 61.9% of cases with sex as a basis contained a harassment allegation. Discharge was the second most frequently alleged issue in sex claims (43.2%).

Frequently Alleged Sex Discrimination Issues		
	Count	**Percent**
Harassment	73	61.9%
Discharge	51	43.2%
Hiring	11	9.3%
Terms/Conditions	10	8.5%

2. Race Discrimination

Harassment was also the most frequently alleged issue in race discrimination claims (41.2%). Discharge was an issue in 29.4% of race claims and terms and conditions of employment was an issue in 26.5%.

Frequent Alleged Race Discrimination Issues		
	Count	**Percent**
Harassment	28	41.2%
Discharge	20	29.4%
Terms/Conditions	18	26.5%
Promotion	5	7.4%

3. National Origin Discrimination

As shown in the next table, harassment was the most frequently alleged issue where national origin was the basis (52.4%), followed by discharge (42.9%) and terms and conditions of employment (28.6%).

Frequently Alleged National Origin Discrimination Issues		
	Count	**Percent**
Harassment	11	52.4%
Discharge	9	42.9%
Terms/Conditions	6	28.6%

4. Religious Discrimination

Discharge and failure to accommodate were each issues in over 60% of religious discrimination claims.

Frequently Alleged Religious Discrimination Issues		
	Count	**Percent**
Discharge	11	61.1%
Reasonable Accommodation	11	61.1%

5. Disability Discrimination

Discharge was the most frequently alleged issue in disability suits (59.5%), followed by failure to accommodate (27%) and hiring (21.6%).

Frequently Alleged Disability Discrimination Issues		
	Count	**Percent**
Discharge	22	59.5%
Reasonable Accommodation	10	27.0%
Hiring	8	21.6%

6. Age Discrimination

Almost two-thirds of age discrimination claims involved either hiring or discharge.

Frequently Alleged Age Discrimination Issues		
	Count	**Percent**
Discharge	12	31.6%
Hiring	12	31.6%

7. Retaliation

Discharge was an issue in 58.8% of retaliation claims, and terms and conditions of employment in 20.6%.

Frequently Alleged Retaliation Issues		
	Count	**Percent**

Discharge	60	58.8%
Terms/Conditions	21	20.6%
Harassment	8	7.8%

C. Bases Alleged in Suits Filed from FY 2004 through FY 2008

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

Bases Alleged in Suits Filed FY 2004 - 2008 Percent Distribution									
FY	**Sex(F)**	**Sex(P)**	**Sex(M)**	**Race**	**Nat. Or.**	**Relig.**	**Dis.**	**Age**	**Retal.**
2004	42.7%	6.3%	3.4%	15.3%	9.7%	4.2%	11.8%	11.8%	37.9%
2005	34.9%	8.1%	3.9%	21.1%	7.8%	3.9%	12.8%	11.2%	35.8%
2006	33.4%	8.6%	3.2%	21.3%	10%	6.5%	10.5%	12.4%	32.3%
2007	30.1%	8.6%	4.8%	19.3%	11.3%	7.7%	12.2%	9.5%	37.8%
2008	30%	8.6%	2.1%	23.4%	7.2%	6.2%	12.8%	13.1%	35.2%

D. Suits Resolved

In FY 2008, the Office of General Counsel resolved a total of 336 merits lawsuits, recovering $101,074,690 in monetary relief.

1. Types of Resolutions

As the table below indicates, 87.5% of EEOC's suit resolutions were settlements, 9.3% were determinations on the merits by courts or juries, and 3.1% were voluntarily dismissed (two of the voluntary dismissals were without prejudice). (The figures on favorable and unfavorable court orders do take reversals on appeal into account.)

Types of Resolutions FY 2008		
	Count	**Percent**
Consent Decree	277	82.4%
Settlement Agreement	17	5.1%
Favorable Court Order	14	4.2%
Unfavorable Court Order	17	5.1%
Voluntary Dismissal	11	3.1%
Total	336	100%

2. Statutes Invoked

Of the 336 merits suits resolved during the fiscal year, almost 80% contained Title VII claims. ADA claims were present in 13.7% of the resolutions and ADEA claims in 11.6%. (Statute numbers in the table below exceed the

number of suits resolved and the percentages total over 100% because suits resolved under multiple statutes ("concurrent" cases) are also included in the tally of suits resolved under each statute.)

FY 2008 Resolutions by Statute		
	Count	**Percent of Suits**
Title VII	265	78.9%
ADA	46	13.7%
ADEA	39	11.6%
EPA	3	.9%
Concurrent	16	4.8%

As shown below, Title VII suits accounted for 65.6% of all monetary relief obtained and ADEA suits accounted for 30.3%. Recoveries in concurrent suits are not included in the totals for the particular statutes.

FY 2008 Monetary Relief By Statutes (rounded)		
Statute	**Relief (millions)**	**Relief Percent**
Title VII	$64.9	64.2%
ADEA	$29.9	29.9%
ADA	$3.3	3.2%
EPA	$1.0	1.0%
Concurrent	$1.7	1.7%
Total	$101.1	100.0%

3. Bases Alleged

As shown in the following table, sex was a basis in 40.2% of the suits resolved, retaliation in 36.6%, and race in 23.8%. The total count exceeds suits resolved (336) because suits often contain multiple bases.

Bases Alleged in Suits Resolved		
	Count	**Percent of Suits**
Sex	135	40.2%
Retaliation	123	36.6%
Race	80	23.8%
Disability	44	13.1%
National Origin	40	11.9%
Age	37	11.0%
Religion	14	4.2%

Equal Pay	3	.9%

4. Issues Alleged

Similar to the suits filed statistics, discharge and harassment were by far the most frequently alleged issues in resolved cases.

Frequently Alleged Issues in Suits Resolved		
	Count	**Percent of Suits**
Discharge	221	65.8%
Harassment	147	43.8%
Hiring	41	12.2%
Terms/Conditions	35	10.4%
Promotion	25	7.4%
Disability Accommodation	17	5.2%
Religious Accommodation	8	2.4%
Pay	7	2.1%

E. Resources

1. Staffing

Since FY 2004, OGC's field staff has decreased from 318 to 296, with attorney staff decreasing from 208 to 193. The following table shows field and headquarters staffing numbers for the last 5 years.

OGC Staffing (On Board)			
Year	HQ	All Field	Field Attorneys*
2004	83	318	208
2005	77	311	203
2006	56	308	200
2007	55	299	194
2008	51	296	193
* Includes Regional Attorneys, Supervisory Trial Attorneys, and Trial Attorneys			

2. Litigation Budget

As indicated in the table below, OGC's litigation support budget has varied less than 10% on a year-to-year basis over the last 5 years.

Litigation Budget Funding (Millions)	
FY	**FUNDING**

2004	$3.36
2005	$3.65
2006	$3.48
2007	$3.35
2008	$3.58

F. Historical Summary: Tables and Charts

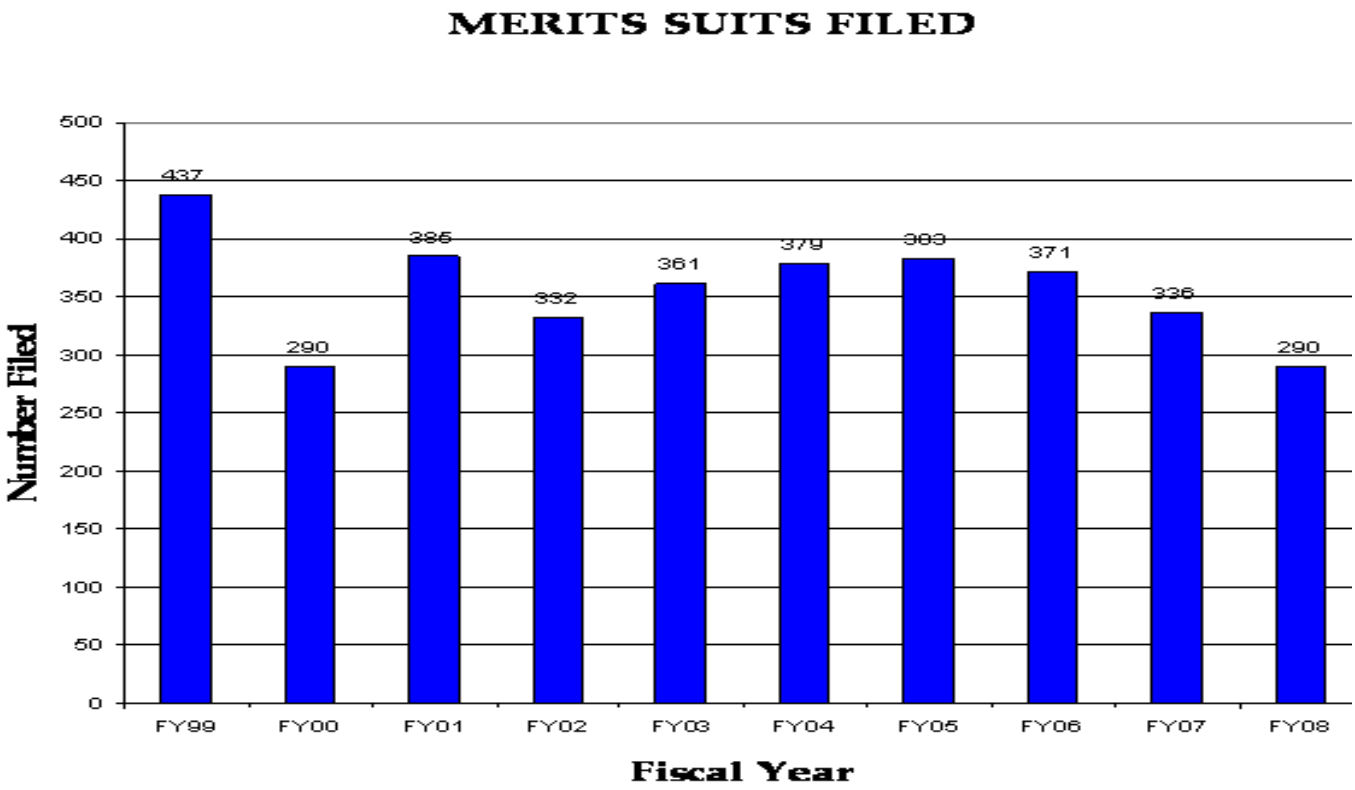
1. EEOC Ten-Year Litigation History: FY 1999 through FY 2008

Litigation Statistics, FY 1999 through FY 2008

	FY99	FY00	FY01	FY02	FY03	FY04	FY05	FY06	FY07	FY08
All Suits Filed	465	329	428	370	400	421	416	403	362	325
Merits Suits	438	292	388	342	366	378	381	371	336	290
Suits with Title VII Claims	341	236	289	268	298	297	295	294	268	224
Suits with ADA Claims	55	29	66	44	49	46	49	42	46	37
Suits with ADEA Claims	47	33	42	39	27	46	44	50	32	38
Suits with EPA Claims	9	9	14	12	12	5	13	10	7	0
Suits filed under multiple statutes[1]	13	14	19	19	19	14	17	22	16	9
Subpoena and Preliminary Relief Actions	27	37	40	28	34	43	35	32	26	35
All Resolutions	350	440	362	381	381	380	378	418	387	367
Merits Suits	320	407	321	351	351	346	338	383	364	336
Suits with Title VII Claims	211	315	232	266	275	277	259	295	297	265
Suits with ADA Claims	74	53	48	65	50	43	41	50	41	46
Suits with ADEA Claims	51	41	39	26	35	34	45	50	36	39
Suits with EPA Claims	7	6	15	9	13	9	12	8	14	3
Suits filed under multiple statutes	22	8	12	15	21	14	18	17	19	16
Subpoena and Preliminary Relief Actions	30	33	41	30	30	34	40	35	23	31
Monetary Benefits ($ in millions)[2]	98.7	52.2	49.8	56.2	146.6	168.6	104.8	44.3	54.8	101.1
Title VII	49.2	35	33.6	29.2	85.1	158.5	98	34.3	38.9	64.9
ADA	2.9	2.9	2.3	15.1	2.3	2.5	3.4	2.8	3.1	3.3
ADEA	42.8	13.8	3.1	1.4	57.8	5.4	2.4	5.1	2.4	29.9
EPA	0	0.2	0.2	0.2	0	0	0	0	0.2	1.0
Suits filed under multiple statutes[3]	3.8	0.4	10.7	10.3	1.5	2.3	1	2.1	10.2	1.7

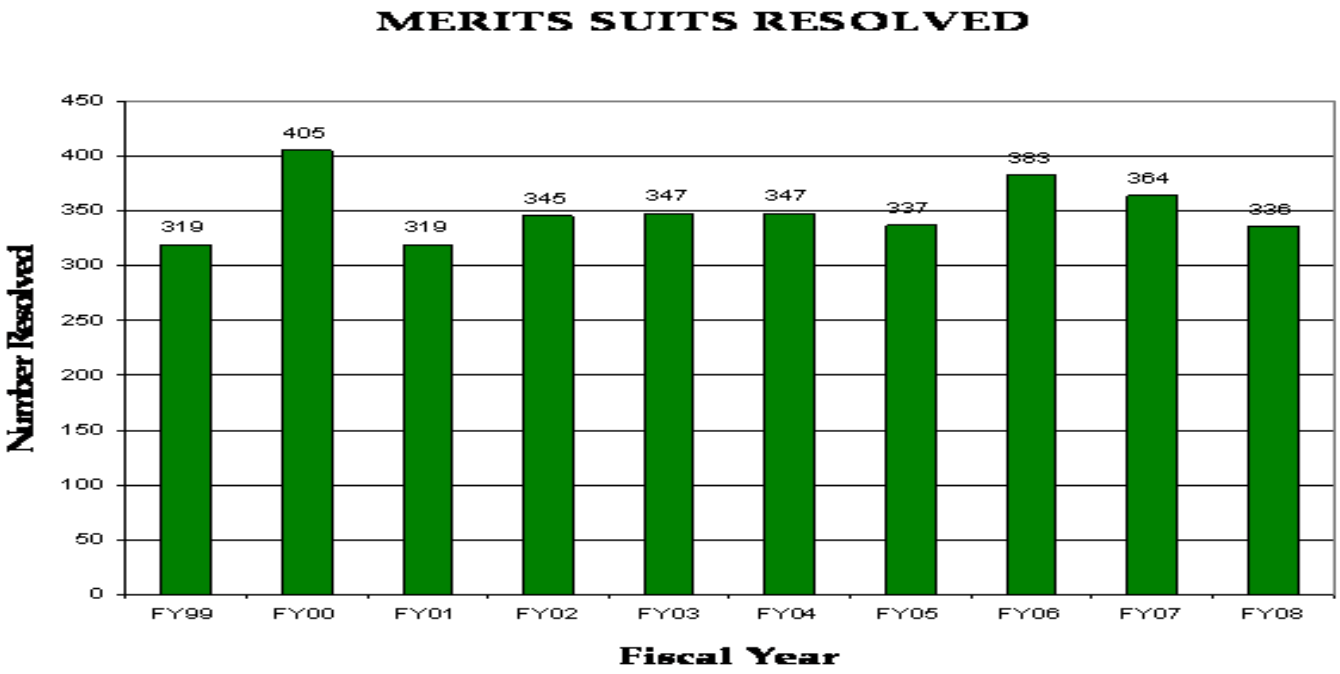
2. Merits Suits Filed FY 1999 through FY 2008

The chart below shows the number of merits suits filed for FY 1999 through FY 2008.



3. Merits Suits Resolved FY 1999 through FY 2008

The chart below shows the number of merits suits resolved for FY 1999 through FY 2008.



4. Monetary Recovery FY 1999 through FY 2008

The chart below shows the monetary recovery for FY 1999 through FY 2008.