



Statement of the U.S. Chamber of Commerce

**ON: THE REGULATORY AND ENFORCEMENT
PRIORITIES OF THE EEOC: EXAMINING THE
CONCERNS OF STAKEHOLDERS**

**TO: THE UNITED STATES HOUSE OF
REPRESENTATIVES COMMITTEE ON EDUCATION
AND THE WORKFORCE SUBCOMMITTEE ON
WORKFORCE PROTECTIONS**

BY: CAMILLE A. OLSON, SEYFARTH SHAW LLP

DATE: JUNE 10, 2014

The Chamber's mission is to advance human progress through an economic,
political and social system based on individual freedom,
incentive, initiative, opportunity and responsibility.

The U.S. Chamber of Commerce is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region.

More than 96 percent of the Chamber's members are small businesses with 100 or fewer employees, 70 percent of which have 10 or fewer employees. Yet, virtually all of the nation's largest companies are also active members. We are particularly cognizant of the problems of smaller businesses, as well as issues facing the business community at large.

Besides representing a cross-section of the American business community in terms of number of employees, the Chamber represents a wide management spectrum by type of business and location. Each major classification of American business — manufacturing, retailing, services, construction, wholesaling, and finance — is represented. Also, the Chamber has substantial membership in all 50 states.

The Chamber's international reach is substantial as well. It believes that global interdependence provides an opportunity, not a threat. In addition to the Chamber of Commerce's 96 American Chambers of Commerce abroad, an increasing number of members are engaged in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

Positions on national issues are developed by a cross-section of Chamber members serving on committees, subcommittees, and task forces. More than 1,000 business people participate in this process.

TESTIMONY OF CAMILLE A. OLSON

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**THE REGULATORY AND ENFORCEMENT PRIORITIES OF THE EEOC:
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JUNE 10, 2014

Good morning Mr. Chairman and members of the Subcommittee. On behalf of the United States Chamber of Commerce, I am pleased to provide testimony of stakeholder concerns regarding recent Equal Employment Opportunity Commission (“EEOC”) actions relating to its statutory mandate to: (1) properly investigate charges and reach a determination as promptly as possible, (2) endeavor to eliminate any alleged unlawful practice through informal methods including conciliation and persuasion, and (3) ensure compliance with federal equal employment opportunity laws through meritorious direct party litigation and amicus participation in federal courts as well as the promulgation of enforcement guidance containing legitimate interpretations of federal employment discrimination laws.¹

Congress empowered the EEOC “to prevent unlawful employment practices by employers.”² The EEOC administers Title VII of the Civil Rights Act of 1964, as amended (“Title VII”), the Equal Pay Act (“EPA”), the Americans with Disabilities Act (“ADA”), and the Age Discrimination in Employment Act (“ADEA”), among other federal employment discrimination laws. The Chamber is a long-standing supporter of reasonable and necessary

¹ I am Chairwoman of the Chamber’s equal employment opportunity policy subcommittee. The Chamber is the world’s largest business federation, representing more than three million businesses and organizations of every size, industry sector, and geographical region. I am also a partner with the law firm of Seyfarth Shaw LLP, where I chair the Labor and Employment Department’s Complex Discrimination Litigation Practice Group. In addition to my litigation practice, which has specialized in representing local and national companies in federal court litigation involving claims of employment discrimination, I also represent employers in designing, reviewing, and evaluating their employment practices to ensure compliance with federal and local equal employment opportunity laws. I have represented business and human resource organizations as amicus curiae in landmark employment cases, including *Wal-Mart v. Dukes, et al.*, 131 S. Ct. 2541 (2011), and also teach federal equal employment opportunity law topics at Loyola University Chicago School of Law.

I would like to acknowledge Seyfarth Shaw LLP attorneys Lawrence Z. Lorber, Paul H. Kehoe, Richard B. Lapp, and Chris DeGross, as well as Jae S. Um for their invaluable assistance in the preparation of this testimony.

² 42 U.S.C. § 2000e-5(a).

steps designed to achieve the goal of equal employment opportunity for all.³ However, the Chamber has serious concerns as to how these laws are currently being administered and enforced by the EEOC. Loosely-defined and overly broad grants of authority to agency officers have created an administrative climate at the EEOC which prioritizes expansive enforcement, aggressive litigation and punishment over education, cooperation and conciliation.

Yet, a properly functioning EEOC is critical for employees and employers alike. An EEOC that timely investigates charges and objectively applies the law to the facts of each charge provides employees with critical information about their rights, and employers with critical guidance as to their obligations under applicable law. Congressionally-mandated *bona fide* EEOC conciliation and other dispute resolution processes can quickly eradicate and remedy an unlawful practice, while also instructing employers as to their legal obligations regarding individual employment decisions and compliant employment policies. The EEOC's vigorous pursuit of cases where unlawful discrimination has occurred as the end stage of enforcement protects affected workers and ensures employer compliance with federal laws.

As described by the Supreme Court, “[t]he EEOC does not function simply as a vehicle for conducting litigation on behalf of private parties; it is a federal administrative agency charged with the responsibility of investigating claims of employment discrimination and settling disputes, if possible, in an informal, non-coercive fashion. Unlike the typical litigant . . . the EEOC is required by law to refrain from commencing a civil action until it has discharged its administrative duties.”⁴

Attached to my testimony is the Chamber's recently-published Paper entitled: “A Review of Enforcement and Litigation Strategy During the Obama Administration - A Misuse of Authority” (June 2014) (“Chamber's EEOC Enforcement Paper”). The Chamber's EEOC Enforcement Paper details unreasonable enforcement efforts by the EEOC during the Obama Administration as documented in federal court decisions and as conveyed to the Chamber by its members. The analysis reveals the EEOC's litigation priorities have included: pursuing investigations and settlements despite clear evidence that the alleged adverse action was not discriminatory and bringing and continuing litigation described as frivolous, unreasonable and without foundation by federal district court judges.⁵ In addition, the Chamber's analysis of 2013 court cases reveals the EEOC's priority is often to advance dubious legal theories in both its

³ For example, the Chamber worked closely with the disability community to reach a compromise that resulted in the bi-partisan passage of the Americans with Disabilities Act Amendments Act of 2008 (“ADAAA”).

⁴ *Occidental Life Insurance Co. of California v. EEOC*, 432 U.S. 355, 368 (1977).

⁵ Since January 2013 the EEOC has been increasingly criticized by numerous courts throughout the country that have sanctioned the EEOC for its overzealous litigation tactics, awarding nearly six million dollars in attorneys' fees and costs to employers as a result of the EEOC's inappropriate litigation.

enforcement guidance and *amicus* litigation program.⁶ For these reasons, the EEOC and its priorities deserve greater attention and oversight. My testimony will include highlights of the Chamber's EEOC Enforcement Paper in two parts: The EEOC's Investigation and Conciliation Record and the EEOC's Private Party and *Amicus* Litigation Record.⁷

The EEOC's Investigation and Conciliation Record

EEOC Investigations

Title VII requires the EEOC to "make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge." Yet, Chamber members, as well as plaintiff and management attorneys and courts have uniformly criticized the EEOC for investigations that are dilatory, inconsistent and of questionable quality.⁸

Chamber members have voiced concern over numerous examples of EEOC enforcement tactics during the EEOC's investigation and attempts to resolve pending charges of discrimination.⁹ Those abuses can be grouped in the following three categories: abuses relating to an investigator's conduct during an investigation; abuses relating to an investigator's conduct during a fact-finding conference; and abuses relating to an investigator's unwillingness to fairly mediate or negotiate a resolution of a charge.

Examples of EEOC enforcement abuses relating to an investigator's conduct during an investigation include: pursuing investigations despite clear evidence that an employee's termination was not discriminatory (including challenging a termination based on video capturing the charging party displaying pornography around the workplace); several examples of instances where employers have been required to submit detailed position statements,

⁶ The EEOC's *amicus curiae* program ("*amicus*") is one of its most important legal enforcement methods. In 2013, the EEOC's *amicus* program was a complete failure – not only were the EEOC's *amicus* positions rejected, the United States Supreme Court and the Courts of Appeals also rejected relevant provisions in the EEOC's underlying Enforcement Guidance documents, compliance manual positions, and policy statements under Title VII and the ADA. The courts' rejection of the EEOC's underlying regulatory guidance leaves employers searching as to where to find accurate, reliable guidance on their legal obligations under federal non-discrimination laws. *See* 12-14 *infra* and Chamber's EEOC Enforcement Paper at 18-25.

⁷ I request that the Subcommittee accept my written testimony as well as the Chamber's EEOC Enforcement Paper as part of the written record of today's Hearing.

⁸ *See* Meeting Transcript of EEOC's July 18, 2012 - Public Input into the Development of EEOC's Strategic Enforcement Plan Meeting at <http://www.eeoc.gov/eeoc/meetings/7-18-12/transcript.cfm> and Meeting Transcript of EEOC's March 20, 2013 - Development of a Quality Control Plan for Private Sector Investigations and Conciliations Meeting at <http://www.eeoc.gov/eeoc/meetings/3-20-13/transcript.cfm>.

⁹ *See* Chamber's EEOC Enforcement Paper at 2-4.

information and documents relating to employees' claims that they had been terminated unlawfully when they were either still employed or had resigned voluntarily (resulting in the expenditure of thousands of dollars in legal fees); requiring the production of workplace policies completely irrelevant to the underlying charge; serving subpoenas for information or documents that were not previously requested by the investigator; communicating directly with employer agents though notified that the employer was represented by counsel; refusing to grant extensions of time to produce information or documents requested because, as a blanket rule, "extensions are not granted"; refusing to provide charging parties or employers with information regarding the case status while it is open; and refusing to close cases that are several years old, preferring instead to continually send employers additional requests for information.

Some employers have gone on the offensive against inappropriate EEOC enforcement tactics, including Case New Holland ("CNH"). In *Case New Holland, Inc. v. EEOC*,¹⁰ CNH filed a lawsuit against the EEOC claiming it violated the Administrative Procedure Act and the U.S. Constitution during its investigation of an alleged age discrimination complaint. Specifically, CNH challenged the EEOC's unannounced surprise delivery of 1300 spam-like emails to CNH managers and employees to "troll" for potential class members at the employees' work email addresses, demanding that they cease their work to communicate with the EEOC on an attached questionnaire.¹¹

The Code of Federal Regulations sets forth express guidelines for the EEOC's investigation of charges of discrimination. It states:

The agency must develop an *impartial and appropriate factual record* upon which to make findings on the claims raised by the complaint. An appropriate factual record is defined in the regulations as one that allows a reasonable fact finder to draw conclusions as to whether discrimination occurred. Investigations are conducted by the respondent agency.¹²

Various issues have also arisen with respect to EEOC enforcement abuses relating to an investigator's conduct during a fact-finding conference, including: requiring mandatory conferences; holding the conference prior to the start of the investigation and without first receiving an employer's position statement or statement of facts; conducting the conferences in a confrontational manner (aggressively questioning employer representatives, but not charging party); and refusing to allow an employer's representative to speak during the conference.

Additional EEOC enforcement abuses during settlement conversations include: urging an employer in writing to accept a mid-five figure settlement with respect to a charge based on a variety of alleged bad facts the EEOC claimed showed discrimination (though the EEOC had not at that time issued a determination letter), and, when the employer rejected the offer, days later dismissing the charge as without reasonable cause to believe discrimination existed; refusing to

¹⁰ No. 13-cv-01176 (D.D.C. filed Aug. 1, 2013).

¹¹ Chamber's EEOC Enforcement Paper at 10-11.

¹² 29 C.F.R. § 1614.108(b) (emphasis added).

engage in a mediation with the employer, claiming the employer did not negotiate in good faith, notwithstanding the same investigator had a few months earlier mediated successfully with the same employer; demanding short turnarounds on any proposed conciliation counteroffers, even though the EEOC's response time for conciliation communications has taken several months; and refusals to provide employers in conciliation and settlement negotiations with information to support the underlying findings or requested relief or appropriate ways to revise policies or practices to comply with non-discrimination laws.

Consistent with the experience of Chamber members, at various Commission meetings aimed at developing the Commission's Strategic Enforcement Plan and Quality Control Plan, Commissioners were confronted with rare agreement between the plaintiff and management bars that the EEOC's investigations are too long, inconsistent, and of questionable quality.¹³ The meeting attendees stressed that the EEOC should focus its resources on its priorities and introduced the concept of a "quality, limited investigation" for remaining charges. Unfortunately, the EEOC's recently-released draft Quality Control Plan ("QCP") that is intended to set quality standards for investigations and conciliations does not offer timeliness guidelines for quality investigations nor a definition of a "quality, limited investigation."¹⁴

Recently, and with more frequency, the sufficiency or the appropriateness of the EEOC's pre-suit obligations have been successfully challenged by employers in courts. "Before the EEOC is able to file a lawsuit in its name, it must establish that it has met four conditions precedent, namely: the existence of a timely charge of discrimination, the fact that EEOC conducted an investigation, issued a reasonable cause determination, and attempted conciliation prior to filing suit."¹⁵ The most recent example of EEOC abuse in the investigation context occurred in *EEOC v. Sterling Jewelers, Inc.*, a nationwide class action alleging discriminatory pay practices against female employees.¹⁶ While 19 female employees from various states filed charges with the EEOC claiming pay-related sex discrimination, the EEOC filed suit on behalf of a nationwide class. However, rather than conducting a *bona fide* investigation, the EEOC in making its reasonable causing finding simply relied on reports prepared by plaintiffs' counsel and "experts." The federal district court rejected this tactic and granted summary judgment in favor of Sterling because the EEOC failed to demonstrate that it had conducted *any* investigation into claims of company-wide pay and promotion discrimination on a nationwide basis as

¹³ See Meeting Transcript of EEOC's July 18, 2012 - Public Input into the Development of EEOC's Strategic Enforcement Plan Meeting at <http://www.eeoc.gov/eeoc/meetings/7-18-12/transcript.cfm> and Meeting Transcript of EEOC's March 20, 2013 - Development of a Quality Control Plan for Private Sector Investigations and Conciliations Meeting at <http://www.eeoc.gov/eeoc/meetings/3-20-13/transcript.cfm>.

¹⁴ Instead, the QCP adopts an "I know it when I see it" standard that offers no guidance to the field other than to correctly fill out a charge form and apply the law to the facts.

¹⁵ *Id.* at 359-60; 42 U.S.C. §2000e-5(b).

¹⁶ *EEOC v. Sterling Jewelers, Inc.*, No. 08-706, 2014 WL 916450, at *1 (W.D.N.Y. Mar. 10, 2014).

opposed to merely being spoon fed unvetted information from plaintiffs' lawyers before filing a lawsuit.¹⁷

Notwithstanding the above failures in the EEOC's investigative processes, the EEOC is unwilling or unable to provide guidance to ensure investigations are run with the utmost professionalism, quality, and consistency throughout the country. The Chamber urges Congress to install much needed common sense safeguards within the EEOC if the EEOC continues to ignore these issues.

EEOC Conciliations

Before filing a suit, Title VII requires that the EEOC "endeavor to eliminate any... unlawful employment practice by informal methods of conference, conciliation, and persuasion."¹⁸ That serves all sides – employees, employers and courts. Needless, expensive, protracted litigation should be avoided if compliance can be obtained through informal means.

Despite this statutory language, the EEOC rejects the notion that its statutory obligation is subject to judicial review; rather, the EEOC contends that courts must simply accept the EEOC's assurance it occurred. Courts, however, are empowered to enforce the law, review agency decisions and ensure that agencies do not exceed their statutory boundaries. Making compliance with a statute unreviewable is to make a violation of that statute irremediable. No legitimate reason exists to exempt the EEOC's statutory obligation to conciliate from judicial review, while other statutory requirements – charge requirements, time limits and notice rules – are routinely subject to judicial review.

In fact, when Congress amended Title VII in 1972 granting litigation authority to the EEOC, it considered exempting the EEOC's conciliation efforts from judicial review. For example, an early version of the bill expressly stated that the EEOC may proceed with a suit if it cannot secure "a conciliation agreement acceptable to the Commission, *which determination shall not be subject to review.*"¹⁹ (emphasis added.) However, as ultimately passed, the 1972 Amendments did not exempt conciliation from judicial review and Title VII does not contain that italicized language above, showing that Congress intended that there be appropriate judicial oversight of EEOC conciliation activities.²⁰

For the last forty years, courts have routinely reviewed whether the EEOC has sufficiently complied with conciliation obligations. Recently, in *EEOC v. CRST Van Expedited, Inc.*,²¹ the Eighth Circuit Court of Appeals largely affirmed a district court's dismissal of an

¹⁷ *Id.*

¹⁸ 42 U.S.C. § 2000e-5(b).

¹⁹ S. 2515, 92d Cong. § 4(f) (1971).

²⁰ 42 U.S.C. § 2000e-5(f)(1).

²¹ 679 F.3d 657, 676-77 (8th Cir. 2012).

EEOC class action complaint which alleged sexual harassment of behalf of 154 women where the EEOC failed to identify the alleged victims during conciliation. The Eighth Circuit held that the EEOC stonewalled the company by making no meaningful attempt to conciliate and described the EEOC's tactic of seeking redress for victims identified after the beginning of litigation as follows:

There was a clear and present danger that this case would drag on for years as the EEOC conducted wide-ranging discovery and continued to identify allegedly aggrieved persons. The EEOC's litigation strategy was untenable: CRST faced a continuously moving target of allegedly aggrieved persons, the risk of never-ending discovery and indefinite continuance of trial.²²

As a result, the district court sanctioned the EEOC and awarded \$4.7 million dollars to CRST for attorneys' fees and expenses.²³ In addition to taxpayers having to fund the sanction against the EEOC for abusing the very statute it enforces, 153 alleged victims' claims were dismissed without a hearing on the merits – a stark example of the harm caused by the EEOC's improper litigation tactics. Judicial review is a meaningful and real check and balance over agency abuse. Without it, tactics like those in the *CRST* case would go unchecked.

Yet a recent Seventh Circuit Court of Appeals case, *EEOC v. Mach Mining, LLC*, 738 F.3d 171, 184 (7th Cir. 2013) rejected this safeguard and held conciliation was not subject to judicial review, creating a split among the Circuit Courts of Appeals regarding the issue of whether the EEOC's conciliation obligations are subject to judicial review, as courts in the Second, Fourth, Fifth, Sixth, Tenth, and Eleventh Circuits²⁴ had all determined that the EEOC's conciliation obligations were subject to review under varying standards.

The House of Representatives recognized the dangers created where there is no meaningful, *bona fide* conciliation. Thus on May 30, 2014, it voted on a bipartisan basis to approve the fiscal year 2015 Commerce, Justice, Science Appropriations bill.²⁵ The report accompanying the bill provided as follows:

²² *Id.* at 676.

²³ *EEOC v. CRST Van Expedited, Inc.*, No. 07-CV-95-LRR, 2013 WL 3984478, at *21 (N.D. Iowa Aug. 1, 2013).

²⁴ The Second, Fifth, and Eleventh Circuits evaluate conciliation under a searching three-part inquiry. *EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256, 1259 (11th Cir. 2003); *EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529, 1534 (2d Cir. 1996); *EEOC v. Klingler Elec. Corp.*, 636 F.2d 104, 107 (5th Cir. 1981). The Fourth, Sixth, and Tenth Circuits require instead that the EEOC's efforts meet a minimal level of good faith. *EEOC v. Keco Indus., Inc.*, 748 F.2d 1097, 1102 (6th Cir. 1984); *EEOC v. Radiator Specialty Co.*, 610 F.2d 178, 183 (4th Cir. 1979); *EEOC v. Zia Co.*, 582 F.2d 527, 533 (10th Cir. 1978). As opposed to the EEOC's positions in these cases promoting a particular judicial standard of review of its conciliation efforts, today the EEOC asserts its efforts are not subject to judicial review.

²⁵ H. Rep. No. 113-448, at 83-84 (2014).

The Committee is concerned with the EEOC's pursuit of litigation absent good faith conciliation efforts. The Committee directs the EEOC to engage in such efforts before undertaking litigation and to report, no later than 90 days after enactment of this Act, on how it ensures that conciliation efforts are pursued in good faith.²⁶

The EEOC should not be permitted to ignore Title VII's plain language, nor should courts abdicate their responsibilities in determining whether an executive branch agency complied with its statutory requirements. Yet, that is what the EEOC argues in courts throughout the country and in its brief filed in response to Mach Mining's petition for writ of certiorari currently pending before the United States Supreme Court.²⁷ Courts have an important role in ensuring that any agency, including the EEOC, does not manipulate, abuse, or evade its statutory duty.

The EEOC's Private Party and Amicus Litigation Record

Recently, multiple federal courts have sanctioned the EEOC in connection with its investigatory and litigation tactics. In the last two years, the EEOC has been ordered to pay employers over \$5.6 million dollars as a result of its improper litigation and conciliation efforts. Five recent cases are of immediate note in which courts sanctioned the EEOC for its: failure to follow appropriate procedures before instituting litigation, failure to appropriately litigate the case, and failure to reasonably assess the appropriateness of continuing its litigation once it became clear in discovery that its complaint's theory had no basis in fact.²⁸

²⁶ *Id.*

²⁷ On December 20, 2013, the Seventh Circuit Court of Appeals broke from over 40 years of jurisprudence by holding that the EEOC's pre-conciliation efforts were not subject to judicial review at all in *EEOC v. Mach Mining, LLC*, 738 F.3d 171, 184 (7th Cir. 2013). See Brief for the Respondent at 7-13, *Mach Mining, LLC v. EEOC*, (No. 13-1019) (May 27, 2014).

²⁸ In *EEOC v. CRST Van Expedited, Inc.*, 2013 U.S. Dist. LEXIS 107822 (N.D. Iowa Aug. 1, 2013), the court ordered the EEOC to pay \$4.7 million in attorneys' fees, expenses and costs to the employer it sued based on its failure to conciliate before instituting litigation. In *EEOC v. Bloomberg LP*, 2013 WL 4799150 (S.D.N.Y., Sept. 9, 2013), the court invited the employer to file a motion for attorneys' fees based on the EEOC's inappropriate conciliation and litigation conduct. In *EEOC v. Womble Carlyle Sandridge & Rice, LLP*, 2014 WL 37860 (M.D.N.C., Jan. 6, 2014), a magistrate judge imposed sanctions of approximately \$23,000 against the EEOC for spoliation of evidence where the claimant destroyed documents during litigation relevant to her duty to mitigate damages. In *EEOC v. Peoplemark, Inc.*, 732 F.3d 584 (6th Cir. Oct. 7, 2013), the court upheld a fee award of \$751,942 for continuing to pursue litigation based on a blanket no hiring policy for ex-convicts where no such policy existed and the EEOC obtained information during discovery that disproved its factual basis for its complaint. In *EEOC v. TriCore Reference Laboratories*, No. 11-2096, 2012 WL 3518580 (10th Cir. 2012), the Tenth Circuit Court of Appeals affirmed summary judgment for the employer determining that no

The \$5.6 million sanctions against the EEOC does not take into account the value of the Commission's resources (in attorney and other staff time, hard litigation and expert witness and other costs and the opportunity costs of pursuing frivolous cases). In addition, there are no available estimates on the resources expended by the EEOC in connection with a number of other high profile losses suffered by the EEOC on its most highly publicized cases during the last year, including most recently, the dismissal of EEOC's nationwide sex discrimination litigation against Sterling Jewelers for its failure to investigate the alleged systemic allegations in the case before initiating litigation (*EEOC v. Sterling Jewelers, Inc.* W.D.N.Y. No. 08-706 3/10/2014).

Reestablishing The Commission's Oversight of The Initiation of Multi-Plaintiff Litigation

Title VII confers authority to initiate litigation to the five-member Equal Employment Opportunity Commission. Title VII authorizes the EEOC's General Counsel to "conduct" litigation. Yet today, the overwhelming majority of EEOC-initiated litigation is initiated throughout the United States by EEOC Local District offices, without review and a grant of authority from the Commission.

This has not always been the case. In 1995, the Commissioners delegated their authority to initiate litigation to the General Counsel, who subsequently delegated much of that authority to the district offices. Since then, the Commission has only exercised authority to initiate litigation in some but not all cases involving a major expenditure of resources, cases presenting a developing area of the law, cases likely to present a public controversy, and cases where an EEOC amicus brief is sought.

In the early- to mid-2000s, as many as 75-80 litigation recommendations were submitted annually to the Commission for authorization. Yet, in recent years, the number has decreased dramatically. In the three-year period covering 2010, 2011 and 2012, a total of approximately 15 cases (of any type) were submitted to the Commission for authorization. In late 2012, the EEOC adopted its Strategic Enforcement Plan, which continued the EEOC's focus on systemic litigation, but slightly modified the delegation of authority to the General Counsel, which required "most" systemic cases to be submitted to the Commission for review. Overall, the Commission required a minimum of 15 cases, one from each district office, be presented for review each fiscal year. In fiscal year 2013, the EEOC filed 21 systemic cases and 21 non-systemic multi-plaintiff cases. Based on information provided before each public Commission meeting, it is clear that many of these cases were initiated by the district offices without approval from the Commission.

Given the significant expenditure of resources by both the EEOC and private employers in connection with multi-plaintiff cases in 2013, the Chamber urges that all multi-plaintiff litigation be submitted to the Commissioners for review and approval prior to initiation of litigation.

material issue of fact remained, and awarded \$140,571 in attorneys' fees to the employer based on the EEOC's pursuit of a failure to accommodate claim with no basis in fact.

Private Party Litigation Failures

Despite significant budgetary increases in 2009 and 2010,²⁹ and consistent funding at high levels since, EEOC litigation is down almost 55%.³⁰ Since April 2010, however, the number of cases that the EEOC has lost due to litigation abuses is troubling.³¹

For example, in a race discrimination case, the EEOC alleged that a staffing company's blanket policy of not hiring individuals with a criminal record had a disparate impact on African-Americans.³² However, the company simply did not have a blanket no-hire policy. Despite becoming aware of the fatal false premise of its case during discovery, the EEOC continued to litigate anyway. The U.S. District Court for the Western District of Michigan determined that "this is one of those cases where the complaint turned out to be without foundation from the beginning." As a result, the court ordered the EEOC to pay a total of \$751,942.48 for deliberately causing the company to incur attorneys' fees and expert fees after the agency learned that the company did not have the blanket no-hire policy.

A federal court in New York dismissed a pregnancy discrimination lawsuit filed by the EEOC, granting summary judgment for the employer, ruling that the EEOC did not present sufficient evidence to establish that, once again, the employer engaged in a pattern or practice of pregnancy discrimination.³³ The EEOC, which represented 600 women against the employer, based its claim on anecdotal accounts that the company did not provide a sufficient work-life balance for mothers working there. The court ruled that the law does not mandate work-life balance. The court criticized the EEOC for using a "sue-first, prove later" approach, noting that, "'J'accuse!' is not enough in court. Evidence is required."³⁴

Similarly, in a case alleging discrimination under the ADA, the EEOC continued to litigate even when it became clear that the case had no merit.³⁵ Specifically, the EEOC admitted that the alleged victim of discrimination could not perform the essential functions of the job but

²⁹ See <http://www.eeoc.gov/eeoc/plan/budgetandstaffing.cfm>. Between fiscal year 2008 and fiscal year 2010, the EEOC's budget increased by over \$38M or 11.5%.

³⁰ See <http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm>. In fiscal year 2008, the EEOC filed 290 merits cases. In fiscal years 2012 and 2013, the EEOC filed 122 and 133 merits cases, respectively.

³¹ For additional analysis regarding the EEOC's litigation abuses, see the Chamber's EEOC Enforcement Paper at 7-11.

³² *EEOC v. Peoplemark, Inc.*, 2011 U.S. Dist. LEXIS 38696 (W.D. Mich. Mar. 31, 2011).

³³ *EEOC v. Bloomberg LP*, 2013 U.S. Dist. LEXIS 128388 (S.D.N.Y., Sept. 9, 2013); *EEOC v. Bloomberg L.P.*, 778 F. Supp. 2d 458, 462 (S.D.N.Y. 2011).

³⁴ *Id.*

³⁵ *EEOC v. Tricore Reference Laboratories*, 2012 U.S. App. LEXIS 17200 (10th Cir. 2012).

“continued to litigate the . . . claims after it became clear there were no grounds upon which to proceed.” Thus, the EEOC’s claims were “frivolous, unreasonable and without foundation.” The district court dismissed the claim and awarded the employer over \$140,000 in attorneys’ fees and costs. The Court of Appeals affirmed.³⁶

While litigating disparate impact claims, which do not require that the EEOC prove intentional discrimination against any alleged victim, the EEOC has fared no better. For example, in an Ohio case alleging that an employer’s use of credit background checks violated Title VII, the Sixth Circuit affirmed summary judgment because the EEOC lacked sufficient evidence to even form a prima facie case of discrimination. There, the EEOC used a novel “race rating” system to establish that the credit background check had a disparate impact against minority applicants. While castigating the EEOC for using a “homemade” method that the EEOC itself prohibits, the Sixth Circuit noted that “[i]n this case the EEOC sued defendants for using the same type of background check that the EEOC itself uses.” *The Wall Street Journal* called the Sixth Circuit’s opinion “The Opinion of the Year”.³⁷

In a Maryland case alleging that an employer’s criminal background policy had a disparate impact on minorities, the EEOC attempted to prove its case through hiring statistics.³⁸ Unable to establish a prima facie case of discrimination, the court awarded summary judgment for the employer. The court found that EEOC’s expert analysis contained a “mind-boggling number of errors.” The court also found the EEOC’s statistical evidence to be “skewed,” “rife with analytical errors,” “laughable,” and “an egregious example of scientific dishonesty.” Accordingly, the court dismissed the case, noting that, “The story of the present action has been that of a theory in search of facts to support it.” When bringing costly litigation, the Government’s representative needs to be held to a standard higher than “laughable” or “scientifically dishonest.”

EEOC abuses can also be found during the discovery phase of litigation. For example, in *EEOC v. Honeybaked Ham*³⁹, a Colorado district court sanctioned the EEOC for its efforts to evade discovery where the EEOC was “negligent in its discovery obligations, dilatory in cooperating with defense counsel, and somewhat cavalier in its responsibility to the United States District Court[.]” In *EEOC v. Womble Carlyle Sandridge & Rice, LLP*,⁴⁰ a North Carolina court sanctioned the EEOC almost \$23,000 for the charging party’s destruction of evidence after the EEOC had initiated litigation, laying blame for the destruction on the EEOC’s attorneys.

³⁶ *Id.*

³⁷ <http://online.wsj.com/news/articles/SB10001424052702304512504579491860052683176>.

³⁸ *EEOC v. Freeman*, 961 F. Supp. 2d 783, 797-799 (D. Md. 2013).

³⁹ *EEOC v. Original Honeybaked Ham Company of Georgia, Inc.*, 2013 U.S. Dist. LEXIS 26887 (D. Colo. Feb 27, 2013).

⁴⁰ *EEOC v. Womble Carlyle Sandridge & Rice, LLP*, 13-CV-46 (M.D.N.C. Jan. 6, 2014); see also *EEOC v. Womble Carlyle Sandridge & Rice, LLP*, 13-CV-46 (M.D.N.C. April 29, 2014).

*The EEOC's Failed Amicus Program*⁴¹

Not only has the EEOC been unsuccessful in its major cases in which it is a party, the EEOC's *amicus curiae* program was equally unsuccessful in 2013. One of the most important legal enforcement methods available to the EEOC is its *amicus curiae* program.⁴² *Amicus* briefs are "friend of the court" briefs filed by the EEOC "in a case that raises novel or important issues of law" that fall within EEOC's expertise.⁴³ The EEOC has an exhaustive approval process for *amicus* participation, with all recommendations in favor of *amicus* participation approved by a majority of the five-member Commission. *Amicus* briefs are part of the EEOC's targeted and integrated approach to law enforcement, focused on the EEOC's priorities, and often seek judicial approval of EEOC positions contained in its enforcement guidelines and policy statements.

In 2013, the U.S. Supreme Court and five Courts of Appeals decided 13 cases in which the EEOC filed *amicus* briefs. To be sure, three of the 13 cases raised contested procedural issues on which the EEOC's *amicus* position prevailed.⁴⁴ Ten of the cases involved substantive issues of the appropriate interpretations of applicable federal law.⁴⁵ The EEOC's position was

⁴¹ For a more in depth analysis of the EEOC's failed *amicus* program, see the Chamber's EEOC Enforcement Paper at 18-25.

⁴² The EEOC has not included information regarding its 2013 *amicus* record on its website, in its 2013 PAR, or in its General Counsel's Law360 article criticizing other analyses of the EEOC's litigation record as failing to perform a comprehensive review of all 2013 EEOC litigation efforts. Without considering the EEOC's 2013 *amicus* record, its General Counsel asserted that when one reviewed the EEOC's entire record instead of a few EEOC losses still on appeal, "...we [EEOC] have a record of success in reversing adverse decisions when a case moves to the appellate court."). P. David Lopez, '*EEOC Overreach*' Analysis Distorted The Record, LAW360 (Jan. 3, 2014, 12:17 PM).

⁴³ See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, AMICUS CURIAE PROGRAM, (Jan. 15, 2014), available at <http://www.eeoc.gov/eeoc/litigation/amicus.cfm>.

⁴⁴ The EEOC prevailed on procedural arguments in the following three *amicus* cases in 2013: *Mandel v M&Q Packaging Corp.*, 706 F.3d 157 (3d Cir. Jan. 14, 2013) (adopting the EEOC position that the district court erred in refusing to consider evidence of harassment over 300 days old in this hostile work environment claim); *Boaz v. FedEx Customer Info. Svs., Inc.*, 725 F.3d 603 (6th Cir. Aug. 6, 2013) (adopting DOL & EEOC argument that an employment contract cannot shorten the statute of limitations under the EPA or FLSA); *Ellis v. Ethicon, Inc.*, 529 Fed. Appx. 310 (3d Cir. Jul. 9, 2013) (adopting the EEOC argument that reinstatement can be an appropriate remedy).

⁴⁵ The EEOC's substantive arguments were rejected in the following eight *amicus* decisions in 2013: *Vance v. Ball State Univ.*, 133 S. Ct. 2434 (Jun. 24, 2013) (rejecting EEOC Enforcement Guidance definition of "supervisor" under Title VII when determining vicarious liability for unlawful harassment); *Univ. of Texas Southwestern Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (Jun. 24, 2013) (rejecting EEOC Enforcement Guidance that the motivating factor standard applies to

rejected in eight of the ten substantive positions it advanced in the appellate courts. In comparison, the United States Chamber of Commerce (“Chamber”) filed *amicus curiae* briefs in three of these same cases, with a 100% success rate.⁴⁶

The Supreme Court itself rejected two long-held EEOC guidance positions. First, in *Vance v. Ball State Univ.*, the Supreme Court rejected the EEOC’s expansive definition of “supervisor” and held that an employer may be vicariously liable for an employee’s unlawful harassment only when that employee has the employer’s authorization to effect significant changes in employment status of the employee (such as hiring, firing, promoting, demoting or significantly changing their responsibilities or employee benefits).⁴⁷ Second, in *Univ. of Texas Southwestern Med. Ctr. v. Nassar*, the Supreme Court rejected EEOC’s *amicus* position and held that in a Title VII retaliation claim, the plaintiff must prove that the harm would not have occurred “but for” the employer’s retaliatory motive.⁴⁸

The Supreme Court’s adverse rulings in 2013 striking down EEOC guidance were not an anomaly. In 2012, the Supreme Court unanimously rejected the EEOC’s position that the

retaliation claims); *Basden v. Prof. Transportation, Inc.*, 714 F.3d 1034 (7th Cir. May 8, 2013) (rejecting EEOC Enforcement Guidance that attendance is not an essential function of the job); *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. Dec. 3, 2013) (rejecting the position offered in a joint brief filed by the EEOC and DOL while the proceedings were before the NLRB that arbitration agreements are inconsistent with federal law); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. Aug. 9, 2013) (rejecting the EEOC’s argument, filed jointly with the DOL, that arbitration agreements barring class claims are impermissible); *McKinley v. Skyline Chili, Inc.*, 2013 WL 4436537 (6th Cir. Aug. 21, 2013) (affirming summary judgment for the employer because loss of confidence and poor performance were not pretextual reasons for termination); *Foco v. Freudenberg-NOK Gen. P’ship*, 2013 WL 6171410 (6th Cir. Nov. 25, 2013) (affirming summary judgment for the employer as the pay disparity was based on something other than sex); *Bailey v. Real Time Staffing Servs., Inc.*, 2013 WL 5811647 (6th Cir. Oct. 29, 2013) (affirming summary judgment for the employer because the employee’s failed drug test, even if caused by medication taken to treat HIV, was a legitimate, non-discriminatory reason for termination). The EEOC prevailed on substantive *amicus* arguments in only two cases in 2013: *Waldo v. Consumers Energy Co.*, 726 F.3d 802 (6th Cir. Aug. 9, 2013) (adopting the EEOC’s argument that a sexual harassment victim does not need to prove that the harassment unreasonably interfered with her work performance, only that work conditions were discriminatorily altered) and *Latowski v. Northwoods Nursing Ctr.*, 2013 WL 6727331 (6th Cir. Dec. 23, 2013) (reversing summary judgment for employer on a pregnancy discrimination claim where a fact issue existed regarding whether the employer’s proffered reason for terminating plaintiff was pretextual).

⁴⁶ The U.S. Chamber of Commerce filed *amicus* briefs in *Vance v. Ball State Univ.*, *Univ. of Texas Southwestern Med. Ctr. v. Nassar* and *DR Horton v. NLRB*.

⁴⁷ *Vance*, 133 S. Ct. at 2454.

⁴⁸ *Nassar*, 133 S. Ct. at 2533-34.

ministerial exception did not apply to ADA retaliation cases.⁴⁹ In 2009, the Supreme Court rejected the EEOC's position that the mixed motive instruction was permissible under the ADEA, which the EEOC had argued as amicus before the Eighth Circuit Court of Appeals and in which the Department of Justice appeared as amicus at the Supreme Court.⁵⁰

In addition to the Supreme Court rejecting EEOC guidance, the Courts of Appeals rejected the EEOC's substantive positions found in its *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans With Disabilities Act*⁵¹ as well as the EEOC's *Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes*.⁵² For example, in *Basden v. Prof. Transportation, Inc.*,⁵³ the Seventh Circuit rejected the EEOC's much maligned position that attendance is not an essential function of a job. In *D.R. Horton v. NLRB*,⁵⁴ the Fifth Circuit Court of Appeals rejected the EEOC's policy position that arbitration agreements are inconsistent with federal civil rights laws.

Whether the EEOC's *amicus* program's success is measured on a pure numerical win/loss basis, or on the importance of the substantive interpretations of federal law it supported in its *amicus* efforts, one thing is clear: it was an overwhelming failure. More important, however, is that courts consistently rejected substantive policy positions adopted by the EEOC, which creates an untenable atmosphere for employers and employees, both of whom are left searching for reliable guidance on rights and obligations under federal employment civil rights laws. The EEOC has abandoned its role as neutral enforcer of the plain language of the law to an overly aggressive litigant, seeking to make law through cases, not legislation.

Expansive Enforcement Guidance

As is clear from the appellate courts' rejection of EEOC guidance, employers find themselves between a rock and a hard place when it comes to determining whether to revise policies and practices to conform to new EEOC enforcement guidance. Guidance represents not the law, but the EEOC's view of the law. Employers look to the EEOC for thought-based, reasonable guidance to assist their compliance efforts. An individual expects that the EEOC

⁴⁹ *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, 132 S. Ct. 694, 707 (2012).

⁵⁰ *Gross v. FBL Services, Inc.*, 557 U.S. 167, 173 (2009).

⁵¹ U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ENFORCEMENT GUIDANCE: REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT, (Oct. 17, 2002), available at <http://www.eeoc.gov/policy/docs/accommodation.html>.

⁵² U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, POLICY STATEMENT ON MANDATORY BINDING ARBITRATION OF EMPLOYMENT DISCRIMINATION DISPUTES AS A CONDITION OF EMPLOYMENT, (Jul. 10, 1997), available at <http://www.eeoc.gov/policy/docs/mandarb.html>.

⁵³ 714 F.3d 1034, 1037 (7th Cir. May 8, 2013).

⁵⁴ 737 F.3d 344, 360 (5th Cir. Dec. 3, 2013).

provides reliable guidance outlining his or her rights under the statutes within its jurisdiction. However, when any enforcement guidance strays from the statutory intent and is ultimately struck down by the Supreme Court or a Circuit Court of Appeals, the EEOC has failed all of its stakeholders and its congressional mandate.

One potential reason for the continued disregard of EEOC guidance is because it adopts substantive policy positions that create compliance requirements without the benefit of public comment.⁵⁵ This is contrary to the strong policy favoring pre-adoption notice and comment on guidance documents. OMB's "Final Bulletin for Agency Good Guidance Practices" states:

Pre-adoption notice-and-comment can be most helpful for significant guidance documents that are particularly complex, novel, consequential, or controversial. Agencies also are encouraged to consider notice-and-comment procedures for interpretive significant guidance documents that effectively would extend the scope of the jurisdiction the agency will exercise, alter the obligations or liabilities of private parties, or modify the terms under which the agency will grant entitlements. As it does for legislative rules, providing pre-adoption opportunity for comment on significant guidance documents can increase the quality of the guidance and provide for greater public confidence in and acceptance of the ultimate agency judgments.⁵⁶

For example, one intended audience for any EEOC enforcement guidance is the EEOC investigators, who are trained to implement the relevant guidance document in their day-to-day investigations. EEOC investigators will determine whether reasonable cause exists that discrimination occurred based on an employer's compliance with the relevant enforcement guidance, essentially equating compliance with a guidance document as compliance with a statute. During an investigation, employers are held to the standards set forth in the EEOC's guidance documents. As many guidance documents take expansive views of rights and obligations under the law, it allows investigators to build large systemic cases on questionable theories that force employers to settle before or in the early stages of litigation.

In April 2012, the EEOC adopted its Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964. This guidance was not issued for notice and comment pursuant to OMB's Final Bulletin for Agency Good Guidance Practices. The rule contained in this guidance is relatively simple – employers commit race discrimination if they choose to hire applicants without criminal

⁵⁵ Notably, the EEOC placed complete drafts of its Strategic Plan and Strategic Enforcement Plan for public comment. *See* <http://www.eeoc.gov/eeoc/newsroom/1-18-11a.cfm> and <http://www.eeoc.gov/eeoc/newsroom/release/9-4-12c.cfm>. It did not provide a complete draft of either its draft Quality Control Plan, enforcement guidance related to the use of criminal convictions, anticipated guidance related pregnancy discrimination, or other draft guidance documents regarding credit background checks or under reasonable accommodation requirements under the ADA.

⁵⁶ Office of Management and Budget, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3438 (Jan. 25, 2007).

histories over applicants with criminal histories unless the employer conducts a highly subjective individualized assessment of the applicant with a criminal history. If the applicant with a criminal history is excluded after an employer considers these factors, presumptively no race discrimination exists. If the applicant is excluded without an individualized assessment, presumptively race discrimination exists. However, there is no individualized assessment requirement under Title VII. The EEOC fails to provide any justification for this logical flaw – that an unsuccessful applicant who received an individualized assessment is not discriminated against while an unsuccessful applicant who did not receive an individualized assessment has been discriminated against.

A second flaw in the EEOC’s guidance is its treatment of state laws. While Title VII does contain a provision that Title VII supersedes state law only where a state or local law requires or permits an act that would violate Title VII,⁵⁷ the EEOC provides no guidance on how an employer should weigh competing federal and state interests, other than to say that an employer will have to establish that a screen based on state law is job-related and consistent with business necessity. It is an expensive endeavor for a nursing home or other health care facility to show that not hiring a serial rapist or drug dealer pursuant to state law is job-related and consistent with business necessity, yet that is what this guidance contemplates.

Finally, the EEOC gives short shrift to common sense employer concerns – workplace safety and the hiring of violent felons, sexual harassment concerns and the hiring of rapists, trust and reliability in one’s workforce. In classic “Do as I say not as I do” fashion, the EEOC itself conducts criminal background checks on potential hires because a history or pattern of criminal activity creates doubt about a person’s judgment, honesty, reliability and trustworthiness.

In addition to the poor showings in court, the EEOC continues to send mixed signals regarding the efficacy of its guidance positions. For example, in the *State of Texas v. EEOC* litigation, the EEOC describes its guidance documents as “lack[ing] the force of law.”⁵⁸ Yet, only months later, the Solicitor General of the United States asked that the Supreme Court not to grant a writ of certiorari in *Young v. United Parcel Service* because the EEOC is about to issue enforcement guidance on the issue.⁵⁹ Note the inherent inconsistency in those positions. Employers are forced to comply with policy positions set for in enforcement guidance documents, while the EEOC argues in court that those positions have no force of law, while at the same time the Department of Justice requests that the Supreme Court deny granting a writ of certiorari in *Young* because the EEOC’s anticipated guidance will resolve the issue.

⁵⁷ 42 U.S.C. § 2000e-7.

⁵⁸ See EEOC’s Memorandum in Support of Motion to Dismiss, No. 5:13-CV-255 C, at 7 (N.D. Tex 2013).

⁵⁹ Amicus Brief for the United States at 21-22, *Young v. United Parcel Service, Inc.*, No. 12-1226 (May 19, 2014). Notably, the EEOC is not a signatory to that brief, indicating that at least three Commissioners do not with the argument set forth by the Department of Justice.

Conclusion

Combating discrimination in the workplace is a worthy goal and one that the U.S. Chamber of Commerce supports. However, the EEOC's abusive enforcement tactics must be addressed. While federal judges have pushed back in certain cases, the EEOC clearly has not received the message. Moreover, relying on federal court judges as the final check on EEOC enforcement is often a case of "too little, too late"; by that time, employers have already spent significant time and resources defending themselves against unmeritorious allegations and the EEOC's misplaced priorities and overzealous litigation tactics leave fewer resources and longer delays in investigating and resolving meritorious discrimination allegations and providing employers with accurate guidance around which to shape their workplace policies. We encourage the EEOC to adopt institutional procedures to provide for internal accountability, more efficient use of resources and adherence to its own statutory conciliation and other obligations. If the EEOC continues to ignore the problem, we encourage Congress to use its oversight authority to install much needed safeguards within the EEOC.

Mr. Chairman and members of the Committee, thank you for the opportunity to share some of those concerns with you today. Please do not hesitate to contact me or the Chamber's Labor, Immigration, and Employee Benefits Division if we can be of further assistance in this matter.

cc: Randel K. Johnson, Esq.

A Review of Enforcement and Litigation Strategy during the Obama Administration—A Misuse of Authority



June 2014

Executive Summary

Much of the visible, public debate in Washington, DC over policy issues focuses on the machinations on Capitol Hill: what bill is introduced; what bill is defeated; what bill can't get past a motion to proceed; what bill may actually become law; and what bill is simply being offered to score political points against the opposing party with no real chance of passage. While sometimes the substance changes, the procedural back and forth largely remains the same.

This is perhaps more true for the employment area than many other areas, as new major employment laws are relatively rare. Indeed, the real day-to-day substantive "action" of employment law is far removed from the Congress and lies in the enforcement agencies and in the courts. On a continuum, agency action can primarily focus on the issuance of regulations, such as at the Department of Labor, or on the development of caselaw such as at the National Labor Relations Board, or somewhere in between. Policy interpretations which are neither regulations nor caselaw provide their own gloss of quasi legal requirements that employers must be aware of. Enforcement theories developed by the agencies and advanced in the courts under the claim of legitimate interpretation of the enabling statute, a regulation or past case underpin an agency's overall strategy to advance its views. This can be done in many ways but is typically done through direct party litigation or *amicus* briefs where an agency weighs in on cases to advance a certain legal proposition—in the hope a court will adopt it—and therefore lay the brick for future enforcement directions. Driving all these is an agency's general view of whether it is to be a relative neutral arbiter of the law or an aggressive advocate for one party or the other. And this view can and will change depending on whether the agency is pursuing a case, such as through the general counsel's office, or is sitting in review of a case.

Unfortunately, while developments on Capitol Hill are relatively easy to track and summarize, it is very difficult to track and analyze an agency's overall approach to enforcing the law, simply because agency actions are on multiple fronts across the entire country, often siloed into many individual cases.

This paper attempts to meet that challenge and create an understandable narrative providing an overview of the enforcement and litigation strategies of the Equal Employment Opportunity Commission ("EEOC" or "Commission") during the Obama Administration. The analysis reveals an agency which often advances questionable enforcement tactics and legal theories. We cannot claim that this analysis reviews every enforcement action or case brought by the EEOC, but the study certainly documents that this is an agency that deserves greater attention and oversight as it claims to promote its critical agenda of equal employment opportunity.

The first part of the paper examines unreasonable enforcement efforts of the EEOC, as detailed by federal courts and as conveyed to us by Chamber members. Some of the findings are as follows:

- EEOC will pursue investigations despite clear evidence that any alleged adverse action was not discriminatory—such as terminating an employee caught on videotape leaving pornography around the workplace.
- EEOC investigators propose large settlement figures, only to dismiss the case entirely upon rejection of the offer, making the whole basis of the original settlement offer intellectually dishonest and turning a supposedly neutral investigation into nothing more than a “shakedown.”
- A federal case in which the judge criticized EEOC for using a “sue-first, prove later” approach.
- A federal case brought by EEOC which the judge described as “one of those cases where the complaint turned out to be without foundation from the beginning.”
- A federal case in which the judge criticized EEOC for continuing “to litigate the . . . claims after it became clear there were no grounds upon which to proceed,” describing the EEOC’s claims as “frivolous, unreasonable and without foundation.”

The second part of the paper reviews the EEOC’s unsuccessful 2013 amicus program, in which its legal interpretations were rejected by federal courts approximately 80% of the time.

- In 2013, the United States Supreme Court, and five different federal courts of appeals collectively decided thirteen cases in which EEOC filed *amicus* briefs.
- With the exception of one case in which EEOC filed an *amicus* in support of neither party, all *amicus* briefs were filed by EEOC in support of a private plaintiff’s position; none in support of a private employer’s position.
- Ten of the cases involved substantive issues of the appropriate interpretations of applicable federal law. EEOC’s position was rejected in eight of the ten substantive positions it advanced in the appellate courts.
- In four of the most important and far reaching discrimination and harassment interpretations advanced by EEOC’s *amicus* participation -- not only was EEOC’s *amicus* position rejected, the United States Supreme Court and the Courts of Appeals also rejected relevant provisions in EEOC’s underlying Enforcement Guidance documents, compliance manual positions, and policy statements.

* * *

In closing, I would like to acknowledge the many members of the U.S. Chamber's Labor Relations Committee for their contributions to this report and, in particular, Camille Olson, Chair of the Chamber's Equal Employment Opportunity Subcommittee, for her

detailed comments and analysis. Lastly, I would be remiss not to thank James Plunkett, Director of Labor Policy for the Chamber, for his on-going efforts in bringing this report to completion.

Sincerely,

A handwritten signature in black ink, appearing to read "Randel K. Johnson". The signature is fluid and cursive, with a large initial "R" and a long horizontal stroke extending to the right.

Randel K. Johnson
Senior Vice President
Labor, Immigration and Employee Benefits

Part I: EEOC Enforcement Results During the Obama Administration

The Equal Employment Opportunity Commission administers Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act (ADA), and the Age Discrimination in Employment Act (ADEA), among other laws. The purpose of these laws—to eliminate workplace discrimination—is strongly supported by the U.S. Chamber; employers therefore understand the need for EEOC to properly investigate charges and vigorously pursue cases where unlawful discrimination has occurred. However, when investigating allegations, EEOC also owes certain duties to employers. As described by one federal appeals court:

The EEOC must vigorously enforce the Americans with Disabilities Act and ensure its protections to affected workers, but in doing so, the EEOC owes duties to employers as well: a duty reasonably to investigate charges, a duty to conciliate in good faith, and a duty to cease enforcement attempts after learning that an action lacks merit.¹

It appears that, all too often, EEOC neglects these duties. Employers often believe that EEOC is not objective in its investigation, has not made good faith efforts to conciliate, or has utilized uncalled-for heavy-handed enforcement or litigation strategies in unmeritorious cases. In other words, many employers feel that EEOC places too much emphasis on the end stage of enforcement—litigation—and too little on the critical steps of mediation and conciliation which serve to: (1) determine, at the outset, whether a particular case has merit; and (2) quickly and efficiently promote the statutory goals of preventing and ending discriminatory practices.

EEOC's Abusive Investigatory Tactics

EEOC abuses can happen during any stage of the enforcement process. Nevertheless, initial interactions with the EEOC investigator assigned to the particular case can set the tone for the entire case, and it is often during these early stages of an EEOC-initiated investigation where the EEOC's bullying enforcement tactics begin. This is critical, because it is during this stage where the EEOC's statutorily required duty to conciliate (and mediate), if effective, can lead to a quick resolution of the dispute. If, on the other hand, the investigator's tactics otherwise disrupt the conciliation process, this can lead to long, drawn out and expensive litigation.

It should be emphasized that such tactics can be difficult to summarize in an analysis such as this. Many concerns seem outrageous on their face. Others might not seem egregious standing alone, but repeated time and again or combined with other abuses, become more serious. With this in mind, set forth below are several examples of EEOC enforcement abuses that we have heard from our Members:

¹ *EEOC v. Argo Distribution, LLC*, 555 F.3d 462, 473 (5th Cir. 2009).

- After the investigation, but before issuing a reasonable cause determination, EEOC investigators send the employer a letter, urging a mid-five figure settlement and outlining a variety of bad facts which show discrimination. Just days after the employer rejects these offers, the EEOC then dismisses the allegations entirely, making the whole basis of the original settlement letter intellectually dishonest and turning a supposedly neutral investigation into nothing more than a “shakedown.”
- An investigator refused to allow the employer to mediate the charge, claiming that the company does not negotiate in good faith.² This position was blatantly inaccurate given that company had successfully mediated a matter with the *same investigator* only a few months earlier. The employer’s request for the case to be reassigned to another investigator was denied.
- Several examples of instances where employees have claimed that they had been terminated unlawfully, when in fact they were either still employed or had resigned voluntarily. The employers were then obligated to respond to such allegations with a position statement in order to simply show that a termination had *not* occurred. This response requires the employer or its representatives to, among other things, review the complaint, obtain documents, interview managers, and draft the legal response. Some Members estimate that preparing such a response can easily cost up to \$4000.
- Pursuing investigations despite clear evidence that any alleged adverse action was not discriminatory—such as terminating an employee caught on videotape leaving pornography around the workplace.
- Investigators refusing to close cases that are several years old by continually making additional requests for information.
- Investigators refusing to close cases, even where the employer, employee and union have all agreed to a private settlement of the matter.
- Refusing to grant extensions of time to produce information or documents requested, because, as a blanket rule, “extensions are not granted.”
- Failing to engage in good faith conciliation in order to pursue a case which EEOC eventually lost on summary judgment, costing the employer several hundred thousand dollars in attorneys’ fees and costs.
- Continually attempting to communicate directly with supervisory employees rather than through employers’ counsel.

² The EEOC has a statutory duty to engage in conciliation before filing a formal complaint. *See* 42 U.S.C. § 2000e-5(b). The policy rationale behind this requirement is simple: needless litigation should be avoided and if compliance may be obtained through informal means, that is preferable to expending the significant resources litigation requires.

- Making overly-burdensome requests for information and issuing subpoenas which are sweeping in scope and not sufficiently related to the underlying investigation.
- Serving subpoenas for information or documents that were not previously included in EEOC Information Requests.
- Demanding that the employer turn over workplace policies that are completely irrelevant to the underlying charge.
- Various issues related to EEOC investigators' "fact-finding conferences," such as:
 - Making these conferences mandatory; and holding them prior to any investigation and prior to permitting the employer to submit a statement of position or a statement of facts.
 - Conducting these conferences in a confrontational and one-sided manner in which EEOC investigators aggressively question employers, but refuse to permit employers' counsel to speak.
 - Making unprofessional and prejudicial statements during conferences, such as exclaiming that, "it is well known that [employer] has a pattern and practice of discriminating and retaliating against its employees."
- Demanding short turnarounds on any proposed conciliation counteroffers even though EEOC's response time regarding conciliation communications may take months.
- Refusals to assist employers in conciliation and settlement contexts with information as to appropriate ways to revise policies or practices to comply with non-discrimination laws.

EEOC's Abusive Litigation Tactics

The anecdotes catalogued above were personally described to Chamber staff by concerned Members. However, there are also a myriad of *public* examples of EEOC's irresponsible enforcement efforts—particularly once they have entered the litigation stage.³ These instances have most notably been demonstrated in a litany of federal court opinions in which federal judges have criticized the EEOC and awarded attorneys' fees and costs to employers who were subjected to EEOC's overzealous enforcement tactics.

³ The Chamber has previously notified EEOC of its concern regarding the Commission's pursuit of meritless charges and suggested potential solutions. See *e.g.*, Johnson, Randel K. STATEMENT OF THE U.S. CHAMBER OF COMMERCE TO THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. *Small Business Realities, Discrimination Laws and the Equal Employment Opportunity Commission*, Hearing, December 9, 1998.

In one of the most well-known examples of EEOC's reckless enforcement agenda, the U.S. Court of Appeals for the 8th Circuit largely affirmed a district court's dismissal of an EEOC class action lawsuit which alleged sexual discrimination but failed to identify the alleged victims of discrimination.⁴ The 8th Circuit agreed with the district court that EEOC stonewalled the company in explaining who it sought to represent and made no meaningful attempt at conciliation. As a result of EEOC's outrageous litigation strategy, the District Court ordered the agency to pay the employer almost \$4.7 million in attorneys' fees and expenses.⁵ The 8th Circuit noted the district court's description of EEOC's tactics in the case:

There was a clear and present danger that this case would drag on for years as the EEOC conducted wide-ranging discovery and continued to identify allegedly aggrieved persons. The EEOC's litigation strategy was untenable: CRST faced a continuously moving target of allegedly aggrieved persons, the risk of never-ending discovery and indefinite continuance of trial.

Additionally, a federal court in New York dismissed a pregnancy discrimination lawsuit filed by EEOC, granting summary judgment for the employer, ruling that the EEOC did not present sufficient evidence to establish that the employer engaged in a pattern or practice of pregnancy discrimination.⁶ EEOC, which represented 600 women against the employer, based its claim on anecdotal accounts that the company did not provide a sufficient work-life balance for mothers working there. The court ruled that the law does not mandate work-life balance. The court criticized EEOC for using a "sue-first, prove later" approach, noting that, "'J'accuse!' is not enough in court. Evidence is required."

In a race discrimination case, EEOC alleged that a staffing company's blanket policy of not hiring individuals with a criminal record had a disparate impact on African-Americans.⁷ However, the company simply did not have a blanket no-hire policy. Despite becoming aware of this issue, EEOC proceeded with the litigation anyway. The U.S. District Court for the Western District of Michigan determined that "this is one of those cases where the complaint turned out to be without foundation from the beginning." As a result, the court ordered EEOC to pay a total of \$751,942.48 for deliberately causing the company to incur attorneys' fees and expert fees when the agency should have known that the company did not have the blanket no-hire policy.

Similarly, in a case alleging discrimination under the ADA, the EEOC continued to litigate even when it became clear that the case had no merit.⁸ Specifically, EEOC admitted that the alleged victim of discrimination could not perform the essential functions of the job but "continued to litigate the . . . claims after it became clear there were no grounds upon which to proceed." Thus, EEOC's claims were "frivolous, unreasonable and without

⁴ *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657 (8th Cir. 2012).

⁵ *EEOC v. CRST Van Expedited, Inc.*, No. 07-CV-95-LRR (N.D. Iowa Aug. 1, 2013).

⁶ *EEOC v. Bloomberg LP*, 2013 U.S. Dist. LEXIS 128388 (S.D.N.Y., Sept. 9, 2013); *EEOC v. Bloomberg L.P.*, 778 F. Supp. 2d 458, 462 (S.D.N.Y. 2011).

⁷ *EEOC v. Peoplemark, Inc.*, 2011 U.S. Dist. LEXIS 38696 (W.D. Mich. Mar. 31, 2011).

⁸ *EEOC v. Tricore Reference Laboratories*, 2012 U.S. App. LEXIS 17200 (10th Cir. 2012).

foundation.” The district court dismissed the claim and awarded the employer over \$140,000 in attorneys’ fees and costs. The Court of Appeals affirmed.

In some cases, EEOC does not even have to try to show that an employer intentionally discriminated, and instead attempts to litigate claims under a “disparate impact” theory of discrimination.⁹ In one particular disparate impact case, EEOC was so steadfast in its efforts to browbeat an employer, it neglected to gather evidence to prove its case.¹⁰ EEOC had alleged that an event planning company’s policy of conducting criminal and credit background checks had a “disparate impact” on African-American, Hispanic and male job applicants. Because EEOC was trying to prove unintentional disparate impact discrimination, it tried to prove its case through hiring statistics. However, the court found that EEOC’s expert analysis contained a “mind-boggling number of errors.” The court also found EEOC’s statistical evidence to be “skewed,” “rife with analytical errors,” “laughable,” and “an egregious example of scientific dishonesty.” Accordingly, the court dismissed the case, noting that, “The story of the present action has been that of a theory in search of facts to support it.”

The EEOC’s disparate impact claim was similarly rejected in *Kaplan*.¹¹ This time, EEOC alleged that an employer’s credit check policy discriminated against African-Americans.¹² In a decision which the Wall Street Journal described as “The Opinion of the Year,” the 6th Circuit Court of Appeals upheld the lower court’s exclusion of EEOC’s statistical evidence and methodology as unreliable. The Court of Appeals concluded, “The EEOC brought this case on the basis of a homemade methodology, crafted by a witness with no particular expertise to craft it, administered by persons with no particular expertise to administer it, tested by no one, and accepted only by the witness himself.”

Subpoena Authority

Although EEOC has a number of fact-finding processes at its disposal, one of the most aggressive is its subpoena power. This power gives EEOC the authority to compel testimony by a witness or the production of evidence with a penalty for failure to do so. But, even though EEOC’s subpoena authority is broad, it is not without limits. In a 37-page opinion, a federal district court chastised EEOC for employing unreasonable and bad faith tactics in connection with subpoenas to a small business.¹³

⁹ As opposed to disparate treatment which alleges intentional discrimination, disparate impact claims involve policies or practices which are neutral on their face, but actually have a disproportionate impact on a protected class.

¹⁰ See *EEOC v. Freeman*, No. RWT 09-cv-2573 (D. Md. Aug. 9, 2013). See also *EEOC v. Kaplan Higher Education Corp.*, 2013 U.S. Dist. LEXIS 11722 (N.D. Ohio Jan. 28, 2013). Like *Freeman*, in *Kaplan*, the court excluded EEOC’s expert reports and testimony of its expert because EEOC failed to show that the expert’s methodology was reliable. The court went on to toss out EEOC’s entire case because without expert testimony, EEOC could not prove its disparate impact theory.

¹¹ *EEOC v. Kaplan Higher Educ. Corp.*, No. 13-3408, 2014 WL 1378197 (6th Cir. Apr. 9, 2014).

¹² As the court of appeals noted, EEOC runs credit checks on applicants for 84 of 97 positions. Despite this fact, EEOC sued Kaplan for using the very same type of background screen.

¹³ *EEOC v. HomeNurse, Inc.*, 2013 U.S. Dist. LEXIS 147686 (N.D. Ga. Sept. 30, 2013). HomeNurse, Inc. provides personal care attendants/aides, home health aides, companion/sitters and skilled nursing care in Georgia.

In *HomeNurse*, EEOC's investigation related to a single-claimant charge alleging discrimination and retaliation based on a number of protected categories. Instead of seeking information by way of requests for information, EEOC launched its charge investigation by "conducting a raid on [the employer's] office 'as if it were the FBI executing criminal search warrant.'" Without any notice to the employer whatsoever, EEOC allegedly showed up unannounced, intimidated the employer's staff, and allegedly confiscated certain documents from the employer's confidential personnel and patient files.

Over the next year and a half, EEOC continued to pursue tactics that the court held "constitute[d] a misuse of [the EEOC's] authority" including: "failure to follow its own regulations ... foot-dragging ... errors in communication which caused unnecessary expense for [the subpoenaed employer] ... and its dogged pursuit of an investigation where it had no aggrieved party." Given EEOC's arguably heavy-handed tactics, the court felt it was its duty to "stand as a bulwark" to protect the "nation's citizens" from "powerful government agencies" intent on "running roughshod over their rights." Finding a gross overstepping and misuse of authority, the court quashed EEOC's subpoena and refused to order enforcement.

This decision is a reminder to employers that federal courts can serve as an important and necessary check on federal agencies, even EEOC.

Preservation of Evidence

Parties to litigation must preserve potentially relevant information when not doing so may cause harm or prejudice. Destroying or significantly altering evidence, or failing to preserve property for another's use as evidence, is considered spoliation.¹⁴ As such, parties are obligated to preserve what they know—or reasonably should know—will likely be requested in reasonably foreseeable litigation. In a lawsuit alleging failure to accommodate disability, EEOC blatantly ignored the legal standard of preservation of evidence but continued to litigate against an employer.¹⁵

Plaintiffs claiming wrongful discharge must make an effort to secure subsequent employment so as not to receive a windfall in their potential backpay by remaining unemployed. In *Womble Carlyle*, a former employee failed to retain materials—such as applications, cover letters or a work search log—related to her efforts to obtain subsequent employment after her termination. This failure to do so occurred *after* the EEOC lawsuit had been filed, meaning that EEOC attorneys should have notified the former employee of her duty to preserve evidence. Moreover, the EEOC continued to demand back pay even after it learned that the former employee had destroyed the pertinent evidence. In imposing nearly \$23,000 in sanctions against EEOC, the court held that EEOC did not

¹⁴ A finding of spoliation can result in sanctions, an adverse inference instruction to the jury, or in extreme cases, dismissal.

¹⁵ *EEOC v. Womble Carlyle Sandridge & Rice, LLP*, 13-CV-46 (M.D.N.C. Jan. 6, 2014); *see also EEOC v. Womble Carlyle Sandridge & Rice, LLP*, 13-CV-46 (M.D.N.C. April 29, 2014).

explain to the allegedly aggrieved party the context or instructions behind keeping these materials. Further, the court held that the timing of the destruction of documents supported a finding of culpability raising to the level of possible gross negligence on behalf of EEOC.

Fortunately, the court in this case held EEOC to compliance with evidence preservation rules which are applicable to all litigants. Like its efforts to sidestep its conciliation requirements, this case is another example of EEOC's attempts to disregard procedural rules.

Evasion of Federal Discovery Obligations

In *EEOC v. The Original Honey Baked Ham*¹⁶, the District Court for the District of Colorado sanctioned EEOC for its efforts to evade discovery, noting that on several occasions, EEOC made the Defendant's discovery efforts more time consuming, laborious, and adversarial than it should have been. The court found that "in certain respects, the EEOC has been negligent in its discovery obligations, dilatory in cooperating with defense counsel, and somewhat cavalier in its responsibility to the United States District Court. EEOC Counsel has prematurely made promises about agreed-upon discovery methodology and procedure when they apparently had no authority to do so" The court held that it had inherent power to sanction parties for unnecessary burdens, and thus it could sanction EEOC for its actions that negatively affected the Court's management of its docket and caused unnecessary burdens on the Defendant and delays in the Court's efforts to proceed with the case.

Wasting Resources in Challenging Uncontroversial Policies

EEOC has challenged several employers' workplace policies which have been in effect for years and have been voluntarily agreed to by all interested parties. In challenging these policies, EEOC has likely expended significant time and resources. Yet even if EEOC is eventually successful in invalidating these policies, any supposed benefits of its efforts will be dubious at best, as it is unclear who EEOC is protecting in these instances or why it is even involved at all.

Targeting Voluntary Partnerships

For example, the Wall Street Journal published a story on EEOC's investigation into PricewaterhouseCoopers ("PwC").¹⁷ EEOC alleged that the firm's partners were actually employees, and that the firm's mandatory retirement policy therefore violated the ADEA. According to the Wall Street Journal, EEOC demanded that PwC eliminate the retirement policy.

¹⁶ 2013 U.S. Dist. LEXIS 26887 (D. Colo. Feb 27, 2013).

¹⁷ *Discriminating Against Partnerships*, WALL STREET JOURNAL, June 3 2013, available at http://online.wsj.com/article/SB10001424127887323855804578511693604180764.html?mod=WSJ_Opinion_AboveLEFTTop

EEOC's legal theory conflicts with its own existing guidance on partnerships and misapplies the law on this issue as interpreted by the U.S. Supreme Court.¹⁸ Even putting those issues aside, one wonders whether pursuit of such a case is the best use of EEOC's resources. After all, the challenged retirement agreement concerns partners who are retiring from a major U.S. accounting firm—hardly a vulnerable group in need of protection.¹⁹ These individuals became partners knowing about and agreeing to this retirement policy, and have benefitted from the partnership structure while they were partners. Pursuant to the policy's terms, these partners enjoy a significant retirement pension supported by current partners. Moreover, individuals always have the option of retaining private counsel to pursue any alleged wrongdoing, rather than simply relying upon EEOC to take up their cause.

Challenging Workplace Safety Policies

In another case, EEOC challenged a company's common sense efforts to ensure a safe workplace in a potentially hazardous industrial environment.²⁰ In EEOC's case against U.S. Steel, the employer performed random drug and alcohol testing on its probationary employees pursuant to the terms set forth in the collective bargaining agreement it entered into with United Steelworkers of America (USW). EEOC challenged this policy as violative of the ADA.

Working conditions at the plant in question required strict adherence to safety rules. Employees worked on or near coke batteries, which contained molten coke as hot as 2,100 degrees Fahrenheit. The working areas were very narrow, were sometimes at dangerous heights and were located among large industrial machinery and gasses that were both toxic and combustible. Quite clearly, the drug and alcohol tests were performed in order to ensure a safe workplace. EEOC might have realized why such tests were so important—and why both the employer and union agreed to them—if investigators had simply asked about the reasons for the policy, or visited a U.S. Steel facility. EEOC investigators did neither.

Instead, EEOC blew through the conciliation process and failed to follow enforcement procedures. Rather, it filed suit against both U.S. Steel and USW alleging that the random drug and alcohol testing violated the ADA, which prohibits workplace medical exams that are not “job-related and consistent with business necessity.”²¹ U.S. Steel argued that the testing was appropriate as job-related and as a business necessity because it enabled them to detect impairment on the job. The district court agreed and granted summary judgment for the company. The court noted that “safety is a business necessity and the testing policy genuinely serves this safety rationale and is no broader or more intrusive than necessary.”

¹⁸ See *Clackamas Gastroenterology v. Wells*, 538 US 440 (2003).

¹⁹ The story notes that these partners are compensated in the “seven-figure range.”

²⁰ *EEOC v. United States Steel Corp.*, 2013 U.S. Dist. LEXIS 22748 (W.D. Pa. Feb. 20, 2013).

²¹ See 42 U.S.C. § 12112(d)(4)(A).

Challenging Workplace Religion Policies

Prayer during the workday is a constant struggle for employers to manage. EEOC, instead of promoting workplaces where *both* employees can have opportunities to pray and employers can keep businesses operating, pushes an all or nothing, no compromise approach to religious accommodation. In one case, EEOC claimed that certain employees required the ability to leave their stations along the assembly line in order to pray.²² Further, the prayer time was to occur during unscheduled periods throughout the workday. The court agreed with the employer that these kind of unqualified requests are too burdensome and broad for an employer to comply with, and granted summary judgment in favor of the defendant on the systemic religious accommodation claim. The court held that the employer established the affirmative defense of undue hardship by showing that the accommodation requested would not only result in more than a *de minimis* cost to the company, but would also result in more than a *de minimis* imposition on non-Muslim coworkers.

In a similar vein, EEOC has vigorously—and publically—challenged the allowance of religious accommodation for employee dress and uniforms.²³ While a circuit court ruled in favor of the employer, holding that the burden is on the employee to prove whether a particular practice is religiously motivated and accommodation be necessary, EEOC is seeking reconsideration of this ruling. It is arguing that something less than an employer’s particularized, actual knowledge should suffice. If this argument finds traction in the courts, it would put employers in an impossible position: an employer would be penalized for not acting on stereotypical assumptions regarding an applicant’s or employee’s religious beliefs, an outcome that is directly opposed to Title VII’s goals.

Challenging EEOC’s Tactics

Undoubtedly fed up with EEOC’s enforcement tactics, it is no surprise that employers are going on the offensive. In *Case New Holland, Inc. v. EEOC*²⁴, the employer filed a lawsuit against EEOC which claimed that it violated both the Administrative Procedure Act and the U.S. Constitution during its investigation of the employer. Specifically, CNH’s complaint alleges that in cooperating with an EEOC-initiated investigation concerning alleged violations of the ADEA, the company submitted over 66,000 pages of documents to EEOC. EEOC then sat on this information and made no effort to contact the employer for 18 months; no alleged discriminatee was identified nor were any specific allegations of wrongdoing leveled at CNH. Subsequently, one morning without prior notification to CNH, EEOC sent over 1300 spam-like emails to CNH managers and employees in an effort to troll for potential class members. The emails demanded that the workers “cease their work ... to the extent necessary” to complete and submit—“as soon as possible”—an attached questionnaire. According to the complaint, EEOC “has never before . . . sent out emails

²² *EEOC v. JBS USA, LLC*, 2013 U.S. Dist. LEXIS 150156 (D. Colo. Oct. 18, 2013).

²³ *EEOC v. Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106 (10th Cir. 2013).

²⁴ No. 13-cv-01176 (D.D.C. filed Aug. 1, 2013).

through business email servers, without any prior notice to the respondent employer, in an attempt to unearth plaintiffs against the employer.”

Issuing Sub-Regulatory Guidance on Employers’ Use of Criminal Background Information

EEOC also pushes its enforcement agenda in the sub-regulatory arena. EEOC has issued guidance concerning employers’ use of criminal background information entitled, *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended* (the Guidance). Although having a criminal record is not specifically protected by Title VII, EEOC takes the position that because “incarceration rates are particularly high for African American and Hispanic men,”²⁵ employers’ use of criminal background information when hiring may have a disparate impact on these individuals.

Unfortunately, EEOC did not publicly release a draft of its Guidance for the public to have an opportunity to provide comment. This is contrary to the strong policy favoring pre-adoption notice and comment on guidance documents.²⁶ Pre-adoption notice and comment would have helped EEOC arrive at Guidance that better reflects the law while limiting controversial elements of the proposal. This lack of transparency is even more troubling considering the fact that the Guidance became effective upon publication, giving employers no time to reconsider policies and practices in preparation for its implementation.

The Guidance contains substantive flaws as well, the first being the suggestion that employers should conduct “individualized assessments” of candidates before any final employment decision is made. According to the Guidance, the individualized assessment essentially gives excluded candidates an opportunity to explain why an employer’s screening policy should not apply to them (e.g., that the background check yielded incorrect information). EEOC, as it must, did recognize that individualized assessments were not required in all instances largely because no statutory language requires it, further calling into question whether an individualized assessment is ever required.

Although the Guidance does not have the force of law, it is not unreasonable to assume that many employers will likely conclude that it *does*, and that individualized assessments are now required under federal law; or, at the very least, that failure to follow

²⁵ See EEOC ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CRIMINAL CONVICTION RECORDS (April 25, 2012), Section II.

²⁶ The Office of Management and Budget, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3438 (Jan. 25, 2007) states the following: “Pre-adoption notice-and-comment can be most helpful for significant guidance documents that are particularly complex, novel, consequential, or controversial. Agencies also are encouraged to consider notice-and-comment procedures for interpretive significant guidance documents that effectively would extend the scope of the jurisdiction the agency will exercise, alter the obligations or liabilities of private parties, or modify the terms under which the agency will grant entitlements. As it does for legislative rules, providing pre-adoption opportunity for comment on significant guidance documents can increase the quality of the guidance and provide for greater public confidence in and acceptance of the ultimate agency judgments.”

the Guidance will be used as evidence of non-compliance. The Guidance is also not sufficiently specific as to under what circumstances an employer should utilize individualized assessments and how they are to be conducted. For instance, must a daycare employer conduct an individualized assessment of a job candidate who has been convicted of a violent crime against a child?

Furthermore, the Guidance notes that state and local laws are preempted by Title VII if they “require or permit the doing of any act which would be an unlawful employment practice under Title VII.” In other words, the fact that an employer’s criminal screening policy was issued in order to comply with state or local law will not be a defense to an allegation of disparate impact discrimination. In such an instance, the employer would be forced to establish through expensive litigation that following a state law is job-related and consistent with business necessity, an argument that EEOC will likely ignore during the investigation stage. Unfortunately, the Guidance offers *no* help to those employers in situations in which there is a potential conflict between state and federal law, and employers cannot be expected to perform their own preemption analyses. Although employers should not be subject to undue scrutiny by EEOC simply because they are complying with state laws, the Guidance indicates that this could be a real possibility.²⁷

The Commission’s Own Limitation on its Oversight Authority

The underlying problem with the enforcement abuses described above is the fact that EEOC has not implemented the appropriate safeguards to ensure it is not wasting resources by pursuing non-meritorious litigation. This may be because a significant amount of litigation authority placed by statute in the hands of the Commissioners has been delegated to the General Counsel. After multiple Commissioners voiced concerns about the broad delegation of authority, a majority voted to rescind a limited amount of that delegation in the 2012 Strategic Enforcement Plan. Given that virtually no oversight over the General Counsel’s office or the field was conducted in recent years, and the only power to initiate litigation of the General Counsel stems from the delegation of authority, this was naturally met with significant resistance within EEOC. It may also be partially attributed to subsequent delegation of authority to District Offices. The Chamber questions whether EEOC is exercising sufficient oversight of that delegation and whether the continued scope of delegation is appropriate in light of the failure to address these problems. Indeed, the Commission severely restricts its ability to reign in the enforcement abuses described above.

What Will Happen to Conciliation?

Clearly, EEOC has become increasingly aggressive in its enforcement efforts, even as it claims its resources have dwindled, despite significant budget increases between 2009

²⁷ See, e.g., *Waldon v. Cincinnati Public Schools*, 1:12-CV-00677 (S.D. Ohio, April 24, 2013).

and 2011. With mounting pressure to purportedly “do more with less,” EEOC is re-inventing itself. The agency appears to be moving away from its mandate to combat discrimination by encouraging employers’ voluntary compliance and, instead, is focused on a “scorched earth” litigation agenda. Especially troubling are instances where EEOC has rushed to file high-profile lawsuits that splash allegations of systemic discrimination across headlines, only to have its claims dismissed altogether or whittled down to a single claimant. As this white paper has illustrated, in some instances, courts have stepped in to correct the balance and sanctioned EEOC for failing to do its homework.

Against this backdrop, the Seventh Circuit decision in *EEOC v. Mach Mining, LLC*,²⁸ is stunning. On December 20, 2013, the Seventh Circuit broke from a majority of the U.S. Courts of Appeals when it held that EEOC’s pre-suit conciliation efforts are not subject to judicial review, at all.²⁹ This ruling has stark implications for employers in the Seventh Circuit—it arguably extinguishes the traditional failure to conciliate defense to an EEOC lawsuit. The ruling also creates a split among the Circuits.

The court’s reasoning is puzzling. It defers entirely to EEOC’s ability to police itself despite clear legislative history otherwise and rejects the notion that “field offices are so eager to win publicity or to curry favor with Washington by filing more lawsuits that they will needlessly rush to court.” The opinion fails to address entirely the facts that have recently lead numerous courts to chastise the agency for precisely the type of conduct the Seventh Circuit characterizes as implausible.

The *Mach Mining* decision effectively condones EEOC’s questionable tactics. Because of the legal importance of the issues involved and the Circuit split on this issue, the U.S. Supreme Court has been asked to weigh in on the issue. In the interim, all employers, and not just those in the Seventh Circuit, should expect EEOC to vigorously object to an employer’s ability to challenge to the sufficiency of EEOC conciliation efforts.

* * *

Combating discrimination in the workplace is a worthy goal and one that the Chamber supports. However, as Part One of this paper demonstrates, EEOC’s abusive enforcement tactics can no longer be ignored. While some federal judges are pushing back in some cases, EEOC clearly has not received the message. Moreover, relying on judges as the final check on EEOC enforcement is often a case of “too little, too late”: by that time, employers have already spent significant time and resources defending themselves against unmeritorious allegations. In other words, even when employers win, they lose. The time has come for EEOC to adopt institutional procedures to provide for internal accountability, more efficient use of resources and adherence to its own statutory conciliation requirement. If EEOC continues to ignore the problem, then Congress should use its oversight authority to install much needed safeguards within EEOC.

²⁸ No. 13-2456, 2013 WL 6698515 (7th Cir. Dec. 20, 2013).

²⁹ According to the Seventh Circuit, the Second, Fourth, Fifth, Sixth, Eighth, and Tenth Circuits have accepted the failure to conciliate affirmative defense.

Part II: EEOC's Unsuccessful 2013 Amicus Program

The Equal Employment Opportunity Commission's ("EEOC") is responsible for enforcing federal employment discrimination laws. But is it a neutral interpreter of the law? And how successful has it been in convincing federal courts that its interpretations are correct? In the EEOC's Fiscal Year 2013 Performance and Accountability Report ("2013 PAR") and accompanying press statements, EEOC representatives trumpet its self-proclaimed successful 2013 litigation program—including securing \$39 million in monetary damages in 9 trial victories and other litigation settlements.³⁰

Left unreported by EEOC are the results of one of its most important legal enforcement methods—EEOC's *amicus curiae* program ("*amicus*").³¹ *Amicus* briefs are "friend of the court" briefs filed by EEOC "in a case that raises novel or important issues of law" that fall within EEOC's expertise.³² EEOC has an intensive process for *amicus* participation, with all recommendations in favor of *amicus* participation approved by a majority of the five-member Commission. *Amicus* briefs are part of EEOC's targeted and integrated approach to law enforcement. They are focused on EEOC's priorities, and often seek judicial approval of EEOC positions contained in its enforcement guidelines and policy statements.

In 2013, the United States Supreme Court, and five different federal courts of appeals collectively decided thirteen cases in which EEOC filed *amicus* briefs. With the exception of one case in which EEOC filed an *amicus* in support of neither party,³³ all *amicus* briefs were filed by EEOC in support of a private plaintiff's position; none in support of a private employer's position. Three of the thirteen cases raised contested procedural issues on which EEOC's *amicus* position prevailed.³⁴ Ten of the cases involved substantive

³⁰ U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FISCAL YEAR 2013 PERFORMANCE AND ACCOUNTABILITY REPORT, (Dec. 16, 2013), p. 3, available at <http://www.eeoc.gov/eeoc/plan/upload/2013par.pdf>. EEOC's General Counsel notes broadly that its "successes have been extensive and significant." P. David Lopez, '*EEOC Overreach*' Analysis Distorted *The Record*, LAW360 (Jan. 3, 2014, 12:17 PM).

³¹ EEOC has not included information regarding its 2013 *amicus* record on its website, in its 2013 PAR, or in its General Counsel's Law360 article criticizing other analyses of EEOC's litigation record as failing to perform a comprehensive review of all 2013 EEOC litigation efforts. Without considering EEOC's 2013 *amicus* record, its General Counsel asserted that when one reviewed EEOC's entire record instead of a few EEOC losses still on appeal, "...we [EEOC] have a record of success in reversing adverse decisions when a case moves to the appellate court." P. David Lopez, '*EEOC Overreach*' Analysis Distorted *The Record*, LAW360 (Jan. 3, 2014, 12:17 PM).

³² See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, AMICUS CURIAE PROGRAM, (Jan. 15, 2014), available at <http://www.eeoc.gov/eeoc/litigation/amicus.cfm>.

³³ Compare *amicus* brief submitted by EEOC (and Department of Justice) in *Vance v. Ball State Univ.*, 2012 WL 3864279 (U.S., 2012) with EEOC *amicus* briefs in all other cases in notes 5 and 6 below. Though not filed on behalf of a private plaintiff, in *Vance* EEOC argued for an expansive interpretation of Title VII -- a position supporting private plaintiffs as opposed to private employers.

³⁴ EEOC prevailed on procedural arguments in the following three *amicus* cases in 2013: *Mandel v M&Q Packaging Corp.*, 706 F.3d 157 (3d Cir. Jan. 14, 2013) (adopting EEOC position that the district court erred in refusing to consider evidence of harassment over 300 days old in this hostile work environment claim); *Boaz v. FedEx Customer Info. Svs., Inc.*, 725 F.3d 603 (6th Cir. Aug. 6, 2013) (adopting DOL & EEOC argument that an employment contract cannot shorten the statute of limitations under the EPA or FLSA); *Ellis v. Ethicon, Inc.*,

issues of the appropriate interpretations of applicable federal law.³⁵ EEOC's position was rejected in eight of the ten substantive positions it advanced in the appellate courts. In comparison, the United States Chamber of Commerce ("Chamber") filed *amicus curiae* briefs in three of these same cases, with a 100% win rate.³⁶

And, as detailed below, most telling, in four of the most important and far reaching discrimination and harassment substantive law interpretations advanced by EEOC's *amicus* participation—not only was EEOC's *amicus* position rejected, the United States Supreme Court and the Courts of Appeals also rejected relevant provisions in EEOC's underlying Enforcement Guidance documents, compliance manual positions, and policy statements under Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act.³⁷

In 2013 EEOC's Amicus Positions were Twice Rejected By The U. S. Supreme Court

In 2013, the United States Supreme Court resolved two contested issues regarding the substantive interpretation of Title VII of the Civil Rights Act of 1964, the primary federal law prohibiting discrimination in the workplace. EEOC participated in both cases, filing *amicus* briefs advocating its longstanding positions regarding key issues of: (1) the

529 Fed. Appx. 310 (3d Cir. Jul. 9, 2013) (adopting EEOC argument that reinstatement can be an appropriate remedy).

³⁵ EEOC's substantive arguments were rejected in the following eight *amicus* decisions in 2013: *Vance v. Ball State Univ.*, 133 S. Ct. 2434 (Jun. 24, 2013) (rejecting EEOC Enforcement Guidance definition of "supervisor" under Title VII); *Univ. of Texas Southwestern Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (Jun. 24, 2013) (rejecting EEOC Enforcement Guidance that the motivating factor standard applies to retaliation claims); *Basden v. Prof. Transportation, Inc.*, 714 F.3d 1034 (7th Cir. May 8, 2013) (rejecting EEOC Enforcement Guidance that attendance is not an essential function of the job); *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. Dec. 3, 2013) (rejecting the position offered in a joint brief filed by EEOC and DOL while the proceedings were before the NLRB); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. Aug. 9, 2013) (rejecting EEOC argument, filed jointly with the DOL, that arbitration agreements barring class claims are impermissible); *McKinley v. Skyline Chili, Inc.*, 2013 WL 4436537 (6th Cir. Aug. 21, 2013) (affirming summary judgment for the employer because loss of confidence and poor performance were not pretextual reasons for termination); *Foco v. Freudenberg-NOK Gen. P'ship*, 2013 WL 6171410 (6th Cir. Nov. 25, 2013) (affirming summary judgment for the employer as the pay disparity was based on something other than sex); *Bailey v. Real Time Staffing Servs., Inc.*, 2013 WL 5811647 (6th Cir. Oct. 29, 2013) (affirming summary judgment for the employer because the employee's failed drug test, possibly caused by medication taken to treat HIV, was a legitimate, non-discriminatory reason for termination). EEOC prevailed on substantive *amicus* arguments in only two cases in 2013: *Waldo v. Consumers Energy Co.*, 726 F.3d 802 (6th Cir. Aug. 9, 2013) (adopting EEOC argument that a sexual harassment victim does not need to prove that the harassment unreasonably interfered with her work performance, only that work conditions were discriminatorily altered) and *Latowski v. Northwoods Nursing Ctr.*, 2013 WL 6727331 (6th Cir. Dec. 23, 2013) (reversing summary judgment for employer on a pregnancy discrimination claim).

³⁶ The U.S. Chamber of Commerce filed *amicus* briefs in *Vance v. Ball State Univ.*, *Univ. of Texas Southwestern Med. Ctr. v. Nassar* and *DR Horton v. NLRB*.

³⁷ EEOC's longstanding interpretations rejected by the United States Supreme Court in 2013 nevertheless remain on the EEOC's website as official EEOC Enforcement Guidance. Compare *Vance v. Ball State*, 133 S. Ct. at 2443 and *Univ. of Teas Southwestern Med. Ctr. v. Nassar*, 133 S.Ct. at 2543-44 with *Enforcement Guidance: Vicarious Employer Liab. for Unlawful Harassment by Supervisors*, 1999 WL 33305874 (EEOC Guidance Jun. 18, 1999) (including a notice that the Supreme Court rejected in part the EEOC's definition of "supervisor"), *Enforcement Guidance on Recent Developments in Disparate Treatment Theory*, 1992 WL 1364355 (EEOC Guidance Jul. 14, 1992) at *6 n.14 (setting forth EEOC's longstanding rule that it will find liability whether or not retaliation is a motivating factor for an action).

definition of supervisor under Title VII; and (2) the applicable burden of proof to establish liability for a retaliation claim under Title VII.

EEOC supported its substantive *amicus* positions in these 2013 decisions by reference to its own previously published interpretations of federal law contained in EEOC guidance documents. EEOC argued to the Supreme Court that its positions contained in these guidance documents were “entitled to respect” as interpretations of federal law by the enforcing agency that “constitute[s] a body of experience and informed judgment to which courts and litigants may properly resort for guidance.” EEOC argued that its prior interpretations contained in its guidance documents were both thorough and validly-reasoned, and thus, entitled to deference under longstanding Supreme Court precedent in *Skidmore v. Swift Co.*, 323 U.S. 134, 140 (1944).³⁸

The Supreme Court declined to exercise deference with respect to the EEOC guidance. Specifically, the Supreme Court rejected EEOC’s substantive positions found in its *Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors* in *Vance v. Ball State*, as well as the EEOC’s *Enforcement Guidance on Recent Developments in Disparate Treatment Theory* in *University of Texas Southwestern Medical Center v. Nassar*.

Vance v. Ball State Univ., 133 S. Ct. 2434 (Jun. 24, 2013)

In *Vance v. Ball State Univ.*, the Supreme Court decided the question of who qualifies as a “supervisor” when an employee asserts a Title VII claim for workplace harassment.³⁹ The term “supervisor” is not defined in Title VII, and had been left undefined by the Supreme Court since its decisions in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2257 (1998), and *Faragher v. Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275 (1998).

EEOC’s *amicus* urged the Supreme Court to defer to EEOC’s approach to supervisory status advocated by its *Enforcement Guidance on Vicarious Employer Liability*.⁴⁰ EEOC’s *Enforcement Guidance* provides that an individual qualifies as a supervisor if: (1) the individual has authority to undertake or recommend tangible employment decisions affecting the employee, or (2) the individual has authority to direct the employee’s daily work activities.

³⁸ *Vance v. Ball State Univ.*, 2012 WL 3864279, 27 (U.S., 2012).

³⁹ Under Title VII an employer’s liability for harassment may depend on the status of the harasser. An employer is liable for the harassing conduct of a co-worker only if the employer was negligent in controlling working conditions. Whereas, if the harasser is a supervisor, the employer is strictly liable for any harassment culminating in a tangible employment action. An employer is also strictly liable for the harassing conduct of a supervisor that does not result in a tangible employment action being taken unless it can establish an affirmative defense that the employer exercised reasonable care to prevent and correct harassment and the harassed employee unreasonably failed to take advantage of the opportunities that the employer provided to prevent or correct the harassment. *See Vance*, 133 S. Ct. at 2439.

⁴⁰ *Enforcement Guidance: Vicarious Employer Liab. for Unlawful Harassment by Supervisors*, 1999 WL 33305874 (EEOC Guidance Jun. 18, 1999).

The Supreme Court expressly rejected EEOC's *amicus* position and Enforcement Guidance definition of supervisor, describing it as "abstract" and "unpersuasive". In adopting the definition advocated by the Chamber, the Court held that an employer may be vicariously liable for an employee's unlawful harassment only when that employee has the employer's authorization to effect significant changes in employment status of the employee (such as hiring, firing, promoting, demoting or significantly changing their responsibilities or employee benefits).

EEOC's definition of supervisor, the Supreme Court explained, would inevitably lead litigants, courts, and perhaps jurors to undertake "nebulous" and "murky" examinations of the so-called supervisor's daily duties (including the number and perhaps importance of the tasks in question), which could be resolved only on case-by-case bases. The Supreme Court criticized EEOC's alternative Enforcement Guidance definition as including key components that "have no clear meaning...a proposed standard of remarkable ambiguity".⁴¹

In contrast, the Supreme Court noted its definition would be readily applicable and clear enough to resolve the issue of supervisory status even before litigation commences. As the Supreme Court explained, "supervisory" status now can be determined "generally by written documentation," thus allowing parties to "be in a position to assess the strength of a case and to explore the possibility of resolving the dispute" before any potential lawsuit is brought.

In *Vance*, the Supreme Court provided employers with much needed guidance on an important issue—guidance that expressly rejected EEOC's decade old policy that had left employers in a sea of ambiguity.

Univ. of Texas Southwestern Med. Ctr. v. Nassar, 133 S. Ct. 2517 (Jun. 24, 2013)

Title VII makes it unlawful for an employer to retaliate against an employee who has filed a charge of discrimination, participated in a discrimination proceeding, or otherwise opposed discrimination. In *Univ. of Texas Southwestern Med. Ctr. v. Nassar*, the Supreme Court rejected EEOC's *amicus* position and applied traditional principles of causation with respect to the question of a plaintiff's burden of proof in a Title VII retaliation claim. The Supreme Court held that a plaintiff must prove that their harm would not have occurred "but for" the employer's retaliatory motive.

EEOC's *amicus* again urged the Supreme Court to defer to its application of a burden of proof standard for retaliation claims found in EEOC's *Enforcement Guidance on Recent Developments in Disparate Treatment Theory* and compliance manual.⁴² Under EEOC's more permissive standard, to prevail in a retaliation case, a plaintiff need only show that an employer's retaliatory motive was a motivating factor in the adverse action, even if it was not the "but for" cause of the harm.

⁴¹ 133 S. Ct. at 2449-50.

⁴² *Enforcement Guidance on Recent Developments in Disparate Treatment Theory*, 1992 WL 1364355 (EEOC Guidance Jul. 14, 1992).

Once again, the Supreme Court expressly rejected EEOC's *amicus* position and declined to defer to its *Enforcement Guidance* and compliance manual interpretation. In refusing to defer to the EEOC's interpretation, the Court explained the EEOC's position lacked the requisite "persuasive force" necessary for such deference.

In particular, the Court faulted the EEOC's position for failing to address the plain language of the statute, which clearly requires "but for" causation in retaliation claims. Similarly, the Court rejected the EEOC's secondary positions as "circular" and "unpersuasive".

Thus, the Supreme Court rejected EEOC's policy position contained in its 1992 *Enforcement Guidance*. Despite this rejection, EEOC has not updated its *Enforcement Guidance* to be consistent with the Supreme Court's holding in *Nassar*.⁴³ Given EEOC statistics show retaliation as the most commonly-filed discrimination claim, the failure to reflect the Supreme Court's standard to analyze retaliation cases is significant.⁴⁴

2013's adverse rulings by the Supreme Court striking down EEOC guidance is not an anomaly. In 2012, the Supreme Court rejected 9-0 the EEOC's position that the ministerial exception did not apply to ADA retaliation cases. *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, 132 S.Ct. 694, 707 (2012). In 2009, the Supreme Court rejected the EEOC's position that the mixed motive instruction was permissible under the ADEA, which the EEOC had argued as *amicus* before the Eighth Circuit Court of Appeals and in which the Department of Justice appeared as *amicus* at the Supreme Court. *Gross v. FBL Services, Inc.*, 557 U.S. 167, 173 (2009).

Important EEOC Amicus Losses In The Courts of Appeals In 2013

In 2013, the Seventh and Fifth Circuit Courts of Appeals rejected EEOC's substantive positions found in its *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans With Disabilities Act*⁴⁵ as well as EEOC's Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes.⁴⁶

Seventh Circuit Rejects EEOC Amicus and Policy Statement Position that Attendance is not an Essential Function of A Job

⁴³ However, EEOC's compliance manual now notes that the Supreme Court "rejected EEOC's position that retaliation is a basis for employer liability whenever it is a motivating factor for an adverse action" and "supplanted" EEOC's position that a legitimate motive for the challenged action would be relevant only to relief, not to liability.

⁴⁴ In FY 2012, the most recent data published by the EEOC, charging parties filed 37,836 retaliation claims.

⁴⁵ U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ENFORCEMENT GUIDANCE: REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT, (Oct. 17, 2002), available at <http://www.eeoc.gov/policy/docs/accommodation.html>.

⁴⁶ U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, POLICY STATEMENT ON MANDATORY BINDING ARBITRATION OF EMPLOYMENT DISCRIMINATION DISPUTES AS A CONDITION OF EMPLOYMENT, (Jul. 10, 1997), available at <http://www.eeoc.gov/policy/docs/mandarb.html>.

In order to be protected under the ADA, an applicant or employee must be able to perform the essential functions of the job. The EEOC has long urged that attendance is not an essential function of a job. Despite at least nine Courts of Appeals rejecting this view,⁴⁷ the EEOC remained defiant and reaffirmed its position most recently in its 2002 *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans With Disabilities Act*, declaring in Footnote 65 that:

“Certain courts have characterized attendance as an ‘essential function.’ [EEOC recognizing certain court decisions]... Attendance, however, is not an essential function as defined by the ADA because it is not one of “the fundamental job duties of the employment position.”

Notably, even the Ninth Circuit Court of Appeals has rejected EEOC’s expansive policy position on this issue.⁴⁸

Yet, the EEOC continued to press its minority view in its amicus brief filed in *Basden v. Prof. Transportation, Inc.*, 714 F.3d 1034 (7th Cir. May 8, 2013). The Seventh Circuit Court of Appeals, however, again rejected EEOC’s position. Citing to its longstanding precedent, the court repeated what every court that has reviewed the issue has concluded: an employer is entitled to treat regular attendance as an essential job requirement. EEOC’s continued adherence to its 2002 Enforcement Guidance blinds itself to the well-accepted rule—namely, that except in the unusual case where an employee can effectively perform

⁴⁷ See, e.g., *Rios-Jimenez v. Principi*, 520 F.3d 31, 42 (1st Cir. Mar. 12, 2008) (“At the risk of stating the obvious, attendance is an essential function of any job. . . . [A]n employee who does not come to work cannot perform the essential functions of his job.”); *Brenneman v. MedCentral Health System*, 366 F.3d 412, 419 (6th Cir. Apr. 26, 2004) (“[R]egular attendance is an essential function of the Pharmacy Technician position, which entails preparing and delivering medications to hospital patients, ordering, receiving, and stocking medications, and posting charges to patients’ accounts. Clearly, plaintiff could not perform these duties when absent from defendant’s premises.”); *E.E.O.C. v. Yellow Freight System, Inc.*, 253 F.3d 943, 947 (7th Cir. Jun. 12, 2001) (*en banc*) (relying, in part, on finding that position of dockworker required physical presence to conclude that “regular attendance” was an “essential function” of the position); *Jovanovic v. In-Sink-Erator Div. of Emerson Elec. Co.*, 201 F.3d 894, 899-900 (7th Cir. Jan. 7, 2000) (“Common sense dictates that regular attendance is usually an essential function in most every employment setting; if one is not present, he is usually unable to perform his job.”); *Browning v. Liberty Mut. Ins. Co.*, 178 F.3d 1043, 1048 (8th Cir. Aug. 17, 1999) (“[I]t is axiomatic that in order for [the plaintiff] to show that she could perform the essential functions of her job, [the plaintiff] must show that she is at least able to show up for work.”); *Hypes on Behalf of Hypes v. First Commerce Corp.*, 134 F.3d 721, 726-27 (5th Cir. Feb. 12, 1998) (finding that loan review analyst position could not be performed from home to support the conclusion that “regular attendance” was an essential function of the job); *Tyndall v. National Educ. Centers, Inc. of California*, 31 F.3d 209, 213 (4th Cir. Aug. 3, 1994) (“Except in the unusual case where an employee can effectively perform all work-related duties at home, an employee who does not come to work cannot perform any of his job functions, essential or otherwise. Therefore, a regular and reliable level of attendance is a necessary element of most jobs. An employee who cannot meet the attendance requirements of the job at issue cannot be considered a ‘qualified’ individual protected by the ADA.”); *Carr v. Reno*, 23 F.3d 525 (D.C. Cir. May 20, 1994) (holding that coming to work regularly is an essential function of the job); *Jackson v. Veterans Admin.*, 22 F.3d 277 (11th Cir. Jun. 6, 1994) (plaintiff failed to prove he was “otherwise qualified” because he failed to satisfy the essential function of being present at his job.)

⁴⁸ See *Samper v. Providence St. Vincent Med. Ctr.*, 675 F.3d 1233 (9th Cir. Apr. 11, 2012).

all work-related duties at home, an employee who does not physically go into work cannot perform any of his job functions, essential or otherwise.

Fifth Circuit Rejects EEOC Amicus and Policy Statement on the Enforceability of Class Action Waivers in Arbitration Agreements

Arbitration of employment disputes offers both employers and employees a quick and cost-effective method for settling employment disputes.⁴⁹ Unfortunately, EEOC takes a skeptical view of such agreements. Indeed, in a National Labor Relations Board (Board) case called *D.R. Horton, Inc. v. Cuda*, No 12-CA-25764, 2011 WL 11194 (ALJ Jan. 3, 2011), EEOC (along with the Department of Labor) filed an *amicus* brief advocating that the Board consider “the critical role of class or collective actions in enforcing employees’ statutory rights and the unenforceability of waivers of class or collective actions in mandatory arbitration agreements that prevent an employee from effectively vindicating his or her statutory rights.”⁵⁰ EEOC argued that “it is crucial that the courts and the relevant governmental agencies whenever possible preserve the right of aggrieved employees and applicants to pursue their claims of employment discrimination on a class basis.”⁵¹ EEOC further asserted that the ability to pursue discrimination claims on a class or collective basis was a “vital tool in enforcing each of the Commission’s statutes.”⁵² Without the class or collective action option, EEOC argued, employees may not be able to effectively vindicate their federal rights because attorneys have less incentive to pursue individual, non-class claims of little monetary value.

While the Board sided with EEOC’s position, on appeal in *D.R. Horton v. NLRB*, 737 F.3d 344 (5th Cir. Dec. 3, 2013), the Fifth Circuit Court of Appeals rejected that policy position. The Fifth Circuit held employment arbitration agreements containing class waivers are enforceable.⁵³ It rejected EEOC’s *amicus* argument that a class action waiver in a mandatory arbitration agreement is impermissible under federal law, including civil rights statutes. The Fifth Circuit noted that the argument paid little attention to the Federal Arbitration Act which permits employees and employers to agree to resolve disputes through individual rather than class arbitrations. The Fifth Circuit specifically noted that there are numerous decisions, including the Supreme Court’s decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20,32, 111 S. Ct. 1647 (1991) holding there is no substantive right to class procedures under other federal employment laws, including non-discrimination laws enforced by EEOC such as the Age Discrimination in Employment Act.

Notably, the Fifth Circuit’s *D.R. Horton* decision also rejects EEOC’s *Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes*. In it, though

⁴⁹ See *Adams v. Circuit City Stores*, 532 U.S. 105, 123 (2001)(“Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts”).

⁵⁰ Brief for Sec’y of Labor and the EEOC at 22, *D.R. Horton v. Cuda* (No. 12-CA-25764), 2011 WL 11194.

⁵¹ *Id.* at 10.

⁵² *Id.* at 8.

⁵³ As of the date of submission of this analysis the Board had not announced publicly whether it will seek review of the case by the United States Supreme Court. The Board has until March 3, 2014 to file a petition for review with the United States Supreme Court.

EEOC expressly recognized case law enforcing mandatory arbitration agreements, including Supreme Court precedent, EEOC details its position that arbitration agreements are inconsistent with federal civil rights laws. As a result of its policy position, EEOC puts employers on notice it will “closely scrutinize” all charges involving an arbitration agreement to see if it was entered into “under coercive circumstances (*e.g.*, as a condition of employment).”⁵⁴

In 2013, the *D.R. Horton* decision continued the across-the-board record of courts of appeals⁵⁵ rejecting EEOC’s Guidance and policy position regarding the enforceability of such arbitration agreements as a matter of public policy.

Conclusion

Whether EEOC’s 2013 *amicus* program’s success is measured on a pure numerical won/loss basis, or on the importance of the substantive interpretations of federal law it supported in its *amicus* efforts, one thing is clear: it was an overwhelming failure.

What’s more, the courts’ rejection of EEOC’s underlying regulatory guidance leaves employers searching as to where to find accurate, reliable guidance on their legal obligations under federal non-discrimination laws. And, with a fully staffed Commission several new guidance positions are possible on a broad range of topics including: wellness plans, reasonable accommodations, pregnancy and national origin discrimination and credit-related background checks. Of course, whether any future guidance would fare better than EEOC’s 2013 track record is unknown. However, if the best predictor of future performance is past performance, in light of EEOC’s 2013 *amicus* performance, it is unlikely.

⁵⁴ U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, POLICY STATEMENT ON MANDATORY BINDING ARBITRATION OF EMPLOYMENT DISCRIMINATION DISPUTES AS A CONDITION OF EMPLOYMENT, (Jul. 10, 1997), p. 20, available at <http://www.eeoc.gov/policy/docs/mandarb.html>.

⁵⁵ See, *e.g.*, *Richards v. Ernst & Young, LLP*, 11-17530, 2013 WL 6405045, n.3 (9th Cir. Dec. 9, 2013) (declining to rely on the Labor Board’s *D.R. Horton* decision in part because “it conflicts with the explicit pronouncements of the Supreme Court concerning the policies undergirding the Federal Arbitration Act (FAA).”); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. Aug. 9, 2013) (echoing the Eighth Circuit’s rationale for rejecting the Labor Board’s *D.R. Horton* decision); and *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, (8th Cir. Jan. 7, 2013) (giving the Board’s decision no deference holding that the Board does not have expertise in interpreting the Federal Arbitration Act.).