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

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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.

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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 theses 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

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

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:

- 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.

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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.

- 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.

- 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.

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

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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.

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).

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

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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).

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

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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.

district court chastised EEOC for employing unreasonable and bad faith tactics in connection with subpoenas to a small business.[13]

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

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.

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

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 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.

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).

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

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

EEOC has challenged several employers' workplace policies which have been in effect for years and have been voluntarily agreed to by all interested parties.

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.

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

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

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).

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."

In another case, EEOC inexplicably challenged a company's common sense efforts to ensure a safe workplace in a potentially hazardous industrial environment.

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.

21 *See* 42 U.S.C. § 12112(d)(4)(A).

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

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.

In a similar vein, EEOC has vigorously—and publically—challenged the allowance of religious accommodation for employee dress and uniforms.

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 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*

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).

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 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?

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.

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."

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.

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.

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

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 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.

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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.

* * *

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.

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.

Left unreported by EEOC are the results of one of its most important legal enforcement methods—EEOC's *amicus curiae* program ("*amicus*").

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

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.

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 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]

EEOC's position was rejected in eight of the ten substantive positions it advanced in the appellate courts.

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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.*, 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).

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 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.

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

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.

"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.

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).

The Supreme Court expressly rejected EEOC's *amicus* position and Enforcement Guidance definition of supervisor, describing it as "abstract" and "unpersuasive".

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.

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

41 133 S. Ct. at 2449-50.

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.

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]

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.

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

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.

The EEOC has long urged that attendance is not an essential function of a job.

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

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

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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.

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

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 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.

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

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

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).

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").

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 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

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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.

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 appeals[55] rejecting EEOC's Guidance and policy position regarding the enforceability of such arbitration agreements as a matter of public policy.

In 2013, the *D.R. Horton* decision continued the across-the-board record of courts of appeals 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.

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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.).

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