

## ABA National Conference on EEO Law

March 23-27, 2010  
San Antonio, Texas

### **EEOC Pattern or Practice Litigation**

**Donald R. Livingston**

Akin Gump Strauss Hauer & Feld, LLP  
Washington, D.C.

The EEOC's pattern or practice cases have been based on a variety of issues. The EEOC has challenged tests that have an adverse impact on a protected group and that are considered by the EEOC to have been improperly validated; facially nondiscriminatory policies that have an adverse impact on a protected group; facially discriminatory policies that exclude older workers, women, or minorities from job opportunities; pregnancy leave policies that treat pregnancy less favorably than non-pregnancy related conditions that have a similar affect on an individual's ability or inability to work; and harassment and retaliation actions.

Over the last several years, the distinction between EEOC pattern or practice lawsuits and other lawsuits the EEOC brings has become increasingly significant. The distinction could determine, for example, whether the EEOC's lawsuit is subject to a 300-day charge filing limitation, is eligible for damages (in addition to back pay) and jury trials, is subject to a two-year pre-charge cutoff on back pay, and is appropriate for the *Teamsters* burden shifting framework.

#### **I. Introduction**

As originally enacted, Title VII authorized the U.S. Department of Justice to bring lawsuits that allege a "pattern or practice" of discrimination. A pattern or practice of discrimination exists where a company repeatedly and regularly engages in acts prohibited by the statute. Isolated acts of discrimination do not constitute a pattern or practice. *Teamsters v. United States*, 431 U.S. 324, 336, n.16 (1977).<sup>1</sup> The government must prove by a preponderance of the evidence that the alleged discrimination was the company's standard operating procedure. The proof framework for pattern or practice cases is discussed in more detail in Section V, below.

In 1972, Congress amended § 707 of Title VII, 42 U.S.C. § 2000e-6, to transfer the DOJ's pattern or practice authority to the EEOC. Congress also authorized the EEOC to bring lawsuits in its own name under Title VII's § 706, 42 U.S.C. § 2000e-5, subject to certain administrative prerequisites (*i.e.* a time charge, investigation, cause finding and conciliation). In addition, Congress added § 707(e) to make § 707 actions subject to the procedures in § 706 ("All [§ 707]

---

<sup>1</sup> *Quoting* definition offered by Sen. Humphrey and stating "This interpretation of 'pattern or practice' appears throughout the legislative history of §707(a), and is consistent with the understanding of the identical words as used in similar federal legislation".

actions shall be conducted in accordance with the procedures set forth in section 706”). Through this means, Congress incorporated the procedures of § 706 into § 707 pattern or practice cases.

There is an advantage to the EEOC in proving a pattern-or-practice of discrimination. In pattern-or-practice cases the EEOC can utilize the *Teamsters* framework. Once the EEOC satisfies the initial burden of demonstrating class-wide discrimination,<sup>2</sup> “the burden then rests on the employer to demonstrate that the individual applicant was denied an employment opportunity for lawful reasons.” *Id.* at 362.

The distinction between EEOC actions under § 706 and pattern or practice actions under § 707 has never been clear. For many years, § 707 was treated as redundant. It was seldom, if ever, relied upon. For example, when in 1980, the Supreme Court held in *General Telephone Co. v. EEOC*,<sup>3</sup> that EEOC actions seeking class-wide remedies are not subject to Rule 23, Fed. R. Civ. P., the Court was interpreting § 706.

Inside the EEOC no special rules or procedures have ever been established specifically for § 707 cases. The term “pattern or practice” is seldom mentioned in EEOC’s regulations or policy guidance, and is not used for internal audit systems. Instead, EEOC’s litigation reports refer to “class cases.” As this term is defined, an EEOC pattern or practice case is a “class case.” But, the converse is not true. Most EEOC class cases are not pattern or practice cases. They are lawsuits brought on behalf of several individuals and that involve allegations of isolated acts of discrimination.<sup>4</sup> They do not involve allegations of repeated and regular violations of Title VII.

## **II. The Influence of the Charge Filing Period on EEOC Remedies**

The EEOC asserts that when it relies on § 707 of Title VII for its pattern or practice cases, the 180- or 300-day charge filing period imposes *no* limitation on damages, and its remedies are not constrained by *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002).<sup>5</sup>

---

<sup>2</sup> At the initial, ‘liability’ stage of a pattern-or-practice suit the Government is not required to offer evidence that each person for whom it will ultimately seek relief was a victim of the employer's discriminatory policy. Its burden is to establish a prima facie case that such a policy existed. The burden then shifts to the employer to defeat the prima facie showing of a pattern or practice by demonstrating that the Government's proof is either inaccurate or insignificant.” *Id.* at 360.

<sup>3</sup> 446 U.S. 318

<sup>4</sup> Office of General Counsel, A Study of the Litigation Program Fiscal Years 1997-2001 (Aug. 13, 2002) (“Litigation Study”), §B(2), [www.eeoc.gov/litigation/study/index.html](http://www.eeoc.gov/litigation/study/index.html).

<sup>5</sup> See, e.g., *EEOC v. Burlington Medical Supplies, Inc.*, 536 F. Supp.2d 647, 650 (E.D. Va. 2008); *EEOC v. Scolari Warehouse Markets, Inc.*, 488 F. Supp.2d 1117 (D. Nev. 2007); *EEOC v. LA Weight Loss*, 509 F. Supp.2d 527, 534-36 (D. Md. 2007); *EEOC v. Custom Companies Inc.*, Nos. 02 C 3768, 03 C 2293, 2004 WL 765891 (N.D. Ill Apr. 7, 2004).

### **A. *Morgan's* Footnote 9 and the Rebirth of § 707 Pattern or Practice Litigation**

In 2002, the Supreme Court resolved many of the complexities that had evolved in the common law of “continuing violations” by holding that discrete acts of discrimination such as hiring, promotion, and firing decisions must be challenged within Title VII’s charge filing period. *Morgan*, 536 U.S. 101 (2002) (“Title VII precludes recovery for *discrete acts of discrimination* that occur outside the applicable statutory charge-filing period”). However, *Morgan's* footnote 9 states that the case gives “no occasion ... to consider the timely filing question with respect to ‘pattern-or-practice’ claims brought by private litigants.” This footnote seem to have accelerated the rebirth of § 707 cases.<sup>6</sup>

### **B. The Charge Period Limitation on EEOC § 707 Actions**

Over the last several years, the EEOC has filed pattern or practice lawsuits that rely on *both* § 706 and § 707 of Title VII. The following is a common assertion from an EEOC Complaint alleging a pattern or practice of discrimination:

This action is authorized and instituted pursuant to Sections 706(f)(1) and (3) and 707 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(f)(1) and (3) and 2000e-6.

#### **1. Incorporation of § 706 Procedures into § 707 Pattern or Practice Cases**

When the Department of Justice sued under 707, it could do so without having received a charge of discrimination, and it was under no obligation to do any of the things Title VII requires the EEOC to do when it gets a charge. It did not need to notify the employer and it did not need to try to resolve the matter informally through conciliation.

When Congress transferred this authority to the EEOC, it could have continued this regime, but it chose not to. Congress instead enacted Section 707(e), to provide that EEOC would have a single integrated scheme: “All actions under Section 707 [in other words, all pattern or practice actions] shall be conducted in accordance with the procedures set forth in Section 706.”

The timely charge filing requirement is in § 706(e): “A charge under this section shall be filed within one hundred and eighty days [300 days in some states] after the alleged unlawful employment practice occurred.” EEOC argues in § 707 pattern or practice cases that § 706(e) is not a limitation on § 707 remedies; or, in other words, that § 707(e) does not incorporate into § 707 any remedial limitation that otherwise might be implied by § 706(e).

EEOC believes that § 707(e) is intended merely to set up an administrative investigation and conciliation process for pattern or practice charges, but was never intended to restrict the scope

---

<sup>6</sup> This reinvention seems to have started four years before *Morgan*, with *EEOC v. Mitsubishi Motor Manf. of America, Inc.*, 640 F. Supp. 1059 (C.D. Ill. 1998).

of EEOC's remedies under Section 707. The plain language of 707(e) does not appear to make this distinction.

Moreover, EEOC's distinction between the investigation and conciliation procedures in § 706 (which it deems incorporated into § 707) and all other procedures contained in § 706 (which it deems not incorporated) would not permit the incorporation of § 706's litigation procedures into § 707. For example, under EEOC's formulation, procedures in § 706(f)(2), 42 U.S.C. § 2000e-5(f)(2), that authorize it to obtain emergency court injunctions would not apply to § 707 cases. Nor would the jurisdictional and venue provisions in § 706(f)(3), 42 U.S.C. § 2000e-5(f)(3), or the right to seek a jury trial, which was incorporated into § 706 by 42 U.S.C. § 1981(a).

In addition, when Congress enacted 42 U.S.C. § 1981(a) in 1991 to authorize EEOC to litigate for compensatory and punitive damages (subject to the remedial limitation of a damages cap), it provided these remedies only for disparate treatment litigation under § 706. Section § 1981(a) makes no mention of § 707. If these monetary remedies are not incorporated into § 707 by § 707(e), it follows that the 1991 Congress did not intend these remedies to apply to § 707 actions, and that they are not available to EEOC in "pattern or practice" cases. Yet, EEOC has never taken this view of the statute.

## **2. The Application of Continuing Violation to EEOC Pattern or Practice Cases**

The EEOC argues that applying the Section 706 limitations period to EEOC's remedies in a § 707 action is inconsistent with the nature of a pattern or practice violation, which is an aggregation of multiple acts over time that cannot be said to have occurred on any particular day. *See EEOC v. L.A. Weight Loss*, 509 F.Supp.2d 527, 535-36 (D. Md. 2007). For this reason, EEOC argues, its § 707 actions are not limited by the holding in *Morgan*. The EEOC asserts that a pattern or practice of discrimination does not involve as series of discrete acts, but a pattern of discriminatory conduct that does not become apparent until the employer has implemented the practice with sufficient frequency to permit assessment of the impact of the policy on various demographic groups. For this reason, the EEOC claims that a pattern or practice of discrimination should be considered a single unlawful employment practice, and not a series of discrete acts, each of which must be challenged within the charge filing period. The counter argument is that even if a discrete acts of discrimination such as failures to promote are part of a pattern or practice, the "failures remain discrete acts of discrimination." *See Williams v. Giant Food Inc.*, 370 F.3d 423 (4<sup>th</sup> Cir. 2004). The question of whether an act of discrimination that falls within a pattern or practice is a discrete act turns on the nature of the act – e.g., hiring decision, promotion decision – not on whether the case is termed a pattern or practice case.

## **III. The Applicability of Rule 23, Fed. R. Civ. P.**

The EEOC's pattern or practice cases are not subject to Rule 23 of the Federal Rules of Civil Procedure. The EEOC is not required to meet the numerosity, commonality, typicality, or adequacy of representation requirements. These elements are not required because EEOC "need look no further than § 706 [of Title VII] for its authority to bring suit in its own name for the purpose, among others, of securing relief for a group of aggrieved individuals." *General Telephone Co. of Northwest v. EEOC*, 446 U.S. 318, 324 (1980).

#### **A. EEOC Pattern or Practice Cases Must be Cohesive**

However, some recent decisions have suggested that pattern or practice cases must be based on common elements, and not an aggregation of individual, distinct circumstances. See *Serrano and EEOC v. Cintas Corp.*, Case No. 04-40132 (S.D. Mich., February 9, 2010); *EEOC v. Carrols Corp.*, 2005 U.S. Dist LEXIS 8337 (N.D.N.Y. April 20, 2005), and *Hohider v. United Parcel Serv., Inc.*, 574 F.3d 169 (3d Cir. 2009).

#### **B. EEOC Pattern or Practice Settlements Do Not Require Court Approval**

Some cases hold that EEOC pattern or practice settlements must be approved by the court as fair, adequate, and reasonable under standards for cases subject to Rule 23, Fed. R. Civ. P.. See *EEOC v. McDonnell Douglas Corp.*, 894 F. Supp. 1320 (E.D. Mo. 1995), citing *Binker v. Penn.*, 977 F.2d 738, 746 (3d Cir. 1992). These opinions predate *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002), and are incorrect. Because Rule 23 is inapplicable to EEOC suits, the settlement of an EEOC action seeking relief for a group of individuals should be treated no differently than the settlement of an EEOC action seeking relief for a single charging party. In these cases, no authority requires that a court review the fairness of the EEOC's settlements. This is true despite the fact that the charging party in this situation has actively engaged the EEOC by bringing a discrimination claim to its attention. If such a party has no right to challenge a settlement based on his or her charge, there is no basis for conferring that right on individuals who did not complain to the EEOC, but who nonetheless happen to be in a position to benefit from an EEOC negotiated settlement.

In some cases, the EEOC chooses to negotiate a settlement that calls for the Court to conduct a fairness hearing and to consider the views of all members of the benefited group as to the fairness and adequacy of the entire settlement bargain.

#### **IV. The Perfect Storm: *Cintas Corp.* and *CRST Van Expedited***

The distinction between EEOC lawsuits brought under § 706 and § 707 may have taken on greater significance as a result of opinions in *Serrano and EEOC v. Cintas Corp.*, Case No. 04-40132 (S.D. Mich., February 9, 2010), and *EEOC v. CRST Van Expedited*, Case No. 07-CV-95-LRR (N.D. Iowa, February 9, 2010).

#### **A. *Cintas*: Pattern or Practice Claims Must be Brought under § 707, Which Does Not Authorize Jury Trials or Compensatory or Punitive Damages**

In *Cintas*, the EEOC exercised its authority under § 706(f)(1) to intervene in a private lawsuit. The EEOC alleged that the defendant engaged in discriminatory hiring practices against female applicants. The court ruled that because the EEOC's action was brought under § 706 and not § 707, the EEOC was not entitled to rely on the *Teamsters* framework designed for pattern or

practice cases.<sup>7</sup> The court criticized opinions of other courts for blurring the line between § 706 and § 707 claims. It also pointed out the obvious: the opinions of the federal courts on the relationship between § 706 and § 707 of Title VII have led to “widely divergent analysis that are impossible to reconcile or even tidily summarize.” *Quoting. EEOC v. CRST Van Expedited, Inc.*, 615 F. Supp. 2d 867, 877 (N.D. Iowa 2009). To attempt to clarify the law, the court explained differences it discerned between § 706 and § 707 claims:

- Plaintiffs in § 706 cases pursue their claims under the burden-shifting framework of *McDonnell-Douglas v. Green*, 422 U.S. 792 (1973).
- Plaintiffs in § 707 cases pursue their claims under the burden-shifting framework of *Int’l Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).
- Under § 706, the EEOC can seek equitable relief under 42 U.S.C. § 2000e-5(g), and may also seek compensatory and punitive damages under 42 U.S.C. § 1981a(a)(1).
- In cases under § 707, the EEOC can seek equitable relief, but is not authorized to seek compensatory and punitive damages; § 1981a(a)(1) authorizes these damages only “in an action brought by a complaining party under [§ 706].”
- The EEOC is limited to pursuing § 706 claims on behalf of those individuals it identifies.

## **B. *CRST Van Expedited***

### **1. Some EEOC “Class Claims” are not Appropriate for Pattern or Practice Treatment**

In *EEOC v. CRST Van Expedited, Inc.*, the EEOC brought a claim of sexually hostile work environment on behalf of an individual charging party and a class of similarly situated female employees. The action was filed under § 706 of Title VII. The complaint did not allege a “pattern or practice” of discrimination, nor did EEOC plead a violation of § 707, 42 U.S.C. § 2000e-6. However, the court entered an order in which it assumed that either (1) § 706 permitted the EEOC to pursue a pattern or practice claim, or (2) the EEOC had constructively amended its complaint to assert a § 707 action. Then the court entered summary judgment for the employer on the pattern or practice claim. Although the EEOC presented the court with evidence that might subject the defendant to liability as to individual women, it failed to present evidence that the employer’s standard operating procedure was to tolerate sexual harassment. While noting that statistical evidence is not necessary to prove a pattern or practice case, the court observed that the EEOC presented no statistical evidence to reinforce any suggestion that discriminatory incidents were not isolated or sporadic, or to disprove the defendant’s statistical

---

<sup>7</sup> *Contrary* are *EEOC v. Int’l Profit Associates, Inc.*, 2007 WL 844555 (N.D. Ill. March 16, 2007) and *EEOC v. Scolari Warehouse Markets, Inc.*, 488 F. Supp. 2d 1117 (D. Nev. 2007). *In accord* is *EEOC v. CRST Van Expedited, Inc.*, 611 F. Supp. 2d 918, 934 (N.D. Iowa 2009) (*dicta*).

evidence. The court stated that EEOC relied on the assertion that sexual harassment among the defendant's female drivers "is shockingly high." The court ruled that EEOC could not utilize the *Teamster's* framework for trial, but could continue the case to prove sexual harassment of individuals.

## **2. Before Suing on "Class Claims" that are Not Appropriate for Pattern or Practice Treatment, EEOC Must Investigate, Find Cause and Conciliate the Individual Claims**

The *CRST* court considered summary judgment motions addressing 150 allegedly aggrieved persons' allegations. The court's disposition of these motions left 67 allegedly aggrieved persons for trial. Later, the court dismissed the EEOC's complaint when it was revealed that "the EEOC did not conduct any investigation of the specific allegations of the allegedly aggrieved persons for whom it seeks relief at trial before filing the Complaint." The court criticized EEOC for suing on behalf of these persons without rendering cause determinations or engaging in conciliation. The court awarded the defendant over \$4 million in attorney's fees. The court held that EEOC's action met the standard for an award of attorney's fees to defendant under the standard of *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978). The court found the action frivolous, unreasonable, or without foundation because EEOC did not investigate and attempt to conciliate the individual claims, which the court referred to a "sue first, ask questions later litigation strategy."

## **3. EEOC Has Responded to *CRST* in the Administrative Process**

The EEOC has responded to *CRST*. In some pending investigations, EEOC Requests for Information have been supplemented with new requests that seek contact information (addresses and telephone numbers) for potential aggrieved persons.

The EEOC has litigation authority under two provisions of Title VII: Section 706(f)(1), which authorizes the EEOC to sue after conciliation failure, and Section 707(a), which authorizes pattern or practice litigation. 42 U.S.C. §§ 2000e-5(f) (1) and (3) and 2000e-6. The authority to bring § 707 actions was transferred from the Department of Justice to the EEOC in 1972. Since then, the EEOC has brought its class-type cases, including cases seeking relief on behalf of only a small group of employees, under both § 706 and § 707. Until 1998, it made little difference whether EEOC filed suit under § 706, § 707, or both. Neither Congress nor the EEOC established any special charge handling or litigation procedures for § 707 actions, and § 707(e) specifies that all § 707 actions will "be conducted in accordance with the procedures set forth in section 706."

But in 1998, in *Mitsubishi Motor Mfg. of America, Inc.*, 990 F. Supp. 1059 (C.D. Ill. 1998), the EEOC persuaded the federal court for the Central District of Illinois that there is no charge filing period – and thus no limitations period – for an EEOC lawsuit brought as a pattern or practice case under § 707.

## **V. The Proof Framework for EEOC Pattern or Practice Cases**

The EEOC pattern or practices cases follow a bifurcated procedure adopted by the Supreme Court in *Teamsters v. United States*.<sup>8</sup> A pattern or practice case is tried in two Stages.

### **A. Stage 1: Proof of a Discriminatory Pattern or Practice and Injunctive Relief**

The EEOC's initial burden at Stage I is "to demonstrate that unlawful discrimination has been a regular procedure or policy followed by an employer."<sup>9</sup> The EEOC is required to prove more than the mere occurrence of isolated or sporadic discriminatory acts.<sup>10</sup> It must establish that discrimination was the company's standard operating procedure. In this first phase, the EEOC typically relies on statistical evidence,<sup>11</sup> but has also argued that a pattern is apparent from a series of similar occurrence (e.g. in the sexual harassment, retaliation, or reasonable accommodation context) that discrimination was the defendant's routine practice. For a statistical promotion case for example, the EEOC would present evidence comparing the promotion rates for minority employees and white employees. Although the EEOC might bolster the statistical showing with anecdotal evidence of discrimination, the focus in the opening phase is often on objective, class-based evidence in the form of statistics. The EEOC is not required at Stage I to offer evidence "that each person for whom it will ultimately seek relief was a victim of the employer's discriminatory policy."<sup>12</sup>

Once the EEOC presents evidence that discrimination is the defendant's regular procedure or policy, the employer can defeat the EEOC's *prima facie* case "by demonstrating that the Government's proof is either inaccurate or insignificant."<sup>13</sup> In essence, the employer must show

---

<sup>8</sup> 431 U.S. 324, 14 FEP Cases 1514 (1977).

<sup>9</sup> *Id.* at 360, 14 FEP Cases 1514 (1977).

<sup>10</sup> *See EEOC v. Jordan Graphics, Inc.*, 769 F. Supp. 1357, 1382, 66 FEP Cases 1170 (W.D.N.C. 1991) (court expresses doubt that anecdotal testimony of 7 victims will be sufficient to establish that discrimination was the defendant's regular operating practice); *see also U.S. v. N.C.*, 914 F. Supp. 1257, 71 FEP Cases 1347 (E.D.N.C. 1996) (finding that 37 victims over 8-10 years across 90 prisons not sufficient to establish a pattern or practice).

<sup>11</sup> 431 U.S. at 337-39; *see also Allard v. Ind. Bell Tel. Co.*, 1 F. Supp. 2d 898, 77 FEP Cases 1667 (S.D. Ind. 1998) (stating that proof in a pattern or practice case [or "proof of a pattern or practice claim"] usually consists of statistical evidence demonstrating substantial disparities); *but see In re W. Dist. Xerox Litig.*, 850 F. Supp. 1079, 1084, 70 FEP Cases 1465 (W.D.N.Y. 1994) (stating that the absence of statistical evidence is not fatal in every pattern or practice case; [w]here the overall number of employees is small, anecdotal evidence may suffice).

<sup>12</sup> *Id.* at 360.

<sup>13</sup> *Id.*

that the EEOC's statistical analysis was flawed or provide a nondiscriminatory explanation "for the apparently discriminatory result."<sup>14</sup>

A court's finding of a pattern or practice of discrimination at Stage I will justify a broad injunction that would benefit the class as a whole, such as an injunction against the continuation of the discriminatory practice.<sup>15</sup> But, it ordinarily will not warrant individual relief.

## **B. Stage II: Individual Liability and Damages**

If the EEOC seeks relief for individuals, a Stage II trial determines the scope of the individual relief. Although Stage II is often thought of as a "remedial stage," I believe this is incorrect in many instances. The Stage I determination that discrimination was the defendant's standard practice completes the liability phase only for purposes of issuing the injunction. As to individuals, "the liability phase remains incomplete" because "to establish the right to employment, promotion, reinstatement, back pay, or similar relief, the individuals have the additional burden of showing that each was an actual victim of discrimination."<sup>16</sup> Indeed, I think it misleading to speak of the additional proof required by an individual class member for relief as being part of the damages phase when that evidence is actually an element of the liability portion of the case.<sup>17</sup> Thus, in *Dillon v. Coles*, the Third Circuit held that before an employer can be found liable to individual class members in a pattern or practice employment discrimination case, individual class members must be found to have been the victims of discrimination based on an inquiry into such individualized issues as the existence of vacancies and the employer's asserted reasons for its actions regarding the class member. Although the individual "may build on the discrimination established by the class," he or she must still point to vacancies or opportunities for advancement, and the employer still must have the opportunity to demonstrate that the class member was denied any such opportunities for lawful reasons.<sup>18</sup> Until that adjudication has occurred, liability to the class member has not been established.<sup>19</sup>

The EEOC tends to see Stage II as solely a remedial phase. Consequently, it has argued that in some cases, as "when discrimination has so percolated through an employment system that any attempt to reconstruct individual employment histories would drag the court into a 'quagmire of hypothetical judgments,'" courts should devise methods to take into account the individual circumstances of the claimants without requiring full-blown individualized hearings for each

---

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Dillon v. Coles*, 746 F.2d 998, 1004, 36 FEP Cases (3<sup>d</sup> Cir. 1984).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* See also *Lusardi v. Xerox Corp.*, 118 F.R.D. 351, 374-75, 48 FEP Cases 1058 (D.N.J. 1987) (extending *Coles* to an age discrimination non-Rule 23 "class action," and noting that the defendant "has the right to defend, and assert each of its defenses, at the liability stage of trial").

class member.<sup>20</sup> The EEOC believes that this can be done through the use of statistical models and class-wide formulas that provide for a claimant-specific distribution of monetary damages.<sup>21</sup>

### **C. Punitive Damages: Stage 1 or Stage 2?**

Similarly, the EEOC believes that punitive damages can be awarded on a class-wide basis. *EEOC v. Dial Corp.*, 259 F. Supp. 710, 712-13 (N.D. Ill. 2003) (allowing determination of an amount of punitive damages “for all the persons, as a group, who ultimately are found to be aggrieved by the pattern or practice” in liability stage of pattern or practice case), *but see EEOC v. Int'l Profit Assocs.*, 2007 U.S. Dist. LEXIS 78378 (N.D. Ill. Oct. 23, 2007) (rejecting *Dial*.) The EEOC has argued that once it has demonstrated “that an employer has engaged in a pattern or practice of discrimination and, in so doing, acted with a ‘reckless or callous indifference to the federally protected rights of others,’ [EEOC] has done all it needs to do to justify an award of punitive damages.”<sup>22</sup>

## **VI. Subpoenas: EEOC Has Broad Subpoena Power in the Administrative Process**

If a party to the charge fails to respond to an investigator’s request, the Commission has delegated to District Directors the authority to issue subpoenas.<sup>23</sup> District Directors, by issuing subpoenas, can require the testimony of witnesses and the production of documentary evidence.

Should the party involved refuse to comply with the EEOC’s subpoena, the United States district courts are authorized to issue an order requiring the production of evidence or the giving of testimony touching the matter under investigation, and to enforce such orders with punishment for contempt.<sup>24</sup> The United States Supreme Court has held that judicial enforcement of EEOC subpoenas is proper as long as a charge exists that meets the requirements outlined in the discrimination statutes and regulations.<sup>25</sup>

EEOC is more likely to issue subpoenas in large scale investigations. While the EEOC is entitled only to evidence that is relevant to the charge under investigation, that limitation on the EEOC’s investigative authority is not especially constraining. Courts continue to generously

---

<sup>20</sup> See Brief of the Equal Employment Opportunity Commission in Support of the Plaintiffs-Appellees, *Beck v. The Boeing Co.*, No.01-80241 (9<sup>th</sup> Cir. June 12, 2002), [www.eeoc.gov/briefs/beckvt.txt](http://www.eeoc.gov/briefs/beckvt.txt); *citing* *Segar v. Smith*, 738 F.2d 1249, 1291, 35 FEP Cases 1312 (1985) (D.C. Cir. 1984) (*quoting* *Pettway v. Am. Cast Iron Pipe Co.*, 494 F.2d 211, 260 (5<sup>th</sup> Cir. 1974)).

<sup>21</sup> *Id. citing* e.g., *Domingo v. New Eng. Fish Co.*, 727 F.2d 1429, 1444-45, 34 FEP Cases 584 (9<sup>th</sup> Cir. 1984).

<sup>22</sup> *Id.* (citation omitted).

<sup>23</sup> 29 C.F.R. § 1601.16.

<sup>24</sup> 29 U.S.C. §161(2).

<sup>25</sup> See *EEOC v. Shell Oil Co.*, 466 U.S. 54, 65, 34 FEP Cases 709 (1984).

construe the term “relevant” to afford the EEOC access to material that might cast light on the allegations against the employer, especially in the investigation of class-type claims. *EEOC v. United Parcel Service*, \_\_\_ F.3d \_\_\_ (2d Cir. 2009), quoting *EEOC v. Shell Oil Co.*, 466 U.S. 54, 68-69 (1984).

There are several reasons that a subpoena is undesirable from a respondent’s perspective and only one reason why a respondent might prefer a subpoena to a request for information. A subpoena is undesirable because it gives the respondent less discretion in providing information to the EEOC, indicates that the EEOC believes that the respondent does not willingly cooperate with EEOC investigator, and increases the risk that the EEOC’s investigation will become public through subpoena enforcement litigation. However, a respondent might desire a subpoena to obtain a court imposed protective order that would prevent the EEOC from disclosing the information. A respondent who wishes to preserve the confidentiality of its documents may wish to negotiate with EEOC that the documents be produced under subpoena, after a subpoena enforcement action. This would give the respondent and the EEOC a process through which they can stipulate to a protective order that would bar the EEOC from disclosing the evidence to third parties

In the more typical case, the respondent seeks to avoid a subpoena. There are at least two very sound reasons for this:

- **A subpoena is a symptom that the investigation is going poorly for the respondent**
- **A subpoena enforcement action can generate public attention**
- **A subpoena from EEOC damages the respondent’s reputation within the EEOC**

**PRESS RELEASE**

11-17-09

**[XXX] must Comply with Subpoena by EEOC and Disclose Databases on Workforce**

DENVER – A federal judge has ordered [XXX], a national company with oil and natural gas extraction rigs in 16 states and Canada, to disclose to the U.S. Equal Employment Opportunity Commission (EEOC) the structure and contents of any of the company’s electronic databases pertaining to its current and former employees, the EEOC announced today. In addition, the judge ordered that [XXX] disclose information about every one of the company’s employees and any records pertaining to complaints of employment discrimination for a two-year period.

The court order stems from an individual charge of discrimination filed with the EEOC alleging racial harassment and retaliation at one of [XXX’s] rigs. In the process of investigating the charge, the EEOC requested a description of [XXX’s] computer database systems in order to tailor future requests for information. In addition, the EEOC sought information concerning the identity of all of Patterson’s employees, including their name, race, position and last known contact information. When [XXX] refused to turn over the information, the EEOC issued a subpoena for it. When [XXX] refused to abide by the subpoena, the EEOC filed suit in the U.S. District Court for the District of Colorado to enforce the subpoena.

In ruling on the EEOC’s motion to enforce the subpoena, U.S. District Judge Philip A. Brimmer indicated that the Commission’s statutory authority to investigate charges of discrimination entitle it to obtain information regarding employees throughout the country, even when investigating an individual charge of discrimination. Contrary to [XXX’s] arguments, Judge Brimmer said that such information is relevant to an EEOC investigation and that Patterson failed to show that it would be unduly burdened by complying with the EEOC’s request.

“Judge Brimmer’s ruling recognizes that the right to investigate a charge of discrimination is not subordinate to the convenience of employers,” said EEOC Regional Attorney Mary Jo

O'Neill of the Phoenix District, which includes Colorado. "The EEOC takes its authority to issue subpoenas seriously and we will seek to enforce them in court when necessary. Employers will not be permitted to refuse to comply with EEOC investigators' lawful and relevant requests for information."

EEOC Phoenix Acting District Director Rayford Irvin added, "Congress endowed the EEOC with broad investigatory powers. Preventing the agency from obtaining relevant information in our investigations, absent a showing of undue hardship, would be a restriction on our mandate to root out and eliminate employment discrimination."

The EEOC enforces federal laws prohibiting employment discrimination. Further information about the EEOC is available on its web site at [www.eeoc.gov](http://www.eeoc.gov).

**PRESS RELEASE**

9-11-09

# U.S. MARSHALS ESCORT BUSINESS OWNER WHO IGNORED EEOC SUBPOENA TO APPEARANCE BEFORE FEDERAL JUDGE

## ***Court Had Issued Writ of Body Attachment for Principal of ShoreKare, LLC***

CHICAGO – The U.S. Equal Employment Opportunity Commission (EEOC) said today that United States Marshals had escorted the owner and registered agent of [ZZZ], a local health care provider, to an appearance before District Judge Amy St. Eve yesterday. The judge had issued a “writ of body attachment” for the businessman for failing to comply with EEOC administrative subpoenas and then not obeying a court order relating to those subpoenas. He was in the custody of the United States Marshals Service on Sept. 10, 2009. At a hearing yesterday afternoon, Judge St. Eve gave him until Sept. 24, 2009, to comply with the subpoenas or be at risk of being placed in custody again.

According to EEOC Chicago District Director John Rowe, the EEOC issued two administrative subpoenas to [ZZZ] after it failed to produce information and testimony the EEOC requested. Rowe said, “At this stage of the investigation, the EEOC is a neutral party with the sole purpose of obtaining information relating to a charge of discrimination. The information requested in the EEOC’s subpoenas is necessary for us to complete our investigation. [ZZZ] elected not to comply with our requests as well as our subpoenas. So we went into court, as provided by federal law, to pursue the matter.”

According John Hendrickson, regional attorney for the EEOC in Chicago, “Title VII of the Civil Rights Act of 1964 expressly provides the EEOC with the authority to issue subpoenas during its administrative investigations and to obtain court enforcement when necessary. The federal courts almost always summarily enforce EEOC subpoenas and require prompt production of the material sought. Employers who choose to defy federal court orders do so, as this case demonstrates, at their peril.”

In addition, Judge St. Eve previously ordered [ZZZ] to reimburse the EEOC for its costs for bringing this action.

The subpoena enforcement action was assigned to Federal District Court Judge Amy St. Eve of the Northern District of Illinois, and is captioned *EEOC v. [ZZZ], LLC*, N.D. Ill. No. 09 C 2790. The subpoena enforcement effort is headed by EEOC Supervisory Trial Attorney Diane Smason and Trial Attorney Aaron DeCamp.

The EEOC enforces federal laws prohibiting discrimination in employment. Further information about the Commission is available on its web site at [www.eeoc.gov](http://www.eeoc.gov).

The EEOC Chicago District Office is responsible for processing charges of discrimination, administrative enforcement, and the conduct of agency litigation in Illinois, Wisconsin, Minnesota, Iowa, and North and South Dakota, with Area Offices in Milwaukee and Minneapolis.