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Dealing With The EEOC In 2010: Strategies For Employers Targeted In Government Enforcement Litigation

By Gerald L. Maatman, Jr.

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ABOUT THE AUTHOR

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Mr. Maatman has a primary emphasis in his practice on defending corporations sued in EEOC pattern or practice lawsuits and employment-related class action lawsuits brought in federal and state courts throughout the United States. In 2009, he settled the largest EEOC pattern or practice lawsuit then pending in the United States. The lawsuit is one of the ten biggest settlements ever in litigation commenced by the EEOC. In addition, Mr. Maatman is now currently defending the largest EEOC pattern or practice gender discrimination lawsuit in the country.

Mr. Maatman is the editor of Seyfarth Shaw's Annual Workplace Class Action Report, a compendium of all class action and EEOC litigation rulings throughout the United States.

Among his various cases, Mr. Maatman successfully defended one of the largest age discrimination class actions ever brought in Illinois, as well as the first sexual harassment class action brought by a State Attorney General in the United States. He has also defended the governments of France, India, and Spain in lawsuits brought in U.S. courts over their employment of American workers.

Mr. Maatman is often consulted by major news organizations for his views on significant court rulings in employment cases. He has served as a legal commentator on the Public Broadcasting System and USA Talk Radio, and his comments have appeared in such publications as the *Wall Street Journal*, *The Economist*, *Business Insurance*, *USA Today*, *Fortune*, *HR Magazine*, *National Underwriter*, and *Forbes*. Mr. Maatman also writes and lectures extensively on employment discrimination and labor law topics. He has authored six books on employment law topics, and has spoken to employer groups throughout the United States, as well as in Asia, Europe, Canada, and Mexico. Based on international surveys of business executives and corporate counsel, *Euromoney* selected Mr. Maatman as one of the leading employment lawyers in the world in 1999 to 2009. In addition, *Corporate Counsel Magazine* selected him as one of the leading employment lawyers in the United States in the Who's Who Guide To Business Lawyers in 2004 to 2009. *Chambers* selected him as one of the leading class action defense lawyers in its 2006, 2007, 2008, and 2009 rankings of U.S. lawyers. Mr. Maatman is also a fellow of the College of Labor & Employment Lawyers.

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I. INTRODUCTION

A new era has dawned at the U.S. Equal Employment Opportunity Commission. With a renewed focus on the importance of its law enforcement functions, backed up with additional funding and an expanded staff of investigators and attorneys courtesy of the Obama Administration, the EEOC is a formable foe for any employer under investigation or sued by the U.S. Government.

This new era is manifested by the EEOC's recent Congressional appropriations request. "While . . . [the EEOC's past] focus has primarily been on individual cases of discrimination, the agency has stated its bipartisan desire to shift emphasis to combating systemic discrimination. A strong systemic program is crucial to battling unlawful patterns or practices of discrimination which have a broad impact on an industry, profession, company, or geographic location." The EEOC relied on this basic premise in its May 2009 submission to the U.S. Congress in seeking to justify its fiscal year 2010 budget request.

No statement could more clearly summarize the EEOC's commitment to its new focus on pursuing investigation and litigation of systemic discrimination. The EEOC has reorganized and refocused its investigation and enforcement philosophies, and set up a "national law firm model" to more effectively and aggressively pursue systemic discrimination allegations in 2010. The bottom line for Corporate America is that the stakes for employers have increased substantially in litigating against the EEOC.

This Whitepaper seeks to guide corporate counsel and HR professionals through the process and practical realities of the EEOC's systemic investigation and litigation initiative, as well as defending high stakes enforcement litigation brought by the U.S. Government. As a case study, the recent $19 million settlement in *EEOC v. Outback Steakhouse*, Case No. 06-CV-1935 (D. Colo.) - the largest EEOC settlement in 2009, and one of the ten biggest EEOC settlements of all time - is examined from a defense perspective.

A. Overview Of The EEOC And Its Investigation Process

Established in 1965, the EEOC is charged with administering and enforcing federal laws prohibiting discrimination in the workplace, including Title VII of the Civil Rights Act of 1964 ("Title VII"), the Equal Pay Act ("EPA"), the Pregnancy Discrimination Act ("PDA"), the Age Discrimination in Employment Act ("ADEA"), the Americans With Disabilities Act ("ADA"), and the newly enacted Genetic Information Non-Discrimination Act ("GINA"). Over the last decade, the EEOC has received 60,000 to 98,000 administrative charges per year alleging violations of federal anti-discrimination laws.

Upon receipt of a charge from an individual, the EEOC conducts an investigation seeking information and documents from the employer that pertain to the allegations of the charge. Barring a settlement, withdrawal of a charge, or an administrative cessation of an investigation, the EEOC is required to make a determination as to whether there is cause to believe a violation

of the law has occurred. If the EEOC makes a "no cause" determination, it issues a right to sue notice to the charging party and closes its investigation. If it makes a "cause" determination, then the EEOC is required to attempt to conciliate the matter, typically by trying to reach a three-party settlement between the charging party, the employer, and the EEOC. If conciliation fails, the EEOC may bring a lawsuit against the employer, but more often than not it takes no action and relies on the charging party's private right to sue to enforce the statute by seeking recovery from the employer in private litigation.

The EEOC also may decide on its own to issue a Commissioner's Charge asserting discrimination based on information learned during the investigation of an individual charge or information learned through other avenues, such as through EEO-1 reports. A Commissioner's Charge may form the basis for pursuing litigation against an employer just as with an individual's charge. Typically, a Commissioner's Charge is broader than an individual charge, and alleges either discrimination against several employees or systemic discrimination against certain protected category groups.

Because its resources are limited - both in terms of its budget, and the size of its investigatory and attorney staffs - the EEOC historically filed relatively few lawsuits. That era has changed. With the change-over in Administrations in January of 2009, the EEOC's agenda is much more activist, and focused primarily on "big impact" litigation.

B. History Of The Systemic Litigation Program

Systemic discrimination - according to the EEOC - is discrimination having a broad impact on an industry, profession, company, or geographic location arising out of a pattern or practice of discrimination, a policy with a discriminatory intent or effect, or discrimination against a class of individuals. Put more simply, systemic discrimination, in the view of the EEOC, is illegal behavior impacting two or more employees. Based on the notion that discriminators tend to treat members of a protected group in an adverse fashion (as opposed to treating just one person that way), the Commission believes that discrimination against one person often is a prelude to discrimination against others. The EEOC views a single charge as "smoke" that may reveal a smoldering "fire" involving systematic treatment of protected group employees in an illegal fashion.

In 2005, the then-chair of the EEOC established a Systemic Discrimination Task Force and charged it with examining the EEOC's investigation and litigation enforcement programs and recommending strategies for combating systemic discrimination. By March 2006, the Systemic Discrimination Task Force issued its report, making the case for systemic discrimination as a top priority at the EEOC and making recommendations for handling systemic cases. The following month, the EEOC approved a comprehensive program to shift its attention to the identification, investigation, and litigation of systemic discrimination cases (the "Systemic Initiative").

In a nutshell, the EEOC's Systemic Initiative seeks to harness, develop, and focus the EEOC's resources to successfully identify, investigate, and litigate cases of wide-spread discrimination. The EEOC called for enhanced coordination between headquarters and field offices, improved sharing of data, and establishment of a Committee of Advisors for Systemic Enforcement ("CASE"), an advisory group of senior enforcement and litigation staff created to assess the agency's overall effectiveness in combating systemic discrimination. Subsequently, on April 4, 2006, the EEOC issued eighteen directives for the Systemic Discrimination Initiative, including:

Systemic Plans – District Directors and Regional Attorneys of the EEOC are to prepare Systemic Plans identifying specific steps to identify and investigate systemic discrimination; district offices are encouraged to partner with offices and staff outside their districts.

Incentives – The EEOC headquarters office is to develop incentives to support the implementation of the Initiative, including making modifications to performance plans of District Directors and Regional Attorneys, and encouraging successful identification, investigation and litigation of systemic discrimination through development of systemic expertise among staff.

Staffing – The EEOC's Office of General Counsel is to facilitate staffing of systemic cases using a "national law firm model." To that end, systemic cases are to be staffed based on what is needed in the particular case regardless of where the case arose and the staff available in that office.

Information Technology – The EEOC's Office of Information Technology is tasked with ensuring that the agency's technology framework supports staff and different offices working together on systemic cases and broadening the ability of staff to share information and to access and review key data, such as EEO-1 data, and to link it to charge data.

Unified Expert Staff – Experts on the staff of the Office of Research, Information, and Planning used to support the development and identification of systemic charges.

Encouraging Development Of Systemic Charges – EEOC attorneys are expected to be involved in all phases of charge development, working closely with enforcement staff to develop and investigate systemic charges.

In a controversial move, the EEOC issued memoranda to its field offices authorizing "incentives" to EEOC investigators to investigate more systemic charges. This could be done through internal performance evaluations for investigators which encourages them to process more systemic cases. At the same time, the Task Force recommended that the EEOC's employee award and incentive pay programs be linked to the Systemic Initiative. Nothing

concrete has been made public regarding the forms of these incentives, but the intent of the Commission is made clear through these field memoranda.

In addition, the EEOC's headquarters also instructed district offices to focus on "local problem areas of discrimination" in certain industries or regions. To develop these targets, the EEOC recommended that district offices analyze employers or industries whose: (i) protected group populations appear to be employed consistently below their labor market availability; (ii) protected group populations are concentrated in lower-paying jobs or excluded from higher-paying jobs; (iii) employer selection techniques are expects to impact protected group populations adversely; and (iv) areas where charge volumes are lower than expected. This last "trouble area" presumes that low charge volume is based on the notion that certain industries are "closed" to protected group populations (*e.g.*, there are no claims of promotion discrimination because minority candidates are being unlawfully excluded at the application stage).

The EEOC's Systemic Initiative does not mean that the EEOC is preserving its enforcement dollars to go after large employers only. The EEOC often investigates smaller and mid-sized employers on the theory that their compliance programs are less sophisticated than industry leaders or that a lack of an HR department translates into more discrimination problems. In practice, the EEOC also views smaller and mid-sized employers as "low hanging fruit" for its litigation enforcement program, for such companies are at a disadvantage in defending litigation brought by the U.S. Government.

As a result of the Initiative, many of the high-level investigations started in 2006 mushroomed into the institution of EEOC pattern or practice lawsuits in 2007, 2008 and 2009. Indeed, by the end of fiscal year 2008 the number of systemic investigations had increased substantially and 38 Commissioners' Charges were under investigation, compared to only 15 Commissioners' Charges in investigation as of March 31, 2006.[1] In fiscal year 2008, the EEOC filed 111 class-type lawsuits. The EEOC estimates filing 300 new lawsuits in fiscal year 2010, and with the focus on systemic litigation, it is expected that the a large number of these newly filed cases will be class-type cases. Thus, employers are likely to face even more systemic charges and litigation in 2010.

C. Impact Of The Obama Administration's Policy Objectives

One of the first acts of President Obama after taking office was to sign the Lilly Ledbetter Fair Pay Act of 2009 ("LLFPA"). The LLFPA amended several discrimination statutes by specifying that the time period in which to file a charge with the EEOC begins anew with the issuance of each paycheck resulting from a discriminatory compensation decision, leaving open the potential that an employee (or groups of employees via a class action) can recover damages dating back to when they first commenced employment, regardless of whether the timeframe

[1] *See* Equal Employment Opportunity Commission FY 2010 Congressional Budget Justification, at 28.

spans months or decades. The EEOC expects that more charges will be filed as a result of this LLFPA. With the possibility of more charges alleging discriminatory pay, the EEOC has a greater opportunity to identify or otherwise develop claims of systemic pay discrimination.

The Americans With Disabilities Act Amendments Act of 2008 ("ADAAA"), effective January 1, 2009, broadened the scope of who is "disabled" under the law, and effectively eviscerated one of the primary and most effective defenses to disability discrimination claims, *i.e.*, that an employee does not have a legally protected disability under the statute. President Obama has been a stanch supporter of integrating disability policies into his proposed initiatives. The Obama Administration has an opportunity to shape this legislation through appointments and additional funding for the EEOC. Indeed, in seeking approval of a fiscal year 2010 budget of $367,303,000, an increase of $23,378,00 from fiscal year 2009, the EEOC anticipated a significant increase in the filing of ADA charges.

Under the Obama Administration, additional discrimination laws may become reality, and, with them, an increase in the number of charges being filed and potential systemic litigation. For instance, the Paycheck Fairness Act, which President Obama supported and co-sponsored while in the Senate, would expand liability under the EPA to allow for compensatory and punitive damages and would effectively gut the EPA's "factor other than sex" affirmative defense to claims of unfair pay. In addition, the Paycheck Fairness Act calls for the EEOC to pro-actively survey and audit employee compensation data to assess statutory violations. Thus, not only would the possibility of additional charges arise form the Paycheck Fairness Act, but also the EEOC will necessarily have to pro-actively review compensation data and will likely do so with an eye toward developing systemic charges and litigation.

The EEOC's proposed fiscal year 2010 budget sought $199,332,000 for private sector charge processing.[2] This is an increase of over $25 million from the fiscal year 2009 estimate of dollars for private sector charge processing. The proposed budget also sought an increase for private sector litigation enforcement. The EEOC informed Congress that: "we expect to have greater resources to carry out the Commission's Systemic Initiative. The Commission is staffing systemic cases using a national law firm model, drawing on the expertise of Commission attorneys in various district offices as needed. As we litigate more systemic discrimination cases, we will incur substantially greater costs, such as attorney and paraprofessional staff time, expert witness fees, and extensive deposition and travel costs."[3] Thus, the EEOC's proposed budget has been crafted with an eye toward the Obama Administration's policy objectives and

[2] *See* Equal Employment Opportunity Commission FY 2010 Congressional Budget Justification, at 12.

[3] Equal Employment Opportunity Commission FY 2010 Congressional Budget Justification, at 29.

the increased opportunity for systemic discrimination investigation and litigation that such objectives may bring.

Ultimately, Congress approved a $23 million budget increase for the EEOC's fiscal year 2010 budget. The money is earmarked for continuing to hire frontline staff, including attorneys, investigators, and experts. Clearly, the EEOC is gearing up for implementing its systemic litigation program in earnest.

II. STRATEGIES FOR DEALING WITH SYSTEMIC CHARGES AND INVESTIGATIONS

A. Overview Of Issues And Concerns In Dealing With Systemic Investigations

It is vital that an employer never underestimate the stakes at issue when a current or ex-employee files an administrative charge with the EEOC. Each charge poses the prospect of an expansion of exposure – a legal claim by one person transformed into an exposure stemming from a systemic allegation that the employer discriminates against many protected group employees. Indeed, an EEOC investigation is not limited to what is alleged in an administrative charge. The EEOC can pursue investigation of any discrimination uncovered or suspected during the investigation of an individual's charge, and will do so through requests for information, documents, and witness interviews. Thus, an EEOC charge presents a special risk; it should not be handled in an ill-prepared fashion or without sound legal counseling. Careful consideration of the theory of the charge, the marshalling of proof that the company handled the personnel decisions appropriately, responding to information requests, and aggressive but practical litigation stances vis-à-vis the EEOC are determinative of success or failure.

B. Strategies For Submission Of Position Statements To The EEOC

The best offense is often a good defense in responding to an EEOC charge. It is critical that careful attention be paid to the initial response to a charge, especially one making any sort of allegation of systemic discrimination. The crux of an initial response is the employer's position statement and accompanying documentary proof to support its legitimate business decisions.

A response to a charge constitutes an admission of fact and may be the first in a long series of responses that an employer makes to the allegations as the case proceeds, either at the administrative phase before the EEOC or into federal court after issuance of a right-to-sue letter. Accordingly, the response should be thoroughly vetted so that the company's position remains consistent if it has to further respond in litigation. Further, when responding to the charge, the response should be written with four audiences in mind: (1) the EEOC investigator; (ii) the plaintiff's lawyer; (iii) the judge in a future lawsuit; and (iv) the jury in a future lawsuit.

Conducting a thorough investigation of the allegations is a critical part of preparing a good position statement. Consideration should be given in the first instance to having an attorney conduct the investigation to preserve the ability to claim attorney-client privilege if need

be. During the investigation, the internal investigator should be sure to interview every person of management that may have information and to gather pertinent documents (including personnel files, personnel policies, etc.). The position statement should be complete, but succinct, and persuasively explain the company's legal position regarding the allegations. It should further preserve the right to produce additional evidence, be submitted under Federal Rule of Evidence 408 (Compromise and Offers to Compromise), use the caveat that it does not reflect all affirmative defenses, and include a statement that it does not concede the timeliness of any or part of the charge. The position statement should also contain an answer responding to each line of the charge, either by admitting or denying each allegation.

If the charge contains systemic allegations from the start or appears that it may be the basis for a systemic allegation, the company should consider pro-actively assessing potential systemic issues internally. If such an internal assessment is to be done, it should be done in consultation with and under the direction of an attorney in order so that the company has the opportunity to protect its assessment under the attorney-client privilege and/or work product doctrine if need be.

When the EEOC issues informal document requests and information requests with the charge, the company should respond to each one individually with any objections and substantive responses that are appropriate under the circumstances. Picking ones battles is important in responding to such informal requests – refusing to provide information which does not appear to jeopardize the company's position but is a refusal for the sake of refusal or lack of effort may lead to closer scrutiny by the investigator, further information requests, and, possibly, an enforcement subpoena.

A more detailed guide to preparing a position statement is set out at Appendix A to this Whitepaper.

C. Strategies For Handling The EEOC's Information And Document Requests

In the past year, the EEOC has begun serving enhanced information and document requests on employers. The EEOC's requests for data and documents are often nationwide in scope.

Dealing with the EEOC's information and document requests necessitates pro-active planning and often a nuanced defense strategy. The goal is multi-faceted: (i) to satisfy the EEOC's investigatory focus; (ii) to narrow the EEOC's investigation; and (iii) to position the company with a basis to resist a subsequent EEOC subpoena.

There are a range of possible objections to expansive EEOC information and document requests. They include the following:

1. The company objects to the information request to the extent that it seeks attorney work product and/or trial preparation materials; communications to or from and materials

prepared by counsel in anticipation of litigation; information covered by the self-critical analysis privilege; or communications protected by the attorney-client privilege or any other applicable privilege.

2. The company also objects to the information request to the extent that it purports to require the company to produce or create electronically stored information in any medium or format other than that in which it is maintained in the normal course of business, and therefore is unduly burdensome and purports to require discovery beyond that permitted by any applicable statute.

3. The company also objects to the information request to the extent that it purports to require production and indexing of extensive electronically stored information, the collection and production of which would seriously disrupt the company's normal business operations and cause significant monetary expense to the company that would outweigh the probative value of such information.

4. The company also objects to the information request on the grounds that it seeks information and/or documents that are not relevant to the Charge under investigation or any aspect of any Charging Party's current or former employment with the company, and therefore is not reasonably calculated to lead to the discovery of admissible evidence in any proceeding related thereto the allegations in the Charge filed with the Commission.

5. The company also objects to the information request on the grounds that the Charging Party is not similarly-situated to other employees, does not raise similar claims of discrimination related to the information request, does not challenge similar employment decisions, and does not share anything in common beyond the fact that they work or have worked for the Company in some capacity at some point in time, and the Charge therefore cannot be used for the purposes of seeking company-wide discovery.

6. The company also objects to the information request to the extent that it seeks information concerning employment policies, practices, or decisions other than those at issue in the Charge, and therefore is not reasonably calculated to lead to the discovery of admissible evidence (e.g., where the Charging Party alleges discrimination in his or her termination, but the EEOC seeks data as to hiring).

7. The company also objects to the information request to the extent that it is not properly limited in time and seek documents beyond any statute of limitations applicable to the Charge, and therefore is not reasonably calculated to lead to the discovery of admissible evidence.

8. The company also objects to the information request to the extent that it is not limited geographically and purports to seek information about "employees working throughout the United States," and therefore is overly broad and unduly burdensome.

9. The company also objects to the information request to the extent that it does not identify the information or documents to be produced with reasonable particularity or is vague or ambiguous. The company reserves the right to amend or supplement this response in the event that the EEOC clarifies the materials sought or later asserts a different interpretation than the company's understanding of any paragraph of the information request.

10. The company also objects to the information request to the extent that it calls for information or documents not within its possession, custody, or control, as well as documents in possession of other affiliated corporate entities not subject to the company's control.

11. The company also objects to the information request to the extent that it seeks highly confidential, proprietary, sensitive or personal identifying information, including information protected by applicable law, about the company, its facilities, processes, or operations, its clients and customers, its parent corporation, subsidiaries and/or affiliates, or any of their current or former directors, officers, and/or employees, other than the Charging Party himself/herself or the facilities or operations in which the Charging Party works (or worked).

After assertion of a range of objections, it behooves the employer's interests to attempt to work cooperatively with the EEOC to narrow the scope of the information request so that the parties can mutually agree on an approach that will be appropriately responsive to the EEOC's specific investigative needs and reasonably protect the company's legitimate concerns.

D. Litigation Over EEOC Subpoenas

To accomplish its stated goal of investigating and eliminating workplace discrimination, the EEOC has a number of fact-finding tools at its disposal as described above. One of the most aggressive tools – used primarily in the face of employer resistance – is the EEOC's subpoena power. The EEOC can serve subpoenas on employers to acquire documents, data, and in some cases even sworn testimony, if it feels such information is relevant to its investigation. The EEOC is not required under applicable law to demonstrate probable cause. In many instances, the purpose of the EEOC's investigation is to determine whether probable cause does in fact exist of an employer's alleged discriminatory practices.

The EEOC's subpoena power, however, is not unlimited. Employers can challenge EEOC subpoenas by filing a Petition to Revoke or Modify the Subpoena with the Commission itself. The time period to make such a challenge is exceedingly short – just five days after receipt of the subpoena. If the employer's Petition is rejected (and it typically is), the EEOC can then seek to enforce the subpoena in federal district court. Some federal courts have held that failure to respond within that five day time frame amounts to a waiver of arguments which could have been made in opposition to the subpoena. The EEOC's guidelines do not give District Offices the discretion to grant extensions for filing a Petition to Revoke or Modify. Thus, upon receipt of an EEOC subpoena, it is imperative that employers act quickly to assess any objectionable features of an EEOC subpoena and respond as may be necessary within the five-day time frame.

Over the past year, the EEOC has been issuing an increasing number of subpoenas seeking nationwide employment data and information, even when investigating claims involving a single charging party. Thus, in addition to making timely objections, an employer must assess whether and what objections to make. One of the arguments employers have traditionally made to challenge subpoenas is that the EEOC seeks information beyond what is relevant to the charge it is investigating, and several cases from a variety of jurisdictions have limited the scope of an EEOC subpoena on this basis. The viability of this objection, however, is being eroded. A recent case from the U.S. Court of Appeals for the Second Circuit - entitled *EEOC v. UPS, Inc.*, No. 08-5348, 2009 U.S. App. LEXIS 25395 (2d Cir. Nov. 19, 2009) - enforced an EEOC subpoena seeking nationwide data about a religious accommodation practice, including nationwide hiring and firing data, all arising out of a seemingly isolated individual religious accommodation case. The Second Circuit noted that the EEOC is entitled to "any evidence of any person being investigated . . . that related to unlawful employment practices covered by [Title VII] and is relevant to the charge under investigation . . . ." *Id.* at * 22.

Employers facing overbroad EEOC have several options in terms of a range of objections, including:

1. That subpoenas with a nationwide request for documentation – to the extent they have little to nothing to do with the charging party's allegations of discrimination – are improper. To underscore this argument, the defense should emphasize the individual facts and circumstances of the charging party's allegations of discrimination (similar to the arguments made in defense of commonality, typicality, and adequacy of representation under Rule 23(a) in a class action context) that form the basis of the underlying investigation.

2. That the EEOC's request for data and information in its subpoena is burdensome to produce, and the probative value of the information is outweighed by the burden and cost to the employer by producing such information.

3. That to the extent the EEOC's request for data and information in its subpoena pertains to a myriad of other employees and ex-employees, the subpoena raises significant privacy concerns with respect to individuals other than the charging party.

4. That the EEOC's subpoena – insofar as it requests nationwide data – is an abuse of process and therefore unenforceable.

An employer's strategy must walk a fine line between producing information and data which may be relevant to the individual charging party and objecting to producing information and data which it asserts to be both burdensome and irrelevant. To the extent an objection is asserted due to burdensomeness, it should be backed up with specific facts (*e.g.*, the number of personnel and hours required to search for an review the information requested in the EEOC's subpoena). The goal of the strategy is to position the employer to ward off and defend against any future EEOC subpoena enforcement action filed in a federal district court.

Case law authority is rather sparse, but there are favorable precedents on which employers may rely. One argument in support of this strategy is to limit production of data and information to the facility where the charging party worked. A good case on that point is *EEOC v. Dolegencorp.*, 2008 U.S. Dist. LEXIS 31281 (N.D. Ill. April 15, 2008), where an applicant disclosed her prior felony conviction upon applying for a position with Dollar General. The company had extended her a provisional offer of employment, but terminated her two days later due to her criminal record. The applicant filed a race discrimination charge with the EEOC. The EEOC issued a subpoena requiring Dollar General to reveal the number of applicants given contingent employment offers between 2004 and 2007 (broken down by position and race), and the number of applicants whose contingent employment offers were revoked after criminal background checks (also broken down by position and race). Dollar General filed a petition to revoke the subpoena, which the EEOC denied. Dollar General then declined to comply with the subpoena, and the EEOC petitioned the Court to enforce it. A Magistrate Judge reviewed the EEOC's petition, and upheld the subpoena but restricted its scope to the division in which the applicant sought work. Dollar General subsequently filed Rule 72 objections to the order. Dollar General advanced two arguments. First, Dollar General claimed that the subpoena should not stand because the EEOC is only empowered to investigate "valid" charges. The Court held, however, that the charge was valid because the applicant used the EEOC's standard form, signed it under penalty of perjury, and described the allegedly discriminatory conduct and its basis. *Id.* at *7. Second, Dollar General argued that the subpoena was invalid because the EEOC sought evidence that the employer discriminated on the basis of a criminal record, a category unprotected by Title VII. The Court noted that the applicant claimed race discrimination; specifically, she alleged that Dollar General disproportionately terminated workers of one race based on their criminal records. The Court also held that the EEOC's investigative powers are restricted to "subpoenaed information that 'might throw light upon' the issues in the charge," meaning that the EEOC must have a "realistic expectation" of uncovering relevant information. *Id.* at *8. The Court found that the EEOC's subpoena was within its proper scope because it could lead to data suggesting that Dollar General fired black employees with criminal records more frequently than it fired similarly-situated white employees. The Court opined that such would be evidence of disparate treatment. The Court upheld the Magistrate Judge's order, granting the EEOC's motion to enforce its subpoena but limiting it to the division at issue because neither party objected to that restriction.

Another argument is that the EEOC's request for nationwide data is tantamount to a fishing expedition. Case law supports the general notion that the EEOC's authority to request information and records is restricted to evidence that is relevant to the charges under investigation only. *EEOC v. United Air Lines*, 287 F.3d 643, 645 (7th Cir. 2000). This limitation on the EEOC's power gives effect to Congress' desire to prevent the Commission "from exercising unconstrained investigatory authority." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 65 (1984); *EEOC v. Dolgencorp*, 2008 U.S. Dist. LEXIS 31281, at *4 (N.D. Ill. Apr. 15, 2008) (restricting EEOC subpoena to the local division where complainant was hired); *EEOC v. Southern Farm Bureau Casualty Ins. Co.*, 271 F.3d 209, 211 (5th Cir. 2001) (denying enforcement of EEOC administrative subpoena where the EEOC sought to expand its

investigation into matters outside the scope of the underlying charge); *EEOC v. Ford Motor Credit Co.*, 26 F.3d 44, 47 (6th Cir. 1994) (affirming modification of an EEOC subpoena and rejecting the EEOC's position that it is entitled to any material which it deems relevant in its discretion); *EEOC v. Central Steel & Wire Co.*, 1981 WL 342, at *3 (N.D. Ill. Aug. 10, 1981) (denying enforcement of subpoena on grounds that requests were not relevant to charge under investigation).

There is also an "abuse of process" argument to limit EEOC subpoenas, although it applies in narrow circumstances. The most recent case law precedent on this is *EEOC v. Bashas*, 2009 WL 3241763 (D. Ariz. Sept. 30, 2009), and *EEOC v. Bashas*, 2009 WL 1783437 (D. Ariz. June 18, 2009). These two cases involved a challenge by an employer to an EEOC subpoena on the grounds that the Commission issued the subpoena for ulterior purposes, including to harass the employer, and to assist a union and a plaintiffs' law firm that were parties to a class action against the employer. The two decisions explore the very narrow circumstances in which an employer can request discovery from the EEOC in terms of the reasons for the issuance of the subpoena, and whether the subpoena is an abuse of process. The case law shows that this argument is viable, but is applicable in very narrow circumstances.

It is also worth noting that, during the pendency of an EEOC investigation, the fact that a charge has been filed is not made public. However, if the EEOC goes to federal court to enforce an subpoena, the fact that a charge was filed will then be a matter of public record even though it is only in the investigatory stage. Thus, in responding to an EEOC subpoena, the company's sensitivity to public knowledge of the pending charge may be a consideration.

E. Key Aspects Of Litigating Commissioner's Charges

Title VII gives an EEOC Commissioner the authority to file a charge on his or her own initiative when there is reason to believe that an employer has engaged in a "pattern or practice" of employment discrimination. *See* 42 U.S.C. § 2000e-5(b) and 6(e). A Commissioner's charge must be in writing, under oath, and contain a "clear and concise statement of facts, including pertinent dates, constituting the alleged unlawful employment practices." *See* 29 C.F.R. § 1601.12(a)(3); 42 U.S.C. § 2000e-5(b). In a pattern or practice case, the Supreme Court has held that that the Commissioner's charge should: (1) identify the groups of individuals the Commissioner believes were discriminated against; (2) the categories of employment positions from which they were excluded; (3) the manner in which the discrimination took place; and (4) the period or periods of time in which the discrimination took place. *EEOC v. Shell Oil Co.*, 466 U.S. 54 (1984). The Supreme Court further stated that a Commissioner's charge need not be as detailed as a complaint initiating a lawsuit, and that the Commissioner need not provide more specific data because it might impair the EEOC's ability to investigate the charge. *Id.* at 68-71.

The EEOC has broad latitude to use ordinary discovery tools to investigate Commissioner charges, including subpoena power, informal investigations, and depositions. Thus, in responding to a Commissioner's charge, the same precautions and suggestions identified

above with respect to private charges apply as well. However, if a Commissioner's charge is issued, one can expect that the EEOC will give it greater attention, thereby increasing the risk to the employer that it will face a cause finding and systemic litigation by the EEOC. Accordingly, employer's should handle Commissioner's charges with the utmost care and attention.

III. DEFENSE OF EEOC PATTERN OR PRACTICE LAWSUITS

The EEOC has two vehicles through which it may bring claims on behalf of classes of employees: (1) representative actions under § 706 of Title VII; and (2) pattern or practice cases under § 707 of Title VII. In a representative action, the EEOC pursues violations uncovered during investigation into charging party's charge, and the EEOC files the lawsuit on behalf of an individual or class of individuals. However, the EEOC does not have to satisfy Rule 23 requirements of a class action because it is not acting as representative of class, but rather, is suing in its own name to redress a discriminatory practice. Pattern or practice cases are filed on the EEOC's own initiative and are based on a Commissioner's charge or an individual's charge where there is a reasonable nexus between the allegations contained in the lawsuit and the individual's charge.

A. Overview Of Pattern Or Practice Lawsuits

As originally enacted, Title VII provided that the Attorney General may file a civil action against "any person or group of persons [who] is engaged in a pattern or practice of [discrimination]…." 42 U.S.C. § 2000e-6(a). In 1972, Congress amended Title VII to empower the EEOC "authority to investigate and act on a charge or pattern of discrimination, whether filed by or on behalf of a person claiming to be aggrieved…." *Id.* at § 2000e-6(e). Unlike private plaintiffs, the EEOC is not bound by Rule 23 of the Federal Rules of Civil Procedure when bringing a class action based on a pattern or practice of discrimination. *General Telephone Co. v. EEOC*, 446 U.S. 318 (1980). Likewise, so long as one employee has filed an administrative charge of discrimination, the EEOC may pursue relief on behalf of other similarly-situated workers. *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975).

The standard that the EEOC must follow when a bringing pattern or practice class action is set forth in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). The Supreme Court described a pattern or practice of discrimination as "more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts." *Id.* at 336. The Supreme Court further explained that "the 'pattern or practice' language in…Title VII…was not intended as a term of art, and [that] the words reflect only their usual meaning." *Id.* In order to prove such a pattern or practice of discrimination, the Supreme Court has identified a burden-shifting framework encompassing two phases of litigation: a liability phase and a remedial phase.

1. Liability Phase

In the liability phase of a pattern or practice case, the EEOC has the initial burden of establishing a prima facie case by showing, by a preponderance of the evidence, that

discrimination was the employer's standard operating procedure, that is, the regular rather than the unusual practice. If the EEOC sets forth a prima facie case, "[t]he burden then shifts to the employer to defeat the prima facie showing…by demonstrating that the…[EEOC's] proof is either inaccurate or insignificant." *Teamsters*, 432 U.S. at 360. If an employer fails to rebut the inference created by the prima facie case, the court will likely conclude that a violation occurred and then move on to the remedial phase. *Id.* at 361.

The Supreme Court in *Teamsters* acknowledged the importance of showing statistics and specific instances of discrimination when putting forth a prima facie case of pattern or practice discrimination. *Id.* at 338. The Supreme Court stated that "'[s]tatistical analyses have served and will continue to serve an important role' in cases in which the existence of discrimination is a disputed issue." *Id.* at 339. As a result, pattern or practice discrimination is generally proved through a combination of statistical evidence and specific instances of discrimination. The Supreme Court added that statistics may often be the only "avenue of proof" to uncover "covert discrimination by the employer." *Id*. at 340.

While the EEOC typically must show statistical analysis and specific instances of discrimination when establishing a prima facie case, it does not need to demonstrate which individuals, if any, have been victims of discrimination. *Id*. at 360. During the liability phase of pattern or practice litigation, "the focus often will not be on individual hiring decisions, but on a pattern or practice of discriminatory decision-making." *Id.* In other words, the EEOC need only prove that a discriminatory policy existed, not that the individuals "for whom it will ultimately seek relief [were]…victim[s] of the employer's discriminatory policy." *Id.*

To defeat the prima facie showing by demonstrating that the EEOC's proof is either inaccurate or insignificant, the employer must do more than make "general statements that it hired only the best qualified applicants." *Id.* at 343. "[A]ffirmations of good faith in making individual selections are insufficient to dispel a prima facie case of systematic exclusion." *Id.* at 343. One way an employer might successfully rebut a prima facie case is to show "that during the period it is alleged to have pursued a discriminatory policy[,] it made too few employment decisions to justify the inference that it had engaged in a regular practice of discrimination." *Id.* at 360. If the employer fails to meet its burden in the liability phase, the court may award prospective relief without any further evidence from the EEOC. *Id.* at 361. This relief may include an injunction against continuing the discriminatory policy or "any other order 'necessary to ensure the full enjoyment of the rights' protected by Title VII." *Id.*

2. Remedial Phase

When the EEOC seeks individual relief in addition to prospective relief, a court typically conducts a remedial phase of the litigation to determine the scope of individual relief. Because the court has already found liability based on the existence of a pattern or practice of discrimination, it infers that "individual hiring decisions were made in pursuit of the discriminatory policy." *Teamsters*, 431 U.S. at 359. Therefore, the EEOC "need only show that

an [] individual [allegedly discriminated against] [] unsuccessfully applied for a job and therefore was a potential victim of the proved discrimination." *Id.* at 362. Once this showing is made, the burden shifts to the employer to "demonstrate that the individual applicant was denied an employment opportunity for lawful reasons." *Id.* If the employer provides a legitimate, non-discriminatory reason for the denial of employment, the EEOC will have an opportunity to demonstrate that the proffered reason is merely pretext for discrimination. *Id.*

Courts must consider several factors when determining the scope of individual relief (including the number of identifiable victims, extent of necessary relief, number of non-victim employees, viable alternatives, and economic circumstances). The court must first examine the evidence presented by both sides and determine which individuals were victims of the discriminatory policy. *Teamsters*, 431 U.S. at 371. After identifying the victims, the court must attempt to place those victims in the positions in which they would have been had there been no discrimination. *Id.* In recreating conditions for these victims, the court must balance interests within the class and must also weigh the interests of class members against the interests of other employees of the company who have not been discriminated against but are also innocent of any wrongdoing. *Id.* The court can fashion the appropriate remedies only after examining these competing interests, as well as considering general principles of practicality and fairness. *Id.* at 375.

B. Strategies For Confronting And Defeating EEOC Pattern Or Practice Lawsuits

Defense of pattern or practice lawsuits is especially challenging.

The cases tend to be statistically-intensive, and difficult to win on summary judgment.

One of the most important aspects of the case is in establishing leverage. The EEOC is apt to bring a motion for bifurcation – based on the *Teamsters* model – with a request that the Court include the issue of liability for punitive damages in the Stage I part of the proceeding. This creates a difficult situation for an employer, and motions to bifurcate should be aggressively resisted. Fortunately, employers have a range of statutory, constitutional, and practical arguments to oppose motions for bifurcation, and employers have been successful in beating the EEOC's tactics. *See, e.g., EEOC v. McCormick & Schmick's*, 2008 U.S. Dist. LEXIS 112283 (D. Md. Nov. 4, 2008).

If there is any question as to the timeliness of the EEOC's institution of the lawsuit (after receiving an administrative charge of discrimination), employers can assert the defense of laches. Courts have recognized that employers are entitled to summary judgment if the EEOC's unreasonable delay in filing the lawsuit has prejudiced the employer's ability to defend the case on the merits. *See, e.g., EEOC v. Martin Processing, Inc.*, 533 F.Supp. 227, 230 (W.D. Va. 1982) (finding EEOC's delay of four years, five months from filing of charge to filing of lawsuit to be "inexcusable and unreasonable"); *EEOC v. Liberty Loan Corp.*, 54 F.2d 853, 857 (8th Cir. 1978) (EEOC's four year, four month delay inordinately long).

Another angle of attack which often bears fruit for employers is to fracture and/or confine the class of allegedly injured individuals on whose behalf the EEOC has brought suit. This can be done by limitations for the time period of the class, limitations on the geographic region, and limitations on the types of employees who were part of the EEOC's underlying investigation.

Finally, defense experts are crucial to success in defending EEOC pattern or practice lawsuits. An employer should retain experts in the field of statistics and labor economics to assist in opposing the EEOC's *prima facie* case under the *Teamsters* model.

IV. NEGOTIATING WITH THE EEOC AND SETTLING EEOC LITIGATION

Successful negotiation with the EEOC can be a difficult process. Using the consent decree in *EEOC v. Outback Steakhouse, Inc.*, 2009 U.S. Dist. LEXIS 125090 (D. Colo. Dec. 29, 2009), as an illustrative template, this section of this Whitepaper discusses the strategies for negotiation of EEOC consent decrees.

Good settlements typically result from hard lawyering. The EEOC is generally motivated to cut a good deal when it faces danger in the courtroom in terms of adverse court rulings impacting the size of its case or the scope of its recoveries. A competent, vigorous, and principled defense – with targeted motions based on surgical strategies – is normally the best manner in which to drive a good settlement result for an employer.

A. Understanding The Difference Between Litigating Against The EEOC As Compared To Private Plaintiffs' Attorneys

Private plaintiffs' attorneys represent the specific individual plaintiffs in a particular case and are duty-bound to zealously advocate for them and act in their best interests alone. On the other hand, the EEOC acts to vindicate not only the rights of individuals in a particular discrimination case, but also to protect the public as a whole from unlawful discrimination. Indeed, the Supreme Court has concluded that when the EEOC litigates on behalf of individuals, its claim is not "merely derivative" of the claims of those individuals, and that it does not stand in the shoes of the individuals. *See EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *General Tel. Co. v. EEOC*, 446 U.S. 318 (1980). Thus, the EEOC's interest in litigating, and, hence, in settling, systemic litigation is geared toward seeking relief and protection for specific individuals *and* the public as a whole. This makes settling litigation with the EEOC a very different process than with private plaintiffs' counsel.

B. Understanding The EEOC's Goals And Process In Settling Pattern Or Practice Lawsuits

The EEOC settles lawsuits through entry of consent decrees, which mean the settlement terms will be placed in the public record. The EEOC will not agree to a confidential settlements and will not be a party to general releases with claimants. In most cases in which a pattern or practice case is settled, at a minimum, the EEOC will require the employer to: (i) post a notice

for employees identifying the terms of the consent decree; (ii) to keep records and make reports to the EEOC; (iii) to provide training to managers and/or employees; and (iv) to pay compensation to alleged victims. Once the lawsuit is resolved, and the court has approved the consent decree, the EEOC will, without fail, issue a press release regarding the case and the consent decree.

The EEOC follows a general template in negotiating consent decrees. An analysis of the provisions in leading EEOC consent decrees is attached at Appendix II. The typical range of items included within an EEOC consent decree include provisions for payments for allegedly injured individuals; a requirement that the employer pay the cost of the settlement administrator for distribution of the class funds; an injunction to refrain from discrimination and retaliation; the posting of a notice with respect to the attributes of the consent decree in a conspicuous location in the company's facilities; the obligation to keep records relative to the employer's obligations under the consent decree, including records relative to promotions, hiring, terminations, and internal discrimination complaints; the use of either an internal monitor or outside monitor in terms of the company's adherence to its obligations under the consent decree; specific EEO training for various classifications of managers (and sometimes employees); and changes to policies and procedures designed to minimize the incidents of discrimination, and to enable the company to respond promptly and appropriately to internal complaints of violations of its personnel policy prohibiting discrimination.

In terms of the length of an EEOC consent decree, the EEOC typically has an opening settlement proposal of five years to six years. Depending on the types of issues in the litigation, employers can often negotiate consent decrees lasting two years to three years, and sometimes "end early" provisions for "good behavior" in terms of compliance with the obligations of the consent decree.

Conversely, there are many items which are typically found in private plaintiff class action settlements that the EEOC will refuse as a matter of policy in terms of negotiating an EEOC consent decree. These items include: (i) an agreement that the charging party will refrain from ever applying for work again with the employer; (ii) that settlement terms be kept confidential; (iii) agreed upon media statements upon the settlement of an EEOC pattern or practice lawsuit; and (iv) a refusal to allow releases for charging parties or class members to waive state law and other claims beyond Title VII. These items can be addressed with "work around" solutions, and the only limit to these solutions is the creativity and negotiating tactics of defense counsel. For example, depending upon timing and leverage considerations, the EEOC has agreed in certain situations to a preview of its press release and/or including only "positive" statements in its press release posting on its website.

The EEOC will also fight aggressively against employers that attempt to "buy off" charging parties and class members without the participation of the EEOC in settlement discussions. Although the case law is mixed, the general trend of the courts is to preclude defense counsel from attempting to settle claims unilaterally with charging parties and class

members who are within the parameters of the EEOC's pattern or practice lawsuit. Therefore, "back door" attempts to settle portions of the litigation without the EEOC are generally unsuccessful.

Finally, the EEOC attorneys litigating the pattern or practice lawsuit typically do not have ultimate authority to resolve the litigation. When settling an EEOC pattern or practice lawsuit, an employer is ultimately settling the lawsuit with a decision-maker at the EEOC's headquarters office. This can impact the employer's maneuverability in the settlement negotiations.

C. Strategies For Successfully Settling EEOC Pattern Or Practice Lawsuits

The consent decree approved by the Court on December 29, 2010, in *EEOC v. Outback Steakhouse, Inc.*, is a case study in the types of issues and problems posed by government enforcement lawsuits. The settlement negotiations in *EEOC v. Outback Steakhouse* – much of which involved complex statistical modeling of HRIS data over a 15-year time period – were conducted "across-the-table" against the government attorneys who lead the EEOC's systemic litigation program. In *EEOC v. Outback Steakhouse*, the government pursued claims on behalf of over 175,000 current and ex-employees within a decade-long class period; and the case ultimately settled for reduced multiples of the damages figures pressed by the EEOC.

One of the most interesting aspects of the settlement focused on a novel strategy utilized to counter the EEOC's exceedingly aggressive tactics in its negotiations. After President Obama signed the Lilly Ledbetter Fair Pay Act ("LLFPA") on January 29, 2009, the company faced the prospect that a settlement of the EEOC's claims could never extinguish potential liability under the LLFPA for pay checks issued to class members after the settlement. To solve that problem, the defense crafted a first-of-its-kind "free-rider pass" from the EEOC for the term of the consent decree (for 4 years) whereby the EEOC agreed not to sue over future pay and promotion claims under LLFPA. When faced with this, the EEOC ultimately agreed not to sue over future claims under the LLFPA (as opposed to its typical agreement to release past claims before the settlement date) to secure the settlement. Defense counsel subsequently secured the Court's approval of this device. To our knowledge, this is the first time the EEOC has ever agreed to a "free-rider pass" in settling any government enforcement lawsuit.

As EEOC pattern or practice litigation is expected to focus on pay and promotion issues in the future, the LLFPA issue will increase in importance, as will settlement devices to account for future causes of action which may be brought under that statute against employers participating in settlements of pay and promotion claims.

V. CONCLUSION

The EEOC has scheduled its first full program evaluation of the Systemic Initiative to begin in fiscal year 2012 and to be completed by fiscal year 2013. Its aggressive development and pursuit of systemic discrimination charges and litigation cannot be expected to slow down anytime soon, but rather, can be expected to increase in 2010 and beyond. The costs and

potential liability related to an EEOC systemic discrimination charge and lawsuit cannot be understated. Accordingly, corporate counsel and Human Resources professionals should tread carefully when faced with an actual or potential systemic action by the EEOC, giving consideration to the points raise din this paper.

APPENDIX I

Preparing Effective Position Statements For Submission To The EEOC

PREPARING AN EFFECTIVE POSITION STATEMENT FOR SUBMISSION TO THE EEOC

Position statements serve as an official declaration of an employer's legal position concerning the allegations brought against them before the government agency investigating the complaint. Generally, position statements are approximately 6 to 8 pages in length. Preparation of the position statement is critical to an employer's defense. Extreme care must be taken in drafting the position statement, as the document constitutes an admission which a plaintiff or the EEOC can use against the employer in subsequent litigation. Once the reasons for a personnel decision are set forth in a position statement, the employer may be "locked in" to that version of the facts.

An effective position statement contains several components.

BODY OF POSITION STATEMENT

The introductory section consists of a basic denial of the allegations made by claimant, followed by statements that protect the employer's position should the charge turn into a lawsuit. This section of the position statement is by and large a boilerplate paragraph, but is often modified to reflect the type of complaint made and the agency reviewing the position statement.

In the first sentence or two, it is useful to summarize concisely the basic allegations made by claimant. The company should then deny, vigorously where appropriate, all allegations made by the claimant, stating that they are without merit and ought to be dismissed by the agency. Furthermore, the company should reserve the employer's right to produce additional evidence of any facts subsequently discovered, and should state that the company may produce additional documentation at a later date. The company should also assert that the position statement in no way reflects all of the possible affirmative defenses that may be available to the company in response to this charge, or in any subsequent litigation. The company should note as well that submission of the position statement does not negate its position that portions of the complaint are time-barred because the applicable statute of limitations may have expired. Finally, the company should state that its correspondence is submitted under Rule 408 for purposes of conciliation and settlement only, and that everything contained in it is privileged and confidential.

In sum, this section should include the following:

- Summary of allegations made by the claimant;
- Vigorous denial of allegations;
- Reservation of the right to produce additional evidence upon discovery at a later date;
- A caveat that position statement does not reflect all possible affirmative defenses that may be available;

- A caveat that the position statement does not concede the company's position that portions of complaint are time-barred because of the expiration of the statute of limitations; and,
- A caveat that the company's correspondence is submitted pursuant to Rule 408 for purposes of conciliation and settlement only, and everything contained within it is privileged and confidential.

BUSINESS OF THE RESPONDENT

This section serves the function of providing the agency with a description of the company's business. It should state the ownership and business of the company, and the address of the location where the alleged incident(s) occurred. This section is generally only several sentences in length.

This section should include the following:

- Brief description and location of the business; and,
- Address of the site where alleged conduct took place.

CLAIMANT'S EMPLOYMENT WITH RESPONDENT

This is the "facts" section that serves to summarize the claimant's employment history with the employer. While preparing this section, the company may find it helpful to keep the question, "What happened?" in the forefront of the position statement. The company should not make explicit arguments in this section; rather, it should present the facts in a logical manner that is most helpful to its position.

Start this section by noting when the claimant's employment began, whether there was an orientation training session that the claimant attended, and whether the employee was given an employee handbook or any handouts that included the company's key personnel policies, such as a non-discrimination policy and complaint reporting and/or internal complaint procedure. Include descriptions of the type of work done by the employee, as well as his/her usual shift and work responsibilities.

Next, describe the claimant's employment history as relevant to the charge. The company should include all facts that are helpful to its position and that the company may wish to reference as part of its argument. For example, if the claimant demonstrated work performance or attendance shortcomings of any kind, failed to get along with other employees, or resisted management's instructions, the company should include these facts, using concise headings to convey the key points. Such facts undermine the claimant's credibility and strengthen the company's position.

In sum, this section should include the following:

- Date employment began;
- A sentence or two on the claimant's attendance at an orientation session;
- A sentence or two on the claimant's receipt of the employee handbook and any other relevant policies, such as the anti-discrimination and anti-harassment policies and the company's work performance/attendance expectations and disciplinary procedures. If the claimant signed any acknowledgement forms confirming his/her receipt of the applicable policies, state this here and attach the forms as an exhibit;
- A general description of the employee's position and work, including job title, responsibilities, and work shift; and,
- A logical, thorough presentation of the claimant's employment history, including any difficulties or problems caused by the claimant during his or her employment.

ARGUMENT SECTION – CLAIMANT'S ALLEGATIONS OF DISCRIMINATION HAVE NO MERIT

This is the "argument" section that serves to address the allegations made by the claimant and present the company's best arguments in response. One may want to keep the question, "What are the strongest arguments in defense of the client, in light of the facts?" in the back of your mind as you prepare this section. In addition to any fact-specific arguments, the company should always emphasize any pre-existing non-discrimination policies in effect at the time of the incident in this section, in order to demonstrate that the company is a responsible employer devoted to maintaining a positive, discrimination-free work environment.

Included at the beginning of this section is a boilerplate statement that restates the basic allegations made by the claimant, followed by a statement that the alleged charges contradict claimant's personnel policies and are "factually unsupportable." The company should also present its non-discrimination policy, ideally quoting it directly from the employment application or employee handbook, and attaching these sources in exhibit tabs at the end of the position statement. Additionally, if the claimant's charge was the company's first notice of the claimant's complaint and the company has a thorough employee recourse procedure, you should note this to show that the claimant's failure to follow the company's established complaint procedure deprived the company of the opportunity to investigate the complaint and take any corrective action. Furthermore, if the company has gainfully employed other employees in the claimant's protected category, especially in supervisory roles, this should be noted toward the beginning of the argument section. Such statistics are extremely compelling evidence that the company does not harbor any discriminatory animus toward individuals in the claimant's protected category and, therefore, allegations that the company harbors such discriminatory animus toward the claimant defy logic.

Similar to the "facts" section, this section should be broken up into several sub-sections. Typically, a good approach is to title the headings as concise responses to the claimant's specific allegations, in such a way as to present the strongest arguments first. For example, suppose you

are preparing an argument section in response to a charge alleging race discrimination. If your investigation reveals that the claimant was terminated for failure to improve her poor attendance record and not due to discrimination based on her race, as her charge alleges, you should include a sub-section to that effect with a proper, descriptive heading, such as "Complainant Was Terminated For Failure To Improve Her Poor Attendance Record." Begin the sub-section with a sentence responding to the claimant's specific allegations. For example, "Complainant's allegations lack any basis in fact insofar as she contends that her termination was discriminatory." Next, make a compelling argument as to why this is so, using specific examples to bolster the company's point.

Most if not all arguments made in this section will be based on the particular facts that are uncovered from research and witness interviews and described in the previous "facts" section. That is why it is important to describe all the pertinent facts in the "facts" section. Each case will have its own unique set of facts and circumstances, and you should look for anything in the case that bolsters the company's position and/or weakens the allegations made by the claimant.

Favorable language contained in the employee handbook or employment application, both of which the claimant should have received at the time of hire, can be very persuasive and referenced where applicable. Any example of how the claimant's own actions brought about the events in question, or how management followed procedures and acted properly under the circumstances, ought to be included.

This section should include the following:

- Simple brief restatement of charges made by the claimant;
- Statement that the claimant's allegations are without merit;
- A paragraph stating that the company is an equal opportunity employer that trains its employees in and implements anti-discrimination/anti-harassment policies;
- Examples of how the claimant's own actions brought about events alleged, especially if they were violations of the employer's rules or code of conduct; and,
- Evidence of how the company acted properly in these circumstances, and has acted the same in past incidents similar to this with similarly-situated employees.

CONCLUSION

As with many of the more basic sections of the position statement, this brief section sums up the company's position.

This section also should include the following:

- "Respectfully request" that the agency dismiss the complaint; and,
- Statement that should the agency require any additional information or documentation, the investigator should contact defense counsel.

APPENDIX II

Analysis Of Leading EEOC Consent Decrees

ANALYSIS OF LEADING EEOC CONSENT DECREES

This Appendix provides a summary of recent EEOC pattern or practice settlements in terms of their programmatic (non-monetary) components and a cost estimate for those components. The summaries include the monetary relief within the settlements, but focus primarily on the ranges of injunctive/programmatic relief agreed to by the parties in each settlement.

Most programmatic relief falls into one of two categories, including: (i) "ice in winter" relief, and (ii) adoption of new or actual changes to policies, procedures, and programs which cost money on the barrelhead (often called "corporate corrections").

"Ice in winter" programmatic relief typically involves a creative re-packaging and presentation of things which the company already does on an on-going basis and agreeing to those "ice in winter" changes as a matter of contract law by virtue of those obligations being confirmed in an enforceable consent decree. Just as ice forms inevitably under cold temperatures during the winter season, a corporation inevitably spends its own monies on internal training, the salaries of HR personnel, and the administration of employee relations programs. A slight majority of class action settlements contain "ice in winter" provisions and the cost of such programmatic relief is minuscule if not non-existent.

In more liability-driven settlements where statistical imbalances in the workforce necessitate agreement to "corporate corrections," programmatic relief can be more onerous, and therefore by definition more costly. Examples from the consent decrees discussed herein include:

- Creation of an English fluency test for adoption at a manufacturing plant where plaintiffs' class action lawsuit claimed an English fluency requirement acted as a barrier to employment opportunities for Latino employees (in the case of *EEOC o/b/o Colindres, et al. v. Goodman*).
- Hiring of diversity recruiters (such as the agreement to hire 25 full-time employees to recruit minority applications in the settlement in *EEOC o/b/o Gonzalez, et al. v. Abercrombie & Fitch*).

The conclusion to be drawn is that programmatic relief which costs hard dollars can run the gamut from the low five figures to the high seven figures.

An analysis of the EEOC consent decrees shows that injunctive relief comprises a substantial portion of the relief at issue and is often far ranging. Some of the injunctive relief should not be of concern to an employer where the company already has instituted such initiatives or implementation of such initiatives should not be arduous. Examples of such injunctive relief are anti-discrimination policies or complaint investigation procedures. Other injunctive relief can be much more difficult and burdensome. For example, the EEOC may

demand that the company create new internal positions to implement and oversee radical changes in the way in which the company determines compensation and/or promotion. Moreover, the EEOC may seek an appointment of an outside monitor who will oversee the implementation of the consent decree. These types of injunctive relief tend to be exceedingly intrusive and the company should resist the EEOC's demand to agree to such radical relief.

This Appendix summarizes the types of relief either agreed to in settlements, or ordered by a court, in EEOC pattern or practice lawsuits. Individual summaries of some of the more noteworthy cases over the past few years are set out in detail. Each case summary identifies the title of the case, the allegations advanced by the EEOC, the stage of proceedings, and the relief either requested, granted by court order, or afforded pursuant to the parties' settlement agreements. The memorandum also provides an executive summary of the most common relief provided by a court or agreed to by settling parties.

Generally, the types of relief made available as a result of an EEOC pattern or practice case can be grouped into four categories: modification of internal practices and procedures, outside oversight of corporate practices, mandatory training, and compensation for allegedly injured victims.

I. MODIFICATION OF INTERNAL PRACTICES AND PROCEDURES

As a result of EEOC consent decrees, employers are often required to make changes to their internal processes. These changes generally impact recruitment, promotion, compensation, training, and human resources policies. An extremely diverse assortment of institutional changes may be required by courts or devised by the parties.

Nevertheless, there are certain policy changes that often emerge as a result of EEOC pattern or practice litigation. First, employers are usually required to institute standardized performance appraisal systems and develop objective job performance criteria, which are designed to make performance assessments, compensation awards, and promotional decisions more objective. Second, employers often are obliged to post job vacancies and promotional opportunities, based upon the theory that this will undercut the effects of an "old boys' network." Third, employers frequently are required to implement programs designed to affirmatively assist women or racial/ethnic minorities, such as affirmative action recruitment, identification of minority employees with good promotional potential, mentoring, and training programs. Lastly, employers often are required to revise and improve their anti-discrimination policies and internal complaint procedures. All of these changes typically are imposed as a result of the EEOC's allegations that an employer's present policies allow for excessive subjectivity and/or cannot be enforced effectively, and thus have allowed the perpetuation of stereotyping and discrimination in the workforce.

II. OUTSIDE OVERSIGHT OF CORPORATE PRACTICES

The most intrusive type of provision in an EEOC consent decree is the imposition of outside oversight of the employer's decision-making processes. The type of oversight involved may vary from monitoring by the court, the EEOC, a third-party consultant, or a task force established by the parties. The degree of oversight also may vary substantially. In general, however, the third party charged with oversight of the employer's practices will have some voice in compliance with the terms of the consent decree. Quite often, the third party also will review promotional decisions, compliance with diversity objectives, compensation decisions, and investigation of internal discrimination complaints.

Outside monitors are typically fought tooth and nail by employers. If agreed to by the parties, the monitor is often an attorney who charges by the hour. Though rare, we are aware of consent decree work off situations where outside monitors earned in excess of $1 million in fees.

III. MANDATORY EEO TRAINING

Virtually all EEOC consent decrees include mandatory EEO training programs. The training programs most often consist of diversity, racial/gender sensitivity, and non-harassment training. Training of senior executives and management is nearly always required, but an employer also may be directed to train nearly all of its employees. The cost of such training can be quite substantial. For example, in *EEOC v. Ford Motor Co.*, the parties jointly agreed to hire Seyfarth Shaw LLP to provide $7.5 million of comprehensive annual training on anti-discrimination topics for three years to over 150,000 employees.

IV. COMPENSATION FOR ALLEGED VICTIMS OF DISCRIMINATION

Not surprisingly, nearly every EEOC consent decree includes payment of some compensation to allegedly injured victims. The amount to be accorded to the named victims (in the EEOC lawsuit) is often specifically determined through settlement, while a compensation fund is typically created for distribution to the rest of the class of alleged victims. The compensation will typically consist of payments for compensatory damages, back pay, and fringe benefits.

CASE SUMMARIES

EEOC v. Sidley & Austin LLP
Case No. 05-CV-208 (U.S. District Court for the Northern District of Illinois)

ALLEGATIONS

The EEOC alleged that Sidley violated the ADEA by expelling certain partners age 40 and older from the partnership because of their age.

STAGE OF PROCEEDINGS

The consent decree was approved by the Court on October 5, 2007.

RELIEF AGREED TO

The Consent Decree was effective through December 31, 2009.

Monetary Relief

- Under the terms of the Consent Decree, Sidley is obligated to pay twenty-seven million five hundred thousand dollars ($27,500,000) to establish the Settlement Fund.
- The EEOC in its sole discretion determined the distribution of funds to individuals from the Settlement Fund.

Programmatic Relief

- Sidley will refrain from terminating, expelling, retiring, reducing the compensation of or changing the partnership status of a partner because of age;
- Sidley will refrain from maintaining any formal or informal policy that mandates partner retirement at any specific age (or age range);
- Sidley will refrain from requiring partners to cease service in certain firm administrative positions because of age; and,
- Sidley was required to provide a copy of the Consent Decree to each partner and to post the Decree in each of its offices.

Internal Mechanisms For Monitoring Compliance With The Consent Decree

- The Parties jointly designated an individual to:

- receive and investigate complaints of violations of the terms of the Consent Decree;
- attempt to resolve any violations of the Consent Decree by agreement between Sidley and any individual complaining party;
- attempt to resolve any violations of the Consent Decree by agreement between the EEOC and Sidley; and
- report to the EEOC on two specific dates the activities engaged in during the relevant reporting period.

EEOC o/b/o Phillips v. Walgreen Company
Case Nos. 05-CV-0440 and 07-CV-172 (U.S. District Court for the Southern District of Illinois)

ALLEGATIONS

Former and current African American employees alleged that Walgreen's discriminated against them based upon their race in assignments, promotions, compensation, and hiring.

STAGE OF PROCEEDINGS

The proposed consent decree was submitted to the Court on July 12, 2007 and received final approval on October 5, 2007.

RELIEF AGREED TO

The Consent Decree is effective for 5 years after it is finally approved.

Monetary Relief

- Walgreen's is obligated to pay twenty-four million dollars four hundred seven thousand five hundred dollars ($24,407,500) to establish the Settlement Fund;

- A total of five million five hundred ninety thousand dollars ($5,590,000) of the Settlement Fund is allocated for attorneys fees and costs; and,

- The remainder of the Settlement Fund will be distributed to the various class members by the Settlement Administrator pursuant to the Allocation Plan and Monetary Award Procedures as outlined in the Consent Decree.

Programmatic Relief

- Walgreen's will retain consultants (with the agreement of the other Parties) to review its employment processes. Thereafter, Walgreen's will provide a copy of the consultants

recommendations to Monitoring Counsel along with a statement identifying the recommendations it intends to implement;

- Walgreen's will retain a consultant to develop written job analysis and job related criteria for certain positions and thereafter, implement selection policies and procedures for those positions;

- Walgreen's will analyze store assignments of African Americans and whites in certain positions on an annual basis and provide that analysis to Monitoring Counsel. If disparities are noted, Walgreen's must investigate the cause of the disparities and take the appropriate corrective actions and make a comprehensive report to Monitoring Counsel;

- Walgreen's will analyze the compensation and bonuses paid to African Americans and whites in certain positions for any statistically significant disparities on an annual basis; If disparities are noted, Walgreen's must investigate the cause of the disparities and take the appropriate corrective actions and make a comprehensive report to Monitoring Counsel; and,

- Walgreen's will use its Best Efforts to meet certain Promotional Benchmarks as further defined in the Consent Decree.

Internal Mechanisms For Monitoring Compliance With The Consent Decree

- Walgreen' designated its Senior Vice President of Human Resources as the Decree Monitor to:

    - use his Best Efforts to assure Walgreens' implementation and compliance with thee provisions of the Consent Decree. Those efforts are to include the following;
    - monitor the establishment, implementation and revision of the store assignment polices and procedures;
    - monitor the efforts to achieve the Promotional Benchmarks;
    - monitor the store assignments and compensation provisions of the Consent Decree;
    - coordinate with the consultants retained by Walgreen's pursuant to the terms of the Consent Decree;
    - oversee the handling of any complaints of race discrimination during the term of the Consent Decree;
    - report to senior management of Walgreen's regarding the company's compliance with the provisions of the Consent Decree;
    - submit compliance reports and other documents to Monitoring Counsel as required by the terms of the Consent Decree; and,
    - recommend awards of appropriate relief to company managers and executives for certain complaints made during the term of the Consent Decree.

EEOC o/b/o Bell, et al. v. Woodward Governor Co.
Case No. 03-CV-50190
(U.S. District Court for the Northern District of Illinois)

ALLEGATIONS

Current and former minority and female employees alleged race, color, national origin and gender discrimination in job assignment, promotion, compensation, and terms and conditions of employment.

STAGE OF PROCEEDINGS

The consent decree was given final approval by the Court on February 16, 2007.

RELIEF AGREED TO

The consent decree is effective for 42 months after its entry.

Monetary Relief

- The total monetary relief that Woodward is obligated to pay under the terms of the consent decree is $4.8 million, and the decree assumes an additional $200,000 in interest accrual for a total settlement fund of $5 million;
- The total settlement fund was divided into $2,400,000 for the Minority Settlement Fund and $2,600,000 for the Gender Settlement Fund; and,
- Class counsel's fees were to be determined through a stipulated Fee Arbitration process with $345,000 specifically agreed to for costs.

Injunctive Relief

- The parties stipulated to the appointment of a named third party individual to oversee Woodward's implementation of and compliance with the consent decree, and Woodward agreed to pay her at her normal hourly rate;
- Woodward must adopt and implement a written complaint procedure and protocol as set forth in the consent decree;
- Adopt and implement a complaint tracking spreadsheet as set forth in the consent decree;
- Submit the complaints, investigations, and remedial actions to the third party monitor;

- Retain a named industrial/organizational psychologist to conduct a job analysis of certain named job codes, and thereafter, the psychologist would develop written job descriptions, a performance appraisal, and compensation review process;
- Based upon the work of the industrial/organizational psychologist, the company must engage in adjustment of certain job levels and classifications;
- Provide to minority and female employees affected by the job level and classification adjustment a development plan;
- Amend the job posting system to include all open working lead job positions;
- Provide 2 hours of EEO training to all current non-management employees; and,
- Provide 4 hours of "supervisory" EEO training to all current management and supervisory level employees and HR professionals.

EEOC o/b/o Colindres, et al. v. Goodman Manufacturing Co., et al.
Case Nos. 01-H-4319 & 01-H-4323
(U.S. District Court for the Southern District of Texas)

ALLEGATIONS

Latinos alleged that they were subjected to discrimination on the basis of race, color, and/or national origin with respect to hiring, firing, job assignment, transfers, compensation and other terms and conditions of employment.

STAGE OF PROCEEDINGS

The consent decree was approved by the Court on January 23, 2007.

RELIEF AGREED TO

The consent decree is effective for 30 months after its entry.

Monetary Relief

- The total monetary relief that Quietflex is obligated to pay under the settlement agreement is $2.8 million; and,
- Of this total, $1,933,33.80 is designated for payment to class members with the remainder of $866,666.20 designated for attorneys fees and costs. If a class member cannot be located, his or her share of the settlement will revert back to the employer.

Injunctive Relief

- The equitable and programmatic relief is limited to Quietflex' Houston, TX facility;
- All non-supervisory full time vacancies in a named department will be put up for bid;
- All vacancies in the same department will be posted;
- Certain seniority preferences for vacancies in the same department are eliminated;
- Certain transfers into the same department will be given based upon seniority and attaining minimal job qualifications;
- With outside experts, the parties will jointly establish an objective test to determine employee knowledge of safety and productivity matters (communication certification); and,
- Quietflex will provide training on compliance with the provisions of the consent decree to all Crew Chiefs and Supervisors within certain departments.

EEOC, et al. v. Ford Motor Company, et al.
Case Nos. 04-CV-00844 & 00845
(U.S. District Court for the Northern District of Ohio)

ALLEGATIONS

African-American employees alleged that Ford's testing process and selection procedures unfairly denied them equal opportunity to participate in Ford's apprenticeship program.

STAGE OF PROCEEDINGS

The parties joint motion to approve the class action settlement and consent decree was granted by the Court on June 15, 2005.

RELIEF AGREED TO

Monetary Relief

- Each member of the settlement class received $2,400;
- Additional incentive payments were afforded each of the named plaintiffs and charging parties; and,

- Attorneys' fees and costs awarded to class counsel.

Non-Monetary Relief

- Ford agreed to cease use of its then current selection procedure of choosing apprentices;
- The parties agreed on an industrial psychologist who will devise a new selection process and procedures for the apprenticeship program; and,
- 279 members of the settlement class were placed on the eligibility list for the apprenticeship program.

Injunctive Relief

- Implementation of a statement of commitment to diversity, and communicating this statement in an annual diversity report;
- Republishing the company-wide policy prohibiting racial discrimination, harassment, and/or retaliation to all exempt employees;
- Continuing training regarding appropriate affirmative action reporting and planning to all district managers and specified general managers;
- Implementing equal opportunity training to all managers regarding the requirements of Title VII with respect to discrimination and harassment and managers' affirmative action responsibilities;
- Providing two-hour refresher EEO training to all managers either in person or via the internet at least once every three years;
- Continuing diversity training for up to 3,000 managers annually regarding the benefits of diversity for business, the impact biases have on employment decisions, sensitivity to cultural differences, and skills to manage a diverse workforce;
- Revamping job posting procedures, including providing a description and the minimum qualifications required of each new job position, electronic notice to candidates who do not meet the minimum qualifications within ten days, and providing internal feedback to rejected candidates on why they were not selected for the opening;
- Hiring an independent industrial psychologist to complete job analyses for all salaried exempt positions;
- Convening focus groups to identify the job duties and responsibilities required for each position, and the knowledge, skills, and abilities needed to perform those duties;

- Designing a structured selection process, including interview questions, for hiring managers to use when evaluating candidates seeking promotion;
- Providing three hour training to all managers of exempt employees on the new selection process;
- Conducting three-hour annual training to Sodexho's executive management team with the primary focus on how to achieve diversity within the company;
- Including a diversity and inclusion component to annual bonus plans for bonus-eligible managers;
- Maintaining an Office of Employment Rights to investigate and resolve internal complaints of employment discrimination by salaried, exempt employees;
- Creating a client non-discrimination policy ensuring that placement of managers in specific accounts are not influenced by the racial preference of clients; and,
- Providing seed money of at least $5,000 for employee networks programs to provide networking opportunities to women and minority groups.

EEOC v. Morgan Stanley
Case No. 01-CV-8421
(U.S. District Court for the Southern District of New York)

ALLEGATIONS

EEOC pattern or practice lawsuit for alleged sex discrimination in compensation and denials of promotions for present and former female employees.

STAGE OF PROCEEDINGS

The consent decree was entered by the Court on July 12, 2004.

RELIEF AGREED TO

The consent decree was effective for 3 years after its entry.

Monetary Relief

- The settlement entailed a payment of $40 million to the class via a claim fund. Morgan Stanley also will pay a special master to determine the appropriate awards, if any, to be paid to claimants from the claim fund;

- $12 million to the representative Plaintiff; and,
- $2 million to fund the costs for implementing injunctive relief.

Injunctive Relief

- Implementing training programs for management on the topics of cultural diversity, performance appraisals, compensation and promotion, account assignment, pregnancy, maternity leave and maternal status, and the complaint process with respect to gender issues;
- Implementing anti-discrimination training programs for all employees emphasizing issues related to sexual harassment, sex-based hostile environment, appropriate work place conduct and retaliation;
- Funding scholarship programs from any monies left over in the claim fund at institutions or organizations for female students pursuing careers in the financial services sector;
- Implementing and enforcing revised policies on code of conduct, anti-harassment, complaint reporting procedure, business entertainment and expense reimbursement, assignments, promotion, and paid parental leave;
- Developing a computer database to record complaints of sex discrimination, including retaliation claims, in all offices;
- Developing a program that identifies high potential female employees and assists them on acquiring the experience and skills needed for career advancement; and,
- Providing a mentoring program for all female employees who wish to participate.

Internal Mechanisms For Monitoring Compliance

- Morgan Stanley will designate an employee as an internal ombudsperson who is responsible for monitoring compliance with consent decree.
- The internal ombudsman must oversee diversity-program provisions of the consent decree, including:

  (a) monitor management and employee training programs;

  (b) ensure enforcement of anti-discrimination policies;

  (c) track internal complaints of discrimination and harassment and produce a report every six months on complaints received;

(d) analyze progress on promotion and compensation goals;

(e) oversee exit interviews of female employees leaving the company voluntarily; and,

(f) implement measures for retention and promotion program.

- Morgan Stanley will compensate a separate outside monitor who will oversee the same programs and have the responsibilities as the internal ombudsman.

EEOC v. Home Depot, U.S.A., Inc.
Case No. 04-CV-1776 (U.S. District Court for the District of Colorado)

ALLEGATIONS

EEOC pattern or practice lawsuit alleging hostile work environment based on gender, race, and national origin and retaliation for complaining of the same. The proposed class encompassed former and current employees who were employed at the company's stores in Colorado between January 1, 2000, and the date of the approved consent decree.

STAGE OF PROCEEDINGS

The consent decree was entered by the Court on August 25, 2004.

RELIEF AGREED TO

The consent decree was effective for thirty months after its entry.

Monetary Relief

- $3 million to resolve charges of discrimination filed by 38 individuals; and,
- $2.5 for placement in a class settlement fund to provide relief for other individuals who were harmed by the alleged conduct.

Injunctive Relief

- Implementing training programs on the requirements of anti-discrimination laws, with appropriate levels of information presented to non-supervisory employees, managers, and human resource employees;
- Appointing an EEO Coordinator to insure compliance with the consent decree and oversee the company's investigation of employee complaints of discrimination; and,

- Submitting quarterly reports to the EEOC regarding any complaints of discrimination and/or harassment, and remain under continued monitoring by the EEOC for the term of the consent decree.

EEOC v. Carl Buddig & Co.
Case No. 02-CV-2240 (U.S. District Court for the Northern District of Illinois)

ALLEGATIONS

Female and African-American applicants and female employees alleged discrimination in job assignments and promotions.

STAGE OF PROCEEDINGS

On September 2, 2004, the Court approved the consent decree.

RELIEF AGREED TO

The consent decree was effective for 3 years after entry.

Monetary Damages

- Carl Budding agreed to pay $2.5 million to the class. Each eligible claimant will receive a pro rata share of the money.

General Injunctive Relief

The employer agreed to:

- Post a notice of the consent decree for 3 years;
- Hire qualified claimants who still wish to be considered for employment;
- If Buddig determines that a claimant is not qualified, Buddig will record the basis for such decision;
- Post job vacancies in an area accessible to all employees;
- Recruit new employees from local vocational schools and community colleges;
- Make available employment records to the EEOC for a period of 3 years after entry of the consent decree;

- If a female applies for certain production work and she is not hired, Buddig will record the basis for the decision; and,

- Provide training on the requirements of Title VII which is to occur in the final 6 months of the consent decree.

Internal Mechanisms For Monitoring Compliance

- Provide written reports to the EEOC every 9 months for a period of 3 years following the entry of the consent decree.

EEOC o/b/o Gonzalez, et al. v. Abercrombie & Fitch
Case No. 03-CV-2817
(U.S. District Court for the Northern District of California)

ALLEGATIONS

Minority employees alleged race, color, and national origin discrimination in hiring, firing, job assignment, compensation, and other terms and conditions of employment.

STAGE OF PROCEEDINGS

On November 17, 2004, the Court approved the consent decree.

RELIEF AGREED TO

The consent decree is effective for 6 years.

Monetary Damages

- A&F agreed to establish a settlement fund of $40 million. Named plaintiffs and charging parties will receive a liquidated amount and the remaining amount will be distributed to the class members per a formula. A claims administrator will administer the distribution of the fund.

- A&F agreed to pay $7,850,000 in attorney fees and costs.

General Injunctive Relief

The employer agreed to:

- Revise marketing materials to reflect diversity per the major racial/ethnic minority populations of the U.S.;

- Post notices and revise its employee handbook to inform its employees of the consent decree;
- Provide EEO training to its managers and human resource associates;
- Develop an internal complaint procedure to provide for the filing, investigation, and remedying of complaints of discrimination or retaliation;
- Revise its performance evaluation process for managers to include compliance with EEO policy and attainment of diversity as factors in the performance review process;
- Hire a professional industrial organizational psychologist to develop a written job analysis and job-related criteria for each in-store position (in consultation with this psychologist, Abercrombie will develop selection criteria for in-store positions and a recruitment and hiring protocol to recruit and hire minority job applicants);
- Use its best efforts to promote minorities;
- Hire and maintain 25 full-time diversity recruiters to recruit minority applicants for in-store positions;
- Advertise for in-store positions with periodicals or media which target minorities;
- Attend minority job fairs and recruiting events;
- Utilize a diversity consultant to conduct diversity/inclusion training for managers;
- Make its best efforts to meet certain hiring benchmarks of minorities; and,
- Retain certain personnel and employment records and allow access to such records.

Internal Mechanisms For Monitoring Compliance

The employer agreed to:

- Create an Office of Diversity to ensure compliance with the consent decree;
- Provide semi-annual reports regarding compliance with the consent decree; and,
- An agreed upon monitor will prepare an annual report on the status of implementation and compliance with the terms of the consent decree.