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**FRANCZEK RADELET 2010 LABOR & EMPLOYMENT  
CONFERENCE**

**Agency Enforcement: There's a New Sheriff in Town  
The New EEOC under OBAMA**

**February 19, 2010**

**Michael A. Warner, Jr.  
Staci Ketay Rotman**

## **EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC)**

### **Statement of Regulatory and Deregulatory Priorities**

The mission of the Equal Employment Opportunity Commission (EEOC, Commission or agency) is to ensure equality of opportunity in employment by vigorously enforcing six federal statutes. These statutes are: Title VII of the Civil Rights Act of 1964, as amended (prohibits employment discrimination on the basis of race, color, sex, religion, or national origin); the Equal Pay Act of 1963, as amended; the Age Discrimination in Employment Act of 1967 (ADEA), as amended; Titles I and V of the Americans with Disabilities Act of 1990, as amended, and sections 501 and 505 of the Rehabilitation Act of 1973, as amended (disability); and the Government Employee Rights Act of 1991. Effective November 21, 2009, the EEOC will enforce Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA), which prohibits employment discrimination based on genetic information.

The first item in this Regulatory Plan is titled "Regulations To Implement the Equal Employment Provisions of the Americans With Disabilities Act Amendments Act." On September 25, 2008, the President signed the Americans with Disabilities Act Amendments Act of 2008 ("ADA Amendments Act" or "Act"). The Act makes important changes to the definition of the term "disability" by rejecting the holdings in several Supreme Court decisions and portions of EEOC's ADA regulations. The Act retains the ADA's basic definition of "disability" as an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment. However, it changes the way that these statutory terms should be interpreted in several ways.

The second item in this Regulatory Plan is titled "Reasonable Factors Other Than Age Under the Age Discrimination in Employment Act". In March 2008, the EEOC published a Notice of Proposed Rulemaking (NPRM) concerning disparate impact under the Age Discrimination in Employment Act. 73 FR 16807 (March 31, 2008). In this NPRM, the Commission asked whether EEOC regulations should provide more information on the meaning of "reasonable factors other than age" (RFOA) and if so, what the regulations should say. After consideration of the public comments, and in light of the Supreme Court decisions in *Smith v. City of Jackson*, 544 U.S. 228 (2005), and *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. \_\_\_, 128 S. Ct. 2395 (2008), the Commission believes it is appropriate to issue a new NPRM to address the scope of the RFOA defense. Accordingly, before finalizing its regulations concerning disparate impact under the ADEA, the Commission intends to publish a new NPRM proposing to amend its regulations concerning RFOA.

Consistent with section 4(c) of Executive Order 12866, this statement was reviewed and approved by the Acting Chairman of the Agency. The statement has not been reviewed or approved by the other members of the Commission.



## The E-RACE Initiative (Eradicating Racism And Colorism from Employment)

The Equal Employment Opportunity Commission has championed equal opportunity in employment since its inception, shortly after the signing of Title VII of the Civil Rights Act of 1964. Although the Commission has been successful in its enforcement efforts, race and color discrimination continues to exist in the workplace. In an effort to identify and implement new strategies that will strengthen its enforcement of Title VII and advance the statutory right to a workplace free of race and color discrimination, EEOC is instituting the E-RACE Initiative.

### E-RACE Objectives

The E-RACE Initiative is designed to improve EEOC's efforts to ensure workplaces are free of race and color discrimination. Specifically, the EEOC will identify issues, criteria and barriers that contribute to race and color discrimination, explore strategies to improve the administrative processing and the litigation of race and color discrimination claims, and enhance public awareness of race and color discrimination in employment. As a framework for implementing the E-RACE Initiative, EEOC has developed a set of detailed [E-RACE goals and objectives](#) to be achieved within a 5-year timeframe from FY 2008 to FY 2013.

Additionally, the Commission will combine the objectives of E-RACE with existing EEOC initiatives. For example, the Commission will integrate the goals of the [Systemic Initiative](#) by addressing race and color issues with class and systemic implications. It will incorporate the principles of the [Youth@Work Initiative](#) by combating disparate treatment of youth based on race and color. And, the Commission will complement the outreach and enforcement efforts of the [LEAD Initiative](#) by challenging exclusionary employment policies that adversely impact people of color who also have disabilities (in both the private and public sectors).

Finally, the Commission will strengthen partnerships with employee advocates and state and local human rights commissions and increase its outreach to human resource professionals and employer groups to address race and color discrimination in the workplace.

#### About E-RACE

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<b>EEOC</b>	<b>NOTICE</b>	<b>Number</b>
		915.061
<b>Date</b>		
9/7/90		

1. **SUBJECT:** Policy Guidance on the Consideration of Arrest Records in Employment Decisions under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq. (1982).
2. **PURPOSE:** This policy guidance sets forth the Commission's procedure for determining whether arrest records may be considered in employment decisions.
3. **EFFECTIVE DATE:** Upon Receipt.
4. **EXPIRATION DATE:** As an exception to EEOC Order 205.001, Appendix B, Attachment 4, §a(5), this Notice will remain in effect until rescinded or superseded.
5. **ORIGINATOR:** Title VII/EPA Division, Office of the Legal Counsel.
6. **INSTRUCTIONS:** File behind the last Policy Guidance §604 of Volume II of Compliance Manual.
7. **SUBJECT MATTER:**

## I. [Introduction](#)

The question addressed in this policy guidance is "to what extent may arrest records be used in making employment decisions?" The Commission concludes that since the use of arrest records as an absolute bar to employment has a disparate impact on some protected groups, such records alone cannot be used to routinely exclude persons from employment. However, conduct which indicates unsuitability for a particular position is a basis for exclusion. Where it appears that the applicant or employee engaged in the conduct for which he was arrested and that the conduct is job-related and relatively recent, exclusion is justified.

The analysis set forth in this policy guidance is related to two previously issued policy statements regarding the consideration of conviction records in employment decisions: "Policy Statement on the Issue of Conviction Records under Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. §2000e et seq. (1982)" (hereinafter referred to as the February 4, 1987 Statement) and "Policy Statement on the use of statistics in charges involving the exclusion of individuals with conviction records from employment" (hereinafter referred to as July 29, 1987 Statement). The February 4, 1987 Statement states that nationally, Blacks and Hispanics are convicted in numbers which are disproportionate to Whites and that barring people from employment based on their conviction records will therefore disproportionately exclude those groups.<sup>(1)</sup> Due to this adverse impact, an employer may not base an employment decision on the conviction record of an applicant or an employee absent business necessity.<sup>(2)</sup> Business necessity can be established where the employee or applicant is engaged in conduct which is particularly egregious or related to the position in question.

Conviction records constitute reliable evidence that a person engaged in the conduct alleged since the criminal justice system requires the highest degree of proof ("beyond a reasonable doubt") for a conviction. In contrast, arrests alone are not reliable evidence that a person has actually committed a crime. *Schware v. Board of Bar Examiners*, 353 U.S. 232, 241 (1957) ("[t]he mere fact that a [person] has been arrested has very little, if any, probative value in showing

that he has engaged in misconduct"). Thus, the Commission concludes that to justify the use of arrest records, an additional inquiry must be made. Even where the conduct alleged in the arrest record is related to the job at issue, the employer must evaluate whether the arrest record reflects the applicant's conduct. It should, therefore, examine the surrounding circumstances, offer the applicant or employee an opportunity to explain, and, if he or she denies engaging in the conduct, make the follow-up inquiries necessary to evaluate his/her credibility. Since using arrests as a disqualifying criteria can only be justified where it appears that the applicant actually engaged in the conduct for which he/she was arrested and that conduct is job related, the Commission further concludes that an employer will seldom be able to justify making broad general inquiries about an employee's or applicant's arrests.

The following discussion is offered for guidance in determining the circumstances under which an employer can justify excluding an applicant or an employee on the basis of an arrest record.

## II. Discussion

### A. Adverse Impact of the Use of Arrest Records

The leading case involving an employer's use of arrest records is *Gregory v. Litton Systems*, 316 F. Supp. 401, 2 EPD ¶10,264 (C.D. Cal. 1970), *modified on other grounds*, 472 F.2d 631, 5 EPD ¶18089 (9th Cir. 1972). *Litton* held that nationally, Blacks are arrested more often than are Whites. Courts and the Commission have relied on the statistics presented in *Litton* to establish a *prima facie* case of discrimination against Blacks where arrest records are used in employment decisions.<sup>(3)</sup> There are, however, more recent statistics, published by the U.S. Department of Justice, Federal Bureau of Investigation, which are consistent with the *Litton* finding.<sup>(4)</sup> It is desirable to use the most current available statistics. In addition, where local statistics are available, it may be helpful to use them, as the court did in *Reynolds v. Sheet Metal Workers Local 102*, 498 F. Supp. 952, 22 EPD ¶130,739 (D.C. 1980), *aff'd.*, 702 F.2d 221, 25 EPD ¶131,706 (D.C. Cir. 1981). In *Reynolds*, the court found that the use of arrest records in employment decisions adversely affected Blacks since the 1978 Annual Report of the Metropolitan Police of Washington, D.C., stated that 85.5% of persons arrested in the District of Columbia were nonwhite while the nonwhite population constituted 72.4% of the total population. 498 F. Supp. at 960. The Commission has determined that Hispanics are also adversely affected by arrest record inquiries. Commission Decisions Nos. 77-23 and 76-03, CCH EEOC Decisions (1983) ¶¶6714 and 6598, respectively.<sup>(5)</sup> However, the courts have not yet addressed this issue<sup>(6)</sup> and the FBI's Uniform Crime Reporting Program does not provide information on the arrest rate for Hispanics, nationally or regionally. As with conviction records (see July 29, 1987 Statement), the employer may rebut by presenting statistics which are more current, accurate and/or specific to its region or applicant pool than are the statistics presented in the *prima facie* case.

### B. Business Justification

If adverse impact is established, the burden of producing evidence shifts to the employer to show a business justification for the challenged employment practice. *Wards Cove Packing Co. v. Atonio*, 109 S.Ct. 2115, 2126 (1989).<sup>(7)</sup> As with conviction records, arrest records may be considered in the employment decision as evidence of conduct which may render an applicant unsuitable for a particular position. However, in the case of arrests, not only must the employer consider the relationship of the charges to the position sought, but also the likelihood that the applicant actually committed the conduct alleged in the charges. *Gregory v. Litton Systems*, 316 F. Supp. 401; *Carter v. Gallagher*, 452 F.2d 315, 3 EPD ¶18335 (8th Cir. 1971), *cert. denied*, 406 U.S. 950, 4 EPD ¶17818 (1972); *Reynolds v. Sheet Metal Workers Local 102*, 498 F. Supp. 952; *Dozier v. Chupka*, 395 F. Supp. 836 (D.C. Ohio 1975); *U.S. v. City of Chicago*, 411 F. Supp. 218 (N.D. Ill. 1974), *aff'd. in rel. part*, 549 F.2d 415 (7th Cir. 1977); *City of Cairo v. Illinois Fair Employment Practice Commission et al.*, 8 EPD ¶19682 (Ill. App. Ct. 1974); Commission Decisions Nos. 78-03, 77-23, 76-138, 76-87, 76-54, 76-39, 76-17, 74-92, 74-83, 76-03, 74-90, 78-03, 74-25, CCH EEOC Decisions (1983) ¶¶6714, 6710, 6700, 6665, 6639, 6630, 6612, 6424, 6414, 6598, 6423, 6400 and Commission Decisions Nos. 72-0947, 72-1005, 72-1460, CCH EEOC Decisions (1973) ¶¶6357, 6350 and 6341, respectively.

#### 1. A Business Justification Can Rarely Be Demonstrated for Blanket Exclusions on the Basis of Arrest Records

Since business justification rests on issues of job relatedness and credibility, a blanket exclusion of people with arrest records will almost never withstand scrutiny. *Gregory v. Litton Systems*, 316 F. Supp. 401. *Litton* held that an

employer's policy of refusing to hire anyone who had been arrested "on a number of occasions" violated Title VII because the policy disproportionately excluded Blacks from consideration and was not justified by business necessity. In *Litton*, an applicant for a position as a sheet metal worker was disqualified because of his arrest record. The court found no business necessity because the employer had neither examined the particular circumstances surrounding the arrests nor considered the relationship of the charges made against him to the position of sheet metal worker. Since the employer had failed to establish a business necessity for its discriminatory policy, it was enjoined from basing future hiring decisions on arrest records. *Accord Carter v. Gallagher*, 452 F.2d 315 (firefighter); *Dozier v. Chupka*, 395 F. Supp. 836 (firefighter); *City of Cairo v. Illinois Fair Employment Practice Commission, et al.*, 8 EPD ¶9682 (police officer).

The Commission has consistently invalidated employment policies which create a blanket exclusion of persons with arrest records. Commission Decision Nos. 78-03, 76-87, 76-39, 76-17, 76-03, 74-90, 74-25, 72-0947, 72-1005, CCH EEOC Decisions (1983) ¶¶6714 (laborer), 6665 (police officer), 6630 (cashier), 6612 (credit collector), 6598 (catalogue clerk), 6423 (uniformed guard commissioned by police department), 6400 (firefighter), 6357 (line worker) and 6350 (warehouse worker or driver). In several decisions, it appears that the arrest record inquiry was made on a standard company application which was used by the employer to fill various positions and there was no mention of any particular position sought. Commission Decision Nos. 76-138, 76-54, 74-82, 74-83, 74-02 and 72-1460, CCH EEOC Decisions (1983) ¶¶6700, 6639, 6424, 6414, 6386 and 6341 and Commission Decision No. 71-1950, CCH EEOC Decisions (1973) ¶6274, respectively. An employer may not routinely exclude persons with arrest records based on the assumption that an arrest record will prevent an applicant from obtaining necessary credentials to perform a job without giving the applicant an opportunity to obtain those credentials. For example, in Decision 76-87, the Commission rejected an employer's assertion that employees' arrest records might hinder its ability to maintain fidelity (bond) insurance since it offered no proof to this effect.

Even where there is no direct evidence that an employer used an arrest record in an employment decision, a pre-employment inquiry regarding arrest records may violate Title VII. It is generally presumed that an employer only asks questions which he/she deems relevant to the employment decision. *Gregory v. Litton Systems*, 316 F. Supp. at 403-404. Noting that information which is *obtained* is likely to be used, the court in *Litton* enjoined the employer from making any pre-employment inquiries regarding arrests which did not result in convictions. *Id.*<sup>(8)</sup> *But see EEOC v. Local 638*, 532 F.2d 821 (2d Cir. 1976) (inquiry not invalidated where there was no evidence that union actually rejected applicants who had been arrested but not convicted); *Jimerson v. Kisco*, 404 F. Supp. 338 (E.D. Mo. 1975) (court upheld discharge for falsifying information regarding arrest record on a pre-employment application without considering the inquiry itself violated Title VII).<sup>(9)</sup> Numerous states have specifically prohibited or advised against pre-employment inquiries in their fair employment laws due to the possible misuse of this information.<sup>(10)</sup>

## 2. The Alleged Conduct Must Be Related to the Position Sought

As discussed above, an arrest record may be used as evidence of conduct upon which an employer makes an employment decision. An employer may deny employment opportunities to persons based on any prior conduct which indicates that they would be unfit for the position in question, whether that conduct is evidenced by an arrest, conviction or other information provided to the employer. It is the *conduct*, not the arrest or conviction *per se*, which the employer may consider in relation to the position sought. The considerations relevant to the determination of whether the alleged conduct demonstrates unfitness for the particular job were set forth in *Green v. Missouri Pacific Railroad Co.*, 549 F.2d 1158, 1160, 13 EPD ¶11,579 (8th Cir. 1977) and reiterated in the February 4, 1987 Statement on Convictions, page 2:

1. the nature and gravity of the offense or offenses;
2. the time that has passed since the conviction<sup>(11)</sup> (or in this case, arrest)...; and
3. the nature of the job held or sought.

*See also Carter v. Maloney Trucking and Storage Inc.*, 631 F.2d 40, 43, 24 EPD ¶31,348 (5th Cir. 1980) (employer refused to rehire an ex-employee who had murdered a co-worker, not solely because of his conviction, but because he was a dangerous person and friends of the murdered man might try to retaliate against him while he was on the job); *Osborne v. Cleland*, 620 F.2d 195, 22 EPD ¶30,882 (8th Cir. 1980) (employee who had forfeited collateral on a charge

of "sexual procurement" was unfit to be a nursing assistant in a psychiatric ward); *Lane v. Inman*, 509 F.2d 184 (5th Cir. 1975) (city ordinance which prohibited the issuance of taxicab driver permits to persons convicted of smuggling marijuana was "so obviously job related" that "it could not be held to be unlawful race discrimination," irrespective of any adverse impact); *EEOC v. Carolina Freight*, 723 F. Supp. 734, 52 EPD ¶139,538 (S.D. Fla. 1989) (criminal history was related to position of truck driver who transported valuable property); *McCray v. Alexander*, 30 EPD ¶133,219 (D. Colo. 1982), *aff'd* 38 EPD ¶135,509 (10th Cir. 1985) (supervisory guard was discharged for killing a motorist, while off-duty, in a traffic dispute because employer concluded that, despite his acquittal, the conduct showed poor judgment on the use of deadly force).

Where the position sought is "security sensitive," particularly where it involves enforcing the law or preventing crime, courts tend to closely scrutinize evidence of prior criminal conduct of applicants. *U.S. v. City of Chicago*, 411 F. Supp. 218, 11 EPD ¶10,597 (N.D. Ill. 1976), *aff'd in rel. part*, 549 F.2d 415, 13 EPD ¶11,380 (7th Cir. 1977), *on remand*, 437 F. Supp. 256 (N.D. Ill. 1977) (applicants for the police department were disqualified for prior convictions for "serious" offenses); *Richardson v. Hotel Corporation of America*, 332 F. Supp. 519, 4 EPD ¶17666 (E.D. La. 1971), *aff'd mem.*, 468 F.2d 951, 4 EPD ¶17666 (5th Cir. 1972) (bellman was discharged after his conviction for theft and receipt of stolen goods was discovered since bellmen had access to guests' rooms and was not subject to inspection when carrying packages); *Haynie v. Chupka*, 17 FEP Cases 267, 271 (S.D. Ohio 1976) (police department permissibly made inquiries regarding arrest records and other evidence of prior criminal conduct).<sup>(12)</sup> (See Examples 3 and 4).

Even where the employment at issue is not a law enforcement position or one which gives the employee easy access to the possessions of others, close scrutiny of an applicant's character and prior conduct is appropriate where an employer is responsible for the safety and/or well being of other persons. *Osborne v. Cleland*, 620 F.2d 195 (8th Cir. 1975) (psychiatric nursing assistant); *Lane v. Inman*, 509 F.2d 184 (taxi driver). In these instances, the facts would have to be examined closely in order to determine the probability that an applicant would pose a threat to the safety and well being of others. (See Examples 5 and 6).

### 3. Evaluating the Likelihood that the Applicant Engaged in the Conduct Alleged

The cases cited above illustrate the job-relatedness of certain conduct to specific positions. In cases alleging race discrimination based on the use of arrest records as opposed to convictions, courts have generally required not only job-relatedness, but also a showing that the alleged conduct was actually committed. In *City of Cairo v. Illinois Fair Employment Practice Commission, et al.*, 8 EPD ¶19682, the court held that where applicants sought to become police officers, they could not be absolutely barred from appointment solely because they had been arrested, as distinguished from convicted. See also Commission Decision No. 76-87, CCH EEOC Decisions (1983) ¶16665 (potential police officer could not be rejected based on one arrest five years earlier for riding in a stolen car since there was no conviction and the applicant asserted that he did not know that the car was stolen). Similarly, in Decision No. 74-83, CCH EEOC Decision (1983) ¶16424, the Commission found no business justification for an employer's unconditional termination of all employees with arrest records (all five employees terminated were Black), purportedly to cut down on thefts in the workplace. The employer could produce no evidence that the employees had been involved in any of the thefts or that persons who are arrested, but not convicted, are prone toward crime. Commission Decision No. 74-92, CCH EEOC Decisions (1983) ¶16424.

An arrest record does no more than raise a suspicion that an applicant may have engaged in a particular type of conduct.<sup>(13)</sup> Thus, the investigator must determine whether the applicant is likely to have committed the conduct alleged. This is the most difficult step because it requires the employer either to accept the employee's denial or to attempt to obtain additional information and evaluate his/her credibility. An employer need not conduct an informal "trial" or an extensive investigation to determine an applicant's or employee's guilt or innocence. However, the employer may not perfunctorily "allow the person an opportunity to explain" and ignore the explanation where the person's claims could easily be verified by a phone call, i.e., to a previous employer or a police department. The employer is required to allow the person a meaningful opportunity to explain the circumstances of the arrest(s) and to make a reasonable effort to determine whether the explanation is credible before eliminating him/her from employment opportunities.<sup>(14)</sup> (See Examples 1, 4, 5 and 6).

### III. Examples

The following examples are provided to illustrate the process by which arrest record charges should be evaluated.

Example 1:

Wilma, a Black female, applies to Bus Inc. in Highway City for a position as a bus driver. In response to a pre-employment inquiry, Wilma states that she was arrested two years earlier for driving while intoxicated. Bus Inc. rejects Wilma, despite her acquittal after trial. Bus Inc. does not accept her denial of the conduct alleged and concludes that Wilma was acquitted only because the breatholizer test which was administered to her at the time of her arrest was not administered in accordance with proper police procedures and was therefore inadmissible at trial. Witnesses at Wilma's trial testified that after being stopped for reckless driving, Wilma staggered from the car and had alcohol on her breath. Wilma's rejection is justified because the conduct underlying the arrest, driving while intoxicated, is clearly related to the safe performance of the duties of a bus driver; it occurred fairly recently; and there was no indication of subsequent rehabilitation.

Contrast Example Number 1 with the facts below.

Example 2:

Lola, a Black female, applies to Bus Inc. for a position as a bus driver. In response to an inquiry whether she had ever been arrested, Lola states that she was arrested five years earlier for fraud in unemployment benefits. Lola admits that she committed the crime alleged. She explains that she received unemployment benefits shortly after her husband died and her expenses increased. During this period, she worked part-time for minimum wage because her unemployment check amounted to slightly less than the monthly rent for her meager apartment. She did not report the income to the State Unemployment Board for fear that her payments would be reduced and that she would not be able to feed her three young children. After her arrest, she agreed to, and did, repay the state. Bus Inc. rejected Lola. Lola's rejection violated Title VII. The commission of fraud in the unemployment system does not constitute a business justification for the rejection of an applicant for the position of bus driver. The type of crime which Lola committed is totally unrelated to her ability to safely, efficiently and/or courteously drive a bus. Furthermore, the arrest is not recent.

Example 3:

Tom, a Black male, applies to Lodge City for a position as a police officer. The arrest rate for Blacks is substantially disproportionate to that of Whites in Lodge City. In response to an arrest record inquiry, Tom states that he was arrested three years earlier for burglary. Tom is interviewed and asked to explain the circumstances surrounding his arrest. Tom admits that although the burglary charge was dismissed for lack of sufficient evidence, he did commit the crime. He claims, however, that he is a changed man, having matured since then. Lodge City rejects Tom. Police officers are: 1) entrusted with protecting the public; 2) authorized to enter nearly any dwelling under the appropriate circumstances; and 3) often responsible for transporting valuables which are confiscated as evidence. The department is, therefore, justified in declining to take the chance that Tom has reformed. Even if the department is completely satisfied that Tom has reformed, it may reject him because his credibility as a witness in court could be severely damaged if he were asked about his own arrest and the surrounding circumstances while testifying against a person whom he had arrested. Since an essential element of police work is the ability to effect an arrest and to credibly testify against the defendant in court, the department would have two separate business justifications for rejecting Tom.

The above example is contrasted with circumstances under which an arrest record would not constitute grounds for rejection.

Example 4:

John, a Black male, applies to Lodge City for the same position as does Tom. John was arrested three years earlier for burglary. The charges were dismissed. Lodge City eliminates John from consideration

without further investigation and will not consider the surrounding circumstances of the arrest. If allowed to explain, John could establish that his arrest was a case of mistaken identity and that someone else, who superficially fit John's description, was convicted of the crime for which John was initially charged. Since the facts indicate that John did not commit the conduct alleged in the arrest record, Lodge City has not carried its burden of proving a business justification for John's rejection.

Example 5:

David, a Black male, applies for a teaching position in West High School. In response to a pre-employment inquiry, David states that he was arrested two years earlier for statutory rape, having been accused of seducing a seventeen-year old student in his class when he taught at another high school. The charges were dismissed. West High rejects David. David relies on *Litton* to establish a *prima facie* case of race discrimination, and West High is unable to rebut the case with more current, accurate or specific statistics. David denies that there is any truth to the charge. West High decides to conduct a further investigation and learns that David was arrested after another teacher found him engaged in sexual activity with Ann, one of his students, in the school's locker room. This event occurred on Ann's eighteenth birthday, but in the confusion of the arrest, no one realized that Ann had just reached the age of majority. Ann's parents and other teachers believed that David had seduced Ann, who had a schoolgirl "crush" on him, prior to her eighteenth birthday. However, since Ann would not testify against David, the charges had been dismissed. West High may reject David. Irrespective of Ann's age, West High is justified in attempting to protect its students from teachers who may make sexual advances toward them. Although he might not have been guilty of statutory rape, his conduct was unbecoming a teacher.

The above example is contrasted to the following circumstances.

Example 6:

Paul, a Black male, applies for the same position as does David. Paul was arrested two years earlier for statutory rape, having been accused of seducing a seventeen-year old student in his class at another high school. West High eliminates Paul from consideration without further investigation and refuses to consider the surrounding circumstances of the arrest. When filing his complaint, Paul states that when he taught at the other high school, he befriended a troubled student in his class, Alice, who was terrified of her disciplinarian parents. Paul insists that he never touched Alice in any improper manner and that on the day before his arrest, Alice confided in him that she had become pregnant by her seventeen-year old boyfriend, Peter, and was afraid to tell her parents for fear that her father would kill him. Paul states that the charges were dismissed because the district attorney did not believe Alice's statements. The district attorney and the principal of the high school, Ms. P., confirm Paul's assessment of Alice. Ms. P. states that Peter confided in her that he was the father of Alice's baby and that Alice had assured him that nothing sexual had ever happened between her and Paul. Ms. P. states that there were indications that Alice's father was abusive, that he had beaten her into giving him the name of someone to blame for her pregnancy and that Alice thought that Paul could handle her father better than could Peter. Since Paul denied committing the conduct alleged and his explanation was well supported by the district attorney and his former employer, West High has not demonstrated a business justification for rejecting Paul.

The examples discussed above demonstrate that whereas an employer may consider a conviction as conclusive evidence that a person has committed the crime alleged, arrests can only be considered as a means of "triggering" further inquiry into that person's character or prior conduct. After considering all of the circumstances, if the employer reasonably concludes that the applicant's or employee's conduct is evidence that he or she cannot be trusted to perform the duties of the position in question, the employer may reject or terminate that person.

Date: 9-7-90

Approved: Date Evan J. Kemp, Jr.(Chairman)

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## Footnotes

1. The July 29 Statement notes that despite national statistics showing adverse impact, an employer may refute this *prima facie* showing by presenting statistics which are specific to its region or applicant pool. If these statistics demonstrate that the policy has no adverse impact against a protected group, the plaintiff's *prima facie* case has been rebutted and the employer need not show any business necessity to justify the use of the policy. Statistics relating to arrests should be used in the same manner..
2. The policy statements on convictions use the term "business necessity," as used by courts prior to the Supreme Court's decision in *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989). In *Atonio*, the Supreme Court adopted the term "business justification" in place of business necessity, but noted that "although we have phrased the query differently in different cases ... the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer," citing *inter alia*, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), 109 S. Ct. at 2125-2126.
3. *U.S. v. City of Chicago*, 385 F. Supp. 543, 556-557 (N.D. Ill. 1974), adopted by reference, 411 F. Supp. 218, *aff'd in rel. part*, 549 F.2d 415, 432 (7th Cir. 1977); *City of Cairo v. Illinois Fair Employment Practice Commission, et al.*, 8 EPD &9682 (Ill. App. Ct. 1974); Commission Decision Nos. 78-03, 77-23, 76-138, 76-87, 76-39, 74-92, 74-90, 74-83, 74-02, CCH EEOC Decisions (1983) &&6714, 6710, 6700, 6665, 6630, 6424, 6423, 6414, 6386 and Commission Decision Nos. 72-1460, 72-1005, 72-094 and 71-1950, CCH EEOC Decisions (1973) &&6341, 6357 and 6274 respectively.
4. The FBI's Uniform Crime Reporting Program reported that in 1987, 29.5% of all arrests were of Blacks. The U.S. Census reported that Blacks comprised 11.7% of the national population in 1980 and projected that the figure would reach 12.2% in 1987. Since the national percentage of arrests for Blacks is more than twice the percentage of their representation in the population (whether considering the 1980 figures or the 1987 projections), the *Litton* presumption of adverse impact, at least nationally, is still valid.
5. The statistics presented in Decision No. 77-23 pertain only to prison populations in the Southwestern United States. This data would, therefore, probably not constitute a *prima facie* case of discrimination for other regions of the country. In fact, there is no case law to indicate whether courts would accept this data as evidence of adverse impact for arrest records, even for cases arising in the Southwest, since all arrests do not result in incarceration. Decision No. 76-03 noted that Hispanics are arrested more frequently than are Whites, but no statistics were presented to support this statement.
6. *Cf. EEOC v. Carolina Freight Carriers*, 723 F. Supp. 734, 751, 52 EPD & 39,538 (S.D. Fla. 1989) (EEOC failed to provide statistics for the relevant labor market to prove that trucking company's exclusion of drivers with convictions for theft crimes had an adverse impact on Hispanics at a particular job site).
7. Under *Atonio*, the burden of producing evidence shifts to the employer, but the burden of persuasion remains with the plaintiff at all stages of a Title VII case. 109 S.Ct. at 2116. *Atonio* thus modifies *Griggs* and its progeny.
8. Furthermore, potential applicants who have arrest records may be discouraged from applying for positions which require them to supply this information, thus creating a "chilling effect" on the Black applicant pool. *Carter v. Gallagher*, 452 F.2d at 330-331; *Reynolds v. Sheet Metal Workers, Local 102*, 498 F. Supp. at 964 n.12, 966 n.13, 967, 973; Commission Decision Nos. 76-138, 76-87, 76-17, 74-90, 74-25 and 74-02, CCH EEOC Decisions (1983) &&6700, 6665, 6612, 6423, 6400, 6386 and Commission Decision Nos. 74-1005 and 71-1950, CCH EEOC Decisions (1973) &&6350 and 6274, respectively.
9. Note also that in *Walls v. City of Petersburg*, 895 F.2d 188, 52 EPD &39,602 (4th Cir. 1990), the court upheld an employer's policy of making an employment inquiry regarding the arrest records of employees' immediate family members. The court determined that under *Atonio*, the plaintiff was obligated to show not only that Blacks were more likely to have "negative" responses to this question, but also that the employer made adverse employment decisions based on such responses.
10. New York, Hawaii, Oregon, Wisconsin, New Jersey, Ohio, Virginia, District of Columbia, California, Maryland, Minnesota, Utah, Washington, West Virginia, Arizona, Colorado, Idaho, Massachusetts, Michigan, Mississippi.

11. *But see EEOC v. Carolina Freight Carriers*, 723 F. Supp. at 753 (court upheld trucking company's lifetime bar to employment of drivers who had been incarcerated for theft crimes since EEOC did not produce evidence that a 5-10 year bar would be an equally effective alternative). Note also that the court in *Carolina Freight* specifically rejected the Eighth Circuit's reasoning in *Green*, cautioning that *Green* could be construed too broadly. 723 F. Supp. at 752.

12. *See also Quarrels v. Brown*, 48 EPD &38,641 (D.C. Mich. 1988) (recent conviction was related to position of corrections officer). Note however, that this action was brought under 42 U.S.C. § 1983, rather than Title VII, and plaintiff alleged that he was discriminated against because he was an ex-offender, not because the policy adversely affected a protected group.

13. The employer's suspicion may be raised by an arrest record just as it would by negative comments about an applicant's conduct made by a previous employer or a personal reference.

14. Although the number of arrests is not determinative (see *Litton*), it may be relevant in making a credibility determination.

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*This page was last modified on August 23, 2007.*



[Return to Home Page](#)



# FRANCZEK RADELET

*Attorneys and Counselors*

## **Sears Settles ADA Lawsuit with the EEOC for a Record \$6.2 Million Regarding Its Workers Compensation Leave Policy**

By: [Abizer Zanzi](#)

On September 29, 2009, Sears, Roebuck and Company agreed to pay \$6.2 million as part of a consent decree to resolve a class-action lawsuit filed by the Equal Employment Opportunity Commission (“EEOC”) in federal district court in Chicago, alleging that the retailer’s workers compensation leave policy violated the Americans with Disabilities Act (“ADA”). *EEOC v. Sears, Roebuck & Co.* The \$6.2 million settlement award – which is the largest for an ADA lawsuit in the EEOC’s history – will be distributed to individual eligible claimants through a settlement fund.

According to the EEOC, Sears maintained an inflexible policy whereby an employee who was on workers’ compensation leave due to a disability arising from a work-related injury was automatically terminated after one year of leave without consideration of whether a reasonable accommodation might have allowed the employee to return to work. Sears denied that its leave policies violated the ADA. But under the terms of the consent decree, the company agreed to revise its policies to: (1) notify affected employees, at least 45 days before their leaves expire, of their right to request a reasonable accommodation to return to work; and (2) inform the employees of examples of reasonable accommodations including modified duty, part-time work, reassignment, additional leave, and assistive devices.

Sears did not admit any wrongdoing or liability, and the consent decree did not resolve the issue of whether Sears’ policy is unlawful. However, as previously reported, the EEOC’s Chicago District Office has recently filed at least two other federal lawsuits asserting claims under the ADA against employers with similar 12-month leave policies. *EEOC v. SuperValu, Inc. and Jewel-Osco; EEOC v. United Parcel Service, Inc.* (To see our previous eBulletin on this subject click [here](#).) While the EEOC’s interpretation of the ADA remains to be tested in court, employers are strongly urged to consult with experienced employment counsel before terminating an employee under a policy that sets a strict time limit on disability leave.

Front & Center Posting Date: **October 1, 2009**



**PRESS RELEASE**

9-29-09

## SEARS, ROEBUCK TO PAY \$6.2 MILLION FOR DISABILITY BIAS

### **Federal Court Approves Largest Monetary Amount Ever in Single EEOC ADA Suit; Employees Allegedly Terminated Based on Inflexible Workers' Compensation Leave Exhaustion Policy**

CHICAGO - The U.S. Equal Employment Opportunity Commission (EEOC) today announced the entry of a record-setting consent decree resolving a class lawsuit against Sears, Roebuck and Co. (Sears) under the Americans With Disabilities Act (ADA) for \$6.2 million and significant remedial relief.

The consent decree, approved this morning by Federal District Judge Wayne Andersen, represents the largest ADA settlement in a single lawsuit in EEOC history. The EEOC's suit alleged that Sears maintained an inflexible workers' compensation leave exhaustion policy and terminated employees instead of providing them with reasonable accommodations for their disabilities, in violation of the ADA.

"The facts of this case showed that, nearly twenty years after the enactment of the ADA, the rights of individuals with disabilities are still in jeopardy," said Commission Acting Chairman Stuart J. Ishimaru. "At the same time, this record settlement sends the strongest possible message that the EEOC will use its enforcement authority boldly to protect those rights and advance equal employment opportunities for individuals with disabilities."

EEOC Chicago District Director John Rowe, who supervised the agency's administrative investigation preceding the lawsuit, said that the case arose from a charge of discrimination filed with the EEOC by a former Sears service technician, John Bava. According to Rowe, Bava was injured on the job, took workers' compensation leave, and, although remaining disabled by the injuries, repeatedly attempted to return to work. Sears, Rowe said, "Could never see its way clear to provide Bava with a reasonable accommodation which would have put him back to work and, instead, fired him when his leave expired."

Regional Attorney John Hendrickson of the EEOC Chicago District Office said pre-trial discovery in the lawsuit revealed that hundreds of other employees who had taken workers' compensation leave were also terminated by Sears without seriously considering reasonable accommodations to return them to work while they were on leave, or seriously considering whether a brief extension of their leave would make their return possible.

"The era of employers being able to inflexibly and universally apply a leave limits policy without seriously considering the reasonable accommodation requirements of the ADA are over," Hendrickson said. "Just as it is a truism that never having to come to work is manifestly not a reasonable accommodation, it is also true that inflexible leave policies which ignore reasonable accommodations making it possible to get employees back on the job cannot survive under federal law. Today's consent decree is a bright line marker of that reality."

In addition to providing monetary relief, the three-year consent decree includes an injunction against violation of the ADA and retaliation. It requires, in addition, that Sears will amend its workers' compensation leave policy, provide written reports to the EEOC detailing its workers' compensation practices' compliance with the ADA, train its employees regarding the ADA, and post a notice of the decree at all Sears locations.

According to Greg Gochanour, EEOC supervisory trial attorney in Chicago, "This is not merely a garden variety so-called 'cost of litigation' settlement. We discovered well over a hundred former employees who wanted to return to work with an accommodation, but were terminated by Sears - and some of them found it out when their discount cards were rejected while shopping at Sears. We believe Sears' decision to accept this decree makes good sense."

The lawsuit, filed in November 2004, was assigned to Federal District Court Judge Wayne Andersen of the Northern District of Illinois and Magistrate Judge Susan Cox, and is captioned *EEOC v. Sears Roebuck & Co.*, N.D. Ill. No. 04 C 7282. Today's decree is dated September 29, 2009. The court will hold a final hearing, currently slated for approximately February 2010, at which time the court will make a final determination as to the fairness of the individual distributions from the \$6.2 million settlement fund.

The EEOC litigation team has included, in addition to Hendrickson and Gochanour, Chicago trial attorneys Aaron DeCamp, Ethan Cohen, Deborah Hamilton and Laurie Elkin.

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



# FRANCZEK RADELET

*Attorneys and Counselors*

## **EEOC Claims Jewel-Osco Violated ADA By Firing Employees After Full Year of Disability Leave**

By: [Maria Troxclair](#)

On September 17, 2009, the Equal Employment Opportunity Commission (“EEOC”) filed a lawsuit against Jewel-Osco in federal district court in Chicago, alleging that several of the retailer’s medical leave practices violate the Americans with Disabilities Act (“ADA”). *EEOC v. SuperValu, Inc. and Jewel-Osco*.

In particular, the EEOC claims that Jewel-Osco’s medical leave practices of (1) automatically terminating employees who have been out on an authorized leave of absence due to a disability for one year, (2) refusing to allow employees with work restrictions to return to work, and (3) refusing to assign employees to “temporary light duty” jobs unless they were injured on the job violate the ADA.

Particularly noteworthy is the EEOC’s assertion that Jewel-Osco violated the ADA by terminating employees who failed to return to work following a full year of leave. While the EEOC’s interpretation of the ADA remains to be tested in court, employers are strongly urged to consult with experienced employment counsel before terminating an employee under a policy that sets a strict time limit on disability leave.

Front & Center Posting Date: **September 22, 2009**



**PRESS RELEASE**

9-11-09

## EEOC SUES SUPERVALU / JEWEL-OSCO FOR DISCRIMINATORY LEAVE AND DISABILITY RULES

### **Federal Agency Says 'One Year and You're Out' and 'No Accommodation, No Restrictions' Rules Violate Americans With Disabilities Act**

CHICAGO – Jewel-Osco, an operating unit of national grocery giant Supervalu, Inc., has been violating federal anti-discrimination law by its leave and disability policies, the U.S. Equal Employment Opportunity Commission (EEOC) charged in a lawsuit it filed today.

According to the EEOC's suit, Jewel-Osco is alleged to have refused to allow qualified employees with disabilities who are on authorized disability leave, or who are eligible for it, to return to work if they have any work restrictions, and to have terminated them if they reach the one-year mark on leave. The EEOC also charges that the company has refused to allow qualified employees with disabilities to be assigned to temporary light duty jobs unless they were injured on the job.

In addition, the EEOC contends, Jewel-Osco failed to stop the harassment of an employee disabled by a seizure disorder at its Melrose Park, Ill., warehouse. Among other things said to him, the EEOC maintains, was 'Go have a seizure and crawl on the floor.'"

The EEOC asserts that all this alleged conduct violates the Americans With Disabilities Act (ADA).

The EEOC filed suit in U.S. District Court for the Northern District of Illinois, *EEOC v. SUPERVALU, INC. a Delaware corporation, and JEWEL-OSCO, an operating unit of SUPERVALU, INC.*, No. 09 CV 5637, assigned to District Judge Richard Guzman and Magistrate Judge Michael Mason, after first attempting to reach a voluntary settlement.

EEOC Chicago District Director John Rowe, who supervised the administrative investigation which the agency conducted before filing suit, said, "The findings of our investigation were troubling. What we learned indicated to us that Jewel-Osco was apparently not moved to implement its leave policies in a way which might have brought capable disabled employees who had been on leave back to work—instead, they were shut out. We also learned about apparent on-the-job harassment of a disabled employee which was far out of bounds."

EEOC Chicago Regional Attorney John Hendrickson said, "Whether discrimination on the basis of disability strikes at classes of employees or at a single individual, it violates the ADA. Whether the issue is one of leave or termination, accommodation or harassment, the lesson is the same –federal law requires that qualified individuals with disabilities be accorded a fair shot on the job. This case is going to be about seeing how this employer measured up against that standard."

Today's lawsuit is the second recently filed in Chicago by the EEOC against Jewel-Osco under the ADA. On September 4, 2009, the agency filed suit against the company, charging that it had failed to reasonably accommodate a pharmacy employee at its 183rd Street store in Homewood, Ill.; the employee suffered from chronic obstructive pulmonary disease and severe allergic reactions to cosmetic fragrances. The September 4 case (N.D. Ill. No. 09 CV 5504) has been assigned to District Judge Elaine E. Bucklo.

Supervisory Trial Attorney Gregory Gochanour and Trial Attorney Gordon Waldron of the EEOC Chicago District Office will lead the agency's litigation team on today's case. The EEOC Chicago District Office is responsible for processing charges of discrimination, administrative enforcement, and the conduct of agency litigation in Illinois, Wisconsin, Minnesota, Iowa, and North and South Dakota, with Area Offices in Milwaukee and Minneapolis.

According to company information, Minneapolis-based Supervalu operates a store network with more than 2,500 locations under various brand names.

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

**PRESS RELEASE**

8-28-09

# UPS SUED FOR DISABILITY DISCRIMINATION

## ***EEOC Says Class of Disabled Employees Fired After Taking Medical Leaves of Absence***

CHICAGO – In a major class lawsuit filed here in federal court, the U.S. Equal Employment Opportunity Commission (EEOC) charged that Atlanta-based United Parcel Service, Inc. (UPS), the world’s largest package delivery company, violated federal law by rejecting an extension of medical leave as a reasonable accommodation for its employees with disabilities.

The EEOC’s administrative investigation, conducted prior to filing the lawsuit and supervised by Chicago District Director John Rowe, found that UPS violated the Americans With Disabilities Act (ADA). According to Rowe, Trudi Momsen, an administrative assistant at UPS, took a 12-month leave of absence from work when she began experiencing symptoms of what was later diagnosed as multiple sclerosis. She returned to work for a few weeks, but soon thereafter needed additional time off after experiencing what she believed to be negative side effects of her medication. Although Momsen could have returned to work after an additional two-week leave of absence, UPS fired her for exceeding its 12-month leave policy. Following its investigation, the EEOC reached an administrative determination that UPS failed to accommodate Momsen’s disability, in violation of the ADA.

“This case should send a wake up call to Corporate America that violating the Americans With Disabilities Act will result in vigorous enforcement by the EEOC,” said Commission Acting Chairman Stuart J. Ishimaru. “The ADA has been the law of the land for nearly two decades now, and employers simply have no excuse for failing to abide by its provisions.”

The EEOC filed suit late yesterday in U.S. District Court in Chicago after first attempting to reach a voluntary settlement with UPS. The litigation, captioned EEOC v. United Parcel Service, Inc. (Civil Action No. 09-C-5291) and assigned to U.S. District Judge Robert M. Dow, Jr., seeks back pay and compensatory and punitive damages for Momsen and a class of disabled employees whom UPS similarly refused to accommodate, as well as an order barring future discrimination and other relief.

EEOC Chicago Regional Attorney John Hendrickson said, “One of the main goals of the ADA is to provide gainful employment to qualified individuals with disabilities. However, policies like this one at UPS, which set arbitrary deadlines for returning to work after medical treatment, unfairly keep disabled employees from working. Sometimes a simple conversation with the employee about what might be needed to return to work is all that is necessary to keep valued employees in their jobs.”

According to company information, Atlanta-based UPS, which describes itself at the world’s largest package delivery company, is a \$49.7 billion global corporation operating in more than 200 countries and territories worldwide. The EEOC Chicago District Office is responsible for processing charges of discrimination, administrative enforcement, and the conduct of agency litigation in Illinois, Wisconsin, Minnesota, Iowa, and North and South Dakota, with Area Offices in Milwaukee and Minneapolis.

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

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*This page was last modified on August 28, 2009.*



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LEXISNEXIS' CODE OF FEDERAL REGULATIONS  
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\*\*\* THIS SECTION IS CURRENT THROUGH THE JANUARY 21, 2010 ISSUE OF \*\*\*  
\*\*\* THE FEDERAL REGISTER \*\*\*

TITLE 29 -- LABOR  
SUBTITLE B -- REGULATIONS RELATING TO LABOR  
CHAPTER XIV -- EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
PART 1601 -- PROCEDURAL REGULATIONS  
SUBPART B -- PROCEDURE FOR THE PREVENTION OF UNLAWFUL EMPLOYMENT PRACTICES  
INVESTIGATION OF A CHARGE

**Go to the CFR Archive Directory**

*29 CFR 1601.16*

§ 1601.16 Access to and production of evidence; testimony of witnesses; procedure and authority.

(a) To effectuate the purposes of title VII, the ADA, and GINA, any member of the Commission shall have the authority to sign and issue a subpoena requiring:

- (1) The attendance and testimony of witnesses;
- (2) The production of evidence including, but not limited to, books, records, correspondence, or documents, in the possession or under the control of the person subpoenaed; and
- (3) Access to evidence for the purposes of examination and the right to copy.

Any District Director, and the Director of the Office of Field Programs, or upon delegation, the Director of Field Management Programs, or any representatives designated by the Commission, may sign and issue a subpoena on behalf of the Commission. The subpoena shall state the name and address of its issuer, identify the person or evidence subpoenaed, the person to whom and the place, date, and the time at which it is returnable or the nature of the evidence to be examined or copied, and the date and time when access is requested. A subpoena shall be returnable to a duly authorized investigator or other representative of the Commission. Neither the person claiming to be aggrieved, the person filing a charge on behalf of such person nor the respondent shall have the right to demand that a subpoena be issued.

(b) (1) Any person served with a subpoena who intends not to comply shall petition the issuing Director or petition the General Counsel, if the subpoena is issued by a Commissioner, to seek its revocation or modification. Petitions must

be mailed to the Director or General Counsel, as appropriate, within five days (excluding Saturdays, Sundays and Federal legal holidays) after service of the subpoena. Petitions to the General Counsel shall be mailed to 131 M Street, NE., Washington DC 20507. A copy of the petition shall also be served upon the issuing official.

(2) The petition shall separately identify each portion of the subpoena with which the petitioner does not intend to comply and shall state, with respect to each such portion, the basis for noncompliance with the subpoena. A copy of the subpoena shall be attached to the petition and shall be designated "Attachment A." Within eight calendar days after receipt or as soon as practicable, the General Counsel or Director, as appropriate, shall either grant the petition to revoke or modify in its entirety or make a proposed determination on the petition, stating reasons, and submit the petition and proposed determination to the Commission for its review and final determination. A Commissioner who has issued a subpoena shall abstain from reviewing a petition concerning that subpoena. The Commission shall serve a copy of the final determination on the petitioner.

(c) Upon the failure of any person to comply with a subpoena issued under this section, the Commission may utilize the procedures of section 11(2) of the National Labor Relations Act, as amended, *29 U.S.C. 161(2)*, to compel enforcement of the subpoena.

(d) If a person who is served with a subpoena does not comply with the subpoena and does not petition for its revocation or modification pursuant to paragraph (b) of this section, the General Counsel or his or her designee may institute proceedings to enforce the subpoena in accordance with the provisions of paragraph (c) of this section. Likewise, if a person who is served with a subpoena petitions for revocation or modification of the subpoena pursuant to paragraph (b), and the Commission issues a final determination upholding all or part of the subpoena, and the person does not comply with the subpoena, the General Counsel or his or her designee may institute proceedings to enforce the subpoena in accordance with paragraph (c) of this section.

(e) Witnesses who are subpoenaed pursuant to § 1601.16(a) shall be entitled to the same fees and mileage that are paid witnesses in the courts of the United States.

**HISTORY:** [*43 FR 30798*, July 18, 1978, as amended at *47 FR 46275*, Oct. 18, 1982; *51 FR 29098*, Aug. 14, 1986; *54 FR 32061*, Aug. 4, 1989; *55 FR 14245*, Apr. 17, 1990; *56 FR 9624*, Mar. 7, 1991; *71 FR 26827*, *26828*, May 9, 2006; *74 FR 3429*, *3430*, Jan. 21, 2009; *74 FR 63981*, *63983*, Dec. 7, 2009]

**AUTHORITY:** AUTHORITY NOTE APPLICABLE TO ENTIRE PART:

*42 U.S.C. 2000e* to *2000e-17*; *42 U.S.C. 12111* to *12117*; *42 U.S.C. 2000ff* to *2000ff-11*.

**NOTES:** [EFFECTIVE DATE NOTE: *74 FR 3429*, *3430*, Jan. 21, 2009, amended paragraph (b)(1), effective Jan. 21, 2009; *74 FR 63981*, *63983*, Dec. 7, 2009, amended paragraph (a), effective Jan. 6, 2010.]

NOTES APPLICABLE TO ENTIRE SUBTITLE:

CROSS REFERENCES: Railroad Retirement Board: See Employees' Benefits, 20 CFR chapter II.

Social Security Administration: See Employees' Benefits, 20 CFR chapter III.

EDITORIAL NOTE: Other regulations issued by the Department of Labor appear in 20 CFR chapters I, IV, V, VI, VII; 30 CFR chapter I; 41 CFR chapters 50, 60, and 61; and 48 CFR chapter 29.

NOTES APPLICABLE TO ENTIRE PART:

EDITORIAL NOTE: Nomenclature changes to part 1601 appear at *56 FR 8624*, Mar. 7, 1991.

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING

SECTION --

*EEOC v Lutheran Social Servs. (1999, App DC) 337 US App DC 373, 186 F3d 959, 80 BNA FEP Cas 1009, 44 FR Serv 3d 784*

663 words



Respondent is a Delaware corporation doing business in the State of Illinois with, at relevant times, facilities within the Eastern Division of the Northern District of Illinois. Respondent has at all relevant times been an employer within the meaning of Section 701(b) of Title VII, 42 U.S.C. § 2000e(b).

Aleita Anderson, Toyia K. Stephens and Tiffany M. Allen (“Charging Parties”), filed charges of discrimination against Respondent (“Charges”) on March 28, 2008, April 8, 2008, and April 15, 2008, respectively (EEOC Charge Nos. 440-2008-04419, 440-2008-04685, and 440-2008-04869). The Charging Parties allege that they had been employed by Respondent in sales positions in Downers Grove, Illinois, within the Respondent’s “Chicago Office,” which is an organizational unit of the company that includes facilities in Downers Grove, Illinois; Elk Grove Village, Illinois; Chicago, Illinois; and Milwaukee, Wisconsin. The Charging Parties allege that ADP discharged them because of their race, black, in March 2008. Allen also alleges that ADP subjected her to different terms and conditions of employment and that after she complained to ADP about the same, ADP retaliated against her. In particular, Allen maintains that ADP’s assignment of sales territories was racially discriminatory.

Upon receiving each of the Charges, the Commission sent a Notice of Charge of Discrimination to ADP. Thereafter, the Charges were assigned for investigation by the Commission, pursuant to Section 706 of Title VII, 42 U.S.C. § 2000e-5.

On July 16, 2009, the Commission issued the instant Subpoena, which requests documents pertaining to hiring, assignment of sales territories, and discharge of sales employees within ADP’s Chicago Office. The Subpoena was issued pursuant to the authority granted to the EEOC by Title VII, in order to investigate matters relevant to the duly-filed Charges of employment discrimination filed by the Charging Parties under Title VII.

On July 27, 2009, ADP filed a petition with the EEOC to revoke the Subpoena. On

September 22, 2009, the EEOC denied that petition and directed Respondent to comply with the Subpoena on or before October 6, 2009.

The Respondent has not complied with the Subpoena. Counsel to the Applicant has conferred in good faith with counsel to the Respondent in an effort to obtain voluntary compliance with the Subpoena, but Respondent has not agreed to comply fully with the Subpoena.

As set forth more fully in the Applicant's forthcoming Memorandum in Support of this Application ("Supporting Memorandum"), the Subpoena is within the agency's authority, the subpoena is not too indefinite, and the information sought is reasonably relevant to the Charges.

Accordingly, and for the reasons set forth more fully in the Applicant's forthcoming Supporting Memorandum, Respondent should be directed to comply fully with the Subpoena.

WHEREFORE, the EEOC respectfully requests that this Court:

- A. issue an Order directing Respondent to appear before this Court on a date certain to show cause why an Order should not issue directing Respondent to comply with the Subpoena;
- B. Upon return of such Order to Show Cause, issue an order directing Respondent to comply with the Subpoena;
- C. Award the EEOC attorney fees and costs in bringing this action; and

D. Grant the EEOC such further relief as may be necessary and appropriate.

Respectfully submitted,

John C. Hendrickson  
Regional Attorney

Gregory Gochanour  
Supervisory Trial Attorney

s/ Justin Mulaire  
Justin Mulaire  
Trial Attorney

U.S. Equal Employment Opportunity Commission  
500 West Madison Street, Suite 2000  
Chicago, Illinois 60661  
(312) 353-7722

**United States District Court, Northern District of Illinois**

<b>Name of Assigned Judge or Magistrate Judge</b>	Robert W. Gettleman	<b>Sitting Judge if Other than Assigned Judge</b>	
<b>CASE NUMBER</b>	09 C 7535	<b>DATE</b>	1/14/2010
<b>CASE TITLE</b>	U.S. Equal Employment Opportunity Commission vs ADP, Inc.		

**DOCKET ENTRY TEXT:**

Pursuant to F.R.C.P. 41(a), this action is dismissed without prejudice. Defendant is to continue to cooperate with plaintiff should the agency identify any discrepancies with ADP's response to the subpoena, with each party to bear its own costs and attorneys' fees.

[Docketing to mail notice]

00:00

Courtroom Deputy	GDS
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# THOUGHTS ON SOME LESS PRODUCTIVE STRATEGIES AND TACTICS IN EMPLOYMENT DISCRIMINATION MATTERS

*John C. Hendrickson, Regional Attorney<sup>1</sup>*  
*U.S. Equal Employment Opportunity Commission*  
*Chicago District<sup>2</sup>*

As a Regional Attorney, I am continuously faced with the ever-changing strategies and tactics of defendant employers and their counsel in EEOC employment discrimination litigation. There are, I think, recognizable trends or “fashions” in the defense of employment cases, some of which are more effective and productive than others. What may begin in one corner of the bar seems to spread with surprising rapidity throughout the bar. So, from time to time, I like to attempt to identify and assess what seems to be going on.

Here, I want to informally discuss four features of the current landscape which have caught my attention: (1) Increasingly frequent demands for “never darken my door again” clauses in consent decrees resolving lawsuits brought by the EEOC, (2) efforts by defendants in EEOC class or “systemic” investigations or litigation to “buy off” charging parties, (3) the conduct of seemingly endless discovery in employment discrimination cases, and (4) the “sue first strategy.”

## **WHAT’S WRONG WITH “NEVER DARKEN MY DOOR AGAIN” CLAUSES**

In the past few years, as we at the EEOC attempt to negotiate consent decrees with employers, we have seen an increasing number of them demand that the decree include a clause which prohibits the individuals who filed the charges of discrimination upon which the litigation is predicated be *forever barred* from again applying for work with the defendant employer. Hence, the “never darken my door again” appellation. (Note that the issue here is *not* whether the employer should ever be required to *hire* or reinstate the individual but, rather, whether the individual shall be, by order of a federal court, prohibited for life from even *applying* for a job with that employer.)

In these negotiations, two things are clear: First, the bar on the charging party’s future application is inextricably and irrevocably tied to the charging party’s participation in the EEOC’s administrative processes and its litigation.<sup>3</sup> After all, it is the charging party’s charge

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<sup>1</sup> The author’s remarks are made in his personal and individual capacity. They have not been reviewed, “vetted,” or approved by the EEOC, they do not necessarily reflect the views of the EEOC or any official of the EEOC, and they do not in any respect constitute an official or authorized statement of EEOC policy or practice.

<sup>2</sup> Since the repositioning of the EEOC effective January 1, 2006, the Chicago District (formerly limited to most of the State of Illinois) has been comprised of Illinois, Wisconsin, Minnesota, Iowa, North Dakota and South Dakota

<sup>3</sup> The principles discussed here would apply with equal force if the individual sought to be barred had not filed a charge of discrimination with the Commission but were merely obtaining relief under a consent decree.

which is the so-called jurisdictional predicate or “pre-condition” of the litigation and it is the consent decree which constitutes the final resolution of that charge.

Second, and closely related to the first, the employer is, however its demand may be phrased, of necessity saying, “We have no means of exercising any control over who may, in the future, apply for a job with us. They may be totally incompetent, they may be absolutely unqualified, they may be career criminals. We can’t stop them from dropping off an application—it would be futile to try. But, by golly, this charging party who went to the EEOC—him we *can* stop, so that’s what we want to do in the consent decree. And, we want to do that even though we have no basis for even attempting this *except* the charging party’s participation in the EEOC process.”

Accordingly, it should not be a surprise to anyone that we at the EEOC view “never darken my door” clauses as fundamentally retaliatory and that we will not include them in consent decrees.<sup>4</sup> Consent decrees are intended and designed to *remedy* past discrimination and to *prevent* future discrimination. Including penalties in the form of restrictions upon the future conduct of statutorily protected participants in our processes is antithetical to all that.<sup>5</sup>

An additional observation: It is not altogether clear *why* demands for “never darken my door” clauses have become more widespread. Employers know that what really counts is not who *applies* but who is *hired*. They know that as long as the hiring process is not discriminatory they can hire or refuse to hire whomever they want—on the merits. They know that charging parties almost never apply for another job with an employer against whom they have previously filed a charge. They know that the EEOC is not running around finding “reasonable cause” or initiating litigation on behalf of the proverbial but apocryphal consent decree beneficiary who is trying to drum up phony retaliation charges.<sup>6</sup>

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<sup>4</sup> We will also not acquiesce in such a clause being included in a “private side agreement” and, if we are to go forward with a consent decree, may require a representation of counsel that no such agreement has been made.

<sup>5</sup> EEOC’s refusal to acquiesce in reapplication bars grows increasingly important as employers increasingly merge with and acquire each other or engage in numerous other business combinations. In one case, a charging party employee of a private security firm told us he appreciated EEOC’s unwillingness to agree to a bar on reapplication because a currently independent firm in that industry to which he might want to apply in the future could, a few months down the road, be owned and operated by the firm against which he had filed his charge. Or, the firm from which he was barred could acquire a contract serviced by his new employer and require all the employees working on that contract to “reapply” in order to keep their existing jobs.

<sup>6</sup> There are several reasons why defendants’ laments that they are merely attempting to “buy peace” by insisting on reapplication bars cannot be credited. First, they *have* bought as much peace as the have a right to in the form of final disposition of the dispute by a consent decree which has *res judicata* effect. Second, no litigant is entitled to the kind of peace in any case which imposes an *in futuro* restriction or penalty related to its opponent’s past exercise of statutorily guaranteed federal rights. Third, in the narrow category of cases in which such future restrictions or penalties are countenanced, they are imposed upon the “bad actor,” not the target of the bad actor’s alleged misconduct (even if the misconduct is not admitted). For example, those who engage in securities fraud may be barred from the securities industry, but no one would suggest that their *victims* or those who report their frauds should be. Finally, it has not escaped our notice at the EEOC that demands for reapplication bars are never coupled with proposals for front pay for a period of years, even if actuarially discounted to present value.

The fact that demands for such clauses were relatively rare until a few years ago, and the fact that employers continue to enter in to consent decrees when their demands are *rejected*, may suggest that the demand is as much the product of defense counsel's thinking as the considered long-range business judgment of the employer. But from our perspective such demands—from wherever they originate—do nothing more than unnecessarily complicate and extend the time spent on negotiations. Even then they are worthless to the employer as a “bargaining chip” because the concept itself is a complete non-starter as far as EEOC concerned.<sup>7</sup>

### ***BUYING OFF CHARGING PARTIES AND THE CONTINUATION OF EEOC ENFORCEMENT***

With respect to the defense strategy of attempting to “buy off” charging parties, I want to note the recent decision of Judge Frank Easterbrook of the U.S. Court of Appeals for the Seventh Circuit in *EEOC v. Watkins Motor Lines, Inc.*, 553 F.3d 593, 105 Fair Empl. Prac. Cas. (BNA) 364 (7<sup>th</sup> Cir. 2009)(7<sup>th</sup> Cir. No. 08-2483, *decided* 1/23/2009). The background of *Watkins* is that the agency had been investigating a charge of discrimination filed by an African-American whom the trucking company had refused to hire because of a “rule” that it did not hire applicants who had been convicted of “violent felonies.”

The charging party had years earlier been involved in a sexually related altercation with his then estranged wife who called the police, resulting in the arrest of the charging party. Subsequently, the wife attempted to withdraw her complaint, but the prosecutor was determined to go forward anyway, and the charging party accepted a felony plea bargain. The Charging Party and his wife were reconciled, had more children, became pillars of their church and their condominium association. But the “violent felony conviction” followed him.

In the course of the EEOC investigation, the employer justified its rule and the rejection of the charging party on the basis of its allegation that three of its employees had earlier been slain in shootings at its facilities. The EEOC sought to enforce a subpoena for employment records which would permit an empirical analysis of whether, when, and how *Watkins* actually applied its rule.

*Watkins* defended on the ground, *inter alia*, that it had negotiated a settlement with the charging party conditioned upon the charging party's withdrawal of his charge. Therefore, *Watkins* contended that the EEOC must treat the charge as having been withdrawn and shut down its investigation without regard to how many others may have been injured by the discriminatory application of its rule.

The District Judge ruled that EEOC's refusal to permit withdrawal of the charge and to shut down its administrative investigation of a possible pattern of race discrimination against the applicant and others in the same position was “arbitrary.” She then dismissed the EEOC's application to enforce the subpoena for documents, concluding that the EEOC could not ask a

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<sup>7</sup> Note that even if the defendant employer were to prevail at trial, it could *not* receive a court order barring a charging party from any future application. Therefore, in terms of assessing whether settlement negotiations are being conducted in good faith, it may be appropriate to consider demands for such terms as unacceptable over-reaching.

court to enforce a subpoena when it should have allowed the charging party to withdraw his charge. *EEOC v. Watkins Motor Lines, Inc.* (N.D. Illinois No. 07 C 4115, J. Pallmeyer, 3/26/2008). The EEOC appealed.

Writing for the Court of Appeals, Chief Judge Easterbrook said, "The Northern District of Illinois is the right tribunal, this is the right time, and these are the right litigants to resolve the question of whether [the rejected job applicant's] request to withdraw his charge ends the EEOC's authority to investigate."

In rejecting the lower court's reasoning and resolving the issue in favor of the EEOC, Chief Judge Easterbrook went on to write, "The problem with the argument is that it allows litigants to achieve their settlement by injuring other unrepresented persons. Many a defendant would love to decapitate a class . . . by paying off the sole representative plaintiff and thus avoiding liability to all other class members. . . That was what Watkins tried to do here . . . The agency and the judiciary are not obliged to abet this strategy by preferring [the rejected applicant's] interests over those of other workers . . . A charging party's change of mind does not diminish the agency's authority to investigate on its own behalf."

The outcome, as far as a defendant employer's push for settlement is concerned, is the same in the *litigation* context. In *EEOC v. International Profit Associates*, one of EEOC's longest-running and largest class sexual harassment cases, the employer sought to end-run the agency and to approach members of the victim class in order to negotiate individual settlements directly with them one-on-one. The District Court, we believed mistakenly, was not persuaded by the EEOC's argument "that the court should prohibit IPA from contacting individual class members because of the potential for intimidation and coercion, due to the parties' unequal level of sophistication and the fact, as asserted by EEOC, that some class members are frightened of IPA." *EEOC v. International Associates, Inc.*, N.D. Ill. No. 03 C 4427 (Order, 10/7/22004, Gottschall, J.) *rehearing denied* 2008 WL 485130 (N.D. Ill. 2/22/2008).

But the court, on the basis of *EEOC v. Waffle House*, 534 U.S. 279 (2002), *did* prohibit IPA from acting on its proposal in a more far-reaching way, applicable across the field of EEOC litigation:

"[T] court agrees with EEOC that it, and not the individual class members, is the master of this case. The status of the EEOC when it brings an action on behalf of a class is *sui generis*. It is not merely a proxy for the aggrieved individuals on whose behalf it brings the action. \* \* \* The Court's analysis in *Waffle House* dooms IPA's contention that its right to try to resolve this litigation, and the public interest in settlement, trump EEOC's authority to direct the course of the litigation. The EEOC, as the Supreme Court has made clear, must vindicate both public and private interests, and must be the captain of the ship that steers the course between them. To allow IPA to entice individual claimants to compromise their claims without the concurrence of EEOC is to undermine EEOC's ability to vindicate all the interests at stake in

this case as it judges best. Congress has placed the responsibility for that judgment with the EEOC, and there it must remain.” *Id.*, *citation omitted*.

In denying IPA’s motion for reconsideration, the court referenced, in addition to *Waffle House*, the Seventh Circuit’s decision in our *Sidley & Austin* case: “That authority has been recognized in the Seventh Circuit and in courts of this and other districts to mean that the EEOC may pursue victim-specific monetary relief, even if a settlement agreement has been reached between a defendant and individual claimants. *EEOC v. Sidley Austin LLP*, 437 F.3d 695, 696 (7<sup>th</sup> Cir. 2006)(EEOC can obtain monetary relief for claimants even if the claimants were barred from bring their own suits).” 2008 WL 485130 at 2.

The moral of the story here is not overly complicated: Employers are well advised to let EEOC investigations run their course—especially since in the overwhelming majority of cases, the EEOC *neither* makes a finding of reasonable cause *nor* litigates. Further, efforts to derail EEOC investigations or litigation by buying off charging parties or class members or by retaliating against them (more on that below) are invariably doomed to failure, and employer resources may be much better invested elsewhere.

#### ***THE PURSUIT OF ENDLESS DISCOVERY IN EMPLOYMENT DISCRIMINATION CASES***

The investment of resources issue necessarily leads to consideration of the enormous sums employers appear to be investing routinely in discovery in employment discrimination litigation. Since compensatory and punitive damages became available under the Civil Rights Act of 1991 there has been a developing perception that the financial stakes in employment discrimination litigation have dramatically increased. While, relatively speaking, there is considerable truth to this perception, it is also true that the \$300,000 cap on damages in even the most egregious and outrageous cases still limits the *in terrorem* impact of the federal statutes. Nevertheless, the increased amounts “in play” have coincided with an exponential growth of the employment discrimination defense bar<sup>8</sup> and, I expect, an enormous increase in the amount of legal fees generated by the practice.

But the latter, of course, is directly dependent upon keeping all of those lawyers busy, and my sense is that where there is the most room for “busy work” is in discovery, and, particularly, in the taking of depositions. There was a time when lawyers on both sides of employment discrimination cases, especially class or “pattern or practice” cases, sometimes with the assistance of the court, were able to negotiate reasonable limits on the number of depositions which would be taken. Class members who would actually testify at trial could be designated and deposed. Methods of “sampling” the class-wide claims could be devised and provide a rational basis for limiting discovery. Parties could jointly move the court for bifurcation of liability and damages, with damages discovery for most class members being deferred to “phase II.” Resources on both sides could be invested in the cost-effective assessment or adjudication or

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<sup>8</sup> At one time, it was possible to count the number of major law firms specializing in employment discrimination law in Chicago on one hand. No longer. The number of major national firms competing for employment discrimination defense business in Chicago appears to have at least easily tripled—or more—in recent years, and that may well be true in other markets as well..

remediation of discrimination or, at least, *not* poured, without rational limitation, down the black hole of the litigation *process*.

Not now. Now, defendants in class cases *usually* take the position that they *must* take the deposition of every class member, and it does not matter whether there are twenty-five, fifty, one hundred, one hundred-fifty, or more class members. They are no longer receptive to the bifurcation of liability and damages phases, which can dramatically reduce their own costs of litigation, or to other alternatives to unlimited discovery. In a world in which the cost of a deposition is often about \$1,000 for court reporting and transcript services *alone* without allowing a nickel for attorneys' fees, this approach makes for mighty high litigation expenses for employers.

Moreover, it is not only class member depositions which keep the costs escalating. Defendants routinely notice depositions of EEOC investigators, although the conduct of EEOC's investigation virtually *never* survives as an issue since defendants are *always* afforded a trial *de novo* on the issue of discrimination. Some defendants want wide-ranging discovery on the issue of whether EEOC attorneys unethically and illegally solicit class members to participate in EEOC litigation—something I am not aware of having been established in any case.<sup>9</sup> Others attempt discovery regarding class members' work at subsequent employers *after* having left the work force of the defendant employer, and still others attempt to delve into the immigration status of class members, although the courts have repeatedly held that to be intimidating, not calculated to lead to the discovery of relevant evidence, and improper.

Fortunately, a number of District Judges appear to have become as impatient with such approaches to the discovery as we at the EEOC are, and they have taken appropriate corrective measures. That number needs to be increased and there needs to be—*for the benefit of both employers and charging parties and class members, and for the benefit of the judicial process itself*—increased scrutiny of the methodology and costs of discovery in employment discrimination cases, especially in class or systemic pattern or practice cases.

#### ***“SUE FIRST” IS NOT REALLY A GOOD STRATEGY IN THE EMPLOYMENT CONTEXT***

Finally, I want to comment on Ronald M. Green's December 1, 2008 article in the *New York Law Journal* concerning "The Employer's Sue First Strategy." In a nutshell, Green argues that employers may be well-advised to consider preemptively initiating litigation against their employees in employment related disputes. He contends that there is a "correlation between a preemptive approach to litigation and a favorable outcome" and that preemptive litigation is a "now proven, effective strategy."

A careful reader of Green's article will observe, however, that notwithstanding the hyperbole, his examples are not highly persuasive. Although he suggests the opposite, he

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<sup>9</sup> One cannot help but have doubts about whether defendants or their counsel who engage in such pursuits have even a minimal a good faith belief in that possibility themselves. More often than not the pursuit of unfounded (but nevertheless offensive) accusations of "misconduct" on the part of career civil service EEOC attorneys appears to be transparent posturing. It is only revelatory of, if anything, a problematical approach not only to the issue of discrimination but to the judicial process and the standards of the profession.

concedes that there "is no definitive cause and effect between the results in the two [Pregnancy Discrimination Act] cases [he discusses] based on . . . litigation strategies." The reader will also observe that several of Green's examples involve classic extortion or other conventional wrongs (*e.g.*, dissemination of confidential business information) as to which there is nothing new in aggrieved persons—whoever they may be—initiating litigation.

Green's leading example of an employment related dispute arising under the Civil Rights Act of 1964 is his discussion of the sexual harassment matter involving the Fox News Channel's Bill O'Reilly. In that case, when negotiations between a subordinate female Fox employee and O'Reilly collapsed, Green's firm "preemptively" sued the employee and her attorney contending that her pre-suit settlement demand amounted to extortion. Without mentioning any details, but implying that the strategy was successful, Green writes, "Soon after the suit was filed, the case settled."

As the *Washington Post* reported, however, "The Fox News talk show host also agreed to drop his extortion suit . . . The deal likely involves payment of millions of dollars to [the woman], since the two sides were discussing an offer of well over \$2 million when negotiations broke down, say sources." The Post went on to report that "Fox believed [the woman's attorney] has tape recordings of the long, highly detailed conversations alleged in the suit . . . Ronald Green [the author of the subject article] never denied that the Fox commentator has used such language, but said he never broke the law . . ." (Howard Kurtz, "Bill O'Reilly, Producer Settle Harassment Suit," *Washington Post*, October 29, 2004, p. C01.)

And, in an MSNBC interview, Green said, "I can't tell you [O'Reilly] never uttered the words or sentences or phrases that appear in the claim that she's made." ("O'Reilly's lawyer explains the extortion suit against Andrea Mackris," *The Abrams Report*, MSNBC.com, October 21, 2004.) In the light of such widely circulated and apparently damaging disclosures, one is compelled to wonder how many "successes" of this kind any defendant could weather.

Accordingly, it is likely not too much to suggest that Green may have "oversold" the actual value of a "sue first strategy." For every proponent of that strategy there are surely many others, whether plaintiffs or defendants, who understand that litigation is no picnic. Attorneys and their clients who have endured the rigors of litigation understand, too well, that litigation, no matter who initiates it, is frequently expensive, embarrassing, and time consuming, with costs of all kinds which frequently out-weigh the value of the benefit obtained.

The latter is especially true, when litigation is initiated in reaction to the exercise of rights conferred by Title VII of the federal Civil Rights Act of 1964 and the other employment discrimination statutes enforced by the EEOC. Title VII prohibits retaliation against any individual who participates in processes under the act (*e.g.*, filing a charge of discrimination with the EEOC, providing testimony in an EEOC investigation, filing a lawsuit under Title VII, etc.) or who opposes any practice made unlawful by Title VII (*e.g.*, complaining to an employer about sexual harassment).

Most employers are aware of the prohibitions on retaliation and understand that engaging in retaliation is one of the most certain ways to attract the attention of the EEOC and to become

a defendant in a government lawsuit. We are especially concerned when employers and their counsel react to employees' exercise of federal rights by initiating litigation against them.

A few recent cases are illustrative. *EEOC v. Ralphs Grocery Co.*, N.D. Illinois No. 07 C 5110, was resolved by a consent decree entered May 20, 2008 which recited, inter alia, "The alleged retaliation against [the charging party] included sending her what the EEOC considered to be a threatening letter and filing suit against her in both federal and state court claiming that her filing of a charge of discrimination violated Defendant's mandatory arbitration policy." The consent decree provided for a payment of \$70,000 to the charging party, required revision of Ralphs' arbitration policy, tolled the charge filing period for a class of employees, mandated a posting, training and periodic reporting, and enjoined the company from "intimidating, threatening, or coercing an employee who files a charge on account of that charge or as a means of compelling that employee to withdraw the charge."

In *EEOC v. Custom Companies, Inc., et al*, N.D. Illinois No. 02 C 3768 and O3 C 2293, the EEOC had charged that three female sales representatives were subjected to sexual harassment and retaliation and that one was sued by the defendants in Illinois state court because she complained to the EEOC. The case was tried to a jury and on November 17, 2006, the jury returned a verdict that appears to have telegraphed its outrage with Custom Companies' adoption of a "sue first strategy." The verdict, for just three women, was \$2.36 million in the aggregate--\$100,000 of which was punitive damages the jury allocated to the victim of the retaliatory state court lawsuit and to which it added \$60,000 for her litigation expenses. (In view of Title VII's damages "caps," the court reduced the aggregate verdict to \$1.1 million.)

In its final judgment, the court rejected defendants' argument "that a legitimate lawsuit cannot be a basis for a retaliation claim," holding that the woman "suffered an adverse action by being sued and being forced to incur the expenses of hiring attorneys" and that "a reasonable jury could have determined that Defendants' lawsuit was retaliatory." (*EEOC, et al v. Custom Companies, et al*, 2007 WL 734395 at 2, 100 Fair Empl. Prac. Cas. (BNA) 859 (N.D. Ill. 3/8/2007).)

A consent decree was entered on December 20, 2006, in *EEOC v. Comprehensive Benefit Consultants, Inc.*, E.D.N.Y. No. 04 CV 3076, a case litigated by EEOC's New York District Office. The decree recited that "EEOC further allege[d] that Defendant retaliated against [two charging parties] for complaining about the harassment by filing defamation lawsuits against them in New York State Supreme Court, Suffolk County State Court." In addition to wide ranging other relief, the decree provided, "Within three days of the entry of this decree [the plaintiff] will dismiss with prejudice the defamation lawsuits," and required the payment of \$150,000 to the two charging parties and two others—and *this was a \$50,000 per claimant "caps" case.*<sup>10</sup>

Finally, on September 22, 2008, the agency filed suit in *EEOC v. Chateau Del Mar, Inc.*, N.D. Illinois No. 08 C 5388, alleging that the defendant—already a defendant in another EEOC suit—had engaged in prohibited retaliation when it sued three former employees who had filed

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<sup>10</sup> That is, the amount of the *settlement* was 75% of the *maximum* amount EEOC could have recovered in damages if it had taken the case to trial and won.

their own private Title VII sexual harassment against it. That case is still in its early stages and, although we at the EEOC are confident of the outcome, there are, obviously, never any absolute guarantees in any litigation.

This much is certain, however: When it comes to employees being sued on account of their engagement in activities protected by the federal employment discrimination statutes the EEOC is going to consider that retaliation and we are highly likely to take action. In those situations, a "sue first strategy" may not only prove to have been ill-suited to the efficient and economical resolution of the underlying employment related dispute, it may also buy the employer the proverbial "peck of trouble" and result in its being named as defendant in a lawsuit brought by the federal government. "Sue first," then, is a strategy employers are well-advised to view with considerable skepticism.

### ***RECONSIDERATION OF UNPRODUCTIVE STRATEGIES AND TACTICS***

As should be apparent from the foregoing, one possible view is that *none* of the strategies or, more properly, tactics discussed above are productive. In the real world, *none* of them appear actually to contribute to the expeditious, efficient, or financially responsible final resolution of federal employment discrimination litigation, particularly in cases brought by the EEOC. I certainly do not see protracted and expensive litigation and interminable negotiations regarding consent decree terms yielding better results for employers.<sup>11</sup>

But these things may make litigation enormously expensive for both employers and the EEOC. A single seven hour deposition allowed by the Federal Rules of Civil Procedure attended by two defense attorneys billing an average \$350 per hour results in \$4,900 in billable hours *without* allowing for any preparation or follow-up. Thus, in an "ideal dream world" in which preparation for depositions is unnecessary and there is no need for follow-up, and literally nothing else ever happens, an aggregate of 100 depositions—no matter which side is taking them—can easily yield fees approaching one-half million dollars plus \$100,000 in court reporting and transcript costs. Although the cost to the EEOC (and, ultimately, the taxpayers) cannot be so readily measured, it is still considerable and a matter of concern.

There are two things, however, which employers can consider to control their costs. First, employers can be proactive—as many of them are—in rooting out employment discrimination before litigation is initiated or, at least, before it metastasizes into the kind of wide-spread problem which gives rise to the major pattern or practice systemic cases brought by the EEOC and sophisticated and successful private plaintiffs counsel. The well-worn adage about "an ounce of prevention" being worth "a pound of cure" is nowhere more true than in the area of employment discrimination.

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<sup>11</sup> There is no attempt here to address the suspicion of some EEOC attorneys that some defense counsel pursue these and other strategies or tactics in order to convince the EEOC or their own current or potential clients that they are the "toughest guys on the block" and, therefore, worthy of getting their way with EEOC or being retained by employers in need. Suffice it to say here that, at least as far as the EEOC is concerned, it does not wash. Among EEOC attorneys, defense attorneys who labor to project a "tough guy" persona risk engendering more derision than respect, and, truth be told, no one is afraid—at all.

Second, employers who, despite their best efforts, find themselves embroiled in an employment discrimination matter, instead of adopting a knee-jerk “fight to the end and damn the cost” strategy, can do something else. They can exercise their best efforts to objectively assess their exposure—what happened, what needs to be done, how do we get there from here. They can assess the situation just as they would any other complex *business* challenge. Successful employers do not, I think, respond to most business challenges with notions of “getting even,” prolonging disputes, putting off predictable inevitable days of reckoning, or investing unlimited amounts in *the process of reaching a decision what about needs to be or must be done*—and they are well advised not to do so when engaged in employment discrimination matters.

That said, employers should be fully involved with their counsel in the development of their defense strategy and tactics, and in the determination of the level of resources it makes good business sense to invest. They can start by thinking *immediately* about where they want to be, what they want their organization to look like and how they want it to operate *when the dispute is over*. In doing so, they can avoid being blinded by the fog of the adversarial process. I believe that approach can work not only to advance employers’ interest, but also to advance the public interest.

I say that not because I am an idealist but because I have seen enough cases in which it has worked. I have seen enough cases in which employers have been determined to view employment discrimination litigation and follow-up consent decrees as wake-up calls, rather than as calls to protracted battle. As spring-boards for making needed and *beneficial* managerial and operational changes. As a way to move beyond the biases of the past and to get with the program for the future. And, that is in everybody’s interest.