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TITLE VII OF THE CIVIL RIGHTS ACT AFTER 50 YEARS

EEOC Obligations; EEOC Initiatives

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TABLE OF CONTENTS

Page

EEOC Obligations and Initiatives

I. EEOC's Subpoena Power

A. Issue: The appropriate scope of EEOC's subpoena power, and the extent to which courts should limit this scope.

B. Statutory Authority: "In connection with any investigation of a charge filed under 2000e-5 of this title, the Commission . . . shall at all reasonable times have access to, for purposes of examination, and the right to copy evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this subchapter and is relevant to the charge under investigation." 29 U.S.C. § 2000e-8(a); *see also* 29 C.F.R. § 1601.16(a) ("To effectuate the purposes of Title VII . . . 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.").

C. Leading Caselaw: *EEOC v. Shell Oil Co.*, 466 U.S. 54, 68-69 (1984) ("[T]he Commission is entitled to access only to evidence 'relevant' to the charge under investigation. That limitation on the Commission's investigative authority is not especially constraining. . . . [C]ourts have generously construed the term "relevant" and have afforded the Commission access to virtually any material that might cast light on the allegations against the employer. . . . On the other hand, Congress did not eliminate the relevance requirement, and we must be careful not to construe the regulation adopted by the EEOC governing what goes into a charge in a fashion that renders it a nullity.").

1. Recent Cases Supporting Broad Application of EEOC Subpoena Power:

a. *EEOC v. Aerotek, Inc.*, 498 F. App'x 645, 647 (7th Cir. 2013), *reh'g denied* (Mar. 12, 2013) (holding that employer waived its right to challenge enforcement of subpoena by not timely filing its petition within five business days as provided in 29 C.F.R. § 1601.16)

(i) Aerotek argued that the subpoena demanded irrelevant information because it sought seventeen categories of documents from six of Aerotek's facilities, yet the charge had claims by only two individual plaintiffs. The Seventh Circuit did not reach the merits of the relevance argument, but did mention that the requirement that the employer challenge enforcement within five days is particularly

important where the objection is based on "relevance or particularity."

(ii) EEOC has used this decision to discourage employers from challenging subpoenas: "The EEOC consistently prevails in court with its subpoena enforcement actions. Prudent and penny-wise employers should consider using subpoenas as an opportunity to show the government that they complied with EEO laws and produce the material they have, in lieu of expending resources to delay the investigation. Courts, as the Seventh Circuit did here, defer to [] EEOC's determination as to what should be investigated." Comments of EEOC Regional Attorney John Hendrickson, Press Release, Equal Employment Opportunity Commission, Aerotek Required by Federal Appeals Court to Comply with EEOC Subpoena (Jan. 13, 2013), *available at* http://www.eeoc.gov/eeoc/newsroom/release/1-16-13.cfm.

b. *EEOC v. Kronos Inc.*, 694 F.3d 351, 364 (3d Cir. 2012), as amended (Nov. 15, 2012) (holding, in ADA context, that EEOC could enforce subpoena issued to nonparty where defendant employer purchased employment tests from nonparty and used those tests as part of its hiring practices because EEOC had to prove that tests did not relate to the position at issue and was not consistent with business necessity, and thus it is "a proper inquiry for the EEOC to seek information about how these tests work, including information about the type of characteristics they screen out and how those characteristics relate to the applicant's ability to fulfill his or her duties for the prospective position")

c. *EEOC v. Konica Minolta Bus. Solutions U.S.A., Inc*., 639 F.3d 366, 369 (7th Cir. 2011) (enforcing, over employer's relevance objections, EEOC subpoena seeking information about employer's hiring practices where EEOC did not allege hiring discrimination but rather only alleged that black employee was treated differently in terms and conditions of employment because "information regarding employer's hiring practices will 'cast light' on [employee's] race discrimination complaint")

d. *EEOC v. Schwan's Home Serv*., 644 F.3d 742 (8th Cir. 2011) (finding that even if female employee's systemic gender discrimination charge were invalid, EEOC was still within its authority to issue subpoena seeking information relevant to systemic discrimination claim because EEOC's investigation of individual claim revealed potential systemic gender discrimination claim)

2. Recent Cases Limiting EEOC Subpoena Enforcement Power:

   a. *EEOC v. HomeNurse, Inc.*, No. 1:13-CV-02927-TWT, 2013 WL 5779046, at *14 (N.D. Ga. Sept. 30, 2013) (quashing EEOC subpoena because subpoena sought information relating to companywide disability, age, race, and genetic discrimination but the charging party was not disabled, under age forty, or Caucasian, and had no pre-existing genetic condition)[1]

   b. *EEOC v. Sterling Jewelers Inc.*, No. 11-CV-00938, 2013 U.S. Dist. LEXIS 141489, at *20-21 (W.D.N.Y. Sept. 23, 2013) (declining to enforce, in part, EEOC subpoena because it was overly broad and sought irrelevant documents where EEOC purported to seek only information that might shed light on company's policy against discussing pay, but subpoena actually sought information relating to all violations of the company's code of conduct (citations and quotation marks omitted))

   c. *EEOC v. McLane Co.*, No. CV-12-02469-PHX-GMS, 2012 WL 5868959, at *4-5 (D. Ariz. Nov. 19, 2012) (appeal filed and decision pending, No. 13-15126 (9th Cir. June 3, 2013)) (declining to enforce EEOC subpoena seeking personal information of every individual who took employer's physical capacity exam that allegedly had discriminatory impact on disabled individuals because (i) charging party was not disabled, and thus not an aggrieved party, so EEOC had no jurisdiction to investigate and (ii) information sought was irrelevant to the gender discrimination claims over which EEOC did have jurisdiction)

   d. *EEOC v. Burlington N. Santa Fe R.R.*, 669 F.3d 1154, 1157-58 (10th Cir. 2012) (holding, in ADA context, that EEOC cannot seek "plenary" discovery to the point of seeking information regarding how employer keeps track of every current and former employee across the country for purposes of creating a "carefully-tailored request . . . for substantive information [of pattern or practice discrimination]" where the actual EEOC charge focuses only on individual claims and makes no mention of pattern or practice claims)

3. Conclusion: Courts should limit EEOC's subpoena power to the factual allegations contained in the charges so that EEOC may not use its

[1] The court in *HomeNurse* also harshly admonished EEOC's tactics in conducting the investigation: "The EEOC launched its investigation of the Charge in May 2010 by conducting a raid on [the employer's office] as if it were the FBI executing a criminal search warrant. The EEOC showed up unannounced with subpoenas in hand, intimidated the staff of that small office, and began rifling through [the employer's] confidential personnel and patient files." 2013 WL 5779046 at *1 (citations omitted).

investigative powers as a "fishing expedition." Still, courts generally grant EEOC substantial discretion with respect to its subpoena power. Accordingly, employers should attempt to negotiate with EEOC to narrow the scope of subpoenas rather than challenging EEOC's powers outright. Although the existence of a charge of discrimination is confidential, a subpoena enforcement action makes the charge and its allegations public.

II. EEOC's Duty To Conciliate

A. Issue: Whether courts can review EEOC's pre-suit conciliation efforts.

B. Statutory Authority: "If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned." 42 U.S.C. § 2000e-5(b).

C. Potential Congressional Action: The House Appropriations Draft Committee Report for appropriations to the EEOC for the next fiscal year indicates that they are "concerned with the EEOC's pursuit of litigation absent good faith conciliation efforts," "directs the EEOC to engage in such efforts before undertaking litigation," and requires that the EEOC issue a report concerning this issue.

D. EEOC Regulation: "Where the Commission determines that there is reasonable cause to believe that an unlawful employment practice has occurred or is occurring, the Commission shall endeavor to eliminate such practice by informal methods of conference, conciliation and persuasion. In conciliating a case in which a determination of reasonable cause has been made, the Commission shall attempt to achieve a just resolution of all violations found and to obtain agreement that the respondent will eliminate the unlawful employment practice and provide appropriate affirmative relief." 29 C.F.R. § 1601.24.

E. EEOC Position: "Title VII certainly does not authorize judicial review of conciliation; indeed, it precludes review. Title VII commits the pre-suit conciliation process to the EEOC's discretion alone. . . . Judicial review of conciliation not only delays and diverts the court from the central question before it—whether an employer has engaged in discrimination—but it also undermines the conciliation process itself by destroying the confidentiality necessary for effective conciliation and by encouraging employers to treat conciliation not as a forum to resolve disputes but as an opportunity to collect defenses for a larger fight to come." Brief for Plaintiff-Appellant EEOC at i, ii, No. 13-24655 (7th Cir. July 31, 2013).

F. Judicial Interpretation of EEOC's Duty to Conciliate: There is significant variation among the circuits as to the appropriate standard for evaluating EEOC's conciliation efforts.

1. The Second, Fifth, Eighth, and Eleventh Circuits all require EEOC to give employers a meaningful opportunity to conciliate and, in some instances, courts in these circuits have gone as far as to dismiss suits where EEOC did not meet that duty. In these Circuits, to fulfill its duty to conciliate, EEOC must (1) outline to the employer the reasonable cause for its belief that the employer is in violation of the law (2) offer an opportunity for voluntary compliance, and (3) respond in a reasonable and flexible manner to the reasonable attitude of the employer. *See, e.g.*, *EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529, 1534 (2d Cir. 1996).

   a. *Johnson & Higgins, Inc.*, 91 F.3d at 1535 (holding, in ADEA context, that EEOC satisfied its duty to conciliate, but only after finding that EEOC notified employer it had reasonable cause to believe that mandatory retirement policy violated the ADEA and invited employer to effect voluntary compliance through informal methods of conciliation, but employer maintained that its policy did not violate law and refused to accommodate EEOC's repeated requests for information about salaries of retired directors to negotiate question of damages)

   b. *EEOC v. Bloomberg L.P.*, No. 07 CIV. 8383 LAP, 2013 WL 4799150, at *8 (S.D.N.Y. Sept. 9, 2013) (granting summary judgment for failure to satisfy conciliation duties of EEOC's discrimination and retaliation claims on behalf of nonintervening claimants because employer offered to discuss cases of any identified individuals that EEOC believed may have legitimate grievances, but EEOC refused to identify the names or request contact information of any of the nonintervening claimants)

   c. *EEOC v. Agro Distribution*, LLC, 555 F.3d 462, 469 (5th Cir. 2009) (district court correctly concluded that EEOC did not conciliate in good faith where EEOC repeatedly failed to communicate with or respond to employer in a reasonable and flexible manner and made a "take-it-or-leave-it demand for more than $150,000 [that] represents the coercive, 'all-or-nothing' approach previously condemned by this court" (quotation marks omitted))

   d. *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657, 676 (8th Cir. 2012) (affirming summary judgment dismissal for EEOC's failure to conciliate where EEOC failed to *investigate and identify names* of class members and size of class during conciliation and thus denied employer meaningful opportunity to conciliate)

e. *EEOC v. Asplundh Tree Expert Co*., 340 F.3d 1256, 1260 (11th Cir. 2003) (affirming dismissal of suit and awarding of attorneys' fees to employer where EEOC failed to identify any theory of liability, quickly rejected employer's good-faith efforts to resolve dispute, and rushed into court, because EEOC's conduct "smacks more of coercion than of conciliation" (citation and quotation marks omitted))

f. *EEOC v. Sterling Jewelers, Inc.*, 08-CV-00706-A, 2014 WL 916450, at *5, *8-9 (W.D.N.Y. Mar. 10, 2014) (Notice of Appeal filed May 12, 2014) (granting summary judgment for employer on nationwide pattern or practice of discrimination claim because EEOC did not meet its duty to investigate *nationwide* claims in that EEOC investigator could recall investigating stores in only two states)

The court also noted that because EEOC had previously withheld on privilege grounds its expert's statistical analysis of Sterling's nationwide compensation and promotion practices, it could not now point to that analysis to support its argument that it conducted a nationwide investigation

g. *EEOC v. Bass Pro Outdoor World, LLC*, No. 4:11-CV-3425, 2014 WL 838477, at *13-16 (S.D. Tex. Mar. 4, 2014) (finding that EEOC had not met duty to conciliate where it refused to provide information as to the 100 individuals it alleged were victims of Bass Pro's hiring discrimination and, further, refused to provide the basis for its request for compensatory damages for those individuals)

Note, however, that the court did not grant Bass Pro's motion for summary judgment dismissal based on EEOC's failure to meet its conciliation duty, but rather decided that, because EEOC's actions were not made in "bad faith," the appropriate remedy was a stay to allow the parties to continue the conciliation process.

G. The Fourth and Sixth Circuits are much more deferential to EEOC with respect to its conciliation efforts.

1. *EEOC v. Keco Indus., Inc.*, 748 F.2d 1097, 1102 (6th Cir. 1984) ("The district court should only determine whether the EEOC made an attempt at conciliation. The form and substance of those conciliations is within the discretion of the EEOC as the agency created to administer and enforce our employment discrimination laws and is beyond judicial review.")

2. *EEOC v. Radiator Specialty Co.*, 610 F.2d 178, 183 (4th Cir. 1979) (EEOC met conciliation duty because "[t]he law requires . . . no more than

a good faith attempt at conciliation" and EEOC met this requirement by sending employer invitation to conciliate, travelling to employer's facility to meet and discuss the charges and, three months after meeting at employer's facility, suggesting another meeting to discuss the feasibility of a settlement")

3. The Tenth Circuit has not articulated a clear standard, but appears to at least require a "sincere and reasonable effort to negotiate by providing the defendant an adequate opportunity to respond to all charges and negotiate possible settlements." The Tenth Circuit, however, will be much more deferential to EEOC where the employer does not meaningfully engage in the conciliation process.

    a. *EEOC v. Prudential Fed. Sav. & Loan Ass'n*, 763 F.2d 1166, 1169 (10th Cir. 1985) (EEOC must make "a sincere and reasonable effort to negotiate" but also finding that dismissal would be particularly inappropriate where employer "made no meaningful response")

4. The Seventh Circuit, most recently, significantly diverged from these standards when it held that EEOC's conciliation efforts are not judicially reviewable and, therefore, there is no good-faith requirement.

    a. *EEOC v. Mach Mining, LLC*, 738 F.3d 171, 183 (7th Cir. 2013) (petition for certiorari to the U.S. Supreme Court filed February 25, 2014) (response due May 27, 2014) ("[W]e see no reason to import a judicially reviewable requirement of good faith into the informal and confidential process of conciliation when the statute does not require it.")

    b. The Seventh Circuit recognized that its decision created a circuit split (or, at the very least, complicated an already existing circuit split): "Our decision makes us the first circuit to reject explicitly the implied affirmative defense of failure to conciliate. Because the courts of appeals already stand divided over the level of scrutiny to apply in reviewing conciliation, our holding may complicate an existing circuit split more than it creates one, but we have proceeded as if we are creating a circuit split." *Id.* at 182.

    c. There are at least four cases substantively citing *Mach Mining*:

        (i) *EEOC v. Forest Cnty. Potawatomi Cmty.*, No. 13-MC-61, 2014 WL 1795137 (E.D. Wis. May 6, 2014) (citing *Mach Mining* for the proposition that "failure-to-conciliate is not an affirmative defense to a discrimination suit")

        (ii) *EEOC v. BOK Fin. Corp.*, No. CIV 11-1132 RB/LAM, 2014 WL 504074 (D.N.M. Jan. 28, 2014) (citing *Mach*

Mining for the proposition that "[t]he adequacy of the EEOC investigation is non justiciable as a matter of law and thus rejecting defendant's request to call as witnesses former and current EEOC investigators to challenge the sufficiency of EEOC's investigation and efforts at conciliation)

(iii) *Bass Pro Outdoor World, LLC*, 2014 WL 838477, at *19 (addressed above) (citing *Mach Mining* in support of its decision to impose a stay for the parties to continue conciliation efforts rather than dismiss for EEOC's failure to adequately conciliate)

(iv) *Sterling Jewelers, Inc.*, 2014 WL 916450, at *8 n.9 (addressed above) (distinguishing *Mach Mining* on grounds that it addressed EEOC's failure to *conciliate* as opposed to failure to *investigate*, and further, noting that "in any event, *Mach Mining* recognizes that unlike the Seventh Circuit, the Second Circuit *does* recognize the defense of failure to conciliate")

H. Conclusion: Courts should review EEOC's presuit conciliation efforts under the standard adopted by the Second, Fifth, Eighth, and Eleventh Circuits. Courts should recognize the distinction between EEOC's taking an aggressive position regarding its settlement demands and impermissibly failing to provide sufficient information during conciliation to support the basis for its position or making only a take-it-or-leave-it demand. Employers can most effectively benefit from the conciliation process by substantively engaging in the process, such as by inquiring into the basis of EEOC's demand, the relationship between the charge and the demand, and, in systemic matters, the scope of the putative class. This will better position any challenges to EEOC's conciliation efforts, as opposed to directly challenging the demand itself or the length of time that EEOC spent conciliating. Because Title VII provides that the conciliation process should be confidential, there is an advantage to employers for settling at the conciliation stage.

III. Employee Waiver Of Right To File EEOC Charge

A. Issue: EEOC is taking an increasingly aggressive stance on its position that employees may not waive their right to file an EEOC charge or communicate with EEOC, such as by filing lawsuits to challenge agreements on the grounds that they interfere with or discourage an employee's filing a charge or communicating with EEOC.

B. Statutory Authority: EEOC argues that conditioning receipt of severance or other benefits on signing or complying with a waiver that allegedly deters the filing of charges and interferes with employees' ability to communicate voluntarily with EEOC violates the following two provisions of Title VII (*See, e.g.*, *EEOC v. CVS*

Pharmacy, Inc., No. 14-0863, Complaint, Dkt. 1, (N.D. Ill. Feb. 07, 2014); *EEOC v. Cognis Corp.*, No. 10-CV-2182, 2012 WL 1893725 (C.D. Ill. May 23, 2012)):

1. "Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described." 42 U.S.C. § 2000e-6(a); 42 U.S.C. §2000e-6(c) (transferring functions of Attorney General under this section to EEOC)

2. "It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor--management committee controlling apprenticeship or other training or retraining, including on—the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter. 42 U.S.C. § 2000e-3.

C. <u>EEOC Guidance</u>:

1. In 1997, EEOC issued guidance setting forth EEOC's position that a waiver agreement "may not interfere with the protected right of employees to file a charge or participate in any manner in an investigation, hearing, or proceeding under the laws enforced by EEOC." EEOC noted that "a strong public policy [] prohibits interference with the right to file a charge with EEOC" because every charge filed with EEOC carries not just the individual's claim for relief, but also EEOC's responsibility "to vindicate the public interest in preventing employment discrimination." EEOC further noted that "[a]greements that attempt to bar individuals from filing a charge or assisting in a Commission investigation run afoul of the anti-retaliation provisions because they impose a penalty upon those who are entitled to engage in a protected activity under one or more of the statutes enforced by the Commission." *See* Enforcement Guidance on Non-Waivable Employee Rights under EEOC Enforced Statutes, April 19, 1997, available at http://www.eeoc.gov/policy/docs/waiver.html

2. In 2009, EEOC issued guidance directed to employees concerning waivers. "No agreement between you and your employer can limit your right to testify, assist, or participate in an investigation, hearing, or proceeding conducted by the EEOC under the ADEA, Title VII, the ADA, or the EPA. Any provision in a waiver that attempts to waive these rights is invalid and unenforceable." *See* EEOC Guidance Statement, Understanding Waivers of Discrimination Claims in Employee Severance Agreements, July 15, 2009, available at http://www.eeoc.gov/policy/docs/qanda_severance-agreements.html#II

3. EEOC's 2013-2016 Strategic Enforcement Plan lists "preserving access to the legal system" as one of its six national priorities. *See* EEOC Strategic Enforcement Plan, FY 2013-2016, "National Priorities," available at http://www.eeoc.gov/eeoc/plan/sep.cfm

D. Recent Case Where EEOC Successfully Challenged An Employer's Waiver Agreement:

1. *EEOC v. Cognis Corp.*, No. 10-CV-2182, 2012 WL 1893725 (C.D. Ill. May 23, 2012)

a. Holding: the court granted summary judgment in favor of EEOC on issue of employer's liability for terminating an employee who refused to sign a "last chance agreement (LCA) that prohibited the employee from filing EEOC charges, even for events that have yet to occur, because the act of refusing to sign the LCA was a protected activity. The court also denied the employer's motion for summary judgment and found a genuine issue of material fact as to whether asking other employees to choose either to sign the LCA or be terminated (but not actually terminating employees) violated Title VII anti-retaliation provisions.

b. EEOC alleged that Cognis violated Title VII's anti-retaliation provision by firing an employee when he informed Cognis that he no longer wanted to be bound by the LCA he had previously signed (in lieu of termination) that prohibited employee from filing EEOC charges, even for events that had yet to occur. EEOC also alleged that Cognis retaliated against five additional employees by requiring those employees to sign the LCA or face termination. EEOC sought monetary damages for affected employees and sought injunction prohibiting Cognis from using the LCA.

c. Specifically, EEOC challenged the following provision in the LCA: "For and in consideration of the mutual promises set forth herein, Whitlow does hereby release and waive any claim of liability against Cognis, its affiliates, partners, agents and employees, for, on account of, or in relation to Whitlow's rights'

[to] employment with Cognis or its affiliates, or his status under this [LCA], and agrees not to commence any action or proceeding, including but not limited to any common law claim or statutory claim under Title VII of the Civil Rights Act of 1964, and similar state or local fair employment practices law, regulations, or ordinance, the Age Discrimination in Employment Act (ADEA), the Rehabilitation Act of 1973, or the Americans with Disabilities Act of 1990(ADA), the National Labor Relations Act (NLRA), the Family and Medical Leave Act (FLMA), or before any state, federal or court or administrative agency, civil rights commission or agency, or any other forum."

d. Notably, the LCA had no express carve-out provision stating that nothing in the LCA prohibits or restricts employees from filing a charge with the EEOC.

e. The parties subsequently entered a consent decree in January 2013 whereby Cognis agreed, *inter alia*, to pay $500,000 in monetary relief, refrain from using any sort of LCA that deters or interferes with employees' right to file charges, report all employee retaliation complaints under Title VII to the EEOC for the next two years, institute anti-retaliation training mechanisms, and adopt new anti-retaliation policies..

E. Recent Cases Where Court Rejected EEOC's Challenge To Waiver Agreement

1. *Romero v. Allstate Ins. Co.*, No. 01-3894, 2014 WL 981520, at *7, 12 (E.D. Pa. Mar. 13, 2014)

a. Holding: the court granted summary judgment for Allstate, holding that the company's requirement that employees sign a release to convert to independent contractor status—rather than be terminated as part of restructuring—was not per se unlawful and, further, the act of not signing the release was not protected activity for purposes of a retaliation claim.

b. The court explained that "the mere offer of the severance agreement is insufficient to constitute discrimination in the retaliation context" and "[t]he employer's action only reaches the level of retaliation if it denies severance benefits that are otherwise promised or owed or if the employer sues to enforce the agreement." *Id.*, at *7.

c. "[B]asic retaliation principles undermine the concept that a mere refusal to sign a broad release of claims . . . constitutes protected conduct." *Id.*, at *12. Further, "even were the Court to find that a refusal to sign a Release constitutes protected activity, the EEOC

has failed to prove that the consequent withholding of benefits to which the employee is not otherwise entitled is an adverse employment action." *Id.*

d. EEOC alleged that by presenting employees with a choice to either sign the agreement or be terminated, Allstate violated Title VII's retaliation provision. Specifically, the EEOC took issue with the following language in the Agreement:

(i) "If you sign the Release, you will be waiving your rights to any claims or potential claims arising out of your employment, termination of employment or transition to independent contractor status which have been, or could be filed against Allstate, or its affiliates pursuant to any local, state or federal law. Therefore, we advise you to consult with an attorney before you elect one of the options available to you and release and waive any legal claims."

(ii) "In return for the consideration that I am receiving under the Program, I hereby release, waive, and forever discharge Allstate Insurance Company, its agents, parent, subsidiaries, affiliates, employees, officers, shareholders, successors, assigns, benefits plans, plan administrators, representatives, trustees and plan agents ("Allstate"), from any and all liability, actions, charges, causes of action, demands, damages, entitlements or claims for relief or remuneration of any kind whatsoever, whether known or unknown, or whether previously asserted or unasserted, stated or unstated, arising out of, connected with, or related to, my employment and/or the termination fo my employment and my R830 or R1500 Agent Agreement with Allstate, or my transition to independent contractor status, including, but not limited to, all matters in law, in equity, in contract, or in tort, or pursuant to statute, including any claim for age or other types of discrimination prohibited under the Age Discrimination in Employment Act of 1967, Title VII of the Civil Rights Act of 1964, the Americans With Disabilities Act, the Employee Retirement Income Security Act ("ERISA"), the Illinois Human Rights Act, and the West Virginia Human Rights Act as those acts have been amended, or any other federal, state, or local law or ordinance or the common law."

(iii) Though it is unclear from he opinion whether the Agreement had an express carve-out provision stating that the Agreement did not prohibit filing an EEOC or state agency charge, the court noted that "the [Release] did not

prohibit Plaintiffs from filing a charge with the EEOC and, thus, did not compel Plaintiffs to waive any rights to which they were entitled." *Id.* at 9 n.7; citing *Romero v. Allstate Ins. Co*., 2014 WL 796005, at *57-62 (E.D. Pa. Feb. 27, 2014) (finding that the language in the Release did not compel plaintiffs to waive right to file administrative charge because "no mention is made [in the Release] of any prohibition on filing any administrative action"))

2. *DeCecco v. UPMC*, No. CIV.A. 12-272, 2014 WL 900224, at *53, *58-59 (W.D. Pa. Mar. 7, 2014) (granting UPMC's summary judgment motion on EEOC's claim that an allegedly unenforceable separation agreement can give rise to a discrete claim for a violation of the ADEA's anti-retaliation provision because that provision requires the EEOC to identify both "a protected activity and an adverse employment action," which were not present here because UPMC did not withhold any compensation or benefit owed to employees who did not sign the agreement)

F. Other Recent Cases Brought by EEOC Challenging Waiver Agreements Where Court Has Not Reached Substantive Decision

1. *EEOC v. Baker & Taylor*, No. 13-03729, Consent Decree, Dkt. 14, (N.D. Ill. July 10, 2013)

a. EEOC alleged that Baker & Taylor violated Section 707(a) of Title VII by conditioning employees' receipt of severance pay on a Waiver Agreement "that interferes with employees' rights to file charges with the EEOC and FEPA and to communicate with the EEOC and FEPAs" and Baker & Taylor filed an Answer denying any violation of Section 707(a) or any other provision of Title VII.

b. EEOC sought injunction preventing Baker & Taylor from using the agreement or from otherwise prohibiting employees from filing EEOC charges and sought tolling of the statute of limitations filing period for employees affected by the Agreement.

c. Specifically, EEOC challenges the following language:

(i) "**I further agree never to institute any complaint**, proceeding, grievance, or action of any kind at law, in equity, or otherwise in any court of the United States or in any state, or **in any administrative agency of the United States** or any state, country, municipality, or before any other tribunal, public or private, against the Company arising from or relating to my employment with or my termination of employment from the Company, the Severance Pay Plan, and/or any other occurrences up to and

including the date of this Waiver and Release, other than for nonpayment of the above-described Severance Pay Plan." (Emphasis added by EEOC in Complaint).

(ii) "I agree that I will not make any disparaging remarks or take any other action that could reasonably be anticipated to damage the reputation and goodwill of Company or negatively reflect on Company. **I will not discuss or comment upon the termination of my employment in any way that would reflect negatively on the Company. However, nothing in this Release will prevent me from truthfully responding to a subpoena or otherwise complying with a government investigation**. (Emphasis added by EEOC in Complaint)."

d. The Agreement did not specifically carve out the employee's right to file a charge with the EEOC and instead had only the following limitations on the scope of the release:

(i) "This Waiver and Release does not apply to any Claims that I cannot waive as a matter of law."

(ii) "[N]othing in this Waiver and Release shall be deemed to be a waiver of rights or Claims that may arise under the ADEA after the date I sign this Waiver and Release."

e. The parties subsequently entered a Consent Decree whereby Baker & Taylor agreed, *inter alia*, not to use a Waiver Agreement that "discourages, deters or interferes with employee's right to file a charge with the EEOC and/or FEPA or to participate or cooperate in any investigation by the EEOC and/or a FEPA" and to include language that "Nothing in this Agreement is intended to limit in any way an Employee's right or ability to file a charge or claim of discrimination with the [EEPC] or comparable state or local agencies." Baker & Taylor also agreed that employees who signed the prior version of the Waiver agreement can file a charge with the EEOC and the company will not raise the 180-day limitation defense." The Consent Decree also provides that no future employment agreement by Baker & Taylor may require employees to (1) maintain as confidential the facts underlying a charge or complaint of discrimination unless there is an express exception for communications with EEOC and comparable state agencies; (2) waive their respective rights to file a charge with EEOC or comparable state agency (3) agree to a non-disparagement and/or confidentiality agreement unless there is an express exception for communications with EEOC or comparable state agencies; (4) agree to waive their right to recover victim specific relief in an

action brought by EEOC. The Consent Decree further requires Baker & Taylor to amend its discrimination and retaliation polcies in accordance with the above restrictions. There was no mention of a monetary component in the Consent Decree.

2. *EEOC v. CVS Pharmacy, Inc.*, No. 14-0863, Complaint, Dkt. 1, (N.D. Ill. Feb. 07, 2014)

   a. EEOC alleged that CVS violated Section 707(a) by "conditioning the receipt of severance benefits on . . . employees' agreement to a Separation Agreement that deters the filing of charges and interferes with employers' ability to communicate voluntarily with the EEOC and FEPAs"

   b. Specifically, EEOC challenges the following provisions of the Separation Agreement: (a) requiring that the employee must "*promptly notify the company's general counsel*" anytime he receives an inquiry related to an administrative investigation from any investigator; (b) prohibiting the employee from making "*any statements that disparage the business or reputation of the Corporation*"; (c) prohibiting the employee from "*disclos[ing] to any third party . . . Confidential information without the prior written authorization of CVS Caremark's Chief Human Resources Officer*"; (d) requiring the "*hereby releases and forever discharges CVS . . . from any and all causes of actions, lawsuits proceedings, complaints, **charges,** debts contracts, judgments, damages, claims, and attorneys fees against the Released Parties, whether known or unknown, which Employee has ever had, now has, or which the Employee . . . may have prior to the date [of] this Agreement . . . **The Releases Claims include . . . any claims of unlawful discrimination of any kind***; (e) requiring the employee's agreement "***not to initiate or file any action, lawsuit, complaint or proceeding asserting any of the Released Claims against any of the Released Parties***." (Emphasis added by EEOC in Complaint)

   c. Notably, the Agreement has the following carve-out provision: "[N]othing in this paragraph is intended to or shall interfere with Employee's right to participate in a proceeding with any appropriate federal, state or local government agency enforcing its discrimination laws, nor shall this Agreement prohibit Employee from cooperating with any such agency in its investigation. Employee shall not, however, be entitled to receive any relief . . . in connection with any Released Claim brought against any of the Released Parties."

   d. On April 18, 2014, CVS filed a motion to dismiss the EEOC's Complaint, arguing that its Separation Agreement is a "run-of-the-

mill agreement [and] does not do what the EEOC alleges. In fact, the agreement *expressly stipulates* that the former employees *may* participate in proceedings before anti-discrimination agencies and cooperate in their investigations." Mem. In Support of Motion to Dismiss, Dkt. 16 at 1 (emphasis in original). Further CVS argued that "even if [the Separation Agreement] *did* interfere with its ex-employees' participation in EEOC proceedings, that at most would render the offending provisions *unenforceable*. The mere inclusion of the provisions in the contract does not, however, amount to unlawful discrimination or retaliation—and the EEOC does not allege otherwise. But without any substantive violations of Title VII, there obviously can be no 'pattern or practice' liability." *Id.* at 8-9 (emphasis in original)

e. On May 6, 2014, the court allowed the Retail Litigation Center to file an *amicus* brief in support of CVS's motion to dismiss. That amicus brief was filed on May 7, 2014.

f. There has been no substantive activity in the case since the Motion to Dismiss was filed. EEOC's response is due June 6, 2014 (*See* Briefing Schedule Order, Dkt 12).

3. *EEOC v. Cardiac Sci. Corp.*, No. 13-cv-1079, Complaint, Dkt. 1 (E.D. Wis. Sep. 25, 2013)

a. EEOC alleges that employer violated anti-retaliation provision of Title VII by refusing to provide severance payments or discontinuing severance payments to employee who filed EEOC charges (in violation of severance agreement) and by subjecting other employees to similar severance agreements that unlawfully deterred them from exercising right to file EEOC charge.

b. EEOC seeks injunction barring Cardiac Science from enforcing or using the severance agreements, monetary relief for employee who was denied severance benefits for filing EEOC charge, and agreement to toll the statute of limitations for filing EEOC charge for all employees who were subjected to the severance agreement.

c. The specific language that EEOC is challenging is not referenced in the Complaint.

d. Cardiac filed its Answer on November 27, 2013, denying that it engaged in any unlawful employment practices and specifically denying that any employee was denied severance benefits for retaliatory reasons. Answer, Dkt. 9.

e. There has been no substantive activity in the case since the Answer was filed.

4. *EEOC v. CollegeAmerica*, No. 14-01232, Compl., Dkt. 1 (April 30, 2014)

a. EEOC alleges that CollegeAmerica's practice of conditioning its employees receipt of severance benefits on unenforceable Separation and Release Agreements that "chill and interfere with employees' rights to file charges and/or cooperate with the Commision and FEPAs and/or assist others pursuing discrimination claims violat[es] Section 7(f) of the ADEA." Compl. at 2.

b. Specifically, EEOC took issue, *inter alia*, with the following language in the Agreements, which conditions the receipt of severance benefits on an employee agreeing to:

(i) "irrevocably and unconditionally waive, abandon, [and] release . . . any and all . . . rights of any kind that Employee has, or could have had, against Released Parties, under all laws . . . from the beginning of the world through the Effective Date of this Agreement, whether known or unknown, and whether asserted or unasserted (the "Released Claims"), . . .[which] include, without limitation . . . any claims that are in any way related to Employee's employment with the Company or the separation of Employee's employment with the Company; … any claims for discrimination . . .; and any claims arising under … the Age Discrimination in Employment Act and Older Workers' Benefit Protection Act . . .". Compl. at 7.

c. There was no "carve-out" provision in the Agreement. There was, though, a severability provision which provided: "If any provision of this Agreement is held to be unenforceable, the remaining shall provisions shall remain in full force and, in lieu of such unenforceable provisions, there shall be added automatically as a part of this Agreement a provision as similar in terms as such unenforceable provision as may be possible and be legal, valid and enforceable." *See* Agreement at 6.

d. EEOC also claims the lawsuit CollegeAmerica filed against a former employee in Colorado state court alleging that her filing of an EEOC charge breached the Agreement, including the non-disparagement provision, constituted retaliation. Compl. at ¶¶ 17, 19, 44, 45.

e. There has been no substantive activity in the case since the Complaint was filed.

G. Conclusion: Courts should not allow EEOC to challenge otherwise lawful waivers and releases, particularly where the agreement includes a carve-out provision affirmatively assuring employees that nothing in the agreement infringes on their right to file an EEOC charge or provide information to or otherwise cooperate with EEOC.

IV. Statute Of Limitations For Pattern Or Practice Claims Brought By EEOC

A. Issue: Whether the limitations period set forth in Section 706(e) of Title VII applies to Section 707 pattern or practice claims brought by EEOC.

B. Statutory Provisions:

1. Section 706(e)(1) of Title VII, 42 U.S.C. § 2000e-5, expressly provides a statute of limitations for all charges filed under that section: "A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . . except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred."

2. Section 707, 42 U.S.C. § 2000e-6, which permits EEOC to bring "pattern or practice" cases, provides no express statute of limitations. EEOC has argued that this absence indicates that Congress did not intend to impose a statute of limitations on charges filed by EEOC. Employers, however, argue that Section 707(e) incorporates Section 706's statute of limitations by its provision that all Section 707 claims "shall be conducted in accordance with the procedures set forth in [Section 706]," and thus the statute of limitations also applies to charges filed by EEOC.

3. Leading Caselaw: No federal circuit court has addressed this issue, and there is a significant split of authority in the district courts that have faced the question. *See EEOC v. U.S. Steel Corp.*, No. CIV.A. 10-1284, 2012 WL 3017869, at *5 (W.D. Pa. July 23, 2012) (noting that no circuit court has addressed the issue yet and citing cases illustrating the split in authority in district court decisions).

a. Recently, several district courts have held that the Section 706 statute of limitations applies to Section 707 claims. *See, e.g.*, *EEOC v. Bass Pro Outdoor World, LLC*, 884 F. Supp. 2d 499, 523 (S.D. Tex. 2012) (holding that EEOC is bound by 300-day limitation period and noting that "[i]f Congress intended to make an exception for the EEOC to revive stale claims under Section

706 and 707, it should have said so" (citations omitted)); *EEOC v. Kaplan Higher Educ. Corp.*, 790 F. Supp. 2d 619, 623 (N.D. Ohio 2011) (holding that 300-day limitation period is applicable to claims brought by EEOC and that "[n]o exception exists in the statute allowing the EEOC to recover damages for individuals whose claims are otherwise time-barred").

b. Other district courts, however, have held that the Section 706 statute of limitations is inapplicable to claims brought by EEOC. *See, e.g.*, *EEOC v. Sterling Jewelers, Inc.*, No. 08-CV-706, 2010 WL 86376, at *6 (W.D.N.Y. Jan. 6, 2010) (holding that 300-day limitation is not applicable to claims brought by EEOC because "a suit by EEOC is not confined to claims typified by those of the charging party. . . . The charge incites the investigation, but if the investigation turns up additional violations the Commission can add them to the suit." (citations omitted)); *EEOC v. Ceisel Masonry, Inc.*, 594 F. Supp. 2d 1018, 1022 (N.D. Ill. 2009) ("The failure of individual class members to file timely charges of harassment does not prevent the EEOC from seeking monetary damages on their behalf.")[2]

4. Conclusion: The limitations period set forth in Section 707 should apply to pattern or practice claims brought by EEOC. The text of Title VII does not permit EEOC to recover on behalf of individuals who themselves have stale claims, and expressly provides that Section 707 claims "shall be conducted in accordance with the procedures set forth in" Section 706, including the limitations period.

[2] Sterling Jewelers recently asked the court to reconsider its January 6, 2010 decision because "[s]ince this ruling, there has emerged a uniform body of case law holding that the 300-day limitations period set forth in §706 limits claims under §707." The court rejected that request, but only on the grounds that the cases cited by the defendant were not authoritative and thus, under the law of the case doctrine, it was bound to its prior decision: "While [the defendant's argument] may be true, none of those decisions are from the Supreme Court or circuit courts of appeal" and "[u]nder the law of the case doctrine, [a] court adheres to its own decision at an earlier stage of the litigation unless there are cogent or compelling reasons not to . . . [and] none of those reasons are present here." *EEOC v. Sterling Jewelers, Inc.*, No. 08-CV-00706-A, 2014 WL 916450, at *10 (W.D.N.Y. Mar. 10, 2014).