

**UNITED STATES
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**



**OFFICE OF GENERAL COUNSEL
FISCAL YEAR 2016 ANNUAL REPORT**

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TABLE OF CONTENTS

I. Structure and Function of the Office of General Counsel.....	1
A. Mission of the Office of General Counsel.....	1
B. Headquarters Programs and Functions	1
1. General Counsel.....	1
2. Deputy General Counsel.....	2
3. Litigation Management Services.....	2
4. Internal Management Services.....	2
5. Appellate Services.....	3
6. Research and Analytic Services.....	3
C. District Office Legal Units.....	3
II. Fiscal Year 2016 Accomplishments.....	4
A. Summary of District Court Litigation Activity.....	4
B. Selected Systemic Resolutions	5
C. Other Selected District Court Resolutions.....	11
D. Selected Appellate and <i>Amicus Curiae</i> Resolutions.....	14
III. Litigation Statistics.....	18
A. Overview of Suits Filed.....	18
1. Filing Authority.....	18
2. Statutes Invoked.....	18
3. Bases Alleged.....	19
4. Issues Alleged.....	19
B. Suits Filed by Bases and Issues.....	20
1. Sex Discrimination.....	20
2. Race Discrimination.....	20
3. National Origin Discrimination	21
4. Religious Discrimination.....	21
5. Age Discrimination.....	22
6. Disability Discrimination.....	22
7. Genetic Information Discrimination	22
8. Retaliation	23
C. Bases Alleged in Suits Filed from FY 2011 through FY 2016	23
D. Suits Resolved.....	24
1. Types of Resolutions.....	24
2. Monetary Relief by Statute	24
E. Appellate Activity	25
F. Attorney's Fees Awarded against EEOC.....	25
G. Resources.....	26
1. Staffing.....	26
2. Litigation Budget.....	26
H. EEOC 10-Year Litigation History: FY 2007 through FY 2016	27

I. Structure and Function of the Office of General Counsel

A. Mission of the Office of General Counsel

The Equal Employment Opportunity Act of 1972 amended Title VII of the Civil Rights Act of 1964 (Title VII) to give litigation authority to the Equal Employment Opportunity Commission (EEOC or Commission) and provide for a General Counsel, appointed by the President and confirmed by the Senate for a 4-year term, with responsibility for conducting the Commission's litigation program. Under a 1978 Presidential Reorganization Plan, the General Counsel became responsible for conducting Commission litigation under the Equal Pay Act of 1963 (EPA) and the Age Discrimination in Employment Act of 1967 (ADEA) (both formerly enforced by the Department of Labor). Subsequently, the General Counsel's authority was extended to Commission litigation under the employment provisions of the Americans with Disabilities Act of 1990 (ADA) (Title I; effective July 26, 1992) and the employment provisions of the Genetic Information Nondiscrimination Act of 2008 (GINA) (Title II; effective November 21, 2009).

The mission of EEOC's Office of General Counsel (OGC) is to conduct litigation on behalf of the Commission to obtain relief for victims of employment discrimination and ensure compliance with the statutes EEOC is charged with enforcing. Under Title VII, the ADA, and GINA, the Commission can sue nongovernmental employers with 15 or more employees. The Commission's suit authority under the ADEA (20 or more employees) and the EPA (no employee minimum, but for most private employers \$500,000 or more in annual business) includes state and local governmental employers. Title VII, the ADA, GINA, and the ADEA also cover labor organizations and employment agencies, and the EPA prohibits labor organizations from attempting to cause an employer to violate that statute. OGC also represents the Commission on administrative claims and litigation brought by agency applicants and employees.

B. Headquarters Programs and Functions

1. General Counsel

The General Counsel is responsible for managing, coordinating, and directing the Commission's enforcement litigation program. He or she also provides overall guidance and management to all components of OGC, including district office legal units. The General Counsel recommends cases for litigation to the Commission and approves

other cases for filing under authority delegated to the General Counsel under the Commission's December 2012 Strategic Enforcement Plan. The General Counsel provides reports regularly to the Commission on litigation activities, and advises the Chair and Commissioners on agency policies and other matters affecting enforcement of the statutes within the Commission's authority.

2. Deputy General Counsel

The Deputy is responsible for overseeing all programmatic and administrative functions of OGC, including the litigation program as well as the litigation support budget allocated to OGC by the Chair. OGC functions are carried out through the operational program and service areas described below, which report to or through the Deputy.

3. Litigation Management Services

Litigation Management Services (LMS) oversees and supports the Commission's court enforcement program in the agency's district offices. In conjunction with EEOC's Office of Field Programs, LMS also oversees the integration of district office legal units with the offices' investigative staffs. LMS provides direct litigation assistance to district office legal units, drafts guidance, develops training programs and materials, and collects and creates litigation practice materials. LMS also reviews proposed suit filings by regional attorneys, and drafts litigation recommendations to the General Counsel for approval or submission to the Commission. LMS reviews various other field litigation related matters, such as requests to contract for expert services and proposed resolutions in cases in which the General Counsel has retained settlement authority. LMS contains a unit that provides technical support to field offices in matters such as producing, receiving, and organizing electronically stored information in discovery, extracting and preserving digital media, and collecting and preserving information from social media sites.

4. Internal Litigation Services

Internal Litigation Services represents the Commission and its officials on claims brought against the Commission by agency employees and applicants for agency jobs, and provides legal advice to the Commission and agency management on employment-related matters.

5. Appellate Services

Appellate Services (AS) is responsible for conducting all appellate litigation where the Commission is a party. AS also participates as amicus curiae, as approved by the Commission, in United States courts of appeals, as well as federal district courts and state courts, in cases involving novel issues or developing areas of the law. AS represents the Commission in the United States Supreme Court through the Department of Justice's Office of the Solicitor General. AS also makes recommendations to the Department of Justice in cases where the Department is defending other federal agencies on claims arising under the statutes the Commission enforces. AS reviews EEOC policy materials, such as proposed regulations and enforcement guidance drafted by the Commission's Office of Legal Counsel, prior to their issuance by the agency.

6. Research and Analytic Services

Research and Analytic Services (RAS) provides expert and analytical services for cases in litigation, assists EEOC attorneys in obtaining expert services from outside the agency, and provides technical support to field staff investigating charges of discrimination. RAS has a professional staff with backgrounds and advanced degrees in areas such as economics, statistics, and psychology, who serve as consulting and testifying experts on cases in litigation. RAS also provides services to other agency offices, such as conducting social science research on issues related to civil rights enforcement, advising the agency on the collection of workforce data, and developing and maintaining special census files by geography, race/ethnicity and sex, and occupation.

C. District Office Legal Units

District office legal units conduct Commission litigation in the geographic areas covered by the respective offices and provide legal advice and other support to district staff responsible for investigating charges of discrimination. In addition to the district office itself, OGC Trial Attorneys are stationed in most of the field, area, and local offices within districts. Legal units are under the direction of Regional Attorneys, who manage staffs consisting of Supervisory Trial Attorneys, Trial Attorneys, Paralegals, and support personnel.

II. Fiscal Year 2016 Accomplishments

In fiscal year 2016, OGC filed 86 merits lawsuits and resolved 139, obtaining over \$52 million in monetary relief. Section A below contains summary statistical information on the fiscal year's trial court litigation results (more detailed statistics appear in part III of the Annual Report). Sections B and C contain descriptions of selected district court resolutions, and Section D contains descriptions of selected appellate and *amicus curiae* resolutions.

A. Summary of District Court Litigation Activity

OGC filed 86 merits suits in FY 2016. Merits suits consist of direct suits and interventions alleging violations of the substantive provisions of the Commission's statutes, and suits to enforce settlements reached during EEOC's administrative process. One suit to enforce an administrative settlement was filed during the fiscal year; the rest of EEOC's merits suits were direct actions. In addition to merits suits, OGC filed 28 actions to enforce subpoenas issued during EEOC investigations.

OGC's FY 2016 merits suit filings had the following characteristics:

- 46 contained claims under Title VII (53.5%)
- 5 contained claims under the EPA (5.8%)
- 2 contained claims under the ADEA (2.3%)
- 36 contained claims under the ADA (41.9%)
- 2 contained claims under GINA (2.3%)
- 31 sought relief for multiple individuals (36.0%)

The above claims exceed the number of suits filed (and percentages total over 100) because cases sometimes contain claims under more than one statute. There were 5 (5.8%) of these "concurrent" suits among the FY 2016 filings.

In fiscal year 2016, the Commission filed 18 systemic lawsuits. These new suits challenge a variety of types of systemic discrimination, including: race-based assignments; sex discrimination in compensation; failure to hire based on sex; subjecting applicants to unlawful inquiries into medical or genetic information; and, maintaining inflexible leave policies that deny reasonable accommodations for individuals with disabilities. Systemic suits comprised 20.9% of all merits suits filed in fiscal year 2016. At the end of fiscal year 2016, a total of 47 cases on the active docket were systemic cases, accounting for 28.5% of all active merits suits.

Office of General Counsel FY 2016 Annual Report

OGC resolved 139 merits suits in fiscal year 2016, resulting in monetary relief of \$52,195,238 for 4,064 individuals. OGC achieved a successful outcome in 90.6% of all suit resolutions. Suit resolutions had the following characteristics:

- 84 contained claims under Title VII (60.4%)
- 7 contained claims under the EPA (5.0%)
- 12 contained claims under the ADEA (8.6%)
- 48 contained claims under the ADA (34.5%)
- 4 contained claims under GINA (2.9%)
- 47 cases sought relief for multiple individuals (33.4%)
- 16 were concurrent suits (11.5%)

Part III of the Annual Report contains detailed statistical information on OGC's FY 2016 litigation activities, as well as summary information for past years.

B. Selected Systemic Resolutions

This past year, OGC resolved 21 systemic cases, six of which included at least 50 victims of discrimination and two of which included over 1,000 victims of discrimination. In total, the agency obtained approximately \$38 million in relief for victims of systemic discrimination. Below is a sampling of significant outcomes of systemic discrimination lawsuits in fiscal year 2016:

EEOC v. Lowes' Cos., Inc., No. 2:16-cv-03041 (C.D. Cal. May 12, 2016)

EEOC alleged in this ADA lawsuit that defendant, a national chain of home improvement stores, failed to provide reasonable accommodations to individuals with disabilities who were unable to return to work within defendant's maximum leave period. Defendant automatically terminated individuals who exceeded the maximum leave period; there was no opportunity to discuss extending leaves, and local HR personnel had no discretion to overrule the terminations. A Charging Party who worked as a kitchen designer at a defendant location in Nevada was terminated after exceeding the leave period by 10 days due to heart surgery and a related e-coli infection; a Charging Party who worked as a building team member at a Pennsylvania location was terminated while on leave for congestive heart failure; and a Charging Party working as a zone manager at a New York location was terminated while on leave for non-occupational injuries to his neck, spine, and shoulder.

A consent decree, applicable nationwide, provides \$8.6 million in damages distributed under notice and claims procedures. Defendant will appoint an EEO consultant with ADA experience to revise its leave of absence policies and ensure compliance with the ADA, including training, creating a centralized tracking system for accommodation requests, and providing annual reports to EEOC. Defendant's ADA policies will include a requirement that defendant engage in the interactive process with employees with disabilities who seek medical leave in excess of the leave normally provided to employees and will contain disability complaint and investigation procedures.

EEOC v. Signal Int'l, LLC, No. 1:11-cv-179 (E.D. La. Dec. 18, 2015)

EEOC alleged in this Title VII suit that defendant, a business that fabricates and maintains marine drilling platforms and provides other marine services, subjected a class of Indian nationals to a hostile work environment and disparate terms and conditions of employment based on their national origin and race, and retaliated against some for complaining about the discrimination.

The class members came to the United States to work for defendant as pipefitters and welders under the H-2B visa program, which allows foreign nationals to work in the United States temporarily due to a shortage of qualified U.S. workers. The workers were promised lawful permanent residency, jobs paying \$18 an hour, and room and board. When the workers arrived, defendant forced them to sign employment and housing agreements permitting defendant to deduct \$35 a day from earnings for food, accommodations, and transportation. The workers were housed in "man camps," surrounded by fencing topped with barbed wire. Visitors were not allowed in the camps. The accommodations were small trailers containing up to 24 bunk beds with only two bathrooms. Food was served in mess halls, and was of poor quality. The employment and housing agreements provided for monetary penalties for violation of housing rules. At work, the Indian nationals were subjected to racial slurs and were assigned the dirtiest and hardest jobs, EEOC alleged.

After the Indian workers complained about their living and working conditions, defendant did not make changes to improve the situation. A camp manager told one worker that the living conditions were better than in India. After the workers tried to organize and set up meetings with attorneys from the Southern Poverty Law Center, a few workers were held against their will in a locked room while defendant apparently made arrangements to deport them for their role in trying to organize the workers, EEOC alleged. After the police and local media were called, defendant released the workers, but then threatened to shut down the visa work program if the workers sued

defendant. Charging Parties were discharged for complaining about their living and working conditions and for their role in trying to organize the workers, EEOC alleged.

Following a trial in a related private suit, which resulted in a \$14 million jury verdict against Signal for five individuals, defendant filed for Chapter 11 bankruptcy protection. EEOC and plaintiffs in multiple private suits negotiated a settlement in which Signal established a litigation trust fund of \$20 million to resolve all litigation claims as part of the bankruptcy filing. The bankruptcy court approved the settlement, under which EEOC obtained approximately \$5.26 million for 476 Indian H-2B workers. The settlement establishes a claims process and ensures that all aggrieved individuals will receive monetary relief despite the bankruptcy proceedings.

EEOC v. Hillshire Brands Co. f/k/a Sara Lee Corp., No. 2:15-cv-1347 (E.D. Tex. Dec. 18, 2015)

EEOC alleged in this Title VII lawsuit that defendant, a producer of baked goods, subjected 25 African American employees at its Paris, Texas, facility to a racially hostile work environment. Class members worked in production jobs and were regularly exposed to racial slurs (“nigger” and “boy”) from white supervisors and coworkers and to racist graffiti (crude drawings of black people hanging from nooses and depicted as apes) on the walls of the men’s bathroom. Defendant assigned black employees to work in the least favorable and most hazardous areas of the plant (closest to the ovens and allegedly contaminated with mold and asbestos) and to the most difficult jobs (cleaning the ceilings and industrial ovens). EEOC’s suit was consolidated with an earlier filed private action alleging claims under 42 U.S.C. § 1981. A consent decree provides \$4 million to a class of 74 individuals. Under the decree, defendant will post its new policy against discrimination at facilities in Texas, Kansas, and Missouri, and implement a graffiti abatement policy. Defendant will also develop discrimination, harassment, and retaliation reporting procedures, and will provide annual training to all employees at a Texas facility on the federal antidiscrimination laws.

EEOC v. New Prime, Inc., No. 6:11-cv-3367 (W.D. Mo. Jun. 2, 2016)

EEOC alleged in this Title VII lawsuit that defendant, a trucking carrier that provides services throughout North America, discriminated against female applicants for over-the-road truck driving positions in training and hiring by maintaining a policy of assigning applicants only to trainers of the same sex (with limited exceptions based on prior relationships). The same-sex training policy was adopted following a jury verdict in a prior EEOC suit that defendant had subjected a female driver-trainee to sexual harassment. Because of defendant’s small number of female trainers, female applicants

were placed on long wait lists for training while male trainees were never placed on wait lists. In spring 2010, defendant had 19 female trainers and 650 male trainers. The long wait for trainers resulted in the denial of driver positions to many female applicants.

In August 2014, the court granted summary judgment on liability to EEOC, finding that defendant's facially discriminatory same-gender training policy placed limits on the opportunity for female applicants to be trained versus male applicants. The court rejected defendant's defense that the policy was necessary to protect the privacy and safety of women and to reduce complaints of sexual harassment by female drivers and driver-trainees. Charging Party, who intervened, accepted an offer of judgment for \$250,000. Following a proceeding on backpay relief before a special master, the parties agreed on backpay amounts for 69 other female applicants who applied to defendant's Student Driver Program or Driver Training Program from 2008 to 2011 and suffered damages as a result of defendant's discriminatory hiring practices. The parties later agreed to compensatory damages, for a total recovery of around \$2.9 million for the 69 class members. The court issued an order prohibiting defendant from implementing a same-sex trainer policy and requiring defendant to offer driver or driver-trainee positions to each class member and to give priority hiring consideration over other applicants to class members that apply.

EEOC v. Mavis Discount Tire, Inc., No. 12-cv-741 (S.D.N.Y. Mar. 24, 2016)

EEOC alleged in this Title VII lawsuit that defendant, an enterprise operating retail tire sales and auto service facilities in four states, denied field positions -- mechanic, tire installer, assistant manager, and manager -- to women because of their sex, and failed to retain applications and other employment records required by Title VII. From 2008 to 2010, defendant hired nearly 1,300 individuals into field positions; all were men. Charging Party applied for three assistant manager positions at defendant locations in the New York City area. She had 14 years' experience as an assistant sales manager and technician with Sears Automotive, but was interviewed by the vice president only after complaining she was not interviewed because of her sex. Charging Party was not hired. Defendant hired males for field positions who had only a few months of employment experience, sometimes unrelated to defendant's jobs; some male hires submitted blank applications, EEOC alleged. Defendant denied interviews and jobs to female applicants with the same or substantially better qualifications as men hired during the same period.

A consent decree provides \$2.1 million for 46 women who applied to defendant, and enjoins defendant from failing to hire female applicants based on sex, failing to retain

recruitment and application materials as required by Title VII and its regulations, and retaliation. Defendant will designate an EEO coordinator and has hired an employment practices expert to assist in recruiting and hiring in field locations. In consultation with defendant and EEOC, the expert will develop a recruitment and hiring protocol to ensure nondiscrimination in hiring. Defendant will also set up annual scholarships of \$2,500, with a yearly commitment of \$10,000, for females at four automotive schools in the regions where defendant operates. Scholarship recipients who successfully complete the training program will be offered available field positions before any other equally qualified applicant. The decree contains good faith hiring goals for each field position. Defendant will establish a toll-free number and a secure email address for employees to report complaints of discrimination, and will report annually to EEOC on complaints of sex discrimination by women applying for or working in field positions and defendant's response. The decree also contains comprehensive recordkeeping provisions.

EEOC v. Cintas Corp., No. 04-cv-40132 (E.D. Mich. Nov. 25, 2015)

More than ten years ago, EEOC intervened in a private Title VII action alleging that defendant, a nationwide manufacturer and supplier of work uniforms and other products to businesses, failed to recruit and hire women as sales service representatives (SSRs). Following dismissal of the private action and a significant victory for EEOC on numerous issues in the Sixth Circuit, the agency entered into a consent decree with defendant providing \$1.5 million in backpay to 1,870 women who applied to work at defendant's rental facilities throughout the state of Michigan. During the decree, defendant will provide annual hiring and recordkeeping training to all managers, supervisors, and HR personnel involved in the selection of SSRs. Defendant will conduct outreach recruitment to attract qualified women for SSR jobs, and will hire an outside expert to revalidate the criteria used to screen, interview, and select SSRs, and revalidate the interview guides used in the SSR hiring process.

EEOC v. Lawler Foods, Inc., No. 4:14-cv-3588 (S.D. Tex. Apr. 22, 2016)

EEOC alleged in this Title VII lawsuit that defendant, a large commercial bakery in Humble, Texas, denied employment to black and to non-Hispanic applicants for entry-level production jobs because of their race and national origin. During the period from 2007 to 2012, over 80% of defendant's production department hires were Hispanic, while Hispanic availability for production positions was just over 40%. Applicants were told defendant was not interested in hiring blacks, would not hire individuals who were not Hispanic, and would not hire individuals who did not speak Spanish, EEOC

alleged. Defendant also untruthfully told black and non-Hispanic applicants that defendant was not hiring.

A consent decree provides for around \$1 million to be paid into a qualified settlement fund. Defendant will offer production positions to eligible claimants before hiring any other applicant unless it needs a readily available applicant to meet its production requirements. Defendant will make its best effort to fill nonsupervisory production positions during the term of the decree at a rate of 25% black hires and 45% non-Hispanic hires. Defendant will appoint an officer or high-level official as a monitor to oversee decree compliance. Defendant will also report on whether it has met its numerical hiring goals, with an explanation of recruiting and related procedures it will take to meet the goals, if needed.

EEOC v. PMT Corp., No. 14-cv-599 (D. Minn. Mar. 4, 2016)

EEOC alleged in this Title VII/ADEA case that defendant, a Minnesota-based manufacturer of medical devices and equipment, failed to hire women for sales representative positions because of their sex, failed to hire individuals over the age of 40 for sales representative positions because of their age, and retaliated against its human resources manager for opposing its unlawful practices and providing information about those practices to EEOC. EEOC also alleged that defendant failed to retain applications and related materials in accordance with Title VII's recordkeeping requirements. From 2007 through 2010, defendant hired 70 individuals into outside sales representative (OSR) jobs – none of whom were female or over the age of 40. Defendant failed to retain application materials after a vacancy was filled.

According to the suit, Defendant's president told an HR manager that women could not be hired for OSR positions because they could not meet the travel requirements due to family obligations and needed chaperones, and to screen out applicants who graduated from college before 1998 because they were too old. The HR manager contacted EEOC about the president's statements. In November 2010, after the president received notice of EEO charges (which did not identify the HR manager), he regularly threatened to "go after" the person responsible for reporting discrimination. The HR manager resigned in November due to the president's threats to retaliate against the unidentified source of EEOC's investigations. Following EEOC's reasonable cause finding in September 2012, the president learned of the former HR manager's EEOC participation and directed the new HR manager to contact the county sheriff's office and accuse the former HR manager of theft for failing to pay health insurance premiums, EEOC alleged. After the sheriff's office conducted an investigation that indicated the issue had been resolved in 2010 with defendant's knowledge, defendant withdrew its complaint.

A consent decree applicable to all of defendant's facilities and operations provides for around \$1 million to be distributed through a claims process. Defendant will conduct good faith recruitment to attract qualified women and applicants over the age of 40 for OSR jobs and will hire an EEOC-approved outside expert in employment discrimination law to ensure Title VII and ADEA compliance with the hiring criteria for OSRs and with record retention policies. Defendant must implement all changes or modifications to its hiring process recommended by the expert. Defendant will submit annual reports to EEOC on its good faith efforts to recruit women and applicants over the age of 40 for OSR positions, on the outside expert's audits of defendant's hiring methods and practices, and on applicants and hires for OSR positions.

C. Other Selected District Court Resolutions

OGC achieved notable outcomes in many other, non-systemic suits. Below is a sampling of other significant resolutions:

EEOC v. Dolgenercorp, LLC d/b/a Dollar General Corp., No. 3:14-cv-441 (E.D. Tenn. Sept. 26, 2016)

EEOC alleged in this ADA action that defendant, a nationwide retail store, failed to provide a reasonable accommodation for Charging Party, an employee with diabetes. Charging Party worked as a cashier at one of defendant's Tennessee stores. Charging Party notified her supervisor of her diabetes and her resultant need to keep juice at the cash register. Defendant denied Charging Party's request. On one occasion when Charging Party was having a hypoglycemic episode at the cash register, she drank an orange juice for sale to alleviate her symptoms, and then purchased the item. Defendant later fired Charging Party for violating its anti-grazing policy.

In a four day trial in September 2016, EEOC presented its case to a jury. At trial, defendant argued that Charging Party's diabetes did not constitute a disability, that it was not required to provide her with a reasonable accommodation, and that it was justified in applying its anti-grazing policy to terminate her employment. The jury rejected defendant's arguments, finding that defendant violated the ADA, and awarded Charging Party \$27,565 in back pay and an additional \$250,000 in compensatory damages.

EEOC Deluxe Fin. Seros., Inc., No. 15-cv-2646 (D. Minn. Jan. 20, 2016)

EEOC alleged in this Title VII action that defendant, a manufacturer of printed checks, subjected Charging Party, a transgender woman, to disparate terms and conditions of employment and a hostile work environment because of sex. Charging Party worked at defendant's call center in Phoenix, Arizona, as a customer service agent/sales representative. At hire, she presented as a male, but began transitioning to female. Charging Party began hormone therapy and met with her supervisor and local HR staff to discuss her formal transition. She asked that her personnel records and all internal systems reflect her female gender and requested use of the women's restroom. She explained that she was required to be on hormone therapy and to present fully as a female for a year prior to surgery, but that she was not sure she could afford the surgery. She also said she was legally changing her name from Eric to Britney.

According to EEOC's suit, Defendant initially told Charging Party that her employment records would not be changed until she legally changed her name, but after consulting with the corporate HR director, defendant told Charging Party her records would not be changed until she completed the surgery portion of the gender change process. She also was told she could not use the women's restroom until she had the surgery. According to the suit, from the time Charging Party began presenting as a female at work, she was subjected to offensive conduct by employees based on her gender transition, including coworkers referring to her by male pronouns and commenting negatively on her attire and hair style. Charging Party complained about the harassing conduct, but defendant did not correct the situation.

A 3-year consent decree, applicable to all of defendant's facilities, provided approximately \$115,000 plus attorney's fees to Charging Party. The decree permanently enjoins defendant from sex discrimination, discrimination under the ADA, and retaliation under Title VII or the ADA. Defendant provided Charging Party with a reference that does not mention her prior legal name and indicates she is eligible for rehire and will issue her a letter of apology (both attached to the decree). Defendant also revised its EEO policies and complaint procedures to conform to requirements set out in the decree. Defendant will ensure that transgender employees have access to restrooms commensurate with their gender identity. In addition, Defendant's national health plans will not include sex-based exclusions for medically necessary care, including transgender status.

EEOC v. Pallet Cos. d/b/a IFCO Sys. NA, Inc., No. 1:16-cv-595 (D. Md. June 24, 2016)

EEOC alleged in this Title VII lawsuit that defendant, a national provider of reusable plastic containers, subjected Charging Party to harassment because of her sex, female, resulting in her discharge, and discharged her in retaliation for complaining of

harassment. Charging Party was hired at defendant's Baltimore, Maryland, plant as a forklift operator on the day shift. She is a lesbian, and her sexual orientation was known to most of her coworkers, including the night shift manager. According to EEOC's suit, almost immediately after Charging Party began working some night shifts, the night shift manager began making comments to Charging Party such as, "I want to turn you back into a woman," "I want you to like men again," "You would look good in a dress," and "Are you a girl or a man?" He also quoted bible passages that a man should be with a woman. Charging Party complained about the manager, but nothing was done. Charging Party also complained that the night shift manager blew a kiss at her and then stuck out his tongue and circled it around his mouth in a suggestive manner. After defendant required the night shift manager to apologize, Charging Party felt intimidated by his following and staring at her and contacted the police, who came to the workplace. According to the suit, the next day Charging Party was called into a meeting with the general manager, regional director, and a human resources representative and asked to resign. She refused and was discharged that day.

A 2-year consent decree, which applies to the seven plants in defendant's six-state North Region, provided \$182,200 to Charging Party, and states that defendant will contribute \$10,000 each year of the decree to the Human Rights Campaign Foundation's Workplace Equality Program. The decree enjoins creating or maintaining a sexually hostile work environment, and enjoins retaliation. Defendant will retain an EEOC-approved expert on sexual orientation, gender identity, and transgender issues to help develop EEOC-approved training on LGBT workplace issues. The LGBT training, along with defendant's policies against sexual harassment and retaliation, will be presented twice to all upper managers nationwide, and will include a quiz the second year with an 80% passing score.

EEOC v. Hobson Bearing Int'l, Inc., No. 3:16-cv-5034 (W.D. Mo. Aug. 25, 2016)

EEOC alleged in this EPA suit that defendant, a wholesale supplier of ball bearings, violated the retaliation provision of the Fair Labor Standards Act (FLSA) by filing a state court malicious prosecution suit against a former employee because she filed an EPA charge with EEOC. Defendant's suit alleged that the former employee had filed the charge "maliciously and without probable cause . . . for the joint purpose of harassing [defendant] and of attempting to receive financial gain from [defendant]"; and that defendant was "compelled to defend the [EEOC charge] at great expense" and that "at great taxpayer expense, the government closed its case stating that it did not find a violation of the statutes under the Equal Pay Act." The suit sought economic and punitive damages from the former employee. Defendant actively litigated its suit against the former employee, including taking the former employee's deposition.

EEOC filed suit, and defendant moved the same day to dismiss its suit against the former employee without prejudice. Upon agreement of the parties, the court entered judgment against defendant, citing case law that charges filed with EEOC are absolutely privileged, even if containing false and defamatory statements, and finding that the parties agreed that defendant's filing of the suit against the former employee because she filed an EPA charge violated the FLSA's retaliation provision. The court ordered defendant to dismiss its lawsuit against the former employee with prejudice and to pay her \$37,500 in damages. The court permanently enjoined defendant from retaliation against any employee for filing an EPA complaint or instituting or testifying in EPA proceedings. The court also enjoined defendant from filing any lawsuit or bringing any counterclaim against the former employee that is based upon her filing a charge with EEOC, including but not limited to defamation.

D. Selected Appellate and Amicus Curiae Resolutions

In addition to its nationwide litigation program at the district court level, OGC maintains an active appellate program in the federal circuit courts of appeal. Among the most notable appellate decisions in fiscal year 2016 is *EEOC v. Geo Group*, 816 F.3d 1189 (9th Cir. 2016), in which the Ninth Circuit reinstated the EEOC's Title VII sexual harassment and retaliation claims on behalf of twenty female victims and held, relying in part on the Supreme Court's decision in *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645 (2015), that Title VII does not require the EEOC to identify all victims prior to suit or to conciliate on an individual basis.

In *EEOC v. Bass Pro Outdoor World*, 826 F.3d 791 (5th Cir. 2016), the Fifth Circuit held that the Commission could prove its claim – that Bass Pro engaged in a nationwide pattern or practice of race discrimination against Black and Hispanic applicants and employees – by using the *Teamsters*, bifurcated trial framework. The court also rejected Bass Pro's contention that the investigation was deficient because it did not address "evidence about specific aggrieved individuals." The court recognized that its review of the Commission's investigation is "limited," for "Title VII 'does not prescribe the manner' by which the EEOC investigates, and 'the nature and extent of an EEOC investigation into a discrimination claim is a matter within the discretion of that agency.'"

In *EEOC v. Koch Foods of Mississippi, L.L.C.*, 838 F.3d 540 (5th Cir. 2016), the Fifth Circuit concluded that the district court abused its discretion in analyzing whether U-visa discovery should be restricted because the discovery would impose an undue

burden. In reaching this result, the Fifth Circuit underscored that the district court failed to weigh how U-visa discovery “might intimidate individuals outside this litigation, compromising the U visa program enforcement efforts more broadly.” The Fifth Circuit emphasized that permitting U-visa discovery here could “deter immigrant victims of abuse...from stepping forward[,]...frustrating Congress’s intent in enacting the U visa program,” and rendering the EEOC and other enforcement agencies “much less able to use the program to solicit cooperation from those most in need of their help.” In closing, the court of appeals declined “to forbid U visa discovery outright,” but cautioned that, on remand, “any U visa discovery must not reveal to Koch the identities of any visa applicants and their families, at least in the liability phase.”

In *EEOC v. Maritime Autowash, Inc.*, 820 F.3d 662 (4th Cir. 2016), the Fourth Circuit held that the EEOC’s subpoena, which sought information about national origin discrimination alleged by an undocumented worker, was enforceable. In rejecting the employer’s arguments, the court stated, “Maritime’s challenge to the EEOC’s subpoena envisions a world where an employer could impose all manner of harsh working conditions upon undocumented aliens, and no questions could be asked, no charges filed, and no agency investigation even so much as begun. The employer is asking the court for carte blanche to both hire illegal immigrants and then unlawfully discriminate against those it unlawfully hired. . . . And it would block the EEOC from shining even the dimmest light upon the employer’s actions. So the agency must be allowed to do its job.”

In *EEOC v. Rite Way Serv., Inc.*, 819 F.3d 235 (5th Cir. 2016), the Fifth Circuit in this Title VII retaliation action held that an employee engaged in protected opposition when she responded to her employer’s questions about another employee’s sexual harassment complaint. In ruling for the Commission, the court stressed that context was important, and that the question must be whether “an employee like [the charging party], not instructed on Title VII law as a jury would be, [could] reasonably believe that she was providing information about a Title VII violation?”

EEOC, represented by the Solicitor General, also filed a brief in one case in the U.S. Supreme Court. In *CRST Van Expedited v. EEOC*, 136 S. Ct. 1642 (2016), the Supreme Court rejected the Eighth Circuit’s holding – not defended by the Commission -- that a prevailing Title VII defendant is not entitled to fees unless it obtains a ruling on the merits of the Title VII claim. The Court noted that various courts of appeals have applied the *Christiansburg* standard to claims that were dismissed on non-merits grounds. The Court remanded the case for resolution of the pending fee issues.

As part of its nationwide appellate program at the district court level, EEOC maintains an active *amicus curiae* program in the federal circuit courts of appeal as well as the district courts. Among the most notable decisions is fiscal year 2016 is *Huri v. Office of the Chief Judge of the Circuit Court of Cook Cty.*, 804 F.3d 826 (7th Cir. 2015), in which the Seventh Circuit reversed the dismissal of plaintiff's complaint. The Court agreed with the Commission that the plaintiff's allegations of national origin and religion-based harassment in her first of three EEOC charges sufficed to support her claim of hostile work environment. The Court also agreed with the Commission that the plaintiff's complaint alleged facts that plausibly stated a claim that her employer was aware that she was a Muslim and an Arab from her garb and appearance and that her supervisors had subjected her to an abusive and hostile work environment through "screaming, prayer circles, social shunning, implicit criticism of non-Christians, and uniquely bad treatment of Huri and her daughter."

In *Connelly v. Lane Constr. Corp.*, 809 F.3d 780 (3d Cir. 2016), the Third Circuit reversed the district court's dismissal of the complaint, consistent with the views submitted by the Commission as *amicus curiae*. The plaintiff alleged that she was discriminated against on the basis of sex, and retaliated against for complaining of sexual harassment, when the defendant refused to rehire her as a truck driver for the company's seasonal construction work. The court of appeals held that the plaintiff's factual allegations as to her sex discrimination and retaliation claims were sufficient to state plausible Title VII claims. The Court also discussed and rejected the district court's conclusion that her retaliation claim was facially implausible for failure to plead a causal connection between her alleged protected activity and defendant's refusal to rehire her for the subsequent construction season. The Court "questioned" the district court's analysis of temporal proximity given the seasonal nature of the plaintiff's work, and explained that the district court had erred by construing certain factual allegations against her, which "is not what the applicable standard of review allows at this point in the case."

In *Guessous v. Fairview Prop. Investments*, 828 F.3d 208 (4th Cir. 2016), the Fourth Circuit agreed with the position of the EEOC as *amicus curiae* and reversed the award of summary judgment in this Title VII and § 1981 suit alleging harassment on the bases of race, religion, and national origin, as well as retaliation against an Arab-American Muslim woman from Morocco. The Court held that the plaintiff's supervisor engaged in harassment by "discussing Moroccans, Muslims, and Middle Easterners in disparaging and offensive ways." The Court also held that, notwithstanding the defendant's claim that it fired the plaintiff for lack of work, a jury could find that it retaliated against her by deciding to fire her within 75 minutes after she complained to her supervisor about his past treatment. Rejecting defendant's argument that the

plaintiff's Title VII harassment claim was untimely, the Court held that her termination, which occurred within 300 days of her EEOC charge, was sufficient to bring the earlier harassing conduct within the statute of limitations.

In *McLeod v. General Mills*, 140 F. Supp. 3d (D. Minn. 2015), plaintiffs brought suit alleging that the company engaged in a pattern or practice of age discrimination. Plaintiffs — long-time employees over age 40 who were laid off in a massive corporate restructuring — were required to sign a release, including an arbitration provision, in order to receive severance benefits. This provision specified that any disputes about the validity or enforceability of the release would be resolved “through a final and binding arbitration on an individual basis.” After plaintiffs brought suit against the company, the defendant moved to dismiss and to compel arbitration on an individual basis, pursuant to the provision. In support of plaintiffs' opposition to the motion, the Commission argued as *amicus curiae* that the release was invalid and the arbitration provision unenforceable under the ADEA. The district court denied defendant's motion to compel arbitration.

III. Litigation Statistics

A. Overview of Suits Filed

In FY 2016, the field legal units filed 86 merits lawsuits. (Merits suits include direct suits and interventions alleging violations of the substantive provisions of the Commission’s statutes, and suits to enforce settlements reached during EEOC’s administrative process.) Of the FY 2016 filings, 85 were direct suits, and one was an action to enforce an administrative settlement; 18 were systemic suits and 13 were non-systemic class suits. The field legal units also filed 28 actions to enforce investigative subpoenas.

1. Filing Authority

In EEOC's National Enforcement Plan, adopted in February 1996 and reaffirmed in the Commission’s December 2012 Strategic Enforcement Plan, the Commission delegated litigation filing authority to the General Counsel in all but a few areas. The General Counsel has redelegated much of this authority to EEOC’s 15 regional attorneys. Redelegated cases are reviewed by Office of General Counsel headquarters staff prior to suit filing. The chart below shows the filing authority for FY 2016 merits suits.

	<u>Count</u>	<u>Percent</u>
Regional Attorney	67	77.9%
General Counsel	9	10.5%
Commission	10	11.6%

2. Statutes Invoked

Of the 86 merits suits filed, 53.5% contained Title VII claims, 41.9% contained ADA claims, 2.3% contained ADEA claims, 5.8% contained EPA claims, 2.3 % contained GINA claims, and 5.8% were filed under more than one statute. (Statute numbers in the chart below exceed the number of suits filed and percentages total over 100 because suits filed under multiple statutes (“concurrent” cases) are included in the totals of suits filed under each of the statutes.)

	<u>Count</u>	<u>Percent of Suits</u>
Title VII	46	53.5%
ADA	36	41.9%
ADEA	2	2.3%
EPA	5	5.8%
GINA	2	2.3%
Concurrent	5	5.8%

3. Bases Alleged

As shown in the next chart, disability (40.7%), sex (29.1%), and retaliation (27.9%) were the most frequently alleged bases in EEOC suits. Bases numbers in the chart exceed the total suit filings (86) because suits often contain multiple bases.

	<u>Count</u>	<u>Percent of Suits</u>
Disability	35	40.7%
Sex	25	29.1%
Retaliation	24	27.9%
Race	10	11.6%
Religion	6	7.0%
National Origin	5	5.8%
Equal Pay	4	4.7%
Age	2	2.3%
Genetic. Info.	2	2.3%

4. Issues Alleged

Discharge was the most frequently alleged issue (66.3%) in EEOC suits filed, followed by hiring (26.7%), harassment (19.8%), and disability accommodation (16.3%). (Note that counts of discharge include constructive discharge.)

FY 2016 Issues Alleged in Suits Filed		
	<u>Count</u>	<u>Percent of Suits</u>
Discharge	57	66.3%
Hiring	23	26.7%
Harassment	17	19.8%
Disability Accommodation	14	16.3%
Prohibited Med. Inquiry/Exam	8	9.3%
Wages	7	8.1%
Terms/Conditions	5	5.8%
Religious Accommodation	5	5.8%
Recordkeeping Violation	5	5.8%
Suspension	4	4.7%
Promotion	2	2.3%
Discipline	1	1.2%

B. Suits Filed by Bases and Issues

1. Sex Discrimination

As shown below, 64% of cases with sex as a basis contained a harassment allegation, and 40% contained a discharge allegation.

Sex Discrimination Most Frequent Issues		
	<u>Count</u>	<u>Percent</u>
Harassment	16	64.0%
Discharge	10	40.0%
Hiring	6	24.0%
Wages	3	12.0%

2. Race Discrimination

Discharge was the most frequently alleged issue (90%) in suits containing race discrimination claims, followed by harassment (60%).

Race Discrimination Most Frequent Issues		
	<u>Count</u>	<u>Percent</u>
Discharge	9	90.0%
Harassment	6	60.0%
Terms/Conditions	3	30.0%
Assignment	2	20.0%

3. National Origin Discrimination

As shown in the next chart, harassment was the most frequently alleged issue (40%) in suits where national origin was a basis.

National Origin Discrimination Most Frequent Issues		
	<u>Count</u>	<u>Percent</u>
Harassment	2	40.0%
Discharge	1	20.0%
English only rule	1	20.0%
Promotion	1	20.0%
Wages	1	20.0%

4. Religious Discrimination

Discharge was an issue in all six religious discrimination cases, and failure to accommodate in 83.3%.

Religious Discrimination Most Frequent Issues		
	<u>Count</u>	<u>Percent</u>
Discharge	6	100.0%
Reasonable Accommodation	5	83.3%

5. Age Discrimination

Discharge was an issue in one of the two cases with age discrimination claims.

Age Discrimination Issues		
	<u>Count</u>	<u>Percent</u>
Discharge	1	50.0%
Breach of settlement	1	50.0%

6. Disability Discrimination

Discharge was the most frequently alleged issue in disability suits (51.4%), followed by hiring (42.9%) and failure to accommodate (37.1%).

Disability Discrimination Most Frequent Issues		
	<u>Count</u>	<u>Percent</u>
Discharge	18	51.4%
Hiring	15	42.9%
Reasonable Accommodation	13	37.1%
Prohibited Med. Inquiry/Exam	2	5.7%

7. Genetic Information Discrimination

Prohibited medical inquiry was the only issue in the two cases raising GINA claims.

Genetic Information Issues		
	<u>Count</u>	<u>Percent</u>
Prohib. Med. Inq.	2	100%

8. Retaliation

Discharge was an issue in 87.5% of the suits containing retaliation claims

Retaliation Most Frequent Issues		
	<u>Count</u>	<u>Percent</u>
Discharge	21	87.5%
Terms/Conditions	3	12.5%
Suspension	3	12.5%
Hiring	2	8.3%

C. Bases Alleged in Suits Filed from FY 2011 through FY 2016

The table below shows, by year, the bases on which EEOC suits were filed over the last 5 years.

Bases Alleged in Suits Filed FY 2012 – FY 2016											
Percent Distribution											
FY	Sex - Fem	Sex - Preg	Sex - Male	Sex - LGBT	Race	Nat'l Orig	Relig	Disab	Gen Info	Age	Retal
2012	20.5%	9.0%	1.6%	0.0%	9.0%	4.1%	7.4%	36.1%	0.0%	9.0%	25.4%
2013	16.8%	7.6%	2.3%	0.0%	10.7%	4.6%	9.2%	34.4%	2.3%	5.3%	34.4%
2014	21.8%	10.5%	1.5%	1.5%	12.8%	7.5%	6.0%	35.3%	1.5%	7.5%	32.3%
2015	18.3%	13.4%	2.1%	1.4%	11.3%	7.7%	3.5%	35.2%	0.7%	9.2%	28.2%
2016	14.0%	7.9%	5.8%	4.6%	11.6%	5.8%	7.0%	40.7%	2.3%	2.3%	27.9%

D. Suits Resolved

In FY 2016, the Office of General Counsel resolved 139 merits lawsuits, recovering \$52,195,238 in monetary relief.

1. Types of Resolutions

As the chart below indicates, 82.7% of EEOC’s suit resolutions were settlements, 17.3% were determinations on the merits by courts or juries, and none were voluntarily dismissals. (The figures on favorable and unfavorable court orders do not take appeals into account.)

	<u>Count</u>	<u>Percent</u>
Consent Decree	113	81.3%
Settlement Agreement	2	1.4%
Unfavorable Court Order	13	9.4%
Favorable Court Order	11	7.9%
Voluntary Dismissal	0	0.0%
Total	139	100%

2. Monetary Relief by Statute

Of the 139 merits suits resolved during the fiscal year, 60.4% contained Title VII claims. ADA claims were present in 34.5% of the resolutions and ADEA claims in 8.6%. (Statute numbers in the chart below exceed the number of suits resolved and the percentages total over 100 because suits resolved under multiple statutes (“concurrent” cases) are also included in the totals of suits resolved under each statute.)

	<u>Count</u>	<u>Percent of Suits</u>
Title VII	84	60.4%
ADA	48	34.5%
ADEA	12	8.6%
EPA	7	5.0%
GINA	4	2.9%
Concurrent	16	11.5%

As shown below, Title VII suits accounted for about 70% of monetary relief obtained in FY 2016 and ADA suits for about 23%. Recoveries in concurrent suits are not included in the totals for the particular statutes.

<u>Statute</u>	<u>Relief (millions)</u>	<u>Relief Percent</u>
Title VII	\$36.8	70.4%
ADA	\$12.1	23.3%
ADEA	\$0.9	1.8%
Concurrent	\$2.3	4.5%
Total	\$52.2	100.0%

E. Appellate Activity

OGC filed briefs as appellant in 8 merits cases during fiscal year 2016, and defended appeals in 3 new cases. At the end of fiscal year 2016, OGC was handling 24 appeals in the federal courts of appeals involving merits suits, 19 as appellant and 5 as appellee. OGC was also handling 6 appeals in subpoena enforcement actions, 4 as appellant and 2 as appellee. In addition, EEOC was participating as *amicus curiae* in 35 cases on appeal or in district court cases in private suits.

On merits cases, EEOC prevailed in four appeals; EEOC did not prevail in three appeals. In subpoena enforcement cases, EEOC prevailed in all three appeals decided. Considering merits, subpoena and amicus cases in the aggregate, EEOC had 21 wins and 7 losses --- a 75% success rate.

F. Attorney’s Fees Awarded against EEOC

No final awards of attorney’s fees were issued against the agency based on the defendant having prevailed on the merits of the suit.

G. Resources

1. Staffing

The number of field trial attorneys has declined over the past five years.

OGC Staffing (On Board)		
<u>Year</u>	<u>Appellate Attorneys</u>	<u>Field Attorneys*</u>
2012	18	211
2013	17	195
2014	16	192
2015	16	195
2016	17	173

***includes Regional Attorneys**

2. Litigation Budget

EEOC’s litigation funding was comparable to the previous several fiscal years.

Litigation Support Funding (Millions)	
<u>FY</u>	<u>FUNDING</u>
2012	\$4.07
2013	\$4.13
2014	\$3.59
2015	\$3.55
2016	\$3.77

H. EEOC 10-Year Litigation History: FY 2007 through FY 2016

	FY07	FY08	FY09	FY10	FY11	FY12	FY13	FY14	FY15	FY16
All Suits Filed	362	325	316	272	301	155	149	168	174	114
Merits Suits	336	290	281	250	261	122	131	133	142	86
Suits with Title VII Claims	268	224	188	192	162	66	77	77	83	46
Suits with ADA Claims	46	37	76	41	80	45	49	49	52	36
Suits with ADEA Claims	32	38	24	29	26	12	7	11	13	2
Suits with EPA Claims	7	0	2	2	2	2	5	2	7	5
Suits with GINA Claims	0	0	0	0	0	0	3	2	1	2
Suits filed under multiple statutes ¹	16	9	9	14	9	3		7	14	5
Subpoena and Preliminary Relief Actions	26	35	35	22	40	33	18	35	32	28
All Resolutions	387	367	352	318	318	280	228	144	193	171
Merits Suits	364	336	324	289	278	251	213	136	157	139
Suits with Title VII Claims	297	265	254	201	215	159	137	87	86	84
Suits with ADA Claims	41	46	40	59	43	72	60	47	64	48
Suits with ADEA Claims	36	39	38	39	26	29	17	11	12	12
Suits with EPA Claims	14	3	5	0	0	2	4	5	1	7
Suits with GINA Claims	0	0	0	0	0	0	1	1	1	4
Suits filed under multiple statutes	19	16	13	10	8	11	6	13	6	16
Subpoena and Preliminary Relief Actions	23	31	28	29	40	29	15	8	36	32
Monetary Benefits (\$ in millions)²	54.8	101.1	81.6	85.6	89.7	43.2	39.0	22.5	65.3	52.2
Title VII	38.9	64.9	64.5	74.0	53	34.2	22.4	15.3	56.9	36.8
ADA	3.1	3.3	9.5	2.9	27.1	5.5	14.0	16.6	6.3	12.1
ADEA	2.4	29.9	6.7	5.8	8.4	2.6	2.1	8.4	.81	.94
EPA	0.2	1.0	0.02	0	0	0	.24	.56	0	.04
GINA	0	0	0	0	0	0	0	0	0	0
Suits filed under multiple statutes ³	10.2	1.7	0.9	2.9	1.1	0.9	.24	6.5	1.3	2.3

¹ Suits filed or resolved under multiple statutes are also included in the tally of suits filed under the particular statutes.

² The sum of the statute benefits in some years will be different from total benefits for the year due to rounding.

³ Monetary benefits recovered in suits filed under multiple statutes are counted separately and are not included in the tally of suits filed under the particular statutes.