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Unnecessary Burdens on Employers: Time for the EEOC to Improve its Systemic Discrimination Initiative

By David P. Twomey

I. Introduction

As the nation's leading enforcer of federal laws prohibiting employment discrimination, the Equal Employment Opportunity Commission (EEOC) has rightfully placed a high priority on issues that impact large numbers of job seekers and employees.[1] Starting in 2006, the EEOC initiated a program devoting resources to investigating and litigating cases of systemic discrimination as a top agency priority.[2] It defined systemic cases as "pattern or practice, policy and/or class cases where the alleged discrimination has broad impact on an industry, profession, company or geographic location."[3] When the agency makes a finding of systemic discrimination and efforts to secure voluntary compliance fail, it may choose to file suit to enforce the law.[4] In Fiscal Year 2011, the Commission filed twenty three lawsuits with at least twenty known or expected class members. These suits comprised nine percent of all its merit filings, and comprised the largest volume of systemic suit filings since tracking started in FY 2006.[5]

The EEOC has had much success in its evolving systemic program.[6] As examples, in FY 2011 the EEOC reported that it achieved settlement with Verizon Maryland, Inc. creating a $20 million fund to compensate approximately 800 victims who were disciplined or fired pursuant to an inflexible attendance policy that did not provide accommodation for disability related absences.[7] Moreover, it obtained a consent decree with

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Roadway Express Inc. resolving inferior work assignments for black employees;[8] it obtained a consent decree against the telemarketing firm International Profit Association in a pattern or practice sexual harassment case;[9] and successfully concluded a nationwide age discrimination case against 3M Company.[10] However, the EEOC did not report instances where it has imposed unnecessary burdens on employers and the courts in its systemic initiative. Part II of the paper deals with the *EEOC v. CRST Van Expedited Inc.* decision of the Eighth Circuit Court of Appeals, where the EEOC failed to reasonably investigate and conciliate in good faith with a large trucking company, placing an unreasonable burden on the employer and the courts.[11] Part III of the paper deals with the *EEOC v. Peoplemark Inc.* decision, where the United States District Court for Western Michigan determined that the EEOC had imposed an unacceptable burden on a temporary staffing company, and the court awarded the company limited attorneys' fees and expenses.[12] Part IV of the paper shows how the EEOC can address the procedural and competency issues made evident in the *CRST* and *Peoplemark* cases; and makes a modest proposal for building neutrality into the investigation stage of the EEOC's prelitigation procedures.

II. Investigation and Conciliation Obligations of the EEOC: The *CRST* Case

In *EEOC v. Van Expedited, Inc.*,[13] the United States Court of Appeals for the Eighth Circuit reviewed a federal district court's series of rulings that collectively disposed of the EEOC's entire action against CRST Van Expedited, Inc. (CSRT), which alleged that CRST had subjected Monika Starke and 270 similarly situated female employees to a hostile work environment in violation of Title VII of the Civil Rights Act of 1964.[14] The district court awarded CRST $4,467,442.90 in attorneys' fees and expenses.[15] A principal determination of the district court was that the EEOC failed to reasonably investigate and conciliate in good faith with CRST.[16] The appeals court majority affirmed the district court's decision that the EEOC failed to reasonably investigate and conciliate in good faith, but reversed the grant of summary judgment against Monika Stark and Tillie Jones, and vacated, without prejudice, the district court's award of attorneys' fees to CRST because it was no longer the "prevailing" defendant with the continuation of the litigation in the cases of Stark and Jones.[17] The Eighth Circuit majority set forth in careful detail the basis for its decision in its review of the six dispositive rulings of the U.S. District Court for the Northern District of Iowa.

A. CRST's Business Model and Training Program

CRST is an interstate logistics and transit company that employs more that 2500 long haul drivers.[18] Its business model relies on an efficiency measure known as "Team Driving," with two drivers to a truck, who alternate between driving and sleeping on-board in the truck's sleepercar, for as much as twenty one days in order to maximize mileage and minimize stops.[19] Newly hired drivers are required to complete CRST's training program before it permits them to drive full time for full pay.[20] During the three and-a-half day classroom component, CRST distributes its Driver's Handbook which contains an entire section devoted to its anti-harassment policy, and the procedures for reporting such harassment.[21] Additionally, CRST orientation leaders orally reiterate CRST's written anti-harassment policy, explain to trainees how they can report harassment complaints, and present a video stressing that CRST will not tolerate sexual harassment.[22] The Driver's Handbook instructs employees who endure or witness harassment or discrimination to immediately report the conduct to either an immediate supervisor or the Director of Human Resources.[23] It states that "[a]ll reports of harassment and/or discrimination will be handled in a confidential manner."[24] At the New-Driver Orientation's conclusion, CRST has each trainee sign a written "Acknowledgement and Pledge Concerning Harassment and Discrimination," attesting to the facts that the trainee "received and read [CRST's] Policy Against Unlawful Harassment and Discrimination."[25]

Following the orientation, each trainee embarks on a twenty eight day, over-the-road training trip with an experienced "Lead Driver" who familiarizes the trainee with CRST's Team Driving Model and evaluates the trainee's performance on the maiden haul.[26] At the conclusion of the training trip, the trainee's Lead Driver gives the trainee "a pass/fail driving evaluation" that superiors consider when determining whether to certify the trainee as a full-fledged CRST driver.[27] Under CRST's organizational structure, Lead Drivers lack the authority to hire, fire, promote, demote, or reassign trainees; CRST's Safety and Operations Departments make all final decisions concerning the trainees' employment.[28]

B. Channels for Reporting Sexual Harassment

CRST provides its trainees and team drivers multiple channels for reporting sexual harassment, including: (1) CRST's "open-door policy," which encourages all of its employees to approach their supervisors, any employee in the Operations or Safety Departments, or any manager about any issue; (2) toll-free phone numbers for fleet managers who were available around the clock; (3) Qualcomm, a device placed in every truck that transmits messages, similar to emails, directly to fleet managers; (4) H.R.'s nationwide toll-free number and local toll phone number, both of which CRST provided in the Driver's Handbook section on how to properly report sexual harassment; and (5) evaluation forms given to all trainees at the training trip's conclusion soliciting each trainee's feedback concerning his or her lead driver.[29]

C. Starke's Initiating Charges; the Investigation; the Conciliation

On December 1, 2005 Monika Starke filed a sexual harassment charge with the EEOC.[30] The EEOC notified CRST of the filing.[31] CRST investigated it and on December 21, 2005 it sent a statement to the EEOC.[32] During the investigation of Starke's charge, the EEOC investigators learned that female drivers Essig, Morgan, Deeples, and Thiel had filed formal charges of discrimination against CRST for alleged sexual harassment.[33] On July 12, 2007, the EEOC presented CRST with its "Letter of Determination," which notified CRST that the EEOC had found reasonable cause to believe that CRST subjected Starke and "a class of employees" to sexual harassment on the basis of gender and offered to conciliate the claim.[34] CRST's attorney spoke with Starke's private counsel and from that conversation determined that conciliation appeared futile.[35]

D. The Instant Lawsuit

On September 27, 2007, the EEOC filed the instant lawsuit seeking redress for the discrimination that Ms. Starke "and a class of similarly situated female employees of CRST" allegedly endured.[36] The EEOC brought the suit in its own name, pursuant to Section 706 of Title VII, "to correct CRST's unlawful employment practices on the basis of sex, and to provide appropriate relief to [Starke] and a class of similarly situated female employees of CRST who were adversely affected by such practices."[37]

From September 27, 2007, the date that the EEOC filed suit, until nearly two years thereafter, the EEOC did not identify the women comprising the putative class despite the district court's and the CRST's repeated requests to do so. According to the district court, "it was unclear whether the instant Section 706 lawsuit involved two, twenty or two thousand 'allegedly aggrieved persons.'"[38] The district court concluded that "the EEOC did not know how many allegedly aggrieved persons on whose behalf it was seeking relief," but "[i]nstead . . . was using discovery to find them."[39]

The district court supported this conclusion with the following excerpted chronology of discovery in the case:

> On May 29, 2008, for example, the EEOC sent 2,000 letters to former CRST female employees to solicit their participation in this lawsuit. On September 28, 2008, the EEOC sent another 730 solicitation letters to former CRST female employees. There was a clear and present danger that this

case would drag on for years as the EEOC conducted wide-ranging discovery and continued to identify allegedly aggrieved persons. The EEOC's litigation strategy was untenable: CRST faced a continuously moving target of allegedly aggrieved persons, the risk of never-ending discovery and indefinite continuance of trial.

On August 8, 2008, CRST asked the court to establish a date "by which the EEOC completes its identification of class members." ... The EEOC responded that it had identified "a total of 49 class members so far," predicted the "total class will reach between 100 and 150 individuals," indicated it believed it could identify "the bulk of the class members" by October 15, 2008, and suggested a December 7, 2008 deadline for identifying the "class members." ...

On August 20, 2008, the court set a[n] October 15, 2008 deadline for the EEOC "to disclose the identit[ies] of class members." ...

By October 15, 2008, the EEOC identified approximately 270 allegedly aggrieved persons to CRST. The number of "class members" greatly increased in the ten days immediately preceding the deadline. Prior to October 7, 2008, the EEOC had identified only seventy-nine "class members" to CRST. On October 7, 2008, the EEOC identified 40 new "class members" and advised CRST that the "investigation is continuing." ... On October 15, 2008, the EEOC identified 119 more "class members" and again advised CRST that the "[i]nvestigation is continuing." ... Also on October 15, 2008, the EEOC partially identified 66 additional persons and stated [that] " the EEOC expects [that] all [of] these individuals are class members. ... Again, the EEOC stated that the "[i] nvestigation is continuing." ...

... The Court took the EEOC at its word that it had a good-faith belief that each and every one of the approximately 270 women it had disclosed to CRST before the deadline had an actionable claim for sex discrimination.[40] ...

Having warned the EEOC that failure to present any woman for deposition before discovery's conclusion on January 15, 2009 would result in barring the EEOC from seeking relief on her behalf, with just 150 women made available for depositions, the district court dismissed the EEOC's claims for the 120 women who were not produced.[41]

Subsequently, the district court also entered summary judgment against a majority of the remaining women and barred the EEOC from seeking relief on their behalf at trial for a variety of reasons, including: judicial estoppel; failure to report the harassment to CRST in a timely manner; CRST's prompt and effective response to the reports that it actually received; and because the alleged harassment was not sufficiently severe or persuasive.[42]

On August 13, 2009, the district court barred the EEOC from seeking relief for the remaining sixty seven women after concluding that the EEOC had failed to conduct a reasonable investigation and *bona fide* conciliation of these claims–statutory conditions precedent to instituting suit.[43] Having disposed of all the allegedly aggrieved women in the EEOC's putative "class," the district court dismissed the EEOC's complaint.[44]

E. EEOC's Presuit Investigation and Conciliation Obligations

Section 706 of Title VII, the provision under which the EEOC sued CRST, authorizes the EEOC to bring suit in its own name on behalf of a person or persons aggrieved by the employer's unlawful employment practice.[45] This right, however, is subject to certain administrative prerequisites.[46] In *Occidental Life Insurance v. EEOC*, the U.S. Supreme Court identified the multistep enforcement procedures culminating in the EEOC's authority to bring a civil action in federal court.[47] First, an employee files with the EEOC a charge "alleging that an employer has

engaged in an unlawful employment practice."[48] Second, "[t]he EEOC is then required to investigate the charge and determine whether there is reasonable cause to believe that it is true."[49] If reasonable cause does exist, the EEOC moves to the third step, which attempts to remedy the objectionable employment practice through the informal, nonjudicial means "of conference, conciliation, and persuasion."[50] However, if the conciliation is unsuccessful, the EEOC may move to the fourth and final step and bring a civil action to redress the charge.[51]

The district court barred the EEOC from seeking relief for the sixty seven allegedly aggrieved women, finding that the EEOC failed to conduct a reasonable investigation and good-faith conciliation as required.[52] The Eighth Circuit majority concluded that the "EEOC did not investigate the specific allegations of any of the sixty seven allegedly aggrieved persons" – the class members – "until after the complaint was filed."[53] Absent an investigation and reasonable cause determination apprising the employer of the charges lodged against it, the court stated, the employer has no meaningful opportunity to conciliate.[54] The court majority determined that the district court's dismissal of the EEOC's complaint on behalf of the sixty seven women was not an abuse of the court's discretion, concluding that the present record confirms that the EEOC wholly failed to satisfy its presuit obligations.[55]

F. Section 707 "Pattern or Practice" Theory

Section 707 of Title VII of the Civil Rights Act permits the EEOC to sue employers when it has reasonable cause to believe they are engaged in a pattern or practice of unlawful employment discrimination.[56] "Pattern or practice" disparate treatment claims focus on allegations of widespread acts of intentional discrimination against individuals. To succeed in a pattern or practice case, the EEOC must prove more than sporadic acts of discrimination. It must establish that intentional discrimination was the defendant-employer's "standard operating procedure."[57]

The EEOC did not allege that CRST was engaged in a pattern or practice of illegal sex-based discrimination or otherwise plead a violation of Section 707 of Title VII.[58] The district court assumed that the EEOC had the right to maintain a pattern or practice claim in this case but dismissed it with prejudice, holding that as a matter of law there was not sufficient evidence from which a reasonable jury could find that it was CRST's "standard operating procedure" to tolerate sexual harassment.[59]

G. The Dissent's View of the EEOC's Litigation Prerequisites

The dissent to the Eighth Circuit's decision disagreed that the EEOC had failed to fulfill its litigation prerequisites prior to filing the lawsuit. According to the dissent, "[t]he majority imposes a new requirement that the EEOC must complete its pre-suit duties for each individual alleged victim of discrimination when pursuing a class action."[60] It's true that in a "pattern or practice" class action case under Section 707 of Title VII, the EEOC would not have to identify and attempt to conciliate each purported class member's claim.[61] However, the EEOC did not advance a Section 707 pattern or practice theory against CRST, and the district court determined that if it did, such a theory would be dismissed with prejudice because there was insufficient evidence from which a reasonable jury could find that it was CRST's "standard operating procedure" to tolerate sexual harassment.[62] The EEOC pursued a "class-like" action under Section 706, containing Title VII's sensible presuit obligations, requiring investigation of each claim and a meaningful opportunity to engage in conciliation, giving the parties the opportunity, at least, to settle some or all of the dispute without the expense of a federal lawsuit.[63]

H. Attorneys' Fees

The district court ruled in CRST's favor in dispositive motions that collectively disposed of the EEOC's entire action.[64] After its final ruling on August 13, 2009, it determined that CRST as prevailing party could file an application for attorneys' fees from the EEOC.[65] The district court determined that attorneys' fees were warranted, and the CRST was entitled to $463,071.25

for reasonable out of pocket expense, with $4,004,371.65 for attorneys' fees.[66] The Court of Appeals reversed the district court's summary judgment as to Monika Starke and Tillie Jones. Because the EEOC still asserts live claims against CRST on behalf of Mss. Starke and Jones, the court vacated, without prejudice, the district court's award of attorneys' fees and expenses.[67] The matter of the EEOC's obligation to pay attorneys' fees awaits a full-blown trial on the merits of Ms. Starke's and Ms. Jones' cases resolving the disputed issues present in those cases, to determine whether they are without foundation, qualifying CRST for attorneys' fees.[68]

I. Unacceptable Burden on the Employer and Courts

The working-living environment of twenty four hour a day service, alternating between driving, and sleeping on board a truck's sleepercab, can lead to serious interpersonal issues between two-person, long-haul driver crews, especially when a crew consists of male and female co-drivers. Hygiene issues,[69] obnoxious satellite radio programs, boasting about past sexual exploits, sporadic remarks of sexual/vulgarity, highly offensive propositions for sex and other sordid matters may occur.[70]

CRST battles sexual harassment through its new driver training program where it comprehensively teaches that it will not tolerate sexual harassment and obtains signed written pledges of no sexual harassment or discrimination and no retaliation[71] and, it trains the drivers how to report violations of its policy.[72]

The law of sexual harassment is well settled. To be actionable the alleged harassment must be so severe or persuasive that it "alter[ed] the conditions of the [woman's] employment;[73] and Title VII is not a general civility code for the American workplace.[74] Precedent clearly established that a Lead Driver as utilized by CRST is not a supervisor.[75] Regarding sexual harassment of coworkers, should it occur, CRST would be liable for this sexual harassment only if CRST knew or should have known of the instances of sexual harassment, and did not properly and effectively take corrective action.[76]

Upon filing the complaint against CRST in the district court on September 27, 2007, the EEOC's higher level attorneys took it upon themselves to issue a press release entitled: **"TRUCKING GIANT CRST SUED FOR SEXUAL HARRASSMENT OF 'TEAM' DRIVERS."**[77] The EEOC had not at that point sent out the 2000 solicitation letters to former CRST female employees to participate in the just filed lawsuit. The mailing was not made until eight months later on May 29, 2008.[78] It was a year after filing suit that the EEOC sent out an additional 730 solicitation letters.[79] Clearly the EEOC had not yet developed its case when it published its press release.

The district court determined that it should bar the EEOC from seeking relief on behalf of sixty seven of the allegedly aggrieved women, because the EEOC did not investigate, issue reasonable cause determinations or conciliate the claims of these individuals. The court believed the dismissal was necessary because to rule to the contrary would permit the EEOC to perfect an end-run around Title VII's integrated, multistep enforcement procedure and would ratify a "sue first, ask questions later" litigation strategy on part of the EEOC, which would be anathema to Congressional intent.[80] Footnote 25 in the district court's decision stated in part:

> The court notes that, upon filing the Complaint, the EEOC's higher-level attorneys issued a press release entitled **"TRUCKING GIANT CRST SUED FOR SEXUAL HARRASSMENT OF FEMALE 'TEAM' DRIVERS."** Mr. John Hendrickson, Regional Attorney for the Chicago District, and Mr. John P. Rowe, District Director of the Chicago District Office, commented on CRST's alleged practices. For example, Mr. Hendrickson stated: "This situation is chilling to contemplate: being trained by a sexual harasser on the open road in a sleeper cab, and not getting immediate help when you complain. We think the repetitive nature of the situation as alleged here makes this case especially compelling ... ." Mr. Hendrickson also attended an employment

law conference in Chicago on October 1, 2008, in which he "highlighted the rampant sexual harassment exhibited by trucking giant CRST and their weak, if typical, defense that it was "all the woman's fault."[81]

When high level EEOC attorneys, officials of the United States government, made public statements connoting the employer's guilt of unlawful employment practices, while belittling the employer's defense, even before the employer has an opportunity to make such a defense, and indeed where the employer had no opportunity for a genuine investigation, reasonable cause determination or conciliation before the class like complaint was filed in court, such a public assertion was untenable.[82] Not only is it destructive of the employer's reputation, but it may well have resulted in the agency itself being locked into the publicly asserted pronouncement of the high level attorneys, leading the agency to progress all claims as meritorious. The district court took the EEOC at its word that the EEOC had a good-faith belief that each and every one of the approximately 270 women it had disclosed to CRST before the deadline had an actionable claim for sex discrimination.[83] Just two cases, yet to be decided on the merits by the trial court, have survived![84]

A litigation strategy by the EEOC to excoriate the employer in the press seeking to obtain a consent degree from the employer without properly developing its case was not condoned by the district court.[85] The litigation cost to CRST was $4,467,442 in attorneys' fees and expenses, which may or may not be awarded to CRST by the district court depending on the outcome of the Starke and Jones cases that have survived for trial.[86] Additional costs were born by CRST for the time and efforts of its employees whose focus was diverted from their business duties to assist in the multi-year litigation. Moreover, critically needed EEOC federal enforcement funds were wasted on this endeavor by the agency. Moreover, the EEOC, asserting to the district court that each and every one of the approximately 270 women eventually named in the class like action against CRST has an actionable claim for sex discrimination, placed an enormous burden on the district court, a burden that should have been performed within the agency itself with the appropriate investigation of each claim and the EEOC correctly applying procedural and substantive law to the facts of each claim.[87]

III. Attorneys' Fees for Unecessary Burden Imposed on Employer: The *Peoplemark* Case

In *EEOC v. Peoplemark, Inc.* the United States District Court for the Western District of Michigan dealt with an employer's motion for attorneys' fees and costs after a joint motion to dismiss the EEOC case against the employer with prejudice was granted.[88]

A. The EEOC's Case Against Peoplemark, Inc.

Peoplemark, Inc. is a temporary staffing company which hires people to perform in light industrial, clerical and receptionist positions.[89] The EEOC had been informed that on July 1, 2005 an officer of the company stated that its customers will not accept for assignment any employee who has a felony criminal conviction because of safety and security concerns.[90] On November 13, 2005, the EEOC received a discrimination claim regarding Peoplemark from Sheri Scott, a two-time felon with convictions for housebreaking and larceny.[91] During the EEOC's investigation of this matter, it utilized administrative subpoenas in 2006 and 2007 to obtain over 18,000 pages of documents from Peoplemark.[92]

On May 29, 2008, the EEOC filed a complaint in the United States District Court for the Western District of Michigan in which it alleged that Peoplemark maintained a policy "which denied the hiring or employment of any person with a criminal record," and that this policy adversely affected African-Americans in violation of Title VII.[93] The EEOC sought relief on behalf of Sherri Scott and others "similarly situated but unidentified African- Americans who were adversely affected by such practices."[94]

On February 4, 2009, Peoplemark asked the EEOC to identify every individual, based on the EEOC's previous investigation, who had been injured by Peoplemark's allegedly discriminatory practice.[95] The only name given was Sherri Scott; no other similarly situated African-American was named.[96] The court ordered the EEOC to fully answer the interrogatories and the EEOC answered in response with the names and addresses of 286 individuals.[97] The EEOC had these names since its administrative investigation during 2006 and 2007, before the lawsuit began. The court pointed out that there was no indication that the EEOC conducted any investigation of the specific allegations of the 286 people it belatedly named as victims, or that it issued a reasonable cause determination in an administrative investigation.[98] And, the court stated that "[h]ad this case been dismissed on the basis that it was not properly investigated before it was brought, the attorneys' fees would be far greater."[99]

Having received the names of the 286 alleged victims, Peoplemark's expert was then able to determine that 22% of these people who had felony convictions were in fact hired by Peoplemark.[100] The court stated that a good EEOC investigation would probably have shown that the EEOC could not make its case even prior to filing the lawsuit, but it certainly became evident when all the evidence submitted by the EEOC was available, even if the EEOC had not conducted its own independent investigation.[101] Based on the unnecessary burden imposed on Peoplemark, the court determined that Peoplemark was entitled to an award of fees and cost incurred from October 1, 2009 until the dismissal of the action on March 29, 2010 in the amount of $751,942.48[102]

B. Unacceptable Burden on the Employer

EEOC Commissioner Ishimaru took the opportunity to highlight this case at a public meeting on November 20, 2008, stating that "[J]ust this past September, the Commission unanimously approved the filing of a case in the Western District of Michigan against Peoplemark, alleging that a class of African-Americans were discriminated against due to its policy that denies the hiring or employment of any person with a criminal record."[103] Surely, the Commissioner was justifiably concerned about a blanket employer policy that denies employment to any person with a criminal record in the context of some 708,0000 men and women being released from prison each year, and the difficulty faced by so many of these individuals to get their lives back by finding employment upon their return to the community.[104] If the EEOC had conducted a good administrative investigation it would have discovered that Peoplemark did not have an administrative policy of not hiring individuals with criminal records.[105] This case should never have been filed in court.

Peoplemark's staff was required to provide some 18,000 pages of documents in response to administrative subpoenas from the EEOC over a two year period.[106] And it had to bear the costs of attorneys' fees and expenses from the initiation of charges on November 13, 2005 through to October 31, 2009, a period of time not covered by the court's ultimate award of attorneys' fees and expense covering the subsequent period of November 1, 2009 until the case was dismissed with prejudice on March 31, 2010.[107] In addition to the economic burden placed on Peoplemark by the U.S. governmental agency, its reputation was harmed by the Commissioner's erroneous public charge against the company. Surely the EEOC should address the structural and competency issues exposed by the court in this case.

IV. Remedial Measures: Conclusion

The *CRST* ruling, internal EEOC planning documents, along with the presence of a new General Counsel, may provide a basis for correcting procedural and competency matters raised by the *CRST* and *Peoplemark* cases. A modest proposal is suggested for building some neutrality into the investigations stage of the EEOC prelitigation procedures under Section 706 of Title VII of the Civil Rights Act.

A. Structural and Competency Issues

The work of the EEOC in administrating Title VII of the Civil Rights Act, the Pregnancy Dis-

crimination Act, the Age Discrimination in Employment Act, the Equal Pay Act, the Rehabilitation Act and the Americans with Disabilities Act is the driving force in shaping fair employment practices in our society and ridding society of unfair employment practices whereby otherwise qualified workers are impeded from competing on an equal basis with fellow citizens for employment and promotional opportunities.[108] In light of the *CRST* and *Peoplemark* decisions the EEOC should take action to remedy the structural and competency problems exposed by these cases.

After the filing of a charge or charges, Section 706 requires that there be an investigation of the charge and a determination made whether there is reasonable cause to believe the charge is true; and if reasonable cause exists the subsequent stage requires the EEOC to attempt to eliminate the unlawful practice by informal methods of conference, conciliation and persuasion.[109]

A reading of the *CRST* and *Peoplemark* decisions exposes competency issues in the agency. In *CRST*, why were so many meritless charges progressed to and pursued before the district court rather than meaningfully investigated and if need be conciliated in fulfillment of the EEOC's administrative responsibilities under Section 706?[110] In *Peoplemark*, the district court pointed out that there is no indication that the EEOC conducted any investigation of the specific allegations of the 286 people it belatedly named as victims.[111]

The EEOC itself has a draft plan focused on quality issues in investigations and conciliations which is directed at competency issues. [112] In the EEOC's "Draft Plan for Fiscal Years 2012-2016" it lists Outcome Goal 111. As "[a]ll interactions with the public are timely, of high quality, and informative."[113] The draft plan proposes a new quality control system for investigations and conciliations, including for FY 2013:

> Develop criteria to measure the quality of investigations and conciliation and develop a peer review assessment system.[114]

The draft explains in part that the current measures do not measure whether charges are appropriately reassessed on a timely basis, how efficient and timely the investigation has been, what the investigation actually consisted of, and whether the investigator correctly applied the law to the facts of the charge. [115]

Speaking at an American Bar Association meeting in Key West, Florida on February 24, 2012, the EEOC's recently appointed General Counsel, P. David Lopez, stated his litigation philosophy as follows: "If we file a case, we should be ready to try it. If we try a case, we should have a reasonable chance of prevailing."[116]

The philosophy of being ready to try the case when the agency files it was not in effect for the *CRST* and *Peoplemark* cases. It is a welcome philosophical change for the agency and should end a perceived litigation strategy of excoriating the employer in the press seeking to obtain a consent decree from the employer without properly developing its case before filing with the court.[117]

B. An Impartial Review Officer

In general, employers are careful to avoid discriminatory behavior, and are quick to settle discrimination charges prior to litigation when there is credible evidence of discrimination. The message sent to the EEOC by the courts in the *CRST* and *Peoplemark* decisions is that the EEOC must develop its Section 706 cases at the investigation stage. The EEOC has broad authority to issue subpoenas, enforceable in federal courts, in support of the investigatory process. [118] Under Section 706, if the EEOC determines after an investigation that there is not reasonable cause to believe the charge is true, the charge will be dismissed; and if the EEOC determines that there is reasonable cause to believe the charge is true, the agency moves to the conciliation stage.[119] This decision making task is a critical juncture in the statutory process.

The EEOC investigator may well have properly pursued a wide and costly investigation, including subpoena enforcement action against the employer. The employer may believe that the investigator has been less than fair and impartial in the investigation process and that a reasonable cause determination decision by the

investigator is unfair process. The investigator may have a hardened view of the employer from the adversarial relationship of the parties.

It is proposed that at the conclusion of the actual investigation in systemic cases under Section 706, where the investigator (investigation unit) intends to issue a letter of determination that reasonable cause exist for the charges in the systemic investigation – called a proposed determination – that the Office of the General Counsel provide a highly qualified Impartial Review Officer to make a nonjudicial review of the administrative record developed during the investigation, and that the neutral officer have full authority to approve, modify or reject the proposed determinations of the investigator. If all or some of the proposed recommendations are found to have merit by the Impartial Review Officer, it would be persuasive pressure on the employer to resolve the action in the conciliation stage of the administrative process. From an investigation quality perspective, the EEOC could expect an improvement in the quality of investigations because each systemic investigation would be subject to the impartial agency review. Moreover, should a proposed determination be modified or rejected for not meeting the reasonable cause standard, scarce agency resources would be preserved to pursue other meaningful enforcement activity by the EEOC.[120]

With twenty three systemic cases filed in FY 2011 a pilot project utilizing highly qualified Impartial Review Officers would have a modest marginal cost to the agency and provide some structural balance and neutrality clearly lacking in the handling of the *CRST* and *Peoplemark* cases before the EEOC. And, it may have the additional benefit of enhancing the public's confidence in the fairness of *EEOC's* enforcement of federal equal employment opportunity laws. ■

ENDNOTES

1 EEOC, Performance and Accountability Report (FY 2011), at 13 [hereinafter 2011 PAR] available at www.eeoc.gov/eeoc/plan/2011par.cfm.

2 EEOC Systemic Task Force Report (Mar. 30, 2006) available at www.eeoc.gov/eeoc/task-reports/systemic.cfm.

3 *Id.* at 7.

4 2011 PAR, at 13.

5 *Id.* The EEOC filed 20 such suits in FY 2009, 19 such suits in FY 2009, 17 in FY 2008, 14 in FY 2007, and 11 in FY 2006. *Id.*

6 2011 PAR, at 14.

7 *Id.*

8 *Id.*

9 *Id.*

10 *Id.* The FY 2011 Performance and Accountability Report also listed significant resolutions by the EEOC of systemic discrimination lawsuits in FY 2011 against Scrub, Inc. for hiring discrimination based on race; AKAL Security for pregnancy discrimination; and Denny's Inc. for denying medical leave beyond a predetermined limit. *See id.*

11 2011 U.S. Dist. LEXIS 38696 (W. D. Mich., Mar. 31, 2011).

12 2012 U.S. App. LEXIS 3485 (8th Cir. 2012).

13 *EEOC v. CRST Van Expedited, Inc.*, 2012 U.S. App. LEXIS 3485 (8th Cir. 2012).

14 Reference to the dispositive rulings of the United States District Court for the Northern District of Iowa are: *EEOC v. CRST Van Expedited, Inc.*, 2009 U.S. Dist. LEXIS 40911 (N.D. Iowa, 2009). *EEOC v. CRST Van Expedited, Inc.*, 2009 U.S. Dis. LEXIS 46204 (N.D. Iowa, June 2, 2009). *EEOC v. CRST Van Expedited, Inc.*, 2009 U.S. Dist. LEXIS 52089 (N.D. Iowa, June 18, 2009). *EEOC v. CRST Van Expedited, Inc.*, 2009 U.S. Dist. LEXIS 64118 (N.D. Iowa, July 9, 2009). *EEOC v. CRST Van Expedited, Inc.*, 2009 U.S. Dist. LEXIS 71396 (N.D. Iowa, Aug. 13, 2009). *EEOC v. CRST Van Expedited, Inc.*, 2010 U.S. Dist. LEXIS 11125 (N.D. Iowa, Feb. 9 2010).

15 *EEOC v. CRST Van Expedited, Inc.*, 2010 U.S. Dist. LEXIS 11125 (N.D. Iowa, Feb. 9 2010).

16 *EEOC v. CRST Van Expedited, Inc.*, 2009 U.S. Dist. LEXIS 71396 (N.D. Iowa, Aug. 13, 2009).

17 *EEOC v. CRST Van Expedited, Inc.*, 2012 U.S. App. LEXIS 3485 (8th Cir. 2012).

18 *Id.* at *4

19 *See id.* The Federal Motor Carrier Safety Administration of the U.S. Department of Transportation limits interstate truck drivers' hours of service to 11 hours of driving per day over a 14 hour period, available at www.fmcsa.dot.gov/rules-regulations/truck/driver/hos/fmcsa-guide-to-hos.PDF.

20 *Id.*

21 *Id.* at **4, 5.

22 *Id.* at *5.

23 *Id.*

24 *Id.*

25 *Id.*

26 *Id.* at *5,6

27 *Id.* at *6

28 *Id.*

29 *Id.* at **6,7

30 *Id.*

31 *Id.* at *8.

32 *Id.* at *9.

33 *Id.* at *11.

34 *Id.* at *11,12

35 *Id.* at *12.

36 *Id.* at *13.

37 *Id.* at *14.

38 *Id.* at **15,16.

39 *Id.* at *16.

40 *Id.* at **16-19. 2009 U.S. Dist. LEXIS 71396 at **30-34 (N.D. Iowa, Aug. 13, 2009).

41 *Id.* at *20.

42 *Id.* at *20-23.

43 *Id.* at *23.

44 *Id.*

45 42 U.S.C. § 2000e-5.

46 *Id.*

47 432 U.S. 355, 359 (1977).

48 *Id.*

49 *Id.*

50 *Id.* quoting 42 U.S.C. § 2000e-5(b).

51 *Id.* quoting 42 U.S.C. § 2000e-(f)(1).

52 *CRST*, 2012 U.S. App LEXIS 3485 at *24.

53 *Id.* at *37, 38.

54 *Id.*

55 *Id.* at 40.

56 42 U.S.C. § 2000e-6.

57 International Brotherhood of Teamsters v. U.S., 431 U.S. 324, 336 (1977).

58 *CRST*, 2012 U.S. App LEXIS 3485 at *39.

59 *Id.* CRST Van Expedited Inc; 2009 U.S. Dist. LEXIS 71396 at *25.

60 *CRST*, 2012 U.S. App. LEXIS 3485 at *94.

61 Section 707 "pattern or practice" cases proceed in two phases, a "liability phase" and a "remedial phase." *Robinson v. Metro-N Commuter R.R. Co.*, 267 F.3d 147, 158 (2d Cir. 2001). The liability phase is largely preoccupied with class-wide statistical evidence directed at establishing an overall pattern or practice of intentional discrimination. *Robinson*, 267 F.3d at 168. At the liability phase, the EEOC is not required to offer evidence that each person for whom it will ultimately seek relief was a victim of the employer's discriminatory policy; its burden is to establish a prima facie case that such a policy existed. *See Teamsters*, 431 U.S. at 360-361. The burden then shifts to the employer to demonstrate that the plaintiffs' proof is either inaccurate or insignificant under the *Teamsters* burden shifting framework. Id. at

360. If the plaintiff succeeds in proving liability, the court may fashion classwide injunctive relief, and then, in the remedial phase, individual plaintiffs may avail themselves of a rebuttable presumption of discrimination in litigating a particular adverse employment decision during the class period to obtain individual relief. *EEOC v. Bloomberg L.P.*, 778 F. Supp. 2d. 458, 469 (S.D.N.Y. 2011).

The purpose of section 707 is "to provide the government with a swift and effective weapon to vindicate the broad public interest in eliminating unlawful practices, at a level which may or may not address the grievances of particular individuals." In contrast, Section 706 of the Act addresses individual grievances and includes requirements that charges be filed, investigations conducted, and an opportunity to conciliate afforded to the respondent when reasonable cause has been found. *EEOC v. JBS USA, LLC*, 2011 U.S. Dist. LEXIS 145102 at **8,9 (D. Colo 2011) quoting *U.S. v Allegheny-Ludlum Indus, Inc.* 517 F.2d 826, 843 (5th Cir. 1975).

62 *CRST*, 2012 U.S. App. LEXIS 3485 at *39, FN 13.

63 *See CRST Van Expedited, Inc.* 2009 U.S. Dist. LEXIS 71396 at *60.

64 *CRST*, 2012 U.S. App. LEXIS 3485 at *8.

65 *EEOC v. CRST Van Expedited, Inc.* 2009 U.S. LEXIS 71396 at *67.

66 *EEOC v. CRST Van Expedited, Inc.* 2010 U.S. LEXIS 11125 at *57.

67 *CRST*, 2012 U.S. App. LEXIS 3485 at *93.

68 *Id.* Ms. Starke was judicially estopped from asserting her Title VII claim. *CRST*, 2012 U.S. App. LEXIS 3485 at **43,44. However, the EEOC, suing in its own name under § 706 may not be judicially estopped because of Starke's independent conduct. *Id.* at *93. Ms. Starke's charge claimed:

> I was hired by the [CRST] on June 22, 2005[,] in the position of Truck Driver. Since my employment began with the Respondent I have been subjected to sexual harassment on two occasions by my Lead Trainers. On July 7, 2005, Bob Smith, Lead Trainer[,] began to make sexual remarks to me whenever he gave me instructions. He told me that the gear stick is not the penis of my husband, I don't have to touch the gear stick so often. "You got big tits for your size, etc...[.]" I informed Bob Smith that I was not interested in a sexual relationship with him. On July 14, 2005, I contacted the dispatcher and was told that I could not get off the truck until the next day. On July 18, 2005[,] through August 3, 2005, David Goodman, Lead Trainer, forced me to have unwanted sex with him on several occasions while we were travelling in order to get a passing grade. *Id.* at *8.

CRST denied discriminating against Starke based on its own internal investigation as follows:

> ... CRST interviewed Smith, Frank Taylor and Madeline Lovins. Smith "admitted to making inappropriate comments while training Ms. Starke, but nothing physical." "He said that was the way in which he trained." Taylor, an eyewitness to some of the alleged sexual harassment, told CRST that Smith had made inappropriate comments towards Starke. When Taylor told Starke that Starke should not drive with Smith if she were uncomfortable, Starke ignored Taylor's advice. Lovins, one of Smith's other trainees, raved about Mr. Smith's abilities. Based on this investigation, CRST gave Smith a "final verbal warning" for making inappropriate comments to Starke and barred Smith from training or driving with women.

In investigating Starke's complaint against Goodman, CRST learned that, on August 3, 2005, Starke reported to CRST in a routine evaluation that Goodman had treated her "very well." Further, Starke did not report the alleged harassment in a timely manner; CRST did not learn of Starke's allegations against Goodman until September 27, 2005, in a letter from one of her attorneys. When CRST confronted Goodman with Starke's allegations, Goodman responded that he and Starke had a consensual sexual relationship. Goodman's current co-driver, Timothy Walker, attested to such a relationship between Goodman and Starke. Walker had listened to four "love messages" Starke had left on Goodman's voicemail. CRST's investigation ended prematurely on September 30, 2005, when CRST fired Goodman for an unrelated reason. *CRST Van Expedited*, 2009 U.S. Dist. LEXIS 71396 at **8,9, internal citations deleted.

Regarding Tillie Jones, the Court of Appeals determined that the district court erred in concluding, as a matter of law, that Tillie Jones suffered harassment that was neither sufficiently severe nor pervasive. Id. at **73,74. The court stated:

> Jones testified that, on three or four occasions over the course of a two-week training trip, her Lead Driver, James Simmons, entered the cab wearing only his underwear and rubbed the back of her head, despite repeated requests by Jones that he stop. Jones also testified that, "everyday," Simmons entered the cab in his underwear while she was driving. Additionally, according to Jones, Simmons called her "his bitch" five or six times, including on one occasion when, in response to Jones's complaints about his slovenly habits, he ordered Jones to clean up the truck, declaring "that's what you're on the truck for, you're my bitch, I ain't your bitch. Shut up and clean it up." Finally, Jones testified that, like many of CRST's Lead Drivers, Simmons routinely urinated in plastic bottles and ziplock bags while in transit. However, Jones testified that Simmons would leave his urine receptacles about the truck's cab and that when Jones implored Simmons to gather them, Simmons ordered her to "shut up and clean it up." No overt physical threat or contact was present, but the evidence suffices to create a genuine issue of material fact concerning the severity or pervasiveness of the harassment which the EEOC alleges that Jones suffered. *Id.*

69 *CRST*, 2012 U.S. App. LEXIS 3485 at *10. By way of example, several women complained that, to minimize stops while in transit, their male Lead Drivers habitually urinated in plastic bottles with no regard for their female trainee, who often heard or even smelled the foul activity.

70 *See id.* at *69.

71 See part II. A.

72 *Id.*

73 Harris v. Forklift Systems, Inc., 510 U.S. 17,21 (1993).

74 Wilkie v. Dep't of Health and Human Services, 638 F.3d 944 (8th Cir. 2011).

75 See Merritt v. Albemarke Corp., 496 F.3d 880,883 (8th Cir. 2007); *Cheshewalla v. Rand & Son Construction Co.*, 415 F.3d 847 (8th Cir. 2005)). Each female trainee was a licensed working driver like her co-driver-lead-trainer, subject to U.S Department of Transportation regulations including hours of service regulations; and subject to all company operating and safety rules including CRST's anti-sexual harassment policy, which required that she should contact her fleet manager immediately in the event she was sexually harassed. *See EEOC v. CRST Van Expedited, Inc.*, 2009 U.S. Dist. LEXIS 46204 at **29-36. Each employee signed another pledge to follow this policy. *Id* at *30. A dispatcher had authority to direct the movement of each truck, and managers supervised operations. *See* id. at *30 and 35. CRST Lead Trainers possessed no power to do anything more than assign a trainee to specific tasks already within a trainee's normal, day-to-day truck driver duties. CRST, 2012 U.S. App. LEXIS 3485 *61,62.

76 Carter v. Chrysler Corp., 173 F.3d 693, (8th Cir. 1999). *See CRST*, 2012 U.S. App. LEXIS 3485 at **87,88 where the appeals court stated: "The record reflects that CRST addressed reported harassment by (1) removing the woman from the truck as soon as practicable, arranging overnight lodging at a motel and subsequent transportation to a CRST terminal at the company's expense; (2) requesting a written statement from the woman; (3) relieving the woman from future assignments with the alleged harasser; and (4) reprimanding the alleged harasser and barring him from team-driving with women indefinitely. These actions, not necessarily in combination, constitute the type of prompt and effective remedial action that our precedents prescribe. ..."

77 *CRST Van Expedited, Inc.*, 2009 U.S. Dist. LEXIS 71396 at **64,65 FN 25.

78 *Id.* at *30.

79 *Id.* at *63.

80 *Id.* at **63,64.

81 *Id.* at **64,65 FN 25.

82 *See id.*

83 *Id.* at *34.

84 *CRST*, 2012 U.S. App. LEXIS 3485 at *93.

85 *See CRST Van Expedited, Inc.*, 2009 U.S. Dist. LEXIS 71396 at *64.

86 *CRST Van Expedited, Inc.*, 2010 U.S. Dist. LEXIS 11125 at *57.

87 *See CRST Van Expedited, Inc.*, 2009 U.S. Dist. LEXIS 71396 at *34.

88 2011 U.S. Dist. LEXIS 38696 (W.D. Mich., Mar. 31, 2011).

89 *Id.* at *1.

90 *Id.* at *12, Fn. 3.

91 *See* id. at ** 12 and 2.

92 *Id.* at *2.

93 *Id.*

94 *Id.*

95 *Id.* at *9.

96 *Id.*

97 *Id.*

98 *Id.*

99 *Id.* at *13.

100 *Id.* at *10.

101 *Id.* at *15.

102 *Id.* at *17.

103 *Id.* at *2.

104 Nicole Porter, The State of Sentencing 2011, The Sentencing Project, p. 15, available at www.sentencingproject.org.

105 Peoplemark Inc., 2011 U.S. Dist. LEXIS 38696 at *15.

106 *Id.* at *2.

107 *Id.* at *18.

108 Laws Enforced By EEOC, available at www.eeoc.gov/laws/statutes/index.cfm.

109 § 706(b), 42 U.S.C. § 2000e-5(b).

[110] See *CRST Van Expedited, Inc.* 2009 U.S. Dist. LEXIS 64118 (W.D. Mich. July 9, 2009).

[111] *Peoplemark*, 2011 U.S. Dist. LEXIS 38696, at *9.

[112] EEOC DRAFT STRATEGIC PLAN FOR FISCAL YEARS 2012-2016, available at www.eeoc.gov/eeoc/plan/upload/strategic plan15to-17DRAFT.pdf

[113] *Id.* * at 15.

[114] *Id.* * at 17.

[115] *Id.*

[116] Jay-Ann Casuga, *Lopez Calls CRST Ruling Unprecedented, Says EEOC Will Review Case, Weigh Options*, 37 DLR C-1 at C-2 (Feb. 24, 2012).

[117] *CRST Van Expedited, Inc.*, 2009 U.S. Dist LEXIS 71396 at ** 63, 64.

[118] If an employer fails to respond to an investigator's request for information the EEOC had delegated to its District Directors the authority to issue administrative subpoenas. 29 C.F.R. § 1601.16. District Directors can require testimony of witnesses and the production of documents by issuing subpoenas. If the employer refuses to comply with the EEOC's subpoena, United States district courts have authority to enforce subpoenas, as long as charge exists that meets the requirements contained in the discrimination statute. See *EEOC v. Shell Oil Co.*, 466 U.S. 65 (1984). In determining whether to enforce the EEOC's subpoena, a court considers: (1) whether the information requested is relevant, (2) whether the requests are burdensome or harassing, and (3) whether privacy or confidentiality concerns prohibit the subpoena of personal, confidential or medical information. *EEOC v. Alliance Residential Co.*, 2011 U.S. Dist. LEXIS 135869 at **8, 9. The courts give the EEOC considerable latitude regarding the term "relevant" to allow the EEOC access to materials that might "cast light" on the allegations against the employer. *EEOC v. Shell Oil Co.*, 466 U.S. 54, 68-69 (1984). But see *EEOC v. University of Pittsburg Medical Center*, 2011 U.S. Dist. LEXIS 55311 (W.D. Pa. May 24, 2011) where the court held that the subpoena constituted an "improper fishing expedition" that sought information that was not relevant to the underlying charge. *Id.* at *9-10.

[119] § 706(b), 42 U.S.C. § 2000e -5(b).

[120] The EEOC files a limited number of merits lawsuits in federal courts supportive of individuals alleging violations of equal employment opportunity statutes, some of whom do not have the financial means to pursue such actions on their own. In a 2009 article published in the *Harvard Law & Policy Review*, the authors' findings showed that the win rate for federal trial court plaintiffs over the period from 1979 to 2006 was 15 percent in job discrimination cases, whereas the win rate in all other civil cases was 51 percent. Kevin Clermont & Stewart Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse*, 3 HARVARD L. & POL'Y REV. 3, 30 (2009). In the period from 1998 to 2006, the win rate for Title VII cases was 10.9 percent — and there was a breathtaking drop of nearly 40 percent in the number of discrimination cases filed in the federal district courts from 1999 to 2007. *Id.* at *41, With the low chances of success in the federal courts private attorneys may well be dissuaded from taking on discrimination cases, leaving an ever increasing burden for the EEOC with its scarce resources to pursue individual merits cases. It is these cases, in part, that make the precedents to be followed not only by the EEOC and federal courts, but are to be followed by arbitrators handling an increasing number of cases under employment arbitration agreements widely used throughout the United States.