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ALFA INTERNATIONAL  
2013 INTERNATIONAL CLIENT SEMINAR

*To Battle or Not to Battle the EEOC's Recent  
Tactics – Time to Take a Stand!*

# Panelists

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# Presentation Overview

**Emerging Enforcement Trends  
Systemic Initiative**

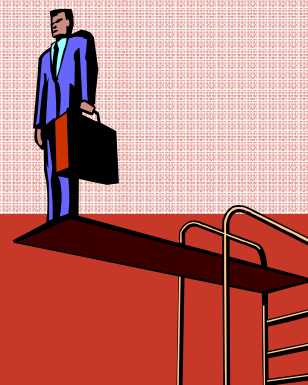
**Employers Fight Back  
Case Law Favoring the Employer**

**Best Practices for Combating the EEOC Tactics**



# Systemic Initiative

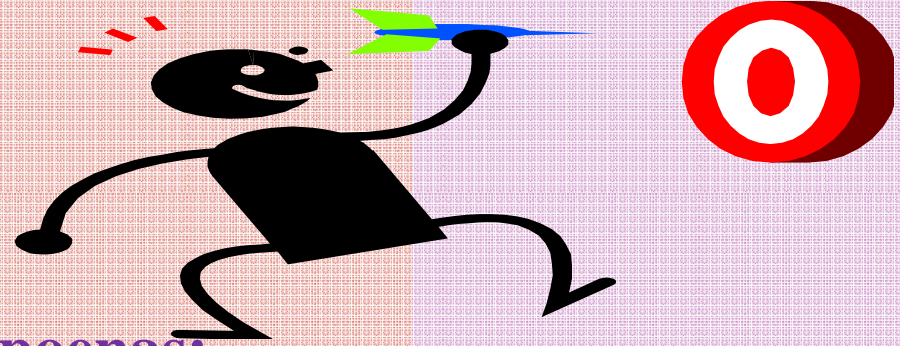
- Initiative makes identification, investigation, and litigation of systemic discrimination cases a top priority for the EEOC
- EEOC uses individual discrimination claims as a “Springboard” to uncover similar cases that can be combined into pattern and practice lawsuits



# EEOC Tactics

## •New Techniques to Target Employers:

- Refusal to Investigate;
- Refusal to Disclose;
- Use of Overly Broad Subpoenas;
- Refusal to Conciliate;



# Case Law Favorable to the EEOC



- *EEOC v. United Road Towing, Inc.* Case No. 10-CV-06259 (N.D. Ill. May 11, 2012)

- Two employees filed ADA charges - Failure to provide reasonable accommodation

- EEOC issued reasonable cause letter on behalf of two employees and “a class of disabled individuals”

- EEOC sought to conciliate requesting \$2 Million in monetary relief, Company to bear the cost of searching for additional class members

## Case Law Favorable to the EEOC (URT)



- URT refused demands, EEOC filed suit and disclosed 17 additional employees during discovery
- URT Sought Summary Judgment
  - EEOC failed to investigate
  - EEOC failed to conciliate for anyone besides the two initially named Plaintiffs

## Case Law Favorable to the EEOC (URT)



- Court rejected URT's arguments.
- EEOC's efforts were sufficient
- Because URT left the table: *“Any deficiencies in conciliation were caused by both parties”*





# Case Law Favorable to the EEOC (URT)



- **Take Away**

- **Employers should not walk away from the table.**

- **Instead, request additional information (e.g. names and numbers of alleged class, injuries).**



# Examples: Media Splash

## Use of “Scare Tactics”



***“EEOC and Burger King Franchisee Settle Sexual Harassment Case for \$2.5 Million” -1/9/13***



***“Verizon to Pay \$20 Million to Settle Nationwide Disability Dispute.” -07/6/11***

# Case Law Favorable to the EEOC



- ***EEOC v. Randstad*, No. 11-1759 (4<sup>th</sup> Cir. 2012)**
- **Complainant Morrison was terminated from one of Company's thirteen Maryland Staffing Offices after it was found he was illiterate**
- **Claim – National Origin Discrimination**

## Case Law Favorable to the EEOC (Randstad)



- EEOC issued administrative subpoena requesting documents setting forth all position assignments made nationally by Company between 2005-2010
- After objection, EEOC narrowed request to 13 MD offices going back 5 years

## Case Law Favorable to the EEOC (Randstad)



- **Randstad provided only information for positions to which Morrison was assigned because MD branches issued in excess of 100,000 assignments during 5 year period**

## Case Law Favorable to the EEOC (Randstad)



- **Company sought relief from 4<sup>th</sup> Circuit arguing that EEOC request was “unduly burdensome,” but Appellate Court held that the EEOC’s subpoena power was to be “broadly construed”**

## Case Law Favorable to the EEOC (Randstad)

- For a subpoena to be “overly burdensome” the cost must, “*Seriously disrupt its normal business operations*”



# Time to Take a Stand...





# Favorable Case-Law for Employers



- *Serrano v. Cintas Corp.* 699 F.3d 884 (6th Cir. Mich 2012)

- EEOC filed gender discrimination claim on behalf of 13 women

# Favorable Case-Law for Employers



- Court Dismissed the EEOC's lawsuit finding:

- At no time prior to suit did the EEOC identify any of the 13 female class members

- EEOC had not conciliated any individual claims

# Favorable Case-Law for Employers



**EEOC v. La Rana Haw., LLC, 2012 U.S. Dist. LEXIS 118881 (D. Haw. Aug 22, 2012)**

- **Sex discrimination and retaliation**
- **After only investigating a single employee's complaint, EEOC demanded:**
  - **\$100,000 for two women**
  - **\$350,000 to create class fund (if none identified money given to non-profit)**

# Favorable Case-Law for Employers



- Employer requested more information without response
- Court Stayed the EEOC's lawsuit:
  - To “Re-do the conciliation process”
  - Commission had “failed to conciliate in good faith” by failing to provide Employer ANY information to evaluate the EEOC's Claims

# Favorable Case-Law for Employers



***“To be meaningful, conciliation must have context and provide for an exchange of relevant and specific information between parties...The EEOC cannot expect employers to make substantial offers of settlement when they are provided...no information with which to evaluate their liability”***

# Favorable Case-Law for Employers



***EEOC v. Nestle Prepared Foods*, 2012 U.S. Dist. LEXIS 71864 (E.D. Ky. May 23, 2012)**

- **ADA and GINA charge; Commission served a subpoena requesting all company-wide medical examinations and all doctors who worked for employer;**

# Favorable Case-Law for Employers



***EEOC v. Nestle Prepared Foods, 2012***  
**U.S. Dist. LEXIS 71864 (E.D. Ky. May 23, 2012)**

- Employer sought to block the subpoena as “absurdly broad”; 6<sup>th</sup> Circuit agreed;

# Best Practices For



## Combating the EEOC Tactics



# Be Proactive! *The Best Defense is a Good Offense*

- On-going audits of payroll procedures and hiring, pay, and promotion to provide early warning for potential discrimination



# Be Proactive! *The Best Defense is a Good Offense*



- **Get Attorneys involved Early**
- **Assist with Communications with EEOC and Requests for information**
- **Consider Potential Early Resolution of Charges**

# Subpoenas: Meet Them Half Way...



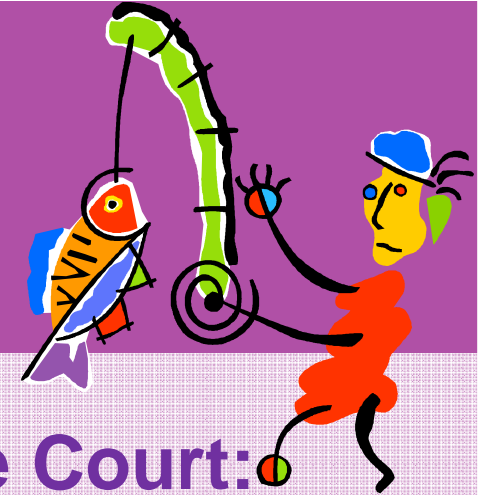
- **First try and work with the EEOC to come to an agreement upon what documents must be produced**
- **Request face-to-face meeting with the investigator, regional director, and the legal division**

# Subpoenas: Meet Them Half Way...



- Provide some information even if you don't agree to produce all information
- Petition EEOC to revoke or modify subpoena
- Be willing to battle an enforcement action

# Subpoenas: If No Common Ground...



- **Make the following arguments to the Court:**
  - **The scope of the Subpoena is overly broad;**
  - **The inquiry is speculative**
  - **The subpoena constitutes a “fishing expedition”**

# Make the EEOC Do Its Job!



- **Once Probable Cause Finding issued, make the EEOC fulfill its pre-suit requirements**

# Make the EEOC Do Its Job!



- **Even in the face of unreasonable settlement requests never walk away from conciliation**
- **Rather request more information, including names and numbers of alleged class members and specific amounts for each person**



# Make the EEOC Do Its Job!



- **Consider requesting a face-to-face meeting with the legal division to discuss the merits of the charge and settlement requests**
- **Let the EEOC walk away from conciliation following requests for more information**





# In the Event of Litigation



- **If litigation cannot be avoided, carefully evaluate the complaint and potential defenses to determine if early dismissal is possible**



# Seek Dismissal



- ***La Rana***: 12(b)(6) failure to conciliate -- Court stayed proceedings to require good faith conciliation by EEOC
- ***Cintas***: MSJ failure to follow administrative prerequisites -- Court dismissed

# Seek Dismissal



- ***Bloomberg***: MSJ failure to conciliate – Court dismissed and held that the EEOC’s process “reek[ed] of using [its] proposed agreement as a ‘weapon of forced settlement’”