Discovery in Employment Discrimination Litigation: What Plaintiffs Can Request and Obtain from Defendants

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This practice note discusses the scope of discovery that plaintiffs can obtain from defendants in employment discrimination cases, including limitations on discovery that defendants often attempt to assert, such as privilege, lack of relevance, lack of proportionality, and privacy interests. The note addresses how to use the different mechanisms for obtaining discovery effectively. It then discusses specific types of discrimination cases and discovery disputes that often occur in such cases.

For more information on plaintiff-side discovery in employment discrimination cases, see Deposing Employer Witnesses: How to Prepare in Employment Discrimination Cases (Pro-Employee), Rule 30(b)(6) Deposition Strategies for Employee-Plaintiffs in Employment Cases, Depositions in Employment Litigation: Preparing the Plaintiff Checklist (Employee), Document Requests (Plaintiff to Defendant) (Single-Plaintiff Discrimination Action), and Notice of Deposition (FRCP Rule 30(b)(6)) (Plaintiff to Defendant). For information on the scope of discovery available from plaintiffs, see Discovery in Employment Discrimination Litigation: What Defendants Can Request and Obtain from Plaintiffs.

Scope of Discovery Generally

The outer limit of permissible discovery in any federal case is set by Federal Rule of Civil Procedure ("Rule") 26(b), which permits parties to "obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." The rule contemplates three limits on the scope of discovery: privilege, relevance, and proportionality. Two other important limits are the privacy interests of other employees, and the bases for obtaining a protective order against discovery under Rule 26(c).

The Privilege Limitation

In addition to the familiar role of attorney-client privilege and attorney work product that are common to litigation in general, several specific issues arise in the context of employment discrimination. Following are tactics to challenge assertions of privilege in this context.

First, the employer may have conducted its own investigation of the alleged discrimination, either internally or with the assistance of outside counsel, and may assert that the investigation is privileged. If the investigation was conducted by human resources personnel, or was not conducted because of litigation but merely as part of a human resources investigation, a court may hold that it is not privileged at all. See, e.g., Koumoulis v. Indep. Financial Marketing Grp., Inc., 295 F.R.D. 28, 46–47 (E.D.N.Y. 2013).

Second, even if responsive documents are privileged, the defendant likely will have waived the privilege if it

is asserting a Faragher/Ellerth affirmative defense. This defense, which applies in certain harassment cases, excuses the employer from liability if the alleged harasser is a co-worker (as opposed to a supervisor), and if the employer can prove (1) that the employer exercised reasonable care to prevent and correct any harassing behavior, and (2) that the plaintiff unreasonably failed to take advantage of the preventive or corrective opportunities that the employer provided. See Vance v. Ball State Univ., 570 U.S. 421, 423 (2013). By asserting this defense, an employer puts its response to the challenged behavior at issue in the case, likely waiving its privilege concerning its own investigation of the complaints of harassment, as well as the nature of its policies for responding to and investigating complaints of harassment. See, e.g., Koumoulis, 295 F.R.D. at 47–48. This can also waive the privilege for communications with outside counsel, if the content of the communications is relevant to the Faragher/Ellerth defense. See id.

Even outside the context of harassment cases, look carefully at the defendant's affirmative defenses in the answer. If they offer the defendant's investigation of or response to the challenged conduct as part of a defense, that may result in a waiver as to any information concerning the defendant's investigation or response. See, e.g., Walker v. Cnty. of Contra Costa, 227 F.R.D. 529, 535 (N.D. Cal. 2005) (in failure-to-promote case, defendant waived privilege by identifying investigation as affirmative defense, causing court to order disclosure of nearly all of an investigatory report prepared by an attorney retained by defendant).

To be able to evaluate a defendant's assertions of privilege, you should demand a privilege log that complies with Rule 26(b)(5). Make this demand in your discovery requests, and if the defendant does not provide a satisfactory log with its discovery responses, renew the demand through meet-and-confer discussions right away. If the defendant is not willing to provide a privilege log, you may have to initiate a motion to compel (see Mechanisms for Obtaining Discovery below).

Relevance

Any information that would tend to prove or disprove any element of any claim or defense is relevant. Note that some practitioners mistakenly argue that any information that is "reasonably calculated to lead to admissible evidence" is discoverable. Rule 26(b) was amended in 2015 to eliminate this phrase.

Lack of relevance will rarely be a hurdle that prevents you from obtaining discovery you need—as long as you can articulate a reason why the requested information could tend to prove or disprove an element of your claim, the information is relevant. Once you demonstrate relevance, the burden will be on the defendant to argue that some other limitation allows the defendant to withhold relevant information.

Proportionality

The factors Rule 26 lists for determining whether a discovery request is proportional to the case are "the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. Rule 26(b)(1). The proportionality limit on discovery is likely to come into play when the plaintiff makes requests that place a burden on the defendant, such as a request for voluminous documents, or a request that would require the defendant to engage in a time-consuming search.

One common example is requests for production of emails, given the large quantity of emails that employees tend to generate. Courts often apply the proportionality limit by striking a compromise between the two parties' positions. For example, in Duhigg v. Goodwill Industries, 2016 U.S. Dist. LEXIS 126791, at *2 (D. Neb. Sept. 16, 2016), the plaintiff asked the defendant to search the email accounts of three managers who allegedly harassed her for any emails mentioning her first or last name for the four years preceding her termination. The defendant reported that the search generated about 14,000 emails, which the defendant refused to review or produce. The defendant also conducted a search using its own chosen search terms during a shorter time period, which resulted in no hits. The court held that requiring the defendant to produce all emails with either the plaintiff's first or last name was too broad, but the court faulted the defendant for unilaterally choosing search terms and for applying them to a shortened time period. The court approved the plaintiff's time period, but ordered the parties to meet and confer regarding which search terms to use.

A defendant will likely raise proportionality as an objection to requests for evidence of other similar allegations of discrimination or harassment made by employees of the defendant other than the plaintiff. Again, courts often strike a balance to achieve proportionality. For example, in Marsh v. Bloomberg Inc., 2017 U.S. Dist. LEXIS 77648,

at *3 (N.D. Cal. May 22, 2017), the plaintiff sought "all complaints regarding gender discrimination, fair pay, or harassment" at all Bloomberg offices and in any settlement agreements resolving such claims. Based on proportionality concerns, the court limited production to all sexual harassment or gender discrimination complaints filed about any person working in the same office as the plaintiff, and any settlement agreements related to that office that did not contain confidentiality provisions, with the names of the complainants to be redacted. Marsh, 2017 U.S. Dist. LEXIS 77648, at *6–7. See also Wagner v. Gallup, Inc., 788 F.3d 877, 888 n.4 (8th Cir. 2015) (affirming lower court's decision to limit discovery into age discrimination case by location and job title).

The proportionality analysis in a class case will allow the plaintiff to discover a much broader range of information. For example, in a class gender discrimination case, you may be able to obtain information pertaining to all the class members. See Chen-Oster v. Goldman, Sachs & Co., 293 F.R.D. 557 (S.D.N.Y. 2013). In drafting discovery requests and in meeting and conferring over them, keep in mind that the broader the time-period and geographic scope that your request covers, the more likely that a court will impose limitations due to proportionality concerns.

Privacy Limits on Discovery

The privacy interest of other employees is a common objection to the plaintiff's discovery requests in discrimination cases. State and federal privacy protections differ, so the discovery you can obtain may depend on whether you are in state or federal court. If you are in federal court, state privacy law may apply if state law supplies the rule of decision (for example, in a diversity jurisdiction case). See, e.g., Madrigal v. Allstate Indem. Co., 2015 U.S. Dist. LEXIS 191875, at *17–19 (C.D. Cal. 2015) (applying California's constitutional privacy protection to discovery dispute when sitting in diversity). Some courts recognize a privacy interest arising from the U.S. Constitution. See, e.g., Roettgen v. Foston, 2016 U.S. Dist. LEXIS 122476, at *3 (S.D. Cal. Sept. 9, 2016). Others rely on Rule 26(c)'s protection against "annoyance" and "embarrassment" (discussed below under "The Factors That Justify a Protective Order Limiting Discovery under Rule 26(c)"). As a general rule, federal courts balance the plaintiff's need for the discovery against the strength of the privacy interest of other individuals. Examples of how privacy objections are likely to play out in different types of discrimination cases are set forth below under Disputes That Often Arise in Specific Types of Discrimination Cases.

If your case is likely to involve the records of other employees, or records of your own client that are sensitive and should be kept confidential, propose to the defendant early on that you enter into a stipulated protective order that requires the parties to maintain the confidentiality of private information produced in discovery. The existence of such a stipulated protective order gives a measure of protection to sensitive documents produced in discovery, and therefore may cause courts to reject a defendant's refusal to produce information based on privacy grounds. See, e.g., Chen-Oster v. Goldman, Sachs & Co., 293 F.R.D. 557, 566 (S.D.N.Y. 2013). Some district courts or judges have a standard protective order that you may use. Entering into such an agreement early on can prevent delays in production of the information. If you plan to submit to the court information that has been designated confidential, you will need to follow the appropriate procedure in that court for filing documents under seal, which may require some advance planning. For example, depending on the court, you may need to file a motion for leave to file documents under seal.

The Factors That Justify a Protective Order Limiting Discovery under Rule 26(c)

Defendants resisting discovery may file a motion for a protective order under Rule 26(c), which allows courts to enter an order to "protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." The rule acts both as a source of limitations on available discovery, as well as a mechanism for defendants to invoke any of the previously discussed limits on discovery (privilege, privacy, etc.). See, e.g., Jauhari v. Sacred Heart Univ., Inc., 2017 U.S. Dist. LEXIS 29441, at *5 (D. Conn. Mar. 2, 2017) (to professor claiming discrimination in denial of tenure, court granted discovery into comparator evidence for professors seeking tenure in the same year, but otherwise denied discovery based on likelihood of "annoyance [or] embarrassment" under Rule 26(c)). The undue burden and oppression factors call for the same type of analysis as the proportionality requirement, discussed above under Scope of Discovery Generally.

Mechanisms for Obtaining Discovery

Your goal in discovery is to obtain the proof that will allow the plaintiff to survive a summary judgment motion and

then prevail at trial. At the outset of discovery, you should perform legal research to understand each element of your client's claim(s), and each element of the defendant's likely defenses. Then, you should draft a discovery plan that maps out the evidence you need to prevail on each of the elements of the claims and defenses. By doing this up front, you will avoid realizing long into the case that you have failed to request discovery on a topic that is important to your case. As the case proceeds and you gather evidence, update your discovery plan to see what you have obtained, what you are still missing, and whether you have learned of new topics of discovery that you had not been able to foresee at the outset of the case. For a model discovery plan, see Discovery Plan (Title VII Discrimination Cases) (Pro-Employee).

All discovery requests must be signed under Federal Rule of Civil Procedure 26(g). By signing a request, you are certifying that the request is not unreasonable or unduly burdensome. If the court finds that this rule has been violated without substantial justification, it is required to impose a sanction under Rule 26(g).

Requests for Production of Documents

Serve document requests early in the case—you will need the evidence to depose witnesses, to prepare your witness to be deposed, and to determine what additional discovery to request. Indeed, the federal rules now permit a plaintiff to serve discovery requests 21 days after service of the complaint. Although such requests will be deemed to have been served on the day of the Rule 26(f) conference (which was formerly the earliest possible date of service), delivering the requests to the defendant early will give the defendant time to make a full, timely response, and will undermine any later argument by the defendant that it needs more time to respond. There is no limit on the number of document requests you can propound under the federal rules, so be specific and comprehensive, but do not be unnecessarily duplicative. If you propound 100 requests, you will not only have to write them, but you will have to review 100 responses and meet and confer about any disputes. When drafting, beware that the defendant will probably interpret them as narrowly as possible. Thus, even though an objective reader might assume that you had intended to include certain documents in your request, if there is any way to interpret the wording of your requests narrowly, such that they arguably do not require the production of certain documents, a defendant may withhold the types of documents you are seeking based on such an interpretation.

You should generally use document requests to obtain documents concerning:

- **The plaintiff.** Seek any formal or informal complaints that he or she made, his or her personnel file (or application file, if the case involves a failure to hire), performance reviews, payment information, relevant communications, and any other documents that might bear on the claims or defenses. Talk with your client about the requests as you prepare them to make sure you cover all documents the client can think of that might be relevant. Speaking with your client will also help you determine whether to request production of the plaintiff's own emails, which you should do if, for example, the emails might contain examples of discriminatory or harassing messages, reflect complaints by your client, or show how your client was performing relative to co-workers whom the employer treated differently.
- **The alleged harasser or perpetrator of discrimination.** You likely should request documents pertaining to any other allegations of discrimination or harassment by that individual, because such incidents will tend to prove that he or she was more likely to engage in the same behavior toward your client.
- **The alleged incidents of discrimination or harassment.** Seek any documents in the defendant's possession pertaining to the alleged incidents of discrimination or harassment. Word the request broadly to cover any document the employer might possess, including the company's knowledge of and responses to any reports or complaints, as well as all documents pertaining to any investigation by anyone into the incident.
- **Comparator employees and examples of other complaints.** Depending on the nature of the case, seek documents about similarly situated employees (or documents that will help you identify who the similarly situated employees are). Determine which documents will help you prove that the employer treated your client less favorably than those comparable employees. Seek documents about any other employees who complained of similar conduct, which may either tend to prove that the plaintiff's allegations are truthful, or be probative of how the company responds to such allegations.
- **Documents pertaining to the company's anti-discrimination policies and procedures.** These are particularly important if the employer is going to rely on its response to your client's complaint(s) or on his or her alleged failure to formally complain as a defense.

- **Any other documents that will help complete your proof plan.** As discussed above, at the outset of the case, map out the elements of the claims and the elements of any likely defenses. Then look at each element and consider whether the defendant may have documents that would help you prevail on that element. For a model proof plan, see Discovery Plan (Title VII Discrimination Cases) (Pro-Employee).
- **Documents about the defendant entity.** If there is any uncertainty about which entity is the relevant defendant, or whether multiple entities might be liable (e.g., due to a joint employer relationship), request information about the defendant entities that will allow you to establish liability. For more information on joint employers, see Joint Employment Relationships: Best Practices and Risks. See also Larson on Employment Discrimination § 152.08 (ADA).

Interrogatories

Unlike document requests, interrogatories in federal court are limited to 25 per party unless the court grants leave to propound more. Be careful not to waste them. In a case with multiple plaintiffs, one strategy is to have a single plaintiff propound interrogatories, such that if that plaintiff reaches the limit of 25 interrogatories, another plaintiff can propound additional interrogatories if necessary. As with document requests, word the interrogatories extremely carefully to make sure that the defendant cannot interpret them more narrowly than you intend. Note that responses to interrogatories (unlike responses to document requests and requests for admission) must be verified—signed under oath by the responding party. If you receive unverified responses, you should insist upon verification.

Interrogatories are useful, particularly early in the case, for identifying witnesses to depose or interview. For example, in a termination case, you should seek the names and contact information of each person involved in the decision to terminate your client's employment. In a harassment case, you should seek the identity of everyone with knowledge about the incidents of alleged harassment. You should also seek the identity of others who complained about the harasser's conduct or about similar conduct at the plaintiff's workplace, although you will likely have to overcome a privacy objection. To that end, you can agree that the interrogatory responses will be covered by a stipulated protective order.

You can use interrogatories to pin down the defendant to a specific story, which you can then probe and attempt to rebut in depositions and follow-up discovery. For example, in a termination case that may involve a mixed motive, ask the defendant to state all the reasons why it terminated the plaintiff's employment. The answer will give you a target to attack, both in depositions and in further written discovery, in attempting to rebut the defendant's claim that it would have terminated the plaintiff even absent any unlawful motive. See 42 U.S.C. § 2000e-5(g)(2)(B). Likewise, if you suspect that the defendant may assert that it would have fired the plaintiff anyway based upon facts it learned after the termination (see McKennon v. Nashville Banner Pub. Co., 513 U.S. 352, 362 (1995)), ask the defendant to state any facts that would support the employee's termination that it discovered after the termination.

You can also use interrogatories to identify any documents that were responsive to your discovery requests but were destroyed.

For additional helpful interrogatories to consider asking, California provides so-called "form" interrogatories specific to employment cases, and although the form itself can be used only in California state courts, it may provide helpful ideas for interrogatories in federal cases. See Form Interrogatories – Employment Law.

Requests for Admission

You can use requests for admission to nail down certain uncontroversial facts so that you do not have to expend time and effort attempting to demonstrate them in discovery. For example, if you would like a clean piece of evidence stating that your client applied for a particular position but that another individual was hired for it, you could request the defendant to admit those facts. The request for admission will have to be quite straightforward and incontrovertible for the defendant to admit it; if there is any room for disagreement, it will likely deny the request, or admit it only in part.

Another excellent use of requests for admission, particularly as the case moves closer to trial, is to establish the authenticity of documents that you wish to submit into evidence. If a defendant fails to make an admission when requested, and the plaintiff later proves that the admission was true or the document genuine, the court may award sanctions. See Fed. R. Civ. P. 37(c)(2).

Meet-and-Confer on Written Discovery

If the defendant refuses to produce some of the written discovery you requested, you should initiate a meet-and-confer process. It is often helpful to use a combination of telephone calls and letters to conduct this process. Phone

calls allow you to get a sense of the real basis of the defendant's objections and where the defendant (and you) may be willing to compromise. Letters allow you to keep track of what has been discussed or agreed in the phone calls, and provide a record that you can use if you need to file a motion to compel the defendant to produce additional information. Organize your letters by request number, and be comprehensive—if you do not include certain requests as raising discovery disputes, you will be in a weaker position to show the court that you met and conferred on those requests, but were unable to obtain adequate responses from the defendant. Keep the process moving quickly, and be sure to track and document whether the defendant is living up to its commitments to produce certain documents by certain dates. If the meet-and-confer process is taking too long, it can be helpful to specify a reasonable date on which you will initiate the motion-to-compel process. If you do not engage in a meaningful meet-and-confer process before filing a motion to compel, the court may require further meeting and conferring before issuing a decision.

Moving to Compel Further Responses to Written Discovery

If your meet-and-confer process does not provide you with the information you need, do not be afraid to file a motion to compel. Certain defendants will simply withhold responsive information unless you show that you are willing to hold them accountable with the court. If you win a motion to compel, the defendant will be less likely to wrongfully withhold information in the future, as the judge will not look kindly upon repeated unjustified refusals to produce information.

Individual courts and judges often have specific procedures for motions to compel. Some judges begin the process with short, informal submissions of the parties' respective positions, after which the judge will provide the parties with an indication of how he or she would likely rule if a full-blown motion were filed. Other courts have elaborate local rules that govern the submission of joint briefing, providing a specified order and length of time for each party to provide its portion of the submission to the other party (see, e.g., C.D. Cal. Loc. R. 37-1, 37-2). Be sure to review the court's local rules and the judge's rules or standing order well in advance, so that if, for example, you want to have the motion decided before a deposition, or you need to resolve a dispute before a discovery cut-off date, you do not wait too long to initiate the process.

Depositions

Depositions are typically more useful after you have obtained written discovery. The written discovery will give you ideas for lines of deposition questioning, and will give you ways to hold the deponent accountable by introducing documents that contradict the deponent if he or she is not truthful. If you depose a witness before you obtain certain documents that are relevant to that witness, it may not be possible to depose the witness a second time.

For each deposition, prepare a detailed outline. Use your discovery plan to make sure you obtain testimony that will fill in the plan wherever possible, and also to generate lines of questioning that will help you locate additional evidence you need.

One key deposition will be of the defendant's corporate designee under Federal Rule 30(b)(6). Your deposition notice must include a list of the topics about which you wish to question the witness. The company then has an obligation to prepare the witness to speak about those topics. The witness's testimony, if it is within the noticed topics, will be binding on the company. Draft the topics so that they are broad enough to cover the lines of questioning that you will want to ask, but specific and concrete enough that the defendant has a fair opportunity to prepare the witness on the topics. If the defendant objects to the scope of the topics in such a way that you will not be able to obtain important testimony, you can either seek a ruling on the objection before the deposition, or hold the deposition open pending a ruling on the objection. Note: you will generally be free to question the witness about topics outside of the notice, although the defendant has the right to object and state that the answers to such questions are given in the witness's personal capacity only, and not on behalf of the company. For more information on deposing an employer's corporate designee, see Rule 30(b)(6) Deposition Strategies for Employee-Plaintiffs in Employment Cases. For a Rule 30(b)(6) notice form, see Notice of Deposition (FRCP Rule 30(b)(6)) (Plaintiff to Defendant).

Disputes That Often Arise in Specific Types of Discrimination Cases

Disputes That Arise in Title VII Cases

In individual discrimination cases under Title VII of the

Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., such as those involving a termination, failure to promote, or failure to hire based on membership in a protected category, the plaintiff typically must seek information about how the employer treated other similarly situated employees or applicants. This often generates disputes about employee privacy. The information is often essential to the plaintiff's case—summary judgment may be granted against an employee who fails to demonstrate the existence of similarly situated employees who were treated more favorably, if no other evidence of discrimination is present. Therefore, courts are likely to compel disclosure of such information over privacy objections, although they will take steps to limit the invasion of privacy if possible. See, e.g., Harris v. Harley-Davidson Motor Co. Operations, Inc., 2010 U.S. Dist. LEXIS 119311, at *7 (M.D. Pa. Nov. 10, 2010) (requiring defendant to answer interrogatories identifying similarly situated employees who also complained of harassment, and to produce the portions of those employees' personnel files relating to the complaint and defendant's response, while redacting confidential and private information); Metcalf v. Yale Univ., 2017 U.S. Dist. LEXIS 21032, at *2 (D. Conn. Feb. 15, 2017) (similar).

Defendants often challenge requests concerning other incidents or complaints of similar discrimination or harassment on either relevance or privacy grounds. You nevertheless have a good chance of obtaining such information, because many courts have held that evidence of systemic discrimination in a workplace is probative of an individual's claim of discrimination, even if the plaintiff is not claiming that the employer engaged in a pattern or practice of this kind of unlawful conduct. See, e.g., Digan v. Euro-Am. Brands, LLC, 2012 U.S. Dist. LEXIS 26045, at *11 (N.D. Ill. Feb. 29, 2012).

In class discrimination cases, you will be able to obtain broader information than in an individual case. See, e.g., Chen-Oster v. Goldman, Sachs & Co., 293 F.R.D. 557, 564 (S.D.N.Y. 2013) (in gender discrimination class action, requiring defendant to produce "any internal complaints regarding compensation, promotion, or performance review where a female employee who is a member of the putative class drew a comparison between herself or another putative class member and one or more of her male colleagues"). In addition, if you have a need to contact the individuals who made complaints in order to investigate the claims, you should seek unredacted versions of the complaints. Chen-Oster, 293 F.R.D. at 565. If you are asserting a company-wide claim, you may obtain company-wide discovery if you are able to plead in the complaint, or gather facts to demonstrate, that the practice you are challenging did, in fact, apply company-wide, regardless of different business units, regional management teams, and the like. See, e.g., Bell v. Lockheed Martin Corp., 270 F.R.D. 186, 189–92 (D.N.J. 2010) (granting company-wide discovery because complaint sufficiently alleged that gender discrimination practices applied across business units). Still, courts will balance the plaintiff's need for the discovery with the burden on the defendant. See, e.g., Welch v. Eli Lilly & Co., 2008 U.S. Dist. LEXIS 32812, at *4 (S.D. Ind. Apr. 16, 2008) (where defendant produced information pertaining to 5,000 potential comparators, court was unwilling to order production pertaining to defendant's 21,000-person national workforce, but suggested that such a step might be justified if the plaintiffs came forward with evidence from the initial production that supported their claim of a discriminatory pattern or practice).

In Title VII disparate impact class actions, which allege that a facially neutral policy had a disparate impact on a protected category of employees, you will likely be entitled to information about the impact that the allegedly discriminatory policy had on the class. Statistical proof is typically central to disparate impact claims, so plaintiffs have a strong claim for access to the data that will allow analysis of the impact of the policy at issue.

You may consider noticing the deposition of the defendant's CEO or other high-level managers. If the CEO has personal knowledge of facts relevant to the case, you should be able to take the deposition. If not, you will face an uphill battle. Courts tend to protect upper-level management from speculative depositions. See, e.g., Lewelling v. Farmers Ins. of Columbus, 879 F.2d 212, 218 (6th Cir. 1989); but see Conti v. American Axle and Manufacturing, 326 Fed. Appx. 900, 907–908 (6th Cir. 2009) ("It is very unusual for a court to prohibit the taking of a deposition altogether and absent extraordinary circumstances, such an order would likely be in error.") (internal citation omitted).

For more information on Title VII, see Title VII Compliance Issues.

Disputes That Arise in ADA Cases

In discrimination cases under the Americans with Disabilities Act (ADA) in which plaintiffs challenge the failure to provide a reasonable accommodation, plaintiffs must prove that with a reasonable accommodation, they could have performed the essential functions of the job in question, and that

the employer refused to make such accommodations. Evidence concerning other employees may prove that other employees with similar disabilities were performing the functions of the job with the help of accommodations. Based on privacy grounds, courts will be wary of disclosing information about the reasonable accommodation requests of other employees, but such information may be obtainable, potentially on an anonymized basis. See, e.g., Frederick v. California Department of Corrections and Rehabilitation, 2011 U.S. Dist. LEXIS 53269, at *7 (N.D. Cal. May 18, 2011).

For more information on the ADA, see Americans with Disabilities Act: Employer Requirements and Reasonable Accommodations.

Disputes That Arise in ADEA Cases

Discrimination cases under the Age Discrimination in Employment Act (ADEA) raise many of the same issues as Title VII cases. As a general matter, an employee over the age of 40 who has suffered an adverse employment action can prove discrimination, among other ways, by showing that he or she was replaced by a younger employee, or that similarly situated younger employees were not subject to the same adverse action. Thus, as in a Title VII case, discovery necessarily involves inquiring about the circumstances of other employees.

One wrinkle in ADEA cases is that the ADEA does not authorize mixed-motive discrimination claims (unlike Title VII claims, as discussed above). Keep this distinction in mind when creating your discovery plan. For more information about ADEA, see Age Discrimination in Employment Act (ADEA): Key Considerations. For a discovery plan form that can be adapted for ADEA cases, see Discovery Plan (Title VII Discrimination Cases) (Pro-Employee).

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