HOW CAN A PLAINTIFF PROVE INTENTIONAL EMPLOYMENT DISCRIMINATION IF SHE CANNOT EXPLORE THE RELEVANT CIRCUMSTANCES: THE NEED FOR BROAD WORKFORCE AND TIME PARAMETERS IN DISCOVERY

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I. INTRODUCTION

The modern discovery process is significant in most litigation, but arguably even more so in employment discrimination litigation under Title VII of the Civil Rights Act of 1964 (Title VII), the Age Discrimination in Employment Act (ADEA), and the post-Civil War statute, 42 U.S.C. § 1981 (§ 1981).

The individual disparate treatment theory based upon circumstantial evidence ("Circumstantial Individual Disparate Treatment") is the most common way by which an employer's discrimination is proved. Using this theory, the plaintiff—either the aggrieved individual or the Equal Employment Opportunity Commission (EEOC) acting on her behalf pursuant to Title VII or the ADEA—has no direct evidence of discrimination. Rather the plaintiff must

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1. Discovery allows a party not only to narrow the issues and obtain evidence for use at the trial, but also to discover information about where and how such evidence could be obtained. See also United States v. Procter & Gamble Co., 356 U.S. 677, 682 (1958) (noting that discovery and other pretrial procedures "make a trial less a game of blind-man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent").

2. See infra notes 133-137 and accompanying text.


6. Ryther v. KARE 11, 84 F.3d 1074, 1080 n.6 (8th Cir. 1996) ("[I]ntentional discrimination will frequently be proven by circumstantial evidence . . . .") (citing United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983)); see also Hollander v. American Cyanamid Co., 895 F.2d 80, 85 (2d Cir. 1990) ([E]mployers rarely leave a paper trail—or 'smoking gun'—attesting to a discriminatory intent . . . .").

7. See infra note 25 and accompanying text.

8. See infra note 24 and accompanying text.

9. United States Postal Serv. Bd. of Governors, 460 U.S. at 716 ("There will seldom be "eyewitness" testimony as to the employer's mental processes.").
prove her case to the factfinder" solely through inferences of discrimination. The assessment of such circumstantial evidence is "generally speaking, most competently and appropriately made by the trier of fact."12

The United States Supreme Court, in St. Mary's Honor Center v. Hicks,13 undoubtedly increased the quantum of circumstantial evidence required to guarantee a plaintiff's victory on a claim of Circumstantial Individual Disparate Treatment.14 Given the Hicks decision and the very nature of a Circumstantial Individual Disparate Treatment claim, federal district courts15 should exercise their discretion16 to allow a plaintiff broad workforce and temporal scope in the discovery process.

Part II of this article discusses the substantive law of Circumstantial Individual Disparate Treatment. It observes that in formulating the Circumstantial Individual Disparate Treatment theory, the United States Supreme Court assumed that the plaintiff would be allowed ample discovery. The article then considers the Hicks decision and its likely effect upon the discovery process.

Part III of the article offers an overview of the relevant discovery provisions of the Federal Rules of Civil Procedure. It also discusses the crucial role of, and great discretion exercised by, district judges and magistrate judges in the discovery process.

In Part IV, the article addresses the special discovery needs of a Circumstantial Individual Disparate Treatment plaintiff, particularly as to workforce data beyond that of the aggrieved individual herself. It also considers three crucial types of workforce data that the plaintiff typically seeks.

Part V of the article analyzes the appropriate workforce scope of discovery, concluding that the plaintiff should not be restricted to discovery within the unit or location at which the aggrieved individual worked.

Part VI of the article similarly analyzes the appropriate temporal scope of discovery, concluding that the plaintiff should be allowed to take discovery of events several years prior to and after the adverse employment action at issue.

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11. Hollander, 895 F.2d at 85 ("[D]isparate treatment plaintiffs often must build their cases from pieces of circumstantial evidence which cumulatively undercut the credibility of the various explanations offered by the employer.").
12. Id.
14. See infra notes 49-65 and accompanying text.
16. See infra notes 79-85 and accompanying text.
Finally, in Part VII, the article recommends that, consistent with the Circumstantial Individual Disparate Treatment theory and with discovery principles, district judges and magistrate judges should exercise their considerable discretion to accord a plaintiff wide latitude in both the workforce and temporal parameters of discovery. Part VII argues that in the absence of such discovery, the goals of the anti-discrimination statutes cannot be fulfilled.

II. THE SUBSTANTIVE LAW OF CIRCUMSTANTIAL INDIVIDUAL DISPARATE TREATMENT

The mission of the anti-discrimination statutes is "to assure equality of employment opportunities and to eliminate ... discriminatory practices and devices." Title VII prohibits employers from discriminating against individuals on the basis of race, color, religion, sex, or national origin. The ADEA prohibits employers from discriminating against individuals at or over forty years of age. Section 1981 prohibits employers from discriminating against persons because of their race, color, religion, or national origin.

17. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973) (addressing a Title VII claim); see also 29 U.S.C. § 621(b) (stating that the purpose of the ADEA includes prohibiting "arbitrary age discrimination in employment"); Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 461 (1975) (noting that § 1981 is "directed to most of the same ends" as Title VII).


19. Section 703(a) of Title VII protects both applicants and employees:

   It shall be an unlawful employment practice for an employer —

   (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

   (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

20. The ADEA covers employers of 20 or more employees. 29 U.S.C. § 630(b).

21. Section 4(a) of the ADEA protects both applicants and employees:

   It shall be unlawful for an employer —

   (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age;

   (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s age; or

   (3) to reduce the wage rate of any employee in order to comply with this Chapter.

22. Section 1981 does not address the size of an employing entity. Michael Reiss, Requiem for An "Independent Remedy": The Civil Rights Acts of 1866 and 1871 as Remedies for Employment Discrimination, 50 S. Cal. L. Rev. 961, 974 (1977) ("Section 1981 contains no statutory minimum" but "clearly does extend its protection to millions of workers ... not covered by Title VII."). Section 1981 has applied to private employers for over two decades. Johnson v. Railway
nating against persons on the basis of race or ethnicity.\textsuperscript{23} The EEOC may sue on the aggrieved individual's behalf under Title VII and the ADEA,\textsuperscript{24} and the aggrieved individual has a private right of action under all three of these anti-discrimination statutes.\textsuperscript{25} 

There are several theories by which a plaintiff can prove a violation of one or more of these anti-discrimination statutes. The first major division is between disparate treatment, which requires proof of intentional discrimination,\textsuperscript{26} and disparate impact, which requires proof that an employer's neutral practice adversely affected a protected class.\textsuperscript{27} Disparate treatment is "the most easily understood type" of discrimination, where an "employer simply

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23. Section 1981 does not use the word "race," but rather provides:
   (a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens. . . .
   (b) For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.


24. Section 706(f)(1) of Title VII provides that the EEOC "may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge," where the EEOC has attempted and failed in conciliation. 42 U.S.C. § 2000e-5(f)(1). The section further provides that the Attorney General of the United States may bring suit against a government, governmental agency, or political subdivision. Id. Section 7(b) of the ADEA similarly provides that the EEOC may bring suit against an employer, where the EEOC has attempted and failed in achieving the employer's voluntary compliance. 29 U.S.C. § 626(b).

25. Section 706(f)(1) of Title VII provides that where neither the EEOC nor the Attorney General has pursued suit against the employer, and where there is no conciliation agreement, "the person claiming to be aggrieved" may file suit "within ninety days after" the EEOC has given such notice. 42 U.S.C. § 2000e-5(f)(1). Section 7(e) of the ADEA similarly provides that the "person aggrieved" may bring suit "within 90 days after the receipt of [a] notice" that the EEOC has terminated its investigatory proceedings. 29 U.S.C. § 626(e).

Individuals must file a charge of discrimination with the EEOC within a certain number of days from the date of the adverse employment action; the time period is 180 days in a non-deferral state and 300 days in a deferral state. Title VII § 706(e)(1), 42 U.S.C. § 2000e-5(e)(1); ADEA § 7(d), 29 U.S.C. § 626(d). The EEOC retains administrative jurisdiction of a Title VII charge for a minimum of 180 days and an ADEA charge for a minimum of 60 days before the individual can file suit. Title VII § 706(f)(1), 42 U.S.C. § 2000e-5(f)(1); ADEA § 7(d), 29 U.S.C. § 626(d).

Section 1981 contains no procedures for administrative actions. Johnson, 421 U.S. at 460 ("Further, it has been noted that the filing of a Title VII charge and resort to Title VII's administrative machinery are not prerequisites for the institution of a § 1981 action."); see also MARK A. ROTHESTEIN ET AL., EMPLOYMENT LAW § 3.36 (1994) ("The absence of the Title VII requirements of administrative exhaustion also simplifies a claim under § 1981.").


27. Id. (finding "[p]roof of discriminatory motive is . . . not required under a disparate-impact theory") (quoting International Bhd. of Teamsters, 431 U.S. at 335 n.15).
treats some people less favorably than others because of their protected status.\textsuperscript{28}

The disparate treatment theory further divides into systemic and individual cases. Systemic disparate treatment, also known as "pattern or practice," occurs where an employer intentionally discriminates against a protected class as a whole.\textsuperscript{29} Individual disparate treatment, in contrast, focuses upon the adverse employment action suffered by one or a few aggrieved individuals within the protected class.\textsuperscript{30} The individual disparate treatment theory further sub-divides into cases based upon direct evidence\textsuperscript{31} and cases based upon circumstantial evidence; the latter are the most common, for "'[e]mployers are rarely so cooperative as to include a notation in the personnel file' that the firing is for a reason expressly forbidden by law."\textsuperscript{32} In relying on circumstantial evidence, the plaintiff essentially proves the employer's intent "by process of elimination."\textsuperscript{33}

Although not every theory is available pursuant to every one of these three anti-discrimination statutes,\textsuperscript{34} it is clear that the courts apply the Circumstantial Individual Disparate Treatment theory identically for Title VII, the ADEA, and § 1981.\textsuperscript{35}

\textsuperscript{28} International Bhd. of Teamsters, 431 U.S. at 335 n.15.


\textsuperscript{30} Cooper v. Federal Reserve Bank, 467 U.S. 867, 876 (1984) (noting that "[t]he inquiry regarding an individual's claim is the reason for a particular employment decision").

\textsuperscript{31} Where there is direct evidence of employment discrimination and the factfinder believes the evidence, the plaintiff prevails. Where the plaintiff proves direct evidence of employment discrimination and the employer proves that it would have taken the same adverse employment action in the absence of the discrimination, a separate "mixed motive" analysis codified in Title VII is used. See 42 U.S.C. §§ 2000e-2(m), -2(m)(2)(B); Price Waterhouse v. Hopkins, 490 U.S. 228, 274 (1989) (O'Connor, J., concurring). Although neither the ADEA nor § 1981 contains such mixed motive language, courts have adopted the mixed motive theory in cases arising under those statutes. E.g., Starceski v. Westinghouse Elec. Corp., 54 F.3d 1089, 1098 (3d Cir. 1995) (affirming district court's decision to give a mixed motive jury instruction in ADEA case); Williams v. Fermenta Animal Health Co., 984 F.2d 261, 265 (8th Cir. 1993) (affirming district court's mixed motive jury instruction in a Title VII and § 1981 case).

\textsuperscript{32} Ramsour v. Chase Manhattan Bank, 865 F.2d 460, 464-65 (2d Cir. 1989) (quoting Thornbough v. Columbus & Greenville R.R. Co., 760 F.2d 633, 638 (5th Cir. 1985)); see also supra notes 6, 9.

\textsuperscript{33} Marzano v. Computer Sciences Corp., 91 F.3d 497, 508 (3d Cir. 1996).

\textsuperscript{34} For example, the disparate impact theory does not apply in § 1981 cases. General Bldg. Contractors Ass'n, Inc. v. Pennsylvania, 458 U.S. 375, 391 (1982) ("Section 1983 can be violated only by intentional discrimination."). Furthermore, the Supreme Court has yet to recognize a disparate impact claim brought under the ADEA. Hazen Paper Co. v. Higgins, 507 U.S. 604, 610 (1993).

\textsuperscript{35} See, e.g., Hazel Paper Co., 507 U.S. at 609 (stating that "[t]he disparate treatment theory is of course available under the ADEA"); Rothmeier v. Investment Advisers, Inc., 85 F.3d 1328, 1332 n.5 (8th Cir. 1996) ("Although McDonnell Douglas is a Title VII case, the framework it establishes applies with equal force to claims under the ADEA."); Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 993 n.3 (5th Cir. 1996) ("Although the ADEA was enacted by Congress as a separate statute, we nevertheless apply the McDonnell Douglas-Burdine framework within the ADEA context."); Smith v. Cook County, 74 F.3d 829, 831 (7th Cir. 1996) (applying the McDonnell Douglas-Burdine burden shifting framework in a § 1981 case); Melendez v. Illinois Bell Tel. Co., 79 F.3d 661, 669 (7th Cir. 1996) ("The substantive standards governing liability for § 1981 claims and Title VII disparate treatment claims are identical."); Reynolds v. School Dist. No. 1, 69
In *McDonnell Douglas Corp. v. Green* and *Texas Department of Community Affairs v. Burdine,* the United States Supreme Court propounded a tripartite analysis for claims of Circumstantial Individual Disparate Treatment, to fulfill the goals of the anti-discrimination law. Under this tripartite analysis, the plaintiff first bears the burden of proving a prima facie case by a preponderance of the evidence. The prima facie case typically requires the plaintiff to prove the following four elements: that the aggrieved individual belongs to a class protected by the relevant anti-discrimination statute; that she was qualified for the position she sought or held; that she suffered an adverse employment action; and that the employer continued to seek to fill the position. Establishing a prima facie case is "not onerous."

Once the plaintiff establishes a prima facie case, the burden of production shifts to the employer to articulate, through admissible evidence, a legitimate, nondiscriminatory reason for the adverse employment action. The employer

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F.3d 1523, 1533 (10th Cir. 1995) ("[W]e apply the *McDonnell Douglas* burden shifting framework originally devised in the Title VII context (in a § 1981 case."); Barbour v. Merrill, 48 F.3d 1270, 1276 (D.C. Cir. 1995) ("A plaintiff may establish a violation of § 1981 using the same three-step framework of proof used to establish racial discrimination under Title VII."); Mitchell v. Toledo Hosp., 964 F.2d 577, 582 (6th Cir. 1992) ("The *McDonnell Douglas* formula is the evidentiary framework applicable not only to claims brought under Title VII, but also to claims under ADEA... and... under 42 U.S.C. § 1981."); Rose v. Wells Fargo & Co., 902 F.2d 1417, 1420 (9th Cir. 1990) ("The shifting burden of proof applied to a Title VII discrimination claim also applies to claims arising under ADEA."); Johnson v. Legal Servs., Inc., 813 F.2d 893, 896 (8th Cir. 1987) ("[T]he Title VII framework is used for claims brought under 42 U.S.C. § 1981.").

38. See supra note 17 and accompanying text.
40. Id. The *McDonnell Douglas* Court also noted that "[t]he facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from [plaintiff] is not necessarily applicable in every respect to differing factual situations." Id. at 802 n.13.

Regarding the fourth element, the Supreme Court has ruled that an ADEA plaintiff need not prove that her replacement was outside the protected class. O'Connor v. Consolidated Coin Caterers Corp., 116 S. Ct. 1307, 1310 (1996) ("[T]he fact that an ADEA plaintiff was replaced by someone outside the protected class is not a proper element of the *McDonnell Douglas* prima facie case."). The Supreme Court has made no such ruling with respect to a Title VII plaintiff. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 528 n.1 (1993) ("This Court has not directly addressed the question whether the personal characteristics of someone chosen to replace a Title VII plaintiff are material, and that issue is not before us today.") (Souter, J., dissenting). Both prior and subsequent to O'Connor, some circuit courts found the identity of the plaintiff's replacement to be irrelevant to the establishment of a prima facie case. E.g., Carson v. Bethlehem Steel Corp., 82 F.3d 157, 158-59 (7th Cir. 1996) ("[A] Title VII employee may be able to show that his race or another characteristic that the law places off limits tipped the scales against him, without regard to the demographic characteristics of his replacement."); Cumpiano v. Banco Santander, 902 F.2d 148, 155 (1st Cir. 1990) ("[W]e have never held that the fourth element of a prima facie discharge case can be fulfilled only if the complainant shows that she was replaced by someone outside the protected group.").

When the adverse employment action is a workforce reduction, the plaintiff cannot prove the fourth element of a prima facie case, for the employer does not hire any replacement. Instead, the plaintiff often must provide additional evidence that others outside the protected class were treated more favorably. E.g., Smith v. Cook County, 74 F.3d 829, 831 (7th Cir. 1996); Wallis v. J.R. Simplot Co., 26 F.3d 885, 891 (9th Cir. 1994).

42. See *McDonnell Douglas*, 411 U.S. at 802; *Burdine*, 450 U.S. at 253.
need not persuade the trier of fact, but simply must "raise[] a genuine issue of fact as to whether it discriminated against the plaintiff." 43

Third, if the employer carries its intermediate burden of production, the plaintiff is afforded "a full and fair opportunity" 44 to prove, by a preponderance of the evidence, that the employer's proffered reason was a pretext for discrimination. 45 For over twenty years, the Burdine Court's description of pretext guided the lower courts:

[The plaintiff] now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. 46

Thus, the burden of proof in a Circumstantial Individual Disparate Treatment case remains at all times upon the plaintiff. 47 The Burdine Court believed that its allocation of proof and production would not "unduly hinder the plaintiff" 48 for several reasons, one of which was based upon the plaintiff's opportunity to conduct discovery:

[T]he liberal discovery rules applicable to any civil suit in federal court are supplemented in a Title VII suit by the plaintiff's access to the Equal Employment Opportunity Commission's investigatory files concerning her complaint. Given these factors, we are unpersuaded that the plaintiff will find it particularly difficult to prove that a proffered explanation lacking a factual basis is a pretext. We remain confident that the McDonnell Douglas framework permits the plaintiff meriting relief to demonstrate intentional discrimination. 49

In 1993, in St. Mary's Honor Center v. Hicks 50 a bare majority of the Court, purportedly relying on United States Postal Service Board of Governors v. Aikens, 51 increased the plaintiff's burden of proving pretext by holding that Burdine's "or" language was dicta. 52 The Hicks Court stated:

43. Burdine, 450 U.S. at 254.
44. See McDonnell Douglas, 411 U.S. at 805; Burdine, 450 U.S. at 255-56.
45. See McDonnell Douglas, 411 U.S. at 804; Burdine, 450 U.S. at 253.
46. Burdine, 450 U.S. at 256 (emphasis added).
47. Id.
48. Id. at 258 (citation omitted). Interestingly, years later in Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 657 (1989), the Supreme Court reiterated its view of employment discrimination discovery to justify increasing the plaintiff's burden in a disparate impact case: "Some will complain that this specific causation requirement is unduly burdensome on Title VII plaintiffs. But liberal civil discovery rules give plaintiffs broad access to employers' records in an effort to document their claims." Id.
50. 460 U.S. 711, 714 (1983) (quoting Burdine's "or" language for proof of pretext, but describing the ultimate issue as "discrimination vel non").
51. Hicks, 509 U.S. at 515.
Title VII does not award damages against employers who cannot prove a nondiscriminatory reason for adverse employment action, but only against employers who are proved to have taken adverse employment action by reason of [protected status]. That the employer’s proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff’s proffered reason . . . is correct.52

It is certain from the above language that the Hicks Court rejected a pure “pretext-only” definition previously adopted by some circuit courts.53 Under the pure “pretext-only” approach, the plaintiff’s discrediting of the employer’s legitimate, nondiscriminatory reason was the “equivalent to a finding that the employer intentionally discriminated” against the plaintiff.54 It is less certain, however, what alternate definition of pretext the Court did adopt, and lower courts are struggling to interpret and apply the Hicks decision.55 Indeed, two circuit courts have required en banc review to determine the current definition of pretext.56

The Hicks language quoted above might be viewed as adopting a strict “pretext-plus” approach, which would require “both a showing that the employer’s reasons are false and direct evidence that the employer’s real reasons were discriminatory.”57 Justice Souter’s dissent in Hicks interprets the decision in precisely that way: “The majority’s chosen method of proving

52. Id. at 523-24.
53. E.g. Rothmeier, 85 F.3d at 1334 (“The [Hicks] Court thus rejected the pretext-only position.”); Betkeur v. Aultman Hosp. Ass’n, 78 F.3d 1079, 1086 (6th Cir. 1996) (affirming district court’s grant of summary judgment for employer and rejecting plaintiff’s argument that under Hicks she could “prevail . . . simply by discrediting the defendant’s articulated non-discriminatory reasons”); Felker v. Pepsi-Cola Co., No. 95-9012, 1996 U.S. App. LEXIS 5836, at *5 (2d Cir. Mar. 28, 1996) (affirming judgment for employer because under Hicks, “[t]he District Court, as the finder of fact, was permitted to accept the premise that reasons other than those articulated by defendant were the basis of the discharge, but nevertheless finding in favor of defendants on the ultimate question of whether plaintiff proved discrimination”); Manzer v. Diamond Shamrock Chems. Co., 29 F.3d 1078, 1083 (6th Cir. 1994) (“The [Hicks] Court rejected the ‘pretext only’ position.”); Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1123 (7th Cir. 1994) (“It is clear that the Court rejected the ‘pretext-only’ rule.”). See also Hicks, 509 U.S. at 512-13, for a discussion of the previous split among the circuit courts.
55. E.g. Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 993 (5th Cir. 1996) (en banc) (finding it “unclear” whether the Court “intended that in all such cases in which an inference of discrimination is permitted a verdict of discrimination is necessarily supported by sufficient evidence”); Anderson, 13 F.3d at 1123 (finding it is “less clear” as to whether the court adopted the “pretext-only” rule or the “pretext-plus” rule). The Second Circuit, however, deems any confusion over Hicks “ill-founded.” Saulpaugh v. Monroe Community Hosp., 4 F.3d 134, 142 (2d Cir. 1993), cert. denied, 510 U.S. 1164 (1994).
56. Sheridan v. E.I. duPont de Nemours & Co., 100 F.3d 1061 (3d Cir. 1996) (en banc); Rhodes, 75 F.3d 993.
57. Anderson, 13 F.3d at 1123 (emphasis added). Judge Joseph E. Irenas of the United States District Court for the District of New Jersey is reported to have determined that the quoted “passage gave rise to the pretext-plus approach that proof that the defendant’s proffered reason is wrong is insufficient for a plaintiff to avoid summary judgment for the defendant and additional evidence is needed to support a finding of discriminatory animus.” Discrimination: Courts Struggle with Summary Judgment in Disparate Treatment Cases, Judge Says, 1996 Daily Lab. Rep. (BNA) No. 45, at D-32 (Mar. 7, 1996) [hereinafter Courts Struggle].
'pretext for discrimination' changes Burdine's 'either . . . or' into a 'both . . . and.' However, the Seventh Circuit treats the above Hicks language as dicta, just as the Hicks Court considered Burdine's "or" language as dicta.

The Hicks opinion also contains more moderate language regarding the plaintiff's burden of proving pretext for discrimination:

[T]he trier of fact proceeds to decide the ultimate question: whether plaintiff has proven "that the defendant intentionally discriminated against [him]" because of his race. The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons, will permit the trier of fact to infer the ultimate fact of intentional discrimination. . . . But the Court of Appeals' holding that rejection of the defendant's proffered reasons compels judgment for the plaintiff disregards the fundamental principle of Rule 301 that a presumption does not shift the burden of proof, and ignores our repeated admonition that the Title VII plaintiff at all times bears the "ultimate burden of persuasion."

In light of this more moderate language, some lower courts have found that Hicks created a "modified pretext-only" standard: "[I]f the employer offers a pretext—a phony reason—for why it fired the employee, then the trier of fact is permitted, although not compelled, to infer that the real reason was [the employee's membership in a protected class]." The EEOC also has interpreted the Hicks decision in this manner.

58. Hicks, 509 U.S. at 531 n.7.
59. Anderson, 13 F.3d at 1124 n.3. The Anderson court stated:
As the dissent in Hicks points out, there is language in the Court's opinion that could support a finding that additional evidence of discrimination besides establishment of a prima facie case and rejection of the employer's proffered reasons for the plaintiff's discharge is required to prove intentional discrimination. However, such language is dicta. In rejecting application of this language, we are mindful of the Supreme Court's admonishment that it is "generally undesirable, where holdings of the Court are not at issue to dissect the sentences of the United States Reports as though they were the United States Code."

Id. (quoting Hicks, 509 U.S. at 515).
60. Hicks, 509 U.S. at 511 (emphasis in original) (citations omitted). Surprisingly, Judge Joseph E. Irenas of the United States District Court for the District of New Jersey, is quoted as finding this language to be "the basis of the pretext-only approach." Courts Struggle, supra note 57.

61. Anderson, 13 F.3d at 1123. Furthermore, "it appears that the [Hicks] Court adopted this circuit's version of the 'pretext-only' rule." Id.; see also Rothmeier, 85 F.3d at 1328 ("The [Hicks] Court, however, also rejected the pretext-plus position."); Dickens v. MCI Telecomm. Corp., No. 94-2494, 1996 U.S. App. LEXIS 3853, at *8 (4th Cir. Mar. 5, 1996) ("The plaintiff, at all times, retains the burden of proving intentional discrimination, which may be accomplished by showing that the reasons proffered by the employer for its actions are pretextual."); Randle v. City of Aurora, 69 F.3d 441, 451 (10th Cir. 1995) ("[A] showing of pretext is evidence which allows a jury to infer discriminatory intent."); Manzer v. Diamond Shamrock Chem. Co., 29 F.3d 1078, 1083 (6th Cir. 1994) (finding that the Hicks Court "also rejected the 'pretext plus' position").

62. EEOC Enforcement Guidance on St. Mary's Honor Center v. Hicks, 1994 Daily Lab. Rep. (BNA) No. 70, at D2 (April 12, 1994) ("In most cases, before and after Hicks, if the evidence shows that the respondent's articulated reasons are untrue, it can be assumed that the em-
Whether Hicks is read as adopting a “pretext-plus” approach or as adopting a “modified pretext-only” approach, it is beyond doubt that the decision increased the plaintiff’s ultimate burden of proving pretext from the burden explained in Burdine.63 Until Hicks is modified by the Court or is legislatively overruled,64 a “plaintiff might be well advised to present additional evidence of discrimination, because the factfinder is not required to find in her favor simply because she establishes a prima facie case and shows that the employer’s proffered reasons are false.”65

The Hicks definition of pretext undoubtedly makes the plaintiff’s discovery process more important, especially to survive the employer’s virtually inevitable motion for summary judgment.66 Management lawyers, citing Hicks, will argue that “a plaintiff cannot defeat an employer’s motion for summary judgment simply by stating a prima facie case[,]” and that “if a plaintiff can produce no evidence beyond a bare prima facie case and a subjective be-

63. Christopher R. Hedican & Timothy D. Loudon, The 1993 Amendments to the Federal Rules of Civil Procedure: Their Anticipated Impact on Employment Litigation, 28 CREIGHTON L. REV. 997, 1015 (June 1995) [hereinafter Hedican & Loudon] (“After the Supreme Court’s recent ruling in Hicks, the plaintiff now arguably has a heavier burden in establishing pretext in order to prove a claim of discrimination.”). This prediction was borne out when the Hicks case was remanded to the district court, which concluded that although the employer’s reasons for terminating the plaintiff were false, the plaintiff had not proven intentional discrimination. The Eighth Circuit affirmed the district court’s judgment for the employer. Hicks v. St. Mary’s Honor Ctr., 90 F.3d 285 (8th Cir. 1996).

64. In 1993, Senator Howard Metzenbaum introduced S. 1776, 103d Cong. (1993), and Representative Major Owens introduced H.R. 3680, 103d Cong. (1993), to restore the McDonnell Douglas and Burdine proof structure for intentional disparate treatment. These bills did not survive committee hearings. See Congressional Index 28,368 and 35,066 (recording bill transfer to committee and subsequent non-passage).

65. Anderson, 13 F.3d at 1124.

66. Rule 56(c) provides that summary judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(c). An employer’s motion for summary judgment typically is not entertained until the parties have conducted some discovery. Evans v. Technologies Applications & Serv., 80 F.3d 954, 961 (4th Cir. 1996) (“As a general rule, summary judgment is appropriate only after ‘adequate time for discovery.’”) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)).

In response to the motion for summary judgment, the plaintiff might seek further discovery pursuant to Rule 56(f) which provides:

Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party’s opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

FED. R. CIV. P. 56(f). To succeed on a Rule 56(f) motion, the plaintiff "must (1) articulate a plausible basis for the belief that discoverable materials exist which would raise a triable issue, and (2) demonstrate good cause for failure to have conducted the discovery earlier."

Price v. General Motors Corp., 931 F.2d 162, 164 (1st Cir. 1991) (quoting Paterson-Leitch Co. v. Massachusetts Mun. Wholesale Elec. Co., 840 F.2d 985, 988 (1st Cir. 1988)); see also Evans, 80 F.3d at 961-62 (affirming district court’s grant of summary judgment for employer, where plaintiff "never filed any discovery requests, moved for a continuance so she could conduct discovery, or filed an affidavit as required by Rule 56(f)").
lief that she was the victim of discrimination, summary judgment is appropriate.\textsuperscript{67}

As Justice Souter explained in his dissent from Hicks, because the factfinder's inquiry is no longer limited to the plaintiff disproving the employer's reason, "pretrial discovery will become more extensive and wide-ranging (if the plaintiff can afford it)—for a much wider set of facts could prove to be both relevant and important at trial."\textsuperscript{68}

The EEOC also has recognized the need for greater discovery in the post-Hicks Circumstantial Individual Disparate Treatment cases that it files on behalf of aggrieved individuals:

In discovery, it will be more important to develop contextual or, if possible, direct evidence that supports the inference from a showing of pretext. Employers will likely rely on contextual factors (e.g., a sterling record of minority hiring; a minority decision-maker, etc.) which (they'll argue) make it less likely that they would have discriminated, even if the fact-finder doesn't believe the proffered reason... We may need to develop a contrary picture of the employer's overall record. More generally, as Justice Souter suggested, the scope of permissible discovery now appears to be much wider; much information will be relevant to persuading the jury to draw the permitted inference, which would not have been relevant to the mere showing of pretext. Previously, discovery requests relating to other employment decisions might have been viewed as only marginally relevant, and often overly burdensome. At the least, Hicks increases the relevance of such materials, and in some cases—where the employer explicitly attempts to paint a broad, favorable picture of itself—they may now be very important.\textsuperscript{69}

Similarly, the Lawyers' Committee for Civil Rights Under Law opines that a plaintiff "will have to focus, more intensely than ever before, on discovery to pierce [the employer's] lies."\textsuperscript{70}

\textsuperscript{67} Hedican & Loudon, supra note 63, at 1008-09 & nn.70-72.

\textsuperscript{68} St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 538 (1993) (Souter, J., dissenting). Justice Souter also stated that "[t]he majority's scheme, therefore, will promote longer trials and more pre-trial discovery, threatening increased expense and delay in Title VII litigation for both plaintiffs and defendants, and increased burdens on the judiciary." Hicks, 509 U.S. at 538.


\textsuperscript{70} Life After Hicks: Strategy and Tactics for Plaintiffs and their Counsel, 7 CIV. RTS. ACT AND EEO NEWS 4, 5 (Lawyers' Committee for Civil Rights Under Law, Employment Discrimination Project) (July 1, 1993). The passage continues:

A plaintiff can protect against the danger of having to disprove a panorama of possible "nondiscriminatory reasons" "vaguely suggested" by the record by using all of the tools of issue-narrowing available under the Rules of Civil Procedure: Rule 16 pretrial conference orders setting out the issues, Rule 33 interrogatories enquiring as to all reasons, Rule 34 requests for production demanding all documents bearing on the reasons and their past application or failure of application to other employees, Rule 36 requests for admissions pinning down the exclusivity of the reasons (with Rule 33 and Rule 34 discovery requests triggered by any failure to admit), pretrial orders setting forth the issues, and motions in limine to exclude evidence of any other reason.

\textit{Id.} at 5.
III. Overview of Discovery in the Federal Courts

Federal Rules of Civil Procedure 26 through 37 govern the discovery process for employment discrimination cases brought in the federal courts. These discovery rules “allow the parties to develop fully and crystallize concise factual issues for trial.” They are to be broadly and liberally construed. This liberal construction, however, can lead to abuse by the parties, with one commentator noting that discovery “now tends to dominate the litigation and inflict disproportionate costs and burdens.”

A. The Role of District Judges and Magistrate Judges

Federal district judges and magistrate judges have great control over the discovery process in employment discrimination litigation, with relatively little appellate law to guide them. Appellate courts “normally do not become involved with ‘nitty gritty’ rulings on discovery matters,” such as analyzing specific discovery requests and objections.

A district judge may refer any civil case, including one involving a Circumstantial Individual Disparate Treatment claim, to a magistrate judge for resolution of discovery matters. The district judge will affirm the magistrate judge’s discovery rulings unless they are “clearly erroneous or contrary to

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71. For a discussion of specific rules, see infra Parts III.B.-III.D.
75. Burns, 483 F.2d at 304-05. The Burns court stated: Because discovery matters are committed almost exclusively to the sound discretion of the trial judge, appellate rulings delineating the bounds of discovery under the Rules are rare. But the Judge’s discovery rulings, like his other procedural determinations, are not entirely sacrosanct. If he fails to adhere to the liberal spirit of the Rules, we must reverse.

Id.
76. Semper v. Johnson & Higgins, 45 F.3d 724, 733 (3d Cir. 1995); see also Mack v. Great Atl. & Pac. Tea Co., Inc., 871 F.2d 179, 186 (1st Cir. 1989) (“Circumstances warranting appellate intervention in garden-variety pretrial discovery are infrequent.”).
78. Rule 73(a) provides:
When specially designated to exercise such jurisdiction by local rule or order of the district court and when all parties consent thereto, a magistrate judge may exercise the authority provided by Title 28, U.S.C. § 636(c) and may conduct any or all proceedings, including a jury or nonjury trial, in a civil case.

Fed. R. Civ. P. 73(a). The Federal Magistrates Act provides:
Upon the consent of the parties, a full-time United States magistrate or a part-time United States magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves.

A magistrate judge’s ruling is clearly erroneous only when, despite “evidence to support it,” the district judge “is left with the definite and firm conviction that a mistake has been committed.” For example, a district judge cannot affirm a magistrate judge’s ruling where the magistrate judge has failed to provide enough explanation for adequate review. In many cases, however, district judges view the clearly erroneous standard as granting magistrate judges “broad discretion, which will be overruled only if abused.”

Once a district judge has made a discovery ruling, whether in the first instance or by reviewing the magistrate judge’s initial ruling, the standard of review on appeal to the circuit court is abuse of discretion, which “occurs only when the [district] court bases its decision on an erroneous ruling of law or when there is no rational basis in the evidence for the ruling.” Some circuits also require that the district court's abuse of discretion result in “substantial prejudice.”

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79. 28 U.S.C. § 636(b)(1)(A) (1994). The Federal Magistrates Act provides: [A] judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate’s order is clearly erroneous or contrary to law.


83. See, e.g., Sempter, 45 F.3d at 774 (stating that “district courts have broad discretion to manage discovery”); Gehring v. Case Corp., 43 F.3d 340, 342 (7th Cir. 1994) (noting that district courts “have substantial discretion to make such decisions to curtail the expense and intrusiveness of discovery and trial”); Johnson v. Thompson, 971 F.2d 1487, 1497 (10th Cir. 1992) (reviewing orders relating to discovery “for an abuse of discretion”); Earley v. Champion Int'l Corp., 907 F.2d 1077, 1085 (11th Cir. 1990) (reviewing district court’s discovery order on “abuse of discretion”); Coughlin v. Lee, 946 F.2d 1152, 1159 (5th Cir. 1991) (noting that the district court is “customarily accorded wide discretion in handling discovery matters”); Sanchez v. City of Santa Ana, 936 F.2d 1027, 1034 (9th Cir. 1990) (applying abuse of discretion standard); Holland v. American Cyanamid Co., 895 F.2d 80, 84 (2d Cir. 1990) (stating that “management of discovery lies within the discretion of the district court”; thus, “an appellate court ordinarily will not disturb a district court’s ruling of a discovery request absent an abuse of discretion”).

84. E.g., Scales v. J.C. Bradford & Co., 925 F.2d 901, 906 (6th Cir. 1991) (“In reviewing the district court’s decision to limit discovery, this court will intervene only if it was an abuse of discretion resulting in substantial prejudice.”); Mack, 871 F.2d at 186 (“We will intervene in such [discovery] matters only upon a clear showing of manifest injustice, that is, where the lower court’s discovery order was plainly wrong and resulted in substantial prejudice to the aggrieved party.”).
Occasionally a circuit court must reverse a district court's discovery ruling, usually for restricting discovery rather than for allowing too much: "If [the district judge] fails to adhere to the liberal spirit of the Rules, we must reverse."\(^\text{86}\) The district court must "examine each interrogatory" and must fully review the magistrate judge’s earlier ruling, if any.\(^\text{87}\) The district court certainly "overstep[s] the bounds of discretion" if it "decline[s] to state any reasons for his order limiting the scope of discovery."\(^\text{88}\)

The circuit court's reversal of a district court's discovery ruling might well result in reversal of a summary judgment grant for the employer\(^\text{89}\) or reversal of a trial judgment for the employer.\(^\text{90}\)

B. Initial Disclosures Preceding Formal Discovery

To augment the traditional, formal discovery methods triggered by a party's requests, Federal Rule of Civil Procedure 26(a)(1) provides that each party disclose to the other certain core information soon after the case is filed.\(^\text{91}\) This initial disclosure provision, however, appears to have had mini-

\(^{86}\) Burns v. Thiokol Chem. Corp., 483 F.2d 300, 305 (5th Cir. 1973); see also Coughlin, 946 F.2d at 1159 (noting that the circuit court must reverse district court's discovery ruling which "results in fundamental unfairness at trial"); cf. Semper, 45 F.3d at 734 (finding that the district court "far exceeded the outermost limits on its discretion" by denying the plaintiff's motion to compel answers to specific interrogatories and instead ordering the employer to answer court-drafted "Bill of Particulars"); Ardrey v. United Parcel Serv., 798 F.2d 679, 682 (4th Cir. 1986) (stating that, "[a]lthough it is 'unusual to find an abuse of discretion in discovery matters,'... a district court may, through discovery restrictions, prevent a plaintiff from pursuing a theory or even cause of action") (quoting Sanders v. Shell Oil Co., 678 F.2d 614, 618 (5th Cir. 1982)).

\(^{87}\) Semper, 45 F.3d at 735.

\(^{88}\) Trevino v. Celanese Corp., 701 F.2d 397, 406 (5th Cir. 1983).

\(^{89}\) E.g., Semper, 45 F.3d at 736 (reversing district court’s grant of summary judgment for employer, where district court substituted its own vague and general Bill of Particulars for the plaintiff's specific interrogatories); Parrish v. Ford Motor Co., No. 91-2300, 1992 U.S. App. LEXIS 3361, at *18 (6th Cir. 1992) (reversing district court’s grant of summary judgment for employer because "we are inclined to believe that further discovery is in order"); Hollander, 895 F.2d at 84 (vacating summary judgment on the discriminatory discharge claim "as this restriction upon [plaintiff's] discovery unduly limited his ability to establish his argument that the employer's discharge of him was pretextual"); Diaz v. American Tel., 752 F.2d 1356, 1364 (9th Cir. 1985) (reversing district court's grant of summary judgment for employer "because [plaintiff] was improperly denied the opportunity to discover material that is relevant to the only bases on which summary judgment could have been granted"); Sweat v. Miller Brewing Co., 708 F.2d 655, 656 (11th Cir. 1983) (reversing district court's grant of summary judgment where plaintiff was prevented from obtaining necessary statistical information); Trevino, 701 F.2d at 405-06 (reversing district court's grant of summary judgment where plaintiff "was effectively hamstrung by the district court's order limiting discovery").

\(^{90}\) E.g., Weahkee v. Norton, 621 F.2d 1080, 1083-84 (10th Cir. 1980) (reversing district court's trial judgment for employer and remanding to "permit... additional discovery"); Rich v. Martin Marietta Corp., 522 F.2d 333, 349 (10th Cir. 1975) (reversing district court's trial judgment for employer and ordering district court to conduct "to reconsider plaintiffs' request for discovery"); Burns, 483 F.2d at 302-03 (reversing district court's trial judgment for employer and remanding so that the district court could make information available to plaintiff).

\(^{91}\) Rule 26(a)(1) provides:
Except to the extent otherwise stipulated or directed by order or local rule, a party shall, without awaiting a discovery request, provide to other parties;
(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying the subjects of the information;
mal effect on the course of litigation, including that under the Circumstantial Individual Disparate Treatment theory.

First, a great many district courts have opted out of the initial disclosure provision, as expressly allowed by the Rule. Second, in many districts, the parties themselves can opt out of initial disclosures by stipulation or local rule. Third, given the prevalence of notice pleading, few complaints and answers involving the Circumstantial Individual Disparate Treatment theory contain many "disputed facts alleged with particularity," required to trigger meaningful initial disclosures. Indeed, the plaintiff's complaint may even contain allegations for which the plaintiff has no evidence, so long as those allegations "are likely to have evidentiary support after a reasonable opportuni-

(B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party that are relevant to the disputed facts alleged with particularity in the pleadings;

(C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

(D) for inspection and copying as under Rule 34 any insurance agreement under which an person carrying on an insurance business may be liable to satisfy part of all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

FED. R. CIV. P. 26(a)(1).

92. FED. R. Civ. P. 26(a)(1). There are 94 federal judicial districts, 45 of which have implemented the initial disclosure rule as written and six of which have implemented the rule "with a significant revision." 8 CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE (Supp. 1995) (reporting on a March 24, 1995 survey by the Research Division of the Federal Judicial Center). Of the 49 remaining districts that have not implemented disclosure, five require initial disclosure under local rules or plans, and 15 give district judges discretion to require initial disclosure in specific cases. Id. The remaining 28 districts have no disclosure requirements. Id.

93. In May of 1995, the FEDERAL DISCOVERY NEWS reported:

Never mind that the district has opted into Rule 26(a)(1). Embedded in the local rules is a clause that allows attorneys to stipulate out of the Rule when they submit a report to the court.... [A] recent survey.... showed that 10 of 19 judges surveyed in the district reported that in 50% or more of their cases that the parties were stipulating out of 26(a)(1).


94. Gerald G. MacDonald, Hesiod, Agesilaus, and Rule 26: A Proposal for a More Effective Mandatory Initial Disclosure Procedure, 28 Wake Forest L. Rev. 819, 838 (1993) (explaining that Rule 26(a) "insures its own ineffectiveness by creating an escape device which will allow parties to avoid the mandatory disclosure requirements in the largest segment of civil litigation—those cases pleaded pursuant to the 'notice pleading' provisions of Rule 8(a)"). Rule 8(a) provides that a pleading, such as the plaintiff's complaint, need contain only:

1) [a] short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks.

FED. R. CIV. P. 8(a). At least one magistrate judge, however, has seen a return to more fact-specific pleadings. Kansas Magistrate Praises Effectiveness of New Rules, FED. DISCOVERY NEWS, Oct. 1995 (discussing Magistrate Judge Gerald L. Rushfelt, who has published a "litany of discovery orders" reports "seeing more specificity in the pleadings"). According to Judge Rushfelt: "the pleadings have become longer and more detailed. That started happening even before the amendment. What the new rules have done is accelerate that pattern." Id.
ty for further investigation or discovery." Accordingly, a plaintiff suing under the Circumstantial Individual Disparate Treatment theory continues to rely on traditional, formal discovery procedures to obtain additional information about her case.

C. The Forms, Limits, and Timing of Discovery

The parties in litigation typically begin formal discovery after they have met and conferred to establish a discovery plan. Pursuant to Federal Rule of Civil Procedure 26(b)(1), the parties are entitled to take discovery "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action."

The party seeking discovery must show that the information sought is relevant; this showing is not difficult, as relevancy "has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." Relevancy extends beyond the issues presented in the pleadings, "for discovery

95. FED. R. CIV. P. 11(b)(3).
96. Rule 26(d) provides: "Except when authorized under these rules or by local rule, order, or agreement of the parties, a party may not seek discovery from any source before the parties have met and conferred as required by subdivision (f)." FED. R. CIV. P. 26(d). Rule 26(f) provides:

Except in actions exempted by local rule or when otherwise ordered, the parties shall, as soon as practicable and in any event at least 14 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), meet to discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by subdivision (a)(1), and to develop a proposed discovery plan.

FED. R. CIV. P. 26(f).
97. Rule 26(b)(1) provides that the discovery is relevant:

whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.

FED. R. CIV. P. 26(b)(1).

The Federal Rules of Civil Procedure incorporate common-law privileges, with the attorney-client privilege being the most important in employment discrimination litigation. See, e.g., Curcio v. Chinn Enters., 70 Fair Empl. Prac. Cas. (BNA) 9, 10-11 (N.D. Ill. 1996) (holding that attorney-client privilege protects questionnaires used at employer's sexual harassment training seminars conducted by employer's attorneys). Rule 26(b)(3) offers a more limited protection for an attorney's work product, mandating production of:

documents and tangible things otherwise discoverable . . . and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative, . . . only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

FED. R. CIV. P. 26(b)(3). Rule 26(b)(5) further requires that any party claiming privilege or work-product protection: "shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection." FED. R. CIV. P. 26(b)(5). This article addresses only those discovery requests by the plaintiff which are non-privileged and do not constitute work product.

itself is designed to help define and clarify the issues.\textsuperscript{100} The parties' requested information "need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."\textsuperscript{101} Thus, discovery should be allowed "if there is any possibility that the information sought may be relevant to the subject matter of the action."\textsuperscript{102}

Federal Rule of Civil Procedure 26(a)(5) lists the traditional, formal methods of discovery available to the parties: depositions upon oral examination or written questions; written interrogatories; production of documents and things or permission to enter upon land or other property; physical and mental examinations; and requests for admission.\textsuperscript{103} The methods may be used in any order.\textsuperscript{104}

The district court can restrict or prohibit the use of any method of discovery if:

(i) [t]he discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.\textsuperscript{105}

Additionally, there are presumptive numerical limitations on two discovery methods. Each party typically is restricted to no more than ten depositions,

\textsuperscript{100} Id.
\textsuperscript{101} FED. R. CIV. P. 26(b)(1); see also Pisacane v. Enichem Am., Inc., No. 94 Civ. 7843, 1996 U.S. Dist. LEXIS 9755, at *14 (S.D.N.Y. July 12, 1996) (contrasting district court's admission of evidence under Federal Rules of Evidence 401 and 403 with "a determination of relevance under the much broader standard" in Federal Rule of Civil Procedure 26(b)(1); Clarke v. Mellon Bank, N.A., 25 Fed. R. Serv. 3d (Callaghan) 1176, 1179 (E.D. Pa. 1993) (refusing to bar broad discovery request though it yielded "some evidence that is not admissible," so long as it was "calculated . . . to lead to the production of relevant matter in view of [plaintiff's allegations]"); Flanagan v. Travelers Ins. Co., 111 F.R.D. 42, 46 (W.D.N.Y. 1986) (finding that "relevance, for purposes of Rule 26, cannot be equated with admissibility at trial or ultimate probativeness").
\textsuperscript{103} FED. R. CIV. P. 26(a)(5).
\textsuperscript{104} Rule 26(d) provides:

Unless the court, upon motion, for the convenience of the parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay another party’s discovery.

FED. R. CIV. P. 26(d).
\textsuperscript{105} FED. R. CIV. P. 26(b)(2).
whether upon oral or written questions. Further, each party typically is limited to twenty-five interrogatories, "including all discrete subparts."

D. Discovery Disputes

The parties to litigation invariably have disputes about the appropriate scope of discovery. Assuming that one party has not waived its objection to the discovery, or that the parties have been unable to reach a compromise, the parties will resort to Federal Rules of Civil Procedure 26 and 37 to protect their positions.

1. Motions for Protective Orders

Federal Rule of Civil Procedure 26(c) allows the party from whom discovery is sought to move for a protective order from the district court, but only after that party "has conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action." If there is "good cause shown" for a protective order, the district court "may make any order which justice requires to protect [the party] from annoyance, embarrassment, oppression, or undue burden or expense." The party moving for a protective order "must make a specific demonstration of facts in support of the request as opposed to conclusory or speculative statements about the need for

106. Rule 30(a)(2) provides:
A party must obtain leave of court, which shall be granted to the extent consistent with the principles stated in Rule 26(b)(2), if . . . without written stipulation of the parties, (A) a proposed deposition would result in more than ten depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by third-party defendants.

FED. R. CIV. P. 30(a)(2).

107. FED. R. CIV. P. 33(a), Rule 33(a) provides: "Without leave of court or written stipulation, any party may serve upon any other party written interrogatories, not exceeding 25 in number including all discrete subparts. . . . Leave to serve additional interrogatories shall be granted to the extent consistent with the principles of Rule 26(b)(2)." FED. R. CIV. P. 33(a); see also McMenamin v. M & P Trucking Co., No. 93-6888, 1994 U.S. Dist. LEXIS 4549, at *8 (E.D. Pa. Apr. 7, 1994) ("The drafters of the Federal Rules of Civil Procedure, I assume after careful consideration, concluded that in the usual civil lawsuit, after self-executing discovery, a limit of twenty-five interrogatories, subject to discretionary expansion of the quantity in appropriate cases, is reasonable.").

108. E.g., Scarfo v. Cabletron Sys. Inc., 153 F.R.D. 9, 11 (D.N.H. 1994) (holding that an employer must abide by its initial agreement to provide plaintiff with certain discovery, even though it later objected to the scope of that discovery).

109. For example, the parties may reach a stipulated protective order to preserve the confidentiality of material. See supra notes 180-181 and accompanying text.

110. FED. R. CIV. P. 26(c). District courts take seriously the requirement that parties attempt to meet and confer prior to filing discovery motions. See, e.g., Chambers v. Capital Cities/ABC, 157 F.R.D. 3, 5 (S.D.N.Y. 1994) ("Attempts to agree on what should be done item-by-item should precede requests for blanket sweeping rules by the Magistrate Judge followed by filing of objections to the Magistrate Judge's rulings.").

111. FED. R. CIV. P. 26(c). These options include:
(1) that the disclosure or discovery not be had; (2) that the disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters.

Id.
a protective order and the harm which will be suffered without one." The party prevailing on the motion for a protective order may recover its fees and costs. In Circumstantial Individual Disparate Treatment litigation, the "undue burden or expense" language is often cited by the employer in its attempt to avoid the plaintiff's discovery. The employer cannot prevail on a motion for a protective order merely by arguing that an otherwise legitimate discovery request is burdensome or expensive, for "[t]he production of discovery materials in litigation is often a costly and burdensome enterprise" requiring "many hours of labor unrelated to any other business purpose." Rather, the employer must show that the discovery is unduly burdensome or expensive. In assessing burden and expense, the district court must take into account "the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues." Nor can the employer prevail on its motion for a protective order merely by arguing that it would be forced to prepare an extensive list of information, for the generation of such lists is not always unduly burdensome or expensive. Moreover, pursuant to Federal Rule of Civil Procedure 33(d), the employer resisting discovery has the right, under certain situations, to produce its business records in lieu of a narrative answer or list. If the employer

113. FED. R. CIV. P. 26(c) (referring to Federal Rule of Civil Procedure 37(a)(4) and its provisions relating to the award of expenses).
114. See infra notes 195-201 and accompanying text.
116. See, e.g., Clarke v. Mellon Bank, N.A., 25 Fed. R. Serv. 3d 1176, 1179 (E.D. Pa. 1993) (holding that in order to avoid complying with a discovery request, the party must show that compliance would be unduly burdensome) (quoting FED. R. CIV. P. 26(c)); see also Ladson v. Ultra E. Parking Corp., 164 F.R.D. 376, 377 (S.D.N.Y. 1996) ("Defendants do not however, claim that production of the files would be more burdensome than supplying the information that they have already offered instead."); Orbovich, 119 F.R.D. at 416 ("The resistance to discovery for those reasons will not be sustained, however, unless the discovery sought is found to be unreasonably burdensome.").
117. FED. R. CIV. P. 26(b)(2).
118. See Burns v. Thiokol Chem. Corp., 483 F.2d 300, 307 (5th Cir. 1973) ("Of course, the extensive listing of information required to fully answer the interrogatories is somewhat cumbersome. But . . . the fact that an interrogatory calls for a list does not make it improper.").
119. Rule 33(d) provides:
Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, including a compilation, abstract or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.
FED. R. CIV. P. 33(d).
cannot segregate the requested information, however, "it may be required to provide broader" information.\textsuperscript{120}

2. Motions to Compel

The party who has propounded discovery and has not received a full response may file a motion "for an order compelling . . . discovery" under Federal Rule of Civil Procedure 37(a)(2)(B).\textsuperscript{121} The motion to compel, like the motion for a protective order, "must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action."\textsuperscript{122} The party prevailing on the motion to compel may recover its costs and fees.\textsuperscript{123}

Just as the party seeking a protective order must show good cause, the party opposing a motion to compel "bears the burden of establishing lack of relevance by demonstrating that the requested discovery either does not come within the broad scope of relevance . . . or is of such marginal relevance that the potential harm occasioned by discovery would outweigh the ordinary presumption in favor of broad disclosure."\textsuperscript{124}

3. Failure to Comply with a Court’s Discovery Order

Once a district court has ruled on a motion for a protective order or a motion to compel, the losing party must comply with the ruling or risk a variety of severe sanctions under Federal Rule of Civil Procedure 37(b).\textsuperscript{125} Sanctions include allowing the winning party additional discovery,\textsuperscript{126} establishing facts against the losing party,\textsuperscript{127} entering default judgment against the defendant,\textsuperscript{128} and dismissing the plaintiff's claims.\textsuperscript{129} The court might give the


\textsuperscript{121} Fed. R. Civ. P. 37(a)(2)(B).

\textsuperscript{122} Fed. R. Civ. P. 37(a)(2)(A); see also Ballou v. University of Kan. Ctr., 159 F.R.D. 558, 560 (D. Kan. 1994) (holding that plaintiff's single letter to opposing counsel prior to filing motion to compel was inadequate, where letter reiterated disclosure request, but did not indicate plaintiff's intent to file a motion).


\textsuperscript{125} Nonetheless, the sanctions in Fed. R. Civ. P. 37(b) are not without limits. See Sempier v. Johnson & Higgins, 45 F.3d 724, 735 (3d Cir.) (stating that "none of the weapons in [Rule 37's] formidable arsenal include the wholesale substitution of court-engineered discovery").

\textsuperscript{126} Jackson v. Harvard Univ., 900 F.2d 464, 469 (1st Cir. 1990) (affirming district court's discovery sanctions of "a continuance and an open run at further discovery").

\textsuperscript{127} Fed. R. Civ. P. 37(b)(2)(A); cf. Hedican & Loudon, supra note 63, at 1015-16 ("If an employer fails to provide critical information in a disclosure, and the jury is instructed that the employer failed to do so despite its obligation to produce that information, this certainly could be viewed as evidence that the employer's asserted nondiscriminatory reason is a pretext.").

\textsuperscript{128} Fed. R. Civ. P. 37(b)(2)(C).

\textsuperscript{129} Id.; see also Spiller v. U.S.V. Lab., Inc., 842 F.2d 535, (1st Cir. 1988) (affirming district court's dismissal of complaint for plaintiff's failure to comply with discovery order).
non-complying party a warning prior to such sanctions, but need not always do so. The court also may order the non-complying party to pay the opposing counsel’s fees and may fine the non-complying party.

IV. THE SPECIAL DISCOVERY NEEDS OF A PLAINTIFF IN CIRCUMSTANTIAL INDIVIDUAL DISPARATE TREATMENT LITIGATION

The courts routinely state that discovery in employment discrimination litigation is special. An individual plaintiff suing "a huge industrial employer" creates a "modern day David and Goliath confrontation . . . ." She needs ample discovery, because "the nature of the proofs required to demonstrate unlawful discrimination may often be indirect or circumstantial." The anti-discrimination statutes are broad, and remedial, and therefore the

130. E.g., Willis, 56 Fair Empl. Prac. Cas. (BNA) at 1454 (granting plaintiff's motion to compel answers to interrogatories and stating that the court "will not tolerate further delays by the defendant in discovery and if any additional motions to compel are filed by the plaintiff, the Court will seriously consider imposing sanctions under . . . Rule 37").

131. Fed. R. Civ. P. 37(b); see also Shipes v. Trinity Indus., 987 F.2d 311, 323-24 (5th Cir. 1993) (affirming district court's award of attorneys fees against party who violated court order regarding discovery).

132. Grimes v. City of San Francisco, 951 F.2d 236 (9th Cir. 1991) (affirming magistrate judge's fine of $500 per day for party's non-compliance with court order).

133. See, e.g., Semper v. Johnson & Higgins, 45 F.3d 724, 734 (3d Cir. 1995) ("Nonetheless, the district court's discretion has boundaries, and in particular, we frown upon unnecessary discovery limitations in Title VII, and hence ADEA, cases."); Sweat v. Miller Brewing Co., 708 F.2d 655, 658 (11th Cir. 1983) ("We note that liberal discovery rules are applied in Title VII litigation."); Trevino v. Celanese Corp., 701 F.2d 397, 405-06 (5th Cir. 1983) ("The imposition of unnecessary limitations on discovery is especially frowned upon in Title VII cases."); Rich v. Martin Marietta Corp., 522 F.2d 333, 343-44 (10th Cir. 1975) ("It is plain that the scope of discovery through interrogatories and requests for production of documents is limited only by relevancy and burdensomeness, and in an EEOC case the discovery scope is extensive. . . . It cannot be said, therefore, that the policy of this court has been to narrowly circumscribe discovery in EEOC cases."); Wilson v. Martin County Hosp. Dist., 149 F.R.D. 553, 555 (W.D. Tex. 1993) ("The imposition of unnecessary limitations on discovery is especially frowned upon in Title VII cases."); Finch v. Hercules, Inc., 149 F.R.D. 60, 62 (D. Del. 1993) ("Discovery requests in discrimination cases have received particularly liberal treatment by the courts."); Flanagan v. Travelers Ins. Co., 111 F.R.D. 42, 46 (W.D. N.Y. 1986) ("Federal Rule of Civil Procedure 26 is not to be interpreted so as to deprive a party of discovery that is reasonably necessary to afford a fair opportunity to develop and prepare the case. . . . This is particularly true in Title VII cases where the imposition of unnecessary discovery limitations is to be avoided.") (quoting Fed. R. Civ. P. 26 advisory note); Henderson v. National R.R. Passenger Corp., 113 F.R.D. 502, 506 (N.D. Ill. 1986) ("The scope of discovery is especially broad in Title VII cases.").

Occasionally, courts will state that discovery in employment discrimination litigation is to be treated no differently than discovery in other types of cases. E.g., Haykel v. G.F.L. Furniture Leasing Co., 76 F.R.D. 386, 391 (N.D. Ga. 1976) (noting that Title VII actions have been granted liberal discovery, but all requests still must follow "traditional discovery notions of relevancy and must not impose an undue burden upon the responding party"); see also Robbins v. Camden City Bd. of Educ., 105 F.R.D. 49, 55 (D.N.J. 1985) (stating that "[t]he responses sought must comport with the traditional notions of relevancy and must not impose an undue burden on the responding party"); Hardrick v. Legal Sers. Corp., 96 F.R.D. 617, 618 (D.D.C. 1983) (noting concern about 'fishing expeditions,' discovery abuse and inordinate expense involved in overbroad and far-ranging discovery requests.


135. Miles v. Boeing Co., 154 F.R.D. 117, 119 (E.D. Pa. 1994); see also Marshall v. Westminster Elec. Corp., 576 F.2d 588, 592 (5th Cir. 1978) ("A plaintiff who must shoulder the burden of proving that his discharge is pretextual should not normally be denied the information necessary to establish that claim.").

136. See Veprinsky v. Fluor Daniel, Inc., 87 F.3d 881, 888 (7th Cir. 1996) ("It has long been
courts should not "allow procedural technicalities to impede the full vindication of guaranteed rights."\textsuperscript{137}

The discovery accorded a private individual in her Circumstantial Individual Disparate Treatment case should be as broad as the discovery accorded the EEOC in its litigation; the individual, in vindicating her rights under an anti-discrimination statute, essentially serves as a private attorney-general for other potentially aggrieved individuals.\textsuperscript{138} As the Tenth Circuit stated in the seminal case Rich v. Martin Marietta Corp.,\textsuperscript{139} whether the plaintiff is an individual or the EEOC, "[i]t is plain that the scope of discovery . . . is limited only by relevance and burdensomeness."\textsuperscript{140}

A. The Relevance of Workforce Data

The Circumstantial Individual Disparate Treatment plaintiff undoubtedly needs discovery beyond the bounds of the facts upon which her claim is based.\textsuperscript{141} The courts should not assume that the plaintiff brings a "highly individualized claim[]."\textsuperscript{142} Rather, because the employer's discrimination against the plaintiff, as a member of a protected group, "is by definition class discrimination,"\textsuperscript{143} the plaintiff is entitled to data about other persons work-

recognized that Title VII is a remedial statute with a broad sweep."); Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221, 1235 (3d Cir. 1994) ("We also bear in mind that, as remedial statutes, Title VII and ADEA should be liberally construed to advance their beneficial purposes."); Martinez v. Orr, 738 F.2d 1107, 1110 (10th Cir. 1984) ("Title VII is a remedial statute to be liberally construed in favor of victims of discrimination."); (quoting Davis v. Valley Distrib. Co., 522 F.2d 827, 832 (9th Cir. 1975)); Thurber v. Jack Reilly's, Inc., 717 F.2d 633, 634-35 (1st Cir. 1983) ("Title VII was considered a generally remedial statute, and the prevailing majority in Congress intended to give it broad effect."); Blue Bell Boots, Inc. v. EEOC, 418 F.2d 355, 358 (6th Cir. 1969) ("Title VII . . . should not be construed narrowly.").

138. Id. ("Any information relevant—in a discovery sense—to an EEOC investigation is likewise relevant to the private attorney-general, either in his individual role or in his capacity as the claimed representative of a class.").
139. 522 F.2d 333, 343 (10th Cir. 1975).
140. Rich, 522 F.2d at 343.
141. See Clarke v. Mellon Bank, N.A., No. 92-CV-4823, 1993 U.S. Dist. LEXIS 6680, at *7 (E.D. Pa. May 11, 1993) ("The needs of the individual plaintiff to information . . . requires that the parameters of discovery be broader than the specific, individual facts upon which the claim is based."); Robbins, 105 F.R.D. at 55 ("Nonetheless, the applicable discovery parameters must be broader than the specific, individualized facts upon which her claims are based because of the nature of the proofs required to demonstrate unlawful discrimination, which may often be indirect or circumstantial.").
143. Blue Bell Boots, 418 F.2d at 358; see also Jenkins v. United Gas Corp., 400 F.2d 28, 32-33 (5th Cir. 1968) ("The suit is . . . more than a private claim of discrimination on the basis of the individual's protected class, rather "the suit is perforce a sort of class action for fellow employees similarly situated."); Robbins, 105 F.R.D. at 58 ("Discrimination on the basis of race is by definition class discrimination and the existence of a pattern of racial discrimination in a job category may well justify an inference that the practices complained of were motivated by racial factors.").
ing for that employer.\textsuperscript{144} In fact, she is entitled to much of the same information as in a systemic disparate treatment case.\textsuperscript{145}

Moreover, the plaintiff in a Circumstantial Individual Disparate Treatment case, whether the individual or the EEOC,\textsuperscript{146} should be entitled to the same expansive definition of relevance as accorded the EEOC when it investigates the underlying charge of discrimination\textsuperscript{147} and requires court enforcement of an administrative subpoena to obtain data from the employer.\textsuperscript{148}

The plaintiff may need workforce discovery to bolster her prima facie case, especially as to the qualifications of the competing employees or appli-

\textsuperscript{144} There may be related employers, such as parents and subsidiaries. See Chambers v. Capital Cities/ABC, 159 F.R.D. 429, 430 (S.D.N.Y. 1995) (discussing as "to what extent, when and how information relating to personnel practices of related entities may be obtained by plaintiff"). This article focuses on a single employing entity.

\textsuperscript{145} See Gomez v. Martin Marietta Corp., 50 F.3d 1511, 1520 (10th Cir. 1995) ("It is well settled that in a Title VII suit, an employer's general practices are relevant even when a plaintiff is asserting an individual claim for disparate treatment."); Burns, 483 F.2d at 306 ("The importance of obtaining an overall statistical picture of an employer's practices with regard to both Black and White employees does not depend on the presence of an alleged 'pattern or practice' or a valid charge of class discrimination or class action."); Flanagan, 111 F.R.D. at 46-47 ("Although plaintiff has alleged individual disparate treatment... such claims, of necessity, require discovery of and comparison with the treatment accorded other employees.... Comparative information is necessary to afford plaintiff a fair opportunity to develop her case and may be relevant to establish the pretextual nature of defendant's conduct.").

A few courts have adopted a stricter approach. According to the Middle District of Georgia: "Plaintiffs do not point to a policy or an institution-wide practice. Instead, they direct their grievances toward particular supervisors... Furthermore, other than counsel's belief that Defendant's database may verify a class-wide discriminatory animus, Plaintiffs have set forth no showing that further discovery will substantiate the class action." Lumpkin v. E.I. du Pont de Nemours & Co., 161 F.R.D. 480, 482 (M.D. Ga. 1995). The Lumpkin court granted an employer's motion for a protective order limiting the scope of discovery in the absence of a class action. Id.; see also Prouty v. National R.R. Passenger Corp., 99 F.R.D. 545, 547 (D.D.C. 1983) ("Because this is an individual suit rather than a class action and plaintiff has not shown a sufficiently particularized need for this information, the Court will limit discovery.").

\textsuperscript{146} The Tenth Circuit explained why individuals and the EEOC should be treated the same: The fact that these cases had to do with discovery efforts by the EEOC itself rather than by individuals cannot serve as a point of departure. The Act's purposes in each instance are the same. Whether, then, the action is by a plaintiff or by the government, the object is 'the elimination of employment discrimination, whether practiced knowingly or unconsciously... Information relevant in an EEOC inquiry is equally relevant in a private action.

Rich, 522 F.2d at 344 (citations omitted).

\textsuperscript{147} The EEOC investigates charges of discrimination brought under Title VII and the ADEA. Section 709(a) of Title VII, 42 U.S.C. § 2000e-8(a) (1994), provides that the EEOC "shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices... and is relevant to the charge under investigation." Section 7(a) of the ADEA, 29 U.S.C. § 626(a) (1994), provides for similar EEOC investigations, "in accordance with the powers and procedures in sections 209 and 211 of the Fair Labor Standards Act.


In enforcing the EEOC subpoena, "courts have generously construed the term 'relevant' and have afforded the Commission access to virtually any material that might cast light on the allegations against the employer." EEOC v. Shell Oil Co., 466 U.S. 54, 68-69 (1984).
cants and as to the employer’s subsequent efforts in filling the position. It is clear that the plaintiff ‘does not have to prove a prima facie case to justify a request which appears reasonably calculated to lead to the discovery of admissible evidence.’

The plaintiff also may need workforce discovery to prove pretext. Even prior to Hicks’ more onerous definition of pretext, courts realized the necessity of “[c]areful review of discovery requests” once an employer has produced legitimate, nondiscriminatory reasons for the adverse action, “because the plaintiff ‘must take the extra step of presenting evidence to show that the reasons given [by the employer] are an attempt to cover up the employer’s alleged real discriminatory motive.’”

Additionally, the plaintiff may need workforce discovery to prove her entitlement to remedies such as lost wages and benefits, injunctive relief, and liquidated or punitive damages.

Three types of workforce data are particularly important for the plaintiff to discover, typically through interrogatories or requests for production of documents: a statistical profile of employees, personnel files of employees, and records of charges or complaints filed by employees.

149. See Parrish v. Ford Motor Co., No. 91-5300, 1992 U.S. App. LEXIS 3361, at *16 (6th Cir. Feb. 7, 1992) (stating discovery of other employees’ personnel files “is clearly necessary for [plaintiff] to establish a prima facie case of discrimination”); Weahkee v. Norton, 621 F.2d 1080, 1082 (10th Cir. 1980) (reversing trial judgment for employer where plaintiff was denied discovery of personnel files because “[t]he qualifications and job performance of these employees in comparison with the plaintiff’s qualifications and performance is at the heart of this controversy”); Davis v. Pyramid Prods., Inc., No. 93-CV-72174-DT, 1994 U.S. Dist. LEXIS 11761, at *17 (E.D. Mich. June 6, 1994) (comparing the plaintiff’s employment record with his competitor and concluding that plaintiff had not established a prima facie case).


152. See Blue Bell Boots, 418 F.2d at 358 (“Moreover, evidence concerning employment practices other than those specifically charged by complainants may properly be considered by the Commission in framing a remedy.”).

153. See EEOC v. Cosmair, Inc., 821 F.2d 1085, 1087 (5th Cir. 1987) (affirming district court’s entry of company-wide injunction in an ADEA individual disparate treatment case brought by the EEOC); Carmichael v. Birmingham Saw Works, 738 F.2d 1126, 1136 (11th Cir. 1984) (stating that in a Title VII individual disparate treatment case, “injunctive relief may benefit individuals not party to the action, and that classwide injunctive relief may be appropriate in an individual action,” so long as the plaintiff “would benefit personally from the relief requested”) (citing Evans v. Harnett County Bd. of Educ., 684 F.2d 304, 306 (4th Cir. 1982), and Meyer v. Brown & Root Constr. Co., 661 F.2d 369, 374 (5th Cir. 1981)); Marshall v. Goodyear Tire & Rubber Co., 554 F.2d 730, 733 (5th Cir. 1977) (stating that ADEA cases “establish that a nationwide or companywide injunction is appropriate only when the facts indicate a company policy or practice in violation of the statute”).

154. Section 7(b) of the ADEA provides that a prevailing plaintiff is entitled to liquidated damages for an employer’s “willful violation[ ]” of the statute. 29 U.S.C. § 626(b) (1994). In an ADEA case, the District of Delaware stated, “[i]f plaintiff establishes any prior adverse legal actions in ADEA matters, the existence of such rulings would shed light on the issue of willfulness if the fact-finder first determines an ADEA violation occurred.” Finch v. Hercules, Inc., 149 F.R.D. 60, 63 (D. Del. 1993). By analogy to Finch, discovery of workforce data in a Title VII case would be relevant to an award of punitive damages, which are allowed against a non-governmental employer if the plaintiff proves that the employer acted “with malice or with reckless indifference” to an aggrieved individual’s rights. 42 U.S.C. § 1977A(b)(1) (1994).
1. Statistical Profile of Employees

A Circumstantial Individual Disparate Treatment plaintiff is entitled to discover the statistical profile of other employees. For example, a plaintiff alleging age discrimination in transfers and promotions should be able to discover the percentage of employees in the protected class who received transfers and promotions, compared with the percentage of all employees in that protected class.\textsuperscript{155} "The courts cannot per se reject the use of statistics in an individual case."\textsuperscript{156}

Some courts allow this statistical evidence to buttress the plaintiff's prima facie case, even though such evidence does not fit squarely within any of the four prima facie elements.\textsuperscript{157}

The more important use of statistical evidence, however, is at the pretext stage. The McDonnell Douglas Court observed that "statistics as to [the employer's] policy and practice may be helpful" in determining pretext,\textsuperscript{158} although generalized statistics "may not be in and of themselves controlling" in an individual's case.\textsuperscript{159}

Workforce statistical profiles may effectively rebut the legitimate, nondiscriminatory reason articulated by the employer.\textsuperscript{160} The profiles also relate to

\textsuperscript{155} Bruno v. W.B. Saunders Co., 882 F.2d 760, 767 (3d Cir. 1989).

\textsuperscript{156} See Cross v. City of Ontario, No. 95-55437, 1996 U.S. App. LEXIS 24417, at *13 (9th Cir. Sept. 16, 1996) (reversing district court's determination that "statistical evidence was invalid as a matter of law"); cf. Riordan v. Kempiners, 831 F.2d 690, 698 (7th Cir. 1987) ("All evidence is probabilistic—statistical evidence merely explicitly so.").

\textsuperscript{157} See, e.g., Smith v. Horner, 839 F.2d 1530, 1536 n.8 (11th Cir. 1988) (finding statistical information "relevant and important" in an "individual case of disparate treatment") (quoting Carmichael v. Birmingham Saw Works, 738 F.2d 1126, 1131 (11th Cir. 1984)); Ardrey v. United Parcel Serv., 798 F.2d 679, 684 (4th Cir. 1986) (suggesting "such evidence may help establish a prima facie case"); Diaz v. American Tel. & Tel., 752 F.2d 1350, 1362 (9th Cir. 1985) (finding statistical information "helpful in establishing a prima facie case ‘despite the fact that [it] may not be directly probative of any of the four specific elements set forth by McDonnell Douglas’") (quoting Lynn v. Regents of the Univ. of Cal., 656 F.2d 1337, 1342-43 (9th Cir. 1989) (alteration in original)); Minority Employees at NASA v. Beggs, 723 F.2d 958, 962 (D.C. Cir. 1983) (allowing statistical evidence to "establish a prima facie case of employment discrimination in an individual case ‘even though such data is generally used in class action cases to show a pattern or practice of discrimination’") (quoting Davis v. Califano, 613 F.2d 957, 962 (D.C. Cir. 1979)); Wilkiev v. Norton, 621 F.2d 1080, 1083 (10th Cir. 1980) (ruling that "statistical evidence may be used to establish a prima facie case of employment discrimination")

\textsuperscript{158} McDonnell Douglas Co. v. Green, 411 U.S. 792, 804-05 (1973) (alteration in original),

\textsuperscript{159} Id. at 805 n.19; see also Carmichael, 738 F.2d at 1131 ("Statistics alone cannot make a case of individual disparate treatment.").

\textsuperscript{160} See Cross, 1996 U.S. App. LEXIS 24417, at *13-14 (approving use of statistical evidence "to show that defendants' stated reasons for rejecting [plaintiff]'s promotion were pretextual"); Hollander v. American Cyanamid Co., 895 F.2d 80, 84 (2d Cir. 1990) (finding it "well-settled that an individual disparate treatment plaintiff may use statistical evidence regarding an employer's general practices at the pretext stage to help rebut the employer's purported nondiscriminatory explanation"); MacDissi v. Valmont Indus., Inc., 856 F.2d 1054, 1058 (8th Cir. 1988) (describing statistical evidence as "surely the kind of fact which could cause a reasonable trier of fact to raise an eyebrow, and proceed to assess the employer's explanation for this outcome"); Weahke, 621 F.2d at 1083 (holding that, after an employer "has come forward with legitimate nondiscriminatory reasons for the action contested, a plaintiff may rely on statistics to discredit the reasons the employer presented for its action"); Fink, 149 F.R.D. at 63 (stating "[i]t follows that information on this potentially discriminatory conduct could be used by a plaintiff to . . . rebut any non-discriminatory reason offered by a defendant").
the ultimate issue of intentional discrimination, as required by Hicks: "Such a discriminatory pattern is probative of motive and can therefore create an inference of discriminatory intent with respect to the individual employment decision at issue." \(^{161}\)

The plaintiff is entitled to discover the raw statistical data about fellow employees even though the comparisons she draws ultimately may lack in weight or relevance. \(^{162}\) Moreover, if she has other evidence to discredit the employer’s articulated reason, her "quantitative [statistical] evidence does not need to reach the degree of certainty required of plaintiffs who present no proof of discrimination besides a statistical pattern." \(^{163}\)

2. Personnel Files of Employees

The Circumstantial Individual Disparate Treatment plaintiff frequently uncovers key evidence in other employees' personnel files, which are, of course, in "the exclusive control" of the employer. \(^{164}\) This evidence may be used in

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161. \textit{Diaz}, 752 F.2d at 1363; \textit{see also} \textit{Esold v. Wolf}, Block, Schorr & Solis-Cohen, 983 F.2d 509, 542 (3d Cir. 1992) (stating "statistical evidence of an employer's pattern and practice with respect to minority employment may be relevant to a showing of pretext"); \textit{Ardrey}, 798 F.2d at 684 (noting that "[s]uch evidence . . . is often crucial for the plaintiff's attempt to establish an inference of discrimination"); \textit{Sweat v. Miller Brewing Co.}, 708 F.2d 655, 658 (11th Cir. 1983) (finding "[s]tatistical information concerning an employer's general policy and practice concerning minority employment possibly relevant to a showing of pretext, even in a case alleging an individual instance of discrimination rather than a 'pattern and practice' of discrimination"); \textit{Clarke}, 25 Fed. R. Serv. 3d at 1177 (noting such evidence "may reveal patterns of discrimination against a group of employees; increasing the likelihood that an employer's offered explanation for an employment decision regarding a particular individual masks a discriminatory motive"). The Eastern District of Pennsylvania explained:

In order to prove any discriminatory intent, plaintiff contends that company-wide statistical evidence regarding the progress of blacks in the workforce would support his position that [defendant] declared the labor surplus as a pretext to remove [plaintiff] from his position because of [the plaintiff's] race, and replace him with a white employee. Indeed, statistical analysis might well be the only means by which plaintiff could prove an alleged pattern or practice of racial discrimination.

Miles v. Boeing Co., 154 F.R.D. 117, 121 (E.D. Pa. 1994); \textit{see also} \textit{Jackson v. Kenney}, 762 F. Supp. 863, 866 (W.D. Mo. 1991) (allowing plaintiff to prove pretext by "present[ing] statistical proof—defendant's answers to interrogatories—which shows that the number of females in the [defendant's] workforce is lower than the percentage of females holding similar positions in the private sector").

Cases brought by the EEOC are to the same effect. For example, the Fourth Circuit stated that:

the EEOC's request for job classifications, hire dates, and placement information is all highly relevant and material to a charge alleging the existence of a discriminatory promotion policy and classification of jobs by race. [The individual's] charge alleges the existence of at least plant-wide policies and the requested information would seem to contain very direct evidence of the existence or non-existence of such policies.

Graniteville Co. v. EEOC, 438 F.2d 32, 41-42 (4th Cir. 1971); \textit{see also} Elaine W. Shoben, \textit{The Use of Statistics to Prove Intentional Employment Discrimination}, 46 LAW AND CONTEMP. PROBS. 221, 237-42 (1983) (discussing how discriminatory intent may be inferred from statistical evidence).

162. \textit{E.g., MacDissi}, 856 F.2d at 1059 (entitling the district court to "give the most weight" to statistics from plaintiff's own department); \textit{Henderson v. National R.R. Passenger Corp.}, 113 F.R.D. 502, 507 (N.D. Ill. 1986) (finding statistics from other locations with lower percentages of minority employees went "to the weight, not the relevancy of the evidence").

163. \textit{MacDissi}, 856 F.2d at 1058.

the prima facie case, to establish the qualifications for the position in question.165 It also may be used to discredit the employer’s reason for its adverse action and to infer intentional discrimination.166 Additionally, it is relevant for damages calculations.167 Even without “a particularly broad definition of ‘relevance,’” there should be “wide discovery.”168

A prudent plaintiff should not request the employees’ entire personnel files, recognizing that they may contain irrelevant “personal and family matters.”169 Instead, she should request all portions of the personnel files relating to specific issues such as performance evaluations and disciplinary actions,170 which certainly are or “might be” relevant.171 The plaintiff undoubtedly requires personnel documents for all employees in her protected class and/or implicated in a similar adverse employment action.172 Moreover, she must

165. See supra note 149 and accompanying text.
166. See Coughlin, 946 F.2d at 1159 (finding evidence in personnel files of repeated disparity in punishment “clearly relevant in considering pretext”); Wilson v. Martin County Hosp. Dist., 149 F.R.D. 553, 555 (W.D. Tex. 1993) (finding “all or parts of these personnel files [could] be central to plaintiff’s effort to prove pretext and are therefore subject to disclosure”); Flanagan, 111 F.R.D. at 47 (viewing comparative information as “necessary to afford plaintiff a fair opportunity to develop her case” and possibly “relevant to establish the pretextual nature of defendant’s conduct”); Jackson v. Alterman Foods, 37 Fair Empl. Prac. Cas. (BNA) 837, 839 (N.D. Ga. 1984) (granting bulk of plaintiff’s motion to compel “personnel files of numerous employees who were either ‘terminated as part of defendant’s [alleged] pattern or practice of terminating older employees, had [allegedly] been otherwise discriminated against on account of age, or had been [allegedly] preferentially retained by the defendant company in the department in which plaintiff worked,” even in the face of defendant’s objection “that those people held jobs that the plaintiff was not qualified to perform and therefore the information is irrelevant” because “this information could be relevant to the plaintiff’s case if these employees were retained for reasons having to do with age”) (alterations in original).
167. See supra notes 152-154 and accompanying text.
168. Coughlin, 946 F.2d at 1159.
169. Sosky v. International Mill Serv. Inc., No. 94-2833, 1995 U.S. Dist. LEXIS 8507, at *13-14 (E.D. Pa. 1995); see also EEOC v. Avco New Idea Div., 26 Fed. R. Serv. 2d (Callaghan) 736, 741 (N.D. Ohio 1978) (“While there is no doubt is much that is irrelevant to this action contained in such persons’ personnel files, those files might reasonably be expected to yield probative evidence of plaintiff’s claims.”).

   Plaintiff justifies Request for Production of Documents by arguing that ‘the contents of a personnel file invariably contain relevant information.’ . . . Plaintiff has requested the pond so that it may go fishing. The rules require that plaintiff request the individual fish themselves. Plaintiff must request documents by specific relevant categories. If those documents are found in the personnel files, they must then be produced.

Id.; see also Sosky, 1995 U.S. Dist. LEXIS 8507, at *14 (finding the plaintiff not entitled to entire personnel files, but could, “within the time limits set for discovery, recast his request to demand disclosure of relevant documents in those files, i.e. transfers, evaluation reports, salary information, job disposition, complaints about any type of discrimination, discipline, etc.”).
171. Ladson v. Ultra E. Parking Corp., 164 F.R.D. 376, 378 (S.D.N.Y. 1996). The court also stated that it was “at a loss to see why current employees’ files might not provide information about hiring and promotion that could be relevant or could lead to the discovery of relevant evidence.” Id.; see also Willis v. Golden Rule Ins. Co., 56 Fair Emp. Prac. Cas. (BNA) 1451, 1454 (E.D. Tenn. 1991) (finding personnel files generally relevant).
172. Jackson v. Alterman Foods, 37 Fair Empl. Prac. Cas. (BNA) 837, 839 (N.D. Ga. 1984) (granting bulk of plaintiff’s motion to compel “personnel files of numerous employees who were either ‘terminated as part of defendant’s [alleged] pattern or practice of terminating older employees, had [allegedly] been otherwise discriminated against on account of age, or had been [allegedly] preferentially retained by the defendant company in the department in which plaintiff worked”) (alteration in original); see also Miles v. Boeing Co., 154 F.R.D. 112, 115 (E.D. Pa. 1994) (sub-
have access to personnel documents of the supervisors and managers who rendered the adverse employment decision.\textsuperscript{173} The employer must identify by name those employees, supervisors, and managers, for such identification is essential to the plaintiff's follow-up discovery.\textsuperscript{174}

Occasionally employers erroneously refuse to produce such personnel files on the grounds of privilege. Under federal law, applied to the plaintiff's claims under a federal anti-discrimination statute,\textsuperscript{175} no true privilege exists.\textsuperscript{176}

Employers also might refuse to produce the documents by challenging the information as private or confidential.\textsuperscript{177} Some courts agree with the employer and deny the plaintiff discovery.\textsuperscript{178} Other courts order the discovery to

jecting employment information regarding a competing candidate in an employment discrimination case to discovery"); cf. Gehring v. Case Corp., 43 F.3d 340, 342 (7th Cir. 1994) (affirming district court's discovery limitations on personnel files because the circumstances of the co-employees whose personnel files plaintiff sought "were not close enough to [plaintiff's] to make comparisons productive").

\textsuperscript{173} See Griffith v. Wal-Mart Stores, Inc., 163 F.R.D. 4, 4 (E.D. Ky. 1995) (granting plaintiff's motion to compel "personnel, appraisal and discipline files" of three managerial employees involved in plaintiff's termination); EEOC v. County of San Benito, 818 F. Supp. 289, 291 (N.D. Cal. 1993) (enforcing EEOC subpoena to obtain personnel record of supervisor of charging party); in Avco New Idea Div., the court stated:

The gravamen of plaintiff's complaint is that unequal standards were applied to women in the defendant company's classification and discharge policies. If such unequal treatment did exist, it necessarily was carried out by the defendant company's supervisory personnel. While there no doubt is much that is irrelevant to this action contained in such persons' personnel files, those files might reasonably be expected to yield probative evidence of plaintiff's claims.

\textit{Avco New Idea Div.}, 26 Fed. R. Serv. 2d (Callaghan) at 741.

\textsuperscript{174} But see Prouty v. National R.R. Passenger Corp., 99 F.R.D. 545, 549 (D.D.C. 1983) (denying the plaintiff's motion to compel the employer to identify relevant employees by name and stating, "[t]he Court finds that the names of [defendant] employees are not relevant to plaintiff's suit").

\textsuperscript{175} See Coughlin v. Lee, 946 F.2d 1152, 1159 (5th Cir. 1991) ("When considering a federal claim, federal courts apply federal common law, rather than state law, to determine the existence and scope of a privilege."); Horizon of Hope Ministry v. Clark County, 115 F.R.D. 1, 6 (S.D. Ohio 1986) ("However, in a federal civil rights action, federal law applies to the determination of what evidence is privileged.").

\textsuperscript{176} See University of Pa. v. EEOC, 493 U.S. 182, 189 (1990) (refusing to grant employer privilege from producing peer review materials); Horizon of Hope Ministry, 115 F.R.D. at 6 (stating that, "[u]nder federal law, there is no privilege for personnel files").

\textsuperscript{177} Miles v. Boeing Co., 154 F.R.D. 112, 115-16 (E.D. Pa. 1994). The Miles court stated:

I am requiring defendant to show good cause for any and all confidential designations. As revised the order shall require defendant to designate information as confidential pending either an agreement to that effect with Plaintiff or the decision on a motion to that effect made by defendant within ten days of such designation. This system does not allow misuse of the confidential designation and places the burden of proving such confidentiality squarely upon defendant as is required by Rule 26(c) and the First Amendment. ... To allow information to become presumptively confidential without affording Plaintiff an opportunity to disagree with that designation and then to bear the burden of mounting a challenge would run afoul of the basic burden-shifting approach mandated by Rule 26(c).

\textit{Id.}

\textsuperscript{178} E.g., Gehring v. Case Corp., 43 F.3d 340, 342 (7th Cir. 1994) (affirming district court's limitation on discovery of personnel files, where "[t]urning over the files ... would invade the privacy of the other employees"). It is unclear what authority supports wholesale denial of personnel files on privacy grounds. Rule 26(c)(7) protects privacy only in the context of a "trade secret or other confidential research, development, or commercial information." \textit{Fed. R. Civ. P.} 26(c)(7).
proceed forthwith, apparently unconcerned with the issue of privacy in the face of a compelling Circumstantial Individual Disparate Treatment claim.\textsuperscript{179}

The most appropriate course of action is for the court to allow the discovery pursuant to a protective court order, drafted either by the parties\textsuperscript{180} or by the court.\textsuperscript{181}

\textsuperscript{179} E.g., Burka v. New York City Transit Auth., 110 F.R.D. 660, 666 (S.D.N.Y. 1986) ("[Factual disclosure of personnel files] is most strongly warranted where a case is based on alleged violations of federally-protected civil rights."); Clarke v. Mellon Bank, N.A., 25 Fed. R. Serv. 3d (Callaghan) 1176, 1179 (E.D. Pa. 1993) ("Defendant's concern regarding the privacy interests of the employees on the document has already been met by virtue of a Stipulated Protective Order. . . . The protective order is broad in its scope and limits disclosure of all documents during any phase or aspect of discovery."); Willis v. Golden Rule Ins. Co., 56 Fair Empl. Prac. Cas. (BNA) 1451, 1454 (E.D. Tenn. 1991) ("The privacy of any individual and the confidentiality of the files may be protected by an appropriate protective order."); Flanagan, 111 F.R.D. at 48 ("The parties are free to fashion an appropriate confidentiality order to protect privacy rights.").

\textsuperscript{180} Miles, 154 F.R.D. at 116. Miles provides a typical protective order:

AND NOW, this 2nd day of March, 1994, after careful consideration of defendant's Motion for Protective Order, it is hereby ORDERED that Defendant's Motion is GRANTED subject to the restrictions and procedures set forth in the attached Memorandum.

Confidential Documents shall be used solely for the purposes of this litigation captioned as Miles v. Boeing, Civil Action No. 93-3063, which is currently pending in the United States District Court for the Eastern District of Pennsylvania, and shall be disclosed only to the following persons:

a. counsel for any party engaged in the litigation of this action and professional, clerical, secretarial and other support personnel of such counsel;

b. specifically named parties to this litigation;

c. experts retained to assist counsel for any party to this litigation;

d. witnesses in the course of deposition or at trial, in the good faith belief of counsel that examination with respect to Confidential Document is necessary for legitimate discovery purposes;

e. this Court and its employees, the triers of fact and court reporters transcribing testimony herein (whether during the course of deposition or trial testimony) and notarizing officers.

Prior to the disclosure of Confidential Documents to any person described in the preceding paragraphs, counsel for Miles shall provide such person with a copy of this Order and shall advise them that the disclosure of Confidential Documents is subject to its terms. Confidential Documents shall be disclosed to an expert only after the expert has signed a Commitment to Comply With and Be Bound by Confidentiality Order. Counsel for Miles shall retain copies of the undertakings she receives from persons to whom she provides Confidential Documents in accordance with this Order. On request of counsel for Boeing, counsel for Miles shall certify that she has complied with the provisions of this paragraph.

At the conclusion of the lawsuit, all Confidential Documents, including originals, copies, abstracts or summaries thereof, shall be returned to counsel for Boeing, and no copies thereof shall be retained by any other person; provided, however, that counsel for Miles may keep one copy of any part of the Confidential Documents that have become part of the official record of this litigation. Such copy shall remain subject to the terms of this Stipulation.

In any case that Confidential Documents are furnished to a testifying or consulting expert retained by counsel for Miles, counsel for Miles shall have the responsibility of ensuring that all such Confidential Documents, including abstracts and summaries thereof, are returned to Boeing.
3. Charges or Complaints Filed by Employees

The Circumstantial Individual Disparate Treatment plaintiff often seeks to discover whether other employees have filed charges of discrimination with the EEOC or have filed discrimination suits in the courts. Certainly, charges or complaints involving the same protected class and a similar adverse action are relevant to show "general patterns of discrimination by an employer."\(^{182}\)

A charge of Title VII or ADEA discrimination is filed by an aggrieved individual with the EEOC or with a comparable state agency.\(^{183}\) During investigation and conciliation, the EEOC must keep the charge confidential and cannot release it,\(^{184}\) but arguably an employer is free to release\(^{185}\) the copy of the charge it has received from the EEOC.\(^{186}\)

The employer may object to producing charges of discrimination on grounds of privacy or confidentiality.\(^{187}\) Some courts have adopted a strict rule against production of the charges because "disclosure might inhibit em-

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Counsel for Miles may retain abstracts or summaries of Confidential Documents which contain counsel's mental impressions or opinions. Such abstracts or summaries shall, however, remain subject to the terms of this Stipulation.

\textit{Id.}

182. As to the relevancy of charges, see Nelson v. Telecable of Overland Park, Inc., 70 Fair Empl. Prac. Cas. (BNA) 859, 862 (D. Kan. 1996) (stating "identities of persons who have filed complaints with the EEOC appear reasonably calculated to lead to the discovery of admissible evidence"); Rodger v. Electronic Data Sys. Corp., 155 F.R.D. 537, 541 (E.D.N.C. 1994) (finding administrative complaints filed by other employees "highly relevant to evaluate the defendant's employment practices as a whole and provide evidence regarding intent and willfulness"); Abel v. Merrill Lynch & Co., 91 Civ. 6261 (RPP), 1993 U.S. Dist. LEXIS 1213, at *14 (S.D.N.Y. Feb. 4, 1993) (granting plaintiff's motion to compel employer's production of age discrimination charges involving the same RIF because such charges "may well lead to discovery of admissible evidence tending to show a pattern and practice of discrimination against older employees"); Flanagan, 111 F.R.D. at 48 (granting plaintiff's motion to compel "information regarding gender or age discrimination complaints filed ... with any governmental agency ... charging [the employer] with gender or age discrimination"); Jackson v. Alterman Foods, 37 Fair Empl. Prac. Cas. (BNA) 837, 838 (N.D. Ga. 1984) (granting plaintiff's discovery request to gather "information in order to accumulate statistical evidence ... which is relevant to [the] charge of age discrimination").

183. As to the relevancy of complaints, see Flanagan, 111 F.R.D. at 48-49 (granting plaintiff's motion to compel information "with respect to any civil action filed against [defendant] alleging age discrimination"); Jackson, 37 Fair Empl. Prac. Cas. (BNA) at 838 (rejecting employer's argument that other age discrimination complaints filed against it were irrelevant). But see Proudy, 99 F.R.D. at 549 (denying the plaintiff's motion to compel lawsuits filed against [employer] for discharge during two months of 1981 and in stating, "[t]he Court finds that issues raised in other lawsuits are not relevant to this case"). The holding of Proudy, however, was expressly rejected in Rodger, 155 F.R.D. at 541 n.1.


185. Abel, 1993 U.S. Dist. LEXIS 1213, at *13 (declining to extend the prohibition on disclosure "beyond the EEOC").

186. Section 706(b) of Title VII provides that the EEOC shall provide the employer a copy of the charge "within ten days." 42 U.S.C. § 2000e-5(b) (1994). Section 7(d) of the ADEA, 29 U.S.C. § 626(d) (1994), provides that the EEOC "shall promptly notify" the employer of the charge. 29 U.S.C. § 626(d) (1994).

187. See Abel, 1993 U.S. Dist. LEXIS 1213, at *14 (rejecting employer's argument that production of charges would result in "undue prejudice" and holding such argument "goes to the admissibility" of the charges at trial and is "not ground for objection to discovery").
employees from bringing such charges and employers from entering into the conciliation process."\(^{188}\) Other courts reject any notion of privacy.\(^{189}\) The middle view is to compel production of the charges, subject to a protective order.\(^{190}\) Once an employee has filed a discrimination suit with a court, however, "the process becomes a public one"\(^{191}\) and the employer certainly cannot object to the production of the complaints on privacy grounds.\(^{192}\)

B. When Production of Employment Data Becomes Unduly Burdensome or Expensive

To avoid responding to the plaintiff's discovery requests for statistical data, personnel files, and charges or complaints filed by other employees, the employer cannot argue merely that the requests are burdensome.\(^{193}\) As the Tenth Circuit stated in Rich, "[i]f the information sought promises to be particularly cogent to the case, the [employer] must be required to shoulder [some] burden.\(^{194}\) Rather, to avoid the discovery, the employer must specifically demonstrate\(^{195}\) that the plaintiff's discovery requests are "unduly burdensome or expensive."\(^{196}\) In most cases it cannot prove such a high degree of burden, especially where much of the data might be accessible from com-

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188. E.g., Johnson v. Southern Ry. Co., 25 Fair Empl. Prac. Cas. (BNA) 714, 720 (N.D. Ga. 1977); see also Prouty, 99 F.R.D. at 553 (denying plaintiff's motion to compel production of claims filed with EEOC and other agencies because it "would be an invasion of privacy" and "could very well inhibit other employees from bringing such charges").


190. E.g., Flanagan, 111 F.R.D. at 48 ("Any information discovered during the course of these proceedings should only be utilized in connection with this litigation and not disseminated in any manner. The parties are free to fashion an appropriate protective confidentiality order if this is necessary."); see also supra note 181 (providing sample protective order).

191. Johnson, 25 Fair Empl. Prac. Cas. at 720 (granting plaintiff's motion to compel production answer of interrogatory "as it relates to Title VII hiring discrimination suits already filed in court").

192. Flanagan, 111 F.R.D. at 48-49 (ordering defendant to respond in full because "the information sought by plaintiff is a matter of public record"); see also Jackson, 37 Fair Empl. Prac. Cas. (BNA) at 839 (rejecting employer's argument that age complaints and lawsuits filed against it were privileged).

193. See supra notes 114-115 and accompanying text.


195. For example, the Eastern District of Pennsylvania stated:

"Defendant has not demonstrated an undue burden here. For one, the Court has not been told that these records are maintained at various locations, rather than at one central location. Even if the records are maintained at several places the Court has no evidence to suggest that defendant and its agents cannot quickly and efficiently search the files to uncover the necessary information.


puters and where it could produce documents in lieu of generating narrative answers to interrogatories. The employer certainly cannot claim an undue burden where it is required to review the same material for its own case preparation. Nor can it claim undue burden where it has created other discovery impediments for the plaintiff.

Thus, the courts rarely should find that the employer has proven such undue burden or expense as to avoid otherwise relevant discovery propounded by the plaintiff. The Tenth Circuit in Rich offered a workable solution—order the discovery to proceed and allow the employer its attorneys fees and costs “if the [plaintiff’s discovery] effort fizzes.”

197. In EEOC v. Lockheed Martin Corp., the court justified the EEOC’s request for information on a computer filing system by stating:

[T]he EEOC, armed with the preliminary information it seeks, can frame its subsequent requests with greater specificity and with a greater likelihood of obtaining all the personnel information to which it is entitled. Similarly, the ability to frame more precise requests will help limit the possibility that irrelevant or unnecessary material will be produced for the EEOC to review.


198. See supra note 119 and accompanying text. In Jackson v. Alterman Foods, the court stated:

The defendant also argues that these requests are burdensome and that, because the burden of gathering this information would be substantially the same on both parties, the defendant should only be required to produce the records from which this information may be ascertained. This Court holds that the defendant may proceed in this manner but should the plaintiff be able to prove that the defendant could have produced this information in a simple and reasonable manner, he is at liberty to file a motion with this Court to recover the expenses incurred by looking through the defendant’s records.

Jackson v. Alterman Foods, 37 Fair Empl. Prac. Cas. (BNA) 837, 838 (N.D. Ga. 1984); see also Halder v. International Tel. & Tel. Co., 75 F.R.D. 657, 658 (E.D.N.Y. 1977) (finding plaintiff’s interrogatories for various employee information to be unduly burdensome, because, “even though the requested information is in defendant’s control, he should not be forced to engage in extensive research and compilation”).

199. Brown v. Ford Motor Co., 25 Fair Empl. Prac. Cas. (BNA) 708, 709-10 (N.D. Ga. 1978) (granting plaintiff’s motion to compel the employer to identify “all documents or other physical evidence which reflect any information requested in other interrogatories” and rejecting the employer’s argument of undue burden because the employer “will likely have to review it in order to answer the interrogatories”).

200. The court in Abel granted plaintiff’s motion to compel and stated:

Due to the size of the defendant and the extent to which the defendant’s record-keeping system has provided impediments to Plaintiff’s obtaining discovery thus far, Plaintiff has yet to obtain basic statistical data as to the ages of employees terminated firm-wide. Plaintiff is consequently unable to narrow the scope of her inquiry into other charges of age discrimination by department or time.


201. Rich, 522 F.2d at 343. However, a court should not punish the plaintiff simply for propounding the discovery. But see Rodger v. Electronic Data Sys. Inc., 155 F.R.D. 537, 542 (E.D.N.C. 1994) (denying the plaintiff’s motion to compel in part and finding “it appropriate to tax the cost of production of the above specified materials to Plaintiffs” so as to “encourage Plaintiffs to narrowly tailor their discovery requests”).
V. THE APPROPRIATE WORKFORCE SCOPE OF PLAINTIFF’S DISCOVERY IN CIRCUMSTANTIAL INDIVIDUAL DISPARATE TREATMENT LITIGATION

As explained in Part IV above, the plaintiff in a Circumstantial Individual Disparate Treatment case must discover certain workforce data in order to bolster her prima facie case, to prove pretext, and to prove her entitlement to various remedies. The employer often resists the discovery by claiming that the plaintiff has requested "information regarding other discrimination claims for unrelated facilities of a defendant employer, or even unrelated divisions."202 The employer will interpret the plaintiff’s complaint in a light most beneficial to the employer by asserting that "unless a pattern or practice is alleged . . . the plaintiff has not established the requisite particularity that would justify discovery on the issue."203 Thus, a prudent plaintiff, although entitled to notice pleading,204 is well advised to allege in her complaint any belief she has as to system-wide discrimination that contributed to her own adverse employment action.205

A. SIMILARLY SITUATED EMPLOYEES

The plaintiff is entitled to workforce discovery of "similarly situated employees,"206 a term defined and applied inconsistently by the courts. The term "should not be used to create arbitrary limitations on discovery,"207 and

202. Hedican & Loudon, supra note 63, at 1011.
203. Id. The article continues, "[i]n fact, defense attorneys may be able to use the particularity provision as a vehicle for limiting the scope of discovery in general. The argument would be that the provision states a congressional preference for tying discovery only to issues apparent in the pleadings." Id.
204. See supra note 94 and accompanying text.
205. See Joslin Dry Goods Co. v. EEOC, 483 F.2d 178, 182 (10th Cir. 1973) ("Nothing in [the] charge or the pleadings suggested company-wide hiring and firing policies and practices."); Hinton v. Entex Inc., 93 F.R.D. 336, 337 (E.D. Tex. 1981) (restricting plaintiff’s scope of discovery because “the Plaintiff has not made any specific factual allegations of discrimination that pertain to any facility of [defendant] other than the one located at Jacksonville.”). Of course, such allegations must be consistent with Federal Rules of Civil Procedure, in that they are “warranted by existing law or by a nonfrivolous argument” for a change in the law, “have evidentiary support” or “are likely to have evidentiary support,” and are not “presented for any improper purpose.” Fed. R. Civ. P. 11(b).
206. See EEOC v. Ford Motor Credit Co., 26 F.3d 44, 47-48 (6th Cir. 1994) (noting plaintiff’s claim could not be adjudicated “without deciding whether she was in fact situated similarly to men who were promoted”); Cosgrove v. Sears, Roebuck & Co., 9 F.3d 1033, 1041 (2d Cir. 1993) (presenting a comparison of "similarly situated employees"); Hicks v. Arthur, 159 F.R.D. 468, 470 (E.D. Pa. 1995) (requiring plaintiffs to show “members of non-protected classes, similarly situated, were treated differently than they were” in making out disparate treatment claim); Rikfinson v. CBS Inc., 69 Fair Empl. Prac. Cas. (BNA) 98, 98 (S.D.N.Y. 1995) (suggesting probative comparative evidence “must relate to employees who are similarly situated to [plaintiff]” and noting that, “[w]hile this principle should not be used to create arbitrary limitations on discovery, the categories suggested by [defendant] appear at this time to be reasonable”); Flanagan, 111 F.R.D. at 47 (restricting discovery requests generally to “similar employees”); Jackson v. Alterman Foods, 37 Fair Empl. Prac. Cas. (BNA) 837, 840 (N.D. Ga. 1984) (granting plaintiff’s motion to compel discovery of “potentially similarly situated employees”).

The plaintiff also needs evidence regarding those supervisors and managers who made the adverse employment decision. See supra note 173 and accompanying text.
207. Rikfinson, 69 Fair Empl. Prac. Cas. at 98.
several factors must be examined to determine whether other employees are indeed "similarly situated."

1. The Protected Class

The plaintiff usually must restrict her discovery to comparative workforce data involving the protected class of which she is a member and upon which her complaint is based.208 Thus, if she alleges sex discrimination, she is entitled to workforce data broken down by gender, but not by race or national origin.

2. The Positions Held

The plaintiff should not be limited to a definition of "similarly situated" that encompasses only those employees who held the same positions as she did. First, there may very few, if any, other employees in identical jobs.209 Second, because Circumstantial Individual Disparate Treatment often arises from an employer’s overall practices, broader "comparative evaluation . . . is obviously essential."210

The plaintiff must make some minimal showing as to why the positions held by other employees are comparable enough to warrant discovery,211 but this should not be a heavy burden. She should be entitled to data for all em-

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208. See General Ins. Co. of Am. v. EEOC, 491 F.2d 133, 136 (9th Cir. 1974) (finding EEOC’s administrative subpoena was overbroad in “demand[ing] evidence going to forms of discrimination not even charged or alleged”); Finch v. Hercules, Inc., 149 F.R.D. 60, 63 n.3 (D. Del. 1993) (determining that plaintiff had “correctly withdrawn his requests for information relevant to types of discrimination other than age”); Robbins v. Camden City Bd. of Educ., 105 F.R.D. 49, 57-58 (D.N.J. 1985) (stating that where complaint alleges race and age discrimination, discovery is limited to those protected categories); Prouty v. National R.R. Passenger Corp., 99 F.R.D. 545, 546 (D.D.C. 1983) (refusing to allow plaintiff discovery of information pertaining to race because he alleged only age discrimination); McClain v. Mack Trucks, Inc., 85 F.R.D. 53, 63 (E.D. Pa. 1979) (indicating that “whether [the employer] discriminates against employees on the basis of religion, creed, gender or national origin is wholly irrelevant to his present claim”). The plaintiff’s complaint generally cannot expand upon the types of discrimination alleged in, or investigated pursuant to, the underlying charge of discrimination. See Sanchez v. Standard Brands, Inc., 431 F.2d 455, 465-67 (5th Cir. 1970).
209. E.g., Georgia Power Co. v. EEOC, 412 F.2d 462, 468 (5th Cir. 1969) (“The EEOC cannot reasonably be expected to discern such discrimination by examining data relating to two individuals.”).
210. Id. (affirming district court’s allowance of discovery of all nonsupervisory personnel); see also Holley v. Pansophic Sys., Inc., 64 Fair Empl. Prac. Cas. (BNA) 366, 368 (N.D. Ill. 1993) (stating that “[e]vidence of discrimination against women at the highest management levels . . . would lend credibility to plaintiffs’ allegations of similar discrimination at the middle management level”).
211. See Nelson v. Telecable of Overland Park, 70 Fair Empl. Prac. Cas. (BNA) 859, 861 (D. Kan. 1996) (denying plaintiff’s motion to compel “information about all employees, without regard to their circumstances of employment which might make information about their employment relevant to this action” because “[t]he parties . . . have given no guidance” as to which employees are similarly situated); Hicks v. Arthur, 159 F.R.D. 468, 470 (E.D. Pa. 1995) (denying plaintiffs’ motion to compel employer answer to interrogatory requesting identifying data on employees in various jobs because plaintiffs “have not demonstrated how [employees holding certain job titles they never held] are similarly situated to them”); Robbins, 105 F.R.D. at 62 (noting that plaintiff was employed by defendant “exclusively as a teacher” and had “failed to demonstrate the relevance of information on job categories other than teachers”).
ployees holding equivalent ranks or grades, in the same or related departments, or performing related work.

The Eastern District of Pennsylvania in Clarke v. Mellon Bank, N.A. took the sensible and fair approach in granting the plaintiff's motion to compel all documents regarding the employer's decision to reorganize a department. It rejected the employer's argument that the request involved "information concerning literally hundreds of employees from departments/divisions other than Plaintiff's department/division, and did not share the same or similar title, salary grade or duties as plaintiff." The court considered the information essential to the plaintiff's opportunity to prove her case: "[I]t thus, this Court's refusal to compel production . . . could well deprive this plaintiff of evidence potentially helpful to her attempt to assemble such a quantum of circumstantial evidence supporting her argument of pretext."

3. The Adverse Employment Action Suffered

The plaintiff also should restrict her discovery to similar types of adverse employment actions which she suffered. For example, where a plaintiff alleges discrimination in tenure and some forms of harassment, she typically cannot discover information on hiring, promotion, transfer, or discharge.

It must be remembered, however, that many types of adverse employment actions, most notably reductions in force (RIFs), may affect employees at all

212. Parrish v. Ford Motor Co., No. 91-5300, 1992 U.S. App. LEXIS 3361, at *18 (6th Cir. Feb. 7, 1992) ("We are inclined to believe that further discovery is in order. Accordingly, we strongly suggest that the district court permit discovery of all the personnel files of grade 12 or 13 Ford employees who were promoted or transferred.").

213. See Cosgrove v. Sears, Roebuck & Co., 9 F.3d 1033, 1041 (2d Cir. 1993) (restricting plaintiff's discovery to specific departments); Flanagan, 111 F.R.D. at 47 (restricting plaintiff's discovery to claims employees).

214. See Rikinson v. CBS Inc., 69 Fair Empl. Prac. Cas. (BNA) 98, 98 (S.D.N.Y. 1995) (restricting plaintiff's discovery to "employees categorized as operations producers or unit managers, but not with respect to clerical or executive personnel" because plaintiff "was a mid-level manager who did not perform creative, technical, 'on-air,' or executive responsibilities and did not seek such positions"); Duncan v. Maryland, 78 F.R.D. 88, 94 (D. Md. 1978) (denying plaintiff's motion to compel discovery of faculty employees, but allowing discovery of staff employees).


216. Clarke, 25 Fed. R. Serv. 3d (Callaghan) at 1178.

217. Id. at 1178-79; see also Abel v. Merrill Lynch & Co., 91 Civ. 6261 (RPP), 1993 U.S. Dist. LEXIS 1213, at 43-4 (S.D.N.Y. Feb. 4, 1993) (rejecting, at the discovery stage, employer's argument that "statistics regarding the overall entity are meaningless where individual employment decisions were made at a local level") (citing Coser v. Moore, 739 F.2d 746, 750 (2d Cir. 1984) and Zahorik v. Cornell Univ., 729 F.2d 85, 95 (2d Cir. 1984)).


[the motion to compel] discovery concerning the entire scope of the defendant's personnel practices and procedures for the entire corporation . . . is denied because there is no indication that plaintiff's claim in any way involves how applicants are treated, the corporation's hiring practices, the administering of tests for hiring or promotions, the pay rates established and how they are administered, or other practices and procedures which are the subjects of many of the interrogatories at issue.


levels and locations of the employer. Furthermore, some employment practices are intertwined, such as promotions and seniority.

4. The Supervisory Chain of Command

Yet another argument posited by employers in opposition to the plaintiff’s discovery of workforce data is that only those employees reporting to the same supervisor or manager are similarly situated. For example, in Aramburu v. Boeing Co., the District of Kansas limited the plaintiff’s discovery to “the work histories of the thirty employees who worked under [his supervisor] at the same time the plaintiff did,” believing that “disciplinary measures undertaken by different supervisors may not be comparable for purposes of Title VII analysis.” The court did acknowledge that the personnel files of other employees “may contain some information relevant to evaluating the statistics regarding [the employer’s allegedly discriminatory] attendance policies,” but found them to be “of limited or negligible value.”

Such a restriction on the plaintiff’s discovery is unjustified. Rarely does the immediate supervisor or manager alone make such an adverse employment decision as suspension or termination; it is far more likely that the decision is made only after consulting other corporate officers or the human resources department regarding written procedures or unwritten customs.

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220. See Abel, 1993 U.S. Dist. LEXIS 1213, at *1-2 (allowing company-wide discovery of employer’s demographic analysis, where employer argued that the plaintiff “was terminated as part of a company-wide reduction in work force”); Haykel v. G.F.L. Furniture Leasing Co., 76 F.R.D. 386, 390-91 (N.D. Ga. 1976) (allowing company-wide discovery because certain decisions were made at a central office); cf. Marzano v. Computer Science Corp., 91 F.3d 497, 505 (3d Cir. 1996) (rejecting the employer’s argument that its RIF was limited to only one unit, where that unit was “independent in name only”).


222. See Duncan v. Maryland, 78 F.R.D. 88, 94 (D. Md. 1978). In Duncan, the district court denied plaintiff’s motion to compel answers to deposition questions and other discovery regarding faculty and associate staff at other campuses. However, the court noted plaintiff’s “personal complaint and the examples of discrimination against others proffered by him” did not “involve practices of general scope” but, rather, “only the specific employment decision affecting him and them.” Under these circumstances, “the general pattern of decision by the person or persons who fired plaintiff [was] highly probative, relevant, and discoverable.” Id.


224. Aramburu, 885 F. Supp. at 1442 (quoting Jones v. Gervens, 874 F.2d 1534, 1541 (11th Cir. 1989)); see also Rodger v. Electronic Data Sys., Corp., 155 F.R.D. 537, 540 (E.D.N.C. 1994) (“The only similarly situated employees to Plaintiffs in this case are those . . . whose employment situations, like Plaintiffs’, were supervised by the President of the State Operations Division.”).

225. Aramburu, 885 F. Supp. at 1444. The court did, however, leave open the possibility for further discovery: “At least at this point in time, the information provided by the defendant should be sufficient for the plaintiff to make, at the very least, a preliminary determination as to . . . disparate treatment in the enforcement of [defendant’s] attendance policies.” Id.

226. See Suspension Instead of Immediate Discharge Can Solve Numerous Problems. MINNESOTA EMPLOYMENT L. LETTER, March 1995, at 4. (“The human resources department or upper management can then make the decision [between discharge and lesser discipline] after careful investigation and complete consideration of all the facts.”); To Suspend or Not to Suspend: That is the Question, PENNSYLVANIA EMPLOYMENT L. LETTER, August 1995, at 3 (“The human resources department or senior management can then make an informed decision [between discharge and lesser discipline] based on a complete set of facts.”). Courts agree with this analysis as well. See Kitchen v. Dial Page, Inc., 67 Fair Empl. Prac. Cas. (BNA) 482, 484 (E.D. Tenn. 1995) (granting
Even if the immediate supervisor does have independent authority to make the adverse employment decision, more extensive discovery by the plaintiff could establish a discriminatory pattern throughout the employer. The Ninth Circuit recognized this possibility in *Diaz v. American Telephone & Telegraph*.

The court rejected the employer's arguments for limiting discovery—that “promotions outside of Tucson were made by decision makers other than the Operations Manager who made the challenged promotion decision”—and presented a compelling justification for greater discovery:

> The underlying purpose of statistical information [is] to provide otherwise unavailable indications of an employer's conscious or unconscious motives. [Plaintiff] contends that his employer . . . engages in a region-wide policy of discrimination. The existence of a pattern of racial disparity in [defendant’s] employment decisions would allow for an inference about its motives. This would bolster [plaintiff’s] prima facie case and would support his contention that the articulated reason for [defendant’s] failure to promote [plaintiff] is pretextual. . . . One way of reaching conclusions about an employer’s motives is by ascertaining whether the employer’s explicit or implicit policies encourage or permit discriminatory employment decisions by its supervisory personnel.

The plaintiff's access to such information is made all the more crucial by *Hicks*’ narrow definition of pretext.

Because the plaintiff can no longer prove pretext merely by discrediting the employer's reason, she must search throughout the employer's records for relevant evidence from which an intent to discriminate can be inferred.

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plaintiff's motion to compel company-wide discovery in part because of human resource manager's input regarding “the company guideline and the company standing on the decision”); *Haykel v. G.F.L. Furniture Leasing Co.*, 76 F.R.D. 386, 391 (N.D. Ga. 1976) (finding nationwide discovery relevant where “there is some evidence that salary records are centrally held . . . and that the Atlanta facility is responsible for appointing managers of the outlying stores”); *Foster v. Boise-Cascade, Inc.*, 10 Fair Empl. Prac. Cas. (BNA) 1287, 1289-90 (S.D. Tex. 1975) (noting that “many of the hiring decisions made at the Houston plant are the result of consultation with . . . [the] district manager” in St. Louis, and that “transfer of managerial personnel between defendant's plants in Texas . . . reinforce[d] the named plaintiff's contention that defendant's employment practices operate on at least a state-wide basis”).

227. 752 F.2d 1356 (9th Cir. 1985).

228. *Diaz*, 752 F.2d at 1363.

229. *Id.* at 1363-64; see also *Henderson v. National R.R. Passenger Corp.*, 113 F.R.D. 502 (N.D. Ill. 1986). In *Henderson*, the plaintiff sued for Circumstantial Individual Disparate Treatment on account of race and sought discovery regarding all employee violations of certain rules nationwide for a five-year period. The employer argued that discovery should be limited to those employees subject to the same hearing officer. The court rejected the employer’s argument, stating that “[i]limiting the geographical scope of discovery . . . and the time to only those investigations conducted by [the hearing officer], attempt[s] to limit the plaintiff's cause of action and theory of discrimination. [Defendant’s] attempt, at this stage, to limit the theory of plaintiff's case and consequent need for proof is improper.” *Id.* at 507.

230. *See supra* notes 57-65 and accompanying text.
B. Geographic Scope

After determining which employees are "similarly situated" to the plaintiff, courts must determine the proper geographic scope of the plaintiff's workforce discovery, as there may be similarly situated employees in many of the employer's work sites. Two frequently cited circuit court cases have inappropriately narrowed the geographic scope of such workforce discovery. To make matters worse, certain later court opinions have misconstrued the cases.

In Joslin Dry Goods Co. v. EEOC,231 the EEOC sought enforcement of a subpoena for information regarding six of the employer's stores. The Tenth Circuit, affirming the district court, limited the EEOC's subpoena to the store at which the aggrieved individual had worked.232 The court justified its limitation because the single store "maintain[ed] its own separate personnel records and there [were] no central employment records,"233 and because "[i]t was not shown that there were any hiring or firing practices and procedures applicable to all of the stores."234 The court essentially "permit[ted] an inference that each of the . . . stores was a separate employing unit."235

In Marshall v. Westinghouse Electric Corp.,236 the Fifth Circuit made even more bold and damaging assumptions about the geographic scope of the plaintiff's workforce discovery. The Secretary of Labor, as the plaintiff, sought information concerning all employees terminated within a particular division of the employer, which "would strengthen his claim by showing a pattern or practice."237 The court, relying on McDonnell Douglas, observed that "the type of statistical evidence . . . sought through the discovery order was relevant to [the plaintiff's] individual case" and that "[a] plaintiff who must shoulder the burden of proving that the reasons given for his discharge are pretextual should not normally be denied the information necessary to establish that claim."238 Nonetheless the court, apparently concerned that the plaintiff could use such broad discovery to "go fishing,"239 ruled that "in the context of investigating an individual complaint the most natural focus is upon the source of the complained of discrimination[—]the employing unit or work unit."240

231. 483 F.2d 178 (10th Cir. 1973).
232. Joslin Dry Good, 483 F.2d at 184.
233. Id. at 182.
234. Id. at 184.
235. Id. at 183-84 (emphasis added).
236. 576 F.2d 588 (5th Cir. 1978).
237. Westinghouse, 576 F.2d at 592.
238. Id.
239. Id.
240. Id. (citing EEOC v. Packard Elec. Div., 569 F.2d 315 (5th Cir. 1978)). In Packard, the Fifth Circuit affirmed the district court's denial of an EEOC administrative subpoena for "workforce breakouts" at all facilities at which charging parties worked. EEOC v. Packard Elec. Div., 569 F.2d 315, 318 (5th Cir. 1978). The district court had limited discovery to the departments in which the charging parties had worked. Id. The circuit court held:

In the context of an investigation of an individual complaint, it might well be most natural to focus on that employing unit or work unit from which came the decision of which the individual complainant complains; within such a unit the EEOC might well need a wide spectrum of statistical data in order to illuminate the general policies bearing on the complaint's situation. But in the absence of some showing by the EEOC to the con-
It then stated that “[t]o move beyond that focus the plaintiff and the EEOC must show a more particularized need and relevance.”\(^{241}\)

The *Joslin* and *Westinghouse* presumptions have been cited by various courts to unnecessarily restrict the geographic scope of discovery to a single unit of the employer and to a single physical location.\(^{242}\) One clear example of the misuse of these presumptions is *Earley v. Champion International Corp.*, where the Eleventh Circuit affirmed the district court’s denial of the plaintiff’s motion to compel discovery of the potential age discrimination implications of the employer’s nationwide RIF. The court conceded that the RIF “was initiated at the national level,” but then relied upon the fact that “each plant was given considerable autonomy in drawing up its own RIF master plan.”\(^{243}\) The court concluded that the RIF decisions were in essence “made locally” and ruled that “discovery on intent may be limited to the employing unit.”\(^{244}\) It rejected the plaintiff’s arguments that the structure of the RIF itself was discriminatory: “A vague possibility that loose and sweeping discovery might turn up something suggesting that the structuring of the RIF was discriminatorily motivated does not show particularized need and likely relevance that would require moving discovery beyond the natural focus of the inquiry.”\(^{245}\) Other courts have been similarly draconian in limiting the plaintiff’s discovery of a nationwide or region-wide adverse employment action, believing the employer’s representation that the “real decision” was made at a lower level.\(^{246}\)

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\(^{241}\) *Packard*, 569 F.2d at 318 (citations omitted).

\(^{242}\) *Westinghouse*, 576 F.2d at 592.


\(^{244}\) 907 F.2d 1077 (11th Cir. 1990).

\(^{245}\) *Early*, 907 F.2d at 1084.

\(^{246}\) Id. Nonetheless the court recognized that the plaintiff was entitled to “nationwide discovery on the availability of other positions with [the employer] at the time of discharge, including documentation regarding its nationwide efforts to find jobs within the company for employees affected by the restructuring.” *Id.* at 1084 n.6.

\(^{247}\) E.g., *Sparling v. Philips Consumer Elec. Co.*, No. 3:93-cv-296 (E.D Tenn. May 9, 1995), annotated in *Empl. Discrimination Rep. (BNA)* No. 22, at 684 (limiting plaintiff’s discovery to a single facility “[i]n light of the defendant’s representation that the actual employment decisions affecting the plaintiff were made locally”); *Cisco v. Commonwealth Edison Co.*, 67 Fair Empl. Prac. Cas. (BNA) 1630, 1631 (N.D. Ill. 1995) (limiting plaintiff’s discovery to single facility where “[t]he defendant asserts that the decision to terminate the plaintiff was made entirely at the local level). In *Cisco* the court limited plaintiff’s discovery “[b]ecause the plaintiff has produced no evidence which would indicate that the decision to terminate him had its origins elsewhere, the scope of the plaintiff’s requests will be restricted to the North Chicago office.” *Cisco*, 67 Fair. Empl. Prac. Cas. (BNA) at 1631.
There are several reasons why the Joslin and Westinghouse presumptions should not stand, especially in light of Hicks' more onerous definition of pretext. First, the courts must realize that such broad, sweeping decisions as RIFs or other restructurings typically are made, or at least approved, at a high corporate level. The court in Finch v. Hercules, Inc., took the correct approach where RIF decisions were initially made by "each individual work unit," but were ultimately approved by a "policy compliance committee." That court held that "[i]n light of the two-step process, discrimination could have occurred either when the individual work unit proposed names, or when the Committee exercised its approval power."

Second, so long as the plaintiff can present some colorable allegation about plant-wide, region-wide, or nationwide discrimination, the courts should honor her allegation to the fullest extent possible in the discovery process. Where she contends that systemic discrimination influenced her individual disparate treatment, she "ought to be able to work with something more than the smallest geographical unit of the company."

Some courts initially limit the plaintiff to the smallest unit, with the promise that she might be allowed to broaden her discovery "[a]t some future date, if [she] is able to make more a particularized showing . . . ." This is a virtually empty promise. In order to determine the relevance of detailed nationwide or region-wide employment data, the plaintiff obviously must be allowed nationwide or region-wide discovery as to how the employer made the relevant employment decisions.

248. See Abel v. Merrill Lynch & Co., No. 91 Civ. 6261 (RPP), 1993 U.S. Dist. LEXIS 1213, at *10 (S.D.N.Y. Feb. 4, 1993) (department heads identified employees for possible termination and submitted information to the human resources department which, in turn, prepared a report for the senior human resources counsel); Finch v. Hercules, Inc., 149 F.R.D. 60, 62 (D. Del. 1993) ("To accomplish the reduction in force, defendant issued 'operational guidelines' which established a 'Policy Compliance Committee' to 'monitor corporate downsizing.'").

249. 149 F.R.D. 60 (D. Del. 1993).

250. Finch, 149 F.R.D. at 64.

251. Id.

252. For example, the Fourth Circuit noted:

Even had [the plaintiff] limited his charge to allegations of personal discrimination or departmental discrimination [instead of plant-wide discrimination] we would hesitate to characterize the desired information as irrelevant and immaterial. Evidence of plant-wide discrimination seems most relevant to a charge that a particular department adheres to a discriminatory policy or that particular action was racially motivated.

Graniteville Co. v. EEOC, 438 F.2d 32, 42 (4th Cir. 1971). But see Hinton, 93 F.R.D. at 337-38 (denying the plaintiff state-wide discovery even though the plaintiff claimed state-wide discrimination and even though the plaintiff's "argument is not without some merit").


254. Citsko, 67 Fair Empl. Prac. Cas. at 1631; see also Aramburu v. Boeing Co., 885 F. Supp. 1434, 1444-45 (D. Kan. 1995) ("If the plaintiff's motion for reconsideration or modification demonstrates that additional discovery is appropriate, the court will then determine an appropriate discovery order.").

255. See Goeth v. Gulf Oil Corp., 19 Fair Empl. Prac. Cas. (BNA) 1710, 1711 (S.D. Tex. 1979) ("Plaintiff may, however, serve interrogatories upon the Defendant attempting to develop information to contradict this affidavit and show a lack of autonomy among the individual plants insofar as employment practices are concerned."); Haykel v. G.F.L. Furniture Leasing Co., 76 F.R.D. 386, 391 (N.D. Ga. 1976) ("At a minimum, the E.E.O.C. should be entitled to conduct
Third, limiting the plaintiff to the smallest possible work unit could well prevent her from making a valid statistical analysis. Although “[t]here is no minimum sample size prescribed either in federal law or in statistical theory,” some courts “have consistently rejected [certain] statistical samples as too small to be meaningful.” Thus, the courts should allow the plaintiff a greater scope of discovery in order to generate valid statistical profiles.

For example, in *Minority Employees at NASA v. Beggs,* the District of Columbia Circuit reversed a district court order limiting the plaintiff’s discovery in a race discrimination case to “a department at NASA Headquarters which had fewer than ten employees during the relevant time period.” The circuit court held that the plaintiff was entitled to discovery outside her department to prove that NASA’s reason for failing to promote her—a hiring freeze—was pretextual. The court stated that if the employer had “promoted white employees without promotion potential or during the hiring freeze, this information would be highly relevant to [the plaintiff’s] claim of intentional discrimination.” Indeed, in some cases of Circumstantial Individual Disparate Treatment, “statistical analysis might well be the only means by which plaintiff could prove an alleged pattern or practice of racial discrimina-

Fourth, even if the plaintiff chooses not to prepare a formal statistical analysis, she still needs discovery beyond the smallest unit to assist her in proving pretext. For example, in *Hollander v. American Cyanamid Co.***

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256. MacDissi v. Valmont Indus., Inc., 856 F.2d 1054, 1058 (8th Cir. 1988) (stating “the adequacy of numerical comparisons within small sets of data depends on the degree of certainty the factfinder requires, as well as the type of inference the statistics are meant to demonstrate”); see also Peighal v. Metropolitan Dade County, 26 F.3d 1545, 1556-57 (11th Cir. 1994) (discussing statistical analysis).

257. Fisher v. Vassar College, 70 F.3d 1420, 1451 (2d Cir. 1995).

258. See *Abel*, 1993 U.S. Dist. LEXIS 1213, at *18 (granting the plaintiff’s motion to compel discovery beyond her department in light of the plaintiff’s allegation “that her department is too small a sample from which to ascertain patterns in rehiring”); Planagan v. Travelers Ins. Co, 111 F.R.D. 42, 46 (W.D.N.Y. 1986) (allowing discovery beyond those employees holding plaintiff’s job title because “[l]imitation of discovery to the classification of Claim Representative Group Claims office would be tantamount to no discovery at all”). But see *Prouty*, 99 F.R.D. at 548 (denying the plaintiff nationwide discovery and stating that “[a]lthough plaintiff contends that headquarters-wide information is needed because this case involves a headquarters-wide discharge, the Court does not consider this sufficient evidence of a ‘particularized need’”).

259. 723 F.2d 958 (D.C. Cir. 1983).


261. Id. at 962-63.

262. Id.


In order to prove any discriminatory intent, plaintiff contends that company-wide statistical evidence regarding the progress of blacks in the workforce would support his position that [defendant] declared the labor surplus as a pretext to remove [plaintiff] from his position because of [the plaintiff’s] race, and replace him with a white employee. Indeed, . . . limiting discovery to just the absorber shop, as [defendant] suggests, would be too narrow since plaintiff has worked at several . . . jobs at the . . . facility. However, production of documents shall be limited to promotions at the . . . facility.

the Second Circuit reversed the district court’s denial of an age discrimination plaintiff’s motion to compel “identification of all management employees terminated since January 1, 1983 and who were over 40 at time of termination.”265 The circuit court noted that the suit
turns on the sincerity of [the employer’s] claim that [the plaintiff’s] abrasive personality justified his discharge, notwithstanding what [the plaintiff] depicts as [the employer’s] prior fickle attitude towards this dimension of [the plaintiff’s] job performance and the inability of a company supervisor to detail instances in which such problems impeded productivity.266

The court concluded that discovery of “company-wide practices may reveal patterns of discrimination against a group of employees, increasing the likelihood that an employer’s offered explanation for an employment decision regarding a particular individual masks a discriminatory motive.”267

Fifth, the Joslin and Westinghouse presumptions contain the implicit suspicion that a plaintiff always will overreach in the discovery process. However, many times the plaintiff does not seek the broadest discovery possible.268 In Rich v. Martin Marietta Corp.,269 a case often viewed as granting liberal discovery, the plaintiff sought only “information [as to] . . . hiring, promotion, demotion, and layoff practices within individual departments on a plant-wide level.”270 Even if the plaintiff initially does overreach, she may be willing to compromise with the employer for some information beyond her own employing unit.271

Sixth, before restricting in any manner the scope of the plaintiff’s discovery, the courts should require substantial, corroborated evidence from the employer regarding alleged irrelevance and undue burdensomeness or expense.

265. Hollander, at 84.
266. Id. at 84.
267. Id. The Eastern District of Tennessee similarly reasoned: The plaintiff has alleged a pattern and practice of age discrimination throughout the defendant corporation in regard to the hiring, promotion, and termination of Regional Marketing Directors and Brokerage Managers. Clearly, the information sought by the plaintiff would be relevant to building a statistical case. In addition, the identity of persons who have filed age discrimination claims might lead to discoverable evidence relevant both to the plaintiff’s pattern and practice claim and to her own discrimination claim. The production of certain personnel files merely further serves these same evidentiary issues.
268. E.g., Georgia Power Co. v. EEOC, 295 F. Supp. 950, 954 (N.D. Ga. 1968) (“The parties are in agreement that the Atlanta area is a proper limitation geographically.”), aff’d, 412 F.2d 462 (5th Cir. 1969).
269. Rich, 522 F.2d at 343 (emphasis added).
270. Cisko, 67 Fair Empl. Prac. Cas. (BNA) at 1630 (invoking plaintiff seeking personnel charts for all employees or “[in] the alternative . . . information on all employees [in specific units]”); Flanagan, 111 F.R.D. at 47 n.2 (stating that “[u]pon completion of further discovery, the parties may be able to agree on an appropriate alternative regional area within which to conduct meaningful discovery”); Johnson v. Southern Ry. Co., 25 Fair Empl. Prac. Cas. (BNA) 714, 719 (N.D. Ga. 1977) (resulting in plaintiff not pursuing original request for “the employment practices for [defendant’s] entire system” and instead compromising on “the total Piedmont Division,” which the district court found “both reasonable and justifiable”).
The courts should not simply assume that "[a]s the scope of the employees involved in the statistical probe widens, . . . the burden posed on the defendant increases and the direct relevance of the information to the plaintiff's claim decreases."272

As to its argument that discovery beyond the plaintiff's employing unit is irrelevant, the employer must "demonstrate [] . . . that decisions affecting the plaintiff were made at a facility level, rather than on a centralized basis."273 Regarding the employer's claim of undue burden or expense, the district court should not simply accept the employer's recitation that discovery of hundreds or thousands of employees would be unduly burdensome.274 Nor should the court presume that the distance between work units creates an undue burden on the employer.275 Moreover, on review, the circuit court should not strain to find any "plausible[]" explanation for the district court's finding of burden.276 Rather, the employer must introduce, at a minimum, a "detailed affidavit demonstrating the burden connected with producing the material."277

VI. THE APPROPRIATE TEMPORAL SCOPE OF PLAINTIFF'S DISCOVERY IN CIRCUMSTANTIAL INDIVIDUAL DISPARATE TREATMENT LITIGATION

Once the plaintiff in a Circumstantial Individual Disparate Treatment case has determined which employees are similarly situated to her and has established the geographical boundaries for her discovery requests, she must set a time period for those requests.278 The plaintiff is entitled to take discovery for each period of her employment in which she claims discrimination,279 but

273. Robbins v. Camden Bd. of Educ., 105 F.R.D. 49, 63 (D.N.J. 1985); see also Witten v. A.H. Smith & Co., 104 F.R.D. 398, 400 (D. Md. 1984) (allowing discovery where employer failed to submit deposition testimony and affidavits showing "that the decisions regarding the conduct of which the plaintiff complains are made by the superintendents of each facility"). But see James v. Newspaper Agency Corp., 591 F.2d 579, 582 (10th Cir. 1979) (affirming limitation on the plaintiff's "discovery to accounting/credit department" so as to "not cause the defendant to expend an inordinate amount of time producing material that was not really relevant to the issues in the case").
275. Mack v. Great Atl. & Pac. Tea Co., 871 F.2d 179, 187 n.7 (1st Cir. 1989) (basing a finding of "decentralized nature of managerial decisionmaking" by measuring distances between employer's stores).
276. Id. at 187 (noting that the district court "could possibly have allowed" plaintiff's company-wide discovery, but affirming district court's denial of said discovery because it "could plausibly have been viewed as 'unduly burdensome'").
277. Abel, 1993 U.S. Dist. LEXIS 1213, at *20 (ordering employer "to provide Plaintiff with a sworn statement by a person with personal knowledge identifying which of the requested records do not exist and explaining why their production would be unduly burdensome"); see also Flanagan, 111 F.R.D. at 46 (granting in part the plaintiff's motion to compel because the employer "has introduced no detailed affidavit demonstrating the burden connected with producing the material").
But see Earlcy v. Champion Int'l Corp., 907 F.2d 1077, 1084-85 (11th Cir. 1990) (affirming district court's limitation on plaintiff's discovery with no elaboration beyond—"the district court apparently found this request to be unduly burdensome on defendant").
278. See Robbins v. Camden City Bd. of Educ., 105 F.R.D. 49, 58 (D.N.J. 1985) (denying the plaintiff's motion to compel answers to interrogatories which "contain[ed] no limitations as to time," but allowing the plaintiff to "propound new interrogatories").
279. E.g., Hicks v. Arthur, 159 F.R.D. 468, 471 (E.D. Pa. 1995) (allowing discovery for the entire period during each plaintiff's tenure, where plaintiffs alleged "both discrimination in termi-
some courts mistakenly restrict her discovery only to that period, which may be relatively short. Such consistent with the goals of the anti-discrimination statutes and with the Federal Rules of Civil Procedure, the plaintiff must be able to take discovery of events both prior and subsequent to her own adverse treatment.

A. Prior to the Adverse Employment Action

The plaintiff can use evidence of the employer’s past employment practices to establish pretext; those practices “may be relevant to show motive and intent as to a present practice.” Some plaintiffs request only one or two years of discovery, which the courts should honor. Other plaintiffs require more years of discovery, and the courts regularly should allow this greater time scope.

Some courts err in restricting the time scope of the plaintiff’s discovery to the limitations period in which the underlying charge of discrimination must have been filed. Such a restriction ignores Supreme Court precedent that “a discriminatory act which is not made the basis for a timely charge . . . may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue.” Thus the courts should extend, as needed, the time scope of discovery beyond the applicable statute of limitation and discrimination during the time of their employment in the denial of the ‘opportunity to enjoy the benefits and emoluments which they had earned through their contracts of employment’”; Robbins, 105 F.R.D. at 62 (holding that where plaintiff alleged harassment and denial of tenure, the entire time period of her employment was relevant); see also Abrams v. Baylor College of Med., 805 F.2d 528, 532-33 (5th Cir. 1986) (allowing plaintiff to allege a continuing violation “where the unlawful employment practice manifests itself over time, rather than as a series of discrete acts”).


281. Henderson v. National R.R. Passenger Corp., 113 F.R.D. 502, 506 (N.D. Ill. 1986); see also Jackson v. Alterman Foods, 37 Fair Empl. Prac. Cas. (BNA) 837, 838 (N.D. Ga. 1984) (allowing discovery of prior employment practices because “the defendant’s treatment of its other employees outside of the pool of employees from which the defendant decided to fire the plaintiff could be relevant to many of the potential issues in this case,” including “a showing of pretext”); Miles v. Boeing Co., 154 F.R.D. 117, 119-20 (E.D. Pa. 1994) (granting plaintiff’s motion to compel discovery in the two years preceding the alleged discrimination). In Miles, the court reasoned: [t]his request is not overly broad and is relevant to show any change in [the employer’s] labor needs during the alleged discrimination and shortly before and after it. This evidence is likely to lead to the discovery of information that [the employer’s] stated reason for rejecting plaintiff was a pretext.


283. Regarding the limitations period for filing a charge, see supra note 25. For an unnecessarily restrictive time period for discovery, see Parrish v. Ford Motor Co., 953 F.2d 1384 (6th Cir. 1992) (restricting temporal scope to 30-day limitations period prior to plaintiff’s filing of a charge of discrimination).

tions. Nor should the courts uniformly restrict the plaintiff’s discovery to a two-year period prior to the filing of the charge, for that time period affects only the calculation of the back pay to which the plaintiff might be entitled.

Of course, at some point a plaintiff’s proposed time scope may become excessive, and the court must set a limit. A sensible approach to drawing temporal boundaries was offered by the Western District of Louisiana in Cormier v. PPG Industries, Inc. The court allowed the plaintiff a five-year period, which was “admittedly arbitrary,” but which was “reasonable in the absence of special circumstances that would warrant a longer period.” The court explained:

If there have been any discriminatory acts within the past five (5) years, such acts would certainly provide sufficient statistical background information in these proceedings. If there have been no acts of discrimination in the preceding (5) years, acts which occurred prior to that period would not appear to lead to the discovery of admissible evidence.

A four-to-five year period for discovery prior to the adverse employment action is common and appropriate. The courts should guard against any narrower time scope, in the absence of the plaintiff’s agreement.

B. Subsequent to the Adverse Employment Action

The plaintiff also must discover information occurring within a reasonable time after the adverse employment action, but she should avoid routinely seek-

285. See Trevino v. Celanese Corp., 701 F.2d 397, 405 (5th Cir. 1983); Mathewson v. National Automatic Tool Co., 807 F.2d 87, 91 (7th Cir. 1986) (“[E]vidence of earlier discriminatory conduct by an employer that is time-barred is nevertheless entirely appropriate evidence to help prove a timely claim based on subsequent discriminatory conduct.”); Cormier v. PPG Indus., 452 F. Supp. 594, 595 (W.D. La. 1978) (“There is no question that plaintiffs are entitled to secure discovery of acts prior to the effective date of their claims.”).

286. Section 706(g)(1) of Title VII provides that “[b]ack pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission.” 42 U.S.C. § 2000e-5(g). In Flanagan v. Travelers Ins. Co., the court examined the provision’s legislative history and ruled that it “in no way indicates that this damage provision was intended to limit the scope of discovery or proof at trial.” Flanagan v. Travelers Ins. Co., 111 F.R.D. 42, 47 (W.D.N.Y. 1986).

287. General Ins. Co. of Am. v. EEOC, 491 F.2d 133, 136 (9th Cir. 1974) (holding that EEOC’s administrative subpoena was overbroad in “reach[ing] back in time nearly eight years.”).


289. Cormier, 452 F. Supp. at 596.

290. Id. (following Georgia Power Co. v. EEOC, 295 F. Supp. 950, 954 (N.D. Ga. 1968)). But see Finch v. Hercules Inc., 149 F.R.D. 60 (D. Del. 1993), where the district court unnecessarily narrowed the Cormier approach. The court assumed that, even though the employer may have been downsizing for a period of six years, any discrimination beyond two years created such a “weak inference” of discrimination that it “does not warrant subjecting defendant to the necessity of searching its records.” Id. at 65.


292. See, e.g., EEOC v. Ford Motor Credit Co., 26 F.3d 44, 45 (6th Cir. 1994) (enforcing EEOC administrative subpoena for “three years plus 300 days preceding” the charge).
ing information to "the present." She needs access to her replacement's personnel file to assess the requisite qualifications as part of her prima facie case. She must examine the personnel files of similarly situated employees and statistical workforce data in an effort to establish pretext, as in *Abel v. Merrill Lynch & Co.* In *Abel*, the Southern District of New York granted the plaintiff's motion to compel discovery of the ages of those employees rehired after a RIF, to determine if the employer rehired "younger employees . . . at the expense of older employees."

Moreover, information following the adverse employment action can be highly relevant for damages, "indicat[ing] the amount of salary the plaintiff could have earned had she continued to be employed by defendant." As with the discovery time scope prior to the adverse action, the courts cannot always precisely delineate the proper post-action time scope. Nonetheless they should use their discretion to allow the plaintiff several years of discovery.

**VII. CONCLUSION**

The Supreme Court expressly adopted the Circumstantial Individual Disparate Treatment theory because rarely will the plaintiff have "smoking gun" evidence of discrimination. She must prove her case inferentially, by comparing her treatment with the treatment of similarly situated employees both in and outside of her protected class. According to *Hicks*, she must disprove whatever legitimate, non-discriminatory reason the employer has advanced, and, to guarantee victory, she also must prove that the real reason for her treatment was her protected class. Obviously, she needs ample discovery to carry this burden of proof.

Given the very nature of a circumstantial test, and the increased post-*Hicks* burden of proving pretext, the courts should reject the presumption that the plaintiff's own unit is the only relevant source of workforce discov-

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294. *E.g.*, *Clarke v. Mellon Bank, N.A.*, No. 92-CV-4823, 1993 U.S. Dist. LEXIS 6680, at *7-8 (E.D. Pa. 1993) ("At the very least, the information sought would have bearing on whether the named employees were qualified for the positions which they were offered.").


297. *Clarke*, 1993 U.S. Dist. LEXIS 6680, at *8; see also *Abel*, 1993 U.S. Dist. LEXIS 1213, at *22 (allowing plaintiff post-RIF discovery of wage data for her grade level and the grade level she sought for damages calculations "whether Plaintiff would have been promoted had she not been terminated").

298. *See James v. Newspaper Agency Corp.*, 591 F.2d 579, 582 (10th Cir. 1979) (allowing plaintiff discovery two years following the adverse employment action of not being promoted); *Hicks*, 159 F.R.D. at 471 (regarding two years after the tenure of the plaintiffs as "a reasonable time frame in which to conduct discovery"); *Willis*, 56 Fair Empl. Prac. Cas. (BNA) at 1454 (three years after); *Milner v. National Sch. of Health Tech.*, 73 F.R.D. 628 (E.D. Pa. 1977) (two years after); *Robbins*, 105 F.R.D. at 63 (two years after).

299. *See supra* notes 6, 9 and accompanying text.

300. *See supra* notes 206-271 and accompanying text.

301. *See supra* notes 49-65 and accompanying text.
ery. Courts need not allow nationwide discovery in all cases, but should honor the plaintiff's request for such discovery whenever the plaintiff has alleged a broad-based discriminatory pattern. In doing so, they give the plaintiff a full and fair opportunity to buttress her prima facie case, to obtain a statistically valid sample to prove pretext, to obtain anecdotal evidence regarding pretext, and to prove her entitlement to remedies.

In like manner, the courts should eschew any narrow restriction on the time period for which the plaintiff seeks discovery. Events occurring years before and years after the plaintiff's adverse employment action are relevant to both liability and damages.

Finally, before restricting this extremely relevant workforce discovery as unduly burdensome or expensive, the courts should require the employer to show, through verifiable documentation, precisely the harm that it would suffer in responding to the discovery.

If the courts define relevance and undue burdensomeness in this proposed manner, which is fully consistent with the discovery provisions of the Federal Rules of Civil Procedure, they indeed will fulfill the mission of the anti-discrimination statutes.