An Insider’s View of the EEOC

Recent and Current Strategies, Litigation, Settlements and What's on the Horizon

July 17, 2024

Littler

ComplianceHR

Today’s Webinar Host:

Stephanie Zielinski

Marketing Director

ComplianceHR

Who We Are

- Technology Platform
- Infrastructure enterprise

- Subject matter expertise
- Knowledge management team
- Case databases

What we do:

Deliver expert guidance in a fraction of time and cost vs traditional methods

Compliance HR

Simplify the complexity of employment law

PolicySmart™
Create and maintain an up-to-date and legally compliant employee handbook

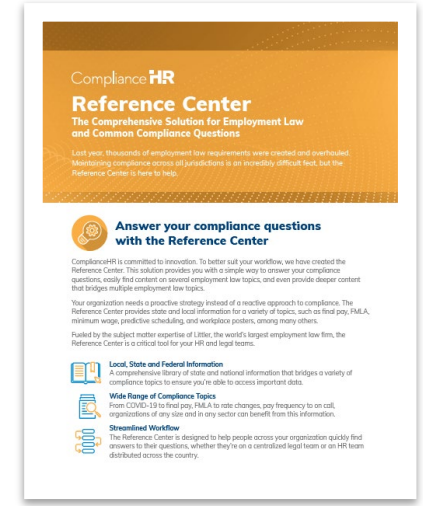
Navigator Independent Contractor
Remove risk in determining Independent Contractor status

Navigator Overtime
Determine if an employee is exempt or non-exempt

The Reference Center
A Comprehensive Solution for Employment Law and Common HR Compliance Questions

The Document Center
Efficiently generate state and federal compliant documents throughout the employee lifecycle

Our Most Popular Solutions



PolicySmart provides you with:

- Federal and state-compliant templates
- Innovative compliance timeline
- Handbook policy checklists
- Automated twice monthly legal update emails

The ComplianceHR Reference Center provides you with:

- Local, state and federal information
- Streamlined workflows
- Wide range of compliance topics
    - Leave, final pay, FMLA, minimum wage, and more

When coupled, these two solutions provide you with comprehensive compliance program support

Sign Up for a Demo

Three ways to sign up for a demo:

1. Reply “Yes” to the on-screen poll
2. Click the link in the Resources panel
3. Visit to www.compliancehr.com/demo/

Benefits of a custom demonstration:

- Discuss your organization’s requirements/challenges
- Review Navigator Suite Solutions
- Share compliance methodologies

Presented by:

Barry Harstein

Co-Chair, EEO & Diversity Practice

James Paretti

WPI and Core Member,

EEO & Diversity Practice

Agenda

- Setting the Stage: (1) EEOC Leadership Now and Moving Forward; (2) Key Recent EEOC Reports; and (3) Noteworthy Statistics
- Harassment Update: Review of Recent EEOC Developments- Updated Guidance
- Scope of Protections/Prohibitions Under Title VII: Potential Impact of Supreme Court decision in Muldrow v. City of St. Louis; Does it Help or Hurt Equal Employment Opportunity?
- Inclusion, Equity and Diversity Programs: EEOC Perspective
- Evolving Issues of Accommodation: (1) New Rules Based on Pregnant Workers Fairness Act; (2) Ongoing Challenges Involving Disabilities under the ADA; and (3) Religious Accommodations and impact of Groff v. DeJoy
- AI Update: An Ever-Evolving Issue
- Pay Equity: Where we are and What's on the Horizon

Littler's Annual Report on EEOC Developments

Five Major Sections:

1. Opening Chapter on Key Issue: Religious Accommodation
2. Summary of Charge Activity, Litigation and Settlements (Appendix A: Settlements/ Appendix B: Appellate Cases)
3. Update on Commission and Regulatory Activities
4. Scope of EEOC Investigations and Subpoena Enforcement Actions (Appendix C: Summary of Subpoena Enforcement Actions by EEOC)
5. Review of Noteworthy EEOC Litigation Issues – From Pleading Through Trial, Plus Key Attorneys' Fees Cases (Appendix D: Summary of Key Summary Judgment Rulings)

Setting the Stage:

(1) EEOC Leadership;

(2) Major Reports and Related Statistics; and

(3) Collaboration with Other Federal Agencies

Current and Anticipated Leadership Changes

Current Commission:

- Keith Sonderling (R), Commissioner (Term expired July 1, 2024; in holdover status)
- Andrea Lucas (R), Commissioner (Term expires July 1, 2025)
- Jocelyn Samuels (D), Vice Chair (Term expires July 1, 2026)
- Kalpana Kotagal (D), Commissioner (Term expires July 1, 2027)
- Chair Charlotte Burrows (D), (Term expires July 1, 2028)

Approval of New General Counsel:

- EEOC General Counsel Appointment – Karla Gilbride (Term expires October 2027)

Key Reports By EEOC – Three Key Reports

- **EEOC Strategic Plan For Fiscal Years 2022-2026** (Approved August 22, 2023). According to EEOC Chair Burrows, “It emphasizes expanding the EEOC’s capacity to eliminate systemic barriers…” Three objectives: (1) systemic focus, (2) outreach to educate public, and (3) strengthen internal functions, including effective use of technology.
- **Strategic Enforcement Plan (SEP)** for Fiscal Years 2024-2028 (Released on September 21, 2023). Purpose is to review priorities for enforcement of EEO laws. Similar to prior SEPs. This is the third SEP, with prior versions issued for FY 2013-2016 and 2016-2021. See additional comments
- **2023 Annual Performance Report by EEOC** (Issued February 23, 2024). Reviews key achievements over past fiscal year. See additional comments.
- **General Counsel’s Annual Report** - Reports on litigation of the past year.

Strategic Enforcement Plan 2024-2028: Six Major Priorities

- Barriers in Recruitment and Hiring
- Vulnerable Workers
- Emerging Issues
- Equal Pay
- Preserving Access to the Legal System
- Harassment

Strategic Enforcement Plan-2024-2028: Six Major Priorities - What's New??

- **Barriers in Recruitment and Hiring-** Concerns include use of technology, including use of AI, policies limiting on-the-job training and pre-apprenticeship or apprenticeship programs, temp-to-hire positions and screening tools that have disparate impact, such as background checks.
- **Vulnerable Workers-** Express reference made to those with prior criminal and conviction records, LGBTQ individuals, temporary workers, older workers, immigrant and migrant workers and those with intellectual disabilities.
- **Emerging Issues** including: (1) qualification standards and inflexible policies and practices, protecting workers affected by pregnancy, childbirth or related conditions under PDA, PWFA and ADA; (2) those impacted by backlash in response to local, national and global events, including antisemitism and Islamophobia, racial or ethnic groups and LGBTQI+ individuals; (3) discrimination impacted by COVID-19 and other threats to public health, including long COVID and denials of accommodation due to disability and on religious grounds; and (4) discriminatory practices based on use of technology including for example, the use of software that incorporates algorithmic decision-making or machine learning, including artificial intelligence; use of automated systems.

Strategic Enforcement Plan: 2024-2028 (Continued)

- **Equal Pay.** The EEOC will combat pay discrimination on the basis of sex and other protected bases covered by federal antidiscrimination laws, and specifically, will also focus on practices that contribute to pay disparities and may lead to violations, such as (1) pay secrecy policies, (2) retaliating against workers for asking about pay or sharing their pay with coworkers,(3) reliance on past salary history to set pay, or (4) requiring applicants to specify their desired or expected salary at the application stage.
- **Preserving Access to the Legal System.** The EEOC will focus on: (1) overly broad waivers, releases, non-disclosure agreements, or nondisparagement agreements; (2) unlawful, unenforceable, or otherwise improper mandatory arbitration provisions; (3) employers' failure to keep applicant and employee data and records required by statute or EEOC regulations; and (4) retaliatory practices that could dissuade employees from exercising their rights under employment discrimination laws.
- **Systemic Harassment**. Thirty-four percent (34%) between 2017 and 2021 included harassment charges. The EEOC will continue to focus on this area and "a claim by an individual or small group may fall within this priority if is related to a widespread pattern or practice of harassment."

FY 2024 Performance Report (February 23, 2024)

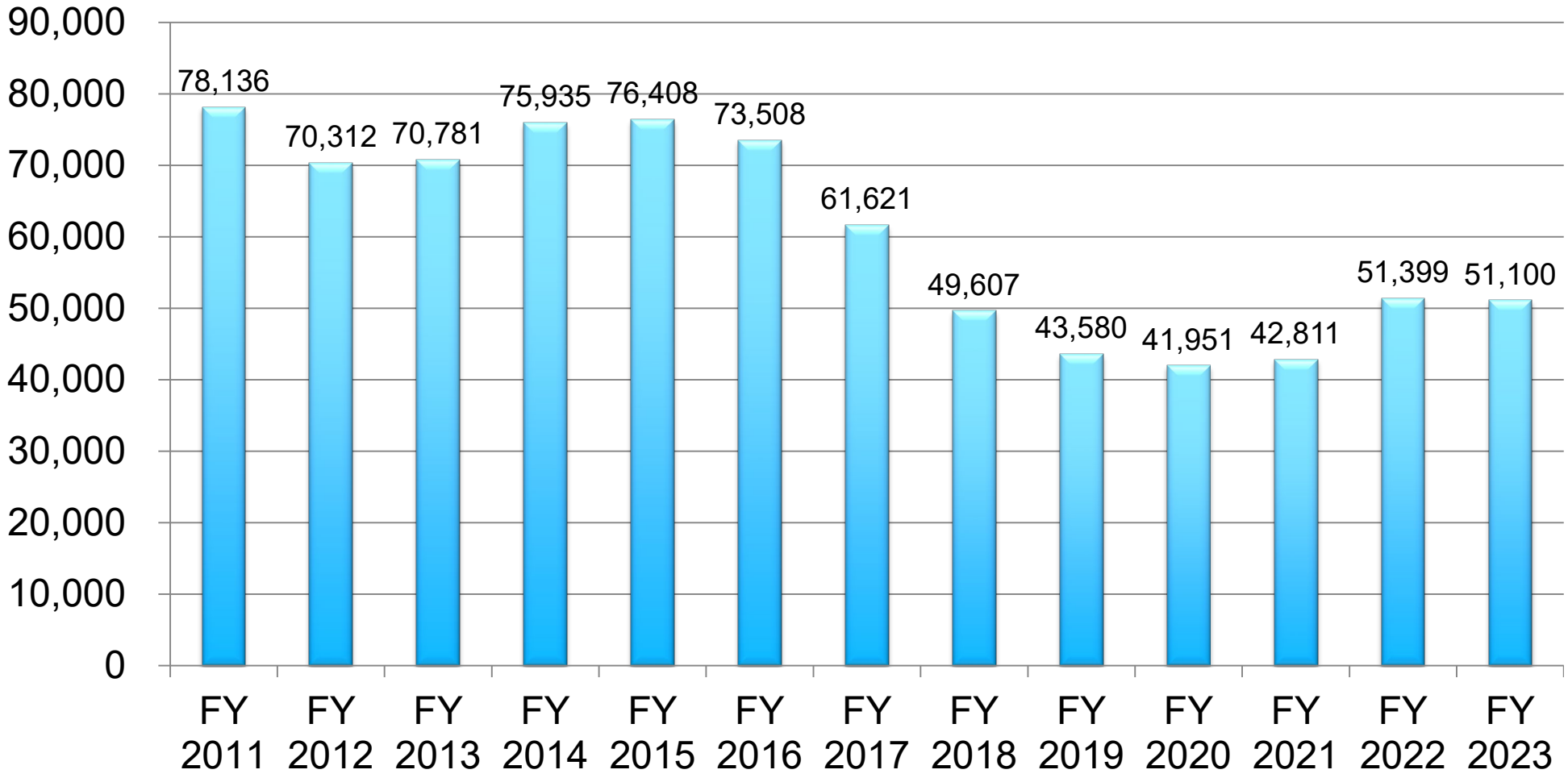
- ***Increase in New Charges of Discrimination***. Received 81,055 new discrimination charges for FY 2023 (i.e., a 10.3% increase from 73,485 discrimination charges filed in FY 2022).
- ***Increased Number of New Lawsuits***. The EEOC filed 143 “merits” lawsuits in fiscal year 2023. Merits lawsuits are direct suits or interventions alleging violations of the substantive provisions of the statutes enforced by the EEOC and suits to enforce administrative settlements. FY 2023 marked the largest number of merits lawsuit filings by the EEOC since fiscal year 2019, when 144 suits were filed.
- ***Increased Amount of Monetary Relief***. Recovered $665 million in monetary relief for more then 22,000 alleged victims. ($513 million was recovered in FY 2022)
- ***Success Rate for EEOC Mediation***. Resolved 7,471 of the 10,404 mediations (***71% settled in mediation***), resulting in over $201.2 million in benefits for charging parties.
- ***Increased Hiring by Agency***. The EEOC exceeded its fiscal year 2023 hiring goal of 2,300 employees, having employed a total of 2,332 employees by the end of FY 2022. The EEOC filled 493 positions - 178 were backfills and 315 were new positions, which included selection of internal and external candidates. The EEOC has continued to increase its staffing levels - 352 new positions were filled involving “front line” personnel in FY 2022 (i.e., investigators, attorneys and related personnel).

FY 2024 Performance Report (Continued)

- ***Systemic Investigations***. EEOC resolved more than 370 systemic investigations, which resulted in more than $29 million and collected $29.7 million in monetary benefits for alleged victims (but no longer publishes statistics of % of cause findings, although historically 35-40%, compared to less than 5% for individual charges)
- ***Settlement of Systemic Lawsuits***. Resolved 14 systemic lawsuits in fiscal year 2023, obtaining just over $11.7 million for 806 workers subjected to alleged systemic discrimination, which also included injunctive relief.
- ***New Systemic Lawsuits***. Filed 25 lawsuits challenging systemic discrimination, comprising 17.5% of all merits suits filed in fiscal year 2023. Of these 25 systemic cases, 11 were “pattern or practice” cases. The fiscal year 2023 systemic filings were almost double the number of systemic suits filed in each of the past three fiscal years, and the largest number of systemic filings since 2018.

Charge Filings FY 2011 Through FY 2023

Backlog of EEOC Charges – FY 2011 Through FY 2023



Statistics on EEOC Litigation – Volume of Litigation

Year	Individual	"Multiple Victim"(Including Systemic Lawsuits)	Percentage/ Multiple Victim Lawsuits	Total Number of "Merits" Lawsuits
2011	177	84	32%	261
2012	86	36	29%	122
2013	89	42	24%	131
2014	105	28	22%	133
2015	100	42	30%	142
2016	55	31	36%	86
2017	124	60	33%	184
2018	117	82	41%	199
2019	100	44	31%	144
2020	68	25	27%	93
2021	74	42	21.1%	116
2022	53	38	41.8%	91
2023	86	57	40%	143

Breakdown of EEOC Lawsuits Filed FY 2023

FY 2023 Bases Alleged in Suits Filed	Count	Percent of Suits
Retaliation	56	39.2%
Sex	50	35.0%
Disability	49	34.3%
Race	24	16.8%
Age	12	8.4%
Religion	10	7.0%
National Origin	8	5.6%
Color	3	2.1%
Equal Pay	3	2.1%
GINA	1	0.7%

Issues in EEOC Lawsuits Filed FY 2023

FY 2023 Issues Alleged in Suits Filed	Count	Percent of Suits
Discharge/Constructive Discharge	99	69.2%
Harassment	56	39.2%
Hiring	36	25.2%
Disability Accommodation	36	25.2%
Term and Conditions	11	7.7%
Religious Accommodation	7	4.9%
Job Assignment	7	4.9%
Discipline	7	4.9%
Promotion	6	4.2%
Wages	5	3.5%

EEOC Systemic Lawsuits

Fiscal Year	Systemic Lawsuits Filed	Monetary Recovery
2012	12	$36.2 million
2013	21	$40 million
2014	17	$13 million
2015	16	$33.5 million
2016	18	$20.5 million
2017	30	$38.4 million
2018	37	$30 million
2019	17	$22.8 million
2020	13	$69.9 million
2021	13	$24.4 million
2022	13	$29.7 million
2023	25	$11.7 million

New EEOC Harassment Guidance & Related Issues – April 29, 2024

Challenging Harassment in the Workplace
Primer for Employers on Prevention Strategies and Applicable Legal Standard – New Littler Publication

(Being Issued July 2024)

Six Major Sections:

I. Introduction

II. A Guide to Harassment Prevention-EEOC Task Force on the Study of Harassment int the Workplace

III. Review of EEOC's Current View on Potential Scope of Harassment Claims and Applicable Liability Standards

IV. Systemic Harassment and Related Concerns

V. Conclusion

VI. Appendices

- Appendix A- High Dollar EEOC Settlements for Harassment Cases
- Appendix B- Case Filings Involving Allegations of Harassmetn Based on Sex, Sexual Orientation and/or Gender Identify
- Appendix C-EEOC Case Filings Involving Allegations of Harassment Based on Race and Other Characteristics
- Appendix D- Promising Practices for Preventing Harassment
- Appendix E- Promising Practices for Preventing Harassment in the Construction Industry

Statistics and Recent Trends

***EEOC Charge Activity*:**

- ***Over 34% of the charges of employment discrimination the EEOC received between FY 2018 and FY 2022***
- ***Strategic Enforcement Plan, 2024-2028***

Preventing and Remedying Systemic Harassment :

. To combat this persistent problem, the EEOC will continue to focus on strong enforcement with appropriate monetary relief and targeted equitable relief to prevent future harassment. The EEOC will also focus on promoting comprehensive anti-harassment programs and practices, including training tailored to the employer's workplace and workforce, using all available agency tools, including outreach, education, technical assistance, and policy guidance

EEOC Litigation:

- **EEOC filed 50 lawsuits challenging workplace harassment**: ***29 cases raised claims of hostile work environment based on sex***, 16 based on race, 5 based on national origin, 1 based on disability, 1 based on religion, and 6 based on retaliation
- **35% of all lawsuits filed in FY 2023 (i.e., 50 of 143**). The EEOC successfully resolved 35 harassment suits in fiscal year 2023. Five of these resolutions involved allegations of systemic harassment

2023 Performance Report by EEOC

STATISTICS AND RECENT TRENDS

Total harassment charges have continued to climb over the past 3 fiscal years:

- **21,270 in FY 2021**
- **24,430 in FY 2022**
- **31,354 in FY 2023**

Total monetary recovery went from:

- **$142.2 million in FY 2021**
- **$144.1 million in FY 2022**
- **$202.2 million in FY 2023**

EEOC Releases New Workplace Guidance on Harassment in the Workplace

- On April 29, 2024, the EEOC published its "Enforcement Guidance on Harassment in the Workplace," which includes approximately 90 pages of text and additional 80 pages with 387 detailed footnotes.

Key Points of Guidance:

- **Focuses on *legal analysis of harassment and the standards for imposing employer liability* for harassment**
- Addresses prohibited harassment "based on race, color, religion, sex (including pregnancy, childbirth or related medical conditions; sexual orientation; and gender identity), national origin, disability, age (40 or older) or genetic information."
- Now serves as the single resource on EEOC-enforced workplace harassment law and "updates, consolidates and replaces the EEOC's five guidance documents issued between 1987-1999."
- Highlights a number of notable changes in the law since then, including the 2020 *Bostock v. Clayton County* decision, in which the U.S. Supreme Court held that Title VII's prohibition on discrimination "because of sex" includes discrimination on the basis of sexual orientation and gender identity.
- Notes that emergence of new issues, such as online harassment, called for such an update.

Key Companion Documents in Reviewing Updated Guidance on Harassment

- ***Summary of Key Provisions*** document includes 25 “Q’s and A’s“ on the guidance
- ***Questions and Answers for Employees: Harassment at Work*** – Document for employees includes 8 “Q’s and A’s” on key issues of concern
- ***Fact Sheet for Small Businesses –*** Includes similar Q’s and A’s to assist small employers with their compliance obligations
- ***Promising Practices for Preventing Harassment***- Reviews recommended employer practices issued on November 21, 2017
- ***Report of the Co-Chairs of the Select Task Fore on Harassment in the Workplace***, issued in June 2016, which included the findings and recommendations about harassment prevention strategies

General Liability Standards for Harassment

- If the harasser is a **proxy or alter ego** of the employer, the employer is automatically liable
- If the harasser is a **supervisor and** the hostile work environment includes a **tangible employment action** (i.e. significant change in employment status) the employer is vicariously liable and there is no defense to liability.
- If the harasser is a **supervisor but does *not* include a tangible employment action**, the employer is vicariously liable but the **employer may limit its liability or damages if it can prove the *Faragher-Ellerth* affirmative def**ense: (1) the employer exercised reasonable care to prevent and correct promptly any harassment; and (2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to take other steps to avoid harm from the harassment. An employer must establish both prongs in order to rely on the affirmative defense
- If the harasser is a **non-supervisory employee or third party,** the negligence standard applies-if the employer was negligent in that it failed to act reasonably to prevent the harassment or to take reasonable corrective action in response to harassment when the employer was aware, or should have been aware, of it.

Focus of the Guidance is on "hostile environment" claims – the absence of a tangible employment action being taken by a supervisor.

Revisits June 2016 EEOC Task Force on Harassment

Two Basics Themes:

- Harassment prevention should be a primary focus in limiting the risks posed by harassment claims

- Key Recommendation to Employers - “Reboot workplace harassment prevention”

Harassment Task Force- Three Primary Areas for Harassment Prevention

I. Leadership and Accountability

-Impact of "Rainmakers"

-Accountability of those engaging in harassment

-Importance of Supervisors Being Accountable to prevent harassment

II. Policies and Procedures

-Anti-Harassment Policies

-View Toward "Zero Tolerance" Policies

-Reporting Systems for Harassment, including Company Investigations

III. Anti-Harassment Compliance Training

Scope of Protection Under Title VII

Potential Impact of Supreme Court decision in *Muldrow v. City of St. Louis*

Does it Help or Hurt Equal Employment Opportunity?

What is Actionable Under Title VII and Related Discrimination Laws

Key Issues for Discussion:

- Starting Point: Key Statutory Provision(s) making it unlawful to discriminate based on "terms, conditions or privileges of employment"
- Review of prior interpretations and recent decisions
- Focus of Discussion- *Muldrow v. City of St. Louis*, 30 F. 4th 680 (8th Cir. 2022), reversed and remanded, __U.S.__ (April 17, 2024) – Facts involved a transfer decision.
- Impact on Discrimination Claims – Will it go beyond or be relied on to challenge other employment decisions?
- Potential Impact on DEI Efforts???????????

What Conduct is Actionable Under Title VII and Related Discrimination Laws

Starting Point: Interpretation of Express Terms of Statute

Section 703 (a) of Title VII of the Civil Rights Act of 1964 provides:

It shall be an **unlawful employment practice** for an employer:

(1) To fail or refuse to hire or to discharge 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.

Interpretation of Section 703(a)(1) by many courts:

- Historically, courts generally have adopted a standard to evaluate claims of discrimination in terms, conditions, or privileges of employment, and limited the scope to actionable "adverse actions."- "materially adverse action" causing economic or other "objectively tangible harm" and decision involved an "ultimate employment decisions"- such as '***hiring, granting leave, discharging, promoting or compensating."***

Issue Under Review- What Conduct is Actionable Under Title VII- Focus on Denial of Transfer Decision

Muldrow v. City of St. Louis, 30 F. 4th 680 (8th Cir. 2022). Denial of Transfer. Muldrow worked in intelligence division of police department on public corruption. Following appointment of a new Commander, Muldrow was transferred to an administrative position involving supervision of patrol officer and she was replaced by a male co-worker. Muldrow earned same salary but had to work rotating schedule including weekends. Also denied request for a job working for her prior boss. Following Title VII lawsuit, SJ granted to employer and Eighth Circuit affirmed based on view that she failed to demonstrate that she suffered "adverse action" as required under McDonnell Douglas framework.

Eighth Circuit held transfer did not constitute a demotion and *the "minor changes" involved "cause(d) no materially significant disadvantage" and did not constitute "adverse employment action."*

Review of Other Related Decisions – What Conduct is Actionable Under Title VII?

- Fifth Circuit: *Evolution from Peterson v. Linear Controls, Inc.* 757 F. App'x 370 (5th Cir. 2019) to *Hamilton v. Dallas County*, 79 F. 4th 494 (5th Cir. 2023) (en banc)
  - *Peterson v. Linear Controls* – Assignment Issue. Fifth Circuit held that employer did not violate Title VII when it forced Black employees to work outdoors in July, without access to water while on an oil rig while white employees with same job allowed to work indoor in air-conditioned space. Court strictly construed and limited actionable conduct to "ultimate employment decisions." (see below)
  - *Hamilton v. Dallas County* – Scheduling Issue. Allowed all detention service workers in Dallas County Sheriff's Dept. to take two days off each week, but only allowed men to select full weekends off; women did not have option and never had full weekend off/no differences in officers' pay or benefits. Dist. Ct. held, based on prior precedent, that scheduling policy did not constitute "adverse employment action," which 5th Circuit had said involves "ultimate employment decisions such as hiring, granting leave, discharging, promotion or compensation. Panel of 5th Circuit held bound by prior precedent, but Fifth Circuit en banc reversed based on plain language of Title VII and concluded no basis for limiting to ultimate employment decisions.

Review of Prior and Recent Decisions – What Conduct is Actionable Under Title VII

D.C. Circuit:

- *Chambers v. District of Columbia*, 35 F. 4th 870 (D.C. Cir. 2022)(en banc)—Transfer issue. Female Support Enforcement Specialist in Child Support Division requested transfer out of "Interstate Unit" to Intake Unit due to perceived heavier case load but denied request despite transfer requests being granted to male colleagues. Following Title VII lawsuit, district court granted SJ to District based on precedent that lateral request did not cause any "material adverse consequences." On appeal, D.C. Circuit focused on express terms of statute regarding "terms, conditions or privileges of employment" and concluded discriminatory denial of transfer was a violation of Title VII, similar to a refusal to hire or fire. Court cited *Bostock v. Clayton County*, 590 U.S. 644 (2020) and view that discrimination means to treat someone worse than others similarly situated. Overruled 23-year-old precedent, *Brown v. Brody*, 199 F. 3d 446 (D.C. Cir. 1999).

Supreme Court Ruling in *Muldrow* – *April 17, 2024*

- **Supreme Court squarely *rejected the notion that Title VII requires*** a plaintiff to show that an allegedly discriminatory act result in ***an injury*** that **is** "***significant…serious, or substantial*, or any similar adjective**."
- The Supreme Court joined the D.C. and Fifth Circuits, which had recently reached the same essential conclusion. As the Supreme Court explained, **"the text of Title VII imposes no such requirement**."
- The majority, however, then went further and proclaimed that, while **plaintiffs** are not required to show "significant" harm, they **must nevertheless show that they suffered "some" harm**. Exactly what constitutes "some" harm was left undefined.
- As Justice Alito stated in his concurring opinion, "I have no idea what this [new standard] means..."
- Given the lack of clarity on this lowered proof standard, ***courts will have to flesh out exactly what harm plaintiffs need to establish*** to successfully challenge an employer's allegedly discriminatory act. What *is* clear is that employers will now have to face Title VII challenges involving employment decisions that may have been dismissed in the past because they did not cause "significant" harm to a plaintiff. "Some" harm is now all it takes.

Potential Impact of *Muldrow* Decision

- Immediate impact on transfer decisions
- How broadly will it be interpreted?
- Although *Muldrow* is a Title VII case,
  - ADEA - Identical language - 29 U.S.C. 623(a)(1)
  - ADA - similar provisions, 42 U.S.C.12112(a) (unlawful to discriminate "in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training and other terms, conditions, and privileges of employment")
  - Section 1981, 42 U.S.C Sec. 1981 (prohibiting discrimination in "the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship")
- Will it be relied on to further strengthen challenges to DEI initiatives??????

EEOC Perspective on Diversity, Equity Inclusion and Accessibility Programs

--

Post *SFFA v. Harvard/UNC*

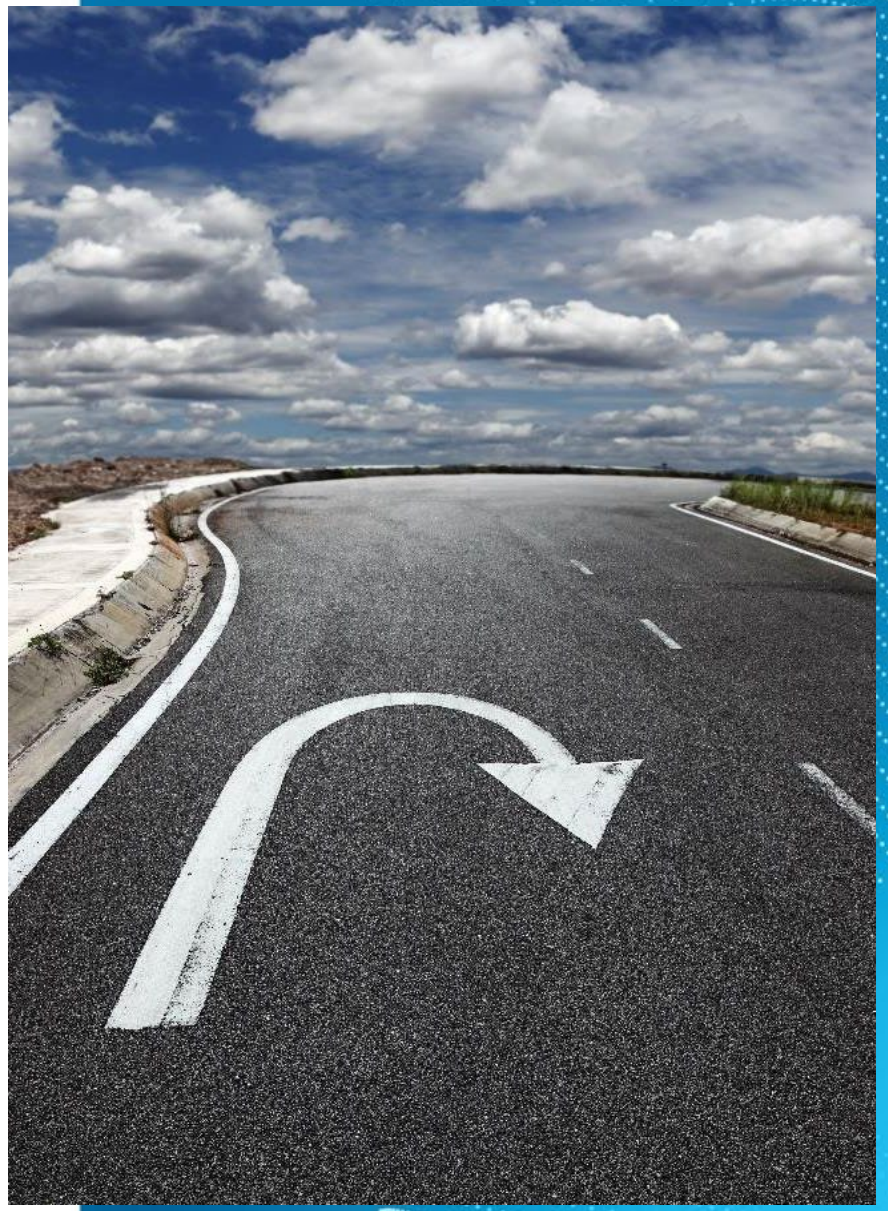
DEI Programs and EEOC Perspective

I. Statement of Chair Burrows

II. Impact of Selected EEOC Regulations/Guidelines

III. Recent Actions by Third Parties Challenging DEI Programs in Submissions to EEOC

IV. Recent Amicus Briefs by EEOC



Statement of Chair Burrows – June 29, 2023

- Statement from EEOC Chair Burrows Based on *SFFA v. Harvard/UNC* Decision:
  - "….. the decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College and Students for Fair Admissions, Inc. v. University of North Carolina* does not address employer efforts to foster diverse and inclusive workforces or to engage the talents of all qualified workers, regardless of their background. It remains lawful for employers to implement diversity, equity, inclusion, and accessibility programs that seek to ensure workers of all backgrounds are afforded equal opportunity in the workplace."

Prohibition of Preferential Treatment Under Title VII

- Section 703 (j) of Title VII, “Nothing contained in this subchapter shall be interpreted to require any employer…. to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer.
- See e.g., *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 280 (1976), upholding a “reverse discrimination” claim.
  - Facts: An employer fired two white employees and retained one Black employee who committed the same misconduct as the white employees.
- U.S. Supreme Court has not yet addressed whether a private-sector employer can engage in affirmative action for a non-remedial purpose. But see, e.g., *Taxman v. Board of Education*, 91 F. 3d 1547 (3rd Cir. 1996), cert. granted, 117 S. Ct. 2506 (1997)(reviews potential concerns in a RIF case that made its way to the U.S. Supreme Court, but settled before being addressed by the Supreme Court)

Selected EEOC Guidance/Regulations

- Following the Supreme Court's decision in *United Steel Workers of Am. v. Weber*, 443 U.S. 193 (1979), the EEOC issued regulations about "Affirmative Action Appropriate Under title VII of the Civil Rights Act of the Civil Rights Act of 1964, as amended," 44 Fed. Reg. 4422 (Jan. 19, 1979), which states that adoption of affirmative action based on the regulations will provide a defense to liability under Title VII. The EEOC regulations provide that such an affirmative action plan requires: (1) a reasonable self-analysis; (2) a reasonable basis for concluding that action is appropriate; and (3) reasonable action. 29 CFR 1608.4. – See next slide
- Also see "Affirmative Action Guidance"- CM-607- Affirmative Action 10/01/1981, which addresses use of affirmative action and use of affirmative action plans under Title VII stating the "race, sex, and national origin conscious decisions may be required in order to eliminate the effects of past discrimination and the adverse effects of present policies and practices," and distinguished between "unapproved plans" (i.e., entirely voluntary) vs. "approved plans" based on E.O. 11246, by court order or directions of a federal or state 706 agency. But Guidance reiterates the 3-step process.
- This was followed by adoption of the EEOC's Compliance Manual, Section 15 on "Race and Color Discrimination" (April 19, 2006), which provides, "Title VII permits diversity efforts designed to open up opportunities to everyone. " "The Commission encourages voluntary affirmative action and diversity efforts to improve opportunities for racial minorities in order to carry out the Congressional intent embodied in Title VII." (citing 29 CFR 1608)." But cautioned, "However, employers are cautioned that very careful implementation of affirmative action and diversity programs is recommended to avoid the potential for running afoul of the law."

Section 1608.4 – Establishing Affirmative Action Plans (non-government contractor)

- (a) Reasonable self analysis. The objective of a self analysis is to determine whether employment practices do, or tend to, exclude, disadvantage, restrict, or result in adverse impact or disparate treatment of previously excluded or restricted groups or leave uncorrected the effects of prior discrimination, and if so, to attempt to determine why…
- (b) Reasonable basis. If the self analysis shows that one or more employment practices:
  - (1) Have or tend to have an adverse effect on employment opportunities of members of previously excluded groups, or groups whose employment or promotional opportunities have been artificially limited,
  - (2) Leave uncorrected the effects of prior discrimination, or
  - (3) Result in disparate treatment, the person making the self analysis has a reasonable basis for concluding that action is appropriate.
- It is not necessary that the self analysis establish a violation of Title VII. This reasonable basis exists without any admission or formal finding that the person has violated Title VII, and without regard to whether there exists arguable defenses to a Title VII action.
- (c) Reasonable action. The action taken pursuant to an affirmative action plan or program must be reasonable in relation to the problems disclosed by the self analysis….

Recent Actions by Third Parties – Challenging DEI Programs in Submissions to EEOC

Statement from Ian Prior, America First Legal ("AFL") Senior Advisor:

- "Title VII of the Civil Rights Act of 1964 guarantees that workplaces in America do not discriminate against workers based on their race, color, religion, sex, national origin, and ethnicity. To enforce that guarantee and protect the rights secured by that law, Congress created the Equal Employment Opportunity Commission. As America's corporations continue to employ illegal and discriminatory diversity, equity, and inclusion practices, it is incumbent on the EEOC to investigate these companies and enforce Title VII, not to encourage such illegal behavior by looking the other way. America First Legal's Center for Legal Equality is committed to ensuring that all discrimination is eradicated, and we will continue to exercise oversight over the government bodies that are supposed to be committed to the same promise of equality under the law," said Ian Prior.
- "AFL has filed dozens of complaints with the EEOC against numerous companies, including companies in technology, retail, hospitality, entertainment and others.
- See America First Legal Launches Investigation Into the Equal Employment Opportunity Commission's Enforcement of Title VII Against Corporations That Use Unlawful Diversity, Equity, and Inclusion Practices - America First Legal (aflegal.org)

Recent Challenges to DEI Programs

- American Alliance for Equal Rights (AAER) led by Edward Blum, who is also the leader of Students for Fair Admissions, the organization that challenged Harvard and UNC's race-based affirmative action practices in the Supreme Court in 2023.
- **Fearless Fund Management** is a Black women-owned investment firm that invests in businesses led by women of color. The Foundation's charitable mission is to eliminate the significant gap in venture capital funding that persists for women entrepreneurs of color. Among other things, Fearless operates the Fearless Strivers Grant Contest, through which it awards $20,000 grants, tools, and mentorship to certain Black women business owners.
- 11th Circuit (June 3, 2024): Court of Appeals held Contest **unlawful under Section 1981**. Rejected the argument established by Supreme Court in 1987 in Weber and Johnson On a voluntary basis where an employer can show: (a) a manifest imbalance between groups in underrepresented job categories as evidenced by structured statistical analysis, (b) narrowly tailored measures to address specific imbalances; and (c) such programs are temporary/limited duration.

Recent EEOC Amicus Brief on DEI Issues

Review of Recent Amicus Briefs by EEOC

- *Vavra v. Honeywell International, Inc.* No. 23-2823, United States Court of Appeals for the Seventh Circuit, "Brief of the EEOC as Amicus Curiae In Support of Neither Party (Feb. 6, 2024) (challenge to unconscious bias training program) (Congress charged the Equal Employment Opportunity Commission (EEOC) with administering and enforcing Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq. At issue in this case is whether unconscious bias trainings are inherently discriminatory and, if not, whether an employee must present evidence to demonstrate a reasonable basis for believing that a particular training was discriminatory based on its design, its execution, or other circumstances.

- *Nathan Roberts and Freedom Truck Dispatch LLC v. Progressive Preferred Insurance Company*, Case No. 1:23-cv-01597 (N.D. Ohio, Feb. 22, 2024), "Grant program in which Defendants would award ten $25K grants to small, Black-owned businesses to use toward purchasing a commercial vehicle. ("The EEOC and the Supreme Court have long agreed that Title VII permits employers to adopt voluntary affirmative-action plans to remedy manifest imbalances in their workforces. Courts have interpreted section 1981 to allow voluntary race-based affirmative action as well, in employment and non-employment cases, guided by the framework established in the Supreme Court's Title VII affirmative-action caselaw."

Evolving Issues of Accommodation Involving:

Pregnancy

Disabilities

Religion

The Changing Laws Involving Pregnancy-

Impact of Pregnant Workers Fairness Act (PFWA) and implementing Regulations

A New Wrinkle—The Pregnant Workers Fairness Act

- The PWFA , signed into law by President Biden on December 29, 2022, ***went into effect on June 27, 2023***, and the EEOC began taking charges on that date. And ***as of April 19, 2024, final rules were issued by the EEOC.***
- The Pregnant Workers Fairness Act (PWFA) ***focuses on reasonable accommodations, and it is broader than the ADA***, which requires an employer to make reasonable accommodations to a qualified individual with a disability who can perform the essential functions of the job with or without reasonable accommodation.
- The PWFA requires "reasonable accommodations to the known limitations relating the pregnancy, childbirth or related medical conditions of a qualified employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity.
- ***Key expansion beyond the ADA:***

  "the term qualified employee" means an employee or applicant who, with or without reasonable accommodation, can perform the essential functions of the employment position, except that an employee or applicant shall be considered qualified if-

  (A) any inability to perform an essential function is for a temporary period;

  (B) the essential function could be performed in the near future; and

  (C) the inability to perform the essential function can be reasonably accommodated…..

Review of Final PWFA Regulations

EEOC issued a Notice of Proposed Rulemaking (NPRM) on August 11, 2023, with a comment period that closed on October 10, 2023, and the final rules were adopted as of April 19, 2024, with an effective date of June 18, 2024

Key Questions Based on for Review of Final Regulations:

1. ***What conditions are covered?***
2. ***Is there a medical threshold requirement triggering the Act's obligations?***
3. ***What is the most unique aspect of the law setting it apart from the ADA?***
4. ***How does an employee request a reasonable accommodation?***
5. ***How should an employer respond to a request for an accommodation?***
6. ***What are the recommended reasonable accommodations based on the final regulations?***
7. ***What are "prohibited practices" under the PWFA based on the final regulations?***

Key Questions for Employers Based on Final PWFA Regulations

1. **What conditions are covered?** Expansive reading of "**pregnancy, childbirth or related medical conditions**" to cover current pregnancy, past pregnancy, potential pregnancy, lactation (including breastfeeding and pumping), use of birth control, menstruation, infertility and fertility treatments ***and choosing or not choosing to have an abortion.***

2. **Is there a medical threshold requirement?** The physical or mental condition **triggering** for the Act's obligations **"can be modest, minor, or episodic," and there is *no requirement that conditions rise to a specific severity threshold*.** *Intended to cover conditions that do not rise to the level of disability applied under the Americans with Disabilities Act (ADA)!*

3. **What is the most unique aspect of the law setting it apart from the ADA?** A "qualified" employee or applicant includes not only an employee or applicant who, with or without reasonable accommodation, can perform the essential functions of a job, but also an employee or applicant **who *cannot* perform an essential function of the job for a temporary period, *if* the person is or is expected to be able to perform the essential function "in the near future," *and* the inability to perform the essential function can be reasonably accommodated.**

    * ***Pregnancy - "Generally forty weeks* from the start of the temporary suspension of an essential function."**

    * ***Other medical conditions* – To be determined on a *"case-by-case basis,"* but does not mean indefinitely**

Key Questions for Employers Based on Final PWFA Regulations (*Continued*)

4. How does an employee request a reasonable accommodation?

As under the ADA, *notice of the need for a PWFA accommodation can be conveyed* ***verbally or in writing****, can be expressed in plain language, and can come from a representative of the employee or applicant. The Commission emphasizes that* ***these should be "simple processes.****"*

5. How should an employer respond to a request for an accommodation?

- ***Given the temporary nature of pregnancy-related conditions, the EEOC encourages employers to respond expeditiously to employees' requests and to consider granting an accommodation request on an interim basis even if the employer believes it needs additional information***
- ***Limit circumstances in which medical documentation is requested - only if it is reasonable under the circumstances*** *to determine if the employee has a qualifying condition and needs an adjustment or change at work due to the limitation.*
- "Reasonable documentation" limited to (1)minimum sufficient to confirm the physical or mental condition; (2) confirms that it is related to protected status; and (3) states that the change or adjustment to the job is needed due to the limitation.
- ***Blanket prohibition in seeking supporting documentation in five instances:*** (1) **limitation** and need for a reasonable accommodation is ***obvious***; (2) employer already has sufficient information to support a known limitation; (3) ***when the request involves one of the four "predictable assessment" accommodations***; (4) when the request is for a ***lactation accommodation***; and (5) policy to grant without requesting documentation.

What are the Recommended Reasonable Accommodations Based on Final Regulations?

The following are <u>four accommodation discussed regarding pregnancy</u>, referred to as "predictable assessments"- **that presumably will not pose an undue hardship-**

- **Allowing an employee to carry or keep water and drink, as needed, in or nearby the employee's work area;**
- **Allowing an employee to take additional restroom breaks, as needed;**
- **Allowing an employee whose work requires standing to sit, and vice versa, as needed;**
- **Allowing an employee to take breaks, as needed, to eat and drink.**

The final rules state that *an employer's delay in providing the accommodations identified as predictable assessments "will virtually always result in a finding of unnecessary delay"* and a violation of the PWFA.

<u>Examples of Reasonable Accommodations:</u>

- **Frequent breaks;**
- **Siting/standing;**
- **Schedule changes, part-time work, and paid or unpaid leave**
- **Telework or remote work;**
- **Reserved parking;**
- **Light Duty;**
- **Making existing facilities accessible or modifying work environment;**
- **Job restructuring;**
- **Temporarily suspending one or more essential functions;**
- **Acquiring or modifying equipment, uniforms or devices;**
- **Adjusting or modifying examinations or policies.**

Key Questions for Employers Based on Final PWFA Regulations

7. What are some express unlawful employment practices based on the final regulations?

(1) **"Unnecessary delay**" in providing reasonable accommodations unless the entity can demonstrate that the accommodation would pose an undue hardship;

(2) Requiring an employee or applicant to accept an accommodation other than through the interactive process;

(3) Denying equal employment opportunities to a qualified employee if the denial is based on the need to make reasonable accommodations based on pregnancy, childbirth or related medical conditions;

(4) ***Requiring the employee to take leave when other accommodations are available***; and

(5) Taking adverse action against a worker for seeking or using a reasonable accommodation.

Plus…. ***the PWFA contains an anti-retaliation provision to prohibit interference with rights under the PWFA.***

Continuing ADA Challenges

ADA Update – EEOC General Counsel Report – March 2024

Disability Discrimination Issues	Count	Percent of Suits
Reasonable Accommodation	36	73.5%
Discharge/Constructive Discharge	32	65.3%
Hiring	15	30.6%
Prohibited Medical Inquiry and Exam	4	8.2%
Qualifications	3	6.1%
Discipline	3	6.1%
Job Assignment	2	4.1%
Promotion	2	4.1%
Wages and Compensation	2	4.1%
Terms/Conditions	1	2.0%
Harassment	1	2.0%
Testing	1	2.0%
Suspension	1	2.0%
Demotion	1	2.0%
Job Classification	1	2.0%
Other Issue Not Listed Above	1	2.0%

Key ADA Accommodation Issues

- Telecommuting
- Maximum Leave and “100% Healed” Policies
- Reassignment

Key ADA Accommodation Issue – Telecommuting

Telecommuting as A Reasonable Accommodation

- See Work at Home/Telework as a Reasonable Accommodation | U.S. Equal Employment Opportunity Commission (eeoc.gov) (Issue Date: 2-3-2003)

EEOC v. Design and Integration, Inc. Case No. 1:20-cv-02350 (D. Md., filed Aug. 17, 2020)

- EEOC sued employer after firing sales administrator who requested telework one day per week for 3-4 weeks as a reasonable accommodation for her reported disability of anxiety and depression. Job duties included researching new projects, reviewing online applications and conducting telephone interviews.
- Employer allegedly refused to grant the accommodation to perform her duties remotely, and the employer reportedly allowed other employees to telework.
- Facts may be dissimilar to some anticipated telework cases because employer allegedly said it would not have hired her had it known about her anxiety and depression.
- **Consent Decree**, which was entered into on April 22, 2021, includes language: "Defendant, its officers, agents, employees and all other persons acting on its behalf are enjoined from refusing to allow qualified individuals with disabilities from teleworking when telework is a reasonable accommodation from the employee's disability."

Query: Will decisions, such as EEOC v. Ford Motor Company, 782 F. 3d 753 (6th Cir. 2015), which rejected the EEOC's claim that the employer violated the ADA by not allowing a disabled employee to telecommute as a reasonable accommodation, be revised????

Reasonable Accommodation Under ADA – Largest EEOC Settlement in Fiscal Year 2023

Issues Front and Center – See EEOC Press Release –Nov. 29, 2022

- $8 million settlement – Nationwide settlement
- Two Key Issues Highlighted:

  (1) Maximum Leave Policies and "100% Healed" Policies

  (2) Reassignment as a Reasonable Accommodation-

Note: Split view among Circuit Courts 4th, 8th and 11th Circuits (finding mandatory reassignment to be unreasonable when an employer utilizes a best qualified hiring policy and 7th Circuit, finding that ADA mandates reassignment to another position where there is no other reasonable accommodation to another position that the employer can make. See generally, Mandatory Reassignment Under the Americans With Disabilities Act: The Fourth Circuit Weighs In - Wake Forest Law Review

Religious Accommodations- Evolving Standard

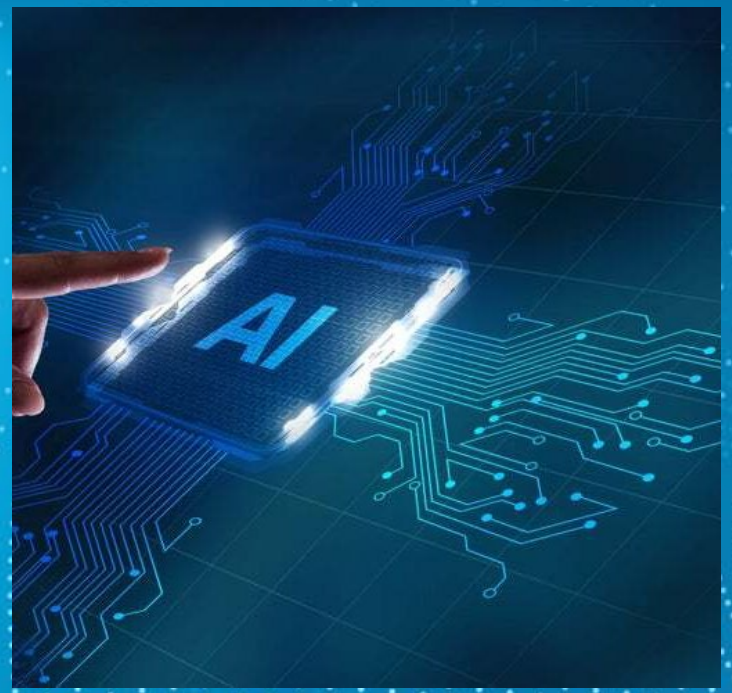
Religious Discrimination—Evolving Standards

- *Groff v. Dejoy* (U.S. Sup. Ct., June 29, 2023): Key decision regarding religious accommodation under Title VII
- Former U.S. Postal Service worker claimed he was disciplined and forced to resign rather than work his mail route on Sundays. USPS made efforts to accommodate Groff by allowing him to swap shifts with other employees. But when it could not find other employees to cover his shifts, USPS scheduled Groff to work on Sunday at least 24 times during a roughly 14-month period.
- Groff refused to work any of those scheduled Sundays and USPS disciplined him on multiple occasions for his refusal. Eventually Groff resigned when it became clear that he faced termination.

Impact of *Groff v. DeJoy* on Religious Accommodation

- Ruling upended nearly 50 years of precedent by "clarifying" the undue hardship standard in religious accommodation claims under Title VII.
- Dismantled "de minimus" framework from S.Ct. decision in Trans World Airlines v. Hardison, 432 U.S. 63 (1977) and created a new, and much higher, standard.
- Requires employers in assessing religious accommodation requests to deny such requests only if there is evidence that providing the accommodation would result in "substantial increased cost in relation to the conduct of [an employer's] particular business."
- This will require case-by-case factual analysis in dealing with reasonable accommodation requests, creating challenges for employers moving forward.
- Courts "must apply the test in a manner that takes into account al relevant factors in the case at hand, including the particular accommodations at issue and their practical impact in light of the nature, "size and operating costs of [an] employer."
- Must at a minimum determine how other employees are impacted, how that impact affects the "conduct of its business," and whether such impact constitutes a "substantial increased cost." At present, recommended option, if not granting the employee request, is to at least consider offering some type of accommodation, even if it is not what the employee requested.

AI Update



AI Update and Role of EEOC

- Artificial Intelligence and Algorithmic Fairness Initiative (2021) - Agency-wide initiative to ensure that the use of software, including artificial intelligence (AI), machine learning, and other emerging technologies used in hiring and other employment decisions comply with the federal civil rights laws that the EEOC enforces.
- EEOC Hearing on AI (1/31/23)- See Meeting of January 31, 2023 - Navigating Employment Discrimination in AI and Automated Systems: A New Civil Rights Frontier | U.S. Equal Employment Opportunity Commission (eeoc.gov)
- ADA and Use of Software, Algorithms, and AI to Assess Applicants and Employees (May 2022) - The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees | U.S. Equal Employment Opportunity Commission (eeoc.gov)
- EEOC Guidance - Select Issues: Assessing Adverse Impact in Software, Algorithms, and Artificial Intelligence Used in Employment Selection Procedures Under Title VII of the Civil Rights Act of 1964 (May 18, 2023)
- Visual Disabilities in the Workplace and the ADA, which includes a discussion of employer's obligations with respect to making reasonable accommodations related to an employer's use of algorithms or artificial intelligence (AI) in decision making.
- 2023 EEOC Strategic Enforcement Plan - Recognizes employers' increasing use of technology including artificial intelligence or machine learning, to target job advertisements, recruit applicants, and make or assist in hiring and other employment decisions, practices, or policies
- Joint initiatives/collaboration with other Federal Agencies

Recent AI Settlements Involving EEOC- Excerpts from the EEOC's 2023 Annual Performance Report

- In *EEOC v. iTutorGroup*, *Inc.*, No. 1:22-cv-02565 (E.D.N.Y. Sept. 8, 2023), the EEOC alleged that the providers of English-language tutoring services discriminated against a group of individuals because of their ages. In 2020, the companies programmed their application software to automatically reject female applicants over the age of 55 and male applicants over the age of 60. Consequently, over a period of a few weeks in 2020, the companies failed to hire the charging party and more than 200 other qualified tutor applicants ages 55 and older from the United States because of their ages. The five-year consent decree in this case provides for $365,000 to the affected applicants who were rejected between March and April 2020. The decree enjoins rejecting applicants or screening applicants based on sex or age, requesting dates of birth of applicants, and retaliation.
- The EEOC also successfully resolved a public conciliation of a Title VII investigation after finding evidence of national origin discrimination. Company that operates a job-search website for technology professionals, allowed customers to post positions that excluded applicants of U.S. national origin, deterring a class of workers from applying. Pursuant to the conciliation agreement, the company will compensate the estate of the original complainant and rewrite its programming to "scrape" for potentially discriminatory keywords. Through the company's use of programming to "scrape" for discriminatory postings, it has agreed to use artificial intelligence to prevent and combat employment discrimination.

Pay Equity—
A Continuing Conundrum

Pay Equity Efforts at EEOC

- The EEOC advanced pay equity by:
- During FY 2023, the EEOC favorably resolved 9 lawsuits involving compensation discrimination, including a systemic case. See Fact Sheet: Notable EEOC Litigation Involving Pay Discrimination | U.S. Equal Employment Opportunity Commission
- Filed 5 lawsuits raising compensation discrimination claims, 3 of which alleged that women were paid less than their male counterparts.
- Favorably resolved 9 lawsuits involving compensation discrimination, including a systemic case.
- Conducted 125 equal pay outreach events, reaching 13,814 attendees.
- Commemorating the 60th anniversary of the EPA, the EEOC released various resources, including:
  - An equal pay data highlight;
  - A fact sheet on notable EEOC litigation involving pay discrimination; and
  - An equal pay social media video campaign called "#LevelThePayingField."

The EEOC Perspective

- Areas of Focus. According to the EEOC's Strategic Enforcement Plan, the EEOC will continue to focus on pay discrimination on the basis of sex and on other protected bases covered by federal antidiscrimination laws, and specifically, will also focus on practices that contribute to pay disparities and may lead to violations, such as:
  - Pay secrecy policies,
  - Retaliating against workers for asking about pay or sharing their pay with coworkers,
  - Reliance on past salary history to set pay, or
  - Requiring applicants to specify their desired or expected salary at the application stage.
- Collection of Pay Data. In July 2022, the EEOC announced a report by the **National Academy of Sciences, Engineering and Medicine** (NASEM) finding "that the data EEOC collected may be used effectively by the agency to help focus its resources to identify pay discrimination and offer short-term and long-term recommendations for improving pay data collection by the agency if undertaken in the future. The Report concluded that collecting "any data would enable the EEOC to pursue a more data driven approach" to challenge pay discrimination and "identify systemic discrimination."
- The major query- Should employers expect the return of some type of requested Component 2-type pay data in future EEO-1 Reports??

Sign Up for a Demo

Three ways to sign up for a demo:

1. Reply “Yes” to the on-screen poll
2. Click the link in the Resources panel
3. Visit to www.compliancehr.com/demo/

Benefits of a custom demonstration:

- Discuss your organization’s requirements/challenges
- Review Navigator Suite Solutions
- Share compliance methodologies

Questions?

Please add any additional questions to the Q&A box

Thank you!