



Emerging EEO Issues

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Today's Topics

- **EEO Litigation Involving “Hot” Topics**
- **EEOC’s Strategic Enforcement Plan**
- **EEOC’s Proposed Guidance on Unlawful Harassment**
- **EEOC’s Guidance on National Origin Discrimination**



Developing Case Law



Title VII Covers Sexual Orientation Discrimination!!

- So says the 7th Circuit, at least
- *Hively v. Ivy Tech*
 - *En banc* court held that Title VII's ban on "sex discrimination" encompasses sexual orientation discrimination
- First Court of Appeals to so hold



Will 2nd Circuit Follow Suit?

- *Christiansen v. Omnicom Group, Inc.*
- Homosexual advertising exec sued employer alleging discrimination based on sexual orientation under Title VII
- Argued that 2nd Circuit should revisit its prior 2000 decision holding that Title VII does not cover sexual orientation discrimination
- Panel held that Title VII does not prohibit sexual orientation discrimination, but remanded based on sexual stereotyping claim
- Will *en banc* court agree with 7th Circuit?



Split in the Circuits

- ***Evans v. Georgia Regional Hospital* (11th Circuit)**
- **Similar case involving sexual orientation discrimination**
- **11th Circuit held that Title VII does not cover sexual orientation discrimination and affirmed dismissal**
- **Split in circuits may lead to review by U.S. Supreme Court**



Genetics & the Law



Genetic Tests & Discrimination

- Is racial identity “fluid”?
- *Brown v. City of Hastings, MI*
- White police sergeant took DNA test that showed ancestry is 18-33% sub-Saharan African ancestry
- Alleged harassment by co-workers ensued and was tolerated by managers
 - Called “Kunta”
 - “Black Lives Matters” taunts
- “Perceived as” discrimination
- Can he prove discrimination was “on the basis of race” if co-workers did not consider him to be in protected class?



Gender Dysphoria & the ADA

- ADA excludes gender identity disorders not resulting from physical impairment
- Federal judge in PA ruled that gender dysphoria could be ADA disability notwithstanding this exclusion
 - *Blatt v. Cabela's, Inc.*
- Held that gender dysphoria that caused “clinically significant stress and other impairments that may be disabling” could be covered by the ADA
- Seems to read the exclusion out of the statute....





EEOC

**U.S. Equal Employment
Opportunity Commission**

EEOC Strategic Enforcement Plan

- **FY 2017-2021**
- **EEOC's strategy is to focus on activities most likely to have strategic impact in advancing EEO**
 - **Issues that will have broad impact because of the number of individuals, employers, or employment practices affected**
 - **Issues affecting workers who may lack an awareness of legal protections or who may be reluctant or unable to exercise rights**
 - **Issues involving developing areas of law, where expertise of EEOC is particularly salient**
 - **Issues involving discriminatory practices that impede or impair full enforcement of anti-discrimination laws**
 - **Issues that may be best addressed by government enforcement**



Substantive Priority #1: Eliminating barriers in recruitment and hiring

- **Class-based recruitment and hiring practices**
 - Exclusionary policies and practices
 - Channeling or steering into specific jobs based on status
 - Job segregation
 - Restrictive application processes
 - Inaccessible online systems
 - Screening tools that disproportionately affect workers based on protected status
 - Pre-employment tests
 - Background checks
 - Date of birth inquiries
 - Medical questionnaires
- **Data-driven selection devices**
- **Lack of diversity in certain industries**



Substantive Priority #2: **Protecting vulnerable workers, including immigrant and migrant workers, and underserved communities from discrimination**

- **Job segregation**
- **Harassment**
- **Trafficking**
- **Pay**
- **Retaliation**
- **Other policies and practices**

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Substantive Priority #3: Addressing selected emerging and developing issues

- **Qualification standards and inflexible leave policies that discriminate against individuals with disabilities**
- **Accommodating pregnancy-related limitations under the ADA and PDA**
- **Protecting LGBT individuals from discrimination based on sex**
- **Clarifying employment relationships for temporary workers, staffing agencies, independent contractors, and on-demand economy**
- **Discrimination against Muslims, Arabs, or individuals perceived as members of those groups**



Substantive Priority #4: Ensuring equal pay protections for all workers

- **Not just about gender**
- **Race and ethnicity**
- **Age**
- **Individuals with disabilities**
- **Intersection of protected bases**

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Substantive Priority #5: Preserving access to the legal system

- **Overly broad waivers, releases, mandatory arbitration provisions**
- **Failure to maintain applicant and employee data and records required by EEOC regulations**
- **Significant retaliatory practices that effectively dissuade others from exercising their rights**



Substantive Priority #6: Preventing systemic harassment

- **Over 30% of EEOC charges allege harassment**
- **Concerted effort to promote holistic prevention programs, including training and outreach, to deter future violations**





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EEOC's Proposed Guidance on Unlawful Harassment

- **Covered Bases**
- **Causation**
- **Hostile work environment threshold**
- **Liability**



Covered Bases

- **Race and color**
- **National origin**
- **Religion**
- **Sex**
 - **Sex stereotyping**
 - **Pregnancy, childbirth, or related medical conditions**
 - **Gender identity**
 - **Sexual orientation**
- **Age**
- **Disability**
- **Genetic information**



Covered Harassment includes:

- Harassment based on perception of membership in protected group, even if perception is wrong
- Harassment because of association with individuals outside individual's protected group
 - Marriage
 - Close friendship
 - Advocacy
- Harassment based on protected characteristic even if harasser is member of same claims
- Harassment based on intersection of two or more protected characteristics



Causation

- **Harassment must be based, at least in part, on protected characteristic**
- **Sexual favoritism**
 - **Preferential treatment based on consensual relationships do not discriminate on basis of sex, as such preference disadvantages both sexes equally**
 - **However, if sexual favoritism towards members of one sex is more commonplace, that can create hostile environment for members of that sex. Favoritism towards females who grant sexual favors can create demeaning work environment**



Proving Hostile Work Environment

- **Severe or pervasive**
- **Objectively and subjectively hostile work environment**
- **Factors**
 - **Frequency and severity of conduct**
 - **Whether it was physically threatening or humiliating**
 - **Whether it unreasonably interfered with employee's work performance**
 - **But complainant does not have to prove that work performance suffered**
 - **Whether it caused psychological harm**
- **If harassment is based on multiple protected characteristics, all acts should be considered together in determining whether there was hostile environment**



Severity

- **Conduct typically severe enough to establish hostile work environment**
 - **Sexual assault**
 - **Sexual touching of an intimate body part**
 - **Physical violence or threat of physical violence**
 - **Symbols of violence or hatred, such as swastika, Klansman's hood, or noose**
 - **Use of "n-word" by supervisor**
 - **Use of animal imagery (monkey, ape)**
 - **Threats to deny job benefits for rejecting sexual advances**



Pervasiveness

- **Cumulative effect of less serious acts**
- **Frequency of conduct**
- **Whether actions occurred close together in time**



Subjectively Hostile Work Environment

- **Complainant's own statement that conduct was perceived as offensive is sufficient**
 - Includes complaint to employer or others
- **Delay in complaining does not mean conduct was not perceived as offensive, particularly if there is explanation for delay**
- **That individual participated in conduct does not preclude finding it was subjectively hostile**
- **Subjective perception can change over time**



Objectively Hostile Work Environment

- Requires “appropriate sensitivity to social context”
- Should be evaluated from perspective of reasonable person of complainant’s protected class
 - Can establish hostile environment even if some members of complainant’s protected class did not find it offensive
- Prevailing workplace culture does not excuse discriminatory conduct
 - No “crude environment” exception



Work v. Non-Work Conduct

- **Harassment may include conduct that occurs in work-related context outside of regular workplace**
 - Off-site training
 - Work-related communication systems
- **Harassment outside of work can have consequences in the workplace and create hostile environment**
 - Communications using private social media accounts



Example of Conduct on Social Media Outside Workplace

- **Brad and Al work on all-male construction crew. Al is superintendent and brings pornographic magazines to the construction site. After Brad repeatedly refuses to look, Al and others begin taunting him. Al uses smartphone to post comments on his Facebook page calling Brad “princess” and “f----t.” Brad and others see posts, and they talk about them at work, direct epithets to Brad, simulate sex acts around him, and expose themselves to Brad**
- **Facebook posts contributed to hostile work environment even though written on personal smartphone after-hours**



Liability: 4 Standards

- If harasser is alter ego of employer, employer is strictly liable
- If harasser is supervisor and hostile work environment includes tangible employment action, employer is vicariously liable
- If harasser is supervisor and no tangible employment action, employer can limit liability with 2-part affirmative defense
- If harasser is co-worker or non-employee, employer is liable if it failed to act reasonably to prevent harassment or to take corrective action when it was aware or should have been aware of harassment



Affirmative Defense to Supervisor Harassment

- **Employer exercised reasonable care to prevent and correct promptly any harassment**
- **Employee unreasonably failed to take advantage of any preventative or corrective measures provided by employer or take other steps to avoid harm**
- **Some courts have held that an employer may avoid liability by proving only the first element when only a single incident of harassment occurred, but EEOC maintains that, if harasser is supervisor, the exercise of reasonable care by employer is NOT sufficient by itself**



First Prong of Affirmative Defense



Preventing & Correcting Harassment

- **Publishing anti-harassment policy**
- **Establishing process for addressing harassment complaints**
- **Providing training to ensure employees understand their rights and responsibilities**
- **Monitoring the workplace to ensure adherence to policy**
- **Implementing policy and complaint procedure to assure employees of fairness and effectiveness of process**



Anti-harassment Policy

- **Define what conduct is prohibited**
- **Widely disseminated**
- **Accessible to workers of all language proficiencies**
- **Require supervisors to report or address harassment when aware of it**
- **Offer various ways to report harassment**



Complaint Process

- **Effective investigations and prompt corrective action**
- **Adequate confidentiality protections**
- **Sufficient anti-retaliation protections**



Second Prong of Affirmative Defense



Employee Failed to Use Preventative Measures

- **Employee's unreasonable failure to use complaint process normally establishes second prong**
- **But there may be reasonable explanations**
 - **Unnecessary obstacles to filing complaint**
 - **Person designated to receive complaints is close friend of harasser**
 - **If employee aware of instances when employer failed to take corrective action in response to prior complaints by others**
 - **If harasser threatened to discharge employee if she complained**
 - **If another employee was subjected to retaliation for complaining about harassment**
- **Delay in reporting not reasonable if based merely on concerns about ordinary discomfort or embarrassment**



Employee Attempted to Avoid Harm Through Other Efforts

- **Even if employee does not use employer's complaint process, employee can show he took reasonable steps to avoid harm**
 - **Union grievance**
 - **EEOC charge**



Employer's Appropriate Corrective Action

- **Must be reasonably calculated to prevent further harassment under the particular circumstances at that time**
 - **Proportionate to seriousness of offense**
 - **Nature and degree of harasser's authority**
 - **Whether harassment stopped, but continuation does not necessarily mean that action was inadequate**
 - **Lack or minimal consequences on complainant**
 - **Options available to employer, such as when harasser is non-employee**
 - **Even if harassment not substantiated, employer should undertake preventative measures, such as counseling, training, or monitoring**



Promising Practices

- **Harassment policy**
- **Complaint system**
- **Training**



EEOC's Guidance on National Origin Discrimination



What is national origin discrimination?

- **Discrimination because an individual or his ancestors**
 - are from a certain place
 - share physical, cultural, or language characteristics of a national origin or ethnic group
- **Title VII prohibits discrimination based on incorrect information or conclusions about ethnicity or nationality**
- **Title VII prohibits discrimination based on associating with someone of a particular national origin**



What is national origin harassment?

- **Ethnic slurs**
- **Ridicule**
- **Graffiti**
- **Physical violence**
- **Other offensive conduct**



What about language issues?

- **Employer may rely on legitimate business reasons for making language-based employment decisions**
- **Language fluency requirement is lawful if fluency is required for effective performance of job**
- **Language-restrictive policy may be unlawful if applied at all times in the workplace**
 - **May be lawful in limited circumstances when needed to promote safe and efficient job performance**
- **Employer may NOT base decision on accent unless**
 - **the ability to speak English is required to perform job duties effectively and**
 - **the accent materially interferes with job performance**



National Origin & Accommodation

- **Title VII does not require accommodation of national origin tradition or practices, but ensure there is no religious component to practice**



Questions?



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