



— 2017 UT SYSTEM — LEGAL CONFERENCE

presented by the Office of General Counsel

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Session 5a

Equal Employment Opportunity Compliance: Agency Perspective & Insight

Presented by:

David Rivela, Senior Trial Attorney
EEOC San Antonio Field Office

Lowell Keig, Civil Rights Division Director
Texas Workforce Commission

September 28, 2017 2:45-3:45 pm

Equal Employment Opportunity Compliance: Agency Perspective & Insight

2017 UT System Legal Conference
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Agenda

- **Agencies' Roles, Operations & Processes**
- **EEO Data & Statistics**
- **Hot Topics/Issues**
 - **Conciliation**
 - **LGBT**
 - **Religion**
 - **Pregnancy**
 - **Disability**
 - **Criminal Background Checks**
 - **Hiring Process, Evaluations & Discipline**
- **Q&A**

EEOC Leadership

- **Commissioners:**
- Victoria A. Lipnic (Acting Chair)
- Charlotte Burrows
- Chai Feldblum
- Two current vacancies on Commission

- Appointed by President
- Serve Five Year Staggered Terms
- Makes equal employment opportunity policy
- May issue charges of discrimination directly against an employer
- Authorize the filing of lawsuits

- **General Counsel** (currently vacant)
- Leads Office of General Counsel Appointed by president
- Responsible for conducting EEOC enforcement litigation
- Serves four year term

Laws Enforced by EEOC

Title VII of the Civil Rights Act of 1964

Race, color, sex, national origin, religion, pregnancy, retaliation

Equal Pay Act of 1963

Protects men and women who perform substantially equal work in the same establishment from sex-based wage discrimination

Age Discrimination in Employment Act of 1967

(Employees forty years of age or older)

Americans With Disabilities Act of 1990 (Amended during 2008)

Protects against discrimination in hiring, employment based on disability, requires reasonable accommodations for qualified individuals with a disability

Title II of the Genetic Information Non-Discrimination Act of 2008

Prohibits Employment Discrimination on the Basis of Genetic Information

Government Employee Rights Act of 1991

Applies to employees of elected officials

Strategic Enforcement Plan 2017-2021

SEP Priorities

- Eliminating Barriers in Recruitment and Hiring.
- Protecting Vulnerable Workers, Including Immigrant and Migrant Workers, and Underserved Communities from Discrimination.
- Addressing Selected Emerging and Developing Issues.
- Ensuring Equal Pay Protections for All Workers.
- Preserving Access to the Legal System.
- Preventing Systemic Harassment.

Emerging and Developing Issues

- a) Qualification standards and inflexible leave policies that discriminate against individuals with disabilities;
- b) Accommodating pregnancy-related limitations under the Americans with Disabilities Act Amendments Act (ADAAA) and the Pregnancy Discrimination Act (PDA);
- c) Protecting lesbians, gay men, bisexuals and transgender (LGBT) people from discrimination based on sex;
- d) Clarifying the employment relationship and the application of workplace civil rights protections in light of the increasing complexity of employment relationships and structures, including temporary workers, staffing agencies, independent contractor relationships, and the on-demand economy;
- e) Addressing discriminatory practices against those who are Muslim or Sikh, or persons of Arab, Middle Eastern or South Asian descent, as well as persons perceived to be members of these groups, arising from backlash against them from tragic events in the United States and abroad.

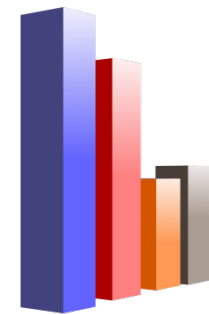
TWC Civil Rights Division's Role, Operations & Processes

- Texas Labor Code, Chapter 21 f/k/a Tex. Comm'n on Human Rights Act; Rules: 40 TAC §819
- Relationship with EEOC
- Mediation Program & Settlement Discussions during Investigation Stage
- Two-step process for Cause Case & Conciliation attempt is required before any lawsuit



Statewide Data on Complaints

- Retaliation and Race – top bases
- Discharge and Harassment – top issues
- No reasonable cause – majority of closures



State Agency Discrimination Complaints Other Than Without Merit – Filed by Basis

Type of Closure	Number	Percent
Sex	2	13%
Race	5	31%
Color	0	0%
Age	3	19%
Disability	16	100%
National Origin	1	6%
Religion	0	0%
Retaliation	6	38%
Genetic Information	0	0%
Other	0	0%

State Agency Discrimination Complaints Other Than Without Merit – Filed by Issue

Issue	Number	Percent
Discharge	5	31%
Terms and Conditions	5	31%
Sexual Harassment	0	0%
Promotion	1	6%
Hiring	1	6%
Demotion	1	6%
Layoff	0	0%
Wages	2	13%
Reasonable Accommodation	7	44%
Benefits	1	6%
Discipline	3	19%
Harassment	4	25%
Language/Accent Issue	1	6%
Other	5	31%

STATE AGENCIES' EEO DATA

Instances of Non-Compliance by State Agencies with Most Common Personnel Policies and Procedures Review Categories

Category of Non-Compliance	FY14	Percent	FY15	Percent	FY16	Percent
Hiring Process/Workforce Analysis & Recruitment Plan	6	12%	24	24%	20	33%
Performance Evaluations	8	16%	15	24%	17	28%
EEO Training	21	43%	10	16%	15	24%
Reasonable Accommodations	14	29%	14	22%	9	15%
Total	49	100%	63	100%	61	100%



Most Recent Supreme Court Cases Involving EEOC

***McClane Company, Inc. v. E.E.O.C.*, 137 S. Ct. 1159 (February 21, 2017, as revised April 3, 2017). Supboena Enforcement**

- An EEOC subpoena should be enforced if the charge is valid and the material requested is relevant, unless the employer establishes that the subpoena is (1) too indefinite, (2) issued for an illegitimate purpose, or (3) is unduly burdensome.
- District Court's order concerning EEOC subpoena was subject to "abuse of discretion" standard of review, not *de novo* review by appellate court.

CRST Van Expedited, Inc. v. E.E.O.C., 136 S.Ct. 1642 (May 19, 2016)

- EEOC claims had been dismissed by district court based on finding of failure to conciliate
- District Court's award of attorney's fees was reversed by 8th Circuit
- Supreme Court held that a "favorable ruling" **on merits** not necessary to be prevailing party under Title VII attorney's fees provision
- Court remanded case back to 8th Circuit to address issue of attorney's fees on case where district court dismissed claims based on failure to conciliate
- Court did not address whether conciliation was proper or whether remedy of dismissal was proper

Hot Topics/Important Cases

Requirements For Conciliation

Mach Mining, LLC v. E.E.O.C., 135 S. Ct. 1645, 1655–56,
191 L. Ed. 2d 607 (2015)

- If the EEOC determines that there is “reasonable cause to believe that the charge is true...” it “...shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.”

42 U.S.C. § 2000e-5(b).

Requirements for Conciliation

The EEOC must:

- (1) inform the employer about the specific allegation, as the Commission typically does in a letter announcing its determination of “reasonable cause.” Such notice properly describes both what the employer has done and which employees (or what class of employees) have suffered as a result.
- (2) try to engage the employer in some form of discussion (whether written or oral), so as to give the employer an opportunity to remedy the allegedly discriminatory practice.

“Judicial review of those requirements (and nothing else) ensures that the Commission complies with the statute....”

Mach Mining, LLC v. E.E.O.C., 135 S. Ct. 1645, 1655–56, 191 L. Ed. 2d 607 (2015)

LGBT Issues

EEOC's Position on Sexual Orientation As a Protected Basis Under Title VII

- The Commission has held “under Title VII of the Civil Rights Act of 1964, the prohibition on sex discrimination itself includes discrimination based on gender identity and sexual orientation.”
- EEOC Directive No. 560.008, June 22, 2016, signed by Chair Jenny Yang

EEOC and Department of Justice Filed Conflicting Amicus Briefs For *Zarda v. Altitude Express, Inc.*, 855 F.3d 76 (April 18, 2017) 2nd Circuit *En Banc* Review

EEOC Amicus Brief filed in on June 23, 2017

- The “EEOC is the primary agency charged by Congress with interpreting and enforcing Title VII of the Civil Rights Act of 1964”
- Sexual orientation discrimination is discrimination “because of...sex,” in violation of Title VII.”

DOJ amicus brief filed on July 27, 2017

- EEOC was “not speaking for the United States.”
- Sexual orientation not covered under Title VII.

Acting Chair Lipnic

August 3, 2017

National Industrial Liaison Group Annual Conference

- Title VII covers sexual orientation discrimination as discrimination based on sex is an approved and voted-on position.
- “We will keep going.”
- Supreme Court will eventually rule on the matter.

Religious Discrimination Under Title VII

EEOC v Abercrombie & Fitch Stores, Inc., 135 S.Ct. 2028 (2015)

- Applicant denied employment because she wore head scarf;
- Defendant asserted that Look Policy barring the wearing of “caps” was a facially neutral policy;
- Decision-maker alleged he did not know that applicant was Muslim;
- However, decision-maker was told before decision to not hire that interviewer believed the applicant wore head scarf because of her religion;
- Applicant did not specifically request accommodation concerning “Look Policy.”

EEOC v Abercrombie & Fitch Stores, Inc. 135 S.Ct. 2028 (2015)

- An employer violates Title VII when a motive for not hiring an applicant is to avoid providing religious accommodation, even if the employer does not actually know whether or not the employee will need one.
- If an applicant proves that one of an employer's motives for not hiring her was that it suspects she might need a religious accommodation, she can prevail on a claim of disparate treatment based on religion, even if she never asked for accommodation during the hiring process.
- To defeat liability, an employer would remain free to prove that no accommodation could have been provided without imposing an **undue hardship** on the operation of its business.

Undue Hardship

- “More than *de minimis*” cost or burden on operation of employer’s business (note: this is lower than ADA standard), for example:
 - More than ordinary administrative costs;
 - Where accommodation infringes on other employees’ job rights or benefits;
 - Impairs workplace safety;
 - Causes co-workers to carry the individual’s share of burdensome or potentially hazardous work;
 - Employee’s religious expression interferes with work, amounts to potential harassment of other employees, or could be reasonably mistaken as employer’s own message;
 - Conflicts with requirements of another federal law or regulation.

Compliance and Best Practice Examples - Reasonable Accommodation

- EEOC Guidance, 29 C.F.R. § 1605.2,
Reasonable Accommodation Without
Undue Hardship

Young v. United Parcel Serv., Inc., 135 S. Ct. 1338, 1354, 191 L. Ed. 2d 279 (2015). Pregnancy Discrimination Act of 1978

- The Pregnancy Discrimination Act proscribes discrimination on the basis of pregnancy and related medical conditions within the definition of sex discrimination.
- women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, **including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work....**
42 U.S.C. § 2000e(k).

Young v. United Parcel Serv., Inc., 135 S. Ct. 1338, 1354, 191 L. Ed. 2d 279 (2015). Duty to Accommodate Pregnancy.

Facts: Employee brought suit alleging pregnancy discrimination when employer refused to permit her to work where she had a lifting restriction which was at odds with job requirement to be able to lift at least seventy pounds.

Held:

- A plaintiff alleging that the denial of an accommodation constituted disparate treatment under the PDA may make out a prima facie case by showing that she belongs to the protected class, that she sought accommodation, that the employer did not accommodate her, and that the employer did accommodate others “similar in their ability or inability to work.”
- The employer may then seek to justify its refusal to accommodate the plaintiff by relying on “legitimate, nondiscriminatory” reasons for denying her accommodation.
- If the employer offers an apparently “legitimate, non-discriminatory” reason for its actions, the plaintiff may in turn show that the employer's proffered reasons are in fact pretextual.
- The plaintiff may reach a jury on this issue by providing sufficient evidence that the employer's policies impose a significant burden on pregnant workers, and that the employer's “legitimate, nondiscriminatory” reasons are not sufficiently strong to justify the burden, but rather—when considered along with the burden imposed—give rise to an inference of intentional discrimination.

Pregnancy Discrimination:

Be Aware that Employers May Have to Accommodate Pregnancy-related conditions/restrictions

- Women affected by pregnancy, childbirth, or related medical conditions must be treated the same as other persons not so affected but similar in the inability or inability to work.
- **Equal Access to Benefits:** An employer is required under Title VII to treat an employee temporarily unable to perform the functions of her job because of her pregnancy-related condition in the same manner as it treats other employees similar in their ability or inability to work, whether by providing modified tasks, alternative assignments, or fringe benefits such as disability leave and leave without pay.

EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issue, Notice No. 915.003.

Disability Issues

Is Obesity a Disability?

Morriss v. BNSF Railway Co., 817 F.3d 1104 (8th Cir. 2016)

- BNSF revoked conditional offer of employment because Morriss' BMI between 40 & 41
- **Obesity must have physiological cause to be a disability**
- No medical condition associated with PI's obesity and he was not regarded as having a current impairment



Is Diabetes Type 1 a Disability?



Kemp v. JHM Enterprises, Inc., No. 6:14-cv-02604-TMC-KFM, 2016 WL 859361 (D.S.C. Mar. 7, 2016)

- PI suffered diabetic episode while traveling on job and fired for “inappropriate behavior”
- Not disability per se—still need substantial limitation of a major life activity
- Medical treatment & symptoms supported MLAs of speaking, communicating and caring for oneself



Regarded as Disabled Due to Anxiety?

Adkison v. Willis, 214 F. Supp. 3d 1190 (N.D. Ala. 2016)

- Sheriff's deputy with anxiety disorder placed on leave for psychological evaluation
- #1: No MSJ on regarded as disabled b/c Sheriff knew of anxiety disorder, aware of unusual behavior, and ordered psych exam
- #2: No MSJ on "qualified individual" b/c not clear that PI could not perform essential functions
- #3: Not "subjected to unlawful discrimination b/c of disability," so MSJ

Myth: You only have to accommodate the work environment for employee

EEOC v. S&B Industry, Civil Action No. 3:15-cv-00641 (**N.D. Tex.** 2017)

- 2 applicants w/ hearing impairments used ASL in interview & asked Superv to write down info about job
- Started writing, but then refused to continue
- Consent decree: \$110K, training, log disability complaints, report to EEOC semi-annually, post notice of settlement



Essential Function? Undue Hardship?

EEOC v. Austin's FEC, LLC, No. 1-15-cv-00873 (**W.D. Tex.** 2016)(**David Rivela case**)

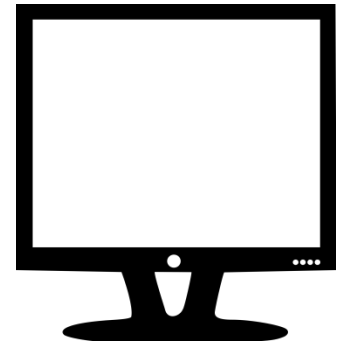
- P-T custodian had disability caused by traumatic brain injuries when child
- Trouble with new electronic clocking in/out system and Er said he was no longer able to do job
- Consent decree: \$20K, policies, training, EEOC notices



Who has the Burden in the Interactive Process?

Dillard v. City of Austin, Texas, No. 15-50779, 2016 WL 4978363 (5th Cir. 2016)(Pl's misconduct and poor performance caused breakdown in interactive process)

- Manual laborer/field advisor – injured and unable to do job
- Accepted Admin. Asst. position
- Ee caused breakdown in the interactive process due to his poor performance



When the Employee runs out of FMLA...

EEOC v. Vicksburg Healthcare, L.L.C., 663 F. App'x 331 (5th Cir. 2016)

- Nurse's RA Rqst for additional 2 wks of leave after FMLA would end was denied
- Dr. said could return to "light work" w/ 10 lb. lifting restriction, but PI was terminated
- Claimed total temp'y disability in applying for benefits
- Court denied Dfndt's MSJ, since stmt not inconsistent w/ claim she could have worked w/ an accommodation



Criminal Background Checks

BROAD POLICY/PRACTICE ON BACKGROUND CHECKS

- EEOC Guidance:
http://eoc.gov/laws/guidance/arrest_conviction.cfm
- Targeted Screen
 - *Green v. Missouri Pacific Railroad*, 549 F.2d 1158 (8th Cir. 1977)
- Individualized Assessment
- *State of Texas v. EEOC*, 5:13-cv-00255-C, N. Dist. of Tex.





Hiring Process, Evaluations & Discipline

Hiring, Performance Evaluations & Disciplinary Actions – Pitfalls to Avoid

- Set of interview questions, preferred answers & scoring – *See Martinez v. TWC, 5th Cir., 12/30/14.*
- Employers should avoid “Evaluation Inflation.”
- Insufficient disciplinary documentation and failure to follow P&Ps.





Q&A

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In addition to sources cited in previous slides, TWC-CRD thanks the EEOC for its resources: www.eoc.gov