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Lessons From the EEOC's General Counsel's Retrospective: Top Ten Litigation Developments and the Effective Employer's Response

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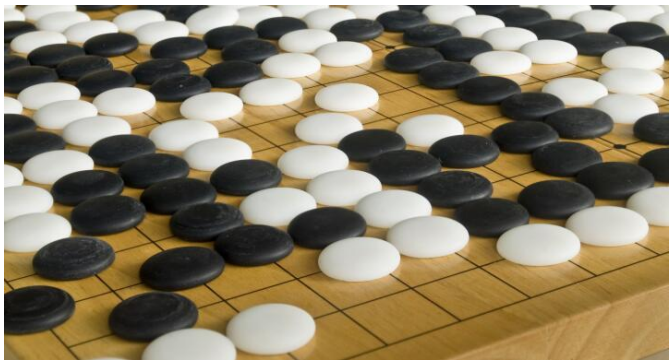
November 8, 2016



On October 7, 2016, the General Counsel of the U.S. Equal Employment Opportunity Commission ("EEOC"), P. David Lopez, presented **"The EEOC's Top Ten Litigation Developments"** at an employment law symposium sponsored by Ward and Smith, P.A. He provided an excellent summary of complex issues arising under the federal laws enforced by the EEOC (such as, for example, Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, and the American With Disabilities Act of 1990). This article summarizes the presentation, which will test whether brevity is indeed "the soul of wit."

With that caveat, here are the EEOC's "top ten" litigation developments in the field of employment discrimination law during the last five years, and what you, as an astute employer, can learn from Mr. Lopez's review (in order of increasing significance):

10. **Retaliation:** Virtually all federal anti-discrimination statutes prohibit not only specified employment discrimination but also retaliation against applicants or employees who have opposed unlawful discrimination. Employers, in other words, can be sued not only for having allegedly engaged in unlawful discrimination (based, for example, on gender, race, or disability), but also for allegedly having *retaliated* against an employee because he or she *complained* that the employer did so.

The U.S. Court of Appeals for the Sixth Circuit just last year affirmed a jury verdict for the EEOC of more than $1.5 million, which was awarded to three female employees who had been sexually harassed by a supervisor and then suffered the further indignity of retaliation after they objected to his sexual advances.

Lesson: Ensure that your personnel policies clearly inform employees about how to complain about unlawful discrimination or retaliation and provide explicitly that retaliation against persons who oppose unlawful employment practices will not be tolerated.

9. **Pregnancy Discrimination:** The Pregnancy Discrimination Act of 1978 provides that "women affected by pregnancy, child birth, or related medical conditions shall be treated the same … as other persons not so affected but similar in their ability or inability to work." The United States Supreme Court, in the 2015 case Young v. UPS, decided that "similar in their ability or inability to work" does not mean that the employee must be "similar" to other employees in all but the protected criteria. A complaining employee can create a

genuine legal issue that requires a trial by producing evidence that the employer accommodated a substantial percentage of *nonpregnant employees* while, at the same time, failed to accommodate a large percentage of *pregnant employees*. The Supreme Court sent the Young case back to the lower courts to determine whether UPS had provided "similarly situated [but not pregnant] employees" with more favorable treatment than had been accorded pregnant employees.

Lesson: If you accommodate certain physical limitations of nonpregnant employees, then you had better provide the same kind of accommodations to pregnant employees.

8. "**Reasonable Accommodation" as required by Americans with Disabilities Act ("ADA"):** The EEOC has underscored the importance of the ADA "by filing and successfully prosecuting cases involving conditions such as diabetes, cancer, intellectual disabilities, and epilepsy," which were difficult to prosecute before the 2008 ADA amendments.

The EEOC has successfully sued employers claiming that they failed to provide employees with "the reasonable accommodation" required by law, as, for example, in a case implicating the need to provide employees with accommodation in the form of permitting them to "telecommute" to work.

Lesson: You must be sure, when it appears that an employee may require an "accommodation" because of a physical or mental disability, that you genuinely determine whether such an accommodation can be provided without imposing an "undue hardship" on your company.

7. **Racial Harassment:** One might think that we had moved on from something as deplorable as racial harassment, but apparently we haven't. As recently as 2013, a jury in the U.S. District Court for the Middle District of North Carolina awarded $200,000 in damages to two victims of racial harassment, and that award was affirmed by the U.S. Court of Appeals for the Fourth Circuit (which has jurisdiction over employers in North Carolina).

Lesson: You (especially if you routinely employ at least 15 employees (and thus are probably subject to Title VII)) should implement and enforce personnel policies that explicitly prohibit racial harassment and prescribe a method by which employees can bring such harassment to the prompt attention of management.

6. **Disparate Impact:** Title VII (among other statutes) prohibits not only intentional discrimination (known as "disparate treatment"), but also personnel practices and policies that have a "disparate impact" on employees based on one or more prohibited criteria (such as race or color). The EEOC, in 2013, sued BMW Manufacturing Co. to challenge its criminal record screening policies. BMW's "criminal conviction policy" did not consider how long ago the conviction had occurred and BMW applied it even to long term employees of one of the company's contractors. The EEOC found that the policy amounted to a blanket exclusion from employment that resulted in an unlawful disparate impact because it disproportionately screened out African-Americans from jobs. The case was settled for $1.6 million.

Lesson: You should carefully avoid personnel policies and practices that, regardless of the purpose behind them, impose a burdensome "disparate impact" on applicants and employees based on nothing more than their race or gender.

5. **"Women Need Not Apply":** Title VII has been around for more than 50 years, so one might think that only oblivious employers would engage in personnel practices that tend to weed women out of certain jobs. The EEOC, however, just this year, resolved a case against a Missouri employer in which the EEOC claimed the employer had failed to hire women for trucking positions. The EEOC alleged the employer had "engaged in a pattern or practice of [unlawful] discrimination and failed to preserve records in accordance" with EEOC regulations. The company agreed to settle the case for $3.1 million in damages and extensive injunctive

relief.

Lesson: Don't even appear to discriminate against job applicants or employees based on gender. *And a special note:* Federal contractors and private employers with more than 100 employees will now be required to add data about employee pay when completing the EEO-1 report beginning with the 2017 report, which will be due by March 31, 2018. Collection of the data is intended to allow the EEOC, the U.S. Department of Labor, and the Office of Federal Contract Compliance Programs to evaluate and address possible pay discrimination.

4. **"LGBT" Coverage and the EEOC:** Title VII prohibits discrimination based on sex, which the EEOC now equates with discrimination against applicants and employees based on sexual orientation and nonconformity with gender based norms. The EEOC, therefore, has begun to sue employers that it contends have engaged in discrimination against employees based on sexual orientation or transgender/transsexual status.

Lesson: Title VII does not explicitly prohibit discrimination in employment based on sexual orientation or nonconformity with "gender norms" (such as gender-specific modes of dress or appearance). Nonetheless, if your company is covered by Title VII, you should implement and enforce personnel policies to prohibit discrimination based on sexual orientation and nonconformity with gender based norms or you will risk an EEOC investigation and potential liability for unlawful employment discrimination.

3. **Discrimination Against Immigrants, Migrants, and Other "Vulnerable" Workers:** The EEOC has begun to take such discrimination very seriously. In EEOC v. Moreno Farms, Inc., filed in 2014, a federal jury awarded more than $17 million to five former female employees who suffered sexual harassment and unlawful retaliation while working at a produce-growing and packing operation in Florida. The U.S. Court of Appeals for the Fourth Circuit, moreover, has recently enforced an EEOC subpoena seeking information pertaining to its investigation of a charge of discrimination alleging "national origin" discrimination and retaliation. The Fourth Circuit noted that the employer, in seeking to avoid producing the records requested by the EEOC, was "asking the court for *carte blanche* to both hire illegal immigrants and then unlawfully discriminate against those it unlawfully hired."

Lesson: You should be sensitive to the rights (and potential claims) of especially "vulnerable workers" or your company faces possible substantial liability for claims of "national origin" discrimination.

2. **Courts and Their Consideration of the EEOC's Pre-Suit Obligations:** Under federal law, the EEOC, after it has determined that there is "reasonable cause" to support a charge of unlawful employment discrimination, must "endeavor to eliminate … such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion" before filing a lawsuit against the employer.

The U.S. Courts of Appeal have not spoken with a unanimous voice as to what the duty of "conciliation" requires, but the Fourth Circuit (among others) has declared that the duty is subject to a standard of "good faith." The U.S. Supreme Court, further, held just last year that "the EEOC, to meet the statutory condition, must tell the employer about the claim - essentially, what practice has harmed which person or class - and must provide the employer with an opportunity to discuss the matter in an effort to achieve voluntary compliance. If the Commission does not take those specified actions, [then] it has not satisfied Title VII's requirement to attempt conciliation."

Lesson: If you are confronted with an EEOC charge of discrimination, "reasonable cause" has been found, and you are interested in compromise, then you should require the EEOC to disclose the practice that has allegedly harmed the employee(s) in question and provide you with a meaningful opportunity to discuss the matter with an EEOC agent in an effort to achieve a compromise acceptable to the EEOC.

1. **TIE: EEOC vs. Hill Country Farms and EEOC vs. Abercrombie & Fitch:** In Hill Country Farms, the EEOC sued on behalf of disabled victims of discrimination, which resulted in a summary judgment in favor of the EEOC on wage discrimination claims in the amount of $1.3 million, and in the highest jury verdict in EEOC history of $240 million in favor of the EEOC for 32 disabled victims.

In Abercrombie & Fitch, a now-famous case involving religious discrimination in which the employer had refused to hire a young Muslim applicant solely because she wore a hijab that violated the company's "Look Policy," the EEOC filed suit and eventually took the case to the U.S. Supreme Court. The Court, in an 8-1 decision written by the late (and conservative) Justice Scalia, ruled in favor of the EEOC and held that "the rule for disparate treatment claims based on a failure to accommodate a religious practice is straightforward: An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions."

Lesson: Be careful to avoid even the appearance that you have taken advantage of disabled employees; and be sensitive to applicants' and employees' religious requirements and accommodate them when you can do so without genuine hardship.

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