Session 5a

Equal Employment Opportunity Compliance: Agency Perspective & Insight

Presented by:
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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
September 28-29, 2017

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Texas Workforce Commission
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
(Employeees 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
District Offices
Atlanta
Birmingham
Charlotte
Chicago
Dallas
Houston
Indianapolis
Los Angeles
Memphis
Miami
New York
Philadelphia
Phoenix
San Francisco
St. Louis

Area Offices
Albuquerque
Boston
Cincinnati
El Paso
Jackson
Kansas City
Little Rock
Louisville
Milwaukee
Minneapolis
Nashville
Newark
Oklahoma
Pittsburgh
Raleigh

Local Offices
Buffalo
Fresno
Greensboro
Greenville
Honolulu
Las Vegas
Mobile
Norfolk
Oakland
Richmond
San Diego
San Jose
San Juan
Savannah
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

<table>
<thead>
<tr>
<th>Type of Closure</th>
<th>Number</th>
<th>Percent</th>
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<tbody>
<tr>
<td>Sex</td>
<td>2</td>
<td>13%</td>
</tr>
<tr>
<td>Race</td>
<td>5</td>
<td>31%</td>
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<tr>
<td>Color</td>
<td>0</td>
<td>0%</td>
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<tr>
<td>Age</td>
<td>3</td>
<td>19%</td>
</tr>
<tr>
<td>Disability</td>
<td>16</td>
<td>100%</td>
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<tr>
<td>National Origin</td>
<td>1</td>
<td>6%</td>
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<tr>
<td>Religion</td>
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<tr>
<td>Retaliation</td>
<td>6</td>
<td>38%</td>
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<tr>
<td>Genetic Information</td>
<td>0</td>
<td>0%</td>
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<tr>
<td>Other</td>
<td>0</td>
<td>0%</td>
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</tbody>
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State Agency Discrimination Complaints Other Than Without Merit – Filed by Issue

<table>
<thead>
<tr>
<th>Issue</th>
<th>Number</th>
<th>Percent</th>
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<tbody>
<tr>
<td>Discharge</td>
<td>5</td>
<td>31%</td>
</tr>
<tr>
<td>Terms and Conditions</td>
<td>5</td>
<td>31%</td>
</tr>
<tr>
<td>Sexual Harassment</td>
<td>0</td>
<td>0%</td>
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<tr>
<td>Promotion</td>
<td>1</td>
<td>6%</td>
</tr>
<tr>
<td>Hiring</td>
<td>1</td>
<td>6%</td>
</tr>
<tr>
<td>Demotion</td>
<td>1</td>
<td>6%</td>
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<tr>
<td>Layoff</td>
<td>0</td>
<td>0%</td>
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<tr>
<td>Wages</td>
<td>2</td>
<td>13%</td>
</tr>
<tr>
<td>Reasonable Accommodation</td>
<td>7</td>
<td>44%</td>
</tr>
<tr>
<td>Benefits</td>
<td>1</td>
<td>6%</td>
</tr>
<tr>
<td>Discipline</td>
<td>3</td>
<td>19%</td>
</tr>
<tr>
<td>Harassment</td>
<td>4</td>
<td>25%</td>
</tr>
<tr>
<td>Language/Accent Issue</td>
<td>1</td>
<td>6%</td>
</tr>
<tr>
<td>Other</td>
<td>5</td>
<td>31%</td>
</tr>
</tbody>
</table>
# State Agencies’ EEO Data

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

<table>
<thead>
<tr>
<th>Category of Non-Compliance</th>
<th>FY14</th>
<th>Percent</th>
<th>FY15</th>
<th>Percent</th>
<th>FY16</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hiring Process/Workforce Analysis &amp; Recruitment Plan</td>
<td>6</td>
<td>12%</td>
<td>24</td>
<td>24%</td>
<td>20</td>
<td>33%</td>
</tr>
<tr>
<td>Performance Evaluations</td>
<td>8</td>
<td>16%</td>
<td>15</td>
<td>24%</td>
<td>17</td>
<td>28%</td>
</tr>
<tr>
<td>EEO Training</td>
<td>21</td>
<td>43%</td>
<td>10</td>
<td>16%</td>
<td>15</td>
<td>24%</td>
</tr>
<tr>
<td>Reasonable Accommodations</td>
<td>14</td>
<td>29%</td>
<td>14</td>
<td>22%</td>
<td>9</td>
<td>15%</td>
</tr>
<tr>
<td>Total</td>
<td>49</td>
<td>100%</td>
<td>63</td>
<td>100%</td>
<td>61</td>
<td>100%</td>
</tr>
</tbody>
</table>
Most Recent Supreme Court Cases Involving EEOC
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

• 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.”

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....”

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

- 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

• 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).

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.

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 Pl’s obesity and he was not regarded as having a current impairment
Is Diabetes Type 1 a Disability?


- Pl 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


- 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?

• 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 Pl was terminated
- Claimed total temp’y disability in applying for benefits
- Court denied Dfdt’s MSJ, since stmt not inconsistent w/ claim she could have worked w/ an accommodation
Criminal Background Checks
BROAD POLICY/PRACTICE ON BACKGROUND CHECKS

- Targeted Screen
  - *Green v. Missouri Pacific Railroad*, 549 F.2d 1158 (8th Cir. 1977)
- Individualized Assessment
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.eeoc.gov