

South Carolina Association of County Attorneys

DISCRIMINATION STANDARDS

TOP TEN CONCERNS OF EEOC...oh, and yea, they should also be your top ten!



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DISCRIMINATION STANDARDS

- ✓ Civil Rights Act of 1964 – Title VII
 - ✓ Governed by the U.S. Equal Employment Opportunity Commission
 - ✓ 2017-2021 mission – new Strategic Enforcement Plan (SEP)
 - ✓ Purpose – to focus and coordinate EEOC programs to have a sustainable impact in reducing/detering discrimination
 - ✓ Six priorities
 - ✓ Integrated enforcement approach – using policy, education, investigation, conciliation and litigation
 - ✓ District plans
 - ✓ Flexibility to investigate and litigate non-SEP issues
 - ✓ Congress gave them lots of new money



DISCRIMINATION STANDARDS

Strategic Enforcement Plan priorities

- Eliminating barriers in recruitment and hiring;
- Protecting immigrant, migrant and other vulnerable workers;
- Addressing emerging and developing issues (e.g., (1) certain ADA issues, including coverage, reasonable accommodation; qualification standards, undue hardship, and direct; (2) accommodating pregnancy related limitations under the Americans with Disabilities Act (PDA); and (3) coverage of lesbian, gay, bisexual and transgender individuals under Title VII's sex discrimination provisions, as they may apply;
- Enforcing equal pay laws;
- Preserving access to the legal system, and
- Preventing harassment through systemic enforcement and targeted outreach.

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DISCRIMINATION STANDARDS

EEOC and Preservation of Access to the Legal System



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DISCRIMINATION STANDARDS

- EEOC v. CVS – (C.A. No. 1:14-cv-00863): District court dismissed challenge to severance agreement which prohibits a pattern or practice interfering with rights protected under Title VII.
- EEOC v. Doherty (C.A. No. 9:14-cv-81184-KAM): mandatory arbitration agreement requiring employees to engage in binding arbitration on any employment claim.
- EEOC v. Waffle House (534 U.S. 279 (2002)): Court reviewed whether an agreement to arbitrate employment related disputes bars the EEOC from pursuing victim-specific judicial relief.



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DISCRIMINATION STANDARDS

DISPARATE IMPACT AND BACKGROUND SCREENS



DISCRIMINATION STANDARDS

- El v. Southeastern Pennsylvania Transportation Authority – The case that captured the attention of the EEOC.
- EEOC V. Pepsi - Public Conciliation for \$3 million for more than 300 African Americans adversely affected by criminal background check policy.
- EEOC v. BMW, (6th Cir. 2014) BMW ordered to pay \$1.6 million and provide job opportunities to victims of race discrimination.



DISCRIMINATION STANDARDS

- ✓ EEOC v. Freeman (No. 13-2365 (4th Cir. 2015))
Nationwide race case challenging disparate impact of felony conviction screens
- ✓ EEOC v. Dollar General: Nationwide race case challenging disparate impact of criminal background check policy for all positions for decades.



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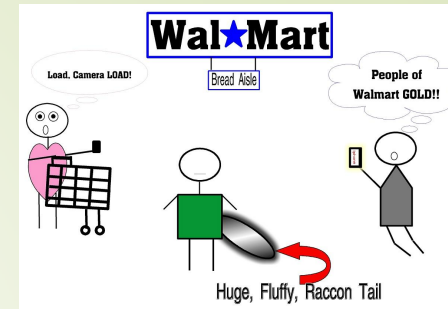
DISCRIMINATION STANDARDS

EEOC and Sex Hiring Discrimination



DISCRIMINATION STANDARDS

- ✓ EEOC v. New Prime (W.D. Mo. 2014): Alleged failure to hire women for trucking positions. Court granted summary judgment in favor of EEOC finding Defendant engaged in a pattern or practice of discrimination and failed to preserve records in accordance with EEOC regulations.
- ✓ EEOC v. Wal-Mart (E.D. Ky. 2001): Systemic failure to hire for warehouse positions (Resolved in Mar. 2010 for \$11,700,000 and broad non-monetary relief, including validation of interview questions and more than 50 positions for eligible claimants.)



DISCRIMINATION STANDARDS

- ✓ EEOC v. Performance Food Group
Alleged nationwide failure to hire female applicants for operative positions;
- ✓ EEOC v. Mavis Discount Tire
Alleged failure to hire for tire installing positions;
- ✓ EEOC v. Unit Alleged failure to hire for drilling rig positions.





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LGBT COVERAGE

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DISCRIMINATION STANDARDS

- Boh Bros. Constr. (731 F.3d 444(5th Cir. 2013): Affirming jury verdict for EEOC. In same-sex harassment case – evidence of gender-stereotyping can be used)
- Macy v. Dep't of Justice, EEOC Appeal No. 0120120821 (April 20, 2012): the Commission ruled that employment discrimination against employees because they are transgender, because of their gender identity, and/or because they have transitioned (or intend to transition) is discrimination because of sex, and thus violation of Title VII.
- Lusardi v. John M. McHugh, Secy, Dept of the Army, EEOC Appeal No. 020120821 (April 1, 2015) Commission held that agency violated Title VII in restricting transgender employee from using common restroom.



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DISCRIMINATION STANDARDS

Discrimination
against Immigrant,
Migrant and other
Vulnerable Workers



DISCRIMINATION STANDARDS

- EEOC v. Pickle, 446 F.Supp. 2d 1247 (N.D. Okla. 2006): Class race and national origin case alleging oil industry parts manufacturer subjected East Indian workers to discriminatory pay and working conditions – Court awarded \$1.2 million
- EEOC v. Del Monte Fresh Produce (D. Haw.): National origin and race harassment case involving Thai farm workers – settled in November 2013 for \$1.2 million and some additional equitable relief.
- EEOC v. Vail Run Resort Community Association (D. Colo. 2013): Employer paid over \$1.2M for sexual harassment, national origin and retaliation.
- <http://www.pbs.org/wgbh/pages/frontline/rape-in-the-fields/>



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DISCRIMINATION STANDARDS

EEOC AND THE IMPORTANCE OF JURIES

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EEOC v. Hill Country Farms (d/b/a Henry's Service Corporation) (S.D. Iowa 2013) *affirmed* 564 Fed.Appx. 868 (8th Cir. 2014)

- ✓ Highest verdict in EEOC history – second highest in U.S. history – under federal anti-discrimination laws.
- ✓ Court granted summary judgment in favor of EEOC on wage discrimination claims in the amount of \$1.3 million
- ✓ Jury verdict in favor of EEOC \$240 million for 32 disabled victims of discrimination
- ✓ \$7.5 million each to 32 disabled victims (\$2 million in punitive damages and \$5.5 million in compensatory damages)
- ✓ Verdict reduced to \$1.6 million (67% of original jury verdict per person).

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- ✓ EEOC v. A.C. Widenhouse, 2013 WL 664230 (M.D. N.C. 2013): Race harassment case on behalf of two victims – Jury verdict for \$200,000 in compensatory and punitive damages. Affirmed on appeal.
- ✓ EEOC v. AA Foundries (W.D. Tenn.): Race harassment on behalf of multiple victims – Jury verdict for \$200,000 in punitive damages.
- ✓ EEOC v. New Breed Logistics (W.D. Tenn.): Sexual harassment case on behalf of four victims – resolved following seven day trial with jury verdict of \$1.5 million. Appeal is pending.



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DISCRIMINATION STANDARDS

EEOC AND REASONABLE
ACCOMMODATION





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- ✓ EEOC has given breadth to the ADA/AAA filing and successfully prosecuting cases involving conditions such as diabetes, cancer, intellectual disabilities, and epilepsy, all of which were not really covered prior to the change in this law.
- ✓ EEOC has filed and resolved its first GINA cases (yea, remember that law..)

DISCRIMINATION STANDARDS

EEOC v. Valley Tool, C.A. No. 3:19-cv-00140 – Employer fired employee after she disclosed blood disorder telling he that he was hiring a healthy employee next time.

- EEOC v. UPS, 2014 WL 538577 – Court held that 100% return to work requirement could be job qualification under the ADA
- EEOC v. American Tool and Mold, Inc. (S.D. Fla. 2014) – unlawful to require a healthy prospective applicant to obtain a release from a surgeon who performed surgery on his back six years
- EEOC v. The Kroger Company, C.A. No. 1:18-cv-03095-WMR-AJB – New employee required to attend an orientation session with a computer-based tutorial. Requested accommodation and was fired.



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DISCRIMINATION STANDARDS

EEOC AND PREGNANCY DISCRIMINATION



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DISCRIMINATION STANDARDS

YOUNG V. UPS

Question presented to the court – The Pregnancy Discrimination Act, 42 U.S.C. 2000e(k), provides that “all women affected by pregnancy, childbirth or related medical conditions shall be treated the same for all employment related purposes***as other persons not so affected but similar in their ability or inability to work.” The question presented is whether and under what circumstances, an employer that provides a work accommodation to non-pregnant employees with work limitations must provide comparable work accommodations to pregnant employees who are “similar in their ability or inability to work.”

GET OUT YOUR LITE DUTY POLICY

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- The EEOC has brought around 40 pregnancy cases in the last four years. This is in light of their new guidelines.
- EEOC v. Houston Funding, 717 F.3d 425 (5th Cir. 2013): Court held that discharge because an employee was lactating or expressing milk states a cognizable sex discrimination claim under Title VII
- EEOC v. Allup's Convenience Store, 15-cv-00863 (D. N.M. 2015): PDA and ADA claims on behalf of charging party and "similarly aggrieved pregnant women with disabilities" based on alleged forced leaves and not making reasonable accommodations.



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DISCRIMINATION STANDARDS

EEOC AND RELIGIOUS DISCRIMINATION



DISCRIMINATION STANDARDS

- ✓ EEOC v. Publix – C.A. No. 3:17-cv-013083: Hired employee with dreadlocks and on his first day demanded that he cut them. When he did not, FIRED.
- ✓ EEOC v. UPS – C.A. No. 1:15-cv-04141: Strict “No Beard” policy operated to exclude Muslims, Rastafarians and other religious groups.



MOST EEOC CHARGES EVER...



- EEOC v. Abercrombie & Fitch 2013 WL 4726137; (2013) WL1435290 (failure to accommodate/failure to hire/discharge cases involving Muslim individuals who wore traditional garb)
– Settled for approximately \$100,000 and significant equitable relief
- EEOC v. Abercrombie & Fitch 731 F.3d 1106 (10th Cir. 2013): a divided panel reversed summary judgment for the EEOC and ordered the dismissal of the case in a matter involving the denial of a job to Muslim applicant with hijab because the charging party did not put the company on sufficient notice of her need for an accommodation.
- Important question here: whether an employer can be liable under Title VII for refusing to hire an applicant or discharging an employee based on a 'religious observance and practice' only if the employer has actual knowledge that a religious accommodation was required and the employer's actual knowledge resulted from direct, explicit notice from the applicant or employee.
- Important answer: No guessing allowed.



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DISCRIMINATION STANDARDS

THE COURT AND EEOC'S PRE-SUIT OBLIGATIONS

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- ✓ The EEOC is charged with the responsibility of eradicating unlawful employment practices by informal methods such as conferences, mediation, conciliation and “persuasion.”
- ✓ Efforts made may not be used as evidence in a subsequent proceeding unless all agree.
- ✓ Offers of conciliation must be met within thirty (30) days or the EEOC can then bring suit.



DISCRIMINATION STANDARDS

- ✓ EEOC v. Mach Mining
 - ✓ Failure to hire for mining positions; judicial review of EEOC's pre-suit administrative requirements.
 - ✓ Unanimous 7th circuit decision rejected "explicitly the implied affirmative defense of failure to conciliate."
 - ✓ Question presented – Whether and to what extent may a court enforce the EEOC's duty to conciliate discrimination claims before filing suit.
 - ✓ EEOC took the position no judicial review was required for conciliation.



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QUESTIONS?

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