2014 DOT CIVIL RIGHTS VIRTUAL SYPMOSIUM

TITLE VII LEGAL UPDATE

Corbett Anderson
Ernest Haffner
EEOC Office of Legal Counsel

Roadmap

- EEOC Strategic Priorities
- Threshold & Procedural Issues
- Disparate Treatment & Disparate Impact
- Specific Prohibitions
  - Sex/Gender/Pregnancy
  - Race
  - Religion
  - National Origin/Accent
  - Equal Pay
  - Harassment
  - Retaliation

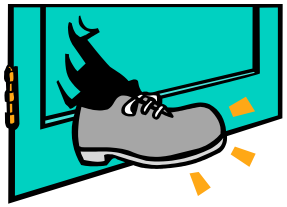
EEOC Strategic Priorities

- **Strategic Plan** 2012-2016 (approved Feb. 2012)

- **Strategic Enforcement Plan** (approved Dec. 2012). Six national priorities:
  - Eliminating barriers in recruitment and hiring;
  - Protecting immigrant, migrant and other vulnerable workers;
  - Addressing emerging and developing employment discrimination issues;
  - Enforcing equal pay laws;
  - Preserving access to the legal system; and
  - Preventing harassment through systemic enforcement and targeted outreach.

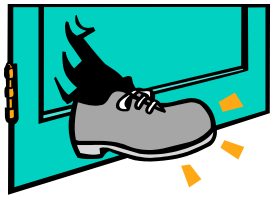
- **Federal Sector Complement Plan**
  - http://www.eeoc.gov/eeoc/plan/federal_complement_plan.cfm

Threshold & Procedural Issues



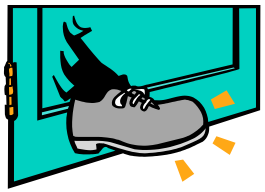
- Administrative Prerequisites (private sector)
  - *EEOC v. Mach Mining, LLC*, __ F.3d __, 2013 WL 6698515 (7th Cir. Dec. 20, 2013).
    - Background: EEOC is authorized to file suit against a respondent only after its efforts to conciliate have failed.
    - Held: EEOC's alleged failure to conciliate is not an affirmative defense to suit and is not reviewable by a court.

Threshold & Procedural Issues - continued



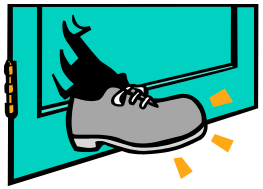
- Definition of "Employee"
  - *Holland v. Gee*, 677 F.3d 1047 (11th Cir. 2012).
    - Issue: Did county exercise sufficient control over data processing technicians to be considered their employer?
    - Held: Technicians were "employees" because the defendant set their work schedules, provided them direct supervision, and assigned tasks.
  - *Hill-Keyes v. SSA*, EEOC Appeal No. 0120123560 (Feb. 19, 2013)
    - Psychologist not an employee where she worked independently and agency did not routinely review her work, she set her own hours, she was paid per report, and she did not receive leave or benefits even though complainant worked on agency premises and agency provided equipment for seven years to do work central to agency mission.
  - *Makuch v. DOD*, EEOC Appeal No. 0120114324 (Dec. 18, 2012)
    - Complainant was employee where agency employee supervised complainant; agency provided equipment and facilities to perform work; complainant was paid a salary and was terminated by the agency; even though agency did not provide complainant with benefits or withhold taxes.

Threshold & Procedural Issues - continued



- Definition of "Employee"
  - *Juino v. Livingston Parish Fire Dist. No. 5*, 717 F.3d 431 (5th Cir. 2013).
    - Did volunteer firefighters receive sufficient remuneration to be considered "employees"?
    - Held: Benefits here, which included $2 per call, life insurance, a uniform and badge, and emergency/first responders' training, did not meet threshold remuneration requirement.
  - ***(*unnamed complainant*) *v. VA*, EEOC Doc. 0120132601 (Jan. 8, 2014)
    - Complainant was volunteer as he did not receive "significant remuneration."

Threshold & Procedural Issues - continued



- National Security Requirements
  - *Kaplan v. Conyers*, 733 F.3d 1148 (Fed. Cir. 2013).
    - Background: Under *Egan*, security clearance determinations are not reviewable.
    - Held: *Egan* precludes review of eligibility for "sensitive" position, even if it does not require access to classified information.
  - *Rattigan v. Holder*, 689 F.3d 764 (D.C. Cir. 2012).
    - Held: Referral can be challenged if employee can show that referrer knowingly provided false information.
  - *Toy v. Holder*, 714 F.3d 881 (5th Cir. 2013).
    - Background: Title VII exempts hiring/firing decisions where individual does not meet national security requirements.
    - Exception applied to revocation of employee's access to building where sensitive information was stored.

Disparate Treatment

- **Demonstrating Pretext**
  - *Grosdidier v. Broadcasting Board of Governors*, 709 F.3d 19 (D.C. 2013).
    - Failure to keep relevant records may help to demonstrate pretext – courts may give the plaintiff the benefit of an "adverse inference" presumption (i.e., a presumption that, had the records been kept, they would have supported the plaintiff).
    - Held: District court erred in holding that employer's destruction of interview notes did not warrant an adverse inference presumption, though this presumption was not sufficient in this case to demonstrate pretext in light of all the other evidence.
  - *Coleman v. Donahoe*, 667 F.3d 835 (7th Cir. 2012).
    - Comparators must be comparable to plaintiff in material respects but need not be identical.
    - Comparators were similarly situated because, although they did not have the same supervisor as the plaintiff, they were investigated and disciplined by the same decisionmaker.

Disparate Treatment – continued

- **"But for" vs. "Sole" Cause**
  - *Ponce v. Billington*, 679 F.3d 840 (D.C. Cir. 2012).
    - Title VII does not require plaintiff to show that discrimination was sole cause.
    - Because plaintiff did not pursue mixed-motives discrimination claim, "but for" jury instruction was proper.
- **"But for" vs. "Motivating Factor"**
  - *University of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013).
    - Background: In *Gross v. FBL Financial Services*, Supreme Court held that ADEA claimant must show that age was "but for" cause.
    - Held: Title VII retaliation claimant must establish that retaliation was "but for" cause.

Disparate Impact

- **Definition**: When an employer's neutral policy or practice disproportionately screens out or disadvantages Title VII-protected individuals and is not job-related for the position in question and consistent with business necessity. 42 U.S.C. § 2000e-2(k).

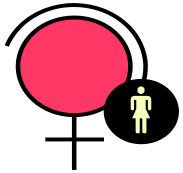
- Disparate impact theory covers "practices that are fair in form, but discriminatory in operation" in that they operate as **"built-in headwinds"** for a protected class. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431-32 (1971).

Disparate Impact – EEOC Enforcement Guidance

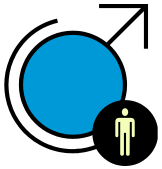
- **Updated EEOC Enforcement Guidance on Employer Use of Arrest and Conviction Records Under Title VII (issued 4/25/12).**
  - If disparate impact of criminal records exclusion is demonstrated:
    - Was the policy or practice **validated** under the Uniform Guidelines on Employee Selection Procedures?
    - **If not**, did the employer develop a **targeted screen**?
      - Nature and gravity of the criminal offense or conduct;
      - Time elapsed since the criminal offense or conduct and/or completion of the sentence; and
      - The nature of the job held or sought.
    - For those screened out by this targeted screen, did the employer offer an **individualized assessment** (recommended)?
  - **Other federal laws might apply to require a criminal records exclusion**.

Subordinate Bias Liability – "Cat's Paw" Doctrine

- *Staub v. Proctor Hosp.*, 131 S. Ct. 1186 (2011).
  - Lower-level supervisor's bias imputable where supervisor intended to cause an adverse action and his conduct was a "proximate cause" of the ultimate challenged action.
  - Independent investigation by the decisionmaker would not absolve the employer of liability as long as the non-decisionmaker's discriminatory animus remained a proximate cause of the action.
- *Chattman v. Toho Tenax Am., Inc.*, 686 F.3d 339 (6th Cir. 2012).
  - African-American plaintiff was disciplined after engaging in horseplay with white coworker. Supervisor's bias could be imputed to the decisionmakers because he recommended that plaintiff be fired, and he knowingly declined to report comparable conduct by white employees.
- *Romans v. Michigan Dep't of Human Servs.*, 668 F.3d 826 (6th Cir. 2012).
  - Bias not imputable where there was separate investigation that did not take supervisor's recommendation into account.
- *Lobata v. New Mexico Env't Dep't*, 733 F.3d 1283 (10th Cir. 2013).
  - Bias not imputable where employer did not rely on any facts from biased supervisor.



Because of Sex/Gender



- **Gender/Transgender**
  - *Macy v. DOJ*, EEOC DOC 0120120821, 2012 WL 1435995 (April 20, 2012).
    - Discrimination based on transgender status is, by definition, sex-based discrimination.
- **Dress Codes**
  - *Whitfield v. DOT*, EEOC Doc. 0120120735 (Nov. 5, 2012): applying dress code with different standards for men and women in order to promote proper decorum and professional atmosphere does not necessarily violate Title VII; male complainant (traffic management coordinator) not harmed by being told he could not wear Lakers jersey to work.
- **Same-Sex Harassment**
  - *EEOC v. Boh Brothers Constr. Co.*, 731 F.3d 444 (5th Cir. 2013).
    - Evidence, including sexualized acts/comments and jokes about using Wet Ones, was sufficient for jury to conclude that male employee was denigrated for not conforming to harasser's "manly-man stereotype."
  - *Wasek v. Arrow Energy Servs., Inc.*, 682 F.3d 463 (6th Cir. 2012).
    - Male-on-male harassment not actionable given lack of comparator evidence or evidence of gender hostility or harasser's homosexuality.
  - *Redd v. New York State Div. of Parole*, 678 F.3d 166 (2d Cir. 2012).
    - Plaintiff presented sufficient evidence to show that she was subjected to sex-based harassment when her female supervisor touched the plaintiff's breasts on three occasions over a five-month period.
- **Gender-based epithets**
  - *Passananti v. Cook Cnty*, 689 F.3d 655 (7th Cir. 2012).
    - Generally, factfinder can infer that use of epithet "b___" is sex-based and derogatory towards women.

Pregnancy Discrimination

- **Access to light duty**
  - *Young v. United Parcel Serv.*, 707 F.3d 437 (4th Cir. 2013), *pet. for cert. filed* (U.S. Apr. 8, 2013, 12-1226).
    - Giving light duty only to those injured on the job, those needing disability accommodation, and those who lost DOT certification neither constituted direct evidence of pregnancy discrimination nor raised any inference of pregnancy discrimination.
  - *Chapter 7 Tr. v. Gate Gourmet Inc.*, 683 F.3d 1249 (11th Cir. 2012).
    - Failure to give light duty to pregnant worker violated Title VII where such positions were available and defendant had policy of offering these jobs to any employee with a medical condition.
  - *Latowski v. Northwoods Nursing Ctr.*, 2013 WL 6727331 (6th Cir. Dec. 23, 2013).
    - Jury could find that policy of firing otherwise qualified workers with restrictions arising from non-work-related injuries, even if they do not limit ability to do their jobs, was "so lacking in merit" as to allow inference of discrimination.

- **Lactation**
  - *EEOC v. Houston Funding*, 717 F.3d 425 (5th Cir. 2013).
    - The court held that discharging an employee because she is lactating or expressing breast milk constitutes sex discrimination in violation of Title VII.



Because of Race



- **Purportedly Neutral Words or Conduct**
  - *Jones v. UPS Ground Freight*, 683 F.3d 1283 (11th Cir. 2012).
    - Given history of racial stereotypes against African Americans, jury could conclude that use of "monkey imagery," e.g., banana peels, was intended as racial insult.
  - *Hernandez v. Valley View Hosp. Ass'n*, 684 F.3d 950 (10th Cir. 2012).
    - Viewing facially neutral conduct in context with facially race-based conduct, jury could conclude that entire pattern of conduct was race-based.

Religious Discrimination

- **Religious Accommodation & Undue Hardship**
  - *EEOC v. Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106 (10th Cir. 2013).
    - Individual must inform employer of conflicting religious practice and need for an accommodation.
  - *Walden v. Centers for Disease Control & Prevention*, 669 F.3d 1277 (11th Cir. 2012).
    - Employer accommodated employee with religious objection to counseling someone engaged in same-sex relationship, by providing her opportunity to apply for another position.
  - *Tagore v. United States*, 735 F.3d 324 (5th Cir. 2013).
    - Allowing wearing of kirpan with blade exceeding 2.5 inches would cause undue hardship for IRS because other federal agencies control decisions concerning building security and because accommodation would result in more than “de minimis” costs.

National Origin Discrimination – Accent Discrimination

- ***Albert-Aluya v. Burlington Coat Factory Warehouse Corp.***, 2012 WL 1590890 (11th Cir. May 8, 2012).
  - Managerial comments about the plaintiff's "thick African accent" and criticism for failing to "speak more like an American" constituted evidence of national origin discrimination.
- ***Dafiah v. Guardsmark, LLC***, 2012 WL 5187762 (D. Colo. Oct. 19, 2012).
  - Adverse decision based on accent lawful only if it materially interferes with job performance.
- ***Shah v. Oklahoma***, 2012 WL 3935699 (10th Cir. Sept. 11, 2012).
  - Comments about the plaintiff's need to improve his English language skills were good faith suggestions for him to improve his interpersonal communications skills, which were essential to his position.

Pay Discrimination

- **Lilly Ledbetter Fair Pay Act**
  - "[A]n unlawful employment practice occurs, with respect to compensation . . ., when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages . . . is paid, resulting . . . from such a decision or practice."
  - *Daniels v. United Parcel Serv.*, 701 F.3d 620 (10th Cir. 2012).
    - Ledbetter Act applies only to discrimination in compensation, i.e., paying different compensation to similarly situated employees.
    - Failure to promote did not qualify as discrimination in compensation.
  - *Kannaby v. Sec'y of Army*, EEOC Doc. 0120122346 (Oct. 23, 2012): Ledbetter Act does not apply to promotions.
  - *Smith v. TVA*, EEOC Appeal No. 20121443 (Mar. 27, 2012).
    - Ledbetter Act does not apply to continued receipt of retirement benefits.
- **Sex-based pay discrimination**
  - *King v. Acosta Sales & Mktg., Inc.*, 678 F.3d 470 (7th Cir. 2012).
    - Reliance on education and experience could explain differences in starting salaries for business managers but could not explain pay increases, which should be based on work performance.
    - Males with comparable sales were paid twice as much as plaintiff.
    - Male business managers were typically paid more than pay scale set by national management while female managers were paid less.

Harassment – Actionable Conduct

- **Unwelcomeness**
  - *Williams v. Herron*, 687 F.3d 971 (8th Cir. 2012).
    - Background: After engaging in a consensual sexual relationship with the chief deputy for a few months, the plaintiff decided to end the relationship.
    - Plaintiff communicated to the chief deputy that his conduct was no longer welcome by telling him that she was uncomfortable continuing their relationship and that she was afraid that she would be fired if she ended the relationship.
- **Severe or pervasive**
  - *Berryman v. SuperValue Holdings, Inc.*, 669 F.3d 714 (6th Cir. 2012).
    - Individual may base hostile work environment claim on discriminatory conduct directed at other members of the protected group if the individual was aware of the conduct.
    - Plaintiffs could not aggregate all of the conduct experienced by each individual because they failed to show that they were aware of the harassment directed at others.
      - Dissent concluded that given the number of plaintiffs, the proximity in which they worked, the public nature of many of the incidents, and the duration of these events, the case should have gone to a jury.

Harassment – Liability

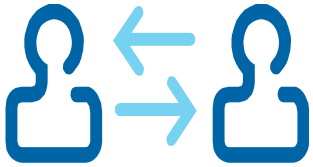
- **Coworker Harassment**
  - *May v. Chrysler*, 716 F.3d 963 (7th Cir. 2013).
    - Employer liable for anonymous harassment, including death threats and vandalism to victim's car, because it failed to take reasonable steps to identify the culprit and end the harassment.
- **Non-Employee Harassment**
  - *Summa v. Hofstra Univ.*, 708 F.3d 115 (2d Cir. 2013).
    - Harassment of graduate student by students on the football team arose in the context of her employment as team manager.
    - Defendant was not liable for harassment by football players because it took prompt and proportionate action in response to each of plaintiff's complaints and it had entire Athletics department staff undergo sexual harassment training.

Harassment – Liability – continued

- **Supervisor Harassment**
  - **Definition of Supervisor**
    - *Vance v. Ball State Univ.*, 133 S. Ct. 2434 (2013): Employee must be authorized to take tangible employment actions against target of the harassment.
    - *McCafferty v. Preiss Enters., Inc.*, 534 Fed. Appx. 726 (10th Cir. 2013).
      - Shift manager's power to direct daily work assignments did not make him a supervisor. Ability to ask employee to cover extra shift or to send employee home early in limited circumstances was not "*significant* change in benefits."
      - Mere potential to influence higher-level managers did not establish supervisory status.
  - **Affirmative Defense**
    - *EEOC v. Management Hospitality of Racine, Inc.*, 666 F.3d 422 (7th Cir. 2012).
      - Employer failed to exercise reasonable care where lower-level managers failed to report harassment, sexual harassment training was inadequate, investigation did not begin promptly, and written policy was not clear.
      - Employees were justified in not contacting district manager after having already complained to lower-level managers.

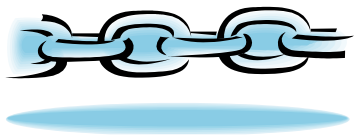
Retaliation – Protected Activity

- *Cook & Shaw Found. v. Billington*, 737 F.3d 767 (D.C. Cir. 2013).
  - Only protected activity of employees and applicants is covered.
  - Protected activity by the plaintiff foundation was not covered.
- *Grosdidier v. Broadcasting Bd. of Governors*, 709 F.3d 19 (D.C. Cir. 2013), cert. denied, 2014 WL 102407 (U.S. Jan. 13, 2014):
  - Complaint about harassing conduct only protected if employee reasonably believed it violated Title VII.
- *Benes v. A.B. Data, Ltd.*, 724 F.3d 752 (7th Cir. 2013).
  - Plaintiff's egregious misconduct sabotaging a mediation session was not protected activity.



Retaliation – Adverse Action

- *Chapter 7 Tr. v. Gate Gourmet*, 683 F.3d 1249 (11th Cir. 2012).
  - Withholding light-duty position that plaintiff was otherwise entitled to under company policy
- *Rivera v. Rochester Genesee Reg'l Transp. Auth.*, 702 F.3d 685 (2d Cir. 2012).
  - Stating that plaintiff could be fired for filing charge
- *Arizanovska v. Wal-Mart*, 682 F.3d 698 (7th Cir. 2012).
  - Placing plaintiff on unpaid leave pursuant to company policy
- *Payne v. Salazar*, 899 F. Supp. 2d 42 (D.D.C. 2012).
  - Harassing actions that, in combination, were reasonably likely to deter protected activity



Retaliation – Causal Link

- **Prima Facie Case/Temporal Proximity**
  - *Hamilton v. Geithner*, 666 F.3d 1344 (D.C. Cir. 2012)
    - No bright-line three-month rule for inferring causation.
    - Depends on specific facts of each case.
  - *Summa v. Hofstra Univ.*, 708 F.3d 115 (2d Cir. 2013).
    - Four-month gap established causation because it was the first opportunity for the decisionmaker to retaliate against the plaintiff.
- **Pretext**
  - *Tingle v. Arbors at Hilliard*, 692 F.3d 523 (6th Cir. 2012).
    - Pretext cannot be established if employer has "honest belief" in the nonretaliatory basis for its action.
    - Pretext can be shown in three ways: (1) proffered reason has no basis in fact; (2) it did not actually motivate the employer's action; or (3) the rationale was insufficient to motivate the employer's action.

END

Questions?