Littler’s Annual Report on The EEOC: Where We’ve Been and What’s on the Horizon

The View from Washington, Key Statistics, EEOC Investigations and Litigation
Looking Back at FY 2016 and Anticipated Changes in FY 2017

February 28, 2017
What to Expect in 2017

“Three Legs of the Stool”

Commission

Courts

District or Field Offices

CONGRESS
Agenda

• Opening Comments
• The View from Washington
• EEOC Charge Statistics
• EEOC Investigation Process – Key Issues in FY 2016
• Selected EEOC Priorities, Litigation Statistics and Key Areas of Focus
  (1) Hiring Barriers
  (2) ADA Litigation
  (3) Systemic Harassment
• The “Wild Cards”
  (1) LGBT Issues
  (2) Preserving Access to the Legal Process
  (3) Pay Equity
• Emerging Hot Topic on the Horizon - Age Discrimination Issues
• Takeaways for Employers
Five Major Sections:

1. A Review of the EEOC’s Systemic Initiative
2. Summary of Charge Activity, Litigation and Settlements (Appendix A: Settlements/ Appendix B: Appellate Cases)
3. Update on Commission and Regulatory Activities
4. Scope of EEOC Investigations and Subpoena Enforcement Actions (Appendix C: Summary of Subpoena Enforcement Actions by EEOC)
5. Review of Noteworthy EEOC Litigation Issues – From Pleading Through Trial, Plus Key Attorneys’ Fees Cases (Appendix D: Summary of Key Summary Judgment Rulings)
## Upcoming Webinars

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<tr>
<td>Thursday, March 23, 2017</td>
<td>LGBT Issues in the Workplace: What to Expect from the Trump Administration</td>
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<tr>
<td>Tuesday, May 23, 2017</td>
<td>Harassment or Accountability? Updates on EEOC’s Harassment Policy Guidance</td>
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<td>Tuesday, July 18, 2017</td>
<td>Medical Marijuana Users – a New Protected Class?</td>
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<td>Tuesday, Sept. 19, 2017</td>
<td>Challenges and Differences in Accommodating Religion, Pregnancy and Disabilities in the Workplace</td>
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<td>Tuesday, October 10, 2017</td>
<td>EEOC Charges and Investigations From A to Z</td>
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<td>Tuesday, November 14, 2017</td>
<td>Workplace Diversity: One Very Eventful Year Later</td>
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The View from Washington
The View from Washington

• Update on the Commission and General Counsel

• Anticipated Impact on EEOC’s Regulatory Efforts

• Potential Impact of Lamar Alexander Report
The View from Washington

• Noteworthy Regulatory and Related Activities
  – Equal Pay Initiative – Revised EEO-1 Report (9/29/16)
  – LGBT Coverage – Impact of prior 3-2 decision in *Baldwin v. DOT* (7/15/15)
  – Retaliation Guidance (8/25/16)
  – Disability Resource Guide (5/9/16)
  – Wellness Rules (5/20/16)
  – National Origin Discrimination Guidance (11/18/16)
  – Proposed Enforcement Guidance on Harassment (1/10/17)

• EEOC Digital Charge Process- New Focus on Technology for Respondents and Charging Parties
Potential Challenge to Current Commission

EEOC Backlog

EEOC Investigations Initiated without a Charge
Comparing Charges Filed with Charge Inventory

Charges Filed: 82,792, 95,402, 93,277, 99,922, 99,947, 99,412, 93,727, 88,778, 89,385, 91,503
Charge Inventory: 54,970, 73,951, 85,768, 86,338, 78,136, 70,312, 70,781, 75,658, 76,408, 73,508

Y-axis: Charges Filed (50,000 to 110,000)
X-axis: Year (2007 to 2016)

Legend: Charges Filed (Blue), Charge Inventory (Teal)
EEOC Charge Statistics
Charge Filings FY 2016

2011: 99,947
Highest Total Ever!

www.eeoc.gov
Backlog of EEOC Charges

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>Charges</th>
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<tr>
<td>FY 2011</td>
<td>78,136</td>
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<tr>
<td>FY 2012</td>
<td>70,312</td>
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<tr>
<td>FY 2013</td>
<td>70,781</td>
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<tr>
<td>FY 2014</td>
<td>75,935</td>
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<tr>
<td>FY 2015</td>
<td>76,408</td>
</tr>
<tr>
<td>FY 2016</td>
<td>73,508</td>
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EEOC Investigations in Absence of Charge

• Commissioner’s Charges –
  – 15 initiated in FY ’16
  – 74 ongoing at end of FY ’16
  – Since 2006, approximately 75% of Commissioner’s charges have involved discrimination in hiring
  – Since 2006, the EEOC has found “reasonable cause” in 81% of the Commissioner charges (84 out of 104 investigations)

• Directed Investigations (ADEA or EPA)
  – 230 initiated in FY ‘16
  – There were 57 ongoing directed investigations at end of FY ’16

• “Pattern or Practice of Resistance” to full enjoyment of rights under Title VII under Section 707 of Title VII (CVS and Doherty litigation - Will be discussed)

EEOC Statistics: FY 2016 by Category

- Retaliation (All Statutes): 45.9% (42,018 cases)
- Race: 33.3% (32,309 cases)
- Sex: 29.4% (26,934 cases)
- Disability: 30.7% (28,073 cases)
- Age: 22.8% (20,857 cases)
- National Origin: 10.8% (9,840 cases)
- Religion: 4.2% (3,825 cases)
- Color: 3.4% (3,102 cases)

The foregoing information was retrieved from the EEOC’s website: www.eeoc.gov
## Mediation

<table>
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<tr>
<th>Year</th>
<th># Mediations</th>
<th># Successful</th>
<th>% Successful</th>
<th>Amount Recovered</th>
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<tr>
<td>2016</td>
<td>10,461</td>
<td>7,989</td>
<td>76.3%</td>
<td>$163.5 million</td>
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<td>2015</td>
<td>10,579</td>
<td>8,243</td>
<td>77.9%</td>
<td>$157.4 million</td>
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<tr>
<td>2014</td>
<td>10,221</td>
<td>7,846</td>
<td>76.7%</td>
<td>$144.6 million</td>
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<td>------------------------------------------------------</td>
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<tr>
<td>Number Completed</td>
<td>300</td>
<td>260</td>
<td>268</td>
<td>273</td>
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<tr>
<td>Settlements or Conciliation Agreements in Systemic cases (general rate)</td>
<td>63</td>
<td>78</td>
<td>70</td>
<td>“57%”</td>
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<tr>
<td>Monetary Recovery</td>
<td>$40 million</td>
<td>$13 million</td>
<td>$33.5 million</td>
<td>$20.5 million</td>
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<tr>
<td>Reasonable Cause Findings</td>
<td>106 (35%)</td>
<td>118 (45%)</td>
<td>109 (35%)</td>
<td>113 (41%)</td>
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<tr>
<td>Systemic Lawsuits Filed</td>
<td>21</td>
<td>17</td>
<td>16</td>
<td>18</td>
</tr>
</tbody>
</table>
EEOC
Investigative Process – Key Issues in FY 2016
EEOC Investigation Process – Key Issues In FY 2016

• Continued Broad Scope of EEOC Investigations – Impact of Systemic Initiative

• Court Deference to EEOC in Subpoena Enforcement Actions, plus Risk of Waiver to Challenge Subpoenas

• Court Limiting Review of Investigations and Conciliation Efforts by EEOC
Expanding Scope of EEOC Investigations

Focus on Systemic Initiative:

- Expansion of individual charges to systemic investigations. See *EEOC v. McLane Company*, 804 F.3d 1051 (9th Cir. 2015) *cert. granted, McLane Company, Inc. v. EEOC* (U.S., Sept. 29, 2016)

- Commissioner’s Charges: See *EEOC v. Shell Oil*, 466 U.S. 54 (1986) (Pending Lawsuit: e.g. *EEOC v. Bass Pro Outdoor World, LLC*, No. 4-11-cv-0325 (S.D. Tex.)

Scope of EEOC Investigations – Factors Considered

• Factors Considered:
  
  (1) “Relevance” – “any material that might case light on the allegations against the employer”

  (2) “Burdensomeness” – “compliance would threaten the normal operation of a [an employer’s] business”

• Key Information For Review:
  
  (1) EEOC filed 28 Subpoena Enforcement Actions in FY ’16
  (2) See Littler’s Annual Report on EEOC Developments at pp. 53-60 and review of selected subpoena enforcement case in Appendix C (pp. 185-198)
General Deference to EEOC in Subpoena Enforcement Actions

• Relevance Challenges:
  1) Upheld subpoena for **nationwide “pedigree” Information stemming expanding individual charge** relating to alleged sex discrimination in use of isokinetetic test: *EEOC v. McLane Co.*, 805 F.3d 1051 (9th Cir. 2015), cert. granted (U.S. Sept. 29, 2016) (No. 15-1248)
  2) Upheld subpoena for confidential client information: *EEOC v. Aerotek*, 815 F.3d 328 (7th Cir. 2016)-required production of info on 22,000 clients despite claim that most were not related to job requisitions EEOC identified as “potentially problematic”

• Burdensomeness:
  1) Upheld subpoena for detailed request for **info on all applicants and employees at facility in Individual Race Discrimination Charge**—Rejected undue burden despite need to hire 3-5 temporary employees for @ 4 months - there were over 1,900 employees and 25,000 applicants”—race discrimination by definition is class discrimination,” and “race discrimination continues to be a matter of grave concern.”  *See* 2016 U.S. Dist. LEXIS 128641 (N.D. Ill. Sept. 21, 2016)
  2) But denied subpoena involving request for over 1 million applicant records and weighed “likely relevance” and alleged “undue burden” in gathering data based on admission that strength test in issue had disparate impact on females, but reserved defense that strength test is “job related for the position in question and consistent with business necessity.  *See* 2016 U.S. Dist. LEXIS 41071 (E.D. Ky. Mar. 29, 2016)
• Other Significant Issues:

1) **Upheld Subpoena for On Site Inspections** – *EEOC v. Steel Gallatin*, 2016 U.S. Dist. LEXIS 56406 (E.D. Ky. Apr. 28, 2016) - Upheld subpoena for inspection and on-site interviews over employer objection and employer claim that it would produce requested info and individuals at EEOC office. Court granted EEOC have absolute right to on-site visit, but limited inspection to “areas of the facility that [Commission’s investigator] reasonably believes to be ‘relevant to the charges filed.’” EEOC desire to understand essential functions of position in ADA charge.

2) **Upheld subpoena for records of white co-workers in race discrimination** – See *EEOC v. City of Long Branch*, 2016 U.S. Dist. LEXIS 36006 (D.N.J. Mar. 18, 2016) - Employer had agreed to produce only if EEOC agreed not to share with charging party and her attorney. Subpoena enforcement action filed and upheld right of EEOC to information, but barred EEOC from sharing with Charging Party.
General Deference to EEOC in Subpoena Enforcement Actions

- Continued Risk – Waiver of Right to Challenge Subpoenas
  1) Five Business Days to Challenge
  2) Pro EEOC Decisions:
     - *EEOC v. Aerotek*, 498 Fed. Appx. 64 (7th Cir. 2013). Only 1 day late, but waiver!!
  3) Pro Employer:
     - But recent decision cites 29 CFR Sec. 1601.16(b)(1) and *EEOC v. Lutheran Social Services*, 186 F.3d 959 (D.C. Cir. 1999) in which court held that this section “presents ‘no categorical bar’ to a court’s ‘excus[ing] noncompliance,’” finding court can look to whether “circumstances are ‘sufficiently extraordinary’ to excuse non-compliance.” See 2016 U.S. Dist. LEXIS 41071 (E.D. Ky. Mar. 29, 2016). Court looked to ongoing objections by employer, despite fact that petition to modify or revoke subpoena was a day late.
Limited Conciliation Obligation Prior to File Suit

• Impact of *EEOC v. Mach Mining*, LLC, 135 S. Ct. 1645 (2015) – The courts are merely required to conduct a “barebones review” of conciliation process. Court have rejected employer arguments that court must inquire whether EEOC made a “good faith” effort at conciliation.


• Ninth Circuit held EEOC *not required to identify class members in conciliation* - the EEOC satisfies its pre-suit requirements to bring a class action if it attempts “to conciliate on behalf of an identified class of individuals prior to bringing suit.” *Arizona ex rel. Horne v. Geo Group Inc.*, 816 F.3d 1189 (9th Cir. 2016).
Review of Selected EEOC Priorities and Related Litigation
Key Issues

- **Strategic Enforcement Plan** - Generally reaffirmed basic terms of 2013-2016 SEP into 2017-2021 SEP, plus newly evolving issues

- **EEOC Statistics and Settlements** - Reduced level of litigation and increased risk of multiple victim and systemic lawsuits

- **Review of Selected Priorities - Areas of Significant Focus**
  1. Hiring Barriers
  2. ADA Litigation
  3. Systemic Harassment
Review of EEOC’s Six Priorities Based on SEP – Issues that have “broad impact” in which “expertise of the Commission is particularly salient,” which are “best addressed” by EEOC based on “access to information, data and research.”

1) **Eliminating Barriers in Recruitment and Hiring** – “Racial, ethnic and religious groups, older workers and people with disabilities.” Exclusionary policies/practices, **channeling/steering** individuals into particular jobs due to status in particular group, job segregation, and **screening tools** used as hiring barriers (e.g., background checks, pre-employment tests, date of birth inquiries, medical questionnaires affecting individuals with disabilities). Added particular concerns involving temporary workforce, data-driven devices and lack of diversity in certain industries.

2) **Protecting Immigrant, Migrant and Other Vulnerable Workers** – Those groups of individuals who are frequently unaware of their rights.

3) **Emerging and Developing Issues** – Certain ADA issues (qualification standards), accommodating pregnancy limitations, LGBT coverage, and clarifying application of civil rights protection based on increased complexity of employment relationships and structures, including temporary workers, staffing agencies, independent contractor relationships and on-demand workers.

4) **Enforcing Equal Pay Protections for all Workers** – Focus on equal pay based on sex, but expands to address race, ethnicity, age disability and other protected groups.

5) **Preserving Access to the Legal System** – By way of example, working to address retaliatory actions, overbroad waivers and settlement provisions restricting access to Commission.

6) **Preventing Systemic Harassment** – Aside from sexual harassment, will focus on claims involving race, ethnicity, religion and age.
### Statistics on EEOC Litigation – Volume of Litigation

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<thead>
<tr>
<th>Year</th>
<th>Individual</th>
<th>“Multiple Victim”</th>
<th>Percentage/ Multiple Victim</th>
<th>Total Lawsuits</th>
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<tr>
<td>2011</td>
<td>177</td>
<td>84</td>
<td>32%</td>
<td>261</td>
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<tr>
<td>2012</td>
<td>86</td>
<td>36</td>
<td>29%</td>
<td>122</td>
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<tr>
<td>2013</td>
<td>89</td>
<td>42</td>
<td>24%</td>
<td>131</td>
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<tr>
<td>2014</td>
<td>105</td>
<td>28</td>
<td>22%</td>
<td>133</td>
</tr>
<tr>
<td>2015</td>
<td>100</td>
<td>42</td>
<td>30%</td>
<td>142</td>
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<tr>
<td>2016</td>
<td>55</td>
<td>31</td>
<td>36%</td>
<td>86</td>
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## Pending EEOC Litigation

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<tr>
<td><strong>TOTAL NUMBER OF PENDING EEOC LAWSUITS</strong></td>
<td>443</td>
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<td>309</td>
<td>-</td>
<td>231</td>
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<td>228</td>
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<td>218</td>
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<td></td>
<td></td>
<td></td>
<td>165</td>
<td>-</td>
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<tr>
<td>• Individual lawsuits</td>
<td>264</td>
<td>60%</td>
<td>172</td>
<td>55%</td>
<td>131</td>
<td>57%</td>
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<td></td>
<td></td>
<td></td>
<td>140</td>
<td>61%</td>
<td>130</td>
<td>60%</td>
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<td></td>
<td></td>
<td>86</td>
<td>52.1%</td>
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<tr>
<td>• Multiple victim</td>
<td>116</td>
<td>26%</td>
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<td>25%</td>
<td>46</td>
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<td></td>
<td>31</td>
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<td>32</td>
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<td>• Systemic lawsuits</td>
<td>63</td>
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<td>62</td>
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<td>54</td>
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<td>57</td>
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<td>48</td>
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<td>47</td>
<td>28.5</td>
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<td>Applicant/Employee</td>
<td>Nature of Discrimination Claim</td>
<td>Number of Systemic Lawsuits</td>
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<tr>
<td>Employee</td>
<td>EPA</td>
<td>1</td>
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<tr>
<td>Employee</td>
<td>Religion</td>
<td>2</td>
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Top EEOC Settlements

- $8.6M – *Disability Discrimination* – Fixed Leave Policy
- $5.26M – *National Origin Discrimination* – Hostile Work Environment – E. Indians subjected to unfavorable conditions in work camps
- $5.05M – *Disability Discrimination* – Class of workers not permitted to sit during shifts as an accommodation (Conciliation)
- $4M – *Race Discrimination/Hostile Environment* – Racist graffiti and racial slurs
- $3.1M – *Sex Discrimination* – Denial of equal employment opportunities by limiting jobs based on same-sex training policy by trucking company
- $2.35 M – *Race Discrimination* – Denial of promotions, training and equal wages to African-American workers (Conciliation)
- $2.1M – *Sex Discrimination* – Refusal to hire woman for field positions throughout northeast
Top EEOC Settlements (continued)

• $1.7M – *Disability Discrimination* – Attendance plan and points for medical-related absences (Conciliation)

• $1.65M – *Race and National Origin Discrimination* – Improperly excluding African American and Hispanic workers from job assignments by Unions

• $1.5M – Sex Discrimination – After litigating claim for over 10 years involving alleged failure to hire females as sales representatives, parties entered into consent decree in settlement of lawsuit

• $1.4M – *Sexual Harassment and Retaliation* – Settlement of sexual harassment lawsuit involving alleged verbal and physical harassment by restaurant manager of 12 women and teenagers

• $1.4 M – *Race Discrimination* – Private conciliation with outsourcing provider involving black and Hispanic individuals, which also included enhancing recruitment hiring and promotion of minorities at its Illinois-based operations
Impact of Significant EEOC “Wins” on EEOC Litigation

• Impact of *EEOC v. Mach Mining* in the New Administration

• Recent Actions Upholding Right to Pursue Pattern-or-Practice Claims Under 706 of Title VII and Secure Compensatory and Punitive Damages
Recruiting and Hiring Barriers
Barriers in Recruiting and Hiring

- Consent Decrees reflected settlements reached in numerous hiring barrier cases
- Lawsuits have dealt with both disparate treatment and disparate impact claims
- Significant “pattern or practice” cases involving race, sex and age discrimination remain on the horizon
- Lawsuits involving criminal background checks in the hiring process are now being challenged focus on substantive and procedural grounds (i.e. record-keeping requirements)
- Are certain industries subject to potential challenge? (e.g. technology, staffing firms and the “gig” economy)
Significant Settlements

- **EEOC v. Mavis Tire**, (S.D.N.Y) - $2.1 million settlement in sex discrimination case based on alleged failure to hire females as managers, mechanics, tire Installers, and similar jobs in northeast (11/8/15)
- **EEOC v. PMT Corp.** (D. Minn.) - $1.02 million in settlement of age and sex discrimination involving sales positions (3/4/16)
- **EEOC v. Cintas**, (E.D. Mich) - $1.5 million settlement in sex discrimination case for uniform delivery jobs in State of Michigan (3/24/16)
- **EEOC v. Lawler Foods**, (S.D. TX) - $1.042 million in settlement of race discrimination involving alleged exclusion of African Americans as commercial bakery workers (4/22/16)
- **EEOC v. New Prime Trucking** (W.D. Md.) - $3.1 million involving alleged sex discrimination based on same-sex training policy for drivers
Pending Large-Scale Failure-to-Hire Lawsuits by EEOC

Pending Large-Scale, Including Nationwide, Disparate Treatment Lawsuits,

• **EEOC v. Bass Pro**, 4:11-cv-03425 (S.D. Tex., filed Sept. 21, 2011). Nationwide lawsuit involving alleged discrimination against African Americans and Hispanics, coupled with retaliation. Interlocutory appeal to 5th Cir. on key issue!!


• **EEOC v. Darden Restaurants, Inc.**, 15-cv-20561 (S.D. Fla., filed Feb. 12, 2015). Nationwide age discrimination lawsuit based on exclusions from “front” and “back” of the house positions.


- Held EEOC can pursue pattern-or-practice claims under Section 706 of Title VII and thus seek compensatory and punitive damages in such actions.


- Permitting a pattern-or-practice claim under Section 706 allows the EEOC to potentially recover compensatory and punitive damages, which are not available for pattern-or-practice claims under Section 707 of Title VII, thus raising the stakes in pattern or practice litigation.
Criminal Background Check Litigation is Alive and Well Monitor in 2016:

- **Challenge to Hiring Practices Based on Disparate Impact on Minorities** - Pending *EEOC v. Dolgencorp* (Filed: N.D. Ill.)

- **Challenging Employer for Failing to Maintain EEO Data and Conduct Disparate Impact Analysis** - 2016 U.S. LEXIS 83520 (E.D. Pa. June 28, 2016) - Title VII, together with record-keeping regulations found in the Uniform Guidelines on Employee Selection Procedures (UGESP), require employers to maintain records disclosing the impact their selection procedures have upon employment opportunities of persons identifiable by race, sex, or ethnic group.
Consent Decree Requiring EEO Data When Making Criminal History Inquiries in the Application Process:

“During the decree's four-year term, if [the Employer] intends to obtain or assess any person's criminal history information, the company must first make and keep records identifying the person's gender, race, and ethnicity. Once [the Employer] has reviewed any person's criminal history information or conducted any criminal history assessment, it also has to keep records of the criminal history information, the results of any criminal history assessment, and any employment decision made based on any criminal history assessment. The decree further requires record keeping relating to complaints about [the Employer’s] use of criminal history information and assessments, including complaints of discrimination, and regular reporting to EEOC throughout the decree's duration.”

See EEOC Press Release dated December 16, 2016
ADA Claims
Key ADA Developments

• Largest EEOC settlement in 2016 involved resolution of an ADA claim
• Largest number of systemic lawsuits filed involved ADA claims (11 of 18 “merits” lawsuits)
• Largest number of lawsuits filed by EEOC involved ADA claims (35 of 86 “merits” lawsuits) (41% of all “merits” lawsuits)
• EEOC Proactive role based on issuance of “Employer-Provided Leave and the Americans with Disabilities Act” (May 9, 2016)

• Acting Chair Lipnic and Commissioner Feldblum have been pro-active over the years dealing with ADA accommodation issues.
Largest EEOC Settlement in FY 2016 -- *EEOC v Lowe's (C.D. Cal. May 13, 2016)* -- $8.6 million - ADA Lawsuit Based on Alleged Inflexible Maximum Leave Policy

- According to EEOC's suit, Lowe's violated the Americans with Disabilities Act (ADA) and engaged in a pattern and practice of discrimination against people with disabilities by firing them and by failing to provide reasonable accommodations to them when their medical leaves of absence exceeded Lowe's 180-day (and, subsequently, 240-day) maximum leave policy. EEOC also charged that Lowe's violated the ADA by terminating individuals who were "regarded as" disabled, had a record of disability, and/or were associated with someone with a disability.

- In addition to monetary relief, the four-year consent decree settling the suit requires that Lowe's retain a consultant with ADA experience to review and revise company policies as appropriate; implement effective training for both supervisors and staff on the ADA; develop a centralized tracking system for employee requests for accommodation; maintain an accommodation log; and post documentation related to this settlement. Lowe's is also required to submit regular reports to EEOC verifying compliance with the decree.
Other Noteworthy Case

**Risks Involving No-Fault Attendance Plans Based on Failure to Include Provisions to Provide Accommodations Based on Disabilities**

- $1.7 Million - 2016 Conciliation/Settlement Based on Nationwide Policy of Issuing Attendance Points for Medical Related Absences

- One of largest ADA settlements- 2011 – Highlighted in EEOC’s 2016 Systemic Litigation Report- $21 million nationwide settlement based on consent decree- EEOC lawsuit challenged failure to accommodate disabilities based on no-fault attendance plan

- Any no-fault attendance policy requires reference to reasonable accommodation under the ADA and (generally) not receiving an adverse action stemming from an absence based on a protected disability. Both the consent decree and EEOC guidance make clear that an employer is required to approach such accommodations on an individualized basis, but limits can be placed on such accommodations to the extent that an employee’s absences would be “unreasonably unpredictable, repeated, frequent or chronic.”
Two lawsuits challenging policy of excluding applicants who tested positive for certain lawful prescription drugs (D. Ariz.) and (D.S.D.) (Applicants)

Alleged pattern or practice of failing to hire individuals based record or sick or FMLA use (S.D. Miss.) (Applicants)

Alleged unlawful health care inquiries of applicants (M.D. Fla.) and (W.D. Mo.) (Applicants)

Policy of refusing to provide more additional leave or light duty assignments (W.D. Okla. and N.D. Ill.) (Employees)

Policy required employees to disclose use of certain prescription medication (N.D. Ala.) (Employees)

Employer allegedly maintained inflexible attendance policy and failed to make reasonable accommodations for employees with disabilities (C.D. Cal. and N.D. Ala.) (Employees)

Employer Allegedly failed to accommodate and discharged employees with disabilities (D. Colo.) (Employees)
Systemic Harassment
Systemic Harassment

• Acting Chair Lipnic, prior to stepping into her current role, has repeatedly stated that the EEOC could spend virtually all of its time litigation harassment cases.

• In July 2016, the EEOC issued a Systemic Report highlighting systemic litigation in recent years, which included significant exposure based on harassment litigation which included:
  – $21 million settlement in 2015 alleging that African American, Native Americans, Hispanics, Asian Americans and biracial individuals at an oil drilling company were subjected to racial and ethnic slurs, assigned the lowest level jobs, denied training opportunities and disproportionately disciplined and demoted (D. Colo.).
  – $11 million and $10 million settlements involved racial harassment by trucking companies that included alleged racially hostile displays, including racist graffiti and nooses and being disciplined more severely than peers of other races. (N.D. Ill.)
  – $2.5 million settlement on alleged sexual harassment of teenagers at a fast food chain (N.D.N.Y.)
  – $2 million settlement involving settlement of alleged sexual harassment claims at another fast food chain. (D.N.M.)

• Plus – FY 2016 settlements of $1.4 million based on sexual harassment of female farm workers and over $1 million against a condominium complex for alleged egregious harassment.
EEOC 2015 Statistics in the Private Sector As Discussed in June 2016 Report

- 27,893 charges received (31%) alleged harassment
- 28,642 charges resolved (31%) alleged harassment
- $125.5 million secured for employees alleging harassment in EEOC's pre-litigation process
- 33 lawsuits filed by EEOC (23% of all suits filed) alleged harassment
- 42 lawsuits resolved by EEOC (27% of all suits resolved) alleged harassment
- $39 million in monetary benefits secured for employees in EEOC lawsuits involving harassment

Acting Chair Lipnic was one of the Co-Chairs of the Select Task Force Report on the Study of Harassment in the Workplace, which issued its comprehensive report in June 2016 at https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm

On January 10, 2017, the EEOC issued 75 pages of Guidance in its “Proposed Enforcement Guidance on Harassment.” This draft Guidance focuses on the legal standards applicable to harassment claims in workplace.

The EEOC’s Press Release on the proposed Guidance highlights that between fiscal years 2012 and 2015, “the percentage of private sector charges that included an allegation of harassment increased from slightly more the one quarter of all charges annually to over 30% of all charges.” See https://www.eeoc.gov/eeoc/newsroom/release/1-10-17a.cfm
Harassment Task Force Report

Select Task Force on the Study of Harassment in the Workplace


Recommendations Focus On:

• Prevalence of Harassment in Workplace
• Workplace Leadership and Accountability
• Harassment Prevention Policies and Procedures
• Anti-Harassment Compliance Training
• Workplace Civility and Bystander Intervention Training
• Targeted Outreach to Youth
• An It’s on Us Campaign

See https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm
Report Recommends Policy Include:

• A clear explanation of prohibited conduct, including examples;
• Clear assurance that employees who make complaints or provide information related to complaints, witnesses, and others who participate in the investigation will be protected against retaliation;
• A clearly described complaint process that provides multiple, accessible avenues of complaint;
• Assurance that the employer will protect the confidentiality of harassment complaints to the extent possible;
• A complaint process that provides a prompt, thorough, and impartial investigation; and
• Assurance that the employer will take immediate and proportionate corrective action when it determines that harassment has occurred, and respond appropriately to behavior which may not be legally-actionable "harassment" but which, left unchecked, may lead to same.

See https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm
Key Limitation on Harassment Claims Highlighted in Harassment Task Force Report:

“Compliance training should also clarify what conduct is not harassment and is therefore acceptable in the workplace. For example, it is not harassment for a supervisor to tell an employee that he or she is not performing a job adequately. Of course, the supervisor may not treat employees who are similar in their work performance differently because of an employee’s protected characteristic. But telling an employee that she must arrive to work on time, or telling an employee that he must submit his work in a timely fashion, is not harassment. Nor do we suggest that occasional and innocuous compliments- ‘I like your jacket’- constitute workplace harassment, but rather reflect the reality of human experience and common courtesy.”
The “Wild Cards”

• LGBT Issues
• Pay Equity
• Preserving Access to Legal System
LGBT Coverage Under Title VII

Determining Scope of Coverage

EEOC

Congress

Courts
Transgender and Sexual Orientation Coverage

- The EEOC’s current position stems from a July 15, 2015, federal sector decision, *Baldwin v. Department of Transportation* (3-2 Decision)
  - *Commission* held that a claim of discrimination on the basis of sexual orientation “necessarily states a claim of discrimination on the basis of sex under Title VII.”
  - EEOC relied on three grounds:
    1. sexual orientation discrimination involves sex stereotyping in not conforming to gender norms;
    2. such discrimination amounts to gender-based associational-type discrimination; and
    3. sexual orientation requires consideration of a person’s sex.
  - Republican-appointed Commissioners Barker and Lipnic voted against approval of the decision.
  - After the Commission shifts to a 3-2 Republican majority, it remains an open question whether the Commission’s current view will endure.

- One District Court decision recently upheld the EEOC position. See e.g., *EEOC v Scott Medical Health Ctr.*, 2016 U.S. Dist. LEXIS 153744 (W.D. Pa. Nov. 4, 2016)

- *What You Should Know About EEOC and Enforcement Protections of LGBT Workers*, available on EEOC website at [https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm);
U.S. Courts of Appeal Reviewing the Issue


Pay Equity
Equal Pay Included as One of EEOC’s Priorities Based on Strategic Enforcement Plan

- EEOC’s Strategic Enforcement Plan (2012-2016) included Equal Pay as one of its six priorities—“Enforcing Equal Pay Laws. Target compensation systems and practices that discriminate based on gender.”
- EEOC’s 2016 Report on its Systemic Initiative looking back over past 10 years includes a focus on “Pay and Promotion.”
- On April 12, 2016, designated as “Equal Pay Day,” Chair Yang highlighted, “EEOC has made fighting pay discrimination one of its six strategic enforcement priorities and (s)ince 2010, the EEOC has taken in tens of thousands of charges of pay discrimination, and we have helped to recover over $85 million in monetary relief for victims of sex-based pay discrimination.”
- **Since May 2016, EEOC has filed more than 12 Equal Pay Act cases in 10 jurisdictions** (AL, CA, CO, MD, MN, MO, OH, WY, TX and DC), including 2 systemic lawsuits, in broad range of industries.
- On September 29, 2016, EEOC amended the rules for EEO-1 reporting, to require employers to include compensation information as part of their annual EEO-1 reporting as of March 2018.
- Impact of “Directed” Investigations: EEOC can self-initiate even without charging party (for both EPA and ADEA claims)
On October 17, 2016, the EEOC issued its SEP for Fiscal Years 2017-2021 and included among its six priorities:

**Ensuring Equal Pay Protections for All Workers:**

- EEOC will continue to focus on compensation systems and practices that discriminate based on sex under the Equal Pay Act and Title VII. Because pay discrimination also persists based on race, ethnicity, age, and for individuals with disabilities, and other protected groups, **the Commission will also focus on compensation systems and practices that discriminate based on any protected basis**, including the intersection of protected bases, under any of the federal anti-discrimination statutes.
Equal Pay Act Litigation

Pending and Recent Systemic Litigation

• **EEOC v. Colorado Seminary d/b/a University of Denver**, Civil Action No. 1:16-cv-02471-WYD, (D. Wyo., **Filed Oct. 3, 2016**) – Class of female full law professors at law school allegedly paid lower salaries than it paid to their male counterparts who were doing substantially equal work under similar working conditions. Pending.


• **EEOC v. True Oil LLC**, Case No. 15-cv-74 (D. Wyo., **May 15, 2016**). Summary judgment for employer striking down EPA claim that female accounting clerks paid less for substantially similar work.
• Current future of a Revised EEO-1 Report in serious question based on recent election and change in administration

• But, EEOC will continue to address pay equity under both EPA and Title VII

• Pay equity legislation also will continue to be adopted at the state level
Key New State Pay Equity Laws

Expansion of Rights Under Selected State Laws:

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Preserving Access to the Legal System
Access to the Legal System

• The EEOC’s stated priority involving “preserving access to the legal system” has involved challenges to employer policies that “target policies and practices that discourage or prohibit individuals from exercising their rights under employment discrimination statutes, or which impede the EEOC’s investigative or enforcement efforts.”

• EEOC has focused on retaliation claims, including the EEOC’s recently adopted Enforcement Guidance on Retaliation and Related Issues,” issued on August 25, 2016, which focused on:
  (1) Scope of employee activity protected by the law;
  (2) Legal analysis to be used to determine if evidence supports a claim of retaliation;
  (3) Remedies available for retaliation;
  (4) Rules against interference with the exercise of rights under the ADA; and
  (5) Detailed examples of employer actions that may constitute retaliation.

• More controversial are the EEOC’s actions based on Section 707(a) of Title VII involving an alleged “pattern-or-practice of resistance to the full enjoyment of any rights” secured by Title VII
Preserving Access to the Legal System - More Controversial Actions By EEOC

Basis for EEOC Actions

• Over the past several years, the EEOC has pursued litigation challenging releases and an arbitration agreement, taking the view that such documents interfere with an individual’s access to the Commission.

• The arguments made by the EEOC in its recent litigation may have a far broader impact for two primary reasons: (1) the EEOC is broadly interpreting its authority to file pattern-or-practice lawsuits even absent a charge of discrimination or retaliation; and (2) the EEOC has further submitted that when filing a pattern-or-practice lawsuit not based on a charge of discrimination or retaliation, it has the right to go directly to court with no duty to conciliate, which is even broader than *Mach Mining*.

Recent Litigation by EEOC – Future Actions In Absence of A Charge Less Likely, such as:

• Challenging Severance Agreements – *EEOC v. CVS*, 809 F.3d 335 (7th Cir. Dec. 17, 2015), *reh’g denied*, No. 14-3653 (7th Cir. March 9, 2016) - Pro Employer

Emerging Hot Topic: Age Discrimination Issues
Emerging Issues under ADEA

- Approaching 50th Anniversary of ADEA
- Evolving Issues Under ADEA:
  1) Whether EEOC can bring failure to hire claims under ADEA as disparate impact claim. See *Villarreal v. R.J. Reynolds*, No. 15-10602, 2016 WL 5800001 (11th Cir. Oct. 5, 2016) (court rejected failure to hire disparate impact claim under ADEA). Plaintiff was screened out based on hiring criteria seeking “targeted candidate…2-3 years out of school” who “adjusts easily to change” and “stay away from” applicants in sales 8-10 years. Court focused on express language of ADEA re disparate impact provision re “unlawful for an employer…to classify his employees in any way …or otherwise adversely affect his status as a employee, because us such individual’s age.” But see *Rabin v. PricewaterhouseCoopers LLP*, 2017 BL 49868, N.D. Cal., No. 16-cv-02276, 2/17/17 (district court permitted ADEA claim and disagreed with Villarreal)
  3) EEOC filed briefs in support of the plaintiffs’ position in both cases
Final Takeaways
Final Takeaways

1) Expect a more nuanced approach in litigation initiated by the EEOC with increased efforts by the Commission to require District Offices to seek approval from the Commission prior to filing systemic lawsuits.

2) Systemic investigations and systemic initiative is not going away!

3) Courts have continued to support EEOC efforts by: (1) permitting broad based investigations; (2) limiting review of EEOC investigations and conciliation; and (3) giving support for compensatory and punitive damages in pattern or practice claims.

4) EEOC lawsuits challenging hiring barriers will remain front and center.

5) The highest volume of litigation involving both individual and systemic claims has involved disability claims under the ADA.
Final Takeaways

6) Employers should be pro-active in trying to minimize the risk of harassment claims by carefully considering the EEOC Task Force Report and proposed guidance

7) Employers need to closely monitor court developments regarding the viability of LGBT claims under Title VII

8) Even assuming the revised EEO-1 Report may not be implemented, pay equity claims will continue under both Title VII and the EPA as well as at the state level

9) Retaliation claims will remain one of the highest risks for employers when faced with litigation

10) Court developments under the ADEA need to be closely monitored and expect increased activity during the coming year
Thank You!