

**EEOC Enforcement Priorities for
2015:
What They're Looking For
and How to be Ready**

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Equal Employment Opportunity Commission (EEOC)

- Federal Agency, established in 1965
- Administration and Enforcement of:
 - Title VII of Civil Rights Act
 - Americans with Disabilities Act (ADA)
 - Age Discrimination in Employment Act (ADEA)
 - Equal Pay Act (EPA)
- \$364 Million Budget; 15 Districts; 53 Field Offices



EEOC Activity in 2014

- 88,778 Charges filed (decrease of 5,000 from 2013)
 - Most common: retaliation; race; sex (including sexual harassment, pregnancy)
- \$296.1 million in relief to private sector complainants
- \$74 million relief to federal sector complainants
- 136 lawsuits resolved; \$22.5 million awarded
- 133 new merits lawsuits filed

EEOC Process

- Charge of Discrimination
- Mediation
- Investigation
 - Position Statement; RFI
 - Fact Finding Conference
 - On-Site
 - Subpoenas
- Determination
- Conciliation
- Enforcement Action



Strategic Enforcement Plan

- Adopted in December 2012
- Purpose: Focus and coordinate EEOC programs to have sustainable impact on reducing and deterring discrimination in the workplace
- Implements 6 National Enforcement Priorities
- Individual District Complement Plans

National Enforcement Priorities

- Eliminating barriers in recruitment and hiring
- Protecting immigrant, migrant and other vulnerable workers
- Addressing emerging and developing issues
- Enforcing equal pay laws
- Preserving access to the legal system
- Preventing harassment through systemic enforcement and targeted outreach

National Enforcement Priorities

- Charges involving these areas will receive “highest priority” in case handling
- Given precedence in litigation case selection and in the systemic program



Priority #1: Eliminating barriers in recruitment and hiring

- Elimination of systemic barriers to hiring
 - Class-based intentional hiring discrimination
 - Facially neutral hiring practices with disparate impact on particular classes (recruitment practices, screening tools, background checks, etc.)
- Guidance to Districts:
 - Target industries with history of underrepresentation of women/minorities.
- Districts may consider EEO reports, job postings, application forms, etc.

Priority #1: Eliminating barriers in recruitment and hiring

- Disparate Treatment/Pattern or Practice
 - *EEOC v. McCormick & Schmick's* (D.Md. 2014): consent decree, \$1.3 million to resolve claim of pattern or practice of not hiring racial minorities for front-of-house jobs at two restaurants
 - *EEOC v. Mavis Discount Tire* (S.D.N.Y. 2012): failure to hire one female among 1,300 hires for tire installing positions

Priority #1: Eliminating barriers in recruitment and hiring

- Disparate Impact Discrimination (neutral policy, discriminatory effect)
 - *EEOC v. Dollar General, Inc.* (N.D. Ill. 2013): nationwide class action alleging race-based disparate impact as a result of criminal background check for all positions

Priority #1: Eliminating barriers in recruitment and hiring

- “Enforcement Guidance in the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act” (April 25, 2012)
 - Criminal background checks permissible if not used in discriminatory manner
 - Blanket policy denying applicants with criminal records violates Title VII – must use *individualized assessment* in each case; review egregiousness of record, consider business necessity, etc.



Priority #1: Eliminating barriers in recruitment and hiring

Strategies to avoid Charges

- Audit hiring procedures
 - Is there a pattern of discrimination?
 - Is there a disparate impact as a result of neutral policies?
- Review Background Check procedures
 - Written policy for conducting background checks.
 - Identify specific criminal background that disqualifies applicant for employment
 - Explain justification for disqualification

Priority # 2: Protecting immigrant, migrant and other vulnerable workers

- Vulnerable worker: unaware of employment rights or reluctant/unable to exercise such rights.
- Focus on disparate pay, job segregation, trafficking cases, harassment, and other discriminatory policies affecting vulnerable workers.
- Outreach programs to educate vulnerable employees on their employment rights

Priority # 2: Protecting immigrant, migrant and other vulnerable workers

- *EEOC v. Pickle, Inc.* (N.D. Okla.)
 - \$1,240,000 verdict to East Indian workers alleging race and national origin discrimination against oil industry parts manufacturer related to disparate pay and working conditions

Priority # 3: Addressing developing and emerging discrimination issues

- Focus on new legislation, developing legal theories, judicial decisions, administrative interpretations



Priority # 3: Addressing developing and emerging discrimination issues

- Emerging Issues Identified by EEOC:
 - Lesbian, Gay, Bisexual, Transgender (LGBT) coverage under Title VII
 - ADAAA: reasonable accommodations; qualification standards
 - Pregnancy coverage under Title VII; pregnancy-related accommodations under ADAAA

Priority # 3: Addressing developing and emerging discrimination issues

- Coverage of LGBT individuals under Title VII
 - EEOC Guidance: Discrimination against LGBT violates Title VII because it is based on sex-stereotypes, e.g., the belief that men should only date women, women should only marry men, etc.
 - Federal Sector cases (sex-stereotype theory)
 - New filings in Private Sector: *EEOC v. RG & GR Harris Funeral Homes* (E.D. Mich 2014) (alleging employer fired funeral director when she notified employer she was transitioning from male to female and would soon start to dress in female business attire).

Priority # 3: Addressing developing and emerging discrimination issues

- ADAAA Regulations

- Developing guidance – e.g., use of leave as a reasonable accommodation
- Emerging Issues – e.g.,
 - *EEOC v. United Airlines* (7th Cir. 2012) (“best qualified” policies do not trump ADA’s reassignment-as-reasonable-accommodation obligation)
 - *EEOC v. Ford Motor Co.* (6th Cir. 2014) (teleworking is a reasonable accommodation when physical attendance not required)

Priority # 3: Addressing developing and emerging discrimination issues

- Pregnancy Discrimination
 - New EEOC Guidance (July 2014)
 - Discrimination based on pregnancy, childbirth, or related medical conditions
 - E.g., “parental leave” must be provided equally to men and women
 - Guidance on accommodating pregnancy-related limitations; intersection of PDA/ADA
 - E.g., lactation as a medical condition

Priority # 3: Addressing developing and emerging discrimination issues

Preparing for Emerging Issues

- LGBT coverage: Train employees to treat LGBT as protected class under Title VII; update EEO policies
- ADAAA: Understand the ADA interactive process; establish an ADA protocol; document it
- Pregnancy Discrimination: Train employees that pregnancy is a protected class under Title VII; and that pregnancy may warrant ADA coverage

Priority # 4: Enforcing equal pay laws

- Focus on compensation systems and practices that discriminate based on *gender*
- Field offices encouraged to use “Directed Investigations” and Commissioner Charges



Priority # 4: Enforcing equal pay laws

Avoiding EPA claims

- Wage Audit
- Recordkeeping



Priority # 5: Preserving access to the legal system

- Focus on policies and practices that either:
 - impede EEOC investigation and enforcement, or
 - prohibit individuals from exercising their rights



Priority # 5: Preserving access to the legal system

- Specific emphasis areas:
 - Retaliation claims (most common type claim)
 - Overly broad liability waivers
 - Settlement provisions prohibiting EEOC Charges
 - Failure to retain records required by EEOC regulations

Priority # 5: Preserving access to the legal system

Avoiding Claims of Interfering with Access to the Legal System

- Prevent Retaliation claims
 - Anti-retaliation policy; train managers and employees
 - Personal warnings in EVERY case
 - Monitor for Hostile Work Environment retaliation
 - Monitor for subtle retaliation (plaintiff's burden is low!)
- Avoid overly broad liability waivers
 - Draft proper waivers
 - Special ADEA requirements

Priority # 5: Preserving access to the legal system

Avoiding Claims of Interfering with Access to the Legal System

- Avoid settlement provisions prohibiting EEOC Charges
 - Carve out to recognize right to file w/EEOC (and NLRB)
- Maintain records required by EEOC regulations
 - Record retention policy

Priority # 6: Preventing harassment through systematic enforcement and targeted outreach

- Harassment charges: 1/3 of all EEOC charges
 - Racial harassment, sexual harassment
- Targeted approach, focus on systemic enforcement
- Outreach campaign to educate employers



Priority # 6: Preventing harassment through systematic enforcement and targeted outreach

- *EEOC v. Emcare* (N.D. Tex. 2014): sexual harassment; 3 victims; awarded \$500,000
- *EEOC v. New Breed Logistics* (WD Tenn. 2013): sexual harassment; 4 victims; \$1.5 million
- *EEOC v. AA Foundries* (WD Tex. 2012): race harassment; 2 victims; \$200,000 plus back pay
- *EEOC v. Wells Fargo* (D. Nev. 2014): female/ female sex harassment; 4 victims; \$300,000

Priority # 6: Preventing harassment through systematic enforcement and targeted outreach

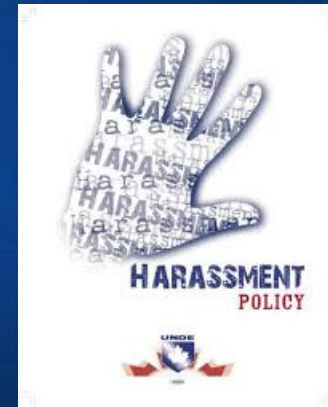
- *EEOC v. YRC, Inc./Yellow Transp.* (N.D. Illinois): egregious racial harassment; consent decree for \$11 million
- *EEOC v. Roadway* (N.D. Illinois): egregious racial harassment; consent decree for \$10 million



Priority # 6: Preventing harassment through systematic enforcement and targeted outreach

Preventing Workplace Harassment

- Maintain effective Anti-Harassment Policy
 - Defines harassment
 - Prohibits harassment
 - Provides complaint procedure
 - Prohibits retaliation
 - Published and communicated
- Training on Policy and Complaint Procedure



Priority # 6: Preventing harassment through systematic enforcement and targeted outreach

Responding to Claims of Workplace Harassment

- Stop the Harassment NOW
- Enforce Anti-Retaliation Policy
- Investigate
- Take Corrective Action



Keys to Making Defensible Employment Decisions

- SLOW DOWN
- Get HR involved
- Get all the relevant facts
 - Both sides of the story
- Identify the issues
- Can we support this decision?
 - Have we documented the history?
 - Are we being consistent?
- What is best for our business?



EEOC Enforcement Priorities for 2015

Discussion?

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