

The EEOC & New Battlegrounds

W. David Paxton

Lindsey A. Coley

GENTRY LOCKE
RAKES & MOORE^{LLP}
Attorneys

Hot Issues

- EEOC litigation
- Pregnancy discrimination
- Sex stereotyping discrimination
- Hiring issues
- Disability issues

EEOC Litigation FY2014

- EEOC filed 61 lawsuits in September 2014
- Focus on sex discrimination and ADA claims
- Pursuing novel procedural issues to broaden its power
 - No duty to conciliate
 - Internal investigative actions unreviewable
 - Challenging settlement agreements

Pregnancy Discrimination

- 45 lawsuits filed since 2011
- EEOC issued Guidance in July 2014
 - Pregnancy Discrimination Act (PDA) now will require employers to offer light duty to pregnant employees as “reasonable accommodation”
 - “Guidance adopts new and dramatic substantive changes” (Commissioner Lipnic)
- ADA makes it clear pregnancy ≠ disability
- EEOC filed 6 lawsuits in Sept. 2014 alleging pregnancy discrimination
 - One in Richmond

Pregnancy Discrimination – Accommodation Issue

- Young v. UPS
 - US Supreme Court will decide whether and in what circumstances the PDA requires an employer to provide work accommodations to pregnant employees
 - Pregnant employee was not given light duty work because she did not qualify under UPS policy
 - 4th Circuit agreed with UPS – PDA does not include duty to provide reasonable accommodation
 - Anticipate decision in mid-2015

Pregnancy Discrimination – Reminders

- Cannot require pregnant worker to accept accommodation if she can perform duties
- Cannot change job duties of pregnant worker without her consent (unless there is business necessity) even if motivated about concerns of health of worker or baby
- Even if Supreme Court agrees with UPS, pregnancy-related conditions still can be disabilities that require accommodation

Pregnancy Discrimination – Reminders

- Lactation is a pregnancy-related medical condition that must be treated like other medical conditions
 - Allow changes in work schedules
 - ACA requires private place and time off for lactating
- Pregnancy-related harassment is prohibited
- Remember FMLA duties for childbirth, adoption, and foster placements

New Era of Sex Discrimination

- Employment Non-Discrimination Act (ENDA) never gained traction (20 years)
- EEOC has changed its interpretation – now accepts all claims of gender stereotyping
- Number of LGBT discrimination claims rising
- EEOC sued funeral home and doctor’s office for firing employees going through gender change process

Sexual Orientation/ Gender Identity Claims	2013	2014
Total Claims Resolved	417	614
Settlements in Optional Mediation	36	44
Settlements in Enforcement Stage	12	24
Withdrawals of Charges	15	18
“Cause” Findings	9	11
Successful Conciliations	6	3

Avoid New Sex Discrimination Claims

- Provide equal employee benefits to same-sex couples
- Evaluate dress codes and grooming standards, and make sure they are tied to business needs and are gender neutral
- Update non-discrimination policies to expressly include gender and/or sexual orientation as protected status bias
- Include training on LGBT bias

Transgendered Employees

- Develop transition plan – candid conversations if possible, but always with respect
- Educate employees on the need to treat transitioning employee with respect – referring to colleague by preferred pronouns
- Bathroom issues – be careful about creating a unisex bathroom for just one person – EEOC thinks individual must choose which to use

Criminal Background Checks

- Ban-the-box movement
- EEOC continues to question legality of credit and criminal background checks to make hiring/employment decisions
- *EEOC v. Kaplan Higher Education*
- *EEOC v. Freeman* - 4th Circuit
- FCRA reminder - \$4 million settlement (10/16/14)
Dollar General
 - Consent not on separate form and individual not given copy of report before adverse action

EEOC & Wellness Plans

- 3 lawsuits in 2 weeks
- EEOC (10/28/14) sued employer to block requirement of wellness plan that required employees and family to undergo biometric testing to get reduced premiums
 - Test included drawing blood, screening for blood pressure, HDL, cholesterol, glucose, and tracking height, weight, and nicotine usage
 - Not “voluntary” because if refused, lose employer HSA contribution plus surcharges for certain conditions
 - Conflict between ACA, ADA, GINA and Title VII

ADA Claims – Past Week

- Is it wrong to terminate a security guard who only has one arm?
 - Removed because of customer complaints
 - Cannot allow preferences and stereotypes
- Applicant sent for pre-job drug test
 - Couldn't give urine sample because of medical condition and manager refused alternative
 - Wal-Mart (Baltimore) paid \$72,500
- Home health worker with fibromyalgia using a cane
 - Client complained about situation and worker fired
 - Company paid \$30,000 and reinstated employee to settle EEOC lawsuit

ADA and Telecommuting

- *EEOC v. Ford Motor Company*
 - Employee with IBS requested to work up to 4 days a week if condition flared up
 - Company said “no” because essential function of job required regular attendance at workplace
- Trial court agreed with Ford
- EEOC appealed
- 6th Circuit reversed, but then agreed to re-hear the case

ADA Warning

- Delays in acting on requests for accommodation can create problems
- Norfolk case - employee quit job after requested accommodation not provided
- Court agreed that 6 month delay in providing accommodation to deaf worker gave rise to constructive discharge claim

EEOC Is More Aggressive

- Increasing its use of subpoenas to gather as much information as possible from employers before filing lawsuits
- Craft careful, accurate and timely position statements
 - Anything you write will be used against you
- Do not provide incomplete or inaccurate information
- Be cooperative and reasonable

Questions?

Lindsey Coley

Coley@gentrylocke.com
(540) 983-9376

David Paxton

Paxton@gentrylocke.com
(540) 983-9334