

# U.S. Equal Employment Opportunity Commission

## Technical Assistance Program Seminar

July 14, 2005

San Antonio, Texas

### Presentation Summaries

#### **John Schmelzer, Attorney Advisor, U.S. Equal Employment Opportunity Commission Headquarters**

##### *Update of Latest EEO Court Cases*

1. National discrimination case statistics:
  - 80-84,000 charges per year
  - 53% race discrimination
  - 35% sex discrimination
  - 11% national origin discrimination
  - Of the sex discrimination cases, 15-20% are filed by men.
  - Retaliation is the fastest growing category of cases.
  - One out of every two or three cases involve multiple categories (age and disability, for example, are common couplings).
2. Charge filings in the San Antonio District (a little over 2,000 per year):
  - Sex – 33%
  - Retaliation – 25%
  - Race – 22%
  - National origin – 22%
  - Age – 22%
  - Disability - 19%
  - Religion – 2%
3. EEOC is not yet accepting charges by e-mail.
4. Concerning “continuing violations,” these typically involve hostile environment claims. If at least one event occurred within 300 days of filing, older acts can be considered if they are part of the same pattern. However, in cases of “discrete acts” (e.g., failure to hire, failure to promote, suspensions, discharge, pay claims/each payment), previous acts outside of the 300 day window cannot be considered. *White v. BFI Waste Serve*, 375 F. 3d 288 (4<sup>th</sup> Cir 2004): The plaintiffs asserted that they were subjected to discriminatory treatment in compensation because they received less pay per route than other similarly situation drivers. The court held that each pay cut was a discrete act, and therefore any action that did not take place within the limitation period was untimely.
5. *Cuddeback v. Florida Bd. Of Education*, 381 F. 3d 1230 (11<sup>th</sup> Cir. 2004): A graduate student doing research in the lab of a university professor was an

- employee for the purpose of Title VII coverage. Even though plaintiff was required to complete laboratory rotation for her course work, she received a stipend, benefits, and leave for work and the university provided equipment and training. The court held that the decision not to renew her employment contract was made for employment reasons and not for academic performance. However, when academic requirements overwhelm employment aspects, students can be treated as a “student” rather than an “employee.”
6. Does requiring a high school graduation or GED result in a disparate impact? Is there a business necessity for this job qualification? This is hard to prove. Is it required for the safe operation of a business?
  7. One court case looked at a height requirement for truck drivers (5 foot 9 inches). Most Hispanics are shorter than this, so it had a disparate impact. What was the business necessity? Prosecutor found one 5 foot 4 inch driver who had won numerous safe driving awards—NOT a business necessity.
  8. *Smith v. City of Jackson*, 125 S. Ct. 1536 (March 30, 2005): The Supreme Court held for the first time that the disparate impact theory is viable under the Age Discrimination in Employment Act.
  9. *General Dynamic v. Cline*, 124 S. Ct. 1236 (2004): While the ADEA’s protection begins at 40 years of age, younger older workers (e.g., 40-50) are not protected versus older workers. There can be no reverse discrimination under the ADEA.
  10. *EEOC v. Seafarers International Union*, 394 F. 3d 197 (4<sup>th</sup> Cir. 2005): EEOC sued a union for age discrimination because it had an apprenticeship program that would only accept applicants who were no older than 35. The court found that the union was relying on a stereotype that older people are unable to learn the skills of a trade as effectively as younger people. The court thus ruled that it was reasonable for EEOC to conclude that Congress intended to prohibit age discrimination at this “doorstep” stage of employment.
  11. *EEOC v. Abercrombie and Fitch*: This was a challenge to “image based employment discrimination.” A&F only hired people with a certain “look.” Their sales associates workforce was 12% minority, while industry wide the percentage of minorities was 36%. The court held that while federal fair employment laws do not prohibit employment decisions based on physical appearance or attractiveness, “image” cannot be used as a proxy to discriminate on the basis of race, national origin, etc. A&F had no job descriptions or objective criteria for hiring qualifications.
  12. *Fonseca v. Sysco Food Services of Arizona*, 374 F. 3d 840 (9<sup>th</sup> Cir. 2004): Discriminatory comments about the plaintiff’s accent were evidence that the plaintiff was denied overtime opportunities because of his national origin.
  13. Workplace Religious Freedom Act – currently before the House and Senate – would make it less difficult for employees to take time off to observe a religious holiday or wear religious clothing at work. To date, the courts have generally found that any impact on the workplace is sufficient to deny religious accommodation, but this bill would require the employer to demonstrate that the accommodation would cause the employee to be unable to fulfill the essential functions of the job.

14. EEOC is seeing an increase in the number of charges involving women wearing veils in the workplace and involving Muslims desiring to pray during the work day.

 **Travis Hicks, Enforcement Supervisor, EEOC San Antonio**

*Reasonable Accommodation under the ADA*

1. Reasonable accommodation obligation begins when a qualified individual with a disability makes a request, or when the reasonable accommodation is readily apparent.
2. A reasonable accommodation analysis involves an individualized assessment of the individual's functional limitations and abilities, and the specific job functions of the position.
3. The employer can ask for information about the impairment, but may not ask for more information than necessary.
4. If an employee with a known disability is having difficulty performing the essential functions of the job, the employer should determine whether it is due to the impairment.
5. If leave is granted as a reasonable accommodation but then the employee is penalized for lack of attendance, this may be viewed as retaliatory.
6. Reassignment is the accommodation of last resort. If no vacant equivalent position exists, the employer should look at any vacant lower level position. If more than one vacancy exists, the employer should look for the closest fit. There is no requirement for the employee to compete for the vacancy, but she/he must be qualified.
7. The employer is not required to assist the employee in becoming qualified for another position (e.g., training). The employer is obligated to inform the employee of appropriate vacancies. Reassignment is not restricted to the same department, unless undue hardship exists. The reassigned employee does not need to be more qualified than others applying for the position.
8. Employee morale is not a defense for denial of a modified work policy.
9. Where does the interactive process break down?
  - Unreasonably slow response
  - Unreasonably burdensome process
  - Essential v. marginal job functions
  - Essential job functions v. the mechanics of performing a job function

 **Rodney Klein, Program Analyst, EEOC San Antonio**

*Harassment and Vicarious Liability*

1. Harassment is unwelcome behavior, connected to a protected class, and involves harm.
2. Harm must be assessed as to its severity and frequency and whether it is tangible (quid pro quo) or non-tangible (hostile work environment).
3. Tangible harm includes discharge, failure to hire, reduction of hours, demotion, failure to promote, denial of benefits, harassment, and constructive discharge. Harassment and constructive discharge can also be non-tangible (depends on the circumstances).

4. With tangible harm, the employer is liable. With non-tangible harm, the employer is possibly not liable.
5. Employer may be liable for a second violation of harassment even if the employee doesn't complain again.
6. *Pennsylvania State Police v. Suders* (2004): An employer cannot raise an affirmative defense if an official act (harm) precedes constructive discharge.
7. Affirmative defense: employer exercised reasonable care to prevent and correct promptly any harassment, and the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.
8. If there are no witnesses, do an assessment of relative credibility of the individuals involved.
9. Mr. Klein will conduct an hour of on-site training regarding sexual harassment on request.

**✚ Naomi C. Earp, Vice Chair, EEOC Headquarters (luncheon speaker)**

1. EEOC is 40 years old as of July 2005.
2. In its first year, the commission received 8,000 charges nationwide. Since then, it has received 2,367,000 charges.
3. EEOC has obtained \$996 million in monetary benefits from litigation, and \$2.5 billion for charging parties in settlements and conciliations.

**✚ Kathy Perez, ADR Coordinator, EEOC San Antonio; Craig Kempf, ADR Mediator, EEOC San Antonio; Dr. Walter A. Wright, Texas State University**  
*Benefits of Mediation*

1. San Antonio District Office has a 70% success rate in mediations.
2. Employers can mediate rather than conciliate after a determination if both parties agree. However, an external mediator would be used. The employer would not have to pay for the external mediator unless EEOC didn't have one available.
3. 70% of charging parties agree to mediate, but only 22% of employers agree.
4. Wright's study found that four times the number of respondents do not agree to mediate compared to charging parties.

**✚ Austin Jaycox, Enforcement Supervisor EEOC San Antonio**

*Insights into How EEOC Investigates Hiring and Firing Complaints*

**1. Hiring Concerns**

- Advertising: "younger person wanted" could have a chilling effect; "entry level position" or "energetic" could signal discrimination
- Applications: If you don't need the age during the application process, don't ask it.
- Interviews: Unless there is a good reason for asking something, don't. Never refer to a prospective employee's age, separate applications by age, or use any other age based criteria for making employment decisions.

**2. Recruitment: What to look for?**

- Is there a recruitment policy?
- Was it followed?

- Is there a job description?
- Are the essential functions identified?
- Is there a target audience? Who? Is anyone excluded?
- What does the current workforce look like?
- What is the available market? Is the workforce representative?
- How are solicitations made?
- Who are applicants?
- How are applicants screened?
- How have applicants been screened in the past?
- What has changed? Why?
- What are the real job requirements v. what was posted as job criteria?
- How are the records related to the hiring maintained? For how long?
- Who will handle the applications? Are codes used to identify applicants? Why?
- When is the process reviewed to determine if there appears to be disparate impact on any group?
- What information was given to the interviewers?
- What impact did the information have on the selection process? Did it create a bias or disparate impact?

### **3. Interviews**

- How are interviews conducted?
- How have interviews been conducted?
- If there are written questions, were they designed to systemically eliminate certain groups or classes of applicants?
- Were the interviewers instructed to take good notes of interviews?
- How is the objectivity of the selection ensured?
- Are notes maintained for one year from the date of final action?
- If a discrimination charge is made, are records maintained until the resolution of the charge?
- How is the notice of interviews announced to those selected for an interview?
- On what basis were those selected for an interview chosen?
- How were the interviews conducted (in person, telephone, etc.)?

### **4. Selection**

- Who was selected? Did the person follow the application procedures?
- Why were they selected?
- Were they the best qualified? If not, were they better qualified than the complainant?
- Was the complainant as qualified as the selectee? If yes, why was the complainant not selected? What was used to distinguish the two?
- Was there anyone in a different protected class better qualified than the selectee? If yes, why was that person not selected?

### **5. Firing**

- What is the policy regarding discharge, dismissal, termination?
- Is there a progressive disciplinary policy? To whom does it apply?
- Is there a difference between the policy and the policy in practice? Which is followed by the employees?

- Does the behavior warrant discharge in accordance with company policies in effect at the time?
- How has the behavior been handled in the past?
- Were the past actions handled by the same ultimate authority? If yes and there is a difference, why the difference?
- Who else was discharged recently? For what reason? By whom?
- What did the employee state in the exit interview? Was there an exit interview or some contact that resulted in a rebuttal?
- Who else is in the same environment of the same protected class? How are they treated? How are others treated in the same circumstance?
- What is the environment like? Have there been recent complaints against the supervisor by employees?
- Have there been other instances of discriminatory behavior in the department? By whom? Is this complaint retaliatory?
- Have any employees resigned in lieu of discharge? How many? What protected class? How does this compare to the complainant?
- Is this action discriminatory? What action needs to be taken (corrective/preventative)?

***The System Equal Opportunity Office has access to a list of questions EEOC advises NOT to ask during interviews. Contact this office if you would like a copy of them.***

**✚ Norma Guzman, Senior Investigator, EEOC San Antonio**

***Retaliation***

1. The number of retaliation complaints has more than doubled between 1991 (7,900) and 2004 (22,740). In fiscal year 1997, there were 18,100 retaliation complaints.
2. The three essential elements of a retaliation claim are:
  - Protected activity, which is comes in two forms: opposition and participation,
  - Adverse action, and
  - Causal connection.
3. Opposition is not just filing a complaint, but can also be:
  - Threatening to file a charge of formal complaint.
  - Complaining to anyone about alleged discrimination against oneself or others.
  - Refusing to obey an order because of a reasonable belief that it is discriminatory.
  - Requesting a reasonable accommodation or religious accommodation.
4. Opposition that is not reasonable includes:
  - Copying & disseminating confidential documents relating to discrimination.
  - Participation in work stoppage that violated a collective bargaining agreement provision.
  - Badgering subordinate employee to give supportive witness statement.
  - Unlawful activities – acts or threats of violence.
  - Making an overwhelming number of unsupported complaints or allegations.
5. The causal connection (most claims fall apart at this stage):

- Is there direct or circumstantial evidence showing that the adverse action was because of the protected activity?
  - Did the company provide evidence of a legitimate, non-discriminatory reason for the adverse action?
  - Is the company's explanation a disguise/pretext to hide retaliation?
  - Did respondent treat similarly situated employees who did not engage in protected activity differently from charging party?
6. Retaliation can occur after the employment relationship has ended.
  7. Participation in a failed EEO complaint is nevertheless considered a protected activity.
  8. An individual is protected against retaliation for participating in employment discrimination proceedings even if those proceedings involved a different employer.
  9. A charging party can bring an ADA retaliation claim against an individual supervisor as well as an employer.
  10. A charging party who alleges retaliation does not have to be in the same protected category as the person treated differently (e.g., race, sex, disability, age).