

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
EXAMINING CONFLICTS IN EMPLOYMENT LAW (EXCEL) CONFERENCE

August 22-24, 2005

Las Vegas, Nevada

Summary

✚ ***Cari M. Dominguez, Chair, U.S. Equal Employment Opportunity Commission***

EEOC Chair's Presentation

1. The most frequent complaints filed against federal agencies are retaliation, age, race, and sex discrimination. There has also been an increase in nonsexual harassment complaints, especially involving terms and conditions of employment. About 43% of the investigations are completed on time.
2. On EEOC's website (<http://www.eeoc.gov>) there is a brochure advising how to make mediation accessible for the disabled.
3. A successful EEO program has three aspects: identifying issues, fully enforcing the laws, and reinforcing through rewards.
4. EEOC has launched a Youth at Work initiative as a result of increased sexual harassment of/by teenagers in the workplace.
5. EEOC is increasing its focus on the use of electronic technology (e.g., videoteleconferencing, electronic filing).


✚ ***Leonora L. Guarraia, Chief Operating Officer, EEOC***

✚ ***Nicholas M. Inzeo, Director, Office of Field Programs, EEOC***

✚ ***Carlton M. Hadden, Director, Office of Federal Operations, EEOC***

Town Hall and Update from EEOC Headquarters

1. A National Contact Center was established in March 2005; it is expected to receive one million calls per year, with 60% of them requesting basic information. The Center will be able to track trends in complaints.
2. Phase two of EEOC's reorganization is a restructuring ("right-sizing"). No offices will be closed and no one will lose their job, but eight district offices will be downgraded to field offices. New offices will be established in Las Vegas and Mobile. Phase three will be a streamlining of headquarters to create a leaner management team.

 **Rod Collins, Chief Operating Executive, Federal Employees Program, Blue Cross/Blue Shield Association**

Characteristics of Great Leaders

1. Leader: a person who has commanding authority or influence; Boss: a person who exercises control or authority.
2. Heroic leaders (1) take charge; (2) have a strong ego; (3) are charismatic; and (4) are larger than life. Heroic leaders are good leaders but not necessarily great leaders. The problem with heroic leaders is what happens when the hero moves on, what happens to the organization?
3. Great leaders (1) have personal humility; (2) exercise professional will (focus on the organization); (3) have clear values; and (4) have a bias for results.
4. Great leaders can channel their ego needs away from themselves and into the larger organization. They “look out the window” to apportion credit when things go well and “look in the mirror” to apportion responsibility when things go poorly.
5. Great leaders are incredibly ambitious; however, their ambition is first and foremost for the organization, not themselves.
6. Great leaders are resolved to do whatever it takes to make the organization great, no matter how big or hard the decisions.

 **Ruth Haag, Principal Author, Haag Press**

Proactive Discrimination Prevention: Changing an Organization's Culture

1. Discrimination laws are not working: (1) people “play” with the laws to “get around them;” and (2) people don't take the time to get to know the “opponent.”
2. White males are raised in a win-lose environment; they can lose to a worthy opponent; however, worthy opponents can only be other white males.
3. It is necessary to train white males to believe that others are also worthy opponents; in fact, all types of people should be trained together to help them overcome the fear of the unknown.
4. Is discrimination intentional or perpetrated by ignorant people? Consider habits, isolation, fear, and nasty people. People tend to flock together in like groups.
5. The top person of the organization has to buy in to the training program.
6. Self-discrimination: people give subliminal or not so subliminal messages; e.g., the way they dress, asking men to lift things for them, men holding the door open for women. Haag advises that you should only hold the door open for people with their hands full (male or female). Seniors also given a message when they say they are having a “senior moment.”
7. Everyone should ask themselves: do I have something in my office that could offend someone? Audit what you are doing periodically.
8. There are nasty people out there; however, after training, the others should be able to keep the nasty ones in line.

9. Knowing the law, signing forms, and punishment do not change an attitude.
10. People must speak out when they see a problem, and speaking out must not cause confrontations.

 **Sheila Somberg, President, Mediation USA, Inc.**

Diversity/Cultural Issues in Mediation

1. Mediators can identify cultural concerns by mirroring actions and words, and through the use of caucuses.
2. Active listening usually involves good eye contact.
3. Consider varying communication styles
 - a. Male vs. female
 - b. Corporate vs. collaborate management
 - c. Faculty vs. staff

 **Christopher Kuczynski, Assistant Legal Counsel, EEOC**

ADA Case Updates

1. Is concentrating a major life activity? Courts disagree, but concentrating may be related to other major life activities, such as thinking.
2. Working may not necessarily be a major life activity (Toyota Motor Manufacturing, Kentucky, Inc. v. Williams).
3. Jacques v. DiMarzio: interacting with others is a major life activity, but not “getting along with others;” an individual is substantially limited in interacting with others only when he or she is severely limited in the fundamental ability to communicate with others, connect with others, or “go among other people” at the most basic level of activity.
4. Fiscus v. Wal-Mart Stores, Inc.: Eliminating waste is a major life activity; EEOC’s list of major life activities is only illustrative, not definitive.
5. Reading is a major life activity (9th Circuit decision).
6. Coons v. Secretary of U.S. Department of Treasury: Inability to travel is not a major life activity.
7. Emory v. Astrazeneca Pharms.: Manual tasks were limited by cerebral palsy, but these were not major life activities; e.g., Emory was a mediator and fire department volunteer.
8. Arrington v. Southwestern Bell Tel. Co.; Branham v. Snow: the condition doesn’t matter; what matters is how it affects someone.
9. Haynes v. Williams: an individual’s own testimony and evidence are relevant.
10. Worster v. Carlson Wagon Lit Travel, Inc.: HIV positive is not always a disability.

11. *Fiscus v. Wal-Mart Stores, Inc.*: While a major life activity must be assessed in light of any corrective measures a person uses to mitigate an impairment, there may be side effects that do substantially limit a major life activity.
12. *Hernandez v. Hughes Missile Sys. Co.*: no re-hire policy was unwritten (record of disability case).
13. *Polini v. Lucent Techs.*: Doctor said Polini couldn't hold a "manufacturing position;" however, this could not be applied across a broad range of jobs and thus did not limit the major life activity of working.
14. *Tullow v. City of Nassau* (5th Circuit): Police department perceived that a fired police officer could never perform any job involving interaction with others; court upheld city's action.
15. *Moorer v. Baptist Memorial Health Care System*: Employer perceived the employee's alcoholism prevented him from performing a substantial number of managerial jobs; plaintiff's significant awards of back and front pay were upheld.
16. *Nese v. Julian Nordic Constr. Co.*: An employer is not necessarily guilty of discrimination if it takes an employment action for one reason, but provides a different explanation to the employee.
17. *Smith v. Henderson*: Reasonable accommodation was not made; other supervisors had been allowed to delegate time-consuming duties.
18. *Albert v. Smith's Food & Drug Centers, Inc.*: accommodation offered was not reasonable (return to original position).
19. *Architect of the Capitol v. Office of Compliance*: Employer's staffing policy contained numerous exceptions allowing maximum flexibility in making assignments.
20. *Mason v. Avaya Communications, Inc.*: A request to work at home may be "facially reasonable" if an employee presents evidence that she could perform the essential functions at home. However, such evidence must be more than self-serving testimony. Court then accepted employer's argument that physical presence at its administration center was essential.
21. *Kelly v. Metallics West, Inc.*; *Williams v. Philadelphia Housing Authority Police Department*: May be required to make a reasonable accommodation even in "regarded as disabled" cases.
22. *Turner v. Hershey Chocolate USA*: The ADA was not intended to compel employers to take actions that could cause employee disability.
23. *Bates v. United Parcel Service*: employer must make an individualized assessment to determine whether deaf driver applicants are qualified to drive smaller trucks safely, rather than categorically exclude all applications who do not meet Department of Transportation large truck hearing standards.

 **Donald Names, Director, Office of Special Services, EEOC**

EEO Case Updates

1. Telecommuting – *Marshall v. USDA*, EEOC Appeal No. 01A31773 (6/3/05): Complainant with multiple sclerosis required the accommodation of working

- from home. EEOC found that the agency violated the Rehabilitation Act when it failed to provide her the reasonable accommodation of telecommuting.
2. July 21, 2005, revision to EEOC's Compliance Manual: Discrete acts which occurred outside of the time limits to file a complaint can be considered in determining cause, but the employer cannot be forced to remedy those discrete acts falling outside of the filing period.
 3. Mixed motive – *Tellez v. Army*, EEOC Request No. 05A41133 (3/18/05): Statements by agency officials influential in the selection process established that age was a motivating factor in one of three challenged non-selections (policy of hiring and promoting “younger blood”).
 4. Disability – *Housh v. USPS*, EEOC Appeal No. 01A33300 (5/19/05): Complainant's lifting restriction of no more than 10 pounds continuously and 35 pounds intermittently was found insufficient to establish that he was substantially limited in the major life activity of lifting.
 5. *Prioleau v. USPS*, EEOC Appeal No. 07A40021 (5/9/05): Complainant alleged that he was denied a reasonable accommodation because he was not reassigned to a position within his medical restrictions. The Commission stated that the complainant had the burden of proving that there were vacancies during the relevant time period into which he could have been reassigned. The agency's failure to conduct either any search at all, or a broad enough search, for a new position for the complainant will not, by itself, result in a finding of discrimination.
 6. Timeliness – *Moore v. USPS*, EEOC Appeal No. 01A34361 (2/19/04): Failure to address a reasonable accommodation request is a recurring violation that repeats each day the accommodation is not provided.

✚ ***Hon. Vanessa Gilmore, Federal District Court Judge, Houston***

Plenary Address

1. Historically, the courts have been used to show whites are superior to blacks, that blacks are property, and that blacks are denied access to education. Examples include the Fugitive Slave Law, the Dred Scott decision, the Emancipation Proclamation, the 13th Amendment, the 14th Amendment, *Plessy v. Ferguson*, *Sweatt v. Painter*, *McLaurin v. Oklahoma*, *Brown v. Board of Education*, *Hopwood v. Texas*, *Grutter v. Bollinger*.
2. The result has been a cumulate advantage for whites and disadvantage for blacks.
3. People are conservative when they have something to conserve.

✚ ***Mary Elizabeth Palmer, Chief Administrative Judge, Baltimore District Office, EEOC***

✚ ***Amy Risley, Resolution Services***

✚ ***Stephen T. Shih, Chief, Center for Equal Employment Opportunity, Office of Personnel Management***

Sufficiency of Investigations

1. What is the issue? What is the rule? Perform an analysis. Draw a conclusion.
2. Look for factual conflicts. Are they material? Is there corroborating evidence?
3. Pet Peeves of Administrative Judges:
 - Relevant witnesses are missing from the investigation.
 - Incomplete responses to investigator questions.
 - Missing relevant documentary evidence.
 - Witness identity confusion (refer to people by their name, not title).
 - Improper sanitization of files (do not sanitize comparative information, e.g., names).
 - Incomplete information to determine reprisal claim.
 - Lack of comparative information.
 - Fragmentation of claims (include information regarding other similar incidents).

 **Stanley Braverman, Deputy District Director, Philadelphia, EEOC**

Mediation Tactics and Techniques

1. Relaxed or aggressive; match the style of the person(s) in the session.
2. Need numerical parity for fairness reasons.
3. Decline to participate if someone's voice is not being heard.
4. Seek new ideas to resolve dispute; however, more choices is not always the best. It overwhelms some people (e.g., the perfectionist), or makes it impossible to identify the best option.
5. Psychological ploys include feigned weakness, sympathy, flattery, silence.
6. Decline negotiations until the party with authority is present.
7. Use trial balloons – would you consider....?
8. Unexpected generosity creates confusion.
9. Threats and promises can be used very creatively; they create linkages.
10. Put escape hatches in commitments; e.g., yes if...Qualifications should be clear in hindsight. Link commitment to a specific condition.
11. Use of red herrings—give up something to get something better.
12. Negotiation myth: Splitting the difference is a fair way to reach a settlement.

 **Sheila Somberg, President, Mediation USA, Inc.**

Deceptive and Passive Biases

1. Bias v. Prejudice: Bias means to look at someone or something in a slanted, skewed, or unfair way; prejudice means to pre-judge someone or something

- before coming to know it. Racism, gender bias, nationalism, and other forms of prejudice are grouped together under the heading of bigotry.
2. Active bias: Both persons are aware of the bias. Passive bias: Receiver is aware of the bias; other person is not. Deceptive bias: Person is aware of own bias, but receiver is unaware of it.
 3. One passive bias is when others make bigoted remarks or jokes and you either laugh or say nothing because you don't want to seem sensitive or self-righteous. Another is when you look for a mentor or protégé, and you pick someone who reminds you of yourself. Another is if you are affiliated with organizations that practice subtle discrimination, but you say nothing. Another is if before you hire someone, you have a vague picture in your mind of what the ideal candidate would look like. Another would be if your conversations use phrases such as "you people," "our kind," or "those people." Another would be if you avoid talking about cultural differences when dealing with people who are different from you so you don't say the wrong thing. Another would be if you are obsessed with using politically correct terms when speaking with others who are different, but you use different terms when the same people are not around. Another would be if you don't want a coworker to attend your private party because you don't want their kind in your home because they "might be uncomfortable."
 4. What kind of people are you "for," e.g., animal lovers; quiet, reserved people? What kind of people are you "against," e.g., loud, obnoxious people, hunters.

 ***Madeline Caliendo, Associate Administrator, Office of Civil Rights, General Services Administration***

Supervisor's Session: Religious Accommodation

1. In the federal sector, there has been a 25% increase in religious discrimination claims from 2000 to 2005.
2. Supreme Court has said that belief is religious for Title VII purposes if there is a "sincere and meaningful belief that occupies—in the life of the person who has the belief—a place parallel to that filled by God." However, EEOC defines religion to include moral or ethical beliefs as to right and wrong that are sincerely held with the strength of traditional religious views.
3. While sincerity is rarely an issue, an employer could challenge a belief when the employee acts in a manner inconsistent with his/her professed religious belief.
4. Religious harassment is discriminatory treatment because of one's
 - a. Affiliation with a particular religious group;
 - b. Display of physical or cultural traits commonly associated with a particular religion;
 - c. Perception or belief that another is a member of a religious group (whether true or not); or
 - d. Association with a religious person or organization.
5. Under Title VII, employers have a duty to reasonably accommodate sincerely held religious beliefs and practices unless to do so would be an undue hardship.

There are no “magic words” required to place an employer on notice that an accommodation is sought. An individual need only provide enough information to make the employer aware of a conflict between the employee’s religious practice/belief and an employment requirement. Undue hardship can mean a significant cost or other non-cost factor, such as office disruption.

6. When looking as to whether cost presents an undue hardship, EEOC and the courts will look to the identifiable cost in relation to the size and operating cost of the employer and the number of individuals who will in fact need a particular accommodation.
7. The Workplace Religious Freedom Act of 2005 has been introduced in both the House and Senate. It seeks to require employers to make an affirmative and bona fide effort to reasonably accommodate the religious practices of employees. It defines the term “essential functions” to exclude practices having a temporary or tangential impact on an employee’s ability to perform job functions, such as practices relating to clothing or time off of work. It sets a higher standard than currently exists in the law for “undue hardship.”