A Comprehensive EEO Update – “Speed Dating” Style

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EEOC Activity - Bad News

- Increase in EEOC charges
- Increase in Cause determinations
- Increase in investigators
- Increase in alleged systemic discrimination
- Increase enforcement in lieu of new legislation

EEOC Focus - Background Checks

- **EEOC v. Freeman (4th Cir. 2/20/2015)**
  - Suit that challenged the use of background checks due to disparate impact on minorities. EEOC relied on Dr. Murphy as an expert who used pictures from drivers licenses.
  - Summary judgment affirmed for employer.
  - Murphy's methodology completely unreliable, containing an "alarming number of errors and analytical fallacies."
  - Concurring Opinion voices strong disappointment "with the EEOC's disappointing litigation conduct" and urged the EEOC "to reconsider how it might better discharge the responsibilities delegated to it or face the consequences of failing to do so."
  - Lesson – Great case, but still hot button for EEOC.
EEOC Focus - Credit Checks

• EEOC v. Kaplan Higher Educ. Corp. (6th Cir. 2014)
  – Suit that challenged the use of credit checks due to disparate impact on minorities.
  – Summary judgment affirmed for employer.
    • Expert witness testimony from EEOC expert demolished by court: “The EEOC brought this case on the basis of a homemade methodology, crafted by a witness with no particular expertise to craft it, administered by persons with no particular expertise to administer it, tested by no one, and accepted only by the witness himself.”
  – Lesson – Great case, but still hot button for EEOC.

EEOC Subpoena Efforts

• EEOC v. Royal Caribbean (11th Cir. 2014)
  – EEOC issued subpoena in single plaintiff ADA charge demanding identities of all foreign nationals fired for medical reasons.
  – Employer refused because reason for discharge was conceded - employee fired because HIV positive, rendering him unfit to sail under Bahamian law.
  – Enforcement of EEOC subpoena denied.
  – Scope of the EEOC's investigative power is determined by the scope of the charge.
  – Lesson – Great case, but the EEOC still tries.

EEOC Focus - Transgender Discrimination

  – Transgender worker fired 10 days after filing an EEOC charge asserting transgender discrimination. Alleged that she was deliberately "misgendered" repeatedly.
  – Employer's motion to dismiss pending.
    • EEOC just filed amicus curiae brief arguing that transgender discrimination is unlawful discrimination based on sex.
  – Lesson – This will continue to be a hot button for the EEOC.
EEOC - Try and Try Again

- **EEOC v. Peoplemark, Inc. (6th Cir. 2013)**
  - EEOC brought class action in light of an employer policy that never even existed. Employer proved over and over again that it did not categorically exclude applicants due to convictions, but the EEOC continued to litigate.
  - Attorneys' fees award against EEOC of $750,000 upheld.
    - The Court focused on EEOC's dogged pursuit of a case when it knew it was baseless called for a substantial fee award.
    - *Lesson* – Great case for employers, but this is a rarity.

Dealing with the EEOC

- "An EEOC subpoena, OMG!!" – Not necessarily
- "An EEOC lawsuit, OMG!!" – Not necessarily
- "I will beat the EEOC" – Maybe, but it will cost and you may not recover from the government.
  - But call us – we love trying!!

Retaliation - Changing Motives Trap

- **Kwan v. Andalex Grp. (2nd Cir. 2013)**
  - Employee terminated for poor performance. Claimed she was retaliated against for complaining about harassment.
  - Summary judgment for employer reversed.
  - Employer gave shifting reasons for the termination. Position statement claimed she was discharged due to business conditions. Supervisor told her she was discharged for performance reasons. Also close temporal proximity between protected activity and discharge.
  - *Lesson* – Position Statements are important evidence.
  - Articulate all reasons for termination at each stage – in meeting, termination letter, and SOP.
Temporal Proximity Trap - 15 months is “close”?!

- Sharp v. Aker Plant Services Group (6th Cir. 2015)
  - Employee RIF’d in January 2009. Secretly records conversations about his RIF before his last day. Sends demand letter and threatened lawsuit in March 2009, attaching secret recordings. Employer won the lawsuit.
  - July 2010 temp agency tries to place him with same employer. Rejected based on recordings, which violated plant policy. Sues for retaliation.
  - Summary judgment for employer reversed.
  - The Court finds that the mere passage of time of 15 months does not categorically disprove retaliatory animus.
  - Lesson – Reliance on mere passage of time doesn’t eliminate the retaliation red flag.

Retaliation Trap – “It was those Securities Attorneys!”

- Greengrass v. Int’l Money Sys. (7th Cir. 2014)
  - Ex-employee brings EEOC charge for sex and national origin discrimination and retaliation. Employer reports charge on its public filings but does not mention plaintiff’s name. EEOC begins vigorous investigation. Only thereafter does employer include ex-employee’s name and nature of the claims specifically in its public filings. Ex-employee claims unemployable because of the filings, therefore retaliation.
  - Summary judgment for employer reversed.
  - Employee engaged in protected activity (the charge) and employer retaliated by publicizing her claims through public filing.
  - Lesson – Importance of working relationship between HR and Securities folks.

Retaliation – “You Lied” Defense

- Cox v. Onondaga County Sheriff’s Dept. (2nd Cir. 2014)
  - White police officers disciplined after they made false racial harassment charges against African American deputy. Employer’s investigation uncovered materially inconsistent statements among the officers. White officers sued for retaliation.
  - Summary judgment for employer affirmed.
  - Title VII does not create an absolute privilege for making harassment allegations when they are knowingly false.
  - Lesson – Liars can be disciplined, but be careful.
  - Document investigation.
Retaliation – the “You’ve Got Mail” Defense

• Wright v. St. Vincent Health Sys. (8th Cir. 2013)
  – Plaintiff fired 45 minutes after complaining of race discrimination to HR. Supervisor had previously fired three African Americans and no Caucasians in her tenure.
  – Employer wins at trial and on appeal.
    – Employer documented that it made the termination decision before Plaintiff made the call to HR.
    – Good case, but be careful with timing unless truly “in the mail.”

Retaliation – the “Yelling” Defense

• Benes v. A.B. Data (7th Cir. 2013)
  – During EEOC mediation, parties were sent to separate conference rooms. After employee received employer’s mediation offer, he barged into employer’s conference room and shouted “You can take your proposal and shove it up your ass and fire me and I’ll see you in court.” So the employer did.
  – Summary judgment for employer upheld.
  – No retaliation because no protected activity.
    – Participating in an EEOC proceeding is protected, but employee was fired for his outburst, not his participation.
  – Lesson – Be specific regarding grounds for termination.

Retaliation – “I didn’t know” Defense

• Davis v. Unified Sch. Dist. 500 (10th Cir. 2014)
  – Head custodian demoted when found lying naked sunbathing on roof of elementary school. Applied for 7 head custodian jobs with District and filed several charges thereafter. Rejected by 7 different decision-makers.
  – Summary judgment for employer affirmed.
  – Can a common purpose to retaliate be inferred from the volume of promotion denials? No, because each decision-maker was independent.
  – Lesson – Naked custodian not a protected trait . . . yet.
    – To the extent possible, insulate decision-makers from information about protected activity.
Retaliation – The “HR loses” Defense

  - African American HR specialist repeatedly complained to supervisor and associate VP of HR about discrimination and retaliation against employees. Employer changed her job duties and otherwise made life miserable for her. Fired her the day after receiving her EEOC charge.
  - Summary judgment for employer denied.
  - Lesson – Courts split on protected activity when conducted by HR professional.

Retaliation Tips

- Most likely to survive summary judgment
- Document, document, document
- Temporal proximity matters

Disability - Threshold Question

- Weaving v. City of Hillsboro (9th Cir. 2014)
  - City police sergeant with ADHD. Long history of interpersonal problems at work. Terminated for poor performance.
  - Jury verdict on ADA claim in favor of City affirmed.
  - Weaving failed to prove ADHD affected his ability to work or his technical competence. Inability to get along with others is not a substantial impairment.
  - Lessons – Can’t pigeon-hole disabilities. Case by case is a must.
Disability - What is “permanent”?

- **Summers v. Altarum Inst. Corp. (4th Cir. 2014)**
  - Plaintiff sustained serious temporary injuries to both legs. Injuries prevented him from walking normally for at least 7 months. Fired shortly after injury.
  - Summary judgment for employer reversed.
  - Plaintiff allowed to pursue his claim. Even temporary injuries covered by ADA when sufficiently severe.
  - *Lesson*: Never make assumptions about severity of injury or nature of injury as temporary or permanent for ADA purposes.

Disability - Qualified

- **Jarvela v. Crete Carrier Corp. (11th Cir. 2014)**
  - Employer terminates alcoholic DOT driver. Driver claims only DOT examiner has ability to declare him unfit for DOT license therefore he’s otherwise qualified until DOT says he isn’t.
  - Summary judgment for employer affirmed.
  - Employer has the burden of ensuring highway safety and compliance with DOT regulations.
  - *Lesson*: Articulate qualifications for the job.

Interactive Process

- **Kauffman v. Petersen Health Care (7th Cir. 2014)**
  - Nursing home hairdresser could not push wheelchair bound residents after her hysterectomy. Asked employer if other workers could transport residents to the salon area. Supervisor responded "we just don’t allow people to work with restrictions.”
  - Summary judgment for employer reversed.
  - Employer failed to engage in the interactive process and failed to accommodate. Other workers were capable of wheeling residents to the salon, and that was a non-essential function.
  - *Lesson*: Engage in interactive process.
Scope of Reasonable Accommodation

- *Walther-Willard v. Mariemont City Schools* (6th Cir. 2/13/2015)
  - Teacher suffered from pedophobia. Taught H.S. until H.S. French program went online. Transferred to middle school. Retired after 6 mos. and sued because school refused to displace existing H.S. Spanish teacher on her behalf.
  - Dismissal upheld.
  - ADA does not require employer to displace current worker as a reasonable accommodation.
  - Lesson – Good for employers, but still look for accommodations.

Disability - Light Duty

- *Majors v. General Electric* (7th Cir. 2013)
  - Employee with 20 pound lifting restriction. Requests accommodation by assigning another worker to perform all heavy lifting.
  - Summary judgment for employer upheld.
  - Requested accommodation not reasonable.
  - Lesson – Employer need not carve out essential job functions for someone else to perform.

Disability - Telecommuting

- *EEOC v. Ford Motor Co.* (6th Cir. 2014)
  - Steel buyer with IBS sometimes unable to drive to work or stand up from desk without accident. Requested telecommute as accommodation. Request denied.
  - Summary judgment for employer reversed.
  - Attendance is not the same as presence at the employer’s actual location. Telecommuting may be a reasonable accommodation.
  - Lesson – Never rule out telecommuting. Tackle it head on.
Work from Home

- **Taylor-Novotny v. Health Alliance (7th Cir. 2014)**
  - Employee approved to work from home when diagnosed with MS for a few days a week. Employer insisted on punctual log-ins from home, but attendance and punctuality issues got worse. Fired. Claimed regular attendance not an essential function.
  - Summary judgment for employer upheld.
  - A work at home policy does not excuse or diminish the necessity for punctuality and predictable attendance.
  - Lesson – Make this clear in your work at home policies.

Disability - Extended Leave

- **Hwang v. Kan. State Univ. (10th Cir. 2014)**
  - Employer had six month leave of absence policy that terminated employment at the conclusion of six months of leave. Employee ran out of leave and sued.
  - Employer wins.
  - "It's difficult to conceive how an employee's absence for six months could be consistent with discharging the essential functions of most any job in the national economy today. Even if it were, it is difficult to conceive when requiring so much latitude from an employer might qualify as a reasonable accommodation."
  - Lesson – Good case for employer, but remains one of EEOC's major bugaboos.

Disability - Punctuality

- **McMilan v. City of New York (2nd Cir. 2013)**
  - Employee with chronic tardiness discharged. Employee's schizophrenia meds made him groggy in the morning. Asked for accommodation of working through lunch or later in the day. Request rejected. Trial court awarded summary judgment to employer.
  - Summary judgment for employer reversed.
  - The court finds that it is not a given that punctuality is essential for every job.
  - Lesson – Disturbing new trend among courts and punctuality/predictability issues?
Disability - Attendance

- **Solomon v. Vilsack (D.C. Cir. 2014)**
  - Depressed employee requested ability to set her own hours as long as she met company deadlines. Trial court awarded summary judgment to employer.
  - Summary judgment for employer reversed.
  - Court must analyze whether a “maxiflex” schedule is reasonable, and then whether it would result in undue hardship.
  - **Lesson** – Job description is key (and not helpful here).

Disability - Threats

- **Owusu-Ansah v. Coca-Cola Co. (11th Cir. 2013)**
  - Employee required to undergo mental health fitness-for-duty exam. While complaining about workplace harassment, he banged his fist on a table and threatened “someone is going to pay for this!”
  - No ADA violation.
  - Requirement of examination was job-related and consistent with business necessity. Employer had an objectively reasonable fear of potential threat.
  - **Lesson** – Point to “objective” factors showing threats.

Disability Tips

- Revisit job descriptions
- Consider ADA threshold questions
- Engage in interactive process
- Hold employees’ to performance standard, but focus on performance only
- Direct threat - available, but hard to prove
- Undue burden - available, but really hard to prove
Sex - Cue George Michael Song

- Orton-Bell v. Indiana (7th Cir. 2014)
  - Members of night crew used employee's desk for sex. Employee eventually learned her desk was a love cushion and complained of sexual harassment. Boss told her to relax and wash her desk each morning. Employee herself was later fired for having sexual relationship with co-worker, including having sex in his office.
  - Court denies summary judgment for employer on hostile environment claim because of sexually charged workplace.
    - Summary judgment granted on retaliation claim - complaint about sex on desk was not complaint of sexual harassment (not on account of her gender).
  - Lesson – No real lesson, but wow!

Sex - BFOQ

- Ambat v. City and Cnty. Of San Francisco (9th Cir. 2014)
  - County jail limited supervision of female inmates to female guards. Jail argued BFOQ and trial court agreed.
  - Summary judgment for employer reversed.
    - The court finds that this doesn't satisfy the high threshold for BFOQ.
  - Lesson – Never (almost never) rely on BFOQ. Restaurants, gyms, locker rooms, spas, massage parlors, etc.

Sexual Orientation and “Sex” Discrimination

  - Male iron-worker harassed by males for lack of masculinity. Sexual epithets 2 or 3 times a day, humped from rear by co-worker 2 or 3 times per week, and supervisor exposed his genitals to him at least 10 times.
  - Jury verdict in favor of employee upheld.
    - Harassment severe and pervasive. Harassment was "on account of sex" because it was based on sexual stereotype.
  - Lesson – Read Oncale v. Sundowner Oil.
Harassment - Customer

• Freeman v. Dal-Tile Corp. (4th Cir. 2014)
  – Sales representative complained of racial harassment by a customer. Employer failed to remedy the situation although it knew or should have known of the harassment.
  – Employer loses.
  – Lesson – Employer has duty to correct even third party harassment even at the risk of losing business.

Harassment - Reporting

• Gorzynski v. JetBlue Airways (2nd Cir. 2010)
  – Employee subjected to sexual harassment by her supervisor. Employer policy provided for reporting harassment to wide number of people, including supervisor. Employee only complained of harassment to the very person who was harassing her.
  – Employer loses.
  – Employee should not have to go from manager to manager to find someone who will remedy the harassment. Going to her supervisor was enough.
  – Lesson – Watch your own policy.

Harassment - Hard Lesson to Learn

• Wilson v. Cook County (7th Cir. 2014)
  – Admin assistant conducted phony job interview with applicant, provided her with an application, and told her if she really wanted the job, she must provide sex. She did, and she did. There was no real job.
  – Summary judgment for employer upheld.
  – Applicant did not suffer a refusal to hire because there was never a job to hire into in the first place.
  – Lesson – Hard lesson – ask for a job posting.
“Reverse” Racial Harassment

- **Knudsen v. Univ. of La. (E.D. La. 4/16/2015)**
  - White police sergeant claimed that black subordinates created a racial hostile environment that employer failed to remedy.
  - Denied summary judgment for employer, • Court focus on what the employer “knew or should have known.”
  - Lesson – harassment is harassment.
    • Take all complaints seriously.

Age

- **Doucette v. Morrison Cnty. (8th Cir. 2014)**
  - Decision-maker heard to say “old people shouldn’t be working in our profession because they get injured”. Employee argued she should not have been fired because her mistakes were minor and fixable, even though repeated.
  - Summary judgment for employer affirmed.
    - “We do not sit as a super-personnel department reviewing the wisdom or fairness of the business judgments made by employers, except to the extent that those judgments involve intentional discrimination.”
  - Lesson – Good case, but could have come out differently (9th Cir. or other places). Train managers.

Age

- **Hutt v. AbbVie Prods. (7th Cir. 2014)**
  - One of new supervisor’s first acts was to ask for employee’s date of birth. This was employee’s only proof of ageist animus.
  - Summary judgment for employer affirmed.
    - Merely asking about age does not prove ageism.
  - Lesson – But, why do we care? Train managers.
**Age**

- *Teruggi v. CIT Group* (7th Cir. 2013)
  - Supervisor had history of making comments about employee's retirement plans, being old, and being on drugs. Comments predated termination by 18 months.
  - Summary judgment for employer affirmed.
  - “The bits of evidence Terrugi offers, which are essentially isolated events or comments with no apparent connection to the termination decision, do not support a reasonable inference of discrimination or retaliatory discharge, either individually or collectively.”
  - *Lesson* – Tread lightly with retirement questions, and keep decision-makers away from such questions. Train managers.

**Religion**

- *Davis v. Fort Bend County* (5th Cir. 2014)
  - Employee wanted Sunday a.m. off because Pastor had requested her to attend a special church service to feed community. Sunday was day set for employer to overhaul computer system. Employer denied time off because event wasn’t a religious belief or practice.
  - Employer loses.
  - Religious belief was sincerely held, and it was based on a religious practice or mission
  - *Lesson* – Never make value or interpretive judgments about religious beliefs.

**Religious Harassment**

- *Harris v. Electro-Motive Diesel* (N.D. Ill. 2/12/2015)
  - Haitian employee who practiced Voodoo claimed religious harassment based on one instance of locker graffiti (“666”) and three inappropriate comments.
  - Supervisors were devout Christians and referred to employee as the devil and the religion as evil.
  - Summary judgment granted for employer.
  - Hostility not severe or pervasive.
  - *Lesson* – Good case for employers, but close call and could have been a different outcome in another jurisdiction.
Doug’s Top Ten List
#1 - Follow Your Own Rules

• Soto-Feliciano v. Villa Copresi Hotels (1st Cir. 2/20/15)
  – Chef fired for profanity, tardiness, and disrespectful remarks. Days before termination, the HR General Manager said he was too old and too slow for the job.
  – Trial court awarded summary judgment to employer.
  – Summary judgment for employer reversed.
    – Employer’s story had gaps and inconsistencies:
      • Employer didn’t raise performance issues in meeting a week before termination.
      • Employer’s written policy required all performance complaints be copied to personnel file, but no complaints appeared in his file.
  – Lesson – Follow your own rules and procedures.

#2 - Don’t be Gun Shy

• Ledbetter v. Good Sam. Ministries (7th Cir. 2/6/2015)
  – Employee reprimanded for intimidating co-worker, files charge and sues within days. Employee reprimanded again for intimidating another co-worker, and bosses decide to fire him for latest event. BUT day before latest reprimand, employee filed another charge. Employer waited for six days after the last reprimand, and one day after receiving second charge, to terminate.
  – Summary judgment for employer reversed.
    – Court focuses on the timing.
    – Lesson – Pull the trigger as soon as you make the decision.

#3 - Be Consistent

• Perez v. Thorntons, Inc. (7th Cir. 2013)
  – Hispanic employee sells herself $127 worth of candy for $12 and gets fired. Few months earlier, Caucasian employee committed similar act but only got a warning.
  – Summary judgment for employer reversed. Jury question as to whether Hispanic and Caucasian worker similarly situated.
  – Lesson – Consistency matters.
#4 - Investigate Claimants

- **Woods v. Delta Air Lines (11th Cir. 2014)**
  - African American senior engineer at Northwest Airlines complained about racist comment and was fired two weeks later. Designated as ineligible for rehire. Filed charge, received NRTS, but never sued. Engineer later got a job at Delta, but lied about his Northwest termination and ineligible for rehire status. Delta and Northwest merge 10 years later, engineer bumps into his old Northwest boss, and gets fired for lying on job application.
  - Summary judgment for employer affirmed.
  - Resume fraud is legitimate non-discriminatory reason.
  - **Lesson** – Limited facts, but illustrates point – investigate.

#5 - Be Clear on PIPs

- **Perret v. Nationwide (5th Cir. 2014)**
  - Two employees placed in PIP. Both claim constructive discharge and quit. Claim they were put on PIP on account of their age/race. Jury found they were constructively discharged, but they would have been put on PIP anyway.
  - Jury verdict for employee reversed.
  - A PIP is not an adverse employment action or a discharge. No threats of immediate discharge, demotion, reduction in salary, reduction in responsibilities, reassignment, harassment, etc.
  - **Lesson** – Good case for employers, but not could have different outcome.

#6 - Be Sure You’re Right

- **Gosey v. Aurora Med. Ctr. (7th Cir. 2014)**
  - Employee fired for 4 tardies after written warning
    - Employer’s documents show he wasn’t tardy on those dates
  - Summary judgment reversed and case goes to trial
    - Jury could find employer’s reason for discharge not only false but a pretext for discrimination
  - **Lesson** – Make sure your paper record supports your adverse employment decision BEFORE you carry it out.
#7 - Take a Fresh Look

- **Lobato v. N.M. Env’t Dep’t** (10th Cir. 2013)
  - Supervisor calls Mexican employee a "f***ing Mexican" and tells boss to fire employee.
  - Boss takes supervisor’s recommendation.
  - Proof of supervisor bias, but no proof boss was biased.
  - Summary judgment for employer affirmed.
  - *Lesson*—Train higher level management to independently verify termination recommendations. Rubber stamps = cat’s paw liability.

#8 - Be Convinced (even if wrong)

- **Lloyd v. St. Joseph Mercy Oakland** (6th Cir. 2014)
  - Employee on final warning when fired for failing to assist staff in confrontation with patient. Employee argued that hospital was wrong—she did assist staff—and failure to assist was just a pretext for age discrimination.
  - Summary judgment for employer affirmed.
  - Employer may have been wrong, but that doesn’t prove it discriminated. "The honest belief rule provides that an employer is entitled to summary judgment on pretext even if its conclusion is later shown to be mistaken, foolish, trivial or baseless."
  - *Lesson*—Do an investigation, but believe it!!

#9 - Document Differences

- **Muor v. U.S. Bank** (8th Cir. 2013)
  - Cambodian banker fired for repeated errors. Pointed to others with same errors but they didn’t have the same years of experience.
  - Supervisor previously made discriminatory comment about “slanty eyes”.
  - Summary judgment for employer affirmed.
  - Employee failed to show other workers were comparable. Racist comment occurred years before the decision, so it’s a “stray remark”.
  - *Lesson*—Complete comparisons impossible (or might be unhelpful), but relative comparisons are mandatory. Document differences – beforehand!
#10 - Don’t Try to “Even the Field”

- **Ondricko v. MGM Grand Detroit** (6th Cir. 2012)
  - African American dealer fired for a “bad shuffle” at blackjack. Her attorney informed employer that a Caucasian dealer had a bad shuffle but wasn’t fired.
  - Employer then fired Caucasian dealer saying it did not want to do so, but “how can I keep the white girl?”
- Summary judgment for employer reversed.
- The court focused on the employer’s express desire for racial balancing as proof of discriminatory animus.
- **Lesson** – “Two wrongs don’t make a right.”

#11 - Know When to “Fold Them”

- **Ayissi-Etho v. Fannie Mae** (D.C. Cir. 2013)
  - Racial hostile environment claim. VP used the “n” word when he yelled at employee to get out of his office.
  - Trial court entered summary judgment because this was a one-time incident.
  - Summary judgment for employer reversed.
  - “Perhaps no single act can more quickly alter the conditions of employment than the use of an unambiguously racial epithet such as the “n” word by a supervisor.”
  - **Concurring opinion:** “No other word in the English language so powerfully or instantly calls to mind our country’s long and brutal struggle to overcome racism.”
  - **Lesson** – Early triage might be appropriate.

Conclusion

- Attend the next presentation
- Like Blondie said “Call us” (O.K., it was “Call me”)