EEO UPDATE

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EEOC DEVELOPMENTS

Administrative Statistics

- Volume
  - FY 2021 = 61,331 charges
  - Total charges ↓ each of last 6 years
  - Fewest since before 1992 and a 9% decrease from prior year
  - Over last 10 years, retaliation and disability claims have increased the most
  - Retaliation has remained most common claim for over a decade – now 56% of all charges and continuing to ↑
  - Cause finding in only 2.7% - lowest since 1996

Administrative Statistics (Cont.)

- Location
  - Like elsewhere, charge filings are down in NC—fewest since before 2009
  - FY 2021: NC – 5% of all charges nationwide
  - 8 States (Texas, Florida, California, Georgia, Illinois, Pennsylvania, New York, and North Carolina) account for over 52% of all charges nationwide

Litigation Statistics

- In FY 2021 – 116 new merits lawsuits filed by EEOC
  - 25% ↑ from FY 2020
  - Nonetheless, much less litigation than 10-15 years ago
  - When EEOC pursues litigation, its results are successful
    - 96% success rate (settlements and jury verdicts)
  - $34m recovery (lowest since 2014)

Systemic Statistics

- Systemic cases are EEOC priority
- Systemic cases involve 20+ employees and are focused on matters in which the alleged discrimination has a broad impact
- FY 2021
  - 505 systemic investigations
  - 378 systemic investigation resolutions = $24.4m
  - Systemic charges: far more likely to result in "cause" determination – 47% vs. 3%
  - New lawsuits: 11% were systemic
  - Active lawsuits: 16% are systemic
  - Litigation resolutions: 26 for $22.7m benefiting 1,671 employees
  - EEOC litigation is *heavily* focused on systemic cases

Systemic Examples from EEOC

- **Hiring/Promotion/Assignment/Referral**
  - Criminal/credit background checks
  - Steering of applicants to certain jobs or assignments based on race or gender
  - Historically segregated occupations or industries
  - Job ads showing preference
  - Customer preference

Systemic Examples from EEOC (Cont.)

- **Policies/Practices**
  - Mandatory religious practices by employers who do not qualify as religious organizations
  - Paternal leave policies that do not give the same benefits for men and women
  - Mandatory maternity leave
  - Fetal protection policies
  - English only rules
  - Age-based limits on benefits or contributions to pension or other benefits

Systemic Examples from EEOC (Cont.)

- **Lay-off/Reduction in Force/Discharge policies**
  - Mandatory retirement
- **ADA/GINA**
  - "No fault" attendance policies
  - Non-accommodation for medical leave
  - Light duty policies for only-work-related injuries

EEOC Composition

- General Counsel
  - Vacant
    - Karla Gillbride – D – Senior Lawyer with Public Justice -- Nominee
- Five Commissioners
  - Janet Dhillon – R - confirmed May 2019 and term ends July 2022
    - Kalpana Katagul – D – Employee-Side – Civil Rights Lawyer -- Nominee
  - Keith Sonderling – R - confirmed September 2020 and term ends July 2024
  - Andrea Lucas – R – confirmed September 2020 and term ends July 2025
  - Charlotte Burrows (Chair) – D - Confirmed August 2019 and term ends July 2023
  - Jocelyn Samuels (Vice-chair) – D – Confirmed September 2020 and term ends July 2026
- What it Means
  - EEOC Republican controlled, but that likely will change by year-end
  - If Democrats gain control, litigation decision-making likely left to GC and staff
    - More litigation by EEOC

Strategic Enforcement Plan: FY 2017-2021

- No changes in 2022, though EEOC forecasts an update within 9 months

1. Eliminating barriers in recruitment and hiring
   - Focus on class-based discriminatory practices (*e.g.*, background checks, job application forms, medical questionnaires)
2. Protecting vulnerable workers, such as immigrant and migrant workers

Strategic Enforcement Plan: FY 2017-2021 (Cont.)

3. Addressing selected emerging and developing issues
   - Inflexible leave policies
   - Duty to accommodate pregnancy-related limitations
   - LGBTQ protection
   - Temporary worker and "independent contractor" protection

Strategic Enforcement Plan: FY 2017-2021 (Cont.)

4. Ensuring equal pay for all workers
5. Preserving access to legal system
   - Releases; arbitration; and retaliation
6. Preventing Systemic Harassment

EEOC Priorities for 2023

- In connection with its budget request for 2023, EEOC identified its target priorities

1. Racial Justice and Systemic Discrimination
   - Systemic Harassment
   - Systemic Barriers to Entry
2. Pay Equity
   - Women working FT earn 82 cents to a dollar when compared to white men

EEOC Priorities for 2023 (Cont.)

3. Civil Rights Impact of Covid
   - Re-entry to Workplace
   - Vaccine Mandates
   - Testing and Masking Requirements
   - The "Future of Work" – presumably remote-work issues

EEOC Activities in 2022

- Strange time procedurally
  - Majority of Commission appointed by Republican
  - Chair of Commission appointed by Democrat
  - No GC
  - Pending Nominations will Change the dynamic
- So, not many major initiatives
- Mostly seemed focused on setting stage for next year

Caregiver Discrimination

- On March 14, 2022, EEOC issued a technical assistance document that applies anti-discrimination laws to caregivers in connection with pandemic
- No new laws or regulations
- Instead, it simply provides EEOC's analysis of existing law to this context

Caregiver Discrimination (Cont.)

- Federal law does not directly prohibit caregiver discrimination
- But, caregiver discrimination does violate federal law when it is based on a protected characteristic, such as sex or race

Caregiver Discrimination (Cont.)

- For example:
  - Refusing to hire a female applicant because of concerns that she has caregiver responsibilities is unlawful
  - Refusing to consider a female employee for a position that requires travel because of concerns that she has caregiver responsibilities is unlawful

Caregiver Discrimination (Cont.)

- Refusing caregiver leave to male employees, while allowing it for female employees is unlawful
- Refusing caregiver leave to employee with same-sex partner because of the employee's sexual orientation is unlawful

Caregiver Discrimination (Cont.)

- No laws enforced by the EEOC require employers to provide caregiver leave as an accommodation
  - Of course, other laws such as the FMLA may apply
- Employers cannot require pregnant employees to telework to keep them safe from Covid

Caregiver Discrimination (Cont.)

- Employers, however, must provide pregnant employees with light duty schedules if other employees are offered such schedules
  - For example, if employees who have severe fatigue and difficulty with breathing because of Covid are granted light duty, then pregnant employees also must be provided with such light duty options

Caregiver Discrimination (Cont.)

- Discriminating against an employee because of the employee's association with someone who is disabled is unlawful
  - For example, refusing an employee's request for unpaid leave to provide care to a spouse who is disabled as a result of Covid is unlawful if such requests are approval for other employees who have personal needs

Caregiver Discrimination (Cont.)

- The ADEA does not give older employees any right to telework accommodation
  - At the same time, the ADEA does not prohibit employers from providing such an accommodation to older employees, even if it does not provide such an accommodation to employees under 40

Caregiver Discrimination (Cont.)

- Employers are not required to excuse poor performance caused by caregiver responsibilities
- Harassment based on caregiver responsibilities could violate federal law
  - For example, disparaging female employees for focusing on careers and not caregiver responsibilities could contribute to a hostile environment

Caregiver Discrimination (Cont.)

- Retaliation against caregivers who reported discrimination concerns is unlawful

SCOTUS

SCOTUS

- Very few employment cases
- A few emergency Covid-related decisions
  - Several justices articulate ongoing concerns about regulations and vaccination requirements that do not carve out exemptions for religious objections
  - We anticipate that, following the Supreme Court's lead, courts will continue to look closely at employment law impacts on religion and religious rights

SCOTUS (Cont.)

- *Kennedy v. Bremerton School Dist.* (2022)
  - First Amendment protects public school coach's right to pray on football field during games
  - A public employer employment decision without a direct impact on private employment
- Several arbitration decisions
  - Fleshed out some nuances to recent decisions that were favorable to compelled arbitration
  - No ground-breaking changes in the law

SCOTUS (Cont.)

- *Dobbs v. Jackson Women's Health Organization* (2022)
  - Ground-breaking decision that overruled prior decisions
  - Other speakers are covering its impact on the employment arena
- *Students for Fair Admissions v. Harvard* and *Students for Fair Admissions v. UNC*
  - These cases tackle the issue of whether race can be used as a factor in college admissions decisions
  - Oral argument set for October 31
  - The decisions may have a ripple effect on the issue of affirmative action in the employment context

ARBITRATION

Arbitration

- The Federal Arbitration Act authorizes the use of arbitration agreements
- SCOTUS has issued numerous decisions over the past 10-20 years that have resulted in the expansion of the use of arbitration agreements
- For example, in 2018, in *Epic Systems*, SCOTUS ruled that arbitration agreements that included the waiver of class action rights were enforceable

Arbitration (Cont.)

- Earlier this year, a new law was passed that limits arbitration in certain circumstances
- The "Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act" amended the FAA by adding a provision that states:

> "[A]t the election of the person alleging conduct constituting a sexual harassment dispute or a sexual assault dispute . . . no pre-dispute arbitration agreement or pre-dispute joint-action waiver shall be valid or enforceable with respect [to a sexual harassment or sexual assault case]."

Arbitration (Cont.)

- As a result, employees who have sexual harassment or sexual harassment claims can pursue them in court, regardless of any arbitration agreement
- While current federal law favors arbitration, current public opinion does not, and there have been bipartisan efforts to limit mandatory arbitration in certain types of disputes
- So, similar legislation further limiting arbitration would not be surprising

DISCRIMINATION, RETALIATION, AND EQUAL PAY

Sempowich v. Tactile Systems Technology (4th Cir. 2021)

- Tactile sells compression devices to treat chronic swelling and wounds
- Tactile hired Sempowich (a woman) in 2007 in a sales position
- She was promoted to Regional Manager in 2014
  - She supervised a 15-person sales team
- In 2014, Tactile also hired Seeling (a man) as a Regional Sales Manager for a different territory

Sempowich (Cont.)

- On February 12, 2018, Tactile told Sempowich she was being removed from the Regional Sales Manager position for performance reasons
  - She would get a newly created job at same pay rate
  - But, she would have no supervisees
- At the same time, Seeling was reassigned to Sempowich's former region and was promoted to Area Director
- On February 22, Sempowich submitted an internal discrimination complaint
- On March 23, she was told that she would be fired if she did not take the new job

Sempowich (Cont.)

- Sempowich rejected the new position, and her employment was terminated
- She sued, alleging discrimination, retaliation, and equal pay violations
- The District Court granted summary judgment to Tactile
- She appealed, and the 4th Circuit reversed

Sempowich (Cont.)

- Discrimination
  - Tactile argued that Sempowich could not establish a claim because she was not meeting their expectations, particularly with regard to team development, and she acknowledged some issues in that area on her performance reviews
  - Tactile argued that Tactile had the right as an employer to identify the performance criteria upon which it based its decision (i.e., team development) and that Tactile and the Court could not substitute their assessment of the proper criteria for what was identified by the employer
  - The District Court agreed

Sempowich (Cont.)

Sempowich, however, offered evidence that:

- Her overall rating on her performance reviews was positive in 2015 and 2016 (evidently, there was no evaluation for 2017)
- In fact, those overall ratings were better than the ratings that were received by Seeling
- Furthermore, there were abundant positive comments throughout various sections of her performance reviews
- And, she received multiple discretionary pay awards throughout her employment
- In fact, she received a raise, combined with an equity grant, less than three weeks before the decision to reassign

Sempowich (Cont.)

- The 4th Circuit sided with Sempowich, concluding that she had offered sufficient evidence of discrimination to defeat summary judgment
  - Tactile claimed that her performance was unsatisfactory, but if that was true then she should not have received overall positive performance reviews, annual raises, or discretionary pay awards
  - Tactile argued that performance reviews from 2015 and 2016 were not relevant to its decision in 2018, but the court noted that there were no more recent reviews that demonstrated any performance concerns
  - Tactile argued that it had the right to focus on a subset of her performance, and the court did not disagree – but it concluded that the evidence Sempowich offered raised doubts about the offered reason

Sempowich (Cont.)

  - For example, the salary increases and equity awards that she received occurred shortly before she was informed of the reassignment decision, casting doubt on the legitimacy of *any* performance concerns
  - Likewise, Sempowich was replaced by Seeling, who was rated worse that she was overall, further casting doubt on the validity of the job performance rationale
- Accordingly, the Court concluded that Sempowich offered sufficient evidence to permit her discrimination claim to be decided by a jury and that summary judgment had been entered for the employer improperly

Sempowich (Cont.)

- Retaliation
  - Retaliation claims require: (i) protected activity, (ii) adverse action, and (iii) a causal connection between the two
  - Sempowich's retaliation claim was based on her argument that the decision to terminate her employment if she did not accept the reassignment was motivated by her February 22 internal discrimination complaint
  - The District Court rejected this claim because the reassignment decision took place on February 12 *before* the February 22 protected activity – so, the protected activity could not have caused the adverse action

Sempowich (Cont.)

- The 4th Circuit, however, concluded that at the time Sempowich was told of the reassignment on February 12, she was not told she would be fired if she did not accept the new position
- Instead, she did not receive that message until March 23, which was after her February 22 internal complaint
- Accordingly, the Court concluded that a jury would need to decide whether Tactile terminated her employment because of the internal complaint

Sempowich (Cont.)

- Equal Pay Act
  - The EPA prohibits paying a different wage to someone of a different sex who is doing the same job
  - The sole issue in this case was whether Seeling was paid a higher wage than Sempowich – there was no dispute that they were doing the same job
  - Seeling was paid a higher annual base salary at all times, but Sempowich earned more in commissions and thus, overall, was paid more
  - Accordingly, the District Court rejected her claim
  - The 4th Circuit, however, concluded that the claim had to be analyzed by looking just at the pay rate, not aggregate compensation
  - Accordingly, the District Court decision was reversed

Sempowich (Cont.)

- Lessons:
  - Accurate performance reviews are key
    - Beware of narrative comments that are overly positive if not true
    - If you are doing annual performance reviews, don't skip a year because the missing information might work against you
    - Beware of overall job performance ratings that do not reflect the substance of the entire review – In other words, if there are serious concerns about an aspect of job performance that is important, then the "overall" performance rating should not be overly positive
  - Paying bonuses and discretionary awards to employees who are not meeting expectations may hinder your ability to credibly take adverse action for performance reasons

Sempowich (Cont.)

- When you make a decision, make sure it is dated and there is documentary evidence
  - It seems likely that when Tactile reassigned Sempowich, it had decided to terminate her employment if she rejected the job, but it failed to document the decision.
- You cannot explain away disparate pay *rates* with bonuses
- With EEOC's expressed focus on equal pay issues, now might be a good time to assess whether your workplace suffers from pay inequality in any positions

DISABILITY DISCRIMINATION

Williams v. Kincaid (4th Cir. 2022)

- Williams is a transgender woman (identifies as female, but was assigned male at birth) with gender dysphoria who was incarcerated for a criminal violation
- Gender dysphoria is "discomfort or distress that is caused by a discrepancy between a person's gender identity and that person's sex assigned at birth"
- Williams had required hormone therapy treatment for this condition for over 15 years
- At the outset of her incarceration, she was assigned to the women's side of the prison

Williams (Cont.)

- But, when prison officials realized that she retained the genitalia with which she was born, they moved her to the men's side of the prison
- There, she was persistently harassed because of her sex and identity
- When she was released from prison after 6 months, she filed a lawsuit asserting, among other things, disability discrimination claims under the ADA and the Rehabilitation Act
- The District Court dismissed those claims, concluding that gender dysphoria is not a disability under the statutes
- Williams appealed
- The 4th Circuit reversed, 2-1

Williams (Cont.)

- ADA prohibits discrimination against qualified individuals who have a disability
- A "disability" is a "physical or mental impairment that substantially limits one or more major life activities"
- Everyone agreed that gender dysphoria fits within this definition
- But, the ADA also excluded "certain conditions" from the definition of disability, including "transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identify disorders not resulting from physical impairment, or other sexual behavior disorders"

Williams (Cont.)

- According to the defendants (as well as the District Court and the opinion of the dissenting judge), "gender dysphoria" is excluded from the disability definition because it is a "gender identity disorder not resulting from physical impairment"
- The majority of the 4th Circuit, in a case of first impression throughout the circuits, held otherwise

Williams (Cont.)

- First, the majority concluded that "gender dysphoria" is not a "gender identify disorder" and thus is outside the statutory exclusion
  - The ADA does not define "gender identity disorder"
  - In 1990, when the ADA was passed, the medical community recognized that "gender identity disorder" was "an incongruence between assigned sex . . . and gender identity"
  - In other words, at that time, "the gender identity diagnosis marked *being transgender* as a mental illness"
  - By 2013, the medical community had rejected entirely "gender identity disorder" and instead recognized "gender dysphoria" as a new condition that had not yet been recognized in 1990

Williams (Cont.)

- In contrast to the no longer valid "gender identity disorder" that was recognized in 1990, the newer "gender dysphoria" condition is not focused exclusively on a person's gender identity, but instead is defined as a "clinically significant distress" felt by some people who experience an "incongruence between their gender identity and their assigned sex"
- In order words, the majority concluded that the "gender identity disorder" that was recognized in 1990 is entirely different from "gender dysphoria," which is focused on a type of clinically significant distress, not a state of being
  - The dissent, in contrast, believed that 1990's "gender identity disorder" included distress related to gender identity and accuses the majority of letting changes in medical understanding modify statutory text

Williams (Cont.)

- As a second and independent basis for its decision, the majority concluded that the statutory exclusion applied only to gender identity disorders "not resulting from physical impairment"
- The majority concluded that Williams' condition *did* result from a "physical impairment" as reflected by her years of hormone therapy
- Thus, even if gender dysphoria is a type of gender identity disorder (which the majority believes is not the case), Williams has a viable claim because her condition results from physical impairment

Williams (Cont.)

- Finally, the majority also observed that if it reached the opposite conclusion, it believes it would face a Constitutional problem because a law that excluded gender identity disorder and gender dysphoria would discriminate against transgender people as a class
- The majority believed this would implicate Equal Protection concerns

Williams (Cont.)

- Because of the history of discrimination against transgender people, laws targeting them must survive "intermediate scrutiny" under the Equal Protection analysis and be supported by "exceedingly persuasive justification"
- And here, the majority saw no justification for excluding transgender people from the protections of the ADA beyond what would have been a desire to harm a politically improper group
- Thus, the majority believes it is prudent to interpret the law in a manner that does not raise such constitutional issues and that does not exclude an entire class of people from the ADA's protections

Williams (Cont.)

- Lessons:
  - The ADA is interpreted broadly, and employers generally should assume that conditions are covered by the statute
  - In the 4th Circuit, gender dysphoria is a disability
  - While Williams was not an employment case, its ADA analysis applies to ADA employment claims
  - This case involves an issue of statutory interpretation that is similar to the issue the Supreme Court decided recently when it concluded in *Bostock* that Title VII's prohibition on sex discrimination applied to sexual orientation and identity discrimination
  - So, it would not be a surprise to see this issue before that court at some point

PREGNANCY DISCRIMINATION

EEOC v. Wal-Mart (7th Cir. 2022)

- Wal-Mart operated a distribution center in Wisconsin where it employed workers who unloaded and packed boxes
- In 2014, Wal-Mart implemented a Temporary Alternate Duty Policy that offered light duty assignments to workers injured on the job, allowing them to retain full pay
- Wisconsin has a workers compensation law that provides compensation for on-the-job injury, and Wal-Mart enacted the policy to reduce costs and improve morale in such situations
- Wal-Mart did not offer light duty to pregnant workers or workers injured off-the-job

Wal-Mart (Cont.)

- So, pregnant employees who required lifting restrictions were required to go on unpaid leave and were not allowed light-duty
- For example, Cassandra Lein was denied light duty while she was pregnant
  - She continued to work despite increasing pain
  - She avoided reporting restrictions as long as possible, but when she could no longer manage the situation, she was placed on leave
- Likewise, Evelyn Welch "begged for light duty" while pregnant
  - Her request was denied because her boss said it would show favoritism
  - She worked as long as possible but eventually had to quit

Wal-Mart (Cont.)

- EEOC filed a systemic pregnancy discrimination lawsuit against Wal-Mart on behalf of a class of pregnant workers
- District Court denied a motion to dismiss, and contentious discovery commenced
- Both parties filed motions for summary judgment
- Wal-Mart prevailed
- The EEOC appealed, and the 7th Circuit affirmed

Wal-Mart (Cont.)

- Title VII prohibits discrimination because of sex
- The Pregnancy Discrimination Act was passed in 1976 to override a Supreme Court decision that concluded that pregnancy discrimination was not sex discrimination
- The PDA accomplished this objective by amending Title VII in two ways:
  - It declared that sex discrimination includes discrimination because of "pregnancy, childbirth, or related medical conditions"
  - It provided that women affected by pregnancy, childbirth, and related medical conditions "shall be treated the same . . . as other persons not so affected but similar in their ability or inability to work"

Wal-Mart (Cont.)

- In *Young v. UPS* (2015), the Supreme Court addressed the issue of pregnancy discrimination and light duty assignments
  - Young was pregnant and had lifting restrictions
  - She asked for light duty
  - UPS refused
  - UPS did allow light duty to workers injured on-the-job, to workers who needed an accommodation because of a disability, and to workers who were injured off-the-job
  - Essentially, only pregnant employees were denied light duty

Wal-Mart (Cont.)

- Supreme Court held that an employee could establish a *prima facie* case of pregnancy discrimination by showing that she was pregnant, sought an accommodation, and was denied the accommodation while the employer did accommodate other employees who had similar work restrictions
- The employer then must offer a legitimate non-discriminatory reason for denying the accommodation (which must be more than just the cost associated with allowing it)

Wal-Mart (Cont.)

- The employee then can show pretext by showing that the employer's policies impose a significant burden on pregnant employees and that the employer's reasons for denying the accommodation are not sufficiently strong
- The Supreme Court concluded that Young had established pretext
  - A large percentage of non-pregnant workers received the light duty restriction, but *no* pregnant workers received it
  - In short, pregnant workers were treated worse than other employees who had similar restrictions

Wal-Mart (Cont.)

- Turning to this case, there was no dispute that the EEOC had set forth a prima facie case of pregnancy discrimination
- Wal-Mart then articulated a non-discriminatory reason for its policy
  - It reduced workers compensation liability exposure by continuing to employ injured workers on light duty and it increased morale and loyalty
- The analysis advanced to the pretext stage, and EEOC argued that the Court should follow *Young* and conclude that it had established its claim

Wal-Mart (Cont.)

- **The 7th Circuit disagreed**
  - In *Young*, pregnant employees were *the only* employees with restrictions who did not get light duty
  - Here, like pregnant employees, employees with off-the-job injuries or similar non-work-related injuries received no light duty -- only employees with work-related injuries received light duty
  - Accordingly, the Court found insufficient evidence of pretext
- **The 7th Circuit noted that in a similar situation, the 2nd Circuit had reached a different conclusion (*Legg v. Ulster County*)**
  - But, the 7th Circuit distinguished that case because in *Legg*, the employer offered inconsistent reasons for its policy
  - In this case, however, Wal-Mart's reasons never changed

Wal-Mart (Cont.)

- Lessons:
  - The EEOC is very focused on pregnancy-related leave issues and accommodations, so be very careful when making decisions in this context
  - The *Wal-Mart* case is one of the rare examples of the EEOC being unsuccessful with systemic litigation efforts
  - If an employer declines to offer light duty to pregnant employees, while offering it to some non-pregnant employees:
    - It needs a clear and consistent non-discriminatory reason
    - It should not treat pregnant employees worse than *all* other similarly situated employees

SMITH ANDERSON

EEO UPDATE

Zebulon D. Anderson

October 27, 2022

EXPECT EXCELLENCE®