SMITH ANDERSON

EEO UPDATE

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EEOC Developments

Administrative Statistics

- Volume
  - FY 2020 = 67,448 charges
  - Total charges ↓ each of last 5 years
  - Fewest since 1992 and a 7% decrease from prior year
  - Disability, color, and GINA claims only ones that ↑
  - Over last 10 years, retaliation and disability claims have increased the most
  - Retaliation has remained most common claim for a decade – now 56% of all charges and continuing to ↑
  - Cause finding in only 2.8% - lowest since 1996

Administrative Statistics

- Location
  - While nationwide charge filings is down, NC is up
  - FY 2020: NC – 5.1% of all charges nationwide
  - 8 States (Texas, Florida, California, Georgia, Illinois, Pennsylvania, New York, and North Carolina) account for over 53% of all charges nationwide

Litigation Statistics

- In FY 2020 – 93 new merits lawsuits filed by EEOC
  - Down 35% from FY 2019, which was down 28% from FY 2018
  - Much less litigation than 10-15 years ago
  - When EEOC pursues litigation, its results were very successful -- $106.1m (most since 2004)
  - 96% success rate (settlements and jury verdicts
    - 50% jury trial success rate (1 win and 1 loss)
  - 2021 already looks like a successful year for EEOC, which obtained a $125m verdict in a single plaintiff disability case against large employer ($150k damages and $125m punitive)

Systemic Statistics

- Systemic cases are EEOC priority, and EEOC published new systemic web page
- Systemic cases involve 20+ employees and are focused on matters in which the alleged discrimination has a broad impact
- FY 2020
  - 558 systemic investigations
  - 412 systemic investigation resolutions = $24m
  - Systemic charges: far more likely to result in "cause" determination – 43% vs. 3%
  - New lawsuits: 19% were systemic and 17% were multi-victim
  - Active lawsuits: 29% are systemic and 15% are multi-victim
  - EEOC litigation is *heavily* focused on systemic and multi-victim cases
  - EEOC had 100% success rate (settlement and verdict)

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

- **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

- **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
  - Sharon Gustafson – R- confirmed August 2019 and term ends July 2023
- Five Commissioners
  - Janet Dhillon – R - confirmed May 2019 and term ends July 2022
  - 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 will be Republican controlled until at least July 2022

Strategic Enforcement Plan: FY 2017-2021

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

2017-21

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

2017-21

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

SCOTUS, EEOC, and Religion Discrimination

Religion Discrimination

- On January 15, EEOC issued new religious discrimination guidance
- It was approved by a 3-2 vote of EEOC commissioners along party lines
- It is the first update to such guidance since 2008
- It addresses recent SCOTUS decisions

Religion Discrimination

- As you may recall, last year SCOTUS issued two cases involving religion discrimination
- In *Our Lady of Guadalupe School v. Morrissey-Berru*, the Court broadly interpreted the "ministerial" exemption to federal anti-discrimination laws based on the First Amendment and its protection for the free exercise of religion
  - So, a broad group of educators at religious schools may not pursue discrimination claims

Religion Discrimination

- In *Little Sisters of the Poor v. Pennsylvania*, the Court enforced federal rules issued under the Religious Freedom Restoration Act (RFRA) to create religious and moral exemptions from the contraceptive mandate under the Affordable Care Act
  - The RFRA was passed with near unanimous bipartisan support in 1993 under President Clinton
  - RFRA determined to be unconstitutional when applied to states, but not when applied to federal government
  - It prevents the federal government from substantially burdening a person's free exercise of religion even if the burden results from a generally applicable law
  - If a generally applicable law furthers a compelling government interest and is the least restrictive way to protect that interest, it does not violate the RFRA

Religion Discrimination

- These decisions made clear that the Court is interested in the intersection between generally applicable federal laws (like federal non-discrimination laws) and religion (including the First Amendment and the RFRA)
- And, decisions issued by the Court in its most recent term reinforce that interest

Tanzin v. Tanvir

- Plaintiffs were Muslims
- The FBI placed them on no-fly list in retaliation for their failure to act as informants against other Muslims
- They filed suit and sought money damages under the RFRA
- The RFRA allows “appropriate relief” for violations
- In a unanimous decision, the Court ruled that money damages are “appropriate relief”
- This expands the remedies for RFRA violations
- This incentivizes the pursuit of RFRA claims

Fulton v. Philadelphia

- Catholic Social Services (CSS) is a foster care agency that places children in foster homes through a contract with Philadelphia
- CSS will not place children with same-sex couples or unmarried couples for religious reasons
- After a newspaper article was published about this issue, Philadelphia refused to refer children to CSS unless it changed its policy because the policy was inconsistent with Philadelphia's general non-discrimination policies, laws, and contract provisions
- CSS sued, alleging First Amendment violations
- The case made its way quickly to SCOTUS

Fulton v. Philadelphia

- The majority first discussed a prior decision
  - In *Employment Division v. Smith* (1990), which prompted the RFRA Congressional response, Justice Scalia wrote a majority opinion that concluded that when a person's free exercise of religion conflicts with "neutral laws of general applicability," a lower level of scrutiny is applied and the general laws may be enforced
  - Scalia was worried that a different approach would create a "private right to ignore generally applicable laws," which might require religious exemptions for things like "compulsory vaccination laws . . . to . . . laws providing for the equality of opportunity for the races"

Fulton v. Philadelphia

- The majority, however, concluded that *Smith* was inapplicable because the Philadelphia policies, laws, and contracts allowed individual exemptions and were not "generally" applicable
- So, applying strict scrutiny it concluded that Philadelphia impermissibly burdened CSS's free exercise of religion
- And, the Court unanimously ruled in favor of CSS, preventing Philadelphia from refusing to contract with it
- Perhaps most notably, Justices Alito (joined by Justices Thomas and Gorsuch) wrote a 75-page concurring opinion, advocating that *Smith* be overruled because it inadequately protected religious rights
  - This clearly forecasts that at least several justices are prepared to permit individual religious exemption from general rules

Tandon v. Newsom

- The latest in a series of cases that address COVID restrictions imposed by a state
- California issued a law that restricted all at-home gatherings (religious or secular) to no more than 3 households
- The 5-4 majority concluded that this was not a law of general applicability and that the law treated religious activities (at-home gatherings of >3 households prohibited) differently than secular ones (at-business [*e.g.*, hair salon and theater] gatherings of >3 households permitted if masks worn, etc.)
- Thus, applying strict scrutiny, the Court concluded that the state had failed to justify the differential treatment and enforcement of the law was prohibited

Tandon v. Newsom

- The dissent argued that the majority made the wrong comparison
  - It argued that the comparison should be: at-home religious gatherings to at-home secular gatherings *not* at-home religious gatherings to at-business gatherings
- The dissent also argued that the majority ignored evidence that justified differential treatment
  - California offered evidence that COVID risks were greater with at-home gatherings than public ones for a variety of reasons

Significance

- Why discuss these non-employment cases?
- Because they forecast that sometime soon the Court will directly confront the intersection of generally applicable employment laws (such as Title VII) and the free-exercise of religion under the First Amendment and/or the RFRA (such as religious beliefs regarding marital status, gender identity, etc.)
- And, these cases suggest that the Court is increasingly supportive of religious rights, even when they conflict with generally applicable laws

EEOC Religious Discrimination Guidance

- Which, brings us back to the new EEOC guidance
- While the EEOC explains that this document does not create law, it also states that it is "intended to provide clarity to the public," especially based on recent legal developments, and to explain "how the Commission will analyze these matters"
- So, employers should pay attention

Guidance

- "Overview: Religion is very broadly defined for purposes of Title VII. The presence of a deity or deities is not necessary for a religion to receive protection under Title VII. Religious beliefs can include unique beliefs held by a few or even one individual; however, mere personal preferences are not religious beliefs. Individuals who do not practice any religion are also protected from discrimination on the basis of religion or lack thereof. Title VII requires employers to accommodate religious beliefs, practices and observances if the beliefs are "sincerely held" and the reasonable accommodation poses no undue hardship on the employer."
- And, just to leave no doubt, the EEOC explains that an "employer should ordinarily assume that an employee's request for religious accommodation is based on a sincerely held religious belief"

Guidance

- Religious organizations are exempt from claims based on application of religious principles
- And employees of religious organizations who perform vital religious duties (such as educators) may not pursue discrimination claims – (the ministerial exemption)
  - This is a Constitutional issue, not just a legal defense

Guidance

- The guidance then confronts the intersection between First Amendment rights/RFRA rights and anti-discrimination laws that we have been discussing, and it states:
  - "It is not within the scope of this document to define the parameters of the First Amendment or RFRA. However, these provisions are referenced throughout this document to illustrate how they arise in Title VII cases and how courts have analyzed them. For example:
    - a private sector employer or a religious organization might argue that its rights under the First Amendment's Free Exercise or Free Speech Clauses, or under RFRA, would be violated if it is compelled by Title VII to grant a particular accommodation or otherwise refrain from enforcing an employment policy;
    - . . .
  - *EEOC investigators must take great care in situations involving both (a) the statutory rights of employees to be free from discrimination at work, and (b) the rights of employers under the First Amendment and RFRA. Although a resolution satisfactory to all may come from good faith on the part of the employer and employee through mutual efforts to reach a reasonable accommodation, on occasion the religious interests of the employer and employee may be in conflict. EEOC personnel should seek the advice of the EEOC Legal Counsel"*

Guidance

- Religious discrimination in hiring, promotion, and compensation is prohibited
- Discrimination because of religious expression also is prohibited
- Religious discrimination based on customer preference is prohibited
  - The EEOC explains the "best practice" for employer in this situation: "If an employer is confronted with customer biases, e.g., an adverse reaction to being served by an employee due to religious garb, the employer should consider engaging with and educating the customers regarding any misperceptions they may have and/or the equal employment opportunity laws."

Guidance

- Harassment because of religion is prohibited:
  - "Overview: Religious harassment is analyzed and proved in the same manner as harassment based on other traits protected by Title VII—race, color, sex, and national origin. However, the facts of religious harassment cases may present unique considerations, especially where the alleged harassment is based on another employee's religious practices. Such a situation may require an employer to reconcile its dual obligations to take prompt remedial action in response to alleged harassment and to accommodate certain employee religious expression."

Guidance

- Compare this:
  - "The president of Printing Corp. regularly mocked and berated an employee who asked for Sundays off to attend Mass. Although he granted the time off, the president teased the employee for refusing to look at a Playboy magazine, called him a "religious freak," and used vulgar sexual language when speaking to or about the employee. He mocked him for "following the Pope around" and made sexual comments about the Virgin Mary. A reasonable person could perceive this to be a religiously hostile work environment."
- To this:
  - "Bob, a supervisor, occasionally allowed spontaneous and voluntary prayers by employees during office meetings. During one meeting, he referenced Bible passages related to "slothfulness" and "work ethics." Amy complained that Bob's comments and the few instances of allowing voluntary prayers during office meetings created a hostile environment. The comments did not create an actionable harassment claim. They were not severe, and because they occurred infrequently, they were not sufficiently pervasive to state a claim."

Guidance

- Title VII requires religious accommodations:
  - "Overview: Title VII requires an employer, once on notice, to reasonably accommodate an employee whose sincerely held religious belief, practice, or observance conflicts with a work requirement, unless providing the accommodation would create an undue hardship. . . . Title VII's undue hardship defense to providing religious accommodation has been defined by the Supreme Court as requiring a showing that the proposed accommodation in a particular case poses 'more than a *de minimis*' cost or burden. "

Guidance

- Perhaps the trickiest issue arises with the intersection between accommodation of religious expression while avoiding claims of harassment
  - "Some employees may seek to display religious icons or messages at their workstations or use a particular religious phrase when greeting others. Others may seek to proselytize by engaging in one-on-one discussions regarding religious beliefs or distributing literature. Still others may seek to engage in prayer at their workstations or to use other areas of the workplace for either individual or group prayer, study, or meeting. In some of these situations, an employee might request accommodation in advance to permit such religious expression. . . .
  - To determine whether allowing or continuing to permit an employee to pray, proselytize, or engage in other forms of religiously oriented expression in the workplace would pose an undue hardship, employers should consider the potential disruption, if any, that will be posed by permitting the expression of religious belief. [R]elevant considerations may include the effect the religious expression has had, or can reasonably be expected to have, if permitted to continue, on coworkers, customers, or business operations."

Guidance

- Here is an example:
  - "Each December, the president of XYZ corporation directs that several wreaths be placed around the office building and a tree be displayed in the lobby. Several employees complain that to accommodate their non-Christian religious beliefs, the employer should take down the wreaths and tree, or alternatively should add holiday decorations associated with other religions. Title VII does not require that XYZ corporation remove the wreaths and tree or add holiday decorations associated with other religions."

Lessons

- The contours of religion discrimination is an “emerging issue”
- The EEOC’s most notable regulatory activity in the last fiscal year was issuing new religion discrimination guidance
- SCOTUS has issued multiple decisions in this area in last two years
- So, while such claims may be infrequent, employers should be very careful

4th Circuit

Roberts v. Glenn Industrial Group

- Roberts was employed by Glenn Industrial as a diver assistant
- Glenn Industrial had an anti-harassment policy that directed complaints to Glenn, the CEO
- All field employees, such as Roberts, were men

Roberts v. Glenn Industrial Group

- Roberts' supervisor, Rhyner:
  - Repeatedly call Roberts "gay"
  - Regularly made sexually explicit comments to Roberts
  - Called Roberts a "f****** r*****" with "r***** strength"
  - Asked Roberts "how many ***** [he] would **** for money"
  - Slapped Robert's face, pushed him, and put him in choke hold
  - Hit Roberts in the head and knocked his helmet off
- Roberts complained to Evans, Rhyner's supervisor
  - Evans told Roberts to "suck it up"

Roberts v. Glenn Industrial

- Roberts complained to Glenn's wife in HR in January 2016
  - Rhyner was not disciplined
  - Harassment continued
- In March 2016, Roberts was disciplined by Glenn for not wearing safety gear that contributed to injury
  - Roberts did not inform Glenn of harassment
- In April 2016, a supervisor reported that Roberts' appeared to be intoxicated at work
  - He passed a drug test
  - Glenn fired him anyway

Roberts v. Glenn Industrial

- Roberts filed suit, alleging hostile environment and retaliation claims under Title VII
- District Court granted summary judgment to the employer on both claims
- Roberts appealed to 4th Circuit

Roberts v. Glenn Industrial

- Hostile Environment
  - Pointing to SCOTUS precedent, the District Court concluded that there were 3 ways to prove unlawful same-sex harassment
    - The harasser is homosexual and makes proposals of sexual activity
    - The harassment suggests general hostility to people of the plaintiff's sex
    - People of one sex are treated better than the other sex in a mixed-sex workplace
- The District Court concluded
  - No evidence Rhyner was homosexual
  - No evidence of hostility to all men
  - Not a mixed sex workplace
  - So, no claim

Roberts v. Glenn Industrial

- 4th Circuit rejected this argument
  - District Court misinterpreted SCOTUS precedent
  - Those are not the *only* ways to establish a claim
  - *Bostock* made plain that: (i) discrimination based on sexual orientation was unlawful, and (ii) discrimination for non-conformance with sex-stereotypes is unlawful
  - So, sexual harassment based on sexual orientation and sex-stereotype non-conformance also is unlawful

Roberts v. Glenn Industrial

- Retaliation
  - District Court rejected the retaliation claim for two reasons:
    - Glenn made the termination decision alone and he had no knowledge of the protected activity (*i.e.*, the complaints were made to his wife, not him)
    - 3 months passed between protected activity and adverse action and that is too long to suggest causal connection
  - 4th Circuit agreed

Smith v CSRA

- Smith was employed by the DEA as a geospatial intelligence expert
- In 2013, she informed her supervisor she had a disability and needed an accommodation for mobility issues
  - She was allowed to work remotely 50% of time
  - She was given a parking pass that limited walking
- In 2017, a senior DEA official, Quinn, decided:
  - To move the work location to a new facility
  - To move Smith to another supervisor
- Quinn also had concerns about Smith's technical skills

Smith v. CSRA

- Smith asked to keep the same accommodations
- For weeks she did not get an answer
- Eventually, DEA told her that they could not continue the parking accommodation, that she had to work on site, but that she could work part-time
- Smith filed a complaint with DEA EEO office
- A few days later, the parking pass accommodation was approved

Smith v. CSRA

- A few days after that, Quinn revoked Smith's security clearance
  - She gave no reason
- As a result, Smith's employment was terminated
- Later, Quinn wrote an email suggesting the revocation was a result of Smith storing DEA records on a personal computer
- But, another DEA official stated that it was revoked because of performance and attendance concerns, including Smith continuing to work remotely while accommodation request was being evaluated

Smith v. CSRA

- Smith sued under ADA & Rehabilitation Act
  - Failure to accommodate
  - Retaliatory discharge
- District Court granted summary judgment to DEA
  - Accommodation:
    - DEA *did* eventually provide accommodation
  - Retaliation:
    - Granting accommodation suggests no retaliatory intent
    - Quinn did not know of protected activity
    - Performance issues were non-retaliatory

Smith v. CSRA

- 4th Circuit
  - Failure to Accommodate
    - Agrees with District Court
    - While it took weeks, DEA eventually provided the parking accommodations
    - While it did not provide the 50% remote work request, it did allow a schedule modification
    - Smith wasn't entitled to the request she sought if what was offered satisfactorily addressed mobility issue
    - Just because DEA allowed 50% remote work before did not mean it had to continue

Smith v. CSRA

- Retaliation
  - While Smith eventually got the accommodation, it was only after she complained
  - And, there was evidence showing that Smith did know about the complaint
  - And, the adverse action happened soon after the protected activity
  - So, Smith established a prima facie case of retaliation
  - She also showed pretext
    - DEA's rationales changed over time
    - No contemporaneous documentation of reason at time of termination decision
    - Reverses District Court

Lessons

- Same-sex harassment is treated the same way as sex harassment
- So, as soon as you get knowledge, investigate and take appropriate action
- Beware of adverse action soon after protected activity
- Pay attention to what knowledge is held by the decision maker
- Carefully document reasons for decision and do not provide inconsistent reasons

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EEO UPDATE

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