

Lessons Learned? EEOC Litigation Trends



**Triangle Industry
Liaison Group
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The Raw Statistics

- Since 1/1/09:
 - The EEOC has filed 89 lawsuits in North Carolina, South Carolina, Virginia, West Virginia, and Maryland.
 - Out of this total, 42 cases were filed in various federal courts in North Carolina.

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Sex Discrimination

- The most frequent type of claim asserted
 - 29 cases:
 - 22 cases allege sexual harassment;
 - 12 cases allege sexual harassment and retaliation;
 - 1 case alleges pregnancy discrimination;
 - 1 case alleges sexual harassment by a customer;
 - 1 case alleges sexual harassment of a male employee by a female supervisor.

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Race Discrimination

- 16 cases filed.
- 9 cases allege race discrimination and retaliation.
- Unusual claims:
 - 2 cases allege discrimination against non-Hispanics (employer preference for Hispanic employees);
 - 1 case alleges discrimination against a white employee;
 - 1 case challenges the use of credit scores in hiring and alleges that it has an adverse impact on minorities;
 - 1 case alleges that the employer assigned workers based on patient preferences for white caregivers.

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Disability Discrimination

- 17 cases filed.
- Types of “disabilities” claimed:
 - Breast cancer
 - “Persons taking narcotics”
 - Spinal Stenosis
 - HIV
 - Mental Impairments
 - Arthritis

Disability Discrimination (cont'd)

- Types of Disabilities:
 - Multiple Sclerosis
 - Deafness
 - Missing fingers
 - High blood pressure
 - ADHD
 - Limitations on the ability to walk and stand
 - Degenerative disc disease
 - Hemophilia

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Religious Discrimination

- 10 cases filed.
 - Allegations of religious harassment, failure to accommodate (work on the Sabbath and appearance standards), failure to hire.
 - Religions:
 - Christian
 - Jehovah's Witness
 - Seventh-Day Adventist
 - Rastafarian
 - Muslim
 - Jewish
 - Children of Yisreal
 - Santaria

Age Discrimination

- 10 cases filed
- Refusal to hire. One employer is alleged to have told the impacted employee that he decided to hire “someone younger” for a mechanic position.
- Class failure to hire: Employer allegedly failed to hire applicants who were 40 and over for Account Executive positions. Employer allegedly stated that it was looking for candidates who were “young and fit”, in their “early 20s or 30s”, or who were “recent college graduates.” Recruiter offered staff a \$500.00 bonus for referral of a “friend’s younger brother or sister.”

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Age Discrimination (cont'd)

- Discharging a 70-year-old finance director/assistant town administrator after the Mayor and Town Administrator openly discussed the fact that the employee's age was the reason for the discharge.
- Discharging a 61-year-old Area Sales Manager after remarking that she was “getting too old for this job” and “It may be time for us older ones to step aside and let the younger ones take over.”

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Impacted Industries

- Healthcare: 5 cases.
- Staffing Agencies: 3 cases.
- Construction/Building materials: 10 cases.
- Food Service: 6 cases.
- Automotive: 3 cases.
- Retail: 4 cases.

Summary Judgment and Appeal

- Summary Judgment for the employer/EEOC appeals/Appeal pending: 4 cases.
- Summary Judgment for the employer/EEOC appeals/Reversed: 3 cases.

“We aren’t in Kansas anymore . . .”

- The EEOC may issue a press release when it files suit.
- Settlement discussions with the EEOC are not comparable to those with a private attorney.
- The EEOC may not agree to a confidential settlement.
- The EEOC may demand a consent decree to settle the case which may include mandated training.
- The EEOC may issue a press release describing the settlement.

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Harassment

- Harassment claims of all varieties continue to be a point of emphasis for the EEOC.
 - Cases of race harassment tend to involve allegations of extreme racial slurs and/or references to the KKK, nooses, or graffiti. One case involved a claim that a co-worker used “threatening language” including a comment that President Obama should be assassinated. Another case involved allegations that a co-worker threw bricks, buckets and shovels at a Hispanic employee.

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Harassment (cont'd)

- Religious harassment case filed on behalf of Christian employee whose church was referred to as a cult, who was called a “devil worshipper”, and whose religion was “denigrated”. Another case involving a Jewish worker alleged a hostile environment based on constant name-calling, throwing the employee into a dumpster, tying him to a fence, and taping swastikas on his vehicle.

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Harassment (cont'd)

■ Sexual harassment:

- Allegations of offensive language and touching or brushing up against the employee. One case involved the President of a company who spoke to an employee about his sexual relations with his wife, made other sexual comments to her, and touched the employee in a sexual manner.
- At least two of the cases filed by the EEOC involved women working in positions that are typically held by males. For example, one case includes allegations that a supervisor belittled the female employee, treated her differently from men holding the same job, and made constant comments indicating that women were “unfit” to work in skilled jobs on a construction site.

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Harassment (cont'd)

- Sexual harassment:
 - Often accompanied by allegations of retaliation for complaining of sexual harassment. Examples of retaliation:
 - Reducing the employee's work time.
 - Firing the employee within a few weeks after she complains of sexual harassment.
 - Demoting a Sales Manager who escalated an employee complaint of sexual harassment against a higher-level manager.
 - Reassigning clients to a different employee who did not complain about discrimination.

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Harassment (cont'd)

- How not to respond to a complaint of harassment:
 - One supervisor told an employee complaining about racial harassment: “You’re a tough guy, you can take it.”
 - In response to a complaint that a supervisor was sexually harassing a subordinate, the president of one company said that he did not ask employees about their sexual preferences so there was nothing he could do about the supervisor’s conduct.
 - One Area Manager, who was a friend of a General Manager who resigned due to an employee’s complaint of sexual harassment, said to the employee: “You have ruined the [General Manager’s] life, get the f—k out”.

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Harassment (cont'd)

- How not to respond to a complaint of harassment:
 - One employer is alleged to have discharged a management employee a few days after she complained of racial harassment and said that she was going to take the issue to the NAACP. A nonemployee who was incorrectly perceived as helping the manager present her claim to the NAACP also was discharged at the same time.
 - When a male employee complained about sexual harassment by a female manager, he was told to “worry more about [his] job than female problems” and he was warned that if he would be looking for a new job if he kept “bringing this s—t up.”
 - Telling a supervisor not to associate with an employee who had filed an EEOC charge against the employer. Shortly after this supervisor told management that he had “knowledge of events and how they were handled” with respect to the complaining party, the supervisor was fired.

Race Discrimination

- In one case, the EEOC alleges that a restaurant employer has “printed and published, and caused to be printed and published, notices and advertisements relating [to] employment that indicated a preference . . . based on race.” The notice in question included advertisements regarding career opportunities on the employer’s “website that contained visual depictions of employees through use of human models that appear to be disproportionately or entirely non-racial minority persons.” This allegedly had the effect of deterring applications from a class of job seekers because of their race.
- In another case, the EEOC alleges that an employer discharged a white employee because of her association with an African-American employee.

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Sex Discrimination

- In one case, the EEOC alleges that the employer discharged several employees after learning that they were pregnant. One employee was removed from training as a file clerk because the CFO concluded that the position was a “risk” to her pregnancy. Another employee was removed from the same training program because, based on “past experiences”, it “would not be fair” for her to continue.
- In another case, a restaurant was sued for failure to promote a waitress to a bartender position. The manager told the employee that he wanted a “straight male” behind the bar.

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Disability Discrimination

- Failure to accommodate:
 - Refusing to allow a store “greeter” to use an assistive device to aid him in standing and walking and discharging him because of his disability.
 - Refusing to provide a modified work schedule, modified job duties, or assistive devices for ambulation for a waitress who was substantially limited in walking because of an anatomical loss.
 - Refusing to allow an employee with cancer an additional week of unpaid leave after he exhausted 30 days of leave. The employee was discharged after he failed to return to work at the end of the 30-day leave.
 - Discharging an assistant teacher who was “hard of hearing” because of the employer’s “unfounded belief that no hard of hearing individual can perform the position.” The employee was demoted to a lower paying position in the mailroom.

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Disability Discrimination (cont'd)

- Failure to accommodate:
 - Discharging an employee with a mental impairment because he needed a week off to obtain medical treatment and to have his medication adjusted.
 - Refusing to hire or placing employees on unpaid leave while they took narcotic medication for an impairment despite the fact that they were allegedly qualified to perform the essential functions of their jobs.
 - Withdrawing a job offer to a candidate who had lost fingers in an accident because of an unspecified “safety issue.” The EEOC alleged that the employer did not engage in an “individualized assessment of [the applicant’s] capabilities” and that the employer discriminated against him based on perception that he was disabled.

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Disability Discrimination (cont'd)

- Imposing different conditions/discharge:
After he disclosed that he had hemophilia, an employer refused to allow an employee working as a stocker to return to work until his doctor signed off on a special job description that the employer would create for the employee.
- Refusing to promote a part-time worker into a full-time position because of her gender and her association with her disabled child. Two of the decision-makers questioned the employee about how she could care for her disabled child if she was hired into a full-time position.

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Religious Discrimination

- Sabbath cases: These still figure prominently in EEOC filings.
- Employer told Rastafarian applicant that it was interested in hiring him if he would cut his hair. Applicant explained that his dreadlocked hairstyle was part of his religious beliefs. Applicant offered to cover his hair or wear a head wrap instead. Employer rejected these suggestions and insisted that applicant cut his hair. Applicant had previously worked for the employer in the position sought before he became a Rastafarian.
- EMT who was a Jehovah's Witness was discharged for refusing to take her ambulance to a local shopping mall to participate in a Halloween carnival being held at the mall. She was discharged as a result.
- Restaurant refused to allow waitress to wear Muslim head-covering while performing her duties.

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Lessons Learned

- Training, training, training.
 - Managers must understand the law and what it requires from the Company and them.
 - They must be able to recognize when an employee is:
 - Requesting an accommodation because of a medical condition;
 - Requesting an accommodation because of a religious belief;
 - Complaining about unlawful discrimination and harassment.

Lessons Learned (cont'd)

- Management training must be comprehensive and must cover the prohibition against unlawful retaliation. Consider whether the Company wants to require supervisors to escalate complaints and requests for accommodation to HR for response/approval.
- Training must be done for hourly employees also. This should focus on standards of workplace behavior, how to request an accommodation, and how to complain about unlawful discrimination or harassment.
- Keep records of subjects covered in training and attendance sheets.

Lessons Learned (cont'd)

- Review your policies
 - Do you have a broad policy prohibiting unlawful discrimination and harassment?
 - Has it been updated to prohibit discrimination based on “genetic information”?
 - Does it specifically mention that the Company prohibits unlawful discrimination and harassment by vendors, contractors, customers, etc.? Does it tell employees what to do if they have a problem with a third-party?

Lessons Learned (cont'd)

- Make a record: When an employee requests an accommodation or complains about discrimination, document the issue and what you do to investigate it and resolve it.
- Whenever an employee asks for an accommodation, require him or her to tell you (preferably in writing) what type of accommodation he or she wants and why he or she thinks it will be effective.
- To prepare for the inevitable disability claim: Take the time to review and update job descriptions. Identify essential functions.
- Remember: These documents will be your defense if the Company receives an EEOC charge or a lawsuit.

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Lessons Learned (cont'd)

- Take your time. Assume that it will take several days to thoroughly examine any requested accommodation and to investigate any complaint of discrimination or harassment.
- If you conclude that the employee's requested accommodation is not reasonable or would impose an undue hardship, document the reasons for this conclusion.
 - For example: The employee's requested accommodation calls for the employer to eliminate an essential function.
 - For example: The employee asks the employer to deviate from its practice of awarding promotions based on seniority in order to place him in a position that would eliminate the obligation for him to work on his Sabbath in his then-current position.
- In a complaint situation, meet with the accused and get his or her side of the story. Review the prohibition against retaliation. Consider whether to suspend the accused pending the outcome of the investigation.
- Document your conclusions on any complaint investigation, including disciplinary action taken. Document any accommodations offered.

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Lessons Learned (cont'd)

- Follow up: Check in periodically with the an employee who complains about discrimination or who requests an accommodation. Document the conversation.
- If an employee has complained about discrimination or requested an accommodation, for the 12-month period following that incident, require the manager to consult with you before issuing a negative performance evaluation, a warning, denying a promotion, or discharging the employee. In each case, ask:
 - What has the employee done to prompt this action?
 - Is there a written rule that the employee is aware of that covers this situation?
 - Have other employees violated this same rule? If so, what action did you take against them?

Lessons Learned (cont'd)

- Be proactive and visible: If you have a work-site that is predominately populated by male employees, visit more regularly and check in with female employees in a general way to see whether they are having any issues.
- Consider a toll-free number that allows employees to raise issues anonymously. Publicize this avenue if you adopt this procedure.
- Investigate unusual turnover rates, whether caused by discharges or voluntary resignations. Why are employees choosing to leave? Why are so many employees unsuccessful in this group or department? Take action, if warranted.

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- Questions?? Comments??