Employment law: Current trends in EEOC enforcement

Trends that suggest creative and progressive legal arguments

By Tom Harrington and R. Scott Oswald

The Equal Employment Opportunity Commission (EEOC) is responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information. The EEOC receives thousands of charges of discrimination a year. This article examines the EEOC's priorities in enforcing the nation's anti-discrimination laws and examines some recent decisions and victories in cases brought by the EEOC.

Strategic Enforcement Plan

On December 17, 2012, the EEOC approved its Strategic Enforcement Plan (SEP) for Fiscal Years 2013-2016. The SEP responded to direction from the Commission's Strategic Plan for Fiscal Years 2012-2016. The Commission established its SEP to focus its programs to reduce and deter discrimination in the workplace.

The Commission is now focused on the following enforcement priorities:

- Eliminating barriers in recruitment and hiring
- Protecting immigrant, migrant and other vulnerable workers
- Addressing emerging and developing issues
- Enforcing equal pay laws
- Preserving access to the legal system
- Preventing harassment through systemic enforcement and targeted outreach

These priorities are explained below, with examples of enforcement actions supporting each priority. Practical tips accompany each priority to guide the practitioner in advocating on behalf of individual claimants.

Priorities

• Eliminating barriers in recruitment and hiring

The EEOC has committed to eliminating barriers in recruiting and hiring. The EEOC is focusing on exclusionary policies and practices; restrictive application processes; restrictive screening tools; and steering protected groups into specific job types. Particularly, it is targeting class-based policies and practices.

Here, one of the EEOC's primary efforts has been to limit the discriminatory effect of policies for performing criminal background checks on employees. The Commission filed suit against BMW and Dollar General, among others, on grounds that their criminal background check policies disproportionately screened out African-Americans. The Commission issued guidance on April 25, 2012, for these policies, "Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*"

The EEOC has also filed suits in other areas where recruiting and hiring barriers create a disparate impact, including against Kaplan Higher Education Corp for its use of credit checks. This case resulted in a decision against the EEOC in the Sixth Circuit Court of Appeals.

The employee bar should examine whether outdated employment applications, forms, or policies may disparately impact protected groups. When an applicant is passed over because of a background check, the policy at issue should be carefully scrutinized against the guidance provided by the Commis-sion. Postings and descriptions should be reviewed to determine that minimum qualifications are not stand-ins for discrimination. And use of the same practices during interviews may also support a discrimination claim.

• Protecting immigrant, migrant and other vulnerable workers

Vulnerable worker populations include immigrants and migrants. But there are other populations that are often unaware of their rights, or reluctant to exercise those rights. The main issues affecting these populations include disparate pay, job segregation, harassment, and even trafficking.

The Commission brought a particularly effective enforcement action in this area against Hill Country Farms. There, the court granted summary judgment in favor of the Commission on wage discrimination claims totaling $1.3 million. Subsequently, a federal jury in the Western District of Iowa returned a verdict for 32 disabled victims of discrimination for $7.5 million each. This comprised $2 million for punitive damages and $5.5 million in compensatory damages. All told, the jury assessed $240 million in damages, the highest verdict in the history of the EEOC. This verdict was ultimately reduced, pursuant to applicable statutory caps, to $1.6 million. The case involved a group of 32 men with intellectual disabilities who had been subjected by their employer to abuse and discrimination. The company had verbally harassed the men (calling them "retarded," "dumb ass," and "stupid") and physically abused them (with hand cuffing, hitting, and kicking),

and put incredible restrictions on their freedom of movement while exposing them to derelict living conditions.

In a national-origin discrimination case, the Commission obtained a consent decree against Mesa Systems for subjecting Hispanic and Asian/Pacific Islander warehouse workers to a restrictive language policy and racist slurs and name-calling. The consent decree provided $450,000 to 18 employees, rescinded the English-only policy, changed the company's harassment policy, and required the company to send apology letters to the claimants.

The employment bar should pay special attention when a client is a member of a disadvantaged group. The EEOC seeks to protect these vulnerable groups in egregious cases like those above, but also in instances where facially neutral policies disparately impact these groups.

•Addressing emerging and developing issues

Emerging and developing issues are dynamic by definition, and will change over the length of the SEP. The factors driving these dynamic issues include demography, legislation, judicial trends, and other significant events. Presently, the EEOC has focused its efforts on ADA issues, accommodating pregnancy-related limitations, and coverage of LGBT individuals under Title VII.

For this priority, there are many recent examples of the EEOC's involvement. For instance, it acted against Interstate Distributor Company, a trucking company that had an unlawful maximum leave policy and a 100 percent-restriction-free return-to-work policy. These policies had the effect of denying reasonable accommodations to disabled employees. A consent decree resulted in $4.9 million being distributed to 427 claimants.

In an important decision by the Fifth Circuit Court of Appeals, in *EEOC v. Houston Funding,* 717 F.3d 425, the court held that an employee had a cognizable discrimination claim under Title VII when she was lactating or expressing milk. The court reasoned that lactation constituted a related medical condition of pregnancy for purposes of the Pregnancy Discrimination Act (PDA). The court noted that "[a]n adverse employment action motivated by these factors clearly imposes upon women a burden that male employees need not – indeed, could not – suffer." In the realm of LGBT individuals, the Commission issued a decision in *Macy v. Department of Justice* on April 20, 2012. The EEOC held that discrimination claims based on transgender status are cognizable under Title VII's sex discrimination prohibition, meaning they can be processed under the EEOC's federal sector EEO complaints process.

The employment bar should pay attention when there is a strong case but no offer to mediate. This can be a sign that the EEOC is interested in enforcing your charge. A note of warning should be issued here: not every case of LGBT discrimination has been interpreted as sex discrimination. The practitioner is advised to research the state of the developing law in this area.

• Enforcing equal pay laws

The EEOC targets companies and their compensation systems and practices that discriminate on the basis of gender. The Commission sees itself as well-positioned to address this systemic and nationwide issue.

Two recent examples of enforcement in this area are cases against the Texas Department of Agriculture and Market Burgers (d/b/a Checkers). In the case against the Texas Department of Agriculture, the EEOC settled for three female program specialists for $175,000 who were paid less than comparable male program specialists. The EEOC alleges that Checkers pays its female employees a lower hourly wage; and regularly schedules them for fewer work hours than their male colleagues.

Practitioners representing employees should be aware that Equal Pay Act cases may offer employers a multitude of available defenses; and should also be aware that there wage claims often overlap with Title VII sex discrimination. The employee bar should be on the alert when compensation systems are not based on legitimate nondiscriminatory criteria.

• Preserving access to the legal system

The EEOC is concerned with employer practices that discourage or prohibit employees from exercising their rights through legitimate legal systems. Additionally, it is concerned when similar practices are used to impede the EEOC's investigative and enforcement efforts. Specifically, these employer practices include retaliatory actions, overly broad waivers, settlement provisions prohibiting the filing of EEOC charges, and failing to retain records required by EEOC regulations.

The Commission seeks, in many cases, to obtain a preliminary injunction prohibiting retaliation. It did so in *EEOC v. Evans Fruit*, (E.D. Wash 2012) and *EEOC v. Pitre Buick*, (D.N.M. 2012). It is also challenging mandatory arbitration agreements. The Commission is filing Amicus Briefs in appropriate cases. (See, e.g., *Jock v. Sterling*, 646 F.3d 113 (2d Cir. 2011) (waiver of class arbitration); *Sutherland v. Ernst & Young*, 2013 WL 4033844, (2d Cir. 2012) (class-action waiver); *D.R. Horton, Inc. & Cuna*, No. 12-CA-25764 (NLRB filed July 27, 2011) (mandatory arbitration agreement barring collective or class claims).

Practitioners should be on the alert when the employer actively discourages the exercise of employee rights, especially as those rights relate to the EEOC's process. Similarly, where employment or separation agreements foreclose filing EEOC charges or mandate arbitration, the practitioner should seek to negotiate around these restrictions or have them found unenforceable. The law for arbitration agreements at present is in flux and should be reviewed regularly.

• Preventing harassment through systemic enforcement and targeted outreach

The Commission's goal is to combat harassment affecting all protected classes, including sex, race, ethnicity, religion, age, and disability. It is committed to enforcing high profile cases where there has been egregious harassment. The Commission leverages these cases as outreach

to educate employers and employees and deter future violations.

One great example is *EEOC v. YRC, Inc. Yellow Transp.*, in which racial harassment claims were settled for $11 million.

Many employers only focus on preventing sexual harassment, but harassment is illegal based on any protected characteristic. But there is no such thing as a "general" harassment claim. For an actionable claim, the employee must tie the harassment back to his or her protected class. In California, there are state-law harassment training requirements that can be relied on to show that managers were aware that their conduct was illegal.

Conclusion

The Commission is serious about its enforcement efforts. It has committed them to writing and has implemented them in practice. Indeed, in fiscal year 2013, the EEOC obtained a record $372.1 million in monetary relief for victims of private-sector workplace discrimination. Practitioners are well-advised to be aware of the Commission's enforcement priorities. The EEOC's enforcement actions result in excellent case law for employees to use to support creative and progressive legal arguments.


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