SMITH ANDERSON

EEO UPDATE

Zebulon D. Anderson
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EXPECT EXCELLENCE®

EEOC DEVELOPMENTS

Administrative Statistics

- Volume
  - FY 2022 = 81,055 charges
  - 11% ↑ and largest volume since FY 2017
  - Substantial decrease in religion discrimination claims
    - Most likely the result of fewer vaccine-related claims
  - Over last 10 years, retaliation and disability claims have increased the most
  - Retaliation has remained most common claim for over a decade – now 57% of all charges include this claim
  - 188 Charges involved the new Pregnant Workers Fairness Act
  - Cause finding in only 2.3% - essentially unchanged
  - Employees recovered $440M – by far the most ever

Administrative Statistics (cont.)

- Location
  - FY 2023: NC – remains about 5% of all charges nationwide
  - 8 States (Texas, Florida, California, Georgia, Illinois, Pennsylvania, New York, and North Carolina) account for over 50% of all charges nationwide

Litigation Statistics

- In FY 2023 – 143 new merits lawsuits filed by EEOC
  - 57% increase from FY 2022
  - Most since 2019
  - About 40% of the lawsuits sought relief for multiple people
  - 69% of the lawsuits involved termination claims; 39% involved harassment claims; and 25% involved disability accommodation claims
  - Much less EEOC litigation than 10-15 years ago
  - When EEOC pursues litigation, its results are successful
    - 91% success rate (settlements and jury verdicts)
  - Litigation resolutions: 98 cases (85% ended with settlement) for $22.6M benefitting 971 people – significant decrease in monetary relief and 2nd lowest year ever

NC EEOC Litigation in 2024

EEOC v. Aurora Pro Services, No. 1:22-cv-00490 (M.D.N.C. Aug. 2, 2023):

- Defendant was a residential home service and repair company;
- Defendant's owner held daily prayer meetings where employees were required to stand in a circle as the owner read Bible scripture and Christian devotionals, led employees in Christian prayers, and solicited prayer requests from employees;
- One CP was an Atheist and asked to be excused from the meetings;
- The owner responded that employees were required to participate, and the employee's pay was cut in half;
- The second CP worked as a customer service representative and is Agnostic;
- She stopped attending the meetings as they increased in length;
- Both CPs were terminated after objecting to the meetings; and
- The 3-year consent decree provides for $50,000 to the two employees and equitable relief.

Systemic Statistics

- Systemic cases are EEOC priority
- Systemic cases involve 20+ employees and are focused on matters in which the alleged discrimination is the result of a "pattern or practice" or "policy" that has a broad impact
- FY 2023
  - 370 systemic investigation resolutions = $29M
  - Systemic charges: far more likely to result in "cause" determination
  - New lawsuits: 40% are systemic or multi-party
  - Active lawsuits: 42% systemic or multi-party
  - 100% litigation success rate (settlement and verdict) = $11M for 806 people
  - EEOC litigation is *heavily* focused on systemic and multi-party cases

Systemic Examples in 2024

EEOC v. The Whiting-Turner Contracting Company, No. 3:21-cv-00753 (M.D. Tenn. May 3, 2023):

- At a construction site, a White crew leader referred to Black employees as "boy," "m___ f___," and "you";
- Porta potties and buildings were riddled with racially offensive graffiti, such as the n-word and KKK references;
- Black employees were assigned the most physically difficult work;
- Black employees reported the harassment, but the employer did not investigate;
- Instead, a White assistant superintendent told one of the Black employees to "let it go" and that the crew leader was "old-fashioned;"
- The charging parties complained about the racially offensive conduct multiple times and were discharged the same day they complained to a manager in a team meeting; and
- The 2-year consent decree provides for $1.2 million to 31 claimants, along with equitable relief.

Systemic Examples in 2024 (cont.)

EEOC v. AMTCR, Inc., AMTCR Nevada, Inc., AMTCR California, LLC, No. 2:21-cv-01808 (D. Nev. Jan 5, 2023):

- Defendant owned and operated 21 McDonald's franchises;
- CP, a teen, was subjected to sexual comments and advances and unwanted touching;
- After CP and his mother complained to management, no corrective action was taken;
- Instead, a manager said CP should take the conduct as a compliment;
- Other male and female employees, some teens, were subjected to groping, sexually explicit comments, and sexual requests from coworkers and managers;
- One male general manager conditioned hire on the acquiescence of male applicants to dates and sexual activity; and
- The 3-year consent decree provides for $1,997,500 to 41 individuals, along with equitable relief.

Systemic Examples in 2024 (cont.)

EEOC v. R&L Carriers, Inc., and R&L Carriers Shared Services, LLC No. 1:17-cv-00515 (S.D. Ohio April 24, 2023):

- CP was a female dockworker who brought claims against a national freight trucking carrier;
- Data showing a statistically significant underrepresentation of female dockworkers/loaders;
- Statements attributable to the employer indicated the employer believed women should not be employed as loaders;
- Comparisons of contemporaneous male and female applicants showed that men were hired for loader positions over more qualified women; and
- The 3-year consent decree provides for $1.25 million to about 200 women who unsuccessfully applied for loader positions between 2010 and 2017 (about 200 individuals) and enjoins failing to hire women as loaders because of their sex.

EEOC Composition

- General Counsel
  - Karla Gillbride – D – Confirmed October 2023 and term ends October 2027
- Five Commissioners
  - Kalpana Katagul – D – Confirmed August 2023 and term ends July 2027
  - Keith Sonderling – R - Confirmed September 2020 and term ended July 2024
    - This seat now is vacant and will be filled by next president
  - Andrea Lucas – R – Confirmed September 2020 and term ends July 2025
  - Charlotte Burrows (Chair) – D - Confirmed August 2019 and term ends July 2028
  - Jocelyn Samuels (Vice-chair) – D – Confirmed September 2020 and term ends July 2026
- What it Means
  - Effective August 2023, control returned to Democrats
  - With Democrat GC in place, we anticipated, and saw, more robust litigation efforts by EEOC
  - Democrat objectives had been stalled, but we anticipate more robust admin activity

Strategic Enforcement Plan: FY 2024 - 28

1. Eliminating barriers in recruitment and hiring
   - Improper use of AI
   - Continued underrepresentation of women and minorities in industries and sectors (such as construction, finance and STEM) is a concern
2. Protecting vulnerable workers
3. Selected emerging and developing issues
   - Qualification standards and inflexible policies or practices that discriminate against individuals with disabilities
   - Protecting workers affected by pregnancy, childbirth or related medical conditions
   - Addressing discrimination influenced by or arising as backlash in response to local, national or global events
   - Discrimination associated with the long-term effects of the COVID-19 pandemic
   - Technology-related employment discrimination

Strategic Enforcement Plan: FY 2024 - 28 (cont.)

4. Advancing Equal Pay for all workers
5. Preserving access to the legal system
   - EEOC will challenge policies and practices that limit substantive rights or discourage or prohibit individuals from exercising their rights
6. Preventing and remedying systemic harassment
   - Since 2018, over 34% of all charges include allegations of harassment

EEOC Priorities for 2025

- In connection with its budget request for 2025, EEOC identified its six target priorities

1. Racial Justice and Systemic Discrimination
   - Systemic Race Discrimination – over 33% of all charges in last 5 years allege race discrimination
2. Pay Equity
   - Women working FT earn 82 cents to a dollar when compared to White men
3. Promote DEI&A
   - Mostly focused on the federal sector

EEOC Priorities for 2025 (cont.)

4. Artificial Intelligence and Algorithmic Fairness
   - AI has potential to discriminate
5. Retaliation
   - Volume of charges containing allegations of retaliation have increased every year for 20 years
   - EEOC will collaborate with DOL and NLRB
6. Strengthening the EEOC
   - By 2020, EEOC staffing was at lowest level in 4 decades
   - Workload was highest ever with population increase and new laws

EEOC Activities in 2025

- Enforcement Guidance on Harassment in the Workplace
  - April 29, 2024
  - https://www.eeoc.gov/laws/guidance/enforcement-guidance-harassment-workplace
  - Important description of EEOC policy – already covered

EEOC Activities in 2025 (cont.)

- Promising Practices for Preventing Harassment in the Construction Industry
  - June 18, 2024
  - https://www.eeoc.gov/promising-practices-preventing-harassment-construction-industry
  - For the last few years, EEOC has made clear that it is focused on the Construction Industry
  - "The EEOC intends to address systemic harassment in construction using a variety of tools, such as encouraging commitment and coordination from every entity with a presence on a construction worksite, including all employers (contractors and subcontractors), unions, apprenticeship programs, and staffing agencies."
  - "*The contents of this document do not have the force and effect of law, do not create any new obligations or duties under federal law, and are not meant to bind the public in any way.* "
  - "Five core principles that have generally proven effective in preventing and addressing harassment: (i) committed and engaged leadership; (ii) consistent and demonstrated accountability; (iii) strong and comprehensive harassment policies; (iv) trusted and accessible complaint procedures; and (v) regular, interactive training tailored to the audience and the organization."

EEOC Activities in 2025 (cont.)

- Final Regulation on Pregnant Workers Fairness Act
  - Issued April 15, 2024
  - Effective starting June 18, 2024
  - https://www.ecfr.gov/current/title-29/subtitle-B/chapter-XIV/part-1636
    - Full text of regulation
    - Includes as Appendix A the EEOC's Interpretive Guidance
    - Super long with many practical examples

EEOC Activities in 2025 (cont.)

- PWFA requires accommodations for pregnancy, childbirth, or related medical conditions
- Regulations make clear this is VERY broadly interpreted by EEOC:

"Pregnancy" and "childbirth" refer to the pregnancy or childbirth of the specific employee in question and include, but are not limited to, current pregnancy; past pregnancy; potential or intended pregnancy (which can include infertility, fertility treatment, and the use of contraception); labor; and childbirth (including vaginal and cesarean delivery). "Related medical conditions" are medical conditions relating to the pregnancy or childbirth of the specific employee in question. The following are examples of conditions that are, or may be, "related medical conditions": termination of pregnancy, including via miscarriage, stillbirth, or abortion; ectopic pregnancy; preterm labor; pelvic prolapse; nerve injuries; cesarean or perineal wound infection; maternal cardiometabolic disease; gestational diabetes; preeclampsia; HELLP (hemolysis, elevated liver enzymes and low platelets) syndrome; hyperemesis gravidarum; anemia; endometriosis; sciatica; lumbar lordosis; carpal tunnel syndrome; chronic migraines; dehydration; hemorrhoids; nausea or vomiting; edema of the legs, ankles, feet, or fingers; high blood pressure; infection; antenatal (during pregnancy) anxiety, depression, or psychosis; postpartum depression, anxiety, or psychosis; frequent urination; incontinence; loss of balance; vision changes; varicose veins; changes in hormone levels; vaginal bleeding; menstruation; and lactation and conditions related to lactation, such as low milk supply, engorgement, plugged ducts, mastitis, or fungal infections. This list is non-exhaustive.

EEOC Activities in 2025 (cont.)

- As with ADA, "qualified" employees entitle to accommodation include those who can perform essential functions, but unlike ADA they include some who cannot:
  - "One month into pregnancy, Akira, an employee in a paint manufacturing plant, is told by her health care provider that she should avoid certain chemicals for the remainder of the pregnancy. One of several essential functions of the job involves regular exposure to these chemicals. Akira talks to her supervisor, explains her limitation, and asks that she be allowed to continue to perform her other tasks that do not require exposure to the chemicals."
  - One of the essential functions of Elena's position as a park ranger involves patrolling the park. Park rangers also answer questions for guests, sell merchandise, and explain artifacts and maps. Due to her postpartum depression, Elena is experiencing an inability to sleep, severe anxiety, and fatigue. Her anti-depressant medication also is causing dizziness and blurred vision, which make it difficult to drive. Elena seeks the temporary suspension of the essential function of patrolling the park for 12 weeks.
  - EEOC – Akira and Elena are qualified because her inability is temporary, they can perform the essential function in near future (less than 40 weeks), and they can do other things until then

EEOC Activities in 2025 (cont.)

- Other examples from EEOC:
  - "Tallah, a newly hired cashier at a small bookstore, has a miscarriage in the third month of pregnancy and asks a supervisor for 10 days of leave to recover. As a new employee, Tallah has only earned 2 days of paid leave, she is not covered by the FMLA, and the employer does not have a company policy regarding the provision of unpaid leave. Nevertheless, Tallah is covered by the PWFA."
  - "Sofia, a custodian, is pregnant and will need 6 to 8 weeks of leave to recover from childbirth. Sofia is nervous about asking for leave, so Sofia asks her mother, who knows the owner, to do it for her. The employer has a sick leave policy, but no policy for longer periods of leave. Sofia is not eligible for FMLA leave because her employer is not covered by the FMLA."
    - EEOC: Unpaid leave must be granted as a reasonable accommodation

SCOTUS

SCOTUS

- Court continues to focus on employment-related issues with nearly 25% of its docket this term touching on employment law, though not all those decisions addressed EEO issues
- In the employment context, courts for years have relied heavily on federal administrative agencies, such as the EEOC, to define the scope of statutory protection; but such reliance now has been limited by the Court

SCOTUS (Muldrow)

- *Muldrow v. City of St. Louis, 601 US 346 (2024)*
  - Ms. Muldrow worked for St. Louis P.D. for nine years in the Intelligence Division (public corruption, human trafficking, gang activity)
  - A new leader assumed command and transferred her to a new position against her wishes
  - She maintained the same rank and pay, but her duties were more administrative and less prestigious, she lost the use of a car, and her schedule was less regular
  - She sued, alleging sex discrimination
  - Summary Judgment for employer based on: (i) precedent that held that transfer was actionable only if it results in a "significant" change in work conditions causing "material employment disadvantage," and (ii) conclusion that that changes in her new job did not reach that level
  - Affirmed by 8th Cir Panel, which agreed she had failed to show that she suffered a "materially significant disadvantage"

SCOTUS (Muldrow cont.)

- SCOTUS accepted the case because courts in at least eight different circuits had articulated different governing standards
- The issue before the Court was whether an employee challenging a transfer must establish some sort of heightened threshold of harm

SCOTUS (Muldrow cont.)

- Justice Kagan issued the opinion of the Court
  - Title VII prohibits discrimination concerning the "terms" and "conditions" of employment
  - "Discriminate against" refers to "differences in treatment that injure" and means "treat worse"
  - So, to be actionable, a transfer must be "disadvantageous" and cause "some harm"
  - But the statute does not require that the employee show that the harm was "significant," "material," or "serious"
  - In response to the employer's argument that this would flood the courts with claims based on minor harms, the Court explained that less harmful acts may be less suggestive of discrimination
  - So, the decision of the 8th Circuit was vacated

SCOTUS (Muldrow cont.)

- Justice Thomas
  - He agreed with the outcome, but . . .
  - He believes that an employee must show a harm that is "more than trifling"
  - And he wasn't sure Muldrow met that standard
- Justice Alito
  - He also agreed with the outcome, but . . .
  - He doesn't think that a change from "substantial" harm to "some" harm is a useful distinction, observing that he has "no idea what that means"

SCOTUS (Muldrow cont.)

- Justice Kavanaugh
  - He also agreed with the outcome, but . . .
  - Any transfer affects the "terms" and "conditions" of employment
  - So, any transfer that is implemented because of sex (or race, etc.) violates Title VII
  - This is a simple straightforward statutory interpretation
  - If an employer told an employee that it was transferring him from Columbus to Cincinnati because he is Black, would that violate Title VII? Of course, and you don't need to ask whether there was "some" harm or "substantial" harm

SCOTUS (Muldrow cont.)

- What is the significance?
  - Taking any employment action because of protected class status is risky, even if there is no monetary harm
  - The decision lowers the bar for employees
  - More claims are likely
  - The Court, other than perhaps Justice Kavanaugh, seems to have drifted away from its developing strict statutory construction approach

SCOTUS (UBS)

- *Murray v UBS Securities*, 601 U.S. 23 (2024)
  - Murray worked as a securities strategist for UBS
  - He received a positive performance review
  - Soon after, two leaders pressured him to skew his reports
  - Murray reported the conduct to his supervisor
  - His supervisor told him that it was "very important" that Murray not alienate those leaders
  - The pressure continued and Murray reported that it was getting worse
  - His supervisor told Murray to do what the internal clients wanted
  - His supervisor then also recommended that Murray be fired
  - His recommendation was approved

SCOTUS (UBS cont.)

- Murray filed a lawsuit, alleging that his termination violated the whistleblower protection provision of Sarbanes-Oxley Act
- The case went to trial and the court instructed the jury that they had to decide whether Murray's protected activity was a contributing factor in the termination decision
- The court did not instruct the jury that Murray had to prove retaliatory intent
- The jury awarded Murray $1M in damages, and the court awarded another $1.769M for fees and costs
- On appeal, the Second Circuit vacated the decision, concluding that the jury should have been instructed that Murray was required to prove that UBS acted with "retaliatory intent"
- SCOTUS accepted the case to resolve a circuit split

SCOTUS (UBS cont.)

- Justice Sotomayor issued the opinion of the Court
  - SOX prohibits discharging or "discriminat[ing]" against an employee "because of" protected whistleblowing activity
  - The employee bears the initial burden of providing that protected activity was a "contributing factor"
  - The employer then bears the burden of showing that it would have taken the same action in the absence of protected activity
  - The term "retaliatory intent" means "animus" (*e.g.*, hostile feelings toward the protected act)
  - The term "discriminate" does not include an "animus" concept so it does not require "retaliatory intent"
  - So, an employee need not prove retaliatory intent, and the Second Circuit decision was reversed

SCOTUS (UBS cont.)

- Justices Alito and Barrett
  - They agree that an employee need not prove anti-whistleblowing "animus," but . . .
  - Based on the plain language of the text, it is clear that there is no "animus" requirement
  - That said, the statute does say that an employee must prove that the adverse action was "because of" the protected activity
  - That means that the statute does require that an employee prove an "intent to discriminate"

SCOTUS (UBS cont.)

- What does that mean?
  - As Alito/Barrett recognize, the Court starts with an assumption that the term "retaliatory intent" means "animus"
  - Based on that assumption, everyone agrees that an employee need not prove that the employer hates whistleblowers
  - But if the statute prohibits adverse action taken "because of" protected activity, aren't Alito/Barrett right when they state that those words require an intent to discriminate?
  - How could an employer fire someone *because* they blew the whistle without retaliatory intent?

SCOTUS (UBS cont.)

- This is simply the latest case in a long lines of cases that attempt to define what "because" means, and none of them make much sense
- Bottom line:
  - In the SOX retaliation context, it is now easier for employees to prevail
  - While SOX retaliation claims arise in the securities law context, the method of proof applies in other settings such as under air carrier and other transportation safety statutes
  - It is simply another example of the Court making retaliation claims easier to pursue, which has directly resulted in the dramatic expansion of retaliation litigation, which is more difficult to defend

SCOTUS (Loper)

- *Loper Bright Enters. v Raimondo*, 144 S. Ct. 2244 (2024)
  - Not an employment case, so won't address the facts
  - But the case will have a significant impact on the development of employment law

SCOTUS (Loper cont.)

- 6-3 decision, with CJ Roberts writing the opinion of the Court
  - In 1984, SCOTUS decided *Chevron*, explaining when a court should defer to an agency interpretation of a statute
    - Step 1: Did Congress directly address the statutory issue?
    - Step 2: If not (*e.g.*, the statute is silent or ambiguous), then a court should defer to an agency interpretation of the statute that is based on a permissible construction of the statute
  - *Chevron* is overruled

SCOTUS (Loper cont.)

- In *Marbury v Madison* (1803!), the Court said it is "the duty of the judicial department to say what the law is"
- In 1946, Congress enacted the APA, which states that when reviewing agency action, courts shall interpret statutory provisions
- When *Chevron* was decided in 1984, the Court improperly ignored the requirements of the APA
- The *Chevron* presumption that Congress implicitly delegated to agencies the power to interpret ambiguous statutory provisions lacks any foundation
- And, while agencies may have expertise in their substantive areas, they have no special expertise in statutory interpretation – that is an area in which courts have expertise
- Perhaps the best argument for keeping *Chevron* is *stare decisis* (*e.g.*, don't change legal precedent) – but *Chevron* (I paraphrase) is really really wrong.

SCOTUS (Loper cont.)

- What does it mean?
  - The legal analysis of the Court is compelling
  - But the Court's current willingness to jettison decades-old precedent is jarring and unsettling
  - As a result of *Loper*, there will be more legal challenges to agency interpretations of the law
  - So, for example, there will be less deference to the EEOC

SCOTUS (Loper cont.)

- Is that a bad thing?
  - It is mostly a shift in power from the administrative (Executive) branch to the Judicial branch
  - Whether that is bad probably depends on your relative trust in those branches of government, and there is a lot of distrust for both these days
  - Personally, I think we have seen a lot of jarring administrative overreach (*e.g.*, the FTC proposed non-compete ban), and when agency interpretations change dramatically from administration to administration it isn't very helpful for business
  - And generally, I tend to believe that federal judges are smart and thoughtful (though we surely see partisanship there as well)
  - For employers, I tend to think it is a positive development that provides additional grounds for challenging agency overreach

FOURTH CIRCUIT
(TIME PERMITTING)

4th Circuit (Billard)

- *Billard v Charlotte Catholic High School* (4th Cir. 2024)
  - CCHS is an "educational community centered in the Roman Catholic faith"
  - CCHS evaluates teachers on "their ability to teach their subjects in a manner "agreeable with Catholic thought"
  - CCHS prohibits teachers from "advocating for conduct contrary to the moral tenets of the Catholic faith, including the Catholic Church's rejection of same-sex marriage"
  - Billard was an English and Drama teacher who did not provide religious instruction and who worked for CCHS
  - Billard is gay, and when CCHS found out he planned to marry a same-sex partner, it fired him

4th Circuit (Billard cont.)

- Billard sued, alleging sex discrimination under Title VII
- CCHS asserted several defenses, including denying that Billard was fired because of his sex and relying on various affirmative defenses and alleged Constitutional rights related to religion
- Notably, it "waived" any First Amendment "ministerial" exemption, presumably because it believed the exemption did not apply
- The District Court rejected all of CCHS's arguments, but considered the ministerial exemption, despite the waiver, concluding it was non-waivable
  - Nonetheless, it found that the ministerial exemption was inapplicable to Billard
- CCHS appealed

4th Circuit (Billard cont.)

- Majority Opinion by Judge Harris
  - The ministerial exemption is outcome determinative and the court could consider it despite its "waiver"
  - SCOTUS precedent identifies four factors to consider—(i) did the employee have the title of minister, (ii) did the employee hold himself out as minister, (iii) did the employee receive religious training, and (iv) did the employee's job duties have a religious component
  - Here, the fourth factor was key
  - Billard was a lay teacher with no religious instruction duties, but his duties did require conforming his instruction with Catholic thought
  - Accordingly, the ministerial exception to Title VII applied, and the decision of the District Court was reversed

4th Circuit (Billard cont.)

- How is this important?
  - In the Fourth Circuit, it is hard to imagine when any lay teacher at a religious institution would not be subject to the ministerial exception
  - So, those teachers in those positions are not protected by Title VII from discrimination
  - More broadly, SCOTUS has for years been strengthening religious rights, including in the employment context, and this case is a natural progression
  - So, think carefully when any employment action impacts religion in any way

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EEO UPDATE

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