

EEO UPDATE



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EEOC DEVELOPMENTS

Administrative Statistics

- Volume

- FY 2022 = 73,485 charges
- 19% ↑ and first ↑ in 6 years
- By far the most religion discrimination claims in a year
 - Went from 2,111 and 3.4% of all charges to 13,814 and 18.8%
 - Many were vaccine-related and SCOTUS has championed religion claims
- Over last 10 years, retaliation and disability claims have increased the most
- Retaliation has remained most common claim for over a decade - now 51.6% of all charges
- Cause finding in only 2.2% - tied with 1996 for lowest ever

Administrative Statistics (cont.)

- Location

- Charge volume ↑ - most since 2018
- FY 2022: NC - 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 2022 - 91 new merits lawsuits filed by EEOC
 - 27% decrease from FY 2021
 - Fewest since 2016 and the 2nd fewest ever
 - About 50% of the lawsuits included SEP claims
 - Much less EEOC litigation than 10-15 years ago
 - When EEOC pursues litigation, its results are successful
 - 94.8% success rate (settlements and jury verdicts)
 - Litigation resolutions: 96 for \$39.7m benefiting 1,461 employees - slight ↑ in monetary 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 2022
 - 431 systemic investigations
 - 347 systemic investigation resolutions = \$29.8m
 - Systemic charges: far more likely to result in “cause” determination - 47% vs. 2%
 - New lawsuits: 14% were systemic and 27% were multi-CP
 - Active lawsuits: 18% are systemic and 25% are multi-CP
 - EEOC litigation is *heavily* focused on systemic and multi-CP cases

EEOC Examples of Practices and Policies that may involve Systemic Discrimination

- **Hiring/Promotion/Assignment/Referral**
 - Criminal/credit background checks
 - Recruitment practices such as favoring or limited to word-of mouth
 - Tap-on-the-shoulder promotion policies
 - Steering of applicants to certain jobs or assignments based on race or gender
 - Historically segregated occupations or industries
 - Job ads showing preference (“young,” “energetic,” “recent graduate,” “men only,” “women only”)
 - Customer preference
 - Big data-using algorithm to sort through applications
 - Personality or customer service tests; physical ability or capacity tests; cognitive tests
 - No rehire of retired workers or hiring of currently employed persons only

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
 - Layoffs, reorganizations and RIFs - disparate treatment and disparate impact based on a protected characteristic
 - Waivers that may prevent employees from filing complaints or assisting the EEOC
 - Waivers that do not comply with the Older Workers Benefit Protection Act

Systemic Examples from EEOC (cont.)

- ADA/GINA
 - “No fault” attendance policies
 - Non-accommodation for medical leave
 - Light duty policies for only work-related injuries
 - 100% healed return to work requirements
 - Pre-employment medical inquiries

EEOC Composition

- General Counsel
 - Karla Gillbride - D - Confirmed October 2023 and term ends October 2027
 - seat was vacant for 2 years
 - success challenging arbitration and advancing disability rights
- Five Commissioners
 - Kalpana Katagul - D - Confirmed August 2023 and term ends July 2027
 - 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, but renominated
 - Jocelyn Samuels (Vice-chair) - D - Confirmed September 2020 and term ends July 2026
- What it Means
 - Effective August 2023, control returned to Democrats, but gridlock could resume if Burrows confirmation is delayed
 - With Democrat GC now in place, we anticipate more robust litigation efforts by EEOC
 - Democrat objectives had been stalled, but we anticipate more robust admin activity

Strategic Enforcement Plan: FY 2024-28

- Long awaited update to the Plan that has been in place since 2013
- The SEP has proven to be an accurate guidepost for EEOC enforcement priorities
 - EEOC will “focus on [these] priorities to maximize the EEOC’s impact”
- New SEP adopted with input from stakeholders
- New SEP re-emphasizes EEOC focus on systemic issues

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

- EEOC identified six subject matter priorities after focusing on these factors:
 - Issues that will have broad impact
 - Issues affecting workers who are unaware of their rights
 - Issues arising in developing areas of the law
 - Issues involving policies or practices that impede enforcement
 - Issues best addressed by government action

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

1. Eliminating barriers in recruitment and hiring
 - The “use of technology, including artificial intelligence and machine learning, to . . . make or assist in hiring decisions where such systems intentionally exclude or adversely impact protected groups”
 - “job advertisements that exclude or discourage certain protected groups from applying”
 - Steering people into specific jobs based on protected characteristics
 - Limiting access to training based on protected characteristics
 - Reliance on application systems that are difficult for people with disabilities to access
 - Reliance on screening tools, including those influenced by AI, that have disparate impact
 - Continued underrepresentation of women and minorities in industries and sectors (such as construction, finance and STEM) is a concern

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

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2. Protecting vulnerable workers

- immigrant and migrant workers and workers on temporary visas
- people with developmental or intellectual disabilities
- workers with mental health related disabilities
- individuals with arrest or conviction records
- LGBTQI+ individuals
- temporary workers
- older workers
- individuals employed in low wage jobs, including teenage workers employed in such jobs
- survivors of gender-based violence
- Native Americans/Alaska Natives
- persons with limited literacy or English proficiency


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

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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 under the Pregnancy Discrimination Act (PDA) and the Pregnant Workers Fairness Act (PWFA), as well as pregnancy-related disabilities under the Americans with Disabilities Act (ADA)
- Addressing discrimination influenced by or arising as backlash in response to local, national or global events, including discriminatory bias arising because of recurring historical prejudices (e.g., discrimination, bias and hate directed against religious minorities - including antisemitism and Islamophobia)
- Discrimination associated with the long-term effects of the COVID-19 pandemic, including Long COVID
- Technology-related employment discrimination


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

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4. Advancing Equal Pay for all workers
 - Pay discrimination on the basis of any protected characteristic
 - Pay discrimination at the intersection of protected characteristics (e.g., groups comprised of people with more than one protected characteristic)
 - Pay secrecy policies
 - Discouraging or prohibiting workers from asking about pay or sharing their pay with coworkers
 - Reliance on past salary history or applicant's salary expectations to set pay


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

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5. Preserving access to the legal system
 - EEOC will challenge policies and practices that limit substantive rights, discourage or prohibit individuals from exercising their rights under employment discrimination statutes or impede the EEOC's investigative or enforcement efforts
 - Specifically, the EEOC will focus on:
 - overly broad waivers, releases, non-disclosure agreements or non-disparagement agreements
 - unlawful, unenforceable or otherwise improper mandatory arbitration provisions
 - employers' failure to keep applicant and employee data and records as required by statute or EEOC regulations
 - retaliatory practices that could dissuade employees from exercising their rights under employment discrimination laws - this includes retaliatory practices that impact employees who have not engaged in protected activity

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

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6. Preventing and remedying systemic harassment
 - Since 2018, over 34% of all charges include allegations of harassment
 - EEOC will focus on combatting systemic harassment in all forms and on all bases—including sexual harassment and harassment based on race, disability, age, national origin, religion, color, sex (including pregnancy, childbirth or related medical conditions, gender identity and sexual orientation) or a combination or intersection of any of these
 - Notably, “a claim by an individual or small group may fall within this priority if it is related to a widespread pattern or practice of harassment”

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

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- EEOC also identified procedural tools to advance these six areas
 - Years ago the EEOC endeavored to investigate *all* charges
 - Faced with limited resources, it shifted to a focus on identifying and investigating “priority” charges
 - “Priority” charges will include those that raise SEP subjects and that the resolution of which will have broad impact
 - At the administrative stage, early litigation stage, and appellate stage, EEOC will “prioritize meritorious cases that raise SEP priorities or are otherwise likely to have strategic impact”


EEOC Priorities for 2024

- In connection with its budget request for 2024, 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
 - Promote Diversity, Equity, Inclusion & Accessibility
 2. Pay Equity
 - Women working FT earn 82 cents to a dollar when compared to white men
 - Women of color earn less


EEOC Priorities for 2024 (cont.)

3. Promote DEI&A
 - Mostly focused on the federal sector
4. Artificial Intelligence and Algorithmic Fairness
 - Per EEOC, AI clearly has potential to discriminate
 - EEOC has plans to provide further guidance and education to stakeholders

EEOC Priorities for 2024 (cont.)

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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
 - Staffing has increased the last two years, but more is needed

EEOC Activities in 2023

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- Over the last two years, EEOC funding has increased
 - At the same time, Congressional action on EEOC Commissioner and GC nominations was delayed until recently
 - This adversely impacted the EEOC's ability to implement priorities and objectives identified by the Biden administration
 - Still, we began to see more activity in 2023
 - And the stage now is set for more robust EEOC activity, both at the administrative level and on the litigation front in 2024

EEOC Activities in 2023 (cont.)

- Pregnant Workers Fairness Act
 - Became effective June 27, 2023, and EEOC began accepting charges for alleged violations
 - That law imposes pregnancy accommodation obligations on employers
 - On October 11, 2023, EEOC issued a Notice of Proposed Rulemaking and comment period has expired
 - Proposed rule can be found here: <https://www.federalregister.gov/documents/2023/08/11/2023-17041/regulations-to-implement-the-pregnant-workers-fairness-act>
 - Notably, it includes multiple examples of accommodations that EEOC believes are required
 - Anticipate final rule will be issued by year-end

EEOC Activities in 2023 (cont.)

- COVID-19 Technical Assistance
 - On May 15, 2023, EEOC issued updates to its COVID-19 Technical Assistance
 - <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#>
 - One significant issue that was addressed relates to accommodations for Long COVID
 - Another significant issue related to harassment, with EEOC suggesting that employers may offer to its employees examples of COVID-harassment
 - “For example, one illustration might show a supervisor or coworker violating the ADA/Rehabilitation Act by harassing an employee with a disability-related need to wear a mask or take other COVID-19 precautions. Another illustration might show a supervisor or coworker violating Title VII by harassing an employee who is receiving a religious accommodation to forgo mandatory vaccination.”

EEOC Activities in 2023 (cont.)

- Assessing Adverse Impact in AI Influenced Selection Tools Technical Assistance
 - On May 18, 2023, EEOC issued Technical Assistance concerning adverse impact caused by use of AI in selection procedures
 - <https://www.eeoc.gov/laws/guidance/select-issues-assessing-adverse-impact-software-algorithms-and-artificial>
 - Narrow focus (“adverse impact” + “selection”) with helpful Q&A
 - EEOC lists various tools that may be implicated:
 - resume scanners that prioritize applications using certain keywords
 - employee monitoring software that rates employees on the basis of their keystrokes
 - “chatbots” that ask job candidates about their qualifications and reject those who do not meet pre-defined requirements
 - video interviewing software that evaluates candidates based on their facial expressions and speech patterns
 - testing software that provides “job fit” scores for applicants or employees regarding their personalities, aptitudes, cognitive skills or perceived “cultural fit” based on their performance on a test

EEOC Activities in 2023 (cont.)

- Resource Guide for Disability Discrimination Under Rehabilitation Act
 - On September 26, 2023, EEOC and DOL issued a resource guide concerning disability discrimination under the Rehabilitation Act
 - <https://www.eeoc.gov/employment-protections-under-rehabilitation-act-1973-50-years-protecting-americans-disabilities>
 - Not much new, but a useful guide for federal contractor covered by the statute

EEOC Activities in 2023 (cont.)

- Advancing Equal Opportunity in the Construction Industry
 - On May 31, 2023, EEOC issued a very detailed report on the advancement of equal opportunity in the construction industry
 - <https://www.eeoc.gov/building-future-advancing-equal-employment-opportunity-construction-industry>
 - Report Summary noted:
 - “discrimination remains a substantial barrier to entry, retention, and advancement of women and people of color in construction”
 - “some of the most egregious incidents of harassment and discrimination investigated by the [EEOC] have arisen in the construction industry”

EEOC Activities in 2023 (cont.)

- Following investigation, EEOC identified these findings:
 - Women and people of color are underrepresented in the construction industry and especially in the higher-paid, higher-skilled trades
 - Discrimination based on sex, race, and national origin persists and contributes to the underrepresentation of women and workers of color in construction
 - Harassment is pervasive on many jobsites and poses a significant barrier to the recruitment and retention of women and workers of color in the industry
 - Racial harassment in construction often takes virulent forms and nooses appear with chilling frequency on jobsites across the country
 - Harassment in construction is a workplace safety issue as well as a civil rights issue
 - Construction workers who experience discrimination, particularly those on temporary assignments or in apprenticeships, often do not know to whom or how to report violations
 - Retaliation is a serious problem in construction and hinders efforts to prevent and remedy unlawful discrimination and harassment in the industry
- EEOC will be focused on these issues administratively and in litigation

EEOC Activities in 2023 (cont.)

- Proposed Enforcement Guidance on Harassment
 - On October 2, 2023, EEOC issued long-awaited Proposed Enforcement Guidance on Harassment, and the comment period closed November 1, 2023
 - <https://www.eeoc.gov/proposed-enforcement-guidance-harassment-workplace>
 - EEOC explains that this Guidance will not have the effect of law or be binding, but “provide[s] clarity to the public regarding existing requirements under the law or Commission policies.”
 - It is a comprehensive and useful analysis of the governing law that addresses the various liability standards and defenses for the different varieties of harassment claims
 - It will replace the prior Guidance issued on this topic
- Some highlights include:

EEOC Activities in 2023 (cont.)

- Sexual orientation harassment
 - Sex-based harassment includes harassment based on sexual orientation and gender identity, including how that identity is expressed. Examples include epithets regarding sexual orientation or gender identity; physical assault; harassment because an individual does not present in a manner that would stereotypically be associated with that person’s gender; intentional and repeated use of a name or pronoun inconsistent with the individual’s gender identity (misgendering); or the denial of access to a bathroom or other sex-segregated facility consistent with the individual’s gender identity

EEOC Activities in 2023 (cont.)

- Harassment directed to others
 - Harassing conduct can affect an employee's work environment even if it is not directed at that employee For instance, the use of gender-based epithets may contribute to a hostile work environment for women even if the epithets are not directed at them.
- Historical workplace culture no defense
 - Although conduct must be evaluated in the context of the specific work environment in which it arose, there is no "crude environment" exception to Title VII if the harassment otherwise meets the standard of severe or pervasive harassing conduct.

EEOC Activities in 2023 (cont.)

- Harassment outside of work through technology
 - Conduct that can affect the terms and conditions of employment, even though it does not occur in a work-related context, includes electronic communications using private phones, computers or social media accounts, if it impacts the workplace. For example, if an Arab American employee is the subject of ethnic epithets that a coworker posts on a personal social media page and either the employee learns about the post directly or other coworkers see the comment and discuss it at work, then the social media posting can contribute to a racially hostile work environment
 - Given the proliferation of digital technology, it is increasingly likely that the non-consensual distribution of real or computer-generated intimate images using social media can contribute to a hostile work environment if it impacts the workplace

EEOC Activities in 2023 (cont.)

- Joint employment harassment in temporary worker context
 - If a worker is jointly employed by two or more employers, then each of the worker's employers may be responsible for taking corrective action to address any alleged harassment about which it has notice. An employer has the same responsibility to prevent and correct harassment of temporary employees as harassment of permanent employees
 - As with any employer, a temporary employment agency is responsible for taking reasonable corrective action within its own control. Corrective action may include, but is not limited to: ensuring that the client is aware of the alleged harassment; insisting that the client conduct an investigation and take appropriate corrective measures on its own; working with the client to jointly conduct an investigation and/or identify appropriate corrective measures; following up and monitoring to ensure that corrective measures have been taken; and providing the worker with the opportunity to take another job assignment at the same pay rate, if such an assignment is available and the worker chooses to do so

EEOC Activities in 2023 (cont.)

- Reasonable care to prevent harassment includes policy, process, and training components
 - For an anti-harassment *policy* to be effective, it should generally have the following features:
 - defines what conduct is prohibited;
 - is widely disseminated;
 - is comprehensible to workers, including those who the employer has reason to believe might have barriers to comprehension, such as employees with limited literacy skills or limited proficiency in English;
 - requires that supervisors report harassment when they are aware of it;
 - offers multiple avenues for reporting harassment, thereby, allowing employees to contact someone other than their harassers;
 - clearly identifies accessible points of contact to whom reports of harassment should be made and includes contact information; and
 - explains the employer's complaint process, including the processes anti-retaliation and confidentiality protections.

EEOC Activities in 2023 (cont.)

- For a complaint *process* to be effective, it should generally have the following features:
 - provides for prompt and effective investigations and corrective action;
 - provides adequate confidentiality protections; and
 - provides adequate anti-retaliation protections
- For *training* to be effective, it should generally have the following features:
 - explains the employer's anti-harassment policy and complaint process including any alternative dispute resolution process, and confidentiality and anti-retaliation protections;
 - describes and provides examples of prohibited harassment, as well as conduct that, if left unchecked, might rise to the level of prohibited harassment;
 - provides information about employees' rights if they experience, observe, become aware of or report conduct that they believe may be prohibited;
 - provides supervisors and managers information about how to prevent, identify, stop, report and correct harassment, such as actions that can be taken to minimize the risk of harassment, and clear instructions for addressing and reporting harassment that they observe, that is reported to them or of which they otherwise become aware of;
 - tailored to the workplace and workforce;
 - provided on a regular basis to all employees; and
 - provided in a clear, easy-to-understand style and format

EEOC Activities in 2023 (cont.)

- o Investigation Guidance
 - An investigation is adequate if it is sufficiently thorough to “arrive at a reasonably fair estimate of truth.” The investigation need not entail a trial-type investigation, but it should be conducted by an impartial party and seek information about the conduct from all parties involved. If there are conflicting versions of relevant events, it may be necessary for the employer to make credibility assessments so that it can determine whether the alleged harassment in fact occurred. Accordingly, whoever conducts the investigation should be well-trained in the skills required for interviewing witnesses and evaluating credibility
 - Upon completing its investigation, the employer should inform the complainant and alleged harasser of its determination and any corrective action that it will be taking, subject to applicable privacy laws

SCOTUS

SCOTUS

- Court continues to focus on employment-related issue with about 15% of its docket this term touching on employment law, though not all those decisions addressed EEO issues
- Court also continues to focus on religious rights and some commentators have noted concern about the Court's very expansive view of Free Exercise and what that means for employment and other laws

SCOTUS (cont.)

- *Students for Fair Admissions v. President and Fellows of Harvard College*
 - As you have heard, this decision almost certainly will have an impact on employer's DE&I initiatives
- *Groff v Dejoy*
 - As you have heard, the Court has re-interpreted Title VII's undue hardship defense in religious accommodation cases
 - Further example of the Court advancing religious exercise rights at the possible expense of non-discriminatory workplace rules

SCOTUS (cont.)

- *303 Creative v Elenis*
 - Lorie Smith, through 303 Creative, wanted to sell wedding website designs to the public, but not designs that promoted same-sex marriage
 - Worried that such an approach would violate CO law, she filed a lawsuit
 - Smith argued that she was willing to offer website services to all people, regardless of sexual orientation, but that requiring her to offer wedding website designs that promoted same-sex marriage would be contrary to her right to express her religious beliefs - framing this as a free speech dispute
 - While recognizing that governments have a compelling interest in eliminating discrimination through public accommodation laws, the Court concluded (6-3) that compelling Smith to speak in a preferred way violated First Amendment rights
 - Accepting the premise that Smith would serve gay customers, as long as she was not compelled to create expressive content that violated her beliefs, the Court concluded that the First Amendment requires tolerance and that forcing Smith to develop expressive websites inconsistent with her beliefs violated Constitutional rights

SCOTUS (cont.)

- The lengthy dissent challenged the decision, arguing that the Court “for the first time in its history, grants a business open to the public a Constitutional right to refuse to serve members of a protected class”
 - The dissent challenges the underlying premise of the decision, suggesting that an assertion that you will sell wedding website services to gay couples as long as the content doesn’t relate to gay marriage is illegitimate
- While not technically an employment-law case, the decision clearly invites the question of when might employment-based anti-discrimination laws be avoided based on a First Amendment right to express religious speech
- What does this mean for employers? Nothing directly, but it further reinforces that when religious rights are implicated in the workplace, employers find themselves in an increasingly complex arena that may warrant seeking legal advice

SCOTUS (cont.)

- *Williams v. Kincaid* (4th Cir)
 - 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”
 - She was assigned to the women’s side of the prison; 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
 - She filed a lawsuit asserting disability discrimination claims
 - The District Court dismissed those claims, concluding that gender dysphoria is not a disability under the statutes, and Williams appealed

SCOTUS (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”
- The majority concluded that “gender dysphoria” is a newly recognized condition not a “gender identity disorder” as identified in the ADA
- It also concluded that the statutory exclusion applied only to gender identity disorders “not resulting from physical impairment” and that Williams’ condition did result from a physical impairment

SCOTUS (cont.)

- Defendant asked SCOTUS to review, and ultimately review was denied
- Justice Alito, joined by Justice Thomas, filed an opinion dissenting, explaining why they thought the Court should decide the case
 - According to Justice Alito, the question of ADA coverage for gender dysphoria was a question of national importance, and the Fourth Circuit had effectively “invalidated a major provision” of the ADA, which would have “far-reaching and controversial effects.”
 - He further explained that he believed that the ruling would “raise a host of important and sensitive questions regarding such matters as participation in women’s and girls’ sports, access to single-sex restrooms and housing, the use of traditional pronouns, and the administration of sex reassignment therapy.”
- For now, the Fourth Circuit decision stands
 - The ADA is interpreted broadly, and employers generally should assume that conditions are covered
 - In the 4th Circuit, gender dysphoria is a disability
- It seems likely, however, that the issues and concerns raised by Justice Alito soon will come before the Court

SCOTUS (cont.) - Adverse Action

- *Chambers v. District of Columbia* (DC Cir.) (*en banc*)
 - Chambers worked for DC Attorney General
 - She sought lateral transfers to different units where she hoped to have lower caseload
 - Transfer requests were denied, and she sued, alleging sex discrimination
 - Summary Judgment for employer based on precedent that held that transfer is actionable only if it results in “objective tangible harm”
 - Affirmed by DC panel
 - Reversed by *en banc* decision that overrules prior law

SCOTUS (cont.) - Adverse Action

- Title VII states that it is “an unlawful employment practice ... to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin”
- So, the question is whether denial of job transfer “discriminate[s] against” an employee with respect to the “terms . . . of employment”
- Court concludes that denial of transfer constitutes such discrimination under the plain meaning of the statutory text and that the “objective tangible harm” standard is grounded in nothing

SCOTUS (cont.) - Adverse Action

- *Muldrow v. City of St. Louis* (8th Cir.)
 - Muldrow worked for St. Louis P.D.
 - She was laterally transferred to a position at the same rate of pay but with duties she claimed were more administrative
 - She sued, alleging, among other things, sex discrimination
 - Summary Judgment for employer based on precedent that held that transfer was actionable only if it results in a “materially adverse employment action,” which did not include lateral transfers
 - Affirmed by 8th Cir Panel

SCOTUS (cont.) - Adverse Action

- Muldrow sought SCOTUS relief
- Petition was granted, and oral argument is set for December
- The issue before the Court is limited to - “Does Title VII prohibit discrimination in transfer decisions absent a separate court determination that the transfer decision caused a significant disadvantage?”

SCOTUS (cont.) - Adverse Action

- This current version of the Court consistently has applied a strict interpretation to the plain meaning of statutory language
- Title VII does not include any sort of “materiality” language for actionable adverse action
- On the other hand, concluding that there is no materiality component could open the floodgates
- Furthermore, SCOTUS (years earlier though) has concluded that there is a materiality component to actionable retaliation under Title VII, despite a similar lack of textual support
- For now, the safest approach is to assume that any transfer decision (or similar employment action) might be actionable and to scrutinize such decisions under normal discrimination analysis

EEO UPDATE



Zebulon D. Anderson
November 14, 2023