

The EEOC's Top Ten Litigation Developments

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President Lyndon Johnson Signing the Civil Rights Act of 1964



President Obama Signs the Lilly Ledbetter Act in 2009



Strategic Enforcement Plan Overview

- Adopted December 2012
- **Purpose:** To focus and coordinate EEOC programs to have a sustainable impact in reducing/detering discrimination
- Six priorities
- Integrated enforcement approach

Strategic Enforcement Plan

National Enforcement Priorities:

- ① Eliminating Barriers in Recruitment and Hiring
- ② Protecting Immigrant, Migrant and Other Vulnerable Workers
- ③ Addressing Emerging and Developing Issues (e.g. 1) certain ADA issues, including coverage, reasonable accommodation, qualification standards, undue hardship, and direct; 2) accommodating pregnancy-related limitations under the Americans with Disabilities Act Amendments Act (ADAAA) and the Pregnancy Discrimination Act (PDA); and 3) coverage of lesbian, gay, bisexual, and transgender individuals under Title VII's sex discrimination provisions, as they may apply).
- ④ Enforcing Equal Pay Laws
- ⑤ Preserving Access to the Legal System
- ⑥ Preventing Harassment through Systemic Enforcement and Targeted Outreach

10. Louisville



EEOC & Preservation of Access to the Legal System



Resolved Cases:

- ***EEOC v. Cognis*** (N.D. Ill. 2012): Summary judgment for EEOC granted in part, denied in part, involving a last chance agreement prohibiting the filing of an EEOC charge.
- Obtained preliminary injunction prohibiting retaliation in two cases: ***EEOC v. Evans Fruit*** (E.D. Wash. 2010) and ***EEOC v. Pitre Buick*** (D.N.M. 2012).

Pending Cases to Watch:

- ***EEOC v. CVS*** (N.D. Ill filed Feb. 2014): District Court dismissed challenge to severance agreement under Section 707(a), which prohibits a pattern or practice interfering with rights protected under Title VII.
- ***EEOC v. Doherty*** (S.D. Fla filed Sep. 2014) (mandatory arbitration agreement under Sec. 707(a)).

9. Villanova



EEOC, Disparate Impact, and Background Screens

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- ***EEOC v. Pepsi***: More than 300 African Americans adversely affected by criminal background check policy (\$3 million conciliation).
 - ***EEOC v. Kaplan***, 2014 WL 1371897 (6th Cir. 2014) (Appellate court affirmed grant of summary judgment to employer dismissing credit screen policy and excluding EEOC expert witness on disparate impact).

Other Pending Cases to Watch:

Appellate Courts

- ***EEOC v. Freeman*** (D. Md. filed Oct. 2009): Nationwide race case challenging disparate impact of felony conviction screens (Pending on appeal in 4th Cir.).
- ***State of Texas v. EEOC***, Case No. 5:13-CV-255 (N.D. Tex. August 20, 2014): District Court dismissed State's challenge to EEOC authority to issue Enforcement Guidance. "Texas has not shown that the Guidance is a final agency action, that any case or attempt at enforcement of the Guidance has been brought against Texas by the Department of Justice, or that the claims raised herein are not seeking a premature adjudication in the abstract without any actual facts and circumstances relating to the employment practices at issue."

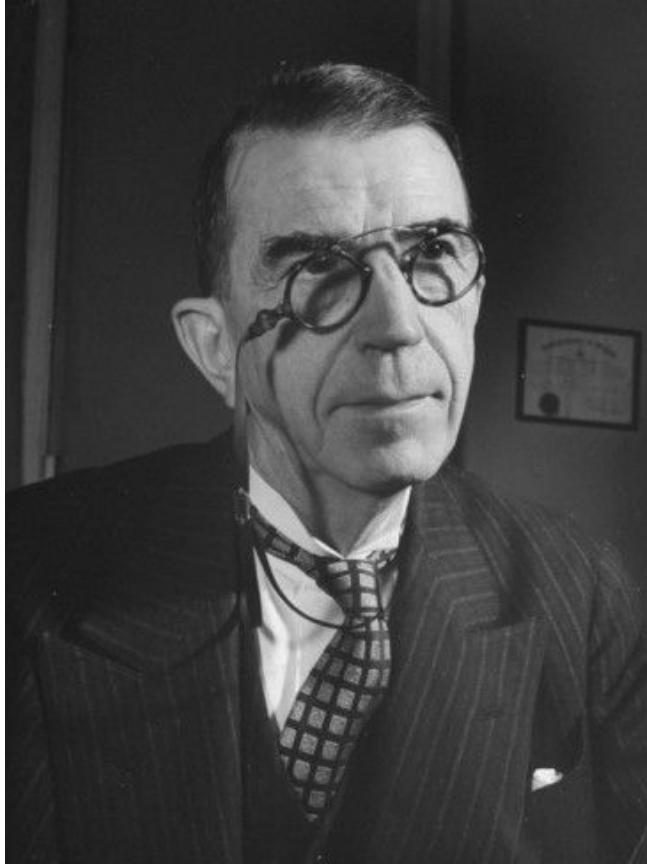
District Courts

- ***EEOC v. BMW*** (D.S.C. filed June 2013): Race case challenging disparate impact of criminal conviction policy applied to long-term employees of contractor (Pending).
- ***EEOC v. Dollar General*** (N.D. Ill. filed June 2013): Nationwide race case challenging disparate impact of criminal background check policy for all positions (Pending).

8. Virginia



EEOC And Sex Hiring Discrimination



Rep. Howard Smith (D)
Virginia's 8th Congressional District 1930-1966

Cases:

- ***EEOC v. New Prime*** (W.D. Mo. 2014): Alleged failure to hire women for trucking positions. (Court granted summary judgment in favor of EEOC finding Defendant engaged in a pattern or practice of discrimination and failed to preserve records in accordance with EEOC regulations).
- ***EEOC v. Presrite*** (N.D. Ohio 2011): Failure to hire for metal forging jobs (Resolved in Apr. 2013 for \$700,000 and non-monetary relief including 40 priority hires, and revised hiring policies).
- ***EEOC v. Wal-Mart*** (E.D. Ky. 2001): Systemic failure to hire for warehouse positions (Resolved in Mar. 2010 for \$11,700,000 and broad non-monetary relief, including validation of interview questions and more than 50 positions for eligible claimants).

Pending Cases to Watch:

- ***EEOC v. United Drilling Co.*** (N.D. Oklahoma 2015): Summary judgment denied in class action against oil drilling company where managers told female applicants that they would distract male employees and no housing was available to them.
- ***EEOC v. Performance Food Group*** (D. Md. filed June 2013): Alleged nationwide failure to hire female applicants for operative positions.
- ***EEOC v. Mavis Discount Tire*** (S.D.N.Y. filed Jan. 2012): Alleged failure to hire for tire installing positions.
- ***EEOC v. Unit*** (D. Utah filed Oct. 2012): Alleged failure to hire for drilling rig positions.

7. Michigan State



EEOC and LGBT Coverage

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- ***Boh Bros. Constr.***, 731 F.3d 444 (5th Cir. 2013)(en banc): Affirming jury verdict for EEOC in same-sex harassment case (Evidence of gender-stereotyping can be used).
 - ***Macy v. Dep't of Justice***, EEOC Appeal No. 0120120821 (Apr. 20, 2012): the Commission ruled that employment discrimination against employees because they are transgender, because of their gender identity, and/or because they have transitioned (or intend to transition) is discrimination based on sex, and thus violates Title VII.
 - EEOC recently filed first cases on behalf of transgender charging parties in Florida and Michigan. The Florida case is ***EEOC v. Lakeland Eye Clinic*** (M.D. Fla. Sep. 25, 2014). Theory of coverage is based on ***Glenn v. Brumby***, 663 F. 3d 1312(11th Cir. 2011)(considering claim under Sec. 1983, the Court states “discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it’s described as being on the basis of sex or gender.”)

6. Gonzaga



EEOC & Discrimination Against Immigrant, Migrant, and Other Vulnerable Workers



Resolved Cases:

- ***EEOC v. Pickle***, 446 F. Supp. 2d 1247 (N.D. Okla. 2006): Class race and national origin case alleging oil industry parts manufacturer subjected East Indian workers to discriminatory pay and working conditions) (Court awarded \$1.24 million).
- ***EEOC v. Del Monte Fresh Produce*** (D. Haw.): National origin and race harassment case involving Thai farm workers (Settled in Nov. 2013 for \$1.2 million and innovative, comprehensive equitable relief).
- ***EEOC v. Mesa Systems*** (D. Utah 2013): National origin harassment and terms and conditions case (Resolved for \$450,000 – largest national origin resolution in Utah).

Cases to Watch:

- ***EEOC v. Signal Int'l*** (S.D. Miss. filed Apr. 2011): 500+ Indian employees subjected to labor trafficking and hostile work environment (Pending).
- ***EEOC v. Koch Foods*** (S.D. Miss. filed June 2011): Sexual harassment case involving a class of female and male Hispanic employees in a poultry processing plant (Pending).

5. Notre Dame



EEOC and the Importance of Juries



EEOC v. Hill Country Farms (d/b/a Henry's Service Corp.) (S.D. Iowa 2013)

- Highest verdict in EEOC history – second highest in U.S. history – under federal anti-discrimination laws.
- Court granted summary judgment in favor of EEOC on wage discrimination claims in the amount of \$1.3 million.
- \$240 million jury verdict in favor of EEOC for 32 disabled victims of discrimination.
- \$7.5 million each to 32 disabled victims (\$2 million in punitive damages and \$5.5 million in compensatory damages).
- Verdict reduced to \$1.6 million (0.67% of original jury verdict per person).

See New York Times, “Boys in the Bunkhouse” March 9, 2014, available at <http://www.nytimes.com/interactive/2014/03/09/us/the-boys-in-the-bunkhouse.html? r=0>

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- ***EEOC v. A.C. Widenhouse***, 2013 WL 664230 (M.D.N.C. 2013): Race harassment case on behalf of two victims (Jury verdict in Jan. 2013 for \$200,000 in compensatory and punitive damages; Affirmed by the 4th Circuit).
 - ***EEOC v. AA Foundries*** (W.D. Tex.): Race harassment on behalf of multiple victims (Jury verdict in Sept. 2012 for \$200,000 in punitive damages).
 - ***EEOC v. New Breed Logistics*** (W.D. Tenn.): Sexual harassment case on behalf of four victims (Resolved after seven-day trial in 2012 with jury verdict awarding slightly more than \$1.5 million) (appeal pending).

One Noteworthy Case to Watch:

- ***EEOC v. Exel, Inc.*** (N.D. Ga. filed 2010) (Jury awarded \$500,000 for sex promotion claim, including \$475,00 for punitive damages; court subsequently reduced, then vacated \$270,000 punitive damages award) (cross-appeal pending).
- EEOC appeal challenges Court's vacation of punitive damages because the discriminating employee was not "high up the corporate ladder" or "higher management countenanced or approved the conduct."

4. Arizona



EEOC and Reasonable Accommodation



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- EEOC has given breath to the ADAAA filing and successfully prosecuting cases involving conditions such as diabetes, cancer, intellectual disabilities, and epilepsy, often difficult to cover prior to the Amendments.
 - EEOC has filed and resolved its first GINA cases.

Noteworthy Cases:

- ***EEOC v. United***, 693 F.3d 760 (7th Cir. 2012) (Effectively en banc; reversed prior 7th Circuit precedent and held that “best qualified” policies do not trump the ADA’s reassignment-as-reasonable-accommodation obligation; cert. denied May 2013).
- ***EEOC v. Interstate Distributor*** (D. Colo.): ADA challenge to leave and return-to-work policy (Settled in Nov. 2012 for almost \$5 million).
- ***EEOC v. UPS***, 2014 WL 538577 (Court denied motion to dismiss, finding that 100% return-to-work policy could be job qualification under the ADA)
- ***EEOC v. American Tool and Mold, Inc.*** (S.D. Fla. 2014): Unlawful to require a healthy prospective applicant to obtain a release, from a surgeon who performed surgery on his back six years before, stating that he had ‘no restrictions’ instead of individually assessing whether he could perform the essential functions of the job for which he was hired
- ***EEOC v. Creative Networks***, 912 F. Supp. 2d 828 (D. Ariz. 2012): Rigid policy of refusing to provide an ASL interpreter at orientation/training for deaf and hearing-impaired employees.

One Noteworthy Case to Watch

- ***EEOC v. Ford***, 2014 WL 1584674 (6th Cir. 2014): Telework as a reasonable accommodation (en banc review pending).

3. Kentucky



EEOC & Pregnancy Discrimination



YOUNG v. UPS

- **Question presented:** The Pregnancy Discrimination Act, 42 U.S.C. 2000e(k), provides that “women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work.” The question presented is whether, and in what circumstances, an employer that provides work accommodations to non-pregnant employees with work limitations must provide comparable work accommodations to pregnant employees who are “similar in their ability or inability to work.”
- Young sought a lifting restriction, which was denied. UPS only provided accommodations for: (1) employees injured on the job; (2) an employee with a disability under the ADA; and (3) an employee who had temporarily lost DOT certification.

YOUNG v. UPS (con't)

- Fourth circuit affirmed denial of summary judgment. The Court agreed with the district court that the petitioner failed to present direct evidence of discrimination or establish a prima facie case under McDonnell-Douglas. UPS argued it treated her just as it did all others.
- U.S./EEOC filed a brief as amicus in support of petitioner.
- Several amicus briefs filed in support of petitioner including by Law Professors and Women's Rights Organizations; Members of Congress; Bipartisan State and Local Legislators; 23 Pro-Life Organizations and Judicial Education Project.

YOUNG v. UPS (con't)

- Supreme Court reverses, back to district court.
- Employer must treat pregnant workers same as it treats non-pregnant workers similar in their ability to work.
- No “most-favored-nation status.” No general right to accommodation for pregnant workers.
- Rejected EEOC’s July 2014 pregnancy guidance.
- Cannot refuse to accommodate pregnant workers if accommodate others similar in their ability or inability to work.

Pregnancy Discrimination Enforcement Guidance

- The Guidance addresses many issues important to pregnant workers, including the PDA's application to current, past, and potential pregnancy; forced leave policies; and the application of the ADA to pregnancy-related disabilities.

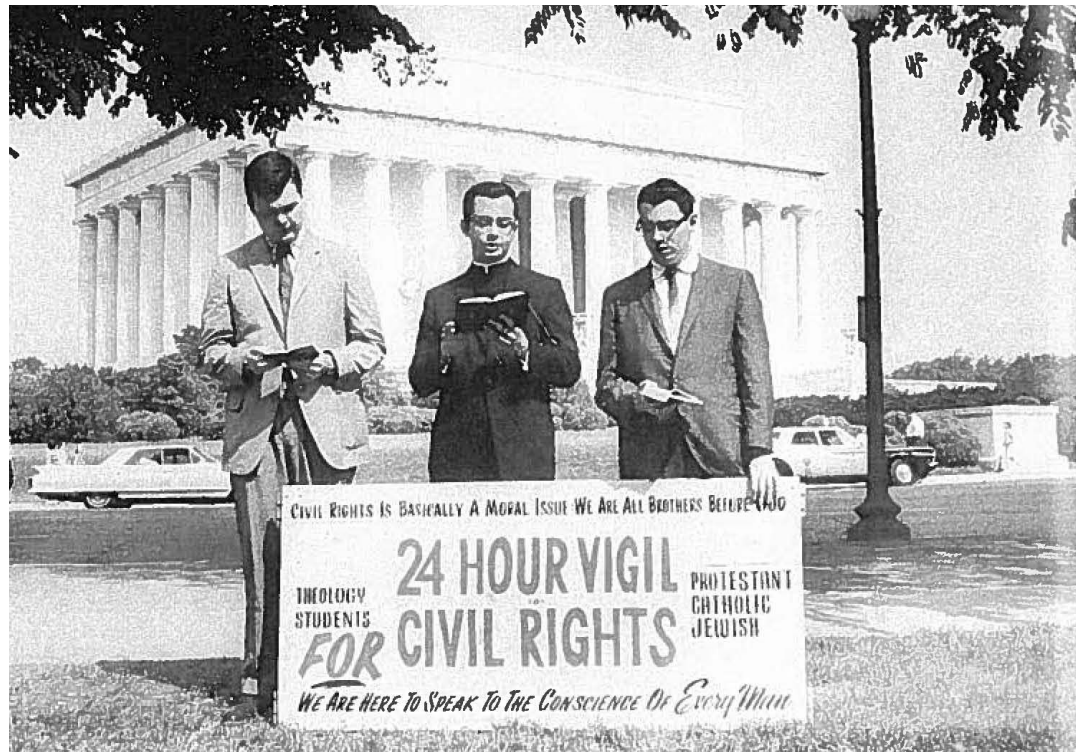


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- The EEOC has brought around 40 pregnancy discrimination cases over the last 4 years.
 - ***EEOC v. Houston Funding***, 717 F.3d 425 (5th Cir. 2013): Published decision holding that discharge because employee was lactating or expressing milk states a cognizable sex discrimination claim under Title VII.
 - ***EEOC v. Akal Sec., Inc.*** (D. Kan. 2010): Class of 26 female security guards for forcing pregnant guards to take leave and then dismissing them (Settled in Dec. 2010 for \$1.62 million).

2. Wisconsin



EEOC And Religious Discrimination



EEOC v. Abercrombie and Fitch (Cert. Granted)

- **Question Presented** (petitioner): “Whether an employer can be liable under Title VII of the Civil Rights Act of 1964 for refusing to hire an applicant or discharging an employee based on a ‘religious observance and practice’ only if the employer has actual knowledge that a religious accommodation was required and the employer’s actual knowledge resulted from direct, explicit notice from the applicant or employee.”
- ***EEOC v. Abercrombie and Fitch***, 731 F.3d 1106 (10th Cir. 2013): A divided panel reversed summary judgment for the EEOC and ordered the dismissal of the case in a case involving the denial of job to Muslim applicant with hijab because the charging party did not put the company on sufficient notice of her need for an accommodation.

EEOC & Religious discrimination (selected cases)

- ***EEOC v. Burger King*** (N.D. Tex. 2013): Despite being told during job interview that she could wear a skirt, in adherence with her Pentecostal beliefs, applicant was sent home during orientation and never brought back to work. (Settled for \$25,000)
- ***EEOC v. Senior Living Properties, LLC*** (N.D. Tex. 2013): The Commission brought suit on behalf of an employee who sought to be excused on Sundays in observance of her Christian faith; she had previously been excused but was not allowed this exemption under new management. (Settled for \$42,500)
- ***EEOC v. AutoZone*** (E.D. Mass. filed Sept. 2010): Suit alleged defendant subjected employee, who had converted to the Sikh religion, to harassment and refused to accommodate his religious need to wear a turban. (Resolved in nationwide consent decree in March 2012 for \$75,000 and injunctive relief.)
- ***EEOC v. Abercrombie and Fitch, 2013 WL 4726137; 2013 WL1435290 (N.D. Cal. 2013)*** (failure to accommodate/failure-to-hire/discharge cases involving Muslim individuals who wore hijabs) (resolved in stipulated judgment and decree in Sept. 2013 including approximately \$100,000 and significant equitable relief, such as changes to accommodation policy).

Religious Garb and Grooming in the Workplace: Rights and Responsibilities

- The Guidance answers questions about how federal employment discrimination applies to religious dress and grooming practices and what steps employers can take to meet legal responsibilities in this area.



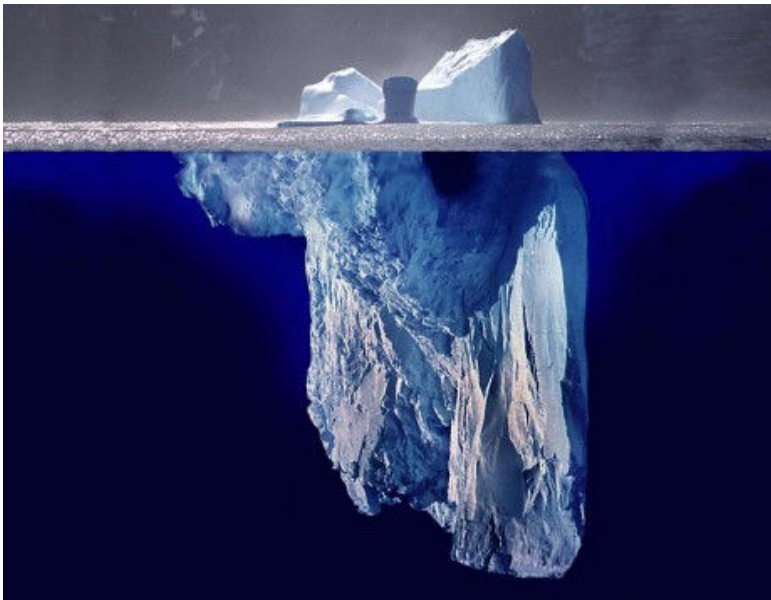
1. Duke



The Courts and EEOC's Pre-Suit Obligations

The Courts and their Consideration of EEOC's Pre-Suit Obligations





Under federal law, once the Equal Employment Opportunity Commission (Commission) determines that there is reasonable cause to support a charge of an unlawful employment practice, the Commission “shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.” 42 U.S.C. 2000e-5(b). Conciliation efforts may not be “made public by the Commission, its officers or employees” and may not be “used as evidence in a subsequent proceeding” unless all “persons concerned” consent. *Ibid.* If the Commission is “unable to secure from the respondent a conciliation agreement acceptable to the Commission,” and at least 30 days have elapsed from the filing of the charge, the Commission may bring suit against the respondent in federal district court. 42 U.S.C. 2000e-5(f)(1).

EEOC v. Mach Mining (Cert. Granted)

- Failure to hire for mining positions; judicial review of EEOC's pre-suit administrative requirements.
- Unanimous 7th Circuit decision in Dec. 2013 rejected "explicitly the implied affirmative defense of failure to conciliate." 738 F.3d 171 (7th Cir. 2013).
- **Question Presented** (petitioner): "Whether and to what extent may a court enforce the Equal Employment Opportunity Commission's duty under 42 U.S.C. § 2000e-5(b), (f)(1) to conciliate discrimination claims before filing suit."
- Amicus briefs filed by National Retail Litigation Center, Equal Employment Advisory Counsel and SHRM, and the American Insurance Association.
- U.S. brief is due on October 27, 2014

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- ***EEOC v. CRST***, 679 F.3d 657 (8th Cir. 2012): EEOC pre-suit obligations in class sex harassment case (Decision awarding fees pending on appeal in 8th Circuit).
 - ***Serrano & EEOC v. Cintas***, 699 F.3d 884 (6th Cir. 2012): Failure to hire for service sales representative positions; failure to conciliate (Court awarded attorney's fees; favorable 6th Circuit decision; cert. denied Oct. 2013).

Thank you!