

THE EEOC'S TOP TEN LITIGATION DEVELOPMENTS

San Diego, California

EEOC Seminar



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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
- District plans
- Flexibility to investigate and litigate non-SEP issues

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
- ④ Enforcing Equal Pay Laws
- ⑤ Preserving Access to the Legal System
- ⑥ Preventing Harassment through Systemic Enforcement and Targeted Outreach

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EEOC & Sex Hiring/Pay Challenges

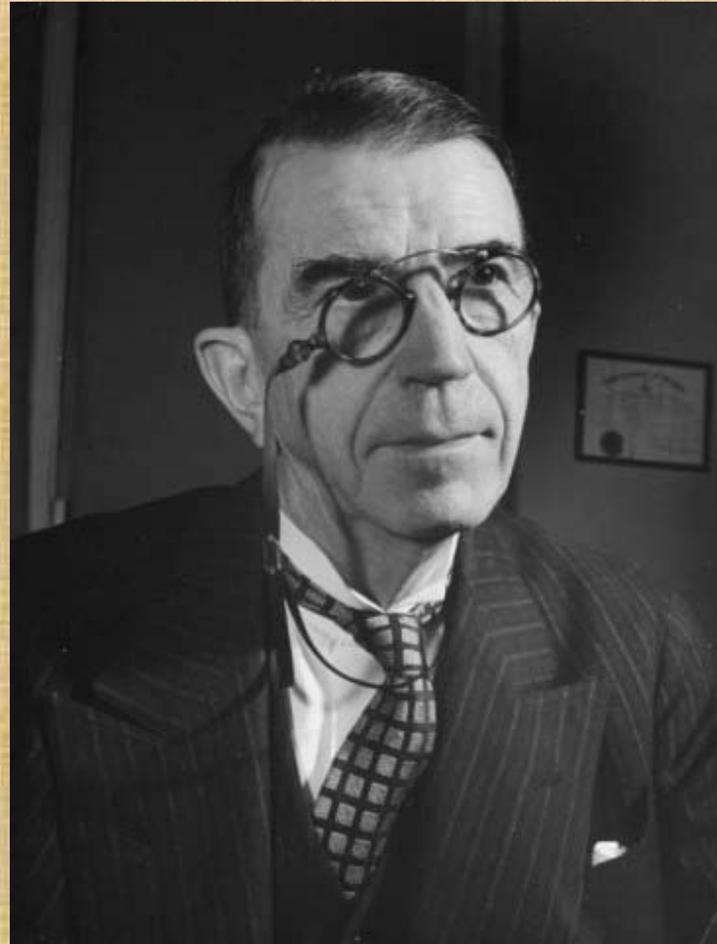
President Lyndon Johnson Signing the Civil Rights Act of 1964



President Obama Signs the Lilly Ledbetter Act in 2009



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



Resolved Cases:

- ***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)
- ***EEOC v. Checkers*** (E.D. Pa. 2014): Charged that Market Burgers paid female shift managers, cashiers, and sandwich makers lower wages than their male counterparts even though they did substantially equal work (Resolved for \$1 million and significant non-monetary relief)
- ***EEOC and United States v. Harmony Schools*** (S.D. Tex. 2014): Equal pay and retaliation cases involving teacher at public school filed jointly by EEOC and the U.S. Dept. of Justice Civil Rights Divisions (Resolved for \$125,000 and significant non-monetary relief, including training)

Pending Cases to Watch:

- ***EEOC v. New York Port Authority*** (2nd Cir 2014): Alleged violation of EPA for general attorney positions
- ***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

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EEOC & Religious Discrimination Cases



CIVIL RIGHTS IS BASICALLY A MARRIAGE ISSUE WE ARE ALL BROTHERS BEFORE GOD

IMMEDIATE STUDENTS **24 HOUR VIGIL** PROTESTANT
FOR CIVIL RIGHTS CATHOLIC
JEWISH

WE ARE HERE TO SPEAK TO THE CONSCIENCE OF EVERY MAN

- ***EEOC v. Abercrombie and Fitch***, 2013 WL 4726137; 2013 WL1435290 (N.D. Cal. 2013): Discharge/failure to accommodate/failure to hire 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)
- ***EEOC v. Abercrombie and Fitch***, 731 F.3d 1106 (10th Cir. 2013): Denial of job to Muslim applicant with hijab (Petition for rehearing en banc denied in 10th Circuit)
- ***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 was not allowed this exemption under new management. (Settled for \$42,500)
- ***EEOC v. Burger King*** (N.D. Tex. filed Aug. 2012): Failure to accommodate teenage worker, a member of the Christian Pentecostal Church, who needed to wear a skirt at work on account of her faith; suit alleged defendant discharged her for inability to comply with company dress code, which required pants (Resolved in January 2013 for \$25,000 and injunctive relief)
- ***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)

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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)

Upcoming Case to Watch:

- **EEOC v. CVS** (N.D. Ill filed Feb. 2014): Challenge to severance agreement under Section 707(a), which prohibits a pattern or practice interfering with rights protected under Title VII

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EEOC & Success in the Fifth Circuit

- ***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)
- ***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

INTERLUDE: Pregnancy Discrimination



- 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.
- The EEOC has brought around 40 pregnancy discrimination cases over the last 4 years.
- 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)

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**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)

- *See also*, PBS Frontline Documentary “Rape in the Fields,” *available at* <http://www.pbs.org/wgbh/pages/frontline/rape-in-the-fields/>

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EEOC & The Importance of Juries

- ***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)

Other Noteworthy Trials:

- ***EEOC v. New Breed Logistics*** (W.D. Tenn.): Sexual harassment case on behalf of four victims (Resolved after seven-day trial in May 2013 with jury verdict awarding \$1.5 million)
- ***EEOC v. Exel, Inc.*** (N.D. Ga. filed 2010)(Jury awarded \$500,000 for sex promotion and retaliation claim)

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EEOC & Reasonable Accommodation Cases



George Bush Signs the ADA in 1990



George W. Bush Signs ADAAA in 2008



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

Other Noteworthy Cases:

- ***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.

ADA CASE TO WATCH

EEOC v. Old Dominion Trucking, (W.D. Ark 2011)

– EEOC alleges company violated ADA by by discriminating against at least one truck driver because of self-reported alcohol abuse. The EEOC alleges the company should have met its legal obligation to comply with the Americans with Disabilities Act while assuring safety, rather than permanently sidelining self-reporting drivers.

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Background Screen Cases

- ***EEOC v. Pepsi***: More than 300 African Americans adversely affected by criminal background check policy (\$3 million conciliation)
- ***EEOC v. Peoplemark***, 732 F.3d 584 (2013)(6th Cir.)(Affirming fee award in disparate impact case)
- ***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:

- ***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)
- ***EEOC v. Freeman*** (D. Md. filed Oct. 2009): Nationwide race case challenging disparate impact of felony conviction screens (Pending on appeal in 4th Cir.)

It's a tie for #1

EEOC Pre-Suit Obligations

- ***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)

EEOC v. Mach Mining

- Favorable 7th Circuit decision in Dec. 2013
- Failure to hire for mining positions; judicial review of EEOC's pre-suit administrative requirements
- Petition for certiorari pending; EEOC filed brief acquiescing in cert.

It's a tie for #1

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



EEOC v. Henry's Turkey Service

- 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>

Thank you!