

EEOC Strategic Plan 2018-2022

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About Your Speaker

- ◆ Susan Fahey Desmond is a principal with Jackson Lewis PC. She has been representing management in all areas of labor and employment law for over 30 years. Ms. Desmond is listed in Best Lawyers in America and has been named by Chambers USA as one of America's leading business lawyers.

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About the Firm



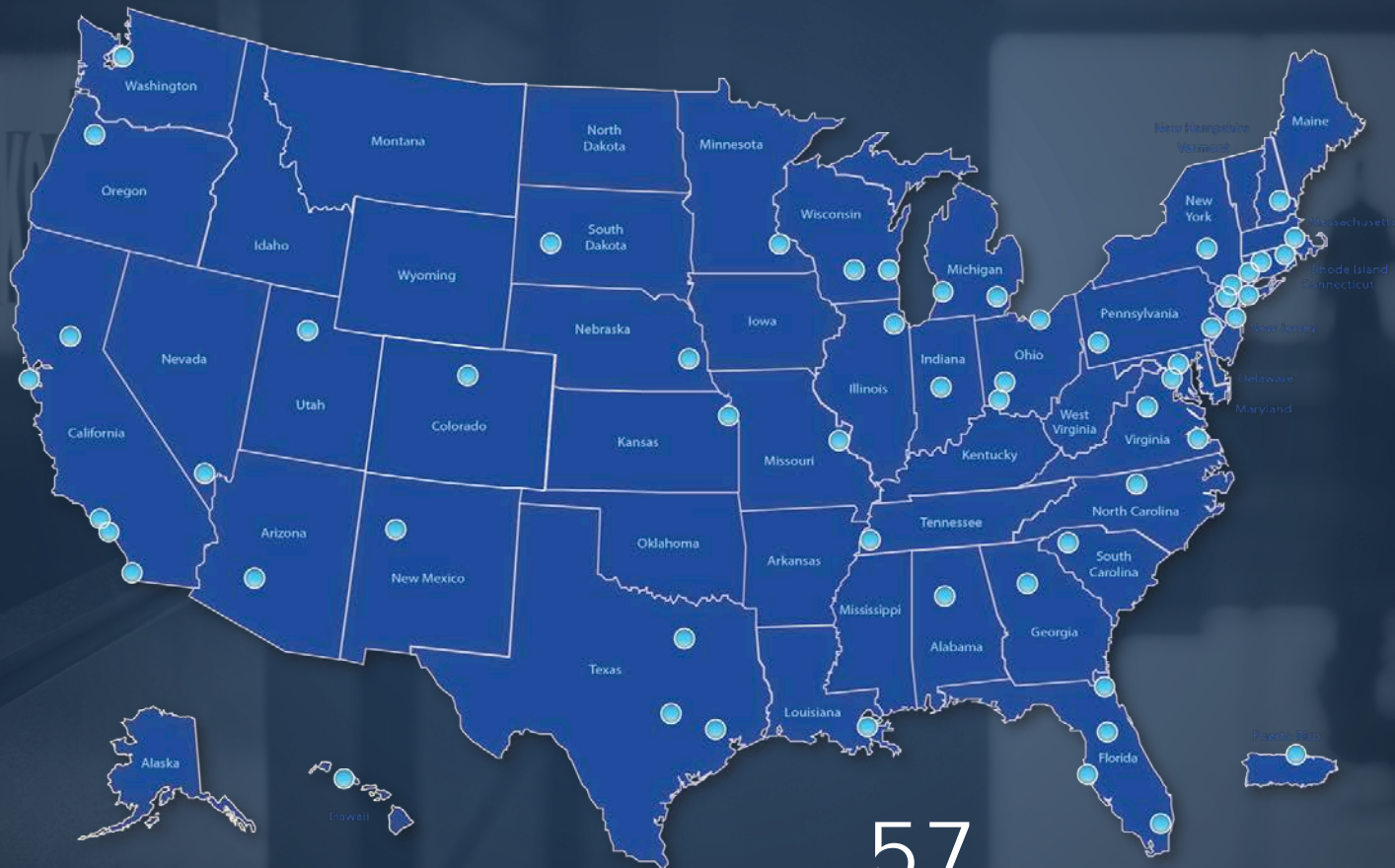
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EEOC Budget

- ◆ Congress approved a \$379.5 million budget for fiscal year 2018.
- ◆ This approval is a \$15 million increase over the previous year and more than the agency itself requested for this year or for 2019.
- ◆ In addition, the Budget signaled the death of the proposed merger of the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) and the EEOC.

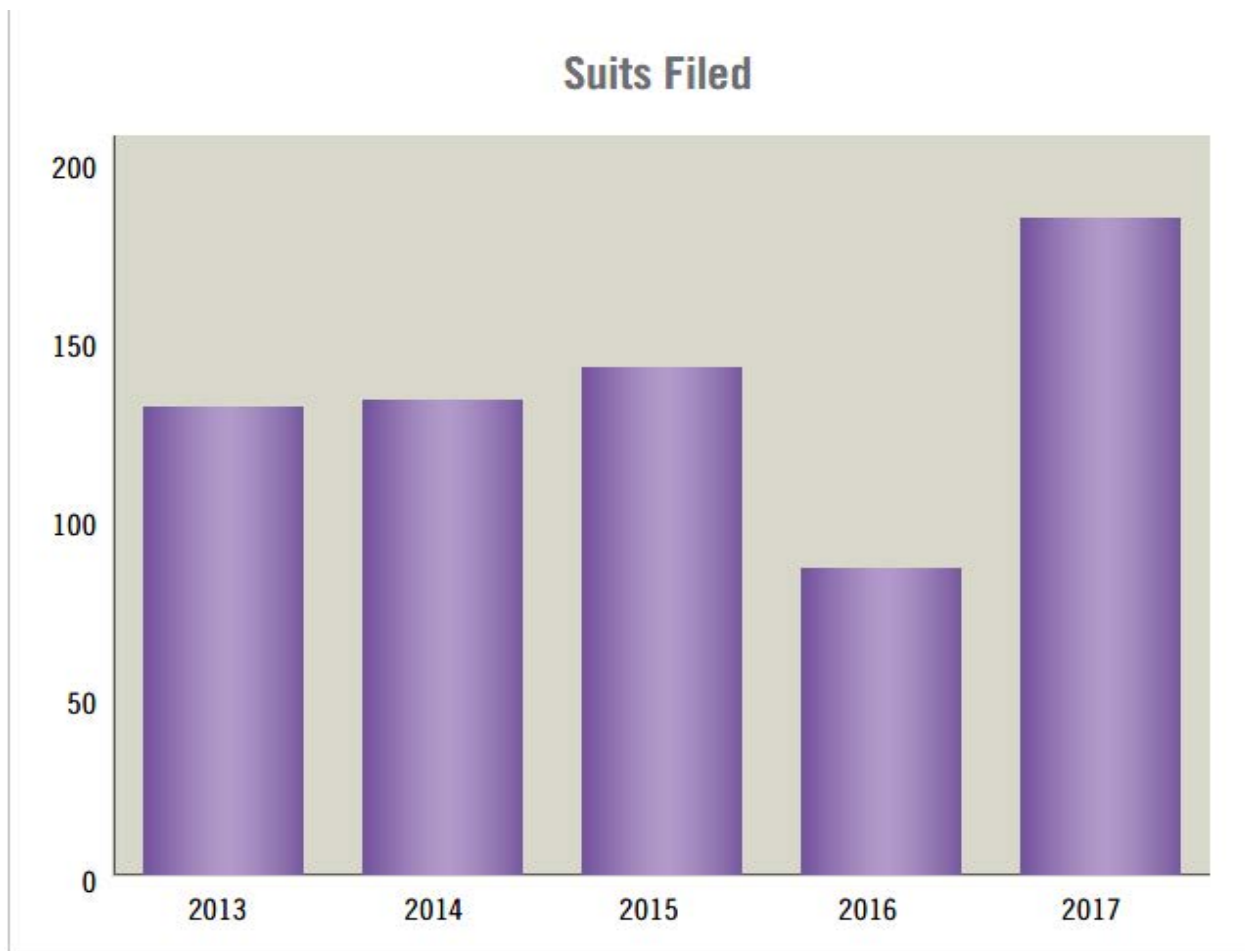
The EEOC's Jurisdiction

- ◆ Title VII
- ◆ Pregnancy Discrimination Act
- ◆ Equal Pay Act of 1963
- ◆ Age Discrimination in Employment Act of 1967
- ◆ Title I and Title V of the Americans with Disabilities Act
- ◆ Section 501 of the Rehabilitation Act of 1973
- ◆ Title II of the Genetic Information Nondiscrimination Act
- ◆ Lilly Ledbetter Fair Pay Act of 2009

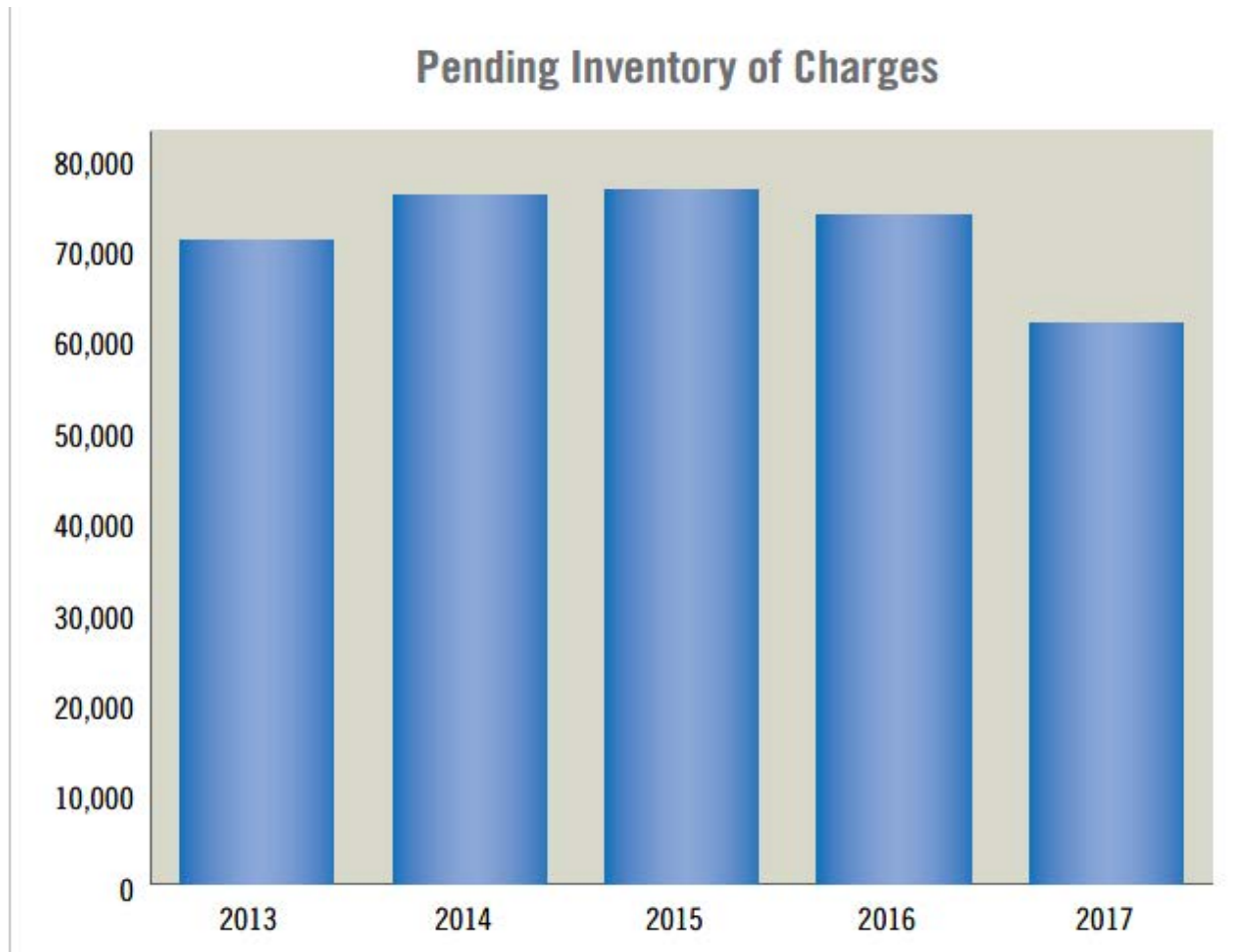
FY 2017 Enforcement and Litigation Data

- ◆ During fiscal year 2017, the EEOC received 84,254 discrimination charges.
- ◆ The agency resolved 99,109 charges in FY 2017 and reduced its charge workload by 16.2% to 61,621.

Suits Filed by the EEOC



Pending Inventory of Charges



Charges Filed with EEOC in FY 2017

- ◆ Retaliation: 41,097 (48.8%)
- ◆ Race: 28,528 (33.9%)
- ◆ Disability: 26,838 (31.9%)
- ◆ Sex: 25,605 (30.4%)
- ◆ Age: 18,376 (21.8%)
- ◆ National Origin: 8,299(9.8%)
- ◆ Religion: 3,436 (4.1%)
- ◆ Color: 3,240 (3.8%)
- ◆ Equal Pay: 996 (1.2%)
- ◆ Genetic Information: 206 (.2%)
 - Note: Percentages add to more than 100% as some charges allege multiple bases.

SEP 2018-2022

- ◆ Published December 8, 2017
- ◆ Public comment period ended January 8, 2018
- ◆ Not much different from the SEP 2017

Strategic Objective No. 1

- ◆ To combat employment discrimination through strategic law enforcement.
- ◆ This objective reflects the EEOC's primary mission of preventing unlawful employment discrimination through the use of:
 - administrative (investigation, mediation and conciliation) and litigation enforcement mechanisms with regard to private employers; labor organizations; employment agencies; and state and local government employers; and
 - adjudicatory and oversight mechanisms with regard to federal employers.

Strategic Objective No. 2

- ◆ To prevent employment discrimination through education and outreach.
- ◆ This objective reflects the importance of our efforts to prevent employment discrimination before it occurs. Investigations, conciliations and litigation are only some of the means by which the agency fulfills its mission and vision.

Small Business Outreach

- ◆ In fiscal year 2017, the EEOC continued to assist and prioritize outreach to small businesses.
- ◆ The EEOC's staff conducted 557 no-cost outreach events for small businesses in 2017.
- ◆ The EEOC continues to promote its Small Business Resource Center, an online service.

Strategic Objective No. 3

- ◆ To deliver excellent and consistent service through a skilled and diverse workforce and effective systems.
- ◆ This objective recognizes that the EEOC's ability to deliver excellent and consistent service is dependent upon a qualified and well-trained workforce and the use of effective systems such as innovative technology and streamlined agency processes.

Systemic Program

- ◆ Tackling systemic discrimination -- where a discriminatory pattern or practice or policy has a broad impact on an industry, company or geographic area -- is central to the mission of the EEOC.
- ◆ Systemic discrimination creates barriers to opportunity that causes widespread harm to workers, workplaces, and our economy. Systemic investigations and lawsuits effectively use government resources because they address significant legal issues, broad policies, or have a broad impact on an industry, profession, company or geographic area.

Systemic Program 2014 to 2017

Investigations	Cause Findings	Litigation Filed	Inventory
2014 – 260 2015 – 268 2016 – 273	2014 -- 188 2015 -- 99 2016 – 113	2014 -- 17 2015 -- 16 2016 -- 18 2017 -- 30	2014 -- 526 2015 -- 515 2016 -- 570

EEOC: Strategic Enforcement Plan

- ◆ The new SEP reiterated the agency's commitment to the six priorities in its previous SEP, with some changes.
- ◆ 2012-2016 SEP:
- ◆ 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 Outreach.

EEOC: Strategic Enforcement Plan

- ◆ The new SEP sets forth new emphasis on these priorities and expanded on certain issues. For example:
 - Qualification standards and inflexible leave policies under the ADA;
 - Complex employment relationships and structures in the 21st century workplace; and
 - Backlash discrimination against those who are Muslim or Sikh, or persons of Arab, Middle Eastern or South Asian descent.

EEOC: Strategic Enforcement Plan

- ◆ Some SEP initiatives will not likely be high priorities for the Trump Administration.
- ◆ Unknown direction for certain EEOC positions and areas of emphasis including:
 - Title VII's sex discrimination provisions and protection of LGBT individuals
 - Emphasis on systemic discrimination

Priority No. 1: Barriers in Recruiting and Hiring

- ◆ EEOC will focus on class-based recruitment and hiring practices that discriminate against racial, ethnic, and religious groups, older workers, women, and people with disabilities. These include exclusionary policies and practices, the channeling/steering of individuals into specific jobs due to their status in a particular group, job segregation, restrictive application processes (including online systems that are inaccessible to individuals with disabilities), and screening tools that disproportionately impact workers based on their protected status (e.g., pre-employment tests, background checks impacting African Americans and Latinos, date-of-birth inquiries impacting older workers, and medical questionnaires impacting individuals with disabilities).
- ◆ The growth of the temporary workforce, the increasing use of data-driven selection devices, and the lack of diversity in certain industries and workplaces such as technology and policing, are also areas of particular concern. This priority typically involves systemic cases. However, a claim by an individual or small group may fall within this priority if it raises a policy, practice or pattern of discrimination.

EEOC v. Jones Lange LaSalle Americas (N.D. Ga)

- ◆ EEOC alleges that the company withdrew a job offer after learning that the applicant had PTSD.
- ◆ She applied for a development and asset strategy production support analyst position.
- ◆ She disclosed that she desired to work remotely once a week to attend medical appointments.
- ◆ Before learning of her PTSD, the company told her that it had flexible work arrangements and schedules.

EEOC v. The Children's Home, Inc. (N.D. Fla)

- ◆ EEOC claims that the employer refused to consider a male employee for a management position in a newly created adolescent maternity home program similar to his then-existing position because of his sex.
- ◆ After voicing his concerns, the employer allegedly refused to consider him for any other position.

EEOC v. A&E Tire, Inc. (D. Colo)

- ◆ Employer allegedly violated Title VII by retracting a job offer and refusing to hire a male applicant once it discovered that he was transgendered.
- ◆ Applicant was offered a services manager position pending a drug test and background check.
- ◆ Background screening identified his assigned sex at birth and indicated that he used another name typically associated with the female sex in the past.

EEOC v. Volvo Group North America (D. Md.)

- ◆ Employer allegedly violated ADA by refusing to hire a qualified worker because of being a past drug addict.
- ◆ Applicant was a recovering drug addict who had not used illegal drugs and had been enrolled in a medication-assisted treatment program since 2010.
- ◆ He was taking legally prescribed suboxone and told the employer of this fact during his post-offer physical exam.
- ◆ Company allegedly stated that it consider suboxone as a narcotic worse than heroin.

Stereotyping

- ◆ *EEOC v. Hussey Copper, Ltd.*, 696 F.Supp.2d 505 (W.D. Pa. 2010)
 - Applicant applied for job as production worker in a copper mill that was considered “safety sensitive.”
 - Applicant tested positive for Methadone that was being used to treat an opiates addiction.
 - ER’s physician did not discuss the effects of Methadone use with the applicant and did not test his cognitive function. ER rescinded job offer.
 - Court found that the ER violated the ADA because it did not conduct an “individualized assessment” of the applicant, and, therefore, *erroneously regarded him as a substance abuser when he was not.*

EEOC v. Norfolk Southern Corp (W.D. Pa.)

- ◆ Employer allegedly disqualified a class of job applicants and employees from positions based on actual or perceived disabilities.
- ◆ Disabilities were disclosed during pre-employment physicals or return to work medical evaluations.

EEOC v. R Wings R Wild (E.D. Ark)

- ◆ Employer allegedly refused to hire a qualified male applicant for bartender positions because the company wanted female bartenders.

Priority No. 2: Vulnerable Workers

- ◆ EEOC will focus on job segregation, harassment, trafficking, pay, retaliation and other policies and practices against vulnerable workers, including immigrant and migrant workers, as well as persons perceived to be members of these groups, and against members of underserved communities.

Outreach to Vulnerable Workers

- ◆ Approximately 42% of the EEOC's outreach in 2017 was to vulnerable workers.
- ◆ This included immigrant and farm worker communities and other communities where individuals may be reluctant to complaint about employment discrimination.

EEOC v. Price Ventures (W.D. Va.)

- ◆ Claim of hostile work environment and retaliation.
- ◆ 18 year old hostess was purportedly subjected to unwelcome sexual harassment.
- ◆ The “significantly older manager” allegedly made comments and touched the 18 year old.
- ◆ Similar conduct with at least one other female employee.
- ◆ Company had no harassment policy in place.

EEOC v. Beaver's (S.D. Ala.)

- ◆ According to the EEOC, in May 2016, Arby's hired a team leader trainee with a known history of sexual harassment who repeatedly pressured young female employees to have sex with him, and regularly used sexually graphic language to describe sexual acts he sought to perform on female employees and customers.
- ◆ The EEOC also alleges that the harasser deliberately touched one female employee in an unwelcome and sexual manner, and attempted to follow female employees home.

Priority No. 3: Selected Emerging and Developing Issues

- ◆ Qualification standards and inflexible leave policies that discriminate against individuals with disabilities;
- ◆ Accommodating pregnancy-related limitations under the Americans with Disabilities Act Amendments Act (ADAAA) and the Pregnancy Discrimination Act (PDA);
- ◆ Protecting lesbians, gay men, bisexuals and transgender (LGBT) people from discrimination based on sex;
- ◆ Clarifying the employment relationship and the application of workplace civil rights protections in light of the increasing complexity of employment relationships and structures, including temporary workers, staffing agencies, independent contractor relationships, and the on-demand economy; and
- ◆ Addressing discriminatory practices against those who are Muslim or Sikh, or persons of Arab, Middle Eastern or South Asian descent, as well as persons perceived to be members of these groups, arising from backlash against them from tragic events in the United States and abroad.

Americans with Disabilities Act Accommodation Issues

- ◆ EEOC v. Home Depot – N.D. Ill. – employer allegedly violated the ADA by not allowing employee to take a short break to take care of herself due to irritable bowel syndrome and fibromyalgia.
- ◆ EEOC v. Halo Unlimited – S.D. Cal. – employer allegedly violated the ADA for denying a pregnant employee a disability accommodation and terminating her within days of learning of her disability.
- ◆ EEOC v. Crain Automotive Holdings – D. Ark. – employer allegedly violated the ADA for refusal to discuss accommodation options for employee suffering from anxiety, depression, and panic attacks.

Americans with Disabilities Act Accommodation Issues

- ◆ EEOC v. G4S Secure Solutions – ED Mich – employer allegedly violated ADA by refusing accommodation for employee with mixed connective tissue disease and lupus. Worker worked behind desk and was put on foot patrol without warning. Denied seated position after she had trouble walking.
- ◆ EEOC v. Senior Care Properties – D.N.C. – denied four weeks of light duty to employee with rheumatoid arthritis to assist her in getting her medications to take effect.

Americans with Disabilities Act Light Duty Policies

- ◆ EEOC v. Prestridge Care – E.D. Cal. – employer allegedly violated the ADA by refusing to provide accommodation to disabled employee and denying light duty.
- ◆ Policy required employees to be 100% healed while at work.
- ◆ In addition, employees were terminated for exceeding restrictive leave policy.

ADA – Leave Policies

- ◆ EEOC v. Triton -- S.D. Cal – employer allegedly violated the ADA by denying a medical leave of absence.
- ◆ EEOC . Keesler Hunter Mgmt – WD Mo – employer allegedly violated the ADA by denying a one-week extension of time to employee's medical leave and refused a reasonable accommodation because it would have violated its 30-day maximum medical leave policy.

EEOC v. West Meade Place LLP (M.D. Tenn.)

- ◆ EEOC alleges that West Meade Place violated the ADA by refusing to provide a leave of absence as a reasonable accommodation for an employee who suffers from an anxiety disorder.
- ◆ According to the EEOC's suit, West Meade hired the employee as a laundry technician in February 2015.
- ◆ When the employee requested leave as a reasonable accommodation for her anxiety disorder in November 2015, management told her she could not take leave, as the Family and Medical Leave Act did not apply to her.

EEOC v. Heritage Home Group (W.D. N.C.)

- ◆ According to the EEOC, Home hired Michael Woods to work as a machine operator at its Hickory Chair Company manufacturing plant in Hickory, N.C., in October 2015.
- ◆ Woods, a diabetic, developed an infection in one of his toes in March 2016. Woods underwent an operation to have the toe amputated, and was subsequently diagnosed with peripheral neuropathy in both feet.
- ◆ The EEOC said that around April 8, 2016, Woods, who was out of work on short-term disability leave, informed Heritage Home of his anticipated return to work the first week of June, since he needed the additional leave to recover fully.
- ◆ In a letter dated April 29, 2016, Heritage Home informed Woods that it was terminating his employment because he would not be able to return to work until then.

Hwang v. Kansas State University

(10th Cir. May 29, 2014)

- ◆ Employee exhausted entire six months of leave under her employer's inflexible leave policy. She sued, claiming employer should have provided additional leave as reasonable accommodation.
- ◆ “Must an employer allow employees more than six months’ sick leave or face liability[?] ...Unsurprisingly, the answer is almost always ‘no.’”
- ◆ It “perhaps goes without saying that an employee who isn’t capable of working for [six months] isn’t an employee capable of performing a job’s essential functions -- and that requiring an employer to keep a job open for so long doesn’t qualify as a reasonable accommodation. After all, reasonable accommodations are all about enabling employees to work, not to not work.”

Severson v. Heartland Woodcraft, Inc. **(7th Cir. 2017)**

- ◆ Employee Severson took twelve weeks of leave from work under the FMLA due to severe back pain.
- ◆ Shortly before this leave expired, Severson contacted Heartland to inform them he was having back surgery on the last day of his FMLA leave.
- ◆ Severson requested an additional two to three months of leave to recover from his surgery.
- ◆ Finding that Heartland did not violate the ADA by refusing to provide the additional leave, the Seventh Circuit unequivocally stated, “a long term leave of absence cannot be a reasonable accommodation,” because it is “not a means to perform the job’s essential functions.”

Latest on Wellness Programs

- ◆ In AARP v. EEOC, a federal district judge concluded that the EEOC had failed to justify its reasoning that incentives and penalties of up to 30% of the cost of an employee's health insurance coverage does not render wellness plan participation "voluntary."
- ◆ The judge vacated the rule effective Jan. 1, 2019.
- ◆ The EEOC has indicated that it will need until August 2018 to reconsider the regulations and expects to issue a new final rule by October 2019.

EEOC v. Simplicity Ground Services (E.D. Mich.)

- ◆ According to the EEOC, a female was employed as a tow team driver for Simplicity Ground Services, a company responsible for transferring baggage on and off commercial flights at Detroit's Metropolitan Airport.
- ◆ As a tow team driver, her job primarily consisted of driving a vehicle, and her job description contained no lifting requirement.
- ◆ The EEOC alleged that upon learning that the employee was pregnant and had a 20-pound lifting restriction, Simplicity informed her she must go on unpaid leave and attempted to make her sign an amended job description which added a 70-pound lifting requirement.
- ◆ Simplicity also forced other pregnant employees to take unpaid leave because they were pregnant and refused to accommodate their pregnancy-related lifting restrictions with light-duty work. Non-pregnant employees with similar restrictions, however, were routinely granted light duty.

Racial/Sexual Harassment

- ◆ EEOC v. Floyd's Equipment – ED Mo – employer allegedly subjected African American employee to racial harassment by use of “n” word towards employees and over the radio.
- ◆ EEOC v. Atlantic Capes Fisheries, Inc. – D. Mass. – alleged hostile work environment for ongoing sexual harassment including solicitations for sex, lewd comments about women's bodies and inappropriate touching of women's bodies.

EEOC v. MPW Industrial Services, Inc. (S.D. Ohio)

- ◆ EEOC alleges that MPW made two employees suffer racial harassment, including hangman's nooses, racial epithets, racist comments and jokes, and an alleged KKK meeting at the worksite.

Priority No. 4: Pay Practices

- ◆ EEOC will continue to focus on compensation systems and practices that discriminate based on sex under the Equal Pay Act and Title VII.
- ◆ Because pay discrimination also persists based on race, ethnicity, age, and for individuals with disabilities, and other protected groups, the Commission will also focus on compensation systems and practices that discriminate based on any protected basis, including the intersection of protected bases, under any of the federal anti-discrimination statutes.

Pay Claims

- ◆ EEOC v. George Washington University – D.D.C. – employer allegedly paid a female less than a male who both worked as an executive assistant to the university's athletics director.
- ◆ EEOC v. National Association for the Education of Young Children – D.D.C. – female associate editor allegedly being paid lower than male counterpart.
- ◆ EEOC v. Vador Ventures – E.D. Va. – employer allegedly paid female day porter less than male counterpart.

EEOC v. Cummins, Inc. (M.D. Tenn.)

- ◆ EEOC alleges that Cummins, Inc., a diesel engine manufacturer which operates a call center located in Nashville, violated Title VII when it paid a female in a benefits enrollment position less than a male colleague doing the same work.
- ◆ According to the EEOC's lawsuit, the female employee had performed the benefits enrollment position for over a year. She later learned Cummins offered a male candidate the same position at a higher rate of pay.
- ◆ The woman then asked her supervisor for a salary review to determine if Cummins compensated her appropriately. After completing the salary review, the company determined it paid the female employee less than her male counterpart. Cummins, however, did not change the woman's salary. When she resigned almost a year later, Cummins still had not increased her pay to match the pay of her male coworker.

EEO-1 Report

- ◆ The EEOC planned to begin collecting summary pay data as part of the EEO-1 report beginning March 31, 2018.
- ◆ This report has been nixed.
- ◆ Regardless, the EEOC believes that pay discrimination is still a huge problem in the workplace, and it is looking for alternative ways to obtain this information.

Priority No. 5: Access to Legal System

- ◆ EEOC will focus on policies and practices that limit substantive rights, discourage or prohibit individuals from exercising their rights under employment discrimination statutes, or impede EEOC's investigative or enforcement efforts.
 - Overly broad waivers, releases, and mandatory arbitration provisions (e.g., waivers or releases that limit substantive rights, deter or prohibit filing charges with EEOC, or deter or prohibit providing information to assist in the investigation or prosecution of discrimination claims);
 - Employers' failure to maintain and retain applicant and employee data and records required by EEOC regulations; and
 - Significant retaliatory practices that effectively dissuade others in the workplace from exercising their rights.

Priority No. 6: Preventing Systemic Harassment

- ◆ This priority typically involves systemic cases.
- ◆ However, a claim by an individual or small group may fall within this priority if it raises a policy, practice, or pattern of harassment.
- ◆ Strong enforcement with appropriate monetary relief and effective injunctive relief to prevent future harassment of all protected groups is critical, but not sufficient.
- ◆ In addition, the Commission believes a concerted effort to promote holistic prevention programs, including training and outreach, will greatly deter future violations

EEOC v. Flash Market (W.D. Tenn)

- ◆ EEOC claims that the owner and operator of convenience store gas stations permitted a mid-level supervisor to create a sexually hostile work environment and terminated her for complaining.
- ◆ Supervisor allegedly propositioned her for sex and made lewd remarks.
- ◆ Area manager allegedly fired her after she filed an EEO charge.

EEOC v. SMX Staffing Company (D. Kan.)

- ◆ EEOC alleges that SMX allowed a manager to repeatedly sexually harass female workers on a manufacturing line.
- ◆ A female employee allegedly reported that the manager repeatedly called her “baby,” told her she was “sexy,” and asked her for oral sex in exchange for paid time off.
- ◆ She refused and reported the harassment to another supervisor, who told her she should “screw him” and take the extra pay. The harassment continued, and on one occasion the account manager exposed his genitals to the employee.
- ◆ After she reported the harassment again to a different supervisor, SMX conducted an investigation, but the company allowed the manager to return to work.
- ◆ Other male employees also intimidated the employee because she reported the harassment.

Questions?

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