

**Trending in Employment Law:
Update for 2015**

TCAA Summer Conference
June 18, 2015

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New EEOC data

- ▶ Latest round of 2014 data released Feb 2015
- ▶ Retaliation at record all time high
 - # Risen steadily for 17 years
 - 43% of charges in 2014 (22% in 1997)
- ▶ 88,778 charges – TX leads nation
 - Decrease of 5,000
 - In part because gov'n't shutdown
- ▶ Expect tough enforcement on 4-year plan
 - More money hiring personnel, technology for 2015
 - 2013–2016

**Good retaliation defense:
Loose lips sink ships**

- ▶ *Crutcher v. Dallas ISD*, Tex. App. – Dallas 2013
 - Summary judgment for employer – no evidence individuals who fired plaintiff were aware of her previous discrimination lawsuit filed several years earlier.
- ▶ *Gorman v. Verizon Wireless* (5th Cir. 2014)
 - Employer wins on retaliation
 - Supervisor subject of previous discrimination complaint participated in termination
 - But ultimate decision maker executive kept ignorant

2015 EEOC Focus

- Systematic Discrimination/Blanket Policies
 - Pregnancy Discrimination/Accommodation
 - Gender Identity and Stereotyping
 - GINA and medical questionnaires
 - Religion and Dress Codes
 - Caretaker Stereotypes
 - Criminal and Credit Screening

EEOC's concern about criminal background bars

FIGURE 11
Marijuana Use by Race: Used Marijuana in Past 12 Months (2001-2010)

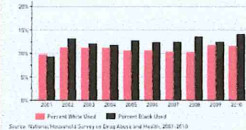
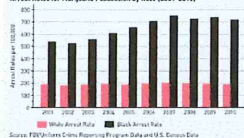


FIGURE 10
Arrest Rates for Marijuana Possession by Race (2001-2010)



EEOC: Eliminate hiring barriers

- ▶ Criminal/Credit Background Checks
 - Criminal past shouldn't be absolute bar to employment
- ▶ Disparate Impact Theory
 - Especially males of color
 - Data-intensive arguments
- ▶ Consider Three factors:
 - Length of time since crime
 - Gravity
 - Relation to job
- ▶ "Ban the Box" legislation spreading

EEOC's Focus on Pregnancy

- ▶ Pregnancy Discrimination Act, 1978
 - Treat same as non-pregnant employees similar in ability to do work.
- ▶ July 2014 Guidance v. Appellate Courts
 - EEOC: Can't treat pregnant employees different from disabled or those with on-the-job injuries
 - Courts: Pregnancy temporary, not disability, and no light duty required so long as pregnancy not only excluded class
- ▶ *Young v. UPS* – 3/25/15 USSC – middle ground
 - WC, disabled, DOT-disqualified employees get light duty
 - All others don't
 - Is this neutral to pregnancy?
 - USSC: not if policy places unjustified "significant burden" on pregnant employees compared to others– look at percentages

EEOC's Focus on Disability

- ▶ Don't rely on customer preference
 - EEOC won Oct. 2014 jury verdict against private security company: one-armed security guard
 - Customer complained: "The company is a joke. You sent me a one-armed security guard."
- ▶ Always engage in & document interactive process
 - Leave limits – flexibility and discussion
 - Accommodations and abilities

Reasonable Accommodation

- ▶ *Feist v. State of LA DOJ*, (5th Cir. 9/13)
 - Duty to accommodate disabilities not limited to accommodating essential functions of job
 - Requested free on-site parking space to accommodate osteoarthritis
 - Required accommodation even though essential functions of Assistant AG did not include driving or parking

Religious Accommodation

- ▶ *Adeyeye v. Heartland Sweeteners, Inc.* 7th Cir. 2013
 - Plaintiff fired after Nigeria travel to lead father's burial rite
 - Two written requests for unpaid leave:
 - Participation was "compulsory"
 - Failure to go would result in "spiritual death" in afterlife.
 - Sufficient notice of the religious nature of leave?
 - Yes, words like "ceremony" "rite" & "spiritual consequences"
 - "Although an employee's religious practices may not be familiar, the protections of Title VII are not limited to familiar religion."
- ▶ June 1 2015 SCOTUS 8-1 decision on *EEOC v. Abercromby & Fitch* – applicant's headscarf enough notice of need for religious accommodation of flexible dress code
- ▶ *Davis v. Fort Bend County* (5th Cir. 2014)
 - Church groundbreaking ceremony is "religious practice"

EEOC's reviewing medical inquiries

- ▶ *EEOC v. All-Star Seed* (11/10/14)
 - Pre-offer, dispatcher job, company questionnaire, company follow-up questions. Third-party doctor.
 - Settled for \$187,500
- ▶ *EEOC v. Fabricut, Inc.* (5/7/13)
 - Post-offer, job-related (carpal tunnel); doctor questionnaire
 - Settled for \$50,000. Not as clear-cut for employers
- ▶ Takeaway: Check with third-party contractors for GINA violations



Same-Sex Marriage – Workplace

- ▶ Do we have a USSC decision by speech time?
- ▶ IRS Aug 2013 Announcement
 - If legally married anywhere, "spouse" for tax purposes
 - Residence irrelevant
- ▶ DOL
 - Secretary of Labor Sept 2013 announcement:
 - All agency leaders directed to implement *Windsor* "in a way that provides maximum protection for workers and their families"
 - FMLA – Final rule effective March 27 (but maybe not in Texas??). Defines "spouse" according to:
 - "state of celebration" or
 - if married abroad, would it be legal in at least one state
 - ERISA – If legally married anywhere, "spouse" for benefits purposes
- ▶ Texas governmental employers in tough spot

LGBT Discrimination



- ▶ If no local legislation, theories based on gender stereotyping/sexually hostile work environment
- ▶ Stems from 2009 3d Cir. *Prowel v. Wise Bus. Forms*:
 - Gay plaintiff, self-described "effeminate male"
 - Coworker Harassment – unaddressed by management
 - Court: gender discrimination – harassed because he failed to meet traditional male stereotypes
- ▶ Gender identity
 - 2014 EEOC/DOJ guidance clear – LGBT covered as sex discrim
 - *But see, Eure v. Sage Corp. (WD TX 11/19/14)*
 - "what is that?" and "we don't hire transgenders"
 - Employer MSJ granted: no 5th Cir /USSC precedent that transgender alone is protected class, without stereotyping evidence

Whistleblower: Appropriate Law Enforcement Agency

- ▶ *Hunt County CSCD v. Gaston* TX App Austin 8/2014
- ▶ Whistleblower claim
 - Report unlawful activity
 - In good faith
 - To appropriate law enforcement authority
 - Adverse action caused by such report
- ▶ Judges not appropriate law enforcement authority
 - They are in charge of making sure department follows the law, just like any other executives, but not investigating or enforcing particular law.

Whistleblower: "Good Faith Report?"

- ▶ *City of S. Houston v. Rodriguez* Tex. App. Houston [14th] 3/14
- Chief municipal clerk discovered and reported "ticket fixing" by subordinate and mayor.
- Basis – discrepancy between paper tickets and electronic entries in 14 cases.
- Not good faith for experienced clerk to assume ticket fixing instead of processing mistakes "in an office with the problems faced by the South Houston municipal court office."

Social Media in the Workplace



Off-Duty Posts Protected Speech?

- ▶ Free Speech:
 - *Bland v. Roberts* Sept 2013 4th Cir.
 - Jail deputies "liked" Sheriff's opponent on Facebook
 - "Liking" is protected speech: "Internet equivalent of yard signs"
- ▶ Not Free Speech – *In Re O'Brien 2013 NJ App.*
 - First grade teacher Facebook post: "I'm a warden for future criminals"
 - ALJ: "thoughtless words can destroy the partnership between home and school that is essential to the mission of the schools."
 - Court: "conduct destroys public respect for government employees and confidence in the operation of public services."



No Free Speech Right

- ▶ First grade teacher terminated
 - Parent complained she had referred to her students as "future criminals" on Facebook
- ▶ ALJ:
 - "thoughtless words can destroy the partnership between home and school that is essential to the mission of the schools."
- ▶ Court:
 - "conduct destroys public respect for government employees and confidence in the operation of public services."

Workplace harassment through social media?

- ▶ *Guardian Civic League v. Philadelphia PD* –
 - Sec. 1983 – PD created hostile work environment by letting white officers operate racist website, post racially offensive comments off-duty
 - "Knew and did not act" standard
 - Settled – six figures plus injunctive relief
- ▶ Managers who know must enforce anti-harassment policies—regardless of medium!

Don't Think Your E-Communications and Off-Duty Posts are Private

- ▶ Texts to coworkers will come out
 - "My hotel room is so lonely"
- ▶ Supervisor's Facebook profile shouldn't focus on porn
- ▶ Off-duty racist posts will bite you in the workplace

Thank you and good luck!

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