

EEO Compliance, Responding to EEOC Charges, and EEOC Enforcement Trends

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Conciliation Process

Mach Mining, L.L.C. v. EEOC, (April 29, 2015)

- Before filing suit against an employer for a violation of Title VII, the EEOC must first “endeavor to eliminate [the] alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.” 42 U.S. 2000e-5(b).
 - *(1) Should EEOC’s conciliation efforts be subject to judicial review?*
 - Yes. EEOC has “wide leeway” over the conciliation process, **but** there is a strong rebuttable presumption favoring judicial review of administrative actions.
 - *(2) If so, what is the proper scope of the judicial review?*
 - Scope = narrow, limited review that respects the expansive discretion that Title VII gives the EEOC while ensuring that EEOC follows the law.

Conciliation Process, Cont'd

- ***How does EEOC comply with conciliation provision?***

- (1) Must **inform** employer about the specific allegation/discriminatory practice;
- (2) Must **try to engage** in a discussion to give the employer a chance to remedy the allegedly discriminatory practice;
- (3) **Sworn affidavit** from EEOC stating that has performed #1 and #2 is enough to show it has complied with the conciliation provision;
- (4) **But**, an employer can rebut with its own affidavit or other evidence to show that EEOC *did not* provide the required information or attempt to conciliate the charge.
- **Court-ordered remedy for a finding of a failure to conciliate?** Back to the drawing board -- the court orders the EEOC to undertake the conciliation process.

EEOC's Strategic Enforcement Plan, FY 2013-2016

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

Addressing Emerging and Developing Issues: *The ADA and Employer Wellness Programs*

- **Wellness Program** = a program and activities offered through employer-provided health plans to help employees improve health and reduce health care costs.
- A majority of employers have some form of wellness program
 - *85% of employers with 500 employees or more offer a program.*
- Many employers use **financial** and **other incentives** to encourage participation in these programs or to encourage employees to achieve certain health outcomes (e.g., lower blood pressure or cholesterol).
 - *42% offer employee incentives to undergo biometric screening*
 - *23% link the incentives to actual results such as reaching/making progress towards blood pressure or body mass targets*
- Some wellness programs require employees to undertake some activity to earn an incentive, but others require employees to answer questions about their health or take medical examinations.

The ADA and Employer Wellness Programs, cont'd

- **How does the ADA affect wellness programs?**
 - **General Rule** = employers are prohibited from asking employees disability-related questions or requiring employees to undergo medical exams.
 - **Exception:** employers **may** ask disability-related questions or conduct medical exams as part of **wellness programs** as long as the questions and/or exams are voluntary.
 - **Note:** If a program simply promotes a healthier lifestyle, but does not ask disability-related questions or require medical exams, the program **is not** subject to the ADA's general rule.

The ADA and Employer Wellness Programs, cont'd

- **EEOC v. Orion Energy Systems**, No. 1:14-cv-01019 (E.D. Wisc. 8/20/14)
 - EEOC alleges Orion shifted entire cost of health insurance to an employee and then fired her because she refused to participate in a wellness program that included disability-related questions and medical exams.
 - EEOC alleges that the questions/exams are not job-related and consistent with business necessity and that the program is not voluntary.
 - EEOC also alleges Orion retaliated against the employee and interfered with her ADA rights.

The ADA and Employer Wellness Programs, cont'd

- **EEOC v. Flambeau, Inc.**, No. 3:14-cv-00638 (W.D. Wisc. 9/30/14)
 - Wellness program provides for the cancellation of health insurance, shifting of entire cost of coverage, and other unspecified discipline for employees who do not submit to biometric screening and complete health risk assessment.
 - EEOC alleges that the inquiries/exams are not job-related and consistent with business necessity and that the program is not voluntary.

The ADA and Employer Wellness Programs, cont'd

- **EEOC v. Honeywell Int'l Inc.**, No. 0:14-cv-4517 (D. Minn. 10/27/14)
 - To participate in the wellness programs, employees and their spouses must agree to under biometric testing;
 - If an employee, or his spouse, refuses to participate -- **\$500** surcharge on health insurance and lose up to **\$1500** in Honeywell contributions to the HSA;
 - EEOC petitioned for a TRO and Preliminary Injunction to enjoin Honeywell from reducing any contribution to a HSA or imposing a surcharge because the employee or his/her spouse declined to undergo the biometric testing;
 - The court denied the injunction without reaching the merits of the case.

The ADA and Employer Wellness Programs, cont'd

- **Notice of Proposed Rulemaking (NPRM):**

- Published in the Federal Register on **April 20, 2015**.
- Proposes to amend **29 C.F.R. 1630.14(d)** of the EEOC's regulations implementing Title I of the ADA.
- Members of the public have **60 days** from the date of publication to submit comments (**on or before 6/19/2015**).
- EEOC will then review and consider the comments, revise the NPRM if necessary, and issue a final rule.

The ADA and Employer Wellness Programs, cont'd

- **The proposed rules explain . . .**
 - (1) what an **employee health program** is;
 - (2) what it means for an employee health program to be **voluntary**;
 - (3) what **incentives** employers may offer as part of a voluntary employee health program;
 - (4) what **notice and confidentiality** requirements apply to the medical information obtained as part of voluntary employee health program; and
 - (5) that compliance with the rules concerning voluntary employee health programs does not ensure compliance with all the **federal anti-discrimination laws**.

The ADA and Employer Wellness Programs, cont'd

- **The proposed rule clarifies. . .**
 - **What incentives can employers offer?** Limited incentives up to a maximum of **30%** of the total cost of employee-only coverage.
 - **What does it mean for a program to be voluntary ?** Does not require employee participation; does not deny coverage under any group health plan for non-participation or limit the extent of such coverage; does not take adverse action or otherwise retaliate against an employee for lack of participation; and includes informed notice to employees about use of their medical information.

Addressing Emerging and Developing Issues: *Accommodating Pregnancy-Related Conditions Under the ADAAA or PDA*

- ***Enforcement Guidance: Pregnancy Discrimination and Related Issues (July 14, 2014). Discusses. . .***
 - (1) when employer actions may constitute unlawful discrimination on the basis of **pregnancy, childbirth, or related medical conditions** under Title VII as amended by the PDA;
 - (2) the obligation of employers under the PDA to provide pregnant workers **equal access to benefits** of employment; and
 - (3) how the 2008 amendments to the ADA, which broadened the definition of disability, applies to individuals with **pregnancy-related impairments**.

Accommodating Pregnancy-Related Conditions Under the PDA, cont'd

- ***Equal access to benefits -- What does this mean?***
 - An employer is required under the PDA to treat an employee temporarily unable to perform the functions of her job because of her pregnancy or a related medical condition in the same manner as it treats other employees similar in their ability or inability to work, whether by providing modified tasks, alternative assignments, or fringe benefits.
- ***When can this become an issue?***
 - Light duty;
 - Leave;
 - Health insurance;

Accommodating Pregnancy-Related Conditions Under the PDA, cont'd

- **Young v. UPS (March 25, 2015)**: An employee can establish a prima facie case under the PDA for disparate treatment based on the denial of an accommodation (e.g. light duty) by showing:
 - (1) She belongs to the protected class;
 - (2) She sought an accommodation;
 - (3) The employer did not accommodate her; and
 - (4) The employer accommodated other employees similar in their ability or inability to work
- The employer may then offer a legitimate, nondiscriminatory reason for not accommodating the employee (cannot = more \$\$ or less convenient).
- Employee can then show that employer's reason is pretextual; and can reach a jury by providing evidence that the employer's policies "significantly burden" pregnant employees and that its "legitimate, nondiscriminatory reasons" are not "sufficiently strong to justify the burden . . . but give rise to an inference of discrimination."

Addressing Emerging and Developing Issues: *Coverage of LGBT Individuals under Title VII*

- **Coverage of LGBT Individuals Under Title VII**: Sexual orientation is not a protected status under Title VII, but discrimination against individuals because they are transgender is discrimination because of sex under Title VII.
 - **EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.**, No. 2:14-cv-13710 (E.D. Mich. 9/25/14) (alleging that the employer fired its funeral director/embalmer because she is transgender, because she is transitioning from male to female, and/or because she did not confirm to the employer's gender-based stereotypes).
 - **EEOC v. Lakeland Eye Clinic**, No. 8:14-cv-2421 (M.D. Fla. 9/25/14) (alleging that the employer fired its employee because she is transgender, because she is transitioning from male to female, and/or because she did not confirm to the employer's gender-based stereotypes)

Coverage of LGBT Individuals under Title VII, cont'd

- **Collaboration with the DOJ**: In December 2014 , AG Holder announced that the DOJ takes the position that Title VII's prohibition against sex discrimination includes claims based on an individual's gender identity, including transgender status.
 - **United States v. Southeastern Oklahoma State Univ. and the Regional Univ. Syst. Of Oklahoma**, No. 5:15-cv-0024 (W.D. Okla. 3/30/15) (alleging that the universities violated Title VII by discriminating against a transgender employee on the basis of sex and retaliating against her when she complained about the discrimination)

Coverage of LGBT Individuals under Title VII, cont'd

- **Lusardi v. McHugh**, Appeal No. 0120133395 (April 5, 2015).
 - Transgender employee was subjected to disparate treatment and sex-based harassment when the Army restricted her from using a common female restroom and when a supervisor intentionally and repeatedly referred to her by male pronouns, her former name, or “sir.”
 - “An agency may not condition access to facilities . . . on the completion of certain medical steps . . . [that] will somehow prove the bona fides of the individual’s gender identity.”
 - “The Commission has held that supervisors and coworkers should use the name and gender pronoun that corresponds to the gender identity with which the employee identifies in employee records and in communications with and about the employee. Persistent failure [to do so] may constitute . . . sex-based harassment.”

Additional Resources

- ADA and Wellness Programs:
 - NPRM Information:
 - Press release:
<http://www.eeoc.gov/eeoc/newsroom/release/4-16-15.cfm>
 - Qs & As:
http://www.eeoc.gov/laws/regulations/qanda_nprm_wellness.cfm
 - Fact Sheet for Small Businesses:
http://www.eeoc.gov/laws/regulations/facts_nprm_wellness.cfm
 - EEOC Meeting:
 - Wellness Programs Under Federal EEO Laws, May 18, 2013:
<http://www.eeoc.gov/eeoc/meetings/5-8-13/index.cfm>

Additional Resources, Cont'd

- Accommodating Pregnancy-Related Conditions Under the ADA or PDA:
 - Enforcement Guidance: Pregnancy Discrimination and Related Issues,
http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm
 - Questions and Answers about the EEOC's Enforcement Guidance on Pregnancy, Discrimination and Related Issues
http://www.eeoc.gov/laws/guidance/pregnancy_qa.cfm
 - Fact Sheet for Small Businesses: Pregnancy Discrimination,
http://www.eeoc.gov/eeoc/publications/pregnancy_factsheet.cfm

Additional Resources, Cont'd

- **LGBT Issues:**
 - *What does the Macy Decision Mean for Title VII?*
http://www.eeoc.gov/federal/training/brown_bag_macy.cfm
 - *Guidance from OPM Regarding Transgender Individuals in the Federal Workplace:*
www.opm.gov/diversity/transgender/guidance.asp

Questions?

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