

1

EEO Legal Update TAPS 2017

Jeanne Goldberg
Senior Attorney Advisor
Office of Legal Counsel
U.S. Equal Employment Opportunity Commission

2

EEOC Strategic Enforcement Plan (SEP) FY 2017-2021

<https://www.eeoc.gov/eeoc/plan/sep-2017.cfm>

Updated SEP Priorities:

- Revised priority on “immigrant, migrant and other vulnerable workers”
 - EEOC offices will identify vulnerable workers/underserved communities within their areas for focused attention, including development or strengthening of partnerships
- Narrows ADA issues that are part of the “emerging and developing issues” priority
 - qualification standards and inflexible leave policies that discriminate against individuals with disabilities

3

Updates to SEP Priorities (cont'd)

- Two new areas added to the “emerging and developing issues” priority:
 - issues related to complex employment relationships and structures in the 21st century workplace (e.g., temporary workers, staffing agencies, independent contractor relationships, and on-demand economy)
 - backlash discrimination against those who are Muslim, Sikh, or of Arab, Middle Eastern or South Asian descent (or perceived to be)
- Continues focus on gender-based pay discrimination, and explicitly extends equal pay priority to all workers
- Refines priority on “access to the legal system” to focus on significant retaliatory practices and policies.

4

Age Discrimination in Employment Act

5

6/14/17 Commission Meeting:
ADEA @50: More Relevant Than Ever
www.eeoc.gov/eeoc/meetings/6-14-17/index.cfm

- **2017 AARP survey:** nearly two-thirds of workers age 55-64 report age as barrier to getting a job; AARP reports hiring discrimination and mandatory retirement are persistent problems older workers face across industries
- **National Bureau of Economic Research Disability Research Center:** 2015 study using resumes for workers at various ages found significant hiring discrimination for female applicants and oldest applicants
- **Challenger, Gray & Christmas, Inc.:** Bureau of Labor Statistics data shows combination of societal tradition and flawed business practices “channel older people out of the work force, especially skilled workers”
- **Center for Research and Education on Aging and Technology Enhancement:** research refutes assumptions that older workers are less productive, technophobic or inflexible

6

ADEA: Pattern or Practice of Refusing to Hire for Certain Positions Based on Age

EEOC v. Texas Roadhouse, Civil Action No. 1:11-cv-11732-DJC (D. Mass. consent decree entered 3/31/2017)

www.eeoc.gov/eeoc/newsroom/release/3-31-17.cfm

- EEOC alleged Texas Roadhouse engaged in a nationwide pattern and practice of refusing to hire individuals age 40 and older for “front-of-the-house” positions
- Terms of Consent Decree:
 - Employer will pay \$12 million and establish a process to identify and compensate individuals denied jobs;
 - Injunctive relief prohibiting future discrimination;
 - Employer will establish a Diversity Manager and pay for a decree monitor; and
 - Increase recruitment and hiring of individuals age 40 and older.

7

ADEA: Disparate Impact Claims by Applicants?

Villarreal v. R.J. Reynolds Tobacco, 839 F.3d 958 (11th Cir. 2016).

- Plaintiff, a 49-year old applicant for employment, alleged that employer's **resume review guidelines, which targeted applicants "2-3 years out of college," and instructed hiring managers to avoid applicants with "8-10 years" prior experience**, disparately impacted older applicants.
- Held: An applicant for employment cannot sue an employer for disparate impact under the ADEA because the applicant has no "status as an employee."
- EEOC has taken contrary position; split in circuits.

8

ADEA: Disparate Impact Claims by Applicants?

Rabin v. Pricewaterhouse Coopers L.L.P., 2017 WL 661354 (N.D. Cal. Feb. 17, 2017).

- Plaintiff filed class action lawsuit alleging PWC's hiring practices disparately impacted older applicants because **entry-level jobs rarely advertised on company website; vacancies advertised through on-campus programs**.
- Employer, relying on Villarreal, argued that job applicants have no right to bring a disparate impact claim under ADEA.
- Held: PWC must defend against claims by a proposed class of rejected 40-and-over job seekers.
 - Precedent supports extending the right to make a disparate impact claim under ADEA to any individual who has been adversely affected because of his or her age.
 - ADEA's legislative history supports the conclusion that older job applicants can bring disparate impact claims.
 - Deference to EEOC's interpretation that ADEA permits disparate impact claims by applicants.

9

National Origin Discrimination

10

Title VII: National Origin

New Enforcement Guidance

- EEOC Enforcement Guidance on National Origin Discrimination (approved Nov. 2016)
- www.eeoc.gov/laws/guidance/national-origin-guidance.cfm
- Questions and Answers: www.eeoc.gov/laws/guidance/national-origin-ga.cfm
- proposal posted for public input April-May 2016
- replaces the Compliance Manual (Vol. II) Section 13: National Origin Discrimination (2002)
- topics addressed include:
 - definition of national origin discrimination;
 - Title VII's application to employment decisions, harassment, citizenship issues, language issues, and related issues, including retaliation; and
 - job segregation, human trafficking, and intersectional discrimination

11

Title VII: National Origin *Language Issues in the Workplace*

- Employers may have legitimate business reasons for making language-based employment decisions.
- It is important, however, to ensure these decisions do not violate Title VII.
- Employers may not base employment decisions on **accent** *unless*:
 - ability to communicate in spoken English is required to perform job duties effectively; and,
 - individual's accent *materially interferes* with that job performance.
- Language **fluency** requirement is lawful *if*
 - fluency is required for the *effective performance* of position
- **Language-restrictive policy** may violate Title VII if applied *at all times* in workplace, but may be lawful *in limited circumstances* when needed to promote safe and efficient job performance or safe and efficient business operations. Of course, it should not be adopted for discriminatory reasons or applied in a discriminatory way.

12

Title VII: National Origin *Language Issues in the Workplace*

- **EEOC v. Wisconsin Plastics, Inc.**, No. 1:14-cv-663 (E.D. Wis. consent decree entered May 26, 2017).
- EEOC alleged metal and plastic products manufacturer unlawfully discriminated against a group of 22 Hmong and Hispanic employees based on national origin when it terminated them based on the company's conclusion they lacked sufficient English skills; the EEOC investigation concluded they did not need English to do their jobs.
- Court ruled in 2016 that it could not find as a matter of law that ability to speak English is a legitimate non-discriminatory reason to fire employees who do not need to speak English to do their jobs.
- Settlement provides for \$475,000 for the employees, periodic reporting to EEOC, and training of management and employees on Title VII obligations.

13

Title VII: National Origin *Language Issues in the Workplace*

- EEOC v. Antonella's Restaurant & Pizzeria, Inc., JTA, Inc., and Dellicap, LLC, Case No.7:15-CV-07666 (S.D.N.Y. consent decree entered June 22, 2017).
- EEOC alleged restaurant company violated Title VII by discriminating against Hispanic employees by subjecting them to name calling, slurs, and creating and maintaining a hostile work environment because of their national origin, and also by requiring that workers speak only English in the workplace without a business reason for this requirement.
- Consent decree settling the suit provides Antonella's will pay \$50,000 for the discrimination victims and implement anti-discrimination policies, EEO training, and problem-solving procedures.

14

Title VII: National Origin *Harassment*

- Unal v. Los Alamos Pub. Sch., 638 F. App'x 729 (10th Cir. 2016).
- Plaintiff, a Turkish-born elementary school teacher, presented sufficient evidence for reasonable jury to find pervasive national origin harassment that created a hostile work environment.
 - offensive comments about her national origin, e.g., calling her a "turkey from Turkey"
 - offensive conduct toward other nationalities, such as use of "little people" to refer to a Vietnamese family
 - use of feigned foreign accents to make school-wide announcement
 - facially neutral conduct demonstrating principal treated her differently than U.S.-born peers, such as soliciting negative feedback about her but not other teachers, and failing to assign her an instructional assistant for months but immediately assigning one to U.S.-born teacher
- animus directed at plaintiff's own nationality provided strongest evidence, but evidence of harassment toward other nationalities also relevant if she knew about it
- while no incident that was sufficiently severe by itself to create a hostile work environment, the conduct occurred with enough frequency for jury to find a hostile work environment

15

Race Discrimination

16

Race Discrimination: EEOC v. Catastrophe Mgmt. Sols., 2016 WL 7210059 (11th Cir. Dec. 13, 2016).

- Employer rescinded a job offer that was made to an African-American woman when she refused to cut off her dreadlocks per employer's dress and grooming code.
- EEOC argued that the employer's ban on dreadlocks discriminated against African-Americans based on physical and/or cultural characteristics.
- Held: The employer's refusal to employ applicant because she wore dreadlocks did not violate Title VII's prohibition on race discrimination.
 - Title VII only prohibits discrimination based on immutable traits, and dreadlocks, although culturally associated with race, are a mutable characteristic.

17

Pregnancy

18

New EEOC Pregnancy Discrimination Resources

- **Legal Rights for Pregnant Workers Under Federal Law**
www.eeoc.gov/eeoc/publications/pregnant_workers.cfm
- **Helping Patients Deal with Pregnancy-Related Limitations and Restrictions at Work**
www.eeoc.gov/eeoc/publications/pregnancy_health_providers.cfm

Other EEOC Pregnancy Discrimination Resources

- **Enforcement Guidance: Pregnancy Discrimination And Related Issues**
www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm
- **Questions and Answers about the EEOC's Enforcement Guidance on Pregnancy Discrimination and Related Issues**
www.eeoc.gov/laws/guidance/pregnancy_qa.cfm
- **Fact Sheet for Small Businesses: Pregnancy Discrimination**
www.eeoc.gov/eeoc/publications/pregnancy_factsheet.cfm

Pregnancy Discrimination Under Both Title VII and ADA

- **EEOC v. Carolina Creek Christian Camp, Inc.**, Civil Action No. 4:16-cv-03714 (S.D. Tex. consent decree entered May 2017).
- Camp registrar was reassigned after employer learned of her gestational diabetes.
- Employer asserted job too demanding, but employee never indicated inability to perform duties nor requested reassignment.
- After she complained about demotion, she was terminated.
- EEOC alleged violation of Title VII and ADA.
- Settlement provides for payment of \$70,000 and other relief, including new policies and annual non-discrimination training, and compliance reports to EEOC for two years.

Sex Discrimination Based on Sexual Orientation or Gender Identity

Pregnancy Discrimination Under Title VII **Legg v. Ulster Cty.**, 820 F.3d 67 (2d Cir. 2016).

- County corrections officer alleged pregnancy discrimination when denied requested light duty because employer's light duty policy only applied to on-the-job injuries
- Held: Applying **Young v. United Parcel Service**, 575 U.S. ___ (2015), reasonable jury could find **policy imposed a significant burden on pregnant employees because it categorically denied light duty to pregnant workers, and employer's reasons for denying plaintiff light duty were not "sufficiently strong."**
- State law requiring light duty for corrections officers injured on job did not prevent county from extending same benefit to pregnant workers.
- Under **Young**, **cost generally cannot justify refusing to accommodate pregnant workers on same basis as other workers.** Reasonable jury could find cost was factor in county's decision, and purported reliance on state law was pretext for sex discrimination.

Reasonable Accommodation Under ADA for Substantially Limiting Pregnancy-Related Impairment

Varone v. Great Wolf Lodge of the Poconos, L.L.C., 2016 WL 1393393 (M.D. Pa. 2016).

- Employer denied massage therapist's accommodation request for short breaks (between massages) for pregnancy-related impairment.
- Held: Court denied employer's motion to dismiss. Plaintiff's allegations were sufficient to state ADA claim of discrimination based on pregnancy-related impairment.
 - Job required standing for long periods of time, causing cramping and pain throughout stomach and chest that limited her ability to perform major life activities
 - Major life activities that may have been substantially limited included her ability to lift, stop, walk, turn, think, concentrate, bend, care for herself, sit and stand for long periods of time, and relate to others.

Title VII: Sex Discrimination -- Sexual Orientation and Gender Identity

What You Should Know About EEOC and Enforcement Protections for LGBT Workers

www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm

25

Title VII: Sex Discrimination

Sexual Orientation

Hively v. Ivy Tech. Community College of Indiana, 853 F.3d 339 (7th Cir. 2017) (en banc).

- Part-time adjunct professor brought Title VII sex discrimination claim, alleging denial of full-time employment and promotions based on sexual orientation
- Full 7th Circuit overruled circuit precedent, becoming first federal appellate court to rule that sexual orientation discrimination is sex discrimination under Title VII
- Rationales:
 - Disparate treatment; and
 - Associational discrimination, similar to discrimination based on inter-racial relationships.

27

Title VII: Sex Discrimination

Gender Identity

- Chavez v. Credit Nation Auto Sales, LLC, 2016 WL 158820 (11th Cir. Jan. 14, 2016) (unpublished).
- Transgender employee alleged sex discrimination when she was terminated for sleeping on the job.
- Appeals court remanded because there were disputed material facts as to whether sex was a motivating factor in the employer's termination decision.
- Less than two months before, supervisor said plaintiff's transgender status made him "nervous" and would negatively impact the business and coworkers, discussed what she was permitted to wear to and from work, warned her not to talk about her transition, and said the owner "didn't like" the implications of her transition.
- Plaintiff received excellent performance appraisal prior to disclosing her gender transition
- Employer deviated from its progressive disciplinary policy in terminating plaintiff.

29

Title VII: Sex Discrimination

Gender Identity

Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 2017 WL 2331751 (7th Cir. May 30, 2017) (Title IX case).

- Suit alleged high school's unwritten policy barring transgender student from using boys' bathroom after he started transition violated Title IX and equal protection clause
- Held: as matter of first impression, transgender students may bring sex discrimination claims under Title IX based on a sex-stereotyping theory, and plaintiff's claim likely to succeed
- "a policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX"
- gender-neutral alternatives "were not true alternatives" because of their distance from student's classroom and "increased stigmatization they caused"
- Similar Title VII rulings: Roberts v. Clark Cty. Sch. Dist., 2016 WL 5843046 (D. Nev. Oct. 4, 2016); Mickens v. General Electric Co., 2016 WL 7015665 (W.D. Ky. Nov. 29, 2016).

26

Title VII: Sex Discrimination

Sexual Orientation

Evans v. Ga. Regional Hospital, 850 F.3d 1248 (11th Cir. 2017), pet. for reh'g en banc pending.

- Security guard brought Title VII sex discrimination claim, alleging harassment because of her sexual orientation and gender non-conformity
- Contrary to Hively, 11th Circuit held binding circuit precedent from 1979 disallowed challenging sexual orientation discrimination as sex discrimination under Title VII
- Claim of sex discrimination based on stereotypes about manner and appearance could proceed
 - Dissent: when woman alleges "she has been discriminated against because she is a lesbian, she necessarily alleges that she has been discriminated against because she failed to conform to the employer's image of what women should be – specifically, that women should be sexually attracted to men only."

28

Title VII: Sex Discrimination

Gender Identity

EEOC v. R.G. and G.R. Harris Funeral Homes, Inc., 2016 WL 4396083 (E.D. Mich. Aug. 18, 2016).

- EEOC argued that the employer fired a funeral director because of her transition from male to female. Court previously ruled that the case could proceed only on a sex-stereotyping theory.
- Held: Summary judgment for employer. Religious Freedom Restoration Act (RFRA) barred claim "under the facts and circumstances of this unique case."
 - RFRA provides federal law shall not "substantially burden a person's exercise of religion" unless it is necessary to further a compelling government interest and is the least restrictive means to do so.
 - Court reasoned that assuming EEOC has compelling government interest in Title VII enforcement, it failed to demonstrate there was no less restrictive means to achieve that goal in this case.
- EEOC has appealed case to the 6th Circuit.

30

Examples of Recent EEOC LGBT-Related Title VII Cases

- Settlement of EEOC v. Deluxe Financial Services Corp. (D. Minn. Jan. 20, 2016) (alleged harassment and termination based on gender identity).
<https://www.eeoc.gov/eeoc/newsroom/release/1-21-16.cfm>
- Favorable court ruling in EEOC v. Scott Medical Health Center (W.D. Pa. Nov. 4, 2016) (holding that sexual orientation discrimination is a form of sex discrimination under Title VII).
<https://www.eeoc.gov/eeoc/newsroom/release/11-9-16.cfm>
- Agreed resolution of EEOC charge against Mon General Hospital (alleging Title VII sex discrimination where spousal medical benefits denied because employee married to same-sex spouse).
<https://www.eeoc.gov/eeoc/newsroom/release/10-25-16.cfm>

31

ADA and Gender Identity?

- **Blatt v. Cabela's Retail, Inc.**, 2017 WL 2178123 (E.D. Pa. May 18, 2017).
- Plaintiff challenged termination as both Title VII sex discrimination and ADA disability discrimination
- ADA claim cited "gender dysphoria, also known as Gender Identity Disorder" as impairment that substantially limits major life activities.
- Employer moved to dismiss ADA claim, citing ADA section 12211's exclusion from ADA coverage of gender identity disorders and other listed conditions
- Plaintiff countered that statutory exclusion violated her constitutional right to equal protection
- Court denied employer's motion to dismiss, ruling section 12211's exclusion could be characterized as only barring disability claims based on condition of identifying as different gender, but not "a condition like Blatt's gender dysphoria, which ... is characterized by clinically significant stress and other impairments that may be disabling"

32

Religious Accommodation

33

Title VII: Religious Discrimination and Accommodation

- EEOC Compliance Manual: Religious Discrimination
www.eeoc.gov/policy/docs/religion.html
- Questions and Answers: Religious Discrimination in the Workplace
www.eeoc.gov/policy/docs/qanda_religion.html
- Best Practices for Eradicating Religious Discrimination in the Workplace
www.eeoc.gov/policy/docs/best_practices_religion.html
- Religious Garb and Grooming in the Workplace: Rights and Responsibilities
www.eeoc.gov/eeoc/publications/qa_religious_garb_grooming.cfm
- Questions and Answers for Employers: Responsibilities Concerning the Employment of Individuals Who Are, or Are Perceived to Be, Muslim or Middle Eastern
www.eeoc.gov/eeoc/publications/muslim_middle_eastern_employers.cfm

34

Title VII: Religious Accommodation

EEOC v. CONSOL Energy, Inc., No. 16-1230
(4th Cir. June 12, 2017).

- Jury returned verdict in EEOC's favor on denial of religious accommodation claim and constructive discharge for denying coal mine employee an alternative means to clock in/out when company adopted "biometric hand scanner" system
- Employee believed scanner "would be used by the Christian Antichrist, as described in the New Testament Book of Revelation, to identify his followers with the 'mark of the beast'"
- Held: jury verdict supported by the evidence:
 - employer had developed bypass for miners physically incapable of using scanner
 - bypass method was in use and effective
 - employer did not offer bypass method as religious accommodation
 - employee met with human resources several times regarding his request, but was repeatedly denied exception to new hand scanner policy

35

Title VII: Religious Accommodation

EEOC v. U.S. Steel Tubular Products, Inc., Civil Action No. 4:14cv2747 (S.D. Tex. Apr. 2017).

- Member of Nazirite sect of Hebrew Israelite faith had sincerely held religious belief that Old Testament forbids cutting hair from scalp
- EEOC alleged denial of accommodation (alternative to post-offer hair follicle drug test), and discrimination/retaliation in non-selection for other positions
- Two-year consent decree provides for payment of \$150,000 to charging party and other relief.
- www.eeoc.gov/eeoc/newsroom/release/4-10-17b.cfm
- **EEOC v. J.B. Hunt Transport (11/15/16 pre-litigation settlement)**
- EEOC alleged company refused alternative to hair sample drug test for four Sikh applicants and denied them employment.
- Public conciliation agreement requires payment of \$260,000 in monetary relief, job offers for rejected applicants, revision of policies, designation of EEO consultant, establishment of a complaint process, and training for anyone involved in hiring process.

36

Title VII: Religious Accommodation

Schwengel v. Elite Prot. & Sec., Ltd.
2015 WL 7753064 (N.D. Ill. Dec. 2, 2015).

- Security officer, a Messianic Jew, created makeshift chair with "Men Only" sign and additional language from Bible concerning women's impurity during menstrual cycle
- when female coworker attempted to use chair, he told her "women are defiled by God under the Mosaic Law" and "all women are unnaturally clean because of menstruation" and "can never be trusted to honestly disclose whether or not [they] are menstruating"
- terminated per employer's policy prohibiting discrimination and requiring professionalism
- Held: Employer not liable for religious discrimination or denial of religious accommodation
- Termination permissible even if based on expression of religious beliefs
- Title VII does not require allowing religious expression if objectively offensive or potential harassment of other employees

Title VII: Religious Accommodation

EEOC v. Triangle Catering, LLC, 2017 WL 818261 (E.D.N.C. March 1, 2017).

- Delivery truck driver alleged he did not wear his Rastafarian religious head covering to job interview for fear it would prevent him from getting job
- Wore it upon reporting for work; was denied accommodation and discharged
- Employer moved to dismiss on ground that his belief was not sincerely held because not worn to interview
- Held: genuine material factual dispute about sincerity, which would turn on factfinder's credibility determination re: his explanation for not wearing to the interview

Title VII: Religious Accommodation

Summers v. Whitis, 2016 WL 7242483 (S.D. Ind. Dec. 15, 2016).

- Plaintiff, a former deputy clerk in a county clerk's office was terminated for insubordination after refusing, on religious grounds, to process marriage licenses for same-sex couples.
- Held: Summary judgment for employer on clerk's denial of religious accommodation claim.
 - No conflict between her religious beliefs and job duties
 - Required to process marriage licenses by entering data and certifying on behalf of state, not on her own behalf, that couple qualified to marry under state law
 - Not required to perform marriage ceremonies, personally sign licenses, say congratulations, or express religious approval
 - Remained "free to maintain her belief that marriage is a union between one man and one woman"

Harassment**EEOC Select Task Force on the Study of Harassment in the Workforce**

- Nearly a third of charges filed with the EEOC involve harassment, with top bases being race, sex, and disability.
- Select Task Force Co-Chairs Report from June 2016: 16 members from around the country held a series of meetings from April 2015 – June 2016.
- Two Key Findings:
 1. Workplace harassment remains a persistent problem-
Almost one third of the approximately 90,000 claims received by the EEOC in fiscal year 2015 included an allegation of workplace harassment.
 2. Much of the training done over the last 30 years has not been an effective prevention tool because it's been too focused on simply avoiding legal liability-
Most effective training is part of a holistic culture of civility and tailored to the specific workforce and workplace.

www.eeoc.gov/eeoc/task_force/harassment/report.cfm

Harassment

Zetwick v. County of Yolo, 2017 WL 710476 (9th Cir. Feb. 23, 2017)

- Plaintiff, correctional officer, alleged subjected to hostile work environment sexual harassment when, over 12-year period, sheriff greeted her with unwelcome hugs more than 100 times and unwelcome kiss at least once
- Held: Jury could find defendant's conduct abusive and out of proportion to ordinary workplace socializing.
 - District court incorrectly concluded that hugs and kisses on cheek are common workplace behavior and not actionable as harassment.
 - District court erred in demanding proof that behavior was severe **and** pervasive, rather than severe **or** pervasive.

Harassment

Jenkins v. Univ. of Minn., 838 F.3d 938 (8th Cir. 2016)

- Graduate researcher went with supervisor on two 17-day research trips to remote location.
- Supervisor allegedly told sexually explicit jokes, asked personal questions about her dating life, and made other aggressive sexual advances.
- Plaintiff was later assigned to shared office with supervisor, and, after being diagnosed with depression and anxiety, resigned
- Held: Plaintiff presented sufficient evidence that she was subjected to a hostile work environment based on sex
 - Geographic isolation of conduct was important
 - Actions that might not be actionable in office setting "take on a different character when two people involved are stuck together with no other people or means of escape"

Harassment

- Mahone v. CSX Transp., Inc., 652 F. App'x 820 (11th Cir. 2016).
- Plaintiff not subjected to racially hostile work environment when coworker called him a "homeboy" during a meeting.
- Conduct not threatening or humiliating, and was too isolated during plaintiff's multi-year employment with defendant to be objectively severe or pervasive
- "Although an isolated incident – if grave enough – may render a work environment hostile, that is not the case here."

Retaliation

Retaliation

New Enforcement Guidance

- **EEOC Enforcement Guidance on Retaliation and Related Issues**
www.eeoc.gov/laws/guidance/retaliation-guidance.cfm
 - *replaces* the Compliance Manual Section 8: Retaliation (1998)
 - addresses retaliation under each of the statutes enforced by the EEOC: Title VII, ADEA, ADA, Rehabilitation Act, EPA, and GINA
 - addresses the separate "interference" provision under the ADA
- **Questions and Answers: Enforcement Guidance on Retaliation and Related Issues**
www.eeoc.gov/laws/guidance/retaliation-qa.cfm
- **Small Business Fact Sheet: Retaliation and Related Issues**
www.eeoc.gov/laws/guidance/retaliation-factsheet.cfm

Who is Protected From Retaliation?

- **All employees** of any employer, employment agency, or labor organization covered by EEO laws
- Includes **applicants, current employees (full-time, part-time, probationary, seasonal, and temporary), and former employees**
 - **Example:** unlawful not to hire applicant because of his EEO complaint against prior employer, or to give false negative job reference to punish former employee for making EEO complaint
- Applies **regardless of citizenship or work authorization status**
 - **Example:** if employer suspects worker undocumented but does not attempt to verify her authorization to work, yet then threatens to expose the worker's immigration status as punishment for her EEO complaint, employer has engaged in unlawful retaliation

Protection Extends to All Employees

- EEOC and Dep't of Labor have taken position that **all employees** who engage in opposition are protected from retaliation, **even if they are managers, human resources personnel, or other EEO advisors** (no "step outside" rule)
- opposition clause purpose promoted by protecting all communications about potential EEO violations by those most likely to discover, investigate, and report them; otherwise, disincentive for them to do so
- same requirements as for proving any other retaliation claim
- **EXAMPLE:** April 2017 \$1.95 million resolution of EEOC charge against American Dental Association filed by former chief legal counsel and director of HR who alleged retaliation for complaining to association's Board of Directors about potential EEO violations. www.eeoc.gov/eeoc/newsroom/release/4-20-17.cfm

Retaliation:

Furcron v. Mail Ctrs. Plus, L.L.C., 843 F.3d 1295 (11th Cir. 2016).

- Plaintiff engaged in statutorily protected opposition by communicating to supervisors about alleged sexual harassment
 - included telling manager that coworker deliberately rubbed against her and that she found it offensive, explaining verbally and in emails her fear and discomfort
- Title VII's protections not limited to individuals who file formal complaints but also extend to employees who voice informal EEO complaints.

Retaliation

EEOC v. Downhole Technology, LLC, Civil Action No. 4:17-CV-00574 (S.D. Tex. consent decree entered April 2017).

- EEOC alleged retaliation against African-American employee after he reported coworkers had used a white hood - evocative of type used by Ku Klux Klan - to intimidate, ridicule, and insult him.
- Company told him incident meant as joke, and then fired him for refusing to sign declaration stating company had adequately responded to his complaint.
- Consent decree provides for \$120,000 monetary relief as well as non-monetary relief, such as Title VII training of all employees, including about history of hate groups, their symbols and harm they cause to others, revamping of company's anti-discrimination policy, and establishment of toll-free telephone number through which employees will be able to report discrimination and harassment.

EEOC v. Day & Zimmerman NPS, Inc.

2016 WL 1449543 (D. Conn. Apr. 12, 2016).

- Employer sent letter to 146 former and current employees identifying Charging Party by name and local union, stating he had filed disability discrimination claim against company, listing his medical restrictions & accommodation he requested, saying you have a right not to speak to the EEOC investigator, and offering option to have employer's counsel present.
- EEOC alleged ADA retaliation and interference.
- Denying employer's motion to dismiss, court ruled: "disclosure of personal sensitive information about an individual could well dissuade that individual from making or supporting" an ADA discrimination charge.
- Court held it reasonably could be inferred letter could have effect of interfering or intimidating CP and recipients as to communicating with EEOC about potential disability discrimination by employer.
- Applying case law interpreting NLRA's analogous anti-interference provision, court also held absence of alleged harm to letter's recipients did not warrant dismissal because sufficient if letter had "a reasonable tendency to coerce or intimidate."

Retaliation Laws Are Not a Shield From Consequences for Poor Performance or Misconduct

- **Employers remain free to discipline/terminate employees for non-discriminatory, non-retaliatory reasons, even if protected activity has occurred.**
 - Raising EEO allegation does not immunize employee from consequences for poor performance or improper behavior.
- Whether employer's action motivated by legitimate reasons or is taken in retaliation for protected activity will depend on facts of case.
- **Compliance Tip:** If manager recommends adverse action in wake of employee's filing EEO complaint or other protected activity, employer may **reduce chance of potential retaliation by independently evaluating whether the recommended action is appropriate.**

Interference with ADA Rights

- ADA prohibits not only retaliation but also "interference" with statutory rights
- interference broader than retaliation
 - unlawful to coerce, intimidate, threaten, or otherwise interfere with exercise of ADA rights (or with assisting another to do so)
- some employer acts may be both retaliation and interference, or may overlap with denial of accommodation/other ADA claims

Examples of ADA Interference

- coercing to relinquish or forgo accommodation otherwise entitled to
- intimidating applicant from requesting accommodation for application process by indicating such a request will result in not being hired
- threatening employee with termination if he does not "voluntarily" submit to a medical exam or inquiry otherwise not allowed under ADA
- policy purporting to limit employees' ADA rights (e.g., fixed leave policy stating "no exceptions will be made for any reason")
- interfering with right to file ADA lawsuit against former employer by stating negative job reference will be given if suit filed
- subjecting employee to adverse treatment for assisting coworker in requesting accommodation
- **Note:** a threat is interference even if not carried out
- **Note:** interference actionable even if individual not actually deterred from exercising/enjoying ADA rights

Promising Practices

- **guidance and support to managers/supervisors**
 - when carrying out management duties or interacting in workplace, how to handle any personal feelings about current or past discrimination allegations against them
- **check in with employees, managers, and witnesses during pendency of EEO matter**
 - offering to hear any concerns about potential/perceived retaliation may help spot issues before they fester
 - may also reassure employees/witnesses of employer's commitment to protect against retaliation
- **examine performance assessments to ensure sound factual basis, free from unlawful motivations, and emphasize consistency to managers**

55

Americans with Disabilities Act

56

Handout: EEOC ADA & GINA Resources

- Key ADA and GINA Documents Available from the U.S. Equal Employment Opportunity Commission on www.eeoc.gov
- Updated May 2017

57

Note What's New, Including...

- Depression, PTSD, & Other Mental Health Conditions in the Workplace: Your Legal Rights
- www.eeoc.gov/eeoc/publications/mental_health.cfm
- Employer-Provided Leave and the Americans with Disabilities Act
- www.eeoc.gov/eeoc/publications/ada-leave.cfm
- What You Should Know About HIV/AIDS and Employment Discrimination
- www.eeoc.gov/eeoc/newsroom/wysk/hiv_aids_discrimination.cfm
- EEO Laws for Employees Affected by the Zika Virus
- www.eeoc.gov/eeoc/publications/zika-eeo-laws.cfm

58

Note What's New, Including...

- Q & A: The EEOC's Final Rule on Affirmative Action for People with Disabilities in Federal Employment
- www.eeoc.gov/laws/regulations/qanda-ada-disabilities-final-rule.cfm
- Tips for Applicants with Disabilities Applying for Federal Jobs
- www.eeoc.gov/eeoc/publications/applicants_with_disabilities.cfm
- Free Webinar: *The ADA, GINA, and Employer Wellness Programs*
- www.eeoc.gov/eeoc/events/webcast-wellness.cfm

59

ADA: Qualification Standards

EEOC v. P.H. Glatfelter, Civil Action No. 15-cv-01881 (M.D. Pa. consent decree entered Jan. 26, 2016).
www.eeoc.gov/eeoc/newsroom/release/1-26-16.cfm

- Employer required employees operating forklifts or other motorized industrial equipment to meet DOT regulations for commercial motor vehicle drivers, which did not apply to such equipment.
- Employer did no assessment of individuals screened out by the standard to determine if they could do job with or without accommodation.
- Terms of Consent Decree:
 - Employer must pay two affected individuals \$180,000;
 - Revise qualification standards; and
 - Post notice about the settlement.

60

ADA: Qualification Standards

EEOC v. Georgia Power Co., Civil Action No. 1:13-cv-03225-AT (N.D. Ga. consent decree entered Dec. 15, 2016).

- www.eeoc.gov/eeoc/newsroom/release/11-15-16a.cfm
- 24 applicants/employees denied employment or not returned to work after medical leave
 - EEOC alleged company applied automatic disqualification seizure policy and drug/alcohol policy without individualized assessment of current ability to work
 - Terms of Consent Decree:
 - Employer will pay \$1.5 million in monetary and injunctive relief;
 - Revise seizure policy and drug and alcohol policy; and
 - Provide EEO training to employees.

61

ADA: Essential Functions**Kilcrease v. Domenico Transp. Co., 828 F.3d 1214 (10th Cir. 2016).**

- Plaintiff, who was rejected for lacking 3 years of mountain-driving experience, argued it was not an essential function of position because company did not uniformly require it
- Court agreed with employer that this experience was essential function for position
 - Job ad clearly stated requirement
 - Evidence showed safety compelled requirement because "vast majority" of routes involved mountain driving
 - During same time period plaintiff applied, company hired six drivers who all had more than 3 years of mountain-driving experience
- Court rejected plaintiff's argument that because company relied on an unwritten policy of what it meant by mountain-driving, it could not be essential function
- See also Adair v. City of Muskogee, 823 F.3d 1297 (10th Cir. 2016).

63

ADA: Recognizing a Request for Reasonable Accommodation

- Cannon v. Jacobs Field Servs. N. Am., Inc., 813 F.3d 586 (5th Cir. 2016) (employee does not have to separately request accommodation where employer is "unquestionably" aware of disability and has received report from its own doctor recommending accommodations).
- Kowitz v. Trinity Health, 839 F.3d 742 (8th Cir. 2016) (plaintiff could be found to have requested reasonable accommodation for medical restrictions related to recovery from back surgery; employer was aware of her disability from her use of FMLA leave for surgery, her doctor's "return-to-work" letter detailing several medical restrictions, and her own letter and phone message referencing her disability, surgery, and request for 4-month extension to complete physical part of CPR certification exam until doctor cleared her to perform it; court noted "the precise words spoken by the employee at the time of the request" are not dispositive, and prior communications to employer may be relevant to determining if accommodation request was made).

65

ADA: Interactive Process**Senatore v. Lynch, ___ F. Supp. 3d ___, 2016 WL 7388289 (D.D.C. Dec. 21, 2016).**

- FBI denied intelligence analyst's request for note taker during training, but fulfilled its reasonable accommodation obligation by offering employee effective alternative of allowing her to audiotape it
 - employee refused to try offered accommodation (and then notify employer if it proved ineffective), so she was responsible for breakdown in interactive process
- FBI did not violate law by denying additional request to use notes for training exams
 - would have undermined employer's ability to gauge her proficiency and understanding of course material

62

ADA: Recognizing a Request for Reasonable Accommodation

- Tennial v. United Parcel Serv., Inc., 840 F.3d 292 (6th Cir. 2016) (employee's "fleeting reference" to having an "ADA deal" did not constitute a request for reasonable accommodation, even though employer knew he had taken FMLA leave in the past).
- Cady v. Remington Arms Co., ___ WL ___, (6th Cir. Dec. 2, 2016) (employer may have been on notice of need for accommodation when engineer it knew had history of back surgeries, recent MRI, and doctor consult said he needed to "mix it up" while performing tasks involving lifting, bending, standing, and climbing).

64

ADA: Interactive Process**EEOC v. Dolgencorp, LLC, 2016 WL 3774492 (E.D. Tenn. July 7, 2016) (decision on post-trial motions).**

- When cashier told supervisor she was diabetic and asked to keep juice at register to prevent hypoglycemic attack, supervisor denied per store policy prohibiting drinks near register. Employer did not consider or offer exception to policy as an accommodation.
- Subsequently, when cashier alone in store and could not leave register unattended, took and drank a bottle of juice from store to treat her hypoglycemic symptoms before paying for bottle.
- Cashier fired for violating employer policy requiring employees purchase products before consuming.
- EEOC argued employer failed to engage in interactive process when it did not offer any reasonable accommodation.
- Jury awarded roughly \$278,000 to employee.

66

ADA: Reassignment**EEOC v. St. Joseph's Hosp., Inc., 842 F.3d 1333 (11th Cir. 2016).**

- nurse sought reassignment due to disability
- was given opportunity to apply for other jobs, but was not given any preference due to her disability
- did not obtain another position and was terminated
- Held: ADA accommodation "only requires an employer to allow a disabled person to compete equally with the rest of the world for a vacant position"
 - Not required to reassign to vacancy ahead of more qualified, non-disabled employees
 - Modifying "best qualified" policy not reasonable in "run of cases," because not best way to promote efficiency and good performance by for-profit business
 - Undermining best qualified policy imposes "substantial costs on the hospital and potentially on patients"
- Contrary view: EEOC, 7th, 10th, and D.C. Circuits

67

ADA: Employee Misconduct

Dewitt v. Southwestern Bell Tel. Co., 845 F.3d 1299 (10th Cir. Jan. 18, 2017).

- Employee hung up on two customers and was terminated.
- Claimed she did not remember the calls and attributed hang-ups to low blood sugar caused by disability
- Held: Company did not deny employee a reasonable accommodation in violation of the ADA.
 - Employee requested "retroactive leniency" for misconduct, rather than a reasonable accommodation as defined by the ADA.
 - Reasonable accommodation does not include overlooking past misconduct even where caused by a disability.

Vannoy v. Federal Reserve Bank of Richmond, 827 F.3d 296 (4th Cir. 2016) ("the ADA does not require an employer to simply ignore an employee's blatant and persistent misconduct, even where that behavior is potentially tied to a medical condition").

68

Genetic Information Nondiscrimination Act

69

GINA

EEOC v. Joy Underground Mining, LLC, Civil Action No. 2:15-cv-01581-CRE (W.D. Pa. consent decree entered Jan. 2016).

- After making conditional offers of employment, employer required applicants to undergo a post-offer medical exam.
- EEOC **alleged employer violated GINA because exam form requested family medical history**, asking applicants if they had any family medical history of TB, cancer, diabetes, epilepsy, or heart disease.
- Two-year consent decree provided for training on GINA for all management and HR personnel with responsibilities relating to hiring, and EEOC monitoring of compliance with terms of decree.

Questions?

Jeanne Goldberg
Senior Attorney Advisor
Office of Legal Counsel
U.S. Equal Employment Opportunity Commission
202-663-4693
jeanne.goldberg@eeoc.gov