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**RECENT DEVELOPMENTS AT THE EEOC**



*Faye A. Williams, Esq. – EEOC Memphis, Tennessee District Office*  
*Anna Y. Park, Esq. – EEOC Los Angeles, California District Office*

Moderator: *Waverly D. Crenshaw, Jr., Esq. – Waller, Lansden, Dortch & Davis*

**NOTABLE LAWSUITS AND CONSENT DECREES**

Race Discrimination

*EEOC v. Big Lots, Inc.*, No. CV-08-06355-GW(CTx) (C.D. Cal. 2010)

- Big Lots subjected a black maintenance mechanic and other black employees to race harassment and discrimination when it allowed an immediate supervisor and coworkers, all Hispanic, to make racially derogatory jokes, comments, slurs and epithets, including the use of the words “n----r” and “monkey.” Despite learning of the harassment, the company took no steps to prevent or correct it.
- In addition to a monetary payment of \$400,000, Big Lots entered into a 2-year consent decree that called for the implementation of new policy, training, procedures, and court monitoring to address harassment and discrimination in the workplace.
- **EEOC’s View:** “The EEOC will continue to take all steps necessary to ensure that employees at all workplaces are respected and free from harassment, discrimination, and retaliation.”

*EEOC v. Race, LLC d/b/a Studsvik, LLC*, No. 2:07-cv-2620 (W.D. Tenn. 2009)

- Courtney Britton, who worked as a lead worker in the shop of Studsvik, and 23 other African American employees were subjected to racially offensive comments by their white supervisor, including references to the employees as “boy” and use of the n-word; the African American employees were also paid them less than white employees who passed the Advanced Radiation Worker test. In addition, the managers subjected the employees to excessive radiation exposure and suspended

Britton for 15 days before laying him off in retaliation for complaining about the harassment.

- In addition to monetary relief in the amount of \$650,000, Studsvik entered into a 3-year consent decree enjoining it from discriminating against its employees because of their race, enjoined from discriminating against any employee because of race in making assignments to work in the Shop Area, and from retaliating against workers who assert their rights. Defendant also agreed to adopt and maintain an anti-discrimination policy, to conduct training on race discrimination, racial harassment, retaliation, and to submit two reports to the Commission about race discrimination at its Memphis, TN facility. Finally, defendant agreed to allow the Commission to monitor its compliance with the decree.
- **EEOC's View:** "[T]he EEOC is particularly concerned when people who have the courage to speak out against such discrimination then experience retaliation by their employer."

*EEOC v. Jack in the Box*, No. 3:08-cv-009663 (M.D. Tenn. 2009)

- Jack in the Box subjected hostess Frances Griffith to harassment because of her race (white) at its restaurant in Nashville and failed to take prompt action to end the harassment when she complained.
- Several African American coworkers repeatedly used racial epithets against Griffith and further insulted her when they learned she was pregnant with a mixed-race baby. White managers refused to take corrective action.
- In addition to monetary relief in the amount of \$20,000, Jack in the Box entered into a 1-year consent decree enjoining it from any employment practice at its Nashville restaurant which had the purpose or effect of discriminating against any employee on the basis of race.
- **EEOC's View:** "Racial harassment directed at a white employee by black employees is just as illegal under federal law as the other way around."

*EEOC v. Franke, Inc.*, No. 3:08-cv-0515 (M.D. Tenn. 2009)

- Franke failed to offer permanent employment to an African American applicant, placed with it as a temporary employee, after the applicant disclosed a non-violent felony conviction on his application.
- Although the company's application provided that having a felony conviction would not automatically disqualify one from employment, the applicant was denied an interview and permanent employment – yet, one year earlier, a white applicant who had completed an application and disclosed several violent felony convictions was interviewed and hired.

- Franke had to offer the applicant permanent employment and \$7,400 in back pay with interest and entered into a 1-year consent decree enjoining it from discriminating against any employee because of race or for retaliation.
- **EEOC's View:** "The EEOC looks closely at disparate hiring practices. The individual in this case deserved to be treated the same as any other similarly situated applicant for hire."

*EEOC v. Tri-State Plumbing*, No. 05-2717 (W.D. Tenn. 2008)

- Tri-State Plumbing subjected black employees working at the FedEx Forum construction site to racial harassment, denied them the opportunity to work overtime because of their race, and laid off several employees in retaliation for complaining about the race discrimination.
- When the employees complained to the local plumbers union, it refused to represent them and denied them job referrals because of their race and in retaliation for opposing the discrimination.
- In addition to paying out \$360,000, Tri-State and the local plumbers union entered into a 3-year consent decree enjoining either from discriminating against employees and members because of their race, Tri-State agreed to provide mandatory training for all of its employees concerning the responsibility of all employees not to engage in unlawful discrimination, responsibility of supervisors and managers to deal quickly, effectively, and fairly with any unlawful discrimination. Each employee required to read and sign a copy of Tri-State's Policy prohibiting discrimination and to be given a copy of the policy..
- **EEOC's View:** "The EEOC will continue to pursue its mission to eradicate the stain of racism from every American workplace."

*EEOC v. Tobacco Superstores, Inc.*, No. 3:05-cv-00218 (E.D. Ark. 2008)

- Theresa Sharkey and a class of African American employees in Arkansas and Mississippi, who were otherwise qualified, were denied promotions to management because of their race.
- In addition to the payment of \$425,000, Tobacco Superstores entered into a 3-year consent decree enjoining it from denying promotions to African American employees because of their race and from engaging in retaliation. In addition, defendant agreed to create and distribute written job descriptions for asst. manager and manager positions to all employees with hiring authority, to create a written promotion policy to disseminate to all employees and post at each location at which TSS does business, to conduct race awareness training to all supervisory and management personnel employed by TSS in Arkansas, MS, and MO, to adopt an Equal Employment Opportunity Policy statement, post notice regarding the settlement, provide reports regarding vacancies and

promotions, and a description of all race discrimination complaints. TSS agreed to file EEO-1 Reports on a yearly basis.

- **EEOC's View:** "All employees should have the freedom to compete for promotions on a fair and level playing field, without regard to race."

*EEOC v. Clougherty Packing Co.*, No. CV-04-8051-GAF(PLAx) (C.D. Cal. 2005)

- Clougherty d/b/a Farmer John denied African American applicants hire because of their race and also engaged in recruitment practices that violated Title VII by discriminating against African Americans.
- Despite having 1,400 employees at its Los Angeles processing facility, Farmer John had an all-Hispanic hiring staff and recruited new hires by word of mouth – hiring 680 people from January 2002 to August 2003, the majority of whom were Hispanic.
- In addition to a monetary award of \$110,000, Clougherty entered into a 4-year consent decree that called for an intensive training program on Title VII compliance, providing the EEOC annual audits of its hiring practices, and posting an EEO notice.
- **EEOC's View:** "Although Title VII was enacted more than 40 years ago, [the EEOC] continues to see charges alleging that employers exclude applicants based on their race. We will continue to vigorously enforce Title VII's prohibitions against race and other forms of discrimination."

### National Origin Discrimination

*EEOC v. Trans Bay Steel, Inc.*, No. 06-07766 CAS(JTLx) (C.D. Cal. 2006)

- Trans Bay received a large sub-contract to provide services to retrofit the Bay Bridge and became the sponsoring employer for a number of Thai workers. Trans Bay contracted with two recruiters to bring the skilled welders from Thailand to meet the needs of the project.
- While the recruiters brought over approximately 48 welders from Thailand, only nine of them went to work for Trans Bay. The remaining welders were brought to Los Angeles and Long Beach and forced to work without pay at Thai restaurants owned by the recruiters, and forced to work other menial jobs without pay.
- The Thai nationals, contracted under H2B visas by Trans Bay, were held against their will, had their passports confiscated, had their movements restricted, and were forced to work without pay. Additionally, some workers were confined to cramped apartments without any electricity, water, or gas.
- At least 17 of the workers were told if they tried to leave the location where they were being forcibly held, the police and immigration officials would be called to arrest them.

- In addition to paying a monetary award of nearly \$1 million, Trans Bay entered into a 3-year consent decree including EEOC monitoring, antidiscrimination training, policy revisions, and development of a complaint procedure.
- **EEOC's View:** "The issues of human trafficking and slavery are an enforcement priority for the Commission."

### Sex Discrimination

#### *EEOC v. Taco Bell Corporation*, No. 2:07-cv-02579 (W.D. Tenn. 2009)

- A former manager at a Taco Bell restaurant in Memphis sexually assaulted a 16-year-old female employee on her first day of work and then tried to follow her as she fled home; the manager had forcibly raped another 16-year-old female employee just five months earlier.
- As part of its 2-year consent decree, Taco Bell will pay a total of \$350,000 and will maintain and distribute a written policy against sexual harassment, conduct anti-discrimination training, and post anti-discrimination notices. Defendant also agreed to provide written reports regarding any persons who have been sexually harassed
- **EEOC's View:** "Protecting the rights of teenaged employees to be free from sexual harassment is a crucial part of the EEOC's mission."

#### *EEOC v. Cracker Barrel, Inc.*, No. 3:07-cv-00376 (E.D. Tenn. 2009)

- Cracker Barrel allowed its general manager, managers, and other male employees to subject a class of women at one Tennessee location to sexual harassment and retaliated against at least two of them.
- Although the women complained to the managers and Cracker Barrel's 800 number complaint line, the company failed to take action to stop the harassment, and the general manager and other supervisors retaliated against women who had complained by moving one to an area where tips were low.
- Besides paying \$255,000 in monetary relief, Cracker Barrel entered into a 3-year consent decree enjoining it from further discrimination and requiring it to conduct annual training on harassment and retaliation, defendant agreed to modify its policies regarding accepting and investigating reports and complaints of sexual harassment, and defendant agreed to maintain records of any complaints of sexual harassment, and to submit three reports to the Commission regarding the complaints, training, and the posting.
- **EEOC's View:** "Under federal law, employers are required to maintain an environment free of sexual harassment and retaliation."

*EEOC v. Lawry's Restaurants, Inc.*, No. CV-06-1963-DDP (C.D. Cal. 2009)

- Lawry's maintained a long-standing company-wide policy of hiring only women for server positions, and Lawry's policy barring men from being hired as servers had existed since 1938.
- While Lawry's claimed the policy was based on tradition, the EEOC found the policy adversely affected a class of men on the basis of sex.
- In addition to paying \$1,025,000 in monetary relief, Lawry's entered into a 3-year consent decree agreeing to changes in policies and practices and to actively promote the hiring of men into server positions.
- **EEOC's View:** "The EEOC will never condone discrimination in the name of so-called tradition. Every individual deserves a fair chance to obtain a job based on their talent and qualifications, regardless of gender."

*EEOC v. ABC Financial Services*, No. 4:08-CV-2816 (E.D. Ark. 2009)

- ABC Financial Services fired a female employee, who was hired as a data entry clerk and placed into a four-week training program followed by a test, because she was pregnant.
- Approximately one week after the employee began the training, she was hospitalized for a condition unrelated to her pregnancy and missed a day and a half of the training. The company fired her because she had missed work and would need further leave to have her baby.
- In addition to paying \$20,000 in monetary relief, ABC Financial entered into a 1-year consent decree enjoining it from discriminating on the bases of pregnancy and retaliation, requiring it to provide training on pregnancy discrimination, and requiring it to post its Title VII policies.
- **EEOC's View:** "Women should not be penalized for choosing to have a family."

*EEOC v. Caesars Entertainment*, No. 2:05-CV-0427-LRH-PAL (D. Nev. 2007)

- Caesars Palace subjected its Latina kitchen workers to repeated and sometimes severe sexual harassment, including demanding and/or forcing female workers to perform sex with them under threat of termination.
- The women, predominantly monolingual Spanish speakers, were forced to have sex in makeshift sex rooms and were forced to endure their supervisors performing other lewd acts on or in front of them, including unwanted sexual touching.
- Even though the women complained about it, management failed to address and correct the conduct – and even worse, when the women complained, they were retaliated against in the form of demotions, loss of wages, further harassment, discipline, or discharge.
- In addition to paying \$850,000 in monetary relief, Caesars Palace entered into a 3-year consent decree agreeing (1) to provide training to all employees on both English and Spanish; (2) to provide semi-annual

reports to the EEOC regarding its employment practices; and (3) to revise its employment policies and procedures to conform to its obligations under Title VII.

- **EEOC's View:** "This case . . . illustrates that employers need to ensure their policies and procedures provide adequate avenues for complaint and redress to non-English speakers."

### Religious Discrimination

*EEOC v. AT&T*, No. 3:06-cv-00176 (E.D. Ark. 2009)

- Two male customer service technicians were suspended and terminated for attending a Jehovah's Witnesses Convention.
- Both men testified that they had submitted written requests to attend six months in advance and that their sincerely held religious beliefs required them to attend the convention each year – which they had done every year throughout their employment with AT&T.
- A jury awarded the men \$1,207,597 in back pay and compensatory damages.
- **EEOC's View:** "These two employees never should have had to choose between their jobs and their sincerely held religious beliefs."

*EEOC v. Southern Hills Medical Center*, No. 3:07-cv-00976 (M.D. Tenn. 2009)

- Southern Hills refused to allow a practicing Muslim to use his earned vacation time to make his pilgrimage to Mecca, which is required by his faith; instead, the hospital insisted that the employee either work as scheduled or resign his position and reapply.
- The employee resigned but not was rehired when he returned and reapplied.
- Besides providing monetary relief of \$70,000, the 2-year consent decree settling the suit enjoins Southern Hills from refusing to accommodate the sincerely held religious beliefs of an employee or retaliating against any employee for requesting a religious accommodation.
- **EEOC's View:** "Demanding that an employee choose between his job and a mandatory tenet of his faith is a violation of federal law."

### Disability Discrimination

*EEOC v. HWCC-Tunica, Inc.*, No. 2:07-cv-171 (N.D. Miss. 2009)

- HWCC-Tunica, Inc. d/b/a Hollywood Casino Tunica denied one of its dealers a reasonable accommodation for her physical limitations.
- The woman, who had sustained injuries in an automobile accident, was capable of doing her job but needed to sit while doing so. Instead of making that accommodation, the casino fired her.

- Besides providing monetary relief of \$75,000, the 3-year consent decree enjoins Hollywood Casino Tunica from discriminating against any employee on the basis of a disability; requires training on employment discrimination awareness to its management staff; and requires reports to the Commission regarding any disability discrimination complaints.
- **EEOC's View:** "This case emphasizes the necessity of employers training their decision makers about the rights their employees have under the Americans with Disabilities Act."

### Multiple Claims

#### *EEOC v. U.S. Concrete*, No. 2:09-cv-02208 (W.D. Tenn. 2010)

- U.S. Concrete d/b/a Titan Concrete allowed company officials to harass and discriminate against a Thai-American employee because of his national origin and age.
- The employee was subjected to racial slurs and insensitive ageist comments, removed from the sales department, and demoted to a driver job because of his age and national origin.
- After the employee was moved out of sales, Titan hired two unqualified white men into that department, without an application process. Ultimately the employee resigned after the work environment became too hostile to endure.
- In addition to a monetary award of \$135,000, Titan entered into a 4-year consent decree which includes injunctive relief that enjoins it from further discriminating based on age, national origin, and retaliation; requires employment discrimination trainings for senior managers involved in hiring and promotion; and mandates settlement compliance reporting to the EEOC.
- **EEOC's View:** "Part of the EEOC's work is to challenge complicated combinations of illegal discriminatory behaviors like this that harm employees, and to assure that fair remedies are achieved."

#### *EEOC v. Landwin Management*, Nos. CV-07-06169-SJO and CV-07-05916-PA (C.D. Cal. 2010)

- In the first lawsuit, the EEOC charged that non-Chinese banquet servers were rejected for hire based on their national origin when the San Gabriel Hilton severed its contract and hired Landwin Management to operate the establishment in April 2005. All the non-Chinese banquet servers who previously worked for the hotel at the time, many of whom were Latino, were not hired back during the turnover and instead replaced with less qualified Chinese workers.
- In the second suit, the EEOC alleged that the San Gabriel Hilton subjected female employees to a sexually hostile work environment, including verbal sexual harassment by the housekeeping department

supervisor, who referred to the women as “whores” and “prostitutes” in addition to other offensive language. The supervisor also allegedly reprimanded the female employees if they even spoke to men, and Landwin failed to respond to the employees’ complaints of harassment.

- In addition to the \$500,000 in monetary relief, Landwin entered into a three-year consent decree to ensure that it would implement hiring and recruiting goals for Hispanic employees; revise its written policies on discrimination, sexual harassment, and recruitment and hiring; perform annual training regarding discrimination; and provide annual reports to the EEOC regarding its employment practices.
- **EEOC’s View:** “Employers must take appropriate corrective action when they receive harassment complaints.”

*EEOC v. Whirlpool Corporation*, No. 3:06-0593 (M.D. Tenn. 2009)

- The EEOC received a final court judgment of \$1,073,261 against Whirlpool Corporation in a race and sex discrimination lawsuit on behalf of Carlota Freeman, an African American former employee at the company’s Tennessee facility.
- The EEOC alleged that the appliance manufacturing giant failed to protect Freeman from persistent harassment by a white male coworker, which ultimately resulted in her being physically assaulted by him.
- The evidence showed that Freeman reported escalating offensive verbal conduct and gestures by the male coworker over a period of two months before he physically assaulted her; four levels of Whirlpool’s management were aware of the escalating harassment; Whirlpool failed to take effective steps to stop the harassment; and, Freeman suffered devastating permanent mental injuries as a result of the assault and Whirlpool’s failure to protect her.
- **EEOC’s View:** “[W]hen those charged with enforcing a policy don’t take that responsibility seriously, an employer has not met its duty under Title VII to prevent and stop illegal harassment in its workplace.”

*EEOC v. L&T Group of Companies, Ltd.*, Nos. 06-0031, 07-0029, 08-0038, and 08-0037 (D. N. Mar. I. 2009)

- In the first case against L&T, the employer retaliated against 14 Filipino and Bangladeshi workers when it terminated them because they filed charges of discrimination with the EEOC. The allegations in the case also included that Bangladeshi security guards were being treated differently than Nepalese with respect to assignment of overtime hours, work location, and housing. L&T further discriminated on the basis of national origin by providing different amounts of benefits to Nepalese, Chinese, Filipino and Bangladeshi employees, and failed to conduct any investigation regarding the claimants’ allegations.

- In the second case, Civil Case No. 07-0029, L&T discriminated against a class of non-Chinese workers, many of them Filipino, due to their national origin, when it forced them to work and eat in segregated facilities, denied adequate them housing and, replaced them Chinese workers when they complained. The charging parties were all are non-resident workers hired by the defendants as sewers, but they actually did the work of “packers,” who packed the clothing made by the Concorde manufacturing facility. In mid-May 2004, all the charging parties – most of whom were Filipino – were called into a meeting with human resources officials and were told that they were being laid off because of low sales. These same charging parties were also segregated from Chinese employees during the work day and at lunch. The Filipino workers were forbidden to use the company cafeteria to eat their lunches, and instead had to bring their lunches to work and eat them outside.
- The third case alleged that L&T discriminated against pregnant women by terminating and replacing them with non-pregnant workers. Also, L&T discriminated against its Filipino employees in assignment of overtime by continuing to give substantial overtime to its Chinese employees while allowing its Filipino employees little to no overtime. Defendants’ payroll records revealed that Chinese employees were receiving significantly more overtime hours per week than Filipino employees.
- The fourth and final lawsuit alleged discrimination against a long-term employee due to age and national origin (Filipino) in that an L&T supervisor constantly subjected the employee to age-related verbal harassment, calling the claimant “old.” In addition to age-based comments, the employee also had to endure from her supervisor discriminatory comments related to her Filipino national origin. The employee was ultimately fired based on age and national origin.
- In addition to having to pay \$1.7 million in monetary relief, L&T entered into a 3-year consent decree requiring it and its subsidiaries to hire an EEO consultant to train all managers and employees; to train all of its non-managerial, managerial, and human resources employees; to not discriminate or retaliate against their employees; and to establish effective policies and procedures for handling discrimination complaints.
- **EEOC’s View:** “Workers should not have to fear losing their job because of their national origin, age or pregnancy, and no one should fear retaliation for coming to the EEOC for help.”

## **RECENT INITIATIVES**

### **E-RACE**

- The E-RACE Initiative is designed to improve EEOC's efforts to ensure workplaces are free of race and color discrimination.
- Specifically, the EEOC will identify issues, criteria and barriers that contribute to race and color discrimination, explore strategies to improve the administrative processing and the litigation of race and color discrimination claims, and enhance public awareness of race and color discrimination in employment.

### **Systemic Discrimination**

- Systemic discrimination involves a pattern or practice, policy, or class case where the alleged discrimination has a broad impact on an industry, profession, company or geographic area.
- Employers are encouraged to prevent discrimination by taking a careful look at the practices they use to recruit, hire, promote, train, and retain employees.
- Examples of systemic practices include: discriminatory barriers in recruitment and hiring; discriminatorily restricted access to management trainee programs and to high level jobs; exclusion of qualified women from traditionally male-dominated fields of work; disability discrimination such as unlawful pre-employment inquiries; age discrimination in reductions in force and retirement benefits; and compliance with customer preferences that result in discriminatory placement or assignments.
- The systemic program is a top priority of the agency. The identification, investigation and litigation of systemic discrimination cases, along with efforts to educate employers and encourage prevention, are integral to the mission of the EEOC.

## **THE EEOC v. YOUR CLIENT: LITIGATING AGAINST THE EEOC**

### **Statistics**

- In FY 2009, EEOC field legal units filed 281 merit lawsuits and 32 subpoena enforcement and other actions.
- Of those filings, 170 were individual suits and 111 were class suits.
- EEOC legal staff resolved 319 merit lawsuits – defined as direct suits and interventions alleging violations of the substantive provisions of the statutes enforced by the Commission and suits to enforce administrative settlements – for a monetary recovery of \$80,628,935.
- Of those resolutions, 249 contained Title VII claims, 40 contained ADA claims, 38 contained ADEA claims, and 5 contained Equal Pay Act claims.

## Subpoenas

- Defense attorneys view the EEOC subpoena as overbroad and unduly burdensome, but courts maintain a relatively low threshold for enforcing an administrative subpoena.
- The question is whether or not the evidence sought by the EEOC is relevant and material to the investigation.
- If the EEOC has properly followed all administrative procedures in obtaining the subpoena, then courts will more likely than not enforce it.
- Enforcement Actions
  - o *EEOC v. Aaron Bros., Inc.*, No. CV-07-5315-AHM(FMOx) (C.D. Cal. 2009)
    - During a nationwide investigation into Aaron Brothers, the Commission issued a subpoena to determine if the retailer discriminated against female managers by paying them less than their male counterparts.
    - The District Court narrowed the scope of the subpoena at first, but the EEOC filed for modification of that order based on its investigation and because Aaron Brothers failed to fully comply.
    - The Court placed on the employer the burden of showing that the subpoena is overbroad or will place an undue burden on it – Aaron Brothers could not meet this difficult burden, and the Court ordered nationwide production of information.
    - **EEOC’s View:** “[T]he EEOC will not back down when investigating claims of systemic compensation discrimination. The court properly ruled that the EEOC has the right to obtain nationwide compensation data to determine if a violation of federal law occurred.”
  - o *EEOC v. Z Foods, Inc. d/b/a Zoria Farms*, No. 1:09-cv-02127-OWW-SMS (E.D. Cal. 2010)
    - For a period of 16 months, the EEOC received 12 charges of discrimination against Zoria, alleging sex harassment; age, disability, and race discrimination; and harassment for complaining about discrimination.
    - Based on the severity of the allegations and the results of the investigation, the EEOC conducted an on-site investigation, wherein the alleged main harasser and his attorney impeded the investigation.
    - Due to the difficulty in obtaining the testimony of the main harasser, the Commission issued a subpoena for his testimony, with which Zoria did not comply.

- The EEOC filed an application for an order to show cause as to why the subpoena should not be enforced.
- The Court found that Zoria and its counsel had impeded the EEOC's investigation and ordered Zoria and its counsel not to interfere with the investigation and not to threaten harm to any witness cooperating with the EEOC.

## QUESTIONS