

The EEOC and Sex Harassment Claims

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The EEOC and Sex Harassment Claims
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I. EEOC Charge Data

- a. [EEOC Charges Filed Alleging Sexual Harassment, by State, FYs 1997 – 2017](#)
- b. [Total EEOC + FEPA Charges Filed Alleging Sexual Harassment, by State, FYs 1997 - 2017](#)

II. EEOC Materials

- a. [What You Should Know: What to Do if You Believe You Have Been Harassed at Work](#)
- b. [EEOC's Select Task Force on the Study of Harassment in the Workplace \(Task Force homepage\)](#)
 - i. [Checklists for Employers](#)
 - 1. [Checklist One: Leadership and Accountability](#)
 - 2. [Checklist Two: An Anti-Harassment Policy](#)
 - 3. [Checklist Three: A Harassment Reporting System and Investigations](#)
 - 4. [Checklist Four: Compliance Training](#)
 - ii. [Chart of Risk Factors for Harassment and Responsive Strategies for Employers](#)
 - iii. [Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic \(June 2016\)](#)
- c. [EEOC's Promising Practices for Preventing Harassment](#)

III. EEOC Investigations

- a. **The scope of investigation may, in appropriate circumstances, extend beyond the allegations of the charging party.**
 - i. *EEOC v. Schwan's Home Service*, 644 F.3d 742 (8th Cir. 2011), located at <https://caselaw.findlaw.com/us-8th-circuit/1573990.html>
 - 1. “Moreover, even if Milliren's systemic gender discrimination charge were invalid, the information sought in the subpoena is nonetheless within the scope of the EEOC's investigative authority. During the course of the EEOC's investigation, Milliren additionally alleged that she would be one of only two female

LGMs out of 500 LGMs nationwide if she had completed the GMDP and that a female applicant was rejected for a manager position because she had children. Because the EEOC's investigation into Milliren's charge of individual gender discrimination revealed potential systemic gender discrimination, the EEOC had the authority to subpoena information relevant to systemic gender discrimination even absent a valid systemic charge by Milliren.”

b. The EEOC can continue the investigation even if the charging party sues or resolves his/her claims.

i. *EEOC v. Union Pacific Railroad*, 867 F.3d 843 (7th Cir. 2017), located at <https://caselaw.findlaw.com/us-7th-circuit/1870828.html>

1. “Accordingly, the disposition of a civil action brought by charging individuals does not necessarily prevent the EEOC from continuing that investigation.⁷ To hold otherwise would not only undercut the EEOC's role as the master of its case under Title VII, it would render the EEOC's authority as “merely derivative” of that of the charging individual contrary to the Supreme Court's holding in *Waffle House*. 534 U.S. at 291, 297, 122 S.Ct. 754. The policy implications of such a ruling are also disturbing, since it would give unhealthy leverage to an individual litigant and an undue incentive to employers to purchase a stipulated dismissal with prejudice in order to prevent the EEOC from pursuing a larger public interest where the circumstances warrant. Even an adjudication on the merits of the individuals' charges, as here, would leave the outcome to the narrower, private interests and resources of those individuals, rather than to the judgment that the EEOC is required to exercise in pursuing leads uncovered as part of its own, independent investigation in the public interest.”

c. The EEOC can seek pedigree information where appropriate in its investigation.

i. *EEOC v. McLane Co.*, 2018 WL 1961162 (D. Ariz., April 28, 2018), located at <http://www.scotusblog.com/wp-content/uploads/2016/04/mclane-op-below.pdf> “The question is not whether the evidence sought would tend to prove a charge of unlawful discrimination. At the investigative stage, the EEOC is trying to determine only whether ‘reasonable cause’ exists ‘to believe that the charge is true.’”

d. The EEOC will seek targeted equitable relief in its conciliation agreements.

- i. **Targeted equitable relief is non-monetary relief designed to address the particulars of the case and aimed at preventing the problem from reoccurring.**
- ii. TER includes relief such as:

1. Training
2. Policy revisions
3. Monitoring provisions
4. Reporting provisions

IV. EEOC Litigation

a. Recent sexual harassment cases

- i. *EEOC v. Geo Group*, 2:10-cv-02088 MHM (D. Ariz. 2017). Press release located at <https://www.eeoc.gov/eeoc/newsroom/release/1-8-18a.cfm>
 1. “The EEOC and ACRD charged that the harassment included sexual assault, a male manager grabbing and pinching the breasts and crotch of a female correctional officer, and a male employee forcing a female employee onto a desk, shoving her legs apart, and kissing her. The EEOC and ACRD also alleged a wide variety of verbal harassment, including male officers asking female officers for sex, a male officer calling a female officer ‘bitch’ and ‘f---ing bitch’ daily, and supervisors and officers making sexually explicit comments to female officers. The EEOC and ACRD said that these comments included offensive remarks such as ‘All I want to see of you is the top of your head bobbing up and down while you are on your knees,’ and a supervisor frequently saying that women should be barefoot and pregnant.”
 2. The consent decree resolving this case provides \$550,000 for 16 women who had been dismissed from this case in 2012. GEO also must send letters of regret to the women and provide employment references for them. In addition, GEO will review its equal employment opportunity (EEO) policies, ensure that all complaints of sexual harassment and retaliation are immediately and thoroughly investigated by a neutral employee, and ensure that the complainant is informed of the results of the investigation. GEO is also required to designate certain alleged harassers as ineligible for rehire, post notices of the consent decree in its Florence facilities, conduct anti-discrimination training, and include EEO compliance when evaluating its managers.
- ii. *Equal Employment Opportunity Commission v. Costco Wholesale Corp.*, Case No 14 C 6553 (N.D. Ill.),
 1. The EEOC’s claims were brought on behalf of a part-time Costco employee who helped Costco customers with purchases and returning merchandise to its location on the store floor. The EEOC alleged in its Complaint that a Costco customer had harassed the employee for over a year by ominous staring, unwanted touch,

including of her face and arm; unwanted requests for dates; recording her on the customer's cell phone; and asking overly intrusive personal questions.

2. After the videotaping incident, the employee obtained an order of protection against the customer from the Circuit Court of Cook County, Illinois. After the cell phone incident, the employee informed Costco that she did not feel safe returning to work. The EEOC alleged that that "when the situation persisted and the employee complained to the police, Costco management allegedly yelled at her and told her to be friendly to the customer."
3. A jury found for the EEOC, awarding \$250,000 in compensatory damages. <https://www.eeoc.gov/eeoc/newsroom/release/12-22-16.cfm>
4. The case is currently on appeal before the 7th Circuit.

b. Cases raising allegations of same sex harassment/ harassment based on sexual orientation

- i. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2nd Cir. 2018) (en banc), located at <https://law.justia.com/cases/federal/appellate-courts/ca2/15-3775/15-3775-2018-02-26.html>
 1. "[S]exual orientation discrimination is motivated, least in part, by sex and is thus a subset of sex discrimination. Looking first to the text of Title VII, the most natural reading of the statute's prohibition on discrimination 'because of . . . sex' is that it extends to sexual orientation discrimination because sex is necessarily a factor in sexual orientation. This statutory reading is reinforced by considering the question from the perspective of sex stereotyping because sexual orientation discrimination is predicated on assumptions about how persons of a certain sex can or should be, which is an impermissible basis for adverse employment actions. In addition, looking at the question from the perspective of associational discrimination, sexual orientation discrimination—which is motivated by an employer's opposition to romantic association between particular sexes—is discrimination based on the employee's own sex."
- ii. *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 362 (7th Cir. 2017) (en banc), located at <http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2017/D04-04/C:15-1720:J:Wood:aut:T:fnOp:N:1942256:S:0>
 1. Title VII of the Civil Rights Act of 1964 makes it unlawful for employers subject to the Act to discriminate on the basis of a

person’s “race, color, religion, sex, or national origin” 42 U.S.C. § 2000e-2(a). For many years, the courts of appeals of this country understood the prohibition against sex discrimination to exclude discrimination on the basis of a person’s sexual orientation. The Supreme Court, however, has never spoken to that question. In this case, we have been asked to take a fresh look at our position in light of developments at the Supreme Court extending over two decades. We have done so, and we conclude today that discrimination on the basis of sexual orientation is a form of sex discrimination. We therefore reverse the district court’s judgment dismissing Kimberly Hively’s suit against Ivy Tech Community College and remand for further proceedings.

- iii. *EEOC v. Rocky Mountain Casing Crews (RMCC)*, 1:16-cv-00428-DLH-CSM (D. N.D.). Press Release located at <https://www1.eeoc.gov/eeoc/newsroom/release/12-20-17b.cfm?renderforprint=1>

c. Provisions in EEOC Consent Decrees relevant to sexual harassment cases

- i. Opposition to confidentiality provisions
 - 1. EEOC Regional Attorney Manual, found at https://www.eeoc.gov/eeoc/litigation/manual/3-4-a_settlement_standards.cfm#section2e
 - 2. “Once the Commission has filed suit, the agency will not enter into settlements that are subject to confidentiality provisions, it will require public disclosure of all settlement terms, and it will oppose the sealing of resolution documents. The principle of openness in government dictates that Congress, the media, stakeholders, and the general public should have access to the results of the agency’s litigation activities, so that they can assess whether the Commission is using its resources appropriately and effectively. Additionally, one of the principal purposes of enforcement actions under the antidiscrimination statutes is to deter violations by the party being sued and by other entities subject to the laws. Other entities cannot be deterred by the relief obtained in a particular case unless they learn what that relief was.

Therefore, resolutions of Commission suits must contain all settlement terms and be filed in the public court record. Further, the Commission must be free to respond fully to inquiries regarding the suit and resolution, and to provide upon request the resolution documents and any nonprivileged case related

documents. Commission attorneys should oppose attempts to seal or otherwise prevent public access to resolution documents, and if, over the Commission's objections, a court issues an order preventing such access, the Regional Attorney should notify the Associate General Counsel for Litigation Management Services immediately and submit a written recommendation regarding appeal of the order.”

- ii. Opposition to “do not darken my door” provisions
 1. Regional Attorneys’ Manual.
 2. “In addition, no individual can be required as a condition of obtaining relief on a Commission claim to agree to refrain from seeking future employment with the defendant or to keep the terms of his or her recovery confidential.”
- iii. Requirement for targeted equitable relief
 1. EEOC v. Coral Gables Trust Co., 18 cv 21148 (S.D. Fla. 2018). Press release located at <https://www.eeoc.gov/eeoc/newsroom/release/4-4-18.cfm>
 - a. In addition to monetary relief, Defendant will provide the victim with a positive job reference. The decree also requires that the employer retain an independent equal employment opportunity consultant to investigate all complaints of sex-based harassment, discrimination or retaliation. The company must also distribute a revised policy against sex discrimination; post a notice informing employees about the suit; provide anti-discrimination training to all managers and employees; and provide individual training to the company's chief wealth advisor. Further, the employer agreed to designate two board members to receive future complaints of harassment, discrimination, or retaliation.
 2. EEOC v. Evergreen Kia, 17-cv-07084 (N.D. Ill. 2018),. Press release located at <https://www.eeoc.gov/eeoc/newsroom/release/4-26-18b.cfm>
 - a. The consent decree settling the suit prohibits future discrimination and retaliation in the future, requires an outside monitor to investigate complaints of sex or disability discrimination or harassment, and provides that Evergreen Kia will pay \$100,000 to the aggrieved individual. Evergreen Kia must also post notices of the settlement, revise its anti-discrimination and record-keeping policies, report complaints of sex or disability

discrimination periodically to the EEOC, and train its managers regarding their obligations under the law.

- V. Local Resources for respectful workplace training**
 - i. Maria Flores, Outreach & Education Coordinator
 - 1. 414-297-3594
 - 2. Maria.flores@eoc.gov
 - ii. Julie Schmid, Acting Area Office Director
 - 1. 612-335-4054
 - 2. Julie.schmid@eoc.gov