The 2018 EEOC Update

Carol R. Miaskoff
Equal Employment Opportunity Commission
Washington DC

2018 EEOC Update
Upper Midwest Employment Law Institute

I. EEOC Staffing Changes

a. Appointees (Commissioners, General Counsel)
b. Senior staff (e.g., first Chief Data Officer)

II. **EEOC Priorities**

a. EEOC Strategic Plan for FYs 2018 - 2022 (February 2018)
b. EEOC Strategic Enforcement Plan FYs 2017 - 2021 (SEP) (October 2016)
c. EEOC Public Portal

III. EEOC Data re: Charges and Litigation

a. Charges filed *with* EEOC FY 1997 - FY 2017 (through September 30, 2017)
    i. Charges Tallied by State and Basis for FY 2017
    ii. Charges Tallied by State and Basis for FY 2009 - 2017 (drop down menu by State)
b. Litigation filed *by* EEOC FY 1997 - FY 2017 (through September 30, 2017)
c. EEOC FY 2017 End-of-Year Press Release (November 15, 2017)

IV. EEOC Update by Policy Priority

All Policy Priorities: *McLane Co. v. EEOC*, 137 S. Ct. 1159 (2017). The Supreme Court stated that a district court should not use an EEOC subpoena enforcement proceeding under Title VII as an opportunity to test the strength of the underlying complaint, but should instead satisfy itself that the charge under investigation is valid and that the material requested is relevant to the charge. If the district court finds the charge valid and the information requested relevant, then "the district court should enforce the subpoena unless the employer establishes that the subpoena is 'too indefinite,' has been issued for an 'illegitimate purpose,' or is unduly burdensome." Specifically, resolving a circuit split, the Supreme Court held that a court of appeals should review a district court's decision to enforce or quash an EEOC subpoena for abuse of discretion, rather than de novo.

a. Eliminating Barriers in Recruitment and Hiring

i. *EEOC v. Bass Pro Shops*, No. 11-cv-3425 (S.D. Tex.) claimed failure to hire African American and Hispanic applicants nationwide and retaliation for complaining. Consent decree entered on July 25, 2017 for $10.5 million and commitment to strengthen and improve hiring and recruiting practices for African-Americans and Hispanics plus recordkeeping and reporting practices.

ii. *EEOC v. Rosebud Restaurant*, Civ. Action No. 13-cv-6656 (N.D. Ill.) claimed failure to hire African Americans in any of company's 13 restaurants in Chicago area, use of racial slurs by the owner, and recordkeeping violations. Consent decree entered on May 30, 2017 for $1.9 million and oversight for four years of commitment to practices preventing discrimination against African American and Hispanic applicants as well as training, posting, and recordkeeping. Note: On September 21, 2017, the EEOC filed suit against Rosebud Restaurants again, claiming that a server was subject to sexual harassment and then termination after she complained and objected to company employees referring to African Americans by racial slurs.

iii. *EEOC v. City Sports*, Civil Action No. 17-cv-6692 (N.D. Ill.) filed on September 18, 2017, claims failure to hire and promote African-Americans and Hispanics into management positions in favor of hiring Koreans to fill management roles, and subjecting three Black salespeople to harassment because of their race.

b. Protecting Vulnerable Workers and Underserved Communities

i. *EEOC v. Wisconsin Plastics*, No. 14-cv-663 (E.D. Wisc.) claimed discrimination against a group of Hmong (an ethnic group of people who live in China, Vietnam, Laos and Thailand) and Hispanic employees by firing them because of their national origin. Two-year consent decree entered on May 25, 2017, provides $475,000; prohibits national origin discrimination in discharge, terms and conditions of employment, and retaliation; requires revising personnel documents to reflect that claimants voluntarily resigned; training on discrimination and retaliation; reporting on terminations and hires, as well as complaints of discrimination or retaliation; and notice posting.)

ii. *EEOC v. Dash Dream Plant, Inc.,* No. 1:16-cv-01395 (E.D. Cal.) claimed that a grower and distributor of orchids in Dos Palos, California, discharged and failed to rehire women who worked on the farm because of their pregnancies. Five-year Consent Decree entered on October 13, 2017 included $110,000 in damages, for which Defendant's part owner and another manager, possibly owner, were personally liable. Decree prohibits pregnancy and sex discrimination and requires defendant to retain an independent EEO monitor to oversee creation of policies, procedures, and training.

iii. *EEOC v. Vador Ventures, Inc., d/b/a Total Quality Building Services,* No. 1:17-cv-00183 (E.D. Va.), claimed that a provider of commercial janitorial services in the Washington, DC, area paid the female Charging Party less than a male coworker performing substantially similar work and discharged her in retaliation for complaining about the wage disparity and requesting a wage increase. Two-year consent decree entered on January 17, 2018 provides back pay and compensatory damages of approximately $36,400, enjoins sex discrimination with respect to wages, requires annual training, prohibits retaliation under the EPA and Title VII, and requires defendant to revise and distribute new EEO policies (in English and Spanish) with discrimination complaint and investigation procedures. The defendant also will revise job descriptions to identify factors that could result in an incumbent being paid more than the rate of pay required by the collective bargaining agreement.

iv. *EEOC v. Beavers' Inc., d/b/a Arby's*, Case No. 1:18-cv-00150 (S.D. Ala.). On March 30, 2018, EEOC filed a lawsuit against an Arby's franchiser on behalf of several teenage employees. EEOC claims that the company hired a team leader trainee with a known history of sexual harassment who repeatedly pressured young female employees to have sex with him and regularly used sexually graphic language to describe the sexual acts he wanted to perform on female employees and customers. EEOC also alleges that the harasser deliberately touched one female employee in an unwelcome and sexual manner and tried to follow female employees home. EEOC contends that employees complained about the harassment to supervisors and managers, and that Arby's failed to act for several months until the harasser physically injured one of the victims. EEOC's lawsuit seeks monetary damages, including compensatory and punitive damages, and injunctive relief.

c. Addressing Selected Emerging and Developing Issues

i. *Inflexible Leave Policies and Qualification Standards*

1. *Severson v. Heartland Woodcraft, Inc.*, 872 F.3d 476 (7th Cir. 2017), *cert. denied*, 2018 WL 489210 (U.S. Apr. 2, 2018). Raymond Severson had back myelopathy and experienced a flare-up that caused him significant pain and required him to take 12 weeks of FMLA leave. He was scheduled to have surgery on the last day of his leave and requested an additional two to three months off for recovery. The defendant terminated him, but told Severson he could re-apply for work when he had recovered. Severson sued, claiming the defendant failed to provide a reasonable accommodation. The court of appeals affirmed the district court's grant of summary judgment for the defendant, re-affirming its position in *Byrne v. Avon Products*, 328 F.3d 379 (7th Cir. 2003), that a multi-month leave of absence is not a "reasonable" accommodation.

2. *EEOC v. American Airlines, Inc. and Envoy Airlines, Inc.*, No. 2:17-cv-04059 (D. Ariz.) claims that the 12 Charging Parties and others with lupus, cancer, asthma, stroke, knee and back injuries, and other conditions, were terminated, placed on unpaid leave, or denied rehire as consequence of a 100% healed policy that did not permit employees on medical leave to return to work with restrictions. Defendants also allegedly refused to provide intermittent leave or reassignment to a vacant position as a reasonable accommodation. A two-year consent decree entered on November 6, 2017 applies to all American and Envoy employees nationwide. Among other things, the decree provides $9.8 million in stock to Charging Parties, requires development of reasonable accommodation policies, appointment of ADA Coordinators, delivery of ADA training, HR review of all denials of reasonable accommodations, and consideration of reassignment as a reasonable accommodation.

3. *EEOC v. United Parcel Service*, No. 09-cv-5291 (N.D. Ill.) alleged that defendant, a nationwide package delivery company, refused to permit an extension of leave as a reasonable accommodation for qualified employees with disabilities and refused to allow employees with disabilities on leave to return to work with

restrictions. Three-year consent decree provides $2 million to nearly 90 current and former disabled employees, requires defendant to update its policies on reasonable accommodation, improve implementation of those policies, and provide periodic reports to EEOC over a three-year period.

ii. *Pregnancy Discrimination and Accommodation*

1. *EEOC v. Silverado Menomonee Falls LLC, d/b/a Silverado Oak Village, and Silverado Senior Living Inc.*, No. 17-cv-1147 (E.D. Wis.) claimed a failure to accommodate Charging Party's pregnancy-related restrictions, resulting in her termination. Consent decree entered on January 29, 2018 includes $80,000 monetary settlement, policy changes and new procedures for requesting pregnancy-related job modifications, review of denials, submitting complaints of discrimination and retaliation, and training. Consent decree also places requirements on parent company, which provides HR services to all sites, to track all job modification requests.

2. *Trinity Health d/b/a Trinity Hospital,* Civ. Action No. 17-cv-0200 (D.N.D) claimed a failure to provide a nurse with lifting accommodations for her pregnancy-related disability, resulting in her termination. Three-year consent decree entered on December 20, 2017, provides $95,000 monetary settlement and prohibits various forms of discrimination against pregnant employees, enjoins restricting any employee's personal physician from cooperating with EEOC, and enjoins retaliation against employees who request accommodation for pregnancy-related restrictions.

iii. *LGBT Issues*

1. <u>Coverage of Sexual Orientation Discrimination Under Title VII</u>

a. *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017) (en banc) (EEOC filed amicus brief). Kimberly Hively, an open lesbian, alleged that she was repeatedly denied a full-time position as a professor because of her sexual orientation. In an 8-3 *en banc* decision, the Seventh Circuit held that Title VII's prohibition on sex discrimination

incorporates a prohibition on sexual orientation discrimination, overruling its contrary prior precedent.

b. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (en banc) (EEOC filed amicus brief). Donald Zarda, a gay skydiving instructor, alleged that he was fired by the defendant because of his failure to conform to sex stereotypes related to sexual orientation. (Zarda died after filing suit, and the executors of his estate were substituted as plaintiffs.) Overruling circuit precedent to the contrary, the *en banc* court ruled 10-3 that Title VII prohibits sexual orientation discrimination as discrimination "because of . . . sex." Similar to the Seventh Circuit's *Hively* decision, the main opinion by Chief Judge Katzmann advances several arguments for concluding that Title VII prohibits sexual orientation discrimination.

c. *EEOC v. Rocky Mountain Casing Crews*, No. 1:16-cv-428 (D.N.D.) claims that defendant, a Wyoming-based oilfield contractor, subjected Charging Party to a hostile work environment because of his failure to conform to male sexual stereotypes and because of his sexual orientation. Three-year consent decree entered on December 20, 2017 provides for $70,000 monetary award to Charging Party, new policies and practices for defendant, training, and reporting to EEOC. Consent decree also requires notices of conduct to be placed in files of harassing supervisor, the operations manager, and the employee who attacked Charging Party.

2. <u>Coverage of Gender Identity Discrimination Under Title VII</u>

a. *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018). The EEOC alleged that the defendant violated Title VII when it fired Aimee Stephens, a transgender woman employed as a funeral director, after she informed the defendant that she would be undergoing gender transition from male to female and intended to dress in female business attire at work. The district court granted summary judgment for the defendant, concluding in part that the defendant was entitled to an exemption under the Religious Freedom Restoration Act. On appeal, the Sixth Circuit reversed and held that Title VII prohibits discrimination based on transgender status. The Sixth

Circuit also concluded that the Religious Freedom Restoration Act did not shield defendant from liability.

d. Ensuring Equal Pay Protections for All Workers

i. *EEOC v. CJMBS Pharmacies, Inc., d/b/a Community Pharmacy*, No. 3:16-cv-2410 (S.D. Cal.) claimed that a woman who worked filling and processing prescriptions was paid less than a newly-hired male pharmacy technician. After Charging Party requested pay for overtime hours, the owner reduced her hours; she complained about this action and about being paid less than the man, claiming sex and age discrimination, and the employer terminated her employment two days later. A 2 ½ year consent decree entered on November 6, 2017 provides $60,000 in back pay and compensatory damages, and requires employer to retain an EEOC-approved and experienced EEO monitor to implement the decree. Among other things, the company will develop company-wide equal pay policies (in English and Spanish), conduct annual EEO training, and track of wages and bonuses.

ii. *EEOC v. PS Holding LLC*, Civil Action No. 2:17-cv-02513 CM-GEB (D. Kan. 2017) claimed that defendant offered a female applicant lower pay than a male applicant for the same job. Two high school friends applied to work at Pizza Studio as "pizza artists." Both were interviewed and offered jobs. They subsequently discussed their starting wages. After the female applicant learned that the male applicant was offered 25 cents more per hour, she called the restaurant to complain about the unequal pay. The company immediately withdrew the job offers from both students. The federal district court ruled in favor of EEOC on November 9, 2017, awarding both students back pay for lost wages, as well as liquidated, compensatory, and punitive damages. The court order also required the company to implement significant policy changes, conduct training, collect and analyze pay and other data, and report data and complaints to EEOC.

iii. *EEOC v. Heritage Bank*, Civil Action No. 4:17-cv-03068 (D. Neb. 2017) claimed that defendant paid two female managers a base salary $10,000 less than a male manager. After one of the female managers learned about the pay difference and complained, the defendant allegedly did nothing. When one of the female managers quit after five years, she was still being paid the same allegedly discriminatory base salary that she earned when she was hired. In a judgment and order issued on July 10, 2017, the federal district court ordered the bank to pay about $31,000 to the female employee. The bank also was ordered the bank to implement

policies to prevent future EPA violations, provide annual anti-discrimination training, and submit semi-annual reports to EEOC.

iv. *Rizo v. Yovino*, No. 16-15372, 2018 WL 1702982 (9th Cir. Apr. 9, 2018) (EEOC filed amicus brief). Aileen Rizo, a math consultant, alleged that the defendant violated the Equal Pay Act by paying her less than all the other math consultants, who were all men. To assign each new management-level employee, including math consultants, to a step within Level 1 of its salary schedule, the defendant considered the employee's most recent prior salary, increased by 5%, and placed the employee on the corresponding Level 1 step. Rizo's most recent prior salary, even with a 5% increase, resulted in a salary lower than the defendant's Level 1, Step 1 salary, so she was placed at the minimum Level 1 salary, with an additional $600 stipend for her master's degree.

The trial court concluded that prior salary standing alone cannot be a "factor other than sex" under the EPA, even if motivated by legitimate business reasons. On appeal, a three-judge panel disagreed, concluding that, consistent with Ninth Circuit precedent from 1982, prior salary may justify a differential under the EPA as a "factor other than sex" if the employer can show that prior salary "effectuate[s] some business policy" and the employer uses prior salary "reasonably in light of [its] stated purpose" and other practices. By contrast, in its April 9, 2018, *en banc* decision, the Ninth Circuit overruled the 1982 circuit precedent to hold that prior salary standing alone or in combination with other factors, cannot justify a wage differential under the EPA.

The court concluded that the EPA's exception permitting a wage disparity based on "'any factor other than sex' is limited to legitimate, job-related factors such as a prospective employee's experience, educational background, ability, or prior job experience." Rejecting the defendant's argument that the catchall exception for "any factor other than sex" unambiguously allows an employer to rely on *any* facially neutral factor, the court ruled that, considering the EPA's statutory context and legislative history, the exception is limited to job-related factors and that prior salary cannot justify a pay disparity between opposite-sex workers performing equal work. The court reasoned that allowing an employer to base the starting salaries of newly hired workers on their salary histories would "perpetuate rather than eliminate the pervasive discrimination at which the Act was aimed."

In taking this position, the Ninth Circuit disagreed with the view of the Tenth and Eleventh Circuits and the EEOC that an employer may rely on prior salary in combination with other factors but not on prior salary alone. The Ninth Circuit stated, however, that it did not address the extent to which prior salary may play a role in individualized salary *negotiations* and that its decision in this case should not be interpreted as "barring or posing any obstacle to whatever resolution future panels may reach regarding questions relating to such negotiations."

e. Preserving Access to the Legal System

i. *Day & Zimmermann NPS, Inc.*, No. 3:15-cv-01416 (D. Conn.) claimed that a staffing company for the nuclear and fossil power industries interfered with Charging Party's and others' right to file an EEOC charge, communicate with the EEOC, and participate in an EEOC investigation. After an electrician filed a disability discrimination charge with EEOC, the company publicized details of the charge, including the employee's name, union affiliation, and information about his medical restrictions in a letter to 146 members of his local union. A three-year consent decree entered on November 30, 2017 provided $45,000 in compensatory damages to the Charging Party and enjoins the company from future retaliation or interference with ADA-protected rights.

f. Preventing Systemic Harassment

i. *EEOC is frequently asked: Has there been an increase in the number of charges alleging sexual harassment since October 2017?* Because EEOC reconciles and reports charge data annually at the end of each fiscal year, EEOC does not have verified data yet.
   1. But, there has been a large increase in number of website "hits" to EEOC harassment webpages.

ii. *EEOC Technical Assistance and Training*
   1. "What to Do if You Believe You Have Been Harassed at Work" (October 2017)
   2. "Promising Practices for Preventing Harassment" (November 2017)
   3. EEOC Launches New Training Program on Respectful Workplaces (October 4, 2017) (interactive, skills-based training that reviews acceptable conduct and provides tools for responding to harassing conduct)
      a. Leading for Respect (for supervisors)
      b. Respect in the Workplace (for all employees)

iii. *Litigation*

1. *EEOC v. American Queen Steamboat Company*, No. 17-cv-02669 (W.D. Tenn.) claimed that a Memphis, Tennessee-based provider of river cruises with about 390 employees discharged Charging Party for participating in an internal sexual harassment investigation. Two-year consent decree entered December 15, 2017, requires employer to provide online training on the statutes enforced by the EEOC, with a focus on retaliation, to HR employees and managers with authority to discharge employees, with supplemental online training for high-level officials. The consent decree also provided Charging Party $50,000 ($18,300 in compensatory damages and $31,700 in back pay) and enjoined retaliation.

2. *EEOC v. Indi's Fast Food Restaurant, Inc., Evanczyk Brothers, LLC*, No. 3:15-cv-590 (W.D. Ky. Jan. 5, 2018) claimed that defendants, owners of a Louisville, Kentucky-based restaurant chain with locations in Kentucky and Indiana, subjected Charging Party and other female employees to sexual harassment. Five-year consent decree entered on January 5, 2018 provides $340,000 in compensatory and punitive damages. Defendants will provide each claimant a letter of apology on company letterhead. The decree permanently enjoins sex discrimination and retaliation, and defendants will implement, post, and distribute EEO policies that include contact information for at least three named individuals to whom employees can complain and a 24/7 hotline number. An outside consultant experienced in employment discrimination law will provide annual trainings set forth in the decree, emphasizing sexual harassment and retaliation.

3. *EEOC v. Rocky Mountain Casing Crews* No. 1:16-cv-428 (D.N.D.) claimed that employer failed to address several complaints from employee of hostile work environment based on his sex and sexual orientation, including a profusion of epithets and graffiti and culminating in physical attack. Three-year consent decree entered on December 20, 2017, provides for $70,000 in compensatory damages in three payments and enjoins creating or maintaining a hostile work environment based on sex or sexual orientation, failing to investigate complaints of a hostile work environment based on sex or sexual orientation, failing to take

prompt corrective action in response to such complaints, and retaliation for complaining about sexual harassment.

4. *EEOC v. Laquila Group, Inc.*, No. 16-cv-5194 (E.D.N.Y.) claims that defendant, a Brooklyn, New York-based heavy construction contractor subjected Charging Party and other African American employees to racial harassment and discharged and failed to rehire Charging Party in retaliation for his complaints about the harassment. A 3½-year consent decree entered on December 1, 2017 provided for $625,000 in back pay and compensatory damages and requires defendant to give all employees (and new employees within 3 days) a letter from defendant's owners describing defendant's commitment to abide by all federal laws prohibiting employment discrimination, with a 24-hour toll-free number (staffed by an independent third-party entity) for employees to make discrimination complaints. Owners, managers, and supervisors will receive annual discrimination and retaliation training. Defendant committed to hire an EEOC-approved independent decree monitor and to report every six months to EEOC on discrimination complaints and the response.