The EEOC and Developments in Anti-Discrimination Law: A Look to 2023 and Beyond

Article By:

Kayla Morin

The Equal Opportunity Employment Commission (“EEOC”) is poised to play an even more essential role in advancing the rights of workers in 2023 and beyond. The EEOC enforces the following federal laws related to employment discrimination:

- Title VII of the Civil Rights Act of 1964 (Title VII), as amended, which prohibits race, color, religion, sex (including pregnancy, sexual orientation, and gender identity), and national origin discrimination;
- The Age Discrimination in Employment Act of 1967 (ADEA), as amended, which prohibits discrimination against workers ages forty years and older;
- The Pregnancy Discrimination Act of 1978 (PDA), which clarifies that Title VII’s prohibition on sex discrimination includes discrimination based on pregnancy;
- The Equal Pay Act of 1963 (EPA), as amended, which prohibits sex discrimination in pay;
- Titles I and V of the Americans with Disabilities Act of 1990 (ADA), as amended, which prohibit discrimination on the basis of disability for private, state, and local employees;
- Sections 501 and 505 of the Rehabilitation Act, which prohibit discrimination on the basis of disability for federal employees; and
- Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA), which prohibits discrimination based on genetic information.

According to its 2022 Annual Performance Report, issued in March 2023, the EEOC secured more than $513.7 million in monetary relief for victims of discrimination in FY 2022, up from $485 million in FY 2021; received more than 73,000 new discrimination charges, a 20% increase from the year prior; and filed 91 lawsuits, including 13 systemic suits.

Looking forward to FY 2024, the EEOC identified six strategic priorities in its Congressional Budget Justification: advancing racial justice and combatting systemic discrimination based on all protected classes; protecting pay equity; supporting diversity, equity, inclusion, and accessibility measures; addressing the use of artificial intelligence as it relates to employment decisions; and preventing unlawful retaliation.

The remainder of this blog outlines recent and upcoming developments related to the EEOC, including its use of amicus briefs, upcoming Supreme Court decisions, and its stance on artificial intelligence.
intelligence, as well as progress in expanding the number of protected classes at the state and local levels.

**Amicus Briefs in Discrimination and Retaliation Cases**

One way in which the EEOC promotes racial justice – one of its strategic priorities – is by advocating for plaintiff-friendly interpretations of Title VII in individual cases, which can then have a broader impact on a multitude of claims. By way of example, the EEOC filed an amicus brief in *Narayan v. Midwestern State University*, No. 22-11140, which is pending in the Fifth Circuit, urging that Court to reinforce broader, more employee-friendly standards in Title VII discrimination and retaliation claims. The plaintiff, N. Sugumaran Narayanan, a political science professor of Malaysian origin, requested to teach summer courses at Midwestern State University (“MSU”). The University denied his request, causing him to lose income, and he filed suit, alleging that its decision was discriminatory on the basis of race, color, and national origin and in retaliation for an earlier lawsuit he had filed against MSU.

In granting summary judgment to the employer, the district court held that the requirement that a plaintiff prove an “adverse employment action” for a Title VII claim meant that he had to show an “ultimate employment action such as hiring, granting leave, discharging, promoting, or compensating.” Denying a request to teach summer school classes, the court found, did not rise to this level. The court applied this same reasoning to plaintiff’s discrimination and retaliation claims, granting summary judgment to MSU on both.

The EEOC filed an amicus brief on March 22, 2023, arguing that the district court misapplied Title VII’s standards. First, it noted that the statute itself prohibits discrimination against a person “with respect to his compensation,” and argued that the district court must consider whether the extra income the plaintiff could have earned teaching summer school affected his compensation. 42 U.S.C. § 2000e-2(a)(1). Second, it reminded the Fifth Circuit that the Supreme Court does not require an “ultimate employment decision” to sustain a retaliation claim, but merely an adverse action that “well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.” *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 68 (2006). The EEOC urged the Fifth Circuit to remand the case so the district court could determine whether a jury might believe that the denial of the opportunity to teach summer courses could dissuade a worker from engaging in protected activity.

In a case with more systemic implications, the EEOC recently filed an amicus brief in *Liu v. Uber Technologies, Inc*. Thomas Liu, an Asian-American man, brought the case on behalf of himself and a putative class of non-white Uber drivers alleging that Uber’s policy of terminating drivers based on star ratings has a disparate impact on non-white drivers. The district court dismissed Liu’s complaint, holding that he did not provide enough evidence of a disparate impact for his claims to survive. Mr. Liu presented evidence based on a survey his attorney conducted of Uber drivers that, he alleged, showed that race played a role in drivers being terminated based on star ratings. The district court found this evidence insufficient to state a claim, applying, the EEOC argues, an improperly high pleading standard, requiring Mr. Liu to show that a disparate impact “actually manifested itself,” rather than the proper standard, which merely requires a plaintiff “to allege facts from which a disparate impact could plausibly be inferred.”

The EEOC regularly files amicus briefs in a wide variety of discrimination and retaliation cases. A full list of its amicus briefs can be found [here](#).
Discrimination Cases before the Supreme Court

The Supreme Court is set to rule on a Title VII case that could have enormous implications for how the EEOC deals with religious liberty cases and for individual plaintiffs nationwide. The Court heard oral arguments in *Groff v. DeJoy*, No. 22-174 on April 18, 2023, and its upcoming ruling could upend Title VII’s religious discrimination jurisprudence. Title VII prohibits an employer from discriminating against an employee because of religion but allows a carve out if the employer “demonstrates that he is unable to reasonably accommodate to an employee’s or prospective employee’s religious observance or practice without undue hardship on the conduct of the employer’s business.” 42 U.S.C. § 2000e(j). Longstanding Supreme Court precedent defines “undue hardship” as anything that requires an employer “to bear more than a de minimis cost” in accommodating the employee. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977).

*Groff* involves a U.S. Postal Service worker’s request to have Sundays off in observance of the Sabbath. When the Postal Service entered into an agreement with Amazon to make deliveries on Sunday, it originally accommodated Gerald E. Groff, an evangelical Christian, by seeking volunteers for Sunday shifts. However, when the Service could not find a volunteer, this meant that other workers had to cover the Sunday shifts due to Mr. Groff’s absence. The Court of Appeals for the Third Circuit ruled in favor of the Postal Service, finding that accommodating Mr. Groff posed an undue hardship on the Service.

In *Groff*, the Supreme Court will consider two questions: (1) whether to retain the “de minimis” test in evaluating religious discrimination claims; and (2) whether an accommodation that solely burdens the employee’s co-workers, but not the business itself, can be considered an undue hardship.

Based on the Supreme Court Justices’ comments at oral argument, the Court appears likely to reject the de minimis standard, or to clarify its meaning to require a more significant showing. Mr. Groff’s attorney advocated for a standard closer to the one used under the *Americans with Disabilities Act*, which requires employers to provide reasonable accommodations to employees with disabilities unless the requested accommodation would cause a significant difficulty or expense, a higher threshold than de minimis.

Although it has not yet granted certiorari, the Supreme Court may also weigh in over a dispute as to whether an adverse employment action for purposes of a Title VII discrimination claim includes a transfer and denial of a transfer. The St. Louis Police Department transferred Jaytona Clayborn Muldrew to a different division, she alleges, based on her sex. Her pay remained the same, but the new position entirely altered her schedule, responsibilities, and workplace environment. Unhappy in her new position, Ms. Muldrew then requested a transfer herself, which was denied. The Eighth Circuit ruled in favor of the City, holding that “a transfer that does not involve a demotion in form or substance, cannot rise to the level of a materially adverse employment action.”

The Supreme Court has asked the Solicitor General to file a brief expressing its views in the case, which, as explained here, dramatically increases the likelihood that the Court will grant certiorari. The Solicitor General will likely confer with the EEOC in developing its brief, which has not yet been filed. The National Employment Lawyers Association (“NELA”) has already filed an amicus brief urging the Court to overturn the Eighth Circuit’s ruling and clarify that the plain text of Title VII, which bars discrimination – *i.e.*, “differential treatment” – encompasses discriminatory transfers, even if the harm to an employee is not economic. If the Court grants certiorari, the Government will likely file a brief on the merits reflecting the views of the EEOC and the Department of Justice.
Artificial Intelligence in Employment Practices

With the rise of artificial intelligence ("AI") and its attendant effects on employment practices, commentators also predict that the EEOC will ramp up its enforcement against discriminatory uses of AI in the next year. The EEOC has already begun to monitor the use of AI, publishing technical assistance documents in FY 2022 that address the use of AI and algorithms in assessing job applicants and employees and the potential negative implications for people with disabilities.

In the EEOC’s draft Strategic Enforcement Plan for 2023-2027, it has identified the use of automated systems and AI as a key priority related to its goal of eliminating barriers in recruitment and hiring. The EEOC may also start to bring more strategic lawsuits to address employers’ discriminatory use of AI to hire and screen candidates as the use of AI expands and discriminatory outcomes become clearer. A list of the EEOC’s documents related to AI in employment can be found here.

Anti-discrimination Laws at the State and Local Level

Finally, although the EEOC is bound by its mandate to enforce federal anti-discrimination laws, states and localities have begun to explore adding additional protected classes to their civil rights laws. The New York City Council, for instance, passed a bill that would prohibit discrimination based on height and weight in employment, housing, and public accommodations. Mayor Eric Adams is likely to sign the bill. Other jurisdictions with similar prohibitions include Michigan, Washington, D.C., and San Francisco. Washington, D.C.’s law, for example, broadly prohibits discrimination based on personal appearance.

In light of congressional gridlock, progress at the state and local level is all the more important in expanding protections for workers.

Katz Banks Kumin LLP Copyright ©