The New Wave of EEOC Discrimination Claims: Unlocking the Bathroom Door and Other New Focal Points for the EEOC in 2015

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One of the last remaining areas in the workplace still governed by gender is the restroom. Doors are clearly labeled "Women" and "Men." However, the choice is not always clear for the modern restroom user. With the increase in openly transgender and sexually-transitioning employees in the workplace, there has been a notable increase in the visibility of transgender issues, and a corresponding increase in enforcement actions brought by the Equal Employment Opportunity Commission (EEOC) against employers. The "restroom wars" are a microcosm of the EEOC's new enforcement agenda, namely, focusing on social issues where legislation is either lagging or not possible yet on the national stage—but media attention is easily garnered. Other high-visibility areas championed recently by the EEOC have been religious garb and grooming, immigrant rights, equal pay and pregnancy. The key for employers is to understand the motivation and operation of the EEOC so as to avoid becoming a target of its new enforcement strategy.

RESTROOM WARS

While restrooms are generally a place of privacy, the EEOC has "opened the doors" to the bathroom stall, and is attempting to eradicate the way in which gender is commonly associated with the workplace restroom. The EEOC is focused on this area even though sexual orientation is not a protected characteristic under federal anti-discrimination laws. Using "gender discrimination" as the enforcement tool, the EEOC is looking for high-profile cases to further what is effectively a social agenda coming from Washington D.C. at the administrative agency level (most likely because Congress and the Executive Branch have been deadlocked for a while).

When the issue of female or male is not so easily defined, the EEOC has provided guidelines for "choosing the right door," and how employers are expected to react to that choice. According to the EEOC, "transgender" is an umbrella term for persons whose gender identity, gender expression, or behavior does not conform to what is typically associated with the sex to which they were assigned at birth. "A person is defined as transgender pre-

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cisely because of the perception that his or her behavior transgresses gender stereotypes."[1]

On April 1, 2015, the EEOC issued its decision in *Tamara Lusardi v. Department of the Army*, ordering the Army to pay monetary damages and attorneys' fees for sex discrimination of a transgender employee.[2] The complainant was a transgender woman who transitioned from presenting herself as a man to presenting herself as a woman during her tenure as a civilian employee for the Army. The complainant and her supervisor created a so-called "transition plan" which included the understanding that complainant would use the single-user, unisex restroom, rather than the common women's restroom, during her transition. She would be permitted to use the women's restroom only after the completion of her gender reassignment surgery. The transition plan was rubber-stamped by the Deputy Program Manager and essentially conditioned the complainant's bathroom access on a medical procedure.

This transition plan was inherently flawed and did not even work well. The single-user restroom was out of order for a week, forcing the complainant to use the common women's restroom, which inevitably resulted in complaints from her female co-workers. The complainant's supervisor ridiculed her for using the women's restroom, and emphasized the requirement that she use the single-user facility. In addition, her supervisor continued to use male signifiers when speaking to the complainant and referred to her by her former male name, since according to the supervisor, "she" was still a "man."

The EEOC found that the Army's treatment of the complainant constituted sex-based discrimination. The condition that the complainant could not use the women's restroom until completion of her surgery was discriminatory according to the EEOC. It segregated her from others of her chosen gender, and perpetuated the sense that she was not worthy of equal treatment. The EEOC determined that the complainant identified as a female and should be treated as a female. The Commission emphasized the importance of the "real life experience" to a transgender employee's transition, and noted that gender reassignment surgery is in no way a fundamental element of a transition.

This decision came on the heels of a string of decisions from the EEOC related to transgender discrimination. In the past three years, the EEOC's attention to transgender discrimination in the workplace has increased markedly. In 2012, the EEOC issued a decision, which for the first time, determined that discriminating against an individual based on gender identity, change of sex and/or transgender status is a form of sex discrimination and is actionable under Title VII.[3] The EEOC has made it clear that it is targeting transgender discrimination in the workplace as an enforcement priority. This is important to know, since a finding of sex discrimination can subject an employer to an array of penalties, such as: requiring the employer to provide sexual discrimination training to its employees, providing additional training to its management personnel, ordering the payment of monetary damages and attorneys' fees, and requiring the submission of a compliance report.

Such penalties are easily avoidable by following an analysis similar to any other accommodation request presented by an employee. With its recent decisions, the EEOC has also provided a few guidelines on how it believes employers can prevent transgender discrimination in the workplace.

1. Treat Transitioning Employees on a Case-By-Case Basis

There is not one defined path which an employer should follow when addressing the con-

cerns of transgender employees. Some transgender employees forgo medical treatment due to individual circumstances such as age or finances. In such cases, these individuals must be afforded the same rights and accommodations as those transgender employees who undergo the transgender reassignment surgery. Treat each transitioning employee on a case-by-case basis, and tailor the company's actions and reactions to the needs of the transitioning employee.

2. Institute a Transition Plan

Employers are encouraged to create transition plans with their employees, but are advised against instituting any waiver of rights in such plans. Even though a transition plan may include a temporary compromise which requires the transitioning employee to use a private restroom facility rather than a common one, the employee retains her right to use any facility consistent with her gender. Employers must balance the concerns of co-workers with those of the transitioning employee. In balancing these concerns, an employer may not allow the preferences of co-workers to justify sex discrimination and the proliferation of gender stereotypes. Safety concerns have been seen as a legitimate, non-discriminatory reason for preventing a transgender employee access to a certain bathroom, such as fear of physical assault. There has to be a legitimate basis for this concern with respect to the transitioning employee, however. A blanket reliance on "safety" issues when an employee has never exhibited any indicia of harassment or inappropriate behavior can make the employer a target of an enforcement action.

3. Use the Name and Gender Pronouns Preferred by the Employee

Employers are also advised to be mindful of the transitioning employee's preferences. Referring to the employee by his or her former name and utilizing improper pronouns can be considered harassment, creating a hostile work environment. Supervisors and co-workers should use the name and gender pronoun that corresponds to the gender identity with which the employee identifies in employee records and in communications with or about the employee.

Following these guidelines has become crucial in the wake of the *Tamara Lusardi* decision. Not even a month old, this decision is already making waves in transgender rights. Recently, a Florida health clinic agreed to pay $150,000 in settlement to a former transgender employee who claimed she was fired because she transitioned to a woman during the time of her employment.[4] This settlement was approved by the Court on April 9, 2015. This is likely the beginning of many settlements paid to transgender employees for similar claims. With the expansion of the sexual discrimination umbrella to include transgender individuals, the EEOC is setting a precedent which employers would be well-advised to follow.

RELIGIOUS DISCRIMINATION—IT'S ALL ABOUT THE HEADWEAR AND THE BEARD

Religion is a protected class under federal anti-discrimination laws. In the last several years, however, the fastest-growing area of enforcement has been with respect to the specific issues of religious garb and grooming. Garnering the most headlines on behalf of the EEOC recently has been the Muslim head scarf known as a hijab. Other high-profile cases have involved the Sikh turban and kirpan (symbolic miniature sword), and adherence to shaving or hair length observances, such as Sikh uncut hair and beard, Muslim facial hair, Rastafarian dreadlocks, and Jewish peyes (sidelocks).

Most recently, the EEOC

sued Abercrombie & Fitch on behalf of a seventeen-year-old Muslim woman who was denied employment when she insisted on wearing her hijab. This case escalated up the ranks of the court system and was heard by the United States Supreme Court in February 2015. Abercrombie & Fitch justified its denial of employment because the hijab clashed with the company's dress code, which called for a "classic East Coast collegiate style." The EEOC found this to be religious discrimination. Despite the fact that Abercrombie's dress code applied neutrally in banning all head coverings, the distinction was made that employers do not have to accommodate a baseball cap, but they do have to accommodate a hijab, yarmulke or turban.

On June 1, 2015, the United States Supreme Court issued its opinion, finding that there is no knowledge requirement in Title VII's prohibition against an employer's use of an applicant's religious practice as a factor in its employment decisions. Accordingly, there can be a finding of religious discrimination even if the applicant has not informed the employer of his need for an accommodation based on his religion. Based on this decision, an otherwise-neutral policy regarding grooming and attire must give way to the need for an accommodation.

In such a situation, how is an employer to know that a hijab or other type of garb or grooming issue is for religious purposes if the employee does not specifically request a religious accommodation? The most practical approach for employers is to include the dress code in the job description. Just like it is appropriate to ask applicants if they are going to be able to perform the essential functions of the job with or without an accommodation, a prudent employer who has a specific dress code should show the applicant the requirements and ask if it poses a problem. An employee then can explain any religious objections or accommodations needed and the employer can determine whether it is a legitimate religious issue that needs to be accommodated. What it cannot do is simply blindly rely on its dress code or the fact that "this is the way it has always been done."

IMMIGRANT STATUS—YES, NON-CITIZENS CAN SUE YOU TOO

Similar to the EEOC's efforts to envelop transgender issues into gender discrimination, the EEOC is attempting to fold "immigrant status" under the national origin discrimination umbrella. The EEOC's agenda directly contravenes federal law, which does not recognize immigrant status as a protected category. This, however, has not stopped the EEOC from bringing expensive, time-consuming, enforcement actions against unwitting employers.

The EEOC's Strategic Enforcement Plan has made it a priority to protect workers it deems to be the most vulnerable, and among these workers are U.S. immigrants.[5] This trend took form at the end of 2013, when the EEOC filed a lawsuit against a storage and moving company, alleging immigrant employees were subjected to a hostile work environment due to racial slurs depicting Mexican heritage made by the warehouse managers. The storage company entered into a settlement of $450,000 with the EEOC. The EEOC has grabbed hold of what it deems to be offensive slurs deriding from an employee's national origin and lack of U.S. citizenship status and utilized them to support its campaign to broaden the scope of protected categories under national origin discrimination.

It is interesting to note that the foregoing, and several recent cases of discrimination and harassment being brought by the EEOC involves Hispanics allegedly discriminating against other Hispanics—the latter

group, however, being non-citizens. Therefore, it is important to investigate and resolve any claims of potential mistreatment, even if on its face, the facts do not comply with stereotypical discrimination/harassment.

In order to avoid unwanted attention from the EEOC, employers should also avoid any sort of pre-employment testing, work rules or practices that could adversely affect those who are not citizens. "English-only" rules are justified when speaking with customers and possible for safety reasons in certain work environments. Having a blanket rule in the workplace (particularly in break areas), however, is unsupportable. A pre-employment test in English also may be illegal unless reading and writing fluently is a bona fide condition of the job. It is important to monitor training, enforcement of work rules, and promotions. If non-citizens are being treated more harshly than citizens, or are receiving less training and fewer promotions, that can be a red flag that more training needs to be done among managers. Even if the potential discrimination is being done by persons of the same national origin, the EEOC will investigate and enforce the violations that are affecting non-citizens—and it may lead to fines, potential lawsuits, bad press and other undesirable outcomes.

EQUAL PAY/ PREGNANCY—STILL HOT BUTTON ISSUES

Although issues affecting women have been at the forefront of enforcement activity for the last several decades, the Equal Pay Act ("EPA") is receiving a tremendous amount of specialized attention from the EEOC in the last few years. Again, perhaps because Congress was unable to pass legislation on the subject, pay equity was designated as a top priority in the EEOC's Strategic Enforcement Plan for 2013–2016. The EEOC is focusing on the comparison between female and male employees working at the same "establishment," meaning the same physical location. In *EEOC v Port Authority of NY/NJ*, the EEOC sought to establish that female attorneys performed similar job duties as male attorneys.[6] Although the EEOC failed to meet its burden of establishing that female and male attorneys performed the same work for unequal pay, and the Court ruled against the EEOC, this case is an example of the cases being brought by the EEOC in this area. The *Port Authority* case began with an investigation into the company's pay practices, leading to the EEOC's conclusion that the company had violated the EPA. The EEOC then brought suit against the company on behalf of the female employees who purportedly received unequal pay. Although the company "won," it cost hundreds of thousands of dollars in legal fees, as well as the bad press and downtime associated with the investigation and subsequent litigation.

Pregnancy discrimination also continues to be at the forefront of the EEOC's agenda. In March 2015, the EEOC filed multiple lawsuits against employers for pregnancy discrimination (*Shefa Wellness Center, Hackensack Collections Firm* and *Noodles Asian Bistro*). Almost a third of all charges investigated by the EEOC last year (26,027 of 88,778 total) involve sex discrimination—and nearly half of those were based on pregnancy, which is not actual sexual discrimination, although obviously only one gender is implicated. Aside from the federal Family Medical Leave Act ("FMLA"), Congress has not passed a national, maternity-leave bill, but that has not stopped the EEOC from acting as if one exists.

Employers outside of states such as California, which has extensive protections for pregnant employees, and those with less than 50 employees (for which the FMLA does not apply) should make sure that any

denial of pregnancy or maternity leave is not inconsistent with other sorts of leaves granted—particularly to male employees. It is also important to make sure that if pregnancy or maternity leave negatively impacts a woman's bonus, annual increase or chance at a promotion, that male employees missing similar amounts of time for medical issues are treated similarly. Hell hath no fury like a woman scorned—particularly if the scorn is discriminatorily applied by the woman's employer. The EEOC may not be analogous to Hell, but it's likely that many employers have made such a comparison when they have undergone a years-long investigation and potential class-action litigation because a policy improperly applied to pregnant women caught the attention of the EEOC investigators.

RETALIATION—DON'T CREATE A LAWSUIT WHERE NONE EXISTS

Having reviewed the foregoing top areas of EEOC attention in the last several years, it is important also to note that the leader of EEOC charges and enforcement actions from the last several years (43 percent of all charges in 2014) was retaliation claims. Most often, these arise from underlying claims of racial, sexual or other discrimination that are investigated by the employer and found—correctly—to be without merit. Unfortunately, after the dust settles and Human Resources talks to the employees about how to avoid such "misunderstandings" in the future, some employees decide the easiest way to avoid such a problem is simply to ignore the employee that brought the complaint. He or she stops being invited to lunch and after-work functions. Perhaps the manager stops mentoring closely, or perhaps the employee receives his or her first ever negative performance review conveniently within a few months of either implicating the manager or simply causing the manager to want to get rid of the new trouble maker.

In order to avoid handing a really good lawsuit to an employee that otherwise did not have one, employers should ensure that complaining employees receive guidance and follow up. If Human Resources or a manager follows up with the employee who made the complaint and he or she says everything is fine, that is an excellent opportunity to document the meeting and the file with an appropriate email. If, however, the employee reveals that he or she feels like a pariah and is being treated differently by co-workers and managers, taking appropriate action can ward off what might otherwise be a potential EEOC charge or a private lawsuit.

CONCLUSION

Based on the foregoing, it is wise to respect the EEOC's new enforcement strategy and not assume the complained-of behavior falls outside the scope of federal anti-discrimination laws. If the issue is related to a protected category—and particularly if it is one where the EEOC can make a large public impact—it may very well be an issue the EEOC will enforce. Knowing this, and knowing how best to respond to potential claims, can help your company stay out of harm's way and focus on making a profit—which has also been a struggle over the last several years.

NOTES:

[1]Glenn v. Brumby, 663 F.3d 1312, 1316. 113 Fair Empl. Prac. Cas. (BNA) 1543, 95 Empl. Prac. Dec. (CCH) P 44349, 84 A.L.R. Fed. 2d 519 (11th Cir. 2011).

[2]Tamara Lusardi v. Department of the Army, EEOC Appeal No. 0120133395 (Apr. 1, 2015).

[3]Macy v. Bureau of Alcohol, Tobacco, Firearms and Explosives, EEOC Appeal No. 0120120821 (Apr. 20, 2012).

[4]Equal Employment Opportunity Commission v. Lakeland Eye Clinic, U.S. District Court for the Middle District of Florida, No. 8:14-cv-2421.

[5]EEOC v. Mesa Systems, Inc., 11-cv-01201-RJS-BCW (2013).

[6]EEOC v Port Authority of NY/NJ, 13-2705-cv (2013).