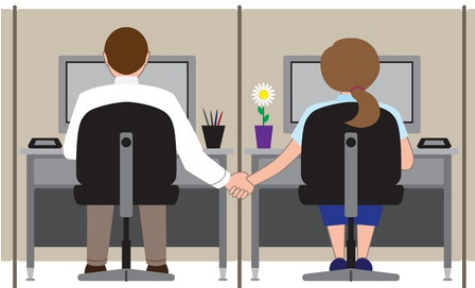


How to Prepare Your Organization to Stay off the EEOC's Target List

Objectives

- A Brief Overview of the EEOC, Its Process, Recent Statistics, and How It Differs from the Michigan Department of Civil Rights.
- Recognizing Recent Changes to the Laws, Caselaw, and the Internal Structure of the EEOC.
- Understanding How These Changes Affect Employers.
- Tips: Dos and Don'ts to Stay Off the EEOC's Target List.

EEOC Overview



- The Equal Employment Opportunity Commission (EEOC) is a federal governmental agency created by the Civil Rights Act of 1964, tasked with interpreting and enforcing Title VII's prohibitions against employment discrimination, harassment, and retaliation.
 - Under the laws enforced by EEOC, it is illegal to discriminate against someone (applicant or employee) because of that person's race, color, religion, sex (including gender identity, sexual orientation, and pregnancy), national origin, age (40 or older), disability or genetic information.
 - It is also illegal to retaliate against a person because he or she complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit.

Tip # 1

- EEOC receives a charge from an employee, whether it be discrimination, sexual harassment, hostile work environment, or retaliation.
 - Tip: if an employee requests a copy of their personnel file under Michigan's Bullard Plawecki Act, employers should treat the request as the employee's first step in suing the employer.
 - » Employers should take the time to review the personnel file and make sure all other documents are in order in case a lawsuit is filed.



Tip # 2

- Within 10 days, the charge is sent to the employer, along with a request to respond in writing.
 - An employer generally has 30 days to gather the information requested and to submit its position statement and attachments to the EEOC.
 - » Tip: It is easy to ask the EEOC for a 30-day extension to respond.



Tip # 3

- The EEOC may investigate by visiting the employer, gathering documents, and interviewing employees.
 - Tip: Onsite investigations and interviews are rare if a detailed position statement is provided.
 - » Counsel maybe present for management interviews



Tip # 4



- Mediation options are offered by the EEOC during this process.
 - Tip: Don't mediate unless you want to settle or you want to learn more about the employee's potential evidence.

Tip # 5

- The EEOC will try to reach an agreement with the employer.
 - Tip: The EEOC rarely files a lawsuit. They often try to facilitate a resolution that's mutually beneficial. They may propose a reconciliation agreement.



Tip # 6

- Require employees to complete training orientation.
 - Have comprehensive and effective policies and publicize them.



Tip # 7

- Monitor compensation practices and performance appraisal systems for discrimination



Tip # 8

- Promote an inclusive culture in the workplace.
- Don't discriminate against someone because of race, color, religion, sex, national origin, age, disability or genetic information.
- Don't retaliate against an employee for complaining about discrimination / harassment



Tip # 9

- Don't include provisions in severance agreements that prevent the employee from reporting to the EEOC
- Do include private arbitration provisions into agreement that require employees to litigate any claims they have against the employer in private arbitration.



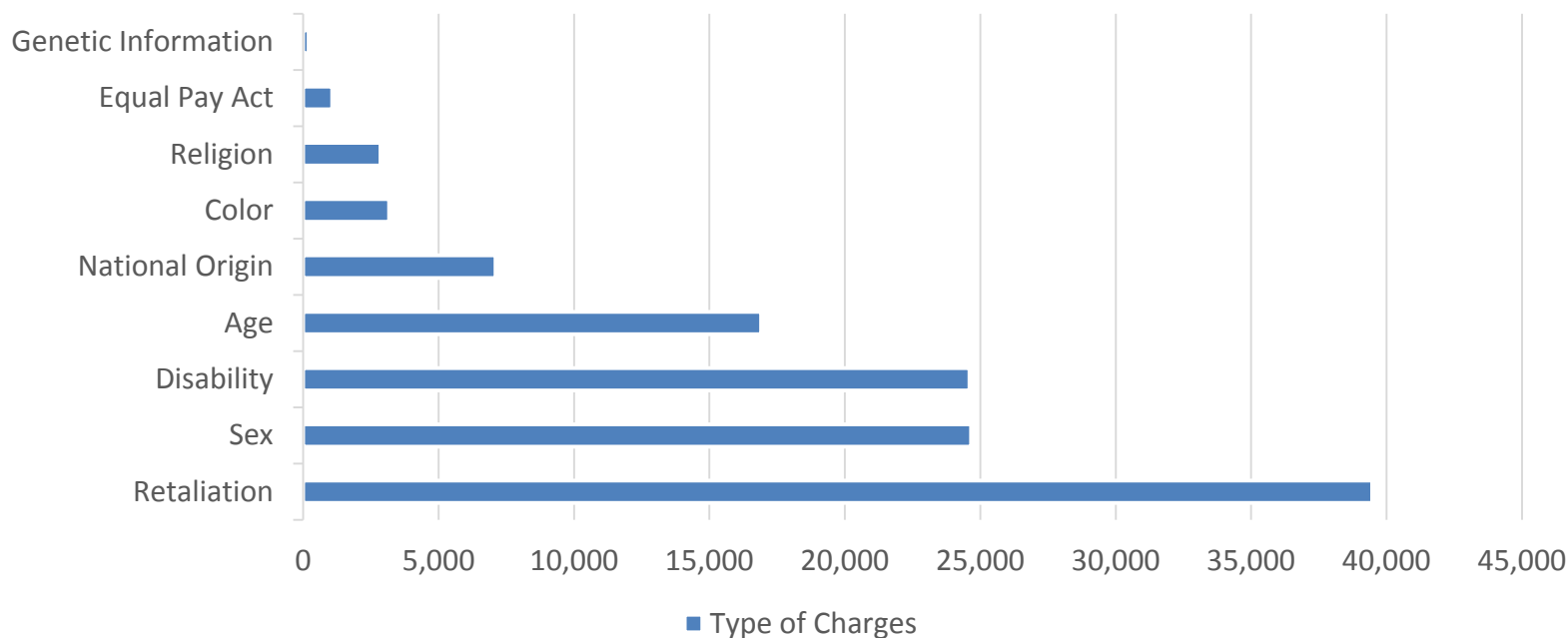
Tip # 10

- Don't make agreements that reduce the limitations with regard to the timeline for filing charges with the EEOC, as opposed to the ability to bring a suit in court



Charges Filed with EEOC

Type of Charges



7 W's of An Investigation

- Who
- What
- Where
- When
- Why
- Witness
- Want (What do you want?)

6 R's of An Investigation

- **Respect:** Listen to various perspectives to learn the facts with an open mind.
- **Restraint:** Prevent any unlawful conduct from continuing and disclose information on a need-to-know basis to maintain confidentiality to the extent possible.
- **Rules:** Evaluate application of the handbook.
- **Respond:** Be swift in investigation and taking appropriate remedial action, if necessary.
- **Record:** Document, document, document.
- **(No) Retaliation:** Do not take adverse action against complainant (who makes claim in good faith) or witness participating in investigation.

Lubahn v Absolute Software, Inc, **2018 WL 5634353 (ED Mich, 2018)**



- The court denied defendant's motion for summary judgement on plaintiff's Elliott-Larsen Civil Rights Act claim that he was laid off because of his age. Plaintiff presented evidence that company officers allegedly made numerous age related statements including a sales director's alleged remark that the company had to get rid of employees "at the end of their rainbow." The plaintiff also provided data showing that, in his department, nearly 70% of employees under 50 were retained.

EEOC v Dolgencorp, LLC, **899 F3d 428 (CA 6, 2018)**



- Jury had sufficient evidence to find that employer failed to accommodate diabetic cashier by discharging her after it denied her request to keep juice nearby in case of a low blood sugar episode. Defendant terminated her for violating company policy by consuming juice from a store cooler before paying for it during two such episodes, where employer's categorical denial of her request justifies a finding of failure to accommodate.

Zarda v. Altitude Express, Inc.



- Gay former employee of a skydiving company brought an action against his employer alleging that he was fired because he failed to conform to male sex stereotypes by referring to his sexual orientation. The former employee argued he was fired in violation of Title VII and New York law.

Zarda v. Altitude Express, Inc.

- Although it is well-settled that gender stereotyping violates Title VII's prohibition on discrimination “because of ... sex,” the Second Circuit Court of Appeals had previously held that sexual orientation discrimination claims, including claims that being gay or lesbian constitutes nonconformity with a gender stereotype, are not cognizable under Title VII. See *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000); see also *Dawson v. Bumble & Bumble*, 398 F.3d 211, 217–23 (2d Cir. 2005).

Zarda v. Altitude Express, Inc.

- However, in Zarda, the Second Circuit overturned its previous decisions and found that sexual orientation discrimination is a subset of sex discrimination because it is discrimination “because of ... sex”; and therefore, is a violation of Title VII.
- On April 22, 2019, the US Supreme Court granted certiorari to hear the case, consolidated with Bostock v. Clayton County, Georgia. A final decision on the case should be coming within a year or so from the court.

E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc.

- The EEOC brought a Title VII action against an employer alleging that employer fired a transitioning, transgender employee based on gender stereotypes and that employer administered a discriminatory clothing allowance policy.
- Employee was terminated from her employment in a funeral home by the owner and operator shortly after the employee informed the owner that she intended to transition from male to female and would represent herself and dress as a woman while at work.

E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc.

- The Sixth Circuit Court of Appeals ruled that “[d]iscrimination on the basis of transgender and transitioning status is necessarily discrimination on the basis of sex, and thus the EEOC should have had the opportunity to prove that the Funeral Home violated Title VII by firing [the employee] because she is transgender and transitioning from male to female.” *Equal Employment Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 571 (6th Cir. 2018), cert. granted, *R.G. & G.R. Harris Funeral Homes, Inc. v. E.E.O.C.*, 139 S. Ct. 1599 (2019).

E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc.

- On April 22, 2019, the US Supreme Court granted certiorari to hear the case and decide whether Title VII prohibits discrimination against transgender people based on (1) their status as transgender (2) sex stereotyping under *Price Waterhouse v. Hopkins*, 490 U.S. 228, (1989).



Fort Bend County, Texas v. Davis

- On June 3, 2019, the United States Supreme Court ruled that Title VII's requirement to file a charge with the EEOC is not jurisdictional.
- Davis, the plaintiff, was an employee of Fort Bend County. In 2011, Davis submitted a charge to the EEOC asserting claims of harassment and retaliation. While the charge was pending with the EEOC, Davis believed she was discriminated against for her religion, by being fired for attending church instead of work on a Sunday.



Fort Bend County, Texas v. Davis

- Attempting to supplement the allegations in her charge, Davis handwrote “religion” on the “Employment Harms or Actions” part of her intake questionnaire, and she checked boxes for “discharge” and “reasonable accommodation” on that form. She made no change, however, in the formal charge document. A few months later, the Department of Justice notified Davis of her right to sue. Davis filed a case in a federal district court and after years of litigation, the defendant claimed that the District Court lacked jurisdiction to adjudicate Davis' religion-based discrimination claim because she had not stated such a claim in her EEOC charge.

Fort Bend County, Texas v. Davis

- The District Court held that Davis had not satisfied the charge-filing requirement with respect to her claim of religion-based discrimination, and that the requirement qualified as “jurisdictional.” The 5th Cir. Reversed, and the Supreme Court granted certiorari to hear the case.
- Justice Ginsburg, writing for the court, ruled that Title VII’s charge-filing requirement is mandatory, but not jurisdictional. The court reasoned that the requirement to file a charge with the EEOC was a procedural obligation and “not a jurisdictional prescription delineating the adjudicatory authority of courts.

