International Municipal Lawyers Association
2012 Annual Conference
Austin, Texas

Work Session VIII: Employment Law
The Future of Employment Law: New Trends in Workplace Discrimination, Expansion of Protected Classes and More

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I. Introduction

Federal laws that form the basis for the majority of employment law practice have changed rapidly in the past two years. The most significant changes in employment law have come not from Congress but from federal administrative agencies. In 2011 and 2012, alone federal policies or enforcement actions have affected how employers conduct criminal background checks,[1] provide leave to disabled employees,[2] and hire employees who do not dress according to their gender.[3] Some of the changes are the work of the U.S. Equal Employment Opportunity Commission and have yet to endure judicial scrutiny.[4]

The administrative changes come at a time when employees are alleging discrimination in record numbers.[5] In 2011 alone, the EEOC handled 99,947 charges, a 24 percent increase from a decade earlier.[6] The EEOC itself filed 300 lawsuits against employers, resulting in $91 million paid by employers.[7] The EEOC considered 23 of the lawsuits to be "systemic," which means they involved large numbers of people.[8]

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[1] U.S. Equal Employment Opportunity Commission, Enforcement Guidance No. 915.002 (April 25, 2012), http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm#sdendnote78anc.

[2] Press Release, U.S. Equal Employment Opportunity Commission, Verizon to Pay $20 Million to Settle Nationwide EEOC Disability Suit (July 6, 2011), http://www.eeoc.gov/eeoc/newsroom/release/7-6-11a.cfm.

[3] *Macy v. Holder*, Appeal No. 0120120821 (2012), http://www.eeoc.gov/decisions/0120120821%20Macy%20v%20DOJ%20ATF.txt (holding that a transgender person who was offered a position with the Bureau of Alcohol, Tobacco, Firearms and Explosives while she presented as a man but then withdrew the offer when she informed them she would be presenting as a woman was illegally discriminated against in violation of Title VII).

[4] *But see*, *EEOC v. Tricore Reference Labs*, No. 11-2096 (10th Cir. 2012) (affirming a motion for summary judgment in favor of the employer). The court also awarded attorney's fees against the EEOC for filing a frivolous appeal when it had not made its prima facie case that the employee could perform the essential functions of the job, with or without accommodation. ("The EEOC continued to litigate the failure-to accommodate and termination claims after it became clear there were no grounds upon which to proceed.") The EEOC claimed at the district court that Tricore violated the ADA when it failed to accommodate, and then fired a clinical lab assistant who had two surgeries on her feet and ankles. Despite numerous accommodations, the employee was unable to perform essential functions of her job, which included standing, climbing, stooping, and kneeling. The EEOC admitted in April 2010 that the employee could not perform the essential functions of her job, and the employer alerted the EEOC in June 2010 of the insufficiency of its claim, yet the EEOC continued with its claims. In its appeal to the 10th Circuit, the EEOC no longer asserted that TriCore failed to accommodate, but only that it discriminated when it terminated her employment.

[5] Press Release, U.S. Equal Employment Opportunity Commission, Private Sector Bias charges Hit all-Time High (Jan. 25, 2012), http://www.eeoc.gov/eeoc/newsroom/release/1-24-12a.cfm.

[6] *Id*.

[7] *Id*.

[8] *Id*.

II. The EEOC Is Paying Particular Attention to ADAAA Violations

In 2008, Congress passed amendments to the Americans with Disabilities Act, and the revised law became known as the ADA Amendments Act (ADAAA). In doing so, Congress overturned several Supreme Court decisions that had narrowly interpreted the definition of "disability."[9] The ADAAA retained the ADA's original definition of "disability" as a physical or mental impairment that substantially limits one or more major life activities; a record (or past history) of such an impairment; or being regarded as having a disability.[10] However, it changed the way the definition is interpreted and required a lower degree of functional limitation than the standard previously applied by the courts.[11] The term "substantially limits" is to be construed broadly, and a particular impairment does not have to severely or significantly restrict a major life activity to be considered "substantially limiting."[12] A major life activity includes caring for oneself, sitting, standing, walking, reaching, seeing, breathing, hearing, speaking, learning and working.[13] For practical purposes, employers should assume that an employee's impairment qualifies as a disability, and then begin identifying reasonable ways to accommodate. Employers under ADAAA must conduct individualized assessments to determine whether a particular impairment "substantially limits" a major life activity for a particular employee.[14]

Penalties on the Rise

As evidence that the EEOC is serious about enforcing the ADAAA, the agency collected $103 million in ADAAA-related penalties in fiscal year 2011, a 36 percent increase over the year before.[15] Collections increased for claims relating to a wide variety of disabilities, including allergies, depression, and post-traumatic stress disorder, or PTSD.[16]

Rigid Attendance Policies

No-fault attendance policies have been the recent targets of EEOC enforcement efforts. Under the ADAAA, an employer should engage in an interactive process with a disabled employee in order to determine how the employer can make accommodations.[17] The rule applies in cases where a disability contributes to a

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[9] U.S. Equal Employment Opportunity Commission, Fact sheet on the EEOC's Final Regulations Implementing the ADAAA: http://www.eeoc.gov/laws/regulations/adaaa_fact_sheet.cfm.

[10] *Id.*; The Americans with Disabilities Act of 1990, 42 U.S.C. § 12102 (stating "the definition of disability in this chapter shall be construed in favor of broad coverage of individuals).

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] Equal Employment Opportunity Commission, ADA Charge Data—Monetary Benefits, *available at* http://www.eeoc.gov/eeoc/statistics/enforcement/ada-monetary.cfm.

[16] *Id.*

[17] 29 C.F.R. § 1630.2(o)(3) (2011) ("To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the individual with a disability in need of the accommodation. This process should identify the precise

violation of an employer's attendance policy. For example, a 2011 disability discrimination case involving telecommunications giant Verizon Communications resulted in the largest disability settlement in EEOC history.[18] As part of the settlement, Verizon agreed to pay $20 million for violating the ADA by refusing to make exceptions to its "no-fault" attendance policy and therefore failing to accommodate disabled employees.[19] Under the attendance policy, Verizon employees who accumulated a certain number of chargeable absences were placed on a disciplinary step that could ultimately lead to termination.[20] The EEOC alleged that Verizon should have made accommodations for people whose chargeable absences were caused by their disabilities, rather than disciplining or terminating them.[21] Offering paid or unpaid leave to an employee with a disability is a reasonable accommodation unless doing so would cause the employer significant difficulty or expense.[22] The lawsuit underscores the need for employers to review attendance policies that fail to have reasonable flexibility when providing leave as an accommodation.[23]

Learning Disabilities

Employers should also pay attention to learning disabilities, which are now considered disabilities under the ADA.[24] Employers should ask whether the disability affects the employee's ability to perform essential functions of the job. If it does, the employer should engage in the interactive process with the employee to determine what reasonable accommodations are available that would assist the employee.[25] If an applicant claims that a learning disability resulted in him not getting a high school diploma, but he is otherwise qualified to do the job, it is the EEOC's position that an employer should be flexible with its diploma requirements.[26]

Obesity

Under the 2008 amendments, obesity can be considered a disability, regardless of whether a person is morbidly obese. Morbid, or severe obesity alone qualifies as a

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limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.").

[18] Press Release, U.S. Equal Employment Opportunity Commission, Verizon to Pay $20 Million to Settle Nationwide EEOC Disability Suit (July 6, 2011), http://www.eeoc.gov/eeoc/newsroom/release/7-6-11a.cfm.

[19] *Id*.

[20] *Id*.

[21] *Id*.

[22] *Id*.

[23] SharedHR, http://sharedhr.com/marketing/PrintArticle.aspx?ArticleID=155 (last visited Aug. 14, 2012).

[24] U.S. Equal Employment Opportunity Commission, Guidance on Disability Discrimination, http://www.eeoc.gov/laws/types/disability.cfm.

[25] U.S. Equal Employment Opportunity Commission, Guidance on Disability Discrimination, http://www.eeoc.gov/facts/accommodations-attorneys.html.

[26] Equal Employment Opportunity Commission, Informal Discussion Letter, Nov. 17, 2011, http://www.eeoc.gov/eeoc/foia/letters/2011/ada_qualification_standards.html.

disability under the ADA.[27] However, even slight obesity could qualify as a disability under the 2008 amendments as long as it substantially limits a major life activity.[28] The analysis must be fact-specific, but obesity can be a disability because it can limit sleeping, walking, or breathing, for example.[29] Summarized below are two recent cases the EEOC pursued against employers who allegedly discriminated against obese employees.

The first was in April 2012, when a nonprofit treatment facility in Louisiana allegedly fired a severely obese worker even though she was able to perform the essential functions of her job.[30] Lisa Harrison worked at Resources for Human Development, where she was in charge of the daycare where children stayed while their mothers received treatment for chemical dependencies. Ms. Harrison weighed 400 pounds when she was hired in 1999. By the time she was fired in 2007, she weighed 527 pounds. During motions for summary judgment prior to the settlement, a federal judge in Louisiana held that severe obesity is an impairment within the meaning of the ADA, regardless of whether it is caused by a physiological impairment.[31] Severe obesity is an impairment under the ADA. It can rise to the level of a disability if it interferes with a major life activity such as breathing or walking, and other health problems resulting from obesity are disabilities themselves.

In the second case, the EEOC sued BAE Systems Tactical Vehicle Systems, LP. The EEOC alleged that BAE fired an employee, Ronald Kratz II, because of his morbid obesity and because BAE Systems regarded him as disabled.[32] The company did not engage in the interactive process or have conversations with Mr. Kratz to determine whether it could make reasonable accommodations that would allow him to continue to perform his duties.[33] The EEOC said in an announcement of the settlement that the ADA protects obese employees, who should be allowed to work on the same basis as non-obese employees.[34]

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[27] *EEOC v. Resources for Human Development, Inc.*, F. Supp. 2d, 2011 WL 6091560 (E.D. La. Dec. 2011) (holding "severe obesity qualifies as a disability under the ADA").
[28] Equal Employment Opportunity Commission, Questions and Answers on the Notice for Proposed Rulemaking for the ADA Amendments Act of 2008, http://www.eeoc.gov/policy/docs/qanda_adaaa_nprm.html.
[29] *Id*.
[30] Press Release, U.S. Equal Employment Opportunity Commission, Resources for Human Development Settles EEOC Disability Suit for $125,000 (April 10, 2012), http://www1.eeoc.gov/eeoc/newsroom/release/4-10-12a.cfm.
[31] *EEOC v. Resources for Human Development, Inc.*, 2011 WL 6091560 (E.D. La. Dec. 2011).
[32] Press Release, U.S. Equal Employment Opportunity Commission, BAE Systems Subsidiary to Pay $55,000 to Settle EEOC Disability Discrimination Suit (July 24, 2012), http://www.eeoc.gov/eeoc/newsroom/release/7-24-12c.cfm.
[33] *Id*.
[34] *Id*.

III. USERRA

The Uniformed Services Employment and Reemployment Rights Act of 1994 prohibits employers from making hiring and employment actions against employees if those actions relate to the employee's military service. An individual may be absent from work and still retain reemployment right for up to five years.[35] However, the law includes important exceptions to the five-year limit, which means in many cases an employer must keep a job available for service members even after five years.[36] The exception applies, for example, when a service member is ordered retained on active duty for more than five years, or when a service member is ordered to involuntary active-duty extensions during a time of national emergency.[37] Notably, the national emergency declared on September 14, 2001, is still in effect, and many soldiers are returning from the Middle East long after their five-year limit has expired. Under the national emergency exception, their employers must allow them to return to their jobs.[38]

Importantly, even if the employer has long since filled the position, USERRA requires replacing the employee in the position with the returning service member. This is actually a "super-discrimination" statute, requiring that an employer fire a perfectly good employee in favor of a returning reservist. Luckily, in Texas, the Texas Workforce Commission has recently adopted a new rule allowing such terminated replacements to qualify for unemployment benefits without the employer having to experience a negative charge-back.[39]

IV. Dress Codes

The headscarf cases and religious discrimination

The EEOC has cracked down on employers who use dress codes to discriminate illegally. The most glaring examples are a series of cases against retail giant Abercrombie & Fitch, which has been the focus of three enforcement actions in recent years.[40] In June 2011, the EEOC filed its third lawsuit against Abercrombie & Fitch alleging implementation of its dress code violated federal law.[41] Umme-Hani Khan, a 19-year-old Muslim woman, worked primarily in the stockroom of a California store for more than four months, at all times coordinating her *hijab*, or religious headscarf to ensure it was consistent with the store's brand image. When

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[35] 38 U.S.C. § 4312(c) (stating a person is entitled to reemployment and benefits with an employer if that person "is absent from a position of employment by reason of service in the uniformed services if such person's cumulative period of service in the uniformed services, with respect to the employer relationship for which a person seeks reemployment, does not exceed five years. . .").

[36] 38 U.S.C. § 4312(c).

[37] *Id.*

[38] Texas Workforce Commission, Legal Issues for Military Leave, http://www.twc.state.tx.us/news/efte/legal_issues_for_military_leave.html.

[39] *Id*.

[40] Press Release, U.S. Equal Employment Opportunity Commission, Abercrombie & Fitch Sued for Religious Discrimination (June 27, 2011), http://www.eeoc.gov/eeoc/newsroom/6-27-11a.cfm

[41] *Id*.

a visiting manager determined that wearing the headscarf was a violation of the retailer's "Look Policy," she was told to remove it. She refused and was fired. In 2010, the EEOC sued the same retailer for refusing to hire an applicant at the Milpitas, Calif., Abercrombie Kids store because she wore a headscarf.[42] Also, in 2005, Abercrombie & Fitch's "All-American Look" policy was the focus of a six-year, $40 million consent decree in which the retailer paid money to African Americans, Latinos, and women who were excluded from hire or promotion.[43]

The headscarf cases are not exclusive to Abercrombie & Fitch. In August 2012, a Maryland assisted living center was fined $25,000 after the EEOC alleged it illegally discriminated against a Muslim job applicant who refused to remove her *hijab*.[44] Khadijah Salim was interviewing for a position as a certified nursing assistant at Morningside House in Maryland when the director of health and wellness asked if she would be willing to remove her *hijab*. The director expressed concern that she may not be able to perform her job while wearing the *hijab*. Ms. Salim responded that she had worn it throughout nursing training and it had never posed a problem, even when she worked in an operating room. Morningside House never contacted her or hired her. The EEOC said the employer discriminated, and would have suffered no undue hardship by allowing Ms. Salim to wear the headscarf while tending to residents.[45]

Also in August 2012, a former hotel restaurant hostess sued Walt Disney Co. for religious discrimination, saying she was told to remove her *hijab*. Imane Boudlal is a 28-year-old naturalized citizen, originally from Morocco.[46]When she refused, she was told she could either be stationed in the rear of the restaurant where she would have no contact with customers, or she could cover the *hijab* by wearing a large hat.[47] Her lawsuits alleges, among other claims, that Disney discriminated on the basis of religion, national origin, color, and that it failed to prevent harassment from other employees after she reported it to management.[48]

By contrast, home furnishings retailer IKEA has been praised among Muslim groups for its handling of the *hijab* issue at work. The retailer approved an *hijab* with its logo embroidered on the back for use by Muslim employees who wish to practice their faith but are required to wear the uniform.[49]

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[42] *Id.*
[43] *Id*.
[44] Press Release, U.S. Equal Employment Opportunity Commission, Morningside House of Ellicott City to Pay $25,000 for Religious Discrimination (Aug. 6, 2012), *available at* http://www.eeoc.gov/eeoc/newsroom/release/8-6-12.cfm.
[45] *Id*.
[46] *Boudlal v. Walt Disney Corp.*, No. SACV12-1306-DOCLAHX (C.D. Cal. filed Aug. 10, 2012).
[47] *Id*.
[48] *Id*.
[49] Press Release, The Hijab Shop, IKEA launches own-brand hijab for Muslim Staff (Aug. 2005), *available at* http://www.thehijabshop.com/press/index.php.

V. Gender Identity

In a significant policy shift, the EEOC in April 2012 expanded the class of people protected against workplace discrimination to include those who dress according to another gender. The Commission ruled in an April 20, 2012 decision that "gender identity, change of sex, and/or transgender status is cognizable under Title VII."[50] Discrimination protection would be extended not only to those who have had sex-change operations, but also to those engaging in pre-operative lifestyle changes.

VI. Criminal Background Checks

In April 2012, the EEOC issued a guidance document clarifying its longstanding position that employers cannot categorically exclude job applicants who have a particular arrest or conviction.[51] The EEOC is primarily concerned that background checks adversely impact young Hispanic and African-American men because they are arrested and incarcerated at a higher rate than the general population.[52] Automatically excluding applicants with arrest or conviction records may violate Title VII of the Civil Rights Act of 1964 under a disparate impact theory. That means even though the employer does not intend to discriminate, its actions nevertheless prevent members of a protected class from obtaining employment. The idea is that such practices are "fair in form, but discriminatory in operation."[53] A plaintiff must prove statistically that a particular employment practice disproportionately impacts a protected class. The burden then shifts to the employer to prove that the policy or practice is job-related and has a business necessity.[54] To prove business necessity, the employer must show that, for each employee, it considered (1) the nature and gravity of the offense; (2) the nature of the job; and (3) the time elapsed since the conviction or completion of the sentence.[55] EEOC has said it prefers employers to refrain from asking about convictions on job applications but rather wait until later in the process, unless inquiries are limited to convictions for which exclusion would be job-related and consistent with business necessity.[56]

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[50] *Macy v. Holder*, Appeal No. 0120120821 (2012), *available at* http://www.eeoc.gov/decisions/0120120821%20Macy%20v%20DOJ%20ATF.txt (holding that a transgender person who was offered a position with the Bureau of Alcohol, Tobacco, Firearms and Explosives while she presented as a man but then withdrew the offer when she informed them she would be presenting as a woman was illegally discriminated against in violation of Title VII).

[51] U.S. Equal Employment Opportunity Commission, Enforcement Guidance No. 915.002 (April 25, 2012), http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm#sdendnote78anc.

[52] *Id*.

[53] *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

[54] U.S. Equal Employment Opportunity Commission, Enforcement Guidance No. 915.002 (April 25, 2012), http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm#sdendnote78anc.

[55] *Id*; *Green v. Missouri Pac. R.R. Co.*, 549 F.2d 1158, 1160 (8th Cir. 1977).

[56] U.S. Equal Employment Opportunity Commission, Enforcement Guidance No. 915.002 (April 25, 2012), http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm#sdendnote78anc

The Guidance comes amid increased enforcement by the EEOC of criminal background practices. For example, in January 2012, the EEOC entered into an agreement with Pepsi Beverages bottling unit, a division of PepsiCo, Inc.[57] The soft drink company agreed to pay $3.1 million because it refused to offer permanent jobs to temporary employees who had been arrested and had pending prosecutions, even if they had never been convicted of an offense. It also denied employment to applicants who had been arrested or convicted of minor offenses. The EEOC alleged that the policy disproportionately affected 300 black applicants.[58] Most of the $3.1 million was to be divided among black applicants for positions at Pepsi. The company also adopted a new criminal-background check policy and agreed to conduct Title VII training for its hiring personnel and managers.[59]

The April 2012 guidance reiterates that the law does not preclude employers from using criminal background checks. Instead, employers who use background checks must conduct individual assessments to determine whether an employee should be precluded rather than make blanket exclusions based on a criminal record.[60]

VII. Confidential Investigations

Recent action by at least one EEOC office has prompted some employers to consider their internal investigation policies. On August 3, 2012, The Buffalo, New York, office of the EEOC sent a letter to an employer warning that the employer's policy violated Title VII because it prohibited employees who participate in an internal investigation from discussing the matter with others. [61] The EEOC referred to agency guidance letters stating that complaining to others—including high management, union officials, other employees, and newspapers—about discrimination is protected action.[62] The letter does not reflect an official, agency-wide position, so employers will have to wait to see if the sentiment takes hold in other EEOC offices. However, it serves as a reminder that internal investigations are often best conducted quickly so that the success of the investigation does not hinge on a policy ordering silence among employees.

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[57] Press Release, U.S. Equal Employment Opportunity Commission, Pepsi to Pay $3.13 Million and Made Major Policy Changes to Resolve EEOC Finding of Nationwide Hiring Discrimination Against African Americans (Jan. 11, 2012), http://www.eeoc.gov/eeoc/newsroom/release/1-11-12a.cfm.

[58] *Id*.

[59] *Id*.

[60] U.S. Equal Employment Opportunity Commission, Enforcement Guidance No. 915.002 (April 25, 2012), http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm#sdendnote78anc.

[61] Is Instructing an Employee Not to Discuss an Investigation a Violation of Title VII? August 8, 2012, http://onemediation.net/2012/08/08/is-instructing-an-employee-not-to-discuss-an-investigation-a-violation-of-title-vii/ (citing EEOC letter stating that "an employer who tries to stop an employee from talking with others about alleged discrimination is violating Title VII rights, and the violation is 'flagrant' not trivial.").

[62] *Id*.

VIII. Online Harassment

Employees can suffer illegal harassment through electronic communications just as they can in-person in the workplace. Harassment is any unwelcome conduct that is based on race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information.[63] It becomes unlawful where 1) enduring the offensive conduct becomes a condition of continued employment, or 2) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive.[64] Harassment in the workplace includes harassing communications that are created outside the workplace but that make their way into the workplace by way of electronic devices, including mobile phones. This can be a tricky balancing act between workplace rights and off-duty privacy rights. Employers should establish effective anti-harassment policies, train their employees on the policies and on how to file a grievance, and take appropriate action when an employee complains about harassment.[65]

IX. Candidate Research on the Internet

Employers still have the right to research job candidates and hire them based on whether they have good judgment, and in many cases that includes conducting Internet research on candidates. However, employers should be careful not to conduct research too early in the hiring process or they risk exposing themselves to discrimination claims. Although equal opportunity laws do not clearly forbid employers from making pre-employment inquiries that relate to, or disproportionately screen out members based on race, color, sex, national origin, religion, or age, such inquiries may be used as evidence of an employer's intent to discriminate unless the questions asked can be justified by some business purpose.[66] Therefore, it is best to wait until late in the hiring process to check for obvious problems online with a candidate in order to avoid discrimination claims. Another way to avoid discriminating is to have the search conducted by someone who is not making the hiring decision, and have that person inform the decision-maker only about information that can legally be used to make a hiring decision.[67] Finally, employers should talk to candidates about what they do find online in order to avoid making hiring decisions based on false information or mistaken identities.

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[63] U.S. Equal Opportunity Commission Enforcement Guidance on Harassment, *available at* http://www.eeoc.gov/laws/practices/harassment.cfm.
[64] *Id*.
[65] *Id*.
[66] U.S. Equal Employment Opportunity Commission Guidance on Prohibited Employment Policies/Practices, *available at* http://www.eeoc.gov/laws/practices/index.cfm.
[67] *Id*. ("inquiries about organizations, clubs, societies, and lodges of which an applicant may be a member or any other questions, which may indicate the applicant's race, sex, national origin, disability status, age, religion, color or ancestry if answered, should generally be avoided).

X. Nursing & Caregivers

The Affordable Care Act, the FLSA, & Nursing Mothers

The Patient Protection and Affordable Care Act of 2010 mandates that employers provide "reasonable break time" to nursing mothers to express, or pump, breast milk for up to one year after the child's birth.[68] The place provided must not be a bathroom.[69] The employer is not required to pay the employee for the time spent pumping milk.[70] All employers covered by the Fair Labor Standards Act must comply with this new provision. However, those with fewer than 50 employees can be excluded from following the Act if they can demonstrate that complying would result in an "undue hardship."[71]

Title VII and Nursing Mothers

In the context of Title VII gender and pregnancy discrimination, the EEOC brought the issue of pumping breast milk in the workplace to the forefront this year when it filed a lawsuit against an employer who allegedly fired a woman after she asked for a place to express breast milk. In a summary judgment decision, a Texas district court held that firing someone for breast-pumping is not protected by Title VII.[72] An employee, Donnicia Venters, began working for the debt-collection firm in 2006, and in 2008, she went on leave to have a baby. The EEOC alleges that after she told her boss she was ready to return to work and asked if she could use a back room to pump milk, she was fired, which was illegal discrimination because she was a lactating female.[73] Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of sex.[74] The Pregnancy Discrimination Act of 1978, an amendment to the Civil Rights Act of 1964, prohibits discrimination on the basis of pregnancy, childbirth, or related medical conditions.[75] The court held that neither violation occurred.[76] The EEOC has

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[68] Fair Labor Standards Act §7(r), 29 U.S.C. 207 (1938).

[69] *Id*. at §7(r)(1) ("An employer shall provide . . . a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.").

[70] *Id.* at §7(r)(2) ("An employer shall not be required to compensate an employee receiving reasonable break time under paragraph (1) for any work time spent for such purpose.").

[71] *Id*. at §7(r)(3) ("An employer that employs less than 50 employees shall not be subject to the requirements of this subsection, if such requirements would impose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business.").

[72] *EEOC v. Houston Funding*, (S.D. Texas Feb. 2, 2012) (Holding that "firing someone because of lactation or breast-pumping is not sex discrimination," and that "even if Venters's claims are true, the law does not punish lactation discrimination.").

[73] *Id*.

[74] Civil Rights Act of 1964, 2 USC §1311 ("all personnel actions affecting covered employees shall be made free from any discrimination based on—(1) race, color, religion, sex, or national origin. . .").

[75] Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (2009) ("The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability

appealed the District Court decision to the 5th Circuit.[77] The EEOC may have been more successful if it compared nursing to another activity where a man may be allowed break time to take care of personal business.

Caregiver Discrimination

The *Houston Funding* case is part of a broader focus by the EEOC in the past two years on caregiver discrimination.[78] Caregivers are not specifically protected under Title VII discrimination laws, but discriminating against caregivers may constitute illegal discrimination on the basis of sex, disability, or other protected traits.[79] For example, if an employer is reticent to hire a woman because of assumptions or stereotypes that she will spend more time away from work due to to caregiver responsibilities, then the employer risks a gender-based discrimination claim based on caregiver discrimination. Likewise, if a male employee is ridiculed or treated adversely in the workplace for taking time off against stereotypes for caregiver duties, he may also be protected from discrimination.

Employers can prevent discriminating against caregivers by: (1) training managers on the legal obligations involving treatment of caregivers; (2) developing and disseminating a strong EEO policy that explains the type of conduct that could constitute caregiver discrimination in violation of federal law; (3) ensuring that all managers are aware of and comply with the business' work-life policies; (4) responding to complaints of caregiver discrimination efficiently

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or inability to work, and nothing in section 703(h) of this title shall be interpreted to permit otherwise.").

[76] *EEOC v. Houston Funding*, No. 12-20220 (5th Circuit 2012) Brief of the EEOC as Plaintiff-Appellant, http://www.employerdefenselaw.com/appealed%20the%20decision%20to%20the%20Fifth%20Circuit.pdf.

[77] *Id*.

[78] Employer Defense Law Blog, "Is Breastfeeding Bias the EEOC's Next Battleground?" *available at* http://www.employerdefenselaw.com/eeoc/is-breastfeeding-bias-the-eeocs-next-battleground/ (last visited Aug. 20, 2012) ("As further evidence of the Equal Employment Opportunity Commission's . . . focus on "caregiver" discrimination, the EEOC has signaled its strong support for protecting working women from discrimination based on lactation or breastfeeding in a case now pending before the U.S. Court of Appeals for the Fifth Circuit."); *See also* Employer Defense Law Blog, "Why Companies Need to Care about Caregivers: The EEOC's Focus on Caregiver Discrimination," http://www.employerdefenselaw.com/eeoc/why-companies-need-to-care-about-caregivers-the-eeocs-focus-on-caregiver-discrimination/ (last visited Aug. 20, 2012).

[79] U.S. Equal Employment Opportunity Commission, *Employer Best Practices for Workers with Caregiving Responsibilities*, last updated Jan. 19, 2011. (Footnote 1 explains possible discrimination against caregivers. "Title VII of the Civil Rights Act of 1964 prohibits, inter alia, discrimination based on sex. 42 U.S.C. § 2000e-2 (2009). The Americans with Disabilities Act of 1990 prohibits discrimination based on a worker's association with an individual with a disability. 42 U.S.C. § 12112(b)(4) (2009). Section 501 of the Rehabilitation Act provides the same protection to federal workers. 29 U.S.C. § 791(g) (2009) (incorporating ADA standards). Neither the 2007 Guidance nor this document create a new prohibited basis for discrimination. Rather, these documents illustrate circumstances in which stereotyping or other forms of discrimination may violate Title VII or the Americans with Disabilities Act.").

and effectively; and (5) providing clear assurances that no retaliation will be tolerated against anyone who complains of caregiver discrimination.[80]

XI. Conclusion

The past two years have brought significant changes to the field of employment law. Employers must now reconsider policies on how to treat candidates and employees with disabilities, those with criminal records, and those who are nursing mothers. In addition to the numerous changes in the law, employees are filing discrimination charges more often than ever before. Although the new policies are significant and must be followed, they are largely administrative and still untested by the courts. Employers are now faced with the challenging decision of whether to follow current guidance or wait until courts have weighed in on the subject.

[80] *Id*.