

NATIONAL EMPLOYMENT LAW INSTITUTE
EMPLOYMENT DISCRIMINATION LAW UPDATE

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Summary

✚ **Jeffrey Wohl, Partner, Paul, Hasting, Janofsky & Walker LLP**

Annual Review of Major Developments in EEO

1. Reeves v. Sanderson Plumbing Prods., Inc., (530 U.S. 133, 82 FEP Cases (BNA) 1748 (2000): Plaintiff has the burden to show sufficient evidence of discrimination, or summary judgment may be granted. With this holding the court rejected what had been known as the “pretext plus” rule. Thus, the employer would be entitled to summary judgment as a matter of law if the record conclusively revealed some other nondiscriminatory reasons or if the plaintiff created only a weak issue of fact as to whether the employer’s reason was untrue and there was abundant and unconverted independent evidence that no discrimination had occurred. The plaintiff must provide probative proof that the employer’s rebuttal is false in order to proceed to trial or to sustain a jury verdict.
2. Mayer v. Nextel West Corp., 318 F.3d 803, 90 FEP Cases (BNA) 1750 (8th Cir. 2003): A prima facie case plus evidence of pretext is not enough absent additional evidence. In this case, a new supervisor was more critical of the employee than the previous supervisor; it was a difference of opinion over performance—not discrimination; no discriminatory comments had been made.
3. Raad v. Fairbanks North Star Borough Sch. Dist., 323 F3d 1185k, 91 FEP Cases (BNA) 785 (9th Cir. 2003): Summary judgment against the teacher was reversed where the comments of the decisionmaker about her accent was evidence of discrimination even though other favorable comments about her were made. The Ninth Circuit stated that “we have never followed the Fifth Circuit in holding that the disparity in candidates’ qualifications must be so apparent as to jump off the page and slap us in the face to support a finding of pretext.”
4. Neal v. Roche, 349 F.3d 332, 92 FEP Cases (BNA) 1601 (10th Cir. 2003): It does not help the plaintiff to prove discrimination if the employer gave a false reason if the real reason is nondiscriminatory; i.e., a false reason does not prove discrimination.
5. Hill v. Lockheed Martin Logistics Mgmt., Inc., 354 F.3d 277, 93 FEP (4th Cir. 2004) (en banc): An influential coworker who was biased reported to management safety infractions committed by plaintiff. The court ruled 7-4 that since the biased coworker was not a decisionmaker, even though influential, there was no proof of improper motivation in the disciplinary actions. Recommendation: Never have a single person

make a termination decision; always involve upper management and/or human resources (for example).

6. Rachid v. Jack in the Box, Inc., 2004 U.S. App. LEXIS 12873 (5th Cir. 2004): Direct evidence is not necessary to receive a mixed-motives analysis in an ADEA claim. A plaintiff may show either that the defendant's reason for the personnel action is a pretext for discrimination, or that the reason, while true, is only one of the reasons and another motivating factor is the plaintiff's protected characteristic.

7. Smith v. City of Jackson, 351 F.3d 183 (5th Cir. 2003), 124 S. Ct. 1724 (2004): The Fifth Circuit held that the ADEA does not permit a disparate impact cause of action. In referring to the phrase in the ADEA that allows an employer to avoid liability if the adverse employment action is "based on reasonable factors other than age," the court stated that this makes the ADEA more like the Equal Pay Act, which does not permit disparate impact theories, than Title VII, which does.

8. General Dynamics Land Sys. Inc. v. Cline, 124 S. Ct., 1236 (2004): ADEA does not prohibit "reverse discrimination" that protects younger workers (although those younger workers are 40 years or older).

9. Grosjean v. First Energy Corp., 349 F.3d 332, 92 FEP Cases (BNA) 1583 (6th Cir. 2003): An age difference of six years or less in the absence of direct evidence (e.g., disparate comments) is insufficient to establish a prima facie case. Age differences of 10 or more years have generally been held to be sufficiently substantial.

10. McKay v. U.S. Dep't of Trans., 340 F.3d 695, 92 FEP Cases (BNA) 905 (8th Cir. 2002): Although by many relevant criteria plaintiff was the best qualified, the decisionmakers presented unrefuted evidence that they rated other criteria more highly. The court was essentially saying it won't micromanage factors used in the selection process.

11. Peterson v. Hewlett-Packard Co., ___ F.3d ___, 92 FEP Cases (BNA) 1761 (9th Cir. 2004): An employee's posting of anti-homosexual biblical passages was intended to be hurtful; the employer had a legitimate goal to increase tolerance of diversity in ordering him to take down the passages. Plaintiff was not discharged because of his religious beliefs but because he violated the company's harassment policy by attempting to create a hostile environment for certain coworkers. There is no obligation to allow religious accommodations that would result in discrimination against coworkers.

12. Endres v. Indiana State Police, 334 F.3d 618, 92 FEP 119 (7th Cir. 2003): Religious accommodation claims under Title VII cannot be made against governmental employers because the duty to accommodate does not enforce a constitutional right nor maintain neutrality toward religion.

13. National R.R. Passenger Corp. v. Morgan, 122 S. Ct. 2061, 88 FEP Cases (BNA) 1601 (2002): The Supreme Court unanimously rejected the continuing violation doctrine when applied to a series of discrete acts. Discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges. However, the court ruled 5-4 that the continuing violation doctrine does apply to hostile environment claims where the unlawful employment practice cannot be said to occur on any particular day but can occur over a series of days or perhaps years.

14. Elmenayer v. ABF Freight Sys., Inc., 318 F.3d 130, 90 FEP Cases (BNA) 1393 (2d Cir. 2003): There was no continuing violation in the employer's present and continuing refusal to allow a Muslim employee to attend prayer sessions during his lunch hour to

meet his Friday prayer obligations. The employer's rejection of the employee's proposal was a discrete act, even though the effect of the rejection continues to be felt for as long as the employee remains employed.

 **Nancy L. Abell, Partner, Paul, Hasting, Janofsky & Walker LLP**

Recent Significant Developments in the Law of Harassment

1. Illegal harassment must be severe or pervasive.
2. If the perpetrator was not a supervisor, did the employer exercise reasonable care to avoid the harassment and eliminate it when it might occur (negligence test)?
3. If the perpetrator was a supervisor and there was tangible action, the employer is liable.
4. If the perpetrator was a supervisor and there was no tangible action, an affirmative defense is possible; e.g., did the employee exercise reasonable care to take advantage of the employer's safeguards and otherwise prevent harm that could have been avoided?
5. Williams v. Administrative Review Board, ___ F.3d ___, No. 03-60028 (Fifth Cir., July 15, 2004): In this whistleblower case, the court ruled that the employer does have the right to an affirmative defense for a hostile environment claim.
6. In Faragher v. City of Boca Raton and Burlington Industries, Inc., v. Ellerth, the Supreme Court held that where harassment by a supervisor culminates in a "tangible employment action," the employer is strictly liable for the supervisor's harassment. In Ellerth, the majority opinion defines a tangible employment action as "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities or a decision causing a significant change in benefits."
6. Fifth Circuit: In Watts v. Kroger Co., 170 F.3d 505, 510 (5th Cir. 1999), no tangible action was found where plaintiff, after complaining of harassment, was assigned to a different work schedule; neither was expanding the duties of one's job.
7. EEOC's Position: 3 criteria for "tangible employment action"
 - a. The supervisor brings the official power of the employer to bear on subordinates, as demonstrated by:
 - It requires an official act of the enterprise;
 - It is usually documented in official company records;
 - It may be subject to review by higher level supervisors; and
 - It often requires the formal approval of the enterprise and use of its internal processes.
 - b. Usually inflicts direct economic harm.
 - c. In most cases, can only be caused by a supervisor or other person acting with the authority of the company. Examples include:
 - Hiring and firing
 - Promotion and failure to promote
 - Demotion
 - Undesirable reassignment
 - A decision causing a significant change in benefits
 - Compensation decisions

- Work assignment

8. Pennsylvania State Police v. Suders, __ U.S. __, 124 S. Ct. 2342 (2004): The Supreme Court recognized for the first time that “Title VII encompasses employer liability for a constructive discharge;” however, the proof is objective: Did working conditions become so intolerable that a reasonable person in the employee’s position would have felt compelled to resign? The employer has the burden of alleging and proving that the plaintiff who was harassed by a supervisor but suffered no tangible employment action failed to mitigate harm. Evidence potentially relevant includes whether the employer had an effective remedial scheme in place, whether an employer attempted to investigate, or otherwise to address, plaintiff’s complaints, and whether plaintiff took advantage of alternatives offered by antiharassment programs.

9. Who is a supervisor? The Supreme Court, in Faragher, found that several indicia of authority were sufficient: a) two of the supervisors who engaged in harassing behavior “were granted virtually unchecked authority over their subordinates” and “directly controlled and supervised all aspects of Faragher’s day-to-day activities;” and b) plaintiff was completely isolated from the City’s higher management. There have been no 5th Circuit cases on this issue. EEOC’s position: An individual qualifies as an employee’s supervisor if:

- the individual has authority to undertake or recommend tangible employment decisions affecting the employee; or
- the individual has authority to direct the employee’s daily work activities.


EEOC may also treat as a supervisor an individual who the alleged victim mistakenly believed to be his supervisor so long as the mistake is reasonable.

10. Always argue that the employee could have avoided the consequences.

11. Participating in an investigation is a protected activity, even if the person is lying or not acting in good faith. This is different from the situation of the alleged victim, who can be disciplined for lying or not acting in good faith.

12. Don’t provide the accused the source of the allegation(s) without the complainer’s approval.

13. The accused should never be the decision maker should subsequent action be taken against the complainer.

 **Gary Siniscalco, Orrick, Herrington & Sutcliffe, LLP**

Adverse Impact and the Uniform Guidelines on Employee Selection Procedures

1. Original guidelines were issued in 1978.
2. E.O. 11246: refers to “applicants” and to “qualified applicants.”
3. EEOC can issue guidelines, but not regulations. OFCCP can issue regulations, which have the force of law.
4. In March 2004, EEOC/OFCCP/OPM issued additional proposed questions and answers intended to provide further guidance in interpreting the Uniform Guidelines with respect to the Internet and related technologies, and they solicited comments. Question 94 states that Internet *recruitment*, e.g., searching on-line resume sites, is exempt from UGESP requirements. However, Siniscalco believes this interpretation is not likely to be adopted.

5. Question (96) addresses the definition of an applicant:
 - The employer has acted to fill a particular position;
 - The individual has followed the employer's standard procedures for submitting applications; and
 - The individual has indicated an interest in the particular position.

However, the question is phrased: “*for recordkeeping purposes* (emphasis added), what is meant by the term ‘applicant’?” There is no specific mention of sex or race data as part of “record-keeping.”

6. Question (97): All search criteria are subject to disparate impact analysis. If a disparate impact is shown, the employer must demonstrate that its criteria are job-related and consistent with business necessity for the job in question.

7. OFCCP also issued a proposed regulation in March 2004, which included the statement: “In general, OFCCP seeks to maximize the likelihood that agency investigation resources are committed to workplaces where systemic employment discrimination exists and to minimize commitment of resources to workplaces where such systemic discrimination is absent.” This implies that its focus is NOT on affirmation action or on the employer's good faith effort to diversify its workforce. The proposed regulation also introduces a fourth element to the definition of an applicant: “the job seeker's expression of interest indicates the individual possesses the advertised, basic qualifications for the position.”

8. Small numbers are not practically significant.

 **Ms. Swanson, Partner, Fenwick & West LLP**

Conducting Effective “In-House” Investigations

1. State Department of Health Services v. The Superior Court of Sacramento County (McGinnis), 31 Cal. 4th, 1026 (2003): The court held that sexual harassment plaintiffs may not recover damages they could have avoided by timely reporting incidents of harassment to the company (the “avoidable consequences” defense).

2. What did the employer do last time there was a complaint? If it was promptly investigated, this can support an avoidable consequences defense. The employer can build a good record by conducting thorough investigations and taking appropriate action.

3. It is almost impossible to get summary judgment in sexual harassment cases now.

4. Don't specify the investigative process in too much detail in the policy distributed to employees in the event time frames, etc., are not met. Can have separate instructions to investigators.

5. Employers need to instruct investigators on what to do if issues are raised outside of the initial complaint; otherwise, the investigators may unilaterally expand the scope of the investigation.

6. On receipt of a complaint, remedy the situation first; e.g., a schedule change, administrative leave with pay, transfer accused temporarily.

7. Previously, the National Labor Relations Board extended “Weingarten rights” to non-unionized employees, granting them the right to request the presence of an employee representative during an investigative interview. However, on June 9, 2004, the NLRB overruled this decision in IBM Corp., 341 NLRB No. 148. An employer has no legal

duty to ask an employee whether s/he wants an employee representative to be present. “Weingarten rights” are only triggered when an employee puts the company on notice that s/he is requesting the presence of an employee representative.

8. Elements of an Unbiased Investigation

- Ensuring the investigator has appropriate training in recognizing and investigating harassment.
- Suspending the corporate document retention policy to protect all documents relevant to the investigation.
- Targeting the gathering of facts rather than unsubstantiated opinions.
- Reviewing the complainant’s performance evaluations if s/he claims that sexual harassment was accompanied by an adverse employment action.
- Creatively and thoroughly seeking corroboration of each party’s version of events.
- Interviewing witnesses with “relevant, open-ended, nonleading questions.
- Interviewing other employees who report to the same alleged harasser.
- Ensuring that the investigator interviews witnesses identified by the complainant and the accused as potentially having information that will support their respective claims.
- Interviewing employees who worked for the accused but recently resigned.
- Offering the parties an opportunity to clarify or correct statements.
- Offering the alleged harasser a final opportunity to respond at the conclusion of the investigation.
- Carefully and accurately recording witness statements in writing.
- Maintaining confidentiality during the investigation process.
- Admonishing witnesses not to discuss their testimony with others.
- A reasoned conclusion supported by substantial evidence.

Michael Dickstein, Dickstein Dispute Resolution

Alternative Dispute Resolution of EEO Claims

Some Issues to Focus on at the Mediation

- Consider the set-up of the room.
- Pay attention during the mediator’s opening.
- Ensure that the mediator is managing the process well.
- Re-evaluate alternatives, interests, and tentative solutions.
- Watch for verbal and physical clues about the other parties.
- Evaluate who has the power, and where the most resistance is to settlement.
- Consider changing one’s communications.
- Consider whether sessions should be in joint sessions or caucus.
- Remember that disagreements can be opportunities.
- Consider what information should continue to be kept confidential.
- Use the mediator to close gaps between the parties (e.g., finding additional value, hypothetical offers, set ranges, mediator’s proposals).

- Consider that a partial agreement may be better than no agreement.
- Ensure that the mediation session ends with an understanding as to the next step.

 **David Fram, Director, ADA and EEO Services, National Employment Law Institute**

ADA Update: Development Affecting “Reasonable Accommodation”

1. Approximately 1200 ADA cases are filed in federal court per year; 400 in Courts of Appeals.
2. “Impairment” is any disorder, according to the courts. “Major life activity” is defined very broadly by the courts.
3. “Substantial limitation” – how serious, how long will it last, is it episodic, how often?
4. Is the applicant/employee qualified? If not because of the disability, and employer can show bona fide occupation qualification, individual may not be qualified. However, does the employer consistently enforce the standard (including with incumbents)?
5. What are the essential functions of the job?
6. Only after these questions are answered should the employer consider reasonable accommodation.
7. Rauen v. U.S. Tobacco (EEOC Brief No. 01-3973 filed in 7th Circuit 8/9/02): An employer may need to provide a reasonable accommodation even if the individual does not need the accommodation to perform the job’s essential functions (s/he could do job better with accommodation). (For example, the EEOC has argued that even though an employee was able to perform her essential functions as a software engineer, the employer still had to consider letting her work at home because her doctor felt this would be “advisable” in light of her complications from cancer surgery.)
8. Employer may need to accommodate any limitation flowing from the disability, not just the major life activity affected.
9. There is case law supporting the use of a cost/benefit analysis of “undue hardship;” however, in U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 122 S. Ct. 1516 (2002), the Supreme Court held that “reasonable” means “reasonable on its face, i.e., ordinarily or in the run of cases.”
10. “Regarded as” disabled cases require no accommodation—just stop regarding them as disabled.
11. “Record of” disability cases may require an accommodation; depends on whether or not there are lingering effects.
12. Just informing the employer of a medical condition does not initiate the interactive process; the employee must ask for something, unless the employer knows an accommodation may be needed.
13. If the employee says s/he doesn’t need anything, there is no requirement to provide anything.
14. Should you require that employees request accommodations in writing? You may state it in your policy, but you can’t enforce it. However, it could assist in the defense of a discrimination charge if an employee claims s/he requested an accommodation but didn’t put it in writing, as the policy instructs.

15. Only in California are employers required to engage in the interactive process; however, it looks good in your defense if you have done so.
16. The employer gets to choose the accommodation, as long as it's effective. If the employee refuses it, s/he may not be "qualified."
17. How much leave should you give? Depends on the job. When does it become an undue hardship?
18. EEOC says employers must give indefinite leave unless it causes undue hardship; the courts disagree—you don't have to.
19. If the employer previously took away an essential function, it doesn't have to maintain it unless it was clear that it was a permanent accommodation. It is preferable to state in writing that the essential function remains, but that it is temporarily being taken away. Further, the employer should state in writing that the employee may be required to resume the essential function in the future. In the employee's performance evaluation, state that the essential function is temporarily taken away, but don't state why.
20. Reassignment is the accommodation of last choice, unless it is what the employee wants.

 **Patricia Gillette, Heller Ehrman White & McAuliffe LLP**

Settlement Strategies and Drafting Releases

1. A settlement is an enforceable contract, but it cannot prohibit future claims.
2. Four Rules:
 - Settlement should be the topic of discussion from day one. Settlement should be a strategic decision, not a desperate action.
 - Choose the best time to settle; i.e., not when the plaintiff is feeling best about the case.
 - Determine the settlement value before beginning the negotiation, and consider what the employee may believe the settlement is worth (e.g., salary, benefits, usually no more than five years front pay—depends on market for employee's skills). Also consider the monetary exposure of the company and the non-monetary exposure of the company (e.g., loss of management time, negative publicity, impact on employees and customers). Consider the precedent value of winning (not usually publicized), losing (usually publicized), settling (may be publicized even if a confidentiality clause is included). Consider attorney fees; defendants rarely are awarded attorney fees when they win.
 - Be ready and able to walk away from a settlement that does not reflect the "value" of the case.
3. Come to negotiations with someone with the authority to commit to the terms.
4. It is impermissible to threaten criminal prosecution if an employee refuses to settle a case. The employer cannot offer to refrain from filing criminal charges against an

employee who has, for example, embezzled, in exchange for the execution of a settlement agreement releasing the company from any liability for the employee's termination. However, you can discuss the possibility of filing criminal charges.

5. The settlement agreement should contain:

- A description of the parties (employer and plaintiff); those who sign the agreement and those who are released
- A full release
- Reference to appropriate state release statutes
- Amount of payment (if any)
- Tax treatment (including withholding for taxes as appropriate); payments for emotional distress require a Form 1099
- Payment of wages (if any)
- No rehire clause; the employee agrees not to seek or accept future employment with the company
- Confidentiality clause, specifying those persons to whom the settlement may be disclosed
- Statement of no prevailing party
- No admission of liability clause
- Older Workers' Benefit Protection language (for employees 40 and older); to waive an ADEA claim, the settlement must be "knowing and voluntary"

6. Consider non-monetary incentives, such as outplacement services, continuation of benefits, continuation of e-mail and voicemail, an apology, a letter of reference, withdrawal of a counseling or negative performance review, agreement not to contest unemployment insurance, a "gripe session" with a high level executive, a payment to a charitable organization, re-training, purchase of annuities.

7. Potential Challenges to the Release:

- It is too broad.
- It was not knowing and voluntary.
- It was obtained under duress.
- It was obtained by fraudulent inducement.
- It applies to future claims.