

EEOC Training Institute EXCEL CONFERENCE

Denver, CO

August 27 – 29, 2013

EEOC Case Update

by Joel A. Kravetz

Civil Rights Program Manager

Nuclear Regulatory Commission



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CONTACT INFORMATION

Phone:

(301) 415-0503

Email: joel.kravetz@nrc.gov



Presentation Overview

- Welcome / Introduction
- 30 Legal Principles in 60 (+/-) minutes!
 - Based on recent Commission Decisions
 - Case citations and summaries in handout



CASE UPDATE

■ Presentation Outline

- Supreme Court Decisions
- Reprisal
- Stating A Claim
- Title VII
- Rehabilitation Act
- Genetic Information Nondiscrimination Act (GINA)
- Class Actions
- Attorney's Fees & Remedies
- ADEA
- Evidentiary Matters
- Joint Employer Liability

Case Update - Principles

- #1 – For purposes of holding an employer vicariously liable for unlawful harassment by a supervisor, an employee qualifies as a supervisor only if the employer has authorized him or her to take tangible employment actions against the victim of the harassment
- #2 – A “but for” and not a “motivating factor” causation standard set forth in § 703(m) of Title VII should apply to Title VII retaliation claims

Case Update – Principles Cont.

- #3 – Statements by a supervisor or manager that could have a chilling effect on one's participation in the EEO process comprise per se reprisal
- #4 – Initiation and processing of internal investigations for retaliatory motives can state a claim of reprisal

Case Update – Principles Cont.

- #5 – An ongoing pattern of comments and rumors referring to an employee as being gay can be sufficiently severe and pervasive to constitute sexual harassment
- #6 – Discrimination or harassment for failing to conform to gender-based expectations is sex discrimination and this principle applies with equal force in cases involving individuals who are gay, bisexual, heterosexual, or transgender

Case Update – Principles Cont.

- #7 – Under Title VII, employers are required to accommodate the religious practices of their employees unless a requested accommodation establishes an undue hardship
- #8 – There are several acceptable alternatives for accommodating conflicts between work schedules and religious practices, including voluntary substitutes and swaps, flexible scheduling or lateral transfer and change of job assignment

Case Update – Principles Cont.

- #9 – Temporary impairments that take significantly longer to heal, long term impairments, or potentially long term impairments of indefinite duration may be disabilities if they are severe
- #10 – When medical restrictions change, an agency has an ongoing obligation to make reasonable accommodations for any such changes

Case Update – Principles Cont.

- #11 – It is a reasonable accommodation to modify a workplace policy when necessitated by an individual's disability-related limitations
- #12 – It is not a legitimate, nondiscriminatory reason to reject out-of-hand a request for telework as a reasonable accommodation because telework is generally determined as not available to a non-disabled worker's coworkers

Case Update – Principles Cont.

- #13 – Medical information about the condition or medical history of an employee must be treated as confidential and stored in separate medical files
- #14 – An impermissible disability related inquiry during a selection process before an offer is made violates the Rehabilitation Act

Case Update – Principles Cont.

- #15 – An agency is required to pay the costs of an applicant's post-offer medical examination of the agency's choice
- #16 – Allegations devoid of facts regarding genetic tests, the genetic tests of family members, or family medical history will fail to state a cognizable claim under GINA

Case Update – Principles Cont.

- #17 – In cases involving either hiring or promotion, applicant flow data is “the most direct route” to proof of discrimination
- #18 – In calculating appropriate attorney’s fees, a fee enhancement may be appropriate in cases where there has been a high degree of success

Case Update – Principles Cont.

- #19 – A review of an award of attorney's fees will only be modified for mistake of law or abuse of discretion
- #20 - The Equal Pay Act does not permit attorney's fees at the administrative level
- #21 – To establish compliance with Commission decisions, an agency must provide supporting documentation of how awards were calculated

Case Update – Principles Cont.

- #22 – Placing a harasser back in the office as a result of a grievance decision does not preclude the victim of harassment from raising a hostile work environment claim based on the harasser's return to the workplace
- #23 – Allegation of reprisal states a claim, and whether it is reprisal for EEO or non-EEO activity is a matter to be determined after an investigation

Case Update – Principles Cont.

- #24 – Being issued a suspension, even if later reduced to a discussion, states a cognizable claim of reprisal
- #25 – Public disclosure of an employee as being on “limited duty” status states a cognizable claim of both reprisal and a violation of the Rehabilitation Act’s confidentiality provisions
- #26 - Contrary to the Supreme Court decision in *Gross v. FBL Financial Services, Inc.*, A mixed motive analysis applies to federal sector age discrimination claims

Case Update – Principles Cont.

- #27 – An Administrative Judge did not abuse his or her discretion when denying appellant the right to question the selectee and a co-worker where their testimony was properly considered to be irrelevant
- #28 – When evidence is, at best, equipoise, then a complainant has not carried his or her burden of proof by a preponderance of the evidence in a case where an agency must issue a final agency decision and a credibility determination based on the demeanor of a witness is not possible

Case Update – Principles Cont.

- #29 – New evidence will not be accepted on appeal unless “the parties affirmatively demonstrate it was not previously available despite the exercise of due diligence”
- #30 – Commission policy states that when two agencies bear joint responsibility for an act of alleged discrimination, both agencies are proper respondents and the complaint must be jointly processed
- Questions?