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EEOC Filed More than 80 Lawsuits this Summer – Why Employers Should Pay Attention

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Indeed, the EEOC filed far more than 80 lawsuits during July, August, and September 2017 – the last quarter of its fiscal year. Approximately 50 percent of those lawsuits targeted employers for alleged individual and, more significantly, systemic violations of the Americans with Disabilities Act (ADA). No doubt, the EEOC is continuing its targeted, systemic focus on ADA violations, and employers should be concerned.

In 2016, the EEOC updated its strategic systemic initiative, which reiterated the EEOC's Strategic Enforcement Plan (SEP) issued on December 17, 2012. In that update, the EEOC highlighted that the SEP emphasizes coordinated strategies across the EEOC to leverage the agency's resources and promote good government and that "an integrated approach promotes broad sharing and consideration of ideas, strategies, and promising practices and furthers collaboration and coordination throughout the agency." This means the EEOC is seeking out employers who maintain policies and/or practices that disparately impact several or large groups of employees – in such cases, the EEOC "leverages" its resources to get the most bang for its buck.

That SEP identified six nationwide priorities for targeted enforcement:

- Eliminating systemic barriers to recruitment and hiring;
- Protecting immigrant, migrant, and other vulnerable workers;
- Addressing emerging issues such as *ADA issues*, LGBT coverage under Title VII, pregnancy-related discrimination, and the aging workforce among other issues;
- Enforcing equal pay laws;
- Preserving access to the legal system; and
- Preventing harassment through systemic investigations and litigation and a targeted outreach campaign to deter harassment in the workplace.

Notably, the EEOC's Compliance Manual describes its selection standard for systemic cases as those cases involving "systemic discrimination" where the "patterns of employment discrimination are the most severe, and where maintenance of a successful 'systemic case' will have a significant positive impact on the employment opportunities available to minorities and women." EEOC Comp. Man. § 16.1.

So, how did that selection standard play out regarding ADA lawsuits filed in the last quarter of the EEOC's 2016-17 fiscal year? For certain, the EEOC has doubled-down on employers who allegedly have failed to comply with the ADA. Failure to accommodate, failure to engage in the interactive process, failure to extend leave beyond FMLA entitlement, and the application of maximum leave and "100 percent healed" policies remain a high priorities for the EEOC and those issues led the way in the suits filed by the EEOC. Here a just a few of ADA suits recently filed by the EEOC:

- *Failure to Accommodate*: The EEOC alleges that a home supply store failed to accommodate and then fired an employee who had a disability-related emergency at one of its Illinois stores. According

to the EEOC's lawsuit, the company violated the ADA by firing an employee with irritable bowel syndrome and fibromyalgia, rather than allowing her to take a short break to care for herself.

- *Failure to Accommodate:* A hearing screening company allegedly violated federal law when it denied an accommodation to a pregnant employee with a disability.
- *Failure to Engage in the Interactive Process; Failure to Accommodate; Maximum Leave Policy:* A North Carolina-based rehabilitation center allegedly failed to engage in the interactive process when an employee requested light duty as an accommodation and then failed to offer the employee another accommodation. The EEOC also alleges that the company fired the employee for exceeding the company's maximum two-week leave policy.
- *Refusal to Hire Because of a Disability:* An auto manufacturer allegedly violated federal law when it refused to hire a qualified worker at its Maryland facility because of his disability. The EEOC alleges that the company "violated federal law when it ignored the qualifications of an applicant, and instead wrongfully rescinded a job offer because he is a recovering drug addict in a medically supervised treatment program."
- *Failure to Accommodate:* The EEOC alleges that a grocery chain denied a reasonable accommodation to a cashier with polycystic kidney disease and then fired her because of her disability. The EEOC alleges that the employee missed work on two occasions because she had been hospitalized and needed to visit the doctor because of her kidney. Although she allegedly informed the company she needed time off due to her kidney impairment, the EEOC alleges that the company terminated her because of her absences and, therefore, failed to accommodate her.
- *Discrimination Based on Actual or Perceived Disabilities or History of Disabilities.* A railroad company allegedly violated federal law by disqualifying a class of job applicants and employees from positions at its company based on disabilities. According to the EEOC's lawsuit, the company's medical department subjected a class of workers to unlawful exclusion from employment based on a wide range of actual or perceived disabilities, or a history of such disabilities, disclosed during pre-employment or return-to-work medical evaluations. The EEOC asserts that the company engaged in a practice of medically disqualifying workers without proper consideration of whether, or to what extent, their conditions may or may not affect the workers' ability to safely perform the jobs they sought or already held.
- *Failure to Accommodate During the Hiring Process.* The EEOC alleges that a shipbuilder violated the ADA when it refused to hire a pipefitter after discovering his hearing impairment. According to the EEOC's complaint, an experienced pipefitter received a conditional offer of employment to work at one of its facilities, and employment was contingent upon passing a physical examination, including a hearing test. The applicant wore hearing aids in both ears and according to the complaint, requested to be tested while wearing his hearing aids. The EEOC further alleges that the request was denied, and as a result, his job offer was rescinded because he had failed the hearing test.

The cases listed above, are just a small sample of the issues raised in suits filed by the EEOC in final quarter of its fiscal year. But, those cases demonstrate that the EEOC is determined to "leverage" its limited resources to send a clear message to employers – the ADA is high on the EEOC's priority list.

Is your organization next? In light of the glut of ADA lawsuits recently filed by the EEOC, employers who have not recently reviewed their policies and practices, or who have not educated managers and supervisors on ADA obligations, should take the time to conduct an assessment of those policies and practices to ensure that they do not have an unintended negative impact on qualified disabled applicants and employees. Because managers and supervisors have day-to-day interface with employees, it also is essential that they are trained to understand their obligations to the complicated morass of regulations known as the ADA. Take proactive steps now to minimize your company's risk of EEOC litigation.