



Department of Budget and Management
Office of the Statewide Equal Employment
Opportunity Coordinator

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EEO Connection

Inside this issue:

Coordinator's Message

Where Do We Go From Here?

As we move out of 2012 and into 2013, let us continue our journey to promote respect for individual human and civil rights. We all deserve the right of choice, opportunity, and to be treated fairly in all aspects of our lives. We all should have the freedom to obtain a job, adopt a career and the right to work gainfully without harassment, abuse and threat of termination. As humans beings these basic rights (and others) are what we cherish about our way of life. With 2013 quickly approaching, we should all pledge to work together to promote these Rights for all in our workplaces and in our daily lives. We will continue to bring you the latest news and information on EEO and Diversity by way of this Newsletter.

In this issue of the EEO Connection read

why The Home Depot, Radio Shack and the Town of Elkton had to shell out hundreds of thousands of dollars to settle discrimination and retaliation lawsuits in the Noteworthy Ruling section. Read about EEOC's new policy on criminal conviction records and how the Courts define who is a Supervisor in Title VII cases in our Spot Light section.

New to the Newsletter is the ADA Corner. Read about the landmark decision by the Courts to permit access to millions of digital books to the blind and print disabled. Also, learn about the benefits and cost savings of providing workplace accommodations to employees with disabilities. Also, new to the Newsletter, read about two (2) actual EEO case studies and how the courts made their rulings. Finally, in the Diversity Corner, learn of small ways we can promote diversity in our workplaces and learn about some significant religious holidays

and cultural events that are taking place in the month of December.

Peace,
Glynis Watford

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"Human diversity makes tolerance more than a virtue; it makes it a requirement for survival."

Rene Dubos

NOTEWORTHY RULING

Home Depot hit with \$100,000 settlement

On September 5, 2012, Home Depot USA, Inc., agreed to pay \$100,000 to a part-time Towson cashier who allegedly was fired because she had cancer. According to the Equal Employment Opportunity Commission's (EEOC) complaint, the former employee had worked for Home Depot since 1997 and received favorable job reviews. In July 2010, she requested unpaid leave to undergo surgery to remove a tu-

mor. Home Depot granted the leave, but a couple months later, on September 27, it warned her that she would be fired if she didn't provide a status update by October 12.

The employee notified Home Depot that she expected to be able to return to work on October 27. According to the EEOC, the company fired her on October 26—one day before her scheduled return.

Under the terms of the consent decree,

Home Depot agreed to pay \$100,000 in compensatory damages and back pay to the former employee. The company also agreed to provide one hour of training on the Americans with Disabilities Act (ADA) to all store managers and assistant store managers, post a notice about the consent decree, and instruct all employees to report any violations of the ADA to their supervisors or the EEOC.

Maryland Employment Law Letter

Jury sides with EEOC in retaliation case

On September 19, 2012, the EEOC scored a victory in federal court in Denver, Colorado, in its employment discrimination lawsuit against Radio Shack, a national retailer. The jury of nine unanimously decided that Radio Shack intentionally fired an employee in retaliation for his complaints about age discrimination.

According to the EEOC's lawsuit, the employee, who was then 55 years old and had been employed for more than 25 years by Radio Shack, was assigned a new 43-year old regional manager in the fall of 2007. Within four months of the new supervisor's arrival at the regional office, the employee, who, according to the EEOC, had a "spotless performance record," was placed

on two performance improvement plans (PIPs).

The employee believed he was being discriminated against by his new supervisor on the basis of his age and complained to Radio Shack's HR department about the discrimination. Within five days of his first complaint, before the period of assessing his performance under the PIP had expired, Radio Shack terminated him. In the lawsuit, the EEOC sought back pay, lost benefits, liquidated damages, and reinstatement.

The Denver jury awarded the former employee \$187,000 in back pay on the retaliation claim and found that Radio Shack's conduct was willful. The federal court will now decide whether to award

liquidated damages (generally, double back pay) and whether front pay would also be appropriate.

Maryland Employment Law Letter

NOTEWORTHY RULING

Town of Elkton shells out \$235,000 to settle age discrimination suit

On October 17, 2012, the town of Elkton agreed to pay \$235,000 and provide other relief to settle an age discrimination lawsuit filed by the Equal Employment Opportunity Commission (EEOC). In its lawsuit, the EEOC alleged that the town fired Andrew Johnson from his position as assistant town administrator/finance director because of his age, 70.

According to the EEOC, during meetings of town officials, Johnson's age was openly discussed as the reason for replacing him. One commissioner said that Johnson was "in his sixties" and was "no

young chick" and suggested replacing him with a "young person out of college." He was later replaced with two substantially younger employees—one as the assistant town administrator and the other as finance director.

In addition to the \$235,000 payout, the town agreed to a 3-year consent decree in which it must implement and distribute to all employees a policy prohibiting age discrimination and provide annual training for managers and employees on the Age Discrimination in Employment Act (ADEA) and other federal equal employment op-

portunity laws. The town is required to post a notice of the settlement and report to the EEOC on its efforts to comply with the consent decree.

Maryland Employment Law Letter

"We have become not a melting pot but a mosaic. Different people, different beliefs, different yearnings, different hopes, different dreams."

Jimmy Carter

SPOT LIGHT

Who is a 'supervisor' in Title VII liability cases?

In *Vance v. Ball State University*, a female African-American employee of the school's catering department sued the university, claiming it violated Title VII of the Civil Rights Act of 1964 by creating a hostile work environment and retaliating against her for her complaints about racial harassment.

Under Title VII and Supreme Court decisions interpreting Title VII, employers are "strictly liable" for harassment inflicted by supervisors, and they can defend against the case only if they can show that the harassment didn't result in a tangible employment action.

However, if only coworkers, rather than supervisors, were responsible for making a work environment hostile, then the employee must show that the employer was negligent in either discovering or remedying the harassment, which often is a difficult standard to meet.

Therefore, the question of whether an alleged harasser is a supervisor is an important one. The 7th Circuit has ruled that under Title VII, (1) a supervisor is someone with power to directly affect the terms and conditions of an individual's employment and (2) that authority "primarily consists of the power to hire,

fire, demote, promote, transfer, or discipline an employee." Other courts, however, have ruled that supervisors need only have the authority to direct and oversee an alleged victim's daily work.

The Supreme Court has agreed to review the case to resolve the conflict among the various federal courts of appeals. The Court will hear oral arguments on November 26.

Federal Employment Law

"A society that puts equality before freedom will get neither. A society that puts freedom before equality will get a high degree of both."

Milton Friedman

SPOT LIGHT

Equal Opportunity panel updates hiring policy

The Equal Employment Opportunity Commission (EEOC) on April 25, 2012 approved an updated policy that makes it harder for employers to use background checks to systematically rule out hiring anyone with a criminal conviction.

The commission said that while employers may legally consider criminal records in hiring decisions, a policy that excludes all applicants with a conviction could violate employment discrimination laws because it could have a disparate impact on racial and ethnic minorities.

The E.E.O.C. adopted its new policy in a 4-to-1 vote at a time when more than 90 percent of employers conduct criminal background checks of applicants, up from 51 percent in 1996.

In publishing its extended guidance to employers, the agency made clear that employers were prohibited from treating applicants with the same criminal records differently because of their race, color, religion, sex or national origin.

The commission said that if employers excluded all applicants with criminal records, they would generally violate employment discrimination laws unless they could show that such exclusions were “job related and consistent with business necessity.”

The agency instead called for employers to conduct individualized assessments of job applicants in a way that examined the nature and gravity of the criminal offense, the time passed since the offense and the nature of the job applied for.

In saying that a blanket exclusion can be discriminatory, the commissioners noted that if current incarceration rates remained unchanged, about one in 17 white men are expected to serve time in prison during their lifetime, compared to one in six Hispanic men and one in three African-American men.

“National data supports a finding that criminal record exclusions have a disparate impact based on race and national origin,” the agency said.

As an example, the commission discussed a situation in which a white applicant and a black applicant were recent graduates of the same university, had similar skills and work experience and had both pleaded guilty to charges of distributing marijuana as high school students. After college, they both applied to the same company, but after a background check, the company referred the white for a follow-up interview but not the black, saying it could not consider “these drug dealer types.”

That disparate treatment would violate federal

antidiscrimination laws, the guidance document said.

The commission said it would look to things like biased statements and inconsistencies in the hiring process as evidence of unlawful bias.

The new policy updates a policy issued in 1987, when Clarence Thomas, the Supreme Court justice, was commission chairman. Then, as now, the commission stated that blanket exclusions could unfairly hurt black and Latino applicants because they have considerably higher conviction records and the criminal offenses might be long ago and have little bearing on a current job.

In its guidance, the commission stressed that the fact that a job applicant was arrested does not establish that criminal conduct had occurred.

Maurice Emsellem, co-director of policy for the National Employment Law Project, an advocacy group for low-wage workers, applauded the commission’s move.

“It makes a big difference because a lot of employers have very little understanding of the basic guidelines on criminal background checks and some have ignored them altogether,” he said. “The E.E.O.C. has made a big effort to make it easier for employers to understand the standard and for workers to understand their rights.”

Michael J. Eastman,

executive director of labor law policy for the United States Chamber of Commerce, said the new directive would make it harder for employers to use criminal histories in employment decisions. “We’re trying to assess how much harder,” he said.

He noted, however, that the policy approved Wednesday was “much improved” over earlier drafts.

NYtimes.com

“Diversity is not about how we differ. Diversity is about embracing one another’s uniqueness.”

Ola Joseph

ADA CORNER

Decision will revolutionize blind people's access to books

Baltimore, Maryland (October 11, 2012): The National Federation of the Blind today applauded a decision issued on October 10, 2012, by the U.S. District Court for the Southern District of New York, which permits the distribution of millions of books to blind and print-disabled people. The ruling in *Authors Guild, Inc., et al., v. HathiTrust, et al.* (Case number: No. 11-cv-6351-HB) held that providing access for students with print disabilities constitutes a "transformative use" under the fair use provision of the Copyright Act and the Americans with Disabilities Act and that Section 121 of the Copyright Act (the "Chafee Amendment") permits university li-

braries to digitize their collections for distribution and use by the blind. As a result, the University of Michigan will now be permitted to make its entire 10 million volume digital collection available to all blind Americans, revolutionizing access to digital books by the blind and print disabled.

The ruling is part of the court's decision to grant the NFB's and HathiTrust's motions for summary judgment in a lawsuit brought by the Author's Guild against the HathiTrust, a repository of several university library collections scanned by Google, and participating universities. The Authors Guild alleged the

HathiTrust and universities violated the Copyright Act by engaging in mass digitization of their collections. Because these works represent the largest collection of works accessible to the blind and print disabled, the NFB intervened in the lawsuit.

Dr. Marc Maurer, President of the National Federation of the Blind, said: "Access to the printed word has historically been one of the greatest challenges faced by the blind. The landmark decision by the United States District Court for the Southern District of New York will revolutionize access to books

for the blind. For the first time ever, blind students and scholars will have the opportunity to participate equally in library research. The blind, just like the sighted, will have a world of education and information at their fingertips. The National Federation of the Blind commends the court's decision, which constitutes a significant step toward full and equal access to information by the blind."

National Federation of the Blind
Chris Danielsen, Director of Public Relations

Job accommodation network (JAN) reports on low cost and high impact of workplace accommodations

The Job Accommodation Network (JAN) has released annually updated findings on the costs and benefits of workplace accommodations. This JAN study has been ongoing since 2004. The study results have consistently shown that the benefits employers receive from making workplace accommodations outweigh the cost. Employers reported that providing accommodations resulted in such benefits as retaining valuable employees, improving productivity and morale, reducing workers' compensation and training costs, and improving

company diversity. In addition, the employers in the study reported that a high percentage (57%) of accommodations cost nothing to make, while the rest typically cost around \$500. Study findings include the following:

1. Of the employers who called JAN for accommodation information and solutions, most were doing so to retain or promote (83%) a current employee.
2. Of the employers who gave cost information related to accommodations they had provided, 336
3. Employers who made accommodations for employees with disabilities

out of 590 (57%) said the accommodations needed by employees cost nothing. Another 221 (37%) experienced a one-time cost. Only 24 (4%) said the accommodation resulted in an on-going, annual cost to the company and 9 (2%) said the accommodation required a combination of one-time and annual costs. The typical one-time expenditure by employers was \$500.

reported multiple benefits as a result. The most frequently mentioned direct benefits were: (1) the accommodation allowed the company to retain a qualified employee, (2) the accommodation increased the worker's productivity, and (3) the accommodation eliminated the costs of training a new employee.

Job Accommodation Network

EEO CASE REVIEW

A slam dunk retaliation case – or was it?

“Liberty, whether natural, civil, or political, is the lawful power in the individual to exercise his corresponding rights. It is greatly favored in law.”

*Henry Campbell
Black*

A black staffer files a race bias complaint, then gets fired and sues for retaliation. Did he win?

“How did this mess with Randall Brown happen?” asked VP Bob Stevens.

“Why do you ask?” asked HR manager Lynn Rondo.

“We just found out he’s suing us,” said Bob. “Tell me what happened.”

He skipped fitness for duty test

“Randall filed a complaint with the Equal Employment Opportunity Commission claiming race discrimination,” said Lynn.

“At the same time, he sent us an 81-page letter that included comments that sounded threatening,” she added.

“I remember that,” said Bob. “What happened next?”

“We put him on administrative leave and asked him to undergo a fitness for duty test,” said Lynn.

“Then he canceled his appointment,” said Lynn. “We tried to get in touch with him and

we even rescheduled a new evaluation for him but he missed that one, too. We had no choice but to fire him.”

“Well, now he’s claiming we retaliated against him for filing that race bias complaint,” said Bob.

“I could see how his case might look strong—his race complaint and his firing were close together in timing—but we had a legitimate reason for firing him,” said Lynn.

“I’m confident the court will see things our way,” she added.

Bob went ahead with his claim. Did Lynn’s firm win?

The decision

Yes, Lynn’s company won.

The court acknowledged that Randall’s complaint met all three elements necessary to make a claim of retaliation:

- the filing of a complaint or claim of bias;
- an “adverse action” taken by the firm, and;
- a causal link between the

claim or complaint and the adverse action.

Once the court determined that, the burden shifted to the company to prove it had a legitimate, non-retaliatory reason for firing Randall, which it did—he cancelled his fitness for duty evaluation and never rescheduled it.

And since Randall wasn’t able to prove that the company’s given reason for firing him was a lie to cover up any illegal retaliation, he lost.

3 ways to handle retaliation complaints

- treat the worker as you would any other staff member;
- communicate openly to find common ground while the investigation or legislation is ongoing, and;
- document all relevant decisions after the bias complaint.

HR Morning.com

EEO CASE REVIEW

Lane v. Secretary of Veterans Affairs, EEOC Appeal No. 0120112256 (2012)

Facts:

The Complainant worked as an MRI Technician at the Agency's Veterans Affairs Medical Center facility in Mountain Home, Tennessee. In June 2010, he filed an EEO complaint alleging that the Agency discriminated against him on the bases of sex (male) and age (over 40). These claims were in response to a number of actions taken by his supervisor, including charging him with eight hours of AWOL when he was forced to take leave from work due to a chronic health condition; denying his request for use of annual leave while allowing female and younger workers to use annual leave in lieu of sick leave; scheduling male technicians to a greater number of patients per shift than female technicians; and allowing only female employees to have lockers.

In its decision, the Agency found that the responsible management officials provided legitimate, nondiscriminatory reasons for their actions. It determined that the Complainant was charged with AWOL simply because he had run out of sick leave, since his supervisors denied having any knowledge of his chronic

health condition and denied that they allowed other employees to use annual leave in lieu of sick leave. The Agency also concluded that the Complainant's claims of harassment were not persuasive because he failed to provide any evidence of pretext or show that the Agency's actions were in any way connected with his sex or age. Thus, the Agency found that the Complainant failed to establish that discrimination occurred on any basis alleged in his complaint. The Complainant appealed.

Issue:

Whether the Commission correctly found that the Complainant failed to establish his claims of discrimination based on age and sex?

Decision:

Holding: The Complainant did not present any evidence that he was treated differently than female and younger employees and thus failed to establish his claims of discrimination based on age and sex.

Analysis: The Commission reviewed the Agency's decision de novo. It noted that a single incident or group of isolated incidents will not be regarded as discriminatory

harassment unless the conduct is severe. *Walker v. Ford Motor Co.*, 684 F.2d 1355, 1358 (11th Cir, 1982). In determining whether the harassment is sufficiently severe to trigger a violation of Title VII, the Commission must consider all the circumstances, including the frequency and severity of the discriminatory conduct, whether it is physically threatening or humiliating, and whether it unreasonably interferes with an employee's work performance. *Harris v. Forklift Systems*, 510 U.S. 17 (1993).

The Commission agreed with the Agency that the Complainant's treatment was not based on his membership in any protected class. The Complainant's supervisor became his supervisor only three months before the AWOL claim occurred, and although he applied the leave rules more strictly than did the Complainant's previous supervisor, he applied them equally to all employees regardless of age or sex.

While the Complainant alleged that a younger female employee was allowed to use annual leave after exhausting her sick leave, the Commission found no evidence that

the same supervisor who granted this leave denied the Complainant's leave. The Commission also found no evidence that the Complainant's supervisor was responsible to his examination scheduling, and instead found that circumstances beyond the supervisor's control impacted the number of examinations any given employee performed in the course of his or her work shifts. Nor was there any indication that the Complainant was denied a locker based on his sex, as the evidence indicated that all employees had to clean out their lockers in anticipation of the arrival of new lockers, regardless of sex or age. Thus, because the Complainant was unable to rebut the Agency's legitimate, non-discriminatory reasons for this treatment, the Commission affirmed its final decision.

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DIVERSITY CORNER

“Equality is the public recognition, effectively expressed in institutions and manners, of the principle that an equal degree of attention is due to the needs of all human beings.”

Simone Weil

Diversity is defined in many ways, e.g., different, unlikeliness, variety, tolerant of multiple world views, etc. In my opinion, diversity is also about knowing who you are and embracing who others are. Our diverse cultures, religions and ethnicities are major components that define the interaction and communication in our workplaces. Showing interest and communicating with our coworkers about their traditions, special times of the year, cultural and religious events can help to create an environment that shows respect and inclusion and is a way of connecting to the particular group for which our coworkers are a part. By doing this, we can help to create those harmonious connections that make our work relationships more positive, meaningful and satisfying.

Let's have meaningful conversations about the cultures and traditions that we each bring to our workplaces. Sharing our differences will help to create the bonds of connection that maintains our common community. Promoting diversity leads to a work

environment that maximizes the potential of all employees while acknowledging their unique contributions and differences.

Here are some religious holidays and cultural events that are taking place in December. Websites are included so that you may learn more about them.

Glynis Watford

8 Bodhi Day (Rohatsu) - http://en.wikipedia.org/wiki/Bodhi_Day (Buddhist)

8 Feast of the Immaculate Conception - <http://www.bbc.co.uk/religion/religions/christianity/beliefs/immaculateconception.shtml> (Catholic)

8-16* Hanukkah - http://www.chabad.org/holidays/chanukah/default_cdo/jewish/Chanukah.htm (Jewish)

12 Day of Our Lady of Guadalupe - <http://www.inside-mexico.com/guadalupe.htm> (Mexican Catholic)

15 Simbang Gabi (Christmas) - http://filipinocatholicministry.org/simbang_gabi.html (Filipino Catholic)

16-24 Las Posadas - <http://www.mexconnect.com/articles/2816-las-posadas> (Mexican)

21 Winter Solstice/Yule - http://en.wikipedia.org/wiki/Wheel_of_the_Year (Neopagan)

25 Christmas - <http://www.history.com/minisites/christmas/Christian>

26 - Jan 1 Kwanzaa - <http://www.history.com/topics/kwanzaa-history> (African American)

Note: Starred (*) holy days begin at sunset of the date listed and go to sunset of the following day.

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