Department of Budget and Management
Office of the Statewide Equal Employment

EEO Connection

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Issue 2

Inside this issue:

Coordinator's Message

National Disability Employment Awareness Month, October 2013

October is National Disability Employment Awareness Month. This is our time to celebrate and honor the talents and gifts that our employees bring to the workplace. This is also a time for us to recommit to our duty to ensure that our work environments are accessible and inclusive to allow people with disabilities to display their many skills and talents. I am proud of the accomplishments that we as a State government have made in providing reasonable accommodations to our employees that need them. Recognizing their contributions and successes deserves honor and applause.

President Barack Obama couldn't have said it any better, "Our Nation has always drawn its strength from the differences of our people, from a vast range of thought, experience, and ability. Everyday, Americans with disabilities enrich our communities and businesses. They are leaders, entrepreneurs, and innovators, each with unique talents to contribute and points of view to express. During National Disability Employment Awareness Month, we nurture our culture of diversity and renew our commitment to building an American workforce that offers inclusion and opportunity for all…" **Barack Obama, President of the United States of America** - September 30, 2013

In this Fall 2013 edition of the EEO Connection, we bring to you news of the EEOC's victory in winning a lawsuit against a North Carolina trucking company. Read about BGE's plans to pay $350,000 to 58 African American job candidates. Also, read why a federal judge has found clothing giant Abercrombie & Fitch liable for religious discrimination. In the ADA Corner, learn what happens when an employee rejects an offered accommodation because she prefers a different one.

There is a new State Law that went into effect October 1, 2013 that requires employers to reasonably accommodate pregnant employees. Maryland Commission on Civil Rights has issued guidance on how to comply with this new law. Read about it in this edition. Test your knowledge on equal employment opportunity in our EEO Trivia section and check-out upcoming trainings and meetings. Other interesting reads are included in this edition. Simply turn the page...

Enjoy!

Glynis Watford
Statewide EEO Coordinator

"If we are to achieve a richer culture, rich in contrasting values, we must recognize the whole gamut of human potentialities, and so weave a less arbitrary social fabric, one in which each diverse human gift will find a fitting place."

~Margaret Mead

NOTEWORTHY RULING

Jury Awards $200,000 in Damages Against A.C. Widenhouse in EEOC Race Harassment Suit

In a legal victory for the U.S. Equal Employment Opportunity Commission (EEOC), a North Carolina federal jury has awarded compensatory and punitive damages against A.C. Widenhouse, Inc., a Concord, N.C.-based trucking company.

On Jan. 28, the Winston-Salem jury of eight returned a unanimous verdict finding that Contonius Gill and Robert Floyd, Jr., former Widenhouse employees, were discriminated against based on their race, African-American. The jury also found that Gill was fired in retaliation for complaining about racial harassment at Widenhouse. The jury awarded a total of $200,000 in compensatory and punitive damages to the men. The court will now decide back pay damages for Gill and injunctive relief.

According to the EEOC's lawsuit, Gill and Floyd worked as truck drivers for the company. From as early as May 2007 through at least June 2008, Gill was repeatedly subjected to unwelcome derogatory racial comments and slurs by the facility's general manager, who was also his supervisor; the company's dispatcher; several mechanics; and other truck drivers, all of whom are white. The comments and slurs included "n----r," "monkey" and "boy." Gill testified that on one occasion he was approached by a co-worker with a noose and was told, "This is for you. Do you want to hang from the family tree?" Gill further testified that he was asked by white employees if he wanted to be the "coon" in their "coon hunt."

Floyd testified that he also was subjected to repeated derogatory racial comments and slurs by the company's general manager and white employees. Floyd testified that when he was hired in 2005, he was the only African-American working at the company. Floyd said the company's general manager told him that he was the company's "token black." Floyd testified that on another occasion the general manager told him, "Don't find a noose with your name on it," and talked about having some of his "friends" visit Floyd in the middle of the night.

Gill repeatedly complained about racial harassment to the company's dispatcher and general manager and Floyd complained to an owner of Widenhouse, but both men testified that the harassment continued. Gill intervened in the lawsuit and in addition to the EEOC's claim of racial harassment, Gill said Widenhouse fired him based on his race and in retaliation for complaining about the racial harassment.

The jury also returned a verdict in favor of Gill on both of his discriminatory discharge claims. Race discrimination, including racial harassment, and retaliation for complaining about it, violate Title VII of the Civil Rights Act of 1964. The EEOC filed suit (*Equal Employment Opportunity Commission v. A.C. Widenhouse, Inc.,* 1:11-cv-00498), in U.S. District Court for the Middle District of North Carolina after first attempting to reach voluntary settlement through its conciliation process.

"This is the second jury verdict we have had within the last few months in a case alleging racial harassment," said EEOC General Counsel P. David Lopez. "It is unfortunate that work-place racial harassment persists in the 21st century, and the EEOC will take those cases to trial, if necessary, to vindicate the rights of the victims."

"The jury verdict in this case is significant because it is a reminder to employers that race harassment and racial discrimination cannot be tolerated in the workplace," said Lynette A. Barnes, regional attorney for the EEOC's Charlotte District Office. "The jury, acting as the conscience of this community, properly found that Widenhouse engaged in conduct that warranted an award of punitive damages. Such damages are designed to punish Widenhouse's past conduct and to deter this employer, as well as other employers, from engaging in this type of race discrimination. We are hopeful that this verdict sends a strong message to employers."

EEOC Trial Attorney Nicholas Walter, who tried the case, added, "We are pleased with the verdict and happy for Mr. Gill and Mr. Floyd. The jury took less than an hour to vindicate the rights of these gentlemen. The EEOC will pursue future cases of racial harassment and discrimination with the same diligence and fervor it did in this case against Widenhouse."

Equal Employment Opportunity Commission (EEOC)

"As you discover what strength you can draw from your community in this world from which it stands apart, look outward as well as inward. Build bridges instead of walls."

~Sonia Sotomayor

NOTEWORTHY RULING

BGE to Settle Hiring Concerns

Baltimore Gas and Electric Co. plans to announce that it will pay $350,000 to a group of African-American job candidates to resolve hiring-diversity concerns raised by the federal government. A routine audit by the U.S. Department of Labor found substantially lower levels of African-American hires in two utility trainee job classifications than would be expected between December 2007 and November 2008, based on the pool of applicants, BGE said.

BGE CEO Kenneth W. DeFontes Jr. said the audit did not find similar problems in the company's 229 other job categories. He said BGE independently concluded it had an imbalance in 2009 and changed its training-hiring process before the audit began that year. "We've signed the agreement, we will comply certainly with both the spirit and intent, but we also want to make sure people know this is something we had already corrected," DeFontes said. "I think we're now on a trajectory that is really where we need to be as a company." The Labor Department has not yet announced the settlement but confirmed BGE's account of it.

"Federal contractors agree to conduct hiring, promotions and compensation fairly…and all examples of non-compliance are concerning," said Michele Hodge, Mid-Atlantic regional director of the agency's Office of Federal Contract Compliance Programs. We are pleased that Baltimore Gas and Electric, as part of this agreement, is taking proactive steps to come into compliance with the law and prevent workplace discrimination."

The Office of Federal Contract Compliance Programs originally zeroed in on BGE's cable installer trainee, cable splicer trainee and distribution construction trainee positions. African-Americans accounted for about a third of applicants for those positions in the 12 months the office analyzed, but about 8 percent of hires, BGE said.

Ultimately, the Labor Department office determined that the problem was limited to two of the trainee jobs: cable splicer and distribution construction.

DeFontes said he believes hiring decisions in those job categories were influenced by employee referrals. BGE has since altered that process to require that referred job candidates go through the same screening process as all other applicants, he said. "If you're going to change your diversity mix over time, you have to make a concerted effort to do that, and we are doing that and have been," he said. "In these couple of classifications, though, we were getting a lot of referrals, which tends to distort the pipeline a bit."

The $350,000 payment will be split between 58 African-American job candidates, BGE said. DeFontes said the company also will hire at least six of the candidates. He said more than 30 percent of the company's utility trainee hires are not minority applicants, same as BGE hiring overall.

"We are absolutely committed to being at the forefront as a company in having a workforce that represents the community that we serve," said DeFontes, who chairs the company's Diversity and Inclusion Council.

Michael Higginbotham, a University of Baltimore law professor, said it is simply good business for a company to make sure it reflects its community – and to take steps if some of its hiring practices are undermining that goal.

"If your workforce lacks diversity, particularly the senior members of your workforce…a referral program may distort the hiring practices," he said. "Because our society is still separated in many respects that happens."

The Baltimore Sun

"America is not like a blanket - one piece of unbroken cloth. America is more like a quilt - many patches, many pieces, many colors, many sizes, all woven together by a common thread."

~Rev. Jesse Jackson

Pre 1965: Events Leading to the Creation of EEOC

Part One of Three

EEOC was created in the historic Civil Rights Act of 1964. This Act was an omnibus bill addressing not only discrimination in employment, but also discrimination in voting, public accommodations, and education as well. The law was forged in an atmosphere of urgency. There was growing unrest in the country emanating from the pervasive and egregious racial discrimination and segregation exposed during the civil rights protests in the 1960s. The civil rights struggle was played out in the streets of Birmingham, Alabama and other southern cities and because of television witnessed by America. During the spring of 1963, the world watched as demonstrators were beaten, attacked by police dogs, sprayed with high-pressure water hoses, and then arrested and jailed. The sight of this kind of brutality against peaceful demonstrators, including children, outraged Americans at home and tarnished the image of the United States abroad. Ironically, these images galvanized the nation by confronting it with its own failings.

On June 11, 1963, during the height of the civil rights protests and demonstrations, President John F. Kennedy went on television to address the nation. He gave a simple but eloquent message:

We are confronted primarily with a moral issue. It is as old as the scriptures and it is as clear as the American Constitution. The heart of the question is whether all Americans are afforded equal rights and equal opportunities, whether we are going to treat our fellow Americans as we want to be treated . . . [O]ne hundred years of delay have passed since President Lincoln freed the slaves, yet their heirs, their grandsons, are not fully free. They are not yet free from the bonds of injustice. And this nation, for all its hopes and all its boasts, will not be fully free until all of its citizens are free.

Now the time has come for this nation to fulfill its promise. The events of Birmingham and elsewhere have so increased the cries for equality that no city or state or legislative body can prudently ignore them. We face, therefore, a moral crisis as a country and as a people. It cannot be met with repressive police action. It cannot be left to increased demonstrations on the streets. It cannot be quieted by token moves or talk. It is a time to act in Congress, in your state and local legislative body and, above all, in all of our daily lives. Next week I will ask the Congress of the United States to act, to make a commitment it has not fully made in this century to the proposition that race has no place in American life or law.

Eight days later, on June 19, 1963, President Kennedy sent comprehensive civil rights legislation to Congress. Although opposition within the Congress was fierce, the need for civil rights legislation to address growing unrest in the country held sway. In August 1963, approximately 250,000 Americans of all races marched in Washington, D.C. in front of the Lincoln Memorial. The event, marked indelibly into the psyche of the nation by the famous "I Have A Dream" speech of Dr. Martin Luther King, Jr. came to symbolize the irresistible insistence for meaningful legislation to address the demand for racial equality and justice. This need, together with the mobilization of the civil rights and labor organizations and strong Presidential leadership, coalesced. The result, on July 2, 1964, was the passage of the Civil Rights Act of 1964. It was to become effective one year later.

Despite the urgency for such legislation, the process to pass it was not easy. The Administration faced stiff opposition in the Congress. The loss of President Kennedy in November 1963 to an assassin's bullet threatened to derail the legislation he championed. However, a new champion an unlikely one in the minds of most civil rights organizations was found in the person of the new President, Lyndon B. Johnson.

Five days after the assassination, while the nation was grieving its terrible loss, President Johnson eloquently invoked that tragedy in an effort to give some meaning to that most senseless of acts. President Johnson, addressing a joint session of Congress, stated:

We have talked long enough in this country about civil rights. It is time to write the next chapter and to write it in the books of law . . . No eulogy could more eloquently honor President Kennedy's memory than the earliest possible passage of the civil rights bill for which he fought so long.

Civil rights leaders, initially distrustful of President Johnson, soon came to recognize him as an ally and worked closely with him to ensure the Act's successful passage. Many legislative battles forced concessions and compromises to avoid a Senatorial filibuster that threatened to kill the entire Civil Rights Act.

Perhaps the most serious compromise occurred in the employment section of the proposed Civil Rights Act, a section that became known simply as Title VII, that prohibited discrimination based on race, color, national origin, sex, religion, and retaliation. That compromise resulted in a bill that eliminated any real enforcement authority for EEOC. Instead, EEOC a five-member bipartisan commission was left only with power to receive, investigate, and conciliate complaints where it found reasonable cause to believe that discrimination had occurred. Where EEOC was unsuccessful in conciliating the complaints, the statute provided only that individuals could bring private lawsuits, and where EEOC found evidence of "patterns or practices" of discrimination, EEOC could then refer such matters to the Department of Justice for litigation.

As will be seen, the decades since 1964 have seen a steady, growing emergence of EEOC as the lead enforcement agency in the area of workplace discrimination, as Congress intended. Over the four decades that EEOC has existed, it has become a respected advocate for the communities it was created principally to serve. Those communities include all peoples of the nation because discrimination can occur to anyone of any race, color, religion, national origin, age, disability, and of either sex. EEOC recognizes that as an agency of the government, it has a role of fairness not only to those protected classes whose forebears helped forge the alliances that resulted in the passage of civil rights legislation, but also to the employers and unions that are subject to EEOC jurisdiction.

EEOC has worked tirelessly to eliminate discrimination from America's workplaces since its creation. The hard work, idealism, and commitment of EEOC employees has been instrumental in widening the doors of employment opportunity for all Americans and helping to create a standard of living for this nation's diverse citizenry that is the envy of the world. But challenges still abound. In far too many workplaces, old ways die-hard. Discrimination, while often boldly evident, persists now in subtle forms as well. The need for an agency like EEOC is as evident today as before 1964. This is the unfortunate but true state of affairs as the nation enters the new Millennium.

www.eeoc.gov/eeoc/history

SPOT LIGHT—cont'd

Abercrombie & Fitch Liable for Religious Discrimination in EEOC

A federal judge has found clothing giant Abercrombie & Fitch liable for religious discrimination when it fired Muslim employee Umme-Hani Khan for wearing her hijab (religious headscarf), the U.S. Equal Employment Opportunity Commission (EEOC) announced. The ruling came in an employment discrimination lawsuit filed by the federal agency in which Khan intervened.

According to the lawsuit, filed in 2011, 19-year-old Khan started working at the Hollister store (an Abercrombie & Fitch brand targeting teenagers aged 14 through 18) at the Hillsdale Shopping Center in San Mateo, California, in October 2009. As an "impact associate." the Muslim teen worked primarily in the stockroom. At first she was asked to wear headscarves in Hollister colors, which she agreed to do. However, in mid-February 2010, she was informed that her hijab violated Abercrombie's "Look Policy," a company-wide dress code, and was told she would be taken off schedule unless she removed her headscarf while at work. Khan was fired on February 23 for refusing to take off the hijab that her religious beliefs compelled her to wear.

In an order issued September 3, 2013, U.S. District Judge Yvonne Gonzalez Rogers noted, "It is undisputed that Khan was terminated 'for noncompliance with the company's Look Policy.' Khan's only violation of the Look Policy was the headscarf." The court dismissed Abercrombie's argument that "its Look Policy goes to the 'very heart of [its] business' and thus any requested accommodation to deviate from the Look Policy threatens the company's success," observing that "Abercrombie only offers unsubstantiated opinion testimony of its own employees to support its claim of undue hardship. The deposition testimony and declarations from Abercrombie witnesses demonstrate their personal beliefs, but are not linked to any credible evidence."

EEOC General Counsel David Lopes said, "No one should have to choose between keeping their faith and keeping their job. "The court sent a clear message that it was illegal to fire Ms. Khan solely for wearing her hijab, and U.S. District Courts are finding that Abercrombie cannot establish an undue hardship defense to the wearing of hijabs based on its 'Look Policy.' This is a clear victory for civil rights."

Title VII of the Civil rights Act of 1964 prohibits discrimination based on religion and requires employers to accommodate the sincere religious beliefs or practices of employees unless doing so would impose an undue hardship on the business. The EEOC filed suit (EEOC & Khan v. Abercrombie & Fitch Stores, Inc. et al, Case No. 11-CV-03162-YGR (N.D. Cal.) in U.S. District Court for the Northern District of California after first attempting to reach a pre-litigation settlement through its conciliation process. Two non-profit organizations, the Legal Aid Society/ Employment Law Center and the Council on American-Islamic Relations, also represent Khan, who intervened in the case.

The court order (U.S.E.E.O.C. v. Abercrombie & Fitch, 2013 WL 4726137, N.D. Cal., 2013) granted the EEOC's and Khan's motion for partial summary judgment and dismissed the following affirmative defenses asserted by Abercrombie: failure to exhaust administrative remedies, undue hardship; and infringement upon its First Amendment right to commercial free speech. The court also denied Abercrombie's cross -motion for summary judgment seeking a ruling that the EEOC failed to conciliate in good faith and dismissed the plaintiffs' claims for injunctive relief and punitive damages. Trial, now limited to damages and injunctive relief, is set for September 30, 2013.

EEOC San Francisco Regional Attorney William R. Tamayo said, " Ms. Khan willingly color-coordinated her headscarf with the store's brand and capably performed her stockroom duties for four and half months until a visiting manager flagged her hijab as a violation of the company's 'Look Policy.' What undue burden did this retail giant face that prevented it from allowing her to practice her faith? None, clearly."

This is the third time that a district court has ruled against Abercrombie's undue hardship defense in cases involving Muslin employees or applicants wearing hijabs. In July 2011, a district court in Tulsa, OK, ruled that it was religious discrimination for the company not to hire a Muslim applicant for a sales position due to her hijab. That case is pending on appeal in the 10th Circuit. In April, 2013, another judge in the Northern District of California ruled for the EEOC on the issue of undue hardship in an unrelated case. That case is still awaiting the resolution of other legal and factual issues.

According to company information, Abercrombie & Fitch Co. operates retail stores under the brands Abercrombie & Fitch, for men and women over the age of 18; Abercrombie Kids targeting preteens between ages seven and 14; and Hollister Co. for teenagers aged 14 and 18, with more than 1,000 stores in North America.

For more information visit the EEOC's website at www.eeoc.gov.

SPOT LIGHT—cont'd

High Court Weighs Age Discrimination Remedies

In the first oral argument of the 2013-14 term, the U.S. Supreme Court, on October 7, 2013, addressed the question of whether state and local government workers may file constitutional claims of age discrimination instead of pursuing their complaints under the Age Discrimination in Employment Act (ADEA) (Madigan v. Levin [No. 12-872]).

The ADEA sets forth requirements that employees "exhaust their administrative remedies" before filing a lawsuit. This includes filing a charge with the Equal Employment Opportunity Commission (EEOC) and allowing time for the EEOC to settle the dispute. Constitutional equal-protection claims are brought under the Civil Rights Act of 1871 (42 U.S.C. Section 1983), which allows plaintiffs to go directly to court. In addition, employees can seek punitive damages under Section 1983, while such relief is not available under the ADEA.

The ruling in the case will primarily affect state and local employers and employees but may be significant for private employers because an underlying issue is whether Congress, in enacting a law with comprehensive remedies such as the ADEA, must explicitly prohibit recourse to other statutory remedies, according to Christin Choi and Christina Michael, attorneys in the Philadelphia office of Fisher & Phillips. The court has previously held that when remedial devices provided in a particular statue are "sufficiently comprehensive," they may demonstrate congressional intent to preclude employees from suing under Section 1983, Choi and Michael said.

Age-Bias Claims

Harvey Levin was hired in 2000 as assistant attorney general in Illinois' Consumer Fraud Bureau. Levin, who was 55 at the time, was promoted to senior assistant attorney general in December 2002, but supervisors advised him that they had concerns about alleged low productivity, excessive socializing at work, inferior litigation skills and poor judgment.

Levin was fired in May 2006, along with 11 other lawyers. He alleged he was replaced by a female attorney in her 30s.

The attorney general, Lisa Madigan, denied that any of the terminated lawyers were "replaced," noting that their cases were not reassigned to younger attorneys.

Levin filed a lawsuit in federal district court in Illinois, claiming sex discrimination under Title VII of the 1964 Civil Rights Act and age bias under the ADEA. He also brought claims under Section 1983, asserting that the alleged sex and age discrimination violated his 14th Amendment equal-protection rights. In addition to suing the state of Illinois, Levin sued Madigan and four employees of the attorney general's office in their individual capacities under Section 1983.

All of the defendants filed motions to dismiss Levin's Section 1983 claims on the ground that the ADEA was his exclusive remedy, but the trial court allowed the constitutional claims to go forward.

The defendants appealed the ruling, but the 7th U.S. Circuit Court of Appeals affirmed the trial court's decision.

Are ADEA Remedies Exclusive?

Illinois Solicitor General Michael A. Scodro, representing Madigan, argued that, in enacting the ADEA, Congress intended to create a comprehensive body of procedures and remedies designed to combat age discrimination in the workplace.

"In extending these procedures and remedies to government employees, Congress did not intend to permit state and municipal workers alone to frustrate this regime or bypass it entirely using the more general remedies of Section 1983," Scodro said.

Justice Ruth Bader Ginsburg asked Scodro: If the ADEA is expanding the civil rights protections against age discrimination, making it much more generous to the employee, "isn't it strange to think that Congress at the same time wanted employees to have these expanded rights and to do away with the pre-existing remedies:"

Edward R. Theobald III of Chicago, Levin's attorney, argued that Congress did not intend in passing the ADEA to preclude a pre-existing Section 1983 equal-protection claim for age bias.

The differences in the rights and protections between the ADEA and the Equal Protection Clause by way of Section 1983 were "vast," Theobald said.

In an ADEA suit, the claim is brought against the employing government agency, while in an equal-protection, case under Section 1983, an individual government official is the defendant, he said.

Further, the ADEA exempts certain categories of workers, while Section 1983 does not carve out any individual exclusions.

Is Case Properly Before High Court?

Rather than addressing the ADEA issue, the justices spent much of the hour-long argument questioning whether the case should be before the court at all. A friend-of-the-court brief filed by a group of law professors who specialize in court procedure had argued that the 7th Circuit had no authority to decide the ADEA issue in the first place. The case reached the appellate court before it had been fully tried by the lower court, solely to review the lower court's decision about whether Madigan had qualified immunity from suit.

In addition, the justices noted, there was a question as to whether Levin was even covered by the ADEA. If he was considered a political appointee as opposed to an employee, the ADEA would not come into play, they said.

"I think that the court was expressing serious concerns that the appeal had been improvidently granted," Katharine Parker, an attorney in Proskauer's New Your office told SHRM Online. "There were procedural questions as to whether or not the 7th Circuit could even take up the question of whether the ADEA precluded Section 1983 claims" on appeal of the qualified immunity issue, she said.

Joanne Deschenaux, J.D., SHRM's senior legal editor

ADA CORNER

Employee Rejects an Offered Accommodation

What Happens When An Employee Rejects An Offered Accommodation Because She Prefers A Different One?

A city laboratory employee - an analytical chemist – worked with solvents and developed health problems as a result of a chemical she was working with — methyl tertiary butyl ether ("MTBE"). She asked for this accommodation: "Avoid any type of work where she would have exposure to organic solvents. Transfer to another line of work. Avoidance of irritants."

The employer offered her the option of wearing a full-face respirator but after a few times using it, she said that it made her claustrophobic and caused her panic attacks. The employer then offered her a partial-face respirator, but she was afraid and refused to try it. She was ultimately fired because of her absences.

The issue before the Court was whether the offered accommodation for the health problem, which she reported, was reasonable for the employee's disability.

The Court held that "we do not need to discuss either the possibility that she could have been reasonably accommodated by a transfer ... or her other post-hoc proposal that...MTBE [could be replaced] with the organic solvent Pentane, because the uncontroverted record reveals that the [employer] offered her a reasonable accommodation by use of a partial-face respirator but that she refused to attempt to use such a respirator."

Therefore, said the Court, "We agree with the District Court that [the employee] is not a 'qualified individual' under the ADA because she refused to try the partial-face respirator made available to her." Nor did the employee "take advantage of a City of Philadelphia employee assistance program available to her which could have provided her with counseling and treatment for claustrophobia and panic attacks."

"In the circumstances, it is clear that even though not covering the entire face, a partial-face respirator could have alleviated [the employee's] claustrophobia problems while protecting her from the effects of exposure to any organic solvents.

Takeaway: The Court said it best – "[a]n employer is not obligated to provide an employee the accommodation he requests or prefers, the employer need only provide some reasonable accommodation."

This result is certainly reasonable. However, we are compelled to ask whether the employee's claustrophobia and panic attacks may also be considered disabilities such that any type of facial respirator would not be a reasonable accommodation and that perhaps her alternate proposals should have been considered.

The Court made much of the fact that the employee did not even *try* the partial facial respirator, but should the outcome of the case have turned on *this* fact?

What if the employee had, in fact, tried the partial facial respirator and suffered the predictable claustrophobia and panic attacks?

What would the result have been in that case — would the Court have found this proposed accommodation "unreasonable" and looked to the employee's "preferred" accommodation?

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

Richard B. Cohen
Fox Rothschild LLP

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

~Jimmy Carter

ADA CORNER—cont'd

MCCR ISSUES GUIDANCE ON REASONABLE ACCOMMODATION FOR DISABILITIES

In a press release issued on September 19, 2013, the Maryland Commission on Civil Rights (MCCR) issued guidance for employers with 15 or more employees on how to comply with the new state law regarding accommodations for pregnant employees that will go into effect on October 1, 2013.

Under the law, employees are now granted a statutory right to a reasonable accommodation if the pregnancy causes or contributes to a disability, and if the accommodation does not impose an undue hardship on the employer.

The law requires that an employer shall post in a conspicuous location, and include in any employee handbook, information concerning an employee's right to a reasonable accommodation and leave for a disability caused or contributed to by pregnancy.

The key provisions are as follows:

An employee disabled contributed to or caused by pregnancy may request a reasonable accommodation and the employer must explore **"all possible means of providing the reasonable accommodation."** The law lists a variety of options to consider in order to comply with a request for a reasonable accommodation including:

- Changing job duties
- Changing work hours
- Relocation
- Providing mechanical or electrical aids
- Transfers to less strenuous or less hazardous positions
- Providing leave

An employer may require certification from an employee's health care provider regarding the medical advisability of a reasonable accommodation to the same extent certification is required for other temporary disabilities. The certification shall include:

- Date a reasonable accommodation is medically advisable
- Probable duration
- Explanation as to the medical advisability of the reasonable accommodation.

RETALIATION:

If an employee seeks to exercise her right under the statute, an employer may not:

- Interfere with;
- Restrain;
- Deny the exercise; or
- Deny the attempt to exercise the right.

Employers should consult legal counsel for the specific language to post and provide in employee handbooks.

For more information, please visit the MCCR's website at http://mccr.maryland.gov.

"Strength lies in differences, not in similarities"

~Steven R. Covey

EEO TRIVIA

1. Which theory of discrimination occurs when a complainant alleges that the agency treated another employee better because of the individual's membership in a protected class.
   a. Disparate Impact
   b. Disparate Treatment
   c. Circumstantial Evidence

2. An agency is required to make a reasonable accommodation of a known mental or physical limitation of an otherwise qualified individual with a disability unless to do so would cause an undue hardship. T or F

3. Equal Employment Opportunity is:
   a. a privilege
   b. the law
   c. a rite of passage

4. EEO is about :
   a. Removing barriers so that every citizen receives fair and impartial opportunity for State employment.
   b. Maximizing the potential of a diverse work force.
   c. Valuing people and respecting their abilities, backgrounds and talents.
   d. All of the above

5. Discrimination is:
   a. Different treatment or impact on the basis of a protected class.
   b. Includes selective, negative behavior toward a group or a member of that group based on assumptions or stereotypes about that group.
   c. May also result from policies, practices or behaviors that exclude otherwise qualified individuals from job opportunities.
   d. All of the above

6. Only a manager or supervisor can be accused of sexual harassment. T or F

7. "Sexual Harassment" refers to unwelcome sexual advances , requests for sexual favors and other verbal or physical conduct of a sexual nature. T or F

Answers: 1) b 2) T 3) b 4) d 5) d 6) F 7) T

EEO CASE REVIEW

Graham v. Secretary of Army—EEOC Appeal No. 0720120039 (2013)

Issue:

Whether the ineffective implementation of a discriminatory and adverse employment action renders it moot?

Facts:

Though the job opening was for a cashier, the Complainant's original supervisor expressed his intent to hire the Complainant as a Waitress. The Complainant, an African-American, won the job and for years, believing she was a Waitress, performed the duties of a Waitress.

Under different management it was discovered that the Complainant's personnel documents described her as a Cashier. Management subsequently changed all her duties to those of a Cashier. The Complainant was then informed that she would not be receiving a three percent incentive pay she received as a Waitress and that she would have to share her tips with the Cashier on duty. However, the Cashier on duty and the Complainant agreed that these changes were inappropriate and came to a mutual agreement that the Complainant would continue waitressing duties. On a number of occasions, management removed the Complainant from the schedule and replaced her with white employees. Eventually, management refused to communicate with the Complainant at all.

Believing these actions were predicated on discriminatory animus due to her race, the Complainant filed a complaint with the EEOC.

Procedural History:

The Administrative Judge found that the Complainant established that she was subjected to disparate treatment on the basis of race when her incentive pay was terminated and when management refused to communicate with her directly. The AJ further found that the Complainant was subjected to a hostile work environment.

But the AJ determined that the Complainant did not establish a claim of disparate treatment when the Agency altered her duties from those of Waitress to those of a Cashier or when she had to share her tips with the other Cashier. Though the AJ found that the Complainant satisfied the prima facie case regarding the change of her duties and the loss of her tips, the AJ reasoned that disparate treatment did not exist because the Cashier and the Complainant ignored the new supervisor's policy.

The AJ ordered the Agency to offer the Complainant a position as Waitress Leader retroactive to the date the Agency altered her duties; offer the Complainant back pay to the date her duties were altered; and pay the Complainant her incentive pay. The Agency was also ordered to pay attorneys fees, provide training to the offending supervisor, and post a notice of discrimination.

The Agency did not dispute the AJ's findings in issuing its Final Order, but did not adopt the AJ's findings on relief pertaining to the offer of a position and retroactive placement and back pay—including lost tips— into a Waitress position. The Agency filed an appeal simultaneously with its Final Order, seeking a declaration that its decision to reject the particular findings on relief was valid because the AJ found no discrimination in the Change of the Complainant's duties or requirement to share tips; those remedies would have exceeded make-whole relief.

Decision:

Holding: Just because the Complainant and the other Cashier refused to follow the supervisor's orders because they thought the orders were discriminatory does not make the supervisor's orders any less discriminatory.

Analysis:

Instead of confirming the Agency's position, the Commission reversed the AJ's finding that the change of the Complainant's job duties was not discriminatory because the instructions were essentially ignored by the Complainant.

The Commission noted "that just because the Complainant and the other Cashier refused to follow the supervisor's [discriminatory orders] does not make the supervisor's orders any less adverse or any less discriminatory."

The Commission further explained that the AJ's finding that the decisions to change the Complainant's duties and to require her to split tips were based on Complainant's race and were evidence of a hostile work environment.

Accordingly, the Commission required the Agency to fulfill the unperformed parts of the remedy orders, though it did not require the Agency to offer the Complainant a job as she has since separated from the Agency on matters unrelated to this complaint.

Federal Employment Law Training Group

"Diversity may be the hardest thing for a society to live with, and perhaps the most dangerous thing for a society to be without."

~William Sloane Coffin Jr.

301 W. Preston Street
Baltimore, MD 21201

Phone: 410-767-3800
Fax: 410-333-5004

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"Create inclusion - with simple mindfulness that others might have a different reality from your own."

~Patti Digh

DIVERSITY CORNER

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Kwanzaa

"Diversity creates dimension in the world."

~Elizabeth Ann Lawless