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

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Issue 1

EEO CONNECTION

Inside this issue:

Coordinator's Message

T. E. A. M. "Together Everyone Achieves More"

Recently, while reflecting on the past year, I realized how far we've come and how much we've achieved - an entirely new staff, reaffirmed commitments, innovative trainings, networking opportunities and most importantly, a TEAM of State EEO Professionals.

The underlying mission of the OSEEOC is to build a highly knowledgeable and deeply resourceful team of EEO Professionals. *The American Heritage Dictionary of the English Language* defines a team as a group of players on the same side in a game or any group organized to work together. As the coach of this team, I am pleased that you have stepped up to the plate of commitment and hit home runs of achievement. I am very thrilled that we have advanced our efforts to promote teamwork and professionalism within our EEO community.

In order to further develop your EEO knowledge, the OSEEOC will continue to provide training in the area of discrimination theories and laws, conducting investigations, alternative conflict resolutions and diversity. Currently, we are planning further educational opportunities for EEO Professionals across the State to increase EEO knowledge, network with fellow team members, gain valuable insight from dynamic guest speakers and receive updates of State and federal EEO laws.

I am especially proud of the first issue of the EEO Connection as it demonstrates how a team can work together to accomplish a common goal. A few dedicated professionals took time out of their busy schedules to coordinate and produce this wonderful resource to be shared by all. These professionals inspired and supported one another to create a true team atmosphere. Many thanks to Paulette Walker (OSEEOC) and her team – Priscilla Johnson (MCHR), Darrell Davis (SHA), Clifford Jones (MDA) , Tyrone Hill (MDE) and Jennifer Reed (DLLR). **GO TEAM!!**

This first issue brings you news of the revisions in EEO law to the Americans with Disabilities Act Amendments Act of 2008, the signing of the Lilly Ledbetter Fair Pay Act of 2009 and recent changes to the Family Medical Leave Act that affect us all. Also, we've spotlighted three very interesting articles of guidance on disciplining disabled employees, accommodation requests on the basis of religious beliefs and settlement of a job bias claim for $1.55 million. In the section, "Noteworthy Rulings" learn of a Maryland Court Ruling on a claim of age discrimination and a case of clarifying the correct standard for retaliation. Finally, in celebration of Black History Month read about the "Little Rock Nine" in the diversity corner.

Remember, our focus has and always will be on making the Governor's desire of a discrimination free and well diversified State Government a reality.

Glynis Watford

Thanks to all who attended…

The OSEEOC's 2nd Annual Meet and Greet Event was a great success. We had 46 professionals in attendance. Our guest speaker, Judge Vicki Ballou-Watts, inspired us with a powerful message encouraging us to examine the level of diversity in leadership across the country and urging us to continue lobbying for diversity and equality.

State Senator Catherine Pugh and Delegate Adrienne Jones, Chairs on the Committee on Fair Practices were in attendance at this fantastic affair. Senator Pugh and Delegate Jones, spoke about the importance of equal employment opportunity and highlighted the activities and achievements of this office. It was a pleasure to have them both with us to witness the bond, commitment and dedicated service of the EEO professionals.

Thank you for attending this special event and for your charitable contributions for Sarah's Place.

CHANGES IN LAW

ADA Amendment Act of 2008

On September 25, 2008, President Bush signed into law the ***Americans with Disabilities Act Amendments Act of 2008, effective January 1, 2009.*** This act, which overturns four U.S. Supreme Court decisions, provides the ADA's definition of disability "shall be construed in favor of broad coverage under the Act, to the maximum extent permitted by the Act."

The act defines major life activity to specifically include "caring for oneself, performing manual tasks, seeing, hearing, eating, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, working" and operation of a major bodily function such as "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions." This rejects the Supreme Court decision in *Toyota Motor Manufaturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002)*, which stated that impairments that only interfere in a minor way with the performance of manual tasks do not "substantially limit" a major life activity. The act now covers those impairments that impact a major bodily function even if they do not impact a traditional major life activity.

The "regarded as" prong of the act covers individuals who have been subjected to an actual or perceived physical or mental impairment, regardless of whether the impairment limited or is perceived to limit a major life activity. This means that an employee only has to show that the employer regarded him or her as having a mental or physical impairment, not that it limited a major life activity. However, impairments that are "transitory," meaning those with an "actual or expected duration of 6 months or less," are not covered. *P.L. 110-325*

Impact: The ADA Amendments Act effectively resets our understanding of how employers and employees can best work together to address employees' disability-related requests for accommodation.
HR.com

EEOC Explains Impact of Lilly Ledbetter Fair Pay Act

The US Equal Employment Opportunity Commission (EEOC) has posted a notice on its website explaining the impact of the Lilly Ledbetter Fair Pay Act of 2009 on federal equal employment opportunity (EEO) law. The notice was posted on the agency's website on February 5, 2009.

The new law. On January 29, 2009, President Obama signed the **Lilly Ledbetter Fair Pay Act of 2009 (Act),** which supersedes the Supreme Court's decision in *Ledbetter v Goodyear Tire & Rubber Co, Inc*, 550 US 618, 89 EPD ¶42,827 LK:NON: STLAWALL 89EPDP42827 (2007). *Ledbetter* required a compensation discrimination charge to be filed within 180 days of a discriminatory pay-setting decision (or 300 days in jurisdictions that have a local or state law prohibiting the same form of compensation discrimination).

The Act restores the pre- *Ledbetter* position of the EEOC that each paycheck that delivers discriminatory compensation is a wrong actionable under the federal EEO statutes, regardless of when the discrimination began. As noted in the Act, it recognizes the "reality of wage discrimination" and restores "bedrock principles of American law."

Charge-triggering events. Under the Act, an individual subjected to compensation discrimination under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, or the Americans with Disabilities Act of 1990 may file a charge within 180 (or 300) days of any of the following:

- when a discriminatory compensation decision or other discriminatory practice affecting compensation is adopted;
- when the individual becomes subject to a discriminatory compensation decision or other discriminatory practice affecting compensation; or
- when the individual's compensation is affected by the application of a discriminatory compensation decision or other discriminatory practice, including each time the individual receives compensation that is based in whole or part on such compensation decision or other practice.

Effective date. The Act has a retroactive effective date of May 28, 2007, and applies to all claims of discriminatory compensation pending on or after that date.

HR.com

Family Medical Leave Act: Some Highlights of Regulatory Changes

There were several amendments and regulatory changes made after a multi-year fact finding and review process conducted by the U.S. Department of Labor. The amendments should provide needed clarity for employers and employees regarding their responsibilities and rights under the FMLA leave. The following are a few of the changes to the fifteen year old Act:
1. Light Duty: Light duty work will not count against an employee's FMLA leave entitlement and the employee's right to restoration will be held in abeyance during the period of time the employee performs light duty (or until the end of the applicable 12 month FMLA leave year). 2. Serious Health Condition: The final rule adds guidance on three regulatory matters. One of the definitions of serious health condition involves more than three consecutive, full calendar days of incapacity plus two visits to a health care provider. Under the final rule, the two visits must occur within 30 days of the beginning period of incapacity and the first visit to the health care provider must take place within seven days of the first day incapacity. A second way to satisfy the definition of serious health condition under the current regulations involves more than three consecutive, full calendar days of incapacity plus a regimen of continuing treatment, however, the final rule clarifies that the first visit to the health care provider must take place within seven days of the first day of incapacity. Thirdly, the final rule defines periodic visits for chronic serious health conditions as at least two visits to a health care provider per year.
3. Fitness For Duty Certifications: The final rule makes two changes to the fitness for duty certification process in that an employer may require that the certification specifically address the employee's ability to perform the essential functions of the job and in cases where safety concerns exist, an employer may require a fitness for duty certification before an employee may return to work when the employee takes intermittent leave.

For further information regarding the other regulatory changes to FMLA, contact the Department of Labor. Composed by OSEEOC Staff.

"Civil Rights opened the windows. When you open the windows, it does not mean that everybody will get through. We must create our own opportunities."

Mary Frances-Berry

SPOTLIGHTS

EEOC:You Can Discipline the Disabled

The U.S. Equal Employment Opportunity Commission (EEOC) has issued a comprehensive question~and~answer guide addressing how the Americans with Disabilities Act (ADA) applies to a wide variety of performance and conduct issues. According to the new guide, employers can apply the same performance standards to all employees, including those with disabilities. It also points out that the ADA doesn't affect an employer's right to hold all employees to basic conduct standards.

The new guide does make clear, however, that employers must make reasonable accommodations that enable individuals with disabilities to meet performance standards. It also explains how and when employees should request accommodations to help them meet performance requirements and comply with conduct rules and how an employer should handle those requests.

The guide reviews relevant ADA requirements and explains how they govern performance and conduct standards as applied to employees with disabilities. It uses examples that are based on actual cases and specific scenarios to explain when and how performance and conduct standards should be applied and the appropriate role of reasonable accommodation.

The guide address other ADA related topics, including attendance, dress codes, and drug and alcohol use and the circumstances in which employers can ask questions about an employee's disability when performance or conduct problems occur.

For more insight, visit
www.eeoc.gov/facts/performance-conduct.html

Leadership should be born out of the understanding of the needs of those who would be affected by it.

Marion Anderson

SPOT LIGHTS Cont.

Rule at odds with EEOC guidance

The U.S. Equal Employment Opportunity Commission (EEOC) recently issued guidance on religious discrimination that uses an example of a nurse in a labor and delivery unit who asks for her faith to be accommodated by trading assignments with other nurses so she can avoid assisting with abortions. In this case, the hospital refuses because it does not have enough staff to trade assignments, but it does let the nurse transfer to a vacant position in the newborn intensive care unit. The EEOC states the hospital has complied with Title VII and does not have to provide the preferred accommodation. According to the EEOC, "If there had been no other position to which she could transfer, the employer would have been entitled to terminate her since it would pose an undue hardship to accommodate her in the Labor and Delivery Unit."

HHS' proposed rule, if finalized, will be in conflict with Title VII's undue hardship exemption and its "minimal accommodation" standard.

** The U. S. Department of Health and Human Services issued final regulations which would protect health care providers from discrimination by expanding provider conscience protections and increasing awareness of and compliance with the "right of conscience rule". Essentially, this regulation finalizes the "right of conscience rule" by allowing federally funded health care providers to decline to participate in any lawful health service or research activity to which they object. Concerns have been expressed that this additional health care conscience rule overlaps with Title VII's protection against religious discrimination (healthcare workers are already protected from religious discrimination and have the right to reasonable accommodation of their religious beliefs) in that it is confusing and will impose a burden on covered employers, particularly small employers.**

HR.com/ Explanation of rule by OSEEOC Staff

"Diversity is the one true thing we all have in common. Celebrate it every day."

Ambrose Bierce

Merrill Lynch settles job bias claim for $1.55 million

On December 31, 2008, the Equal Employment Opportunity Commission (EEOC) announced that Merrill Lynch, the international financial services firm, settled a discrimination lawsuit filed on behalf of an Iranian Muslim former worker who claimed he was terminated because of his religion and national origin. Merrill Lynch agreed to pay $1.55 million to settle the suit.

In the initial lawsuit, the EEOC claimed that Merrill Lunch refused to promote and then terminated Majid Borumand from his position as a qualitative analyst in August 2005 because of his Iranian national origin and because he was a Muslim. The EEOC argued that Merrill Lynch instead retained and promoted a less-qualified individual.

According to the consent decree settling the litigation, in addition to the monetary relief for Borumand, Merrill Lynch agreed to (1) provide training to its employees regarding religious and national origin discrimination, (2) refrain from discriminating against employees because of their national origin or religion or retaliating against employees who oppose perceived discrimination, and (3) allow ongoing monitoring by the EEOC to ensure compliance.

EEOC vs. Merrill Lynch, SDNY Case No. 07-CV-6017.

Maryland Employment Law Letter

NOTEWORTHY RULINGS

No individual liability for age discrimination claims

In a recent decision, the U.S. District Court for the District of Maryland ruled that a principal in a business couldn't be held liable for a former employee's claim of age discrimination.

According to the court, under Fourth Circuit case law, individuals cannot be held liable for employment discrimination under the Age Discrimination in Employment Act (ADEA). The court noted that while there's no absolute prohibition on the imposition of a ADEA liability on individuals, such liability is clearly the exception rather than the rule.

In the case, Lisa Eden, a former employee of ARC Developers Inc., claimed that Nicole A. Halbreiner, a principal of ARC, made negative comments about Eden's age including, "you can't even get up the stairs. You're just like my mother." The court ruled that those types of remarks didn't remove the case from the normal realm of age discrimination claims and provided no basis for the imposition on individual liability on Halbreiner.

The court noted that even though there is generally no individual liability for ADEA claims, that doesn't mean an individual may not be subject to liability for other types of claims, including sexual harassment. In other words, individual liability may be imposed when an individual makes sexual advances towards another employee, including groping and kissing on and off the job.

This case serves as a reminder that at least with regard to age discrimination claims, individual supervisors and other decision makers generally aren't subject to liability. However, that doesn't mean that the statements made won't come back to haunt the employer which is vicariously liable for the acts of its agents. Don't' be surprised if the former employee in this case uses the alleged age related comments made by the principal as evidence of age discrimination by the company.

Maryland Employment Law Letter

"No provisions in our Constitution ought to be dearer to man than that which protects the rights of conscience against the enterprises of the civil authority.

Thomas Jefferson

Fourth Circuit Clarifies Correct Standard for Retaliation

In a recent decision, the U.S. Court of Appeals for the Fourth Circuit (which covers Maryland) clarified the correct standard for evaluating retaliation claims under Title VII of the Civil Rights Act of 1964.

The Court found that there are two distinct categories of employee retaliation claims: (1) those in which the employee perceives an improper action and (2) those in which the employee participates or otherwise assists in the processing of a formal charge or in the investigation of a charge.

Claims alleging the first theory of liability must include evidence that the employee had a reasonable basis for believing the employer's actions were unlawful. Claims under the second theory of liability do not require that showing.

The case of Dana W. Cumbie v. General Shale Brick, Inc. 4th Circuit, Case No. 07-1723, decided December 8, 2008, highlights the different legal standards used to evaluate employee retaliation claims. For claims involving an allegation that the employee has opposed an employer practice that the employee believes is improper, the employee must be able to show that his opposition was based on a reasonable belief that the actions were in fact improper under Title VII.

However, when the employee claims that he was retaliated against because he participated in the filing of a charge or testified, assisted, or participated in an investigation, proceeding, or hearing related to that charge, there is no requirement that he have a reasonable belief that the employer's actions were improper.

Maryland Employment Law Letter

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LITTLE KNOWN HISTORY FACTS

DIVERSITY CORNER

1957 -The Southern Christian Leadership Conference (SCLC), a civil rights group, was established by Martin Luther King, Charles K. Steele, and Fred L. Shuttlesworth (Jan.-Feb.)

Nine black students are blocked from entering the school on the orders of Governor Orval Faubus. (Sept. 24). Federal troops and the National Guard are called to intervene on behalf of the students, who become known as the "Little Rock Nine." Despite a year of violent threats, several of the "Little Rock Nine" manage to graduate from Central High.

Infoplease.com

Recommended Reading

Telling Stories Out of Court:

Narrative about Women about & Workplace Discrimination

By: Liza Featherstone and Ruth O'Brien

Your Rights in the Workplace:

By: Barbara Kate Repa

Gender In The Workplace:

A Case Study Approach

By: Jacqueline Delaat

Religious Freedom:

Religion Discrimination in the Workplace

By: Lucy Vickers

Harassment & Discrimination and Other Workplace Landmines:

Entrepreneur Legal Guide

By: Gavin Appleby

Employment Discrimination Laws Under Title VII:

Legal Almanac for Laypersons

By: Margaret Jasper

Ten Commandments of Working In A Hostile Work Environment

By: T.D. Jakes

1001 Ways to Reward Employees

By: Bob Nelson

Kiss, Bow or Shake Hands

By: Terri Morrison and Wayne Conway