Lessons Learned From the Latest List of Equal Employment Opportunity Commission Settlements

Insights
4.21.16

Several recent settlements between the United States Equal Employment Opportunity Commission ("EEOC") and employers in Pennsylvania underscore the importance of proper policies and procedures in the context of the Americans with Disabilities Act ("ADA"), the Age Discrimination in Employment Act ("ADEA"), and Title VII of the Civil Rights Act of 1964 ("Title VII"). While neither the court nor a jury of fact-finders reached the merits of the following cases, the alleged facts and claims—and disclosed settlement amounts—remind employers to review policies and procedures to ensure that employers are compliant with the law and following best practices in their industry as to employment-related decisions.

ADA: An action was recently instituted in the United States District Court for the Middle District of Pennsylvania by Plaintiff, the EEOC, against a trucking company, alleging disability discrimination under the ADA. The EEOC alleged that since 2009, the company had violated the ADA and discriminated on the basis of disability. The EEOC claimed that the company discriminated by, inter alia, administering an overbroad physical qualification standard for applicants and employees entering positions involving the operation of powered industrial trucks ("PITs"), such as forklifts, clamp trucks, and lift trucks, that is not job-related or consistent with business necessity, and failing to conduct individualized assessments of applicants' or employees' ability to operate PITs and/or consider accommodations that, if needed, would enable the individual to do so. The EEOC also alleged that the company violated the ADA by administering unlawful medical exams or inquiries as part of its physical qualification standard.

A settlement agreement was reached between the parties on January 25, 2016, for $180,000.

What You Need to Know: Under the ADA, an employer's ability to make disability-related inquiries or require medical examinations is analyzed in three stages: pre-offer, post-offer, and during employment. At the first stage (prior to an offer of employment), the ADA prohibits all disability-related inquiries and medical examinations, even if they are related to the job. At the second stage (after an applicant is given a conditional job offer, but before s/he starts work), an employer may make disability-related inquiries and conduct medical examinations, regardless of whether they are related to the job, as long as it does so for all entering employees in the same job category. At the third stage (after employment begins), an employer may make disability-related inquiries and require medical examinations only if they are job-related and consistent with business necessity. What this case underscores for the employer is the importance of not making disability-related

What this case underscores for the employer is the importance of not making disability-related inquiries and medical examinations at the pre-offer stage of employment, even if they are related to the job.

ADEA: An action was instituted in the United States District Court for the Eastern District of Pennsylvania by Plaintiff, the EEOC, against a fast-food company, alleging age discrimination under the ADEA. In this action, the Commission alleged that the company violated the ADEA and discriminated on the basis of age by requiring job applicants to provide age or date of birth, telling certain applicants that they are "too old" for the position after the applicants disclosed their age, and not hiring these applicants because of their age.

A settlement agreement was reached between the parties on January 20, 2016, for $36,000.

What You Need to Know: A request on the part of an employer for information such as age or date of birth on an employment application form is not, in itself, a violation of the ADEA. However, because the request that an applicant state his or her age may tend to deter older applicants or otherwise indicate discrimination against older individuals, employment application forms that request such information are closely scrutinized. What this case underscores for the employer is that if you require job applicants to provide age or date of birth, be certain that the request is for a permissible purpose and not for purposes prohibited by the ADEA. If you do request that a job applicant provide his or her age or date of birth, it would also be prudent to indicate that the purpose is not one prohibited by the statute by indicating on the application the following statutory prohibition language:

> ***"The Age Discrimination in Employment Act of 1967 prohibits discrimination on the basis of age with respect to individuals who are at least 40 years of age, or by other means. The term 'employment applications,' refers to all written inquiries about employment or applications for employment or promotion including, but not limited to, résumés or other summaries of the applicant's background. It relates not only to written pre-employment inquiries, but to inquiries by employees concerning terms, conditions, or privileges of employment as specified in section 4 of the Act."***

Title VII: An action was instituted in the United States District Court for the Southern District of West Virginia by Plaintiff, the EEOC, against an energy company, alleging national origin discrimination under Title VII. Even though the company is located in West Virginia, the EEOC District Office, which pursued this case, was the Philadelphia District Office, which oversees Pennsylvania, Maryland, Delaware, West Virginia, parts of New Jersey, and Ohio.

In this action, the EEOC alleged that a mine foreman was subjected to pervasive national origin discrimination when supervisory and non-supervisory personnel made degrading comments based on his Polish ancestry, such as "stupid Polack." The EEOC further alleged that the foreman was retaliated against when he was disciplined and ultimately fired from employment after he made a good-faith complaint of discrimination.

good-faith complaint of discrimination.

A settlement agreement was reached between the parties on January 19, 2016, for $62,500.

What You Need to Know: Federal discrimination laws prohibit retaliation against individuals who oppose practices made unlawful by those statutes, including Title VII. To succeed in a retaliation claim, employees generally must establish (1) that they engaged in a protected activity (such as making a good-faith complaint about the discrimination); (2) that they suffered an adverse employment action (such as unfair discipline or termination); and (3) that there is an underlying connection between the protected activity and the adverse action. Retaliation claims often crop up when an employee is subjected to an adverse employment action after being engaged in a protected activity. In particular, disciplinary action raises a red flag if it follows too closely in time to an employee's protected activity. What this case underscores for the employer is the importance of having a workplace anti-discrimination and no-retaliation policy, harassment complaint and investigation procedures, and policies and procedures related to notice-posting, record-keeping, training, reporting, and other requirements. If your establishment does not have such policies and procedures, create and implement one immediately.

Additionally, consider the following in order to protect against claims of retaliation:

- Make sure the employee has foreknowledge of the possible or probable disciplinary consequences of his or her conduct. This is usually accomplished by providing the employee with an employee handbook, which includes rules of conduct and discipline.
- Before administering the discipline, make an effort to discover whether the employee did in fact violate the rules and policies (e.g., conduct an investigation).
- When disciplining or otherwise taking an adverse employment action, make sure that managers follow your discipline procedures fairly and consistently. Managers should not appear to target anyone who has made a discrimination claim or participated in a protected activity.
- Document discipline or adverse employment decisions to show the nondiscriminatory reasons for the actions. You should provide an accurate accounting of any and all non-discriminatory reasons for the decision as well as any steps taken prior to the adverse action (such as counseling sessions and warnings to improve).
- Review disciplinary actions before implementing them. In particular, consider the timing of the discipline to the protected activity, the degree of the discipline administered (e.g., is it reasonably related to the seriousness of the proven offense?), compliance with your establishment's disciplinary procedures, etc.