

EEOC and the Trump Administration

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OUTTEN GOLDEN LLP  
Advocates for Workplace Fairness

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Current Nominees

- Janet Dhillon
  - Executive VP and General Counsel of Burlington Stores, Inc.
  - Previously VP and General Counsel of J.C. Penney and US Airways Group, Inc.
  - National Partnership for Families:
    - Concerns about her ability to protect rights of women and minorities
- Daniel Gade
  - George W. Bush's administration
    - Advisory on veteran's issues, military healthcare and U.S. disability policy
  - National Council on Disability
  - Vocal about harm of disability checks to wounded or disabled military members after they leave service



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Current Nominees Cont'd

- Sharon Gustafson
  - Former Associate at Jones Day
  - Solo practitioner since 1996 who represents both employees and employers
  - Represented Peggy Young against UPS in the case that ended up in the Supreme Court
  - Named Lawyer of the Year by Metropolitan Washington Employment Lawyers Association (2016)
  - J.D., Georgetown Law Center (1991)
  - Federalist Society



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## Office of General Counsel and Litigation

- In FY 2017, EEOC filed 185 cases, up significantly from FY 2016

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## Americans with Disabilities Act (ADA)

- Reassignment as Reasonable Accommodation
  - *EEOC v. St. Joseph's Hospital, Inc.*, 842 F.3d 1333 (11th Cir. 2016) (holding that employers do not need to abandon a so-called "best-qualified" policy for filling vacancies, even as a reasonable accommodation)
  - *E.E.O.C. v. United Airlines, Inc.*, 693 F.3d 760, 761 (7th Cir. 2012) cert. denied, 133 S. Ct. 2734, 186 L. Ed. 2d 192 (U.S. 2013) (holding that "best qualified" policies do not trump the ADA's reassignment-as-reasonable-accommodation obligation)

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## Age Discrimination in Employment Act (ADEA)

- Disparate Impact Claims
  - *Villarreal v. R.J. Reynolds Tobacco Co.*, 839 F.3d 958 (11th Cir. 2016), petition for cert. filed, No. 16-971 (Feb. 2, 2017)
  - *Dale E. Kleber v. CareFusion Corp.*, No. 17-1206, 7th Cir. (argued October 11, 2017) (EEOC did not weigh in)

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## Title VII

- **Discovery and Immigrant Workers**
    - *Castor v. Koch Foods of Mississippi, L.L.C.*, 838 F.3d 540 (5th Cir. 2016) (restricting employer access to employees' U-visa application through discovery)
    - *E.E.O.C. v. Mar. Autowash, Inc.*, 820 F.3d 662 (4th Cir. 2016) (holding that EEOC subpoena on employer seeking information on discrimination against undocumented employee is enforceable)
    - *EEOC v. Phase 2 Invs., Inc.*, 2018 BL 1136566, D. Md., No. 1:17-cv-02463, 4/17/18

## Title VII: Race Discrimination

- *EEOC v. Catawba Mgmt. Sols.*, No. 14-13482, 2016 WL 7210059 (11th Cir. Dec. 13, 2016) (refusing to hire applicant with dreadslocks is not race discrimination)
  - On December 5, 2017, the 11th Circuit refused to rehear the matter en banc. This triggered a sharp exchange between Judge Adalberto Jordan, who wrote the panel decision, and Judge Beverly Martin, who urged rehearing. Judge Martin said ... (876 F.3d 1273, 2017 WL 6015374, 11th Cir. Dec. 13, 2017)
  - It isn't hard to see why an immutable-trait requirement has no place in the race-discrimination context. The doctrine presumes that there are immutable, or naturally-occurring physical differences between racial groups. This, even though, both the academy and the courts have long rejected the notion that racial divisions are based on biological differences
  - The panel actually says that while dreadslocks, a "black hairstyle," is a "mutable choice" and therefore not protected, an Afro, "black hair texture," is an "immutable characteristic" and therefore protected. This is beyond the plain text's power to alter, id. at 1029 (quotation omitted), thus neither dreadslocks nor Afros are immutable traits of black people. Like any hair style, both can be altered

# EEOC and LGBT Issues

- *Macy v. Dep't of Justice*, EEOC Appeal No. 0120120821 (Apr. 20, 2012): The Commission ruled that employment discrimination against employees because of their gender identity, or because of their gender transition or intent to transition, is sex discrimination that violates Title VII.
  - *Baldwin v. Department of Transportation*, EEOC Appeal No. 0120133080: Baldwin alleged that the Federal Aviation Agency (FAA) discriminated against, harassed, and refused to promote him on the basis of his sexual orientation. EEOC issued a ruling stating allegations of discrimination on the basis of sexual orientation always and necessarily state claims of discrimination on the basis of sex, and violate Title VII.
  - *EEOC v. Scott Med. Health Ctr.*, P.C., No. CV 16-225, 2016 WL 6569233, at \*1 (W.D. Pa. Nov. 4, 2016): EEOC filed the U.S. government's first sex discrimination lawsuit based on sexual orientation. District Court judge said discrimination based on sexual orientation constitutes sex stereotyping prohibited by law.
  - *Evans v. Georgia Regional Hospital*, No. 15-15234 (11th Circuit 2017). Evans, a lesbian, sued her employer, alleging that she endured hostility and harassment in the workplace in violation of Title VII. 11th Circuit held that Title VII does not prohibit anti-gay discrimination.
  - *Christiansen v. Omnicom Grp.*, Inc., 167 F. Supp. 3d 598 (S.D.N.Y. 2016). 2nd District found that Christiansen could pursue a claim of sex discrimination under Title VII of the Civil Rights Act of 1964, which bars sex stereotyping against employees who do not conform to gender norms. Chief Judge Robert Katzmann authors separate to explain why Title VII *always* prohibits employment discrimination on the basis of sexual orientation

## EEOC and LGBT Coverage Cont'd

*Hively v. Ivy Tech*, No. 3:14-cv-1791 (7<sup>th</sup> Circuit April 4 2017)

- Chief Judge Diane P. Wood: "Hively's claim is no different from the claims brought by women who were rejected for jobs in traditionally male workplaces, such as fire departments, construction, and policing. The employers in those cases were policing the boundaries of what jobs or behaviors they found acceptable for a woman (or in some cases, for a man)."
- Judge Richard Posner, Concurring Opinion: "It has taken our courts and our society a considerable while to realize that sexual harassment, which has been pervasive in many workplaces (including many Capitol Hill offices and, notoriously, Fox News ...), is a form of sex discrimination."
- Judge Diane Sykes, Dissenting Opinion: "However welcome today's decision might be as a policy matter, it comes at a great cost to representative self-government... Today the court jettisons the prevailing interpretation and installs the polar opposite. Suddenly sexual-orientation discrimination is sex discrimination and thus is actionable under Title VII. What justification is offered for this radical change in a well-established, uniform interpretation of an important—indeed, transformational—statute?"

## EEOC and LGBT Coverage Cont'd

*Zarda v. Altitude Express*, No. 15-3775 (2d Cir. 2018). The Second Circuit, sitting en banc, held that sexual-orientation discrimination claims are cognizable under Title VII's prohibition against sex discrimination.

- Chief Judge Katzmann, writing for the 10-3 majority, reasoned sexual orientation discrimination is motivated, at least in part, by sex and is thus a subset of sex discrimination." To "identify the sexual orientation of a particular person," an employer must "know the sex of the person and that of the people to whom he or she is attracted." He further reasoned that sex stereotyping theory also supports coverage because homosexuality "represents the ultimate case of failure to conform to gender stereotypes"—the expectation that men only date women, and women only date men. Finally, this principle of "associational discrimination" applies to race and sex, and an employee who suffers discrimination because of his associations with a partner of the same-sex has experienced illegal sex discrimination.
- Judge Lynch, in dissent, viewed the original intent of Title VII, the inclusion of "sexual orientation" in state law provisions, as the failure of Congress to include similar language in the context of structural history. According to Judge Lynch, gender stereotyping did not apply because the discrimination is not dependent on how men or women are supposed to behave, but rather that, in general, people should behave in a heterosexual manner.

## EEOC and LGBT Coverage Cont'd

*E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 2018 WL 1177669, (6th Cir. 2018). The Sixth Circuit held that gender identity discrimination is covered by Title VII's prohibition against sex discrimination. The court held that these protections extend beyond sex stereotyping as held by the district court and constituted a form of sex discrimination per se.

- The Sixth Circuit also reversed the district court's decision finding the Defendant had a defense under the Religious Freedom Restoration Act. The Court held that the employer was not substantially burdened by the EEOC's action and that neither tolerating the employment of a transgender employee nor concerns about customer backlash were sufficient to establish burden. Further, even if burdened, the government's interest in eradicating sex discrimination is sufficiently compelling and the least restrictive way to further this interest is to ensure employer non-discrimination.

# EEOC Pay Data Tool

## EEO-1 Initiative

- Starting March 2018: EEOC planned to collect summary employee pay data from private employers with 100 or more employees
  - 60,886 employers were covered
  - 63 million employees
- August 29, 2017: OMB suspended collection of pay data
  - Acting Chair Lipnic: pay data tool is "the poster child for the kind of regulation that the president campaigned against"
  - New requirement caused an unnecessary burden
  - Highly aggregated data from individual employer would not be very helpful in identifying unlawful pay discrimination
- Employers still have to file EEO-1 forms with traditional information (race, sex, and ethnicity of employees by numbers)

## Litigation

- NWLC v. OMG*, No. 1:17-cv-02458 (D.D.C. 2017)
  - Violation of APA and PRA; seeks reinstatement
  - "attack on women and working families turns back the clock on equity in the workplace, and empowers the 60,886 employers covered by the pay rule—who collectively employ 63 million workers—to shield race and gender pay gaps from scrutiny"

# 2012 Background Screen Policy

# Rule on Wellness Programs

## Select Taskforce on Harassment

- Headed by acting Chair Victoria Lipnic and Commissioner Chai Feldblum
- Examined workplace harassment & recommended ways to prevent and address it
- Report includes recommendations on:
  - Anti-harassment compliance training
  - Anti-harassment workplace policies
  - Workplace civility and bystander intervention
- Work has concluded

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## Proposed Enforcement Guidance on Unlawful Harassment

- The proposed guidance, which is the product of extensive research, analysis, and deliberation, explains the legal standards applicable to harassment claims under federal employment discrimination laws. The laws enforced by EEOC protect individuals from harassment based on race, color, religion, sex, national origin, disability, age, or genetic information
- Submitted for public comment in January 2017
- Acting Chair Victoria Lipnic says it will likely be issued soon

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## Questions?

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