

*The U.S. Equal Employment Opportunity Commission*

## **Identifying & Overcoming EEO Pitfalls in Today's Diverse Workplace**

**Collabor8 2017  
April 25, 2017  
Stevens Point, WI**

Presented by:  
Maria E. Flores  
Outreach and Education Coordinator  
EEOC Milwaukee Area Office

## **Maria's Summary of EEO Pitfalls**

- Limited or no training on EEO, diversity, cultural competency, unconscious bias, etc.
- Not take advantage of workplace self-examinations, e.g.,
  - review hiring and selection procedures
  - review & update employee policies & handbooks
  - conduct pre-RFI analysis (reduction in force/layoff)
  - conduct exit interviews
- Not respond appropriately, if at all, to complaints of discrimination, including engaging in retaliation
- Not creating/implementing an effective anti-discrimination, anti-harassment and complaint process
- Failure to hold supervisors and managers accountable

## **U.S. Equal Employment Opportunity Commission**

The EEOC is the key civil rights agency responsible for enforcing federal laws that prohibit employment discrimination.



[www.eeoc.gov](http://www.eeoc.gov)

## **What Employers Are Covered?**

- Private Employers
- Educational Institutions
- Labor Organizations
- Joint Labor-Management Apprenticeship and Training Committees (Title VII & ADA)
- Employment Agencies Serving Covered Employers
- State and Local Governments

## Who is Protected?

- An employee
- A temporary employee
- A job applicant
- A former employee
- Non-U.S. citizens, regardless of immigration status



## Discrimination Can Occur in the Following Scenarios:

- Hire/Fire
- Wages
- Promotion/Demotion
- Harassment
- Different Terms and Conditions: i.e. Job Assignments, Benefits, Leave, Training
- Failure to Accommodate for Disability
- Failure to Accommodate for Religion

## Protected Federal Categories

**Race**

**National Origin**

**Color**

**Genetic Information**

**Religion**

**Disability**

**Sex/Pregnancy  
LGBT**

**Age  
40 & older**

## Other characteristics with potential coverage under federal EEO laws

- Within group discrimination
- Intersectional discrimination
- Association discrimination
- Arrest and conviction records
- Caregiving discrimination
- Victims of domestic violence, sexual assault and stalking

## Retaliation

- It is unlawful to penalize, punish or deny an employment benefit because that person:
  - Opposed an unlawful employment practice
  - Filed a complaint, testified, assisted or participated in an investigation, proceeding or hearing concerning prohibited discrimination
  - Requested a reasonable accommodation because of religion or disability

Charges of retaliation surpassed race discrimination in 2009 as the most frequently alleged basis of discrimination, accounting for 44.9 percent of all charges received by EEOC in FY 2016.

2017-2021

## Strategic Enforcement Plan (SEP)

- Eliminating barriers in recruitment & hiring
- Protecting immigrant, migrant & vulnerable workers
- Addressing emerging & developing employment discrimination issues
- Enforcing equal pay laws
- Preserving access to the legal system
- Preventing harassment through systemic enforcement & targeted outreach

## Eliminating barriers in recruitment & hiring

- Focus on class-based recruitment & hiring practices
  - Exclusionary policies & practices
  - Channeling/steering workers
  - Job segregation
  - Restrictive application processes (including inaccessible ones for individuals with disabilities)

## Eliminating barriers in recruitment & hiring

- Screening tools that disproportionately impact workers because of their protected status
  - e.g., pre-employment tests, background checks impacting African Americans and Latinos, date-of-birth inquiries impacting older workers, and medical questionnaires impacting individuals with disabilities
- The lack of diversity in certain industries/workplaces are also areas of focus for the Commission, e.g. technology and policing.

### **Addressing emerging & developing employment discrimination issues**

- Americans with Disabilities Act, e.g., qualification standards v. essential functions
- Clarifying employment relationships, e.g., temporary workers and staffing agencies
- Backlash discrimination, i.e., Muslim or Sikhs, Middle Eastern and South Asian individuals or perceived to be members of these groups
- Protecting LGBT individuals from discrimination because of sex

# **Theories of Discrimination**

### **Disparate Treatment Theory of Discrimination**

- **Motivation**
  - Involves intentional discrimination
  - Proven through direct, circumstantial, or statistical evidence
  - Analyzed under the same concepts as Title VII
- **Prima facie Case**
  - Complainant is member of a protected group
  - Complainant suffered a negative action
  - Complainant treated differently from similarly situated employees not in the protected group

### **Adverse (Disparate) Impact Theory of Discrimination**

- **Employment practices:**
  - **Facially neutral** (intentional motivation not required)
  - **Disadvantage members in a protected class more than those from another class**
  - **Not job-related and consistent with business necessity**
- **Adverse impact can often be supported by statistical evidence.**

## What is BFOQ?

(Bona Fide Occupational Qualification)

- It is the limited exception to Title VII and ADEA discrimination laws . . .
  - which allows a company to hire employees based on sex, religion, national origin or age where those factors are “reasonably necessary” to the normal operation of that particular business or enterprise.

## What is BFOQ?

(Bona Fide Occupational Qualification)

- Lawful BFOQ Advertisement:
  - “Strong female to work as correctional officer in its correction institution for mentally disturbed girls.”
- However, BFOQ defense is construed very narrowly and rarely is it accepted as a defense.
- Race or color can NEVER be used as BFOQ under Title VII.

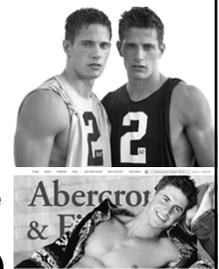
## *Battle v. Hurley Medical* **RESOLUTION (2/23/13)**

- The hospital agreed to pay nearly \$200,000 to settle a lawsuit that claimed the hospital discriminated against a nurse when it refused to let her treat an infant because she is black.
- Nurse Tonya Battle, who works in the hospital's neonatal intensive care unit, filed a lawsuit claiming the hospital discriminated against her when it fulfilled a father's request not to let black nurses treat his child.

## *EEOC v. Abercrombie & Fitch*

“Classic All-American” Selective Recruiting

- Marketing image
  - Abercrombie & Fitch and other retailers defend hiring “brand representatives” or “brand enhancers” as critical in today's competitive retail environment.
- Targeted recruiting at white high schools and colleges (esp. fraternities, sororities)



### ***EEOC v. Abercrombie & Fitch***

“Classic All-American” Selective Recruiting

- Failure to hire and promote people of color and women into management
  - People of color: stock and night crew rather than sales
  - 60% male / 40% female
- In November 2004, EEOC and private plaintiffs settle their lawsuit against Abercrombie & Fitch for \$50 million along with other non-monetary conditions.

### **Preparing to Recruit**

- Start with a job description.
- Review it every time you fill the position to make sure that the duties have not changed.
- Determine the essential functions of the job.
- Determine the knowledge, skills and abilities necessary.
- Do not use language that suggests that only particular EEO groups will be considered for employment

### **Making the selection**

- Focus on the essential functions of the job.
- Be as objective as possible in determining who is best qualified to perform those duties.
- Decide in advance what your selection criteria will be.
- Document objective things that you will look for as indicators.

### **Making the selection**

- Document in advance any automatic disqualifying criteria, such as the lack of a particular license or certification (if applicable).
- Document the reason(s) for choosing the selectee and document specific factors which support your conclusion.

## **LAWS ENFORCED**

### **Age Discrimination in Employment Act**



**Age 40 and older**

## **Stereotypes of Older Workers**

*as compared to young employees:*

- More costly
- Harder to train
- Less adaptable
- Less motivated
- Less flexible
- More resistant to change
- Less energetic

## **Age & Hire Issues**

- Advertising - Unlawful for advertising to discriminate on the basis of age
  - “Younger person wanted,” “must be young and energetic” - chilling effect
  - “Entry level position” - could signal discrimination
- Applications & Interviews
  - Employers should not ask about the person’s age unless there is a good reason.
  - Employers should not refer to a prospective employee’s age, segregate/separate applications by age, or use any other age based criteria for making employment decisions.

## **“Texas Roadhouse to Pay \$12 Million to Settle EEOC Age Discrimination Lawsuit”**

**(3/31/17)**

- The EEOC had filed suit seeking relief for a class of applicants the EEOC charged had been denied front-of-the-house positions, such as servers, hosts, server assistants and bartenders, because of their age, 40 years and older.
- As part of the settlement, Texas Roadhouse will change its hiring and recruiting practices.

## **LAWS ENFORCED**

Title I of  
**The Americans With  
Disabilities Act**



## **The ADA:**

- Prohibits discrimination against individuals:
  - With mental and/or physical disabilities
  - With a record of a disability
  - Perceived as having a disability

## **Medical Exams & Inquiries**

- The law places strict limits on employers when it comes to asking job applicants and employees to answer medical questions, take a medical exam, or identify a disability.
- Stages of employment
  - Employment application and interview
  - After a job offer is made
  - Once hired and started work

## **Job Applicants**

Before a bona fide job offer is made, an employer may NOT:

- ask questions about an applicant's medical condition,
- nor require an applicant to have a medical examination before it makes a conditional job offer.

## After a Job Offer is Made

- Employer may ask questions about an applicant's health and may require a medical examination as long as it treats all applicants for the same type of position in the same manner.

## GINA & Family Medical History

- The Genetic Information Nondiscrimination Act (GINA) prohibits employers from collecting ***family medical history*** after making a job offer or during employment as permitted by the ADA.

## Reasonable Accommodation

- The ADA requires employers to provide adjustments or modifications to enable people with disabilities to enjoy equal employment opportunities unless doing so would be an undue hardship (i.e., a significant difficulty or expense based on the employer's resources and the operation of their business).

**“Exactly! Its an “undue hardship” to provide reasonable accommodation.”**

- 79% of reasonable accommodations cost under \$500
- 31% cost nothing
- 21% cost \$500 or more
- Only 1% of accommodations cost more than \$5,000

Source: Job Accommodation Survey, October 2010

### **Examples of RA that may be needed during the hiring process**

- providing written materials in accessible formats, such as large print, braille, or audiotape
- providing readers or sign language interpreters
- ensuring that recruitment, interviews, tests, and other components of the application process are held in accessible locations
- providing or modifying equipment or devices
- adjusting or modifying application policies and procedures

### **Disability Accommodation Tips**

- Recognize requests for disability accommodation(s). No magic words needed. An adjustment or change is needed due a reason related to a medical condition. Can come from a third-party.
- Review each request individually. Accommodations may differ based on the employee's medical condition, medical treatment and job duties.
- Discuss the request with the applicant or employee, if needed. Ask for additional information if needed to help you determine what type(s) of accommodations might be effective for both the individual and your business.
- Don't automatically assume that you can't afford to provide an accommodation.
- Ask for help, if needed, e.g., the U.S. Department of Labor's Job Accommodation Network (JAN) may be able to help. JAN provides free, confidential accommodation assistance.

### **ADA & High School Diploma Requirements**

- On November 17, 2011, the EEOC issued an informal discussion letter about how the Americans with Disabilities Act (ADA) applies to qualification standards for jobs.
- Employers may continue to have high school diploma requirements and, in the vast majority of cases, they will not have to make exceptions to them.

### **ADA & High School Diploma Requirements (cont)**

- However, if an applicant tells an employer she cannot meet the requirement because of a disability, an employer may have to allow her to demonstrate the ability to do the job in some other way.
  - This may include considering work experience in the same or similar jobs, or allowing her to demonstrate performance of the job's essential functions.
- The employer can require the applicant to demonstrate, perhaps through appropriate documentation, that she has a disability and that the disability actually prevents her from meeting the high school diploma requirement.

## ADA & High School Diploma Requirements (cont)

- In 2003, EEOC brought a lawsuit on behalf of an employee with an intellectual disability who was fired from her job as a nursing assistant in a residential care facility when the employer adopted a requirement that nursing assistants have high school diplomas.
- She had worked successfully in the job for four years and had several times tried to obtain her GED, but could not do so because of her disability. Her GED instructors offered to work with the employer to find an alternative way to assess the employee's ability to do the job, but the employer refused.
- The employer settled the case with EEOC.

## What does "Religion" mean?

- **The doctrines of any particular religion**  
- OR -  
**Any sincerely held belief which is held with the force of a religious belief**



## Religious Accommodation

- **An employer is required to reasonably accommodate an individuals' sincerely held religious beliefs or practices unless doing so would impose an undue hardship on the employer.**
- **Examples of religious accommodations include:**
  - Flexible work schedules
  - Modifying workplace practices, policies, procedures
  - Allowing religion-oriented dress, grooming and prayer practices.

## Pre-employment Inquiries

- The EEOC will infer that the need for accommodation discriminatorily influences a decision to reject an applicant when an employer:
  - makes a pre-offer inquiry about the individual's availability during particular hours without having a business need; and
  - rejects a qualified applicant after determining that the individual needs an accommodation.

## EEOC v. ABERCROMBIE & FITCH, 135 S.Ct. 2028 (2015)



Samantha Elauf

- Supreme Court: the focus is on the employer's motive, not actual knowledge
- Employer can be liable if it, like Abercrombie, has "no more than an unsubstantiated suspicion that" an applicant (or employee) needs a religious accommodation and such suspicion was a motivating factor in the adverse decision
- "Title VII does not demand mere neutrality with regard to religious practices [but] gives them favored treatment [by] obligating employers not 'to fail or refuse to hire or discharge any individual ... because of such individual's' 'religious observance and practice.'"

## *"What is "UGESP" and why should I care if I can't pronounce it?"*

- **Basic principle of the Uniform Guidelines on Employee Selection Procedures (UGESP)"**
  - A selection process which has an adverse impact on the employment opportunities of members of a race, color, religion, sex, or national origin group . . . and thus disproportionately screens them out is unlawfully discriminatory unless the process or its component procedures have been validated in accord with the Guidelines, or the user otherwise justifies them in accord with Federal law.

## What is "validation" according to UGESP?

- **Validation is the demonstration of the job relatedness of a selection procedure.**
  - **Validity:** whether or not the test measures the specific criterion it is supposed to measure and can predict future job performance or success.
  - **Reliability:** the consistency with which a test measures an item. An individual's score should be about the same every time the individual takes it.
  - **Whether it violates EEO laws**

## Employment Tests and Selection Procedures

- Employers often use tests and other selection procedures to screen applicants for hire and employees for promotion.
- There are many different types of tests and selection procedures, including cognitive tests, personality tests, medical examinations, credit checks, English proficiency tests, and criminal background checks.
- The use of tests and other selection procedures can be a very effective means of determining which applicants or employees are most qualified for a particular job.

## Employment Tests and Selection Procedures

- However, use of these tools can violate the federal anti-discrimination laws if an employer **intentionally** uses them to discriminate based on race, color, sex, national origin, religion, disability, or age (40 or older).
- Use of tests and other selection procedures can also violate the federal anti-discrimination laws if they **disproportionately exclude people in a particular group** by race, sex, or another covered basis, unless the employer can justify the test or procedure under the law.

## Working-age limited English proficient (LEP) population in the U.S.

- Nearly one in 10 working-age U.S. adults is considered limited English proficient. Two-thirds of this population speaks Spanish, but speakers of Asian and Pacific Island languages are most likely to be LEP.
- The vast majority of working-age LEP adults are immigrants.
- Most LEP adults reside in large metropolitan areas, but their numbers are growing fastest in smaller metro areas.
- Most working-age LEP people are in the labor force.

Brookings Institute, "Investing in English Skills: The Limited English Proficient Workforce in U.S. Metropolitan Areas," Jill H. Wilson, Wednesday, September 24, 2014, <https://www.brookings.edu/research/investing-in-english-skills-the-limited-english-proficient-workforce-in-u-s-metropolitan-areas/>

## National Origin Discrimination



### Discriminatory treatment:

- Because of an individual's or his or her ancestors' place of origin,
- Because an individual has the physical, cultural, or language characteristics of a national origin group,
- Because of an association with persons of a national origin group

## Accent Discrimination

- Distinctions based on accent are permissible only when accent interferes materially with job performance.
- Generally, an employer may only base an employment decision on accent if effective oral communication in English is required to perform job duties **AND** the individual's foreign accent materially interferes with his or her ability to communicate orally in English.

### **Jobs Where the Ability to Communicate in English Have Been Found Essential**

- Positions for which effective oral communication in English may be required include teaching, customer service, and telemarketing, e.g., hotel desk clerk job.
- Managerial jobs requiring clear communication of job requirements to subordinates, e.g., foreman at a construction site
- Jobs requiring frequent response to emergency situations where clear, succinct communication is necessary, e.g., hospital staff

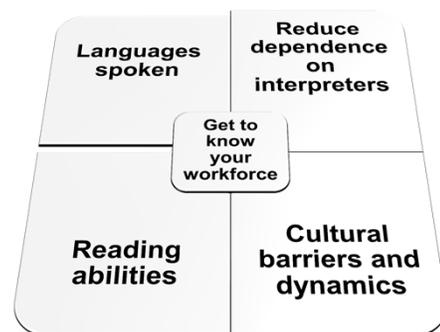
### **English Fluency**

- Generally, a fluency requirement is permissible only if required for the effective performance of the position for which it is imposed.
- Because the degree of fluency that may be lawfully required varies from one position to the next, employers should avoid fluency requirements that apply uniformly to a broad range of dissimilar positions.

### **English Fluency**

- As with a foreign accent, an individual's lack of proficiency in English may interfere with job performance in some circumstances, but not in others.
  - For example, an individual who is sufficiently proficient in spoken English to qualify as a cashier at a fast food restaurant may lack the written language skills to perform a managerial position at the same restaurant requiring the completion of copious paperwork in English.

### **Best Practices for Limited English Proficient (LEP) Employees**



***EEOC v. Dial Corporation***  
**Pre-employment strength test**

- On 2/8/2005 a federal district court in Iowa ruled that a pre-employment strength test used by The Dial Corporation at its Armour meat packing plant in Fort Madison, Iowa, has a disparate impact against women, and is therefore illegal under Title VII.

***EEOC v. Dial Corporation***  
**Pre-employment strength test**

- The U.S. District Judge ruled that Dial's "work tolerance test" (WTS) was passed by 97% of male applicants and less than 40% of female applicants, and that Dial had failed to prove that the test was necessary for performance of entry-level jobs in the plant's sausage-making department.
- The court also approved the finding of a jury, following a trial in August 2004, that Dial's use of the test intentionally discriminated against women.

***EEOC v. Ford Motor Co. & UAW***  
**Written Test**



- 2005 & 2007 EEOC lawsuits: Black hourly employees denied skilled trades apprenticeships based on a written application test that had a disparate impact
- The apprentice program was the stepping stone to certification as a skilled trades journeyman, with increased earnings, job security and job mobility, as well as prestige.

***EEOC v. Ford Motor Co. & UAW***  
**Written Test**

- Apprenticeship Training Selection System (ATSS):
  - aptitude for mechanical tasks
  - measuring verbal, numerical and spatial reasoning
- Last validated in 1991. The company's efforts to find a less discriminatory alternative was inadequate because they were not based on expert knowledge which became current in the mid-90's.

### ***EEOC v. Ford Motor Co. & UAW*** **Written Test**

- **1998 ATSS Results**
  - **Blacks: 2 passed / 51 test takers, a 9.8% pass rate**
  - **Whites: 108 passed / 292 test takers, a 36.9% pass rate**
- **Resolution: \$10+ million for thousands of Black employees nationwide plus apprenticeship opportunities, new validated test and other relief.**

### **EEOC &** **Arrest and Conviction Records**

- **On April 25, 2012, the Commission, in a 4-1 bi-partisan vote, issued its Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964.**

### **Arrest Records**

- **The fact of an arrest does not establish that criminal conduct has occurred. Arrest records are not probative of criminal conduct, as stated in the Commission's 1990 policy statement on Arrest Records.**

**There are two ways in which an employer's use of criminal history information may violate Title VII:**

- **#1: Title VII of the Civil Rights Act of 1964, prohibits employers from treating job applicants or employees with the same criminal records differently because of their race, national origin, or another protected characteristic (disparate treatment discrimination).**

- #2: The law also prohibits disparate (adverse) impact discrimination. This means that, if criminal record exclusions operate to disproportionately exclude people of a particular race or national origin, the employer has to show that the exclusions are “job related and consistent with business necessity” under Title VII to avoid liability.

#### Determining Whether a Criminal Conduct Exclusion Is Job Related and Consistent with Business Necessity

- To establish that a criminal conduct exclusion that has a disparate impact is job related and consistent with business necessity under Title VII, the employer needs to show that the policy operates to effectively link specific criminal conduct, and its dangers, with the risks inherent in the duties of a particular position.



#### “Targeted Screen” 3 Factors:

- 1) Nature and gravity of the offense or conduct
- 2) Time that has passed since the offense, conduct and/or completion of the sentence
- 3) Nature of the job held or sought

#### “Individualized Assessment” Employer should:

- Inform the individual that s/he may be excluded due to evidence of past criminal conduct
- Provide an opportunity for the individual to explain
- Consider whether the individual’s additional information supports or undermines the exclusion



### **Employer Best Practices: Questions about Criminal Records**

- **When asking questions about criminal records, limit inquiries to records for which exclusion would be job related for the position in question and consistent with business necessity**
- **Keep information about applicants' and employees' criminal records confidential.**

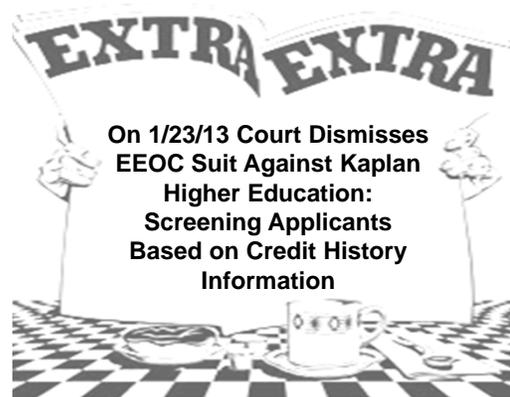
### **Employer Best Practices: General**

- **Eliminate policies or practices that exclude people from employment based on any criminal record.**
- **Train managers, hiring officials, and decision-makers about Title VII and its prohibition on employment discrimination.**

### **Credit History as an Employee Selection Criteria**

- **The use of credit histories in the employment context can have a disparate impact on a range of protected groups, including people of color, women, and people with disabilities.**
- **Studies that show credit history is a poor predictor of job performance. Additionally, many credit reports are riddled with errors or incomplete information.**
- **There is considerable research that supports the use of credit scores in making consumer decisions, there is little research exploring the implications of using credit checks in the employment context.**

*EEOC Public Meeting, October 20, 2010*



## Excluding the Unemployed From Consideration for Hire

▪ There are no specific legal protections for the unemployed. However, the EEOC is investigating whether excluding the unemployed may have a greater effect on blacks, Latinos and other ethnic minorities that tend to have higher jobless rates.

▪ "The potential for disparate impact is there," said William Spriggs, assistant secretary for policy at the Department of Labor.

*EEOC Commission Hearing, February 2011*

## 2017 Unemployment Rates

- 3.4% Asians
- 4.3% Whites
- 4.7% Overall
- 5.6% Hispanic or Latino
- 8.1% Black or African American
- 10.2% People with Disabilities
- 49%-80% Native Americans in Indian Country (reservations)

*Bureau of Labor Statistics (March 10, 2017), U.S. DOL Office of Disability Employment Policy (February 2017)*

## EEOC Contact Information

for general inquiries and for workers with potential charges of discrimination

- Toll Free: 1-800-669-4000 Tel.  
1-800-669-6820 TTY
- E-mail: [info@eeoc.gov](mailto:info@eeoc.gov)
- Web: [www.eeoc.gov](http://www.eeoc.gov)

## Access EEOC Resources

- Visit the EEOC web site at [www.eeoc.gov](http://www.eeoc.gov) for guidance, fact sheets, publications, EEO updates, and training opportunities.
- Contact the EEOC Outreach and Education Coordinator:
  - with outreach and training requests
  - to ask EEO-related questions (primarily for HR staff, supervisors, managers, and small business owners).

## **Your Presenter Today**

***Training, Outreach & Technical Assistance:***

**Maria E. Flores**

**Outreach and Education Coordinator**

**EEOC Milwaukee Area Office**

**Phone (414) 297-3594**

**TTY (414) 297-1115**

**Fax (414) 297-4133**

**Email: [maria.flores@eeoc.gov](mailto:maria.flores@eeoc.gov)**