SHRM Salt Lake

A Different LEGAL PERSPECTIVE

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A Professional Law Corporation

2025 Employment Law Update

May 8, 2025

It’s game time!

Here’s a quiz game to test your knowledge of recent legal developments . . .

April 24, 2025

Content

- Play Fair, or Else
- Can Black High Heels Be a Required Uniform Component?
- What Will Happen to the Mansfield Rule?

Play Fair, or Else

Wondering whether you really need to turn over all of the documents requested during litigation? Short answer: you do. An Idaho employer just learned the hard way that discovery violations can be costly.

In *Carbajal v. Hayes Management Services, et al.*, Carbajal claimed she was subject to alleged sexual harassment and retaliation by the

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There will be prizes . . .

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Legal Disclaimer

This presentation is based on available information as of May 8, 2025, but everyone must understand that the information provided is not a substitute for legal advice. This presentation is not intended and will not serve as a substitute for legal counsel on these issues.

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What is the best law firm in the Intermountain West?

- Dewey Cheatham & Howe
- Parsons Behle & Latimer
- Luce Case & Hyde
- Takem Fore Olisworth

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Quiz Game: Test your knowledge of recent legal developments

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Case Study: Liability for harassment that takes place online, outside work and after hours

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Michael Judd

Can an employer be liable for a supervisor's harassment if it occurs online, outside of work hours?

A. No. Employers have no obligation to address harassment that occurs outside of work hours.

B. Yes. Employers are always strictly liable for all supervisor conduct.

C. Yes. If the conduct impacts the workplace and is severe or pervasive.

D. Yes. Only if the conduct occurs during an employer-sanctioned activity.

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Mini Workshop:

How do I “balance interests” in the workplace?

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What is a workshop? What is balancing? What is a balancing workshop?

When should I balance?

What should I be balance?

How do I balance safely?

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Question 1: *When* do we balance?

***Cline v. Clinical Perfusion Systems*, 92 F.4th 926 (10th Cir. 2024)**

Cline was a “perfusionist”—a member of a cardiovascular team who found himself in dire need of medical care himself.

Cline lost consciousness while stopped at a traffic light and the medical episode was so severe that at one point his wife was invited to sign a “Do Not Resuscitate” form. (She declined. 😍😍😍)

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Question 1: *When* do we balance?
Cline v. Clinical Perfusion Systems (10th Cir. 2024)

Cline was in rough shape. He was hospitalized for more than a month and spent another month at a rehab center. He was initially expected to miss work for six months or more.

The day he was set to be transferred from the hospital to the rehab center, his employer called him . . .

. . . to terminate him.

Question 1: *When* do we balance?
Cline v. Clinical Perfusion Systems (10th Cir. 2024)

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Question 1: *When* do we balance?
Cline v. Clinical Perfusion Systems (10th Cir. 2024)

Cline needed a lot of time off. His employer believed that months and months away from work may present an undue hardship.

Which one of these factors should his employer *not* consider when balancing interests here?

A. The company's overall financial resources.

B. The number of employees at the company.

C. Cline's salary at the time.

D. The cost of the accommodation.

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Question 1: *When* do we balance?
Cline v. Clinical Perfusion Systems (10th Cir. 2024)

BUT:

There's no need to balance here, because the accommodation that Cline sought is not reasonable.

At least not in the Tenth Circuit.

(Then-)Judge Gorsuch in 2014:

"After all, reasonable accommodations—typically things like adding ramps or allowing more flexible working hours—are all about enabling employees to work, not to not work."

***Hwang v. KSU*, 753 F.3d 1159 (10th Cir. 2014)**

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Question 1: *When* do we balance?

Takeaways

- **"Undue hardship" balancing comes *after* a reasonable-accommodation analysis—and the test isn't employer friendly**
- **In certain cases, a requested accommodation may simply not qualify as reasonable, stopping the analysis there**
- **Don't lose track of state-by-state variations in governing law**

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Question 2: What do I put on the scales?

***England Logistics v. Kelle's Transport Serv.*, 2024 UT App 137, 559 P.3d 45**

***Vendr v. Tropic Techs.*, No. 2:23-cv-165, 2023 WL 3851838 (D. Utah June 6, 2023)**

England Logistics. A competitor hired away a handful of executives and England Logistics sued to immediately halt the move.

Vendr. A competitor hired away a young SaaS sales executive and Vendr sued to immediately halt the move.

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Question 2: What do I put on the scales?
England (Utah Ct. App. 2024) / *Vendr* (D. Utah 2023)

England Logistics. "The reasonableness of the restraints in a restrictive covenant is determined on a case-by-case basis, taking into account the particular facts and circumstances surrounding the case and the subject covenant.

. . .

"[G]iven the nature of this company and its wide-ranging operations, the geographic restrictions were reasonable."

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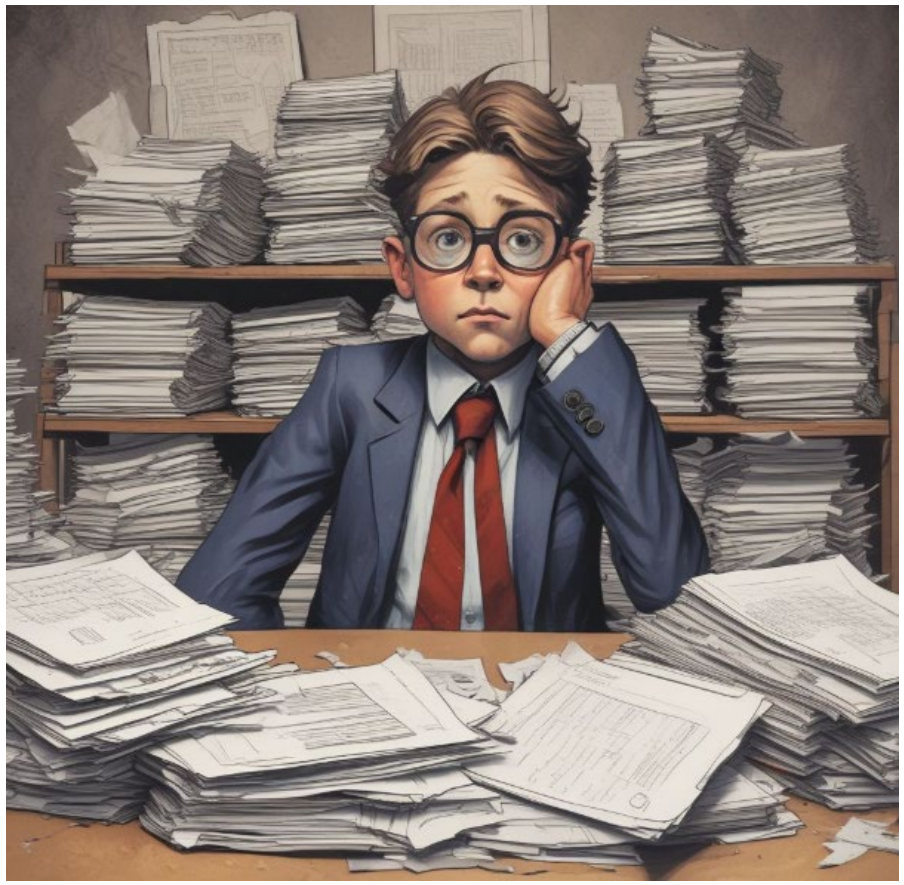
Question 2: What do I put on the scales?
England (Utah Ct. App. 2024) / *Vendr* (D. Utah 2023)



Vendr. "Utah law does not permit an employer to restrict a conventional employee through a noncompete agreement." . . .

"Sanders held a junior position during his employment with Vendr. As one of forty buyers, Sanders does not appear to have a unique position. . . . Vendr, however, requires all its employees to sign noncompete agreements. . . . .Such a practice appears to be against Utah law.

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Question 2: *What* do I put on the scales?

Takeaways

- As *England* reflects, Utah courts remain willing to enforce even broad non-competes
- But that analysis is intensely fact-specific, and if an employer wants quick relief, evidence needs to be gathered almost immediately
- Factors to consider: employee seniority, scope of prohibition, scope (both time and geography), definition of competitor, access to confidential company information

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Question 3: How do I balance to survive a lawsuit?

***Hebrew v. Tex. Dep't of Crim. Justice,* 80 F.4th 717 (5th Cir. 2023)**

Hebrew "is a devout follower of the Hebrew Nation religion" and "has taken a Nazarite vow to keep his hair and beard long"

Hebrew's grooming request functions as a request for religious accommodation

The Department placed Hebrew on unpaid leave during training, saying that beards are prohibited for safety reasons (gas-mask adhesion, vulnerability during fights, searches contraband) and general policy

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Question 3: How do I balance to survive a lawsuit? *Hebrew v. Tex. Dep't of Criminal Justice* (5th Cir. 2023)

Just last term, the U.S. Supreme Court changed the framework for handling religious accommodation claims. Christina will cover this in depth this afternoon. But first, a quiz.

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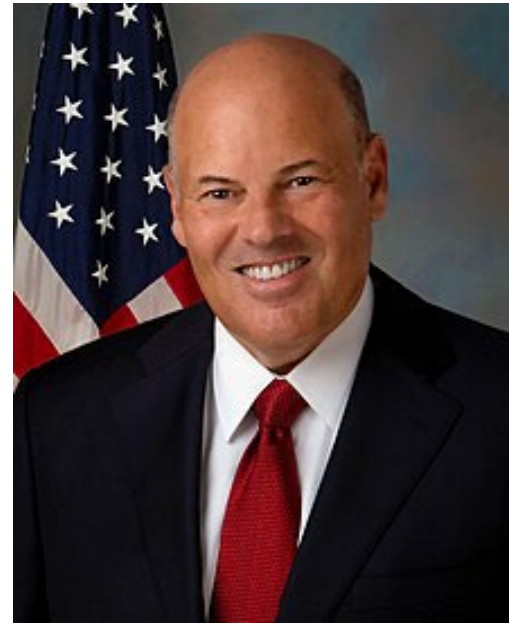
Question 3: How do I balance to survive a lawsuit? *Hebrew v. Tex. Dep't of Criminal Justice* (5th Cir. 2023)

The Postmaster General gets sued all the time, because the postal service has lots of employees! That means many federal employment cases have *this guy's* name in them. Who is he?

A. Joseph "Jojo" Doe
B. Louis DeJoy
C. Joyous DeLou
D. Lionel DeJuice



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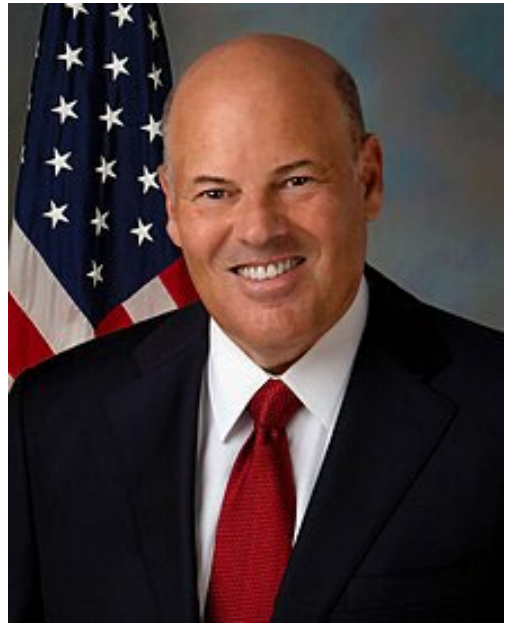

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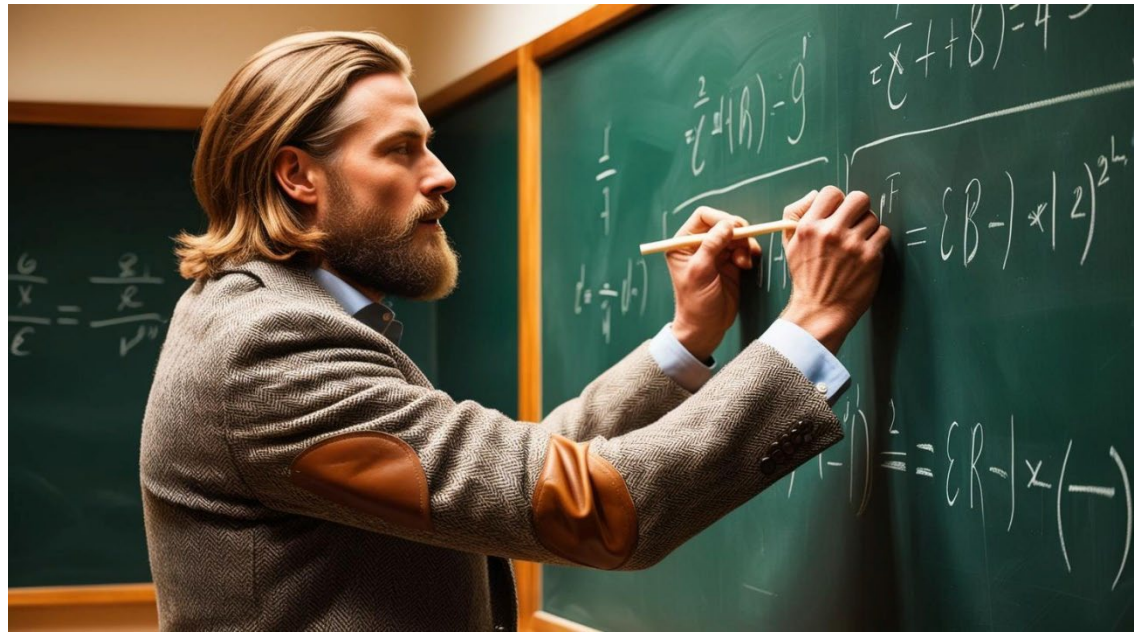
Question 3: How do I balance to survive a lawsuit? *Hebrew v. Tex. Dep't of Criminal Justice* (5th Cir. 2023)

The Department won at the district court: coworkers would have to "perform extra work to accommodate"

That conclusion was reversed (quite emphatically) on appeal

The Department needed to show "substantial additional costs or substantial expenditures"



But it had shown no evidence of "cost in context" and no evidence rebutting counterexamples (shorter beards, female guards), and it had relied (wrongly) on the "neutrality" of its grooming standards

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Question 3: *How* do I balance?

Takeaways

- **Winning on a balancing-test argument takes *work*, in the form of carefully gathered evidence**
- **Coworker impacts are "off the table"**
- **Employer must lead: "reasonably accommodate," not merely "assess the reasonableness of a particular possible accommodation"**
- **Evaluating "if *everyone* received an accommodation cannot show that [an employer] faces an undue hardship if it grants *one* accommodation"**

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Coda: One more shot at balancing

***Okonowsky v. Garland,* 109 F.4th 1166 (9th Cir. 2024)**

Lindsay Okonowsky worked as a psychologist for a federal prison.

Her coworker (and prison supervisor) Steven Hellman, pictured at the right, posted "overtly sexist, racist, anti-Semitic, homophobic, and transphobic memes" on Instagram, where he was followed by more than 100 prison employees—*including the HR Manager*.

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Coda: One more shot at balancing *Okonowsky v. Garland* (9th Cir. 2024)

Okonowsky complained to the prison's Active Safety Manager and, eventually, HR.

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Coda: One more shot at balancing *Okonowsky v. Garland* (9th Cir. 2024)

Okonowsky complained to the prison's Acting Safety Manager.

How did that manager respond?

A. "We don't tolerate this kind of behavior."
B. "We'll look into it."
C. "Tell us more about what Hellman wrote."
D. "Sorry, not sorry."

Coda: One more shot at balancing *Okonowsky v. Garland* (9th Cir. 2024)

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Coda: One more shot at balancing *Okonowsky v. Garland* (9th Cir. 2024)

The prison's response seemed to be weighing *something* against Okonowsky's right to be free of harassment—including, maybe, other employees' speech rights or rights to privacy about out-of-work conduct.

But the reviewing court held that "even if discriminatory or intimidating conduct occurs wholly offsite, it remains relevant to the extent it affects the employee's working environment."

Coda: One more shot at balancing *Okonowsky v. Garland* (9th Cir. 2024)

The court wasn't done:

> Social Media posts are permanently and infinitely viewable and re-viewable by any person with access to the page or site on which the posts appear. No matter where [Hellman] was or what *he* was doing when he made his posts, [coworkers] who followed the page were free to, and did, view, 'like,' comment, share, screenshot, print, and otherwise engage with or perceive his abusive posts from anywhere. The Instagram page also served as a record of which co-workers subscribed to the page and commented on posts, showed their comments and their 'likes,' and could be seen at any time or at any place—including from the workplace.

Deciding to "balance" here was a horrible idea.

Coda: One more shot at balancing

Final Takeaways

- "Document, document, document" is always a good practice—and some legal positions require more thorough documentation
- Work closely with legal counsel: some cases don't require balancing (think *Cline*), but others do (think *Hebrew*)
- Some balancing tests are employer-friendly (non-competes) while others are employee-friendly (ADA, PWFA, religious accommodation)
- Oh, and just because conduct occurs offsite does not mean it cannot be the basis for a harassment claim

Supreme Court Update

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Christina Jepson

Adverse Action

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Trivia Question

A transfer to another job can be considered discrimination:

A. Only if it causes significant harm
B. Only if it leads to termination
C. Only if the employee objects to the transfer
D. If it causes some harm

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Adverse Action Backdrop

In a 1999 case, Boone v. Goldin, Vernet Boone, a black woman working at NASA, was reassigned to work in a wind tunnel

Boone sued, arguing that her reassignment to a more stressful job constituted discrimination

A federal appeals court disagreed, ruling that Title VII discrimination claims require an "**adverse employment action**" that is **significant**, *e.g.*, **discharge, demotion, changes that impact pay, promotional opportunities, etc.**

Mere reassignment, even to a wind tunnel, didn't qualify

"Significant" or **"material"** adverse action has been the standard for job reassignment cases for the last twenty-five years, until 2024.

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Muldrow v. City of St. Louis

On April 17, 2024, the Supreme Court issued a decision in *Muldrow v. City of St. Louis*

The case creates a new standard for determining when job reassignment is an adverse employment action - expanding employee protections in reassignment cases and possibly beyond

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Muldrow v. City of St. Louis, 601 U.S. 346 (2024)

Jatonya Muldrow alleged that the St. Louis Police Department transferred her to a less desirable role because of her gender

Lower courts ruled against Muldrow, finding her reassignment was not materially adverse because her pay and rank were unchanged

The Supreme Court reversed holding that Muldrow didn't need to show a "significant employment disadvantage" to sustain a Title VII claim—she only needed to show "**some harm from a forced transfer**"

Why would the current SC rule this way?

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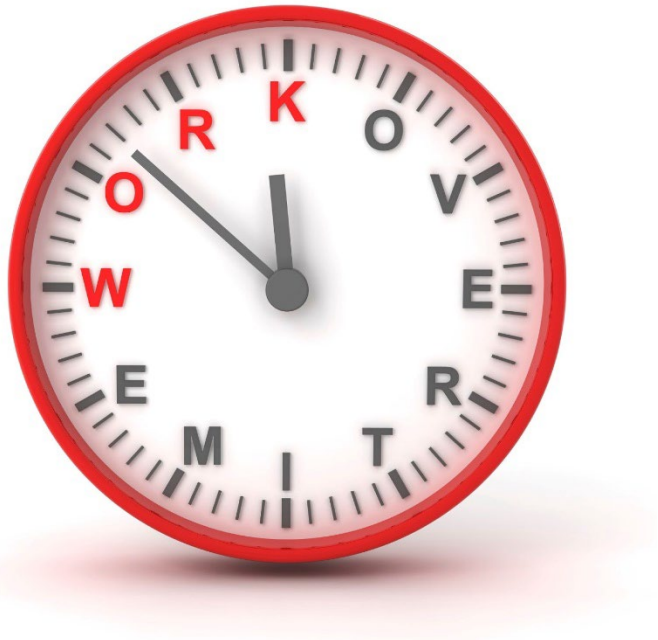
Muldrow v. City of St. Louis, 601 U.S. 346 (2024)

Takeaways

- Easier to file discrimination cases
- "Some harm" is all that is required for a transfer to be deemed adverse, which can be shown through evidence of diminished responsibilities, perks, and schedule
- "Some harm" now likely is the standard for other types of discrimination and retaliation claims too, *e.g.,* discipline and counseling
- Retaliation claims already are the most frequently filed EEO claim--that's only going to increase
- Be proactive—train your supervisors to document legitimate non-discriminatory, non-retaliatory business motivations for all their employment decisions, including transfers



Overtime Exemptions – Burden of Proof

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Trivia Question

When an employer claims an employee is exempt from overtime, the employer must prove the exemption by:

A. Preponderance of the evidence

B. Clear and convincing evidence

C. Beyond a reasonable doubt

D. A written agreement

Trivia Question

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B. Clear and convincing evidence

C. Beyond a reasonable doubt

D. A written agreement

E.M.D. Sales, Inc. v. Carrera, No. 23-217, 2025 WL 96207 (Jan. 15, 2025)

- The Fair Labor Standards Act ("FLSA") generally requires employers to pay workers who work more than 40 hours in a week overtime pay
- The FLSA includes a number of exemptions from overtime pay
- Under the FLSA, an employers bears the burden of showing that an exemption applies

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E.M.D. Sales, Inc. v. Carrera, No. 23-217, 2025 WL 96207 (Jan. 15, 2025)

- EMD is a distributor of international food products that employed "sales representatives to manage inventory and take orders at grocery stores that stock EMD products"
- The sales representatives worked more than 40 hours per week but were not paid overtime because EMD classified them as exempt under the "outside-sales" exemption for an employee who "primarily makes sales and regularly works away from the employer's place of business"
- The sales representative sued EMD alleging EMD violated the FLSA by failing to pay them overtime

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E.M.D. Sales, Inc. v. Carrera, No. 23-217, 2025 WL 96207 (Jan. 15, 2025)

- The district court found that EMD had "failed to prove by **clear-and-convincing evidence** that the employees qualified as outside salesmen"
- EMD appealed arguing that the district court should have applied the "less stringent preponderance-of-the evidence standard." The Fourth Circuit of Appeals upheld the district court.
- The Supreme Court reversed holding that **a preponderance-of-the-evidence standard applies when an employer seeks to prove that an employee is exempt under the FLSA**

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E.M.D. Sales, Inc. v. Carrera, No. 23-217, 2025 WL 96207 (Jan. 15, 2025)

Takeaways

1. This case may have limited applicability because "[t]he Fourth Circuit [stood] alone in requiring employers to prove the applicability of the [FLSA] exemptions by clear and convincing evidence
2. Nevertheless, the difference in the two evidentiary standards is significant
3. Still need to careful about exemptions

FLSA
FAIR LABOR STANDARDS ACT

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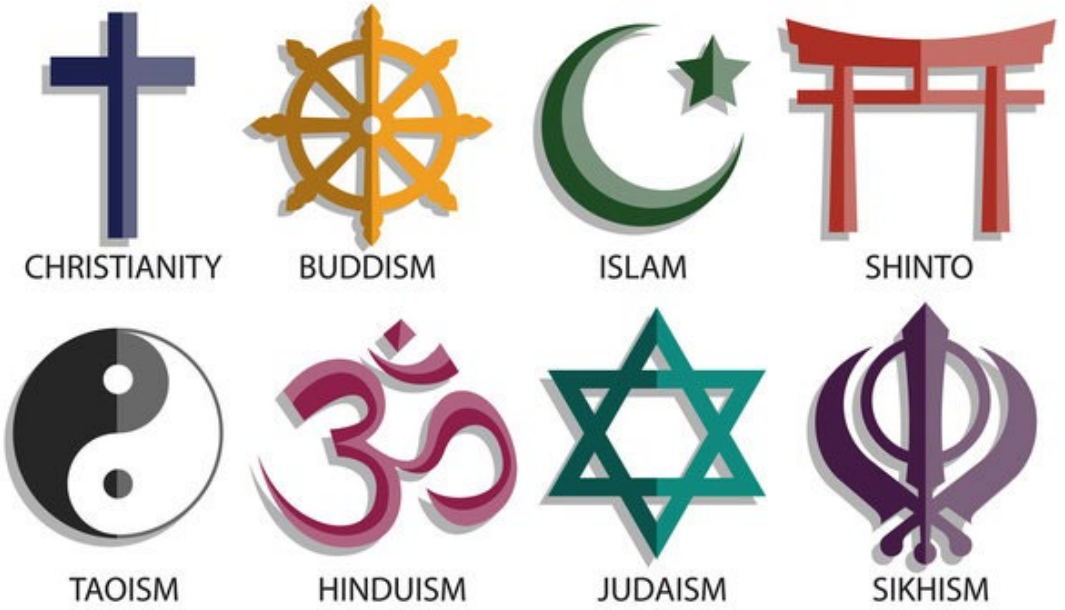

Religious Accommodation

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Trivia Question

When an employee requests a religious accommodation, the employer can deny the accommodation if:

A. The employee does not belong to a recognized religion

B. The accommodation will cause substantial increased cost to the employer

C. The accommodation will cause more than de minimis cost to the employer

D. The religious accommodation is objectionable to the majority of co-workers

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Groff v. Dejoy, 600 U.S. 447 (2023)

Prior to 2023, courts held that a religious accommodation was an "**undue hardship**" if it would require an employer to bear more than a "***de minimis* cost**"

In June 2023, the Supreme Court issued a decision in *Groff v. Dejoy* changing this standard

The Supreme Court held that a religious accommodation would constitute an "undue hardship" if it "would result in **substantial increased costs** in relation to the conduct of a particular business"

Why would the current SC rule this way?

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Groff v. Dejoy, 600 U.S. 447 (2023)

In applying this test, courts must "**take into account all relevant factors in the case at hand**, including the particular accommodations at issue and their practical impact in light of the nature, size, and operating cost of an employer"

In addition, the court explained that: "Impacts on coworkers are relevant only to the extent those impacts go on to affect the conduct of the business . . .. Further, a hardship that is attributable to employee animosity to a particular religion, to religion in general, or to the very notion of accommodating religious practice, cannot be considered "undue."

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Applying *Groff* - *Kluge v. Brownsburg Community Sch. Corp.*, 732 F.Supp.3d 943 (S.D. Ind. 2024)

- Brownsburg Community School Corporation's ("BCSC") policy allowed students to change their preferred name, pronoun, and gender marker in the school's database if the student requested the change and provided a letter from a parent and a letter from a health care provider
- Teachers were required to call students by the preferred name listed in the school's database
- John Kluge, an orchestra teacher, opposed the policy on religious grounds and requested that as an accommodation he be allowed to call all students by their last name only

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Applying *Groff* - *Kluge v. Brownsburg Community Sch. Corp.*, 732 F.Supp.3d 943 (S.D. Ind. 2024)

- The School initially granted the accommodation but later revoked it after determining that the proposed accommodation harmed transgender students and was disruptive to other students and teachers
- Kluge filed suit alleging religious discrimination
- The District Court for the Southern District of Indiana granted summary judgement in favor of the School finding that the accommodation was an undue hardship because it imposed more than a "de minimis cost" and the Seventh Circuit affirmed

Applying *Groff* - *Kluge v. Brownsburg Community Sch. Corp.*, 732 F.Supp.3d 943 (S.D. Ind. 2024)

- Following the Seventh Circuit's decision, the Supreme Court issued its decision in *Groff v. Dejoy*
- The Seventh Circuit remanded the Kluge case back to the district court to evaluate it under the standard set forth in

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Applying *Groff* - *Kluge v. Brownsburg Community Sch. Corp.*, 732 F.Supp.3d 943 (S.D. Ind. 2024)

- On remand, the district court once again granted summary judgment in favor of the School
- The court explained that as a public school, the purpose of the school "is **providing a supportive environment for students** and respecting the legitimate expectations of their parents and medical providers" and that this "**mission can legitimately extend to fostering a safe, inclusive learning environment for all students and evaluating whether that mission is threatened by substantial student harm and the potential for liability**"

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Applying *Groff* - *Kluge v. Brownsburg Community Sch. Corp.*, 732 F.Supp.3d 943 (S.D. Ind. 2024)

- The court found that the accommodation caused "emotional harm" to transgender students and "disrupted the learning environment" of all students and teachers
- The court explained that even if most students and teachers were not bothered by the accommodation: "BCSC is a public-school corporation and as such has an obligation to meet the needs of *all* of its students, not just a majority of students or the students that were unaware of or unbothered by Mr. Kluge's practice of using last names only"
- The court further noted that even if the only harm to the School's business was emotional harm to transgender students that "[a]s a matter of law, this is sufficient to demonstrate undue hardship, because if BCSC is not able to meet the needs of all of its students, it is incurring substantially increased cost to its mission to provide adequate public education that is equally open to all."

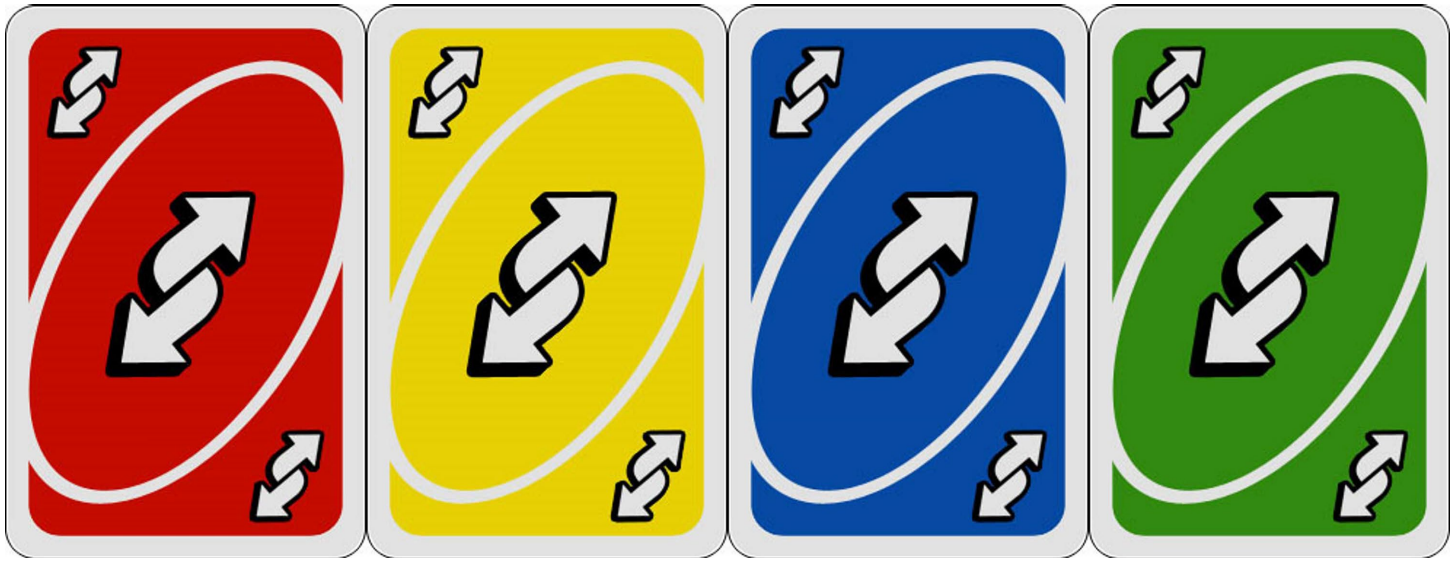
Applying *Groff* - *Kluge v. Brownsburg Community Sch. Corp.*, 732 F.Supp.3d 943 (S.D. Ind. 2024)

- The court also found that the school suffered an undue hardship from a risk of liability. The court explained that "Title VII does not require an employer to grant a religious accommodation that would place it on the razor's edge or liability" and that "the threat of disrupting litigation may in some circumstances constitute undue hardship."
- In this case, the court acknowledged that there were several examples of Title IX litigation involving transgender students and that "it has become clear that treating transgender students differently than other students invites litigation under a variety of theories beyond Title IX, many of which have been successfully litigated."
- How will the current SC view this case if it takes up this case?

Applying *Groff* - *Kluge v. Brownsburg Community Sch. Corp.*, 732 F.Supp.3d 943 (S.D. Ind. 2024)

Takeaways

1. It is easier for an employee to bring a claim regarding religious accommodations
2. Under *Groff*, the undue hardship must be considered in the context of the employer's business. In this case, it was critical that BCSC was able to define it business as providing a safe and inclusive learning environment for *all* students.
3. If a proposed accommodation risks subjecting an employer to serious and disruptive litigation it can be an undue hardship.
4. New EEOC Chair Andrea Lucas: "my priorities will include . . . Protecting workers from religious bias and harassment"



Reverse Discrimination

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Ames v. Ohio Dep't of Youth Services, 6th Cir. 2023

- Plaintiff Marlean Ames is a heterosexual woman who, after 30 years of public service, applied for a promotion to a Bureau Chief position and was instead demoted
- The promotion to Bureau Chief was given to a "gay woman," and her position was given tc a "gay man"
- The decisionmakers for the promotion/demotion were heterosexual
- The district court granted summary judgment to the employer and appeal was taken to the 6th Circuit.

Ohio

Department of Children & Youth

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Ames v. Ohio Dep't of Youth Services, 6th Cir. 2023

- Reviewing the lower court's decision, the 6th Circuit applied the "background circumstances" test to Ames' reverse discrimination claim, i.e., it asked whether Ames had established "background circumstances to support the suspicion that the defendant is that unusual employer who discriminates against the majority"
- The court observed that "otherwise [i.e., if Ames had alleged that she was gay and that a straight person was promoted] Ames's prima facie case was easy to make"

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Ames v. Ohio Dep't of Youth Services, 6th Cir. 2023

- The court explained that the background circumstances test can be established by:
  - Showing that a "member of the relevant minority group (here, gay people) made the employment decision at issue; or
  - Statistical evidence showing a pattern of discrimination against the majority group.
- Concluding that Ames had not made such a showing, the 6th Circuit affirmed summary judgment in favor of the employer

Ames v. Ohio Dep't of Youth Services, 6th Cir. 2023

- In a concurring opinion, Judge Kethledge criticized the "background circumstances" standard for reverse discrimination claims
- "The 'background circumstances' rule is not a gloss upon [Title VII], but a deep scratch across its surface. The statute expressly extends its protection to 'any individual'; but our interpretation treats some 'individuals' worse than others—in other words, it discriminates—on the very grounds that the statute forbids. . . . Respectfully, our court and others have lost their bearings in adopting this rule."

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Reverse Discrimination—Circuit Split

- **The Majority (7 Circuits)**
  - The test to show "reverse discrimination" is the same as any other discrimination
  - Circuits: 1st 2nd 3rd 4th 5th 9th 11th
- **The Minority (5 Circuits – including our Circuit)**
  - "Background circumstances" or
  - "Evidence that there is something 'fishy' going on"— "indirect evidence to support the probability that ***but for*** the plaintiff's status he would not have suffered the challenged employment decision"
  - Circuits: D.C. 6th 7th 8th 10th

The U.S. Supreme Court Has Taken Up the Issue

- SCOTUS granted cert and heard argument in *Ames v. Ohio Dep't of Youth Services*
- The central question before the Supreme Court is whether Title VII imposes a heightened evidentiary standard on majority-group plaintiffs
- Based on the tenor of questions from the justices, we anticipate that the Court will reject the higher reverse discrimination standard

For example, "conservative" Justice Amy Coney Barrett observed that the burden of proof should be the same for all individuals, whether they are straight, gay, or otherwise

And "liberal" Justice Elena Kagan pressed the employer on whether the Sixth Circuit's ruling effectively penalized Ames for being heterosexual

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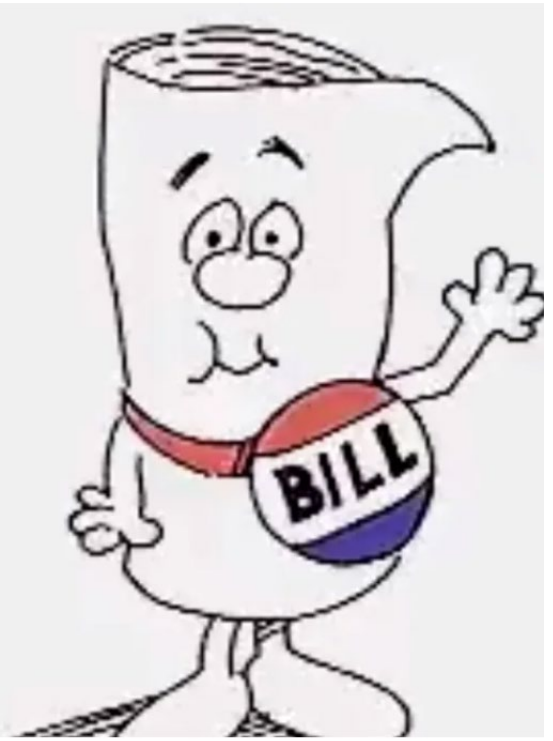

2025 Utah Legislative Update

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Mark D. Tolman

Trivia Question

True or False. In 2025, the Utah Legislature passed a record number of bills (591), including many employment related bills.

A. True

B. False

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True or False. In 2025, the Utah Legislature passed a record number of bills (591), including many employment related bills.

A. True

B. False

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H.B. 267 Public Sector Labor Union Amendments

Passed the House and Senate. Governor Cox has signed.

Primary bill sponsors are Rep. Teuscher and Sen. Cullimore.

Found at: https://le.utah.gov/Session/2025/bills/static/HB0267.html

Utah bill to end collective bargaining for public workers passes, heads to Cox

HB267 bars government employers from recognizing a union as a bargaining agent.

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Found at: https://le.utah.gov/Session/2025/bills/static/HB0267.html

- Prohibits a public sector employer from recognizing a union as a bargaining unit and from signing a CBA.
- Does not prohibit public sector unions outright, e.g., unions could still organize a strike. But without the power to collectively bargain, public sector unions may struggle to remain viable.
- But will it take effect? More than 320,000 signatures were collected for a referendum to repeal the law.

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Other Employment Bills that Passed in 2025

- **HB 19 Child Labor Amendments:** imposes criminal sanctions for violations of Utah's child labor laws.
- **HB 50 Occupational Safety and Health Amendments:** increases civil penalties for OSHA citations—the range for a fine for a willful violation will increase from $9,753 to $136,532, to $11,518 to $161,323.
- **SB 86 Workplace Protection Amendments:** clarifies the definition of "sexual harassment" that was adopted as part of the 2024 bill that renders confidentiality agreements void if they prohibit disclosure of sexual harassment. Prior definition defined sexual harassment as a "violation of Title VII." Now, sexual harassment is defined as harassment based on "sex, sexual orientation, or gender" that violates Title VII.

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H.B. 55 Employee Confidentiality Amendments (2024)

Effective May 1, 2024, but applies retroactively to Jan. 1, 2023.

Primary bill sponsor is Rep. Kera Birkeland (District 4 – Daggett, Duchense, Morgan, Rich, Summit)

Found at: https://le.utah.gov/~2024/bills/static/HB0055.html

- This bill renders void nondisclosure and nondisparagement clauses in employment agreements when those clauses could prohibit disclosures about sexual assault or sexual harassment.
- A severance agreement with a former employee may prohibit these types of disclosures, but such agreements are subject to a three-business day revocation right.

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Exclude sex assault and harassment from your definition of “confidential information”

Consider how you’ve defined “Confidential Information” in your contracts. If that definition is broad (most are), add a disclaimer like this:

> The term Confidential Information shall not mean: (a) any information that is known by me prior to my employment, without an obligation of confidence; (b) any information that is publicly disclosed by the Company; or (c) information related to sexual assault or sexual harassment as those terms are defined under Utah Code § 34A-5-114.

Add a similar disclaimer to narrow the scope of your non-disparagement clauses.

Trump 2.0: Have We Seen This Movie Before?

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What employers should expect from President Trump's Second Administration

1) Department of Labor: unlikely to see major changes to salary thresholds for EAP exemptions but may see return to a more pro-business independent contractor test.
2) "No Taxes on Tips" or overtime?
3) Big swings at the National Labor Relations Board, and a possible return to the pre-*Stericycle* pro-employer standard for conduct standards, i.e., facially neutral conduct and professional standards may be lawful again.
4) Immigration – ICE Raids and I-9 Audits.
5) DEI under attack and a new perspective about discrimination.

True or False. If ICE shows up with a judicial warrant, your receptionist should not allow a search until company counsel is informed and present.

- True
- False

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True or False. If ICE shows up with a judicial warrant, your receptionist should not allow a search until company counsel is informed and present.

- True
- False

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Basic Rule—Searching/Access to Private Areas Requires a Warrant

- ICE can mill about public areas (lobbies/parking lots/common areas) etc. without any kind of warrant.
- To access an area normally reserved for employees or otherwise not accessible to the public, ICE agents must have a warrant signed by a judge.

ICE Raids and Administrative Warrants

Administrative warrant

- Does not allow searches
- Signed by ALJ or government official
- Usually issued in association with an I-9 audit

Judicial warrant

- Allows searches
- Check to make sure signed by judge
- Allows search to be made at a particular time – check to make sure raid is compliant

ICE Raids – Judicial Warrants

1) Train receptionist/managers to tell ICE that they are calling the company's lawyer, but do not interfere with the search

2) Understand that ICE agents may only search areas identified in warrant

3) Do not tell your employees to leave (no code words)

4) Understand that employees are not required to answer questions and they may hire their own lawyer (although you should not direct employees to refuse to answer ICE's questions)

5) If employees are detained, have someone contact next of kin and deliver paycheck

6) MAKE A PLAN!!!

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Let’s drill in on those DEI Executive Orders

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President Trump's Executive Orders have required which of the following?

- Private sector employers to terminate all Diversity, Equity, and Inclusion offices and programs.
- Federal agencies to define "sex" as either male or female and to remove any concept of gender identity.
- The EEOC to stop enforcing discrimination laws.
- Federal agencies to declare that President Trump is THE best.

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- The EEOC to stop enforcing discrimination laws.
- Federal agencies to declare that President Trump is THE best.

Executive Order 14151

EO (14151), titled "Ending Radical and Wasteful Government DEI Programs and Preferencing," requires the termination of all "discriminatory programs, including illegal [DEI] mandates, policies, programs, preferences and activities in the Federal Government, under whatever name they appear."

It requires that federal agencies terminate all (i) DEI offices and positions, (ii) "equity" plans, actions, initiatives or programs and "equity-related" grants or contracts, and (iii) DEI "performance requirements for employees, contractors or grantees."

Executive Order 14173

EO (14173), titled "Ending Illegal Discrimination and Restoring Merit-Based Opportunity," rescinds a six-decade old EO that required federal contractors to adopt affirmative action practices for hiring/promoting women and minorities.

Requires federal contractors to end "illegal DEI" practices and to certify that their DEI programs do not violate anti-discrimination law.

Executive Order 14168

EO (14168), titled "Defending Women from Gender Ideology Extremism," defines "sex" as an individual's "immutable biological classification as either male or female," removing any concept of "gender identity."

Directs federal agencies to "remove all statements, policies, regulations," etc., that "inculcate gender ideology" and prohibits the use of federal funds to promote gender ideology.

The order instructs the attorney general to (i) clarify that Title VII does not require gender identity-based access to single-sex spaces and (ii) ensure the "freedom to express the binary nature of sex" and right to single-sex spaces.

EEOC follows the White House's EO.

The EEOC filed motions to dismiss six lawsuits it had filed on behalf of transgender or gender nonconforming employees, citing the executive order declaring that the government would recognize only two "immutable" sexes.

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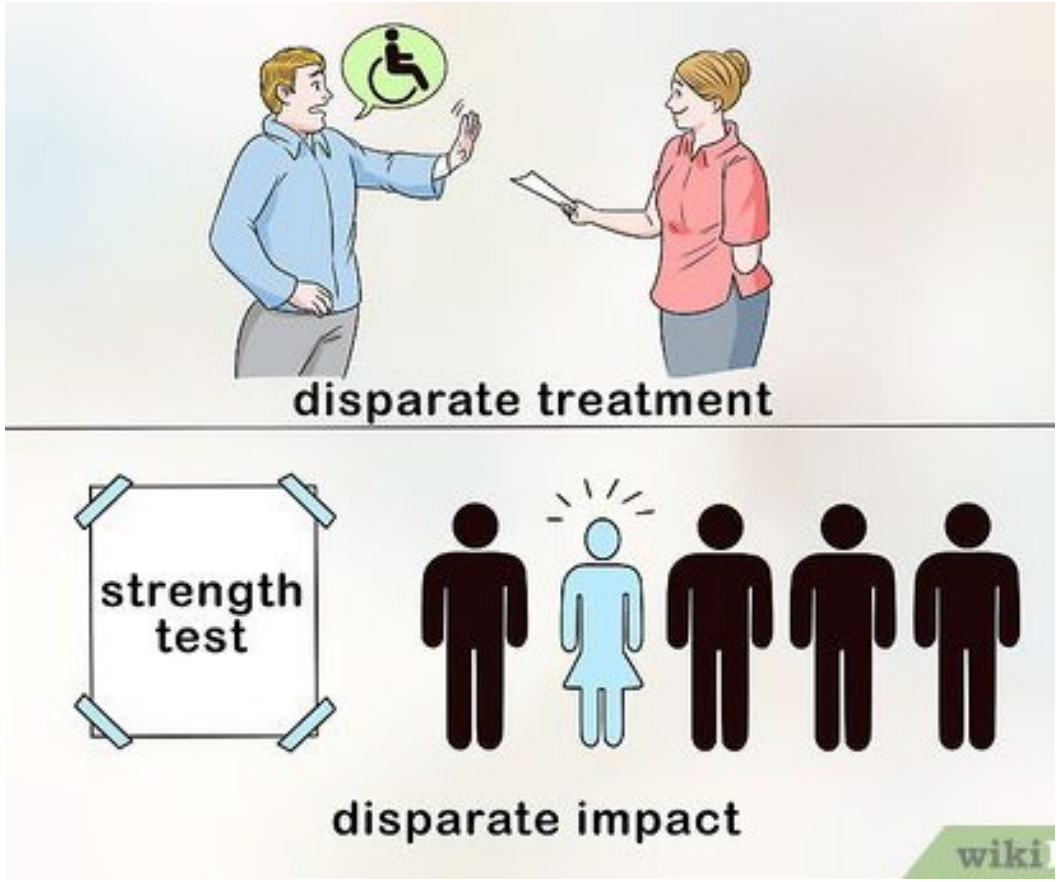
Executive Order 12250

Hot off the presses: on April 23, 2025, President Trump issued an Executive Order entitled **"Restoring Equality of Opportunity and Meritocracy"**

The Purpose: "to eliminate the use of **disparate-impact liability** in all contexts to the maximum degree possible."

The Rationale: Disparate-impact liability "all but requires individuals and businesses **to consider race** and engage in racial balancing to avoid potentially crippling legal liability."



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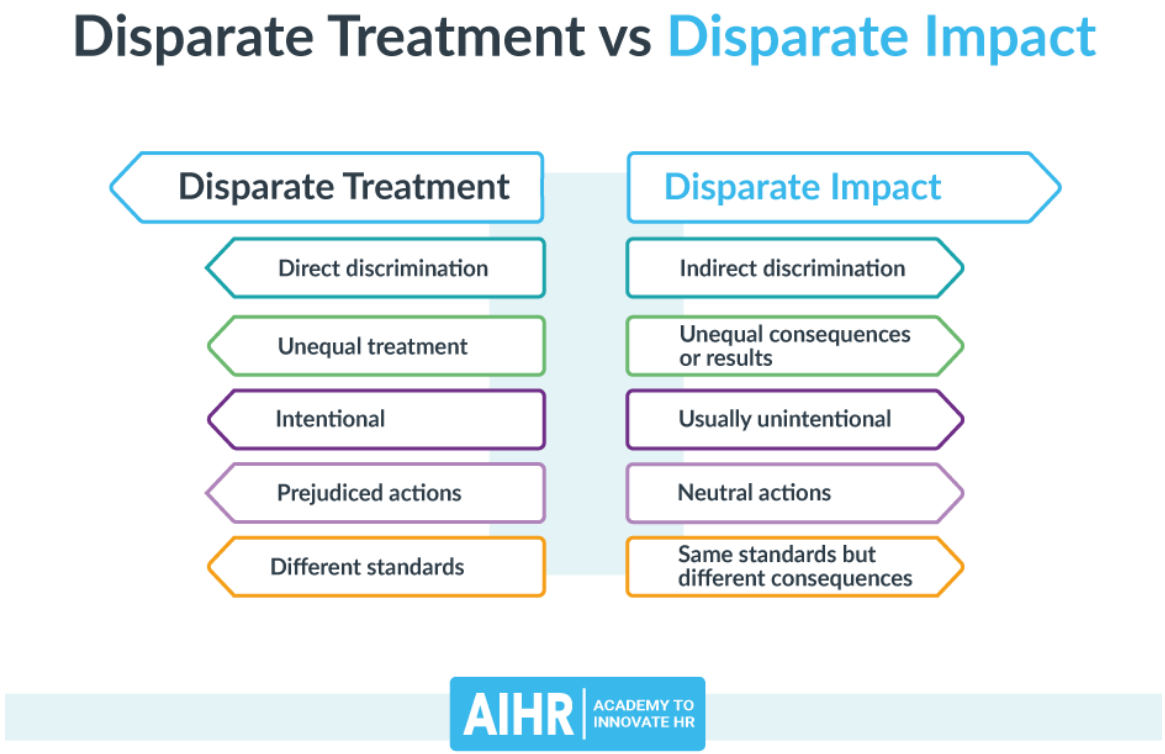
Disparate Treatment 101



Reminder: "disparate-impact liability" is a type of discrimination where a **seemingly neutral policy** or practice **disproportionately harms members of a protected group**, even if it was **not intentionally discriminatory.**

Image provided by Academy to Innovate HR, available here: https://www.aihr.com/blog/disparate-treatment/

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Executive Order 12250

The Directives: deprioritize enforcement, initiate action to **repeal/amend** portions of Title VI of the Civil Rights Act of 1964 (federal law that prohibits race discrimination in programs receiving federal assistance), **assess** pending EEOC investigations/lawsuits brought under Title VII of the Civil Rights Act (federal law the prohibits race and other forms of discrimination in employment), **determine** whether state law can be preempted.

VI AND VII

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Executive Order 12250

A Word of Caution: federal courts have recognized disparate impact liability theories for more than 50 years, since 1971. Unless Congress amends Title VII or the Supreme Court reverses precedent, disparate impact liability remains viable.

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EEOC Updates

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Elena T. Vetter

An employer may not seek medical documentation confirming the need for any requested accommodation under the PWFA.

A. True

B. False

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An employer may not seek medical documentation confirming the need for any requested accommodation under the PWFA.

A. True

B. **False**

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Pregnant Workers Fairness Act

On **April 15, 2024**, the EEOC issued its final regulations on PWFA enforcement.

On **December 18, 2024**, the EEOC issued guidance to healthcare providers regarding the documentation employers may seek to support requests for accommodation.

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PWFA

The PWFA requires employers with at least 15 employees to provide reasonable accommodations for pregnant applicants and employees that are needed for pregnancy, childbirth, and related medical conditions.

PREGNANT WORKERS FAIRNESS ACT

NEW RESOURCES

WWW.EEOC.GOV/PREGNANCY-DISCRIMINATION

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PWFA and Accommodations

Four accommodations should be granted in almost every circumstance:

- (1) keeping water near and drinking as needed;
- (2) extra time for bathroom breaks;
- (3) to sit or stand as needed; and
- (4) extra breaks to eat and drink as needed.

Employers are ***NOT*** allowed to get health care provider confirmation that an employee needs these four accommodations.

New EEOC Guidance on PWFA

If employers request supporting documentation, the guidance states healthcare providers should:

- explain the healthcare provider's qualifications;
- confirm the employee's physical or mental condition;
- confirm that the condition is related to pregnancy, childbirth, or related medical conditions; and
- describe the needed adjustment or change at work, including the expected duration.

New EEOC Guidance on PWFA

Providers may also give additional information or clarification, such as a view on whether a proposed "alternative accommodation would be effective."

Two more points, keyed to employee privacy:

"Generally, employers cannot require a specific form be used for the supporting documentation for a PWFA accommodation, especially one that asks for unnecessary information."

"You should not simply provide your patient's medical records, because they will likely contain information that is unnecessary for the employer to have."

The EEOC recently did which of the following:

A. Publish new guidance about harassment
B. React to pressure to withdraw recent guidance about harassment
C. Publish new guidance about wearable technology
D. Withdraw recent guidance about wearable technology
E. All of the above

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Last year, the EEOC published new harassment guidance . . .

- Among other things, that guidance extended the protections of EEO laws to repeatedly misgendering individuals, outing individuals, and restricting use to bathrooms or other sex-segregated facilities based on gender identity.
- Now, it comes with a warning:

> "When issuing certain documents, the Commission acts by majority vote. Based on her existing authority, the Acting Chair cannot unilaterally remove or modify certain 'gender identity'-related documents subject to the President's directives in the executive order."

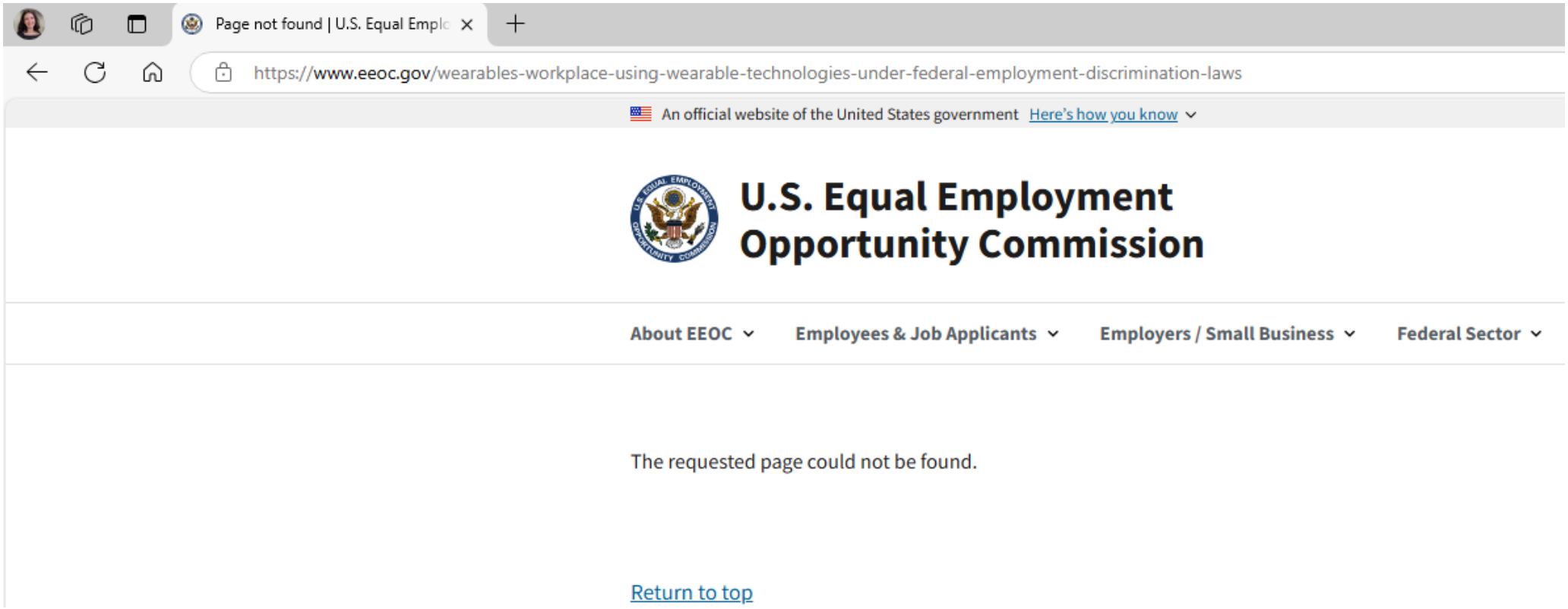
And:

Discrimination claims that might conflict with Trump's executive orders, including one executive order declaring that "sexes are not changeable," will now sent to the EEOC for review, rather than follow the normal investigatory process.

A statement released by the EEOC explains: "acting Chair Lucas has directed that all charges that implicate these executive orders be elevated for review at EEOC headquarters to determine how to comply with these executive orders prior to the recission or revision of the harassment guidance," and "to the extent that a charging party requests a notice of right to sue for one of those charges, EEOC will issue that notice of right to sue, as statutorily required."

Last year, the EEOC published wearable tech guidance . . .

- It's now been scrubbed from the website.



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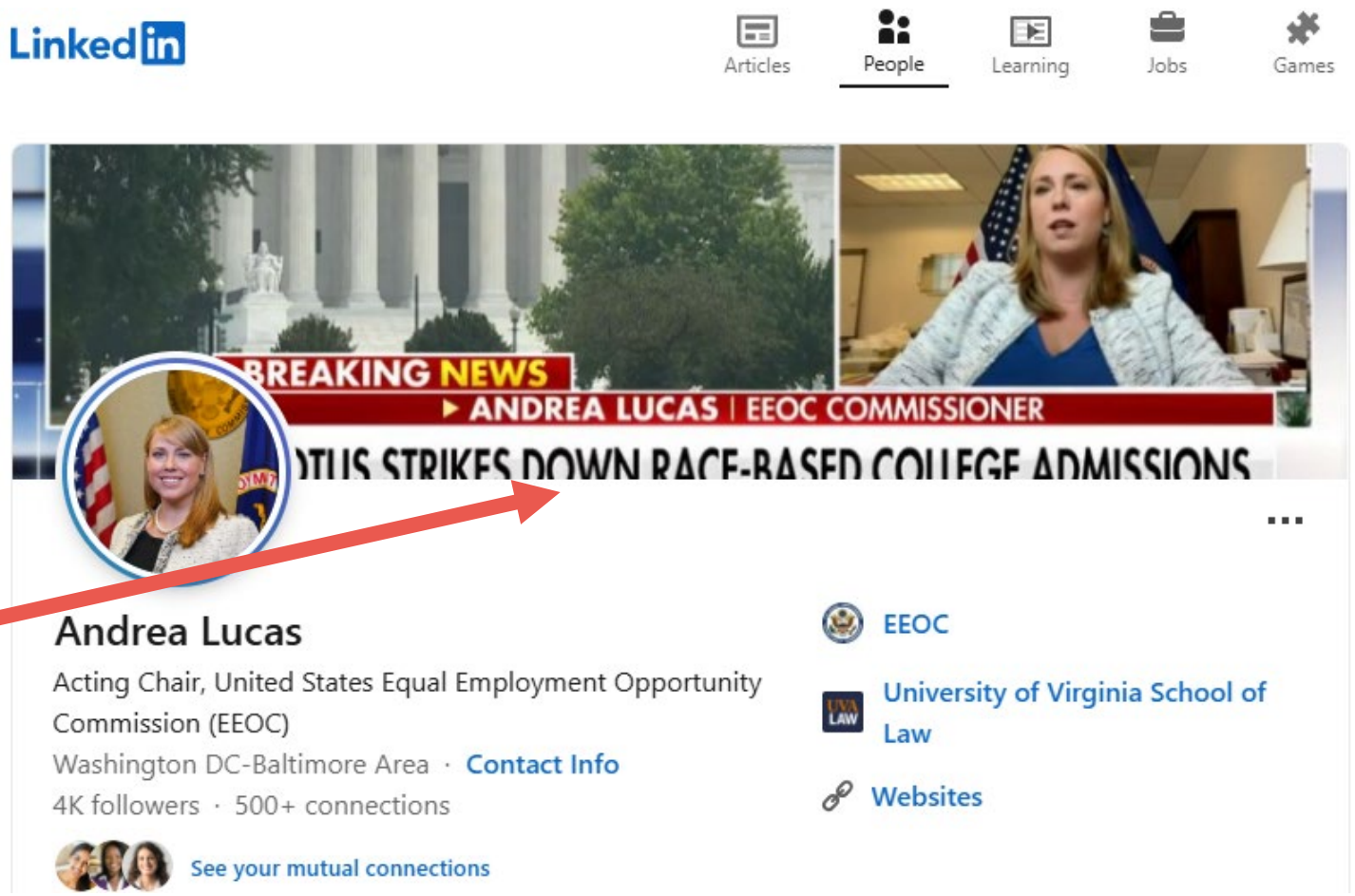
Meet Andrea Lucas, the Newly Appointed Acting Chair of the Equal Employment Opportunity Commission.

And check out her LinkedIn profile header.



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Andrea R. Lucas, Acting Chair of the EEOC

"I look forward to restoring evenhanded enforcement of employment civil rights laws for all Americans. . . ."

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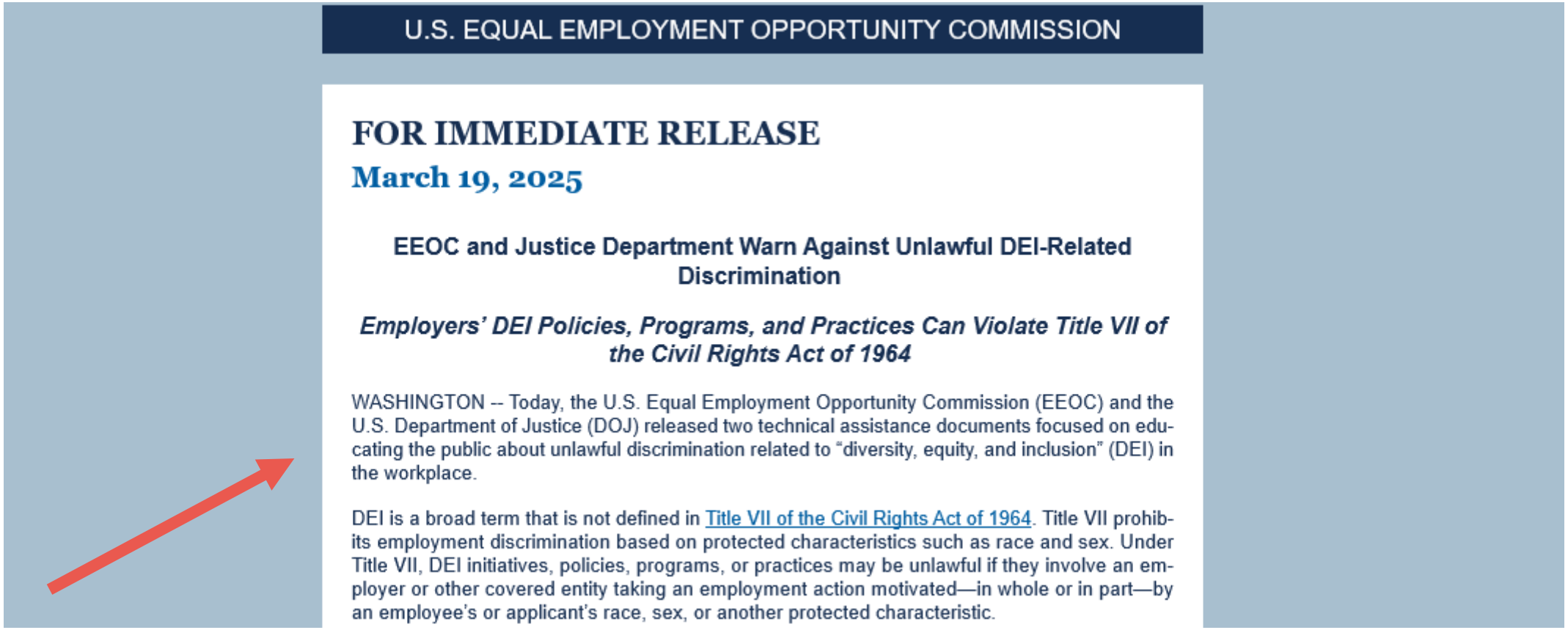
Specifically, she's interested in:

- "rooting out unlawful DEI-motivated race and sex discrimination";
- "protecting American workers from anti-American national origin discrimination";
- "defending the biological and binary reality of sex and related rights, including women's rights to single sex spaces at work"; and
- "protecting workers from religious bias and harassment, including antisemitism."

New EEOC Guidance Documents . . .



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

FOR IMMEDIATE RELEASE

March 19, 2025

EEOC and Justice Department Warn Against Unlawful DEI-Related Discrimination

Employers' DEI Policies, Programs, and Practices Can Violate Title VII of the Civil Rights Act of 1964

WASHINGTON -- Today, the U.S. Equal Employment Opportunity Commission (EEOC) and the U.S. Department of Justice (DOJ) released two technical assistance documents focused on educating the public about unlawful discrimination related to "diversity, equity, and inclusion" (DEI) in the workplace.

DEI is a broad term that is not defined in Title VII of the Civil Rights Act of 1964. Title VII prohibits employment discrimination based on protected characteristics such as race and sex. Under Title VII, DEI initiatives, policies, programs, or practices may be unlawful if they involve an employer or other covered entity taking an employment action motivated—in whole or in part—by an employee's or applicant's race, sex, or another protected characteristic.

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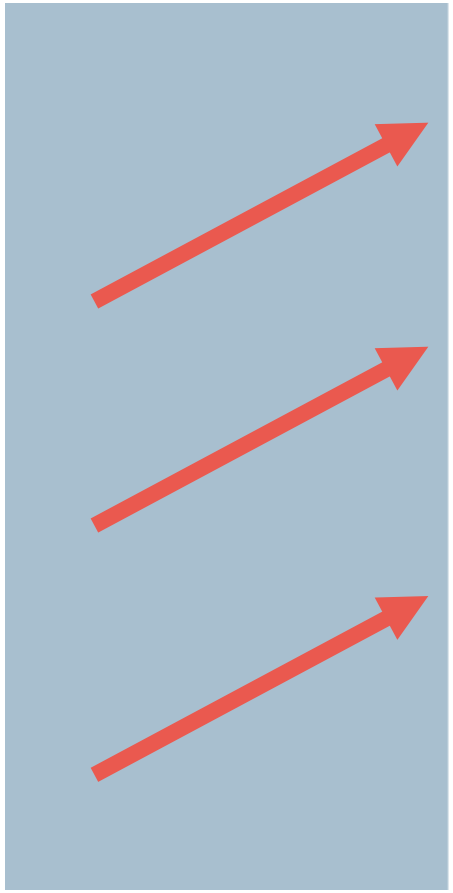
Discrimination based on protected classes has long been illegal.



In the past five years, DEI policies, programs, and practices have become increasingly prevalent in many of our nation's largest and most prominent businesses, universities, and cultural institutions. The widespread adoption of DEI, however, does not change longstanding legal prohibitions against the use of race, sex, and other protected characteristics in employment.

To help educate the public about how well-established civil rights rules apply to employment policies, programs, and practices—including those labeled or framed as "DEI"—the EEOC and the DOJ today released a joint one-page technical assistance document, "What To Do If You Experience Discrimination Related to DEI at Work." The EEOC also released a longer question-and-answer technical assistance document, "What You Should Know About DEI-Related Discrimination at Work." Both documents are based on Title VII, existing EEOC policy guidance and technical assistance documents and Supreme Court precedent.

"Far too many employers defend certain types of race or sex preferences as good, provided they are motivated by business interests in 'diversity, equity, or inclusion.' But no matter an employer's motive, there is no 'good,' or even acceptable, race or sex discrimination," said EEOC Acting Chair Andrea Lucas. "In the words of Justice Clarence Thomas in his concurrence in *Students for Fair Admissions*, 'two discriminatory wrongs cannot make a right.'"

Lucas emphasized, "While the public may be confused about what rules apply to DEI, the law itself is clear. And there are some serious implications for some very popular types of DEI programs. These technical assistance documents will help employees know their rights and help employers take action to avoid unlawful DEI-related discrimination."

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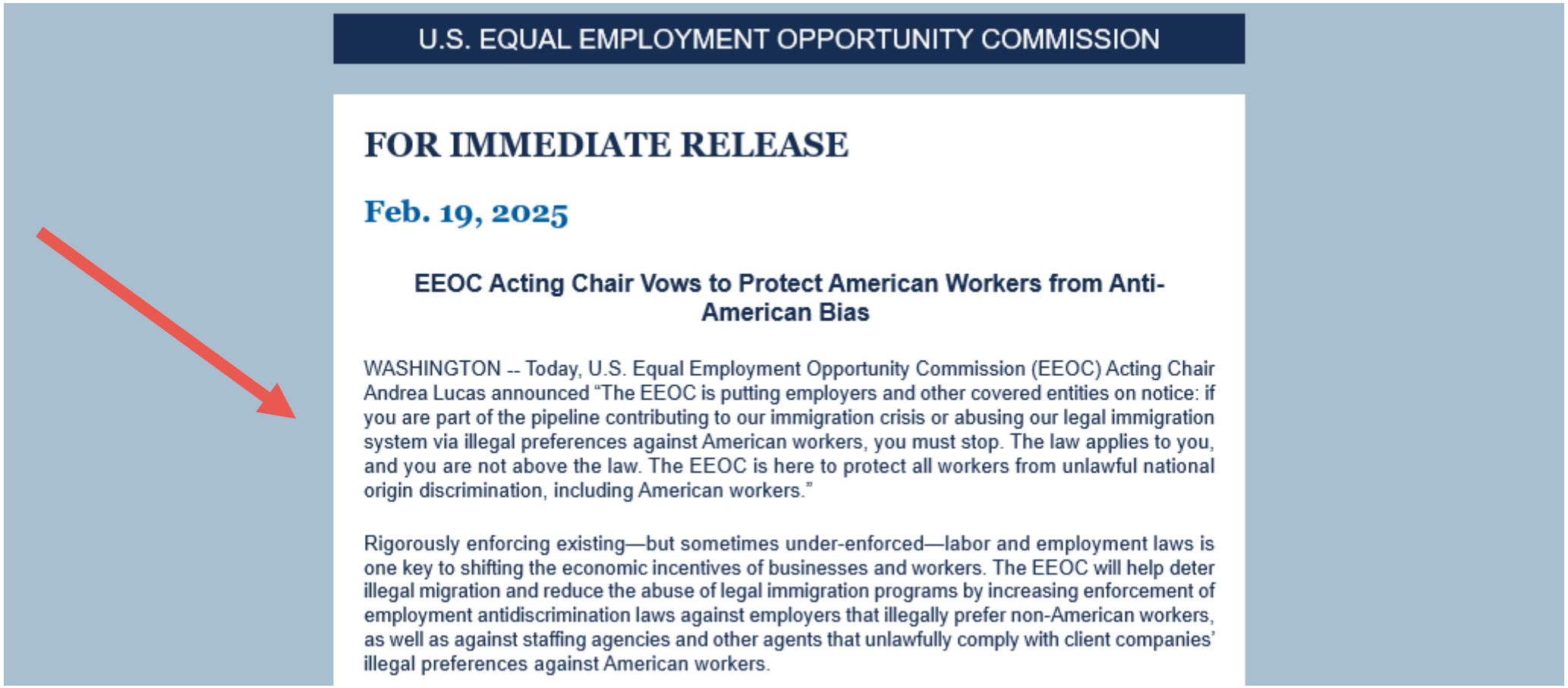
More EEOC Press Releases . . .



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

FOR IMMEDIATE RELEASE

Feb. 19, 2025

EEOC Acting Chair Vows to Protect American Workers from Anti-American Bias

WASHINGTON -- Today, U.S. Equal Employment Opportunity Commission (EEOC) Acting Chair Andrea Lucas announced "The EEOC is putting employers and other covered entities on notice: if you are part of the pipeline contributing to our immigration crisis or abusing our legal immigration system via illegal preferences against American workers, you must stop. The law applies to you, and you are not above the law. The EEOC is here to protect all workers from unlawful national origin discrimination, including American workers."

Rigorously enforcing existing—but sometimes under-enforced—labor and employment laws is one key to shifting the economic incentives of businesses and workers. The EEOC will help deter illegal migration and reduce the abuse of legal immigration programs by increasing enforcement of employment antidiscrimination laws against employers that illegally prefer non-American workers, as well as against staffing agencies and other agents that unlawfully comply with client companies' illegal preferences against American workers.

What does the new guidance say?

Under Title VII, DEI policies, programs, or practices may be unlawful if they involve an employer or other covered entity taking an employment action **motivated**—in whole or in part—by an employee's race, sex, or another protected characteristic.

In addition to unlawfully using quotas or otherwise "balancing" a workforce by race, sex, or other protected traits, DEI-related discrimination in your workplace might include the following:

- Disparate treatment (exclusion from training or fellowships, hiring, or promotion)
- Limiting membership in workplace groups, or separating employees into groups based on protected class
- Harassment
- Retaliation

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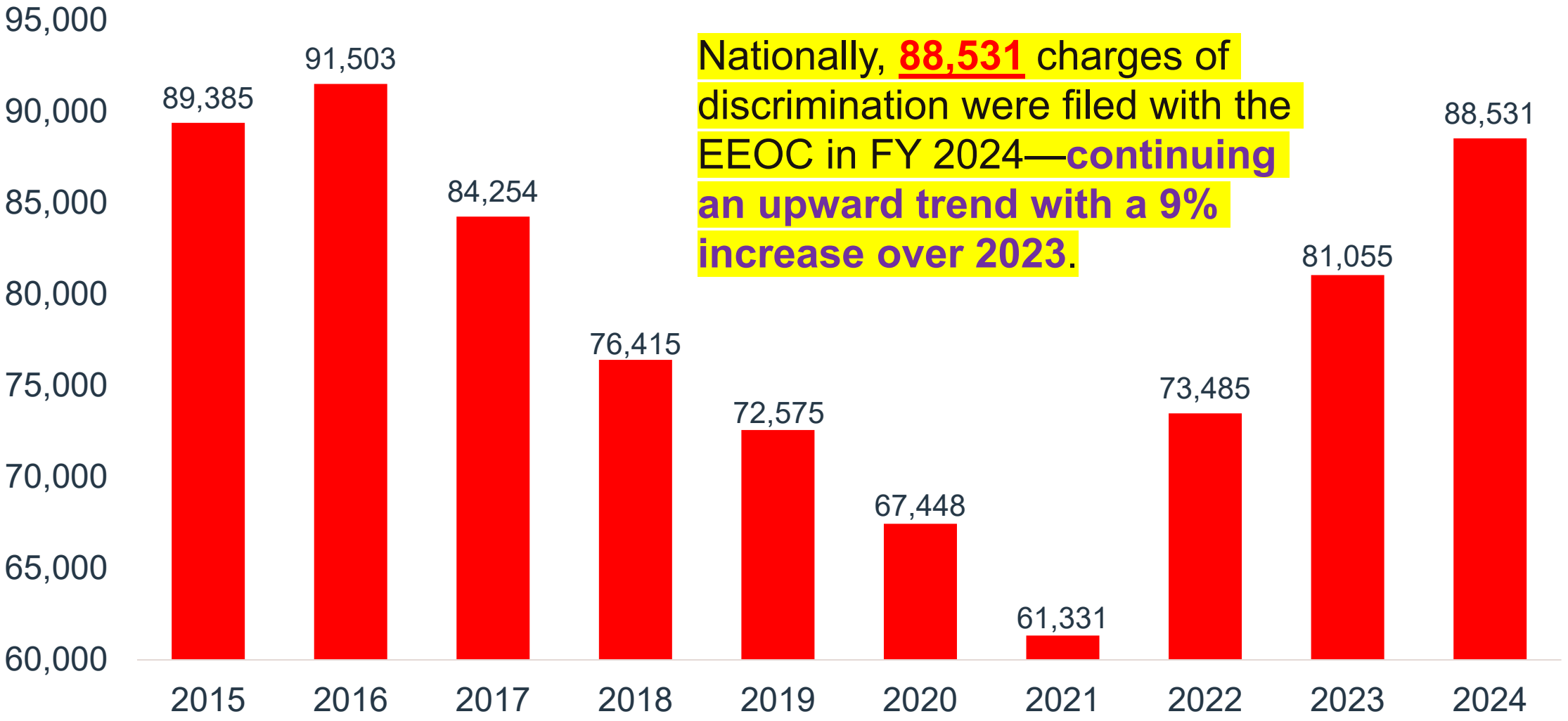
2024 EEOC CHARGE DATA



Nationally, **88,531** charges of discrimination were filed with the EEOC in FY 2024—**continuing an upward trend with a 9% increase over 2023**.

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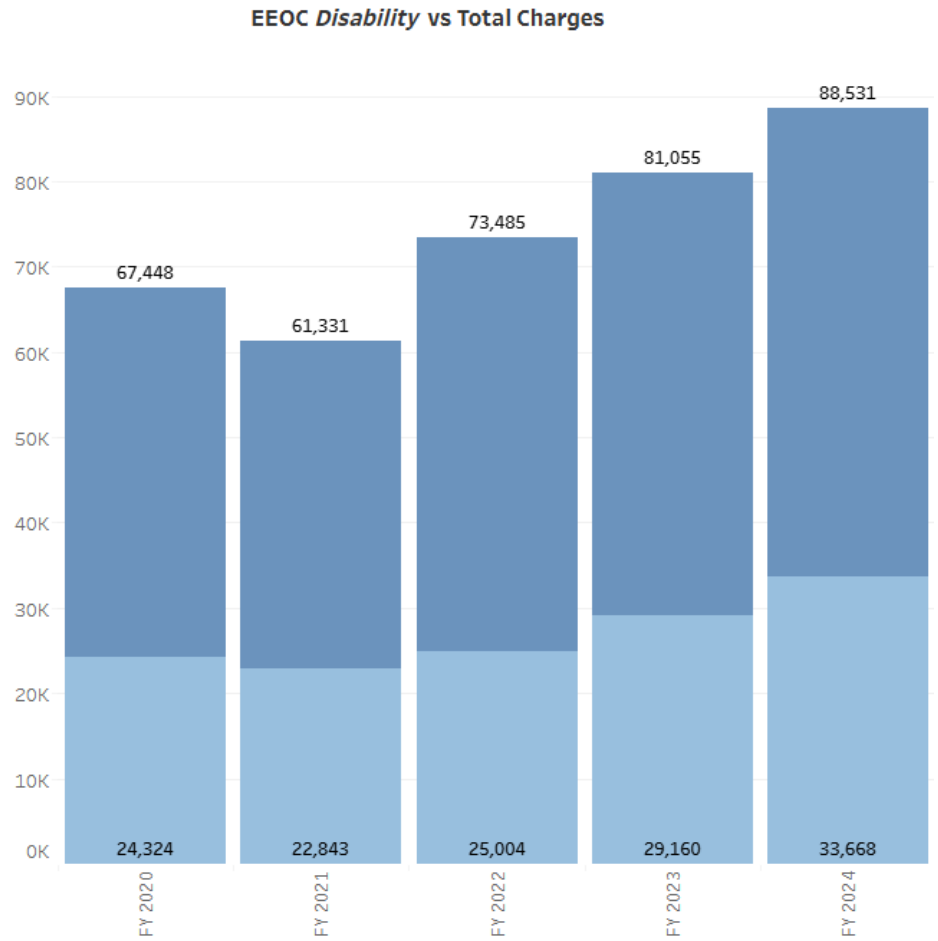
ADA (disability) claims are on the rise.

The EEOC received more claims for disability discrimination, including failure to accommodate, than any other form of discrimination (although retaliation number one overall).

In 2024, of the 88,531 total charges of discrimination, 33,668 alleged disability discrimination—about 38% of all charges filed nationally (45% in Utah).

That's a record number of disability discrimination claims!



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What will the EEOC do next?

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The Rise of Reverse Discrimination Claims

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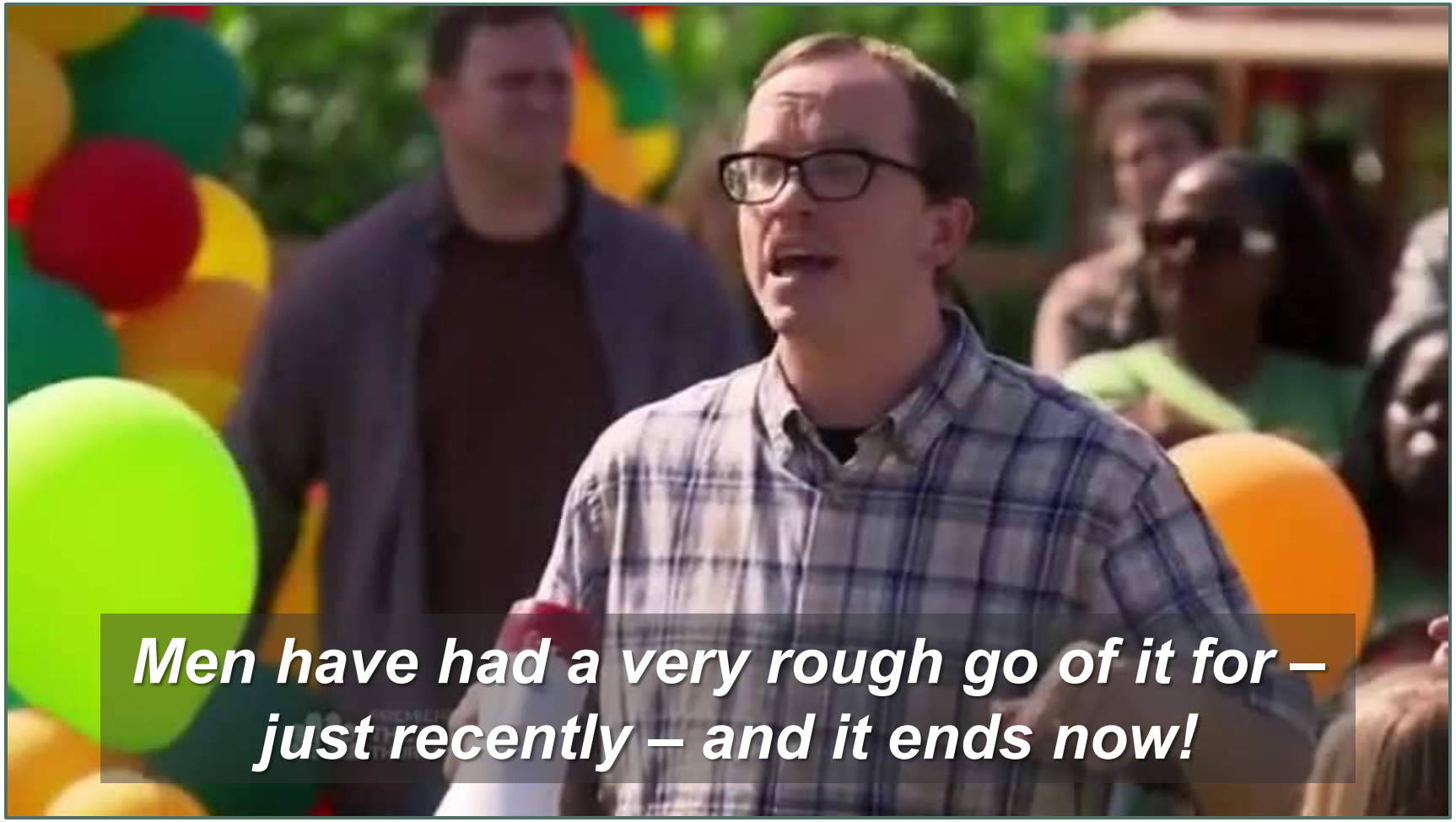
Paul R. Smith

The Rise of “Reverse Discrimination” Claims



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What even *is* reverse discrimination?

Two Perspectives

- Discrimination against majority-group plaintiffs, e.g., discrimination against a male, white, American, or straight employee.
- "The EEOC's position is that there is no such thing as 'reverse' discrimination; there is only discrimination." What You Should Know About DEI-Related Discrimination at Work.

https://www.eeoc.gov/wysk/what-you-should-know-about-dei-related-discrimination-work#_edn26

True or False: President Trump is a huge fan of DEI programs?

A. True

B. False

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True or False: President Trump is a huge fan of DEI programs?

A. True

B. **False**

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If you're going to maintain a DEI program/policy, which of these things should you avoid?

A. Specific quotas based on protected classes
B. A caste system designating a hierarchical preference for certain racial groups over others
C. Specific plans for how to achieve diversity goals
D. Placing managers under pressure to increase minority representation in the workplace (by, e.g., compensating them to do so)
E. All of the above

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In the TV show Seinfeld, what did Kramer receive for settling his claim against big tobacco, after smoking cigars made him “hideous”?

A. A lifetime supply of coffee
B. The coat from “Joseph and the Amazing Technicolor Dreamcoat”
C. He got to be the Marlboro Man
D. A rooster name Little Jerry

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Standard for Title VII Discrimination Claims

- Direct Evidence of discrimination
  - Statements (e.g., from a manager)
  - Policies
- Circumstantial evidence of discrimination
  - Burden-shifting framework (*McDonnell Douglas*)

Circumstantial Evidence—Burden Shifting

- Plaintiff's Burden
  - Person was a member of a protected class
  - Person was qualified for position
  - Person suffered an adverse employment action
  - After rejection, position remained open, and the employer continued to seek applicants of plaintiff's qualifications
- Employer's Burden
  - Articulate a legitimate, nondiscriminatory reason for employee's rejection
- Back to Plaintiff's Burden
  - Show employer's reason is pretextual

Reverse Discrimination—Two Approaches

- **The Majority**
  - The test stays the same
  - Circuits: 1st 2nd **3rd** 4th 5th 9th **11th**
- **The Minority**
  - The first element (plaintiff belongs to a protected class) is modified—Plaintiff must show:
  - "Background circumstances" or
  - "Evidence that there is something 'fishy' going on"— "indirect evidence to support the probability that but for the plaintiff's status he would not have suffered the challenged employment decision"
  - Circuits: D.C. 7th 8th 10th (our circuit)

Lewick v. Sampler (D. Kan.)

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- Richard Lewick
  - Hired as a Sales Associate in October 2018
  - He quickly moved up the ladder: promoted twice in the next year
  - Was hoping to get promoted again (Store Manager)
  - Instead, Sampler hired a female
  - Lewick felt the woman was less qualified than him
- Lewick sued, alleging sex discrimination
- Sampler filed a motion to dismiss

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- Lewick didn't really point to any evidence of "background circumstances"
- Instead, he said the heightened standard for reverse-discrimination cases wasn't really a thing anymore (citing Bostock)
- The court disagreed
  - "He alleges only that defendant promoted a woman instead of him on just one occasion"
- However, the court pointed to several other recent reverse-discrimination cases where the plaintiffs were able to survive motions to dismiss

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Court pointed to several other recent reverse-discrimination cases where the plaintiffs survived motions to dismiss

- *Seymour v. Tonganoxie*
  - Plaintiff's alleged supervisor excluded him from meetings that similarly situated female employees attended and plaintiff's job duties were reassigned
- *Walker v. Answer Topeka*
  - Plaintiff alleged “several instances of his female coworkers engaging in the same activity that got him fired” without any consequence
- *Mackley v. TW Telecom Holdings, Inc.*
  - Plaintiff was given different work assignments and office hours than his fellow female employees and “even though his performance numbers were superior to similarly situated female employees he was nonetheless terminated”
- *Slyter v. Board of County Commissioners for Anderson County*
  - Plaintiff alleged that “he reported several departmental policy violations by a junior female employee, she was not disciplined for these violations, and he was terminated for violating an unwritten policy
- These are all Kansas cases….

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Duvall v. Novant Health, Inc.

NOVANT™ HEALTH

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- Jury awarded Duvall $10 million in punitive damages based on his race/sex discrimination claim
- Why the big difference between Duvall's case and Lewick's?

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Duvall

- White male
- Hired in 2013 as Novant Health's VP of Marketing and Communications
- Evidence at trial demonstrated that Duvall "performed exceptionally in his role"
  - He received strong performance reviews
  - Received national recognition for himself and the program he developed
- Novant fired Duvall in July 2018
- What happened?

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- In 2015 Novant Health hired Tanya Blackmon as Senior VP of Diversity and Inclusion
- Novant tasked Blackmon to develop a “Diversity and Inclusion Strategic Plan” for the company
- The Plan had 3 phases
  - **Phase 1**: Asses Novant’s DEI culture, benchmark its DEI levels, and get the company’s Board to commit to using DEI in decision making
  - **Phase 2**: Set goals to embed diversity and inclusion in 3-5 years, with a commitment to adding additional dimensions of diversity to the executive and senior leadership teams
  - **Phase 3**: Evaluate the progress toward embedding DEI and implement strategies and tactics to close identified gaps

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- In May 2018, Novant's DEI Council met and reviewed DEI data
  - Decline in female leaders from 2015 to 2017
  - 82% of Novant's workforce was female but only 4% female
  - Increase in white male representation
- In July 2018, Novant fired Duvall. Novant replaced him with a white woman and 2 black women.
- In October 2018, the DEI Council met again
  - Discussed their philosophy: "Our team members should reflect our communities. Our leadership should reflect our team members."
  - Discussed quotas and targets
- In February 2019, the DEI Council met again and reviewed a report
  - DEI Plan had seen great success in using qualitative and quantitative data as drivers to track progress
  - Showed that Novant had made progress in increasing Black/African American representation in leadership roles

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- When Duvall's supervisor told him he was being fired, he simply said the company was "going in a different direction"
- No prior indication that his job was in jeopardy

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- At trial, the supervisor testified that Duvall was fired because he “lacked engagement” and “support from the executive team”
  - He said Duvall “damaged his credibility” when he “froze” and “walked off” the stage while giving a presentation to Novant’s leadership team, and then declined opportunities to speak before the Board
- But it turned out that Duvall was actually sick—a fact that the supervisor knew at the time

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- The supervisor also testified that Duvall missed two management meetings
  - But both absences were the product of known and previously existing scheduling conflicts (one for a presentation at a national conference, and one for a family reunion)
- In December 2018, just a few months after the termination, Duvall's supervisor praised Duvall's performance to a recruiter
  - Supervisor said the reason Duvall was let go was because the company had experienced "a lot of change"—there was a "desire to bring new leaders" and for a "different point of view"
- Four months before Novant fired Duvall, it fired another white male worker and replaced him with a black male employee

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- Again, the jury awarded Duvall $10 million in punitive damages
- The *Duvall* court highlighted several things
  - The use of quotas
  - The folks with whom Novant replaced Duvall
  - The supervisor's "shifting, conflicting, and unsubstantiated explanations for Duvall's termination"
    - "[M]erely post hoc rationalizations invented for the purposes of litigation and therefore unworthy of credence"

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Lessons from Duvall

- Don’t use DEI quotas
  - DEI programs should be about expanding the applicant pool (outreach and removing barriers), not about meeting hiring/promotion quotas
- Document performance issues
- When terminating an employee, provide the actual reason—don’t just say “not a good fit” or “going in a different direction”
  - You don’t want it to appear that you’re changing or manufacturing your story once in litigation
- Follow your policies for *everyone*

Dill v. IBM (W.D. Michigan March 26, 2025)

- Randall Dill worked as a consultant for IBM.
- For seven years, his reviews were stellar.
- Then, Randall was put on a performance improvement plan . . .
- Eventually, Randall's employment was terminated.

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Dill continued . . .

- Randall sued for race and gender discrimination.
- He said that IBM implemented a policy that incentivized management to terminate white male employees and seek a higher percentage of minorities and women in the workplace.

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Dill continued . . .

- IBM moved to dismiss the complaint
- The court denied that motion, noting:
  - IBM's policy provided a bonus multiplier for managers hiring diverse candidates
  - IBM's CEO stated "specific quotas" for minority and female employees at a company meeting, and IBM Annual Reports listed specific representation goals
  - The PIP tasked Dill with wholly new tasks, and therefore could have been pretextual

Lessons from *Dill*

- The court listed the following ways to analyze "whether a diversity policy goes beyond mere aspirational goals" and violates Title VII:
  - Does the policy define specific quotas based on protected classes?
  - Does the policy "refer[] to any caste system designating a hierarchical preference for certain racial groups over others"?
  - Does the policy provide specific plans for how to achieve diversity goals?
  - Does the policy place managers under pressure to increase minority representation in the workplace (by, e.g., compensating them to do so)?

Thank you!

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