

2023 Equal Employment Opportunity Trends in Litigation and Enforcement

by Melissa Raphan

Data from 2022 portends a monumental year ahead for Equal Employment Opportunity (“EEO”) litigation and enforcement. Plaintiffs are filing class-based-employment claims in higher numbers than ever, and class actions involving EEO claims have resulted in historic settlement amounts. The EEOC has signaled it will step up enforcement efforts regarding systemic discrimination in 2023. Even the U.S. Supreme Court is focused on EEO in 2023, granting a writ of certiorari in a Title VII religious-accommodations case to be argued this year. Employers should also be mindful of expansive new state laws protecting employees who “blow the whistle,” including regarding claimed EEO violations. This article summarizes the general trends in EEO in litigation and enforcement for 2023.

Class-Based Claims and Settlements

Class-based-employment claims have increased in volume in recent years, by some counts comprising over 25% of all class actions. For class-based-employment-discrimination cases settled in 2022, the total of the top-ten settlements soared to nearly \$600 million—an increase of nearly 100% from the previous year.¹ Nine out of the ten highest settlements involving class-based-employment claims in 2022 involved sex-bias claims, and the tenth case involved a religious-discrimination claim related to a company’s COVID-19 vaccination requirements. Furthermore, motions for class certification in class-based-employment lawsuits were granted 53% of the time last year. Viewed together, this information paints a picture that is likely to embolden class-action-employment attorneys in 2023 to aggressively pursue class-based claims.

The EEOC has also signaled it will prioritize EEO issues in 2023. In the agency’s Fiscal Year 2022 Agency Financial Report,² it highlights trends that drive the agency’s enforcement efforts in 2023, and the EEOC notably focuses on efforts to address systemic discrimination. The agency resolved 330 systemic investigations on the merits in 2022, obtaining \$29.7 million in monetary benefits for victims. It also filed 10 lawsuits asserting systemic discrimination, collecting over \$28 million in damages. The EEOC’s

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“docket” of pending systemic cases is down to only 29 (far fewer than the 71 systemic cases pending in 2018), freeing up the agency’s resources to bring new EEO enforcement actions. Several of the EEOC’s EEO settlements in 2022 should be notable to employers: Labor agencies’ top-ten settlements recovered a combined \$403 million in 2022 (more than double the amount from the previous year). This includes the EEOC’s \$18 million settlement in March of 2022 with Activision Blizzard over sexual harassment and pregnancy-bias claims, and its \$8 million settlement with Circle K Stores Inc. over pregnancy- and disability-discrimination allegations.

Beyond remaining aware of the growing EEO trend in litigation and enforcement, employers can take several actions to reduce their risk of a class-based-EEO claim. First, companies are increasingly conducting pay-equity audits, including on regular intervals, to assess whether their systemic compensation and benefits practices are susceptible to a disparate-treatment or disparate-impact claim. Second, employers should consult with experienced employment counsel before making decisions that impact all or most employees in a position, department, building, or other division—particularly if those divisions raise implicit issues involving the protected statuses of employees (e.g., sex, gender or identity, sexual orientation or preference, race, national origin, religion, age, marital status, or disability status). And third, employer-provided benefits are a frequent issue in class-based-employment claims, so companies should be mindful of their benefits offerings and carefully consider with legal counsel any actions that may reduce or change employees’ current benefits.

Groff v. DeJoy

Because the U.S. Supreme Court chooses the cases it hears each term, only a select few EEO cases reach the highest court. On January 13, 2023, the Supreme Court granted certiorari in *Groff v. DeJoy*, a case involving important religious-accommodation issues under Title VII.

Gerald Groff was a postman who delivered mail for the United States Postal Service (“USPS”) from 2012 until 2019 in rural Pennsylvania. In 2013, Amazon contracted the USPS to deliver their packages, and the deal required packages to be delivered on Sundays and holidays. Groff is an evangelical, protestant Christian who observes the Sunday Sabbath. The USPS tried for years to accommodate Groff’s religion, including by finding volunteers for certain of his shifts, but by 2017 it began disciplining him for failing to show up for scheduled shifts on Sundays. Groff quit in 2019 and sued the USPS under Title VII of the Civil Rights Act for failing to accommodate his religious practice.

The U.S. Supreme Court’s review of *Groff* involves two questions: (1) whether the Court should disapprove the more-than-de-minimis-cost test for refusing religious accommodations under Title VII; and (2) whether an employer may demonstrate “undue hardship on the conduct of the employer’s business” under Title VII merely by showing the requested accommodation burdens the employee’s coworkers rather than the business itself.

Expanded Whistleblower Protections

Whenever EEO issues become more visible—whether by litigation and high-settlement amounts, increased agency enforcement, or landmark cases—a common trend is an uptick in employee complaints, whether internal (e.g., to a co-worker, a manager, human resources, or executive leadership) or external (e.g., to law enforcement, news media or the press, or by filing a complaint). This trend will likely emerge in 2023 with states passing increasingly protective whistleblower laws to shield those employees from any adverse employment action.

In February of 2022, New York State passed by amendment one of the most expansive whistleblower laws in the country. New York’s expanded whistleblower statute now contains significant exceptions to the rule that an employee must first report suspected wrongdoing to the company, it protects reports about any individual whom a worker reasonably believes has violated a law or rule, and it allows for punitive damages to some employees, former employees, and independent contractors. California and New Jersey have passed similar, but less expansive, laws containing broad protections for whistleblowers. We expect other state legislatures to consider passing similar laws in 2023 and beyond.

Employers—particularly those with operations in multiple states—should continue to monitor these state-law changes. Companies should consult experienced employment counsel upon receipt of a serious complaint by an employee—even an informal complaint. Employers with operations in New York (or other states with new or expanded whistleblower statutes) should also review their company whistleblower and anti-retaliation policies and ensure they conform to the new requirements.

¹ Bennett, Jennifer, “Workplace Class Settlement Values, Certifications Soared in 2022,” Bloomberg Law, Jan. 6, 2023.

² https://www.eeoc.gov/eeoc-fiscal-year-2022-agency-financial-report#_Toc24980000.