

Advisory

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Update on the EEOC's Targeting of Systemic Discrimination Practices

In an Advisory released in 2009, we reported on the steps taken by the Equal Employment Opportunity Commission ("EEOC") to embolden its efforts in attacking systemic discrimination in employment, and thus, to continue driving agency focus from individual discrimination cases to agency driven charges attacking such suspected systemic discrimination practices. Since that Advisory, the EEOC has more than fulfilled its promise.

Specifically, the EEOC has commenced over 100 class action and multi-plaintiff lawsuits against various employers alleging systemic discrimination. A number of these actions have resulted in significant monetary settlements, along with agreed upon provisions for ongoing EEOC oversight. The following are just a few examples:

- The grocery store chain Albertsons agreed to pay \$8.9 million to settle claims of race and national origin discrimination and harassment claims lodged by African American and Hispanic employees;
- Sears Roebuck agreed to pay \$6.2 million to former employees who alleged disability discrimination claims;
- KFC agreed to pay a group of nineteen female employees over \$1 million to settle their claims that they had been subjected to unwelcome sexual conduct by their male coworkers;
- Allstate Insurance agreed to settle age discrimination claims made by sales agents in the amount of \$4.5 million;
- Phoenix based Republic Services, and its subsidiary, agreed to pay nearly \$3 million to settle claims of age discrimination; and
- SUPERVALU, Inc., American Drug Stores LLC, and Jewel Food Stores, Inc., collectively resolved a class action complaint brought by the EEOC for \$3.2 million, in which a class of terminated employees alleged disability discrimination.

Viewed against the backdrop of the publicity surrounding recent settlements and jury awards in privately initiated class actions, such as in one of the most publicized class actions, *Dukes v. Wal-Mart* (certifying the largest discrimination class in history), and *Velez v. Novartis Pharmaceuticals* (where a New York jury awarded a class of female sales reps \$250 million in punitive damages), the message is clear---systemic discrimination challenges will be the focus of employment litigation for years to come.

The EEOC's broad and expansive powers under federal law have taken the EEOC into other areas of employment decision making also involving allegations of systemic discrimination. For example, on October 20, 2010, the EEOC held a public meeting to address employers' use of credit and other background checks in connection with hiring and other employment

continued next page

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decisions. At this meeting, the EEOC Chair, Jacqueline A. Berrien, noted statistics suggesting the use of such criteria by employers has a disproportionately adverse impact on minority groups because their members generally exhibit more negative credit histories than do non-minority employees. Various states have enacted, or are considering, legislation to prohibit reliance on negative credit histories in making employment decisions, unless a satisfactory credit history is a “bona fide occupational requirement” of a subject position. On the federal level as well, legislation was introduced in July 2009, called the Equal Employment for All Act, which prohibits current or prospective employers from using information about an individual’s creditworthiness, credit standing or status in making employment decisions, unless certain exceptions are met.

These developments make it all the more compelling for employers to undertake internal audits covering all those primary areas of decision making that we highlighted for you in 2009. For your easy reference, please visit www.wiggin.com to view the article.

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