

Title VII & Race Discrimination

{ Carter M. Stewart
U.S. Attorney
Southern District of Ohio



What it is/What it does:

- ⌘ A federal anti-discrimination law that prohibits employment discrimination based on race, color, religion, sex, or national origin.

Civil Rights Act of 1964 – Title VII

Who it covers:

- ⌘ All government employers
- ⌘ And private sector employers employing at least 15 employees
- ⌘ Employment agencies
- ⌘ Unions having at least 15 members or which operate hiring halls

Title VII

Protections

- ⌘ Recruiting, Hiring & Advancement
- ⌘ Harassment/Hostile Work Environment
- ⌘ Compensation & Privileges
- ⌘ Segregation & Classification of Employees
- ⌘ Retaliation (employees' right to file complaint)

Title VII

Who does it cover?

- & Employees
- & Applicants for employment
- & Former employees

Title VII

Disparate Treatment

- ⌘ Claim: The employer treats some people differently because of their membership in a particular class that is protected by statute
- ⌘ Proof of intent to discriminate is critical

Types of cases

Disparate Impact

- ⌘ Claim: A facially neutral employment practice has a disproportionately adverse impact on members of a particular class that is protected by statute
- ⌘ Proof of discriminatory intent is NOT required

Types of cases

Mixed Motives

- ⌘ Disparate treatment case in which illegal discrimination was a motivating factor but other factors also influenced adverse action
- ⌘ Defendant has burden to prove that same decision would have been made absent consideration of prohibited factor

Types of cases

Pattern and Practice

- ⌘ Claim that discrimination is the employer's standard operating procedure
- ⌘ Plaintiff alleges systemic discrimination against a particular group, not just a specific individual

Types of cases

Administration & Enforcement

- ⌘ U.S. Attorney's Offices and the Federal Programs Branch **defend** federal government agencies in federal discrimination suits.
- ⌘ DOJ Civil Rights Division engages in **affirmative civil enforcement** and investigates allegations of discrimination against government agencies and anyone subject to federal funds.

DOJ role

U.S. Attorney's Offices

- ⌘ Responsible for overseeing employment discrimination litigation brought against federal agencies in district courts

DOJ – Civil Division
Defensive Litigation

Federal employee makes informal complaint

Meets w/ EEOC/agency grievance body

Makes formal complaint

EEOC/grievance body - Fact-finding/investigation

EEOC/grievance body determination

No cause – EEOC dismisses

Individual files lawsuit

Reasonable cause

Conciliation efforts unsuccessful

We represent

Public employer

When lawsuit
is filed in

Federal District Court

Appellate Court

U.S. Attorney's Offices – Case example

Phillips, et al.

No. 03-4190

Phillips, et al. v. Cohen

Page 2

OPINION

AVERN COHN, District Judge. This is a race discrimination case under Title VII. Plaintiffs claim that facially neutral criteria used to determine promotions had the effect of discriminating against African-American employees in the Department of Defense's Defense Finance and Accounting Service, Columbus Center ("DFAS-CO"), in violation of 42 U.S.C. § 2000e-16. Plaintiffs appeal the decision of the magistrate judge granting summary judgment to the Secretary and finding that five of the named plaintiffs, Curtissene Anderson, Richard Goudy, Denise Goudy, Linda Pettes, and Jean Washington lacked standing. Plaintiffs also raise an issue regarding the magistrate judge's treatment of its motion for sanctions. We agree with the magistrate judge's decision regarding standing with the exception of one plaintiff, Denise Goudy. We disagree with the magistrate judge's decision to grant summary judgment in favor of the Secretary, finding sufficient evidence in the record of a disparate impact. We also find that the magistrate judge erred in its handling of plaintiff's motion for sanctions. Accordingly, for the reasons that follow, the decision of the magistrate judge is **AFFIRMED IN PART, REVERSED IN PART, and REMANDED** for proceedings consistent with this opinion.

I. BACKGROUND

A. The DFAS-CO

The DFAS-CO is an independent agency within the Department of Defense, created in 1991. Its chief function is paying the Department's contractor and vendor bills, but it also provides accounting services for smaller Department agencies. The new office expanded rapidly, from four to five hundred employees at its opening, to about 3,500 employees in 1995. Mahlon Boyer, Director of Human Resources at DFAS-CO, estimated that about three thousand employees were hired at the office between 1991 and 1995.

Charles Coffee ("Coffee"), the Director of DFAS-CO, describes the promotion process in the agency, as it existed in the mid-1990s, as follows. First, the manager with an opening in the department decides whether the position should be filled externally, or through a temporary or permanent promotion. Next, the manager works with a human resources specialist to develop a "recruiting plan" that details the qualifications needed for the position. If the manager chooses a permanent competitive promotion as the best option, an internal posting of the job vacancy takes place. Employees then submit applications. A human resources employee ranks the applications numerically, using values assigned for experience, education, awards, disciplinary actions, and performance reviews. This information is provided to human resources by the employee's supervisor. Human resources issues a document called a promotion certificate referring the top fifteen ranked candidates to the hiring manager. The agency's equal employment opportunity office reviews the certificates to determine whether any of the finalists are members of under-represented groups, and puts this information on the certificate. (Underrepresentation is determined by looking at the number of members of that group in the position's grade level.) The hiring manager, using the certificates, ranks the finalists and determines which ones she wishes to interview. The ranking is based on qualifications detailed in the recruiting plan. After choosing the successful candidate, the manager must

This is a race discrimination case under Title VII.

Plaintiffs claim that facially neutral criteria used to determine promotions had the effect of discriminating against African-American employees in the Department of Defense's Defense Finance and Accounting Service, Columbus Center ("DFAS-CO"), in violation of 42 U.S.C. § 2000e-16.

Defensive Litigation

U.S. Attorney's Offices – Case example

Phillips, et al.

- ⌘ Discrimination complaint alleged disproportionately low number of African-Americans receiving promotions
- ⌘ EEO Officer prepared report – found African-Americans comprised about 22% of the DFAS workforce and received about 22% of the promotions
- ⌘ DFAS EEO referred complaint to EEOC
- ⌘ Phillips filed complaint in Southern District of Ohio

Defensive Litigation

U.S. Attorney's Offices – Case example

Phillips, et al.

- ⌘ Submitted allegations of discrimination under a disparate impact theory, as follows:

During the 1991–95 hiring expansion at DFAS-CO, many new hires were white women with no prior federal experience. By contrast, many of DFAS-CO's African-American employees had transferred from other federal positions when the agency opened. A clique of white supervisors held social functions to which white employees were invited. A morale problem developed in the agency. The 1997 PAT Report showed evidence that promotion policies disparately impacted African-Americans. DFAS-CO has engaged in employment practices that treat white employees more favorably in promotion, discipline, awards, and performance appraisals.

Defensive Litigation

U.S. Attorney's Offices – Case example

Phillips, et al.

- ⌘ Magistrate judge found that plaintiffs had failed to show DFAS-CO's promotion policies had a negative disparate impact on African-Americans.

Defensive Litigation

Civil Rights Division

- ⌘ Responsible for the **enforcement** of federal employment discrimination laws **against state and local government employers**

DOJ – Civil Division

Affirmative Enforcement

Civil Rights Division

– Employment Litigation Section

⌘ Has jurisdiction under Title VII to bring cases under both Section 707 and Section 706

Affirmative Enforcement

Civil Rights Division

– Employment Litigation Section

⌘ Section 707: A Department priority

- ⌘ Bring suits where there is reason to believe a “pattern of practice” exists

- ⌘ DOJ has self-starting authority to initiate investigations

Affirmative Enforcement

Griggs v. Duke Power

- ⌘ Supreme Court decision 40 years ago
- ⌘ Employment practices that disproportionately screen out people of a particular race can be as exclusive as a sign that reads:

BLACKS NEED NOT APPLY

- ⌘ Applicant screening tests

Affirmative Enforcement

Griggs v. Duke Power

The law is not designed to ensure any pre-ordained outcome.

It is designed to ensure that the pool of applicants is not artificially limited by *unnecessary* barriers that bear no relationship to job performance.

Affirmative Enforcement

U.S. v. State of New Jersey, et al. - 2012

- ⌘ Alleged pattern or practice of discrimination based on race and national origin
- ⌘ Written exam to screen and select candidates for promotion to police sergeant
- ⌘ Consent decree – state will pay \$1 million in backpay to African American and Hispanic victims

Affirmative Enforcement

U.S. v. City of New York Fire Dept. - 2007

- ⌘ Pass/Fail use of written exams for entry-level firefighters had disparate impact on African-Americans and Hispanics
- ⌘ Tests not job related
- ⌘ \$98 million settlement for backpay and fringe benefits

Affirmative Enforcement

Civil Rights Division

– Employment Litigation Section

⌘ Section 706: DOJ can file suit against a state or local government employer based upon an individual charge of discrimination referred by the EEOC

⌘ After reasonable cause determination by EEOC and failed efforts to conciliate

⌘ DOJ cannot initiate investigation on its own

Affirmative Enforcement

U.S. v. Reading Parking Authority - 2013

- ⌘ Discriminated against & harassed Hispanic workers and then retaliated against former worker when he complained
- ⌘ New reporting and investigating process
- ⌘ RPA will pay \$77,500 in relief to victims

Affirmative Enforcement