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Emerging EEO Trends: Staying Compliant with Current Laws

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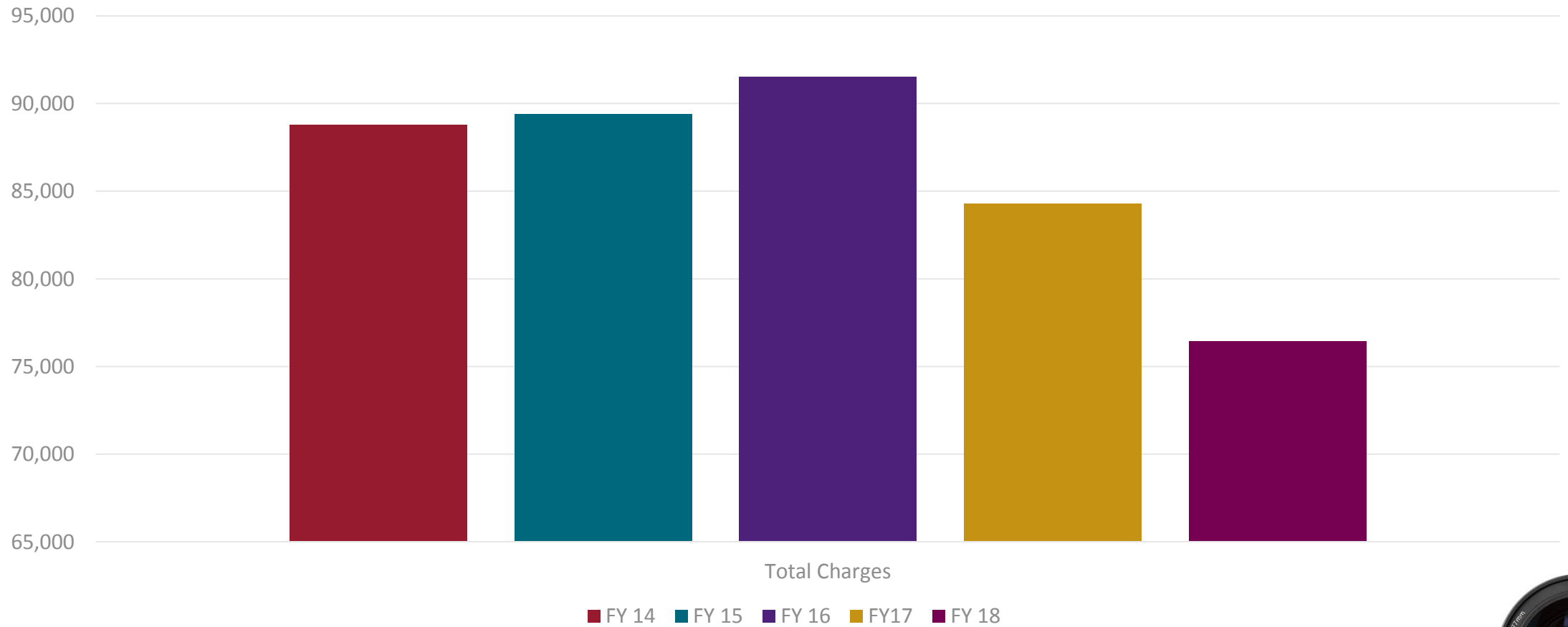
- Associate General Counsel, BlueCross BlueShield of South Carolina
 - Joined in 2004
 - Focuses on labor, employment, litigation, HIPAA, contracts, real estate
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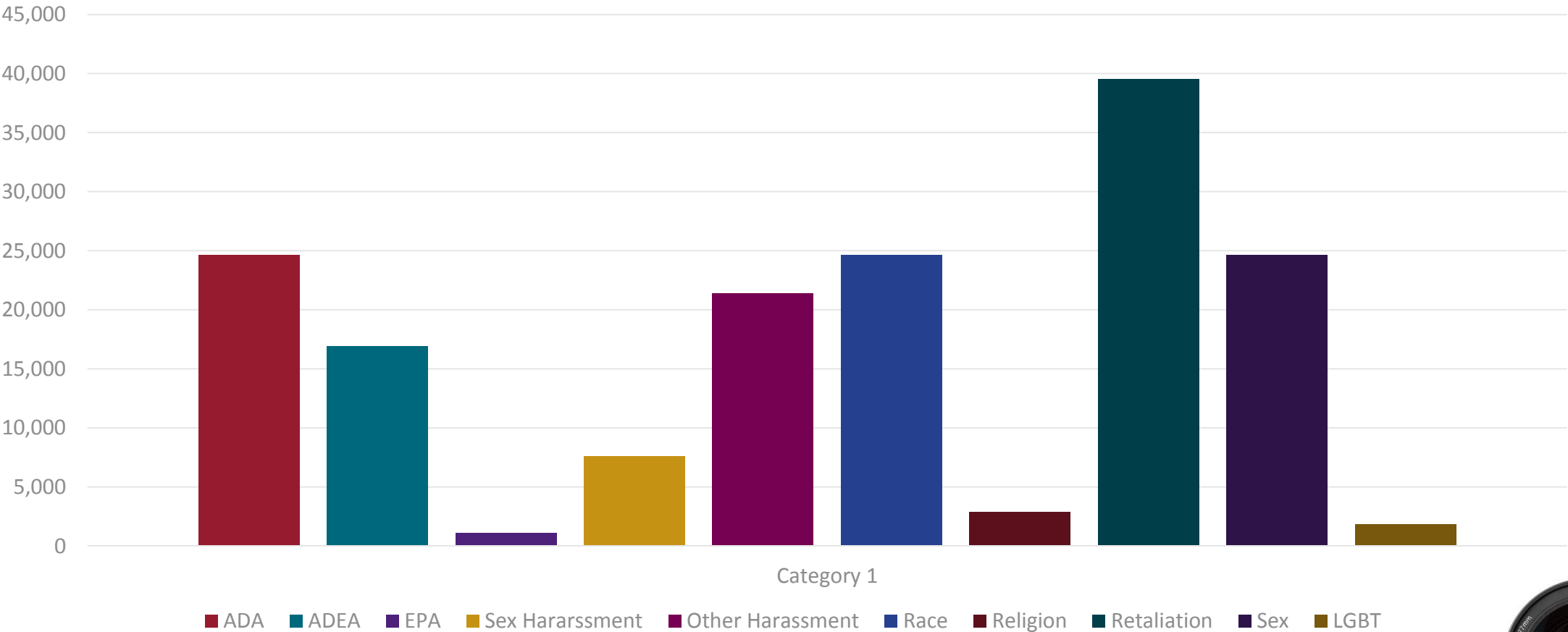
EEOC FY 2018 Stats



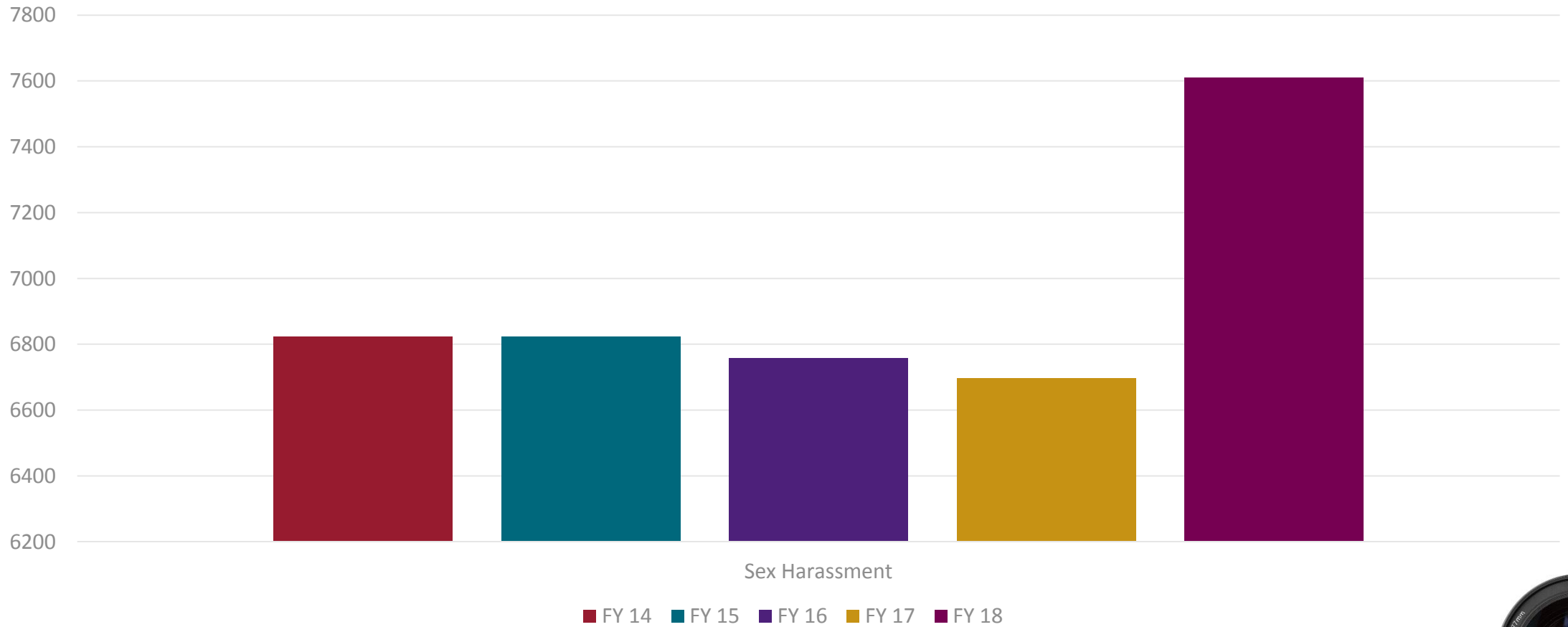
Total EEOC charges by FY



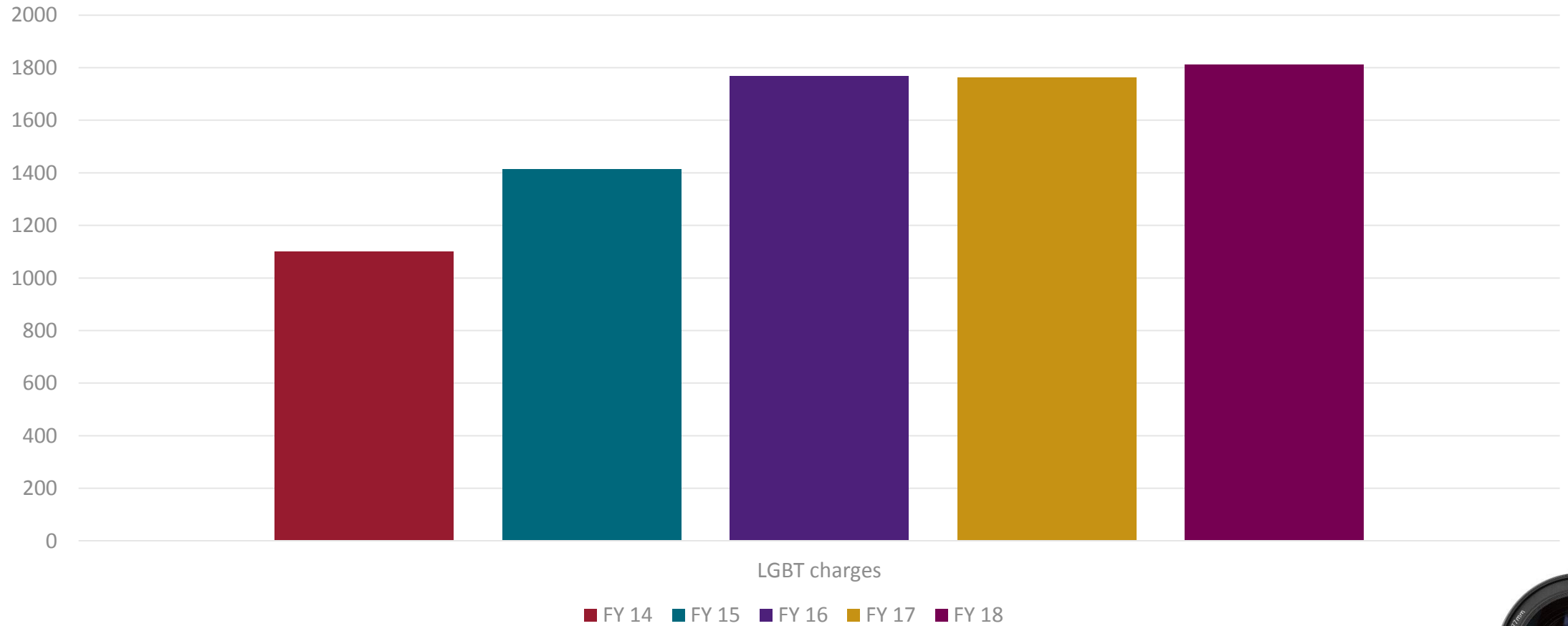
Charges by type of claim



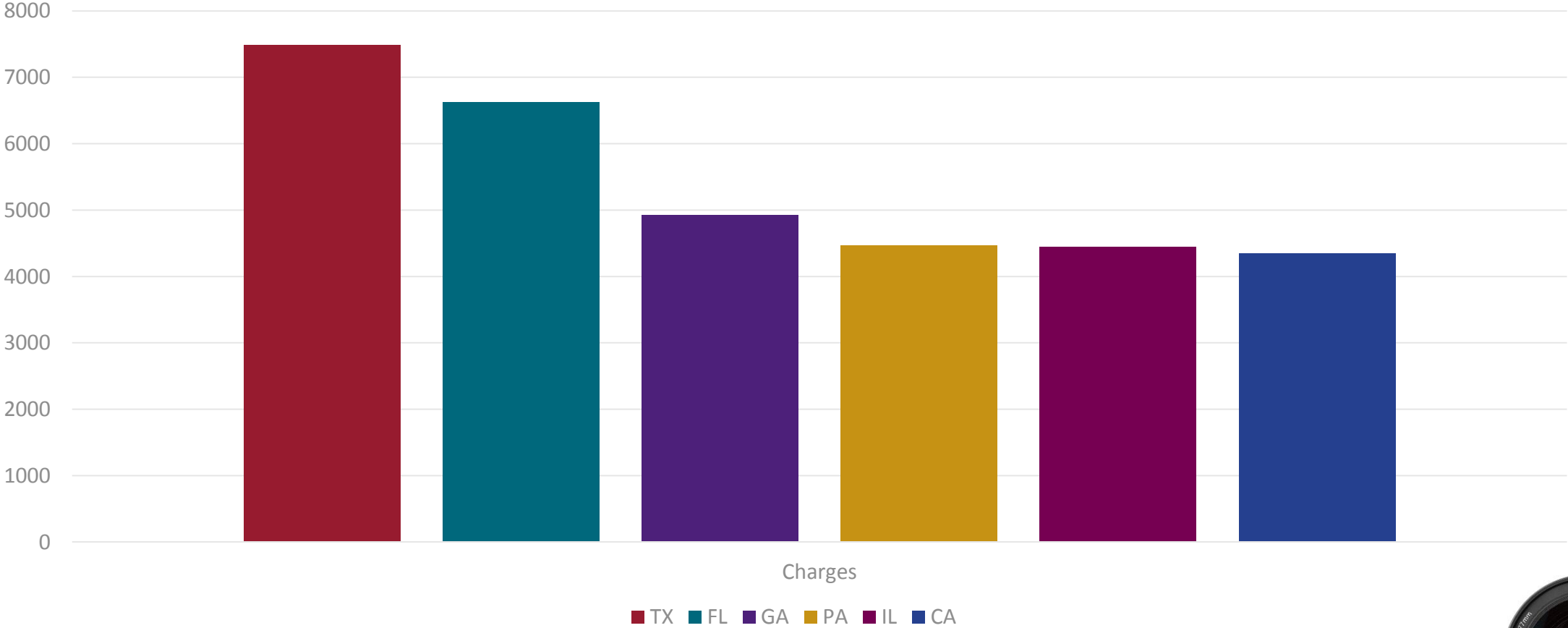
Increase in sex-based harassment charges



LGBT charges continue to increase

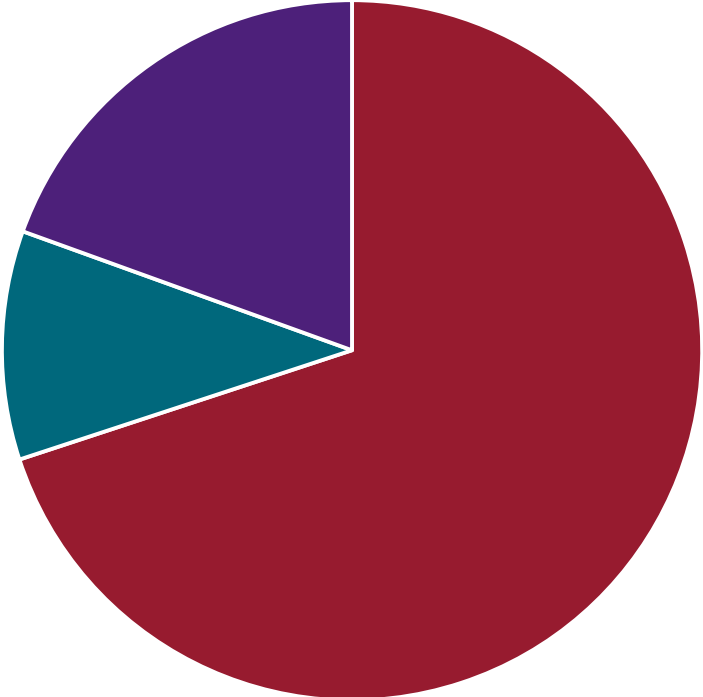


Most charges by state



\$505 million in monetary recovery

Monetary Recovery



■ Mediation & Settlement ■ Litigation ■ Federal employees



Targeted Recruitment

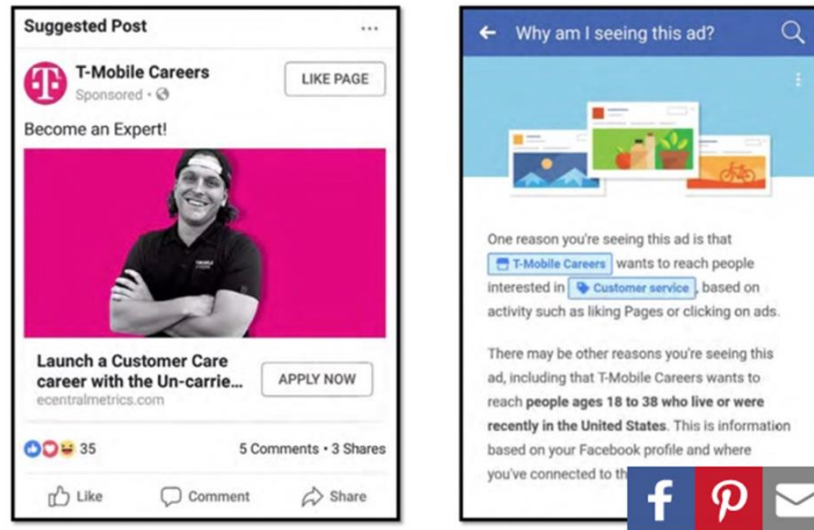


T-Mobile





Communications Workers of America filed suit


- Alleges that hundreds of employers illegally targeted ads on Facebook to exclude older workers
- Class action alleging age discrimination



Suggested Post




 **T-Mobile Careers**
Sponsored · 

Become an Expert!







Launch a Customer Care career with the Un-carrie...
ecentralmetrics.com


APPLY NOW

   35

5 Comments · 3 Shares




 Like  Comment  Share

← Why am I seeing this ad? 



One reason you're seeing this ad is that [T-Mobile Careers](#) wants to reach people interested in [Customer service](#), based on activity such as liking Pages or clicking on ads.

There may be other reasons you're seeing this ad, including that T-Mobile Careers wants to reach **people ages 18 to 38 who live or were recently in the United States**. This is information based on your Facebook profile and where you've connected to th



Motion to dismiss filed

- ADEA “publication” provision
 - Illegal to publish or print ads indicating any preference, limitation, specification, or discrimination based on age
 - Campaign blocks older workers from seeing ads
- Defenses
 - Ad is facially neutral
 - Ad is available to all people regardless of age on various websites
 - Using limited revenue to reach different segments of the population, in addition to publishing more broadly, is not age discrimination



What about affirmative action recruiting?

- If CWA wins, does that make recruitment targeted to females and minorities racially discriminatory?



ADEA protects employees, but not applicants?



Kleber v. CareFusion (7th Circuit)

- 58-year-old attorney allegedly denied interview because he had too much experience
- Job posting for senior counsel position stated “3 to 7 years (no more than 7 years)” prior experience
- Kleber had extensive experience in private practice and as general counsel with major national corporation
- 3-judge panel of 7th Circuit ruled that he could proceed with claim for unintentional or disparate impact age discrimination
- Issue is whether ADEA protects applicants (as opposed to employees) from adverse impact based on facially neutral policy



Reviewed en banc by full appellate court

- ADEA provision that authorizes disparate impact claims is plainly limited to employees and is unambiguous
- Creates a split among appellate courts regarding whether ADEA adverse impact provision applies to applicants
- Practice of college recruiting questioned as discriminatory



Algorithmic hiring



Are algorithmic hiring tools better?

- Supposed to predict whether applicant will be successful in job
- Supposed to eliminate protected characteristics from process
- Creates efficiency for talent acquisition teams facing large pools of applicants
- Do they unfairly weed out women and minorities?
 - Typically use employer-provided information to assess applicants
 - But if employers rate performance of men or non-minorities higher, they may be favored by algorithm
- EEOC studying this issue
- Not aware of any lawsuits yet



Creative – or questionable? – diversity initiatives



Microsoft announced strategies to boost diversity

- 2016: Tied executive bonuses to workforce diversity goals
- 2018: Made inclusion “core priority” for employees and factors into compensation package
 - Ongoing conversations with manager about how contributing to making Microsoft more diverse and inclusive
 - Joining employee resource group
 - Participating in inclusion training
 - Teaching at pipeline organizations supported by company
- Potential backlash and unintended consequences?



Pregnancy & fitness requirements



Thomas v. Florida Parishes Juvenile Justice Commission (Louisiana)

- Staff officers required to demonstrate defined level of physical fitness on bi-annual basis
- Pregnant employee (6 weeks) failed 1.5 mile run and had placental bleed
- Re-test scheduled for 1 month later
- Doctor's note stated "avoid extended running due to high risk pregnancy"
- According to supervisor, Commission would not excuse pregnant employees, even with physician's note, but would excuse non-pregnant employees with physical limitations
- Employee did not provide note to HR and failed run again
- Suffered back injury and placed on light duty for remainder of pregnancy



Was there an adverse action?

- Employee claimed that refusal to accommodate pregnancy-related restriction while accommodating non-pregnant workers was discrimination
 - PDA: Women affected by pregnancy shall be treated the same for all employment-related purposes as others not so affected but similar in ability or inability to work
- Employer said “no harm, no foul” because no adverse action
- Supervisor’s comment was direct evidence of discrimination
- Novel issue: court held employee need not suffer adverse action to establish claim under this provision of PDA
- Summary judgment denied



Is breaking the law protected activity?



Netter v. Guilford County Sheriff's Office, NC (4th Circuit)

- Employee alleged she was disciplined based on race (Black) and religion (Muslim)
- During investigation, she provided confidential personnel files of several employees to HR, EEOC, and her lawyer
- Her employment was terminated for those actions, which violated state law prohibiting dissemination of county personnel files without authorization
- Does Title VII protect against retaliation for that conduct?
 - No, because she violated state law
 - Court left open the possibility that other types of disclosures could be protected activity



Gossip can = sex discrimination



Parker v. Reema Consulting Services (4th Circuit)

- Can a false rumor that female employee slept her way to the top give rise to liability for sex discrimination?
- Yep!
- “As alleged, the rumor was that Parker, a female subordinate, had sex with her male superior to obtain promotion, implying that Parker used her womanhood, rather than her merit, to obtain from a man, so seduced, a promotion. She plausibly invokes a deeply rooted perception – one that unfortunately still persists – that generally women, not men, use sex to achieve success. And with this double standard, women, but not men, are susceptible to being labeled as ‘sluts’ or worse, prostitutes selling their bodies for gain.”



But teasing is okay...



Ponder-Wallace v. Sanderson Farms (Georgia)

- HR supervisor left work for 2 hours on Wednesdays to attend Bible study
- Employees called her “church lady” or “church girl”
- One employee made (ungrammatical) comments, such as:
 - Don’t nobody give an “F” if you’re Christian
 - I ain’t got to watch my mouth because you in the room
 - I guess I need to get me a f’ing church so I can take long breaks
 - I hope you ain’t got church tonight

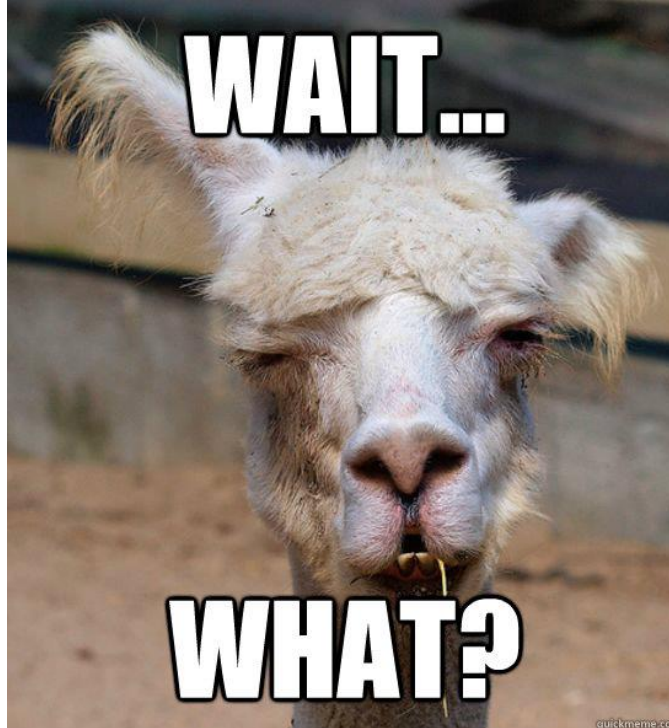


HR manager said “don’t pay him no mind”

- Summary judgment granted to employer
- Not severe or pervasive
- Not subjectively offensive
 - Not bothered by being called “church lady”
 - Other remarks were not meant to be derogatory
- Not objectively offensive
 - Teasing, offhand comments



Can heterosexual maintain claim for sexual orientation discrimination?



O'Daniel v. Industrial Service Solutions (Louisiana)

- HR manager posted a less-than-nice comment on Facebook about transgender woman in the dressing room at the mall
- Her lesbian boss reprimanded her and required sensitivity training
- HR manager complained that she was discriminated against for being heterosexual and then let go in RIF
- Is objecting to heterosexual discrimination protected activity under Title VII?
 - 5th Circuit precedent says that Title VII does not apply to sexual orientation claim
 - Title VII protects activity based on “objectively reasonable good faith belief”
- EEOC and other LGBT groups filed brief supporting HR manager
- 5th Circuit held conduct was not protected
 - It was unreasonable to believe Title VII prohibited sexual orientation discrimination in light of its prior rulings



Supreme Court to hear sexual orientation/gender identity cases

- *Bostock v. Clayton County* (11th Circuit)
 - Title VII does not prohibit sexual orientation discrimination
- *Zarda v. Altitude Express Inc.* (2nd Circuit)
 - Sexual orientation discrimination is motivated, at least in part, by sex and is therefore a subset of sex discrimination prohibited by Title VII
- *EEOC v. R.G. & G.R. Harris Funeral Homes* (6th Circuit)
 - Discrimination on basis of transgender status necessarily implicates Title VII's prohibition against sex stereotyping



Must employer accommodate gender dysphoria?



ADA & gender identity

- The ADA expressly excludes “gender identity disorders not resulting from physical impairments” from definition of disability
- *Blatt v. Cabela’s* (ED Pa 2017)
 - Court ruled that the exception only applies to the condition of identifying with a different gender, not conditions like gender dysphoria, which goes beyond gender identity and is characterized by stress and other conditions that may be disabling
- *Parker v. Strawser Construction* (SD Ohio 2018)
 - Court disagreed with *Blatt* and held that the ADA does not protect disabling or non-disabling gender identity disorders
- *Doe v. Massachusetts Department of Correction* (D Ma 2018)
 - Court agreed with *Blatt* and noted that there may be physical etiology for gender dysphoria



So what's an employer to do?

- Other conditions relating to gender dysphoria may be disabilities, such as anxiety
- It is not clear if recovery from gender reassignment surgery could be disability
- State and local laws may not exclude, or may include, gender dysphoria
- Proceed cautiously, engage in interactive process, and accommodate where feasible



And, what about effects of Tourette syndrome?

- Lawsuit filed by African American employee alleging racial harassment based on co-worker's "coprolalia," which causes person to involuntarily say inappropriate things
- Allegation that co-worker said the "N" word 18 times in a 6-minute period and that employer failed to take corrective action
- Court rejected argument that employer's hands were tied because of employee's disability
 - Employer can lawfully take action against employee with Tourette syndrome if the disability-caused behavior is disruptive to co-workers
- *Evans v. Orthopedic Assoc.* (ED Mo 2019)



Reasonable accommodations in the applicant process



Kasper v. Ford Motor Co. (Ohio)

- Class action alleging online application process discriminates against disabled applicants
- According to Complaint:
 - System includes ADA contact information, but applicant needed assistance to find it
 - Applicant required to provide information, such as job interested in, that was not accessible
 - Phone calls never returned
- Motion to strike class allegations denied



Review online processes

- OFCCP routinely reviews online application process for accessibility and contact resources
 - Expect this to be closely monitored in focused reviews
- DOJ and plaintiffs filing more and more lawsuits over website accessibility in general
- Provide contact information in accessible form and don't require applicants to provide more than their basic contact information



A case of alleged compensation discrimination

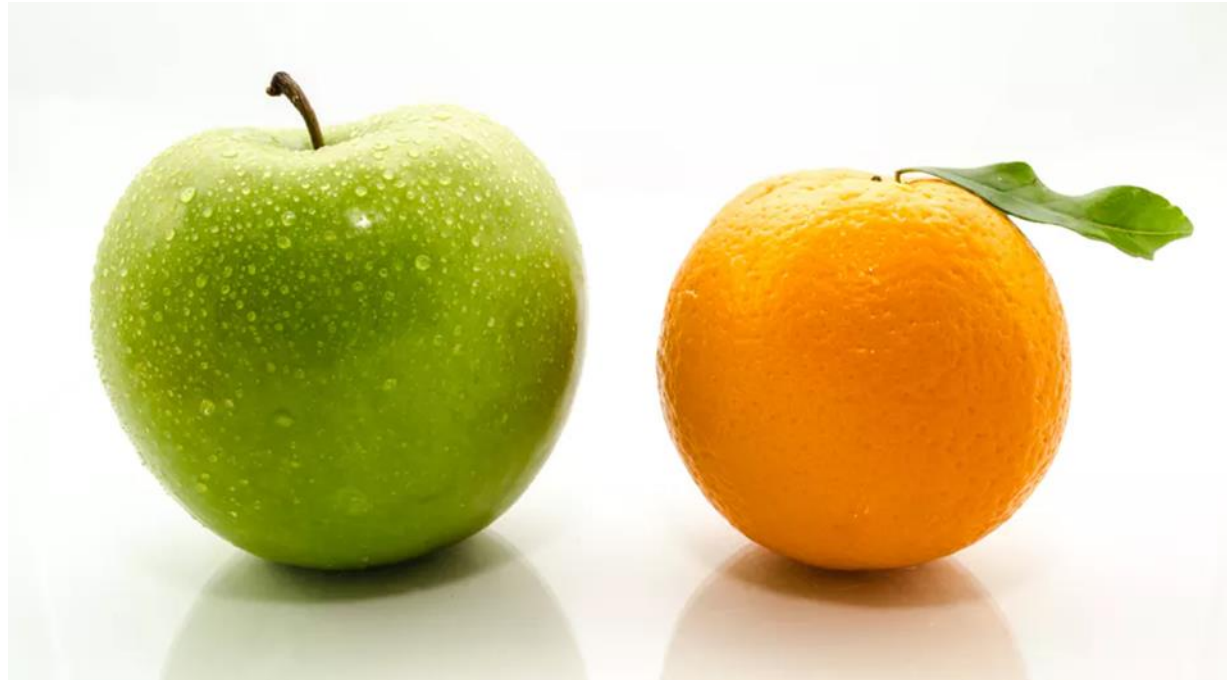


Spencer v. Virginia State University (4th Circuit)

- Female sociology professor alleged sex discrimination in pay
- Compared herself to 2 former administrators in other departments
- EPA
 - Not performing “equal” work requiring “equal skill, effort, and responsibility”
- Title VII
 - Jobs not “similar”
- Court affirmed summary judgment to university on grounds that males were not appropriate comparators



Who is similarly situated?



Lewis v. City of Union City, GA (11th Circuit)

- Full 11th Circuit clarified standard for determining which employees are similarly situated comparators
- Employer argued should be “nearly identical”
- Employee argued should be that employees are comparable so long as differences aren’t so significant that they render comparison effectively useless
- Court adopted employer-friendly standard
 - “Similarly situated in all material respects”



Session takeaways

- Make accommodations (even if coverage not certain) wherever feasible
- Don't allow gossip (or teasing) about any protected characteristic
- Update website accessibility
- Don't cross the line with diversity initiatives
- Be careful with AI technology in hiring
- Respond to employee complaints quickly and consistently



Thank you!

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