

## 4 EEOC Cases Attorneys Should Watch In 2024's 2nd Half

By **Anne Cullen**

Law360 (June 21, 2024, 3:27 PM EDT) -- The U.S. Equal Employment Opportunity Commission's current docket includes several harassment cases alleging managers not only failed to stop misconduct but joined in on it, and experts say these suits may indicate that higher-ups' misbehavior is a focus area for the workplace bias watchdog.

Here, Law360 takes a look at four lawsuits filed by the EEOC that discrimination attorneys should keep an eye on in the latter half of this year.

### Agency Says Agriculture Firm Owner Deadnamed Employee

In March, the commission **filed a lawsuit** against Illinois-based pig farming business Sis-Bro Inc., alleging that a former employee who transitioned while working there was asked invasive questions, mocked, sexually harassed, groped and repeatedly referred to by her previous name.



Experts say several harassment suits on the Equal Employment Opportunity Commission's current docket suggest an agency focus on managers' misbehavior. (iStock.com/Andrii Dodonov)

Sis-Bro's president participated in the harassment of the unnamed worker, who began transitioning in 2018, according to the EEOC's short, eight-page complaint. In a charge filing that the former employee lodged with the Illinois Department of Human Rights, she alleged that the company owner was one of the

"primary harassers" by making cruel remarks about her body as she transitioned and by continuing to use her deadname over her objections.

The agency said that because the harassment was allowed to persist, the worker felt she was forced to quit in October 2021.

The U.S. Supreme Court ruled in **Bostock v. Clayton County** in 2020 that Title VII of the Civil Rights Act protects workers from discrimination based on their sexual orientation and gender identity. The EEOC has made clear in its guidance building off of that ruling that intentional and repeated use of the wrong name and pronouns for a transgender employee can support a Title VII harassment allegation.

While the EEOC has long held that Title VII protects LGBTQ workers — years before the Supreme Court endorsed this position — Sis-Bro argued in a May motion to dismiss that the commission can't bring a bias claim over the worker's transgender status because most of the harassment purportedly took place before the high court's edict in Bostock.

James F. Hermon, a member at Dykema Gossett PLLC who advises businesses on the full gamut of employment issues, said that while the company's argument is a "stretch," it highlights the need for more case law on Bostock to build up.

"I don't know that that's going to be a successful argument going forward, but it shows the need to continue to flesh out these areas of discrimination," Hermon said.

Edward Hollis, a management-side partner at Quarles & Brady LLP, added that the EEOC is only going to ramp up the lawsuits it files on behalf of transgender workers, making it important that employers pay attention to the legal moves in this arena.

"A lot of people still aren't used to the notion of deadnaming being a potential form of harassment," Hollis said. "But what employers ought to be cognizant of is that more of these claims involving transgender employees will be filed going forward."

### **Trial Teed Up in SkyWest Harassment Battle**

In February, the EEOC won **a Texas federal court's approval** to move ahead **with its lawsuit** alleging SkyWest Airlines stood idly by while a former parts clerk faced constant, degrading sexual harassment, including invasive questions and banter about rape.

Former SkyWest employee Sarah Budd's boss ignored her multiple complaints about misconduct in the heavily male airline parts department in Dallas, according to the commission's August 2022 lawsuit. Other members of Budd's department openly talked explicitly about her body, asked her what sexual positions she enjoyed and regularly joked about rape, the agency alleged.

A maintenance supervisor took part in the misconduct, but Budd's direct boss ignored her pleas to intervene, according to the lawsuit.

Budd felt forced to quit her job in May 2020, the agency said.

Following the EEOC's recent win, both sides are now gearing up for a trial slated for November.

Garen Dodge, a management-side attorney at Odin Feldman & Pittleman PC, said the case spotlights the importance of speedily acting on workers' complaints.

"SkyWest had complaints they should've investigated early, so it highlights some of the basics," he said. "If somebody complains about harassment or discrimination, the Supreme Court has made it clear that you have to begin your investigation right away."

According to case filings, Budd's boss opted not to act because he told her it would put an even bigger target on her back. Dodge made clear that's not a justification for letting an employee be harassed.

"That's not an excuse," Dodge said. "There's an obligation for the company to look into it, at a minimum. You can't just sweep it under the rug."

### **EEOC Lodges Rare Genetic Bias Suit**

The sole lawsuit the EEOC filed under the Genetic Information Nondiscrimination Act in its last fiscal year alleged that a mail room supervisor for an Oklahoma-based printing firm **repeatedly harassed a subordinate**, including by calling her reprehensible names, after learning of her African ancestry.

In a 10-page complaint filed just before the agency's fiscal year closed, the commission said that the mistreatment started after Angela Navarro-Alcorn, a former mail room sorter for ResourceOne in Tulsa, Oklahoma, was looking at the results of an at-home DNA kit on her phone. The results revealed she had ancestry from Cameroon, the Congo and northern Africa, according to the agency.

Navarro-Alcorn, who is multiracial, showed the results to her supervisor, Mor Lee, and the boss laughed and quickly started leveling cruel race-related comments at her, the commission said. Lee called Navarro-Alcorn an "ape" and said she "swings through the trees," among other remarks, according to the lawsuit.

The harassment occurred in front of other workers, but the supervisor did not stop, even after Navarro-Alcorn and other employees pressed him to, the EEOC said. Navarro-Alcorn's complaints to a higher-up also went unheeded, according to the lawsuit, and the agency said she started facing less favorable working conditions.

The abuse was so bad that Navarro-Alcorn was forced to leave in August 2022, just a few months into her tenure at ResourceOne, according to the complaint.

Because of the scant case law out there on GINA, Hermon, of Dykema, said it's important to pay attention to the very few cases the commission files under the statute.

The charges the EEOC receives each year under the genetic nondiscrimination statute make up just a fraction of its total intake — it fielded 361 GINA filings in its 2023 fiscal year, representing less than half of a percent of all of the charges that came in. And the EEOC accordingly files very few GINA lawsuits, firing off only a dozen in the decade and a half since the law took effect in 2009.

Hermon also pointed out that this is yet another harassment case where a higher-up is alleged to have not only failed to stop the misconduct, but played a part in it.

In conjunction with the lawsuits against Sis-Bro and SkyWest, Hermon said, the commission may be drilling down on this kind of misconduct.

"In all three of these cases, there was manager involvement in the harassment, it wasn't just the co-workers," he said. "It seems to be a focus for the EEOC."

And he said it highlights a company's need to train their supervisors.

"If you look at these cases in concert, it really makes it clear the importance of having effective harassment training, not just for the co-workers, but at that next level up," he said. "You need to teach the supervisors and managers that they can't be doing this — you're not one of the guys — and if you do see it, you need to take appropriate action."

### **Sheetz Case May Signal Refocus on Background Checks**

The EEOC **made a splash** in mid-April when it sued convenience store chain Sheetz, alleging that the company rejects every candidate deemed to have failed its criminal background review and that this policy — which Sheetz has had in play since at least 2015 — disproportionately culls nonwhite applicants.

According to the EEOC, Black job applicants failed the company's screening and consequently lost out on jobs at a rate of over 14.5%, while white candidates wound up in the same boat about 8% of the time.

The EEOC has long held that, based on the racial disparities in the criminal justice system, categorically refusing to hire people based on conviction or arrest records will have a disparate impact and therefore run up against Title VII.

However, Steven J. Pearlman, a management-side employment partner at Proskauer Rose LLP, said the commission has been quiet in this arena for years.

"About 10 or 15 years ago, there was a very significant amount of activity, including lawsuits, EEOC

pronouncements and some guidance from the EEOC about how to minimize the risks," he said. But then there were "crickets," Pearlman said.

In 2012, the agency updated its 1980s- and 1990s-era guidance documents on arrest and conviction records, and the following year, it fired off two high-profile lawsuits over companies' criminal background screening policies and issued a fact sheet for employers on the topic.

Then, in 2014, the commission issued a pair of technical assistance documents aimed at employers and employees about background reports, including relating to credit and criminal history.

Since then, there's been a lull of activity in this realm, Pearlman said, but he told Law360 it's possible that the commission's lawsuit against Sheetz is a sign the agency is planning to ramp it back up.

"The question is, are we going to see a resurgence of EEOC activity on this front? Is this a harbinger of more lawsuits focused on the application process and on the criminal background check process?" he said. "That seems to be consistent with [President Joe] Biden's agenda, and if Biden gets reelected, that could mean more of these suits coming down the pike."

--Additional reporting by Emmy Freedman and Braden Campbell. Editing by Abbie Sarfo and Nick Petruncio.