

RECENT EMPLOYMENT LAW DEVELOPMENTS

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Recent Developments

- ❖ EEOC Update
- ❖ ADAAA Regulations
- ❖ GINA Regulations
- ❖ Retaliation Claims/Whistleblower Claims
- ❖ Right to Privacy
- ❖ Class Actions

EEOC Update

- ❖ 99,922 charges filed with EEOC in 2010 (representing a 7.1% increase over 2009 & 20.7% increase over 2007).
- ❖ Highest number since EEOC's founding in 1965.
- ❖ For second year in a row, retaliation claims were the most frequently cited charge.
- ❖ Number of charges of race, national origin, religion, and disability all rose to record highs.
- ❖ Charges alleging violations of the ADA had the largest year-over-year jump and likely reflects the recent amendments to the ADA.

EEOC Update

- ❖ Notably, in 2010, the EEOC shifted the Agency's focus to systemic, rather than individual, charges of discrimination.
- ❖ At the end of 2010, the EEOC reported that it was in the process of conducting 465 systemic investigations.
- ❖ EEOC announced that it intends to dedicate significant resources in 2011 to expand the Agency's outreach efforts to potential claimants.

EEOC Update

- ❖ On January 20, 2011, a jury in the Northern District of New York returned a \$1,260,080 verdict in a significant sexual harassment lawsuit by the EEOC on behalf of a class of female employees.
- ❖ The manager of a grocery store harassed teenage workers by making sexual comments, subjecting them to unwelcome touching and discussing his sexual relationship with his fiancée, the store's owner.

EEOC Update

- ❖ EEOC argued that the company repeatedly failed to stop the harassment, despite numerous complaints to management and the police.
- ❖ Of the damages, \$10,080 were compensatory, \$1,250,000 were punitive.

EEOC Update

- ❖ In early 2010, in connection with a workers' compensation leave exhaustion policy, Sears Roebuck & Co. paid the largest ADA settlement in EEOC history.
- ❖ The Northern District Court of Illinois approved distribution of a \$6.2 million compensation fund to the former 235 employees that had been terminated from their positions. The average award for each claimant was approximately \$26,300.
- ❖ EEOC alleged that Sears maintained an inflexible policy and terminated disabled employees instead of offering reasonable accommodations.

ADAAA Regulations

- ❖ ADAAA went into effect January 1, 2009.
- ❖ ADAAA overturned several Supreme Court decisions.
- ❖ Final regulations approved and published March 25, 2011.
- ❖ Final regulations will become effective on May 24, 2011.
- ❖ Increases potential liability under ADAAA.

ADAAA Regulations

- ❖ Broader Scope of "Disability"
 - "Substantially limits" is to be construed broadly (need not be "significant" or "severe").
 - Expanded definition of "major life activities" that includes a list of bodily functions.
 - Cannot review "mitigating measures" other than eyeglasses or corrective lenses.
 - Impairment that is episodic or in remission is still considered.

ADAAA Regulations

❖ Broader Scope of "Disability"

- An impairment is a disability if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population; it does not need to prevent, or significantly restrict the individual from performing the major life activity.
- An impairment only needs to substantially limit one major activity.

ADAAA Regulations

- The previous six-month "transitory" part of the "transitory and minor" exception to "regarded as" coverage does not apply to the definition of disability – the effects of an impairment lasting or expected to last fewer than six months can be substantially limiting and even less than a few months, if it is severe.

Recommendations Based on ADAAA Regulations

- ❖ Ensure the company's managers and human resources professionals are trained and provided with guidance on the effect of the Regulations, understand the interactive process, and involve human resources in consistently offering and documenting accommodations.

Recommendations Based on ADAAA Regulations

- ❖ Take a fresh look at the company's ADA procedures and policies to ensure that they concentrate less on whether an employee is disabled and more on whether an employee with a physical or mental impairment can perform the essential functions of the position, with or without reasonable accommodation (focus on "qualified").
- ❖ Provide accommodations to the company's disabled employees, such that a meaningful interactive process occurs sooner with the disabled employee.

Recommendations Based on ADAAA Regulations

- ❖ Review all company job descriptions to confirm that they specifically and accurately define the essential functions of each position.
- ❖ Analyze the company's pre- and post-employment screening and testing, to ensure they are job-related and do not adversely affect the broad range of qualified, disabled individuals who will now take part in the screening or testing.

GINA Regulations

- ❖ EEOC issued final regulations that implement employment provisions (Title II) of the Genetic Information Nondiscrimination Act of 2008 (GINA) effective January 10, 2011.
- ❖ Purpose is to prevent use of genetic information and family medical history to be a basis for denial of employment.
- ❖ There were over 200 filings with the EEOC relating to GINA. Expected to increase.

GINA Regulations

- ❖ What Does GINA Limit and By Whom?
 - Employers cannot take adverse action/discriminate based on genetic information.
 - Employment agencies cannot discriminate.
 - Labor organization cannot exclude or expel.
 - No retaliation against employees alleging GINA violation or participating in the investigation of alleged violations.
 - No harassment because of genetic information.

GINA Regulations

- ❖ What is "genetic information"?
 - Results of an employee's genetic tests.
 - Genetic tests of family members of such employee (up to fourth-degree relatives).
 - Manifestation of a disease or disorder in an employee's family members.
 - Request for or receipt of genetic services (e.g., genetic counseling).
 - Participation in clinical research which includes genetic services.
 - Does NOT include information about the age or sex of any individual.

GINA Regulations

❖ What Does GINA Prohibit?

➤ Discrimination based on genetic information.

- Hiring, discharge, or otherwise discriminating with respect to compensation, terms, conditions or privileges of employment because of genetic information.
- Limiting, segregating or classifying employees in any way that would deprive or tend to deprive opportunities.

➤ Acquisition of Genetic information.

- Requesting, requiring or purchasing genetic information with respect to an employee or a family member of the employee.

GINA Regulations

- ❖ Six Narrow Exceptions to Ban on Acquisition of Genetic Information:
 1. Inadvertent acquisitions (e.g., manager overhears employee talking about relative's illness).
 2. Genetic information obtained as part of health or genetic services, including wellness programs, offered by employer on a voluntary basis, if specific requirements are met.
 3. Family medical history acquired as part of the certification process for FMLA leave (or leave under state or local law).

Six Narrow Exceptions to Ban on Acquisition of Genetic Information:

4. Genetic information acquired through commercially and publicly available documents, so long as the employer is not searching with the intent of finding genetic information or accessing sources likely to contain genetic information.
5. Genetic information acquired through genetic monitoring program that monitors biological effects of toxic substances in the workplace.
6. Acquisition of genetic information of employees by employers who do DNA testing for law enforcement purposes as a forensic lab or for purposes of human remains identification.

GINA Resolutions

- ❖ Clarification of Inadvertent Acquisition of Protected Information that does not violate GINA:
 - Overhearing a conversation.
 - Making a general inquiry (e.g., "Will your daughter be okay?").
 - Unsolicited information.
 - A social media platform that the employee granted permission to be accessed.
 - A social media platform that the employee did not grant permission to be accessed.
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GINA Regulations

- ❖ Safe harbor language should be used whenever requesting medical information:

"The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. 'Genetic information' as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services."

29 C.F.R. § 1635.8.

Recommendations Based on GINA Regulations

- ❖ Review procedures and policies to ensure compliance with new regulations.
- ❖ Requests for medical information related to post-offer pre-employment examination, for accommodations under ADAAA, and for fitness-for-duty exams, and requests for leave should use safe harbor provision.
- ❖ Managers, human resources personnel, recruiters and company doctors should ensure that genetic information and family medical history information is not requested and if inadvertently obtained, it is not shared or used.

Retaliation Claims

- ❖ In the 2006 case *Burlington Northern & Santa Fe Railway Co. v. White*, the Supreme Court adopted an expansive definition of "adverse action," making it far easier for plaintiffs to pursue retaliation claims.
- ❖ The Court held that illegal retaliation occurs whenever a manager engages in conduct which has the effect of discouraging a "reasonable employee" from making a discrimination complaint.
 - e.g., reduction in work assignments and responsibilities.

Retaliation Claims

- ❖ Plaintiffs need not show that the alleged retaliation significantly impacted a term, condition, or benefit of employment.

Retaliation Claims

- ❖ In the 2009 case *Crawford v. Metropolitan Gov't of Nashville and Davidson County*, the Supreme Court considered how far anti-retaliation protections reach and who can bring retaliation claims.
- ❖ Though the plaintiff admitted she had not been the target of any discrimination, she later brought her own retaliation claim.
- ❖ The plaintiff claimed that her employer had taken adverse action against her because the information she disclosed during an investigation had corroborated another employee's discrimination complaint.

Retaliation Claims

- ❖ The Crawford Court held plaintiffs **need not** first allege that they suffered discrimination before claiming that they suffered retaliation.
- ❖ The Court held that the act of reporting inappropriate behavior during the investigation constituted protected action. Accordingly, adverse action taken in response to such reporting could constitute retaliation.
- ❖ On remand for further proceedings, the plaintiff was awarded **\$1.5 million**.

Retaliation Claims

- ❖ For the third time in five years, the United States Supreme Court ruled on a claim of unlawful retaliation in the employment discrimination context.....
- ❖ On January 24, 2011, the Court handed down its decision in *Thompson v. North American Stainless, LP*, No. 09-291, U.S. Supreme Court (January 24, 2011).
- ❖ Notably, this decision also marks the third consecutive time the Supreme Court has sided with aggrieved employees and expanded their retaliation protections.

Retaliation Claims

- ❖ In *Thompson*, the Court considered whether the fiancée of an employee who filed a sexual discrimination claim against the company, could bring a claim of unlawful retaliation when he was fired by that same employer three weeks later.
- ❖ Eric Thompson and his fiancée Miriam Regalado were both employees of North American Stainless. Regalado filed a sex discrimination charge with the EEOC and the employer fired Thompson three weeks later.

Retaliation Claims

- ❖ The Court unanimously ruled that Thompson, who had not participated in the investigation of Regalado's sexual discrimination claim, could bring a claim of retaliation even though he wasn't the one who brought the underlying sexual discrimination claim.
- ❖ The Court concluded that it is "obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancée would be fired."
- ❖ The Court held that Thompson should be protected and could bring his own retaliation claim.

Whistleblower Claims

- ❖ Employees who complain about illegal conduct or unsafe work conditions can later claim to be whistleblowers.
- ❖ It is very difficult to obtain summary judgment on whistleblower claims.
- ❖ The False Claims Act prohibits employers from knowingly making false statements to or engaging in fraudulent conduct towards the federal government for the purpose of obtaining payment from the federal government.
- ❖ Many statutes permit for retaliation claims or whistleblower claims even outside the discrimination context (FLSA, OSHA, PA Whistleblower Law).

Whistleblower/Retaliation Claims

- ❖ Keys to avoiding whistleblower/retaliation claims.
 - Document every complaint and the company's response.
 - Document whether the complaint had any validity.
 - Apply the same standards to the complaining employee as are applied to all others.
 - Make sure that the reasons for any subsequent disciplines are well documented.
 - Adopt strong anti-retaliation policies and communicate them regularly.
 - Train your managers.

Privacy in the Workplace

❖ Right to Privacy comes into play in a variety of ways:

- Office Searches
- Electronic Monitoring
- Off Duty Conduct
- Background Checks
- Polygraphs and Employment Testing
- Health and Medical Information (Ex. GINA)
- Substance Abuse Testing

Privacy in the Workplace

❖ Public v. Private Sector

- Public Sector – Broader protection (protection of the U.S. Constitution – 4th Amendment)
- Private Sector – Not protected by 4th Amendment – governed by common law, usually tort, and specific statutory provisions (Electronic Communications Privacy Act, HIPPA, FMLA, GINA, Fair Credit Reporting Act, Rehabilitation Act, etc.)

Privacy in the Workplace

❖ Office Searches

- Balancing Test - intrusiveness of search vs. justification of search
- *K-Mart v. Trott* – employer-provided lockers are subject to legitimate reasonable searches where lockers were either unlocked or the employer provided the lock
- Advance Notice – in Handbook or Policy – limits expectation of privacy

Privacy in the Workplace

❖ Electronic Monitoring

➤ Strongly Consider Promulgating Electronic Monitoring and Acceptable Use Policies

- Electronic Monitoring – informing employees that the company has reserved its right to monitor all electronic communications including email and internet use.
- Acceptable Use – set standards for acceptable use of company computer systems including emails and internet use, referencing company's non-discrimination and harassment policies

Privacy in the Workplace

❖ No Reasonable Expectation of Privacy in Electronic Communications:

➤ *Kelleher v. City of Reading* (E.D. Pa. 2002)

- Court Held that Employee did NOT have a reasonable expectation of privacy where the employer's Handbook informed employees of its right to monitor email and the employee signed a form acknowledging his receipt of the Handbook

Privacy in the Workplace

❖ *City of Ontario v. Quon*, 130 S.Ct. 2619(2010)

- Text messages sent using employer-issued electronic device (pager) did not, under the circumstances in that case, violate 4th Amendment reasonable search standards
- The Supreme Court held that the search was justified because it was motivated by legitimate work-related purpose; the scope was reasonable and not excessively intrusive; and the officer could not have assumed that messages were immune from scrutiny in all circumstances

Privacy in the Workplace

❖ Duty to Monitor Electronic Communications

- Employers generally do not have a duty to monitor employees' private communications, but employers may have a duty to take effective action if they have knowledge of unlawful conduct
- *Doe v. XYZ Corp.*, 887 A.2d 1156 (N.J. Super. 2005) – plaintiff sued her ex-husband's former employer for failing to monitor and prevent the employee from viewing pornography during work even though the employer had actual knowledge of employer's illegal computer usage.

Privacy in the Workplace

- ❖ Recommendations for Electronic Communications:
 - Develop narrowly tailored policies clearly establishing that the employee does not have a reasonable expectation of privacy in electronic communications sent through employer-provided computers, networks, systems
 - Uniformly enforce the established policies

Privacy in the Workplace

❖ Off Duty Conduct - Private Sector

- Unless protected by CBA or a specific statute, private employees have little protection if blogs they keep on their own computers, on their own time, cause them to be disciplined, including discharge, by their employers
- **CAUTION** - *Pietrylo v. Hillstone Restaurant Group* – jury found that the employer did invade the employees privacy by accessing employees MySpace page without authorization [Need Valid Access]

Privacy in the Workplace

- ❖ Public Sector – An employer does not violate the public employees rights if the action taken by the employer did not violate the employees constitutional rights.
 - *Snyder v. Millersville University* - Court held that Employer did not violate the Employees First Amendment Right as the Employee was unable to show that her MySpace postings related to matters of public concern
 - *Richerson v. Beckon* – the employees blog did not address matters of public concern and thus, her speech was not protected. Therefore, the School District was justified in reassigning her duties

Privacy in the Workplace

❖ Reason to Monitor Off Duty Employee Conduct:

- Confidentiality/Trade Secret Concerns
- Harassment of Fellow Employees
- Defamation Concerns
- Company Reputation

❖ Be Aware of

- Discriminatory Enforcement
- Retaliation

Class Actions

- ❖ Courts appear increasingly willing to permit class action lawsuits. For instance in *Dukes v. Wal-Mart*, 603 F.3d 571 (9th Cir. 2010), a gender-discrimination case, the Ninth Circuit, recently certified a class action that could include as many as 1.5 million plaintiffs.
- ❖ Although the United States Supreme Court will review the class certification by the Ninth Circuit, *Dukes* is a huge win for plaintiffs in the interim.

 **QUESTIONS ???**