

# Employment Law Update 2012

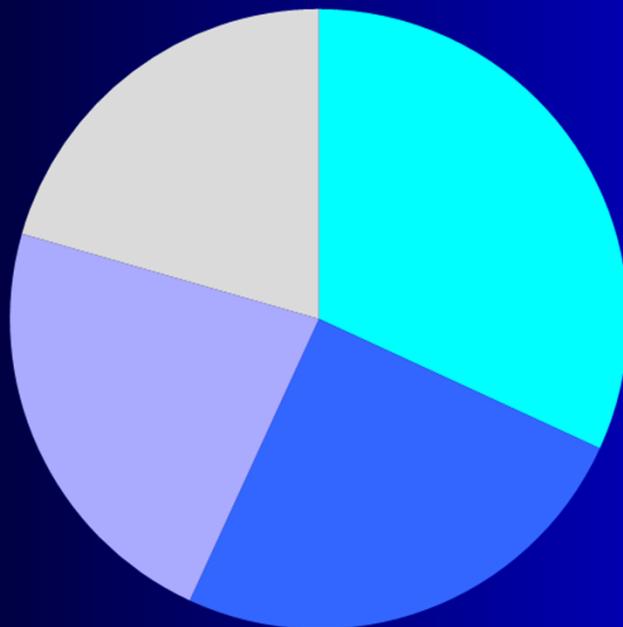
Maryland Association of CPA's

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# Charge Filings Remain High at EEOC



- Retaliation Charges-36,344
- Sex Discrimination Charges-28,534
- Disability Discrimination Charges-25,742
- Age Discrimination Charges-23,465

# Number of Discrimination Suits Soar

- Sexual harassment charges increased 146% between 1992 and 2001.
- Pregnancy discrimination charges increased 126% between 1992 and 2001.
- Sexual discrimination charges increased 112% during the same period
- Racial discrimination charges increased 484% between the 1980s and 1990s.
- National Origin charges increased 112% in the period 1992-2001.

# EEOC

- 182 days- average time it takes to process an EEOC investigation.

# Federal docket of employment cases

- 1/3 of all federal civil trials involve civil rights cases (about half of these cases are in the job discrimination area).
- Summary judgment is granted to the employer approximately 64% of the time.
- If consider only employment cases in which the employee was represented by counsel, summary judgment is granted to the employer approximately 54% of the time.
- Approximately 1/3 of lawsuits filed by employees proceed pro se.

## Why the increase in discrimination cases?

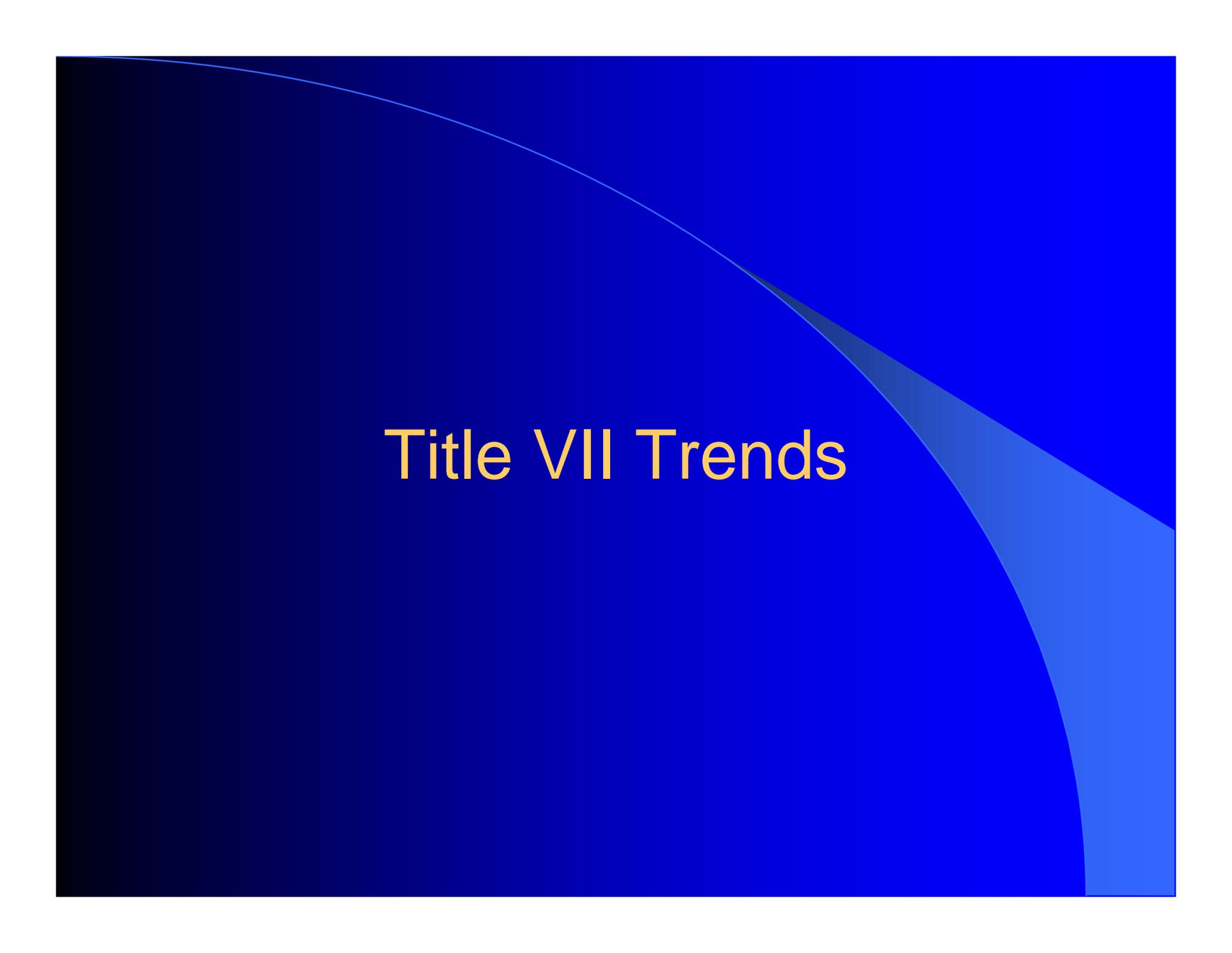
- Increase in the number of non-whites and women in professional and managerial positions.
- Increasingly integrated character of the workplace, making it easier to observe unfair practices against a particular group or groups.

# Cost of defending an employment discrimination lawsuit

- \$10,000 if the suit is settled.
- \$100,000 if it's resolved through summary judgment or other pre-trial motion.
- \$175,000 if it goes to trial.
- \$250,000 if the trial is won by the plaintiff.
- \$300,000 if the plaintiff victory survives appeal.

# Most Employment Discrimination Lawsuits Settle

- Only 6% of discrimination cases ever go to trial.
- Of the cases that make it to trial, only 1/3 of plaintiffs are successful.
- 16% chance the award will exceed \$1 million (excluding attorney fees) and a 67% chance that the award will exceed \$100,000.
- Average compensatory award in all federal employment cases (excluding punitive damages or attorney fees) is more than \$490,000.

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# Title VII Trends

# Title VII-Prohibited Bases of Discrimination- Race, Color, Religion, Sex, or National Origin

- Sexual orientation and gender identity not protected under Title VII
  - Employment Non-discrimination Act (“ENDA”) introduced in Congress in 2011 but did not pass.
- Genetic Information Nondiscrimination Act Signed into law on May 21,2008
  - Adds Genetic Information as a prohibited basis for discrimination
- Trend toward prohibiting discrimination against unemployed in hiring
  - Bills pending in Congress, California, and other states. New Jersey statute signed into law in 2011.

# Federal, State, and Local Anti-Discrimination Laws

	Federal law	Title 20	Baltimore County	Howard County	Montgomery County	Prince George's County
<b>Coverage</b>	15 or more employees	15 or more employees	Less than 15	5 or more	1 or more	1 or more
<b>Protected Classes</b>	Race, Color, Religion, Sex, National Origin, Age, Disability, Retaliation	Adds Marital Status, Sexual Orientation, and Genetic status	Same as 49B	Same as 49B and adds Familial Status, Political Opinion, and Occupation.	Same as 49B and adds Family Responsibilities	Same as 49B and adds Familial Status, Political Opinion, and Occupation
<b>Statute of Limitations</b> (1) Administrative (2) Judicial	(1) 300 days (2) Within 90 days of administrative leave	(1) 180 days (2) Not specified	(1) 6 months (2) 2 years	(1) 6 months (2) 2 years	(1) 1 year (2) 2 years	(1) 180 days (2) 2 years
<b>Exhaustion of Administrative Requirements</b>	180 days	180 days	60 days	45 days	45 days	45 days
<b>Attorneys Fees &amp; Costs</b>	Available to prevailing party including deposition costs	Same excludes deposition costs	Same as 49B	Same as 49B	Same as 49B	Same as 49B
<b>Damages</b>	(1) Back pay and other make whole remedies; (2) injunctive relief; (3) Compensatory damages not to exceed \$50,000 to \$300,000 depending on number of employees; (4) punitive damages in some cases.	Same as federal law	Punitive damages not available	No specified limitations on "damages, injunctive relief, or other civil relief"	No specified limitations on "damages, injunctive reliefs, or other civil relief"	No specified limitations on "damages, injunctive relief, or other civil relief."

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# Case Law Trends in Discrimination

# Who is employee under Title VII?

- *Murray v. Principle Fin. Group Inc.*, 613 F.3d 943 (9<sup>th</sup> Cir. 2010)(under circumstances, insurance agent was independent contractor not entitled to protections of Title VII; emphasizing absence of any “functional difference” between “common law agency test,” “economic realities test,” and “common law hybrid test”).

An employer cannot prevent a black supervisor from supervising white employees on the ground that the employees would not take instruction from her

- *Chaney v. Plainfield Healthcare Ctr.*, 612 F.3d 908 (7<sup>th</sup> Cir. 2010) (work environment at nursing home was hostile or abusive where black nursing assistant was not allowed to provide care for resident who did not want care from black assistants).

## Discriminatory treatment of white employees because of their association with blacks is prohibited

- *Barret v. Whirlpool Corp.*, 556 F.3d 502 (6<sup>th</sup> Cir. 2009)(discriminatory harassment is impermissible whether based on victim's association with protected employees or on victim's advocacy for protected employees).
- *Hernandez v. Yellow Transp., Inc.*, 641 F.3d 118 (5<sup>th</sup> Circle 2011) (white employee who had no personal relationship with any minority co-workers but merely associated with them was not member of protected class for purposes asserting hostile environment claim based on incidents of harassment directed at Hispanic workers).

## Pregnancy Discrimination cases on the rise

- Pregnancy discrimination complaints rose from 3,385 in 1992 to 4,449 in 2005.
- *Hall v. Nalco Company*, 534 F.3d 644 (7<sup>th</sup> Cir. 2008)(adverse actions taken on account of childbearing capacity affect only women, and thus cause of action was stated under Pregnancy Discrimination Act by plaintiff who alleged she was fired for taking time off to undergo in vitro fertilization).
- *Wierman v. Casey's Gen. Stores*, 638 F.3d 984 (8<sup>th</sup> Cir. 2011)(pregnant employee's discharge only four days after she took time off from pregnancy-related reasons gave rise to inference of discrimination as required to establish prima facie case).

- *Elam v. Regions Financial Corp.*, 601 F.3d 873 (8<sup>th</sup> Cir. 2010)(employer was not required to overlook plaintiff's frequent absences from work even if absences were caused by her pregnancy, unless it overlooked frequent absences of nonpregnant employees).

## Title VII requires equality in Fringe benefits for pregnancy and pregnancy-related conditions.

- *AT&T Corporation v. Hulteen*

- 2009 Supreme Court holds that an employer does not necessarily violate the Pregnancy Discrimination Act when it pays pension benefits calculated in part under an accrual rule that gave less retirement credit for pregnancy leave than for medical leave generally.

- Sharp dissent by Justice Ginsburg

- Decision rested on fact that pension calculation policies pre-dated the Pregnancy Discrimination Act.

## Sexual Harassment- Was the “hostile environment” severe or pervasive?

- Two 2008 Sixth Circuit opinions hold that this is a question of fact requiring a trial. *Hawkins v. Anheuser-Busch, Inc. and Thornton v. Federal Express Corp.*
- *Lapka v. Chertoff*, 517 F.3d 974 (7<sup>th</sup> Cir. 2008)(alleged rape by co-worker while attending mandatory off-site training session was sufficiently severe to create objectively hostile work environment).

- *Aulicino v. New York City Department of Homeless Servs.*, 580 F.3d 73(2<sup>nd</sup> Cir. 2009)(vacating summary judgment; in considering frequency of racially derogatory comments, district court should not have focused on two-year period that had been free of such comments so as to dilute strength of claims based on other periods of more intense harassment).
- *Kaytor v. Electric Boat Corp.*, 609 F.3d 537 (2<sup>nd</sup> Cir. 2010) (addition of physically threatening behavior may cause offensive conduct that is neither severe nor pervasive to cross line and become actionable).

- *Billings v. Town of Gafton*, 515 F.3d 39 (1<sup>st</sup> Cir. 2008) (emphasizing that it was by no means fatal to plaintiff's hostile environment claim that she testified that, notwithstanding alleged harassment, she was able to get her work done).
- *Webb-Edwards v. Orange County Sheriff's Office*, 525 F.3d 1013 (11<sup>th</sup> Cir. 2008) (male supervisor's regular comments about plaintiff's physical appearance were not actionably severe or pervasive where that was no showing that comments interfered with plaintiff's job performance, and where supervisor stopped making comments when requested).

A hostile environment can be proved even where the harassment lacked any overtly sexual content.

- *Kaytor v. Electric Boat Corporation*, 609 F.3d 537 (2<sup>nd</sup> Cir. 2010) (circumstantial evidence that facially sex-neutral incidents were part of the pattern of discrimination may consist of evidence that same individual engaged in multiple acts of harassment, some overtly sexual and some not).
- *EEOC v. Burlington Medical Supplies, Inc.*, 536 F. Supp 2d 647(E.D. Va. 2008) (courts should not divide conduct into instances of sexually oriented conduct and instances of sexually oriented conduct and instance of unequal treatment and discount the latter, thereby robbing instances of gender-based harassment of their cumulative effect).

## Trend- First Amendment defenses to hostile environment claims

- *Rodriguez v. Maricopa County Community College District*, 605 F.3d 703 (9<sup>th</sup> Cir. 2010) (emphasizing that there is no “harassment exception” to First Amendment’s free speech clause, and holding as a matter of law that professor’s racist emails to community college employees did not constitute unlawful harassment for purposes of equal protection claim).

# How can an employer prevent and correct harassment?

## Prevention-

- Provide reasonable procedures for registering complaints.

## Correction-

- *Hawkins v. Anheuser-Busch*, 517 F.3d 321 (6<sup>th</sup> Cir. 2008) (simply separating harasser and harassee is not sufficient; employer must take affirmative steps to end and prevent pattern of harassment, such as counseling harassers and warning them of serious discipline if future allegations are substantiated).

- *Lapka v. Chertoff*, 517 F.3d 974 (7<sup>th</sup> Cir. 2008) (employer responded with appropriate remedial action when it conducted prompt investigation into alleged rape of employee by co-worker and reasonably concluded that it had insufficient evidence to proceed against alleged perpetrator).
- *Tademy v. Union Pacific Corp.*, 520 F.3d 1149 (10<sup>th</sup> Cir. 2008) (evidence of failure to investigate or discipline perpetrators precluded summary judgment as to employer's liability on negligence theory).
- *Wilson v. Moulison North Corp.*, 639 F.3d 1 (1<sup>st</sup> Cir. 2011) (even though harassment continued, employer's response was timely and appropriate where harassers were reprimanded and told that repetition would result in dismissal; barring exceptional circumstances, employer's reasoned application of progressive discipline will ordinarily suffice).

## Courts do not “second-guess” a company’s internal investigation.

- “The appropriate scope of an employer’s investigation of a claim of sex discrimination is a business judgment, and shortcomings in an investigation do not by themselves support an inference of discrimination.” *Mc Cullough v. University of Arkansas*, 559 F.3d 855 (8<sup>th</sup> Cir. 2009).

## Trends- Title VII's religion exemption

- *Spencer v. World Vision, Inc.*, 633 F.3d 723 (9<sup>th</sup> Cir. 2011)(self-defined Christian charitable organization satisfied multi-part test for entitlement to exemption).

## Trends- Religious Harassment

- *EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306 (4<sup>th</sup> Cir. 2008) (reversing summary judgement; issues of fact existed as to whether Muslim employee, in being subjected to repeated comments disparaging him and his faith in time immediately following September 11<sup>th</sup> attacks, suffered religious harassment that was persistent, demeaning unrelenting, and widespread).

## Trends in Retaliation Cases

- *Hatmaker v. Memorial Medical Center*, 619 F.3d 741 (7<sup>th</sup> Cir. 2010) (participation clause is limited to participation in official investigations, not purely internal ones, with possible exception of internal investigation begun after EEOC charge has been filed).
- How specific must the employee be in her complaint? *Smith v. International Paper Company*, 523 F.3d 845 (8<sup>th</sup> Cir. 2008) (African-American employee's complaint to human resources about his supervisor's complaint to human resources about his supervisor's "cussing and hollering at me" was not protected conduct where complaint contained no reference to racial motivation).

# Lily Ledbetter Fair Pay Act of 2009

- Act amends Title VII to state that the 180-day statute of limitations for filing a pay discrimination claim resets with each new discriminatory paycheck.

# Discrimination and CPA firms

- Price Waterhouse discrimination case still good law. Female employee turned down for partnership in 1983 because she lacked “interpersonal skills”.
  - Result: for first time in U.S. history, an accounting partnership was forced to accept as a partner a person it did not want.
  - Lessons:
    - Using “interpersonal skills” as an evaluation criterion
    - avoid sexual stereotyping in personal actions

# Trends in cases under the Age Discrimination Employment Act

- 2009 U.S. Supreme Court decision

*Gross v. FBL Financial Services*

- A plaintiff must prove by a preponderance of the evidence that age was the “but-for” cause of the challenged employment decision
  - A different standard than Title VII cases
- Protecting Older Workers Against Discrimination Act introduced in Congress in 2009 as legislative “fix”.

# Drafting Employment Policies

## Prevention of problems can be a defense

- Policies are best way to demonstrate prevention.
- Where an effective policy is in place, the employer as a matter of law has satisfied its duty to inform itself. *Adams v. O'Reilly Automotive, Inc.*, 538 F.3d 926 (8<sup>th</sup> Cir. 2008).

## An impeccable policy is not enough- follow the policy.

- *EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306 (4<sup>th</sup> Cir. 2008) (while adoption of effective policy is important factor in determining whether employer exercised reasonable care, policy must be effective to have meaningful value).
- *Hawkins v. Anheuser-Busch, Inc.*, 517 F.3d 321 (6<sup>th</sup> Cir. 2008) (employer's policy did not absolve it from liability if it knew or should have known about conduct but failed to respond appropriately).



# Trends- Alternative Dispute Resolution in Employment Litigation

# Controversy concerning enforceability of mandatory arbitration provisions

- Arbitration Fairness Act introduced in Congress 2011
  - Would declare pre-dispute arbitration agreements invalid in employment disputes.
- Defense Appropriations Act
  - Would prohibit government's use of defense contractors who require employees to sign predispute arbitration agreements.
- *14 Penn Plaza v. Pyett.*-2009 U.S. Supreme Court holds collective bargaining agreement that requires union members to arbitrate claims is enforceable.

## Arbitration provisions in employee handbooks generally unenforceable

- *In re Lucchese Boot Co.*, 324 S.W.3d 211 (Tex. App. 2010)(employer's promise to arbitrate was illusory where employer retained unilateral control over agreement and could amend or terminate plan at any time without notice).
- *Melters v. Ralphs Grocery Company*, 161 Cal. App. 4<sup>th</sup> 696 (2008) (employee did not agree to arbitration by signing dispute resolution form that merely referred to arbitration policy).

# Ten Tips to Avoid Employer Liability

Employment Issues in  
Today's Workplaces

## Why should you be concerned about employer liability?

- Litigation can damage your reputation
- Litigation takes time and money

## Tip #1 - Create an employee handbook and policy manual

- Establishes a set of rules
- Sets expectations for employees

## Tip #2 - Reinforce the at-will employment relationship

- What does at-will employment mean?
- Ensure that employees understand that they are at-will employees
  - Offer letters and job application forms
  - Employment manuals
  - Train managers

## Tip #3 - Draft a detailed description of each job's requirements

- Eliminates miscommunications
- Establishes any minimum education and work criteria
- Helps evaluate whether disabled employees or applicants are able, with or without reasonable accommodation, to perform the job

## Tip #4 - Use sound hiring and interviewing practices

- Achieve a diverse workforce.
  - Advertise open positions
  - Interview at a range of universities
  - Employers with at least \$10,000 in government contracts and a minimum of 50 employees must meet limited affirmative action requirements

## Tip #4 - Use sound hiring and interviewing practices

- Provide managers with training on interviewing practices
  - Treat all job candidates consistently
  - Follow company practices and policies
  - Avoid illegal questions
  - Focus on the criteria for the job
  - Encourage interviewers to make a written record
  - Retain documents

## Tip #5 - Select the right employees

- Verify a candidate's address and work history
- Conduct a background check
  - Ensure that investigations are equivalent for all similarly situated candidates
  - Ask job candidates for copies of performance appraisals from prior jobs
  - Consider using outside firms for background checks
    - Credit History and Fair Credit Reporting Act
    - Driving records
    - Personal references
    - Job references
    - Criminal convictions
      - Cannot exclude people from jobs simply because of an arrest record or misdemeanor conviction

## Tip #6 - Avoid discrimination

- Make decisions based on job-related criteria
- Document hiring and terminating employees
- What is inappropriate behavior?
  - Consider each individual situation
- Take proactive measures to discourage harassment
- Respond quickly and investigate thoroughly
- Have an anti-harassment policy

## Tip #7 - Treat disabled candidates and employees fairly and legally

- ADA prohibits employers with 15 or more employees from discriminating against disabled individuals who are qualified, with or without accommodation, to perform the job in question
- Have a well-drafted job description
  - How frequently will the employee need to perform the task?
  - Do other employees also perform the task?
  - Is the task critical to the business?
  - Does the job exist to perform that function?
  - Is the task associated with the expertise needed to do the rest of the job?

## Tip #7 - Treat disabled candidates and employees fairly and legally

- Ask for reasonable medical documentation of an employee's limitations
- Engage in a dialogue
- When must an employer provide accommodation under the ADA?

## Tip #8 - Understand the FMLA

- The FMLA guarantees employees the right to take unpaid time off work of up to 12 weeks in a 12-month period for “serious health conditions” experienced by the employee or an immediate family member, or for the birth, adoption, or foster care placement of a child
- Verify the severity of the health condition
- Not required to pay employees on leave, but must maintain health coverage
- Have sick leave run concurrently with FMLA leave

## Tip #9 - Evaluate employees

- Have a detailed job description
- Treat each person equally
- Be consistent, objective, and evenhanded
  - Put several reviews side by side
  - Examine the way you are phrasing your evaluation
  - “Sleep on it”
- Give negative performance appraisals when appropriate

## Tip #9 - Evaluate employees

- Treat performance evaluations as sensitive and confidential
- Permit employees to obtain a copy of their performance appraisals
- Require employees to sign their performance evaluations
- Give employees the right to attach statements to appraisals if they disagree with the evaluation

## Tip #10 - Provide references with care

- Treat former employees consistently
- Do not give a letter of reference to a problem employee
- Verify the identify of the person requesting a reference

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