

**14<sup>th</sup> Annual Labor and Employment Law  
Conference**

**Recent Developments in  
Discrimination: 2010-11**

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# Overview

- EEOC Statistics: what's hot and what's not
- New case law: worker-friendly SCOTUS cases, bad news for marijuana users, and Title VII applies to men, too!
- Along came GINA

# EEOC Statistics: 2010 Update

- 99,922 charges – highest number recorded
- Increase in religion, retaliation, and disability charges
- Decrease in race, sex, national origin, and age charges
- GINA's first showing: 201 charges, or 0.2%

# Case Law Update

- The United States Supreme Court: More than just *Dukes*
- Developments in the Ninth Circuit
- Developments in Washington State

# Supreme Court



. . . whose side are they on anyway?

## *Thompson v. North American Stainless, LP* (“Zone of Interest”)

- Plaintiff fell within “zone of interests” protected by Title VII
- Firing an employee’s fiancé in response to the employee’s charge of sex discrimination is unlawful retaliation and actionable subject to Title VII
  - fiancée is entitled to maintain claim

# *Staub v. Proctor Hospital*

## *(Independent Investigation Not Enough!)*

- Uniformed Services Employment and Reemployment Rights Act (USERRA)
- A decision maker's *independent investigation* and rejection of plaintiff's claims of discriminatory animus will not negate the effects of prior discrimination
- If supervisor's anti-military animus is the proximate cause of an adverse employment action, employer is liable
  - Even if the actual decision maker within the employer had no anti-military animus

# Lewis v. Chicago (“Employment Practice” Defined)

- The term “employment practice” in disparate impact claims includes each time the City excluded an applicant who scored below a certain grade – no statute of limitations problem
- This is true even though adoption by the City of the test itself was determined to have given rise to a “disparate impact” claim years earlier
- Each instance of applying a discriminatory practice is a stand alone violation of Title VII



# Coming Soon

- *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*

- Americans with Disabilities Act

- Are tenured teachers at religious schools “ministers” under the ADA?



# Ninth Circuit Developments

- One joint and you're out (forever)
- *McDonnell Douglas* burden-shifting framework applies in all federal discrimination cases
- Race to the human resources department
- Men can be sexually harassed, too
- What is a “religious organization”?

# *Lopez v. Pacific Maritime Association*

- One Strike Rule valid under Americans with Disabilities Act (ADA) and California's Fair Employment and Housing Act (FEHA)
- One Strike Rule: a positive test for drugs permanently eliminates consideration of any applicant



# *Dawson v. Entek International*

- Retaliatory discharge
- Hostile Work Environment (based on sex)
- Sexual Orientation Hostile Work Environment



# *Dawson v. Entek International* (cont.)

- If a federal court has subject matter jurisdiction over discrimination claims, those claims are analyzed under the *McDonnell Douglas* burden-shifting framework -- *even state discrimination claims:*
  - Employee: prima facie case of discrimination
  - Employer: articulate a legitimate, non-discriminatory reason for challenged action
  - Employee: employer's proffered reason is pretextual

# Hawn v. Executive Jet Management

- HELD: In cases alleging *disparate treatment* courts may properly focus on whether similarly situated persons received more favorable treatment (the “inference of discrimination” evidence)
- Male pilots fired for complaints of sexually-charged conduct unwelcome by female flight attendants
- Pilots claimed “gender discrimination” saying flight attendants engaged in the same conduct
  - But flight attendants not fired for same conduct because Pilots never complained of behavior as “unwelcome”

# *Hawn v. Executive Jet Management (cont.)*

- “We do not support a ‘race to the Human Resources office’ as the sole determinant of the relevance of a complaint”  
... but getting there first sure doesn’t hurt





# *EEOC v. Prospect Airport Services, Inc.*

- Sexual Harassment where a male employee was the victim of a female co-worker
- Lower court found that most men in plaintiff's circumstances would have "welcomed" the behavior he alleged was discriminatory....
- 9<sup>th</sup> Circuit reversed -- "Men as well as women are entitled under Title VII to protection from a sexually abusive work environment."





# *Spencer v. World Vision Inc.*

- Panel (finally) concludes that Title VII exemption for “religious corporation, association, or society” is satisfied if it (at least):
  - is organized for a religious purpose
  - is engaged primarily in carrying out that religious purpose
  - holds itself out to the public as an entity for carrying out that religious purpose, and
  - does not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts.
- Note: organization does NOT have to be “affiliated with any particular congregation or sect.”

# Washington State Developments

- Workers can be fired for smoking pot
- No gay rights under WLAD before midnight, June 6, 2006
- Employees have a right to accommodation, even if such accommodation is unnecessary

# Washington State Supreme Court

- *Roe v. TeleTech Customer Care Management, LLC*
  - An employer can terminate an employee based on the employee's use of marijuana, even if used at home for medicinal purposes



# Washington State Court of Appeals

- *Loeffelholz v. University of Washington*
  - Sexual orientation amendment to the Washington Law Against Discrimination (WLAD) applies prospectively only
  - WLAD became law at midnight on June 6, 2006



# Washington State Court of Appeals (cont.)

- *Johnson v. Chevron U.S.A., Inc.*
  - “Medical necessity” is no longer the sole basis for disabled employees’ right to accommodation
  - 2007 WLAD Amendment: accommodation required if an impairment is the source of a “substantial limitation”



# Along came GINA



# Can these former employees sue?

- *Moore is fired for alleged performance reasons. Three days earlier, Moore's supervisor overheard Moore telling a co-worker that Moore's daughter has autism.*
- *Hoag uses employer-provided counseling to deal with Hoag's alcoholism, a problem shared by Hoag's brother and father. Hoag is later fired for cursing at work.*

*– can Moore or Hoag successfully sue??????*



# What is GINA?

- Genetic Information Nondiscrimination Act
- Enacted May 21, 2008; effective November 21, 2009
- Prohibits genetic-based discrimination in health insurance (Title I) and employment (Title II) contexts



# GINA – Employment Context (Title II)

- Applies to Employers, Labor Unions, Employment Agencies, and Training Programs
- Prohibits employers from
  - Considering someone’s genetic information or background in hiring, firing, promotions, training, or classification decisions
  - Requesting genetic testing
  - Acquiring genetic information on particular individuals or their family members (with exceptions)

# GINA – What is “Genetic Information”?

- Genetic Information is information about:
  - An individual’s genetic tests
  - Genetic tests of an individual’s family members (including embryos and fetuses)
  - The manifestation of a disease or disorder in family members
- Genetic Information is not information about an individual’s (1) age or (2) sex

# GINA – What Situations May Give Rise to a Claim?

- Water cooler problem
- Pre-emptive strike problem
- Existing genetic information in company files
- Gathering information for company leave policies
  - Non-state or federal
  - E.g. bereavement leave

# GINA – What is Permissible?

- Employers may gather:
  - “Non-genetic information” about an employee’s manifested disease or disorder, even if the disease or disorder has a genetic basis (e.g. gathering data to develop reasonable accommodations for a disabled employee)
  - Information in connection with wellness programs and state / federal medical leave laws

# GINA – Overlap with Other Laws

- Americans with Disabilities Act
  - Manifest physical traits or symptoms (e.g. obesity, alcoholism)
  - Asymptomatic carrier of genetic diseases or disorders (may impact ability to procreate and have intimate sexual relationships, major life activities under ADA)

# GINA – Overlap with Other Laws (cont.)

- Title VII: Genetic disorders and conditions associated with protected classes. See *Norman-Bloodsaw v. Lawrence Berkeley Laboratory* (pre-GINA)
  - Sickle cell (race)
  - Pregnancy (sex)

# GINA – Claims and Remedies

- Disparate treatment only; no disparate impact (but Congress will revisit in 2017)
- Remedies:
  - Reinstatement
  - Hiring
  - Promotion
  - Back pay
  - Injunctive Relief
  - Attorneys' fees
  - Pecuniary and non-pecuniary damages (including compensatory and punitive damages)

# GINA – Impact (so far)

- 5 GINA cases have been decided in federal court:
  - *Pro se* plaintiffs
  - Dismissed for failure to state a claim
  - Raised with other discrimination laws
- EEOC: 201 charges in 2010, or 0.2% of EEOC caseload
- GINA is still young . . .





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