15th Annual Labor
and
Employment Law Conference

Recent Developments in Discrimination Law: 2011-12

Portia R. Moore
Joseph P. Hoag
Davis Wright Tremaine LLP
(206) 622-3150
portiamoore@dwt.com
josephhoag@dwt.com

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Overview

- EEOC Statistics: What's Hot and What's Not
- New Case Law: Religion, Procedure, and Marijuana (again)
- Hot Topic: Criminal Discrimination

EEOC 2011 Update

- EEOC increases its activity:
  - More total EEOC charges
  - Increase in charges in almost every discrete category
  - A record-setting settlement

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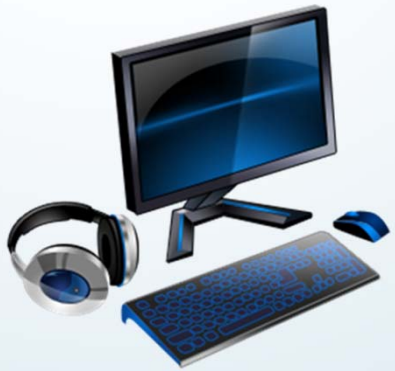
EEOC 2011 Statistics

- 99,947 Charges – another banner year
- Common Areas: race (35%), sex (29%), retaliation (37%), age (24%), and disability (26%)
- Less Focus: national origin (12%), religion (4%), color (3%), and GINA (.2%)
  - But all are increases in terms of raw numbers

EEOC Enforcement Actions

- Verizon pays $20 million in nationwide ADA suit
  - Terminations and no reasonable accommodations based on “no fault” attendance policies
  - Largest single-lawsuit disability settlement in EEOC history



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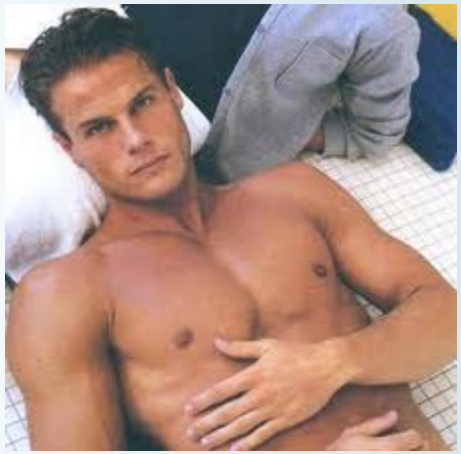
EEOC Enforcement Actions

- Abercrombie & Fitch targeted for no-hijab policies
  - San Mateo, CA
    - Young Muslim woman fired from Hollister store for refusing to remove hijab
    - Primarily a stockroom worker
  - Milpitas, CA
    - Applicant denied job at Abercrombie Kids, allegedly because of hijab



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Case Law Update

- The United States Supreme Court: Religion and Qualified Immunity
- Developments in the Ninth Circuit
- Developments in Washington State

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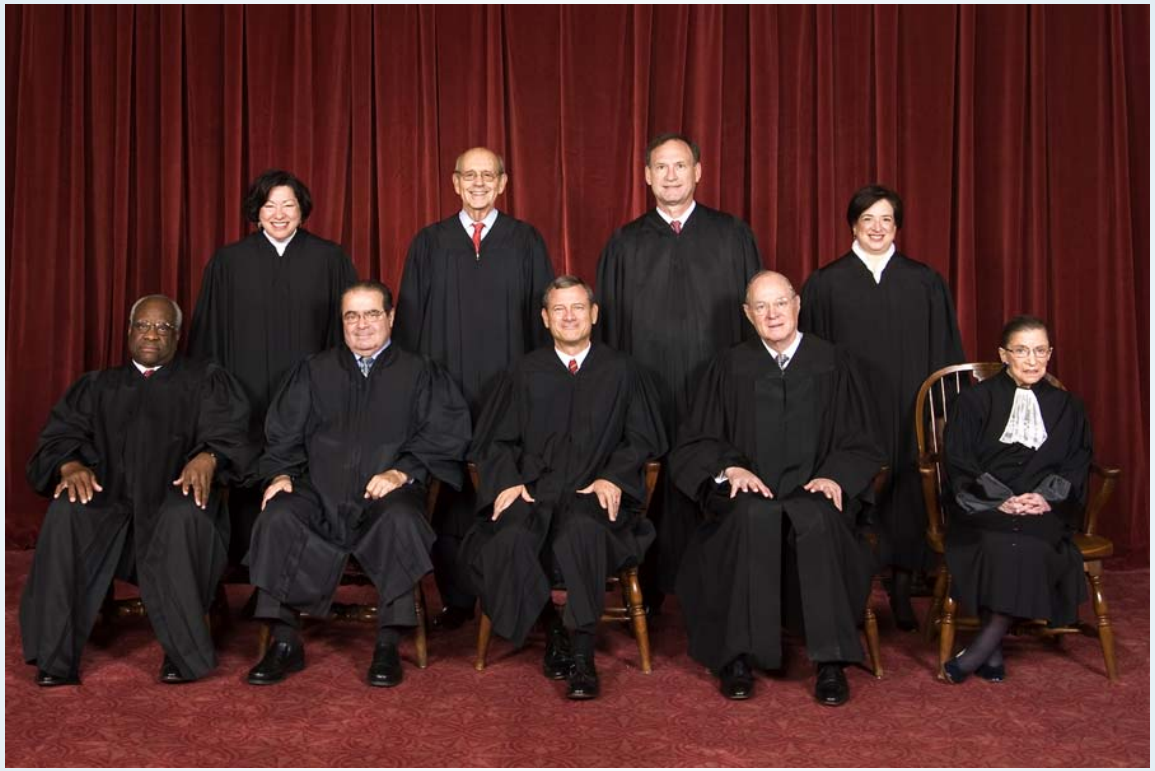
Supreme Court



Big year for *The Nine*

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National Federation of Independent Business v. Sebelius, AKA Obamacare

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… just kidding

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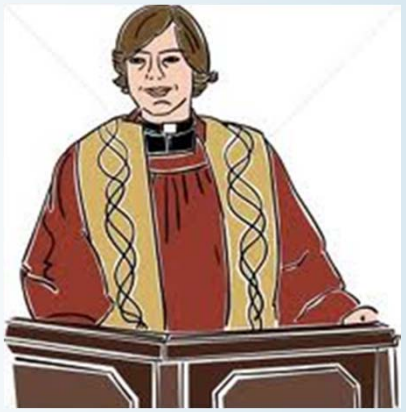
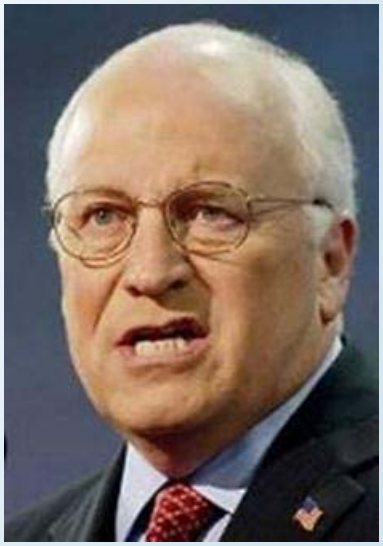
Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC

- Unanimous decision
- Affirms existence of constitutional "Ministerial Exception" to employment discrimination laws
- No "rigid formula for deciding when an employee qualified as a minister"
- May narrow *Employment Div. v. Smith* (Native American peyote case)
- Affirmative Defense, not jurisdictional bar



Reichle v. Howards

- Qualified Immunity: Did a government official violate a clearly established statutory or constitutional right?
  - If no clear violation, the government official is immune
- "To be clearly established, a right must be sufficiently clear that every reasonable official would have understood that what he is doing violates that right"



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Coming Soon: *Vance v. Ball State University*

- Seventh Circuit:

  Absent employer negligence, an employer is not liable for a supervisor's harassment if the supervisor did not have power to take formal action ("hire, fire, demote, promote, transfer, or discipline") against the victim.

- Issue before the Court:

  Does the *Faragher* and *Ellerth* "supervisor" liability rule apply to harassment by those whom the employer vests with authority to direct and oversee their victim's daily work (2nd, 4th, and 9th Circuits), or is it limited to those harassers who have the power to "hire, fire, demote, promote, transfer, or discipline" their victim (1st, 7th, 8th Circuits)?

Ninth Circuit Developments

- No ADA Title I damages for state employees
- Pot is still illegal
- NICU nurses need to show up for work
- And more!!

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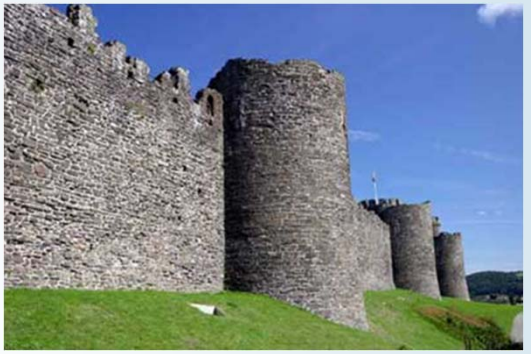
Okwu v. McKim

- State employees cannot sue their employer for damages under Title I of the ADA (employment discrimination)



- Qualified immunity bars damages actions against the state
- Title I's "comprehensive remedial scheme" precludes a *1983* action against officials
- Only injunctive relief and state-law claims remain

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James v. City of Costa Mesa

- Suit under ADA, Title II—Discrimination in the provision of public services
- Plaintiffs: “Severely disabled” individuals with valid prescriptions for medical marijuana, in accordance with state law
- Court: Medical marijuana use is not protected by the ADA

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Shelley v. Geren

- Course of Conduct: Discrimination in filling a position temporarily and then permanently is one, not two processes for purposes of making a timely complaint to the EEOC
- Supreme Court decision in *Gross v. FBL Financial Services* (2009) did not make *McDonnell Douglas* framework improper for ADEA cases

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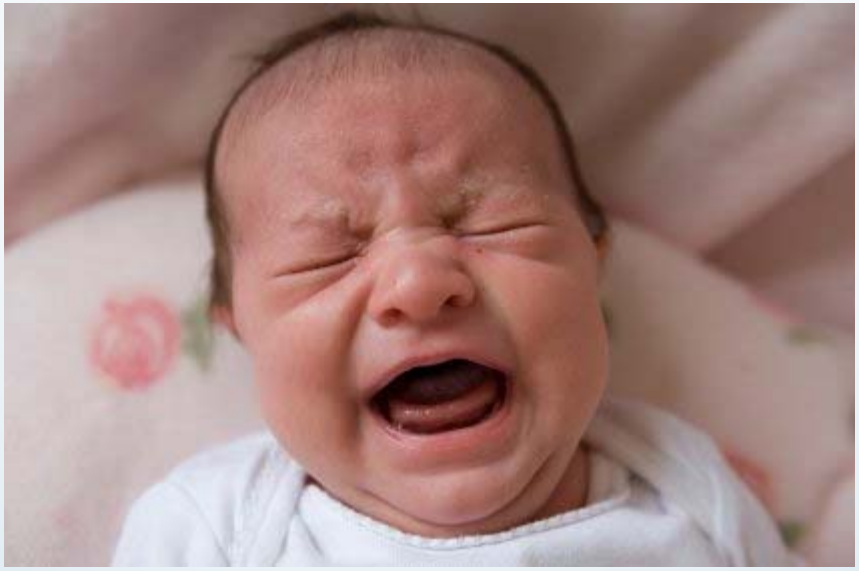
Samper v. Providence St. Vincent Medical Center

- NICU nurse requested “unspecified number of unplanned absences” as a reasonable accommodation



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Samper v. Providence St. Vincent Medical Center (cont.)

- Essential Function: Samper's job "unites the trinity of requirements" making on-site presence "necessary"
  - Teamwork
  - Face-to-face interaction with patients
  - Working with on-site medical equipment

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Honorable Mentions

- *Wood v. City of San Diego*: For Title VII disparate treatment claims, policies must be (1) facially discriminatory or (2) involve discriminatory *intent*; knowledge of possible discriminatory impact alone is insufficient

- *Johnson v. Bd. of Trustees*: Teacher who failed to renew teaching certificate because of a disability not "qualified" for teaching position
  - Pre-ADAAA case

Washington State Developments

- Thumbs up for failure-to-promote federal standard
- Thumbs down for failure-to-accommodate federal standard
- Arbitrators really *can* be reversed

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Fulton v. State, Dep't of Social & Health Serv. (Div. 2)

- Court adopts "relaxed federal standards" for failure-to-promote cases
- *Probably* an issue of first impression under WLAD…
- Fulton establishes *prima facie* case, but still loses on third *McDonnell Douglas* step

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Short v. Battle Ground Sch. Dist. (Div. 2)

- Short claimed her employer failed to "reasonably accommodate" her religious beliefs by ordering her to lie
- No "failure to accommodate" theory of liability for religious discrimination under WLAD
- No constructive discharge when allegedly hostile conduct was limited to a 2-day period

Int'l Union of Operating Engineers, Local 286 v. Port of Seattle (Div. 1)

- Worker: I had no idea that hanging a noose might be racially offensive

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Int'l Union of Operating Engineers, Local 286 v. Port of Seattle (cont.)

- Issue: Did arbitrator's act of reducing termination to 20-day suspension violate an "explicit, well defined, and dominant public policy"?
- Answer: Yes—(1) ending current discrimination and (2) preventing future discrimination (WLAD)
- But Superior Court exceeded its authority by crafting its own remedy

Becker v. Washington State Univ. (Div. 3)

- Special rules in student-university settings
- Federal age discrimination claims against a college or university receiving federal financial assistance (basically all of them) must be brought in Federal District Court
  - Jurisdictional requirement!
- WLAD limits age discrimination claims to employment setting, and a grad student/TA is not an employee

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Honorable Mentions

- *Cole v. Harveyland, LLC* (Div. 1): WLAD "8 employee" requirement is not jurisdictional
- *Frisino v. Seattle Sch. Dist. No. 1* (Div. 1): In reasonable accommodation cases, employees have "duty to communicate" whether an accommodation was effective, which includes ascertaining whether offered accommodation actually works
- *Crownover v. State, Dep't of Transp.* (Div. 3): Course of conduct—alleged retaliatory and discriminatory conduct cannot be combined to avoid a hostile work environment claim SOL

A New Protected Class?

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Who Has a Valid Discrimination Claim?

- *Moore, an attorney with a very impressive track record, applies for a job at a prestigious law firm. During a routine background check, the firm learns that Moore was arrested (but not convicted) for beating up opposing counsel during a contentious deposition. The firm immediately sends Moore a rejection letter.*
- *Hoag, 58 years old, recently received his MBA from Wharton (second career) and has applied at a mid-level firm in a "secondary market." During the application screening process, the mid-level firm learns that Hoag was convicted of stealing $300 from his step-father when Hoag was 17. Citing the firm's policy of only hiring trustworthy individuals, Hoag's application is summarily rejected.*

EEOC Enforcement Guidance No. 915.002

- Purpose: Provide complete EEOC guidance regarding the use of arrest or conviction records in employment decisions under Title VII
- Effective Date: April 25, 2012
- Approved by a 4-1 vote

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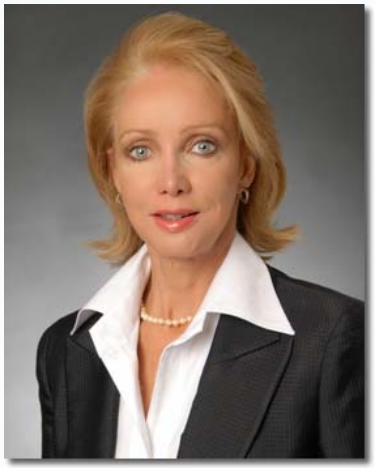
The Lone Dissent

- Opposed by Commissioner Barker (R):



"I'm afraid the only real impact the guidance will have will be to scare business owners from ever conducting criminal background checks."

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Backdrop

- Title VII does not prohibit discrimination based on criminal activity, but it does based on race, color, religion, sex, etc.
- Arrest and conviction rates for African American and Hispanic men are disproportionately high
- Background checks and criminal record repositories are not always accurate
- Almost all employers engage in some form of background checks

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Disparate Treatment

- No using criminal records as a pretext for unlawful discrimination
  - *E.g.*, turning down a black applicant but hiring an equally qualified white candidate where both have similar criminal histories

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Disparate Impact

- First question: Is there a disparate impact?
  - Is there a policy or practice regarding applicant/employee criminal histories?
  - If so, almost default showing of Disparate Impact against African American and Hispanic males (at least, in the EEOC's eyes)
  - May be rebutted by regional or local conviction-rate data, or by employer's data showing no disparate impact.

Disparate Impact (cont.)

- Second question: Is there a valid business necessity? 2 methods endorsed by EEOC:
  - Validation under EEOC's Uniform Guidelines on Employee Selection Procedures
    - http://uniformguidelines.com/uniformguidelines.html
    - this method will only be available in rare circumstances
  - Application of *Green* factors "+"

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Disparate Impact (cont.)

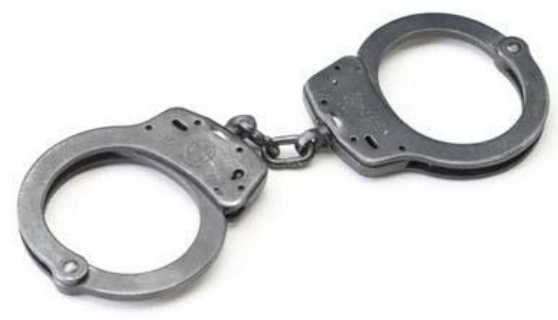
- Business necessity (cont.)
  - *Green v. Missouri Pacific Railroad* (8th Cir. 1975):
    - The nature and gravity of the offense or conduct;
    - The time that has passed since the offense or conduct, or completion of the sentence; and
    - The nature of the job
  - "Plus" an "individualized assessment"
    - Notice, opportunity to be heard, consideration by employer

Disparate Impact (cont.)

- Wildcard: Less Discriminatory Alternatives

  "…a Title VII plaintiff may still prevail by demonstrating that there is a less discriminatory 'alternative employment practice' that serves the employer's legitimate goals as effectively as the challenged practice but that the employer refused to adopt."

  -no further guidance as to what this means



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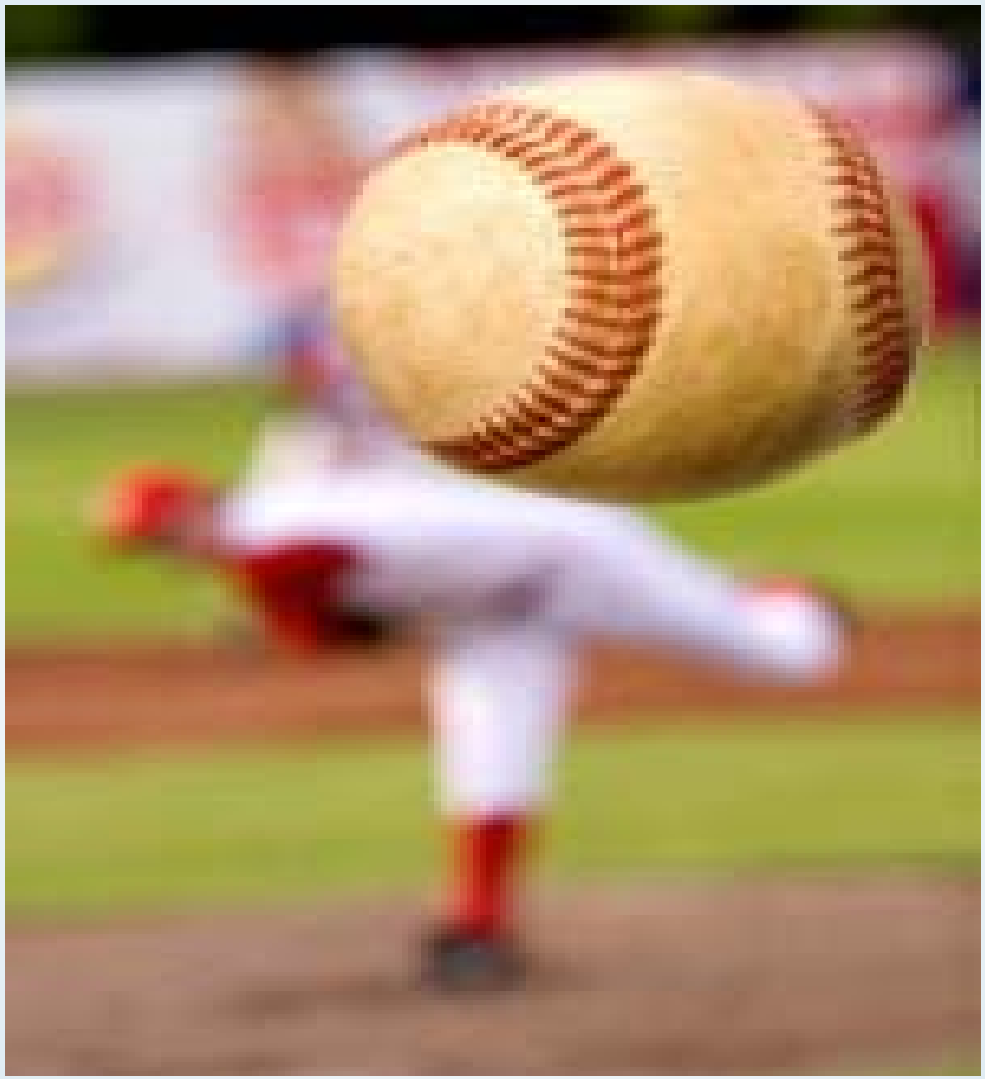

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Relationship with Other Laws

- Federal: Compliance with federal laws/ regulations is a defense
  - *E.g.* Federal law enforcement officers must be removed if convicted of a felony, 5 U.S.C. § 7371(b)
  - If a waiver is optional, employer must seek such in a nondiscriminatory manner
- State and Local: Compliance with these laws/regulations is *not* a defense

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