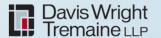
# 14<sup>th</sup> Annual Labor and Employment Law Conference

# 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%

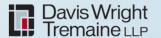


### Case Law Update

 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?



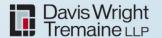
# Thompson v. North American Stainless, LP ("Zone of Interest")

- Plaintiff fell within "zone of interests" protected by Title VII
- Firing an employee's <u>fiancé</u> 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 <u>independent investigation</u> 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 <u>each time</u> 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



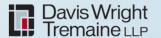
#### Coming Soon

 Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC

Americans with Disabilities Act

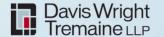


– Are tenured teachers at religious schools "ministers" under the ADA?



### Ninth Circuit Developments

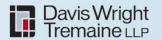
- One joint and you're out (forever)
- McDonnell Douglas burden-shifting framework applies in all federal discrimination cases
- Race to the human resources department
- Men can be sexually harassed, too
- What is a "religious organization"?



# 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

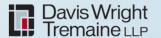
Hostile Work Environment (based on sex)

 Sexual Orientation Hostile Work Environment



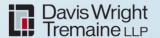
# Dawson v. Entek International (cont.)

- If a federal court has subject matter jurisdiction over discrimination claims, those claims are analyzed under the McDonnell Douglas burdenshifting framework -- <u>even state discrimination</u> <u>claims:</u>
  - 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

- <u>HELD:</u> 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



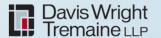


## EEOC v. Prospect Airport Services, Inc.

- 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."

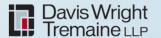


#### Washington State Developments

Workers can be fired for smoking pot

 No gay rights under WLAD before midnight, June 6, 2006

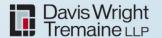
 Employees have a right to accommodation, even if such accommodation is unnecessary



#### 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





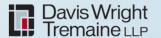
# Washington State Court of Appeals (cont.)

Johnson v. Chevron U.S.A., Inc.

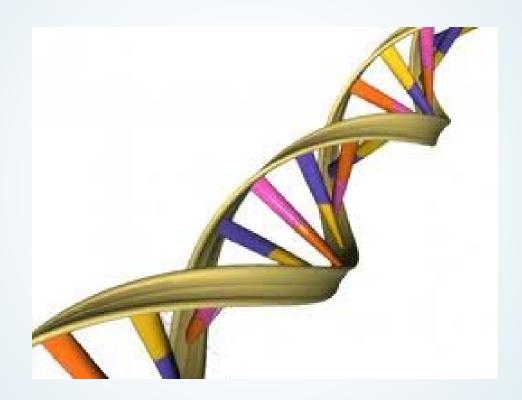
 "Medical necessity" is no longer the sole basis for disabled employees' right to accommodation

 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 coworker 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

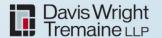
 Enacted May 21, 2008; effective November 21, 2009

 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



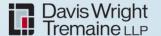
## GINA – What Situations May Give Rise to a Claim?

- 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



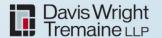
#### GINA – What is Permissible?

- 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)

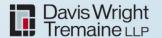
#### Remedies:

Reinstatement -Hiring

Promotion -Back pay

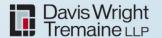
Injunctive Relief -Attorneys' fees

 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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