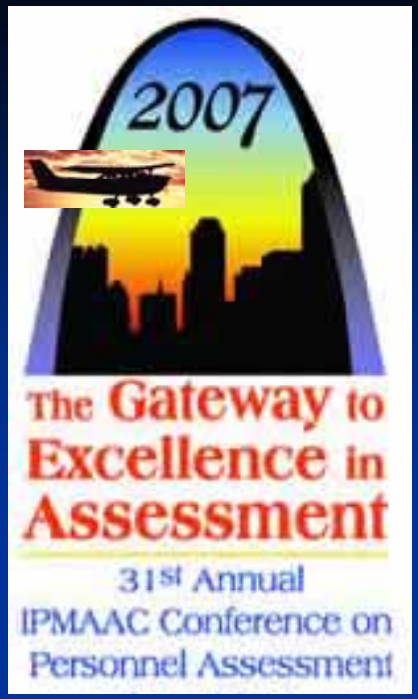

IPMA-HR

Assessment Council

31st Annual Conference

2007 Legal Update

Jeff Feuquay
Russell, Brown & Breckenridge
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Premises:

- National / International Audience
- Focus on Context & Applicability:
  - Put testing in broad HR perspective
  - Limit state-specific & trial court cases
- Presented by *Overlapping* Categories

Case categories are merging . . .

Foundational Information

- In tests used by courts, in decision rationales, there is tremendous inter-applicability, i.e., Title VII is Title VII.

- If you want a fair and reasonable outcome, give the judge and/or jury the facts and law they need to give you one. ("currentized" example)

Topics

1. General Guidelines & Procedures
2. Harassment / Retaliation
3. Age
4. Gender
5. Race / National Origin
6. Testing & Race / N.O.
7. 3rd Party Harassment & Workplace Violence
8. Disability / ADA / FMLA
9. Constitutional Issues
   a. Free Speech & Association
   b. Privacy & Due Process
   c. Equal Protection

General Rules / Procedures

- A plaintiff alleging discrimination by a supervisor has a greater burden if that supervisor is the same person who twice promoted the plaintiff.

Coghlan v. American Seafoods Company LLC, 413 F.3d 1090 (9th Cir.2005)

See also *Bradley v. Harcourt, Brace & Co.*, 104 F.3d 267, 270-71 (9th Cir. 1996)

- The validity of the "same actor" inference, where employee is hired and fired by same person within short time span, has been affirmed in almost every circuit in some form.

Antonio v. Sygma Network, Inc., 458 F.3d 1177 (10th Cir. 2006)

Be careful with context of *same supervisor/actor* rule.

General Rules / Procedures

- Same-supervisor rule does not preclude testimony from plaintiff's co-workers on effects of alleged discriminatory reduction in force.
- The rule generally restricts co-worker testimony only regarding of alleged discriminatory discipline.

Mendelsohn v. Sprint/United Management Co., (10th Cir. 10/26/2006)

General Rules / Procedures

- Claims not raised in an EEOC complaint (charge form) may be brought in federal court if they are reasonably related to the claim filed with the agency.
- A claim is considered reasonably related if the conduct complained of would fall within the scope of the EEOC investigation which can reasonably be expected to grow out of the charge that was made.

Williams v. New York City Housing Authority, 458 F.3d 67 (2d Cir. 2006).

But . . .

General Rules / Procedures

- Claims based on the same set of facts constitute the same cause of action for the purpose of claim preclusion.
- Claim preclusion bars litigation of claims that **were or could have been** raised in a prior action.

Holcombe v. Hosmer, 477 F.3d 1094 (9th Cir. 2007).

General Rules / Procedures

Title VII plaintiff who won before state agency and state court could later file suit in federal court seeking relief unavailable at state level, such as costs & fees, emotional distress, and punitive damages.

***Nestor v. Pratt & Whitney*, No. 05-1754-cv (2nd Cir. 10/4/2006)**

General Rules / Procedures

- "Close Call Promotion" Court declined to intervene when U.S. Customs Service promoted white female 15 years younger than the over-40 African-American female based on younger woman's front-line operational experience.

  Barnette v. Cherthoff, 453 F.3d 513 (D.C. Cir. 2006)

- A few isolated, allegedly comparable qualifications won't trump a successful candidate's overall superior qualifications.

  Hux v. City of Newport News, 451 F.3d 311 (4th Cir. 2006)

General Rules / Procedures

Title VII plaintiff's "failure to cooperate in good faith" with EEOC investigation MAY or MAY NOT result in a bar to suit.

No Bar: *Doe v. Oberweis Dairy*,
456 F.3d 704 (7th Cir. 2006)

Bar: *Shikles v. Sprint/United Mgmt. Co.*,
426 F.3d 1304 (10th Cir. 2005)

7th Circuit opinion will likely prevail.

General Rules / Procedures

- Untimely employment discrimination claims are not be revived by employer's reiteration of refusal to hire applicant.

  ***Brown v. Unified School Dist. 501,* No. 05-3378 (10th Cir. 10/12/2006)**

- An unjustified delay of several months in reporting sexual harassment precludes a lawsuit, where the employer has a bona fide complaint procedure.

  ***Williams v. Missouri Dept. of Mental Hlth.,* 407 F.3d 972 (8th Cir. 2005)**

  cert. denied, U.S. No. 05-515, 2006 U.S. LEXIS 58 (2006)

General Rules / Procedures
New Case: *Ledbetter*

- Because Title VII prohibits discriminatory employment *decisions*, a plaintiff can prevail only by proving that within the 180 or 300-day limitations period the employer based a decision regarding plaintiff's pay on a discriminatory motive.
- Plaintiff cannot succeed if during the actionable period her pay is merely a reflection of a discriminatory decision taken beyond the limitations period.
- Expect this holding to apply to all claims under Title VII, not just claims of sex discrimination.

Ledbetter v. Goodyear Tire & Rubber Co., Inc., U.S. No. 05-1074, May 29, 2007, 2006 U.S. LEXIS 58 (2006)

General Rules / Procedures
Ledbetter - continued

- EPA & §1981 still available
- EPA prohibits even unintentional pay inequities, requires no EEOC filing, & can have S of L as long as 3 years
- §1981 prohibits intentional discrimination on the basis of color (race, ethnicity, some religions and ancestry), & has 4 year S of L

Ledbetter v. Goodyear Tire & Rubber Co., Inc., U.S. No. 05-1074, May 29, 2007, 2006 U.S. LEXIS 58 (2006)

Retaliation ≈ Deterrence

- Title VII's anti-retaliation provision does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace.
- Provision covers those employer actions that would have been materially adverse to a reasonable employee or job applicant.
- Employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination.

Burlington Northern & Santa Fe Railway Co. v. White
126 S.Ct. 2405, 165 L.Ed. 345 (2006)

Retaliation claimant must prove:

- He/she engaged in a protected activity, opposing something reasonably believed to be an unlawful employment practice,
- A contemporaneous or soon-after adverse employment action was taken against him/her, and
- A causal connection exists between the protected activity & the adverse action.

Burlington and, locally, *Frietag v. Ayers*, 468 F.3d 528 (9th Cir. 2006)

Burlington applications

- Person is protected from retaliation only when an objectively reasonable person could have believed that in reporting an incident to management he/she was opposing an unlawful hostile work environment.

Jordan v. Alternative Resources Corp. **467 F.3d 378 (4th Cir. 2006), cert. denied, No. 06-1086, April 16, 2007.**

Harassment / Retaliation

- Original complaint must be facially valid to be protected from retaliation under Title VII.

Slagle v. County of Clarion, 435 F.3d 262 (3rd Cir. 2006)

- 42 U.S.C. §1981, as amended by 1991 CRA, applies to prohibit all forms of retaliatory discharge.

Humphries v. CBOCS West, Inc., No. 05-4047 (7th Cir. 1/10/2007)

Age

- EEOC has proposed regulations that confirm the ADEA does not prohibit preferences for older employees over 40+ younger employees.

  29 CFR Part 1625, 71 Fed. Reg. 46177 (Aug 11, 2006)
  Comment period ended October 10, 2006.

- The new regs bring the EEOC in line with the Supreme Court's 2004 *General Dynamics Land Systems, Inc. v. Cline* decision.

Gender Stuff You Already Know

- Similar job titles and general duties do not equate to equal skills and responsibilities under the Equal Pay Act.

Wheatley v. Wicomico County, Maryland, 390 F.3d 328 (4th Cir. 2004)

- Knowledge of the pregnancy is required before an employer can be found to have discriminated on that ground.

Trop v. Sony Picture Entertainment, Inc., 400 F.3d 702 (9th Cir. 2005)

Gender Stuff You Already Know

- It is not unlawful gender-based discrimination to dismiss a female bartender for noncompliance with its dress and grooming standards, including a requirement that female bartenders wear makeup.

Jespersen v. Harrah's Operating Co., Inc., 444 F.3d 1104 (9th Cir., 2006)

Gender Stuff That Bears Repeating

Different treatment of female firefighters in protective clothing and bathrooms constitutes gender discrimination. (also re EEOC filing)

Kline, Wedow et al. v. City of Kansas City, Mo., Fire Dep't, 175 F.3d 660 (8th Cir.1999), *cert. denied*, 528 U.S. 1155, 120 S.Ct. 1160, 145 L.Ed.2d 1072 (2000)

Anne & Kathleen won again at trial and on appeal.

Wedow & Kline v. City of Kansas City, Mo., 442 F.3d 661 (8th Cir., 2006)

Gender Stuff You May Know

- A jury finding of gender discrimination can be overturned if the employer's action is based on legitimate concerns about the employee's performance.

Walker v. Board of Regents of the U. of Wisconsin System
410 F.3d 387 (7th Cir. 2005)

- Misconduct discovered **after** female applicant not selected defeated applicant's claim of gender discrimination.

Underwood v. Perry County Commission
417 F.3d 1183 (11th Cir. 2005)

compare

McKennon v. Nashville Banner Publishing Company,
513 U.S. 352 (1995)

Gender

- A transsexual is not a member of a protected class but may sue if treated differently based on gender stereotypes.

  Barnes v. City of Cincinnati, 401 F.3d 729 (6th Cir. 2005)

- A male employee created triable issues under FEHA with evidence that male co-workers made derogatory comments about his perceived homosexuality.

  Singleton v. United States Gypsum Co. (2006) 140 Cal.App.4th 1547, 45 Cal.Rptr.3d 597.

Race / National Origin

- City can't transfer firefighters to fix unintentional racial segregation.

  Lomack v. City of Newark, 463 F.3d 303 (3rd Cir., 2006)

- Employers may not use affirmative action goals to justify hiring preferences.

  Kohlbek v. City of Omaha, 447 F.3d 552 (8th Cir., 2006)

Race / National Origin

- The word "boy" *may* be a racial epithet at work.

Ash v. Tyson Foods, Inc., No. 05-379 (S.Ct. 2/21/2006)
cert. denied, No. 06-706 (U.S. 1/22/2007)

- Use of racial epithets at workplace was insufficient to create a legally cognizable hostile work environment; must show adverse employment action.

Singletary v. Missouri Dept. of Corrections
423 F.3d 886 (8th Cir. 2005)

Would this stand under *Burlington* ?

Race / National Origin

- Supervisor's continuing use of "western" nicknames for Arabic employee can be considered racial discrimination.

El-Hakem v. BJY, Inc., 415 F.3d 1068 (9th Cir. 2005)

Race / National Origin

- Workplace "English-only" policy may disparately impact Hispanic employees.

  Maldonado v. City of Altus, OK, 433 F.3d 1294 (10th Cir. 2006)

- Employment discrimination plaintiff could not salvage untimely administrative complaint by referencing Spanish-language document filed with district court; federal litigation must be conducted in English, and untranslated foreign-language documents form no part of record of appeal.

  Frederique-Alexandre v. Dept. of Natural and Environmental Resources of Commonwealth of Puerto Rico, No. 06-1132 (1st Cir. 3/1/2007)

Testing & Race / National Origin

A written promotional exam and its cutoff score must be validated and measure minimum qualifications.

Isabel v. City of Memphis, 404 F.3d 404 (6th Cir. 2005)

See also *Johnson et al. v. City of Memphis*, Case Nos. 00-2608 DP, 04-2017 DP, & 04-2013 DA (W.D.TN. 12/28/2006)

Testing & Race / National Origin

A city cannot justify its exam cutoff score by asserting that it reasonably limits the number of applicants to be processed through the remainder of the process.

Lewis v. City of Chicago
No. 98 C 5596 (USDC No. Dist. Ill., March 22, 2005)

Testing & Race / National Origin

In Louisiana, there is a one year statute of limitations for filing a discrimination claim under the Equal Protection Clause of the Fourteenth Amendment.

The limitations period is suspended when the plaintiff does not know nor reasonably should know of the existence of a cause of action.

Lawsuit filed years earlier by former unsuccessful firefighter applicants was held not to constitute notice to current eligibles of potential discrimination claims.

Bourdais v. New Orleans City, No. 05-30517 (5th. Cir. 4/20/2007), --- F.3d ---; 2007 WL 1168735, (5th Cir. 2007)

3rd Party Harassment – Hostile Environment

- Harassment of an employee by non-employees can create liability if it is condoned by the employer.

  Galdamez v. John Potter, 415 F.3d 1015 (9th Cir. 2005)

- Agency liable for failing to remedy hostile environment created by prison inmates.

  Freitag v. Ayers, 468 F.3d 528 (9th Cir. 2006)
  Cert. den. --- U.S. --- (2007)

Disability / ADA

- An employee may recover for disability discrimination without the need to show his disability was the sole cause of his firing . . . only that it was a "motivating factor."

  Head v. Glacier Northwest, Inc., 413 F.3d 1053 (9th Cir. 2005)

- Under FEHA, employers must provide reasonable accommodation and participate in the interactive process with employees "regarded as" disabled, even if not actually disabled.

  Gelfo v. Lockheed Martin Corp., (2006)
  140 Cal. App. 4th 34, 43 Cal. Rptr. 3d 874

Disability / ADA

- HIV-positive candidate demonstrates triable issues regarding whether foreign service officer position requires availability for worldwide assignments and whether his proposed accommodations are reasonable.

  Taylor v. (Condi) Rice, 451 F.3d 898 (D.C. Cir. 2006)

- Under the ADA, a state may be sued for money damages by a disabled inmate.

  U.S. v. Georgia, No. 04-1203, 2006 DJDAR 307 (S.Ct. 1/10/2006)

Disability / ADA

- Employee's non-physiological morbid obesity was not "impairment" for purposes of alleged discriminatory termination in violation of ADA. To constitute ADA impairment, even morbid obesity must stem from underlying physiological condition.

***EEOC v. Watkins Motor Lines, Inc.*, 463 F.3d 436 (6th Cir. 2006)**

- Nursing home violated ADA by terminating cook for having hepatitis. Cook was regarded as disabled where nursing home administrator expressed concern over mass exodus should clients learn of cook's condition. Issue of punitive damages should have gone to jury where administrator knew obligations under ADA.

Equal Employment Opportunity Commission v. Heartway Corporation, No. 05-7011 (10th Cir. 10/26/2006)

Disability / ADA

- **Employer required fitness for duty examination before allowing person to return to same job that caused her to go to the emergency room with anxiety attack and miss 3 weeks work.**
- **Test was legitimate because it was job related and based on business necessity.**

Thomas v. Corwin, 483 F.3d 516 (8th Cir., 2007)

Disability / ADA

State employer was entitled to sovereign immunity against former employee's claim alleging termination in violation of Family and Medical Leave Act's self-care provision (contrasting family-care provision, which abrogates state sovereign immunity).

Toeller v. Wisconsin Dept. of Corrections, 461 F.3d 871 (7th Cir., 2006)

Free Speech – *Public Whistleblower Standards*

- 1st Amendment does not protect "every statement a public employee makes in the course of doing his or her job."
- Official communications have official consequences, creating a need for substantive consistency and clarity. Supervisors must ensure that their employee's official communications are accurate, demonstrate sound judgment and promote the employer's mission.
- Government workers "retain the prospect of constitutional protection for their contributions to the civic discourse." They do not have "a right to perform their jobs however they see fit."

Garcetti v. Ceballos, 126 S. Ct. 1951 (2006)

Free Speech & Association

Not Protected or lost "balancing test"

- Police officer in off duty sex video.

  City of San Diego v. Roe, 125 S.Ct. 521 (2005)

- Police officer display of offensive tattoos.

  Inturri v. City of Hartford, 2006 WL 231671 (2nd Cir. 2006)

- Affairs with co-worker's spouse.

  Beecham v. Henderson County, Tenn., 422 F.3d 372 (6th Cir. 2005)

Free Speech & Association

Not Protected or lost "balancing test"

- Public employees talking to clients about religion and posting religious symbols in cubicle.

Berry v. Department of Social Services, 447 F.3d 642 (9th Cir. 2006)

- Policy making employee's statements re substantive aspect of the job.

Hinshaw v. Smith, 436 F.3d 997 (8th Cir. 2006)

- Wearing pro-union button at work.

CWA v. Ector County Hosp. District, No. 03-50230 (5th. Cir. 10/5/2006)

Free Speech & Association

Not Protected Under Garcetti Standard

- Correctional Officer (outstanding employee) told Asst. Superintendent about her supervisor's breach of prison contraband control policy.
- She sued for retaliation when, 4 days later, she was reassigned to outer fence patrol and food delivery.
- She was speaking pursuant to her official duties, so her speech was not protected.

Spiegla v. Hull, 481 F.3d 961 (2d Cir. 2007)

Free Speech & Association
Protected or won "balancing test"

- Employee's testimony in a personnel hearing.

Kirby v. City of Elizabeth, 388 F.3d 440 (4th Cir. 2004)

- Employee who speaks out against discrimination suffered by others.

Konits v. Valley Stream Central High School, 394 F.3d 121 (2d Cir. 2005)

- Temporary employees

Ashman v. Barrows, 438 F.3d (7th Cir. 2006)

Still stand under *Garcetti* ?

Free Speech at School

- A public high school can prohibit Biblical anti-gay messages on t-shirts worn in response to a "Day of Silence" sponsored by Gay-Straight Alliance.

  Harper v. Poway Unified School Dist., 445 F.3d 1166 (9th Cir., 2006)

- But, a "Bong Hits 4 Jesus" banner may be okay.

  Frederick v. Morse, 439 F.3d 1114 (9th Cir., 2006)

  & U.S. Supreme Court in June, 2007

Constitutional Rights - Privacy

No reasonable expectation of privacy over workplace computer's hard drive where the computer was company-owned and the company conducted routine monitoring of employees' computer activity.

United States v. Ziegler, 474 F.3d 1184 (9th Cir. 2007)

Constitutional Rights – Due Process

- County's termination of employee six weeks after its right to do so did not constitute a waiver.
- A waiver must be an intentional relinquishment of a known right.
- It's OK to think things over.

Zwygart v. Bd. of County Comm. of Jefferson County,

483 F.3d 1086 (10th Cir. 2007)

Constitutional Rights – Equal Protection

- **Equal Protection Clause ensures similarly situated persons should be treated alike.**
- **The "class of one theory" recognizes claims where a plaintiff alleges he/she has been intentionally treated differently from similarly situated others, absent any rational basis for the different treatment.**
- **9th Circuit held that the class of one theory does not apply to public employment, & rights of public employees should not be as expansive as the rights of ordinary citizens.**
- **Public employers must be able to discharge employees for reasons that may appear arbitrary without fear of federal judicial review.**

Engquist v Oregon Dept. of Agriculture, 2007 WL 415249, --- F.3d --- (9th Cir. 2007)

More on this later . . . no doubt.

What's Next?

- On June 4, 2007, the Supreme Court Justices announced they want to hear more about a 2d Cir. decision that greatly expanded employee's ability to sue their employers.
- Issue: Does an employee alleging ADEA violation satisfy the requirement to file an EEOC charge by filling out the agency's intake questionnaire?

Federal Express Corp. v. Holowecki, et al., No. 06-1322

International Personnel Management Association

Assessment Council

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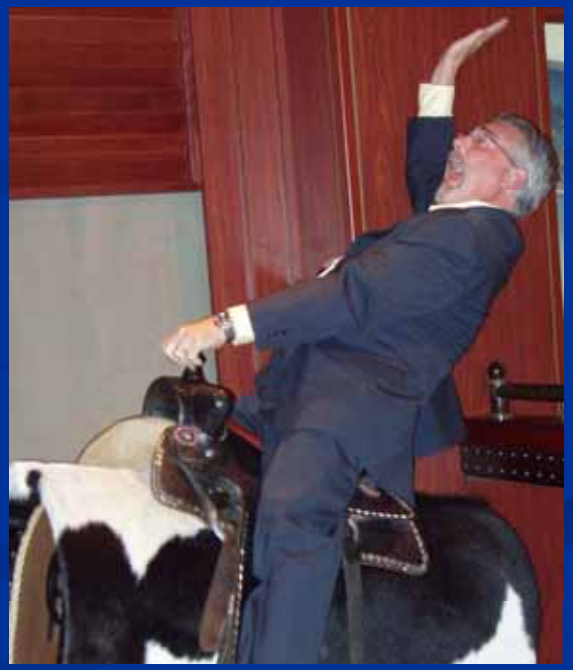

Calcitronus Gluteas Sordes Vilis