



INTERNATIONAL PERSONNEL ASSESSMENT COUNCIL

2008 LEGAL UPDATE

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Inspirational Message



WHARRGARBL

WHARRGARBL

Premises:

- National / International Organization
- Focus on Context & Applicability:
 - Put testing in broad HR perspective
 - Limit state-specific cases
 - But, beware: state statutes are often more far-reaching than federal law
- Presented by *Overlapping* Categories

Case categories are merging . . .

Foundational Considerations

- 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 jury the facts and law they need,
and
 - recognize that you probably know the law better than your attorney (You get to prove that today.)

Topics

SHIFTING FUNDAMENTALS

RETALIATION & HARASSMENT

HOSTILE WORK ENVIRONMENT

1ST AMENDMENT – FREE SPEECH

WHISTLE BLOWER

ADA & OTHER STUFF

Why I went to law school . . .

*Attorneys General and the
smellsay rule of evidence.*

Pop Quiz

Louis Gilden, an attorney out of St. Louis, presented the winning oral argument for Respondent Percy Green. A month and a half later, on May 14, 1973, Mr. Justice Powell delivered the opinion of the Court.

Name that case.

Hint: Some poor spellers think golden arches are involved.

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)

Pop Quiz 2: What's this mean?

Without direct evidence of discrimination, we apply the burden-shifting scheme of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), in Title VII and § 1981 cases.

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

How Does Burden Shifting Work ?

- Employee must establish prima facie case (rebuttable presumption of a statutory violation)
 - Belongs to protected class
 - Performing according to her employer's legitimate expectations
 - Suffered an adverse employment action
 - Other employees with similar qualifications were treated more favorably.
- Employer must articulate a legitimate nondiscriminatory reason for its decision. (burden of production)
- Employee must establish that the employer's reason is a pretext for discrimination.
- Burden of persuasion on employee throughout the analysis.
See, e.g., Noyes v. Kelly Services, Inc., 488 F.3d 1163 (9th Cir. 2007)

← Defendant's Counsel

Plaintiff's Counsel →

One More Failure to Promote

- Police corporal, of Hispanic descent, tested for promotion to sergeant for 4 years
- Made eligibility list each time but other candidates were promoted
- Corporal picked apart qualifications of those promoted and showed he was superior on some of them
- Asserted the Chief was rude and discourteous during two of the interviews (but never any racially disparaging remarks)
- Showed a chart of the racial make-up of the Police Dept asserting it showed Hispanic officer were kept out of management & supervisory positions.

How did this turn out?

The Corporal's Attorney Should Have Known . . .

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)

Balancing Test in **ADEA** Mixed Motive Cases (maybe)

- Use McDonnell Douglas if plaintiff fails to present "direct evidence" that an illegitimate criterion plays a "substantial role" in decision.
- Use Price Waterhouse with "direct evidence" and shift the burden of **persuasion** to employer to prove its decision would have been the same absent consideration of the employee's age.

Gross v. FBL Financial Svcs, Inc., Nos. 07-1490/1492 (8th Cir. May 14, 2008)

"Replaced By" Prima Facie Case

according to *Vincent v. Brewer Co.*, 514 F.3d 491 (6th Cir. 2007)

1. Belongs to protected class
2. Qualified for the position (*performing according to her employer's legitimate expectations)
3. Suffered an adverse employment action
4. Replaced by person outside protected class (*non-protected employees with similar qualifications were treated more favorably)

**Noyes v. Kelly Services, Inc.*, 488 F.3d 1163 (9th Cir. 2007) in parentheses

Inspirational Message



ENVY

When you can't have one, pick people off who do is the next best thing.

ticking

Hostile Work Environment Prima Facie Case, **generic** ver. 1.0

Must prove harassment based on protected status that was "sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment" and was remediable by her employer.

Duncan v. Madison County, No. 07-14847 Non-Argument Calendar (11th Cir. 4/9/2008)

Hostile Work Environment Prima Facie Case, **gender** ver. 2.0

Employee must show that:

- (1) she was subjected to verbal or physical conduct of a sexual nature;
- (2) this conduct was unwelcome; and
- (3) the conduct was sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.

Craig v. M&O Agencies, 496 F.3d 1047 (9th Cir. 2007)

Pop Quiz 2a

What constitutes a hostile work environment?

- CEO conducting meetings in his underwear?

Nelson v. American Apparel Inc. et al., No. BC 333028, pretrial briefs filed (Cal. Super. Ct., L.A. County Jan. 9, 2008)

- A "problem" with pornography on company computers?

Bright v. Hill's Pet Nutrition, Inc., & Colgate-Palmolive Co., 510 F.3d 766 (7th Cir. 2007)

Pop Quiz 2b

What constitutes a hostile work environment?

- Supervisor saying women are more patient and nurturing than men and we have no complaints about them.

Barker v. Missouri Dep't of Corr., 513 F.3d 831 (8th Cir. 2008)

- Daily exposure to language and radio programming that are particularly offensive to women but not targeted at the plaintiff . (Based on protected status?)

Reeves v. C.H. Robinson Worldwide, Inc., No. 07-10270 (11th Cir. 4/28/2008)

Pop Quiz 2c

What constitutes a hostile work environment?

- Man yelled at in front of others and told that he had "a typical Hispanic macho attitude," and that he should work in the field because "Hispanics do good in the field."
- Supervisor referred to other females as "castrating bitches," "Madonnas," or "Regina" in her presence and called the plaintiff "Medea" at least once.

Johnson v. Riverside Healthcare System, LLP, 516 F.3d 759 (9th Cir., 2008) citing prior cases.

Pop Quiz 2d

What constitutes a hostile work environment?

- Boss repeatedly solicited woman to perform sexual favors over several months and engaged in five significant incidents of harassing conduct, including one in which he followed her into a women's restroom and kissed her.
- Coworkers pulled their eyes back to mock appearance of Asians, called her pronunciation “ridiculous” and yelled “China woman, China woman . . . get your butt over here”

Johnson v. Riverside Healthcare System, LLP, 516 F.3d 759 (9th Cir., 2008) citing prior cases.

California caution: Supremes have new case . . .

Retaliation \approx 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)

Pop Quiz 3

What constitutes retaliation under Title VII?

- Post-employment spreading of derogatory rumors?

Robinson v. Shell Oil Co., 519 U.S. 337 (1997)

Abdullah v. Prada USA Corp., No. 07-2489 (7th Cir.,
March 21, 2008)

- Co-worker's retaliatory conduct?

Hawkins v. Anheuser-Busch, Inc., No. 07-3235 (6th
Cir., February 19, 2008)

- An independent administrative investigation?

Poland v. Cherthoff, F.3d 2007 (9th Cir. 2007)

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)

Barker v. Missouri Dep't of Corr., 513 F.3d 831 (8th Cir. 2008)

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)
Barker v. Missouri Dep't of Corr., 513 F.3d 831 (8th Cir. 2008)

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

Humphries v. CBOCS West, Inc., 474 F.3d 387 (7th Cir. 2007)
(Cracker Barrel)
affirmed *CBOCS West, Inc. v. Humphries*, No. 06-1431 (U.S.
5/27/2008)

Harassment / Retaliation

- ❖ ADEA covers retaliation claims under the federal workplace provisions.

Gomez-Perez v. Potter, No. 06-1321 (U.S. 5/27/08)

You can stretch a claim . . .

- ❖ 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, you get just . . .

one bite at the apple,

- ❖ 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).

unless. . .

you didn't get a shot at the whole apple.

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, 466 F.3d 65 (2nd Cir. 2006)

Sound Advice



SURVIVAL

When you are in deep trouble,
say nothing, and try to look like
you know what you're doing.

Leftover stuff that I still like:

- ❖ 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)

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.

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

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)

ADA New Stuff

National Defense Authorization Act of 2008

An eligible employee who is a spouse, son, daughter, parent, or next of kin of a covered service member is now permitted to take up to 26 weeks of FMLA leave in a 12-month period to care for the service member who became seriously ill or was injured while on active duty. The amendments define terms not previously included in the FMLA – namely “next of kin,” “covered service member,” and “serious illness or injury.”

And, an eligible employee may take up to 12 weeks of FMLA leave in a 12-month period because of any “qualifying exigency arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in support of a contingency operation.”

Disability / ADA / Rehab Act

- ❖ Placement of employee in employer's rehabilitation program does not demonstrate that employee was disabled under the disability laws.

Rolland v. Potter, 492 F.3d 45 (1st Cir. 2007)

- ❖ Inquiring into a job applicant's employment gaps "other than those due to personal illness, injury, or disability" could violate the ADA.

Government Employee Relations Report,
Vol. 45, No. 2227 (Oct. 23, 2007)

Disability / ADA

- ❖ U.S. Supreme Court will consider whether the ADA requires employers to reassign a disabled employee to a vacant position for the employee is not the most qualified.

Huber v. Wal-Mart, 468 F.3d 480 (8th Cir. 2007)
cert. granted December 7, 2007 ---U.S.---, 2007 WL 2978334

- ❖ No it won't. The case was settled and is now dismissed.

Huber v. Wal-Mart, 493 F.3d 1002 (8th Cir. 2007)
cert. dismissed January 14, 2008 ---S.Ct.---, 2008 WL 114946

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)

- ❖ Ninth Circuit, en banc, set aside its earlier ruling against UPS and sent *Bates v. UPS* back to the trial level to decide if drivers of non-DOT-regulated vehicles (<10K lbs) can be required to pass a hearing test. UPS can use >10K standard in support of business necessity.

Bates v. United Postal Service, Inc., ---F.3d---, 2007 WL 4554016 (9th 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)

See also *McKlintic v. 36th Judicial Circuit Court, Juvenile Division, State of MO,* No.06-3568 (8th Cir. 2007)

Disability / ADA

May an employer fire someone who has trouble concentrating and setting priorities, then reacts to a performance improvement plan by throwing it at her supervisors and unleashing a string of profanities at them, before kicking and throwing things in her cubicle?

In the 9th Circuit, maybe not.

“The jury was entitled to infer reasonably that her ‘violent outburst’ was a consequence of her bipolar disorder, which the law protects as part and parcel of disability. In those terms, if the law fails to protect the manifestations of her disability, there is no real protection in the law because it would protect the disabled in name only.”

Gambini v. Total Renal Care, Inc. dba DaVita, 486 F.3d 1087 (Wash. 2007)

Cautionary Tale



THIS

WILL NOT END WELL

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)

1st Amendment - Free Speech

What do you need to know to determine the “*balancing test*” result?

- Correctional officer complaining of Sheriff’s sick leave-home audit policy said Sheriff’s guys were gonna get shot and compared them to Nazis.

Curran v. Cousins, 509 F.3d 36 (1st Cir. 2007)

- Police investigator alleged drug task force members alerted gangs & reported misconduct to his superiors. Removed from task force and demoted.

Sigsworth v. City of Aurora, Ill., 487 F.3d 506 (7th Cir. 2007)

1st Amendment - Free Speech

What do you need to know?

- Public Works Director of Orrick, Missouri was required to attend City Council meetings to report about public works. After city sent him to training on Missouri's "sunshine" (open meeting) law, he asserted numerous times that city was not complying. Hit with new critiques of his work, he was soon fired.

Lindsey v. City of Orrick, Missouri, 491 F.3d 892 (8th Cir.)

1st Amendment - Free Speech

Does motive matter?

Bob was a Deputy DA in Brooklyn. He wrote a fictionalized account of a Brooklyn DA. Interviewed by *New York* magazine, he said, “Brooklyn is the best place to be a homicide prosecutor because we’ve got more dead bodies per square inch than anywhere else.”

They fired him & he sued for retaliation for his exercise of 1st Amendment right to free speech.

Reuland v. Hynes, 460 F.3d 409 (2d Cir. 2006),

cert. den. 128 S.Ct 119.

Self esteem . . . Priceless!



ROCK BOTTOM

You'll Know It When You Get There.

Constitutional Rights - Privacy

Extensive background checks of low risk contract employees may constitute violation of privacy rights.

Nelson v. NASA, --- F.3d ---, 2008 WL 110465 (9th Cir. 2008)

Cool new cause of action . . .

Contracts Clause of the U.S. Constitution

- ❖ Under a CBA with AFSCME, Benton agreed to pay 100% of the insurance coverage for employees upon retirement.
- ❖ City Council passed a resolution saying it would stop paying any premiums for retirees with less than 10 years of service.
- ❖ District Court nullified the resolutions and 8th Circuit affirmed.
- ❖ The Contracts Clause of the United States Constitution provides that no state shall pass any law impairing the obligation of contracts.

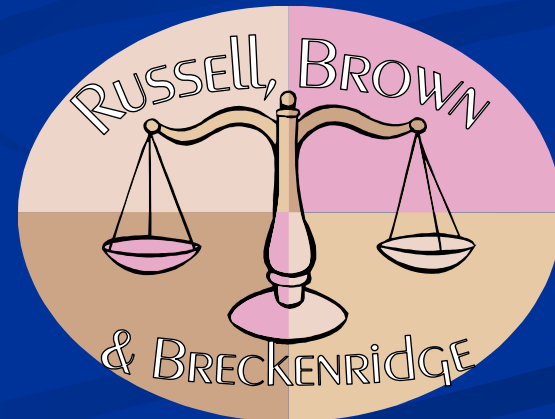
American Federation of State, County and Municipal Employees, Local 2957 v. City of Benton, Arkansas, 513 F.3d 874 (8th Cir. 2008).



2008 LEGAL UPDATE

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