The Law of Employment Discrimination -an update-

AASB 2018 Summer Conference

Dorman Walker

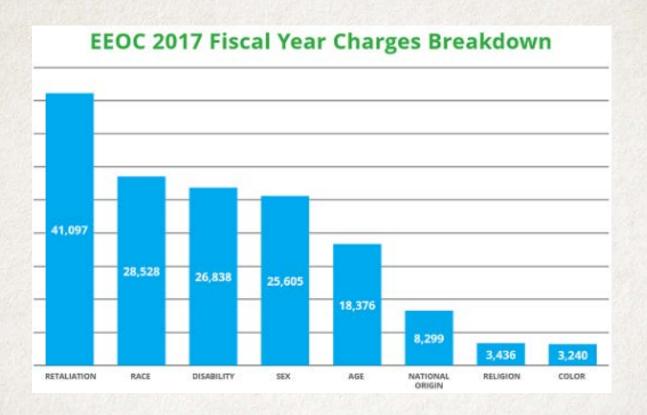


What We Will Discuss Today

- Discrimination Filings
- Who or What Get Protected
- Religious Discrimination
- #MeToo and Sexual Harassment



Discrimination Filings





Who or What Gets Protected





















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EEOC v. Catastrophe Management Solutions

- Chastity Jones, a black female, applied for a job at Catastrophe Management (CMS)
- After she was hired, CMS rescinded its job offer because Jones wore her hair in dreadlocks
- CMS HR Director dreadlocks "tend to get messy"
- CMS admitted that Jones' dreadlocks were not messy



CMS policy

- All personnel are expected to be dressed and groomed in a manner that projects a professional and businesslike image while adhering to company and industry standards and/or guidelines...[H]airstyle should reflect a business/professional image. No excessive hairstyles or unusual colors are acceptable[.]"
- No formal written policy barred dreadlocks.



 Can an employer refuse to hire a qualified black woman with well-kept natural dreadlocks because of a stereotypical belief that dreadlocks "tend to get messy," when dreadlocks as physiologically, culturally, and historically associated with African-Americans?



- Price Waterhouse (1989)(plurality opinion).
 - Ann Hopkins did not make partner because her gender presentation did not meet the firm's view of how a woman should look and act.
 - Told she needed to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."
- Supreme Court said these comments shows Hopkins was discriminated against because of her sex.
- Could Jones make a similar argument?



- District Court dismissed the complaint.
- Eleventh Circuit affirmed the dismissal.
 - Rationale: deadlocks are not an immutable characteristic, even if they are associated with being African American
- U.S. Supreme Court refused to hear the appeal.



 What if Ms. Jones has asserted that deadlocks were part of her religion?



Religious Discrimination



Religious Discrimination

- What is a Religion ?
- For purposes of Title VII, religion includes not only traditional, organized religions such as Christianity, Judaism, Islam, Hinduism, and Buddhism, but also religious beliefs that are new, uncommon, not part of a formal church or sect, only subscribed to by a small number of people, or that seem illogical or unreasonable to others.



"Religion" is Defined Broadly

An employee's belief or practice can be "religious" under Title VII even if the employee is affiliated with a religious group that does not espouse or recognize that individual's belief or practice, or if few – or no – other people adhere to it. Title VII's protections also extend to those who are discriminated against or need accommodation because they profess no religious beliefs.



"Religion" is Defined Broadly

• Religious beliefs include theistic beliefs (i.e. those that include a belief in God) as well as non-theistic "moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views." Although courts generally resolve doubts about particular beliefs in favor of finding that they are religious, beliefs are not protected merely because they are strongly held. Rather, religion typically concerns "ultimate ideas" about "life, purpose, and death." Social, political, or economic philosophies, as well as mere personal preferences, are not "religious" beliefs protected by Title VII.



"Religion" Includes Dress and Practices

Religious observances or practices include, for example, attending worship services, praying, wearing religious garb or symbols, displaying religious objects, adhering to certain dietary rules, proselytizing or other forms of religious expression, or refraining from certain activities. Whether a practice is religious depends on the employee's motivation. The same practice might be engaged in by one person for religious reasons and by another person for purely secular reasons (e.g., dietary restrictions, tattoos, etc.).



Duty to Accommodate Religious Beliefs, Dress, and Practices

 An accommodation would pose an undue hardship if it—would cause more than de minimis cost on the operation of the employer's business. Factors relevant to undue hardship may include the type of workplace, the nature of the employee's duties, the identifiable cost of the accommodation in relation to the size and operating costs of the employer, and the number of employees who will in fact need a particular accommodation.



Co-Worker Complaints

Although religious accommodations that infringe on coworkers' ability to perform their duties or subject coworkers to a hostile work environment will generally constitute undue hardship, general disgruntlement, resentment, or jealousy of co-workers will not. Undue hardship requires more than proof that some coworkers complained; a showing of undue hardship based on co-worker interests generally requires evidence that the accommodation would actually infringe on the rights of co-workers or cause disruption of work.



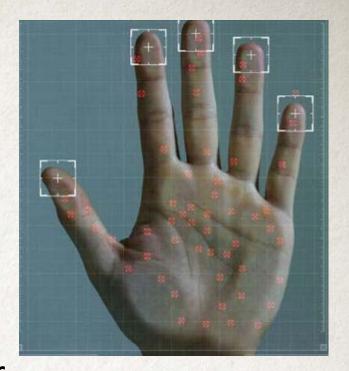
Religion and Security

• If a religious practice actually conflicts with a legally mandated security requirement, an employer need not accommodate the practice because doing so would create an undue hardship. If a security requirement has been unilaterally imposed by the employer and is not required by law or regulation, the employer will need to decide whether it would be an undue hardship to modify or eliminate the requirement to accommodate an employee who has a religious conflict



Consol Energy v. E.E.O.C.

- Beverly Butcher
- 37 yrs. at Robinson Run Mine
- Evangelical Christian
- 2012 biometric hand scanner





"And he causeth all, both small and great, rich and poor, free and bond, to receive a mark in their right hand, or in their foreheads."

Revelation 13:16

- Butcher refused to use the hand scanner
- Book of Revelation Mark of the Beast used to brand followers of the Antichrist
- Butcher believed that using the hand scanner would result in his being "marked" and "condemned to everlasting punishment"
- Resigned rather than use hand scanner



- A) Was Butcher's belief reasonable?
- B) Was Butcher reading the Book of Revelation correctly?
- C) Was Butcher's belief sincerely held?
- D) Was it a religious belief?
- E) Was the accommodation offered by Consol Energy reasonable?



- Jury found that Robinson Run failed to reasonably accommodate Butcher's sincerely held religious belief and that Bucher was constructively discharged.
- Awarded \$580,860 in compensatory damages, back pay and future pay.



Sexual Harassment and #MeToo



Harassment Can Be More tThan Because of Sex

- TITLE VII –age, gender (sex, LGBT, transsexual), national origin, race, religion
- Americans with Disability Act disability
- USERRA uniformed service
- Pregnancy Discrimination Act pregnancy
- Family Medical Leave Act leave



What Women Do When Sexually Harassed

- Avoid the harasser 33% to 75%
- "It's not that bad." 54% to 73%
- Ignore, forget, or endure 44% to 70%
- Talk with family members 27% to 37%
- Talk with friend or trusted person 50% to 70%
- Talk with supervisor, manager, or union representative
 30%



What's Missing?

- Reporting
 - Sexually harassing conduct almost never reported
 - Unwelcome physical touching ~8%
 - Sexually coercive behavior ~30%
- Filing a formal complaint
 - 6% to 13%



Direct Costs

- Hiscox Insurance 2017 study
 - In 2016, U.S employers had at least a 10.5% chance of having an employment charge filed against them
 - For Alabama employers, that figure was 39%
 - 1,214 small- to medium-sized employers with fewer than 500 employees
 - 24% of charges resulted in defense and settlement costs averaging \$160,000
 - 318 days



Indirect Costs

 Employees who experience sexual harassment are more likely to develop symptoms of depression, PTSD, elevated level of stress and anxiety, negative mood, loss of self-esteem, disengagement from work, drug and alcohol abuse, loss of sleep and exhaustion



Indirect Costs

 Employees who witness harassment directed towards others also likely to suffer lower psychological well being as a result of fear of being harassed themselves, concerns about fairness in the workplace, and worry for the victim



Sexual Harassment Defined

- Legal Unwelcome conduct (words or acts) that occurs because of sex and that is sufficiently severe or pervasive to alter the terms and conditions of employment, and some basis for holding the employer liable.
- Baldwin v. BlueCross/Blue Shield of Alabama, 480
 F.3d 1287 (11th Cir. 2007) (Carnes, J.).



Sexual Harassment Defined

- The "severe or pervasive" element is the one that "tests the mettle of most sexual harassment claims."
 - Gupta v. Florida Bd. of Regents, 212 F.3d 571, 583 (11th Cir. 2000).
- "ensure that courts and juries do not mistake ordinary socializing in the workplace—such as male-on-male horseplay or intersexual flirtation—for discriminatory 'conditions of employment.'"
 - Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998).



Objective and Subjective Components

 The harassment must be <u>both</u> objectively severe or pervasive to <u>a reasonable person</u> (a reasonable woman?)

AND

subjectively severe or pervasive to the plaintiff



Objectivity

- No mathematical equation
- No single factor required for finding
- Factors:
- (1) the frequency of the conduct;
- (2) its severity;
- (3) whether it is physically threatening or humiliating, or a mere offensive utterance; and
- (4) whether it unreasonably interferes with an employee's work performance



How The Standard Is Applied

- Mendoza v. Borden, Inc., 195 F.3d 1238, 1247 (11th Cir. 1999).
- Conduct of female employee's male supervisor over a period of 16 months included allegations he was rubbing his hip against hers while touching her shoulder and smiling, making a "sniffing sound" while looking at her groin area on multiple occasions, and "constant[ly] following" her while staring at her.



How The Standard Is Applied

- Mendoza v. Borden, Inc., 195 F.3d 1238, 1247 (11th Cir. 1999).
- Conduct of female employee's male supervisor over a period of 16 months that included allegations he was rubbing his hip against hers while touching her shoulder and smiling, making a "sniffing sound" while looking at her groin area on multiple occasions, and "constant[ly] following" her while staring at her.
- "well short" of altering the terms and conditions of her employment



Rigorous Standard Applied

- Johnson v. City of Birmingham, 2017 WL 6406487 (N.D. Ala. Dec. 15, 2017)
- Over two years: supervisor (1) once put his hand on plaintiff's thigh without her consent, said he knew she liked it and put his hand on her thigh again; (2) swung at her as if to punch her and told her "shit happens when you talk like a man"; (3) showed up at one of her business calls and blew on her thigh; (4) referred to female coworkers as "bitches" on one occasion; (5) told her on one occasion that he could make her sexually "come two times"; and (6) intentionally and forcefully bumped into her and knocked her off balance on at least three occasions



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- Inappropriate "offhand comments" and action not severe or pervasive



Liability - Who's the Harasser?





Co-Worker

VS.

Supervisor



Co-Worker Harassment

- Employer had KNOWLEDGE
 and
- Failed to take PROMPT
 REMEDIAL measures



Supervisor Harassment

STRICT LIABILITY

IF harassment has resulted in a tangible adverse employment action.



Defense

- Tangible Adverse Employment Action Defense
- 1. Reasonable care to prevent and correct promptly any sexually harassing behavior; and
- 2. Employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.



- EEOC Harassment Risk
 Factors
- •How many apply?



HOMOGENOUS WORKFORCE



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SOME EMPLOYEES DO NOT COMPLY WITH WORKPLACE NORMS





CULTURAL & LANGUAGE ΔΙΦΦΕΡΕΝΧΕΣ

(differences)



COARSENED/HEATED SOCIAL DISCOURSE OUTSIDE THE WORKPLACE





YOUNG WORKFORCE





"HIGH VALUE" PERSONS







SIGNIFICANT POWER DISPARITIES



RELIANCE ON **CUSTOMER** SERVICE OR CLIENT SATISFACTION



WORKPLACES
WHERE
WORK IS
MONOTONOUS
OR TASKS ARE LOW
INTENSITY





ISOLATED WORKPLACES



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WORKPLACES THAT ENCOURAGE OR TOLERATE ALCOHOL CONSUMPTION





DECENTRALIZED WORKPLACES



Responding to Harassment

Leadership

- Sense of urgency about preventing
- Visible role in stating the importance of a diverse and inclusive workplace free of harassment
- Building and maintaining a culture that reflects the organizations values
- A palpable commitment by leadership creates confidence that harassed employees can safely report

Accountability

- Hold responsible persons who harass, especially the star value ones
- Make mid-level managers and front-line supervisors responsible for monitoring and stopping harassment



Recommendations for Workplace Leadership and Accountability

- Communicate and model a commitment to a civil workplace in which harassment is not tolerated
- Assess the workplace for harassment risk factors and seek to minimize them
- Conduct a climate survey to determine if harassment is a problem in the workplace
- Devote sufficient resources to harassment prevention
- Hold mid-level managers and front-line supervisors accountable for preventing/responding to harassment in performance reviews



Recommendations for Policies and Practices

- Have a comprehensive anti-harassment policy, including social media, with procedures that promote confidence that a response will be prompt and effective
- Effectively communicate policy and procedures to employees, especially how to report harassment
- Allow multiple ways and points of contact for reporting harassment
- Actively monitor for possible retaliation against employees who participate in a complaint/investigation
- Periodically test reporting procedures
- Make discipline consistent, prompt, and proportional



Recommendation for Anti-Harassment Compliance Training

- Provide regular (repeated) and universal training (employees and persons regularly in the workplace)
- Provide training to mid-level manager and frontline supervisors to recognize harassment, or when someone is trying to report harassment, and how to intervene if they become aware of harassment



Recommendations for Workplace Civility and Bystander Intervention

 Provide workplace civility and bystander intervention training as part of anti-harassment program



QUESTIONS or COMMENTS?

Dorman Walker dwalker@balch.com

