Recent Developments in Discrimination Law: 2012-2013

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Overview


• Hot Topic: Are Criminals a Protected Class?
EEOC 2012 Update

• Focus remains on race, sex, and retaliation.

• Lots of results…and money.

• A new strategic plan.
EEOC 2012 Statistics

• 99,412 Charges – first drop since 2009 (but just barely—less than .5%).

• Proportion of sex discrimination, age discrimination, and retaliation charges goes up.

• Most common charges:
  – Retaliation (occurs in 38.1% of EEOC charges)
  – Race (33.7%)
  – Sex (30.5%)
EEOC 2012 Results

• Relief obtained for 23,446 individuals.

• $365.4 million obtained (for EEOC) through administrative process—highest ever.

• $44.2 million obtained (for EEOC) through 254 lawsuits.
EEOC 2013-2016
Strategic Enforcement Plan

1. Eliminate barriers in recruitment or hiring.
2. Protect vulnerable workers.
3. Emerging and developing issues
   - *e.g.* ADA issues, pregnancy, LGBT
4. Equal pay.
5. Access to legal system
   - *e.g.* retaliation, waivers
6. Preventing harassment through “systemic enforcement” and “targeted outreach”.

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Case Law Update

• The United States Supreme Court Title VII.
• Developments in the Ninth Circuit.
• Developments in Washington State.
Supreme Court

(Divided) focus on Title VII
Vance V. Ball State University

• 5-4 Decision.
• Vicarious liability under Title VII for a supervisor’s conduct.
• Q: What is a supervisor?
  – A: Someone who can take a “tangible employment action” against another.
• Q: What is a tangible employment action?
  – A: A “significant change in employment status”.
  – e.g. hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.
University of Texas Southwestern Medical Center v. Nassar

- 5-4 Decision.
- Title VII’s discrimination standard—motivating factor.
- Title VII’s retaliation standard—*but-for causation*.
  - Based, in part, on Congress’s inclusion of the “motivating factor” language in a Title VII subsection that only applies to discrimination claims.
- Invitation to Congress to amend Title VII?
United States v. Windsor

• Held: Defense of Marriage Act (“DOMA”) definitions of “marriage” and “spouse” as excluding same-sex partners is unconstitutional.
  – DOMA “violates basic due process and equal protection principles applicable to the Federal Government” by the Fifth Amendment.

• Very strong signal against LGBT discrimination.
Coming Soon

• **Madigan v. Levin**
  – Issue: Are federal age discrimination claims against the state limited to the ADEA, or can they proceed under Section 1983?
  – Seventh Circuit: ADEA does not preclude 1983 claims.

• **Lawson v. FMR, LLC**
  – Sarbanes-Oxley prohibits retaliation against publicly-traded company employees for engaging in protected activity.
  – Issue: does SOX’s anti-retaliation provision apply to private contractors of a publicly traded company?
  – Split between the First Circuit and the DOL.
Ninth Circuit Developments

• Adventures in Bankruptcy.

• Statistics can be helpful… or not…

• Questions regarding the constitutionality of a controversial WLAD provision.
Schechner v. KPIX-TV
(Ninth Circuit)

• Statistics showing a “stark” pattern of discrimination can establish a plaintiff’s prima facie case...
  – …even if the statistics do not account for the employer’s legitimate, non-discriminatory explanation.
  – Reminder: showing pretext is harder than showing a prima facie case of discrimination.

• Same actor inference applies to promotions and signing new contracts.
Sheppard v. Evans and Associates (Ninth Circuit)

• In “straightforward” federal discrimination cases, *Iqbal* and *Twombly* do not make Plaintiff’s burden more difficult.

• Facts:
  – ADEA claim.
  – Minimal allegations: (1) 40 years old; (2) satisfactory performance; (3) discharged; and (4) five younger comparators kept their jobs.

• Holding: dismissal for failure to state a claim reversed.
Day v. AT&T Disability Income Plan (Ninth Circuit)

- ADEA’s 40 year-old requirement is not jurisdictional.
- Offsetting an employee’s long-term disability payments by the amount the employee removed from his pension plan did not violate the ADEA.
  - Offset was not coercive because employee’s action was voluntary.
Ockletree v. Franciscan Health System (W.D. Wash.)

• Certified:
  – Does the WLAD’s exclusion of religious non-profit organizations from the definition of “employer” violate the Washington Constitution?
  – If not, is the religious exemption unconstitutional as applied to claims “wholly unrelated to any religious purpose, practice, or activity?”
Ockletree v. Franciscan Health System (W.D. Wash.)

- Timeliness of EEOC charge:
  - Plaintiff’s assertion that an intake questionnaire (not a charge of discrimination form) was timely filed sufficient to grant the court subject matter jurisdiction...
  - ...even though the EEOC had no record of receiving such a questionnaire, and other evidence suggests no such questionnaire was received.

- A handbook’s limited EEO policy insufficient to foreclose statutory exceptions to discrimination claims.
Washington State Developments

- Sexual orientation discrimination—loopholes and pseudo-loopholes.
- Federal law—to follow or not.
- Procedural issues, and more!
Loeffelholz v. University of Washington (Supreme Court)

• WLAD amendment making sexual orientation a protected class is not retroactive (effective date: June 7, 2006).

• Plaintiff cannot recover for conduct preceding effective date...

• …but pre-effective date conduct is admissible as “background evidence”.
Erdman v. Chapel Hill Presbyterian Church (Supreme Court)

• Applies *Hosanna Tabor* to Title VII and common law employment negligence claims:
  – Retention
  – Supervision

• *Hosanna Tabor v. EEOC*:
  – 2012 US Supreme Court case.
  – Affirms existence of First Amendment “ministerial exception” to employment discrimination laws.
Davis v. Fred’s Appliance, Inc.  
(Court of Appeals)

• Facts: Heterosexual employee repeatedly called “Big Gay Al” (from “Southpark” cartoon show) by alleged supervisor.
• Claims: WLAD discrimination and retaliation
• Court:
  – “perceived sexual orientation” is not a protected class.
  – Comments were “casual, isolated, and trivial.”
  – Supervisor’s conduct not imputed to Employer.
Lodis v. Corbis Holdings, Inc. (Court of Appeals)

- Q: Must an employee’s conduct “step outside” his or her job duties to engage in statutorily protected activity?
  - A: Maybe under FLSA, but not under the WLAD.

- Q: Does the “same actor inference” apply when the plaintiff was just promoted?
  - A: Not for WLAD retaliation claims.

- Plus, pleading “garden variety” emotional distress waives the patient privilege.
Weiss v. Lonnquist
(Court of Appeals)

• Attorney termination case.
• Claim: wrongful discharge in violation of public policy.
  – Policy: candor toward the tribunal (RPC 3.3).
• Court: No
  – bar disciplinary proceedings sufficient.
  – personal relief to the employee not required.

(not the actual litigants)
A New Protected Class?
“Job Assistance Legislation”
(aka Seattle’s Criminal Background Check Ordinance)

- Desire to reduce recidivism and improve safety.
- Disproportionate racial impact.
- Similar legislation passed in other jurisdictions.
- Effective November 1, 2013.
Criminal Background Check Ordinance—What Does it Do?

- Criminal background inquiries—must wait until after “initial screening”.
- No employment decisions based on arrest records.
- No employment decisions based on criminal history at all unless there is a “legitimate business reason”.
- Before making adverse employment decision, must:
  - give applicant notice and time to respond; and
  - hold position open.
- Applies to all employers with positions that spend 50% or more of their time in Seattle.
Criminal Background Check Ordinance—What Does it Not Do?

• Certain positions exempt from new law:
  – Criminal justice-related positions; and
  – Access to vulnerable persons.

• State and federal laws control.

• No private right of action.
Criminal Background Check Ordinance—Enforcement?

• Seattle Office for Civil Rights (“SOCR”)
• Investigations:
  – Complaint or No Complaint
• Violations:
  – First-Warning
  – Second-$750
  – Subsequent-$1,000
  – Plus Attorneys’ Fees
Criminal Background Check Ordinance—Concerns

• Negligence and other common law claims:
  – Indirect ordinance-based cause of action
  – No safe harbor

• Complaint-less investigations.

• “Legitimate” reason standard.

• Separation of Powers—SOCR:
  – Rule-making
  – Investigations
  – Adjudications

• Helpful or harmful to Seattle’s economy?
  – one of a number of Seattle-specific laws
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