

## Minimizing Risk & Exposure

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## SOBERING STATISTICS

- ◆ Steady increase in federal and state discrimination claims
- ◆ Illustrative verdicts

## Illustrative Verdicts

*Arango v. Mazada N.A.* The jury found Mazda liable for both a hostile working environment and *quid pro quo* sexual harassment

**AWARD: \$4.4 MILLION**

*Channon v. U.P.S.* The jury found in favor of a female employee who claimed she was poked in the breast and stalked by a company driver

**AWARD: \$82.7 MILLION**

## EMPLOYMENT DISCRIMINATION

- ◆ Prohibited Discrimination
  - ◆ Race
  - ◆ Color
  - ◆ Sex
  - ◆ National Origin
  - ◆ Religion
  - ◆ Age
  - ◆ Disability

## TITLE VII

- ◆ Race
- ◆ Color
- ◆ Sex
- ◆ National Origin
- ◆ Religion

## CIVIL RIGHTS ACT OF 1964 (TITLE VII)

- ◆ Prohibited Employment Decisions
  - ◆ Failing or Refusing to Hire
  - ◆ Discharging Employee
  - ◆ Otherwise Discriminating
    - ◆ Compensation
    - ◆ Terms
    - ◆ Conditions
    - ◆ Privileges of Employment
- ◆ Retaliation

## Theories of Discrimination

- ◆ Direct Evidence
  - ◆ "Dumb Stuff"
- ◆ Managers who use or condone racial, ethnic, or sexual jokes, slurs, or epithets
- ◆ Managers who stereotype applicants or employees
- ◆ Inference is that manager is adversely affected by race, sex, etc., of the applicant or employee

## Theories of Discrimination

- ◆ Disparate Treatment
  - ◆ Member of protected group treated differently in terms or conditions of employment than non-member
  - ◆ Requires proof of intent
  - ◆ Inference = Illegal discrimination
  - ◆ Defense: Different treatment due to legitimate business reason

## Theories of Discrimination

- ◆ Adverse Impact
  - ◆ Facially Neutral Policy or Practice
  - ◆ Adversely affects protected group
  - ◆ Defense: Policy or practice = business necessity and no alternative way with lesser adverse impact

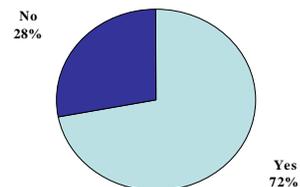
## Reverse Discrimination

Title VII applies to ALL races and to males and females. Courts may order "reverse" discrimination to remedy effects of past or continuing discrimination.

## TWO AREAS OF TITLE VII THAT ARE ESPECIALLY LITIGATED

1. Sexual Harassment
2. Retaliation

## Sexual Harassment is a Common Occurrence in the Workplace



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**Is it Reasonable to Believe That a Woman Would Not File a Report Against a Supervisor Who is Sexually Harassing her Because She Fears Losing Her Job?**

Yes  
100%

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**Sexual Harassment**

- ◆ Any unwelcome sexual advances
- ◆ Request for sexual favors and
- ◆ Other verbal or physical conduct or materials of a sexual nature which unreasonably affect an employee's terms or conditions of employment

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**What is Prohibited?**

- ◆ Conduct or comments of a sexual nature or which are "gender-directed"
- ◆ Unwelcome sexual advances or requests for sexual favors
- ◆ Jokes (e.g., "dumb blond" jokes)
- ◆ Sexual comments (e.g., foul language with sexual connotation)
- ◆ Inappropriate use of terms of endearment ("honey", "baby" or "dear")
- ◆ Sex or gender based epithets (e.g., "bitch")
- ◆ Touching in a manner having sexual overtones (e.g., pat on the .....? hug?)

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**What is Prohibited?**

Where employee subjected to this conduct suffers no "tangible adverse employment action," the conduct must be so severe or pervasive that it alters the conditions of the victim's work environment and creates an abusive working environment.

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**What is "Severe or Pervasive?"**

- ◆ Courts look at the following in determining if conduct would be offensive to a "reasonable person"
  - ◆ The frequency of the discriminatory conduct
  - ◆ Its severity
  - ◆ Whether it was physically threatening or humiliating
  - ◆ Whether it interfered with an employee's work performance

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**Sexual Harassment**

- ◆ *Quid Pro Quo* (Something for Something)
  - ◆ Manager or Supervisor
  - ◆ Strict liability
- ◆ Harassment (based upon sex)
- ◆ Hostile Work Environment
- ◆ Management created or condoned
  - ◆ Sexual advances
  - ◆ Stereotyped or demeaning comments
  - ◆ Sexually related insults
- ◆ Altered Employment
- ◆ Strict liability (employee's supervisor or high level manager and tangible job detriment)

### Who is Liable?

- ◆ Employer strictly liable for this discriminatory conduct if an employee suffers some tangible adverse employment action (fired, not promoted, demoted, etc.)
- ◆ Employee must show that conduct occurred
- ◆ Need not have to show “pervasive”
- ◆ Employer strictly liable for the discriminatory acts of its supervisors/agents where these individuals hold high positions in the management hierarchy (proprietors, partners, corporate officers)

### What About the Individual Supervisor/Agent?

- ◆ Generally not liable under Title VII
- ◆ May be liable under state law if they engage in, condone, or ratify the harassing conduct
  - ◆ Intentional infliction of emotional distress (outrageous conduct)
  - ◆ Battery (offensive touching)
  - ◆ Assault (put fear of being touched)
  - ◆ False imprisonment (forced to stay in room)
  - ◆ Invasion of privacy (watched while changing clothes)

### Who is Liable?

- ◆ Where no “tangible job detriment” and actor is not level official, employer liable for the hostile environment if the employer knew or should have known about the conduct, and did not stop it
- ◆ Knowledge and inaction viewed as negligence or as adoption of the conduct
- ◆ Doesn’t matter who caused hostile environment (supervisor, co-worker, etc.)
- ◆ Conduct must be “severe or pervasive”
- ◆ Even where employer not negligent, an employer is still liable to a victimized employee for an actionable hostile environment created by a supervisor
- ◆ But, when no tangible employment action is taken, employer may raise an affirmative defense to liability or damages

### Who is Liable?

- ◆ Affirmative defense - employer must show:
  - ◆ That it exercised reasonable care to prevent and correct promptly any sexually harassing behavior
  - ◆ That the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm

### Sexual Harassment

- ◆ Avoiding liability (co-worker or not direct supervisor)
- A. Employer exercised reasonable care:
  - ◆ Policy (open door, complainant process, non-retaliation)
  - ◆ Strong zero-tolerance practice; harassment training
  - ◆ Thorough investigation
  - ◆ Prompt remedial action
- B. Employee unreasonably failed to avoid harm (i.e., not report)

### Sexual Harassment

- ◆ State law (and, more importantly, state court) claims
  - ◆ Assault and battery
  - ◆ Intentional infliction of emotional distress
  - ◆ False imprisonment
  - ◆ Negligent infliction of emotion distress
  - ◆ Negligent hiring
  - ◆ Negligent retention

## Sexual Harassment

### EMPLOYER'S OBLIGATIONS

- ◆ Ensure that managers, supervisors, or other agents do not engage in or condone sexual harassment of any kind
- ◆ Ensure that any such conduct is promptly reported by both supervisors and employees

## Sexual Harassment

### EMPLOYER'S OBLIGATIONS

- ◆ Investigate rumors or allegations of sexual harassment immediately with due regard for confidentiality
- ◆ If the allegations are substantiated, take immediate and appropriate action to stop the conduct
- ◆ Avoid retaliation

## REMEMBER

- ◆ Harassment based on race, color, religion, national origin, ancestry, age or disability also is prohibited

## Retaliation



- ◆ Taking action against an employee or applicant because he:
  - Opposes an unlawful employment practice
  - Has filed a charge, testified, assisted, or participated in any manner
- ◆ Charge need not be meritorious
- ◆ Purpose of retaliation clause: to protect people who assert statutory rights or who seek access to EEOC or the Courts

## Retaliation



- ◆ Defenses
  - ◆ No causal relationship between employee's opposition or participation and employer's action
  - ◆ Employer had legitimate business reason for taking action against employee (lying in investigation?)

## Remedies: Title VII

- Reinstatement
- Back pay (up to trial)
- Front pay (after trial)



Back Pay

Front Pay

\_\_\_\_\_ | \_\_\_\_\_  
Discrimination Trial

## Remedies: Title VII

- ◆ Compensatory Damages
  - ◆ Emotional Pain
  - ◆ Suffering
  - ◆ Inconvenience
  - ◆ Mental Anguish
  - ◆ Loss of Enjoyment of Life
- ◆ Punitive Damages
  - ◆ Punish Wrongdoer
  - ◆ Send Message

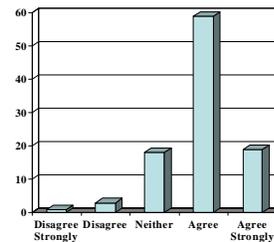
## Remedies: Title VII

- ◆ Limits (excludes back pay and front pay)

|           |           |
|-----------|-----------|
| ◆ 15-100  | \$50,000  |
| ◆ 101-200 | \$100,000 |
| ◆ 201-500 | \$200,000 |
| ◆ 501+    | \$300,000 |
- ◆ Reasonable attorney fees and costs

## Age Discrimination in Employment Act (ADEA)

## Companies Discriminate Unfairly Against Older Workers



## Age Discrimination

- ◆ More than 15 employees
- ◆ 40 years of age
- ◆ No upper age limit
- ◆ Retaliation

## Age Discrimination

- ◆ Remedies
- ◆ Reinstatement
- ◆ Back pay
- ◆ Front pay
- ◆ Liquidated damages ("willful")
- ◆ Attorney fees

## Discipline & Discharge

## Employment At-Will

- ◆ An indefinite hiring may be terminated at will by either party.
- ◆ For a good reason, bad reason, or no reason at all.

## Discipline Begins on Day One

- ◆ Provide notice of expectations
- ◆ Training
- ◆ Feedback

## Your Discipline and Discharge Procedures

- ◆ Be honest
- ◆ Respect the individual

## Discipline Considerations

- ◆ Performance appraisals
  - ◆ Honest and accurate
  - ◆ Fair warning of need for improvement
  - ◆ Must support terminations
  - ◆ Assist in making termination decisions
  - ◆ Kept secure and shared only on a "need to know" basis

## Consider These Comments From Actual Performance Appraisals

- ◆ "This associate is really not so much a has-been, but more of a won't be"
- ◆ "I would not allow this employee to breed"
- ◆ "This employee is depriving a village somewhere of an idiot"

## Progressive Discipline

- ◆ Suspension pending discharge
- ◆ Oral warning
- ◆ Written warning
- ◆ Final warning

## Progressive Discipline

### Oral Warning

- ◆ Informal discussion of work related problems
- ◆ Stress good points, corrective action
- ◆ Document

## Progressive Discipline

### Written Warning

- ◆ Explain reason
- ◆ Employee's story
- ◆ Explain how to improve
- ◆ Consequences
- ◆ Document
- ◆ Copy to file and employee

## Progressive Discipline

### Final Warning/Suspension Termination

- ◆ Explain reason
- ◆ Employee's story
- ◆ Consequences
- ◆ Document
- ◆ Copy to file and employee

## Discipline Considerations

- ◆ The sequence of events
- ◆ Why this action did not meet standards
- ◆ The corrective action required
- ◆ The time frame
- ◆ The consequences if the corrective action is not taken

## Why is Documentation of the Discipline Process Important?

- ◆ Because we will use documented progressive discipline to convince the jury
- ◆ Remember: If it's not written down, it didn't happen
- ◆ The disciplinary document should be written in such a way that a "stranger" could read and understand.

## Common Methods of Avoiding a Solution

- ◆ Constructive discharge
- ◆ Reduction in hours
- ◆ Transfer to another supervisor
- ◆ Avoiding criticism or poor evaluations
- ◆ Demotion

## Taking Action

- ◆ Adherence to "Employer Policy"
- ◆ Being mindful of past situations
- ◆ "Support" from other employees
- ◆ Offering the employee a chance to explain or sink him/herself

## Written Counseling

On April 7, 2003, you were 30 minutes late. When I asked why you were late, you said you had car trouble and the reason you did not call into work to advise your supervisor that you were going to be late was because you "forgot." I counseled you, and you indicated you understood, that your tardiness and your failure to call in to work constituted a violation of our policy. On April 23, you were 25 minutes late and you did not call in to advise your supervisor you would be late. When asked why you were late, you said you misjudged the traffic, and that you understood that you had violated our policy.

**I asked you if there were any problems that you wanted to tell me about, but you said there were none. I also asked if I could be of any help to you in solving your problem and you said no.**

**Yesterday, May 27, you were absent from work. You did not call in to report your absence, which is a clear violation of our policy. When I asked you why you were absent, you said you were sick and that you forgot to call in.**

"I expect immediate and consistent improvement to my satisfaction in the following areas: \_\_\_\_\_, otherwise you may be subject to further discipline up to and including discharge."

Your pattern of conduct during the past two months indicates a disregard for our policies and procedures. You must correct this conduct immediately, and comply with all of our policies and procedures from this day forward. Failure to do so will result in further discipline, up to and including discharge. 10/25/04

\_\_\_\_\_/s/  
Supervisor's Signature

As evidenced by my signature below, I have received and read this written counseling as of the date indicated below.  
Date: 10/25/04

\_\_\_\_\_  
Employee name

\_\_\_\_\_  
Employee signature

## Documentation

- ◆ Counseling and reprimands: Specific?
- ◆ Evaluations: Honest?
- ◆ Time/Production records
- ◆ Reports of complaints
- ◆ The employee's own writings
- ◆ Electronic mail

## Making Use of Key Personnel

- ◆ Involve someone from the same protected category?
- ◆ Involve more than one decision-maker?
- ◆ Use the individual who made the hiring decision?

## Cardinal Rules of Termination RULE # 1

- ◆ Never summarily discharge an employee

- ◆ Even when an employee is apparently caught red handed.....
- ◆ ...suspend subject to discharge pending further investigation
- ◆ violent acts exception

## This Procedure Gives the Employer Time to Take the Following Steps:

- ◆ Allow time for all parties to cool down
- ◆ Take into custody and examine physical evidence, such as drugs, alcohol, stolen property
- ◆ Obtain written statements from all witnesses, including the employee under suspension
- ◆ Complete a thorough factual investigation
- ◆ Examine discipline previously imposed on other employees who committed similar infractions

- ◆ Determine if the individual has been the recipient of demeaning remarks or comments related to his or her protected status
- ◆ Review the employee's past work record and performance
- ◆ Obtain the employee's account of what happened
- ◆ Have the appropriate decision making officer, official or manager decide on appropriate discipline
- ◆ Consult an employment attorney in questionable cases before final action is taken

## Cardinal Rules of Termination RULE # 2

- ◆ Get all the facts first to make sure your investigation is thorough, complete and well-documented

## Cardinal Rules of Termination RULE # 3

- ◆ Conduct all employee interviews with care and deliberation, paying attention to detail (who, what, when, where, why and how)

## Cardinal Rules of Termination RULE # 4

- ◆ Investigate promptly - don't delay
  - ◆ Investigation completed within 48 to 72 hours
  - ◆ Final decision to employee within 24 to 48 hours thereafter

## Cardinal Rules of Termination RULE # 5

- ◆ Pinpoint the basis of the discharge

## Cardinal Rules of Termination RULE # 6

- ◆ Beware of the set-up

## Telltale Signs That They Are Being Set-up:

- ◆ Requests by employees to see or copy their personnel file and possibly those of other employees
- ◆ Requests that the employer put statements in writing; conversations focusing on the employee's protected status

- ◆ Detailed inquiries about disciplinary procedure or company policies and benefits
- ◆ Copying of corporate policies
- ◆ Questions concerning comparative treatment with regard to other employees and other similar actions may be indications that employees have been furnished with a detailed game plan to put the employer on the defensive

## Cardinal Rules of Termination RULE # 7

- ◆ Conduct the discipline/termination meeting

## Follow Your Outline

- ◆ Emphasize that there was a careful investigation and review of the relevant facts
- ◆ Allow the employee the last opportunity to state his/her case again (never too late to investigate further if new information is presented)
- ◆ Maintain the dignity of the person

## Workers' Compensation

- ◆ Bodily injuries in course of employment
- ◆ Coverage for sexual harassment
  - ◆ Unwanted bodily contact/groping
  - ◆ Consequential injury - headaches, etc.

## Insurance Protection Against Employment Claims

- ◆ Workers' compensation insurance
- ◆ Commercial general liability
- ◆ Directors and officers insurance
- ◆ Employment practices liability insurance

## EPLI Policies in General

- ◆ Covered perils
- ◆ Prior acts coverage
- ◆ Duty to defend and duty to indemnify
- ◆ Claimants covered
- ◆ Amounts covered
- ◆ Exclusions
- ◆ Enhancements to coverage

### Covered Perils

- ◆ Wrongful termination
  - ◆ Actual or Constructive
- ◆ Sexual Harassment
  - ◆ Hostile environment & *Quid Pro Quo*
- ◆ Discrimination
  - ◆ Any violation of statutory rights
  - ◆ Federal, state and local

### Workplace Torts

- ◆ Employment related
- ◆ Emotional distress claims
- ◆ Invasion of privacy claims
- ◆ Defamation
- ◆ Failure to employ or promote
- ◆ Retaliatory/constructive discharge

### Prior Acts Coverage

- ◆ Entities acquired after inception of policy
- ◆ No coverage for liabilities existing prior to acquisition

### Claimants Covered

- ◆ Present employees
- ◆ Past employees
- ◆ Job applicants
- ◆ Administrative agencies
  - ◆ EEOC
  - ◆ State employment agencies
- ◆ Third parties
  - ◆ Clients, customers, vendors, and contractors

### Exclusions From Coverage

- ◆ Civil or criminal fines - penalties
- ◆ Declaratory relief - reinstatement or injunction
- ◆ Cost to modify buildings - ADA compliance
- ◆ Violations of various statutes
  - ◆ COBRA, ERISA, WARN, OSHA, NLRA, FLSA
  - ◆ "Carve-out" for retaliatory discharge

### Exclusions From Coverage

- ◆ Liability assumed under contract
- ◆ Breach of employment contract
- ◆ Criminal acts
- ◆ Plant or facility closings
- ◆ Arbitration under collective bargaining agreements
- ◆ Prior knowledge exclusions
- ◆ Punitive or liquidated damages

## Other Points to Consider

- ◆ “Hammer” Clause
  - ◆ If the insurer recommends a settlement and the Company chooses not to settle and loses, then the Company is responsible for a percentage or amount over the recommended settlement value.

# THANK YOU

*Presented by:*  
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