



TMHRA Employment Law Seminar “State/Federal Update”

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Federal Legislation and Proposals Very Active in 2008

What's In Store For 2009?

Lilly Ledbetter Act

- January 29, 2009 – President signed the bill
- Reversed Supreme Court decision in *Ledbetter v. Goodyear Tire & Rubber Co.*
- Discriminatory practice occurs when:
 - Discriminatory compensation decision or practice is adopted
 - When individual becomes subject to discriminatory compensation decision/practice
 - When individual is affected by application of discriminatory compensation decision or other practices
- Retroactive to May 28, 2007
- Eliminates regular charge filing deadlines for EEOC charges for alleged pay discrimination under Title VII, ADA, and ADEA

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Lilly Ledbetter Act

- **Reset statutory limitations periods upon receipt of any paycheck affected by a discriminatory decision even one that goes back many years**
- **Back pay is limited to two years**
- **Result makes it easier for employees to litigate formerly stale discrimination claims**
- **Law applies to all classes, not just sex discrimination**
- **Unknown if LLA will be applied to failure to promote claims**

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Lilly Ledbetter Act

- Coverage: just pay issues or other employer actions?
- Demotion issue—16 years before and claim not barred
- Denial of tenure—filed 2 years later
- Arguably: LLA has done away with Title VII's Statute of Limitations because every action by employer will affect compensation in some way

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Lilly Ledbetter Act

- “Must do’s” for Employers:
 - Examine record retention policies – indefinite
 - Review pay practices
 - Develop forms
 - Get employee feedback annually after raises
 - Consider conducting statistical self-audit of recent pay decisions:
 - Starting pay
 - Promotional pay increases
 - Merit pay
 - Get professional compensation plan advice
 - Any pattern of discrimination in last two years?
 - Try to cloak self-audit with attorney-client privilege

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Economic Stimulus Bill Adds Whistleblower Protections

- McCaskill Amendments
- Gross mismanagement
- Gross waste of funds
- Abuse of authority regarding use of funds
- Violation of law
- In implementation or use of stimulus funds
- Clear and convincing burden of proof
- No waiver of rights permissible—ergo no settlements possible
- Punitive damages--unsettled

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Economic Stimulus Bill Adds Whistleblower Protections

- No statute of limitations specified, so 4-year general SOL applies
- *Garcetti*—trumped by Whistleblower provisions
- Individual can file complaint even if problem is within scope of employee's job
- No requirement of reasonable belief of violation of ARRA
- Only have to show *good faith belief* of gross mismanagement or waste

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Economic Stimulus Bill Adds Whistleblower Protections

- Covers employees of private contractors and state/local governments who report:
 - Public safety issues

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McCaskill Amendment

- Disclose wrongdoing to 9 different entities
- Including person with supervisory authority over the employee
- Includes internal disclosures in course of employee's duties
- Defense will be difficult because of "clear and convincing" evidence rebuttal requirement
- Administrative remedies must be exhausted by complaint with appropriate Inspector General who will investigate
- NOTE – Employee friendly burden of proof

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Amendments to ADA – a Watershed??

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Background

- Near-unanimous support in Congress
- Approved by business and disabled communities
- Signed by President on September 25th
- Effective date – January 1, 2009
- **MOST SIGNIFICANT CHANGES TO EMPLOYMENT LAW SINCE FMLA ENACTED**
- Overturned several Supreme Court decisions that had limited ADA
- Erases several employer defenses to ADA claims

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Reasons Behind Amendments

- Congress concerned courts had unduly narrowed group of people it intended to protect in 1990
- Purpose of ADAAA – restore intent and protections of ADA

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New ADAAA Regulations

- June 17—EEOC voted approval of Notice of Proposed Rulemaking—enormous shifts in EEOC policy
- Hints at more aggressive enforcement position by EEOC based on comments by EEOC assistant legal counsel
- NPRM broadens text of ADAAA by adding three major life activities: reaching, sitting and interacting with others—and three major bodily functions: hemic, lymphatic and musculoskeletal
- NPRM lists impairments that impact major life activities—kidney disease affects bladder function
- Identifies categories of impairments that will constitute disabilities

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ADAAA Regs — cont'd.

- Proposed definition of “Substantially Limited”
 - Focus on whether discrimination occurred, not on definition of “disability;” construe this broadly
 - Employee doesn’t have to show limited in “activities of central importance of daily life”
 - Disability may be based on showing impairment that substantially limits only *one* major life activity
 - Use common sense analysis without using scientific or medical evidence and compare disabled person to the general population
 - Impairments of less than 6 months can be substantially limiting

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ADAAA Regs — cont'd.

- Regulations will list impairments that are obviously limiting and those that may be
- Result will be to deem some conditions as disabilities *per se*
- “Class” and “Broad range of job” requirements are eliminated
- Instead comparison is to most people having comparable training, skills and abilities
- Surgical interventions included as a “mitigating measure”

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ADAAA Regs — cont'd.

- Substantial disagreement on this NPRM—even from current EEOC Commissioners
- Review by OPM and then issued in Proposed Form for public comment
- New focus - reasonable accommodation: is person qualified to do the job and is person a “direct threat”
- Update job descriptions

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COBRA Changes In Economic Stimulus Act

- Effective retroactively
- Premium subsidy—35% paid by employee involuntarily terminated between September 1, 2008 and December 31, 2009
- “Involuntary termination” not defined in the Act
- Employer gets credit against payroll taxes
- Subsidy can last up to 9 months
- New notice requirement to those who didn't ask for COBRA
- March 19-DOL issued model COBRA continuation notices-4 types of notices
- February 17-notice requirements became effective and had to be completed by April 18-then 60 days to accept coverage
- DOL to resolve disputes about disputed eligibility for coverage issues

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What Should Employers Keep Doing?

- Update regular COBRA notices and election forms to include information about the subsidy and prepare the special COBRA notice and election form for individuals entitled to the special election rights
- Make arrangements for special notices to be sent to qualified beneficiaries who may be eligible for the subsidy and special election rights

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What Should Employers Keep Doing? — cont'd

- Work with your COBRA administrator and other vendors to develop procedures for tracking assistance-eligible individuals and the eligibility period for those who enroll during the special election period
- Develop procedures for providing the subsidy and claiming the tax credit
- Review and update health plan documents to reflect and incorporate the new COBRA rules
- Review current severance plans and arrangements and evaluate whether any changes should be made in light of ARRA

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Genetic Information Nondiscrimination Act

- Prohibits employers and health insurance providers from discriminating against individuals based on genetic information
 - Possible predisposition to certain diseases
- Designed to prohibit disclosure and adverse use of certain personal health information
- Employers must protect genetic information they may possess
- EFFECTIVE DATE: November 21, 2009

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GINA – Proposed Regs Issued

- EEOC proposed Regulations issued March 2, 2009
- Defines “genetic test”
- Drug and alcohol tests are not “genetic tests”
- 6 exceptions from acquiring genetic information

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6 Exceptions From Acquiring Genetic Information

- “Water cooler”
- Genetic services offered as part of voluntary wellness program
- Compliance with certification under FMLA
- Genetic information is publicly available such as on internet
- Genetics obtained through monitoring toxic substances in workplace
- Law enforcement employees – to detect sample contamination

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More Congressional Action on the Horizon

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Public Safety Employer-Employee Cooperation Act

- Passed House in July 2007
 - Vote of 314 to 97
- Senate Considered & Tabled in May 2008
- Opposition Efforts

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Public Safety Employer-Employee Cooperation Act

- Where Are We Now?
 - HR 413 introduced in House on January 9, 2009
 - Politics of Washington
 - President Supports Collective Bargaining
 - “It’s Unacceptable When Fire Fighters Do Not Have Collective Bargaining”
 - Role of Senate Filibuster – 60 Democratic Senators
 - Supreme Court Strategy
 - Collaborative Strategy

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Galveston Editor Calls For End of Collective Bargaining on the Island

- July 26—Editor calls for referendum on ending police and fire collective bargaining
- Needed to maintain solvent city where middle-class families can live
- Taxes going up by 12 percent but not enough to cover deficit
- “Impossible to control city spending without controlling salaries”
- “Impossible to control salaries without controlling collective bargaining”
- Public employee unions hold too much power—soak up disproportionate share of tax money

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Galveston Editor Calls For End of Collective Bargaining on the Island – cont'd

- Unions create unhealthy disparity in way other city employees are treated
- 6% increase in wages mandated in current CBA's
- Public safety undermined by collective bargaining—higher salaries means fewer employees can be retained
- City-wide vote required—why not ask citizens to review once every 30 or 40 years?
- Median household income in Galveston is \$34,100
- Average Police income \$71,092

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Proposed FMLA Amendments Designed To Expand Protection

- H.R. 398 – would eliminate hours of service requirements and allow FMLA for part-time employees
- H.R. 824 – would expand access to FMLA by covering employers with 25+ employees and allow for parental leave

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Healthy Families Act

- May 2009 - HFA introduced in House and Senate
- HR 2460—guarantees full-time employees up to 56 hours of paid sick leave annually and pro-rata to part-time employees
- Applies to employers with 15+ employees
- Guarantees one paid hour off for every 30 hours worked and carry over from year to year
- Sick leave for employee illness or child, parent, spouse or any other blood relative
- Applicable to absence for domestic violence, sexual assault or stalking

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Healthy Families Act - cont'd

- Anti-discrimination and anti-retaliation provisions
- Employer's existing sick leave policy would have to be amended to comply with HFA and cannot be reduced
- Use of sick leave can't be included in "no fault" absence plan or absence control policy and can't be a negative factor in an employment action
- Opposition to bill cites costs
- SHRM and other business groups have opposed the bill because of burden on small employers and effect on existing benefits

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Paid Parental Leave for Federal Employees

- June 4—House approved HR 626 to provide federal employees with 4 weeks of paid parental leave following birth or adoption of child
- Also offers use of accrued sick or vacation leave to fund 12 weeks of FMLA
- Senate version introduced in March 2009 (S.354); debate not yet scheduled
- This may be precursor to HFA

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More Employment Bills Likely

- **WORKING FAMILIES FLEXIBILITY ACT**
 - Annual right to apply for modification of employee's work hours, schedule or work location
 - Prompt meeting to discuss request
 - 14 days to provide decision in writing and state grounds for denial
 - Reconsider if not satisfied and have representative at meetings
 - Employer can't interfere with employee's rights
 - Effect: Dramatic, as it does away with significant management authority over working conditions

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Landmark Sexual Orientation Discrimination Bill To Be Considered Again

- **House passed Employment Non-Discrimination Act of 2007 ("ENDA")**
 - Would prohibit employment discrimination on basis of sexual orientation
- **Reintroduced on June 19 and likely will again pass House**

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ENDA — cont'd

- Forecast to pass both House and Senate
- Will likely include all forms of same sex discrimination including trans-gendered
- President indicates he will sign

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Other Civil Rights Act Amendments Likely

- Increases penalties and adds compensatory and punitive damages;
- Prevailing employees to recover expenses such as expert witness fees
- Retaliation barred and no penalty for sharing confidential pay information
- Permits class actions under Rule 23—opt out

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Proposed Paycheck Fairness Act

- Has passed House and been read in Senate
- Addresses wage disparities on basis of sex
- EPA defense is reasonable factor other than sex
- PFA—defense: is factor used to set disparate wages “bona fide” and justified by business necessity?

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Other Federal Law Changes Likely To Be Introduced

- Increase in minimum wage
- 2009 - \$7.25
- Likely to pass increase to \$9.50/hour in 2011

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Equal Remedies Act

- Not yet introduced in Congress, but likely will repeat the 2007 & 2008 versions
- Repeal the \$50,000 to \$300,000 cap on compensatory damages available in employment discrimination cases
 - Title VII
 - Americans with Disabilities Act

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FLSA Amendment Designed To Deter Improper Use Of Independent Contractor Status

- Employee Misclassification Prevention Act
 - Strengthen enforcement
 - Increase penalties
 - Maximum fine of \$10,000 for willful violation
 - DOL to audit

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State Laws Impacting Human Resources

- COMPLIMENTS OF CLEAT:
 - HB 1177—lowers population floor for legislative leave to cities with 50,000+ (effective 9/1/09)
 - HB 1720—False Advertising During Issue Election—Class A misdemeanor for false advertising during issue election—such as collective bargaining or M&C (effective 9/1/09)
 - HB 1960—provides pay for appearing as a witness at an administrative hearing on employment issue (effective 6/19/09)
 - HB 2580—TWC and TCLEOSE to develop jobs database and website for Texas (effective 6/19/09)
- COMPLIMENTS OF FIRE FIGHTERS:
 - HB 2113 - 9/11 Holiday for Fire Fighters

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Texas Legislation—cont'd

- HB 1177—legislative leave provisions for cities of 50,000+

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2009 Collective Bargaining Bills in Texas

- **Politics of Austin**
- **Three bills introduced**
- **TEXPELRA Committee efforts**
- **2009 Results**

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Federal Agencies Are Active

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DOT Direct Observation Requirements

- Effective August 31, 2009
- All return-to-duty and follow-up urine tests
- Must permit direct observation of specification collection
- Goal: Prevent use of prosthetic or other cheating devices

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EEOC Filings Alleging Discrimination And Retaliation Are On Rise

- March 11, 2009 – newest EEOC stats
- 15% increases in charges overall – 95, 402 charges
- More claims than any other year in EEOC history
- Age and retaliation largest annual increases
 - Age claims up 28.7%

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EEOC Filings Alleging Discrimination And Retaliation Are On Rise

- Sex discrimination charges up 14%
- Retaliation almost overtook race claims as the number one charge
- Large spike in age claims because of economic conditions and demographics and disparate impact claims now viable
- ADA claims expected to rise in 2009 because of ADAAA

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EEOC Issues Compliance Manual On Religious Discrimination

- 100% increase in religious bias claims in 15 years
- Statutory definition of religion is broad
 - Includes new or uncommon religions
 - Social or political philosophies are not protected religious beliefs
- Employment decisions on basis of religion permitted only if a BFOQ
- Religious harassment
 - Coercing employee to abandon or adopt a religious belief
 - Unwelcome comments or conduct based on religion

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EEOC And Religious Discrimination - cont'd

- **Religious accommodation – best practices:**
 - Inform employees of efforts to make reasonable accommodation and have internal procedure to process requests
 - Individually assess every request; avoid stereotypes
 - Offer alternatives if preferred accommodation can't be implemented
 - Seek voluntary modification of CBA seniority provisions
 - Adopt flexible leave and schedule policies
 - Permit voluntary substitutions or shift swaps

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EEOC And Religious Discrimination - cont'd

- **Avoiding religious harassment complaints**
 - Have written anti-harassment policy covering religion
 - Treat religious expression same as other types of personal expression
 - End conduct that may become pervasive
 - Supervisors should avoid religious talk

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EEOC Focuses on Age

- Large spike in age discrimination claims due to widespread layoffs
- EEOC holds public hearing on the subject – Summer 2009
- Experts testified about damaging effect of age stereotyping and the *Gross* decision
- Common negative stereotypes about older workers: more costly, harder to train, less flexible, etc.
- Research shows opposite to be true—performance often improves with age
- Second negative stereotype is older workers provide lower ROI—training

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EEOC Focuses on Age - cont'd

- Research shows older workers less likely to quit and payback comes in first few years after training
- Focus on individual job related characteristics of employees
- EEOC gets an earful about ageist comments – “too damn old to do the job”
- Plaintiffs attorneys see need to amend ADEA to be similar to Title VII
- Employer responses: flexible work options, retiree hire back programs, phased retirement programs; greater leave policies

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Reducing Success of Discrimination Claims

- Respond promptly and civilly to demand letter
- Carefully consider contesting unemployment
- Beware of retaliation claims
- Watch for set ups
- Confidentiality of investigation
- Investigate promptly
- Conduct thorough investigation
- Document interviews
- Keep your credibility
- Use mediation
- Retain an expert
- Write good responses to EEOC charges
- EEOC is not the enemy – or is it?
- Balance cost of defense versus settling

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Supreme Court Developments

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Supreme Court Issues Most Important Employment Decision

- *Ricci v. DeStefano* — June 2009
 - 5/4 decision in favor of group of white fire fighters who challenged New Haven's decision to throw out results of exam taken for promotion to Lieutenant or Captain
 - Test included an assessment center and written exam—60/40 weight; assessors were diverse
 - City did not certify eligibility list because no African-Americans and only 2 Hispanics made the list
 - White firefighters claimed disparate treatment on account of race
 - City claimed disparate impact of testing permitted its actions

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Ricci — cont'd.

- District Court and 2nd Circuit Court of Appeals approved of City's action (note Sotomayor on panel)
- Supreme Court says "no"
- Must be strong evidentiary basis to believe City would be subject to disparate impact liability
- Fear of litigation doesn't justify using race to detriment of those who passed the test
- Decision resolves competing expectations under Title VII
- VIP—written test had been validated and came from the outside
- Could this happen in Texas?? Not under 143 civil service, but in other cities the fact pattern could occur

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Supreme Court Increases Plaintiffs' Burden of Proof in Age Discrimination Claims

- *Gross v. FBL Financial Services, In.*
 - Mixed motive discrimination claims under ADEA
 - Plaintiff must prove that age was “but-for” cause of challenged adverse employment action.
 - Court rejected burden shifting framework used in Title VII mixed motive cases—showing of “a motivating” factor shifts burden of persuasion to employer that it would have acted same in absence of impermissible consideration.
 - Under ADEA claims—burden of persuasion never leaves the employee
 - Result—makes it more difficult for employees to prove age discrimination especially where action influenced both permissible and impermissible factors
 - Significant “win” for employers—talk of overturning by legislative action—like the Lily Ledbetter Act.
 - Deep division in Supreme Court—5/4 split on this case

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Discrimination Claims Subject to Arbitration

- *14 Penn Plaza v. Pyett* — U.S. Supreme Court
 - Court enforced mandatory arbitration provision in CBA that extended to claims of discrimination
 - *Gardner-Denver v. Gilmer*
 - CBA specifically referred to statutory discrimination claims
 - Union has power to agree to binding arbitration
 - About-face from prior precedent
 - Keep in mind for next collective bargaining negotiations

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Other Court Decisions of Interest

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Numerous Free Speech Claims Decided This Year

- *Heffernan v. Straub*-New York District Court
- Fire Lieutenant made radio transmissions while on duty—also served as VP Of local union
- Claimed 1st Amendment violation and question was whether statements made as part of his official job duties
- Court holds statements made statements on duty and in response to order regarding his unit and not protected.
- “ordinary citizen not employed by the Fire department would not be able to form the opinion that plaintiff expressed—could not have made this speech.
- Subjective belief of making statement as a citizen (or union rep) is not enough
- Failure of job description to mention use of portable radio did not make his comments outside is job duties
- Hostile looks, condescending and bitter responses do not demonstrate proof that City officials acted against him because of his union activities

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First Amendment-cont'd.

- *Schlarp v. Dern* — District Court Pennsylvania
 - City grant MSJ on police officer's claim of retaliatory denial of promotion
 - Dern passed over for promotion under a civil service system
 - First amendment claims based on factionalism within the PD
 - Internal feud between two competing factions
 - Court finds no evidence of connection between pass over and any constitutionally protected activities—including serving as chairman of another employee's grievance committee (remote in time)

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Another Denial of Promotion Claim Survives MSJ

- *Robinson v. York*—9th Circuit
 - First Amendment claim re denial of promotion after reporting departmental misconduct in police department
 - Plaintiff claimed supervisors' response to his numerous complaints was that he stop filing misconduct reports against other officers
 - County claimed reports were not matters of public concern—but court disagreed
 - Important that Court did not decide whether Robinson was obligated to make his complaints as part of his job duties
 - Court excused Plaintiff's failure to make his complaints through established channels

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Grievances not on a Matter of Public Concern

- ***Desrochers v. City San Bernadino-9th Circuit***
 - Police officers lawsuit alleged transfer and discipline was retaliation for protected speech
 - Grievances about supervisors' cited personality conflicts and micro-managing, autocratic and controlling not matters of public concern
 - Poor interpersonal relationships don't automatically transform speech to a matter of public concern
 - Content of grievances didn't address police competence or anyone to do their job
 - Instead, only a personality dispute about management style
 - Form of grievance was internal and public didn't learn contents
 - Speech reflected only dissatisfaction with employment

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Internet Access Challenged

- **Lawsuit by Philadelphia police officers**
- **Race discrimination alleged due to PD permitting white officers to maintain private website used as forum for racially offensive comments**
- **Alleged hostile environment created because contents discussed at work**
- **Did PD have knowledge of content?**
- **Question regarding extent of city's liability for harassing conduct by some supervisors**

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Tattoo Regulations Issued in Dallas

- Dallas PD regulation in the works: cover tattoos with clothes or make up—be more professional
- Some believe grandfathering necessary because hired with tattoos in place
- Question whether tattoos “fit in” to culture

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Stray Remarks and Age Discrimination

- *Braymiller v. Lowe’s Home Centers, Inc.*
 - Court affirms dismissal of claim under TCHRA
 - Replaced as store manager
 - Claimed ageist comments—“young man” “boy” and “son” even though he was 62
 - Braymiller sought special pricing on sale appliances and investigation followed
 - Fired for using position to gain improper discount, involved subordinates in transaction and showed poor judgment during investigation
 - Court concluded that the alleged ageist comments were stray remarks and did not establish discriminatory intent

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Fifth Circuit Court of Appeals Says Employers Must Have Dialogue on Reasonable Accommodation

- *EEOC v. Chevron Phillips Chemical CO., LP*
 - Neterville had chronic fatigue syndrome
 - But was in remission when hired by CPC
 - Once hired, began having symptoms
 - Later fired for not truthfully answering her medical history questionnaire
 - EEOC files suit alleging ADA discrimination by failing to accommodate and firing
 - Court says employee not required to come up with specific accommodation on her own
 - “Once company on notice of her needs, company obligated to engage in interactive process to determine reasonable accommodation”
 - Here, the employee met “silence” not a dialogue with her managers
 - Result is important in showing that courts will be vigilant in assessing a city’s response to an employee’s request for an accommodation—even if made in general terms

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Interesting ADA Case: Sleep is a Major Life Activity

- *EEOC v. Chevron Phillips Chem. Co. -5TH Circuit*
 - Employee had Chronic Fatigue Syndrome (CFS)
 - Claim of failure to accommodate
 - Court overturns lower court grant of MSJ
 - Fired for falsifying her medical history questionnaire
 - Charge of failure to accommodate & retaliation

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Chevron Phillips - cont'd

- Court found employee had substantial limitation on major life activities of sleeping, thinking and caring for herself
- Sleeping is a major life activity
- Court also finds that relapsing-remitting conditions can constitute disability
- Ability to perform job while having CFS symptoms doesn't affect disability determination
- Company failed to entertain requested accommodation and refused to discuss it with her - no interactive process

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EEOC Nixes Health Risk Assessment

- EEOC Informal Opinion Letter 2009
- Required health risk assessment to participate in health plan violates ADA
- County did not even receive results of the assessment, except in aggregate
- No participation meant no health coverage
- HRA is not job-related and consistent with business necessity says EEOC
- This is not a wellness program—because not voluntary

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Court Resurrects ADA Retaliation Claim

- *Casna v. City of Loves Park* - 7th Circuit
 - Transfer to police clerical position after conflict with previous supervisor—new conflicts arose
 - Casna wore hearing aids and was asked “How can you work if you cannot hear?” after an incident
 - Police Chief recommends firing and Mayor obliges
 - Casna claimed her reply to question above was protected activity: “Aren’t you being discriminatory?”
 - Court holds informal complaint may constitute protected activity in a retaliation claim
 - Firing one day after her questions was very suspicious

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FMLA Violation to Combine Absences with Leave Time

- *Powers v. Woodlands Religious Community* — 5th Circuit Court
 - Employee fired 30 days after returning from FMLA leave
 - Claim of retaliation for using FMLA leave
 - Proximity in time between return from leave and firing—plus employer counted FMLA absences –along with other absences stated a case.
 - No progressive discipline created jury issues
 - Keep FMLA absences from others when determining whether absence policy is violated and taking action against employee

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Supervisors Not Managers if Unable to Affect Status of Employees

- *Huston v. P & G Paper Prod. Corp* -- 3rd Circuit
 - Hostile work environment claim liability may turn on supervisory status of harasser
 - Court held team leaders—aware of harassing behavior—not management level personnel
 - Huston falsified date into logs and was fired
 - Team leaders were hourly paid—no authority to hire, fire or discipline.

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FMLA and Individual Liability

- *Barnes v. LaPort County* — Indiana Dist. Ct.
 - Barnes sued County and the County Auditor in her individual capacity
 - Claimed termination in violation of FMLA
 - Auditor claimed she was not an employer under FMLA
 - Court held employee within a public Agency could be held individually liable under FMLA
 - 5TH Circuit has held that public official can be liable

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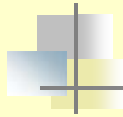


DOL Clarified FMLA Notice Requirement for Unforeseeable Events

- May 5, 2009—DOL Opinion Letter
- Original-- 2-day notice for unforeseeable leave since 1999 DOL opinion
- Now—DOL retracts 2-day rule; look to employer's call-in policy—unless circumstances prevented employee from complying
- Employers can enact and enforce reasonable call-in policies that employee must follow unless unusual circumstance prevents

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Sex Harassment Cases Continue in the Courts

- **Barnett v. Boeing Co.—5th Circuit—worker leered at employee, touched her in inappropriate and unwelcome ways and intimidated her after complaint.**
- **Court concludes conduct was not severe or pervasive**
- **Alleged stalking, glaring and intimidating after report of harassment did not show employee unable to succeed in workplace environment**

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Rodriguez and Round Rock FFA v. City of Round Rock

- Permanent injunction issued
- “Weingarten Rights”
- Broader implications to all Texas cities

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Houston Fire Department in Spotlight

- Female fire fighters at HFD claim racist and sexist graffiti—6 complaints since April 1
- Does discrimination spread beyond Station 54
- Many calls being received from others
- Is grievance process broken?
- Transfers to other stations likely
- Mayor threatens sanctions against perpetrators
- Two outside law firms and Office of Inspector General to investigate—what may be categorized as hate crimes under State law

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Outrageous Behavior & Poor Evaluations = Legitimate Reasons for Firing

- *Matthews v. City of Houston*-Dist. Ct. Texas
 - MSJ granted to Houston on retaliation claim of minority employee's claim-race, sex, disability and age claims
 - Matthews worked in Fire Department as analyst
 - Written reprimand for raising voice toward another employee—argumentative & accusatory
 - Performance evaluation-overall “needs improvement”—her appeal rejected

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Houston — cont'd

- Several EEOC claims and amendments
- Fired one month after her second EEOC charge
- City's MSJ granted—problems with time deadlines—failed to meet 90 day limit
- Disparate treatment rejected: “employees with different disciplinary records are not nearly identical”
- Assignment of undesirable duties and exclusion from meetings are not ultimate employment decisions
- 3 months between protected activity and alleged discrimination is too long to establish causal link
- City had legitimate reasons for firing-non-discriminatory
- Sleep apnea not a substantial limitation on her ability to work

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Another Surprising FLSA Ruling From California

- Police Officers Putting on Uniforms and Equipment—is it compensable?
- Depends upon where employed
- LAPD officers will have to be paid after federal court decision
- Police uniforms convey and legitimize officer's authority. . .—5 to 15 minutes before and after every shift
- Chief says “We have enough costs to bear without paying officers to take their clothes on and off”
- Estimated increase of \$2000 per year in salary
- 9th Circuit addressing issue in oral argument
- Question: What is work??

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USERRA Decisions Continue to Develop the Contours of the Law

- Crews v. City of Mount Vernon, Illinois
- Weekend guard duties for police officers
- City permitted preferential make up on days off during week but then stopped the privilege
- Court of Appeals holds nothing in USERRA required this privilege
- Reasoning based on fact City did not provide similar benefit to employees missing work for other reasons
- No retaliation because no material adversity

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Employers Must Use Revised I-9 Form

- USCIS Interim Rule
- Effective April 3, 2009
- Revises types of acceptable identity and employment authorization documents
- Expired ID documents
 - No longer OK to verify work eligibility

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Texas Supreme Court Declines to Find Immunity

- *City of El Paso v. Heinrich*
 - Widow brought action against city and pension fund regarding reduction of pension benefits
 - City and others sought immunity since money damages were sought
 - Court denied sovereign immunity—suits to require state officials to comply with statutory provisions are not prohibited by sovereign immunity—even if declaration compels payment of money—when an ultra vires exception—
 - Where officer acted without legal authority or failed to perform a purely ministerial act


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84



Reduction in Force? Planning and Surviving

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It's Happening Everywhere!!

- Chicago Police—hundreds of jobs in PD going unfilled; 400 vacancies in sworn officers
 - 2-man squad cars eliminated
- Versailles, Pa—eliminates its PD
- Concern that layoffs of police will bring increase in crime and assaults on officers
- Stimulus money available is 1/8 amount requested

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It's Happening Everywhere!!

- cont'd

- **Employees covered by CBA's voting to defer pay increases for 2009-2010**
 - Austin—paramedics forego 2.75% increase in return for guaranteed 3% raises in 2011 and 2012
 - Police officers give up 2.75% raise but get increased pay out of sick leave from 1400 to 1700 hours in 2011; no music department to be funded
 - Houston—losing 155 Police Officers and hiring bonuses; crime wave predicted by union president
 - Fort Worth civilian employees face 3% pay cut or 8 furlough days without pay

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It's Happening Everywhere!!

- cont'd

- **Anchorage, Alaska—Police union accepts wage concessions by deferring 3% wage increase in 2009 and adding one year to CBA**
- **Suffolk County New York Deputies—union balks at concession and County responds by proposing to layoff 7 officers and cut police overtime**

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It's Happening Everywhere!!

- cont'd

- Dallas—reducing civilian employees by 26%; total reduction of 13 % of its entire workforce; total of 785 full-time positions being eliminated
 - Workers in all departments subject to layoff -- some laying off now and eliminating jobs in next budget cycle
- Broward County Florida Sheriff laying off jailers
- Orlando, Florida—firefighters and police officers picketing City Hall against plan to lay off 76 fire fighters and police officers and refused to give up 3.5% COL increase to save the jobs; employees still get 4.7% step raises; 10 percent cut in total number of employees is on the table
- Kansas City—considering eliminating new cadet class

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It's Happening Everywhere!!

- cont'd

- Plummeting property and sales tax dollars—especially in California
 - Police Departments reduced in size
 - Modesto-Police picketing city hall to support deferring raises instead of layoffs in return for promise of job security
 - Los Angeles police mobilize to oppose furloughs that call for other city employees to have 26 unpaid days/year
 - Vallejo-bankruptcy because of lucrative police jobs and deep cuts in PD--140 to 98 officers
 - Sacramento County Deputies agreed to concessions in wages to save jobs; deferred 4% of a 6.9% raise to be spread out over 3 years; 90%+ voted approval; County granted other concessions on vacation pay out
 - Sacramento fire fighters offer 30 month pay freeze for no-cut guarantee

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STRATEGIES

- **GOALS:**
 - Avoid lawsuits and EEOC charges
 - Avoid losing lawsuits

- **Reduction in Force**
 - Can be a single job elimination or any sized group

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Temporary Furloughs

- **Mandatory**—unworked and unpaid day(s)
 - Can help employer avoid permanent layoffs
 - Numerous public entities shutting down several days in this and next year
 - Consider having employees substitute accrued paid time off for furlough days
 - Important FLSA regulation permits this for exempt employees, whose salaries otherwise could not be reduced because of a lack of work
 - 29 C.F.R. §541.710(b) says deductions from pay due to budget-required furlough does not disqualify employee from being paid on salary basis except in work week when furlough occurs and pay is reduced

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Temporary Furloughs

- cont'd

- Voluntary leaves of absence—long term
 - Often used in private industry
 - Could work in public sector also
- Temporary leaves of absence
 - Shorter version of above
- Work-sharing arrangements—part-time status for 2 or more employees

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Reduction in Pay

- Temporary or Permanent
- Who is to be affected?
- FLSA implications?
- Salaried employees' pay can be reduced, so long as the salary meets the minimum threshold and is not adjusted downward based upon the quantity of work performed
- Non-exempt employees' hourly rates can be reduced, so long as above minimum wage

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Permanent Layoffs--RIF

- Reduction in Force
- Justify why needed
 - Show demonstrable economic or other business need
 - Reduction in property and/or sales tax revenues
 - Other unexpected loss of revenue
 - Unexpected expenses—hurricane cleanup
- Are jobs being eliminated or redefined?
- Which areas/positions are subject to reduction?
- Number of employees to be displaced?
- What are criteria to be used in decision-making?

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Permanent Layoffs--RIF

- cont'd

- What is time frame?
 - One-time event
 - Gradual reduction
- Need for any “stay” protection?
- What benefits to be provided to those Riffed?
- Can't be used to discriminate
- Seniority-based layoff is least subject to successful challenge under non-discrimination laws
- Beware of “fake” RIF's
- Failure to follow RIF policy
- Recall rights
- Role of “stray remarks” in a RIF

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Other Considerations for Permanent Layoffs

- Who selects positions/programs slated for layoffs?
- Policy matter in most cases—cops v. librarians
- Who chooses which employees lose jobs?
- Determining criteria for choices
- Important to include procedural safeguards to reduce likelihood of legal challenges
- Is “bumping” or transferring to vacant position an option?

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Other Considerations for Permanent Layoffs — cont'd

- Determine whether employees under contract—individual or CBA
- Consider what personnel policy manual says about layoffs
- Are there any past practices that need to be considered?
- Who decides whether defensible basis for each proposed layoff? Program wide v. individual selection

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Other Considerations for Permanent Layoffs – cont'd

- Disparate impact analysis
- Who will conduct?
- Locate expert with ability to perform statistical analysis to determine whether any protected category is disparately impacted by proposed lay off selections
- Tweak selections, if necessary, to avoid disparate impact
- If tweaking not possible, develop legitimate business reasons for each person selected
- Consider stray remarks when conducting analysis

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Hiring Freeze

- Usually coupled with a RIF
- Often will permit hiring of essential employees with approval of higher level of management—example police personnel
- Often done in conjunction with transfers from within, where jobs being eliminated
- Avoid discriminatory effect by laying off employee and then getting exemption from hiring freeze.
- Consider exemption for ADA accommodation transfers within the organization

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Impact of Collective Bargaining Agreements

- Is bargaining over decision to lay off employees necessary under CBA?
- Does CBA speak to a reduction in force?
- Does CBA dictate RIFs according to seniority?
- Can public employer unilaterally change CBA because of drastic unforeseen economic circumstances?
- Pay Freeze – including “step” plans
- “Trading layoffs” for salary concessions — mid-contract revisions including wage freezes

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Severance Package Coupled with Release

- Recommended course of action
- Permits employer to receive release of claims
- Reduces number of potential EEOC claims and lawsuits
- Consider whether collective bargaining is necessary
- Morale can be improved in a difficult time by offering a severance package
- Consider first offering exit incentives for early retirement before beginning full fledged layoff

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Severance Package - cont'd

- Consider which employees will be offered severance incentives—regular v. temporaries
- Long-term v. probationary
- Strong recommendation that severance packages include sufficient consideration to obtain a full release of all claims
- Consider state constitutional or statutory restraints, if any, on severance packages
 - Example Chapter 143 of Texas Local Govt. Code

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Severance Package - cont'd

- Consider public's perception of severance benefits
- Calculate the financial impact of severance and whether its impact negates its projected savings
- Consider having governing body approve concept and scope of severance offerings
- Consider whether higher paid individuals merit a variation in severance in order to increase overall salary savings—example bridging pension time and/or retiree health benefits

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Severance Package - cont'd

- Compliance with OWBPA requirements essential when writing Release Agreements
- Essential ingredients:
 - Attorney consultation
 - 21/45 days to review
 - 7 days to revoke
 - Decisional unit information
 - Description of scope of layoff
 - Must be in “plain English”

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What About Benefits?

- Consider whether outplacement assistance will be offered
- Continuation of medical insurance; “bridging” to employee’s eligibility for retiree coverage
- Continuation of disability and other insurance coverage

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Unemployment Benefits

- Employees who are laid off will be eligible for unemployment insurance
- Most states grant unemployment to employees whose hours are reduced due to lack of work—differs from state to state

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Employees with Special Circumstances

- Impact on employees with known disabilities that are being accommodated?
- Employees on FMLA leave or other leaves
- Employees on military leave with USERRA protection
- Employees on leave due to work related injuries
- Litigious employees—whistleblowers or other “live” retaliation claims, such as pending EEOC charges
- Impact on employees nearing full vesting in retirement plans or retiree health insurance benefits

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Implementing a Reduction in Force

- Decide who is on RIF task force
- Establish an implementation schedule once policy decision is made
- How will task force make individual decisions?
- If supervisors involved, what kind of training before selection of those to be laid off occurs?
- What documentation will be considered and created to justify decisions made?
- Any training necessary to those making lay off decisions?—example ADEA considerations

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Implementing a Reduction in Force — cont'd

- Create forms to be universally used
- Confidentiality of process while it is ongoing?
- Who is to maintain documents and data used for decision making?
- Consider implications of open records laws
- Consider necessity of integrating layoff process with existing termination processes, i.e., rights to hearings, right to documentation of reason for termination, etc.
- Communicating to employees in general
- Notification of those selected for lay off

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Implementing a Reduction in Force — cont'd

- How will final pay be given to employees?
 - Direct deposit or check?
- Determine how to ensure entity's property is returned—uniforms, cell phones, lap tops, etc.
- Consider deductions from final pay—not severance pay—for items not returned

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Role of Documentation

- *Hillebrand v. MTron Indus., Inc.*,
- 827 F.2d 363, 367–368 (8th Cir. 1987)
 - (in valid RIF employer usually has “some kind of plan to reduce expenses by eliminating jobs,” which plans “generally include objective criteria by which to determine which jobs will be eliminated;” “some companies use committees to make the final decision ... to insulate employees from possible biases or prejudices of immediate supervisors and to protect the employer in any subsequent discrimination lawsuits.” Here, however, “[t]here exists little evidence of [an] objective plan to reduce expenses at the time of [plaintiff's] discharge”)

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Documentation — cont'd

- *Stenberg v. I.C. System, Inc., 2009 WL 1507417, at *8 (D. Minn. May 29, 2009)*
 - (although the lack of written documentation does not, by itself, show that the RIF was not bona fide, it can support plaintiff's prima facie case)

- *Bateman v. American Airlines, Inc., ___ F. Supp. 2d ___, 2009 WL 997340, at*15 (E.D. Va. Mar. 9, 2009)*
 - (employer failed to submit any written documentation that the RIF was a pre-planned, deliberate action, and the court "casts a wary eye on undocumented RIFs")

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113

Thank you!

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114