

NATIONAL EMPLOYMENT LAW INSTITUTE
EMPLOYMENT DISCRIMINATION LAW UPDATE

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Summary

✚ **Zachary D. Fasman, Paul, Hastings, Janofsky & Walker LLP**

Annual Review of Major Developments in Equal Employment Law

1. 10% of the federal docket is composed of employment discrimination cases.
2. Courts are more accepting of evidence that previously would have negated an inference of discrimination. For example, they may question the replacement of a 72 year old employee by a 41 year old employee, even though the latter is also in the protected class. Also, they used to accept only terminations as final employment actions. Another example is that they will consider instances where an employee stole documents before their termination as after acquired evidence (this enters into the remedy phase).
3. Employers are expected to have policies AND training, whether they are or are not liable for punitive damages.
4. Under the ADEA, 95% of employers win, usually by summary judgment.
5. The circuits have been divided as to the level of control a biased subordinate must exert in order for the “cat’s paw” theory to be applicable. If the decision-maker is getting information from a biased person, is the biased individual playing a “significant role” or exercising “substantial influence” in the employment decision? (BCI Coca-Cola Bottling Co. of Los Angeles v. EEOC, 450 F.3d 476, 98 FEP Cases (BNA) 571 (10th Cir. 2006), cert. granted, 127 S. Ct. 852 (January 5, 2007) cert dismissed).
6. Ash v. Tyson Foods, Inc., 126 S. Ct. 1195, 97 FEP Cases (BNA) 641 (2006): The Supreme Court negated a 5th Circuit decision that the disparity in qualifications must be “so apparent as virtually to jump off the page and slap you in the face.” Rather, the Court cited three other court of appeals decisions, such as the factfinder may “infer pretext if a reasonable employer would have found the plaintiff to be significantly better qualified for the job.”
7. Tomassi v. Insignia Financial Group, 478 F.3d 111 (2d Cir. 2007, DLR February 22, 2007): The court of appeals reversed summary judgment for the employer, holding that the designation of whether a comment is “stray” or probative of bias is a conclusion to be drawn after the context is considered, not a category into which comments can be put in the abstract based on how offensive the language is. The comments may not be negative or offensive, but could be evidence of discriminatory intent.

8. Forrester v. Rauland-Borg Corp., 453 F.3d 416, 98 FEP Cases (BNA) 546 (7th Cir., 2006): Whether a man discharged for harassment did it or not is not the issue; the issue is whether it is the true ground of the employer's action rather than being a pretext for a decision based on some other, undisclosed ground. Thus, if the employer reasonably believe the employee had harassed, the termination was legitimate, event if the employer's belief was wrong. Pretext would only be a deliberate falsehood.
9. Mondero v. Salt River Project, 400 F.3d 1207, 95 FEB Cases (BNA) 577 (9th Cir. 2005): Summary judgment for the employer was affirmed in a claim by a laid-off female electrician. Comments by supervisors were not relevant because they were not communicated to the decision-maker.
10. Torlowei v. Target, 401 F.3d 933, 95 FEP Cases (BNA) 753 (8th Cir. 2005): Mixed motive is applicable to post-trial jury instructions and not to the analysis performed at the summary judgment stage.
11. Ledbetter v. Goodyear Tire & Rubber Co., __ US __ (No. 05-1074, May 29, 2007): Pay discrimination claims are not continuing violations subject to unique statutes of limitations. Compensation decisions are plainly "discrete" acts rather than cumulative harassment claims, and therefore the statute requires charges attacking compensation to be filed within the 180 or 300 day period after the intentionally discriminatory decision about pay was made. However, this decision did not address the discovery rule; when did the plaintiff find out about the discriminatory decision?
12. Retaliation claims require (1) a protected act; (2) adverse impact; and (3) a connection between the two.
13. Violating workplace rules (e.g., violence) is not excused by a "protected act."
14. Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 98 FEP Cases (BNA) 385 (2006): Reassignment of duties can in some circumstances constitute a judicially cognizable adverse action, but context is important. Reassignment of job duties is not automatically actionable.
15. Tomanovich v. City of Indianapolis, 457 F.3d 656, 98 FEP Cases (BNA) 1206 (7th Cir. 2006): The passage of four months is insufficient to show a causal connection for retaliation.
16. Velez v. Jannssen Ortho LLC, 467 F.3d 802, 99 FEP Cases (BNA) 161 (1st Cir. 2006): An open-ended request for employment should not put a burden on an employer to search for jobs that met the applicant's credentials.
17. A Federal Express case is expected to go to the Supreme Court next term, questioning whether or not completing an EEOC intake form is sufficient for "filing a charge."
18. Mendelsohn v. Sprint/United Management Co., 466 F.3d 1223, 99 FEP Cases (BNA) 172 (10th Cir. 2006), cert. granted, __ S. Ct. __, No. 06-1221 (June 11, 2007): Tenth Circuit held that a trial judge abused his discretion by excluding "me too" evidence offered by a plaintiff involving the layoff of other protected-age employees who had been selected for the same layoff, where the other employees were not selected by the same supervisor. The Supreme Court has agreed to hear this case to determine under what circumstances a trial court may

- exclude such “me too” evidence. Fasman believes the Supreme Court will definitely reverse this decision.
19. Smith v. City of Jackson, 125 S. Ct. 1536, 95 FEP Cases (BNA) 641 (2005): ADEA permits a disparate impact cause of action. However, Congress gave employers a defense in ADEA cases; a prohibition on challenges to employer rules based on “reasonable factors other than age.” The employer’s decision to provide greater percentage increases to employees with less seniority was a reasonable attempt to meet local market conditions.
 20. Pippin v. Burlington Res. Oil and Gas Co., 440 F.3d 1186, 97 FEP Cases (BNA) 745 (10th Cir. 2006): The criteria the employer used for the RIF constituted reasonable factors other than age (prior job performance and honoring prior commitments to hire several new employees fresh out of school). “Corporate restructuring, performance-based evaluations, retention decisions based on needed skills, and recruiting concerns are all reasonable business considerations.”
 21. General Dynamics Land Sys., Inc., v. Cline, 540 U.S. 581, 93 FEP Cases (BNA) 257 (2004): The ADEA does not prohibit favoring the old over the young. EEOC is issuing new guidance stating that employers can make decisions favoring older workers.
 22. EEOC v. Lockheed Martin Corp., 444 F. Supp. 2d 414 (D. Md. 2006): It is unlawful retaliation to offer a severance package conditioned upon dismissing a pending EEOC charge.
 23. Vickers v. Fairfield Med. Ctr. 453 F. 3d 757, 98 FEP Cases (BNA) 673 (6th Cir. 2006): There is no Title VII protection for an individual taunted and harassed because co-workers perceived he was gay. He was not discriminated against because he did not conform to traditional gender stereotypes at work.
 24. Vickers is contradicted by Barnes v. City of Cincinnati, 401 F. 3d 729, 95 FEP Cases (BNA) 994 (6th Cir.) cert. denied, 126 S. Ct. 624, which held that Title VII contains a cause of action for failure to conform to the stereotypes applicable to one’s sex.
 25. Hamm v. Weyauwega Milk Prods., Inc., 332 F.3d 1058, 92 FEP Cases (BNA) 89 (7th Cir. 2003): Being perceived to be gay is not the same as sexual harassment; thinking someone is gay is not enough to prove co-workers believed he did not fit the sexual stereotype of a male.

 **Brian W. Bulger, Meckler Bulger & Tilson LLP**

Religious Discrimination and Accommodation Update

1. Since 2002, there have been approximately 2,500 religious discrimination charges (out of approximately 80,000 filed).
2. Religion raises Constitutional tension; one cannot establish religion in the workplace. Thus, accommodation options are not as open as in disability cases.
3. According to the EEOC, whether something is a religion or belief is not important; the law protects moral and ethical values as well—to the same degree as religion and beliefs.


4. The question is whether or not the belief is *sincerely* held. Mere secular views do not suffice. For example, if one's religion prohibits work on the Sabbath, but the person plays golf on Sundays, the belief may not be considered to be sincerely held. Evidence tending to show that an employee acted in a way inconsistent with his religious beliefs is relevant to the finding of the sincerity of the belief (United States v. Seeger, 380 U.S. 163, 184-85, 1965).
5. Is an "interactive process" required? Simply pointing to a policy *might* carry the day, but before denying an accommodation, talk to the employee about it.
6. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977): The Supreme Court held that an employer has no duty to accommodate when any accommodation would result in an undue burden. In this case, the Court found that any accommodation would result in an undue burden because it would either trample other employees' seniority rights or create more than a de minimis cost. The EEOC disagrees about \$ cost; depends on the size of the employer, just like under the Americans with Disabilities Act.
7. Unpaid leave will generally suffice as an accommodation.
8. If you provide an accommodation and then there is a change in policy or management, be careful about withdrawing the accommodation.
9. A hypothetical negative impact is not enough. EEOC v. Alamo Rent-A-Car LLC, 98 FEP Cases 324 (D. Ariz. 2006): Employer allowed employee to wear her head scarf in the back office, but required her to remove it when she interacted with customers at the front desk. There was no evidence that accommodating her religious practice would affect the impression she would make on customers, would negatively impact customer expectations concerning service or product quality, or otherwise create any type of negative expectations with customers.
10. Moranski v. General Motors Corp., 433 F.3d 537 (7th Cir. 2005): The fact that the employer recognizes affinity groups based on other protected classes under Title VII does not mean their decision to exclude all groups formed on the basis of religion violates Title VII.

 **Brenda Feis, Seyfarth Shaw LLP**

Responding to and Preventing Retaliation Claims


1. In 1992, approximately 14% of discrimination charges included retaliation. By 2006, it was over 25%.
2. There is a three part test to meet a prima facie retaliation claim:
 - a. Employee was engaged in a statutorily protected activity or opposed an employment practice that one reasonably believed, in good faith, is unlawful.
 - b. There was a subsequent adverse employment action.
 - c. There is a causal connection.
3. A totally baseless charge is not a protected activity (Mattson v. Caterpillar, Inc., 359 F.3d 885 (7th Cir. 2004).
4. Informal complaints may be considered opposition and protected activity.

5. The action does not have to be related to employment or the workplace for retaliation purposes. However, it cannot be petty or trivial. It must produce injury or harm; i.e., be materially adverse.
6. Context is important. The “reasonable person” standard is applied. Is someone persuaded from undertaking a protected activity?
7. “Tangible” is much broader in retaliation claims than in discrimination claims.
8. Burlington Northern & Sante Fe Ry. Co. v. White, 125 S. Ct. 2405 (2006): The reassignment of job duties was materially adverse because the new duties were more arduous, dirtier to perform, and her previous duties carried more prestige; further, even though White was reinstated with back pay, she went without a paycheck for over a month during the holidays, which would be an emotional and financial hardship for most people. This decision substantially widened what can be considered to be an “adverse employment action.”
9. Performance evaluations may or may not be considered “employment actions” vis-à-vis retaliation claims. Context is important.
10. McCoy v. Shreveport (July 11, 2007; 5th Cir.): Taking away a police officer’s badge and gun and placing him on administrative leave was a “close call” because of the context.
11. Causation: How close in time was the protected activity and the adverse employment action? Maximum thus far to establish connection is three months (Singfield v. Akron Metro. Hous. Auth., 389 F3d 555 (6th Cir. 2004)). However, Feis recommends using four months as a general rule.

 **Grady B. Murdock, Jr., Littler Mendelson**

Termination and Severance Agreements: Selected Issues

1. Older Worker Benefit Protection Act (OWBPA) amended the Age Discrimination in Employment Act to require individuals 40 years and older be provided 21 days after signing a release to revoke the release. Further, the individual must be advised in writing to consult with an attorney prior to executing the agreement.
2. Employers cannot require employees signing a release not to file a charge of discrimination. An employer may include a covenant that the individual signing the release warrants that the individual does not have any other complaints, charges, or actions pending against the employer at the time the individual signs the release. The release should contain a non-admission clause, in which the employer denies liability and asserts that signing the release does not constitute an admission of liability.

 **Jill Rosenberg, Orrick, Herrington & Sutcliffe LLP**

Legal and Practical Considerations in Reductions-In-Force

1. Historically, the disparate impact theory has only been used to prove Title VII claims arising out of a RIF. However, in Smith v. City of Jackson, 544 U.S. 228 (2005), the Supreme Court held that a disparate impact theory could also be applied to claims under the ADEA. The 5th Circuit had previously noted a “clear textual difference” between the ADEA and Title VII.
2. Disparate impact on older workers may still be legal if reasonable criteria are used; the criteria must be age neutral and voluntary.
3. RIFs and restructuring are different.
4. To avoid making misrepresentations, say nothing or little prior to a RIF.
5. Prepare an age banding analysis under legal direction prior to a RIF; this is better than an under/over 40 analysis. Involve your EEO officer. (Page I-1 under Chapter 4 provides a RIF EEO analysis template.)

 **David K. Fram, National Employment Law Institute**

ADA Update: Reasonable Accommodation

1. EEOC says employers can only look at what employees cannot do; courts have ruled that employers can also look at what employees can do.
2. How does the disability compare to the average person?
3. Most EEOC investigators use three months in determining whether an impairment is short or long term.
4. There have been more record of disability cases lately.
5. EEOC and most courts say employers have to accommodate any limitation flowing from a disability.
6. According to a strict reading of the law, it is the disability that must be accommodated, not the major life activity.
7. Personal use items (e.g., hearing aid) may be required because of workplace conditions. For example, a digital hearing aid may be required in a noisy environment. Employers can require that the item be left at the workplace, but why would you? Depends on the accommodation.
8. The Supreme Court has not mentioned (either to accept or reject) the approach taken by most Courts of Appeals, which have stated that the term “reasonable” itself requires a cost/benefit analysis. Fram says to use it if it helps your case.
9. In the last year or two, there has been a shift indicating that individuals regarded as having a disability also are entitled to reasonable accommodations (Kelly v. Metallics West, Inc., 410 F3d 670, 10th Cir. 2005).
10. Train supervisors NOT to say “we treat everyone the same.” This can create a futile gesture defense (Davoll v. Webb, 194 F3d 1116, 10th Cir. 1999).
11. If inflated performance reviews are given, an employee could say he didn’t know he needed to ask for an accommodation.
12. Employers may not have to act “immediately” on an accommodation request. Gerton v. Verizon South, Inc., 2005 U.S. App. LEXIS 18062 (6th Cir. 2005) (unpublished): The court would not hold an employer liable simply because it did not act “immediately” on an employee’s accommodation request, especially when the delay was due to “events outside the employer’s control.”

13. Failure to engage in the interactive process is not a violation per se (except in 9th Cir.); it is a means to an end. However, the employer will lose summary judgment if it does not engage in the interactive process.
14. If the employee's doctor doesn't/won't provide the needed information, tell the employee he needs to go to another doctor who will. Loulseged v. Akzo Nobel Inc., 178 F3d 731 (5th Cir. 1999): Mental disability cases present "unique problems," where employees "may not be fully aware of the limitations their conditions create, or be able to effectively communicate their needs to an employer." In such cases, employers "may have an extra duty to explore the employee's condition...and the interactivity of the process may be of less importance."
15. Accommodation Preferences
 - a. Keep in the job at the workplace
 - b. Keep in the job at home
 - c. Approve leave
 - d. Reassignment
16. When does leave become a hardship? EEOC says indefinite leave is possible; however, in some cases, it has stated that an employer is not required to wait indefinitely for the medical conditions to be corrected.
17. Repeated extensions can be considered indefinite; Fram says generally three extensions begin to trigger "indefinite."
18. Unreliable/Unpredictable Leave: Wait until all leave has been exhausted (especially FMLA) before terminating employment. You might win in the 5th Circuit if you don't, but it's risky.
19. Transitional duty is not required, but can be used – goes beyond the ADA. If used, the employee should sign that certain essential functions are temporarily not required. Don't call it an "accommodation."
20. Can you be required to turn a full time position into a part time position? EEOC says maybe; courts say no.
21. Working certain shifts can be an essential function of the job.
22. Undue hardship – cost is a bad argument.

 ***Ellen McLaughlin, Seyfarth Shaw LLP***

FMLA and Interaction Between ADA/FMLA and Other Leave Laws

1. Department of Labor has issued a report of comments on the abuse of intermittent leave; however, new regulations are not expected any time soon.
2. Don't tell an employee he is eligible for FMLA unless an analysis has been conducted with documentation; however, you can tell them they are conditionally on FMLA pending more medical information, etc.
3. If leave is intermittent for different reasons, the employee may not be eligible. Each reason may need to be evaluated.
4. Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81 (2002): if an employee is able to show that he or she was harmed by the employer's failure to designate

- leave as FMLA, then he or she may be entitled to additional leave beyond the 12 week maximum or other relief. The prudent employer should still provide written designation of leave as FMLA-qualifying as soon as possible in order to avoid challenges by employees who claim that they were prejudiced in some fashion by the failure to provide notice.
5. If the employee received 12 weeks of leave, it is irrelevant whether or not it was designated FMLA.
 6. Was the employee able to return to work at the end of 12 weeks?
 7. Vague complaint of being “sick” is insufficient notice of FMLA benefits (Phillips v. Quebecor World RAI, Inc., 2006 U.S. App. LEXIS 14328 97th Cir. June 12, 2006).
 8. Oatman v. Fuji Photo Film U.S.A., Inc., 5th Cir. Nov. 12, 2002, cert. denied, 538 U.S. 978 (2003): Employer could fire an employee prior to the expiration of his FMLA leave because the employee admitted that he could not have returned to his old job at the time his FMLA leave actually expired five days later. Also, injury did not rise to the level of a disability.
 9. Consider ADA coverage, such as transfer to a vacant position.
 10. Can an employee who fails to comply with attendance standards be disciplined due to FMLA/ADA absences? If the absences are FMLA-protected, the employee should not be disciplined for the absences.
 11. Notice is required every time an employee requests possibly qualifying FMLA leave. However, under FMLA, the employer cannot require information on the underlying medical condition.
 12. Under EEOC v. Yellow Freight Sys., and employee’s attendance record can support a finding that an employee is not a qualified individual, even if the absences are related to his disability.
 13. An employer may discipline an employee for failing to follow its call-in procedures, even if due to the disability.
 14. The medical certification must be provided within 15 days after it is requested, or as reasonably possible under the circumstances. Failure to provide the medical certification in a timely manner may result in denial of leave until it is provided.