# Recent Developments in Discrimination Law: 2012-2013

Portia R. Moore
Sheehan Sullivan Weiss
Davis Wright Tremaine LLP
(206) 622-3150
portiamoore@dwt.com
sulls@dwt.com

APRIL 8, 2014

Davis Wright Tremaine LLP

# Overview

- EEOC Statistics: What's Hot and What's Coming Up.
- New Case Law:  SCOTUS, Ninth Circuit, and Washington State.
- 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

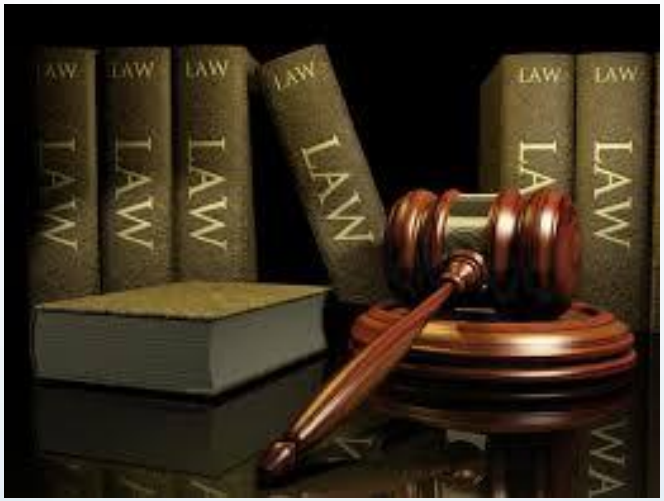
- Relief obtained for 23,446 individuals.
- $365.4 million obtained (for EEOC) through administrative process—highest ever.
- $44.2 million obtained (for EEOC) through 254 lawsuits.

# 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”.

# 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

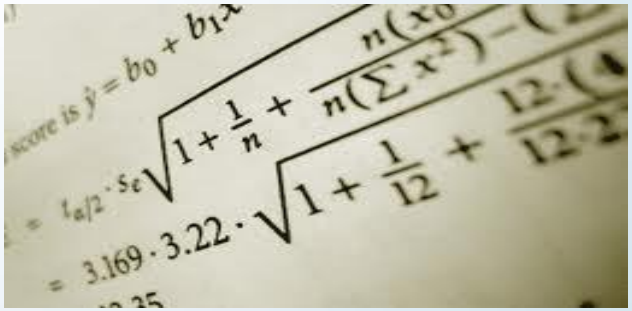
- *Madigan v. Levin*
  - Issue: Are federal age discrimination claims against the state limited to the ADEA, or can they proceed under Section 1983?
  - Seventh Circuit: ADEA does not preclude 1983 claims.
  - Split with District of Columbia, First, Fourth, Fifth, Ninth, and Tenth Circuits.
- *Lawson 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…
- …*<u>but</u>* 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.

City of Seattle

# 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*

Seattle Office for Civil Rights

# 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

# Recent Developments in Discrimination Law: 2012-2013

Portia R. Moore
Sheehan Sullivan Weiss
Davis Wright Tremaine LLP
(206) 622-3150
portiamoore@dwt.com
sulls@dwt.com

# Recent Developments in Discrimination Law: 2012-2013

DWT 23424409v1.pptx