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Hot Topics: The Latest Interpretations of Current Employment Law

for Sterling Education Services' seminar: "New Realities in Employment Law; How to Function in Today's Business Environment" in Morgantown, WV, March 25, 2009

Drew M. Capuder
CAPUDER FANTASIA PLLC

CF

Biography: Drew M. Capuder

- Licensed in West Virginia and Texas; practicing law 23 years.
- Drew Capuder's practice consists primarily of employment litigation and consulting, and also includes mediation, commercial litigation, and business consulting.
- Author of Drew Capuder's Employment Law Blog
- Teaching: "Legal and Ethical Issues in Media," at Fairmont State University (2005 to present); Teaching: Legal Writing at University of Houston Law School (1992-1998).
- Frequent presentations in recent years at Continuing Education seminars. Prior topics include: at will employment; Americans with Disabilities Act; sexual harassment; age discrimination; retaliation claims; awards of attorneys' fees in employment litigation; expert witnesses; whistle blower claims; general overview of West Virginia discrimination and wrongful discharge law; and recent employment law developments.
- Several appearances during the last 5 years on WAJR's radio program "Ask the Experts"; appearance for WBOY TV on the WVU-Rodriguez lawsuit.
- Several Lectures and Television Appearances for the Texas Society of CPAs from 1992-1998.
- JD, University of Houston Law School, 1985
- BA, University of Southwest Louisiana (now named University of Louisiana), in Music Theory and Composition.
- Gina Fantasia's practice focuses on real estate law, insurance law issues, and business advice.

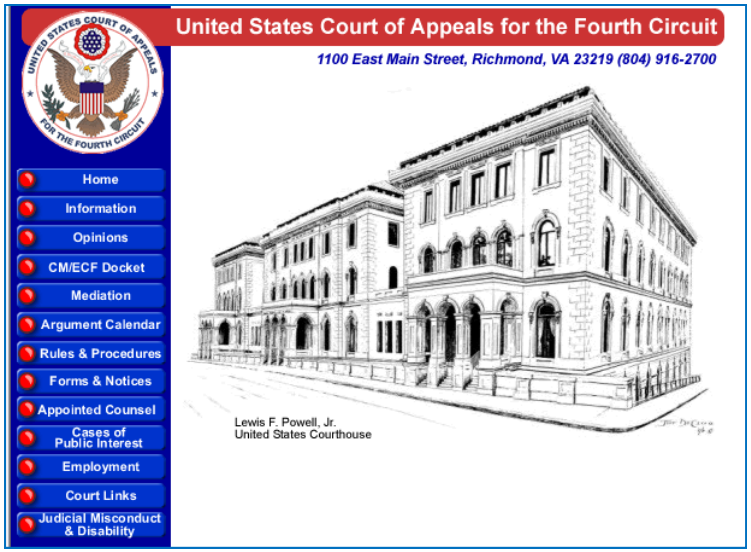
Outline from Seminar Agenda

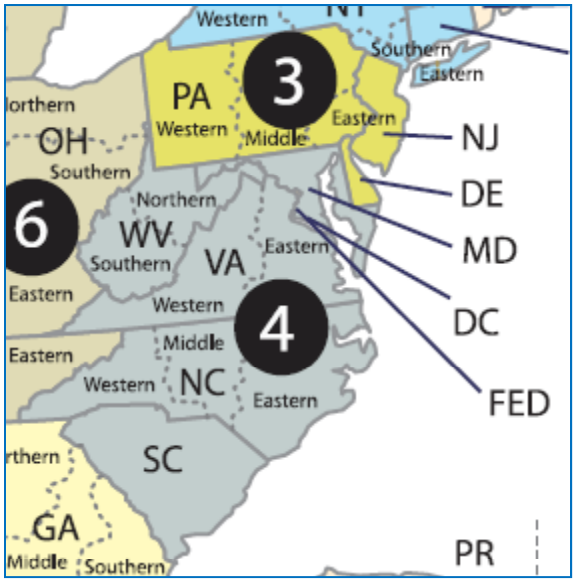
- What constitutes sexual harassment?
- The treatment of arrest and conviction records
- Potential expansion of retaliation claims
- Employer liability of the acts of non-employees

Other "Hot Topics"

- Four vacancies on the Fourth Circuit
- Three vacancies on the National Labor Relations Board
- Likely future legislation – sexual orientation as a protected characteristic
- Pending legislation not yet passed – arbitration
- Recently passed legislation – Lilly Ledbetter Fair Pay Act
- ADA Amendments Act of 2008

Vacancies on the Fourth Circuit





- The US Fourth Circuit Court of Appeals hears appeals from federal district courts in West Virginia, Virginia, Maryland, North Carolina, and South Carolina.
- The Fourth Circuit has 15 authorized judges.
- There are 4 vacancies right now on the Fourth Circuit. In other words, 4 of the 15 judge positions are vacant.
- All of the nominations from President Bush to fill those positions have expired, so President Obama will have the nominations to fill all 4 positions.
- Appointments to these federal judicial positions require the confirmation by the US Senate.
- The Democrats control at this time 58 votes in the Senate, through 56 Democrats and 2 Independents (Joe Lieberman, CT; Bernie Sanders VT) who caucus with the Democrats. If Al Franken eventually is declared the winner in Minnesota, which is expected, the democrats will have 59 votes.
- President Obama only needs 51 votes to confirm one of his judicial nominations.
- If the Republicans chose to filibuster any of President Obama's nominations, the Democrats need 60 votes for cloture to cut off the filibuster and force a vote (cloture requires a three-fifths vote of the voting Senators). If the Democrats will be starting with 59 votes, they will likely frequently be able to "peel off" a Republican or two to break the filibuster.
- *Fourth Circuit web site: http://www.ca4.uscourts.gov/*
- *Map of federal circuits: http://www.uscourts.gov/images/CircuitMap.pdf*

Vacancies on the Fourth Circuit

Current composition of the court [edit]

As of the retirement of William Walter Wilkins on October 5, 2008, the judges on the court are:

#	Title	Judge	Duty station	Born	Term of service			Appointed by
					Active	Chief	Senior	
35	Chief Judge	Karen J. Williams	Orangeburg, SC	1951	1992–present	2007–present	—	G.H.W. Bush
29	Circuit Judge	J. Harvie Wilkinson III	Charlottesville, VA	1944	1984–present	1996–2003	—	Reagan
32	Circuit Judge	Paul V. Niemeyer	Baltimore, MD	1941	1990–present	—	—	G.H.W. Bush
36	Circuit Judge	M. Blane Michael	Charleston, WV	1943	1993–present	—	—	Clinton
37	Circuit Judge	Diana Jane Gribbon Motz	Baltimore, MD	1943	1994–present	—	—	Clinton
38	Circuit Judge	William Byrd Traxler, Jr.	Greenville, SC	1948	1998–present	—	—	Clinton
39	Circuit Judge	Robert Bruce King	Charleston, WV	1940	1998–present	—	—	Clinton
40	Circuit Judge	Roger L. Gregory	Richmond, VA	1953	2000[a]–present	—	—	Clinton/G.W. Bush
41	Circuit Judge	Dennis W. Shedd	Columbia, SC	1953	2002–present	—	—	G.W. Bush
42	Circuit Judge	Allyson Kay Duncan	Raleigh, NC	1951	2003–present	—	—	G.W. Bush
43	Circuit Judge	G. Steven Agee	Salem, VA	1952	2008–present	—	—	G.W. Bush
—	Circuit Judge	*(vacant - seat 4)*	*(n/a)*	*(n/a)*	*(n/a)*	*(n/a)*	*(n/a)*	*(n/a)*
—	Circuit Judge	*(vacant - seat 7)*	*(n/a)*	*(n/a)*	*(n/a)*	*(n/a)*	*(n/a)*	*(n/a)*
—	Circuit Judge	*(vacant - seat 8)*	*(n/a)*	*(n/a)*	*(n/a)*	*(n/a)*	*(n/a)*	*(n/a)*
—	Circuit Judge	*(vacant - seat 11)*	*(n/a)*	*(n/a)*	*(n/a)*	*(n/a)*	*(n/a)*	*(n/a)*
24	Senior Circuit Judge	James Dickson Phillips, Jr.	*(inactive)*	1922	1978–1994	*(none)*	1994–present	Carter
28	Senior Circuit Judge	Robert Foster Chapman	*(inactive)*	1926	1981–1991	*(none)*	1991–present	Reagan
33	Senior Circuit Judge	Clyde H. Hamilton	Columbia, SC	1934	1991–1999	*(none)*	1999–present	G.H.W. Bush

[a] Recess appointment by Bill Clinton, re-appointed by George W. Bush and confirmed by the United States Senate at a later date.

- Of the 15 authorized judicial positions, 4 are vacant and will be filled by President Obama.
- Federal court of appeals nominations are usually made from lawyers with significant prior judicial experience. So the pool of lawyers to be considered will likely by the current federal district judges, and, less likely, current state court judges.
- Given Presidential history since 1980, the substantial majority of federal judges are appointees of Republican Presidents (20 years of Republican presidency versus 8 years of Democrat presidency).
- Of the current 11 judges on the Fourth Circuit, 6 were Republican appointees and 5 were Democrat appointees (although Judge Gregory was a "hybrid" as the footnote in the chart explains).
- Assuming President Obama fills all 4 current vacancies, then we will have a realignment on the Fourth Circuit to:
  - 9 Democrat appointees
  - 6 Republican appointees
- *Wikipedia page on Fourth Circuit:*
  - *http://en.wikipedia.org/wiki/United_States_Court_of_Appeals_for_the_Fourth_Circuit#Current_composition_of_the_court*

US Supreme Court Justices

Justice	Since	Appointed By	At Age	Current Age
John G. Roberts (chief justice)	9-29-2005 3 Years	GBW Bush 78-22	50 1-27-55	54
John Paul Stevens	12-19-1975 33 Years	Ford 98-0	55 4-20-20	88
Antonin Scalia	9-26-1986 22 Years	Reagan 98-0	50 3-11-36	72
Anthony Kennedy	2-18-1988 21 Years	Reagan 97-0	52 7-23-36	72
David Souter	10-9-1990 18 Years	GHW Bush 90-9	51 9-17-39	69
Clarence Thomas	10-23-1991 17 Years	GHW Bush 52-48	43 6-23-48	60
Ruth Bader Ginsburg	8-10-1993 15 Years	Clinton 97-3	60 3-15-33	75
Stephen Breyer	8-3-1994 14 Years	Clinton 87-9	56 8-15-38	70
Samuel Alito	1-21-2006 3 Years	GW Bush 58-42	55 4-1-50	58

- Current Supreme Court: 7 appointed by Republican presidents, 2 appointed by Democrat presidents.
- The conventional view is that there is currently a 5-4 conservative-liberal split, with Kennedy frequently being the swing vote and less reliably conservative.
- Conservative wing: Thomas, Scalia, Alito, Roberts, Kennedy.
- Liberal wing: Ginsburg, Breyer, Stevens, Souter.
- Average age is now 68.
- Stevens is 88; Ginsburg recently had surgery for pancreatic cancer.
- *Official Site: http://www.supremecourtus.gov/about/biographiescurrent.pdf*
- *Wikipedia page on Supreme Court: http://en.wikipedia.org/wiki/United_States_Court_of_Appeals_for_the_Fourth_Circuit*
- *NYT: http://topics.nytimes.com/topics/reference/timestopics/organizations/s/supreme_court/index.html*

US Supreme Court Direction

The Washington Post

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Court Defies Pro-Business Label

Decisions Reveal More Nuanced Portrait

By Robert Barnes
Washington Post Staff Writer
Sunday, March 8, 2009; A02

After the Supreme Court completed its first full term with both of President George W. Bush's appointees in place, business groups and those who represent them could hardly come up with the accolades to describe the new court.

One prominent practitioner said that if former Chief Justice William H. Rehnquist's court had created a good forum for business, the one headed by his protege and successor John G. Roberts Jr. would be even better.

Robin S. Conrad, executive vice president of the legal arm of the U.S. Chamber of Commerce, said the term that ended in June 2007 was "our best Supreme Court term ever," with the business lobby prevailing in 13 of the 15 cases in which it took a position.

- The Supreme Court, after President Bush's 2 appointments (Alito and Roberts), has been a mixed bag on business interests.
- This article from the Washington Post discusses the good and bad from the new Court for business interests in general, and more specifically for employment issues.
- *http://www.washingtonpost.com/wp-dyn/content/article/2009/03/07/AR2009030701596.html?referrer=emailarticle*

The court drew loud protests in 2007 when it ruled that Lilly Ledbetter, a tire-plant worker from Alabama, was not entitled to the award she won after suing Goodyear for paying her less money than the men she worked with. The court said her suit violated the time limitation set in the federal statute under which she sued.

But since then, the court has consistently sided with employees who have alleged discrimination, and ruled in all five cases it heard last term to allow lawsuits to go forward. It has continued the pattern in cases decided this term.

Liberal groups often express surprise when things go their way. People for the American Way President Kathryn Kolbert this week said the *Wyeth* decision was "a welcome, and rare, victory for the rights of American patients and consumers," while warning that "the Roberts court has slapped down many other wronged Americans who have faced off against powerful interests."

Conrad, meanwhile, is preparing a law review article on the myth of the pro-business court. She and Adler say that more important to the court than the individual justices' predilections is the importance it places on the role of Congress' expressed intent in the legislation it passes and the support of the federal government. Conrad points out that business does best when it has the support of the solicitor general, although that was not the case in the *Wyeth* decision.

If so, it will be another factor worth noting, with a new Congress dominated by Democrats and with President Obama appointing a new team of lawyers to represent the government's interest before the court.

Already, Congress has passed changes in the law that effectively nullifies the court's decision in Ledbetter's case. And Democratic leaders last week filed a bill that would do the same to the *Riegel* decision on medical devices.

Vacancies on the NLRB

Board

The *Board* has five Members and primarily acts as a quasi-judicial body in deciding cases on the basis of formal records in administrative proceedings. Board Members are appointed by the President to 5-year terms, with Senate consent, the term of one Member expiring each year. The current Members are Chairman Wilma B. Liebman and Peter C. Schaumber. (There are three vacancies on the Board.)

Member biographies:

Wilma B. Liebman was designated by President Barack Obama to serve as Chairman of the National Labor Relations Board (NLRB) on January 20, 2009. ...
→ Read more

Peter Carey Schaumber is serving in his second term on the Board, his first term having expired on August 27, 2005. ...
→ Read more

[Member]	**Vacant**
[Member]	**Vacant**
[Member]	**Vacant**

See all Members and Terms since 1935

- The National Labor Relations Board (NLRB) consist of 5 members, and the NLRB board issues important decisions on a broad range of union issues.
- There are currently only 2 members, so there are 3 vacancies. Wilma Liebman is considered liberal and pro-union. Peter Carey Schaumber is considered conservative and pro-management.
- President Obama will be able to fill the 3 vacancies, with a likely significant shift
- *NLRB home page: http://www.nlrb.gov/index.aspx*
- *NLRB board members: http://www.nlrb.gov/about_us/overview/board/index.aspx*
- *National Right to Work Legal Defense Foundation: http://www.nrtw.org/en/free-tagging/nlrb*

New Right to Work Podcast: Obama Administration to Pack the NLRB
Wed, 11/26/2008 - 12:15 — Will Collins

The National Labor Relations Board (NLRB) and the underlying law it enforces are major tools for union bosses to force workers into union collectives and force them to pay union dues. The incoming Obama administration is expected to help Big Labor use the NLRB even more aggressively in its war against employee free choice.

Today, Foundation VP Stefan Gleason is joined by former NLRB Member John Raudabaugh, who reveals some disturbing things American workers and businesses should expect from the Obama NLRB:

Vacancies on the NLRB

Union Activist NLRB Member Again Bashes the Very Law She Must Impartially Enforce

Mon, 01/05/2009 - 12:22 — Nick Cote

Today the *New York Times* published a letter to the editor from union activist Wilma Liebman, who as a member of the National Labor Relations Board has testified before Congress on behalf of the woefully misnamed Employee Free Choice Act (a.k.a. the Card Check Forced Unionism Bill) and complaining about individual rights. In the letter, Liebman writes:

> Labor policy is indeed a long-neglected arena, ripe for the intervention of President-elect Barack Obama. What the editorial doesn't mention is the opportunity to revitalize the National Labor Relations Board, which administers the main federal labor law.
>
> During the Bush administration, nearly every policy choice made by a sharply divided board impeded collective bargaining, created obstacles to union representation or favored employer interests. Not surprisingly, the board has lost legitimacy.

But how can the board be legitimate when a member of the Board spends her free time bashing the very law she is supposed impartially to enforce while campaigning -- in Congress, in "academic" journals, in the letters section of the *Times* -- to rewrite it.

One wonders how an employee could expect Liebman (who previously worked as a union lawyer) to fairly apply the law in a case where union intimidation restrains an employee's free choice to not associate with a union. Surely in most other fora, judges would recuse themselves in such cases. (In fact, it may be appropriate for legal counsel to seek Liebman's recusal if they believe her naked union activism has forfeited her objectivity.)

Member Liebman can parrot Big Labor talking points all she wants, but the fact remains that she routinely displays an ugly disdain for *true* employee free choice -- the right for each employee to decide on his or her own, without being intimidated by a union organizer, whether to join or pay dues to a union.

Liebman | Liebman Watch | National Labor Relations Board | NLRB | Nick Cote's blog | Add new comment | Read more

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September Massacre: The Latest Battle in the War on Workers' Rights Under the National Labor Relations Act

Anne Marie Lofaso
West Virginia University - College of Law

May 2008

Abstract:
This paper, electronically distributed on May 14, 2008, by the American Constitutional Society for Law and Policy, focuses on several of the sixty-one decisions issued by the National Labor Relations Board in September 2007, a group of decisions that many in the labor community have referred to as the "September Massacre." The paper discusses the decisions and their effects on the right to organize and other rights guaranteed under Section 7 of the National Labor Relations Act. The paper also explores "the aggregate, weakening effect by both the Bush Board and prior governmental action." In exploring the decisions within this larger context, the paper explains that "many of the September decisions fit into a long history of legislative, administrative, and judicial cutbacks to the original NLRA," and might most accurately be viewed as "the latest, and perhaps most serious, attack on workers' rights." The paper pays special attention to the NLRB's Dana Corporation decision, one of the September decisions that is particularly harmful and revolutionary. The paper concludes with some thoughts on what the labor movement can do to regain economic and political power. Along those lines, the paper suggests a course that includes political activism, legislative changes (both substantive and procedural) to the NLRA, a federal judiciary willing to reverse the NLRB in appropriate circumstances, labor advocates being willing to use what remains of the NLRA to further workers' rights, and renewed attention to the teaching of labor law in our nation's law schools.

Keywords: labor, administrative law, working class rights, legal system

JEL Classifications: K31, K23, K4

Working Paper Series

Date posted: May 20, 2008 ; **Last revised:**

Home › Blog › Patrick Semmens's blog

Dana/Metaldyne One Year Later: The Myth of the "September Massacre"

Fri, 10/03/2008 - 10:18 — Patrick Semmens

Ever since the National Labor Relations Board ruled in the Dana/Metaldyne case exactly one year ago yesterday, pro-forced-unionism "scholars" have rushed to decry the decision as "revolutionary." Apparently giving workers more freedom of choice is deeply disturbing to union bosses.

A paper by Anne Marie Lofaso, of the University of West Virginia is a perfect example of hyperbole trumping facts, while posing as academic scholarship. In over-the-top style, Lofaso titles her paper: "September Massacre: The Latest Battle in the War on Workers' Rights Under the National Labor Relations Act." (Despite being published in May, as of August the paper was still the most downloaded Labor/Employment/Benefit paper off the Social Sciences Research Network site, according to the Workplace Prof Blog.)

- *National Right to Work Legal Defense Foundation: http://www.nrtw.org/en/free-tagging/nlrb*
- *September Massacre article: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1133607#PaperDownload*

Likely Future Legislation: Unions, Free Choice Act

- **The Employee Free Choice Act of 2009.** In 2005 and 2007, the US Congress considered but did not pass the Employee Free Choice Act. In 2007, it passed the house, it had more than 50 votes in the Senate, but the Democrats could not get the 60 votes in the Senate to shut off debate and get a vote. So the bill died in the Senate.
- President Obama and the Democrats in Congress support the Employee Free Choice Act, and the Democrat leadership in Congress is promising to introduce again the legislation soon (probably within a few days of this article being written).
- Union and business interests are promising to devote very large amounts of money and effort into passing and defeating the legislation. There is an incredible amount of inflated rhetoric being generated by the Act, and there seems to be an incredible disagreement on what it will actually do. From the casual observer's perspective, it is obvious that the two competing groups are so aggressive in their positions because the Employee Free Choice Act will make it easier to get unions certified. The discussion below assumes that the upcoming 2009 version of the act, which is probably only a few days from being introduced into Congress, will be similar or identical to the 2007 version which nearly passed Congress.
- The key language in the 2007 Act was this: "Notwithstanding any other provision of this section, whenever a petition shall have been filed by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a majority of employees in a unit appropriate for the purposes of collective bargaining wish to be represented by an individual or labor organization for such purposes, the Board shall investigate the petition. If the Board finds that a majority of the employees in a unit appropriate for bargaining has signed valid authorizations designating the individual or labor organization specified in the petition as their bargaining representative and that no other individual or labor organization is currently certified or recognized as the exclusive representative of any of the employees in the unit, the Board shall not direct an election but shall certify the individual or labor organization as the representative described in subsection (a)."
- The current state of the law is that there is, because of rights the employer has under the law, almost always a secret ballot (after a lengthy campaign on both sides.) The 2007 Act would lead to certification of the Union—and would eliminate the need for the formal campaign and secret ballot—where a majority of the employees at the workplace sign valid cards saying they want the union to represent them.
- *For the 2007 version, go to THOMAS, check 110 under "Select Congress" and in the "Enter Word/Phrase to Search Bill Text" type Employee Free Choice Act: http://thomas.loc.gov/home/multicongress/multicongress.html*

> `(6) Notwithstanding any other provision of this section, whenever a petition shall have been filed by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a majority of employees in a unit appropriate for the purposes of collective bargaining wish to be represented by an individual or labor organization for such purposes, the Board shall investigate the petition. If the Board finds that a majority of the employees in a unit appropriate for bargaining has signed valid authorizations designating the individual or labor organization specified in the petition as their bargaining representative and that no other individual or labor organization is currently certified or recognized as the exclusive representative of any of the employees in the unit, the Board shall not direct an election but shall certify the individual or labor organization as the representative described in subsection (a).

Likely Future Legislation: Unions, Free Choice Act

Summary Of The Employment Free Choice Act

The Senate is preparing to take up the Employee Free Choice Act with a possible vote on Thursday. Click on read more for a smmary of the legislation that will allow workers to choose a union free from employer coercion.

Majority Sign-Up—Employees Choose A Union When A Majority of Workers Sign Cards Endorsing the Union

Problem: Union elections are often the focus of employer intimidation and coercion—employers illegally fire employees for union activity in more than one-quarter of all organizing efforts. In 2005, over 30,000 workers were discriminated against—losing wages or even their jobs—for exercising their freedom to associate.

Solution: The bill provides that workers can choose a union when a majority of them sign valid cards stating they want a union as their bargaining representative. Existing law allows for majority sign-up, but only at the employer's discretion. The National Labor Relations Board (NLRB) will determine the validity of the cards.

Reaching First Contract Through Mediation and Arbitration

Problem: 34 percent of union victories—more than one-third of hard-won elections—did not result in a contract for workers. This renders employee choice meaningless.

Solution: The bill provides that if the parties don't reach a contract within 90 days, either one can seek mediation from the Federal Mediation and Conciliation Service (FMCS). If there is no agreement after 30 days of mediation, the dispute will go to arbitration, the result of which will be binding on the parties for two years.

Strengthens Remedies for Employer Coercion When Employees are Trying to Organize or get a First Contract

Problem: Employers fire pro-union workers in 25% of organizing drives. But remedies for this coercion are inadequate. An employee must often spend years to prove her case—and then she is only eligible to receive back pay and reinstatement to her job.

Solution:

- **Injunctions:** The NLRB must go to court to get an order stopping an employer that is firing or discriminating against workers based on their union activity during an organizing or first contract drive.
- **Treble Backpay.** An employer that discriminates against a worker during an organizing campaign or first contract drive must pay three times back pay.
- **Civil Penalties:** Imposes civil fines up to $20,000 per violation if an employer willfully or repeatedly violates workers' rights during an organizing campaign or first contract drive.

April 23, 2007

How the Employee Free Choice Act Takes Away Workers' Rights

by James Sherk and Paul Kersey

Executive Summary #2027

Revised and updated March 4, 2009

Organized labor has made the Employee Free Choice Act (EFCA) its top legislative priority. The act would replace the current system of secret-ballot organizing elections with card checks, in which workers publicly sign union cards to organize and join a union. It would also impose binding arbitration for the initial bargaining agreement after organization and increase the penalties for unfair labor practices committed by employers—but not unions—during organizing drives. Each of these provisions would harm American workers.

Stifling Free Choice. Under the EFCA, once organizers collect signed cards from a majority of a company's employees, all of the company's workers would be forced to join the union without a vote. This strips workers of both their fundamental right to vote and their privacy. Both the union and the employer would know exactly which workers want to join the union, leaving workers vulnerable to threats and intimidation.

Even when organizers obey the law, card check allows union organizers to push workers to commit to joining a union immediately after hearing their one-sided sales pitch without either a chance to hear the arguments from the other side or time for reflection. When workers decline to sign the union card on the spot, union organizers return again and again to pressure these holdouts to change their minds. Privately, unions acknowledge that union cards signed under these circumstances do not accurately reflect workers' desire to join a union.

Contrary to union rhetoric, organizing elections are fair and do protect the rights of workers. If anything they favor union organizers, which is why unions win 60 percent of organizing elections. Government data show that employers rarely fire union supporters—in just 2.7 percent of election campaigns—and most alleged violations are investigated and processed in a few months. Today's election procedures balance the rights of employers and unions and ensure that unions have access to workers when they are not on company time.

- *Democrat summary of 2007 Employee Free Choice Act: http://democrats.senate.gov/journal/entry.cfm?id=277222&*
- *Heritage Foundation article against the Act: http://www.heritage.org/research/labor/bg2027es.cfm*

Likely Future Legislation: Sexual Orientation

- Sexual orientation is currently not a "protected characteristic" under federal and West Virginia anti-discrimination laws.
- The West Virginia legislature has had bills introduced to make sexual orientation a protected characteristic. For example, Senate Bill 600 was introduced in 2008 but was never voted upon. The two key excerpts from the bill are printed below.
- Essentially the same bill has now been introduced in the current legislative session as SB 238 on February 12, 2009. It has not yet been voted upon.
- A number of years ago, the US Congress considered legislation to make sexual orientation a protected characteristic, and it came close to passing the in House.
- Minnesota, Oregon, Washington, New York, several other states, and some local governments, have included sexual orientation in the list of protected characteristics.
- There is a growing political movement that, in my opinion, makes it likely that the US Congress, now that the Democrats have control, will amend Title VII of the Civil Rights Act of 1964 to include sexual orientation as a protected characteristic.
- *Language of WV Bill in 2008: http://www.legis.state.wv.us/Bill_Text_HTML/2008_SESSIONS/RS/BILLS/SB600%20SUB1%20eng.htm*
- *Language of WV SV238 introduced on February 12, 2009: http://www.legis.state.wv.us/Bill_Text_HTML/2009_SESSIONS/RS/Bills/SB238%20SUB1.htm*
- *Washington State's web page on sexual orientation:* http://www.hum.wa.gov/Sexual%20Orientation/empFAQ.html
- *Minnesota's web page on sexual orientation:* http://www.humanrights.state.mn.us/rsonline3/so_overview.html

Key language of Senate Bill 600 that was introduced in the West Virginia legislature in 2008, but was never voted upon:

(h) The term "discriminate" or "discrimination" means to exclude from, or fail or refuse to extend to, a person equal opportunities because of race, religion, color, national origin, ancestry, sex, age, sexual orientation, blindness, disability or familial status and includes to separate or segregate;
(i) The term "unlawful discriminatory practices" includes only those practices specified in section nine of this article;

(n) The term "sexual orientation" means heterosexuality, bisexuality, homosexuality or gender identity or expression, whether actual or perceived.

Pending Legislation, Not Yet Passed: Arbitration

- The Arbitration Fairness Act of 2009 (H.R. 1020) was introduced in the US House on February 12, 2009. The bill has 36 co-sponsors, and has been referred to the House Committee on the Judiciary.
- The Bill would render unenforceable "pre-dispute" employment arbitration agreements. Its point is to reject US Supreme Court precedent allowing for enforcement of such arbitration agreements under the Federal Arbitration Act, 9 U.S.C. §§ 3-4. *See EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002).
- *Summary of bill from washgingtonwatch.com: http://www.washingtonwatch.com/bills/show/111_HR_1020.html*
- *Sponsor, Hank Johnson's news page: http://www.house.gov/apps/list/press/ga04_johnson/2009_02_12_arbitration_fairness_drops.html*
- *The bill itself: http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.1020:*

Rep. Johnson seeks to strengthen consumer, employee rights

February 12, 2009

WASHINGTON -- Rep. Hank Johnson (GA-04) introduced legislation today known as the Arbitration Fairness Act.

The bill aims to protect consumers from business practices that require them to cede their rights to a jury trial as a condition of service. The Judiciary Committee, on which Johnson serves, held hearings on the bill in 2007 and 2008. Sen. Russ Feingold (D-WI) introduced similar legislation in the Senate in 2007.

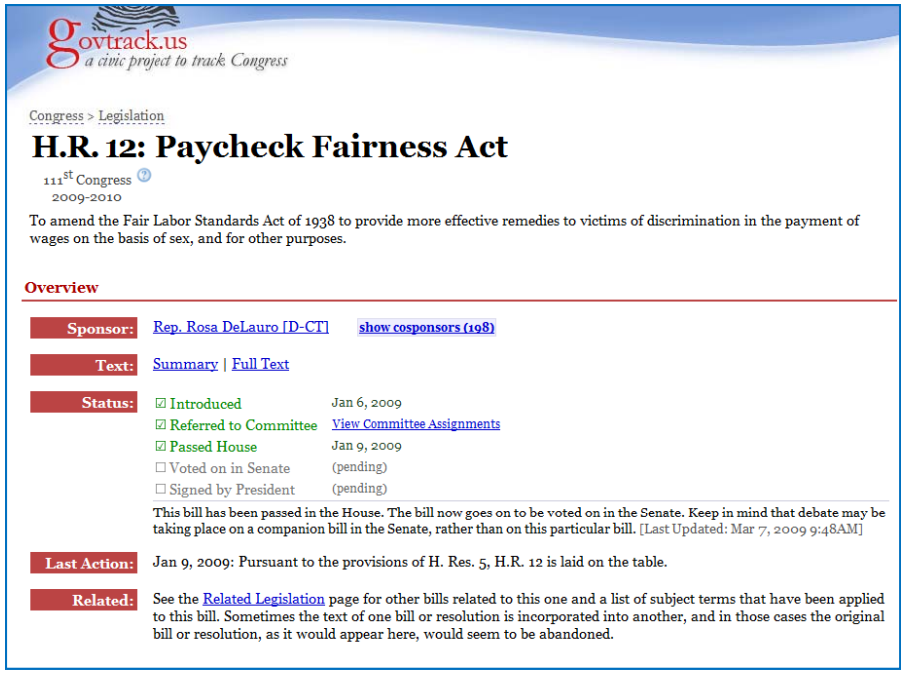
Today, many businesses rely on mandatory and binding pre-dispute arbitration agreements that force consumers, employees and franchisees to settle any dispute with a company providing products or services without the benefit of a jury trial.

"This is not an anti-business bill, but a pro-consumer bill," said Johnson. "One of our indelible rights is the right of a jury trial. Guaranteed by the Constitution, this right has been gradually ceded by citizens every day as they purchase a new cell phone, buy a home, place a loved one in a nursing home, or accept a new job. Once used as a tool for businesses to solve their disputes, arbitration agreements have found their way into employment, consumer, franchise and medical contracts."

Johnson is optimistic about the bipartisan legislation because he garnered more than 35 original cosponsors, including Judiciary Committee Chairman John Conyers, former subcommittee chair of Commercial and Administrative Law Rep. Linda Sanchez and Republican Rep. Steven LaTourette.

Pending Legislation, Not Yet Passed: Paycheck Fairness Act

- The Paycheck Fairness Act of 2009 (H.R. 12) was introduced in the US House on January 6, 2009. The Bill purports to strengthen laws prohibiting pay discrimination. It includes a modification of the defense that employers may assert to justify differential pay between genders.
- It passed the US House and is pending in the Senate.
- *Statute of bill: http://www.govtrack.us/congress/bill.xpd?bill=h111-12&page-command=print*
- *Summary of bill from pro-bill advocacy group: http://themiddleclass.org/bill/paycheck-fairness-act-2009*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Congress > Legislation

H.R. 12: Paycheck Fairness Act

111st Congress
2009-2010

To amend the Fair Labor Standards Act of 1938 to provide more effective remedies to victims of discrimination in the payment of wages on the basis of sex, and for other purposes.

Overview

Sponsor: Rep. Rosa DeLauro [D-CT] show cosponsors (198)

Text: Summary | Full Text

Status:

☑ Introduced	Jan 6, 2009
☑ Referred to Committee	View Committee Assignments
☑ Passed House	Jan 9, 2009
☐ Voted on in Senate	(pending)
☐ Signed by President	(pending)

This bill has been passed in the House. The bill now goes on to be voted on in the Senate. Keep in mind that debate may be taking place on a companion bill in the Senate, rather than on this particular bill. [Last Updated: Mar 7, 2009 9:48AM]

Last Action: Jan 9, 2009: Pursuant to the provisions of H. Res. 5, H.R. 12 is laid on the table.

Related: See the Related Legislation page for other bills related to this one and a list of subject terms that have been applied to this bill. Sometimes the text of one bill or resolution is incorporated into another, and in those cases the original bill or resolution, as it would appear here, would seem to be abandoned.


H.R. 12

Paycheck Fairness Act of 2009

in CIVIL JUSTICE CLASS ACTION LAWSUITS EMPLOYMENT DISCRIMINATION WORKPLACE & JOB CREATION

Introduced: 01.06.2009 [House]

Sponsor: Rep. Rosa DeLauro [D-CT]

House: Yea-256, Nay-163

The Legislation:

The Paycheck Fairness Act strengthens protections against compensation discrimination. It narrows the defense that employers can use to demonstrate that a difference in compensation is not based on gender. Under the Act, employers must show that the difference in compensation is not based on or derived from a sex-based difference in compensation and is related to job performance. Additionally, the legislation clarifies that, for the purpose of determining discrimination, compensation comparisons can be made between employees even if they do not work at the same physical place of business. The Act also prohibits employers from retaliating against employees who share salary information. The bill permits employees to seek compensatory and punitive damages against employers who violate the Equal Pay, which is currently not allowed. The legislation makes it easier to file class action lawsuits under the Equal Protection Act.

The Paycheck Fairness Act authorizes the Secretary of Labor to establish a grant program for negotiation skills training for girls and women, mandates the Secretary to disseminate research about the elimination of pay disparities between men and women, and creates an award to encourage proactive efforts to comply with the Act. Finally, the bill improves the collection and publication of information about compensation discrimination, while providing technical assistance to small businesses to carry out the legislation.

Bill Statistics

The Middle Class Position

The middle class supports.

How They Voted

59% with middle class
38% against middle class
3% did not vote

Grades

C
HOUSE

The House receives a grade of C for its support of the middle class on this piece of legislation.

256 Representatives voted for the middle-class position; 163 voted against.

See how each member voted on this bill.

HOUSE

Pending Legislation, Not Yet Passed: WV: Personnel Files

- In the West Virginia Legislature, HB 3032, introduced on March 10, 2009, would give employees the right to review their personnel files. The full text is reprinted below.
- *Full text on legislature's web site: http://www.legis.state.wv.us/Bill_Text_HTML/2009_SESSIONS/RS/Bills/hb3032%20intr.htm*
- *West Virginia Legislature, bill status: http://www.legis.state.wv.us/Bill_Status/bill_status.cfm*

ARTICLE 3. SAFETY AND WELFARE OF EMPLOYEES.

§21-3-22. Right of employees to inspect and copy personnel file; frequency of inspection; employer's right to retain personnel files on employer's premises.

(a) "Personnel file," as used in this section, means papers, documents and reports pertaining to a particular employee which are used or have been used by an employer to determine such employee's eligibility for employment, promotion, additional compensation, transfer, termination, disciplinary or other adverse personnel action including employee evaluations or reports relating to such employee's character, credit and work habits. "Personnel file" does not mean stock option or management bonus plan records, materials which are used by the employer to plan for future operations, security files, information such as test information, the disclosure of which would invalidate the test, or documents which are being developed or prepared for use in civil, criminal or grievance procedures.

(b) "Security files," as used in this section, means memoranda, documents or collections of information relating to investigations of losses, misconduct or suspected crimes and investigative information maintained pursuant to government requirements, provided such memoranda, documents or information are not used to determine an employee's eligibility for employment, promotion, additional compensation, transfer, termination, disciplinary or other adverse personnel action.

(c) Every employee, whether public or private, has the right to inspect his or her personnel file, if the file exists. Inspection shall take place during regular business hours at a location at or reasonably near the employee's place of employment.

(d) Each employer shall, within a reasonable time after receipt of a written request from an employee, provide the employee with a copy of all or any requested portion of his or her personnel file, provided the request reasonably identifies the materials to be copied. The employer may charge a fee of ten cents per page for copying the file or any part of the file: *Provided*, That an employer may not be required to provide a copy of an employee's personnel file more than two times in a calendar year, unless the employee requesting the personnel file has been terminated involuntary. In that circumstance, upon written request of the employee after notice of the involuntary termination, the employer will provide another opportunity to review or request a copy of the personnel file.

(e) The provisions of this section may not be construed to permit an employee to remove the original of his or her personnel file or any part of the file from the employer's premises or where it is made available for inspection. Each employer retains the right to protect his or her files from loss, damage or alteration to ensure their integrity. Each employer may require that inspection of any personnel file take place in the presence of a designated official.

Recently Passed Laws: Ledbetter Fair Pay Act

- Congress passed, and President Obama signed into law (on January 29, 2009), the Lilly Ledbetter Fair Pay Act (Pub. L. 111-2, §1, 123 Stat.5), which overturns the US Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007).
- This is what happened in the Ledbetter case: Ledbetter filed a charge of sex discrimination with the EEOC in 1998 and then later in the year retired. She claimed that, years earlier in her career at Goodyear, male supervisors gave her bad performance reviews compared to what men received. She claimed that Goodyear awarded raises based on those performance reviews, so that her pay raises were reduced as a result of the discriminatory performance reviews. Ledbetter went to trial and persuaded the jury that the performance reviews, years before she filed her EEOC charge, were discriminatory based on her sex, and the jury found her rights had been violated and awarded her damages based on her lower paychecks throughout her career. The trial judge entered a "judgment" in Ledbetter's favor based on the jury's verdict. So Ledbetter won at trial on her sex discrimination claim under Title VII. The Eleventh Circuit Court of Appeals threw out the jury verdict and trial court judgment for Ledbetter, and entered a judgment in favor of Goodyear, based on her failure to file her EEOC charge within 180 days of when the performance reviews had been conducted. The United States Supreme Court affirmed, meaning that Goodyear won.
- Here is the problem for Ledbetter: Title VII of the Civil Rights act, which governs sex discrimination in the workplace under federal law, says that an employee must file a charge of discrimination within 180 days (or, depending on the state, 300 days) after the discrimination occurred about which the employee is complaining. The Courts, in examining when the discrimination occurred (for purposes of figuring out when that 180 day "clock" starts to run), have focused on the "discrete" employment "decision" that caused some consequence (usually pay check-related) for the employee. Based on when Ledbetter filed her EEOC charge in 1998, for it to be timely, she had to be complaining about "decisions" which occurred within the 180-day window preceding the charge. But the discriminatory evaluations had occurred years before that, even though the reduced paychecks about which she complained continued into that 180-day window.
- The Supreme Court held that, in a situation where a decision (such as a performance review) was made that discriminated against a female employee by paying her less, the employee was required to file a charge of discrimination with the EEOC within 180 days of *when the decision was made and communicated to her.* That, for Ledbetter, would have been within 180 days after the bad performance reviews were conducted and the results were communicated to her. Since she did not file EEOC her charge until years later, the charge was not timely under Title VII. The consequence is that she loses all rights under the EEOC charge process, and she loses all rights to file suit on the same claims in Court under federal law.
- The Supreme Court's decision was a 5-4 vote that illustrates the ideological divide on the Court. The 5 vote majority consisted of the "conservative" block on the Court (Alito, Roberts, Scalia, Kennedy, and Thomas), and the 4 vote dissent consisted of the "liberal" block on the Court (Ginsburg, Stevens, Souter, and Breyer).
- *My news page on the Ledbetter decision: http://www.capuderfantasia.com/news_employment.html*

Recently Passed Laws: Ledbetter Fair Pay Act

- Key provisions of the Lilly Ledbetter Fair Pay Act (Pub. L. 111-2, §1, 123 Stat.5), which overturns the US Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007):
- The Ledbetter Act makes it clear that the 180 (or 300) day window for filing a charge of discrimination with the Equal Employment Opportunity Commission applies not only to the original decision in issue (as in Ledbetter's case, discriminatory evaluations and a decision to pay her less than men), but also applies to each pay check she earns under the discriminatory decision. For example, if the discrimination pay decisions was made in 2005, and during each pay period the woman is paid into 2009 less than men based on that prior decision, each pay check is an "unlawful employment practice". Under the law, you must file a charge of discrimination with the EEOC within 180 (or 300) days of the "unlawful employment decision". The US Supreme Court said in *Ledbetter* that the only "unlawful employment decision" was the discrimination evaluation and related pay decision, both of which were years before Ledbetter filed her charge. The Supreme Court held that each pay check that Ledbetter had earned over the years was irrelevant to when she had the 180 (or 300) day window to file a charge. The new Ledbetter Act, on the other hand, says that each pay check is another "unlawful employment decision", given the woman 180 (or 300) days from *each paycheck* to file a charge.
- Here is the key language in the Ledbetter Act, as it is placed in the Civil Rights Act of 1964: "For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this subchapter, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice." 42 U.S.C. § 2000e-5(3)(A).
- Section 6 of the Ledbetter Act states that it is retroactive and applies to all discrimination claims (as defined in Section 6) that were pending as of May 28, 2007: "This Act, and the amendments made by this Act, take effect as if enacted on May 28, 2007 and apply to all claims of discrimination in compensation under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.), the Age Discrimination in Employment Act of 1967 (29 U.S.C. 621 et seq.), title I and section 503 of the Americans with Disabilities Act of 1990, and sections 501 and 504 of the Rehabilitation Act of 1973, that are pending on or after that date."
- The full Act on the White House web site: http://www.whitehouse.gov/briefing_room/LillyLedbetterFairPayActPublicReview/

Recently Passed Laws: ADA Amendments Act of 2008

- Congress passed (Senate: unanimous; House: 402-17), and President Bush signed into law (on September 25, 2008), the ADA Amendments Act of 2008, which overturns some of the US Supreme Court's decisions under the original ADA: Sutton v. United Airlines, Inc., 527 U.S. 471 (1999) (mitigating measures are to be considered in assessing whether someone is disabled); Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002) (creating a "demanding standard" on whether an impairment "substantially limits" a person's major life activities).
- Below is the EEOC's list of changes brought about by the ADA Amendments Act of 2008.
- *Georgetown site on original ADA and 2008 amendments, with legislative history and language of the acts: http://www.law.georgetown.edu/archiveada/#ADAAA*
- *Text of ADA Amendments Act: http://www.law.georgetown.edu/archiveada/documents/S3406FinalEngrossedVersion.pdf*
- *Text of original ADA with changes from the 2008 amendments redlined: http://www.eeoc.gov/policy/ada.html (from EEOC site) and http://www.law.georgetown.edu/archiveada/documents/ADAAsAmendedFINAL_10172008_.pdf (from Georgetown site)*
- *EEOC's list of changes in 2008 amendments: http://www.eeoc.gov/ada/amendments_notice.html*

The Act retains the ADA's basic definition of "disability" as an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment. However, it changes the way that these statutory terms should be interpreted in several ways. Most significantly, the Act:

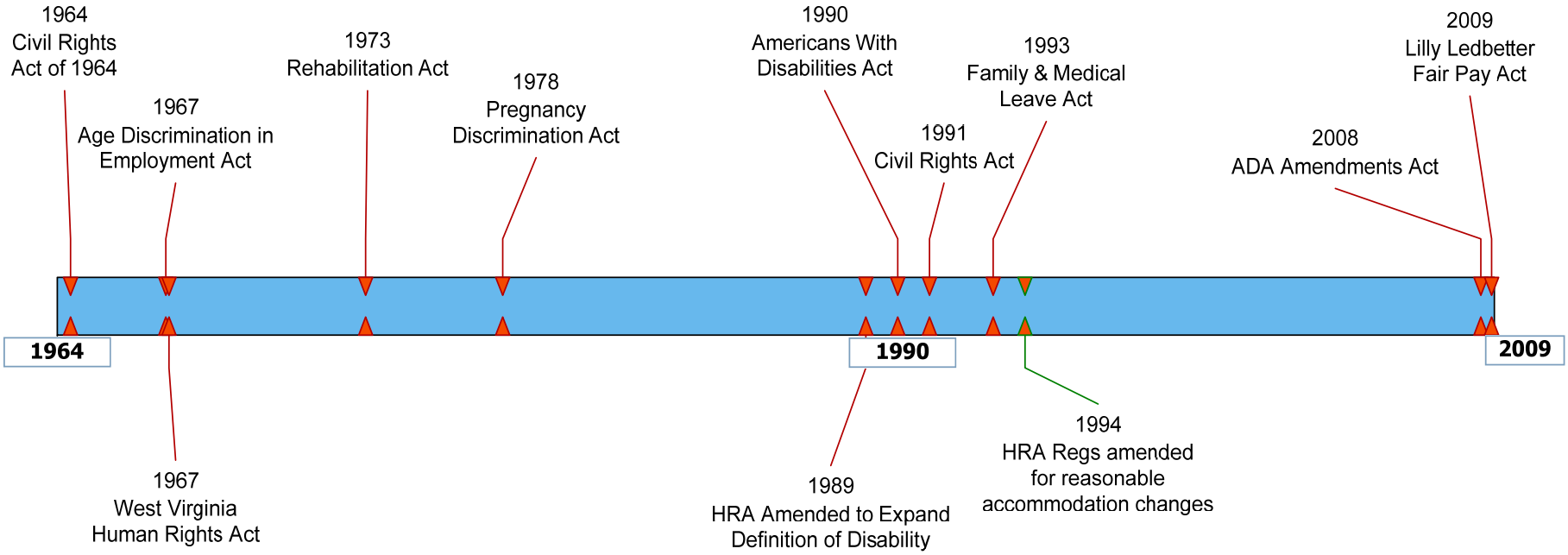
- directs EEOC to revise that portion of its regulations defining the term "substantially limits";
- expands the definition of "major life activities" by including two non-exhaustive lists:
  - the first list includes many activities that the EEOC has recognized (e.g., walking) as well as activities that EEOC has not specifically recognized (e.g., reading, bending, and communicating);
  - the second list includes major bodily functions (e.g., "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions");
- states that mitigating measures other than "ordinary eyeglasses or contact lenses" shall not be considered in assessing whether an individual has a disability;
- clarifies that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active;
- changes the definition of "regarded as" so that it no longer requires a showing that the employer perceived the individual to be substantially limited in a major life activity, and instead says that an applicant or employee is "regarded as" disabled if he or she is subject to an action prohibited by the ADA (e.g., failure to hire or termination) based on an impairment that is not transitory and minor;
- provides that individuals covered only under the "regarded as" prong are not entitled to reasonable accommodation.

History of Employment Discrimination Laws

Focus on Federal and West Virginia Disability Discrimination

Key dates for Employment Discrimination Laws:

- 1964: US Civil Rights Act (Title VII)
- 1967: US ADEA & WVA HRA
- 1990: US Americans with Disabilities Act



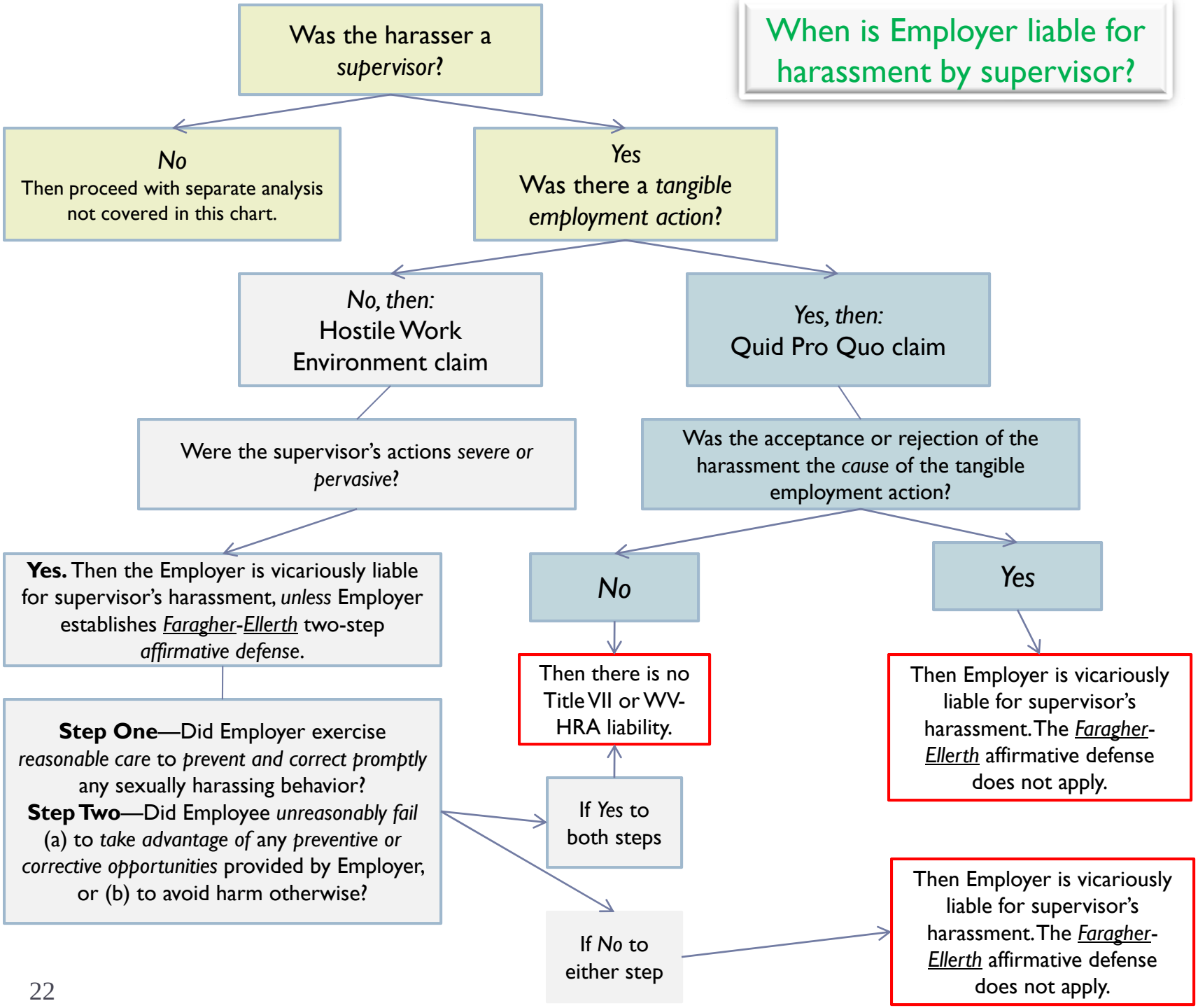
Notes:

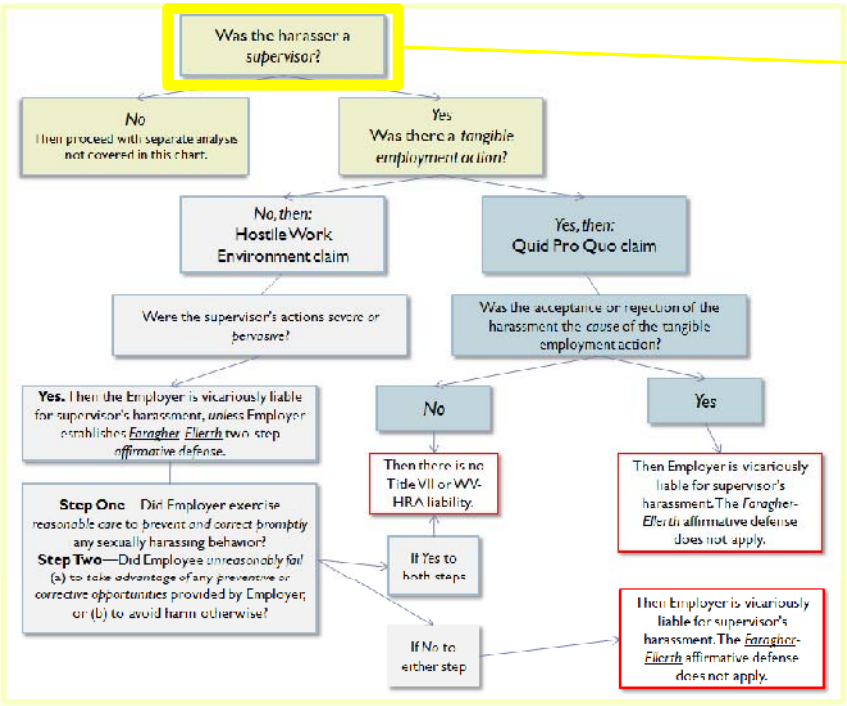
1. As of 1967 when WV HRA was passed, there was no general federal legislation protecting disabled person in the workplace, so there was no federal precedent to rely upon for workplace disability discrimination.
2. The first WV decisions on disability discrimination under the HRA were *Coffman* and *Ranger Fuel* Corporation (1988), and Davidson (1989). The ADA had not yet been passed, and the only helpful federal precedent was under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C.A. § 701 et seq., which applied disability discrimination protection to some federal employees and some employees of contractors who did business with the federal government.

Outline from Seminar Agenda

- What constitutes sexual harassment?

When is Employer liable for harassment by supervisor?



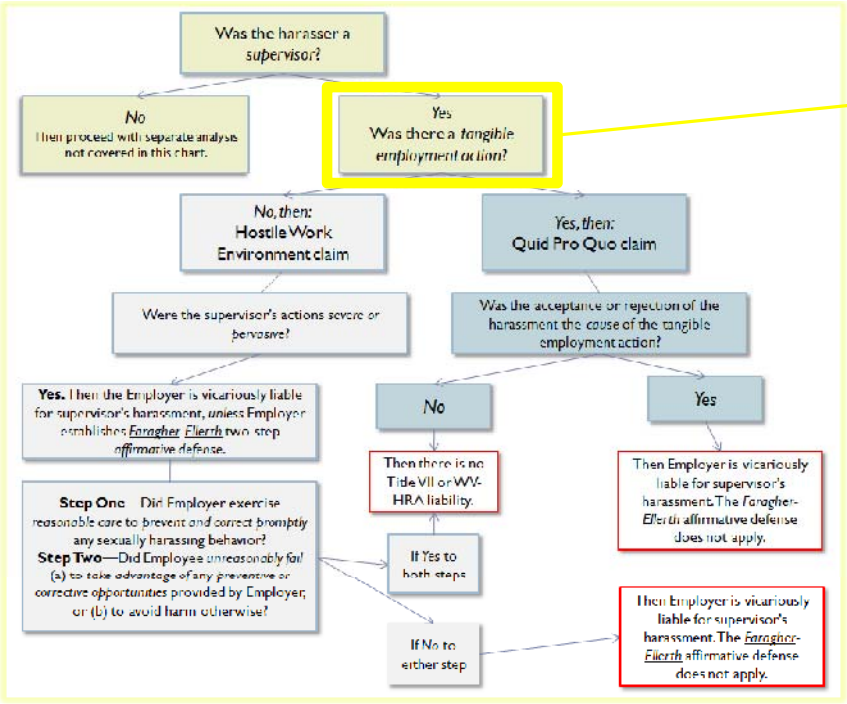


Prevention Tips:

1. Careful differentiation between supervisors and co-workers reduces likelihood that harasser will be a "supervisor", which activate F-E affirmative defense.
2. Make sure employee signs off on job description.
3. Prepare/revise job descriptions: (a) limit and describe precisely supervisory authority, and (b) for positions which no supervisory authority, make that clear.
4. Make sure appropriate management see and understand the job descriptions.
5. Incorporate job descriptions into performance reviews.
6. Make compliance with limits on supervisory authority an item to be examined during review.
7. Consider establishing procedure for *periodically* distributing job descriptions to employees. Don't let them become ancient relics.

Was the harasser a supervisor?

1. Why do we care: Harassment by a supervisor will make Employer vicariously liable for tangible employment action, and Employer may not invoke the *Faragher-Ellerth* affirmative defense.
2. **Federal, EEOC Position (broad test):** Harasser in employee's (plaintiff's) chain of command is a "supervisor" if (a) the individual (harasser) has authority to undertake or recommend tangible employment decisions affecting the employee; or (b) the individual has authority to direct the employee's daily work activities." EEOC Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors (1999) (web). If harasser was not in employee's (plaintiff's) supervisory chain of command, then harasser will be treated as a "supervisor" if employee (plaintiff) reasonably believes harasser had supervisory authority over her.
3. Broad or narrow test? There is no clear US Supreme Court or 4th Circuit decision. There is substantial disagreement among federal courts on the proper test, but the "trending" view seems to be adoption of the EEOC's broad test: *Mack v. Otis Elevator Co.*, 326 F.3d 116, 126-127 (2d Cir. 2003) (surveying decisions and adopting EEOC test), *cert. denied*, 540 U.S. 1016 (2003). But other circuits disagree and adopt a narrower test: *Weyers v. Lear Operations Corp.*, 359 F.3d 1049, 1056-57 (8th Cir. 2004) (rejecting EEOC and *Mack*, adopting narrower test focused on authority to make tangible employment decisions). *Mikels v. City of Durham, N.C.*, 183 F.3d 323, 332 -333 (4th Cir. 1999) is cited by *Weyers* for the narrow test, but that interpretation is very debatable, see *Homesley v. Freightliner Corp.*, 122 F.Supp.2d 659, 663-4 (W.D.N.C. 2000), aff'd, 61 Fed. Appx. 105 (4th Cir. 2003) (not published).
4. **West Virginia:** *Colgan Air, Inc. v. West Virginia Human Rights Commission*, 221 W.Va. 588, 656 S.E.2d 33, 41 (2007): Noted, without analysis, that harassing employees had "no management or supervisory authority", and that arguably reflects the EEOC's 2-part analysis. Albright's partial dissent surveys conflicting tests and proposes test close to EEOC test.

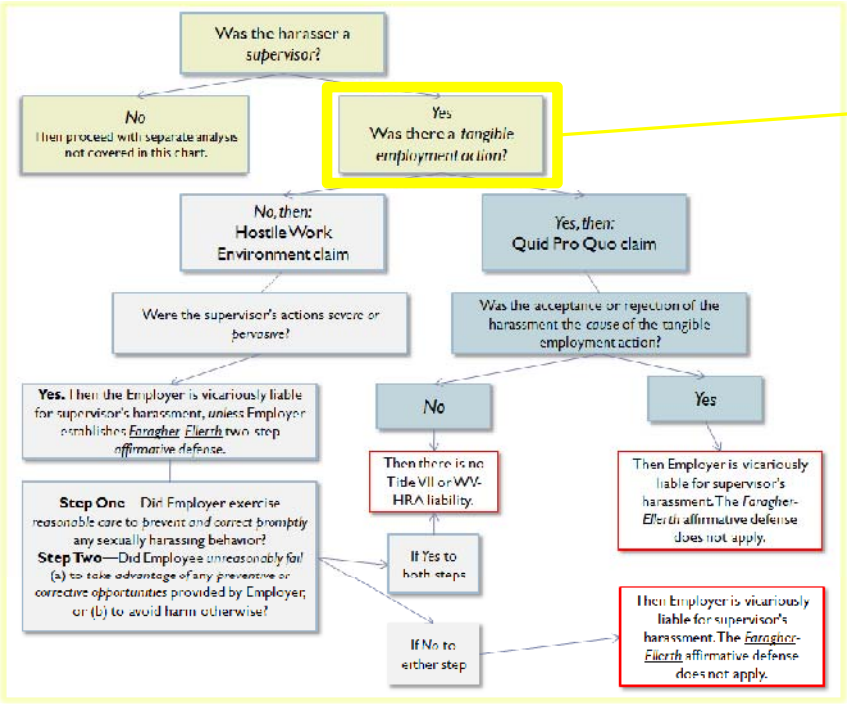


Prevention Tips:

1. There is not anything you can do to alter the definition of tangible employment action. A "firing" is a firing, etc.
2. But consider examining your policies/procedures on who has authority to make the decisions (firing, etc.) that will be treated as tangible employment actions.
3. Consider two possible changes in those policies and procedures:
    1. Take the authority away from a group or class of employees that you might consider to be higher risk for sexual harassment claims (supervisory workers on a manufacturing floor would be stereotypical risky employees).
    2. Apply more review to tangible employment actions, with an eye toward scrutinizing those decisions for risky situations (ex.: sudden adverse action to employee with prior solid record).

Was there a *tangible employment action*?

1. Why do we care: If there was a *tangible employment action*, the Employer may *not* invoke the *Faragher-Ellerth* affirmative defense.
    1. If there is a tangible employment action, the sexual harassment does not need to be "severe and pervasive".
    2. The action is conclusively presumed to be by a supervisor, and there is generally no issue of "notice" to Employer.
    3. The only real issues will be: (a) did the sexual harassment occur, and (b) was the plaintiff's reaction the cause of the tangible employment action.
2. **Federal Position:** In *Pennsylvania State Police v. Suders*, 542 U.S. 129, 144 (2004), the Supreme Court held that a tangible employment action is a "significant change in employment status", such as
    1. Hiring,
    2. Firing (which, under some circumstances, can include constructive discharge),
    3. Failing to promote,
    4. Reassignment with significantly different responsibilities, or
    5. A decision causing a significant change in benefits.
    6. [and probably:] An "extremely dangerous job assignment to retaliate for spurned advances" (page 150)
3. **West Virginia:** There is no indication that West Virginia has any different listing or application of tangible employment action.



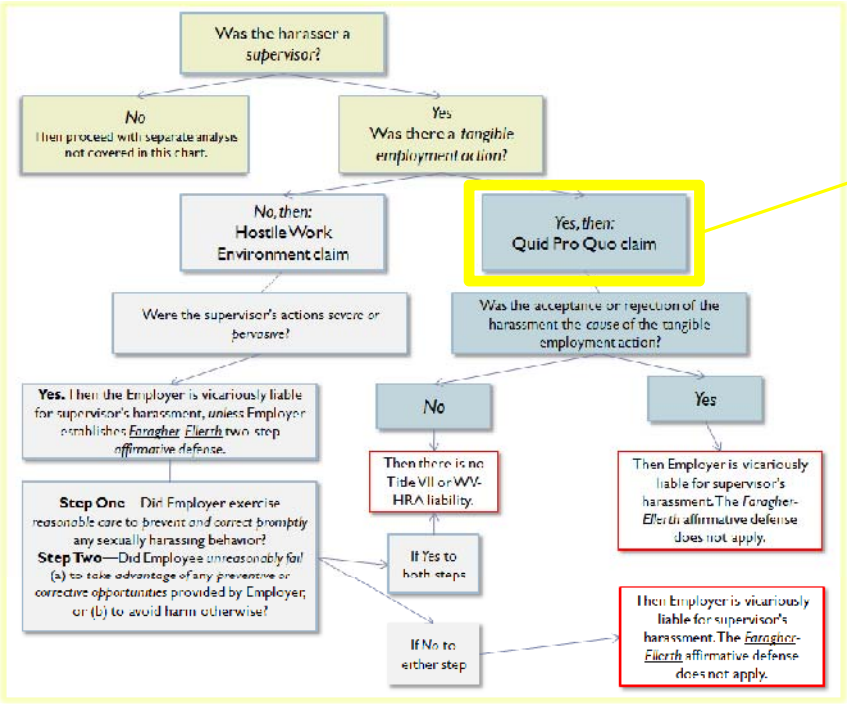
Prevention Tips:

1. Resignation claimed to be constructive discharge involves (a) "precipitating conduct" by the employer, and (b) the "employee's decision" to quit. Pennsylvania State Police v. Suders, 542 U.S. 129, 148 (2004).
2. For the employee's decision to quit, the following consideration can be addressed in terms of preventive measures: (a) clear anti-harassment and complaint policies, (b) dissemination of and training on those policies, (c) the personalities and accessibility of persons/departments to whom complaints would be directed, (d) treatment of the complaining employee in response to a complaint, (e) how the complaining employee is informed about the investigation and any resulting action, (f) support for or hostility against the complaining employee amongst co-workers, (g) the complaining employee's understanding of what happened with prior complaints (by herself or others), and (h) the complaining employee's perception of the power of the harasser within the organization.

Was there a tangible employment action?

Note on constructive discharge.

1. Constructive discharge is a phrase used to describe what is apparently a voluntary resignation, but will be treated by the law as the equivalent of a termination. What is the definition of constructive discharge?
2. **Federal**: A constructive discharge exists if the "working conditions" were "so intolerable that a reasonable person would have felt compelled to resign". *Pennsylvania State Police v. Suders*, 542 U.S. 129, 147 (2004).
3. **West Virginia**: To prove constructive discharge: "adverse working conditions must be so intolerable that any reasonable employee would resign rather than endure such conditions." *Slack v. Kanawha County Housing and Redevelopment Authority*, 188 W.Va. 144, 423 S.E.2d 547 (1992)
4. Constructive discharge applies to all forms of discrimination and all types of hostile work environment. *Love v. Georgia-Pacific Corporation,* 209 W.Va. 515, 550 S.E.2d 51 (2001). Constructive discharge" is "functionally the same" as termination for calculation of damages. *Pennsylvania State Police v. Suders*, 542 U.S. 129, 148 (2004).
5. **Does a finding of constructive discharge mean that the employee's departure will be treated as a tangible employment action (assume supervisor)?** *It depends* (isn't the law wonderful). Both of the following scenarios assume the resignation was a "constructive discharge":
    1. If the resignation is prompted or precipitated by a tangible employment action, then the *Faragher-Ellerth* affirmative defense does not apply. Possible tangible employment actions: (a) demotion, (b)reduction in pay, (c) transfer to a very unattractive position (including dangerous). *Pennsylvania State Police v. Suders*, 542 U.S. 129, 148 & 150 (2004).
    2. Otherwise, the *Faragher-Ellerth* affirmative defense applies.

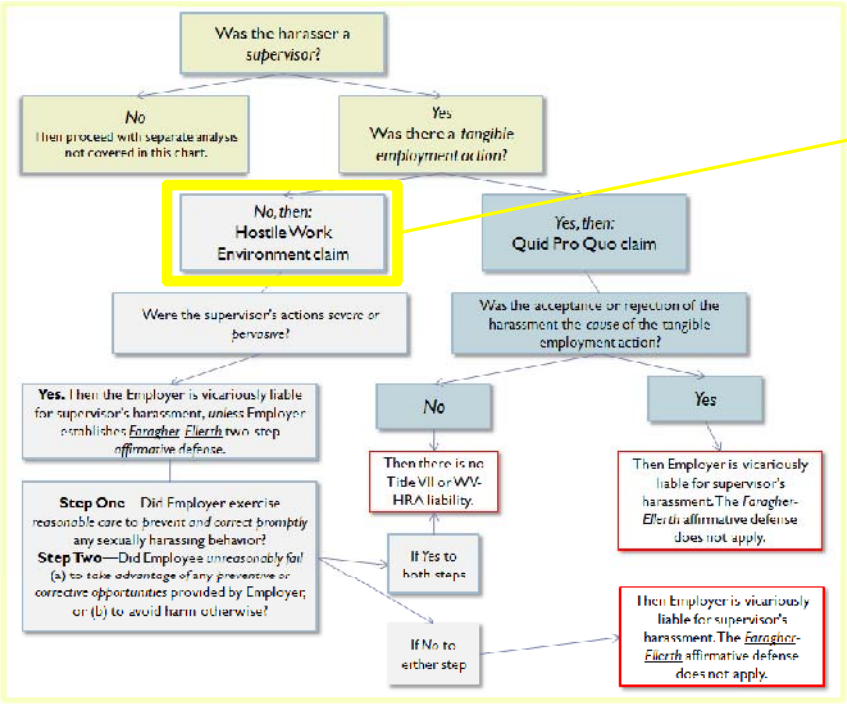


Prevention Tips:

1. No separate suggestions that are not covered elsewhere.

Quid pro quo claim for sexual harassment.

1. *Terminology:* although the courts continue to frequently use the "quid pro quo" name, the US Supreme Court has criticized use of that name (along with "hostile work environment"). *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 752-754 (1998). The Supreme Court has instead applied this terminology (*Pennsylvania State Police v. Suders*, 542 U.S. 129, 143 (2004)): (a) Harassment that culminates in a tangible employment action (for which the employer is strictly liable); and (b) harassment that takes place in the absence of a tangible employment action (to which the employer may assert the *Faragher-Ellerth* affirmative defense).
2. **Federal: Prima facie case** (*Reinhold v. Commonwealth of Virginia,* 135 F.3d 920, 931-932 (4th Cir.1998)):
    1. the employee belongs to a protected group;
    2. the employee was subject to unwelcome sexual harassment;
    3. the harassment complained of was based on sex;
    4. the employee's reaction to the harassment affected tangible aspects of the employee's compensation, terms, conditions, or privileges of employment; and
    5. the employer knew or should have known of the harassment and took no effective remedial action (this is automatically satisfied where the sexual harassment by the supervisor).
3. **West Virginia: Prima facie case** The plaintiff must prove (*Gino's Pizza of West Hamlin, Inc. v. West Virginia Human Rights Commission*, 187 W.Va. 312, 315; 418 S.E.2d 758, 761 (1992)):
    1. That the complainant belongs to a protected class;
    2. That the complainant was subject to an unwelcome sexual advance by an employer, or an agent of the employer who appears to have the authority to influence vital job decisions;
    3. the complainant's reaction to the advancement was expressly or impliedly linked by the employer or the employer's agent to tangible aspects of employment.

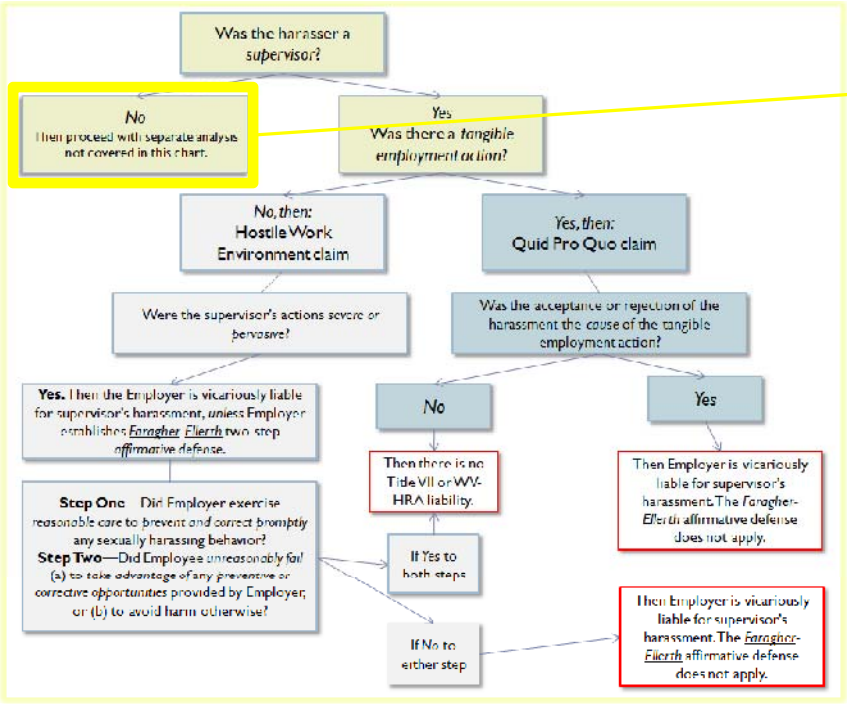


Prevention Tips:

1. Remember, we are dealing with harassment by a supervisor. Therefore, issues of whether the employer knew about the harassment are arguably not relevant, but some courts ignore the distinction between supervisor and co-worker hostile work environment claims and require notice to the employer even where the harassment was by the supervisor. Stress in your policies the need for the employee to bring the alleged harassment to the attention of appropriate persons.
2. Focus on policies with particular emphasis on:
    1. Dissemination, training, and periodic re-distribution of policies.
    2. Look at the complaint procedures and tweak them for the best argument that it was unreasonable not to invoke the complaint procedure,

Hostile work environment claim for sexual harassment.

1. **Federal: Prima facie case** (Gilliam v. South Carolina Department of Juvenile Justice, 474 F.3d 134, 143 (4th Cir.2007) (racial harassment)):
    1. The conduct was unwelcome;
    2. The conduct was based on race (or sex, etc.); and
    3. The conduct was sufficiently severe or pervasive to alter the conditions of employment and create an abusive atmosphere.
2. **West Virginia: Prima facie case** The plaintiff must prove (*Hanlon v. Chambers*, 195 W.Va. 99, 106-7, 464 S.E.2d 741, 748-9 (1995) (*citing Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993)):
    1. The subject conduct was unwelcome;
    2. It was based on the sex of the plaintiff;
    3. It was "sufficiently severe or pervasive to alter the [plaintiff's] conditions of employment and create an abusive work environment"; and
    4. It was imputable on some factual basis to the employer [supervisor status should suffice for this element].
3. The requirement that the harassing conduct was "severe or pervasive" is the most controversial part of the claim. It is the source of the most fact-intensive analysis. *Clark County School Dist. v. Breeden,* 532 U.S. 268, 270-271 (2001).
4. **Faragher-Ellerth affirmative defense** applies (*Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998)):
    1. **Step One:** Did Employer exercise reasonable care to prevent and correct promptly any sexually harassing behavior?
    2. **Step Two:** Did Employee unreasonably fail (a) to take advantage of any preventive or corrective opportunities provided by Employer, or (b) to avoid harm otherwise?
    3. Note: It is the employer's burden to prove the affirmative defense.



Prevention Tips:

1. Careful differentiation between supervisors and co-workers reduces likelihood that harasser will be a "supervisor", which activate F-E affirmative defense.
2. Make sure employee signs off on job description.
3. Prepare/revise job descriptions: (a) limit and describe precisely supervisory authority, and (b) for positions which no supervisory authority, make that clear.
4. Make sure appropriate management see and understand the job descriptions.
5. Incorporate job descriptions into performance reviews.
6. Make compliance with limits on supervisory authority an item to be examined during review.
7. Consider establishing procedure for *periodically* distributing job descriptions to employees. Don't let them become ancient relics.

Harassment by *co-worker*, hostile work environment

1. **West Virginia: Prima facie case** The plaintiff must prove (*Hanlon v. Chambers*, 195 W.Va. 99, 106-7, 464 S.E.2d 741, 748-9 (1995)):
    1. The subject conduct was unwelcome;
    2. It was based on the sex of the plaintiff;
    3. It was "sufficiently severe or pervasive to alter the [plaintiff's] conditions of employment and create an abusive work environment"; and
    4. It was imputable on some factual basis to the employer [this element is treated differently, depending on whether the harassment was by a supervisor].
2. **Flash-back; Harassment by supervisor:** "Where an agent or supervisor of an employer has caused, contributed to, or acquiesced in the harassment, then such conduct is attributed to the employer, and it can be fairly said that the employer is strictly liable for the damages that result." *Hanlon v. Chambers*, 195 W.Va. 99, 108, 464 S.E.2d 741, 750 (1995). [Is this altered after US Supreme Court's 1998 decisions in *Faragher* and *Ellerth?*]
3. **Further Requirements for Harassment by Co-Worker:** Plaintiff's burden to prove: "When the source of the harassment is a person's co-workers and does not include management personnel, the employer's liability is determined by
    1. its knowledge of the offending conduct,
    2. the effectiveness of its remedial procedures,
    3. and the adequacy of its response." *Hanlon*, 195 W.Va. at 108, 464 S.E.2d at 750.
4. **How is "knowledge" proven?** "Knowledge of work place misconduct may be imputed to an employer by circumstantial evidence if the conduct is shown to be sufficiently pervasive or repetitive so that a reasonable employer, intent on complying with ... [the West Virginia Human Rights Act] would be aware of the conduct." *Hanlon*, 195 W.Va. at 108 n.9, 464 S.E.2d at 750 n.9.

Illustrations of Common Sexual Harassment Lawsuit Scenarios

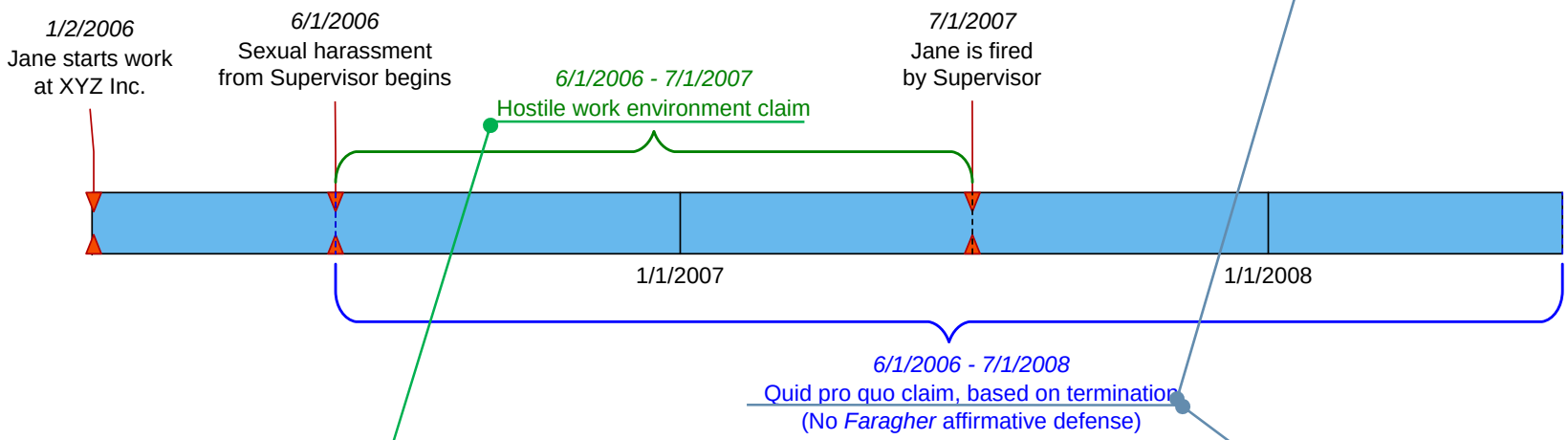
Termination Scenario, Harassment by Supervisor

Notes:

- Plaintiff could prevail on either hostile work environment claim, or quid pro claim, or both. One is not dependent on the other.
- To win on hostile work environment claim, harassment must be "severe or pervasive." That requirement does *not* apply to quid pro quo claim.
- Notice to employer is irrelevant in both claims. The employer is vicariously liable.
- The Plaintiff would also likely assert a retaliation claim.

Retaliation **prima facie case** (*Conrad v. ARA Szabo*, 198 W.Va. 362, 480 S.E.2d 801 (1996)):

1. that the complainant engaged in protected activity;
2. that complainant's employer was aware of the protected activities;
3. that complainant was subsequently discharged and (absent other evidence tending to establish a retaliatory motivation); and
4. that complainant's discharge followed his or her protected activities within such period of time that the Court can infer retaliatory motivation



Hostile work environment **prima facie case** (*Hanlon v. Chambers*, 195 W. Va. 99, 106-7, 464 S.E.2d 741, 748-9 (1995)):

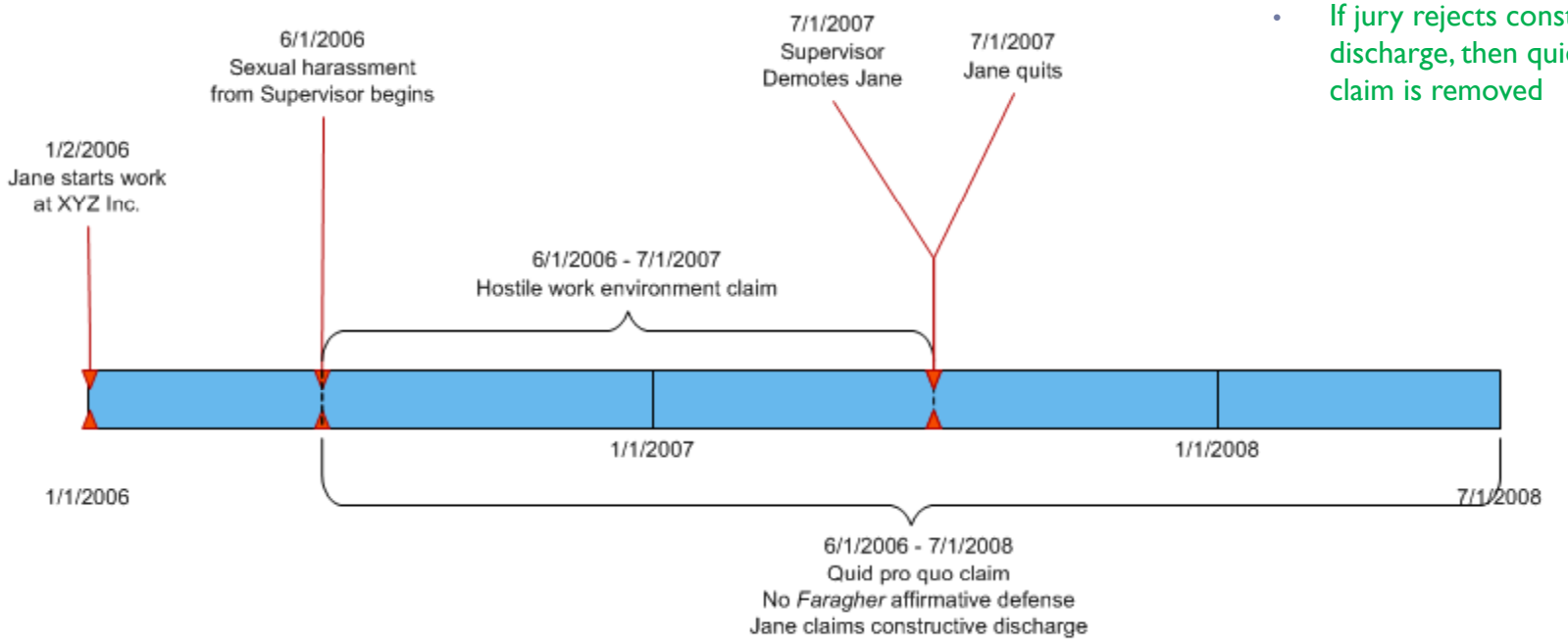
1. The subject conduct was unwelcome;
2. It was based on the sex of the plaintiff;
3. It was "sufficiently severe or pervasive to alter the [plaintiff's] conditions of employment and create an abusive work environment"; and
4. It was imputable on some factual basis to the employer.

Quid pro quo **prima facie case** (*Gino's Pizza of West Hamlin, Inc. v. West Virginia Human Rights Commission*, 187 W. Va. 312, 315; 418 S.E.2d 758, 761 (1992)):

1. That the complainant belongs to a protected class;
2. That the complainant was subject to an unwelcome sexual advance by an employer, or an agent of the employer who appears to have the authority to influence vital job decisions;
3. the complainant's reaction to the advancement was expressly or impliedly linked by the employer or the employer's agent to tangible aspects of employment.

Illustration of Common Sexual Harassment Lawsuit

Constructive Discharge Scenario, With Prior Tangible Employment Action



- If you remove Demotion 7/1/07, then *Faragher-Ellerth* affirmative defense applies
- If jury rejects constructive discharge, then quid pro quo claim is removed

Notes:

- Plaintiff could prevail on either hostile work environment claim, or quid pro claim, or both. One is not dependent on the other.
- To succeed on hostile work environment claim, harassment must be "severe or pervasive." That requirement does *not* apply to quid pro quo claim.

Key Sexual (and Other) Harassment Decisions

US Supreme Court Decisions

1. *Meritor Savings Bank , FSB v. Vinson*, 477 U.S. 57 (1986)
2. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993)
3. *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998)
4. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998)
5. *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998)
6. *Clark County School Dist. v. Breeden*, 532 U.S. 268, 270-271 (2001)
7. *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004)

Fourth Circuit Decisions

1. *Paroline v. Unisys Corp.*, 879 F.2d 100, 106 (4th Cir.1989)
2. *Spicer v. Commonwealth of Virginia, Department of Corrections*, 66 F.3d 705 4th Cir. 1995)
3. *Reinhold v. Com. of Virginia*, 135 F.3d 920, 935 (4th Cir.1998)
4. *Lissau v. Southern Food Service*, Inc., 159 F.3d 177, 180 (4th Cir.1998)
5. *Mikels v. City of Durham*, N.C., 183 F.3d 323, 332 -333 (4th Cir. 1999)
6. *Conner v. Schrader-Bridgeport Intern., Inc.*, 227 F.3d 179, 196-199 (4th Cir. 2000)

WV Supreme Court Decisions

1. *Westmoreland Coal Company v. West Virginia Human Rights Commission*, 181 W. Va. 368, 382 S.E.2d 562 (1989)
2. *Gino's Pizza of West Hamlin, Inc. v. West Virginia Human Rights Commission*, 187 W. Va. 312; 418 S.E.2d 758 (1992)
3. *State ex rel Tinsman v. Hott*, 188 W.Va. 349, 424 S.E.2d 584 (1992)
4. *Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995)
5. *Conrad v. Szabo*, 198 W. Va. 362, 480 S.E.2d 801 (1996)
6. *Williamson v. Greene*, 200 W. Va. 421, 490 S.E.2d 23 (1997)
7. *Napier v. Stratton*, 204 W. Va. 415, 513 S.E.2d 463 (1998)
8. *Fairmont Specialty Services v. West Virginia Human Rights Commission*, 206 W. Va. 86, 522 S.E.2d 180 (1999)
9. *Akers v. Cabell Huntington Hospital, Inc.*, 215 W. Va. 346, 599 S.E.2d 769 (2004)
10. *Kanawha County Board of Education v. Sloan*, 219 W. Va. 213, 632 S.E.2d 899 (2006)
11. *Johnson v. Killmer*, 219 W. Va. 320, 633 S.E.2d 265 (2006) (age-based harassment)
12. *Kalany v. Campbell*, 220 W. Va. 50, 640 S.E.2d 113 (2006)
13. *Colgan Air, Inc. v. West Virginia Human Rights Commission*, 221 W. Va. 588, 656 S.E.2d 33 (2007)

US Supreme Court Decisions on Harassment -- 1

Decisions by US Supreme Court	Description
Meritor Savings Bank , FSB v.Vinson, 477 U.S. 57 (1986) -- Winner: Employee -- 9-0	-- Sexual harassment, hostile work environment, supervisor; -- Trial court entered judgment in for defendants, court of appeals reversed in favor of employee, Supreme Court affirmed court of appeals and remanded for new trial; -- Supreme Court for first time recognized claim of hostile work environment, as being sex discrimination; -- Hostile work environment claim does not require economic harm; -- Issue is whether sexual advances were "unwelcome", not whether plaintiff's participation in sexual activity was "voluntary"; but evidence of "voluntariness" may be relevant to the issue of whether sexual conduct was offensive; -- Employer is not automatically liable for sexual harassment of supervisor; agency principles should be consulted; common law agency principles apply with potentially some modification because of Title VII's language; -- Mere existence of employer's sexual harassment procedure, and fact that plaintiff did not invoke the procedure, does not necessarily protect employer from liability.
Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993) -- Winner: Employee -- 9-0	-- Hostile work environment, sexual harassment, supervisor; -- Trial court dismissed claim, court of appeals affirmed, Supreme Court reversed and remanded for new trial; -- Harassing conduct in hostile work environment claim need not seriously affect an employee's psychological well-being or lead the employee to suffer injury; -- Hostile work environment claim requires an objectively hostile or abusive environment-one that a reasonable person would find hostile or abusive-as well as the victim's subjective perception that the environment is abusive; -- Whether environment is sufficiently abusive to create a hostile work environment must be evaluated based on all the circumstances, not just any single factor.
Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998) -- Winner: Employee -- 9-0	-- Sexual harassment between members of the same gender ("same-sex sexual harassment") is actionable; -- Objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances.

US Supreme Court Decisions on Harassment -- 2

Decisions by US Supreme Court	Description
Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998) -- 7-2 (Scalia and Thomas dissenting)	-- Employer vicariously liability for an actionable hostile environment created by a supervisor with immediate or successively higher authority over employee; -- In absence of a tangible employment action, employer may raise an affirmative defense to liability or damages; -- The affirmative defense requires employer to prove that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior and that employee unreasonably failed to take advantage of any preventive or corrective opportunities provided or to avoid harm otherwise; -- Hostile work environment claim requires "severe or pervasive" harassment; a quid pro claim does not.
Faragher v. City of Boca Raton, 524 U.S. 775 (1998) -- Winner: Employee -- 7-2 (Thomas and Scalia dissenting)	-- Sexual harassment by supervisors, hostile work environment, no tangible employment action; -- Trial court rules in favor of employee on hostile work environment; court of appeals on banc reversed in favor of employer; Supreme Court in favor of employee and reinstatement judgment for employee; -- Same rulings as Ellerth on vicarious liability and affirmative defense -- Thomas and Scalia would have incorporated the affirmative defense into the plaintiff's case requirements, and would have remanded for new trial

US Supreme Court Decisions on Harassment -- 3

Decisions by US Supreme Court	Description
Clark County School Dist. v. Breeden, 532 U.S. 268, 270-271 (2001) (per curiam) -- 9-0	-- Hostile work environment, sexual harassment by supervisor -- Single incident of arguably sexual commentary could not have been found by any reasonable person to have constituted a hostile work environment; -- Sexual harassment must be "sever or pervasive" to constitute a hostile work environment, and this must be examined based on the totality of circumstances; -- Title VII forbids only behavior so objectively offensive as to alter the 'conditions' of the victim's employment"). Workplace conduct is not measured in isolation; instead, "whether an environment is sufficiently hostile or abusive" must be judged "by 'looking at all the circumstances,' including the 'frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.
Pennsylvania State Police v. Suders, 542 U.S. 129 (2004) -- 8-1 (Thomas dissenting)	-- Hostile work environment by supervisor, plaintiff quit and claimed constructive discharge; -- Constructive discharge may not have been precipitated by a tangible employment action, in which case the employer may assert the Faragher-Ellerth affirmative defense; -- However, if the constructive discharge was precipitated by a tangible employment actions (such as a demotion or reduction in pay), then the employer is vicariously liable for the supervisor's conduct, and the employer may not invoke the Faragher-Ellerth affirmative defense; an unattractive transfer and an extremely dangerous assignment may also constitute tangible employment actions in this context; -- Constructive discharge puts the plaintiff in the same position for damages as termination;

WV Supreme Court Decisions on Harassment -- 1

Decision by WV Supreme Court	Description
Westmoreland Coal Company v. West Virginia Human Rights Commission, 181 W.Va. 368, 382 S.E.2d 562 (1989) -- Winner: Employee -- 4-0 (Workman did not participate)	--Sexual harassment, hostile work environment; -- HRC ruled for employee on sexual harassment, but appeal to Circuit Court reversed that decision; Supreme Court reversed decision of Circuit Court and reinstated HRC's decision for employee; -- Prima facie case for quid pro quo harassment; -- Fact that plaintiff's conduct was "voluntary" is not a defense to sexual harassment case; Circuit Court incorrectly focused on "voluntariness" in concluding quid pro quo claim was not viable.
Paxton v. Crabtree, 184 W.Va. 237, 400 S.E.2d 245 (1990) -- Winner: Employee -- 5-0	-- Not a sexual harassment case, but contains significant discussion of sexual harassment law and standards by which employer is liable for supervisor's conduct; -- HRC and Circuit Court both found pregnancy discrimination; Supreme Court agreed, but reversed on issue of mitigation of damages (trial court improperly concluded failure to mitigate)
State ex rel Tinsman v. Hott, 188 W.Va. 349, 424 S.E.2d 584 (1992) (per curiam) -- Winner: Employee - 5-0	-- Sexual harassment, hostile work environment by non-supervisor; -- Trial court's pretrial order precluded testimony about sexual harassment victims other than plaintiff; Supreme Court revered and concluded evidence of other victims may be admissible on issue of whether hostile work environment existed; -- Whether evidence of other sexual harassment victims may be introduced into evidence depends on whether the evidence suggests that a hostile work environment existed for plaintiff -- But evidence of sexual misconduct 4 years before plaintiff's employment was properly excluded, because it did not impact plaintiff's environment
Gino's Pizza of West Hamlin, Inc. v. West Virginia Human Rights Commission, 187 W.Va. 312; 418 S.E.2d 758 (1992) -- Winner: Employee - 4-1 (Neely dissenting)	-- Sexual harassment by supervisor, quid pro quo claim; -- HRC rules in favor of employee, and Circuit Court on appeal reversed in favor of employer; Supreme Court reversed in favor of employee and remanded on damages; -- Prima facie case for quid pro quo harassment; -- Sufficient evidence existed to support HRC's finding of sexual harassment, even though no other persons witnessed the harassment, and even though the plaintiff did not complain to anyone about the sexual harassment

WV Supreme Court Decisions on Harassment -- 2

Decisions by WV Supreme Court	Description
Hanlon v. Chambers, 195 W.Va. 99, 464 S.E.2d 741 (1995) -- Winner: Employee - 5-0	-- Sexual harassment, hostile work environment by non-supervisor; -- Trial court granted employer's motion for summary judgment; Supreme Court reversed and remanded for new trial; -- Trial court improperly ruled that sexual harassment of a supervisor by a subordinate was not actionable; -- Prima facie case for hostile work environment claim. Discussion of appropriate policies and remedial action.
Conrad v. Szabo, 198 W.Va. 362, 480 S.E.2d 801 (1996) -- Winner: Employee - 5-0	-- Sexual harassment, hostile work environment by non-supervisor; -- Trial court granted employer's motion for summary judgment, and Supreme Court reversed and remanded for new trial; -- Discussion of "severe and pervasive"; no requirement for physical contact or threatened assault; -- Expressly sexual conduct must be examined (for "severe and pervasive") in light of non-sexual abusive conduct; -- Prima facie case for hostile work environment, and discussion of each element; -- When harassment is not by supervisor, employer's liability turns on is knowledge of the offending conduct, effectiveness of its remedial procedures, and adequacy of its response; -- Knowledge of sexual harassment may be imputed to employer where the conduct is sufficiently severe and pervasive so that a reasonable employer, intent on complying with HRA, would be aware of the conduct.
Williamson v. Greene, 200 W.Va. 421, 490 S.E.2d 23 (1997) -- Winner: Employee -- 5-0	-- Sexual harassment, claims of hostile work environment and termination, supervisor; -- Employer did not have 12 or more employees requirement by WV HRA; -- But employee could maintain a claim for sex discrimination and sexual harassment under common law claim for violation of public policy under Harless v. First National Bank of Fairmont, 162 W.Va. 116, 246 S.E.2d 270, 275 (1978)

WV Supreme Court Decisions on Harassment -- 3

Decisions by WV Supreme Court	Description
Napier v. Stratton, 204 W.Va. 415, 513 S.E.2d 463 (1998) (per curiam) -- Winner: Employer -- 5-0	-- Disability-based harassment by co-workers, hostile work environment; -- Trial court granted employer's motion for summary judgment; summary judgment was affirmed by WV Supreme Court -- Insults and harassment over a period of six months were not sufficiently "severe or pervasive" so as to constitute a hostile work environment, partly because some of the comments were away from work, and plaintiff sometimes joined in on hurtful comments about other employees
Fairmont Specialty Services v. West Virginia Human Rights Commission, 206 W.Va. 86, 522 S.E.2d 180 (1999) -- Winner: Employee -- 4-1 (Davis dissenting)	-- Hostile work environment based on ancestry (Mexican-American), harassment by non-supervisor; -- Human Rights Commission's decision for plaintiff was affirmed by Supreme Court; -- Prima facie case for hostile work environment; -- Discussion of "severe and pervasive" and appropriate remedial action.
Akers v. Cabell Huntington Hospital, Inc., 215 W.Va. 346, 599 S.E.2d 769 (2004) -- Winner: Employee -- 4-1 (Maynard dissenting)	-- Sexual harassment, hostile work environment, by supervisor; -- Trial court directed verdict for employer based solely on plaintiff's failure to call expert to link sexual harassment to psychological injuries; -- No economic harm was asserted, but plaintiff claimed damages for (a) general emotional distress, and (b) specific psychological injury; -- Supreme Court reversed and remanded for new trial; prima facie case for hostile work environment; -- If plaintiff satisfies prima facie case elements, the case should be submitted to jury; -- Discussion of "severe and pervasive"; -- Sexual harassment claim does not require proof of psychological injury, but it does require that the environment by "hostile or abusive"; -- Psychiatric testimony was not necessary to link sexual harassment and psychological injury.
Kanawha County Board of Education v. Sloan, 219 W.Va. 213, 632 S.E.2d 899 (2006) -- Winner: Employee -- 4-1 (Benjamin dissenting in part)	Very unusual decision involving termination of a custodial employee working for a board of education. The Supreme Court ultimately rules that the plaintiff was guilty of immoral conduct but not sexual harassment, and that termination was a disproportionately harsh penalty. This case turns entire on law governing public employees in the education system, and appears to have no impact on employment sexual harassment law.

WV Supreme Court Decisions on Harassment -- 4

Decisions by WV Supreme Court	Description
Johnson v. Killmer, 219 W.Va. 320, 633 S.E.2d 265 (2006) (per curiam) -- Winner: Employer -- 5-0	-- Age based termination and hostile work environment claim, supervisor; -- Trial court granted summary judgment for employer, Supreme Court affirmed; -- Supreme Court assumed but did not directly decide that an age-based claim exists for hostile work environment; -- Prima facie case for hostile work environment; -- Facts did not establish that the harassment was severe or pervasive; -- Work environment is sometimes "rough and tumble" and that is not actionable; -- Plaintiff proved only a rude age-related remark, other comments were non-actionable rudeness; -- Rudeness and ostracism alone are insufficient to establish a hostile work environment claim.
Kalany v. Campbell, 220 W.Va. 50, 640 S.E.2d 113 (2006) -- Winner: Employee on liability -- Winner: Employer on attorneys' fees -- 4-1 (Starcher dissenting in part, on issue of attorneys' fees)	-- Sexual harassment, hostile work environment, and retaliatory discharge; -- Sexual conduct by owner of bar on a single occasion (grabbed against her will and kissed her), plaintiff complained, owner then laid off plaintiff; -- Jury found against plaintiff on sexual harassment claim, but for plaintiff on retaliatory discharge claim; and awarded attorneys' fees trial court entered judgment for plaintiff; -- Supreme Court affirmed judgment for damages, but reversed award of attorneys' fees; -- Employer was liable on common law claim for retaliatory discharge (based on complaint of sexual harassment), even though employer had few than 12 employees (so there was no coverage under WV Human Rights Act); -- Retaliatory discharge claims did not require proof (and success before the jury) on underlying sexual harassment allegation; plaintiff need only prove that she complained in good faith about what she reasonably believed was sexual harassment in violation of HRA; -- Employees should be encouraged to report sexual harassment even before it rises to the level of being "severe or pervasive".

WV Supreme Court Decisions on Harassment -- 5

Decisions by WV Supreme Court	Description
Colgan Air, Inc. v. West Virginia Human Rights Commission, 221 W.Va. 588, 656 S.E.2d 33 (2007) -- Winner: Employer -- 3-2 (Albright and Starcher dissenting, only on issue of hostile work environment)	-- Harassment based on national origin and religion, hostile work environment, misconduct by non-supervisors; -- Human Rights Commission found for employee on hostile work environment and on discharge for complaining about harassment; Supreme Court reversed on both claims and entered judgment for employer; -- Employer was not liable for harassment because it had proper anti-discrimination policies, and took prompt and effective remedial action after employee complained; harassers were issues warnings and were then terminated, and harassment ceased; -- Majority found that harassers were not supervisors; Albright's dissent reviewed in detail case law on definition of "supervisor" and concluded evidence existed to conclude harassers were supervisors; -- Good case for examining appropriate policies and investigative procedures; -- HRC was mistaken in ruling that the discharge was in retaliation for complaints of harassment; employer proved that it had conclusive non-discriminatory reason for discharge (failure of plaintiff to pass pilot proficiency test); dissenting judges agreed with this conclusion

Issue: Categories of Sexual Harassment -- 1

Decision or Other Authority	Description
29 C.F.R. § 1604.11(a)	"Harassment on the basis of sex is a violation of section 703 of title VII. [FN1] Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." Footnote: 1 "The principles involved here continue to apply to race, color, religion or national origin."
W.Va. C.S.R. § 77-4-2(2.2)	2.2: "Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when: 2.2.1. Submission to or rejection of such conduct is made either explicitly or implicitly a term or condition of an individual's employment or is exchanged for job benefits; 2.2.2. Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or 2.2.3. Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."

Issue: Vicarious Liability for Supervisor Harassment -- 1

Decisions by WV Supreme Court	Description
Meritor Savings Bank , FSB v. Vinson, 477 U.S. 57, 72 (1986)	-- Employer is not always automatically liable for harassment by supervisor, citing Restatement (Second) of Agency 219-237 (1958) (72) -- Court decline to issue "definitive rule on employer liability" for supervisor harassment, but Congress wanted Courts to look at "agency principles for guidance in this area" but common law agency principles may not be "transferrable" to Title VII "in all their particulars" in light of Title VII defining (42 U.S.C. 2000e(b)) "employer" to include any "agent" of the employer (which "surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible" (72) -- "Court of Appeals was wrong to entirely disregard agency principles and impose absolute liability on employers for the acts of their supervisors, regardless of the circumstances of a particular case (73)

Issue: Severe and pervasive -- 1

Decisions by WV Supreme Ct	Description
Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993)	-- "terms, conditions, or privileges" of employment encompass "requiring people to work in a discriminatorily hostile or abusive environment". Title VII is violated if the conduct is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." (21) -- The standard takes a middle ground between the "merely offensive" conduct and requiring "tangible psychological injury". (21) -- "mere utterance" of an "epithet which engenders offensive feelings" does not "sufficiently affect the conditions of employment" (21) -- To create a hostile work environment, the conduct must be "severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive". "Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment" (21-22) -- A violation exists if the "environment would reasonably be perceived, and is perceived, as hostile or abusive" (22) -- "But Title VII comes into play before the harassing conduct leads to a nervous breakdown. A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers". (22) -- Title VII does not require "concrete psychological harm", nor does it require conduct which would "seriously affect a reasonable person's psychological well-being" (22) -- But we can say that whether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required." (23) -- Scalia concurring: "[T]he test is not whether work has been impaired, but whether working conditions have been discriminatorily altered." (25)

Issue: Severe and pervasive -- 2

Decisions by WV Supreme Ct	Description
Faragher v. City of Boca Raton, 524 U.S. 775, 787 (1998)	-- a "sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so" (787)
29 C.F.R. § 1604.11(b)	"In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis."
W.Va. C.S.R. § 77-4-2(2.3)	2.3: "In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case-by-case basis, but in all cases the harassment complained of must be sufficiently severe or pervasive." (emphasis added; italicized phrase is not in 29 C.F.R. 1604.11(b))
W.Va. C.S.R. § 77-4-2(2.4)	2.4.:"In determining whether alleged sexual harassment in a particular case is sufficiently severe or pervasive, the Commission will consider: 2.4.1. Whether it involved unwelcome physical touching; 2.4.2. Whether it involved verbal abuse of an offensive or threatening nature; 2.4.3. Whether it involved unwelcome and consistent sexual innuendo or physical contact; and 2.4.4. The frequency of the unwelcome and offensive encounters. 2.4.5. A person who has been harassed on an isolated basis may offer evidence of harassment suffered by other employees as proof that the harassment was pervasive or severe."
W.Va. C.S.R. § 77-4-2(2.5)	2.5: "Harassment is not necessarily confined to unwanted sexual conduct. Hostile or physically aggressive behavior may also constitute sexual harassment, as long as the disparate treatment is based on gender."

Issue: Notice to Employer -- 1

Decisions by WV Supreme Court	Description
Meritor Savings Bank , FSB v. Vinson, 477 U.S. 57, 72 (1986)	-- "absence of notice to an employer does not necessarily insulate that employer from liability"
Faragher v. City of Boca Raton, 524 U.S. 775, 810 (1998)	-- Vicarious liability for supervisor harassment "renders any remand for consideration of imputed knowledge entirely unjustifiable"

Issue: Anti-Discrimination Policies -- 1

Decisions by WV Supreme Court	Description
Meritor Savings Bank , FSB v. Vinson, 477 U.S. 57, 72-73 (1986)	-- "Finally, we reject petitioner's view that the mere existence of a grievance procedure and a policy against discrimination, coupled with respondent's failure to invoke that procedure, must insulate petitioner from liability. While those facts are plainly relevant, the situation before us demonstrates why they are not necessarily dispositive. Petitioner's general nondiscrimination policy did not address sexual harassment in particular, and thus did not alert employees to their employer's *73 interest in correcting that form of discrimination. App. 25. Moreover, the bank's grievance procedure apparently required an employee to complain first to her supervisor, in this case Taylor. Since Taylor was the alleged perpetrator, it is not altogether surprising that respondent failed to invoke the procedure and report her grievance to him. Petitioner's contention that respondent's failure should insulate it from liability might be substantially stronger if its procedures were better calculated to encourage victims of harassment to come forward."
29 C.F.R. § 1604.11(f)	"Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under title VII, and developing methods to sensitize all concerned."

Outline from Seminar Agenda

- The treatment of arrest and conviction records.

EEOC Guidance on Arrest/Conviction Records

- Three starting points concerning employer's use of arrest and conviction records (and these 2 points are limited to federal and West Virginia law):
  - There is no blanket prohibition on the consideration of arrest and conviction records in the hiring and firing of employees.
  - There is no categorical rule that use of arrest and conviction records is discriminatory (but keep in mind that some states –not West Virginia—have anti-discrimination laws based on criminal convictions)
  - There is no language in Title VII or the WV Human Rights Act that addresses criminal convictions.
- But the EEOC has taken the position that there are circumstances under which use of criminal and arrest records may be discriminatory:
  - First, --and this should be obvious--if an employer uses arrest or conviction records, for example, to exclude Hispanics but ignores them for whites, then this would be discriminatory un disparate treatment theory. That practice could well establish intentional discrimination.
  - Second,--and this may be less obvious—if an employer uses a categorical rule barring persons from positions who have a conviction or arrest record, that policy may be discriminatory where it would be shown through statistics to have a disproportionate impact on racial groups. The EEOC has concluded that African Americans and Hispanics have arrest and conviction histories disproportionately high compared to the general population, so that categorical rules may constitute disparate impact (which does not require proof of intentional discrimination) on racial minorities (EEOC Policy Statement on the Issue of Conviction Records (1987)).
- Looking at that second situation (disparate impact on categorical exclusions), here is the EEOC's rule: "Where a charge involves an allegation that the Respondent employer failed to hire or terminated the employment of the Charging Party as a result of a conviction policy or practice that has an adverse impact on the protected class to which the Charging Party belongs, the Respondent must show that it considered these three factors to determine whether its decision was justified by business necessity:
  - 1. The nature and gravity of the offense or offenses;
  - 2. The time that has passed since the conviction and/or completion of the sentence; and
  - 3. The nature of the job held or sought."
- EEOC Policy Statement on the Issue of Conviction Records under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. (1982) (2/4/87) (http://www.eeoc.gov/policy/docs/convict1.html)
- EEOC Policy Statement on the Use of Statistics in Charges Involving the Exclusion of Individuals with Conviction Records from Employment (7/29/87) (http://www.eeoc.gov/policy/docs/convict2.html)
- EEOC Compliance Manual, Section 15: Race and Color Discrimination (2006) (http://www.eeoc.gov/policy/docs/race-color.html#VIB2conviction)

EEOC Compliance Manual on Criminal Records

- The EEOC Compliance Manual, Section 15: Race and Color Discrimination (2006) (http://www.eeoc.gov/policy/docs/race-color.html#VIB2conviction), summarizes the legal landscape as seen by the EEOC (I have omitted the footnotes):

> Conviction and Arrest Records
>
> Of course, it is unlawful to disqualify a person of one race for having a conviction or arrest record while not disqualifying a person of another race with a similar record. For example, an employer cannot reject Black applicants who have conviction records when it does not reject similarly situated White applicants.(96)
>
> In addition to avoiding disparate treatment in rejecting persons based on conviction or arrest records, upon a showing of disparate impact, employers also must be able to justify such criteria as job related and consistent with business necessity.(97) This means that, with respect to conviction records, the employer must show that it considered the following three factors: (1) the nature and gravity of the offense(s); (2) the time that has passed since the conviction and/or completion of the sentence; and (3) the nature of the job held or sought.(98) A blanket exclusion of persons convicted of any crime thus would not be job-related and consistent with business necessity.(99) Instead, the above factors must be applied to each circumstance. Generally, employers will be able to justify their decision when the conduct that was the basis of the conviction is related to the position, or if the conduct was particularly egregious.
>
> Arrest records are treated slightly differently. While a conviction record constitutes reliable evidence that a person engaged in the conduct alleged (i.e., convictions require proof "beyond a reasonable doubt"), an arrest without a conviction does not establish that a person actually engaged in misconduct.(100) Thus, when a policy or practice of rejecting applicants based on arrest records has a disparate impact on a protected class, the arrest records must not only be related to the job at issue, but the employer must also evaluate whether the applicant or employee actually engaged in the misconduct. It can do this by giving the person the opportunity to explain and by making follow-up inquiries necessary to evaluate his/her credibility.(101)
>
> Other employment policies that relate to off-the-job employee conduct also are subject to challenge under the disparate impact approach, such as policies related to employees' credit history. People of color have also challenged, under the disparate impact theory, employer policies of discharging persons whose wages have been garnished to satisfy creditors' judgments.(102)

EEOC Position Has Largely Been Adopted by Courts

- Here is a list of court decisions that have largely or completely adopted the EEOC's position:
  - *Green v. Missouri Pacific Railroad Company*, 549 F.2d 1158, 1160 (8th Cir. 1977)
  - *Carter v. Gallagher*, 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972) (brought under 42 U.S.C. §§ 1981 and 1983)
  - *Richardson v. Hotel Corporation of America*, 332 F. Supp. 519 (E.D. La. 1971), *aff'd mem.*, 468 F.2d 951 (5th Cir. 1972)
  - *Hill v. United States Postal Service*, 522 F. Supp. 1283 (S.D. N.Y. 1981)
  - *Cross v. United States Postal Service,* 483 F. Supp. 1050 (E.D. Mo. 1979)
- These cases are discussed in EEOC Policy Statement on the Issue of Conviction Records under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. (1982) (2/4/87) (http://www.eeoc.gov/policy/docs/convict1.html)
- Note: The EEOC initially issued its Policy Statement on use of arrest and conviction records in 1983, and eventually revised it in 1987 (which is the Policy Statement cited above). Make sure you have the 1987 Policy Statement.
- Note: The *Green* decision is generally viewed as the most important case in this area.
- Note: Court generally give substantial deference to the EEOC's interpretation of the federal anti-discrimination law, but they are not bound by it. The Courts are free to disagree with the EEOC's interpretation of the law, but that doesn't happen too often. In preparing and implementing employment policies in this area, to stay on the safe side, I would view the EEOC Policy Statement as controlling.

Outline from Seminar Agenda

- Potential expansion of retaliation claims.

Retaliation Claims—Prima Facie Cases

- Before getting into the specific prima facie case requirements for a retaliation claim, I would like to stress two distinctions: (1) the distinction between the *substantive anti-discrimination provisions of the law ("don't discriminate because of race"), and the retaliation provisions ("don't retaliate against an employee who has complained about race discrimination"); and (2) the distinction between the federal anti-retaliation provisions and the West Virginia anti-retaliation provision in the Human Rights Act.*
- **West Virginia Prima Facie Case.** In a retaliation claim under the West Virginia Human Rights Act, W.Va. Code § 5-11-9(7)(C), the plaintiff must show the following to establish a prima facie case:
  - a. that the complainant engaged in **protected activity;**
  - b. that complainant's employer was aware of the protected activities;
  - c. that complainant was subsequently discharged and (absent other evidence tending to establish a retaliatory motivation); and
  - d. that complainant's discharge followed his or her protected activities within such period of time that the Court can infer retaliatory motivation.
  - *Colgan Air, Inc. v. West Virginia Human Rights Com'n,* 656 S.E.2d 33, 42 (W.Va. 2007) (emphasis added) *(quoting Syl. pt. 6, Conrad v. ARA Szabo,* 198 W.Va. 362, 480 S.E.2d 801 (1996)).
- ***Federal Prima Facie Case.*** Federal Courts, applying the federal anti-retaliation provisions, have employed a substantially similar test. For example, in *Hughes v. Derwinski,* 967 F.2d 1168 (7th Cir. 1992), the Seventh Circuit held that a retaliation claim under Title VII required the following for a prima facie case:
  - a. The plaintiff engaged in **statutorily protected expression;**
  - b. The plaintiff suffered an adverse action by his employer; and
  - c. There is a causal connection between the protected expression and the adverse action.
  - 967 F.2d at 1174 (emphasis added).
- *So an essential part of a prima facie case for retaliation under employment discrimination laws is that the plaintiff must establish that he or she engaged in some type of "protected activity" or "protected expression". So what is that?*

Retaliation Claims—Protected Activity

- Protected activity for purposes of a retaliation claim consists typically of either (a) complaining about discrimination (against the complainer or someone else), or (b) participating in a proceeding involving a claim of discrimination (submitting a statement to the employer, testifying, either in the complainer's or someone else's proceeding).
- An important thing to understand is that the complaint made by the employee, or the proceeding in which the employee participated, need not be *correct or successful.*
- "Protected activity" on the part of the plaintiff, under West Virginia law, means "expressing opposition to a practice that he or she *reasonably and in good faith believes violates the provisions of the Human Rights Act.* This standard has both an objective and a subjective element. The employee's opposition must be *reasonable in the sense that it must be based on a set of facts and a legal theory that are plausible*. Further, the view must be honestly held and be more than a cover for troublemaking." *Hanlon v. Chambers, 195 W.Va. 99, 112, 464 S.E.2d 741, 754 (1995)* (emphasis added). This means that the plaintiff may be mistaken in complaining about allegedly discriminatory conduct, and the employer may still be liable if it then retaliates.
- For example, in *Kalany v. Campbell,* 220 W.Va. 50, 640 S.E.2d 113 (2006), the West Virginia Supreme Court held that the retaliation provision of the West Virginia Human Rights Act did not require proof (and success before the jury) on underlying sexual harassment allegation; the plaintiff need only prove that she complained in good faith about what she reasonably believed was sexual harassment in violation of HRA.

Retaliation Claims—Who Can Sue?

- In light of these principles so far, under retaliation claims involving complaints about discrimination under either federal or West Virginia anti-discrimination laws, the following people can file suit:
  - Employee who complained about discrimination **against himself** (regardless of whether the employee was correct in asserting that there was discrimination, as long as the employee was complaining in good faith).
  - Employee who complained about discrimination **against a co-worker** (regardless of whether the employee was correct in asserting that there was discrimination, as long as the employee was complaining in good faith).
  - Employee who participated in a **proceeding (by giving a statement, testifying, etc.)** involving a complaint of employment discrimination by either that same employee or someone else (the participation is protected regardless of whether the complaint was ultimately correct, as long as the participating employee was operating in good faith).
- There is also a more controversial area involving *relationships* to the employee who complains of discrimination. For example, what if Bob and wife Mary both work for the employer, Bob complains that he did not get a promotion because of his age, and the employer retaliated against wife Mary, even though Mary herself did not complain of discrimination and Mary did not participate in any proceeding initiated by Bob. The federal courts are in conflict over whether Mary would have a retaliation claim.
- The West Virginia Supreme Court developed the doctrine of "collateral victims" of retaliation in *Bailey v. Norfolk and Western Ry. Co.*, 206 W.Va. 654, 670, 527 S.E.2d 516, 533 (1999), where there was a complaint of retaliation for age discrimination complaints, and persons under 40 were terminated and those persons under 40 had not personally complained about age discrimination. The decision was based on the specific language of the West Virginia anti-retaliation provision:
  - "Pursuant to this section, where the employer engages in activities of any nature, the purpose of which is to cause economic loss, the employer has committed an unlawful discriminatory practice under the Act. Thus, whether entertained as a derivative or an independent claim, individuals who may not otherwise be covered under the specific requirements of the Act can seek relief through the more general provisions of West Virginia Code § 5-11-9(7). In the case sub judice, the five individuals have asserted that they were victims of an unlawful discriminatory practice perpetrated through the Railroad's engagement in discriminatory activities, and we find that relief through section 5-11-9(7) is appropriate. Thus, despite the fact that they had not attained the age of forty at the time of the alleged discriminatory action, they are appropriately considered collateral victims of the discrimination against the members within the protected age group and can be viewed as suffering the same consequences as those within the protected age group."
  - *Bailey v. Norfolk and Western Ry. Co.*, 206 W.Va. 654, 670-671, 527 S.E.2d 516, 532 - 533 (1999).

Retaliation Claims—Supreme Court in *Burlington*

- In *Burlington Northern & Sante Fe Railway Co. v. White, 548 U.S. 53 (2006) ("Burlington Northern v. White"), the US Supreme Court stressed the first of those two distinctions–the difference between the federal substantive and retaliation provision in the anti-discrimination laws. The point there was that the retaliation provisions were broader than the substantive anti-discrimination provisions in 2 ways:*
  - Retaliatory conduct is not limited to employer's action at the workplace, and it is not limited to action taken while the plaintiff is still working for the employer. Furthermore, retaliatory conduct is not limited to "ultimate employment decisions" which have an *economic impact on the employee.* In other words, conduct that could be found to be retaliatory can take place away from the workplace, it can take place after the plaintiff's employment has ended, and it can involve action that does not have a direct economic effect on the employee. This ruling resolved a "conflict" amongst federal appellate courts, some of which had rule that the reach of the retaliation provision in Title VII was limited to the workplace and ended when the plaintiff's employment terminated.
  - Action by the employer may violate the anti-retaliation provision even if it does not cause a tangible loss, such as pay, for the plaintiff. The conduct may violate the law if it "materially adverse" (as opposed to "trivial") to the employee, and might dissuade a "reasonable worker" from "making or supporting a charge of discrimination". So, for example, transfers to different positions, even though they involve no loss in pay or benefits or promotional opportunities, might constitute unlawful action because, if the transfer is to what a reasonable worker would view as a less attractive job, they might dissuade a reasonable worker for complaining of discrimination.

Retaliation Claims—Supreme Court in *Burlington (cont)*

- Those are important distinctions, and that Supreme Court in *Burlington Northern v. White* explained those distinctions as being based on the very different language in the Title VII substantive and retaliation provisions. Here is the language the Court emphasized from Title VII of the Civil Rights Act of 1964, and the Court observed "[t]he language of the substantive provision differs from that of the anti-retaliation provision in important ways":

Substantive Provision	**Retaliation Provision**
"Section 703(a) sets forth Title VII's core anti-discrimination provision in the following terms:" "It shall be an unlawful employment practice for an employer- "(1) *to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or* "(2) to limit, segregate, or classify his employees or applicants for employment in any way *which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." § 2000e-2(a) (emphasis added by Supreme Court).*	"Section 704(a) sets forth Title VII's anti-retaliation provision in the following terms:" "It shall be an unlawful employment practice for an employer *to discriminate against any of his employees or applicants for employment ... because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." § 2000e-3(a) (emphasis added by Supreme Court).*

The Supreme Court then stated: "The underscored [italicized] words in the substantive provision-"hire," "discharge," "compensation, terms, conditions, or privileges of employment," "employment opportunities," and "status as an employee"-explicitly limit the scope of that provision to actions that affect employment or alter the conditions of the workplace. No such limiting words appear in the anti-retaliation provision." *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 61-62 (2006).

So the federal (Title VII) retaliation provision is *different and broader* than the substantive provision. If we then move to the West Virginia retaliation provision, then we see that it is even broader than Title VII (federal) retaliation provision.

Retaliation Claims—WV Provision is Broader

- The retaliation provision of the West Virginia Human Rights Act is substantially broader than the comparable federal anti-retaliation provisions. Section 5-11-9 of the West Virginia Human Rights Act states:
- "It shall be an unlawful discriminatory practice, unless based upon a bona fide occupational qualification, or except where based upon applicable security regulations established by the United States or the state of West Virginia or its agencies or political subdivisions: . . . (7) For any person, employer, employment agency, labor organization, owner, real estate broker, real estate salesman or financial institution to: (A) Engage in any form of threats or reprisal, or to engage in, or hire, or conspire with others to commit acts or activities of any nature, the purpose of which is to harass, degrade, embarrass or cause physical harm or economic loss or to aid, abet, incite, compel or coerce any person to engage in any of the unlawful discriminatory practices defined in this section; (B) Willfully obstruct or prevent any person from complying with the provisions of this article, or to resist, prevent, impede or interfere with the commission or any of its members or representatives in the performance of a duty under this article; or (c) Engage in any form of reprisal or otherwise discriminate against any person because he or she has opposed any practices or acts forbidden under this article or because he or she has filed a complaint, testified or assisted in any proceeding under this article."

Why Are Retaliation Claims Sometimes Easier to Prove?

- **Timing Issues**
- It makes sense that the Courts would require some "closeness" in time between the "protected activity" by the employee and the "retaliation" by the employer. Otherwise, there is no basis for an inference of a connection between the two.
- There are cases in which the plaintiff has some type of more direct evidence of causation (someone supposedly blurts out "I fired him because he complained"), but usually the causation is based on the circumstantial evidence that the employee's complaint was closely followed by the termination.
- The problem for employers is the situation where the complaint is quickly followed by termination. It just can look absolutely horrible to a jury, and the timing creates, informally in terms of juror attitudes, something of a presumption of guilt.
- In *Clark County School Dist. v. Breeden*, 532 U.S. 268, 273-274 (2001), the US Supreme Court stated: "The cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be "very close," *O'Neal v. Ferguson Constr. Co.*, 237 F.3d 1248, 1253 (10th Cir. 2001). *See, e.g., Richmond v. ONEOK, Inc.*, 120 F.3d 205, 209 (10th Cir. 1997) (3-month period insufficient); *Hughes v. Derwinski*, 967 F.2d 1168, 1174-1175 (7th Cir. 1992)." The West Virginia Supreme Court has made it clear, however, that you can prove causation by means other than temporal proximity. "[A] temporal relationship between the protected conduct and the discharge is not the only, or a required, basis for establishing a causal relationship between the two". *Hanlon v. Chambers*, 195 W.Va. 99, 111 n.18, 464 S.E.2d 741, 753 n.18 (1995).

Why Are Retaliation Claims Sometimes Easier to Prove?

- **Lower Threshold of Employer Conduct**
- In *Burlington Northern & Sante Fe Railway Co. v. White,* 548 U.S. 53 (2006) ("Burlington Northern v. White"), discussed in more detail above, the Supreme Court focused on the difference in the language between the "substantive" anti-discrimination provisions in Title VII and the "retaliation" provision, and concluded that action by an employer may violate the anti-retaliation provision even if it does not cause a tangible loss, such as pay, for the plaintiff. The conduct may violate the law if it "materially adverse" (as opposed to "trivial") to the employee, and might dissuade a "reasonable worker" from "making or supporting a charge of discrimination". So, for example, transfers to different positions, even though they involve no loss in pay or benefits or promotional opportunities, might constitute unlawful action because, if the transfer is to what a reasonable worker would view as a less attractive job, they might dissuade a reasonable worker for complaining of discrimination.
- Thus an employer may face liability for the "retaliation" provisions even if there was no economically adverse impact on the employee. That creates a lower threshold for prevailing on a claim, compared to the substantive discrimination provisions (except that hostile work environment sexual harassment does not require economic loss, but then extremely severe conduct is required).

Why Are Retaliation Claims Sometimes Easier to Prove?

- **Retaliation is Not Limited to Workplace Conduct**
- As I discuss above, the Supreme Court held in *Burlington Northern & Sante Fe Railway Co. v. White*, 548 U.S. 53 (2006) that retaliatory conduct is not limited to employer's action at the workplace, and it is not limited to action taken while the plaintiff is still working for the employer.

Recent US Supreme Court Retaliation Decisions

- **Including the *Burlington* case, the US Supreme Court has addressed retaliation claims 4 times in the last 3 years, and all 4 decisions have been against the employer. Here is the complete list, including *Burlington*:**
- *Burlington Northern & Sante Fe Railway Co. v. White*, 548 U.S. 53 (2006) (9-0): Retaliatory conduct is not limited to employer's action at the workplace, and it is not limited to action taken while the plaintiff is still working for the employer, and an employer may be liable for retaliation even if its action would not otherwise be significant enough to constitute a violation of the law's substantive provisions.
- *Gomez-Perez v. Potter*, 128 S. Ct. 1931 (2008) (7-2): Postal Service employee has a claim for retaliation under ADEA, even though the provisions under ADEA for public sector employees did not expressly create such a claim.
- *CBOCS West, Inc. v. Humphries*, 128 S. Ct. 1951 (2008) (7-2): Recognized retaliation claims under 42 U.S.C.§1981, including claims where the plaintiff tried to help another employee. Section 1981 does not expressly include a retaliation claim.
- *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*, 129 S. Ct. 846 (2009) (9-0): Employee engaged in protected activity by completing the employer's questionnaire in connection with a sexual harassment complaint filed by a different employee. Crawford did not herself make a complaint of sexual harassment.

Resources on Retaliation

- EEOC explanation of retaliation law: http://www.eeoc.gov/types/retaliation.html
- EEOC Compliance Manual, Section on Retaliation, http://www.eeoc.gov/policy/docs/retal.html
- EEOC Compliance Manual, Section on Threshold Issues: http://www.eeoc.gov/policy/docs/threshold.html#2-II-A-5 (search for "retaliation")
- *Federal Express Corp. v. Holowecki*, 552 U.S. ----, 128 S. Ct. 1147, 1156, (2008) (EEOC compliance manuals "reflect 'a body of experience and informed judgment to which courts and litigants may properly resort for guidance' " (quoting *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998))); *accord* *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*, 129 S. Ct. 846 (2009) (citing *Federal Express Corp. v. Holowecki* concerning EEOC Compliance Manual)
- EEOC Statistics on Charges: http://www.eeoc.gov/stats/charges.html

Outline from Seminar Agenda

- Employer liability for the acts of non-employees.

Sexual Harassment by Non-Employees

- For sexual harassment cases, there are traditionally three categories of harassers on which the courts focus for determining whether the employer is liable for the alleged misconduct: (1) supervisors, (2) non-supervisory employees (co-workers), and (3) non-employees.
- **1. Supervisory employees.** The test for employer liability for sexual harassment by supervisory employees is discussed above, but generally the employer is vicariously liable for the sexual harassment by the supervisory, without requiring "notice" to the employer. The US Supreme Court's decisions in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 752-754 (1998); and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), then provide employers with the affirmative defense discussed above based on an effectively implemented anti-harassment policy. The West Virginia regulation from the Human Rights Commission incorporates some .but not all of these principles, but, as a practical matters, the WV Supreme Court has been following federal law W.Va. C.S.R. § 77-4-3.1.
- **2. Non-supervisory employees (co-workers).** Here is the EEOC test for employer liability for sexual harassment by non-supervisory employees: "With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action." 29 C.F.R. § 1604.11(d). The West Virginia regulation from the Human Rights Commission is similar but not identical. W.Va. C.S.R. § 77-4-3.2.
- **3. Non-employees.** Here is the EEOC test for employer liability for sexual harassment by non-employees: "An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees." 29 C.F.R. § 1604.11(e). The West Virginia regulation from the Human Rights Commission is identical. W.Va. C.S.R. § 77-4-3.3.
  - This part of the test is identify to the test for non-supervisory employees: "where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action"
  - But here is the *additional* analysis when dealing with non-employees: "In reviewing these cases the Commission will consider the **extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees**." (emphasis added)

Sexual Harassment by Non-Employees

- How do the Courts examine the *additional* analysis relevant to harassment by non-employees? Again, here is the *additional* analysis when dealing with non-employees: "In reviewing these cases the Commission will consider the **extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees**." (emphasis added). 29 C.F.R. § 1604.11(e); W.Va. C.S.R. § 77-4-3.3.
- There is not a lot of case law on this issue. The EEOC issued a decision in EEOC Dec. P 6841, 34 F.E.P. CAS. (BNA) 1887, 1984 WL 23399 where a waitress was being sexually harassment by a customer at the restaurant. The EEOC found in favor of the waitress, concluding the waitress had complained to management about the customer and management did not take appropriate action. The EEOC thought it was significant that:
  - The harasser was not a stranger, but rather a regular and frequent customer, and
  - The owner had a personal friendly relationship with the harasser.
  - The EEOC concluded the owner had the ability to take corrective action. For example, the owner could have told the harasser directly that such conduct would not be tolerated in his restaurant, or the owner could have told the waitress she wouldn't have to wait on this customer. "What is significant, however, is not the [owner's] failure to take these particular actions but, rather, his failure to take any action to assure the [waitress] that he did not condone sexual harassment of his employees and that she would not have to tolerate such conduct by a customer in the future."
- In *Quinn v. Green Tree Credit Corp*., 159 F.3d 759, 766 (2d Cir. 1998), the Second Circuit, without any significant discussion, stated: "Though we need not decide the precise contours of the duty, if any, that employers owe to employees who are subjected to harassment by outsiders such as customers, such a duty can be no greater than that owed with respect to co-worker harassment."
- In *Folkerson v. Circus Circus Enterprises, Inc*., 107 F.3d 754, 756 (9th Cir. 1997), the Ninth Circuit stated: "an employer may be held liable for sexual harassment on the part of a private individual, such as the casino patron, where the employer either ratifies or acquiesces in the harassment by not taking immediate and/or corrective actions when it knew or should have known of the conduct".
- *Magnuson v. Peak Technical Services, Inc*., 808 F. Supp. 500 (E.D.Va. 1992).

Internet Resources: Employment Law Links

- Employment law links on my web site
- http://www.capuderfantasia.com/employment.html

Web sites on West Virginia employment law:

WV Human Rights Commission

HRC: 5 Steps of the Complaint Process and Instructions for Complaint

HRC Forms and Decisions

WV Human Rights Act (prohibiting discrimination)

WV Legislature and pending legislation

WV Supreme Court and its Searchable Opinions

Web sites on federal employment law:

US EEOC, Filing a Charge, Information for Businesses

Dept of Labor: FMLA Info

EEOC Info on Types of Discrimination

US Supreme Court and Opinions and FindLaw Site

Other employment law web sites:

AARP on Age Discrimination, and Report on 50+ Workers

Nolo.com on Discrimination

Lawyers.com on Discrimination

FindLaw on Employment Issues

DOJ on Employment Law

Internet Resources: Government and Law Links

- Government and law links on my web site
  - http://www.capuderfantasia.com/politics.html
  - Scroll down to where it says "Government Sites; United States and West Virginia"

Government Sites; United States and West Virginia

United States Government:

US Constitution and Amendments; Related Documents: Yale Site, National Archives, and Library of Congress; Text and Annotations from Cornell Site, Educational Resources

Treaties: Treaties in Force 2007, Series 1 (Bilateral), Series 2 (Multilateral), Helpful Links, FAQ, Pending Treaties, THOMAS Search, United Nations Collection, Duke Research Site

US Statutes: GPO Collection (Official), Cornell, FindLaw

US Regulations: GPO Collection (Official), Cornell, FindLaw, Federal Register

USA.Gov (main portal for US government)

Organization Chart of US Government, How Our Laws Are Made, US Government Manual, The Plum Book

President, Executive Orders, Signing Statements

U.S. Senate, Byrd, Rockefeller

House of Representatives, Mollohan, Capito, Rahall

US Supreme Court, Oral Argument Schedule (Listen), Justices, Opinions, FindLaw Site, Tour of Building

West Virginia Government:

WV Constitution, WV Code, WV Code of State Rules

WV State Web Site, Elected Officials

Governor

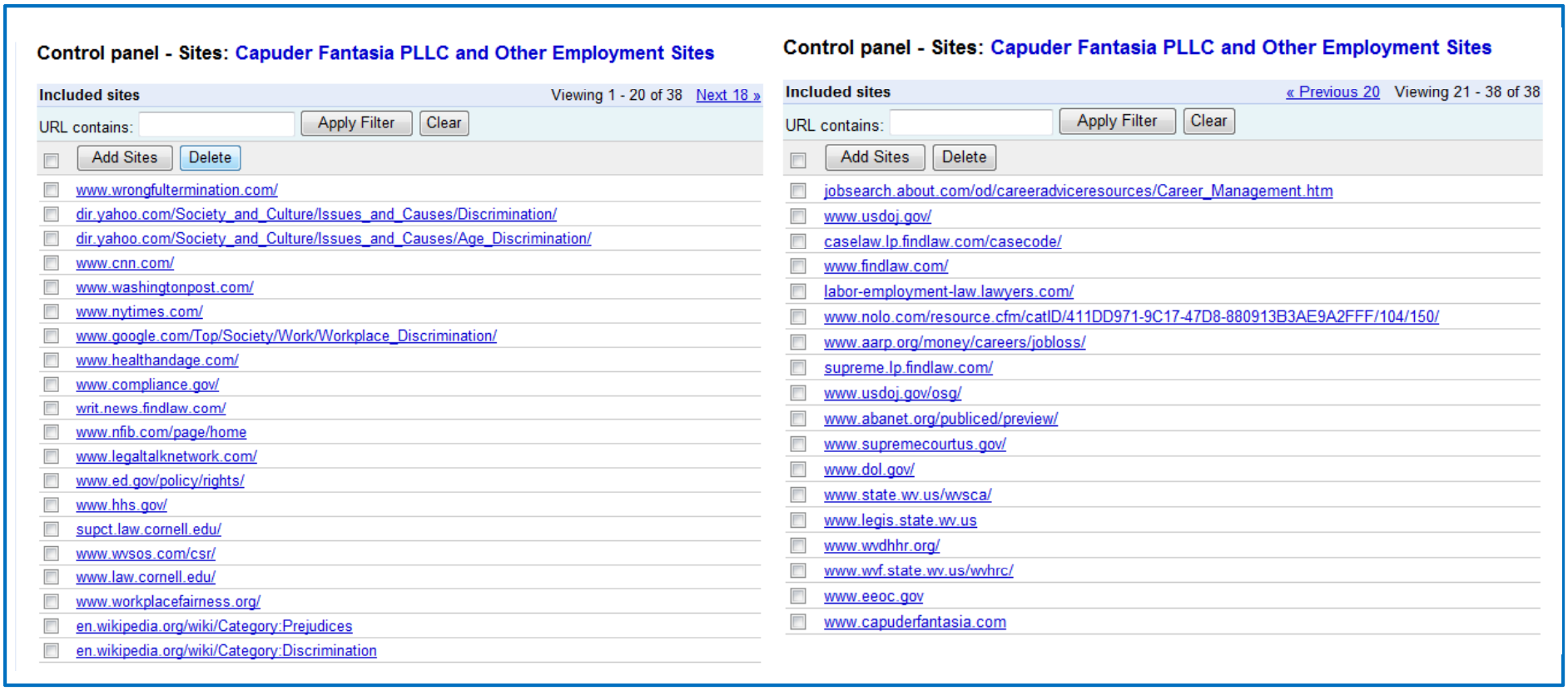
Senate, Bill Status

House of Delegates

Schedule, Justices

Internet Resources: Customized Google Query

- Customized Google search on my web site
- http://www.capuderfantasia.com/search_googleplus.html
- This customized query searches through only the web sites that I have specifically identified in setting up the custom search. So the customized query will not pick thousands of useless "hits". The sites I have selected and law and news sites. Those sites are listed below:



Internet Resources: EEOC Site

- Equal Employment Opportunity Commission
- Home page: http://www.eeoc.gov/
- Enforcement Guidance: http://www.eeoc.gov/policy/guidance.html
- Laws: http://www.eeoc.gov/policy/laws.html
- Regulations: http://www.eeoc.gov/policy/regs/index.html
- Help for small business: http://www.eeoc.gov/employers/smallbusinesses.html