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***The New Normal:  
An Update on  
Employment Law***  
*October 9, 2015*

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**EEOC Federal Law Enforcement**

- **Title VII**
  - Race
  - Religion
  - National Origin
  - Color
  - Sex /Pregnancy
  - Genetics
- **ADEA** (Age Discrimination in Employment Act)
  - Age (≥ 40 years old)
- **ADA** (Americans with Disabilities Act)
  - Disabilities (actual or perceived)

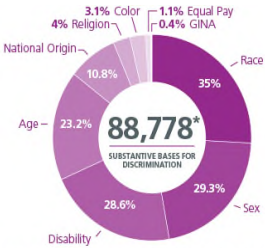


## Theories of Discrimination

- Disparate Treatment
- Disparate Impact
- Harassment/Hostile Work Environment
- Reasonable Accommodations
- Retaliation



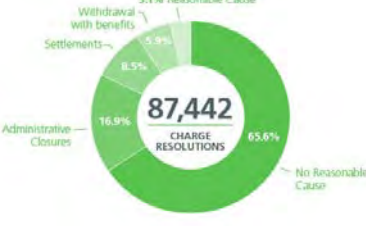
## EEOC Charge Activity – FY 2014



Substantive Basis	Percentage
Race	35%
Sex	29.3%
Disability	28.6%
Age	23.2%
National Origin	10.8%
Religion	4%
Color	3.1%
GINA	0.4%
Equal Pay	1.1%

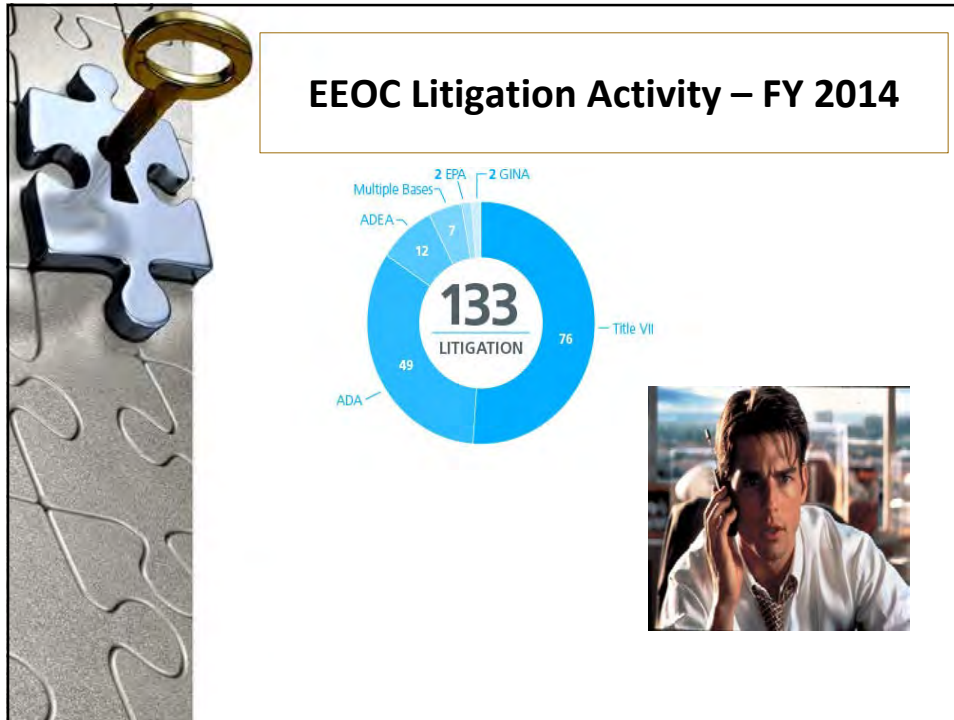
**88,778\***  
SUBSTANTIVE BASES FOR DISCRIMINATION


\*Some charges contain more than one substantive basis for discrimination and/or a retaliation claim.



Resolution Category	Percentage
No Reasonable Cause	65.6%
Administrative Closures	16.9%
Settlements	8.5%
Withdrawal with benefits	5.9%
Reasonable Cause	3.1%


**87,442**  
CHARGE RESOLUTIONS






## Young v. UPS (2015) SCOTUS

- Part-time delivery driver required to lift up to 70 lbs. as an essential function of their job, and up to 150lbs with assistance.
- Pregnant & restricted to not lift more than 20 lbs; asked for an accommodation to work light duty.
- UPS denied request for light duty; 70 lbs. was an essential function of the job. She remained on unpaid leave until after her child was born.
- UPS did however accommodate workers with light duty if on-the-job injury or a disability.
- Young brought suit and lost in the trial court. She appealed.
- 4<sup>th</sup> Circuit: Affirmed. The PDA did not create an independent legal right to accommodations or leave.




## Young v. UPS (cont'd)

- SCOTUS vacated the 4<sup>th</sup> Circuit decision affirming summary judgment for UPS and remanded the case.
- SCOTUS held: A pregnant employee can establish a *prima facie* case of disparate treatment by showing that: (1) she belongs to a protected class; (2) she sought an accommodation; (3) the employer did not accommodate her; and (4) the employer accommodated others “similar in their ability or inability to work.”
- If these elements are established, the employer has the burden of demonstrating a legitimate, nondiscriminatory reason for denying the accommodation. However, the reason must be more than an employer’s claim that it is more expensive or less convenient to add pregnant women to the categories of employees that the employer accommodates.




## EEOC Pregnancy Guidelines (July 2014)

- Issued *after* SCOTUS granted cert. in *Young v. UPS* but *before* SCOTUS decision.
- Guidance is not the law.
- Protected classes under the PDA according to EEOC:
  - Current pregnancy
  - Past pregnancy
  - Potential pregnancy (i.e. infertility treatment)
  - Medical conditions related to pregnancy
- The EEOC takes the position that a pregnant employee is entitled to reasonable accommodation as that term is defined by the ADA. The undue hardship analysis applies if the comparator is a disabled employee.
- Prohibits policies reserving light duty assignment to those injured on the job.




## *EEOC v. Abercrombie & Fitch* (2015)

- Elauf, a 17 year old Muslim woman, wore a black headscarf (hijab) to an interview for a sales job at A&F. Elauf did not specifically state that she needed a religious accommodation nor did A&F ask if she needed an accommodation.
- Abercrombie denied Elauf the job because wearing the headscarf violated the company's "look policy" which prohibits head wear.
- The EEOC sued A&F on behalf of Elauf, claiming that A&F failed to provide her a reasonable religious accommodation in violation of Title VII. DCT granted summary judgment in favor of the EEOC.
- 10th Circuit reversed: Elauf never informed A&F prior to its hiring decision that she wore her headscarf for religious reasons and needed an accommodation for that practice. Therefore, A&F had no notice.
- In June 2015, SCOTUS ruled in favor of Elauf and the EEOC. The Court concluded that A&F assumed that, because Elauf wore a headscarf, that she would not comply with the policy because of her religious beliefs.




## ***EEOC v. United Airlines (2015)***

- ***U.S. Airways v. Barnett (2002)***
  - Mandatory reassignment not reasonable given company's seniority system.
- **Federal Circuits split. Examples:**
  - 10th and D.C. Circuits - "mandatory preference"
  - 8th Circuit - "opportunity to compete"
- ***EEOC v. United Airlines:***
  - 7<sup>th</sup> Cir: ADA mandates reassignment to open position if qualified provided (1) ordinarily reasonable; and (2) not an undue hardship. Remanded case to determine if transfer to vacant position would be ordinarily reasonable. Noted no seniority policy existed.
  - United Airlines appealed.
  - Issue: Whether an ER should automatically place a qualified individual with a disability seeking reassignment to an open position when he/she cannot be reasonably accommodated in his/her current position. **The Supremes declined to review.**




## **What's Up with GINA?**

- Genetic Information Non-Discrimination Act (GINA)
  - Prohibits use of genetic information in employment decision-making
  - Restricts employers from requesting, requiring or purchasing genetic information
  - Requires that genetic information be maintained confidentially and strictly limits its disclosure
- Genetic Information
  - Genetic tests of the individual or his/her family members;
  - Family medical history
  - An individual's request for, or receipt of, genetic services, or participation in clinical research that includes genetic services; or
  - Genetic information of a fetus carried by an individual or by a pregnant family member



## **EEOC Cases - GINA**


- ***EEOC v. Fabricut (2013)***  
– Settled \$50,000
- ***EEOC v. All Star Seed (2014)***  
– Settled \$187,500
- ***EEOC v. Founders Pavilion (2015)***  
– Settled \$370,000



## **EEOC Wellness Guidelines (2015)**


- Voluntary means no required participation nor penalty for non-participation
  - In order to be voluntary:
    - Incentives (reward or penalty) cannot exceed 30% of total of employee only coverage
- Authorization must meet minimum standards:
  - Written in a manner that individual providing the GI is reasonably likely to understand;
  - Describe the type of GI to be obtained; and
  - Describe the restrictions on disclosure of GI
  - Voluntary, i.e. incentives (reward or penalty) cannot exceed 30% of total of employee only coverage
- Any medical exam/inquiry must be voluntary, meaning employer cannot:
  - Deny coverage under any group health plan or benefits package within a plan for non-participation or limit extent of benefits
  - Take any adverse employment action, retaliate against, or interfere with, coerce, intimidate or threaten employees






## ***EEOC v. Mach Mining (2015)***

- EEOC issued for cause determination; failure to hire women based on gender
- When EEOC issues for cause determination, it has an obligation to conciliate the claim in good faith prior to filing lawsuit
- EEOC sues; Company moves to dismiss arguing a failure to conciliate in good faith. EEOC argues courts has no authority to review conciliation efforts
- April 2015, SCOTUS Decision:
  - EEOC must inform the company of specific allegations: (a) what the company has done; and (b) which employees or class of employees have suffered as a result.
  - EEOC must also engage in some form of discussion to afford the employer a chance to discuss and rectify a specified discriminatory practice.




## **FMLA New Rule**

- **Feb. 2015**, DOL issued Final Rule revising definition of “Spouse” under FMLA. Husband or wife as defined or recognized in the state where the individual was married (“place of celebration”), and specifically includes individuals in same-sex and common law marriages. Effective March 2015
- **June. 2015**, *Obergefell v. Hodges (2015)*
  - SCOTUS: Ruled it is unconstitutional to *ban same-sex marriages*.




## Gender Identity/Transgender Issues


- **Title VII Does Not Apply** (Stereotyping claims only)
- **ADA Does Not Apply** (Excluded from coverage)
- **Exec. Order 13672** (2013)
  - Gender identity protections for federal contractors
- **OHSA Guidelines for Restroom Usage** (June 2015)
- **Employment Non-Discrimination Act (ENDA)**
  - Would prevent discrimination based on gender identity
  - Passed Senate in November 2013; yet to pass House



## EEOC Case Law – Gender Identity


- ***EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*** (E.D. Mich. September 25, 2014)
- ***EEOC v. Lakeland Eye Clinic*** (M.D. Fla. September 25, 2014)
- ***EEOC v. Secretary of the Army*** (2015)
- ***EEOC v. Deluxe Financial Services Corp.*** (S.D. Minn. 2015)






## State Law – Gender Identity

- **19 States Passed Laws with Protections**
  - CA, CO, CT, DE, HA, IL, IA, MA, MD, ME, MN, NV, NJ, NM, OR, RI, UT, VT, and WA
- **States with laws re: Restroom Use**
  - CO, DE, IA, OR, VT, and WA
- **Texas has Several Cities with Local Laws**
  - Austin, Dallas, El Paso, Fort Worth, San Antonio



## Texas Cases – Transgender Issues


- *Lopez v. River Oaks Imaging* (S.D. Tex. 2008)
  - Biological male who presented as female
  - Title VII protects transgender employees based on stereotypes
- *Jamal v. Saks & Co.* (S.D. Tex. 2014)
  - Petition alleged transgender woman suffered harassment
  - Settled out of court
- *In Re Jared Woodfill et al.* (Tex. 2015)
  - Stuck down Houston Hero Law
  - Because petition contained requisite number of signatures to repeal ordinance, City Council should have performed ministerial act of reconsidering ordinance or put to popular vote
  - Will be put to vote in November 2015 (Prop One)




## National Labor Relations Act (NLRA): PCA Aggression

**Protected Concerted Activity**

“Employees have the right to act together for their mutual aid and protection, **even if they are not in a union**”.



The screenshot shows the National Labor Relations Board website. The header includes the NLRB logo and the text 'NATIONAL LABOR RELATIONS BOARD'. Below the header is a navigation menu with links: Home, Rights We Protect, What We Do, Why We Are, Cases & Decisions, News & Outreach, Reports & Guidance. A search bar is also present. The main content area features a blue banner with the title 'Protected Concerted Activity' and a photograph of a group of workers. The text on the banner reads: 'Employees have the right to act together for their mutual aid and protection, even if they are not in a union. Find out more through the stories of workers across the country on this dynamic page.'




## NLRA & PCA

- **Examples:**
  - “Two or more employees addressing their employer about improving their pay
  - Two or more employees discussing work-related issues beyond pay, such as safety concerns, with each other.
  - An employee speaking to an employer on behalf of one or more co-workers about improving workplace conditions”.



## NLRA - Recently Expanded Rights

- **Company Email** - Employees may use company email to solicit each other for the union so long as they do so during non working time.
- **Social Networking** - Employees cannot be disciplined for criticizing the company or its managers on Facebook when discussing terms and conditions of employment with one or more co-workers.
- **Confidentiality of Company Investigations** - Employer cannot make broad statement to employee requiring confidentiality of investigation.
- **Misconduct During Protected Concerted Activity** – Extreme profanity and threatening behavior may be protected depending on circumstances.



## FLSA (Fair Labor Standards Act)

- **Covers:**
  - **Minimum Wage**
  - **Overtime**
  - **Exempt v. Non-Exempt Positions**
- **Executive Order 13568**, effective Jan. 1, 2015
  - Federal contractors/subcontractors required to pay minimum wage of **\$10.10/hour** to employees working ON or IN SUPPORT of the federal contract.
- **Proposed Regulations/What's Next:**
  - **Salary Test** - \$455/week to \$970/week
  - **Duties Test** - Expect more restrictive factors to qualify for exemptions
  - **Minimum Wage** – anticipate new national minimum wage, possibly tied to inflationary adjustments



***Thanks!***

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