



**Monday, October 20**  
**2:30 pm-4:00 pm**

## **203 Handling Your First Discrimination or Wrongful Termination Complaint: EEO Investigation Basics**

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## Faculty Biographies

### Cathi J. Hunt

Cathi J. Hunt is associate general counsel for Progress Energy, a Fortune 250 energy holding company headquartered in Raleigh, North Carolina. Progress Energy provides service to over three million customers in North Carolina, South Carolina, and Florida. Ms. Hunt serves as lead employment and benefits law counsel to the company.

Prior to joining Progress Energy, she practiced with regional boutique litigation firm, Cranfill, Sumner and Hartzog, LLP. Ms. Hunt has conducted sensitive investigations, provides legal oversight to internal investigations and has defended numerous EEOC charges and litigation matters related to investigation outcomes.

Ms. Hunt also serves as a director on the board of interact, a North Carolina domestic violence and sexual assault response agency, and is chair of its human resources committee. She also serves as a volunteer judge for Teen Court, a juvenile court diversion program. Together with her co-chair and committee, she designed the North Carolina Justice Teaching Institute for secondary school teachers and brought the Council for Civic Education's "We the People" constitutional law program under the umbrella of the North Carolina Bar Association. For other pro bono efforts, she was recognized as an outstanding volunteer by the Wake County Volunteer Lawyers Program.

Ms. Hunt received her BA from Reed College, her MA, with honors, from the University of Melbourne in Australia, and her JD, cum laude, from Boston College Law School.

### Craig S. Long

Craig S. Long is general counsel for Community Choice Credit Union/Capital Financial Service Corporation based in Johnston, Iowa. As a sole practitioner and corporate generalist for a small financial institution, he brings a unique, small office perspective to employment issues. His duties include the investigation of employee misconduct and the implementation of employment-related compliance and training programs.

Prior to assuming his position with Community Choice/Capital Financial, Mr. Long was in private practice specializing in litigation, including but not limited to the prosecution and defense of employment law matters.

He is an active member of the Iowa State Bar Association, the Polk County Bar Association, the Polk County Volunteer Lawyer's Project, and ACC. Mr. Long also participates in the activities of the Des Moines Radio Amateur Association, the Polk County Amateur Radio Emergency Service, and is a volunteer counsel for the American Radio Relay League.

Mr. Long received a BA from Gustavus Adolphus College in St. Peter, Minnesota, and a JD from Drake University Law School in Des Moines, Iowa.

### Alyssa T. Senzel

Alyssa Senzel is currently assistant general counsel at Blackboard Inc., where she handles all domestic and international employment issues.

Prior to working for Blackboard, Ms. Senzel was counsel at Patton Boggs LLP in Washington, DC. She focused her practice on all aspects of employment law, including counseling, training, and litigation. She has trained employees and HR professionals regarding a variety of issues, including but not limited to investigating employee misconduct, handling EEOC charges, documenting terminations, and preventing harassment and discrimination.

Ms. Senzel also provides AB 1825 sexual harassment training for managers and supervisors in California.

She has a BA from the University of Pennsylvania and a JD from the University of Virginia School of Law.

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**Overview**

- Discrimination and wrongful termination claims and defenses
- Defending an EEOC Charge
- Tips on preventing and responding to discrimination allegations

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**Exceptions to Employment at Will Doctrine**

Anti-Discrimination Laws –  
Federal and state statutes and other laws prohibiting employers from adverse employment actions based on unlawful discrimination.

Other Exceptions

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**Employment at Will Doctrine**

Termination of employment --  
At any time, for any reason

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**Anti-Discrimination Statutes**

- Title VII of Civil Rights Act of 1964
  - Pregnancy Discrimination Act of 1978
  - Civil Rights Act of 1991
- Americans with Disabilities Act of 1990 (ADA)
- Age Discrimination in Employment Act of 1967 (ADEA) and Older Workers Benefit Protection Act of 1990 (OWBPA)
- Family and Medical Leave Act of 1993 (FMLA)

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**Anti-Discrimination Statutes (cont.)**

- Equal Pay Act of 1963 (part of FLSA)
- Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA)
- Vietnam-Era Veteran's Readjustment Assistance Act of 1974
- National Labor Relations Act of 1935 (NLRA)
- Sarbanes-Oxley Act of 2002 – Whistleblower Provisions (SOX)
- Genetic Information Nondiscrimination Act of 2008 (GINA)

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**Title VII of the Civil Rights Act of 1964**

Prohibits employment discrimination based on:

- Race
- Color
- Religion
- Sex
- National Origin
- Pregnancy

Prohibits retaliatory action against employee

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**Standard Defense**


Always examine whether the employer had a **legitimate, non-discriminatory reason** for the adverse employment action at issue to raise as a defense.

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**Title VII of the Civil Rights Act of 1964**

- Enforced by Equal Employment Opportunity Commission (EEOC)
- 82,792 charges of discrimination received by EEOC in 2007
 

TOP 3: Race	30,510
Retaliation	26,663
Sex/Gender	24,826


 **Defenses to Title VII Claims**

- Employer has less than 15 employees
- Employer Anti-Harassment Policy
- Employer took action to prevent and promptly correct harassment
- Wage differences are based upon merit, education, seniority, and quantity or quality of production


 **Defense to Title VII Claims – Business Necessity Justification**

The practice must be:

**Job Related**  
and  
**Consistent With Business Necessity**

 **Defenses to Title VII Claims**

- Bona Fide Occupational Qualification (BFOQ)
  - Applicable to gender, national origin, religion, e.g.,
    - Requiring a female actor for a female role for purposes of authenticity
    - Requiring a Catholic college chaplain to be of Catholic faith
    - Height and weight requirements

 **Age Discrimination in Employment Act of 1967 (ADEA)**

- Protects individuals 40 years of age or older
- Applies to employees and applicants
- Retaliation provision
- Enforced by EEOC



### Defenses to ADEA Claims

- Employer has less than 20 employees
- BFOQ -- reasonably necessary to the normal operation of the particular business
  - e.g., pilot and bus driver mandatory retirement age
- Reasonable factor other than age
- Employee works in a foreign country and compliance with ADEA would cause employer to violate laws of that country



### Defenses to ADA Claims

- Employer employs less than 15 people
- Business necessity
- Direct threat
- Infectious and communicable diseases



### Americans with Disabilities Act of 1990 (ADA)

- Protects qualified individuals with disabilities
  - Qualified** – Possesses skill, experience, education and job-related requirements for the position who can perform with essential functions of the job with or without reasonable accommodation
  - Disability** – Physical or mental impairment that substantially limits one or more major life activities
- Requires Reasonable Accommodation
- Retaliation provision



### Defenses to ADA Claims (cont.)

- Individual cannot perform “essential functions” of the job
- Individual is not “disabled”
- Individual is not “qualified”
- Accommodation imposes undue hardship



### Equal Pay Act of 1963

- Protects employees who perform substantially equal work from sex-based wage discrimination
  - Substantially same skill, effort, and responsibility
- Enforced by EEOC



### Family Medical Leave Act of 1993

- Employers must grant eligible employees up to 12 workweeks of unpaid leave during any 12 month period:
  - birth and care of a newborn child
  - placement of a foster child with employee
  - care for spouse, child, or parent with a serious health condition
  - employee unable to work due to a serious health condition
- Employee maintains benefits while on leave
- Employee right to reinstatement
- Retaliation protection



### Defenses to EPA Claims

- Pay differentials are based on:
  - Seniority
  - Merit
  - Education
  - Production quantity or quality
  - Any factor not related to gender



### Defenses to FMLA Claims

- Employer employs fewer than 50 employees within 75 miles of worksite
- Employee was not employed for prior 12 months or did not work 1,250 hours during that period
- Employee or employee's family member did not have a "serious health condition"



### Uniformed Services Employment and Reemployment Rights Act (USERRA)

- Prohibits denial of employment and benefits to members of the uniformed service based on obligation for service (including Armed Forces Reserve and National Guard)
- Preserves health insurance coverage and other benefits
- Retaliation provision



### National Labor Relations Act of 1935

Guarantees employees' right to engage in "protected concerted activity"

- employee speaking to employer on behalf of co-workers about improving workplace conditions
- employees discussing workplace conditions



### Defenses to USERRA Claims

Denial of reemployment permissible if:

- The action would have been taken in absence of the service
- Assisting the individual to become qualified for the position would pose "undue hardship" (e.g., a disability)
- Position was for a brief, non-recurrent period (e.g., a seasonable job)



### Retaliation

- Employers may not retaliate against applicants or employees who complain about or file claims alleging discrimination
- Most anti-discrimination statutes have express anti-retaliation provisions
- State law can provide retaliation protection
- Section 1981 of the Civil Rights Act of 1866
- U.S. Supreme Court *Burlington Northern* standard





### Section 1981 (42 U.S.C. § 1981)

- Prohibits racial discrimination in contract formation and enforcement, including employment contracts (including employment at will contracts)
- In *CBOCS West, Inc. v. Humphries* (U.S. 2008) -- Section 1981 and the ADEA cover claims of workplace retaliation
- More expansive than Title VII
  - No EEOC complaint needed
  - Four year statute of limitations
  - No cap on punitive or compensatory damages
  - Applies to employers with fewer than 15 employees



### State Anti-Discrimination Laws

- State versions of the Civil Rights Act
- Disability acts
- Retaliatory employment discrimination acts
  - e.g., protection for employees filing Workers' Compensation and Wage and Hour claims
- Sexual Orientation acts
  - As of November 2007 -- CA, CT, CO, DC, HI, IL, IO, MA, ME, MD, MN, NE, NH, NJ, NY, OR, RI, NE, WA and WI
- Age Discrimination against Young People acts
  - E.g., *Bergen Commercial Bank v. Sisler*, 157 N.J. 188 (1999)



### *Burlington Railway v. White Standard* (U.S. 2006)

- Employer liable under Title VII for retaliatory actions that “could well dissuade a reasonable worker from making or supporting a charge of discrimination.”
- Action is likely to deter employee from approaching EEOC



### Other State Law Exceptions to Employment at Will – Wrongful Termination Claims

- Express contractual requirements
- Implied contract
- Promissory estoppel
- Covenant of good faith and fair dealings
- Public policy



### Outline

- You've got the charge – What now?
- Investigating the issue(s)
- Drafting a persuasive position statement
- Responding to requests for information
- On-site investigations/witness interviews/fact finding conferences
- Resolution



### The Charge – The Basics

- Size of company
  - Title VII, ADA – 15 employees
  - ADEA – 20 employees
  - Equal Pay Act – 1 employee
- Check timeliness
- What is EEOC asking of company?
  - No action?
  - Position statement?
  - Request for information?



### The Charge – The Basics

- Employee may file within 180 days or 300 days if deferral jurisdiction
- 10 Day Notice from EEOC
- Title VII, ADA, ADEA, Equal Pay Act
- Substance of complaint
- Info on mediation and next steps
- State/local agency rules



### Internal Investigation and Procedure

- Are allegations a surprise?
  - Why?
  - If so, how can problem be fixed in future?
- Has the issue already been investigated?
  - If not, you'll need to do an internal investigation



### Internal Investigation and Procedures

- Gather facts
  - Avoid putting people on the defensive
  - Talk to complainant?
- Identify witnesses
- Review company policy
- Documentation
- No retaliation



### Internal Procedures

- Litigation hold letter – samples:
  - <http://www.acc.com/resource/index.php?key=7511>
  - <http://www.acc.com/resource/v9164>
  - Implementing Legal Holds:  
<http://www.acc.com/infopaks/implementing.php>
- What to instruct witnesses
- Prepare to respond to media inquiries
- Other?



### Internal Procedures

- Who do you tell?
  - Insurance carrier
  - Those who need to know but ONLY those who need to know
  - May differ depending on whether or not the individual is an applicant, employee or former employee
  - May differ depending on what the EEOC is asking of you (e.g., no action required)



### Time Out...

- Is a position statement the right way to go?
- Should company mediate?
- Factors in the decision
  - Is it likely company did discriminate or take action that is difficult to explain?
  - Does it make economic sense to settle rather than fight?

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### Position Statement

- Tell a story – avoid a rambling history of the world
- Use clear language – the EEOC may not understand your company's acronyms and jargon
- Check your facts – confirm that what you are saying is accurate before you say it
- Tell the full story
- Be persuasive

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### Position Statement -- Format

- Opening statement
- Brief company description – keep it simple
- EEO policies
- Employee's history at the company – explain performance problems, attendance problems, makeup of employee's department, etc.
- Address specific items raised in charge, if not already addressed in body of statement
- Other defenses?
- Brief conclusion requesting dismissal

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### Position Statement

- Focus on the issues raised in the Charge

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### Request for Information (RFI)

- What is it?
  - Specifically tailored or standard questions
- Don't ignore it
- Focus on relevant time period only
- "similarly situated"
  - Who should be considered to be in the same or similar situation (not hired, not promoted, etc.)

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### Agency Staff

- Establish a rapport
- Extensions of time – ask for them, but sparingly
- May be able to negotiate the RFI once you determine what agency is really looking for

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### EEOC Next Steps

- Fact-finding conference
  - May be a good way for you to gather information
- Telephone interviews
- Determination
  - Finding of no discrimination
  - Finding of discrimination

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### EEOC Possible Next Steps

- Request for more information
  - May be an indication of which way agency is leaning
  - Investigator may just need more to write it up
- On-site investigation
  - May want to interview some of the key players
  - May include a record review

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### On-Site Investigation – When Likely?

- Timely processing (Is statute of limitations about to expire? Is interim relief necessary?)
- Nature or scope of the evidence
- Previous unresponsive experiences with company
- Preservation of evidence (often with recruitment, hiring, referral cases)
- Nature of allegation (some issues more appropriate for on-site)



### On-Site Investigation

- Try to prevent or at least limit scope
- Be prepared -- review files, have meeting space available
- Try to limit witnesses
- Sit in on management interviews
- Prepare management
- Discourage tours - no roaming allowed



### The Finding

- Cause
- No Cause and the Right to Sue Letter
  - Complainant will get a right to sue letter informing him/her of right to sue in federal court within 90 days of receipt
  - Have 90 days to file suit (2 years for Equal Pay Act)
- Other Dismissals
  - Administrative
  - No jurisdiction
  - Unable to locate complainant



### Fact-Finding Conference

- Not mandatory (usually)
- May be an opportunity for assistance with inexpensive settlement
- Be prepared:
  - Prepare list of questions for investigator to ask
  - Decide on spokesperson
  - Prepare conference attendees as if for depositions



### Dismissal and Notice of Rights

- EEOC Form 161
- Explains the reason the EEOC is closing its file
- Notice of Suit Rights



### Developing and Implementing an EEO Policy

- Basic contents of an EEO policy
- Why an effective EEO policy can be so important -- vicarious employer liability under *Faragher/Elterth*



### Basic Contents of an EEO Policy

- Scope and application
- Identification of prohibited behaviors
- Penalties for violating the policy
- Complaint process details
- Alternative Dispute Resolution (if appropriate)
- Proper distribution among all employees



### Benefits of an EEO Policy

- Implementing an EEO policy can:
  - Help avoid claims of employment discrimination.
  - Assist in ensuring your company is in compliance with laws and regulations.
  - Can serve as a defense against potential and/or pending lawsuits.
  - Enables in-house counsel to demonstrate value and educate the client.



### Scope and Application

- A properly designed policy should apply all terms and conditions of employment:
  - Recruitment
  - Hiring/firing
  - Layoffs/downsizing
  - Promotion/demotion
  - Training
  - Pay
  - Other



### **Types & Forms of Prohibited Behaviors**

- A policy should include federal, state and local laws applicable to your company's specific locations.
- Primary federal protected categories:
  - Race
  - Color
  - Religion
  - Sex
  - National Origin
  - Disability
  - Age



### **Consequences of Violating the Policy**

- An effective policy must clearly and unequivocally communicate the consequences of violating the policy.
- For example:
  - Suspension;
  - Demotion;
  - Transfer;
  - Termination.



### **Types and Forms (cont.)**

- Examples of other forms of discrimination which might be included with a EEO policy:
  - Associational discrimination
  - Pregnancy discrimination
  - Genetic information discrimination
  - Marital or family status
  - Military/veteran status



### **The Complaint Procedure**

- Provide a clear and conspicuous means of reporting possible policy violations
- Clearly designate EEO Officers outside the chain of command to field complaints
- Provide alternatives to immediate supervisors or managers
- Require designated persons and supervisors to report instances of possible misconduct





### Complaint Procedure (cont.)

- The complaint process should:
  - Assure protection against retaliation
  - Assure employees that the confidentiality of complaints will be protected to the fullest extent possible (but don't promise secrecy)



### Suggested Pre-employment Practices

- Application
- Background checks
- Reference checks
- Standardized interview process
- Training interviewers
- Offer letters



### Policy Distribution

- *Everyone* gets a copy!
- Have employees sign a copy of the policy
  - Many employers give their employees two copies; one to sign return to the employer, and one to keep
- Consider posting the policy in the workplace
- Incorporate the policy into the employee handbook



### Demonstration of the Importance of Having an Effective EEO Policy

- *Fragher v. City of Boca Raton*, 524 U.S. 775 (1998)
- *Ellerth v. Burlington Industries, Inc.*, 524 U.S. 742 (1998)



### Faragher/Ellerth (cont.)

- If a “tangible employment action” results from the refusal of an employee to submit to a “supervisor’s” sexual demands, the employer is strictly liable for the supervisor’s actions and without the use of an affirmative defense
- Nondiscriminatory explanations may still be offered



### Practical Application & Cases

- The Supreme Court has stated that an employer may be able to prove the first prong of the defense by proving it had an anti-harassment policy in place with a complaint procedure. *Burlington Industries*, 524 U.S. 765; *Faragher*, 524 U.S. at 807-08.



### Faragher/Ellerth (cont.)

- However, even if a “tangible employment action” did not result from the refusal, an employer will still be held liable unless it can establish the following:
  1. Employer exercised reasonable care to prevent and correct sexually harassing behavior; and
  2. Plaintiff unreasonably failed to take advantage of preventative or corrective opportunities provided by an employer or to otherwise avoid harm.



### Practical Application & Cases

- Failure to prove first element:
  - The 4<sup>th</sup> Circuit found that an employer failed to prove the first prong of the defense because its policy against sexual harassment, while covering “sexual harassment, sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature,” did not specifically cover harassment based upon the basis of gender that is not overtly sexual in nature. *Smith v. First Union Nat'l*, 202 F.3d 234 (4<sup>th</sup> Cir. 2000).



### Practical Application & Cases

- Successful application of first element:
  - Are sexual harassment complaint procedures reasonable when the only person *within a particular store* to whom a complaint can be made is also the aggressor? Yes, as long as the policy specifically designates other individuals, such as a district or regional manager, to also receive complaints. *Madray v. Publix Supermarkets, Inc.*, 208 F.3d 1290 (11<sup>th</sup> Cir. 2000).



### Practical Application & Cases

- Unsuccessful application of first element:
  - Plaintiff alleged that she and two co-workers had been harassed by the same person, and that the employer had ignored the complaints by the other two women.
  - 4<sup>th</sup> Circuit held that, “in certain circumstances, an employer, whose tepid response to valid complaints of sexual harassment emboldens would-be offenders, may be liable if a vigorous response would have prevented the abuse.”



### Practical Application & Cases

- Correction of prohibited behavior:
  - An employer was found to have responded adequately to an allegation of harassment when the employer: (1) informed the alleged perpetrator that the allegations were serious; (2) instructed the perpetrator to stay away from the complainant; and (3) transferred the perpetrator to another shift. *Star v. West*, 237 F.3d 1036 (9<sup>th</sup> Cir. 2001).
  - The adequacy of the employer's actions to remedy the situation are more important than the labels which may be assigned to particular remedies, i.e., use of the word “discipline.”



### Useful Resources

- U.S. Department of Labor: [www.dol.gov](http://www.dol.gov)
- EEOC: [www.eeoc.gov](http://www.eeoc.gov)
- State-by-state employment law summary: <http://www.acc.com/infopaks/emplawsummary.php>
- Internal investigations: <http://www.acc.com/infopaks/intinvest.php>
- Responding to EEO charges: <http://www.acc.com/infopaks/employment/eeodiscrimination.php>
- EEOC Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors <http://www.eeoc.gov/policy/docs/harassment.html>