209 - Employment Law Update

Frank Lopez
Assistant General Counsel
Ryder System, Inc.

Anne Minteer
Senior Attorney
Cubic Corporation

Christine Zebrowski
President and General Counsel
Overbrook Resources

Faculty Biographies

Frank Lopez

Frank Lopez is assistant general counsel and director of the labor, employment, and benefits law group at Ryder System, Inc. in Miami, Florida. His responsibilities include providing legal counsel and advice to human resources, labor relations, operations, and executives on all aspects of labor and employment law; managing employment related litigation matters; handling all employment related claims, conducting labor arbitrations; representing Ryder before the National Labor Relations Board with regard to elections and unfair labor practices; assisting labor group in labor campaigns and negotiations; and other labor-related legal advice and strategy.

Mr. Lopez was formerly as associate at Fisher & Phillips LLP, a national labor and employment law firm.

He received a B.A. from Florida International University and is a graduate of Emory University School of Law.

Anne Minteer

Anne E. Minteer is a senior attorney with Cubic Corporation, in San Diego, where she has represented the company and its subsidiaries in all legal matters relating to labor and employment law for over 15 years. Cubic operates two major business segments, defense applications and transportation systems, and employs approximately 6,000 employees world-wide. Ms. Minteer advises management and human resources on employee relations issues as well as wage and hour and immigration law matters. Ms. Minteer is responsible for conducting investigations and developing employment-related policies as well as for presenting compliance and training programs to managers and other staff. Ms. Minteer also handles union negotiations, arbitrations, and agency charges of discrimination, and manages all employment-related litigation.

Ms. Minteer previously specialized in labor and employment litigation at Sheppard, Mullin, Richter & Hampton before joining Cubic. She has worked in historical and legal research positions at the U.S. Senate and the United States Supreme Court.

She is a past president of the ACC's San Diego Chapter and a frequent speaker to industry and to both legal and human resources groups on employment law topics.

Ms. Minteer received a B.A. from the University of California at Santa Barbara with high honors and was elected to Phi Beta Kappa. She received her J.D. from Georgetown University.

Christine Zebrowski
President and General Counsel
Overbrook Resources

ACC Association of Corporate Counsel
The in-house bar association.℠ 25TH ANNIVERSARY

Areas to be Covered:

- EEOC Developments
- New Legislation and Court Cases
  - Discrimination
  - Harassment
  - Retaliation
  - FMLA
  - FLSA
  - Arbitration
  - USERRA
  - Labor Law

ACC's 2007 Annual Meeting:
Enjoying the Ride on the Track to Success **October 29-31, Hyatt Regency Chicago**

EEOC Developments

- Systematic Discrimination Initiative
  - Focus on "widespread" discrimination cases
  - Limited evaluation
  - Involve lawyers early in process

New EEO-1 Form

- New ethnic and racial categories
- Two or More Races Category
- Officials and Managers Category
  - Split based on responsibility/influence
  - Some business and financial occupations moved to Professional Category

ACC's 2007 Annual Meeting:
Enjoying the Ride on the Track to Success
October 29-31, Hyatt Regency Chicago

EEOC Amends Regulations about Older Workers

- *General Dynamics Land Systems v. Cline*, USSC 2004
- 29 CFR 1625
  - Favoring older employee over younger one not unlawful
  - Impact on language
    - employment ads
    - applications

EEOC Guidance on Workers with Care-giving Responsibilities

- Family Responsibilities Discrimination
  - New and separate category
  - Tremendous expansion of claims
    - Disparate Treatment
    - Stereotyping
    - Hostile work environment
    - Retaliation

ACC's 2007 Annual Meeting:
Enjoying the Ride on the Track to Success
October 29-31, Hyatt Regency Chicago

Other EEOC Enforcement Priorities

- Race and National Origin Discrimination
  - Speech patterns
  - Arrest and conviction records
  - Credit Checks

Legislation

- Employment Non-Discrimination Act (ENDA)
  - Expected to pass the House
  - 15 or more employees
  - Unlawful to discriminate based on individual's actual or perceived sexual orientation or gender identity

ACC's 2007 Annual Meeting:
Enjoying the Ride on the Track to Success
October 29-31, Hyatt Regency Chicago

Supreme Court Cases

- *Burlington Northern & Santa Fe Railroad v. White*
  - Broad definition of retaliation
    - Any "materially adverse employment action that would have dissuaded a reasonable worker from complaining about discrimination"
  - What this means: A New Frontier
    - Almost 30% of all EEOC charges filed in FY 2006
    - Easy to allege and hard to eliminate on SJ
    - Increases punitive damage exposure

Cases following *Burlington*

- *Higgins v. Gonzalez* (8th Cir.)
  - Native American Assistant US Attorney
  - Complained supervisor made inappropriate comments and did not mentor
  - Transferred to city over 200 miles away
  - No retaliation found
    - "Materially adverse employment action" does not include personality conflicts
    - No negative changes in job prestige, compensation, duties

ACC's 2007 Annual Meeting:
Enjoying the Ride on the Track to Success
October 29-31, Hyatt Regency Chicago

Retaliation: The New Standard

- Any action that is **materially adverse to a reasonable employee** or applicant
- **Need not be related to employment** or occur in the workplace
- Test: Would the action be likely to **dissuade a reasonable worker** from making or supporting a charge of discrimination?
  - Context matters
  - Causation remains key

Basic Prevention Steps

- Adopt and publicize policy against retaliation
- Use a complaint procedure w/multiple reporting options
- Train managers
  - Retaliation not necessarily nefarious in intent
  - Many complaints of unlawful treatment are mistaken or due to criticism by supervisor
  - Reprisal not tolerated, even if supervisor innocent of original complaint

Supreme Court Cases

- *Ash v. Tyson Foods*
  - Two African-American employees claimed discrimination due to their non-promotion
  - Use of the word "boy"
    - Contextual use important to determine speaker's meaning
      - Inflection, tone, custom and usage
  - Train managers to increase sensitivity

Cases Following *Ash*

- *Canady v. Wal-Mart* (8th Cir.)
  - Use of word "boy"
  - Court acknowledged holding in *Ash*
  - No evidence of racial bias
    - Supervisor apologized
    - Did not repeat offensive comments

ACC's 2007 Annual Meeting:
Enjoying the Ride on the Track to Success
October 29-31, Hyatt Regency Chicago

Supreme Court Cases

- *Ledbetter v. Goodyear Tire & Rubber*
  - 19 year employee
  - Discrimination based on disparate pay beginning in early 1980's
  - Plaintiff claimed continuing violation based on paycheck accrual theory
  - Claim time barred to extent based on events occurring more than 180 days before EEOC charge filed

Releases: New Developments

- *EEOC v. Lockheed Martin* (D. Md. 2006)
  - Employee laid off due to merger; filed discrimination charge with EEOC
  - Offer of severance benefits contingent on signing Release of Claims form and agreement to withdraw charge
  - Court viewed conditional relationship and refusal to award severance benefits as retaliation

ACC's 2007 Annual Meeting:
Enjoying the Ride on the Track to Success
October 29-31, Hyatt Regency Chicago

Releases: New Developments

- *Thomforde v. IBM* (8th Cir.)
- *Syverson v. IBM* (9th Cir.)
  - Workforce reductions
  - Employees offered severance in exchange for signing release
  - Agreements found to be invalid
  - OWBPA/ADEA requires waiver to be knowing and voluntary
    - Clear
    - Calculated to be understood by average employee

Title VII and Class Actions

- *Dukes v. Wal-Mart* (9th Cir.)
  - Class of 1.5 million
  - Gender discrimination
  - Commonality requirement satisfied
    - "Social framework" analysis
      - Corporate-wide practices/policies
      - Excessive subjectivity in personnel decisions
      - Gender stereotyping
    - Statistical analysis: Compensation and promotion rates
      - Men vs. Women
      - Wal-Mart vs. Competitors

Title VII and Dress Codes

- *Jespersen v. Harrah's* (9th Cir.)
  - Uniform and appearance/grooming standards for all bartenders
    - Females required to wear makeup
  - Sex discrimination and gender stereotyping claim failed
    - Appropriate differentiation between genders okay
    - Policy did not unfairly burden one gender over another
    - Plaintiff could not show stereotyping motivated policy

Damages

- *Murphy v. IRS* (D.C. Cir. 2007)
  - Damages awarded for emotional distress/mental anguish/loss of reputation are taxable
    - Traditional definition of "income" tax
    - Constitutional

ACC's 2007 Annual Meeting:
Enjoying the Ride on the Track to Success
October 29-31, Hyatt Regency Chicago

FAMILY AND MEDICAL LEAVE ACT

- **Eligibility: 12 Months of Prior Employment Need Not be Consecutive**
- *Rucker v. Lee Holding Co. (1st Cir. 2006)*
  - Employee worked 5 years, left for several years and came back
  - Employee terminated for taking leave after 7 months on the job
- Court found employee could combine previous and current periods of employment to satisfy the 12-month FMLA requirement
- DOL Regulation: 12 months of employment need not be consecutive to qualify for FMLA leave

FAMILY AND MEDICAL LEAVE ACT

- **Eligibility: On-Call Time May Qualify for FMLA Leave**
- *Knapp v. America West Airlines (10th Cir. 2006)*

- Pilot denied FMLA leave - not worked 1250 hours
- Pilot claimed on-call hours should have been counted
- Court: on-call hours that are compensable under the FLSA count towards FMLA eligibility.

ACC's 2007 Annual Meeting:
Enjoying the Ride on the Track to Success
October 29-31, Hyatt Regency Chicago

FAMILY AND MEDICAL LEAVE ACT

- **<u>Notice:</u> Actual notice of medical condition not required**
- *Burnett v. LFW, Inc. d/b/a Habitat Co. (7th Cir. 2006)*
- Employee told supervisor over a 4 month period that he had a weak bladder, had medical visits and testing, and a recent biopsy.
- Employee left work because he was sick and was terminated for leaving work without permission
- Court: Employer violated FMLA because symptoms and complaints indicated likely FMLA eligibility
- Court: Employer should have investigated employee's health condition further
- In Sum: Disclosure of Symptoms Sufficient Notice under FMLA

FAMILY AND MEDICAL LEAVE ACT

- **Retaliation Claims**
- ***Morgeson v. OK Interiors Corp., (S.D. Ohio 2007)***
- Employee called in for leave to be with sick father.
  - Employer said employee failed to comply with procedures for requesting FMLA (no completed forms, no medical certification); employer said employee not needed to care for his father, just visiting.
- Employee was terminated.
- Court: Informal notice by phone sufficient; employee presented enough proof of retaliation because he was told not to return to work.

ACC's 2007 Annual Meeting:
Enjoying the Ride on the Track to Success
October 29-31, Hyatt Regency Chicago

FAMILY AND MEDICAL LEAVE ACT

- **Retaliation Claims**
  - ***Marks v. Custom Aluminum Prods., Inc. (*N.D. Ill. 2007)**
    - Employee terminated 3 weeks after leave for shoulder injury
    - Court: suspicious timing. Also, employee produced evidence that CEO was angry about leave; company gave inconsistent reasons for discharge.
    - Facts were sufficient to go to jury on retaliation.

FAMILY AND MEDICAL LEAVE ACT

- **Settlement of Claims Requires Court Approval**
  - ***Taylor v. Progress Energy Inc., (4th Cir. 2007)***
- Court affirms prior decision: Employees cannot waive past or future rights under FMLA or release claims without prior DOL or court approval

ACC's 2007 Annual Meeting:
Enjoying the Ride on the Track to Success
October 29-31, Hyatt Regency Chicago

FAMILY AND MEDICAL LEAVE ACT

- Class Actions

- FMLA class action challenging improper calculation of leave.
  - *Clary, et al v. Southwest Airlines*, (N.D.Tx. 2007)

- Plaintiffs claim an internal practice resulted in a loss of more than 40 hours per week from their FMLA leave bank, even though their FMLA leave bank could accrue no more than 40 hours per week.

FAMILY AND MEDICAL LEAVE ACT

- New State Laws on Paid Leave

- Paid sick leave for San Francisco employees, including part-timers, temps and participants in Welfare-to-Work programs.
- Washington State: paid family leave law for up to 5 weeks paid family leave for birth or placement of a child with the employee.

ACC's 2007 Annual Meeting:
Enjoying the Ride on the Track to Success
October 29-31, Hyatt Regency Chicago

FAMILY AND MEDICAL LEAVE ACT

- **LEGISLATIVE UPDATE**
- **Department of Labor's Request for Comments**
  - In December, 2006, DOL requested comments on the effectiveness of the FMLA.
  - Specific topics included: eligibility, definition of "serious health condition," intermittent leave, paid leave, medical certifications, and others.
  - ACCA Labor and Employment Law Committee submitted comments, along with many other interested groups. (See ACCA Website for details)
  - DOL Issued FMLA Report, Citing ACC Employment & Labor Committee Comments. Report acknowledged there were issues to address in improving FMLA, but no proposed rules or changes were issued.

FAMILY AND MEDICAL LEAVE ACT

- **Legislative Update - Expansion of FMLA**
  - ***Expansion of FMLA for Families of Military Personnel***
  - Up to 6 months unpaid leave for spouses and parents of seriously injured soldiers recommended by President's Commission on Care for America's Returning Wounded Warriors.
  - Similar legislation in Senate (S.1894): Up to 6 months unpaid leave for family or primary caregivers of wounded military personnel.
  - ***Paid Parental Leave for Federal Employees***
  - Federal Employees Paid Parental Leave Act (HR 3158): 8 weeks paid parental leave for federal employees
  - Family Leave Act of 2007 (S.80): 8 weeks paid leave for federal employees for a mother after childbirth; minimum 5 weeks paid leave for fathers and adoptive parents. Also, up to 8 paid hours "responsible parenting" leave for school functions and medical appointments.

ACC's 2007 Annual Meeting:
Enjoying the Ride on the Track to Success October 29-31, Hyatt Regency Chicago

THE AMERICANS WITH DISABILITIES ACT

- **No Personal Liability for ADA Violations**
- *Walsh v. Nevada Department of Human Resources* (9th Cir. 2006)
  - Court looked to Title VII and found supervisors should not be held personally liable for violations of the ADA.
- **EEOC**
- "Questions and Answers About Health Care Workers and the Americans with Disabilities Act"

THE AMERICANS WITH DISABILITIES ACT

- ADA Class Actions
- *Federal Court in Pittsburgh Certifies ADA Class against UPS (2007)*
- Judge certified class of 30,000-50,000 workers nationwide claiming UPS prevented them from returning to work due to a "100 percent healed policy."
- Plaintiffs allege UPS refused to accommodate disabilities and failed to provide accommodations under the policy.
- Plaintiffs also allege job descriptions were too general and failed to identify essential functions.

ACC's 2007 Annual Meeting:
Enjoying the Ride on the Track to Success
October 29-31, Hyatt Regency Chicago

THE AMERICANS WITH DISABILITIES ACT

- **Legislative Update**
- *Americans With Disabilities Restoration Act* (HR 3195)
  - To ensure ADA covers full range of people originally intended by Congress
  - Amends definition of "disability" and prevents consideration of "mitigating measures"
  - Focus is on the reason for an adverse action and whether employee was treated less favorably "on the basis of a disability"
  - Reduced focus on whether employee revealed enough information to show an actual limitation from the impairment

Fair Labor Standards Act

- Wage- Hour Developments
- *Increase in the Minimum Wage*
- Current minimum wage of $5.15 an hour will increase to $7.25:
- July 24, 2007: to $5.85
- July 24, 2008: to $6.55
- July 24, 2009: to $7.25

ACC's 2007 Annual Meeting:
Enjoying the Ride on the Track to Success
October 29-31, Hyatt Regency Chicago

Fair Labor Standards Act

» *Supreme Court Decisions*

- ***Long Island Care at Home Ltd. V. Coke (2007)***
  - Home care workers are exempt from the FLSA
  - Court upheld DOL regulation excluding all workers providing in-home care for elderly or disabled people
  - Importance: Supreme Court gives deference to DOL Regulation

Fair Labor Standards Act

- ***Murphy v. Kenneth Cole*** **(Cal. Supreme Court 2007)**
  - Payments to employees for missed meal and rest periods are wages or premium pay and are subject to a 3-year statute of limitations
  - Significance: more "meal and rest period" cases against employers? Potentially triples liability for employers.

ACC's 2007 Annual Meeting:
Enjoying the Ride on the Track to Success
October 29-31, Hyatt Regency Chicago

Fair Labor Standards Act

- ***Gorman v. The Consolidated Edison Corp.* and *Gorman v. Entergy Nuclear Operations, Inc. (2d Cir. 2007)***

- Class of employees alleged they were required to spend 18 to 30 minutes daily passing through multiple layers of security at a nuclear power plant before starting work.
- Case was dismissed because court found the activities were non-compensable preliminary and postliminary activities.
- *Gorman* is a case of first impression addressing whether time spent complying with an employer's rigorous security procedures constitute compensable work.

Fair Labor Standards Act

- Punitive Damages

Sines v. Serv. Corp. Int'l (SDNY 2006)

- Case of first impression
- Employee can recover punitive damages under anti-retaliation provisions of the FLSA

ACC's 2007 Annual Meeting:
Enjoying the Ride on the Track to Success
October 29-31, Hyatt Regency Chicago

Fair Labor Standards Act

- **Discrimination Complaints – Denial of Overtime Could be Adverse Action**

- ***Lewis v. Chicago (7th Cir. 2007)***
- Denial of particular assignment to female police officer that would have paid overtime could be considered "adverse action" based on gender
- Court: "depending on the type of work, overtime can be a significant and recurring part of an employee's total earnings similar to a recurring raise.."

Miscellaneous Employment Law Issues

- **Mandatory arbitration of employment disputes**
- *Davis v. O'Melveny & Myers (9th Cir. 2007).* Court struck agreement to arbitrate because employee had no "opt out" opportunity.
- *Armstrong v. Associates Int'l Holdings Corp. d/b/a Citifinancial Int'l Ltd. (5th Cir. 2007).* Notice, acknowledgement by employee, and continued work sufficient to support binding arbitration.
- Recent cases in Iowa, Ohio and Mississippi support binding arbitration agreements.
- Legislative Update. Another bill seeks to undermine mandatory arbitration agreements.

Miscellaneous Employment Law Issues

- ***USERRA***
- State family military leave acts (Illinois, Indiana, Maine, Minnesota, Nebraska and New York)
- USERRA claims are subject to mandatory arbitration (*Garrett v. Circuit City* Stores, 5th *Cir. 2006*)
- Changes to Job Duties Do Not Support USERRA Claim (*Francis v. Booz, Allen & Hamilton,* 4th Cir. 2006)

Labor Law Update
Potential Legislative Changes

- Employee Free Choice Act ("EFCA")
  - Eliminating secret ballot union elections and mandating of contracts
- RESPECT Act
  - Redefining "supervisor" under the NLRA

- EFCA was introduced into both the House and Senate this year with strong support from Democrats and Organized Labor.

- Proposed Changes to Federal Labor Law:
  1) Elimination of Secret Ballot Elections
  2) Mandating First Contracts
  3) New Employer Sanctions

1) Elimination of Secret Ballot Elections

- Require the NLRB to certify a union as the exclusive representative of employees without an NLRB-supervised election where "a majority of the employees in a union appropriate for bargaining has signed valid authorizations."

1) Elimination of Secret Ballot Elections (continued…)

- Under current law, an employer may lawfully refuse to recognize a union until the union wins an NLRB secret-ballot election. To obtain an election, a union must obtain support from at least 30% of employees and file an election petition. The Board then notifies the employer and schedules an election.

1) Elimination of Secret Ballot Elections (continued…)

- Proponents of this law believe employers engage in unlawful conduct during the campaign period coercing employees against supporting a union, thus the need to eliminate elections.

ACC's 2007 Annual Meeting:
Enjoying the Ride on the Track to Success
October 29-31, Hyatt Regency Chicago

2) Mandating First Contract

- Require parties who cannot agree upon the terms of a first collective bargaining contract within 120 days to submit the issues to an arbitration board, which would be empowered to settle the dispute.
- Results of binding arbitration are binding on parties for two years.

New Employer Sanctions

- Provide for liquidated damages of two times back pay for certain unfair labor practices.
- Civil penalties against employers for campaign conduct.

Effects of the Proposed EFCA:

1) Automatic NLRB Certification when union obtains majority of signed authorization cards.
2) No challenges to union's certification for one year certification period.
3) Parties who fail to negotiate will have arbitrator determine wages, terms and conditions of employment.

Effects of the Proposed EFCA (continued):

4) Arbitrator's contract decisions are binding for two years.
5) Contract bar prevents challenges to union status during term of contract.
6) Greater anti-employer penalties.

While the EFCA was recently defeated in the Senate, it is expected to return in the next Congress as this is a top priority of organized labor.

RESPECT Act

- The Re-Empowerment of Skilled and Professional Employees and Construction Trade Workers ("RESPECT") Act was also introduced in House and Senate this year.
- Proposes changing the definition of "supervisor" contained in Section 2(11) of the NLRA.

ACC's 2007 Annual Meeting:
Enjoying the Ride on the Track to Success
October 29-31, Hyatt Regency Chicago

Current Law:

The NLRA excludes "supervisors" from its protections. Unions cannot require supervisors to be included in a bargaining unit, and supervisors do not have a protected right to promote unionization in the workplace.

The definition of "supervisor" is contained in Section 2(11) and reads as follows:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay-off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

- The definition of supervisor has long been litigated in the Board and the Courts through Kentucky River cases.
- Last year, the Board in Oakwood Healthcare issued a decision clarifying the definition of supervisor. In that case, it found that the charge nurses, as a regular part of their duties, assigned nursing personnel to the specific patients for whom they would care during their shift. The Board found that such assignments, which consisted of giving "significant overall duties" to an employee, met the statutory definition of "assign" under the Act.

Proposed Law:

- Organized labor disagreed with Oakwood and saw it as the denial of union rights to many employees. The RESPECT Act is intended to reverse the Oakwood Decision.
- The RESPECT Act would make three significant changes to the definition of supervisor:
  1) Delete "assign;"
  2) Delete "responsibly to direct;" and
  3) Require that the individual spend the majority of his or her time performing the remaining supervisory functions in order to be classified as a supervisor.

ACC's 2007 Annual Meeting:
Enjoying the Ride on the Track to Success
October 29-31, Hyatt Regency Chicago

Effects of Proposed RESPECT Act:

- Will change the supervisory status of many individuals who have been previously deemed supervisors.
- Affect relationship between management and these individuals who have certain supervisory responsibilities but are no longer considered supervisors.
- Could lead to redistribution of job duties to ensure compliance with new law.

RESPECT Act is pending in both Chambers of Congress. Similar to the EFCA, it is not expected to ultimately make it past the Senate. However, it is also a top priority of organized labor that is expected to come up in the next Congress, should it be defeated in the current Congress.

ACC's 2007 Annual Meeting:
Enjoying the Ride on the Track to Success
October 29-31, Hyatt Regency Chicago

ACC Annual Meeting 2007:
Recent Developments in Labor and Employment Law

Anne Minteer, Cubic Corporation
Christine Zebrowski, Esq., Overbrook Law Group LLC

TABLE OF CONTENTS

The authors would like to acknowledge Lindsey Stevens, a law clerk in the Cubic Corporation Legal Department who contributed greatly to these materials.

I. Discrimination, Harassment and Retaliation

A. EEOC

1. Systematic Discrimination Initiative

- The newly appointed EEOC Chair, Naomi Earp, has identified that the EEOC's "challenge in 2007 is to make the most effective and efficient use of agency resources."
- The EEOC has developed the "Systemic Initiative" plan to combat this challenge. The Systemic Initiative calls for the EEOC to uncover, investigate, and successfully litigate more cases of widespread employment discrimination.
- Strategy changes include:
  a. Structured questioning to evaluate the potential of class based allegations, even when brought as an individual claim;
  b. Limited evaluation of claims in early stages, which means pursuit of class wide discrimination claims regardless of their apparent merit; and
  c. Involving lawyers at the beginning of the administrative process.

What this means: The EEOC will scrutinize charges upfront for potential class-based allegations, employer's compliance is more important than ever.

2. EEO-1 Form

- The EEOC approved revisions to the EEO-1 form. This form is the reporting form that employers provide to the federal government to describe the workforce composition in terms of race, ethnicity, and gender. The form must be filed annually by private sector employers with more than 100 employees and some government contractors with 50 or more employees. Employers are required to use the new form for the report due September 30, 2007. Revisions include:

1. **New Ethnic and Racial Categories**:
- A. "Asian or Pacific Islander" → "Asian" & "Native American or other Pacific Islander";
- B. New "Two or more races" category;
- C. "Hispanic" → "Hispanic or Latino"; and
- D. Black" → "Black or African American".

2. "Officials and Managers" divided into two levels based on responsibility and influence: Executive/Senior Level Officials and Managers and First/Mid Level Officials and Managers.

3. Some business and financial occupations are moved from "Officials and Managers" category to "Professionals".

What this means: Changes pose a challenge to employers who also complete Affirmative Action Plans because EEO-1 race/ethnicity categories are not consistent with OFCCP categories.

RACIAL/ETHNIC AND VETERAN STATUS FORM

Cubic Corporation and its subsidiary companies are subject to certain governmental recordkeeping and reporting requirements for the administration of civil rights laws and regulations. In order to comply with these laws, the Company invites employees to voluntarily self-identify their race and ethnicity and veteran status. Submission of this information is strictly **voluntary** and refusal to provide it will not subject you to any adverse treatment. The information will be kept confidential and will only be used in accordance with the provisions of applicable laws, executive orders, and regulations, including those that require the information to be summarized and reported to the federal government for civil rights enforcement. When reported, data will not identify any specific individual.

A. GENDER:

Male Female

B. RACE/ETHNICITY

Please check one box below:

Hispanic or Latino: A person having origins in any of the Spanish cultures including Mexico, Puerto Rico, Cuba, Central America, South America, or any other Spanish culture or origin, regardless of race.

White: A person having origins in any of the original peoples of Europe, North Africa, or the Middle East.

Black or African American: A person having origins in any of the black racial groups of Africa.

Asian: A person having origins in any of the original peoples of the Far East, Southeast Asia, or the Indian Sub-continent.

American Indian or Alaska Native: A person having origins in any of the original peoples of North, Central, or South America and who maintain tribal affiliation or community attachment.

Native Hawaiian or Other Pacific Islander: A person having origins in any of the peoples of Hawaii, Guam, Samoa, or other Pacific Islands.

C. TWO OR MORE RACES: I identify with more than one race/ethnicity (none of them Hispanic).

Yes No

D. VETERAN STATUS

If you are a Veteran, please check the appropriate box(es) that apply to you:

DISABLED VETERAN
- A Veteran who is entitled to compensation under laws administered by the Department of Veteran Affairs for a disability; and a. Is rated at 30 percent or more; or b. Is rated at 10 or 20 percent in the case of a veteran who has been determined under section 1506 of Title 38, U.S.C. , to have a serious employment handicap; or
-A person who was discharged or released from active duty because of a service-connected disability.

VETERAN OF THE VIETNAM ERA
-A person who served more than 180 days of active military, naval, or air service, any part of which was during the period of August 5, 1964 through May 7, 1975; and
  a. Was discharged or released therefrom with other than a dishonorable discharge; or
  b. Was discharged or released from active duty because of a service-connected disability.

OTHER ELIGIBLE VETERAN
-A person who served in a war, campaign, or expedition.

I elect not to provide the above requested information.

Employee's Signature_____
PRINT NAME _____ **Date:** _____

3. EEOC Amends Regulations About Older Workers

In July 2007 the EEOC amended provisions in the CFR regarding age discrimination.

1. The legislation amends 29 CFR 1625.2 and provides that favoring an older individual over a younger one, because of age, is not unlawful discrimination.
2. Also amended is 29 CFR 1625.4 regarding help wanted notices. Notices or advertisements that contain terms like "college student" violate the act, while notices advertising for "retirees" do not violate the act.
3. 29 CFR 1625.5 was amended to clarify the implication of a date of birth or age request on an employment application. A request for this information does not violate the act but applications will be carefully scrutinized to ensure that age discrimination is not occurring.

History behind the legislation:

- In 2004, in *General Dynamics Land Systems, Inc. v. Cline*, the Supreme Court resolved a conflict among Federal Appeals Courts about the concept "reverse age discrimination." The Court held that the ADEA does not shield individuals within the protected age category who are treated less favorably than similarly situated older individuals.

Case summary: The Court rejected claims of employees' aged 40-49 who were excluded from future retiree health benefits under a Collective Bargaining Agreement. The retiree benefits were only given to current workers age 50 and over. The younger employees claimed a violation of ADEA rights. The Court found that the ADEA is intended to protect older employees against discrimination of favored younger employees and is not a remedy against discrimination for the relatively young.

What this means: An employer may favor older employees over younger ones, may advertise jobs for older employees, but should still be cautious when asking for date of birth on a job application.

4. EEOC Guidance on Workers With Care-Giving Responsibilities

- The EEOC recently released the "Unlawful Disparate Treatment of Workers With Care-giving Responsibilities" publication, to aid in enforcement guidance. This category of discrimination is also known as "family responsibilities discrimination" and is identified by the ABA as one of the fastest growing segments of employment law with a 400% increase in the last 10 years.
- Information within the publication covers the following topics:
  1. Unlawful disparate treatment of caregivers;
  2. pregnancy discrimination;
  3. Discrimination against male caregivers and women of color;

  4. Caregiver stereotyping under the ADA;
  5. Hostile work environment; and
  6. Retaliation.

5. EEOC Guidance on ADA

- In 2007 the EEOC issued "Questions and Answers about Health Care Workers and the Americans with Disabilities Act."

6. Other EEOC Enforcement Priorities

- Race and national origin discrimination based on speech patterns, arrest/conviction records and credit checks has become a priority of EEOC enforcement.

7. Waiving the Defense of an Unverified EEOC Charge

Buck v. Hampton Township School District (3d Cir. 2006).

Case significance: Under federal law, the requirement that an EEOC charge be verified is not jurisdictional. If an employer responds to an unverified charge, rather than alleging the defect as a defense, this defect is waived. State law may provide a different result.

Case summary: Plaintiff's attorney signed her intake questionnaires with the EEOC and sent a detailed letter to the EEOC. The EEOC then forwarded the letter to Plaintiff's employer. Plaintiff's employer responded without alleging that the EEOC charge was not verified. The Third Circuit found that the employer waived the defect by responding to an unverified charge.

What this means: Employers should allege the defect of an unverified EEOC charge before replying to an unverified charge in order to preserve the defense.

B. Legislation

1. Employment Non-Discrimination Act (ENDA)

Current status: It is expected to pass in the House with bipartisan support; there is no current indication of how the Senate or White House will act.

- ENDA offers protection from bias discrimination in the workplace on the grounds of sexual orientation and gender identity, and, would provide Federal Court remedies for violations. ENDA makes it unlawful for an employer to:
  - fail or refuse to hire or discharge any individual, or otherwise discriminate against any individual, with respect to the compensation, terms, conditions, or privileges of employment of the individual, because of such individual's actual or perceived sexual orientation or gender identity; and
  - limit, segregate, or classify the employees or applicants for employment of the employer in any way that would deprive, or tend to deprive, any individual of employment, or otherwise adversely affect the status of the individual as an employee, because of such

individual's actual or perceived sexual orientation or gender identity.

- ENDA would apply to all employers with 15 or more employees.
- Employees who feel they have been discriminated against based on their sexual orientation or gender identity will be able to file a compliant with the EEOC that is similar to a Title VII claim.
- ENDA will not be retroactive.
- Exemptions are provided for: religious organizations, tax-exempt private membership clubs, employers hiring on the basis of veteran's preference, and the armed forces.
- ENDA does not mandate quotas nor require domestic partner benefits.
- ENDA also offers direction on collateral issues such as facilities management and grooming standards.
- California has had legislation in place protecting sexual orientation/gender identity since 1993, but, it is currently legal to terminate employees in 42 states based on gender identity or expression.

C. Supreme Court Cases

1. Retaliation

Burlington Northern & Santa Fe Railroad v. White (2006).
Case significance: The Supreme Court adopted a broad definition of retaliation. Now, any "materially adverse" employment action "that would have dissuaded a reasonable worker" from complaining about discrimination can constitute actionable retaliation under Title VII. To be actionable, the alleged retaliatory conduct must be material and not trivial. The Title VII anti-retaliation provision is not limited to actions affecting employment or to those occurring at work and can extend to actions causing harm outside the workplace.

Case facts: After Plaintiff complained to company officials that her immediate supervisor harassed her, she was reassigned to another position that was deemed less desirable and more physically demanding. Her supervisor was also disciplined. Plaintiff filed suit alleging that her reassignment was unlawful discrimination and retaliation for reporting her supervisor's actions. After a small disagreement with her new supervisor, Plaintiff was suspended indefinitely but reinstated 37 days later with back-pay. Because Plaintiff was reassigned to duties that were far dirtier and less prestigious than her original position, the Court had no difficulty finding that Plaintiff had established a "materially adverse personnel action."

- Current information on retaliation:
  EEOC retaliation charges are at all time high, constituting 29.5% of all claims filed in FY 2005.
- Implications of the ruling:
  Retaliation is easy to allege, and difficult to eliminate, before reaching a jury.

There is potential for significant punitive damage awards because the claim is always based on intentional conduct.

What this means: Employers should ensure that their policies prohibit not only discrimination and harassment, but also retaliation.

Follow Up Cases:
U.S. EEOC v. Lockheed Martin (D. Md. 2006).
Case significance: A release requiring employee to withdraw her EEOC charge constituted a material adverse employment action and also unlawful retaliation.

Case facts: Employee was informed that she was being laid off as a result of a merger and that she would receive severance benefits in exchange for signing a "Release of Claims Form". The employee refused to sign the release and instead filed a charge of discrimination with the EEOC. Her employer steadfastly refused to give the employee severance benefits if she did not sign the release. The Court considered this conditional relationship and the refusal to award severance benefits retaliatory. This also constituted a materially adverse employment action.

What this means: An employer should not make severance contingent on employee's withdrawal of EEOC charges or participation in an investigation.

Higgins v. Gonzales (8th Cir. 2007).
Case significance: The Court interpreted materially adverse as to exclude personality conflicts, petty slights, and snubs. Employment transfers also do not meet the standard when there is no diminution in benefits, duties, or prestige.

Case facts: Plaintiff, a Native American, was employed in a 2-year position as an Assistant US Attorney. Plaintiff's supervisor made comments about Native Americans, implied that Plaintiff would not be rehired at that office, gave Plaintiff the cold shoulder, and deprived Plaintiff of a mentor. Plaintiff was offered another 2-year position in another South Dakota City over 100 miles away. Plaintiff accepted the position and experienced no negative changes in job prestige, responsibilities, or compensation. The Court held that the personality conflict or lack of mentoring did not give rise to a materially adverse employment action. Plaintiff did not experience a materially adverse employment action when Plaintiff was transferred because she did not suffer any diminution of benefits, duties, responsibilities or prestige. Developing new business contacts is a normal consequence of a job transfer and is not a material adverse employment action.

What this means: Following *Burlington*, a plaintiff must demonstrate a material adverse employment action, not an inconvenience or personality conflict.

2. Racial Discrimination

Ash v. Tyson Foods (2006).

Case significance: The Court ruled that the term "boy" is not always a racially neutral term, speaker's meaning may depend on context, inflection, tone, custom, and historical usage.

Case facts: Two African-American employees brought a claim against their employer for discrimination arising out of their non-promotion. The Court ruled that the use of the word "boy" while not always evidence of racial animus, the term standing alone is not always benign. Contextual use is important to determine the speaker's meaning.

What this means: Employers must train managers to be cautious about their word choice, use of nicknames, etc.

Cases following the decision:
Canady v. Wal-Mart Stores, Inc. (8th Cir. 2006)
Case significance: The 8th Circuit acknowledged the holding of *Ash* but did not find evidence of racial bias in the use of the word boy because the supervisor apologized for two of his offensive comments and did not repeat them.

3. Pay Discrimination and Timing in Which EEOC Charges Can be Filed
Ledbetter v. Goodyear Tire & Rubber Co. (2007).
Case significance: The Supreme Court ruled that the time for filing a charge of employment discrimination with the EEOC begins when a discriminatory pay decision occurs. Following this ruling, there is likely to be an increase in EPA claims because no filing of an EEOC charge is required.

Case facts: Plaintiff worked for Goodyear from 1979 to 1998. Shortly before retiring in 1998, Plaintiff filed a claim with the EEOC alleging that Goodyear had discriminated against her in pay. Plaintiff alleged that her performance evaluations, upon which her pay was based, were lower because of her gender. Plaintiff unsuccessfully argued that pay discrimination is different than other forms of discrimination and that the paycheck accrual theory should apply. The paycheck accrual theory would have allowed the suit to proceed because issuance of a paycheck based on discrimination against an employee would have been a continuing violation of Title VII and would continually trigger a new charging period. Plaintiff lost because she did not allege that Goodyear made any intentionally discriminatory decision within the charge filing time period. The Court concluded that a pay-setting decision, like a termination or a demotion, is a "discrete act" forming the basis of a Title VII claim, and thus triggering the 180 day period to file a charge.

What this means: Employees are barred from filing a Title VII disparate pay claim if the employee fails to file a charge of discrimination with the EEOC within 180 days (or 300 days in certain jurisdictions) after the discriminatory pay decision was made.

D. Other Significant Discrimination Issues
1. ADA Legislation
House Majority Leader Steny Hoye (D-Md) and Rep. F. James Sensenbrenner (R-Wis.) introduced legislation July 26 (H.R. 3195) to ensure that the ADA covers the full range of people originally intended by Congress, before it was interpreted through Court decisions.

The proposed Americans With Disabilities Restoration Act would amend the definition of "disability" so that those who Congress originally intended to protect from discrimination are covered under the ADA, and it would prevent Courts from considering "mitigating measures" such as eyeglasses or mediation, when determining whether a person qualifies for protection under the law. According to a bill summary, the legislation would focus litigation on the reason for an adverse action and whether a plaintiff was treated less favorably "on the basis of disability" and not whether enough information was revealed to demonstrate how a person is limited by an impairment.

2. Significant Case Decisions
a. Weight Discrimination Connected to a Physiological Condition is Actionable Under the ADA.
EEOC v. Watkins Motor Lines (6th Cir. 2006).
Case significance: Not all abnormal physical traits constitute an 'impairment' under the ADA. The physical characteristics at issue must relate to a physiological disorder to qualify as an ADA impairment.

Case facts: Watkins Motor Lines had a policy of terminating any employee who took a leave of absence greater than 180 days. The policy also required a doctor's authorization and sometimes physical exam for an employee to return to work. A Watkins employee was climbing a ladder at work when the rung broke, injuring the employee. The employee initially returned to work but soon took a leave of absence. During his employment, the employee typically weighed 340 to 450 pounds. He knew of no physiological reason for his weight. Plaintiff obtained a doctor's evaluation in order to return to work shortly before the termination deadline. The physician noted that the employee could not safely perform his job because of his weight of 405 pounds even though the employee met the Department of Transportation standards for truck drivers. The company did not allow the employee to return to work without a doctor's authorization and consequently the employee was terminated for exceeding a 180-day leave of absence. The employee believed he was terminated for his weight and filed a claim with the EEOC.

The EEOC filed suit on behalf of the employee alleging that Watkins violated the ADA. The EEOC unsuccessfully argued that an ADA impairment could be shown by weight problems caused by a physiological condition or morbid obesity regardless of the cause. The Sixth Circuit disagreed and ruled that an ADA impairment for weight must be the result of a physiological condition.

What this means: To allege an ADA impairment claim, obese plaintiffs must be able to connect their weight to a physiological condition. Employers should exercise caution when making employment decisions based on physical characteristics.

b. The Interactive Process of Determining a Reasonable Accommodation May Include Plaintiff's Attorney.
Claudio v. Regents of University of California (Cal. Ct. App. 2005).
Case significance: The university may have failed to engage in the interactive process of determining a reasonable accommodation for plaintiff by failing to talk with plaintiff's attorney.

Case facts: Plaintiff, an employee of UC Davis Veterinary School, developed a disease that made him unable to work with animals. Plaintiff requested that a university vocational specialist talk with his attorney about job arrangements. The vocational specialist attempted to communicate with Plaintiff to request a resume and not Plaintiff's attorney. Plaintiff failed to respond and based on Plaintiff's old resume the vocational specialist determined there was no reasonable accommodation available and Plaintiff was terminated.

What this means: Employers should not automatically refuse to allow Plaintiff's attorney to participate in determining a reasonable accommodation.

c. Jobs Available Within a Reasonable Period of Time Should be Evaluated When Considering Reassignment as Accommodation for an Impairment.
Dark v. Curry County (9th Cir. 2006).
Case significance: In considering reassignment as an accommodation, an employer must look not only at the open positions but also those that will become available within a reasonable period of time.

Case facts: Plaintiff experienced epileptic seizures which he could control with medication. Prior to a seizure Plaintiff often experienced an 'aura.' Plaintiff chose to work while experiencing an aura and consequently suffered a seizure while driving a county vehicle. The county responded by placing Plaintiff on administrative leave and requesting he obtain a neurological examination. The examination resulted in a doctor's conclusion that Plaintiff should not work in high places or around machinery. Plaintiff was terminated because he could not perform the essential duties of his position and because his poor judgment posed a safety threat to others. Plaintiff filed suit alleging a violation of the ADA for failure to accommodate. The Court found that that the Plaintiff could have reasonably been reassigned to jobs that became available shortly after his termination.

What this means: An employer must look to all currently open positions and also those that will become available within a reasonable period of time to accommodate an employee.

d. Individual Supervisors Are Not Personally Liable for ADA Violations.
Walsh v. Nevada Department of Human Resources (9th Cir. 2006).
Case significance: Individual supervisors cannot be held personally liable for violations of the ADA. The Court addressed for the first time whether individuals are personally liable for violations of the Americans with Disabilities Act (ADA). The Court recognized that individuals may not be sued for damages under an analogous statute, Title VII, because Congress limited liability under Title VII to employers with 15 or more employees so as not to burden small entities with the costs associated with litigating discrimination claims.

e. ADA Class Actions: A federal judge in Pittsburgh certified an ADA class action challenging company's return-to-work policies. The class is composed of employees who were absent from work for medical reasons and allegedly prevented from returning to work due to the company's requirement that employees present full medical releases with no permanent restrictions to return to work following an injury or long-term illness. The employees allege the company refused to accommodate their disabilities and avoided providing accommodations by following a "100 percent healed policy." The employees also claimed the general job descriptions failed to detail the essential functions of specific jobs.

3. ADEA: The Older Workers Benefits Protection Act (OWBPA)

a. Data Provided to Employees Need Only be Regional.
Burlison v. McDonald's Corporation (11th Cir. 2006).
Case significance: An employer undertaking nationwide reduction in force is only required to give implicated employees regional data about their own decisional unit and not nationwide data.

Case facts: McDonald's sought a nationwide reduction in force to increase company efficiency and competitiveness. McDonald's offered employees only regional data about the decision. Plaintiffs were 15 employees who felt they had been terminated because of their age. Plaintiffs also argued that the releases failed to comply with the OWBRA because they were denied nationwide information in their release. The Court found that the OWBPA requires that an individual's waiver of age based claims is enforceable only if it was knowing and voluntary. Employers seeking waivers related to an employment termination are required to inform the employees from whom the waivers are sought of:

- Any class of individuals covered by such a program and eligibility factors for the program; and
- The job titles and ages of all individuals in the same job classification who are not eligible for the program.

What this means: Employers reducing their nationwide force need only give employees information regarding each employee's regional decision unit and not nationwide data.

b. Separation and Release Agreements must be Understood by the Average Employee.
Thomforde v. IBM (8th Cir. 2005).
Case significance: At the federal level, a number of agreements have come under scrutiny and/or been invalidated.

Case facts: Employer underwent a reduction in force and requested employees to sign a 'Release Not to Sue.' Plaintiff asked for an interpretation of the language of the release from the on-site attorney, but was informed to consult his own counsel. The Plaintiff met with his attorney and concluded he could both sign the agreement and bring his claim for age discrimination limited to the ADEA. Plaintiff filed suit. The employer moved to dismiss the case arguing that Plaintiff had released the employer from liability. The Court did not agree with the employer and found that an average employee would be confused by the agreement. The case was remanded.

Syverson v. IBM (9th Cir. 2006).
Case significance: OWBPA Release agreements must be calculated to be understood by an average employee.

Case facts: When IBM implemented a workforce reduction plan each employee was offered severance benefits for signing a release document. Plaintiffs are a class of terminated employees who did not understand the release. The OWBPA requires a waiver to be knowing and voluntary in order to be effective. In order to be knowing and voluntary a release must be calculated to be understood by an average employee. The Court did not find the release to be clear and calculated to be understood by an average employee.

What this means: Employers must review form releases to ensure they comply with OWBPA requirements and are clear, concise, and easily understood.

c. The Supreme Court has Granted Review to the Issue of Testimony Used to Prove Age Discrimination.
Sprint/United Management Company v. Mendelsohn, (cert. granted June 11, 2007).
Case significance: Currently the Tenth Circuit allows testimony of non-party former employees alleging discrimination by supervisors who played no role in the action challenged by the plaintiff to show that discrimination against older workers pervades the workplace. The 2d,3d,5th, and 6th Circuits disagree and do not allow this type evidence.

4. Title VII
a. Class Claim Allowed to Proceed Based on Sociological Concepts Combined with Demographics and Statistics.
Dukes v. Wal-Mart Inc. (9th Cir. 2007).
Case facts: The named plaintiffs are seven female employees who allege discrimination in company wide corporate practices and policies based on statistical data and subjectivity in personnel decisions; the class is 1.5 million large.
The Court found the commonality requirement satisfied by evidence of company wide corporate practices and policies which include:

- Excessive subjectivity in personnel decisions;
- Gender stereotyping;
- Maintenance of a strong corporate culture;
- Statistical evidence of gender disparities caused by discrimination; and
- Anecdotal evidence of gender bias.

Influential expert evidence consisted of a "social framework" analysis in which an expert compared Wal-Mart's policies and practices against what social science shows to be factors that create and sustain bias.
Influential statistical evidence included:

- A regression analysis to show a statistically significant difference between men and women in compensation and promotional rates and
- A comparison of Wal-Mart with its competitors to show that Wal-Mart promotes a smaller percentage of women.

What this means: Companies should analyze their data for disparities in key employment actions and scrutinize subjective decision making in employment decisions.

b. Religious Discrimination: Religious Accommodation Does Not Obligate an Employer to Rearrange Staffing and Incur Additional Costs of Diverting Duties.
Noesen v. Medical Staffing Network (7th Cir. 2007).
Case significance: Title VII requires employers to make reasonable accommodations for their employees' religious beliefs and practices unless doing so would result in undue hardship to the employer. An employer is not under an obligation to rearrange staffing and incur costs associated with diverting other employees from their normal duties in order to accommodate an inflexible employee.

Case facts: A pharmacist who refused to issue birth control for religious reasons was justifiably fired. His termination was not employer's failure to accommodate his religious beliefs because the employer did make reasonable accommodations such as removing the pharmacist from contraception transactions.

What this means: An employer is not under obligation to rearrange staffing or incur costs associated with diverting other employees from their normal duties

because that would exceed reasonable accommodation of an employee's religious beliefs.

c. Religious Expression Need not be Completely Eradicated From the Workplace.
Powell v. Yellow Book USA (8th Cir. 2006).
Case significance: An employer need not eradicate all religious expression from the workplace.

Case facts: Plaintiff sat next to a co-employee who spoke of sexual matters and also religious issues with Plaintiff. Plaintiff informed her co-employee to not discuss religious topics and complained to management about the religious conversations. Plaintiff's co-employee also had religious messages posted in her cubicle. The employer notified the co-employee to not discuss religious matters. After eight more complaints to her employer about her co-employee's religious messages as distracting and inappropriate, the employer moved the co-employee to another cubicle. Plaintiff filed a claim with the Iowa Civil Rights Commission and received three written reprimands. Plaintiff filed suit alleging religious discrimination, religious harassment, and sexual harassment.

What this means: Employers need to respond to employee's complaints, but do not need to remove all religious expression from the workplace.

d. Sex Discrimination can be Found Within Dress Code and Appearance Policies.
Jespersen v. Harrah's Operating Co. (9th Cir. 2006).
Case significance: If a policy does not unfairly burden one gender over another, the policy will not violate Title VII, but appearance standards may become the subject of a Title VII claim for sexual stereotyping.

Case facts: Plaintiff's employer had a uniform and appearance and grooming standards for all bartender employees. All bartenders were required to wear the same uniform. Women were required to wear makeup and men were required to keep their hair above their collar. Plaintiff was terminated for not wearing makeup. Plaintiff filed a sex discrimination and sexual stereotyping claim against her employer. The Ninth Circuit found that appropriate differentiation between genders was not facially discriminatory. Plaintiff's stereotyping claim failed because plaintiff could not show that stereotyping motivated the policy.

What this means: Employers should review their appearance, grooming, and dress code polices to ensure that the policies are not motivated by gender stereotyping in order to protect from stereotyping claims, and to ensure one gender is not unequally burdened.

e. Proving a Prima Facie Case of Sex Discrimination: a Woman Replaced by a Woman can still be Discrimination.

Miles v. Dell, Inc. (4th Cir. 2005).
Case significance: If a plaintiff in a Title VII case shows that different people made the decisions to hire and terminate the plaintiff and hire another woman, a plaintiff does not need to show that a man replaced her in order to show a prima facie discrimination case.

Case facts: Plaintiff, an account manager, requested pregnancy leave from her employer Dell. Dell responded by increasing her quotas and reducing her covered territory. After returning from pregnancy leave Plaintiff received a poor performance evaluation and was terminated. Plaintiff was replaced by a woman. The District Court granted summary judgment for Dell because Plaintiff could not prove discrimination because she was replaced by a female. The Fourth Circuit reversed summary judgment and remanded the case.

What this means: Now a female can pursue a sex discrimination claim even if replaced by a female.

f. National Origin Discrimination: **Use of the Word Hispanic Constitutes National Origin Discrimination.**
Salas v. WI Dept. of Corrections (7th Cir. 2007)
Case significance: Hispanic refers to a national origin group, and is thus discriminatory.

Case facts: The Equal Employment Opportunity Commission (EEOC) defines national origin discrimination to include the denial of employment opportunities because of an individual's (or his ancestor's) place of origin "or because an individual has the physical, cultural, or linguistic characteristics of a national origin group."

g. Safe and Secure Workplace Issues: An Employer's Duty to Provide a Safe and Secure Workplace Requires an Employer to Address Credible Threats of Violence.
Franklin v. The Monadnock Co. (Cal. Ct. App. 2007).
Case significance: Employers have a duty in the interest of public policy to provide a safe and secure workplace and to address credible threats of violence.

Case facts: A co-worker threatened to have Plaintiff and other co-workers killed. Plaintiff complained to human resources but the employer did not respond. A week later, Plaintiff was assaulted by the co-worker with a screwdriver. Plaintiff filed a complaint with the police. Plaintiff was terminated after complaining about the threats. He filed a claim for wrongful termination in violation of public policy. The Court reviewed relevant statutes and found an explicit public policy requiring employers to provide a safe and secure workplace. This policy requires employers to take steps against credible threats of violence in the workplace.

What this means: Employers should have a policy to address workplace violence or threat of violence. Complaints must be taken seriously to evaluate if there has been a credible threat of violence that an employer must address.

h. Non-Physical Personal Injuries are Taxable.
Murphy v. IRS (D.C. Cir. 2007)
Case significance: Damages for emotional distress or mental anguish and loss of reputation are taxable. The ruling rested on Court's acceptance of traditional definition of income tax and confirmation that it is constitutional to tax such damages.

What this means: Damages for non-physical personal injury are taxable.

II. Arbitration Agreements
A. Legislation
Another bill is in the works that would invalidate mandatory pre-dispute arbitration agreements in employment cases.

B. Significant Cases
First the good news:
1. *Armstrong v. Associates Int'l Holdings Corp. d/b/a Citifinancial Int'l Ltd.*, (5th Cir. 2007).
Case significance: Notice, acknowledgement, and continued work are sufficient to support binding Arbitration Agreement.

Case facts: The Fifth Circuit ruled that a corporation's assistant general counsel, who twice signed an agreement to arbitrate all employment claims, was bound by the Agreement and must arbitrate his claims after his position was eliminated. The Court affirmed an order to compel. James J. Armstrong, Assistant General Counsel for Associates International Holdings Corp., doing business as Citifinancial International Ltd., signed an Arbitration Agreement in 2001. He signed the same Agreement a second time in 2002, as required by Citifinancial's Employee Handbook, and continued in his employment.

Shortly thereafter, the company told him his position was being eliminated and he resigned. "Citifinancial's Notice, Armstrong's acknowledgment, and his continued employment effectively bind him to arbitrate this employment-related dispute," the Court said in a per curium, unpublished opinion. When he once more signed an Agreement, "the same series of events--notice, acknowledgment, and continued employment--binds Armstrong to arbitrate his employment claims." Armstrong also asserted that the employment arbitration policy was not supported by sufficient consideration. "Under Texas law, however, the contractual obligation for both parties to arbitrate, as required by the policy contested in this appeal, is by definition sufficient consideration," the Court stated.

What this means: Courts in several jurisdictions continue to support the enforceability of mandatory pre-dispute arbitration agreements.

2. *Faust v. Command Ctr. Inc.,* (S.D. Iowa 2007).
Case significance: Arbitration Agreement was upheld despite the fact that punitive damages available under title VII were not permitted under the Arbitration Agreement.

Case facts: A women asserting sex discrimination, sexual harassment, and retaliation under Title VII of the 1964 Civil Rights Act and Iowa law must submit those claims to arbitration under her employment contract even though its arbitration clause bars any award of punitive damages, the U.S. District Court for the Southern District of Iowa decided. Granting Command Center Inc.'s motion to compel arbitration, the Court rejected Cynthia Faust's contention that the arbitration clause's ban on punitive damages rendered the Agreement unenforceable.

Faust argued that, because an Arbitrator cannot award all of the remedies available under Title VII, the arbitration agreement violated public policy, contract law, and Congress's intent in passing Title VII. She asked the Court either to invalidate the entire Arbitration Agreement or send the case to arbitration but declare the punitive damages ban unenforceable. The Court, however, said that its role in ruling on a motion to compel arbitration is to determine solely whether a valid Agreement exists between the parties and whether the disputed claims fall with the scope of the Agreement. The Agreement here was valid and the disputes raised by Faust fell under its scope, it ruled.

What this means: An Arbitration Agreement is not invalidated because all remedies under Title VII are not available.

3. *Ignazio v. Clear Channel Broad. Inc.* (Ohio 2007).
Case significance: Arbitration agreement was upheld despite conflict with State law.

Case facts: A provision in an employment Arbitration Agreement that provided for greater judicial review of an arbitrator's award than permitted under State Arbitration Law did not render the entire agreement unenforceable, and an employee should have been compelled to arbitrate her age and sex discrimination and other claims after the offensive provision was severed.

4. *Smith v. Captain D's LLC* (Miss. 2007).
Case significance: Claims brought under Arbitration Agreements are limited based on scope.

Case facts: An 8-1 Mississippi Supreme Court revived the negligent hiring, supervision, and retention claims of a teenage server at a Captain D's restaurant who alleges that a manager raped her, finding that the claims were not within the scope of the parties' employment Arbitration Agreement. "The question of 'scope' is narrowed to whether Tammy [Smith]'s rape claim arises out of or relates to '[Tammy's] application for employment, employment, and/or cessation of employment with Captain D's,' so as to subject Tammy's sexual assault claim to arbitration," Justice George C. Carlson Jr. wrote. "While recognizing the breadth of the language in the arbitration provision, we unquestionably find that a claim of sexual assault neither pertains to nor has a connection with Tammy's employment," he said.

Now the bad news:
5. *Davis v. O'Melveny Myers* (9th Cir. 2007).
Case significance: Mandatory pre-dispute Arbitration Agreements are procedurally unconscionable if they are made a condition of employment, essentially requiring an "opt out" for all employees covered by such plans, even new employees.

Case facts: The arbitration plan was procedurally unconscionable because it was a condition of Davis's employment, presented on a "take it or leave it" basis with no opportunity to negotiate, the Court said. And four provisions of the plan either were substantively unconscionable or void and could not be severed without "gutting" the entire agreement.

The offending provisions required Davis to provide notice and a demand for mediation--a prerequisite to arbitration--within one year, prohibited her from discussing her claims with any party not involved directly in the proceedings, allowed the firm but not Davis to go to Court to seek injunctive or equitable relief regarding certain claims, and prohibited Davis from filing any administrative claims with the Labor Department or the California labor commissioner, he noted. However, the firm imposed the arbitration plan on a "take it or leave it" basis, leaving Davis with the choice only to accept the condition or seek a job elsewhere, King said. He noted that the Court previously ruled that "take it or leave it" arbitration plans imposed as a condition of employment with no opportunity to negotiate or opt out are procedurally unconscionable.

III. Fair Labor Standards Act (FLSA)
A. Legislation: Increase in the Minimum Wage

- The first minimum wage increase in a decade was signed into law in May. The current minimum wage of $5.15 an hour will increase to $7.25 in three steps over two years. The first increase, to $5.85 per hour, took effect July 24, 2007. The minimum wage will increase again to $6.55 per hour a year later on July 24, 2008, with the final increase becoming effective July 24, 2009.
- **Maryland Implements a Living Wage**

This year, Maryland became the first state to enact a statewide "Living Wage" law that requires state government service contractors and subcontractors to pay employees working on state contracts a "living wage."

B. Supreme Court Decision
Long Island Care at Home Ltd. V. Coke (2007).
Case significance: The US Supreme Court ruled that the minimum wage and overtime protections don't apply to home care workers. The Court upheld a Department of Labor regulation that excludes all workers who provide in-home care for elderly or disabled people from the FLSA. The challenged exclusion applies to employees of home care companies and agencies of any size.

Case facts: The case began when Evelyn Coke sued her employer, Long Island Care at Home, alleging that it violated the FLSA by paying her less than minimum wage and failing to pay extra compensation for overtime work. The District Court sided with the employer, which argued that a Department of Labor rule exempts third-party employers of home care workers from the FSLA. Ms. Coke appealed to the Second Circuit Court of Appeals challenging the validity of the Department of Labor regulation. The Circuit Court sided with Ms. Coke and ruled that the regulation was invalid because it was inconsistent with Congress's purpose when it expanded the FLSA to cover domestic service workers in 1974 and inconsistent with other Department of Labor regulations. The Supreme Court today struck down that decision and gave deference to the DOL regulation.

C. Wage/Hour Cases
1. *Murphy v. Kenneth Cole Productions* (Cal. 2007).
Case significance: On April 16, the California Supreme Court unanimously decided that the payments to employees for missed meal and rest periods are wages or premium pay, not penalties. Therefore, claims for missed meal and rest breaks under the Labor Code are governed by a three-year statute of limitations.

What this means: The decision in *Murphy v. Kenneth Cole Productions* will clearly result in the filing of even more meal and rest period cases against employers. Jury awards and settlement amounts will very likely increase. The decision, in effect, triples the liability for missed meal and rest periods.

2. *Arias v. Superior Court* (Cal. Ct. App. 2007).
Case significance: The California Court of Appeal has increased the potential liability to employers in wage and hour class actions in a decision on a procedural issue involving class certification of wage and penalty claims under the California Labor Code. Specifically, the Court ruled that representative claims for unpaid wages brought under the Unfair Competition Law ("UCL") must be brought as class actions under Section 382 of the Code of Civil Procedure, but claims for penalties under the Labor Code Private Attorneys General Act ("PAGA") do not.

What this means: For California employers, this opinion underscores the need to conduct periodic audits of wage and hour practices to limit potential liability for wage and hour claims.

3. *Gorman v. The Consolidated Edison Corp.*(2d Cir. 2007) and *Gorman v. Entergy Nuclear Operations, Inc.*, (2d Cir. 2007).
Case significance: The Court of Appeals for the Second Circuit affirmed the dismissal of a collective action lawsuit under the FLSA against current and former operators of a nuclear power facility located in New York seeking compensation for certain required activities before and after the work day. The Court decided the consolidated appeal of two separate District Court rulings which had dismissed claims by employees in favor of the employers.

Case facts: The employees alleged that they were required by their employers to spend an additional 18 to 30 minutes every day passing through multiple layers of security at the nuclear power facility before they could perform the tasks for which they were hired. Once through the security procedures, the employees claimed they were entitled to compensation for time spent donning and doffing basic safety gear (e.g., helmet, goggles, and steel-toed shoes), and walking to and from the area where the safety gear is located and their work areas. The employees alleged these activities were compensable under the FLSA. The employers argued that permitting the employees' claims to proceed would constitute an expansion of the compensable work day in contravention of existing law. The employers maintained that the Portal-to-Portal Act was passed precisely to prevent employers from being subjected to the uncertainties and unexpected liabilities that would result from allowing employees to pursue compensation for the kinds of activities alleged.

The Portal-to-Portal Act amended the FLSA to exclude certain preliminary and postliminary activities from compensable work. The employers asserted that the Supreme Court's decision in *IBP v. Alvarez*, 546 U.S. 21 (2005), supported their position, because activities do not become compensable merely because they precede compensable work. The Second Circuit agreed that the activities at issue were non-compensable preliminary and postliminary activities.

The Court's analysis interpreted and applied Supreme Court precedent announced in *Steiner v. Mitchell*, 350 U.S. 247 (1956), and reiterated in *IBP v. Alvarez,* that pre- and post-shift activities must be both "integral and indispensable" to principal work activities to be compensable. The Court noted that the employees relied chiefly on their contention that the activities at issue were "indispensable" to principal work without accounting for the requirement that the activities also must be "integral" to principal work to be compensable.

4. *Bonilla v. Baker Concrete Constr., Inc.*, (11th Cir. 2007).

Case significance: Contrary to the predictions of some commentators after *IBP v. Alvarez* was decided, the Second and Eleventh Circuits both recognized that the Portal-to-Portal Act continues to exclude from compensable work those preliminary and postliminary activities which are not "integral and indispensable" to principal work.

Case facts: Coincidentally, on the same day the Second Circuit issued the *Gorman* decision, the Eleventh Circuit issued a decision on a similar claim. In the Court of Appeals in Florida affirmed summary judgment for an employer who had contracted to perform work at an airport. In *Bonilla*, following an analysis similar to that in *Gorman*, the Court rejected claims by employees that they were entitled to be compensated for time spent traveling or being cleared by security before arriving at their actual worksite within the airport.

The courts in both *Gorman* and *Bonilla* relied heavily on the reasoning regarding "integral and indispensable" activities set forth in the Supreme Court's 2005 decision in *IBP v. Alvarez*. However, contrary to the predictions of some commentators after *IBP v. Alvarez* was decided, the Second and Eleventh Circuits both recognized that the Portal-to-Portal Act continues to exclude from compensable work those preliminary and postliminary activities which are not "integral and indispensable" to principal work.

What this means: The *Gorman* decision is likely the first case of its kind *in any court* addressing whether time spent complying with an employer's rigorous security procedures constitutes compensable work.

D. Punitive Damages
Sines v. Serv. Corp. Int'l, (S.D.N.Y. 2006).
Case significance: In a case of first impression, the S.D. N.Y. held that an employee could recover punitive damages under the anti-retaliation provisions of the FLSA.

E. Class Actions
- Class actions are being filed for unpaid overtime. For example, a group of Universal Media Group IT employees has filed a class action lawsuit alleging the music label hasn't paid overtime as required by law. The Complaint was filed in Los Angeles County Superior Court.
- IBM has also been hit by a second class action lawsuit alleging it has failed to pay overtime to sales workers. The Complaint claims the employees regularly worked more than 40 hours per week as well as daily shifts exceeding eight hours, but were not paid overtime or received mandatory rest and meal breaks.

F. Discrimination Complaints
Lewis v. Chicago (7th Cir. 2007).
Case significance: Denial of overtime could be adverse job action under Title VII.

Case facts: The city of Chicago's denial of a female police officer's request to work the 2002 International Monetary Fund meeting in Washington, D.C., and her resultant loss of overtime could support a finding that she was subjected to an adverse job action because of her gender, the U.S. Court of Appeals for the Seventh Circuit held July 26 in a case of first impression. "Our circuit has not directly addressed the issue of whether a denial of overtime is an adverse employment action sufficient to implicate Title VII" of the 1964 Civil Rights Act, Judge Michael S. Kanne noted. "Depending on the type of work, overtime can be a significant and recurring part of an employee's total earnings similar to a recurring raise or it could be insignificant and nonrecurring like a discretionary bonus," he said.

IV. Family Medical Leave Act (FMLA)
A. Legislation
1. Expansion of FMLA

- The President's Commission on Care for America's Returning Wounded Warriors July 25 recommended expanding the Family and Medical Leave Act to allow spouses and parents of seriously injured soldiers to take up to six months of unpaid leave. In its July 25 report, the commission called on the White House and Congress to implement the provisions as quickly as possible to ensure that soldiers serving in Iraq and Afghanistan can transition successfully to civilian life or active duty service.
- Sen. Christopher Dodd (D-Conn.) introduced similar legislation (S. 1894) July 26 that would allow family members or primary caregivers of wounded military personnel to take up to six months of unpaid leave, compared to the current 12 weeks of leave under the FMLA. "It took me seven years, three presidents, and two vetoes to get the Family [and] Medical Leave Act enacted into law," he said in a July 26 statement. "I will not rest until we are able to modernize this statute to cover our wounded warriors."

2. Paid Parental Leave for Federal Employees

- Federal employees would receive eight weeks of paid parental leave under legislation introduced July 25 by Rep. Carolyn B. Maloney (D-N.Y.). By providing the eight weeks of paid leave, the Federal Employees Paid Parental Leave Act (H.R. 3158), co-sponsored by House Majority Leader Steny H. Hoyer (D-Md.) and Rep. Tom Davis (R-Va.), would make it easier for federal employees to take the 12 weeks of parental leave guaranteed to all U.S. workers by the Family and Medical Leave Act.
- Senate Bill introduced by Sen. Ted Stevens (R-Alaska) in January as the Family Leave Act of 2007, (S. 80) would provide federal employees with at least eight weeks of paid leave for a mother after childbirth while requiring a minimum

of five weeks of paid leave for fathers and adoptive parents. In addition, the Senate bill would provide for up to eight paid hours of "responsible parenting" leave. Parents who work for the federal government would be able to use such annual leave to attend their children's school functions and take their children to medical and dental appointments.

3. Paid Sick Leave:

- San Francisco employers must provide paid sick leave to employees, including part-time employers, temporary workers and participants in Welfare-to-Work programs. Paid sick leave in San Francisco began accruing on February 5, 2007.
- Washington State enacted a paid family leave law in May. Under the new law, employees in the State are entitled to up to 5 weeks' paid family leave for the birth of a child or placement of a child with the employee for adoption and to care for the child.

B. DOL Developments
Request for Comments:

- On December 1, 2006, the Department of Labor (DOL) formally requested comments from employers and employees on the FMLA. The Department of Labor specifically sought the information as part of its review of its administration of the Act and its regulations. The DOL specifically requested information on the following aspects of the FMLA:
    a. Who is an “eligible employee,” including the definition of a “worksite;”
    b. The definition of “serious health condition;”
    c. The definition of “day” for both calculating leave and defining a medical condition;
    d. Substitution of paid leave;
    e. Attendance policies;
    f. Types of FMLA leave, including the length of time;
    g. Light duty;
    h. Essential functions;
    i. Waiver of rights;
    j. Communication between employers and their employees;
    k. FMLA leave determinations and medical certifications; and
    l. Employee turnover and retention.
- In addition, the DOL also requested that commenter’s provide information on ways that it could determine the number of people using FMLA leave, including intermittent FMLA, the financial impact of intermittent leave and whether FMLA leave has a different effect on employers of differing sizes. Comments were to be submitted by February 2, 2007.
- The ACC Labor and Employment Committee submitted comments to the DOL, which are available on the ACC website. DOL's response was to

acknowledge that there were issues to address in improving FMLA, but DOL did not issue any new rules or recommendations.

C. FMLA Notice and Eligibility
1. *Burnett v. LFW, Inc. d/b/a Habitat Co*. (7th Cir. 2006).
Case significance: Disclosure of symptoms before cancer diagnosis found to be sufficient notice under the FMLA.

Case facts: The U.S. Court of Appeals for the Seventh Circuit, which includes Illinois, Indiana, and Wisconsin, held that an employee provided information over a four-month period that was sufficient to communicate that he had a serious health condition under the Family Medical Leave Act (FMLA). The employee had informed his supervisor that he was suffering from a weak bladder, he was undergoing medical visits and testing, he had recently had a biopsy, and that he might commit suicide if he ended up bedridden with cancer. The Court ruled that this account of symptoms and complaints formed a coherent pattern and progression that communicated to the employer the employee's likely eligibility for FMLA leave. Therefore, when the employee insisted that he needed to go home because he was sick, the employer violated the FMLA by terminating him for leaving work without permission.

What this means: Employers may be found more often to have received sufficient notice of an employee's serious health condition that is afforded protection under the FMLA, even if the employee never gave the employer actual notice of the medical condition. In effect, this Seventh Circuit decision requires employers to absorb all of the accumulating information about an employee's medical condition as information is received. For example, various statements that were made by Burnett, standing alone, would not have given LFW sufficient notice about his medical condition under the FMLA. However, the Court held that Burnett's statements still should have prompted LFW to conduct further investigation into Burnett's health condition, especially if the health condition was one that qualified for leave under the FMLA. Employers must pay closer attention to their employees' reasons for taking leave and the relevant context surrounding when and under what circumstances the statements are made. All supervisors and managers should be aware of the company's leave policies and should inform the Human Resources Department immediately when an employee makes statements regarding a serious health condition, in order to avoid potential liability. Additionally, employers should be consistent in their approach regarding employee leave issues, and retain copies of proper documentation to justify their employee leave decisions. *Burnett* is another example of the uncertainties that employers face in determining exactly at what point an employee has triggered his FMLA rights.

2. *Knapp v. America West Airlines* (10th Cir. 2006).
Case significance: On-call time may qualify employee for FMLA leave.

Case facts: A pilot was denied FMLA leave because she had not worked 1250 hours in the 12 months prior to the requested leave. The pilot claimed that the hours she spent on-call should have been counted as hours of service. The Tenth Circuit ruled that on-call hours that are compensable under the Fair Labor Standards Act (FLSA) should be considered hours of service in determining FMLA eligibility. In this case, the pilot's on-call hours were determined not to be compensable under the FLSA and so she was not entitled to FMLA leave. While on-call, the pilot was to refrain from drinking alcohol, be available by phone, and be ready to report to the airport within one hour. The Tenth Circuit found that the pilot's activities were not so curtailed as to convert the on-call time into compensable working time.

3. *Rucker v. Lee, Holding Co*., (1st Cir. 2006).
Case significance: Break in employment does not disqualify employee from FMLA leave.

Case facts: An employee worked for a car dealership for five years but then left his employment for many years. The employee returned to employment with the car dealership and, after seven months of reemployment, was discharged for taking medical leave. The employee filed suit claiming his discharge violated the FMLA. In a case of first impression, the First Circuit ruled that the employee was eligible for FMLA leave because he could combine his previous period of employment with his most recent employment to satisfy the FMLA's 12-month employment requirement. The Court noted that the FMLA is ambiguous as to whether previous periods of employment count towards the 12-month requirement. However, a Department of Labor regulation suggests that previous periods of employment should be combined with current employment to determine whether the employee has been employed for at least 12 months. The Department of Labor regulation states that the 12 months an employee must have been employed need not be consecutive months.

D. Settlement of FMLA Claims
Taylor v. Progress Energy Inc. (4th Cir. 2007).
Case significance: Settlement of FMLA claims requires Court approval. Employees can't waive FMLA claims.

E. FMLA Class Actions
Southwest Airlines Employees filed FMLA class action challenging improper calculation of leave.

F. FMLA and Retaliation
1. *Morgeson v. OK Interiors Corp.,* (S.D.Ohio 2007).
Case significance: FMLA leave may be used to provide comfort to a family member with a serious health problem.

Case facts: A carpenter who was told not to return to work while visiting his sick father presented sufficient evidence to proceed to trial under the Family and Medical Leave Act. OK argued that Morgeson failed to comply with its procedures for requesting FMLA leave because he did not complete the required forms or provide medical certification. It also contended that he missed work not to care for his father but merely to visit him and thus did not qualify for protection under the FMLA. The Court rejected those contentions, noting that federal regulations allow an employee to give informal notice by telephone of the need to take leave for unforeseeable circumstances. The judge further said that FMLA leave may be used to provide psychological comfort to a family member with a serious health problem. The Court found that Morgeson presented enough proof of retaliation. During his absence to care for his father, he was advised not to return to work, it noted.

2. *Marks v. Custom Aluminum Prods. Inc.,* (N.D. Ill. 2007).
Case significance: Evidence of anger and inconsistent reasons for discharge gives rise to a retaliation claim.

Case facts: A plant manager who was fired about three weeks after leave for a shoulder injury raised a jury issue of retaliation under the FMLA. Denying summary judgment to Custom Aluminum Products Inc. and chief executive John Castoro, the Court said that, in addition to the suspicious timing of his termination, James Marks produced evidence that Castoro was angry about Marks taking leave for physical therapy and that the company gave inconsistent reasons for his discharge.

V. USERRA
A. Legislation: New Family Military Leave Act
A growing number of states pass family military leave acts including Illinois, Indiana, Maine, Minnesota, Nebraska, and New York.

B. Significant Cases
1. *Francis v. Booz, Allen & Hamilton* (4th Cir. 2006).
Case significance: Changes in job duties do not support USERRA claim.

Case facts: After returning from active duty, an employee was reinstated to her prior position with the same title, salary and work location. However, in the months after her reinstatement, her work duties changed due to the employer's preexisting outsourcing decision. Her employer also changed her work hours. The employee was eventually discharged for a pattern of inappropriate behavior. The employee sued under the Uniformed Services Employment and Reemployment Rights Act (USERRA) alleging that her change in work duties, work hours, and discharge constituted discrimination and wrongful termination.

The Fourth Circuit dismissed the employee's claims. The Court ruled that the employee had been reinstated under the same terms and conditions she had

enjoyed prior to active service. The change in work duties and work hours occurred after her return to work and the changes were slight or applied to all employees in the same position. Finally, the Court ruled that the employee could not prove that her military status was a motivating factor for these changes. The Court recognized that, under USERRA, the employee could be discharged only for cause for one year after her reinstatement. However, the Court upheld summary judgment in favor of the employer because the evidence was overwhelming that the employee arrived late for work and left early without permission, missed conference calls and acted inappropriately to customers and co-workers. Further, the evidence reflected that the employee had received notices that detailed specific instances of misconduct to be corrected. She had been informed that if she failed to correct her misconduct she would be discharged for cause. Therefore, the Court found there was a history of misconduct and a refusal to correct that misconduct when it was brought to the employee's attention. Under these conditions, the Court ruled that the employer had cause to terminate the employee.

2. *Garrett v. Circuit City Stores Inc.* (5th Cir. 2006).
Case significance: USERRA claims are subject to mandatory arbitration.

Case facts: The Fifth Circuit has ruled that individual contracts requiring mandatory arbitration of employment disputes apply to claims under USERRA. As federal policy favors arbitration, the Court ruled that a reserve officer bore the burden to prove that Congress intended to preclude arbitration of USERRA claims. The Court ruled that USERRA does not contain a clear expression of Congressional intent concerning arbitration as a forum for resolving employment disputes. Accordingly, a contract may abridge procedural rights under USERRA by requiring that USERRA claims be arbitrated.

VI. Immigration
A. DOL Amends Regulations Governing Permanent Labor Certificates
- The DOL amended its regulations regarding the acquisition and use of permanent labor certifications in order to reduce the incentives and opportunities for fraud and abuse in the permanent labor certification program. The DOL's Final Rule makes a number of changes that will impact employers who use permanent labor certifications to employ immigrant aliens.
- For many years, DHS has had an informal practice of allowing employers to substitute an alien named on a pending or approved labor certification with another prospective alien employee, as an accommodation to employers due to the length of time it took to obtain a permanent labor certification or receive approval of the Form I-140 petition.
- The new rule eliminates this practice. Specifically, it prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications as of the effective date of the rule, July 17, 2007.
- This prohibition will apply to all pending permanent labor certification applications and to approved permanent labor certifications, whether the

application was filed under the Program Electronic Review Management (PERM) program regulation effective March 28, 2005, or under prior regulations implementing the permanent labor certification program.

VII. ERISA
A. Supreme Court Decision
Beck v. PACE International Union (2007)
Case significance: The Court overturned an earlier decision issued by the Ninth Circuit after finding that the merger of single-employer plans into multi-employer plans is not a permissible method of plan termination. The Court held that a bankrupt employer did not breach its fiduciary duties when it chose to purchase an annuity to terminate its pension plans rather than merge the plans into the union's multi-employer pension fund.

Case facts: Crown Vantage, Inc. went into bankruptcy. The Company's board of directors considered whether to terminate a number of ERISA-qualified defined benefit pension plans by purchasing annuities. PACE International Union, which represented employees covered by many of the plans, objected and proposed merging the plans with a pre-existing multi-employer plan. Crown decided to terminate the plans and purchase the annuities. PACE sued Crown in Bankruptcy Court, claiming that Crown's board breached its fiduciary duties under ERISA and the Bankruptcy Court agreed. Beck, the bankruptcy trustee, appealed.

The Ninth Circuit reasoned that the decision to terminate the plan was a business decision not subject to ERISA fiduciary obligations. However, the Ninth Circuit also held Crown breached its fiduciary duty by failing to consider the merger. The Supreme Court held that Crown did nothing wrong. The Court's decision primarily is based on the fact that ERISA provides for only two options when terminating a plan: purchasing annuities, as Crown did, or a lump sum distribution. The Court agreed with the Pension Benefit Guaranty Corporation, the federal agency that regulates pension plans, that merger is not an authorized form of plan termination.

What this means: Merger is not an authorized form of plan termination under ERISA.

VIII. Miscellaneous
A. Employee Blogging
- Considered a form of viral marketing because the spread from consumer to consumer happens spontaneously, external blogs focus primarily on commentary and personal opinion.
- Not surprisingly, the unfiltered nature of blogs can represent a potential legal liability and public relations nightmare if used inappropriately or unwisely by employees.

- Although major technology powerhouses like IBM, Microsoft, Sun Microsystems, Dell, and Hewlett-Packard encourage and support employee blogging, others view blogs with trepidation.
- Employers rightly worry that employee blogging could leak company trade secrets and copyrighted or trademark materials, contain harassing or discriminatory comments, or libel employees, clients or others.
- Only 15 percent of U.S. companies have policies that address work-related blogs, according to a 2006 study by the Employment Law Alliance.
- Recent scandals:
- John Mackey, CEO of Whole Foods posted anonymously on Yahoo stock market boards deriding Whole Food's competitor Wild Oats, when in fact Whole Foods is attempting to buy Wild Oats.
- Wal-Mart's public relations firm attempted to improve the corporation's image by sponsoring a blog. The sponsorship was discovered and spoiled the purpose of the blog.
- Blog postings and website profiles serve as evidence in some discrimination cases. For example, employees post reviews of bosses on websites like eBossWatch.com. The negative profile of a supervisor can support a discrimination claim.