ASSOCIATION OF CORPORATE COUNSEL

TITLE: **The Latest Trends In EEO Law: How Are They Creating Risk For Your Workplace?**

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PRESENTED BY: **ELT, Inc.**

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Operator: Just a reminder today's conference is being recorded.

Female: Welcome to this ACC Webcast.

Shanti Atkins: All right. Thank you so much, Sandy. Thank you to Commpartners and to the Association of Corporate Counsel. My name is Shanti Atkins, and I'm going to be your moderator today. And I want to welcome everyone to the latest trends in EEO law: What's creating risk in your workplace? This event is being sponsored by the Association of Corporate Counsel as well as ELT and Littler Mendelson.

A few housekeeping items before we get started. The first is just to let everyone know we have a very large audience that registered for today's Webcast. So you're going to have a great peer – community of peers – attending today's presentation with you, which is wonderful. And we really want to encourage all of you to ask questions during the Webcast. You can do that through the little console you should be seeing on the bottom left-hand corner of your screen. You can type a question into that little window and click "submit."

Margaret Hart Edwards and myself, who are your two speakers, are going to be making every effort to leave some time at the end of the presentation to answer your questions. Keep in mind, however; we do have a very large audience registered, so we won't be able to get to all of them. But we will give you some follow-up information should you like your question answered after the event.

The last thing I want to draw your attention to are the additional compendium materials that are available in the Webcast interface. First, you'll see that evaluation form, which we'd really appreciate you filling out at the end of the Webcast. You also see the two speaker bios are available in that link section. And most importantly, under number four and number five are two very in-depth compendium materials about harassment in the workplace and discrimination in the workplace. These contain detailed case summaries and analyses as well as 50 State Surveys, checklist, policies, sample tools that you can use in your everyday practice. There are over350 pages of materials here that have been updated right up until the last few months in terms of current case law and we're very happy to be able to provide those to today's attendees. And finally, that last link, you can get a copy of the slides in PDF form.

All right, so let's get started and we want to do a couple of introductions first. My name is Shanti Atkins. I am going to be your moderator today. I am the president and CEO of ELT. We are

specialists in online ethics and legal compliance training, and I advise clients across multiple industries and of all sizes about strategic risk management and compliance initiatives particularly as they relate to EEO issues.

More importantly, I want to introduce my colleague, Margaret Hart Edwards who is a shareholder with Littler Mendelson. Margaret is truly a giant in the field, an incredible expert. She's litigated hundreds of employment law cases in the state and federal courts, beginning her practice in 1975. And she routinely advises employers on legal compliance and litigation prevention measures and also trains extensively in harassment and discrimination protection.

Just to give you a brief overview of who ELT and Littler are, because we are somewhat joined at the hip, Littler Mendelson as many of you know is the nation's largest employment law firm now with more than 700 attorneys operating in 44 offices across the states. In 1996, Littler spun ELT out as a separate company that is designed to focus exclusively on online compliance training for your frontline employees and managers.

Today, we've been used by more than a thousand organizations around the globe and have trained more than 2 million employees and managers. But our goal today is not to provide the type of training that would go to a frontline employee or manager, it's to provide training to you as legal professionals about some of these latest cutting edge trends in EEO law.

So with that, let's jump right into the EEOC fiscal year 2007 charge statistics, which were just released a few weeks ago. Discrimination charges have hit their highest level in five years. It's the largest annual increased about 9 percent, since we've seen since the early 1990s. And in 2007, the agency obtained over $345 million in damages for their victims either in damages or settlements. You can see the various protected categories here and which one formed the charges coming out of the EEOC.

But what I want to stress today is that our goal is not to go through each of these protected categories and give you a very traditional overview of EEO law. We want to do something a little bit different today and in addition to covering some recent cases. Really give you a sense of some of the cutting edge trends and potential legal theories that as we go professionals you should be paying attention to when it comes to EEO law. Now we obviously can't be comprehensive with just about 45 minutes of speaking time but we'll going to try and touch on some of the issues that we think are going to be most interesting to you and most helpful to you in terms of your roles in health legal professional.

You can see from our agenda we're going to cover everything from technology to politics, the new face of sex and gender discrimination, the race in America, sweet revenge which is our nomenclature for retaliation and then a couple of other noteworthy trends and decisions.

So let's start with the technology revolution, you know, it goes about saying that technologies change all of our lives in ways we could never predicted. We all started with cell phones and laptops and now we've reached an entirely new age of technology with handheld devices' self-authoring technology. And this is really an ever evolving risk profile for American businesses. And that the trend that we want to focus on is posting content online, user generated content. Time magazine named us the Person of the Year in 2006 for this trend of user generated content on the Internet and see some pretty interesting statistics here from U.S. Census in 2003 and then Pew Research Polls from 2006 and 2007, 55 percent of U.S. homes have a web connected computer. We have 40 percent of adults getting their news from the Web, a huge component of Gen Nexters using social networking sites. Although that percentage is not much lower when you get into higher age ranges of those between 30 and 50. The social networking has become a big trend. And the other is blogging, 5 percent of employees have a personal blog, according to the Employment Law Alliance Poll from 2006. That could be as high as 10 million workers. But only 15 percent of companies have a policy that address blogging. So in short, there are all kinds of

ways that your employees can be posting content on the Internet, whether it's appropriate or inappropriate and whether it's on their personal or potentially in their professional lives.

On the left hand side of the screen there, obviously, you see our two most popular social networking sites MySpace and Facebook and then YouTube and Twitter. Twitter is a blogging site where you can actually do what called micro-blogging using texting capabilities from a cell phone. You can actually post live content to the Internet in real time using a cell phone.

So the implications of this in the workplace are obviously pretty far reaching and there've been some – some pretty headline-grabbing news stories in the last 18 months related in particular to social networking. California AAA fired 27 employees for posting messages to their MySpace account that were considered offensive on the basis of weight and sexual orientation. We have a New York City investigator fired for making racist comments on his MySpace page. Here we see that blurry line between personal life and work life. Of course, a lot of employees are accessing these social networking sites at work. The latter two are less EEO issues, but I think there somewhat interesting. There's a Comcast employee who was fired after a customer posted a video of that employee sleeping on the customer's couch to YouTube. This is one of the most popular downloads last year. The technician waiting for Comcast to give him instructions on how to fix the clients cable box actually fell asleep on the couch. That resulted in that employee getting fired and then a subsequent racial discrimination lawsuit.

And, of course, we have identity issues and IP and confidentiality issues when employees post private information on their social networking sites or other such sites. And we see Collectors Universe actually fired an employee for posting a photo of the CEO on his MySpace profile.

So lots of stuff hitting the headlines, but, Margaret, what about the actual case law in this area as it relates to employee use of electronic resources?

Margaret Hart Edwards: Well, it's interesting, Shanti. The case law is, of course, lagging what everyone is doing in real life because it takes a long time to develop case law. So surprisingly, we don't have as many Court of Appeals and higher decisions dealing with the use of electronic resources as you might think, but the cases that have evolved have made it very clear that these electronic resources can make or break a case for an employer or an employee.

So the use of e-mail, the use of these other electronic resources, has definitely become a huge deal in the trial courts. So it is now routine in even one-plaintiff cases for e-mail to become a major issue, and the electronic discovery issues that can arise in the single-plaintive case can be perfectly astonishing, as we all learned, in the ((inaudible)) Lockheed series of decisions. So people are trolling through the e-mail looking for that smoking gun that might exist for either side. But, of course, in the trial-court level we're also seeing a lot more use of the information that shows up in the social networking sites and also other kinds of postings to blogs. So we are – we're definitely in it now.

This is interesting, because it – really if the granddaddy of all these cases is the case of Blakey v. Continental Airlines case. And the Blakey versus Continental Airlines case, which was decided in New Jersey in 2000, now almost seems quaint because the court in that case was trying to actually grapple with what is as Internet service provider and what is an electronic bulletin board. But this case really is still important to bear in mind, because it essentially set up the legal landscape here. Because it warns that if an employer sponsors an electronic bulletin board and becomes aware that that bulletin board is being used in a way that discriminates against a particular employee or group, the employer is going to be responsible. And what happened in that case unfortunately was a female pilot was being pilloried by her male counterpart on an electronic bulletin board called the Crew Members Forum.

So the risks here are very large and the risks are, you know, involved confidential information that can be disclosed on these Web sites, but also it is very much – there are huge issues around

defamation, there are issues around discrimination and, of course, right in the center of all this is controversy over what is the right of the individual to express himself under the First Amendment. So as you watch the news, you'll see that there are stories like the story from the "New York Times" about a bank trying to shut down a Web site that published its confidential documents and then countervailing criticisms that this is a – this is an effort to prevent free speech.

So let's focus on one particular kind of use of electronic resources that you may actually be consulted about which is the temptation to use MySpace, Facebook and these other resources in the process of recruiting. There is no question that if you – one goes to somebody's MySpace page or Facebook page you'll going to ultimately discovered their ethnic origin, their gender, you're going to learn something about their age, you may learn about their personal habits, you may learn about their drinking, you may learn about their sexual preferences, and so forth. So this is huge amount of information on these pages and once a recruiter becomes in possession of that information it's a little bit difficult to unring the bell. So it's going to be a very important for employers to make sure that their contracting recruiters as well as their employee recruiters are not misusing this information.

On the other hand, there are legitimate reasons and arguments to use this information. If a person takes some of their remarks about how they feel about working and how they feel about their job and puts them on a Web site for all to see then, you know, arguably the employer has the right to use that information. And of course, its such a hard balance to strike because on the one hand, you know, that applicant you have to be careful about what maybe appearing on their Facebook page and then perhaps after you hire them if they're making racist comment or sexually derogatory comment toward coworkers on that site but you have another reason that's maybe actually affirmatively using that information and taking action.

Well and also sometimes people really do silly things and I saw this myself when I was looking at some Facebook pages in connection with a lawsuit. But sometimes people will use their cell phone cameras to take pictures of themselves doing things at work but they really should not do and then thinking that this ever so clever put it on their Facebook page. You know, arguably the employer has the right to look at that and the right to act on it because after all it's an admission.

So what do we do if the employee is posting inappropriate contents but the inappropriate content is being posted anonymously or under a pseudonym? You know, usually the ISP provider will not provide the identity of the poster without a subpoena. And there is now a growing body of case law about motions to quash the subpoenas and there is even a technical way to try to hide the blogger's IP address even from the Internet service provider that is hosting the blog.

So I'd like to really focus on a very interesting case it was just decided last month. It's the Krinsky v. Doe 6 case. And in this case, a CEO of a drug company is the plaintiff, Ms. Krinsky and she brought a defamation suit against a variety of Doe descendants and then send the subpoena to Yahoo! to try to discover the identity of the Doe descendants who had said such profoundly disgusting things about her that it's just hard to believe that anybody would do it in public. But some of them were arguably defamatory some of them were just simply extremely insulting.

So the court was faced with deciding whether or not it was going to reveal the identity or force allow Yahoo! to reveal the identity of the people who've made the remarks. And there was a motion to quash to subpoena and the Doe 6 with arguing vociferously that he had a constitutional right to remain anonymous. The court set the standard and this is a very important case so I think we'll have repercussions around the country. That the standard is that there should usually be some effort to notify the poster in this case that was found. But in order to pierce through the pseudonym the plaintiff must demonstrate a prima facie case of defamation. At least defamation was the issue in the Krinsky case. And here, Ms. Krinsky did not meet that standard and she didn't meet that standard because the expressions of – that were on the Web site were just so hyperbolic that the court found that they were obviously expressions of opinion.

Shanti Atkins: Wow, well, that's a very interesting case and one I think that's important to track. Let's talk about some other practical steps that employers can take and help counsel can take to manage some of these risks. You know, most organizations by now have what's known as an electronic resources policy or a cyber policy. What I find though in advising client is that these tend to be somewhat outdated. There is a big trend in the late '90s and early 2000 to finally get them in placed but most of them only addressed very basic technologies like e-mail and Internet use. And all of these new technologies which have literally exploded in the last two years especially with blogging and social networking are just not addressed in a lot of employer policies.

So it's critical to update those policies to set the rules of the road as it come to some of these new technologies and the ability to self author content. And I think you really need to address the employer's right to control communications in terms of dispelling free speech myths. A lot of employees have the attitude "You can't tell me what to say. I can say whatever I like. I have First Amendment protection pretty much over any opinion or statement I want to make whether verbal or online." And that so critical to dispel that kind of – that kind of thinking.

And part of the problem here is that a lot these new technologies are experienced first in an employees personal life at home, you know, in their social circles and then they creep into the workplace. So a lot of the habits and behaviors and opinions that your employees have about these technologies have been formed in their private lives. So you really need to set clear rules about using these technologies, making certain statements about accessing certain sites and explain privacy rights and responsibilities, you know. Every year, I think, it's a good idea to remind employees that they don't have a reasonable expectation of privacy in employer owned electronic resources or even potentially in those resources that they're accessing during working time. And although it's not an EEO issue, you obviously want to emphasize the trademark and confidentiality issues that can come out of the use of these electronic resources.

Finally, you got to bring that policy to life by actually training on it and clearly explaining the consequences for violating it. And so often policies go on Web and don't really – don't really resonate with employees because they don't see them come to life practically through educational programs.

But with that and in the interest of time, let's move to our second EEO trends which are hot politics. In our current presidential race which is very, very exciting to watch. Massive media coverage, which is basically dominating every news channel, but they're very divisive and emotional issues at the heart of the presidential race everything from abortion, the healthcare, the environment, economics, immigration, the war on terror. Suffice it to say, this means that your employees are talking about these issues at work and debating them with their coworkers in the working environment.

And when you think about the 2000 presidential race, you know, there are some very sensitive issues that come out of the various candidates. You know, did Obama do enough to denounce the divisive remarks associated with his campaign? Very powerful speech made last week with a heavy, heavy focus and emphasis on race. I'm really talking about race in a way that a lot of political pundits and politicians say is somewhat novel in terms of its directness. Then we have the issue of our first potential female president, you know, is Clinton playing the gender card? And issues of race with McCain as the oldest first-time presidential candidate.

So I think that the headlines from a news perspective are putting additional emphasis on this type of issues in the workplace.

Margaret, let's talk about what kinds of speech are and are not protected when it comes to employee conversations?

Margaret Hart Edwards: Well, generally speaking, even if you assumed that the First Amendment does apply in a workplace, and generally it applies much more in public workplaces than it does in

private workplaces, there are still large carve outs from the First Amendment. So it has been established now for quite sometime it says certain kinds of speech are not protected. So defamation is a good example, obscenity, pornography. But, in addition, discriminatory or harassing remarks are also not protected speech nor/or words that are fighting words that essentially incite people to violence or constitute threats in and of themselves.

And the cases that have looked at this in the Aguilar v. Avis Rent a Car case back from 1999 California Supreme Court went through this very, very carefully. Have looked at these different classifications of unprotected speech. And noted that in the workplace people really are captive audience, and the rules necessarily have to be different. And in that case, they actually upheld a prior restraint, an injunction, prohibiting discriminatory remarks in the workplace.

But turning to a couple of more recent cases that deal with religion, these cases are very interesting, because these cases involve that fine line that the employers are trying to walk, both in the public and the private workplace, between First Amendment expressions about religion and other people's rights. And so the Piggee case and the Ng case are both examples of circumstances where an employee took the position that he or she had the right to proselytize at work.

So Piggee, which I think is a great name for a woman who was teaching cosmetology, was putting brochures against homosexuality – very violent brochures, I might add – into the smock of one of her gay students and essentially trying to harass him into somehow changing his lifestyle. And that was found to be illegal harassment, and she was ultimately disciplined and discharged. This was in a community-college environment, so she tried to assert First Amendment protections and lost.

In the Ng case, Ms. Ng was trying to conduct an e-mail ministry using the employer's e-mail system at work and also use employer's conference rooms to hold prayer meetings and indeed entire services. And after being repeatedly called that she could not do that, she continued to do it, was fired for insubordination and then claimed that her beliefs were not being accommodated, and without to much difficulty the California Court of Appeals found that she did not have the right to do that to the detriment of other people's right to be not harassed with other people's religious belief.

And then the other case that's very much like this is the important Ninth Circuit case of Peterson v. Hewlett-Packard. And this case is particularly interesting, because there the court found that there was not protection for Mr. Peterson. Mr. Peterson was offended by diversity posters being put on the walls by Hewlett-Packard at his facility. And he put up his own quotations in large lettering on his work space along the lines of Leviticus 20:13, "that if a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination; they shall surely be put to death." Well, was this – the real question was, you know, was this protected speech. And the answer resoundingly is no, because one of the things that Mr. Peterson makes plain is that he was actually trying to be hurtful. He was trying to jolt other people into his reality with his very strong statements. And the court found that in a circumstance like that, the employer just simply cannot allow, that it doesn't have to accommodate that kind of speech under the religious accommodation requirements, because it's to the detriment of other people's rights.

Now interestingly, if this had been a somewhat different set of facts, if there had just simply been a lively debate between coworkers about some of these election issues and it had not been hurtful and it had not been inappropriately intrusive on people's rights, it probably would be a core political speech that is protected. And in some states like California, there's actually a statue prohibiting discrimination in the private workplace on the basis of political belief.

So right now during the election we are going to be looking at people expressing a lot of very strong opinions, and most of it will not have any repercussions at all. But one of the things that I think very senior managers need to think about is whether or not the remarks that *they* make

about how they feel about John McCain's age, for example, may end up being quoted in a future age-discrimination case.

Shanti Atkins: Yes, I think that's interesting you can have that be sort of ancillary evidence potentially to a hostile environment, either based on age or some other protected category. And those are, that certainly, we've seen that in the case law in past years, that those types sort of environmental comments that aren't necessarily tied to a particular incident can be very damaging.

So in terms of, you know, the practical steps, I think that, you know, we're seeing a theme here are the policies and training. You absolutely need to update your policy. But you need to be realistic and enforce rules regarding workplace speech that are actually manageable and don't create such a high standard that you actually create liability for the organization. So it's not realistic to tell people they can never talk about politics. They can never talk about religion. You really want to find that right balance in terms of the message that's going to and plea. So on the one hand, they understand where the boundaries are in terms of certain types of speech particularly speech designed to be hurtful or harassing and if they, you know, at the same time obviously are not going to be policed to the point that they can't have conversations in the workplace. But I think it's also important to inform employees that often workplace policies are broader than the law. And the employer does have some capabilities to control the type of speech that are happening in the workplace.

So let's turn to our third hot topic when it comes to EEO trends and that's the new face of sex and gender discrimination. We have very quickly discover a few high points here because there has been a lot going on in this area that I think are important for our audiences in health legal professionals. So let's talk about romance in work. I've some very interesting statistics from a Harris Interactive and Spherion Corporation Poll got 41 percent of workers between 25 and 40 admitting they've had an office romance and 76 percent of workers thinking that office romance is more common than it was 10 years ago. It's not really about surprising to see some of these statistics because I think people are working longer hours. They've seen some sexual taboos relaxed. And it is natural to look for and find a mate at work. In full disclosure, I met my husband on our first law firm.

But sexual favoritism can be a time bomb and I think one of the cases we want to focus on here is the Miller versus Department of Corrections case of 2005 California Superior Court case. And basically, the California court there was focusing on an instance not where two people are in a relationship when the relationship goes badly and one of them claimed harassment, but rather a relationship between a supervisor and a subordinate that's going well, but the people observing that relationship aren't so happy about it. Because it's creating the impression that you need to be in a relationship with the boss potentially to get ahead.

And so this theory of sexual favoritism is certainly gaining ground in California but at the same time looking at Federal law, you have to remember that anytime you got a supervisor-subordinate relationship that others are able to observe and comment on. We've also got potential liability for this basic environmental sexual harassment where the two lovebirds, perhaps being overly amorous or in their expression of affection for each other, are just creating an offensive environment to other employees. But the sexual-favoritism concept is really taking hold in California, and it's that "Hey, do I need to sleep with the boss to get ahead?"

Now, this is also making headlines and it certainly made headlines this week with our big news story with Detroit Mayor Kwame Kilpatrick. He was obviously involved in that very high profile text messaging scandal with his former chief of staff. There has been an accusation that taxpayer funded-security was used to cover up the relationship. The current total depending on which news station you listened to is that either between $8 million or $9 million have been paid out by the city of Detroit to try and handle this case. Kilpatrick was charged with perjury, obstruction of justice and official misconduct on Monday. He was indicted yesterday.

So definitely, newsworthy, and, of course, Paul Wolfowitz made the news last year with his romantic relationship with a female subordinate. I think everyone is familiar with that case. But one but maybe a little less familiar is Mark Everson. He was the sixth CEO in five years of the Red Cross. Basically, got hired to come in and clean up the debacle after Katrina. Some of them mismanagement of the Red Cross and within his first six months of being on the job got into a relationship with a female subordinate and was asked to resign within six months of being at the Red Cross. Very high profile resignation which obviously had damage not just on the potential legal scale but damaging further with the reputation of the Red Cross and really hamstringing some of their effort in terms of fund raising.

So sexual favoritism is definitely newsworthy not just something that's gaining momentum in terms of a legal theory. So in terms of saying ahead of the trends when it comes to office romance I really think you need to look at your policies when they come to patronization. Are you going to bend and discourage supervisor-subordinate relationships? That's a less common approach the more – the more popular one is to discourage it and require that to get into a relationship with supervisor-subordinate to disclose it and then separate the parties. That it's really important to raise awareness of this inside the workplace in terms of what your rules are with people dating whether it's employee to employee or employee to supervisor. A lot of employees are frequently unaware that a policy even exist and it's really important that your training program vis-à-vis sexual harassment touch on this issue of sexual favoritism which is this phenomenon not of the relationship going badly between the two parties, but how that relationship is perceived by coworkers.

There are interesting quick statistics as we just catch onto some trends in this area and actual overall decline in the number of sexual harassment charges being brought by women but a slight uptake in the number of charges being brought by men so a little bit of an uptrend there.

More importantly, we want to talk about sexual orientation and gender identity protection. They are definitely expanding. We have currently 17 states offering protection on the basis of sexual orientation, and nine of those states also offer some protection based on gender identity. But there's a lot of confusion about what gender identity even if and whether it's the same or different from sexual orientation, it's very different. Gender identity is about an employee's belief about whether he or she is female. It has nothing to do with sexual orientation and obviously there's less protection in terms of state law in this area but it's one that definitely growing.

The Employment Non-Discrimination Act, this is actually been around in some way, shape or form since the early '70s. But it was finally passed by the House of Representatives in November of last year and it prohibits discrimination on the basis of sexual orientation. So this is potential Federal law that if you were to ask me my opinion I think we're going to see this passed and active in 2009. That's going to make sexual orientation a federally protected category.

There were a controversial about the ENDA is that in order to get it passed by the House of Reps, gender identity was specifically removed from this piece of legislation. So the ENDA is covering sexual orientation but not that gender identity protection. Margaret, maybe you can give us a little insight on some of the local protections in this area as well?

Margaret Hart Edwards: Well, there quite a few states as you mentioned do protect this as a category but then there are also counties and cities that do as well. And an example is the case that comes out of New York City. Hear the Maffei case and this case the fascinating one, because the particular New York City ordinance involved protected sexual orientation and prohibited discrimination on the basis of sex. But it didn't actually have the two words "gender identity" in the ordinance at that time. And the plaintiff Maffei was a man who started life as a woman and went through sexual identity change and was very badly harassed on the job by his supervisor. And he brought a claim under the ordinance and the court said, "You know, this is really very different." This is not about sexual orientation because Mr. Maffei is not homosexual. So it really has to be considered under the category of sex. And so taking a lease out of some early or Title

VII cases including U.S. Supreme Court decision are the Oncale case the court said this person is being harassed because of his sex even though that sex has just been change.

So I think this furnishes a very interesting theoretical models or how these kinds of claims can be made. And it's similar to the theoretical model in the next case. The Cromer-Kendall case because this is another case that try to address the issue of discrimination involving a woman supervisor who was a sergeant in the D.C. police who was indeed really stalking one of her female subordinates to try to start a sexual relationship with her. And the court addressed that entirely through the lens of traditional Title VII sex discrimination theory again following the lead of Oncale since there was no protection available on the basis of sexual orientation discrimination under Title VII at that time.

So once we get a change in the law I think we can assume that there will be a whole new body of case law that will develop under sexual orientation discrimination theory that up until this point has been nibbled away at the edges under more traditional Title VII types of theories.

Now our next topic is family discrimination family responsibility discrimination. And this is one that I think is extremely important for employers to be aware off because this is a very common and very subtle form of discrimination that is happening all the time. And we're all familiar with pregnancy discrimination and pregnancy discrimination is a tiny little subset of what this is really about. This is actually about stereotyping and denying opportunities to people because they maybe married or because they might be a single mother or a single father or because they might be a parents or they might – or denying opportunities for people who are responsible for taking care of an elderly parent or taking care of a member of the family who is disable.

So the EEOC issued a very interesting enforcement guidance in May 2007, which is actually a pretty interesting read. The statistics in the footnotes are fascinating. And the EEOC's guidance gives a lot of very concrete example of the kind of caregiver discrimination that is going on and which the EEOC is making an enforcement priority. And as a result of not just the EEOC's focus on this but actually a focus that started earlier in some of the legal aide organizations and people that are trying to pursue impact litigation. There have been a big – there's been a marked increased in the number of cases on dealing with family responsibility discrimination just in the last 10 years.

And the cases are going to increase at an astonishing rate. They have already increases at an astonishing rate but as more and more information become available to potential claimants and there are more and more legal aide organizations making this a project or a priority we can expect a marked uptake in these kinds of claims. But as – even as we deal with family responsibility discrimination we mustn't forget that all the other more traditional types of sex discrimination and sexual harassment claims are alive and well. As you saw on those statistics at the beginning of our program sex discrimination is still one of the most popular charges filed with the EEOC accounting for slightly more than 30 percent of the charges. And all of the traditional forms of sexual harassments are still very much in evidence and cases are being filed all the time where, you know, groping and jokes and pornography and demeaning conduct and inappropriate behavior at work.

Shanti Atkins: So Margaret maybe you can give people an idea so that, you know, what a traditional type of case results to in terms of average liability?

Margaret Hart Edwards: Well, unfortunately the average liability in a typical sexual harassment case is going to end up coming out to about a million dollars so that's a national average. If you have the misfortune of practicing here in California it's higher. So the sexual harassment liability is huge and as a consequence it really does have to be addressed from a preventative point of view.

Shanti Atkins: That's right and when it comes to ongoing harassment training in a court of California we contend with our mandatory harassment training that we have to do every other year. It's

important to explore, you know, these more traditional areas and then some of the more grey areas in some of the emerging trends like sexual favoritism, sexual orientation, the FRD gender stereotyping. And I would encourage people who are even not in California to take a look at the California harassment training regulations. We put the URL where you can access some right there at the bottom of the screen.

These are really the only available regulations out there that go into extensive detail on what is considered really good harassment prevention training not just for sex but other protected categories. And a lot of our client you see is even outside of California as a very helpful benchmark.

So let's turn to our fourth trend which is race in America which is obviously still a big issue. Some interesting statistics here about the percentage of Americans who believe that racism is still a serious problem and a very controversial study coming out of the University of Connecticut from Professor Jack Dovidio estimating that 80 percent of White Americans have a racist feelings and many may not even recognized them as racist.

A Gallup Poll from 2006 though shows that everyone feels at some point but they might have experienced discrimination in the workplace you can see some interesting statistics on that screen 31 percent of Asian Americans, 26 percent of African Americans, 18 percent of Hispanic Americans, and 12 percent of White Americans.

And as Margaret mentioned, you know, the trend continues with EEOC charges race topping the charges every year really since the early '90s and once again in fiscal year '07. Race was the top charge making up to 37 percent of all EEOC charges.

The EEOC is definitely fighting back. They announced a little over a year ago their E-Race Initiative which is designed to eradicate both racism and colorism from the workplace. Colorism obviously being related to skin tone and not being distinguished from race. Very serious education outreach efforts by the EEOC which means we can expect larger plaintiff cases, more enforcement, bigger dollars, bigger publicity, and more individual claims as a result of the efforts. And I think that, you know, the take away here is that when it comes to your preventative efforts with your policies and your training programs just be aware of the problems of the issues of race discrimination. And don't allow this preventative program to get what I like to call "siloed" into sex harassment prevention programs only, and I feel a lot of that with employers. They just get very, very myopically focused on sex harassment and they forget about race.

So Margaret with that, let's talk a little bit about retaliation.

Margaret Hart Edwards: Well, speaking of things – that thing is better forgotten. One of the biggest problem is retaliation because it is apparently a basic human emotion and it certainly one of the most dangerous claims that can be brought in front of the jury. And there is a reason why almost every discrimination claim that gets filed at least out here in California includes a retaliation claim. It's because it's so easy to win a retaliation claim in front of a jury.

Now one of the, you know, the basic here are of course a person cannot be retaliated against for engaging in protected activity like making a complaint or whether its an external complaint or an internal complaint or participating in an investigation. And if they do make a complaint the complaint doesn't even have to be right. They just have to be made in good faith.

Now unfortunately, most managers do not understand that they actually have to really engage in very careful behavior if they're accused. Their first reaction they have is to want to retaliate and they simply cannot. It's too dangerous. And this is reflected in the statistics because retaliation claims are now making up of over 32 percent of all the claims being filed with the EEOC. And this is shown in a nice consistent growth and of course, we have also seen very high profile of retaliation type claims in the press with, you know people who are whistleblowers and so forth.

But I'd like to focus on one particular type of retaliation that I'm sure many of you were familiar with which is retaliation prohibited under the Sarbanes-Oxley securities law. And this retaliation is consistently expanding. There was a very interesting case just decided last month in the Southern District of New York the O'Mahony case, which I commend to your reading. Ms. O'Mahony was employed in France by a French subsidiary of Accenture, which is a Bermudan company and she complained that her – she did not had social security contributions made on her behalf to the French government and that this was tax fraud. And her complaint related to earlier years when she was an employee of the U.S. subsidiary again working in France. And she was apparently demoted after making these complaints. The court found that she could make that claim even though it had been dismissed on a administrative level because it seem to involve an extraterritorial application of Sarbanes-Oxley. So this is a very important case because it almost seems like the district court reached out to take jurisdiction of this one because the decision makers involved were working in the United States.

Another thing that's very important to keep in mind in the retaliation area is the Burlington Northern decision by the U.S. Supreme Court in 2006. I'm sure you're very familiar with this. It's really significantly expanded the retaliation exposure by lowering the bar of what could be retaliatory conduct. And the result is that were going to see more and more claims of retaliation. They're going to be harder to defeat on summary judgment and we are also going to see more and more instances where people will take a variety of small behaviors and add them up aggregate them to talk about accumulative effects of those things against the individuals.

Shanti Atkins: Margaret, on the interest of time maybe we can just jump to some of the practical tips related to….

Margaret Hart Edwards: You bet.

Shanti Atkins: …retaliation.

Margaret Hart Edwards: Well, one of the things that you want to do to make sure that retaliation is not happening is to make sure that your managers understand what the provisions are against retaliation and how low the bar indeed is under the U.S. Supreme Court decision. This really does mean that mandatory training of managers on retaliation should be – should be considered here because there isn't any other way to get the message through and it is this training ideally gives them some practical examples and is sympathetic to the fact that instinct towards retaliation is very much alive and well.

Shanti Atkins: That's right. Well, let's get to our last topic which are some quick hits on some other notable trends and decisions. Maybe you can talk for a few seconds here on pattern and practice cases and then I think we'll just going to skip right through to our military leave laws and the "me, too" case.

Margaret Hart Edwards: OK. Well, one of the things that you have probably already heard about that it is very, very true. Is that the EEOC is trying to focus on systemic discrimination. They've announced this is a litigation initiative. They are definitely pursuing cases like this by the end of fiscal year 2006 43 percent of their active files involved multiple aggrieved parties. They are claiming a very high litigation success rate of almost 93 percent, which, you know, tells us that we can definitely expect more of this kind of pattern and practice cases in the future.

Moving on to military leaves, it's really important that everybody recognized that as of January 28th of this year there is now a new form of FMLA leave for family members of military people. And there are two different kinds of leave here. There's an additional 12 work week for what is called the qualifying exigency. The term that is undefined as yet by the Department of Labor, which is supposed to adapt regulations. And 26 weeks of leave to care for an injured or ill service

member and this extends not just to the usual spouse, parent, child, but even to the next of kin who might have the responsibility to be the caregiver.

In addition, a number of different states have also adapted attached work of different kinds of military family leave laws. California for example has a 10-day mandatory unpaid leave when the service member comes back from leave. But in Indiana, Illinois, Nebraska and a number of other states have adapted a somewhat different type of state law. None of these state laws fit together with the Federal law very well and so there is a huge question as to whether or not they're an addition to each other, whether they overlap that remains to be resolved.

The U.S. Supreme Court this year came out with a very interesting decision about "Me Too" evidence. In (absence) what they decided is that this really in the sound discretion of the trial court. So if the trial court wants to allow in evidence of discrimination against other people even potentially by different managers at the employer that is within the discretion of the trial court. And it essentially reversed a Court of Appeal decision that it just said failed to give decision reference to the trial court as the decider on plaintiff evidence in determining whether or not "me, too" evidence will be allowed. This has not settled the question in any profound way. So it hasn't said "me, too" evidence is not allowed and it hasn't said "me, too" evidence is always allowed it's just simply leaves it up to the trial court.

Shanti Atkins: All right, with that. Let's put everything back together, you know, very brief summary here. It's obviously important to pay attention to trends, political issues and demographic shifts and really, you know, the two practical things that you need to be considering in all of these areas and it's a mantra that I know. Margaret, you and I preached all the time on updating your policies and training on the policies is so incredibly important in these areas. So we have about five or 10 minutes left for questions, before we get to that I'm just going to put up on the screen our e-mail addresses if we don't get to you because as I mentioned we've got a large number of people on today's Webcast. And also you can see there our Web site www.elt-inc.com we just has some fantastic complimentary resources. These are the training policies, 50 State Surveys, all that good stuff that ties in to many of the topics that we've covered today.

So Margaret with that, I'm going to start perusing some of the questions that come in for the ACC members, and let's see if we can get some great advice.
So one of the questions is about defamation, can an individual bring defamation charges against a party that's falsely accused of discrimination if the person was found to be cleared of all accusations and the original allegation had no weight or merit?

Margaret Hart Edwards: Well, you know, that's a very tough claim to actually sustain in most jurisdictions. And the reason is that the individual's ability to make a claim of discrimination it may very well be a privileged event. Privileged in the sense of it's either covered by the judicial privilege which is recognize exclusively in some jurisdiction by statute and another jurisdiction in the common law. Or it maybe privileged because it involve a communication between people who have a common interest – a common interest privilege.

So it's very seldom possible for the victim of a false accusation of discrimination to successfully make a defamation claim. Also efforts to try to litigate those claims in many jurisdictions have also been unsuccessful under the anti-SLAPP statutes.

Shanti Atkins: Right. The question about First Amendment rights, do employees of private i.e., non-governmental organizations even have a First Amendment argument against their employer when it comes to texting, blogging and speech in the workplace?

Margaret Hart Edwards: Well, the key word here is speech in the workplace because one of the things that is really very difficult here is what is in the workplace and what is not in the workplace? Because if it's the employer is controlling the use of particular electronic resources and put some restrictions in place on use of its electronic resources it can enforced those even though that may

significantly restrict people's right of speech. However, if the employee is engaging in free speech outside of work then the question becomes more difficult because then the question becomes is that exercise of free speech protected or not protected and can the employer take – take measures against the employee if the employee engages in speech outside work that actually has a negative impact on the abilities to (perform) or on other legitimate interest for the employers. So these – these cases tend to turn very much on their individual facts.

Shanti Atkins: Well, you know, and that's a partial answer to the set of question which is a very big one, you know, how the court look at situation where employer discipline employees for sending racially or sexually degrading and highly offensive documents and pictures using private e-mail during non-working time like via home computer and then to the private e-mail addresses of other employees. And that sort of I totally agree with you, Margaret, really follows from the facts of the case and whether you can still show that there is a nexus into the workplace as a result of the nature of the comments and the way that they've been made.

Margaret Hart Edwards: Yes, and one the things that's interesting is that this battle has already been fought about sexual harassment that it doesn't happen to occur in a workplace but occurs after work perhaps at the local watering hole. And this is very similar, if the relationship that leads to this kind of private e-mail arises out of work and has some kind of relationship to work particularly if it involved the boss or the subordinate then this kind of use of private e-mail may end up having a potential liability for the employer.

Shanti Atkins: Yes. I think we have time for one more question and we have a good one about office romance. Aren't there pitfalls separating two employees where they have unequal work roles? How does an employer effectuate "equal separation" without precipitating an additional sex discrimination claim?

Margaret Hart Edwards: Yes, that was a really nice situation if you discovered that a higher-ranking person is having an affair with a lower ranking person and whom are you going to move. I know that sometimes the employer considers trying to give the people in the relationship a choice but is not always. Something is necessarily makes business sense. So unfortunately, the answer is always going to be extremely situational. You have to look at what are the real legitimate business interest here and how well can those be documented and is necessary proved in order to make a decision. You definitely don't want a situation where the default provision is move the woman because that is, you know, obviously going to look like sex discrimination.

Shanti Atkins: All right. Well, with that words about one minute pass the hour and we're now all officially in the afternoon depending what time zone we're in. I want to thank everyone so much for attending the Webcast today on EEO trends and also thank the Association of Corporate Counsel for sponsoring today's event. And a big thank you to you, Margaret, for speaking and sharing your expertise with us today.

Margaret Hart Edwards: Well, thank you, Shanti.

Shanti Atkins: Thank you so much, everyone, and a reminder, again, of all the compendium materials that are available to you. We really recommend that you take advantage of those employment discrimination and harassment in the workplace publications that we post for you. They're incredibly in-depth and up to date with very recent case law summaries and updated 50 State Surveys.

So thank you so much to Margaret, thank you so much to the Association of Corporate Counsel. And this is ELT saying thank you for participating and have a great afternoon.

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