

LABOR & EMPLOYMENT LAW UPDATE

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FLSA MINIMUM WAGE INCREASES

- July 24, 2007 - \$5.85 per hour
- July 24, 2008 - \$6.55 per hour
- July 24, 2009 - \$7.25 per hour

FMLA Rights for Military Families

- New FMLA rights for military families were expanded by the Act passed January 28, 2008
- New regulations expected

“Exigency” Leave: 12 Weeks

- In addition to the events that have always provided entitlement to leave for twelve weeks (i.e., birth of child, placement of child for adoption/foster care, care of child/spouse/parent, and serious health condition), there is a new category providing entitlement for twelve weeks.
- Exigency: Leave is provided “[b]ecause of any qualifying exigency (as the Secretary shall, by regulation, determine) arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in support of a contingency operation.”
- “Exigency” portion of Act will take effect after the Department of Labor issues regulations.

Servicemember Family Leave – 26 weeks

- “Subject to section 103 [certification requirements], an eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember shall be entitled to a total of 26 workweeks of leave during a 12-month period to care for the servicemember. The leave described in this paragraph shall only be available during a single 12-month period.”
- “Next of kin” is defined as “the nearest blood relative of that individual.”

Servicemember Family Leave – 26 weeks

- “Covered Servicemember” means a member of the Armed Forces...who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness.”
- “Serious Injury or Illness” means “an injury or illness incurred by the member in line of duty on active duty in the Armed Forces that may render the member medically unfit to perform the duties of the member’s office, grade, rank, or rating.”

Combined Leave Total

- “During the single 12-month period...an eligible employee shall be entitled to a combined total of 26 workweeks of leave under paragraphs (1) and (3) [the 12 and 26 week entitlements]. Nothing in this paragraph shall be construed to limit the availability of leave under paragraph (1) [the 12 week entitlements] during any other 12-month period.”
- Probably means that if the employee takes, for example, 14 weeks of servicemember family leave, the employee still has 12 weeks of other type of FMLA leave left.

Intermittent Leave

- Both the new “qualifying exigency” and “servicemember family leave” may be taken intermittently.

Substitution of Paid Leave

- For “exigency leave,” employee may elect or employer may require the employee to substitute paid vacation, personal or family leave.
- For “servicemember family leave,” employee may elect or employer may require the employee to substitute paid vacation, personal, family, or sick leave.
- Nothing requires an employer to provide paid leave in any situation in which the employer would not normally provide any such paid leave.

Notice Requirement

- For “exigency leave,” employee is to provide notice to the employer as is “reasonable and practicable.”

Certification

- Allowed for “servicemember family leave” similar to other types of certification.
- For “exigency leave,” an employer “may require that a request for leave...be supported by a certification issued at such time and in such manner as the Secretary may by regulation prescribe.”

New E-Discovery Obligations

- New Federal Rules of Civil Procedure
 - Explicitly recognizes “Electronically Stored Information” as discoverable in lawsuits
 - Requires attorneys to discuss early in case
 - Early due diligence and retention

New E-Discovery Obligations

- Obligation to Preserve and Produce Relevant Evidence
- Paper Documents
- Electronic Media
- Metadata/Native Format
- Adverse Consequences of Failing to Fulfill E-Discovery Obligations
- Coleman Holdings, Inc. v. Morgan Stanley and Company, Inc.
- Zubulake v. UBS Warburg, LLC

ESI Discovery Obligations

- Hold and preserve potentially relevant ESI
- Identify all sources and those in possession of information in any form
- Advise all of their responsibilities
- Inventory/Identify resources – Desktop server, laptop, cell phone, blackberry, backup tapes, old computers/devices/other devices

Obligations to Produce ESI

- Cost of responding your expense
- Cost of doing business in computer age.
- Requester determines format/native format/all metadata.
- Possible cost shifting for inaccessible data – 7 factor test.

Minimum Requirements

- Immediately notify all of duty to preserve all relevant information. (“Hold Letter”)
- Conduct an inventory/itemization/what to preserve.
- Identify internal/external sources to retrieve information/review/produce what is required.
- As needed, perform data searching and restoration functions.

Planning in Advance for ESI Discovery

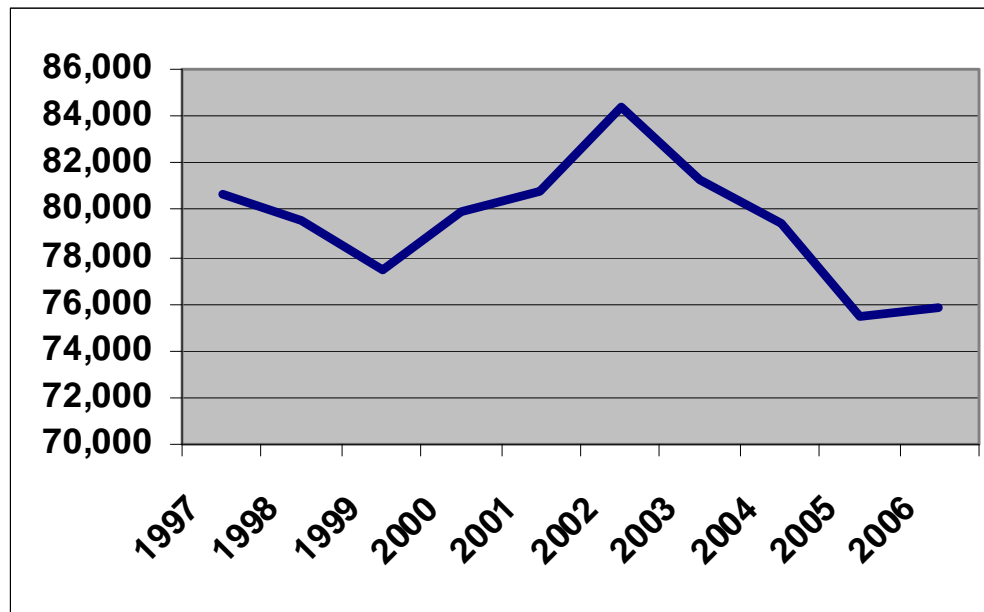
- Before a lawsuit hits:
 - Inventory ESI assets
 - Identify backup procedures and retention periods
 - Draft form litigation hold letter
 - Identify key individuals
 - Identify inaccessible data

Consequences of Messing Up ESI Discovery

- If relevant information is lost or destroyed, a party could face—
 - A “spoliation” order
 - Monetary sanctions
 - Adverse jury instructions
 - Just Generally, Embarrassment
- Big Ticket Item for Employment Cases:
 - E-MAIL!

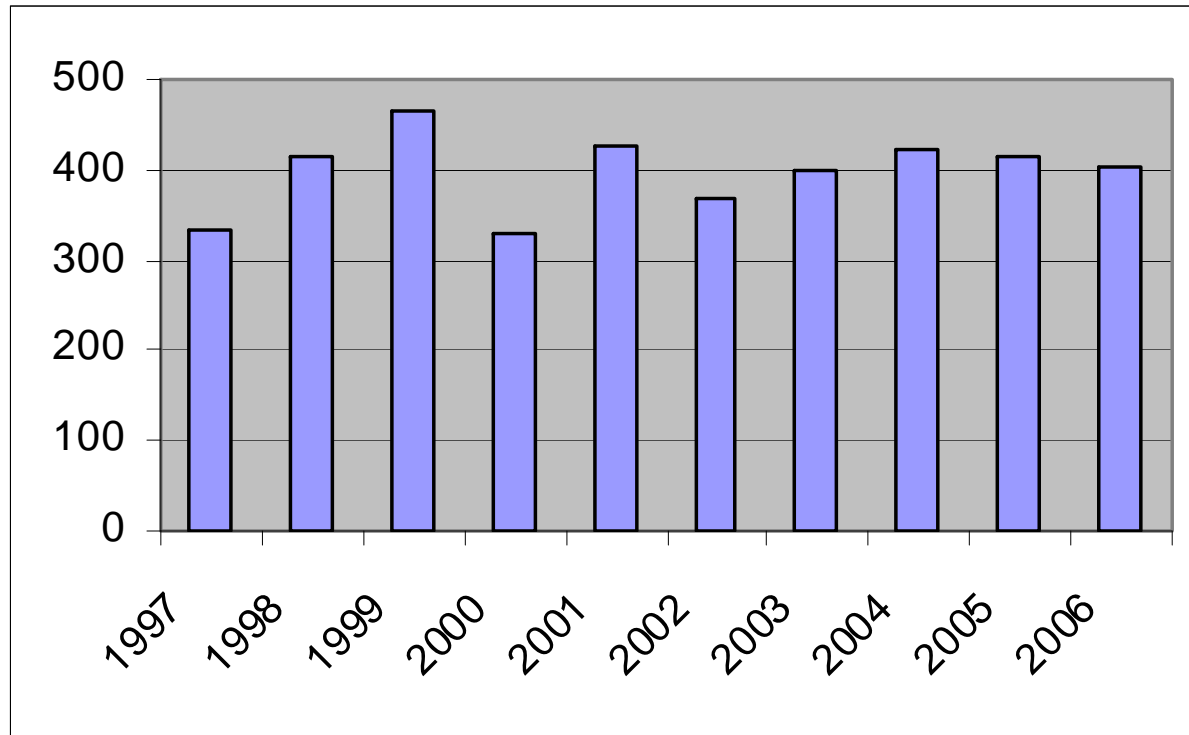
National EEOC Statistics

TOTAL CHARGES



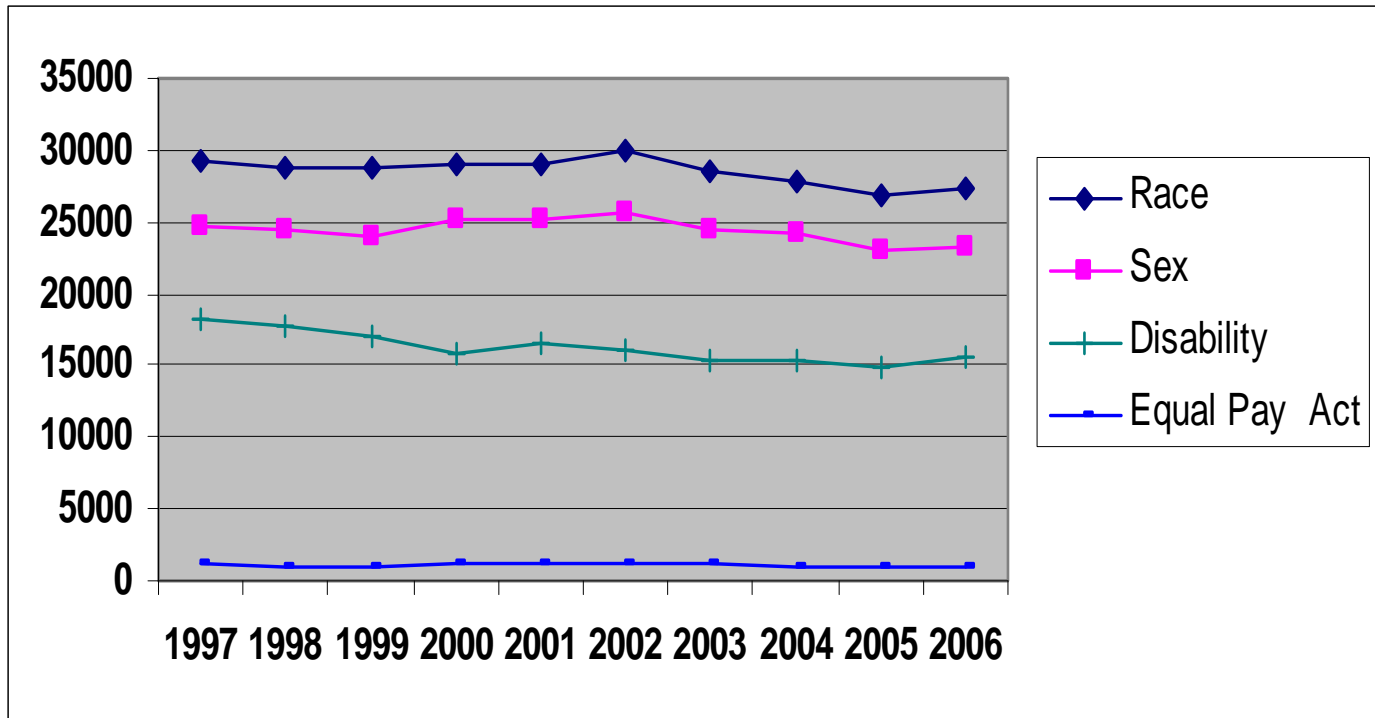
National EEOC Statistics

EEOC LAWSUITS



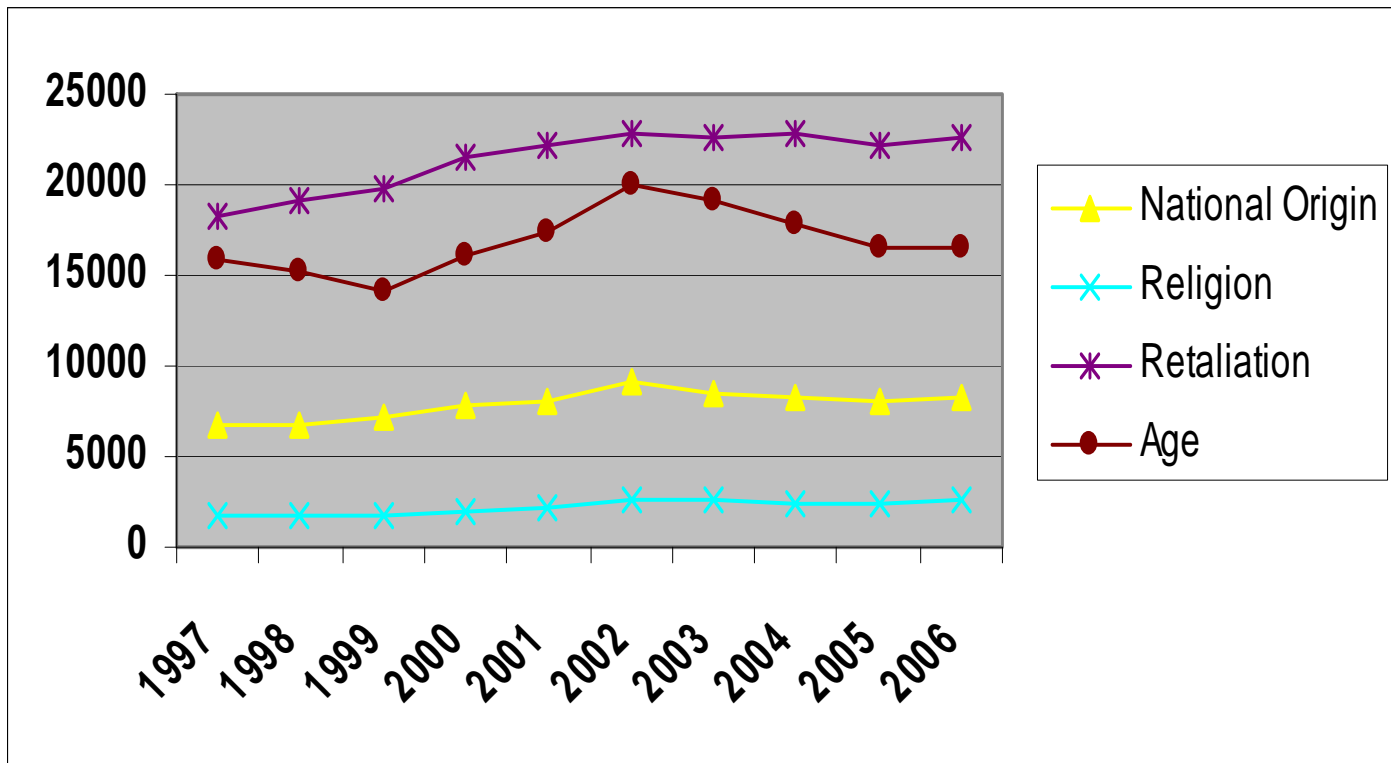
National EEOC Statistics

CHARGES BY TYPE

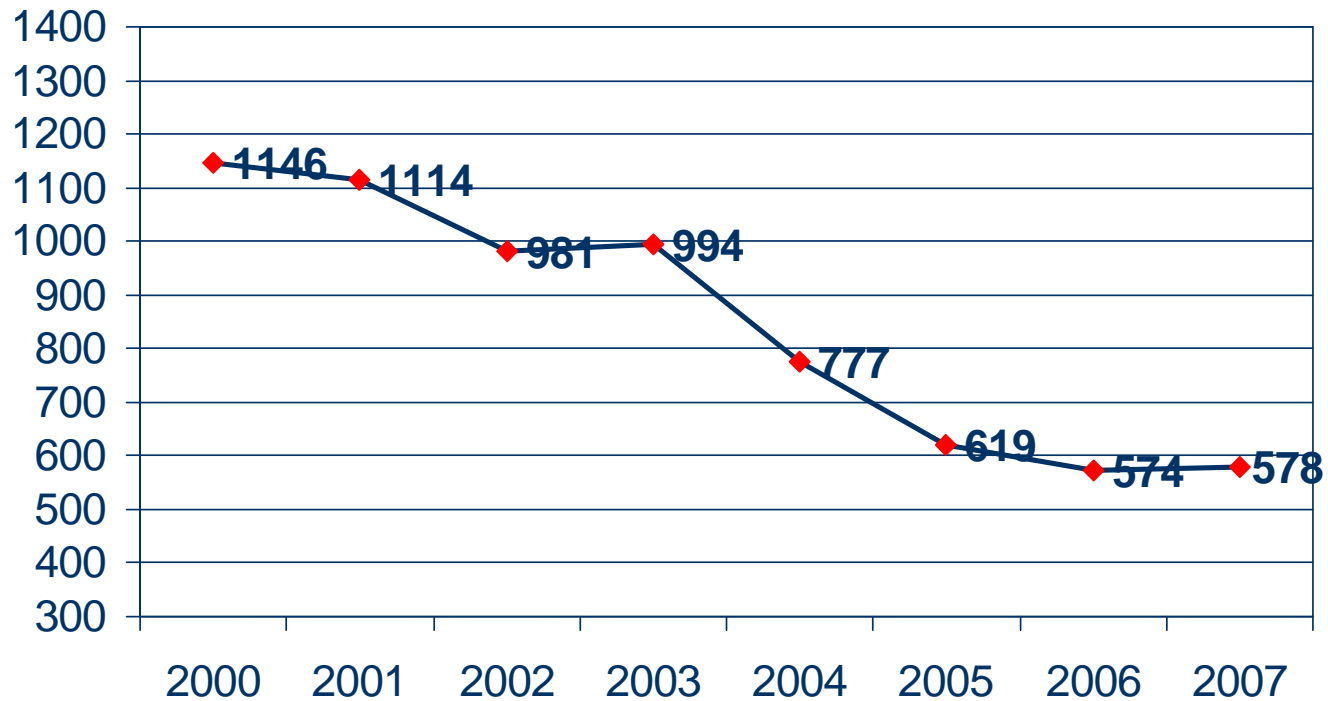


National EEOC Statistics

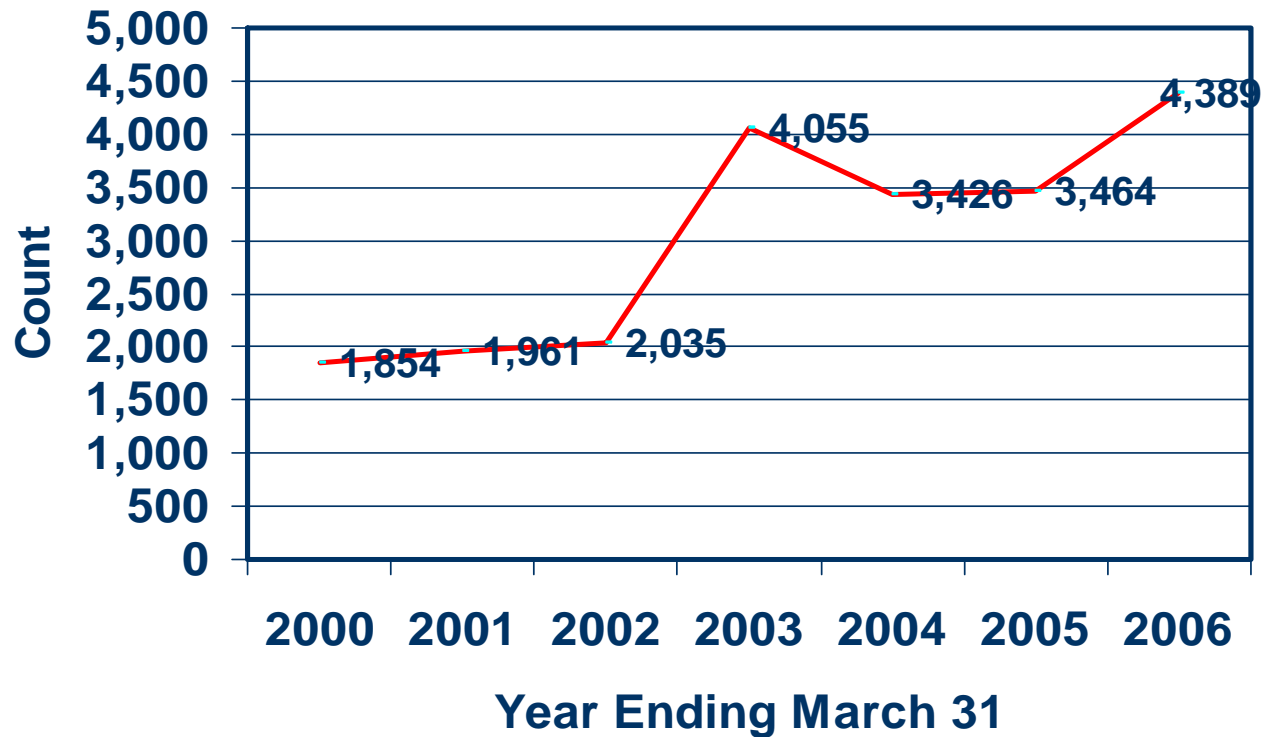
CHARGES BY TYPE



Alabama Federal Employment Discrimination Cases



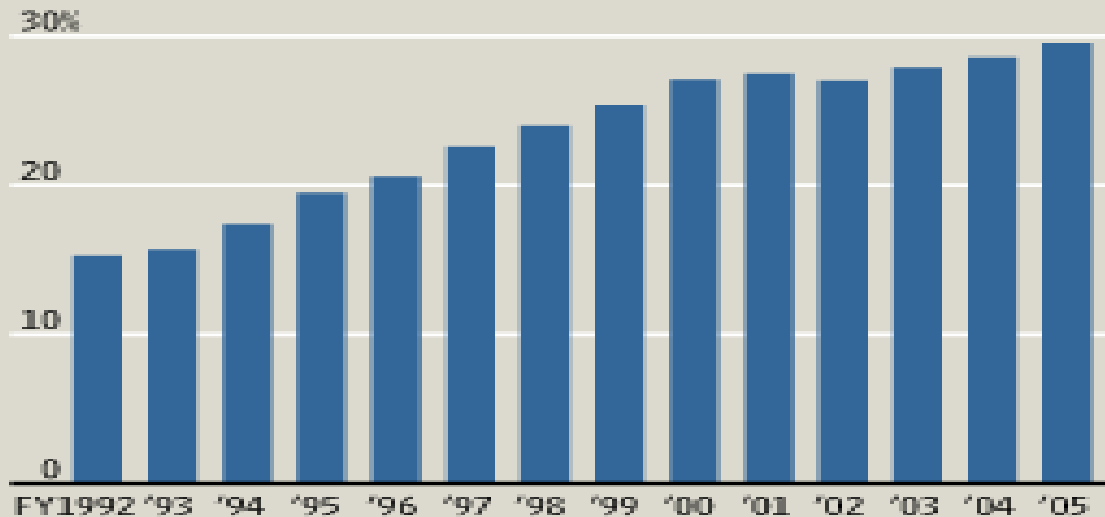
Fair Labor Standards Act Case Filings 2000-2006



Supreme Court Expands Retaliation Claims

Backlash

Percentage of all EEOC complaints which include employee-retaliation claims



Source: EEOC

Burlington N. & Santa Fe Ry. Co. v. White (2006)

- **When an employee alleges retaliation, what is a “materially adverse” action?**
- **Any harm or injury considered materially adverse**
- **Reasonable person dissuaded from making/supporting charge of discrimination due to employer’s conduct**
- **Genuine issues of material fact**

Wallace v. GA DOT (11th Cir. 12/13/06)

- **Plaintiff received written reprimand but no lost pay or denial of promotion**
- **Retaliation adverse action – “harmful to the point that it could well dissuade a reasonable worker from making a charge”**

Wallace v. GA DOT (11th Cir. 12/13/06)

- **Dismissed because 7-month delay not causal connection (3-4 months may be too long)**
- **Disparate treatment standard – “serious and material change in the terms, conditions and privileges of employment” as viewed by a reasonable person**

Employment Actions Considered “Materially Adverse”

Burns v. Air Liquide Am., L.P. –

Reassignment of prime sales accounts and territories.

Halfacre v. Home Depot, U.S.A., Inc. –

Negative evaluation if impacted wages or professional advancement.

Dean v. Children’s Hospital Medical Center

– Alleged changes in work schedule and earnings capacity

Employment Actions Considered Not to be “Materially Adverse”

Gelin v. Paulson – Subjective belief that downgraded irrelevant where performance appraisal overwhelmingly positive.

Allen v. AMTRAK – Reassignment of work while absent and one incident of criticism.

Csicsman v. Sallada – Elimination of pre-leave position and placement in new Disaster Recovery job; terms of employment the same.

Davis v. NPC Pizza Hut (11th Cir. 3/15/07)

- **Defendant – promoted white manager to area manager because she had of years of experience managing and owning multiple restaurants**
- **Plaintiffs – longer tenure with NPC**

Davis v. NPC Pizza Hut (11th Cir. 3/15/07)

- **To establish pretext on the basis of a comparison of qualifications - “the difference in qualifications must be so glaring that no reasonable impartial person could have chosen the candidate selected”**

Washington v. Kroger (11th Cir. 2/8/07)

- **Racial harassment claim based on figurine with a rope and repeatedly being called “boy”**
- **No evidence that threat of raping wife, calling P an MF or threatening to steal jacket based on race**

Washington v. Kroger (11th Cir. 2/8/07)

- **Court held that while figurine may have been severe conduct and physically threatening, Kroger took prompt remedial action**
- **“Boy” comments not severe, extreme or pervasive because only for three months and harasser only one of dozens of employees**

Washington v. Kroger (11th Cir. 2/8/07)

- **Retaliation claim dismissed**
- **Although the district court found causation, “a causation inference could not be reasonably drawn” because of (i) 5-month lapse, (ii) P not treated differently during 5 months, and (iii) no more harassment**

Ballard v. BC/BS of AL (11th Cir. 3/19/07)

- **11th Cir. Did not decide whether conduct was severe and pervasive**
- **Faragher-Ellerth Defense: (i) reasonable care to prevent and promptly correct; (ii) plaintiff did not complain**
- **BC/BS met first prong because it had policy and conducted reasonable investigation**

Ballard v. BC/BS of AL (11th Cir. 3/19/07)

- **Moreover, “a reasonable result cures an unreasonable process”**
- **Warning and monitoring are an adequate corrective remedy, especially when allegations unsubstantiated**

Ballard v. BC/BS of AL (11th Cir. 3/19/07)

- **Employer can establish second prong if plaintiff fails to complain or unreasonable fails to take advantage of a corrective measure**
- **Ballard failed on both counts**
- **Reporting delay of 2.5 months too long**

Ballard v. BC/BS of AL (11th Cir. 3/19/07)

- **Retaliation claim dismissed because BC/BS fired Ballard for refusing to work with supervisor**

Goldsmith v. Bagby Elevator (Jan. 17, 2008)

- Employee had an existing EEOC charge
- Employee refused to sign a mandatory arbitration agreement covering all past, present or future discrimination claims
- Employee was immediately terminated
- Court held that immediate termination was sufficient to prove retaliatory discharge on its face.
- (What not to do at a jury trial...!)

Van Voorhis v. Hillsborough Co. (Jan. 8, 2008)

- “Direct Evidence” case
- Pilot job posted...all applicants were over 40.
- Manager: “I don’t want to hire an old pilot”
- Rewrote job qualifications and re-posted job
- Hired younger pilot with less experience
- Ruling for plaintiff.

Freytes-Torres v. City of Sanford (Mar. 25, 2008)

- Sex harassment case
- Allegations included stopping at Plaintiffs desk to stare at her breasts, commenting on her “sexy voice,” asking out on dates, making obscene sexual gestures, smelling.
- Court held that Plaintiff established a *prima facie* case (subjectively and objectively offensive, severe and pervasive)

Freytes-Torres v. City of Sanford (Mar. 25, 2008)

- Court rejected City's Faragher Defense
 - Plaintiff complained to City Manager
 - Plaintiff complained to HR Director
 - Plaintiff filed a written complaint
 - City urged her not to be “too graphic,” then urged her to withdraw due to open records request
 - Perfunctory investigation and no remedial action

Davis v. Coca-Cola (Feb. 6, 2008)

- Pattern-and-Practice Allegations
 - 1) CCBCC has a pattern or practice of subjectively hiring supervisors that leads to qualified blacks not being meaningfully considered;
 - 2) CCBCC preferred whites in awarding light work assignments;
 - 3) CCBCC maintained a racially hostile work environment; and
 - 4) CCBCC retaliated against one of the plaintiffs for complaining about race discrimination on two occasions.

Davis v. Coca-Cola (Feb. 6, 2008)

- Court held that “pattern and practice” allegations could only be brought as Rule 23 class actions
- Court commented on “shotgun pleadings” by both sides and encouraged clear and civil proceedings
- Implications: Plaintiffs may bring more class actions

Federal Express v. Holowecki (Feb. 27, 2008)

- Issue: is filing an EEOC “Intake Questionnaire” sufficient to satisfy the EEOC filing prerequisites to filing suit under the ADEA?
- Answer: YES.
- *Oddity: Even the EEOC did not treat the Intake Questionnaire as a Charge of Discrimination.*

Immigration Reform???

- Federal Initiatives
- ICE, ICE BABY
- Status of No-Match Letters??
- State-Level Immigration Enforcement

Shameless Self-Promotion

- Balch & Bingham Labor & Employment Bulletin (gratis!)
- Balch & Bingham Labor & Employment Seminars
 - Biloxi, MS: September 11-12, 2008
 - Birmingham, AL: October 30-31, 2008

Questions? Thank You!

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