Speakers

• Jeremy Stephenson, Esq. - Partner McNair Law Firm
• Kirk Angel, Angel Law Firm
• Laura Westfall Casey, Assistant Vice President, ACE North American Claims
• Mark Weintraub, Esq. – Insurance and Claims Counsel, Lockton Companies
What is Employment Practices Liability

- Claims from Employees
  - Wrongful termination
  - Harassment
  - Discrimination
  - **Wage & Hour Claims**
    - Over 50% of all Employment claims have a wage & hour component.
  - Retaliation / Whistleblower
  - **Employee Privacy**
    - A HUGE potential growth area
- Claims from others
  - 3rd party coverage (harassment & discrimination from non-employees)
  - Illegal Immigration Defense Coverage
Issues in Employment Law

Kirk J. Angel
Attorney
Unlawful Harassment

- Race, Color, Sex, National Origin, Religion, Disability, Age 40+
- Severe or pervasive
- Co-worker v. Supervisor
Retaliation

• Protected Activity
• Adverse Action
• Causal Connection
  – Danger
  – Retaliation when wrong
Leave Issues

• Family and Medical Leave Act (FMLA)
  – 12 weeks
  – Intermittent

• Americans with Disabilities Act (ADA)
  – Reasonable Accommodation
Mistakes Employers Make

• Providing “Reasons”
• Unemployment
• Disbelieving
• Heartless
Mark Weintraub
Pressure to increase retentions has abated in last 3-6 months:

- Carriers losing D&O market share from increased competition now targeting EPL to replace lost revenues, which has increased competition for EPL and made retention increases more difficult.
- Many retentions have already been increased to acceptable levels, so further increases are unnecessary.
- Instead of an across-the-board retention increase, a split retention for class/mass actions and California claims has been a workable compromise.
**Wage and Hour Trends**

- Bermuda continues to offer a blended product for large companies with high retentions.
- London now offering mid-market W&H product with six-figure retentions and $5M limit.
- Domestic carriers exclude W&H claims. Mixed claims, however, can get a defense under duty-to-defend policies. But:
  - Carriers try to allocate W&H portion of claim.
  - Others adding policy language requiring allocation or straight denial.
Claim Trends—Severance

• Severance offered and declined, then a claim is made. Carrier reduces settlement contribution by offered severance amount because severance is “uncovered.”

• Is it uncovered?
  – Lack of consent?
  – Definition of Loss?

• Problematic coverage position:
  – Acts as disincentive to avoid claim.
  – Factually incorrect.
  – Feels like disingenuous “gotcha” to insureds.
Applicant applies for job and is not hired due to consumer report. Lawsuit filed for violating Fair Credit Reporting Act (“FCRA”).

Context of lawsuit is EPL (wrongful failure to employ; employment-related misrepresentation), but alleged causes of action are limited to FCRA violations.

Carrier denies coverage because no Wrongful Act is alleged, despite Insured’s expectation that background-check risks are covered.
• Multiple similar, close-in-time EEOC charges allege gender discrimination, and lead to an EEOC systemic investigation.

• While defending EEOC matter, defense counsel argues charges are unrelated and have nothing in common.

• Carrier uses defense counsel’s argument as basis to demand multiple retentions, despite EEOC treating matter as one systemic investigation.
• Policy requires carrier’s prior consent before incurring defense costs. Once panel counsel in place and retention exhausted, insured presumes counsel communicating with carrier.

• Panel counsel neglects to seek prior approval for consultant, vendor or other defense cost.

• Insured penalized for panel counsel’s mistake as otherwise covered cost no longer covered.
Non-duty-to-defend policies requiring panel counsel.
Choice of counsel and defense counsel rates.
Late notice issues.
Consent to handling EEOC charges in-house.
Laura Westfall Casey
Why the Increase in FLSA claims?

• Easier to evaluate merits of a W&H claim than that of a discrimination or wrongful termination claim.
• Financial incentives regarding fees.
• Aggressive plaintiff’s bar, particularly in South Florida.
• Hoffman LaRoche case giving Federal Courts the discretion to facilitate notice to potential “Opt In” Plaintiffs.
• Could suggest that FLSA violations are more prevalent; that FLSA violations have been reported and pursued more frequently or a combination thereof.
During this same time period that we’ve seen a major uptick in the number of FLSA claims brought, the Department of Labor has reduced the number of FLSA guidance documents.

- In 2009 it stopped issuing opinion letters.
FY2012 the DOL conducted investigations or conciliations in response to 20,000 FLSA complaints.

FY2012 the DOL filed about 200 federal lawsuits to enforce the requirements of the FLSA on behalf of workers.

Also in FY2012, the Wage & Hour Division initiated and concluded about 7,000 targeted FLSA investigations.
Findings

• The US Government Accountability Office reviewed a representative sample of FLSA suits filed in federal District Courts:
  • 97% filed against Private Sector Employers
  • 57% filed against 4 broad industry areas: 1) Accommodations & Food Services; 2) Manufacturing; 3) Construction; and 4) “Other Services” including laundry services, domestic work and nail salons.
Advisen published a study in 2014 which shows that employers with greater than 1,000 employees face the largest number of employment practices complaints.

Can you guess who came in second place?

- 750-1000
- 500-750
- 200-500
- 100-200
- 50-100
- 25-50
- 0-25
Answer:

- Employers with only 0-25 employees.
- In order from most to fewest number of complaints:
  - 1000+
  - 0-25
  - 25-50
  - 50-100
  - 100-200
  - 500-750
  - 750-1000
New Trends:

- Wage and Hour
- Background Checks
- Fair Credit Reporting Act
  - Pregnancy
  - Sick Leave
  - Social Media
- Spying on Employees
- Medical/Recreational Marijuana
  - Affordable Care Act
Late Claim Reporting

• Timely reporting of a claim is a condition precedent to coverage.
• Many employers don’t realize that a demand letter or an e-mail can be a “claim”.
• Many employers hope to resolve the matter inexpensively or informally directly with the claimant.
• Still other employers hope to resolve the matter at the administrative level on their own.
The consent to settle clause:

- Insured's consent is required to settle claim.
- Insurer seeks to convince the insured to accept the settlement offer by spelling out the consequences if the offer is refused.

- Road blocks to settlement: reputational risk; windfall to claimants; copy cat cases/repeat offenders.
• 504 cases authorized for ADR funding
  • 75% of voluntary ADR proceedings were successful
  • 49% of court-ordered ADR proceedings were successful

• $1,816,177 spend in mediation services
  • Average of $3,603.53 per case

• $35,077,997 in discovery/litigation expenses saved
  • Average of $69,599.20 per case

• 14,553 days of attorney/staff time saved
  • Average of 28.88 days per case

• 2,692 months of litigation avoided
  • Average of 5.34 months per case
State Agency Statistics by Comparison

• Early Mediation Program (Before determination)
  • Held: 283
  • Settlements reached: 219 (77%)
  • Average: $9,932.13

Saves an average of $20,690.74 per case.

Conciliation Division (After a Probable Cause Finding)

• Held: 273
• Settlements reached: 177 (65%)
• Average: $30,622.87

Costs 3xs more to settle at this stage.
Value Added Services

- Risk management services.
- Assist hot-lines.
- Websites with forms; templates, guidance.
- Webinars.
Jeremy Stephenson
• National Labor Relations Board update
• EEOC agency update
• 2014 Case Law Update
  – Pending SCOTUS cases
  – Fourth Circuit Court of Appeals
  – North Carolina Courts
New Quickie Election Rules

April 4, 2015, new rules make significant changes to existing union election rules:

• Expanding the voter information that an employer must provide to the union after an election petition is filed and shortening the time for providing it;

• Permitting electronic filing and communications;

• Setting short and definite deadlines for conducting pre and post election hearings;
• Restricting the issues that can be litigated in pre-election hearings;
• Requiring employers to identify all pre-election issues in a Position Statement, with any issues not identified deemed waived;
• Permitting an election to proceed despite an appeal;
• Permitting an election to proceed despite an appeal of a decision regarding pre-hearing issues; and
• Eliminating post-hearing Briefs.
BUT…

On January 5, 2015, US Chamber of Commerce and other trade groups, filed lawsuit to stop NLRB “quickie election” rules.

STAY TUNED!
Many recent NLRB rulings expanding Section 7 rights, including:

- Join a union
- Bargain collectively
- Engage in concerted activity
- Refrain from joining a union, bargaining collectively, or engaging in concerted activity
Unfair Labor Practices

Section 8(a)(1)

“It shall be an unfair labor practice for an employer-(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section [7]…”
Plaza Auto Center, 360 NLRB No. 117 (May 28, 2014)

- Employee engaged in protected concerted activity when he called the owner of the company a “f_cking motherf_cker,” a f_cking crook” and an “a__hole” during a discussion about the company’s employment practices.

- NLRB: employee did not lose protection of the act because his conduct was not “menacing, physically aggressive, or belligerent.”
Fresh & Easy Neighborhood Market, Inc., 361 NLRB No. 12
(August 11, 2014)

- Employee seeking witness statements from co-workers in support of a sexual harassment complaint engaged in "protected concerted activity".
- NLRB: actions were "for mutual aid or protection" even though she was confronting misconduct that was "similarly directed at her alone."
- NLRB: her actions would have been concerted even if her co-workers had not supported her.
Food Services of America, Inc., 360 NLRB No. 123 
(May 30, 2014)

• The NLRB struck down the following policy:

  Solicitation discussions of a non-commercial nature, 
  by Associates, are limited to the non-working hours of 
  the solicitor as well as the person being solicited and 
  in non-work areas.  (Working hours do not include 
  meal breaks or designated break periods.)
A “like” on Facebook is protected concerted activity.

Fair Labor Standards Act retaliation to fire an employee for liking a Facebook post expressing workplace wage/hour concerns.

It violates NLRA to fire an employee for commenting “Such an a__hole” in response to a post about the owner’s failure to properly handle wage deductions.
NLRB CONFIDENTIALITY CASES

• Employers must be VERY careful in drafting policies regarding confidentiality.

• Overbroad policies may be illegal under NLRA.
Flex Frac Logistics, LLC, 360 NLRB No. 120  
(May 30, 2014)

• NLRB: company’s confidentiality rules overly broad, however, the employee’s termination was upheld because her actions in sharing the confidential information were not protected.
CONCLUSION

NLRA remains an ENORMOUS potential liability for employers…even most employees unaware.

Subscribe (free) to: http://www.nlrb.gov/cases-decisions/board-decisions
Fiscal Year 2014 (ended Sept. 30, 2014):

Every year 200,000 individuals contact the EEOC about filing a charge of discrimination

88,778 new EEOC Charges filed

- Down 5,000 from FY2013
- Down from high of 99,900 in FY2010, 11, and 12

87,442 Pending Charges resolved
Fiscal Year 2014 (ended Sept. 30, 2014):

Claim Investigation process

The EEOC again faces a major challenge addressing pending inventory of private-sector discrimination charges, while improving quality of charge processing.

In FY2014, inventory of pending charges increased from 70,781 to 75,935, due to (1) gov’t shutdown, and (2) decrease in investigators from FY2012 to FY2013.
Fiscal Year 2014 (ended Sept. 30, 2014):

Claim Investigation process

The EEOC is developing systems that will allow the ability to check status of charge on-line, upload documents, provide on-line scheduling of meetings with investigators, and transform the existing paper process into a fully digital charge system.

These technology projects will reduce calls and wait times for charging parties and respondents seeking information, and will reduce agency staff time on administrative tasks.
Fiscal Year 2014 (ended Sept. 30, 2014):

Claim Investigation process

Systemic Investigations

260 systemic investigations completed

78 (34%) resolved with voluntary agreements, 34 pre-determination and 44 at conciliation after finding

$13 million total recovered, or avg. $166,666/case
Fiscal Year 2014 (ended Sept. 30, 2014):

**Claim Investigation process**

**Systemic Investigations, examples:**

The EEOC reached a negotiated settlement agreement with a company to pay $650,000 to a class of persons the company failed to hire because of their race, black, or national origin, Hispanic. The company also agreed to hire 75 African-American and Hispanic workers over the next five years. The combined value of this relief was over $4.6 million.
Fiscal Year 2014 (ended Sept. 30, 2014):

Claim Investigation process

Systemic Investigations, examples:
Successful conciliation of four systemic ADEA investigations alleging the employers stopped allowing volunteer firefighters to accrue points for performing certain duties when they reached age 55 or 60. These points translated into larger retirement benefits. Restored points not awarded due to age which resulted in an increased monthly benefit at retirement and lump sum retroactive awards of monetary benefits for current retirees and family members of deceased retirees. Total monetary benefits of over $1.4 million agreed to through the conciliation agreements and employers changed their policies to comply with the ADEA.
Fiscal Year 2014 (ended Sept. 30, 2014):

Claim Investigation process

Systemic Investigations, examples:
Systemic investigation of a major restaurant chain resulted in a cause finding that the restaurant failed to hire front of the house staff on the basis of sex, female, and national origin, Hispanic. Investigation as successfully resolved through a conciliation agreement providing $1 million to class members, training to all human resource and management staff, and the employer agreed to engage in recruitment of females and Hispanics.
Fiscal Year 2014 (ended Sept. 30, 2014):

Claim Investigation process

Systemic Investigations, examples:

After a finding that a company employing drivers had a practice of not hiring women for driving positions because of their sex, a successful conciliation agreement was reached with the company. The company paid $530,000 in monetary relief and provided significant targeted equitable relief including the adoption of an effective EEO policy prohibiting gender discrimination. The agreement also calls for gender-based discrimination training to all its human resources employees.
Fiscal Year 2014 (ended Sept. 30, 2014):

**Claim Investigation process**

**Systemic Investigations, examples:**
The Commission also reached voluntary agreements with employers to modify their leave policies to provide accommodation for employees with disabilities. A hospital and an insurance company both agreed to modify their fixed leave policies and each agreed to provide $500,000 in monetary relief to aggrieved individuals. Several other employers also agreed to modify their leave policies to come into compliance with the ADA including a franchised cable television provider, a child care center, a gas company, a home health provider, and a transit company and its union.
Fiscal Year 2014 (ended Sept. 30, 2014):

Claim Investigation process

Mediation

In FY2014, EEOC’s mediation program secured 7,846 mediated resolutions out of 10,221 conducted.

EEOC recovered $144.6 million for employees in mediations in FY2014, or roughly $18,000 per case.
Fiscal Year 2014 (ended Sept. 30, 2014):

EEOC Litigation

133 new “merits” lawsuits filed in FY2014 (down from 261 in ’11)

- 76 with Title VII claims;
- 49 with ADA claims;
- 12 with ADEA claims
- 2 with Equal Pay Act claims; and
- 2 with Genetic Non Discrimination Act claims
Fiscal Year 2014 (ended Sept. 30, 2014):

**EEOC Litigation**

14 new lawsuits in FY2014 by Charlotte District Office;

Compare:

26 new lawsuits by Chicago District;
13 by Philadelphia;
8 by New York.
Fiscal Year 2014 (ended Sept. 30, 2014):

EEOC Litigation

In FY2014, EEOC had 228 pending cases in US District Court

- 31 (14%) were non-systemic class actions;
- 57 (25%) were systemic discrimination.

In FY2014, EEOC settled 136 merits lawsuits for total of $22.5 million, or $165,000 per lawsuit, benefiting 1,593 individuals with monetary relief
FY2014 EEOC Litigation, example (in our area):

_EEOC v. McCormick & Schmicks_ (D. Md.), EEOC alleges pattern or practice of refusing to hire African Americans into front-of-the-house positions at Baltimore restaurants. Those few African Americans hired denied equal work assignments; and on-line advertising with visual depictions of employees showed a preference for non-black employees. Two-year consent decree with $1.3 million to 200 individuals, new targets for hiring black applicants, and requires restaurant to review its advertising to avoid expressing a preference for non-blacks. In addition, the restaurant must conduct a self-assessment of hiring and work assignments and submit progress reports to the EEOC.
SURVEY!
CONCLUSIONS

• Even after finding discrimination, EEOC resolves very few claims, and files suit itself in even fewer.

• Keep the process in perspective

• Agency data does not include suits by private plaintiff attorneys.
Pending SCOTUS Cases


Issue(s): Whether and to what extent a court may enforce the Equal Employment Opportunity Commission's mandatory duty to conciliate discrimination claims before filing suit.
Pending SCOTUS Cases


Issue(s): Whether an employer can be liable under Title VII of the Civil Rights Act of 1964 for refusing to hire an applicant or discharging an employee based on a “religious observance and practice” only if the employer has actual knowledge that a religious accommodation was required and the employer's actual knowledge resulted from direct, explicit notice from the applicant or employee.
Pending SCOTUS Cases

Young v. United Parcel Service, No. 12-1226 [Arg: 12.3.2014]

Issue(s): Whether, and in what circumstances, the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k), requires an employer that provides work accommodations to non-pregnant employees with work limitations to provide work accommodations to pregnant employees who are “similar in their ability or inability to work.”
Decided SCOTUS Case

*Integrity Staffing Solutions v. Busk, No. 13-433*


Holding: The time spent by warehouse workers waiting to undergo and undergoing security screenings is **not** compensable under the Fair Labor Standards Act, as amended by the Portal-to-Portal Act.
Case Law Update: 4th Circuit


Facts:

- In 2004, Professor reprimanded and required to take training on sexual harassment in the workplace;
- In 2007, 2008 and 2009, more complaints surfaced regarding Professor’s disparaging and aggressive behavior and classroom conduct;
- During his February 2009 suspension with pay, UMES conducted an extensive investigation and recommended a mental health evaluation;
Coursey v. University of Maryland Eastern Shore

Facts, Con’t:

– Professor filed a grievance, alleging improper investigation and later filed an EEOC charge;

– Professor requested a faculty review by the Termination Panel, which recommended his discharge, which subsequently occurred;

– Professor sued, claiming UMES violated the ADA in requesting that he undergo a mental evaluation and that he was terminated because he was regarded as disabled.

– Professor also claimed retaliation on the grounds that he was terminated because he filed an EEOC charge.
Legal Analysis

– Court reviewed the sheer volume of complaints about Professor and determined that UMES has valid concerns about his ability to work as a professor;
– Court determined UMES had legitimate reasons to request a mental health exam and that the mere request for such exam did not show that UMES regarded him as disabled;
– Court determined that professor had shown a causal link between his EEOC complaint and his termination but noted that UMES had legitimate and non-retaliatory reasons for his termination.
Employers are reminded of the need to conduct thorough and timely investigations of harassment complaints and to base subsequent employment decisions on legitimate, non-discriminatory reasons.

Facts:

Ranade sued under the FMLA, claiming she was terminated in retaliation for her exercise of FMLA rights and that BT interfered with the exercise of her FMLA rights while she was employed.
Legal Analysis

– The Court noted a six-month gap between Ranade’s FMLA leave and her termination, which indicated she was not retaliated against for taking FMLA leave;

– The Court also found her poor performance evaluations and the multiple failed rehabilitative efforts to be legitimate reasons for her discharge;

– The Court rejected her claim of interference while she was employed based upon the record which showed replete evidence of BT’s accommodations of her needs.
Practice Pointer

- DOCUMENT, DOCUMENT, DOCUMENT;

- Being nice, and trying to accommodate, always pays off.

Facts/Legal Analysis:

Terminated employee sued, employer enforced arbitration agreement. Employee argued invalidated by Dodd-Frank (strengthening whistleblower claims).

Court disagreed. Plaintiff not a “Dodd-Frank Whistleblower”. Arbitration compelled.

Facts/Legal Analysis:

July 2011, Employee injured outside of work and prognosis of many months of bed rest and rehab to walk again. Employee asked about return to work, or work from home; given STD paperwork. “Altarum never followed up on request to return to work. Did not engage in any interactive process with Summers. On November 30, 2011, Altarum informed Summers that Altarum was terminating him effective December 1, 2011 to place another analysis in his role at DCoE.”

**Facts/Legal Analysis:**

US District Court granted Motion to Dismiss on basis “temporary condition, even up to a year, does not fall within ADA”, so Plaintiff was “not disabled”.

Fourth Circuit reversed. Under ADAA, “an impairment is not categorically excluded from being a disability simply because it is temporary.”

Facts/Legal Analysis:

Employee loss prevention called police on suspect, then lied about it to supervisors, then was fired. Argued termination violated public policy encouraging employees to report crimes. Case dismissed at MSJ.

Lengthy discussion of “public policy” exception to At-Will employment in North Carolina. Nothing Plaintiff alleged violated public policy. He was fired for lying, and policy prohibiting employee from calling police without telling supervisor first.

Facts/Legal Analysis:

Non-compete in sale of business prevents business in all of NC and SC for five years. Realizing company did not do business throughout both states, seller decides to compete. Gets sued. Wins at trial court, loses in Appellate Court. Appeal pending before NC Supreme Court.

Main issue: clause permitting trial judge to modify any over-broad provision enforced, “blue penciling”. STAY TUNED.