

The Employment Law Counselor

Episode 23

PLUS Staff: [00:00:00] Welcome to this PLUS Podcast, *The Employment Law Counselor*. Before we get started, we'd like to remind everyone that the information and opinions expressed by our speakers today are their own and do not necessarily represent the views of their employers or of PLUS. The contents of these materials may not be relied upon as legal advice.

Victoria Fuller: Hi, everyone. Welcome to this episode of *The Employment Law Counselor* podcast. I'm your host, Victoria Fuller. And as always, I'm joined by my co-host, Laura Corvo.

Hey, Laura. What's going on today?

Laura Corvo: Hey, Vicki. How are you? It's great to be here. This is our first podcast of 2026, so happy New Year, everyone, and welcome back.

And to kick things off, we thought we would discuss one of the hotter topics we're seeing. That is a rise in, so called, reverse discrimination claims. As a lot of our listeners have probably heard, there's been some recent legal decisions that have made it [00:01:00] easier for employees to bring what is commonly referred to as “reverse discrimination claims,” or claims brought by employees who are in majority groups. [They are] kind of the employees we may not always think of as being in protected classes.

Victoria Fuller: Laura, you're dead right on this. This is a type of discrimination that has historically been referred to as reverse discrimination.

On our podcast today, I'd like to use the term majority group discrimination instead. The term reverse discrimination, it feels like a misnomer. It implies that discrimination flows just in one direction, from a majority group to a minority group. The truth is you can have discrimination claims based on adverse employment actions taken by a person in one minority group against a person in a different minority group. You can also qualify as being in a majority or minority group depending on the nature of the claim.

So, let's take for example, you have a [00:02:00] heterosexual woman who is [part of] a minority group, insofar as she's a woman, but in a majority group because she's heterosexual. So, just for the sake of linguistic accuracy for today,

can we use the term “majority group discrimination?” And if we happen to say reverse discrimination here and there, we all know what we're talking about.

Laura Corvo: Yeah, I completely agree Vicki. I think majority group discrimination is the right term and I will use it.

When it comes to majority group discrimination, I think there's obviously been a lot of developments in the past year. I think it's interesting because about a year ago this time, you and I did a podcast shortly after President Trump issued executive orders aimed at eliminating DEI, discrimination and preferences. We talked about what impact that might have on the EPL world. And now we've got some new case law and some action from the EEOC. And it's going to be interesting to see where things now stand, in our world at least.

We're really excited [00:03:00] because we have a special guest who can help us shed light on this topic and really delve into the important issues surrounding majority group discrimination claims, particularly in EPL. So, I'm really excited to welcome to the podcast, Berkeley Select's Assistant Vice President of Claims, Jim Baffa.

Victoria Fuller: Laura, I have to also just point out [that] Jim has more than 20 years in the insurance industry and about 10 years working with EPL claims.

Welcome, Jim.

Jim Baffa: Thank you very much, Laura and Vicki. I'm happy to be here. Nice to be on *The Employment Law Counselor*. This is my first appearance. It's great to be here.

This is certainly getting a fair amount of attention recently. While it's difficult to retrain my brain to say, “majority group discrimination,” I've been saying “reverse discrimination” all my life, I think that is a better label than reverse discrimination. So, I'll do my best to use the term “majority group discrimination” in our discussion today.

[I'm] really looking forward to it.

Laura Corvo: We're so happy you're here, Jim. Let's just get into it.

Vicki, before we do anything [or] have any discussions, can you kind of give us a little bit of a history [00:04:00] lesson? Walk us through what's happened because the concept of easing the pathway for more majority group

discrimination claims is really not something that came about overnight, right? It's been brewing for a little while.

Victoria Fuller: It's been brewing for a long time. In preparation for this podcast today, I started doing some research going back all the way to affirmative action. There's a whole history there that is super interesting. If we were to go back that far, instead of having a thirty minute to forty-five-minute podcast, we'd be here for a very long time.

So, I thought instead, let's start in the more recent history that really has led to where we are today. That is in 2023. The Students for Fair Admissions case, which got a lot of attention within the higher ed legal space, was actually the case that got us started to where we are today.

In that case, the US [00:05:00] Supreme Court struck down affirmative action programs in college admissions that included race as a determining factor. While that decision was in the higher ed space and got a lot of attention in that space, it was at the time widely anticipated that it was really only a matter of time before the Supreme Court extended the same underlying principles to employment law and employment discrimination.

Then in 2024, the Supreme Court issued the first of two decisions that changed the employment landscape for majority group discrimination claims like we're seeing today. So that first decision was *Muldrow v. City of St. Louis*. In that case, the Supreme Court expanded the potential actions that could constitute adverse employment actions or adverse changes to the terms and conditions of employment.

In that case, in *Muldrow*, the employee, a plain clothes police officer in the St. Louis Police Department [00:06:00] Intelligence Division alleged she had been discriminated against on the basis of sex. Her claim was based on her transfer by her supervisor out of the Intelligence Division to a uniformed job. While her rank and her pay did not change, her responsibilities, her perks and her schedule did change. [This included] a change by which she no longer had weekends off from duty.

In *Muldrow*, the Supreme Court noted that an adverse change in an employee's terms and conditions could include more than economic or tangible harms. [It] rejected the argument that the employee had to show that the adverse employment action was significant. So, it's no longer the case after *Muldrow* that you have to show adverse monetary consequences or that there was something significant that changed. Now we have a much broader scope of

potential actions that could be negative changes to the terms and [00:07:00] conditions of employment sufficient to support a discrimination claim.

If you're listening and you're thinking, "Well, how does a sex discrimination case have anything to do with reverse discrimination or DEI programs?" Well, think about it. If the employee does not have to show direct economic harm to establish an adverse term or condition of their employment, would exclusion from work opportunities available only to certain employees or applicants in certain protected categories satisfy this new bar? What about a decision to hire or promote where the only determining factor between two otherwise equally qualified candidates comes down to their inclusion in a protected category?

While many commentators picked up on this issue when *Muldrow* came out, *Muldrow* in and of itself did not open the floodgates for majority group discrimination claims at that time.

Alright, so let's fast forward now to January of last year [00:08:00] when President Trump issued executive orders targeting DEI programs in both the public and private sectors. This led to employers across the country auditing and updating their DEI policies. Laura, as you mentioned, we covered this in an episode right about this time last year. And at the time there was a lot of coverage about it because we were expecting more to come and now more has come.

That brings us up to June 2025 when the Supreme Court issued its decision in *Ames v. Ohio Department of Youth Services*. I do want to point out that all of the justices either joined that decision or concurred, but there was no dissent amongst any of the justices.

Before I talk about the Supreme Court's decision in *Ames*. I need to give another very mini history lesson. Prior to the Supreme Court's decision, in several jurisdictions, a majority group employee making a discrimination claim under Title VII had to [00:09:00] face a stricter standard of proof than an employee in a traditionally protected category.

Many of our listeners will be familiar with the tried-and-true McDonnell Douglas analysis, the three-step burden-shifting analysis that's used in discrimination cases. For a majority group discrimination claim, though, that prima facie case included an additional step. The employee had to show these background circumstances that would support the suspicion that a defendant is that unusual employer who discriminates against the majority. Now background circumstances are typically shown through evidence that a member of the

relevant minority group made the adverse employment issue, or by using statistical evidence showing a pattern of discrimination by the employer against members of the majority group.

Okay, so now we've had that mini history lesson, let's talk about *Ames*. In that case, the Supreme Court did away with that background circumstances, prong of [00:10:00] analysis for majority group discrimination claims. In other words, the field is level.

Let's talk about the facts in *Ames*. We have a heterosexual woman who had worked for the Ohio Department of Youth Services for a couple of decades. She was interviewed for a management position, which was ultimately given to a lesbian woman. She was subsequently demoted from her current position, which was then given to a gay man. Ames sued alleging that she was not promoted and was demoted because of her sexual orientation.

So here, this is what we talked about. She's a woman, so she's in a minority group in that respect, but she's heterosexual, so she's in the majority group in terms of that category.

What happened with her case? Procedurally, the district court and the Sixth Circuit analyzed her claim under that McDonnell Douglas analysis. The District Court granted summary judgment, which was then upheld by the Sixth Circuit on the grounds that she had [00:11:00] failed to show those background circumstances to support the suspicion that her employer discriminated against someone in a majority group.

She appealed to the Supreme Court and in a decision authored by Justice Jackson, the court looked at the text of Title VII and noted that it protected everyone from discrimination regardless of their inclusion in a majority or minority group. That decision goes on to say that these background circumstances, that factors inconsistent with the plain wording of Title VII.

As a result, as I said, the field is level now. The McDonnell Douglas analysis applies to all discrimination claims regardless of whether the employees in a majority group or minority group because there is no more background circumstances factor, at least as it relates to Title VII. We'll talk about that particular issue in just a minute.

Laura, I ran a quick Shepherd's search on the *Ames* decision and it looks like there are already about a dozen cases citing to it for this updated standard.

[00:12:00] I think that's a very interesting development, and I do think that we're going to see more this year on majority group discrimination claims.

Laura Corvo: Yeah, Vicki, one of those cases is actually pending in the Third Circuit, in my neck of the woods, involving the New Jersey law against discrimination as a statute that I come across frequently in my practice. It's a case that is considering the impact of *Ames* and whether or not the background circumstances test is going to apply when we interpret state discrimination statutes.

What happened in that case is a white deputy police chief was passed over for promotion by someone who was in a traditional minority group. He sued and the trial court dismissed the case saying that he hadn't satisfied the background circumstances test that the courts and the LAD, interpreting the LAD, have typically applied. On appeal to the Third Circuit, Massey argued that the *Ames* [00:13:00] decision, which rejected that heightened standard, should apply to LAD.

So, even though *Ames* dealt with Title VII, the argument is this is going to apply to our state discrimination statutes as well. There was oral argument before the Third Circuit. We're still waiting on the decision. Massey argued that because many of the decisions that interpret the LAD actually follow the same framework as Title VII. It follows that the background circumstances should be eliminated when it comes to the LAD. But the township pushed back and said, "Well, wait a minute. This really isn't for you federal court to decide. We should have the state Supreme Court look at this. Our state Supreme Court has interpreted the LAD sometimes more broadly than Title VII."

We're kind of waiting to see where this will end up and how this interplays between what's going on with the federal laws, whether or not that will trickle down to our state discrimination laws and how state courts are going to also [00:14:00] interpret this.

Victoria Fuller: I think that's a really good point. And typically state anti-discrimination laws do follow federal laws. But on this particular issue, I wonder if we are going to start seeing a divergence where the state law continues to follow the background circumstances analysis, or some heightened pleading standard versus the new standard under Title VII.

Jim, I'm curious. Just from your position inside the claims department in Berkeley Select, what have you seen historically in terms of majority group

discrimination claims? Has it changed in light of what we're seeing now post-*Ames*?

Jim Baffa: Just one quick additional comment about *Ames* that I thought was interesting. The decision itself wasn't surprising given the court's focus on textualism. The text of Title VII doesn't include any extra requirements for majority group discrimination. There were a number of other jurisdictions that used that background circumstances additional requirement. In [00:15:00] particular, I think there were three or four different other federal circuit courts of appeal that had employed that standard. So, *Ames* did have a real impact despite the fact that it was pretty predictable to most court watchers.

In my experience in the industry, majority group discrimination is pretty much always there, but never in great numbers. It was something of a bit of a novelty, so it tended to get attention when it came up, but it was never really commonplace, I'd say. It was a regular occurrence, but not a frequent occurrence, if you can grasp that subtle distinction.

Anecdotally, if I asked our EPL adjusters how many majority group discrimination claims they had historically on their desk at any given time, the answer was probably about one. At any given time, an adjuster probably had one. Clearly identifiable majority group discrimination claim, maybe two, just depending on how the majority group and minority group may have been defined in a given industry or geographic location or other factors.

In addition, from my perspective it's important to note [00:16:00] that I don't believe this data has been tracked empirically, right? I want to see data. I want to see numbers on all these things and all these trends.

The EEOC has repeatedly stated that its position [is] that there is no such thing as reverse discrimination or majority group discrimination. There is only discrimination. That is literally pulled from their website, and I think it's been on there for quite some time. There is only discrimination.

So, I'm not aware of any data that tracks this on a specific basis, although it wouldn't surprise me and I'd certainly be interested in it if data was obtained or compiled by non-governmental sources that may capture this information. Just through a manual review of the information and the data.

My company, Berkeley Select, I think is fairly represented in this respect. We track causes of loss in EPL claims, but there's no set subcategory for majority group discrimination. We track discrimination by age, race, religion, gender,

and a few other bases, and we evaluate that data. But there's no category for majority group discrimination.

Actually, in light of these issues, we've [00:17:00] had some internal discussions about tracking this data, this majority group discrimination, but at this point they're only just discussions. We're not actually tracking it. I'd be interested to see if that changes within my organization or other organizations.

Now, when we see majority group discrimination, frankly it's just progressed like another discrimination claim—similar facts, similar analysis, prima facie case, justifiable reason for termination, and then an analysis of pretext. Right? Those are the McDonnell Douglas factors.

They are, for lack of a better word, they're normal. They're normal discrimination claims in many respects—same defenses, same problems of proof, same desire that the employer has contemporaneous documentation of the performance issues and the like. We'll get into [that] a little bit later.

One example I can provide that, that we've encountered. We recently had a claim involving a white man in a manufacturing position. He was fired for repeatedly making off color jokes and making other comments that he believed to be okay, but certainly would be viewed as offensive to a reasonable person. The claimant asserted that he [00:18:00] was fired due to a variety of improper reasons, most notably a hostile work environment related to his race. He was, as I stated, a white male, and the workplace was diverse with many African American and Hispanic or Latino employees.

We were, thankfully, rewarded summary judgment related to that claim. The court concluded the claimant only referenced a handful of unpleasant interactions with his coworkers, but no actual specific hostility directed towards his race, nor anything severe or pervasive enough to qualify as a hostile working fire.

Now, this was a fortunate case for the defense. Obviously as many of us know [that] practice in this area, summary judgment in this area is relatively rare. But I think it is representative of how these claims are presented, how they develop and how they mature. And, as I noted, in many ways they're typical employment discrimination claims.

Laura Corvo: Jim, that's really interesting. I think my experience, and probably Vicki's as well, similar to your experience, we haven't seen a tremendous amount of so-called majority discrimination [00:19:00] claims. But when you

do see them, I think you're right, they are discrimination claims and they tend to follow the same pattern.

What I guess I'm wondering is, Vicki, as we continue to see the development of this case law and we are also seeing some new guidance from the EEOC on this, where are things going to go? I think it's interesting that [in] majority discrimination claims, while our experience is really, like Jim said, just a handful, it's really high on the EEOCs list of priorities or so it appears to be.

Victoria Fuller: Let's talk about that, a couple of ways we know this is on their radar.

First, in December of last year, Andrea Lucas, the EEOC chair, posted a video on social media in which she says, and I'm going to quote the video, “Are you a white male who has experienced discrimination at work based on [00:20:00] your race or sex? You may have a claim to recover money under federal civil rights laws.”

What's interesting about this post on social media is she identifies a specific intersectional majority group, white males. Not just white employees, not just male employees, but specifically white males. And she's directing them to come forward with claims. We really should take seriously that the EEOC is going after these types of discrimination claims in 2026.

As you mentioned, Laura, the EEOC also recently issued guidance on “DEI related discrimination at work.” The guidance states, I'm going to quote it here, “Under Title VII, DEI initiatives, policies, programs, or practices may be unlawful if they involve an employer or other covered entity taking an employment action motivated in whole or in part [00:21:00] by an employee's or applicant's race, sex, or other protected characteristic.”

It also goes on to say, “Under Title VII, an employer initiative, policy program or practice may be unlawful if it involves an employer or other covered entity taking an employment action motivated in whole or in part by race, sex, or another protected characteristic.” It then also goes on to say, “Client or customer preference is not a defense to race or color discrimination. Basing employment decisions on the racial preference of clients, customers, or coworkers constitutes intentional race discrimination”

So that last one, I just want to flag that, that's for your clients, for example, that want to know that you have a diverse team. [Clients that want to know] that you include women and other protected categories within your team who are doing

work for that client. What the EEOC [00:22:00] is saying is they're taking the position that complying with those client requests may be race discrimination or other types of discrimination.

The takeaway here is that the EEOC has made it very clear that they're openly targeting majority group discrimination claims arising out of an employer's DEI program.

Laura Corvo: And that's not really an empty threat on behalf of the EEOC, is it Vicki?

Victoria Fuller: It's not. And some recent case law shows that it's not.

On February 17th, the EEOC sued a Coca-Cola distributor in the District of New Hampshire and alleged that the company violated Title VII by excluding male employees from an employer-sponsored trip and networking event. The charging party in that case is a male production employee who worked at this Coca-Cola facility in New Hampshire. He alleged that he would have gone to this event if he had been invited.

The complaint alleges that male employees were [00:23:00] not invited to the event which was hosted at Mohegan Sun, which is a casino and entertainment place in Connecticut. [They alleged] that it included paid time off from work for the female employees, a social reception, team building exercises and recreational activities.

The theory of liability advanced by the EEOC in this case has potentially huge implications for employers who sponsor activities for minority group affinity groups. So, for example, the employer could find itself facing a class action of all the majority group employees who are not invited to that company sponsored affinity group event. They could find another EEOC complaint against them for hosting women's retreats or having funding for minority group affinity groups.

We have to really take this seriously. Thinking about even a situation in which we have hiring and you have [00:24:00] any job for which a person in a protected class was hired, are we going to start seeing class actions by majority group candidates who didn't get that job, claiming discrimination?

An important point here in all of this is for many employers, it's not about whether they ultimately prevail in a suit brought by the EEOC or by majority group employees. It's the fact that they're going to get sued and that they're

going to have to defend those suits. So, we want to flag this because this is an increase in risk for employers.

Another type of situation where I think this could potentially come up is think about the stereotypical golf outing where a white male boss only invites white male subordinates. [It's] not because the boss intends to only invite white males, but because he's offering them an informal mentorship opportunity that's offsite. Could female or non-white subordinates advance a colorable discrimination [00:25:00] claim that they would've gone, that they wanted to have those informal mentorship opportunities? Because of the *Muldrow* decision, I could see an argument being made that this could be an adverse employment action. Those types of social opportunities, those informal social gatherings, those are the kinds of opportunities to develop bonds with your bosses [and] with key people in an organization that can lead to better work assignments, promotions [and] things like that.

Laura Corvo: Yeah, I think that's right, Vicki. I could see that occurring as well.

I should mention that the *Coca-Cola* case is not a one-off. The EEOC is also investigating another large corporation, Nike. It recently sought to enforce a subpoena against Nike in an action it brought in federal court alleging that Nike discriminated against white workers, including through its DEI programs.

It's a little interesting in that case because the claim there is not just disparate treatment. It also appears to [00:26:00] be a disparate impact claim, and it's looking into things like layoff data.

It's kind of interesting to me because last fall the EEOC issued a memorandum saying it was abandoning its disparate impact claims and not seeking to enforce disparate impact claims and was going to focus solely on disparate treatment. Now we've kind of seen what seems to be a little bit of a reversal, or at least them looking at the disparate impact claims when it comes to DEI programs or bringing the disparate impact analysis back into disparate DEI claims.

Victoria Fuller: Laura, just for our listeners who may not know, could you explain the difference between a disparate treatment and a disparate impact claim?

Laura Corvo: Sure, Vicki.

A disparate treatment claim happens when an employer intentionally takes an action that discriminates against an employee or an applicant based upon some protective characteristic. With a disparate treatment, there's an intentional act by the employer to discriminate. You purposely [00:27:00] failed to promote Mary because she's a woman and you promoted John instead.

Disparate impact occurs when the employer has a policy or procedure that's kind of neutral on its face, and there's no intention necessarily to discriminate, but it has the impact of discriminating against protected classes. You see this in weight or strength preferences [or], for example, in careers where maybe women traditionally haven't been accepted. We see this with background checks, which may adversely affect minority employees. Now we're seeing it with DEI claims saying that DEI programs adversely affect majority groups.

Another case where we saw this kind of scrutiny of DEI efforts came out of the Ninth Circuit, a case involving Clorox. There, a white male employee was terminated during reorganization and replaced by a white woman. He sued for discrimination. The district court initially sided with [00:28:00] Clorox, but the Ninth Circuit reversed the decision and said that a jury could conclude that the company Clorox's reasons for firing the plaintiff were internally inconsistent in evidence of discrimination because Clorox had a DEI policy that it stated was aimed at increasing women in management. So, we're seeing how DEI can be used as evidence to support that traditional discrimination claim.

So, Jim, what has the EEOCs shift in focus meant for your insureds, if anything? Are you seeing more EEOC claims alleging majority discrimination? What recommendations do you have for your insureds as a result of this kind of shift in focus for the EEOC?

Jim Baffa: My prior comments regarding what we've historically seen, were obviously backward looking. More recently the answer's kind of the same thing. There's been a handful of cases, probably a small uptick, but not a ton. Frankly, it's too [00:29:00] early to determine whether or not there'll be a statistically significant uptick. As we've discussed here, and I agree, and I think most commentators would agree, [is] that there will be a demonstrable increase. I think it'll be small, but it'll be significant, if that makes sense.

One thing I have noticed that may be significant, and this literally just happened to us last week, one of our claims involved the likely intervention of a third-party pro bono advocacy group on behalf of the claimant who is a white Christian male. Frankly, that doesn't concern me from an individual claim perspective, but it suggests that the specific employer had maybe been targeted

by this group, which is obviously not a good thing from the defense and the insurance perspective.

Now, third party advocacy groups also have another name. They're called just lawyers, so it's not too much of a concern. They're just a lawyer that represents a party, right? But they do suggest that a group may have a broader agenda. Also, third party advocacy groups are not unique to [00:30:00] majority group plaintiffs either. They're present at all kind of aspects-- all sides of this coin, so to speak.

But that issue, the intervention of a counsel or advocacy group, which is beyond your typical plaintiff's attorney involvement, could be an issue and could be problematic. I can foresee that being an issue coming down the pipe with more regularity.

With respect to my world, insurance coverage and things of that sort, given the increase in complexity of these claims and these laws, the rise in workplace litigation and the majority group discrimination issues we've discussed, obviously having insurance is an essential component of any company's risk management strategy. That should be fairly clear. Having EPL coverage provides the financial protection resources for risk management [and] legal support that employers need.

Along with legal counsel, you can use your insurers external advisors when addressing the majority group discrimination type issues. Some insurers, like Berkeley Select, provide access to specialized legal expertise and resources to assist employers in navigating these complex issues, [00:31:00] interpreting the regulations and implementing risk management strategies. Here I'm talking about hotlines [and] third party consultants. Berkeley Select, for example, has one called Zywave that we provide to our insureds. Taking advantage of these are great resources for businesses to maximize the value of their insurance, be more proactive and manage risk better. I think it just makes sense.

As far as other policy related considerations, like limits and deductibles, your insurance broker agent could assist employers with these questions. They'll have more information about what limits are appropriate, deductibles based on geographic locations, nature of the business and similar types of factors. Some of these issues are market driven and very employer specific, so specialized advice is a good idea.

One other thing I'll note about the DEI policies: employers are kind of in a, "damned if you do, damned if you don't" type of situation. I think it's difficult

for employers to navigate. Employers will face scrutiny for having a DEI policy and for not having a DEI policy, right? I mean, [00:32:00] how do you win? A robust DEI policy could be construed as evidence of systemic majority group discrimination. The absence of a policy suggests negligence or indifference towards traditional discrimination type issues and problems. This puts a typical employer, human resources [or] legal risk management in a tough position. I don't envy those people in this situation where it's difficult to know what's right as far as balancing the traditionally desirable DEI policies with the more recent majority group discriminations that we're discussing.

So again, it makes documentation critical, which is something we'll discuss shortly.

Victoria Fuller: Jim, that's a really, really good point. This is a very tough time for employers.

I think that's a good segue to transition to talking about what employers can or should do. Laura, can you give our listeners some ideas about what things they should be doing or implementing in order to manage that [00:33:00] risk?

Laura Corvo: Yeah, so I think the takeaway from all of this is discrimination claims are going to be coming at you. They're going to continue to come at you from people who [we] view as traditional minorities groups. They're also going to be coming at you from the majority group. Anytime you take an adverse employment action against employee, there is a risk, regardless of what protected class that employee may be in, that they're going to sue you for discrimination. And you have to take the steps, the practical steps, to make sure that decision is backed up in a way that shows there's legitimate, non-discriminatory, non-retaliatory reasons for whatever you are doing.

That means documentation. Jim said it before. We say it on every podcast. It is so super important to document in real time. Document the reasons. "Why are you going to do something for [00:34:00] Mary that you're not going to do for John? What is it that is driving your decision?" You've got to put that down.

It's a hard thing for employers to do [and] a hard thing for managers to remember to do because everybody's busy, everybody's doing their things. [Its important to make] sure that documentation is there and [make] sure you have HR or upper management reviewing that documentation so that it's an order and it says what you need it to say. So, when Vicki and I come in, or when you call Jim with the claim, the first thing we're going to do is ask you for that documentation. [It should be] there, it [should be] ready, and it [should be]

documented in a way that's going to give you a defense to these potential claims.

Victoria Fuller: That's a great point, Laura. I also want to stress that in order to effectively mitigate risk, we need to have a conversation about what's driving these developments. [What's driving them] is a general perceived lack of trust amongst the workforce that employers policies and practices are being implemented fairly and meritoriously.

As [00:35:00] a result, employers really should take this opportunity at this moment in history to review their handbooks. Take a really good look at your hiring, your retention, your disciplinary, your promotion practices. Ask yourself, "Are these defensible as they are actually implemented? Are there gaps? Are there inconsistencies in how discipline is being applied amongst the workforce?"

For example, if you have two employees who have both had tardiness issues and one was terminated and the other wasn't, does the employer have a legitimate non-discriminatory reason for that different treatment? Do you have documentation of the reasons for that differential treatment? We see this come up in our practice, when we talk about that McDonnell Douglass analysis, when we get to that third step of pretext.

We're always looking at comparator data. How many other employees have had the same discipline for the same conduct? What happened with other employees? [00:36:00] Were they treated consistently? Were they treated uniformly? And if not, why not? If the answer is poor management training and just general inconsistency in application, that's not good.

Take this opportunity to make your practices [better], like really shore them up, so that everybody knows what the plan is, what are the policies, and how it's going to be implemented.

Laura Corvo: Vicki, you make two great points.

One is, if you haven't had that handbook updated and reviewed with counsel in some time, now is the perfect time to do it. You really want to make sure that all of your policies have been audited, including your DEI policy.

I can't emphasize this enough, but when you're doing that, please do not turn to your friends chat GPT or AI or try to pull something off the internet. You really do need to work with counsel or HR professional to change these policies and

procedures up because there are so [00:37:00] many potential minefields that you could be stepping into, and there's a lot of legal nuances, and they do need to be reviewed and customized and tailored to your particular needs.

And then Vicki, as you said, it's so important to consistently enforce those policies once you have them. Right? Don't bend the rules for one employee and not the other without a really good reason for doing so.

When you have any employment-related decision, it probably is worth a quick call to counsel. I always say this. A ten minute call with Vicky or me, or to Jim's hotline, is probably worth the investment as opposed to getting the lawsuit and having to deal with the claim. So, it's important that you start to think that there's this potential now that every employee you have could hit you with a discrimination suit. Anytime you're making an action, you're taking an action with respect to them, you [should] have legal counsel [00:38:00] guiding you, making sure that that decision is appropriate.

Victoria Fuller: That's a really good point, Laura. And I know we've talked about this on a prior episode about RIFs. You handle a ton of RIFs, and one of the things I've noticed about you is how detailed and thoughtful you are when you're developing rubrics and analyzing the data for perception of disparate impact. I think that's really what we're talking about here is like, don't do this stuff on your own. Employers, please get counsel involved.

Laura Corvo: Yeah, I think between AI and potential economic shifts more and more companies may be considering doing layoffs or reductions in force. With the relaxing of majority group discrimination claims, as well as the impact of traditional group discrimination claims, it's really important to really think those things out because when you lay off a bunch of employees, you're going to get a claim. You want to make sure you've done it in a way that was thoughtful and [00:39:00] defensible.

Victoria Fuller: And Laura, one of those rubrics that you usually look at is performance, isn't it?

Laura Corvo: A lot of employers when you say, "Well, why are you going to terminate? If you're looking to reduce people, how are you choosing the people you're going to reduce?" Many employers are going to go to discipline, right? Because it makes sense if you're going to get rid of people, you want to get rid of your lowest performing employees.

But if you're doing that, it's important for the employers to ensure that you have the background, the documentation [and] that your managers are counseled and up to date on how to give the discipline appropriately: verbal feedback, written feedback, documentation. [This is important] so that when the employer says, "Well, yes, [you were] terminated in this RIF because we looked at you as one of the lowest performers," and there's no documentation or little documentation, that's not going to fly.

Victoria Fuller: We should also mention at this point that while the *Ames* decision interpreted Title VII---- I kind of touched on this earlier, but we don't know yet how the anti-discrimination laws at the state [00:40:00] level will shake out. While historically, like I said, many of them have looked at federal law. I don't know that that's going to happen here.

So, as Jim was saying, "You're damned if you do. You're damned if you don't." There could end up being this differential between state law and federal law on majority group discrimination claims. And your best course of action is the same advice, which is to make sure your policies are clear [and] consistent. [Make sure] that they're being implemented in a way that is fair so that if you do get a claim, you've got the documentation and you've got the evidence to show that there was no discrimination.

Laura Corvo: This is going to be a really difficult time for employers. It is all the more reason why all employers should be staying abreast of these issues because I think there will likely be further developments. Regardless, you're going to expect discrimination claims coming at you from probably most of your workforce, the potential for discrimination to come at you from [00:41:00] most of your workforce.

And with that, Jim, are there any tips for employers or for your insureds or insureds from the insurance perspective? What should insureds be doing?

Jim Baffa: Yeah, sure. Absolutely. First, get insurance. I mean, that should be clear from this discussion, but I'll explicitly state it. I mean, obviously it's a self-serving statement from my perspective, but go and get EPL insurance. Severity is up. What that means is that claims are costing more to defend and settle, so insurance helps with that.

As I alluded to earlier, taking advantage of the resources that your insurer may provide. Berkeley Select, just as an example, has a pre-claim hotline that employers can call for assistance. [Berkeley works] with a vendor company called Zywave that has other resources, that I might broadly call training

materials and guidelines, that can be consulted. Your insurer has the resources and the information for an employer to consult and insureds should take advantage. It'll be foolish not to, frankly.

Furthermore, report your claims, or your potential claims to your insurance [00:42:00] company. I simply cannot stress this enough. I don't have precise data, but probably at least fifty percent of coverage denials, when we get a claim in and we deny coverage far more so than any other single issue or factor, result from an insured's failure to timely report the claim. If you get a claim, you report it. If you get circumstances that might result in a claim, inform your broker or inform your insurance company directly as soon as possible.

For example, an employee who is terminated and on the way out the proverbial door [and] they allege discrimination, report that. Give the insurer the person's name, the circumstances of their background info, and preserve that potential claim with your insurer. There's simply very little downside to doing so.

Take the allegation seriously. Whether it's traditional discrimination or majority group discrimination claims, you need to take it seriously. You need to investigate and then report it to your insurance company, contemporaneously with an investigation that you might conduct.

Following up on Vicki and Laura's comments, [00:43:00] employers need to consistently and clearly document performance issues, employment decisions, rationales for those decisions. Hopefully those decisions are based on merit rather than any demographic characteristic. The documentation can include notes made during meetings with an employee as well as regular performance appraisals or anything like that. Documentation is important because no one believes your verbal testimony after the fact is justification for an action.

In addition, employers should exercise caution when taking an employment action following an employee's complaint or allegations. I'm talking about retaliation here. Even seemingly minor things, such as shifts in scheduling, departmental transfers, or altered job duties like in the *Muldrow* decision, can be interpreted as retaliation, which complicates your defense and increases your potential liability. Retaliation claims generally are increasing, so caution needs to be exercised whenever a report of anything wrong comes through the door.

Implement a strategy for handling [00:44:00] complaints or full-blown claims. Maintain confidentiality, avoid retaliation, and again, promptly notify your insurance company.

Those are probably the best high-level summary of advice I can give to an employer.

Laura Corvo: Jim, those are all excellent points and great advice for employers. I want to thank you for joining us. You have been a fantastic guest.

It does look like we are out of time, but we hope that you'll join us again.

Jim Baffa: Of course. Yeah, that was fantastic.

Victoria Fuller: I want to chime in too. Jim, thank you for joining us. This is a really difficult topic. This has been a great discussion. I'm so glad that you were able to join us.

I want to thank all of our listeners for joining us here again on *The Employment Law Counselor* podcast, where we talk about the risks facing employers today and discuss how better mitigation equals less litigation. If you enjoyed this episode, please leave us a five-star review, tell your friends [and] subscribe to the podcast.

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