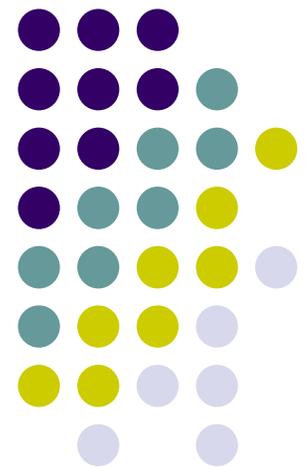


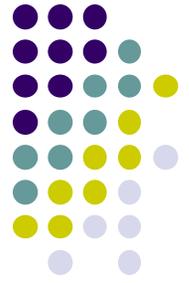
LEGAL UPDATE

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Timeliness:
**Mandel v. M&Q Packaging Corp., 706 F.3d
157 (3d Cir. 2013) [p.2]**



- Pursuant to the Supreme Court's decision in National Railroad Passenger Corp. v. Morgan, all of the acts forming part of a hostile work environment claim constitute a single unlawful employment practice.
- Therefore, as long as one act is timely, all related acts that are part of the same claim are also timely.

Timeliness:

Chin v. Port Auth. of N.Y. & N.J., 685 F.3d 135 (2d Cir. 2012), cert. denied, 133 S. Ct. 1724 (2013) [p.2]



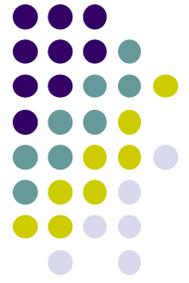
- Plaintiffs contended that, because promotion denials had been pursuant to a discriminatory policy that the employer continued to apply within the filing period, all promotion denials under the unlawful policy were timely.
- Rejecting this contention, the court explained that, pursuant to National Railroad Passenger Corp. v. Morgan, 536 U.S. 101 (2002), discrete acts that fall outside the limitations period are not timely even when taken based on a general policy that results in other discrete acts within the limitations period.

Timeliness: Lilly Ledbetter Act
Daniels v. United Parcel Serv., 701 F.3d 620 (10th
Cir. 2012) [p.2]



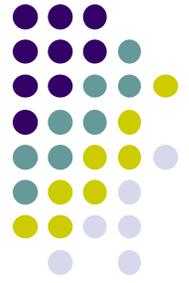
- Lilly Ledbetter Fair Pay Act applies only to claims of “discrimination in compensation,” i.e., paying different compensation to similarly situated employees, and was not intended to create a “limitations revolution for any claim somehow touching on pay.”
- HELD: Because plaintiff’s failure-to-promote claim did not allege discrimination in compensation, it was not timely pursuant to the Ledbetter Act.

Class Actions:
**Tabor v. Hilti, Inc., 703 F.3d 1206 (10th Cir.
2013) [p.3]**



- A class of plaintiffs challenged the employer's promotion process which included multiple components tracking different aspects of an employee's promotion eligibility.
- Citing Wal-Mart, the court concluded that the plaintiffs had not shown that the employer maintained a "common mode for exercising discretion that pervaded the entire company." Given the broad discretion exercised in the promotion process and the highly individualized facts and circumstances raised by each promotion decision, the proposed class did not present a common issue that could be resolved efficiently in a single proceeding.

Waiver of Class Arbitration: American Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013) [p. 4]



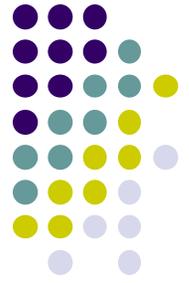
- Held: Small merchants were subject to class action waiver in their mandatory arbitration agreements with a large credit card issuer.
- The arbitration agreement precluding them from bringing a class arbitration is enforceable under the Federal Arbitration Act *even where* the plaintiffs can show that costs related to the proof of their antitrust claims would make it economically infeasible to engage in individual arbitrations.

Race Discrimination: Coleman v. Donahoe, 667 F.3d 835 (7th Cir. 2012) [p.5]



- An African-American postal employee alleged race discrimination when she was fired after telling her psychiatrist that she thought about killing her supervisor. She presented evidence that two white male employees at the same facility who had recently threatened another employee at knife-point received only one-week suspensions from the same manager who had fired the plaintiff.
- Held: The comparators and the plaintiff were similarly situated because they were at the same job site, they were subject to the same standards of conduct, they violated the same rule against workplace violence, and they were disciplined by the same manager.

Arrests and Convictions:
Waldon v. Cincinnati Public Schools, 2013 WL
1755664 (S.D. Ohio, April 24, 2013) [p. 5]



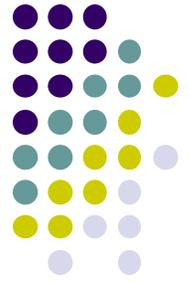
- Plaintiffs were two long-time employees with excellent records who were terminated in 2008 pursuant to a 2007 state law requiring termination of school employees convicted of certain crimes regardless of how they related to the job or how long ago the convictions occurred.
- Held: Motion to dismiss denied; court could not conclude that such a termination policy was a business necessity.

National Origin Discrimination:
Shah v. Oklahoma, 2012 WL 3935699 (10th Cir.
Sept. 11, 2012) [p. 6]



- Physician alleged that his employer did not renew his medical residency contract because of his East Indian accent.
- Held: Plaintiff was lawfully terminated because of performance deficiencies that compromised patient care.
- Comments on plaintiff's need to improve his English language skills were "good faith suggestions to improve his interpersonal communication skills, which are essential for patient care in psychiatry and to his ability to fulfill residency position requirements."

National Origin Discrimination:
Dafiah v. Guardsmark, L.L.C., 2012 WL
5187762 (D. Colo. Oct. 19, 2012) [p. 6]



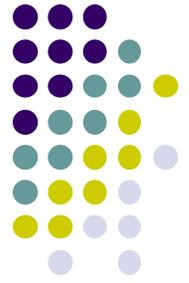
- Plaintiffs alleged that they were terminated from security guard positions due to their national origin (Sudanese and Ethiopian).
- Employer argued that they were terminated because managers had difficulty understanding them on the radio due to their accents and were worried that they would not be able to communicate clearly in an emergency.
- Held: Plaintiffs provided sufficient evidence that they were able to successfully fulfill their job duties; a reasonable jury could find that decision to remove them was based on national origin rather than inability to communicate clearly in English.

Religious Discrimination: EEOC v. Thompson Contracting, Grading, Paving, & Utils., Inc., 2012 WL 6217612 (4th Cir. Dec. 14, 2012) [p.6]



- EEOC alleged denial of accommodation and discriminatory termination of a Hebrew Israelite dump truck driver who requested Saturdays off to observe the Sabbath.
- Held: Granting accommodation would be undue hardship because work left undone would have to be completed by the other drivers or by hired independent contractors, or else would not be completed at all.
- Moreover, securing proper substitutes would have required the company to incur the costs of recruiting, training, and qualifying them on its insurance policy.

Religious Discrimination:
Finnie v. Lee Cnty., Miss., 2012 WL 124587
(N.D. Miss. Jan. 17, 2012) [p. 8]



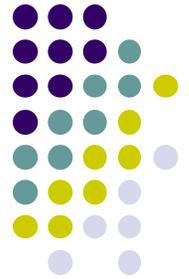
- Pentecostal female juvenile detention officer alleged that the county violated Title VII by refusing to accommodate her religious objections to the pants-only uniform policy.
- Evidence showed legitimate safety concerns about detention officers wearing skirts, including the ability to perform various defense-tactic maneuvers. For example, an assailant could pin the material of the skirt to the floor with his knees.
- Furthermore, the standardized uniform requirement enhanced efficiency by subordinating individuality to the overall group mission.



Sex Discrimination: Pregnancy Text of the PDA (42 USC 2000e(k))

- (k) The terms “because of sex” or “on the basis of sex” include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, . . . as other persons not so affected but similar in their ability or inability to work,

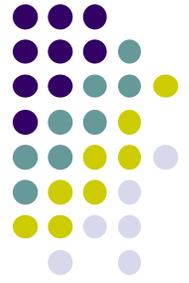
Sex Discrimination: Pregnancy
EEOC v. Houston Funding, 2013 WL 2360114 (5th
Cir. 2013) [p.8]



- EEOC alleged employer terminated charging party because she asked to express breast milk; employer claimed it terminated her for job abandonment
- Reversing summary judgment for employer, court held that lactation is a “medical condition” related to pregnancy and there were issues of fact concerning employer’s reasons for terminating the charging party

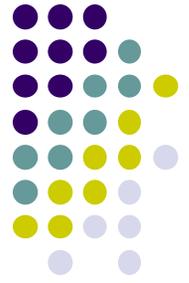
Sex Discrimination: Pregnancy

Hamilton v. Southland Christian Sch., Inc., 680 F.3d 1316 (11th Cir. 2012) [p.9]



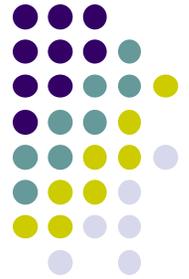
- After teacher at Christian school told employer that she was pregnant and that she had conceived the child before getting married, she was fired, allegedly for engaging in premarital sex.
- Holding that a plaintiff does not need a non-pregnant comparator if she has other evidence from which discrimination can be inferred, the court held that the plaintiff in this case presented evidence that the firing official expressed more concern about having to replace her because of her pregnancy than about premarital sex.

Sex Discrimination: Pregnancy
Young v. United Parcel Serv., 707 F.3d 437
(4th Cir. 2013) [p.8]



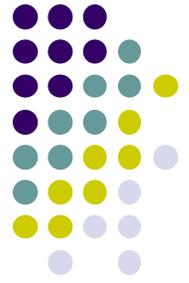
- Employer's light duty policy was limited to individuals injured on the job, those with disabilities, and those who lost Department of Transportation certification to drive commercial motor vehicles.
- Held: Pregnant worker with 20-pound lifting restriction not entitled to light duty under the PDA.

Sex Discrimination: LGBT Issues [p.10]



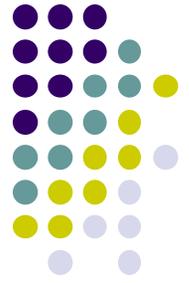
- **Macy v. Dep't of Justice, EEOC Appeal No. 0120120821, 2012 WL 1435995 (E.E.O.C. April 20, 2012)** (discrimination against an individual because that person is transgender (also known as gender identity discrimination) is discrimination because of sex in violation of Title VII of the Civil Rights Act of 1964).
- **Veretto v. U.S. Postal Service, EEOC Appeal No. 0120110873, 2011 WL 2663401 (E.E.O.C. July 1, 2011)** (discrimination based on sex stereotype that men should only marry women can constitute discrimination based on sex).
- **Castello v. U.S. Postal Service, EEOC Request No. 0520110649, 2011 WL 6960810 (E.E.O.C. December 20, 2011)** (discrimination based on sex stereotype that women should only have sexual relationships with men can constitute discrimination based on sex).
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Age Discrimination: Hale v. ABF Freight Sys., Inc., 2012 WL 5259156 (6th Cir. Oct. 25, 2012) [p.11]



- Operations supervisor terminated for timeliness issues argued that timeliness was a pretext for age discrimination because: (1) on several occasions, his supervisor asked him when he planned to retire; (2) his supervisor told a coworker that the plaintiff is “going to leave here when he is 62[, and] I am going to see to it”; and (3) his supervisor regularly committed the same infractions that she cited to justify the plaintiff’s termination.
- Held: (1) asking an individual when he planned to retire was not based upon his age; (2) stating that an employee is going to leave when he is 62 is directly based on his age; and (3) the fact that the supervisor committed the same infractions as the plaintiff was potential evidence of pretext. Summary judgment reversed in part.

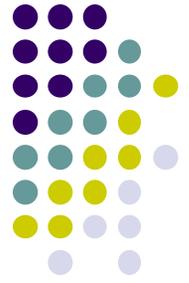
III. GENETIC INFORMATION NONDISCRIMINATION ACT (GINA)



Genetic Information includes information about:

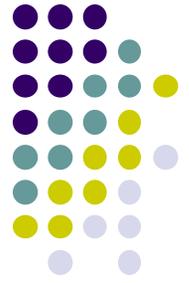
- An individual's genetic tests
- Genetic tests of family members, and
- **The manifestation of a disease or disorder in family members (family medical history)**

Genetic Information Nondiscrimination Act



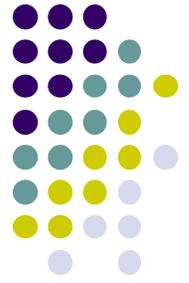
- Prohibits use of genetic information (including family medical history and results of genetic tests) in employment decision-making
- Prohibits covered entities from requesting, requiring, or purchasing genetic information of applicants and employee, with limited exceptions
- Requires confidentiality of genetic information

Genetic Information Nondiscrimination Act



- Major exceptions to rule prohibiting acquisition of genetic information:
 - **Inadvertent acquisition**
 - **Voluntary health or genetic services**
 - **FMLA purposes (serious health condition of family member)**
 - **Sources that are commercially and publicly available**
- **NO EXCEPTION FOR POST-OFFER OR FITNESS-FOR-DUTY EXAMS**

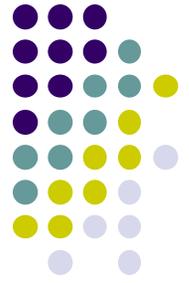
Genetic Information Nondiscrimination Act [p.11]



- **EEOC v. Fabricut, Inc.** (Case No. 13-CV-248-CVE-PJC), consent decree May 7, 2013 (N.D. Okla.) – EEOC alleged that contract medical examiner requested family medical history in post-offer medical exam – case settled for \$50,000.
- **EEOC v. Founders Pavilion** (Case No. 6:13-cv-06250) filed May 16, 2013 (W.D. N.Y.) - EEOC alleges that rehab center requested family medical history in post-offer medical exams.

Harassment:

Vance v. Ball State Univ., 133 S. Ct. 2423 (2013) [p.11]



- An employee qualifies as a “supervisor” for purposes of holding an employer vicariously liable for unlawful harassment, only if the employer has authorized him or her to take tangible employment actions against the target of the harassment, i.e., to “effect a ‘significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.’”
- The Court declined to defer to the EEOC’s standard, which defines an employee as a supervisor if he or she has the authority to take tangible employment actions *or* to control the complainant’s daily work activities.

Harassment:

Jones v. UPS Ground Freight

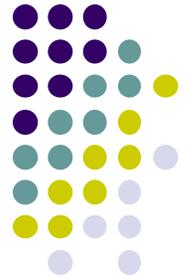
683 F.3d 1283 (11th Cir, 2012) [p.12]



- Truck driver alleged racial harassment when, among other things, he repeatedly found banana peels on his truck after it was parked at the employer's terminal.
- Rejecting the employer's contention that the banana incidents were not race-based, the court explained that given the history of racial stereotypes against African-Americans, "it is a reasonable – perhaps even an obvious – conclusion that the use of monkey imagery is intended as a 'racial insult' where no benign explanation for the imagery appears."
- Here, plaintiff found banana peels on his truck on multiple occasions even though he parked in a different location each night.

Harassment:

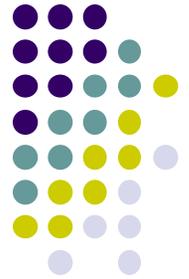
Ross v. Colorado Dep't of Transp., 2012
WL 5975086 (D. Colo. Nov. 14, 2012) [p.12]



- The plaintiff, a devout Christian, alleged that he was subjected to a religiously hostile work environment when the defendant accommodated certain Muslim religious observances.
- Ruling for employer on harassment claim, court said: “That an employee occasionally may be confronted at work with religious beliefs or practices different from and offensive to his own does not make out a claim for a religiously hostile work environment, at least on the record . . . here.”

Harassment:

EEOC v. Management Hospitality of Racine, Inc.,
666 F.3d 422 (7th Cir. 2012) [p. 13]



- Sexual harassment claim brought on behalf of two teenage servers by EEOC.
- Held: Evidence was sufficient for the jury to have concluded that the employer failed to exercise reasonable care to prevent and correct harassment.
- An employer must adopt a clear complaint process, especially when a number of employees are teenagers.
- Here the employer's policy provided no names or contact information at all. Therefore, the jury reasonably concluded that the employer failed to exercise its duty to prevent and correct sexual harassment.

Retaliation:
Wright v. Monroe Cmty. Hosp., 2012 WL
3711743 (2d Cir. 2012) [p.13]



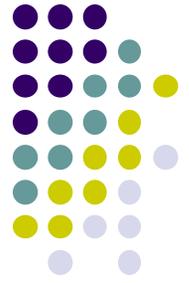
- Complaining about an assignment to care for a patient who used racial epithets and otherwise denigrated racial minorities was not protected opposition.
- The court stressed that the patient suffered from dementia, and therefore the plaintiff did not have a reasonable, good faith belief that the employer's unwillingness or inability to control the patient's behavior was unlawful racial discrimination.

Retaliation – Protected Conduct:
EEOC v. IPS Indus., Inc., 899 F. Supp. 2d
507 (N.D. Miss. 2012) [p.14]



- An employee’s complaint to a supervisor about his sexual harassment, including confronting the supervisor about his insinuations that the employee was involved in a relationship with a coworker, telling the supervisor not to touch her again after he reached around behind her, and informing him that she would only return to work if he stopped touching her, were not “mere rejections” of inappropriate sexual conduct, but rather constituted protected conduct under Title VII’s opposition clause.

Retaliation: Causal Link Requirement
University of Tex. S.W. Med. Ctr. V. Nassar,
133 S.Ct. 2517 (2013) [p.15]



- Held: A plaintiff alleging retaliation in violation of Title VII must establish that the employer’s discriminatory motive was a “but for” cause of the challenged practice, as opposed to merely a “motivating factor,” which would allow liability even where the employer would have taken the same action absent a discriminatory motive.

Retaliation: Pretext

Kelley v. Correctional Med. Servs., Inc., 707
F. 3d 108 (1st Cir. 2013) [p.16]



- Held: A reasonable jury could find that the plaintiff, a registered nurse, was disciplined in retaliation for her ADA reasonable accommodation requests, as opposed to her refusal to follow a direct order from her supervisor.
- A reasonable factfinder could find that the supervisor's action "was 'a disingenuous overreaction to justify dismissal of an annoying employee who asserted [her] rights under the ADA.'"