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Employment Law Developments from 2006

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Purpose:

- Look back at the development of employment law to see the big picture
  - Mainly court decisions
- Assess impact on current practices
  - Maybe too restrictive; maybe too lenient
- Anticipate where the law is going
  - Be proactive, not just reactive

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Caveat:

- This is an overview, not a set of rules that apply in every case
- Employment law cases are highly fact-specific
  - That's why employment lawyers add value ☺
- Judges try to do justice, so unfairness often loses
  - Determine "fairness" by reference to how that facts would sound to the jury when explained by a skilled plaintiff's lawyer

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What is the "law"?

- Starts with statutes
  - Title VII, ADA, ADEA, FMLA, FLSA, ERISA, WFEA and other WI statutes
  - Sometimes administrative regulations or rulings
- Develops with court decisions that interpret and apply the statutes
  - Arise in fact-specific cases, but provide guidance and interpretation
  - Establish precedent that guides claims and defenses in future cases

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What is the "law"?

- Court decisions usually on appeal from trial judge rulings:
  - After trial, sometimes
  - Before trial, often
- "Summary Judgment" = pretrial challenge to the legal sufficiency of plaintiff's claim and evidence
- If successful, avoids trial, but after much cost, effort and pain
  - Appealable

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2006 Highlights

- Context matters!
  - Even more emphasis on fact-specific inquiry
- Retaliation claims in the spotlight, and the legal standard broadened
- National Origin discrimination claims given powerful new legal tool – 42 U.S.C. §1981
- FMLA further refined; mostly pro-employer
- Wage litigation is everywhere

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Retaliation – Supreme Court weighs in

- *Burlington North. & Santa Fe Ry. Co. v. White*
- Facts:
  - White = first female in facility; "Track Laborer"
  - Initially assigned to forklift driving
  - Complained of harassment by supervisor
    - Repeatedly told her women should not work on RR
  - Supervisor suspended 10 days and trained
  - White moved to more arduous duties w/in job description (forklift assigned to a "more senior man")
  - White filed retaliation charge
  - 3 days after second charge, suspended for insubordination
    - But won grievance and got 37 days back pay

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Retaliation - *Burlington Northern*

- Court process:
  - Jury rejected sex discrim. claim but found for White on retaliation; $46k damages and $55k fees
  - Appellate court panel (3) reversed
    - Concluding that White did not prove that she suffered and adverse employment action
  - Full appellate court reversed and ruled for White
  - Supreme Court accepted case to reconcile the different standards for retaliation claims

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Retaliation - *Burlington Northern*

- Unanimous Supreme Court (9-0) ruled for White, concluding:
  - Anti-retaliation provision of Title VII not confined to actions that affect status of employment
  - Retaliation claim exists whenever the employer's actions (in response to protected activity) would deter a reasonable person in the position of plaintiff from pursuing the protected activity

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Retaliation - *Burlington Northern*

- *Lessons:*
  - Context matters
  - Anti-retaliation provisions even reach employer behaviors outside the workplace
- *Impact:*
  - Expect to see more retaliation claims:
    - In the national spotlight
    - Emphasis on fact-specific context makes claims harder to win on summary judgment
    - More jury trials = more $ for plaintiffs' lawyers

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Retaliation - *Burlington Northern*

- *Advice:*
  - Train supervisors on retaliation
  - Review and maybe revise policies that promise no retaliation
  - Be more vigilant in follow-up with complaining ee
  - Be more vigilant in oversight of supervisor and others who deal with complaining ee
  - Review changes to complaining ee's work circumstances before implementing

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Retaliation

- *Isbell v. Allstate Ins. Co.*
  - Supreme Court declined to accept
  - Let stand 7th Circuit ruling that rejected retaliation claims of ees who refused to sign a release of claims and therefore did not get the opportunity to be indep. Contractors
- *Sylvester v. SOS Children's Villages Ill., Inc.*
  Termination close in time after complaints
  + any fishy circumstances
  = liability for retaliation

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Title VII

- *Ash v. Tyson Foods, Inc. (U.S. Sup. Ct.)*
- Facts:
  - 2 Black supervisors sought promotions that were awarded to two white males
  - Plaintiffs pointed to references to them as "boy" to support claim of race discrimination
  - Plaintiffs argued they had superior qualifications
- Jury awarded each $250k compensatory and $1.5m punitive damages

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Title VII – *Ash v. Tyson*

- Appellate court reversed
- Supreme Court reversed again, concluding:
  - App. Ct. interpreted impact of "boy" too narrowly; context matters
  - App. Ct. set too high of a standard for comparative qualifications evidence
  - Sent back to App. Ct. to articulate better standards

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Title VII

- *Ptasznik v. St. Joseph Hospital* (7th Cir.)
  - 51-year old Polish immigrant terminated from job as sleep technician for failure to follow protocol
  - Sued for National Origin discrim., citing supervisor comments over time "you're Polish and you're stupid"
  - Claim failed because comments disconnected to termination decision
  - Court re-emphasizes the limits on its authority; *And .....*

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Title VII

- Court concluded that national origin discrim. claims can be asserted under 42 U.S.C. §1981
- Unlike Title VII, Section 1981 claims:
  - Need not be filed with EEOC before court
  - Have much longer statute of limitations (four years instead of 300 days)
  - Allow back pay awards for more than 2 years
  - Allow unlimited compensatory and punitive damages awards

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Title VII

- *Mlynczak v. Bodman* (7th Cir.)
  - Reverse race discrim. claims by white males still meeting resistance
  - Provides guidelines for acceptable diversity policy practices
- *Davis v. Wis. Dept. of Corrections* (7th Cir.)
  - Inconsistent application of structured discipline policy supported finding of race discrimination

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Title VII

- *Forrester v. Rauland-Borg Corp.* (7th Cir.)
  - Provides excellent restatement of discrim. claim analysis
  - Employer wins if its stated reason for the action is non-discriminatory and true, even if wrong or even dumb
- *Goodwin v. Board of Trustees* (7th Cir.)
  - Reversed sj ruling for employer because race-related comment of supervisor was made in relation to the demotion
  - This is the flip-side of *Ptasznik*

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Title VII - miscellaneous

- EEOC Policy Guidance on Race Discrim.
  - "Perceived" race discrim. is illegal
  - "Race" discrim. includes discrim. based on ancestry or physical or cultural characteristics associated with a certain race
- On the near horizon...
  - Supreme Court to decide how far back in time a back pay award for discriminatory pay practice can reach
  - *Ledbetter v. Goodyear Tire and Rubber, Inc.*

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Harassment

- Pendulum seems to swing back just a bit with pro-plaintiff rulings
- *Valentine v. City of Chicago*, (7th Cir.)
  - Ee complaint to supervisor about co-worker "aggravating" her was enough to trigger employer's duty to investigate and remedy
- *Patton v. Keystone RV Co.*, (7th Cir.)
  - Supervisor's touching ee under her clothing sufficient to establish hostile work environment

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FMLA

- When does the employer know enough to trigger FMLA?
- *Phillip v. Quebecor World RAI, Inc*. (7th Cir.)
  - Oct. 15: ee left work early saying she did not feel well
  - Oct. 15: ee submitted medical office form confirming she was seen by Dr.; off until Oct. 19
  - Charge with 3 days absence; plus subsequent absences put ee over policy limit = fired
  - FMLA claim dismissed on SJ, and affirmed
  - Court: ee's info. too vague; no "ongoing treatment"
  - Court refused to require employers to determine whether FMLA applied "every time an employee was absent because of sickness" because this would be an unreasonable burden

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FMLA

- *Burnett v. LFW, Inc.*, (7th Cir.)
  - Ee worked as "detailer" for landlord
  - Oct. '03, ee informed supervisor of health problems requiring medical attention
    - Declined transfer due to "weak bladder"
  - Dec. '03, ee presented Dr. note for blood work
    - Explained high PSA count and high cholesterol
  - Later meeting, ee said he was "feeling sick"
    - Compared to family member with prostate cancer
  - Jan. '04 biopsy; supervisor issued reprimands for substandard work and disruptive behavior
  - Jan. 29: ee said he felt sick; argued with supervisor and went home
  - Jan. 30: ee fired for insubordination
  - Feb. 10: ee diagnosed with cancer

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FMLA

- *Burnett v. LFW, Inc.* (cont.)
- District Court granted SJ and dismissed
  - Ee failed to prove he gave employer enough information to show he had a serious health condition
- Appellate Court reversed
  - "Ee's notice obligation is satisfied so long as he provides information sufficient to show that he likely has an FMLA-qualifying condition."
  - "sick" is insufficient; *but ...*
  - overall context here (including 4 months of ee comments about his deteriorating health) put employer on notice that FMLA might apply and triggered duty to request more information

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FMLA – some help for employers

- *Anders v. Waste Mngt. Of WI*, (7th Cir.)
  - FMLA claim of ee fired for threats and aggression rejected
  - Court sided with employer, saying FMLA "was not intended to excuse violence in the workplace"
- *Crouch v. Whirlpool Corp.*, (7th Cir.)
  - Employer noticed junior ee took disability leave (w/Dr. note) for weeks coinciding with fiancé's vacation; went to Vegas; fired fraudulent leave claim
  - FMLA claim dismissed because "employer's honest suspicion that the employee was not using his medical leave for its intended purpose is enough to defeat the employee's substantive rights FMLA claim."

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FMLA – some help for employers

- *Hull v. Stoughton Trailers LLC,* (7th Cir.)
  - FMLA claim failed for lack of proof of "similarly-situated" ee treated more favorably
- *Johnson v. Vintage Pharm., Inc.,* (11th Cir.)
  - FMLA claim of fired ee fails b/c FMLA expired by date of firing and employer's miscalculation did not extend it

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FMLA – some help for employers

- *Yashenko v. Harrah's NC Casino Co.,* (4th Cir.)
  - Ee fired while on FMLA has no claim if employer shows that he would have lost job even if not on FMLA
  - Apply to job eliminations, and potentially disciplinary situations
- *Harrell v. US Postal Service,* (7th Cir.)
  - CBA may impose stricter return-to-work requirements than the FMLA

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Disability Discrimination

- *EEOC v. Watkins Motor Lines,* (6th Cir.)
  - 400 lb. dock worker fired for failure to return to work; Dr. would not release due to obesity
  - ADA claim dismissed; self-imposed morbid obesity not a protected disability
  - Court injects self-responsibility concept
- *Yindee v. CCH, Inc.,* (7th Cir.)
  - Ee with cancer that required hysterectomy had ADA disability, but no ADA claim where firing not connected to her sterility
  - Cured cancer and vertigo not ADA-protected
  - Firing before end of PIP not evidence of discrim.

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Disability Discrimination

- *Timmons v. GM,* (7th Cir.)
  - Ee with MS accommodated and ultimately fired when no positions available
  - Employer's reliance on Occupational physician opinion that ee could not drive insulated it from claim for discrim.
- *Stoughton Trailers, Inc. v. LIRC,* (Wis.App.Ct.)
  - "clemency and forbearance" from application of no fault policy may be required as reas. accom.
  - Wis. Supreme Court will review decision

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Age Discrimination -- RIF directions

- Employers given more flexibility in using subjective decision-making factors in a RIF
  - *Meacham v. Knolls Atomic Power Lab,* (2nd Cir.)
  - RIF selections made in part on subjective considerations need only be "reasonable" in relation to non-discriminatory business objectives
- OWBPA notice requirements can be limited to group with whom plaintiff was considered
  - *Burlison v. McDonalds Corp.,* (11th Cir.)

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Age Discrimination

- Burden of proving that comparison ee is "similarly-situated" continues to doom claims
  - *Merillat v. Metal Spinners, Inc.* (7th Cir.)
  - To be similarly-situated for purposes of discrim. analysis, other ee's circumstances must be the same as plaintiff's in all material respects
    - Different job, supervisor, work history, skill sets, etc. can defeat an attempt to make the comparison in support of a claim

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FLSA

- Wage claims are all the rage
  - Class actions (attract claimants and lawyers)
  - Exempt status
  - "Hours worked" (preliminary and post-liminary activities, interrupted meals, etc.)
  - Proper OT calculation ("regular rate")
- *Sehie v. City of Aurora,* (7th Cir.)
  - Employer required ee to attend weekly psychotherapy sessions for stress/anger
  - All time spent in sessions and traveling to and from was "hours worked"

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ERISA – employee benefits

- Health plans can recoup from plan participant $$ paid for medical treatment for participant who gets $$ from third party that caused participant's injuries
  - *Sereboff v. Mid Atlantic Med. Serv.,* (US Sup. Ct.)
  - This right requires a properly drafted "subrogation clause" in the plan

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ERISA – employee benefits

- Pension plan could reduce benefits to plan participant who received SSI disability benefits, and require participant to reimburse the plan
  - *Northcutt v. GM Hourly-Rate Employees Pension Plan,* (7th Cir.)
  - Again, proper plan language is the starting point

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NLRA – Labor law for all

- *Oakwood Healthcare,* (NLRB)
  - Defined guidelines for determining who is a supervisor (and therefore outside the NLRA protections)
  - 12 factor test (only a labor lawyer could love)
    - Ex) "independent judgment" must:
    - 1. not be effectively controlled by another
    - 2. be present for matters more than routine/clerical
  - Biggest direct impact in healthcare
    - But will impact any employer facing an organizing drive – determines who is in/out of unit

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NLRA – Labor law for all

- Company did not violate NLRA by refusing to hire "salts" unless proof that salts would have accepted and performed jobs if offered
  - *Starcon Int'l, Inc. v. NLRB,* (7th Cir.)
- Employer can fire ee for making public, disparaging comments about layoffs if reasonably likely to cause harm to company
  - *Endicott Interconnect Tech. v. NLRB,* (D.C. Cir.)

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Litigation Trends

- Wage claims abound – class actions
- Retaliation claims surge, while ordinary discrimination claims decline a bit
- 401(k) plans, plan sponsors and managers sued (especially for any self interest)
- Proper retention and handling of electronic evidence is more critical than ever
  - New federal court rules and court decisions (in a sex discrim. case) have made litigation more burdensome and expensive and given plaintiff's lawyers new leverage

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