ALASKA STATE HR CONFERENCE
SHRM

May 19, 2017

Please Sue Me – Alaska Edition: A Legal Update

Presented by: Liz Hodes and Kristal Leonard

Davis Wright Tremaine LLP
DEFINING SUCCESS TOGETHER

Agenda

- Legal Update on Agencies and Legislation
  - Federal Focus and Trends
  - State Focus and Trends
- Litigation Trends and Case Law Update
  - Harassment
  - Disability/Leave/Accommodations
  - Retaliation
  - Other Cases of Interest from the High Courts

Equal Employment Opportunity Commission

Democrats | Republicans

Chair

Victoria A. Lipnic
July 2020

Charlotte A. Burrows
July 2019

Chai R. Feldblum
July 2018

Jenny R. Yang
July 2017

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Equal Employment Opportunity Commission

- *Select Task Force on the Study of Harassment in the Workplace*, Report of Co-Chairs Chai R. Feldblum and Victoria A. Lipnic (June 2016)
  - March 21, 2017, was close of the comment period for the agency's proposed enforcement guidance
- Resource limitations
- Targeted systemic enforcement in particular industries

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EEOC's Current Strategic Enforcement Plan

1	Eliminating barriers in recruitment and hiring.
2	Protecting immigrant, migrant, and other vulnerable workers.
3	Addressing emerging and developing issues.
4	Enforcing equal pay laws.
5	Preserving access to the legal system.
6	Preventing harassment through systemic enforcement and targeted outreach.

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EEOC – What to Watch for

- Charge-based agency; statutes unchanged
- Some priorities will remain in place
  - Harassment
    - Sex, religion, and national origin
  - Sexual orientation and identity
    - Agency unchanged; courts may dictate
  - Disability & Accommodation
- Possibly more business friendly?
  - EEO-1 form changes rolled back?

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Alaska State Commission for Human Rights

- 2016 Annual Report
  - More charges relating to disabilities than any other protected classification
  - Race and sex not far behind
  - Retaliation

- FY2018 Governor's Operating Budget Report
  - Resource concerns in budget climate
  - Goal is to expand outreach efforts
  - Contract mediator retirement at the end of FY2017; ASCHR intends to revise the program

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Alaska State Commission for Human Rights

Closures At-a-Glance

	2013		2014		2015		2016	
Category of Closure	**ASCHR**	**EEOC**	**ASCHR**	**EEOC**	**ASCHR**	**EEOC**	**ASCHR**	**EEOC**
Mediation	18	0	15	3	22	1	28	0
Administrative	52	1	25	0	27	5	35	3
Not Substantial Evidence	**313**	**22**	**310**	**17**	**286**	**18**	**301**	**33**
Conciliation and Settlement	19	5	33	3	30	3	28	4
Hearing	11	0	14	0	12	1	22	0
Subtotal	413	28	397	23	377	28	414	40
TOTAL	441		420		405		452	

*Table based on numbers published by ASCHR in its 2016 Annual Report

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U.S. Department of Labor

29 agencies, including the following:

- OSHA (Occupational Safety and Health Administration)
- WHD (Wage and Hour Division)
- OFCCP (Office of Federal Contract Compliance Program)
- BLS (Bureau of Labor Statistics)
- PBGC (Pension Benefit Guaranty Corporation)
- ETA (Employment and Training Administration)
- OLMS (Office of Labor-Management Standards)
- OWCP (Office of Workers' Compensation Programs)

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DOL – Changing Tone

- Acting Solicitor Nicholas Geale speech at Georgetown: the department is going to "listen to the regulated community a little more" and exercise "a little bit more humility"
- Enforcement priorities
- Resources for inspections
- Litigation
- OSHA not naming employers in its press releases about fines

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DOL – Rule Changes

- E.O. on "Blacklisting" and pay transparency (federal contractors)
- Other anticipated changes:
  - FLSA salary threshold
  - Joint employer theory; independent contractor issue
- E.O. 11246 still in effect, including prohibition against federal contractor discrimination on the basis of sexual orientation or gender identity

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Other Potential Changes

- Federal Minimum Wage?
- Prevailing Wage?
- Salary Threshold Raise
- ACA
- Immigration

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Legislative Update

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Trends - Paid Sick Leave

- In President Trump's recent address to a Joint Session of Congress, he proposed a paid sick leave or paid maternity leave initiative
  - Six weeks paid leave
  - Unclear if this is intended for "family leave" or "maternity leave" or something else
  - Question: easier and more efficient than FMLA?
- In Alaska, HB 30 (currently in committee) would require at least one hour of paid sick leave for every 40 hours the employee works

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Omnibus Workers' Compensation Bill

- HB 79 (in its current form) would significantly change workers' compensation coverage
- Major change in exemption for independent contractors
- Still in committee
- Various Alaska Supreme Court opinions in the last year or two on WC issues

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New Additions to AS 18.80.220?

- HB 184 and SB 72 would add "sexual orientation, gender identity or expression" to prohibition against discrimination contained in AS 18.80.220
- Still in committee in both houses

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Trends in Employment Litigation

Discrimination/Harassment
Don't do it!

Disability/Leave/Accommodation
To accommodate or not to accommodate?
It's an expensive question!

Retaliation
Seriously, don't do it!

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Sex and Race Discrimination

- Sex-Based Charges filed with EEOC

Fiscal Year	FY 2000	FY 2005	FY 2010	FY 2015	FY 2016
Charges Filed	25,194	23,094	29,029	26,396	26,934
Cases resolved-No Reasonable Cause*	15,980 (54%)	13,853 (58%)	18,709 (61%)	16,790 (62%)	18,505 (64%)
Monetary Benefits	$109.0m	$91.3m	$129.3m	$130.9m	$137.3m

- Race-Based Charges filed with EEOC

Fiscal Year	FY 2000	FY 2005	FY 2010	FY 2015	FY 2016
Charges Filed	28,945	26,740	35,890	31,027	32,309
Cases resolved-No Reasonable Cause*	21,319 (64%)	18,608 (68%)	26,319 (70%)	22,696 (71%)	25,000 (74%)
Monetary Benefits	$61.7m	$76.5m	$84.4m	$88.4m	$79.0m

* includes resolution of cases carried over from previous year

Sex and Race Discrimination

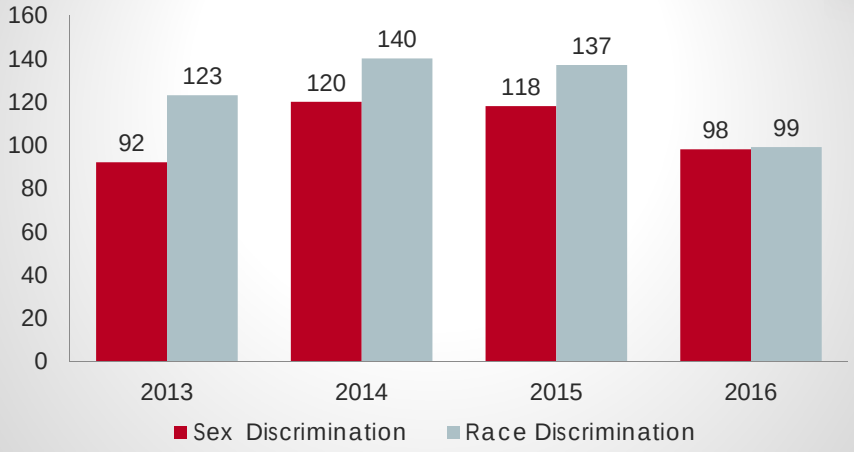

*Table based on numbers published by ASCHR in its 2016 Annual Report

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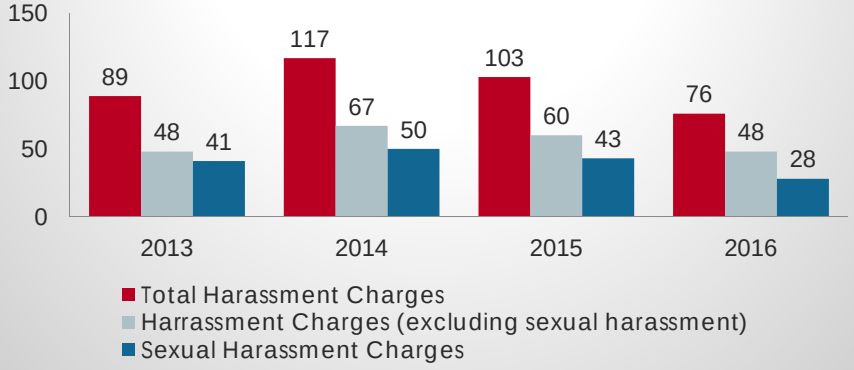
Harassment

- All charges allegeing harassment filed with the EEOC (including sexual harassment)

Agency	FY 2013	FY 2014	FY 2015	FY 2016
EEOC	26,756	26,820	27,893	28,216

- Charges filed with ASCHR



Reynaga v. Roseburg Forest Products (9th Cir 2017)

- Father and son were millwrights of Mexican descent
- Racially disparaging comments by a Lead
- Father complained
- What would you do?

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Reynaga v. Roseburg Forest Products (9th Cir 2017)

- Employer separated them from Lead pending investigation
- When scheduled to work on shift with alleged harasser, Father and son walked off
- Sound right? Good enough?

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Reynaga v. Roseburg Forest Products (9th Cir 2017)

- Ninth Circuit sent claims to trial (hostile work environment, disparate treatment, and discriminatory termination)
- Hostile work environment claim requires (1) sufficiently severe or pervasive conduct (2) that creates an abusive environment
- Level of severity or seriousness varies inversely with the pervasiveness or frequency of the conduct

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Reynaga v. Roseburg Forest Products (9th Cir 2017)

- Employer can be liable for hostile work environment created by a co-worker if (1) employer knew or should have known about the harassment and (2) failed to take prompt **and** effective remedial action
- Court found question for trial regarding whether employer's response was effective because conduct allegedly continued

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Reynaga v. Roseburg Forest Products (9th Cir 2017)

- **Takeaways**:
  - Prompt response is not enough to escape liability
  - Courts/jury will look at whether the remedial action was reasonable **and** effective

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Mayes v. WinCo Holdings, Inc. (9th Cir 2017)

- The case of the stolen cakes! (and conflict with a supervisor)

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Mayes v. WinCo Holdings, Inc. (9th Cir 2017)

- **Takeaways**:
  - Sex discrimination claim is not barred just because the plaintiff and the alleged discriminatory actor are the same sex
  - Employment litigation can take years
    - case was originally filed in 2012 and was just remanded back for trial this year

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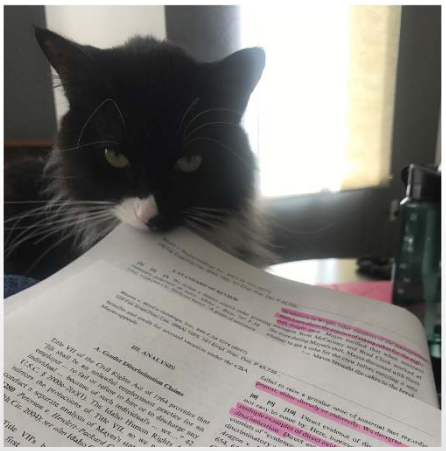
Mayes v. WinCo Holdings, Inc. (9th Cir 2017)

- Goober would like stale cake….



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Disability/Accommodation

- ADA charges filed with the EEOC

Fiscal Year	FY 2000	FY 2005	FY 2010	FY 2015	FY 2016
Charges Filed	15,864	14,893	25,165	26,968	28,073
Cases resolved- No Reasonable Cause*	11,431 (56%)	9,268 (60%)	15,182 (62%)	16,526 (60%)	18,833 (64%)
Monetary Benefits	$54.4m	$44.8m	$76.1m	$128.7m	$131.0m

* includes resolution of cases carried over from previous year

- For 2016, largest category of claims was "other disability" (36%)
- Other large categories included: non-paralytic orthopedic impairment (8%); back impairments (8%); anxiety disorders (7%); and depression (7%)

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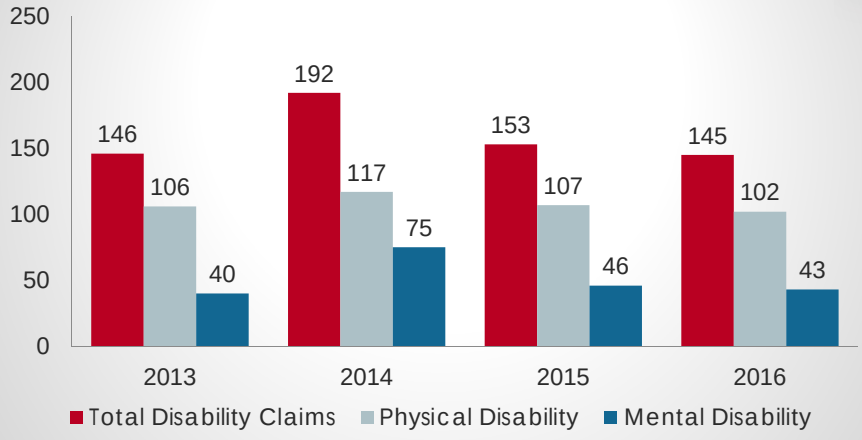
ASCHR - Disability/Accommodation



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Quick Refresher

- *EEOC v. Parker Drilling* (D. Alaska 2015)
- Parker Drilling rescinds job offer to drilling manager after he fails medical exam (he only had one eye)
- Business necessity and direct threat defenses fail
- Damages $250,000+ (not counting claim for attorneys' fees and costs of $300,000+)

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Todeschi v. Sumitomo Metal Mining Pogo LLC (Alaska 2017)

- Employee, a supervisor in a mine, had multiple back injuries and surgeries
- After latest surgery, he was released to return to work with no restrictions
- Then the employer created new job description with additional lifting requirements....

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Todeschi v. Sumitomo Metal Mining Pogo LLC (Alaska 2017)

- New job requirements included: "replace water pumps (lifting 60lbs to 250lbs depending on the pump being replaced) on their own."
  - ***Really?***
- Doctor reports employee could lift items up to 50 pounds occasionally, should not lift anything more than 40 pounds repetitively, and should be provided a truck as an accommodation
- Employee terminated on grounds that he could not perform his regular job due to restrictions

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Todeschi v. Sumitomo Metal Mining Pogo LLC (Alaska 2017)

- Claims included: discrimination, failure to accommodate, retaliation for workers' compensation claim, and breach of the covenant of good faith and fair dealing
- Jury found that the employer did not terminate the employee due to a disability or workers' compensation claim, BUT employer did breach implied covenant of good faith and fair dealing
- ***Takeaway***: Employer can act unfairly in violation of the covenant of good faith and fair dealing without violating discrimination and retaliation laws

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Mendoza v. The Roman Catholic Archbishop of Los Angeles (9th Cir. 2016)

- Mendoza worked full-time as a bookkeeper
- During a medical leave, the priest took over the bookkeeping duties and determined the position should be part-time

- Employer wins on summary judgment because there was no evidence its reasons were pretextual
- ***Takeaway***: Nondiscriminatory business reasons will still prevail if they are legitimate

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EEOC v. St. Joseph's Hospital, Inc. (11th Cir. 2016)

- Bryk was a nurse in the psychiatric ward
- She had spinal stenosis which required her to use a cane to walk
- Hospital was concerned psychiatric patients could use the cane as a weapon
- Told Bryk she could no longer use the cane in the psychiatric ward
- Allowed her 30 days to identify and apply for other positions within the hospital
- Out of 700 open jobs, she applied for seven positions

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EEOC v. St. Joseph's Hospital, Inc. (11th Cir. 2016)

- Bryk was not selected for any of the positions because the hospital deemed other applicants more qualified and she was terminated
- EEOC contended that ADA mandates noncompetitive reassignment

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EEOC v. St. Joseph's Hospital, Inc. (11th Cir. 2016)

- Eleventh Circuit upheld district court's finding that the ADA does not always mandate reassignment without competition
  - ADA provides that a reasonable accommodation **may** include reassignment, but does not state reassignment is always reasonable
  - Requiring reassignment in violation of employer's best-qualified hiring or transfer policy is not always reasonable
- **Takeaway**:
  - Circuit split regarding whether the ADA requires reassignment without competition
  - Ninth Circuit has not weighed in on the issue

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Capps v. Mondelez Global, LLC (3rd Cir. 2017)

- Capps was employed at a snack making company and operated a mixing machine that made dough
- He suffered Avascular Necrosis which led to severe pain, sometimes lasting for days or weeks
- One night, after requesting intermittent FMLA leave for the day, he went to a pub and was later arrested for drunk driving
- He was released early in the morning but claimed he experienced severe pain before his shift started and requested FMLA leave

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Capps v. Mondelez Global, LLC (3rd Cir. 2017)

- Manager later became aware of the DUI conviction and asked the HR department to investigate

- Capps' arrest date and some of his court dates corresponded with his requests for FMLA leave
- Capps was terminated for dishonesty

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Capps v. Mondelez Global, LLC (3rd Cir. 2017)

- Capps claims FMLA retaliation and failure to accommodate under ADA
- Retaliation claim failed because no causation: not close in time and no evidence of antagonism for taking leave
- Employer's honest belief that Capps was misusing leave is a legitimate, nondiscriminatory reason for termination
- Even if Capps did request reasonable accommodation, no evidence employer discriminated against Capps or refused to accommodate his request

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Capps v. Mondelez Global, LLC (3rd Cir. 2017)

- **Takeaways**:
  - Important determination is whether the employer in good faith believed the employee was guilty of misconduct, not whether the employee actually engaged in the misconduct
  - Requests for intermittent FMLA leave may qualify as a request for accommodation under the ADA

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Graziadio v. Culinary Institute of America (2nd Cir. 2016)

- Employee had two sons, each with different medical issues
- Employee requested FMLA leave
- Employee failed to provide necessary medical certifications
- Employee was terminated for abandoning her position

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Graziadio v. Culinary Institute of America (2nd Cir. 2016)

- HR Director named as defendant along with employer
- Second Circuit Court of Appeals held a rational jury could find the HR Director exercised sufficient control over the employee's employment to be subject to liability under FMLA

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Graziadio v. Culinary Institute of America (2nd Cir. 2016)

- "Associational discrimination" claim under the ADA
  - ADA prohibits "excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association." 42 U.S.C. § 12112(b)(4).
- This claim dismissed for lack of evidence

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Graziadio v. Culinary Institute of America (2nd Cir. 2016)

- **Takeaways**:
  - Don't forget: HR Directors may be individually liable for FMLA violations
  - Three theories for establishing an "associational discrimination"
    1) expense;
    2) disability by association; and
    3) distraction

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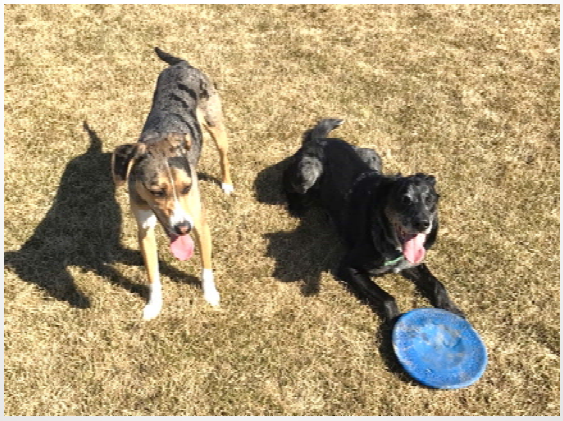
Okay, take a breath....



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Retaliation

- Retaliation-based charges filed with the EEOC

Fiscal Year	FY 2000	FY 2005	FY 2010	FY 2015	FY 2016
Charges Filed	21,613	22,278	36,258	39,757	42,018
Cases resolved- No Reasonable Cause*	12,931 (53%)	13,157 (58%)	22,803 (60%)	25,427 (64%)	28,620 (65%)
Monetary Benefits	$76.3m	$88.8m	$150.8m	$173.5m	$182.0m

* includes resolution of cases carried over from previous year

Table based on statistics published by the EEOC at https://www.eeoc.gov/eeoc/statistics/enforcement/retaliation.cfm

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ASCHR – Retaliation Charges

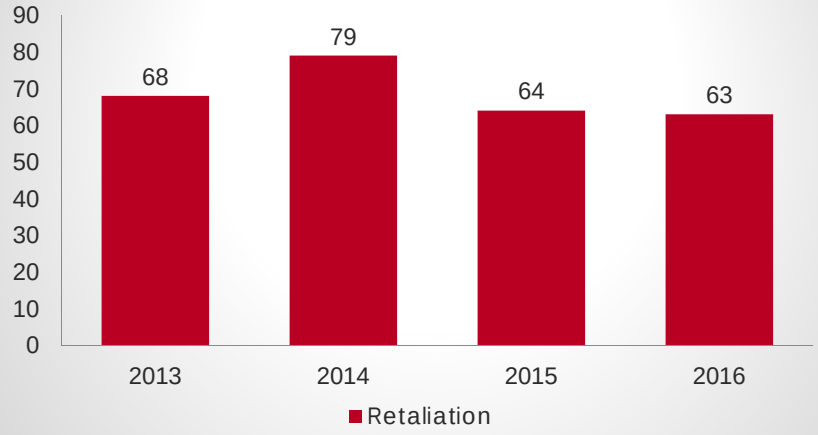

*Table based on numbers published by ASCHR in its 2016 Annual Report

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Rosenfield v. GlobalTranz Enterprises, Inc. (9th Cir. 2015)

- Rosenfield was Manager of Human Resources and then the Director of Human Resources and Corporate Training
- She repeatedly complained to her superiors that the company was not compliant with the FLSA
- She was fired fives days after documenting instances of non-compliance and complaining to her boss

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Rosenfield v. GlobalTranz Enterprises, Inc. (9th Cir. 2015)

- Employer must have "fair notice" employee was making a complaint within the meaning of the FLSA
- Managers are in a different position than other employees—employers expect managers to voice concerns and suggest changes

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Rosenfield v. GlobalTranz Enterprises, Inc. (9th Cir. 2015)

- No summary judgment for employer
- Rosenfield was not responsible for ensuring employer's compliance with FLSA
- Supervisor told Rosenfield he "did not understand, appreciate, or welcome bringing to his attention FLSA violations"

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Rosenfield v. GlobalTranz Enterprises, Inc. (9th Cir. 2015)

- **Takeaways**:
  - Case-by-case determination
  - Employee's responsibilities may be considered when determining whether complaints constituted protected activity, but this is not a catch-all

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Sanders v. Energy Northwest (9th Cir. 2016)

- Maintenance manager for a nuclear power plant
- Sanders and other mangers were part of an internal committee to review severity of condition reports
- Sanders disagreed with a co-manager about a classification of a report, but would "let it go"

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Sanders v. Energy Northwest (9th Cir. 2016)

- Summary judgment in favor of employer
- Designation process involved collaborative opinions from co-managers
- Single expression of a difference of opinion lacks a sufficient nexus to a concrete, ongoing safety concern
- **Takeaway**: Whether the employee's actions constitute "protected activity" is usually a case-by-case determination

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Thomas v. State (Alaska 2016)

- Public employee, seafood inspector
- Familiar facts: Employee asserting complaints and whistleblowing allegations throughout ongoing disciplinary issues
- Eventually, after contentious airport inspection that resulted in complaints by a seafood processor and an airline, employment terminated

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Thomas v. State (Alaska 2016)

- Well-documented disciplinary process and counseling communications over time
- Undisputed allegations were sufficient to grant summary judgment on all claims for employer, including claims re: retaliation, Alaska Whistleblower Act, and covenant of good faith and fair dealing
- **Takeaways**:
  - HR assistance communicating with challenging employees comes through again!
  - Plaintiff's own speculation and personal feelings of unfairness are not sufficient evidence

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Other State and Federal Cases

Supreme Court of Alaska

U.S. Supreme Court

What to watch...

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Burton v. Fountainhead Development, Inc. (Alaska 2017)

- Tour company hired Burton to work the tourist season as its representative at a Fairbanks hotel
- Hotel management told tour company Burton had been banned from hotel property, had once been involved in an altercation with a guest, and he had "defaced" hotel property
- Employee advised he could not work at any other hotel
- Tour company terminated employee
- Employee sues client hotel

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Burton v. Fountainhead Development, Inc. (Alaska 2017)

- Conditional business privilege for statements motivated by desire to protect economic interest rather than spite, malice, or improper objective
- Two defamatory statements - $15,000 award
- Reason for termination was refusal to work at other hotels, so no interference with business relationship or damages for loss of employment

Takeaways:

- Employer was smart in offering alternative work locations (even helped client hotel in the long run)
- AS 09.65.160 protection for communications with prospective employers is not at issue in this case, but this case is a good reminder of its good faith limitations

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EEOC v. McLane Co. (Supreme Court 2017)

- Employee was a cigarette selector who failed strength test after maternity leave
- She filed a charge with the EEOC for sex discrimination
- How many of you have been asked for extensive employee information from an investigating agency?
- EEOC, per common practice, asked for extensive information on broad group of employees

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EEOC v. McLane Co. (Supreme Court 2017)

- The test for EEOC's subpoena power is whether the information is "relevant," not whether it is "necessary"
- Ninth Circuit was outlier regarding standard for review of district court enforcement decisions on EEOC subpoenas – Supreme Court says trial court decision is reviewed for abuse of discretion

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*EEOC v. McLane Co. (*Supreme Court 2017)

- **Takeaways**:
  - EEOC has broad authority to seek and obtain evidence and information from employers
  - That authority can be limited by the district court's determination of:
    - whether the evidence sought is relevant to the specific charge;
    - whether the subpoena is unduly burdensome in light of the circumstances.

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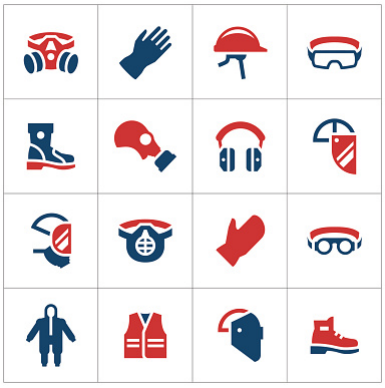
Tyson Foods, Inc. v. Bouaphakeo (2016)



- Pork processing plant employees bring class action for overtime compensation
- Employer allegedly failed to compensate for time spent donning and doffing mandatory protective gear
- Employer did not keep records of time employees spent donning and doffing
- Since there were no records, employees relied on expert testimony to provide an estimate

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Tyson Foods, Inc. v. Bouaphakeo (2016)

- Statistical evidence was allowed to establish class-wide liability because evidentiary gap created by employer's failure to keep adequate records
- **Takeaways**:
  - Keep records!
  - It is the rule under Alaska (AS 23.10.100) that employers are required to keep records of all hours worked by **all employees**
  - This rule also applies to **exempt employees**

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Interesting issues to watch

- *Encino Motorcars, LLC v. Navarro* (2016). Alleged FLSA violations relating to service advisors. Supreme Court remanded to 9th Circuit to interpret FLSA without deference to 2011 DOL regulations. On remand, 9th Cir. held service advisors not exempt.
- **Reasoning** : DOL failed to comply with the basic procedural requirement to give "adequate reasons" for its decisions. Thus, the usual deference to agency regulations not warranted.

- *Epic Systems Corp. v. Lewis*, and related cases including Murphy Oil (2017-2018 term) – class action waivers and the Federal Arbitration Act versus the NLRA

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Questions?

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Thank you!

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