

Employment Law Update American Association of Port Authorities

Presented by:
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Charge Filings Continue at Record Highs

- **Newly announced EEOC charge stats from FY 2012: 97,000 charges.**
- **Follows three prior years of record charges (FY 2011: 99,947; 2010: 99,922; FY 2009: 93,277.)**



EEO Hot Issues

- **Automatic termination of employees who have exhausted FMLA or other types of leave**
 - EEOC sued major employers throughout the country alleging the employer's leave policies violate the ADA
 - *Remember* – providing additional leave is a form of reasonable accommodation
 - Cannot automatically terminate – must engage in interactive process
 - EEOC position.....no amount of leave is unreasonable

What Should You Do?

- Review attendance procedures
- Train – to flag potential notice of need for attendance accommodations



Sex Harassment: Failure By Manager To Keep Information Confidential

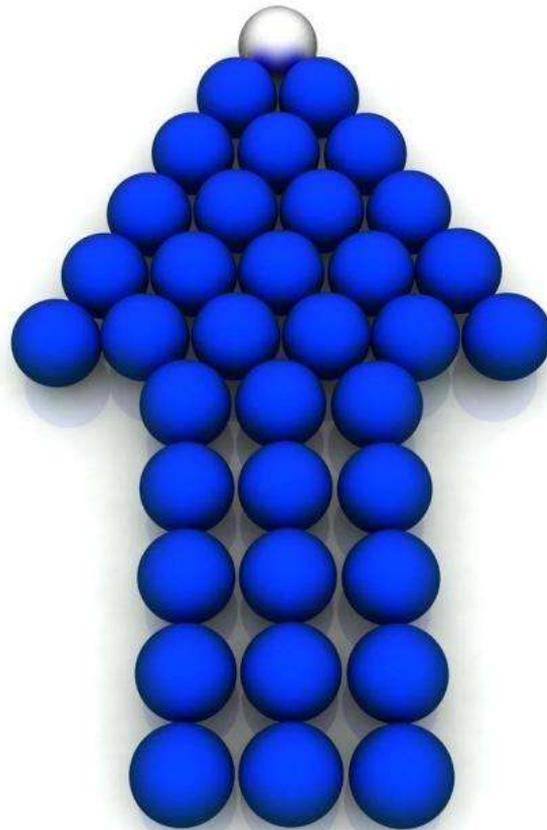
- **Menten worked as a barista at Starbucks**
- **After a sexual assault (unrelated to work), Menten discloses to store manager.**
- **Thereafter, without permission, the manager informs the other baristas, and employees from other stores, about the assault and they make comments to Menten.**
- **Menten also becomes the subject of sexual jokes and pranks by co-workers. Starbucks responds to each incident.**
- **Months later, Menten is suspended for arguing with a substitute manager. Menten resigns out of anger but later tries to withdraw resignation. Store Manager moves forward with resignation.**

Sex Harassment: Failure By Manager To Keep Information Confidential (Cont'd)

- **Holding**: Store manager gossiping about the sexual assault is sufficient evidence by itself of sexually hostile work environment to defeat Starbuck's motion for summary judgment and let case go to a jury trial.
- **Court**: "The jury could reasonably conclude that such widespread knowledge and discussion of [the] sexual assault was against Plaintiff's will and that it was sufficiently ... sexually offensive to create a 'humiliating work environment.'"



“Me Too” Evidence



Working at a Law Firm



- An office worker is hired by a small law firm in 2002
- She claims that while working there, the named partner slapped and touched her buttocks, touched her leg, called her a “stupid bi**h,” and referred to his employees as “his Mexicans.”
- She eventually was terminated, also in 2002

His Explanation



- **He admits that he uses profanity, but it is not directed at anyone in particular**
- **He also states that he has a policy of not tolerating discrimination or harassment**

The “Me Too” Evidence



- Plaintiff offered “me too” evidence from other employees
- At times when she was not employed, or not present, the named partner behaved in a similar manner
- Testimony offered from four other employees
- Remember: Plaintiff did not hear/see this...

“Me Too” Sexual Harassment



- “You should wear see-through dresses more often and get up on the ladder.”
- “If we get T-shirts for the office, we’d have to get extra large because both of your chests are so big.”
- “What is written on the elastic band of your underwear?”
- Touched and slapped employees’ buttocks and legs

“Me Too” Demeaning Comments

- Frequent use of profanity, directed at individuals: “Fu**, Sh**, Bi**h”
- “Monkeys could do your job better than you”
- “Why can’t I get a competent staff?”
- “Why can’t I fu**ing get a good staff?”
- “Get your head out of your a**.”
- “What the f**k is wrong with you?”
- “*****”

Trial Court Ruling



- **This evidence is excluded.**
- **These alleged events took place when the office worker was not employed, and did not impact her work environment.**

Reversed on Appeal!

- Because the named partner claimed that he engaged in profane tirades without bias, the “me too” evidence could be used by the jury to evaluate his credibility, motive, and intent.
- Case is sent back for another trial (remember the year when the office worker was fired?)
- *Pantoja v. Anton*, 198 Cal. App. 4th 87 (2011)

Lessons Learned

- **The “I am a jerk to everyone” defense is not a very good defense!**
- **Every day counts!**
- **Every statement made in the workplace is important!**
- **Never give up!**



Intersection of FMLA/ADA – Extended Leave



- **Leave as a Reasonable Accommodation under the ADA**
- **What do your policies provide happens when FMLA expires?**

Intersection of FMLA/ADA – Extended Leave

- **Courts are also taking notice**

- *Shelton v. Bridgestone MetalPha*, No. 3-11-0001,
(M.D. Tenn. May 8, 2012)



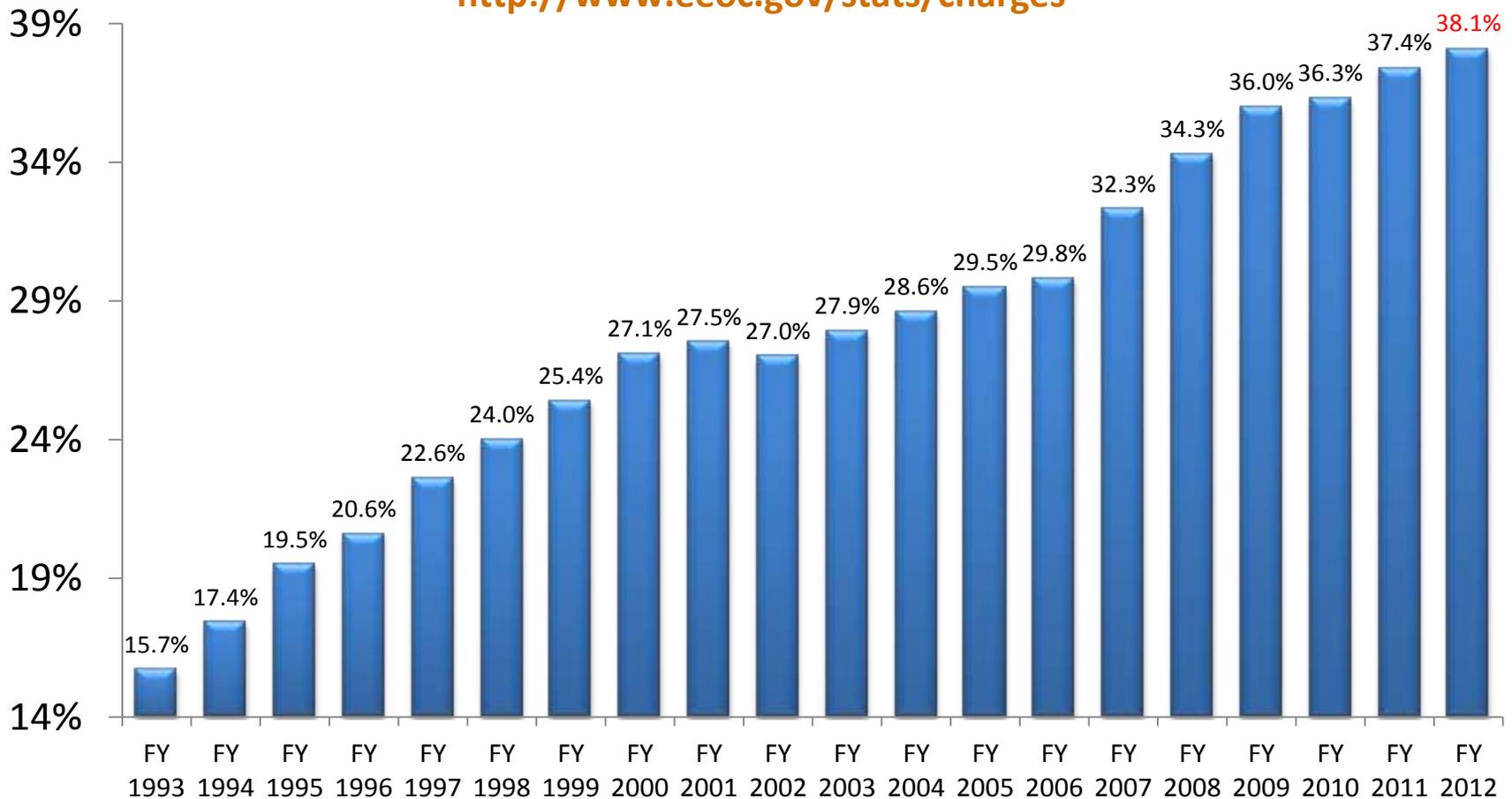
Anti-Retaliation Protections Are Everywhere

- OSHA
- ADA
- Title VII
- False Claims Act
- Equal Pay Act
- FLSA
- USERRA
- Immigration Reform and Control Act (IRCA)
- ADEA
- NLRA
- Workers Compensation Acts
- Dodd-Frank
- Sarbanes-Oxley
- The Rehabilitation Act



The Rising Tide of Retaliation Claims

<http://www.eeoc.gov/stats/charges>



Expansive View of Protected Conduct In The Wage And Hour Context

- **The Fair Labor Standards Act prohibits an employer from retaliating against any employee who “has filed any complaint . . . under or related to” the statute**
- **Filed with whom?**
- **What kind of complaint?**



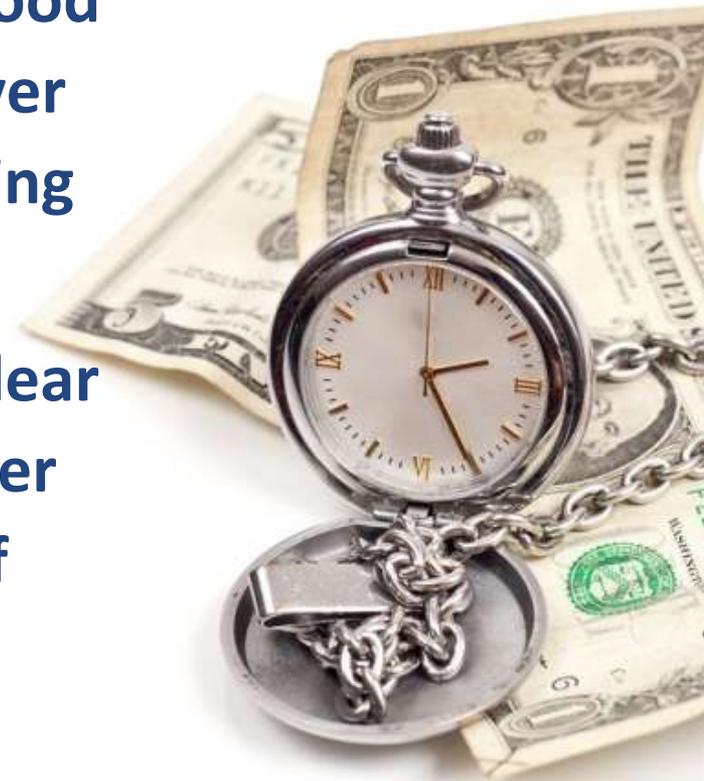
Expansive View of Protected Conduct In The Wage And Hour Context

- **Oral Complaints are protected activity**
 - *Kasten v. Saint-Gobain Performance Plastics Corp.*



Expansive View of Protected Conduct In The Wage And Hour Context

- A complaint is filed when a “reasonable, objective person would have understood the employee to have put the employer on notice that the employee is asserting rights under the” FLSA
- “The complaint must be sufficiently clear and detailed for a reasonable employer to understand it . . . as an assertion of rights protected by the” FLSA



Expansive View of Protected Conduct In The Wage And Hour Context

- **Most courts agree that complaints to employers are protected activity**



Best Practices: Back to Basics

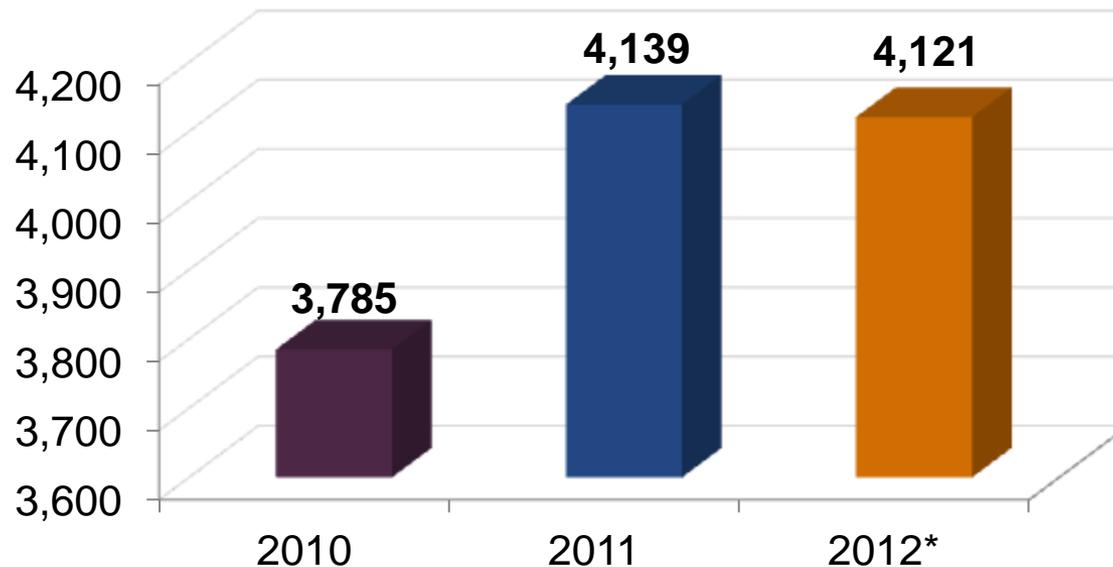


- **Publish policies that specifically prohibit retaliation**
- **Train managers and staff on law and protected activities**
- **Promptly investigate claims. Remind participants of anti-retaliation policy**
- **Track/review discipline for consistency. Assure that employees who have made complaints are not held to higher standards or treated differently**
- **Document and take timely action re: performance problems**

Nationwide Wage and Hour Class Action Filings Have Increased

Over 90% of all employment class/collective actions are W/H

W/H Class and Collective Actions Filed in
Federal and State Courts



**Based on filing rate through 9/30/12*

Wage & Hour

- **90% of all employment class and collective actions filed in state and federal courts in the United States are wage and hour cases**

Source: Laurent Badoux, Trends in Wage and Hour Litigation Over Unpaid Work Time and the Precautions Employers Should Take (2011)

Common Class Action Issues

- **Employees misclassified as exempt**
- **Employers automatically deducting for meal periods**
- **Employees required to work “off the clock”**



Thank you!



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