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Presented to IMLA



"Diversity and Inclusion from a Compliance Perspective"

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NB: AUDIENCE

- **NO PART OF THIS PRESENTATION IS OR IS INTENDED TO BE "LEGAL ADVICE."**

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OVERVIEW

- LEARNING OBJECTIVES
- INTRODUCTION
- SHIFTS IN THE LAW
- “COMPLIANCE” vs. “STRATEGY”
- A PROACTIVE APPROACH
- CONCLUSION

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LEARNING OBJECTIVES

- To examine a representative sample of recent federal employment law cases
- To understand the organizational difference between a focus on "compliance" and a focus on "strategy"
- To recognize the benefits from a compliance standpoint of the proactive use of a diversity and inclusion strategy

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INTRODUCTION OF ELIZABETH

- Attorney – federal government, law firm, and in-house
- HR Professional
- Diversity and Inclusion Strategist
- GO BLUE!

INTRODUCTION OF PARTICIPANTS

- Attorneys –
    - Large city?
    - Smaller city?
    - International?
    - Firm practitioners?
    - Solo practitioners?
- Other professionals?
- Examples of Diversity elements

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CONTEXT: IMLA's MISSION STATEMENT

- *To serve local government lawyers and to advance the interests of local government law locally, nationally, and internationally.*

- Tag Line: *Advancing Excellence in the Practice of Local Government Law*

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SHIFTS IN EMPLOYMENT LAW

- Retaliation
- Expansion of the Statute of Limitations
- Expansion of who can sue and for what

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TRENDS IN CURRENT EEO CASES

- Retaliation—increasingly popular cause of action

- Elements:
  - Employee engaged in protected activity
  - Employer took adverse employment action against Employee
  - Causal connection between protected activity and adverse employment action

- Broad-based cause of action especially given Employer policies

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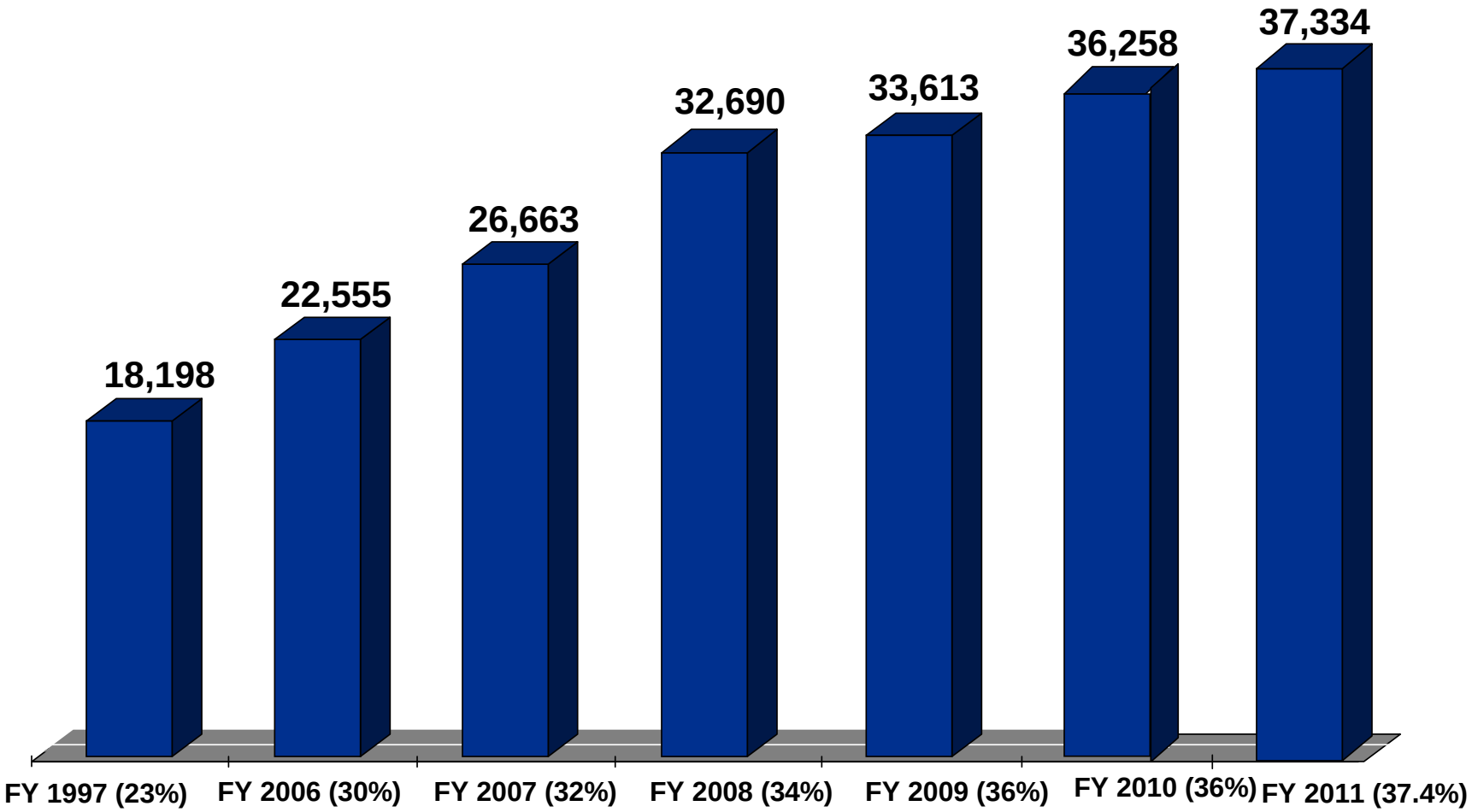
EEOC RETALIATION CLAIMS TREND UPWARD



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RETALIATION

- Easier to prove than initial claim of discrimination

- See, e.g.: *Fischer v. UPS*, 390 F. App'x. 465, 2010 WL 2994002 (6th Cir. 2010)

    - Employee brought race discrimination action
    - Employee lost trial and was subsequently terminated
    - Employee brought retaliation claim
    - Awarded $650,000 in compensatory damages
    - Awarded $300,000 in punitive damages

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MEET LILLY LEDBETTER – GAME CHANGER

- *Lilly M. Ledbetter v. The Goodyear Tire & Rubber Company, Inc.*, 550 U.S. 618 (2007)

  - Supreme Court case that triggered a change in the way that employers need to look at discrimination claims, especially as they relate to compensation.

  - Plaintiff worked for Respondent for 20 years starting in 1979, mostly as a salaried manager.

  - When she retired, Ledbetter was the only female area manager.

MEET LILLY LEDBETTER – (Cont'd)

- Through an anonymous tip just before she retired, Ledbetter found out that she was paid less than her male counterparts ($3700 per month vs. $4300-$5200 per month for her male colleagues).

- Ledbetter filed a Charge of Discrimination with the Equal Employment Opportunity Commission in July 1998 claiming that she received lower performance evaluations because of her gender and as a result was paid a lower salary.

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MEET LILLY LEDBETTER (Cont'd)

- Ledbetter would subsequently describe her employment conditions as consisting of acts of sexual harassment (*quid pro quo* relating to a requested exchange for a favorable performance evaluation), hostile work environment, retaliation (reassignment to a heavy-lifting position), as well as pay differentials.

- The District Court allowed the case to proceed to trial and the jury found in favor of Ledbetter. The Eleventh Circuit Court of Appeals reversed, "holding that a Title VII pay discrimination claim cannot be based on any pay decision that occurred prior to the last pay decision that affected the employee's pay during the EEOC charging period. 421 F. 3d 1169, 1182-1183 (2005)." *Ledbetter, supra at 622-623*.

MEET LILLY LEDBETTER (Cont'd)

- The U.S. Supreme Court affirmed the Eleventh Circuit's decision.

- *Held*: The later effects of past discrimination do not restart the clock for filing an EEOC charge; "[b]ecause a pay-setting decision is a 'discrete act,' it follows that the period for filing an EEOC charge begins when the act occurs." *Ledbetter*, supra at 621. Ledbetter's EEOC charge was filed considerably more than 180 days after her employer established her salary and thus was untimely. (Subsequent pay decisions were deemed non-discriminatory.)

MEET LILLY LEDBETTER (Cont'd)

- Note: Ledbetter's claim was brought in Alabama. The EEOC filing period to bring a charge of discrimination is 300 days for states with a parallel agency with jurisdiction over employment discrimination claims. In states without such a state agency, like Alabama, the filing period is only 180 days.

- Thus, the effect of the *Ledbetter* decision was to cut-off claims by employees where the most recent discriminatory act occurred more than 180 days (or 300 days) before discovery and filing of a Charge of Discrimination.

LILLY LEDBETTER FAIR PAY ACT OF 2009

- Following the Supreme Court's decision, Congress addressed its concern that the intent of the underlying Title VII and related equal employment opportunity legislation was thwarted.

- Statute: "An Act to amend [T]itle VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967, and to modify the operation of the Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973, to clarify that a discriminatory compensation decision or other practice that is unlawful under such Acts occurs each time compensation is paid pursuant to the discriminatory compensation decision or other practice ... ."

LILLY LEDBETTER FAIR PAY ACT OF 2009

- Congressional finding # 1: “The Supreme Court in [Ledbetter] significantly impairs statutory protections against discrimination in compensation that Congress established and that have been bedrock principles of American law for decades.”

- Congressional finding # 2: “The limitation imposed by the Court on the filing of discriminatory compensation claims ignores the reality of wage discrimination and is at odds with the robust application of the civil rights laws that Congress intended.”

- Act effective as of May 28, 2007 (the day before the Supreme Court’s decision in *Ledbetter*).

LILLY LEDBETTER FAIR PAY ACT OF 2009 (Cont'd)

- Impact on employers -- potential increase in exposure for discriminatory pay practices. Federal government contractors, covered by Executive Order 11246, may have greater exposure from the compensation analysis portion of audits conducted by the U.S. Department of Labor's Office of Federal Contract Compliance Programs.

- Employers -- take proactive approach to examine *and address* all suspect compensation discrepancies.

EXPANSION OF WHO CAN SUE AND FOR WHAT

- *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325 (2011)
  - Case changed the standard for evaluating what employee actions constitute "protected activity"
  - Court determined that plaintiff's verbal complaints constituted protected conduct and triggered the anti-retaliation protective provisions of the Fair Labor Standards Act.

EXPANSION OF WHO CAN SUE AND FOR WHAT

- *Staub v. Proctor Hospital*, 131 S. Ct. 1186 (2011)
  - Recognized "Cat's Paw" theory of employer liability where decision-maker relied on "tainted" personnel records prepared by other employees.
  - Under some fact scenarios, an employer can assert a shield of protection from liability if a manager or other "authority" is not aware of the offending facts or could not reasonably be expected to know of the offending facts.
  - The "Cat's Paw" theory, in contrast, recognizes that otherwise "innocent" managerial decision-makers may be influenced by the bias of others in the investigation and recommendation chain.
  - Court's ruling suggests affirmative obligation to ensure that the information relied upon is free of bias.

EXPANSION OF WHO CAN SUE AND FOR WHAT

- *Crawford v. Metro. Gov't of Nashville and Davidson County, Tenn.*, 555 U.S. 271 (2009)
  - Retaliation claim can arise even if employee did not file a complaint of discrimination.
  - Supreme Court recognized that an employee's comments made during an internal investigation of another employee's harassment complaint amounted to "protected conduct" and warranted protection from retaliation.

EXPANSION OF WHO CAN SUE AND FOR WHAT

- *Thompson v. North American Stainless*, 131 S. Ct. 863 (2011)
  - Supreme Court recognized claim of third party for retaliation under Title VII.
  - Where an employee claimed discrimination, an employer could not take an adverse employment action against the employee's fiancé, who was also an employee.
  - The fiancé's ability to bring a third-party claim for retaliation was upheld.

COMPLIANCE vs. STRATEGY

- Compliance – a necessary organizational function (or current state of being)
- The absence of “compliance” is simply unacceptable
- Strategy – a distinction with a difference

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COMPARE/CONTRAST

- **Equal Employment Opportunity**
  - Policy driven
  - Compliance with federal, state and local laws
  - Compliance with company HR policies (including EEO and Anti-Harassment)
  - Narrowly tailored
  - Reactive and circumstantial
  - TO THE EXTENT THAT YOU WANT TO MAXIMIZE SUCCESS HERE....

- **Diversity and Inclusion**
  - Strategy driven
  - Long-term strategic plan with quantitative metrics and qualitative standards
  - Tied to an organization's core mission
  - Comprehensive
  - Proactive and continuous
  - YOU ARE LIKELY TO BE ABLE TO USE THESE STRATEGIES TO YOUR ADVANTAGE

PARTICIPANT FEEDBACK

- How many are with an organization with a fully developed compliance program around Equal Employment Opportunity?

- How many are with an organization that has a diversity and inclusion strategy?

- How many are with an organization with a compliance program but without a diversity and inclusion strategy? *Vice versa*?

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DIVERSITY and INCLUSION STRATEGY

- Executive leadership and buy-in
- Mission/Vision -- the “business or organization case”
- Comprehensive:
  - Workforce
  - Workplace
  - Marketplace
- Communications strategy and training

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A PROACTIVE APPROACH

- Employment Law 101 (for example)
- Key elements of a Diversity and Inclusion Strategy
- But first, identification of potential barriers to success

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STEREOTYPES

- An exercise to appreciate this subtle culprit

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A PROACTIVE APPROACH

Employment Law 101:

(1) Thoroughly investigated

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A PROACTIVE APPROACH

Employment Law 101:

(1) Thoroughly investigated

(2) well documented

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A PROACTIVE APPROACH

Employment Law 101:

(1) Thoroughly investigated

(2) well documented

(3) objective decision-making

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A PROACTIVE APPROACH

Employment Law 101:

(1) Thoroughly investigated

(2) well documented

(3) objective decision-making

(4) against a back drop of sound HR policy, training, and consistent enforcement

A PROACTIVE APPROACH

Employment Law 101:

(1) Thoroughly investigated

(2) well documented

(3) objective decision-making

(4) against a back drop of sound HR policy, training, and consistent enforcement

(5) buttressed by diversity and inclusion strategy

HEADLINE NEWS – EMPLOYMENT LAW

- Consumer electronics company paid $2.3 million to settle sexual harassment and retaliation lawsuit with the EEOC (August 2012)

- Large bank paid $175 million to settle race discrimination investigation regarding mortgage lending practices to African-Americans and Hispanic borrowers (July 2012)

- Another large bank paid $335 million in to settle similar race discrimination charges (December 2011)

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ADVANTAGES OF A PROACTIVE APPROACH

- Employers may utilize effective diversity and inclusion workforce, workplace, and marketplace strategies to:
  - Enhance credibility

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ADVANTAGES OF A PROACTIVE APPROACH

- Employers may utilize effective diversity and inclusion workforce, workplace, and marketplace strategies to:
  - Enhance credibility
  - Demonstrate “good faith” efforts

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ADVANTAGES OF A PROACTIVE APPROACH

- Employers may utilize effective diversity and inclusion workforce, workplace, and marketplace strategies to:
  - Enhance credibility
  - Demonstrate “good faith” efforts
  - Create employee engagement

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ADVANTAGES OF A PROACTIVE APPROACH

- Employers may utilize effective diversity and inclusion workforce, workplace, and marketplace strategies to:
  - Enhance credibility
  - Demonstrate “good faith” efforts
  - Create employee engagement
  - Create community and supplier support

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ADVANTAGES OF A PROACTIVE APPROACH

- Employers may utilize effective diversity and inclusion workforce, workplace, and marketplace strategies to:
  - Enhance credibility
  - Demonstrate “good faith” efforts
  - Create employee engagement
  - Create community and supplier support
  - Mitigate against claims for workplace discrimination and/or harassment and the attendant claims for compensatory and punitive damages.

MITIGATION

- Employer can avoid liability through adequate remedial actions. See *Griffin v. Harrisburg Property Services, Inc.*, 421 Fed. App'x 204, 2011 WL 1227784 (3rd Cir., Apr. 4, 2011)

    - Employee claimed racial harassment by co-worker
    - "[c]ommencing an investigation immediately, granting Griffin's transfer, disciplining [co-worker accused of racial harassment], and instituting diversity training was adequate remedial action."
    - Employer avoided liability for damages and punitives

MITIGATION

- In *Fischer v. UPS*, 390 F. App'x. 465, 2010 WL 2994002 (6th Cir. 2010), court held Employer liable and distinguished Employer's conduct there from that by Employer in *Bryant v. Aiken Regional Medical Centers, Inc.*, 333 F.3d 536 (4th Cir. 2003):

MITIGATION -- Cf. *Bryant*:

- Circuit court "vacated the jury's punitive damage award where it found that the employer not only had an antidiscrimination policy, a grievance policy encouraging employees to bring forward claims of discrimination, and a diversity training program, but also ensured implementation by 'voluntarily monitor[ing] departmental demographics as part of an on-going effort to keep the employee base reflective of the pool of potential employees in the area.'"

CLOSING THOUGHTS

- Advantages of a proactive approach
- Be mindful of your organization's diversity and inclusion strategies (as they seek to build a more diverse, inclusive, and productive workforce)
- Employment best practice:
  - Always emphasize qualifications, experience, and then apply consistent standards to <u>everyone</u>

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LEARNING OBJECTIVES -- Revisited

- To examine a representative sample of recent federal employment law cases
- To understand the organizational difference between a focus on “compliance” and a focus on “strategy”
- To recognize the benefits from a compliance standpoint of the proactive use of a diversity and inclusion strategy

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AUDIENCE FEEDBACK

- Questions?
- Any “aha” moments?
- Any success stories from audience?

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THANK YOU!

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