The Future of Employment Law:
October 2012 Update

Presented to:

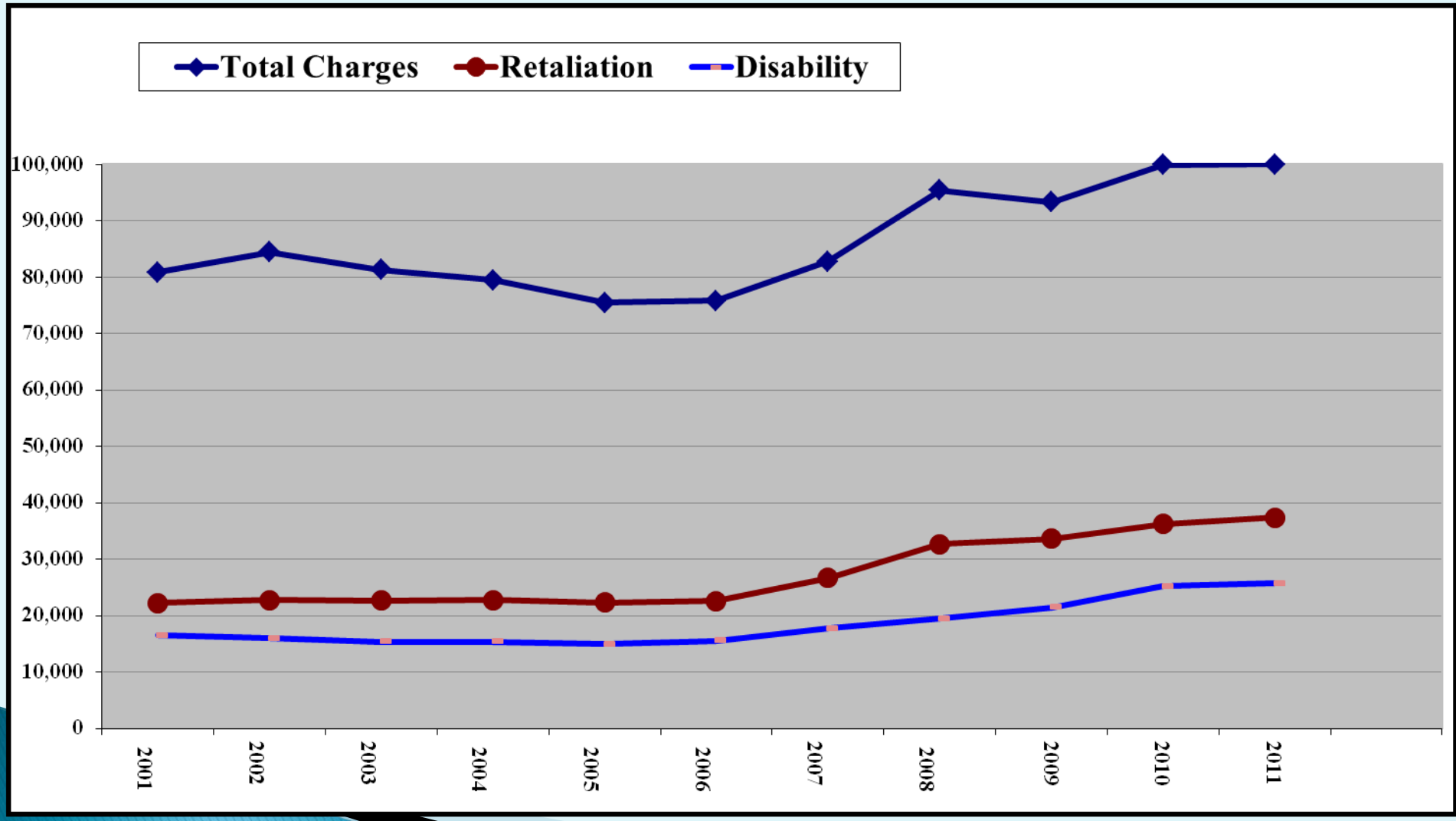
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Advancing Excellence in the practice of Local Government Law

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EEOC: 2011 Bias Charges Hit All-Time High



EEOC is Serious about ADA-AA

- EEOC collected ADA-AA $$
  - FY 2009 – $67 Million
  - FY 2010 – $76 Million
  - FY 2011 – $103 Million (35% increase)

- EEOC litigated:
  - FY 2010 – 9 ADA cases
  - FY 2011 – 60 ADA cases

Neutral Absence Control Policies

- Verizon/EEOC settlement **$20 Million**
  - Additional leave flexibility may be reasonable accommodation
- Add to Leave Limits policy:
  - We will comply with the ADA when additional, limited time off
    - is necessary to accommodate an employee's disability,
    - such leave is for a specified time period,
    - the leave can be granted without undue hardship to the Company, and
    - the employee is otherwise qualified for the position.

Learning Disabilities

- ADA-AA: Now considered a disability
- Does it affect ability to do essential functions?
- Can we reasonably accommodate it?
- Use the interactive process!!

Obesity as a disability

- No longer “morbidly obese” test
- Does it affect ability to work?
- If so, how can we accommodate it?
- Use the interactive process!!



Bottom Line ADA

- Reasonable accommodation of **all** health issues
  - Essential Functions
  - Undue Hardship
  - Direct Threat of Imminent Harm
  - Interactive Process
- Err on the side of:
  - It **is** a disability and it **can** be accommodated

USERRA



- Reinstatement to same position
  - Honorable discharge
  - 90 days
- More than five years if still “National Emergency”
- Bumping requirement
- Doesn’t matter if they said earlier that they wouldn’t be returning

Dress Codes, Religion, and "I've got to be me!"

- 3 current Muslim headscarf suits against Abercrombie & Fitch
- The "Look Policy"
  - Clothing consistent with brand
  - No hats or other coverings
  - No black clothes
- Ikea provided headscarves in company colors with logo – applauded by Muslim groups
- Church of Body Modification?
- Is "too sexy" sexist? Not sexy enough?

Gender Identity

- Advocacy groups have been unsuccessful in passing ENDA
- 16 states ban gender identity or expression
- ATF case: “budget cuts” after applicant reveals transition.
- April 2012: EEOC finds sex discrimination under Title VII
- Will likely extend from transgender to sexual preference

Criminal/Credit Background Checks

- Pepsi $3 Mil settlement with EEOC
- Race Discrimination – Adverse Impact
- Mostly concerned with minor crimes of young men of color

EEOC's Bottom Line on Criminal History

- EEOC now requires employer analyze 3 factors:
  - Nature and gravity of crime
  - Time passed
  - Job requirements
- Don't automatically screen out – individual assessment
- EEOC "doesn't like" asking about it on applications

The Buffalo EEOC Letter on Confidential Investigations

- Does requiring confidentiality of complainants and witnesses in an EEO investigation violate the law?
- “Discussing one’s complaints of sexual harassment with others is protected opposition”
- Simply having the policy is “flagrant, not trivial” violation.

Electronic Harassment

- Internet
- E-Mail
- IM
- Text



On-Line Hostile Environment?

What if written off-duty?





Social Networking and Privacy

- Stick with public pages
- No “surreptitious friending”
- 2011: Day after 12-year-old drowned on field trip to beach, NYC 5th grade teacher posted:
  - “After today, I’m thinking the beach is a good trip for my class. I hate their guts.”
  - Arguing right to privacy – intended for friends off duty
  - Was colleague who turned her in.
  - Hearing examiner upheld termination
  - UPDATE – REINSTATED BY NY COURT!!
    - Behavior was “repulsive”— but punishment was out of proportion for “isolated incident.”



Still OK to Google applicants

- But what if you find something that you are not allowed to make a decision on??
  - Member of disability/disease chat group?
  - Religion?
  - Sexual preference?
  - Prior discrimination claims?
- Search late in the process
- Have nondecision-maker do search
- Talk to applicant about what you find
  - Mistaken identity
  - False information

Affordable Care Act & Nursing Mothers

- Employers must provide nursing mothers with:
  - Reasonable break time to express milk
  - A private, comfortable, separate place to do it (not a bathroom)
  - Refrigerator available to store expressed milk
- Applies to **all** employers
  - 50 employees and over, mandatory and absolute
  - Under 50 employees, mandatory unless employer can show “undue hardship” (better be careful!)

Caregiver Discrimination

- Against women
  - Going home for a sick child treated more harshly than going home to deal with a plumbing issue
- Against men
  - “Real men” don’t do child/parent care





Managers need to get advice BEFORE the deed is done!

- We just fired a minority, pregnant, over 40, disabled employee who recently returned from a workers' comp injury
- We fired her for complaining that her back still hurt
- It was really annoying
- Was that ok?

Thank you and good luck!

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