

NEW DIMENSIONS IN LABOR AND EMPLOYMENT LAW

Discrimination, Harassment, and Emerging Legal Issues

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This outline contains a general overview of discrimination and harassment law. The session will focus on new and emerging discrimination and harassment claims, theories, and protected classes.

I. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964: THE KEY FEDERAL ANTI-DISCRIMINATION LAW

- A. Prohibited conduct - Title VII prohibits discrimination “in the terms or conditions of employment” due to race, color, religion, sex, or national origin.
 - 1. Title VII applies to all employers with fifteen or more employees for each working day in each of twenty weeks in the current or preceding calendar year.
 - 2. Title VII has been amended over time, including significant amendments in 1991 to permit recovery of emotional distress and punitive damages, subject to certain limits based on the number of employees employed by the defendant.
 - 3. The Supreme Court has decided that Title VII's coverage extends to adverse actions against former employees.
 - 4. The Genetic Information Nondiscrimination Act of 2008 (GINA) adds “genetic information” as a protected category to the existing Title VII protected categories of race, color, religion, national origin, and sex.
 - a. GINA makes it an unlawful employment practice to fail or refuse to hire, or to discharge, or otherwise to discriminate against any employee, “because of genetic information with respect to the employee.”
 - b. “Genetic information” is largely defined as genetic test results of an individual employee, or of the employee’s family members. However, a separate subsection defines “genetic information” as “the manifestation of a disease or disorder in family

members” of an employee, which creates the possibility of far broader coverage.

- c. GINA specifically excludes age and sex information from the definition of “genetic information.” In addition, standard medical information “that is not genetic information” regarding a “manifested” illness is not “genetic information,” even if the illness may have a genetic basis.
 - d. GINA makes it an unlawful employment practice to request or require genetic information from an employee (subject to some exceptions, including a specific exception for information required to prove an employee’s entitlement to FMLA leave).
 - e. GINA specifically does not permit a disparate impact claim.
 - f. Although the scope of GINA is potentially enormous, it may not prove to have much practical effect. Va. Code § 40.1-28.7:1 already prohibits an employer from requesting or requiring a genetic test as a condition of employment, and Va. Code § 38.2-508.4 prohibits discrimination in the terms and conditions of employment based on any identifiable gene or chromosome known to cause (or increase) the risk of a disorder.
5. Relief – Successful employee claimants under Title VII may recover equitable, compensatory and punitive damages, as well as attorney’s fees, expert witness fees, and other costs.
6. Equitable damages include:
- a. Back pay; that is, the compensation the employee would have earned but for the discriminatory discharge from employment.
 - b. Front pay – particularly used in class actions, but only infrequently used in individual cases.
 - c. In some cases, a court order reinstating a victim of discrimination.
7. Compensatory and punitive damages are available to a complaining party, capped based on the size of the employer:

- a. 15 to 100 employees – damages not to exceed \$50,000.
 - b. 101 to 200 employees – damages not to exceed \$100,000.
 - c. 201 to 500 employees – damages not to exceed \$200,000.
 - d. 500 plus employees – damages not to exceed \$300,000.
8. The United States Supreme Court decided that punitive damages may be available so long as the employer's conduct was intentional and taken with "reckless indifference" as to whether or not its actions violated federal law.
- a. The Supreme Court refused to require "egregious" conduct for an employer to be liable for punitive damages.
 - b. However, the Supreme Court held that an employer may not be liable for punitive damages for discriminatory actions of supervisors where those actions are contrary to an employer's good faith efforts to comply with Title VII.
9. Prevailing employees are entitled to attorneys' fees as a matter of course.
- a. An employer, by contrast, is only entitled to attorney's fees if it can demonstrate that the claim is frivolous, unreasonable, or groundless
- B. Disparate impact – In addition to prohibiting the most common form of discrimination, known as disparate treatment, Title VII also prohibits discrimination due to facially neutral job requirements or regulations that have a disproportionate adverse impact upon a protected group of employees. Disparate impact claims currently are most often found where facially objective requirements such as test scores, physical ability tests or requirements, or similar standards, are used as part of the selection criteria for hiring or promotion.
1. If a job requirement or regulation is determined to have a disproportionate impact on a protected group, it is unlawful unless the employer can demonstrate:

- a. That the challenged practice is job-related for the specific position in question and
 - b. The practice is consistent with business necessity.
 2. A complaining employee may also prevail by demonstrating that an employer rejected an alternative employment practice that would have achieved the same desired goal as the one used without the negative impact.
 3. The United States Supreme Court has held that consideration of race in the testing/promotion context – even to avoid disparate impact – can constitute discrimination. *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009).
- C. Workplace harassment is specifically prohibited by Title VII.
1. According to the "offensive/hostile working environment" theory of workplace harassment, a complaining employee can prevail even though he/she has suffered no economic loss. The same analysis applies whether the conduct is based on race, sex, religion, color, or national origin. Since 1991, compensatory damages for emotional distress, and punitive damages, can be awarded even in cases where the employee has not suffered any loss of income.
 2. The United States Supreme Court has ruled that the proper test for determining whether activity is sufficiently offensive is whether the activity was "unwelcome."
 - a. In the case of sex-based workplace harassment, this may be true even if an employee appears to engage voluntarily in sexual conduct.
 - b. Conduct which may "appear" to be voluntary may in fact be in response to advances which are actually unwelcome.
 3. The Supreme Court has reaffirmed that a discriminatorily hostile or abusive working environment can lead to employer liability for workplace harassment.
 - a. The Supreme Court refused to require a plaintiff to prove psychological or emotional injury to prevail in such a case.

- b. The Supreme Court did not provide employers with a standard as to what constitutes workplace harassment in every case, but, rather, restated that whether a specific work environment is "hostile" or "abusive" can only be determined by looking at all of the circumstances on a case by case basis. In deciding whether or not harassment of this nature exists, courts may consider, among other things, the following factors:
 - i. The frequency of the discriminatory conduct.
 - ii. The severity of the discriminatory conduct.
 - iii. Whether the conduct is physically threatening or humiliating, or a mere offensive utterance.
 - iv. Whether the conduct unreasonably interferes with an employee's work performance.
 - c. Sex-based activity or conduct may also be actionable when same-gender individuals are involved if the alleged victim can establish "but for" his/her gender, he/she would not have been subject to unwelcome conduct. Male-on-male sexual harassment is illegal regardless of sexual orientation, if it is inflicted because of the victim's sex, and same-sex harassment charges have made up over fifteen percent of the EEOC's harassment workload in recent years.
4. An employer can be vicariously liable to a victimized employee for an actionable hostile work environment created by a **supervisor** with immediate authority over the employee.
- a. In these cases, the hostile work environment was created by the supervisors' sexual demands and threats of adverse employment action, though no such adverse action was taken and neither employee submitted to the demands.
 - i. For this type of claim to be actionable, the employee must still prove that the harassment was severe or pervasive.

- ii. An employer may even be liable for a supervisor's conduct when other members of management were not aware of the conduct.
 - iii. The Supreme Court has tightened the definition of "supervisor" to include only those managers who have the ability to take tangible adverse employment action.
 - b. Where no tangible adverse employment action results from the employee's refusal to submit to a supervisor's demands, the employer is entitled to assert an affirmative defense showing that:
 - i. The employer exercised reasonable care in preventing and promptly correcting any sexually harassing behavior; and
 - ii. The employee unreasonably failed to avail him/herself of any preventive or corrective opportunities provided by the employer.
 - c. In other words, if an employer has a strong workplace harassment policy, and enforces such policy, it may have a defense to liability.
 - i. The Supreme Court has strongly encouraged training employees on avoidance of workplace harassment.
- 5. If the alleged harasser was a ***non-supervisor*** (e.g., co-worker, customer, supplier), the employer will be liable if it knew or should have known of the harassing conduct and failed to act reasonably to stop it.

6. The obligation to provide employees with an environment free of illegal harassment may include preventing non-employees (including customers, clients, suppliers, and independent contractors) from engaging in behavior that is offensive to employees.
 - a. Whether an employer may be liable for the conduct of a non-employee depends upon the employer's knowledge of the offensive behavior and the extent to which the employer is in a position to take effective action to stop the offensive behavior.
7. An employer is required to take appropriate steps to stop and eliminate workplace harassment. A zero-tolerance policy against harassment, with multiple reporting avenues and a "no retaliation" provision, is a must for all employers.
 - a. Employers should promptly and thoroughly investigate any report of harassment.
 - b. Timely efforts to eliminate any offensive activity if discovered.
 - c. Take appropriate remedial action if offensive activity is discovered.
 - d. A "zero tolerance" policy against retaliation must be part of any policy, and the "no retaliation" message should be reiterated whenever a complaint is made.

D. Pregnancy discrimination is specifically prohibited under Title VII.

1. Pregnancy must be treated consistently with other temporary disabilities.
2. Employer policies affecting the working conditions of pregnant employees based on "fetal protection" considerations may actually violate Title VII.
3. A 2014 EEOC Enforcement Guidance requires, in effect, an employer to "reasonably accommodate" pregnant employees.

E. Religious discrimination.

1. From a long-term perspective, the number of EEOC charges alleging religious discrimination more than doubled between FY 1997 and 2013. In July of 2008, the EEOC issued an extensive enforcement guidance – a chapter in the internal EEOC Compliance Manual – to provide EEOC personnel with guidance and instructions for investigating and analyzing charges asserting discrimination based on religion.
2. A religious belief will be protected if it:
 - a. Is sincerely held.
 - b. Occupies a place in the believer's life similar to that filled by the idea of God.
 - c. Is distinct from a mere personal moral code.
 - d. Title VII's religion clauses also extend to those who profess no religious beliefs, e.g. atheists and agnostics.
 - e. Non-mainstream religious beliefs and practices are protected if they meet these standards. For example, Wiccans are fully-protected by Title VII.
3. Reasonable Accommodation.
 - a. Employers are required reasonably to accommodate an applicant's or employee's religion or religious practices, unless this creates an undue burden on the employer.
 - b. Undue Burden – A certain accommodation is an "undue burden" if it significantly increases costs or otherwise harms the legitimate business interests of the employer. Please note that although the same term – "undue burden" – is used in the context of the Americans with Disabilities Act, the burden to an employer of proving an "undue burden" imposed by a proposed accommodation under the religious harassment protections of Title VII is far less burdensome than under the ADA. Under the ADA, an

undue burden is a “significant difficulty or expense,” while under the Title VII religion clauses it is merely “more than de minimis.”

4. Religious discrimination, including harassment, may be based on any of the following:
 - a. Affiliation: discriminating because an individual is affiliated with a particular religious group.
 - b. Physical or cultural traits and clothing: discriminating because of physical, cultural, or linguistic characteristics, such as accent or dress, associated with a particular religion. For example, harassing a woman wearing a hijab (*i.e.*, a body covering and/or head scarf worn by some Muslims), is illegal.
 - c. Perception: discriminating because of the perception or belief that a person is a member of a particular religious group, whether or not that perception is correct. For example, harassing a Sikh man wearing a turban, because the harasser incorrectly thought he was a Muslim, is illegal.
 - d. Association: discriminating because of an individual's association with a person or organization of a particular religion. For example, refusing to promote an employee because she attends a Catholic church, is illegal.

F. National Origin Discrimination.

1. "National Origin" refers to the geographic birthplace of an individual or of the individual's ancestors.
 - a. The EEOC defines "national origin discrimination" broadly as: "...including, but not limited to, the denial of equal employment opportunity because of an individual's, or his or her ancestor's, place of origin; or because an individual has the physical, cultural, or linguistic characteristics of a national origin group."
2. The EEOC recently has experienced an increase in national origin discrimination and harassment complaints, and has therefore issued updated guidance for employers. Over the past five years, almost twelve percent of EEOC charges involve claims of national origin discrimination or

harassment.

- a. The EEOC is on the alert for instances of harassment, intimidation, or other discrimination on the basis of national origin, particularly involving Arab, Middle Eastern, or South Asian employees.
- b. The EEOC guidance follows significant recent changes in the work force. For example, one in ten Americans is now foreign-born; one in eight is Hispanic; and, immigrant workers have filled a substantial portion of the jobs created in the last decade.

G. Retaliation – Personnel decisions taken in *retaliation* for an individual's opposition to practices made unlawful by Title VII, or for participation in the EEOC enforcement process, also are prohibited.

1. A claim for retaliation can succeed whether or not the underlying claim is justified, so long as the underlying claim was reasonable.
2. Retaliation claims are given high priority by the EEOC.
3. Any action that materially injures or harms an employee who has complained of discrimination and would dissuade a reasonable worker from making or supporting a charge of discrimination can constitute actionable retaliation. “Adverse actions” that would not be severe enough to give rise to a discrimination claim may nonetheless support a retaliation claim.
4. According to FY 2013 EEOC Charge filing statistics, retaliation charges comprise both the largest category of charges (over 41% of all charges) and the fastest-growing category of charges.

H. Sexual Orientation: Discrimination based on sexual orientation is not expressly prohibited under Title VII. However, many states or localities protect against discrimination based on sexual orientation. In Virginia, sexual orientation discrimination is not against state law, but is prohibited by some local Human Rights ordinances. A congressional effort to add “sexual orientation” to the list of protected classifications under Title VII has been made repeatedly

for decades, via the Employment Non-Discrimination Act (ENDA); it seeks to prohibit employment discrimination on account of actual or perceived sexual orientation or gender identity.

1. Employers may wish to be aware, however, of extra-legal considerations bearing on the decision to take adverse action due to an individual's sexual preference.
 2. These include public relations concerns, such as media coverage and/or demonstrations by activist organizations, as well as the possibility of an adverse effect on employee morale.
 3. However, action taken based on gender stereotypes may be actionable.
- I. In 2012, the US EEOC issued a Commission decision (i.e., one involving federal employment) holding that discrimination against a trans-gender employee constituted sexual stereotyping, and was *per se* illegal as sex discrimination under Title VII. A number of federal courts (although not the Supreme Court) have reached a similar conclusion.

II. AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967

- A. The ADEA prohibits age discrimination against any employee aged 40 or older.
1. Age discrimination lawsuits are on the rise because of the trend among employers to downsize their work forces, particularly in the area of mid-level management.
 2. The U.S. Supreme Court has ruled that employers can be liable for age-motivated terminations even when the replacement employee is another individual over 40 years of age and also protected by the ADEA.
 - a. The Court held that the replacement worker's protected status (over 40) is not as significant a factor as the fact that the replacement employee is substantially younger than the terminated employee.

- B. Coverage – Employers with 20 or more employees for each working day in each of 20 or more calendar weeks of the current or preceding calendar year are covered by the ADEA. Employers with fifteen, sixteen, seventeen, eighteen, or nineteen employees are covered by Title VII, but not by ADEA.
- C. Relief – unlike Title VII, the ADEA does not provide for general compensatory or punitive damages.
 - 1. However, employers should be aware of efforts within Congress to revise the ADEA relief scheme to include the compensatory and punitive damage schedule provided in Title VII.
 - 2. Equitable damages available include: back pay, front pay, reinstatement, attorneys' fees, and liquidated or double damages.
- D. Jury trials – ADEA plaintiffs have the right to a jury trial.
- E. Like Title VII, the ADEA prohibits retaliation against a complaining employee.
- F. Despite the similarities between the ADEA and Title VII, the U.S. Supreme Court recognizes material differences between the two statutes. For example, under Title VII, if a plaintiff can prove that his or her protected class played a "motivating factor" in an employment decision, the burden will shift to the employer to prove by a preponderance of the evidence that the employer would have made the same decision even if that "motivating factor" was not taken into account. Such scenarios are known as "mixed motive" cases under Title VII. In *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009), the U.S. Supreme Court clarified that unlike Title VII, the ADEA does not allow a plaintiff to establish discrimination by showing that age was simply a "motivating factor." Therefore, even if an ADEA plaintiff shows that age was a motivating factor, the burden will not shift to the employer to show that it would have taken the action regardless of age. Instead, an ADEA plaintiff retains the burden to prove that age was the "but for" cause of the employer's adverse decision.

G. Reverse Age Discrimination – Rejected by the U.S. Supreme Court

1. The U.S. Supreme Court rejected the argument that the ADEA bars *favoring* older workers over younger ones. *General Dynamics v. Cline*.
2. Employers are thus free to provide benefits to older workers beyond those provided to younger workers, under the ADEA.

III. AMERICANS WITH DISABILITIES ACT OF 1990

A. The ADA sets forth broad prohibitions against discrimination on the basis of disability and provides protection for qualified individuals with a disability. The ADA has the same structure, and uses the same procedures, as Title VII. In 2008, Congress passed amendments substantially expanding coverage under the ADA.

1. A disability is a mental or physical impairment that substantially limits one or more major life activities.
 - a. An employee may also establish a disability by showing he or she has a record of impairment or is regarded as being impaired.
 - b. The U.S. Supreme Court decided some years ago that a determination of whether an individual has a disability must be made with full regard for corrective or mitigating measures, such as corrective lenses or prescription medicines. The impact of this ruling has been essentially overturned (albeit not for eyeglasses) by the 2008 Americans with Disabilities Act Amendments Act (often referred to as the ADAA or the ADA Amendments Act). Note that individuals who use “ordinary eyeglasses or contact lenses” are not considered to have a disability under the ADAA.
 - c. The ADA Amendments of 2008 contain a non-exhaustive list of “major life activities” covered by the ADA. These activities include many activities that the EEOC has specifically recognized (for example, walking), as well as broader categories (such as “functions of the immune system”). The Supreme

Court has declined to hear cases about whether “driving” is a major life activity and the courts are split on the issue.

- d. The ADA Amendments of 2008 also reverse earlier judicial precedent regarding the length of time an impairment must be present in order to qualify as a disability. Now, an impairment that is “episodic” or “in remission” may be a disability if it substantially limits a major life activity when active; accordingly, an individual may be “disabled” under the ADA even if she or he has no current impairment.
 - e. The ADA Amendments of 2008 specifically provide that the definition of “disability” under the ADA must be interpreted broadly, attempting to reverse two decades of judicial interpretation that generally read the term narrowly.
2. A qualified individual with a disability is any individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position held or desired.
- a. "Essential function" means any job task that is fundamental, and not marginal, to a particular job.
 - b. The Supreme Court has held that HIV infection itself (and not only symptomatic AIDS) is a physical impairment from the outset and during every stage of the disease.
- B. Coverage – The ADA applies to employers with 15 or more employees.
- C. Reasonable accommodation – The Act requires that a qualified person with a disability be reasonably accommodated so as to enable him/her to perform the job. However, while the ADA protects employees who are simply “regarded as” having a disability, the ADA emphasizes that non-disabled employees who are incorrectly regarded as disabled are not entitled to reasonable accommodations. The process of generating a “reasonable accommodation” is often described by the EEOC as “iterative,” implying an interactive, back-and-forth dialogue between employee and employer to find an appropriate accommodation.

1. This may involve job restructuring, modified schedules, reassignment to vacant positions, eliminating non-essential elements of the job, re-delegating assignments, exchanging assignments with another employee, and redesigning procedures for task accomplishment.
 2. Accommodation must be provided unless it constitutes an "undue hardship" on the employer. "Undue hardship" is defined as an action requiring significant difficulty or expense, such as an action that is unduly costly, extensive, substantial, disruptive, or that will fundamentally alter the nature of a program. The standard is a fairly rigorous one, and courts have imposed some very costly accommodations under difficult circumstances. The following factors will be considered:
 - a. The nature and cost of the needed accommodation.
 - b. Site factors, looking at the overall financial resources of the facility in providing the accommodation.
 - c. Parent company factors, looking at the overall financial resources of the entity.
 3. According to a federal appellate court decision, employers do not have to wait an indefinite period of time to permit an employee to be cured of a disability.
- D. Illegal drug use exception – Individuals who currently use illegal drugs are specifically excluded from the definition of an individual with a disability. Similar exclusions apply for current alcohol abuse. While the status of being an alcoholic or the status of being a drug addict may constitute a "disability," nothing in the ADA protects an employee who currently abuses the substances.
1. The ADA does not prohibit an employer from giving a drug test to a current employee to determine the presence of illegal drugs.

IV. UNIFORM SERVICES EMPLOYMENT AND RE-EMPLOYMENT RIGHTS ACT OF 1994 ("USERRA")

- A. This law strengthens federal prohibitions against termination, refusal to promote, or denial of any other "incident or advantage of employment" because of an employee's obligations as a member of the Military Services.
 - 1. Unless an employer can demonstrate that USERRA requirements impose an undue hardship, the Act entitles any person who has been absent from employment because of reserve or active duty to the full benefits of the Act, provided:
 - a. The person has given advance notice of military service to the employer (the employee is excused from notifying the employer if precluded by military necessity or it is otherwise impossible or unreasonable).
 - b. The cumulative length of absence in any previous absence from employment by reason of military service does not exceed five years (under certain circumstances, this five-year period may be extended).
 - c. The person reports or applies to the employer on completion of his/her service in accordance with USERRA notice requirements.
- B. USERRA significantly affects employee benefit plans, which must comply with the Act's requirement that a participant's benefits must continue to accrue for up to five years while he/she is on military absence. Defined contribution plans must also permit returning veterans to make plan contributions which were missed during their military service.
- C. The Act forbids discrimination or retaliation against individuals acting in support of reservists seeking to exercise USERRA rights.
- D. Other significant Act provisions:
 - 1. Repeals the exclusion of individuals who held temporary positions from re-employment protection.

2. Requires employers to make reasonable efforts, including training, to refresh or update the skills of an individual seeking re-employment.
3. Requires an employer to provide reasonable accommodations to returning employees with a service-related disability.
4. Maintains the obligation of the employer to preserve the seniority of a returning employee.
5. Provides for continued health coverage, if chosen by the service-member, who can be required to pay, at most, 102% of the full premium for such coverage (an individual serving for fewer than 31 days can only be required to pay the normal employee share of the premium).
6. Provides a "tenure" provision which temporarily removes a returning employee from "employment at-will" status, regardless of any policy or agreement between the employee and employer.
 - a. An individual whose period of military service was more than 30 days but less than 181 days cannot be removed without cause for six months.
 - b. A person whose period of service was more than 180 days cannot be removed without cause for one year.

V. CIVIL RIGHTS ACT of 1866 (§ 1981)

- A. The Civil Rights Act of 1991 expanded the scope of § 1981 lawsuits to include claims of racial discrimination related to all aspects of the employment relationship, including discharges.
 1. This change significantly increased the likelihood that employers will face § 1981 suits, particularly those employers to whom Title VII does not apply.
- B. Coverage – All persons have the same right to make and enforce contracts as is enjoyed by white citizens. While this is a "race-based" protection, "race" is interpreted very broadly and may include distinctions we commonly consider to be ethnic, religious, or based on national origin.

1. This includes employment contracts.
 2. Section 1981 embraces the "disparate treatment" theory of discrimination but not the "disparate impact" theory.
- C. No administrative prerequisites as are required under Title VII.
- D. Statute of limitations – four years.
- E. Relief.
1. Compensatory and punitive damages.
 - a. There is no limit or "cap" for damages under this statute.
 2. Attorney's fees – pursuant to Civil Rights Attorney's Fees Award Act of 1976.
 3. Right to jury trial.

VI. THE VIRGINIA HUMAN RIGHTS ACT (Va. Code Ann. § 2.1-714 et seq.)

- A. Establishes a state agency, the Virginia Council on Human Rights.
- B. The Council is empowered to investigate complaints of unlawful discrimination because of race, color, religion, national origin, sex, age, marital status and disability, in places of public accommodation, educational institutions, real estate, and employment.
1. The Council is empowered to attempt conciliation between employers and employees when unlawful discrimination is found.
 2. The Council may conduct public hearings regarding a charge and request that employer documents be subpoenaed.
 3. The Council has no enforcement power of its own but may refer findings of unlawful discrimination to other agencies.

- C. The General Assembly amended the Virginia Human Rights Act to:
1. Permit claims arising under the Act only for employers who employ more than five but fewer than fifteen persons (thus creating a “gap” whereby employers with fifteen to nineteen employees are not prohibited from discriminating on the basis of age by either federal or state law).
 2. Require employees to file lawsuits arising under the Act within 180 days of the date of their discharge, in either General District or Circuit Court.
 3. Limit remedies to twelve months' back pay with interest.
 4. Limit attorney's fees for prevailing employees to no more than 25% of the back pay award.
 5. Expressly provide that the Court shall not award other damages, compensatory or punitive, and that it may not order reinstatement of the employee.
- D. Arguably, plaintiffs may not have the right to a jury trial, although this is not a settled issue.
- E. Employees and businesses employing 15 or more employees retain the right to exercise federal remedies under Title VII or similar civil rights statutes.

VII. OTHER PROTECTED CLASSIFICATIONS

- A. Under the Affordable Care Act, lactating mothers must be provided with an appropriate, clean, private place to express breast milk, which may not be a ladies' room. This provision is part of the Fair Labor Standards Act, so failure to provide a proper place may not be actionable by an employee; however, retaliatory discharge for making a complaint certainly is.
- B. Under the Affordable Care Act, employees are protected from retaliation due to their eligibility for an ACA insurance subsidy.
- C. Individuals who make qualifying complaints concerning possible financial irregularities under the Sarbanes-Oxley Act are protected from retaliation. This provision was originally thought to protect federal contractors; in 2014 the Supreme Court held that subcontractors (i.e., companies that contract to supply goods or services to federal contractors for ultimate provision to the federal government) also are covered by the Act.