

Leadership Lunch and Learn: Knowing Employee Rights

Presenter:

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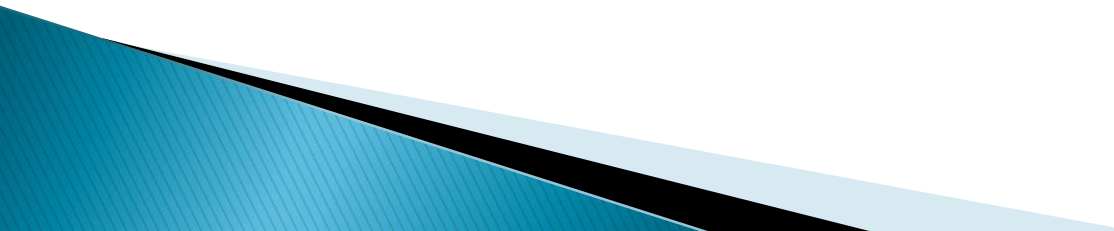
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Speakers

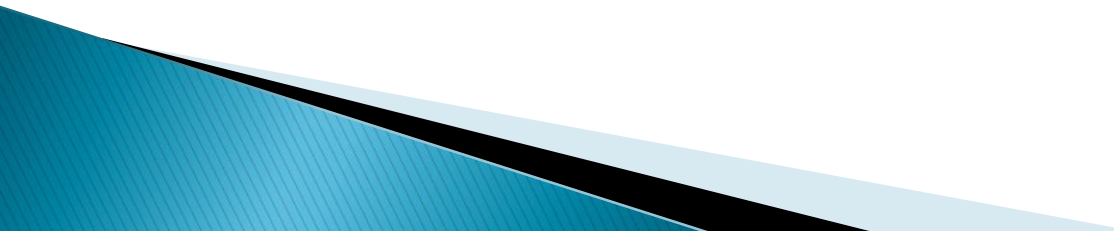


1. Professor David Sherwyn '86, JD '89, John and Melissa Ceriale Professor of Hospitality Human Resources and a Professor of Law at Cornell University's School of Hotel Administration
2. Jay Wolman '97, Counsel at Randazza Legal Group, PLLC
3. Meghan Bass Gearhart '04, Attorney at Lathrop & Gage LLP

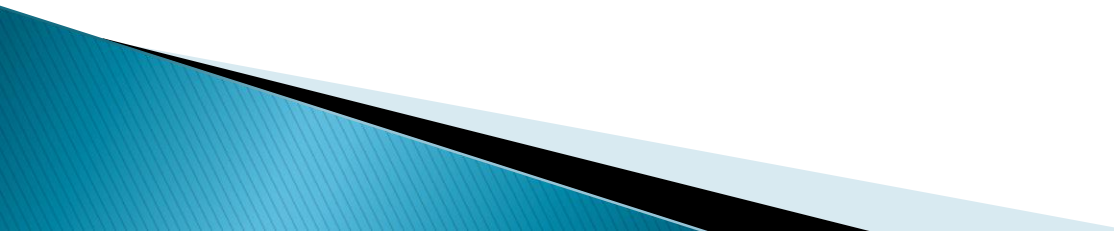
Introduction – Jay

- ▶ Admitted to Practice Law in CT, MA, NY & DC
 - ▶ Received BS in Industrial & Labor Relations from Cornell University
 - ▶ Received JD from Georgetown University Law Center
 - ▶ Practice Employment Law and Business Litigation before State and Federal Agencies and Courts
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Introduction – David

- ▶ John and Melissa Ceriale Professor of Hospitality Human Resources and a Professor of Law at Cornell University's School of Hotel Administration
 - ▶ Director of the Cornell Institute for Hospitality Labor and Employment Relations
 - ▶ Research fellow at the Center for Labor and Employment Law at New York University's School of Law and of counsel to the law firm of Stokes, Wagner
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Introduction – Meghan

- ▶ Graduated from the Cornell University School of Hotel Administration in 2004
 - ▶ Attained her law degree from Valparaiso University School of Law in 2007
 - ▶ An attorney at Lathrop & Gage LLP in St. Louis, Missouri
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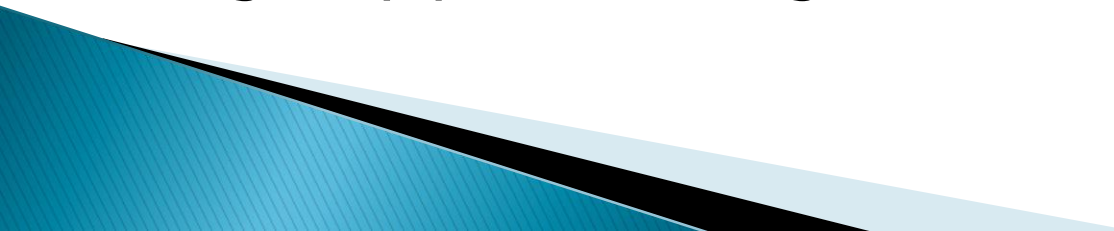
Background on Employment Law

- ▶ Creature of Contract
 - Employer promises to pay Employee in exchange for Employee performing tasks for Employer
- ▶ Freedom of Association
 - Employers and Employees do not have to work with each other unless they want to (like a private club)
 - Thus, “at-will” Employment is the norm: the parties can enter or end the association (and contract) at either one’s will, for good reason, bad reason, or no reason at all, so long as it is not an illegal reason

Background on Employment Law

- ▶ Federal Law: Throughout the United States (examples)
 - National Labor Relations Act (29 U.S.C. §§ 151–169)
 - Civil Rights Act of 1964, Title VII (42 U.S.C. §§ 2000e *et seq.*)
 - Occupational Safety and Health Act (29 U.S.C. §§ 651 *et seq.*)
- ▶ State Law: Vary from State to State
 - Common Law
 - Statute
- ▶ State Laws often expand Federal Laws, providing greater protections or benefits
 - Federal Minimum Wage: \$7.25/hour (29 U.S.C. § 206)
 - State Minimum Wage: \$9.15/hour (Conn.Gen.Stat. § 31–58(j))

Title VII of the Civil Rights Act

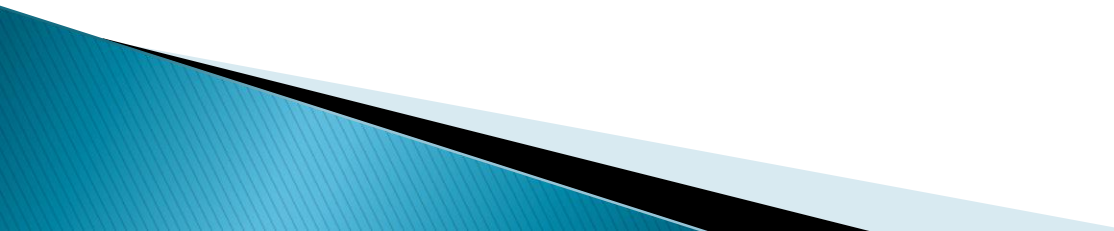
- ▶ 42 U.S.C. 2000e
 - ▶ Applies to Employers > 15
 - ▶ Prohibits discrimination based on race, color, religion sex and national origin
 - ▶ Per Pregnancy Discrimination Act: pregnancy is based on sex
 - ▶ Does not include orientation. But, see, Complainant v. Foxx, EEOC App. No. 0120133080 (July 16, 2015)
 - ▶ Must file with EEOC within 180 days unless state agency permits longer
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Title VII of the Civil Rights Act

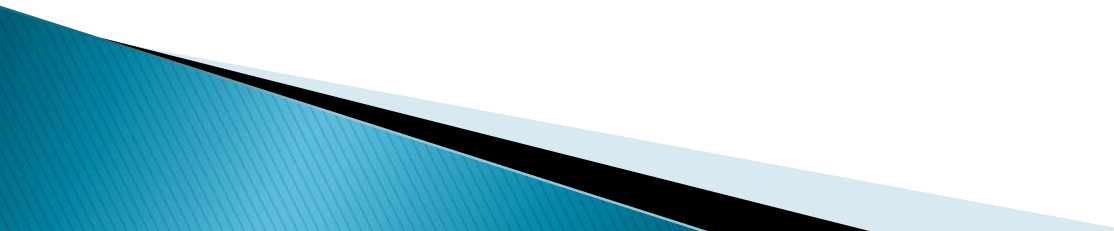
▶ Disparate Treatment

- McDonald–Douglas v Burdine: Must be member of protected class, suffer adverse action, circumstances (direct or indirect, e.g. replacement) give rise to evidence of discrimination. If indirect: employer offer legitimate reason, and employee may challenge as pretext

▶ Disparate Impact

- A policy or procedure that disproportionately affects a protected class
 - Statistics
 - Business Necessity
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Americans with Disabilities Act

- ▶ 42 U.S.C. sec. 12101 et seq.
 - ▶ Prohibits discrimination on the basis of disability
 - ▶ Disability is medical or physical impairment that substantially limits a major life activity
 - ▶ Employee must be qualified—able to perform essential functions with or without reasonable accommodation
 - ▶ Employer must accommodate unless undue burden
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Americans with Disabilities Act

- ▶ ADA Amendments Act of 2008 (Pub. L. 110–325)
 - Continues to apply to employers with >15 employees
 - Definition of disability to be construed broadly to provide maximum protection
 - Cannot consider mitigating measure (medications, assistive devices) in determining whether disability exists
 - Defines “Major Life Activities”:
 - major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.
 - major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

Age Discrimination in Employment Act

- ▶ 29 U.S.C. sec. 621–634
 - Prohibits discrimination against individuals >40 years old on account of age
 - If evidence is replacement, new worker must be younger, but can be over 40
 - State laws may have no age restriction
 - Special attention must be given during a RIF or termination regarding waivers of claims (45 or 21 / 7 period)

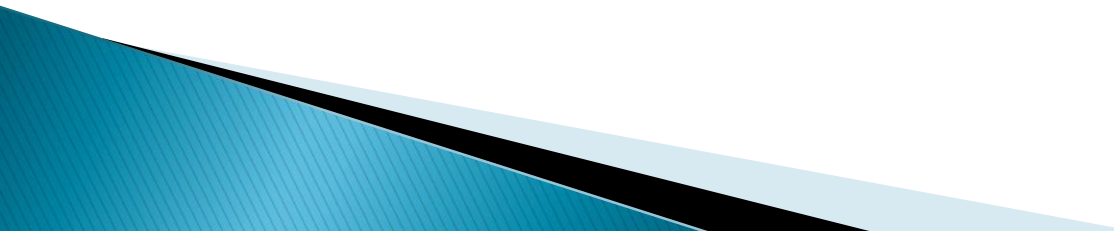
Recent Supreme Court Cases

- ▶ EEOC v Abercrombie & Fitch Stores, Inc., No. 14–86 (June 1, 2015)
 - Samantha Elauf wore headscarf. Denied job based on suspicion of need for religious accommodation (look policy).
 - Employer need not have actual knowledge; protected characteristic is the motivating factor. Failure to accommodate is disparate treatment.
- ▶ Young v. UPS, No. 12–1226 (Mar. 25, 2015)
 - Young sought reasonable accommodation while pregnant. PDA silent on issue.
 - PDA does not necessarily require same accommodation as that for ADA, but employer must demonstrate legitimate reason beyond cost.

Wage & Hour Law

- ▶ Minimum Wage

- ▶ Overtime

- Time and a Half for Hours >40/week
 - Bonuses & Salaried Employee Issues
 - Compensatory Time only available in Public Sector
 - New Proposed Rules: Highly compensated employees must earn \$970, not \$455/week
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Wage & Hour Law

▶ Misclassification

- Employee vs Independent Contractor
 - IRS Rules: Right to Control
 - DOL Interpretation: Economic Realities
 - Integral Part
 - Managerial Skill Affects Worker's Profit/Loss
 - Relative Investment
 - Special Skills and Initiative
 - Permanent or Indefinite
 - Nature and Degree of Control
- Exempt vs Nonexempt
- State Tests May Differ

Wage & Hour

Glatt v. Fox Searchlight Pictures Inc., C.A. No. 13–4478–cv (2nd Cir. July 2, 2015) (Black Swan Case)

- ▶ District Court, finding for employees used DOL criteria:
 1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;
 2. The internship experience is for the benefit of the intern;
 3. The intern does not displace regular employees, but works under close supervision of existing staff;
 4. The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;
 5. The intern is not necessarily entitled to a job at the conclusion of the internship; and
 6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.
- ▶ Court of Appeals Rejected—Used Primary Beneficiary Test

National Labor Relations Act

- ▶ Quickie/Ambush Election Rule eff. Apr. 15, 2015
 - Hearing within 8 days of filing
 - Employer must provide full employee list (name, jobs, shifts, locations) pre-hearing, plus phone number and email
 - Detailed Position Statement
 - No Posthearing Brief
 - No pre-election appeal to Regional Director
 - No 25 day waiting period
- ▶ Social Media:
 - Costco Wholesale Corp., 358 NLRB No. 106 (Sept. 7, 2012) (Posting Policy)
 - Karl Knauz Motors Inc., 358 NLRB No. 164 (Sept. 28, 2012) (Discharge)
- ▶ Investigatory Policies
- ▶ Retaliation for Class or Collective Actions: 200 East 81st Restaurant Corp., Case 02-CA-115871 (NLRB July 29, 2015)

Questions & Answers



Resources

- ▶ The Legal Satyricon (<http://randazza.wordpress.com>): Our blog
- ▶ Cornell Legal Information Institute: Employment—(<https://www.law.cornell.edu/wex/employment>): Links to statutes and caselaw
- ▶ Justia Subscriptions (<http://law.justia.com/subscribe>): Daily court opinions and summaries, plus weekly subject area summaries
- ▶ Other useful law blogs (national scope despite local names):
 - Ohio Employer's Law Blog (<http://www.ohioemployerlawblog.com>)
 - Employment & Labor Insider (<http://www.employmentandlaborinsider.com>)
 - The Employer Handbook (<http://www.theemployerhandbook.com>)
 - Evil HR Lady (<http://evilhrlady.org>)
 - FMLA Insights (<http://www.fmlainsights.com>)
 - Connecticut Employment Law Blog (<http://www.ctemploymentlawblog.com>)
 - The Delaware Employment Law Blog (<http://delawareemploymentlawblog.com>)
 - Employment Discrimination Report (<http://employmentdiscrimination.foxrothschild.com>)

Acknowledgments

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 - Amanda Massa, Office of Alumni Affairs