

1998
Legal Update

Tina Ott, Esq.

Director of Government Affairs for IPMA

Dr. Jeff Feuquay, Psychologist & Attorney

Fisher & Feuquay L.L.P., Perry, OK - 580-336-4908

International Personnel Management Association
1998 Annual Conference

First ...

We need two people in which
these three words coalesce...

Texas, adult, school

Second ...

Please hold up your hand if
you received a ticket today.

FAMILY AND MEDICAL LEAVE ACT

Technical Corrections Bill, H.R. 3751:

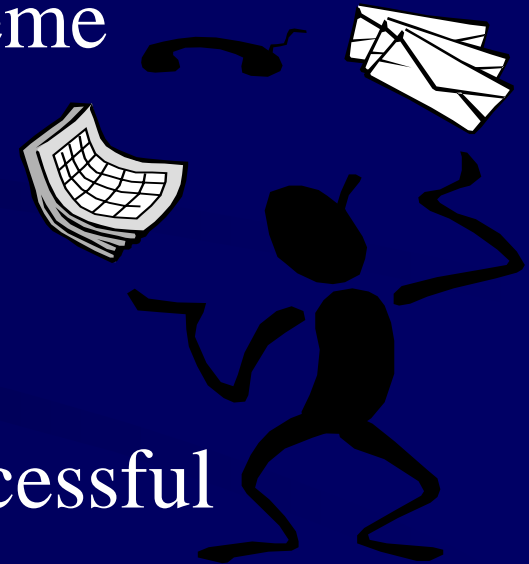
- Redefine Serious Health Condition
- Limit intermittent leave

Expansion bills- unsuccessful this year

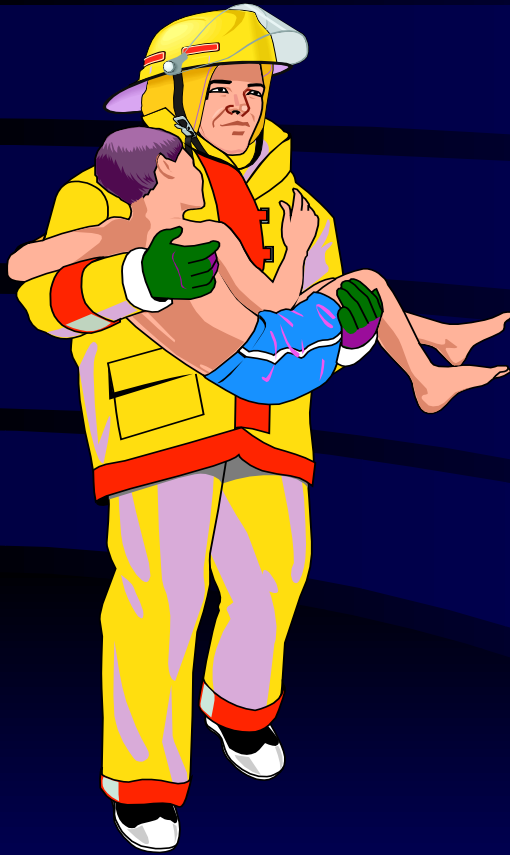


Fair Labor Standards Act

- Salary Basis Test Impact of Supreme Court decision
- Compensatory Time Bill
- Minimum Wage Increase - unsuccessful



EMS Personnel - 207(k)



- Bills Introduced: H.R. 2891, H.R. 3958
- Would allow partial exemption from overtime
- IPMA to file brief asking for Supreme Court review of *West v. Anne Arundel Co.*

Educational Assistance

- Employer-Provided Educational Assistance
- Employees exclude up to \$5,250 of assistance
- Undergraduate provision expires 5/31/00
- Grad. Expired 6/30/96



Pension Portability

- IPMA Resolution Supporting Portability
- Bills introduced would permit rollovers between private, public, & non-profit plans
- Public Pension Coalition Lobbying

SAVER Act

- Savings Are Vital To Everyone's Retirement Act
- Labor Department Outreach
- National Summit June 4&5
- IPMA Worked to Ensure Public Sector Participation



Mandatory Social Security



- Part of solvency debate
- For newly hired state and local employees S. 1792
- No activity this year, may take years

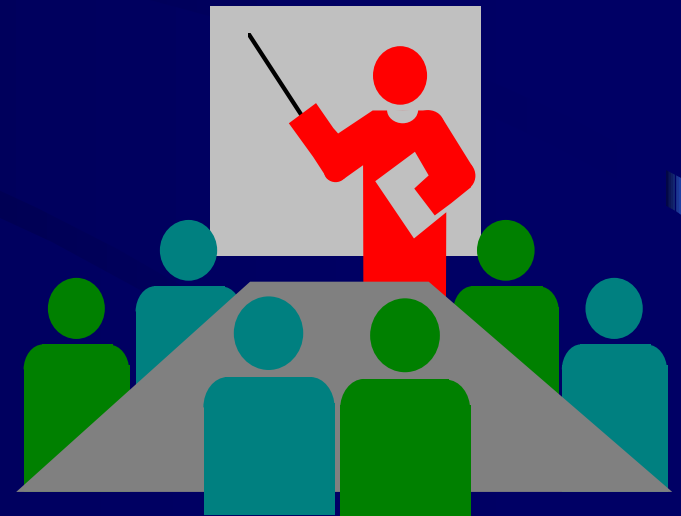
Fair Credit Reporting Act

- Amended September 30, 1997
- Written authorization
- Separate document
- Pre-adverse action disclosure
- Post-adverse action disclosure



Job Training Bill

- Workforce Investment Act signed Aug.7
- Consolidates programs Into Block Grants to States
- Establishes Individual Training Accounts
- One-stop service centers



Union Dues



- Worker Paycheck Fairness Act
- Require unions to obtain written permission
- Republican sponsored legislation
- California voters narrowly defeated Prop.
226 June 2

Age Discrimination

Supreme Court Case:

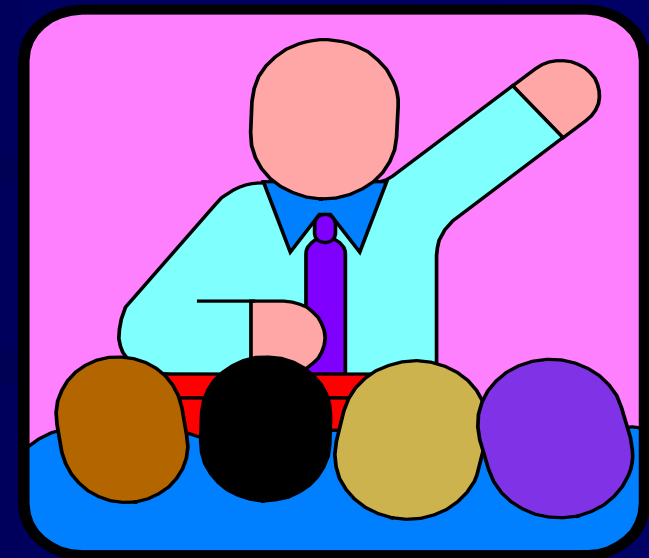
Oubre v. Entergy Operations, Inc.



- Invalid Waiver
- Employee can sue without returning severance package

Affirmative Action

- Bills pending in House and Senate
- House bill tabled
- Supreme Court-maybe next year



In Brief



- Law passed applying OSHA to the Postal Service
- Mandatory Collective Bargaining Bill introduced

Next Congress:

- FMLA technical corrections
- Pension Portability
- OSHA reform legislation
- Employer-Provided Educational Assistance
- Mandatory Social Security debate
- Mandatory Collective Bargaining bill debate
- FLSA reform

IPMA Family Feud®

- Individual Contestants have numbered slips, except for our first two.
(It's way too late to pawn your slip off on someone else)
- A Contestant from each team will compete in answering a “simple” question.
- The winning contestant will consult with his/her team to answer the follow-up “tough” question.
- Everyone helps with the timing.
- The rules may change as we go along.
(We must adapt to survive)

Contestants #1...
educated, consenting,
Texas adults,
come on down!

Sex in Texas Schools

Individual Question 1

- Can a school district be held liable under Title IX for the sexual harassment of a student by one of the teachers?

YES, but...

Sex in Texas - *Team Question 1*

- When is the district liable? Under what circumstances?

When an official of the school district who at a minimum has authority to institute corrective measures has **actual** notice of, and is deliberately indifferent to, the teacher's misconduct.

Gebser v. Lago Vista I.S.D. (S.Ct. 1998)

Actual v. Constructive Knowledge

“knew or should have known”

Actual = you knew

Constructive = you should have

Title IX implications?

Sex in Georgia - Full Group Question

Can a school district be sued over a teacher's alleged failure to step in after a 5th-grader complained that another student was sexually harassing her?

We'll know soon...

Civility in the American Workplace

Individual Question 2

Harassment is in the “eye” of the beholder.
(the person allegedly being harassed)

True or False?

FALSE

We'll talk about this...

Civility in the American Workplace

Team Question 2

Is verbal or physical harassment in the workplace automatically sex discrimination if the words used have sexual content or connotations?

NO. Title VII is directed only at *discrimination* because of sex.

(or race, national origin, ethnicity, etc.)

Let's chat a bit...

Civility: Explanation (1 of 2)

- The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.

Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993).

- Conduct that is not severe or pervasive enough to create an objectively hostile work environment-an environment that a reasonable person would find hostile or abusive-is beyond Title VII's purview.

Id., citing *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986).

Civility: Explanation (2 of 2)

- The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by the simple recitation of the words used or the physical acts performed. (When can buttocks be patted?)

Oncala v. Sundowner Offshore Services, Inc. ___ U.S. ___ (1998).

- Male-on-male horseplay or intersexual flirtation should not be mistaken for discriminatory “conditions of employment.” *Id.*

Common Sense!

Title VII Harassment Post-test

Individual Question 3

Can a heterosexual (straight) female sexually harass a homosexual (gay) male?

Of course... Nothing in Title VII necessarily bars a claim of sex discrimination merely because the plaintiff and perpetrator are of the same sex (or have the same sexual targets).

Oncale v. Sundowner Offshore Services, Inc. ___U.S.___ (1998)

Title VII Harassment Post-test

Team Question 3

Can a person discriminate against another person of the same race?

Yes... “Because of the many facets of human motivation, it would be unwise to presume that human beings of one definable group will not discriminate against other members of that group.”

Oncale v. Sundowner Offshore Services, Inc. ___U.S.___ (1998) citing *Castaneda v. Partida*, 430 U.S. 482, 499 (1977).

Jury Selection

*Possible Implications for
Employee Selection
(and other HR stuff)*

Vicarious Liability v. Negligence

Preliminary Individual Question 4

What in tarnation is “vicarious liability?”
(I didn’t do it, but I’m responsible for it.)

What is the plural of y’all?



Vicarious Liability v. Negligence

Individual Question 4

When **no** tangible employment action is taken, is an employer liable to a victimized employee for a hostile work environment created by a supervisor in the chain of command over the employee?

Yes

Faragher v. City of Boca Raton, ___ U.S. ___ (1998)

Vicarious Liability v. Negligence

Team Question 4

What are the elements of an affirmative defense that an employer might raise?

(“Hey, we wrote a policy on it” is incorrect.)

Vicarious Liability v. Negligence

Answer to Team Question 4

That the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, AND

that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

So...

- Have a safe and reasonable way for employees to report harassment,
- investigate the reports, and
- **DO SOMETHING APPROPRIATE.**

e.g., “Employee Watch” or “Safe Call”

Vicarious Liability v. Negligence

Whole Group Question

When a supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment, what are the elements of an affirmative defense?

No affirmative defense is available.

Being able to take the action demonstrates that the supervisor is the agent of the employer.

Burlington Industries, Inc. v. Ellerth, ___ U.S. ___ (1998)

42 U.S.C. §1983 - *Discussion*

42 U.S.C. §1983 lawsuits are a mess
(also a lot of fun)

“deprivation of rights under color of law”

- Analysis is based on whether it is a substantive due process claim (e.g., right to life) or covered by a specific Constitutional provision (unreasonable search and seizure),
- Lots of immunities, e.g., scope of employment & legislative

42 U.S.C. §1983 - Legislative Immunity

Individual Question 5

Are members of a city council liable under 42 U.S.C. §1983 when they approve an ordinance eliminating a one-person department after the incumbent tried to fire a politically well-connected woman for making repeated racial and ethnic slurs?

No. All, even local, government legislative activity is immune, regardless of the motives.

Bogan et al. v. Scott-Harris, ___U.S.___ (1998)

42 U.S.C. §1983 - Legislative Immunity

Team Question 5

Is the mayor that prepared the city budget and recommended eliminating the department liable under 42 U.S.C. §1983?

No. the introduction of a budget and signing into law of an ordinance also are formally legislative, even though the mayor is an executive official.

Bogan et al. v. Scott-Harris, ___U.S.___ (1998)

ADA - Keywords

- **Disability**
AIDS, Diabetes
- **Qualified**
Can perform the essential functions:
show up, lift, etc.
- **Reasonable**
Transfers, specificity



Questions?



1998

Legal Update

Tina Ott, Esq., Director of Government Affairs

Dr. Jeff Feuquay, Psycho-Attorney

Thank you ... Go ye forth.