



2015 YLD
Bridge the Gap Seminar

Human Resources Issues
Legislative, Administrative, and Executive
Employment Law Developments

8:30 a.m.-9:30 a.m.

Presented by:

Bridget Penick
Fredrikson & Byron, P.A.
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Des Moines, IA 50309
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Thursday, May 14, 2015

Legislative, Administrative, and Executive Employment Law Developments

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Iowa State Bar Association
Bridge the Gap
May 14, 2015

Active Agencies in 2014-15

- National Labor Relations Board
- Equal Employment Opportunity Commission
- Department of Labor
- OSHA
- Presidential Executive Orders

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NLRB

EMPLOYEE HANDBOOKS/POLICIES:

NLRB has stricken very common policies

- Confidentiality
- Non-disparagement/No gossip
- Positive Reflection on Company
- Social Media
- At-will disclaimer
- FOA won't save bad policies

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NLRB Strikes Confidentiality Rule

- *Fresh & Easy Neighborhood Market* (July 2014)
- Code of Business Conduct, Confidentiality and Data Protection Rule:
- "Keep customer and employee information secure. Information must be used fairly, lawfully and only for the purpose for which it was obtained."

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NLRB Protects Facebook Rant

- *Pier Sixty LLC (March 2015)*
- Catering company with union organizing campaign-one issue was disrespectful supervisors
- Supervisor said in a "loud voice," to "Turn your head that way and stop chitchatting" and told them to "Spread out, move, move," using a "raised, harsh tone."

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NLRB Protects Facebook Rant

- *Pier Sixty LLC (March 2015)*
- Upset employee got permission to take a break; went outside; posted on Facebook:

Bob is such a NASTY MOTHER F***ER"
 don't know how to talk to people!!!! F**k
 his mother and his entire f***ing family!!!!
 What a LOSER!!!! Vote YES for the
 UNION!!!!!!!!!!!!

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NLRB Protects Facebook Rant

- *Pier Sixty LLC (March 2015)*
- Employee was fired for harassment
- NLRB found his conduct was protected concerted activity under the NLRA and was not egregious enough to lose protection.
- NLRB considered *Triple Play* factors

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NLRB Protects Facebook Rant

- *Pier Sixty LLC (March 2015)*
- Was there evidence of antiunion hostility on the part of the employer;
- Did employer provoke the conduct;
- Was conduct impulsive or deliberate;
- Location/subject/nature of the post;
- Did employer consider similar language to be offensive;

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NLRB Protects Facebook Rant

- *Pier Sixty LLC (March 2015)*
- Did the employer maintain a specific rule prohibiting the language used; and
- Was discipline imposed typical of that imposed for similar violations or was it disproportionate to the offense.
- “not a slur against [supervisor]’s family but, rather, an epithet directed to [supervisor] himself.”

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NLRB Upholds/Strikes At-Will Disclaimers

- UNLAWFUL DISCLAIMERS:
- *I further agree that the at-will employment relationship cannot be amended, modified or altered in any way.*

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NLRB Upholds/Strikes At-Will Disclaimers

- UNLAWFUL DISCLAIMERS:
- *I acknowledge that no oral or written statements or representations regarding my employment can alter my at-will employment status, except for a written statement signed by me and the president or executive vice president/COO.*

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NLRB Upholds/Strikes At-Will Disclaimers

- UPHELD DISCLAIMERS:
- *No representative of the Company has authority to enter into any agreement contrary to the foregoing "employment at will" relationship. Nothing contained in this handbook creates an express or implied contract of employment.*

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NLRB Upholds/Strikes At-Will Disclaimers

- UPHELD DISCLAIMERS:
- *No manager, supervisor, or employee has any authority to enter into an agreement for employment for any specified period of time or to make an agreement for employment other than at-will.*

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NLRB Upholds/Strikes At-Will Disclaimers

- DIFFERENCE?
- The unlawful provisions constitute the employee releasing the right to advocate concertedly to change his or her at will status.

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NLRB on Freedom of Association Clauses

- *First, Transit, Inc.* (April 2014)
- Disclaimer: "management supports the employee's individual right to choose whether to vote for or against union representation without influence or interference from management"
- NLRB found insufficient to cure some overbroad rules in the handbook

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NLRB on Freedom of Association/Savings Clauses

- *First, Transit, Inc.* (April 2014)
- Savings/safe harbor clause should:
- Be broad enough to include all Section 7 rights (not just union organizing)
- Be prominent and proximate to rules impacted
- Expressly refer to rules/rules expressly refer to savings clause

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EEOC

Lawsuit challenging CVS Pharmacy's Separation Agreement:

- Confidentiality/non-disclosure clause
- Non-disparagement clauses
- Cooperation clause (notify Co first)
- Carve out was not enough
- NDIL dismissed –no conciliation
- Other similar EEOC lawsuits

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NLRB QUICKIE ELECTION RULES

- **Guidance for Representation Case Rule Implementation**
- **Effective April 14, 2015**
- **Reduces time between petition and election from 6 weeks to 2-3 weeks**
- **Lawsuit challenging rules was unsuccessful**

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NLRB QUICKIE ELECTION RULES

- Petition/other documents will be electronically filed with the NLRB.
- Employers must give the union a list of employee names & personal employee information (phone number, home address and email address)

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NLRB QUICKIE ELECTION RULES

- Employers must identify all the issues in dispute of the election in a position statement, which must be submitted 7 days after notice of a pre-election hearing or waived
- Issues such as employee eligibility to vote may be deferred until after the election is held

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NLRB QUICKIE ELECTION RULES

- Individual Regional Directors will have discretion to determine whether post-hearing briefs may be submitted.
- The current automatic stay of an election that issues when a party requests review of a pre-election hearing decision will be eliminated.

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EEOC

Enforcement Guidance: Pregnancy Discrimination and Related Issues (July 14, 2014)

- Do not act on stereotypes and assumptions about job capabilities and commitment to the job
- attendance, caregiver responsibilities most common

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EEOC RULEMAKING

April 20, 2015: EEOC issued Notice of Proposed Rulemaking on Employer Wellness Programs

- Before NPRM, EEOC had not said whether employers may offer incentives to employees to participate in such programs or whether offering incentives would make participation involuntary.

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EEOC RULEMAKING

April 20, 2015: EEOC NPRM on Employer Wellness Programs

- HIPAA, as amended by ACA, allows wellness programs to offer rewards to participating employees who achieve certain health outcomes or penalties if participating employees fail to achieve health outcomes.

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EEOC RULEMAKING

April 20, 2015: EEOC NPRM on Employer Wellness Programs

- NPRM clarifies that ADA allows employers to offer incentives up to 30% the cost of employee-only coverage to employees who participate in a wellness program and/or for achieving health outcomes.

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EEOC RULEMAKING

April 20, 2015: EEOC NPRM on Employer Wellness Programs

- NPRM describes what is and is not a wellness
- Defines voluntary health program
- Explains how ADA rules requiring employers to keep medical information confidential apply to medical information obtained as part of voluntary employee health programs.

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- *EEOC v. Orion Energy Systems* (August 2014-Wisconsin)
- First lawsuit alleging violation of ADA by requiring employee to submit to medical exams that were not job-related but part of wellness program, then firing employee when she objected to the program
- EEOC position: must be voluntary

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EEOC

- *EEOC v. Lakeland Clinic (FL) & EEOC v. R.G. & G.R. HARRIS FUNERAL HOMES INC., (MI)* (September 2014)
- First EEOC lawsuits alleging Title VII violated by firing transgendered employees after they began presenting as the opposite sex
- Based on April 2014 EEOC decision deeming discrimination against transgendered people = sex discrimination

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DOL REGULATORY AGENDA

- Will propose rule as a result of 3/13/14 Obama Memorandum directing DOL to modernize and streamline the existing overtime regulations for executive, administrative, and professional employees.
- last updated in 2004
- On Hold, per DOL in February

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DOL REGULATORY AGENDA

- Update recordkeeping regulations under the FLSA to enhance the transparency and disclosure to workers of their status as the employer's employee or some other status, such as an independent contractor, and if an employee, how their pay is computed.

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DOL Wage and Hour Division

Final Rule effective March 27, 2015 to Amend FMLA definition of spouse to comply with *Windsor* decision

- Change from a “state of residence” rule to “place of celebration”
- Definition of spouse expressly includes same-sex marriages and common law marriages

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DOL-OFCCP

August 8, 2014 Notice of Proposed Rulemaking (due to 4/8/14 Exec. Order):

- Requires certain Federal contractors and subcontractors supplement their EEO-1 Report with summary information on compensation paid to employees, as contained in Form W-2 by sex, race, ethnicity, job categories, hours worked, and the number of employees.

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DOL

Presently drafting rule to implement 2014 Obama Executive Orders:

- 4/8/14: Prohibiting wage disclosure retaliation
- 7/21/14: Prohibiting discrimination based on sexual orientation and gender identity

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DOL- Paid Maternity Leave?

- September 2014: new video comparing pregnant women from US and Germany.
- Announcement that DOL is giving funding to help 3 states and DC conduct feasibility studies on new paid leave policies.
- Paid leave legislation has been introduced but no action taken.

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Executive Orders

- 7/31/14: Requires federal contractors to disclose recent safety and health violations, wage and hour, collective bargaining, and EEO violations.
- 2/12/14: Minimum wage for federal contractors
- Immigration Executive Order-DACA expansion 2/18/15; temporary injunction, issued February 16.

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Iowa Case Law Developments

- *Pippen v. State of Iowa*, July 2014
 - Class action suit filed in 2007 alleging that the State failed to enforce its own statutory and regulatory policies and thereby denied African-Americans equal opportunities for employment.

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Iowa Case Law Developments

- *Pippen v. State of Iowa*
 - The plaintiffs did not contend that the discrimination was intentional, but rather alleged that it was a “natural unintended consequence of the State’s failure to follow rules.”
 - The plaintiffs did not challenge any one or more specific employment practice or decision.

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Iowa Case Law Developments

- *Pippen v. State of Iowa*
 - State produced paper files and electronic data from a central database containing information on every applicant for hire and promotion.
 - The court found because plaintiffs had challenged the overall hiring system, they needed to show why the State’s decision-making process was ‘not capable of separation for analysis.’

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Iowa Case Law Developments

- *Pippen v. State of Iowa*
- Iowa Supreme Court decision made clear that it was not required to follow the US Supreme Court’s analysis of federal law when interpreting Iowa law.
 - Nevertheless, since plaintiffs did not present an alternate theory, it followed US Supreme Court’s analysis

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Iowa Case Law Developments

- *Smith v. Iowa State University* July 2014
 - Iowa Supreme Court decision upheld \$500,000 award on intentional infliction of emotion distress, citing employer's "outrageous conduct"
 - Previously the court had affirmed a \$200,000 award as the "upper limit" of an emotional distress award

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Iowa Case Law Developments

- *Smith v. Iowa State University*
 - Alleged retaliation for reporting managerial misconduct to ISU president.
 - His boss engaged in "unremitting psychological warfare against Smith over a substantial period of time.
 - She tried to have him treated as a scary and mentally unstable outcast.
 - She did all this to cover up what basically amounted to her theft from ISU.

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Iowa Case Law Developments

- *Goodpaster v. Schwan's Home Service*, Iowa Supreme Court June 2014
 - District Court found MS not a disability under ICRA
 - Plaintiff argued ADAAA requires court to interpret ICRA to include MS as disability
 - Iowa Supreme Court made clear amendment to federal law does not control interpretation of state statute.

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Iowa Case Law Developments

- *Goodpaster v. Schwan's Home Service*, June 2014
 - Iowa Act only pronounces general prohibition on discrimination and courts look to corresponding federal statutes to help establish framework
 - ICRA declares that it "shall be construed broadly to effectuate its purposes."
 - Genuine issue of fact as to whether MS substantially limits his major life activities

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Iowa Case Law Developments

- *Dindinger v. AllSteel, Inc.* (March 6, 2015)
 - 2009 Equal Pay Act was unclear as to period of damages recovery
 - Law is not retroactive
 - Each unequal paycheck an employee receives is a separate discriminatory practice but limited recovery for unequal pay to within a 300-day period.

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- *Pier Sixty LLC (March 2015)*
- Catering company with union organizing campaign-one issue was disrespectful supervisors
- Supervisor said in a “loud voice,” to “Turn your head that way and stop chitchatting” and told them to “Spread out, move, move,” using a “raised, harsh tone.”

NLRB Protects Facebook Rant

- *Pier Sixty LLC (March 2015)*
- Upset employee got permission to take a break; went outside; posted on Facebook:

Bob is such a NASTY MOTHER F***ER”
don’t know how to talk to people!!!! F**k
his mother and his entire f***ing family!!!!
What a LOSER!!!! Vote YES for the
UNION!!!!!!!!!!!!

NLRB Protects Facebook Rant

- *Pier Sixty LLC (March 2015)*
- Employee was fired for harassment
- NLRB found his conduct was protected concerted activity under the NLRA and was not egregious enough to lose protection.
- NLRB considered *Triple Play* factors

NLRB Protects Facebook Rant

- *Pier Sixty LLC (March 2015)*
- Was there evidence of antiunion hostility on the part of the employer;
- Did employer provoke the conduct;
- Was conduct impulsive or deliberate;
- Location/subject/nature of the post;
- Did employer consider similar language to be offensive;

NLRB Protects Facebook Rant

- *Pier Sixty LLC (March 2015)*
- Did the employer maintain a specific rule prohibiting the language used; and
- Was discipline imposed typical of that imposed for similar violations or was it disproportionate to the offense.
- “not a slur against [supervisor]’s family but, rather, an epithet directed to [supervisor] himself.”

NLRB Upholds/Strikes At-Will Disclaimers

- **UNLAWFUL DISCLAIMERS:**
- *I further agree that the at-will employment relationship cannot be amended, modified or altered in any way.*

NLRB Upholds/Strikes At-Will Disclaimers

- **UNLAWFUL DISCLAIMERS:**
- *I acknowledge that no oral or written statements or representations regarding my employment can alter my at-will employment status, except for a written statement signed by me and the president or executive vice president/COO.*

NLRB Upholds/Strikes At-Will Disclaimers

- UPHELD DISCLAIMERS:
- *No representative of the Company has authority to enter into any agreement contrary to the foregoing “employment at will” relationship. Nothing contained in this handbook creates an express or implied contract of employment.*

NLRB Upholds/Strikes At-Will Disclaimers

- UPHELD DISCLAIMERS:
- *No manager, supervisor, or employee has any authority to enter into an agreement for employment for any specified period of time or to make an agreement for employment other than at-will.*

NLRB Upholds/Strikes At-Will Disclaimers

- **DIFFERENCE?**
- The unlawful provisions constitute the employee releasing the right to advocate concertedly to change his or her at will status.

NLRB on Freedom of Association Clauses

- *First, Transit, Inc.* (April 2014)
- Disclaimer: “management supports the employee’s individual right to choose whether to vote for or against union representation without influence or interference from management”
- NLRB found insufficient to cure some overbroad rules in the handbook

NLRB on Freedom of Association/Savings Clauses

- *First, Transit, Inc.* (April 2014)
- Savings/safe harbor clause should:
- Be broad enough to include all Section 7 rights (not just union organizing)
- Be prominent and proximate to rules impacted
- Expressly refer to rules/rules expressly refer to savings clause

EEOC

Lawsuit challenging CVS Pharmacy's Separation Agreement:

- Confidentiality/non-disclosure clause
- Non-disparagement clauses
- Cooperation clause (notify Co first)
- Carve out was not enough
- NDIL dismissed –no conciliation
- Other similar EEOC lawsuits

NLRB QUICKIE ELECTION RULES

- **Guidance for Representation Case Rule Implementation**
- **Effective April 14, 2015**
- **Reduces time between petition and election from 6 weeks to 2-3 weeks**
- **Lawsuit challenging rules was unsuccessful**

NLRB QUICKIE ELECTION RULES

- Petition/other documents will be electronically filed with the NLRB.
- Employers must give the union a list of employee names & personal employee information (phone number, home address and email address)

NLRB QUICKIE ELECTION RULES

- Employers must identify all the issues in dispute of the election in a position statement, which must be submitted 7 days after notice of a pre-election hearing or waived
- Issues such as employee eligibility to vote may be deferred until after the election is held

NLRB QUICKIE ELECTION RULES

- Individual Regional Directors will have discretion to determine whether post-hearing briefs may be submitted.
- The current automatic stay of an election that issues when a party requests review of a pre-election hearing decision will be eliminated.

EEOC

Enforcement Guidance: Pregnancy Discrimination and Related Issues (July 14, 2014)

- Do not act on stereotypes and assumptions about job capabilities and commitment to the job
- attendance, caregiver responsibilities most common

EEOC RULEMAKING

April 20, 2015: EEOC issued Notice of Proposed Rulemaking on Employer Wellness Programs

- Before NPRM, EEOC had not said whether employers may offer incentives to employees to participate in such programs or whether offering incentives would make participation involuntary.

EEOC RULEMAKING

April 20, 2015: EEOC NPRM on Employer Wellness Programs

- HIPAA, as amended by ACA, allows wellness programs to offer rewards to participating employees who achieve certain health outcomes or penalties if participating employees fail to achieve health outcomes.

EEOC RULEMAKING

April 20, 2015: EEOC NPRM on Employer Wellness Programs

- NPRM clarifies that ADA allows employers to offer incentives up to 30% the cost of employee-only coverage to employees who participate in a wellness program and/or for achieving health outcomes.

EEOC RULEMAKING

April 20, 2015: EEOC NPRM on Employer Wellness Programs

- NPRM describes what is and is not a wellness
- Defines voluntary health program
- Explains how ADA rules requiring employers to keep medical information confidential apply to medical information obtained as part of voluntary employee health programs.

EEOC

- *EEOC v. Orion Energy Systems* (August 2014-Wisconsin)
- First lawsuit alleging violation of ADA by requiring employee to submit to medical exams that were not job-related but part of wellness program, then firing employee when she objected to the program
- EEOC position: must be voluntary

EEOC

- *EEOC v. Lakeland Clinic (FL) & EEOC v. R.G. & G.R. HARRIS FUNERAL HOMES INC.*, (MI) (September 2014)
- First EEOC lawsuits alleging Title VII violated by firing transgendered employees after they began presenting as the opposite sex
- Based on April 2014 EEOC decision deeming discrimination against transgendered people = sex discrimination

DOL REGULATORY AGENDA

- Will propose rule as a result of 3/13/14 Obama Memorandum directing DOL to modernize and streamline the existing overtime regulations for executive, administrative, and professional employees.
- last updated in 2004
- On Hold, per DOL in February

DOL REGULATORY AGENDA

- Update recordkeeping regulations under the FLSA to enhance the transparency and disclosure to workers of their status as the employer's employee or some other status, such as an independent contractor, and if an employee, how their pay is computed.

DOL Wage and Hour Division

Final Rule effective March 27, 2015 to Amend FMLA definition of spouse to comply with *Windsor* decision

- Change from a “state of residence” rule to “place of celebration”
- Definition of spouse expressly includes same-sex marriages and common law marriages

DOL-OFCCP

August 8, 2014 Notice of Proposed Rulemaking (due to 4/8/14 Exec. Order):

- Requires certain Federal contractors and subcontractors supplement their EEO-1 Report with summary information on compensation paid to employees, as contained in Form W-2 by sex, race, ethnicity, job categories, hours worked, and the number of employees.

DOL

Presently drafting rule to implement
2014 Obama Executive Orders:

- 4/8/14: Prohibiting wage disclosure retaliation
- 7/21/14: Prohibiting discrimination based on sexual orientation and gender identity

DOL- Paid Maternity Leave?

- September 2014: new video comparing pregnant women from US and Germany.
- Announcement that DOL is giving funding to help 3 states and DC conduct feasibility studies on new paid leave policies.
- Paid leave legislation has been introduced but no action taken.

Executive Orders

- 7/31/14: Requires federal contractors to disclose recent safety and health violations, wage and hour, collective bargaining, and EEO violations.
- 2/12/14: Minimum wage for federal contractors
- Immigration Executive Order-DACA expansion 2/18/15; temporary injunction, issued February 16.

Iowa Case Law Developments

- *Pippen v. State of Iowa*, July 2014
 - Class action suit filed in 2007 alleging that the State failed to enforce its own statutory and regulatory policies and thereby denied African-Americans equal opportunities for employment.

Iowa Case Law Developments

- *Pippen v. State of Iowa*
 - The plaintiffs did not contend that the discrimination was intentional, but rather alleged that it was a “natural unintended consequence of the State’s failure to follow rules.”
 - The plaintiffs did not challenge any one or more specific employment practice or decision.

Iowa Case Law Developments

- *Pippen v. State of Iowa*
 - State produced paper files and electronic data from a central database containing information on every applicant for hire and promotion.
 - The court found because plaintiffs had challenged the overall hiring system, they needed to show why the State's decision-making process was 'not capable of separation for analysis.'

Iowa Case Law Developments

- *Pippen v. State of Iowa*
- Iowa Supreme Court decision made clear that it was not required to follow the US Supreme Court's analysis of federal law when interpreting Iowa law.
 - Nevertheless, since plaintiffs did not present an alternate theory, it followed US Supreme Court's analysis

Iowa Case Law Developments

- *Smith v. Iowa State University* July 2014
 - Iowa Supreme Court decision upheld \$500,000 award on intentional infliction of emotion distress, citing employer's "outrageous conduct"
 - Previously the court had affirmed a \$200,000 award as the "upper limit" of an emotional distress award

Iowa Case Law Developments

- *Smith v. Iowa State University*
 - Alleged retaliation for reporting managerial misconduct to ISU president.
 - His boss engaged in “unremitting psychological warfare against Smith over a substantial period of time.
 - She tried to have him treated as a scary and mentally unstable outcast.
 - She did all this to cover up what basically amounted to her theft from ISU.

Iowa Case Law Developments

- *Goodpaster v. Schwan's Home Service*, Iowa Supreme Court June 2014
 - District Court found MS not a disability under ICRA
 - Plaintiff argued ADAAA requires court to interpret ICRA to include MS as disability
 - Iowa Supreme Court made clear amendment to federal law does not control interpretation of state statute.

Iowa Case Law Developments

- *Goodpaster v. Schwan's Home Service*, June 2014
 - Iowa Act only pronounces general prohibition on discrimination and courts look to corresponding federal statutes to help establish framework
 - ICRA declares that it “shall be construed broadly to effectuate its purposes.”
 - Genuine issue of fact as to whether MS substantially limits his major life activities

Iowa Case Law Developments

- ***Dindinger v. AllSteel, Inc.***

(March 6, 2015)

- 2009 Equal Pay Act was unclear as to period of damages recovery
- Law is not retroactive
- Each unequal paycheck an employee receives is a separate discriminatory practice but limited recovery for unequal pay to within a 300-day period.