



Meet Bob Wenzel & Jonathan Judge...





Robert Wenzel became a lawyer after a career in human resources which affords him a unique insight into the daily operational issues facing employers when dealing with employees. He is a well-known speaker to various organizations around the country on labor and employment issues. He has conducted hundreds of training sessions, briefings and seminars and lectured at numerous conventions.

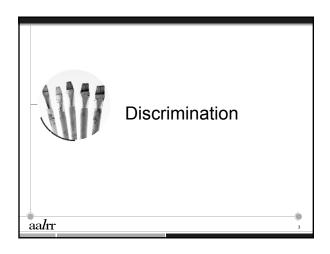
Jonathan Judge counsels employers in labor law and various employment litigation matters, including wrongful termination, discrimination, wage & hour, harassment, WARN Act, and Patient Protection and Affordable Care Act/Healthcare Reform. He represents employers before the NLRB, DFEH, EEOC, the California Division of Labor Standards Enforcement, and in arbitration. Mr. Judge also advises employers on personnel policies and employee handbooks.

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Agenda

• Discrimination
• Diversity
• Harassment & Abusive Conduct

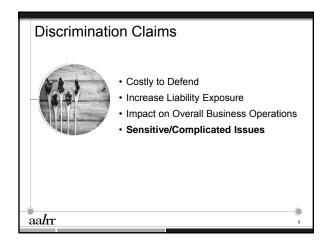


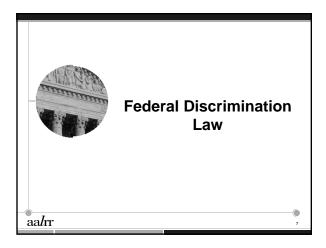


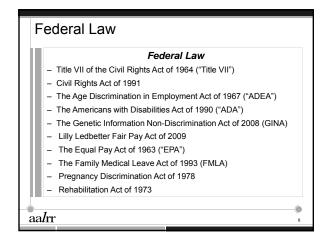


	FY 2016 EEOC Performance Report
	he U.S. EEOC reported on its enforcement efforts during scal year 2016, which ended Sept. 30:
-	EEOC secured more than 482 million for victims of discrimination in private, state and local government, and federal workplaces.
_	EEOC filed 86 lawsuits alleging discrimination during fisca year 2016. This included 55 individual suits and 13 suits involving multiple victims or discriminatory policies (versus discriminatory treatment), of which 18 were systemic suits



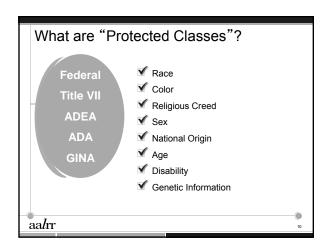








Title VII - What Does it Protect? • Prohibits discrimination in the workplace for both employees and applicants of employment based upon "protected characteristics" Applicable To... Employers (with 15 or more employees for each working day in 20 or more weeks during the year in question), employment agencies, labor organizations, and joint labor management committees controlling job training programs



EEOC LGBT Protections • EEOC interprets and enforces Title VII's prohibition of sex discrimination as forbidding any employment discrimination based on gender identity or sexual orientation. • Examples of Claims: - Failing to hire an applicant because she is a transgender woman, - Firing an employee because he is planning or has made a gender transition, - Denying an employee equal access to a common restroom corresponding to the employee's gender identity, or - Harassing an employee because of gender transition, such as failing to use the new name that the employee now identifies with.



Discrimination Forms of Discrimination	
Disparate Treatment Intentional Retaliation Disparate Impact	
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Discrimination Disparate Treatment • Prima Facie Case - Protected Status - Qualified - Adverse employment action • Legitimate Non-Discriminatory Reason • Pretext • Mixed Motive

Discrimination
Disparate Impact – Elements

• Existence of disparity.

• Disparity is caused by a specific employment device, policy or practice.

• Challenged policy was not justified by business necessity.

• Alternative and less discriminatory measures were available to the employer.



Discrimination Defenses to Disparate Impact Discrimination
Statistical Evidence (Two standard deviations) Business Necessity Job Related Alternatives with a Lesser Impact Resp. fide account in page 4 to place the page 4 to place the page 4 to place
Bona fide occupational qualification (Hire a male attendant in the men's locker room)

EEOC Enforcement Plan FY 2017 - 2021

- The EEOC Strategic Plan directed the Commission to develop a Strategic Enforcement Plan (SEP) that (1) establishes priorities and (2) integrates all components of EEOC's private, public, and federal sector enforcement. The purpose of the SEP is to focus and coordinate the EEOC's programs to have a sustainable impact in reducing and deterring discriminatory practices in the workplace.
- SEP Priorities

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- Eliminating Barriers in Recruitment and Hiring.
- Protecting Immigrant, Migrant and Other Vulnerable Workers.
- Addressing Emerging and Developing Issues.
- Enforcing Equal Pay Laws.
- Preserving Access to the Legal System.
- Preventing Systemic Harassment.

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Discrimination

Disparate-Treatment

- EEOC v. Abercrombie & Fitch Stores, Inc. (U.S. Supreme Court (2015)):
 - To prevail in a disparate-treatment claim under Title VII an applicant need only show his or her need for an accommodation was a motivating factor in the employer's decision, not that the employer actually knew of his or her need.



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The ADEA - The Basics • The ADEA prohibits discrimination on the basis of age against any individual employee over the age of 40. • Applies to employers with 20 or more employees in each of 20 or more calendar weeks during the current or preceding calendar year.

The ADA - The Basics

- The ADA prohibits discrimination in the workplace against employees suffering from a physical or mental impairment which substantially limits one of more major life activities.
- The ADA prohibits discrimination in the workplace against employee "regarded as" disabled.
- Applies to employers engaged in an industry affecting commerce with 15 or more employees working on each work day in 20 or more calendar weeks.

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The ADA - The Basics (Continued)

- What is a major life activity for purposes of the ADA? Major life activities include, but are not limited to...
- Caring for oneself
- Performing manual tasks
- Seeing, hearing, eating, breathing
- Sleeping, walking, standing
- Lifting, bending and
- Speaking, learning, reading, concentrating, thinking, communicating, and working

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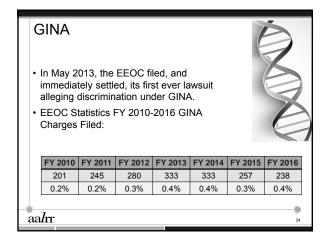


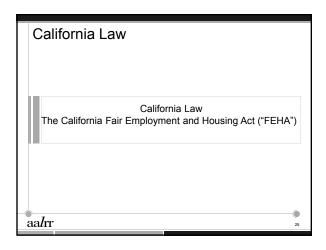
The ADA - The Basics (Continued) • Examples which have routinely met the definition for disability include... – Deafness, blindness – Intellectual disability – Partially or completely missing limbs – Mobility impairments requiring the use of a wheelchair – Autism, cancer, cerebral palsy, diabetes, epilepsy, HIV/AIDS, multiple sclerosis, muscular dystrophy and – Major depression, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia

The ADA Does NOT Protect • Having green eyes • Having poor judgment • Being left-handed • Kleptomania • Having brown hair

	The Genetic Information Non-Discrimination Act
	Prohibits the use of employee's genetic information in hiring, refusing to hire, terminating, discharging, or in any other way affecting compensation, terms, conditions, benefits of employment, or health insurance coverage.
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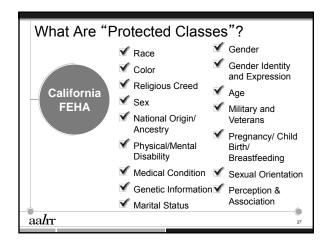


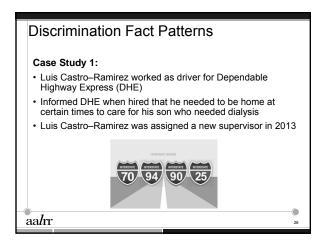




The FEHA - The Basics	
Applies to employers (with 5 or more employees), employment agencies, labor organizations, apprenticeshi programs leading to employment, and other applicable employment agencies)
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Discrimination Fact Patterns Case Study 1: Castro-Ramirez requested earlier routes Supervisor denied requests even though customer requested Castro-Ramirez's services during the earlier shift Supervisor scheduled Castro-Ramirez to work shifts that prevented him from administering dialysis to his son



Discrimination Fact Patterns Case Study 1: • DHE terminated Castro-Ramirez after he did not work the scheduled shift • Court held DHE must reasonably accommodate applicant or employee who is associated with person with disability • Castro-Ramirez v. Dependable Highway Express (California Court of Appeal (2016))

Fair Employment & Housing Council Regulations

- "Sex Stereotype" an assumption about a person's appearance or behavior, or abilities based on social expectations or generalizations.
- "Transgender" refers to a person whose gender identity differs from the person's sex at birth.
- "Transitioning" process that some transgender people go through to begin living as the gender with which they identify, rather than the sex assigned at birth.

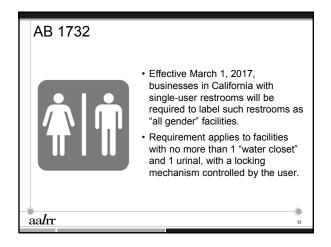
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Fair Employment & Housing Council Regulations (Working Conditions)

- Equal access to "facilities" without regard to the sex of the employee.
- Permit employees to use "facilities" that correspond to the employee's gender identity or gender expression.
- Transiting employees shall not be required to undergo, or provide proof of, any particular medial treatment to use "facilities" designated for use by a particular gender.
- Employers and other covered entities with single-occupancy "facilities" shall use gender-neutral signage.

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Case Study 2: • Michaelin Higgins-Williams worked as a clinical assistant • In June 2010 complained she was stressed due to interactions with supervisor and regional manager • Sutter Medical Foundation (SMF) granted Higgins-Williams leave under FMLA

Case Study 2: • Higgins-Williams returned to work in August • Higgins-Williams claimed supervisor treated her negatively • Higgins-Williams requested leave to transfer to work for another manager

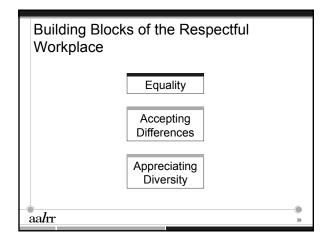


Discrimination Fact Patterns Case Study 2: SMF terminated Higgins-Williams in February 2011 Higgins-Williams sued for failure to accommodate disability Court held stress related to a supervisor's standard oversight is not a disability Higgins-Williams v. Sutter Medical Foundation (CA Court of Appeal (2015))







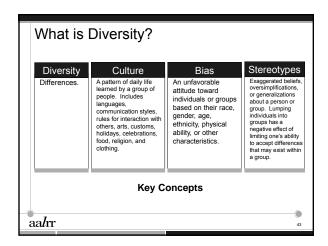


Building Blocks of the Respectful Workplace Equality • All persons have an equal right to work. • Each person should have an equal opportunity to make the best use of his or her abilities without regard to race, color, religion, sex, national origin, ancestry, physical or mental disability, age, medical condition, marital status, military service, sexual orientation, gender, or any other basis protected by law.

Building Blocks of the Respectful Workplace Accepting Differences • We all work with people who are different from us. They may look different, sound different, and even behave differently. They may practice a different religion or come from a different cultural background. • These differences do not prevent us from having an equal right to work.



Building Blocks of the Respectful Workplace Appreciating Diversity The variety of experience, viewpoints, abilities, and ways of thinking found in today's workforce is an advantage for an organization. Diversity adds depth and strength to the workplace.





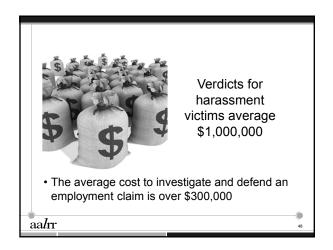






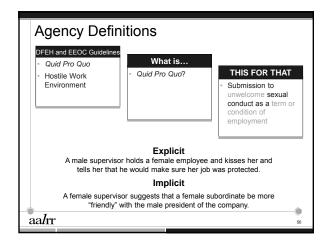
Why the Impact on Productivity?	
 ▲ Higher absenteeism ▲ Increased accidents because of distractions ▲ Increased turnover and training ▲ Increased Employee exchanges 	
 ▼ Lower self-worth and self-confidence ▼ Lower employee satisfaction ▼ Decreased energy and morale 	
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The Law – State and Federal

The California Fair Employment and Housing Act (FEHA) and Title VII of the Civil Rights Act of 1964 (Title VII) prohibit sexual harassment in the workplace.





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What is a Hostile Work Environment?	
"Unwelcome sexual conduct that unreasonably interferes with an individual's job performance and creates an intimidating, hostile, or offensive work environment."	
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Severe or Pervasive?	
The environment must be sufficiently severe or pervasive to alter conditions of the victim's employment and create an abusive working environment.	

alter conditions of the victim's employment and create an abusive working environment.

**Was the Conduct...*

* Verbal or physical?

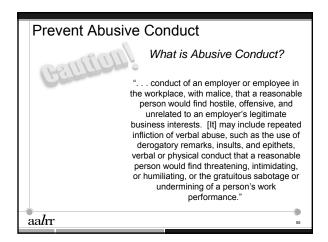
* Repeated?

* Hostile or patently offensive?

Severe or Pervasive? The environment must be sufficiently severe or pervasive to alter conditions of the victim's employment and create an abusive working environment. Was the Harasser... • A co-worker or supervisor? Was the Harassment... • Directed at more than one individual? Did others Join... • In perpetrating the harassment? A single isolated incident of offensive sexual conduct is normally NOT enough to prove a hostile environment.

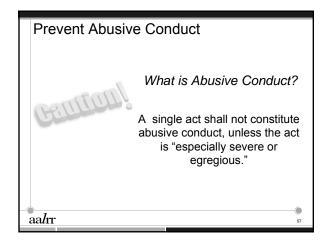


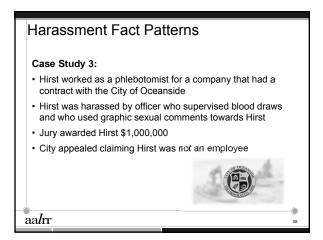




A Better Definition What is Abusive Conduct | Bullying? Repeated, usually intentional, health-harming mistreatment of one or more persons (targets) by perpetrators(s) that takes one or more of the following forms: Verbal abuse Offensive conduct and behaviors which are threatening, humiliating or intimidating Work interference or sabotage which prevents work from getting done May also include real or perceived imbalance of power, evident enjoyment by the aggressor and sense of oppression by the target.







Harassment Fact Patterns	
Case Study 3:	
Court concluded FEHA covered Hirst as a "person providing services pursuant to a contract"	
Hirst v. City of Oceanside (California Court of Appeal (2015))	ıl
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Whether an employee (or another individual) makes a written complaint, a verbal complaint, or a report from a third party, or you witness inappropriate behavior, the most important thing is to RESPOND!

If an Employee Complains to You...

1 Listen objectively and impartially
2 Ask for the whole story or ask the employee to write down the complaint
3 Observe their behavior and demeanor
4 Ask who, what, when, where, why and how questions.
5 Ask the employee to demonstrate if possible
6 Ask the employee if others witnessed the incident

If an Employee Complains to You...

7 Take thorough notes

3 Make the employee feel comfortable and reassure the employee that you will handle the situation.

9 Remind the employee that retaliation will not be tolerated and to bring any additional issues to your attention.

10 Respond according to company policies and procedures

11 Never promise confidentiality— assure the employee that only those individuals who need to know about the complaint will be informed.

12 Involve Human Resources

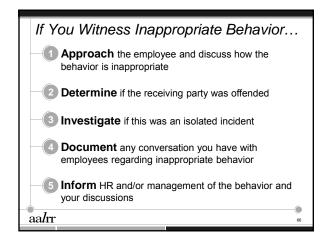


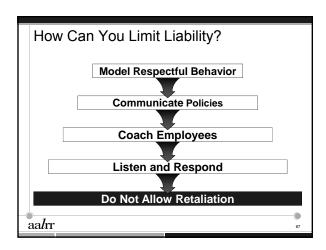
Harassment Fact Patterns
Case Study 4: • Britney Austin worked for Deluxe Financial Services Corp. in Minnesota
Austin was assigned the male sex at birth and presented as male when hired by Deluxe
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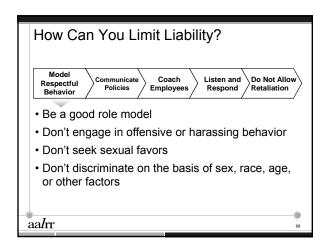
Harassment Fact Patte	erns
Case Study 4: Austin informed her supervitransgender and began to pwork Deluxe refused to let Austin restroom	present as a woman at
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Case Study 4: • Supervisors & co-workers subjected Austin to a Hostile Work Environment, including hurtful epithets and intentionally using the wrong gender pronouns to refer to her • Deluxe settled with the EEOC and agreed to pay Austin \$115,000 • EEOC also required Deluxe to enter into a consent decree requiring a letter of apology and annual training to supervisors and employees regarding sex-stereotyping, gender identity and transgender status • EEOC v. Deluxe Financial Services Corp. (EEOC, 2016)



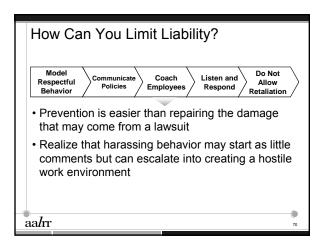


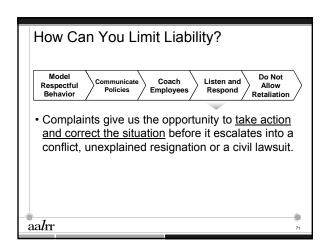






How Can You Limit Liability?		
Model Respectful Behavior Model Respectful Behavior Respond Coach Employees Coach Employees Listen and Respond Respond Retaliation		
Communicate company policies clearly and consistently to employees		
Familiarize yourself with those policies and enforce them		
Employees must know that they will be protected from harassment		
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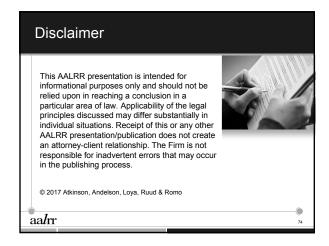














Thank You For questions or comments, please contact:	
AALRR 562.653.3200 aalrr programs@aalrr.com	
aalrr Atkinson, Andelson Loya, Ruud & Romo	