FINAL TRANSCRIPT

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**ACC - Every Employer Has Employees: Basic Issues in Employment Discrimination Law and What Every In-House Counsel Should Know About Them

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PRESENTATION

Margaret Bryant - *Jackson Lewis, LLP - Director of Communications*

Good afternoon, everyone, and welcome to the Association of Corporate Counsel Labor and Employment Law Committee Webcast on basic issues in Employment Discrimination Law and What Every In-house Counsel Should Know About them. My name is Margaret Bryant. I am the Director of Communications for Jackson Lewis, LLP.

Jackson Lewis is the law firm sponsor for the ACC Labor and Employment Law Committee. Today's Webcast is part of the ACC outreach to attorneys new to the role of in-house counsel and new to ACC.

Our Webcast faculty today are Lisa Whitney, Vice President, Secretary, and General Counsel for Nautica Enterprises, Inc., and Susan McKenna, Partner in the Orlando office of Jackson Lewis.

Lisa Whitney - *Nautica Enterprises, Inc. - VP, Secretary and General Counsel*

I'm sorry, Margaret, were you?

Margaret Bryant - *Jackson Lewis, LLP - Director of Communications*

I'm going to just add a little bit about you, Lisa and Ms. McKenna, if that's okay.

Lisa Whitney - *Nautica Enterprises, Inc. - VP, Secretary and General Counsel*

All right.

Margaret Bryant - *Jackson Lewis, LLP - Director of Communications*

Lisa started her career with Avon Products as an attorney and manager for government relations. She was previously also with the JC Penney Company, and the LJ Hooker Retail Group. Also, she was with Holsen Bulgaze, before joining Nautica Enterprises, Inc., where, as I said, she is Vice President, Secretary and General Counsel. Lisa is very active in a number of legal and professional associations, and has been a very active member of ACC for many years. She serves on the New York chapter in a number of executive positions, and has received several distinguished service awards from the New York chapter, as well as the national chapter, of ACC.

Susan McKenna is a partner in the Orlando office of Jackson Lewis. Susan is very active in employment litigation with Jackson Lewis and is a member of the ABA Section on Labor and Employment Law, the Federal Bar Association and the Florida Bar. She's involved in the Central Florida Industrial Relations Research Association, the Labor Management Dispute Resolution Center.

She serves on the board there and has been selected by her peers for inclusion in leading Florida attorneys in the area of labor and employment law, and is included in Best Lawyers in America, Labor and Employment Law.

A few notes about the program. Today's Webcast is accompanied by a PowerPoint presentation that is accessible on the ACC Webcast Web page. The link to the materials is located down near the bottom of that page.

Lisa and Susan will be happy to take your questions today, and we will do that by asking you to please e-mail your questions to me, Margaret Bryant, and there will be links to my e-mail address also on the Webcast Web page. My e-mail address is bryantm@jacksonlewis.com. We will hold the questions until the conclusion of the prepared remarks by Lisa and Susan, but please feel free to e-mail those questions at any time during the presentation.

That takes care of all the housekeeping chores. Let's begin our Webcast today.

Lisa Whitney - *Nautica Enterprises, Inc. - VP, Secretary and General Counsel*

As Margaret said, my name's Lisa Whitney. I'm General Counsel here at Nautica, and I would like to say that it's a real pleasure to be participating in this Webcast with Susan McKenna of Jackson Lewis. Jackson Lewis-- real personal information about Jackson Lewis because they have counseled me on a number of occasions and their advice is practical and on point, so I think you're all in for a real treat. In fact, I assume that I'm going to learn a lot on the Webcast as well.

Additionally, the first time I ever became a general counsel was really a sole lawyer for a new company, and what I knew about employment law you could have put on the head of a pin. So I'm hoping that by going through these laws and listening to Susan and some of the practical advice that perhaps I can give you as well, that you will be in a better position and able to avoid some of the struggles that I had to deal with as a new GC building a legal department.

If you look at your agenda, you'll see that rather than repeat the things that are on the agenda - I think it's very clear - we're talking about the discrimination laws and our reasons for being concerned with them, as well as our ideas for best employment practices. The question of why be concerned with the employment discrimination laws is almost a no-brainer on some level, but there certainly is an increasing number of claims, charges and lawsuits, and employees are more aware of their rights.

I think these issues are the subject of movies and TV programs, books. Cases are reported in the news with a lot of fanfare as well. It seems also that the only persons who are unaware of the discrimination laws are some of the clueless supervisors who are the subject of some of these complaints. So we really have to be aware. We're aware, our employees are aware, and it's in the common parlance today to discuss these things and to be aware of what people's rights are, of their rights.

Additionally, of course, there's corporate liability we've all known about. I think the thing that a lot of managers don't understand is that there really is individual liability also, and those liabilities are usually in the nature of tort. Examples of those liabilities are defamation, assault and battery, negligent supervision, negligent investigation, and negligent infliction of emotional distress.

With the individual liability, of course, this raises not only from a corporate governance standpoint, protecting the company, it raises these issues to a very high level with your executive. Additionally, it's competitively essential to provide a harmonious workplace, and in my view it's competitively essential to have a diverse workplace so that we can better understand our customers in this global economy.

Susan, I think you're going to take us through Title 7, the basics, and then through the majority of the other substantive laws that we've listed on the agenda.

Susan McKenna - *Jackson Lewis, LLP - Partner, Orlando Office*

Yes, Lisa, thank you. The place to begin when we're talking about an overview of discrimination law is with the Civil Rights Act of 1964, commonly referred to as Title 7. This is the granddaddy of them all in terms of employment discrimination law, and it comprises by far the largest percentage of claims or charges that are filed against corporations.

It has some very basic concepts that it shares with other discrimination fact sheets that we're going to talk about today. Of course, the first concept that's noted in the PowerPoint is the whole idea that certain categories of employees are protected by news of the statute, and specifically Title 7 protects from discrimination individuals on the basis of their race, national origin, religion and gender, sex, which includes within it pregnancy, a related subject we'll be talking about, or sexual harassment. The rationale behind Title 7 is that individuals that fit into one or more of these categories, and of course we all do, are protected from having employment decision making based upon their inclusion in the category, as opposed to having that decision making based on legitimate business considerations.

So the burden on an employer is always to be able to articulate and prove a legitimate business reason for every employment decision that's made, including by the way decisions that aren't made, because sometimes the challenge is that the company didn't do something that was afforded to other individuals. And we always have to be able to show that that had nothing to do with somebody's protected status, but rather was solely due to whatever business consideration was at work in that particular decision.

Now, while it's true that legally a plaintiff in a discrimination action bears the burden of proof, almost always - there are some cases where that burden ultimately shifts to the company, but in the vast majority of cases, the plaintiff bears the burden of proof. But in a real practical way, we bear the burden of being able show the legitimacy of our business decisions, and that has a lot to do, as Lisa indicated, with the whole idea that to be competitively in tune with what's going on in the marketplace and to decrease liability, we want to be able to show that the workplace is free of discrimination and harassment, and to be able to show why.

Now, there are two different legal theories that underpin Title 7 and other discrimination statutes that we'll discuss that are important conceptually and practically, and these two theories of liability are referred to as disparate impact and disparate treatment. By far, most discrimination claims that are brought against employers are disparate treatment claims. They're brought by individuals who allege quite simply that they were treated differently than a similarly situated employee not in their particular protected category, and that the inclusion in the category is the reason for that different treatment.

Of course, that's the heart of an individualized discrimination claim by somebody says that says it was my race or my pregnancy or my religion that made the difference in the decision. In order to prove a disparate treatment claim, a plaintiff has got to show intent. Intentional discrimination is what's prohibited by law, and so there is that element of a motive, of what's called a discriminatory animus on the part of a decision maker in a disparate treatment case. The disparate impact is very different. A disparate impact case is a case in which a neutral policy or practice, for example, a hiring requirement, is applied evenhandedly to everybody, regardless of their protected status, but in practice that policy or procedure has the impact of disproportionately serving to a disadvantage members of a protected group.

So, for example, a classic example of a disparate impact theory would be a company that has a pre-hire skills test that everybody that's applying for that particular position must complete, and yet because of flaws in the testing mechanism, it holds trouble bias, and it discriminates against, it screens out, a disproportionate number of African American or other minority applicants. Further, the test is not a predictor of success in that particular position, so that even those that fare poorly on the test can do quite well in that position. There's not a good link there between the test and what's being asked in terms of that position. That would be a classic example of a disparate impact problem with that screening device.

In fact, any of you that have ever worked with or in human resources may be well aware that any kind of tool of that nature that is applied pre-hire have been validated by an appropriate consulting agency to attest to the fact that it is job-related to the position in question, so any disparate impact can be warranted on legitimate business grounds.

So, basically, when we're talking about everyday life in corporate America, we're looking at disparate treatment claims. Disparate impact claims are much more rare, and much less likely to be encountered. And in turning to the various protected categories under Title 7, it's appropriate to start with race discrimination, because that really was the impetus behind Title 7's passage. Forty years ago this year Title 7 was signed into law.

It was part of Lyndon Johnson's Great Society package back in 1964 and was designed to eradicate a very real problem that existed at that time, in that there were blatantly segregated workplaces, blatantly discriminatory hiring and promotion and pay practices based on race of employees. That was the impetus, of course, behind its passage.

What sometimes surprises people is that even though you may hear in the media, for example, about other kinds of claims like sexual harassment, like perhaps the ADA, more frequently nowadays you may hear about these other kinds of issues, nevertheless, race discrimination charges remain the most frequently filed claim with the Equal Employment Opportunity Commission, which is the federal agency that has the authority to enforce Title 7. And in the workplace, there are various ways in which race discrimination claims tend to emerge that I think are worth mentioning from a very practical viewpoint.

It is very rare nowadays that we'll have a race discrimination claim based on failure to hire, for example, even though that was a common claim back in the early days of Title 7. More likely is that an employee may claim that they are not promoted because of their race, and that may have to do with an argument that there is racial stereotyping going on in that workplace, that minority team members are not viewed to have leadership potential. That may be linked to a very real problem that there are more mentoring opportunities available to Caucasian employees who may have come into the workplace through upper-level executives that met them through the club or the church or some social setting, or even a professional setting, and that those individuals then have better communication and access to management, to decision makers, and hence have better mentoring opportunities.

So, failure to promote is a very real issue that we still see happening frequently, and that of course we have to guard against. We have to make sure that in our workplaces we have promotional opportunities, training, career advancement mechanisms in place that reach out to everybody and that further that corporation's diversity goal in so doing.

The other problem that continues to persist, and of course this varies by industry - some industries are more prone to it than others, some workplaces are more likely to encounter this problem than others - but the problem of racial harassment deserves a particular mention. The notion of racial harassment is that a workplace can be a hostile, intimidating, discriminatory workplace for a minority member because of the words and deeds of either coworkers or, of course, in the worst case scenario, supervisors or managers. And the hostile workplace can be created, for example, by the use of racial epithets, the use of the N-word, for example, in the workplace, racially stereotypical humor, or insulting humor that has a race basis to it. Of course, any kind of visual, whether it be a cartoon or an Internet joke or a tangible item introduced into the workplace that has a racially insensitive to it, certainly, joking among coworkers, like in the sexual harassment context can be a problem, if there's that racial link to the nature of the humor or the actions that are going on.

Of course, the corporation's goal is twofold, in my opinion to try to avoid this kind of problem from happening. The first very important goal is we to make sure that our management team is leading by example, that our supervisors and managers, and certainly our upper-level executives, understand, have been provided the training, and their actions demonstrate a commitment to a diverse worksite, and that none of those kinds of behaviors are going on at that level. But secondly, we have to make sure that our supervisors - again, Lisa alluded to kind of the frontline supervisors really being key to the organizational health of those employers. We have to make sure that they are aware of not only their obligations to not engage in such actions, but to be mindful of them going on in the workplace, and to know how to deal with them, to be able to set them promptly and correct

those issues when they emerge, to get human resources or legal involved immediately, so that what may be a small problem can be remedied before it becomes a big problem.

Now, with respect to national origin discrimination, the next protected category under Title 7, analytically this is very similar to race discrimination. It does in fact protect all ethnicities, and of course all of us have an ethnic background, so in theory any one of us could claim that we were being treated differently because of our national origin. In practice, again, depending upon your geographical area, it is not uncommon that Latino, Latina employees, Hispanic employees, may be more likely than many to claim that they're being treated differently, singled out, because of their national origin.

But, in my career, I've had issues involving Italians and Greeks and Moroccans, practically every national origin that you can think of, people that have come forward and have felt that they were being discriminated against. Most recently, there has been a significant increase in the number of claims brought by Americans of Middle Eastern ancestry, post-9/11, and in fact the Equal Employment Opportunity Commission has issued on more than one occasion special guidance to employers cautioning about them about the problem that there may be kind of hateful speech or actions directed to employees with a Middle Eastern heritage. And this is linked, by the way, with such behaviors that may be directed to Muslim American workers, which would sit under the religious discrimination umbrella.

Again, we just have to be vigilant in our workforces to make sure that what somebody might see to be only patriotic dialog doesn't cross the line and basically be condemning of entire ethnicities, which could create a hostile workplace for employees that come from the Middle East or whose ancestors did.

Lisa Whitney - *Nautica Enterprises, Inc. - VP, Secretary and General Counsel*

May I ask you, Susan, the EEOC advisories, do you get those on their Web site?

Susan McKenna - *Jackson Lewis, LLP - Partner, Orlando Office*

In fact, you can. The EEOC Web site, which I believe is EEOC.gov, you can pull down the guidance that they've issued since September 11th. They were quick to issue them. I think the first guidance issued in October of that year, but there have been updates and supplementations to it, Lisa, so those are accessible on the Web site.

Lisa Whitney - *Nautica Enterprises, Inc. - VP, Secretary and General Counsel*

Okay, that's great. Thank you.

Susan McKenna - *Jackson Lewis, LLP - Partner, Orlando Office*

You're welcome.

Now, you'll see mentioned in the PowerPoint the English only rules, and I offer this as an example of how employment law is dynamic and how perceptions, and, in fact, interpretations by courts and agencies of what's appropriate can change with the passage of time. When I first began practicing law, it was quite common for an employer to have a policy that said, "We are an English-only workplace. English alone may be used at all times while you are on the clock or while you are in customer or client areas." And a narrow exception only was carved out for employees in a lunchroom break, off-the-clock, on-their-own-time kind of thing.

That was widely upheld to be a legitimate policy, and yet with the passage of time, that has come to be viewed, and is viewed by the EEOC, as a per se violation of Title 7. And the EEOC's view is that that policy is overly broad. To give an example, if two

employees working in an engineering department in a custodial capacity, both Hispanic-originated employees, are working side by side in a corridor, on the clock, and they choose to converse with one another in their native tongue, then the EEOC would say, "What's the harm? Why would that be prohibited." Instead, the employer has to show a business necessity for a restriction on the use of native language, and of course there are many times when you can do so, but that a blanket prohibition like that I described initially, would be overly broad.

In the past several years, the EEOC has filed several class actions across the country against various large employers, attacking English-only rules. So, again, lesson learned is that if your organization has an English-only rule, you should have your counsel review it, both in terms of what it says and how it's being applied, to make sure that it may not be overly broad. Lastly, with respect to national origin, I have a notation here - Polish jokes are illegal? And that's simply in a somewhat humorous way making a point that, yes, like every protected category, ancestry or national origin is protected from workplace harassment, and a workplace that is imbued with ethnically based ridicule or humiliating behaviors, or insulting words and deeds, could of course create a hostile workplace for somebody of that national origin, whether it be Polish or any other.

Now, religious discrimination is an interesting twist in Title 7, because it has a couple of aspects to it, and I'll use a religious analogy, since we're talking about religious discrimination. It shares with every other protected category a first commandment, the commandment, "Thou shalt not discriminate." And, of course, it prohibits disparate treatment on the basis of somebody's religion. The statute defines religion very broadly - I shouldn't say the statute does - the court decisions interpreting it and the interpretive regulations make it clear that religion is to be defined very, very broadly. So, in addition to the major established religions, with which we are all familiar, many more unusual or less-popular sects and faiths have been recognized to be religions.

Here in my area, in Florida, we've had numerous cases over the years that have been brought by, for example, practitioners of witchcraft. Atheists and agnostics are also protected, of course, as are Catholics, Protestants, Jews, Muslims, Hindus and every other major faith.

Now, in addition to that first commandment, there's a second commandment under religious discrimination, "Thou shalt accommodate." And the only other protected category that shares the second category, of course, is the ADA. Disability discrimination has an accommodation requirement, and this is an affirmative obligation on the part of an employer to accommodate somebody's faith. It usually comes up in the context of a request for a religious observance, to have a day off or a schedule change or something of that nature, to be able to observe the strictures of their faith.

Since September 11, it's come up in the context of Muslim employees asking for accommodation to be able to pray at their regular intervals throughout the day, when that's appropriate. And the duty on the part of the company is to consider the request, to determine whether or not a reasonable accommodation can be made, and, if not, to determine that it's an impossible because it would pose an undue hardship on the employer.

Of course, the most important point behind considering a request for an accommodation is that it must be considered, and our supervisors need to be trained to understand that merely because a schedule has already been made up, and merely because they're afraid to say "yes" to somebody asking for a day off, because others will want the day off too, that those aren't legitimate considerations in and of themselves to deny a request for an accommodation. So we want them to understand that they can't just say "no," that they need to get the information about the request, go to human resources or legal, where it will be evaluated and a proper response made.

Now, one of the other changes that we've observed in the workplace over the last 10 to 15 years has to do with the vocal nature of many employees when it comes to their faith. Employees now are much more likely to talk about their religious views, to discuss issues of faith in the workplace, and of course that means that there's that potential for workplace harassment based on somebody's belief. There's also the potential that an employee may be engaging in proselytizing activities at work, perhaps with the best of intentions, perhaps because they believe that they are pursuing what their faith compels them to pursue, but again, the bottom line is that a nonbeliever is protected from unwelcome proselytizing every much as a devout Christian is

protected from being made fun of for being a holy roller and having blasphemy directed towards him or her personally and that kind of thing.

So we try to balance that in the workplace, so that believers and those that choose not to believe are equally protected from being uncomfortable in the workplace, because of their views of faith.

I guess that leads us to the last category with respect to Title 7, and that's sex discrimination. There's an interesting history behind sex discrimination being included in Title 7. When the initial bill was proposed back in the early '60s, sex was not one of the protected categories thought to be included, and, as you can imagine back in the '60s, given the era we were in, this was a very controversial piece of legislation, and there were plenty of vociferous opponents to it, people that felt that segregated workplaces were correct, and that we shouldn't be up turning society in the way that this act envisioned doing.

One particular legislator, from a Southern state, came up with what he thought was a brilliant idea to guarantee that Title 7 wouldn't pass, and his idea was to add, as a protected category sex, based upon the widespread belief that certainly, and this was back in the '60s, certainly nobody is going to vote for a bill that's going to guarantee equal treatment at work for male heads of households as housewives. And yet, of course, history shows that this was an ill-fated attempt to railroad Title 7, because it passed anyway, with sex discrimination as a protected category.

It was not until 14 years later, approximately, that pregnancy discrimination was added. Sex and pregnancy-related conditions was added to the language of Title 7 to protect that as well. Now, Title 7, in the case of gender, protects males and females. Of course, the vast majority of cases are brought by women, but I have defended cases where a male claims, for example, that a less-qualified female was promoted because of a company's attempt to increase their EEO numbers, that kind of thing.

With respect to pregnancy discrimination, the law simply says that a pregnant employee can't be treated any differently than a similarly situated non-pregnant employee. And what that means in practice is that if you have an individual who is out for a while with a short-term condition that prevents them from working, if you would hold their job for them or provide them with benefits or offer them other advantages because of that condition, that you have to do the same for a pregnant employee.

It does not require that you have maternity leave policies, paid or unpaid. It does not require that you accommodate pregnancy. It's very narrow in its focus in terms of treating pregnant employees the same as similarly situated non-pregnant employees. Of course, the Family and Medical Leave Act, which is beyond the scope of today's Webcast, because it is not a discrimination statute, has other protections for employees that are eligible, and for qualified employers, that have direct impact on pregnancy and maternity leave.

Now, Title 7, as of today, does not protect against individuals on the basis of their sexual orientation. There have been attempts to amend Title 7 to include that. One attempt came just a vote shy of passage some years ago, but it is not a federal law today in terms of protecting sexual orientation. But Lisa and I both felt when we were pulling these materials together that it's important to emphasize that many state laws and local ordinances do protect sexual orientation, and even in localities where those laws aren't in place, increasingly more employers are adding that protection to their own diversity policies, for obvious reasons.

I guess then the focus needs to be on what is probably the most frequently litigated aspect of gender discrimination, of sex discrimination, under Title 7, and that's the whole notion of sexual harassment, because certainly this has become in some areas of the country almost a cottage industry with a geometric increase in the number of claims that have been filed, at least since the Clarence Thomas/Anita Hill hearings made sexual harassment part of the common vocabulary of this country. Again, as Lisa said, the popular press is increasingly likely to report on incidents of workplace discrimination. Certainly sexual harassment would lead that charge in terms of the publicity that it has engendered.

As is the case with other categories that we've talked about, there's a broad prohibition and a broad protection so that women, of course, are protected from sexual harassment, as are men. Of course, the claims of a woman harasser, preying upon a male victim, are much less frequent, it is cognizable, there have been reported cases, I've handled such cases in my career, and since

1998 we now know with certainty, because the Supreme Court that year issued a definitive decision, that same-gender harassment is also against the law.

So a female harassing another woman, a male harassing a male, so long as the other requirements of harassment are satisfied, so long as it's otherwise illegal conduct, in other words, that's prohibited as well, regardless of the sexual orientation of the harasser. Now, there are two very different kinds of sexual harassment, and although the Supreme Court in recent decisions has shied away from using these kind of shorthand words to describe them. They're still very descriptive and helpful and useful instruction, to think about the two types, these being quid pro quo harassment or hostile environment harassment.

Quid pro quo harassment means really - what that translates to, I think, in the literal Latin means this for that. Quid pro quo is the notion that in exchange for submission to sexual favors or advances, a tangible job benefit is afforded to that person that submits. Or, of course, if they refuse the advance, the request for an affair, whatever it might be, then that victim suffers a tangible job detriment, so there's some exchange required. Submit to my advances, I'll hire you, I'll promote you, I'll give you added responsibility, I'll increase your salary. I won't lay you off. Those kinds of considerations being extracted from these employees.

Now, the nature of quid pro quo harassment is such that the harasser is always a supervisor, because in practical terms, only a supervisor can make the kinds of decisions that amount to tangible employment action. So we are looking at supervisory, managerial conduct that could subject somebody to quid pro quo harassment.

The second category of harassment is much more common. It is what Anita Hill claims she suffered while she worked for the EEOC many years ago. It's what's more commonly depicted, and it has to do with a pattern of potentially harassing behaviors that are shown here on the PowerPoint, whether it be touches, looks, leers, undressing somebody with your eyes, sexually graphic humor, any number of things that we'll touch on that creates a hostile, offensive, workplace for that victim.

The words that are shown here on the PowerPoint are meant to be examples only, but yes, it has to do with language and actions that have a sexual connotation to them, and visual, as well, whether it's (inaudible) or sexually explicit e-mail. I've had cases where people have literally brought in software programs to their computers. I had a pornographic screensaver case once where some guy brought that into his , quote, "his computer," at work, and of course that employer had to explain, look, it's not your computer, it's all company property. Nothing of that nature is appropriate at work. Asking personal questions of somebody about their social life, sex life, marital history, anything of that nature. Many times these come up with coworkers in a jocular tone. Certainly, there are plenty of cases where the supervisors are involved in this conduct as well.

What sometimes surprises employees when I train, both supervisors and hourly employees, because sometimes I'll go out and train coworkers how to treat one another, is this whole notion that repeatedly pressuring somebody for a personal relationship, asking them out, again and again and again, can rise to the level where a court or the EEOC might view it to be harassing. So we have to let them be aware of that as well, that persistence is one thing, but in this area, after a point, and I usually say "three strikes and you're out," desist in your attempts to get somebody to date you, because you're treading on thin ice.

The next sexual harassment strain shares some common key concepts that I'm just going to touch on briefly. The conduct needs to be severe or pervasive to be illegal, and there are plenty of cases out there that vary by jurisdiction in terms of whether it's bad enough to be severe or pervasive conduct. The conduct also has to be unwelcome by the victim. If the victim generally welcomes it or enjoys it or reciprocates it in some fashion that shows it's not unwelcome, then that victim may not have standing to sue. In terms of what we communicate in our workforce, however, is we don't want anybody trying to second guess whether it's welcome or not. We of course want our employees not to engage in it at all, and that's what I mean when I say you have to judge the behavior itself. Is it appropriate, is it professional, is it sexual in nature? If so, if it's sexual in nature, don't do it. If it's not appropriate or professional, don't do it. Don't judge from the reaction of the recipient whether it's something that you believe you'll get away with because you think it may be welcomed.

The caution about fraternization is based on the very real dynamic of many, many sexual harassment cases where a supervisor and a subordinate employee had a consensual relationship that for some reason went south. Accusations are then raised as to sexual harassment and the prudent policy, very practically, that employers should think about adopting, if you haven't already, is to prohibit chain-of-command personal relationships because of the sexual harassment potential, and of course because they're demoralizing for other reasons - accusations of favoritism, et cetera.

So that's what's meant by fraternization, the very real danger of a boss dating a subordinate, and it creating liability. Of course, that leads us to the next issue - when can an employer be liable for the actions of a supervisor, because occasionally we will all have, unfortunately, that bad-apple supervisor. Where is that person's actions going to cause the employer, the company, to be liable? And again, we now have some clarity on this issue based upon that key year for sexual harassment decisions, 1998. The United States Supreme Court ruled as follows. First of all, the premise that we begin with is that we, the company, are bound by the actions of our supervisors.

A simple way to consider it is that they are our agents, and under a typical agency theory, we are bound by their actions. When we're talking about hostile environment workplace, the words, these jokes, the touches, whatever, the Supreme Court has provided us, however, with an affirmative dissent. If we can prove that the company that the employer exercised cared to present and correct promptly the sexually harassing behavior, which in plain English means we've got a good policy that prohibits this, that has an appropriate reporting mechanism in it, that we distribute to our employees in a way we can prove they received it, that we provide training to our supervisors on its administration, and when a complaint comes forward, we promptly investigate it and take appropriate remedial action.

That's great. That's the first prong of that affirmative defense. But you'll notice the conjunctive here, and. We also have to prove, in order to establish this defense, that the employee somehow acted unreasonably by failing to take advantage of our preventive and corrective measures, by, for example, complaining to a peer instead of a member of management or human resources, by waiting many, many months before coming forward, harm along the way. So the bottom line is that we've got to prove both that we, the employer, acted reasonably to correct it, and that the employee acted unreasonably somehow in order to avail ourselves of that affirmative defense. Not always an easy burden to meet.

Of course, in the case of quid pro quo harassment, as the next slide shows, we don't even have that affirmative defense. If a supervisor has taken action against somebody because they wouldn't submit to their advances, then whether or not it's against company policy, we're going to be liable for the actions of that supervisor. If, instead, we're talking about a peer or a third party like a vendor or a client, and they're the harassers, then the standard is, did the employer know, or should the employer have known, and did the employer fail to take corrective action once they had this real or implied knowledge.

Lisa, I guess that means it's now time to talk about kind of the practicalities of avoiding liability when it comes to workplace harassment.

Lisa Whitney - *Nautica Enterprises, Inc. - VP, Secretary and General Counsel*

That's right, Susan. I think one of the most instructive and essential things that any attorney can do when they first go into a company is to review the internal company policy book, not only for discrimination and sexual harassment issues, but also for other legal compliance. It's key, I think, to make sure that once you review it, either the policies which are lacking are reviewed and revised, and the good policies enforced. And when it comes to sexual harassment, there should be a zero tolerance for harassment and an accessible reporting policy.

The company, I think, should foster a come-to-us-first attitude so that we can investigate the claim and fix it. Then you get to the issue, I guess, of how do you really respond to these complaints? When I first started to handle some of the employment issues several jobs ago, it was more common that attorneys, the in-house attorney actually got involved. I think that is a matter

now that is really receiving a lot of disfavor for a variety of reasons. I think it's a crucial decision to have an appropriate investigator, but who do you really want?

The legal department, since the investigative work is truly not legal work, you can become a weakness and your notes can become discoverable. Well, the notes can become discoverable no matter who, but you don't necessarily want to be the person, the company lawyer being on the witness stand in an investigation of sexual harassment. You can certainly have, if HR is properly trained, they can be an effective investigator. They have third parties that do this for a living. But if you're going to select an outside counsel to do it, don't have it be your trial counsel, because they will be tainted and have the same problem that you will have, and they have to become a witness and couldn't defend you if the matter went to trial.

When Susan and I were talking about this presentation, she let me know that in some instances, they have used a reputable plaintiff's counsel. It makes a lot of sense. There certainly would be credibility, of course, with the employee and also the plaintiff's counsel could be conflicted out for any future actions, so there is a method to the madness. But it's not something I would have thought of, and I think it's a really interesting possibility.

Then just in whoever the investigator is, it's essential of course that every complaint be taken seriously, no matter how trivial it may appear, because of the fact that sexual harassment, like the other discrimination laws, are so well known and because of the fact there are jokes about these things, I think we want to make sure that whoever's investigating does not trivialize the concern. Because it may truly be a serious concern to the person who's making the complaint. Obviously, being objective and getting the story is all part of the process, taking notes - and when you take notes, or when the investigator takes notes, obviously, the documents themselves become discoverable, so the manner in which they're prepared has to be well thought out.

There shouldn't be legal conclusions, for example, in these notes. They should be fact intensive, and that is it. While the investigation - you'll see on the screen, it says must keep all information confidential. That is key, but there also is a situation that I wanted to bring into this. Some employees may approach you and say, "I want to tell you about a problem on a confidential basis." I think it's key in those situations to do two things. One is, you have to advise the employee that, depending on what is said, if this is something that would be a violation of company policy or law, it would have to be investigated, and, also, in those situations, to advise the employee that you cannot be their attorney, that you truly would be somebody who would be investigating, represent the company, and you would be investigating on behalf of the company.

We certainly, of course, can assure them that only persons with a need to know will be advised, and that they will be required to keep the matter confidential. Then I think it's essential, of course, to get back to the victim with the results of your investigation and/or the action that you plan to take. And I'd like some feedback from Susan, I think, on this because it doesn't necessarily mean that the action that you're taking is the action that the victim necessarily would think is appropriate, but I think if they feel that the company has made a good-faith effort to try to resolve the problem, that that goes a long way towards defusing the problem.

Susan McKenna - *Jackson Lewis, LLP - Partner, Orlando Office*

Yes, I agree, Lisa. I think that in an investigation, it is not uncommon, and I have no problem with an investigator asking the victim, "What do you want to see happen?" But, of course, that's not something that we're wedded to. We're going to take appropriate action depending upon what we can prove, the severity of the case and all those other factors that we're going to take into account. But you're so right to talk about the importance of getting back to the victim, because if they make a complaint, we do an investigation, we impose discipline, but the victim never knows, and it's not obvious to the victim.

They may think that their complaint wasn't heard, and they may then go to that next level of reaching out to an attorney or the EEOC because they feel unsatisfied. So I do think, while you don't have to be specific and tell that victim exactly what you did, you need to let them know that discipline was taken and we don't expect any further problems, so they feel that we've acted.

Lisa Whitney - *Nautica Enterprises, Inc. - VP, Secretary and General Counsel*

Okay, Susan, thank you. I think also the next issue here is that with all of the people involved in this matter - the supervisor or the other employees who know or have complained about the problem, is I think it's almost human nature that people now who have been complained about are annoyed. And that's where you have the problem where it comes out of - or the problem of retaliation. Since most companies do a very poor job of employee reviews, it seems that when there has been a problem, then all of a sudden you're haring about, "So-and-so employee was never such a good employee anyway." Well, too bad. If you don't have a paper trail on the fact that the problem who was the complainant, that the complainant was causing a lot of problems before this, there's nothing really much you an do, except perhaps going forward, if the complainant became a problem for legitimate going-forward reasons, reasons that happened in the future, not anything about what they had done in the past.

I think the whole retaliation thing is a real problem. It's almost - the claimant retaliation I think is probably more severe than the original complaint, and supervisors and your employees really need to be well schooled in what they can and cannot do with regard to retaliation. I think you're going to take it away with age discrimination, Susan?

Susan McKenna - *Jackson Lewis, LLP - Partner, Orlando Office*

I wanted to touch very quickly on a couple of other employment statutes, federal statutes, the Age Discrimination and Employment Act protects employees who are at least 40 years old. When it was initially passed, it had an age 70 ceiling, but that was later removed. So it's now 40 and up. In fact, I've got a case in my office, an 86-year-old employee bringing a claim for age discrimination. Just examples of the kinds of issues that result in age claims in recent years - failure to hire is a very real issue with older employees who find it difficult to secure employment.

Of course, there's a layoff, a reduction in force, a reorganization, there's a lot of potentialities for older employees to say that they were singled out because of their age for reduction. Now it is more common, of course, and almost unheard of not to, in the course of a layoff, to get a waiver and a release from the category of affected employees that complies with the Older Workers Benefits Protection Act, which is a federal statute that sets forth specific requirements that must be in a valid waiver of age discrimination claims. Those requirements include things like a 21-day consideration period for an individual, or a 45-day consideration period if it's a group reduction, a seven-day revocation period and other protections that must be in the release itself in order to be binding as an age waiver.

Of course, like any category of discrimination, age-disparaging humor, comments, any behaviors that could create a hostile workplace are prohibited by this statute.

Lisa Whitney - *Nautica Enterprises, Inc. - VP, Secretary and General Counsel*

Susan, let me ask you, does the ADEA apply to the highest-level employees? At one point at least there had been some sort of an ability to, say, set a 60 or 70-year-old policy for retirement from your highest-level workers. Is that still ...

Susan McKenna - *Jackson Lewis, LLP - Partner, Orlando Office*

That's correct. There is a narrow exception for upper-level executives who can be required to retire upon reaching a certain age. That's correct, Lisa. You're right.

I'm not really going to say much about the Equal Pay Act except to say that it's there, it prevents gender discrimination on the basis of wages. Many times, equal payout claims are brought along with Title 7 gender claims. And the last statute that we need to touch on is the Americans with Disabilities Act.

Now, this act, shoot, you could spend an entire day Webcast just talking about all of the nuances of this statute and the regulations that interpret it, and the court decisions that have come down since its passage. It has a very broad definition of disability, and there's a lot of litigation, trying to decide, is this particular plaintiff disabled under the law or not. But it encompasses people who are currently impaired in some fashion, affecting what's called a major life activity, like the ability to move, to interrelate, to communicate, to use your major senses.

But it also protects people who have a record or a history of a disability, or even someone that's never been impaired, but they're regarded, perhaps, as being impaired, because of, for example, an impediment that affects their gait or their speech that's not significantly limiting, but nevertheless may communicate that they are, in some fashion, disabled. There are key definitions to this statute, like any other. If somebody is otherwise qualified to do the job, and that means that they can perform the essential functions of that position either with or without a reasonable accommodation, then they're protected from discrimination under the ADA. As I mentioned earlier, there's also that accommodation requirement that it shares with religious discrimination.

This law changed the way in which we can get information about medical histories or previous worker's comp claims. The ADA has prohibited any inquiries that might tend to reveal the existence of ability pre-offer of employment. So we no longer can ask any medical-related information prior to extending an offer of employment to somebody, and that's really changed the way in which information was obtained during the hiring process. It protects those disabilities, conditions that may not obviously be disabilities - addictions to drug or alcohol may be disabilities, depending upon the nature of the addiction. The simple rule of thumb is, if it's a legal substance like alcohol or your own prescription, an addiction may well amount to a disability. If it's an addiction to an illegal substance or somebody else's prescription, illegal use of a prescription drug, then it's likely not to be a disability.

Of course, what you have to do to accommodate those kinds of conditions is going to vary, depending on whether we're talking about misconduct or performance or attendance issues, the standards are different in terms of what might we have to do to accommodate. Unlike any other discrimination statute, the ADA has a specific prohibition against disclosure of information. There's a confidentiality requirement right in the statute, and for that reason companies must segregate, must keep separate all medical-related information not included in the personnel files, and we look to keep oral communications from disclosing information about somebody's disability or medical condition.

Now with that, Lisa, I know we're probably just about of time, but if you could sum up the best employment practices, it would be a great way to end.

Lisa Whitney - *Nautica Enterprises, Inc. - VP, Secretary and General Counsel*

Sure. I think it's an easy thing to remember, the way that Jackson Lewis has set out the PowerPoint, which is like feast or famine. The feast is what we all want. We want fundamental fairness. It's what we demand in our lives, and that's what we should give in return. We should have effective communications, prompt responses and thorough investigations, appropriate documentation should be timely, accurate, with no legal conclusions and no inappropriate tone. Remember that e-mail is documentation and it's the Bill Gates rule - e-mail is documentation.

Supervisory training, I think, is also key. If your company policy is that you have an open-door policy, well, then, it must be an open-door policy and your supervisors must understand that. You have to train your supervisors not only how to act, but how to respond when a complaint is made, and how to observe, so that even if a complaint is not made, they are aware of what's happening with the people that they supervise. Then, of course, you need a timely response in dealing with all of these issues and claims of discrimination.

The more you delay, the worse it is. Recollections may fade over time, and even worse, fiction may become perceived reality. So that's the feast, and we don't want the famine. And that's it. I guess we have our questions, if there are any.

Susan McKenna - *Jackson Lewis, LLP - Partner, Orlando Office*

Thank you, Lisa.

Margaret Bryant - *Jackson Lewis, LLP - Director of Communications*

Well, thank you, Susan and Lisa, and want to of course thank the Association of Corporate Counsel Waiver and Employment Law Committee, the ACC staff, and most especially our listeners today. We have run over a little bit, but I think it was well worth the extra five minutes. Interestingly enough, there are no questions at this point, but we will continue to be happy to take your questions if you so choose to e-mail them to bryantm@jacksonlewis.com.

And, with that, if there is no further comment, we will say goodbye.

Susan McKenna - *Jackson Lewis, LLP - Partner, Orlando Office*

Thank you, Margaret.

Lisa Whitney - *Nautica Enterprises, Inc. - VP, Secretary and General Counsel*

Thank you, Margaret. Bye-bye.

Margaret Bryant - *Jackson Lewis, LLP - Director of Communications*

Thanks, Susan.

Okay, bye-bye.