


# EMPLOYMENT DISCRIMINATION LITIGATION

Expert defense strategies for leading outside counsel and in-house counsel  
on litigating today's key issues involved in representing management

February 25 – 26, 2010 | Millennium UN Plaza Hotel | New York, NY


Featuring 23 federal judges from  
district courts located in 10 circuits.

**HEAR FROM:**

 **Hon. Robert W. Pratt**  
U.S. Dist. Ct., S.D. Iowa

 **Hon. James G. Carr**  
U.S. Dist. Ct., N.D. Ohio

 **Hon. Donetta W. Ambrose**  
U.S. Dist. Ct., W.D. Pa.

 **Hon. John C. Coughenour**  
U.S. Dist. Ct., W.D. Wash.

 **Hon. Eric F. Melgren**  
U.S. Dist. Ct., D. Kan.

 **Hon. James L. Robart**  
U.S. Dist. Ct., W.D. Wash.

 **Hon. Roslyn O. Silver**  
U.S. Dist. Ct., D. Ariz.

 **Hon. S. Maurice Hicks, Jr.**  
U.S. Dist. Ct., W.D. La.

 **Hon. Matthew F. Kennelly**  
U.S. Dist. Ct., N.D. Ill.

 **Hon. William T. Lawrence**  
U.S. Dist. Ct., S.D. Ind.

 **Hon. Jack Zouhary**  
U.S. Dist. Ct., N.D. Ohio

**Faculty includes 37 experienced in-house counsel from:**

Aetna	Family Dollar	Schering-Plough
American Express	FedEx	Sprint Nextel
APCO	GE	Sterling Jewelers
AT&T	Hertz	Sunoco
Bayer	IBM	3M
Bell Helicopter	Medtronic	TJUH
Bridgestone	Merrill Lynch	Toyota
Bristol-Myers Squibb	Microsoft	Trans States
ConvaTec	Motorola	24 Hour Fitness
Covidien	Pioneer Hi-Bred	Verizon Wireless
Credit Suisse	Prudential	W.R. Grace
Del Monte	Roche	

**...AS WELL AS FROM:**

 **Hon. William S. Duffey, Jr.**  
U.S. Dist. Ct., N.D. Ga.

 **Hon. Warren W. Eginton**  
U.S. Dist. Ct., D. Conn.

 **Hon. David N. Hurd**  
U.S. Dist. Ct., N.D.N.Y.

 **Hon. John E. Jones III**  
U.S. Dist. Ct., M.D. Pa.


 **Hon. George A. O'Toole, Jr.**  
U.S. Dist. Ct., D. Mass.

 **Hon. C. Ashley Royal**  
U.S. Dist. Ct., M.D. Ga.

 **Hon. Anthony J. Battaglia**  
U.S. Dist. Ct., S.D. Calif.

 **Hon. Arthur J. Boylan**  
U.S. Dist. Ct., D. Minn.

 **Hon. James P. O'Hara**  
U.S. Dist. Ct., D. Kan.

 **Hon. Joe B. Brown**  
U.S. Dist. Ct., M.D. Tenn.

 **Hon. Mildred E. Methvin**  
U.S. Dist. Ct., W.D. La.

 **Hon. James C. Francis IV**  
U.S. Dist. Ct., S.D.N.Y.

**Senior in-house counsel, top outside defense litigators and renowned jurists will provide you with up-to-the minute practical information on:**

- » Preparing for new and anticipated legislation, regulations, and amendments affecting the employment discrimination landscape
- » **Disability Claims:** Defending against FMLA, ADA, and pregnancy claims and making sense of the "Bermuda Triangle crossover" between them all
- » The surge in high-exposure **retaliation claims:** Getting them dismissed via dispositive motion and/or minimizing their jury appeal
- » Countering **age discrimination claims under ADEA** as a result of individual adverse actions and in the context of **reductions in force**
- » Special issues in **gender/sex discrimination:** Defending against **pay and compensation discrimination** suits and the latest sexual orientation/gender identity claims
- » The rise in **sexual harassment claims:** Minimizing conduct or showing that it had no effect on the discriminatee
- » Ensuring that **evidence** doesn't overwhelm the defense's case on the merits — "Me Too," discriminatory motive, **mixed motive, witness credibility and turnover**
- » **Procedural strategies** for winning employment discrimination cases: Spotlight on **removal and summary judgment**
- » **Mediation and arbitration** of discrimination claims: Strategies and techniques for engaging in successful **alternative dispute resolutions**
- » **Class actions** considerations: Certification, settlement and more
- » **Jury communication and advocacy:** Humanizing the employer, and overcoming sympathy for plaintiffs and bias against companies

Be sure to also register for the:

**ERISA Boot Camp for Labor & Employment  
Defense Litigators Who Occasionally Encounter  
Benefit Plans and Fiduciary Related Matters**

February 24, 2010 | 1:30 p.m. – 5 p.m.



Media Partner:



Exhibitor:



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# The premier employment discrimination litigation conference devoted entirely to the defense of claims, led by an unparalleled faculty of 37 in-house counsel, 23 federal judges, and the top outside counsel defense litigators and firms.

The volume of employment discrimination litigation has greatly increased. The cases are complex and the stakes involved for defendants are exceptionally high. The best plaintiff attorneys are involved in these cases and the defense bar is seeing more and more class actions and collective claims. But in defending and managing these complex claims, *counsel for management face a distinct uphill battle*, including:

- Overly-aggressive tactics and even abusive practices by opposing counsel that have made the defense of cases significantly more expensive, adding exposure to employers
- Containment of defense costs, particularly when email and e-discovery has substantially changed the playing field, and the all too often occurrence of early settlement of an unmeritorious claim to avoid defense costs
- Negotiating unfavorable facts that that could have been easily corrected by prior planning and better written and comprehensive documentation
- Credibility of company and management witnesses in front of the jury, and turnover in the workplace leading to key witnesses or decision makers being no longer with the employer
- Frivolous claims and the unlevel economic playing field between plaintiff and defense counsel
- Juror attitudes and psychology
- New legislation overturning Supreme Court decisions
- Difficult summary judgment standards for these types of cases
- Varying extremes in jurisdictions (e.g. federal or state, liberal or conservative state)

As a result of this uphill battle, **there is simply no room for error in the defense of these claims.** In response, **American Conference Institute** is proud to introduce *the essential advanced defense forum that will shape the future of employment discrimination strategies for leading litigators and in-house counsel: **Defending and Managing EMPLOYMENT DISCRIMINATION LITIGATION.*** Through a distinguished faculty of 37 in-house counsel, the top outside defense counsel, as well as 23 renowned jurists, this conference will provide even the most seasoned litigators with clarity and certainty with respect *to today's key issues crucial to mounting a rigorous and complete defense.*

Our employment litigation events, including our annual *Wage & Hour* and *EPLI* conferences, offer unique opportunities for in-house counsel to gain expertise in evaluating litigation tactics and approaches and providing valuable input to the trial team and for law firm litigators to learn from some of the best in the industry. They offer tremendous networking opportunities with senior in-house counsel.

Register now by calling 888-224-2480, faxing your registration form to 877-927-1563 or registering online at: [www.AmericanConference.com/Discrimination](http://www.AmericanConference.com/Discrimination)

## Who You Will Meet

### In-House Counsel, including:

- General Counsel
- Chief Employment Counsel
- Labor and Employment Counsel
- Employment Litigation Counsel

### Outside counsel practicing in the areas of:

- Labor and Employment Law
- Employment Discrimination
- Class Actions

## Continuing Legal Education Credits



Accreditation will be sought in those jurisdictions requested by the registrants which have continuing education requirements. This course is identified as nontransitional for the purposes of CLE accreditation.

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ACI has a dedicated team which processes requests for state approval. Please note that event accreditation varies by state and ACI will make every effort to process your request.

PRE-CONFERENCE BOOT CAMP | WEDNESDAY, FEBRUARY 24, 2010 | 1:30 p.m. – 5:00 p.m.

### ERISA Boot Camp for Labor & Employment Defense Litigators Who Occasionally Encounter Benefit Plans and Fiduciary Related Matters

A valuable 3 ½ hour drill down on:

- Establishing an ERISA Plan
- ERISA preemption procedurally and substantively
- Evidence outside the administrative record
- Standards of review
- Conflicts of interest
- Fiduciaries and nonfiduciaries
- Plan remedies
- ERISA's enforcement scheme
- Service provider relationships
- Attorney-client privilege and ERISA practice
- Section 510 claims
- ERISA fund claims
- Intersection of ERISA with ADA, FMLA, and Workers' Comp

*Plus much more! Speakers TBA Shortly*

Register now: 888-224-2480 • fax: 877-927-1563 • [AmericanConference.com/Discrimination](http://AmericanConference.com/Discrimination)

7:15 Registration and Continental Breakfast

7:55 Co-Chairs' Welcoming Remarks






**Gregory M. McLaughlin**  
Senior Attorney, Litigation  
IBM (White Plains, NY)



**William Klemick**  
Vice President, Counsel  
Bayer Corporation (Pittsburgh, PA)

8:00 **In-House Management Think Tank on Containing Costs (Including ESI/E-Discovery Burdens and Attorney Fees) and Optimizing Internal Policies, Practices, and Documentation to Set Up, Control and Strengthen the Defense if Litigation Arises**

Panel 1 8:00 – 9:00	Panel 2 9:00 – 10:00 <i>(morning coffee break from 10:00-10:05)</i>	Panel 3 10:05 – 11:05
<p><b>David J. A. Hayes III</b> Vice-President &amp; General Counsel <b>Trans States Holdings, Inc.</b> (St. Louis, MO)</p> <p><b>Deborah Hilke</b> Principal Litigation Counsel <b>Medtronic, Inc.</b> (Minneapolis, MN)</p> <p><b>Jane Howard-Martin</b> Assistant General Counsel Labor &amp; Employment <b>Toyota Motor Sales, U.S.A., Inc.</b> (Torrance, CA)</p> <p><b>Paul Lancaster Adams</b> Associate General Counsel <b>Microsoft Corporation</b> (Redmond, WA)</p> <p><b>Kevin A. Marks</b> VP, General Counsel <b>Roche Palo Alto LLC / Roche Molecular Systems</b> (Palo Alto, CA)</p> <p><b>Rebecca E. Walsh</b> Senior Employment Counsel <b>Covidien</b> (Hazelwood, MO)</p> <p><b>Larry E. Wollert, II</b> Vice President and Corporate Counsel <b>24 Hour Fitness</b> (San Ramon, CA)</p> <p><b>Bettina W. Yip</b> Associate General Counsel <b>Del Monte Foods</b> (San Francisco, CA)</p> <p><b>James M. Zappa</b> Assistant General Counsel <b>3M Company</b> (St. Paul, MN)</p> <p><b>Moderator:</b></p> <p> <b>Wayne E. Pinkstone</b> Fisher &amp; Phillips LLP (Radnor, PA)</p>	<p><b>Celeste Como</b> Assistant General Counsel <b>Verizon Wireless</b> (Basking Ridge, NJ)</p> <p><b>Beth A. Forwalder</b> Senior Counsel, Employment &amp; Labor Law <b>Sprint Nextel</b> (Overland Park, KS)</p> <p><b>David B. Friedman</b> Senior Staff Counsel, Labor &amp; Employment Law <b>The Hertz Corporation</b> (Park Ridge, NJ)</p> <p><b>Monique Gibson</b> Attorney <b>Bell Helicopter</b> (Fort Worth, TX)</p> <p><b>E. Jane Hix</b> Associate Counsel, Office of General Counsel <b>Thomas Jefferson University Hospitals, Inc.</b> (Philadelphia, PA)</p> <p><b>Timothy G. Johnson</b> General Attorney <b>AT&amp;T Mobility</b> (Atlanta, GA)</p> <p><b>Dori Anne Kuchinsky</b> Senior Litigation Counsel <b>W.R. Grace</b> (Leesburg, VA)</p> <p><b>Neal A. Murphy</b> Counsel <b>Aetna Inc.</b> (Hartford, CT)</p> <p><b>Virginia Wadsworth</b> Vice President and General Counsel <b>Automobile Protection Corporation – APCO</b> (Norcross, GA)</p> <p><b>Moderator:</b></p> <p> <b>Mark E. Schreiber</b> Edwards Angell Palmer &amp; Dodge LLP (Boston, MA)</p>	<p><b>Alexander Barnard</b> Director &amp; Counsel <b>Credit Suisse Securities (USA) LLC</b> (New York, NY)</p> <p><b>Jason K. Brown</b> Vice President and Senior Counsel Employment Law Group <b>American Express Company</b> (New York, NY)</p> <p><b>Wanda E. Flowers</b> Chief Counsel, Labor, EEO &amp; Employment <b>Sunoco, Inc.</b> (Philadelphia, PA)</p> <p><b>John P. Forgach</b> Senior Employment Law Counsel <b>W.R. Grace &amp; Co.</b> (Columbia, MD)</p> <p><b>Sharyn B. Mandell</b> Vice President, Corporate Counsel <b>Prudential</b> (Newark, NJ)</p> <p><b>Michael A. Putetti</b> FVP – Senior Counsel <b>Merrill Lynch</b> (New York, NY)</p> <p><b>Xan Raskin</b> VP &amp; Senior Counsel, HR Law Group <b>Bristol-Myers Squibb</b> (New York, NY)</p> <p><b>Richard R. Roberts</b> Managing Director, Employment Litigation <b>Federal Express Corporation</b> (Memphis, TN)</p> <p><b>Michael R. Von Ohlen</b> Counsel <b>ConvaTec</b> (Skillman, NJ)</p> <p><b>Moderator:</b></p> <p> <b>Michael C. Lasky</b> Davis &amp; Gilbert LLP (New York, NY)</p>

**THINK TANK TOPICS INCLUDE:**

*The Paper Trail and Documentation*

- Adequate documentation that supports legitimate reason(s) for action taken
- Well written and comprehensive documentation of performance issues and prior discipline

*Avoiding Unfavorable Facts in Litigation: Policies, Practices & Consistent Application of Policy/Practice*

- Educating & training workforce/supervisors/management and avoiding inconsistent application of company policy
- Prompt, complete and competent investigation of the claim and creating an administrative record that is accurate

*Conducting Reductions in Force That Avoid Discrimination Claims*

- RIF: How it's handled and documented; conducting RIFs in an appropriate & thought-out manner
- RIF Reasonable efforts to ensure nondiscrimination, including analysis to avoid disparate impact

*Cost of Defending Cases, Attorney Fees, and Fee Shifting*

- Managing/containing legal fees and outside counsel: What alternative billing methods are being used successfully?
  - Fee shifting statutes and how the fee can run the case instead of the merits or the plaintiff's interests

*Preservation and Production of ESI and E-Discovery Considerations*

- An unlevel playing field: Managing the disproportionate costs and logistics of ESI
- Ensuring the burdens of e-discovery do not overwhelm the merits of the case; mitigating sanction/spoliation risk

11:05 **Preparing for New and Anticipated Legislation, Regulations, and Amendments Affecting the Employment Discrimination Landscape**

**Dean Kim**

General Counsel – Labor and Employment  
Bridgestone Americas, Inc. (Nashville, TN)



**Susan M. DiMichele**

Squire, Sanders & Dempsey L.L.P.  
(Columbus, OH)



**Brian S. Greig**

Fulbright & Jaworski L.L.P.  
(Austin, TX)



**Jeffrey I. Kohn**

O'Melveny & Myers LLP  
(New York)



**Mark J. Neuberger**

Foley & Lardner LLP  
(Miami, FL)

*There are sweeping changes within the Obama administration, Congress and federal and state agencies. The full impact of these changes remains to be seen, but employers and their counsel need to prepare for major changes to how the employment relationship is regulated as well as to how those changes will affect industry's risk and litigation profile. Speakers will address the key issues currently in play, such as:*

- New laws, amendments to old laws, legislative intent behind these new statutes, and pending bills/initiatives
  - The ADA and how it will impact on things such as defining what substantially limits one's major life activities; Mental Health Parity; Lilly Ledbetter Act; Fair Pay Act; Employee Free Choice Act; Employment Non-Discrimination Act; GINA; FMLA-Military leave
- Overturned Supreme Court decisions as a result of newer legislation, including in the age bias and pay discrimination areas
- New case law involving new legislation where the law is not developed

12:05 **Disability Claims: Defending Against FMLA, ADA, and Pregnancy Claims and Making Sense of the "Bermuda Triangle Crossover" Between Them All**



**Helen Adams**

Corporate Counsel  
Pioneer Hi-Bred International (Johnston, IA)



**Amy L. Bess**

Sonnenschein Nath & Rosenthal LLP  
(Washington, DC)



**Neil A. Capobianco**

Seyfarth Shaw LLP  
(New York, NY)



**Christopher G. Gegwich**

Nixon Peabody LLP  
(Jericho, NY)



**Michael P. Collins**

Bond, Schoeneck & King, PLLC  
(New York, NY)

**The ADA (and its Amendments), Reasonable Accommodation, and the Interactive Process**

- The EEOC's continued emphasis on ADA litigation
- ADA Amendments: who is now in the protected class?; who is "disabled"?; how to now defeat a claim on the basis that the plaintiff is not disabled
- What is the impact of the ADA Amendments on the number of filed charges/lawsuits and what is the impact on the number of claims that survive summary judgment?
- Determining whether or not an employee has a disability at all, is covered by ADA, and if the employer has any duty to provide the employee with a reasonable accommodation
- Once a condition is deemed a disability, how does the employer defend under the other prongs?
  - what is a "reasonable accommodation"; claims of failure to reasonably accommodate a disability; proving that an employer reasonably accommodated a disabled employee
  - what's required as part of the "interactive process" and navigating the "interactive process" in responding to requests for "reasonable accommodation"
- Addressing the nuances of claims that an employee was "regarded as" disabled

**FMLA, Leave of Absence Laws and Related Claims (including Leave Retaliation Provisions), and Employer Leave Policies**

- FMLA and the new regulations – what you now need to know
- Proving that an illness is not a serious health condition under the FMLA
- The level of sophistication needed for companies to handle FMLA cases correctly from the start
- Dealing with and defending FMLA intermittent leave claims
- How to handle the case of strategic use of disability leaves to foil the employer's intent to discipline or terminate the employee for performance reasons
- Special nuances with regard to
  - cases where employees have used all leave that is available to them under state and federal and employer leave policies, but needs additional time off -- proving the point at which doing so becomes an undue burden on the employer
  - cases where an employee returns from leave but has ongoing medical issues and performance problem – how to avoid discrimination and/or retaliation cases with regard to the performance issues in this context

**Pregnancy Bias or Discrimination**

- Overcoming the unique challenges in defending against pregnancy claims, as compared to other discrimination claims
- Defending a case involving employee leave issues where there is a difficult pregnancy whereby the mother/employee and infant require extended medical care

**ADA/FMLA Interplay and "The Bermuda Triangle" – ADA, FMLA, Workers' Comp and Beyond**

- Defending cases involving crossover of ADA and FMLA and the interplay between the expanded ADA and the revised FMLA regulations
- Litigating leave management issues under the FMLA/ADA, particularly additional (beyond FMLA) leave as an ADA reasonable accommodation
- Defending against claims involving employees who have some disability or work restriction involving the intersection and/or conflict of two or more of the following laws: ADA, FMLA, Workers' Comp, Social Security disability, ERISA, and unemployment claims

1:05 **Networking Luncheon for Speakers and Delegates** 

1:55 **The Surge in High-Exposure Retaliation Claims: Getting Them Dismissed Via Dispositive Motion and/or Minimizing Their Jury Appeal**



**Gregory M. McLaughlin**

Senior Attorney, Litigation  
IBM (White Plains, NY)



**Jill M. Harrison**

Dow Lohnes PLLC  
(Atlanta, GA)



**Eve I. Klein**

Duane Morris LLP  
(New York, NY)



**Terence P. McCourt**

Greenberg Traurig, LLP  
(Boston, MA)



**D. Michael Reilly**

Lane Powell PC  
(Seattle, WA)

- Newest trends in the expansion of retaliation claims: what constitutes protected activity and/or adverse action?
- The impact of the Supreme Court opinion in *Burlington*: dealing with the new, lower, standard for retaliation claims to survive summary judgment
- Retaliation and whistleblower claims under an array of federal and state statutes and common law causes of action, including the recently enacted ARRA stimulus package
- Preventing retaliation claims: what the jury will want to see before you terminate a problem employee
- Overcoming the difficulties in defending retaliation claims because of the law and the nexus/causal connection issues to protected activity
- Easy to plead, difficult to dispose of: How defense counsel can succeed in summary judgment motions
- Countering the usage of discrimination and whistleblower claims as precursors to retaliation claims
- Keeping what might be an easy to address discrimination claim from becoming a difficult retaliation claim

- Retaliation accompanying a discrimination claim: Defending against a remaining retaliation claim when the underlying discrimination or harassment claim is found to be without merit or specious
- Defending retaliation claims brought by current (rather than former) employees
- Overcoming the problematic fact of temporal proximity between a complaint or EEOC charge and a subsequent adverse action or termination
- Jury appeal of retaliation claims: Voir Dire on retaliation claims and how to overcome juror preconceived notions that it is natural to want to retaliate when someone has made allegations against you – even if they were unfounded
- Dealing with and defending retaliation claims that were filed solely to protect an otherwise poor performer or when the plaintiff has a demonstrable history of prior complaints

2:55 **Countering Age Discrimination Claims under ADEA as a Result of Individual Adverse Actions and in the Context of Reductions in Force**

**Jill A. Goldy**

Corporate Vice President, Labor/Employment Law, Ethics & Compliance  
Motorola, Inc. (Schaumburg, IL)

**Wayne O. Adams III**

Ice Miller LLP  
(Indianapolis, IN)

**John M. Barr**

LeClairRyan  
(Richmond, VA & Washington, DC)

**Marcia E. Goodman**

Mayer Brown LLP  
(Chicago, IL)

**Robert T. Zielinski**

Miller, Canfield, Paddock and Stone, P.L.C.  
(Chicago, IL)

Individual Adverse Actions

- The number of age discrimination charges (under the ADEA) brought before the EEOC have grown significantly in recent years relative to other discrimination claims – what are the preventive employment practices that should be practiced with this key trend in mind?
- The latest defense strategies given the Supreme Court's ruling in *Gross v. FBL*, which requires that age now be the “decisive factor” in terminating the plaintiff
- Disposing of “pretext” arguments
- Defending against disparate impact claims, given that the standard “reasonable factor other than age” laid down by the Supreme Court has not been well defined in case law or regulations
- The sympathy factor: How to defend an age discrimination case where the plaintiff is the primary breadwinner, and/or has some difficult situations with which to deal at home (such as a spouse dying of cancer)
- Overcoming the difficulty of mitigating damages in age discrimination claims

Reductions in Force

- Defending age discrimination cases arising out of reductions in force, especially given difficulties of making sure one gets valid releases and the increasingly hostile job market
- How do you bring out legit selection criteria (such as high salary or weaker skills) in your defense given the following:
  - older workers tending to believe they are targeted in RIFs because of age
  - in a period of recession it's easy to “disguise” terminations of older workers
  - aging workforce that either wants or needs to continue to work, leading to less turnover through regular attrition and voluntary early retirement programs, causing employers (particularly in the current downsizing climate) to make more frequent involuntary termination decisions affecting older employees
- How are RIF claims currently moving through the EEOC process?
- Overcoming the complexity of RIF cases and the various case law strains that can apply
- Mitigating damages in RIF cases

3:55 **Afternoon Refreshment Break**

4:00

**Special Issues in Gender/Sex Discrimination: Defending Against Pay and Compensation Discrimination Suits and the Latest Sexual Orientation/Gender Identity Claims**



**William Klemick**

Vice President, Counsel  
Bayer Corporation (Pittsburgh, PA)



**Alison N. Davis**

Little Mendelson P.C.  
(Washington, DC)



**Margaret A. Keane**

Dewey & LeBoeuf LLP  
(East Palo Alto, CA)



**Reed L. Russell**

Akin Gump Strauss Hauer & Feld LLP  
(Washington, DC)

Glass Ceiling, Gender Claims and the Equal Pay Act

- Multi-plaintiff or class actions: Countering the ease of the plaintiffs in demonstrating membership in the protected class
- The impact of the Lilly Ledbetter Fair Pay Act of 2009 on the defense of compensation discrimination claims
- Developing defendant's evidence in a compensation discrimination claim after the Ledbetter Fair Pay Act (which effectively abolishes the statute of limitations for compensation discrimination claims), where a claim alleges a discriminatory decision occurred during a period for which records are no longer available
- The Paycheck Fairness Act? – what's the latest?; if passed, what will be the intrusion on employers?

Sexual Orientation/Gender Identity

- What's the latest on claims of discrimination against LGBT?
- LGBT claims in light of state marriage initiatives and the Defense of Marriage Act
- LGBT employment law protection under state and local laws
- Overt and covert harassment of LGBT employees in the workplace
- Special nuances on defending against discrimination suits with a transgender employee
- What you now need to know re same-sex marriage, civil unions and domestic partnerships as a factor in the workplace

5:00

**The Rise in Sexual Harassment Claims: Minimizing Conduct or Showing That It Had No Effect on the Discriminatee**

**Jennifer Hamilton Lewis, Esq.**

Senior Claims Analyst  
Darwin National Assurance Company (Farmington, CT)



**Stuart R. Buttrick**

Baker & Daniels LLP  
(Indianapolis, IN)



**Lauri F. Rasnick**

Epstein Becker & Green, P.C.  
(New York, NY)



**Janis van Meerveld**

Adams and Reese LLP  
(New Orleans, LA)

- What conduct is now “severe or pervasive” in the eyes of your jury (vs. a jury in some other city or state)
- Hostile work environment: recent changes that make it more difficult for employers to defend against them, at least at the summary judgment stage
- How to counter claims by employees who feel that “displeased” is harassment, or just do not like the boss, and claim harassment as a way to get rid of that boss
- Sexual harassment claims where the relationship was apparently consensual at the beginning but then changed
- How not to let the secondary fallout from the claims (beyond the legal claims) impact the cases
- Defending against claims when a key executive is the alleged perpetrator or there are allegations of physical abuse

6:00

**Conference Adjourns**

8:00 **View From the Bench: Federal District & Magistrate Judges Speak out on How to Convey Complexities to a Court (including Parameters of and Changes to the Law), Effective Theories/Defenses, Evidentiary Approaches, Statute of Limitations, Deciding Cases Early, Discovery, and More**

Panel 1 – Circuits 8, 9 and 10  
8:00 – 9:30

- Hon. Robert W. Pratt*  
U.S. Dist. Ct., S.D. Iowa
- Hon. John C. Coughenour*  
U.S. Dist. Ct., W.D. Wash.
- Hon. Eric F. Melgren*  
U.S. Dist. Ct., D. Kan.
- Hon. James L. Robart*  
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- Hon. Anthony J. Battaglia*  
U.S. Dist. Ct., S.D. Calif.
- Hon. Arthur J. Boylan*  
U.S. Dist. Ct., D. Minn.
- Hon. James P. O'Hara*  
U.S. Dist. Ct., D. Kan.


Moderator:

 **Steven W. Suflas**  
Ballard Spahr LLP  
(Voorhees, NJ)

Panel 2 – Circuits 5, 6 and 7  
9:30 – 10:55 (morning coffee break from 10:55-11:00)

- Hon. James G. Carr*  
U.S. Dist. Ct., N.D. Ohio
- Hon. S. Maurice Hicks, Jr.*  
U.S. Dist. Ct., W.D. La.
- Hon. Matthew F. Kennelly*  
U.S. Dist. Ct., N.D. Ill.
- Hon. William T. Lawrence*  
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U.S. Dist. Ct., N.D. Ohio
- Hon. Joe B. Brown*  
U.S. Dist. Ct., M.D. Tenn.
- Hon. Mildred E. Methvin*  
U.S. Dist. Ct., W.D. La.


Moderator:

 **Jason C. Schwartz**  
Gibson, Dunn & Crutcher LLP  
(Washington, DC)

Panel 3 – Circuits 1, 2, 3 and 11  
11:00 – 12:30

- Hon. Donetta W. Ambrose*  
U.S. Dist. Ct., W.D. Pa.
- Hon. William S. Duffey, Jr.*  
U.S. Dist. Ct., N.D. Ga.
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U.S. Dist. Ct., D. Mass.
- Hon. C. Ashley Royal*  
U.S. Dist. Ct., M.D. Ga.
- Hon. James C. Francis IV*  
U.S. Dist. Ct., S.D.N.Y.

Moderator:

 **Peter D. Stergios**  
McCarter & English, LLP  
(New York, NY)

- Early defense considerations (motions to dismiss, preemption, summary judgment practice)
- Novel approaches to case management
- Discovery limits
- Jury demands, motions to strike
- Conveying the complex to the court
- Procedural and legal interpretative inconsistencies related to venue across the federal circuits – how to handle differing approaches among some circuits on key standards of title VII
- Educating the court/administrative agency about the parameters of the law (and changes to the law)
- Settlement, particularly after losing a decision on a 12(b)(6) motion
- Judicial “pet peeves”

- Presenting comparative evidence to demonstrate that the termination decision was consistent with other decisions made with regard to other employees in similar circumstances
- Excluding evidence of, or responding to, statements allegedly made by supervisors or managers, where the statement was made by someone not a decision maker or was unconnected to the challenged decision

Mixed Motive Evidence

- Responding to mixed motive claims
- Defending cases given the recent unfavorable rulings on mixed motive


Witness Credibility and Turnover of Witnesses


- Quality of witnesses: Avoiding company and management witnesses who lack credibility
- Ferreting out any and all witnesses available to support the defenses
- Bolstering your defense through interviews of all appropriate witnesses and not taking your client's word for it: Using your investigation to find previously unknown problems with the plaintiff's case and/or even potential liability by third parties
- Turn-over/termination of witnesses/people with knowledge of the facts of the case: Defending your client when all or many of the key decision makers and fact witnesses are no longer employed with the company and are often uncooperative
- Dealing with employers who terminate key witnesses during active litigation


12:30 Networking Luncheon for Speakers and Delegates 

1:20 **Admissibility of Evidence: Ensuring that Evidence Doesn't Overwhelm the Defense's Case on the Merits —“Me Too,” Discriminatory Motive, Mixed Motive, Witness Credibility and Turnover, and Beyond**

 **Elise M. Bloom**  
Proskauer Rose LLP  
(New York, NY)

 **Vincent A. Cino**  
Jackson Lewis LLP  
(Morristown, NJ)

 **Eric W. Iskra**  
Spilman Thomas & Battle, PLLC  
(Charleston, WV)

 **Charles O. Thompson**  
Lewis Brisbois Bisgaard & Smith LLP  
(San Francisco, CA)

“Me Too” Evidence

- Dealing with anecdotal and “me too” evidence, claims, or witnesses
- Eliminating the “taint” which burdens the employer when other employees testify as to similar or comparable discrimination suffered by them in the same workplace

Special Issues with Discriminatory Motive or Motivation

- Showing a lack of any incentive or motive to discriminate
- Establishing the employer's lack of discriminatory motivation, because it is difficult to prove the absence of a fact

2:15

**Procedural Strategies for Winning Employment Discrimination Cases: Spotlight on Removal and Summary Judgment**

 **Martha S. Doty**  
Alston & Bird LLP  
(Los Angeles, CA)

 **J. Randall Patterson**  
Baker Donelson Bearman Caldwell & Berkowitz, PC  
(Jackson, MS)

 **Ricki E. Roer**  
Wilson Elser Moskowitz Edelman & Dicker LLP  
(New York, NY)



**Richard G. Rosenblatt**  
Morgan, Lewis & Bockius LLP  
(Princeton, NJ)

**Removal**

- Countering the naming of individual defendants on bogus claims to avoid removal to federal court and whether Supreme Court decisions in *Twombly* and *Iqbal* can stem this trend by plaintiffs' attorneys
- Applying *Iqbal* and *Twombly* to employment discrimination cases
- Developing removal strategies
  - when do you make a motion to remove?; pre-lawsuit discussions as sufficient cause for removal; using CAFA as a basis for removal; making a fraudulent joinder motion

**Summary Judgment and Dismissal**

- Determining whether you are preparing a successful summary judgment motion, or whether your case is destined for trial
- Overcoming the difficult summary judgment standard in discrimination cases (and winning the motion)
- Examples of weak claims surviving summary judgment due to the efforts of good plaintiff lawyers
- Countering plaintiffs who lie, expand their stories, change their stories, never commit to a story, etc. to avoid summary judgment
- Separating the wheat from the chaffe in the plaintiff's litany of complaints so as to not bog the courts down in a summary judgment motion, but to focus only on the actionable claims, not the smoke and mirrors
- Positioning discovery so that a viable motion for summary judgment can be made

3:10

**Mediation and Arbitration of Discrimination Claims: Strategies and Techniques for Engaging in Successful Alternative Dispute Resolutions**

**Rachel H. Khedouri**  
Legal Director, Global Law  
Schering-Plough Corporation (Kenilworth, NJ)

**Michael Lynch**  
Vice President, Employee Relations  
Sterling Jewelers, Inc. (Fairlawn, OH)



**Mark Nordstrom**  
Senior Counsel, Labor Relations  
General Electric (Fairfield, CT)



**Patrick M. Sanders**  
Lathrop & Gage LLP  
(St. Louis, MO)

**Mediation and Settlement**

- Steering an employment discrimination matter to non-binding mediation
- How employers can use mediation effectively (and how to structure it)
- Case valuation in the mediation context, and bursting a plaintiff's unreasonable settlement expectation early in a case
- The problem of too many settlement (often pre-litigation): how to avoid the threat of payment of fees to the employer's lawyer leading to immediate settlement on a potentially meritless case
- Strategies for volunteering the one-way attorney fee provision (the "tail that wags the dog") artificially driving up the settlement value of employment discrimination claims
- Mediation advocacy and negotiating skills

**Arbitration**

- Assessing the merits of arbitration as a means of resolving a discrimination, harassment or other employment practices claim
  - quantifying the perceived efficiencies and cost savings of pursuing arbitration rather than litigation; addressing the perception that an arbitration panel is more likely than a court to issue a compromise decision – and if so, why?; whether arbitration results in a decreased likelihood of settlement as compared

4:05

4:10



**Todd S. Aidman**  
Ford & Harrison LLP  
(Tampa, FL)



**Michael Iwan**  
Dorsey & Whitney LLP  
(Minneapolis, MN)

**L. Michelle Gessner**  
Divisional Counsel  
Family Dollar Stores, Inc. (Matthews, NC)



**Jeffrey M. Rosin**  
Constangy Brooks  
& Smith, LLP (Boston, MA)

- The year in review: impact of the leading employment class action settlements
- How the plaintiffs' bar approaches litigation strategy relative to the size of classes and scope of recoveries
- Cutting-edge defense strategies for defeating class certification
- Opt-In and Opt-Out classes together – review of the benefits and burdens
- How elements of the class action differ depending on whether it is a state law, federal or hybrid class action
- The latest on statistic defenses once a class is certified – and how the statistics can be manipulated
- How to control defense costs once a class is certified and mitigate damages exposure

5:05

**Jury Communication and Advocacy in Employment Discrimination Cases: Humanizing the Employer, and Overcoming Sympathy for Plaintiffs and Bias Against Companies**



**Allan S. Bloom**  
Paul, Hastings, Janofsky & Walker LLP  
(New York, NY)



**Lynne C. Hermle**  
Orrick, Herrington & Sutcliffe LLP  
(Menlo Park, CA)



**Barbara E. Hoey**  
Kelley Drye & Warren LLP  
(New York, NY)



**Rebecca Williams Shanlever**  
Troutman Sanders LLP  
(Atlanta, GA)

- Overcoming overwhelming natural and understandable bias of the jury in favor of the employee
- Jury sympathy and psychology for the "little guy": how to handle 12 people in the box, all of whom have suffered or know someone who has suffered some sort of adverse employment consequence at some point in time
- Establishing a theme of personal responsibility over deep pockets responsibility
- Getting the jurors to believe that
  - the employer engaged in due process, that its actions were justified, and that the employee was treated fairly; the employer's actions were for legitimate business reasons or plainly non-discriminatory; the plaintiff is not a sympathetic person; the action complained of would not shock the conscience of a sensible person
- Making the determination which witnesses will be better in front of the jury
- Ideal jurors (and jurors to avoid)

6:00

**Conference Concludes**

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