

PART 2: SEXUAL HARASSMENT AND ASSAULT in the WORKPLACE:

- 1) What's An Employer Supposed to Do?**
- 2) Immigration Issues that May Arise**

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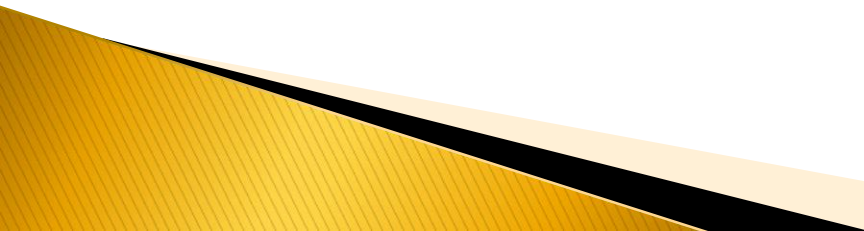
Bill Tamayo

- ▶ Nearly 20 years as EEOC Regional Attorney; office has filed sexual harassment lawsuits that include violent acts, rapes, etc. (overwhelmingly immigrant victims)
- ▶ Represented four dozen battered immigrant women; co-authored VAWA self-petitioning memo for legislation as attorney at the Asian Law Caucus; trained US CIS U-visa adjudicators on assessing credibility and workplace issues that involve crimes and create substantial harm

It's All About Power

- ▶ Sexual assault and harassment illustrate the disparity of power – **and predators know this**
- ▶ Employee v. Supervisor (she depends on him)
- ▶ ***Employee v. Company***
- ▶ Employee: needs job, limited English, limited education, fear of retaliation
- ▶ Company: has money, connections, holds the livelihood card, may employ victim's family, controls the conditions of work, can fire her and siblings, etc.; ***enables the predator***

The Duty of the Employer

- ▶ Employer sets and creates the conditions of work
 - ▶ Employer has duty to make sure that workplace is safe and free of discrimination including harassment
 - ▶ Employer can be liable for sexual harassment by company officials, co-workers and third parties.
 - ▶ Law expects employer to take prompt and corrective action once it knows *or should have known* about harassment.
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Parties

- ▶ Victim or harasser may be man or woman
- ▶ Victim and harasser may be of same sex
- ▶ Harasser can be supervisor, agent of employer, co-worker, or third party
- ▶ Victim can be someone not directly targeted but nevertheless affected by the hostile work environment

What is Sexual Harassment?

- ▶ Unwelcome verbal or physical conduct of a sexual nature, including
- ▶ rape, assaults, battery,
- ▶ grabbing, touching, fondling
- ▶ sexual advances, requests for sexual favors, demeaning terms, etc.
- ▶ *Must be severe or pervasive enough to alter an employee's working conditions that it*
- ▶ *creates intimidating, hostile or offensive work environment*

Sexual Harassment

- ▶ **Quid Pro Quo:** conditioning certain terms of employment, e.g. hire, keeping a job, promotion, getting more hours to work, etc. based on sexual favors

No employer defense to quid pro quo harassment (tangible employment action, e.g. hire, promotion, termination, etc.)

Sexual Harassment by Supervisor

- ▶ **Affirmative Defense:** employer must show
- ▶ 1) that it took steps to deter harassment (policies, training, awareness) and once made aware, took prompt and corrective action (up to and including termination of harasser), AND
- ▶ 2) that claimant failed to notify the employer or use company's preventive measures
- ▶ CA State law: strict liability for supervisor harassment (no defense) (same in WA, HI, etc.)
- ▶ Supervisor: someone with authority to hire, fire, demote, recognized person of authority

Sexual Harassment by Non-Supervisor

- ▶ Non-supervisor can include co-workers or third parties
- ▶ Claimant must show that
 - ▶ 1) employer knew or should have known about the harassment and
 - ▶ 2) failed to take prompt and corrective action to stop the harassment and to deter future harassment
- ▶ **NOTICE:** if someone in supervisory authority or someone designated to report complains is informed about harassment, company is on notice

Common Responses by Employers in EEOC Investigations

- ▶ Employer will claim that it did it's own investigation and found
 - ▶ 1) charging party incredible
 - ▶ 2) charge "not substantiated"; no one saw it; "didn't know who was telling the truth, so we just told them to conduct themselves properly and use common sense"
 - ▶ 3) company interviewed witnesses and "none could corroborate"
 - ▶ 4) Harasser denied it (no kidding) or
 - ▶ 5) "relationship" was consensual

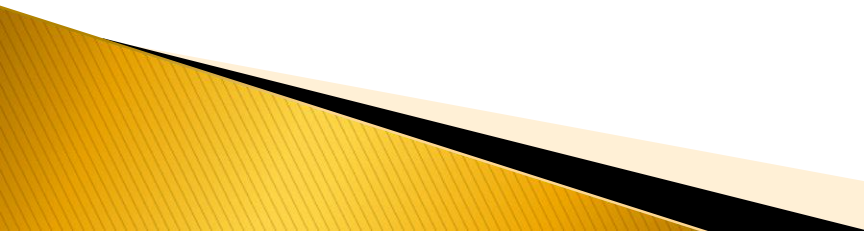
Credibility & Sexism

- ▶ “Jose sexually assaulted me in the back of the shed”
- ▶ “Are you sure Maria? Jose’s a family man. No one has ever complained about him. No one ever saw him attack you or say those things about you. But, weren’t you late for work yesterday? Jose would never do such a thing. He’s been with us since he was a teenager. He hired you (and he can fire you) and your sister”.
- ▶ (*You’re a liar, Maria*)

Credibility & Sexism

- ▶ “Help! Help! Jose’s got a gun, and he just shot someone in the back of the warehouse! There’s blood everywhere!”
- ▶ “Are you sure Maria? Jose’s a family man. No one has ever complained about him. No one ever saw him attack you. But, weren’t you late for work yesterday? Jose would never do such a thing. He’s been with us since he was a teenager. He hired you (and he can fire you)”
- ▶ (*You’re a liar, Maria*)

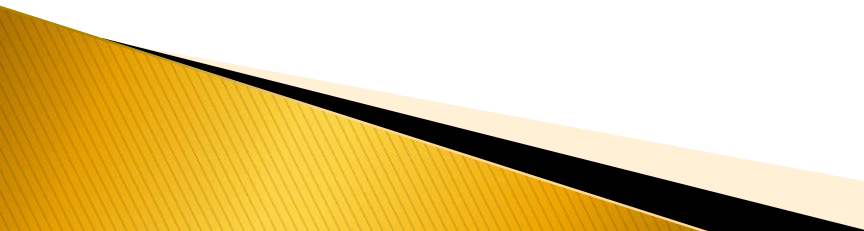
Credibility & Sexism

- ▶ “Help! Help! Jose’s got a gun, and he just shot someone in the back of the warehouse! There’s blood everywhere!”
 - ▶ “Omigosh! Are you okay, Maria??? Who else is working there? Is anyone else hurt? Get everybody to safety!!! Hurry up!! Somebody, call the police!! Get an ambulance!!”
 - ▶ **WHY IS THE RESPONSE SO DIFFERENT?**
- 

Common Threads in Management When Sexual Assault Occurs

- ▶ “Out of sight, out of mind”
- ▶ “Policies, policies?? We don’t have any policies. These are just farm workers.....I mean we’re just a family farm.”
- ▶ “We have state of the art production and marketing. (but ineffective human resources)
- ▶ “Oh yeah, we train them about OSHA. Sexual harassment? We just tell them not to do it.”
(Doesn’t sexual assault threaten health and safety??)

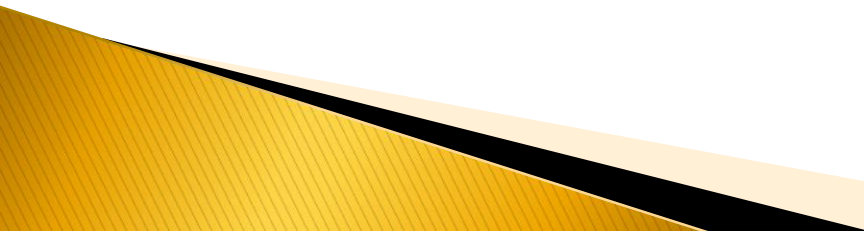
Common Threads

- ▶ Owners and Office staff don't speak Spanish; workers don't speak English
 - ▶ The Farm Manager is given virtually unchecked power; not told that retaliation is unlawful and could lead to termination; long time employee
 - ▶ Supervisors and Managers don't know the laws against sexual harassment; don't know how to handle a complaint; discourage complaints; make threats
 - ▶ If there's a policy, no one knows what it is and what it means; no accountability; no training; no consequences; **ENABLES THE PREDATOR**
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Common Threads

- ▶ If there's one worker who complains, there are many more who have been harassed
- ▶ Use of weapons and threats to kill or do other physical harm; threats to terminate, demote
- ▶ A strong culture of fear; lack of trust that management will protect them
- ▶ Indifference by management at best; retaliatory actions at worse
 - *If the victim was your daughter or sister, how would you want the company to react?*


Employer's Response: Separation

- ▶ TO CONDUCT FAIR INVESTIGATION, PARTIES SHOULD BE INTERVIEWED SEPARATELY. EMPLOYER SHOULD NOT RETALIATE
 - ▶ Did ER change the conditions of Charging Party? How? (different shift, reduced hours, leave without pay) Why? Who decided? (Could it be retaliatory?)
 - ▶ What changes occurred to harasser? Granted administrative leave?
 - ▶ Was CP still reporting to supervisor harasser (possible retaliation?)
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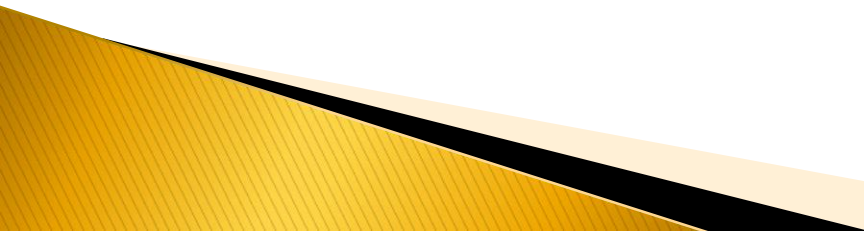
Employer Response: Timing

- ▶ INVESTIGATION SHOULD BE DONE IN MATTER OF DAYS OR WEEKS
- ▶ *Silva v. Lucky Stores* (15 interviews within 30 days of complaint; reasonably concluded that harassment occurred; fired harasser)
- ▶ Lack of staffing or \$\$ resources no excuse; how many in HR; ever hire outside?
- ▶ Overload of cases: no excuse
- ▶ Alleged Harasser or company witness not available: what does company do in an emergency? Call him/her back from vacation? From a business trip?


The Company's Investigator: Competency, Neutrality

- ▶ What procedures exist for conducting the investigation? What training provided by company?
 - ▶ Qualifications of investigator? How many investigations? Ever find that harassment occurred? What percentage?
 - ▶ Training of investigator to conduct investigations? What courses? Dates?
 - ▶ Who does she report to within company? Where in the chain of command? Is she objective and neutral?
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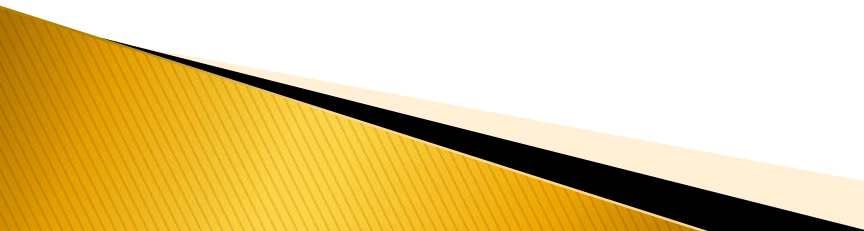
The HR Investigator's Plan

- ▶ Factual and legal issues to resolve
 - ▶ Selection of proper investigator
 - ▶ List of potential witnesses
 - ▶ Timeline and order for interviews; reasons for selecting these witnesses; any witnesses not interviewed that CP suggested? Why not?
 - ▶ Tentative list of questions
 - ▶ EXPECT PLAINTIFF TO GET A COPY OF THE PLAN!
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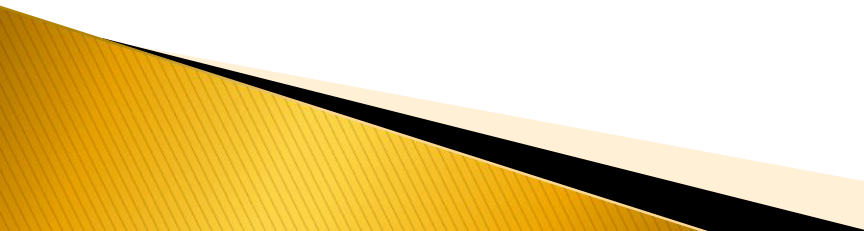
Keys: Cultural and Linguistic Competencies of Investigator

- ▶ Could female victim better describe intimate, embarrassing facts to female investigator?
 - ▶ Does the investigator have experience investigating rape or other egregious harassment cases?
 - ▶ What is investigator's training in "cross cultural dynamics"; must victim "look you in the eye"; what is concluded if she doesn't?
 - ▶ Familiarity with victim's culture?
- 


Language

- ▶ Company Investigator should speak same language as CP; victims better describe emotional facts in first language
 - ▶ What language did INV use?
 - ▶ Did CP ask for a translator? Granted?
 - ▶ Was interpreter used? Who? Competent? Neutral?
 - ▶ If INV is “bilingual”, how fluent? Ever done similar investigation in that language before?
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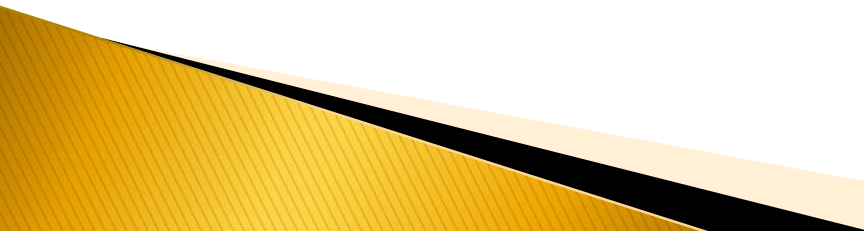
Must Have Real Preventive or Corrective Opportunities

- ▶ What is the complaint process? Avenues to complain?
 - ▶ Has court ever found process inadequate?
 - ▶ Have employees complained that process is unfair, cumbersome? Or do they believe that complainers are fired?
 - ▶ How are employees informed about the process? Language?
 - ▶ How are managers trained? When? Frequency?
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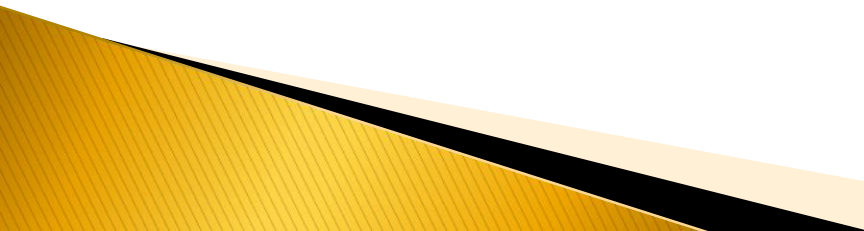
Company's Interview of the Charging Party Should Be Done in Private

- ▶ Was it done in private? Separate from harasser?
 - ▶ Where was interview conducted? Who was present? CP uncomfortable? Feel threatened? Too many “suits”? Frequent interruptions? Attempts to chill her out?
 - ▶ How long did interview last? How many done?
 - ▶ Was there any hint of retaliation for filing complaint? Words used? Reaction?
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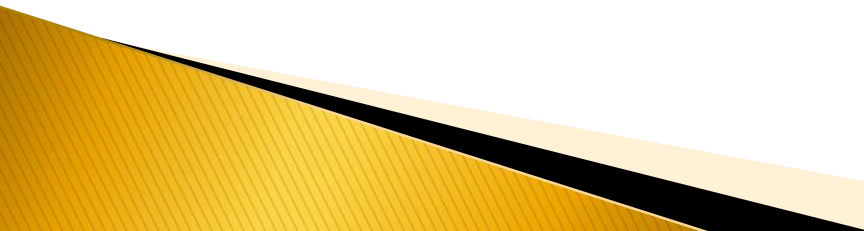
Company's Interview of CP

- ▶ Was CP asked about the details? Given chance to describe? What did CP describe to the investigator? Investigator's reaction?
 - ▶ Was CP visibly upset? Crying?
 - ▶ Did CP mention threats, retaliation by harasser or others?
 - ▶ CAVEAT: in sexual assault cases there is no one way for survivor to react; failure to report to police is not determinative of CP's credibility
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Company's Interview of Alleged Harasser

- ▶ Was he interviewed separately from harasser? How soon after allegation was made? Date? Any delays?
 - ▶ What is company policy on dealing with harasser?
 - ▶ What did investigator ask Harasser?
 - ▶ Did investigator tell Harasser not to retaliate?
 - ▶ Who else was present? Rep? Company official? Company lawyer? (is neutrality compromised?)
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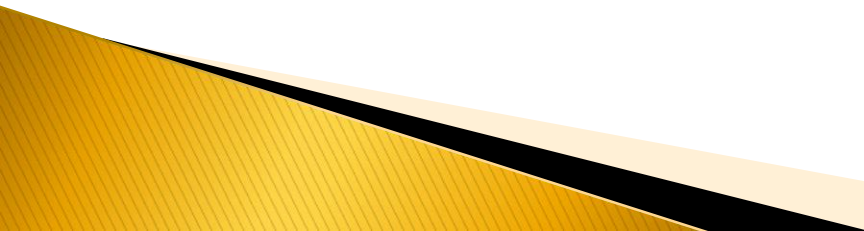
HR Investigator's Determination

- ▶ Factual findings must be precise
 - ▶ Were witnesses pressed for details? Dates?
 - ▶ How did HR Investigator make the credibility findings for each witness? Factors considered? Did she assume bias without interviewing key witness?
 - ▶ How did higher up respond to determination? Is there a higher deciding official who has input? Did official do any of the interviews?
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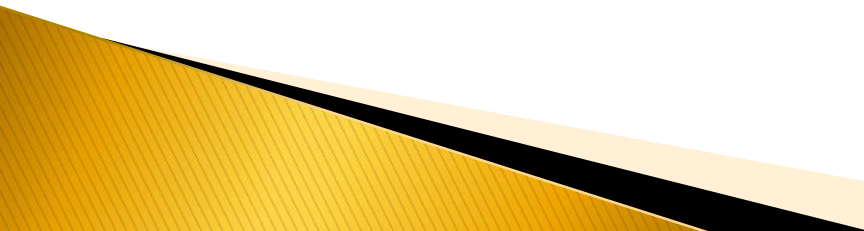
HR Investigator's Determination (cont.)

- ▶ Did higher up make proposed amendments? Who? Did lawyer tinker with report? How?
 - ▶ Who is the actual final decision maker? What is the HR INV's input into the decision?
 - ▶ Were findings shared with CP?
 - ▶ Did HR INV ask CP if she was retaliated against?
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The Decision Maker

- ▶ What standard of evidence applied?
 - ▶ Who has burden of proof?
 - ▶ What evidence would be needed to establish “behind closed doors” harassment?
 - ▶ Ever discipline an employee for harassment?
 - ▶ Reasons for the decision? What information relied upon? Consider contradictory information? How weigh it? Disregard it? Why?
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Final Tips

- ▶ HR Investigator's report is a critical piece of evidence used for the defense
 - ▶ Many "HR Investigators" are not properly trained; high turnover; minimal resources; viewed as "non profit generating"; disproportionate placement of women and minorities
 - ▶ Some fear retaliation if they find that higher ups did harass and/or retaliate
 - ▶ (State of CA HR investigator: "If I ever concluded that a top manager harassed someone, I'd be fired!")
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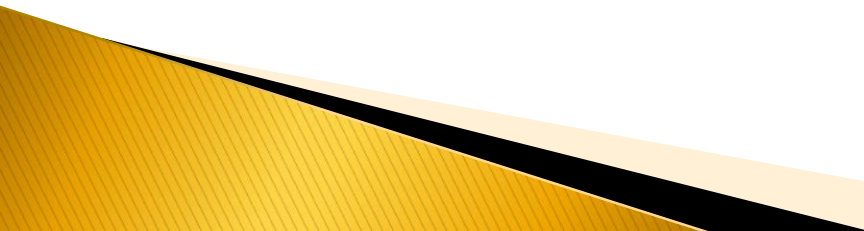
Concluding Investigation

- ▶ If employer reasonably concludes that harassment occurred, it must take appropriate discipline to stop *and prevent future harassment*
- ▶ Includes suspension, termination, etc.
- ▶ Complete defense against harasser's "wrongful termination" claim. *Cotran v. Rollins Hudig Hall International, Inc.*, 17 Cal. 4th 93; 69 Cal.Rptr. 2d 900 (1998)

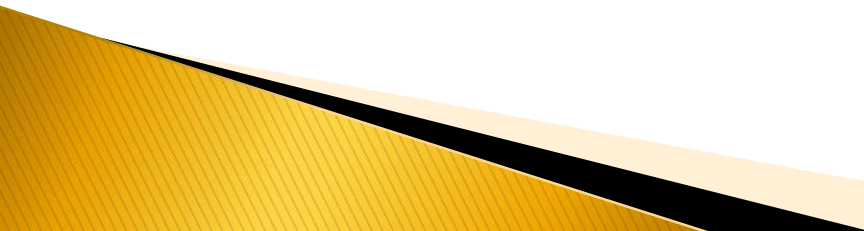
IMMIGRATION STATUS, THREATS TO DEPORT and EMPLOYMENT LITIGATION: THE EEOC'S APPROACH



Goals

- Making sure that immigration status is not a weapon in the arsenal of a defendant employer;
 - Maximizing the claimant's recovery
 - Making sure the claimant is not chilled out or dissuaded from pursuing her civil rights and remedies
 - Remember: the company lawyer will use every legal tactic to dissuade the claimant, persuade the jury that claimant is lying, and sow doubt about the validity of a claim
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Some factors to weigh

- ▶ 1. The likelihood that the information will be used by ER or 3rd party to retaliate
 - ▶ 2. The extent of disclosures ordered by the court and how clearly such disclosures point to undocumented status
 - ▶ 3. The enforcement climate in the industry or area
 - ▶ 4. Criminal history, use of false documents
 - ▶ 5. Wrongdoing by the employer, e.g. selling or arranging for false documents
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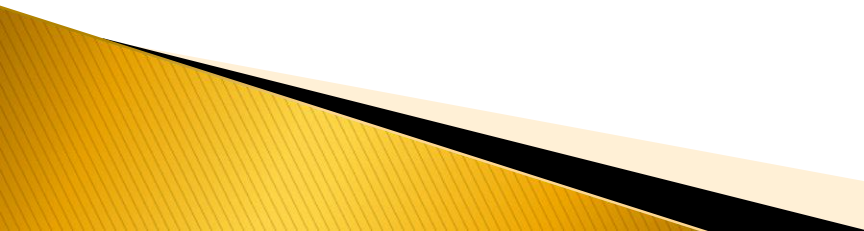
Some factors to weigh

- ▶ 6. Availability of immigration relief (e.g. T or U visas, permanent residency)
- ▶ 7. Policy considerations, i.e. protections at stake v. severity of the employer's actions
- ▶ In California (*see Salas v. Sierra Chemical Co.*, 59 Cal. 4th 407 (2014)) **should you be in federal court?** Compare: *Egbuna v. Time Life* (4th Cir.) (undocumented worker's failure to rehire retaliation claim fails because he was not qualified to work when he sought rehire)


Immigration 101

- ▶ U.S. citizens (by birth, naturalized)
- ▶ Lawful Permanent Residents (LPR's, "green card" holders)
- ▶ Nonimmigrants (legally here, limited authorized time, may or may not be work authorized, e.g. tourists, students, skilled workers (H-1) or agriculture (H-2))

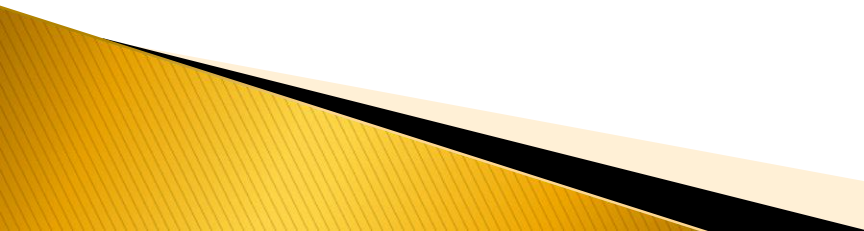
Immigration 101 (cont.)

- ▶ Refugees, asylees: well-founded fear of persecution (status granted)
 - ▶ Undocumented:
 - overstays, violations of nonimmigrant status, worked without authorization, etc.
 - entered without inspection
 - violations of lawful permanent status and ordered deported
- 

The Undocumented

- ▶ 7 million undocumented workers primarily in agriculture, service, light manufacturing and construction
 - ▶ Nonwhite, non-citizen, non-English speaking, can't vote, low wages, not organized, may live in fear of deportation
 - ▶ If deported: extreme poverty and/or persecution
- 

The Undocumented

- ▶ Blamed for everything: unemployment, disease, crime, terrorism, “decrease of American culture”, etc.
 - ▶ Therefore: very vulnerable, very exploitable, scared to assert rights...and their employers know that
 - ▶ Perverse incentive to hire them, yet demand documents when they complain
 - ▶ All of these factors play into the “imbalance of power”
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Coverage

- ▶ *EEOC and Castrejon v. Tortilleria La Mejor*. despite the passage of the Immigration Reform and Control Act of 1986 which bars the known hiring of undocumented workers, undocumented workers are covered by Title VII; Title VII makes no exception based on immigration status for workers in the U.S. and its territories

Remedies

- ▶ Title VII: backpay, frontpay, reinstatement and other injunctive relief; 1991 Act: **compensatory (pain and suffering) and punitive damages**
- ▶ *Hoffman Plastics*: under NLRA, undocumented worker not entitled to back pay; NLRB had no authority to interpret Immigration & Nationality Act
- ▶ *Rivera v. NIBCO* (dicta): Does Hoffman even apply to power of fed judge under Title VII?? Still open question if undocumented worker can get backpay, reinstatement.

TRO's and Injunctions to Stop Retaliation that Could Result in Deportation

- ▶ *EEOC v. Sako*: TRO issued to stop termination and consequent deportation of CP who helped workers filed Title VII (pregnancy) charges
- ▶ *EEOC v. Saipan Grand Hotel*: TRO issued to stop termination and consequent deportation of CP filed ADA charge protesting posting of HIV testing results

Retaliation: Attempts to Deport

- ▶ *EEOC v. Queen's Medical Center*. initiated deportation proceedings for national origin complaint, 4 years after hire of doctor; \$150,000 for retaliation
- ▶ *EEOC v. Holiday Inn Express*: employer reported workers to INS after they engaged in protected activity under NLRA and Title VII

Protective Orders to Stop Immigration Status Inquiry during Lawsuit

- ▶ *Rivera v. NIBCO*: in national origin, termination case, court issued protective order to bar company lawyer's inquiry into immigration status, place of birth, place of education;
- ▶ *EEOC v. First Wireless*: court denies pre-trial access to immigration status and tax returns (key: does it chill out charging party? *In terrorem* effect? (*Burlington*))
- ▶ *Litigation is not the place to find out employee's immigration status; ask about it at hiring*

Protective Orders

- ▶ *EEOC v. Bice of Chicago*: in sex and national origin harassment case, court allows inquiry of alias names and false identities used in employment but not about circumstances for use of alias; bars inquiry of citizenship, place of birth, prior and post employment

Protective Orders

- ▶ *EEOC v. DiMare Ruskin* (M.D. Fla.), in sexual harassment and retaliation case, Def requested documents on immigration status. Court grants protective order because immigration status is irrelevant to liability and where back pay or reinstatement are not sought. EEOC hampered if victims fear criminal charges and deportation. (Feb 2012)

Protective Orders

- ▶ ***EEOC v. Willamette Tree***: court bars deposition questions into immigration status, sexual history of complainant (FRE Rule 412), and reasons for refusing to report rapes to police (where supervisor had already threatened violence if she reported rapes to anyone). Court also barred third party subpoenas to current employer.

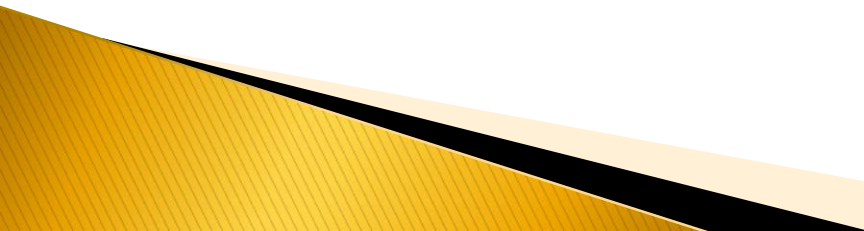
Motions in Limine

- ▶ *EEOC v. Harris Farms*: sexual harassment (rape of farm worker) trial; plaintiff EEOC anticipated motion to bar defendant from asking immigration status of Spanish-speaking witnesses (verdict: nearly \$1 million)


Protective Order, I-9

- ▶ *EEOC v. Perkins Restaurant*. sexual harassment; after reporting harassment, HR tells CP to submit valid I-9; suit did NOT seek backpay, front pay or reinstatement
- ▶ Court: protective order issued; no need for immigration status when no back pay, front pay or reinstatement sought;


The U-Visa: Victims of Trafficking and Violence Protection Act 2000

- ▶ Nonimmigrant visa (not permanent) for victims of crimes who suffered mental or physical abuse (substantial harm)
 - ▶ Have information regarding the activity
 - ▶ Are willing to assist government officials in the investigation of the activity; if victims can't come forward for fear of deportation, crime continues;
 - ▶ Criminal activity violates U.S. laws or occurred in U.S. (or territories)
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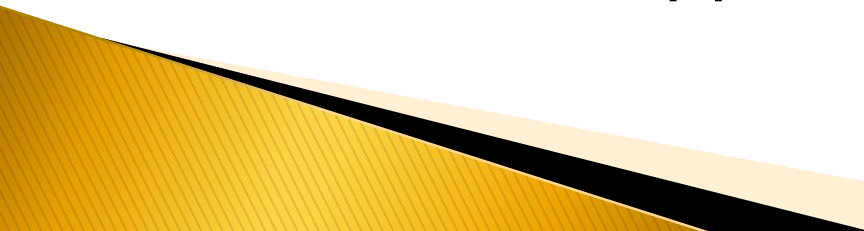
Procedures

- ▶ Victim files U Visa Petition with U.S. Citizenship & Immigration Services
 - ▶ Certifying agency must certify that victim has been helpful, is helpful or is likely to be helpful” in the investigation or prosecution of criminal activity
 - ▶ Includes: Fed, state or local law enforcement, prosecutor, judge, child protective services, EEOC (*DeCoster Farms*) U.S. Department of Labor
 - ▶ Head of agency or a designated supervisor can certify
- 

Family Members

- ▶ Family members who accompany the petitioner can obtain U visa
 - ▶ If principal petitioner is under 21, qualifying members include spouse, children unmarried siblings under 18, and parents
 - ▶ If principal is over 21, qualifying members include spouse and children.
- 

So what happens

- ▶ U Visa can last up to four years; allows individual to remain in U.S., be authorized to work, and to travel
 - ▶ After 3 years of continuous presence, can apply for permanent residency (green card)
 - ▶ No charge
 - ▶ EEOC will not ask immigration status in investigation
 - ▶ If you need a U-visa, contact EEOC Regional Attorney; Regional Attorney must certify interview of applicant and credibility
- 

INFORMATION: SAN FRANCISCO DISTRICT OFFICE

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- ▶ EEOC website: www.eeoc.gov; can file charges on line

WASHINGTON, ALASKA, IDAHO, OREGON, MONTANA

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