



COUNSEL TO GREAT COMPANIES

Discipline and Discharge of Employees: Lessons from 35 Years

June 9, 2016 – Employment Law Seminar

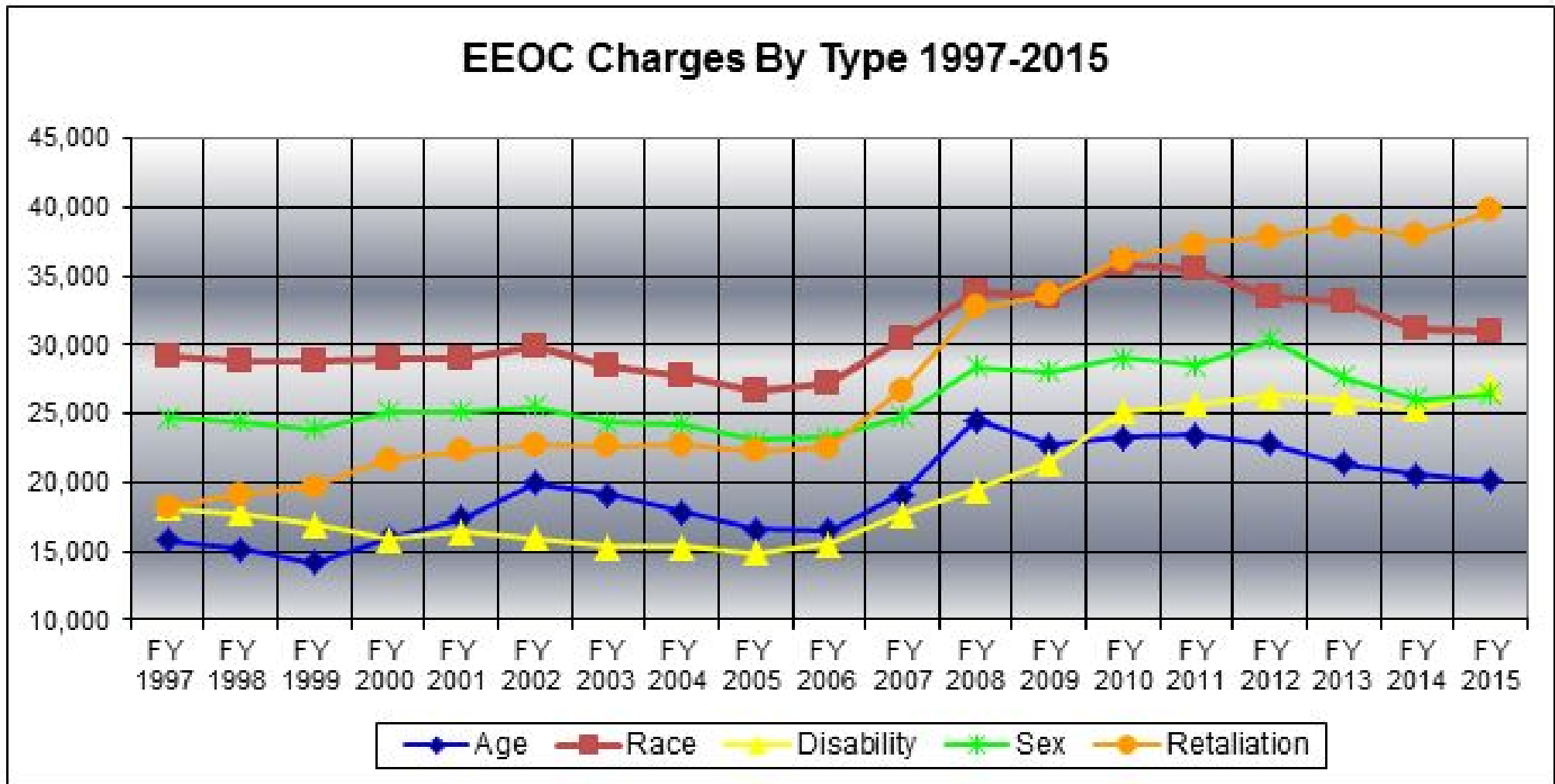
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Why We're Here

- 90,000 charges of discrimination or retaliation filed with the EEOC each year
- Thousands more filed with Washington State Human Rights Commission and similar agencies
- Consistent and fair practices regarding discipline and discharge help avoid and defend legal claims and improve the work environment

Why We're Here (cont'd.)



Source: <http://www.natlawreview.com/article/2015-eeoc-charges-rebound>

General Rule: At-Will Employment

- Absent an unlawful motive or breach of an employment agreement, an employer may discharge an employee for any reason or no reason at all
- In *Thompson v. St. Regis Paper Co.*, the Washington Supreme Court rejected the idea that termination of employment is subject to a covenant of good faith and fair dealing

Exceptions to the General Rule

- **Laws against discrimination**
 - ADA, ADEA, WLAD, etc.
 - Employees who are disciplined and/or discharged may challenge the employer's action by alleging that it was taken *because of* the employee's protected status
- **Prohibition on retaliation for protected activity**
- **Violation of public policy**
- **Contracts and collective bargaining agreements: lack of "cause"**

Keys to Effective Discipline

- Set the standard
- Identify the deficiency
- Describe the expectation for improvement

Keys to Effective Discipline (cont'd.)

- Consistency tempered with flexibility
- Progressive steps as appropriate
- Documentation
- Human Resources involvement and review

Making the Decision to Discharge

1. Are all facts recorded?
2. Are all documents assembled?
3. Is the employee aware of the problem?
4. In appropriate cases, have disciplinary steps been taken and documented?

Making the Decision to Discharge (cont'd.)

5. Has the employee had the opportunity to tell his or her side of the story?
6. Have you considered past similar situations to be certain your actions are consistent?
7. Have you complied with all internal review procedures or other practices called for by the organization's policies?

Logistics of Discharge

- **Communications to the employee**
 - Who, what, when, where



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Logistics of Discharge (cont'd.)

- **Security issues**
 - Security precautions
 - Confidential information
 - Employer property
 - Locks and security codes
- **Resignation in lieu of discharge**

Separation Agreements

- **Form**
 - Employees over age 40: specific requirements for a valid release under the ADEA
 - Other requirements: additional consideration, consideration period, revocation period, etc.
- **Purposes**
 - Draft carefully to effectively bar potential claims
- **Presentation**
 - How agreement, if rejected by employee, would be perceived by a jury

After the Discharge

- **Communications to**
 - Co-workers
 - Customers and suppliers
- **References**
 - RCW 4.24.730
- **Liability**
 - Potential claims for defamation, blacklisting, or interference with contract
- **Authorization**

Compensation and Benefits

- Final paycheck
- Commissions and bonuses
- Withholding from final paycheck
- Vacation and sick leave
- COBRA

Unemployment Claims

- Questionnaire
- Presumption of receipt of benefits
 - Poor job performance is not “fault” under RCW 50.01.010
- Disqualification for misconduct
 - Burden is on the employer to prove...
- Off-duty misconduct
 - Burden is on the employer to prove...
- Inadmissibility of determination

Review of Personnel File

- **Review rights**
 - RCW 49.12.250 *et seq.*
 - Former employee retains rebuttal rights for two years after termination
- **What is a “personnel file”?**
 - Statute provides no definition, but the term “personnel file” has been interpreted by L&I to mean...
 - Take care not to include any correspondence with counsel

Questions?