# Chapter 1

# Overview of Employment Law

**OUTLINE**

# Heard at the Staff Meeting

*Clippings*

**U.S. Employment Law is a Fragmented “Work in Progress”**

**Sources of Employment Law**

Constitutions

 Statutes

 Executive Orders

 Regulations, Guidelines, and Administrative Decisions

 Common Law

**Substantive Rights under Employment Law**

Nondiscrimination and Equal Employment Opportunity

 Freedom to Engage in Concerted Activity and Collective Bargaining

 Terms and Conditions of Employment That Meet Minimum Standards

 Protection of Fundamental Rights

 Compensation for Certain Types of Harm

*Dukowitz v. Hannan Security Services*

**Determining Which Employment Laws Apply**

Public or Private Sector Employment

 Unionized or Nonunion Workplace

 Employer Size

 Table 1.1 Employment Size of Firms (2011)

 Geographic Location

 Government Contracts

 Industry and Occupation

**Historical Development of U.S. Employment Law**

Figure 1.1 Timeline of Major U.S. Employment Laws

**Procedures for Enforcing Employment Laws**

What Does an Employee Decide to Do When She Believes That Her Rights Were Violated?

How Long Does the Employee Have to Bring a Case?

Just the Facts

Can a Lawsuit be Brought? By Whom?

Class-Action Lawsuits

Is There an Administrative Prerequisite to a Lawsuit?

Must the Employee Exhaust Internal Dispute Resolution Mechanisms Before Proceeding?

The Changing Workplace: Alternative Dispute Resolution Procedures

**Enforceability of Arbitration Agreements**

*Clippings*

*Chavarria v. Ralph’s Grocery Company*

*Clippings*

Just the Facts

**Remedies for Violations of Employment Laws**

*EEOC v. AutoZone*

 *Clippings*

# The Role of Managers in Legal Compliance

 Just the Facts

**KEY TERMS**

**CHAPTER SUMMARY**

**PRACTICAL ADVICE SUMMARY**

**CHAPTER QUESTIONS**

**Case questions**

***Dukowitz v. Hannon Security Services,*** 841 N.W.2d 137 (2014)

Hannon hired Dukowitz as a security officer in November 2005 and assigned her to an evening position. In July 2008, Dukowitz learned about a temporary daytime position that would be available for the holiday season. Dukowitz’s supervisor offered her the position, but required Dukowitz to sign a document acknowledging the possibility that the position would be unavailable beyond the holiday season. Dukowitz switched to the daytime position in September 2008. In early December, Dukowitz’s supervisor informed her that the position would no longer be available after the end of December and that Hannon did not have any hours available for Dukowitz in the ensuing months. Dukowitz claims that she told her direct supervisor that she would need to apply for unemployment benefits “to make ends meet.” According to Dukowitz, her supervisor then turned to another supervisor and asked, “Should we term her?” In other words, terminate her employment. Dukowitz claims that she begged her supervisor not to terminate her and asked that Hannon place her on a “floating shift” so that she could work when shifts became available.

Dukowitz was terminated from her employment in March, 2009 (the parties dispute the reasons why), and sued for wrongful termination, asserting a violation of public policy because the firm fired her for exercising her right to apply for unemployment benefits. The Minnesota public policy exception to employment at will applies only to a demand by the employer for the employee to commit an illegal act, which does not apply to this case. The Minnesota Supreme Court declined to create a new cause of action under these circumstances for two reasons: First, the court was reluctant to extend legislatively declared public policy, since it believed the job was usually better performed by the legislature. Second, the court declined to expand the public-policy exception to the employment at will rule because the legislature had already delineated the consequences for an employer that interferes with an employee’s application for unemployment benefits (the firm is guilty of a misdemeanor).

1. *What was the legal issue in this case? What did the Minnesota Supreme Court decide?*

The legal issue was whether the state’s public policy exception to the general rule of employment at will applied to plaintiff’s case regarding her termination allegedly in retaliation for applying for partial unemployment benefits.

1. *What is “employment at will”? What role does it play in this case?*

The doctrine of employment at will gives the employer the right to fire any employee unless the firing is prohibited by law. Unless the firing is prohibited in the circumstances, the employer may fire the employee for any reason or no reason at all.

1. *Why does this court rule for the employer? Why does the dissenting judge (Justice Wright) believe that the employee should have been allowed to go to trial?*

The court rules for the employer in this case because it believes that plaintiff’s case does not fit within the public policy exception set by the state legislature, and that it should not expand that exception, as that is a job for the legislature. The stated public policy exception applies only to cases in which the employee has been asked to do something illegal, and refuses. Justice Wright does not believe that only the legislature has the responsibility to set public policy, but that judges also have that responsibility when deciding cases based on the common law. He argued that common law is not a fixed set of rules, and that as a society changes over time, the common law must also change.

4. *Do you agree with the court’s decision in this case? Why or why not?*

Students may agree or disagree with the decision in this case. This question provides a first opportunity for students to consider and debate the merits of employment at will, in this case, with the added factor of Dukowitz’s allegation that she was terminated for the lawful act of applying for unemployment benefits.

***Chavarria v. Ralph’s Grocery Company*** 773 F.3d 916 (9th Cir. 2013)

Plaintiff was an employee of Ralph’s Grocery Company who brought a class action suit on behalf of herself and other similarly situated, alleging violations of California law. The employer moved to compel arbitration pursuant to the employment application provision providing arbitration as the exclusive remedy, a provision which all applicants must sign when applying for work. Plaintiffs contended the provision was unconscionable.

1. *What was the legal issue in this case? What did the Appeals Court decide?*

The legal issue was whether the arbitration agreement contained in the employment application was unconscionable, and whether the Federal Arbitration Act applied to bar Plaintiffs’ cause of action.

2. *What does it mean for a contract to be “unconscionable?” “Procedurally unconscionable?” “Substantively unconscionable?”*

Agreements are unconscionable when there is an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party. In order to conclude that an agreement is unconscionable, it is necessary to show that the agreement is both procedurally and substantively unconscionable. A procedurally unconscionable agreement is a “contract of adhesion” drafted by a party with superior bargaining power and presented on a take it or leave it basis with no opportunity for negotiation or modification of terms. Substantive unconscionability has to do with the contents of the agreement. Is the agreement so unduly harsh, oppressive, and one-sided as to shock the conscience?

3. *What was the evidence that this agreement was procedurally unconscionable? That this agreement was substantively unconscionable?*

Evidence of a procedurally unconscionable agreement in this case was that the application for employment itself contained the “agreement” to arbitrate, that there was no opportunity for negotiation. This presentation of an agreement on a take-it-or-leave-it basis by representatives of a large corporation was sufficient to show that the agreement was *procedurally* unconscionable.

In this case, evidence of a substantively unconscionable agreement included the fact that the agreement was structured in such a way that the arbitrator who would hear the case would inevitably be the one chosen by the employer, that the provision regarding “sharing” of the arbitrator’s fees unduly burdened plaintiffs, and that the employer could unilaterally modify the policy without notice to any of the employees.

4. *Do you agree with this decision? Why or why not?*

Students may voice their opinions, giving their reasons, and discussing the policy issues involved.

5. *What would you advise this employer to do in light of this decision? Should it redraft the language of the arbitration agreement to deal with the court’s objections (and, if so, how) or drop the whole thing?*

It depends on how badly the employer prefers arbitration instead of litigation. If they are committed to the idea of having an arbitration agreement, they will have to either re-draft the agreement to rid it of the offending terms (e.g., by making the sharing of fees avoid constituting a burden on plaintiffs, by making the arbitrator selection process fairer) or offer the agreements on something other than a take it or leave it basis. What would happen, for example, if they made acceptance of the agreement truly voluntary, but offered an incentive for employees to accept?

***EEOC v. AUTOZONE*,**

707 F.3d 824 (6th Cir. 2012)

Plaintiff was an employee of AutoZone, and alleged that AutoZone had violated the Americans with Disabilities Act (ADA). The jury decided in favor of the plaintiff, and the magistrate judge approved $100,000 in compensatory damages, $200,000 in punitive damages, $115,000 in back pay, and an injunction on AntoZone’s anti-discrimination policies. AutoZone appealed.

*1. What were the legal issues in this case? What did the court decide?*

The legal issues were whether the amount of compensatory and punitive damages were excessive, and whether the injunction entered by the court was warranted.

*2. What are compensatory damages? Why did the appeals court uphold the compensatory damages awarded to the plaintiff?*

Compensatory damages are meant to compensate the victim for pain, suffering, disability and disfigurement, and other losses beyond wages. In this case, the appeals court found that the damages awarded to plaintiff were comparable to damages awarded in other similar cases, and were rationally connected to plaintiff’s injury.

*3. What are punitive damages? Why did the appeals court uphold the awarding of punitive damages in this case? Why was the amount of punitive damages deemed not constitutionally excessive?*

Punitive damages are available in EEOC cases if the plaintiff can demonstrate that the defendant engaged in intentional discrimination “with malice or with reckless indifference to the federally protected rights of an aggrieved individual.” The appeals court noted that, based on the evidence, the jury could have found that the defendant acted with reckless indifference to plaintiff’s employment rights. Among other findings, the court also noted that the letter directing plaintiff not to perform duties that affected his medical condition came 3 days after he had already been injured. The amount of punitive damages was not found to be excessive because the facts of the case met all three guideposts for the review of punitive damages awards, and so were not in violation of the Constitution’s Due Process clause.

*4. What is injunctive relief? What was the employer ordered to do? Why was the first injunction “remanded” to the trial court?*

An injunction is a court’s order to do something, or to refrain from doing something. AutoZone was ordered to comply with the reasonable accommodations requirement of the ADA for employees in the Central District of Illinois, to notify the EEOC of any employee in that district who requests an accommodation during the next 3 years, and to maintain complete records of its responses to such accommodation requests. The first provision of the injunction did not contain a time limitation, and so was remanded for the court to consider a time limitation.

*5. Overall, do the damages awarded to the plaintiff in this case seem “just?” Why or why not?*

Students’ answers will differ, but most may conclude that the amount to be paid was certainly justified by the repeated denial of requests for accommodation, and the resulting injury.

**JUST THE FACTS**

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*A nurse’s aide alleged that on August 22, 2012, she was attacked while cleaning a resident’s room by a male coworker who attempted to rape her. She was able to escape and reported the attack to the nursing home’s managers. However, following this incident, managers started saying that she had fabricated the whole thing and her work hours were changed without notice. Coworkers also started to exhibit hostility toward her, saying that she was a “liar,” refusing to work with her, and in one instance, spilling hot coffee on her. After her request for transfer to another unit was denied, the woman resigned on September 11, 2012. She filed a discrimination charge with the EEOC on July 3, 2013. When she later filed suit in federal court, the nursing home moved to have the case dismissed because her EEOC charge had not been timely. What should the court decide? Why? Johnson v. Amherst Nursing Home, 2015 U.S. Dist. LEXIS 105381 (D. Mass.).*

Defendants argued that the case should be dismissed because plaintiff’s claim was based entirely on the sexual assault, and that event occurred more than 300 days prior to the date she filed her claim. Plaintiff argued that because the harassment related to the sexual assault continued, some of the harassment constituted a series of related acts that together formed a discriminatory pattern of conduct, some of which was committed within the 300 day period, and under the continuing violation theory, her claim should stand. The District Court agreed with plaintiff that the continuing acts of harassment related to the sexual assault formed a pattern of conduct, some of which was committed within the 300 day limitations period.

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*An employee believed that he had been discriminated against by his employer. He filed a lawsuit in federal court, but the employer argued that the court should require him to arbitrate the dispute instead. When the employee was hired, he had signed an arbitration agreement. During his first week of employment, he had been instructed by the human resource manager to “read it and sign it.” The document was the standard agreement that the company required all of its employees to sign, and there was no opportunity to negotiate over the terms. Under the agreement, employees were required to file grievances within five days of the actions being challenged. This limitations period did not apply to any claims that the company night have against employees. The agreement also provided that each party would bear its own attorney’s fees and expenses. Arbitrators were to be selected from a list of four names provided by the American Arbitration Association. In the absence of mutual agreement on who would arbitrate the case, names would be struck from the list until a single name remained. The company would get the first strike and then the parties would take turns. Should the court compel arbitration of this dispute? Why or why not? Nino v. The Jewelry Exchange, 609 F.3d 191 (3d Cir. 2010).*

No. The agreement was both procedurally and substantively unconscionable. Because there was no chance for negotiation and the agreement was presented on a take-it-or-leave-it basis, the agreement was procedurally unconscionable. Because the system for choosing an arbitrator would always result in an arbitrator chosen by the employer, it was substantively unconscionable. The appeals court decided that the arbitration agreement was unconscionable and that the offending terms could not simply be severed from the rest of the agreement. Thus, the plaintiff was free to pursue his discrimination claims in court.

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*After a jury awarded a plaintiff $300,000 in damages in a sexual harassment case, a federal district court judge reduced the awarded to $50,000. The judge did so because at the time of the jury’s verdict, the plaintiff’s employer had twenty-five employees, and Title VII caps damages for employers with no more than 100 employees at a maximum of $50,000. However, four years earlier, when the harassment occurred, the employer had 247 employees. Was the judge correct in capping damages awarded to the plaintiff based on the employer’s size at the time of the jury’s verdict rather than at the time when the discrimination occurred? Why or why not? Hernandez-Miranda v. Empresas Diaz Masso*, *Inc*., 651 F.3d 167 (1st Cir. 2011).

No, the judge was not correct. The Court of Appeals held that the correct time to judge the employer’s size was at the time of the discrimination. Plaintiff’s award was reinstated.

**PRACTICAL CONSIDERATIONS**

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*How should employers that operate in different states and cities deal with lack of uniformity in employment laws?*

As a start, employers should make a list of each state and city in which they operate. One way to deal with the requirements of differing state laws and city ordinances is to adopt practices that comply with all of the various state statutes and city ordinances, memorialize them in an employee handbook, and use those practices in all of the states and cities in which the employer operates. Another way to deal with differing state and local laws is to first create policies and practices (and an employer handbook) based on federal law, and include in the handbook a section on “local practices” or something similar, in which the particular requirements of a state or city can be addressed. The employee handbook will be slightly different for each state, and perhaps for a city, but would cover all requirements where needed.

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*Would you advise an employer to use arbitration agreements? Why or why not?*

The hope is that arbitration agreements will resolve disputes rather than have those disputes become—quite literally—“federal cases.” A quicker and less expensive way of enforcing employment laws is certainly attractive. But arbitration agreements are not foolproof means of avoiding litigation. Agreements might be instituted that turn out to be unenforceable because they are unconscionable or because they were not presented to employees in a sufficiently clear manner. While there is no longer any doubt that courts will generally enforce arbitration agreements, the standards for enforceability still differ across courts. Agreements that more closely replicate the protection available through the courts are more likely to be enforced, but also offer less advantage to employers. Enforcement agencies can investigate and bring suit regardless of the presence of arbitration agreements. Ultimately, if arbitration procedures make it easier and less costly to bring complaints, employers may face more rather than fewer cases. There is no certainty that privatizing the enforcement of employment law will result in rulings that are any more to employers’ liking than the decisions of judges and juries. However, there is some recent empirical evidence suggesting that employers are faring relatively well in cases brought under arbitration agreements and that they do, in fact, enjoy advantages as “repeat players” at arbitration (*see*, Alexander J.S. Colvin. “An Empirical Study of Employment Arbitration: Case Outcomes and Processes.” *Journal of Empirical Legal Studies* 8, 1 (March 2011), 1-23.)

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*Which of the following legal compliance strategies would you advise an employer to adopt? Why?*

*“Pushing the envelope” in areas of legal uncertainty or erring on the the side of caution?*

 *Doing no more than the minimum required by the law or going well beyond that?*

 *Responding to legal problems as they arise or proactively investing in polices and practices designed to avoid legal problems?*

*Litigating whenever necessary to protect employer interests or attempting to work things out with employees who feel that they have been wronged?*

Even assuming a desire to comply with the law, employers make choices about how to do so and these choices are significant. The strategy favored throughout this book is an approach that treats the law as a “floor” on the treatment of employees rather than a ceiling, is proactive in preventing legal problems, errs on the side of caution in construing legal requirements, focuses on the “spirit” and not merely the narrow “letter” of the law, and leans toward working out disputes without resort to litigation. But clearly, there are other ways to play the game.

## **Chapter Questions**

**Beginning on p. 35 of text**

1. *Would you be inclined to take legal action against your employer if you felt strongly that your legal rights had been violated? Why or why not?*

It is critical to the enforcement of employment laws that at least some employees are willing to take legal action when their rights have been violated. Employment laws are not self-enforcing. Asking and personalizing this question often causes students to take pause, think about their attitudes toward litigation and consider factors that might influence whether they would pursue legal action (e.g., length of time on the job, availability of severance pay, job prospects)*.* It also provides an opportunity to talk about the stages through which a legal claim proceeds, starting with the need to first recognize that one has been wronged in a way that potentially implicates the law (“naming”), becoming convinced that one’s employer is responsible and should be held accountable for this wrong (“blaming”), initiating a legal claim (“claiming”), and taking that claim through the legal process (“disputing”).

2. *The XYZ Company had twelve employees for the first half of 2014. It signed a contract with a major retailer in June 2014 and hired an additional eight employees to handle the extra work. The contract was cancelled in January 2015, and the company terminated the eight new hires. In March 2015, another employee was fired. If the employee believed that the termination was discriminatory, could the employee have brought a case under Title VII of the Civil Rights Act?*

Employers must adhere to the requirements of Title VII of the Civil Rights Act if they had 15 or more employees for each working day in each of 20 or more calendar weeks during the current (i.e., the year in which the alleged discrimination occurred) or preceding calendar year. Because the XYZ Co. had 20 employees for over half a year (at least 26 weeks) during the preceding calendar year (2014), it can be sued under Title VII. It does not matter that the company had only 12 employees at the time at which the alleged discrimination occurred.

*3.* *A teacher was terminated and filed a discrimination charge with the EEOC. While his case was pending, he moved to another state to care for his mother, who was in the final stages of Alzheimer’s disease. About six months after he had filed his charge, the EEOC sent him notice of his right to sue. The notice was sent to his previous address in Washington, D.C. On his EEOC intake form, the teacher had listed his former Washington, D.C. address, but had also written “c/o” (“in care of”) with his attorney’s name and contact informtion. However, the teaher had not thought to contact the EEOC and provide it with his new out-of-state address. A copy of the right to sue letter was not sent to the attorney. When the attorney later contacted the EEOC for an update on the status of the teacher’s case, he was informed that the right to sue letter had been issued almost seven months earlier. The attorney then promptly filed suit in federal court, but the suit was dismissed as not timely. The teacher argued that the period for filing a discrimination suit should have been tolled because he was out of state to care for his mother and he reasonably believed that the EEOC would notify his attorney. On appeal, what should the court decide? Why? (Maggio v. Wis. Ave. Psychiatric Ctr., 795 F.3d 57 (D.C. Cir. 2015)).*

The court declined to use equitable tolling to permit the teacher’s lawsuit to go ahead. The court cited many previous cases in which the complainant lost his right to sue when he gave an incorrect address, or neglected to inform the EEOC when he moved. The court determined that Maggio had come into court without “clean hands.”

*4.* *An employee signed an arbitration agreement when he was hired. The agreement provided that the costs of the arbitration would be split equally between the parties, with the employee payment capped at the amount earned in the employee’s highest earnings month during the previous year; remedies could not include either punitive damages or reinstatement; all claims must be brought forth within a year; and depositions were limited to one for each side. The employee was fired and filed a lawsuit. The company went to court to compel arbitration. What should the court decide? Why?* (*In re Johnny Luna, 2004 Tex. App. LEXIS 8241 (1st Dist.)).*

The appeals court reversed (conditionally granted a “writ of mandamus”) the trial court’s decision granting the employer’s motion to compel arbitration. Evidence was presented that the arbitration could cost the employee as much as $4,550 and that this amount would be prohibitive. The court also held that while remedies available through arbitration need not be identical to those available through the courts, the prohibition against reinstatement as a remedy was directly contrary to the public policy articulated through the state workers’ compensation statute. Based on the cost and remedies provisions of the agreement, the court found the agreement as a whole to be unconscionable. However, other features of the agreement—including shortening of the statute of limitations and limitations on discovery—were not regarded by the court as evidence of an unconscionable agreement, primarily because they applied equally to both parties. Lastly, because the unconscionable terms were integral to the entire arbitration agreement, the court declined to enforce the agreement to arbitrate while severing the particular aspects of the agreement it found to be unconscionable.

*5. A server signed an arbitration agreement when she was hired by a restaurant in September 2009. She left the job in July 2010 but was subsequently re-hired in March 2011. She was not asked to sign an arbitration agreement upon being re-hired. The server alleged that she was sexually harassed following her re-hiring and sued the restaurant. The restaurant moved to compel arbitration under the agreemetn she had signed in 2009. That agreement stated, among other things, that “I will resolve by arbitration all claims and controversies (“claims”), past, present, or future, whether or not arising out of my employment or termination from employment, that I may have against [employer]…or that [employer] may have against me.” The agreement specifically referred to harassment claims. It also stated that “[t]his Agreement shall survive termination of my employment or expiration of any benefit plan.” Is the employee still bound by an arbitration agreement signed during a previous stint of employment? Anderson v. Waffle House, 920 F. Supp.* 2d 685 (E.D. La. 2013).

The court held that the parties were still bound by the arbitration agreement. The agreement was validly formed, and by its terms, applied even after the termination of the plaintiff’s employment, specifically referenced in the agreement. Further, plaintiff’s claims fell within the scope of the agreement, which listed claims for “harassment” specifically. The case was sent to arbitration.

6. *A fitness center issued an employee handbook that included a section providing that all employment-relatged disputes would be “resolved only by an arbitrator through final and binding arbitration.” It specified that disputes under the Fair Labor Standards Act was among those subject to the mandatory arbitration policy and further stipulated that disputes could not be brought as class-actionsuits. A sales representative signed a form acknowledging that he had recceived the handbook. The acknowledgmetn reiterated that “if there is a dispute arising aout of my employment…I will subnmit it exclusively to binding and final arbitraiton…” The acknowledgment also stated that the terms of the handbook were subject to change: “I acknowledge that, except for the at-will employment, [the employer] has the right to revise, delete, and add to the employee handbook. Any such revisions to the handbook will be communicated through official written notices approved by the President and CEO…” The sales representative subsequently filed a lawsuit under the Fair Labor Standards Act, alleging that the company fiailed to provide required overtime pay. The fitness center sought removal of the lawsuit from court and an order to compel arbitration of the dispute. What should the court decide? Why? (Carey v. 24 Hour Fitgness, 669 F.3d 202 (5th Cir. 2012)).*

Plaintiff argued that there was no valid agreement to arbitrate because the agreement was illusory. Significantly, the defendant employer reserved the right to change the agreement (except for the employment-at-will provision) at any time, giving it the power to amend the agreement retroactively. In that case, the defendant employer could avoid an arbitration which the employee had sought to pursue under the agreement. Moreover, the notice provision did not state that any changes would apply prospectively. In effect, the agreement allows the defendant employer to hold its employees to the promise to arbitrate while reserving for itself the right to remove that right. In that case, the agreement to arbitrate was illusory, and the case could proceed to trial.

7. *At the end of a workplace meeting in which a number of issues were discussed, the company president mentioned that a new arbitration policy was being instituted. A pamphlet outlining the new dispute resolution program was available, but it was not read to employees and not all employees picked it up. Employees who continued to work after the effective date of the new policy were deemed to have accepted it. When an employee told the president that he would not sign, he was told “not to worry about it.” Subsequently, a new employee handbook was issued. The handbook included the arbitration program. The handbook also included an acknowledgement form, but the employer did not require or receive signed forms. When a group of employees filed suit for unpaid wages, the employer attempted to compel arbitration of the issue. Should the court enforce the arbitration agreement? Why or why not?* (*Moran v. Ceiling Fans Direct*, *239 Fed. Appx. 931 (5th Cir. 2007)).*

The appeals court affirmed the lower court’s decision to not compel arbitration because the employer did not give adequate notice of its arbitration policy, the employees did not understand the terms of the agreement, and the policy did not cover claims under the Fair Labor Standards Act. Under Texas law, an employer seeking to modify the terms of at will employment must prove that he unequivocally notified employees of definite changes and employees must have knowledge of those changes, including both the nature of the changes and certainty as to whether they will be imposed. In this case, the employer’s failure to convey the policy to employees, to ensure that they read it, and to offer consistent statements as to whether the policy would be enforced, supported the conclusion that there was inadequate notice given to employees. The appeals court did not examine the other grounds on which the district court had ruled.

8. *An employee was subjected to severe national origin and religious harassment over a period of at least three years. The harassment included numerous death threats, vandalism, and workplace graffiti. The employee made many complaints to company officials, but the perpetrator(s) were never identified and disciplined. Actions taken by the employer (a large automaker) included holding two plant meetings with employees, compiling a list of suspects, analyzing plant entry and exit data, hiring a forensic document examiner to analyze the handwriting in graffiti and offensive notes, developing a protocol for handling incidents regarding this employee, increasing security walkthroughs, and conducting additional diversity training. The employer declined to interview the individuals on the suspect list or (as suggested by the police) install surveillance cameras. A jury found the employer liable for harassment, and the trial court awarded the maximum punitive damages allowable under Title VII ($300,000) to the plaintiff. Was the award of punitive damages appropriate in this case? Why or why not? (May v. Chrysler Group, 716 F. 3d 963 (7th Cir. 2012)).*

No, the award of punitive damages is appropriate in a case where the employer acted with the required malice or reckless indifference. Here, Chrysler took several steps to try to alleviate the harassment. Although one might argue they could have taken different or more effective actions, their conduct does not demonstrate a reckless disregard for the plaintiff’s federally protected rights. While plaintiff is rightfully awarded compensatory damages, punitive damages are not appropriate in this case.

9. *What legal issues did you identify in the “staff meeting” discussion that opened the chapter? What should this company be doing differently? What aspects of the situation are you unsure of and would want to learn more about?*

a) Employment status of unpaid interns: This has become a significant issue in recent years, as students are increasingly counseled to obtain job experience through internships and some employers are tempted to exploit interns as a source of free labor. The Department of Labor has established criteria for determining whether interns are employees who must be paid at least the minimum wage. Insofar as these criteria specify that to not be considered employment the relationship should primarily benefit the intern, the employer should derive no immediate advantage from the presence of the intern, the intern should be closely supervised, and the intern should not displace regular employees, the company is likely violating wage and hour laws by not paying the interns for their work.

b) Nondiscrimination in hiring: These practices would likely result in disparate impact discrimination, since it is a historic fact that minorities are and have been arrested with more frequency than whites. In addition, eliminating a person from consideration for a job on the basis of an arrest only, assumes guilt from the mere arrest. The arrest might have been wrong, and in any case, does not prove guilt. It is merely a charge against the person. Even a conviction should not automatically disqualify a job applicant, since it might not have any bearing on the applicant’s qualifications for and ability to do the job. As one example, convictions for “disturbing the peace” as the result of a protest might be on the records of perfectly respectable people, and would probably not normally indicate guilt of a crime beyond trespass.

c) Reinstatement rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA): The USERRA requires that employees who have served up to five years in the military, been honorably discharged, and requested reinstatement in a timely fashion, be reinstated by their former employers. Reinstatement should be to the position that the employee would have attained if he or she had not taken leave for military services. Employers may have to provide training to accomplish successful reinstatement.

d) Obtaining and using medical and genetic information under the ADA and GINA: Medical information of this type cannot be lawfully obtained prior to the making of a conditional offer of employment to the candidate. Here, the medical histories are being obtained from applicants. Even if the medical information were obtained at the proper time, the employer would not be free to deny employment to a disabled employee based on the belief that the employee’s medical condition would increase health insurance costs. Additionally, the gathering of information about the medical histories of family members violates the Genetic Information Nondiscrimination Act’s sweeping prohibition of both the gathering and use of genetic information.